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# From “Institutional” to “Structural” Corruption: Rethinking Accountability in a World of Public-Private Partnerships

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by Irma E. Sandoval-Ballesteros  
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## Abstract

This paper invites us to radically rethink the concept of accountability and to design new solutions to the problem of corruption. It identifies and critiques both the “public-sector” and the “modernizationist” biases which characterize dominant approaches to the study of corruption. It maintains that corruption is a matter of political domination, structural impunity (especially for the private sector) and social disempowerment. The fundamental remedy, therefore, lies in significant doses of civic and economic democracy. The paper offers a new “structural” approach to corruption as well as a new “democratic-expansive” understanding of transparency. These approaches are particularly important in the wake of the generalization of Public–Private Partnerships throughout the developing world. The important achievements in recent decades with regard to the transparency and oversight of government entities are being eclipsed by the opacity under which the private sector carries out its new public responsibilities. The heuristic devices developed in this paper will help to better understand how the new “structural pluralism” of public authority presents unique challenges for accountability, transparency and democracy.

Keywords:

Accountability, transparency, democracy, institutional corruption, structural corruption

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## Introduction

Most work on corruption is undergirded by two problematic assumptions. First, a public-sector bias in which the state is seen to be the principal site of inefficiency, inefficacy and waste. From this perspective, corruption is equated with the bribery of or extortion by a public agent, elected official or politician. Second, a “modernizationist” approach to the relationship between corruption and the economic and cultural spheres. Here, corruption is seen to be principally caused by underdevelopment, state control over the economy, and a lack of a so-called “culture of legality.” These two assumptions together have generated a widespread consensus that the cure-all for corruption in the developing world is to strengthen bureaucracies, enhance market incentives and educate societies so as to quickly ascend to the pinnacle of Transparency International’s Corruption Perception Index (CPI).

The present essay argues that the above two assumptions are intimately intertwined and that both, individually and together, miss the mark. As a result, we need to radically rethink our approach to accountability as well as design new solutions to the problem of corruption. Specifically, I will argue that corruption is a matter of political domination, structural impunity (especially for the private sector) and social disempowerment. Its fundamental remedy therefore lies in significant doses of civic and economic democracy.

The most important corruption problems are at the top, not the bottom. Corruption is not just a question of low-level public servants filling their pockets at the expense of common citizens. Nor is the combat of corruption principally an issue of reeducation or “cultural transformation.” Corruption is an institutional and political problem which requires structural solutions. The real corruption problems lie, on the one hand, in the structural capture of the state by private economic interests and, on the other hand, in the pyramidal structure of institutionalized corruption in which bureaucrats are forced to extort citizens by orders of their superiors. In short, the real problem is not inside the state but at the margins of it. And it is important to note that these margins have expanded in recent years as a result of the privatizing trends in the management of public affairs.

Below I will offer a new structural approach to corruption as well as a new “democratic-expansive” approach to transparency. I will argue that these

approaches are particularly important when analyzing countries such as Mexico, which is undergoing economic and political transition, and has an historical legacy of corrupt institutional practices as well as a powerful, oligarchical ruling class.

Corruption comes from and affects the private sector just as much as it does the public sector. Indeed, the study of corruption is an excellent entrance point for questioning the very separation between the “public” and the “private” spheres. One of my central objectives in the present essay is to re-conceptualize the corruption that typically occurs in the public sphere (bribery, favoritism, nepotism, cronyism, and state privileges of various kinds) as intimately intertwined with private and corporate corruption practices (lobbying, money laundering, insider trading, illegal political funding, related-lending, etc.). These private practices are not unwanted side-effects which distort otherwise well-functioning and efficient markets, but rather form a central constitutive element of markets themselves and make up a political backbone for the system as a whole.

Elsewhere I have demonstrated from a diachronic perspective that it is wrong to conceptualize “neoliberalism” in the developing world as an economic orthodoxy with political consequences.<sup>1</sup> Instead, it should be understood as a fundamentally political project with economic redistributive effects. Here I will argue that the same holds when we take a synchronic approach to the relationship between states and markets. In other words, the accountability challenges which arise from private control over public services should be dealt with principally as political problems involving the relationship between state and society, instead of as problems of market failure requiring technical fixes.

This new structural perspective for the study of corruption and transparency is particularly important in the wake of the emergence of new arrangements for public services and responsibilities. Subcontracting, outsourcing, partnerships, joint ventures, public–private partnerships (PPPs), and so on are becoming more common everyday throughout the world. The important achievements in recent decades with regard to the transparency and oversight of government entities are being eclipsed by the opacity under which the private sector carries out its new

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<sup>1</sup> See Irma E. Sandoval-Ballesteros, *Crisis, Rentismo e Intervencionismo Neoliberal en la Banca: México (1982-1999)*, (Centro de Estudios Espinosa Yglesias, 2011).

public responsibilities.<sup>2</sup> There also has been almost total impunity with regard to the spectacular failures of big corporations and financial giants.<sup>3</sup> Seemingly never-ending corporate scandals have systematically contaminated the role of the private sector. The heuristic devices I develop below will help us better understand how the new “structural pluralism”<sup>4</sup> of public authority presents unique challenges for accountability, transparency and democracy.

In the first section I introduce my *Structural Corruption Approach* (SCA). I do this by engaging in a close dialogue and debate with other helpful paradigms. This will include the institutional corruption framework,<sup>5</sup> the political corruption approach,<sup>6</sup> the pathological corruption construction,<sup>7</sup> the electoral-competitive corruption agenda,<sup>8</sup> the political-capitalist corruption framework,<sup>9</sup> and the political economy approach to corruption.<sup>10</sup> These approaches have all served as inspiration for the development of my own perspective, although each has important limits which need to be overcome in order to fully understand the key tasks which lie ahead in the anti-corruption agenda.

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<sup>2</sup> See Jean Shaoul, Anne Stafford, and Pamela Stapleton, “Accountability and Corporate Governance of Public Private Partnerships,” *Critical Perspectives on Accounting* 23.2 (2012): 213–229.

<sup>3</sup> An important case in point is the decision taken by the US Department of Justice with respect to the banking giant HSBC, which is apparently too powerful and important to be subject to the rule of law for its involvement in money laundering by Mexican drug cartels as well as its involvement with important terrorist groups. On Tuesday, December 11, 2012, DOJ official Lanny Breuer declared that this financial giant would not be criminally prosecuted for its multiple laundering felonies: “HSBC, Britain's biggest bank, said it was ‘profoundly sorry’ for what it called ‘past mistakes’ that allowed terrorists and narcotics traffickers to move billions around the financial system and circumvent US banking laws.” For an excellent analysis of this case, see Glenn Greenwald, “HSBC, Too Big to Jail, Is the New Poster Child for US Two-Tiered Justice System,” *Guardian*, December 12, 2012, <http://www.theguardian.com/commentisfree/2012/dec/12/hsbc-prosecution-fine-money-laundering>.

<sup>4</sup> Alasdair Roberts, “Structural Pluralism and the Right to Information,” *University of Toronto Law Journal* 51.3 (2001): 243-271.

<sup>5</sup> See Lawrence Lessig, “Institutional Corruptions” Edmond J. Safra Research Lab Working Papers, No. 1, March 15, 2013.

<sup>6</sup> See Stephen D. Morris, *Political Corruption in Mexico: The Impact of Democratization* (Lynne Rienner Publishers, 2009).

<sup>7</sup> See Michael Johnston, *Syndromes of Corruption: Wealth, Power and Corruption* (Cambridge University Press, 2006).

<sup>8</sup> See Gulnaz Sharafutdinova, *Political Consequences of Crony Capitalism Inside Russia* (University of Notre Dame Press, 2011).

<sup>9</sup> See Boris Kagarlitsky, “‘Political Capitalism’ and Corruption in Russia,” *International Journal of Socialist Renewal* 21 (2002).

<sup>10</sup> See Susan Rose-Ackerman, “The Law and Economics of Bribery and Extortion,” *Annual Review of Law and Social Science* 6 (2010): 217-236; also see Susan Rose-Ackerman & Sinéad Hunt, “Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest,” *New York University Law School Annual Survey of American Law*, 2011 67 (2012): 433-466.

In the second section, I discuss the issue of the public-sector bias of anti-corruption studies in the context of the reconfiguration of public authority discussed above. I will argue that the reality of PPPs and other new public management reforms forces us to question the stark separation between the “public” and the “private” spheres which forms an essential part of the neoliberal creed.<sup>11</sup> Specifically, transparency and anti-corruption controls normally reserved to oversee government should also be extended to corporations and the private sphere. In general, the failure of traditional policy approaches to transparency as “government openness” to adapt to and take into account the new, complex structures of public authority should be understood not as a technical failure but as a democratic failure. Government transparency should not be limited to a focus on public “hygiene” or “public relations,” but ought to be understood as part of a broader, *Democratic-Expansive Project of Transparency* (DET)<sup>12</sup> based on the reformation of the relationships between state and society.

In the third section I provide a brief demonstration of some of the central issues discussed above through an examination of the Mexican case. The failure of the “consensus package” of economic and political liberalization to bring about more honest and accountable government in Mexico highlights the failings of traditional approaches to corruption. This experience also underlines the fruitfulness of my alternative approaches to both transparency and corruption. Finally, in the concluding section, I summarize my basic findings and provide an outline of possible directions for future research.

## Beyond Bribes and Bureaucracy

It is time to put behind us both “modernizationist” approaches which frame corruption as principally an issue of economic underdevelopment<sup>13</sup> and moralistic

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<sup>11</sup> The term “neoliberal creed” is applied here drawing on Karl Polanyi’s classic metaphor that defines the “liberal creed” as a dangerous justificatory ideology for overlooking the enormous human suffering and economic devastation of community. See Karl Polanyi, “The birth of the liberal creed,” in K. Rea and J. McLeod, eds., *Business and Government in Canada* (Methuen, 1969).

<sup>12</sup> See Irma E. Sandoval-Ballesteros, “Transparency Under Dispute: Public Relations, Bureaucracy and Democracy in Mexico,” in Robert Vaughn & Padideh A’lai, eds., *Transparency from Different Perspectives* (American University, 2013).

<sup>13</sup> See Colin Leys, “What is the Problem about Corruption?” in Arnold J. Heidenheimer, Michael Johnston & Victor T. Le Vine, eds., *Political Corruption: A Handbook* (Transaction Publishers, 1993), 51-66. Also see Jon

conceptions which focus on the cultural roots of the problem.<sup>14</sup> Recent work has demonstrated that economic growth and a wide variety of cultures can coexist with corrupt practices. Incentive-based, micro-organizational,<sup>15</sup> normative-legal<sup>16</sup> and political economy approaches<sup>17</sup> are all very useful, but they normally do not take into account broader issues of state-society relations and how these have an impact on the nature and forms which corruption takes in a particular institutional environment. Morris (2009); Johnston (2006) Kagarlitsky (2002), Rose-Ackerman (2010), Sharafutdinova (2011) and Lessig (2013) take a major step forward in so far as all these authors try to outline different social, political and institutional variables at stake when describing corrupt systems. Nevertheless they do not go far enough in fully extricating corruption studies from state-centric and modernizationist assumptions.

In order to better understand the principal strengths and weaknesses of other frameworks, I start by presenting my own concept of corruption. I define “*structural corruption*” as a specific form of social domination characterized by abuse, simulation, and misappropriation of resources arising from a *pronounced differential in structural power*. The particular acts, practices and dimensions of corruption have had many different variants throughout history. Some of them encompass illegal actions while others can be perfectly lawful but morally questionable. In general, corruption is a symptom of the weakening of the principles of justice and legitimacy that should characterize state-society synergies in a democratic society.<sup>18</sup>

For decades, the concept of corruption has often been trivialized and reduced to a mere synonym for bribery or extortion. But we should avoid reducing this complex phenomenon to isolated cases featuring low-level public officials receiving discrete,

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Moran, “Patterns of Corruption and Development in East Asia” in Michael Johnston, *Public Sector Corruption* (Sage, 2011).

<sup>14</sup> See Claudio Lomnitz, *Vicios públicos, virtudes privadas: la corrupción en México* (CIESAS, 2000); also see Agustín Basave, *Mexicanidad o esquizofrenía* (Océano, 2000). For a more nuanced and complex understanding of corruption and morality, also see Ernesto Garzón Valdés, “Acerca de la calificación moral de la corrupción. Tan sólo una propuesta,” *Isonomía: Revista de Teoría y Filosofía del Derecho* 21 (October 2004).

<sup>15</sup> See Robert Klitgaard, *Controlling Corruption* (University of California Press, 1988).

<sup>16</sup> See Ernesto Garzón Valdés, *Derecho, Ética y Política* (Centro de Estudios Constitucionales, 1993). Also see Jorge Malem Seña, *La corrupción* (Editorial Gedisa, 2002) and Jana Kunicova, “Democratic Institutions and Corruption: Incentives and Constraints in Politics,” in Johnston, *Public Sector Corruption*.

<sup>17</sup> See Kurt Weyland, “The Politics of Corruption in Latin America,” *Journal of Democracy* 9.2 (1998): 108-121.

<sup>18</sup> Id., at note 1.

bureaucratic bribes. The most harmful forms of corruption often have little to do with pecuniary benefit, but involve the accumulation of power and privileges by illegitimate means. In addition, corruption should not be limited to the study of the personal volition of social actors or exclusively from a “principal-agent” perspective, but principally as a symptom of the social, structural and institutional inertias that allow its continuing operation and generation.

A good starting point to set out my conceptual path is the widely known metaphoric formula of Klitgaard that equates corruption to the *monopoly of public action plus discretion, in the absence of accountability*. The principal problem with such formalization is that it gets caught in the traditional understanding of corruption as an exclusively public issue. The “monopoly of public action,” as understood by the author, is inevitably held by the state. The state is depicted here once again as a black box, from which opacity, along with an ominous “reason of the state,” emerges to impede any form of accountability. But, as discussed above, it is not helpful to limit our focus on corruption exclusively to bureaucracies or administrators.

We also need to question the focus on “monopoly” as the center of the problem. There is not a necessary or natural correlation between corruption and monopoly control.<sup>19</sup> Monopolies in and of themselves are not always negative for economic and social development. For instance, in certain sectors such as energy, water, oil or electricity (so-called “natural” monopolies), central coordination and planning can hold a distinct advantage over market-based forms of organization.<sup>20</sup>

In any case, the key issue should not be envisioned as a *lack of competition* but as a *lack of regulation* that allows the emergence of episodes of abuse of power. The reason why monopolies can indeed damage accountability is not fundamentally because of a lack of competition, but because of the lack of external oversight and control. Marketization can sometimes help introduce oversight, but such reforms can also have precisely the opposite effect.

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<sup>19</sup> See Patrick M. Emerson, “Corruption, Competition and Democracy,” *Journal of Development Economics* 81.1 (2006): 193-212.

<sup>20</sup> See Andrew Cumbers, *Reclaiming Public Ownership: Making Space for Economic Democracy* (Zed Books, 2012).

The focus on “discretion” is also problematic. Discretion in itself is not an explanatory variable of corruption, but at most a descriptive feature of the murkiness and darkness of corrupt dealings themselves. Discretion, or bureaucratic freedom, is not a cause, but an effect of corruption and it only becomes evident once the corrupt act finally takes place.

I therefore propose to go beyond Klitgaard’s classic formula to propose my own *Structural Corruption Approach (SCA)* that, in contrasting terms, defines corruption as the *abuse of power, plus impunity, in the absence of citizen participation*.

<p>MICROORGANIZATIONAL APPROACH (Klitgaard)</p>	<p>STRUCTURAL APPROACH (<b>SCA</b>) (Sandoval)</p>
<p><b>Corruption = Monopoly of Public Action + Discretion – Accountability</b></p> <p><b>(C) = (MPA) + (D) – (A)</b></p>	<p><b>Corruption = Abuse of Power + Impunity – Citizen Participation</b></p> <p><b>(C) = (AP) + (I) – (PC)</b></p>

For the *Structural Corruption* approach, the key element is the *abuse of power* and the processes of domination which accompany it, not monopoly. As a result, although government employees are often some of the key social actors who commit corrupt acts, this phenomenon can also exist in private locations. Corruption not only implies the illegal enrichment of isolated public servants or officials, but emerges from and affects the way in which the State relates to society. It constitutes a specific form of social domination that can emerge from public bureaucracies but also from semi-public organizations, the market and the private sector.

Structural corruption, in either its public or private venues, operates as a highly sophisticated organized system that organically integrates economic, legal, social, administrative and political subsystems. Low- and middle-level extortions, payoffs, bribes and kickbacks coalesce within complex pyramidal structures of clientelism, institutionalized patronage and impunity.<sup>21</sup> Structural corruption reaches the

<sup>21</sup> See: Irma E. Sandoval-Ballesteros, *Contemporary Debates on Corruption and Transparency: Rethinking State, Market and Society* (World Bank – IISUNAM, 2011).

highest levels of power and ruling authority through a dense network of connections, relations and complicities that interfere with and delay accountability. What is ultimately in play with structural corruption is an environment of authoritarianism and social exclusion. Effective strategies to combat corruption should therefore go beyond getting the proverbial rotten apples out of the basket, and look inside the basket itself to observe the structural textures, waves and underlying incentives that allow for corruption to flourish.<sup>22</sup>

In Mexico and Latin America, for example, corruption has been intimately linked to economic “liberalization” and privatization. The typical perspective depicts the wave of economic reforms that took place during the 1980s and 1990s in this region as the cold imposition of an economic orthodoxy on a wasteful bureaucracy and a corrupt political class. But recent research on Mexico reveals that in fact this was not the case. The supposedly liberalizing economic reforms have actually led to more instead of less corruption and waste.<sup>23</sup> In general, the so-called “neoliberalism” should not be conceptualized as an economic project with political implications, but as a political project with economic consequences. The reforms did not reduce the power of the state and empower technocracy, but reshaped the state and political power in accord with the interests of new distributional coalitions.<sup>24</sup>

The Russian case is similar. The Russian liberalization process focused on the privatization of state property rather than on the reform of markets. This posed a major problem as demand for such property was relatively low and thus revenues for the state would have been low if property were sold through regular markets. As a result, privatization led not to the development of healthier market relations but to a sweeping bureaucratic redistribution of public assets. The principal outcome of this was the rise of “political capitalism,” a system in which bureaucrats at the highest levels handed out state property to their partners and clients.<sup>25</sup>

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<sup>22</sup> Id.

<sup>23</sup> Id., note 21. Also see: Luigi Manzetti, “Political Opportunism and Privatization Failures,” in Irma Eréndira Sandoval-Ballesteros, ed., *Contemporary Debates on Corruption and Transparency* (World Bank – IISUNAM, 2011).

<sup>24</sup> Id., note 1.

<sup>25</sup> See Kagarlitsky, “Political Capitalism and Corruption in Russia.”

Simultaneously, a steep rise in taxes led to corruption in other spheres of society and engendered a “shadow economy” characterized by corrupted exchanges. Kagarlistky refutes the portrayal of Russian corruption as principally emerging from the weaknesses of the country’s legal system. For him, a well-designed legal framework in itself does not lead to good practices because the rule of law itself is annulled in a context of widespread corruption. This political capitalism depended to an excessive degree on personal ties, informal agreements and bureaucratic intrigues. Parallel to my approach, Kagarlistky’s understanding of corruption sees this social problem as a structural phenomenon, since it reproduces itself through the existing systems of relationships and established ties and norms.

Along the same lines, Sharafutdinova maintains that the post-communist transformation in Russia resulted in the emergence of a crony capitalist system defined as a “distinct institutional order characterized by the domination of informal elite groups.” One of the central political consequences of such a system is the emergence of a “democratic failure” which reflects a deeper structural problem: the toxic co-existence of electoral competition and corruption.<sup>26</sup> Her hypothesis is that under a system based on privileges rather than rights, political competition often ends up being a race to the bottom, an all-out war between political factions which undermines the legitimacy of government authorities.

Unrestricted political competition during electoral campaigns uncovers the predatory nature of crony elites who engage in an intense contestation full of manipulative political practices. This scandal-driven politics occurs because under crony capitalism the political and economic spheres are so tightly intertwined that access to power means access to property and *vice versa*. Accordingly “the degree and the character of political contestation is even more intense due to the higher stakes involved in controlling a state office.”<sup>27</sup> The most worrisome outcome of this dynamic, for the author, is the undermining of the legitimacy of the political and economic order crafted by a self-serving ruling class.

Rose-Ackerman also addresses the relationship between the different forms of trust and honesty on the one hand and political and economic development on the other

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<sup>26</sup> See Sharafutdinova, *Political Consequences of Crony Capitalism Inside Russia*.

<sup>27</sup> *Id.*, 37.

hand. For her, corruption “represents a betrayal of public trust” in government officials.<sup>28</sup> In addition, the existence of untrustworthy officials creates an environment which encourages citizens to turn to corrupt practices. But according to the author, the best way to solve the problem is not by insisting on greater citizen trust as the solution, but by reducing the need for trust. The key strategies, for her, involve implementing institutional reforms which reduce the benefits of bribery and other corrupt practices for officials.

This focus on incentives is what undergirds her understanding of corruption as “a symptom that state-society relations operate to undermine the fairness and legitimacy of the state.” She therefore recommends imposing limits on political power by promoting regulatory and transparency reforms that change the relationship between officials and citizens. Equally important for her is an increase in the expectations and complaints on the part of citizens with regard to the quality of public services.

Corruption can be controlled by lowering the benefits and raising the costs of particular corrupt transactions. But it can also be controlled indirectly by limits on political power and by changes in public attitudes toward the exercise of that power. This latter strategy involves giving people and groups a way to complain about poor government service provision. To facilitate such activities, the government supplies information about its actions, the media and the public voice complaints, and private organizations and individuals push for public accountability.<sup>29</sup>

Ironically, however, although Rose-Ackerman successfully argues for reducing our dependence on trust in government affairs, here she seems to bring trust back into the equation in order to apply it to the private sector. Although government officials should not be trusted *a priori*, she seems to imply that individuals, private organizations and the media should be.

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<sup>28</sup> See Susan Rose-Ackerman, “Trust, Honesty and Corruption: Reflections on the State Building Process,” *Archives of European Sociology* 42.3 (2001): 526-570.

<sup>29</sup> *Id.*

Lessig also emphasizes the element of confidence and trust when describing the concept of institutional corruption. He defines this as “the consequence of an influence within an economy of influence that illegally weakens the effectiveness of an institution specifically by weakening the public trust of the institution.”<sup>30</sup> For him, an institution is trustworthy only if its practices don’t undermine the pursuit of the objectives and goals which justify its own existence. In other words, the distance between abstract mission and concrete practices is the key breeding ground for corruption.

One of Lessig’s most important contributions is his concept of “dependence corruption.” Building on Thompson’s analysis of “institutional corruption,”<sup>31</sup> he stresses the external influences exerted upon institutions, in particular the US Congress and courts, in order to foster a specific political gain.<sup>32</sup> Along the same lines as Rose-Ackerman’s commitment to developing an analysis that goes beyond only identifying rotten apples in order to get them out of the basket, Lessig’s framework encourages a more sophisticated and comprehensive structural study of corruption. The author states that dependence corruption is fundamentally an institutional question: “It is the institution as a whole that has developed a conflicting dependence. And once that conflicting dependence is identified, even perfectly benign behavior within it is part of this corruption.”<sup>33</sup> Lessig suggests that the US Congress, for example, “is not corrupt in any traditional . . . sense of the term,” and then goes further to argue that US congressmen “are not seeking bribes, or using their official influence for private gain.”<sup>34</sup> To the contrary, dependence corruption is “a corruption practiced by *decent* people working with a system that has evolved the most elaborate and costly bending of democratic government in our history.”<sup>35</sup>

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<sup>30</sup> See Lawrence Lessig, “Institutional Corruptions,” Edmond J. Safra Research Lab Working Papers, No. 1, March 15, 2013.

<sup>31</sup> See Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Brookings Institution Press, 1995).

<sup>32</sup> For a recent paper which argues that only studies and research on breaches of fiduciary duty may properly be considered as examples of “institutional corruption,” see Marie E. Newhouse “Institutional Corruption: A Fiduciary Theory,” Edmond J. Safra Research Lab Working Papers, No.25, October 3, 2013.

<sup>33</sup> *Id.* at note 30. P.15

<sup>34</sup> See Lawrence Lessig, “What an Originalist Would Understand Corruption to Mean,” *California Law Review* (forthcoming 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2257948](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257948).

<sup>35</sup> Richard L. Hasen, “Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers,” *California Law Review* 84.1 (1996): 1-59, at 235, (emphasis added).

Whereas for Rose-Ackerman corruption is a symptom that indicates the deep weaknesses of the state-society synergies which end up undermining the fairness and legitimacy of the state, for Lessig corruption is the involuntary result of an institutional dependence that leads to a loss of trust in the political process and ends up undermining democracy as such. Both of these frameworks push us in the right direction.

One problem with Lessig's approach, nevertheless, is the apparent disconnect between the problem he identifies and the solutions he proposes. If corruption is as deeply ingrained as the author says it is, and individual Congressmen and lobbyists are so profoundly disempowered, it would appear that the only way to bring about change would be through external means. But paradoxically, the solution proposed is that the way out is to work with Congress and the existing political class to pass new laws which can de-link special interests and politics.<sup>36</sup>

It is not clear how this could be possible. It appears that this argument is either misguided about the absolute structural nature of corruption in Congress or inaccurate in suggesting that there are levers to bring about change from within the system itself. Lessig's insistence on the "decency" and lack of direct responsibility or culpability of individual Congressmen may be strategically important in terms of building political support for his proposals. But on a theoretical plane, this removal of agency leads to a doomsday scenario which sits in tension with the proposals themselves.

Michael Johnston's work also takes a political economy-institutionalist approach that vindicates the roles of the state and political debate as essential elements to foster legitimacy for economic development and reform. "The state and politics are, often as not, seen as parts of the problem, rather than as essential elements of development and reform. Governing is reduced to public management functions while complex questions of democracy and justice are to be addressed through technically sound 'good governance' rather than politics. There is little attempt to differentiate among corruption problems, either between or within societies;

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<sup>36</sup> See Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (Twelve, 2011).

instead, much research seeks to explain variations in whole countries' scores on one-dimensional corruption indices."<sup>37</sup>

Instead of categorizing specific actions or attributes of corruption, Johnston is concerned with identifying the underlying systemic problems. These emerge both from abuses of power and from the connections and close interactions between *wealth* and *power* which weaken competition and participation in both economic and political institutions. Such a focus has obvious connections to my Structural Corruption Approach, although, as we will see below, Johnston's work also has important methodological shortcomings and comes to some debatable conclusions.

A key element of Johnston's approach is his framework of four different "syndromes" of corruption which in principle debunk the modernizationist notion of what he calls the "consensus package" of economic and political liberalization. According to Johnston, the typical approaches assume that corruption will work itself out when developing countries follow the path of what he calls "affluent market democracies." He questions this linear framework grounded in "one-dimensional corruption indices" by setting up four different qualitatively different categories which include the corruption in developed countries as just another form of corruption instead of *a priori* "better" or somehow less problematic.

Although this provocative approach pushes in the right direction, in the end it falls prey to the same "modernizationist" bias it is designed to combat. For instance, the four categories are clearly identified with different regions of the world: "Influence Markets" (includes United States, Germany, UK and other countries from the "the global North" supposedly characterized by "strong institutions" and "vibrant societies"); "Elite Cartels" (which include Italy, Korea, Spain and other countries with weaker institutions and growing social discontent); "Oligarchs and Clans" (consisting of places such as Russia, Philippines and a dozen Latin American and Asian countries depicted as societies with minimalistic and fragile institutions and widespread social unrest); and finally "Official Moguls" (a catch-all category which includes China, Kenya, Indonesia and many other African countries that, according to the author, exemplify an underworld of black markets, extreme

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<sup>37</sup> See Johnston, *Syndromes of Corruption*, 19.

poverty and collapsed societies). Although the initial goal is to achieve a multidimensional analysis instead of the typical unidimensional descriptions, the final outcome is still very much within the evolutionary and developmentalist vein. For instance, one of the central objectives Johnston poses for anti-corruption reformers is to encounter ways to move up the list from “Official Mogul” corruption, to “Oligarch and Clan” corruption, on to “Elite Cartel” corruption and finally to “Influence Market” corruption.

For Johnston, corruption is a highly contested concept “that is best understood in the context of a nation’s political development and system of public order.” This opens up space for creative thinking. But he simultaneously defines corruption in a quite traditional way as “the abuse of public roles or resources for private benefit.” Although, to his credit, he emphasizes that concepts such as *abuse*, *public roles* and *private benefits* are matters of “contention,” “controversy” and “ambiguity.”<sup>38</sup>

One worrisome element of his framework is his acceptance of impunity in the name of order, control and legitimacy. According to Johnston, in environments in which corruption is most entrenched, with weak boundaries between wealth, power, society and state, it is not worthwhile to fight for accountability: “Rather than aiming directly at eliminating corruption and firing up market and political competition, the initial strategy might be to reduce insecurity while creating legitimate alternatives to corrupt ways of pursuing and defending self-interest.”<sup>39</sup>

This is problematic because despite his claims to the contrary, here he approaches corruption not as a social, systemic problem rooted “in the basket” but as a “principal-agent” dysfunction emerging from individual apples in the process of becoming decomposed by way of chasing and protecting their personal self-interest.

Johnston also reveals a consistent pro-market bias with regard to the solutions he offers. Among other remedies he recommends strengthening property rights, establishing sound banks and currency, market-oversight bodies, bond and equity markets, reliable and fair tax collectors and other initiatives that “may increase the sense of security” among the people. “These initiatives will not make the oligarchs

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<sup>38</sup> Id., 58.

<sup>39</sup> Id., 208.

go away, but they might reduce incentives to violence, stem capital flight, and bring more economic and political activity back within official arenas. For ordinary citizens they can gradually open up legitimate alternatives to corrupt treatment and influence. By contrast, attacking the opportunities that have given rise to oligarchs, or confiscating their gains—the ‘strong-hand’ option—would defeat the purpose of political and market transitions and might create more disorder.”<sup>40</sup>

And here is precisely where I part company not only with Johnston’s approach, but also with those of Rose-Ackerman, Sharafutdinova and Lessig. All of these authors in the end prioritize confidence and trust in the political system as a whole as the overarching objective of accountability reform. Such an approach puts clear limits on the range of specific anti-corruption policies or practices which are feasible, since strategies which may call into question the legitimacy of the system as such are put off limits. These authors are of course right to see trust, confidence and legitimacy as some of the most important values of a democratic system. Nevertheless, their emphasis on trust and confidence more as *an end* in itself than as a tool or a means to fight corruption at its roots creates problems.

In contrast, from the Structural Corruption Approach, the central problem with corruption is not that it delegitimizes X or Y institution but that it makes the institution operate in a partial, ineffective and inefficient way. In other words, I agree that the loss of public trust in democratic institutions does enormous harm to societies and that we should be concerned about the wave of “democratic disappointment” that haunts the world on a global scale. Nevertheless, we should also understand that *trust* and confidence must be in relation to the *trustworthiness* of a government, organization, or public or private institution. The level of citizen trust should be calibrated in proportion to the level of behavior of the actor, organization or institution that is to be trusted. Trust and confidence should be the *result* not the *premise* of democratic politics.

Here is where I find the work of Stephen Morris particularly enlightening.<sup>41</sup> The author explores the problem of the lack of legitimacy of the State, which perpetuates illegal practices within both State and society, as fundamentally a

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<sup>40</sup> Id.

<sup>41</sup> See Stephen Morris, “Mexico’s Political Culture: The Unrule of Law and Corruption as a Form of Resistance,” *Mexican Law Review* 3.2 (2010): 327-342.

political problem of culture, legitimacy and resistance. He challenges views that depict Mexico as a country lacking “a culture of legality.” He demonstrates that the majority of Mexicans in fact do comply with the law and that corruption is not accepted as “normal” by Mexicans: “The existence of corruption (and acknowledging its existence in public opinion polls) does not necessarily indicate a cultural acceptance of corruption *per se*.”<sup>42</sup>

The issue is that citizens follow the law more out of fear of punishment than as an act of trust in the well-founded character of the law. But this lack of legitimacy of the Mexican state is not necessarily bad news. In Morris’ view, Mexico is more a country of skeptics and disbelievers than of corruptors.

According to this author, Mexican society has responded to the frustration of being ruled by an authoritarian and corrupted system with “everyday forms of resistance.”<sup>43</sup> Mexicans participate in low-level corruption as an extension of anti-systemic behavior in general.<sup>44</sup> Mexicans, in the end, equate obedience to the law as an imposition from an illegitimate regime or government, and see occasions to violate and break the law as acts of social disobedience against an illegitimate and undemocratic rule. The cronyism of the Mexican polity is captured by Morris when he states that “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 guilty until proven rich.”<sup>45</sup>

In other words, the political culture and history of the country has defined very high standards for democracy, and perhaps this is the reason for its poor scores in terms of the perception of corruption in the international measures every year.<sup>46</sup>

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<sup>42</sup> Id., 331.

<sup>43</sup> James C. Scott, “Everyday Forms of Resistance,” *Copenhagen Journal of Asian Studies* 4.1 (2008): 33.

<sup>44</sup> A similar argument for US culture can be found in David Callahan’s 2004 book: “When cheating becomes so pervasive that the perception is that ‘everybody does it,’ a new ethical calculus emerges. People place themselves at a disadvantage if they play by official rules rather than the real rules. . . . Many of us won’t give in to pressures to cheat even when we perceive that everybody else does it. We’ll study harder to outdo the cheating students, or train more fanatically to beat the athletes who use drugs, or simply make a point of living our lives in more ethical arenas. But all this means playing by our own rules rather than the prevailing rules, which makes life harder in the process.” David Callahan, *The Cheating Culture: Why More Americans Are Doing Wrong to Get Ahead* (Harcourt Books, 2004), 26.

<sup>45</sup> Morris, “Mexico’s Political Culture, 338.

<sup>46</sup> In 2012, Mexico for example received a score of 3.4 from Transparency International and today is ranked at the level of Algeria, Armenia, Bolivia, Gambia, Kosovo, Mali, and the Philippines, and below Tanzania. See

Along these lines it is also quite striking that in Mexico in the most recent Latin barometer scores revealed that seventy-three percent of the population is “unsatisfied” with democracy, reaching the highest disapproval rating in all of the Americas, just after Haiti.<sup>47</sup>

Morris offers an important analysis of the consequences of the “assumption of corruption.” According to him, if people believe corruption is widespread then they tend to perceive political statements or legal actions against corruption as a symptom of the same corrupt practices rather than as an attempt to have law prevail.<sup>48</sup> Thus, both real and perceived corruption have a negative impact on the rule of law. In terms of the possible solutions to combat corruption, he recommends focusing on building confidence in the State and on addressing the critical issue of legitimacy. It is primordial for State officials to be perceived as complying with the law. In the absence of such compliance, civil society finds a justification for not adhering to the law.

Morris also formulates two main policy proposals towards strengthening the rule of law: greater accountability in the case of unlawful practices involving state officials, and increased participation of citizens in “co-governance agreements.” Morris does not see corruption as a mere bureaucratic or technical problem to be addressed with institutional engineering or with more laws or police control and coercion, but with the establishment of deeper processes of accountability, legitimacy and political agency in the pursuit of the collective good.

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

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Transparency International, Corruption Perceptions Index 2012, <http://cpi.transparency.org/cpi2012/results/>.

<sup>47</sup> It is important to note that this “democratic disappointment” is not only occurring in Latin America. For the last three years, Gallup has ranked the public trust that US citizens have in their Congress behind the trust they have in “big business,” “banks” and “HMOs.” Also in a recent survey, US citizens ranked reduction of corruption as the number two issue for the next President to prioritize in 2013, way ahead of lowering the budget deficit and confronting terrorism. See Jeffrey M. Jones, “Americans Want Next President to Prioritize Jobs, Corruption,” Gallup Politics, July 30, 2012, quoted in Maggie McKinley “Studying the Everyday Lives of Professional Federal Lobbyists,” Edmond J. Safra Lab blog post, April 12, 2012, <http://www.ethics.harvard.edu/lab/blog/261-studying-the-everyday-lives-of-professional-federal-lobbyists>.

<sup>48</sup> Almost half (43%) of all Mexicans are convinced that the government not only is ineffective in its fight against corruption, but that it directly protects and supports illegal activities. Also see Mitchell A. Seligson and Amy Erica Smith, eds., “Democratic Consolidation in the Americas in Hard Times: Report on the Americas,” December, 2010, [http://lapop.ccp.ucr.ac.cr/pdf/Report\\_on\\_the\\_Americas\\_English\\_Final2.pdf](http://lapop.ccp.ucr.ac.cr/pdf/Report_on_the_Americas_English_Final2.pdf).

solve the problem; it will exacerbate it. . . . If the lack of compliance and enforcement of laws is the problem, then the more law is often not a solution: it simply means more laws to ignore or abuse. . . . Greater judicialization similarly does not necessarily mean greater respect for the rule of law. . . . 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*.<sup>49</sup>

The key element of this approach is that it gives a central place to political struggle and resistance in the fight against corruption. It is also clear that the powerful political actors at the top of societies should internalize the public values which can deter corruption and teach by example.

This emphasis on the construction of *trust* via the achievement of legitimacy, as a *means* and not as an *end* in itself, helps us to go beyond both the reification of institutions as *all-powerful structures* that lead passive but “decent” actors to play a part in corruption as in Lessig, and the focus on *incentives* that encourage rational-choice actors to control by narrowly clientelistic or self-interested ends as in Rose-Ackerman’s work. Morris’ work reminds us that institutions are also sites for battles of contention and resistance in the constant struggle for democracy and accountability.

As we will see below, the Mexican case demonstrates the fruitfulness of this approach. For decades, the Mexican government has functioned as a sophisticated mechanism for consolidating economic and political privilege and defending the elite from the “excessive” demands of social groups. The fact that during a brief period of time there was an alternation of power in the federal government did not transform the way in which power and authority are managed in Mexico at the structural level. In general, if democracies are unable to demonstrate that they are more effective and able to deliver public goods and accountability than previous authoritarian regimes, citizens naturally turn to non-democratic or “charismatic” and authoritarian leaders who simply promise to resolve problems overnight.

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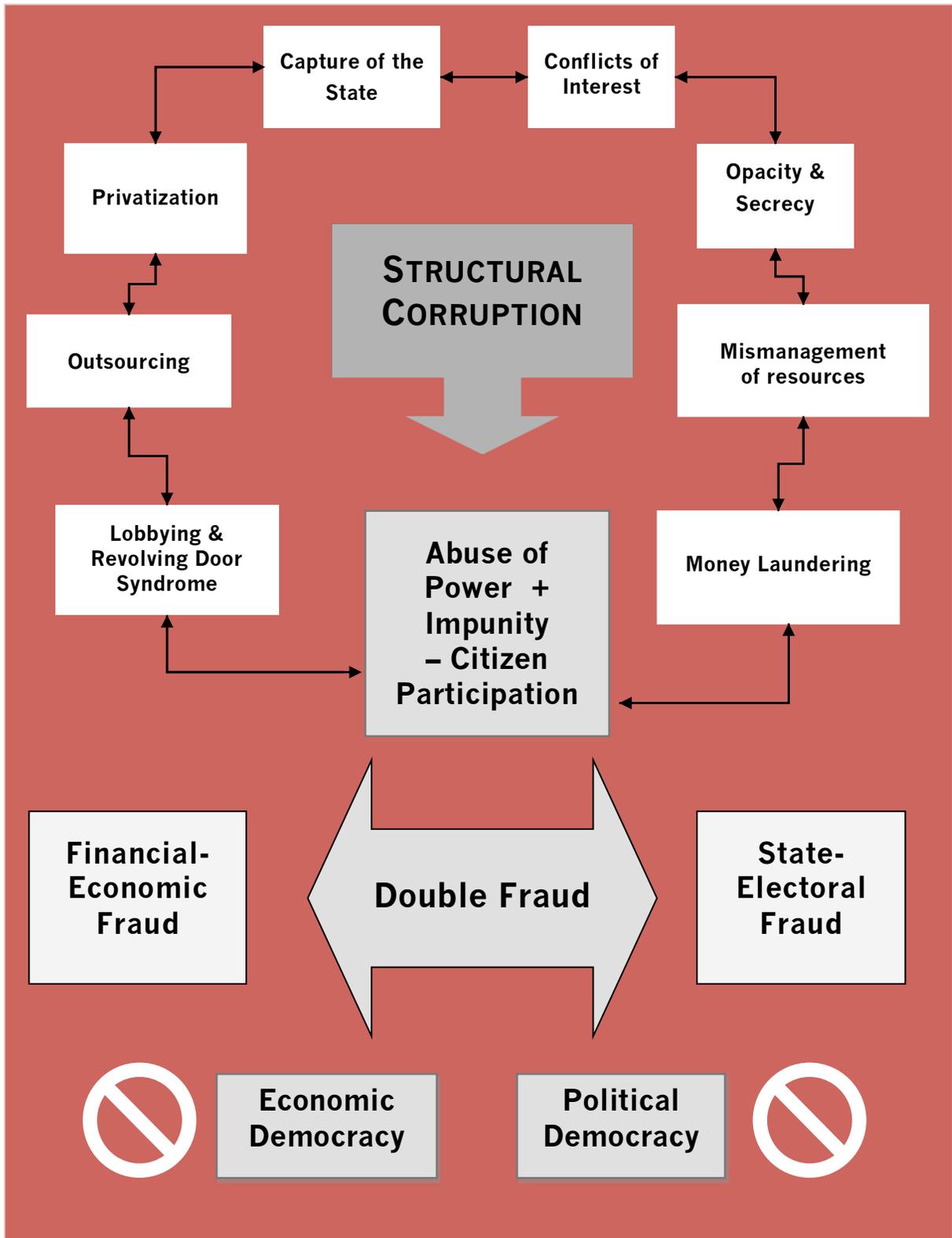
<sup>49</sup> Morris, “Mexico’s Political Culture,” 340 (emphasis added).

It is typical for authors to envision democratic transition and economic liberalization as two sides of the same coin.<sup>50</sup> The “consensus package” means that neoliberal economic reforms, on the one hand, and transparency, administrative and electoral reforms, on the other hand, work together in almost automatic synergy. Nevertheless, such an approach reveals that normally the underlying power relations at work in markets which tend to centralize decision-making are in the hands of a small number of private economic actors, making this sphere antithetical to democracy.

To conclude, my concept of structural corruption emphasizes three key elements of dysfunctional governance: A) the abuse of a pronounced power differential creating a situation of domination, B) the lack of punishment, especially for the private sector when it captures areas of, or takes over functions which normally correspond to, the public sector, and C) citizen disempowerment and distancing of society from the political class. These three elements (political domination, impunity and social disempowerment) explain the genesis and emergence of a “double fraud,” both financial-structural and political-electoral, which obstructs the development of sustainable and just state structures. We will return to this last point through an examination of Karl Polanyi’s “double movement” in both the following and the final section of this paper. Meanwhile, I provide an initial schematization of my framework in the flow chart below:

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<sup>50</sup> See Laurence Whitehead, *Emerging Market Democracies: East Asia and Latin America* (John Hopkins University Press, 2002). In that same volume, also see the chapter by Sylvia Maxfield, “Capital Mobility and Democratic Stability,” 103-114.



## Breaking the Public Sector Bias

The wave of freedom of information legislation and anti-corruption reforms that has swept the globe over the last two decades<sup>51</sup> has increasingly strengthened the grip of oversight and control, but on an ever smaller piece of public authority and social power. Today there are almost one hundred national access to information laws in effect,<sup>52</sup> and each year governments compete to improve their rankings on the Transparency International, Global Integrity, Budget Accountability, World Bank and Latin American Barometer “scoreboards.”<sup>53</sup> Meanwhile, the economic orthodoxy of the past two decades has pushed central government functions out towards the private sector, where public accountability is virtually nonexistent.<sup>54</sup>

Access to information laws historically developed as a way to control the new administrative state, or “fourth branch of government,” that emerged during the 19th and 20th centuries in both the global north and south. Transparency of government documents and spending has proven to be one of the best ways to control large bureaucracies.<sup>55</sup>

But now the situation is different. Throughout the world, public functions such as schooling, health care, prisons, infrastructure, insurance, social security and even war are increasingly being taken up by private corporations and independent

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<sup>51</sup> See: John Ackerman and Irma E. Sandoval-Ballesteros, “The Global Explosion of Freedom of Information Laws,” *Administrative Law Review* 58.1 (2006): 85-130. See also the recent reports of the International Organization of Supreme Audit Institutions (INTOSAI) available at [http://www.intosai.org/fileadmin/downloads/downloads/4\\_documents/publications\\_stand\\_xxi\\_INCOSAI/E\\_U\\_N\\_INTOSAI\\_Joint\\_Project.pdf](http://www.intosai.org/fileadmin/downloads/downloads/4_documents/publications_stand_xxi_INCOSAI/E_U_N_INTOSAI_Joint_Project.pdf).

<sup>52</sup> In September 2012 there were 93 FOI laws. See Roger Vleugels, “Overview of All FOI Laws,” September 30, 2012, [http://www.right2info.org/resources/publications/laws-1/ati-laws\\_fringe-special\\_roger-vleugels\\_2012-sept](http://www.right2info.org/resources/publications/laws-1/ati-laws_fringe-special_roger-vleugels_2012-sept).

<sup>53</sup> World Bank Institute, “Collaborative Governance,” <http://wbi.worldbank.org/wbi/topic/governance>; Jason Levitts, Nicholas Johnson and Jeremy Khoulish, “Promoting State Budget Accountability through Tax Expenditure Reporting: Executive Summary,” Center on Budget and Policy Priorities, April 9, 2009, <http://www.cbpp.org/cms/index.cfm?fa=view&id=2772>; Global Integrity, “Innovations for Transparency and Accountability,” <http://www.globalintegrity.org/>; and Transparency International, “Corruption Perceptions Index Overview,” [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010](http://www.transparency.org/policy_research/surveys_indices/cpi/2010).

<sup>54</sup> See Alasdair S. Roberts, *The Logic of Discipline: Global Capitalism and the Architecture of Government* (Oxford University Press, 2010).

<sup>55</sup> Scholars like Katznelson have called the rise of the administrative state the “second great macroprocess of modernity” comparable only to the rise of capitalist market relations in the 19<sup>th</sup> century. See: Ira Katznelson, “Structure and Configuration in Comparative Politics,” in Mark Irving Lichbach and Alan S. Zuckerman, eds., *Comparative Politics: Rationality, Culture, and Structure* (Cambridge University Press, 1997), 81-112.

contractors or quasi-governmental entities.<sup>56</sup> Nevertheless, almost no national information laws include transparency provisions for public services and goods provided by private companies. This constitutes the Achilles' heel of these reform strategies.<sup>57</sup>

The final result is a net accountability loss. Incremental gains with regard to the transparency and oversight of government entities are compensated for by the opacity of the enormous new responsibilities now in the hands of the private sector. In the private sphere, concerns for accountability and answerability are normally subordinated to the need to assure profits and "competitiveness."<sup>58</sup> Here, secrecy, not transparency, is the priority: tax secrets, corporate secrets, technological secrets, bank secrets, etc., are designed to protect the private sector from citizen oversight. Although recent economic crises have placed corporate responsibility in the public eye, it is still generally believed that too much transparency in this realm would lead to a reduction in innovation and unfair stealing of information between market rivals.<sup>59</sup>

This new context of structural pluralism<sup>60</sup> of public authority reinforces the argument, developed in the previous section, that old anti-corruption and transparency strategies limited to reducing bribes and assuring basic bureaucratic "hygiene" are not enough to bring about the change in the relationship between state and society needed to better deliver the goods to citizens in a democratic context.<sup>61</sup> This is especially the case in highly unequal societies with a strong power-elite and where the private sphere is controlled by a small number of oligopolistic corporations, such as the Mexican case.<sup>62</sup> In such a context, the private sphere is even more lawless and opaque than usual, and in more need of

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<sup>56</sup> See: Jeffrey Delmon, *Private Sector Investment in Infrastructure: Project Finance, PPP Projects and Risks* (Kluwer Law International, 2009).

<sup>57</sup> See Shaoul et al., "Accountability and Corporate Governance of Public Private Partnerships," 4.

<sup>58</sup> See Robert Bloomfield and Maureen O'Hara, "Market Transparency: Who Wins and Who Loses?" *Review of Financial Studies* 12.1 (1999): 5-35.

<sup>59</sup> See Alex Cukierman, "The Limits of Transparency," in *Economic Notes* 38.1/2 (2009): 1-37.

<sup>60</sup> See Roberts, "Structural Pluralism and the Right to Information," and Jerry Mashaw, "Accountability and Institutional Design: Some Thoughts on the Grammar of Governance," in Michael Dowdle, ed., *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006), 115-156.

<sup>61</sup> See Anthony Giddens, *Runaway World: How Globalization is Reshaping Our Lives* (Profile, 1999), and Anthony Giddens, *The Constitution of Society, Outline of the Theory of Structuration* (Polity Press, 1984).

<sup>62</sup> See James M. Cypher, "Nafta's Lessons: From Economic Mythology to Current Realities," *Labor Studies Journal* 26.1 (2001): 5-21.

the transparency and anti-corruption controls normally reserved to the public sector.<sup>63</sup>

In general, the use of the differentiation between the “public” and the “private” sectors has created a pocket of impunity and opacity for private actors who fulfill public functions. Private corporations in charge of public sector work frequently argue that they cannot possibly make public their negotiations, reveal details of their operation, or in some cases, even the contracts themselves, because they are “commercially sensitive.”<sup>64</sup> Revealing them, they insist, would give too much information to competitors, and make the bidding process “less competitive” since it would give an unfair advantage to those with less knowledge and expertise.<sup>65</sup>

But these sorts of justifications are not tenable in a world of expansive Public-Private Partnerships (PPP). Fair market competition is not going to be improved by carefully protecting information that should be public.<sup>66</sup> To the contrary, opacity will damage competition and open up a dangerous space for impunity. The real motivation for private sector opacity when it fulfills public functions, therefore, does not appear to be to foster better and more effective markets, but to safeguard narrow self-interest and keep potential conflicts of interest and other wrongdoings in the dark.<sup>67</sup> This once again ratifies the need to go beyond bureaucratic and institutional corruption approaches in order to engage with a new structural corruption perspective that situates abuse of power at the center, regardless of whether this abuse emerges from the public or the private spheres.<sup>68</sup>

It is generally accepted that governments outsource because of the advantages in terms of efficiency, efficacy and flexibility in the managerial and administrative

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<sup>63</sup> See Marshal B. Clinard, *Corporate Corruption: The Abuse of Power* (Greenwood Publishing Group, 1990).

<sup>64</sup> See Helmut Willke, *Transparency After the Financial Crisis: Democracy, Transparency, and the Veil of Ignorance* (Transparenz, 2010), 56-81.

<sup>65</sup> See Wim Dubbink, Johan Graafland, and Luc van Liedekerke, “CSR, Transparency and the Role of Intermediate Organisations,” *Journal of Business Ethics* 82.2 (2008): 391-406.

<sup>66</sup> See Irma E. Sandoval-Ballesteros, “Opacity in the Management of Public Resources: The Case of Government Trust Funds,” in Jonathan Fox, et al., eds. *Mexico’s Right to Know Reforms: Civil Society Perspectives* (Fundar, 2007), 180-196.

<sup>67</sup> See Gillian Peele and Robert Kaye, “Regulating Conflicts of Interest: Securing Accountability in the Modern State,” in Irma E. Sandoval-Ballesteros, ed., *Contemporary Debates on Corruption and Transparency: Rethinking State, Market and Society* (World Bank, 2011).

<sup>68</sup> Sandoval-Ballesteros, “Transparency under Dispute.”

realms.<sup>69</sup> There are many advantages of this kind without a doubt, but it is equally important to carefully consider the losses and understand that the initial benefits may come at a tremendous long-term cost in terms of both economic and democratic development.<sup>70</sup> Private contractors have become an integral part of public life and therefore they represent an important challenge with regard to the construction of a new strategy to confront structural corruption.

The growing expansion of PPPs and their wider propagation into areas and tasks previously seen as reserved to government<sup>71</sup> creates serious challenges for established democratic frameworks, as there are valid concerns that PPPs involve a trade-off between managerial notions, such as efficiency and democratic notions, and others such as accountability and legitimacy.<sup>72</sup> This fact should drive us to embark upon debates on new philosophical grounds. For instance, we need to consider the direct opposition between the traditional public service *ethos* that rejects profit-making values and the new supposedly “pragmatic” focus on the needs of the firm, the contractor and the private consumer present in most of the justifications for PPPs.<sup>73</sup>

Concepts of *ethics* and *democracy* should not be thrown out when governments subcontract public functions. Jonathan Marks, for example, has suggested applying Lessig’s framework of “institutional corruption” to PPPs related to food and health in order to “draw attention to the limitations of prevailing analytical approaches to the ethics of PPPs, and suggest alternative ways of addressing the systemic ethical issues they raise.”<sup>74</sup>

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<sup>69</sup> See Allison Stanger, *One Nation Under Contract: The Outsourcing of American Power and the Future of Foreign Policy* (Yale University Press, 2011).

<sup>70</sup> Ackerman and Sandoval-Ballesteros, “The Global Explosion of Freedom of Information Laws,” 122.

<sup>71</sup> These areas and tasks include among others national security, defense, prisons, state surveillance, migration, elections, and even diplomacy itself. See Phil Taylor and Christine Cooper, “‘It was absolute hell’: Inside the private prison,” *Capital and Class* 32.3 (2008): 3-30. Also see Paul R. Verkuil, *Outsourcing Sovereignty* (Cambridge University Press, 2007).

<sup>72</sup> See Matthew Flinders, “The Politics of Public-Private Partnerships,” *British Journal of Politics and International Relations* 7.2 (2005): 215-239, at 216.

<sup>73</sup> *Id.*

<sup>74</sup> See: Jonathan H. Marks, “What’s the Big Deal?: The Ethics of Public-Private Partnerships Related to Food and Health,” Edmond J. Safra Research Lab Working Papers, No. 11, May. 23, 2013, 4. Also see Rema Nagarajan, “Public-Private Partnerships in Food, Health Undermine Government Partner’s Credibility: Harvard Study,” *Times of India*, October 17<sup>th</sup> 2013, [http://articles.timesofindia.indiatimes.com/2013-10-17/india/43143479\\_1\\_research-partnerships-public-private-partnerships-paper](http://articles.timesofindia.indiatimes.com/2013-10-17/india/43143479_1_research-partnerships-public-private-partnerships-paper).

In principle, there is no reason to treat private providers or contractors of public services differently from public providers with regard to accountability issues. As the global economy expands and the concentration of wealth increases, the balance of power between the public and the private sectors has increasingly moved away from the former and more towards the latter. Money has always implied power, particularly in the social and the economic spheres, but today perhaps more than at any other time in history wealth directly translates into public power.<sup>75</sup>

It is important to question the black and white manner in which the public-private distinction is normally conceived. Indeed, as Karl Polanyi pointed out decades ago, this is a basic foundation of the “liberal credo” and of liberal democratic theory in general.<sup>76</sup> The traditional distinction is between a *private* sphere typically depicted as the site of *synergies*, *initiatives* and *freedom* occupied by individuals that make “autonomous” decisions. This is placed in contrast to a public sphere responsible for resolving the conflicts which arise as a result of the autonomous decisions taken in the private sphere. The “public,” therefore, is equated with *conflict*, *controversy* and *limits*, whereas the private would be the locus of *independence*, *harmony*, *convergence* and *freedom*.

It is time to put into question this cornerstone of liberalism. For instance, John Parkinson offers a fruitful new taxonomy as an alternative way to understand the public-private relationship.<sup>77</sup> He argues that there are four categories which apply to the concept of the *public*: 1) freely accessible places “where strangers are encountered whether one wants to or not, because everyone has free right of entry. . . . These are places where the spotlight of publicity shines, and so might not just be public squares and market places, but political debating chambers where the right of physical access is limited but informational access is not”; 2) common goods such as clean air, water, public transportation, and concerns about crime, children, and elderly people; 3) public figures or rulers; and 4) collective activities

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<sup>75</sup> Sandoval-Ballesteros, “Transparency under Dispute.”

<sup>76</sup> See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon, 1944).

<sup>77</sup> See John R. Parkinson, *Democracy and Public Space: The Physical Sites of Democratic Performance* (Oxford University Press, 2012).

“owned by the state . . . and paid for out of collective resources like taxes, government buildings, national parks, military bases and equipment, and so on.”<sup>78</sup>

Building on this framework, the next question is how to conceptualize a “public service.” Here it is not particularly useful to follow the traditional liberal understanding of the public-private distinction in which “public services” are limited to those services provided by the State or the government.<sup>79</sup> From this perspective, the idea of private provision of public services embodied in the PPP revolution simply makes no sense. The empirical reality of public service reform itself forces us to de-fetishize the concepts of the “public” and “private,” and to stop treating them as strictly independent domains.

I therefore submit that a service should be considered “public” if: 1) it affects communities, societies or large groups of people, or uses collective resources; 2) it cannot be parceled up and distributed to or owned by individuals; and 3) it is an essential precondition for healthier, worthwhile, respectful and safer living for communities, societies, or individuals.

Accordingly, every service funded with tax dollars is, in principle, a public service since it is paid for out of collective resources.<sup>80</sup> The provision of clean air, public water, or even energy resources are public services since this good cannot be packaged up or owned individually.<sup>81</sup> Additionally, health care, education, and insurance should be considered public goods and their provision a public service because they all constitute an essential precondition for healthier, worthwhile, and secure lives.<sup>82</sup>

The central social and political challenge is to avoid the use of expanded privatization and corporate dominance in the world as an excuse for a reduction in transparency and accountability.<sup>83</sup> In general, we need to emphasize the basic principle of transparency and free flow of information as a necessary precondition

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<sup>78</sup> *Id.*, 51.

<sup>79</sup> *Id.*

<sup>80</sup> Verkuil, *Outsourcing Sovereignty*.

<sup>81</sup> Parkinson, *Democracy and Public Space*.

<sup>82</sup> Marcus Taylor, “The Reformulation of Social Policy in Chile, 1973—2001: Questioning a Neoliberal Model” *Global Social Policy* 3.1 (2003): 21-44.

<sup>83</sup> Irma E. Sandoval-Ballesteros, “Transparency under Dispute.”

for 1) market actors to make informed and responsible decisions, and 2) for a healthier democracy in which the values of openness, accountability, and resistance cease to be under pressure.<sup>84</sup>

Privatization, like the wider project of neoliberalism, has always been a highly disputed and contested process.<sup>85</sup> Most historic and analytical accounts date its emergence to the 1980's, but in reality the attack on public services in their government form began as early as 1968, in order to counteract the global tide of progressive politics and the wave of social and national independence movements which emerged throughout the world at the time.<sup>86</sup> This strategy was not only in terms of advancing a pragmatic “modernizing” project of efficacy and efficiency for markets, but also had political motives as a way to confront and roll back the threat of socialism.<sup>87</sup>

The neoliberal privatization agenda was an attempt to offer a competing “utopia” for societies “at risk” of following the socialist path to development.<sup>88</sup> A new utopia in which market individualism, voluntary exchange, and free markets would overcome the “Road to Serfdom”<sup>89</sup> that an overgrown interventionist state had implied. The freeing of the entrepreneurial spirit and individual and private actors from artificial controls, it is claimed, would lead to a betterment of humanity as a whole.<sup>90</sup> Privatization and markets would stop bureaucratic controls or trade union monopolies from impeding dynamic increases in productivity.<sup>91</sup> Each region of the world would be able to specialize in what they are best at doing, their “comparative advantage.”<sup>92</sup> Meanwhile, the rich might be getting richer, but the poorest would also do better as a result of the “trickle-down”<sup>93</sup> social policies of redistribution.

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<sup>84</sup> Id.

<sup>85</sup> See Hussein Soliman and Sherry Cable, “Sinking U Weight of Corruption: Neoliberal Reform, Political Accountability and Justice,” *Current Sociology* 59.6 (2011): 735-753.

<sup>86</sup> See David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2012).

<sup>87</sup> Id.

<sup>88</sup> See Friedrich Hayek, *The Road to Serfdom* (Routledge & Kegan Paul, 1976).

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Id.

<sup>92</sup> See Michael Porter, *The Competitive Advantage of Nations* (Free Press, 1990).

<sup>93</sup> See Philippe Aghion and Patrick Bolton, “A Theory of Trickle-Down Growth and Development,” *Review of Economic Studies* 64.2 (1997): 151-172.

This neoliberal utopia therefore presents itself as “popular capitalism” which supposedly offers benefits to everyone.

However, today this utopia is increasingly coming under fire.<sup>94</sup> The increasing concentration of wealth, the global economic financial crisis, surges in unemployment, and the emergence of vast popular movements throughout the world have all pushed people to imagine a more stable and just alternative.<sup>95</sup> This mobilization and discontent has been ongoing since the Zapatista rebellion of Mexico in 1994, the 1997 mobilization against the World Trade Organization in Seattle, and more recently the Occupy movement on Wall Street in New York City and the extraordinary social movements in Spain, Turkey, Egypt, Chile, Brazil, and many other Latin American and European cities which have all manifested the clear rejection of the neoliberal utopia and privatization as well as the defense of the public space.<sup>96</sup> Simultaneously, the fall of the bureaucratic-authoritarian version of communism embodied in the old Soviet empire has opened up space for creative rethinking about the critique of liberal capitalism.

Now that the neoliberal utopia has become a “dystopia”<sup>97</sup> with all the associated impoverishment, unemployment, violence, and economic and social upheaval, it is increasingly difficult to openly defend privatization or the project of neoliberalism in general.<sup>98</sup> The discrediting of privatization as a tool to improve governance is a result not only of its failure to bring about prosperity, development, and growth, but also of the moral bankruptcy of a philosophy that vindicates ownership based solely on private property forms. Maintaining exclusively private or corporate

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<sup>94</sup> See Tova Benski, Lauren Langman, Ignacia Perugorría, and Benjamín Tejerina, “From the Streets and Squares to Social Movement Studies: What Have We Learned?” *Current Sociology* 61.4 (2013): 541-561. In the same volume, also see Lev Luis Grinberg, “The J14 Resistance Mo(ve)ment: The Israeli Mix of Tahrir Square and Puerta del Sol,” *Current Sociology* 61.4 (2013): 491-509.

<sup>95</sup> Joseph E. Stiglitz, *Globalization and its Discontents* (W.W. Norton and Co., 2002).

<sup>96</sup> Margaret Kohn, “Privatization and Protest: Occupy Wall Street, Occupy Toronto, and the Occupation of Public Space in a Democracy,” *Perspectives on Politics* 11.1 (2013): 99-110. Also Parkinson, *Democracy and Public Space*.

<sup>97</sup> See Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Macmillan, 2007).

<sup>98</sup> *Id.*

control of social resources is today understood to be an obvious negation of the social, economic, and cultural rights of numerous social groups.<sup>99</sup>

It is precisely in this context of the growing illegitimacy of the discourse and practice of privatization that the new strategy of PPPs has emerged on the scene. This leads us to ask ourselves what the real purposes of this strategy might be. Specifically, are PPPs genuinely intended to improve efficiency and efficacy to the delivery of core public services or are they only a new façade whose central purpose is to give artificial life to the same political agenda of neoliberalism and exclusion that has met such widespread global rejection? In other words, the key question is whether the PPPs represent a new and more sophisticated social arrangement of the “public,” or whether they represent only a less contentious way to “privatize” government services and decision-making.

PPPs have largely been evaluated through conceptual lenses that emphasize the administrative, managerial, financial or technical dimensions of this “governance” strategy.<sup>100</sup> It is important to complement this literature with a broader political-economy approach, which takes into account the political tensions that have largely been overlooked by the most enthusiastic advocates.<sup>101</sup>

Typical portrayals of PPPs present them as win-win arrangements between states and private entities, grounded in the notions of flexibility, efficiency, efficacy, and earned autonomy for private sector contractors while maintaining public sector values and benefits.<sup>102</sup> This standard approach pragmatically celebrates the involvement of private sector actors, frequently in long-term large infrastructure projects, that create synergies and operate through “complex multilayered networks.” Accordingly, a PPP is best seen as “a risk-sharing relationship between

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<sup>99</sup> See Yvon Le Bot, *La gran revuelta indígena* (Editorial Oceano, 2013). Also see Patrick Gun Cuninghame, “Resistiendo al imperio. Autonomía, autonomismo y movimiento sociales latinoamericanos,” *Veredas* 21.11 (2010): 149-166.

<sup>100</sup> See John Forrer, James E. Kee, Kathryn E. Newcomer, and Eric Boyer, “Public-Private Partnerships and the Public Accountability Question,” *Public Administration Review* 70.3 (2010): 475-484.

<sup>101</sup> See Aidan R. Vining and Anthony E. Boardman, “Public-Private Partnerships: Eight Rules for Governments,” *Public Works Management & Policy* 13.2 (2008): 149-161.

<sup>102</sup> Flinders, “The Politics of Public-Private Partnerships.”

the public and private sectors based upon a shared aspiration to bring about a desired public policy outcome.”<sup>103</sup>

The very notion of a *partnership* between the public and the private sectors has its conceptual underpinnings in the political and sociological framework of the “Third Way” applied in British politics during the 90s.<sup>104</sup> According to Giddens, this political project represents a “radical center” insofar it avoids both ideological dogma and the binary divide between the public and private sector.<sup>105</sup> As Broadbent, Gray, and Jackson note, the “Third Way” rejects both the neoliberal thrust of the previous conservative government’s reliance on the market and the centralized planning and delivery associated with traditional social democracy. In its place it posits an approach that is grounded in the notion of *partnership*.<sup>106</sup>

The typical arguments in favor of PPPs are that the scheme delivers efficiency, savings, and improvements in service standards.<sup>107</sup> Further, it is argued that PPPs transfer risk from the public to the private sector, and that technocratic expertise and professional management skills can be applied to public projects via these initiatives.<sup>108</sup> However, the empirical record is mixed with regard to whether this actually occurs in practice.<sup>109</sup>

The contrasting hypothesis advanced in this paper is that PPPs synthesize the worst of both the private and the public spheres. They are not privatization as usual because they limit private risks and responsibility, nor are they traditional government services because they avoid the mechanisms of public accountability.<sup>110</sup> As Shaoul notes, “far from transferring risk to the private sector, PPP transfers the risk to the government, workforce and the public as users and tax payers. . . . [T]he concept of risk transfer in the context of essential services is

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<sup>103</sup> Id.

<sup>104</sup> See Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press, 1998).

<sup>105</sup> Id.

<sup>106</sup> See Jane Broadbent, Andrew Gray and Peter McLeod Jackson, “Public-Private Partnerships: Editorial,” *Public Money and Management* 23.3 (2003): 136 (emphasis added).

<sup>107</sup> Ananya Mukherjee Reed and Darryl Reed, “Partnerships for Development: Four Models of Business Involvement,” *Journal of Business Ethics* 90. (2009): 3-37.

<sup>108</sup> Vining and Boardman, “Public-Private Partnerships: Eight Rules for Governments.”

<sup>109</sup> Pauline Vaillancourt Rosenau, “The Strengths and Weaknesses of Public-Private Policy Partnerships,” *American Behavioral Scientist* 43.1 (1999): 10-34.

<sup>110</sup> Irma E. Sandoval-Ballesteros, “Transparency under Dispute.”

fundamentally flawed.”<sup>111</sup> PPPs both increase public debt and therefore lead to a rise in taxes (*public costs*), and intensify the exploitation of labor through the elimination of labor rights.<sup>112</sup> All of this behind the discourse of “efficiency” and “efficacy” and the resulting intensified level of appropriation of common and public resources (*private profit*).

Three key elements push us to understand PPPs as principally a neoliberal façade. First, PPPs represent a “buy now, pay later” scheme for states that deepens the vulnerability of the public sector to private finance, oriented towards expanding the process of hollowing out the states. Second, such schemes institutionalize the financial and corporate bailouts that have taken place everywhere and that have been under bitter legal and budgetary disputes in most of the parliaments around the world. Third, and perhaps most importantly, PPPs apply the famous “divide and conquer” strategy against the labor movement and unions around the globe, since there is virtually no room for labor rights in these arrangements.<sup>113</sup> While historically neoliberalism and privatization had to deal with labor rights,<sup>114</sup> unions and to some extent workplace democracy in many liberal democracies, the PPP’s governance model wants to completely get rid of them.

Today is the perfect moment to reread and update Polanyi.<sup>115</sup> For this author, market relations should not become the only economic relations between people since the market- and trade-dominated society is an artificial creation of relatively new social structures based on specific laws that produce an extreme commodification of land, labor and money. He warned that this ominous path would lead to societal upheaval and destruction.<sup>116</sup> Therefore, the excessive incursion and spread of market values and norms through heightened commodification processes into all areas of economic life needs to be regulated if

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<sup>111</sup> Jean Shaoul, “A Financial Analysis of the National Air Traffic Services Public Private Partnership,” *Public Money and Management* 23.3 (2003): 185-194, at 193.

<sup>112</sup> Flinders, “The Politics of Public-Private Partnerships.”

<sup>113</sup> See Faranak Miraftab, “Public-Private Partnerships: The Trojan Horse of Neoliberal Development?” *Journal of Planning Education and Research* 24.1 (2004): 89-101.

<sup>114</sup> In 1980 Douglas Fraser, the President of the United Workers Union, was a member of the board of Chrysler. See Cumbers, *Reclaiming Public Ownership*, 29.

<sup>115</sup> Polanyi, *The Great Transformation*.

<sup>116</sup> *Id.*

wider social goals, such as environmental sustainability, healthier lives, economic democracy and social justice are to be achieved.

There is, nevertheless, one crucial difference between liberalism and neoliberalism. While the *liberal* creed was relatively consistent between beliefs and policy, the *neoliberal* creed is openly hypocritical. Under the liberal creed, markets—in order to function properly—are and ought to be “self-regulating.”<sup>117</sup> But today, while many still publicly defend the “invisible hand” and the importance of free-market forces,<sup>118</sup> in fact public officials openly facilitate, accelerate and enable state intervention.<sup>119</sup> The extensive government-led financial bailouts following the 2008-2009 global economic crisis are a particularly clear example.<sup>120</sup>

In general, the idea that “poorly performing private firms tend to go out of business” is as much of a misrepresentation as the idea that elections guarantee democracy and the government of the people. The ideology of “too big to fail” has made evident that poorly performing private firms are often given more money and support in order to overcome their shortcomings.<sup>121</sup> And with the spread of the PPP model of governance, this trend is institutionalized by normalizing continuous bailouts and government interventions. State-intervention or “expropriation” have been replaced by a constant process of state alleviation. Today’s neoliberalism is based upon regulation, intervention and state arrangements much more than more primitive forms of liberalism.

In response it is crucial to expand our understanding of transparency and accountability to include the private sector. In order to create the conceptual space to make this move, we need to go beyond the typical bureaucratic and public relations approaches to transparency and develop a new democratic-expansive understanding.

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<sup>117</sup> See Ulrich Witt, “Self-Organization and Economics—What is New?” *Structural Change and Economic Dynamics* 8.4 (1997): 489-507.

<sup>118</sup> See Katie Willis, *Theories and Practices of Development* (Taylor & Francis, 2011).

<sup>119</sup> See Irma E. Sandoval-Ballesteros, “Financial Crisis and Bailout: Legal Challenges and International Lessons from Mexico, Korea, and the United States,” in Peter L. Lindseth and Susan Rose Ackerman, eds., *Comparative Administrative Law* (Edward Elgar Publishing, 2010).

<sup>120</sup> *Id.*

<sup>121</sup> Greenwald, “HSBC, Too Big to Jail.”

The bureaucratic approach to transparency can be defined as a specific form of organizational rationalization of public administration that advocates for a basic dose of bureaucratic hygiene with the only purpose of improving control, surveillance and the establishment of a so-called “culture of legality” among citizens and public employees.<sup>122</sup> The belief here is that corruption is only a matter of low-level public servants filling their pockets at the expense of common citizens, or principally an issue of reeducation or cultural transformation.<sup>123</sup>

Based on this limited perspective, large teams of experts and advisers in the fields of law, political science, and public administration travel throughout the world issuing reports and recommendations on how to improve the practice of access to public information.<sup>124</sup> Academics, commissioners and officials from institutions with access to public information continuously organize high-level forums, conferences, and costly meetings to analyze proposals and government responses.<sup>125</sup> Some of them might end up offering suggestions for the improvement and modernization of government processes, and the treatment of public and government information, in order to improve electronic FOIA requests, modernize internet procurement procedures or decrease the amount of time it takes to provide a response to citizen requests, for example.<sup>126</sup>

This work is important and valuable, but unfortunately it is not powerful enough to overcome the enormous resistance to transparency and accountability present in Mexico and other similar countries.<sup>127</sup> This is because the problem at root is not

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<sup>122</sup> Sandoval-Ballesteros, “Transparency under Dispute.”

<sup>123</sup> See Salvador Vega Casillas, “Anti-Corruption in the Federal Civil Service: Instruments, Mechanisms, and Best Practices,” *Revista de Administración Pública* Vol. XLIII Sept-Dec, 227-248, and Guillermo Cejudo, “Public Management Policy Change in Mexico, 1982-2000,” *International Public Management Journal* 6 (2003): 309-325.

<sup>124</sup> Sandoval-Ballesteros, “Transparency under Dispute.”

<sup>125</sup> Id.

<sup>126</sup> One other example of this bureaucratic understanding of transparency that equates it to a matter of bureaucratic hygiene is the conception of transparency and public administration as a tool of *societal plumbing*. “If our social policy is regressive, if our tax system is ineffective, if our public security policy is in crisis, if local governments don’t deliver good results, all of this and more is due to the fact that we have overlooked the *organizational plumbing*, thinking instead that the political plurality and checks and balances by themselves would automatically solve every single public problem. This time again we face the risk to repeat the very same mistake: to embark in thinking about the major challenges of the State, without having resolved first the administrative means to make this envisioned new State possible.” Mauricio Merino, “La Fontanería de la Democracia,” *El Universal*, May 9, 2007, <http://www.eluniversal.com.mx/editoriales/37525.html>.

<sup>127</sup> Canadian Journalists for Free Expression (CJFE), “A Hollow Right: Access to Information in Crisis,” January 31, 2013, <https://cjfe.org/resources/publications/hollow-right-access-information-crisis>.

merely technical, nor cultural, but also political and structural. In principle, it is not in the immediate interest of top public servants, judges, and elected officials to reveal all information about their actions, decisions, budgets, and public expenditures.<sup>128</sup> Transparency normally leads to scandal and this type of public attention can inflict significant damage on their political careers.

The tendency has therefore been to defend transparency discursively, without following up with any concrete steps to implement it or to show firm commitment to it in practice. Thus emerges what we can call the “public relations” approach as the other side of the coin of the dominant bureaucratic approach. This understanding of transparency can be defined as a discursive façade that allows for the political abuse of the language of transparency and accountability with the main objective of obtaining legitimacy and stability for governments and gaining trust for investors vis-à-vis growing social demands against opacity and corruption on the part of citizens.<sup>129</sup> In other words, the public relations approach focuses on transparency as a legitimating tool.

The alternative to these two approaches is the democratic-expansive project of transparency, which can be defined as a tool of democratic performance, or as a form of collective action designed to carry out accountability, resist corruption and undo the system of impunity and privilege which is so deeply entrenched in Mexico and similar countries today. This approach understands transparency as a matter of rights and citizenship and not of bureaucratic hygiene.<sup>130</sup> The principal goal of this project of transparency is to serve as an engine of change that pushes forward the normative and political achievements with regard to accountability.

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<sup>128</sup> The most recent proposed amendments to the *Law on Freedom of Access to Information of Bosnia and Herzegovina*, which aimed to exclude large volumes of information about the functioning of public bodies and the judiciary from the right of access to information, are another example of this trend that seems to be a world-wide trend against the most basic pillars of democracy. For more on this case see Organization for Security and Co-operation in Europe, “Press Release: OSCE Media Freedom Representative Expresses Concern about Access to Information Law Amendments in Bosnia and Herzegovina,” June 4, 2013, <http://www.osce.org/fom/102269>.

<sup>129</sup> Brad L. Rawlins, “Measuring the Relationship between Organizational Transparency and Employee Trust,” *Public Relations Journal* 2.2 (2008), and Secretaría de la Función Pública, *Transparencia, buen gobierno y combate a la corrupción en la función pública* (Fondo de Cultura Económica, 2005).

<sup>130</sup> According to Mark Bovens (2002), we should think of information rights as the fourth great wave of citizens’ rights, equivalent to the civil, political and social rights outlined in T.H. Marshall’s classic text. With the beginning of the end of the industrial era and the rise of the “information society,” the world needs to update its constitutional frameworks to take into account the new universal right to information. Here the author makes a crucial distinction between transparency as a question of “public hygiene” and information rights as an issue of citizenship. See: Mark Bovens, “Information Rights: Citizenship in the Information Society,” *Journal of Political Philosophy* 10.3 (2002): 317–341.

Civil society, social movements, investigative journalists, and normal citizens aided by social media have all been the principal actors in this democratic expansive project of transparency.<sup>131</sup> These social actors have tremendous importance in the struggle to push transparency as a key element of democracy. Their actions and initiatives have been important for the advance of this project since they have proven to be much more aware of and capable of documenting abuses than bureaucratic agencies, politicians, technocrats or what we can call “corruption plumbers.”<sup>132</sup> In a nutshell, the struggle to fill transparency with meaning is a long one which ultimately depends on political will and social mobilization, not only technical formulas.<sup>133</sup>

## The Mexican Case

Almost fifteen years have passed since Mexico’s authoritarian state-party regime officially came to an end in the year 2000. One would expect that the emergence of vigorous political competition would have had an immediate and irreversible impact on corruption and accountability.<sup>134</sup> Healthy competition between different political parties, social interests and even government institutions should lead to increased mutual oversight. In addition, the real possibility of losing political power at the next election ought to create strong incentives for government officials to reach out to citizens by involving and informing them better.

But progress in fact has been extremely slow, and in some areas there are even signs of reversal. In 2012, Mexico received a score of thirty-four from Transparency International. Mexico today is ranked at the level of Philippines and below China, Tanzania and Morocco.<sup>135</sup> In addition, almost half (forty-three percent) of all Mexicans are convinced that the government not only is ineffective in its fight

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<sup>131</sup> See Sallie Hughes, *Newsrooms in Conflict: Journalism and the Democratization of Mexico* (University of Pittsburgh Press, 2006). Also see Jenaro Villamil, *El sexenio de Televisa: conjuras del poder mediático* (Random House Mondadori, 2012).

<sup>132</sup> See Merino, “La Fontanería de la Democracia.”

<sup>133</sup> Sandoval-Ballesteros, “Transparency under Dispute.”

<sup>134</sup> See Arturo Guillén, “México: alternancia política, estancamiento económico y proyecto nacional de desarrollo,” in José Luis Calva, ed., *Políticas macroeconómicas para el desarrollo sostenido* (Juan Pablo Editores, 2012).

<sup>135</sup> Transparency International, Corruption Perceptions Index 2012, <http://cpi.transparency.org/cpi2012/results/>

against corruption, but that it directly protects and supports illegal activities.<sup>136</sup> Victimization surveys offer similar data. The 2012 Americas Barometer revealed that the percentage of the Mexican population which has been a victim of corruption went up five percentage points between 2008 and 2012, from thirty-two to thirty-seven percent.<sup>137</sup>

But these reports barely scratch the surface of the issue. The real problem is not so much low-level coercion of innocent citizens by policemen, garbage collectors and bureaucrats, but the structural corruption which invades the central functions of the state. Conflicts of interest abound at the highest levels of government in Mexico. Top officials are not required to divest from problematic investments, nor are they required to make their assets declaration public. The law does prohibit public servants from being directly hired by interests they are supposed to regulate, up through one year after leaving public service, but this is rarely enforced and violation is considered a minor administrative offense.<sup>138</sup>

In Mexico, the entire public education system is based on a network of payments and paybacks between the teachers union, individual teachers, school authorities and parents.<sup>139</sup> Mexico's numerous "independent" regulatory agencies are mostly staffed by political appointees or commissioners who have long careers within the very sectors they are supposed to regulate.<sup>140</sup> It is very difficult to find civil society leaders or independent experts in these jobs.

The Secretary of the Public Function (SFP), the agency responsible for preventing and combating corruption in the federal government, is not at all independent from the President and has been remarkably ineffective. The recent heads of the SFP

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<sup>136</sup> Id.

<sup>137</sup> Vidal Romero, Pablo Paras and Mitchell A. Seligson, "Cultura Política de la Democracia en México y las Américas 2012," Latin American Public Opinión Project, Vanderbilt University, July 2013, [http://www.vanderbilt.edu/lapop/mexico/Mexico\\_Country\\_Report\\_2012\\_W.pdf](http://www.vanderbilt.edu/lapop/mexico/Mexico_Country_Report_2012_W.pdf). According to this report, in 2001 Mexicans had to pay bribes for 10.6 out of every 100 government transactions. This number has remained virtually unchanged for the last 11 years. During 2007, Mexican families spent approximately 27 million pesos (2 million USD) on bribes, or an average of 8% of their income—and 18% of their income for the poorest families.

<sup>138</sup> Irma E. Sandoval-Ballesteros, "Financial Crisis and Bailout."

<sup>139</sup> For an excellent analysis on this topic see Luis Hernández Navarro, "Elba Esther Gordillo's Downfall in Mexico Is Political, and Personal," *The Guardian*, February 28, 2013, <http://www.theguardian.com/commentisfree/2013/feb/28/elba-esther-gordillo-mexico-embezzlement>.

<sup>140</sup> See Ernesto González Cancino, "Rendición de cuentas, transparencia y acceso a la información pública. El dilema: avanzar o regresar," Fundación Rafael Preciado Hernández Working Paper, No. 504, August, 2013, [http://www.fundacionpreciado.org.mx/boletin/Documentos\\_PDF/Documento\\_504.pdf](http://www.fundacionpreciado.org.mx/boletin/Documentos_PDF/Documento_504.pdf).

have all been political appointees who know little or nothing about the central issues and strategies of corruption control. This is one of the principal reasons why this agency has been so ineffective.<sup>141</sup>

In general, government institutions, and the law itself, have a double-sided contradictory nature in Mexico. The governing class has historically given great value to institutional development and defended the autonomy of the state. Throughout most of the twentieth century, political cadres did not normally come from the private sector, but were typically drawn from the professional class, social organizations or academia.<sup>142</sup> Over time, a relatively stable political class grew up which was intimately linked to the success and growth of government institutions as well as to the use and abuse of government budgets.<sup>143</sup> Thus the classic Mexican political adage: “To live outside of the budget, is to live in error.”<sup>144</sup>

Mexico has therefore inherited institutions which are “strong,” technically speaking, in so far as they are powerful, quite well funded, relatively autonomous and generally respected by society. Nevertheless, historically the principal function of these institutions has not been to resolve social problems, stimulate economic development or work in the public interest. To the contrary, their principal role has been to favor particular elites<sup>145</sup> and interest groups, guarantee political stability and promote the political careers of top bureaucrats.<sup>146</sup>

The institutional effects of the arrival of democratic political competition must be understood in this context. On the one hand, many of the same authoritarian ways

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<sup>141</sup> For instance, over 50% of the irregularities discovered by the SFP in government are repeat violations, a fact that demonstrates significant problems with the enforcement of the recommendations. In addition, the number of citizen complaints against wrongdoing by public servants has actually decreased over the years, revealing a lack of outreach and confidence by the population at large. But perhaps the most worrisome fact is that the agency has only been able to effectively charge less than 1% of the total amount of monetary sanctions it imposes. Also, these sanctions tend to be for minor offenses. Almost 50% are for “administrative negligence” for instance, while 1.5% are for extortion or corruption. See Informe de la Secretaría de la Función Pública 2012.

<sup>142</sup> See Roderic A. Camp, *Mexico’s Mandarin’s: Crafting a Power-Elite for the 21<sup>st</sup> Century* (University of California Press, 2002).

<sup>143</sup> Irma E. Sandoval-Ballesteros, “Opacity in the Management of Public Resources.”

<sup>144</sup> In Spanish: “Vivir fuera del presupuesto, es vivir en el error.”

<sup>145</sup> See Young Hyun Jo, “The elitism in Mexican political culture: the case Salinas and democracy,” *Korean Journal of Hispanic Studies* 5.1 (2012): 1-31.

<sup>146</sup> We therefore have a perfect example of what Guillermo O’Donnell has called the “particularization” of government institutions. See: G. O’Donnell, “Polyarchies and the (Un)Rule of Law in Latin America,” in J. Méndez, G. O’Donnell, and P.S. Pinheiro, eds., *The (Un)Rule of Law and the Underprivileged in Latin America* (University of Notre Dame Press, 1999).

of managing government affairs have remained intact. Corruption, clientelism and capture continue to be as present today as in the past.<sup>147</sup> Spending is still highly ineffective and civil service remains in its infancy.<sup>148</sup> Impunity and the abuse of human rights still reign in the judicial system.<sup>149</sup> Poverty and inequality have not significantly improved.<sup>150</sup> Regime change has not automatically led to a modification in the way in which government does business.

Indeed, in some respects, the situation has gotten even worse since the official beginning of democracy in the country. For instance, as a result of the fragmentation of the monolithic state-party edifice, the governors of the thirty-one states and the mayor of Mexico City have increased their relative power over their respective territories. This entrenchment of federalism has not necessarily led to greater accountability or better service provision. Provincial governors in Mexico are infamous for their iron, centralized control over politics, economics and society. While before they were at least held accountable by the President, today they are free to abuse of their power, turning them into the modern-day equivalent of feudal lords.<sup>151</sup>

Another indicator of the weakness of state institutions in Mexico is the fact that to this day the government only collects approximately twenty percent of GDP in tax revenue.<sup>152</sup> This is due to three factors: 1) the dependence on oil revenues<sup>153</sup> 2) the predominance of the informal sector, which employs half of the labor force,<sup>154</sup> and

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<sup>147</sup> Transparency International, Corruption Perceptions Index 2012, <http://cpi.transparency.org/cpi2012/results/>.

<sup>148</sup> OCDE, "Estudio de la OCDE sobre el proceso presupuestario en México," 2010, [http://www.contraloriadelpoderlegislativo.gob.mx/Revista\\_Rc\\_et\\_Ratio/Rc\\_et\\_Ratio\\_2/Rc8.pdf](http://www.contraloriadelpoderlegislativo.gob.mx/Revista_Rc_et_Ratio/Rc_et_Ratio_2/Rc8.pdf).

<sup>149</sup> Oficina en México del Alto Comisionado de las Naciones Unidas para los Derechos Humanos en México, "Informe Sobre la Situación de las y los Defensores de Derechos Humanos 2013: Actualización a 2012 y Balance a 2013," June 2013, [http://hchr.org.mx/files/doctos/Informe\\_defensoresDH\\_2013\\_web.pdf](http://hchr.org.mx/files/doctos/Informe_defensoresDH_2013_web.pdf).

<sup>150</sup> Economic Commission for Latin America and the Caribbean (ECLAC), "Time for Equality: Closing Gaps, Opening Trails," June 2010, [http://www.eclac.cl/publicaciones/xml/1/39711/100604\\_2010-115-SES-33-3-Time\\_for\\_equality\\_doc\\_completo.pdf](http://www.eclac.cl/publicaciones/xml/1/39711/100604_2010-115-SES-33-3-Time_for_equality_doc_completo.pdf).

<sup>151</sup> For general background on the topic see Wayne A. Cornelius, Todd A. Eisenstadt, and Jane Hindley, eds., *Subnational Politics and Democratization in Mexico* (Center for U.S.-Mexico Studies, 1999).

<sup>152</sup> By far the lowest in all of the OECD, <http://www.oecd.org/dataoecd/48/27/41498733.pdf>.

<sup>153</sup> See Secretaría de Energía, *Estrategia Nacional de Energía 2013-2027*, [http://www.energia.gob.mx/res/PE\\_y\\_DT/pub/2013/ENE\\_2013-2027.pdf](http://www.energia.gob.mx/res/PE_y_DT/pub/2013/ENE_2013-2027.pdf). Also see Todd Moss, "Oil-to-Cash: Fighting the Resource Curse through Cash Transfers," *Yale Journal of International Affairs* 6.2 (2011): 43-58.

<sup>154</sup> See Emma Liliana Navarrete, "Problemáticas laborales de México y Brasil en el actual contexto económico," *Estudios Demográficos y Urbanos* 27.1 (2012): 189-199. Also see Arne L. Kalleberg, "Precarious Work, Insecure Workers: Employment Relations in Transition," *American Sociological Review* 74.1 (2009): 1-22.

3) the incredible concentration of wealth and property ownership in a few hands.<sup>155</sup> Easy money from oil takes pressure off the need for fiscal reform. Both informal businesses and elite monopolists find it relatively easy to avoid the reach of the treasury authorities and free-ride on the public services financed by the formal labor force and the working classes.

In addition, as discussed above, the global shift of power from the public to the private sectors implies significant new challenges to transparency and accountability in Mexico and beyond. Markets are supposedly more “efficient” than government, but they are also by nature more opaque and present greater risks of abuse of power. The experience of the last two decades of privatizations in Mexico demonstrates that this is the case.

In sum, in order to truly combat corruption in Mexico it is necessary to start the cleaning job from the top to the bottom, just as you sweep the stairs. It is also important to not stop at the frontiers of government but also open up the internal accounts and practices of government contractors and monopolistic companies.

## Political Neoliberalism and Public-Private Partnerships

The connection between economic reform and structural corruption is particularly clear when we look at the 1994 Mexican bank bailout.<sup>156</sup> In 1994, financial crisis hit Mexico. The peso lost half its value, foreign investors ran to withdraw their money and the economy went into free fall. During 1995, GNP decreased by 6.2 percent, the exchange rate increased by one hundred percent and unemployment went up drastically.<sup>157</sup> This situation pushed most major Mexican banks to the verge of bankruptcy as debtors defaulted on their loans and creditors quickly withdrew their deposits in search of a more reliable investment climate.

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<sup>155</sup> See Human Development Report on México, <http://hdrstats.undp.org/en/countries/profiles/MEX.html>.

<sup>156</sup> Greenwald, “HSBC, Too Big to Jail.”

<sup>157</sup> See Jolle Demmers, Alex E. Fernández Jilberto, and Barbara Hogenboom eds., *Miraculous Metamorphoses: The Neoliberalization of Latin American Populism* (Zed Books, 2001) and Alejandro Nadal, “Contradicciones del Modelo de Economía Abierta,” Programa sobre Ciencia, Tecnología y Desarrollo (PROCIENDEC), Documento de trabajo No. 1-01, January 2000. Also see Manuel Pastor & Carol Wise, “A Long View on Mexico’s Political Economy: What’s Changed? What Are the Challenges?” in Joseph S. Tulchin and Andrew D. Selee, eds., *Mexico’s Politics and Society in Transition* (Lynne Rienner Publishers, 2003).

Something had to be done to save Mexico's system of financial mediation. Then President Ernesto Zedillo was faced with a crucial economic policy decision. A full menu of options was open to him, including the re-nationalization of the banks, a partial takeover, an across-the-board bailout of all banks, a partial bailout of some banks or specific debtors, or simply allowing the existing banks to fail and be replaced by new ones.

Economic orthodoxy called for a careful partial bailout while doing everything possible to avoid corruption.<sup>158</sup> The banks themselves should cover most of the costs, those guilty of illegal practices should be punished, and illegal loans should not be covered by bailout programs. Otherwise, the government sends a signal that irresponsible and illegal behavior will not be punished, and sets the stage for a worsening of the crisis in the short run and the emergence of a new crisis in the medium to long run.

Mexican law also required a careful approach to any bailout operation.<sup>159</sup> For instance, the Mexican Constitution requires Congress to formally authorize any new public debt and does not allow the indiscriminate use of public funds to bail out banks. These legal impediments should have pushed Zedillo to carefully design his bailout strategy, with an eye to public legitimacy and the future health of the banking system.

But Zedillo didn't follow either economic orthodoxy or Mexican law. His government orchestrated an across-the-board bailout of all Mexican banks and their holdings.<sup>160</sup> Favoritism, corruption and special treatment were rampant throughout the process. This was not the best strategy from either a strict technocratic perspective nor from the perspective of public legitimacy and the rule of law. But it was the correct strategy from the point of view of defending the interests of Mexico's emergent distributional coalition. Politics trumped economics. Zedillo lived up faithfully to the neoliberal cause.

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<sup>158</sup> L. Rojas-Suaréz and S.R. Weisbrod, "Manejo de las crisis bancarias: lo que debe y lo que no debe hacerse," in R. Hausman and L. Rojas-Suaréz, eds., *Las crisis bancarias en América Latina* (Inter American Development Bank, FCE, 1997).

<sup>159</sup> Irma E. Sandoval-Ballesteros, *Crisis, Rentismo e Intervencionismo Neoliberal en la Banca*.

<sup>160</sup> Celso Garrido, "Mexico's Financial System and Economic Development: Current Crisis and Future Prospects," in Kevin Middlebrook and Eduardo Zepeda, eds., *Confronting Development: Assessing Mexico's Economic and Social Policy Challenges* (Stanford University Press, 2003). See also: Susan Kaufman and Luis Rubio, *Mexico under Zedillo* (Lynne Rienner Publishers, 1999).

This political agenda has recently gotten a significant boost through the passage of a new Law of Public-Private Associations (LAPP in its Spanish acronym), signed by former president Felipe Calderon on January 16, 2012. The LAPP seeks to completely open the door to private ownership and control of a wide range of public services, including highways, hospitals, jails and schools. It not only permits private takeover of existing government services, but also creates incentives for private corporations to propose new construction projects to the government which would be funded by both public and private monies.

The LAPP allows for the establishment of long-term contracts (up to fifty years or more) with private national and international companies that would directly control the infrastructure and provision of areas strategic to the country's development. For its critics, this would imply the absolute subordination of the public interest to the directives of financial intermediaries paving the way for the institutionalization of public debt, illegality and corruption. The services envisioned by this law include health care, public security, communication, infrastructure, education, etc.

The government argues that the main goal is to compensate for the fiscal crisis which has limited public investment in crucial social sectors. The problem is that the transfer of public services to private hands could dramatically limit the reach of basic transparency and anti-corruption oversight mechanisms. The private projects would not be required to subject themselves to the same accountability controls as normal government projects. The most likely scenario is that Mexico would therefore relive once more the failed experience of privatization of the 1990s that simply led to the transfer of public rents to private hands.<sup>161</sup>

In addition, this "solution" paradoxically rewards those very same actors responsible for the original problem. Tax revenues are so low in Mexico precisely because the powerful economic elites refuse to pay taxes by hiding their money in offshore accounts or simply intimidating treasury authorities.<sup>162</sup> This is the real source of the fiscal crisis and should be taken on directly.

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<sup>161</sup> H. Shamis, "Avoiding Collusion, Averting Collision: What Do We Know about the Political Economy of Privatization?" in Irma E. Sandoval-Ballesteros, ed., *Contemporary Debates on Corruption and Transparency, Rethinking State, Market and Society* (World Bank, 2011).

<sup>162</sup> See Juan Carlos Gómez-Sabaini, and Juan Pablo Jiménez, "Estructura tributaria y evasión impositiva en América Latina," Corporación Andina de Fomento (CAF) Documento de Trabajo, August 2011.

The antecedent for the LAPPs are the “service delivery projects” (PPS from its Spanish initials) first used in 2003. Through these projects, the government took advantage of legal loopholes to unconstitutionally privatize broad sectors of government services such as water, infrastructure, highways, bridges, hospitals, schools and several other public works, through the Ministry of Finance—particularly in the Northern states of the country.<sup>163</sup>

But this system of PPSs wasn’t enough for the most powerful corporate monopolies, since it didn’t allow them to control the granting of licenses, permits, and other kinds of authorizations. The LAPP replaces “concessions” with “joint-ventures” which will mean even fewer obligations and commitments to the public interest. The new LAPP asserts that public projects are no longer subject to the Law of Acquisitions, the Public Sector Leasing Act, the Public Works Act, nor related laws that were designed to provide for a level of transparency and to avoid conflicts of interest. According to the new LAPP, any entity, organism or trust in the federal government will have wide margins and authority to establish public-private partnerships. Through this law, major international firms are today getting ready to enter into such essential sectors as telecommunications, energy, air transport infrastructure, ports, highways and a long list of other goods and services.

In the past, the public sector was responsible for determining the necessity of carrying out investment projects. Starting today it will be the private sector that will detect the “need” and will advance *motu proprio* its proposals. In this way, projects motivated by profit, which will be financed with public resources, will be placed above public priorities defined collectively by elected officials through, for instance, the Plan for National Development which is developed at the beginning of each presidential administration. These new “joint-venture” contracts can also be “transferred (in whole or in part) or guaranteed in favor of third parties.” In other words, crucial areas of national development will literally be gambled on through the financial and speculative adventures of private investors.

LAPPs may not even lead to an increase in private investment in public services. Under the new scheme, the state could finance up to one hundred percent of the

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<sup>163</sup> Programas y Proyectos de Inversión,  
[http://www.shcp.gob.mx/EGRESOS/ppi/Paginas/Preguntas\\_Frecuentes.aspx](http://www.shcp.gob.mx/EGRESOS/ppi/Paginas/Preguntas_Frecuentes.aspx).

new investments and then issue expropriation decrees to hand over the investments to domestic and international private companies. This will eventually entail regressive reforms to the Expropriation Law, the General Law of National Goods, and the Federal Civil Code, among others. In general, Article 21 of the LAPP establishes that “while planning its budget, the contracting agencies and entities will prioritize the obligations established within a public-private partnership contract.” This “prioritization” will mean a burden for the budgets of federal and local agencies. For instance, the payment of public debt incurred through these new projects will be legally prioritized and obligatory every year, violating the constitutional powers of the House of Representatives to determine and redirect funds to areas of more pressing need and in the public interest.

Another worrisome procedural “innovation” is related to the process of appraisal. In the past, the Institute of Appraisal and Administration of National Goods was the only entity that could give authorized appraisals. With the passage of the LAPP, private banks, which are almost completely controlled by foreign financial giants, will now be able to give estimates. Without a doubt, these estimates will favor private interests at the expense of bleeding the public budget even more. In sum, under the aegis of balancing risks between the state and private agents, the government has succeeded in strengthening the ever-present neoliberal project by privatizing gains and socializing losses.

The LAPP law will also have a disastrous impact on freedom of information. According to the Transparency and Freedom of Information Act, only public agencies and authorities are responsible for providing public information to the citizens, but once public money is handled by a private entity or person, this obligation disappears. For instance, citizens will no longer be able to access key information and monitor the everyday functioning and managing of important public institutions such as public hospitals, schools, prisons and highways.

One possible solution to this problem would be to consider an amendment to Article 6 of the Mexican Constitution, which covers the right to access public information. This Constitutional provision should not only assure access to information about the amount of public resources received by private individuals or corporations, but also should compel them to provide information directly to the public about the specific uses they make of the funds, just as government agencies

must do today. This would be particularly important in the case of private actors who take up public functions, those in charge of delivering public services originally entrusted to the State, or for those directly exploiting nationally owned resources.

In general, the Mexican historical experience with privatizations demonstrates that handing over too many responsibilities to the private sector often results in an important loss in efficiency. For instance, the Federal Congress' Public Finance Research Center has discovered that the widespread privatization of highways during the Carlos Salinas administration (1988-1994) led to disastrous results.<sup>164</sup> Only a few years later, in 1997, the government was forced to carry out a 58.1 billion peso highway bailout that would later increase to 98.7 billion due to interest.<sup>165</sup>

Even after this failure, PPP schemes for highway construction have continued to be implemented and encouraged in recent years. For example, from 2000 to 2006, Vicente Fox awarded the private sector with eleven highway projects amounting to a 29.2 billion pesos investment. During Calderon's term, seventeen concessions were in effect with an initial investment of 59 billion pesos. To this day, eighteen highways are being operated through this scheme, with an original investment of 39.1 billion pesos. Using the service delivery project scheme, seven concessions have been granted with a 33.8 billion peso investment and, finally, under the "assets harvesting" scheme three major highway projects have been delivered to the private sector with a 12.287 billion pesos investment.<sup>166</sup>

Another antecedent to the LAPP, the Investment Projects to be Deferred in Expenditure (PIDIREGAS)—which had the purpose of attracting private funds to be invested in infrastructure for the energy sector—also led to an explosion of public debt. The debt rose to 896 billion pesos for PEMEX, and 263 billion pesos in the case of the Federal Electricity Company (CFE). Although these schemes aimed to transform the oil industry into a highly competitive sector, PEMEX moved from

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<sup>164</sup> 52 federal highways were granted to the private sector, to be exploited for 50 year terms.

<sup>165</sup> Cámara de Diputados, Centro de Estudios de Finanzas Públicas. Also see Ana Lilia Pérez, "Ley de APP, la última apuesta de Calderón," *Revista Contralínea*, January 19, 2011, <http://contralinea.info/archivo-revista/index.php/2011/01/19/ley-de-app-la-ultima-apuesta-de-calderon/>.

<sup>166</sup> Secretaría de Comunicaciones y Transportes, "Asociaciones Público-Privadas para el Desarrollo Carretero en México," <http://www.sct.gob.mx/fileadmin/DireccionesGrales/DGDC/Publicaciones/Presentaciones/asociaciones.pdf>.

sixth place among the world's most important oil firms in 2000 to eleventh in 2011.<sup>167</sup>

Mexico experienced one of its first failures with privatization schemes in the area of water provision as early as 1993. In the state of Aguascalientes, the privatization of water services led to a 170 percent fee increase to be enforced every 2 months. With the economic crisis of 1994, the government had to implement a new bailout of this sector by creating a subsidy fund.<sup>168</sup> In addition, during the management of services by private hands, the public did not get better quality and reasonable fees. In Saltillo, for example, a private firm provides poor quality water and charges excessive fees. The private firm Vivendi provides a similar example, again in the state of Aguascalientes. In response, citizens decided not to pay the fees, but the firms have reacted with service interruption.<sup>169</sup>

PPP projects at the federal level have also been implemented in the health and education sectors. For example, the Ministry of Health, in partnership with the private sector, carried out the construction and provision of at least seven hospitals. The Ministry of Education recently signed a contract for the construction, equipment, financing and management of a university in San Luis Potosí, to be operated for twenty years. Similarly, Mexico City's government awarded the construction of a new subway line to a private firm, a project which was plagued by delays and exploding costs.<sup>170</sup>

Scientific innovation will also be affected by the LAPP. The law claims to encourage academic research projects through the investment of both public and private sectors. But according to some experts, the law in fact "reduces government's responsibility with scientific and technological development and encourages its

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<sup>167</sup> See Secretaría de Comunicaciones y Transportes, "Diseño y Gestión de Proyectos Carreteros en Asociaciones Público-Privadas," 40, <http://www.sct.gob.mx/fileadmin/DireccionesGrales/DGDC/Publicaciones/Libro/capitulo5.pdf>.

<sup>168</sup> Id.

<sup>169</sup> Miguel Concha Malo, "La Privatización del Agua," November 29, 2009, <http://contralinea.info/archivo-revista/index.php/2009/11/29/la-privatizacion-del-agua/>.

<sup>170</sup> Elva Mendoza, "Asociaciones Público Privadas: la nueva oleada de privatizaciones," *Revista Contralinea*, January 8, 2012, <http://contralinea.info/archivo-revista/index.php/2012/01/08/asociaciones-publico-privadas-nueva-oleada-de-privatizaciones/>.

privatization.”<sup>171</sup> By encouraging PPP schemes in this area, the government is abandoning its duty to strengthen scientific innovation and research and education.

The Mexican government has also encouraged the insertion of the private sector into the fight against poverty. For instance, the new “National Crusade against Hunger” will be subordinated to imperatives from the corporate giants of the food industry. The government has hired some of the biggest firms in the food industry to “collaborate” with the program, including Nestlé, Pepsico, Kellogg’s and Quaker, among other multinationals. This alliance will include “government’s support to Pepsi’s donation of healthy products,” as well as Nestlé and Quaker providing training programs to women and men to start their own businesses. The aid and training programs will be delivered in rural areas, and will supposedly combat under-nutrition.<sup>172</sup>

This program has been highly criticized by NGOs and public opinion, since it appears to be a contradiction that companies from the *junk food* industry would be able to provide the expertise necessary to provide healthy food to poor people. Moreover, these firms are also symbols of the political and economic power of transnational corporations, which have successfully modeled public policies and regulations in recent years in order to run small rural producers out of the market in Mexico. For instance, Fernando Celis, leader of Mexico’s coffee producers’ confederation, has pointed out that Nestlé is a leading example of how international firms receive special tax breaks and have run national producers out of business.<sup>173</sup>

The crisis of Mexico’s prison system, a consequence of the “war on drugs,” is also being used by the authorities as an argument in favor of the privatization of prisons.<sup>174</sup> The first steps taken in that direction were made in June 2009, when the former Public Security Minister, Genaro García Luna, announced his plan to

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<sup>171</sup> Asa Cristina Laurell, “Ley de Asociaciones Público-Privadas: la investigación como negocio particular,” *La Jornada*, December 9, 2011, <http://www.jornada.unam.mx/2011/12/09/opinion/a03a1cie>.

<sup>172</sup> “Los convenios de Nestlé y Pepsico en la Cruzada contra el Hambre,” *Aristegui Noticias*, April 23, 2013, <http://aristeguinoticias.com/2304/mexico/documentos-los-convenios-de-nestle-y-pepsico-para-la-cruzada-contra-el-hambre/>.

<sup>173</sup> “Capturan chatarreras Cruzada Nacional contra el Hambre,” *El Poder del Consumidor*, <http://www.elpoderdelconsumidor.org/saludnutricional/capturan-empresas-de-comida-chatarra-la-cruzada-nacional-contra-el-hambre/>.

<sup>174</sup> “Borrego pide privatizar cárceles tras fuga en Coahuila,” *El Universal*, September 21, 2012, <http://www.eluniversal.com.mx/notas/871893.html>.

hand over the construction of twelve federal prisons to the private sector in order to solve the overcrowding problem prevailing in federal and local facilities.<sup>175</sup> During his fourth “State of the Union” address, former president Calderón made public the construction of these twelve prison facilities in order to handle 32,500 convicts. The projects were awarded under the PPS scheme, in order to “maximize the confinement capacity” of the Federal Prison System. Each prison would be worth 2 billion pesos, and the private sector’s participation would supposedly only involve the construction of the facilities, but not their management or operation.<sup>176</sup> Jail privatization is profitable for both public and private actors, since the developers get thirty-five percent of profits and the government can avoid the need for Congressional approval in order to establish and expand the facilities.<sup>177</sup> The firms also have the chance to use their participation and investments in jails in order to boost the value of their shares in the stock exchange.<sup>178</sup>

Nevertheless, a recent United Nations’ report has condemned the privatization of jails as a breach of international human rights obligations and a dangerous delegation of responsibility with regard to public security.<sup>179</sup> Some researchers have also concluded that such policies do not solve the problems they are intended to tackle, since “violence is often more severe in private than in public facilities, there is no complying of the rehabilitation programs, inmates’ human rights are violated and there’s still drug trafficking”<sup>180</sup>

Mexico’s National Human Rights Commission (CNDH) has also contested the privatization of jails. The national ombudsman recently filed a report<sup>181</sup> concluding that prisons constructed and managed under public-private partnerships do not

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<sup>175</sup> Garcia Castillo, “Pingües ganancias, ofrecimiento a la IP para construir prisiones federales,” *La Jornada*, April 30, 2012, <http://www.jornada.unam.mx/2012/04/30/politica/002n1pol>.

<sup>176</sup> Presidencia de la República, *Cuarto Informe De Gobierno*, <http://bit.ly/Q13alt>.

<sup>177</sup> Nacha Cattán and Eric Sabo, “Drug War Lures Mexico Firms to Jails as Foreign Rivals Stay Away,” *Bloomberg*, August 2, 2012, <http://www.bloomberg.com/news/2012-08-02/drug-war-lures-mexico-firms-to-jails-as-foreign-rivals-stay-away.html>.

<sup>178</sup> “La privatización del sistema carcelario en México,” *Nexos*, Blog de la Redacción, April 9, 2012, <http://bit.ly/HvRuP2>.

<sup>179</sup> Rodrigo Vera, “Privatización carcelaria: los reos, negocio rentable,” *Revista Proceso*, October 5, 2013, <http://www.proceso.com.mx/?p=354672>.

Id.<sup>181</sup> Henia Prado, “Cuestiona CNDH penales ‘privados,’” *Criterio Hidalgo*, June 9, 2013, <http://www.criteriohidalgo.com/notas.asp?id=173137>.

<sup>181</sup> Henia Prado, “Cuestiona CNDH penales ‘privados,’” *Criterio Hidalgo*, June 9, 2013, <http://www.criteriohidalgo.com/notas.asp?id=173137>.

lead to increased cost efficiency, and that inmates' welfare has not improved inside the prisons, despite the higher investment per prisoner. This situation has led to the filing of complaints to the CNDH by several prisoners of a PPP jail in Hermosillo, Sonora, alleging violation to their health rights, due process, the right to be treated with dignity, and rights to rehabilitation and social reintegration.<sup>182</sup> Problems with social reintegration and rehabilitation are some of the major concerns about the transformation of jails into privatized facilities, since such purposes revolve around social interests, not economic gain.

Transparency and accountability are also a serious problem with privatized prisons. For example, the contracts regarding the construction of Mexico's PPP federal prisons have already been classified as reserved documents for a period of twelve years.<sup>183</sup>

## Old Strategies in New Bottles: Peña Nieto's Reforms

With the return of the old-guard Party of the Institutional Revolution (PRI) to the presidency on December 1, 2012, the new president Enrique Peña Nieto put on an excellent display of how *Public Relations Transparency* can be used as political cover instead of as a mechanism for citizen empowerment.<sup>184</sup> On January 15, 2013, he organized a high-profile press conference to make the supposedly "historic" announcement that the President and his cabinet would publicly release information about their assets. The problem is that the audited published statements that the top public servants revealed were not very transparent at all. When the documents were made public, they only contained their monthly salaries, which is already public information, as well as a list of the houses and other real estate and possessions (jewels, works of art, etc.) which belonged to the President and other members of his cabinet.<sup>185</sup> No information was provided about the value

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<sup>182</sup> Rodrigo Vera, "Privatización carcelaria: los reos, negocio rentable."

<sup>183</sup> See Henia Prado, "Matan en penales a 12 reos al mes," *Reforma*, June 15, 2013, <http://www.reforma.com/nacional/articulo/703/1405399/>.

<sup>184</sup> See Tania L. Montalvo, "**Peña Nieto publica su declaración patrimonial sin el valor de los bienes.**" CNN Mexico, January 16, 2013, <http://mexico.cnn.com/nacional/2013/01/16/pena-nieto-publica-su-declaracion-patrimonial-sin-el-valor-de-los->.

<sup>185</sup> Other very high-ranking members of his cabinet like Emilio Lozoya, President of the State Oil enterprise PEMEX, declared having one original Picasso and four original Dalí paintings. Of course he also abdicated his obligation to declare its monetary value, and they were also reported as "donations." See Ron Buchanan, "Mexico's Strangely Opaque Transparency Drive," *Financial Times*, January 30<sup>th</sup> 2013,

or location of the real estate, nor was there any information about financial assets or the market value of their other possessions. In addition, no information was provided about the assets of family members. Also, many of the properties were suspiciously listed as having been “donated” to the President, without further explanation. According to Peña Nieto, revealing this information was “clear evidence of his commitment with transparency.”<sup>186</sup>

It is very important to take into account the political context in Mexico when evaluating accountability policies. One important consideration is the widespread rejection of Peña Nieto by the majority of Mexico’s youth during the 2012 presidential election, particularly the growing student population embodied in the #YoSoy132 movement.<sup>187</sup> This rejection was, and is, grounded in the public perception that Peña Nieto’s election was not free and fair.<sup>188</sup> Independent electoral observers reported that almost one third of voters (28 percent) were significantly pressured to vote, over seventy percent of those for the PRI, and that voter secrecy was violated in almost a quarter of the voting booths (twenty percent).<sup>189</sup> This is clearly only the tip of the iceberg, since domestic and international NGOs invested far less in electoral observation in 2012 than in past elections.<sup>190</sup> The current President also most likely grossly violated the campaign spending limits established by law, and has been accused of diverting enormous amounts of cash to his political campaign through financial institutions with dark pasts and links to money-laundering operations such as HSBC and Monex.<sup>191</sup>

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<http://blogs.ft.com/beyond-brics/2013/01/30/mexicos-strangely-opaque-transparency-drive/#axzz2NKjnBExg>.

<sup>186</sup> “Cumplimiento de la declaración patrimonial pública,” January 16, 2013,

<http://www.presidencia.gob.mx/cumplimiento-de-la-declaracion-patrimonial-publica>.

<sup>187</sup> See Luz Estrello and Massimo Modonesi, “El Yo Soy 132 y las Elecciones en México: Instantáneas de una imposición Anunciada y del Movimiento que la Desafió,” *Revista OSAL* 32, November 2012.

<sup>188</sup> Enrique Peña Nieto has been accused of authoritarianism and corruption ever since his time as Governor of the State of Mexico, a state which has been governed by the old guard PRI party for over 90 years without alternation in power. This negative image grew exponentially with the enormous vote-buying operation deployed during the past presidential election. See CNN Mexico, “Civic Alliance: The Choice Was Not ‘Clean’ or ‘Fair,’” July 3, 2012, <http://www.adnpolitico.com/2012/2012/07/03/alianza-civica-la-eleccion-no-fue-limpia-ni-equitativa>.

<sup>189</sup> See Alianza Cívica, Boletín de Prensa, July 3, 2012,

<http://www.alianzaciciva.org.mx/archivos/pub/4434Informe%203%20de%20julio%202012.pdf>.

<sup>190</sup> See <http://2012.contamos.org.mx/index.php/main> <http://www.somoselmedio.org/?p=1788>

<http://eeas.europa.eu/eucom/> <http://mexico.cnn.com/nacional/2012/07/02/la-onu-encabeza-ejercicio-de-observacion-en-mexico-recibe-1300-denuncias>.

<sup>191</sup> See Jo Tuckman, “Mexico Presidential Runner-Up Alleges Money Laundering in Election,” *Guardian*, July 18, 2012, <http://www.guardian.co.uk/world/2012/jul/19/lopez-obrador-election-money-laundering>; “Monex,

In response, the President launched two new proposals regarding accountability in order to reconstruct his base of support and to gain the public legitimacy that he did not receive at the polls.<sup>192</sup> The first proposal seeks to transform the agency responsible for guaranteeing the application of Mexico's access to information law, the IFAI, into a fully "autonomous" body, since today this body is still under the control of the executive.

The second proposal would create a supposedly independent anti-corruption agency in charge of investigating and preventing corruption.<sup>193</sup> Although both proposals sound appealing on the surface, a quick review of the bills' details reveals that they are actually designed to cover up instead of expose and punish corruption and opacity.<sup>194</sup> The first one looks to centralize political control and dependency of the IFAI in the hands of the executive. The second would eliminate both the federal government's civil service career, today under the control of the current anti-corruption agency, the Secretary of the Public Function (SFP)<sup>195</sup> and the Federal Police Secretariat. Both initiatives represent clear examples of what we here call "transparency for the public relations."<sup>196</sup>

Information is power and Peña Nieto's transparency proposal does not grant the IFAI any real autonomy. To the contrary, its main purpose is to strengthen the direct control of the presidency over the quantity and quality of information available, and to promote greater opacity, particularly with regard to delicate

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ligado al caso del lavado de dinero en Wachovia, al caso Yarrington, a Zhenli Ye Gon y... al PRI," February 5, 2013, <http://www.sinembargo.mx/05-02-2013/516111>; and Roberto González Amador, "La operación de Monex encuadra lavado de dinero," *La Jornada*, July 12, 2012, <http://www.jornada.unam.mx/2012/07/12/politica/005n1pol>.

<sup>192</sup> Dictamen de las Comisiones Unidas de Puntos Constitucionales, de Transparencia y Anticorrupción, y de Régimen, Reglamentos y Prácticas Parlamentarios, con proyecto de decreto que reforma y adiciona los artículos 6, 6, 73, 76, 78, 89, 105, 108, 110, 111, 116 y 122 de la Constitución Política de los Estados Unidos Mexicanos, en materia de transparencia. Publicado en Gaceta Parlamentaria, No. 3842-A, August, 21, 2013, enacted on August 22, 2013, <http://gaceta.diputados.gob.mx/PDF/62/2013/ago/20130821-A.pdf>.

<sup>193</sup> See Iniciativa con Proyecto de Decreto que Reforma y Adiciona los Arts 22, 73, 79, 105, 107, 109, 113, 116 y 122 de la Constitución Política de los Estados Unidos Mexicanos que presentan los senadores del Partido Revolucionario Institucional, <http://es.scribd.com/doc/117192797/Iniciativa-Comision-Nacional-Anticorrupcion>.

<sup>194</sup> See Perla Gómez Gallardo, "Análisis de la propuesta de autonomía constitucional del IFAI, presentada por Enrique Peña Nieto, September 21, 2012, 7, <http://www.scribd.com/fullscreen/106610774>.

<sup>195</sup> The Secretary of the Public Function (SFP), the agency responsible for preventing and combating corruption in the federal government, is not at all independent from the President and has been remarkably ineffective. The recent heads of the SFP have all been political appointees who know little or nothing about the central issues and strategies of corruption control. This is one of the principal reasons why this agency has been so ineffective and the new proposal of EPN looks to perpetuate this same political dependency.

<sup>196</sup> See Sandoval-Ballesteros, "Transparency under Dispute."

political matters. The supposed autonomy of the new IFAI will be in name only, because the proposal maintains and even places in the Constitution the President's near total control over the appointment of the agency's commissioners.<sup>197</sup> The new IFAI as envisioned by the PRI includes no nomination hearings or public debates on the merits of potential commissioners in front of any legislative body. As in Rome during the election of the pope, the nominees will be announced when white smoke one day emerges from the presidential residence in Los Pinos. As a mere formality, the Senate will have the opportunity to object to the appointees within thirty days, bringing Congress back to the humiliating days in which it operated as a simple rubber-stamp institution during the days of the authoritarian state-party regime. If within the thirty days the Senate does not issue any official response or reaction, the presidential nominations will be automatically ratified. Should the Senators dare to reject the President's proposals on two occasions, then the President will have the authority to directly appoint a third person of his choice. In other words, the only dilemma for the President will be whether he wants to try to dress his appointees with apparent legitimacy by getting Senate approval or not. Regardless of which strategy he chooses, only loyalists need apply. The central thrust of the President's proposal is to increase the number of IFAI commissioners from five to seven. This is not to strengthen this institution with greater human resources, but to consolidate his own political power within the federal transparency body of the nation.

The transparency bill also includes a new way in which the government can guarantee opacity in practice. Today, all IFAI decisions are final and cannot be appealed by the government even to the Supreme Court of Justice. But the reform proposes changing this and allowing the President to challenge any decision made by the IFAI which may "put national security at risk."<sup>198</sup> Such a broad catch-all category can quickly turn into a dangerous loop-hole. It is important to recall instances such as the landmark case concerning the electoral ballots used in the 2006 federal elections, in which conservative candidate Felipe Calderon was declared the winner by a margin less than a one point (0.5 point) and multiple

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<sup>197</sup> See Irma E. Sandoval-Ballesteros. "El Frankenstein de la transparencia," *Proceso*, September 21, 2012, <http://www.proceso.com.mx/?p=320466>.

<sup>198</sup> "Dictamen de las Comisiones Unidas de Puntos Constitucionales."

allegations of electoral fraud existed.<sup>199</sup> Despite dozens of requests to view the ballots and conduct an independent citizen recount, the Mexican electoral authorities simply refused to grant access based on an argument that there was a risk of harm to national security.<sup>200</sup> These refusals were in clear violation of the access to information law and are a reminder that transparency in Mexico can only go as far as it is politically feasible.<sup>201</sup> Again, it appears that “transparency for public relations” is viewed as a nice idea to improve the public image of government, but quickly becomes dangerous and unacceptable when it touches highly sensitive areas of public power and gets closer to a democratic expansive understanding of the concept.<sup>202</sup>

With regard to the new anti-corruption agency, Peña Nieto has proposed the same opaque, undemocratic, and discretionary method of appointing the top commissioners. There are also two additional tricks within this proposal:

First, to make room for the new agency, the bill entirely eliminates the Secretary of the Public Function, the executive agency created in 2003 to guarantee the application of Mexico’s civil service law and oversee all public spending. This agency’s former roles and responsibilities will be broken up and taken over by cabinet members as well as by the Treasury Department. The entire system of internal control over professionalization and public spending built up over the past thirty years will be dismantled, fragmented and handed over to political operatives. The current system of internal control has, of course, serious problems, but the solution is not to eliminate it. The solution is to build on the existing strengths and fix the endemic problems.

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<sup>199</sup> In the 2006 presidential elections, Felipe Calderón received 35.8 percent of the vote, whereas the candidate from the left, Andres Manuel López Obrador, received 35.3 percent. They were separated by just 236,000 votes, out of more than 41 million votes cast. For a very complete account of this election and its implications see John M. Ackerman, *Autenticidad y nulidad. Por un derecho electoral al servicio de la democracia* (Instituto de Investigaciones Jurídicas, 2012).

<sup>200</sup> For two excellent analyses of this case see Netzaí Sandoval, “La negativa del derecho a la información en las boletas electorales: una violación a los derechos humanos,” in John M. Ackerman, ed., *Nuevos Escenarios del Derecho Electoral. Retos de la reforma 2007-2008* (Instituto de Investigaciones Jurídicas– UNAM, 2009) and John M. Ackerman, “When Transparency Meets Politics: The Case of Mexico’s Electoral Ballots,” in Robert Vaughn and Padideh A’lai, eds., *Transparency from Different Perspectives* (American University, 2013).

<sup>201</sup> See Graciela Rodríguez Manzo, “Boletas 2006: Verdad y justicia,” *Proceso*, October 29, 2012, <http://www.proceso.com.mx/?p=323780>. Also see Rosalía Vergara, “Da IFE último visto bueno a destrucción de las boletas 2006,” *Proceso*, September 4, 2013, <http://www.proceso.com.mx/?p=351918>.

<sup>202</sup> Sandoval-Ballesteros, “Transparency under Dispute.”

Second, the new, supposedly autonomous, anti-corruption agency will be under the control of a new “National Public Ethics Council.”<sup>203</sup> This council is a strictly political body since it is made up of the thirty-one state governors, the Federal Secretary of the Treasury, the Secretary of the Interior, and the Federal Prosecutor, and will be presided over by Peña Nieto himself.<sup>204</sup> Such an institutional design guarantees that political criteria will prevail in the new government’s supposed fight against corruption. This fulfills the project of transparency for public relations because it guarantees total impunity for the top officials who will sit on the Council, as well as for their friends and allies. In other words, although this Council may put some “small fish in the frying pan,” the really big ones will continue to leisurely go about their business.<sup>205</sup> While governor of the State of Mexico, Peña Nieto perfected the art of using supposedly autonomous institutions to cover up his abuses. His accountability strategy as President seems to be to repeat this experience by creating more white elephants at the national scale.<sup>206</sup>

Another important aspect of these bills is that civil society has been entirely excluded from participating in their design and is clearly intended to have no role in the functioning of the new institutions. This is perhaps the most important weakness of the proposed reforms. International research shows that the most effective anti-corruption strategies are those which are firmly grounded in the participation of society.<sup>207</sup> Non-profit organizations, social movements, investigative journalists, and normal citizens are often much more aware of and capable of documenting abuses than bureaucratic agencies.<sup>208</sup> Such strategies are off limits for the government, since they risk uncovering what is really happening beneath the surface and therefore put political careers and economic fortunes at risk.

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<sup>203</sup> Los convenios de Nestlé y Pepsico en la Cruzada contra el Hambre,” 15.

<sup>204</sup> Id.

<sup>205</sup> Such as the recent case of the ex-governor of the State of Tabasco, Andres Granier from the ruling Institutional Revolutionary Party (PRI), who is hiding in Miami and has been accused of plunging the state into debt by squandering and embezzling millions of dollars. State prosecutors have found 88.5 million pesos, about \$7 million in cash, in an office used by his former treasurer of the state, Jose Saiz. Granier himself was secretly recorded bragging about owning hundreds of suits and pairs of shoes and about shopping exclusively at Beverly Hills luxury stores. <http://abcnews.go.com/International/wireStory/official-seized-mexico-corruption-case-19360336#.Ubc4qDbD-JA>

<sup>206</sup> See John M. Ackerman, “Biden’s Visit to Mexico: What You Should Know, Joe,” September 19, 2013, *Guardian*, <http://www.theguardian.com/commentisfree/2013/sep/19/joe-biden-mexico-enrique-pena-nieto>.

<sup>207</sup> Raza Ahmad, “Governance, Social Accountability and the Civil Society,” *JOAAG*, 3.1 (2008): 10-21.

<sup>208</sup> Merino, “La Fontanería de la Democracia.”

While the Peña Nieto administration aggressively critiques government control over the oil industry and wants to “pragmatically” hand it over to private corporations, it simultaneously looks to recentralize and hyper-bureaucratize government control over corruption control.<sup>209</sup> Citizens and journalists who expose corruption are punished instead of rewarded.<sup>210</sup> Mexico today is one of the most dangerous countries in the world for journalists, often compared to Afghanistan.<sup>211</sup>

Beyond the extreme bureaucratization and over-politicization that Peña Nieto is proposing, transparency agencies have faced serious political difficulties in recent years.<sup>212</sup> For instance, in recent months, there has been a severe internal political crisis within the IFAI, in which there is an open dispute among commissioners regarding violations of the guarantee of anonymity of citizen requests.<sup>213</sup> The current commissioners are apparently more concerned with investigating which computers the information requests emerged from than with punishing violations of the law.<sup>214</sup>

Another example of the crisis of accountability is that many of the new access to information laws passed by State governments in recent years, supposedly in compliance with the new constitutional text, are clearly subject to the logic of the public relations project of transparency analyzed above, and have made things worse instead of better.<sup>215</sup> Specifically the states of Querétaro and Nayarit have

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<sup>209</sup> See “Mexico’s Pemex Looks to Tap U.S. Shale. CEO Lozoya Seeks to Reverse Production Slump at State-Run Firm,” *Wall Street Journal*, August 18, 2013, <http://online.wsj.com/news/articles/SB10001424127887323608504579020791384328888>.

<sup>210</sup> Guadalupe Pérez-Anzaldo, “Los peligros de ser mujer, periodista y/o defensora de los derechos humanos en el México globalizado actual,” *Revista de Filología y Lingüística* 37.2 (2011).

<sup>211</sup> See “A WAN-IFRA and IPI Joint-Report on the Freedom of the Press in Mexico,” Vienna, Austria, April, 2013.

<sup>212</sup> See 9º. Informe de Labores 2011, Instituto Federal de Acceso a la Información y Protección de Datos Personales. [http://inicio.ifai.org.mx/Informes%202011/9o\\_informe.pdf](http://inicio.ifai.org.mx/Informes%202011/9o_informe.pdf). Also see John Ackerman, *El Instituto Federal de Acceso a la Información Pública: Diseño, Desempeño y Sociedad Civil* (Centro de Investigaciones y Estudios Superiores de Antropología Social-Instituto de Investigaciones Histórico-Sociales, 2007).

<sup>213</sup> In January 2013, IFAI’s Internal Audit Unit began an investigation against Commissioner Sigrid Artz, who has been accused by her colleague Commissioner Ángel Trinidad Zaldivar of having a “conflict of interest,” since she allegedly had made requests of information from her own computer under a pseudonym, and then she presented and defended those same requests. See “IFAI under Fire from PRI Members in Mexican Congress,” January 26, 2013, <http://justiceinmexico.org/2013/01/26/ifai-under-fire-from-pri-members-in-mexican-congress/>.

<sup>214</sup> Id.

<sup>215</sup> Víctor S. Peña Mancillas, “Transparencia en los Estados y Ciudadanía: Incidencia de la Participación en la Gestión y Desarrollo del Tema en la Agenda Pública,” Escuela de Graduados en Administración Pública y Política Pública (EGAP) Instituto Tecnológico y de Estudios Superiores de Monterrey – Campus Monterrey (ITESM).

created “independent, specialized oversight institutions” made up of unpaid volunteers from “civil society,” most of whom happen to be close friends or allies of the sitting governor.<sup>216</sup> In other states, politicians have taken advantage of the constitutional requirement to reform their freedom of information laws to expand the list of legal reasons for which it is permitted to withhold information, often including new broad categories which can serve as catch-alls to hide any information that might become uncomfortable if it got into the hands of a journalist or a political enemy.<sup>217</sup>

The special Access to Information Agency for requests to Congress has turned out to be highly inefficient and ineffective.<sup>218</sup> This “agency” is plagued by conflicts of interests since the parliamentary coordinators of each legislative group are in charge of it along with three “external experts,” supposedly from academia, but in reality with political closeness to the same representatives.<sup>219</sup>

Reforms to the Federal Criminal Procedures Code under the past government of Felipe Calderón are also a good example of this opacity.<sup>220</sup> In the midst of perhaps the most serious public security crisis Mexico has ever experienced, Congress passed a bill which covers the Attorney General’s Office in a cloud of secrecy.<sup>221</sup> Specifically, the new text of the law prohibits citizen access to public information, including versions of “*averiguaciones previas*,” the files which document the investigative work of the public prosecutors or “Ministerios Públicos.”<sup>222</sup> This proposal goes against the “Principle of Maximum Publicity” included in the 6<sup>th</sup> Article of the Constitution, and also violates Article 20 of the Constitutional text,

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<sup>216</sup> Alfonso Nambo Caldera, “Reflexiones en torno a la Ley de Transparencia de Nayarit,” in Jorge Gutierrez Reynaga, ed., *Derecho a la información, Valores y Perspectivas* (Instituto de Transparencia e Información Pública del Estado de Jalisco (ITEI), 139.

<sup>217</sup> Pérez-Anzaldo, “Los peligros de ser mujer, periodista y/o defensora de los derechos humanos en el México globalizado actual.”

<sup>218</sup> See “Denuncian Transparencia Simulada en San Lázaro,” *El Financiero*, June 6, 2013, <http://www.elfinanciero.com.mx/component/content/article/47-politicasociedad/17411-denuncian-transparencia-simulada-en-san-lazaro.html>.

<sup>219</sup> Id.

<sup>220</sup> See Instituto de Acceso a la Información Pública y Protección de datos Personales del Distrito Federal (INFODF), “[La reforma penal propicia opacidad del ministerio público federal.](http://www.infodf.org.mx/web/index.php?option=com_content&task=view&id=336&Itemid=217)” *Boletín de Prensa*, February 17, 2009, [http://www.infodf.org.mx/web/index.php?option=com\\_content&task=view&id=336&Itemid=217](http://www.infodf.org.mx/web/index.php?option=com_content&task=view&id=336&Itemid=217).

<sup>221</sup> “La PGR elimina el Consejo de Participación Ciudadana, órgano de transparencia y rendición de cuentas,” *Sinembargo*, March 26, 2013, <http://www.sinembargo.mx/26-03-2013/571033>.

<sup>222</sup> Id.

which holds that criminal procedure should be guided by the principle of publicity.<sup>223</sup> Additionally, the new legal text goes against numerous regional and international human rights mechanisms that have been signed and ratified by the Mexican government.<sup>224</sup>

## IV. Conclusions and Future Research

This essay has sketched a new framework for understanding transparency and combating corruption which takes into account both new developments in the structure of governance and the failings of old accountability strategies. I have argued against both the “public sector bias” and the “modernizationist” obsessions which undergird most studies of corruption and transparency in both the developing and the “developed” world. I have also demonstrated that the proliferation of Public-Private Partnerships and related initiatives has already started to break down the empirically existing divisions between the public and the private sector.

Instead of holding onto old categories to explain new phenomena, it is time to develop renewed conceptual frameworks in order to continue the time-old struggle in favor of greater public accountability and citizen participation. Indeed, studies of institutional capture in the “developed” world would also greatly benefit from the lessons and methods normally used to study institutional failure in the “undeveloped” world.<sup>225</sup> The opposite is also the case. Students of the developing world should pay much closer attention to structural imbalances of social power and the influence of money in politics. This is something that is often left aside in typical studies of bribes and bureaucratic reform. In this essay I have proposed the implementation of both a “structural” approach to corruption and a “democratic-expansive” vision of transparency. The structural approach defines corruption as the *“abuse of power plus impunity in the absence of citizen participation.”* The democratic-expansive approach includes the extension of transparency and accountability controls normally reserved for the public sector into the private

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<sup>223</sup> Instituto de Acceso a la Información Pública y Protección de datos Personales del Distrito Federal (INFODF), “[La reforma penal propicia opacidad del ministerio público federal.](#)”

<sup>224</sup> <http://www.oas.org/es/cidh/mandato/Basicos/reglamentoCIDH.asp>.

<sup>225</sup> An excellent example of this, for instance, is Lessig’s use of the concept of “gift economy” to understand politics in Washington.

sphere. Both of these frameworks call for theorists and reformers to take into account broader structures of social and political power and establish concrete links between accountability and democracy.

In terms of directions for future research, I envision two parallel paths. On the one hand, I will broaden the comparative-empirical basis for the project by incorporating full case studies of countries with similar structural corruption problems to Mexico, like Brazil, Russia, India and Indonesia. This systematic comparisons will allow me to isolate more clearly specific causal factors.

On the other hand, I plan on exploring the linkages between structural corruption and political reform. Specifically, the problems identified above with traditional approaches to corruption also apply to mainstream approaches to democracy. In Mexico, Russia and Brazil, for instance, the institutional effects of the arrival of democratic politics has not been reflected in a positive impact on corruption and accountability. To the contrary, the same authoritarian ways of managing government affairs have remained intact. Indeed, in some respects, “structural corruption” has gotten even worse. As a result of the fragmentation of the authoritarian institutions in these countries, an ominous dynamic of “double fraud” (in some ways parallel to Polanyi’s “double movement”) has emerged: a financial-structural fraud intertwined with a political-electoral fraud.

In these new and vulnerable democracies which are infamous for their iron-clad, centralized control over politics, economics and society, this double fraud is responsible for keeping back social and economic progress. For instance, my research team is presently conducting an analysis of both the vote buying operation that was deployed during the 2012 presidential election in Mexico and the financial mechanisms through which campaign spending limits were surreptitiously evaded by the principle presidential candidates.

Structural corruption of electoral politics is also linked to the growth of public-private partnerships (PPP) and conflicts of interests. When powerful interests determine politics they demand retribution after elections. Then their increased power allows them increased political leverage the next time around.

A final area of research is to complement this work with a focus on society and social movements as offering a possible solution to the “double fraud.” My initial

hypothesis is that the most effective strategies to confront “structural corruption” in new democracies, as opposed to simple bureaucratic corruption, are those which are firmly grounded in the participation of society. Non-profit organizations, social movements, investigative journalists and normal citizens are often much more aware of and capable of documenting abuses than bureaucratic agencies.

The central question is, therefore, how to construct a new organizational equilibrium from a structural, long-term perspective. This working paper has argued that “culturalist” and “pedagogical” solutions based on teaching bureaucrats or school children the correct “values” are doomed to fail. No matter how much one teaches citizens and public servants to “behave correctly,” if the surrounding enabling environment punishes exactly this “good behavior,” even the most honest and effective bureaucrats will be quickly “de-educated” and will turn into “bad apples.” The real challenge is therefore to develop a new system of institutional, organizational, social and political checks and balances which can move government institutions to a new equilibrium in which the central priority moves from personal gain to public good.

## About the Author

Irma Eréndira Sandoval-Ballesteros is a Professor at the Institute for Social Research of the National Autonomous University of Mexico (UNAM), and Director of the Laboratory for the Documentation and Analysis of Corruption and Transparency of the UNAM ([www.corrupcion.unam.mx](http://www.corrupcion.unam.mx)). Sandoval-Ballesteros is a member of Mexico's National System of Researchers and a recipient of the prestigious 2009 Manuel Espinosa Yglesias award for her academic work in political economy. She is a fellow at the Edmond J. Safra Center for Ethics at Harvard University and has served as a Visiting Professor at American University (2012-2013).

She holds an MA and PhD in Political Science from the University of California, Santa Cruz as well as an MA in Latin American Studies from the UNAM. She has two BAs, one in Economics from the UNAM and the other in Sociology from the Autonomous Metropolitan University in Mexico City (UAM). She teaches advanced graduate and undergraduate seminars on accountability, institutional reform and social theory, and has directed over a dozen student theses. She has also worked as a senior consultant to the World Bank, UNDP, Global Integrity, the Open Society Institute and the Budget Accountability Project.

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