

**AT THE TURN OF THE TIDE: A FRAMEWORK FOR A POLICY-ORIENTED INQUIRY
INTO STRATEGIES FOR THE TRANSFORMATION OF THE CONSTITUTIVE PROCESS OF
AUTHORITATIVE DECISION IN MEXICO**

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INTRODUCTION

Articulating a contemporary narrative of constitutional change in Mexico has been my chief preoccupation over the last four years. The coexistence of a constitutional order based on a monistic democratic model in which normal politics are the exclusive track for constitutional-making and a strong symbolic power of the constitution, has resulted in a seemingly unassailable rampart against the more modern approaches of constitutionalism in which the People are increasingly claiming ownership of the constitution.

Furthermore, enduring constitutional inheritances that are no longer suited to present practices, perspectives, expectations and demands muddle further meaningful constitutional change. Authoritarian inheritances coexist with pressing new demands for self-government.

Over the last two decades, Mexico's transition to democracy has been akin to a child learning to walk. A satisfactory democratic outcome has not been achieved, because the constitutive process of authoritative decision-making, a critical part of any transition, has not departed from the traditional Mexican decision-making process. This has been a process that supported an authoritarian regime in which a one-party elite monopolized the power of decision-making. At the center of the problem of transition in Mexico—and perhaps other similarly situated states—is (as we will see) the dichotomy between power and authority, as well as the identity of the *effective* participants in the constitutive process.¹

¹ Michael Reisman, *A Jurisprudence from the Perspective of the "Political Superior,"* 23 N. KY. L. REV. 605 (1996). According to Professor Reisman, the term *constitutive process* refers "to that portion of a group's activity concerned with establishing, maintaining, or changing the fundamental institutions and procedures of decision-making. From the perspective of a jurisprudence for those making choices, a focal lens which clearly identifies when constitutive decisions are being taken and how they are likely to impact on and shape the constitutive process in the future is important." The constitutive process is also defined as "authoritative power exercised to provide an institutional framework for decision and for allocating indispensable functions; the particular decisions emerging from this process, which we call 'public order'".

Criticism, skepticism and disbelief are commonplaces in narratives of the Mexican transition to democracy. These narratives directly describe in profuse detail the problems and dysfunctions of our democracy but fail to analyze the underlying sources of those problems. The exposure of these causes is the key to understanding the obstacles to a transition to democracy in Mexico and to the design of ways for accomplishing it.

The recent shift of power from one hegemonic party to three major parties and the atomization of authority in a relative separation of powers in the Montesquieuan model has resulted in a sort of *gattopardism*² in which the unsuitability of the present constitutive process to the achievement of the progressive social demands made upon it has become manifest.

In the center of the analysis is the tension between authority and power, the latter being the predominant feature of decision-making in Mexico. This power is mostly, if not exclusively, exercised by a political elite composed of political parties and de facto participants who dictate in most cases the outcome of major decisions taken by the government. Around these two most influential types of actors are other participants, who, though more marginal, are equally influential in the decision-making process.

The lack of openness, accountability, fairness and actual deliberation are the characteristic components of the constitutive process of authoritative decision in Mexico. Decisions are taken by incumbent elites in arenas that are closed off from any public scrutiny or deliberation with the intention of maintaining and exchanging political favors and privileges. The result is a balance of power among those elites with a vested interest

decisions, may be specialized to the shaping and sharing of wealth, enlightenment, respect, and all other values." *Authoritative decision* refers to "a process of decision characterized both by expectations of authority and by effective control." See Myres McDougal, Harold D. Lasswell and W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, in Myres S. McDougal and W. Michael Reisman, *INTERNATIONAL LAW ESSAYS. A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* (1981). The original version of this article was published in 19 J. LEGAL ED. 253, 403 (1967).

² Expression taken from the novel *Il Gattopardo* (c. 1958) of Giuseppe Tomasi di Lampedusa: "If we want things to stay as they are, things will have to change."

in never opening the decision-making process to new participants, or to public scrutiny. Most often the Executive and Legislative branches of government stymie each other as they pursue their respective political interests. The resulting institutional paralysis evokes the so-called “Linzian nightmare” or frequent scenarios of crisis in governability.³

It is the struggle to gain and maintain power, rather than the drive to secure a public order of human dignity, that has been the guiding light of traditional decision-making in Mexico. A Machiavellian understanding of politics has blocked the possibility of bridging the gap between privileged and non-privileged individuals, and has acted to increase poverty and marginalization in the country. The present elites are committed to maintaining their privileges and the *status quo* by deploying a manifold of strategies to minimize the demands from the citizenry for access to the constitutive process as a full-fledged participant.⁴

With this context in mind, I begin analyzing, in Part I, the connections between contemporary political transformations and constitutional change in order to lay out the conceptual framework of this work. To do so, I dispute the dominant narrative that deems political transformations and constitutional change as episodic events that take place periodically within a given society. In contrast, I argue that these phenomena should be seen as falling a continuum⁵ in a social process aimed at displaying an

³ These expressions were coined by Professor Bruce Ackerman to describe the potential scenarios that emerge in the traditional model of separation of powers. Professor Ackerman describes the “Linzian nightmare” (in ironic tribute to his friend and colleague Juan Linz) as the constitutional breakdown that results when rival incumbents – (in this case the President and house) assault the constitutional system and strive to be the single lawmaker, with or without the redeeming grace of a supportive plebiscite. In a broader sense, Professor Ackerman explains the concept of “crisis in governability” as the situation in which the contending powers use the constitutional tools at their disposal to make life miserable for each other. Unfortunately, both scenarios have been a recurrent trend in our failed process of democratization. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 646, 647 (2000).

⁴ Professor Michael Reisman likes to remind readers/recall/refers John Austin’s notion of the “political superior” as the sovereign or the “uncommanded commander.” See Michael Reisman, *A Jurisprudence from the Perspective of the “Political Superior”*, 23 N. KY. L. REV. 605 (1996).

⁵ Jack Balkin, CONSTITUTIONAL REDEMPTION, at 1-2, and 8-9 (2011). Balkin’s argues (in the context of American constitutional law) that the constitutional project is “always in the process of changing. [Heraclitus] said that one cannot step into the same river twice; it is equally clear, from studying American

intermittent effort for calibration and refinement of the constitutive process of authoritative decision.

In addressing the predicaments of contemporary political transformations and their impact on constitutional arrangements within a polity, I embark on a description of some strategies used by political elites to promote, deter or inhibit constitutional change. I refer in particular to a practice known as *constitutional symbolism*, which poses an emblematic, almost mythical value on the constitution as an expression of the ability of the People to inscribe (or fail to inscribe) social change in a distinctive constitutional grammar of political legitimation.

In addressing the challenges of modern political transformation, in this chapter I examine three trends that illustrate different strategies used for modeling constitutional change, such as Ackerman's unconventional adaptation, constitutional radicalism, and elite socialization from the perspective of the policy-oriented jurisprudence.

In Part II, I explore the monist, derivative and symbolic character of Mexican constitutionalism throughout its history in order to articulate a new narrative of constitutional change in Mexico more in tune with the deep political transformations we have occurring over the last three decades. In doing so, I identify some recurrent trends and participants that have deterred enduring constitutional transformation.

Following this introspective examination, I provide a description of the cycle of political transformation and constitutional change in Mexico by explaining the dynamics

history, that one cannot participate in the same Constitution twice. Opinions and views that were once 'off-the-wall' later become orthodox, and the settled assumptions of one era become the canonical examples of bad interpretation in another. Canonical cases, ideas, and doctrines soon become anti-canonical, completely reinterpreted, or merely forgotten. [We] cannot deny the fact of enormous change in the doctrines of constitutional law and in the institutions and operations of constitutional government. [No] matter how often we point to the fixed features of our Constitution, set forth in clear determinate rules, *much of the Constitution is not fixed, but changing, and even the parts that are fixed endure against a world that is constantly changing*, turning the adept compromise of one era into the antiquated conception of another. *The Constitution is not a finished building; it is a framework that invited further construction*. It is a project whose contours must be filled out over time. The persons who framed the Constitution understood that they could not fully control what others would do with it; and each generation eventually understands that it, too, cannot control what the next generation will do," emphasis added.

of the constitutive process and identifying the participants, perspectives, situations, bases of power and outcomes that have, historically, characterized the process for authoritative decision in Mexico.

Part III construes a narrative on a critical period of transformation in Mexico that entailed a radical shift on its political ethos due to a growing role and influence of distinctive social movements that shared a flourishing demand for meaningful democratization. These movements pushed for real political pluralism in Mexico and constituted the basis of the political Left that would become instrumental to mobilize a national coalition to force the regime not only to implement electoral reforms aiming at further political liberalization, but even importantly, to create an independent electoral authority. In this part we explore the array of causes that triggered these changes by advancing a comprehensive study on two landmark events in Mexico's recent history: the students' movement of 1968 and the presidential election of 1988. These two events marked the way in which the constitutive process would unfold over the last quarter of the past century.

In Part IV, I advance a contemporary perspective of political transformations and constitutional change in Mexico by describing the present state of affairs pertaining to maximization of violence, weaknesses in the rule of law, and inadequacy of institutions and processes, as growing barriers to any transformative attempt.

I relate these variables to some inquiries into current constitutional decision-making in Mexico, including: constitutional symbolism, decaying hyper-presidentialism, fragmentation of political power, and revolutionary nationalism, all based on contemporary roles of elites and social movements.

To illustrate the interplay between elites and social movements, I conduct in Part V a case study of the political reforms introduced by President Calderón in 2009, intended as a groundbreaking venture to democratize the political system, its institutions,

and procedures. In this chapter (as in Part IV) I raise the questions of whether political transformations serve for renewal and creation and/or rather to perpetuate the ancient regime, thus turning counter-transformative or counter-revolutionary, and of whether or not “We the People” have spoken in Mexico in a process of political transformation and national self-redefinition.

Finally, in Part VI, I elaborate on specific strategies for the transformation of the constitutive process of authoritative decision in Mexico, based upon two main premises: the importance of moving towards a model of constrained parliamentarism, and of a dualistic system characterized by the implementation of a higher lawmaking track in order to adequately channel the increasingly majoritarian mobilizations of the People advocating constitutional change.

In sum, I have attempted, throughout this work, to test the limits and possibilities for self-government in Mexico under the present constitutional framework. I predict that, unless we employ innovative and distinctive strategies for transforming the dominant political ethos, we will be unable to promote enduring constitutional change in Mexico.

A core component of this work is based upon a series of interviews to relevant participants of the constitutive process in Mexico. The contributions of each interviewee were intended to be reflected in different chapters of the dissertation and are fully transcribed in the Appendix. Beyond a doubt, the efforts expended in articulating this dissertation would have been futile without the contributions of these interviews, which constitute a core component of this work.

Carlos Nino used to describe the constitution as a "road map" for national self-

redefinition.⁶ Under our present, haunting, circumstances, I find it rather more appropriate to deem the constitution as a "navigational chart", since we are assuredly not at the turning of the tide.

Finally, I want to express my gratitude to the members of my Committee -Bruce Ackerman, Robert Burt and W. Michael Reisman, for their insight, generous teachings and constructive suggestions to improve the quality of this work, which would not have been possible without the contributions of each one of them. Their scholarship and friendship have been a constant incentive and source of inspiration to complete this dissertation.

⁶ Carlos Nino, FUNDAMENTOS DE DERECHO CONSTITUCIONAL. ANÁLISIS FILOSÓFICO, JURÍDICO Y POLITOLÓGICO DE LA PRÁCTICA CONSTITUCIONAL, at 1 (2005).

PART I

THE PROBLEMS AND HYPOTHESES OF POLITICAL TRANSFORMATIONS AND CONSTITUTIONAL CHANGE

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 3. Social Movements and the Perspective of the Political Superior

INTRODUCTION

The world is rapidly changing, as are the rules of social understanding. A significant problem associated with this change is that previously existing principles, rules and institutions developed over the course of almost three centuries and framed in constitutional law, have not responded at the same pace as changes are occurring, and in many cases, lag far behind. Contemporary transformations entail—as an anticipation of how the government and society will interact in the future—radical shifts in the relationships between political institutions and social forces. This can be seen, for instance, in the enormous and increasing influence of social networks to spur on or deter different public and private initiatives, or to empower or bring down governments and participants in the public arena.

The events of recent years teach us that public affairs are no longer the exclusive domain of those in power (typically in the form of a small group of elites) and that these matters of public concern are no longer deliberated upon exclusively in predetermined formal arenas (assemblies, conventions or legislatures) but increasingly in informal settings in which collective conversations are taking place—even virtually—and which are now rapidly overshadowing the traditional processes of public deliberation and decision-making. It seems that technological improvements have dramatically enhanced the way in which collective conversations are conducted by equalizing participants more effectively than other conventional procedures of public deliberation.

In light of these changes (as has also happened in the past with other types and aspects of political and collective transformations) constitutional law carries great weight and can no longer be disregarded. As Bruce Ackerman illustrates in his discussion of

“revolution on a human scale¹” as a plausible method of modeling change, we should ask ourselves through the lens of either historic or modern constitutionalism if our preexisting institutions are still capable of directing the continuous debate between the diverse and numerous participants in contemporary processes of collective redefinition.²

The events which began in 2011 and which continue to the present day (e.g., the so-called “Arab Spring”, the *Indignados* movement in Spain and other countries, Occupy *Wall Street* and related movements have shown that rank-and-file citizens are not willing to continue to remain confined to their conventional role as bystanders in the public space. On the contrary: they are asserting not only a new approach and interpretation of the mandate of the people, but even more importantly, they are changing the principles, practices and procedures of conventional public decision-making with the goal of making the execution of that mandate more certain, transparent, open and effective, with the permanent warning that if this undertaking is not adequately fulfilled, then further protest and replacements by the power of social mobilization will reign as the order of the day.

Moreover, these recent events have taught us that both elites and social movements are also changing their substance and practices very swiftly, since they no longer rally on the streets but rather on the Internet. In terms of opening new channels for non-traditional participants, these transformations are plausible. However, if left unchecked and unregulated, they can lead to further disorder and disruption, even when conducted in the name of “the people” although this is hard to define precisely in the context of social networks. This is why the assertion of constitutional law acquires a fundamental relevance for assuring an ordered and peaceful transition to what we can fairly describe as a new political order.

¹ Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279 (1999).

² *Id.*, at 2285.

From my point of view, the main line of inquiry regarding contemporary political transformations should not seek to determine whether there is an American model of “the People” as a unitary conception capable of being mirrored in other contexts; nor whether social mobilizations are the most democratic way of taking ownership of the constitution; nor whether there is a better way of modeling change. Rather, the central questions are whether our respective constitutional frameworks are currently equipped with sufficient preexisting institutions to direct the ongoing debate toward our political definition, and whether or not adequate institutions actually exist within our respective constitutional mainstream to direct such debate; in sum, to determine whether the nature of political transformations is a continuous process of decision-making by virtue of the adequate degree of clarification, implementation and appraisal of prescriptions that aim to consolidate “unconventional changes” as depicted in the Ackermanian narrative of the human dimensions of constitutional development.³

I. THE *STATUS QUAE*STIONIS OF CONTEMPORARY POLITICAL TRANSFORMATIONS AND CONSTITUTIONAL CHANGE

The theory and practice of constitutionalism are not passing through their finest hour at present, nor are the constitutional decision-making processes that democratic governments have designed to comply with the mandate of the people and assure the expected stability, durability and entrenchment of the constitutional principles that serve as foundations of a democratic, equalitarian and peaceful public order.

The post-war enthusiasm for a renewed understanding of the constitution as the best possible instrument of political legitimization that would serve both as a constraint

³ *Id.*, at 2284-2285.

against abuses of power and as an expression of public self-determination has declined over the last decades.

In some political systems this has prompted legally sophisticated practices of using the constitution and its principles against the mandate of the people, the very people who originally endowed elected governments with the democratic legitimacy to be custodians of the popular interest clearly expressed in that constitution and therefore faithfully execute its provisions and the laws therein related.

In terms of Austin's dyad of the exercise of political sovereignty,⁴ numerous generations and their legal systems have functioned within a framework in which the political superior holds the greater weight of public decision-making in the polity. There is a majoritarian view of the relationship between the citizen and the government, as a necessary subordination of the former towards the latter, without allowing any exception. According to this assumption, self-governance is not an alternative way to mediate between the government and the People.

However, this assumption has significantly changed over the past decades, during which time an increasing demand for self-governance and for devising a new grammar of legitimization has become one of the most relevant questions of modern constitutionalism. The main predicament of the citizenry in these new circumstances rests upon the question of the formation of a polity -a "We"- and how it is held together. Once this is answered, it aims to clarify how that "We" endeavors to formulate a myriad of arrangements, arguments and strategies to claim ownership of the constitution.

In the past, particularly in the early decades of the last century, these predicaments were channeled and entrenched by the conventions that most often followed radical political-social breakdowns resulting from the establishment of new

⁴ John Austin, *The Province of Jurisprudence Determined* 2, Legal Classics (1994). See also Michael Reisman, *A Jurisprudence from the Perspective of the "Political Superior"*, 23 N. KY. L. REV. 605 (1996).

constitutional regimes. The grammar of the former “new order” was written by the triumphant side that claimed as an entelechy, as a fiction that gave voice to the will of the People.

This claim was founded in a practice of deference paid by the rank-and-file to the leading elites who were the only relevant and effective stakeholders in the political decision-making processes. Although this customary deference gave these elites authority to speak on behalf of the People, the constitutional structure put in motion from those foundational moments onward lacked the desired input from the citizenry.

I am not claiming here that these new orders were illegitimate or held power against the will of the People. On the contrary, my argument aims to observe such practices through a contemporary lens in order to appraise how democratically endowed the present regimes are in light of the increasing demands of self-governance.

This is not to say that the achievements of twentieth century constitutionalism were not fundamental in establishing the foundations of what we presently enjoy as the fruits of such undertakings in the name of constitutional rights and freedoms. Nonetheless, what I will try to analyze in this chapter is the influence of constitutional symbolism, social movements and their interaction at specific moments of history in refining the relationship between the government and the People.

For the purposes of this endeavor, I will focus my inquiry on the last period of democratization of the past century which Samuel Huntington has labeled as the “third wave”⁵ and its effects almost thirty years after its initial appearance to determine whether the promise of democratic, popular and participative governance was fulfilled, and if not, what interfered with the effort to accomplish these *aspirations*.

⁵ Samuel Huntington, *THE THIRD WAVE. DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1993). The raising of authoritarian regimes at the end of the 1950’s represented a period that Professor Huntington referred to as the “second counter-wave” of democratization. Those regimes were finally dismantled or returned power to democratic elected governments with acquiescence in the 1970’s and 1980’s in a period that Huntington described as the “third wave” of democratization.

The Promise of the Third-Wave Constitutional Democracies

The underlying promise of the radical shifts of power from authoritarian to democratic regimes in the last quarter of the past century was rooted in the popular demands for democratically elected governments, with a genuine separation of powers, effective protection of human rights, and the establishment of mechanisms for popular participation in the political process of decision making. The expectation of the People in these processes was to acquire, once and for all, a genuine civic status as part of that polity and with it, participate freely in shaping the common interest.⁶

Authoritarian regimes ceded power to democratically elected governments, who dealt with the intrinsic conundrums of inheriting a legal system structured in authoritarian practices inconsistent with basic civic values, but which, at the same time, needed to be maintained until a new constitutional and democratic framework could be established. This gap between the old authoritarian regime and the recently inaugurated democratic government was filled by the transformative power of constitutional law that played then, as now, an irreplaceable role.⁷

It was in this transformative period when the democratic rulers had to decide the way in which they, as legitimately endowed by the People to speak on its behalf, would model constitutional change. They vacillated between elite governing and the evolution

⁶ Hannah Arendt, *ON REVOLUTION*, at 22 (2006).

⁷ Ruti Teitel, *TRANSITIONAL JUSTICE*, at 4-6 (2006). Regarding the role of law in periods of political transformation, I find the work of Ruti Teitel especially illuminating. Professor Teitel has explained it in the following terms: “neither liberal nor critical theorizing about the nature and role of law in ordinary times accounts well for law’s role in periods of political change, missing the particular significance of justice claims in periods of radical political change and failing to explain the relation between normative responses to past injustice and a state’s prospects for liberal transformation. [Transitions] imply paradigm shifts in the conception of justice; thus, law’s function is deeply and inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation. [Therefore] the threshold dilemma arises from the context of justice in political transformation: Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective. [In periods of transformation] law is shaped by political circumstances, but, also challenging the prevailing realist accounts, law here is not mere product but itself structures the transition.”

of community folkways, as well as other possibilities including revolutionary transformation.⁸ Although their choice turned out to be instrumental in the ultimate outcome, their intention was to establish a new grammar of legitimacy that would align, from that moment on, the relations between the government and the citizenry.

This being said, the key decision of those newly inaugurated leaders was to determine to what degree they would conduct the necessary transformations of the legal system. By the time these shifts in power took place, the demands for revolutionary transformation following the logic of “new beginnings” were vastly intensified. Radical breaks with the authoritarian regimes were seen as indispensable in consolidating fledgling democracies. However, this strategy of radical revolutionary transformation did not bring about the most desired outcomes. Sometimes they triggered violent reactions from the actors involved, who still enjoying sufficient influence and power to challenge the democratic government and even to regain power due to the social disruption, confrontation and instability that revolutionary transformations entailed.

Such political regressions or involutions encouraged policymakers as well as observers of constitutional phenomena to moderate their approaches to democratizing public orders that followed authoritarian regimes. This strategic moderation in modeling change was not a newly developed idea: on the contrary, this realistic technique of capturing and influencing public decision and effectively channeling social claims has borne fruit in specific periods of American history, specifically the Foundation, Reconstruction and the New Deal as Professor Bruce Ackerman has argued.⁹ In Ackerman’s narrative, this technique can be explained in terms of what he defines as an

⁸ Bruce Ackerman, *supra*, note 1.

⁹ *Id.*, at 2286.

“unconventional adaptation” of popular claims that succeed in being involved in the constitutional order by virtue of what he defines as “revolution in a human scale.”¹⁰

The democratization processes of the last quarter of the past century have entailed significant achievements in terms of breaking away from the defining totalitarian (either personalistic or single-party) concentration of power. These processes have entered into a phase of more pluralistic exercise of public decision-making, in which newly enfranchised political parties have been able to take part in the formally designated lawmaking procedures to direct constitutional debate and change. Political exclusiveness—so characteristic of authoritarian regimes—has shifted to a plurality of expression, which has nonetheless retained the privileged initiative in developing, discussing and deciding the relevant issues of government policy in the hands of the elites.

If there has been a failure (what I have referred to as the “failed promise”) of these democratization processes, it was the continuance of the elite management model of change, which by definition disenfranchises participants other than those formally endowed to speak on behalf of the People: political parties and representatives democratically elected by the citizenry. These political parties and elected officials could, therefore, execute their mandate within the ordinary channels and procedures of constitutional decision-making.

This was not a deliberate failure. On the contrary: from a gradualist perspective, democratic governance and stability prompted by political parties and traditional participants were the main goals of nascent democracies that followed long tenures of authoritarian regimes. The promise then was to reestablish democracy, even in its minimal expression, in order to undertake further reforms that would enable other participants to seek constitutional change.

¹⁰ *Id.*, at 2282.

In the meantime, former authoritarian constitutions and systemic inertias persisted until new constitutions were promulgated by democratically elected regimes. However, sooner than was expected, the heralds of the newly drafted constitutions realized that their promulgation was not enough to inaugurate a new constitutional order, let alone a new political culture more consistent with the standards of contemporary democratic public order. Instead, authoritarian practices persisted with or without the enactment of new constitutions, and the citizenry found itself—in the transformative mainstream—as insulated as it was when the former authoritarian regime was at the zenith of its power.¹¹

As we will demonstrate in this chapter, the idea of the constitution as a symbol entailed a conservative culture that endured and prolonged authoritarian practices and principles that prevented the constitution from being amended or displaced by a new constitution and new operational and cultural codes. This occurred through the preservation of old institutions, practices and principles, blocking any attempts at transformation, which, even with newly drafted constitutions, were not sufficient to consolidate democracy and fulfill the promise of enfranchising non-traditional actors to take part in the constitutive process.

As an unfulfilled promise this aspiration acquired a significant implication when the ordinary channels of constitutional decision-making and traditional participants (government and political parties *inter alia*) are outstripped by pressing demands for more meaningful political participation and influence by non-ordinary participants in the constitutive process of decision-making.

¹¹ This political milieu reminds one of the proverb “a leopard can’t change his spots.” This strategy of giving the appearance of changing important institutions within the system in order to keep things unchanged at a deeper level, is eloquently expressed in the novel *Il Gattopardo* (c. 1958) of Giuseppe Tomasi di Lampedusa: “If we want things to stay as they are, things will have to change.”

These demands are voiced and embodied by the collective enterprise of groups of citizens, who because of their identifications and expectations, endeavor to give a new meaning to the relationship between government and citizenry.¹² This endeavor is being carried out in the form of social movements, which, outside the traditional channels of governance, are striving to capture and shape decision-making in non-conventional ways.

Before entering into an analysis of social movements and their democratic legitimacy to influence constitutional change, we must first consider two ideas underlying any attempt—whether formally or informally oriented—to regulate the constitutive process of decision-making:¹³

First is the idea of constitutional amendment or change as the basis for further inquiries about its possibilities. The way in which constitutional change is perceived and directed within a polity will equally affect the way in which social movements perform their desired role.

Second are the predominant practices and principles designed to channel formal and conventional constitutional decision-making within a polity. The question here is whether there are pre-existing institutions capable of empowering participants other than those formally endowed to speak on behalf of the People to act in effective and meaningful ways to promote constitutional change.

A further question concerns whether current political institutions and their procedures are capable of capturing and incorporating the demands of mobilized citizens who are in effect speaking a different language from those who claim to speak on their behalf.

¹² Reva Siegel, *The Jurisgenerative Role of Social Movements in United States Constitutional Law*, Seminario en Latinoamérica de Teoría Constitucional y Política (SELA), at 1-2 (2004).

¹³ Michael Reisman, *A Jurisprudence from the Perspective of the "Political Superior"*, 23 N. KY. L. REV. 605 (1996). Professor Reisman refers to the constitutive process as "that portion of a group's activity concerned with establishing, maintaining, or changing the fundamental institutions and procedures of decision-making."

II. THE POINT OF DEPARTURE: ON THE DIFFERENCE BETWEEN REVOLUTIONS, NEW BEGINNINGS AND POLITICAL TRANSFORMATIONS

Whether these are thought of as revolutions, political transformations or systemic changes, each concept is rooted in social processes that aim to refine the interaction between institutions and social forces in order to establish an adequate framework for channeling persistent disagreements between them, and through the implementation of effective procedures to maintain an optimum public order.

One of the great difficulties in clarifying the complex environment of these social processes rests upon the fact that the predominant approach towards revolutions and/or political transformations and/or systemic changes is influenced by preconceptions which are, from my point of view, no longer applicable to contemporary decision-making processes. Decisions are governed by circumstances and participants that significantly differ from previous processes of national self-definition and institution building that typically serve as patterns or blueprints for present challenges. It is a truism that the perspectives of 18th and 19th centuries' revolutionaries are not the same as those that constitute the predicaments of current transformations, although both attempts at for change—as I will demonstrate—are originated in the same expectations and demands. Nonetheless, their achievement cannot be pursued with the same strategies that were implemented in those times of *new beginnings*.

Decisions shape transformations, and this is why conceptual and historical clarifications are necessary for making effective decisions concerning meaningful and sound transformations.

On the Character of Political Transformations

Historically, successful revolutions are expressed in new social and institutional arrangements through the enactment of new constitutions. In short, the predicate of revolutionary transformations is articulated by means of constitutional prescriptions. Even so, principles and practices deeply embedded in the mindset of social and political realms continuously reinforce or undermine the vigor of the constitution. It is therefore fair to ask ourselves as observers of the social process, what was and continues to be the character of those transformative attempts expressed in innovative constitutional grammar?

As all revolutions imply radical political transformations, not all of these necessarily result from a revolution, at least in its traditional guise. Similarly, not all systemic changes are the outcome of a triumphant revolution. During the last century, revolutions have acquired a very different meaning and expression from those of the 18th and 19th centuries, which first gave birth to the concept.

Political transformations are not the result of forces of nature, nor are they predictable and standardized phenomena. On the contrary, they entail a radical process of change that traditionally results in a new understanding and collaboration between the relevant participants in the public realm.

Modern political scientists and philosophers take political transformations as a prerequisite or as a given aspect of their main concern, which is how decisions are made within the pluralistic reality that characterizes modern constitutional change. However, on my understanding, a clarification of political transformations as independent and contingent processes that will help establish the rules according to which such decisions will be deliberated upon and ultimately made, is always indispensable to framing the discussion of political liberalism and its problems.

On the other hand, modern political transformations cannot be analyzed using the traditional approaches that have predominated over the last two centuries. I will dedicate a comprehensive part of this chapter to demonstrating this assumption. It is evident now that modern political transformations no longer result exclusively from a revolution or a drastic change of practices, principles and structures. On the contrary: we have witnessed over the years how a strong democratic and constitutional tradition such as the American one has experienced radical political transformations without breaking away from their fundamental political structure. It is remarkable how the United States has passed through the most dramatic stages of political transformation yet has still preserved its original Constitution, albeit with amendments which have been included over time in light of social, economic, political and cultural changes that its society has faced.

We find the opposite example in the case of most civil law countries, where their constitutions have been abrogated each time they have undertaken a process of political transformation. It seems in this case that a whole “new beginning” is drafted and written for any occasion of radical political change.¹⁴

The issue here concerns matters of degree and stability. In the first case, e.g., the American experience, political transformations are thought of as part of the social process, and so the Constitution has to be adapted to new realities either through the legislatures or the courts, without entailing a radical departure from its foundational social contract, since it is capable of adjusting to new realities. By contrast, in the second example, e.g., most of civil law countries, political transformations need to be expressed in a new social contract that will reflect the normative deviation from the previous status

¹⁴ Roberto Gargarella, *THE LEGAL FOUNDATIONS OF INEQUALITY. CONSTITUTIONALISM IN THE AMERICAS, 1776-1860*, at 1-8 (2010).

quo in order to be complete and legitimate. In this last case, political transformations are mostly viewed as exceptional and episodic (erroneously, in my view).

While it is true that a central objective of political transformation is the continuous refinement of the relationship between the State and the citizens to produce stable democratic procedures of decision-making, their ultimate goal is to produce robust democratic culture. Hence, political transformations should be considered as a constant element of the social process instead of extraordinary events in history that necessarily entail radical changes of the status quo.

As Professor Jack Balkin argues,

“The goal of a democratic culture is a *continuous process* rather than an achievable endstate, for democracies always exist and have existed in societies shaped by existing social hierarchies and previous injustices.”¹⁵

There are two fundamental ideas that might be useful in explaining the goals of political transformations. The first of these is the notion that, they are only justified if they aim to maximize the threshold of equality among citizens to participate in the public realm, as they foster the principle of justice as fairness in significantly pluralistic societies. The other idea is stability. Clearly, it will not do to define stability as the triumph of a given political view that vanquishes its opposing views and therefore tends to remain unfixed over time.

The desired stability in this case is rather whatever features allow political transformations to be constant and continuous processes by virtue of ongoing collective

¹⁵ Jack Balkin, *The Declaration and Promise of a Democratic Culture*, 4 WID. L. SYMP. J. 167 (1999); emphasis added.

and inclusive deliberations dedicated to the improvement of the structure and operation of political institutions and their relations with social forces.

This view might imply a departure from conventional approaches toward political transformations, which have traditionally defined the latter as changes from one political system to another. What I argue here is that the paradigm of political transformations has experienced a significant change over the last decades, making it necessary to redefine the paradigm in light of modern phenomena.

Preliminary Clarifications and Methodology

Before entering into the actual process of decision-making and the role, perspectives and interests of those involved, we should first undertake the unconventional task of attempting to redefine (or at least to frame from a contemporary perspective) political transformations at a time when they do not necessarily follow authoritarian regimes, revolutions or internal conflicts that make it imperative to rebuild a nation from the bottom up.

Our generation (and perhaps previous ones as well) has witnessed in varying degrees how modern democracies have not been able to meet the minimum standards of equality and fairness that they ought to satisfy. The effort to find strategies of transformation in the form of policy and decision-making that may help to synchronize structures and practices with the interest and perspectives of the citizenry is a political transformation in itself, and therefore, it should not be expected (as has traditionally been emphasized) that such strategies of transformation must always imply a constitutional reform rather than an adjustment of the values and practices within the current constitutional framework. This is to say that political transformations—at least in this work—are not seen as a precondition of a democratic regime. From my point of

view, enough literature has proven that such a notion is beyond dispute. What I want to underscore is that political transformations serve to further purposes that transcend the mere change of political systems. I will try to demonstrate that political transformations are in fact mechanisms of continuous improvement of the way in which the public interests and demands are deliberated and decided. My aim is to link political transformations with an ongoing process of a democratic conversation towards a public order of human dignity.

In order to demonstrate my argument, I will test it throughout this and the following parts of the dissertation, in light of some hypotheses, which, taken together, constitute a comprehensive explanation of the relationship between political transformations and the constitution, as well as between the social process and constitutional change. These hypotheses comprise, from my observational standpoint, a series of principles that provide a better understanding of the idea of political transformations discussed in the previous paragraph.

At first sight, the basis of the notion of political transformation that I am trying to establish might appear to be divergent from and/or counterintuitive to the fundamental features of each of the scholarly approaches I will employ in clarifying my point.

However, as I hope to make clear, , the initial disparity between our notion of political transformation on the one hand and Professor Ackerman's constitutional dualism and idea of constitutional moments, on the other.

This tension may be resolved at some point through an analysis of the approach to policy-oriented jurisprudence which sees law as a continuous process of authoritative decision and also with the constitutional entrenchment that results as a necessary outcome of social mobilizations regardless of their immediate success or failure as the

present trends of democratic constitutionalism show. Break this into smaller pieces, not sure how

If there is one point of connection between our notion of political transformation and the goals of each of these scholarly doctrines, it is the desire to allocate a decision-making responsibility more widely, beyond those traditionally so endowed. This is to say that each of these theories, like the one presented here, sees political transformation as a phenomenon that will be more democratic, fair and equalitarian to the degree it allows the participation of non-traditional participants in the process of public deliberation, e.g., non-members of the predominant elites.

This being said, I will explore the connection between my thesis of political transformation and the constitutional theories of Professor Bruce Ackerman and his views on the human dimension of revolutions and the constitution¹⁶ Professor W. Michael Reisman and his thesis concerning “jurisprudence from the perspective of the political superior;”¹⁷ Jack Balkin, Robert Post and Reva Siegel’s “democratic constitutionalism” and “living originalism” arguments;¹⁸ and finally, Roberto Gargarella’s “legal foundations of inequality.”¹⁹

Before entering into the analysis, I must clarify that the purpose of this comparative endeavor rests upon the idea of testing the definition of political transformation using the intellectual tools provided by each of these doctrines. It is not my purpose to conduct a comprehensive study of any of these lines of thought, each of which comprises a distinctive explanation of how modern constitutional organization

¹⁶ Bruce Ackerman, *supra*, note 1.

¹⁷ Michael Reisman, *supra*, note 13.

¹⁸ Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *HARV. C.R.-C.L. L. REV.* 373 (2007); Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VA. L. REV.* 1045 (2001).

¹⁹ Roberto Gargarella, *supra*, note 14.

and its operation is and should be. Such an analysis is beyond the objectives of this chapter and of the whole dissertation.

Hence, I intend to demonstrate that from a contemporary perspective, political transformations should not be seen as episodic or occasional phenomena, but as continuous processes of authoritative decision-making by the institutions and procedures that will ultimately influence the social process, bearing in mind that,

“[The] primary policies of termination are the reduction of the cost of social change and the encouragement of change in directions that more closely approximate the common interest of the community. The effectiveness of these policies depends on the cultivation of a climate which is sympathetic to change. But this, in turn, depends upon general expectations that changes when undertaken will minimize the destructive consequences of the abrogation of existing legal regimes.”²⁰

III. THE EPISODIC VERSUS CONTINUOUS NATURE OF POLITICAL TRANSFORMATIONS

One of the most influential theories of political transformation is Samuel Huntington’s explanation of democratic changes. His theory describes the array of outcomes that result from radical political transformations, from authoritarian to democratic regimes. One of the constants in his explanation is the notion that such changes are episodic and occasional, in order to better bring about further stability and durability. However, more than a half century after the central period of his subject matter of study (the waves of democratization that followed the collapse of the 1930s and 1970s authoritarian regimes respectively) Huntington’s thesis seems incapable of

²⁰ Michael Reisman, *supra*, note 13, at 625.

fully explaining how political transformations unfold in present times. My attempt is to propose a more functional and comprehensive vision of political transformations, not as episodic events in the social process, but rather as a continuous operation of political refinement within the constitutive process of decision-making.

Modern democratic systems are constitutionally endowed with enough legitimacy that “Huntingtonian” views of political transformations are not suitable. Presently, radical changes can take place within the legal and/or constitutional framework without basic alterations of in the pre-existing democratic system per se.

Thus, Huntington’s theory of modernization and social change fails to fully explain political transformations in scenarios that differ from those characterized by transitions from authoritarianism to democracy, or by implementing new political orders in changing societies. Consequently, the question is: How do we assess and conceptualize political transformations in an era when democratic regimes are consolidated, and problems arise not from having an authoritarian or totalitarian regime in power, but rather a majoritarian, democratically-elected government one, who, despite these credentials, can turn its policies against the common interest of the citizenry?

It is far from my aim to embrace a merely “Heraclitian” explanation of political transformations as a continuum. Furthermore, I share Huntington’s views of political transformations as processes of balancing existing institutions with the demands and expectations of social forces, regardless of the episodic and occasional nature of political transformations as long as they are only considered in the historic perspective of the democratization processes that he describes in his works don’t understand this clause.

However, my goal here is to demonstrate that the attribute of dynamism or continuity which I am trying to assign to political transformations is indeed twofold: a matter of degree on the one hand, and of interpreting our subject matter through a non-

conventional, rather functional, perspective e more consistent with current thinking on the matter, on the other.

Hence, the question is whether we can depart from an episodic-occasional view of political transformations to a more stable definition of the latter as a continuous process of constitutive decision-making characterized by an inherent dynamism. More in tune [with the corresponding trends of contemporary constitutional change. In other words, we may ask if it might be possible to reach a dynamic and functional conception of political transformations that will differ both from the Arendtian postulates of a “new beginning” or the Huntingtonian theories of systemic transformations from the top down.

My idea of political transformations tries to bring together both approaches and, at the same time, provide a distinctive meaning to this instrumental conception of political transformations. From my perspective, this is not an oxymoron. On the contrary, political transformations in the post-communist era do not take place as Hannah Arendt and Samuel Huntington explain in their classic and influential analyses.

Rather, current political transformations are marked by a reasonable pluralism of political, philosophical, religious and moral conceptions of the good, which are most often both contradictory and irreconcilable. My attempt to define them as a process a way of responding to the practice of overcoming inevitable dissent in our contemporary reality of overlapping consensus. From this vantage point, political transformations are more dynamic and continuous than before, for the sole reason that reasonable pluralism requires an ongoing engagement of decision-making to overcome these predominant and seemingly insuperable differences in light of the common interest.

Political Transformations and Constitutional Change as a Continuum

We are used to portraying political transformations as landmarks in specific periods of time in the form of revolutions, “new beginnings,” regime changes, systemic shifts, or the emergence of new political and economic orders. Once we frame political transformations in such fashion, we tend to think about them as distant events that may not take place again as long as their consequences are stable and enduring, and which strengthen with time to prevent further radical changes.

Political transformations are more than events in history, however. The traditional approach toward them is no longer plausible in light of the way in which political change takes place in present times. On the contrary, political transformations are now so swift and sometimes unexpected, meaning that they can hardly be described as episodic, occasional or fixed in time.

We have been influenced by the prevailing hypothesis that if political transformations are predicated and codified by a new grammar of legitimization expressed in a new set of constitutional arrangements, then this understanding might remain untouched and unchangeable unless reckoned extremely necessary in light of changing circumstances and as long as the current state of affairs is not replaced by a new political transformation. This is to say that political transformations, constitutional orders and democratic cultures are linked in such a way that they are expected to endure with the same stability until a new transformation takes place. This has not been the case in recent times, however, and for this very reason is why literal readings of the constitution and thus of reality, are not fitting.

A change in the dominant approach toward political transformations is critical to understanding the way in which contemporary decision-making processes unfold. To date, we have been inclined to assume that political transformations are no longer

connected with constitutional change, and even less with current institutions and practices. It may appear that political transformations, constitutional change, practices and institutions are intrinsically linked with revolutions, regime change and new beginnings. I disagree with this way of thinking. Even when these events occur, political transformations persist as a constant in the social process of national definition in order to refine and calibrate more accurately the relationships between political institutions and social forces.

So let us assume for a moment that, rather than being sporadic or temporary, political transformations are continuous and permanent processes, carrying with them an array of implications for the decision-making enterprise and the attitudes of all participants involved. This departure from the dominant approach toward political transformations may help today's decision-makers to be more flexible in regard to the momentum of change in modern societies. Neither the constitution nor its institutions and practices are written in stone; on the contrary, they are more analogous to living organisms than to archeological artifacts and remains. By assuming political transformations are a constant of the social process, we may be able to approach the expectations and demands of different participants and stakeholders involved in more realistic and effective ways, rather than tolerate views and practices that might have served in the time of the founding or revolution, but which are no longer applicable to the mainstream of constitutional and political change. Furthermore, the possibility of change in the dominant approach toward political transformations is closely related to the way in which the constitution is seen in a given society, how this vision informs the civic culture, and the way in which a community channels its inherent dissents and differences.

Political transformations and the constitution should not be viewed in the same way. It is a truism that they are not the same. However, long-standing constitutional

traditions show that if we compare political transformations with the constitution, the latter is seen to be more flexible and adjustable to time and circumstances in terms of constitutional change than political transformations that comprise a more symbolic and fixed perception. This is not to say that constitutions do not have a strong symbolic feature, something which will be addressed in due course. What I am trying to demonstrate is that political transformations have to be perceived as much more constant, enduring and flexible, as much so as constitutions, in contrast with the widely held perception of political transformations as fixed and definite periods of time that are exhausted once the transformative process is completed by the enactment of a new constitution or by the implementation of radical constitutional changes. In sum, political transformations are mostly seen as an outcome rather than as a process, and this is an inaccurate perception.

Moreover, the current gap between political transformations and the constitution is also due to a lack of historical perspective. Currently, constitutional change is conducted without imbuing its decision-making processes with the experience of the past, e.g. the founding or the revolution. This lack of perspective tends to undermine the desirable balanced and healthy connection between political transformations and the constitution.

As an adherent of living constitutionalism, I tend to think that the drafters of the constitution not only spoke to their contemporaries, but more significantly to future generations of citizens by not focusing solely on their present but also on their future, and assuming that the arrangements therein contained had to be adjusted to different contexts in the coming times. Thus, as has been propounded for decades, the constitution as a living organism is not only a document but also the foremost expression of a particular political community. It is fair to ask then, if the constitution and the civic culture it generates are the most evident outcomes of a process of political

transformation, why should the latter be regarded as exhausted once it is well-established by a set of constitutional prescriptions?

I think that political transformations are more successful when they are framed and spurred on by a constitution, rather than being interrupted by its promulgation. This view may help in channeling the expectations and demands of a given society, as it would be much easier to maximize the possibilities of making both political transformations and the constitution coincide as a process, and as an institution, respectively.

Furthermore, combining both will contribute to spreading the perception that political transformations serve to refine the constitutional order, and therefore, to lend currency the principles, practices, institutions and promises originally prescribed in the constitution.

To continue, I put forward the following propositions: (1) that political transformations should not be treated as isolated events unrelated to the constitution or to constitutional change; and (2) political transformations can be defined as the continuous and controlling process of constitutional decision-making by virtue of which attitudes, values and expectations of the people are channeled and prescribed through a constant dialogue between political institutions and the social forces that comprise a political community.

It is not an oxymoron that political transformations, as a continuous process of change and part of the social process, sometimes entail refinement and progress, and at other times entail setbacks and regressions. Hence, they fall along a continuum as has been explained in the foregoing.

This continuum of political transformations does not conflict with Ackerman's dualist model of democracy, because its differences are merely matters of degree. Political transformations, falling along a continuum as argued here, may sometimes involve higher lawmaking and at other times, ordinary politics; some times political

transformations may mobilize the entire national coalition. And at other times, just groups of participants directly interested in advancing some specific issues of the national agenda. My crucial point in advancing this concept of political transformation in connection with Professor Ackerman's theory is that political transformations as a continuum require citizens to devote their energies to both ordinary politics and higher lawmaking constantly, and not exclusively for a finite some specific period of time, as the episodic approach would prescribe. Hence, political transformations as a continuum, in line with the Ackermanian approach, are the synthesis of dualist democracy.

Perhaps a good example of how both higher lawmaking and ordinary politics are of key relevance to political transformations is the way in which a great number of citizens mobilize in order to oversee their elected representatives' execution of the popular mandate and to advance proposals to refine current constitutional processes of decision-making. The demand for accountability of the people's mandate is part of ordinary politics, while the refinement of processes for constitutional decision-making is part of a broader attempt at higher lawmaking; both can coincide in time. Though their relevance varies in degree. Nonetheless, both are part of this continuous conception of political transformations as a synthesis of the model of dualist democracy.

However, decisions and processes do not unfold in a vacuum. History, context, participants, perspectives, outcomes and an array of principles and interests influence them in a significant way. A continuous conception of political transformations and constitutional change brings to the surface the idea that a new beginning always lies ahead of the transformative enterprise. New, weak institutions coexist with old, strong inertias; contemporary regime changes are not made out of whole cloth. On the contrary, their aim is to make the present demands of change the actual new beginnings of next generations; nevertheless, these processes are influenced by an unceasing sense of tension and uncertainty. As Huntington has emphasized,

“Violence and instability was in large part the product of rapid social change and the rapid mobilization of new groups into politics coupled with the slow development of political institutions.”²¹

In my estimation, it is a restrictive approach to see the connection between political transformations and the constitution in purely causal terms, the latter being the most frequent outcome of the former. In fact, political transformations and the constitution are at some points not exclusively linked by causality, but are instead connected to the extent that political transformations define the substance of the constitution and also represent the process by which the constitution may be implemented and effectively executed.

In this context, political transformations and the constitution are coexistent and codependent. Both political transformations as a process, and the constitution as the most important political institution of a given society, articulate the way in which the social process is conducted. The result of the equation combining both is what we call constitutional change.

These proposed changes of attitude toward political transformations may also require the participants involved to modify their preconceptions about the constitution, revolutions and the ways in which social change is shaped in present times. Let’s begin with the traditional symbolic conception of the constitution.

²¹ Samuel Huntington, *POLITICAL ORDER IN CHANGING SOCIETIES*, at 4 (1968).

IV. THE SYMBOLIC PROBLEM OF THE CONSTITUTION

I first heard the expression “Constitutional Symbolism” in a conversation with Professor Bruce Ackerman during earlier preparations of this work. He explained this trend in the context of political orders that transitioned from authoritarian to democratic regimes, and their counterintuitive, almost paradoxical approach to the constitution and its possibilities of transformation: in many cases, particularly in Latin America, (including Mexico of course), in periods of concentration of power and hegemonic rule of a single party, a group, or a leader, the constitution was easily amended. Paradoxically, in periods of increasing political plurality the constitution seemed less susceptible to change. In Professor Ackerman’s view, this paradox is a consequence of a strong tradition of constitutional symbolism, which I will explore in the following paragraphs.

The predominant views of constitutional change are closely linked with the ideas of constitutional interpretation. The dilemma is widely known:

On one hand, any attempt to approach the constitution in its original meaning and persevere in maintaining the interpretative standpoint of the constitution-makers also implies the prolongation of the context in which the constitution was promulgated.

One may, on the other hand, adopt an approach to viewing and interpreting the constitution as a living thing that evolves in the same way in which society evolves²² From this vantage point, the constitution should be interpreted in terms of current political and social changes, which most of the time will not coincide with the circumstances that prevailed during the Founding.

²² Bruce Ackerman, WE THE PEOPLE: FOUNDATIONS, 266-294 (1991). See also Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

Although I do not intend to enter into the discussion between *originalist* and *living* methodologies of constitutional interpretation, their distinction is key in framing the subject matter of this section. The problem of constitutional symbolism is to determine to what extent and for how long the identifications, expectations and demands of the constitution-makers who initiate a new beginning through a new normative order expressed in a constitution will serve as a political-legal compass for future generations.

In order to make this clarification, we have to start with our understanding of what the constitution fundamentally represents. At first glance, we can say that the constitution is the expression of who our predecessors (the constitution-makers) were and of who we (their heirs) are, and want to be, as a polity. The constitution also outlines the arrangements by which we decide to shape our relations with the government and among ourselves in the public arena.

Furthermore, since the eighteenth century, constitutions have been the result of radical transformations that hoped for a new beginning due to the inability of the regime that preceded these revolutionary transformations to capture the expectations and demands of the governed, who as a polity were unsatisfied with the status quo.

Hence, the constitution that followed these revolutionary transformations reflected the ideals, principles and arrangements of the people by virtue of which they hoped to manage their relation with the government, particularly by setting limits to governmental reach over the governed, as well as how the people mandated this government to function and be structured. The constitution thus represented the primary source of legal and political organization and management, and at the same time, it laid out the road map to achieving the transformative ideals that brought it into being.

We can infer that the constitution serves both as an instrument of organization and control, as well as a symbol of authority and protection.²³ Both features will be essential to assessing further implications of constitutional change.

However, defining the constitution both as symbol and instrument is not an easy undertaking. It admits numerous possibilities and interpretations, depending the time and context of constitutional change, particularly when it results from revolutionary transformations.

In characterizing this difficulty, it will suffice to cite Professor Jiri Priban, who notes,

“[Part] of the moral system due to their power to symbolically express social ideals and transform them into general values. The constitution, which is meant to codify the processes of political decision-making and specify the moral symbols of a political society, needs the language of morality for its own legitimation and political power to guarantee its enforcement. The legal constitution of a political society seeks to mediate between (two) seemingly irreconcilable worlds of normative eidetic origins and the real life of a political society. It converts ideals into norms and re-enters the code of morality into the sphere of political decision-making. The morality of a constitution means that it preserves the integrity and solidarity of a polity and presents this preservation as itself a value. In the moral sense, constitutions codify good and bad political and legal decisions. They are immediate *expressions* of a political society. Like other texts, they are acts of expressive symbolization of collective needs, sacred or profane such as the Old Testament or Lincoln’s Gettysburg address. In order to operate as part of the moral system of society, constitutions - these immediate expressive symbols and sources of cultural identity - further have to evolve into a set of *dogma* which

²³ Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 6 AM. POLITICAL SCIENCE REV. 1071 (1936).

establishes belief systems and value orientations. Primary expressive symbolism comes to be adjusted to mundane social reality and routinized by members of a collectivity. The symbolic power of constitutions cannot be only expressive and has to become evaluative. Expressive cultural symbols have to be manipulated and synthesized by moral judgments and converted into value-orientation patterns. Constitutions subsequently become rigorously consistent value-systems. The moral code of a constitution draws on expressive symbolism of culture and transforms it into evaluative symbolism and dogma of morality. A constitution therefore cannot be taken as a mere instrument of circulation of political power or self-reference of the legal system, but also has to be analyzed as an object of culture and tradition. It is both regulatory and symbolic, a useful tool of social control and a source of ‘eternal truths’ of a polity. Pragmatic legal tools and concepts, such as ‘trust’ or ‘public work’ are symbolized and symbols have power to determine legal policies and suppress different ideologies and their symbolic universe.”²⁴

In summing up his characterization of the constitution as a symbol, Professor Priban warns that even though “constitutional documents contain elements of expressive symbolism because they refer to the ideality of a political society by the legal code, (they) cannot operate as symbol of ultimate social integration and *more geometrico* of modern society”²⁵ since they serve only as mediators of the interplay of moral, legal and political systems in order to keep them differentiated enough to function adequately.

The lengthy quote above was meant to underscore how problematic it is to categorize the constitution as a perpetual symbol of legal, moral and social organization. Similarly, Professor Harold Lasswell notes the vagueness, diffuseness and distance of

²⁴ Jiri Priban, *The Time of Constitution-Making: On the Differentiation of the Legal, Political and Moral Systems and Temporality of Constitutional Symbolism*, *RATIO JURIS*, VOL. 19, NO. 4, 456-478 (2006).

²⁵ *Id.*, at 475.

symbols such as the constitution, which are capable of acquiring a distinctive individual meaning only as a result of personal displacements, projections and connections of some images from the primary world: the personal or non-political sphere of individuals, to the secondary political world.²⁶

According to Larry Baas, Harold Lasswell and Abraham Kaplan draw a distinction between the manifest and latent meaning of symbols,²⁷ the former being the more general and obvious kind of meaning: an inducement of loyalty, legitimacy, compliance, social integration, hope, security and protection. Symbols are crafted by individuals, collectivities or whole cultures into restrictive or figures with respect to welfare or deference values. Conversely, the latent indulgent meaning of symbols is related to the types of emotion they are likely to evoke. On this more internal level, the meaning of a symbol for a particular individual depends upon the individual's life history.

As has been explained in the preceding section, the notion of constitutional symbolism is two-sided: on the one hand, it comprises an operational code of interplay and value-oriented analysis that harmonizes the inherent tensions between moral, legal and political systems within a polity.

On the other hand, the meaning of the constitution as a symbol is ultimately embedded in what the constitution as a whole and in a personal and private sense means to the public. As we will see, both features will help determine our approaches to modeling constitutional change through unconventional adaptation and even more importantly, how these two features will influence social forces to channel their interests in the public arena in pursuit of said constitutional change. These complexities and the

²⁶ Larry R. Baas, *The Constitution as Symbol: The Interpersonal Sources of Meaning of a Secondary Symbol*, AMERICAN JOURNAL OF POLITICAL SCIENCE, VOL. 23, NO. 1, 101-118 (1979).

²⁷ Harold Lasswell and Abraham Kaplan, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* (1950).

lack of further analysis of the symbolic meaning of the constitution,²⁸ have contributed to perpetuating a practice of entrenchment of traditional decision-makers who keep the constitution and its operational code immune to change.

As a consequence, this misleading view of constitutional symbolism has been employed to discourage any attempt of constitutional change promoted by participants other than the national elites, the only agents formally authorized to give “voice” to the will of the people through the ordinary channels and procedures of governance. It has also served to establish practices, which, due to the pre-existing, formally designated lawmaking procedures, aim to keep rank-and-file insulated from the mainstream of constitutional change, maintaining it as a privilege reserved for the elites who are periodically products of national elections,²⁹ and other more permanent elites.

Furthermore, this utilitarian conception of constitutional symbolism has been used by political elites to transfer the symbolic weight of the constitution, as described above, to themselves as the only authorized agents of constitutional change and decision-making. Once this reallocation of power and symbolism has been achieved it become even more difficult to envision successful political transformations outside the formally designed procedures of constitutional amendment.

If we pay close attention to these features of predominant notions and practices of constitutional symbolism, we will find that their distorted conception is not situated in the constitution itself, nor in its principles or ideals, but rather in its functioning, procedures and agents.³⁰

²⁸ Larry R. Baas, *supra*, note 26, at 102, 114-116.

²⁹ Jack Balkin, *Brown, Social Movements, and Social Change*, at 1-2 (2004). See also Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

³⁰ Jack Balkin & Reva Siegel, *Principles, Practices and Social Movements*, 154 U. PA. L. REV. 927 (2006).

The problem of constitutional symbolism is rooted not in the core element of political organization (the constitution) nor in its possibilities of change, clearly provided and pre-established in very specific prescriptions of the constitution (such as Article V of the American Constitution, or Article 135 of the Mexican Constitution) but instead in the processes of constitutional decision-making and the actors or agents who control them. The burden of tradition and perpetuation of this prolonged transfer of constitutional meaning and symbolism to political elites is what continues to insulate other actors indefinitely from achieving a more significant role in the constitutive process.

This misunderstanding of constitutional symbolism through the use of the constitution as a perennial and unchangeable symbol has become a technique of “preservation through transformation”³¹ by which anti-transformative agents commit themselves to blocking any initiative aimed at opening channels of deliberation and participation to traditionally unprivileged participants, mainly the citizenry at large.

According to Michael Reisman,

“Big symbols are frequently used by elites to legitimize themselves and to validate the use of the authority over the rank-and-file without consulting them. Bitter experience has led to a deep suspicion about symbols of this type and those who wield them. [The] problem is not the symbols but the confusion that their use may engender. When the manipulation of the great contemporary collective symbols

³¹ Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2119 (1996). Professor Siegel constructs a theory through a case study of domestic assault law that illustrates how manifold efforts to reform a status regime can be successful in bringing about change, but not in the expected shape of change advocates. She describes such reform in the following terms “[When] the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges – gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend. Thus, civil rights reform can breathe new life into a body of status law, by pressuring legal elites to translate it into a more contemporary, and less controversial, social idiom. I call this kind of change in the rules and rhetoric of a status regime ‘preservation through transformation’.”

obscures individual people, who in all social interactions are the ultimate and only actors, critical human values can be jeopardized. Fascisms of various kinds can be the result of the uncritical abstraction and elimination of real people in favor of emotionally charged mythicized collective symbols.”³²

As we will observe, the main difficulty that these interpretations of constitutional symbolism have brought to the study of constitutionalism seems to be that modern democratic institutions are capable of giving a human dimension to the constitution, its practices and principles. The constitution is ultimately the creation of human agency and even more importantly, if these modern democracies were capable of undertaking the possibilities of change in a mindset in which traditional participants and procedures could constructively engage with the citizenry in the enterprise of bringing their constitution up to date, it would be deemed a human enterprise rather than as an untouchable symbol.

V. POLITICAL TRANSFORMATIONS THROUGH UNCONVENTIONAL ADAPTATION

Revolutions entail political transformations, which traditionally have also included constitutional change. The predominant narrative of revolutions departs from the successful experiences of the late eighteenth century and the two centuries that followed. The totalitarian feature of these approaches equalized revolutions with radical and violent breakthroughs with past regimes that were no longer sustainable, and the elitist and/or majoritarian claims for replacing them by revolution inaugurated an era of

³² W. Michael Reisman, *LAW IN BRIEF ENCOUNTERS*, at 4-5 (1999).

man-made “new beginnings,” as Hannah Arendt memorably described these phenomena in her essay *On Revolution*.

As Professor Ackerman explains,

“[Revolutions] became more secular with the American and French experiences of the eighteenth century. [The] dominant emphasis has been on the revolutionary possibilities of man-made change with spokesmen for We the People claiming the authority to inaugurate a breakthrough in political meaning by constructing a new constitutional order. This idea, once unleashed, has been one of the great exports of the modern West, generating a host of abuses and achievements both in the world of ideas and in ordinary life.”³³

In an attempt to rescue the revolutionary idea from the totalitarian exaggerations that spread through the twentieth century, Professor Ackerman advocates recapturing the idea of revolution for serious analysis, while scaling it down to human dimensions, without obliterating its distinctive character.³⁴

With this objective, he introduces the notion of *revolution on a human scale*, and defines it as

“[A] self-conscious effort to mobilize the relevant community to reject currently dominant beliefs and practices in one or another area of social life. Such revolutions succeed when they reorganize dominant beliefs and practices in a fundamental way within a relatively short period of time. Radical reorganization in one domain may, but need not, lead to similar transformations in others.”³⁵

³³ Bruce Ackerman, *supra*, note 1, at 2282-2283.

³⁴ *Id.*, at 2283.

In order to attain this goal, such human revolution (in opposition to the totalizing notion of revolutions characteristic of the eighteenth century) relies on constitutional politics as a deliberative practice in which a movement manages to make major headway among ordinary citizens in order to persuade them of the ideas that the movement is postulating. Their fellow citizens are expected to “not accept or reject the movement’s revolutionary proposals without a great deal of passionate debate and anxious indecision.”³⁶ In sum, a revolution on a human scale calls for the empowered elite traditionally represented by the government, the mobilized participants and the citizenry at large (what Professor Ackerman refers to as “ordinary Americans”) to engage in a conversation towards constitutional change.

In this context, Ackerman warns us to bear in mind that, contrary to past landmark events, what makes the process “revolutionary” is not violence, but instead the “unabashed way in which change-agents describe themselves as replacing an old order with a new one that repudiates central elements of the status quo”³⁷ with the always latent possibility of the old regime reacting violently to these peaceful revolutionary attempts. As Ackerman warns, however, “with the two sides mobilizing their forces, it is only too easy for each to demonize the other, generating a cycle of incivility that can lead to disaster if left unchecked.”³⁸

To prevent this undesirable outcome, in Ackerman’s view the key inquiries in such undertakings should strive to determine whether or not: *i.* Preexisting institutions are capable of directing the raging debate between the supporters and opponents of the

³⁵ *Id.*

³⁶ *Id.*, at 2284.

³⁷ *Id.*

³⁸ *Id.*, at 2284-2285.

movement's revolutionary proposals; *ii*. The constitution provides the contending parties the adequate grammar to define the crucial issues of their political skirmish; *iii*. And finally whether or not the same constitution provides the procedures to minimize the possibilities of one side crushing the other because of their evident disagreements.

In sum, the key questions that Professor Ackerman posits in his attempt to demonstrate that “constitutional revolution” is not an oxymoron but a serious possibility of social change, are first how to determine to what extent current institutions are capable of and appropriate for effectively channeling the likely bitter debate between the contending parties, and how these same institutions would be able to guarantee that, despite the outcome, both contenders will recognize that the final word of their struggle rests in the will of the people.

Deeming the constitution as the paramount expression of a new beginning (or as the American Founders referred to it, the *novo ordo seclorum*) or as a distinctive expression of renewal and creation as Professor Ackerman describes it, leads us to think that there must be an absolute rupture with the past in order to inaugurate a new era.³⁹ However, things are not that simple, precisely due to the weight of tradition and the temporal dynamics of revolutionary change that have been predominantly analyzed from purely theoretical standpoints rather than from more realistic and human vantage points.

The symbolism of the constitution as the product *par excellence* of a revolution has established a long tradition of seeing distinctively political revamping as directly connected with constitutional change, and of seeing revolutionary transformations as the leading way of modeling constitutional change since the landmark set by the American, French, Russian and Mexican revolutions in the last two-and-a-half centuries.

As Professor Ackerman has argued, contemporary constitutional changes can no longer be envisioned and implemented from the disruptive and totalizing perspective of

³⁹ Bruce Ackerman, *supra*, note 22, at 205.

revolutionary transformation, by virtue of the contemporary, if not perpetual, inability of succeeding regimes to break away completely with the past.⁴⁰ In this context, former institutions and inertias are so deeply rooted within the political realm and its civic culture that the mere advent of a new regime, endowed with democratic legitimacy and additionally, with a new or amended constitution on its side, is not enough (nor even advisable) to accomplish the absolute eradication of the previous regime and its institutions.

On Ackerman's account a more effective and realistic approach to success in the enterprise of constitutional change is by means of what he describes as "revolution on a human scale" through a technique of "unconventional adaptation," which in a nutshell can be defined as the discriminatory relationship between the new and the old order, in which the former "may reject key elements of the preexisting legal mix, (and) may also seek to retain others unchanged, while adapting yet others into the new system of revolutionary legality they seek to establish."⁴¹ The key roles in unconventional adaptations in revolutions on a human scale are not so much those of constitution-makers, but rather their successors, as lawmakers who adapt the constitution to fit the *demos* and *nomos* of the polity as it evolves.⁴²

While this unconventional adaptation in revolutions on a human scale is fundamental to understanding the notion of constitutional change advocated in this chapter, it is tempting to assume that constitutional symbolism, understood as a practice designed to deter further constitutional change, imperils the possibilities of future political transformation.

⁴⁰ Bruce Ackerman, *supra*, note 1, at 2285-2286.

⁴¹ *Id.*, at 2293.

⁴² See Robert Cover, *The Supreme Court 1982 Term. Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 28 (1983); Robert Post, *Who's Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative*, 17 YALE J. L. & HUMAN. 9 (2005).

This view is based on a misconception of constitutional change and the actual reach of political transformations that has led, paradoxically, to a misunderstanding of the constitution as a symbol of perpetuation and as a bulwark against further transformative processes as those that originated the constitution.

In an interesting article on constitution making, Professor Jiri Priban argues,

“[Revolution] is a social ‘big bang’ that needs to be codified by a constitution in order to contain destructive totalizing power of revolutionary politics. The constitutionalization of revolution is a process of dismantling the totality of future political hopes facilitated by political revolution and reducing the politicization of social reality that is typical of all revolutionary processes.”⁴³

It is a truism that revolutions are complex social changes in which political expectations of the future cannot be facilitated and controlled by the political present. According to Priban,

“[Revolution] is a moment of ultimate selection between the past and the future. In the process of revolutionary change, the present is already perceived as the abandoned past, and the future emerges as part of the present. [However,] making the future in the revolutionary present always involves the risk of failure, insecurity and violence. [Revolution] therefore requires further mechanisms of stabilization because its repudiation of the present in the name of the future calls the existence of social reality into question. Revolutionary condemnations of the present order must be balanced with the political need for stability, continuity and predictability. At a certain moment of revolution, stability must take over from revolutionary change.”⁴⁴

⁴³ Jiri Priban, *supra*, note 24, at 474.

Furthermore, for Priban,

“[Legalizing] the revolution by means of a constitution corresponds to the temporal logic according to which all revolutions end up with the restoration of order. [The] symbolic function of legal rationality therefore becomes extraordinarily strong in the process of revolution, which depicts itself as a constitutional and legal change and transformation. In a political society undergoing revolutionary discontinuity, the law may become an important symbol of unity and provide an integrative framework for political fractures. The revolutionary process of codification and constitution-making shows that time and the concept of temporality are identified with both social stability and change.”⁴⁵

It is beyond question that once a revolution succeeds in fundamentally reorganizing one or another area of social life, it must be rationally expressed in a constitutional document capable of answering the inquiries connected with the ability of preexisting institutions and procedures to channel the intense debate between opposing views of reality in pursuance of constitutional change.

In this context, Priban suggests a rehabilitation of Gadamer’s concept of prejudice by stating that the latter is a paradigm capable of making the past effectively define the foundation of present conditions. He goes on to say:

“Traditional power of political and moral prejudice is often reflected in the symbolic rationality of constitutional documents and thus represents an important link between the social past and present. Gadamer’s rehabilitation of prejudice has a profound effect on our understanding of the constitution-making and

⁴⁴ *Id.*, at 472.

⁴⁵ *Id.*

codification processes of modern political societies. Prejudice accommodates the *longue durée* of social institutions and develops in the long-term process of cultural sedimentation. Any act of legislation and constitution-making is consequently both an actual happening and participation in the long term, leading to a continual reproduction of a specific social institution.”⁴⁶

Thus, as Priban concludes, constitutional change is profoundly affected by the persuasive power of prejudice and tradition emphasizing that the enterprise of constitution-making is a continuous cycle “in the temporal dynamic of different social structures, historical cycles and traditions calling for ‘remembrance of things past.’”⁴⁷

This assessment coincides with Professor Ackerman’s rejection of the idea that wrenching change should occur suddenly and all at once, as he underscores that,

“[Really] big constitutional changes do not generally occur in such a short time without lots of people setting their sights on some big ideas, and working hard and long to make them into realities (though, of course, the actual results may well fall short of activists’ dreams). In contrast, when evolutionary processes add up to big differences, they generally achieve this result only in the longer run.”⁴⁸

This leads us to recognize that in contemporary societies the idea of progress (and this can be applied to constitutional change in particular) as a definitive achievement of the ideal social condition has been transformed into a never-ending process of social evolution and expansion of future possibilities.⁴⁹

⁴⁶ *Id.*, at 467-468.

⁴⁷ *Id.*, at 468.

⁴⁸ Bruce Ackerman, *supra*, note 1, at 2288.

⁴⁹ Jiri Priban, *supra*, note 24, at 469.

When Priban differentiates revolutions from its constitutionalization, he is pursuing the same attempt at clarification undertaken by Professor Ackerman when trying to set a departure from the predominant notion of totalizing revolutions to propound a human dimension of revolutionary change.

Priban's concern regarding the scarcity of time inherent in the very notion of revolution, is no longer justified if we assume the vantage point of revolutions on a human scale and their characteristic methodology of unconventional adaptation and their fixed period of at least ten years to persuade, implement and appraise legal transformations towards social change.⁵⁰

From my personal standpoint as an observer of constitutional change, Ackerman's unconventional adaptation when he differentiates the latter from total revolutionary breaks, is most persuasive,

“Law does break down in the interpretation of total breaks –since, by hypothesis, there is absolutely nothing linking the lawmaking system before and after the revolutionary breakthrough. But there is no similar paradox involved in the legal attempt to study the prevailing patterns of unconventional adaptation achieved during the Founding, Reconstruction and New Deal. *Despite the revolutionary character of these periods, certain basic continuities manage to maintain themselves.* Perhaps, then, we will be in a position to identify the systemic imperatives shaping key decisions to transform some basic principles and practices but not others? To be sure, the constitutional meaning of the surviving elements may themselves be transformed as a result of the emergence of new principles and practices. Nonetheless, *the reflective study of patterns of legal continuity within the context of revolutionary change may yield insights into the most durable elements of our constitutional language and practice.*”⁵¹

⁵⁰ Bruce Ackerman, *supra*, note 1, at 2287.

The Human Scale of Revolutions and its Influence in Contemporary Political Transformations

“Call it revolution on a human scale, and define it as a self-conscious effort to mobilize the relevant community dominant beliefs and practices in one or another area of social life. Such revolutions succeed when they reorganize dominant beliefs and practices in a fundamental way within a relatively short period of time. Radical organization in one domain may, but need not, lead to similar transformations in others.”

Bruce Ackerman⁵²

As I said in the introduction to this section, the main inquiry of contemporary political transformations does not set out to clarify whether there is an American-model of the People as a unitary conception susceptible of being mirrored in other contexts; nor whether social mobilizations are the most democratic way to take ownership of the constitution; nor whether there is a better way of modeling change. Instead, the main inquiry is whether our contemporary constitutional frameworks are equipped with sufficient preexisting institutions to adequate to the task of channeling the ongoing debate toward our political redefinition; whether or not sufficient institutions to channel this debate actually exist within our constitutional mainstream; in sum, to argue that the nature of political transformations is a continuous process of decision-making by virtue of the adequate degree of clarification, implementation and appraisal of prescriptions that aim to consolidate “unconventional changes” as depicted in the Ackermanian narrative of the human dimensions of constitutional development.

With this clarification, I find—for the purposes of my inquiry—an intriguing parallel between the postulates of Ackerman’s distinctive view of the constitution and the policy-oriented approach that sees law as a process of decision, both authoritative and controlling.

⁵¹ *Id.*, at 2295; emphasis added.

⁵² Bruce Ackerman, *supra*, note 1, at 2284-2285.

As Ackerman has explained in his *Revolution on a Human Scale*,

“Despite the revolutionary character of these periods (the Founding, Reconstruction, and New Deal), certain basic continuities manage to maintain themselves. Perhaps, then, we will be in a position to identify the systemic imperatives shaping key decisions to transform some basic principles and practices but not others? To be sure, the constitutional meaning of the surviving elements may themselves be transformed as a result of the emergence of new principles and practices.”⁵³

I have found it unavoidable to explain my view of political transformations in light of our definition of the constitutive process and law as authoritative and controlling decisions. This is to say that contrary to the predominant theories of political transformations (mostly Huntington and Arendt) that deem them as occasional and episodic or as “moments in time or history,” the present development of political transformations (over at least the last 20 years) indicates that the latter no longer necessarily entail radical changes from a non-democratic system to a democratic one—the underlying basic premise of Huntington's arguments—as they did in the past. I am arguing, then, that political transformations are continuous constitutive processes for refinement and calibration of the fundamental institutions and procedures of decision-making.

Consequently, political transformations are not adequately predicated: revolutions, since the 18th century, are associated with bloody revolts and violent mobilization of masses that threatened private property or led to totalitarian regimes. For this reason (among others of course) critics of revolutions suggested a more conservative

⁵³ Bruce Ackerman, *supra*, note 1, at 2295.

approach by renaming such transformations as *regenerations* or *restorations*, as if there were no conceptual, ideological and historical difference between these three words to substantiate the distinctions between them. However, my point here is that Ackerman's attempt to humanize revolutions accords well with the disastrous experience of the American radicalism in the first years of the revolutions in the United States as portrayed by experts on that period.⁵⁴

However, there is a different approach to political transformations than has been traditionally advanced. My aim is to explain by a more functional grammar, political transformations as constitutive processes of unconventional constitutional adaptation. To do so, I depart from a chief premise that under the present model of representative democracy, our vote is meaningless. The right to vote that triggered the most symbolic revolutions of the 18th, 19th and early 20th centuries is no longer an effective transformation tool in modern democracies. To illustrate this, we can just see contemporary scenarios in which suffrage constitutes only a part of the overall process of decision-making, which is chiefly controlled by multiple of elites rather than by the constituents. This asymmetry has created deep and enduring political and economic inequalities that have eroded the constitutive process of decision-making. Hence the question here is, *mutatis mutandis*, whether present generations will be able to craft a new model of democratic representation based on and checked by more effective means than the traditional vote. For this undertaking, it is necessary to reexamine an illuminating trend of constitutional history that turns to be very germane to our present inquiry.

⁵⁴ Roberto Gargarella, *The Constitution of Inequality. Constitutionalism in the Americas, 1776-1860*, 3 INT'L J. CONST. L. 6-7 (2005).

VI. THE SOURCE OF ENDURING DEMANDS: CONSTITUTIONAL RADICALISM REVAMPED

The nonpareil influence of American constitutionalism in establishing the political and legal foundations of Western democracies is beyond question. This influence constitutes our predominant framework of inquiry and outweighs any other constitutional perspective in this work. However, my aim is not to elaborate a justification of this influence over the last two centuries. I hope to show that inasmuch as the American Constitution, and its institutions, was widely replicated by nascent political orders as the quintessential model of political organization, its procedures for decision and policy-making were set aside in those fledgling political orders for an array of reasons, mainly based on the cultural and social ethos than constituted the mainstream of those countries. By putting forward a distinctive approach towards political transformations and constitutional change, I will also endeavor in Part II of the dissertation to bring to the surface these problems of constitutional transplanting, (in the case of Mexico) which have not always been as successful as desired. It may suffice for the moment to explain some background relating to the problem of constitutional transplanting and its influence in the historical tensions between three models of constitutional design.

Some preliminary clarifications

In their attempt to create a new constitutional order, fledgling republics of the 19th century were inspired by the American Founding and its constitutional canons. Thus, the American Constitution was transplanted into many of these nascent political orders, overlooking the fundamental incompatibility of the transplanted American model with the culture, practices and social ethos of these new states. Problems soon arose,

since the governing elites realized the extent to which the foreign constitutional grafts transplanted into their new constitutions, were incompatible with their distinctive, and often conflicting, views of reality in light of the cultural backgrounds of their societies.

Hence, in light of these self-imposed transplants and their complex adaptation to these new constitutional orders, a bitter and enduring conflict between liberals and conservatives haunted most of those countries that adopted the American model of constitutional organization.

A compelling and equally comprehensive account of these predicaments is eloquently described in the works of Roberto Gargarella. His analysis illustrates how, as the confrontation between the conservative and liberal groups unfolded, each attempting to achieve institutionalization of their model as the definite constitutional order for their country, constitutional reform by means of normative prescription and more sophisticated transplants from foreign constitutional institutions became the trend of constitutional change in these countries.

In this process, they completely overlooked the possibility of creating a constitution that would reflect the distinctive identity, history, culture, expectations and demands of the people. When the transplants became ineffective and the practice of constitutional transplanting became increasingly questionable, the immediate reaction was to continue with the transplanting but thoroughly differentiating it from previous unsuccessful transplants by associating it with whatever faction was in power at a given moment. The great paradox is that despite the impetuous flow of constitutional change in these countries, they opted for almost a century to keep their faith in constitutional transplanting as a practice, rather than focusing on original and realistic constitutional crafting.

This flawed process of constitutional-making shows not only its imperfections and inadequacy for political, legal and social contexts, which may considerably differ

from the prevailing situation and organization from which the transplant is made, but also demonstrates the necessity of observing these events from a continuous rather than the traditional episodic perspective, because of the pressing need for refinement in order to bring constitutional prescriptions up to date with actual social demands and expectations.

The argument for this undertaking comes in the form of public policy. As long as the latter is consistent with constitutional prescriptions, successful transplanting or distinctive crafting may be plausible methodologies of bringing about constitutional change.

According to Gargarella, the topic of constitutional transplants, extensively discussed by legal theorists, has focused mainly on two aspects: (1) the *incorporation of foreign institutions* (emphasis added) or the reception of judicial decisions from a foreign country; and (2) the very value of such operations.⁵⁵ My concern involving the connection between political transformations and constitutional transplants focuses on the incorporation of foreign institutions into new constitutional orders, e.g., into novel or original constitutional texts.

In order to elaborate on this matter, it is necessary first to explore what Gargarella identifies as the three constitutional traditions that influenced the foundational period of constitutionalism in the Americas⁵⁶, focusing in particular on the distinctive schemes in which these models conceive the separation of powers and the role of the people in the process of constitutional decision-making.⁵⁷

⁵⁵ Roberto Gargarella, *Grafts and Rejections: Political Radicalism and Constitutional Transplants in the Americas*, 77 REV. JUR. U.P.R. 508 (2008).

⁵⁶ *Id.*, at 510.

⁵⁷ *Id.*, at 511.

Three Constitutions, One Consensus

Gargarella identifies three types of ideologies that lay behind the core of constitutional making over the 19th century: conservatism, liberalism and radicalism.

The distinctive features of each model, though widely known in our discipline, are, in a nutshell:

“*Conservatism* is the ideology most closely associated with the colonial era, and can be identified as the philosophy endorsed at the time by British and Spanish Crowns. In this last version, the combined force of the military and the Church – the mark of conservatism in the Americas--reached the peak of its power. This way of conceptualizing power was dominant for about four centuries and, after independence (in the late eighteenth and early nineteenth centuries), continued influencing the philosophy of many elites of the newly independent nations. These elites were confronted with the threat of revolutionary beliefs that thought of constitutionalism in terms of the model inherited from the French Revolution. [In] short, what the conservatives wanted *was a constitution capable of establishing order, and order charged with securing the dominance of religion. [They] wanted a system organized around a hyper-powerful Executive, while, at the same time, defending a system of individual rights made conditional to respect for the dominant religion.*”⁵⁸

Gargarella describes *radicalism* in the following terms:

“[Its] extreme opposition to the remaining forces of the past, which were identified, precisely, with conservative thought. [While] the latter asked for the centralization of power, [radicals] *asked for maximum decentralization; while*

⁵⁸ *Id.*, emphasis added.

*[conservatives] advocated for a strong president, [radicals] pushed for a (weak) president (subordinated) to the legislature.”*⁵⁹

And finally, Gargarella explains *liberalism* as a reaction against these two conflicting views, quoting James Madison, “[against] tyranny and against anarchy,”⁶⁰

“[Liberals] rejected the tyranny of the ‘one’ that the conservatives supported, and at the same time rejected the anarchy of the ‘many,’ an anarchy that, according to them, was the natural product of the influence of radical thought. Liberals positioned themselves at an equal distance from both options, which they portrayed as unacceptable alternatives. [The] main proposal of liberals concerning the organization of power was *that of ‘checks and balances,’ which were designed to impose as much control over the Executive (which had tyrannical tendencies) as over the Legislature (the favored body of the radicals that liberals considered vulnerable to abuses and excesses)*. [The] United States Constitution of 1789 probably comes closest to representing the ‘ideal’ liberal type.”⁶¹

The first-half of the nineteenth century served as a laboratory for the testing of the applicability of these ideological models in developing a stable and enduring constitutional framework. Because of the inherent extremism of radicalism and its tensions with counter-majoritarian politics driven by elites being the latter more in tune with the other two models, the radical approach were rarely explored. Conversely, within the same period and until the present day, the main political factions leaned either toward

⁵⁹ *Id.*, at 512; emphasis added.

⁶⁰ *Id.*

⁶¹ *Id.*, at 512-513; emphasis added.

conservatism or liberalism, constituting a sort of enduring ideological consensus.⁶² The main tensions between them, e.g., institutional design and the degree of state independence, were solved by watered-down versions of federalism and the introduction of different controls on the Executive branch, yet granting it some unique privileges for the sake of a balanced relationship with the Legislature.

This understanding was reached given the high degree of agreement between conservatives and liberals on one matter that was enough to enable accommodation: their trust in counter-majoritarian politics and elite-based politics, in contrast with the radical approaches based on genuine majoritarian politics. Their premises underlying both conservative and liberal thinking regarding political representation was rooted in a deep reluctance to share power with the governed. As Gargarella explains,

“[Using] contemporary academic terminology, we could say that liberalism and conservatism were united by a tendency towards counter-majoritarian politics. In other words, both factions were united by a common distrust of the capacity of the citizens to participate in politics, which translated into a shared preference for designing institutions [to] limit majoritarian involvement. Both views rejected the central role of the legislature advocated by radicals; they renounced the idea that the legislature could have the last institutional say on any matter; they repudiated the politics of the Latin American *cabildo* or North American *town meetings*; and, in general, were very hostile to the involvement of the masses in politics. The latter influenced the design of less open institutions or ones which were directly opposed to participation.”⁶³

⁶² This ideological consensus has been extensively articulated by means of elite settlements that are sometimes reflected at a constitutional level, and in many others, have remained at a political level. In any case, these settlements have served as cornerstones of the social understanding that prevailed in different times and realms. This will be explored more fully in Parts II and III of this dissertation.

⁶³ Roberto Gargarella, *supra*, note 55, at 514-515.

Thus, in light of this strong and lasting ideological consensus, political radicalism was historically displaced as a viable constitutional model.

Why Radicalism?

Inasmuch as the conservative and liberal models ultimately eliminated political radicalism as an alternative for constitution making in the 19th century, these two models have historically been adequate to explain our predominant models of separation of powers and institutional design, since by definition, both conservatism and liberalism are fundamentally based on the paradigm of political representation by means of counter-majoritarian politics.⁶⁴ This dualistic model has traditionally sufficed to explain the dynamics of power and decision-making within systems that are characterized by Montesquieu's argument for a tripartite model of checks and balances in contrast with those who claim for a strict separation of powers, as political radicalism did, for example, in the first constitutional deliberations in the United States.⁶⁵ However, such a model fails to adequately explain how power can be distributed in situations in which majorities have a more active role in voicing the will of the people by means of direct participation of the latter in the formal and informal processes of decision-making.

⁶⁴ *Id.*

⁶⁵ Roberto Gargarella, *The Constitution of Inequality. Constitutionalism in the Americas, 1776-1860*, 3 INT'L J. CONST. L. 4 (2005). Based in the work of Maurice Vile, Gargarella presents the following argument "[Typically], within the threefold organization of power generally approved at the time (in the first decade of the 1800s) radicals considered the legislature the most important branch, given its democratic character, and tended to reject institutional arrangements that allowed other branches to interfere with legislative decisions. Radicals further favored a 'strict separation' of powers whereby no branch had the right to interfere with the actions of the others. As Maurice Vile explains in his study on the first constitutional discussions in the U.S.: 'they [the radicals] all adhered to the doctrine of the separation of powers, and they all rejected, to a greater or lesser degree, the concept of checks and balances.' They saw the strict separation doctrine, as the best way of allowing the majority will to prevail. [Most] of the first radical constitutions in the U.S. –that is to say, the state constitutions that were approved prior to the adoption of the federal Constitution of 1787, created systems of strict separation."

Conversely, the radical model is better equipped to explain the way majorities can be involved in the formal processes of decision-making traditionally assigned to political parties and representatives as the embodiment of the paradigm of counter-majoritarian political representation.

In this particular case, I depart from the traditional definition of counter-majoritarianism, since its traditional meaning is not suitable for democratically elected political authorities for representation. In this case, consistent with Gargarella's thesis on political radicalism, I deem as counter-majoritarian those models that differ from the radical political program to strengthen the connections between the representatives and the people, by a systematic empowerment of the latter.⁶⁶

It must also be clarified that I am here not advocating against the checks and balances model of separation of powers as the most adequate for any democracy, which I resolutely endorse. What I am trying to claim is that, in light of my goal of finding ways to foster citizen's engagement in contemporary political processes, the radical model may provide more keys to articulate this engagement from outside the formal processes now controlled by the political elites.

In the context of the prevailing political and constitutional consensus between conservatives and liberals for the last two centuries, this may be useful to explore. Perhaps by assuming the observational standpoint of political radicalism and using its elements as a prism to analyze civil engagement in contemporary authoritative decision-making, we may be able to clarify the complexities of a more active citizenship that has not yet found its place in the predominant counter-majoritarian trends for the distribution of power.

⁶⁶ *Id.*, at 5.

Constitutional Radicalism Foundations

People's demands to redress political grievances, to institutionalize channels that may help in the articulation of the relationship between the government and the people, to level all members of a polity, to make self-government effective, to challenge predominant practices of elite decision-making, to introduce new trends for collective political deliberation, and to share bases of power for increasing understanding, are hardly a new set of claims. On the contrary, all these demands originated from so-called radical groups that both in England and the United States established landmarks in political thought and practice.

Due to the influence of the two triumphant constitutional models in the 18th and 19th centuries, conservatism and liberalism, the original movement that triggered the first revolutions, constitutional radicalism, is utterly forgotten. Notwithstanding, as I will explore in this part, the core ideas of self-government and citizen empowerment through constitutional means and institutional design is historically rooted in the English and American radicalisms of the late 17th and 18th centuries.

Both radical movements propounded a strict separation of powers and the preeminence of the majority's will in political decision-making, granting a privileged place to collective rights over individual rights. By virtue of the strict separation of powers, and in contrast to the eventually successful checks and balances doctrine, radicals believed in the predominance of the legislature over the other two branches of government. Moreover, radicals supported the idea of decentralizing the decision-making process by transferring powers of decision to local governments and communities inspired in principles of actual federalism.

Radicalism was eventually defeated as a consequence of its extremist demands and the lack of capacity to balance radical perspectives with the contextual complexities

that both English and American late 18th century processes of political redefinition confronted. In short, it seems that radicalism's inability adequately to interpret contexts and perspectives, as well as the interests and expectations of relevant participants in the constitutive process, ultimately opened the possibility for the liberal and conservative models to install themselves as binary historical dialectic of national self-definition, as was demonstrated over the 19th century in particular.

Nonetheless, constitutional radicalism is worthy of closer observation and analysis in the present day. It may seem oxymoronic to say that the triumph of both conservative and liberal doctrines--and for many experts, their present failures--over radicalism, is the very reason we should revisit its underlying ideas.

It is very illuminating to examine the parallels between the latest political and social movements in Northern Africa, Europe and the United States (just to mention a few), and the radical principles and demands of the late 17th and 18th centuries. Then as now, current institutions and procedures were not capable of channeling the relations between government and social forces by minimizing the possibilities of disruption and violence. Then as now, there was an increasing sense of failure and distrust in the predominant model of political representation and the execution of the people's mandate. There was a growing perception that political elites monopolize the decision-making processes by keeping the citizenry insulated from meaningful participation. Then as now, corruption is seen as a systemic feature of social organizations that continuously undermines public trust in any given polity's procedures and institutions.

It was disappointment in government that triggered the radical uprisings. In connection with the 17th and 18th century English radicalism, it has been said that the *Whig* regime between 1725 and 1782 became so corrupt that a political restoration was

necessary in order to guarantee the continuity of English political institutions.⁶⁷ Such a transformation required a radical change from within and also from the top-down throughout the entire system. The depth of the transformations that was deemed necessary to undertake then, served as an inspiration to denominate as “radical” the mobilizations in support of such changes and is germane to our analysis of current predicaments.

By virtue of observing the evolution of constitutionalism over the last two centuries, is interesting to see how the demands, once championed by radicalism are once again brought to the surface as an alternative model to the failure of the traditional model of political representation. It is necessary, then, to inquire whether this revamped radicalism is sufficiently well equipped to succeed this time.

Constitutional Radicalism: The Failure to Balance the Majorities' Will with Minority Rights

English radicalism of the 18th century advanced the notion that each individual should be trusted to assume an active role in affairs related to his own political realm. Thomas Paine disseminated these ideas in the United States, advocating radical institutional reforms that would result in granting more access by regular citizens to spheres of political decision-making, as Roberto Gargarella has brought to our attention.

In Thomas Paine’s own words “fundamental truths can be known by everyone as long as the latter perseveres in examining reality in detail and reflects on his own

⁶⁷ Enrique Krauze, *Por una democracia sin adjetivos*, at 7 (1983). According to Krauze, the French historian Emmanuel Le Roy Ladurie found a deep resemblance between the political structures prevailing in Mexico (when Le Roy Ladurie visited Mexico back in 1980) and those of 18th century England. To strengthen this argument, Krauze cited Mexican historian Rafael Segovia’s views on the parallelisms between institutional corruption in Mexico during the 1980s and political decadence in England in the 18th century, based on Sir Lewis Namier’s *The Structure of Politics at the Accession of George III*. In his famous essay, Krauze depicts the evolution of the English political system based on political parties as a response to the waning Whig regime. In his view, the corruption and decadence that brought that regime to an end and the ability of the English political elite to build a new system of self-government based on a partnership between the government and the people, might very well serve as an illustrative, guiding yet distant mirror to the case of Mexico.

experience.”⁶⁸ Gargarella underscores that this epistemic precondition was expected to play a significant role in contexts where the ruling elites were determined to impede and delay the political participation of majorities in public affairs.⁶⁹

According to Gargarella’s account, the Rousseauian influence in the first constitutional drafts in Latin America made elites aware that political decisions from that moment on, in order to be legitimate, had to be informed by the opinion of the citizenry, acknowledging the latter as the relevant recipient of political decisions. That awareness made “majoritarian participation,” a *conditio sine qua non* of the new social order and its distinctive new grammar of constitutional legitimation.⁷⁰

From this principle, an array of contemporary theories of political decision-making came into being. Since then, the correlativeness of the increasing number of decision-makers and the maximization of correctness of their decision by virtue of equalizing the number of the former with the degree of inherent goodness of the latter, aimed to assure impartiality in the final outcome. This approach ended up becoming a constant in the discussion of modern constitutionalism.⁷¹

The problem of this approach in these early stages of radical constitutionalism was that its supporters tended to identify the “general will”⁷² with the “will of the legislatures,” based upon the natural right of freedom and equality that all individuals are bestowed with, and therefore contributed to advancing a model of political organization

⁶⁸ Roberto Gargarella, *LOS FUNDAMENTOS LEGALES DE LA DESIGUALDAD. EL CONSTITUCIONALISMO EN AMÉRICA (1776-1860)*, at 22 (2005).

⁶⁹ *Id.*, at 22-23 on Gargarella’s approach toward Jeffersonian views of the dichotomy of political v. self-representation.

⁷⁰ *Id.*, at 24.

⁷¹ *Id.*

⁷² *Id.*, at 29. Nonetheless, Rousseau’s claim of “common interests” within society in order to construct a genuine “shared general will,” coincides with the policy-oriented thesis of maximizing the agreement and identifications amongst the relevant participants in any given society, in order to foster a public order of human dignity.

of “self-government,” which at some point and with obvious extremism, endowed the general will with sovereign “flawlessness.”⁷³

Another difficulty with this radical approach was that the maximization of the general will’s reach to every area of political interest, put at risk a number of important decision domains, which in order to maintain social order, must be kept excluded from any majoritarian interference, e.g., judicial decision-making.⁷⁴

One of the core inquiries of this radicalism was, and still is, whether the rule of majorities constitutes a menace rather than a solution to democratically constituted governments with their continuous demand for refining present institutions and procedures for constitutional decision-making.

In my view, Gargarella’s elaboration of the historical origins and motivations of “constitutional radicalism,” describes in clear terms the unending struggle between the ruling elites and the people in the pursuance of better institutional and social scenarios.

However, Gargarella’s depiction of the 18th and 19th centuries’ struggles has experienced a 180° turn in recent times, as contemporary elites, instead of urging radical transformations through political and legal reforms, are using their monopoly and mastery of and over the “system” to deter, prevent or minimize such transformations, in evident opposition to the role that the eighteenth-century elites played by championing radical changes of the status quo.⁷⁵

Furthermore, in terms of institutional design, there is also a fundamental difference between the radical arguments, since in modern discourse, we are not as much aware as those in the “radical past” of the fine differences within a democratic system between a “strict separation of powers” as propounded by the radicals and a “checks and

⁷³ *Id.*, at 26.

⁷⁴ *Id.*

⁷⁵ *Id.*, at 11.

balances system” ultimately established by the liberal majority in the drafting of the American constitutional document of 1787.⁷⁶ It is useful, then, to revisit the exchange between these two visions of political organization in the ongoing debate concerning how best to bring our procedures and institutions of government up to date in light of the present decline of traditional schemes of political representation and the way in which the popular mandate is executed in contemporary democracies.

As I have mentioned in the foregoing, one historical trend that has impeded the distribution of power is precisely the widespread inclination of ruling elites to concentrate power in an individual or a group, despite the existence of legal rules designed to prevent or ultimately eradicate such concentration of power.

I share Gargarella’s view that the eighteenth century revolutions awakened the “sleeping giant”, who from then on began to claim ownership not only of the new constitutions, but even more importantly, of -the newly defined- rights and privileges.⁷⁷

As Gargarella explains,

“In the United States, (their) fight against England was made in the name of self-government; and their revolutionary leaders demanded their political mobilization invoking self-governing ideals. The practice of the ‘town meetings,’ which was common before and after the revolution allowed the people to intervene directly in the political affairs of the community, these meetings enabled them to have a clear say in public matters and taught them about the importance of their participation. These people, in fact, assumed that their political will should prevail and, for that reason, demanded new institutions that facilitated this result.”⁷⁸

⁷⁶ *Id.*, at 12. See also Roberto Gargarella, *Legal Foundations of Inequality*, at 208: 2nd full paragraph, 194-207, 54-73.

⁷⁷ *Id.*, at 15.

⁷⁸ Roberto Gargarella, *supra*, note 14, at 12-13.

It seems that, then as now, the problem of self-governance (as a fundamental tenet of republican and democratic forms of government), albeit in a representative fashion by necessity, comprises three main inquiries.

First, political representation, e.g., whether elected representatives are entitled to serve as spokespersons of the people; whether these representatives are effectively bound by the mandate of the people, and if so, how this mandate is executed.

Second, political deliberation, e.g. how the perspectives of the people are channeled and voiced by their representatives and in what degree public deliberation, is conducted as a means to recreate the continuous processes of collective rumination.

Third, political and constitutional decision-making, e.g. whether decisions are taken as a result of exhaustive, fair and inclusive deliberation processes based, most of the times, on intense exchanges and conversations between opposing views that in the name of the people and in pursuance of predetermined procedures and institutions seek to prevail over their opponents: the key inquiry here is whether the accomplishment of the proponents of a specific initiative over their opponents is a result of a “fair and square” deliberative process in which both winners and losers had enough opportunities to voice, defend, and contrast their views in order to enable ultimate decision-making as an expression, not only of the interests of the majorities, but also as a safeguard of the demands and expectations of protected minorities within the democratic realm.⁷⁹

According to Gargarella,

“[Rousseauian] thought, on the other hand, contributed for many leaders of that time to subscribe the idea that in order to adopt fair political decisions, it was indispensable to take into account the people’s opinion as those mainly affected by

⁷⁹ Roberto Gargarella, *supra*, note 68, at 22-26. *See* the decision-making process at 24.

those decisions.”⁸⁰ Furthermore “[the] assumption that helped radicals go from their confidence in the people’s capacity to their preference for “large numbers” was probably something like the ‘Millean’ premise that said that each person is the ‘best judge’ of his or her own interests, a premise that was not at all foreign to the American constitutional writers. If one takes into account all these ideas, one can reasonably conclude, with many radicals, that the decisions tend to become more impartial after a *process of collective reflection*. In fact, radicals may say, if the decision makers do not consult *all those potentially affected*, they probably lose fundamental information regarding the decision they want to make. Without that information, it is more difficult for them to adequately recognize and balance all the different viewpoints (*perspectives in the policy-oriented grammar*) existing in society: their choice, therefore, runs the risk of being less impartial than it should be.”⁸¹

In this context, it is not that the modern approach toward the rightful preservation of minorities’ interests begins with the *Carolene Products* doctrine and its famous footnote four, as well as the influential work of John H. Ely in his *Democracy and Distrust*. On the contrary, it is well known that the concern about the tension between the majority’s will and the interests of the minorities has been a constant since the Foundation.

Nonetheless, this tension is still at issue in contemporary political processes, notwithstanding the fact that it was not sufficiently solved until *Carolene’s footnote four*. More importantly, thanks to the improvements and sophistication of global constitutionalism and the protection of human rights over the last fifty years, there are fundamental areas and values, which by their nature are excluded from any majoritarian interference.

⁸⁰ *Id.*, at 24; personal translation of the author.

⁸¹ *Id.*, at 23.

It is clear then, that the problem of political definitions first, and then of political transformations, resides more in the constant demand to refine the process of voicing the interests of the people, or the majority of them, in such a way that the threshold of the majoritarian will be balanced with that of the minorities. The legitimate interest of the latter may not overshadow the incontrovertible delegated popular authority of the majority to speak in the name of the people and execute their mandate, by acknowledging at the same time that, notwithstanding this majoritarian support, they are also obliged to look after the interests of those minorities who played no part in putting them in office.

In sum, the constant conundrum about political decision-making in times of overlapping consensus is whether elected majorities and minorities are able to have a conversation that might result in maximizing the possibilities of reciprocity and minimizing those of retaliation in benefit of the common good.

The founding ideals of both English and American radicalisms not only inspired a radical transformation in which public affairs were understood then, but also entailed, as Hannah Arendt reminds us, a collective awareness that there was indeed a possibility for actual new beginnings made by men, instead of relying on old institutions, principles and procedures that no longer met the expectations and demands of self-governance widely spread in the 18th and 19th centuries. This was based on the core idea that each person as a citizen is entitled to take part in the political life of his community, by virtue of the mere fact that all men are created equal.

It is particularly timely to see how influential Thomas Paine's arguments of three centuries ago have been, and how applicable they are to the present situation. As Gargarella explains, the frustration and increasing demands of the governed to take part in political decision-making in England in the late 18th century, embodied a strong movement which at the end of the day meant an up-side-down change in the relations

between those who govern and those governed, despite the efforts of the former to prevent the sway of the latter to advance these transformations. The ruling elite, then as today, failed to stop this majoritarian revolution that founded the modern trends of governance.

Radical New Beginnings: On Civic Virtues as Fabric of New Political Orders

Constitutional radicalism strived for finding the “glue” that would unite society. In policy-oriented jurisprudence terms, it strived to find the best way to maximize the identifications between the people in light of an increasing cultural, political and social pluralism.⁸²

One of the core principles of radicalism, which appeared in daunting and trying times of political corruption and institutional deterioration, relied upon the idea of civic virtue as a fundamental component of the social process and of the public interest, whatever this meant by that time. This idea of civic virtue is closely related to individual sacrifice for the sake of the common interest.

If there is one distinctive feature of the contemporary public outrage that began in January 2011 with the Arab Spring, it is that unlike the past, ordinary citizens once again are willing to put their individual interests aside for the sake of the common good. This is relevant to our inquiry, since the fact that the stability and preservation that result from political transformations, in their traditional-episodic version compel rank-and-file citizens to leave the mastery of all decision-making processes in the hands of the elites, regardless of whether these processes entail ordinary or fundamental decisions of “ordinary politics” and “higher lawmaking” in the Ackermanian narrative, by the incumbent authorities. The events of 2011 and 2012, taking the form of social

⁸² Roberto Gargarella, *supra*, note 14, at 32.

mobilizations against the rule of privileged elites in countries as Egypt, Tunisia, Syria and Libya, demonstrated that there are some situations that indeed lead masses of people to repudiate central elements of the status quo and ultimately to replace them with more effective and suitable institutions.

The dominant attitude toward public affairs in the context of ordinary politics is that of assuming a secondary and passive role towards the pressing issues in a given society. Both liberal and conservative models of organization based in political representation have created a deeply rooted inclination of the people to pay deference in the decision-making processes to the incumbent and/or traditional elites, instead of performing a more active and compelling role in the deliberation and decision of public affairs,

Yet that inclination has suffered radical changes since the economic collapse of 2008, and more acutely, after the increasing outrage continuing from 2011 to the present day, events which are extending globally with demands for rethinking our present social understandings and their expression in constitutional terms.

It is evident that the citizenry is increasingly unwilling to continue to assume its traditionally passive role that has prevailed over time. On the contrary, in very different ways, rank and file citizens are awakening from their usual quietude in order to undertake a radically different attitude about their stakes in the making of decisions that may directly affect their own lives.

All these changes can be identified by observing how the rank-and-file are leaving their “comfort zones,” to undertake more direct and committed participation in the public realm, in some cases with a great measure of sacrifice. This new commitment is what embodies civic virtue in present times and shapes the form of contemporary and future political orders.

Thus, before entering into a discussion of the constitutional technicalities that

shape this new political order through equally new decision-making processes, it is necessary to test the profile and characteristics of those that are not only urging on but also conducting this new approach. To explore this “new man” for the “new order” I would like to rely on Ackerman’s methodology of intergenerational synthesis to introduce a conversation between the Founders of the predominant political order since the late 18th century to the present on the one hand, and those proponents and supporters of this inceptive new model of collective definition on the other. To do so, I will frame this conversation in exploring the genealogy of Mexican constitutionalism since the Founding in Part II of this dissertation.

For the moment, suffice is to say that my fundamental aim is to determine whether both types of founders, in different times and circumstances, share the same common ground of values and ideals that articulated the new beginnings that gave birth to republican democracies since the French and American revolutions. The lifeblood of those foundations was the value of sacrifice that the first revolutionaries displayed as an exemplary attribute to convoke their fellow citizens to embrace the quest for a new order.⁸³ The main goal then was to shape a “new citizen” characterized by the inculcation and exemplary living of civic virtues that might serve as the fabric to build a new order.⁸⁴ My aim here is to contrast the fostering and display of radical virtues in the middle of transformative times. This is clearly described by Bruce Ackerman in the two-period

⁸³ Bruce Ackerman, *WE THE PEOPLE: FOUNDATIONS*, 165-169 (1991). As Professor Ackerman explains: “[We] must learn to see the Founders as they saw themselves: as successful revolutionaries who had managed, time and time again, to lead their fellow citizens in public-spirited collective action, *even at a great personal cost* (emphasis added).” See also Gordon Wood, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 46-75 (1969).

⁸⁴ Roberto Gargarella, *supra*, note 14, at 33 (2010). In Gargarella’s account, based in the comprehensive historical work of Gordon Wood, such civic virtues, among others, were patriotism, austerity, courage, frugality, solidarity, simplicity and industry. All these virtues were fostered in order to eradicate the predominance of their counter-habits such as cowardice, selfishness and vagrancy. As Gargarella points out “the former (virtues) seemed indispensable for enriching communal life, whereas the latter represented a fundamental obstacle to its constitution.”

schema of successful revolutions,⁸⁵ in the attempt of those revolutionaries, who later became founders and rulers of a new order, to do something with the attitude and virtues that presently define contemporary “change-makers.”

This intricate process of contrasting 21st century revolutionaries with those of the 19th century in terms of their civic virtues turns particularly relevant for the task at hand due to the general and pervasive lack of interest in public affairs on the part of most of the citizens, unless their country is passing through a process of radical political transformations.

Even those countries that still enjoy, though not completely, stability and moderate economic growth, also appear to be as much concerned as those that are passing through the complex processes of turmoil and decline of their preexisting weakening institutions. Possible indications could be increasing national debt, unemployment, uncontrolled immigration, political unrest, growing distrust in public institutions and officials due to corruption, maximization of violence. A combination of any or all of these factors are compelling governments to redefine the nature of political representation, the fairness of their distributive arrangements, the goals of their public policies, and the way in which the people are framing and channeling their conversation with its government. This is why, even under conditions of apparent or minimal stability, almost any country is alien to this type of predicament.

This being said, my aim is to assess the degree of self-sacrifice that characterizes the proponents of a revolution, since it might be radically different from that of the 18th and 19th centuries’ revolutionaries. At first glance, it seems that the readiness to do so is

⁸⁵ Bruce Ackerman, *supra*, note 83, at 213-214. As Ackerman describes, the legitimation problem of any successful revolution can be classified in two times: “Time One: a group of outsiders challenge the legal authority of the ins, proclaiming their superior dedication to the public good before irregular assemblies claiming to speak in the name of the People. Time Two: outsiders become insiders, and struggle with their revolutionary past as they seek to legitimate their present authority.” This schema is precisely one of the main inquiries of this work and most importantly of the current processes of collective redefinition and transformation.

significantly different from the virtues of sacrifice that distinguished those role models of the American Founding Fathers.⁸⁶ This assumption may be inaccurate, however, due to the fact that sacrifice nowadays comes with different garments.

As we will see in the coming paragraphs and more specifically in Part II, that civic virtue, either in the form of sacrifice or leadership, becomes meaningless in the absence of sound and adequate institutions specifically designed to channel civic virtues and flourish increasing collective identifications and understanding.⁸⁷

In conducting our conversation with our correlative 19th century citizen, now as then, we start by sharing a common ground in the growing dissatisfaction of how the mandate of the people is interpreted by our representatives. In short, then as now, we are identified by the sense that our vote is futile in the public realm as it is currently organized, since we can witness the inadequacy of present institutions and procedures to our collective expectations and demands.

Then as now, we face exclusive institutions that are open to and operated by members of the political, social and economic elites. At the same time, however, we also experience the lack of incentives to turn this system upside down in order to achieve a more accurate representation of the interests of the people in the public realm.⁸⁸ In this

⁸⁶ Bruce Ackerman, *supra*, note 83, at 171.

⁸⁷ Roberto Gargarella, *supra*, note 14, at 45. As Gargarella argues: “For radicals, the basic institutions of society had to be shaped in specific ways in order to foster certain moral qualities in the citizenry and thus make self-government possible. Clearly, the civic commitments that radicals favor cannot be possible and cannot flourish in just any type of institutional setting. If, for example, the political institutions prevent participation or make it very difficult, then the ideal of self-government is seriously affected. Within a hostile political system, even virtuous and political committed individuals tend to lose their civic energies. Political apathy may indeed be the outcome of a certain institutional organization rather than an innate human quality that we have to condemn. [In] addition because of their confidence in the people's capacities and their general distrust of representatives, radicals defended an institutional system that not only allowed but also encouraged the people's active participation in politics. It is important to emphasize this point because most alternative institutional proposals were designed to block this possibility. In the proposal that most radicals favored, the institutions did not appear as a mere ‘procedural’ structure, aimed at allowing free agreements among free people, or consist of a general framework, open to any kind of ‘substantive’ content. Instead, it required an institutional system that advanced the majority interests. This system was linked to certain basic substantive values, shaped in their light, and aimed at honoring them.”

respect, 18th - 19th century radicalism looks particularly enlightening.

As I have argued in this chapter, there are three major tasks required to refine the way in which public affairs are conducted under the current model of representative democracy: (1) to analyze the adequacy of present institutions and procedures to genuinely utter the voice of the people; (2) to share more areas of effective decision-making with the people instead of keeping the latter excluded from public deliberation toward the making of those decisions; and (3) to improve the relationship between representatives and the people, by interpreting the mandate of the people in more radical and democratic ways, assuming that the people have the power to revoke such a mandate in cases where it is not adequately executed.

Looking more closely at these demands, we see that they are not at all new and roughly coincide with the banners waved by 18th and 19th century radicals who struggled to include the rank-and-file in the decision-making process, traditionally controlled by elites, by creating representative institutions that would not only channel and voice the interests of the people, but even more importantly, serve as guardians of their rights and ideals of self-government. This is due to the decentralized nature of the institutions they created, in which more people would be able to engage in the process of collective redefinition by virtue of their openness and dissemination in an array of situations and areas of diverse decision-making. Thus, we may ask ourselves if these demands were substantially different from those we are considering today the answer is most likely no.

Hence, the fundamental inquiry is based not on these demands, but rather on appraising both the traditional and contemporary institutions and procedures that have

⁸⁸ *Id.* According to Gargarella, in the late 18th century, both in the United States and in Latin America “there were elitist and restrictive political regimes that concentrated political rights on only a very small group, the ‘select few.’ [In] the people’s opinion, the existing political institutions were not only unjust but also incompatible with the production of adequate, impartial decisions. Even an altruistic leader aiming to promote the interests of the community, they assumed, would be unable to properly defend the common good. In their opinion, [impartiality] required a process of collective reflection and not simply the goodwill of the enlightened few.”

failed to fulfill the historical expectations of numerous generations of citizens who have hoped (and are still hoping) for a more meaningful participation in the public realm. Something has changed with respect to the way in which the institutional design through constitutional arrangements fulfills major societal expectations nonetheless, we may also need to analyze our attitude toward public affairs and our readiness to engage in collective deliberation and to make the same sacrifices that was considered earlier (e.g., patriotism, austerity, courage, frugality, solidarity, simplicity and industry, in order to achieve effective political and social transformations.

Once we have framed the inquiries to be taken up during our inter-generational conversation with our 19th century citizen, focusing not on the demands (which remain substantially the same) we will focus on the failure of constitutional institutions and the resultant shift in civic virtues, since in the beginning, both institutions and virtues were considered the keys to promoting a deep change in the relations between representatives and the people.

While the failures of radicalism may be put down to the relative success of its rivals, I am not persuaded by the possibility of embracing this simple though incomplete explanation of radicalism's inapplicability to the goals proposed herein. I believe that both then and now, in light of the present failure of conservatism and liberalism as plausible systems for channeling collective demands, radicalism turns out to be—once again—, a reasonable doctrine for further transformation.

The answer to our predicaments is found, then and now, in the conception of the constitution and its arrangements as the institutional writ by which social and personal relations may be conducted.⁸⁹

⁸⁹ We will explore this in more detail in Part II.

Radicalism in Contemporary Perspective

Radicalism may sound persuasive, and even be appealing in contexts where the governed demand extending their participation in public affairs beyond simple suffrage. However, in embracing radical postulates there are at least two ways in which we should be especially careful:

One concern is to consider radicalism as a contemporary *third way* for constitutional modeling. In light of the consolidation and endurance of the liberal model for the last one-and-a-half centuries, it might be even regressive to consider the implementation of a radical model in its totality as an effective constitutional design for addressing the present dilemmas of our democracies. Such an implementation, by the mere definition of radicalism, may require a complete break with the past, including not only the still- defective democratic institutions, but also the very foundations of our contemporary forms of government. In short, what I am trying to posit with this argument is that radicalism in its purest form entails a revolutionary change that consists in an extreme transformation of the status quo. Such an outcome conflicts with our idea of the human scale of revolutions, in contrast with traditional totalitarian views and also with our method of unconventional adaptation as means for transformation. In saying this I am not disregarding radicalism as a plausible source of new approaches toward constitutional change and political transformations; on the contrary, what I am proposing is that as we embrace the Ackermanian argument for recapturing the idea of revolution for serious analysis, by scaling it down to human dimensions, without obliterating its distinctive character.⁹⁰ I think that a similar approach is necessary in the case of political radicalism, and I contend we should infuse our views on radical

⁹⁰ Bruce Ackerman, *supra*, note 1, at 2283.

constitutionalism with the same human scale that we adopted in the case of the concept of revolution.

The other way in which we should be careful when analyzing radicalism pertains to the introduction of some of its institutions in a given constitutional model. It may be a truism that in functioning (though perhaps not perfect) democracies with a tradition of successfully channeling their differences with resilient institutions and policy-oriented mechanisms to deal with their collective problems, radicalism has little to contribute, for the reasons mentioned above. The case is different when it comes to defective, less well evolved, and dysfunctional democratic systems, where inequality pervades all areas of human life. In these cases, albeit not in an absolute fashion, radical principles appear not only plausible, but crucial by virtue of extreme concentration of power in the hands of a few. It is in these cases, when our ideals of civic virtue, inspired by radical axioms, come into practice and are contextually implemented through decision and policy. This could possibly dilute the concentration of power into more sharing situations.

It would be naive to postulate the implementation of radical constitutionalism without taking into account (among many other arguments) at least these two points that I posited in previous paragraphs. It is clear that in societies like ours, where ideological dualism reigns supreme, radicalism has very limited chances of success after two centuries of having been utterly obliterated by the entrenchment of the liberal-conservative consensus. Perhaps a more realistic approach may be to infuse the predominant ideological consensus historically expressed in our constitutions, with radical institutions.

VI. POLITICAL TRANSFORMATIONS THROUGH ELITE SOCIALIZATION AND SOCIAL MOVEMENTS: A JURISPRUDENCE FROM THE PERSPECTIVE OF THE POLITICAL SUPERIOR

Once we have clarified that the all-encompassing views of revolution are no longer suited to contemporary societies and their systems of political organization, and with a basic idea of constitutional symbolism, unconventional adaptation, and the differentiation between total revolution and that on a human scale, we can enter into the analysis of the contending parties in scenarios of constitutional transformation in light of the brief analysis that we have just regarding constitutional radicalism.

The Role of Elites in Political Transformations and Constitutional Change

Throughout this chapter, I have repeatedly referred to the political or national elites as the exclusive or privileged stakeholders of decision-making in the constitutive process. In short, I have described how political elites have managed to retain the possibilities of political transformation as their exclusive domain.

By the same token, I have anticipated the importance of sharing with other participants (the citizenry to be precise) the possibility of taking part in the continuous processes of constitutional transformation on a regular basis that envisages effective participation in public decision-making in ways that transcend the right to vote in periodic elections.

Both propositions require an important clarification:

While I endorse the goal aim of enfranchising non-traditional participants to engage in the collective enterprise of constitutional change, I am not at the same time underestimating or undermining the power and legitimacy of the political elite as the leading part of the constitutive process.

As Professor Michael Reisman and Aaron Schreiber put it,

“Democracies, and ours in particular (referring to the American democracy), hold forth the notion that all are equal before the law which *all participate in making*. In fact, in many if not all social systems, relatively small groups of people, known as elites, have much more power than others. ‘... In all large-scale societies, the decisions at any given time are typically in the hands of a small number of people... government is always government by the few, whether in the name of the few, the one, or the many.’”⁹¹

Reisman and Schreiber referred to Mosca’s earlier formulations of the concept of elites:

“In all societies –from societies that are very under-developed and have largely attained the dawning of civilization, down to the most advanced and powerful societies –two classes of people appear- a class that rules and a class that is ruled. The first class, always the less numerous, *perform all the political functions, monopolizes power and enjoys the tremendous advantages that power brings*, whereas the second more numerous class, is directed and controlled by the first, in a manner that is now more or less legal (this definition was given in 1939), now more or less arbitrary and violent.”⁹²

But both authors were also prompted by Robert Dahl’s words written back in 1961: “Democracy is the best form of government and *every citizen should have an equal*

⁹¹ Michael Reisman & Aaron Schreiber, JURISPRUDENCE. UNDERSTANDING AND SHAPING LAW. CASES, READINGS, COMMENTARY, at 44-53 (1987); emphasis added.

⁹² *Id.*, at 44; emphasis added.

chance to influence government policy.”⁹³Dahl’s inquiries become key and relevant to our subject matter:

“Do leaders tend to cohere in their politics and form a sort of ruling group, or do they tend to divide, conflict and bargain? Are different kinds of decisions all made by the same people? What is the relative importance of the most widely distributed political resource –the right to vote? To what extent do various citizens use their political resources? Is the operation of the political system affected in any way by what ordinary citizens believe about democracy?”⁹⁴

These questions are the underlying concerns of contemporary democracies and especially those trapped between old authoritarian constitutions and new democratic systems, because what should be normal in any modern democracy is not normal in their case, and what should be granted by the sole provision in the constitution granting an equal chance to influence government policy in any of these polities, turns out to be deceptive due to the monopoly and control that are connatural to political elites.

From the foregoing, it should be clear that elites rather than a variety of democratic institutions are a constant in their structure and operation. Any observer of social and constitutional phenomena must assume this very fact in order to elaborate further analysis aimed at devising strategies for enabling ordinary citizens, the People, to influence government policy at any given time. Thus, the inquiry is not whether elites will continue to dominate, since we can take that for granted, but rather in the assurance of the rotation of its components and their ability to genuinely engage in continuous

⁹³ *Id.*, at 45; emphasis added.

⁹⁴ *Id.*, at 45-47.

conversations with the governed concerning the sharing of power that these elites have traditionally monopolized.

Constitutional change, therefore, should not be the exclusive domain of constitution-makers and lawmakers from the vantage point of traditional procedures of constitutional decision-making, nor of the national elites that periodically result from elections. On the contrary, constitutional change involves such significant issues that it should not be left solely in the hands of traditional actors. Meaningful constitutional change requires the input of those participants traditionally disenfranchised from the constitutive process.

The great paradox here is that the people, the citizens, as the sovereign entity that legitimizes the constitution, its principles and procedures, once it had been promulgated and periodic elections have taken place, enter into a period of what we can describe as “hibernation,” leaving the whole constitutive process (and therefore, the initiative for constitutional change) in the hands of the national elites.

Modern approaches to popular decision-making demand a broader and an up-to-date interpretation of the mandate. In this context, how can ordinary citizens cut the Gordian knot that prevents them from having a more meaningful and effective influence in the process of constitutional change, while the elites are entrenched and have constituted themselves as a bulwark against any attempt to change the status quo?

Social Movements as Contemporary Agents of Political Transformations and Constitutional Change

The writing of this dissertation coincides in time with a wave of important economic, political and social transformations now taking place in different parts of the world and is bringing to the surface the current dilemmas and weaknesses of present political regimes and the predominant models of domestic and international decision-

making. Furthermore, this wave of transformations is spurred by new participants, who through recently developed means, strategies and methodologies, are urging ruling elites to acknowledge their stake in their political realm.

The social mobilizations that have been witnessed since the beginning of 2011 show that the preponderance of elite management as the most influential way of modeling change is yielding power to the social movements, mainly integrated by nonpartisan, educated young professionals with access to different types of social networks. These young, newly enfranchised people have challenged their respective status quo with claims of genuine democracy, meaningful and effective influence in relevant processes of decision-making and more transparency and accountability in the exercise of their representative's mandate by introducing elements that will help to share the power of decision-making.

All in all, these social movements, displaying a wide array of outcomes (from removing Hosni Mubarak and his family from power after more than thirty years ruling in Egypt, to the dramatic killing of Muammar Gaddafi in Libya) share a distinctive feature that becomes relevant to our particular inquiry: Are social movements replacing the predominant role of national elites in modeling change or striving for political transformation? Are political transformations acquiring different attributes that limit their understanding and explanation through traditional lenses?

The decision-making mechanisms prescribed and implemented by virtue of democratic representation seem no longer capable of channeling the expectations and demands of increasingly dissatisfied citizens who have been, over decades, gradually insulated from the political process of decision-making. In short, the mechanism of constitutive decision-making by political representation, as currently executed, is inadequate for the present times and participants.

However, the significant feature of contemporary political and social transformations, as an echo of successful and influential social movements in the U.S. in the past century, lies in a fundamental departure from conventional interpretations of modeling regime changes on the basis of confronting and eventually replacing a dominant elite by means of a revolution or foreign occupation, a shift to more feasible, realistic and plausible strategies, which can in short be summarized as unconventional accommodations between the views of social movements and rank-and-file citizens with those of the ruling elites. Modern political transformations aim not to the elimination of the elites but rather to what Jack M. Balkin has described as “elite socialization.”⁹⁵ Hence, the basis of effective influence of traditionally disenfranchised participants in the process of decision-making lies in their capacity to appeal to the values and perspectives of the national elites, in order to make the latter assume the demands of the former as of their own.

Social Movements and the Perspective of the Political Superior

I refer to social movements as the embodiment of different relevant participants within the political realm, which, due to their distinctive interests, strive not only for transformation inside a given society and its government but also in its values, practices and principles. Social movements seek to enhance a continuous process of refinement not only of democratic procedures and institutions, but also of the role that each member of the political realm is expected to play.

To sum up, a functional approach towards political and social transformations from a contemporary perspective recommends an engagement between social movements and elites that is characterized by the maximization of accommodation,

⁹⁵ Jack Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of New Departure*, 39 Suffolk L. Rev. 27, 33 (2005).

compromise, persuasion and reciprocity, rather than elimination, endless confrontation, imposition and retaliation.

The fundamental difference between authoritarian and democratic systems can be summarized in the fact that political authority derives from the consent of the governed expressed by the making of social, legal and political choices that together integrate a process that provides a guidance for how the governed expect their government to implement those choices.

Professor Reisman sets forth a theory of jurisprudential rational choice in the following terms,

“One of the functions of jurisprudence, properly determined, in a democratic political system, is to identify the points of choice in the legal process –the inescapable roles of political superior- and to clarify the policies that should govern its execution and appraisal. This proposal is a prerequisite of rational and responsible elite behavior. [A] jurisprudence for the political superior identifies the intellectual tasks and necessary legal and moral conceptions of this perspective. Its focus is not rational choice as such, but the jurisprudence of rational choice.”⁹⁶

From this perspective, the key to identifying these intellectual tasks is based on the distribution of individual choice among the members of a polity with the prerequisite of maintaining a public minimum order. Thus, as Professor Reisman suggests,

⁹⁶ Michael Reisman, *supra*, note 13, at 606-608.

“[The] opportunities for making political choices depend, for all but absolute rulers, on a degree of effective and stable democracy. [Democratic] politics itself is an institutionalized process of making choices.”⁹⁷

This being said, one of the main inquiries in a transformative scenario from an authoritarian to a democratic regime aims at identifying the threshold for the distribution of individual choice and the extent to which social movements can effectively influence this definition in light of the controlling influence of political elites.

The answer to this inquiry can be summarized in the following sequence: mobilization, persuasion, deliberation and further mobilization. Political elites pay little attention to social mobilizations until they acquire enough public support and political influence to gain recognition of the ruling groups. But how can this be achieved? How much signaling do social movements have to undertake and to what extent to gain an authoritative standing before the power elite?

In many countries haunted by this indefinite impasse of accommodation between old authoritarian practices and principles and democratic ones, the inaction or resistance of the political elite to constitutional change is usually answered in one of two predominant ways.

One is for the citizenry also to assume a passive role and wait for changes until the political elite deems it necessary, timely and convenient. The other consists in the citizenry assuming a more active role, pushing for constitutional change by generating proposals that reject the status quo and are directed by their peers and the power elite at the same time, to engage in a dialogue for transformation. This is the collective enterprise that I referred to at the beginning of this chapter as “social movements”.

⁹⁷ *Id.*, at 609-610.

Professor Reva Siegel defines social movements as crucial building blocks of self-governance designed to mediate relations between government and citizenry outside the ordinary channels and procedures of governance to enhance democratic ends. In the case of incomplete or defective democratic systems, characterized by the existence of formal restrictions “on the franchise or political barriers that inhibit effective access to governmental decision making,”⁹⁸ social movements are a plausible vehicle to pursue constitutional change. In Siegel’s words,

“[Social] movements supplement electoral politics as a medium of democratic expression. [In] democratic states there are important areas of governance that are not subject to direct electoral oversight.”⁹⁹

In such scenarios, Siegel continues,

“[Social] movements have served as democratizing factors in constitutional development, even when (these) movements have precipitated change by means that do not conform to constitutionally designated procedures.”¹⁰⁰

Thus, in a nutshell, social movements are vehicles of change and their evident natural enemy is an authoritarian culture of decision-making that is designed in such a way as to ignore social movements’ transformative signaling.

Furthermore, for a social movement to be democratically legitimized to shape the development of constitutional change, as Siegel argues, it must have two features. First, it

⁹⁸ Reva Siegel, *supra*, note 12, at 2.

⁹⁹ *Id.*

¹⁰⁰ *Id.*, at 3.

must meet what she calls the “consent condition,”¹⁰¹ which refers to persuasion as the only means by which social movements must seek constitutional change; this intellectual task is defined by pre-establishing the question that the social movement is rejecting the current state of affairs, which includes its transformative proposal, and selecting the audience to whom the social movement will address their demands.

The other legitimizing prerequisite for a social movement to become an authoritative participant in constitutional change is what Reva Siegel describes as “the public value condition,”¹⁰² which can be summarized as the ability of social movements to translate their partial interests into a public and comprehensive language that will maximize the identifications of the movement with the audience they are trying to persuade.

In Siegel’s view, the best way for a social movement to achieve its public value condition is by making a connection between their interest and aims with the shared values of the nation or the community expressed in the constitution. Once the social movement succeeds in making this association, the degree of persuasion maximizes and elites are obliged to acknowledge the demands of the movement and accommodate them within the formally designed procedures of constitutional decision-making.

As Professor Balkin has proposed, social movements should not necessarily be categorized by the well-known landmark of footnote four of *Carolene Products*.¹⁰³ Contrary to the predominant narrative about the influence of “discrete and insular minorities,” according to Balkin, social movements can succeed and get the attention of the political elites as long as they have shown their “political muscle” and demonstrated that “they are

¹⁰¹ *Id.*, at 9.

¹⁰² *Id.*, at 11.

¹⁰³ *United States v. Carolene Prods. Corp.*, 304 U.S. 144, 152 n. 4 (1938).

a force to be reckoned with.”¹⁰⁴ The key conclusion that we can deduce from Balkin’s deconstruction of the *Carolene* myth, is precisely that a social movement will be successful in pursuing constitutional change as long as it is capable of being persuasive enough to align its interests and demands with those of the political elites.

As we can see, the effectiveness and democratic legitimacy of a social movement to push for constitutional change are conditioned by the degree of persuasion that the social movement can achieve in the attempt to bring the attention of the elites to engage in a conversation to determine the pros and cons of any attempt at transformation.

In settings where meaningful participation in setting the public agenda (and consequently in seeking constitutional change) is compromised by a legacy of an authoritarian concentration of power that constitutes an obstacle to channeling further civic participation, the alternative of distributing the power of rational choice from a perspective of empowering every citizen to perform the role of the political superior by the legitimization of social movements as effective vehicles to mediate between government and citizenry, is worth exploring?

This might ultimately result in a distinctive expression of unconventional adaptation by managing political and constitutional transformations through increasing persuasion and deliberation set by these social movements that in the final analysis will make the constitution, its principles and practices our own in the spirit of a genuine revolution on a human scale. As we are about to see, it is just a matter of rational choice.

¹⁰⁴ Jack Balkin, *supra*, note 35, at 7.

PART II

THE FOUNDATIONS AND DYNAMICS OF THE CONSTITUTIVE PROCESS OF AUTHORITATIVE DECISION IN MEXICO

INTRODUCTION

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INTRODUCTION

In this Part, I will analyze the dynamics described in the previous chapter through the lens of Mexico's troubled beginnings and attempts to consolidate its political system by bridging the perennial gap between the elites and the people. I will argue that elites kept a solid control over the constitutive process, as the latter endeavored in the struggle to claim ownership of the constitution, and hence of constitutional change.

To do so, I must bring to the fore an underlying premise that informs this analysis:¹

From historical and contemporary evidence, it may seem that the citizens of Mexico do not understand themselves to be part of a unified culture; which is to say, they possess no sense of a unitary conception of People-hood. A feeling that there is a lack of participation in the overarching political culture where different groups (e.g., the Military, Unions, Professional Middle Class, the Catholic Church) fail acknowledge the legitimacy of the stake held by other groups in a communally identified polity. Unlike the United States, where a unified polity with common interests was a constant point of reference for our framers and political leaders, México has lacked the basis for a strong democratic ethos. Such an ethos depends on a widespread belief that today's losers in a majority vote have a good chance to become tomorrow's winners, a goal achievable by appealing to other groups with common interest, thus creating a majority for the next vote. Based on this belief, the losers in any given election are prepared to accept their loss because they don't see themselves as permanent (and therefore oppressed and excluded) minorities. This appears not to be true in Mexico.

¹ These ideas are the result of conversations with Professor Robert Burt, who generously shared his views on the existence (or not) of a unitary conception of peoplehood in Mexico, as in the U.S. model, which was replicated in the founding of Mexico as a Republic and expressed to a varying extent in all constitutional texts from 1824 through 1917, and remaining in force to the present day.

The importance of cultivating a common political culture in Mexico is paramount. Since achieving these goals may be a prerequisite to other transformative prescriptions.

As we will see, historically, constitutional change has tended to be thought of predicated in Mexico normative reform by the legislature. Traditionally, judicial adjudication has not performed a relevant role in constitutional change due to institutional deference not only to other branches of government during different moments of history, but also to the nature of our legal institutions, particularly the writ of *Amparo*, which is binding only for the involved parties in the process with no general effects.

My aim is to demonstrate that political transformations need not rely solely on constitutional amendments to be successful, as the historical narrative in Mexico would seem to suggest. On the contrary, I argue that political transformations have been inscribed into constitutional grammar not solely by amendments, but instead by authoritative decisions taken by a vast array of participants, through processes both formal and informal as well institutional and non-institutional ones. This also implies that the enduring practice of giving priority to the amendments to the constitutional text as primary means of realizing social or political transformations and thus making them authoritatively binding, is necessarily incomplete.

I. THE CONNECTION BETWEEN POLITICAL TRANSFORMATIONS AND THE CONSTITUTIVE PROCESS IN MEXICO

As suggested in Part I, political transformations consist in formal and informal processes of authoritative and controlling decisions that alter pre-existing core elements of public order ranging from substantive political principles to equally relevant

institutions and procedures within the political process.

Hence, political transformations are articulated in many forms, ranging from gradual alterations of political behavior and decision-making, to normative adjustments and adaptations to new political realities. At a prescriptive level, political transformations are typically predicated upon statutory or constitutional modifications. When they are translated into constitutional grammar either by means of constitutional amendment or constitutional making, that is to say, the distinctive and rare occasions of constitutional creation, we reach the level of constitutional change.

According to Ackerman's theory, the type of democratic model in which a given society is organized in a sense dictates the form constitutional change will take. This change then may vary in monist or dualist democracies.

In the case of Mexico, constitutional change has historically been resulted directly from constitutional amendment, consistent with its model of monist democracy. The aim of this part is to undertake a reconstruction of our constitutional narrative to reveal the nature of constitutional change in Mexico over the last century and to ascertain to what extent the derivative and monist character of constitutional making in Mexico has narrowed the field of possibilities foreclosed a more creative and authoritative role for "We the People" in constitutional change.

II. THE FRAMEWORK OF INQUIRY: CONSTITUTIONAL INTROSPECTION

How much attention has been given in Mexico over the last century to "understanding itself [and] decoding the meaning of its national identity?"² It is beyond

² Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989). Professor Ackerman propounds the idea of a "dualist constitution" as a response to the monistic democracy model that postulates the grant of plenary lawmaking authority to the winners of the last general election. To the contrary, the model of dualist democracy distinguishes between two different decisions that may be made

doubt that from a sociological and cultural perspective, this has been a central preoccupation of our most respected and sophisticated intellectuals. However, when this question is raised at the constitutional level, we find that many premises and elements of our constitutional framework have been taken for granted.

After its formation as a polity, Mexico borrowed its constitutional model, as did many other nascent republics in the early 18th century, from the American and French constitutions. These contrasting versions of man-made revolutions, which resulted in new regimes representing radical breaks with the past, set the foundational canon of the constitutional enterprise in Mexico.

Our constitutional history is one that presents an interesting dichotomy of constitutional isomorphism, significantly influenced by European and American models, and regime change, contextually shaped by the distinctive character of Mexican political transformations.³ Inasmuch as political change in Mexico has been characterized by its originality since the 18th century, the way in which these changes were constitutionally predicated has been notably derivative.

In trying to conduct a reconstruction of Mexico's constitutional history, following the illustrative outline of the Ackermanian narrative in the case of the American Constitution,⁴ I will describe the turning points of Mexican constitutional

in a democracy. The first type refers to the decisions of the People; the second points to decisions of their government. Professor Ackerman explains that decisions by the People occur rarely and under special constitutional conditions. Those special conditions are profusely described with his theory of the "constitutional moments." Conversely, decisions by the government occur daily and can be summarized as "normal politics." The first type of decision, made by the People under very special conditions, triggers the concept of "higher lawmaking" as an opposite to "normal lawmaking." Ackerman describes two distinct lawmaking tracks for use in a democracy. On the one hand, the "higher law track" is specifically designed to identify and implement those rare occasions when a political movement has gained the right to speak on behalf of a mobilized and decisive majority on a matter of central political importance. On the other hand, the "normal law track" is used for usual politics in which a deep popular mandate or a significant political mobilization, do not exist. See B. Ackerman, *WE THE PEOPLE: FOUNDATIONS*, at 6-10, 266-322 (1991). See also B. Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 665 (2000).

³ Paul Kahn, *Comparative Constitutionalism in a New Key* (2004). *Faculty Scholarship Series*. Paper 324. See at http://digitalcommons.law.yale.edu/fss_papers/324.

⁴ *Id.*, at 454.

transformations in terms of the way in which each Mexican Constitution regulated the process of amending the constitutional text in order to clarify the doctrinal matrix for constitutional change in Mexico. My aim is to provide a useful framework of inquiry that may help answer the fundamental questions concerning the role of We the People of Mexico in constitutional self-definition. To do so, I will focus on the Constitutions of 1824, 1836, 1843, 1847, 1857 and 1917, which according to the Mexican constitutional canon⁵ purport to be the indisputable hallmarks of our constitutional history.

Born Monist

This first constitution resulted from the War of Independence (1810-1821), which ended Spanish colonial rule in Mexico. The Constitution of 1824 framed our system of government as a federal, popular and representative republic.⁶ Departing from its immediate forebears the conceptual frameworks of the American and French constitutions, the first Mexican constitution did not contemplate the People as the embodiment of national sovereignty. On the contrary, it placed sovereignty in what was called the “Supreme Federal Power” based on the Montesquieuan scheme of separation of powers.

The power to amend the Constitution was given to the President, Congress and the state legislatures, in observance of:

⁵ Emilio O. Rabasa, *HISTORIA DE LAS CONSTITUCIONES MEXICANAS*, at 9 (1997). For the sake of categorizing the full-fledged, operational constitutions in our history, Rabasa establishes the following criteria: (1) That resulted from a constitutional convention; (2) with sustained temporal validity; (3) in force in all the national territory or a substantial part of it; (4) that entailed a radical break with the past, particularly pertaining to the form of government; and (5) meant a distinctive contribution to the constitutional realm.

⁶ Constitución de los Estados Unidos Mexicanos, 4 de Octubre de 1824 (Mex.). See <http://www.ordenjuridico.gob.mx/Constitucion/1824B.pdf> (Last visit: March 23, 2013). An English version is available at <http://tarlton.law.utexas.edu/constitutions/text/1824index.html> (Last visit: April 4, 2013).

“**Article 170.** In order to reform or amend this Constitution or the Constitutional Act, shall be observed, besides the rules prescribed in the foregoing Articles, all the requisites provided for the formation of laws, excepting the right to make observations granted to the President in Article 106.”⁷

From the beginning, authority to introduce amendments for congressional action was given to the President:

“**Article 105.** The President has the power to lay before Congress such propositions or amendments of laws as he may deem conducive of the general good, directing them to the House of Representatives.”⁸

However, the same power was also contemplated for both Houses of Congress and the State legislatures:

“**Article 165.** The general Congress alone *can resolve doubts, which may occur about the meaning or understanding of the Articles of this Constitution* (italics are mine) and of the Constitutional Act;⁹

Article 166. The Legislatures of the States can make such observations as they may deem proper about particular Articles of this Constitution and the Constitutional Act.”¹⁰

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

The Constitution of 1824 did not grant the Supreme Court authority to interpret the constitution, instead limiting its role to the resolution of disputes between States of the Federation, and conflicts between lower Federal Courts and the States, and to oversight of the responsibilities of public officials in the execution of their mandate:

“**Article 137.** The attributions of the Supreme Court are the following: I. To take cognizance of the difference which may arise between one and another state of the Federation, whenever it embraces a subject of litigation in which there must be a formal sentence, and those that arise between one state and one or more inhabitants of another, or between individuals about pretensions to lands under concession from states, without depriving the party of the right of reclaiming the concession from the authority which granted it; II. To terminate all disputes which arise, or contracts or negotiations made by the Supreme Government or its agents; III. To consult relative to publishing or retaining of Pontifical Bulls, Briefs, and Prescripts issued in matters litigant; IV. To adjust any dispute that may exist among the tribunals of the Federation, and between these and those of the states, and these which may arise between the tribunals of one state and those of another; V. To take cognizance; First, of the prosecution moved against the President and Vice President according to articles 38 and 39, after the previous declaration in article 40. Second, of the criminal prosecutions of the Representatives and Senators, indicated in article 43, after the previous declaration required in article 44. Third, of those against Governors of the states in the cases spoken of in article 38, in its third part, after the previous declaration required in article. 40. Fourth, of those of Secretaries of State in conformity with articles 38 and 40. Fifth, of the civil and criminal affairs of the Diplomatic Ministers and Consuls of the Republic. Sixth, of the Admiralty cases, captures by sea, land, and contraband, of crimes committed on the high sea, of the offences against the United Mexican States, of

those employed in the Treasury and Judiciary of the Federation, and of the infractions of the Constitution and general laws, as may be provided for by law.”¹¹

Thus, the first Mexican Constitution adopted a monist democracy framework granting to the Legislative branch interpretative authority over the Constitution, and establishing a process for amendment that implied interchanges between the President, Congress and State legislatures, within a scheme of “normal politics.” The Supreme Court was notably excluded.

Consistent with the strong influence from the American model, the key feature of the first Constitution was the organization of the newborn nation as a federal republic divided into independent states and three branches of government, with the Legislative branch being endowed with higher interpretative authority over the Constitution. This first Constitution was also congruent with the trend toward constitutional radicalism popular at the time, which advocated allocating more power to the Legislature, as the most genuine expression of the popular will.

The Centralist-Conservative Intermezzo

The years that followed the promulgation of the Mexican Constitution of 1824 were marked by political and social turmoil. The unrest escalated into an intermittent war between federalists and centralists, which resulted in an interregnum of a centralist government from 1836 through 1847. During this time, President Antonio López de Santa Anna replaced the Constitution of 1824 with two constitutional instruments: the so-called “Seven Laws”¹² and the “Organic Bases of the Mexican Republic.”¹³ Although

¹¹ *Id.*

neither was considered as an official constitution replacing, in its entirety, its predecessor of 1824, they entailed radical changes in the structure of government, which can be summarized in two main aspects:

First, they replaced the original states with departments controlled by a central government, following the French model of *départaments*, in which the President appointed governors. Second, the new structure of separation of powers departed from its original meaning and allocated privileged authority to the President, who was entitled to suppress both Congress and the Supreme Court if deemed necessary. With these substantial changes, the radical first constitution shifted to a conservative constitution.

This, were not for defeat in the Mexican-American War after the annexation of Texas in 1845 and the ultimate failure of Santa Anna's presidency in 1855, might have obliterated the reformist character of Mexican constitutionalism. However, once Santa Anna was defeated and exiled in 1847 and the U.S. and Mexico signed the peace accords of the Treaty of Guadalupe Hidalgo in 1848, the Constitution of 1824 was restored and the centralist laws were abrogated by means of the "Constitutional Act of Reforms of 1847."¹⁴ This left behind the only successful, albeit brief, historical experience of constitutional centralism in Mexico; including its attempted revival during the Second Mexican Empire of Maximilian of Austria in 1865, which eventually failed.¹⁵

Beyond these distinctive features of the centralist-conservative Mexican constitutionalism of the nineteenth century, I would like to focus on the embedded antiradicalism of its ideology. At the core of this conservatism we can identify a deep

¹² Leyes Constitucionales, 29 de Diciembre de 1836 (Mex.).

See <http://www.ordenjuridico.gob.mx/Constitucion/1836.pdf> (Last visit: March 23, 2013).

¹³ Bases de Organización Política de la República Mexicana, 12 de Junio de 1843 (Mex.).

See <http://www.ordenjuridico.gob.mx/Constitucion/1843.pdf> (Last visit: March 23, 2013).

¹⁴ Acta Constitutiva y de Reformas, 18 de Mayo de 1847 (Mex.).

See <http://www.ordenjuridico.gob.mx/Constitucion/1847.pdf> (Last visit: April 10, 2013).

¹⁵ Estatuto Provisional del Imperio Mexicano, 10 de Abril de 1865 (Mex.), Articles 28-44.

See <http://www.ordenjuridico.gob.mx/Constitucion/1865.pdf> (Last visit: March 23, 2013).

Burkeanism in the political views of Lucas Alamán,¹⁶ considered the most influential conservative thinker of the time. A supporter of a strong executive branch and a sharp critic of popular self-government, Alamán was keenly influential in shaping the conservative project between 1830 and 1853, despite the numerous shifts of power in the 1840s. One of Alamán's main concerns was the protection of private property and the preservation of privileges for the upper classes. This, orientation informed his attitude toward constitutional decision-making, in his word, “[The] proprietors generate envy and rapacious feelings, that is why they need protection... we need to ensure the proprietors a direct influence over the creation of law... in many states a war has been declared against them... this is why so many nations limited the right to suffrage only to the proprietors, and in accordance to their contributions.”¹⁷

Alamán's position on the misrule of the people was also fundamental in building up the conservative bases for concentration of power in the President.

A salient expression of Alamán's dedication to understanding the meaning of Mexican national identity and finding sound and enduring identifications among the Mexican people can be found in his letters to President Santa Anna. In one of these dispatches, Alamán argued for the importance of using the coercive powers of the State

¹⁶ Joshua Simon, *THE IDEOLOGY OF CREOLE REVOLUTION: IDEAS OF AMERICAN INDEPENDENCE IN COMPARATIVE PERSPECTIVE*, Dissertation presented to the Faculty of the Graduate School of Yale University, at 119 (2012). Simon provides a notable study on the ideology of the Creole Revolution, by choosing three distinctive representatives of the conservative thought in the first half of the nineteenth century: Alexander Hamilton, Simón Bolívar and Lucas Alamán. In exploring Alamán's writings and his influence in Mexican constitutional and political narratives over that period, Simon brilliantly articulates a balanced account of Alamán's legacy. Furthermore, he clarifies some frequent historical misconceptions on the real influence of some ideologies in Mexican conservative thinkers of the period. *See* Joshua Simon, at 148 n. 83.

¹⁷ Quoted in Roberto Gargarella, *THE LEGAL FOUNDATIONS OF INEQUALITY. CONSTITUTIONALISM IN THE AMERICAS, 1776-1860*, at 11, 100 (2010). As stated by Roberto Gargarella, Lucas Alamán was “the main right-wing ideologist during the nineteenth century (in Mexico).” Alamán's conservative views were preconditioned by the harm that radical measures adopted by the revolutionaries in the early nineteenth century, caused to his family's properties and lands. Hence, his constitutional projects aimed at undermining the rule of majorities and protect private property above all. Moreover, pertaining to Burke's influence on Alamán, it can be summarized in the latter's assertions on the pervasive impact of the French Revolution in other countries, “[the new social movements] came to ‘replace the tyranny of one’ with the ‘infinitely more inadmissible tyranny of the many’.”

to enforce Catholicism as the only and official religion in Mexico because it was the “only common bond that held all Mexicans together.”¹⁸

It must be noted that Alamán’s low regard for the Constitution of 1824 was manifest in his ideas. From his perspective, federalism was inherently disruptive and if left unchecked, could lead to anarchy.¹⁹ Because of his admiration for the Westminster model, Alamán considered of paramount importance the advancement of the Executive’s strongholds especially; the conservative establishment represented by the Church, the Army and the upper classes, as buffers against the dictates of the Legislative branch.²⁰ Between 1830 and 1843, the conservatives engaged in an aggressive campaign against the Constitution of 1824 and the principles it enshrined, particularly federalism and the role of the legislature as the privileged forum for constitutional decision-making. According to Roberto Gargarella, Lucas Alamán played a decisive role in drafting the “Seven Constitutional Laws” of 1836 by which a “Supreme Conservative Power” was established. In complete contrast with the Constitution of 1824,

“The ‘Seven Laws,’ created through the political pressure of Santa Anna and the intellectual influence of Alamán, provided for an indirectly elected and powerful executive, organized the judicial system, and crafted a ‘Supreme Conservative Power’ with ample political power. Among other powers, the ‘Supreme Conservative Power’ *was allowed to control the constitutionality of the laws (it could even invalidate the decisions of the supreme court or suspend it if it improperly interfered with other powers)*. [A] Council of state, composed of members of the military, the church and

¹⁸ *Id.*, at 98.

¹⁹ *Id.*, at 113. According to Gargarella, Alamán defined federalism as “the most powerful and destructive instrument imaginable.”

²⁰ *Id.*, at 115.

the wealthiest sectors of society, was in charge of advising the President.”²¹

However, the “Seven Laws” failed to be implemented successfully and was met with a strong reaction from the supporters of federalism. In order to institutionally channel the growing popular discontentment with the conservative project, Congress called for the creation of a new constitution, which was intended to bring a compromise falling halfway between the federalist-radical and centralist-conservative projects. In short, the purpose was to reject the “Seven Laws” by pushing for a moderate constitution. Congress began debates on a new constitution in 1842, a majority of delegates leaning toward support of the federalist project. Once the conservatives deemed this outcome as inevitable, they disbanded the sessions and Congress was dissolved. Conservative President Nicolás Bravo then appointed a council of eighty prominent elites to draft a new constitution called “Organic Bases,” which abrogated the “Supreme Conservative Power” and restored the traditional structure for separation of powers with a bicameral Congress, yet granting a privileged status to the Church and conservative elites. The “Organic Bases” was essentially an attempt to water down the conservative constitutional project that had been overwhelmingly rejected by moderates and liberals.²² In the words of Emilio Rabasa, the Organic Bases of 1843 “laid the foundations for ‘constitutional despotism’.”²³

One of Alamán’s central concerns regarding institutional design was its coherence with the dominant social and economic context and trends of the time. This

²¹ *Id.*, at 123; emphasis added. In addition to this, Gargarella brings to our attention the opinion of one of the authorities on Mexican constitutional history, Emilio Rabasa, when appraising the “Seven Laws.” According to Rabasa, “the ‘Seven Laws’ created the basis for ‘oligarchic constitutionalism’.”

²² Enrique Sánchez Bringas, *DERECHO CONSTITUCIONAL*, at 92-93 (2003).

²³ Roberto Gargarella, *supra*, note 17, at 123. However, I would like to clarify an important feature of the “Organic Bases,” that differs from a small historical misconception in footnote 101: The Organic Bases imposed important restrictions to Congress, as provided in Article 67. In contrast with Gargarella’s description in this specific matter, Congress was actually banned to suspend individual rights except in cases of national emergency, as contemplated in Article 198 of the same law.

explains his inclination towards a religious-based elitist political representation and limited franchise based exclusively on property ownership. To articulate his ideas, his proposed Senate in 1834 was composed by landowners, professionals, magistrates, industrials, public administrators, and of course, the clergy and the military.²⁴

Alamán's constitutional stance can be summed up as favoring a *strong central government-powerful executive-limited franchise* trichotomy²⁵ based in the following premises,

“[Property-owning] citizens, the clergy and all those who desire what is best for their nation [believed] in the following principles: 1) that the Church and its privileges should be respected and protected, for the Catholic faith was the only tie left that united the Mexican people; 2) that any anti-clerical and anti-Catholic publications should be censored; 3) that the government needed to be strong, [subject] to certain ‘principles and responsibilities’ in order to prevent misuse of power; 4) that the federation should be dismantled and replaced with a centralist system; 5) that any form of popular representative system based on elections should be eradicated for the time being.”²⁶

There is no doubt of the nonpareil influence of Alamán's views on Mexican constitutional conservatism in the first-half of the nineteenth century. His ideas were an expression of the views of the so-called *Creole elite*, the ruling class before and after the first Mexican revolution of 1810. According to some scholars, Alamán was also the driving force behind the constitutional changes that took place in Mexico from the time

²⁴ *Id.*, at 142. As explained by Gargarella, “Alamán sought to represent and guarantee the protection of these interests, by reserving, especially for landed interests, a fixed place in the constitution. ‘It is necessary,’ he argued, ‘that proprietors, and in particular landholders... have a direct influence in legislation.’ Landed interests represented ‘the most stable [interest] and [that which was] most closely linked to the prosperity of the nation.’”

²⁵ Joshua Simon, *supra*, note 16, at 120.

²⁶ Roberto Gargarella, *supra*, note 17, at 136.

it gained its independence from Spain through the triumph of the liberals over the conservatives in 1857.²⁷

The Arduous Struggle of Constitutional Liberalism

Despite Santa Anna's return to power in the early 1850s, political unrest continued. The rise of the ideological conflict between conservatives and liberals, which characterized the second-half of the nineteenth century, brought a new complexion to the historical struggle between federalists and centralists. As we will see, both conflicts – at least at a constitutional level, ended with the triumph of the liberals, first with the “Reform Laws” enacted between 1855 and 1863, and a greater degree with the Constitution of 1857. However, the implementation of these radical constitutional changes took until the mid-1870s to consolidate.

By the beginning of the 1850s, the Mexican political ethos was characterized by the strong influence of the Catholic Church and the conservative local elites who benefited from Santa Anna's rule after 1833. The political process was conducted by those members of the elite with connections to both the Catholic Church and the government, either in the center or in the regions divided in departments. The constant granting of privileges and favors to the Catholic Church and its members, as well as to the Army, led to a growing discontentment among the liberal circles. Once this discontentment began to spread among the dominant elites who rejected the privileges enjoyed by the Church and the Army,²⁸ a project to dismantle the dominant regime

²⁷ Joshua Simon, *supra*, note 16, at 123.

²⁸ Roberto Gargarella, *supra*, note 17, at 183-184. Gargarella illustrates it the liberal mainstream of that time as a fight against all privileges. He assigns special activism in this particular matter to President Valentín Gómez Farías and José María Luis Mora. From Gargarella's view, “[Mora] criticized the privileges of the church not only because of his utilitarian philosophy but also after his analyses of the national economy: most of the country's property was stagnant or unused because it was in the hands of the church. In

began to gain force. It was the failure of Santa Anna's last presidency (1853-1855) that paved the way for the transformative liberal enterprise in Mexico. It came at two different moments and by two varying means. Through the "Reform Laws" which aimed at dismantling the religious and military-based regime of privileges and special jurisdictions,²⁹ and with the Constitution of 1857 which set the foundations of what from that moment on would become the predominant framework for constitutional-making in Mexico.

At the beginning of 1854, Santa Anna's disdain and his oppressive policies triggered a series of uprisings at different levels in the Army, as the latter assumed the role of protecting the interests of the people the face of an intolerable dictatorship. These uprisings resulted from a combination of factors, some dating back to the Mexican-American War of 1847, and others to the loss of great portions of the national territory to the United States. Outlined in the "Plan de Ayutla,"³⁰, originally signed by some colonels and later endorsed by prominent generals,³¹ was a call³² to overthrow Santa

addition, the church's advantages contradicted the 1824 constitution, while its overwhelming influence over the educational system blocked the circulation of new ideas. Mora argued for similar ideas in his analysis of the military's advantages: [A] large army [constituted] a source of permanent disputes. [Gómez Farías] made significant efforts to restrict the power of the military and reduce the number of its members." Until 1855, the members of the Catholic Church –the official religion in Mexico as provided in Article 3 of the Constitution of 1824; Article 1 of the "Constitutional Bases" of 1835; Article 3 of the "Constitutional Laws" of 1836; and Article 6 of the "Bases for the Political Organization of the Mexican Republic" of 1843- and those of the Army, enjoyed special jurisdictions.

²⁹ *Id.*, at 184. In the author's view "[One] of the most notable efforts at ending these privileges came after Santa Anna's definitive defeat. At that time, two progressive laws named after their authors, the 'Ley Juárez' and the 'Ley Lerdo,' appeared to challenge directly the prevailing privileges. The 'Ley Juárez,' sanctioned during Juan Álvarez's transitional government (one of the generals that led the 'Ayutla Revolution'), suppressed the *civil fueros* of the military and the church and opened up the possibility of renouncing the religious *fueros* in the case of common crimes. [The] 'Ley Lerdo' (aimed at) mobilizing and redistributing the church's unused property (by establishing) that the church had to sell all its urban and rural properties to its tenants at a price that was accessible to them. If necessary, the state would sell these lands through a public auction (avoiding any means of expropriation)."

³⁰ Plan de Ayutla, 1º de Marzo de 1854 (Mex.). See <http://www.ordenjuridico.gob.mx/Constitucion/CH4.pdf> (Last visit: April 3, 2013).

³¹ The amended version of the "Plan de Ayutla," was signed ten days later in Acapulco. The most relevant feature of the final version of the Plan was the inclusion of the three leading generals of the liberal faction: Juan Álvarez, Nicolás Bravo and Tomás Moreno, and that of the retired colonel Ignacio Comonfort. See <http://www.ordenjuridico.gob.mx/Constitucion/CH5.pdf> (Last visit: April 3, 2013).

Anna from power. Due to the considerable mobilization of the populace it involved it can rightly be considered a revolution against Santa Anna's tyranny and after its success, its leaders called for a constitutional convention that produced the Constitution of 1857.³³

Despite the victory of the Ayutla Revolution and the establishment of an interim government headed by General Juan Álvarez, instability was the order of the day given the conservatives' reaction to the "Reform Laws," which had only recently been implemented after the promulgation of the Constitution of 1857. The tensions between conservatives and liberals escalated to open confrontation and the constitutional order was broken by a coup led by conservative general Félix Zuloaga. With the pronouncement of the "Plan de Tacubaya," calling for the abrogation of the liberal Constitution of 1857, President Ignacio Comonfort, a liberal moderate, was forced to support the rebellion in order to remain in power. Comonfort's vacillating positions, supporting the conservatives one day and leaning the liberals the next, fractured his presidency and he went into exile, leaving the country in a state of civil war. The President of the Supreme Court, Benito Juárez, decided to restore the constitutional order disrupted by conservatives and transferred the seat of the government to Veracruz. A period of open conflagration between conservatives and liberals ensued historically known as the "Reforma War," that was finally won by the liberal side led by Juárez in 1861, restoring the constitutional order of 1857.

³² Will Fowler (ed.), *FORCEFUL NEGOTIATIONS: THE ORIGINS OF THE PRONUNCIAMIENTO IN NINETEENTH-CENTURY MEXICO* (2010). In Fowler's account "Often translated as "revolt," a *pronunciamento* was a formal, written protest, typically drafted as a list of grievances or demands, that could result in an armed rebellion. This common nineteenth-century Hispano-Mexican extra-constitutional practice was used by soldiers and civilians to forcefully lobby, negotiate, or petition for political change. Although the majority of these petitions failed to achieve their aims, many important political changes in nineteenth-century Mexico were caused or provoked by one of the more than fifteen hundred *pronunciamentos* filed between 1821 and 1876."

³³ Roberto Gargarella, *supra*, note 17, at 18, 42 and 184.

The Constitution of 1857³⁴ meant a radical break with the conservative legacy of the previous two decades. It allocated, once more, considerable authority to Congress, though establishing for the first time a unicameral legislative body.³⁵ As we will see later on, this new balance of power had critical consequences in the years to come, since the Executive was forced to govern from outside from the constitutional framework.³⁶

The Constitution of 1857 eradicated all privileges previously enjoyed by the church and the military, on the grounds that equality before the law was the core axiom of this new constitution:

“Article 13. In the Mexican Republic no one shall be tried according to private laws or by special tribunals. No person or corporation shall have privileges nor enjoy emoluments that are not in compensation for a public service and established by the law. Military jurisdiction shall be recognized only for the trial of criminal cases having direct connection with military discipline. The law shall clearly define the cases included in this exception.”³⁷

Federalism, as conceived in the founding of the Republic, was restored (Articles 40, 41), and checks on the Executive branch were once more implemented. However, it should be noted that reelection was not limited for any public office, and as we will see below, its lack of regulation was the basis for ensuing conflicts.

³⁴ Constitución Federal de los Estados Unidos Mexicanos, 5 de Febrero de 1857 (Mex.). See <http://www.ordenjuridico.gob.mx/Constitucion/1857.pdf> (Last visit: April 3, 2013). An English version is available at Hilarion Noel Branch, THE MEXICAN CONSTITUTION OF 1917 COMPARED WITH THE CONSTITUTION OF 1857 (1917). However, some provisions of this study do not correspond to the original version of the Constitution of 1857 given that the translation is based on the later amendments of 1874.

³⁵ Francisco Zarco, HISTORIA DEL CONGRESO CONSTITUYENTE DE 1857, at 477-493 (1916).

³⁶ Emilio Rabasa, LA CONSTITUCIÓN Y LA DICTADURA, at 189-206 (1912). According to Rabasa, the empowerment of the Legislative branch that the Constitution of 1857 brought about, constituted one of the fundamental reasons for the meta-constitutional powers that the Presidency displayed in the next half-century.

³⁷ *Supra*, note 34.

In connection with the powers to introduce legislation, the new constitution provided,

“**Article 65.** The right to originate legislation pertains:

- I. To the President of the Republic;
- II. To the Deputies of the Federal Congress;
- III. To the State Legislatures,”³⁸

It also outlined the legislative process³⁹ in very similar terms to those prescribed in the Constitution of 1824,⁴⁰ along with the process to amend the constitution,

“**Article 127.** The present Constitution may be added to or amended. No amendment or addition shall become part of the Constitution until agreed to by the Congress of the Union by a two-thirds vote of the members present and approved by a majority of the State legislatures. The Congress shall count the votes of the legislatures and make the declaration that the amendments or addition have been adopted.”⁴¹

In sum, the Constitution of 1857 moved from the conservative-centralist scheme toward a *federal government-separation of powers-universal franchise*⁴² trichotomy.

However, it must be noted that this process was not entirely free of forceful disagreement or stress within the liberal ranks:

On one hand, there was a strong portion of liberal moderates who advanced the

³⁸ *Id.*

³⁹ *Id.*, article 70.

⁴⁰ *Supra*, note 6, articles 51-66.

⁴¹ *Supra*, note 34.

⁴² In this particular historical context, I use the term *universal franchise* to mean every citizen’s right to vote regardless of his economic condition or of any property requirements.

idea of restoring the Constitution of 1824, after its interim interruption by the centralist-conservative regime. In their view, once the pervasive influence of centralized tyranny was eradicated, the previous constitutional order could be easily restored.⁴³ This was clearly expressed from the beginning of the debates at the convention and was reflected in the final draft of the new constitution. In terms of the structure of government and its teleology, the final draft of this new document showed a clear continuity with [showed the influence of] the basic principles of the Constitution of 1824.⁴⁴

Conversely, pure liberals deemed it vital to inaugurate a modern constitutional order by drafting a new constitution that would reflect the radical social changes resulting not only from the popular demands, but also from the tensions and hostilities of previous decades. In the end, their position prevailed.

The debates of the constitutional convention of 1856-1857 are an ode to self-government, popular sovereignty and political representation by direct election. They reflect the growing sentiment of trusting to the people the definition of their government and the selection of their representatives. Also in evidence is the deep influence of the American experience; the work of Tocqueville can be detected in the contributions of some delegates, for example Ponciano Arriaga and Francisco Zarco, who articulated their views on the system of political representation based on the narrative of the federalist regime of the Early American Republic.⁴⁵

From this vantage point, perhaps one of the most salient features of the

⁴³ As we will see, this is a recurring attitude of moderates and gradualists when they succeed in replacing an anti-constitutional regime: rather than contemplating as a first option the inauguration of a new constitutional order by drafting an equally new constitution, they opted for the restoration of the preceding constitutional order once violated by regressive authoritarianism. This also happened with the “Maderista Revolution” after the end of the *porfiriato*: Madero was confident that once the tyrant went into exile, the full validity of the Constitution of 1857 would be easily restored.

⁴⁴ Emilio O. Rabasa, *supra*, note 5, at 65 (1997). According to Rabasa, both the Ayutla Revolution and the Constitution of 1857 succeeded thanks to the liberal moderates, who provided the majority necessary to install the Constitutional Convention of 1856-1857 and served as a buffer between their rival conservatives and radical liberals.

⁴⁵ Francisco Zarco, *supra*, note 35, at 494-518.

Constitution of 1857 was the power of review assigned to the judiciary, specifically of the Supreme Court, as a safeguard against violations of the individual rights provided in the new constitution. This was a great leap towards judicial supremacy with respect to constitutional interpretation and set the foundations of the legal system that persists as we now know it,⁴⁶

“**Article 100.** [The] Supreme Court shall be either a court of appeals, or a court of last resort, as may be defined by the law regulating the jurisdiction of the circuit and district courts;

Article 101. The Federal Tribunals shall take cognizance of:

- I. All controversies arising out of laws or acts of the authorities which shall infringe any personal guarantees;
- II. All controversies arising out of laws or acts of the federal authorities which limit or encroach upon the sovereignty of the States;
- III. All controversies arising out of laws or acts of the State authorities which invade the sphere of Federal authorities.”⁴⁷

With a balanced separation of powers and a central focus on individual rights informed by the intellectual trends of the time, the new Mexican constitutional order inaugurated with the Constitution of 1857 nonetheless faced great challenges in the years following its promulgation. The conservative rebellion of 1858 that resulted in the “Three Years’ War,” which ended in 1861 with the restoration of the liberal government headed by President Juárez was followed by the French Intervention and the so-called Austrian-Mexican Empire, from 1864 through 1867, which was finally defeated by Juárez,

⁴⁶ Emilio O. Rabasa, *supra*, note 5, at 66.

⁴⁷ *Supra*, note 33.

who reinstated the republic in 1867. Perhaps the most challenging test of the Constitution of 1857, though, was reserved for the years following 1867, when,

“[In] spite of the adoption of a federal system by Mexico in 1857, the highly centralized traditions of Spanish rule perpetuated themselves and finally resulted, under the Díaz administration, in the complete subordination of the individual states to the national government.”⁴⁸

This quote is a meager depiction of one of the most dramatic constitutional regressions in Mexican history that is evidenced by the complexity, if not impossibility, of changing enduring political mores despite improvements in constitution making.

The Troubled Beginnings of the Liberal Regime

It is often said that that a sudden death prevented President Juárez from becoming a despot. He spent fourteen years as President and, in view of his detractors (many former allies), Juárez was determined to remain in power even in light of his deteriorating health and, more importantly, of the decline of popular support for his presidency. These factors contributed to growing social discontentment and political instability. The elections of 1871 that resulted in Juárez’s second reelection triggered a strong reaction from Porfirio Díaz, who called for a rebellion against what was described in his pronouncement of La Noria⁴⁹ as “a threat to national interests and institutions” given the “violent, indefinite and violent reelection” of President Juárez.

⁴⁸ L.S. Rowe, *Foreword to Hilarion Noel Branch, THE MEXICAN CONSTITUTION OF 1917 COMPARED WITH THE CONSTITUTION OF 1857*, iii-iv (1917).

⁴⁹ Plan de La Noria, 9 de Noviembre de 1871 (Mex.). *See* <http://www.ordenjuridico.gob.mx/Constitucion/NORIA.pdf> (Last visit: April 5, 2013).

In Díaz's view, all other branches of government obsequiously served President Juárez and his government. In his account, the Supreme Court's independence was significantly compromised,

“In the Supreme Court, the independent minority that in previous times safeguarded the constitutional principles against this collapse of perversion and immorality, is now powerless given the absence of two of its most dignified members and the appointment of a new one very close to the protection of the Executive. Since then, no individual right has enjoyed any protection; noble judges and magistrates of our Federal Tribunals are arbitrarily substituted by obedient servants to the government, thus the most cherished interests of the people and our most enduring values are left at the mercy of these unwanted guardians.”⁵⁰

In the same context, Congress was described as being equally subordinated,

“In Congress, a majority driven by shameful and unprincipled interests has managed to obstruct the noble efforts of independent congressmen and has converted the forum of national representation in an obsequious, courtesan chamber driven by the interests of the Executive.”⁵¹

Nonetheless, Díaz was defeated by the armed forces of Juárez, but this uprising brought to the surface the social and political turmoil that characterized the dawn of the Juárez presidency. After the death of Juárez, Sebastián Lerdo de Tejada was appointed as Interim President and called for special elections in October of 1872, in which Díaz was soundly defeated by Lerdo de Tejada. However, in the following years, due to very

⁵⁰ *Id.*, at § 3.

⁵¹ *Id.*, at § 2.

unpopular policies implemented by the Tejada's administration, the popular base supporting Díaz's ambitions grew, particularly among conservatives, who remained disgruntled by the liberal reforms of the past two decades. Their support encouraged Díaz to once again defy the status quo, and he decided to run for the presidency against President Lerdo de Tejada, who was seeking a second term. Díaz announced a new pronouncement called "Plan de Tuxtepec"⁵² which basically outlined the same grievances of La Noria, though it included specific provisions for constitutional reform banning reelection should the new revolution succeed. The Tuxtepec Revolution was the last civil war of the nineteenth century and it paved the way for Porfirio Díaz's subsequent Presidency after the elections of April of 1877. From that moment onward, he managed to be reelected until his resignation and exile in 1911, after the triumph of the *Maderista* Revolution.

The "Pax Porfiriana"

The years that followed were marked by economic prosperity, vigorous industrial transformation and political stability. The defeated conservatives of the 1850s-1860s were again on the front lines of political decision-making, and the influence of the Church gained new force. A flourishing Mexican aristocracy was specially favored by the government of *Don Porfirio*, who was deemed –at the pinnacle of his uninterrupted tenure in power- the father of the nation.

In order to fully understand Díaz's instrumentalisation of the Constitution to his personal interests, we must take a closer look at the regulation of reelection within this

⁵² Plan de Tuxtepec, 15 de Enero de 1876 (Mex.). See <http://www.ordenjuridico.gob.mx/Constitucion/TUXTEPEC.pdf> (Last visit: April 6, 2013).

period.⁵³ After being elected in 1877, and honoring the principles of the Tuxtepec Plan, Díaz promoted a constitutional reform in 1878 to ban *immediate* reelection (Article 78), allowing a previously elected President to run for a second term after the end of the following presidential term. This provision was in force until 1887, when Díaz began his second term as President, and a new amendment to Article 78 was passed, allowing the President to be reelected for consecutive terms, while foreclosing the possibility of running for a third [consecutive] term: in effect embracing one half of the American model, since the possibility of allowing a run for reelection after sitting out a term, was still being contemplated. But if this was not enough to guarantee his remaining in power, in 1890, he ushered in a reform in which reelection—as in the original text of 1857-- was not limited at all. This marked a return to the very issue (indefinite presidential reelection) that prompted Díaz’s Tuxtepec Revolution back in 1876.

The key to understand Díaz’s unchallenged permanence in power, can be found in five factors: (1) favorable policies for the military to preserve their loyalty; (2) resolute control of state and local governments; (3) expansive and regionally inclusive industrialization; (4) national creditworthiness due to an active foreign policy; and (5) fiscal responsibility. These factors taken together brought about a sustained period of economic growth and more importantly, of unbroken social order that had not been experienced since the beginning of the nineteenth century. Of course, this situation was also favored by the global trends of technological, scientific and industrial improvement.

As the saying goes, “there is no such thing as a free lunch,” and so the price for peace and prosperity was an implicit arrangement between the elites of the time and the *caudillo*: as long as they continued to enjoy these “blessings,” he could remain indefinitely

⁵³ Imer B. Flores, *La Constitución de 1857 y sus reformas: A 150 años de su promulgación*, in EL PROCESO CONSTITUYENTE MEXICANO. A 150 AÑOS DE LA CONSTITUCIÓN DE 1857 Y 90 DE LA CONSTITUCIÓN DE 1917, 285-324 (Diego Valadés & Miguel Carbonell eds., 2007).

as President and guarantee the preservation of the status quo.⁵⁴ As we will see below, this pact implied the confused premise that the will of the President is the will of the people. In sum, both national sovereignty and popular will were embodied in one man and his rule, obliterating the republican ideals of the Constitution of 1857.

However, during Díaz's three decades in power, the Constitution of 1857 was in force –at least formally-- despite the incremental gap between its principles and provisions and reality. In fact, it is ironic to contemplate how the very reasons for which Díaz's called for revolution both in La Noria and Tuxtepec pronouncements, with time became the underlying causes for the radical opposition that triggered the Mexican Revolution of 1910 against his rule. However, the basic principle of self-government was utterly obliterated during the *porfiriato*, as we will see in the following sections.

In the account of Francisco I. Madero, the *Pax Porfiriana* was the result of Díaz's *idée fixe*,

“Peace, which he preserves now with such effort, is not so much for love of the country, but because it is the best means of keeping power indefinitely. [The] fixed idea of General Díaz, while he did not have power, was to win it at all costs, and once he had it in its possession, never to release it for any reason. [But] in order to keep the power of a bellicose Nation, it was necessary not to stir it up, and we shall see how General Díaz will provide for the Nation the greatest good possible provided that is incompatible with his indefinite re-election.”⁵⁵

President Díaz profited from the people's anxiety about civil war and social unrest, fueled by past decades of unending turmoil and instability. With this popular

⁵⁴ Francisco I. Madero, *THE PRESIDENTIAL SUCCESSION OF 1910*, at 178 (Thomas B. Davis trans., Peter Lang, 1990) (1908). Madero described this settlement in the following terms referring to the pact between Díaz and the state governors “You support us in power and in our turn we support you indefinitely.”

⁵⁵ *Id.*, at 84-85.

perception in mind, he ruled with an iron hand. Something that cannot be disputed was Díaz's deep knowledge of the Mexican identity and social behavior: The threat of war was his trump card for roughly thirty years. He knew that as long as he kept the local, economic and political elites at his side by offering the promise of continuing peace and prosperity, he would remain in power indefinitely. Hence, the constitutional order was only important to him as long as it served his interests, but no further. As Madero describes the motives that drove him to becoming involved into public affairs, despite his status as a prominent member of the elites,

“Like the immense majority of my compatriots who have not passed their 50th birthday (two whole generations!) I was living quietly, tending to my own private affairs, busy with a thousand details that shape the background of social life –all eternally banal, in effect absolutely sterile. Public issues concerned me but little, and I thought even less about them because I was accustomed to see within the circumference of my life that *everyone was accepting the existing situation with stoic resignation*; I followed the general current and buried myself, like everyone else, in my own cycle of life. I was familiar, in theory, with the grandiose principles won by our forefathers as well as the rights in which they vested us, bequeathing to us in the Constitution of '57 the most precious guarantees that, united, we might work together for progress and exaltation of the country. Nevertheless, these rights are so abstract, they speak so little to the feelings that although I saw clearly that under the government with which I was familiar since I was able to think for myself that they were being violated I still was not aware of the lack which it meant for me because I was able to distract myself by tending, feebly enough, to my own affairs and by accepting all the pleasures which our refined civilization offers to us.”⁵⁶

⁵⁶ *Id.*, at 5; emphasis added.

These words reflect the perceptions and *modus vivendi* of the elites in the *porfiriato*. The likelihood of any of its members challenging the status quo was very low, and the *caudillo* relied on that premise. Nonetheless, it took only one man experiencing a civic awakening to start the narrative of a democratic epiphany in Mexico.

In this connection, I will focus on three fundamental ideas of the political transformations that characterized the decline of the *porfiriato* and the social mobilizations for self-government that resulted in the Mexican Revolution of 1910: (1) the idea of the “symbolic fiction of the people” as the cornerstone of Díaz’s political legitimacy;⁵⁷ (2) the idea of reelection and the presidential succession as the core inquiry of the regime;⁵⁸ and (3) the rise of “the (new) people” as a central stakeholder of the process for political self-redefinition triggered by the *Maderista* Revolution.⁵⁹ As we will see in the following section and in Parts III and IV, these fundamental ideas are also substantially embedded in the complex structure of the dominant regime that resulted from the Mexican Revolution, and which ruled Mexico for almost eight decades.

The elite settlement and the “symbolic fiction” of the people

The great achievement of the *porfiriato* was the first lasting elite settlement since the foundation of Mexico as an independent nation. This was not a minor issue: as we have seen, the intermittent civil wars and social unrest of the first three quarters of the

⁵⁷ II Francois-Xavier Guerra, *MÉXICO: DEL ANTIGUO RÉGIMEN A LA REVOLUCIÓN* 136-137 (2003).

⁵⁸ *Id.*, at 80. As Guerra underscores “Indeed, the key problem of the *porfirismo* is the presidential succession. In the regime’s power configuration, the succession depended upon Díaz as ‘sovereign.’ It was he in the final analysis that could designate his successor to whom he would transfer all his authority over a large network of loyals; or establish the rules for a competition between pretenders to succeed him, in order to test their respective zones of social influence. This is to say, an election between a *porfirismo* without Díaz, or a democratization of the regime.”

⁵⁹ *Id.*, at 134-138.

nineteenth century put in jeopardy the viability of Mexico as a nation, notwithstanding its leaders' efforts to avert catastrophic scenarios. These ongoing struggles were triggered by the unreconciled conflict of liberals and conservatives, which reached its peak with the promulgation of the Constitution of 1857. When he assumed the presidency for the first time, Díaz was well aware of this tension and its predictable outcome if left unattended. In order to guarantee his peaceful permanence in power, he focused in pleasing both sides in their respective core demands:⁶⁰ In the case of the conservatives, he was wily enough to gain their support by neglecting the implementation of the liberal measures contained in the constitution. With this, the conservatives were able to maintain their privileges, which allowed them to increase their wealth. In the case of the liberals, Díaz praised the symbolic value of the Constitution of 1857, as a useful guide for his government's policies, while speaking publicly about how "difficult" it was to actually implement. . However, the liberals were pleased when Díaz expressed the programmatic importance of the Constitution, deeming his words a public recognition of the "liberal spirit of 1857."

It was clear, however, that Díaz was merely paying lip service to the legacy of 1857,⁶¹ since it was the elite settlement and not the constitution that provided the actual [legitimation and foundation of the regime. This arrangement was a product of the comprehensive network of identifications, connections, favors and privileges that in the final analysis brought Mexican elites together.⁶² The key to understanding these elite-based dynamics lies in their conception of the general will as an expression of the arrangements between them and with the man in power. At this time, no such thing as a popular will existed, nor anything asserted or suggested by the phrase "the People." On

⁶⁰ *Id.*, at 333-335.

⁶¹ *Id.*, at 329-330.

⁶² As they still doing so even to this day, as we will see in Parts III and IV.

the contrary, it was the understanding between the elites –both central and peripheral– that gave political legitimation to the incumbent local and national governments. Thus, as long as this arrangement was accepted in principle by the elites—notwithstanding their obvious differences—it was easy to get sufficient “popular endorsement”, necessary to provide the legitimacy of the regime since they controlled (to varying degrees) the life of small local communities or larger urban and sophisticated collectivities, and so were able to provide the needed legitimacy of the regime. In this context, there was no need to channel heterogeneous expressions of the general will, since in the case of this elite settlement, there was a “single and unified” voice of “the people” that “coincided” with that of the President.

The idea of “institutionalized” presidential succession

It is a complex task to talk about institutions within a conceptual framework such as the *porfiriato*. In short, this political system had only one stable and enduring institution, Presidency, with the rest of the edifice built around it. Everything was subordinated to the *dictum* of President Díaz: although Mexico was organized as a federation according to the constitution, the President was powerful enough to remove and appoint state governors as he pleased. The same happened with the members of the local and “federal” legislatures and judiciaries. Interestingly, the *porfiriato* set the practical foundations and operational codes for the hegemonic regime following the revolution that was ultimately responsible for the *porfiriato's* collapse.

By first amending the constitution to limit reelection, and then by waiving [its] legal constraints at all on reelection, Díaz undermined the fledgling institutional mechanisms for presidential succession. As long as the elite settlement endured, there was no need to activating these mechanisms, but when this pact started waning by the end of

the 1890s, and as Díaz became older and weaker, the presidential succession became a critical predicament.

The main problem in this instance was the charismatic nature of Díaz's regime. In the view of the elites of the time, there was [no clear vision of the future after Díaz with no heir visible. Their allegiance to Díaz was implicit in the "long-lasting" nature of the elite settlement they had made with the President. However, if the latter did not make up his mind regarding his replacement in a satisfactory manner, a new clash between elites was a highly predictable outcome.⁶³

The last decade of the *porfiriato* was haunted by this unresolved quandary. It became more complicated when Díaz, after having publicly stated in 1908 he would definitely leave power after the end of his term in 1910, decided to run again that year and was reelected President for a seventh term, at age 80. This last reelection was "the drop that spilled the glass" and sparked the revolution of November of 1910. However, it was not a lack of institutional mechanisms for succession that caused this outcome. On the contrary, such mechanisms existed—albeit weak ones—but would have been inadequate to the task of challenging the will of the President even irrespective of their strength and sophistication: The lack of institutionalization of the system favored no one except Díaz.

The rise of "the (new) people"

The regime's neglectful attitude with respect to Díaz's succession raised the question of whether the people would once again tolerate a regime change driven by the governing elites as had occurred many times before—or would instead engage in a transformative enterprise of political legitimation. The answer to this inquiry, a constant in the political process, rested in the attitude that the elites would assume when Díaz was

⁶³ II Francois-Xavier Guerra, *supra*, note 57, at 79-101.

gone. The underlying argument in this potential transformation was the transfer of the “general will” from Díaz the *de facto* sovereign to the constitutional sovereign, the people. Of course, this presupposed that elites would fulfill their role by shaping the “will of the people,” either to transform or to perpetuate the existing regime. The revolution that followed was embedded [in large measure a reflection of] the conflicting attitudes of the elites toward this regime change.

The preservationists (those in favor of the regime) supported the continuation of Díaz’s legacy and government, even without Díaz, in order to maintain their privileges and wealth. The actual effectiveness of the constitution was subservient to that main goal. Conversely, the reformers put at the center of their mobilization the idea of genuine democracy, rooted in independent political parties from the government and acknowledging the constitutional value of the franchise. For them, the power of the constitution was of paramount importance. As the moderate liberals of the constitutional convention of 1857, the reformers thought that the problem was not the constitution, but the men in power: as soon as they left it, the constitution could regain its majesty and validity.

The reformers (with Madero at the forefront) were especially aware of the importance of invoking the support of the heterogeneous representations of the people: local, central, urban, peasants, religious, non-religious, of creole ancestors, indigenous, workers, and landowners, among others as a way of legitimating their transformative enterprise. They were aware of the upcoming political shift from the “popular will” embodied in Díaz, to the “general will” expressed by the vote of the majorities. Their *leitmotif* was “Effective Suffrage, No Reelection.”

Madero’s success was due to the harmonic integration of three basic ideas: (1) selecting the right audience; (2) developing a new grammar for national self-redefinition; and (3) the ability to frame the central question, pertaining the continuation of the status

quo..

(1) *Audience*. For the reformers, the pressing political transformation of the regime presupposed the birth of a “new man” in contrast with those of past generations who, as Madero argued, were guilty of “accepting the existing situation with stoic resignation.”⁶⁴ In this case (as in many such “new beginnings” narratives) there was a distinctive conception of the expected role of the people in the enterprise of self-redefinition.

This “new man”, however, was not expected to come from the ruling elites, but rather from a new segment of society resulting from the cultural enlightenment and economic progress of the late nineteenth century: the middle class. In Madero’s words,

“[The] only persons who are not satisfied are the poor intellectuals who have not suffered the corrupting influence of wealth. Among those one finds the thinkers, the philosophers, the writers, the lovers of the Fatherland and of Freedom; the Middle Class that does not have many distractions and that dedicates itself to study, that does not receive any benefit from the present regime of government and that class, in the shop, while it has at stake its physical strength for the discharge of its daily task, lets its restless imagination wander through the spacious field of thought, conceiving brilliant dreams of redemption, of progress, of equality. And finally, between the working classes the select element which aspires to improve and which has managed to form powerful leagues to obtain means of the union the force necessary for the recovery of its rights for the realization of its ideals.”⁶⁵

In selecting his audience, Madero opted for what at the time looked more promising as the critical mass for democratic conversion the nation required. His audience was what he called “the new people,” the newly ascendant middle class, the

⁶⁴ *Supra*, note 56.

⁶⁵ Francisco I. Madero, *supra*, note 54, at 170.

creature of the *porfiriismo*, which comprised professionals, journalists, teachers, intellectuals, students, craftsmen, workers and traders.

Madero thought that this middle class embodied the attributes of this “new man.” His idea was to empower ordinary citizens as never before to utter their demands and expectations in the public space. As we will see, this civic revolution comprised a distinctive popular mobilization vying for meaningful political participation which in many ways resembled the contemporary dilemmas to be discussed in greater depth in Parts III and IV of the dissertation.

(2) *New grammar*. This transformation also supposed a new grammar of legitimation, one that Madero used to describe as “the language of the Fatherland.”⁶⁶ This grammar was articulated in the dichotomy of *genuine political freedom and effective democracy*, in contrast with the practices of appearances and formalities that characterized the old regime.

This new language, given the trends of free thought dominant at the time, was especially evocative to Madero’s selected audience. Conversely, the declining elites of the *porfiriismo* were neither intellectually nor socially equipped to internalize this new grammar of reinvention and power sharing with the people.

Furthermore, this novel language rested upon the idea that the regime change should be conducted within the constitutional framework and peacefully. It must be noted that Madero, before, during and after his presidential campaign in the spring of 1910, advocated for law’s empire. Madero did not envision a violent solution as a plausible alternative to transform the regime:

“[We] did not want more revolutions (he was referring to the last electoral results in his home state Coahuila, where despite the popular support to an independent

⁶⁶ *Id.*, at 3.

candidate, the winner was appointed by the Center through an evident electoral fraud), because we did not wish to see the soil of our native land again stained with blood of our brothers, and because we had faith in democracy. The triumphs which one obtains through the democratic system are more slow but more certain and more productive.”⁶⁷

He adds,

“[If] by ‘crowning’ his work (of Díaz) we are to understand the definitive implantation of centralism and absolutism, then [we] are not in agreement that he should carry forward such a coronation and we *shall oppose it within the law*, as far as lies within our powers.”⁶⁸

Ab initio et ad interim, Madero was not seeking a violent solution. He was aiming at a peaceful revolution that would transform the role of his fellow citizens in the public space, by invoking a more coherent approach to implementing the political rights enshrined in the constitution and their practical application, as a result of this shift from the “fiction of the people” to the reality of “the new people.”

(3) *The central question*. By framing the core predicament of the final phase of the *porfiriato*, Madero was able to synthesize the main goals of his transformative endeavor. In his view, the most “transcendental problem” of the country, concerned the authoritarian nature of the regime and its continuation survival, which he articulated in the form a dilemma:

⁶⁷ *Id.*, at 10.

⁶⁸ *Id.*, at 197.

“[Is] the Mexican Nation satisfied with the continuation of the present regime of absolute power: or rather, does it wish the implantation of democratic practices? If the first, indubitably the role of independent citizens will be reduced to approval by its silence or indifference the continued re-election of General Díaz and of those who wish to continue in power. (But if) [the] alternation of functionaries, by means of democratic practices, is what the country wishes, the role of the independent citizens ought to be very important. Then they may organize a party which by its tendencies will be democratic and manage to fight bravely in the next electoral campaign against the official element, because no effort can be expected from this group on the side of democracy.”⁶⁹

Historically, from the *porfiriato* through the end of the Mexican Revolution in the early 1920's, presidential succession by peaceful, institutional means was the central political question. However, except for the possible exception of Madero's election in 1911, presidential succession was not decided by genuine democratic practices and means until the last quarter of the twentieth century. Thus, from the central question of *peaceful presidential successions*, Mexico gradually moved toward a different –more substantial, pursuit based on *fair and democratic presidential successions*.

Suffice to say for the moment that the successful integration of these components of the *maderista* narrative was aided by other factors that favored it significantly, including: the ongoing quarrel between the elites;⁷⁰ the growing social discontent resulting from the regime's repressions of workers and indigenous

⁶⁹ *Id.*, at 198-199; emphasis added.

⁷⁰ II Francois-Xavier Guerra, *supra*, note 57, at 79-143. Guerra provides a comprehensive overview of the collapse of the *porfirista* elite settlement by the end of the 1890s and the early 1900s, revealing it as/arguing it was/ one of the fundamental causes for the ultimate failure of Díaz to remain in power and the success of Madero's movement. In Guerra's view, the lack of compromise between the two factions into which the *porfirista* elite split, the *reyistas* (supporters of General Bernardo Reyes, Secretary of the Army) and the *científicos* (followers of José Ives Limantour, the influential Secretary of the Treasury), paved the way for the final breakdown of the regime.

communities in the North; the underestimation that the regime and the military did of the movement and its leaders; and the Díaz Government's growing detachment from reality. The movement launched by Madero was preceded by a national political mobilization—remarkable when judged by the standards of that time—in support of the candidacy of General Bernardo Reyes, for Vice-President in the election of 1909, in which he sought to share the ticket with President Díaz, in accordance with the constitutional reforms of 1903 that introduced the vice-presidency and extended the presidential term from four to six years.⁷¹ However, Díaz's selection of Ramón Corral as his running mate triggered an unprecedented reaction within the ranks of Reyes' supporters: instead of accepting Díaz's decision with discipline by resigning themselves to Díaz' choice for Vice-President (as was then the general practice) the *reyistas* mobilized against Corral's nomination and tried to persuade the President to change his mind. Though they did not succeed in persuading neither the President nor the elites, the *reyistas* found massive popular support that later became a threat to the regime itself.⁷² General Reyes was forced to forfeit his political ambitions, leaving the movement in absolute ruins.⁷³ The next step was to eradicate the remaining expressions of dissent within the movement to prevent further destabilization. Still, the fundamental damage was done and the regime was fractured from within. It was just a matter of time before it collapsed and to discover who would reap what the *reyista* movement sowed.⁷⁴

⁷¹ *Id.*, at 94. According to Guerra, this constitutional amendment was due to the pressure from the liberals. In their National Convention, in June 1903, Francisco Bulnes, in a memorable speech, prompted General Díaz to have “the law” as successor, and to allow “society to rely -from that moment onward, upon their laws and not upon the men.” In the words of Guerra, Díaz reacted to this speech with the purpose of appeasing the political turmoil that his reelection for 1904 was generating, as well as the financiers from abroad, that were also putting pressure on his government. With these predicaments in mind, he decided to agree to reform the constitution to introduce the vice-presidency (an idea that until then, he had always rejected) and extending the constitutional term for the presidency to six years.

⁷² *Id.*, at 158-159.

⁷³ *Id.*, at 145.

⁷⁴ *Id.*, at 176.

The “Maderista” Revolution

A further essential element underlying the proliferation success of Madero’s movement can be found in the influence of the American political process on him, particularly his recognition of the importance of the *town meetings* and *conventions* as foundations of civic participation.⁷⁵ To articulate his political program, he founded the National Democratic Party, which pushed for an *anti-reelection* agenda.

Of course, in his first tour of the country (1909), he focused on spreading the reiterating the themes of *effective suffrage and no reelection*. As his campaign unfolded, he realized that the movement ought to take advantage of the political momentum left by the *reyista* wave in order to channel constructively the popular frustration and discontentment produced by the regime’s repression. Being fully aware of the outcome of the *reyista* movement, Madero was wily enough to underscore the importance of a negotiated settlement with the regime,

“The negotiations leading to the acceptance of the candidacy of the person whom the Democratic Committee (of the National Democratic Party) might choose would lead to discussions with General Díaz, and *perhaps a pact could be arranged with him or an agreement which would have as a result [that] General Díaz would remain in the Presidency, and accepting as Vice-President the candidate on whom the democrats had decided for the same post*, and giving specific freedom so that gradually and without shock the [authorities] in all the Republic would be changed. [In] this way, without violent shocks and without struggles of uncertain results, [the] transformation of Mexico would have been verified. General Díaz, who would be able to leave the weight of this work to the Vice-President, would remain on a very high pedestal as the stern

⁷⁵ Francisco I. Madero, *supra*, note 54, at 9, 89.

guardian of the law, as the true incarnation of the Fatherland.”⁷⁶

Within just a few months, Madero succeeded in breaking with many of the enduring paradigms of the political ethos: from the “symbolic fiction of the people,” he managed to mobilize the “real new people” for the defense of the effective suffrage; from the “simulating morphology” of the *porfiriato*, he introduced a new grammar of political legitimation; from the “symbolic synthesis of the general will and the will of the *caudillo*,” he proposed the democratization of the popular will, as expressed in fair elections won by majorities. In sum, this political revolution succeeded in triggering a national civic awakening.

In preparation for the national party convention planned for April 1910, Madero campaigned across the country once more (early 1910), visiting the numerous democratic clubs that had been established to elect delegates for the convention. The response in the states was very positive and his movement acquired such momentum that in the weeks preceding the convention, it appeared as the only political alternative with a real possibility of challenging the regime in the June elections. In light of the growing influence of Madero’s movement, the regime decided to react with the use of force: it ordered the detention of Madero and his closest advisors, expecting that –as had happened with the *reyistas*, the movement would wane if deprived of its leaders. This miscalculation brought fatal consequences to the regime and marked the beginning of the armed phase of the revolution,⁷⁷ which ended with Díaz’s defeat and exile in May

⁷⁶ *Id.*, at 230.

⁷⁷ II Francois-Xavier Guerra, *supra*, note 57, at 199-200. After an interview with President Díaz, just before the national convention of his party, Madero realized that the negotiated solution was out of reach. In light of this disappointment, Madero anticipated at the convention “[if] Díaz decided to put in motion an electoral fraud by the use of force, then...[I] am convinced that force will be repealed with force, by a resolved people willing to fight for their sovereignty.” It seemed that from that moment, the die was cast. After thirty-five years without pronouncements of rebellion, Madero signed the “Plan de San Luis,” calling

1911 and Madero's democratic election for President in November of that same year, although he would be in office for just fifteen months. On February 1913, he was assassinated after a military coup, which radicalized the armed conflict that started three years earlier and that would see no definitive end until the 1920's.

Turbulent Outcomes

These events raise a central question: whether the constitutional framework in force at that time was capable of institutionally channeling the expectations and demands of the people before the undesirable outcome that led to the armed revolution. It was clear that the events following the elections of June 1910 showed the failure of the political process. The predicament was that when a regime is resolved to use force against its people to remain in power, there are not enough institutions and procedures to prevent it from doing so, since the dynamic this puts in motion already extends beyond the political sphere. The limited scope for meaningful political participation provided by the Constitution of 1857 was not enough to avert the armed revolution from happening.

This occurred for many reasons of course, but it may suffice to elaborate briefly on some of them:

Constitutional Monism. If our constitutional framework had envisaged the benefits of providing a distinctive track for constitutional change to channel those rare popular mobilizations demanding meaningful political change by rejecting central elements of the status quo (in this case, unlimited reelection of political authorities and permanent isolation of ordinary citizens from the political process) it would probably have

for a revolution against Díaz's regime. This was the "birth certificate" of the Mexican Revolution. See Plan de San Luis, 5 de Octubre de 1910 (Mex.), at <http://www.ordenjuridico.gob.mx/Constitucion/CH7.pdf> (Last visit: April 10, 2013).

succeeded in averting the armed revolution.

Elite settlements (aside from the constitution). However, the lack of a higher lawmaking track was due to the actual prevalence of elite settlements as the practice par excellence for [reaching] political compromise, overlooking the importance of their constitutional entrenchment. As explained above, the prolonged and undefined permanence of Santa Anna, Juárez or Díaz in power obeyed the political mores of their time, insofar as it was exclusively driven by the elites and the arrangements (or disagreements) among them. Thus, while the constitution had a symbolic and instrumental value for their goals, this did not amount to function as an institutional limit to their actions.⁷⁸

Ill-timed democracy. To the previous objective features we are considering as possible, we should add the subjective element pertaining to Madero's idyllic idea of democracy. In the view of some scholars, Madero's greatest failure was to think that democracy would bloom in Mexico automatically, once the regime was deposed. In their opinion, Madero underestimated (as have other leaders in more recent years) just how deeply rooted was political authoritarianism in the social ethos.⁷⁹ However, I am more persuaded by Alan Knight's argument that Madero's failure was due to two main factors: First, he tried to introduce democracy after thirty five years of closed, oligarchical and authoritarian politics managed by the elites of the *porfiriato*; second, he tried to implement his program within a polarized and confronted society, which was struggling against the appalling socio-economic iniquities generated by the *porfiriato*. In Knight's view, implementing Madero's democratic experiment turned out to be very complicated, occurring as it did in the midst of the social upheaval that resulted from the political

⁷⁸ This trend remained practically unchanged in greater part of the twentieth century under the rule of the PRI. This will be explored in more depth in Parts III and IV.

⁷⁹ In particular, Jorge Castañeda and Héctor Aguilar Camín have expressed this view in the essay *A Future for Mexico*. Traditionally, this pessimistic view of our national identity can be attributed to Octavio Paz's main opus *The Labyrinth of Solitude*. However, according to Alan Knight, such an approach is rather "too simple and deterministic," see *infra*, note 80.

conflict with the regime.⁸⁰

Fragmentation of absolute power. Madero's program to introduce and consolidate a model of liberal democracy failed in light of the legacy of three decades of concentrated power in the hands of a single leader and his supporters. Díaz's defeat and exile left a vacuum that was rapidly filled by local leaders that saw in this juncture an opportunity to enhance the power of their communities or states. However, these attempts were swiftly

⁸⁰ Interview with Alan Knight, Professor of the History of Latin America, Faculty of History, University of Oxford, in St. Antony's College, Oxford (Sept. 11, 2012). Professor Knight is one of the most authoritative voices on the history of the Mexican Revolution. In a recent interview, he explained Madero's failure in these terms: "The question of why he failed is a really interesting debate; it sometimes involves what we call "counterfactuals". Could it have been different? Had Madero done things differently, could he have somehow survived, could democracy have remained? My view is he faced an extremely difficult situation so, while I wouldn't say it was impossible, I do think it was very difficult for him. Now, partly his character was part of the problem, he was as you say, rather naive, idealistic, and optimistic and he had considerable faith in dialogue with the people, that he could bring the old *porfirian* people into the political system, that he could answer to working class and peasant demands at the same time. So I think he had an excessively optimistic view of what could be done. Other members of his group were more pessimistic or more hardheaded in terms of what they thought could be done. However, leaving aside the personality—which I don't think is the crucial thing—it seems to me that it was exceptionally difficult for Madero to really implement and preserve the democratic system for two principal reasons. [I] don't or wouldn't argue that somehow Mexico is hard-wired to be authoritarian. I made an argument about political culture in an article once because I was asked to write about political culture in the Revolution and I was slightly criticized by Enrique Krauze for apparently saying that in Mexico you had to be authoritarian, that there was no alternative because it was part of the Mexican heritage, the colonial legacy. I don't like that argument; I think it's too simple, too deterministic. The reason I think that Madero found it too difficult to implement democracy is for two reasons, one of which you've mentioned, that it had thirty or more years of *porfirian* rule during which there will be no parties—I mean, parties came and went, they were just *clubes electorales*- so there was no party institution, the media had been controlled, the newspapers, and elections had been manipulated. So quite quickly it goes for thirty or more years of authoritarian pseudo-democracy to something that resembles a kind of proper liberal democracy. Now that's difficult because you need to learn how to do this, you need to realize that if you lose the election you don't have a *cuartelazo* or a *golpe*, that you have to wait for next time and you have to observe the rules of the game. So it's very difficult to institute democracy quickly after a long period of authoritarian rule. That's true in any country, it doesn't matter whether it is China or whatever. [The] other reason, perhaps is even more important, which is of course—following on what we've just talked about—Madero was trying to do this in 1911, 12, 13, at the time when Mexico was going through the beginnings of a social revolution. Zapata was rebelling in Morelos, Orozco in Chihuahua; there was banditry, there was upheaval, there was a working class movement, particularly in some of the textile factories. [As] I think Madero was trying on the one hand to implement democracy, the new experiment, and at the same time he was trying to govern a country in which social class tensions were running very high. Now, if you have an established political system, which is reasonably legitimate, it has been there for many years, you can perhaps manage social tensions. Let's say, during the Depression of the 1930's, American democracy didn't collapse because it was sufficiently strong to deal with very severe social problems and unemployment. In Madero's case he had to implement democracy (that was his ideal) but at a time when the country was undergoing great social upheaval, and that's an extremely difficult thing to do. I'm not surprised he failed; even if he had been a political genius I think he might've failed anyway. I don't mean that Mexico is somehow condemned to be authoritarian, that's not my argument. In fact, the experience of the last 25 years has shown that Mexico has evolved—not suddenly-- from authoritarian to democratic, but in a much more incremental process from *priista*, sometimes called inclusionary authoritarianism through a period of reforms opening, PAN getting stronger, into something you could call a functioning in perfect liberal democracy. So, it can be done, it's not an impossible task, but I think in Madero's context, given particularly the armed revolution and the social upheaval it was extremely difficult.

challenged by the irruption of rebellions all across the country (Zapata in the center, Villa in the North, Orozco in Chihuahua, to mention just a few) to bring up to the surface the ongoing demands of social justice from the peasant and working classes –which had a radical expression in the coming constitution of 1917. As we will see in Parts III and IV, in the realm of political transformations and regime change, the gradual evolution from an authoritarian to a democratic regime may be encompassed by the initial coexistence of authoritarian and democratic institutions in order to assure peace and stability. Such perspectives were not considered in the case at hand.

In light of these predicaments, would a new constitution be able to redress the enduring grievances that produced the revolution? Well, at least in theory, that was the idea back in 1916, when Venustiano Carranza –the new leader of the revolution,⁸¹ called for a new constitutional convention in Querétaro.

The Ideological Consensus Entrenched: The Constitution of 1917

We should bear in mind that the central elements of this political transformation were the questions of presidential succession, effective suffrage and reelection, despite Madero’s amendments in this regard: they were prescribed but barely internalized in the dominant political ethos.⁸² Any constitutional amendment ought to be articulated with

⁸¹ In 1913, Generals Victoriano Huerta, Félix Díaz and Bernardo Reyes led a counterrevolution that resulted in a military coup against Madero’s government. He was forced to resign and was later assassinated, along with his vice-President, José María Pino Suárez. Huerta assumed the presidency and installed a military dictatorship, which was rejected by a number of state governors led by Venustiano Carranza, Governor of Coahuila, who started a rebellion to uphold and restore the constitutional order [broken] by Huerta. Carranza succeeded and took Mexico City in the fall of 1915. *See* Plan de Guadalupe, 27 de Marzo de 1913 (Mex.), at <http://www.ordenjuridico.gob.mx/Constitucion/CH10.pdf> (Last visit: April 10, 2013).[not sure if “breaking order” works well]

⁸² In a constitutional amendment to Articles 78 and 109, Madero addressed by means of prescription the main goals of his political program: his proposed amendments introduced the principle of “no-reelection,” by limiting the presidential and vice-presidential terms to six years, banning any possibility for reelection in the case of the President (and Vice-President). In turn, the Vice-President could not be elected as President for the immediate following term (Article 78). The same scheme was prescribed for the states

these premises as the nucleus of the new order. Carranza's original idea was to reform the Constitution of 1857. At least at an earlier stage, consistent with Madero's views, Carranza did not envision the necessity of a new constitution.⁸³ In the end however, the document that Carranza promulgated in February 5, 1917 was not an amendment to the constitutional text of 1857. On the contrary, it was a full-fledged wholly new constitution that despite the similarities to its predecessor in its definition of the form of government and institutional design, as well as the bill of rights and the principle of popular sovereignty it featured, it had its own distinctive character, which derived in part from the incorporation of the demands and expectations of the vast array of groups involved in the revolution.

In the opinion of some experts, "the most significant early accomplishment of the *constituyentes* (the delegates of the constitutional convention of 1916-1917) was to adopt a form of government that would end the pendulum swings from legislative anarchy to dictatorial rule that had plagued Mexico in the nineteenth century. The principal architect of the solution to this problem (i.e., structuring a stable form of government that would not deteriorate into dictatorship) was Emilio Rabasa, who argued that the seeds of the Mexican tendency to migrate towards dictatorial power were sown in the Constitution of 1857. According to Rabasa, the 1857 Constitution had empowered the legislature at the expense of the executive, had placed the legislature above the executive by adopting a unicameral legislature and limiting the President's powers. As Rabasa wrote:

and the election of governors (Article 109). Notwithstanding the fact that this amendment was very important at a prescriptive level, the following years of political instability and turmoil prevented it from being fully applied. Its validity relied upon the approach that the constitutional convention of 1916 would take toward this matter (and see if Madero's amendment would remain after the constitutional convention).

⁸³ *Supra*, note 5, at 81-84.

“The suppression of the Senate destroyed [the equilibrium between Presidential and legislative power], not only by increasing the power of the unicameral Congress, but also by depriving the States of their equal representation in the legislative assembly. Though later establishing a Senate, the Charter still contained important defects that in practice would lead to profound conflict between branches of government, which ensured the preponderance of the legislature over the executive, thus leading to either of two extremes to deal with the omnipotence of Congress: the submission of the Executive, which establishes the dictatorship of Congress, or a *golpe de estado* [*coup d'état*] that enthrones the dictatorship of the President.”⁸⁴

Rabasa’s diagnosis of the imbalance of power between Congress and the President created by the Constitution of 1857 captures the [fundamental challenge facing new constitution-makers in preventing further crises in governability. Hence, they decided to outline a system of government in which the President may enjoy strong powers to prevent “legislative anarchy,” as described by Rabasa.

Unfortunately, this meant an extreme pendulum swing as well, since it implied a shift from the Legislative predominance of the Constitution of 1857 –at least on paper, since it was utterly obscured by Díaz’s dictatorship, to the consolidation of what would later be known as *Presidencialismo*,⁸⁵ in the Constitution of 1917, according to which the

⁸⁴ Stephen Zamora, José Ramón Cossío, et al., *MEXICAN LAW*, at 31 (2004). For Rabasa’s quote, *see supra*, note 36, at 196.

⁸⁵ *Id.*, at 34. In view of Zamora, Cossío, et al., “[The] defining features of Mexican *presidencialismo*, and the secret to its success and longevity, were two: an assumption by the executive branch (under the control of the President) of virtually absolute power, *relegating the legislative and judicial branches to lesser roles*; and a temporal limitation on that power to the *sexenio*, or six-year term of office of the President, who cannot be re-elected. Power was always highly personal and colored by the President’s individual choice. While the President was bolstered by the party apparatus of the PRI, the non-ideological nature of the party itself allowed each President considerable latitude in setting policies. The limitation of presidential power to a single *sexenio* prevented the system from degenerating into dictatorship;” (*emphasis added*). This view is disputable at least in two issues: (1) the ability of PRI over its history to adjust itself according to the prevailing national and international contexts to different political creeds and trends, did not make it non-ideological or ideologically empty, as these scholars argue. Moreover, the PRI itself managed to entrench

political system as a whole was structured around the powerful institution of the Presidency. This was taken to its ultimate consequence during the one-party rule in the decades following the promulgation of the new constitution.⁸⁶ Consequently, the only difference between the strong powers that held the President during the *porfiriato*, and those after the new constitution entered into force, was that from that moment onward, they enjoyed full constitutional legitimacy, and therefore, the only foreseeable lacuna was that of the peaceful succession in power.

In this context, the incorporation of Madero's amendments of 1912 banning reelection into the new constitution, constituted the main check on this full-fledged powerful Presidency, as some scholars have argued,

“[The] *constituyentes* embraced the *maderista* belief in non-reelection [term limits] as a fundamental deterrent to entrenched political power. Not only did the Constitution of 1917 provide for an absolute ban on reelection of the President (Article 83), but the concept of non-reelection was also applied to federal and state senators and representatives (Articles 59 and 155-III). Indeed, throughout Mexican society, it is commonly accepted, under force of law, regulation or customary practice, that leaders of public institutions should not be reelected, or at least that their terms should be limited.”⁸⁷

Again, this was relative: if the Constitution of 1917 succeeded in entrenching Madero's arguments against reelection either of the President, state governors and elected officials, it failed in preventing a single-party perpetuation by *de facto* reelection for

its own ideology—revolutionary nationalism— as part of our political ethos. On the other hand, it is deceiving to claim that the temporal limitation of presidential power was a deterrent to dictatorship; it may make sense in the traditional scheme of individual or personal dictatorship, but the argument collapses when referring to what really happened in Mexico after the PRI's foundation: a single-party dictatorship.

⁸⁶ This matter will be explored in more depth in Parts III and IV.

⁸⁷ Stephen Zamora, et al., *supra*, note 84, at 32.

almost eight decades. Ironically, from the non-democratic reelection of individual men in the past, we moved towards the continuous non-democratic reelection of a single party in the succeeding constitutional regime.

According to Zamora, et al., “by coupling the primacy of executive power with the concept of non-reelection, the Mexican Constitution of 1917 laid the foundation for the single-party form of government that [governed] Mexico throughout the twentieth century,” by creating a powerful Presidency as the core of a corporatist State structured as a single-party rule that succeeded in institutionally channeling its interests among the vast array of participants that survived the Revolution, e.g. labor unions, peasants, growing bureaucracy, local leaders, and in neutralizing the inherited institutions of the *ancien régime*: the Church, business leaders, and landowners,⁸⁸ (as will be explained in the second part of this chapter).

Despite the novelty that the predominant narrative has in the Constitution of 1917, it instead evoked a continuity of the basic principles and doctrines of political organization enshrined in its predecessors of 1824, and more importantly of course, of 1857. As explained above, perhaps the most salient departure of the new constitution from earlier models was its embrace of a more conservative approach toward constitutional design with respect to the powers of the Presidency in relation to the other two branches of government. It is worth noting that, except for the centralist intermezzo of 1836-1856, our framers allocated substantial political power to the Legislature rather than in the Executive branch; this radically changed in 1917 and set the foundations for a presidential-centered political system that nonetheless remained faithful to the monist and derivative character of our constitutional order.⁸⁹

⁸⁸ *Id.*, at 32-33.

⁸⁹ William J. Suarez-Potts, *THE MAKING OF LAW. THE SUPREME COURT AND LABOR LEGISLATION IN MEXICO, 1875-1931*, at 5 (2012). Suarez-Potts summarizes the derivative character of our predominant

Pertaining to the powers to initiate legislation and the legislative process itself, no substantial changes appeared in the new constitution:

“**Article 71.** The right to introduce laws or decrees belongs:

- I. To the President of the Republic;
- II. To the deputies and senators of the Congress;
- III. To the legislatures of the States.

The bills submitted by the President of the Republic, by the legislatures of the States or by deputations thereof shall be referred at once to Committee. Those which are introduced by deputies or senators shall be subject to the procedure prescribed in the regulations on debate;

Article 72. Every bill or proposed decree, the resolution of which does not pertain exclusively to one of the chambers, shall be discussed successively in both, the regulations on debate being observed as to form, intervals of time, and mode of procedure in discussions and voting.

- a. A bill approved in the chamber of its origin shall be referred to the other for discussion. If the latter approves it, it shall be sent to the Executive who, if he has no objections to make, shall immediately publish it.
- b. Every bill shall be regarded as approved by the executive branch if it is not returned to the chamber of its origin within ten business days; unless, during this time, the Congress shall have adjourned or suspended its sessions, in which case the return must be made on the first business day on which the

constitutional model since 1857, “Mexico’s legal system also shares aspects of its American counterpart. The U.S. Constitution impressed the drafters of the 1857 constitution, on which the 1917 constitution was modeled. Both the 1857 and 1917 texts outlined a federal system of government. Each state has a governor, legislature and courts. The federal government similarly has three branches or powers: the presidency, a bicameral congress, and judiciary.”

Congress next meets.

- c. A bill or proposed decree rejected in whole or in part by the Executive shall be returned, with his objections, to the chamber of origin. It must be discussed anew by the latter, and if it is confirmed by a vote of two thirds of the total membership it shall again be sent to the revisory chamber. If it is sanctioned by the latter by the same majority, the bill shall become a law or decree and shall be returned to the Executive for promulgation. The voting on a law or decree shall be by roll call.
- d. If any bill or proposed decree is rejected in its entirety by the chamber of revision, it shall be returned to that of its origin with the objections made by the former. If upon examining it anew, it is approved by an absolute majority of the members present, it shall be returned to the chamber that rejected it, which shall again consider it and if it approves it by the same majority, it shall be sent to the Executive for the purposes of section (a) above; but if disapproved, it cannot be again introduced in the same period of sessions.
- e. If a bill is rejected in part, or amended or added to by the revisory chamber, the new discussion in the chamber of origin shall be confined to the part rejected or to the amendments or additions, without alteration in any way of the articles approved. If the additions or amendments made by the revisory chamber are approved by an absolute majority of votes present in the chamber of origin, the entire bill is sent to the Executive for the purposes indicated in section (a). If the additions or amendments made by the revisory chamber are disapproved by a majority of the votes in the chamber of origin, they shall be returned to the former for consideration of the reasons of the latter, and if the amendments or additions are rejected in this second revision by an absolute majority of votes present, the bill, insofar as it has been approved by both chambers, shall be sent to the Executive for the purposes indicated in section (a). If the revisory chamber insists, by an absolute majority of votes present,

upon such amendments or additions, the entire bill shall not be again presented until the following period of sessions unless both chambers agree, by an absolute majority of their members present, that the law or decree be issued only with the approved articles, and those added or amended shall be reserved for examination and vote at the following sessions.

- f. In the interpretation, amendment, or repeal of laws or decrees, the same procedure shall be followed as that established for their enactment.
- g. Every bill or proposed decree that is rejected in the chamber of its origin, cannot be again introduced in the sessions of that year.
- h. The enactment of laws or decrees may commence in either of the two chambers, without distinction, with the exception of bills dealing with loans, taxes, or imposts, or with the recruiting of troops, all of which must be discussed first in the Chamber of Deputies.
- i. Bills or proposed decrees shall preferentially be discussed in the chamber in which they are introduced, unless one month elapses since they were sent to the reporting committee without a report being made, in which case the bill may be discussed in the other chamber.
- j. The Federal Executive cannot offer objections to the resolutions of the Congress or of either chamber, when they exercise functions of an electoral body or of a jury, nor when the Chamber of Deputies declares that a high functionary of the Federation should be impeached for official crimes.

Neither may he do so in regard to a decree of convocation to extraordinary sessions issued by the Permanent Committee.”⁹⁰

Needless to say, in light of the incremental power of the Executive branch, that the driving force of the legislative process was the President and not the legislature. In

⁹⁰ Constitución Política de los Estados Unidos Mexicanos, que reforma la del 5 de Febrero de 1857, 5 de Febrero de 1917 (Mex.). See <http://www.ordenjuridico.gob.mx/Constitucion/1917.pdf> (Last visit: April 11, 2013).

fact, the President became not only the initiator of law, but also the lawmaker *par excellence* in the following years, chiefly by marshaling Congress, as the state governors had done with the state legislatures. Hence, the system aligned itself with the substantial concentration of power that was allocated to the Executive branch.

The Institutionalization of the Revolution

The power vacuum that President Díaz left behind brought with it a new and lamentable trend in politics: presidential succession by assassination. While in the nineteenth century there was no record of a president being assassinated while in office, this changed dramatically in the years that followed the end of the *porfiriato*: most of the prominent leaders of the revolution⁹¹ and particularly those that reached the Presidency, were assassinated: Madero in 1913, Carranza in 1920 and Obregón in 1928.⁹² These sad events entailed an important amount of national turmoil and undermined the nascent political institutions. It seemed that in this new regime, only violence was capable of solving the differences between those in power.

Additionally, it suggested that the new constitution was not enough to guarantee the peaceful and institutionalized access to power. In Knight's account, of all these assassinations,

“[Obregón's] death was, in national political terms, the most significant and critical. Along with his fellow Sonoran, Plutarco Elías Calles, he had been the chief architect of the post-revolutionary state of the 1920s. Together, they had formed an effective diarchy, the twin pillars of the Sonoran dynasty (1920-34).

⁹¹ Emiliano Zapata and Francisco Villa were gunned down in 1919 and 1923 respectively.

⁹² According to Alan Knight, these political executions provided a reminder that “[the] old definition of czarism –autocracy tempered by assassination- (fitted) revolutionary Mexico tolerably well.” See Alan Knight, *Mexico's elite settlement: conjuncture and consequences*, in *ELITES AND DEMOCRATIC CONSOLIDATION IN LATIN AMERICA AND SOUTHERN EUROPE*, 113-145 (John Higley & Richard Gunther eds., 1992).

Obregón had served as president between 1920 and 1924, weathering military rebellion, economic recession, and pressure from the United States. Calles had succeeded him in 1924 and served until 1928, embarking on (but then later backing away from) more radical policies of land distribution, labor reform, economic nationalism, and, above all, anticlericalism. In the election of July 1, 1928, Obregón had been comfortably reelected, *following a constitutional amendment allowing such a reelection to take place*. His assassination, barely two weeks later, created a major political crisis. Calles remained the incumbent president until November 30. With diarchy converted de facto to monarchy, however, no obvious successor, no providential caudillo, could be found: ‘No one has yet been able to find the man’ who might succeed Calles.’⁹³

Knight’s description of the social and political perplexity in the aftermath of Obregón’s assassination sheds some light on a very relevant aspect of the process of political institutionalization that followed the end of the revolution: the power vacuum left by the *porfiriato*, was supposedly filled at last by “the twin pillars of the Sonoran dynasty”, Obregón and Calles. The power they amassed was now absolutely concentrated in Calles⁹⁴ and paved the way for the foundational elite settlement of post-revolutionary Mexico.

These tragic events yielded, however, an interesting political process that led to a radical redefinition of Mexico’s future. Calles implemented an overarching strategy for taking the pulse of the relevant actors involved in that redefinition: the military, state governors and members of Congress. Drawing on diplomatic cables from the American

⁹³ *Id.*, at 115; emphasis added.

⁹⁴ *Id.* Calles and Obregón amassed so much power that the general perception after Obregón’s assassination (and as the end of Calles’ presidency approached) fluctuated between scenarios of “[dire] predictions and sober warnings: [If] Calles were to step down, it would mean the ‘total ruin of the country;’ it would generate a crisis in Congress and a renewal of civil war in Mexico.”

Embassy to Mexico exchanged during those years, Knight concludes: “[Generals] and politicians poured into Mexico City from all parts of the country;’ the Hotel Régis, a favorite hostelry, ‘daily took on more and more the appearance of a political convention.’”⁹⁵ According to Knight, given the pressing timetable to make decisions on the presidential succession under those circumstances, everything was set for the beginning of September, when President Calles was expected to deliver his last state of the union address to Congress. In it, he made a firm appeal for a “deliberate shift toward political institutionalization”⁹⁶ by announcing that he would not seek the Presidency again, enabling Mexico to move from “a country ruled by one man” to a “nation of institutions and laws.”⁹⁷ Furthermore, Calles promised “the definitive entry of Mexico into the realm of institutions and laws and, with a view to regulating our political life, the establishment of genuine organic national parties.”⁹⁸ Henceforth, “a government of institutions would replace rule of caudillos. In early 1929, Calles founded a party, the PNR (National Revolutionary Party), to preside over national and state elections and channel military commander’s rivalries.”⁹⁹

Through the creation of the new party, Calles secured not only a presidential succession that would benefit his allies, but also, a peaceful political settlement guaranteeing that all factions of the so-called “revolutionary family,”¹⁰⁰ would be unified

⁹⁵ *Id.*, at 116.

⁹⁶ *Id.*, at 117.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ William J. Suarez-Potts, *supra*, note 89, at 22.

¹⁰⁰ Alan Knight, *supra*, note 92, at 121n10. Knight argues that “The ‘revolutionary family’ is a term that Mexicanists habitually use [with more abandon than precision] too loosely: It denotes the group that took power during the armed revolution of 1910-20 and whose descendants, political and biological, have ruled to this day. It represents, therefore, a series of generational political elites. The term (which enjoyed currency at least as early as the 1920s) neatly captures the combination of bonding and rivalry, comradeship and competition, that characterized the revolutionary elite(s).”

under the same national political party with unequaled powers of electoral mobilization.

With the National Revolutionary Party, the narrative of the revolutionary nationalism was born, and along with it, a distinctive view of the Mexican constitution and the possibility of change.

The New Constitutional Cycle: Revolutionary Nationalism and the “Institutionalized Revolution”

The elite settlement that gave birth to the *Partido Nacional Revolucionario* (National Revolutionary Party – PNR), which was PRI’s original name in 1929¹⁰¹ and replaced the rule of caudillos by a government based on institutions and laws, initiated a new constitutional cycle in Mexico characterized by the rule of a single-party based upon key features to be explored in this section: (1) a broad corporatist structure with unparalleled national influence; (2) vigorous political pragmatism based on ideological pluralism within the party; (3) a strong Presidency that centralized decision-making authority; (4) a distinctive method of selecting the presidential nominee by the incumbent president; and (5) an absence of meaningful political opposition.

1. National Corporatism based on Absolute Subordination to the President:

Due to its unequaled national influence, the PRI also managed to foster a new sense of national identity built around its distinctive ideology known as “Revolutionary Nationalism,” characterized by a strong commitment to the legacy of the Mexican Revolution and its goals, which can be encapsulated in terms of the establishment of a

¹⁰¹ President Plutarco Elías Calles originally named the party *Partido Nacional Revolucionario* (National Revolutionary Party - PNR) in 1929. Then, in 1938, President Lázaro Cárdenas changed its name to *Partido de la Revolución Mexicana* (Party of the Mexican Revolution – PRM). The party’s was finally named *Partido Revolucionario Institucional* (Institutional Revolutionary Party – PRI) in 1946, by President Manuel Ávila Camacho. Despite these name changes in its early years, the party’s founding principles remained essentially the same. Notwithstanding these name changes, hereinafter I will refer to the party as PRI.

strong government capable of providing the Mexican people with the standards of well-being outlined in the Constitution.

This might have seemed a reasonable goal in principle, except for the basic premise that was utterly forgotten since the beginning of this regime. Historically, the PRI and its leaders overlooked the importance of maintaining an uninterrupted and uninhibited conversation with the people. The party substituted this desired conversation with the corporatist mobilization expected to provide ceaseless popular legitimation to the regime, based upon the so-called “four main sectors” that had formed the party’s initial base of support: workers, the military, peasants and popular organizations. As Roderic Ai Camp describes,

“Since the revolution –that is, for most of the twentieth century- Mexico used an interesting (corporatist) structure to channel the most influential groups’ demands, enabling the government to monitor the demands and mediate among them. The government [sought] to act as the ultimate arbiter [to] see [that] no group [became] predominant.”¹⁰²

In this context, the regime relied on the insulation of the people from the political process, structuring the latter around the regime’s two basic pillars: the President and the Party, both aiming at sustained economic growth and the increase of uncontested political power as their fundamental goals.¹⁰³

The administration of President Lázaro Cárdenas was instrumental to achieving an enduring corporatist structure based mainly on labor and peasant organizations. From

¹⁰² Roderic Ai Camp, *POLITICS IN MEXICO. THE DEMOCRATIC CONSOLIDATION*, at 137 (2007).

¹⁰³ Daniel Cosío Villegas, *EL SISTEMA POLÍTICO MEXICANO. LAS PROBABILIDADES DE CAMBIO*, at 22-52 (1976).

Cárdenas' administration onwards, the stability of the regime outweighed ideologies. In the account of Jo Tuckman,

“The PRI's longevity was partially built on its ability to contain the latent (ideological) conflict both by promoting itself as the vanguard of the struggle for social justice and by incorporating most of the other significant political forces into its structure. Leftist President Lázaro Cárdenas did most to establish both traditions. During his *sexenio* (1934-1940), Cárdenas consolidated the regime's claims to embody the legacy of the Revolution by distributing land to the peasants and nationalizing the oil industry. He also cemented its political control by incorporating labour and peasant organizations into the state in a way that both harnessed their support for the regime project and helped neutralize their opposition when things did not work out as promised. To round it off, Cárdenas underlined the priority given to stability over ideology by choosing a right-leaning successor.”¹⁰⁴

The buildup of this corporatist structure was fundamentally based on the axiom that inspired the articulation of post-revolutionary Mexico: institutional subordination.¹⁰⁵ As will be explained in the last part of this chapter, the birth of the PRI provided a suitable framework for institutionalizing past operational codes deeply embedded in our culture endowing the presidency with a great number of powers and privileges that were not provided for in the constitution. These prerogatives informally vested in the president were also known as *meta-constitutional powers*.¹⁰⁶

¹⁰⁴ Jo Tuckman, MEXICO. DEMOCRACY INTERRUPTED, at 247 (2012).

¹⁰⁵ Enrique Krauze, LA PRESIDENCIA IMPERIAL. ASCENSO Y CAÍDA DEL SISTEMA POLÍTICO MEXICANO (1940-1996), at 127-159; 229 (1997).

¹⁰⁶ Jorge Carpizo, EL PRESIDENCIALISMO MEXICANO, at 190 (1978). This feature of Mexican presidentialism has also been comprehensively explored by Diego Valadés. See Diego Valadés, *Problemas y Perspectivas del Sistema Presidencial Mexicano*, at 445, in <http://biblio.juridicas.unam.mx/libros/6/2748/27.pdf>

During the hegemony of the PRI (1934-1994), it was the president who appointed most members in the governmental structure at both federal and state levels. As a reflection of these privileges, state governors appointed local candidates and officials. The selection of the awardees was based mainly upon their closeness and loyalty with the party leadership and ultimately, with the president. Presidential appointments were not limited to the cabinet; on the contrary, the president nominated deputy secretaries, senators, deputies, members of the Supreme Court (known as *Ministros*), judges, magistrates, state governors, the mayor of Mexico City, ambassadors, union leaders, the president of the National University (UNAM)¹⁰⁷, and even UNAM faculty, in some cases.

2. Political Pragmatism as a Guarantee for Stability

As Tuckman explains, the goal of enduring political stability was foremost from the early years of the PRI's regime onward. Over the years, this particular feature of revolutionary nationalism led the party to structure the broadest ideological base in Mexico, managing to bring together within party ranks members from all dominant ideologies, ranging from strong-minded nationalists who constituted a majority in the first four decades of the regime, to young technocrats educated mainly in the United States who were strongly influenced by the neoliberal canon.

To channel the inherent tensions between ideological opposites, the PRI relied upon the solid discipline that had historically bound it together by acknowledging in the

(Last visit: August 31, 2014). Also see Fernando Serrano Migallón, *Meta-constitutional Powers of the Executive Branch in Mexico*, in http://www.law.yale.edu/documents/pdf/Meta_Constitutional_Powers.pdf (Last visit: August 31, 2014).

¹⁰⁷ This changed when the National University gained its autonomy in 1929 under President Emilio Portes Gil's administration.

incumbent president (usually referred to as the “Maximum Leader”) the role of final arbiter of disputes within the party that scaled up to his judgment.

This practice, with time (as we will see in the next chapter) ultimately led the party to a dramatic decline. Tuckman’s explanation is enlightening,

“Over time, the PRI developed an ideological nebulosity that belied attempts to pin it down to any particular part of the spectrum. Even in the final decades of the regime, when orthodox neoliberal technocrats took control of economic policy, it could not be described as an orthodox neoliberal technocratic party. Politics remained largely under the control of old-style operators, the so-called ‘dinosaurs.’ They were not only experts at ensuring that elections were won, whatever the ballots said, but also past masters at nationalist rhetoric infused with sentiment and symbolism.”¹⁰⁸

3. A Strong Presidency as Engine of Constitutional Development

In terms of constitutional development, the formal mechanism for constitutional amendment provided in Article 135 reached its climax by conveniently putting the political agenda of the incumbent president in line with that of Congress and the state legislatures.

As pointed out repeatedly in this work, the driving force of the process was the Executive, which enjoyed the deference from the other branches of government and the state and local leadership around the country.

The party served as the structure to channel either support or dissent from all ranks (as long as they were subordinated to the party, as most parts of society were) to the presidential legislative agenda. Dissent was traditionally resolved through the

¹⁰⁸ *Supra*, note 104, at 247.

exchange of favors and promises to further the political careers of those who dissented. In case the dissenters did not relent, the only possible outcome was political exile; being pushed outside the party's structure meant there would be no possible future for those exiled.

Roderic Ai Camp provides a remarkable explanation of how these dynamics within the PRI guaranteed an enduring period of political stability since the 1930s,

“The most important institutional political contributor to sustaining [stability] was [the] Institutional Revolutionary Party (PRI). The government and party leaders were able to maintain their dominance and control over the electoral process and national leadership in all three branches of government as well as among state governors until the 1990s. Mexican political leadership affiliated with this party was successful in achieving this goal because they were *pragmatic in orientation*, welcomed ambitious, younger politicians from both the ideological left and the right, and actively recruited talented figures in secondary, preparatory, and university environments. *Each generation of politicians mentored a younger generation, contributing to an incremental quality in their personnel, while introducing new blood to each successive generation.* Eventually, within its own ranks, *an increasing number of politicians became disenchanted with the governing elite either because they were left out of the decision-making process, or truly wanted a more open and decentralized process for selecting future leaders.*”¹⁰⁹

4. The Practice of the “Dedazo”

Inasmuch as indefinite reelections triggered the bloody revolutions of 1876 and 1910, the new regime that resulted from the institutionalization of the revolution

¹⁰⁹ Roderic Ai Camp, MEXICO: WHAT EVERYONE NEEDS TO KNOW, at 40 (2011); emphasis added.

established an enduring approach to the transfer of power that was embodied in the *Maderista* revolution's slogan: "Effective Suffrage, No Reelection."¹¹⁰ Instead of relying on democratic methods to select the candidate that would succeed an incumbent President, the PRI depended on an informal privilege of the President to select his successor at the end of his term. As explained by Jo Tuckman,

"During the PRI regime the incumbent president had reserved the right to designate his successor, who would then go through the legitimizing ritual of elections everybody knew he would win. This process was known as the *dedazo*, or 'the finger'."¹¹¹

This practice, in my view, was the key to understanding the political stability that the PRI enjoyed for almost six decades. As we will see in the next chapter, the collapse of the PRI's hegemony began when this "presidential privilege" was challenged.

5. Lack of Meaningful (Competitive) Political Opposition

As projected by the PRI, a sustained period of economic expansion unfolded for almost four decades (1930-1970) and served to legitimize the regime even at the cost of democracy and civil liberties. An unparalleled process of governmental proliferation also served to consolidate the strong rule of the PRI across the nation and economic progress helped to gain international recognition and support.

¹¹⁰ Paradoxically, by formally preventing any incumbent President from being reelected, the regime was not at odds with the prospect of having a single-party winning the Presidency, Congress and state legislatures indefinitely and without any significant competition. This, in the end, led Madero's legacy to be utterly forgotten. As Ai Camp puts it " [Self-perpetuating] personal leaders like Díaz were replaced by a perpetual political organization (the PRI) allowing a rotating pool of ambitious politicians to govern Mexico for seven decades." See Roderic Ai Camp, MEXICO: WHAT EVERYONE NEEDS TO KNOW, at 97.

¹¹¹ Jo Tuckman, MEXICO. DEMOCRACY INTERRUPTED, at 70 (2012).

However, the lack of political competition caused by the complete absence of other political forces with real chances to be elected gradually brought to the surface an endemic feature that ultimately put the regime into question, by exposing its major flaw: the nonexistence of free elections and real democracy in Mexico.

This will be explored in more detail in the next chapter, in which we will analyze a period of radical transformations in Mexican society that ultimately led it to demand political pluralism and free elections as the basic foundations of a new social understanding. This ultimately set the stage for a new phase of our constitutional regime.

III. THE CYCLE OF POLITICAL TRANSFORMATION AND CONSTITUTIONAL CHANGE IN MEXICO

With this brief historical analysis of the foundations of the successive constitutional regimes reigning in Mexico since its proclamation as an independent republic in 1821, we can identify, a pattern with six recurring phases. In the first phase, factions opposing the governing coalition mobilize to voice their growing sense of dissatisfaction with the way in which public affairs are conducted, focusing on the poor or disappointing performance of the incumbent President. In the second phase, the factions opposing the governing coalition claim to be the legitimate voice of the People and advance a reformist agenda that most of the time implies the removal of the incumbent government, by use of force, if necessary. In the third phase, the governing coalition and its opposing factions spiral downward toward a violent showdown, while still contemplating the possibility of an eleventh hour elite settlement. In the fourth phase, if, on the one hand, the governing coalition prevails, it promotes national reconciliation by means of constitutional reform intended to redress the evils that triggered the rebellion; if, on the other hand, the opposing factions succeed in their

endeavor, they either call for new elections or for a constitutional convention to draft a new constitution that will include their reformist agenda. In either case, the fifth phase, the most likely outcome is a new constitution or a series of radical changes to its previous version. The critical components of the new legislation are focused on those matters that produced the conflict in the beginning. In the sixth and final phase, The victors, most often speaking through the President—announce that constitutional order and social peace will endure at last and that the country should move forward in a path of progress and national reconciliation.

Trend Description

The formal foundations of the constitutive process in Mexico are enshrined in the Constitution of 1917. However, there are older, culturally distinctive forces that have shaped and oriented the process since the 19th century. Four such features are commonplace in Latin American countries, and have been referred to as “recurring trends”¹¹²: ideological dualism; corporatism; anomie; and concentration of power. Each of these features has influenced and shaped the constitutive process in Mexico since the 1800’s. I first give a general description of each of these trends, then later demonstrate their specific impact on the constitutive process in the Mexican context.

Ideological dualism refers to the continuous tension between two different visions of reality. On the one hand, there is the liberal tradition, which has favored secularism, merit-based advancement, critical approaches to mores and traditions, while remaining skeptical of the claims to legitimacy advanced by some of the traditional participants in

¹¹² Carlos S. Nino, *RADICAL EVIL ON TRIAL*, at 44-50 (1996). Professor Nino describes what he calls the “four recurring dynamics” that emerged in Argentina since the beginning of the 19th century. Considering that there are remarkable parallelisms between Argentina and Mexico, not only in the shaping of their cultural mindsets but in their historical development, and due to empirical evidence, I will follow Professor Nino’s description of these trends to provide the constants in Mexican contemporary history as well.

the constitutive process, especially the church and the military. On the other hand, there is the conservative vision, which advocates the importance of traditions, social differentiation, the predominance of certain groups in society as the church, the military and economic elites, favoring a closed framework that defends traditional social institutions. The polarization of both visions and their supporters in different times throughout history has often resulted in the paralysis or counter-developmental scenarios that I described above.¹¹³

Corporatism is a bi-frontal feature of Latin American ethos. It has served as a means of controlling society through the state apparatus. This is clearly evinced by the authoritarian mobilizations of the working class to support the hegemonic party's continuance in power. Another aspect of corporatism can be seen in the way in which different interests or pressure groups express their opinions toward the traditional decision makers.¹¹⁴

Anomie, a legacy of the Spanish colonial period in Latin America, is clearly perfectly captured in the words of Professor Nino: "Here the law is respected, but not obeyed."¹¹⁵ It refers to widespread indifference toward social, moral and legal norms. This prevalent attitude has led to corruption in the state apparatus and a failure to eradicate corruptive practices.

Finally, the *concentration of power* is another trend inherited from the Spanish colonial regime. The political ethos has come to embrace a predilection for charismatic

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*, at 47. Carlos Nino notes that this expression was frequently used in the colonial period to describe the indifference of local officials who used it to the laws enacted in Spain for the colonies in America. Carlos Nino makes a comprehensive analysis on the implications of an anomic culture in the establishment (or not) of the rule of law in Argentina that serves very well to our own inquiries. See Carlos Nino, UN PAÍS AL MARGEN DE LA LEY (2005).

unipersonal exercise of authority.¹¹⁶ As we will see, concentration of power is root cause of the closed, non-inclusive constitutive process decision-making in Mexico.

The Dynamics of the Constitutive Process in Mexico

The Mexican legal system has displayed a distinctive preference towards monist constitutional thought.¹¹⁷ The people behind the phrase “We, the People” are in practical terms limited to participating in periodic elections to endow elected representatives with the necessary powers to conduct the decision-making process. There is no such thing as a “higher-law track” at work in Mexico, of the kind found to be at work in Professor Ackerman’s discussion of the American context.¹¹⁸

The shaping of the constitutional agenda is usually encumbered by an “electoral myopia” which limits itself to each party’s electoral program; thereby losing sight of the larger goal of promoting advanced citizenship.

The process is initiated when any branch of government submits a proposal for Congressional deliberation; these are most often initiated by the Executive Branch, and often reflect the electoral ambitions of the President and his cohort of advisors. These advisors are critical stakeholders in the formulation and analysis of the proposals and are actively involved in deliberations concerning them, and so often use the proposals as a way of asserting their will for the maintenance of their hegemony.

Upon submission, the proposal is deliberated in fine-grained detail in both Houses. Political parties and labor unions¹¹⁹ especially relish these moments, since it gives

¹¹⁶ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 657-664 (2000). Professor Ackerman provides a comprehensive explanation of the cult of personality and the threats that it poses to traditional separation of powers.

¹¹⁷ See B. Ackerman, *supra*, note 2.

¹¹⁸ Bruce Ackerman, WE THE PEOPLE: FOUNDATIONS, at 6-10.

them an opportunity to influence the proposal in a way consistent with their partisan interests. The constant struggle between the President and his supporters on the one hand, and the opponents on the other, leaves just two possible outcomes, both of which may not be desirable from the perspective of the larger constitutive process (I will here refer to the first scenario as “accommodation” and the second “deterrence”). In “accommodation”, the two factions –the President and his opponents- are able to reconcile their interests in a manner that favors the ultimate approval of the proposal. The second scenario, “deterrence”, envisages a larger strategy by the ruling faction. This involves seemingly flexible deliberations in the first instance, which serves only to placate the interests of the opponents, such that they do not voice their opposition during the deliberations on a second proposal, which is critical to the ruling faction and is introduced only after the culmination of the process of accommodation. Since the second proposal embodies pivotal objectives of the ruling faction these must be passed with as little opposition as possible. This process highlights the appeasement of the opposition by the ruling party such that the most pressing electoral proposals of the party in power are accepted in Congress with little or no opposition. This process of political temerity brings to the fore the perniciousness of the absence of the voice of the People in the deliberative process. An analysis of the role of the participants in the political arena of Mexico will lend further credence to this analysis.

A. PARTICIPANTS

1. Governmental Institutions

¹¹⁹ As a legacy of the corporatism that resulted from the Mexican Revolution and the rule of the hegemonic party (PRI) in Mexico for 72 years, unions belonged to the party from the very beginning, and were controlled by it. Therefore, even nowadays, the larger unions in Mexico still adhered to the PRI and they still postulating candidates together in order to have the interests of the party as well as those of the union, represented in Congress.

Governmental institutions bear the greatest influence on the constitutive process in Mexico. Putting it succinctly, they are the awarders, as well as the awarded. They control all initiatives in varying degrees and at all stages- from cradle to grave.

a. Presidency

History has witnessed the President playing a decisive role in Mexico's political decision-making. The constant of our political ethos, the "concentration of power",¹²⁰ has accorded the Presidency with insurmountable power. A direct consequence of this constant has been the total absence of the creativity and imagination that a political system requires in order to serve all strata of society effectively.

For the last three quarters of the past century, the President was the embodiment of the political system as whole.¹²¹ The Legislature and the Judiciary were little more than his minions, acting on his absolute authoritative will. The 1980's witnessed a gradual shift in the equation of power. The electoral triumph of the main opposition party brought about this erosion of presidentialism. The vacuum created by the demise of the earlier hyper-presidentialism generated frenetic power grabbing among the rest of the participants. Since then, the President's powers have been shackled considerably and brought under the permanent scrutiny of the other actors. However, public memory, though generally considered short, retains the imprint of earlier times: It is often argued that the President has been held hostage to the partisan interests of myopic participants, thus depriving him from working on an agenda of his own, which many consider a boon for the greater good of the nation.

¹²⁰ *Supra*, note 112, at 48.

¹²¹ Daniel Cosío Villegas, *EL SISTEMA POLÍTICO MEXICANO. LAS PROBABILIDADES DE CAMBIO* (1976). Daniel Cosío has provided in the eyes of many specialists, the best analysis of the political system in Mexico and the presidentialism that resulted after the Mexican Revolution. Cosío's concept of the so-called "concentric circles" depicting how the whole political system spun around the President and how all decisions were ultimately taken by him during his term in power – "A sexennial monarchy" as Cosío refers to it- is a key notion for understanding the political ethos in Mexico after the Revolution.

b. Congress

The Legislative arm of government is experiencing a newfound independence. Previously it functioned more or less as an appendage to the President's will. However, since 1997, there has been an increase in the number of opposition parties represented in Congress, thereby altering the balance of power. The President's party no longer enjoys absolute control of Congress. This new political reality has compelled Congress to conduct an inner deliberation within the different political lobbies in order to develop the constitutive process. They have made Congress the arena where they spar with one another in an attempt to express their interests over those of others in the most meaningful manner.

Since Congress is the primary arena of political decision-making, lawmakers, however, make a concerted effort to keep the institution insulated from public participation and scrutiny. As a result, there is heightened unaccountability. For example, disallowing reelection for members of Congress¹²² reduces incentives for them to serve the interests of their constituencies. This particular feature of representative government in Mexico lowers the esteem of the legislative body in the eyes of the public.¹²³ Lawmaking is considered distanced from the actual identifications, expectations and demands of the constituents.

¹²² Article 59 of the Mexican Constitution provides that Senators and Members of the house cannot be re-elected for consecutive terms, eliminating the single most powerful incentive for lawmakers to be accountable to their constituents. The strongest provision regarding non-reelection in Mexico refers to the Presidency and it is the legacy of the leitmotif of the Mexican Revolution "Sufragio efectivo, no reelección" ("Effective vote, reelection not"). It is provided in Article 83 and expressly prevents those who have executed the office of President of Mexico from being re-elected.

¹²³ In a poll conducted by one of the major diaries in Mexico in August 2008, 24% of those consulted had a favorable opinion of Congress. *See* <http://busquedas.gruporeforma.com/reforma/Documentos/DocumentoImpresa.aspx>, March 11, 2009.

c. Judiciary

The Judicial Branch is also experiencing regenerative independence. In 1995, the Judiciary was restructured and became more transparent and accountable to the public. Appointments of Supreme Court Justices are now based more on merit rather than political affiliation. Even though the selection process is still controlled by the political parties, Congress, and the Presidency, the independence of the Judiciary as an institution has remained unblemished. However, for this very reason, the Judicial Branch is experiencing problems of counter-majoritarianism, particularly while justifying judicial review.¹²⁴ By introducing televised deliberations and providing informative access to court material, the Supreme Court is attempting to gain greater legitimacy¹²⁵ after decades of silent subordination to the President. Over the past few years, it has asserted the “right degree of independence.”¹²⁶ Notwithstanding these laudable efforts, the excessive length of judicial deliberations and the time taken to arrive at decisions coupled with a lack of professionalism at the lower strata of the Judiciary greatly mars its public reputation.

The Judiciary, particularly the Supreme Court, has focused predominantly on private law adjudication, following the so-called “dispute resolution model” which views adjudication solely as a process to resolve private disputes. The other, often ignored model, is “structural litigation.” This refers to that form of adjudication that emerged in the United States during the civil rights era. It is characterized by two main features: the

¹²⁴ I am referring to Alexander Bickel’s “counter-majoritarian” difficulty. *See* Alexander M. Bickel, *THE LEAST DANGEROUS BRANCH. THE SUPREME COURT AT THE BAR OF POLITICS*, at 16-23 (1986).

¹²⁵ *See* Robert A. Burt, *THE CONSTITUTION IN CONFLICT*, at 374 (1992). Professor Burt refers to the legitimacy of the Judiciary in these terms: “The Supreme Court must never conclude that its authority to act or to withhold action is unquestionably legitimate. For the same reason, the Court must never conclude that other institutions or individuals have unquestionably authority to coerce anyone.”

¹²⁶ On the independence of the Judiciary *see* Owen Fiss, “The Right Degree of Independence”; *see also* Robert A. Burt, “Judicial Independence and Constitutional Democracy: Lessons from the U.S. Experience”; both in *Irvin P. Stotzky (ed.), TRANSITIONS TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* (1993).

awareness that the basic threats to civil liberties are posed not by individuals but by the state apparatus; and that unless that apparatus is restructured, the threats to constitutional rights will not be eliminated.¹²⁷ Structural litigation remains a panacea for our Judiciary. As Professor Bruce Ackerman eloquently describes, the Judiciary, in enforcing constitutional rights, can take up either of two attitudes: One is to allow the natural separation of political and legal times to persevere until society witnesses the evolution of social mores, or second, to embrace judicial activism in the attempt to meld political and legal processes while adjudicating constitutional rights. Consequently, this process would create a strong precedent for the protection of these rights for posterity. It is this kind of activism that is expected from the Mexican judiciary in these trying times.

d. Bureaucracy

Traditionally, members of the official party composed the state apparatus. The bureaucracy was considered to be simply an extension of the ruling party. The appointment of public officials was contingent on their political affiliation and ability to win the favor of the party elites, a practice that continued for several decades. It created a general perception that the only formula for bureaucratic success was to work for the government and muster political favor. Such practices –still prevalent in state apparatus– undermined the quality of public service. The lack of accountability of public officials stemming from being under the protection of political superiors has been gradually eroded, but has not undone the damage caused by decades of dysfunction. However, the technocrats were a pleasing exception to this state of malfunction. This category consisted of upper-level public officials educated in the best institutions in Mexico and abroad and endowed with exceptional professional skills. Their efficiency saved the day

¹²⁷ Owen M. Fiss, *THE LAW AS IT COULD BE*, at 48-58 (2003). Professor Fiss explains the two predominant models of adjudication in the United States and in contrasting them, defends the social value of structural litigation to protect civil rights.

for the Mexican bureaucracy, the silver lining in the cloud the bright side of a bad situation. On many occasions, it even improved the performance of the state organizations where they worked.

e. Political Parties

The Mexican political system is based on a multiparty structure, which serves as the link between the citizens and the State. At the dawn of the Mexican Revolution, the political factions clustered together as the Partido de la Revolución Mexicana (PRM), which was later transformed into Partido Nacional Revolucionario (PNR). Later, in 1929, it attained its present form as Partido Revolucionario Institucional (PRI- Institutionalized Revolution Party). The peculiar feature of PRI was that it concentrated the power of ordinary citizens -chiefly, workers and peasants. It also centralized the full range of political ideologies, from the most liberal to the most libertarian. The President was not only head of state, but also, the head of the party. He had the unique privilege of appointing his successor to the Presidency. He also approved all nominees for each local and federal election. The party's allegiance to the President was unquestionable. However, in the 1970's, Mexico bowed to international pressure and allowed opposition parties to have greater representation in Congress with the goal of enhancing democratic plurality. A series of constitutional reforms were undertaken as a result. These reforms gave opposition parties sufficient representation to dislodge the PRI monopoly on the decision-making process in Congress.

Political parties have a life of their own, unaffected by social movements or public critique. They have shown that they possess the final word in the decision-making process, which they have molded according to their interests. Frequent political bargaining, undertaken secretly, coupled with mere lip service to transparency, goes a long way in distancing the People from the political process.

A regressive constitutional reform allowed only political parties to enter into contracts to buy airtime on television broadcasts in order to promote their electoral programs. This privilege undermined the access of other participants to one of the most common forms of information dissemination. The Judiciary reviewed this reform and surprisingly upheld its constitutionality. As a consequence, political parties have the sole right to the use of the mass media to reach out to the People, thus delivering a deathblow to free debate between all constituents.¹²⁸

Campaign finance for political parties is another characteristic feature. Each year political parties are assigned almost 0.5% of the annual budget for their campaign finance.¹²⁹ The threshold of accountability for this budgetary allocation is almost non-existent and corruption is rampant in the management of these budgets.

Recent opinion polls demonstrate that political parties are losing public confidence and that the average citizen does not feel adequately represented by any of them.¹³⁰

f. Labor Unions

One of the greatest achievements of the Mexican Revolution was the establishment of freedom of association and the protection of the working class expressed explicitly in various constitutional provisions. This resulted in the labor unions attaining significant influence in the state apparatus. Becoming an extension of the

¹²⁸ In October 2, 2008 the Supreme Court granted a writ of certiorari to a group of citizens and private associations that filed a collective pleading challenging the constitutionality of the legislative procedure that was followed for the electoral reforms made in 2007 preventing citizens and organizations different to political parties to access mass media –radio and television in particular- to convey their ideas. The case was remanded to the lower court and it granted jurisdiction in January 16, 2009.

¹²⁹ *See* http://www.apartados.hacienda.gob.mx/presupuesto/temas/pef/2009/temas/tomos/tomo_1/tomo_1_i09.pdf, March 11, 2009.

¹³⁰ The same study conducted in August 2008, shows that the least well regarded/least respected institutions in Mexico are the political parties, with just 22% of public approval. *See* <http://busquedas.gruporeforma.com/reforma/Documentos/DocumentoImpresa.aspx>, March 11, 2009.

official party. The original purpose of the unions – that of protecting the interests and rights of their members was quickly forgotten, as they zealously embraced the dominant political ideology and became tools of political mobilization and expression of support.

After the decay of the hegemonic party, unions remained active participants in the process of decision-making, either by encouraging initiatives that would increase their privileges, or by opposing initiatives that would subject them to transparency and accountability. The degree of opacity prevailing in the management of unions has eroded their public image and they are now widely seen an obstacle to development.¹³¹

g. Military

The triumphant generals of the revolution, after consolidating the constitutional regime, established a professional military. The subsequent years of the revolution saw the military presiding over the government. In the mid 1940's, power shifted from military to civil control.¹³² Since then, the military has played such an important institutional role that has become one of the most revered public institutions in Mexico.¹³³ Due to an unwritten code, the military does not take an active part in the political process. However, in matters of national security, it plays a discrete but key role in decision-making.

¹³¹ Polls taken in 2007 show that public support for unions and its leaders fluctuate between 20-30%. *See* <http://busquedas.gruporeforma.com/reforma/Documentos/DocumentoImpresa.aspx>, March 11, 2009.

¹³² On the matter of civil-military relations, earlier works of Samuel Huntington are particularly instructive. *See* Samuel Huntington, *THE SOLDIER AND THE STATE. THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* (1957).

¹³³ As a poll taken in August 2008 demonstrates, the military is held higher in the public eye than any other participants in the study, with 63% approval rating. *See* <http://busquedas.gruporeforma.com/reforma/Documentos/DocumentoImpresa.aspx>, March 11, 2009.

2. Non-Governmental Organizations

Despite the fact that non-governmental organizations enjoy diminished influence as compared to governmental organizations, the current process of political transformation in Mexico has endowed the former with enough power and authority to influence, and in some cases, even control, the processes of decision-making. I will now briefly enumerate their roles in the constitutive process.

a. Private Sector (Businessmen)

When I refer to the private sector, I describe a very small group of groups, associations and individual businessmen representing a large portion of the private wealth in Mexico. These business elites are formidable actors in the constitutive process, particularly in economic affairs. As the government embraced privatization, reduced its size and assigned several contracts to the private sector, it gained the enduring allegiance of the business elite. However, this allegiance was not always unconditional. By the end of the 1970's, the chambers of commerce and most business associations began to demand greater accountability in public functions and a fairer taxation policy. Notwithstanding these ripples of dissent, the private sector has generally played a central role in pushing initiatives chiefly tax policies favorable to their interests.

b. Media

The media is perhaps the most influential participant in the process today. Due to unparalleled public reach and lenient regulation, the media—particularly—television networks—have acquired an increasing influence on public affairs. Doing little more than serving as the unofficial press service of the prevailing government, the media have progressively experienced a greater degree of independence.

However, in managing and conveying information, the media are not subject to any regulation either, despite their lack of shared code of ethics. This absolute lack of a control mechanism results in media being used as an instrument of intimidation against proponents of reform and regulation, effectively alienating proponents of change from the constitutive process.

As the law stands today, the only political participants allowed to communicate their ideas through television networks are political parties. This dichotomous relationship between political parties and “independent” television networks is one of the most concerning threats to democracy. It is the most obvious assault on the freedom of citizens to take part in public affairs.

c. Non-Governmental Organizations *strictu sensu*

The so-called “third sector”¹³⁴ has acquired greater importance over the last two decades. Since their origin was outside the state apparatus, their survival and perdurability has depended on their commitment to their goals and the support of particular sections of society that they serve (for example women, children, elders, environment, human rights). Their participation in the constitutive process is gradually increasing. In particular, they address a mosaic of subject matters and offer a more objective analysis of a range of issues. In many ways, they have been pioneers in the attempt to open the constitutive process to non-traditional participants.

d. Intellectuals

Intellectuals have traditionally been the critics of the status quo. For over a century, they have criticized the way in which the government relates to the citizens.

¹³⁴ The expression “third sector” is commonly used in Mexico to denote the Non-Governmental Organizations in order to distinguish them from traditional public (governmental structure) and private (business organizations) institutions.

From the very beginning of the authoritarian regime, intellectuals denounced the lack of political plurality and political freedom in Mexico. They embodied public reason. However, due to the authoritarian practices of the ruling party, intellectuals were frequently silenced by intimidation or coercion, with many fleeing the country as a result. Those who stayed were often suppressed or made to take on a sympathetic view of the regime.

However, it was the intellectuals who provided the narrative of the constitutive process that followed the Mexican Revolution, as well as of the distribution of power amongst the elites over the next decades. They also brought to light the failures of the political system as well as the challenges that lay in the path to democratization. They provided the agenda of change for the democratic regime that followed.

e. The Church and Religious Associations

The Roman Catholic Church has played a decisive role in Mexico ever since the Spanish colonial regime. Due to ideological dualism, the tension between the Church and the State has been a constant. After the end of the Mexican Revolution, the State undertook a radical campaign against the Catholic Church that escalated into a war, generally known as “Guerra Cristera.”¹³⁵ The outcome of this war was a shaky truce between both groups. The Church limited its role to spiritual ministry. In the 1990’s, after a series of constitutional reforms that granted legal standing to religious associations, including the Roman Catholic Church, the institutional relations between these institution and the state attained an unprecedented degree of tolerance and communication. Historically, Mexico has been almost 90% Catholic and religious fervor of its population is evident in a diversity of cultural and social institutions. However, in

¹³⁵ The most prolific historical work pertaining to the “Guerra Cristera” is by Jean Meyer. *See* Jean Meyer, *LA CRISTIADA* (1975).

the last decades, the growing number of sects and religious faiths has weakened the dominance of the Catholic Church in Mexico. This notwithstanding, Catholicism remains the preferred religion of the political elite.

3. Other Participants

a. Local Leaders

Local leaders exhibit some of the clearest expressions of influence in the micro-constitutive process. They conduct unilateral decision-making in regions. Due to the historical trend of concentration of power, these leaders enjoy substantial independence in local decision-making. At one time, local leadership served as one of the main assets of the ruling party in its attempt to maintain control over the nation. By bestowing political favors and economic rewards, the party relied on local leaders to assure and/or manipulate the local electoral results in order to retain power in the region.

Due to the high degree of poverty in large parts of Mexico, local leaders still control most decisions. This is primarily because they are the only ones sufficiently capable of obtaining the necessary means of subsistence for their communities. Unscrupulous participants often take advantage of the situation to obtain the acquiescence of the local leader to conduct their illegal activities without hindrance. In exchange, they reward the leader with financial support that is significantly greater than the contribution that they receive from the government.

b. Illicit Participants¹³⁶

Over the last twenty years, organized crime has spread its tentacles throughout Mexico, leading to a rise in instances of violence and intimidation. The emergence of this anti-social force has led to a breakdown of the constitutive process. Drug organizations, local gangs, warlords and thugs have systematically bribed key public officials and now conduct their business with impunity. Furthermore, they have attained such a high degree of power that they have managed to undermine the functioning of key governmental institutions. But their threat to society goes further than this: Their continuous efforts to increase their influence has resulted in a brutal and bloody struggle that has spilled onto the roads, putting innocent lives at risk. Due to this reality, the incidence of violence in Mexico is extremely high. Illicit participants are today the most dangerous threat to our peaceful existence.

c. Indigenous People

There are approximately 62 indigenous communities in Mexico, numbering around 10 million people; most of these have their own language and customs. Since the Spanish colonial regime, the majority of indigenous communities have been able to preserve their traditions. They live in relative isolation from the rest of the population. Their livelihood comes primarily from agriculture and craftwork. Due to their inability to speak Spanish, their participation in the constitutive process is minimal. However, as a political concession and due to international pressure, the state has created public offices and programs to assist the advancement of indigenous people.¹³⁷ However, these

¹³⁶ Professor Reisman explains that criminals are rarely brought into refined legal discussion and regrets this tendency, due to the fact that thugs are instructive as a power phenomenon. Therefore, by following the teachings of his mentor Harold Lasswell, Professor Reisman proposes to include thugs and organized crime as participants in any constitutive process of authoritative decision's analysis. See W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 110 (1981).

programs have been unsuccessful in bringing about social congruence and they remain marginalized from the process of decision-making. For this reason, their expectations are the lowest among all the social groups in Mexico.

d. Foreign governments

As interdependent as we are in today's metamorphosed world, the influence of foreign governments on the constitutive process cannot be underestimated as an important variable influencing decision-making in Mexico. Due to significant foreign investment in Mexico, the demands of foreign nationals for safety and security have always been an important consideration for the government. Foreign governments often engage in dialogue with their Mexican counterparts to advocate for the interests of their nationals. Furthermore, in terms of strategic geopolitics, foreign governments pay close attention to the outcomes of the macro- and micro-constitutive processes in Mexico. The classic example of this communicative process of mutual cooperation is best exhibited in the relations with the United States. The United States, because its own political, economic and national security interests, is a permanent participant in ordinary decision-making in Mexico.

Having provided a brief description of the participants in the constitutive process, I will now proceed to describe the perspectives, situations, bases of power and outcomes that characterize decision-making in Mexico.

¹³⁷ As Professor Reisman underscores, the responsibility of states to the "indigenous peoples" within their borders has acquired an international currency and is now the subject of a number of initiatives to forge a common policy expressed in multilateral conventions. He also explains that when these claims have been made by the elites of the smaller groups, they have been framed in terms of "group rights". See Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 411 (1993).

B. PERSPECTIVES

1. Identifications

As a result of the cohabitation and intermarriage between native communities and Spanish colonizers in the 16th century, there is rich social diversity in Mexico. However, this heterogeneity has not prompted a historical consensus on national identity. On the contrary, vast social and economic stratification has influenced the presence of a constant feeling of struggle and resentment between the haves and the have-nots. The former consist primarily of descendants of European immigrants in the 16th and 17th centuries, and the latter, of the indigenous people. Considering that development has not been inclusive enough to lead to an equal distribution of wealth in society, there has historically existed an insurmountable gap between the privileged classes and the vast majority of the rest of the population. Thus, socio-economic status is a key variable of social differentiation in Mexico.

These asymmetries have a great impact on the distinction between urban and rural settings. On the one hand, between urban groups of major cities and those of smaller, relatively backward cities, and on the other hand, between rural townships close to industrialized regions, which tend to be more prosperous, and those further away.. Among each one of these social settings—urban and rural, centralized and distant—there exist great differences in social stratification. These differentiations perpetuate inequalities that undermine the very essence of democracy by inhibiting a significant section of the society from taking an active part in the constitutive process.

As a result, it has been very difficult to define a common identity among Mexican people. For various socio-economic, cultural, religious, political and ideological reasons, Mexican society is greatly fragmented. In fact, ideological dualism has played a crucial role in dividing Mexican society since the 19th century. The struggle between conservative and liberal views of reality has kept the country at odds ever since. This lack of [basic

identifications] constitutes an essential element for the elaboration of further strategies that would enhance our identity as Mexicans; an in depth-analysis of the strife within Mexican society is beyond the scope of this work, however.

2. Expectations

The absence of a strong national identity had a visible impact on the expectations of groups and individuals in Mexico. The more advantaged socio-economic groups are characterized by very high expectations. They share a self-imposed burden to help alleviate Mexico's many problems. For them, the main question in the constitutive process is whether they would be able to retain their privileges and way of life in case of any potential reform. As long as this is answered in the affirmative, these groups pledge themselves to reform. Gradualism and steady progress are the distinctive expectations for these groups.

On the contrary, among the less privileged groups, living a life of poverty and extreme deprivation, the expectations are very low. They are satisfied with two square meals a day, enough seed to sow and the hope for a fruitful harvest. They aspire for a peaceful existence with little or no participation in the constitutive process –this reduces their expectations substantially.

Between these two extremes, there lies a middle class that constitutes the critical mass of the process of decision-making in Mexico. It spurs reform of the constitutive process by arguing for greater inclusiveness, democratization and human dignity. Unlike the advantaged groups that are concerned only with retaining and enlarging their privileges, this middle class strives for a better distribution of all the values that were mentioned at the inception of this work. Inclusiveness is the key element of this task. Unlike the less-privileged groups at the bedrock of social structure,¹³⁸ the middle class

¹³⁸ Numbering about 40 million people.

has at the center of its concerns the quest for transformation in order to alleviate the condition of the dismally depressed masses.

In terms of expectations, however, one variable has a particularly strong influence on the constitutive process: the violence that has prevailed in Mexico in the last decades. Whether form actual or implicit intimidation, violence has shaped the way in which the constitutive process is conducted in Mexico, as well as its outcomes. The incidence of violence is significant due to the struggle between the State and organized crime groups, gangs and drug cartels in focalized parts of the country. Extensive Poverty in the peripheries of major cities also increases the crime rate. Notwithstanding the numerous expressions of dissatisfaction and demands for more security from urban citizens, the government has been overwhelmed in its efforts to lower the expectations of violence that characterize the constitutive process.

3. Demands

A lack of widespread common national identity in Mexico and a great variety of expectations lead to manifold demands. The current participants in the decision-making process both in its macro and micro dimensions are unwilling to let other participants diminish their influence. Conversely, those at the margins of the process struggle nonetheless to gain entry. There is a distinct connection between identifications and expectations with demands. As has been explained above, the level of expectations corresponds to the degree of demands that each group brings to the attention of the incumbent authorities. For instance, the demands of privileged participants (such as political parties and labor unions) are significantly more numerous and pressing than the demands of the less privileged. Paradoxically, of course, it ought to be the other way around. However, as organized as political parties, unions, business associations are, it is easier for them not only to express their demands but also to pressure the decision makers to favor them. The voice of the downtrodden is made to resound in the ears of

the decision maker only when there is a significant mobilization. The misery of the unprivileged finds voice mainly through the efforts of the middle class, who shape and form common interests.

Consistent with the goal of minimum order, the most relevant appeals to common interests include those directly related to the maintenance of this order: a decrease in intimidation and violence as instruments of change.¹³⁹ In the present case, the relevance of this demand and its fulfillment cannot be stressed enough.

C. SITUATIONS

Governmental participants predominantly conduct the process of authoritative decision in Mexico in a centralized manner. Since Mexico City is the seat of federal power, all major decisions are made by the political elites located there. As has been explained previously, the process is neither transparent nor significantly deliberative. Decisions are made at the “center” without a fair sense of its broader implications for the rest of the country. Consequently, conflicts arise between federal, state and local levels of government.¹⁴⁰ However, decentralization remains a goal of modern federalism.

That being said, the most concerning practice pertaining to “situations” or “arenas” of decision-making in Mexico is the restriction of decision-making to a handful of elites, elites who may not possess legitimate authority. They tend to discuss national affairs privately and their deliberations are completely inaccessible to ordinary citizens. The great concern pertaining to situations of authoritative decision-making in Mexico —

¹³⁹ Myres McDougal, Harold D. Lasswell and W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, in Myres S. McDougal and W. Michael Reisman, *INTERNATIONAL LAW ESSAYS. A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* (1981). The original version of this article was published in 19 *J. LEGAL ED.* 253, 403 (1967).

¹⁴⁰ In this respect the opinion of Cuauhtémoc Cárdenas, a prominent Mexican politician, former Governor of the State of Michoacán and Presidential candidate in 1988, 1994 and 2000, is particularly useful to emphasize the importance of downscaling the areas for decision-making in order to enhance the participation of local and state governments. Interview with Cuauhtémoc Cárdenas, Mayor of Mexico City 1997-1999; Governor of Michoacán 1980-1986; in Mexico City (Apr. 10, 2012). *See* Appendix, at 33-38.

as occurs in most Latin American countries--¹⁴¹ is that there are no transparent procedures for the administration of the constitutive process. This fosters political gerrymandering and corruption. Moreover, ex post public scrutiny of decisions is often fruitless.

D. BASES OF POWER

Power has been the defining feature of decision-making in Mexico. This is in part due to the legacy of authoritarianism imposed by the official party for over seven decades, during which the President and his appointees exercised power with full discretion over a lenient citizenry. Power was managed as a means of control and intimidation, rather than as a capacity and willingness to make a preferential expression effective.¹⁴² The difference is small yet fundamental: when power is used to make a preferential expression effective by intimidation or violence, it is inconsistent with the value of human dignity. Conversely, if exercised with an aim to minimize expectations of intimidation and violence, it is consonant with human dignity and will be regarded as exercise of legitimate power.

Authority, as the basis of power in the constitutive process, has been overshadowed by raw power in Mexico. The use of violence and intimidation against those who take lawful part in the process is the clearest example of how authoritarianism overshadows authority.¹⁴³

¹⁴¹ A comprehensive study pertaining to the functioning of the bureaucracies and decisionmaking processes in Latin American has been made by Professor Susan Rose-Ackerman, underscoring the wide differences of institutional operation in the region. Her insights into the Mexican case are extremely relevant here. See Susan Rose-Ackerman, *Public Administration and Institutions in Latin America*, article prepared for the "Copenhagen Consensus," Consulta de San José de Costa Rica, September 11, 2007.

¹⁴² *Supra*, note 137, at 110-111.

¹⁴³ Hannah Arendt, *ON REVOLUTION*, at 27-28 (2006). Here, Arendt's reflections on violence and its relation with authority are particularly relevant. In explaining the connections between violence and revolution, Hannah Arendt gives the example of the Roman republic as a model of political realm where authority, and not violence, ruled the conduct of the citizens.

E. OUTCOMES

In describing the outcomes of decision-making in Mexico, I have categorized them in terms of the eight preferred values: power, wealth, enlightenment, well-being, skill, affection, respect and rectitude.¹⁴⁴ The perspectives mentioned above serve to shed some light on the condition of each of these values.

1. Power

Considered as the capacity and willingness to make preferential expressions effective, power is currently exercised only by the most advantaged participants in the constitutive process. It is their choice and their alone to share their power with others. Since authority is still [not the basis for prescriptions in Mexico, the disruptive effects of violence often undermine effective decision-making. Consequently, if power remains concentrated in the hand of a few, the possibilities of transformation are minimal.

2. Wealth

About 70% of Mexico's national wealth is concentrated among a thousand families. At the other end of the spectrum lie around 40 million people who live in abject poverty. The distribution of wealth is highly imbalanced. Under the current situation, the rich get richer and the poor, poorer. The only way to change this dynamic is to devise mechanisms of social and political inclusiveness for the less privileged.

3. Enlightenment

Basic literacy has not sufficed in making Mexican society inclusive. Notwithstanding the fact that illiteracy in Mexico is relatively low, the quality of basic education is mediocre. One of the greatest obstacles to development in education is the lack of professionalism in the teaching ranks. Due to the overriding influence of their

¹⁴⁴ W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 580 (2007).

labor union and the power of union leaders, teachers enjoy great benefits that are not on par with their performance. Since they are not subject to performance evaluations and are [often involved in political] activities, the students receive deficient educations, which is in turn reflected in a lack of expectations and diminished accomplishments.

4. Well-Being

Although there has been an increase in life expectancy in Mexico, public health services are strained to their maximum capacity and are now at their breaking point. This is primarily due to the growing number of elderly people needing continuous medical attention. Disease in remote areas of the country is rampant increasing mortality and lowering life expectancy.

5. Skill

There was a considerable advancement in the development of skill after the conclusion of the Revolution. A large educational enterprise created a vast framework of institutions where knowledge was transmitted and shared in order to foster social-economical development. However, an expectation of broader dissemination of skills still exists.

6. Affection

Mexico is a traditional and conservative nation, where the institution of family is at the epicenter of an individual's life. The degree of social affection is intimately related to the sentiments that people develop towards their families and friends. However, as stratified as our society is, exclusiveness has increased. This has undermined the values of loyalty among inclusive groups.

7. Respect

Respect is determined by socio-economic position. The higher the position, the higher the degree of respect. There is a tendency to maximize both individual and

exclusive behavior. Merit-based social recognition is becoming increasingly important and accepted. However, the lack of a common identity prevents group members from perceiving themselves as full participants in the social process.

8. Rectitude

Anomie¹⁴⁵ is the worst enemy of rectitude in Mexico. The internalization of personal codes is dependent on how firmly human values have been implanted. Bribery and corruption are widespread practices that tend to undermine the rectitude of individuals.

For these reasons, individuals are often less interested in taking part in a process that systematically marginalizes them. Moreover, the lack of historical memory makes it easy for the citizenry to overlook the misdemeanors and abuses of its representatives, which further impedes accountability and the acquirement of a notion of mandate in Mexico.

After exploring the dynamics that characterize the constitutive process and having identified the participants, perspectives, situations, bases of power and outcomes of such a process, we will analyze in the coming chapters the distinctive features that distinguish contemporary political transformations in Mexico.

¹⁴⁵ Carlos Nino, UN PAÍS AL MARGEN DE LA LEY (2005).

PART III

THE CRITICAL PERIOD OF TRANSFORMATION: 1960-1988

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XII. THE INSTITUTIONAL EXIT: THE FOUNDING OF THE PRD AND THE CREATION OF THE *INSTITUTO FEDERAL ELECTORAL* (IFE)

It was an unexpected and quiet revolution. It started from the periphery of the regime and gathered momentum from within. In a quarter of century, the authoritarian regime of the PRI dramatically collapsed. Mexico had changed and the regime hardly noticed it. Here is the story of this critical period that transformed the face of our constitutional history.

I. ON THE CAUSALITY OF THESE TRANSFORMATIONS

The period of sustained economic growth between 1940 and 1970 brought a substantial change in social organization. The intermigration from rural settings to urban areas was one of the most salient consequences of the so-called “Mexican Miracle.”¹

According to Roderic Ai Camp, the Mexican Miracle refers to the longest continuous period of economic expansion in modern Mexican history, beginning with the administration of President Miguel Alemán (1946-1952), continuing with the administrations of Presidents Adolfo Ruiz Cortines (1952-1958), Adolfo López Mateos (1958-1964), and Gustavo Díaz Ordaz (1964-1970). As Ai Camp describes,

“Economic growth during these years averaged a consistent 3 to 4 percent yearly and was characterized by low inflation rates. By the 1960s, gross domestic product was averaging 7 percent. Most economists attribute this growth to several important conditions. Most commonly, they point to the import substitution strategy pursued by the Mexican government, which protected domestic industry through high tariffs on

¹ Roderic Ai Camp, *MEXICO: WHAT EVERYONE NEEDS TO KNOW*, at 109-110 (2011).

consumer goods and allowed the importation of capital goods. (In this period) [Mexico] began rapidly to shift from a rural to an urban society. It witnessed a huge internal shift in the population from small villages and towns to urban centers, as the percentage of Mexicans employed in agriculture declined and those in manufacturing and services increased significantly.”²

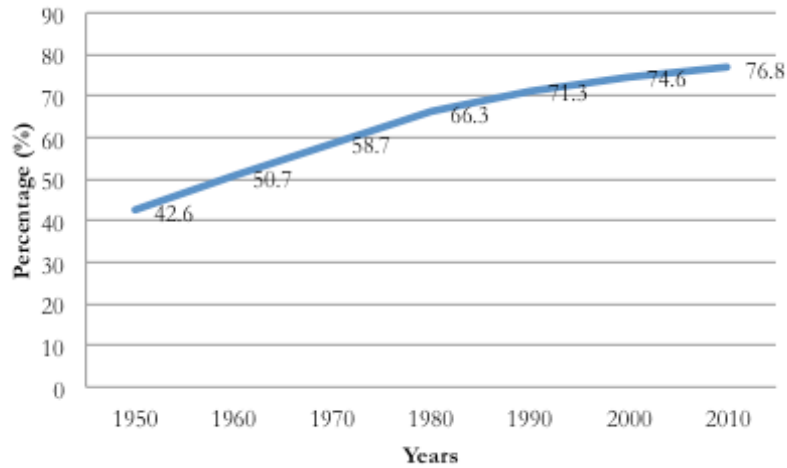
As we can see in the following chart, the migration of population to urban areas increased almost 8% per decade since 1950, which resulted in a rise of almost 40% in forty years. These figures were unprecedented and had a clear impact in framing a new political culture.

Table 1. Total population in urban areas, 1950 to 2010 (Percentage)³

Country	1950	1960	1970	1980	1990	2000	2010
México*	42.6	50.7	58.7	66.3	71.3	74.6	76.8

² *Id.*, at 110.

³ INEGI, *Censos de Población y Vivienda, 1950 - 2010*. These figures correspond to the census of June 1950; June 1960; January 1970; June 1980; March 1990; February 2000; and June 2010. It refers to population of 2500 or more.



An additional result of the economic expansion and the shift in the distribution of population was the proliferation of governmental agencies that required operators with sensitivity to local issues to further the party's influence in the states. Although these operators remained linked to their places of origin, they were based in Mexico City as the seat of the federal government and the party.

As is well known, urban populations tend to be more politically active than their rural counterparts; for this reason, as greater numbers of migrants moved from the periphery to the cities, political activism also increased. This phenomenon concurred with an expansion of professional middle class in Mexico since the 1940s.

From that decade until the late 1970s, the role of the National University as the heart of elite socialization and path of political ascent within the government structure was fundamental. However, the vitality of academic dialogue and exposure to dominant ideological trends around the globe also fostered an increasingly critical attitude among teachers and students that by the end of the 1960s were clearly influenced by democratic experiences from abroad that ultimately led them to challenge the status quo.

In this context, the education of Mexican elites abroad, particularly in the United States, also implied a change in the understanding of the regime's structure and operation. Inasmuch as these elites learned from other cultures, they aimed at applying their experiences and education in the service of refining existing structures and practices to democratize the political system. This led to rising expectations and demands of this professional middle- and upper-middle class elites educated abroad, who felt that the introduction of a democratic culture in Mexico was a plausible goal worth of fighting for.

In the midst of these gradual but enduring transformations, the political preference for the PRI began to decline, albeit rather slowly. A more politically active and critical urban professional middle class began to reshape the monolithic democratic culture fostered by the PRI in the preceding decades. In this endeavor, an ascending left gradually became the driving force behind social demands for meaningful change and political plurality. As we are about to see, by the mid-1960s, the decline of the PRI had already begun.

II. FIRST SPARKS OF CHANGE

In 1964, the regime was at its peak. The ability of the PRI to channel and integrate most of social and political movements into its structure was effective in deterring relevant opposition to the regime, which was mainly embodied by the right-wing *Partido Acción Nacional* (National Action Party - PAN), founded in 1939 as an ideological alternative to the PRI (then known as PNR). Since the beginning, the PAN framed its political platform around the principle of human dignity and its expression in the public space by empowering citizens to serve in public office outside the PRI's mainstream. As described by Ai Camp,

“[The] PAN was founded at the highpoint of Lázaro Cárdenas’ administration. Many of its founders were opposed to policies implemented by Cárdenas and the direction of post-revolutionary governments. In particular they were critical of the government’s orientation favoring the incorporation of socialist principles in public education, the anti-Catholic rhetoric of numerous government party officials, and, most significantly, the virtual political monopoly exercised by the Party of the Mexican Revolution (PNR’s successor in 1938) over every elected office from mayor to president.”⁴

Nonetheless, as of 1964, PAN’s opposition lacked sufficient force to push for further political liberalization. This drive was brought by social movements that surfaced as an expression of discontentment rejecting central elements of the status quo, mainly the axiom of absolute subordination to the president and the party leadership. As we shall see, a few major social mobilizations were triggered by labor unions and professional organizations in rejection of the regime’s systematic violation of their freedom of association.

The Train Engineers Movement

The first significant challenge was in 1959 with a national mobilization of the train drivers’ union, demanding an increase in their wages. By that time, it was common to have union leaders appointed by the government, which meant they were totally committed to the party rather than to the workers. As explained in the

⁴ Roderic Ai Camp, MEXICO: WHAT EVERYONE NEEDS TO KNOW, at 110 (2011).

previous chapter, dissent within the corporatist structure of the regime was strongly punished.

In this case, the train engineers decided to exchange their non-representative leadership for one that would advocate for their demands. They elected Demetrio Vallejo, a train driver from the state of Oaxaca, by an overwhelming majority. Vallejo did not betray the confidence of his peers and insisted on a wage increase. The government did not satisfy the demands and Vallejo called for a national strike on September 1, 1959. Telegraph operators and teachers joined the railroad engineers in solidarity. All were violently repressed by the police and Vallejo was arrested under the charges of *promoting social dissolution*, as provided in Article 145 of the Criminal Code, which served as legal justification of the regime's persecution of political dissidents. In the end, Vallejo and his followers were imprisoned for almost a decade and the regime settled the conflict by appointing a new, more receptive leadership to the unquestionable axiom of subordination. However, the legacy of this movement served as an inspiration for two other major mobilizations that at the end of the 1960s set the regime in a dramatic decline.

The "Navista" Movement

The second test came from within, from the so-called "subordinates," and was prompted by the rise of an independent local leader, a doctor from the state of San Luis Potosí, Salvador Nava, who challenged the hegemony of an also local *cacique* (a petty tyrant), Gonzalo N. Santos, who by 1958 had enjoyed almost two decades of unchallenged rule over the state of San Luis Potosí, of which he was governor from 1943 through 1949. However, Santos did not require the power of formal office to be the de facto governor of that state. He appointed and dismissed local authorities as he

pleased. Santos also owned almost half of the state's territory. He also managed, after the end of the revolution, to befriend each and every president in order to maintain his rule in San Luis Potosí unaltered. Santos' iron-fist rule experienced a dramatic change in 1958, when a professor of medicine from University of San Luis Potosí, Salvador Nava, decided to form an organization of local professionals and intellectuals to promote political change in San Luis Potosí and challenge Santos' rule. Nava was intelligent enough to align his organization with the PRI national popular sector, since he thought that meaningful change could only be possible from within the system.⁵

Nava's adamant enterprise inspired other local dissident groups to gather under his leadership in the *Unión Cívica Potosina* (Civic Union of San Luis Potosí) and nominated Salvador Nava to run for the office of Mayor of San Luis Potosí. Not without violent reactions from Santos and his group, Nava won the election for Mayor with 26,319 votes, as compared to the 1,683 of the candidate supported by Santos.⁶ The central government had no choice but to recognize Nava's triumph, and in the end, his organization became part of the PRI. The Nava movement showed that regime change from within was possible, at least at the local level; however, when Nava tried to run for governor two years later, his fate was not the same.

After serving for almost two years as Mayor of San Luis Potosí and implementing an administration open to public scrutiny and close to the people, Salvador Nava decided to run for governor as the PRI candidate (the only way to achieve the governorship at that time) and pushed for primaries in the party to select the nominee. In a personal interview with the president of the PRI, Alfonso Corona del Rosal, Nava was informed that he would not be the party's candidate. As an

⁵ Enrique Krauze, *LA PRESIDENCIA IMPERIAL. ASCENSO Y CAÍDA DEL SISTEMA POLÍTICO MEXICANO (1940-1996)*, at 245 (1997).

⁶ *Id.*, at 243-246.

illustration of the PRI's authoritarian practices and methods, here is a passage of this interview:

“Coronal del Rosal: Doctor (Nava was an optometrist), you will not be the PRI candidate for governor of your state;

Nava: General, you may be mistaken, since in San Luis Potosí we have not yet made the party's primaries;

Corona del Rosal: No, Doctor, with primaries or not, you will not be the party's nominee, even if you were to win those primaries, because in addition to the popular vote you would need something else;

Nava: What else would I need? The approval of the President?

Coronal del Rosal: No, Doctor, leave the President out of this;

Nava: Then, would I need your approval instead?

Corona del Rosal: Let's assume that you are right about my approval, doctor;

Nava: Well, I don't accept that, because you are not the party, the party is structured around its members, and it is their vote what I am seeking;

Corona del Rosal: You should wait doctor, it may be different. For the moment, I offer you to be deputy of the first district (in San Luis Potosí) and to reimburse you the money that you have already spent in your campaign;

Nava: General, I am not looking for a job. I have been called to participate as candidate for governor because the people trust me. And about your money offer, that is an insult, because you are treating me as if I was like those that call you to ask for your support to be deputies. [Hence] General, thank you for the invitation for lunch. I regret I accepted it, because what you have proposed is an insult.”⁷

⁷ *Id.*, at 247-248. The same excerpts from this interview also appear in Sergio Aguayo, *LA TRANSICIÓN EN MÉXICO. UNA HISTORIA DOCUMENTAL 1910-2010*, at 93-94 (2010).

Salvador Nava returned to San Luis Potosí and explained to his followers the contents and outcome of the conversation with Corona del Rosal. They decided to make a run for the governorship with Nava as an independent candidate. The Nava movement spread all over the state with unprecedented popular support. The party reacted violently against the rising mobilization: one of the leaders of the Nava campaign was killed in order to persuade Nava to withdraw his candidacy. He resisted the pressure and continued until the end of the election. The official candidate won by means of a massive and unabashed electoral fraud that led the Nava movement to civil disobedience. The army occupied the state capital of San Luis Potosí. All protests were prohibited. Nava's followers were repressed. The military seized the headquarters of the Nava campaign and arrested Salvador Nava and his closest aides. They were charged with the crime of social dissolution (as in the case of Demetrio Vallejo, the train drivers' leader). Nava was released free a month later. The message was clear: the governors belonged to the President –and to the party's leadership as well. As Enrique Krauze explains,

“Nava was not communist, nor sinarquista, nor panista, neither a wholehearted priísta. He was a common citizen who wanted to exercise political freedom in his municipality and his state, and he met [great] limits: he found that the exercise of self-government consecrated since the Constitution of 1857 equaled the crime of ‘social dissolution.’ In the 2352, theoretically free municipalities and the 32 supposedly sovereign states of the pretended federation, only one party had historical entitlements to govern: the PRI.”⁸

⁸ *Id.*, at 249; personal translation of the author.

The Medical Movement

One of the salient contributions of the post-revolutionary regime was the creation of a broad healthcare infrastructure that improved the quality of public medical assistance provided to the Mexican people. Two major institutions served this goal: on the one hand, the *Instituto Mexicano del Seguro Social* (Mexican Institute of Social Security – IMSS) that provided medical assistance and pensions to public and private workers and was funded by individual, employer and state contributions. On the other hand, the *Instituto de Seguridad Social y Servicios para los Trabajadores del Estado* (Institute for Social Security and Services for State Workers – ISSSTE) which—in contrast with the IMSS—was charged with providing health care and social security for federal government workers exclusively.

Most of the national medical force worked in these two institutions. However, their salaries and benefits were very low in the case of those who served at IMSS, and practically non-existent for those doctors working at ISSSTE. Between 1964 and 1965, these conditions led to a movement that gained national support demanding better employment conditions, particularly for those doctors and nurses serving at ISSSTE.

The movement started with almost two hundred doctors who were assigned to the largest hospital of ISSSTE in Mexico City, calling for a strike if their employment conditions were not improved. They were immediately removed from their posts. As a result, these doctors created the *Asociación Mexicana de Médicos Residentes* (Mexican Association of Medical Residents – AMMR) that would be later joined by a larger and more moderate organization, the *Alianza de Médicos Mexicanos* (Mexican Doctors Alliance – AMM) sharing their demands. Together, these two organizations pushed for the reinstatement of the doctors fired from ISSSTE and the

improvement of the working conditions at the hospitals, ranging from the salaries to the facilities and the services therein provided. The leaders of the movement met twice with President Gustavo Díaz Ordaz, who was reluctant to cede to all their demands; after all, in his view, neither the President nor the government could be subject to pressures of this sort. In the end, the President agreed to offer raises and some additional benefits for the residents. It seemed a reasonable and fair outcome; however, there was a twist: each of these organizations belonged to the official corporatist structure; hence, none of them were affiliated to the PRI. Consequently, they were subject to intense pressure from other labor unions to join the organization that centralized them all, the *Confederación de Trabajadores de México* (Mexican Workers Confederation – CTM). The movement did not have much room to maneuver, and most of their members started their affiliation within the ranks of official syndicalism.

At the end, some small factions of the movement remained adamant, maintaining their original demands. The response from the regime was close to repression: the police dismissed all medical personnel from the most important hospital of ISSSTE in Mexico City, their posts replaced by Army physicians and nurses. The President appeared then in a national broadcast accusing the doctors of malpractice and negligence. The medical movement was defeated, but the seed had been sown. In contrast to movements led by workers or peasants, the medical movement brought to the arena a new type of participant the regime was not used to dealing with: the growing professional urban middle class.

As these episodes reveal, any attempt at political pluralism and democratization outside the PRI was answered with repression. The regime used the legal framework at their disposal to prevent further liberalization—Article 145 of the Criminal Code, the infamous crime of *social dissolution*—in a vigorous attempt to

preserve the status quo, but this was about to change dramatically with the most important social movement ever seen in Mexico: the student movement of 1968.

III. GENERATIONAL SHIFT, SOCIAL REVOLUTION AND CATHOLIC INTROSPECTION

Two major international events had a tremendous influence in Mexico over the 1960s, beginning with the Cuban Revolution of 1959. The herald of that revolution in Mexico was the most popular living former president by that time, Lázaro Cárdenas, who was instrumental to the success of Castro's movement during his exile in Mexico. The impact of the Cuban Revolution in Mexico resulted from a significant revision of the Mexican Revolution's social legacy:

Ideologically, the regime shifted to the right from 1940 to 1960, which meant among other trends, that the social legacy of the Cárdenas administration was gradually forgotten. The "Mexican Economic Miracle" succeeded at the expense of utterly forgetting the social commitments of the Mexican Revolution and its promise of social justice in the Constitution of 1917. The promise of empowering the have-nots was honored during the presidency of General Cárdenas, when he implemented an unprecedented land reform that gave ownership to rural communities and peasants as never before. Furthermore, President Cárdenas led the historic Mexican oil expropriation, restoring this essential natural resource to the Mexican people, which before 1938 had belonged to international corporations. The symbolism of Cárdenas' reforms brought with them a new sense of national identity and was seen as a fulfillment of the promises of the Mexican Revolution and the nascent PRI. However, this shining inheritance was progressively overshadowed by a shift to the right that modeled political change within a structure that no longer responded to

social demands but rather, to corporatist and economic interests that were not compatible with the *cardenista* legacy.

With time, Cárdenas' followers and many left organizations, ranging from peasants to intellectuals were insulated from the dominant, in fact, exclusive political force—the PRI—which caused among the former a growing sense of frustration and despair. With this background, the triumph of the Cuban Revolution was a breath of fresh air for the Mexican left.

According to Enrique Krauze's account,⁹ there was widespread support for the Cuban Revolution in Mexico among the different groups of the left, particularly among urban-based intellectuals and university college and graduate students. In many respects, they found in the Cuban Revolution an inspiration to promote social and political change in Mexico. Notwithstanding that within the next years, their enthusiasm for the Cuban experience waned (mainly because of Castro's embrace of communism) their demands for political plurality and economic equality persisted. Even former president Cárdenas kept his distance from the Cuban regime, but insisted addressing the pressing needs of the Mexican people and the decay of the political system.

By the beginning of the 1960s, Lázaro Cárdenas remained the most influential living public figure in Mexico and within some sectors of the PRI. The regime's concern over Cárdenas' leaning to the Cuban model grew day by day, since if left unchecked, it might very well imply a dramatic secession from the PRI and the potential birth of a strong and unified left. President López Mateos had numerous conversations with general Cárdenas to persuade him not to break with the party. In the end, Cárdenas maintained institutional and supported the party nominee to succeed President López Mateos, Gustavo Díaz Ordaz.

⁹ *Id.*, at 249-265.

Mexican intellectuals were also fascinated with the success of Castro's revolution. Their enthusiasm had deeper motivations. In contrast with their predecessors, these mid-century intellectuals were exposed to the most influential international trends of philosophical and political thought that triggered the social movements that dominated the 1960s. This was not an ordinary generation. It was called the *Generación de Medio Siglo*¹⁰ (mid-Century Generation) and congregated writers such as Carlos Fuentes,¹¹ Víctor Flores Olea,¹² Porfirio Muñoz Ledo,¹³ José Emilio Pacheco and Carlos Monsiváis.¹⁴ All of whom shared a critical vantage point about the regime and the unfulfilled promises of the Revolution. Except for a brief period in the 1950s, in which they continued with the narrative of Mexican "costumbrism," in an attempt to discover the true identity of the Mexican people, the mid-Century Generation presented their distinctive views and interpretations of Marxism and socialism and scaled them down to the national context. Some of these

¹⁰ *Id.*, at 253.

¹¹ Carlos Fuentes (1928-2012) published his first novel in 1958. The *Región más transparente* (known in English as "Where the Air is Clear") was a stunning success. It portrayed intersecting stories about different individuals coming from the countryside to Mexico City in the first half of the century. The main character is an old revolutionary who followed the dominant trend of economic progress at the end of the conflict and became a successful financier (forgetting the ideals for which he fought in the revolution). The novel displays a deep criticism of the Mexican political system and its inherent inequalities due to the failure of the Mexican Revolution.

¹² Víctor Flores Olea (1932) wrote a series of essays at the end of the 1960s that were of remarkable influence among intellectual circles. Some of these essays were *Marxismo y democracia socialista* (Marxism and socialist democracy), published by UNAM in 1969; *Sobre la sociedad industrial contemporánea* (On contemporary industrial society), also published in 1969 by the Fondo de Cultura Económica.

¹³ Porfirio Muñoz Ledo (1933) would become one of the most important political actors in Mexico from 1970 onwards. After being one of the PRI most prominent members and presiding the party between 1975 and 1976, Muñoz Ledo was also Secretary of Education (1976-1977); Ambassador of Mexico to the United Nations (1979-1985) and founder with Cuauhtémoc Cárdenas of the *Partido de la Revolución Democrática* (Party of the Democratic Revolution – PRD), which will be explored in greater detail in this section.

¹⁴ Carlos Monsiváis (1938-2010) was one of the most influential writers and journalists of his generation. His ability to capture the essence of the social movements that characterized civic and political transformations in Mexico since the 1960s made him an authoritative voice on the understanding of contemporary social change. Monsiváis' unceasing rebellious attitude toward the authoritarianism of the PRI regime inspired a number of generations that would push for political liberalization in Mexico.

intellectuals were also professors at the University whose views shaped the minds of the new generations in the turbulent decade of the 1960s.

Enrique Krauze refers to Ortega y Gasset's generational theory to explain the role of different generations of intellectuals in Mexico since the Revolution.¹⁵ Accordingly, the founding generation of 1915 of Daniel Cosío Villegas and Manuel Gómez Morín set the cultural narrative of the revolutionary political order.¹⁶ Their legacy was continued by the generation of 1929 led by Miguel Alemán who consolidated the Mexican political system as it is today.¹⁷ In continuation of this cycle, the following generation had to answer a calling of criticism towards the regime.¹⁸ This was the expected role of the mid-Century Generation and they fulfilled it, eventually setting the stage for the next generation that would complete the *orteguian* cycle,

“The *Medio Siglo* generation [had] an (unprecedented) collective influence [in] classrooms through their magazines, books and articles, in workshops, conferences and cafés, they educated the next generation of intellectuals ideologically which, completing the *orteguian* cycle, would not have the vocation of criticizing, but rather of destroying the old revolutionary order.”¹⁹

The other sweeping event that shaped the way in which the social process was conducted in Mexico was the Second Vatican Council (1962-1965). Since the end of the *Guerra Cristera* (1926-1929), this implied the most violent anti-clerical reaction

¹⁵ Enrique Krauze, *supra*, note 5, at 253.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*, at 258.

of the post-revolutionary nascent regime against the Catholic Church, by banning public worship, the relations between the government and the Church were based on a sort of *modus vivendi*, keeping the clergy from any involvement in politics.²⁰

However, this gradually changed with the great introspection undergone by the Catholic Church during the Second Vatican Council convened by Pope John XXIII in 1962, an unprecedented effort to define the role of the Church in modern times. The worldwide impact of *Vatican II* was radical: it inspired a major involvement of the Church in social issues, particularly in developing countries with pressing inequalities, taking Catholic doctrine from the pulpits to the streets and the fields. Mexico of course was no exception to this transformative wave. In Krauze's account, to the Mexican clergy, and eventually, to Mexican society this *aggiornamento* meant

“[A] genuine converting process which implied passing from catholic right militancy—of the *Cristero* type—to a catholic left activism [with] more collective commitment [in] light of growing social and racial oppression.”²¹

In this context, the attitude of the Church towards the regime became increasingly critical and it symbolized a distinctive expression of a gradual shift to the left that had a deep impact in Mexican society, equally influential in rural and urban areas, in the years to come. At least in the 1960s it was no surprise to find the Mexican clergy less subordinated to the regime than in the aftermath of the *Cristiada*, and more socially active and adamant.

²⁰ See Part II, at 169.

²¹ *Id.*, at 272.

These events set the stage for the most transformative social mobilization of that turbulent decade in Mexico, which would bring the seed of democracy along and would also radically shape its political ethos forever.

IV. THE STUDENTS' MOVEMENT OF 1968: THE NEW REVOLUTION

The decline of the regime started from its peak. The Díaz Ordaz administration exercised presidential authority to the limit. It was not in the character of the President to negotiate the observance of the law as a fundamental feature to preserve the stability and perpetuation of the regime. In contrast with most of his predecessors, who managed to reconcile the conflicting interests of the government with intermittent demands from the array of social movements that characterized the 1950s and early 1960s, Díaz Ordaz enforced the law without leniency. The crucial problem was that some laws of that time, as previously explained, were designed not to strengthen democratic rule of law, but rather a single-party rule aimed at perpetuating itself by eliminating any type of effective social dissent and meaningful political opposition.

The growing social dissatisfaction with the regime, particularly among the professional urban middle class, exploded due to the lack of institutional procedures and institutions to channel such discontentment. The regime was reluctant to acknowledge that it was not adequately equipped to address the demands of a changing society clamoring for civil liberties and political pluralism.

In this context, Mexico City and the National University became the epicenter of criticism and rejection of the status quo. As Sergio Aguayo puts it:

“In 1968 the strings of history [got] tensed up. The regime’s true nature came up to the surface along with the social enthusiasm bred from the democratic utopia. The government showed its strength; the youth in the capital city released their fear and took the streets to demand reforms and/or revolution, and the international community started to realize that something was not going well in Mexico. The capital city reaffirmed its leading role. Nothing would be the same again.”²²

By the end of the 1960s, Mexican universities –particularly those in the cities, and more saliently, those located in Mexico City, were deeply politicized. The flow of revolutionary ideas constituted a critical mass that became instrumental in pushing for a regime change.

As a result of its economic progress and growing international reputation, Mexico was selected to celebrate the XIX Olympic Games in 1968 and the 1970 FIFA World Cup; both events required unprecedented infrastructural preparations that presupposed a substantial public expenditure. The regime was determined to make of each of these events a showcase to promote Mexico around the world. From the system’s vantage point, these plans were not compatible with the growing political and social unrest triggered by the social movements that dominated that decade. On the verge of the Olympics, social contestation and opposition were persecuted, oppressed and ultimately silenced. A great number of leftist activists were illegally detained and held in isolation in the months prior to the inauguration of the Olympiad. The legal grounds to justify these massive and mostly secret detentions

²² Sergio Aguayo, *LA TRANSICIÓN EN MÉXICO. UNA HISTORIA DOCUMENTAL 1910-2010*, at 145 (2010); personal translation of the author.

(that marked the beginning of the so-called *Dirty War*²³ in Mexico), was Article 145 of the Criminal Code,

“**Article 145.** Any national or foreigner who in oral or written form or by any other means, makes political propaganda among other foreigners of Mexican nationals, spread ideas, programs or norms of action from any foreign government, disrupting public order or harming Mexican sovereignty, will be imprisoned from two to six years. Public order may be disrupted when any action from those described in the preceding paragraph, tends to produce rebellion, sedition, riots or mutiny. National sovereignty may be harmed when these actions put at risk or menace the Republic’s territorial integrity or impede the adequate functioning of legitimate political institutions, or promote disobedience of Mexican nationals of their civic duties.”²⁴

This provision of the Criminal Code was promulgated in November of 1941 in order to punish subversion and covert operations in Mexico from supporters of the Nazi regime in particular, as part of the diplomatic collaboration of the Mexican government with the Allies. However, once World War II ended, the provision remained in order to deter the emergence of opposing movements and operations that might put the system’s stability at risk.

²³ Roderic Ai Camp, *supra*, note 4, at 113-115. According to Roderic Ai Camp, Mexico’s *Dirty War*, “[The] persecution of left-wing political activists, [began] in earnest after the 1968 student movement. After imprisoning many activists following the tragic massacre of students and bystanders in October 1968, the government instructed its security forces to persecute other potential leaders. In December 1970, President Luis Echeverría, the former minister of government who oversaw the massacre of student demonstrators under his predecessor (Gustavo Díaz Ordaz), took office and began his own contradictory strategy of dealing with dissident groups. He recruited some former student leaders to the government and pursued others through the Federal Security Agency in the Secretariat of Government or directly through the armed forces. A number of groups resisted the violent reprisals and several guerrilla organizations came into existence during the Echeverría administration (1970-1976). [During] this period, units of the Mexican Army were involved in human rights abuses throughout Mexico, including the murder of prisoners.”

²⁴ Diario Oficial de la Federación, del 14 de noviembre de 1941 (Mex.), DECRETO-LEY POR EL QUE SE REFORMA Y ADICIONA EL CÓDIGO PENAL PARA EL DISTRITO FEDERAL EN MATERIA DEL FUERO COMÚN Y PARA TODA LA REPÚBLICA EN MATERIA DEL FUERO FEDERAL; personal translation of the author.

With this background, it was evident that the university students -well-versed in existentialism, Marxism, socialism and other dominant intellectual trends of the time,²⁵ were highly politicized and unwilling to tolerate governmental abuses and police repression because most did not share the ideas and principles that held the regime together. As Fournier and Martínez-Herrera explain,

“The 1968 Mexican student movement was the historical result of a decade of government repression on educational and working institutions. It was closely connected to the lack of economic support for popular education, the breaking up of protests, and the extrajudicial arrest of progressive trade union leaders who became political prisoners.”²⁶

According to Octavio Paz, the regime was determined to maintain political and social stability for the Olympic Games at all costs.²⁷ The PRI wanted to show to the rest of the world that their model of governance was able to promote economic progress and institutional durability by (and thanks to) the rule of a single party. In this equation, the lack of political pluralism by means of electoral fraud and the growing figures of Mexicans in poverty and illiteracy were variables that the regime was equally determined to keep away from the eyes of the world. The inauguration was scheduled for October 12, 1968.

The students’ criticism about the way in which the government was betraying the legacy of the Mexican Revolution turned into activism when the regime used

²⁵ Enrique Krauze, *supra*, note 5, at 316-320. This generation –as Enrique Krauze describes it in the context of the *orteguian* cycle, was expected to “dismantle or destroy the system,” by assuming a rebellious attitude toward the status quo as their distinctive quality. Their rebelliousness aimed at changing the political system and its operators, which they considered authoritarian, demagogic and repressive.

²⁶ Patricia Fournier and Jorge Martínez-Herrera, “México 1968:” *Among Olympic Fanfares, Government Repression and Genocide*, in P. Funari et al. (eds.), *MEMORIES FROM DARKNESS, CONTRIBUTIONS TO GLOBAL HISTORICAL ARCHEOLOGY*, at 148 (2009).

²⁷ Octavio Paz, *POSTDATA*, at 241-253 (2004).

police repression to respond to insignificant violent skirmishes between preparatory students of rival institutions by the end of July 1968. From that moment, an inevitable and expected collision between the government and the students unfolded.

The rivalry between students from the *Universidad Nacional Autónoma de México* (National Autonomous University of Mexico – UNAM) and the *Instituto Politécnico Nacional* (National Polytechnic Institute – IPN) was transformed into unity in the face of the increasing police repression displayed in those days as an expression of the government’s obsession to hide social discontent and opposition away from the international observers.

Student demonstrations in the streets increased and were systematically disbanded by violent police action. Despite the fact that most of the protests were peaceful, they were answered disproportionately: in an operation at the *Escuela Nacional Preparatoria*, located in the historic downtown of Mexico City and part of UNAM, soldiers occupied the facilities and arrested all the students in the building. Entering the building, the soldiers destroyed the symbolic 18th century handcrafted wooden door, a valuable cultural asset, with a bazooka. This particular event caused national outrage since it made evident the lack of lack of reservations shown by the government in repressing the students. According to authoritative data, by the end of July, the figures were around 500 injured and more than 1200 detainees.²⁸

By the beginning of August, things escalated: A local problem gradually became a crisis of national proportions. Influenced by the student-led movement in Mexico City, other universities around the country took to the streets to protest and started traveling to the capital city to support their fellow students.

The *Rector* (President) of UNAM, Javier Barros Sierra, adamantly denounced the official repression and made it clear that the academic community was behind the

²⁸ Patricia Fournier and Jorge Martínez-Herrera, *supra*, note 26, at 149. In Krauze’s account, the figures are similar: around 400 injured and 1000 arrested. See Enrique Krauze, *supra*, note 5, at 321.

students and their demands that the ongoing repression cease. The Rector led a massive protest of 50 000 students and supporters in one of the major avenues in Mexico City under the motto *¡Únete Pueblo!* (People Unite!). The urban professional middle class took the streets to express their support for the students. In the protest, there were families cheering and encouraging the students to continue with their movement. President Díaz Ordaz and his government read these actions as a grievous provocation—in fact, the President of UNAM was theoretically subordinated to the power structure—but it was clear that Barrios Sierra was unwilling to perform that role. With this gesture, the Rector became a symbol of the movement and embodied the kind of national leadership that the student movement was demanding. This was a severe blow to President Díaz Ordaz that he would not forgive.

Krauze eloquently describes the state of mind of the students in these early days of the conflict,

“The young rebels felt a sense of freedom that was difficult to describe, as they were approaching forbidden ground. An immense ‘no’ embraced all protesters, came from their voices, from their steps, exploded in the sky, it was a ‘no’ against the authorities. The air was cleaner and clearer. It was breathed differently. In short time, there was the perfect phrase to explain what was happening: ‘Winning the streets’.”²⁹

As the tension grew, students from a wide range of institutions led by those of UNAM and IPN created the *Consejo Nacional de Huelga* (Strike National Committee – CNH) with representatives from almost every university in the country. The

²⁹ Enrique Krauze, *supra*, note 5, at 322; personal translation of the author.

Committee presented their list of demands, the so-called *Pliego petitorio*, on August 4, comprised by six points:³⁰

1. Firing of the chiefs of police;
2. Dismantling the repressive forces and paramilitary squads;
3. Investigating police and military abuses since the beginning of the movement;
4. Respect for the universities' autonomy;
5. Reparations to the families of the students killed or injured in the protests;
6. Abrogation of articles 145 and 145 *bis* of the Criminal Code pertaining the crime of social dissolution; and
7. Release of the regime's political detainees

In the following days, the students prepared a massive demonstration to strengthen their list of demands. On August 13, more than 100 000 students marched to the *Zócalo*, Mexico City's historical main square, which is deemed the heart of the nation, where the National Palace—the seat of the government—and the Supreme Court of Justice are located. In view of the movement's leaders

“[The] streets were finally won when we entered and occupied the *Zócalo* on August 13. That day we broke a taboo.”³¹

³⁰ *Id.*, at 323.

³¹ *Id.* The testimony is from one of the movement's leaders, Salvador Martínez della Roca, also known as “El Pino.”

It was a civic celebration. The students were chanting phrases such as *¡México libertad, México libertad!* (México, freedom! México, freedom!); *¡Libros sí, bayonetas no!* (Books yes, bayonets no!); *¡Libros sí, granaderos no!* (Books yes, police no!).³²

One of the key features of this movement was its internal process of decision-making and the way in which the delegates interacted. In Krauze's view, direct democracy was the constant within the movement and its deliberations,³³ which were open, unrestricted and rich in their explorations of political philosophy, democracy, self-government and inclusive economic development. An additional attribute of the movement was that the audiences for their deliberations asked the speakers to present their arguments in concrete and practical terms, rather than in elaborate speeches reflecting the authoritarian regime's usual demagoguery, which the students massively and consistently rejected. In this particular matter, the leitmotif was *concretito* (very concrete).³⁴

Their internal organization and mobilized action were based on brigades, who were in charge of distributing leaflets all over the city and collecting contributions from people on the streets to cover the printing costs of their flyers and pamphlets. According to some testimonies, the brigades distributed around 600 000 leaflets per day.³⁵ In addition to the list of demands, the leaflets also encouraged future protests and rallies which gradually included input from ordinary citizens who also wanted to express their grievances. Although the movement was spread all over the city, its core

³² *Id.*

³³ *Id.*

³⁴ *Id.*, at 324.

³⁵ *Id.*, at 325.

was located in the main campuses of UNAM and IPN. As Krauze describes it, “[the] University became an immense agora.”³⁶

In this “gilded phase” of the movement, a deep cultural shift that would drastically influence the political liberalization of the next decades began to take shape, substituting the regime’s traditional authoritarian practices of obedience, silence and subordination with discussion, deliberation, dissent and insubordination.³⁷ In short, every decision relating to the movement was thoroughly discussed and voted on. This was explained in the following terms,

“[An] almost ridiculous exaggeration of parliamentarianism (within the movement) was the natural reaction to the political asphyxia imposed by the system, and it reflected the total absence of meaningful public deliberation in Mexico. The core of the movement was its public nature. The students went out to the open, to the public, they sought to do everything public, they publicly discussed their ideas and publicly articulated their proposals.”³⁸

By the end of August, the government began to show openness to dialogue. The Secretary of Government, Luis Echeverría, conveyed the government’s readiness to negotiate. The students demanded that such dialogue should be public, with media and press covering it. The government accepted the terms. With this, the movement felt that victory was within their reach.

Before the dialogue with the government, the movement held their largest demonstration at the *Zócalo* in the evening of August 27.³⁹ Their sense of triumph led

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Some data show that this demonstration gathered around 300 000 people.

the student leadership to relax the security measures around the protest, which allowed some infiltrators to take advantage of the massive euphoria, engaging in offensive language against the President and issuing threats calling for revolution.⁴⁰ The protesters (agitators to be precise) continued by substituting the Mexican flag with a red-and-black-flag, intended to symbolize the apparent communist and syndicalist ideological preferences of the movement. This infiltration was clearly planned to harm the reputation of the movement and show its alleged “dark side.” It was hard to say how much of what happened in that demonstration was a genuine expression of the students and what was a result of the covert action from the government; what was clear, however, was that this public backlash would not be forgiven and the regime was preparing a response of unprecedented magnitude.

The showdown between the students movement and the regime

After the protests at the *Zócalo* on August 27, the movement was forced to take a more moderate attitude towards the government, which no longer seemed interested in pursuing a negotiated solution as originally proposed by the Secretary of Government, Luis Echeverría. From the vantage point of the government, the lack of respect and offenses shown in the students’ rally of August 27 against the President and the institution of the presidency itself, were intolerable and should be strongly dealt with the authorities. From the perspective of the movement’s leadership, though the students did not initiate the alleged provocations of the protests, it was clear that their lack of care gave the regime a pretext to break off negotiations. At this

⁴⁰ Patricia Fournier and Jorge Martínez-Herrera, *supra*, note 26, at 151. There is a plausible hypothesis that explains what really happened that night. In view of some commentators of those events, “[several] police officers were assigned to go undercover (sic) as students. They acted as agitators. They pretended to share leftist ideas, but they committed acts of vandalism with the aim of gaining public support for government repression. The government stated that the student movement was part of a communist conspiracy.”

juncture, the movement decided to continue pushing for their demands in a more amicable fashion. As described by Krauze,

“[Since] the morning of August 28, the CNH (Strike National Committee – *Consejo Nacional de Huelga*) assessed the cost of the verbal and symbolic excesses of the previous evening. Immediately, (the movement) insisted in their openness to dialogue and offered an explanation: they did not order (the disruptive behavior of that night). [Heberto] Castillo (an engineering professor at UNAM and one of the movement’s spokesperson) softened his position: dialogue was convenient ‘more than ever,’ and it was no longer necessary to ‘broadcast it by radio and television, as a Roman circus.’ [On] August 31, one day before the State of the Union, the CNH asserted their willingness to ‘dialogue peacefully without being pressured by the police and the armed forces.’ (They even offered) ‘To serve as volunteers for the XIX Olympics, cleaning the streets every day, serve as hosts, interpreters...Before being students engaged in a struggle for more liberty and democracy, we are Mexicans... We are not against the Olympics, we want Mexico to honor its international commitments with dignity.’”⁴¹

However, the movement’s goodwill was answered with an escalation of repression and arbitrary detentions of students. As the date for the inauguration of the Olympics approached, the government felt more pressure to dissolve the protests. Nonetheless, an interesting feature in the dynamics of constitutional moments and social mobilization took place in the President’s speech for the State of the Union: the President announced that the government would be willing to consider abrogation of Articles 145 and 145 bis of the Criminal Code, for which he

⁴¹ Enrique Krauze, *supra*, note 5, at 338; personal translation of the author.

was convening a national debate on this particular matter.⁴² At the end of his remarks, the President warned,

“I am aware that millions of my fellow citizens are resolutely in favor of maintaining (public) order and against anarchy... We would not like to see ourselves adopting undesirable measures, but we are willing to if necessary; whatever may be our duty, we will perform it; wherever we ought to get, we will get there.”⁴³

As a reaction to the President’s message in the State of the Union, the CNH assumed a more critical tone,

“[The] system of political oppression and concentration of power in Mexico has reached a degree of totalization—from a simple police officer to the President, that a simple struggle for a minimum set of democratic liberties (as the rights to protest on the streets and ask the release of political prisoners) confronts any ordinary citizen with the overwhelming State apparatus and its despotic and inexorable nature, with no possible defense.”⁴⁴

As Krauze’s narrative reveals, with this statement the movement shifted from an emotional to a more intellectual and political dimension in which its criticism

⁴² *Id.*, at 339. These two articles were not abrogated during the movement of 1968. Congress passed legislation to abrogate them in 1970. It is worth saying that, paradoxically, these two provisions of the Criminal Code were not employed to prosecute those students and supporters of their movement that were arbitrarily detained and imprisoned during the crisis.

⁴³ *Id.*

⁴⁴ *Id.*

against the regime became more resolute. Their demands at this stage were summed up in their pressing demand to *make public the country's public life*.⁴⁵

Notwithstanding their adamant attitude, the movement insisted on having a dialogue with the government, even “by writing” if that would serve as an incentive to bridge the gulf with the regime.⁴⁶ A final, powerfully symbolic protest took place on September 13, 1968. It was made in complete silence over one of the most important avenues in Mexico City, gathering around 200 000 students with handkerchiefs covering their mouths as an expression of their massive silence.⁴⁷ According to some testimonials of the “March of Silence,” the students were cheered by the people as thousands of them advanced over *Paseo de la Reforma* Avenue. These expressions of popular support meant a good lift to the movement but also a reason for major concern to the government.

The government read the growing support for the movement as an anticipation of a massive social upheaval that should be swiftly prevented. To do so, the armed forces occupied the campus of UNAM on September 18, in clear violation of its institutional autonomy. The University's community reacted peacefully, however, with 500 people being detained in this operation. On September 23, the President of the University, Javier Barros Sierra, tendered his resignation but was later convinced by the students to continue in his office. The following day, September 24, the armed forces occupied the campus of the IPN. In this case, the students tried in vain to repel the occupation for few hours. In the eve of the massacre that would ultimately end the students' movement, Daniel Cosío Villegas wrote,

⁴⁵ *Id.*, at 340. Krauze attributes this phrase to Daniel Cosío Villegas.

⁴⁶ *Id.*

⁴⁷ *Id.*

“[For] the first time in a quarter of century, the (political) authority, used to the official applause, resonant but insincere, has been forced to acknowledge the existence of a dissenting public opinion. More importantly: (this) has created a problem that tests its intelligence, imagination, skill, and not only its authority. [What] is at stake is the very existence of what we proudly call our revolution, the Mexican revolution. Is the country going to pass this difficult test? ... The entire nation is vigilant of the outcome to make an irrevocable judgment this time.”⁴⁸

The students' sacrifice in Tlatelolco

The government set the stage for the start of negotiations with students on the morning of October 2. After the occupation of their campuses by the armed forces, the movement was dramatically waning after weeks of systematic oppression and arbitrary detentions. The leaders gathered for a rally at *Tlatelolco* Square, in Mexico City, also on October 2 in the afternoon. The purpose of that meeting was to encourage the students to continue with their civic struggle. The rally gathered around 10 000 students that afternoon.⁴⁹ Policemen, soldiers and tanks posted to guarantee public security were tracking them closely, as was common practice since the beginning of the government's escalation against the movement. What followed still remained a mystery: while the leaders were about to deliver their speeches, they decided to cancel their protest to prevent the infiltration of agitators as had happened on August 27 at the *Zócalo*. But at the beginning of the meeting, two flares—one

⁴⁸ *Id.*

⁴⁹ Patricia Fournier and Jorge Martínez-Herrera, *supra*, note 26, at 153. According to Fournier and Martínez-Herrera, by 5:30 PM the plaza was filled with approximately 10 000 people. Enrique Krauze on his part, provides an estimate of 5 000 to 10 000 persons. It has never been clear the exact number of people that gathered that afternoon in *Tlatelolco* Square, and that is for the official cover-up that has been displayed for decades on this matter.

green and one red—were dropped from a helicopter that was flying over the square to indicate the beginning of an operation designed to give the impression that the police and the armed forces were attacked by the students, whereas both groups (civilians and military/police forces) were targeted by snipers and members of a paramilitary group so-called *Batallón Olimpia* (Battalion Olympia).⁵⁰ The result of this operation was massive mayhem. As narrated by Fournier and Martínez-Herrera,

"[Snipers] were posted at several buildings, including the *Chihuahua* building (where the speakers were located). [They] opened fire on civilians and military officers as well. They even shot the General in charge of the soldiers when he was asking the people to disperse. [Snipers] created confusion. Their main goal was to unleash military forces' violence while trying to repel the aggression supposedly coming from radical students. Light tanks [entered] the plaza, firing their machine guns at the crowd. [Caught] in the crossfire, civilians tried to get to the church (also located at the square), which was transformed into an execution wall. They also tried to run to the nearest exit: a corridor between the plaza and the *Chihuahua* building. [Right] there, they were caught by soldiers who slaughtered them with bayonets and guns. [In] only 10 min, the plaza became a mouse hole and the Chihuahua building, a mousetrap."⁵¹

The most credible explanation of the brutal reaction of the military is that the soldiers reacted to the shooting that begun after the two flares were dropped from

⁵⁰ According to Fournier and Martínez-Herrera, based in the works of Francisco Taibo, "[the] 'Batallón Olimpia' was created in February 1968, with the aim of watching for the security at the venues of the Olympic Games and carrying out certain orders (related with enforcing the security of the Olympics). It depended directly on the Chief of Staff and, in consequence, on the President. It was made up of agents from different battalions all over the country, and it had an extraordinary number of noncommissioned officers... On October 2, it was increased by the addition of two cavalry units."

⁵¹ *Id.*, at 154-155.

the helicopter over the *Chihuahua* building. In Krauze's account, the intentional confusion created by the first shots was designed to make the military think that it was the students who initiated the shooting. The operation continued until the following morning. No traces were left behind. An actual siege was implemented in the area by shutting down lights and phone lines. This was followed by an information blockade designed to prevent foreign press from reporting about these tragic events on the eve of the Olympics opening ceremony.

In his account of these events, Enrique Krauze could not have found a better description of the symbolic relevance of this massacre but in the words of his mentor, Octavio Paz,

“[It] was no coincidence that the Mexican students had fallen in the ancient square of Tlatelolco: it was the precise location of the Aztec temple where human sacrifices were performed (*teocalli*)... The killings of students were a ritual sacrifice... it was about terrifying the population, using the same methods that the Aztecs employed to make human sacrifices.”⁵²

V. THE LEGACY OF THE STUDENT MOVEMENT OF 1968

As we have seen, the students' movement of 1968 took many forms, the synthesis of a critical period of transformation that led to major political liberalization.

It was also the culmination of unprecedented post-revolutionary social mobilizations that set the stage for a regime change that, as we will see at the end of this section and in the next chapter, would ultimately take place two decades later, in 1988, with the alleged first presidential defeat of the PRI.

⁵² Enrique Krauze, *supra*, note 5, at 347; personal translation of the author.

The students' movement of 1968 also influenced a deep transformation of Mexican national identity by including a whole generation in the quest for democratization. Since then, revolutionary nationalism would not be the exclusive or dominant trend defining Mexican identity. On the contrary, a growing demand of democratization served as an underlying premise for collective national redefinition. This attitude would substitute with time the old patterns of national identity set after the Revolution by entrenching the collective desire for political liberalization as a distinctive feature of the generations that participated in the movement of 1968 and those that followed.

After 1968, as Octavio Paz frequently emphasized, Mexico would not be the same, due in large part to the *Tlatelolco* massacre.⁵³ As described by Paz,

“[Intuitively,] these groups (the students) (found) that our social and political development (did) not correspond to economic progress. Hence, although sometimes phrases and mottos uttered by students and other groups probably (reminded) us those from American, French or German students, the problem (was) entirely different. It (was) not about a social revolution -though many leaders (were) radical revolutionaries- but rather about performing a reform of our political system. If we do not begin now, the next decade may be violent.”⁵⁴

Paz was right: in the years that followed those dark events, governmental repression continued with the so-called "Dirty War" of the 1970s in which non-institutional opponents of the regime were systematically and arbitrarily detained, tortured and in some cases, disappeared by the police and the armed forces.

⁵³ *Id.*, at 363.

⁵⁴ *Id.*, at 358; personal translation of the author.

Meanwhile, some reformers within the system who were particularly concerned with the outcome of the students' movement of 1968 started a series of gradual changes to refine the political machine to answer the growing demands of democratization.

VI. CHANGING THE MECHANISM

As we will explore in this section, constitutional change in Mexico after the events of 1968 was chiefly driven by electoral reforms aiming at opening institutional channels to capture the increasing political pluralism that have characterized Mexican politics ever since.

The social left, which as we have seen spurred these transformations, ruminated on two ways to channel their expectations and demands in the aftermath of *Tlatelolco*.

The left's dominant groups can be divided into two categories:

On the one hand, there were the *institutional reformers* that chose to push for liberalization by means of political mobilization within the government structure, either by serving in different offices (which was very rare in the immediate years after *Tlatelolco*), or by competing for public office after the electoral reform of 1978. This represented a radical overhaul in terms of political representation, since it included in Mexican electoral rules the possibility of minoritarian parties' candidates to be elected for Congress. I would include in this category those left-leaning young members of the PRI who were deeply influenced by the events of 1968 and would push for democratization from within the regime.

On the other hand, there were also the *radicals* who embraced more totalitarian means to push for change, mainly tactical and focalized violence in the form of "guerrillas" in Guerrero and other southern states. This wave of the left was aimed at a total dismantlement of the regime, which in their view would not be accomplished

except by waging a frontal war against the government.

From these two opposing views to pursue change after *Tlatelolco*, it was the *institutional reformers* who ultimately succeeded in introducing effective democracy in Mexico.

VII. THE ELECTORAL MECHANISM BEFORE THE PERIOD OF POLITICAL LIBERALIZATION

For almost four decades (1940-1978), elections in Mexico were controlled by a set of rules that were structured around the principle of subordination to the authority of the President. As explained in Part II, the President at the federal level, and the Governor at the state level, exercised a series of prerogatives that most of the times were not formally prescribed in the Constitution or in statutes, but constituted a robust and effective symbol of authority and political control. In this scheme, these prerogatives to guide the electoral process consisted in:⁵⁵

1. The power to select the players
2. The power to set the rules
3. The power to organize elections
4. The power to count the votes
5. The power to validate the elections

The distinctive feature of this mechanism (at the federal level which also had its correlative at the state dimension) was that these prerogatives were concentrated in the Executive branch, through a National Electoral Commission, which provided the

⁵⁵ María Amparo Casar, *LA REFORMA DE LAS INSTITUCIONES POLÍTICAS DEL ESTADO MEXICANO*, at 18 (2014).

government full control of the access to power and its distribution according to its interests.

The other distinctive feature of the political structure was the series of mechanisms of electoral manipulation that the PRI implemented for decades in order to assure their continuity. According to Paul Gillingham, these electoral strategies resulted from blending a gradual multiparty democracy with operational codes of dictatorship that demanded sophisticated tactics to manipulate elections.⁵⁶ In Gillingham's view,

“[Mexican] elites fixed elections through a constantly evolving set of formal, institutional measures: the metagame of producing electoral laws and party statutes that favored them in mobilizing sympathetic voters, and above all in *demobilizing dissidents and disarticulating organized opposition*. Within these rules, which many Mexicans vigorously contested, elections were a complicated ‘nested game’ with two main components: the intrapolitical negotiation behind choosing a candidate, and the dirty work of drumming up, scaring off, or writing off strategic groups of voters in order to elect them.”⁵⁷

In his enlightening study, Gillingham displays a categorization of the formal and informal practices that led to electoral control. Within the formal domain, the metagame of institutional control and biasing of elections was structured around five elements:⁵⁸

- a. The existence of a dominant party
- b. Centralization of candidate selection and elimination of independent social leadership

⁵⁶ Paul Gillingham, *Mexican elections, 1910-1994: voters, violence, and veto power*, in Roderic Ai Camp, *THE OXFORD HANDBOOK OF MEXICAN POLITICS*, at 59 (2012).

⁵⁷ *Id.*, at 60.

⁵⁸ *Id.*, at 60-61.

- c. Disenfranchisement, disarticulation and co-optation of political opposition
- d. Absolute governmental control over the election day and its results, and
- e. Assurance of voter turnout to gain legitimacy

These elements ranged from passing federal laws requiring other parties to fulfill “extraordinarily stringent requisites to gain registry and win a place on the ballot;”⁵⁹ or by banning the participation of many political formations that were considered especially disruptive by the regime, such as the communists, the militant Catholic *sinarquista* party or the *henriquistas*;⁶⁰ or by selecting as candidates only those members who were willing to acquiesce to the party’s leadership; or by excluding specific groups from electoral competition for extended periods such as women (from 1910 through 1952), militantly anti-system Catholics (1948-1986) or communists (1949-1978);⁶¹ to registering opportunist parties that would give the impression of political plurality, but once in Congress, would align with the majoritarian representation of the dominant party; or by altering electoral results that were not favorable to the government’s electoral coalition.

These institutional electoral features were blended with a set of informal practices that together were described by the PRI as *electoral alchemy*, consisting in a series of manipulations that entailed the most sophisticated “black arts of electoral fraud...(that

⁵⁹ *Id.*, at 60.

⁶⁰ This refers to an important dissident movement within the PRI in 1952, led by General Miguel Henríquez Guzmán, who sought the nomination of this party for the presidential election of that year. He represented a critical wing of the party that criticized the ideological shift implemented during the presidency of Miguel Alemán Valdés (1946-1952) and were advocating for a restoration of the principles of the Mexican Revolution in the party’s political programs by introducing democratic practices to select candidates. This movement was a pioneer in protesting for democratization within the regime. After the presidential election of 1952, the *henriquistas* organized a demonstration to expose the electoral fraud and the police repressed them, with a large number of people killed and injured.

⁶¹ Paul Gillingham, *supra*, note 56, at 60.

summarized) undue influence, corruption, chicanery and violence.”⁶² People were forced to vote for the official candidate on election day; others were paid to attend the polls and vote for the PRI candidates; ballot boxes were filled with unregistered votes that favored the official candidate; or in case an opposition candidate was winning the voting in a determined poll, the ballot boxes were stolen.

Altogether, these formal and informal mechanisms of electoral manipulation served to perpetuate the hegemonic party in power and were the underlying motivations of the social discontent that emerged in the panoply of movements of the 1950s and 1960s described above. This was about to change, albeit gradually, with the electoral reforms that followed in the coming decades.

VIII. CONSTITUTIONAL CHANGE THROUGH ELECTORAL REFORMS

One of the most authoritative voices on the nature and operation of the Mexican political system is Maria Amparo Casar, who has depicted Mexican transition to democracy as a process of political liberalization characterized by a "continuous (uninterrupted) process of gradual and controlled reforms aiming at a comprehensive transformation of the political order."⁶³ As we have seen, Casar's portrayal of the Mexican process of political liberalization endorses the underlying thesis of political transformations as a continuum, articulated throughout this work.

From her vantage point, which is not part of the mainstream narrative on this issue in Mexico due to its distinctiveness and depth (the result of more than three decades analyzing the mutations of Mexican presidentialism) the Mexican political elite opted for a gradual and progressive series of institutional and operational changes within

⁶² *Id.*, at 62.

⁶³ María Amparo Casar, *supra*, note 55, at 18.

the constitutional regime of 1917, rather than pursuing a radical breakthrough that would jeopardize the survival of the political system itself.

As posited by Casar, Mexico passed through a gradual and controlled process of political liberalization of almost twenty years (1978-1996) in which the face and operation of the political system changed radically. In Casar's view, the political-electoral reforms of 1978, 1986-1987, 1989-1990, 1993, 1994, and 1996 entailed components that in the final analysis enhanced democratic fairness, political equality and electoral justice by means of adjudication.⁶⁴

i. The Electoral Reform of 1978

The students' movement of 1968 galvanized the urban professional middle class, the political opposition (mainly the PAN) and the left at large. In addition, some members of the political elite within the ranks of the PRI were also persuaded to exercise leverage to promote a series of substantial changes in procedures and institutions that were not in tune with political reality, and whose implementation seemed necessary to prevent an escalation that would result in social outburst. One of these actors was the Secretary of Government (1976-1982), Jesús Reyes Heróles, who championed the most innovative electoral reform the regime had seen since the enfranchisement of women's back in 1953.

The electoral reform of 1978 was mainly designed to enable democratic representation of political minorities traditionally insulated from the political process due to the overwhelming national corporatist structure of the PRI. The mechanism used to achieve this goal was the introduction of proportional representation in Congress, a balancing strategy that would enable political representation of minoritarian parties.

⁶⁴ *Id.*, at 19.

According to Manuel Camacho Solís, who served as political advisor to Reyes Heróles at the time, the Secretary told him "I prefer to see these leftists officially competing for a seat in Congress than lining up with the guerrillas."⁶⁵

The core feature of this reform was the mitigation of the requirements to register as a national party. This enabled the registration of the Communist and Socialist parties and began a slow but firm institutionalization of the political left. According to Reyes Heróles, the main goal of this reform was not political liberalization, but rather the deterrence of growing social discontentment that followed the events of the previous decade. His aim was to institutionalize the dissident opposition clustered in left-oriented movements and the guerrillas in many cases. The reform of 1978 succeeded in minimizing political violence by offering an institutional space to channel the expanding opposition structured around the social left.

Features of the electoral reforms prior to 1988

The electoral reforms of 1986-1987 were a curious blend of political liberalization on the one hand and the regime's perpetuation on the other: to continue with the trend initiated by the reform of 1978, these reforms extended to 200 the number of deputies that could be elected by proportional representation. The downside of this reform, however, was the introduction of the so-called "governability clause", which was intended to grant plenty lawmaking authority to the most voted party in the national election. Even though the PRI was then experiencing a slight decline in its share of the national vote, this clause was designed to perpetuate its dominance in Congress in light of the increasing number of elected officials from opposition parties.

⁶⁵ Interview with Manuel Camacho Solís, Senator (incumbent), Commissioner for the Peace Process in Chiapas 1994; Mayor of Mexico City 1988-1993; in Mexico City (Jan. 10, 2013). *See* Appendix at 256-257.

These reforms gradually enabled increasing representation of political opposition in Congress (see Table 2), which resulted in obtaining for the first time (in 1997) an opposition's majority in Congress over PRI's traditional dominance. There is no doubt that this reform contributed not only to a wider distribution of power, but also (and more saliently) to promoting the kind of representation coherent with growing political pluralism.

Table 2. Federal Elections: Chamber of deputies⁶⁶

Party	2012	2006	2003	2000	1997	1994	1991	1988	1982	1976	1970	1964	1958	1952	1946
PRI	42.40%	28.18%	36.79%	36.90%	38%	48.58%	58.47%	51.0%	69.4%	85.0%	83.3%	86.3%	88.2%	48.99%	73.5%
PAN	22.80%	33.41%	30.73%	38.2%	25.85%	24.98%	16.82%	18.0%	17.5%	9.0%	14.2%	11.5%	10.2%	29.45%	2.2%
PRD	20.80%	28.90%	17.61%	18.70%	24.98%	16.12%	7.91%	9.4%	2.3%	x	x	x	x	x	x
Others	14.00%	9.51%	14.87%	6.20%	11.17%	10.32%	16.80%	22.7%	-	-	-	-	-	-	24.3%

However, the government was intent on maintaining control over the elections by any means necessary, which continued as a remarkable attribute of the PRI. The introduction of the so-called "Governability Clause", which enabled the political party that obtained the highest percentage of the national vote to enjoy automatically an absolute majority in Congress and, as a result, the right to amend the constitution and pass legislation, was a setback in the quest for democratization that revealed the regime's

⁶⁶ Sistema de Consulta de la Estadística de las Elecciones Federales, *Atlas de Resultados Electorales Federales 1991-2012*, Instituto Nacional Electoral, see <http://siceef.ife.org.mx/pef2012/SICEEF2012.html#> (Last visit: December 10, 2014).

entrenchment in the eve of its coming secession.

IX. THE DEMOCRATIC WAVE OF 1987

But as we will see, an unprecedented rebellion from within the PRI would lead to even more radical institutional and prescriptive transformations. As I have previously explained in this work, one of the most conflicting institutions of the Mexican political process is the "democratic fiction" by which President Porfirio Díaz perpetuated himself in power for thirty years and by means of which the post-revolutionary presidents selected their successor as president. This practice was deeply embedded into the PRI's political culture and was vehemently contested in 1987 by a group of prominent members of the PRI led by Cuauhtémoc Cárdenas and Porfirio Muñoz Ledo, who demanded the introduction of democratic procedures for the selection of candidates, and of the presidential candidate in particular for the election of 1988.

From 1970 through 1987, Mexico experienced a dramatic economic decline characterized by recurrent economic crises that increased Mexican international debt to unmanageable limits. One of the underlying reasons for this economic decay was, on the one hand, the alteration of the unwritten rule guaranteeing the autonomy of the Secretary of the Treasury and the Central Bank to outline and implement the government's economic policies with no political interference whatsoever. The administrations of Luis Echeverría (1970-1976) and José López Portillo (1976-1982) were economically irresponsible and were characterized by constant interference in the form of populist economic policies designed to defuse political opposition at federal and state levels. Furthermore, these two administrations were also known for a series of excesses and corruption scandals—particularly in the case of the López

Portillo administration—that - created an internal wave of criticism within the PRI.

The succeeding president, Miguel de la Madrid (1982-1988) promised a "moral renovation" at all levels of public service. However, his main task was to correct the economic wrongs of the previous administration by introducing a series of radical economic reforms that moved Mexico from the extreme of economic populism to the edge of neoliberalism. This will be explored in greater detail in the next chapter.

The resulting economic policies and the regime's political entrenchment in the face of the gradual electoral victories obtained by the opposition—mainly the PAN—in local and state elections, by justifying the so-called "patriotic fraud," prompted internal contestation in the PRI.

Notwithstanding the political and electoral reforms implemented since 1978, the distinctive prerogative of the incumbent President to select his successor remained untouched. As we have seen, this prerogative was the quintessence of the principle of subordination in the PRI.

However, this prerogative presented a challenge to the process of selecting the PRI's presidential nominee for the election of 1988. The former Governor of Michoacán and political heir of General Cárdenas, Cuauhtémoc Cárdenas, and the former Secretary of Education, former Chairman of the PRI and former Ambassador to the United Nations, Porfirio Muñoz Ledo, led a group of prominent members of the party in favor of celebrating a primary election to select the presidential nominee. Their chief motivation was the growing influence of the so-called "technocrats" at the highest level of decision-making and the predictable nomination of one of those technocrats as the successor of President de la Madrid. In the account of Muñoz Ledo,

“[Our] demand was the application of the PRI’s existing rules that already allowed primaries. Our request was to enable our group to register and compete within the party with our candidate for the presidency (Cuauhtémoc Cárdenas), and also our candidates for deputies and senators. This was in step with the party’s quotas for ideological representation. It was clear then that we were not aspiring to win the presidential nomination, which was impossible under the circumstances, but we were resolved to put together a movement that would result in more political pluralism: a shift from a party structured around sectors and territorial petty tyrants towards a party of (coexisting) ideological trends.”⁶⁷

Their demands were rigorously met by the party's leadership and they had no option but to leave the PRI after the President unilaterally decided to nominate the young technocrat, Secretary of Budget and Governmental Planning, Carlos Salinas de Gortari as the party's presidential candidate.

Cárdenas, benefitting, perhaps, from the strong symbolism his name carried with it, was able to galvanize the enduring expectations of the social left—broken in 1968—to engulf in an unprecedented national mobilization that brought together the most important leftist parties and social movements to nominate him as their presidential candidate for the election of 1988.

His campaign was politically effective and emotionally powerful. Who better than him to claim that genuine political change within the system was any longer possible, and democratization should come beyond the regime’s boundaries. He was able to mobilize a leftist national political coalition that cornered the government in

⁶⁷ Martha Anaya, 1988. *EL AÑO QUE CALLÓ EL SISTEMA*, at 187 (2009). This is a groundbreaking study of the events surrounding the presidential election of 1988, mainly based on a series of interviews with the leading participants of the election and its outcome. This excerpt was taken from the author’s interview with Porfirio Muñoz Ledo, who led the secession from the PRI with Cuauhtémoc Cárdenas and the coalition of the left for that Election; translation by the author.

an unexpected fashion.

In view of one of the most authoritative *Mexicanists*, Roderic Ai Camp,

“The 1988 presidential election took place when the government and the PRI were at a low in terms of their legitimacy among the people. The selection of Salinas as the PRI candidate, the least popular choice among party leaders, further eroded the PRI’s position. Given these conditions, the opposition began a vigorous campaign against Salinas. The PAN selected a charismatic businessman from the north, Manuel J. Clouthier, who provided energetic, if somewhat bombastic, leadership during the contest. Cárdenas was off to a rocky start, but with his name recognition, notably in rural Mexico, he began to build a following. Three leftist parties, which typically had attracted only small numbers of Mexican voters, eventually joined Cárdenas’s battle against the PRI candidate: the Popular Socialist Party (PPS); the Cardenista Front for National Reconstruction Party (PFCRN); and the Mexican Socialist Party (PMS). Of the eight parties on the 1988 presidential ballot, four supported Cárdenas.”⁶⁸

X. THE ELECTORAL FIASCO OF 1988

According to Cárdenas and Muñoz Ledo, just a few days before the election, the *Frente Democrático Nacional* (National Democratic Front or FDN), the coalition built around the leftist parties competing in the election, was leading the PRI in opinion polls by 4-5 points. The dominant feeling was that if they did not win the election, the FDN would gain at least very strong electoral support.⁶⁹ President de la Madrid and his Secretary of Government, Manuel Bartlett, also shared this view: the

⁶⁸ Roderic Ai Camp, *POLITICS IN MEXICO. THE DEMOCRATIC CONSOLIDATION*, at 208 (2007).

⁶⁹ Martha Anaya, *supra*, note 66, at 148, 190-191.

growing popular support for Cárdenas's candidacy was completely unexpected.⁷⁰ This last-minute turn of events required the regime to implement a novel strategy to guarantee Salinas's victory.

On Election Day, July 6, 1988, as the results flowed to the National Electoral Commission controlled by the Secretary of Government, official concern grew as they gradually began to realize that Cuauhtémoc Cárdenas was leading the polls. In an extreme measure, the Secretary of Government ordered to stop vote counting that evening. This decision also meant that the official count was “shut up,” squelched, to prevent further and irreversible damage to the PRI. As President de la Madrid recalls,

“I knew that night that the first tallies were very much against the PRI, but I was also informed that they were not representative enough of the national vote, since they were chiefly from Mexico City, Michoacán and Morelos. [Bartlett] told me ‘the tallies are coming that bad, that if we disclose the results at this moment (at night of the election day), it will reinforce the idea that the PRI lost the election. It may be better to wait for better results, much more representative (of the national vote).’ Hence, we both agreed to wait for further results to disclose the preliminary results of the election.”⁷¹

After this, the opposition candidates led by Cuauhtémoc Cárdenas (of the FDN), Manuel Clouthier (of the PAN) and Rosario Ibarra (of the *Partido Revolucionario de los Trabajadores*, Workers Revolutionary Party, or PRT) went to the Ministry of Government and demanded Secretary Bartlett to resume the tallies. He explained that a technical problem had interrupted the counting, that it was being taken care of as they spoke, and that they expected to resume the tally in the following hours.

⁷⁰ *Id.*, at 132, 176.

⁷¹ *Id.*, at 133; personal translation of the author.

Creatively, the PAN representative for the National Electoral Commission, Diego Fernández de Cevallos, informed that the "system was shut up"⁷² which was immediately interpreted by the public and political parties as an indication of an imminent electoral fraud. In light of the lack of the preliminary results from the election, Fernández de Cevallos stated,

“In light of the prevailing irregularities of this election, [we] are faced with the undeniable fact which is that despite abstentionism, México has demonstrated its plurality. This is an achievement for the republic, the hope of the Mexican people reborn. In this election, the rusty, full wagon fell over the edge and let’s hope that that old vehicle will not ever travel the avenues of our democracy. Mexico has changed.”⁷³

When the system was partially "restored," it showed that Carlos Salinas had won the election after all, with an almost 20 percent advantage over Cárdenas,

“To most analysts’ genuine surprise, the populist and leftist Cárdenas alliance generated a widespread response among Mexican voters. Cárdenas, according to official tallies, received 31 percent of the vote, the highest figure given to an opposition presidential candidate since the revolution; Salinas obtained 51 percent, barely a simple majority; and Clouthier captured 17 percent, the typical PAN percentage in a presidential election. *Contrary to most observers’ expectations, the Left, not the Right, altered the face of the election.*”⁷⁴

⁷² *Id.*, at 20.

⁷³ *Id.*, at 66-67.

⁷⁴ Roderic Ai Camp, *supra*, note 67, at 208; emphasis added.

The next day, July 7, at noon, Carlos Salinas proclaimed his victory not without acknowledging,

“Notwithstanding that our victory is indubitable and evident, this election marks the end of a time characterized by the rule of a single party. We are entering into a new era.”⁷⁵

This was deemed a preposterous outcome by the rest of the presidential candidates and they formed a coalition to challenge these results. However, the lack of adequate and impartial institutions to channel these demands made it fundamentally impossible to contest these results.

What followed deeply shaped the course of Mexico’s constitutional arrangements and structure for the next two decades, as we will explore in greater length in the coming chapters.

XI. A NEW ELITE SETTLEMENT: THE PACT BETWEEN SALINAS AND THE PAN

At first, the Left and the Right mobilized together to challenge the results of the election. The lack of solid information on who really won the election made each opposition candidate distrustful of the other, since each candidate had his own polls. It was clear that no one was willing to concede.

After the ballots were authenticated by the National Electoral Commission, the next step of the process (according to the 1986 electoral rules and procedures) was the validation of the election by Congress, a prerequisite to declaring the elected

⁷⁵ *Id.*, at 54.

candidate President in order to maintain the constitutional order. The newly elected members of Congress conducted this process. In order to declare Salinas President-elect, the PRI needed the vote from the opposition, namely the PAN. Under the prevailing circumstances, the members of Congress that belonged to the National Democratic Front (FDN) were pushing to have the election invalidated by virtue of the massive electoral fraud.

The electoral mechanism was designed to enable the traditionally majoritarian parliamentary group of PRI in Congress to validate the presidential election and declare President-elect. In 1988, for the first time, the PRI required the vote of other political forces to attain these goals.

In the meantime, Cárdenas intensified his mobilizations nationwide, in Mexico City in particular, demanding a new election. Meanwhile, the PAN leadership held secret meetings with Salinas and his closest aides, who were looking to secure their vote for the election's validation in Congress. The best they could achieve was securing PAN's compromise to abstain from voting in validating the election. This compromise secured, at least, the PRI's majority in the procedures. In return (and here is the key to understand the constitutional reforms that followed during the Salinas administration) the PAN demanded that Salinas make some sweeping institutional and normative overhauls that this party had championed for many years. These proposed reforms included the creation of an independent electoral authority that would organize and validate future electoral processes. This was, beyond any doubt, a new version of the elite settlements that have historically characterized political transformations and their constitutional rendering in Mexico.

The PAN's attitude was based upon an underlying premise that they described as "legitimacy of exercise," which meant that considering Salinas did not enjoy political "legitimacy of origin" in light of the contested results of the election,

he might acquire such legitimacy by virtue of his actions as President. This theory was bitterly disputed by the Left and an array of political actors then and until this day.

The Left claimed (and still do), that this elite settlement between Salinas and the PAN led to the insulation of the People and the mobilized political Left from the constitutive process that followed the election of 1988 and dominated the constitutional arrangement of the next two decades.

It was clear that the regime's strategy to undermine Cárdenas's popular support was to implement the old adage *Divide et impera* (Divide and conquer): their goal was to preserve as much political power as possible under growing political pluralism, and if such power had to be shared, it would be with the Right embodied in the PAN. It was no accident, then, that the following year (1989) the PAN won its first governorship in Baja California with the acquiescence of President Salinas and the PRI.

XII. THE INSTITUTIONAL EXIT: THE FOUNDING OF THE PRD AND THE CREATION OF THE IFE

Cárdenas opted for an institutional and peaceful strategy to pursue his struggle for democracy by founding the year after, the Partido de la Revolución Democrática (Democratic Revolution Party - PRD) as the synthesis of all the social and political organizations that supported him for the election of 1988. With this, the Mexican political left had at last, and for the first time, a competitive political party with a national presence.

One of their first goals of the new legislature was precisely to push for a constitutional reform creating an independent electoral authority that would organize and validate future national electoral processes.

The government, to gain political legitimacy after the fraudulent way in which it won the election of 1988, acquiesced to these demands and introduced a piece of legislation proposing the creation of the *Instituto Federal Electoral* (Federal Electoral Institute - IFE) to oversee the organization of elections. This law passed with the electoral reforms of 1989-1990 and in 1991 created the Federal Electoral Institute as part of the Secretary of Government, whose top official also served as President of the Institute. The electoral authority was created in the following terms,

"Article 36. [The] organization of federal elections is vested in the Executive and Legislative branches. [This] function shall be performed by a public agency with its own legal status and budget. [Statutes] will provide a framework to challenge electoral results and such controversies will be adjudicated by an independent tribunal specialized in electoral matters [and] its decisions will be indisputable."⁷⁶

Despite the achievement of establishing an electoral authority separated from the Executive branch, it actually remained within the sphere of the government since constitutionally the electoral function still vested in the Executive and Legislative branches. The most important outcome from this reform was the introduction of independent (non-partisan) members of the Electoral Commission, in contrast with its previous integrations entirely based upon governmental officials.

It was not until the electoral reforms of 1994 and 1996 that the IFE acquired full autonomy in overseeing the organization and counting of federal elections, inasmuch as the judicial branch of the national electoral authority, the *Tribunal Electoral del Poder Judicial Federal* (Electoral Tribunal of the Federal Judiciary - TEPJF) was created to oversee the

⁷⁶ Diario Oficial de la Federación, del 6 de abril de 1990 (Mex.), DECRETO POR EL QUE SE REFORMAN Y ADICIONAN LOS ARTÍCULOS 5, 35 FRACCIÓN III, 36 FRACCIÓN I, 41, 54, 60 Y 73 FRACCIÓN VI, BASE 3ª. Y DEROGADOS LOS ARTÍCULOS TRANSITORIOS 17, 18 Y 19, TODOS DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS; personal translation of the author.

validation of electoral processes should the results be contested by any of the parties involved and to protect, by means of adjudication, political rights, chiefly the right to vote,

"Article 41-III. The organization of federal elections is a State's function conducted by an autonomous public agency called *Instituto Federal Electoral*, with legal status and budget of its own. [The] *Instituto Federal Electoral* will be the authority on electoral matters, independent on its decisions and operation;

Article 99. The *Tribunal Electoral* will be the highest judicial electoral authority [and] shall resolve the issues listed below, in a definitive and irrefutable manner, observing the provisions established by this Constitution and the applicable law:

I. Appeals of elections regarding representatives and senators.

II. Contestation of election of the President of the Republic. Only the Superior Electoral Court can resolve such kind of contestations.

The Superior Electoral Court shall carry out the final count of votes in the election of the President of the Republic, provided that contestations thereof have been resolved. Then, the Electoral Court shall declare the validity of the election and shall name the elected President, i.e., the candidate who has obtained the highest number of votes.

III. Contestations of acts and resolutions issued by the federal electoral authority, different to those mentioned in the two previous paragraphs, that breach constitutional and statutory prescriptions.

IV. Contestations of final acts and resolutions issued by the state electoral authorities related to organization and assessment of elections; as well as controversies arisen during the election process that could affect such election

process or the results thereof. This procedure shall be admissible only when the remedy requested is physically and legally possible within the electoral terms, and provided that it is feasible to be implemented before the date legally established for set up of the electoral bodies or for inauguration of elected officials.

V. Contestations regarding acts and resolutions that infringe political-electoral rights of citizens: right to vote, right to be elected, right to freely join a party, right to peaceful assembly, according to this Constitution and laws.”⁷⁷

As we can see, with this reform, the electoral authority gained actual independence. The salient feature of this reform is that it granted plenary autonomy to the electoral authority, which from that reform on, became a full-fledged "democracy branch" in terms of Bruce Ackerman's *New Separation of Powers*,

“[Having] won a election, the lawmaking majority may notoriously seek to insulate itself from further electoral tests – by suspending elections, restricting free speech, or fiddling with electoral laws to stack the deck against regions full of disaffected voters. Thanks most notably to the work of John Ely, the need for a check against this sort of abuse is broadly acknowledged in constitutional circles. But it is a fair question whether we should entrust this function, which Ely calls representational reinforcement, solely to a constitutional court, or whether some aspects of this mission *deserve the attention of a special branch of government*.

This is, at any rate, the question raised by the common use of independent, but non-judicial, agencies throughout the world *to supervise crucial*

⁷⁷ Diario Oficial de la Federación, del 22 de agosto de 1996 (Mex.), DECRETO MEDIANTE EL CUAL SE DECLARAN REFORMADOS DIVERSOS ARTÍCULOS DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS; personal translation of the author.

elements of the electoral process. The functions of these agencies have been quite diverse. Sometimes they are called upon to redraw electoral districts to conform with changing populations; at other times, they seek to enforce and interpret campaign finance laws; *most often, they simply try to assure an honest count on election day.*⁷⁸

There is no doubt of the greatest achievement –as a beginning– on having an independent electoral authority to assure an honest count of the ballots in light of the shameful precedent of 1988, but with time, our “democracy branch” has evolved inasmuch as our constitutional understanding, by including much more sophisticated features, that were also anticipated by Ackerman, such as

“requiring (more) fairness in defining legislative districts and justice in the distribution of financial resources during political campaigns.”⁷⁹

All these reforms meant a substantial leap for the Mexican political system as a result of a process of political liberalization and growing social mobilization. They also synthesized the enduring demands for democratization championed by more than two generations.

There is no doubt from a contemporary perspective that this outcome constitutes a salient example of a gilded constitutional moment in Mexico.

The electoral fiasco of 1988 triggered a series of dynamics that defined the outcome of the process of political liberalization, with the PRI's first loss of majority in Congress in 1997 and its first presidential defeat in the election of 2000. However, as we will explore in coming chapters, these events, though important, are of lesser

⁷⁸ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 716, 717 (2000); emphasis added.

⁷⁹ *Id.*, at 718.

relevance when seen from a more comprehensive perspective, in which the endurance of institutions is what defines the survival of any political order.

On the other hand, it was my initial impression that it had been a partnership between the Left and the Right that forced the Salinas administration to create an independent electoral authority. However, after conducting comprehensive research on these momentous episodes, there is solid evidence that this independent electoral branch resulted from a settlement between Salinas and the PAN. Notwithstanding this fact, it is very clear that without the historical mobilizations of the Left in the aftermath of the 1988 presidential election, none of the constitutional reforms aiming at major political pluralism would have been possible; nonetheless, it was others who reaped the benefits sown by the Left during the social and political movements of the 1960s and thereafter.

The events described in this chapter shaped the way in which contemporary constitutional change was framed in Mexico. The dynamics set forth by the landmark episodes of 1968 and 1988 in particular set the stage for gradual and controlled reforms that would ultimately transform the Mexican political order in a dramatic fashion. However, some trends remained constant throughout this process, as we will explore in the coming section.

PART IV

THE PROBLEMS OF POLITICAL TRANSFORMATIONS AND CONSTITUTIONAL CHANGE IN MEXICO: A CONTEMPORARY PERSPECTIVE

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INTRODUCTION

Mexico looked very promising by the beginning of the 1990's, despite widespread problems of all sorts. The editorial of a special issue of *National Geographic* appearing in August 1996 described it as follows,

“Today Mexico’s 95 million people seem poised for another momentous change. Rich in natural resources, blessed with strong family ties and a hardworking populace, Mexico is ready to move from the ranks of developing nations into a new role, this time as a modern player on the world stage. But those hopes have been tarnished, at least for the moment, by political corruption, civil unrest, environmental pollution, and the Mexican government’s devaluation of the peso. The resulting economic woes have exacerbated tensions along the United States-Mexico border, where drug trafficking and illegal immigration rise each time the peso falls. Such ripples touch neighbors in all directions, for our lives are ever more closely linked –by the North American Free Trade Agreement, by the recent guarantee of 20 billion dollars in U.S. loans to Mexico, by the growing influence of Hispanic culture spreading north of the border, by the hefty U.S. investment in new businesses south of the border, and by modern communications that shrink the world with each passing day. We wanted to explore how our neighbors are facing the current economic and political crisis and to gauge how they are shaping their own future. What follows is a portrait of Mexico –a complex country caught in yet another moment of painful rebirth, somewhere between a turbulent past and a promising future.”¹

¹ Emerging Mexico: Bright with Promise, Tangled in the Past, *National Geographic*, Vol. 190, No. 2, August 1996, at 2-132.

And yet, seventeen years after this editorial was written, Mexico seems trapped indefinitely in a painful rebirth that hinders further evolution, revealing (against the editorialist's prediction) a promising past and a more turbulent future.

I. 1989-2000: THE TRANSFORMATIVE YEARS

In the last two decades of the past century, one word encompassed every governmental action: reform. The changing international context² and the gradual political liberalization of the system by virtue of substantial changes within the hegemonic party were substantial enough to persuade the governing elites to structure an agenda for economic and political transformation.

These events coincided with an important generational shift within the power elites: from the traditional politicians who came up within the structures of the PRI and with proven political experience, a new generation of leaders--mainly educated in the United States and exponents of contemporary models of economic development--³

² Interview with Carlos Salinas de Gortari, President of Mexico 1988-1994, in Mexico City (Dec. 10, 2011). Salinas explained that at the beginning of his presidency, he was against the prospect of negotiating a Free Trade Agreement with the United States and Canada, mostly driven by his concern over the overwhelming external debt that Mexico had at that time. However, he gradually changed his mind as defining international events unfolded: the fall of the Berlin Wall, the Malta Summit that paved the way to the end of the Cold War, the waves of democratization around the globe, among others. In Salinas' account, these events were determinant of the reformist character of his government. *See* Appendix, at 18.

³ Sarah Babb, *PROYECTO: MÉXICO. LOS ECONOMISTAS DEL NACIONALISMO AL NEOLIBERALISMO*, 239-307 (2003). To fairly understand the context and challenges in which these transformations took place and the role that some of the participants involved played, the account of Francisco Gil-Díaz is remarkably enlightening, "(The economic reforms of the 1980's and 1990's) [were] providential. During the administration of President de la Madrid, Carlos Salinas was in charge of the economy. He had a group of young economists around him who provided good advice such as (Jaime) Serra, Pedro Aspe, (José María) Córdoba. However, Salinas also had a strong political pressure on his shoulders that led the government to act fiscally irresponsibly then. [Mexico] had a closed economy, due in part to the increasing need of foreign currency and an ideologically oriented economic policy-making in which regulation [and competitiveness] did not play a significant role. [Suddenly], all this changed when the economy entered into an unprecedented crisis (in 1987); inflation went to extremely high thresholds, thus we entered into a pre-cycle of hyperinflation which made Carlos Salinas to give serious thought to the convenience or not of maintaining such negative economic policies at the risk of losing his job. There was a bitter encounter between him and President de la Madrid [in] which Salinas convinced the President to change the course of action (as advised by Aspe, Serra, et al.). And it is in this precise moment when the Mexican government

occupied strategic positions in the government since the administration of Miguel de la Madrid (1982-1988). According to Roderic Ai Camp,

“[Miguel] de la Madrid, selected his former secretary of Programming and Budget (Carlos Salinas de Gortari) to pursue his economic philosophy, reflecting an internationally oriented, neo-liberal strategy. To reinforce that policy direction, Salinas surrounded himself with political technocrats who, similar to the president, often had undergraduate degrees in economics, had little electoral political experience, boasted advanced graduate education abroad, typically at Ivy League schools in the United States, and introduced an increasing number of graduates from private universities in the capital, to top political posts.”⁴

Their focus was on implementing sound reforms that would put Mexico more in tune with the dominant global economic trends, by bringing up to date sensitive areas that had remained impervious to change since the 1950's and which were more receptive to different economic and political contexts, both at home and abroad, e.g. the renegotiation of the foreign debt, the implementation of free trade agreements with other countries, the enhancement of economic competitiveness by means of privatizing state-owned companies, the autonomy of a central bank, a new regulation of land property, among others. Most of these items required a constitutional amendment to enter into force, which meant leading this new generation to a deep reform of the dominant economic structures and practices.

officially decided to open the economy.” Interview with Francisco Gil-Díaz, Secretary of Finance 2000-2006, in Mexico City (Nov. 23, 2012; Jan. 9, 2013). *See* Appendix, at 236-240.

⁴ Roderic Ai Camp, MEXICO. WHAT EVERYONE NEEDS TO KNOW, 122 (2011).

As Pedro Aspe explains,

“In the final analysis, our most salient reforms –very unpopular at the beginning of course, were the North American Free Trade Agreement (NAFTA), the constitutional autonomy of the *Banco de México* (Mexican Central Bank), the privatizations and the constitutional amendment to Article 27 (land property) – [but] all of them were achieved at a constitutional level and affirmed by the Supreme Court.”⁵

Furthermore, I would like to underscore Pedro Aspe’s view of the attitude toward timely reforms, which in my view, accurately summarizes the reformist animus,

“[Reformers] ought to have two characteristics: One is to dislike what they see, otherwise, why to reform? Conversely, if you believe that reality is unfair, inefficient, for whatever reason, and you reject it and consequently, you want to change the status quo, and that makes you a reformer. But to be a reformer, also demands of you to have ideals: if you want to change reality without ideals and confidence that change can be done, you will fail. Additionally you must be willing to deal with those unpleasant things that you want to change while you get involved in the reform process. You cannot be a perfectionist and a reformer at the same time. If you have this clear, you stay on the reform track –tolerating such (unpleasant) things, knowing that you are heading to an important change. I think that these two ideas interwound in our case: our status quo was a disaster, taking us to impoverishment, social polarization, an absurd socialism that made me reject those perspectives for the future of my country. On the other hand, given that I was educated in a Saxon society with a strong middle class made me ruminate on

⁵ Interview with Pedro Aspe Armella, Secretary of Finance 1988-1994, in Mexico City (Nov. 8, 2012). *See* Appendix, at 168-175.

how to create a strong middle class in Mexico without extreme poverty and extreme wealth.”⁶

As this new generation succeeded in implementing transformative reforms in the economic sphere during the Salinas administration, political reforms, equally pressing, were put in place during the presidency of Ernesto Zedillo. However, these transformations were originated not only from within, but also from the political system’s periphery where a vast array of participants were advocating for radical changes to the prevailing political model which had failed to internalize the growing wave of political pluralism.

While the economic reforms of the de la Madrid and Salinas administrations allowed Mexico to enter the global economy, this also entailed structural changes, especially democratic political competition and stable rule of law. If Mexico was to enjoy the profits of engaging with other countries in mutual benefit, then it would have to live according to the basic rules of contemporary democracies.

It must be noted that, contrary to popular belief, the reformers of the 1990’s did not focus exclusively on economics, neglecting other relevant areas such as electoral politics and rule of law. As Ai Camp explains,

⁶ *Id.*, at 125-126. “Mira, yo te voy a decir, los reformadores tienen que tener yo creo dos características. Una es que lo que ven no les guste, si no ¿por qué reformar? Entonces que tú crees que la realidad no te gusta porque es injusta, porque es ineficaz, por alguna razón y por eso quieres cambiar el *status quo* y te vuelves reformador. [Si] no tienes ideales no puedes ser reformador porque si quieres cambiar la realidad tienes que tener un ideal y creer que se puede. Si tú estás convencido de que no se puede pues ni lo intentas. Entonces tienes que tener un ideal pero por otro lado tienes que transitar en un corto - mediano plazo con cosas que no te gustan porque no puedes ser perfeccionista. No puedes ser reformador y perfeccionista. [Y] hay más, pero sigues en tu camino porque crees que hay que tolerar ciertas cosas si la dirección que estás haciendo te va a llevar a un cambio importante. [Había] yo creo que dos ideas grandes en esto. Una, esta idea de que el *status quo* era un desastre, que nos estaba llevando a empobrecimiento, a polarización social, a un socialismo absurdo, y decir esto no puede ser lo que será el futuro de mi país, no lo quiero. Y por otro lado el decir que yo me eduqué en una sociedad sajona con una clase media fuerte. Yo me acuerdo mi visión que era de ¿cómo le podremos hacer para que haya una clase media grande donde no haya ni carencias ni opulencias extremas?”

“Ideologically, the Mexican *técnicos* (technocrats) who gradually seized control of economic policy fostered a number of significant visions on Mexican society. It is erroneous to suggest that their beliefs in empirical methodologies and technical solutions made them value-neutral. They actively used their economic knowledge to foster a macroeconomic strategy, which included considerable ideological components and was linked directly to Mexico’s political development. [On] the political liberalization front, young power elites were more strongly divided, with the majority of incumbent political leadership adamantly opposed to rapid pluralization. President Zedillo, even though he came from the technocratic wing, helped to break down that barrier, frequently shifting the balance of power to a younger group of incumbent reformers.”⁷

In the words of one of the actors at the forefront of Zedillo’s administration (speaking under condition of anonymity),

“When we won the election of 1994, it was clear that despite the fact that we won it legally, the competition was iniquitous, the election was not fair. We were convinced that we had to change that.”⁸

The administration ushered in two major reforms, complete constitutional overhauls designed to liberalize the political system: an electoral reform creating

⁷ Roderic Ai Camp, *MEXICO’S MANDARINS. CRAFTING A POWER ELITE FOR THE TWENTY-FIRST CENTURY*, at 183, 252 (2002). Ai Camp argues that the Mexican technocrats, the “*técnicos*” as he refers to them, have left a distinctive imprint on their Latin American peers, “The *técnicos*, as a group, are worth examining because *they perhaps more than any other power elite group in Mexico influenced the major trends in public policy, trends which confronted and reformed the country’s economic and political structures;*” (emphasis added). Quoting Harvard professor Raymond Vernon, he describes them as having “a common ideology which, harnessed to the government apparatus, constituted a strong force in shaping the behavior of the public sector in Mexico... Accordingly, the strength of the technicians lies not so much in their powers to shape policy directly as in their capacity to choose the technical alternatives which are presented to their political masters,” at 176-177.

⁸ Personal interview (March 22, 2013).

autonomous Electoral branch, and an unprecedented reform in the judiciary designed to restore its independence and enhance its role as a constitutional tribunal.

The electoral reform ended the long-standing practice of allowing the government playing the role of electoral authority while its candidates were running for office, a practice which functioned reasonably well within the context of single-party rule. But when political pluralism was consolidated by the political reforms of 1977, this practice of being referee and player simultaneously became increasingly disruptive to fair political competition. This reached its climax in the election of 1988, one in which the PRI was either close to losing or actually lost. The government used its power to act as electoral authority to validate the final results showing Salinas had won.⁹ Since then, the demands for an independent electoral authority rose considerably, but it was not until the Zedillo administration that these demands were addressed.

In the case of the reforms of the judiciary, the main goal was to create a robust and independent judicial system as the key component of a stable rule of law, but also to establish a judiciary more in tune with the political plurality that characterized the liberalization of the political system. In the account of one who is considered to be one of the architects of this reform, José Ramón Cossío, changes became imperative:

“[To] the extent that by the early 1990’s the judiciary was considerably discredited, including the Supreme Court, but at the same time (given the political context of the time), it required a foundational or re-foundational of our judicial system that would result in a Judicial branch capable of functioning in the context of political plurality that we were about to enter. That is the fundamental issue in my view.”¹⁰

⁹ Roderic Ai Camp, *supra*, note 4, at 124-125.

¹⁰ Interview with José Ramón Cossío Díaz, Justice of the Mexican Supreme Court 2003-2018, in Mexico City (July 13, 2012). I am particularly grateful to Justice Cossío for his insightful comments on the nature

To illustrate this, Justice Cossío cited a case decided by the Supreme Court in 1997 with origins going back to 1940: it concerned a boundary dispute between the states of Campeche and Quintana Roo, in the Yucatán Peninsula. President Lázaro Cárdenas settled the dispute, without any constitutional authority but enough political power to do so. By means of presidential decree, he set the territorial limits between the states. This remained in force until a new conflict concerning the same boundaries arose between the states, each claiming a historical right over the pre-Hispanic town of Calakmul, leading to a constitutional dispute, which was ultimately adjudicated by the Supreme Court. Cossío explains his metaphor,

“What do I mean with this? That in the past there were many (informal) alternative dispute resolutions for political conflicts between the different levels of government. The power to solve them was basically allocated to the President and the Secretary of Interior, or in the president of the PRI. But when we entered into a context of political pluralism it was more complicated for a Secretary of Interior from the PRI, to call two state governors from the PAN, to solve their dispute, aside the constitutional powers bestowed by the constitution.”¹¹

Furthermore, these reforms paved the way for a new constitutional order in Mexico. As Zamora and Cossío underscore,

“[The] fundamental changes that have occurred during the past decade in institutions central to Mexico’s constitutional order (are not only due to) [the]

of our Supreme Court after the constitutional reforms of 1995 as well as its present role as a full-fledged constitutional tribunal. *See* Appendix, at 63-68.

¹¹ *Id.*, at 68. The constitutional dispute he referred to is *Controversia Constitucional 31/97*, 10 SJF 708 (9a época 1999).

demise of a single-party democracy (that) not only created a new political order: it generated as well, fundamental changes in Mexican constitutionalism, with formal constitutional and legal reforms playing an important but secondary role in revising Mexico's constitutional structure. The authoritarian presidencialismo that dominated Mexico's political culture throughout much of the twentieth century has been replaced by a disempowered presidency and a divided Congress, with a revamped Mexican Supreme Court –long a minor factor in Mexican constitutional politics- assuming a key role in the development of the law [and] becoming an arbiter between Congress and the presidency. [The] political instability of multiparty politics in Mexico will place further strains on Mexican constitutionalism in the future and will require careful responses from those institutions –especially the Supreme Court- that oversee the development of law in Mexico.”¹²

Taken together, these transformative events served as a foundation for the implementation of democracy in Mexico, which reached its pinnacle with the election of the *panistas* Vicente Fox and Felipe Calderón to the Presidency in 2000 and 2006, respectively. However, as we will see in coming sections, the consolidation of democracy in Mexico would require much more than a peaceful transfer of power, given the deeply rooted political practices and symbols of our political ethos.

In outlining these challenges, I will begin by providing a brief description of our current state of affairs, giving special attention to the problems that have haunted our democracy over the last six years.

¹² Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism after Presidencialismo*, 4 INT’L J. CONST. L. 411 (2006).

II. THE PRESENT STATE OF AFFAIRS

As in many other countries in the world, Mexico is living through daunting and challenging times. Among many observers representing a wide range of ideologies and perspectives, there is consensus that the country is at a critical point. Increasing violence, fragile rule of law, soaring unemployment, dubious political processes and actors, a growing gap between the government and the people, rising unrest within civil society, and scores of regions all over the country controlled by the drug cartels, are some of the formidable challenges characterizing the present state of our nation.

I will focus in some of the obstacles of particular relevance to the subject matter of this work: (i) violence, (ii) rule of law, and (iii) the quality of our political institutions and processes (e.g. institutional paralysis and legislative stalemate), in order [to provide a sketch of] the status quo in Mexico over the last six years (2006-2012).

i. Violence

The growing violence and its expansion throughout the territory has, over the past six years, resulted in casualties numbering somewhere between 47,500 and 100,000, depending on which source is taken as authoritative.¹³

¹³ At the end of the Inaugural Meeting of North American Defence Ministers in Ottawa, Canada on March 27, 2012, U.S. Secretary of Defense, Leon Panetta, in a joint press conference with Mexican Secretaries of National Defence and of the Navy, estimated that 150,000 persons have lost their lives in Mexico for narco-violence. The statement was immediately used by different informative agencies to evidence the inaccuracy of the official numbers that are around 50,000 casualties. In a joint press release, the Mexican Secretaries of National Defence and of the Navy, clarified that Secretary Panetta was referring to the total of casualties in Latin America per year due to the war on drugs, underscoring that the estimation in Mexico approximates 50,000 over the last six years. Nonetheless, non-official estimations point to almost 100,000 deaths within the same period, e.g. December 2006 through March 2012. *See* http://www.nytimes.com/2012/01/12/world/americas/mexico-updates-drug-war-death-toll-but-critics-dispute-data.html?_r=0; *see also* <http://www.nytimes.com/2012/06/11/world/americas/us-braces-for-mexican-shift-in-drug-war-focus.html?pagewanted=all>; (Last search: November 9, 2012).

What is clear is that the general perception of the maximization of violence constitutes the greatest concern in the society and there is a growing impression that despite the strategies implemented by President Calderón, the levels of violence did not decline, but, on the contrary the death toll of the drug war has increased steadily since 2006, and that violence rather than receding, continues to spiral out of control.

Over the last decade, and particularly over the last six years, drug violence has become a constant in Mexico's daily life. Nearly all areas of social activity have been affected, from small villages to larger urban settings, dramatically changing the Mexican way of life: most citizens have changed their routines and behavior over the last six years in light of deteriorating public safety due to the ceaseless struggle of the drug cartels to control different regions of the country.

This scenario became more complex when President Calderón ordered the deployment of military forces throughout the country, especially in the northern regions of Mexico, where the presence of the drug cartels was more evident and strong enough to undermine the authority of democratically elected local authorities. This strategy, though necessary at some point in light of the way in which drug trafficking eroded local institutional capacity to combat it, did not achieve the goal of making the inhabitants of those regions feel safer and more secure. On the contrary, there has been a gradual and silent diaspora of middle-class Northern Mexicans to the U.S. southern states. However, most of the people living in Mexico's northern states have remained in their cities and villages in the midst of unending battles between security forces and drug cartels. This milieu gave (and continues to give) the overall impression within society that such situation may never end.

Since the beginning of 2007, drug violence rapidly eclipsed other public concerns, becoming in the years that followed the only relevant topic in the headlines of Mexican major newspapers and media, as well as the sole topic of interest of the foreign press. It

was just a matter of time before the public became inured to hearing reports of daily killings, kidnappings and events associated with drug violence. Sadly, it has become part of the mainstream of Mexican life.

Although it may appear that this is one of many problems now plaguing Mexico, it is worth explaining why drug violence, initially fostered by other dysfunctional Mexican public institutions and policies, has become the most influential variable in the entire public decision-making process of in Mexico.

The primary source of this problem—though not the only one, is Mexico’s geographical importance for the transport of drugs to the United States. As is well known, in the 1980’s Mexico served as portal for drugs moving from South America (mainly Colombia) across the southern border of the U.S. According to some experts, Mexican drug cartels of that time were given between 35% to 50% of each drug shipment,¹⁴ so that by the 1990’s, they were well-established not only as facilitators of drugs transport but, even more importantly, as producers, becoming the largest producers of cannabis and methamphetamines,¹⁵ and controlling almost 70% of the drug flow to the United States.

In a developing country such as Mexico, with national wealth inequitably distributed, the possibility of participating in the profitable business of drug trafficking became increasingly popular in small communities and villages, to say nothing of larger towns and cities. This was also due to the fragility of local institutions and the easily corrupted local police. Consequently, there was a comprehensive corruption network that involved the drug cartels with law enforcement officers and authorities at all three levels of government, with municipal and state levels being the most accessible.

¹⁴ See Mexico, U.S., Italy: The Cocaine Connection, Stratfor Intelligence, September 18, 2008.

¹⁵ Letter from Mexico: Silver or Lead, *The New Yorker*, May 31, 2010, at 40-41.

The pattern of collaboration was simple: municipal and state officials—from the police force to democratically elected officials—were bribed or threatened by the members of the drug cartels to allow them to trade and transport drugs freely within any given state, city or town, and, as has been seen over the last years, drug cartels have also replaced officials, becoming *de facto* local authorities in order to exercise absolute control upon their communities and *plazas*.

This phenomenon demonstrated how fragile our institutions were and how inadequately prepared and ill-suited our traditional practices and actors were with respect to the shift of power that took place in 2000, when Vicente Fox won the presidency. Until this occurred, and even under the aforementioned circumstances, drug violence was not yet rampant, by virtue of a sort of implicit *modus vivendi* between drug cartels and governments controlled by the hegemonic party –PRI.

This is very well described in Jo Tuckman’s accurate [maybe something else here] account of Mexico’s pressing realities. Following sociologist Luis Astorga she explains the close connections between the drug cartels and the government in Mexico in the following terms:

“[The] intimate association between trafficking organizations and politics [started off] with local politicians directly controlling local drug traffickers. The relationship became more complex when traffickers got richer and governments were politically required to be at least seen to be chasing them, though it was never broken. One-party hegemony meant that the regime could still impose limits on the autonomy of both the traffickers and the corrupt security officials and individual politicians in their pay, but this began to break down as the PRI slowly lost its monopoly of political power. [The] burgeoning political plurality of the end of the twentieth century freed the traffickers to play the new political game and to expand their influence, especially in the provinces. The weakening of central

government meant that it was more useful than ever for the cartels to control local police forces and local politicians. Genuinely competitive elections meant that politicians with access to cartel funds had a better chance of winning –and a larger debt to repay if they did.”¹⁶

Furthermore, Tuckman continues,

“In cartel bastions around the country there began what Astorga calls ‘a parallel transition.’ One-party rule had meant that the mafia bosses were required not to make life too difficult for the local authorities, for fear of incurring the wrath of centralized power. Now the federal institutions were just one player among many, and their ability to define and enforce the rules of the game was drastically cut. ‘In the old days the state held the balance defining the correlation of forces,’ says Astorga. ‘With the referee out of the picture, the struggle for hegemony among drug-trafficking groups became something different.’”¹⁷

According to more rigorous studies of this matter, the escalation of violence since 2000 was also due to the success of increasing law enforcement operations against the leaders of the cartels, which necessarily created leadership vacuums within which were often followed by bloodshed and killings until new leadership was assumed, or, (as has occurred in numerous cases) the respective drug cartel is fragmented.¹⁸

In order to combat the law enforcement strategies and operations conducted by the federal government, drug cartels have intensified their pressure on officials to lower the intensity and to limit success of these operations. As a consequence, the drug

¹⁶ *Supra*, note 3, at 25.

¹⁷ *Id.*, at 26.

¹⁸ *Id.*, at 22. (añadir cita del quinto párrafo de esta página).

violence spiraled out of control in the aftermath described above and that has left officially 50,000 people killed.

The drug war was the top priority of President Calderón's tenure and has triggered a massive reaction from civil society, embodied mainly in social movements composed of victims' relatives, who bitterly questioned the strategies implemented by the federal government to fight the drug cartels.

Radical Evil, Human Rights and the Need for a New Approach

In this scenario, the state of human rights and their protection is far from being even minimally acceptable. The increasing maximization of the expectations of violence across the country and the inability of state, local and municipal authorities to control the growing expansion of the drug cartels and the terror inherent in their activities, has led to a collective sense of frustration, impotence and despair. Ordinary citizens feel hopeless in the face of what has acquired the dimensions of radical evil.¹⁹

This radical evil is no longer a theoretical notion, an abstract way of describing atrocities occurring in other cultures and countries in different times and contexts. We are now experiencing in our daily lives the most overt expressions of evil, and the incapability of our authorities, procedures and institutions to meet this challenge represents a fundamental threat to our way of life and to our very existence as a nation.

I am not over-dramatizing the present situation by saying that if effective actions are not taken from the civil society sphere, this wave of terror and violence will ultimately set a new *modus vivendi* that is clearly incompatible with rule of law. The culture

¹⁹ Jaime Olaiz-González, *Questioning Impartiality: The Role of the Judiciary in Transitions to Democracy Confronting Radical Evil*, paper presented in the Aspiring Scholars Symposium at Yale Law School, April 2009

of violence and disrespect for human rights is gradually embedding itself in our culture, and particularly in new generations.

The experience of the last six years shows that separate and dissociated strategies to bring to an end these phenomena has ultimately lead to ineffective and futile outcomes. However much funding is allocated, and whatever collaboration between the U.S. and Mexican governments is attempted, if these strategies do not directly involve civil society they are likely to fail.

In the opinion of Albert Gore,

“[On] the security issue (in U.S.-Mexico relations), I think the U.S. policy that has allowed so many deadly guns that come from the U.S. into Mexico is a catastrophic policy and of course, should be changed. *I think that the whole policy of both countries toward narcotics is in need of a fresh review.* That is not a cryptic way of endorsing legalization. I’m not a fan of legalization but I hear some modified proposals that I think both countries should really work together on the demand side to stop the guns, and obviously we need a comprehensive immigration reform.”²⁰

A contextual and functional approach to the problem of violence and its impact on the protection of human rights is urgently needed. New strategies should be articulated from a comprehensive and transverse perspective aiming to empower non-traditional participants in various policy-making processes by cultivating civic virtues that might encourage a collective approach to action in contrast with those that now constitute the mainstream of our social life today, e.g. fear, selfishness, tolerance to

²⁰ Interview with Albert A. Gore, Vice President of the United States (1993-2001); Nobel Peace Prize (2007), in Mexico City (Nov. 17, 2011). *See* Appendix, at 11.

wrongdoings, and the disintegration of basic forms of social organization such as families and small local communities.

Such an approach may help bring to the table effective ideas and strategies capable of maximizing the possibilities of reciprocity, consensus and solidarity while minimizing the expectation of retaliation in every aspect of our social life.

The predominant narrative of human rights in Mexico has three threads: the first concerns the vision and practice of public authorities in the three levels of government, presently focused almost completely in the fight against the drug cartels. The second is usually the counterpart of the first, and takes the form of NGOs, who advocate for limiting the State in its actions and initiate litigation when human rights are violated by the authorities. Finally, the third element clusters media, academics and public opinion, which from a critical observational standpoint assess the attitude of authorities and NGOs toward human rights, favoring or rejecting their actions based on an array of variables. The fact is that there are very few channels connecting these parts, so it is very difficult to generate a meaningful conversation between them.

On the other hand, we still influenced by the preconception that the State is the most responsible party for violations of human rights. The evolution of human rights protection regionally and globally, as well as the emergence of organized crime (as the greatest threat to security and human rights) demand more functional and contextual approaches to this problem. A first step toward this goal is acknowledging drug cartels and criminal organizations as the *de facto* predominant perpetrators of human rights violations in Mexico. Among other things, this means that the language the government and NGOs use to shape public opinion must change rapidly to enable a productive conversation.

A further goal of this undertaking, then, is to create a framework that may enable such a conversation, from the most basic levels of social organization to those

more complex. The goal here is to provide arguments, intellectual tools and skills for government officials, NGOs activists and rank-and-file citizens as a way of enabling between them meaningful conversations in order to in the short run, elaborate strategies to minimize violence and human rights violations in small communities, and then, to work together to shape public policies in this area.

The fundamental reason underlying deteriorating human rights situation in Mexico is the lack of effective strategies for fostering and cultivating a new approach to an empire of human rights. The predominant view of human rights in Mexico is reactive rather than preemptive. This orientation makes a substantial difference in the way escalating violence is handled authorities. So far, the focus has been on reacting to the deteriorating situation of the country by combating criminal organizations directly. Caught in middle of this strategy, a great number of innocent bystanders have lost their lives.

Although it clearly necessary for the State to respond directly the drug cartels,, from the vantage point of civil society it seems clear that it must also adopt preemptive strategies designed to minimize the risk of communities falling in the hands of the cartels. This is best accomplished through a broad and inclusive process of collective redefinition through human rights education—in the forms of town meetings or other deliberative bodies—to address these problems with the particularities of each community in view, since in a problem of this magnitude, a one-size-fits-all strategy seems doomed to failure.

ii. Rule of Law

The deterioration of the quality of life in Mexico due to the drug war has coincided with the failure to completely consolidate the rule of law. A pervasive culture

of anomie now prevails within Mexican society, where attitudes of disdain toward the law are commonplace.

As Carlos Santiago Nino describes in the Argentinean context,²¹ in the case of Mexico, anomie easily grew within an atmosphere of institutional weakness, social fragmentation and enduring elites' privileges. This fostered a culture of differentiation that has historically undermined the rule of law.

As a consequence, corruption and impunity are rampant in Mexico. Nonetheless, there has been an unwavering effort by civil society organizations and the federal government to address this weakness, which, if left unchecked, could become a systemic and permanent flaw in our legal and political system.

There is a clear awareness among Mexican elites that if the country's rule of law is not promoted and effectively assimilated as part of the civic culture of the present and coming generations, further possibilities of political stability and economic development would be imperiled. However, it is also clear that there is much more to do if we want to strengthen our rule of law in the coming years.

Looking at the interviews conducted for this dissertation, it would appear that most of the interviewees who are part of economic and political elites are rather optimistic about the future of rule of law in Mexico. Their shared optimism seems to reside in the belief that as long as Mexico perseveres in refining its processes of constitutional and legal change by strengthening current political institutions, our rule of law will be able to endure and prevail over the cultural inertias and trends created by anomie, corruption and impunity.

And yet the undertaking to reinforce our rule of law does not solely depend upon gradual changes in social attitudes toward the legal system, but also in the perspectives of the legal community as a key participant in the social process, since this community will

²¹ Carlos Nino, *UN PAÍS AL MARGEN DE LA LEY*, at 53-85 (2005). I appreciate Professor Burt's enlightening explanations on this matter.

have to play a crucial role in the shaping and influencing the final outcome of this enterprise by means of changes in legal education and profession.²²

Never before has there been such pressing public awareness of the importance of strengthening the rule of law. This collective understanding has led to important constitutional changes aimed at introducing new legal institutions and processes in order to restore public trust in the empire of law especially in light of the growing violence resulting from the drug wars. And yet, after almost a half-decade after the approval of a bill specifically designed to address the unprecedented scenarios brought on by the drug wars not only there has not been any substantial progress, but rather some evidences of regress.

This stagnation has very much to do with the perception of the governed about their safety, the robustness of the rule of law, their trust in law enforcement institutions and their views on the effective protection of human rights in Mexico, a fact which is borne out by survey research: In a series of surveys conducted in 2012,

- 8 out of 10 Mexicans considered the prevailing situation of violence worse than in previous years in the same study;
- 1 out of 7 citizens acknowledged having bribed a police officer within the three-month period prior to the survey; the survey also revealed that the more educated a person is, the more likely he or she is to bribe authorities;
- 1 out of 4 of those who participated in the study, was victim of a felony; and

²² In Part VI, I elaborate in greater depth on the expected role of the legal profession and academy to enhance our rule of law.

- 3 out of 10 Mexicans answered that insecurity was the most pressing problem in the country.²³

When it comes to public approval of our institutions, the most highly esteemed are, in descending order: universities, the Church, the Army, the National Commission of Human Rights and the media, which are positively valued by an average of 7.5 out of 10 Mexicans. These institutions are followed in a second tier by the Supreme Court, rated with an average approval rating of 6.9, Businessmen with 6.8, the Electoral branch and the Banks, both with an approval rating of 6.7, and the President with 6.6. In a third tier, the unions, the Senate and political parties, are rated with the minimal approval of 6.0, followed at the end of the tier by the police and the Chamber of Deputies, both rated 5.9.²⁴

According to one of my interviewees (who is a former government official and asked for anonymity) the core problem in Mexico is our societal lack of appreciation for the rule of law. In his view, to the extent that Mexican society systematically holds rules and institutions in low esteem, impunity, anomie and corruption will continue to corrode our social and political structures. He described this conundrum in the following terms:

“In the context of the conferences that I am frequently asked to give in Mexico, I have noticed that when I start talking about the importance of a sound rule of law, I lose visual contact with the audience given the uncomfortableness that these type of comments produce, since the social ethos –when it comes to the impartial application of the law- is more concerned about finding the right connections in

²³ For these and other figures/data, *see* <http://consulta.mx/web/images/mexicoopinapdf/Décima%20Primer%20Encuesta%20Nacional%20sobre%20Percepcion%20de%20Inseguridad%20Ciudadana.pdf> (Last search: February 28, 2013).

²⁴ *See* http://consulta.mx/web/images/mexicoopinapdf/20120830_NA_Confianza_Instituciones.pdf (Last search: February 28, 2013).

the government structure in order to avoid the legal consequences of its actions, instead of assuming it as a predictable and logic consequence of the adequate operation of a system of justice based in a effective rule of law.”²⁵

The huge gap between our legal culture and those of developed countries is that Mexico has historically undertaken the lengthy and strict formulation of all kinds of laws, but when it comes time to applying them, it opts for a lax, selective and differentiating approach. In more developed countries the situation is very much the reverse: the rule of law is characterized by a minimalist and flexible legislation, with ample room for interpretation, and a strict, non-selective and egalitarian application of the law where all citizens are treated in the same way regardless of their position in the political, social or economic structures.²⁶

iii. Quality of political institutions and processes

Mexico’s democracy is broken, as well as its social bonds. We have mutated from a semi-authoritarian model of extreme concentration of power to a ‘democratic’ system characterized by the fragmentation of authority and institutional frailty. This has led large portions of the population to yearn for the “good and peaceful old years,” inspired by nostalgia for a more orderly time, to rush back into the arms of the former hegemonic party in the last presidential elections of 2012.

²⁵ Personal interview on February 22, 2013.

²⁶ I owe this insight to Guillermo Aguilar-Álvarez, who has experienced through his practice as international arbitrator the remarkable differences between these two approaches when it comes to appraising the operational codes for legal adjudication. In terms of equality before the law, in contrast to deeply-rooted practices of differentiation based status privileges, I have found an explanation from Porfirio Muñoz Ledo, particularly suitable/relevant her: “[a] transition to democracy is more enduring when it succeeds in eradicating past impunity by reinforcing the rule of law. In that respect, the Mexican case has been catastrophic,” *see* Carmen Aristegui and Ricardo Trubulsi, *TRANSICIÓN. CONVERSACIONES Y RELATOS SOBRE LO QUE SE HIZO Y DEJÓ DE HACER POR LA DEMOCRACIA EN MÉXICO*, at 254 (2009).

As Jo Tuckman describes it, our political transition has been accompanied from the very beginning by continuous and increasing

“[Fragmentation] of authority and institutional weakness, [as] well as the failure of the political elite to seize the golden opportunity presented by the demise of one-party hegemony to push forward democratization in a much more aggressive way.”²⁷

History has made us painfully aware of how challenging our political transition was, and shown that we were not adequately equipped to assume political liberalization from a critical perspective and a more resolute determination.

We have devoted the last twenty years to articulating our demands concerning the process of selecting and appointing our representatives, while ignoring how these representatives should execute the mandate of the people.

Too much attention and detail has been given to the electoral process, at the expense of the constitutive process, which from our vantage point, is the series of operations by virtue of which democratically elected representatives in executing the people’s mandate, engage in a conversation with the governed to articulate the procedures of constitutional decision-making. And yet, in light of the ongoing demands and legitimate expectations of the people, it is the constitutive rather than the electoral process that stands most in need of a rethinking in our public agenda.

To explain the growing dissatisfaction with current political processes and institutions, as part of his distinctive call to revisit the traditions of political radicalism, Roberto Gargarella presents a compelling description of the present state of affairs,

²⁷ *Id.*, at 51.

“[The] problem consists in the skepticism before the task of political bodies (Congress, the Executive branch) [given] the conviction that such organs are not working in an acceptable way, as they are far from adequately representing the governed. [Given] that we want our political system to be responsive to the will of the majority and, at the same time, to ensure an adequate protection of minorities, [we may be able to find a] response in the 'genuinely radical tradition,' which means that 'all possible affected' by a particular decision ought to take part in the decision-making process; as they acknowledge at the same time the inherent fallibility of majoritarian processes of decision-making.”²⁸

From the interviews conducted here, it is clear that among the ruling elites, two groups are, in the final analysis, the driving force behind the constitutive process as a whole: the political elite and the technocrats. It seems that ever since the transformative years of the last decade of the past century, there has been an implicit agreement between them not to interfere in their respective domains in order to leave the status quo intact.

In terms of the operational codes among the relevant participants in the constitutive process, there is a widespread perception that the more institutionalized the system, the less room for improvisation in the process of decision-making. Conversely, the less institutionalized through procedures and protocols, the greater the chances of arbitrary behavior on the part of decision-makers who, in the absence of rules, typically improvise. In sum, improvisation fosters unfairness, unpredictability, uncertainty, opacity, arbitrariness and ultimately, illegality.

There are several misconceptions about the current state of affairs and the quality of our democratic processes: Mexico does not suffer from an institutional paralysis, as has been claimed, since there is evidence that from 1997 until this day, there have been

²⁸ Roberto Gargarella, *LA JUSTICIA FRENTE AL GOBIERNO. SOBRE EL CARÁCTER CONTRAMAYORITARIO DEL PODER JUDICIAL*, at 13 (1996).

more constitutional reforms than in any fifteen-year periods since 1917.²⁹ This perception of paralysis could be misleading, for the following reasons:

- a. According to Casar, in the period of 1997-2009, there have been more proposed and approved bills than ever before;³⁰
- b. The system was forced to liberalize and by definition, transformations do not occur with paralysis;
- c. The system was not prepared for political plurality that characterizes our political system since 1997;
- d. Hence, from the perspective of the dualist democracy model, in that period Mexico actually experienced a shift into a higher lawmaking gear, as we will see in Part V.

An additional problem is that our political culture is not well equipped to handle disagreement. Instead, we think of politics as the art of bringing everybody together to speak in the same voice. . We think that only through agreement and consensus, genuine democracy is served. This is wrong: at this stage of our nascent democracy we should get used to disagreement as a constant in the constitutive process, as a healthy expression of our plurality.³¹

For the foregoing, I put forward the idea that pursuing constitutional change in Mexico exclusively in a top-down fashion is wrong. As part of our longstanding legalist

²⁹ John Ackerman, *La nostalgia autoritaria*, VARIOPINTO, Agosto 2012, at 38-41.

³⁰ María Amparo Casar, *Representation and Decision-Making in the Mexican Congress*, Documento de Trabajo Núm. 258, Centro de Investigación y Docencia Económicas, at 11 (Oct. 2011).

³¹ John Ackerman, *El consenso de los oligarcas*, PROCESO, 25 de Marzo de 2013. Available at <http://johnackerman.blogspot.com/p/el-consenso-de-los-oligarcas-revista.html> (Last visit: April 14, 2013)

tradition, we have assumed that reality might change by means of prescription. It is the same reality that shows the failure of this approach. Accordingly, I will argue that constitutional change should be undertaken from the bottom-up, as a reflection of changes in reality that need to be constitutionally codified.

Furthermore, regarding the question of whether our constitutional system is equipped with adequate institutions and processes to handle the bitter debate between the People and their representatives, in the case of Mexico I am afraid the answer is no: This is clear from a brief look at how the power elites have monopolized the process of decision-making in the case of our political transformations as described in Part II, and more recently, with the political reform that will be comprehensively analyzed in Part V.

III. THE CORE INQUIRIES OF CURRENT CONSTITUTIONAL DECISION- MAKING IN MEXICO

Mexico's political system seems stuck in a kind of dysfunctional limbo. It has left behind one-party hegemony, but has failed to make the transition to democracy in which the citizens have effective ways of demanding more than superficial attention outside of elections, and punishing the careers of those who have let them down.

Jo Tuckman³²

1. *The Problem of Constitutional Symbolism in Mexico*

If, contrary to prevailing but misleading preconceptions, constitutional symbolism was stronger during the reign of the hegemonic party as compared with the

³² Jo Tuckman, MEXICO. DEMOCRACY INTERRUPTED, at 82 (2012).

subsequent period of constitutional reforms since 1997, after other political parties outnumbered the PRI in Congress, we may conclude that:

- a. The hegemonic party, contrary to popular assumption, was either reluctant to change the constitution or highly respectful of the then-prevailing tradition of constitutional symbolism;
- b. The hegemonic party saw no need to change the constitution, except when absolutely necessary or when it served to their supreme interest of remaining in power;
- c. The hegemonic party paid minor attention to the constitution when governing, since for them its only value was symbolic;
- d. The hegemonic party was influenced in its attitude towards the constitution by a combination of these three hypotheses.

The argument can be summed up as follows. Since the constitution is constraint on the misuse of power, and, in light of the fact that the hegemonic party's exercise of power was absolute, the constitution was meaningless during their seventy-year-rule, except as means of symbolically expressing what at any given time was convenient to the ruling party.

Hence, the actual enforcement of the constitution in terms of authentically articulating the relationships between the governed and the governing came into being after the establishment of political plurality in Mexico and its representation in Congress in 1997, continuing until the present day. Since then, taken together, political parties in Congress have more seats than PRI, which has implied a radical change in/altering of the constitutive process of decision-making, as political parties and their representatives were forced to establish multi-partisan collaboration across the aisle.

The liberalization of the political system was the first attempt by the governed in decades to claim or vindicate their ownership of the constitution and also represented the first steps toward a conception and meaning of the Mexican constitution as a living document, rather than merely symbolic one.³³

The hegemonic party tended to consider the constitution as an instrument of power or legitimation, rather than as a declaration or a promise for a better future, as an instrument for transformation. The great difference in conceptions of the constitution before and after the political liberalization of the last fifteen years is what lies behind the bitter debate over how the country should address its present and future challenges.

2. *Decaying Hyper-Presidentialism and Fragmentation of Power*

Mexican political and constitutional culture was, and to a degree still is, deeply rooted in a model of complete concentration of power that left small room to autonomous participants. Everything was designed to fit with a political organization built around the hegemonic party as the embodiment of the regime, with the president as the guiding force of the whole system. Hence, once this changed and power was fragmented, new realities demanded not only the allocation of power in new participants, but also (and perhaps more importantly) a radical shift in the prevailing political and constitutional culture.³⁴

³³ My views on this particular matter (especially as expressed in Part I) are influenced by the work of Robert Post & Reva Siegel, in which they formulate a distinctive vision of “democratic constitutionalism.” See et al., Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. Civil-Rights Civil-Lib. L. Rev. 373 (2007); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020* 25-34, (Jack M. Balkin & Reva B. Siegel eds., 2009).

³⁴ However, this is not a shared view among relevant participants who still allocating in the president substantial influence and power in the constitutive process. Such is the case for example of Xavier Olea Peláez, who still believing the president as “the most powerful person in Mexico. [There] is no such thing as saying no to the president. [There] are very few people around the president with whom he would share the insight for further decision-making. It is a very small group, like in a bunker.” According to Olea there is no such thing as genuine fragmentation of power or decaying hyper-presidentialism in Mexico. See

Our constitution was not adequately equipped to address the fragmentation of power brought about by political pluralism, despite the number of political reforms that have been implemented with this in mind. Their repeated failure only shows that the problem does not reside exclusively in rules and prescription, but instead in the dominant political culture that remains anchored in the past.

Thus far, the fragmentation of power has meant only a slight change in rhetoric, shifting from the use of singular to plural conjugations to describe the exercise of power. However, as did the president and the hegemonic party in the past, the “de facto powers”, following a similar pattern, now manage “to get the rules changed to fit with their interests, or to ensure that their transgressions are tolerated by the authorities.”³⁵

In the opinion of some actors at the forefront of the process of democratization that resulted in a soft-liberalization of the political system,³⁶ the momentum to consolidate the radical transformations ushered in since 1988 did not begin until the opposition won the presidency in 2000. According to these views, the following six years were crucial to dismantling the corporative apparatus resulting from the so-called “institutionalized revolution” framed by a seventy-year one-party rule. In short, for these commentators it was a unique opportunity to establish a new historical and political narrative in the use of power, leaving behind the corporatist and semi-authoritarian one-party rule together with all its principles and practices. It could then be replaced with a

Interview with Xavier Olea Peláez, Criminal Defense Attorney; Partner of Olea & Olea Abogados; in Mexico City (Oct. 10, 2012). *See* Appendix, at 137-138.

³⁵ *Supra*, note 32, at 84-85. This is also shared by Xavier Olea Peláez, who argues “[The] main interest of political elites and ‘de facto’ powers can be summarized in a single word: ‘impunity.’” *See* Interview with Xavier Olea Peláez, Criminal Defense Attorney; Partner of Olea & Olea Abogados; in Mexico City (Oct. 10, 2012). *See* Appendix, at 130-131.

³⁶ Carmen Aristegui and Ricardo Trabulsi, *TRANSICIÓN. CONVERSACIONES Y RELATOS SOBRE LO QUE SE HIZO Y DEJÓ DE HACER POR LA DEMOCRACIA EN MÉXICO* (2009). Aristegui provides a very interesting account of the flaws of our defective transition to democracy based on candid and revealing interviews with some of the most relevant political actors of that defining period of our recent history.

democratic vision of the mandate of the people, with the latter as the cornerstone of the political system, rather than the president and his party as in the past.

In the view of the same commentators, this opportunity was as pressing as it was unique: there was limited time, it was thought, to take resolute action to transform the prevailing political structures and procedures before the PRI recovered from defeat and began mobilizing its political base to reclaim its predominance. But the moment was lost, and this historical opportunity was squandered, in part because of dubious attempts by the incumbent president, Vicente Fox, to appease the PRI and govern in consensus with them. He soon began to fathom his own naiveté as he found himself unable to cope with their fierce opposition in Congress anytime he intended to push for legislative reform.

In this context, it is worth emphasizing the unmatched ability of PRI to channel social discontent in a way favorable to it and to turn it against its adversaries. With its enduring political experience and a long-range planning, the PRI managed to regroup in the years following their defeat in 2000, by engaging in a comprehensive political and programmatic introspection and an overhaul of its national electoral machinery,³⁷ aiming not toward the upcoming presidential election of 2006, but rather to the consolidation of its supremacy over the years in order to regain the presidency in 2012 as they in fact did by an overwhelming majority, by taking political advantage of the growing social frustration and repudiation of the majority of the population with both the Fox and Calderón administrations,

The remarks of some commentators concerning the fledgling condition of our democracy are also worth considering here. On these accounts, the flaws of the political

³⁷ Interview with Miguel Alemán Velasco, Governor of Veracruz 1998-2004; Senator 1991-1997, and Lorenzo Lazo Margáin, Chief of Staff to the Governor of Veracruz 1998-2004, in Mexico City (Dec. 5, 2012). In this instance, I have benefitted from the insights offered by Miguel Alemán Velasco and Lorenzo Lazo pertaining to the PRI's 20th National Assembly held in August 2008 which served as the baseline for the future campaigns the PRI would later win by landslides: the mid-term elections of 2009, and a few years after, the Presidency. *See* Appendix, at 232-275.

system can be explained as the consequence of a set of societal values that have kept us anchored in the past.³⁸ Mexico has been characterized by a presidential system that reached its peak in the 1, second half, of the 20th century under the PRI's rule.³⁹ The power that the president enjoyed then and the resulting operational codes, led this form of government to be described as *hyper-presidentialism*,⁴⁰ in which separation of powers is made non-existent by the absence of real checks and balances.

This began to change from 1994 onwards. As a result of liberalization from within as well as President Ernesto Zedillo's self-restraint and personal commitment to democratic values and practices, hyper-presidentialism gradually mutated into a genuine system of checks and balances in which the Legislative and Judicial branches of government were progressively empowered, filling the formal vacuums once discharged by the so-called "meta-constitutional" powers of the president.

This earlier fragmentation of power also benefited the political parties in proportion to their size. Governors, local officials and union leaders also began to enjoy

³⁸ Héctor Aguilar Camín and Jorge G. Castañeda, *Un futuro para México*, NEXOS, Nov. 2009, <http://www.nexos.com.mx/?P=leerarticulo&Article=29024> (Last visit: March 30, 2013). These prominent Mexican intellectuals describe how Mexico remains trapped by its past: "Mexico is a prisoner of its history. Inherited ideas, sentiments and interests keep Mexico from swiftly moving to the place yearned for by its citizens. The history that has been logged in our national psyche—in its laws, its institutions, its habits, and fantasies—obstructs the country's future trajectory. [This] inheritance includes unchallenged traditions: petro-nationalism, a defensive approach to sovereignty, the freezing of property and coastal assets, monopoly trade-unionism, habitual corruption, and patrimonial bureaucracy. These are solutions and vices acquired during different moments of the country's history, representing a cocktail of different vintages, cemented in the public consciousness, refusing to depart the scene, and featured in public habits, economic interests, and a political patronage that recycles old formulas because it defends old interests." The English version of the article can be viewed at <http://media.jorgecastaneda.org/files/D9971499-7B52-719E-D955-38BF66650BFD.pdf> (Last visit: March 31, 2013)

³⁹ Daniel Cosío Villegas, *EL SISTEMA POLÍTICO MEXICANO. LAS PROBABILIDADES DE CAMBIO* (1976). As explained in Part II, Daniel Cosío is for many specialists the acknowledged authority in describing the political system in Mexico and the presidentialism that resulted after the Mexican Revolution. Cosío's theory of "concentric circles" depicting how the whole political system spun around the president and how all decisions were ultimately taken by him during his term in power—"A sexennial monarchy" as Cosío refers to it- is a useful tool for understanding the political ethos in Mexico after the Revolution.

⁴⁰ Susan Rose-Ackerman, Diane A. Desierto, and Natalia Volosin, *Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and Philippines*, 29 *BERKELEY J. INT'L LAW* 246 (2011). I owe this observation to the work of Carlos Santiago Nino, describing its application in the case of the Argentinian Presidency, see Carlos S. Nino, *Hyper-Presidentialism and Constitutional Reform in Argentina*, in Arend Lijphart and Carlos H. Weisman (eds.), *INSTITUTIONAL DESIGN IN NEW DEMOCRACIES* (1996).

an unprecedented autonomy. However, within society the story was remarkably different: despite this atomization of political power from a centralized authority into a vast array of actors, the citizens continued—perhaps—unconsciously, as a consequence of customary behavior—to place the burden of government in the person of the president as they had in the times of the hegemonic party and the hyper-presidentialism.

This reaction was due to a deeply rooted charismatic conception of power and its personalization in the institution of the presidency, one accurately described with an illustrative metaphor by Jo Tuckman, who characterizes the PRI regime at its pinnacle as

“[A] kind of political solar system [where] the president –the sun- provided the guiding force for almost everybody, from the governors to intellectuals, the unions to the Church, and the media to the opposition political parties. They moved around the system with different degrees of subordination to the center, [but] their movements were always controlled to some degree. [But in the era of political plurality] the waning of the sun’s gravitational pull released the planets to roam more freely, but the absence of more concerted efforts to deepen democratization meant that they did so with their own orbits largely intact. Some floated off towards irrelevance and began to lose their satellites, but others began drawing in more floating bodies, gaining greater weight and importance in the definition of how the whole system works.”⁴¹

This widespread behavior, (of seeing the president as the cornerstone of the whole political system) continues even to the present day, and has also pervaded elite-based groups such as political parties, lawmakers, businessmen, and intellectuals who in

⁴¹ Jo Tuckman, MEXICO. DEMOCRACY INTERRUPTED, at 84 (2012). Most likely, Tuckman’s reference to Krauze in this matter is based on the deep influence of the work of Cosío Villegas on Krauze’s historical narrative. See *Supra*, note 39.

different ways direct their demands, dissatisfaction, and frustration at the president. This is worth noting because the structural changes ushered in over the last two decades were intended in large part to invite other actors into the decision-making arena, which until then had been exclusively centered on the president.

3. *The problem of “revolutionary nationalism” as a self-perpetuating narrative*

For decades our common political culture was framed in the postulates of the so-called “revolutionary nationalism,” the ideology that provided the guiding ideology for the hegemonic party since its foundation in 1928. Briefly summarized, it was based in the premise of a state party with great powers of popular mobilization by means of extensive and sophisticated patronage networks and fierce nationalist fervor of the populace. The cornerstone of this structure was the president, who controlled with full authority all the chess pieces not only at the three levels of government but also outside the political spectrum, including media, academia, business, and banking. This changed with the liberalization reforms implemented in the 1990’s, reaching its climax in 2000 when the PRI lost the presidency. The shift in power was also supposed to bring about a substantial change in political culture. It did not occur. The error was to expect that such changes would be realized in just a decade.⁴² A clear example of a recurrent lack of historical perspective in assessing democratization. Revolutionary nationalism was patiently infused in many generations within more than seven decades in power and by means of a powerful and redemptory narrative after the end of the Mexican Revolution.

⁴² *Supra*, note 38. In this instance, Aguilar Camín and Castañeda offer an instructive description of the depth of “revolutionary nationalism” in our political and social ethos, “[Public] life in Mexico is held hostage by the decisions of its dead Presidents, by the political inheritance of statism and corporatism that we call ‘revolutionary nationalism’ and is sheltered by that mythical acronym—PRI—that today is both a minority party and the reigning political culture. [The] PRI might have left *Los Pinos* (name of the official residence of the President of Mexico), but it never left the soul of Mexico;” emphasis added.

For millions of Mexicans, the ethos of revolutionary nationalism was part of their daily life, of their identity. Thus, it seems naïve to expect that this would change by a mere shift of authorities.

However, changes are unfolding rapidly despite the remaining strength of this narrative. Civil society institutions, mainly in the form of social movements and by means of social networks, have been tirelessly pushing for a new political culture more in tune with our current realities and predicaments. Notwithstanding the fact that the PRI won the presidency in 2012, it is clear that the trajectory towards the consolidation of a more democratic political culture is irreversible. This transition however, still generates monumental tensions between those who await a sort of revived revolutionary nationalism seeing it as a viable project of modernization for the country, and those who believe the practices of revolutionary nationalism are utterly incompatible with political pluralism and general democracy. The underlying concern with revolutionary nationalism is—given its historical record—that it is at odds with the idea of an overarching political culture in which all political forces are endowed with the same democratic legitimacy to speak on behalf of the people as part of a communally identified polity. Historically, revolutionary nationalism has been reluctant to acknowledge the legitimacy of those dissenting from their views, inasmuch as they represent a threat to the stability of the system.

The interrupted democracy described by Tuckman is due to the tension over the last fifteen years between these two conceptions of our political culture. They clearly portray the struggle between perpetuation and transformation of a narrative that no longer serves to cultivate a common political culture in Mexico.

To what extent is revolutionary nationalism incompatible with political pluralism? To the extent that it expects to remain as the predominant (as was indeed the case in the past) trend of our democratic ethos by undermining strong political pluralism. If, on the

other hand, this endeavor to bring an up-to-date revolutionary nationalism that fully endorses, not only in rhetoric, but in action, as well as adopting values of strong political pluralism as represented by a dynamic and continuously changing distribution of power, then revolutionary nationalism may very well stake a claim to a renewed viability, by virtue of its commitment to transformation rather than perpetuation. By the same token, those participants advocating strong political pluralism must be willing to come to terms with the idea that the revolutionary nationalism and its supporters, are equally entitled to constitute a majority to lead. In short: pluralism by definition includes revolutionary nationalism.

Consistent with our monist system, revolutionary nationalism not only generated a distinctive political culture but also a perpetuating notion of constitutional change. Since its foundation, the PRI has been characterized by a distinctive inclination to have a totalizing conception of majority.

However, it must be said that there are reasons to believe that revolutionary nationalism is passing through a perceptible shift in its underlying principles and practices, although it is too early to draw any conclusions regarding the depth and permanence of these changes.

A better understanding of the nature of revolutionary nationalism will enable us to identify the cultural inertias relating to the use of power and to identify preferred outcomes arising from this acute debate which—as we shall see—also has a constitutional analogue.

4. *The Role of the Elites and Social Movements*

“While in the realms of purely ideal and theoretical politics, public men engage in organizing governmental structures, distribute power by outlining rights and duties, or analyze the expansion or reduction of the states’

autonomy, other men –much more powerful, laugh at this, because they acknowledge themselves as the masters of society, holding real power in their hands, given that it is they whom at the end, own our national sovereignty.”

Ponciano Arriaga⁴³

Political transformations in Mexico are largely seen as an exclusive domain of political elites, as a top-down process. According to this perspective, other sources of political transformation, such as social movements and ordinary people, are mostly seen as outsiders; their participation is rather sporadic and are accommodated only on the grounds of a “lesser evil” when elites are forced to include them in any transformative (or perpetuating) enterprise. However, the process of political transformation in Mexico is more intricate and complex than that provided by the perspective of this predominant formalistic narrative.

The dominant perspective of elite predominance and exclusivity in managing political transformation makes sense in the context of formal institutional channels and procedures, but it appears incomplete when it comes to giving attention to participants not formally enfranchised to take part in those formal processes. This approach has become increasingly relevant in light of the growing importance of actors from outside the institutional mainstream who have become decisive in refiguring our democratic ethos.

⁴³ This extract was taken from the transcripts of the Constitutional Debates of 1856-1857 that resulted in the promulgation of the Mexican Constitution of 1857. *See* Francisco Zarco, *HISTORIA DEL CONGRESO CONSTITUYENTE DE 1857*, at 310-312 (1916). In a passionate debate on the project for Title II Section I of the Constitution of 1857 pertaining to the definition of national sovereignty and the form of government, Ponciano Arriaga championed the thesis that the people, by means of their right to petition, can modify the law, anticipating –in my view, an early shift into a higher lawmaking gear [a more advanced level of lawmaking] –at least from the analytical perspective of this work.

Political Transformations and the Participants in Conflict

Political transformations are characterized by the tensions that exist between a plurality of agents who take a particular stance towards changes in the social and political order.⁴⁴ First, we have those relevant participants who are mobilized to keep the political system unchanged in order to preserve the privileges that they have always enjoyed. We can identify its representatives as “preservationists.”

On the opposite end, there are those participants who, given their own experience and their perspective on observation of the political and social processes, postulate the need for a deep change in the system to allow access by non-traditional participants to the decision-making process. This typically implies a radical transformation of the prevailing system, by means of a series of immediate and complex structural reforms, which necessarily results in confrontation with the preservationists, since they aim to establish a new political order that may reject central elements of the status quo. We identify these participants with the name of “reformers.”

Between both groups there are other participants who support piecemeal changes that may mitigate the confrontations between preservationists and reformers, betting on gradual transformations from within the system and hoping that over time, such changes may progressively take place. We will refer to this third type as “gradualist.”

Obviously, in any theory of revolutions and political transformations there are also participants for which the only alternative to the prevailing state of affairs lies on an inevitable confrontation with the elites, willing to accept in the logic of the totalitarian

⁴⁴ Samuel Huntington, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968); and also Samuel Huntington, *THE THIRD WAVE. DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1993). Additionally, Álvaro Soto provides an illustrative explanation of the dynamics between preservationists, reformers, gradualists and extremists in his account of the Spanish Transition, *see* Álvaro Soto, *LA TRANSICIÓN A LA DEMOCRACIA. ESPAÑA, 1975-1982*, at 29-33 (1998).

revolutions of the 18th and 19th centuries, the use of the force and the violent collapse of the prevailing political system. These groups are identified as "extremists."

In Mexico, for nearly three decades, we have witnessed "low-intensity warfare" between hardliners on both sides in both preservationist and reformer camps, virtually silencing the gradualists' arguments by citing the ineffectuality of the "reforms from within", which have consistently been thwarted since the late 1990's.⁴⁵ Historically, the majority of Mexican society has leaned between preservationists and reformers, while extremism has never been an appealing option for the people after the Revolution.

In this context, we must not lose sight of the fact that the entire process of political transformation must necessarily be considered, as a means to an end of something greater, namely, the establishment of a new political culture⁴⁶ that may set the foundations for effective organization and operation of our democratic system.

A political reform should not necessarily be understood as an effort whose fruits will be leveraged by the same generation that carried it out. Inasmuch as it is not fully understood that, (unlike the political reforms undertaken since the 70s, whose emphasis was to open spaces for political pluralism on the basis of a system of representation articulated in political parties) present expectations of change entail meeting the growing demands of empowerment of non-traditional participants (e.g. those marginalized by the so-called "partidocracia;" --the rule of political parties) that has failed to open up more

⁴⁵ Luis Carlos Ugalde, *Por una democracia liberal (Para erradicar el clientelismo)*, NEXOS, February 2010, <http://www.nexos.com.mx/?P=leerarticulo&Article=72986> (Last visit: April 2, 2013). In Ugalde's account, President Fox faced a dilemma: either adopt a strategy of gradual reform based on negotiations with the structures inherited from the old regime (mainly labor unions, influential business groups, agrarian movements, and corporative political parties) or on the contrary, put into motion radical transformations based upon his democratic legitimacy and the overwhelming popular support that he enjoyed at the beginning of his presidency. Ugalde concludes that by opting for the former strategy, namely gradualism, Fox perpetuated the enduring system of political and economic patronage though it was disguised with a democratic façade.

⁴⁶ Harold D. Lasswell & Myres S. McDougal, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY*, at 683-722 (1992).

opportunities for decision to those citizens that are not, nor do they purport to be, linked to a political party in order to fully exercise their political rights.

To this demand for greater citizen empowerment may be added, at a minimum, the dissatisfaction, or at most, the complete repudiation of the manner in which democratically elected representatives have executed their mandate.

An exemplifying mirror: The Spanish Political Reform of 1977

In this context, I find it instructive to consider the way in which the Spanish transition to democracy was conducted, in particular as regards the preparation, processing, analysis, discussion, deliberation and approval of the “Law for Political Reform” adopted on January 4, 1977, which opened the way for constitutional democracy in post-Franco Spain.

In particular, the endeavor that brought about -the then unpopular (and, in the opinion of the majority of the elites of the time, inexperienced) first transition government provides an important lesson in political negotiation. Led by Adolfo Suárez, it was charged with dismantling the political structure of Franco’s regime without abandoning the principles of the old regime that Suárez and his ministers, along with the newly appointed king Juan Carlos I, had sworn in the past to uphold.

They needed first to convince the Spanish Courts that after Franco’s death Spain should be radically transformed into a democratic system where citizens could enjoy the wider decision-making power and participation in the deliberative process. This project ultimately resulted in the Constitution of 1978.

It was the people, who by referendum in December 1976 overwhelmingly approved the reformist project that the King, President Suárez and the President of Congress (the so-called “Cortes”), Torcuato Fernández Miranda, had been stitching

together since the twilight of Franco's regime. The Spanish people affirmed the successful transition legitimizing the transformative enterprise that Fernández Miranda summarized in a phrase that would define that peaceful political change in Spain: "From the law to the law, passing through the law."⁴⁷

In this fortunate political reform (though not exempt from obstacles and difficulties, and under constant threat of coups and civil insurrection that reminisced about the run-up to the war which began in '36 in the aftermath of the Republic) a unity of common interests prevailed over the differences among the various participants involved, and they were able to push forward the reform project which, it was hoped, would ultimately give rise to a constitution.

Then, the King, government and parliament sought to convince the people the vast majority of whom lacked any concept of political participation, but who nonetheless were the party best qualified to tell the monarch and political representative that they would choose democracy as their system of political organization.

This account shows how even in complex and challenging transformative scenarios such as the dismantling of Franco's regime by its own custodians, an undertaking of this kind could not be carried out without giving up personal and

⁴⁷ Abel Hernández, *SUÁREZ Y EL REY* (2009). This famous formula generally attributed to Fernández Miranda, appears –among others, in pages 42 and 84. This formula also influenced key reformers in Mexico such as Pedro Aspe, Secretary of Finance (1988-1994), who underscores the importance of reforming the system from within and through the law, “[Remember] what Fernández Miranda –who served as mentor of the King of Spain and managed the Transition- used to say ‘from the law to the law.’ What is the meaning of this phrase? There are laws that are unjust; some are even a sham, [as a result] from having an authoritarian government. Thus, if you do not like those laws, you ought to change them. But until you change it, you must remember to move ‘from the law to the law.’ This is something that I learned from Felipe González and Carlos Solchaga, and will never forget. [You] must operate with that law, [otherwise] it would be the complete eradication of the rule of law. Hence, if a law is notoriously wrong, unfair or inadequate, then change it, but in the meantime you have to abide it, regardless if you like it or not. Furthermore, if you have to move from the law to the law, then, what you can really do until you manage to achieve a normative or constitutional reform, is to shape those public policies related with that flawed law that you wish to change.” *See* Interview with Pedro Aspe Armella, Secretary of Finance 1988-1994, in Mexico City (Nov. 8, 2012). *See* Appendix, at 173.

collective interests and privileges,⁴⁸ especially by those with the heavy burden of carrying on the transformative enterprise.

The Interplay of Elites and Ordinary People in Mexico

Asef Bayat argues that, the way in which elites and ordinary people relate shapes the patterns of their conflicts and their resolution.⁴⁹ The protracted political contestation between those in control of the political process, elites, on the one hand, and the rest of society on the other, is by definition a constant of the constitutive process, hence of political transformations. The real question is how these prolonged antagonists can be led to be open and sharing enough to recognize the different areas and tasks where they can engage in common decision-making by breaking away from conventional paradigms that are no longer effective to channel their conflicting interests and expectations. In order to answer this question, we must refer back to Ackerman's conception of dualist democracy discussed earlier.

Once social movements⁵⁰ realize that their traditional strategies are not effective in continuing pushing for change, should explore unconventional tactics in order to meet their goals.⁵¹ I will try to clarify whether this has in fact occurred in the case of Mexico.

⁴⁸ Bruce Ackerman, *WE THE PEOPLE: FOUNDATIONS*, at 171-179 (1991).

⁴⁹ Asef Bayat, *LIFE AS POLITICS. HOW ORDINARY PEOPLE CHANGE THE MIDDLE EAST*, at 12 (2010).

⁵⁰ *Id.*, at 19. Quoting Charles Tilly, *Social Movements and National Politics*, in *STATE-MAKING AND SOCIAL MOVEMENTS: ESSAYS IN HISTORY AND THEORY*, at 304. According to Tilly, social movements are defined as the "organized, sustained, self-conscious challenge to existing authorities."

⁵¹ *Id.*, at 16.

The Social Movements Perspective

Over the last years, social movements in Mexico have become less conventional and more sophisticated. In earlier times, they were often co-opted by the government, who offered public posts to their leaders. However, the growing political plurality herein described has also affected the role of social movements in our democratic ethos.

In exploring the influence of social movements on contemporary constitutional decision-making in Mexico, I found a coincidence with some of the predominant attitudes in the United States in this respect, since the stance of Mexican elites in the matter range on the one hand from a complete denial of social movements in the constitutive process, as illustrated by Associate Justice Aguirre Anguiano,

“Nowadays I no longer listen to them (social movements), despite of their high decibels. We have become used enough to have these protests (outside the Supreme Court) that we no longer listen. We do not even know who protested, what they wanted or what they were asking. [Most] of the times we do not have even the authority to answer their demands. [Sadly,] these are not legitimate social demands, but protests driven by illegitimate economic and political interests that we are not interested in clarifying.”⁵²

In contrast, the other dominant attitude in respect to the role of social movements in Mexico implies an enthusiast acceptance not only of their importance for participatory democracy, but also in their strategic growing involvement in the processes

⁵² Interview with Salvador Aguirre Anguiano, Associate Justice (Ministro) of the Mexican Supreme Court 2003-2018, in Mexico City (June 29, 2012). See Appendix, at 82. The opinion of Justice Aguirre Anguiano reminded me Justice Antonin Scalia’s dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Cited by Jack Balkin, Scalia wrote “How upsetting it is that so many of our citizens... think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus.” See Jack Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of New Departure*, 39 Suffolk L. Rev. 27 (2005).

of lawmaking and judicial decision. This is the case of Ricardo Sepúlveda, who served as Advisor to the Secretary of the Interior, Santiago Creel during Vicente Fox's administration. In Sepúlveda's experience,

“[Human] rights are a good area to assess the influence of civil society and social movements in Mexico. It is an issue where we find a well-organized, strong and informed civil society. With these features I think everyone would agree that the success of protecting human rights at the constitutional level through normative reforms is due to the pressure of social movements at a domestic and international level. [It] took a decade to reach the legislative consensus that passed the constitutional reform on human rights in 2011. What (civil society) did during that period was to create new areas of decision and political participation, not necessarily formal and institutional, to engage in a conversation with the government. [From] the latter, we also created *de facto* mechanisms to channel these new dynamics.”⁵³

Whether they can be considered jurisgenerative at this point is disputable; however, it is broadly accepted that their influence and power to shape political decisions has increased. To support this claim, it may suffice to mention the thousands of adherents and public endorsements that the *Movement for Peace with Justice and Dignity (MPJD)* accumulated back in 2011. This movement was made up of thousands of victims of the drug wars and their families that have haunted Mexico since 2006. It has become a paradigm for social mobilizations in Mexico and has served to challenge the governing elites and their public records. The movement has served as a voice for the traditionally insulated minorities of the traditional political process, creating a collective belief that

⁵³ Interview with Ricardo Sepúlveda Iguíniz, Director of Human Rights of the Ministry of Interior, in Mexico City (Jan. 13, 2013). *See* Appendix, at 82.

with enough organization between NGOs, they can constitute a powerful force against the dominant elites.

While this is today the most salient social movement in Mexico, there are many others that also advocate for better channels of meaningful political participation, at both local and national levels. Together, they have managed to create a common agenda for political transformation, as it will be explained in detail in Part V.

However, if there is a distinctive feature of social movements in Mexico, it is that their success is predetermined by their capacity for elite socialization: the less radical they are in voicing their demands and the more open to engage in meaningful conversations with the elites, the higher prospects of success. Nonetheless, this is very rare and more likely to happen among urban elite-based NGOs and movements with access to social networks.

Furthermore, there are “other social movements,” that have in fact served as pressure groups to block efforts at the national and state levels to introduce cutting-edge reforms in a vast array of issues, ranging from improving the quality of public education in Mexico to the need for constitutional amendments to allow private investment in the state-owned oil company. In these and other cases, these reactionary “social movements” try to combat these transformative agendas, undermining the reputation of genuinely non-disruptive social movements within the public opinion.

As we will explore in Part V, elite-based social movements have become an influential participant in the current political process, though there is much more to do in this regard.

The Elites Perspective

In trying to answer the central question of how elites and ordinary citizens engage each other in political transformation, and after a comprehensive amount of data collected from interviews with relevant actors, some preliminary conclusions may be drawn:

- a. It is clear that constitutional decisions in Mexico are the exclusive domain of the political and economic elites, whereas social movements and rank-and-file have a modest say. However, depending on the context, there are transformative undertakings that show occasional connections between the elites and social movements that put sufficient pressure on the system that it responds to their demands. This was the case for the political reforms of 1977⁵⁴ and 1997.⁵⁵

- b. According to Camacho, in order to successfully undertake a process of political transformation that may result in constitutional change, only two things are needed: (1) a member of the elite, i.e., an insider with the necessary power of decision-making, and, (2) with sensibility and/or interests in pushing the demands that a social movement is advocating.

⁵⁴ Interview with Manuel Camacho Solís, Senator (incumbent), Commissioner for the Peace Process in Chiapas 1994; Mayor of Mexico City 1988-1993; in Mexico City (Jan. 10, 2013). *See* Appendix at 255-258.

⁵⁵ Interview with Santiago Creel Miranda, Senator 2006-2011, Secretary of Interior 2000-2005, in Mexico City (Jan. 21, 2013). *See* Appendix, at 304-308.

- c. In pursuing structural reforms such as those described at the beginning of this chapter, elite members feel more secure in their attempts for transformation once the transformation is constitutionally enshrined and supported by courts.⁵⁶
- d. I have also found a widely shared perception of political transformation as episodic events, rather than a continuous process, as I have tried to demonstrate in this work. This impression makes it more difficult to articulate an effective connection between political transformations and constitutional change. However, the clarity in which the relevant participants understand the value of predicating political transformations on inscribing into a constitutional grammar of legitimation, either by the legislature or the courts, help illustrate the importance of the close association between political and constitutional change.
- e. In connection with the elites' influence on the political transformations taking place in the 1980's and 1990's, particularly with regard to economic policies, the case of members of the legal elite, educated in the United States and Europe, is worth exploring. These elites may have acquired a distinctive vision of constitutional change that enhances their ability to articulate and undertake the necessary institutional reforms within our constitutional framework, as the so-called technocrats did more than two decades ago.
- f. Since we find a great diversity among ordinary citizens, the higher you go in the social, political and economic structures, the more likely you are to find a remarkable uniformity: In perspective (identifications, expectations, and

⁵⁶ Interview with Pedro Aspe Armella, *supra*, note 5, at 173-175.

demands), optimism, and shared-values. Conversely, the lower you go, the less identifications you will find, as well as considerably less optimism. However, this apparent uniformity amongst the elites may be (as history has shown) deceiving, implying a caveat: as happened in the early nineteenth century during the War of Independence, and in the first decade of the twentieth century, in the Maderista Revolution, the traditional silent agreement amongst elites to keep things unchanged as long as they continue to enjoy their privileges may be disrupted when -within the same group of elites, some of its members become unwilling to tolerate growing conditions of inequality accepted and/or prompted by the other elites, perhaps because they have been enjoying more dominant positions.⁵⁷

To illustrate these perspectives and how they interconnect in the realm of political transformations and constitutional change, we will explore in the following Part the way in which Mexican elites model change and how non-traditional actors engage in the process.

⁵⁷ Joshua Simon, *THE IDEOLOGY OF CREOLE REVOLUTION: IDEAS OF AMERICAN INDEPENDENCE IN COMPARATIVE PERSPECTIVE*, Dissertation presented to the Faculty of the Graduate School of Yale University, at 119 (2012).

PART V

PRESERVATION THROUGH TRANSFORMATION: THE WAY OF MODELING CHANGE BY THE MEXICAN ELITES: THE CASE OF THE POLITICAL REFORM OF 2012

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I. MEXICAN EXCEPTIONALISM?

How can we appraise the quality of a democratic system if it is not the people on the streets calling for constitutional reforms, but rather the political elite who are the driving force, each moving in different directions toward transformation? Is democracy well served by the mere fact that, in contrast with other political systems, peaceful protestors are not disbanded, arrested or repressed for their dissent? To answer these inquiries we must first make some clarifications:

The first is that sometimes, it is precisely the elites who undertake what appear to be radical transformations, as a way of preventing the people from taking to the streets to call for them, a preemptive strategy to maintain the status quo. On occasion it may be the political elites themselves who instigate peaceful demonstrations of dissent as a way of sidestepping meaningful reform that might change their status or privileges.

The other clarification aims at a contextual feature that does not involve political elites, but rather informal actors, such as organized crime, who have enough power to undermine current political processes, by silencing peaceful expressions of dissent, for example.

Thus, it may be deceiving if we try to analyze the robustness of freedoms in Mexico using a conventional lens and with the predominant categories typically invoked in such cases. Instead, as I will endeavor to show, these categories should be rejected, since our elites have managed to create a distinctive narrative of apparent transformation, while in fact they embark in preserving the procedures and institutions that rhetorically they claim to transform.

II. PRESERVATION THROUGH TRANSFORMATION IN MEXICO

It is essential to our task that we understand how, in the name of democracy, an array of prescriptions are continuously introduced to relieve the pressure from different groups demanding a more effective protection of their interests and rights. However, as we shall see, this technique of appeasement has served to a more fundamental and underlying goal of those actors controlling the political process: to maintain their status privileges as they give the impression of pushing rules that entail radical changes to the status quo. This is what I described in Part I of this work as *preservation through transformation*.¹

The narrative of progress infusing constitutional change in Mexico after the Revolution, has served as an instrument for perpetuation. To the extent that with the Constitution of 1917 there was a radical break with an unjust and illegal past, the political order established thereafter served as a powerful deterrent to advancing the narrative of change in a progressive direction. As Jack Balkin and Sanford Levinson explain in the case of American constitutionalism,

“Yet the narrative of progress (whether inevitable or hard fought) can also work in a conservative direction. People can invoke comparisons between the present and the injustice of the past as proof that the country has left behind [an oppressive social order –white supremacy] or the denial of civil liberties, and that further

¹ Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2119 (1996). Professor Siegel constructs a theory through a case study of domestic assault law that illustrates how manifold efforts to reform a status regime are successful in bringing about change, but not in the shape expected by change advocates. She describes this reform in the following terms “[When] the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges – gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend. Thus, civil rights reform can breathe new life into a body of status law, by pressuring legal elites to translate it into a more contemporary, and less controversial, social idiom. I call this kind of change in the rules and rhetoric of a status regime ‘preservation through transformation’.”

reforms are unnecessary or are deviations from the path of progress. [As Reva Siegel] has pointed out, hierarchical regimes of injustice do not vanish in the face of legal reforms but often reconfigure themselves to thrive in new legal environments. The happy story of progressive legal reform can mask the elements of unjust status hierarchies that still remain, aided and abetted by the very rules that purported to disestablish them.”²

This description is useful to portrait the way in which Mexican elites have historically articulated their narrative of progress in a conservative direction. Despite the egalitarian language of the Constitution of 1917, there was an insurmountable gap between legal prescriptions and reality. Those that ended up outside of the mainstream after the Revolution in the early 1920s had to exert a great effort to voice their demands within the following decades. Opponents to the majority, originally assembled in the so-called “Revolutionary Family”³ and then in the PRI, were hardly in a position to express their dissent in the context of a state-party political system that ruled for the rest of the century.

As suggested in Part V, the legacy of revolutionary nationalism has also strengthened this technique, which has reigned supreme among political elites aided by a constitutional framework that encourages a display of appearances designed to keep things unchanged. There are salient examples of how this technique has been developed in Mexico, but first we need to make a preliminary clarification of the legislative process

² J. M. Balkin and Sanford Levinson, *LEGAL CANONS*, at 20-21 (2000).

³ Alan Knight, *Mexico's Elite Settlement: conjuncture and consequences*, in *ELITES AND DEMOCRATIC CONSOLIDATION IN LATIN AMERICA AND SOUTHERN EUROPE*, 121 (John Higley & Richard Gunther eds., 1992). Knight explains this elite settlement in the following terms: “The ‘revolutionary family’ is a term that Mexicanists habitually use with more abandon than precision: It denotes the group that took power during the armed revolution of 1910-20 and whose descendants, political and biological, have ruled to this day. It represents, therefore, series of generational political elites. The term (which enjoyed currency at least as early as the 1920s) neatly captures the combination of bonding and rivalry, comradeship and competition, that characterized the revolutionary elite(s).”

to fully understand how this strategy has become very successful in giving the impression that everything changes while remaining the same.

In order to become effective each piece of legislation that is approved in the floor of Congress and then promulgated by the President requires a secondary piece of legislation outlining the rules under which the substantive bill would apply. As a result, no matter how relevant the contents of a substantive bill are, if its respective regulatory law does not accompany the former, it becomes useless. With this clarification in mind, it should not be surprising to find “transformative” rhetoric from the elites surrounding some legislation and promulgating it as “the law of the land,” while at the same time crippling it by delaying the formulation of its respective adjective law.

Additionally, in order to articulate this narrative of transformation through preservation, Mexican elites have traditionally displayed a twofold strategy comprising a persuasive rhetoric of transformation combined with sophisticated practices of perpetuation. We can identify the following types of preservative-transformative strategies:

- a. *Procedural (deterrent)*: this is mostly employed within the framework of the legislative process and the applicable rules, in order to speed up or defer consideration of a piece of legislation, depending on the interests of the elites involved in the process and those potentially affected by it;
- b. *Rhetorical*: the predominant narrative is of transformation and progress: however, there are differences of degree based on ideologies and political agendas. Despite the rhetoric aimed at transformative endeavors, when it comes to substance, the rhetoric wanes as the preservationist outlook gains more ground;

- c. *Substantive*: in this instance *reformers* and *preservationists* engage in a bitter, blunt and open debate on the pros and cons of transformation. They present their case to the public in order to win popular support and speak in the name of the majority, either in supporting or rejecting the “transformative” legislation;

- d. *Adjective*: as previously explained, this strategy deals more with the outcome of the transformative enterprise, since it relies on the fundamental need of a set of procedural rules to implement a previously promulgated substantive law, otherwise the latter becomes dead letter.

In this Part, we will analyze a recent process for constitutional amendment pertaining to a political reform introduced by President Calderón, which made our *transformative preservationists* resort to all sorts of dilatory procedural tactics and strategies of deterrence in order to prevent a transformation that was seen as a meaningful possibility of empowering ordinary citizens to take part in the political process. In sum, we will see how the “preservation through transformation” techniques operate in Mexico.

III. THE POLITICAL REFORM OF 2012: A CASE STUDY

In December of 2009, President Calderón introduced a bill for reforms to the structure and operation of the democratic system of government.⁴ This political reform proposal was comprised by nine items that together were aimed at what the president at the time called “an unprecedented effort to bring up to date the relationship between

⁴ Oficio de la Subsecretaría de Enlace Legislativo de la Secretaría de Gobernación, No. SEL/300/3612/09, December 15, 2009. See at <http://bit.ly/4XaBiK> (Last visit: March 30, 2013).

the government and the citizens, the governing and the governed.”⁵

The bill was discussed and approved by the Senate in April of 2011⁶ and by the Chamber of Deputies in April of 2012.⁷ President Calderón finally signed it in August of that year. From its introduction through its publication, almost three years passed; this period was marked by intermittent negotiations and bitter debates among the political elites, the public and NGOs, who assumed an active role in the discussion and pushed for passage of the bill as presented by the President.

Nonetheless, as we will see in coming sections, the process of this reform bill provides a salient example of how our elites react to any effort that threatens to deprive them of their privileged position as the predominant stakeholders in the political process. We will see how political rhetoric merely pays lip service to the ideal of a stronger and genuine democracy, but ultimately, these same elites manage to keep business as usual” while at the same time giving the impression of being reformers.

With these dynamics in mind, I aim to reconstruct this case in the context and through the lens of constitutional moments theory⁸ in order to clarify whether the

⁵ Felipe Calderón, Speech for the Plenary Session with the Congressional Group of Partido Acción Nacional (PAN), January 26, 2010. <http://www.presidencia.gob.mx/2010/01/palabras-del-presidente-felipe-calderon-durante-la-reunion-plenaria-del-grupo-parlamentario-del-pan-en-la-camara-de-diputados/> (Last visit: November 20, 2012).

⁶ Gaceta Parlamentaria, Senado de la República, LXI Legislatura, Segundo Periodo Ordinario, No. Gaceta: 255, April 27, 2011. DICTAMEN DE LAS COMISIONES UNIDAS DE PUNTOS CONSTITUCIONALES; DE REFORMA DEL ESTADO; Y DE ESTUDIOS LEGISLATIVOS, EL QUE CONTIENE PROYECTO DE DECRETO POR EL QUE SE REFORMAN Y ADICIONAN DIVERSAS DISPOSICIONES DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, EN MATERIA DE REFORMA POLÍTICA. See at <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=29592> (Last visit: March 30, 2013).

⁷ Gaceta Parlamentaria, Cámara de Diputados, LXI Legislatura, Segundo Periodo Ordinario, No. Gaceta: 3494-IX, April 19, 2012. DICTAMEN DE LAS COMISIONES UNIDAS DE PUNTOS CONSTITUCIONALES Y DE GOBERNACIÓN, CON OPINIÓN DE LA COMISIÓN DE PARTICIPACIÓN CIUDADANA, A LA MINUTA DEL SENADO DE LA REPÚBLICA CON PROYECTO DE DECRETO POR EL QUE SE REFORMAN Y ADICIONAN DIVERSAS DISPOSICIONES DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, EN MATERIA DE REFORMA POLÍTICA. See at <http://gaceta.diputados.gob.mx/Gaceta/61/2012/abr/20120419-IX.pdf> (Last visit: March 30, 2013). It passed with 279 votes (PRI, 143; PAN, 78; PRD, 40; PVEM, 15; PNA, 3) to 19, with 3 abstentions.

⁸ Bruce Ackerman, *WE THE PEOPLE: FOUNDATIONS*, at 290-291 (1991).

unprecedented mobilization and deliberation triggered by the political reform bill meets the criteria set by Ackerman's model of a successful constitutional transformation.

A. SIGNALING

According to the Latinobarometro survey published at the end of 2009,⁹ among Latin-American countries, Mexico had the lowest level of support for democracy as a form of government, backed by only 62 percent of Mexicans, (as opposed to 90 percent in Venezuela and Uruguay, 80 percent of support in stable democracies such as Brazil and Costa Rica, or 76 percent in Chile); or even countries that despite having undergone severe political crises of varying magnitude but which have not seen a comparable [loss] in the citizens' appreciation for democracy, including Argentina, Colombia, Nicaragua, Guatemala and Honduras, with support fluctuating between 71 and 75 percent. Without experiencing the overthrow of a president (as occurred in Honduras in that year) or being plagued serious problems with the production apparatus and rifts within the ruling party and in its offshoots, as was the case for Argentina, Mexico showed the lowest level of confidence in democracy as a form of government back in 2009, when the bill for political reform was introduced.

The same survey showed that 6 out of 10 Mexicans prefer economic development without democracy, thus revealing the still-strong underlying authoritarian political ethos in Mexico, a conception which places limits to the virtuous cycle between democracy, rule of law and development.¹⁰

⁹ Informe Latinobarómetro 2009, published on December 11, 2009. See at www.latinobarometro.org

¹⁰ W. Michael Reisman, *Development and Nation Building: A Framework for a Policy-Oriented Inquiry*, 60 Maine Law Review 309-311 (2008). In this article, Professor Reisman sheds light on the connection between development and public orders of human dignity based on goal values, "[The] optimal state of any community is not the achievement of a specific level of 'development', in the sense of some static capitalization and allocation of values meeting the demands of *certain members or strata of a community at a*

The bill was preceded by the mid-term federal elections of 2009, in which the Chamber of Deputies' composition was completely renewed. In that election, there was a strong mobilization by urban-based NGOs calling for purposive vote spoiling (casting an empty ballot) as a civic expression of disapproval on how political representation and processes were conducted in Mexico. Historically, [empty ballots] in federal elections represent an average of 2% of the total. In this election, and as a clear effect of this mobilization, null votes reached 5.41%,¹¹ setting a historical record, since this equaled the number of votes received for the fourth most popular political party and was considerably above the number of votes received by the remainder of small parties in that election. As expected, the highest rates of casting of empty ballots came for urban areas.

This manifest discontent of the citizenry, now politically signaled in the elections, sparked a series of reactions from some groups of the political elite, mainly from the two major political forces represented by the PAN and the PRI, who, in acknowledging the message of the people, decided to give serious thought to the best way to be reconciled with the governed.

Different surveys conducted between December of 2009 and January of 2010 showed that an average of 9 out of 10 Mexicans deemed political reform necessary.

By the same token, 8 out of 10 did not know the main components of the President's bill. Among those who were familiar with it, an average of 75% supported those elements of the bill aimed at civic empowerment: independent candidacies; the entitlement of groups of ordinary citizens to present bills for congressional action (so-called "popular initiatives") and the referendum in case of congressional inaction.

particular moment. The optimal state is rather the establishment of a viable and ongoing development process which is responsive to environmental and political changes, capable, where necessary, of reformulating goals and strategies to meet them, and able to perform the decision functions indispensable to the maintenance of satisfactory community order;" (emphasis added).

¹¹ See https://pef2009.ife.org.mx:51443/reportes_computos/nacionales/ComputosRP_Nac.html

B. PROPOSAL

The immediate focus of attention after the mid-term legislative federal elections of 2009 was the formulation of an adequate response to growing public discontent with the political process. With this goal in mind, the President articulated reform initiatives in light of the adverse results for his administration and his party in the federal elections of 2009—which have traditionally represented a de facto mid-term referendum on the government’s performance—in - which they lost the majority in both Houses and also mobilized a significant part of the urban voters to void their vote as a protest against the low quality of political representation and the poor results of elected representatives in executing their mandate. Each of these elements was of key importance in drafting the bill.

The reform package included the following scheme of sweeping changes:

1. To allow federal and state lawmakers, mayors and city council members to be elected for multiple terms, up to a maximum of 12 years;
2. To reduce the number of members both in the Chamber of Deputies and in the Senate by modifying the rules and principles to integrate both Houses;
3. To incorporate a rule for presidential elections establishing a the principle of absolute majority by means of introducing into our electoral system a 2nd presidential round or runoff, in such case that any of presidential candidate obtained the necessary majority to be elected in the 1st round; in cases in which any of the candidates receives enough votes to be elected in the first round.
4. To increase to 4% the minimum percentage of votes required for a political party with national representation to maintain its registration (as a percentage of the overall national vote in a federal election);

5. To incorporate at a constitutional level the right to participate in an election as an independent candidate for any public office;

6. To incorporate at a constitutional level the right of non-partisan citizens to introduce bills for congressional action as a result of the constant demands of civil society;

7. To grant the Supreme Court the power to introduce bills in Congress relating to its jurisdiction;

8. To give the President powers to introduce in each session of Congress two bills that he may mark as having higher priority as “high priority”, implying each will be discussed and voted on by means of an expedited legislative process. In the case of congressional inaction, the president may be entitled to call for a referendum on these bills;

9. To give the President the power to modify the annual budget bill in whole or in part.

Departing from previous political reforms,¹² this bill placed great emphasis on setting the rules for enabling access of non-partisan citizens to the formal processes of political and constitutional decision-making, traditionally controlled in their entirety by political parties and appointed government officials.¹³ Thus, this bill had a distinctive

(Last visit: April 2, 2013). The total number of null votes in that election was 1,876,629. This was totally unprecedented and clearly signaled a bitter discontentment with and disapproval of the way in which the political elites has handled the political process.

¹² José María Córdoba, *Para Gobernar México*, NEXOS, December 2009, at 46-57.

¹³ Luis Carlos Ugalde, *Por una democracia liberal (Para erradicar el clientelismo)*, NEXOS, February 2010, <http://www.nexos.com.mx/?P=leerarticulo&Article=72986> (Last visit: April 2, 2013). According to Luis Carlos Ugalde, the political reform proposed by President Calderón is the most relevant and ambitious in the last thirty years and represents a first step to evolve toward a liberal democracy model based in a Government that ensures an effective rule of law as it protects individual freedoms. However, Ugalde warns that one of the principles that should guide the pursuit of liberal democracy is the avoidance of “reformer maximalism” which aims to reinvent or re-found the country from scratch. Despite the fact that I share his concern about the risk of “reformer maximalism” and the desired goals in consolidating a liberal democracy in Mexico, I do not share Ugalde’s skepticism regarding the possibilities of political

meaning, [unlike any of its predecessors and required a substantial credible effort of Calderón's administration; this was an undertaking of considerable magnitude, and though it was considered by some commentators as untimely, in general terms, the bill had public opinion behind it. Despite its good intentions, as we will see, both the process and the bill itself were characterized by several flaws that significantly influenced their final outcome.

On the other hand, the following *mobilized deliberation* put in motion the recurring trends and dynamics of political transformations in Mexico, again bringing to the surface the conflicting views and interests of the preservationists, on the one hand, whose ultimate objective was to cripple reform even using sophisticated tools such as political deterrence and legislative deferral) and on the other, the reformers who through formal and informal processes were committed to pushing the bill through before the end of the term.

C. MOBILIZED DELIBERATION

According to some commentators, the President's bill was out-of-touch with customary practices regarding the distribution and use of power, and was perhaps also incomplete from a comprehensive vantage point; however, it deserved a chance in light of the political context that prevailed when it was introduced. Most of the criticism of the bill centered on its untimeliness, inadequate articulation; lack of political compromise across the aisle; and the insulation of the people in its preparation. We will briefly analyze each of these points.

transformation and constitutional change through a social mobilization embedded in the ideal of replacing the old authoritarian trends of political patronage with a more committed citizenry willing to assume its role as stakeholders of central decisions of our polity.

Untimeliness

Notwithstanding the merits of the bill, the haste in which it was presented by the President brought to the surface the perception that the proposal was prepared as a mere reaction to the major setback in the last election, rather than a genuinely selfless effort to champion the longstanding demands of the governed increasingly dissatisfied with the quality of their political representation.¹⁴ As I will explain, the bill's sweeping nature was precisely one of the causes of its ultimate failure.

The distribution of power in Congress when the bill was introduced had a decisive institutional effect on the resulting mobilized deliberation. By virtue of the midterm federal elections in the summer of 2009, Calderón's party –Partido Acción Nacional (PAN), came second –with 28% of the votes–, after an overwhelming comeback by the Partido Revolucionario Institucional, or PRI, which after placing third in the 2006 elections returned with a landslide victory over PAN, with 37% of the votes, receiving almost 10 percentage points more than PAN and 25 points more than the leftist party, the former winner of the distribution of power in Congress in 2006, the Partido de la Revolución Democrática which placed a distant third with just 12% of the votes.

With the PRI maintaining a relative majority in Congress and hoping to regain the Presidency in the elections of 2012, President Calderón's effort to change the core structures and practices of political representation in Mexico did not look at all promising. The first criticism of this attempt at political reform concerned its inappropriate timing. For many commentators, this undertaking was bound to fail since the bill was unlikely to be able to get enough votes in the lower Chamber of Deputies, which was clearly controlled by the PRI.

¹⁴ Enrique Krauze, *Convergencias Maderistas*, in LETRAS LIBRES, Mayo 2012, at 14-24.

The second-half of a presidential administration in Mexico is, what is in American politics known as “a lame duck”. As the incumbent president approaches the end of his tenure, all political forces, his party included, start to maneuver with the next presidential election in sight and with a decreasing influence of the current president in the political processes that take place in that second half. Of course this decaying presidential leverage faces its lowest point in the last (sixth) year of government. Nonetheless, it is well known that, with no possibility of reelection, the most prolific phase of the presidential agenda in Mexico occurs in the first three of the six years in office.

However, this distribution of power and its causes go back to 2006 and Calderón’s inauguration, showing that the PRI’s comeback was the result of a skilled strategy to rise from the ashes of 2000, when they lost the presidency for the first time. The acrimonious conflict between PAN and PRD after the 2006 election won by Calderón by a margin of 0.56 per cent over Andrés Manuel López Obrador (the extremely popular leftist PRD candidate) led to a post-electoral crisis by virtue of what López Obrador considered a “historical electoral fraud.”¹⁵

This crisis put Calderón’s inauguration in jeopardy. López Obrador called for massive marches with the goal of impeding the president-elect from taking the oath of office in Congress as is constitutionally mandated, putting the PRI in the convenient and profitable position of being the balancing force in this unique scenario.

As Tuckman explains,

“[The] PRI helped the new president (Calderón) ride out the initial challenge to his legitimacy (by providing the necessary quorum for the inaugural session to swear in

¹⁵ To understand the complexities around the outcome of the 2006 presidential election, I benefited from the insight of Javier Quijano Baz, a prominent Mexican lawyer who served as an advisor of Andrés Manuel López Obrador when he was Mayor of Mexico City and was subject to a process of impeachment. *See* Interview with Javier Quijano Baz, Lawyer; former President of the Mexican Bar Association, in Mexico City (Oct. 24, 2012). *See* Appendix, at 154-163.

Calderón in 2006), [presenting] itself as the picture of democratic responsibility in the period of intense polarization between the PAN and the PRD. [PRI] also cooperated with Calderón to get several early initiatives through the legislature, including pension reform and mild-mannered energy and tax reforms. The strategy helped propel the PRI to become the big winner in the 2009 mid-term legislative elections [by] nearly doubling its representation in the lower House, to the point where it could form an absolute majority with small-party allies. It's new position [gave] it little incentive to continue cooperating with the government.”¹⁶

With this in mind, the first weakness of Calderón's political reform bill was its introduction at the beginning of his fourth year as president in the middle of the unfavorable political context described above. Not only was his party defeated in the 2009 election, but—unlike 2006 when he was succeeded in being sworn-in as president with the PRI's support to avoid an unprecedented constitutional crisis—after PRI's landslide victory in the 2009 mid-term elections, the President could no longer count on their cooperation in implementing his plans. In fact, the reverse became true the PRI felt emboldened by their victory and redoubled efforts to win the presidency devoting the next three years to block or filibuster Calderón's legislative agenda, and his political reform bill in particular.

Inadequate articulation

The other blemish on the proposed bill, this one more substantive, concerned its contents and the lack of coherence between its various elements. In the realm of political transformations, not all the proposals found in the bill were of the same type. According

¹⁶ Jo Tuckman, *MEXICO. DEMOCRACY INTERRUPTED*, Yale University Press, at 71-72 (2012).

to Huntington's theory of democratization and taxonomy of problems characterizing processes of democratization (transitional, systemic and contextual)¹⁷ it is not adequate to pursue a comprehensive transformation of the system, by trying to address each of these types of problems at the same time. Conversely, each category must be dealt with to the extent that the process of democratization demands.

Thus, in the case of Calderón's bill, its elements differ with respect to this classification, but also (and perhaps more importantly) in their degree of importance with respect to the ongoing problems within the structure of government and its functioning, and also in the relationship between the governing and the governed.

For this reason, the bill included some proposals that belonged to the domain of the establishment of institutions, while others were of more a systemic or contextual character. Though taken together they may have appeared as a plausible effort to transform the system from within, they were a mishmash of dissociated ideas in the end.

Moreover, the bill contained a series of inconsistencies with respect to the issue of maintaining desirable balance of powers in a democratic system. The proposal was articulated with nine reform items, each aiming to ameliorate the relationship between the citizens and their government. However, these nine items did not represent a balanced, and therefore comprehensive, assessment of the functioning of the political system, since eight of those proposals concerned the structure and operation of the Legislative branch. Thus, the President was signaling with his bill that the lion's share of the blame for the most critical problems of our system of government were primarily the result of Congress while declining of to appraise the other two branches of government with the same rigor and propose changes to refine their performance as well.

¹⁷ Samuel Huntington, *THE THIRD WAVE. DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1993), at 209-210.

Mistakes were made both in the drafting of the proposal and in outlining the strategy to pass it in both chambers of Congress. Thus, the president's declaration that the bill was the most aggressive step he could take to address the defective state of our democracy may appear counterintuitive. It was clear that he was not seeking to persuade Congress of the merits of his bill, but rather to assume a militant posture, siding with, as he described it, the citizens rather than with the political elites. This miscalculation had grim consequences for the bill.

However, as we will see, the signal from the President was rather equivocal: on the one hand, he insisted that with this reform he was closing ranks with the citizens, but at the same time, they did not have a say in drafting the proposal. On the other hand, once the president became aware that his bill was at risk of being derailed on the floor of Congress, he decided to ask for the support of the public regardless his neglect of the relevant participants, e.g., members of Congress and civil society, in drafting the bill.

A missed opportunity to encourage cross-party and presidential-congressional collaboration

An undertaking of this magnitude required an entirely novel approach: instead of drafting it with a single-minded vision particularly biased by the Executive's observational standpoint, it would have been desirable to draft it from its earlier stages in collaboration with Congress and at least the three predominant political parties in the legislature. Such an approach would have given more authority to the bill and higher prospects of being approved. It would also have helped if political parties had been more committed to political reform. The way in which the process was conducted from the very beginning prevented this from happening.

This was a major reform, a complete overhaul of the political system,¹⁸ and put on the floor for the first time proposals which in the past were considered taboo, such as reelection, independent candidacies, popular initiative, referendum, a reduction of the size of both chambers of Congress, a raising of the voting threshold required for national political parties to maintain their eligibility in federal elections. It thus would have benefitted from an unconventional approach and more thoughtfulness on the part of the bill's sponsor.

Given the momentum that the Senate gained in the first-half of the legislature (2006-2009) as a committed ally in passing critical reforms, such as the one on Security and Law Enforcement in 2008, it would have been ideal to include its leaders in the drafting of the proposed legislation. This would have been more persuasive if it had been negotiated at the appropriate time with the Chamber of Deputies. It would also have prevented the adverse reaction from both chambers to the original proposal in the following discussions.

During that first-half of the legislature (2006-2009), it was the Senate who asked a group of recognized legal scholars to undertake a comprehensive analysis of the functioning of the political system in Mexico,¹⁹ placing special emphasis on the role and powers of the Executive branch in the context of political pluralism and strong checks and balances. The resulting opinion was diametrically different from the President's bill:

¹⁸ Luis Carlos Ugalde, *supra*, note 13. *See* also José María Córdoba, *supra*, note 12.

¹⁹ Daniel Barceló (Coord.), Universidad Nacional Autónoma de México, Senado de la República e Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México, *La Reforma del Estado. Propuesta del IJJ-UNAM para la actualización de las relaciones entre poderes del sistema presidencial mexicano* (2009). *See* at <http://bit.ly/5tQqV9> (Last visit: March 31, 2013). The conclusions of this analysis served as a baseline for the proposal that was articulated by the Senate. One of the front-line actors of this process, Pedro Joaquín Coldwell reflected “[We] (in the Senate) thought that the political reform should entail not only the modernization of Congress, but also of the Presidency, [meaning] a constitutional reengineering of the relations between these two branches of government.” *See* Interview with Pedro Joaquín Coldwell, Senator 2006-2011; President of the Executive National Committee of the PRI (2011-2012); Secretary of Energy (incumbent), in Mexico City (Nov. 22, 2012). *See* Appendix, at 228.

it focused on introducing radical transformations within the Executive branch by empowering the Legislative body to strengthen the separation of powers.

Thus, it proposed (among other things), the following: congressional control over the appointments of the members of the cabinet; congressional control, allocated to both Houses, over the annual budget; introduction of a rebuttal procedure to the President in the State of the Union address provisions for of succession to the office of the President in case of removal, death, resignation or inability to discharge duties; a distinctive type of legislation immune from presidential veto. In sum, there were only two points on which the presidential bill and the scholarly opinion coincided: (1) reelection of lawmakers and (2) the “fast-track” or preferential process for the President when proposing bills with high priority in his legislative agenda.

Thus, there were at least two projects for political reform on the table, each aiming in different directions. With Congress feeling under attack and having diluted the political initiative to push through the reform, the President had left little room to exercise any influence in the legislature and at some point ultimately, the bill seemed to lack a sponsor. A new actor however, quickly filled this vacuum: civil society.

A useful precedent

A year-and-a-half before the introduction of this bill, another intense debate between the President and Congress took place, this time concerning the energy reform bill presented by Calderón in April 2008. The bill called for a series of changes to a comprehensive reform of the state-owned oil company, Pemex, in order to make it more efficient and to strengthen the oil sector in hopes of making it more competitive and reducing the burgeoning debt of the company. It aimed to open the company for private investment.

The opposition represented by the coalition of leftist forces grouped in the so-called “Frente Amplio Progresista” (FAP) and which provided an umbrella to López Obrador’s demands, immediately reacted against the bill and called for national demonstrations to prevent the discussion of the bill in Congressional Committees and in the floor the Senate.

The opponents of the reform based their position on the memory of the expropriation of oil companies in 1938, which established one of the landmarks and core principles of revolutionary nationalism’s ethos, and thus, in their view, any attempt to change the paradigm “the oil belongs to the Mexican people” was tantamount to a political abomination.

The FAP applied more pressure by taking control of the podium in the Senate (as they had done) in the Chamber of Deputies for Calderón’s inauguration in 2006) until there was an agreement to block any possibility of the bill’s discussion in a special session, given that Congress adjourns by the end of April until September.

A few days later, the leaders of the Senate reached an agreement to call for an open and inclusive debate between lawmakers, experts, political leaders and officials of the Executive branch in order to conduct an exhaustive examination of and deliberation on the bill. These hearings were divided into almost twenty workshops scheduled for May, June and July of that year. There was a total of 162 participants in the workshops and 204 days of continuous debate along with extensive media coverage. At the end, a purported “possible energy reform” was approved by the end of October, balancing the two conflicting approaches to managing the country’s energy resources, which, despite its controversial character was praised as a historic achievement by political leaders, lawmakers, President Calderón and even by López Obrador, each claiming a share of the credit for making it possible.

For the Citizens, Without the Citizens

Why have I made this brief description of a bill with seemingly very little to do with the matter at hand? Simply because the process of approving the energy reform bill just considered provides such a clear illustration of how, even in the most complex circumstances, the involvement of non-partisan actors lends substance to the deliberation and the process itself, and becomes critical to the success or failure of the intended reform. This experience also provides plausible operational codes worthy of imitating in comparable undertakings.

It is fair to ask why this process, after its documented success, was not contemplated as a reasonable referential framework for an endeavor of this nature, especially considering the fact that citizens' empowerment was at the center of the bill. It is clear that a bill that aimed to open more channels for the citizens would have been more authoritative and robust if it comprised non-partisan involvement from the beginning.

One might reasonably ask in this connection what meaningful process of political reform seeking the expansion of the spectrum of citizen participation in the decision-making process could be discussed without the contributions of the target population. What process of political reform claiming to have the interest of citizens at its core could be accomplished without directly consulting the governed, so that they and not any other political authority, decide what type of political system will best ensure greater prosperity and security to the people?

It seems that political expedience weighed heavily in the President's decision to put forward a bill for political reform, which treated the governed not as a legitimate participant in deliberations on the bill. As we will see, however, the governed, through civil society, filled that vacuum in its own right as the process unfolded.

From a broader perspective, this bill aimed to provide a blueprint for a genuine and meaningful fulfillment of the promise of popular sovereignty enshrined in article 39 of the Mexican Constitution:

“Article 39. The powers of the sovereignty are vested in the people. Public power comes from the people and it is institutionalized for the people’s benefit. People can change or modify its form of government.”

Inasmuch as any bill aims to redress the problems of given political institutions and processes, it should be realistic, carefully drafted and planned, and limited to realistic proposals aiming at underpinning the structure of political organization that contemporary circumstances demand in a given society. In the case of Calderón's political reform the means to achieving this goal were not adequately thought out.

An endeavor of this magnitude, which aimed to redefine our system of government and political representation, along with a renewed conception of the mandate and the necessary accountability of our representatives with a powerful set of mechanisms of incentives and punishments, should have been the result of a deliberative process which, ideally, would have engaged political elites in an intense dialogue with the governing in order to articulate a reform bill whose main goal was to empower the people.

Hence, any attempt at constitutional transformation that would imply radical changes in the political mainstream, should result from an intense, inclusive and often bitter deliberation between the relevant participants. Accordingly, to the extent that key actors do not feel excluded from the process –particularly those most likely to benefit from the bill if approved—the more likely the process is to succeed.

By neglecting non-partisan involvement in the making of the bill, the President lost an opportunity to champion meaningful and unprecedented reform. As soon as the Senate received the bill and referred it to the appropriate committees, it scheduled special public hearings for late January in order to have the commentary of partisan and non-partisan actors on the proposed piece of legislation. This was a first step towards major involvement of civil society in the process.

In light of these tribulations, the President's strategy focused on bringing to his side not only the public opinion but the Senate, which, as we will see in coming section, was a distinctive example of political compromise to approve fundamental pieces of legislation in the period 2006-2012.

The LX-LXI Senate (2006-2012) was atypically reformist and politically progressive compared to previous meetings, contrasting their fellow lawmakers in the Chamber of Deputies within the same period.²⁰ It was perceived as an exemplary arena for consensus and compromise, in contrast with the Chamber of Deputies, which was in constant stalemate. This Senate served as the driving force behind the approval of critical pieces of legislation during Calderón's administration, such as the bills on energy, rule of law, human rights, pensions, electoral reform and labor, because of the majority his party (the

²⁰ Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). The composition of Congress is provided in articles 50, 51, 52 and 56 of the Mexican Constitution: *Article 50*. The legislative power is vested in a Congress of the United Mexican States, which shall consist of a Senate and House of Representatives; *Article 51*. The House of Representatives shall be composed of members chosen every third year by the people of the several states. For each representative, a substitute shall be elected; *Article 52*. The House of Representatives shall be integrated by 300 members, who shall be elected according to the principle of majority voting through the uninominal voting system in all the electoral districts; and 200 members chosen according to the principle of proportional representation, using a system of regional lists and majority rule with representation for the electoral minority in proportion to the way the people vote; *Article 56*. The Senate shall be composed of 128 senators, two Senators from each state and the Federal District elected in accordance to the principle of majority voting and one Senator shall be apportioned to the largest minority. For this purpose, political parties must register a list with two sets of candidates. The largest minority seat shall be granted to the set of candidates heading the list of the political party that shall have attained the second place in the number of votes casted in the corresponding state. The remaining thirty-two senators shall be elected under the principle of proportional representation, through the system of lists voted in one sole national plurinominal district. The law shall establish the regulations and formalities that shall be applied for these purposes. The Senate shall be totally renewed every six years.

PAN) held in the Senate in alliance with the PRI.

Pedro Joaquín Coldwell, who served as President of the Constitutional Reform Committee of the Senate in the period 2006-2011, describes the distinctiveness of the LX and LXI Senate,

“[In] that period (2006-2011), we passed 34 constitutional reforms, which represented the highest record in history, since it was the highest number of constitutional amendments within a six-year term of the Senate. Not even in the times of the so-called ‘hegemonic presidentialism,’ so many reforms were passed. [And] in this particular case, there is a high political value since any party represented in Congress enjoyed a qualified majority even for legal reform, much less for the case of constitutional reform.”²¹

However, this balance changed dramatically during the second half of Calderón’s administration, after mid-term legislative elections to elect a new Chamber of Deputies.

The composition of the Senate was significantly different from the distribution of power in the Chamber of Deputies during this period (2009-2012); the allocation of seats in each chamber seemed to be the primary reason for this difference: while in the Senate almost 90% of the seats (out of a total of 128) were divided between PAN (52 seats), PRI (33) and PRD (26), with PRI being the second most-powerful force in the Senate and PAN’s main ally in the House; in the Chamber of Deputies the balance of power was drastically different, since the PRI held an overwhelming majority with 242 seats out of a total of 500 seats, needing just 9 more votes to pass any bill or resolution within that period. The PRI cleverly used its majority in alliance with the so-called Green Party

²¹ Interview with Pedro Joaquín Coldwell, Senator 2006-2011; President of the Executive National Committee of the PRI (2011-2012); Secretary of Energy (incumbent), in Mexico City (Nov. 22, 2012). *See* Appendix, at 221.

to block the President's legislative agenda in the second half of his administration. In light of the figures involved, it may be clear how in many cases, the agreements and compromises reached in the Senate were derailed or substantially modified in the Chamber of Deputies. This was not the exception in the case of the political reform bill.

With these scenarios in mind and acknowledging that in this new legislature (2009-2012), his government would not continue to enjoy the PRI's support in Congress, the President decided to bring his case before the public, which triggered an unprecedented level of mobilization in social networks and elite-based NGOs, who later became champions of the political reform bill.

Winning over the public: mobilization towards a potential constitutional moment

At the same time, the bill became the most relevant issue on the public agenda and the citizenry began to become involved in the process in the following months. The necessity and effectiveness of each of the planks of the bill (particularly those with a neutral emphasis such as independent candidacies and the right of nonpartisan citizens to introduce proposals for congressional action) became the most relevant issues on the public agenda. Arguments for and against the bill went back and forth and the decibel level of the conversation rivaled the type of deliberations of constitutional moments. The question was whether we were in the face of one of those moments.

With the President and Congress at odds and with the increasingly prominent role of civil society, it was clear that the process had to be addressed in an unconventional manner by the traditional actors, the President in particular, in order to win over public opinion.

Once the special public hearings organized by the Senate in late January '10 were completed, the President presented a distinctive argument of the bill in a meeting with

his fellow party members, asking for their support to get the bill passed and framing it as an groundbreaking effort to enable ordinary citizens to assume a more active role in the political process. The most relevant points of this speech were not in defense of the bill but rather, on his personal interpretation of the demands of the citizenry at the time:

“In my opinion, what the citizens demand is a political reform that will empower them by enlarging their political rights to have a louder voice and vote in national affairs. This is, precisely, the goal and core of the bill that I presented to Congress. What we need now is to reach the citizens and explain the benefits of this bill to them. We have to broaden the deliberation on the bill by taking it out of the chambers of the politicians, out to the streets and to the real public opinion, which is that of the citizens.”²²

With this, the President attempted to give the impression that we were confronting a potentially extraordinary overhaul of the political process which in his words, needed to be ushered in mainly by the people:

“The way to countervail the strong resistance to these deep changes is by generating a current of opinion among the citizens to push for the reforms that the country needs. [This] transformative endeavor must be led by the citizens. It must be the citizens who should break the resistance coming from the bureaucracy of the political parties. [In] Acción Nacional (the President’s political party) we have always thought that to remediate political, social and economic unfairness, we need to make deep changes, fundamental transformations of which the people shouldn’t merely be the beneficiary but rather, the author of

²² See at <http://calderon.presidencia.gob.mx/2010/01/palabras-del-presidente-felipe-calderon-durante-la-reunion-plenaria-del-grupo-parlamentario-del-pan-en-la-camara-de-diputados/#> (Last visit: March 8, 2013).

such changes. Hence, *it is essential to incorporate the citizens in this debate for enabling them to be the authors of these transformations.*"²³

It took twenty words for the President to trigger an unprecedented civic mobilization to back the bill. In my view, we were facing the dawning of a constitutional moment. However, no one knew then whether or not it would be successful.

The Showdown between Preservationists and Reformers

As expected, the bill passed in the Senate in April of 2011, with minor changes. However, in light of the aforementioned unbalanced character of the President's bill, focusing its attention exclusively on the Legislative branch, the Senate stripped the bill of its most controversial elements relating to checks & balances, such as the reduction of the number of members both in the Senate and in the Chamber of Deputies and the increase of the national vote threshold for a political party to maintain its eligibility. Conversely, and as a result of a more comprehensive and inclusive approach to the reform, comprising a more balanced view toward the refinement of the system as a whole, the Senate incorporated some key elements into the new version of the bill pertaining to congressional control over the Executive branch in the appointment of key positions to the Cabinet and Regulatory Agencies, as well as prescribing different mechanisms to replace the President in cases of temporary or definitive absence.

However, critical components of the bill, especially reelection, independent candidacies, popular initiative, and referendum in case of congressional inaction, survived the deliberative process on the floor of the Senate and were included in the measure passed to the Chamber of Deputies for consideration, where in light of the distribution

²³ *Id.*

of power explained before, the chances for the approval of the bill looked rather ambiguous.

The PRI majority in the LXI Chamber of Deputies had an agenda of its own. After PRI's landslide victory in the mid-term elections of 2009, the focus of its attention was to secure that majority as a baseline for the upcoming presidential election in 2012. Collaboration with Calderón's government was no longer a politically profitable course of action. On the other hand, the PRI enjoyed for the first time in 12 years a comfortable majority in coalition with the Green Party, which enabled it to control the Chamber of Deputies however it wished. The only incentive from PRI's perspective was to undermine the Calderón administration as much as possible during its second-half term, ranging from entertaining some bills indefinitely to more frontal challenges such as filibustering most of Calderón's pieces of legislation throughout that period. In the case of the political reform bill, the PRI's majority in the Chamber of Deputies put both strategies in action.

As provided in Articles 65 and 66 of the Constitution, Congress shall meet in accordance with the following scheme:

“Article 65. The Congress shall assemble every year on September 1, for the first ordinary period of sessions, and on February 1st for the second ordinary period of sessions. [In] both periods of sessions, the Congress shall study, discuss and vote the bills submitted thereto and shall resolve any other affairs pertaining to it according to this Constitution. [The] Congress shall preferably devote itself to the issues established by its Organic Law.

Article 66. Each ordinary period of sessions shall last as long as necessary to solve the affairs mentioned at the previous article. The first period cannot be extended beyond December 15 of the respective year, except on those years

when according to Article 83, a new President of the Republic is going to be inaugurated. In such a case, sessions may be extended until December 31. The second period shall not be extended beyond April 30 of the respective year. [If no agreement is reached by both Houses about the date to close sessions, then the President of the Republic shall resolve the dispute.”

The bill was approved by the Senate on April 27, 2011 and passed on to the Chamber of Deputies for consideration the next day, the appropriate time to discuss the bill in that chamber within the ordinary period elapsed, given that Congress adjourns on April 30th. However, once the bill was received in the Chamber of Deputies, it was duly referred to the appropriate committees. Thus, with Congress adjourned until September, the Permanent Committee discharged the legislative agenda for the following months.

In compliance with Article 78 of the Constitution, when Congress is in recess, a Permanent Committee may continue with the business of both chambers until they reconvene to resume business of Congress:

“Article 78. During recesses of the Congress of the Union, there shall be a Permanent Committee composed of 37 members -19 Representatives and 18 Senators-, appointed by their respective House the day before the closing of the ordinary period of sessions. A substitute shall be appointed for each member of the Permanent Committee.”

The turning point of this process came with a decision of the Permanent Committee on June 7, 2011 to delay discussion of the bill until further notice in order to take into account, the opinion of state legislatures and local authorities, setting the 1st of August, 2011 as a tentative deadline to gather this information. In short, the Permanent Committee delayed the discussion and approval of the bill indefinitely since, in their view, there was no reason to hasten the process.

This decision was the straw that broke the camel's back. It resulted in a bewildering reaction from civil society that changed the course of events, which historically had been orchestrated only within the halls of Congress. This time things might be a bit different.

The Unofficial Account: the mobilization of the ordinary

It started as an elite-based mobilization chiefly organized by highly educated young members of different organizations from civil society, in response to what they deemed as “dilatory procedural tactics” of the Permanent Committee by neglecting further discussion of the bill until both Houses resumed business.

The clash of views underlying this deliberation was at the level of principle, just as the postulates of the constitutional moments theory require: on the one hand, the preservationists of the political elite, mainly represented by the PRI's majority in the Chamber of Deputies defending the status quo thus aiming to preserve a substantial concentration of power in the hands of the political parties, all of whom were reluctant in varying degrees to share it with the governed. On the other hand, the reformers advocating for a “serious transformative initiative”²⁴ uttering civil society's enduring and higher-pitched demands for meaningful reforms of the sharing of power, which would enable the governed for the first time to exercise effective control in their government through prescriptive mechanisms at the constitutional level.

Until the decision of the Permanent Committee on June 7, 2011 to bottle up the bill, the role of NGOs and think-tanks was rather secondary and reactive. But this drastically changed when the decision was made public. It began with an intense repudiation in social networks (chiefly Twitter and Facebook) coinciding in time with the

²⁴ Bruce Ackerman, *supra*, note 8, at 286.

mobilizations then taking place in Spain under the banner “Indignant Movement” (also known as “the 15-M Movement.”) Aiming at more persuasive and so more effective means of protest, a vast array of these social networks joined in calling for a demonstration in the Senate, which served as the seat of the Permanent Committee. It was convened on June 10.

At the beginning and inspired by the tactics implemented by the Spanish movement, the organizers decided to carry out the demonstration by setting up an encampment outside the Senate for several days. However, after weeks of ineffective symbolic occupation, they received no response from either the lawmakers who integrated the Permanent Committee, or from the political parties. The media did not pay much attention to these demonstrations, despite the relevance of the matter.

With these disappointing results, the movement (then known only as *#AcampadaCongresoMX* (*#EncampmentCongressMX*), convened for a series of meetings with other groups and organizations with similar demands. The degree of identification among them was remarkable, though not surprising: these organizations were mostly constituted by highly educated upper middle-class professionals with a keen interest in public affairs, very critical and with strong opinions regarding on the current role and performance of elected authorities and political parties, well-versed in international political affairs, and remarkably skilled and active in social networking. At the same time, they had very limited political skills and a considerable lack of experience in conducting the political process from within, as opposed to contemplating and criticizing it from the outside. They also lacked experience in structuring and operating social movements. However, their mastery of social networks was the key to their future mobilizations.

In the meantime, the political elite, the President included, maintained business as usual. There were no further institutional calls in support of the pending bill, which was bottled up in Congress. At that time, other issues of the public agenda displaced political

reform as a priority. It must be noted that once the bill was passed in the Senate, political reform was no longer a hot topic. Moreover, by the summer of 2011, there had been almost a year and a half of deliberations on political reform. In the opinion of most of the public, the issue had run its course. Simultaneously, violence continued to spiral out of control and the domestic economy began to wane as a result of the international financial unrest, which meant that the people started paying less attention to politics. Thus, with the bill losing momentum, the new reformers had to row against the tide in all possible ways.

After internal discussions and organization aimed at establishing common ground between them, the leaders of the movement held a press conference during which a significant group of organizations and think-tanks announced the creation of a movement called “Reforma Política Ya” (Political Reform Now) with the purpose of pushing through the bill during the remaining part of the legislative term. In particular they put their focus of attention on the sections of the bill that directly affected citizens’ empowerment: reelections, independent candidacies, popular initiatives, and referenda in cases of congressional inaction. This was followed by an article in one of the two major newspapers with national distribution on August 18 and a carefully planned strategy to start lobbying for the prompt approval of the bill in the Chamber of Deputies as of September 1st, when Congress was expected to resume business.

What followed was an interesting and illustrative process of elite socialization in which the movement started bringing followers to its cause not only from the ranks of civil society, but also from those members of the political elite committed with meaningful political reform. This also led to a bitter clash between the Senate and the PRI’s majority in the Chamber of Deputies. The former tried to maintain its reformist credentials as the driving force behind this transformative initiative, as the latter

remained stubbornly entrenched in their desire to preserve the status quo by blocking the bill in the floor of the Chamber of Deputies.

With a reformist Senate on one side and a preservationist Chamber of Deputies on the other, the dynamics of contemporary political transformations and constitutional change in Mexico were on full display. Following a series of bitter exchanges between both Houses, the Senate harshly criticized the attitude of their fellow lawmakers in the Chamber of Deputies by stripping the bill of some fundamental components and delaying its approval until further deliberations had taken place. In the Senate's view, the problem was that most of the controversial issues in the bill had been comprehensively discussed for at least the previous two or three years, and so there was no credible reason or supervening circumstance that justified further deliberation.

In the Senate's account, the bill for consideration was ready and enjoyed a majoritarian consensus in the national public opinion. Making manifest their ability for compromise across the aisle on fundamental matters, all political parties in the Senate supported the bill as it passed to the Chamber of Deputies. Hence, the only group delaying its approval was the PRI's majority in that House. Furthermore, the other two parties in the Chamber of Deputies, the PAN and the PRD, extended their support to the bill and called for prompt debate and a vote in the floor of the House. However, they did not have enough votes to push it through without the cooperation of the PRI. The discrepancies between them had reached a stalemate.

This confrontation between the PRI's factions in the Senate and the Chamber of Deputies was unprecedented. It was a revealing standoff that reinforced the ideas that we were now confronting a significant attempt at a radical transformation of the regime.

What were the most relevant constitutional issues at stake in this case? In my view, a salient feature of the resulting conversation and confrontation between the preservationists and the reformers in this case was ascertaining which parts of the bill

entailed the transformative bulk within the system, both in its structure and operation. There was a consensus on both sides whether this took the form of defending or rejecting these components (depending on the case), that the key feature of the bill consisted in the introduction of innovative political rights within the constitutional framework such as reelection, independent candidacies, popular initiative and referendum. From the vantage point of the reformers, these issues were worth fighting for, and in the case of the preservationists, they possessed sufficient transformative potential to require being resisted.

The subsequent events of September of 2011 can be encapsulated in the intense effort of the reformers, the Senate in particular, to exert a great deal of pressure on the Chamber of Deputies for the consideration of the bill in its original terms. This was enhanced by the strong influence of other actors such as the Executive branch, the media and public opinion. The distinctive feature of this undertaking was that the NGOs representing civil society demanded they be allowed to take part in the private hearings of the Committees that were considering the bill. Once this was granted, the hearings not only became public, but also enjoyed wide coverage. The members of the diverse group of NGOs, banding together in the movement “Reforma Política Ya” voiced in blunt terms the demand to pass the bill as it was sent to the Chamber of Deputies for consideration. The members of the Committees in charge of considering the bill agreed to have it ready for a vote in the floor of the Chamber of Deputies before the end of October.

The result was frustrating. The Chamber of Deputies stripped the bill of some relevant features, such as reelection and referendum. Furthermore, even when other features were approved, such as those dealing with popular initiatives and independent candidacies, the effect in the immediate future, specifically for the coming federal elections of 2012, was insignificant, since there was not enough time to draft the

applicable rules for each of these new rights in time to be considered and put into force for those elections. This was a deliberate strategy of the PRI majority in the Chamber of Deputies, designed to minimize the distorting effects of these sections of the bill into the foreseeable future.

Once the bill was watered down in the Chamber of Deputies, it passed to the Senate for consideration. The Senate decided to revamp the bill in its original terms, that is to say, with reelection and referendum included.

The bill approved in the Chamber of Deputies focused on enhancing the collaboration between the Executive and Legislative branches, though giving more attention to the Executive branch. In contrast with the Senate bill, which comprised a balanced reengineering of both the Legislative and the Executive branches, the bill from the lower House placed emphasis on merely keeping those features that were related to more efficient performance on the part of the Executive branch. It seemed that the bill approved in the Chamber of Deputies was paving the way for a president coming from the ranks of the PRI's majority in that House.

Regardless of the Senate's efforts to refurbish the bill and go for a second round to push it through, the die was cast. It was clear that the dilatory procedural tactics overtly implemented by the PRI's majority in the Chamber of Deputies succeeded in causing the bill to fail completely.

The ensuing exchanges can be epitomized by the Senate's efforts to persuade the Chamber of Deputies to include those critical components of the original draft of the bill, these being reelection and referendum, the decisive elements in the success or failure of this venture. The proposal for reelection did not pass, despite the insistence from the Senate, NGOs, social movements, media and the public opinion at large. The referendum was included in the final version of the revised bill approved by the

Chamber of Deputies in April 12, 2012, but the required threshold of 40% of the registered voters to validate it made its implementation totally impracticable.

The Aftermath

The underlying reason behind the PRI's stance had to do with their focus on the next presidential election and the strategies to preserve the status quo that they not only mastered, but which also entailed favorable prospects for the coming election. They did not want to put that at risk. There was too much at stake if they approved the political reform at the wrong time.

In the assessment of then Senator Pedro Joaquín Coldwell,

“I think that the political reform was truncated. It shows undeniable improvements as the preferential congressional procedure; independent candidacies. It also managed to include the constitutional base for popular referendum. [This] reform served to open spaces for citizens' political participation. It empowers the citizens through popular referendum (and popular initiative). However, we got stagnated in reelection of members of Congress, state legislatures and mayors. In this issue, there was substantial disagreement within the ranks of my party (the PRI). I think that in light of the important issues that were left aside in this reform, we may see a second round in the next administration.”²⁵

The resulting watered-down political reform was not a mere defeat of a bill. It was the pinnacle of preservationist politics, an unwillingness to introduce new

²⁵ Interview with Pedro Joaquín Coldwell, Senator 2006-2011; President of the Executive National Committee of the PRI (2011-2012); Secretary of Energy (incumbent), in Mexico City (Nov. 22, 2012). *See* Appendix, at 228.

constitutional tools aimed at sharing more power with the governed. It was also anticipation of what, with time, would appear to be a restoration of the old hyper-presidentialism.

Why did the PRI opt for this course of action? In terms of political calculation, the answer is obvious: They wanted to secure their victory in the presidential election of 2012 under the rules existing Prior to the approval of the political reform. The rules in force for that election were clearly favorable to a system based upon strong majoritarian political parties. Thus, the minor possibility of putting that at risk with independent candidates or reelection would have jeopardized their intricate planning to regain the Presidency and control of Congress in 2012. Furthermore, the PRI's enduring practice of managing power by making patronage appointments throughout the vast structure of the system, may have been put in danger if the plank for reelection had succeeded in getting passed. It is curious to see how, after the election of 2012, all those engaged in filibustering the political reform bill in the Chamber of Deputies were rewarded with prominent positions in the Cabinet and agencies controlled by the Executive branch.

On the other hand, it must be also noted that this serves not only as an example of how selfish partisan interests often outweigh the common good, but also as an illustration of how either of the two majoritarian parties while in the opposition can commit themselves to blocking any attempt at substantial reform sponsored by the incumbent president, only to wait until winning the next election and then support essentially the same reform, but now as the governing coalition.²⁶ This has led to an entrenchment of the practice of parties blocking all meaningful reforms while in the opposition, until the victorious party is able to endorse them by a coalition of the

²⁶ As it actually occurred with the political reform of 2014 ushered by the PRI in Congress, in which besides the electoral predominant component, the new constitutional amendment passed reelection at a constitutional level. *See* Diario Oficial de la Federación, del 10 de febrero de 2014 (Mex.), DECRETO POR EL QUE SE REFORMAN, ADICIONAN Y DEROGAN DIVERSAS DISPOSICIONES DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, EN MATERIA POLÍTICA-ELECTORAL.

incumbent president and his party's majority in any House of Congress. We should not wait for these alignments; in the context of growing political pluralism it may take decades for these to ever occur.

But leaving this outcome aside for a moment, I would like to explore in greater detail the components of the bill that in my view comprise a radical change in our political process and are therefore worthy of further transformative undertakings.

D. CODIFICATION

The bill approved by the Chamber of Deputies almost three years later, only passed three out of the nine original proposals for reform that the President put forward with the main goal of making an alteration of the traditional model of political representation. The President signed the bill on August 8, 2012 and was published the following day.²⁷

Public opinion and mass media labeled it as containing only “watered-down political reforms”; a fair criticism, since despite including critical elements of the proposed bill such as independent candidacies and the popular initiative, it left out more sweeping reforms, being reelection the most relevant.

Although this attempt at meaningful political reform came closer to succeeding than any other in decades, it utterly failed. Despite its failure, however, it triggered a groundbreaking blueprint for self-government in Mexico, which, as I have articulated in previous chapters, is the principal preoccupation of my work.

Additionally, its apparent defeat was in fact the first step toward further radical transformations in the narrative of political transformations and constitutional change as

²⁷ Diario Oficial de la Federación, del 9 de Agosto de 2012 (Mex.), DECRETO POR EL QUE SE REFORMAN Y ADICIONAN DIVERSAS DISPOSICIONES DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, EN MATERIA POLÍTICA.

a continuum, which I have been arguing for. I wanted to examine it through the prism of constitutional moments theory, because in my view, it provides a valuable intellectual tool to frame the dynamics of the ongoing tensions between traditional and innovative strategies for political transformation and constitutional change in Mexico.

It must be noted that, given the great differences between constitutional culture in Mexico and the U.S., a strict application of the scheme of the constitutional moments theory is not entirely adequate to the task of articulating this case study. Nonetheless, I have found its distinctive theoretical framework especially appropriate for testing how close this mobilized deliberation came to a deeply transformative outcome. Thus, bearing in mind the fundamental differences in our respective constitutional ethos, I embarked on an effort to apply this the theory in order to determine whether we were "in the shift to higher lawmaking gear."²⁸ To strengthen my argument, in the following section, I will analyze the critical components of the bill and their impact on the attempt to shift to a higher lawmaking gear for the first time in our constitutional history.

Congress under Fire: Lifting the Constitutional Ban on Reelection and the Proposal to Reduce the Number of Seats in Congress

A question that arises here, is how should we understand the fact that, despite the taboo on reelection in our complex political culture, one of the main sections of the bill provided for the consecutive election of legislators for a maximum period of twelve years, notwithstanding the general discontentment with the way in which they have fulfilled the people's mandate?²⁹

²⁸ Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989).

²⁹ We should bear in mind that when the bill was introduced, the general perception about politicians and the political process itself was at its lowest point in years. A survey in June 2009 showed that 69% of those interviewed felt disappointed by their elected representatives; 49% expressed a complete disdain of politics;

Only from the perspective of political suasion or calculation could reelection be proposed at the same time of a reduction in the number of members of Congress the latter being the proposal that generated the highest rate of support among the public according to various surveys taken in the last weeks of December 2009, since that of the newspaper *Excelsior* showing that 93% of respondents supported the reduction of the number of members in both chambers.

Conversely, and according to the same source, 3 out of 4 rejected reelection of lawmakers up to a maximum of twelve years. This apparent contradiction—a reduction in the number of seats in each chamber and an extension of their tenure by means of reelection—was in fact a clever strategy on the part of the President to give an incentive to the members of Congress use these two critical components of the bill as an incentive to change the political structures: by reducing the size of both Houses, which would only benefit the three larger parties, at the same time as paving the way to be reelected in office, in exchange for approving the rest of the proposals, which would imperil the current powers vested in Congress.

Thus, the rejection of the proposal submitted by the Executive by the majority of political parties represented in Congress was no surprise. Political relations are governed by reciprocity or retaliation; what reaction could be expected from the members of Congress to a bill that consisted of 7 out of 9 proposals that directly affected the structure and operation of the Congress, without including any reciprocal measures to limit the existing powers of the Executive Branch?

It is very difficult to create an optimum climate for political compromise when there is such an evident imbalance in the bill. When there is no reciprocity, those who feel aggrieved and threatened with the proposal, are likely to respond by using the logic

and 88% voiced support for any type of initiative which aimed at enhancing accountability from political parties and elected representatives. *See* at <http://busquedas.gruporeforma.com/reforma/Documentos/DocumentoImpresa.aspx> (Last visit: April 2, 2013).

of retaliation.

In my view, the core problem of the bill (as introduced in December 2009) was that it confused the legitimate demand for citizens' empowerment with frustrating filibustering between the Executive and Congress, given the recurrent legislative stalemate that Mexican presidents have faced during the second-half of their administrations since 1997.³⁰

This bill was a formula to cut the Gordian knot that oppresses a political system of presidential tradition such as ours, in which an elite has not been able to properly adjust to the fragmentation of power. This has led to political alternation and the coexistence of legislative majorities antagonistic to the incumbent president with enough power to obstruct any reform, with the sole purpose of undermining the incumbent president and his party's prospects for the next election.

In such scenario, those opposing majorities in the legislature, expect to consolidate an absolute majority in Congress with the head of the Executive Branch as used to happen in the "good old days."³¹

³⁰ María Amparo Casar, *La ruta del fracaso*, REFORMA, Jan. 12, 2010. Casar's description of the failure of the legislative process over the last years is crystal clear: "Step One. The Executive pitches a reform bill; Step Two. The opposition tackles the bill with one of these three attitudes: 'the bill is incomplete' (totalizing cliché), or 'the bill subverts the foundations of the State' (national-revolutionary cliché), or 'the bill is against the interests of the majority or the mainstream economy' (populist cliché); Step Three. The bill is referred for Committees' consideration and 'marketing' begins; Step four. The bill passes with substantial changes to the original proposal from the Executive, contradicting its initial scheme; Step Five. The Executive thanks Congress and signs the bill depicting it as a 'historical achievement' or as 'the best possible reform;' Step Six. The opposition assumes no costs on the pervasive effects of the bill or of its uselessness; Step Seven. All participants agree that a new reform bill on the same subject matter is needed and that this time, it will be definitive." If we pay close attention to Casar's timeline, we will identify interesting parallels with the "crisis in governability" scenario sketched by Bruce Ackerman, *see infra*, note 57.

³¹ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 647 (2000). As Professor Ackerman explains, "Rather than all-out war, president and house may merely indulge a taste for endless backbiting, mutual recrimination, and partisan deadlock. Worse yet, the contending powers may use the constitutional tools at their disposal to make life miserable for each other: the house will harass the executive, and the president will engage in unilateral action whenever he can get away with it. I call this scenario 'crisis in governability.' [Once] this crisis begins; it gives rise to a vicious cycle. Presidents break legislative impasses by 'solving' pressing problems with unilateral decrees that often go well beyond their formal constitutional authority; rather than protesting, representatives are relieved that they can evade political responsibility for making hard decisions; subsequent presidents use these precedents to expand their decree power further;

This strategy of “political deterrence” (to put it mildly) has resulted in many years of legislative paralysis³² and the blocking of any possibilities for meaningful strategic reforms that still desperately needed,³³ as it has also paved the way for further concentration of power when the same party holds the Presidency and the majority in Congress.

In the present circumstances, the path toward meaningful political transformation entails a new redistribution of power, from the governing political elites (in whose hands it remains concentrated) to traditionally disenfranchised participants, mainly the people. This is best accomplished by introducing effective procedures and institutions to channel their expectations and demands.

the emerging practice may even be codified by later constitutional amendments. Increasingly, the house is reduced to a forum for demagogic posturing, while the president makes the tough decisions unilaterally without considering the interests and ideologies represented by the leading political parties in congress.”

³² Luis Rubio, *Kamikaze*, REFORMA, Jan. 10, 2010. In this editorial, Luis Rubio provides a keen description of widespread “institutional dysfunction by inaction,” in the following terms “[The] country is in a juncture that demands action and resolve. And yet, our political class is paralyzed. Those bestowed with the duty of deciding, don’t decide. Those in charge of enhancing our separation of powers, an of appraising and refining proposals articulated by the Executive, merely focus on criticizing the existent without advancing ideas to overcome the legislative deadlock. However, there are great ideas and proposals at hand that none of these actors within the political elite is willing to sponsor. They are haunted by myths, as interests and privileges drive their actions. No country can function under these premises. [It] may be necessary to acknowledge that we are paralyzed and that such condition is not due to a single person –regardless its power, but rather to the array of actors that are more keen in protecting and preserving their interests than in making our country viable.”

See at <http://www.cidac.org/esp/cont/articulos/kamikaze.php> (Last visit: April 2, 2013).

³³ José María Córdoba, *supra*, note 12. According to Córdoba “Since 1997, Mexico lives under a divided government, where the party of the incumbent President does not hold a majority in Congress. Since then, our country functions, but do not progress. It is fair to say that the country functions: each branch of government works with reasonable normality under its constitutional powers. However, it is undeniable that the country is not progressing: in the last twelve years, no single reform aimed at dynamizing the political, economic and social processes has passed; mediocrity blooms in every area of the public space. This paralysis is due to great extent to alarming dysfunctions between the Executive and Legislative branches of government, as a result of a defective constitutional architecture.”

The Siren Song: Independent Candidates

It may be misguided to support the introduction of independent candidacies in our electoral system, which is exclusively designed to operate through political parties, without doing a close analysis, mainly based on the following considerations:

Let's assume for a moment that our promising independent candidate is elected to office: how will she fulfill her legislative role in the Congress? Will she always cast a lone vote? The obvious answer is that sooner rather than later, our independent candidate will inevitably need to close ranks with the majoritarian blocs in order to play a meaningful role in the legislature. The associated costs of so doing is that the reasons for which she was elected, the proposals and the high expectations of independence from any political party, may all be nullified.

Thus, independent candidates do not represent an effective solution to untie the Gordian knot choking our political system. Independent candidates may only work to undermine the strength of the prevailing party in certain electoral districts, districts which are so dissatisfied with the performance of their current representatives and in which the opposition does not have real possibility of victory, such that the figure of an independent citizen removed from the interests of the political parties is more attractive and reliable to the voters; in this case she may have the ability to displace even the strong party in that district, as "a breath of fresh air," in the government or in the legislature. This idea may appear persuasive and appealing,³⁴ until we visualize it against the backdrop of the entire political edifice of Mexico and its schema of popular representation assembled in political parties, where our-newly elected promising

³⁴ However, there are more positive readings about the introduction of independent candidacies in our political system, such as that of Judge Manuel González Oropeza who argues "[the] most advanced international standard recommends independent candidacies to prevent political parties of becoming the only participants to be voted in electoral processes. [Probably] the best way to approach independent candidacies in our country is to start with them at the municipal level, from the bottom up, in order to foster local leadership." Interview with Manuel González Oropeza, Judge of the Federal Electoral Tribunal, in Mexico City (Oct. 23, 2012). *See* Appendix, at 151-152.

independent candidate barely stands up with only her novelty to keep her going, but is completely nullified at the time to participate as an "independent" in the decision-making process: in that key moment, her independence is opposed to her political survival, forcing her to join the blocs that form the majority.

IV. THE TROJAN HORSE: THE CITIZENS' ENTITLEMENT TO INITIATE CONGRESSIONAL ACTION

Using this analysis, we can only conceive of the transformation of our political system through the introduction of effective institutions that allow citizens to limit the unlimited control currently exercised by the political parties and other elite participants in the privileged decision-making process in Mexico. This is where the citizens' power to introduce bills for congressional action acquires a key role (at least in terms of access to the legislative process) by being also able to define the issues, which, from the vantage point of the citizen as sovereign, should be the priorities in the formulation of the public agenda.

In this, as it has been argued by several authorities for years,³⁵ institutions such as the referendum, the plebiscite and the revocation of the mandate are of cardinal importance.³⁶

Future success will depend on the proper regulation of these institutions, and the scrutiny of the way in which the democratically elected representatives fulfill their

³⁵ María Amparo Casar, *Reformas en el aire*, NEXOS, December 2009, at 35-44. In this article, Casar outlines a useful description of some proposals for political reform between 2007-2009, leaning toward institutional robustness and a gradual evolution in our political culture as bedrocks of further constitutional refinement. See at <http://www.nexos.com.mx/?P=leerarticulo&Article=56105> (Last visit: April 2, 2013).

³⁶ Nonetheless, their mere introduction is no guarantee of success in democratizing the constitutive process, since these institutions can also be used to further authoritarian goals and practices, as has happened in several Latin-American countries, such as Venezuela, reminiscent of the totalitarian mobilizations of the 1930s. It is what has been described as *democratic authoritarianism*.

mandate in providing the citizens effective mechanisms to ensure that their elected representatives (president, senators, representatives, governors, mayors, among others) are held directly accountable to the people and not to the party leadership (as has thus far been the case). Only these measures are capable of underpinning the flimsy structure that now sustains the political organization of the country.

In the case of political reform, the proposal to grant non-partisan citizens the right to introduce pieces of legislation for congressional action as part of the formal legislative process provides a salient example on how such a change may alter the course of long-lasting practices. Historically, the introduction of bills (though not exclusively) has been reserved to the president, who over time became the driving force par excellence of the legislative process. Before the approval of the political reform bill in August '12, Article 71 of the Mexican constitution provided:

“Article 71. The right to introduce laws or decrees belongs:

- I. To the President;
- II. To the members of Congress;
- III. To the state legislatures

The bills submitted by the President of the Republic, the state legislative bodies or their commissions shall be referred to a committee. The bills brought by representatives or senators shall be subject to the procedure established by the Congress Act and its regulations.”

After the reform, the new version of the article provides:

“Article 71. The right to introduce bills or decrees belongs:

- I. To the President;
- II. To the members of Congress;

III. To the state legislatures

The bills submitted by the President of the Republic, the state legislative bodies or their commissions shall be referred to a committee. The bills brought by representatives or senators shall be subject to the procedure established by the Congress Act and its regulations.

(Included by decree published on August 9, 2012)

IV. To citizens in a number equivalent, at least to zero point thirteen percent of the voters registration list, under the terms set by the law
(emphasis added).

(Amended by decree published on August 9, 2012)

The Law of the Congress will determine the procedure for the initiatives.”

With this, what had been a de facto exclusive power of the president is now shared with a group of citizens (the 0.13% of the registered voters in 2012 is equivalent to 100,291 citizens) who by means of this reform, are now entitled at the constitutional level to introduce bills for congressional action. However, this achievement cannot be fully enjoyed until some congressional measures are taken in order to establish an appropriate legal framework to implement this provision. Until this day, no such undertaking has been attempted, and so this citizens’ enfranchisement remains inoperative, and, as a result, this points to a central point of inquiry of this work and it pertains to the acknowledgment that as we have experienced over the last two decades, the gradual and sustained fragmentation of power previously concentrated in the hands of the presidency, has revealed that a new set of rules is necessary to guide the power distribution and sharing among a vast array of formal and informal participants. The key inquiry in this matter is whether the preexisting rules, institutions and processes through

which this great quantity of power were formerly channeled a ought to be transformed as well, and adapted to these new realities and participants.³⁷ So far, there have been a few adjustments, but a complete constitutional overhaul has been systematically neglected, and even rejected in some cases, by the political elite. I think this has been an error.

Without a doubt, the prescription at the constitutional level that the people will have to call directly for congressional action was an important step towards the liberalization of current political processes, and a more accurate expression not only of a healthier checks-and-balances system, but even more importantly, as an instance of a bridging of the gap between political elites and the people. With this undertaking, the message is that under the status quo the president is not the only participant privileged with initiating the legislative process, as in the past. It is also clear that if this is adequately supplemented by further prescriptions, it may entail a clear empowerment of ordinary citizens to shape constitutional change.

This component of the bill is particularly relevant in the present context, given the implications of enabling the citizens to start formal conversations with the Executive and Legislative branches, outside the framework (of what has been described as) “the process of higher lawmaking”. Through its enactment, this entitlement may serve to include the citizens’ input in the processes framed as “ordinary politics,” as opposed to their occasional participation in defining constitutional moments. With this new entitlement, the extraordinary role of the people may become commonplace and more in tune with the continuous nature of political transformations and their translation into constitutional grammar.

This entitlement is also relevant to channeling present criticism and frustration through institutions so that it can have an affect on the ways in which political representation operates. But we may also need to be careful: without an adequate

³⁷ Luis Rubio, *supra*, note 32.

regulation of the subject matters that can be addressed with this entitlement, we have to prevent it from becoming a disruptive element, unsettling organic stability in the government. In short, we have to avert the possibility of making this entitlement a political weapon against democratically elected representatives or a substitute for the role constitutionally assigned to lawmakers.

A further concern is that we not get lost in the Minotaur's labyrinth: the mere introduction of this entitlement does not guarantee that the political process will be more responsive to the demands and expectations of ordinary citizens. This alone should not suffice. To be meaningful, it requires supplementary measures aimed at refining political representation and the execution of the people's mandate. In this context, transparency and accountability within political structures are paramount. Thus, an integral reformist approach comprising not only the proposals ultimately approved by Congress in this case, but also reelection as a key element of our institutional evolution and as a prominent component of our constitutional reengineering. This is why it is of great importance to grant privileged status to this citizens' right to initiate congressional action by prescribing that any popular initiative meeting the legal requirements provided in Article 71-IV should be discussed without delay by Congress as an express mandate of the People for legislative action.

If the underlying reason for including the citizens' right to introduce bills to Congress was democratizing the political process, then this entitlement, given its extraordinary character and strict rules, should enjoy an equally privileged treatment as that granted to those bills introduced by the President, as provided by Article 71, in the penultimate paragraph of article 71³⁸ The underlying motivation of this section was to

³⁸ *Supra*, note 20. Article 71, § 2, "The opening day of each ordinary session period, the President of the Republic may present up to two initiatives for preferential procedure, or under this preferential character appoint up to two initiatives that had already been presented in previous periods, when ruling pending. Each initiative should be discussed and voted by the Plenary of the Chamber of origin on a max thirty natural days period. Otherwise, the

break the legislative deadlock between President and Congress by introducing a preferential congressional procedure for ensuring that those bills deemed of fundamental importance or priority to the President's legislative agenda be discussed without further deletions.³⁹ In my view, the citizens' right to introduce bills for congressional action ought to enjoy similar privileges.

This part of the bill has been utterly underestimated. Other elements such as those concerning reelection or runoff elections raised more interest among the public at large. However, from the vantage point of our constitutional history and because of the nature of our democratic model (as explained in Part II) the most salient and transformative feature of political reform is precisely the citizens' right to introduce laws. It is a radical shift from our enduring monist tradition that with this new feature, we are experiencing an evolution towards a dualist democracy. However, to make it count, it is necessary to push for its respective statute and to enjoy the privileged status of the preferential legislative procedure, given its strict rules.

V. A CRITICAL ASSESSMENT OF MEXICO'S TRANSITION TO DEMOCRACY

Is there someone to blame for our failed transition to democracy? Besides the political elite, we the Mexican people as a whole are to blame for not being able to develop, in light of overwhelming evidence in our daily lives of the uselessness of current political processes and institutions, a more sophisticated degree of citizenship. Fortunately, it seems that this is gradually changing for good as portrayed in the social mobilization for the political reform.

initiative under its terms and without any higher procedure will be the first matter that will be discussed and voted in the next plenary session. If approved or modified by the originating Chamber, the respective bill of law or decree will immediately be passed to the Reviewing Chamber for discussion and vote on the same period and under the above mentioned conditions;" emphasis added.

³⁹ María Amparo Casar, *supra*, note 30.

On the other hand, either because of selfish interests or good intentions, those experts who have advised our leaders for at least the last thirteen years, have utterly failed in adequately reading the nature and evolution of our transition to democracy. Despite its distinctive character, there was not a single policy component in this period that reflects an institutional approach that resulted from a comprehensive study of the dynamics and tensions inherent in any process of democratization. It seems that there was a clear and incontrovertible attitude of founding a new order by eradicating all central elements of the previous regime, overlooking and underestimating the depth of PRI's views in our political culture. The naiveté was precisely in not assuming a clever and gradual, approach to inaugurating a new system of government through a cautious and progressive dismantlement of the structures of the former regime. This did not happen in Mexico. It was as if we had a collective torpor that not only affected our social judgment, but also from which we have not yet been able to recover completely, even to this date.

In light of the predominant transitional narrative, the biggest mistake was not to include PRI components and members in the administrations that followed the shift of power in 2000 throughout 2012.

Transitional euphoria replaced thoughtfulness and judgment, Fox's ignorance of the nature of the political process also came to light for the first time. He seemed to believe that, as had happened in functional and consolidated democracies, the transition was going to be peaceful and stable with no major threats on the horizon in light of the serenity in which PRI surrendered power after losing the 2000 election. Fox's conciliatory approach, despite his advisers counsel to move in the opposite direction, breathed new life into to a then almost defunct PRI.

Twelve years after, we can see that this strategy was wrong. As previously explained, the Fox administration in particular failed to foresee the effect of the power

vacuums left behind by the PRI's defeat in 2000. The newcomers thought that this would be a simple change of administration. In the end, it was more complex than that: it was an actual regime change and both the government and the society at large failed to recognize it. Much of the resulting political tensions and polarization that characterized the two last presidential administrations (2000-2012) would have perhaps been averted or minimized at least, if the PRI had been given a more substantial role in the transitional process. This would have also had a significant impact on the war on drugs. Hence, from this incomplete transition to democracy we can learn that political transformations entailing actual regime change require multi-partisan compromise and collaboration, rather than isolation and political eradication.

This was not a mere change of a party in power, it was much more than that and it seems that we were only able to see a small part of the whole picture. First of all, we lack the necessary historical perspective: when we talk about the Mexican Revolution and the *ancient régime* that it replaced; we frame it in that period of our history from 1876 to 1911, which makes 35 years long enough to describe the rule of President Porfirio Díaz as the old regime. And yet, in the case of PRI, we are talking about 72 years in power, thus, unlike any other moment in our history, this shift in power constituted a radical break with the past, with an *ancient régime* of almost three-quarters of century, whose influence as has been shown, was deeply embedded within our society and for many generations.

An additional flaw in this transition was the inability to persuade to dominant political coalition of the need to make a set of new rules for the “new game of democracy” and “fragmented” power in Mexico. The irony is that the regime change was not persuasive enough to make our elites more aware of the fact that, notwithstanding the shift in the presidency, the same rules of governing were in force as in times of PRI.

This scenario reflects what experts have described in broader terms as the tension between old authoritarian constitutions and new democratic systems.

Constitutional symbolism is deeply enrooted in Mexican political culture. It may be deceiving to conclude that this strong tradition is no longer predominant in Mexico by virtue of the numerous reforms of the constitution since 1997 with political pluralism as a constant in the distribution of power among the political elites.⁴⁰ This may be deceptive, because such reforms distract us from the underlying fundamental assessment of beginning a new democratic regime by means of drafting a new constitution and/or inaugurating a new political and constitutional culture by the introduction of radically different institutions, practices and procedures from those of the past, as has happened in the vast number of processes of democratization over the last four decades.

Constitutional symbolism is deeply enrooted in Mexican political culture, a result of our elites' traditional view of the Revolution from a totalitarian perspective.⁴¹ From their vantage point, the unparalleled violence that resulted from the Mexican Revolution demanded the establishment of a new political order founded on a new constitution. However, as is well known, although there were a few small differences between the latter and its predecessor of 1857: the principles, practices and operational codes remained basically the same. As has already been explained, after the elite settlement of 1929, the constitution served more as an instrument to consolidate a one-party system than as a foundation to foster a strong democratic ethos in Mexico.

When we try to analyze the case of the transition to democracy in 2000, from the vantage point of totalitarian revolutions, we see that this theoretical framework turns out to be inadequate to the purposes of our inquiry, since this new political transformation

⁴⁰ María Amparo Casar, *Representation and Decision-Making in the Mexican Congress*, Documento de Trabajo Núm. 258, Centro de Investigación y Docencia Económicas, at 11 (Oct. 2011). *See also* John Ackerman, *La nostalgia autoritaria*, VARIOPINTO, Agosto 2012, at 38-41.

⁴¹ Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2282-2283 (1999).

was basically different from the Mexican Revolution, since there was no violent change in the status quo. Here again, the traditional views of totalitarian revolutions [were interfering in the introduction of more conventional approaches to the connections between political transformations and constitutional change in order to frame our contemporary transition to democracy with a “human scale perspective.”

Thus, the traditional, anachronic, view of revolutions and constitutional change, is significantly strong in Mexico in light of a vigorous legal formalism, which has prevented all attempts to predicate the transition to democracy in a new constitutional grammar. This conservative view has managed to appease the demands for a new constitution by implementing numerous reforms to the constitution, claiming that such changes are the expression of the mandate of the people to bring the relationships between the latter and the government up to date. But change in the form of constitutional amendment does not, of itself, mean real transformation. The conservative view has managed to sell as transformations what have really been merely symbolic changes to the constitution, since our political and constitutional culture remains intact. Constitutional symbolism has prevented the replacement of the old with a new constitution, by introducing changes that in the end have reaffirmed the idea that a new constitution is not needed to express a new grammar of legitimation in Mexico. Perhaps this is true, but for the wrong reasons: from a legalistic vantage point, we should not need a new constitution to the extent that constitutional amendments have served to update the original text, but when it comes to a more living and functional view of the constitution, things necessarily look different: in this case, as a People, we surely need a new framework of understanding more in tune with the perspectives, expectations and demands that have resulted from the deepest political transformation we have experienced since the end of the Mexican Revolution. To articulate this distinctive grammar of political legitimation and social understanding, we may think about some

strategies for the transformation of our present constitutional order and culture. We will explore this in the next and final chapter of this work.

PART VI

STRATEGIES FOR THE TRANSFORMATION OF THE CONSTITUTIVE PROCESS OF AUTHORITATIVE DECISION IN MEXICO

INTRODUCTION

- I. GOAL CLARIFICATION
- II. THE CONSTITUTIONAL CENTENNIAL
- III. INSTITUTIONAL DESIGN
- IV. CONSTRAINED PARLIAMENTARIANISM: THE WAVE OF THE FUTURE?
- V. DOWNSIZING CONSTRAINED PARLIAMENTARIANISM TO MEXICAN
CONSTITUTIONAL POLITICS
- VI. THE TRANSFORMATIVE POWER OF LAW
- VII. LIVING CONSTITUTIONAL CHANGE
- VIII. THE SHIFT TOWARDS DUALIST DEMOCRACY
- IX. IMPROVING THE PROCESS

FINAL REMARKS

INTRODUCTION

"We all have different parts to play, and we must all be allowed to play them."

Robert Crawley

(Downton Abbey)

In Parts III and IV we have analyzed the central problems of our current processes of authoritative decision-making and how the interplay between its relevant participants affects the outcome no matter how effective a given prescription or policy may appear.

We have also seen how the trends of constitutional symbolism, revolutionary nationalism, elite management and the ongoing fragmentation of power also influence the way in which the process is conducted by participants engaged in these decisions.

This Part is the result of qualitative empirical research that I conducted in Mexico for almost two years with a comprehensive variety of elites. All the elements sketched here as benchmarks for further constitutional decision-making were identified during these conversations.

Given that the primary audience of my dissertation are the full range of relevant participants involved in constitutional decision-making, from each of the three branches of government to local authorities, and from elite-based NGOs to intellectuals and social movements, I would like to emphasize that constitutional decision-making should no longer be viewed as the exclusive domain of certain elites.

In this Part, I would like to reflect on some strategies for the transformation of our current processes of constitutional decision-making as a way of bringing together the ideas concerning the connections of contemporary political transformations and constitutional change that have been advanced in this work.

As a result of the inquiries posed in preceding parts of this work, the following strategies of transformation are based upon the central question of whether under current processes and institutions the People can claim ownership of the Constitution and its transformation, and whether under current processes and institutions incumbent elected politicians can be held accountable by the People, and whether the existing procedural and institutional framework can serve to channel and balance the inherent competing interests that characterize the political process in a constructive manner.

Additionally, we should also try to determine which attitude the relevant participants ought to take with respect to the way in which political transformations and constitutional change have been traditionally modeled in Mexico. Should the governing remain impervious to the enduring elite-oriented strategies of preservation through transformation?

To answer these inquiries, I will not embark on enumerating a “wish list” for better authoritative decision-making; instead, I will reflect on some issues that seem to offer promising ways of enhancing our constitutive process in order to channel the expectations and demands of the relevant participants involved in the process more effectively. I will also sketch a series of concepts that are of chief importance for further constitutional decision-making in Mexico.

To describe this approach, I found particularly suitable an explanation from Bradford Smith, Microsoft’s General Counsel and Executive Vice President,

“[There] is a particular approach or technique that I at least believe is useful for almost every decision making process. Whenever you are engaged in a thought process or a discussion about what one might do, what a government might do, what a company might do, what a University might do, people usually want to talk about doing many things. If they’re disciplined maybe they only talk about

five things or seven, or three but there's usually a fair long list. That's okay, and usually it is important to do more than one thing, but I often find it's also really helpful as one gets about 2/3 of the way through the process, after the ideas have come together, after there is sort of a menu –if you will- of possibilities to ask this question: if we could only do one thing, what would the one thing be?

The truth is that you probably end up doing more than one thing, but if you know what the one thing is you are almost certain to do that one thing very well. And I think specially in the world of public policy, where every six years in Mexico, every four in the U.S. we tend to talk about sort of the same issues: the state of economy, the state of education, the growth in jobs. If you could step back from time to time and ask what's the one thing we are trying to do there is actually a pretty good chance that there will emerge a set of steps that will be quite effective in moving that one thing forward and if you pick the right thing, you'll have a real impact.”¹

But before entering into the analysis of desirable transformations in our constitutive process we should set the expected goals to which these strategies will aim at.

I. GOAL CLARIFICATION

In light of the predominant historical and cultural background and the current state of affairs, and before entering into the projection of future trends, I will first outline

¹ Interview with Bradford Smith, Microsoft's General Counsel and Executive Vice President, in Mexico City (Nov. 25, 2012). *See* Appendix, at 167-168. This stance on the reasonability to clarify goals in any process of decision-making is also shared by philanthropist Fernando Landeros, who attributes the success of his NGO's initiatives to a reasonable and realistic set of goals, based on doable long-term projects. *See* Interview with Fernando Landeros, President of Fundación Teletón México, in Mexico City (Dec. 8, 2011). *See* Appendix, at 12-15.

the basic public goals that all relevant participants involved in the constitutive process of authoritative decision in Mexico should seek to secure.

As Michael Reisman explains,

“A person engaged in performing any decision function that involves choosing should examine the demands of particular actors in terms of their congruence with the common interest, expressed as preferred patterns of production and distribution of every value within a system of stable minimum order.”²

Hence, the activity of postulating and clarifying a set of public order goals ought to be characterized not only by the array and some times conflicting expectations and perspectives of the relevant actors, but also by what a given society in a particular time and place demands.

In the case of Mexico and its current predicaments, we should start by making a distinction between securing a minimum public order³ by lowering the dominant expectations of violence, and the establishment of a desirable optimum public order of human dignity, in which all value categories are comprehensively fostered and achieved.

To do this, we depart from the identification of the eight familiar values postulated by policy-oriented jurisprudence: power, wealth, enlightenment, skill, well-being, affection, respect and rectitude. From our perspective, a contextual focus is preferable to the conventional approach, based upon the predominance of one value over the rest. In our view:

² Michael Reisman, *A Jurisprudence from the Perspective of the “Political Superior”*, 23 N. KY. L. REV. 619 (1996).

³ Harold D. Lasswell & Myres S. McDougal, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY, at 34-35, 197-198 (1992).

“[A] contextual focus emphasizes the multiple interrelationships between value production and distribution in all value categories. What can be achieved with respect to any one value is dependent on what can be achieved with all other values; positive developments in one value category may entail retrogressions or disdevelopments in others.”⁴

This clarification, emphasizing the appropriateness of using a contextual focus in contradistinction with the “one-value predominance” approach, is particularly relevant in a scenario such as the one that has been described for Mexico. Consequently, I would like to outline the series of goals to which we should aim in order to achieve an optimum public order of human dignity in Mexico, based on our familiar value categories.

A. Power

The generation and distribution of power in Mexico has been traditionally confined to a limited number of participants, who, due to their control of the related institutions and procedures, have managed to prevent power from becoming a more widely allocated value.

For this reason, we should seek to shift from an elite-based model of concentration of power to a framework based upon effective processes of power-sharing, in which non-traditional participants and informal procedures are equally acknowledged as sources of authoritative decision. In this respect, we should move from the present model of collaboration between the three branches of government towards a growing dialogue between each of these three branches and civil society.

⁴ W. Michael Reisman, *Development and Nation Building: A Framework for a Policy-Oriented Inquiry*, 60 *Maine Law Review* 311 (2008).

This strategy of power-sharing may also help to balance the present production and distribution of power by introducing new trends approaches to authoritative decision-making such as those described in Chapter V: constrained parliamentarianism, strategic litigation and democratic dualism.

B. Wealth

There are very high expectations about Mexico's economic performance for the next two decades. According to a range of analysts, if Mexico continues on its current innovative and transformative tack, it will become one of the leading economic powers at some point in this century. Alas, these expectations may not suffice to minimize the enduring economic inequality which characterizes the Mexico of today: as seen in the fact that it is not only the country with the richest man in the world but also the one with the highest rates of inequality, with half of its population in poverty.

Hence we should aim at not only becoming a robust leading economy but also at bridging the gap between the haves and have-nots. Ultimately, we should bear in mind that in addition to other criteria for measuring wealth “[from] the perspective of the agent of development, a wealth development is measured in the increased capacity of a community to produce wealth.”⁵

C. Enlightenment

According to available data, 1994 was the year with the highest birth rate in our history. That generation turned 18 in 2012, and represents an unprecedented increase in the number of students going to college. This demographic increment is expected to

⁵ *Id.*, at 312.

affect the dissemination of knowledge at groundbreaking rates, altering not only social behavior but also a wide array of decision-making processes. If this new generation is adequately equipped, we will experience a series of fundamental changes in our political ethos that will be reflected in the production, distribution and promotion of the other value categories.

My expectation is that this new generation (those born from 1994 onwards) will receive a top-notch education more consistent with advances in other areas in Mexico and the globe.

D. Well-Being

According to available information, current life expectancy in Mexico is 74 years⁶, having increased by thirteen in years over the last forty-year period. Nonetheless, urban settings still represent the highest rates in this regard, which means a need of effective strategies for reaching rural communities. In this instance, the implementation of public policies aiming to extend access to low-cost and high-quality medical attention⁷ is of paramount importance to build a robust public and private infrastructure to decrease the expectations of the incidence of disease.

E. Skill

Modern technologies and innovation have brought to the stage a new type of citizen, one proficient in the use and influence of social networks and their effect on

⁶ INEGI, Censo de Población 2010. The average per gender is 77 years for women and 72 for men.

⁷ At the present time, the access to health services (public and private) covers 65% of the population.

social behavior. Yet this phenomenon has only impacted 3 out of 10 persons in Mexico.⁸ This is why we need expanded Internet coverage that would provide every citizen with free access the web in public spaces. At the moment, there is a proposal to amend the Constitution to guarantee a universal right to access and use the Internet.⁹

F. *Affection*

The dramatic spiral of violence that has been haunting Mexico for the last decade has destroyed our social fabric and undermined our societal values. Distrust, disloyalty, deceit, corruption and violence are commonplace in our daily lives. This situation has also negatively affected family behavior and values. Hence the restoration of a minimum public order is paramount at this stage. Moreover, the implementation of policies to strengthen family ties and values may be key to carry through other strategies.

These strategies should aim at achieving a public order of human dignity characterized not only by optimum access to the most-cherished values but also to the appropriate mechanisms by which they are achieved: inclusiveness rather than exclusiveness; legitimate authority rather than raw power; reciprocity rather than retaliation; openness rather than secrecy; accountability rather than impunity; peace rather than violence; fairness rather than arbitrariness; transparency rather than opacity; trust rather than intimidation; deliberation rather than imposition. In short, what I call a notion of *advanced citizenship* rather than *primitive citizenship*.¹⁰

⁸ INEGI, Censo de Población 2010. According to INEGI, only 34.54% of the population has access to the Internet.

⁹ See www.internetparatodos.mx (Last visit: August 5, 2013).

¹⁰ The notion of “advanced citizenship” coincides with the idea of “committed citizenship” that Bruce Ackerman describes as the crucial point of the revolutionary claim that brought a new sense of the special dignity of political life by engaging with one’s fellow citizens in an effort to define and achieve the political good, or in our terms, the most-cherished values of all human beings. See B. Ackerman, WE THE PEOPLE: FOUNDATIONS, p. 205-212 (1991).

There is no doubt that we are a fragmented society. The reasons for this are multiple: historical background, lack of national identity, violence, and ideological dualism, among others. We desperately need collective reconciliation based on an inclusive and comprehensive project for national self-redefinition in which elites and the rank-and-file find sufficient identifications to set a series of common goals for the future.

G. Respect

There is a growing belief in Mexico that connections and political-economic influences override individual merits and competence. This belief has also undermined our rule of law, where those well-connected and powerful have managed to manipulate the legal system in their favor.

Consequently, from this perspective, we should seek a gradual transformation of our individual and collective attitudes towards these behaviors by cultivating the value of equality of all citizens before the law, regardless of their position, wealth and power. In my view, the role of the legal community may be a fundamental key in achieving this goal.

H. Rectitude

Here again, the maximization of the expectations of violence has deteriorated personal and community codes and norms. Poverty and unemployment have facilitated the recruitment of thousands of Mexicans by drug cartels, an easy path to earning considerable amounts of money. Moreover, bribing and corruption still are growing sources of institutional and cultural decadence.

As a result, a deep change in our social mores may help minimize these corrupting trends, since their eradication, though desirable, may be a naiveté under the present circumstances and the always-present human condition.

II. THE CONSTITUTIONAL CENTENNIAL

In 2017, our Constitution will celebrate its centennial. Since our Founding we have not had a constitution with greater longevity. This occasion may serve for a distinctive type of celebration: rather than praising its resilience (which is chiefly due to our strong symbolic tradition) we should seize the moment to trigger a conversation about national self-redefinition within the framework of what the constitution should mean to a nation that is now radically different from the one that saw its birth, almost one hundred years ago.

In previous parts of this work I have focused on the perpetuating side of constitutional symbolism. In this Part, I would like to embark on exploring the other side of it: the Constitution as a unifying expression of our national self-redefinition in our quest to achieve a more democratic ethos.

In this context, it will be also opportune to determine whether the constitution still represents the most widely shared values of our polity, or if, on the contrary, it has become a mere instrument full of abundant prescriptions out of touch with reality.

This type of celebration creates a potentially fertile ground for embarking on attempts at national self-redefinition. For, as I have argued in this work, (in Part II in particular) I think that as a polity we owe ourselves such a conversation.

With this in mind I will here enunciate a few proposals that may be incorporated into the deliberations, which, as the generation of the constitution's centennial, we ought to undertake in our quest for a more robust constitutional order of human dignity.

In my view, we should focus our transformative inquiries on the following aspects:

- (a) *Institutional design*: A refinement of our political model by introducing a scheme of constrained parliamentarianism;
- (b) *Transformative power of law*: The fostering of a new legal culture by enhancing strategic litigation as means of constitutional transformation;
- (c) *Living constitutional change*: To evolve from the traditional approach of constitutional change focused narrowly on constitutional amendment to more functional and inclusive practices;
- (d) *Shift towards dualist democracy*: To assess the possibility of reading the empowerment of non-traditional participants in the political process as a potential shift into higher lawmaking gear.
- (e) *Improving the process*: Less bureaucratic red tape, more meaningful debate.

As we have seen, meaningful and enduring transformations do not require complete constitutional overhauls. Sometimes it is better to use old institutions and the prescriptions of the status quo, despite its defects, to push for transformation. Though modest, this may be a rather more effective strategy of constitutional change. The following proposals are articulated around this idea.

III. INSTITUTIONAL DESIGN

As explored in Part V, one of the reasons why our political process is broken is the lack of political consensus on meaningful and substantial reforms, such as the political reforms of 2012. Although disagreement is inherent in the legislative democratic

process, in some cases, the lack of compromise on a particular bill between Houses of Congress reaches frustrating stalemates.

As we become more accustomed to dissent as a constant of the democratic process, we also need to acknowledge that there are some instances in which the legislative process requires sound cooperation and compromise across the aisle.

The following functions of the decision process¹¹ seem particularly in need of improvement in this respect:

1. In the case of *intelligence*,¹² we need to clarify which types of bills, based on their subject matter, require a more consensual approach;
2. In terms of *promotion*¹³ and *prescription*,¹⁴ I would suggest expanding the role of “Congressional Joint Committees,” to guarantee that both Houses discuss bills on the same grounds, to ensure a meeting of the minds;

¹¹ W. Michael Reisman, Siegfried Wiessner & Andrew Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575, 580 (2007). According to its proponents, the New Haven School (a jurisprudential school of thought characterized by the adaptation of “the analytical methods of the social sciences to the prescriptive purposes of the law”) “provides a way of organizing thought and action with respect to any decision process. The functions that compose decision processes include *intelligence*, *promotion*, *prescription*, *invocation*, *application*, *termination*, and *appraisal*. The fact that each function is always in operation does not mean that it is being performed well. Accordingly, the New Haven School offers criteria for appraising the performance of each function, and by bringing each function into clear view, the School provides a nuanced and realistic way to improve decision.”

¹² Michael Reisman, *A Jurisprudence from the Perspective of the “Political Superior,”* 23 N. KY. L. REV. 605, 621 (1996). From the perspective of the policy-oriented jurisprudence, *intelligence* “comprises the gathering, evaluation and dissemination of information relevant to decision-making; prediction based on the intelligence derived; and the planning for future contingencies.”

¹³ *Id.*, at 622. *Promotion* “involves active advocacy to the community of policy alternatives. Promotion is ubiquitous. We promote policy alternatives on committees, in faculties, in government departments when we espouse a particular viewpoint, before parliaments, through the media when we speak as commentators, or through violent street confrontations and other forms of intense and coercive agitation.”

¹⁴ *Id.* In accordance with the policy-oriented jurisprudence’s intellectual framework, the function of *prescription* “or law-making involves the selection of a particular policy and the design of a program for its implementation. The sequences of this function are initiation, exploration of potentially relevant facts and policies, formulation or characterization of the facts and policies as relevant, and promulgation of the prescriptive outcome to a target audience.”

3. Pertaining to *invocation*,¹⁵ *application*,¹⁶ *termination*¹⁷ and *appraisal*,¹⁸ it may be convenient to involve the Cabinet more directly in the discussion of the legislative agenda from a policy-oriented perspective, one that keeps potential consequences in view (perhaps much of the failure of strategic reforms can be explained by the degree of involvement under the current rules of the legislative process).

In view of some interviewees for this dissertation, such as Ignacio Orendain,¹⁹ José González Morfín²⁰ and Javier Tejado,²¹ a central part of refining Mexican institutional design (the Legislative branch in particular), has to do with the integration of experts or specialists to serve in the legislative committees throughout the legislative process. At the present time, people whose main attribute is her loyalty or closeness with a member of Congress (without relevant expertise in lawmaking) generally comprise

¹⁵ *Id.*, at 623. *Invocation* “refers to the provisional characterization of facts as deviating from prescribed policy and the provisional assertion of control to prevent or abate the deviation or to secure control of individuals or values necessary for subsequent application. The word ‘provisional’ is critical in this function, for enormous value deprivations may flow from hasty and irresponsible characterizations of delinquency or defection from community norms.”

¹⁶ *Id.*, at 624. *Application* “represents the transformation of authoritatively prescribed policy into controlling event. [The] policies of application are concerned, first, with the reinforcement of expectations of effectiveness about the decision process as a whole and, secondly, with a provision of a remedy for a particular case. The rights of individuals in application are critical.”

¹⁷ *Id.*, at 625. The function of *termination* “deals with the abrogation of extant prescriptions and the design of arrangements that minimize the disruption of an expected and demanded regime. [Maintaining] a congruence between our expectations and formally prescribed law is essential to an efficacious process of decision.”

¹⁸ *Id.*, at 612, 626. *Appraisal* “is concerned with evaluating the aggregate performance of all decision functions in terms of community requirements... [Complex] decision processes must provide for an examination of the extent to which their aggregate performance continues to approximate the fundamental goals for which they were established.”

¹⁹ Interview with Ignacio Orendain Kundhardt, Partner at *Arias, Meurinne, Orendain y Rodríguez, S.C.*, in Mexico City (Apr. 12, 2012). *See* Appendix, at 43-44.

²⁰ Interview with José González Morfín, President of the Senate, in Mexico City (Apr. 13, 2012). *See* Appendix, at 56-61.

²¹ Interview with Javier Tejado Dondé, Director for Information and Legal Counsel for Televisa, in Mexico City (Nov. 5, 2012). *See* Appendix, at 179.

most of the staff of legislative committees. Hence, a substantial part of the herein proposed transformation of our current institutional design aims at professionalizing congressional committees' staff based on the expertise and experience of the staff member in the subject matter of each congressional committee.

However, any attempt to refine our institutional design requires deeper analysis on the constitutional model of separation of powers that Mexico should embrace in light of the process of democratization that has been in course over the last two decades. Pedro Salazar's insight in this endeavor is significantly enlightening,

“[Within] the context of transitions to democracy in Latin America during the last two decades, we can observe the adoption of the European model of constitutional democracy: written constitutions with rigid clauses and procedures for amendment, bill of rights and constitutional courts. [In] this scenario, Mexico was caught in between the American and the European constitutional models, hence it may be fair to ask ourselves at a theoretical level to which constitutional paradigm do we belong and at a more practical dimension, we should inquire onto which institutional design of separation of powers are we heading to.”²²

In the enterprise to answer these predicaments, Salazar's has an interesting reading of our current institutional design,

“[In] my view, successful institutional designs are those located in an intermediate level, between the people and the constitution, and that points to the government and its public policymaking. I think that it is in the daily design and implementation of public policies by the government where the people's

²² Interview with Pedro Salazar Ugarte, Researcher at Instituto de Investigaciones Jurídicas UNAM and Professor of Constitutional Law and Human Rights, in Mexico City (June 18, 2012). *See* Appendix, at 64-66.

demands and the promises of the constitution converge. And in this instance, we are ruined in Mexico. Why do I say this? If we look to some of the most important constitutional reforms of recent years, such as those (i) on human rights, (ii) on the Amparo trial, (iii) on transparency and accountability; and (iv) on security and criminal law, we will see that at least these four, resulted from a strong mobilization of civil society. The sway of these four reforms [was] a result of a very well organized civil society coalition that succeeded in putting enough pressure on the political elites to amend the constitution including their specific demands on different public issues. Consequently, one may very well conclude something like this: Mexican civil society is even more powerful (influential) than its American correlative. And this may be truth. Mexican civil society and academia may be more influential than American civil society in shaping constitutional design and lawmaking. [Scholars] are consulted and heard and can achieve more easily the goal of reflecting in the constitution what we built in our academic offices. Mexican constitutional law scholars even draft constitutional amendments, thus one would say 'how powerful is Mexican civil society and academia,' [but] as I am about to explain, this is a deceiving conclusion: [When] it comes to translate those constitutional amendments in specific operational rules and most importantly, in public policies, we run out of fuel. There is a significant ability to influence at the first level of institutional design (constitutional amendment), but any further attempt to translate those changes into public policies is futile, meaningless. This is why I feel persuaded by your metaphor about the leopard: we change the rules to leave reality intact. This is what makes a great difference between Mexico and other countries: where there is an appearance of a powerful and influential civil society and academia, in reality it is weaker than those of other countries who despite that they are not powerful enough to amend the constitution, they actually influence and shape the design

and implementation of public policies, budget spending, setting public priorities, in the daily routine of government.”²³

In envisioning an alternative to the preservationist practice of the elites to keep insulated the domain of policy-making from the input of other participants, Salazar puts forward some keys to undertake transformation,

“[In] Mexico we should change our traditional standpoint focused on the process of normative change, and we should set our sight on the process of execution and implementation of those norms (public policies, the role of government) and on the process of judicial review. [We] should aim at changing the dynamics of those in the Executive and Judicial branches of government, (to modify their attitude towards constitutional change, by considering policy-making and adjudication as alternative ways to the traditional strategies for constitutional transformation). We should also ask ourselves if the current hybrid of a presidential-based institutional design combined with a European-based constitution is the most adequate for the present distribution of power in Mexico. I think not. I think that the next step to follow the import of the European constitutionalist model was to change our presidential system for a parliamentary model. We failed to do so and we still living in an absurd: The U.S. model functions because they have a strong separation of powers with a minimal constitution and a Judiciary that creates law through their decisions. In contrast, we brought the entire European model originally designed to function with a parliamentary system,

²³ *Id.*, at 70-71.

and instead, we installed it in a presidential model of separation of powers.

That was a great mistake.”²⁴

The existing scheme of separation of powers under the current constitutional arrangement is intended to foster lively debate between president and congress, congress and court. Nonetheless, the Montesquieuan scheme that has prevailed in Mexico since our Founding does not fully answer to the dynamics that have characterized the distribution of power amongst our traditional branches of government over the last two decades. Furthermore, the gradual shift toward promoting the establishment of independent agencies to guarantee impartiality and professionalization in sensitive areas such as the electoral, integrity and regulatory branches, shows that we have gradually shifted from a traditional checks-and-balances model of separation of powers to a scheme of constrained parliamentarianism, which we will now explore in greater detail.

IV. CONSTRAINED PARLIAMENTARIANISM: THE WAVE OF THE FUTURE?

Having accepted the proposition that the model of constrained parliamentarianism is the new separation of powers, I see the notion of separation as a tool to preserve a balance of authority entrusted embedded within the different branches of government. This ultimately serves democracy as a *conditio sine qua non* of any constitutional government.

Professor Ackerman’s thesis of constrained parliamentarianism is thus a comprehensive reading of how those constitutional systems that have moved away from

²⁴ *Id.*, at 71-73.

the predominant extremes (i.e., the parliamentary and presidential systems represented by the Westminster and Washington models, respectively) and have thus succeeded in maintaining balance and efficacy in executing their constitutional mandates.

It is also clear that today's debate should not center on which of the traditional models (parliamentarianism or presidentialism) is the most conducive) for an effective separation of powers. If any lesson of comparative constitutionalism is beyond doubt it is precisely the non-existence of a "one-size-fits-all" model equally effective in all countries.

The ability to learn from the lessons of history, accompanied by a reasonable awareness of place and time, should provide the basic foundation on which to build the most suitable constitutional framework for a nation immersed in a process of political self-redefinition.

In Huntington's account of the processes of democratization that followed WWII, we can see how the presidential system was enthusiastically supported and employed in countries where a separation of powers was regarded as an obstacle to secure order and stability. This line of thinking encouraged the eruption of dictatorships around the globe from the 1960's to the mid 1970's. At the same time, in different latitudes, parliamentarianism was consolidating but in a form different from the Westminster model. At the turn of the new century, this form of parliamentarianism has proved a more effective and stable model of separation of powers.

The processes of democratization of the last quarter of the past century helped create a new approach towards the traditional scheme of separation of powers; it did this by juxtaposing key features of the presidential and parliamentarian models in order to procure an adequate balance of power. The resulting model was what Ackerman defines as "constrained parliamentarianism."

The chief characteristic that makes the model of constrained parliamentarianism worth considering is that, despite its name, its scheme of separation of powers is not entirely constrained. On the contrary: it is a very flexible model that allows various combinations of parliamentary and presidential elements, which, taken as a whole, is more than the sum of its parts. Therefore, constrained parliamentarianism, like the historically predominant parliamentary and presidential systems, serves to expand the principle of separation of powers, but to do so more effectively by curbing the well-known weaknesses of the Westminster and Washington schemes.

Despite the fact that constrained parliamentarianism has been thought of as the wave of the future for several decades, inherited governmental traditions are still the most evident obstacle to the consolidation of this model. The tension between the monistic and dualistic models of democracy influences the way in which the distinct variations of constrained parliamentarianism can be implemented.

The concern here is that trying to maintain the separation of powers by following the “road map” of constrained parliamentarianism (including, as part the “one-and-a-half house solution”, a written constitution new autonomous bodies of government such as the integrity, regulatory and electoral branches; and the protection and enhancement of fundamental rights), would in the end result in a greater separation of powers that would increase exponentially the problems of the traditional Montesquieuan separation of powers.

If we try to meet this concern by looking at the successful experiences of constrained parliamentarianism of Japan, Germany, Canada or South Africa, we might conclude our worries are unjustified and optimism warranted. If, however, we analyze it through the lens of how the model has failed to ensure stability for those cases in which elected legislatures barely conclude one year in office before the Prime Minister and his

Cabinet are removed by a vote of no confidence (as in the case of Italy), then our approach ought to be different.

To the extent that the central question pertaining to democratic legitimation concerns the number of elections needed to endow a political movement with plenary lawmaking authority, I would like to extend the question of what is the shortest amount of time necessary for that political movement to accomplish the political agenda for which it was elected. From a monist perspective, once elected, governments are endowed with plenary lawmaking authority, and consequently, should have a fixed period to govern and push for the initiatives that they championed during the elections. Such minimal guarantees of stability would prevent the shadows of the Linzian nightmare haunting the scheme of constrained parliamentarianism.²⁵

If the life expectancy of a legislature in our model of constrained parliamentarianism is as contingent and as short as in the Italian or French cases, then it would be fair to ask if a reform-minded or radically transformative constitutional agenda that gained the support of the People, can be accomplished in such a short period. The most likely answer is no, showing one of the most salient weaknesses of the proposed model.

In my view, the underlying problem is that not all the work of government should be left to politics. Lawmaking authority is political per se and we cannot expect to professionalize Congress or the Presidency. However, what we can expect of Congress is to have the wisdom to make that distinction and specify which issues must be insulated from arrangements that result from certain political junctures, since they are fundamental to the stability of the nation.

This is to say that, inasmuch as there are some issues that ought to be set aside by the contending parties and their naturally competing interests, in order to be left to

²⁵ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 645-647 (2000).

independent and impartial agents, these agents must be held accountable as well because of the power that is bestowed on them. To the extent that the traditional parliamentary or presidential schemes are not adequately equipped to answer this particular predicament, constrained parliamentarianism is in a more advantageous position to shed light on this inquiry because of its ability to distribute those issues that require specialization, impartiality and independence among the integrity, electoral and regulatory branches.

Another attractive feature of constrained parliamentarianism relates to electoral expenditure. By not differentiating the election of members of Congress and that of the President, the electoral calendar for both branches of government naturally coincides and therefore, the problem of staggered electoral calendars is solved. In terms of public expenditure, this has an undeniable impact.

Constrained parliamentarianism has another advantage over the presidential system, which is the fact that in such a system, the losers of the election engage in political arrangements with the winners while they are governing. In the case of presidential systems, the losers are not institutionally recognized and therefore are not constrained by the rules of political legitimation. Conversely, in the case of constrained parliamentarianism, the losers of the election and their leader are institutionally recognized as the opposition, which in the parliamentary arena, will serve as a check on the elected government. Institutionalization thus serves as a token for stabilization.

If a country has a tradition of autocratic exercise of authority, constrained parliamentarianism in its purest form would not be effective. A combination of significant presidential elements as an expression of the political ethos including the President being head of state and head of government at the same time, with increasing features of parliamentarianism such as congressional control over Cabinet appointments, combined with a growing cooperation between Congress and the Presidency, and the

introduction of mechanisms (such as the referendum or the popular initiative) will gradually result in the transformation of the current models of political organization.

With this goal in mind, the consolidation of the integrity, regulatory and democratic branches, is paramount. As long as bureaucratic affairs are insulated from the ever-present contingencies of political bargaining, the stability of the governmental structure will resist any number of “votes of no confidence” or anticipated ends of the legislature, because regardless of the color of the coalition in government, matters of state will remain in the hands of a professional-non-political bureaucracy.

V. DOWNSIZING CONSTRAINED PARLIAMENTARIANISM TO MEXICAN CONSTITUTIONAL POLITICS

Inasmuch as constrained parliamentarianism may sound plausible, I find appealing to relate it to the case of Mexico, a country with a strong presidential tradition in which the president has long been the embodiment of the political system. During recent years, we have shifted from hyper-presidentialism to a very limited type of constrained parliamentarianism in which most of its elements formally exist but in reality, old practices still prevailing.

According to Santiago Creel, the core problem of the political system in Mexico is that after thirty years of political reforms aiming at facilitating political representation of minorities, the party system radically shifted from a one-party model to a pluralistic scheme in which the national vote is fragmented enough to create the legislative stalemates that have predominated since 1997. In Creel’s view,

“[In light of this central problem] my bid is to move towards a parliamentarian system, semi-presidential, which –without affecting political plurality- may be

capable of building political coalitions after the election, in order to create stable majorities to govern. [In] my view, (the central feature of this arrangement) is to make it after the election, in order to set a legislative agenda, a government plan, and a plural cabinet. [In] this scheme, the leaders of each political party represented in Congress are expected to have a seat in the legislative body (in contrast with the current practice of organically separating political leadership from Congress), in order to infuse some unity in the decision-making process.”²⁶

How to approach a case like this? Are we really in an era of constrained parliamentarianism, or on the contrary, are we still having the same presidentialism but with different layers that hide its true character.

Over the last decade, political campaigns in Mexico have approached electoral anarchy. The exchange between the parties is usually an invitation to engage in frivolous behavior, and substance, as always, is the absent component in the electoral struggle. The only purpose of these events has been to secure enough direct and proportional representation in Congress to maintain “business as usual.” If we add to the equation the exchange of accusations launched by politicians at all levels -from former presidents to incumbent members of the government- that their opponents are connected with drug cartels and engaged in significant acts of corruption; the status quo of the Mexican political system could not be more discouraging.

Though intended to endow Congress with plenary lawmaking authority, this year’s elections seem to be a plebiscite on the ability of elected representatives to bring the People into the process of political decision-making. There is a seemingly unbridgeable distance between the citizen and his elected representatives. Due to lack of accountability and incentives to uphold a public record while in office, one of the most

²⁶ Interview with Santiago Creel Miranda, Senator 2006-2011, Secretary of Interior 2000-2005, in Mexico City (Jan. 21, 2013). *See* Appendix, at 309-311.

ironic features of Mexican presidential system—which borrow most of the elements of the Washington model—is that members of Congress respond to their parties and not to their constituents, as also occurs in the Westminster model. Not only that, since they have been traditionally barred from being reelected, to prevent “misuse of power”, they do not have any incentives to change the existing framework, unlike the Westminster model in which continuous scrutiny from the party peers and the constituents define the Prime Minister and his or her cabinet permanence in office.

Furthermore, as Congress is elected every three years and the President and the Senate each six, the scenarios of the “Linzián nightmare” and “crisis in governability” are commonplace in Mexican politics.²⁷ Still used to unilateral exercise of power because of its earlier hyper-presidentialism, the Mexican political ethos is today characterized by a great degree of uncertainty and instability due to the prevalence of what Hannah Arendt termed, “rule of nobody.”²⁸

Besides of the technocrats, our bureaucracy is not professionalized. Rather it remains as a large structure of rotating appointments influenced primarily by political arrangements.

In addressing these issues we should start from the vantage point of political theory by asking ourselves: What are the fundamental values expressed in this constitutional design? Once we have identified these values, we have to ask which of them will be seriously endangered in the process of creating a different structure that will be in charge of protecting them. This is the so-called “Democracy Branch.” It is constituted by distinct powers that are enshrined in the constitution as “Electoral

²⁷ *Id.*

²⁸ Hannah Arendt, *Responsibility and Judgment*, p. 31 (2003). Arendt describes it in the following terms “[In] every bureaucratic system the shifting of responsibilities is a matter of daily routine, and if one wishes to define bureaucracy in terms of political science, that is, as a form of government -the rule of offices, as contrasted to the rule of men, of one man, or of the few, or of the many- bureaucracy unhappily is *the rule of nobody* and for this very reason perhaps the least human and most cruel form of rulership,” emphasis added.

Commissions.” Our Montesquieuan conception of the separation of powers has no electoral commission; it is not sufficiently advanced to address the set of values that need to be protected. The model of constrained parliamentarianism would attempt to detach some functions from the Montesquieuan structure and create insulated agencies capable of decision-making in which the personnel is not determined by the prevailing parliamentary majority.

Constrained parliamentarianism also presents a two-sided idea of democracy: on the one hand, the periodic change of decision-makers either in the monist or dualist conception. On the other hand, democracy is equivalent to expertise. Members of those insulated agencies are expected to have an independent criterion for decision-making.

I would like to underscore the feature of constrained parliamentarianism that in my view has had more impact in Mexico’s political organization; The “Democracy Branch” as Professor Ackerman refers to it, was back in 2006 the only thing that separated us from social calamity. Political disruption prevailed after the contested results of the elections that culminated in an unprecedented 0.1% of difference between the winner of the elections and his closest opponent. Notwithstanding the number of critics that the electoral branch had faced previous to this conflict, it then faced its most radical and difficult test. Even though its ruling was and is still being broadly questioned, the undeniable outcome is that in traditional separation of powers (or even worse, in the case of a predominant branch that overshadows the others) the institutional restraint that an independent electoral branch could bring to the equation, would be unimaginable.

At least in the case of Mexico, if a model of constrained parliamentarianism guarantees that the differences between winners and losers of the election—regardless how close they finished from each other in the count of the popular vote—we should continue supporting this novel separation of powers.

However, it would be naïve to expect that the mere normative orientation of our system towards the adoption of figures such as the integrity, regulatory and democracy branches will suffice to prevent political arrangements from influencing the daily functioning of government. Regulation, as professionalized as it may be, does not occur in a vacuum: To varying degrees, it is always influenced by the way normal politics are conducted. For this reason, I think that the expectation in professionalizing the bureaucracy should attempt not solely its insulation from politics, but rather to establish an ongoing procedure in which, whatever attitude of those holding power, the governmental function will remain effective and competent.

In present times, the involvement of the citizens in public issues tends to be waning. Citizens are very selective as to the time that they dedicate to matters that are not “directly” concerned with their life. In devising new modes of institutional interaction between different branches of government, officials have to acknowledge the fact that ordinary citizens pay less and less attention to public matters. In most parts of the globe, politicians are less well regarded than in the past. However, in my opinion, we cannot relinquish any effort to change things just because of this pandemic of political disenchantment.

The traditional separation of powers has served as a good foundation on which to construct modern democratic systems; however, it was never intended to remain untouched, or unchanged. To the contrary, as dynamic as the body politic is, its form of organization should be as flexible as the mainstream is.

Thus assuming for a moment that ordinary citizens’ involvement in public affairs is likely to continue being limited to the selection of representatives endowed with the authority to execute their mandate of conducting plenary lawmaking, we should keep in mind that the citizen has only one card to play and those interested in gaining public confidence in governing, should reflect on how make that “only card” count. I think that

the traditional separation of powers--either in the Westminster or Washington models--does not satisfactorily resolve this predicament: even though the ordinary citizen pays little attention to politics, when it comes to control over her ordinary way of life, she expects to have at hand--as a fundamental right-- the power to intervene in the process and change the way in which the political agenda has been carried out.

It is on these occasions, when the ordinary citizen is willing to get more involved and interested in public affairs, not because he or she suddenly decides to be less self-centered, but because his or her fundamental interests are at stake, that we need a model that would allow the normal functioning of government, while the mobilized majority of the People signals a genuine popular claim to change the status quo.

For these scenarios, which are abundant and frequent in modern democracies, the model of constrained parliamentarianism seems to be an alternative.

The model of constrained parliamentarianism is focused on a Westminster-style assembly, but the legislative output is constrained by substantive political principles legitimated by a higher lawmaking process, constructed by different constitutional materials. In this model, the “crucial building block” is the popular referendum as a way to bring the People back in the constitutive process.²⁹ It also implies a constitutional court to make the principles enacted by the People into operational realities.

Greater involvement of the ordinary citizen in public affairs is always desirable since it contributes to provide a check on the mandate of his elected representatives. Not only that: greater involvement of the ordinary citizen in the functioning of the normal and higher law tracks helps foster deliberation as a key component of consolidated democracies. In order to accomplish this, the ordinary citizen has to be brought into the public deliberation. The proposal pertaining to the popular

²⁹ Bruce Ackerman, *supra*, note 25, at 666-668.

referendum³⁰ as an alternative is plausible and more or less easy to implement. The value of public citizenship in Spain after Franco's long dictatorship was stimulated—more so than many other policies—by the institution of the popular referendum, which allowed the citizenry to engage in debate over substantive issues of paramount political importance. The sudden change from having no involvement in the decision-making process to having the final word concerning their political fate came almost overnight. They did not have time to consolidate this renewed value of citizenship in their political ethos for the next generation. They learned its blessings by practicing it, by taking part in the referenda.

Constrained parliamentarianism brings it with the possibility of the People to engage in processes of popular mobilization that might result in substantial constitutional changes. By practicing higher-lawmaking and enjoying its fruits, the ordinary citizen will take part in the *res publica* more often. Even more importantly, their idea of citizenship will change for the better.

We must be aware that neither the constitution, nor the model of political organization that results from it -are *deus ex machina*. An effective construction of a model of political organization passes through the important challenge of adapting existing models of proven success, to the particular governmental traditions of one or another nation. This is the vocation of comparative constitutionalism; let's hope that the dialogue will continue with an eye toward finding the most adequate institutional middle between the extremes. So far it seems that it is constrained parliamentarianism.

³⁰ Nonetheless, there is also a negative reading of the popular referendum in recent years, since it has served to entrench undemocratic practices by gaining majoritarian popular support, such as in the case of Venezuela, Ecuador and Bolivia. This has led to see the popular referendum as an effective tool to encumber effective separation of powers and political rights. In an interview for this dissertation, Pedro Salazar warns about the negative effects of popular referendum in scenarios with a historical tradition of concentration of power in a strong presidency. Interview with Pedro Salazar Ugarte, Researcher at Instituto de Investigaciones Jurídicas UNAM and Professor of Constitutional Law and Human Rights, in Mexico City (June 18, 2012). *See* Appendix, at 69-70.

VI. THE TRANSFORMATIVE POWER OF LAW

Thus far, the principal forums for constitutional change in Mexico have been the Presidency and the Legislature. After the reforms of 1995, the Supreme Court and the Judiciary have played a more relevant role in framing, from a jurisprudential perspective, a new narrative of constitutional change in Mexico. The Supreme Court's role in the past was focused more on private litigation with little public exposure or influence--- due to the nature of our framework for constitutional adjudication and the enduring reluctance to address political questions.

This has now changed with the gradual transformation of the Court into a Constitutional Tribunal. Furthermore, changes in the Amparo Act, bring with them the possibility of making the Court's decisions dealing with the constitutionality of laws generally effective. In this it will be key for the Court to be deferent to the signaling of the People (landing halfway between Burkean elitism and Waldron's radicalism). The authority of the court may come from its correspondence with the social consensus.

In view of James E. Baker, the role of legal education in preparing present and future judges will ultimately serve not only to strengthen the rule of law in Mexico, but also to expand the base of decision-making participants. Based on his experience as a judge, he shared some thoughts on the connection between legal education and fostering an independent judiciary,

“First, I am not a big fan of Mao but he had the comment that a long march starts with a single step and I think it’s very important to not be overwhelmed by the challenges, but rather start making many single steps. The judiciary is a place where I would like to start because it’s a finite and manageable problem to build an elite judiciary, and elite meaning effective, not exclusive, here I think it’s something manageable and it can be done in both large and small scale on any democracy and

you do that with the judiciary. My grandfather said, and he was quite right, that in the U.S. we like to view ourselves a nation of law and we operate under the rule of law, but really what we are is a nation of men. And he was thinking and writing in the fifties so he was a man (and woman, pretending to set the women apart but he didn't) pretending that we are a nation of men because it's men who make laws, interpret laws and decide whether to apply the law in the first place so we should not pull ourselves into thinking that law is something that comes automatically, and he said, 'therefore the root of the rule of law is to have judges with more integrity to apply it in an honest way.' I think that it is ultimately, the root of any effective system that depends in the rule of law and, as much as I'd say it's the electoral process, or it's this or that, that's something you can't manage in an ordinary way because in the U.S it's not a problem the whole electoral process or politics, or money and politics, it's how are you better trained, how are you better equipped? [One] way I think you'd do it is [by] teaching the next generation and bringing them up. It's how you reform the military, it's how ultimately the civil rights in the U.S. evolved with great judges like Frank Johnson and Judge Tuggle and S. Wright, but it also happened because the younger generation came up and realized this is nuts. That came through education, through people, the judges educating people, media educating people, and I think that's the ultimate way to do it, to the power education. It starts in a law school classroom; it starts with independent media that has something on its front page rather than Michael Jackson. [The] law student that I teach get more than enough law they know things about law I will never get, but they get no inspiration. There's no professors that stand up in front of them and say 'this is what the law can do.' [Do] you know who Frank Johnson is? He was the Federal District Court Judge in Montgomery, Alabama, he was 37 years old and he had been a Judge for three months when that case came before him and he was one of three Judges who read the case because it was a constitutional issue and at that time three Judges were required. Well, Frank

Johnson was the Federal District Court Judge that desegregated the schools, the YMCA, the train station, you name it. It was in his Court Room where it was desegregated, in Alabama. When I went to Yale Law School, 18 of his clerks went to YLS and I didn't hear Frank Johnson's name once, not once when I was at that Law School. I heard about evidence, criminal procedure, and that sort of stuff but what I really needed to know was, what law students need to know today is who are the Frank Johnsons today and who will be Frank Johnsons tomorrow. Who in your class of 40 up there about human rights is going to be the Frank Johnson who stands up for the rule of law? It doesn't do them any good if they know all this law if they are not prepared to be Frank Johnson. Once you convince 30 of the law students here that they are going to be Frank Johnsons, mission accomplished in terms of independent judiciary."³¹

With these goals in mind, I argue that it is the time for the Court and the People to engage in the definition of our constitutional order at the same degree of engagement that the Legislature and the Executive have traditionally enjoyed.

We also need to change the privileged role of the legislature in transforming the Constitution to a more active role on the part of the judiciary.³² At this point, we should aim to transform reality by judicial adjudication rather than constitutional amendment.

We should also be aware, however, that if constitutional symbolism remains as it is today, neither the courts acting in the name of the People nor the People themselves will be able to claim ownership over the constitution; therefore, it will continue to serve as an instrument to preserve the interests and privileges of the few.

³¹ Interview with James E. Baker, Chief Justice of the U.S. Court of Appeals for the Armed Forces, in Mexico City (November 8, 2011). *See* Appendix, at 8-9.

³² The conclusion on the increasing role of the Judiciary as an agent of constitutional change and its growing influence in defining social values in Mexico is shared by some of the relevant participants who were interviewed for this dissertation. This is the case of Associate Justices of the Mexican Supreme Court, Margarita Luna Ramos and José Ramón Cossío, as well as of Manuel González Oropeza, Judge of the Federal Electoral Tribunal. *See* Appendix, at 86-91, 94-95, and 142-143.

With this in mind, I think that the models of structural and strategic litigation are worth of deeper analysis.

In a country characterized by the existence of a high concentration of economic and political power in the hands of very few, the need for a strong rule of law aiming at creating conditions for a better distribution of power is paramount.³³ From the standpoint of an observer of social and legal processes, I find the model of strategic litigation as plausible and effective way to change scenarios of structural inequality and in some cases, humiliation.³⁴

Strategic and structural litigation have not been enough explored in Mexico.³⁵ The predominance of the paradigm of traditional litigation is overwhelming in light of dominant legal positivism among the legal community. However, strategic litigation is gaining currency though very slowly.

In the opinion of Associate Justice Cossío, the success or failure of strategic litigation in Mexico relies upon the ability of law schools and the legal community at large to bringing up to date their teaching and professional skills in order to gradually

³³ According to *The Social Inclusion Index 2012* published by the American Quarterly, Mexico ranks 6th among eleven Latin American countries in an evaluation ranging social inclusion indicators such as political participation, social rights, civil liberties, and equal access to social services and labor markets. This study shows that in accessing a formal job by gender and by race, Mexico ranks 6th and 8th respectively, evincing the extended social inequality based on discrimination to minority groups. See http://www.americasquarterly.org/charticles/images_spring2012-charticle/Spring_2012_Charticle.pdf (Last visit: March 24, 2014).

³⁴ The notion of structural humiliation is eloquently described in Professor Ackerman's third volume of *We the People*, recently published. It is unavoidable to link the growing inequality in some countries, such as Mexico, with the concept of institutionalized humiliation articulated by Ackerman. See Bruce Ackerman, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION*, 137-141 (2014).

³⁵ Owen M. Fiss, *THE LAW AS IT COULD BE*, at 48-58 (2003). Professor Fiss explains the two predominant models of adjudication in the United States and in contrasting them, defends the social value of structural litigation to protect civil rights. As explained in Part II of this dissertation, the so-called "dispute resolution model" views adjudication solely as a process to resolve private disputes. The other, often ignored model is "structural litigation." This refers to that form of adjudication that emerged in the United States during the civil rights era. It is characterized by two main features: the awareness that the basic threats to civil liberties are posed not by individuals but by the state apparatus; and that unless that apparatus is restructured, the threats to constitutional rights will not be eliminated.

change the mindset of legal practice towards a collective and structural model of litigation.³⁶

A good opportunity to enhance the prospects of strategic litigation was back in 2010 and 2011 with the reform that introduced collective rights and actions at a constitutional level. Regardless the high expectations that this reform created among civil society and academia because these two participants saw it as an opportunity to start dismantling some economically and politically abusive structures, the reform's final outcome only introduced collective actions to protect environmental and consumer rights. Nonetheless, there is no doubt that this reform was a good start to gradually evolve towards a model of strategic and structural litigation.

VII. LIVING CONSTITUTIONAL CHANGE

As I have outlined in this work, our constitutional order has lived in a historical paradox for almost a century and a half, by having a liberal constitutional text that has coexisted with an enduring conservative tradition of concentration of power, particularly in the Presidency. In the view of some experts, this paradox of concurrent liberal prescriptions and conservative practices and operational codes has created a sort of constitutional schizophrenia.³⁷

As I argued in Part I, in the case of dysfunctional constitutional frameworks it is worth exploring the introduction of some institutions, which though not essentially compatible with the original constitutional model, may help to bridge the gap between the written constitution and the actual living out of it within a given polity.

³⁶ Interview with José Ramón Cossío Díaz, Associate Justice (Ministro) of the Mexican Supreme Court 2003-2018, in Mexico City (July 13, 2012). *See* Appendix, at 84-85.

³⁷ Some keys to understand this paradox are interestingly articulated by Agustín Basave in his book "Mexicanidad y Esquizofrenia," (2010).

Furthermore (as I tried to describe in the case of the political reforms of 2012), our democratic ethos is shifting toward increasing demands of self-government and the enlargement of meaningful participation of the governing in the political process, beyond their franchise.

An additional predicament that we should bear in mind has to do with the translation of contemporary political transformations into constitutional grammar. As argued in Part II, since the *porfiriato*, our regime changes have been framed in the fashion of elite settlements, rather than constitutionally enshrined. This has deepened the constitutional schizophrenia I mentioned above. This is why (among many other reasons) we really need as a polity to engage in a conversation on the meaning of the constitution and the role that each participant is supposed to play.

In respect to the consolidation of our rule of law, I believe that both the legal profession and legal scholarship require a fundamental change of attitude, aimed at a gradual shift from their conventional and formalistic views to more functional and contextual approaches in tune with contemporary perspectives of constitutional change. This is to say that we have to evolve from the inherited 19th century-tradition of constitutional formalism based on limiting the scope of inquiry to the study of constitutional amendments, statutes and their validity on the exclusive grounds of their coherence with pre-existing formal procedures and institutions, to a more comprehensive, critical and dynamic interpretative approach based more on principle than technicalities, more on substance than formalities. Living constitutional change is not a chimera, nor should it be.

The governing tends to forget that they are custodians, not owners, of what they have received through the mandate of the People.

VIII. THE SHIFT TOWARDS DUALIST DEMOCRACY

As the traditional model of representative democracy is in dramatic decline (some authors have described it as "democracy in retreat,"³⁸) we should give serious thought to the importance of introducing a or enhancing the (depending the case) higher lawmaking track as an appropriate channel for popular deliberation and decision that may ease the transition to new schemes of political representation and decision in the name of the People.

This may also require the dualists to take an approach less limited in time, yet equally strict in its rules toward constitutional change than they had originally proposed through constitutional politics or higher lawmaking in settings that demand to take action for urgent national self-redefinition.

Communications, technology, public discourse, public morality are shifting faster than in the Founding, Reconstruction and the New Deal; thus, it may be necessary to be more open to the idea that elites can mobilize the People more frequently than in the past for the purposes of transformative constitutional making.

In the case of Mexico, I think this shift can be prompted through two main strategies:

a. Enhancing our normal politics track:

From the vantage point of the core inquiries of the authoritative process of decision-making in Mexico, lifting the ban on reelection is paramount for the purpose of introducing meaningful accountability for elected politicians. In my view, reelection is a powerful incentive for both the governed and the governing to make our current model

³⁸ John Kurlantzick, *DEMOCRACY IN RETREAT. THE REVOLT OF THE MIDDLE CLASS AND THE WORLDWIDE DECLINE OF REPRESENTATIVE GOVERNMENT* (2013).

of political representation more robust.

The current framework implies that the elected politicians answer to the party elites rather than to their constituents. Consequently, the attitude of the governed fluctuates from total disengagement to absolute frustration.

In this context, the implementation of strategies aimed at generating reciprocity between engaged participants, elected politicians, and the governed, may result in substantial changes to the quality of their present relationship.

How to force politicians to be more answerable to the constituents rather than to the party elites? Is there any halfway solution between reelection and the present status quo, in which elected politicians are practically unaccountable to their constituents? So far, I have not been capable of finding a more powerful and effective incentive than reelection.

As explained in Part V, lifting the constitutional ban on reelection may trigger an innovative set of dynamics within the traditional political process: the elected politicians may have to acknowledge the relevance of their constituents to their goal of staying in office and the latter may feel empowered to make their representatives accountable. Additionally, despite the fact that the political parties' hierarchies are relevant, with this change they will no longer enjoy exclusivity in the processes of lawmaking and policymaking.

As argued in the previous chapter, there is a constant and growing popular dissatisfaction with the way in which elected politicians fulfill the mandate of the People. At the present time, without reelection, the governed lack effective means for making elected politicians accountable. In sum, these incentives clearly outweigh the traditional arguments against reelection and may prompt a radically different relationship between the governed and the governing.

b. Building a higher lawmaking track:

Despite being an important component of a larger restructuring of our constitutive process, reelection is not enough.³⁹ As I argued in Part V, there are other elements of change that are not limited to normal politics.

The increasing demands of the governed to play a more influential role in the political process beyond the franchise have entailed a potential shift towards higher lawmaking gear.

However, the ultimate success of this endeavor depends upon the adequate implementation of the popular initiative as shown in Part V: it requires the enactment of its respective adjective law outlining the rules under which this new institution may operate at a constitutional level, in addition to a reassessment of the implications of submitting the popular initiative to the preferential congressional procedure already stipulated for the bills introduced by the President.

As I underscored then, the strict requisites for the popular initiative are as important as the rigorous standards for higher lawmaking at its theoretical and practical levels, and therefore, it should also enjoy a privileged procedure in order to differentiate from ordinary politics.⁴⁰ In my view, the amendment to Article 71 of the Mexican Constitution established, for the first time in our history, a landmark advance towards a

³⁹ The ban for reelection at a constitutional level has been partially lifted with the political reform of 2014. It allowed members of the Chamber of Deputies to be elected for four consecutive three-year terms; members of the Senate for two consecutive six-year terms; members of State legislatures for four consecutive three-year terms; and mayors and city council members for two consecutive three-year terms. In the case of Congress, these rules will enter into force for the election of 2018. *See* Diario Oficial de la Federación, del 10 de febrero de 2014 (Mex.), DECRETO POR EL QUE SE REFORMAN, ADICIONAN Y DEROGAN DIVERSAS DISPOSICIONES DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, EN MATERIA POLÍTICA-ELECTORAL.

⁴⁰ Bruce Ackerman, *WE THE PEOPLE: FOUNDATIONS*, 272-277 (1991). This includes the three senses of extraordinariness postulated by Ackerman in the signaling of higher lawmaking: depth, breadth, and decisiveness.

dualist model of constitutional change. Nevertheless, its constitutional prescription is not enough to make it fully operational.

On the contrary, the introduction of a specific constitutional provision to institutionally channel the demands of the People by means of their entitlement to initiate direct congressional action should be encompassed with a clear set of rules. These rules should help this achievement to become functional; otherwise, it may end as another example of the deceiving strategy of *transformation through transformation*. Until the popular initiative is not fully regulated for its effective implementation, we may very well deem this constitutional amendment a signal from the political elites to keep things unchanged despite of their rhetoric of transformation.

In sum, we have to change our traditional views of concentration of power to a new trend toward a "sharing of power." To do so, elites must be willing to share power with the governed, as much as the latter must be willing to confer with the elites. This approach requires changing the patterns of conflict and retaliation according to which both have interacted so far, to ones of reciprocal trust and cooperation. In my view, a productive strategy of fostering desirable levels of trust and cooperation between ordinary citizens and elites rests upon the premise of sharing bases of power by means of implementing the proposed changes, including lifting the constitutional ban on reelection and the popular initiative.

The promotion of the enhancement of our normal politics track and the introduction of a higher lawmaking framework are particularly relevant to our case, given a context characterized by a low degree of civic engagement contrasted with a high degree of concentration of power amongst very few participants (specifically, political and economic elites) where strategies aiming at involving non-traditional but equally relevant participants in the political process and at making political accountability genuinely effective,) may result, in the final analysis, in a more democratic constitutional

order in which ordinary citizens feel increasingly more involved and influential.

IX. IMPROVING THE PROCESS

One of the present conundrums of our process of authoritative decision aims at the inadequacy of the current constitutional framework to internalize the vast array of informal processes of authoritative decision, elite settlements in particular.

Another concern deals with the inadequacy of the traditional frameworks of majoritarian decision-making and the pressing contemporary challenges that the swift political and economic global transformations bring along with them. According to Ernesto Zedillo, the ongoing European crisis with the euro evinces the dysfunctions between economic problems and policies with dominant political processes. In his view, the model of decision-making based on partisan politics necessarily unfolds at a considerably slower speed than the pressing global demands of swift decisions to avert economic catastrophes. Hence, Zedillo advocates for a refinement of the dominant model of political decision-making in order to effectively encompass and react to the speed with which global and/or regional economic problems are unfolding.⁴¹

Special attention must be given to the way in which informal processes affect political transformations in Mexico. As we explored in Parts II and III, after the promulgation of the Constitution of 1917, the fundamental changes of our political order have been predicated by means of elite settlements (1929 and 2000) rather than by means of constitutional prescription.⁴²

⁴¹ Ernesto Zedillo, Remarks on “The Dismal State of Global Cooperation when it is Most Needed,” at the Yale Club of New York, January 29, 2013.

⁴² In view of some relevant participants, the party-based agreement between President Enrique Peña Nieto and the three major political parties in Mexico, so-called “Pacto por México,” signed in December 2012, also represents a full-fledged political settlement that constitutes a “foundational” moment that may affect the way in which the political process is going to be conducted in the future. In my view, it is another

Despite the fact that I agree with the argument that formal and informal processes are equally influential in shaping decision-making, and in this instance, constitutional change, I also think that when it comes to regime changes (meaning a rejection of central elements of the status quo) as happened in 1929 and 2000, it would be more adequate to translate the political pacts into constitutional grammar in order to enshrine a given transformation, thus lending the political pacts formal validity and stability, making them binding for all the participants involved. This is especially relevant in a context characterized by the fragmentation of political power as articulated in Part IV.

example of elite settlements that set a large-scale reformist agenda which, despite its good intentions, lack formal validity, and therefore are extremely unstable, by being made aside the constitution and the current formal institutions and procedures. Certainly, the existence of this type of elite settlements evinces the failure of traditional political process and institutions; however we should not forget that even in the case of informal participants and processes, their ultimate goal is to persuade the formal participants to internalize the demands of the former to achieve a meaningful change by means of bringing their arguments currently “off-the-wall” to be indisputably “on-the-wall.” From this vantage point, this is not a goal for the advocates of past and new elite settlements: they consider informal political compromise as an end, in order to secure a reasonable degree of political maneuvering before the next election, inasmuch as they (the political elites) secure enjoying their privileges by means of presenting a narrative based on “unprecedented agreements,” resulting from “a foundational moment in our recent history,” which anticipates that “now the real transformations will come along,” signaling the enduring predominance of the *preservation through transformation* well-known perpetuating rhetoric. An interesting reading on this issue – though opposite to the view that I explained above, is that of Joaquín López Doriga, who recognizes “[the] unprecedented value of Peña’s administration in its first days in government to bring together the leaders of the three major political parties in Mexico to set a common legislative agenda aiming at structural constitutional reforms.” See Interview with Joaquín López Doriga, Broadcast journalist; Anchorman for the Televisa Evening News; in Mexico City (Jan. 18. 2013). See Appendix, at 295-297.

FINAL REMARKS

As I have articulated in this dissertation, one of the benefits of considering political transformations and constitutional change as continuous and dialectical rather than as episodic processes is the opportunity to continuously appraise, recalibrate and refine decision and desired outcomes. Thus, this approach may be a helpful tool to address these issues, particularly in settings in which each any attempt at political transformation and constitutional change is seen and implemented as an inescapable break with the past. Elites in Mexico have spread the view that meaningful change requires reformers to create a *tabula rasa*, a clean break, with the past. The failure of our recent transitional experience proves this approach wrong. Additionally, our inability to attain political and constitutional syncretism has created institutional loopholes that have undermined the possibilities of meaningful reforms in Mexico.

To make these reforms possible, I have put forward a series of proposals around the premise of a dualist democracy model. As posited in Part V, after a careful reading of the *signaling* by the relevant participants in the case of the most recent political reforms in Mexico, and the amendment of Article 71 introducing the entitlement of ordinary citizens to introduce bills for congressional action, we have embarked on a historical shift into higher lawmaking gear.

It would be a mistake, however, to envision higher lawmaking in Mexico as it has along the same lines as it has operated in the United States. As explained in Part V, in the American experience, higher-lawmaking has been episodic and very rare throughout history given the adequate functioning of their normal politics track since the Founding. However, in monist scenarios such as ours, where the normal politics track is the exclusive domain for constitutional change, the shift towards higher lawmaking gear may

offer another meaningful space for channeling the expectations and demands of the People that are not satisfactorily processed through the normal politics track.

In Mexico, the manipulation of the constitutional document to adjust it to the interests of the predominant and unchanging elites has created a sense of what has been described in this work as “preservation through transformation.”⁴³

As Mexicans, our predicament centers on the question of what to do with our constitution, in asking ourselves how to create or enforce a constitution when we lack credible popular mobilizations and reliable lawmakers, when we have not been capable of creating a language by which the people can try to take ownership of the constitution, either formally or informally. On the contrary: we are subjugated by an abiding rhetoric of preservation through transformation.

My view is that—departing from Professor Ackerman’s view—in our current transition to democracy we have been incapable of forming a polity (“a We”) and the basic rules that will bind it, by failing to draft a new constitution as evidence of a new grammar of legitimation and citizenship. The paradox inherited from the authoritarian regime that amended the constitution at whim haunts our current constitutive process by demonstrating that somehow that very same constitution, modified continually in the past, now seems not amendable.

If, as I intend to demonstrate with this work, we must create a new language of committed citizenship, the success rests upon the ability of convincing the participants involved (elite and non-elite groups; spokesmen and the people; leaders and rank-and-file) to replace the old order with a new one that rejects central elements of the status quo. I strongly believe that the strategies for transformation herein described may represent a sound framework for genuine and enduring political and constitutional transformation in Mexico.

⁴³ Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2119 (1996).

I am convinced that, as long as the current process in Mexico does not meet the most widely shared democratic standards pertaining to authoritative decision-making, such as inclusiveness, openness, deliberation and accountability, any transformative enterprise will be futile.

I think that it is an opportune time to break away from a series of taboos (and entrenched beliefs) in Mexico that are no longer suitable for present times: the non-reelection principle; the fetishism regarding the myth of the Mexican Revolution; the sort of absolute power that traditional participants such as political parties and labor unions have enjoyed; the prevailing sense of pessimism that overwhelms us as Mexicans; the lack of interest in public affairs considering that things should remain as usual; the lack of accountability of our public officials; the cynical attitudes of privileged decision makers; the frustrating distance between the government and its citizens.

Indeed, there is another way to direct the *res publica* in Mexico and it is now time for the We the People to spur the quest towards inclusiveness, openness, accountability and deliberation in order to finally shift from an apparent democracy to an authentic one in Mexico.

I want to conclude by expressing the wish for a peaceful new beginning in Mexico. I consider that it is time to undertake deep transformations in Mexico for political redefinition. It is about time to let the People decide not only with their votes, but even more importantly, with their scrutiny of the mandate of their public officials and furthermore, it is now time to protect constitutionally the People's will to engage in those rare events when they deliberate about the signaling of a constitutional moment. I believe that we are in the dawn of one of these moments in Mexico, one which (it is hoped) will enable us to engage in acts of advanced citizenship from now on. While we undertake this historical challenge, we stand still at the turn of the tide.

APPENDIX

THE INTERVIEWS

One of the core goals of this dissertation is to articulate a proposal, then formulate strategies for transforming the constitutive process of authoritative decision in Mexico by virtue of analyzing the series of operational codes and decision-making processes that have been employed by the relevant participants over the last twenty-five years. In order to do so, and as a substantial part of my research, I conducted a series of interviews with the relevant actors of the period (referred to in Part IV as “The Transformative Years”) in which the political, economic and legal orders in Mexico passed through deep and startling transformations that generated, then as today, sharp debates on the nation’s road map for the future.

These interviews were characterized by an informal format intended to get candid and vivid answers from the interviewees in light of the fundamental inquiries of the dissertation. The resulting material has a distinctive scientific value for the following reasons:

1. It comprises the outlook of relevant participants who had a central role in the constitutional transformations of the last quarter of century;
2. Most of the interviews are focused in the process of liberalization of the political system in Mexico and therefore, provide a lucid version recounting of events that for many observers are historically critical and even foundational;
3. They also provide in some cases, accounts that -due to the freedom of the interviewees to describe events in more forthright and some times blunt terms, differ from the “official” versions in all sorts of records of the related events;

4. It provides an interesting insight into the ways in which Mexican elites conceive political transformations and constitutional change, and also into the practices and processes that they formal and informally employ to model change and shape decisions;
5. It allowed the opportunity of testing some theories of constitutional change and political transformation posited in this dissertation, which, by scaling them down in more empirical terms entailed the benefit of being reexamined in light of new evidence, and in some cases, appraised by the interviewees.

The interviews are comprised by the contributions of a different range of participants, including: two former Mexican Presidents, three Supreme Court Justices, one former U.S. Vice-President, 3 former State Governors, 3 Senators, 1 former Secretary of Interior, 2 former Secretaries of Finance (Treasury), 1 Oxford scholar considered an international authority in the Mexican Revolution, the Vice-President of a top-scale international corporation, the Chief Justice of the U.S. Armed Forces, 1 Judge of the Electoral Court, 1 former president of a local electoral authority, the top anchorman of the largest TV network in Mexico, 1 Vice-President of the same TV network, 1 university president, 3 heads of NGOs, 6 of the foremost constitutional law practitioners and/or history and political science scholars.

In spite of the fact that at the beginning, all positions and backgrounds were considered in the preliminary selection of interviewees (either for their notoriety or their role in the matters related to the framework of inquiry) as the process of conducting the interviews a singular approach emerged, shaped by the acceptance of different actors to participate in this study. Hence, although there was no intention to focus the interviews in a particular group of relevant participants at the beginning of this empirical qualitative part of the research (which was conducted in Mexico in years 2011 and 2012), at the end

the short list of interviewees was composed of actors who played a fundamental role in the transformative events of the last decade of the past century.

What ultimately resulted was a distinctive compilation of viewpoints closely connected to the constitutional reforms championed in the 1990s mainly to modernize the political and economic frameworks in Mexico, along with other relevant episodes such as:

- The economic crisis of 1994-1995
- The negotiation of the external debt in the late 1980s and early 1990s
- The negotiation and approval of NAFTA
- The rebellion and peace agreements in Chiapas in 1994
- The constitutional reform on the autonomy of Mexico's Central Bank
- The presidential elections of 1988, 2006 and 2012
- The constitutional reforms on human rights; collective rights; security and law enforcement; access to public information; property rights; electoral system, et al.
- The constitutional reform of the Judicial Power in 1995
- The liberalization of the political system in 1997-2000
- The diplomatic relations with the United States of America
- The escalation of drug-related violence since 2006

Although not originally planned, the conducting of these interviews also put me in contact with an issue of which I had only limited and superficial knowledge: the influence of the so-called *technocrats* in the deep transformations that took place in the last two decades –especially in the 1990s- and the tremendous effect of their education abroad (particularly in the United States during the 1970s and 1980s) to establish a radically new economic model more in tune with the global economy at that time. This discovery led me to analyze this trend in more depth since it became necessary to

understand the behavior of Mexican elites and their management of constitutional decisions.

I must say that each of these interviews also provided substantial educational value, since taken together, they formed an intensive course in public decision-making that provided me a radically different view, one that contrasted sharply with my personal preconceptions of how public affairs are conducted in Mexico.

By carrying out these interviews, I realized that authoritative decision-making is much more complex than it would appear, judging from presentations of the topic in popular media. Moreover, most of the time, events related to these processes of decision-making bear no resemblance to what is presented by commentators.

The interviews also gave me the opportunity to be in direct contact with actors who, in light of their experience and involvement in some of the narrated events, demonstrated some degree of statesmanship worthy of respect and admiration, which also infused in me a sense that things in Mexico may be better than would appear, given the daily critical and pessimistic rhetoric which pervades public opinion.

In sum, I am convinced that the intellectual efforts expended in putting together this dissertation would be futile without the contributions of these interviews, which constitute a core component of this work.

The Interviewees

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|------------------------------|-----------|
| 1. James Baker | 8-XI-11 |
| 2. Al Gore | 17-XI-11 |
| 3. Fernando Landeros | 8-XII-11 |
| 4. Carlos Salinas de Gortari | 10-XII-11 |
| 5. Cuauhtémoc Cárdenas | 10-IV-12 |

6. Ignacio Orendain	12-IV-12
7. José González Morfín	13-IV-12
8. Pedro Salazar	18-VI-12
9. Salvador Aguirre Anguiano	29-VI-12
10. José Ramón Cossío	13-VII-12
11. Margarita Luna Ramos	22-VIII-12
12. Alan Knight	11-IX-12
13. Xavier Olea Pelaez	10-X-12
14. Manuel González Oropeza	23-X-12
15. Javier Quijano Baz	24-X-12
16. Bradford Smith	25-X-12
17. Pedro Aspe Armella	8-XI-12
18. Javier Tejado Dondé	15-XI-12
19. José Núñez Castañeda	22-XI-12
20. Pedro Joaquín Coldwell	22-XI-12
21. Francisco Gil Díaz	23-XI-12
22. Miguel Alemán Velasco	5-XII-12
23. Lorenzo Lazo	5-XII-12
24. José Manuel Núñez Pliego	16-XII-12
25. Manuel Camacho Solís	10-I-13
26. Ricardo Sepúlveda Iguíniz	15-I-13
27. Joaquín López Dóriga	18-I-13
28. Santiago Creel Miranda	21-I-13
29. Confidential	22-II-13

These interviews are intended to be among the most salient contributions in this dissertation, by virtue of their candidness and distinctive insight that sometimes confirmed several hypothesis of this work, and which at others significantly differed from them. All in all, I found them of fundamental importance since the beginning of this endeavor to articulate my work, not only because of the comments of the elites, but also because of their direct input, which, in the final analysis, has crucially infused and enriched what is argued in this dissertation.