



MEXICO'S POLITICAL CULTURE: THE UNRULE OF LAW AND CORRUPTION AS A FORM OF RESISTANCE

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In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.

James MADISON, FEDERALIST, No. 51.

ABSTRACT. Mexico faces intense rule of law challenges vis-à-vis society (crime, informal markets, etc.) and the state (corruption, human rights abuses, etc.). One factor linking these two dimensions is the lack of legitimacy. Mexicans rarely trust the law, governmental institutions, or their politicians. This essay explores some of the implications, dimensions and challenges of this aspect of the dominant Mexican political discourse. Following a brief discussion of the Mexican political culture as it relates to questions of legitimacy and the rule of law, I argue that these factors generate an underlying assumption of corruption, an anti-state and hence pro-society bias, and an ambiguous political situation, and, in turn, craft an environment feeding corruption, and non-systemic behavior. The essay concludes by highlighting not only the im-

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portance of establishing the legitimacy of the rule of law and the difficulties and challenges of doing so, but also the need to prioritize the application of the rule of law to the state and state officials based on a strategy of strengthening civil society.

KEY WORDS: *Rule of law, corruption, legitimacy, political culture.*

RESUMEN. *México enfrenta un problema serio de falta de Estado de derecho y respeto a la ley dentro de la sociedad (crimen, mercado informal) y el Estado (corrupción, abuso de los derechos humanos). La falta de legitimidad conecta estas dos dimensiones. Los mexicanos tienen poca confianza en la ley, las instituciones del gobierno, o los políticos. El trabajo examina algunas de las implicaciones y retos de este aspecto de la cultura política mexicana. Después de explorar brevemente esta cultura, planteo que estos factores generan una presunción de corrupción, una actitud anti-Estado y pro-sociedad, y una situación política ambigua, y por ende crean un ambiente que alimenta la corrupción y la conducta antisistémica. El ensayo concluye subrayando no sólo la importancia de establecer la legitimidad del Estado de derecho y los retos de hacerlo, sino también la necesidad de dar prioridad a la aplicación de la ley al Estado y los servidores públicos dentro de una estrategia que debe fortalecer a la sociedad civil.*

PALABRAS CLAVE: *Estado de derecho, corrupción, legitimidad, cultura política.*

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Mexico suffers widespread unlawful activities both within civil society (from organized crime and drug trafficking to the burgeoning informal market and business fraud) and within the state (from corruption, human rights abuses, and noncompliance with bureaucratic regulations and procedures to backroom deals). But this is really nothing new. According to Fernando

Escalante “The Mexican state has never been able to impose compliance with the law, not even among its own officials.”¹ As Jorge Zepeda Patterson starkly concludes, “We do not live within the rule of law.”² Beyond weak enforcement institutions—the topic of much analysis over the years—one key factor linking these two dimensions is a fundamental lack of legitimacy. Mexicans rarely trust the law, governmental institutions, or their politicians. This essay explores some of the implications, dimensions and challenges of this aspect of the dominant Mexican political discourse. Following a brief discussion of the Mexican political culture as it relates to questions of legitimacy and the rule of law, I argue that these factors generate an underlying assumption of corruption, an anti-state and hence pro-society bias, and an ambiguous political situation, and, in turn, craft an environment feeding corruption, and non-systemic behavior. The essay concludes by highlighting not only the importance of establishing the legitimacy of the rule of law and the difficulties and challenges of doing so, but also the need to prioritize the application of the rule of law to the state and state officials based on a strategy of strengthening civil society.

I. MEXICAN POLITICAL CULTURE

Whether referring to citizens or their servants, as Immanuel Kant recognized, compliance to rules and laws depends largely on individual notions of legitimacy. According to Tom Tyler, “authorities need for people to take the obligation to obey the law onto themselves, and to voluntarily act on that perceived obligation.”³ This occurs, he contends, when people believe the legal decision to be morally right, when they feel that decisions are made in a fair and impartial way, when they trust the motives of the decision makers, and when they feel they are being treated with dignity and respect. Stefan Voigt similarly posits that for there to be an effective opposition to crossing the line, individual attitudes must be compatible with the rule of law: “attitudes incompatible with the rule of law,” he notes, “will make it less likely for a constitution based on the rule of law to be enforced effectively.”⁴ Viewed from a negative angle, this means that when the perception exists that the rules serve the interests of the powerful rather than

¹ Fernando Escalante Gonzalbo, *México, fin de siglo*, in *PENSAR EN MÉXICO* 19-36 (José Antonio Aguilar Rivera et al. eds., FCE, 2006).

² Cited in SARA SEFCHOVICH, *PAÍS DE MENTIRAS: LA DISTANCIA ENTRE EL DISCURSO Y LA REALIDAD EN LA CULTURA MEXICANA* 277 (Océano, 2008).

³ Tom Tyler, *Multiculturalism and the Willingness of Citizens to Defer To Law and to Legal Authorities*, 25 (4) *LAW & SOC. INQUIRY* 985 (2000).

⁴ Stefan Voigt, *Making Constitutions Work: Conditions for Maintaining the Rule of Law*, 18 (2) *CATO JOURNAL* 191-210 (1998).

the general interest or that the rules fail to apply equally to all, then compliance comes to rely more on the fear of punishment than on voluntary compliance. In this context, citizens or public servants may obey the law, but not comply (*obedezco pero no cumplo*): a clear bow to power differentials, but not to vested authority. Unfortunately, this is the prevailing pattern in Mexico.

Ample evidence points to weak respect for the rule of law and a fundamental lack of faith in politicians and public institutions in Mexico. The 2005 survey of Mexican political culture by the Secretaría de Gobernación, for instance, found 61 percent of respondents believing that officials use the law to defend the interests of those in power or to commit *arbitrariedades* (Encuesta Nacional de Cultura Política [ENCUP]).⁵ As Carlos Elizondo Mayer-Serra contends, the perception is widespread among citizens that rather than promoting public order or wellbeing, the law serves as “a recourse at the disposal of politicians to combat enemies and protect their friends.”⁶ Consequently, as shown in surveys by Transparencia Mexicana and UNAM, most citizens abide by the law simply to avoid punishment, rather than because of the law’s fairness or moral grounding. In fact, the UNAM study found that a majority of respondents did not consider violating the law a serious matter: the issue, instead, is getting caught.⁷ This lack of legitimacy can be seen at various levels. Even among politicians and officials—individuals drawn from the same cultural milieu—state legality suffers when there is a sense that the law is used and abused by others for political ends. As Luis Rubio and Edna Jaime note, “many political actors, like a significant portion of society, see the legal framework not as a norm of conduct, but as an instrument that can be molded to the objectives of a case.”⁸

Such low levels of legitimacy of the law, in turn, underlie perceptions of the institutions empowered by the law and charged with its implementation. In the 2005 ENCUP study, for instance, over 60 percent of respondents expressed little or no confidence in the Supreme Court and Congress, while more than 75 percent had little or no confidence in the police and political parties.⁹ When asked about their image of judges and the courts,

⁵ Encuesta Nacional de Cultura Política, 2001, 2003, 2005. Mexico City: Secretaría de Gobernación, available at <http://www.encup.gob.mx/encup>.

⁶ Carlos Elizondo Mayer-Serra, *Constitutionalism and State Reform in México*, in REBUILDING THE MEXICAN STATE: MÉXICO AFTER SALINAS 45 (Mónica Serrano & Víctor Bulmer-Thomas eds., 1996).

⁷ Cited in Sefchovich, *supra* note 2, at 316.

⁸ LUIS RUBIO & EDNA JAIME, EL ACERTIJO DE LA LEGITIMIDAD: POR UNA DEMOCRACIA EFICAZ EN UN ENTORNO DE LEGALIDAD Y DESARROLLO 24 (FCE, 2007).

⁹ Tyler, *supra* note 3; See also Gustavo Fondevila, *Police Efficiency and Management: Citizen Confidence and Satisfaction*, 1 (1) MEX. L. REV. 109-118 (2008); Ben Brown et al., *Public Perception of the Police in Mexico: A Case Study*, 29 (1) POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES AND MANAGEMENT 158-175 (2006).

the critical rule of law institutions, 40 percent of those responding chose “mala” or “muy mala” (“bad” or “very bad”) compared to a mere 17 percent selecting “muy buena” or “buena” (“very good” or “good”). When prodded as to why, 31 percent selected the option “don’t work, there is no justice,” while another 34 percent cited “corruption and impunity.”¹⁰ With respect to political parties, the key institution providing popular representation and accountability, a 2007 poll showed around 40 percent of those questioned did not believe that any party represented the interests of the people (*Milenio* December 3, 2007). It is not surprising then that in 2001 when asked the first word that comes to mind upon hearing the world politics, “corruption” ranked as the top response (selected as the first response by 21 percent of respondents and as a second choice by another 13 percent).¹¹

Coupled with this rather cynical view of existing law and institutions, the Mexican political culture also incorporates a normative dimension that fully recognizes the virtues of and need for accountability, supports the ideal of democracy, acknowledges the differences between proper and improper conduct, and routinely condemns the latter. Few respondents in the *Transparencia Mexicana* polls, for instance, believe that any form of corruption is acceptable or even agree with the popular saying “el que no transa, no avanza” [a person who does not cheat, does not get ahead].¹² This suggests that the existence of corruption (and acknowledging its existence in public opinion polls) does not necessarily indicate a cultural acceptance of corruption *per se*.

In a similar manner, the fact that crime is rarely reported does not indicate an acceptance of crime, but rather a lack of faith in the police or the justice system to do anything about it. In the ICESI study, the main reason given for not reporting a crime was “waste of time” (39 percent). If you combine this with the 16 percent of respondents who attributed non-reporting to “lack of confidence in authorities,” the 3 percent who blamed the “hostility of the authorities,” and the 1 percent who failed to report crime out of “fear of being extorted,” then almost 60 percent failed to denounce crime because of institutional factors.¹³ In sum, corruption and other forms of state illegalities in Mexico are expected but not accepted forms of behavior; condemned but not denounced.

¹⁰ See also Miguel Carbonell, *Judicial Corruption and Impunity in México*, in GLOBAL CORRUPTION REPORT 2007, 225-228 (Cambridge University Press, 2007).

¹¹ Encuesta Nacional de Cultura Política, *supra* note 5.

¹² STEPHEN D. MORRIS, POLITICAL CORRUPTION IN MÉXICO: THE IMPACT OF DEMOCRATIZATION (Boulder, 2009).

¹³ Sexta Encuesta Nacional sobre Inseguridad. Instituto Ciudadano de Estudios sobre la Inseguridad, ICESI (August 2009); see also GUILLERMO ZEPEDA LECUONA, CRIMEN SIN CASTIGO: PROCURACIÓN DE JUSTICIA PENAL Y MINISTERIO PÚBLICO EN MÉXICO (CIDAC-FCE, 2004).

II. ATTITUDINAL AND BEHAVIORAL DIMENSIONS

1. *Assumption of Corruption*

A wide range of attitudinal and behavioral consequences fasten onto this fundamental lack of legitimacy of the law and distrust of those making and enforcing it: all forging part of the broader political culture. Among these is a tendency on the part of the public to use this discourse as a tool to interpret everyday events. This includes the assumption of corrupt behavior and corrupt motives and hence a rejection of pro-systemic, normative-based interpretations of events. When one starts out from the assumption that the powerful abuse and manipulate the law, then one tends to interpret rhetorical promises to address corruption or even the occasional prosecution of a corrupt official not as a counterstrike against the dominant tendency, but rather as part of the same abusive pattern.¹⁴ “Official versions are dismissed beforehand and the promises to follow an investigation to its ultimate consequences are received with general skepticism.”¹⁵ This means that speculations, accusations, rumors, etc., of corruption are oftentimes accepted as truth (unless targeted at partisans) regardless of the outcome of the investigation or the resolution of the case simply because they ring consistent with the dominant political narrative. The public then sees the subsequent failure to prosecute an official already tried in the court of public opinion as just further confirmation of the pattern of impunity —rather than as perhaps an indication of the effective pursuit of justice. Even when the system successfully prosecutes “corrupt” officials, it is often interpreted not as a conquest in the battle against corruption, but dismissed as a manipulation of the law orchestrated by those in authority to eliminate their opponents, consolidate their power, for public show, or to hide what they are really doing. Meanwhile, the public summarily dismisses accusations against partisans and allies as politically motivated, again as part of this narrative rather than an affront to it. In short, if impunity is the rule rather than the exception, then exceptions to that rule are not interpreted as examples of compliance with the rule of law; instead, they are seen as conforming in some

¹⁴ One prominent example of such an interpretation involves the attempted removal of the immunity of Mexico City Mayor Andrés Manuel López Obrador by the Fox government in response to the mayor’s temporary failure to abide by a judicial injunction. Had the move succeeded, it would have prevented the then front-runner in the polls —López Obrador— from running for president. The effort, however, was widely perceived not as the application of justice or the rule of law —as Fox initially claimed— but as political maneuver. JOSÉ ANTONIO CRESPO, *CULTURA POLÍTICA Y CONSOLIDACIÓN DEMOCRÁTICA* (1997-2006) 28 (2007).

¹⁵ Héctor Aguilar Camín, *Procuradores de injusticia*, 1216 PROCESO, Feb. 20, 2000, at 49.

twisted way to the same political logic, motivated by personal ambition, political vengeance, or public show, not to promote the rule of law.

2. *Hierarchy of Legitimacy and Anti-State/Pro-Society Bias*

Not all notions of legitimacy are equal, of course. I would argue that subsumed within this framework separating state and social forms of illegality there resides a hierarchy of legitimacy that privileges or positions the rule of law within the state above the rule of law within society. This means that if the rule of law does not seem to apply to those empowered by it (*i.e.* state officials), this spills over to undermine or tarnish the legitimacy of the rule of law within society. In short, it is easy for citizens to justify illegal conduct if they are convinced that state officials do not abide by the law. Indeed, why pay taxes if you are certain that the politicians are simply going to pocket the money? “The abuses by police, the corruption, the extortion and other arbitrary acts contribute to citizens considering taxes a confiscation of their income”.¹⁶ This is precisely how both the perception and the reality of corruption undermine the public’s respect for the rule of law and thus contributes to illegal behavior. The implication here, of course, is that because of this hierarchy, rulers must set the example.¹⁷

Related to this hierarchy and drawn from repeated political experience lies an anti-state/pro-society bias. On one side of this equation, the lack of faith in the state and in authority weakens the ability of the state to deploy its instruments of coercion to enforce the rule of law. As noted earlier, citizens tend to reject official interpretations out of hand, seeing these as hiding rather than revealing the true motives of the political actors. Hence, the 2001 ENCUP found 68 percent of respondents disagreed with the use of public force to resolve conflicts, and only 18 percent agreed. President Fox not only acknowledged this widely held view, equating the use of repression to the old authoritarian *PRI-gobierno*, but more importantly, it prompted him to consciously shy away from the use force to handle certain problems within society. In an interview with the *Wall Street Journal* in October 2006 the president stated “When someone breaks the institutional order, even by taking the street or highway, the use of force is legitimate. However, in Mexican society a political culture to accept it does not exist. For this reason, it is not done.”¹⁸

¹⁶ José Antonio Aguilar Rivera, *El capital social y el Estado: algunas aproximaciones al problema*, in *PENSAR EN MÉXICO* 198-109 (José Antonio Aguilar Rivera et al. eds., FCE, 2006).

¹⁷ Turning this equation around seems far less plausible. In other words, political leaders would seemingly be less likely to justify their corrupt conduct based on the high levels of illegality in society. Public officials, arguably, do not look for society to set the example to emulate.

¹⁸ Cited in Crespo, *supra* note 14, at 24.

The flipside of this anti-state bias is a pro-society bias: the sense that “civil society was everything that politics had not contaminated.”¹⁹ Fernando Escalante characterizes this as “a new ‘*código de pureza*’ that demands that one oppose the government, the party, and the State in order to demonstrate opposition to corruption and backwardness.”²⁰ On the more positive side, seeing citizens as essentially pure (at least “purer” than politicians) and non-corrupt nurtures efforts to mobilize society to control and check government: to empower citizen counselors to staff accountability institutions like the electoral institute or to conduct oversight through *contralorías sociales*. Indeed, many in Mexico pin their democratic hopes on citizen-led social movements, which take control of the state from below or, in a word, *ciudadanización*. This pro-society bias, however, also feeds a tendency for people to side with societal actors in the streets, and to assume that their cause is just and that they suffer at the hands of repressive state authorities. Such a posture not only delegitimizes the use of state force, as President Fox noted, but also helps justify even the illegalities committed by such groups in asserting their demands in the name of justice: a point further explored later.

3. Epistemological Dilemma

Yet another consequence of this political narrative crystallizes an epistemological dilemma. Given the sense that politicians use and abuse the law for political ends, it becomes difficult to know whether a given reason for a particular act is indeed valid or not. Numerous cases or examples of this dilemma exist. We know the brother of the former president, Raúl Salinas, for instance, was found to have numerous false passports and multi-million dollar bank accounts under different names in the US and Switzerland. In the early days of the Zedillo administration, Salinas was arrested and convicted for the murder of the PRI legislative leader José Francisco Ruiz Massieu. Throughout this time, Salinas insisted on his innocence, claiming that the move was politically motivated and targeting his brother, the former president. Indeed, years later, after Zedillo left office, the courts turned around and exonerated Salinas, failing to find sufficient evidence for his original murder conviction or any firm evidence of money laundering or corruption. This turnabout leaves any observer questioning which of the two sets of contrasting legal actions and “evidence” was valid and which responded to political factors. With limited faith in political institutions, a person’s determination of social truth often comes to rest, perhaps, more on partisan or political

¹⁹ Fernando Escalante Gonzalbo, *México, fin de siglo*, in PENSAR EN MÉXICO 33 (José Antonio Aguilar Rivera ed., FCE, 2006).

²⁰ *Id.* at 27.

loyalties and attachments. This is consistent with the finding of Cleary and Stokes that associates a low level of trust in institutions, with trust in individual politicians and *vice versa*.²¹ Similar cases abound. Even the more recent case of exiled mining union leader Napoleón Gómez Urrutia encompasses allegations of widespread corruption by the administration amidst rumors and speculations of political revenge from unionists.

4. *Compliance as Oppression: Corruption as Resistance*

Beyond these related attitudinal dimensions, this dominant political discourse also influences forms of social behavior. Foremost is the lack of compliance with the law. Simply put, viewing the operation of the law, the institutions and the officials empowered by it as oppressive makes abiding by the law —despite acknowledging its normative virtues— difficult. “Citizens do not feel the obligation or the desire to respect the law, the institutions, the authorities, or the people.”²² In fact, a narrative that envisions the law as oppressive makes compliance a form of submitting to that oppression. While this may mean obeying the law and authorities when it is necessary for both practical and instrumental reasons —to avoid punishment or to enjoy the benefits— it also means taking advantage of the system’s flexibility and failures whenever possible to get ahead, just like everyone, particularly the powerful, presumably do. In this sense, avoiding the law, manipulating it, or getting around it (through bribery or any other means) becomes a form of protest, of political contestation, and of everyday resistance. Seeing bribery in this way fits within James Scott’s description of resistance wherein subordinate groups use disguise, deception and indirection while maintaining an outward impression of willing consent.²³ So not only does corruption constitute a mechanism of everyday survival as often noted,²⁴ but it also becomes a way to get ahead and exploit the system’s weaknesses for personal gain. Hence, while the public may condemn corruption, they nonetheless are quick to engage in it when the course lays open to them, justifying their actions by pointing to the fact that public officials and others engage in similar conduct. This interpretation helps the citizen guard his/her sense of personal integrity and assign blame to greedy politicians. From

²¹ MATTHEW R. CLEARY & SUSAN C. STOKES, *DEMOCRACY AND THE CULTURE OF SKEPTICISM: POLITICAL TRUST IN ARGENTINA AND MEXICO* (Russel Sage Foundation, 2006).

²² Sefchovich, *supra* note 2, at 316.

²³ JAMES SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 17* (Yale University Press, 1990).

²⁴ Eric Uslaner *cited in* Gabriela Catterberg & Alejandro Moreno, *Particularized Trust, Private Politics, and Corruption in New Democracies: The Experiences of Argentina and Mexico*, paper presented at: WAPOR Latin American Congress (2007).

this perspective, even a degree of social tolerance toward corruption becomes a consequence of widespread corruption rather than a cause.

5. *Divorcing Law from Justice*

Particularly problematic, this lack of legitimacy in the rule of law also seemingly divorces the law from notions of justice. If the law itself or its implementation serve the interests of the powerful rather than some concept of justice, then not only does compliance become problematic, but it also justifies the use of other avenues in the pursuit of justice.²⁵ This feeds the use of alternative paths to pursue demands before the government. Just as individuals will employ illegal means for individual gain, this same factor also encourages the use of collective means to pressure the government for justice. Such actions range widely from the privatization of security measures (from lynching of police officers to gated communities),²⁶ public protests and sit-ins to demand the reinstatement of a union leader “wrongly” accused of corruption or to reverse a reform agreement signed by a corrupt union leader or a fraudulent election (drawing on recent examples), to even neo-populist government officials using extra-institutional means to pursue their political objectives.²⁷ This tendency, in which the paths to justice are divorced from the rule of law, greatly intensifies the degree of politicization within society and arguably further undermines compliance and the rule of law itself.

6. *Pessimism, Lack of Civic Behavior and Trade-Offs*

The lack of legitimacy, moreover, breeds pessimism regarding the potential for change, nurtures alienation and atomization, and suffocates the

²⁵ In the 2001 ENCUP poll, when asked whether one should always abide by a law even if it is unjust, 72 percent said no. In a separate question, 56 percent agreed that people should disobey unjust laws. The notion that the law is flexible, in short, seems widespread both in thought and particularly in deed.

²⁶ According to González Compeán, there were almost 100 cases of lynchings in Mexico between 1987 and 2001. He characterizes these as an alternative to the incapacity of the institutions to punish and guarantee justice. He also adds that no one was prosecuted for the lynchings. See Miguel González Compeán, *Justicia o legalidad: el discurso revolucionario y la descomposición de las reglas escritas*, in PENSAR EN MÉXICO 278-234 (José Antonio Aguilar Rivera ed., FCE, 2006).

²⁷ According to Davis, López Obrador draws extensive support from lower-income citizens engaged in the informal sector with police complicity and linked to contraband and drug involvement of the police; Diane Davis, *Undermining Rule of Law: Democratization and the Dark Side of Police Reform in México*, 48 (1) LATIN AMERICAN POLITICS AND SOCIETY 55-86 (2006).

public's "commitment to collective projects [and] civic behavior." Polling data amply illustrate this pattern. *Transparencia Mexicana* polls, for example, show almost a third of respondents believing that it is simply impossible to curb corruption. Such perceptions and lack of faith in politicians makes it difficult to enlist the support of the public in fighting corruption or pursuing other social goals.²⁸

Coming to grips with this political reality, finally, also informs tradeoffs in which people are willing to accept a certain level of corruption or illegality on the part of their officials as long as the officials address their needs or critical societal problems.²⁹ In one poll, 59 percent of those surveyed agreed with just such a statement.³⁰ This contrasts the huge majorities in the same poll who rejected specific types of corrupt conduct when asked directly. While again some might interpret this acceptance of corruption as a measure of social tolerance —considered a key cultural determinant of corruption— it can also be seen as a Hobbesian deal with reality.³¹ If corruption is widespread, the norm, and one feels that little can be done to truly address it, then getting something along with it is better than nothing.³² This notion of trade-offs, however, also point to a tendency to blame corruption for the failures of government (part of the dominant narrative), but when the government is doing something good, corruption becomes unimportant and in fact can be dismissed or excused.

III. ORDER WITHOUT LAW AND LEGITIMACY

The high level of state and societal illegalities in Mexico may give the false impression of anarchy. It is not that no one complies with the law, that institutions never function as designed, or that Mexico suffers a breakdown of the state, nor is it the case that behavior is un-patterned or unregulated

²⁸ Stephen D. Morris & Joseph L. Klesner, *Corruption and Trust: Theoretical Considerations and Evidence from Mexico*, COMPARATIVE LEGAL STUDIES (2010, forthcoming).

²⁹ Luigi Manzetti & Carloe Wilson, *Why do Corrupt Governments Maintain Public Support?*, in CORRUPTION AND DEMOCRACY IN LATIN AMERICA (Charles H. Blake & Stephen D. Morris eds., University of Pittsburgh Press, 2009).

³⁰ Encuesta Nacional de Corrupción y Buen Gobierno 2005, *Transparencia Mexicana*, results available at: www.transparenciamexicana.org.mx.

³¹ Uslaner, *supra* note 24.

³² This tradeoff coupled with the notion of resistance found in the ideas of *machismo* in the Mexican culture may relate to the manner in which drug traffickers are sometimes admired and emulated by the public. See Mark Edberg, *Drug Traffickers as Social Bandits: Culture and Drug Trafficking in Northern México and the Border Region*, 17 (3) JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 259-277 (2001); ERIC HOBBSAWM, *BANDITS* (Delacorte, 1969).

by other, non-legal mechanisms. As documented by scores of analysts (particularly anthropologists, but also political scientists), an elaborate network of informal rules and institutions prevail in Mexico that are rooted in easily identifiable power relationships, friendships, and economic incentives, and that supplant or supplement the legal and institutional avenues.³³ The Mexican government, in short, may not always operate as a government of laws, but it does often operate as a government of friends; the legal system may not always function in accordance to the principle of innocent until proven guilty, but rather innocent until proven rich. Carlos Elizondo Mayer-Serra notes, for instance, that the Mexican system thrives on the ability to create ambiguity, competing legal claims and different hierarchies of power that in turn provide the space for negotiated solutions.³⁴ Indeed the real operation of the system attaches to the normative order of the state with key intermediaries operating between the two. Intermediaries operate within the normative context to negotiate exceptions, and justify them in the name of the state and the normative order. They are able to produce order without undermining the state or threatening its legitimacy directly. “Whatever formally sanctioned law exists is applied intermittently, if at all [...]”³⁵ and is encompassed within the informal law determined by the “privatized —patrimonial, sultanistic, or simply gangster-like— powers that actually rule those places.” Guillermo O’Donnell calls these “brown areas.”³⁶

Anthropologists Chris Kyle and William Yaworsky detail how rights in Mexico relate primarily to one’s socioeconomic standing within the community. They explain this pattern in the following manner:

Life in Mexico has traditionally been, and to a great extent remains, regulated not with reference to constitutional rights and by means of universally applied legal procedures but through participation in hierarchically structured and sharply stratified patronage networks. [The study also finds that] instead of equitable treatment and dispassionate justice, government functionaries dispense *mercedes* in accordance with rules that rarely have much relationship to codifications and that instead accord a decided advantage to

³³ What analysts refer to as privatism arises from particularized trust or sense of obligation to family or friends. This includes a strong sense of solidarity with the extended family and hostility to the outsider, See Seymour Lipset & Gabriel Lenz, *Corruption, Culture and Markets*, in CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS 112-124 (Samuel Huntington & Lawrence Harrison eds., Basic Books, 2000). And is closely associated with Banfield’s (1958) notion of amoral familism. See EDWARD BANFIELD, THE MORAL BASIS OF A BACKWARD SOCIETY (New York Free Press, 1958).

³⁴ Mayer-Serra, *supra* note 6.

³⁵ Fernando Escalante Gonzalbo, *México, fin de siglo*, in PENSAR EN MÉXICO (José Antonio Aguilar Rivera et al. eds., FCE, 2006).

³⁶ THE QUALITY OF DEMOCRACY: THEORY AND APPLICATIONS 41 (Guillermo O’Donnell et al. eds., 2004).

those of higher social standing [...] Whereas the winners to such interactions see “justice” done, the losers experience the sting of *impunidad*.³⁷

IV. CHALLENGES AND CONCLUSIONS

Most recommendations to address Mexico's rule of law problems center on strengthening the institutions of the criminal justice system, greater enforcement, and more oversight and accountability. Whereas a lengthy discussion on policy approaches is beyond the scope of this paper, the foregoing discussion crystallizes certain dimensions of the challenges and at least two priority approaches.

First, without addressing the critical issue of legitimacy, more enforcement tools, a stronger state, and more laws will be insufficient. If government and society are unable to control the police, then more police will not solve the problem; it will exacerbate it. Indeed, over the past decade, Mexican public security budgets increased 565 percent, the number of federal police climbed 51 percent (between 1999 and 2007), and the number of agents within the *Agencia Federal de Investigaciones* shot up almost 100 percent. The budget for the federal public security ministry doubled from 2000 to 2008 and the PGR budget increased 94 percent over a decade. And yet, despite the resources, the number of crimes rose by 8.6 percent between 2006 and 2007 and the number of reported kidnappings climbed 45 percent over the past 3 years (*Latin American Mexico & NAFTA Report*, September 2008 RM-08-09). More troubling, the deployment of military forces to contain drug trafficking have wrought an increase in human rights abuses. “Troops dispatched to try to wrest control of states where the drug trade has escalated are also accused of violations against the very civilians they are sent to protect” (*SourceMex* March 4, 2009). A recent report by the *Centro de Derechos Humanos Miguel Agustín Pro Juárez* highlights the rise in reported abuses since the start of the Calderón administration. The report also questions the immunity (*fuero*) enjoyed by the military and civilian control over the military forces.³⁸

A similar dilemma relates to recommendations for more laws, greater judicial independence, and even more taxes. If the lack of compliance and enforcement of laws is the problem, then more law is often not a solution: it simply means more laws to ignore or abuse. In some areas, in fact, the problem may be too many laws or conflicting laws, which broadens the

³⁷ Chris Kyle & William Yaworsky, *Mexican Justice: Codified Law, Patronage and the Regulation of Social Affairs in Guerrero, Mexico*, 64 JOURNAL OF SOCIAL AFFAIRS 67-90 (2008).

³⁸ Jorge Carrasco Araizaga, *El fuero militar, garante de impunidad*, PROCESO, Mar. 8, 2009, at 12-17.

range of discretion.³⁹ Greater judicialization similarly does not necessarily mean greater respect for the rule of law,⁴⁰ particularly if the resulting judicial decisions are seen as partisan, of protecting the government or the ruling elite, or if they remain unenforceable. This point is even clearer when it comes to taxes: if tax evasion is pervasive, increasing taxes is hardly a solution. Even increasing the policing ability of the state to force taxes will not tackle the underlying problem of the lack of legitimacy. Forcing greater compliance while those in power are believed to be putting the extra revenue in their pockets will probably deepen the resentment and further weaken respect for the rule of law. Enhanced oversight without strengthening legitimacy and the voluntary foundations of compliance seem, in short, to have short-term effects at best. A study by O'Day and López on contraband trade in the north, for example, showed how a scandal focused attention on the problem and led to a crackdown that effectively paralyzed the industry. But this lasted for only for a short time: "Within no more than a month and a half, however, the public's attention began to focus on other things, and in short order, the fix [corrupt deal] was back in."⁴¹

Beyond the catch-22 dilemma of addressing enforcement and legitimacy, the above discussion also suggests certain strategies and approaches to deal with rule of law problem. First, owing to the hierarchy of legitimacy, establishing the rule of law vis-à-vis the state would seem to be more important, offering potential spillover effects on compliance to the rule of law within society. Of course, any concerted attack on state illegality (corruption, abuse of human rights, violation of institutional rules) must rise above the political fray and not be used or abused for political goals (or even be seen as such); otherwise, it too will be absorbed as simply "politics-as-usual."⁴²

³⁹ Valeria Merino Dirani, *Role of Civil Society in Promoting Transparency and Fighting Corruption in Ecuador*, 10 SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS 319-343 (2004).

⁴⁰ Pilar Domingo, *Rule of Law, Citizenship and Access to Justice in México*, 15 (1) MEXICAN STUDIES 151-191 (1999); Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in México*, 32 JOURNAL OF LATIN AMERICAN STUDIES 705-753 (2000); Pilar Domingo *Judicialization of Politics or Politization of the Judiciary? Recent Trends in Latin America*, 11 (1) DEMOCRATIZATION 104-126 (2004); Lawrence Whitehead, *High Level Political Corruption in Latin America: A Transnational Phenomenon?*, in POLITICAL CORRUPTION: CONCEPTS AND CONTEXTS 801-818 (Heidenheimer & Johnston eds., 2002).

⁴¹ Patrick O'Day & Angelina López, *Organizing the Underground NAFTA*, 17 (3) JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 240 (2001).

⁴² This danger is illustrated in two critical areas: in the growing corruption within the military as its role in fighting drug trafficking has increased, and the concerns about the politicization of the ostensibly independent citizen counselors in IFE. See Patrick O'Day, *The Mexican Army as Cartel*, 17 JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 278-295 (2001); GUILLERMO ROSAS ET AL., ARE NON-PARTISAN TECHNOCRATS THE BEST PARTY WATCHDOGS MONEY CAN BUY? AN EXAMINATION OF MEXICO'S INSTITUTO FEDERAL ELECTORAL (American Political Science Association, 2005).

Second, given the anti-state/pro-society bias, strengthening the rule of law must rely on the institutionalized empowerment of citizens through various co-governance arrangements.⁴³ Citizens begin with a greater reservoir of legitimacy than do government officials, offering a small window of opportunity to strengthen oversight and accountability of rule of law institutions. Mexico's Federal Electoral Institute (IFE) provides an example whereby deeply engrained perceptions and attitudes regarding elections changed in a relatively short period of time, moving from the assumption of electoral fraud to a belief in free and fair elections. Again, the dangers, of course, are that such empowered citizens get pulled into partisan politics and in a sense lose their neutral, citizenship status, or, worse perhaps, become politically irrelevant. The main danger is that the political contaminates the social, rather than vice versa.

In the end, strengthening the rule of law is critical to the construction and consolidation of democracy in Mexico.⁴⁴ For many, of course, Mexico's weak rule of law stems from the nation's authoritarian past. González,⁴⁵ Philip and Zamora,⁴⁶ among others, cite overt rule breaking and the arbitrary application of law as a political strategy of the one-party regime. But if this authoritarian legacy were the true culprit, then democratization should improve the situation even if at a slow, glacial pace. And yet, the levels of state and societal illegality have arguably climbed since democratization as confidence in the law and institutions continue to deteriorate. During the key period of democratization, for instance, confidence in the government actually fell from 30 percent in 1998 and 36 percent in 2000 to 23 percent by 2003, while confidence in the police dipped consistently from 33 percent to 28 percent to 16 percent during those years.⁴⁷ Alberto Díaz-

⁴³ John Ackerman, *Co-Governance for Accountability*, 32 (3) *WORLD DEVELOPMENT* 447-463 (2004).

⁴⁴ Despite many differences, most discussions on the rule of law tend to agree on its centrality to democratic consolidation. According to Philippe C. Schmitter, *The Ambiguous Virtues of Accountability*, 15 (4) *JOURNAL OF DEMOCRACY* 52 (2004), democratic consolidation means "getting people to compete and cooperate according to rules and within institutions that citizens, representatives, and rulers alike find mutually acceptable." By contrast, non-consolidated democracy exists where the rules of the system are not the only rules that operate and where public opinion may not always uphold them (GEORGE PHILIP, *DEMOCRACY IN LATIN AMERICA: SURVIVING CONFLICT AND CRISIS* (2003)). On the challenges to the criminal justice system during democratization, see Susanne Karstedt & Gary LaFree, *Democracy, Crime and Justice*, 605 *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES* 6-23 (2006).

⁴⁵ Miguel González Compeán, *Justicia o legalidad: el discurso revolucionario y la descomposición de las reglas escritas*, in *PENSAR EN MÉXICO* 278-324 (José Antonio Aguilar Rivera et al. eds., FCE, 2006).

⁴⁶ Philip, *supra* note 44; STEPHEN ZAMORA ET AL., *MEXICAN LAW* (Oxford University Press, 2004).

⁴⁷ Demetrius Lee Walker & Richard W. Waterman, *Elections as Focusing Events; Explain-*

Cayeros and Beatriz Magaloni note that despite the institutional changes supporting accountability during these years, behavior has not been in the direction lawmakers intended. Rather than limiting discretion and the arbitrary use of power, the changes have seemingly enhanced both. So while authoritarianism may have created the unrul of law, democracy as practiced thus far has not only failed to reverse the course, but seems to have exacerbated it.⁴⁸ As Miguel Ángel Granados Chapa, the recipient of the government's Belisario Domínguez award, noted during his acceptance speech before the Senate:

The power of money and the criminal power of arms increasingly undermine the rule of law and the capacity of the State [...] The real powers, which govern without having been elected, which seek and obtain profits from businesses that operate against the general interest, govern to a greater degree than the government; the struggle of some illegitimate powers against society, their success in efforts to dominate society, is favored by an economic situation, ever more adverse, that is less propitious than the prosperity and expansion of the human potential.

ing Attitudes toward the Police and the Government in Comparative Perspective, 42 *LAW AND SOCIETY REVIEW* (2) 337-366 (2008).

⁴⁸ ALBERTO DÍAZ-CAYEROS & BEATRIZ MAGALONI, CONCLUSION: DEMOCRATIC ACCOUNTABILITY AND RULE OF LAW IN MEXICO (forthcoming).