

# **The Right to Revolution:**

## **Popular Sovereignty, Revolution and the Fragility of the Rule of Law in Mexico**

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"... we are the true heirs of the builders of our nationality, we are dispossessed millions and we call upon our brothers to join this call as the only path left to avoid dying of hunger before the unending ambition of a 70 year dictatorship led by a handful of traitors who represent the most conservative and *vendepatrias* [merchants of the fatherland]. They are the same ones who opposed Hidalgo and Morelos, those who betrayed Vicente Guerrero, they are the same ones who sold over half of our territory to the foreign invader, they are the same ones who brought a European prince to govern us, they are the same ones who established the dictatorship of the Porfirian científicos, the same ones who opposed the Oil Expropriation, the same ones who massacred railroad workers in 1958 and students in 1968, the same ones who today take from us everything, absolutely everything.

To avoid this and as our last hope, after having tried everything to put into practice legality based on our Magna Carta, we appeal to it, our Constitution, to apply Constitutional Article 39 which literally states:

"National sovereignty resides essentially and originally in the people. All public power springs from the people and is instituted for its benefit. **The people have at all times the inalienable right to alter or modify its form of government.**"

Ejército Zapatista de Liberación Nacional, Segunda Declaración de la Selva Lacandona, June 1994.

### **Introduction**

Revolution in the name of the law has deep roots in Mexico's political and legal culture. It predates both Mexican law and polity. It is not infrequent that rebels claim to have the better

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right, but in Mexico the text of the constitution and the dominant political discourse of the state for most of the 20th century intersect, making for a peculiar relationship between revolution and law. To some, the right to revolution has constitutional standing, making for a powerful trope in political discourse. To those of us inquiring into comparative constitutional culture, the right to revolution presents an opportunity to inquire into the complexity and contradictions that underlie Mexican legal culture and its contrast with other constitutional cultures with more stable notions of the rule of law, such as that of the United States.

In the United States, revolution and law, though intimately related, are imagined as mutually exclusive: they depend on each other, but cannot coexist. For the legal culture of the United States, Paul Kahn has argued, revolution precedes law and succeeds only if and when it establishes the rule of law, but rule of law and revolution cannot coexist.<sup>1</sup> The popular sovereign appears during a revolution, gives law, and then recedes. Revolution is fluid but short lived, the rule of law is stable and long running. In Mexico, by contrast, revolution has come to be imagined as ongoing and the popular sovereign is recurrently imagined as a standing presence. Thus, both the constitution and the rule of law must exist in the ever-possible immediate presence of the popular sovereign. The right to revolution, as read into the Mexican constitution, is an insightful entry point for exploring the unstable relationships between rule of law and revolution in Mexican political and legal imagination.

When I speak of the “right to revolution” I refer to a contested interpretation of article 39 of the Mexican constitution. It literally states:

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<sup>1</sup> PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (Yale University Press 1997).

National sovereignty resides essentially and originally in the people. All public power springs from the people and is instituted for its benefit. **The people have at all times the inalienable right to alter or modify its form of government.**

The “right to revolution”, has been read into the closing sentence of the article, for it speaks of an inalienable *right* to alter government. Of course, the question of exactly *how* the inalienable right is to be exercised is contested and, for the most part, neutralized in sanctioned legal opinion by holding that the right is to be exercised through representative bodies according to the amendment procedure established in the constitution.<sup>2</sup> The passage, however, has staying power in popular political imagination and has been invoked by the three most prominent political opposition movements that have questioned the legitimacy of government of recent times –the Zapatista rebellion of the mid 1990’s, former presidential candidate Andrés Manuel López Obrador in the wake of the controversial presidential election of 2006 and more recently by *autodefensa* leader Mireles, after his imprisonment in 2014–.

The idea that revolution can be the exercise of a legal right seems to cut against the understanding that revolution and constitution are co-dependent yet exclusionary moments in the life of a polity.<sup>3</sup> It is not in spite of, but rather *because of* this contradiction that studying Mexican constitutional culture from this entry point insightful: it can shed light on the contradictory relationships between law and politics, revolution and rule of law, rebellion (and maybe disobedience) and constitution in Mexico.

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<sup>2</sup> See below, section II.

<sup>3</sup> Kahn, THE REIGN OF LAW... *supra* note 1 and PUTTING LIBERALISM... *infra* note 5.

As the opening article to the constitutional chapter on “National Sovereignty and Form of Government”, article 39 stands at the inception of the constitution’s organization of the state. Together with the other two articles in that chapter, article 39 establishes the basic political definitions that organize the State –its “principle[s] of order”<sup>4</sup>–, and the guidelines to conforming state organs.

This paper traces the transition from royal, to national, to popular sovereignty as a source of legal and political authority in Mexico's constitutional history. It explores the role of the Revolution in political discourse and how it ties into a radical idea of popular sovereignty; radical, yet captured by official discourse. Having unpacked constitutional genealogy, it takes up Paul Kahn’s analytic framework for understanding “the autonomy of the political” and exploring the structure of imagination in Mexico’s legal and political culture, focusing on the tension between constitution and revolution, and how this tension results a fragile rule of law.

## **I. Sovereignty**

“A people must free themselves before they can form themselves.”<sup>5</sup>

Luis Villoro, in his classic interpretation of the ideological evolution of the war of Independence,<sup>6</sup> holds that the war for independence that started in 1810, needs to be understood in light of events preceding it by two years, when elite *peninsulares*<sup>7</sup> broke the established legal

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<sup>4</sup> That is, the core of the formal cause, *see* KAHN, PUTTING LIBERALISM... *infra* note 6 at 264.

<sup>5</sup> KAHN, PUTTING LIBERALISM... *supra* note 5 at 265.

<sup>6</sup> LUIS VILLORO, EL PROCESO IDEOLÓGICO DE LA REVOLUCIÓN DE INDEPENDENCIA (CONACULTA 2002).

<sup>7</sup> Spaniards born in Spain.

order by carrying out a *coup* against the Viceroy and the mostly *criollo*<sup>8</sup> City Council - *ayuntamiento*- of Mexico City, sparking *criollo* imagination to question the legitimacy of Spanish rule. When in 1808 Napoleon invaded Spain, forcing both king and successors to abdicate in his favor, loyal subjects of the Crown in both the (Iberian) Peninsula and America resisted, held the abdication null, and took over government in one form or other.<sup>9</sup> Upon learning the news, the *ayuntamiento* of Mexico City invoked an long-standing political doctrine<sup>10</sup> which held that, in the absence of the King and a legitimate heir, sovereignty reverted to the Kingdom, specifically to its constituted representatives.<sup>11</sup>

Mexico City –as "head" of the Kingdom of New Spain acting through its *ayuntamiento*- took it upon itself to temporarily represent the kingdom and to call upon all *ayuntamientos* across the viceroyalty to come together and take measures to govern and defend the realm from the French invaders. The *ayuntamiento* recognized standing authorities, but refused to recognize newly appointed ones on their way from Spain. The same people would rule, but under the Ayuntamiento's, not the deposed king's, authority. This autonomist stance was quickly and violently repressed by a coalition of Mexico City's elite *peninsular* merchants, church officials, and the *Audiencia*, the highest royal (i.e. non-representative... and dominated by *peninsulares*)

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<sup>8</sup> Spaniards born in America.

<sup>9</sup> The assumption of sovereignty or government by local authorities in Spanish domains was a wide spread reaction to the deposition of King Charles IV by Napoleon. see MANUEL CHUST (ed.) 1808: LA ECLOSIÓN JUNTERA EN EL MUNDO HISPANO (FCE 2007). Specifically for the case Mexico, see Virginia Guedea, La Nueva España in the same volume.

<sup>10</sup> Catholic thinkers of the counter-reformation developed a political doctrine that held that kings governed by divine right, though mediated through the political community. See Quentin Skinner, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: VOLUME II: THE AGE OF REFORMATION (Cambridge University Press 1978), chapters V and VI and Villoro, *supra* note 5 at 47.

<sup>11</sup> The Nation, the body politic, was thought of as an aggregate of corporations or estates (clergy, citizens, indians, etc.) with pre-established, legitimate representatives. The understanding of the body politic had the body, rather than contract, as the guiding metaphor and corresponds to a medieval understanding of political community. MAURICIO FIORAVANTI, CONSTITUCIÓN. DE LA ANTIGÜEDAD A NUESTROS DÍAS (Trotta 2001) at 63. Author's translation. See all of chapter 2, for more on the "medieval constitution".

tribunal. The *peninsulars* imprisoned or killed the leaders of the *ayuntamiento* and deposed the Viceroy.

According to Villoro, this was a breaking point for the *criollos*:

The *criollo* finds himself before an order of law that ruled him for three hundred years; but before it seemed to him anchored on irrevocable principles that he never thought to call into question; now, in contrast, he begins to discover that behind this order was the arbitrary will of the legislator who imposed it.

(...)

Social structure is no longer a *given* for the *criollo*, something definitively constituted, it is now *imposed* from outside by an instance that does not subject itself to its own laws.<sup>12</sup>

When revolt against Spanish rule broke out two years later, its leader, parish priest Miguel Hidalgo, incited his flock to rebellion by pointing out that “rewarded [are] those who sequestered the viceroy [...] for defending you...”.<sup>13</sup> The call to arms would turn into a bloody rampage by an angry mob, willing and capable of slaughtering urban, civilian (mostly white) population wherever it resisted. In turn, the professional royal armies slaughtered the mob as it advanced toward Mexico City and, later, retreated from it. Hidalgo’s victories depended largely on his numbers and their willingness to sacrifice themselves *en mass*. The cry for freedom was quickly paid for in flesh.<sup>14</sup> The rebellion was short lived: within the year, the key leaders were captured and executed. Hidalgo, in spite of his failed revolt, would nevertheless take up the place as Father of the Nation. In historical narrative and popular imagination, it was the spontaneous, popular, chaotic, bloody and *failed* rebellion of 1810 that broke Spanish rule and gave birth to independent Mexico.

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<sup>12</sup> VILLORO, supra note 5 at 65. Author’s translation.

<sup>13</sup> Both quoted by supra note 5 at 68. Author’s translations.

<sup>14</sup> Literally “dolores” means “pains” in Spanish, so a more fitting name, The Shout of Pains, could not have been found.

The legitimacy of insurgency was presented in contrast with the illegitimacy of government, which had broken the law. According to this narrative, it was the *interested* disruption of the legal order that triggered insurgency. According to Villoro, the result of the suppression of the *ayuntamiento's* claim to safe-guard and exercise sovereignty was not only the sense of the illegitimacy of the resulting government, but an incipient liberation of the *criollos* from bonds of Spanish law, now understood as *instrument* of the economic interests of the *peninsulares*.<sup>15</sup>

Yet the ideas that inspired the events of 1808 differed much from the experience of 1910. During the events of 1808, the proposals and claims of the *criollos* voiced by the *ayuntamiento* were rather orthodox. Speaking of the “civil” death of the King and successor, council member Juan Francisco Azcárate held that:

By their absence or impediment sovereignty resides represented in the whole Kingdom, and in the classes that constitute it, and more specifically in the superior Tribunals that govern it, administer justice and in the bodies that carry the public voice, all of whom conserve it [that is, sovereignty] intact, defend it and sustain it as a Holy deposit, so as to give it back, either to the Lord Charles fourth himself, or to his son the Lord Prince of Asturias...<sup>16</sup>

The underlying theory was that “the Nation” had

entrusted [the Kingdom] to his Royal Person only for its better Government... In consequence the abdication neither abolished the natural and legal incapacity that all have to give away what is not theirs; nor could it abolish the just right of his Royal descendants to obtain what the Nation gives them in their respective case and turn.<sup>17</sup>

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<sup>15</sup> Villoro, *supra* note 8 at 66.

<sup>16</sup> Acta del Ayuntamiento de México, en la que se declaró se tuviera por insubsistente la abdicación de Carlos IV y Fernando VII hecha a Napoleón: Que se desconozca todo funcionario que venga nombrado de España; Que el Virrey Governe por la Comisión del Ayuntamiento en representación del Virreynato, y otros Artículos, in TENA RAMÍREZ, LEYES FUNDAMENTALES, *op. cit.*, at 14.

<sup>17</sup> *Ibid.* at 13.

This may sound revolutionary to us, but there are precisions to be made. First: sovereignty at this point is not thought of as self-determination but self-government or, more precisely, self-management. That is, the Nation, having recovered its sovereignty cannot reinvent itself, it cannot be something other than what it is. It can simply rule itself.<sup>18</sup> Second: the Nation is conceived as a preexisting entity, composed of estates, communities –both Hispanic and Indian–, towns (*pueblos* –that is towns– as opposed to *el Pueblo* –the People–), guilds, monastic orders, the Church, etc. It is nowhere near the idea that the polity can reinvent itself.

Two years later, Hidalgo’s popular insurgency broke out, what it said was very much akin to what was said in 1808, but what it *did* was radically different. The popular uprising itself was transformative. Villoro interprets Hidalgo’s rebellion as the direct putting into practice of popular sovereignty for the first time, lacking still doctrinal articulation.<sup>19</sup>

Villoro holds that Hidalgo’s rebellion is an exercise of negative liberty, undertaken with “lightness” and in “frenzy” –Hidalgo’s own words-. Accordingly “most of his provisions were of a repealing character”:<sup>20</sup> the abolishment of slavery, the repeal of taxes, the banning of monopolies established by law. For him, it would be José María Morelos, Hidalgo’s unlikely successor and the most successful insurgency leader, to exercise positive liberty and articulate the idea of popular sovereignty and, for the first time, conceive sovereignty as the power of the polity to reinvent itself. But the people –the masses–, not as an abstract idea, but as a presence –a threat, to many– had already erupted into history and, thus, carved a peculiar place for itself in

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<sup>18</sup> VILLORO, supra note 5 at 56. Author’s translation.

<sup>19</sup> VILLORO, supra note 5 at 79. Author’s translation.

<sup>20</sup> Ibid.



the political imagination. This presence -explosive, spontaneous and dangerous- remains a key factor if we are to understand Mexican political -and legal- imagination.

The early experience of Mexico's political independence –Hidalgo's uprising- is relevant to our inquiry for three reasons. First, it is the remote antecedent of an attempt to put into play the idea that sovereignty originally resides in the political community as a whole, not in the King, to whom it was delegated. Second, it sets up a clear precedent of an instance where the semblance of legal authority does not guarantee legitimacy. Third, it made “the people” –as incarnate in Hidalgo's masses– look more like an immediate, tangible reality than a remote, transcendental entity. The first two ideas, put together, allow for the questioning of the legitimacy of government and open the door to direct challenge of authority and the denial of legitimacy to institutional government by popular opinion. The last allows us to imagine *how* government is to be challenged and by whom. Moreover, independence -and with it the end of “*el mal gobierno*”- would take over a decade to become a reality. This means that both the usurpation of sovereignty and the efficacy of illegitimate government can both be prolonged phenomena in historical memory.

On the conceptual side, sovereignty was understood as “national”, not “popular” at this early stage of the insurgency. In the political language of the time, “national”, as opposed to “popular”, referred to the union of the multiplicity of corporations –secular church entities, military, Indian communities, regular Church orders, cities and towns, guilds, lay religious organizations such as co-fraternities, etc.-, conceived as fixed and preexisting, each with its collective preordained representatives. The body politic was imagined as an organism, with

distinct organs playing distinct roles. In contrast, “popular” sovereignty would refer to a community of individuals conforming the polity, on equal standing. The notion of sovereignty would quickly evolve. By 1812, insurgents, labeled sovereignty “popular”, instead of “national”, yet held that it resided –was embodied- in the king.<sup>21</sup> By 1813, the first well-organized insurgent government, under the leadership of Morelos, drafted the first official Declaration of Independence. In it, openly hold that the link to the Spanish crown was “forever dissolved”.<sup>22</sup>

Under the influence and protection of Morelos, the first American (as opposed to peninsular) constitutional text would follow: commonly called the “Constitution of Apatzingán”,<sup>23</sup> it was named after the remote mountain town where it was adopted in 1814.<sup>24</sup> It was not thought of as a permanent Constitution, but rather as establishing a revolutionary government intent on “reintegrating the Nation in the exercise of its august and imprescriptible rights, [so as to] lead it to the glory of independence...”. That is, it was a temporary constitution for the war, not the definitive constitution of government.

The Constitution of Apatzingán defined sovereignty as “the power to dictate laws and establish the form of government most convenient to society” (article 2) and held it to be “by nature” unperishable, indivisible and inalienable (article 3). More importantly, in article 4, it states:

Because government is not instituted for the honor or interest of individuals of any family, for any man or class of men, but for the protection and general security of all citizens,

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<sup>21</sup> Ignacio López Rayón, *Elementos constitucionales* circulados por el Sr. Rayón in TENA RAMÍREZ, op. cit. at 23.

<sup>22</sup> CONGRESO DE ANÁHUAC, *Acta solemne de la declaración de independencia de la América Septentrional* in TENA RAMÍREZ, op. cit., at 31.

<sup>23</sup> Roberto Gargarella, classifies this first Mexican constitution as one of the most clearly radical constitutions. See ROBERTO GARGARELLA, *THE LEGAL FOUNDATIONS OF INEQUALITY* (Cambridge 2010). Interestingly, he holds that the Constitution of 1857, usually identified as liberal, has deep radical strains. As we will see, regarding popular sovereignty and the right to revolution, there certainly is continuity between the constitutions of 1814 and 1857.

<sup>24</sup> CONGRESO DE ANÁHUAC, *Decreto constitucional para la libertad de la América Mexicana*, op. cit., at 32-58.

**willingly united in society, this later has the undeniable right to establish the government that it finds most favorable, to alter it, modify it or abolish it wholly when its happiness so requires.**

Thus, at the very inception of our constitutional tradition, we find explicit reference the “right to revolution”. Moreover, because the text is unusually explicit, we learn much about the right to revolution: *because* government is instituted for the protection of *citizens* united *willingly* in society, society can alter and even abolish government. The political community (“society”) is no longer the Nation –a quasi-natural, almost inalterable *fact*–, but rather a community of equals who, through will, come to be and can become something else if they so choose. Because it is willing individuals, not preordained corporations, that form government, they can abolish it. Because society is the product of the will of individuals, not of nature as manifest in already constituted bodies, it can reinvent itself.

Article 5 continues:

Therefore, sovereignty resides originally in the people, and its exercise in the national representation composed of representatives elected by citizens as established by the constitution.

The language of the constitution of 1814 must be understood in its context: an itinerant Congress in the middle of a full-fledged war with an uncertain outcome drafted it. Moreover, the army behind it was a popular, non-professional, rebel army. It understood itself as continuing the very same uprising of Hidalgo’s masses, but it was now well-organized and better equipped, thought still popular, body. When stating that the people could modify or abolish government, it was not speaking of a hypothetical situation projected into the future or going about an invocation of its own supposed origins, but rather it is speaking of the very real, tangible situation, in which the

members of the insurgent Congress were literally immersed. The right to revolution was being exercised even as it was proclaimed.

Morelos was captured in 1815 and his rebellion dwindled henceforth. In 1821 political Independence was attained, but it was the royal army itself -in an uneasy allegiance with the Church, and the diminished insurgent guerrillas that remained from Hidalgo's and Morelos's uprisings- that proclaimed independence under the leadership of a leading anti-insurgency commander, Augustin de Iturbide, Morelos's nemesis. His army marched, unopposed, under the "Three Guarantees" he proclaimed: Independence, Unity and (Catholic) Religion. Hidalgo's rebellion failed militarily. So did Morelos and the guerrilla leaders who succeeded him. Nevertheless, Hidalgo's exercise in negative liberty is pinpointed at the origin of the nation. Locating the origin of the nation in a failed insurgency, the negative exercise of liberty brings forth the nation. Hidalgo's revolt was, however, not followed by an (successful) exercise of positive liberty: Morelos was defeated; Iturbide would become Emperor in 1822; deposed within the year; he was later executed. In the four decades following independence, the country's territory was dismembered piecemeal –whether by local independence or foreign intervention-, and invaded 4 times by foreign armies.<sup>25</sup>

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<sup>25</sup> Spain in 1829; France in 1838; the U.S. in 1846-47; and finally France again from 1861-1867.

## II. Constitution

“A state that operates under the rule of men, not law, has no unity over time; it is as various as the interests of those who come to rule.”<sup>26</sup>

If the insurgency represents the irruption of the Mexican popular sovereign into existence through the exercise of negative liberty –that is, the destruction of the colonial regime–, then the decades following independence represent the effort to exercise positive liberty by the new sovereign through the establishment of a constitutional order. This effort was largely unsuccessful –at least until the second half of the century. It was also a more moderate exercise in sovereignty, in so far as it did not seek to remake the political community so much as reorganize it while preserving what was perceived as the core constituent element that unified the country: Catholicism. For the proponents of building the newly independent polity as a “Catholic Nation”, the political community was imagined as overlapping with -and stemming from- the religious community, the *corpus mysticum* of the faithful united in the Eucharist.<sup>27</sup>

The radical understanding of sovereignty of 1814 as “popular” and directly exercised through revolution would be much tempered in the decades following independence. After a short-lived Empire, Congress adopted a federalist constitution in 1824. It established that sovereignty resided in the Nation, not in “the people”.<sup>28</sup> The idea of what the Nation was and who embodied it had changed since 1808 and was now associated with elected bodies (elected through indirect, limited elections), rather than with traditional representations of corporations, estates, guilds or

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<sup>26</sup> KAHN, PUTTING LIBERALISM... supra note 5 at 265

<sup>27</sup> BRIAN CONNAUGHTON, ENTRE LA VOZ DE DIOS Y EL LLAMADO DE LA PATRIA (FCE 2010), chapters V and IX.

<sup>28</sup> Article 3 of the ACTA CONSTITUTIVA DE LA FEDERACIÓN that preceded the Constitution. TENA RAMÍREZ, op. cit., at 154.

classes. For decades “the people” would no longer be the locus sovereignty in our constitutional texts, but rather an intermediate but undefined entity: the Nation.

Importantly, the constitution of 1824 established that the Catholic religion as the official religion, division of powers and the federalist structure of government were un-modifiable (article 171). That sovereignty itself was partially, but rigidly, restricted for future generations harks back to the understanding of government as management rather than full-fledged self-determination. For its part, the establishment of Catholicism to the exclusion of all other religions, drew on a long-standing and widely-accepted notion that understood Catholicism as simultaneously the unifying element in a large, disperse and segregated society and thus the foundation of its national identity, and the notion that Mexico (New Spain beforehand) had a transcendental mission to defend Catholicism and establish a political community where it was duly followed.

With these three features –“national” sovereignty, religious intolerance, and constitutional rigidity- the idea of popular sovereignty as legitimately being exercised in the form of revolution, were suppressed from constitutional texts following independence. Catholicism and religious intolerance would remain a central themes in political discourse in the decades to come, slowly evolving from being the thin base of a broad but unstable coalition on what was to be the new nation’s identity, to becoming the symbolic core of a full-fledged civil war as the role of the Church was debated and increasingly questioned during the 1850s and 60s. The two, centralist, constitutions that subsequently replaced the federal constitution of 1824 (in 1835-6 and 1843) spoke of a sovereign Nation, not people, and preserved religious intolerance and official Catholicism.

The period following independence -from 1821 to 1867- was marked by political instability, military coups, foreign interventions and, finally, a full-fledged civil war in 1858-1860 that would transform into the French Intervention of 1862-1867. During this period, constitutions would be increasingly short-lived and Mexico underwent a process of territorial contraction, imposed both from internal and external actors. Central America, including Chiapas, seceded in 1822 (Chiapas would return in 1823-24). The state of Zacatecas and the territory of Texas proclaimed independence in 1835 with the suppression of the federal regime (Zacatecas was repressed and forced to rejoin that same year). Yucatán would declare independence twice, in 1841 and 1847, but voluntarily rejoined, in the midst of a massive Mayan uprising that threatened to ethnically cleanse the territory of white *criollos*, and would lead to a *de facto* independent Mayan theocracy on the western coast of Yucatán, only gradually reclaimed at the turn of the century, at the cost of recognizing British possession of Belize. Finally, California and New Mexico would be occupied and annexed by the United States in 1848, after a military defeat that called into question the viability of the country itself. In 1850, two years after the U.S. withdrew its troops and severed the northern territories, in the official speech delivered in the port of Veracruz commemorating independence, José Ignacio Esteva claimed that

Independence imposed upon us the duty to organize ourselves, *to constitute ourselves*; and that is the task still pending; although we've attempted many times, we have not yet achieved it.<sup>29</sup>

The first three decades of independence are relevant for at least two reasons. First, they represent a failure to successfully establish a stable, constitutional government and retain the physical

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<sup>29</sup> José Ignacio Esteva, Discurso pronunciado en la plaza principal de la H. Veracruz, el 16 de setiembre de 1850, aniversario de la independencia nacional, por el ciudadano José Ignacion Esteva, comisionado al efecto por la Junta Patriótica, Imprenta del Comercio, Veracruz, 1850 quoted in CONNAUGHTON, *supra* 27 at 127.

(territorial) integrity of the “fatherland”. Second, they reflect a timid understanding of sovereignty that looks back to “management” and shies away from self-determination. This is linked to a conception where national identity –understood as anchored in Catholicism- was taken to precede (and survive the failures of) political constitution, both historically and conceptually. That is, Mexico *was*, even though it failed to establish *what* it was. In the midst of territorial contraction and foreign invasions, the concern was increasingly whether it would continue to be.

This failure spurred the liberal party to push aggressively for a substantive transformation of Mexican society. At the core of this transformation, was an attempt to redefine the role of the Church and of religion. In 1854 it called forth an armed revolution that, unlike the coups of the first four decades, would lead to a major civil war and, finally a stable (though largely ineffective) constitutional regime. This military enterprise, and the political refurbishing of the state that followed are known as the Reform.

It was the Reform that produced the constitution of 1857, and brought back the language of popular sovereignty into the constitutional texts, including “the right to revolution”. The Reform targeted religious intolerance and corporate property, that is, Church property.<sup>30</sup> Liberals had for some time made the Church as an institution –not religion itself, or Catholicism in particular- the target of its criticisms, and had gained support among broader segments of society.<sup>31</sup> Once

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<sup>30</sup> The two main owners of corporate property were Indian townships and, more importantly in terms of value and concentration, the Church.

<sup>31</sup> See CONNAUGHTON, *supra* 27 especially chapters XI, XVI and XVII.



successful, reformers produced a liberal Constitution with radical undertones<sup>32</sup> and prevailed on the battlefield in a full-blown civil war with the conservative party between 1858 and 1860. Finally, they successfully resisted the French Invasion of 1862-1867.

The Reform and its constitution are particularly important for many reasons. To begin, the current constitutional regime claims continuity from it: the constitution of 1917, still in force, was originally conceived as a bulk of amendments to the 1857 constitution; moreover, legislatures -we are currently on the 61st- count back to the first legislature of the 1857 regime. More importantly, it sought to –and in many ways did– radically transform Mexican society by separating Church and State, abolishing special regimes; most notably, the privileges of the Church and the prerogatives of Indian towns, the two most persistent surviving colonial corporations. After the Reform prevailed in both battle and government, Mexico's elite fully embraced the project of building a modern, industrial society –as opposed to a traditional, agrarian and, in more than one way, medieval aggregate of communities under a common crown– that Mexico has been becoming ever since. For the first time since Morelos, reformers were attempting to exercise sovereignty as self-determination, not just management. The text constitution of 1857 itself was moderate in terms of established religion. It did not dare openly declare a fundamental right to freedom of religion, but for the first time it omitted direct and explicit establishment of the Catholic as the state religion and the consecration of religious intolerance into the Constitution.

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<sup>32</sup> According to Gargarella's typology, see *supra* note 23.

It was far less moderate regarding sovereignty. It established article 39, quoted in the introduction, as it remains to date. The language used in the text, quoted in the introductory lines to this paper, seems a compromise between the notions of popular and national sovereignty: “National sovereignty resides essentially and originally in the people”. Although the language speaks of *national* sovereignty, it is clear that the locus of sovereignty is the people, not an intermediate body. The incorporation of “national” seems more a rhetorical compromise than a political stance, an appeal to identity, not a dictum on power.

On the closing sentence of article 39, which speaks of the “inalienable right to alter or modify the form of government” (henceforth, the Right to Revolution Clause) a revealing discussion took place. A congressman requested that the text explicitly state that the people needed to exercise this right *through* its legitimate representatives –that is, the elected, representative bodies as established in the constitution itself. This proposal was answered by the President of Congress (and leader of its radical liberal party) Ponciano Arriaga, who held that “the people, in exercising its right to petition and participating in public business, could itself reform the laws.”<sup>33</sup> Following up on Arriaga’s answer, congressman Mata explained that the proposed drafting of article 125, which determined the procedure for amending the Constitution, required amendments be subjected to the people *after* approval by Congress in the next congressional election.<sup>34</sup> With that, the article was approved.

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<sup>33</sup> Zarco, *supra* note 27 at 575. See note 2.

<sup>34</sup> The proposed article 125 established a complex reform mechanism, which required five steps for ratification including subjection to a vote in the following election. Comisión de Constitución, Proyecto de Constitución. Dictamen de la Comisión in TENA RAMÍREZ, *op. cit.*, at 572.

Arriaga argued for direct intervention through petition; Mata referred to the proposed amendment procedure that subjected amendments to ratification in two elections. In both cases, the participation of “the people” in constitutional amendments is imagined as direct, and so they both make sense out of the Right to Revolution Clause. Yet both have very different implications. Arriaga’s interpretation of the people’s participation is largely *unregulated*. We can read into it that “the people” must activate the amendment process directly in the exercise of the right to petition, but he does not say as much. Rather, his language (that “the people... could itself reform the laws”) points to a direct exercise of sovereignty. Mata’s argument is far less radical: he imagines a *regulated*, direct participation of the people, through an amendment process.

In the end, Mata’s argument was rendered moot: the proposed amendment procedure was not approved; instead, a far simpler amendment procedure (still in force) that excluded direct appeal to the people, was adopted: Congress should approve amendments with a two thirds majority, followed by a simple majority of local congresses ratifying it. And so, the people’s direct participation in amending the constitution and thus exercising the “inalienable” Right to Revolution is either moot or, as Arriaga proposed, unregulated.

As in the war of independence, during the Reform we learn what to make of popular sovereignty more by concrete experience than by proclaimed law.<sup>35</sup> When the liberals succeeded in the field of battle, elections were called for to renew government and bring it out of the state of emergency, into constitutional regularity. The government, headed by Benito Juárez, taking the

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<sup>35</sup> In many ways, it could not be otherwise. See PAUL KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (Columbia University Press 2011) chapter 1.

opportunity of elections being held, called forth “the people” as sovereign: bypassing the constitutionally established amendment procedure, he submitted a number of amendments to the electorate for it to “authorize” the newly elected Congress to carry them out. These amendments were not insignificant; they substantially undercut congressional powers and strengthened the executive branch.<sup>36</sup>

In justifying the direct appeal to the people, the government explicitly invoked article 39 stating:

If the Constitution itself recognizes, for it couldn't do otherwise, that the free will of the people can always essentially change even the form of government, it would be absurd for some to invest such fervor in not modifying the Constitution at all, that they intend to deny the people the right to authorize the coming Congress to amend it in specific points. The nation has approved that amendments to the Constitution be made, without subjecting them before or after to the requirements demanded by the Constitution for amendment. [...] the government... has limited itself to appealing to the people, the one and only sovereign.<sup>37</sup>

In attempting to bypass the constitution, the government invoked the Right to Revolution Clause and referred *other cases* in which the amendment process had been omitted. In doing so, it made the popular sovereign tangible, located it within hands' reach. In the end, the attempt failed when some of the other constituted bodies did not fully cooperate in bypassing the amendment procedure.<sup>38</sup> After ten years of existence, most of which had been suspended under generous emergency powers granted to Juárez, the text of Constitution would not be sidestepped that easily.

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<sup>36</sup> They included the creation of a second chamber of Congress, enlargement of the President's veto powers, and limitations on the calling forth of extraordinary sessions of Congress. The amendments would have moved the constitution away from radical constitutionalism and closer to liberal constitutionalism, in Gargarella's typology. See *supra* note 22.

<sup>37</sup> H. CÁMARA DE DIPUTADOS, DERECHOS DEL PUEBLO MEXICANO. MÉXICO A TRAVÉS DE SUS CONSTITUCIONES, Tomo VI (Miguel Ángel Porrúa 1994) at 79.

<sup>38</sup> Some states published the call for referendum, others did so only partially, still others refused to publish it at all.

Even if unsuccessful, the attempt ratified the possibility of direct, immediate appeal to the people, at least in the political imagination. More importantly, it made it clear that the government considered “the people” to be present, in the electorate, capable of making a decision if called upon. “The People” is thus imagined as a standing entity, always within reach, always present, always capable of being called forth. The opposition to the attempt at a referendum did not deny this, it merely demanded that consultation be done *according to the constitution*. But no one questioned that The People were present, and that it could manifest itself through elections, constitutional or otherwise. Article 39, including the Right to Revolution Clause, would transit intact into the constitution of 1917.

The Constitution of 1857 prevailed but would remain largely unenforced. Until 1867, the country was formally in a state of emergency. Almost immediately upon reestablishment of constitutional normality, the legality of government and elections came under question –both politically and militarily- (although the liberal, constitutional regime was not). More importantly, the stable, modernizing, liberal regime that formally ruled under the 1857 Constitution from 1876 through 1910, quickly evolved into a *de facto* dictatorship, operated through a delicate web of local, regional and national networks of personal and political nature (military and police repression, were called upon when needed) that converged in president Porfirio Díaz, (1876 to 1880 and 1884 through 1911).

### III. Revolution

“The state is not a transitional moment in a move towards something else...”<sup>39</sup>

The Revolution of 1910, the narrative goes, began by interrupting the longest running period of government stability in Mexican history and achieved an institutional –though not technically “constitutional”- arrangement which would last, substantially unmodified, into the 21st century. At its start its claims were moderate: that elections be free, not simulated; that the constitution of 1857 be complied with, not revered while being transgressed. The rebellion was aimed, specifically, against Porfirio Diaz’s 1910 reelection (he had been reelected 7 times since 1876). The opposition leader, Francisco Madero, in calling for armed rebellion, claimed -as the *ayuntamiento* in 1810- to be defending legality against a government unwilling to comply with its own laws:

... the Mexican People have protested against the illegality of the most recent elections, and wanting to exhaust successively all resources offered by the laws of the Republic, in proper manner, it petitioned the House of Representatives for the annulment of the elections.... Under these conditions, the people, who is the only sovereign, also protested energetically against these elections in imposing public meetings throughout the Republic... This violent and illegal situation cannot continue.<sup>40</sup>

Like the Hidalgo rebellion a century earlier, Madero unleashed discontents that it could not fully grasp, let alone articulate. And so, again, experience would preempt theory, this time producing an ongoing, transformative, and transcendent Revolution. Or so the official narrative went.

A complex, contrasting coalition of peasant armies, armed workers, intellectuals and professional soldiers emerged from the convulted civil conflict to enact a cluster of amendments to the constitution, which was so transformed it is deemed a different document altogether. The new

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<sup>39</sup> KAHN, PUTTING LIBERALISM... supra note 5 at 277.

<sup>40</sup> Francisco I. Madero, Plan de San Luis Potosí, in TENA RAMÍREZ, op. cit., at 732.

constitution of 1917 incorporated key demands of the revolutionary armies, notably a project for substantive land reform, national ownership of mineral wealth (including oil), and labor rights such as minimum wage and maximum work-hours. This would be hailed as the first constitutional consecration of social rights (anteceding the Soviet revolution), making Mexico the vanguard of the emancipation of the exploited underclasses.

A decade later, political instability remained. By 1928 most revolutionary leaders had met untimely deaths –Madero, Zapata, Carranza, Villa, Obregón, to name the most salient– or were exiled –former president Adolfo de la Huerta and ideologue José Vasconcelos among them-. After revolutionary hero and President elect Álvaro Obregón was assassinated, rule by personal charisma seemed exhausted. Outgoing president, Plutarco Elías Calles, transferred power to an interim president and soon after called for the unification of all revolutionary leaders under one party, the National Revolutionary Party (PNR), founded in 1929. The central purpose was to bring the revolution into institutional –though not necessarily constitutional- channels. Calles would eventually be exiled too, but the party he founded was to sweep most elections for most offices for most of the 20th century, most often without need to recur to electoral fraud, but willing and capable of doing so when needed. From 1946 on, the party took up the name of the Institutional Revolutionary Party, or PRI.

Throughout the period, the constitution was held as a symbol of the promises of the Revolution, but its key aspects –except for a ban on reelection which was reinstated in 1929 and extended to all elected offices- went unenforced. Social rights were read as *programmatic* norms, not

enforceable rights by the judiciary throughout the 20<sup>th</sup> century and early 21<sup>st</sup> century.<sup>41</sup> Much land was redistributed (especially during the 30's) and workers rights were enhanced, but mostly through unilateral administrative decisions or political negotiations in which legal decisions formalized prior political negotiations and agreements. Legislation regarding the separation of Church and State and a ban on religious education were openly disregarded, as long as the Church did not openly participate in politics. Of the four key contributions of the Constitution of 1917, only the ban on reelection (after Obregón's assassination) and national ownership of the oil industry (after expropriation of foreign companies in 1838) were strictly enforced.

It should be apparent that the events referred to as the Revolution were anything but a linear, clearly oriented process; its protagonists were at war with each other more often than not, and could hardly be expected to construct a single narrative. Yet that is exactly what resulted: an enduring narrative, involving all of Mexican history, both past and present, where the the Revolution is not only unified, but ongoing.

*La Revolución* emerged as successive official memories in a process not unlike geologic formation: an uneven sedimentation of memory, myth and history. It was named, historicized, and reified quite early on.<sup>42</sup>

Porfirio Díaz's regime constructed a historical narrative in which the nation had been built through two successive revolutions: Independence and Reform. In this narrative, the Díaz regime was the successor of the latter. The revolutionaries under Madero adopted and revised this

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<sup>41</sup> They would not be deemed justiciable until 2011, when a slight majority of 6 out of 11 Justices reverted the doctrine of non-justiciability. Pleno de la Suprema Corte de Justicia de la Nación, Amparo en Revisión 315/2010. The precedent, however, is not binding on lower courts until 4 alike cases ratify the criteria.

<sup>42</sup> THOMAS BENJAMIN, *LA REVOLUCIÓN. MEXICO'S GREAT REVOLUTION AS MEMORY, MYTH AND HISTORY* (Kindle edition) (University of Texas Press 2000) at location 281.



master narrative, adapting it so as to interpret Diaz's regime as a hiatus of oppression that had been duly extirpated:

...*la Revolución* was historicized: it was portrayed as the third stage of an ongoing revolutionary tradition that began with the Insurgency of 1810 and continued with the Reform of the mid-to-late 1850's.<sup>43</sup>

Madero's followers interpreted his revolution as the culmination of the revolutionary tradition uniting Insurgency and Reform, but would have the Revolution stop with his success.<sup>44</sup> This quickly became a problem for the revolutionaries who soon after revolted against Madero. *They* needed to separate the revolution from Madero and his administration, and so the revolution became a thing in itself, it became The Revolution:

... *la Revolución* was reified: it was presented as an autonomous force of nature or history destined to transform Mexico regardless of Madero's mistakes and conservatism and despite the machinations of "reactionaries" pitted against it. In this way, revolutionaries disenchanted with or opposed to Madero justified their actions and rallied their supporters. These enhancements transformed an evocative but multivalent concept into a myth.<sup>45</sup>

The issue was still unresolved, however: that revolutionaries, both those disenchanted with Madero and his loyal followers faced a similar problem in turn. When each in turn came to power, their claims echoed Madero's claim: the revolution extended back to incorporate Independence and Reform, but culminated and ceased upon the corresponding leader's anointment. The solution that emerged –with the institutionalization of revolutionary leadership in the National Revolutionary Party founded by Calles in 1929- was continuity, a Revolution that extended indefinitely into the future. A Revolution, however, is a struggle, so revolutionary discourse needed something to struggle with indefinitely: a Counterrevolution; at the very least, a latent one.

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<sup>43</sup> BENJAMIN, supra note 42 at location 486.

<sup>44</sup> "After May 1911, Madero spoke of "the revolution" as an event of the past, something closed and concluded". BENJAMIN, supra note 35 at location 515.

<sup>45</sup> BENJAMIN, supra note 42 at location 488.

Revolutionaries not only reified *la Revolución* but also its historical nemesis: *la Reacción*. In revolutionary discourse the Reaction survived the fall of the dictatorship in May 1911 and embarked upon a counterrevolution.<sup>46</sup>

Thus, reification of both the Revolution and the Reaction allowed not only for indefinite continuation, but also for deeper legitimation: detached from individual leaders, the Revolution could continue, but it could also come to be identified with the People itself.

As government gradually stabilized in the late 1920's

*la Revolución* was transformed into government (“*la Revolución hecha gobierno*”) and was thus perceived as permanent and ongoing. Second, *la Revolución* was unified by a “revolutionary family” in which feuds would be forgotten if not entirely forgiven.<sup>47</sup>

Springing from a revolutionary tradition stretching back to Independence and Reform; facing an ever-lurking enemy –the Reaction– which, although defeated, still threatened; the Revolution – the People in arms– was transformed into be government, and was carried on, indefinitely. Through the exercise of government, it built and came to be incarnate in institutions.

Furthermore, because the Revolution, having become detached from its charismatic, individual leaders, *came to be* “the People in arms”, and then became government, so did “the People”. The People became incarnate in institutions, the Party first and foremost, for it was through it that government was consistently renewed to fuel the continuation of the Revolution. The National Revolutionary Party and its successors -the Party of the Mexican Revolution (PRM, after 1938) and the Institutional Revolutionary Party (PRI, after 1946)- were the vehicle enabling the People to govern. The foundational documents of the Party reflect both the ongoing character of the

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<sup>46</sup> BENJAMIN, *supra* note 42 at location 530.

<sup>47</sup> BENJAMIN, *supra* note 42 at location 820.

Revolution and point to its identification with the People. At its foundation, the Party's fourth (of five) stated principles affirmed:

The National Revolutionary Party declares that when the armed struggle of the Revolution has come to pass and its ideology has become rooted in the national conscience, those governments sprung from the political action of the Party shall dedicate their better energies to national reconstruction, continuing the work that revolutionary administrations have already vigorously developed.<sup>48</sup>

The Party became the vehicle of the trans-generational project of an ongoing Revolution.

Finally, the Declaration of Principles of both the Party of the Mexican Revolution of 1938 and the Institutional Revolutionary Party of 1946 include, as their second principle, the following:

Declares that **all the conquests achieved by our social movement are the result of the permanent struggle of the people**, in its eagerness to better its own economic and cultural conditions, and to organize human interaction on the indestructible base of social justice.<sup>49</sup>

The work of the Party is the work of the People; the People manifests itself through government, because it is monopolized by the Party... for the Party is the continuation of the Revolution, moving from its armed phase to its institutional phase. People-Revolution-Party-Government come to be conflated full circle. It is ever-present, ever-governing and indefinitely on-going.

Eventually, the revolutionary discourse of the PRI was tuned down through the 80's and, especially, the 90's, when neoliberal economic orthodoxy displaced revolutionary nationalism as the key government project. After the violent repression of student protests in 1968, intellectuals broadly came to question the continuous legitimacy of the Revolution and the governments claim

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<sup>48</sup> Declaración de Principios del Partido Nacional Revolucionario in PNR, PRM, PRI. ACTAS CONSTITUTIVAS. DOCUMENTOS BÁSICOS (Partido Revolucionario Institucional 1991) at 16.

<sup>49</sup> Declaración de principios y programa de acción del Partido de la Revolución Mexicana and Declaración de principios y programa de acción del Partido de la Revolución Mexicana, both in PNR, PRM, PRI. ACTAS CONSTITUTIVAS. DOCUMENTOS BÁSICOS (Partido Revolucionario Institucional 1991) at 377 and 477 respectively.

to incarnate it. The political opposition to the PRI successful argued that democracy *required* alternation in government, and so the Party of the Revolution would have to step down if government was to be legitimate. Eventually, this led to the PRI's electoral defeat 2000.

We are still living within the boundaries of legal and political imagination, as well as the constitutional and institutional edifice, built by The Revolution made government. Moreover, national identity is firmly engrained in the nationalistic, race-blind narrative the revolutionary governments built, in which resistance is measure of valor.

#### **IV. The Right to Revolution: Popular Sovereignty, Revolution and the Fragility of the Rule of Law**

So where does this leave us? There are two, related points that I want to make. First, that the path sovereignty, constitution and revolution have followed in the development Mexican political and legal culture result in the autonomy of the political playing out differently in Mexico as it does, for example, in the United States. Second, that the relationships between Revolution and Constitution –the negative and positive exercises of sovereignty- set up an unstable relation between law and politics, which is not a very nurturing context for the practice of the rule of law.

*THE AUTONOMY OF THE POLITICAL AND THE SUBORDINATION OF LAW TO POLITICS*

Mexico shares with other “modern Western states”<sup>50</sup> the “autonomy of the political”<sup>51</sup>, that is, the self-referential character of the state as a frame of meaning. In *Putting Liberalism in Its Place*, Paul Kahn dissects, and so explains, the autonomy of the political by drawing on the Aristotelian four causes, asking the questions: what brought the state into being? (efficient cause); what principle of order signifies the state? (formal cause); what is the state made of? (material cause) and what end is pursued by the state? (final cause). Kahn’s answers refer to the modern nation-state, any modern nation-state, but are explicitly modeled after the experience of the United States as the paradigmatic Nation-State.<sup>52</sup> Asking these same from the Mexican experience we may gain insight into the architecture of Mexican political imagination.

Kahn identifies revolution as the efficient cause of the Nation-State; constitution as both its formal cause and its final cause; and the citizen’s body as its material cause. In the following paragraphs, I will engage the questions of the efficient, formal and final causes in the Mexican experience and argue that the answers differ from Kahn’s model Nation-State inspired on the United States.<sup>53</sup>

As to the efficient cause of the state, Mexico fits with Kahn’s model: it is revolution that brings it into being. That is, it is the popular sovereign manifesting itself in an exercise of negative liberty

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<sup>50</sup> KAHN, PUTTING LIBERALISM... *supra* note 5 at 259. Kahn speaks of “modern Western states –as well as those that model themselves on the West...”. Making the case that Mexico is forcefully and unsuccessfully modeled on the Western ideals, *see* GUILLERMO BONFIL BATALLA, MÉXICO PROFUNDO (1987).

<sup>51</sup> The belief that the state is its own efficient, formal, material and final cause. *See* KAHN, PUTTING LIBERALISM... *supra* note 5 at chapter 6.

<sup>52</sup> KAHN, PUTTING LIBERALISM... *supra* note 5 at 261-2.

<sup>53</sup> I do not engage the question of the material cause not because I don’t think it important. On the contrary, I believe that there too the answer differs from Kahn’s and that this difference has important consequences. The length and focus of this paper (in trying to understand the instability deriving from the relations between law and revolution in Mexico) and the complexity of engaging the notions of sacrifice and death in Mexican history and imagination keep me from engaging the matter here and choosing to leave it for later elaboration.

that destroys the *ancien régime* and brings forth the state. It is in answering the questions of what are the formal and final causes of the state that clearly Mexico drifts away from the model Nation-State. Kahn sees constitution as the formal cause of the state, and “constitutionalism without end” as its final cause. Kahn’s identification of formal and final cause is fitting with Aristotelian understanding of natural objects.<sup>54</sup> It makes sense that both the *modern* state and the naturally occurring object –say, a tiger-, being ends in themselves, not instrumental to other ends, have a final cause that consists in projecting their formal causes indefinitely into the future.

The Mexican experience, however, does not fit the mold. As we’ve seen, the exercise of positive liberty by the popular sovereign in Mexico looked, for decades, as a failure from any angle (military, economic, political). Eventually, a formal constitution –that of 1857- was stabilized, though largely ineffective. Whether it is the Constitution of 1857 (and its successor/continuation of 1917) that formally ordered the state occupies the place the formal cause of the Mexican state or rather the system of patronage networks that the Diaz regime (through personal relations), first, and the PRI regime, later (through institutional relations) is debatable. But in either case, Mexico has had a constitution –whether formal or informal- that structures its political and legal life. It is not the rule of law that has informed the Mexican polity, but maybe the rule of men (or maybe even a “rule of institutions” –government agencies, parties, unions, etc.-) which somehow harks back to the corporate organization of the “Nation” during colonial times.

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<sup>54</sup> In Aristotelian thought there was a difference between natural things and man made things in how the substantial form or formal cause related to the final cause of a thing. For Aristotle the final cause of naturally occurring things and their formal cause (or substantive form) were the same thing; regarding crafted or man-made things, on the contrary, the final cause and the formal cause were two different things. see RICHARD BODÉÜS, Aristotle in RICHARD H. POPKIN, THE COLUMBIA HISTORY OF WESTERN PHILOSOPHY (ed.) (1999) at 65.

What is most relevant, however, is that, for Mexico, the final cause of the state does not seem to be “Constitutionalism without end”, but rather “Revolution without end”, the ongoing Revolution. I propose that the Mexican state projects not its formal cause (constitution) as its purpose (final cause), but rather it projects its efficient cause (revolution)<sup>55</sup>. If this is so, then, for Mexico at least, the quote that opens section III of this chapter is wrong: in Mexico, the state *is* a (permanent) transition towards something else: whether that “something else” be the fulfillment of the promises of Revolution –be it a democratic polity or the fulfillment of social rights established, both *programmatic norms* established in the text of 1917 and long pushed recurrently into the future.<sup>56</sup> It is not the trans-generational continuation of the rule of law –the constitutional democracy it claims to be- that the Mexican state seeks, but the continuation of revolution as a way of resisting –or escaping- oppression or, worse still, disappearance.

It is here that the Right to Revolution Clause is most illuminating. In establishing “the People”’s inalienable right to redefine itself –to alter the polity’s organizing principles-, the constitutional tradition stretching back to 1814, has brought the efficient cause into the formal cause of the state. Because revolution is the quintessential exercise of sovereignty, it marginalizes the rest of the ordering principles, always subject to the possibility alteration by a readily-at-hand popular sovereign. Because the Right to Revolution can be appropriated by anyone claiming to speak for or to the popular sovereignty, it must be appropriated also by government and thus undermines the idea of government as management under a rule of law. Revolution –and because of it, the

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<sup>55</sup> Although it is certainly not fitting with Aristotelian methodology.

<sup>56</sup> And if so, this may reflect the millenarist zeal stretching back to Franciscan evangelical zeal of the Conquest and reappearing in the dream of a truer Catholic nation in the early insurgency and early independent years.

popular sovereign- stands not only at the beginning and the end of the life of state, but everywhere in between.

The political is autonomous in the case of Mexico, but it is also collapsed into its purest sovereign form –revolution-, and so it overwhelms its more tame manifestation, the legal. And so law is subordinate to politics, continuously, not only when politics breaks free in the form of a (localized) revolution.

At the very least, the architecture of this political imagination leaves us with an uneasy relationship between law and politics.<sup>57</sup> In Mexico the sovereign either does not successfully speak a Constitution into being –as in the first half of the 19<sup>th</sup> century- or, if it does, it does not recede –as in 1867 or throughout the 20<sup>th</sup> century. The People remain present and, moreover, become incarnate in the Party/Government.<sup>58</sup> The Constitution cannot rule if the Sovereign is ever present. It is a superfluous presence. How can the Constitution bind the Sovereign? Not under the radical understanding of popular sovereignty that results from our constitutional history. Political action, when carried out by the institutions that incarnate the sovereign, is thus ultimately unrestrained. If it is faced with a legal obstacles -even constitutional ones-, the obstacles are to be removed.

But the vulnerability of law before political action does not concern only a government that (still) presumes it incarnates the Sovereign. If the sovereign is ever-present and readily hand; if

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<sup>57</sup> See Alejandro Madrazo, *Estado de derecho y cultura jurídica en México*, ISONOMÍA no. 17, October of 2002.

<sup>58</sup> This, of course, is problematic today, when the government is headed by the party associated with The Reaction. Yet no alternative narrative has successfully been offered.



historical experience tells us that the people can either burst out or be called upon through no determinate path (not necessarily one established in then constitution), then rhetoric of popular sovereignty can hardly remain the government's monopoly; opposition too will lay a claim to it.

This is again where the Right to Revolution comes into play. Opposition can challenge the government, while remaining loyal to the Sovereign, as did the *ayuntamiento* of 1808. It can do so violently and radically, as Hidalgo's mob did. Opposition can call upon article 39 of the constitution so as to call for the establishment of a new constitution. And this is what we have seen happen thrice in two decades.

The "transition to democracy" that became tangible when the PRI lost the Presidency has not produced a driving historical narrative. The discourse of government since has focused on the virtues of democracy, understood in its minimal expression as free, competitive elections. Not being able to renounce The Revolution and its centrality to Mexican national identity, the PAN governments -the party historically linked to The Reaction in the revolutionary narrative- have downplayed the revolutionary origins of the constitution under which they rule, exalted Madero's limited electoral concerns as the key inheritance of The Revolution, but they have not been able to offer a dense, alternative narrative to capture the collective imagination of Mexicans. Socially conservative, they can at most move toward a liberal discourse, but liberalism has not historically engendered identity by itself in Mexico. And here, they fail where Kahn tells us liberal theory fails: "They are likely to see popular sovereignty as a voting mechanism, rather than as an expression of a faith in a transtemporal, plural subject".<sup>59</sup>

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<sup>59</sup> PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* (Princeton University Press 2005) at 152.

But Mexican identity and commitment to the transtemporal polity, was not forged in the deployment of reason, not in the procedural exercise of participating in elections; rather, it was forged through the existential experience of violent, massive revolt; it was built on sacrifice of both self and foe in acts of resistance. Neither the Federal Electoral Institute nor Civil Society can incarnate the popular sovereign. The People, present in the *Grito de Dolores* and in the killing fields of The Revolution, does not discursively or electorally manifest itself. Communion comes through the experience of uprising or resistance:

The revolutionary explosion is a marvelous feast in which the Mexican, drunk with himself, discovers at last, in a mortal embrace, the other Mexican.<sup>60</sup>

A present sovereign may not provide a solid foundation for building the rule of law, but it is fertile ground for capturing the collective imaginationsss to think it is possible to correct social injustice and growing inequality in what is still a post-colonial country in more than one way.

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<sup>60</sup> PAZ, supra note 26 at 180.