

Fragmentation of Property Rights in the Mexican *Ejido* and
Its Effects on the Exercise of Constitutionally Protected
Rights

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Dedication

To my parents

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Abstract

In order to alleviate poverty in Mexico, the federal government created a form of land tenure called the *ejido*. People in the *ejido* work and live under a particular set of federal regulations which, among other things, severely restricts transferring *ejido* land. After almost a century of being legislated, however, the *ejido* has not helped its inhabitants rise out of poverty. Moreover, the *ejido*, I argue, became an impediment to even economic and political progress in Mexico because it isolated a portion of the population within this regime and placed barriers to the exercise of its members' constitutionally protected rights and freedoms.

Through an analysis of the conflict in the Atenco *ejido*, I will show how the *ejido's* legal regime, which aims to regulate the economic use of the land, filters the *ejidatarios'* relations with all other levels of government. The *ejido's* regulations affect, thus, the political agency of the *ejidatario* outside of the *ejido*. Using a historical and empirical approach, I explain the failure of the *ejido* as a productive asset and also as a site for political participation. In the process, I caution against calls for greater autonomy of the *ejido* if they rely on the idea of an intrinsic characteristic that unites all inhabitants of the *ejido* into "one people", or if they rely on the idea of self-legitimizing shared understandings that operate without the need of checks and balances. I conclude with law reform proposals

that take into consideration Mexico's history and the actual socio-political environment in which *ejidos* operate. These reforms aim at making the *ejido* more responsive to the plurality of experiences within the *ejido* as well as to the plurality of other political units of which it forms part.

Résumé

Afin de remédier à la pauvreté au Mexique, le gouvernement fédéral a créé le *ejido*, une forme de régime foncier. Ceux qui habitent dans le *ejido* travaillent et vivent sous une réglementation fédérale, qui restreint, entre autres, le transfert de propriété *ejido*. Malgré la législation sur le régime foncier pendant presque un siècle, le *ejido* n'aide toujours pas ses habitants à échapper la pauvreté. Cette thèse avance que le *ejido* est devenu un obstacle au progrès économique et politique au Mexique car ce régime foncier a pour effet d'isoler une portion de la population et de poser des barrières à l'exercice de leurs droits et libertés fondamentaux.

À travers une analyse du conflit dans l'*ejido* d'Atenco, cette thèse démontrera comment le régime juridique du *ejido*, qui a pour but de réglementer l'utilisation économique de la propriété, filtre les relations des *ejidatarios* avec tous les autres niveaux du gouvernement. La réglementation du *ejido* influence l'action politique des *ejidatario* à l'extérieur de cette propriété. Employant une approche historique et empirique, cette thèse explique l'échec de l'*ejido* comme agent productif ainsi qu'à titre de site de participation politique. Cette thèse fait preuve de prudence contre l'appel pour une plus grande autonomie attribuée à l'*ejido* si celle-ci est basée sur l'idée d'une caractéristique intrinsèque d'unification de tous les habitants de l'*ejido* dans "un peuple", ou bien si cette idée est fondée

sur une conception partagée d'autolégitimation qui procède sans recours à un système d'équilibre des pouvoirs. En conclusion, cette thèse propose des réformes du droit aux *ejidos* qui prennent en considération l'histoire du Mexique ainsi que l'environnement sociopolitique contemporain. Ces réformes ont pour objectif de sensibiliser l'*ejido* à la pluralité des expériences à l'intérieur de ce dernier ainsi que la pluralité d'autres unités politiques à l'intérieur de laquelle il s'inscrit.

Introduction

The lack of economic opportunities has been a source of political and social instability in Mexico since even before it became independent. A large proportion of the population did not have any kind of substantial property. In order to correct this, the government created a form of land tenure, called the *ejido*, in which people would live and work protected from market risks and discriminatory treatment that would eventually made them lose their property. After almost a century of being formally legislated, the *ejido* has not helped their inhabitants leave poverty.¹ Moreover, the *ejido*, I argue, became an impediment for even economic and political progress in Mexico because it encapsulated a portion of the population and it placed barriers to the exercise of the *ejidatarios'* constitutional protected rights and freedoms. The issue could not be more pressing since, to this date, approximately 43% of Mexico's territory is governed under *ejido* rules.² In this study, I will explore the kind of dynamics that lead the *ejido* to its present form and the dynamics that are generated by the *ejido* itself.

¹ Approximately 46% of the Mexican population lives in a form of poverty; 11.7 million people live in extreme poverty. Consejo Nacional de la Evaluación de la Política de Desarrollo Social, Análisis y Medición de la Pobreza, *Pobreza 2010: Porcentaje de la Población en Pobreza Según Entidad Federativa, 2010 Estados Unidos Mexicanos*, <http://www.coneval.gob.mx/> (Mex.).

² Claudia Terzi Ewald, "La Certeza Jurídica de los Derechos de Propiedad y el Desarrollo Sustentable" in Juan Carlos Solís Mendoza ed, *Derecho Agrario y Desarrollo Rural* (Mexico, D.F.: Porrúa, 2012) 55 at 61. [Terzi Ewald]

This examination will reveal important aspects of the relation between the fragmentation of property rights and access to public power, and it will illustrate how historical inertias affect legislation and the interaction between land rights and the exercise of political rights.

Each of these elements is complex on its own; by studying their interaction there is a risk that the study can become too big and unfocused. The challenge is to have a study that it is broad enough to encompass their interactions but narrow enough that does not lose itself in a great number of research possibilities. According to John Gerring, a case study is the most useful tool to develop a deeper understanding of the mechanisms at work by zooming in and out of the research area.³ There are two main cases analyzed. The first case study addresses a conflict that occurred in the municipality of San Salvador Atenco which originated from the federal government's project of building an airport in an area that encompassed some of the territory of the municipality. This case is considered important because it was the first major social conflict after the democratic transition of 2000. The second one analyzes Jeffry Rubin's account of a small indigenous community and its relation to bigger power structures.⁴ The case studies will be analyzed through legal and theoretical

³ John Gerring, *Case Study Research: Principles and Practices* (Cambridge: Cambridge University Press, 2007) at 38.

⁴ Jeffrey W. Rubin, *Decentering the Regime: Ethnicity, Radicalism and Democracy in Juchitán, México* (Durham, NC., 1997) [Rubin].

lenses. Therefore, the study will follow a sequential approach: from early Mexican history to current empirical studies of the *ejido*, followed by an analysis section and concluding with a series of recommendations for legal reform.

The *ejido* is a form of land tenure that gives the *ejidatarios* an opportunity to keep a piece of land and decide on the use of their resources through the *ejido's* political bodies. *Ejido* land cannot be sold, nor can it be used as collateral for loans. This form of land tenure presents a paradox in that in order to ensure that a portion of the population is not dispossessed of all property, and therefore deprived of a significant source of private power to influence their surroundings, their property is collectivized and fragmented so that no one individual can absolutely dispose of it. This paradox is explained by Jean Baechler in the following terms:

...we can say that a political regime can guarantee its members security, prosperity, and freedom only on the imperative condition that each member or coalition of members constitute autonomous centers of decision. Autonomous, that is to say, neither independent – because then there would be no association – nor absorbed by the association – since there would be then no guarantee. This requirement of autonomy is the rational foundation of the distinction between the public and the private. The private is that space where the centers take their autonomous decisions; the public

is the space where the rules of the association are defined and the problems to which it gives rise are resolved.⁵

Baechler was not referring to the *ejido* but he touches on several issues that will be studied here. First, the seemingly contradictory obligations of the government towards the population: guaranteeing prosperity and freedom. Every policy and legal reform regarding the *ejido* faces the double challenge that the more freedom the government gives to the *ejidatarios*, the less effective the *ejido* becomes to protect the prosperity of the historically dispossessed. On the other hand, more protection from market forces translates into strengthening the sphere of influence of the group at the expense of the individual.

Second, the paragraph describes the inherent tension in the notion that we are more likely to achieve our goals in association with others than by working on our own. This tension arises because although we are more likely to succeed in our endeavors when they are backed by a group, it is also very likely that in order to get that backing we have to compromise our initial plans. This tension will be revealed in the case of the *ejido* very clearly. The legal structure of the *ejido* reflects a pervasive idea in government and society that the least advantaged form an undifferentiated collection of individuals, whose concerns and conceptions of the good are mostly the same so that their political

⁵ Jean Baechler, "Liberty, Property, and Equality" in J. Roland Pennock & John W. Chapman, eds, *Property: Nomos XXII* (New York: New York University Press, 1980) 269 at 272 [emphasis in original] [Baechler].

aspirations can be properly dealt with through the bodies of administration of the *ejido*. This paradigm has led the legal profession in Mexico (in government and academia) to see the *ejido* only through the lenses of agrarian law (which reflect the concerns of the public and those of government officials) and not through the lenses of property law and political rights which more adequately take into consideration individual freedoms.

Finally, Baechler's paragraph is important for our study because it links property law and the formation of the individual in his public and private domains. Baechler goes on to say that "... 'property' is only a word used to designate the autonomous centers of decision, or again that which is *proper* to the individual or a coalition, that which is private."⁶ The term "proper" that Baechler highlights, reveals that communal property, and not only property that belongs to one individual, can serve as locus of initiative as long as the property suits the particular needs of such a group. In the case of the *ejido*, this aspect has been largely ignored by the legal community and only picked up by sociologists and political scientists. The *ejido* is as much a form of property as it is a political unit. Ignoring that the *ejido* has these two qualities, while devising public policy, has made the *ejido* ineffective and counterproductive to its intended purposes. By studying the *ejido* solely as part of agrarian law, the government has blurred the

⁶ *Ibid* at 273. [emphasis in original]

distinction between the public and private spheres. This, I argue, partly explains the conflict of Atenco; the *ejido* is not a form of property that allows for *proper* (as in suitable to a person or group) decisions to be made.

In this project, I argue that the *ejido* failed, first, because the government objectives were contradictory to begin with. Instead of creating the conditions in the country so poor peasants could keep their land while fully integrating into the rest of society, the government decided to enclose the *ejidatarios* in this form of land tenure to keep them separated from normal market forces and social interactions. Furthermore, the legal evolution of the *ejido* has always been marked by swings from genuine concern for the *ejidatarios* well-being to political calculations.

Second, I argue that since the *ejido* only grants usufruct rights over the land, the government forced the *ejidatarios* to be always dependent on it to move forward their initiatives, since their capacity to enter into a contract with the rest of the population is severely limited. I will argue that this limitation extends not only to their economic opportunities, but also to their political rights. The fragmentation of property has deprived the *ejidatarios* from having a neutral place where to exercise their self-determination; that is, the *ejidatarios* are forced to formulate and revise what is important to them in a communal fashion, limiting opportunities for reflection.

Finally, and as a result of the two previous reasons, I argue that by tying property rights to political rights, the *ejido* regime does not only affect the individual as an *ejido* member, but also in his relation to other government agencies and to the rest of society. In this sense, I argue that the *ejido* is an insular political unit that creates inward-looking citizens who are limited in their economic and political aspirations because of the status that they were assigned to within the *ejido*. By placing barriers between the *ejidatario* and the rest of society and government, the *ejido* forces its members to revise their conceptions of the good within this form of communal land ownership, blurring the distinction between the public and the private.

The main objective of this study is to reconcile the idea of the individual as an “autonomous center of decision” with the fact that our decisions are determined by our socio-political environment. In this regard, there is a recognition that the scope of choice of an individual is determined by a host of normative dynamics that range from internal imperatives to the diffuse effects of economic and political factors. The first part of this study will concentrate on analyzing the nature and interaction of different normative orders by mainly studying their effects in the two case studies mentioned above. The second part will probe the extent to which an individual can move from being a subject of a plurality of normative orders, to an agent capable of shaping them. The challenge

is to strike a balance between empowering the individual while respecting and protecting the context that gives meaning and value to her choices.

This work draws insights from a wide variety of theoretical perspectives. The purpose of theoretical analysis is neither to prove the superiority of one theoretical framework over the other nor to develop an all-encompassing theoretical approach of my own. Rather, it is the case study itself which is seen as a micro-cosmos that can help explain dynamics happening across different *ejidos*. The function of the theoretical analysis is to put into perspective the findings of the case study and to inspire ways to move forward. As a result, it should be noted that the use of a determinate author's ideas does not entail the adoption of his or her entire body of work, but it only helps get across a specific point. Hernando de Soto, for instance, figures predominantly in the latter chapters but his ideas are used as vehicle to make certain points about the relation between property rights and community.

That being said, while the purpose of this work is not to prove a particular ideology, this work deals with the traditional liberal concern to expand the scope of individual action. Using William Kymlicka and Michael Bratman's ideas, I try to respond to some common criticisms directed at liberalism, particularly from some communitarian authors. Furthermore, I recognize that some of the justice claims made by the residents of the *ejido* of Atenco are similar to other justice claims

made in different times and places and that have been already extensively analyzed. As a result, I use Nancy Fraser's distinctions of different justice claims to illustrate how they may relate or oppose each other. Finally, given the emphasis on the case study, this work uses a pragmatic approach to law using as a theoretical framework Jacques Lenoble and Marc Maesschalck ideas about law and governance.

This is not an exhaustive list of all authors and approaches used in this work. The main purpose of the preceding two paragraphs is to give the reader a guide to the main theoretical discussions below. The main focus of the work is not theoretical analysis but the analysis of the case study. The study of the conflict in the *ejido* of Atenco provides a specific instance in which to identify how *ejidatarios* relate to the formal power structure and legal system and, on the other hand, to the plurality of other social and cultural dynamics that also shape their behavior. In addition to bringing greater clarity to the interaction of different normative orders and to the role of positive law in Mexico, this thesis also provides legal reform recommendations to the *ejido* regime. These recommendations aim at turning the *ejido* into a suitable political unit where informed decisions can be made. Furthermore, this thesis challenges common approaches to problems in small localities as well as common assumptions about the social implications of communal living. This approach is not restricted to the

ejido, as it could also be used as the starting point of analysis in similar communities.

This study is ordered as follows: chapter I introduces the historical reasons for the emergence of the *ejido* and its legal evolution. Chapter II describes the conflict in Atenco, while chapter III puts the resistance observed in Atenco in a historical perspective. Chapter IV describes how the historical and political circumstances determined the juridical nature of the *ejido*, while chapter V does the same but analyzing the *ejido* as a political unit. I will argue that it is important to conceive of the *ejido* as a political unit since it affects many important aspects of the daily lives of the *ejidatarios*. Chapter VI situates the discussion in a broader theoretical framework. The purpose of this chapter is to reflect on certain concepts and understandings used to describe or explain the normative dynamics regarding real property. Chapter VII challenges common approaches to conflicts in communities following a pragmatist approach to certain concepts such as culture, shared understandings, and the concept of community itself. Finally, chapter VIII offers an approach to solve the conflicts that affect the *ejidos* as well as the general condition of injustice that the *ejido* itself represents. This chapter navigates the different normative orders discussed throughout the study with a historical understanding.

Chapter I

The Evolution of the *Ejido* in Mexican Legislation

1. The Colonization Period

Generally speaking, *ejido* (from the Latin *exitus* which means exit) is a piece of land, located close to a population center, primarily used for raising cattle and open for every member of the community. Since the land is commonly shared by the population center, it is usually not allowed to cultivate crops since that would prevent other people from using it for a period of time.⁷ There is no consistent definition of an *ejido* in the Mexican legislation; as a result, it is necessary to refer to historical changes in the term's definition and usage, in order to know the definition of it at a specific point in time. Before colonization, the native population organized their economy in a communal fashion.⁸ The *calpulli* was a form of land ownership used by the Aztecs that had some similarities with the *ejido*, although, as it will be explained in chapter III, these similarities should not be overstated. In the *calpulli*, each family clan had a right to use a communal piece of land that was administered by a group of elders.

⁷ Joaquín Escriche, *Diccionario Razonado de Legislación y Jurisprudencia* (París-México: Ed. Bouret, 1925) at 999 cited in Marco Antonio Díaz de León, *Historia del Derecho Agrario Mexicano* (México: Porrúa, 2002) at 75 [translated by author] [Díaz de León].

⁸ David Ronfeldt, *Atencingo: The Politics of Agrarian Struggle in a Mexican Ejido* (Stanford, Calif.: Stanford University Press, 1973) at 7.

Although the land was shared by several clans, each had the usufruct of an individualized portion of the land. This right could be inherited but it could also be lost if in two farm cycles the land was not worked.⁹

During the period of colonization by the Spanish, the term *ejido* is found in early legal documents. In the Laws of the Indies, the “exido” was the piece of land allocated for the common enjoyment of all of the members of the population, who could use it for recreation or for cattle raising. It is important to note that, in addition to allocating the land for raising cattle, the law of *Ordenanzas de Descubrimiento y Pacificación*, also contemplated the use of land for cultivation.¹⁰ During this period, however, the native population was severely restricted in their use of land by the Spanish Crown. The Crown considered itself the holder of rights over all of the territory and waters of New Spain. Native land property existed as long as the authorities consented and could not be sold by the native population. If the Crown declared that native territories were *baldíos* (abandoned or not worked) it could take the land and re-distribute it. This new distribution of land benefited Spanish citizens and the Catholic Church. In time, large amounts of territory were in the hands of a few people, creating the *latifundios* (large landholdings) at the expense of the natives.¹¹

⁹ Jesús Carlos Morett Sánchez, *Reforma Agraria: Del Latifundio al Neoliberalismo* (México: Plaza y Valdés, 2003) at 36 [translated by author] [Morett Sánchez].

¹⁰ Francisco de Icaza Dufour, ed., *Recopilación de Leyes de los Reynos de las Indias*, 1st ed. (México: Porrúa, 1987) at 304 [translated by author].

¹¹ María Teresa Vázquez Castillo, *Land Privatization in Mexico: Urbanization, Formation of Regions and*

2. The Liberal/Conservative Divide

After New Spain's independence war in 1810, there were several conflicts between the *latifundistas* and the Church on one side, and liberals who wanted a fairer distribution of the land on the other. This conflict was part of the broader conflict between conservatives and liberals, who also disagreed about the type of country Mexico should be.¹² The political instability caused by the combination of such powerful players and a weak state still in formation resulted in little to no changes in land ownership. Between 1855 and 1857, President Benito Juárez, a liberal, issued laws that severely affected the Church's economic interests and its political power.¹³ In 1859, Juárez expropriated all of the Church's property and banned the clergy from having real estate property that was not necessary for religious practice.¹⁴ This prompted an armed conflict promoted and financed by the Church.¹⁵ Finally, in 1860 the liberals prevailed over the conservatives, who were temporarily defeated. Soon after their defeat, the conservative forces formed an alliance with the French invaders who imposed Maximilian of

Globalization in Ejidos (New York: Routledge, 2004) at 22 [Vázquez Castillo].

¹² Marco Antonio Díaz de León, *Historia del Derecho Agrario Mexicano* (México: Porrúa, 2002) at 143 [translated by author] [Díaz de León].

¹³ *Ibid* at 132.

¹⁴ *Ibid* at 136-139.

¹⁵ *Ibid* 145-146.

Habsburg as the head of the Second Mexican Empire in 1864.¹⁶ To their dismay, however, Maximilian sympathized with the liberal cause and not only did he ratify Juárez's reforms (*las leyes de reforma*), but he also expanded the land redistribution policies in favor of indigenous populations.¹⁷ Eventually, Juárez's forces defeated those of Maximilian and he reassumed power.

3. The Porfiriato

Juárez was re-elected in 1871, causing a political rift led in part by a former friend of his, Porfirio Díaz.¹⁸ Juárez died of a heart attack in 1872 and, Porfirio Díaz started his longest presidential period in 1884.¹⁹ Following, in theory, the liberal ideals of Juárez, Díaz implemented a plan to identify land that did not have an owner, to measure it, and to sell it to small owners.²⁰ The surveying corporations received a third of the land that they had identified as being vacant. During that time, however, many small owners and indigenous populations were dispossessed of their lands because they lacked legal title to

¹⁶ *Ibid* at 146.

¹⁷ *Ibid* at 149.

¹⁸ Paul Garner, *Porfirio Díaz: Profiles in Power* (Harlow, UK.: Pearson Education, 2001) at 56-57. [Garner]

¹⁹ Díaz army occupied Mexico City and he became president for a brief period in 1876. He selected Juan Méndez as interim president who called for new elections in December of that same year. After the fraudulent elections were held, Díaz became president again in 1877. Díaz presided over the election period of 1880 in which his candidate, General Manuel González won the election in a very controversial process. González was president until 1884, year in which Díaz was re-elected. *Ibid* at 64, 80-81, 88-90, 92-93.

²⁰ Robert H. Holden marks 1882 as the beginning of the most significant transfer of public land to private hands. Robert H. Holden, *Mexico and the Survey of Public Lands: The Management of Modernization 1876-1911* (DeKalb, Ill.: Northern Illinois University Press, 1994) at 7. [Holder]

the land and the surveying corporations considered them as *baldíos*. According to Morett Sánchez:

Between 1883 and 1910, fifty surveying companies identified 63 million hectares of land, receiving as compensation 21 million hectares, in other words, more than 10% of the entire country. The 42 million hectares that were given to the government were not sold to settlers but were mostly sold to hacendados and mining and railroad companies, who, in just 27 years acquired more than 30% of the land of the country.

By 1905, land ownership was so concentrated that the 0.2% of the population owned 87% of land suitable to farm.²¹

The Díaz government started an aggressive campaign to modernize Mexico and to open it to the American market with the idea that the benefits of free market would trickle down to the rest of the population.²² Not only did giving free rein to capitalism not bring benefits to the general population, but natives and the poor were also made semi-slaves of the minority that controlled all the resources.²³ Just as foreigners and the few rich were concentrating economic power, Díaz was concentrating political power. The political system at the time

²¹ *Supra* note 9 at 45. Holder maintains, however, that the assertion that the surveying companies' actions were the cause of land concentration at the expense of indigenous populations and small owners has not been "systematically tested." Holder, *supra* note 20 at 22.

²² It was also the case that good relations with the U.S. were essential for the stability Díaz's regime. Garner, *supra* note 18 at 139.

²³ For Díaz, the main solution to the problems of rural Mexico was introducing "...agrarian entrepreneurship and capitalist enterprise" (*Ibid* at 187). The efforts of modernization had few limits. In 1902, the Díaz government forcibly deported entire communities of Yaquis from Yucatan after they consistently refused to accept the modernization policies. *Ibid* at 132.

was a pyramid with Díaz at the top. Each state had a representative, in the form of the governor, who was loyal to Díaz and who, in turn, had a representative in local districts called *jefe político* (political boss).²⁴

The Constitution of 1857²⁵ was not worth the paper on which it was written. Public officials went through the motions mandated by law, but the real rule of the land was dictated by Díaz and the small group in which power resided.²⁶ The Constitution seemed only to prohibit what in reality was the daily practice of the oligarchy. Article 40, for instance, stated that the will of the Mexicans was to form a republic that was representative, democratic, federal, and composed by free and sovereign states.²⁷ In reality Mexico was ruled by a dictator.

4. The Revolution

It was against this background that Francisco I. Madero, himself a wealthy landowner from the state of Coahuila, ignited the Mexican Revolution. Madero's revolt was mainly against the lack of political freedom under the Díaz regime. There was only one paragraph in his Plan de San Luis Potosí about the land

²⁴ Frank Tannenbaum, *The Mexican Agrarian Revolution* (Hamden, Conn.: Archon Books, 1968) at 134-155 [Tannenbaum, *Revolution*].

²⁵ Constitución Política de la República Mexicana de 1857 [C.P. 1857], Art. 40, Instituto de Investigaciones Jurídicas, <http://www.juridicas.unam.mx/infjur/leg/conshist/pdf/1857.pdf> (last visited June 6, 2013) (Mex.).

²⁶ Garner, *supra* note 18 at 127.

²⁷ C.P. 1857 at art. 40.

taken from small landowners (which he promised to return) and his main warring cry was *Sufragio Efectivo, No Reelección* (Effective Suffrage, No Re-election).²⁸ Madero's revolution was short lived but successful; by the 25th of May, 1911, Díaz submitted his resignation to Congress.²⁹ However, Madero's narrow political objectives did not satisfy his allies. Not only Madero had no urgency to return land to the dispossessed, but he also immediately started making new businesses with American corporations tacitly acknowledging their legitimacy to keep *latifundios*.³⁰

Madero was deposed and, by the time of drafting the new constitution, Venustiano Carranza was in power. In 1916, the Constitutional Convention adopted an aggressive policy towards land reform. These are some of the most important aspects of article 27 of the Constitution of 1917:

1. All land and water within the territory belongs to the Nation, which has the prerogative to transmit it to individuals to create the private property.
2. The powers of the government were expanded to limit the scope of private property and to reduce the requirements to expropriate land.
3. *Latifundios* were prohibited.

²⁸ Tannenbaum, *Revolution*, *supra* note 24 at 156-187.

²⁹ Garner, *supra* note 18 at 219.

³⁰ John Mason Hart, *Revolutionary Mexico: the coming and process of the Mexican Revolution* (Berkeley: University of California Press, 1987) at 247 [Hart].

4. The restitution of land which was taken from agricultural communities was established.
5. Those communities that did not qualify for restitution were given a guarantee to receive land.
6. Limitations were set for foreigners, religious organizations and corporations to acquire real state in Mexico.³¹

These provisions of article 27 show that private, public, and social land tenure were protected by the Constitution. Although a bold move on paper, the application of article 27 turned out to be ineffective.³² Carranza opposed the agrarian revolution and this became a further source for armed rebellions, particularly from the Zapatistas.³³ Álvaro Obregón became president by the end of 1920. One of the first laws that he issued was the *Ley de Ejidos* (*Ejido Law*), which gives more certainty to this form of land tenure. This law was also significant because it was the first time that the term *ejido* was defined in the Mexican legislation.³⁴ The *ejido* was defined in this law as the land given to pueblos. A pueblo was defined as any population center that was recognized as such by official documents, that political superiors considered it as such or, if all

³¹ Díaz de León, *supra* note 12 at 285.

³² Hart, *supra* note 30 at 330.

³³ *Ibid* at 331-337.

³⁴ Morett Sánchez, *supra* note 9 at 78.

of this was lacking, a census showing that more than 50 people lived in the population center. It is important to mention that the first article of the Ley de *Ejidos* also clearly provided that the population center could keep the *ejido* until there was legislation regarding its conversion into private property.³⁵ This legal figure was intended as a transitional form of property distribution in order to help the dispossessed start with a communal piece of land to then later move to becoming small owners who were able to keep their land once all of the protections of the *ejido* were lifted.³⁶ The law also established that ranches, congregations, communities and other population centers were eligible to receive land from the government.³⁷

Necessity and restitution were the two main ways of getting land. Article 5 established four reasons to receive land from the government because of necessity: 1) when the members of a community did not have enough land that provided double the daily income of a community; 2) when it was duly proven that the community was within a *latifundio*; 3) when the main source of income of a community disappeared; and 4) when a community was able to prove that it had communal land before June 25, 1856.³⁸ In terms of receiving land by restitution (land given back if it was illegally taken) the population center had to

³⁵ Ley de *Ejidos* [L.E.] [*Ejido* Law], arts. 3 and 13, Diario Oficial de la Federación [D.O.], 8 de Enero de 1921 (Mex.).

³⁶ Morett Sánchez, *supra* note 9 at 79.

³⁷ L.E., *supra* note 35 at art. 1.

³⁸ *Ibid* at art. 5.

prove that they were the owners of the land before the illegitimate or illegal land transmission took place. If the population center could not prove this but they could prove necessity then they were entitled to receive land from the government in any case.

The law established that the extension of the *ejidos* had to be, at a minimum, large enough to provide its members double the mean income of the community and had to be located in the immediate vicinity of the pueblo; it had to be shaped as a square and it had to be of the same number of hectares as the pueblo, unless unfeasible.³⁹ The law gave the president the power to decide if land was to be given or not after hearing the recommendations of the *Comisión Nacional Agraria* (National Agrarian Commission [CNA]), an agency that depended directly from the president, the governor of the state, and the mayor of the town. The president's decision was final with no recourse possible.⁴⁰ Those affected by the government's decision to take their land to give it to pueblos had the right to compensation.⁴¹ The *Junta de Aprovechamiento del Ejido* (Board of *Ejido* Exploitation) was in charge of administering the *ejidos*. The Board was composed of 5 members who were elected each year by the *ejido* and who were in charge of regulating the internal life of the *ejido* and that represented it in any

³⁹ *Ibid* at arts. 13 and 14.

⁴⁰ *Ibid* at arts. 22 and 34.

⁴¹ *Ibid* at art. 56.

dealings with outsiders.⁴² This law was short lived since it was abrogated by December 10, 1921.⁴³ The basic concept of the *ejido*, however, would not depart too much from what was established here in subsequent pieces of legislation.⁴⁴

In April 1922, the *Reglamento Agrario* (Agrarian Regulation) kept the term *ejido* but modified some of the content of the *Ley de Ejidos*. This new law restricted the redistribution of land. In particular, land that had fewer than 50 hectares and where its owners had its legal title for more than 10 years could not be affected. Even if the piece of land was bigger than 50 hectares, the owner could protect up to 50 hectares for himself from redistributive expropriation.⁴⁵ The extension of the *ejidos* was also defined more clearly at a maximum of 3 to 5 hectares for rain-fed land and 6 to 8 hectares of land of lower quality.⁴⁶ The law also offered the possibility to land owners who had cultivated their lands, and that were being seized by the government, to exchange them for a different piece of land; this new piece of land had to be of the same quality as the one that was expropriated and be situated no more than 5 kilometers from the population center that was about to receive the land as *ejido*.⁴⁷

⁴² *Ibid* at arts. 39-42.

⁴³ Díaz de León, *supra* note 12 at 346-360.

⁴⁴ Morett Sánchez, *supra* note 9 at 79.

⁴⁵ Reglamento Agrario [R.A.][Agrarian Regulation], as amended , art. 5, Secc. II and art. 8, Diario Oficial de la Federación [D.O.], 17 de Abril de 1922, (Mex.).

⁴⁶ *Ibid* at art. 10.

⁴⁷ *Ibid* at art. 20.

5. The Maximato

Plutarco Elías Calles became president on December 1, 1924. He strengthened a single national union of workers (CROM) with power over labor regulations,⁴⁸ he pursued land redistribution policies,⁴⁹ and he launched an irrigation and road program.⁵⁰ Like most post-revolutionary presidents, Calles considered land redistribution policies merely in political terms.⁵¹ A major development in 1925 was the obligation that *ejido* croplands be divided individually in the hope of, eventually, creating small private land owners, although these lands were still inalienable and imprescriptible.⁵² The individual parcels were given to men over 18, or younger if they were married, and to women only if they had a family to take care of and were either single or a widow.⁵³ The law also restricted who could receive land by excluding people who were considered well-off or those who had a profession.⁵⁴

⁴⁸ Michael J. Gonzales, *The Mexican Revolution, 1910-1940* (Albuquerque, NM.: University of New Mexico Press) at 210 [Gonzales].

⁴⁹ He distributed approximately 3,045, 802 hectares of land to 301, 587; mostly with the purpose of gaining political support. *Ibid* at 207.

⁵⁰ *Ibid* at 205.

⁵¹ Since 1917 until Calles, only 7% of land was distributed and tended to be of poor quality for agriculture. *Ibid* at 207.

⁵² Forests and pastures were still considered of common use for all the members of the *ejido*. Dana Markiewicz, *The Mexican Revolution and the Limits of Agrarian Reform, 1915-1946* (Boulder: Lynne Rienner, 1993) at 48.

⁵³ Ley que Reforma la de Dotaciones y Restituciones de Tierras y Aguas [L.R.D.R.T.A.] [Law that Reforms the one on Endowment and Restitution of Land and Water], art. 15, Diario Oficial de la Federación [D.O.], 17 de Agosto de 1927, (Mex.).

⁵⁴ *Ibid* at art. 16.

Congress modified the Constitution so that Álvaro Obregón, who already had been president, could run again. This change created new armed revolts that were ruthlessly crushed. Obregón assumed power as president but he was killed soon after, on July 17, 1928, by a Christian fanatic.⁵⁵ Calles vowed never to seek the presidency again and declared that the age of the caudillo was over. Although he refused formal power, Calles became a king maker and the real power behind the president. Calles selected and supported four presidents between 1928 and 1934.⁵⁶ One of the presidents anointed by Calles, General Abelardo L. Rodríguez, reformed article 27, on Calles's orders, and entrenched the procedure to obtain land to a constitutional level.⁵⁷ This was the first attempt to unify and standardize all of the agrarian regulations in the country. Soon after, President L. Rodríguez issued the first *Código Agrario* (Agrarian Code) in March, 1934. The code was a very detailed set of rules that sought to control the ownership of the land at all times and the internal decisions made by the *ejido*.⁵⁸ The code contemplated that the administration and control of decisions made by the *ejido* was in the hands of the *Comisariado Ejidal* (*Ejido* Commissary), itself

⁵⁵ A nun, Madre Conchita, and a few young religious fanatics conspired to kill him as the *Cristero War* (an armed conflict prompted by Obregón's anti-clerical policies) was still raging on. Frank Tannenbaum, *Mexico: The Struggle for Peace and Bread* (New York: Alfred A. Knopf, 1964) at 67 [Tannenbaum, *Struggle*].

⁵⁶ They were General Emilio Portes Gil, General Pascual Ortiz Rubio, General Abelardo Rodríguez, and General Lázaro Cárdenas (who eventually ended Calles's extra-constitutional powers). Gonzales, *supra* note 48 at 217-221.

⁵⁷ Decreto que reforma el artículo 27 [Decree that reforms article 27 of the Constitution], *Diario Oficial de la Federación* [D.O.], 10 de Enero de 1934 (Mex.).

⁵⁸ Código Agrario [Agrarian Code] [C.A. 1934], *Diario Oficial de la Federación* [D.O.], 22 de Marzo de 1934 (Mex.).

constituted by a president, a secretary, the treasurer, and their respective deputies. The *Comisariado* was elected every two years by the assembly of *ejidatarios*.⁵⁹

During this period, it is relevant to mention the contribution of President Portes Gil to the organization of the *Partido Nacional Revolucionario* (National Revolutionary Party [PNR]) in which every major sector of leadership was given a share of power or a bribe to try to avoid further armed rebellions.⁶⁰ The PNR extended the presidential term to six years and no further attempts of re-election were made respecting the prohibition in the Constitution of running for re-election. The nation started to calm down and saw few armed rebellions during Calles's shadow government (also known as the *Maximato*).⁶¹ General Lázaro Cárdenas, who was the last president appointed by Calles, came to power on December 1, 1934. Cárdenas had an ambitious agrarian policy that consisted in continuing land redistribution policies and organizing rural life. In 1940, president Cárdenas issued a new agrarian code that abrogated the 1934 code, however there were no major changes in it.⁶² Cárdenas, however, would be better known for ending Calles's *Maximato* peacefully, for his support for unions, for

⁵⁹ *Ibid* at arts. 119, 122, and 125.

⁶⁰ Tannenbaum, *Struggle*, *supra* note 55 at 68.

⁶¹ Calles was considered the *jefe máximo* (the ultimate boss); from this nickname the term “maximato” was derived. Gonzales, *supra* note 48 at 217.

⁶² Díaz de León, *supra* note 12 at 625

nationalizing the railroad and, more importantly, for nationalizing the oil industry.⁶³

Cárdenas turned over the railroad industry to its union and established the National Credit Bank for the *ejidos*.⁶⁴ President Cárdenas not only fortified communal land but also small property, as both helped to dismantle the *latifundios* that were still abundant in Mexico by the end of the 1930s. During his presidency, Cárdenas almost doubled the amount of land redistributed by all of his other predecessors.⁶⁵ Cárdenas organized the growing power of the peasants into a union, the *Confederación Nacional Campesina* (National Agrarian Confederation [CNC]), in order to be able to control it. The CNC, along with the labor union, the *Confederación de Trabajadores de México* (Confederation of Mexican Workers [CTM]), would prove to be one of the most important tools of political control of the newly emerging political system that lasted for more than 70 years.⁶⁶

6. The PRI-Regime

⁶³ Tannenbaum, *Revolution*, *supra* note 24 at 73.

⁶⁴ Tannenbaum, *Struggle*, *supra* note 55 at 71-77.

⁶⁵ *Ejido's* participation in the workable land passed from 13% in 1930 to 47% in 1940. The agrarian product of the *ejido* passed from 11% in 1930 to 53% in 1940. Morett Sánchez, *supra* note 9 at 67.

⁶⁶ *Ibid* at 67.

What emerged from this structure created by Calles and strengthened by Cárdenas was a political system (the PRI-regime; PRI is the Spanish acronym for Party of the Institutional Revolution) in which the president had at his disposal meta-constitutional powers that allowed him to control congress and the governorships by corporatist tactics and electoral fraud.⁶⁷ After Cárdenas, President Ávila Camacho assumed the presidency in 1940 and land redistribution policies slowed down considerably. In 1942, Ávila Camacho issued a new agrarian code which abrogated the 1940 code.⁶⁸ This third agrarian code was in force until 1971. Even though initially only up to 50 hectares were protected from land redistribution policies, the new code protected up to 300 hectares for certain crops and, for the land destined for cattle raising, the law protected it up to a size that could hold 500 animals (or a minimum of 300 if the animals produced milk).⁶⁹ This meant that there was less land to redistribute. In terms of agrarian authorities, the 1942 code no longer considered the *Comisariado* as a general agrarian authority, as the 1940 code did, but only as the authority of the *ejido*, probably in order to limit their power to the *ejido* alone. Additionally, the code also considered the general assembly of *ejidatarios* as an authority inside the *ejido*, and, finally, it created the vigilance council as an

⁶⁷ Steven Barraca, "Gubernatorial Politics and the Evolution Toward Democratic Federalism in Mexico" (2007) 17:2 Reg'l & Fedl Stud 173 at 180. [Barraca]

⁶⁸ Código Agrario [Agrarian Code] [C.A. 1942], art. 33, Diario Oficial de la Federación [D.O.], 31 de Diciembre de 1942 (Mex.).

⁶⁹ *Ibid* at arts. 173 and 256.

authority of the *ejido*.⁷⁰ These two reforms sought to fragment power within the *ejido*. The vigilance council had a similar structure as that of the *Comisariado* and its primary role was to check the legality of the actions of the *Comisariado* and to keep informed the Agrarian Department of any changes to the rights of the *ejidatarios*.⁷¹

This code also reaffirmed that individual parcels were inalienable, could not serve as collateral for loans, and could not be leased.⁷² López Mateos (1958-1964) stopped the slow reversal of Cárdenas policies, redistributing large quantities of land.⁷³ López Mateos chose Gustavo Díaz Ordaz as his successor and assumed power on December 1, 1964. Díaz Ordaz was a staunch anti-communist,⁷⁴ and under his presidency one of the darkest chapters of the political regime that came out of the Revolution was written when he violently terminated a student strike using the army.

In 1946, the State party was renamed *Partido Revolucionario Institucional* (Party of the Institutional Revolution [PRI]) by President Ávila Camacho. The political system devised by Calles had successfully prevented any more rebellions after each presidential succession. No other president ever attempted to re-elect himself; in exchange the president in turn elected his successor and

⁷⁰ *Ibid* at art. 4.

⁷¹ *Ibid.* at arts. 29 and 45.

⁷² *Ibid* at art. 128.

⁷³ Vázquez Castillo, *supra* note 11 at 61.

⁷⁴ Julio Scherer García & Carlos Monsiváis, *Parte de Guerra, Tlatelolco 1968: Documentos del General Marcelino García Barragán: Los hechos y la historia* (México: Nuevo Siglo, 1999) at 134.

the governors of the states. The system bribed or destroyed any sector that could represent a threat to it and institutionalized the lives of workers (through the unions) and peasants (through the *ejidos* and unions). To avoid international criticism, the system always gave a small space to real or pretended opposition; but by 1968 the system had become so closed that the space was very slim.⁷⁵ President Luis Echeverría Álvarez (1970-1976) continued the political repression and had to fight urban and rural guerrilla groups. Echeverría abrogated the 1942 code by signing the *Ley Federal de Reforma Agraria* (Federal Law of Agrarian Reform [LFRA]) in 1971. This law had as its main objective turning the *ejido* into an economically efficient entity. The Echeverría government strengthened the *ejido* by turning it into a social enterprise with a legal personality that was capable of exploiting all of the resources within it. The law also withdrew the protections for large extensions of land used for cattle contemplated in the 1942 code.⁷⁶ The *ejido*, thus, was no longer considered a transitional form of land tenure, but rather part of the Mexican economic system.

Since the *ejido* was considered a social enterprise, the government considered its responsibility to control and organize every aspect of it. Even though the Echeverría government significantly increased loans to *ejidos*, the heavy regulations that ruled them and the large bureaucratic system in charge of

⁷⁵ *Ibid* at 137.

⁷⁶ *Exposición de Motivos de la Iniciativa de Ley Federal de Reforma Agraria de 1971*, reprinted in Díaz de León, *supra* note 12 at 654-658.

making the decisions for the *ejidatarios* meant that most of the profits obtained by the *ejidos* stayed in the bureaucracy.⁷⁷ Other problems that prevented the *ejido* from becoming efficient were caused by the same mechanisms that were set to protect *ejidatarios*, but that started to work against them. Since land could not be sold on the market, there were large extensions of land that were idle. *Ejidatarios* that no longer could or wanted to work their land were forced to opt for extra-legal and illegal forms of property transmission. Because of the lack of legal guarantees of this form of land transmission, the *ejidatarios* had to give their land at very low prices or under disadvantageous terms.⁷⁸ The *ejido* started to appear as an inefficient and unproductive form of land tenure, while Mexico was opening its doors to the global economy.⁷⁹ Discussions were already taking place for a North American trade agreement and the U.S. Congress was blaming the *ejido* system for the low productivity of Mexican agriculture which, according to the report, could not feed the *ejidatarios* themselves let alone the Nation.⁸⁰

7. The Modernization Period

⁷⁷ Morett Sánchez, *supra* note 9 at 105.

⁷⁸ Díaz de León, *supra* note 12 at 856.

⁷⁹ Vázquez Castillo, *supra* note 11 at 39.

⁸⁰ U.S., U.S. Congress, Office of Technological Assessment, *U.S. - Mexico Trade: Pulling Together or Pulling Apart* (ITE-545) (Washington, DC: U.S. Government Printing Office, October 1992) at 73.

Carlos Salinas de Gortari, a staunch neo-liberal, assumed power on December 1, 1988, following a very controversial election.⁸¹ Salinas was determined to intensify the reforms of privatization, modernization and liberalization of the Mexican economy that his predecessor, Miguel de la Madrid, had started.⁸² In order to modernize the *ejido* and rural properties, Salinas reformed article 27 in 1992 to de-regularize the *ejido* and to give more certainty and precision to *ejido* rights so that *ejidatarios* could integrate with the rest of the economy. These reforms were the most radical formal changes made to article 27 since the Constitution was drafted in 1917. The reforms had as objectives to:

1. Stop the fragmentation of agrarian land (*minifundio*).
2. Stop land redistribution policies.
3. Stimulate agrarian productivity.
4. Legalize and regularize land titles to give legal certainty to the *ejidatarios'* property rights.

⁸¹ Nikki Craske, "Dismantling or Retrenchment? Salinas and Corporatism" in Rob Aitken et al, eds, *Dismantling the Mexican State?* (Basingstoke, UK.: Macmillan Press, 1996) 78 at 81.

⁸² In his first annual state of the nation speech, Salinas told Congress that the very existence of Mexico was dependent on its ability to change and modernize. Salinas considered modernization as the ability to break free from whatever stops the progress of the country. The revolution, he said, was meant to create a strong state but also an "emancipated" society where farmers could break free from bureaucracy and from the ignominy of living as an "underage social class." A state overwhelmed administering corporations is a state that is failing article 27 of the Constitution of 1917 because the state becomes weak and unable to protect farmers, workers, businesses, and popular and middle classes. An overburdened state, according to Salinas, could not face the world. Carlos Salinas de Gortari, *Primer Informe de Gobierno ante el Honorable Congreso de la Unión, 1989*, [First Government Report before the Honorable Congress of the Union], Biblioteca Garay <http://www.biblioteca.tv/artman2/publish/1989_66/Mensaje_del_Primer_informe_de_gobierno_de_Carlos_S_77.shtml> [translated by author] (last visited June 6, 2013).

5. Change the term “small agrarian property in production” to “small rural land” removing the obligation to work the land for agrarian purposes.
6. Diminish the restrictions that corporations had to associate with *ejidatarios*; corporations could also own “rural land.”
7. Ease the restrictions on *ejidos* to be sold, leased or used as collateral.
8. Allow foreigners to participate in agricultural activities, albeit with conditions.
9. Establish new specialized tribunals to settle *Ejido* disputes.
10. Give incentives to *ejidatarios* to move from the *ejido* to private property.⁸³

Although it was impossible to continue redistributing land permanently, the action was criticized by people who claimed that the reform did not take into account the people affected by it and that critics of the reform were either being bribed or threatened by the regime.⁸⁴ With these changes, rural property rights were given certainty to allow *ejidatarios* to capitalize their land in an open market. Although some considered the changes necessary because the old legislation was not solving the problem of low agricultural productivity,⁸⁵ the effects of the legislation were not those that were promised and the *ejidatarios* did not see a change in their lives for the better. The reforms were designed to end the *ejido* as

⁸³ *Exposición de Motivos de la Iniciativa de Reformas de 1992 al Artículo 27 Constitucional*, reprinted in Díaz de León, *supra* note 12 at 918.

⁸⁴ Vázquez Castillo, *supra* note 11 at 42.

⁸⁵ See for instance, Morett Sánchez, *supra* note 9 at 111-114.

a form of land tenure and as an economic activity,⁸⁶ but Mexico was not prepared, nor did the government make any plans, to absorb the people who migrated from the fields to the urban centers.

Salinas abrogated the LFRA of 1971 and signed the new *Ley Agraria* (Agrarian Law) as part of the agrarian reforms. This law no longer contemplated the president as the supreme authority in agrarian issues, signaling a new change of priorities for the political system that no longer considered the *ejido* as an important part of it. The *ejidos* were given more liberty to regulate themselves and the kind of use that they wanted to give the communal land. These reforms gave even more choices for *ejidatarios* with individualized parcels to use them as an economic asset.⁸⁷ *Ejidatarios* could engage in any contract, including using *ejido* land as collateral for loans, as long as it was approved by the *asamblea ejidal*, in the case of communal land, or by the holder of rights over an individualized parcel if that were the case.⁸⁸ Communal land, however, could only be transferred to a third party (outside the *ejido*), or put in risk of being transferred to a third party, with the consent of the *Procuraduría Agraria* (The Agrarian Legal Office), which was part of the federal government.⁸⁹ *Ejidatarios* with individualized parcels were given more protections against the

⁸⁶ *Ibid* at 170.

⁸⁷ *Ley Agraria* [Agrarian Law] [L.A.], *as amended*, arts. 9-11 and 14, Diario Oficial de la Federación [D.O.], 26 de Febrero de 1992 (Mex.).

⁸⁸ *Ibid* at arts. 45 and 46.

⁸⁹ *Ibid* at arts. 74 and 75.

encroachment of the rest of the *ejidatarios*. To have full ownership over his or her land, however, the *ejidatario* had to go through a process in which the government had to identify the exact dimensions of the individual parcel that belonged to the *ejidatario*, and then he or she could proceed to sell it to a third party if there was no one with preference within the *ejido* as determined by law.⁹⁰

Salinas, after he dealt with the agrarian reform, started a wave of privatizations of publicly owned enterprises, renegotiated the foreign debt, and reduced the deficit. These reforms were necessary for Salinas's main objective. Salinas was convinced that Mexico could not subsist on its own and also that it was not ready to compete with the world and, therefore, that it was necessary for Mexico to form an economic bloc with the United States to strengthen its position on the world stage.⁹¹ The North American Free Trade Agreement (NAFTA) was signed in 1992 by the Presidents of Mexico, U.S. and Canada, and came into effect on January 1, 1994. Salinas, as Porfirio Díaz, believed that the benefits of economic liberalization would eventually trickle down to all Mexicans. At the same time that Salinas intensified his modernization agenda the political environment started to decompose. On January 1, 1994, the same day that

⁹⁰ *Ejidatarios* within the *ejido* in which the sale of the individual parcel was taking place had preference to buy it, unless they had more land in the *ejido* than that set by the law. *Ibid.* at arts. 76-86.

⁹¹ President Salinas thought it necessary to start a campaign to change the attitudes of Mexicans towards the U.S., as he once put it: "... we heard protectionism used as a synonym for nationalism. Now, we would promote trade opening as means to strengthen the nation." See, Carlos Salinas de Gortari, *Mexico: The Policy and Politics of Modernization* (Barcelona: Plaza Janés, 2002) at 50 [Salinas de Gortari, *Modernization*].

NAFTA came into effect and Mexico was supposed to enter modernity, the *Ejército Zapatista de Liberación Nacional* (Zapatista Army of National Liberation [EZLN]) declared war on the Mexican government.⁹²

Salinas picked Ernesto Zedillo Ponce de León as his successor (after his initial candidate was assassinated) and he assumed power on December 1, 1994. Zedillo faced intense political and financial turmoil almost immediately. On December 21, Mexico went into financial shock as capital fled the country, fearing a steep devaluation of the Peso caused by political and social instability. Zedillo blamed Salinas for the country's problems, causing an unprecedented conflict between the President and the ex-President not seen since the conflicts between Cárdenas and Calles. On March 10, 1995, Salinas decided to leave the country (although he later claimed that he was asked to leave by order of Zedillo). The Zedillo government pressed charges against his brother for the alleged commission of several crimes, including murder.⁹³

Although Zedillo faced very serious problems, he managed to get the economy back on track by the end of his term. Zedillo is recognized, however, because he was the first President of the PRI-regime in more than 70 years to be succeeded by an opposition candidate. Vicente Fox Quesada of the center-right

⁹² Gloria M. Delgado de Cantú, *Historia de México: México en el Siglo 20*, Vol. II, 4th ed. (México: Pearson Educación, 2003) at 491-496.

⁹³ Salinas maintains that he was pressured to leave and that the charges against his brother were political motivated. Salinas de Gortari, *Modernization*, *supra* note 91 at 1184-1186.

Partido Acción Nacional (National Action Party [PAN]) assumed power on December 1, 2000. The democratic transition of power caused much excitement among the population, as change seemed to be the word of the moment. Fox's main battle cry was getting rid of the PRI-regime. Other than this objective, there was no coherent government plan. His economic agenda as a candidate was vague and, other than promising 7% annual growth and micro-credits, there were no significant proposals. His proposal to tax food and medicine was defeated in Congress and no clear economic direction was announced other than maintaining the *status quo*.⁹⁴

⁹⁴ Edna Jaime, "Fox's Economic Agenda: An Incomplete Transition" in Luis Rubio & Susan Kaufman Purcell eds, *Mexico Under Fox* (Boulder: Lynne Rienner, 2004) 35 at 59.

Chapter II

The Conflict in San Salvador Atenco

History explains more than just the *ejido's* legal framework. In this and the following two chapters, I will illustrate how national events shape and are shaped, in turn, by smaller political units and how that affects the *ejido* as a site of a plurality of normative orders.⁹⁵ By describing this conflict, I shed light on the type of mechanics that make the *ejido* an authentic political unit, even if it is an insular and undemocratic one. The importance of describing this particular episode lies not only in its explanatory power but also in providing context to certain concepts that are commonly found in the studies of small political units such as community, culture, and shared understandings. In this chapter, I will analyze the most relevant conflict in an *ejido* in recent years.

The previous chapter presented a historical account that aimed at presenting the evolution of the *ejido* and the use that was given to it at different points in time. This account also reveals the stubborn presence of misery and inequality. Although I will come back to the role of poverty in local governance in chapter VII, for now I want to draw attention to the role of a permanent underclass in the national legal system and how that affects conflict resolution

⁹⁵ Chapter VIII will address the interaction of these normative orders.

dynamics. The conflict in Atenco is particularly relevant, not only because of the scale of the conflict, but because it took place after the democratic transition of 2000. This political event was supposed to correct Mexico's democratic deficit and facilitate communication between citizens and authorities.

1. The Origin of the Conflict

San Salvador Atenco is a small municipality close to Mexico City. It has an extension of 94.67 square kilometers and a population of 42,739, according to the 2005 census,⁹⁶ 359 of whom speak an indigenous language. Originally, the word Atenco came from the Náhuatl and it means "the place next to the water." The inhabitants of that region were Toltecas and Chichimecas who fell to the Spanish conquistadors in 1521. On the 21st of October, 2001, the Fox government proposed a controversial plan to construct the new international airport for Mexico City in the State of Mexico, part of which was going to be built in the municipality of San Salvador Atenco. Even though the media kept calling it the Texcoco Project, the airport was not going to be constructed only in Texcoco but also in the city of San Salvador Atenco and another portion in the city of

⁹⁶ Instituto Nacional de Estadística y Geografía, *Indicadores seleccionados de la población por municipio, 2005*, <http://www.inegi.org.mx/est/contenidos/espanol/rutinas/ept.asp?t=mpob103&s=est&c=3850&e=15> (Mex.).

Ecatepec.⁹⁷ The government was also considering the option of constructing the new airport in the city of Tizayuca, in the State of Hidalgo.⁹⁸ The governors of both states were very interested in having the airport in one of their cities because it meant more businesses and more revenues. In both cases, the governors were from the PRI: Arturo Montiel Rojas from the State of Mexico and Manuel Ángel Nuñez of the State of Hidalgo. Arturo Montiel was accused, particularly in the left leaning press, of being part of a political group called Atlacomulco, which is the name of the city where he was born. This group, supposedly led by Carlos Hank González, a powerful businessman and politician, was said to be the dominant political and economic force in the State of Mexico. Many governors were said to be part of this group, including Enrique Peña Nieto, the current President of Mexico.⁹⁹

The mayor of San Salvador Atenco, Margarito Yáñez Ramos, was of the same political affiliation as that of the governor (PRI). Yáñez Ramos was deeply

⁹⁷ Almendra Vázquez Bravo & Rebeca Jiménez Jacinto, “Crece polémica por ubicación del aeropuerto” *El Universal* (27 February 2001) online: El Universal <www.eluniversal.com.mx>. Confusion over the location of the new airport reached such a point that the mayor held a referendum to ask the people of Texcoco if they wanted the airport in their city or not. Seventy percent of those who attended the referendum rejected the project out of fear of environmental degradation and overpopulation in the region. When they were told by the state government that Texcoco was not being considered to build the airport, the mayor of the left-leaning *Partido de la Revolución Democrática* (Party of the Democratic Revolution [PRD]) did not believe the Governor Arturo Montiel (from the PRI) and accused him of trying to delegitimize the referendum. See, Almendra Vázquez & José Roldán, “Rechazan Aeropuerto en Texcoco” *El Universal* (6 March 2001) online: El Universal <www.eluniversal.com.mx>.

⁹⁸ The city of Tizayuca is approximately 52 kilometers from Mexico City, it had a population of 40, 875 in the year 2000, and the main economic activity comes from the industries installed in the city, although there is some agricultural activities as well. See, Secretaría de Gobernación, *Enciclopedia de los Municipios de México*, Tizayuca, online: Enciclopedia de los Municipios de México, http://www.e-local.gob.mx/wb2/ELOCAL/EMM_hidalgo (Mex.).

⁹⁹ José Gil Olmos, “Grupo Atlacomulco” *Proceso* (10 September 2008), online: Proceso <www.proceso.com.mx>.

committed to having the airport in San Salvador Atenco, as was Montiel. Even though the old political system had been ousted from power at the federal level, and the president no longer had the kind of power he used to have, in most states the political system was the same. The states that had been dominated by the PRI, and that still had not elected a governor from an opposition party, had a pyramidal political and legal system where the governor had the last word.¹⁰⁰ Not only the situation did not improve with the democratic transition of power at the federal level, it became worse in the states where the PRI had hegemonic political power. Without the president to rein in the ambitions and excesses of the governors, all the formal powers of the state, including those of the municipalities, were submitted to the whims of the governor in turn.¹⁰¹

Yáñez Ramos considered opposition to the airport project to be politically motivated and only supported by members of the leftist *Partido de la Revolución Democrática* (Party of the Democratic Revolution [PRD]), who were very vocal in

¹⁰⁰ As it will be show in the next chapter, it is important not to let the metaphor of the pyramidal power structure overshadow the local politics that sustained the political system. Even the ability to “appoint” governors had to take into consideration certain local dynamics in order to avoid excessive political unrest. See, Barraca, *supra* note 67 at 182.

¹⁰¹ One of the clearest examples of this system is the Lydia Cacho case in the State of Puebla, where the PRI had dominated ever since this party was created. The governor of this State, Mario Marín, was involved in a scandal when a recording of his telephone calls with the business man Kamel Nacif were revealed by the press. In the conversation, Nacif thanked the governor for jailing the journalist Lydia Cacho who had accused him in a book of abusing minors. Marín not only ordered the police to detain Cacho to defend his friend, but also talked with the prosecutor and the judge in charge with her case to complicate her legal situation and, furthermore, talked with the authorities of the prison to instruct them to put Cacho with “the crazy women,” implying with women most likely to hurt her or intimidate her. This is just one of the irregularities that happen in Puebla and in many other States where only the PRI has governed. See, Jaime Aviles, “Pretende Marín salvarse; quita a Juanito la maquiladora de la cárcel” *La Jornada* (24 February 2006), online: La Jornada <www.jornada.unam.mx>.

their discontent.¹⁰² The authorities of the *ejido* of Atenco were receptive about discussing the terms of the project. The *ejido* of San Salvador Atenco had 487 members who could vote in the *Asamblea Ejidal*, and 1,020 members who had a piece of land where they had their houses.¹⁰³

Severanio Zavala Altamirano, president of the commissary of the *ejido* of San Salvador Atenco, had been in talks with representatives of the state government. In a meeting, Zavala told the state representatives that the assembly had approved certain conditions that the state government had to respect in order for the assembly to approve the airport in their territory: 1) the *ejidatarios* and the airport were to be commercial partners; 2) the *ejidatarios* had to receive monetary compensation for life; 3) the taxis and buses of the airport had to be the property of a cooperative composed of *ejidatarios*; and 4) the square meter had to be valued at \$10,000 pesos. Zavala also agreed with Yañez in the sense that the protesters were not members of the *ejido* but members of the PRD.¹⁰⁴

On October 22, the head of the *Secretaría de Comunicaciones y Transporte* (Department of Communications and Transport [SCT]), Pedro Cerisola, announced that the airport was going to be built in the state of Mexico.

¹⁰² Juan Lázaro, “Obstaculizan estudios del plan del nuevo aeropuerto” *El Universal* (21 July 2001), online: El Universal <www.eluniversal.com.mx>.

¹⁰³ Juan Lázaro, “Piden campesinos ser socios del aeropuerto” *El Universal* (2 August 2001), online: El Universal <www.eluniversal.com.mx> [Lázaro, “Socios”].

¹⁰⁴ *Ibid.*

Cerisola said that the decision was made because it was the most economical site when compared to the project in the state of Hidalgo (40% cheaper in total cost and this project required 23% less in federal participation).¹⁰⁵ The current airport was going to cease operations and, instead, the federal government planned to build an environmental space and a financial center in its place.¹⁰⁶ That same day, the *Diario Oficial de la Federación* (Official Diary of the Federation [DOF]) published 42 expropriation decrees, the majority affecting the city of Texcoco. The decrees showed that even though the government was negotiating with the people of San Salvador Atenco to get their consent, and the decision was not announced until October 22, the decision to expropriate the lands of the *ejido* of San Salvador Atenco had been taken since at least September 21st. The municipality of San Salvador Atenco was hit with ten different decrees of expropriation affecting the *ejidos* of San Salvador Atenco, Col. Francisco I. Madero, Santa Isabel Ixtapan, Nexquipayac, and San Francisco Acuescomac.¹⁰⁷

Legal actions were planned or carried out by both sides. The Montiel government initiated legal actions against some of the people that had blocked the highway and that had seized San Salvador Atenco's city hall in protest of the

¹⁰⁵ Mariel Zúñiga & Ramón Sevilla, "Despega Texcoco con Turbulencia" *Reforma* (22 October 2001), online: Grupo Reforma <www.reforma.com>.

¹⁰⁶ Angelina Mejía, Georgina Howard & Ella Grajeda, "Gana Texcoco; hay protestas" *El Universal* (23 October 2001), online: El Universal <www.eluniversal.com.mx>.

¹⁰⁷ *Diario Oficial de la Federación* [DO], [Official Federal Daily Gazette], 22 October 2001, online: <www.dof.gob.mx> (Mex).

decision.¹⁰⁸ Mexico City's government and the PRD had decided to challenge the decision of the federal government in the Supreme Court. The PRD's arguments were that it was the municipality's constitutional right to decide what kind of use each zone within the municipality would have and, therefore, that the federal government could not build an airport without the municipality changing the zoning laws. They also claimed that, according to article 115 of the Constitution, municipalities were entitled to participate in discussions relating to any issue regarding transportation that affected their territory.¹⁰⁹ The people of San Salvador Atenco who opposed the project were also preparing their legal defense by hiring Mexico's most prestigious constitutionalist, Ignacio Burgoa Orihuela, to help them obtain an *amparo* (a legal mechanism that protects constitutional rights against government actions or omissions).¹¹⁰ Burgoa Orihuela claimed that the decrees lacked legal reasoning and that the federal

¹⁰⁸ Enrique I. Gómez, "Buscan a fraccionadores" *Reforma* (1 November 2001), online: Grupo Reforma <www.reforma.com>.

¹⁰⁹ Lilia Saúl & Ella Grajeda, "Alistan controversia por Texcoco" *El Universal* (24 October 2001), online: El Universal <www.eluniversal.com.mx>.

¹¹⁰ Érika Hernández, "Aprueban contratar a Ignacio Burgoa" *Reforma* (2 November 2001), online: Grupo Reforma <www.reforma.com>. *Amparo* is a widely used federal legal mechanism against any type of perceived violation of the constitution by any authority at any level: "[a]mparo petitions may be filed to challenge the constitutionality of numerous types of acts: procedural errors in constitutional reforms (e.g. lack of proper quorum in Congress for approval of a reform); laws passed by the Federal Congress or by state legislatures; administrative rules issued by the President of the Republic or governors of states; final judgments handed down by the courts of any state, the Federal District, or the Federal government; arbitrary arrests conducted by the police; resolutions issued by any administrative authorities; expropriation of assets, etc. *Amparo* has become so crucial to litigation that in many judicial and administrative proceedings the parties are not as interested in the ordinary process itself as they are in using the regular trial as preparation for a subsequent *amparo* suit." Stephen Zamora et al., *Mexican Law* (New York: Oxford University Press, 2004) at 259.

government took territory for itself that belonged to a sovereign state without asking for the consent of the local Congress.¹¹¹

In spite of looking for legal ways to resolve their conflict, the people that opposed the airport project escalated their protests by a variety of actions, including: firing gun-powdered canons in the city square towards Mexico City,¹¹² by marching in Mexico City armed with machetes, stopping traffic, attacking police with stones, machetes, and bats,¹¹³ by detaining and questioning people that they considered “spies,”¹¹⁴ by refusing to allow the mayor return to the city hall because they considered him a “traitor,”¹¹⁵ and by blocking highways.¹¹⁶

2. Fractions in the Opposition

Not everyone in San Salvador Atenco agreed with the measures taken by their new unelected leaders. At the beginning of the protests, some *ejidatarios* expressed that they did not want outside interest groups in their movement; but

¹¹¹ Ramón Sevilla, “Confía Burgoa en suspender expropiación” *Reforma* (10 November 2001), online: Grupo Reforma <www.reforma.com>.

¹¹² Érika Hernández, “Desairan 'changarros' de Fox” *Reforma* (5 November 2001), online: Grupo Reforma <www.reforma.com>.

¹¹³ Iván Ventura, “Van 1,500 a Los Pinos” *Reforma* (1 November 2001), online: Grupo Reforma <www.reforma.com>.

¹¹⁴ César Díaz, “Detienen vecinos a 'espías’” *Reforma* (26 October 2001), online: Grupo Reforma <www.reforma.com> [Díaz, “Espías”].

¹¹⁵ Érika Hernández, “Corren' a edil de San Salvador Atenco” *Reforma* (31 October 2001), online: Grupo Reforma <www.reforma.com>.

¹¹⁶ Humberto Padgett León, “Bloquean campesinos autopista” *Reforma* (27 October 2001), online: Grupo Reforma <www.reforma.com>.

when Ignacio Del Valle, leader of the Emiliano Zapata group, started assuming a position of leadership, he radicalized the entire movement.¹¹⁷ This group allied itself with leftist groups from outside San Salvador Atenco and bought more machetes to arm its protests. Some *ejidatarios*, however, were uneasy with Del Valle's leadership.¹¹⁸ Protesters received sympathy from leftist intellectuals who saw history repeating itself in San Salvador Atenco's struggle: the dispossessed being abused by small but economically powerful interest groups that destroy communities and their culture to make a profit. These same intellectuals paid little attention to the infringement of the liberties of those who did not agree with the protesters and their allies.¹¹⁹

Some *ejidatarios* who wanted to sell their land to the government were being harassed by opponents without any authority intervening on their behalf. Some people were not able to bury their dead because they were being charged more to use the cemetery if they were known to support the project or the

¹¹⁷ Del Valle violent tendencies were in display when he threaten to physically harm the "spies" that he claimed have found in Atenco. See Díaz, "Espías," *supra* note 114.

¹¹⁸ Érika Hernández & Humberto Padgett, "Divide a los campesinos los métodos de lucha" *El Universal* (17 November 2001), online: El Universal <www.eluniversal.com.mx>.

¹¹⁹ Among these groups were: 1) the EZLN; 2) Frente Popular Francisco Villa; 3) Convención Nacional Popular; 4) te CGH; 5) Comité de Campesinos Pobres; 6) Unión Campesino Demócrata; 7) Indígenas Migrantes; 8) Comité Obrero de Derechos Humanos en Defensa de la Educación y el Trabajo; 9) Central Independiente de Obreros Agrícolas y Campesinas; 10) Coordinadora Nacional Plan de Ayala; 11) Sindicato de Trabajadores Académicos de la Unidad Autónoma Chapingo; 12) Consejo Mexicano de ONG's pro Naciones Unidas; 13) Chapingo Students; 14) Movimiento de Unidad y Lucha Popular; 15) Costureras 19 de Septiembre; 17) Former leaders of the 68 student movement and; 18) Pueblos Unidos de Tláhuac. Érika Hernández & Humberto Padgett, "Aprovechan protestas de *ejidatarios* de Atenco" *El Universal* (19 November 2001), online: El Universal <www.eluniversal.com.mx>.

mayor.¹²⁰ Some people who were not part of Del Valle's group organized a march to demand that the government intervene; furthermore, dissenters from Del Valle's actions denounced that this group was using weapons to intimidate people who agreed with the project or who simply did not agree with Del Valle's leadership.¹²¹ However, sympathizers of Del Valle were not deterred and, in addition to their actions in Atenco, they helped to violently seize the state congress of the State of Morelos,¹²² they also kidnapped employees of a private company hired to make a map of the area for a federal project. These employees were taken to the town auditorium where Del Valle supporters discussed whether to lynch them. After demanding to speak with their boss, a citizen of Bulgaria, he was kidnapped too after meeting with Del Valle's group and he was not released until 68 hours later.¹²³ Days later, Del Valle's supporters also retained academics from Canada and Peru for three hours.¹²⁴

3. The Showdown

¹²⁰ Juan Lázaro, "Cobran 5 mil por inhumar en Atenco" *El Universal* (19 May 2002), online: El Universal <www.eluniversal.com.mx> [Inhumar].

¹²¹ Almendra Vázquez, "Protestan por acoso a ejidatarios de Atenco" *El Universal* (28 May 2002), online: El Universal <www.eluniversal.com.mx>.

¹²² Justo Miranda & Gerardo Rico, "Toman normalistas la sede del congreso" *El Universal* (29 May 2002), online: El Universal <www.eluniversal.com.mx>.

¹²³ Humberto Padgett León & Erika Hernández, "Retienen a 5 trabajadores" *Reforma* (2 June 2002), online: Grupo Reforma <www.reforma.com> and Erika Hernández, "Entregan a topógrafos retenidos en Atenco" *Reforma* (4 June 2002), online: Grupo Reforma <www.reforma.com>.

¹²⁴ Almendra Vázquez Bravo, "Retienen ejidatarios a académicos y funcionarios" *El Universal* (6 June 2002), online: El Universal <www.eluniversal.com.mx>.

After days of seizing public and private property, protests, kidnappings and vitriol, the conflict reached its most critical moment on July 12. Leaders of the movement were apprehended after a protest ended with a violent clash against the police, Ignacio Del Valle included. Sympathizers of Mr. Del Valle marched to Texcoco where they stormed a public office and kidnapped the sub-attorney general of the State of Mexico and other public employees. The hostages were taken to downtown San Salvador Atenco where protesters threaten to burn them alive unless their leaders were liberated. The protestors criticized the government use of the public force to protect “capitalist interests”.¹²⁵ Even though government forces surrounded San Salvador Atenco and plans were being discussed to free the hostages, some protesters managed to kidnap five more people two days after the crisis started. Other groups sneaked into San Salvador Atenco to strengthen the protesters’ ranks.¹²⁶ Meanwhile, the governor of the state, Arturo Montiel, was in Cancun claiming that the problem was not of his competence because the airport was a federal project, even though members of his own personnel were being held under threat of lynching.¹²⁷ Members of the State of Mexico Human Right's Commission tried gain access to see the

¹²⁵ Erika Hernández, et. al., “Truena crisis en Atenco” *Reforma* (12 July 2002), online: Grupo Reforma <www.reforma.com> and Luis Alegre, “Traigan más gasolina” *Reforma* (12 July 2002), online: Grupo Reforma <www.reforma.com>.

¹²⁶ Humberto Pedgett, “Respaldan 20 organismos acciones de los campesinos” *Reforma* (15 July 2002), online: Grupo Reforma <www.reforma.com>.

¹²⁷ Alfredo Mondragón, et. al., “Se deslinda Montiel de la crisis” *El Universal* (14 July 2002), online: El Universal <www.eluniversal.com.mx>.

hostages in order to check their health. The protesters refused to let them see the hostages and briefly retained them as well.¹²⁸

Although the government promised to uphold the rule of law and not surrender to extortion, in the end Montiel instructed the judge that was overseeing the legal proceedings to “find a way” to liberate the protesters that were being held in jail, which the judge did.¹²⁹ The federal government also offered more money, as well as housing and jobs, to the protesters. After their leaders were released from jail, the protesters released the hostages who were being held and the highways that were being blocked.¹³⁰ Even though the government kept increasing the financial and social offers, the protesters kept increasing their demands until, in August, the federal government finally decided to cancel the project. With this cancellation, the State of Mexico lost close to \$3,000 million dollars in direct investment and more than 80 thousand jobs in one of the poorest regions in the state.¹³¹ Even though 11 of the 13 *ejidos* affected by the expropriation decree agreed with the new financial and social package that the government had offered back in July, the project was cancelled without taking

¹²⁸ Alberto Cuenca, “El aeropuerto no vale la pena si se construye con violencia” *El Universal* (14 July 2002), online: El Universal <www.eluniversal.com.mx>.

¹²⁹ Enrique I. Gómez & Erika Hernández, “Otorgan nuevo plazo a ejidatarios” *Reforma* (15 July 2002), online: Grupo Reforma <www.reforma.com>.

¹³⁰ Almendra Vázquez Bravo, “Aminora la tensión en zona de conflicto” *El Universal* (16 July 2002), online: El Universal <www.eluniversal.com.mx>.

¹³¹ María Teresa Montaña Delgado, “Millonarias pérdidas en Edomex en inversión directa” *El Universal* (2 August 2002), online: El Universal <www.eluniversal.com.mx>.

into consideration their interests. Some families lost a substantial amount of money that could have helped them start a new life.¹³²

4. The Autonomous Municipality

Del Valle decided that the normal electoral process was not going to take place in San Salvador Atenco any longer and that this area would become an autonomous municipality. His arguments were that given that there was no authority in town and that his supporters were already making all of the decisions, he and his group should be the official authorities (even though the reason that there was no authority in town was because Del Valle and his supporters did not allow the elected officials to return).¹³³ Del Valle's decision not to give back the city hall and to seize authority over San Salvador Atenco caused new divisions. Four hundred people marched in Atenco to ask Del Valle to release city hall, as no state authority seemed eager to intervene to restore the legal order in town.¹³⁴ Del Valle created the *Consejo Popular* (Popular Council)

¹³² “De 13 núcleos ejidales, 11 habían avalado la construcción” *El Universal* (2 August 2002), online: El Universal <www.eluniversal.com.mx>, Humberto Padgett, “Piden oportunidad de no ser ‘campesinos’” *Reforma* (3 August 2002), online: Grupo Reforma <www.reforma.com> and Víctor Fuentes, “Pierden campesinos ganancias millonarias” *Reforma* (4 August 2002), online: Grupo Reforma <www.reforma.com>.

¹³³ Humberto Padgett & Hugo Corzo “Amplía Atenco sus exigencias” *Reforma* (3 August 2002), online: Grupo Reforma <www.reforma.com> and Humberto Padgett “Impedirán regreso de autoridades” *Reforma* (4 August 2002), online: Grupo Reforma <www.reforma.com>.

¹³⁴ Erika Hernández, “Exigen devolver Alcaldía de Atenco” *Reforma* (2 September 2002), online: Grupo Reforma <www.reforma.com> and Enrique I. Gómez, “Descartan usar la fuerza en contra de *ejidatarios*”

that, his daughter explained, would have all of the functions of the *Ayuntamiento* (City Council). At the same time, Del Valle supporters demanded that Yañez step down as mayor and that he close the alternative city hall that he had opened in Santa Isabel Ixtapan. They also demanded that the state and federal government give them resources or else they would resume the protests and marches. According to the protesters, articles 39 and 115 of the federal constitution, which established that sovereignty resides in the people and that the people have the right to alter their form of government, protected their actions.¹³⁵ Another of Del Valle's orders was that no construction of an airport was allowed in the federal property adjacent to San Salvador Atenco as that would attract unwanted development around the town. This too, if his instructions were not followed, would force him to resort to violence again.¹³⁶

Del Valle successfully disrupted the scheduled election period and, as usual, no authority intervened. The electoral authorities called for new elections on July 6, but these elections were too under the threat of Del Valle's group.¹³⁷ Meanwhile, the state government claimed that they were not going to be provoked and that under no circumstances would they intervene to protect the

Reforma (12 September 2002), online: Grupo Reforma <www.reforma.com>.

¹³⁵ Humberto Padgett, "Eligen en Atenco Consejo Popular" *Reforma* (9 September 2002), online: Grupo Reforma <www.reforma.com> and Humberto Padgett, "Establecen en Atenco un Gobierno Autónomo" *Reforma* (11 September 2002), online: Grupo Reforma <www.reforma.com>.

¹³⁶ Humberto Padgett, "Anuncia Resistencia" *Reforma* (9 September 2002), online: Grupo Reforma <www.reforma.com>.

¹³⁷ Hugo Corzo, "Reiteran rechazo a elección" *Reforma* (5 July 2003), online: Grupo Reforma <www.reforma.com>.

elections, unless people's lives were in danger.¹³⁸ Finally, later that month, the state government capitulated and “froze” the legal proceedings against the protesters that allegedly committed crimes and, in return, Del Valle promised to give back city hall and the public vehicles that they had seized.¹³⁹ An interim government took office as the authorities planned a third extraordinary election for San Salvador Atenco.¹⁴⁰

A new government was elected and although Del Valle's group protested the change of government ceremony, and after clashes that left some injured, the new officials took office. The next day, Del Valle and his supporters gave back city hall to the new mayor after new clashes.¹⁴¹ Pascual Pineda Sánchez, the new mayor of San Salvador Atenco, inspected the conditions of city hall, where major investments were needed in order to repair the damage of more than one year of conflict.¹⁴² After a few skirmishes the situation in San Salvador Atenco returned to normal - for a while at least.¹⁴³

¹³⁸ Arturo Espinosa, “Descartan violentar Atenco” *Reforma* (6 July 2003), online: Grupo Reforma <www.reforma.com>.

¹³⁹ Arturo Espinosa & Francisco Ortiz, “Congelan actas vs. Atenco” *Reforma* (23 July 2003), online: Grupo Reforma <www.reforma.com> and Almendra Vázquez, “Quedan libres de culpas los 'cabecillas' de Atenco” *El Universal* (27 August 2003), online: El Universal <www.eluniversal.com.mx>.

¹⁴⁰ Erika Hernández, “Preparan en Atenco cambio de Gobierno” *Reforma* (16 August 2003), online: Grupo Reforma <www.reforma.com>.

¹⁴¹ “Toman protesta 3 ayuntamientos” *El Universal* (1 December 2003), online: El Universal <www.eluniversal.com.mx>, Juan Lázaro, “Entregan ejidatarios la alcaldía de Atenco” *El Universal* (2 December 2003), online: El Universal <www.eluniversal.com.mx> and Érika Hernández, “El 'arrestre' del pueblo” *Reforma* (2 December 2003), online: Grupo Reforma <www.reforma.com>.

¹⁴² Míriam Vidal, “Comienza Atenco en situación precaria” *El Universal* (4 December 2003), online: El Universal <www.eluniversal.com.mx> and Érika Hernández, “Priva incertidumbre en Atenco” *Reforma* (4 December 2003), online: Grupo Reforma <www.reforma.com>.

¹⁴³ There was a second big conflict between some inhabitants of San Salvador Atenco and the authorities in 2006 after the government did not allow flower vendors to sell their products without permits. In 2009, the

Supreme Court of Mexico determined that there were grave violations of human rights in the government actions. I will not describe this second conflict though since it did not involve the *ejido* as such but the municipality. “Mexican Supreme Court finds police committed abuses in retaking town” *EFE News Service* (13 February 2009) online: ProQuest <<http://www.proquest.com>>.

Chapter III

Resistance in Historical Context: Power and the Parallel Structure in Rural Mexico

Is the story of Atenco one of successful resistance against an oppressive government or is it the story of a weak government unable to conduct public policy and defend the rule of law? The episode described above seems to indicate that it was both at times. This leaves us, however, with the contradictory notion of an oppressive government trying to apply the rule of law. To avoid adopting pre-fabricated discourses that negate parts of the entire episode, it is necessary to reflect on it carefully. The story of Atenco is a symptom of an anachronistic legal and political system and a society adapting to the rapid changes in the country. In order to assert this, however, social events have to be put into historical perspective; it cannot be a perspective given by the official account of things. The official story would describe the *ejido* as a success of the Revolution and the embodiment of the emancipatory claims of the dispossessed; a closer examination reveals, however, a further tool to control them.

Supporting this last claim, however, requires putting the conflict in Atenco in context to see how the *ejido*, in fact, was designed to support local *caciques*

that could control the rest of the population and ultimately help to reduce the number of conflicts in the country. The government did not have the capacity or the resources to impose its will on the entire country. The political system needed a parallel power structure that was self-sustained; that is, a power structure that generated its own support without necessarily supporting the government directly or without even opposing it. The following account in this chapter describes how, in a small rural community in Mexico, seemingly emancipatory movements may defy easy classification in pre-fabricated narratives. This can be used to situate the conflict of Atenco in a historical context to be able to determine what it can tell us of the political and normative evolution in the country.

1. The *Ejido* and Resistance

It is interesting to note in this, admittedly, very abridged history of the *ejido* that its existence and transformation can be explained through the needs of the political system. The Atenco case further emphasizes that the *ejido* does not provide an appropriate site to resolve conflicts. This is not to say that the *ejido* did not make any changes for the better in the Mexican landscape. Over the course of 80 years, around 52% of the territory was redistributed to *ejidatarios*

and other communities.¹⁴⁴ The problem is that the *ejido* also meant that for many people that was all that they could aspire to because the *ejido's* legal framework made it very difficult to use it in any other way than for subsistence farming. On the other hand, directly intervening in rural life was unnecessary for the PRI-regime at a time that Mexico was becoming more urbanized. Moreover, the *ejido* did have clear problems to become more effective and productive. Among them, were the heavy regulations and restrictions imposed on the *ejido* as it tried to navigate the markets. But the *ejidos* are more than just property; they form authentic political units. The *ejidos* provided the dispossessed with a place from which to resist authority and make demands grounded in the historical injustices that the revolution was supposed to redress. The most interesting aspect of the *ejido* is that, at the same time, the *ejido* is both an economic asset and a locus for political and community decision-making. The problem *is*, since the *ejido* is still very much present in Mexico,¹⁴⁵ that it was designed to provide a very narrow scope of movement to the *ejidatario*.

That institutions respond to historic circumstances is simply pointing to the obvious. What makes the *ejido* distinctive, as a historic institution, is that it

¹⁴⁴ Ana de Ita, "Land Concentration in Mexico after PROCEDE" in Peter Rosset, Raj Patel & Michael Courville, eds., *Promised Land : Competing Visions of Agrarian Reform* (Oakland, Calif., Food First Books, 2006) 148 at 149.

¹⁴⁵ In 2007 there were 31,518 *ejidos* and agrarian communities. It must be noted, however, that this article does not deal with indigenous agrarian communities which are ruled by a different set of regulations. Instituto Nacional de Estadística y Geografía, *Total de ejidos y comunidades según tipo de actividad agropecuaria o forestal y forma de explotación por entidad federativa, 2007*, online: INEGI <www.inegi.org.mx> (Mex.).

embodies a historic *and* present tension; it embodies unresolved power struggles between elites and the worst-off. The *ejido*, even though a juridical institution, has different meanings depending on the particular context. In other words, the *ejido* is a malleable institution; the precise meaning of what it means to live inside an *ejido* is determined by the type of relational dynamics that take place within the *ejido* and with the outside world. This does not mean that the *ejido* is unaffected by legal changes, but that their meaning changes depending on the power dynamics that take place at the moment and place where the reforms are being applied. This would come as a counterintuitive conclusion taking into consideration that the official reason that *ejido* was created by the federal government was to keep it stable from whatever turmoil might be happening at the state or municipal level. What the history of the *ejido* tells us, however, is that the *ejido* was used as one of the mechanisms to strengthen the standing of the president in turn among the rural class. The *ejidos* became local power structures that helped centralize power.

It is useful to remember that the two greatest armed internal conflicts in Mexico have been related to conflicts among the elites. The Mexican Independence war started as a dispute between *criollos* (people born in New Spain but of Spanish ancestry) and *peninsulares* (Spanish-born people living in

New Spain).¹⁴⁶ The rebels used the indigenous and mestizo population for their cause but of this alliance only a fragment of mestizos benefited from the spoils of war while indigenous populations were disregarded once again.¹⁴⁷ With only a slightly more inclusive composition, post-independence governments formed new elite groups, but as the regime became more repressive and less inclusive, former elite members rebelled against it.¹⁴⁸ Both Miguel Hidalgo (the 'so-called' father of Mexico's Independence) and Francisco I. Madero (who initiated the Mexican Revolution) were members of the upper class.¹⁴⁹ Divisions among elites always prompted one or both sides to look for support among the general population. I argue that the *ejido* is the product of that dynamic.

The malleability of the concept of the *ejido* in different times and places, thus, is not an unintended consequence of Mexico's weak institutions; it was meant to be responsive to these tensions. The *ejido* created a theater for power struggles to play out without involving large armed enterprises. More to date, power is now displayed in bribes to the legal system, fights over relatively small pieces of land, and in small instances of domination and resistance in the daily basis of coexistence. There is much to gain and lose in these battles, but at least

¹⁴⁶ Eric Van Young, *The Other Rebellion: Popular Violence, Ideology, and the Mexican Struggle for Independence, 1810-1821* (Stanford, Calif.: Stanford University Press, 2001) at 32-33.

¹⁴⁷ In fact, Van Young argues that the position of some groups may have deteriorated with the dismantling of the Spanish policies of tutelage. *Ibid* at 4.

¹⁴⁸ Hart, *supra* note 30 at 74.

¹⁴⁹ Enrique Krauze, *Mexico: A Biography of Power: A History of Modern Mexico, 1810-1996*, trans. by Hank Heifetz (New York: HarperCollins, 1997) at 101-102, 245 [Krauze].

much is not everything. In historical terms this was progress. The PRI-regime institutionalized inequality and ritualized power struggles. The rules of conduct vis-à-vis land were no longer determined in armed rebellions; they were codified in positive law and fought over in public offices, amid paperwork, and informal social norms (more on this later). The presence of great inequality in the country meant that it was nearly impossible for the state to implement one law across the land uniformly. As the description of the emergence of the PRI-regime illustrated, it was necessary to keep the elites with a certain degree of domination over their “turf” to avoid further rebellions on their part. Law became an object through which the elites could still exercise domination, without damaging the overall political system and – what was the golden rule during the PRI-regime – without threatening the president himself.

In this regard, it is important to point out that even though the president was the most powerful figure in Mexican politics during the PRI-regime, his power was very much shaped through his “administration” of all these struggles by both legal and informal means. This is a thesis advanced by Jeffry W. Rubin who argues that power might not have been as centralized as most observers of Mexican politics made it to be. Rubin notes that the political scaffold solidified during the Cárdenas regime was not that of a centralized government that controlled the periphery via official and semi-official means but exactly the other

way around. Cárdenas decentralized power in ways that supported the power in the center.¹⁵⁰ This is not just a play on words. This inversion in the analysis has far reaching implications while studying the main source of normative rules in Mexico and, in particular, in the *ejido* context.

Before going into exploring that issue in detail, it is important to resolve an apparent tension between Rubin's conception of power in Mexico and that of historian Enrique Krauze. Krauze's position is that the personal events that surround the lives of Mexican leaders, particularly those in the presidency, shape the fate of the nation as well.¹⁵¹ The idea that not all power was centralized in the presidency and that, yet, the personal characteristics and events that surround the president had more than anecdotal explanatory power is congruent. Rubin's point is not that power does not gravitate to the center but, rather, that the reason that power gravitates to the center is due to a series of interactions and dynamics that take place in the periphery of power and that make this possible. Thus, it is still the case that personality and accident had great weight in Mexican politics during the PRI-regime because the dynamics of power both constituted centralized power and, at the same time, helped shape it by the process of acquiescence and resistance. In other words, the system devised by Calles and Cárdenas made possible the centralization of power precisely by decentralizing

¹⁵⁰ Rubin, *supra* note 4 at 13.

¹⁵¹ Krauze, *supra* note 149 at XV.

acts of resistance which the president could stay out of and, at the same time, resolve at a certain point.

Rubin notes that “the Mexican state and regime should be seen as parts of a complex and changing center that coexists with, and is indeed constituted through and embedded in, the diversity of regional and cultural constructions that have evolved throughout Mexico since the 1930s.”¹⁵² The idea of the changing center should be seen through the Foucauldian prism through which he sees the power structure in Mexico. Rubin notes that for Foucault:

...the state apparatus is the ‘institutional crystallization’ (93) of something that happens elsewhere, in multiple local sites of contestation, such as workplaces, families, associational groups, and institutions (94). The apparatuses of the state are thus decentered; they are things which the ‘dense web’ of power relation ‘passes through... without being exactly localized in them’ (96).¹⁵³

Rubin focuses on Juchitán which is a municipality in the Isthmus of Tehuantepec in Oaxaca. Most of its inhabitants are part of the Zopetec indigenous group.¹⁵⁴ Through a very detailed case study of the political history of the municipality, Rubin notes that ethnicity, culture, and community politics shape

¹⁵² Rubin, *supra* note 4 at 13.

¹⁵³ *Ibid* at 14.

¹⁵⁴ *Ibid* at 1.

the meaning and the characteristics of what the PRI-regime meant in Juchitán.¹⁵⁵

The implication of this is that the nature of the regime changed as the local dynamics changed as well. The evolution of the power dynamics in Juchitán are affected by three main characteristics: 1) an inside/outside narrative;¹⁵⁶ 2) an ever-present threat to the inside (real or imagined);¹⁵⁷ and 3) severe inequality in the distribution of resources.¹⁵⁸ I will take these characteristics in turn.

The basis of the mechanics of resistance is an inside/outside narrative which establishes the distinctiveness between those who are resisting and those who are being resisted.¹⁵⁹ In the case of Juchitán, this narrative was centered in ethnicity: the Zapotec culture. According to Rubin, much of the Zapotec culture was shaped by the rough environment itself that pushed people living there to value toughness and solidarity. The Zapotecs were notorious for their often very violent reactions to any type of change particularly coming from the outside.¹⁶⁰ That a harsh environment produces strong ties in a community, particularly an agrarian community, is something observed by James C. Scott. Scott notes that as soon as a peasant seeks and obtains help from a fellow peasant he also tacitly gives him a claim over their resources and work.¹⁶¹ These ethnic and

¹⁵⁵ *Ibid* at 13.

¹⁵⁶ *Ibid* at 6.

¹⁵⁷ *Ibid* at 36.

¹⁵⁸ *Ibid* at 121.

¹⁵⁹ *Ibid* at 24.

¹⁶⁰ *Ibid.* at 26.

¹⁶¹ Scott is referring to south Asian cultures and his observation is mainly related to the kind of dynamics that take place on rice fields; however, many of the circumstances that he describes are similar to what

social characteristics allow for more control inside the political unit from those who wield local power. Rubin notes that cultural characteristics and the meaning of being a Zapotec, even in a very tight community such as Juchitán, are in fact always going through a process of contestation, negotiation and affirmation. These three processes vary according to the particular circumstance through which the community is going through and to the alignment of local forces with those outside the present at the time. Furthermore, these transient interactions between various “outsides” and “insides” helped, at the same time, to change the character of the discourse about what was outside and inside.¹⁶²

The inside/outside narrative is susceptible to a discourse of mistrust towards those who are outside. In the Juchitán case, Rubin points out that there might have been very good reasons to distrust foreigners. The Isthmus of Tehuantepec had been the center of several attempts by the Spanish and other outsiders to take control over it since it sits at a prime location.¹⁶³ The constant interference of non-residents of Juchitán gave some local forces a pretext to strengthen internal control and justified quashing internal dissent.¹⁶⁴ On many occasions this discourse was enough to make overt dissent a sign of not being

happens in other rural areas which are physically, socially, or culturally isolated. James C. Scott, *The Moral Economy of the Peasant: Rebellion and Subsistence in South Asia* (New Haven, Conn.: Yale University Press, 1976) at 28 [Scott, *Rebellion*].

¹⁶² Rubin, *supra* note 4 at 42-43.

¹⁶³ The isthmus had the shortest distance between the Gulf of Mexico and the Pacific Ocean, prior to the Panama Canal. The isthmus is also in the route of those moving from the north to the south of Mexico and vice versa. *Ibid* at 25.

¹⁶⁴ *Ibid* at 57.

fully loyal to the community. In this regard, the particular power structure that at the moment rules the community gets confounded with the community itself.¹⁶⁵ If what is inside is intrinsically so valuable as to justify its zealous protection from the outside, it then follows that any criticism to the internal threatens to destabilize the interior/exterior discourse on which power structures and identity politics depend on. By reading Rubin's account of the evolution of power in Juchitán it is easy to spot this dynamic which in turn explains the popular support for despotic forms of government. From the Revolution onwards, Juchitán's political scenario is marked by the transition from *cacique*-style ruling to interest-based group ruling.¹⁶⁶

Bearing in mind what we discussed in the previous two points, it is now time to see what both the inside/outside discourse and a siege mentality bring about in terms of the form of government and how this affects notions that were supposed to be stable such as ethnicity and culture. What, initially, may seem as a retreat of central power is, in fact, a strategy to constitute it. In the next section, I will apply this narrative to the *ejido* context. For now, however, I return to Rubin's account of power dynamics in Juchitán. The rhetoric of the fiercely independent Zapotec was a response to the constant armed incursions in their territory in pre and post-colonial times. Other forms of defense, however,

¹⁶⁵ *Ibid* at 58.

¹⁶⁶ *Ibid* at 42.

consisted in adopting outside narratives and making them their own. During colonial times, Juchitán conceived a form of “Zapotec Christianity” that allowed Zapotecs to reconcile the need to adopt Christianity in order to avoid further armed incursions and the need to protect internal power structures that provided order and meaning to the community.¹⁶⁷ Many of the tensions between Juchitecos and outsiders revolved around people who went there only to exploit and take over resources that the Juchitecos relied on. Much of the success of elites in protecting their power from outside forces relied on pledging alliance to the Zapotec vision of common access to resources.¹⁶⁸ Thus, in this division between elites needing to buy local support and peasants that remained more attached to ethnicity, there was a utilitarian use of what it meant to be Zapotec. Ethnicity was a useful recourse for the elites to mobilize Juchitecos and that same ethnicity was useful for Juchitecos to demand access to resources to the local elites.¹⁶⁹ This same rationale prevailed during the days of *cacique* rule.

During the post-revolutionary times, the *cacique* promised to uphold Zapotec culture before the central power while exercising despotic practices inside Juchitán.¹⁷⁰ What is interesting to note in Rubin’s account is that General

¹⁶⁷ *Ibid* at 31.

¹⁶⁸ In spite of these pledges, Rubin notes that, during the *cacique*-rule years, Juchitán was particularly inegalitarian. Indeed, he goes on to note that “... economic differentiation among Juchitecos was marked, though both landed and commercial holdings in Juchitán were relatively small compared to other regions of the country.” *Ibid* at 55.

¹⁶⁹ *Ibid* at 37.

¹⁷⁰ *Ibid* at 45.

Heliodoro Charis, the regional *cacique* or political boss, got to be the main defender of Zapotec customs by participating in the same revolutionary movement that promised to bring all of Mexico under its narrative.¹⁷¹ It was thanks to his military victories that he gained recognition in Juchitán.¹⁷² Missing in this account is the reason why Charis participated in the revolution in the first place. What can be concluded from the narrative is that without his standing in national politics, Charis would not have become Juchitán's *cacique*. This standing was not an easy one and it moved back and forth from resistance to compromise and both constituted the basis for his authority in Juchitán. Without his cause to resist the impositions of the central authorities, Charis would not have been able to quash internal dissent so easily;¹⁷³ and thanks to his ability to compromise with those same outside authorities, he did not become a target for the central power to eliminate but, on the contrary, they legitimized him by allowing his resistance. Although this did not exclude the use of violence by the central power entirely, without Charis the government would probably have resorted to this mean of coercion more often and with increasingly poorer results. Charis's resistance facilitated the operation of the newly emerging political system in Juchitán. Charis became an acceptable face for the PRI-regime in

¹⁷¹ *Ibid* at 47.

¹⁷² *Ibid*.

¹⁷³ In one very interesting passage, Rubin notes this ambivalence about Charis present even after his death; while some people chose to portray him as someone who worked to improve conditions in Juchitán, others portrayed him as a murderous, power-obsessed individual. The narrative seems to indicate that he was both. *Ibid* at 49.

Juchitán and the same can be said of the rest of the *Cardenista* political structure in the region.¹⁷⁴

Finally, since Charis controlled much of the resources in Juchitán through political machinations and the raw use of violence, Charis's ups and downs affected the distribution of resources in Juchitán as well. The strong and fiercely defended local autonomy brought with it internal conflicts with reformist and established elites that eventually caused intense divisions after Charis's death.¹⁷⁵ The narrative of autonomy, now particularly adopted by local elites, led to the rejection of state authorities' reform efforts that were meant to channel internal political competition through the figure of primary elections. From a *cacique*-rule Juchitán transitioned into a closed political system in the 60s that insulated the region even further until a process of economic modernization began to engulf the region.¹⁷⁶ These tensions gave rise again to reformists (now arguing to be true to Juchitecos' history) and their fight against local elites that were more aligned with the PRI-regime.¹⁷⁷ The history of Juchitán does not end here, evidently, but for our present purposes it is only necessary to show with specific instances how the process of domination and resistance can work to push people outside of national movements both politically, and it follows, legally.

¹⁷⁴ *Ibid* at 52-54.

¹⁷⁵ *Ibid* at 62.

¹⁷⁶ *Ibid* at 65-66.

¹⁷⁷ *Ibid* at 81-88.

2. The *Ejidatario* as a Legally Distant Person

The most revealing part of the juridical history of the *ejido* is the shift of emphasis from precisely demarcating the physical dimensions of the *ejido* to intervening in their internal organization to back again concentrating on the physical dimensions of property with the intent of privatizing the *ejido*.¹⁷⁸ Following as a theoretical framework the insights gained from analyzing the Juchitán case described in the last section, I will concentrate on the ubiquitous nature of the effects of power in the interaction of the *ejidatarios* among each other and with the official power structures. This will also shed light on the position of law in the Mexican political system during the PRI-regime. In order to bring some clarity to the discussion, I would like to introduce the term of “legally distant person [LDP].” By LDP I mean a person who is at the outer ring of legal relations; this means that the number of legal processes that this individual makes in order to obtain the same goal is larger than that of other individuals. Now, the fact that some individuals go through some more legal processes than others is not in itself quite revealing or something particularly worrisome. Each person finds herself in a particular set of circumstances and it only makes sense

¹⁷⁸ See chapter I for quick overview of the *ejidos* legal evolution.

that to get to a particular legal outcome certain standard requirements have to be fulfilled first. What sets the concept of LDP apart from this mundane fact of all legal systems are two related characteristics: 1) the position of the LDP affects her access to all or most legal processes; and 2) the state imposes barriers for the LDP to move to the inner rings. It would be in describing how these two characteristics play in the context of the *ejido* that the mechanics of the parallel power structure of the PRI-regime will come into play with the legal system.

The notion of the LDP helps illustrate how historic and political dynamics affects a certain group of people. Acting according to the inertias set forth since the revolution, the Mexican government has purposely pushed the worst-off to the edges of legal power and that increased the power of actors that were able to support the centralization of power. A more benign interpretation – and that has already been advanced – is that facing the circumstance that it was not possible to apply one law uniformly given the great social inequality and weak institutions of post-revolutionary Mexico, the government had no choice but to follow a scheme that allowed local elites to exert power over the worse-off. These two possibilities might not be altogether incompatible. It can be the case that post-revolutionary governments faced the difficulty of trying to create one system of government and, at the same time, they acknowledged that the task required giving extra-legal prerogatives to actors whose help was necessary to

consolidate government. In any event, and regardless of the necessities that the times demanded in forging a new government, it is important to see how this worked in the case of the *ejido*.

The account of Juchitán did not involve an *ejido*. In fact, Rubin notes that the elites were successful in convincing locals that an *ejido* was not in their best interest when the reforms were at Juchitán's doors.¹⁷⁹ The purpose of re-telling Rubin's account was to show how, in practice, the dynamic of the LDP develops and this is a phenomenon that does not circumscribe itself to Juchitán or the *ejido*. The main ingredient in Juchitán's narrative was that of ethnicity, in the case of the *ejido* this is going to be substituted by a peasant identity. Rubin notes that many indigenous identities morphed into peasant identities throughout Mexico and adopted the Mexican culture (the Zapotecs being one of the exceptions).¹⁸⁰ This identity will come into play while discussing the *ejido* as a theater for both contestation and affirmation of power relations with the outside. And just as with Rubin's account we can already note that the *ejido*, as "the inside," was created by federal legislation as a response to the demands of those who had the least. The *ejido* is another instance of a policy dressed in emancipatory garments that helped sustain the PRI-regime. This type of analysis attempts to unmask dynamics of oppression within a discourse of resistance that occurs at different

¹⁷⁹ *Ibid* at 68.

¹⁸⁰ *Ibid* at 37.

levels of social interaction that work in tandem to create one system. Through unveiling this dynamic, I will also describe how this tension creates the same spaces of resistance that help give stability to the dynamics of power centralization.

The following account will illustrate the historical inertias in the Mexican political and legal system that shaped the nature of the *ejido*. Once the general “tendency” of the political environment has been introduced briefly and generally in chapter I, exemplified concretely in chapter II, and elaborated in the previous sections of this chapter, it is now necessary to see how this affected the legal shape of the *ejido*. Although not only the *ejidatario* could be considered an LDP, this account will only concentrate on this particular case.

3. Relevant Aspects about the Internal Organization of the *Ejido*

According to the Agrarian Law, the *ejido* has legal personality and the ability to control its own resources.¹⁸¹ Consequently, the *ejido* self-regulates, according to its internal written regulations (*reglamento interno*), with no more limitations than those imposed by legislation.¹⁸² This “self-regulation,” however has to take place within the parameters pre-established by the federal

¹⁸¹ L.A., *supra* note 87 at art. 9.

¹⁸² *Ibid* at art. 10.

government. According to the Agrarian Law, there are three bodies through which an *ejido* operates: 1) the assembly; 2) the *ejido* commissary; and, 3) the vigilance council.¹⁸³ The assembly is the most important body of representation of the *ejidatarios*. The assembly is composed by all members of the *ejido*, must meet at least once every 6 months, and is in charge of every major decision of the *ejido* and of the relations of the *ejido* with the outside world. Among others duties, the assembly administers the elections and finances of the *ejido*; it delimits the division of land within the *ejido* for different purposes (to live, to work, or some other purpose, and it also establishes what part of the land is common); it establishes the internal rules for the *ejido*, authorizes contracts with people that are not part of the *ejido*; and it can also request from the authorities the termination of the *ejido*.¹⁸⁴ The *ejido* commissary is in charge of executing the agreements made by the assembly, representing the assembly, and administering the *ejido*.¹⁸⁵ Finally, the vigilance council is in charge of making sure that the commissary acts according to the mandate of the assembly, and according to the internal rules of the *ejido*. The vigilance council is also in charge of revising the financial statements of the *ejido* and of convoking the assembly when the commissary fails to do so.¹⁸⁶

¹⁸³ *Ibid.* at art. 21.

¹⁸⁴ *Ibid* at arts. 22-23.

¹⁸⁵ *Ibid* at art. 32.

¹⁸⁶ *Ibid* at art. 36.

It is important to mention that not everyone in the assembly is represented. The assembly is only composed by those who have *ejido* rights. There are members of the population of the *ejido* that do not have *ejidatario* rights and therefore do not participate in the assembly. Although it is commonly understood outside of the *ejido* that every person living inside of it is an *ejidatario*, the law makes it clear who an *ejidatario* is; it is not enough to live inside of an *ejido* but you need to have *ejido* rights (*derechos ejidales*). People who have lived in an *ejido* for a year or more without having *ejido* rights are an *avecindados*,¹⁸⁷ if the assembly recognize them as such or if an agrarian tribunal recognizes them as such.¹⁸⁸ Even within the *ejido*, then, there are people who are at even greater distance from the reach of government than the common *ejidatario*. There are several degrees of LDP and the *ejido* aggravates this condition rather than solving it.

As explained earlier, every decision affecting the *ejido*, even those normally regulated by ordinary courts, is subject to the special legislation and procedures affecting the *ejido*. This means that there are a number of people who do not have a say in the internal matters of the *ejido* because they lack property. The true extent of an *avecindado's* rights within the *ejido* is ascertained by analyzing the internal regulations, power distribution, and customs of each

¹⁸⁷ The term “avecindado” is related not only to being a neighbor but also to having being admitted as such by a group.

¹⁸⁸ L.A., *supra* note 87 at art. 13.

ejido. For instance, if the *ejido* decides to create a center for the development and integration of young *ejidatarios*, *avecindados* are able to use it.¹⁸⁹ The existence of the center is conditioned, however, to the assembly approving its construction. It is also important to mention that an *ejidatario* loses his place in the decision making process of the *ejido* if he cedes his *ejido* rights to another individual.¹⁹⁰ The quality of being an *ejidatario* is strictly linked to having *ejido* rights, which in turn is the only legal way to have access to the land, the right to work it, and the right to inherit.¹⁹¹

The law contemplates a residential space that the *ejido* has to establish for the people living in the *ejido*. The space where the *ejidatarios* live is determined by the assembly and it is inalienable, imprescriptible, and cannot be used for collateral.¹⁹² The only transfer of land destined to human habitation that is allowed is that from the *ejido* to the municipality or other public entity to provide public services.¹⁹³ Although the *ejidatarios* must follow the municipality's building regulations and the customs of the region, the assembly makes most of the decisions related to the residential areas. Once a space is given to an *ejidatario* for residential purposes, the property is not common but exclusive to the

¹⁸⁹ *Ibid* at art. 72.

¹⁹⁰ It must be stressed that this does not happen just by giving up the right over common areas. It only happens if he or she also gives up their rights over their land. *Ibid* at art. 60.

¹⁹¹ *Ibid* at art. 17.

¹⁹² Although the usufruct can be used as collateral, for the common areas, the contract has to be approved by the assembly and for individual plots, the *ejidatario* must approve the contract. *Ibid* at art. 45.

¹⁹³ *Ibid* at art. 63 and 64.

ejidatario (as exclusive as it can be in the *ejido* context).¹⁹⁴ The land for common use is also considered inalienable, imprescriptible and not liable to execution. The law establishes that the right to use common land has to be distributed, in order of preference: to *posesionarios*, *ejidatarios* and *avecindados* whose “prominent” work have improved the land, the direct descendants of *ejidatarios* and *avecindados*, and other individuals who are deemed worthy by the assembly.¹⁹⁵ It is interesting to note that *posesionarios* (people with mere possession of the land, without *ejido* rights), have preference over *ejidatarios* and *avecindados* to make use of the common areas, even without having to prove “dedication and effort” as *avecindados* have to. What does having possession means and what the appropriate weight that this term has over other considerations such as hard work and investment is not clear from the law. The law only establishes that if there were equally valid claims, according to these considerations, for allotting individual parcels, then the parcels would be allocated by lottery.¹⁹⁶ In the absence of clear rules in the law, the assembly makes the appropriate determination about which circumstance has more weight than others. Their decision is not final, however, as the party that feels it has been unjustly deprived from land by the assembly can challenge the decision directly before the agrarian tribunals or before the *Procuraduría Agraria* (Agrarian

¹⁹⁴ *Ibid* at art. 68.

¹⁹⁵ *Ibid* at art. 57.

¹⁹⁶ *Ibid* at art. 58.

Solicitor General).¹⁹⁷ Even though people with mere possession do not have voice or vote in the assembly, they do have legal recourse in case they consider that their rights to use of the common land or to be allotted individual parcels has been infringed. This legal recourse, however, is conditioned on their status in the *ejido* being recognized by the assembly (more on this later).

In terms of land uses, the law recognizes four types within the *ejido*: land for human habitation, individual parcels, land for common use, and land that has not yet been given any use by the assembly (although it may be occupied by *posesionarios*). There are different rules and levels of access to these types of land depending on your status within the *ejido* (i.e. *ejidatario*, *avecindado* or *posesionario*). These three different statuses make it easy to identify the extent of the LDP phenomenon within the *ejido*. Each inhabitant of the *ejido* is assigned a status or class within the *ejido* based on the level of access to land. Everyone within the *ejido* is there because of lack of resources to acquire and keep land. Among the inhabitants of the *ejido*, people are assigned a further status based on their “lineage”: people with *ejido* rights can inherit them but for people without statuses it is very difficult to influence their political environment to change their circumstances. These circumstances are not just legal labels to organize the

¹⁹⁷ *Ibid.*

administrative aspects of the *ejido* but have consequences in many other political aspects since the *asamblea ejidal* does more than just administering resources.

4. The different forms of property

There are four types of land uses that produce three different types of statuses within the *ejido*, according to the kind of relation that they have with the land. The first type of land use is that destined for habitation. This space, as mentioned before, is established by the assembly with consultations with the municipality. These consultations are meant to assure that zoning, safety and sanitary conditions are met. Decisions pertaining to the characteristics of the urban zone and the distribution of *solares* (individual habitation spaces) are determined by the assembly. For an assembly to exist, there already needs to be *ejidatarios*, meaning people with *ejido* rights; they are the people who decide about the distribution of habitation spaces. The law only gives a right to have a *solar* to an *ejidatario*. It is only, and after all, *ejidatarios* get a *solar*, that the assembly could lease or sell to *avecindados*. This kind of land is not considered to be common nor can the occupant sell or use the property for collateral. Any contract made with the occupant to the contrary would not be enforceable in a court of law.

For the distribution of *solares*, the assembly must first propose a plan to urbanize part of the *ejido* for habitation and community activities to the *Procuraduría*. This plan has to take into account not only the space for houses but also for community centers to help the youth and women. Additionally, depending on the arrangements that the assembly is able to make, they can also have a chapel or church, and a school. The plan made before the *Procuraduría* must distribute the *solares* rights in equal manner and be registered in the *Registro Agrario Nacional* (Agrarian National Registry). Part of the 1992 reforms were precisely aimed at giving more legal certainty in property rights to *ejidatarios*, and *solares* are very important in this sense because this is the space where the *ejidatarios* live. The government launched the *Programa de Certificación de Derechos Ejidales y Titulación de Solares* (a program to regularize *ejido* and *solares* titles [PROCEDE], which ended in 2006) and, according to government officials, now 96% of the *ejidos* have legal certainty in their property rights.¹⁹⁸

Individual parcels are also distributed by the assembly but once distributed the law confers certain exclusive rights that will be explained below. The individual parcel is the place where the *ejidatario* has more choices available to

¹⁹⁸ Secretaría de la Reforma Agraria, Press Release, No. 007, “El 96 por ciento de la propiedad social está regularizada y con certeza jurídica: Abelardo Escobar Prieto” 18 enero 2010, <<http://www.sra.gob.mx/sraweb/noticias/noticias-2010/enero-010/4685/>>. (Mex.) (last visited June 10, 2013).

him, at least in theory (more on this later). The law allows the *ejidatario* to use the individual parcel in contracts with third parties, without the authorization of the assembly.¹⁹⁹ The main restriction is, however, that in order to sell the property, the *ejidatario* needs to sell his parcel to another *ejidatario* or to an *avecindado*.²⁰⁰ Outsiders are not allowed to bid for the parcel unless the majority of the parcels have been properly identified and their owners have legal titles, in which case the limited ownership becomes full ownership, but they also lose all the protections of the agrarian regime and must be eliminated from the agrarian registry to transit to the *Registro Público de la Propiedad* (Public Registry of Property). The *ejidatario* only loses his legal status as an *ejidatario* if he no longer possesses any other parcel within the *ejido*.

The other two types of land uses, that of common use and land that has not been given any use yet by the assembly, have in common that both are in direct control of the assembly. The main difference between the two is that in the land that has not yet been given any use, the *posesionarios* have a preference in their use over the *ejidatarios*. However, as explained before, how exactly the assembly weighs each condition is not very clear. Common land is also considered to be inalienable, imprescriptible and not liable to execution. The land

¹⁹⁹ *Supra* note 87 at art. 79.

²⁰⁰ It should also be noted that the law establishes that the spouse and the children of the seller have preference over anyone else and must be notified of the intention to sell the parcel. The spouse and children have 30 days to make an offer to buy the parcel. *Ibid* at art. 80.

however, can be used in conjunction with a civil or mercantile society as long as there are *ejidatarios* involved and the deals are approved by the assembly.²⁰¹ In the case of land that has not yet been given any use by the assembly, the only limitation to their disposal by the assembly is that of the rights of *posesionarios*, as explained earlier. However, the *posesionarios* do not have voice or vote in the assembly unless the assembly decides to give them additional, rights and thus their status as *posesionarios* must be recognized by the assembly as such.²⁰²

Subsequently, the type of property that you have affects your status within the *ejido* (*ejidatario*, *avecindado*, *posesionario*) and, in turn, your status affects your chances of getting property within the *ejido*. People with no relation at all to the land do not have a status in the *ejido* and their presence in the *ejido* is dependent on a member with *ejido* rights. The member with the most power within the *ejido* is the *ejidatario*. The *ejidatario*, as mentioned before, is the person who has *ejido* rights and has vote and voice in the assembly. The *ejidatario* influences the assembly which in turn influences the entire organization of the *ejido* and the scope of other member's rights and access to the land. Although it may seem that everyone with *ejido* rights has an equal standing in the assembly, the fact is that there are differences among the *ejidatarios*

²⁰¹ *Ibid* at art. 75.

²⁰² Reglamento de la Ley Agraria en Materia de Certificación de Derechos Ejidales y Titulación de Solares [Reg. Cer. Tit.] [Agrarian Law Bylaw for the Certification of *Ejido* Rights and the Registration of Solares], as amended, arts. 38-40, Diario Oficial de la Federación [D.O.], 6 de enero de 1993 (Mex.).

themselves. These differences may come about with time but others may reflect initial abuse of power that gets ratified in the government programs designed to give legal certainty to land tenure.

Lasse Krantz reveals this process in his description of how an *ejido* is born and how the initial distribution of land affects subsequent land redistribution and registration policies.²⁰³ Krantz explains that although initially a movement to get land may be popular and democratic, almost immediately after the creation of the *ejido* different power dynamics emerge where people with more connections with government officials get more land and political power within the *ejido*. This situation has the long-term effects of creating a *cacique*-like figure within the *ejido*. The *cacique-ejidatario* gets to control the assembly and thus has great influence on the rights and freedoms of other *ejidatarios*. This control extends not only to their work environment but to every aspect of their life since the assembly controls and organizes educational, cultural, recreational and religious events. Since the “common areas” are controlled by the *ejidatarios*, the *cacique-ejidatario* exerts more control on this land as well.

The *avecindado*, on the other hand, is a person who has lived in the *ejido* for at least more than a year but has neither *ejidatarios* rights nor any of the rights that *posesionarios* have gained by working the land even without the

²⁰³ Lasse Krantz, *Peasant Differentiation and Development: The Case of a Mexican Ejido* (Stockholm: Studies in Social Anthropology, 1991) [Krantz].

ownership or permission of the assembly. The *avecindado* can be the children of *ejidatarios* who have neither inherited from their parents' *ejido* rights nor received *ejido* rights from the assembly either. The *ejido* right is indivisible and can only be transferred to one person. It should also be mentioned that agrarian jurisprudence has determined that individual parcels are also indivisible in order to prevent the excessive fragmentation of agrarian land. This applies as long as the land is under the protection of the agrarian legislation and the holder of *ejido* rights has not transitioned to full ownership.²⁰⁴ In order to acquire *ejido* rights, you must be over 18 unless you are inheriting the land or if you already have a family. However, in order to keep more land than is allowed, some *cacique-ejidatarios* have used their infant children by putting the land in their name while maintaining control of the land. This situation does not go unnoticed to the rest of the *ejidatarios*, but mistrust of the authorities and the fear of creating adverse consequences for them within the *ejido* prevents them from speaking out.²⁰⁵ Since the *cacique-ejidatario* most likely obtain his position thanks to his connections outside of the *ejido*, the rest of the *ejidatarios* do not trust in going to the authorities because the chances of changing the situation are slim and the

²⁰⁴ Parcela ejidal. Es indivisible bajo el régimen agrario en vigor, Tribunales Colegiados de Circuito Novena Época. Tomo XIV. Octubre 2001, Página 400 (Mex.).

²⁰⁵ Article 41 of the Agrarian Law, allows for the constitution of *juntas de pobladores* (meeting of inhabitants) which are composed by *ejidatarios* and *avecindados*. Article 42 establishes that these meetings evaluate the need for more services from the municipalities. The establishment of such meetings is not obligatory and its functioning depends on their own internal bylaws. Although this measure seems to give more participation to *avecindados* than before the 1992 reforms, its legal framework is too ambiguous for these meetings to serve as an authentic site for contestation of internal decisions and of negotiation with municipal authorities. L.A., *supra* note 87 at arts. 41-42

potential for conflict in such tight communities is too great to take unless it is necessary. In addition, most *cacique-ejidatarios*, have acquired more resources that make them more able to influence a legal result than a poor *ejidatario*. This kind of situation is normally dealt by gossip between neighbors.²⁰⁶

The last of the type of status that you can acquire from your access to land is that of the *posesionario*. The *posesionario* is not a figure that is very clearly defined in the legislation. A *posesionario* normally is a person who is occupying a piece of land but does not have any sort of property rights over it. The *posesionario* does have some rights granted by the Agrarian Law. Specifically, he has preference to use the land that has not been given any official purpose by the assembly. Also, the *posesionario* is eligible to receive individual parcels.²⁰⁷ Although it may seem that the *posesionarios* are somewhat protected by the Agrarian Law, the law only protects those *posesionarios* who have been recognized as such by the assembly.²⁰⁸ In fact, according to agrarian jurisprudence, if there is a conflict between a person who has been recognized by the assembly as having rights over the land and a *posesionario* who just by occupying the land considers that he has obtained certain rights, the law favors

²⁰⁶ Monique Nuijten, "What's in the land? The multiple meanings of land in a transnationalized Mexican village" in Annelies Zoomers ed, *Land and sustainable livelihood in Latin America* (Amsterdam: Royal Tropical Institute, 2001) 71 at 73 [Nuijten].

²⁰⁷ *Supra* note 87 at art. 37.

²⁰⁸ See, Reconocimiento como posesionarios de tierras ejidales. Es requisito de procedibilidad del juicio agrario, previo a promoverlo, solicitarlo a la asamblea ejidal. Interpretación del art. 56, párrafo primero, y fracción II, de la Ley Agraria. Tribunales Colegiados de Circuito. Época: Novena. Tomo: XIV, Agosto de 2001. Página, 1173 (Mex.).

the person with *ejido* rights.²⁰⁹ There seems to be little incentive for the assembly to recognize *posesionarios* if this will tie their hands in the distribution of the land in the *ejido*. And although the *posesionarios* can challenge the decision of the assembly to not recognize them, and if they win, their rights and life within the *ejido* can be very unpleasant since there is no more obligation from the assembly other than to allow them some use of the land. The chances of *posesionarios* having vote and voice within the assembly, or to ever become an *ejidatario* with full rights, are severely diminished if they have conflicts with the assembly – the assembly has no obligation to give them political rights.

People who do not have any kind of relation to the land have no status within an *ejido*. The *ejido* does not produce one type of property, common or otherwise, but several types of land tenures that have important implications for the life of the members of the *ejido* both inside and outside of it. This is important because it emphasizes how the *ejido* has been designed to be an insular political unit. As Monique Nuijten has pointed out, the usually unfair conditions in many *ejidos* have consequences outside of the *ejido* affecting the municipality to which it is attached. On some occasions, Nuijten notes, the *ejido*, and not the municipality, is more able to bring infrastructure to the region, depending, again, on the particular alignment of power. The autonomy of the *ejido* and its

²⁰⁹ If the conflict is between two persons without any kind of legal rights preference will be given to the person who can prove that he or she has been occupying the land. Agrario. Conflicto Parcelario. Posesión. Tribunal Colegiado de Circuito. Época 9A. Tomo I Mayo 1995, Página, 332 (Mex.).

unrepresentative body of administration (in the sense that it does not represent everyone inside the *ejido*, let alone the entire municipality), brings the municipality under the *cacique* and/or insular dynamics of the *ejido*. Both, landless people living inside the *ejido* and people living in the municipality may see their political power diminished because of a lack of property. In this sense, land is not only an economic asset but an authentic basis for political representation and a pre-requisite for the effective exercise of political rights as well.²¹⁰ In this regard, it is not surprising that, in spite of the problems described, many *ejidatarios* still cling to their land and many landless people want to integrate themselves into the *ejido*. It is not about economy necessarily but about politics and being considered a citizen.

The purpose of this chapter was to tie together emancipatory justice claims and their role in shaping the Mexican political and legal system. This was necessary in order to emphasize how both created a parallel power structure that shaped people's choices without being properly legislated to do so. This structure cannot be boxed simply as "informal" because it relies heavily on positive legislation nor can it be considered solely as the creature of government action because, as the Juchitán case analysis illustrated, it also relies heavily on how people respond to a series of socio-economic circumstances not easily predicted

²¹⁰ Nuijten, *supra* note 206 at 85.

in advance. The endurance of the PRI-regime, which was once described by the Peruvian intellectual Vargas Llosa as “*la dictadura perfecta*” (the perfect dictatorship),²¹¹ was due to its ability to exploit the historical inertias in the Mexican society, or, better said, the inertias created by the friction of different societies.

To conclude this chapter, it is important to emphasize that emancipatory struggles hide in themselves further smaller and more personal acts of oppression and resistance. It is important, then to look at the material conditions that make these struggles tragic (in the classical sense of inevitable).²¹² The cases of Atenco and Juchitán, as well as other sociological studies cited in this work, point to a more diffuse dynamics of oppression that the democratic transition of 2000 only exacerbated. These circumstances explain the “zooming in” and “zooming out” approach of this study; it is necessary not to be carried away neither by the narratives of particular cases nor by official narratives. Both of these narratives seek to filter reality through their own interest in legitimizing themselves. In what follows, I will situate the *ejido* in the broader legal system to see how it differentiates the *ejidatarios* from the rest of Mexicans.

²¹¹ “Vargas Llosa: ‘México es la dictadura perfecta’” *El País* (1 September, 1990) online: [El País <http://www.elpais.com>](http://www.elpais.com).

²¹² For more on this see chapter VIII, section 2, on Arendt’s description of the inevitability of failure of revolutions motivated by the “social question.” Arendt, *infra* note 528.

Chapter IV

The *Ejido* as a Juridical Figure in the Broader Mexican Legal System

1. The *Ejido* as a Composite of Land Tenures

The rights and freedoms of the *ejidatarios* are linked to the amount of control that they have over the land. From the previous passage we can extrapolate that there are three kinds of dynamics between property and political rights within the *ejido*: 1) land access with voice and vote at the assembly;²¹³ 2) land access without voice and vote; 3) no land access, no vote and no voice. In the first type we find the *ejidatarios*, in the second the *posesionarios* who have been recognized by the assembly and in the third option are *avecindados*. All members of the *ejido* are, initially, eligible to receive an individual parcel, regardless of status, but this does not necessarily translate into having political rights. The individual parcel does not guarantee access to common land either. The additional rights to have a voice and a vote in the assembly must be approved by the assembly itself. Once the initial distribution of *ejido* rights has

²¹³ It is possible that an *ejidatario* can lose access to common land and still be considered an *ejidatario*. The only way that he can lose his status as an *ejidatario* is if he also loses his parcel. L.A., *supra* note 87 at art. 60.

been made, unless more land is available to create more *ejido* rights, it is very difficult for people without *ejido* rights to have a chance to influence their surroundings through the legal mechanisms of political participation that exist in the *ejido*. The *ejido* rights, as explained before, cannot be divided, the chance of a given *ejido* to acquire additional land to create more *ejido* rights is also minuscule since the *ejido* is created with the land extension deemed necessary for the number of people who initially made the request. Furthermore, land redistribution policies ended in the Salinas administration, obtaining *ejido* rights through inheritance means that only one child will get the title and, finally, the sale of *ejido* rights is very restricted.

Initial inequalities in the distribution of land, thus, are not easily corrected through time in the *ejido*. Land regularization programs only benefited those who already had obtained land, either by legal or illegal means. Furthermore, the objective of these programs was to facilitate market transactions rather than to correct injustices. However, what kind of owners can we say the *ejidatarios* really are? The *ejido* is considered a social program by the state and, as such, the state and the *ejidatarios* share “interest” in the land. *Ejidatarios* could work the land and profit from its fruits but they do not have full ownership. The benefit of usufruct is retained as long as the land is being used and lost if it is not.

2. Property Law in Mexico

The Constitution of 1917 established that all of Mexico's lands and waters were the property of the nation which, in turn, could transmit the dominion to private citizens to create private property.²¹⁴ This notion that the territory belongs originally to the nation stems from the fact that when Mexico was part of Spain all real property, ultimately, belonged to the Spanish Crown. Once independence was achieved the ownership of real property was transferred to the newly independent state thereby constituting the original ownership.²¹⁵ This does not mean, however, that the government has the right to take away property without justification claiming "original ownership." The second paragraph of the same article establishes that expropriations must be for public utility purposes and that the state must compensate. Original ownership does mean, however, that the government has the right to impose limitations on private property and use it for social purposes.

The constitution contemplates all three kinds of property: public (owned by the government), private (owned by private persons), and social (specifically the

²¹⁴ Constitución Política de los Estados Unidos Mexicanos de 1917 [C.P.] [Political Constitution of the Mexican United States], *as amended*, art. 27, Diario Oficial de la Federación [DO], 11 de Junio de 2013 (Mex.).

²¹⁵ Díaz de León argues that the Constitution has the concepts backwards and that we should be talking about the original dominion of the nation over land and not of "original property" since, according to him, the nation has no property rights. However, regardless of the order of the terms, the reality is that the interpretation of the constitution always reflected that, in fact, it is the private citizen who has "property" and the nation the "original dominion." *Supra* note 12 at 11.

ejido and indigenous communities). Social property is where the government exercises most clearly the ultimate sovereignty that it has on property. During the land redistribution period, the government took land that it considered had not been acquired through a fair process, even if the land had been acquired following proper legal procedures at that time, and gave it to people who needed it. Since this type of property was conceived as a tool to pursue social justice goals, it had many limitations imposed on it. The *ejido* in particular, although not actually defined in the constitution, does have many of its main features enshrined in the constitution. Presently, article 27 of the constitution has the following important characteristics:

1. The *ejido* has its own legal personality.
2. The government can regulate the economic activity inside the *ejido*.
3. The government can regulate the association of *ejidatarios* either among themselves or with others.
4. The constitution establishes the main authority of the *ejido* (the assembly) and the “executive power” of the *ejido* (the *comisariado*).
5. Controversies within or among *ejidos* are of federal jurisdiction.

The government has more rules for *ejidos* than for indigenous communities, recognizing that their existence responds to two different social and historical circumstances. The indigenous communities were formed to protect the organization of groups of people who have maintained a distinct way of life since before the Spanish colonization; the *ejido* was created to protect the economic means of peasants and to, eventually, integrate them into the rest of the economy.²¹⁶ The *ejido* was initially meant as a transitory form of land tenure, but it has persisted as permanent feature of the Mexican legal and economic system, in spite of efforts to dismantle it.

The typical *ejidatario*, or at least the kind of person that the law intended to create, was someone who accepted the authority of the assembly and had either an individual parcel or access to common land. However, the law created several types of land tenures within the *ejido*. The *ejido* may seem to be a single form of land tenure on the exterior. Inside the *ejido*, however, *ejidatarios* can assign individual parcels to other *ejido* inhabitants, creating a form of semi-private property. Furthermore, the *ejidatarios* themselves can designate a space for the *avecindados* to work the land for their personal consumption, creating a form of

²¹⁶ The Supreme Court of Mexico has determined that the functioning of the internal administrative bodies of representation of the *ejido* should not be considered under the protection of the self-determination rights of indigenous groups. *Ejididos y Comunidades Agrarias. Al Constituir Formas de Organización Interna Establecidas Constitucionalmente, El Funcionamiento de la Asamblea General, así como la Elección del Comisariado, son Actividades que no Forman Parte del Ejercicio del Derecho a la Libre Determinación de Los Pueblos y Comunidades Indígenas.* Suprema Corte de Justicia de la Nación, [TA]; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; Tomo XXXI, Febrero de 2010; Página 115 (Mex.).

social property within the *ejido*. Within the semi-private property modality there are two types of actions that an *ejidatario* can take: he or she could either retain an individual parcel, which would give him or her more options than those available within the communal land regiment, or the *ejidatario* could decide to acquire complete ownership of it. If an *ejidatario* chooses to this latter option, the land is no longer considered to be part of the *ejido* or under the control of the assembly, but private property. At this point, the ownership over the land can be considered to be complete and comes at the expense of the new owner losing his identity as an *ejidatario* and his place in the assembly.

3. A Two Tier Property Law System: The Inertia of Tutelage

As described in chapter I, when the Spanish arrived to what would later become Mexico, all land became the property of the Crown of Castile.²¹⁷ In practice, however, after the fall of Tenochtitlán, Hernán Cortés started distributing the land that was owned by the natives to his soldiers.²¹⁸ These land grabs were later formalized through the *mercedes* ²¹⁹ by Felipe II in 1578. Even though the king was only formalizing a situation over which he had little control, the fact of

²¹⁷ This power came, in turn, by pontifical authorization issued by Pope Alexander VI, which gave the Spanish Crown sovereignty over the newly “discovered” territory with the obligation to Christianize the natives. Francisco de Solano, *Cedulario de Tierras: Compilación de Legislación Agraria Colonial* (Mexico: UNAM III, 1984) at 15. [de Solano]

²¹⁸ Díaz de León, *supra* note 12 at 60-61.

²¹⁹ A *merced* was a gift of land. MacLachlan & Rodriguez, *supra* note 222 at 151.

recognition by the Crown ratified its ultimate ownership of the land.²²⁰ Other than this particular *mercedes*, which was granted by the king, generally it was the Viceroy who was in charge of property in New Spain, and it was he who normally issued the *mercedes* and it was to him that such requests were directed.²²¹ Private property, thus, existed in New Spain. Even the natives themselves could also be considered “assets” to be distributed by the Crown under a different concept: the *encomienda*.

The Spanish were not content with merely taking indigenous land, but they also destroyed the institutions of the natives, criminalized their culture, and demoted their human identity to an inferior status.²²² The Spanish campaign of destruction did not stop until, as an early historian put it, “no sign remained of what they were before”.²²³ Once destroyed, the natives had to be “reconstituted” into proper human beings. In order to accomplish this, the Crown ceded its power to exert contributions from the natives to an *ecomendero* (a Spanish conquistador) who would then be obliged to Christianize the natives under his

²²⁰ Spanish authorities were particularly worried by the little power that they had to control “illegal” land grabs by the Spanish in Mexico. Authorities in Spain were worried not about the dispossessed native but about the consequences of having their representatives in New Spain making their own determinations without consulting the Crown. The main problem was, of course, that the people in charge of applying the law were the ones breaking it. De Solano, *supra* note 217 at 22-23.

²²¹ *Ibid* at 24.

²²² Oppressing people in conquered territories was a common practice for the Aztecs as well. It was not uncommon for Aztecs to “imprison” images of the gods of the conquered population in a special temple in Tenochtitlan. Furthermore, Tenochtitlán usually excluded the conquered people from their normative system and reserved the right to act arbitrarily. Colin M. MacLachlan & Jaime E. Rodríguez O., *The Forging of the Cosmic Race: A Reinterpretation of Colonial Mexico* (Los Angeles: University of California Press, 1990) at 61. [MacLachlan & Rodríguez]

²²³ Fray Bernardino de Sahagún, *The General History of the Things of New Spain*, as reprinted in Krauze’s book, *supra* note 149 at 35.

command in exchange for their labor. The *encomienda* constituted one of the most essential pillars of the Spanish rule in America since it made it feasible for a few to extract resources and wealth at a very low cost.²²⁴ Moreover, this legal concept authorized, institutionalized, and systematized the spiritual and physical control of the native population and asserted the despotic control of the Spanish in each instance of its application.²²⁵ The type of normative and cultural dynamics set forth at that time continues to reverberate to the present.²²⁶

This does not mean that natives were not allowed to own property. The Spanish formally recognized the right of the native population to own property and enjoy the benefits of full ownership, including the ability to bequest. It quickly became apparent to the Spanish authorities that the natives were losing their property, when they managed to acquire any. This eventually led authorities to withdraw the right of natives to acquire full ownership of the land, starting by limiting their ability to sell their property, an operation which, in some cases, required the approval of the Viceroy himself.²²⁷ The natives were usually

²²⁴ The *encomienda* also contemplated the obligation to defend the territory given. Francisco J. Andrés Santos, "Encomienda y Usufructo en Indias: Reflexiones Romanistas en torno a la Doctrina de Juan Solórzano y Pereira" (2001) 69 Legal Hist Rev 245 at 245-246. [Andrés Santos]

²²⁵ This mode of oppression was not, however, completely foreign to the Aztecs, who also saw in their own conquests a way to extract more resources and tributes. As MacLachlan & Rodríguez describe it: "The symbol of Aztec sovereignty continued to be the *calpixque*, the resident tribute collector, who exploited his position to the maximum in occupied territory, confident that any disobedience would be punished by force of arms. Concern for the well-being of subject Indian groups appeared limited. In the case of famine or other disasters, Tenochtitlan might suspend tribute payments, but little else." MacLachlan & Rodríguez, *supra* note 222 at 60.

²²⁶ For historian Lucas Alemán, according to Krauze: "In Mexico absolutely everything that exists has its roots in that prodigious Conquest." Krauze, *supra* note 149 at 42.

²²⁷ If the native died without having a testament then his property would pass to the community but never to

regarded as economic objects rather than subjects in New Spain, with little say and few options to pursue their interests and improve their circumstances. Their expulsion from power deprived the natives of their wealth, which resulted in an economic entrenchment of their low status. Without money and power, the natives were not able to engage with a property regime that was unknown to them. Furthermore, unlike the pilgrims in America, the Spanish did not arrive to the “New World” to build a nation; from the outset, their concern was to extract wealth.²²⁸

Not only was private property a land regime that the natives were unfamiliar with,²²⁹ the Crown also made little effort to make it accessible to the natives. That being said, the Crown, in general, professed to have far more concern for the natives than their representatives did in New Spain. Once news reached the Crown of the natives being dispossessed of their land, it issued *cédulas reales* (royal decrees) protecting indigenous land from being “illegally” seized by the Spanish. However, this “protection” had the effect of further deepening the isolation of the natives from the Spanish ruling class and the growing caste of *mestizos*. The Crown also declared that the native’s *fundos*

a Spaniard. Díaz de León, *supra* note 12 at 69-71.

²²⁸ MacLachlan & Rodriguez, *supra* note 222 at 144. The intense preoccupation with wealth of the Spanish in New Spain reached such a level that King Ferdinand instructed that the clergy stop having natives to work for them since they were more concerned with making money than with their “divine” mission in New Spain. Lesley Bird Simpson, *The Encomienda in New Spain; the Beginning of Spanish Mexico* (Berkeley: University of California Press, 1966) at 21. [Simpson]

²²⁹ They could only own small plots that belonged to clans as explained in chapter I.

legales (townsites) were to have “buffer zones” between them and the growing urban areas.²³⁰ An argument could be made that this was an honest effort to protect the natives’ land from the economic pressure of the higher castes. What is certain, however, is that it created a two tier system of property law very early on in Mexico’s history.

As explained in chapter I, the *ejido* is a very similar institution to that of the Aztec *calpulli*. The *ejido* was also an institution already known in Spain which was imported to New Spain. The *ejido* should not be confused with the *fundo legal*, since they are two different institutions: the former should be considered an optional extension of the latter, which essentially was a native town that now owed its formal existence by the acknowledgment of the Spanish Crown. The *ejido*, thus, was established by the Spanish as a way to help the natives without addressing the deep injustices that made the *ejido* necessary in the first place. Not that the Crown could do much anyway; it had the very difficult task of trying to keep the loyalty of its representatives in New Spain, and there was a wide ocean separating them; that made its power less effective than in Spain. Faced with the challenge applying one uniform law across the new territories, having a legal system that allowed those with the most power to have privileges, with

²³⁰ MacLachlan & Rodriguez, *supra* note 222 at 165.

some constraints, was better than having no legal system at all, which would have undermined the power of the Crown itself.

4. The Usufruct in Civil Law

The two tier property law system, on the one hand, allowed the higher castes to enjoy full ownership rights, while on the other, deeming the lower casts to be either “not ready” or too weak to hold property. The two legal instruments that the colonial government came up with to protect and guide the natives to a future where they could stand on their own were: the *encomienda* and the *ejido*. Of these two institutions only the *ejido* remains to this day. Both systems place in tutelage goods or people without actually anyone owning them in exchange for extracting some benefit, in other words, a usufruct. Before going into defining the characteristics of the usufruct and how it links both institutions, it is important to take a brief excursion into the concept of ownership in civil law²³¹ and, in particular, in Mexico.

Ownership in civil law is a much more rigid concept than in common law but it is also simpler to grasp its meaning. As opposed to A.M. Honoré’s famous

²³¹ The term “civil law” is used to identify what in most of Europe and Latin America is called the “Romano-Germanic legal tradition.” David S. Clark, “The Idea of the Civil Law Tradition” in David S. Clark ed, *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Berlin: Duncker & Humblot, 1990) at 12-14.

fragmentation of ownership in a bundle of rights and incidents,²³² the civil law conception of ownership is much more indivisible and exclusive. To own something means that it belongs to a determined person or entity and, by extension, that it does not belong to anyone else.²³³ All other grey areas between ownership and non-ownership become eliminated.²³⁴ More technically speaking, ownership involves possessing three different powers over the good possessed: *uti*, *fruti*, and *abuti*, that is, the right to use the good itself, the right to benefit from its fruits or proceeds, and the right to abuse or to dispose of it.²³⁵

Although there are significant differences between the two understandings of ownership, which will be explained below, these should not be overstated since at the core both share certain meanings. Both understandings of ownership allow the owner to: exclude, use, encumber, convey and enjoy.²³⁶ Moreover, there is such a thing as shared ownership in civil law as well.²³⁷ Whereas there is much discussion in common law regarding what constitutes the core of the

²³² A.M. Honoré, "Ownership" in Anthony Gordon Guest, ed, *Oxford Essays in Jurisprudence: A Collaborative Work* (New York: Oxford University Press, 1961) 107. [Honoré]

²³³ This is much closer to Ackerman's description of the "Ordinary Observer" understanding of ownership, which is a much more cohesive concept than the "bundle of sticks" understanding of ownership of the "Scientific Policymakers". Bruce A. Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1978) at 138.

²³⁴ John Henry Merryman, "Ownership and Estate (Variations on a Theme by Lawson)" reprinted in John Henry Merryman, David S. Clark & John O. Haley eds, *The Civil Law Tradition: Europe, Latin America and East Asia* (Charlottesville, Virginia: The Michie Company, 1994) at 1191. [Merryman]

²³⁵ William D. Signet, *Introduction to the Mexican Real Estate System* (Durham, North Carolina: Carolina Academic Press, 2010) at 141. [Signet]

²³⁶ *Ibid* at 142.

²³⁷ Merryman, *supra* note 234.

concept of ownership,²³⁸ civil law instead conceives of a distribution of different “property rights” but no division of ownership. This is more than mere esoteric legal distinction; ownership is a much more complex social and political institution than a simple analysis of the distribution of prerogatives would reveal. Historically, ownership and political rights have been closely related since owners often had some public duties, such as paying taxes, as well as certain political prerogatives like voting or having the right to have a voice in political matters.²³⁹ The relationship between ownership and political rights is not a new one and has been noted extensively elsewhere. Although from opposing camps, both Hegel and Marx were keenly aware of how a property regime influences the political process and vice versa. For Hegel, in the two primary types of human association, that is, in both “civil society” and the state, the prevailing property regime in a society reveals power positions and the nature of society itself. Marx takes this observation even further in his discussion of how a property regime situates people within the power structure, and also how the way of production colors the entire dynamic of property and power.²⁴⁰ Land, in particular, plays a central role in the political organization of any society, and it is precisely

²³⁸ See for instance, Larissa Katz, “Exclusion and Exclusivity in Property Law” (2008) 58 UTLJ 275; J.E. Penner, “The ‘Bundle of Rights’ Picture of Property” (1996) 43 UCLA L Rev 711; Lawrence C. Becker, “The Moral Basis of Property Rights” in Roland Pennock & John W. Chapman eds, *Property: Nomos XXII* (New York: New York University Press, 1980) at 190-191.

²³⁹ Merryman, *supra* note 234 at 1193.

²⁴⁰ Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990) at 148-152, 174-175.

regarding the ownership of land where Hegel and Marx differ sharply. Whereas Hegel sees “the landed gentry” as being stewards of the public interest,²⁴¹ Marx, in contrast, calls for the abolition of property in land.²⁴² More recent authors like Robert C. Ellickson, have argued that there has been scarce discussion about land regimes in spite of being “the rules that establish the foundation of virtually all human activity.”²⁴³ Property regimes tell a much bigger story than simply who gets to control resources, and ownership of land is one of the most controversial aspects of property law. Individual ownership of land is sometimes considered the source of many evils or a god-sent protection against the state. The different views about property between Hegel and Marx reveal these very divergent approaches to ownership in land.

Merryman contrasts the concept of ownership in civil law with that of “estate” or “interest” in land in common law in the following terms:

Romanic ownership can be thought of as a box, with the word “ownership” written on it. Whoever has the box is the “owner.” In the case of complete unencumbered ownership, the box contains certain rights, including that of use and occupancy, that to the fruits or income, and the power of alienation. The owner can, however, open the box and remove one or more such rights and transfer them to others. But, as long as he keeps the box, he still has the ownership, even if the box is empty. The contrast with the Anglo-

²⁴¹ *Ibid* at 152.

²⁴² Karl Marx & Friedrich Engels, *The Communist Manifesto* (New York: Penguin Books, 2002) at 37.

²⁴³ Robert C. Ellickson, “Property in Land” (1993) 102 Yale LJ 1315 at 1318.

American law of property is simple. There is no box. There are merely various sets of legal interests. One who has the fee simple absolute has the largest possible bundle of such sets of legal interests. When he conveys one or more of them to another person, a part of his bundle is gone.²⁴⁴

A classic example of transmitting *uti* and *fruti* but still remaining an owner is the concept of usufruct. The mere definition of usufruct in the Mexican Civil Code (federal) makes clear this distinction: “usufruct is a real and temporary right to enjoy the property of others.”²⁴⁵ The usufruct can be constituted by law, by consent or by adverse possession.²⁴⁶ The *usufructuario* has the right to receive all fruits (benefits) related to the good, regardless if they are “natural, industrious or civil.”²⁴⁷ In general, the *usufructuario* has no more obligation than using the good with moderation and to return it in the same condition in which it was received if it was a good that could not to be completely consumed.²⁴⁸ If the good cannot be used without being consumed, then the *usufructuario* has the obligation to either replace the good with another similar in nature, quantity and quality; if this is not possible then the *usufructuario* has to make a monetary compensation no greater than the monetary value of the good itself.²⁴⁹ It should also be noted that the *usufructuario* can sell, rent and profit from the usufruct

²⁴⁴ Merryman, *supra* note 234 at 1195.

²⁴⁵ Código Civil Federal [C.C.F.], *as amended*, art. 980, Diario Oficial de la Federación [D.O.] 9 de abril de 2012 (Mex.).

²⁴⁶ *Ibid* at art. 981.

²⁴⁷ *Ibid* at art. 990.

²⁴⁸ *Ibid* at art. 1006.

²⁴⁹ *Ibid* at art. 994.

right but all contracts related to the usufruct end with the usufruct itself, just with *ejido* rights.²⁵⁰

5. The *Encomienda* and the *Ejido*: The Usufruct as a Common Thread

There can be multiple reasons for not wanting to give up ownership while being willing to let someone else profit from the good in exclusion even of the owner. As explained before, ownership is related to a certain type of power than goes beyond profiting and that has more to do with political influence. In the case of the Crown, it was willing to let the Spanish exercise control over the natives in exchange for having ultimate sovereignty over them. This served two purposes: on the one hand it provided a more effective control mechanism over the natives than what the Crown could accomplish by fiat. By putting the natives at the service of the *conquistadores*, it also gave an incentive for the Spanish to exploit the resources of the land without having to get involved themselves in the hard work. The Crown, on the other hand, kept its ultimate claim over the natives through the mechanism of the official “permission” to use them. Most likely the natives would have been used by the Spanish in New Spain regardless of what

²⁵⁰ *Ibid* at art. 1002.

the Crown thought of it. The imbalance of power along with a cultural dynamic that tolerated abuse set the stage for forced labor of natives with great efficacy.

The *encomienda* is not usually described as a usufruct but as a “distinction” that the Crown made to certain Spanish who were “entrusted” with the well-being of the natives as well as with the task of collecting tributes from them.²⁵¹ Since the reign of Isabelle II, natives were formally considered free people, so there was no formal ownership over the person. Nevertheless, the Crown reserved the right to force them to work for the Spanish for a variety of reasons, including to “force the said Indians to associate with the Christians”.²⁵² Somehow, the only idea that the Crown could come up with to increase “contact” between conquerors and the conquered was to force the latter to work for the former. The *encomienda* could not, then, originate by any means other than by royal instruction since its existence was due to serve the interests of the Crown.²⁵³ A final link between the *encomienda* and the usufruct is that when the usufruct ended, the native went back to being under the tutelage of the Crown since, as mentioned before, the natives were considered to be legal minors who could not make major decisions by themselves.²⁵⁴

²⁵¹ Andrés Santos, *supra* note 224 at 251.

²⁵² Simpson, *supra* note 228 at 12-13.

²⁵³ Andrés Santos, *supra* note 224 at 255.

²⁵⁴ MacLachlan & Rodriguez, *supra* note 222 at 197.

In the case of the *ejido* a similar analysis can be made between this institution and the usufruct. It should be noted that the *ejido* rights are not defined as usufruct. Furthermore, the *ejido*, as opposed to a usufruct, has a juridical personality of its own and is distinct from the members who compose it. What that means is that the *ejido* has an interest that is not the mere aggregate of the individual interests of the *ejidatarios*. This interest is in part represented and protected by the administrative bodies of the *ejido*, but it is also the case that the *ejido* is an entity of public interest and that, as such, the federal government must assume a much more proactive role in protecting such interest than it would protecting private property. What, specifically, “public interest” entails is not clear but the fact that they have a special status in Mexican legislation stems from the fact that the *ejido* is constitutionally protected. Because of these differences between the legal definition of usufruct and the sort of usufruct-type of effects that the *ejido* confers, it is more appropriate to talk about a *quasi-usufruct regime*.²⁵⁵

It is clear that the land does not properly belong to the *ejidatario*, but only the usufruct. It is, however, an oversimplification to reduce the *ejido* only to usufruct rights. There are certain features of the *ejido* usufruct that are not commonly found in the private sector. The most relevant of the features of this

²⁵⁵ I would like to thank Professor David Lametti for pointing this out.

quasi-usufruct is the fact that it originates from public power and it serves its interests as well and not just those of the *ejidatarios*. The *ejido* rights, considered as usufruct rights, also give rights to political participation in the *ejido* and this combination of economic and political rights are the essence of *ejido* rights. It is the ownership over these rights that this discussion is concentrating on, specifically who can own these rights to the exclusion of everyone else. Rights that are based in the ownership of a thing, are considered rights in rem, whose main distinctive characteristic is that they are “enforceable not just against the original grantor of the right, but also against other persons to whom possession of the asset, or other rights in the asset, are subsequently transferred;” that is, that the right “runs with the asset.”²⁵⁶ A right in rem, then, is not only opposable to the grantor of the right, but against everyone else in the world.²⁵⁷ This is the case for *ejido* rights, although with many particularities that make the *ejido* hard to classify.

The *ejido* rights, as a composite of economic and political rights, can be owned by the *ejidatarios* and are enforceable against everyone else. In that sense, it does comply with the essential requisite to be considered a right in rem. However, when we consider the “cardinal” features of ownership which, according to Honoré, are “the right of use, the right to exclude, the power to

²⁵⁶ Henry Hansmann & Reinier Kraakman, “Property, Contract and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights” (2002) 31 J Legal Stud S373 at S378.

²⁵⁷ Samatha J. Hepburn, *Principles of Property Law* (London: Cavendish, 2001) at 3.

alienate, and immunity from expropriation,”²⁵⁸ the panorama becomes more complicated. Regarding the right to use, which also encompasses the right to exclude everyone else from the good, the *ejidatarios* can exclude, through the *comisariado*, other non-members of the *ejido* from using the common land. However this right is shared with the rest of the *ejidatarios*. The essential nature of the *ejido* implies that a certain group of individuals is incapable of retaining property and are thereby protected from normal market forces. The *ejido* is not designed to be used exclusively by the *ejidatario*, and the very nature of the kind of ownership that he or she has is a very limited one. The *ejidatario* lacks ownership *per se* over the land, which instead rests ultimately with the government. To sum up, the exercise of *ejido* rights is indeed opposable to everyone who is not an *ejidatario*, but the nature of the *ejido* rights themselves is such that they are designed to be commonly shared among all *ejidatarios* and therefore depend on collective action. Even the right to obtain an individual parcel is dependent on the collective decision of others. As for the power to alienate, it has been already described as being either very limited in the case of the individual parcel, to the point that the *ejidatario* can only sell to other *ejidatarios* within his particular *ejido*, or, regarding to common land, where he only has a share of the collective power to alienate what it is distributed among

²⁵⁸ Honoré, *supra* note 232 at 113.

all *ejidatarios*. Finally, regarding immunity from unregulated expropriation, one can argue that this is a feature that is actually shared with all other kinds of real property in Mexico. Although it is true that the agrarian law lists the possible scenarios that could merit expropriation,²⁵⁹ these are defined so broadly that there is little difference with the general causes for expropriation contemplated in the constitution.²⁶⁰

Of the four cardinal features that were mentioned and described by Honoré, only one, that of expropriation, can be said to be a feature of the ownership of *ejido* rights. The other two could only be considered as exclusive if the *ejidatarios* were to be seen as indivisible parts of a unit. Although this can be considered as analogous to buying a share of a corporation, the differences between these two property regimes are great. The interest that a shareholder has in a corporation does not determine his standing as a citizen. In the case of the *ejido*, the interest in the ownership of the *ejido* rights is directly related to his general ability to participate, not only in the future of the *ejido* as an economic enterprise, but also in pursuit of his most immediate social, cultural and political aspirations. It is the assembly which determines how much land an individual *ejidatario* might receive or if and where, for instance, educational or religious facilities are going to be built. As described before, these types of decisions can

²⁵⁹ L.A., *supra* note 87 at art. 93.

²⁶⁰ C.P., *supra* note 214 at art. 27.

only be made by people who own *ejido* rights and who can participate in the assembly. Having being born and having lived in the *ejido* for one's entire life does not confer political rights (although it does confer certain rights of preference in distribution of land), nor do any other types of ties with and within the *ejido*, such as family or traditional ties. The ownership of *ejido* rights has implications that having a share in a corporation does not entail and that go beyond the fact that a share is not the same as a usufruct right.

Given that the even the most fundamental features of ownership are divided when it comes to the ownership of *ejido* rights, the question that lingers is who actually has ownership of those rights and what the meaning of such a statement is. Honoré does not give an answer to this because even though he considers these four features as “cardinal” he does not flatly say that without all four there is no ownership, but rather only that the liberal concept of ownership would be in question.²⁶¹

The encomienda, the ejido, and Juchitán: Decentralizing Oppression

The *ejido* and the *encomienda* have as a common thread usufruct traits. In both cases, however, it is a very particular type of usufruct with significant

²⁶¹ Honoré, *supra* note 232 at 113.

differences with what we would find in private law. These similarities and differences are relevant to show how they aim to operate. In both cases one can find the ordering of private relations for the interests of the ruling caste/class (depending on the era), through a decentralization of the micro-management of the worst-off for a profit. The root of both legal figures is the same, but their evolution and operation became more sophisticated over time.

The *encomienda* was a very straightforward placement of people in the hands of others for their exploitation. As explained before, the Crown had little choice but to decentralize the extraction of resources since it did not have enough man power nor did it have the legitimacy to accomplish this through direct agents of the Crown. Furthermore, the Crown also considered the natives to be too backward and savage to be acknowledged as full adults. Their “tutelage” under a Spanish “noble” was also meant to bring them in contact with Christians on a more regular basis in the hopes that by observation and cohabitation the natives would improve their ways.

The *ejido* also emerged in that same period and it was justified with similar arguments. The *ejido* was a figure known to both the Aztecs and the Spanish. The *calpulli*, the Aztec version of the *ejido*, was also a political unit, the most basic one in fact. All contact with the bureaucracy was filtered through this clan-based form of organization. Just as with today’s arrangement, the *calpulli* was

subsumed into a bigger hierarchical structure called the *nauhcampa*, which divided the city of Tenochtitlán into four quarters and helped to sort out and keep separate the different clans, ethnic groups and social classes of the city. The ruling class tended to come only from certain quarters while the others were systematically kept out of power, thanks, in part, to this form of social organization.²⁶² The Spanish *ejido*, on the other hand, was considered to be land for common use at the periphery of communities. As explained in chapter I, since the land was intended for common use, cultivation was usually not allowed since that would imply more than casual use of the land. Grazing for animals was the most common use.²⁶³

The modern Mexican *ejido* contains elements of both the *calpulli* and the Spanish *ejido*. The *ejido* is an economic asset but also a political unit as much as the *calpulli*. As mentioned in chapter I, since the *ejido* was never given a robust definition in the legislation it followed many of the historic tendencies of the time as it developed endogenously. The colonial regulation of the *ejido* aimed at making sure that the *ejidos* and the rest of the population were kept separate. This had two purposes: 1) to reduce the chances that the sprawling cities, mainly

²⁶² MacLachlan & Rodríguez, *supra* note 222 at 51. It should be noted that although there have been studies that link the *calpulli* system to that of the place of *barrios* (neighborhoods) in modern Mexican municipalities, this study focus is on much broader normative dynamics that could apply more generally in Mexico. The “*barrio* identity” is not widespread throughout Mexico. See for example, Hugo G. Nutini, “Clan Organization in Nahuatl-Speaking village of the State of Tlaxcala, Mexico” (1961) 63:1 *American Anthropologist*, New Series, 62 at 67.

²⁶³ Díaz de León, *supra* note 12 at 75.

composed of Spanish and mestizos, did not threaten the land that was assigned to the natives (*fundos legales*, *ejidos*, and other communal land), and; 2) to reduce interracial marriages or “contacts” that were not strictly under the rules of the *encomienda* or other Spanish rules regarding relations between the conquerors and the conquered.²⁶⁴ However, the *ejido* at this time functioned like a traditional Spanish *ejido* where the natives with more wealth could take their animals to graze while the natives mostly lived in the *fundos legales*.²⁶⁵ It was not until after the revolution that the *ejido* evolved into a political unit that could control the persistent unhappiness with the country’s deep inequalities.

The *ejido* was, thus, associated with tradition and communal living, and was seen as a space to be protected from state action that was, in fact, a foreign imposition. As opposed to what traditional liberal theory says about regarding land property, individual ownership of land was a mechanism to take away native land and power under the guise of free private transactions.²⁶⁶ In addition to Spanish ambitions, native nobles and *caciques* sold land that was inalienable arguing that it belonged to them and not to the community. Since there were no land titles as such among natives, the Spanish found it easy to accept their claims.²⁶⁷ The very early version of land tenure for natives was already a system

²⁶⁴ MacLachlan & Rodriguez, *supra* note 222 at 197-198.

²⁶⁵ *Ibid* at 165-166.

²⁶⁶ See for instance the reference to Baechler in the introduction.

²⁶⁷ MacLachlan & Rodriguez, *supra* note 222 at 167.

that favored those better-off among the worse-off. These legal and social dynamics entrenched the inequalities already present in the Aztec empire and helped solidify the “dual society” of New Spain with a *república de los indios* and a distinct *república de los españoles*. The land regime that each sector was assigned was meant to geographically give expression and enforce the preconceptions about each group. The higher castes quickly became urban since they had the labor of the natives to work the land while the natives and other lower castes were moved from the urban centers to the periphery to become rural.²⁶⁸

The narrative of the revolution exalted the peasants’ life style contrasting it to the corruption that was associated with the *Porfiriato*. This exaltation was also tactical since the *revolucionarios* needed those who were most desperate to fight battles whose primary objective was to shuffle the balance of power between elites. This, however, created a very influential series of events that solidified the peasant identity that became useful for the peasants themselves to cling to as a discursive weapon against the elites. As the Juchitán case illustrated, and James Scott points out very clearly in his analysis of other authoritative regimes, what could be considered as false consciousness, where the worst-off interiorize the

²⁶⁸ *Ibid* at 197-202.

place in society that was assigned to them, is turned into a way to hold the upper class accountable and responsive to their own discourse.²⁶⁹

There can be an authentic intention to resist authority by adopting the official discourse. However, this only tells a part of the story. As it will be explained in the following chapter, the tendency and historic inertia of the *ejido* made it an insular political institution prone to patriarchal politics. This parochialism, along with deep inequalities that pervade the *ejidos*, made them easy prey for corporatist interests and *cacique* rule. Positive law has helped entrench this dynamic by assigning functions within the *ejido* and its place within the general power structure of the country. The result is, as the Juchitán case illustrates, that an authentic desire to resist oppression, when acted upon, can actually reaffirm the conditions being resisted.

²⁶⁹ Indeed, Scott notes that in czarist Russia, taking seriously the official discourse to gain adepts can actually be a form to resist the authority: “In a form of symbolic jujitsu, an apparently conservative myth counseling passivity becomes a basis for defiance and rebellion that is, in turn, publicly justified by faithful allegiance to the monarch! Once the serfs were convinced that their resistance was serving the czar, the submissive patience and prayer advised by the myth was of no avail not officialdom.” James C. Scott, *Domination and the Arts of Resistance: the hidden transcripts* (New Haven: Yale University Press, 1990) at 98.

Chapter V

The *Ejido* as a Political Unit

We have seen that the ownership of *ejido* rights is related to the *ejidatario* political rights. The *ejido* is, thus, as much a political unit as a type of property. The link between ownership and political freedom is very clear in the case of the *ejido*; however, its legal study is frequently made exclusively with the perspective of agrarian law. The lack of proper consideration to the full legal effects of the *ejido* is the root of the problem in Atenco. There are two main reasons for this, which can be studied by analyzing the characteristics of the “*ejido*-citizen,” within the *ejido* itself, and the place of the *ejido*-citizen outside of it. In this chapter I will analyze the first of these two considerations and next chapter I will use Hernando de Soto’s theoretical framework to analyze the place of the *ejido*-citizen in broader political structures. The fact that the *ejido* has traditionally been seen just as a type of agrarian unit means that the political bodies of the *ejido* are conceived of as merely administrative bodies and not as a space for political discussions. What kind of citizen emerges from the legal and social conditions that affect the people living in it? How does he or she relate to his most immediate environment?

1. Property as the Origin of *Ejido*-Citizenship

The claim that property is the origin of citizenship in the *ejido* is based on three elements: 1) the kind of property analyzed; 2) the relation between land and *ejido* rights; and, 3) the relation between *ejido* rights, property and citizenship. Regarding the nature of property, we saw in the last chapter that the *ejidatarios* have usufruct rights over land, but not ownership. The *ejido* rights give certain exclusive uses of the land to the *ejidatarios*. However, this exclusivity must be understood considering the *ejidatarios* as a class and not as individuals. The space given to the *ejidatario* to use property according to his or her individual preferences is very narrow. However, the ownership over the *ejido* rights follows a more traditional description of what property, as it is normally understood, entails. The main difference between a traditional notion of property and the type of property of *ejido* rights lies in its origin: *ejido* rights are mainly born through government grants as a response to social justice claims, and their transmission is heavily regulated and limited to other members of the same class (i.e. other *ejidatarios*). But if we consider the *ejido* as an isolated political unit, and there are some reasons that makes this plausible (more on this later), the ownership over *ejido* rights do follow a more traditional form of ownership: they are exclusive in the sense that they cannot be taken away unless there is a legal

process; they can be inherited; they can be transmitted, with the limitations discussed; and there are remedies in case that the *ejidatarios* exclusive prerogatives are violated.

Even if we consider that the *ejido* rights do not give complete ownership over the land, it would be hard to make the case that the *ejido* rights and the land are unrelated. It is precisely to secure an exclusive piece of land for a group of people that the *ejido* as a type of land tenure was created. The paradox is that in order to secure access to the land to the disadvantaged, the government took partial ownership of it. However, the *ejido* rights by themselves are meaningless without the land. The *ejido* rights, as previously discussed, comprise property and political rights. The land is tied to both of them. The *ejido* property rights revolve around the type of access and uses that the *ejidatario* is allowed to make of the land, without actually owning it. The *ejido* property rights, however, expand and contract depending on the individual circumstances related to each type of actual, instead of legal, use that it is available to the *ejidatario*. In the last chapter, I briefly discussed that the land may not be distributed equally among the *ejidatarios*. There are several reasons that make this the most likely scenario for any *ejido*: 1) the land itself may be of different kinds, so even if equally distributed in terms of size, the land may be of a lower quality or have less access to water; and 2) the process to create an *ejido* was essentially a political one, involving the

executive power. As previously discussed, although originally designed to give the dispossessed secured access to land, the political environment soon turned the *ejido* into a mechanism of political control. The decisions made took into consideration, not so much the technical requirements, but the stability of the political system that emerged from the revolution. Finally, the level of corruption and governmental inefficiency allowed certain individuals to bribe officials to get more land, or to make them ignore that more land has been taken for individual parcels than permitted by law.

Krantz, in his analysis of the *ejido* of San Vicente, describes how the initial inequality is perpetuated in time due to the link between property and political participation inside and outside of the *ejido*. The *cacique-ejidatario*, that he describes, manages to accumulate land and wealth in complicity with outside political authorities and an internal group (mostly relatives and close friends) for which he provides.²⁷⁰ The internal dynamics this unleashes is that other *ejidatarios*, on one hand, resent the accumulation of wealth and excesses but, on the other hand, recognize that being in good terms with a powerful figure is important when he and his group control their most immediate environment.²⁷¹ Given the small size of the *ejido* as a political unit, the need for cooperation for

²⁷⁰ Krantz, *supra* note 203 at 61-80.

²⁷¹ In Krantz's analysis he points out that it is usually political power outside of the *ejido* which helps consolidate economic power within the *ejido*. It must be noted however, that economic power translates into political power in the *ejido* context. *Ibid* at 119.

several economic and social activities, and the problems with the application of the law, as has been described, make interpersonal relations very important and weigh in the way that the law is applied. In the case of Atenco, it was clear from the description of the conflict that the people of Atenco could hardly be considered “one people,” although living in the same space. There were clear divisions regarding the construction of the airport, and these divisions reflected the diverse type of experiences that each *ejidatario* had in Atenco. Some groups emerged after the creation of the *ejido* and some others had existed since its creation. Older groups are associated with the PRI-power structure, not surprisingly, supported the airport project while younger groups were supported by newer political parties, mainly the PRD, and opposed the project and distrusted the established authorities.²⁷² In the end, the formal bodies of political representation of the *ejido* failed to channel and resolve these differences.

The *ejido* political rights, since they are tied to property, also create deep inequalities within the *ejido*, since not all the people living there have land. As explained in the previous chapter, there are three types of people who live in the *ejido* without being *ejidatarios* and who have no vote in the assembly: the *avecindados*, the *posesionarios*, and the children of *ejidatarios*, along with their families, who do not inherit the *ejido* rights. Although the *ejido* initially mainly

²⁷² Almendra Vázquez & Alejandro Almazán, “Liderazgo *ejidatario*, una pugna partidista” *El Universal* (05 November 2001), online: El Universal <<http://www.eluniversal.com.mx>>. This political division along generational lines is also found in Krantz’s study. Krantz, *supra* note 203 at 121-123.

comprises people with *ejido* rights, in time, as Krantz pointed out, the number of landless people can be great since *ejido* rights can only be inherited by one person.²⁷³ People without any political representation and without legally recognized property are hardly the kind of emancipated people that the *ejido* was supposed to create.²⁷⁴ Some may argue that the *ejido* rights are only related to the administration of the *ejido*, that someone without any *ejido* rights would not need them and that it would, in fact, be unfair if they had them. However, this reasoning ignores the fact that the *ejido* is not any kind of political unit but one that it is largely isolated from the rest of the political units in the country. Consider that the decisions made about the most immediate necessities of an *ejidatario* are made in the assembly. These decisions include, among others: the ownership of property, the location of housing, the regulation of social and religious affairs, the relations with authorities outside of the *ejido*, and the economic focus of the *ejido*. The effects of the *ejido* on the people living inside the *ejido* as a citizen of three distinct levels of government will be discussed in the next chapter; however, it is important to mention here that the *ejido* assembly is the channel through which the *ejidatarios* relate themselves to the rest of the

²⁷³ Krantz discovered in his study that many *ejidatarios* would formally transmit the *ejido* rights to one of their children, but informally split the land between the siblings. Krantz, *supra* note 203 at 207.

²⁷⁴ Gareth A. Jones, in an essay published not long after the 1992 reforms, argued that although the reforms provided the potential for political opening in the *ejidos*, Salinas had the intention of maintaining the ambiguity over ownership of *ejido* rights in order to keep the *ejido* under the control of the state apparatus. Furthermore, Jones argues that the lack of experience in democratic political process is also an impediment for a true autonomy of the *ejido*. Gareth A. Jones, "Dismantling the *Ejido*: A Lesson in Controlled Pluralism" in Rob Aitken et al, eds, *Dismantling the Mexican State?* (Basingstoke, UK.: Macmillan Press, 1996) 188 at 193-194. [Jones]

country. This assembly does not properly represent all people living inside the *ejido* and lacks enough checks and balances to be considered a true democratic political unit.

The *ejido* creates, thus, an insular type of citizen whose life is reduced to the socialization that corresponds to the “class” in which he is born to, with no neutral mechanism of choosing a different path. I speak of class because even though landless *ejidatarios* do have an obvious interest in participating in the political processes of the *ejido*, the lack of property situates them as a separate class of people inside the *ejido*.²⁷⁵ However, this does not mean that people without *ejido* rights cannot be properly called *ejido*-citizens, but simply that they are of a different kind of citizens. There are two reasons for which they still should be called *ejidatarios*: 1) because they are under the jurisdiction of the *ejido* regulations and 2) they are considered to be *ejidatarios* outside of the *ejido* by the rest of the population even if, formally speaking, they lack *ejido* rights. It is important to stress these two points because they are also the reasons behind my argument that the *ejido* is a form of insular citizenship. Any person, regardless of whether or not he or she belongs to the *ejido*, has the obligation to

²⁷⁵ For Larry May: “If any member [of a group] is excluded from [the] benefit or use [of a thing] then that member is not properly a member of the group that collectively owns a thing.” Larry May, *The Morality of Groups: collective responsibility, group-based harm, and corporate rights* (Notre Dame, Ind.: University of Notre Dame Press, 1987) at 130 [May]. In the case of the *ejido*, the thing is the *ejido* itself and the different types of uses that an *ejidatario* can give it. Although a person without *ejido* rights could live and even work the land, this is thanks to the favor of a “true” *ejidatario* or thanks a decision made by the assembly, and not something that the person lacking *ejido* rights can adequately control. As discussed in the previous chapter, although *avecindados* and *poseisionarios* have certain legal rights in the *ejido*, these are difficult to exercise.

follow the *ejido* rules. But this is most acute in the case of the landless *ejidatarios*. The term acute is used to express that not only the landless *ejidatarios* are ruled by very particular and narrowly drafted regulations, but that these regulations are more severe because the *ejidatario* without *ejido* rights lacks proper mechanisms to resist or attenuate their effects. Any legal remedy is to be found outside of the *ejido*, which diminishes its efficacy and is prone to create long-term conflicts within the *ejido* that may render any positive outcome useless. The second reason refers to what Larry May, following Sartre, describes as the awareness that the collective is already treating every *ejidatario* as "... an undifferentiated, unified collective,"²⁷⁶ that is, that each is a replica of the other. For the legal system, everyone who lives inside the *ejido* is an *ejidatario* who is properly represented by the assembly; there are only a few and inefficient legal mechanisms available for the *ejidatario* without *ejido* rights to resist the collective. But, more importantly, as shown by the description of the conflict in Atenco, most scholars, politicians, journalists, and even many sociologists or social observers, refer to the people living inside the *ejido* simply as *ejidatarios* without much thought as to their internal differentiations.²⁷⁷

²⁷⁶ Indeed May goes on to say that: "For Sartre, 'alterity' is 'a relation of separation, opposed to reciprocity.' And yet at the same time (...) each person finds a kind of commonality in the recognition that each person is replaceable by the other... One comes to the concept of replaceability from the recognition of [a] common characteristic... But this alterity also leads to a kind of unification, insofar as having a common characteristic makes them all members of the same group." *Ibid* at 35, 39.

²⁷⁷ An example of this approach is the book that describes the conflict in Atenco by Cristina Alcaya. See Cristina Alcaya, *Atenco, el peso del poder y el contrapeso de la resistencia civil* (México, D.F.: Miguel Ángel Porrúa, 2002) [Alcaya].

2. The *Ejido*-Citizen

From what has been discussed so far, it becomes apparent that there is a tension between the people who live in the *ejido*, with their own aspirations and conceptions of the good, and their identities as *ejidatarios*. In this section, I will analyze this tension between identities and make the case that this tension is different from that of any other Mexican who is under the jurisdiction of different government levels. Regarding the first element to analyze, I will explain the conditions in which this tension between identities takes place. First, we explained that property rules created specific roles (or classes) within the *ejido*, and how all initiatives from *ejidatarios* should pass through the political bodies that were created to administer the *ejido*. In this sense, these offices, designed only to administer property, became bodies of political representation. The government ignored that property rules not only create relations between individuals regarding the object but also assign roles in society.²⁷⁸ For Ellickson, “[l]and rules literally set the platform for social and political institutions. Economists themselves agree that the evaluation of a land regime must go

²⁷⁸ Monique Nuijten, for instance, explains how the *ejido* meetings have a strong “symbolic function” since they make perfectly clear who has power within the *ejido*; who are insiders and who are outsiders. Nuijten, *supra* note 206 at 84.

beyond its possible contributions to material well-being.”²⁷⁹ The government created land rules with only their possible economic effects in mind, ignoring the consequences of encapsulating a population this type of land tenure and imposing limitations to the *ejidatarios*’ ability to exit. Although the *ejido* evolved to be a mean of political control, initially the *ejido* did try to solve the problem that a sector of the population was unable to keep their land unless restrictions on ownership were imposed. However, it is important to analyze why these limitations were imposed on the freedoms of only one sector. I will deal with this issue in the next chapter, but for now suffice it to say that the type of property that the government created did limit not only the freedom to own property, but also political freedoms.

As Ellickson points out, classical liberal thought considers private property as associated with more freedom while communal types of ownership are associated with more equality.²⁸⁰ In the case of the *ejido* I argue that this form of land tenure fails on both accounts. The type of semi-private land that is assigned within the *ejido* does not follow the rules of normal private property and offers only slightly less oppressive regulations. Moreover, the way in which the *ejido* was implemented also created inequalities between *ejido* members and entrenched the inequalities of the disadvantaged within the rest of the population.

²⁷⁹ Ellickson, *supra* note 243 at 1344.

²⁸⁰ *Ibid.*

However, the relation between property and the pursuit of conceptions of the good is not as straightforward as it seems. First, freedom and equality are not terms that can be used in a vacuum. Second, as the analysis of Baechler's paragraph indicated, there is no freedom without equality and vice versa, and increasing one necessarily imperils the other. Finally, the main problem with the government policies is not so much that they created a form of land tenure that is economically inefficient (more on this later), but that it was created to enclose only a certain part of the population.

Our conceptions of the good are related to the environment in which we socialize. According to Will Kymlicka, there are two types of communities where we exercise our self-determination: a political one and a cultural one. The first one refers to the space in which our self-determination is bound to the legal framework, and the second refers to the space in which we define or alter our aims, according to our experience with the cultural and social environment in which we live.²⁸¹ In the case of the *ejido*, the government severed pockets of the population from the general population in both accounts. The legal regime that the *ejido* creates limits the interactions between *ejidatarios* and the rest of the population. In fact, what justifies the existence of the *ejido* at all is the notion that people from outside of the *ejido* are looking to dispossess the *ejidatarios* of their

²⁸¹ This is the liberal interpretation of our relation to our cultural environment, which is not considered to be binding in liberal thought. Will Kymlicka, *Liberalism, Community, and Culture* (New York: Clarendon Press, 1989) at 135 [Kymlicka, *Liberalism*].

property. Therefore, the cultural environment in which the *ejidatarios* form and revise their conceptions of the good is basically limited to the *ejido* itself. They can, of course, leave the *ejido*, but then they are forced to choose between a life with formal freedom equal to that of the rest of Mexicans or continue living within their cultural, social, and familiar environment. This is an impossible choice and one which, at least formally, no other Mexican is forced to take. Although many Mexicans, regardless of their belonging to an *ejido* or not, are forced to leave their communities because of a lack of economic opportunities, in the case of the *ejido* the circumstances are more particular because it is the legal framework which explicitly sets them apart from the rest of the population. To move from the *ejido* to the rest of Mexico is a form of emigration similar to that of many others expatriates, since they are socialized to be suspicious of non-*ejidatarios* and, as explained before, the rest of the population sets them apart as well even if their circumstances may not be the same as those of the archetypical *ejidatario*.

Does this condition of being apart from the rest of society translate into considering the *ejidatarios* an indigenous population? One of the reasons that the group opposing the airport in Atenco argued in their favor is that they considered themselves indigenous populations who deserve special treatment from the government to preserve their culture. This is a claim that is repeated by many sympathizers of the movement. It is strange, though, that the *ejidatarios*, or their

sympathizers, were never able to clearly identify to which indigenous population they belonged to.²⁸² It is true, as explained in the description of the conflict, that that land was previously occupied by indigenous populations. However, this does not mean that the people who currently live there are their direct descendants, since many of those populations were gradually removed, first by the Spaniards and then by the subsequent, frequently despotic governments of early Mexico and the constant armed conflicts.²⁸³ However, let us assume that the *ejidatarios* are in fact the direct descendants of indigenous populations who lived there since before Mexico became Mexico. According to Kymlicka, indigenous populations do deserve to be set apart from the rest of the liberal environment in which their fellow citizens live. Indeed, according to him, "...the viability of Indian communities depends on coercively restricting the mobility, residence, and political rights of both Indians and non-Indians."²⁸⁴ This is mainly because cultural minorities can never properly influence government levels bigger than their own community because they would always be outnumbered. In this sense,

²⁸² Furthermore, in their warring cries they claimed the legitimacy that confers the victimhood of indigenous populations, but they also made their own the emancipatory claims of Mexico's independence leaders, most of whom were direct descendants from Spaniards. Almendra Vázquez, "Realizan doble 'Grito' en San Salvador Atenco" *El Universal* (17 September 2002), online: El Universal <<http://www.eluniversal.com.mx>>.

²⁸³ This is a common tactic in peasant movements, as Hobsbawm notes: "[s]tudents of peasant movements know that a village's claim to some common land or right 'by custom from time immemorial' often expresses not a historical fact, but the balances of forces in the constant struggle of village against lords or against other villages." Eric Hobsbawm, "Introduction: Inventing Traditions" in Eric Hobsbawm & Terence Ranger eds, *The Invention of Tradition* (Cambridge, UK.: Cambridge University Press, 1983) 1 at 2. [Hobsbawm]

²⁸⁴ Kymlicka, *supra* note 281 at 146.

Kymlicka seems to indirectly support the claims of the group opposing the construction of the airport and, in general, the constant march to turn the *ejido* property into a form of private property. Regarding ownership of land, Kymlicka goes on to say:

Indeed the most common way of breaking open stubbornly held Indian land for white settlement was to force the Indians to take individual title to alienable land, making the pressure on some individuals to sell almost unbearable, partly because Indians were financially deprived (and hence in need of money to meet the needs of the family), and also because they were culturally ill-equipped to understand the consequences of having (or selling) title to land...²⁸⁵

In order to protect indigenous population from this, Kymlicka proposes what, in effect, the Mexican government ended up doing: create differentiated citizenships. For Kymlicka, "...in culturally plural societies, differential citizenship rights may be needed to protect a cultural community from unwanted disintegration. If so, then the demands of citizenship and cultural membership pull in different directions."²⁸⁶ Having these pockets of culturally compatible citizenships would allow liberalism to remain coherent by not imposing conceptions of the good which may be completely foreign to some communities.

²⁸⁵ *Ibid* at 141.

²⁸⁶ *Ibid* at 151.

The political and the cultural communities should not be at odds with each other. Although the conflict in Atenco emerged because of expropriation and not because the government was forcing the *ejidatarios* to turn their land into private ownership, the conflict in itself did take place in the framework of the reforms of 1992, made by President Salinas, which facilitated *ejidatarios* turn their land into private land making them vulnerable to small but economically powerful interests groups.

There are several problems when we try to apply this type of reasoning to the conflict in Atenco. Leaving aside the issue of ethnicity, the main problem with the argument is that indigenous populations, or culturally distinct populations, are normally considered to be those that developed independently from the dominant political force. First, the *ejido* was not designed as a way to preserve cultural minorities.²⁸⁷ As mentioned before, the *ejido* was designed to secure an economic asset to populations that have been historically dispossessed. At the time that these policies were implemented, land was the main mean to have any economic productivity. Secondly, the *ejido* is not culturally sensitive to any kind of culture of indigenous populations. The basic *ejido* rules, and its structure, were not created by the populations that inhabited it but by bureaucrats and politicians. The reasons behind the nature of the *ejido* were a mixture of genuine concern for

²⁸⁷ It must be noted that the Constitution mandates the government to protect the integrity of indigenous land. This is not a concept in dispute in this study. C.P., *supra* note 214 at fracc. VII, art. 27.

the well-being of the disadvantaged and political calculations. Thirdly, the *ejido* did not necessarily encompass a particular defined community; the criterion, as explained in the introduction, was to provide land to those who did not have it as a result of historical oppression.

There is no reason to believe that the *ejido* is a culturally distinct community and, even if it had developed into one, it was created by the government itself.²⁸⁸ The main reason to separate the *ejido* from the rest of the population was the perceived disadvantage that the *ejidatarios* had to pursue their own conception of the good using economic means. Without properly regulated property, the *ejidatarios* lack the ability to have a neutral locus of self-determination to set or revise their conceptions of the good. Since, in the case of the *ejido*, this is linked to their political rights, their position within the *ejido*, property-wise, also affects what they can accomplish in the public arena. The *ejido*, in this sense, is a form of political body, but it is not the expression of the cultural particularities of any group; the *ejido* is, rather, the result of a complex set of bureaucratic decisions. The *ejidatarios*, thus, do develop a specific identity

²⁸⁸ Ute Shüren, for instance, makes a clear distinction between culturally homogenous rural communities, the Mennonites in Mexico in this case, and the dynamics that take place within the *ejido*. He concludes that agricultural activity for the Mennonites is more than an economic activity but a way of life that has existed for many generations. For many *ejidatarios*, however, the agricultural activity is one that is imposed more by the legal restrictions to leaving the *ejido* and by the lack of opportunities outside of this activity. Shüren hints, then, that for many *ejidatarios* to successfully leave the *ejido* means social mobility, integration to the rest of society, and leaving behind “the stigma of being rustic,” and I may add the stigma of being considered as a person unable to protect his or her own interests. Ute Shüren, “Economic strategies of rural producers: a comparison of *ejido* and Mennonite agriculture” in Annelies Zoomers ed, *Land and sustainable livelihood in Latin America* (Amsterdam: Royal Tropical Institute, 2001) 209 at 223 [Shüren].

related to their “citizenship” to the *ejido*. This identity is not cultural or ethnic, but the result of people being encapsulated in a certain piece of land and being liable to be “acted upon”²⁸⁹ by the government. In this sense, it is important to qualify the kind of identity that land confers to indigenous populations and the kind of identity that the *ejido* as an insular political unit confers. My argument is that in the *ejidos*, as exemplified by the Atenco case, it is government regulation and not some mystical connection to the land which gives rise to the *ejido*-citizenship.²⁹⁰ The idea of differentiated citizenships ignores the fact that people, even in small communities, have different conceptions of the good; it is the government’s job to treat any reasonable conception of the good with the same amount of respect as that given to any other. This perspective does help reduce tensions between the political and cultural communities.

The *ejido* identity is dormant, or not very intense, while there is no issue that affects the *ejidatarios* as a group. At this stage, their identity to other political units (mainly the national identity) and their identity as part of smaller identity

²⁸⁹ By “being liable to be acted upon,” I mean May’s idea that “...each person comes to care about how each other member is treated, for since each is treated as indistinguishable from each other, how your neighbor is treated counts as a strong indication of how you will be treated, or would have been treated had you been there instead of your neighbor.” May, *supra* note 275 at 39.

²⁹⁰ Some sociologists argued that the conflict in Atenco was due to the loss of identity that the land gives to *campesinos*. Roger Bartra, for instance, argued that as “suburban-*campesinos*,” the identity of the *ejidatarios* of Atenco was already perceived to be under siege by the sprawling urban development, increasing the fear of losing their way of life. Without denying that this may have played a role, the argument obscures the reason why the other identities did not substitute the loss of the identity that was already in decline. For different interpretations of the conflict in Atenco from the identity perspective, including the one of Roger Bartra, see, Dora Luz Haw, “Naufraga la identidad si se pierde la tierra” *Reforma* (24 July 2004), online: Grupo Reforma <<http://www.reforma.com/>>.

groups (e.g. family and friends) may be more prevalent. This divided identity is revealed by the ambivalence of some younger members of the *ejido* who did not feel strongly that keeping the *ejido* was important but felt a moral obligation to support their parents' struggle.²⁹¹ This explains, as well, why the project became more unpopular as time went by. At the beginning, individual *ejidatarios* might have been lured by the individual economic gains obtained by accepting the monetary compensation for the expropriation. However, as the conflict intensified by the actions of a minority, the quality of belonging to the *ejido* gained more importance, as the likelihood of being acted upon by the collective outside of the *ejido* increased. This probably made it more difficult for those *ejidatarios* who did support the project to express their opinions without being seen as "betraying" their *ejidatario* identity, the one closest to their environment.

This tension between identities is not comparable to that of any citizen who lives in a country with multiple levels of government. To begin with, multi-level governments are the result of broad democratic discussions about the type of government that the population wants. In Mexico, particularly, there was always a tendency, inherited by the two despotic forms of government that preceded independence – that of the indigenous populations and that of the Spanish Crown – for government officials to concentrate power. As discussed in

²⁹¹ Iván Ventura, "Regresan a sus Orígenes" *Reforma* (28 October 2001), online: Grupo Reforma <<http://www.reforma.com>>.

the introduction, the history of Mexico swung from despotic governments to violent uprisings, either with emancipatory or merely power-grabbing claims. The constitution of 1917 was the second effort to create a decentralized republic, which eventually succumbed to the practices of the PRI-regime. In any event, these despotic tendencies and the resulting conflicts always involved broad discussions about the type of country that Mexico should be. In the case of the *ejido*, this was a form of land tenure that was created by the political establishment affecting a portion of the disadvantaged population. The socio-economic conditions of the people who normally live inside the *ejido* made them particularly less apt to participate in any discussions about the proper way to resolve their economic situation and position vis-à-vis the state. The creation of the *ejido* gave the *ejidatarios* a micro-cosmos in which they could have some influence, their political power in other levels of government being very small.

The discussions that shaped the type of relation between government levels, and between them and the rest of the population, involved large segments of the population because every Mexican, regardless of his or her socio-economic status, lives under the rule of three jurisdictions: the municipal,²⁹² the state, and the federal. The *ejido* rules are meant only for a portion of the population and whatever rules apply to them do not really affect anybody else. To

²⁹² In Mexico City's case, people live in *delegaciones* (delegations) rather than municipalities.

complicate things even further, the *ejido* is designed to function as a stand-alone entity; the government does not do much to strengthen the institutional channels of communication and cooperation with other *ejidos*. The *ejidatarios* do not have the same kind of access to the different jurisdictions because they live in a federal bubble. The ability of the *ejidatarios* to contact outside authorities is diluted when their individual will is subsumed into the will of the group, or, more specifically, into the will of the *ejido* authorities. In the next chapter, I will analyze this claim more carefully, but for this chapter it is important to take into consideration that the *ejidatarios* do not only live under a further jurisdiction but that their presence, as individuals, is diminished in the rest of the government levels.

Finally, the rights and freedoms of the rest of the Mexican population, at least formally, is not tied to owning of property. Every individual has the same basic rights as anyone else for no other reason than being Mexican. In the case of the *ejido*, however, one is a proper member of the political community by owning property. This presents a particular problem for the *ejido* because, as mentioned before, the *ejido* was created not only to provide secure access to an economic asset but also to provide means for the disadvantaged to manage their affairs without being oppressed by more powerful players. I have argued that the *ejido* fails at both objectives, but at least on paper that was the idea. Providing

political representation to those who did not have an economic stake in the future of the *ejido* could have opened a dangerous back door to special interests. Furthermore, as discussed before, the *ejido* was not really designed as a formal political unit, although in practice there was really no justification for not doing so. Even if we assume that it was justified to impose strict limitations to the political rights of those who live within the *ejido* but do not own property themselves, the result was the creation of a sub-class. In the next section, I will expand on this.

3. Divided Property and Political Rights in the *Ejido*

As described before, the type of property that a person has within the *ejido* affects the ability to transform his or her environment. This limitation comes in the form of restricting the political rights of some *ejidatarios*. One of the reasons why these limitations may be in place is that the *ejido* is supposed to insulate the *ejidatarios* from other players who might take advantage of their precarious economic situation, which would leave them without land. Allowing people without a vested interest in the *ejido* to take part in the administrative decision process could lead to the *ejidatarios'* loss of their property. However, this reasoning ignores that the *ejido* is more than just a collective form of land tenure. As described by the historic legal evolution of the *ejido*, there have been several

attempts to either diminish the *ejido* as a form of communal land tenure or to diminish its importance in the overall economy. These attempts have been met with resistance and, as a consequence, it has left the *ejido* without a coherent legal framework. Another important issue is the fact that as the population of the *ejido* grows so does the number of people who have a vested interest in the *ejido*, even though, legally speaking, they do not own any property within the *ejido*. This emerging vested interest may become the result of what Harold Demsetz calls compactness. By this term, Demsetz refers to the extent to which a problem, and the consequences of solving it, can have broad “even” effects due to the fact that a certain group of people is “close” to each other; that is, that they share an affinity due to cultural, social, or biological reasons, among others.²⁹³ The effects of a common effort are “even” because the members are guided by sympathetic motivations; helping another member is helping the community and, thus, oneself.

Even though the *ejido* does encourage “compactness,” in the sense of promoting affinity towards fellow members of the *ejido*, the evenness of the effects of common action is either low or lacking. In his article, Demsetz refers to technological changes and specialization as factors that diminished the relevance of compactness in the evolution of property by increasing

²⁹³ Harold Demsetz, “Toward a Theory of Property Rights II: The Competition between Private and Collective Ownership” (2002) 31 J Legal Stud S653 at S661.

productivity.²⁹⁴ Increased productivity makes the *ejido* much more relevant for society in general and, in turn, outside interests become more important to *ejidatarios* since excess of goods can be sold outside of the *ejido*. The strength of the compactness is thus diminished when there is a lack of a strong source of identity in the *ejido* other than economic ones. Productivity diminishes closeness, which in turn threatens the political *locus*. This political unit may be the only one available for the historical dispossessed. An expansion of economic activity threatens the only way of life that some individuals think they can have access to and to which they have been encapsulated by government policies.

In the case of Atenco, it was not so much that the government wanted the *ejidatarios* to be more productive, but to take the land away from the *ejidatarios* to use it for a more profitable endeavor. The dynamics explained so far, however, revealed the impossibility of reaching a solution that could meet several legitimate claims. On one hand, the government had as its constitutional prerogative the promotion of economic development; a multimillion-dollar airport program was sure to create more jobs and economic prosperity for the whole region than using the land for the self-consumption needs of a few people. On the other hand, some of the *ejidatarios* had a rightful claim that the *ejido* should not be considered only as a piece of land. Equally legitimate were the claims of

²⁹⁴ *Ibid* at S663.

other *ejidatarios* who saw the opportunity as a profitable way out of the *ejido*, especially after the government increased the amount of the compensation; taking into consideration all the restrictions to sell their land rights on the land, this was probably a unique opportunity.

All the actors involved in the conflict (the government, the *ejidatarios* who wanted to keep their land, and the *ejidatarios* who wanted to sell their land rights or were content to receive compensation for losing their *ejido* rights) had legitimate interests in the land, and that is precisely the problem. The *ejido* could have hardly met the objectives of all the parties involved. This simplified summary of legitimate objectives reveals that two of the groups of actors wanted to revise their conceptions of the good: society, through their elected officials, and the *ejidatarios* who were content to receive compensation for losing their *ejido* rights. Originally, the government considered it important to give that land to the historically dispossessed.²⁹⁵ Then, after many years and for various reasons, it decided to give a different use to that land that never completely belonged to the *ejidatarios*, as it was discussed in the previous chapter. In the case of the *ejidatarios*, the reasoning has to be a bit different because they are descendants of people who initially considered having *ejido* property as a good thing and were subsequently encapsulated by a series of regulations that did not make it easy to

²⁹⁵ Although during the period in which the *ejido* program was legislated the governments were not exactly democratic, the intent to give land to the dispossessed can be considered in line with the view of the rest of the population.

revise that decision. Although we always revise our conceptions of the good in the social context in which we find ourselves, it is important to note that this particular context (the *ejido*) was created by government regulations. It did not emerge from the collective self-determination of the people who lived there. Furthermore, this group of people was one that was united by government policy and not one that emerged spontaneously.

The effects of the fragmentation of property rights that was discussed in the previous chapter were exposed by the conflict in Atenco. This conflict had as its origin the narrow prism through which the *ejido* was conceived. The existence of the *ejido* was justified by the interest of society and the ruling class to symbolically give property to those who never had one or were unjustly dispossessed of it. Since the main reason to give that land was to prevent rural communities to keep providing recruits for future rebellions, the administration mechanisms of the *ejido* were designed to control and channel the aspirations of the peasants. These administration mechanisms were an easy target to being controlled by the old regime, but after the fall of this political system, the *ejidatarios* no longer felt much respect for those mechanisms, since they do not really reflect the entire composition of the *ejido*. On the other hand, the fragmentation of property rights legitimized any movement, as small as it may be, to claim to represent the true interests of the entire *ejido*; it is the confusion of

who owns what that allowed the movement that opposed the airport project to oppress other voices.

4. The Anti-Commons Features of the *Ejido*

The *ejido* would intuitively be considered an example of commons property where no one has the right to exclude others from the use of the land; at least that is the idea that most people in Mexico have about the *ejido*. After all, the very idea of the *ejido* is linked to providing a group of people a piece of land for common use. As it was explained in the previous chapter, the legal reality of the *ejido* is much different and the consequences of this, I argue, are responsible for the failure of the *ejido* as a mean to empower poor peasants. There is exclusion in what is supposed to be common, and there is no real ownership in what is supposed to resemble private property within the *ejido*. Programs designed to give clarity to property titles, such as the PROCEDE previously discussed, did not really solve the problem because they only entrenched a vicious dynamic between the disaggregated features of ownership and their confusing distribution. So, even though formally the law contemplated a complex set of different property types between the *ejido*, in theory creating the space for both private and communal use of the land, the overall rules governing the *ejido*

made it possible for anyone to make a legitimate claim to exclude a certain use for the land.²⁹⁶

This dynamic described above is the center of attention for Michael Heller in his study of the anti-commons phenomenon. His study about this type of property reveals several similarities with the *ejido*: the reasons for the emergence of anti-commons property, the type of property that the anti-commons is, and the political implications of anti-commons property. For Heller, the paradigmatic example of anti-commons property is that of the contrasts that were present between kiosks full of merchandise and the empty shelves of formal stores after the Russian transition from socialist to a capitalist regime. The reforms created, in some instances, what Heller calls "...the gradient of property in transition."²⁹⁷ Instead of defining the type of property by the rights that the owner held, the socialist regime defined property by the identity of the owner; if property was held by the state, then it received more protection than if it was held by a private citizen.²⁹⁸ In the *ejido*, the situation is very similar: the type of property that receives the most protection and clarity in the legislation is the common property; individual property exists within this framework. Although individual parcels

²⁹⁶ Shüren also came to this conclusion in his comparative study between the Mennonites and the *ejidatarios*. He claims that the main problem of the *ejidatarios* was not the lack of proper land titles but the difficulty of turning the land into a productive asset because of its legal composition. Shüren, *supra* note 288 at 222.

²⁹⁷ Michael A. Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets" (1998) 111:3 Harv L Rev 621 at 627 [Heller].

²⁹⁸ *Ibid.*

receive protection from the legislation in the sense that the owner of the rights over that parcel has more control over it, in fact that control is limited by the overall *ejido* regime.²⁹⁹ In this regime, much like in the old Russian socialist regime, clear boundaries of property were not deemed necessary because everything within the *ejido* belonged to everyone, that is, until the reforms of 1992. These reforms, as previously discussed, strengthened individual property and established a clear path to set boundaries of individual parcels that could later be registered with the agrarian authorities. The ability, however, to clearly define where one parcel started and the other ended did not do anything to break the hierarchy of the commons regime, although it did introduce a level of uncertainty regarding the extent of the powers of the assembly. This is consistent with Heller's hypothesis that if the elements of ownership are too divided, they tend not to transition effectively to private property.³⁰⁰

This failure can be explained by the anti-commons dynamics that take place after the transition from one form of property to another. These anti-commons dynamics can have two sources: legal and de facto. The legal anti-commons dynamics are related mostly to the level of protection that the type of property received from the legal system. Important to note is the situation between owners and users; both have ambiguous rights but their role within the

²⁹⁹ This was discussed in the previous chapter; however, this will be further discussed in this part while analyzing the "spatial anticommons" in the next few pages.

³⁰⁰ Heller, *supra* note 297 at 631.

property is connected to different political circumstances. In the case studied by Heller, the owners were state agencies since they were originally the ones who held property, but the users were a protected class, namely, worker's collectives. In the case of the *ejido*, formally land ownership is federal but another protected class holds the usufruct: the rural dispossessed. In addition to the overlapping and confusing division of ownership rights between owners and users, there is a further fragmentation of property rights given the control over property that was given to the *asamblea ejidal*. Finally, society has also an interest in the *ejido* since it is an entity of public interest. Society can be included in this list because the *ejido* regime is dealt with by public law instead of private law. As explained before, the current legislation of the *ejido* does not enforce all of the prerogatives that the constitution has reserved for it. In the legal anti-commons there is, thus, an inadequate distribution of the elements of ownership for the most efficient economic use of the object.

The de facto anti-commons mechanisms are related to issues such as corruption, a weak legal system that creates uncertainty and, what Heller calls "spatial anticommons."³⁰¹ The level of mistrust in Mexico towards the authorities and the legal system is widespread.³⁰² The political system that emerged from

³⁰¹ *Ibid* at 651.

³⁰² The relationship between levels of trust in public officials and the inefficiency of the Mexican government - where corruption is widespread - is not a simple one. Given that even after the democratic transition, and as the Atenco case attested, deep levels of mistrust persisted, it is important to take this into account. As Morris and Klesner point out, *political* mistrust creates a fertile ground for corruption since it is

the period commonly known as “the Mexican Revolution” was a factious one. This is, as previously discussed, related to the fact that Mexico had, rather than a revolution, a civil war between different political factions fighting for power. Porfirio Díaz, the tyrant that all forces were amalgamating to defeat, left the country before the revolution even started. The revolution turned against itself with the independent armed groups that were formed in different regions of the country fighting each other. One faction won and the result was a political system that only looked to accommodate the interests of others to assure its survival. The political system captured the legal system; the division between the public and the private was blurred so that there was no place that offered a neutral platform to find solutions to conflicts. Although this system was defeated in the year 2000, the political and legal system changed little and the resentment and distrust is still very much present in Mexico, particularly in those who historically have been abused by the system. The legitimacy of the government to impose burdens and limitations was in question, and the perception of corruption made difficult for the *ejidatarios* to turn to the legal system for help. The perception of corruption was an element that helped radicalize the conflict in Atenco, and it also helped consider acceptable inside the *ejido* being isolated from broader

expected that it will take place. Perception of corruption also entrenches social conditions that foster bribery and clientelism; this, in turn, confirms the reasons for being mistrustful. Stephen D. Morris & Joseph L. Klesner “Corruption and Trust: Theoretical Considerations and Evidence from Mexico (2010) 43 Comp Pol Stud 1258 at 1260-1263, 1277 [Morris & Klesner].

political participation. As explained before, the assembly is easily controlled by the *ejidatario* with most economic power and connections with public officials outside the *ejido*. *Ejidatarios* with less economic means cannot give bribes or may not know how to work the system to obtain a favorable result. Furthermore, even if authorities changed, the perception of corruption may be such that *ejidatarios* may just skip dealing with the authorities altogether and opt instead for informal ties with other *ejidatarios* to negotiate their interests.³⁰³

In the case of Atenco, this dynamic was very clear when the airport project forced people to take sides. As described in the second chapter, the state, the municipality, and the assembly were controlled by the PRI-dominated structure. Since this structure replicates the old system, except with the state government instead of the federal government, it is no surprise that the mayor and the leader of the assembly were in tune with the governor supporting the project. Because it lacked legitimacy, the assembly was not able to neither contain nor channel the mounting discontent of a sector of the population. The fact that the division was so strong is further evidence that the *ejidatarios* cannot be considered an undifferentiated block whose interests can be accurately taken into account by the bodies of organization of the *ejido*, which were primarily designed to

³⁰³ See e.g. Shüren, *supra* note 288 at 222, describing the widespread distrust of authorities in the *ejido* and the resulting strengthening of informal ties. See also, Nuijten, *supra* note 206 at 83-85, describing the relation between economic power within the *ejido* and how this affects capturing formal power structures within and outside of the *ejido*, and the state of uncertainty in which less powerful *ejidatarios* may find themselves. Finally, see also, Krantz, *supra* note 203 at 99 –123, explaining the link between social inequalities within the *ejido* and political power outside of it.

administer property. This is not to deny that the *ejido* responded to a very critical situation, with large segments of the population dispossessed and, in many cases, victims of a long series of injustices. However, the *ejido* entrenched its inhabitants as a permanent subclass of citizens by fragmenting their property rights and, thus, placing barriers for them to choose a different path.

The legal structure in Mexico has not completely recovered from years of informal rules and corruption, and in many states the local legal and political structure is not that much different to what was present during the PRI-regime. Corruption and a weak legal system, thus, create a de facto state of anti-commons property since the “owner” cannot really exercise his rights without first identifying and paying corrupt authorities. One more element that could result in the emergence of de facto anti-commons property is the spatial anti-commons. In this case, the owner has formal rights over the object, but the space to use them may be too small to make any efficient use of them.³⁰⁴ In the case of the *ejido*, spatial and legal anti-commons overlap; the holder of rights over an individual parcel has both an inadequate access to the benefits of legal property and too little space to exercise these rights. One of the reasons behind the reforms of 1992 was precisely to stop the fragmentation of agrarian land. This fragmentation occurred mainly because of two reasons: 1) since there was less overall land

³⁰⁴ Heller, *supra* note 297 at 651.

available in the country, new *ejidos* were allotted with less arable land that later had to be distributed to too many people and; 2) in *ejidos* already constituted, even if *ejido* rights are not divisible, many *ejidatarios* would formally transmit the rights to one of their children but would arrange for siblings to share smaller portions of land.³⁰⁵ This complicated agreements to associate with other *ejidatarios* and with people outside of the *ejido*, because there were just too many interests on very small pieces of land.

This leads us to the final considerations about the anti-commons features of the *ejido* and their impact on the political rights of *ejidatarios*. Heller noted that, in the Russian case, if the owners of an anti-commons asset perceived that the economic and political environment was too unstable, they would still prefer to keep their rights over the asset to use them “as leverage in political battles rather than in economic markets.”³⁰⁶ In this case, the political use of anti-common property may encourage an owner or user in this regime to hold on to his rights, either because the political instability allows him to give those rights a wider use than that he would get from private property, or because the political instability may create an opportunity to acquire full rights through corrupt mechanisms. In the case of Atenco, the situation was similar in the sense that the *ejidatarios* had a reason to believe that the government was being corrupt and not paying them

³⁰⁵ Krantz, *supra* note 203 at 207.

³⁰⁶ *Ibid* at 657.

their fair share for the land (which was later confirmed when the government tacitly acknowledged that the payment was unfair.)³⁰⁷ In fact, it is probably safe to assume that had the compensation been perceived as fair, the project would have had higher chances to succeed. The conflict originated mainly because of the low compensation amount and later became radicalized and infiltrated by interests foreign to the *ejido*.

5. The Effects of Fragmented Property Rights on the Decision-Making Process

A serious analysis of the resistance to the airport project in Atenco has to take into consideration the legal and socio-economic circumstances in which most *ejidatarios* found themselves. These sets of conditions, that are going to be discussed next, made the value of the land higher than what the government could possibly offer in monetary terms. “Socio-economic” circumstances, however, is a very broad term. In this section, I will concentrate on the second part of the term, that is, on the economic conditions using the lens that the previous discussion gave us. The next chapter will take the first part of the term, that is, I will analyze the social effects of the re-distributional policies of the

³⁰⁷ That the compensation amount was very low was recognized, in fact, by all level of governments. See, Enrique I. Gómez, “Abogará Montiel por mejor indemnización” *Reforma* (29 October 2001), online: Grupo Reforma <<http://www.reforma.com>> and Juan Arvizu Arriola, “Pagarán a *ejidatarios* 500 mil por hectárea” *El Universal* (23 July 2002), online: El Universal <<http://www.eluniversal.com.mx>>.

Mexican government. Now, although the economic effects of the *ejido* regime are not the same for everyone within the *ejido*, both the fact of “compactness”³⁰⁸ and the anti-commons dynamics had an effect in deciding whether to support the government offer or not. The *ejidatarios*, and in this sentence I mean *ejidatarios* as the sum of individual *ejidatarios* and not as an undifferentiated group, faced the very difficult task of deciding whether or not the project was beneficial for them. There are several reasons to consider this decision difficult: 1) the land was not only an economic asset but also part of their history and identity and/or of the rest of the *ejidatarios*; 2) the cost-benefit analysis had to take into consideration that the use of the *ejido* land, even the individual parcels, was dependent on the informal ties that were created within the *ejido*, and that pushing too hard for an economic advantage selling it, if this deal did not happen because of the political instability, could harm the chances of turning the land into a productive asset afterwards; 3) the opportunities outside of the *ejido*, where not all the *ejidatarios* had developed informal ties, were uncertain given the distrust in the government and the legal procedures; 4) the amount of political power that some *ejidatarios* had gained within the *ejido* thanks to their property could probably not be replicated outside of the *ejido* with the amount of money that they would receive, and finally; 5) the assembly, where each *ejidatario* had to

³⁰⁸ See section 3 of this chapter for more information on this term.

express his or her opinion about whether or not to support the airport project did not really represent all the *ejidatarios* (in fact, it was heavily perceived as an extension of the state-municipal PRI-dominated power structure) and was made irrelevant by the movement of Del Valle who made himself a de facto authority. In what follows, I will explain these reasons and how they relate to the anti-commons features of the *ejido*.

As discussed previously in this chapter, the *ejido* had become a part of the identity of many of the *ejidatarios* in Atenco by their own admission. However, I have argued that this sense of identity did not come from cultural or ethnic reasons but by government policies. But once the dynamic of identifying a group with a piece of land and a particular way of life (that of a peasant), it becomes difficult to modify it, even by the members of the group, without being seen as a “traitor” or someone who has abandoned his or her “true” self in exchange for material compensation.³⁰⁹ The *ejidatarios* that have certain “individual” ownership rights are forced to take into consideration that their use is subject to the interests of people who, in principle, have no say over those rights in particular and who have an interest to positivize the peasant identity in order to facilitate the control over resources that legally belong to someone else. In the old regime, this

³⁰⁹ This justified, in the eyes of some *ejidatarios* the punishments inflicted on those who were supporting the airport project. These punishments could be as radical as charging more to the supporters of the project to bury their loved ones. This extra-charge reached such proportions that the price prevented the sympathizers of the project from burying their dead. See, Inhumar, *supra* note 120.

feature was useful as a control mechanism of the *ejidatarios*. The assembly was being controlled by the PRI-regime power structure and those who did not follow “their leader’s” instructions could be considered to be harming their own cause; calls for brotherhood among people who in principle share the same goals and resources can easily resonate. What changed after the 2000 democratic transition at the federal level, however, was that the interests of the previously homogenous power structure were split between the interests of the federation and those at very different levels of governmental and non-governmental power structures. There was a fight to define the appropriate interpretation of what being an “*ejidatario*” meant. This would not be a conflict if it were not because the *ejido* lacked the appropriate representation mechanisms to discuss these issues in the public arena, and because the *ejidatarios* lacked the appropriate locus of self-determination to use their own resources to advance their interests in the private sphere.

Along with the notion that property within the *ejido* does not really “belong” to the owner, because it has a communal significance, the lack of a proper distribution of ownership rights forces *ejidatarios* to use their property through the consent of a network of informal relationships. In the last chapter, I addressed how the fragmentation of property rights, in the *ejido* context, diminished the ability to use property effectively when the property finds itself in a communal

setting. This is because the uncertainty produced by the fragmentation of ownership rights creates, in turn, alternative legitimate claims over the property. The legal and de facto anti-commons features affect even what could be considered in the *ejido* as individual property. These two circumstances, plus the legal and social isolation of the *ejido*, make informal relations very important to be able to use property effectively. On many occasions *ejidatarios* have to rely on each other, and only each other, to make the land productive, particularly since the *ejido* stopped being a priority of the federal political system.³¹⁰ In the case of Atenco, however, the costs of open confrontations seemed even stronger as the most basic rights and freedoms (such as freedom of expression or political rights, such as voting) were suspended by a group who was able to capture the *ejido* of Atenco, while the authorities were uncertain of their jurisdiction and preferred to avoid political costs.

This last fact also reveals the weak and uncertain position of the *ejidatarios* outside of the *ejido*. *Ejidatarios* that had strong ties with the political structure outside of the *ejido* were not only more likely to exert control inside the *ejido* but were probably also more able to take advantage of the economic opportunities obtained from the government's compensation. Since this group

³¹⁰ As explained in the first two chapters, the federal government created several programs to support the *ejidos*. These programs reflected the particular views of the respective president in turn, but in general there was a concern to make the *ejido* regime work. However after the modernization policies started in the Presidency of Miguel de la Madrid, and were continued and strengthened by President Carlos Salinas, the *ejido* no longer figured as part of modern Mexico.

also controlled the official bodies of representation of the *ejido*, these *ejidatarios* were more in touch with the authorities, more likely to trust them and to negotiate their interests with them. The fact that other *ejidatarios* did not have close contact with the official authorities, which were, furthermore, perceived to support just one faction within the *ejido*, made negotiations very difficult for the government: there was no unified voice in the *ejido* and no proper channel to communicate with the rest of the *ejidatarios* since the authorities of the *ejido* were perceived as factious. Furthermore, the typical *ejidatario* is isolated from the rest of society politically (since his most immediate environment is controlled by the assembly and the role of other jurisdictions is not clear) and economically (since the *ejidatario* has many obstacles to use his property outside of the *ejido*). Many were concerned that any amount of money was not going to be sufficient because they had little knowledge of life outside of the *ejido*. This made them more likely to lose everything; history had showed them that it had happened on many occasions, and there was no reason to believe that this time was going to be any different. The creation of the *ejido* reflected this reality, and after more than 90 years many *ejidatarios* felt that few things had changed.³¹¹

³¹¹ Some *ejidatarios* expressed this idea to the media saying that money did not guarantee them a “life”; uncertainty about their place outside of the *ejido* therefore devalued the compensation money. See, Alejandro Almazán, “Temen represión en Atenco” *El Universal* (25 October 2001), online: El Universal <<http://www.eluniversal.com.mx>>. Other *ejidatarios*, for instance, expressed their concerns to the authorities that the government was hiding the true costs and benefits of the airport project. This revealed uncertainty about their future and the need to know exactly what the result was going to be. See, Juan Lázaro, “Rechazan *ejidatarios* aeropuerto en Texcoco” *El Universal* (03 June 2001), online: El Universal <<http://www.eluniversal.com.mx>>. Finally, Nuijten explains in her study how attachment to the land

The Del Valle group, which was able to capture the entire *ejido* institutions, revealed the isolation of the *ejido* since the *ejidatarios* had little resources against the excesses of this group. The rebellious group was able to claim autonomy due to its “indigenous” roots to the land and to the fact that the authorities were uncertain about how to proceed since upholding the rule of law could have had dramatic consequences because: 1) the authorities were uncertain about what their proper role within the *ejido* was, and; 2) the authorities lacked legitimacy since they were still perceived as factious in spite of the democratic transition. The amount of power that Del Valle and his followers acquired within the *ejido* could hardly ever be replicated to such extent in bigger power structures, such as the municipality or the state level (although they did try to extend their influence). This complicated negotiations with the government since no amount of money that the government could have reasonably give them would have allowed them to acquire so much power. In addition, outside groups saw in Atenco a space in which to play their own power struggles with the legally constituted authorities. The *ejidatarios* were pawns in these power struggles having to pay dearly even for expressing their opinions if they were not in tune with those of Del Valle’s group.

diminished as the *ejidatario*, with or without land, acquires different sources of revenue and has left the *ejido*, or even the country, and proved himself or herself to be successful outside of the *ejido*. *Ejido* land can be considered as an insurance against bad luck outside of the *ejido*; the conflict in Atenco reveals the same dynamics. Nuijten, *supra* note 206 at 86.

It is hard to understand why the movement in Atenco was considered “popular” and democratic by a portion of society.³¹² There needs to be more analysis on the negative consequences of fragmenting property and not simply assume that the legal and political isolation of the *ejido* have protected the rights of *ejidatarios* to self-determination.³¹³ This could not be further from the truth since the *ejidatarios* lack a neutral place where to form and revise their conceptions of the good since their immediate needs have to be negotiated with their fellows *ejidatarios*, sometimes under very unequal conditions. The above description hints that at least part of the problem lies in adopting pre-fabricated narratives without empirical, or even logical, examination. In the next chapter, I will explain how this dynamic has created, in effect, a subclass of citizens who do not benefit from all the rights and freedoms that the Mexican Constitution is supposed to give to every Mexican. The next chapter will, thus, take to task some of the theoretical foundations of these pre-fabricated narratives, in particular those that champion the legitimacy of spontaneous or “natural” governance mechanisms.

³¹² See e.g., Rosario Ibarra, “Dramática injusticia en San Salvador Atenco” *El Universal* (16 July 2002) online: *El Universal* <<http://www.eluniversal.com.mx>>; Gerardo Unzueta, “En Atenco, legítima acción de autodefensa” *El Universal* (20 July 2002) online: *El Universal* <<http://www.eluniversal.com.mx>>; and, Alcaya, *supra* note 277.

³¹³ Alcaya, *supra* note 277 at 31. See also, Humberto Padgett, “Insisten en su autonomía” *El Universal* (09 August 2002) online: *El Universal* <<http://www.eluniversal.com.mx>>.

Chapter VI

Redefining the Bell Jar: The *Ejido*-Citizen and the Limits of Redistribution

In the last four chapters, I have described a series of circumstances that could hardly be explained by a single source of injustice. The first chapter described the series of historic events that led to the creation of the *ejido*. The second chapter offered a snapshot of what has become of the *ejido* and the resulting power dynamics. The third chapter provided a legal analysis of the *ejido* to show the extent to which these power struggles have affected the corresponding legal regime. Finally, the fourth chapter challenged the notion that the *ejido* provides an adequate place for self-determination as claimed by the left in Mexico.³¹⁴ Although after reading the first chapter we would be tempted to conclude that “bad government” is the culprit of all the problems in the *ejido*, the second and third chapters describe a situation where the abuse does not only come from government officials but also from “the people” themselves; those with more power abuse it in order to oppress those with less power. As for the *ejido* itself, although eventually the government managed to significantly reduce the number of landless people, this outcome was far from being a permanent

³¹⁴ See chapter 4.V.

solution. Furthermore, the *ejido* created new problems. These different scenarios demonstrate the limits of redistribution as a sole approach to meet justice claims and the need to move to an alternative solution to confront problems of deep social, economic, and political inequality.

Before talking about solutions, however, it is necessary to locate where it is that redistribution, as a sole policy to remedy inequality, fails in the case of the *ejido*. To do this, this chapter will re-conceptualize how power relations are commonly understood to function in the law and development literature. In particular, this chapter will examine the work of Hernando de Soto, using de Soto as a representative of policymakers who argue for greater liberalization of economic assets. In this regard, this chapter will focus on de Soto's emphasis of the "impersonal" nature of the legal framework that facilitates the flow of information of property and the "social contract" that supports property in informal systems.

1. Inverting de Soto's Analysis

Before examining the details of de Soto's theory, it is important to justify its use since it mainly focuses on informal types of property. Property is considered irregular or informal as the result of it not being regulated or even recognized by

law. In the case of the *ejido*, however, we are talking about property that I have been describing as having exactly the opposite problem, that is, too much regulation. So, why use of de Soto when analyzing the *ejido*? The first and most obvious response is that de Soto's emphasis on the need to eliminate red tape resonates as a proper response to the complex legal framework of the *ejido* regardless if the red tape affects formal or informal property. In the end, red tape blocks people from getting "inside" the bell jar. And even if de Soto's thesis has come under criticism for some dubious claims,³¹⁵ his approach of reducing the costs of transitioning to a more effective property regime is appealing even if it does not provide all of the far reaching results that de Soto envisions. Indeed, there is something inherently appealing in creating the proper conditions for people to make the best use of their resources. Finally, de Soto's call to pay attention to how people understand their property and how they manage to obtain gains (as small as they might be), in spite of the regulatory hurdles, is a relevant issue for this study since, as already shown, the *ejido* has people who strongly believe that the *ejido* is or could become an asset for economic progress. Given that the land is not held irregularly, we avoid the complications of justifying the potential taking of land that already has other owners or of encouraging land invasions.³¹⁶

³¹⁵ Heather Bourbeau, "Property Wrongs" *Foreign Policy* 127 (November-December 2001) 78. [Bourbeau]

³¹⁶ See e.g. Carol. M Rose, "Invasions, Innovation, Environment" in D. Benjamin Barros ed, *Hernando de*

While these issues will be studied in this chapter, a final preliminary remark explaining the use of de Soto analysis is necessary since there are significant differences between his approach and mine. De Soto begins his account with the idea that culture is not responsible for the success of capitalism.³¹⁷ De Soto's interest here is to reject essentialist arguments that point to the insurmountable incompatibility of capitalism with certain cultures that would discourage even thinking of incorporating some poor societies to economic progress. Putting aside the argument that there are, in fact, cultures that are incompatible with capitalism,³¹⁸ de Soto's rush to part ways with fatalistic arguments made him lose sight of the kind of culture-like dynamics that take place in society and that could help explain, at least in part, pockets of poverty. Although a complete account of the nature of culture is not the aim of this project, it is necessary to take a short detour to explain what is it about culture that de Soto ignored when he put it aside and why it is relevant to bring it back. The purpose of the following comments is not to generate a definitive definition of culture, but to clarify how this study will make use of the concept.

The word culture is typically used without stopping to discuss to what it is that we are referring. For instance, why is it that red tape is not seen as a

Soto and Property in a Market Economy (Burlington, Vt.: Ashgate, 2010) 21. [M. Rose]

³¹⁷ Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000) at 4. [De Soto, *Mystery*]

³¹⁸ See, M. Rose, *supra* note 316 at 30-34 and Bourbeau, *supra* note 315 at 79.

reflection of culture? Part of the answer to this, in particular regarding de Soto, is because whatever happens in government is seen as happening in a “small” organization (small at least in comparison to the rest of society), whereas what happens “in society” (outside of government) is seen as reflective of the true culture of the country.³¹⁹ However, this way of thinking is a gross simplification of the dynamics of culture. A type of government cannot be explained without taking into consideration the dynamics that occur in society which in turn are shaped by culture. This is the case even while analyzing despotic governments since a government is considered despotic when it does not respond to the expectations its citizens. The reasons that such governments win power and can function explain something about society even if that something is not positive. One of the things that could be explained by a functional despotic government is a divided society that allows the government to gain supporters from people in different circumstances or with different values.³²⁰ Treating government as an entity isolated from the people that it governs is a misguided approach because it does not explain how the government is able to function.

How are these remarks relevant to de Soto’s analysis? If I am correct in this interpretation, then it does become necessary to analyze culture in order to

³¹⁹ In one revealing passage, de Soto notes that those using the formal legal system are only “elites” whereas where people actually live (outside of the proverbial bell jar) people use extra legal arrangements. De Soto, *Mystery*, *supra* note 317 at 156.

³²⁰ John R. Searle, “Social Ontology and Political Power” in Barry Smith, David M. Mark & Isaac Ehrlich, eds, *The Mystery of Capital and the Construction of Social Reality* (Peru, Ills.: Carus, 2008) 19 at 28-30 [Searle].

understand what type of policies the government takes regarding property. Secondly, de Soto's notion of the bell jar as composed solely of laws and administrative procedures that keep elites and disadvantaged groups separate is an inversion of the actual power dynamics that take place in society which later find expression in law. Finally, de Soto's recipe of validating "popular conventions" regarding property arrangements are doomed to fail if we simply assume that they reflect a proper power balance within a given community. In this chapter, I will take these three different issues in turn and, later, I will explain why they reflect the folly of focusing solely on redistributive policies. First, I will return to the previous discussion of using de Soto in the *ejido* context given that de Soto's main concern was to incorporate the informal economy into the formal one.

De Soto's analysis is far-reaching and influential even though some of his arguments – and even some of the facts that he uses – have received intense criticism.³²¹ Likewise, de Soto remains influential even though arguing that an efficient system of property rights is fundamental for economic development was hardly a new idea.³²² It is useful to try to identify why de Soto's approach has been so captivating and yet so controversial. At least part of the he answer is that

³²¹ See the discussion at the beginning of this chapter.

³²² Robert Home, "Outside de Soto's Bell Jar: Colonial/Postcolonial Land Law and the Exclusion of the Peri-Urban Poor" in Robert Home & Hilary Lim, eds, *Demystifying the Mystery of Capital: Land Tenure and Poverty in Africa and the Caribbean* (Portland, Or.: Cavendish, 2004) 11 at 12.

there has been very little attention given to de Soto's theoretical framework, which is much more than a recipe of simple laws and efficient mechanisms. De Soto's most original contribution is to see property documentation as representations used to establish trustworthy and effective communication vis-à-vis an asset in a legal framework. A formal property title is a representation of: 1) certainty of the validity of ownership; 2) certainty of the unencumbered status of the property; 3) certainty of the characteristics of the property; and 4) certainty about the exchangeability of the asset. On the other hand, this piece of paper allows people to effectively make agreements that do not rely on informal relations but rather on "the impersonal context of law."³²³ People engaging in these transactions rely on the legal and institutional framework that is presupposed by the legal title, rather than on the impressions that each has of the other, thus facilitating the easy movement of assets.

The idea that de Soto's thesis is mainly about the formalization of land ownership is erroneous. In fact, de Soto's thesis is mainly about the empowerment of people to use and accumulate wealth. Thus, the way to empower people is to create the conditions so that the property of the worse-off has the same worth and capacity to create surplus value as that of the most-advantaged. It is, in essence, a discourse about equality, at least in economic

³²³ De Soto, *Mystery*, *supra* note 317 at 54.

terms. The law is the mechanism that allows the empowerment of people by, ironically, decontextualizing informal property and putting it at the same standing as that of any other piece of property. A land title presupposes a robust institutional system that makes it relevant retrospectively, when dealing with issues of validity, and prospectively, when dealing with actual and potential transactions.

2. The destructive effect of the *ejido* on culture

Can the law decontextualize property? No, it cannot. The first and most obvious reason is because, if de Soto thinks, and it can hardly be disputed, that law is a social construction, then the idea that law can decontextualize property is nonsensical. Law depends on context to have meaning. Explaining the last sentence requires that we analyze the basic elements in de Soto's theory: culture, law, and the concept of social contract. I began this chapter disagreeing with de Soto's prompt dismissal of culture as a factor for lack of economic development. That the culture of countries with high development is not the same does not mean that there is nothing to learn by analyzing what culture could bring to a study that relies so heavily on representations and communication as de Soto's. For this purpose, I define culture not as "a historic way of being" but, as

Kymlicka does, which is as the context that gives meaning to people's choices.³²⁴

In this regard, Kymlicka explains that changing a historic way of being, for instance from vilifying the union of same-sex partners to recognizing these unions as an acceptable social behavior, does not imply a loss of culture, but simply the building of a new cultural structure.³²⁵ There are two important corollaries for this study: 1) culture is constructed by people's choices and, in turn, those choices help explain future choices; and 2) there is a hegemonic cultural framework when it manages to limit the number or scope of minority (in number or strength) cultural groups' choices. I will link these two ideas with de Soto's conception of the bell jar and with his idea of the social contract.

First, however, this section will explain Kymlicka's description of culture and how it applies in the *ejido* context. In the last chapter, I argued that the *ejido* is not responsive to any specific indigenous cultural structure. There were mainly three reasons for this: 1) the *ejido*, as currently constituted, is a political regime created by the government and not an indigenous creation; 2) the *ejido* does not cater, nor does it respond to any specific culture, and it is shaped by certain regulations that apply across the board; and 3) most *ejidatarios* themselves identify more with a "peasant" culture rather than with a particular pre-Hispanic indigenous culture as the rhetoric coming from the group opposing the airport

³²⁴ Kymlicka, *supra* note 281 at 166 -167.

³²⁵ *Ibid* at 169.

implied.³²⁶ In what follows, I expand on this notion of the *ejido* as not culturally responsive. Furthermore, I examine the *ejido* as a regime that destroys the context in which to make meaningful choices.

The political dynamics within the *ejido*, which have been evolving for more than 90 years since its first formal appearance in the legislation, do provide a context for people's choice. Accordingly, the first question to explore is why to consider the *ejido* as not culturally responsive. The answer lies in defining what making a choice actually means. If someone said to you "your wallet or your life" you would be making a choice regardless if you chose to hand over your wallet or if you resisted. However, as Dan-Cohen explains, to consider this scenario as an authentic choice could only make sense in pure rational choice terms in which the important thing is to have a set of options and go through a more or less rational way about selecting one of them.³²⁷ But this situation could hardly be considered a "meaningful" choice, as Kymlicka requires in his approach to culture. Indeed, for Kymlicka, cultural membership is "important in pursuing our essential interest in leading a good life, and so consideration of that membership is an important part of having equal consideration for the interests of each

³²⁶ It was explained that the issue of self-identifying themselves as indigenous people really only occurred after the conflict started as a rhetorical weapon in a political struggle. The idea was that the land was part of their indigenous culture and that it could not be taken without doing an irreparable harm. As discussed in the second chapter, however, the community was divided and a majority of the *ejido* assemblies had accepted the airport project. Atenco did not approve the construction of the airport but their internal political structure was captured by a very vocal and, in some respects, violent group that managed to silence other voices and close neutral forums of communication. See also, Hobsbawm, *supra* note 283.

³²⁷ Meir Dan-Cohen, *Harmful Thoughts: Essays on Law, Self, and Morality* (Princeton, NJ.: Princeton University Press, 2002) at 126. [Dan-Cohen]

member of the community.”³²⁸ To be meaningful then, a choice would have to be made within the context of the person’s notion of the good life which, in turn, has to be reconciled with that of others.

So, cultural membership is important because it gives meaning to our conceptions of the good life and not the other way around. In other words, our conceptions of the good create culture. Each individual chooses an end that is consistent with his or her own relation to a particular context. Thus, protecting cultural membership requires equal consideration to the way in which each member is affected by the choices of others in order to prevent the choices of some to override the possibility of making different choices by others. An approach to culture with the individual at its base does not imply isolation; on the contrary, it is constructed with a series of meaningful interactions with other members of the community. These interactions are meaningful because they reflect the balance that the community strives for between having a “viable community of individuals with shared heritage” and the respect to each person’s conception of how that balance should look.

Culture and Political Rights

³²⁸ Kymlicka, *supra* note 281 at 168.

I have adopted Kymlicka's definition of culture because I find his arguments persuasive and illuminating. Still, I must address that this same definition of culture leads Kymlicka to support limiting political rights of members and non-members of the cultural unit to preserve its viability. This limitation is in stark contrast to what I will conclude, but I will address it here first. Foremost, it is important to recall that Kymlicka refers specifically to the relation between "Indians" and "non-Indians."³²⁹ I have been making the case that this sort of "thick" ethnic and cultural difference is not present in the conflict in Atenco, nor is it generally an aspect of the *ejido* in Mexico. However, if we analyze the reason to support the limitation of political rights in order to protect the "cultural structure," we find Kymlicka arguing that cultural membership is related to self-respect and that, therefore, it is a primary good in Rawlsian terms.³³⁰ Cultural membership as a primary good leads us to conclude that regardless of the source, culture is important for all individuals. Kymlicka argues, again following Rawls, that people should not be penalized for circumstances which they did not choose and he distinguishes between special rights claims grounded on "differential choices" and rights grounded on "unequal circumstances."³³¹

Here, Kymlicka's argument becomes problematic. If, for Kymlicka, a person who cultivates a taste for expensive wine is not entitled to special rights

³²⁹ *Ibid* at 146.

³³⁰ *Ibid* at 166.

³³¹ *Ibid* at 186.

because she is responsible for the cost of her choice,³³² in what sense is anyone not responsible for their tastes if we have already established that all conceptions of the good are valuable precisely because they are an expression of people's choices? Kymlicka goes on to contrast the taste for expensive wine with the need for expensive medicine due to a natural disability. This example is not consistent with his previous argument since comparing culture with a natural disability implies that there is no choice in shaping one's culture.

Kymlicka uses Dworkin's distributional justice scheme as an additional argument to support his claim. In this argument, the low number of aboriginal people places them at a disadvantage vis-à-vis the majority who may adopt policies that prevent the minority from making their own choices or destroying their "cultural structure."³³³ This argument has the same deficiency as the previous one, that is, if we imagine ourselves in an ahistorical scenario (as Rawls and Dworkin's justice theories ask us to do) where we take seriously the importance of culture as a context of choice, then we would not only create an "insurance" mechanism in case we happen to be an ethnic minority, but also if we belong to a minority in terms of language, religion, occupation, social class, philosophy, and other tastes that we would imagine to be as important as being the member of an ethnic minority. The first comment is, again, that if what

³³² *Ibid.*

³³³ *Ibid* at 189.

matters is to protect culture as a basis for self-respect for individuals the same consideration should be given to all manifestations of culture. To the argument that cultural traits that are considered to be prior to individual choices have more weight than those acquired during the course of our lives, the response is that this argument is contrary to the idea of culture as a relational trait and not as constitutive of the self. All cultural manifestations express our relation to our environment regardless of the stage in our lives in which we acquire them; it is our daily practicing of those traits, and not their *a priori* standing, what makes them worthy of consideration.

The second comment has to do with the value of protecting the cultural context of choice in institutional terms rather than protecting a particular cultural expression. Analyzing this argument finally takes us back to the initial concern of limiting political rights in the name of culture. Kymlicka explains that a child born in a, let us call it, culturally distinct community would not have a place to make meaningful choices if people from outside the community are not restricted in their political rights (including the right to enter the community in the first place). He goes on to claim that this is a unique threat to her cultural environment that neither French nor English Canadians, for instance, face.³³⁴ This argument only makes sense if we understand culture precisely the way that Kymlicka asks us

³³⁴ *Ibid.*

no to, that is, as a historical way of being. Otherwise, Kymlicka would have to acknowledge the incompatibility of the notion that there is no such thing as “culture” independent of how the person interprets it to be and the restriction of the political liberties that make such interpretation meaningful. It is true that certain choices become more or less available to us depending on the historic moment in which we find ourselves but this is a universal fact. The concern that this range of options is being set by “outsiders” begs the question of how would it be any better if the limitations came from “insiders.” This would imply that the insiders have the same intrinsic cultural traits that are “natural” for this people and hence for the child as well even though she has not made any choices herself. The problem is not if outsiders or insiders are shaping our range of choices, to some extent both do and this happens all the time; the real issue to analyze is if there is the institutional framework necessary so that the process to procure these changes gives the proper respect to everyone’s rights and opinions. In the case of Atenco, for instance, and whichever group prevailed over the other, the result had consequences on the choices of future generations. Is what matters that the decision was made by “insiders” regardless of how the decision was made?

Kymlicka explicitly warns us to be mindful of partisan groups that use culture to entrench their vision of the “character” of the community.³³⁵ By this Kymlicka means that his concern for the stability of the cultural structure should not be interpreted as arguing for culturally distinct communities to adopt one and only one cultural expression. Making a clear distinction between culture as a context of choice and the specific cultural expressions that the structure produces is a very difficult task (to say the least). However, Kymlicka goes on to minimize the number of instances when the restriction of political liberties becomes too burdensome.³³⁶ In a more recent work, Kymlicka again dismissed the relevance of instances of internal oppression in the name of culture and further argued that illiberal practices exist regardless of multicultural policies. Finally, Kymlicka makes the case that multicultural policies enhance “both the gravitational pull of liberal values and the capacity of state institutions to effectively protect these values within minority communities.”³³⁷

Thus, Kymlicka’s later work does make a stronger case for a “liberal view [that] requires *freedom within* the minority group, and *equality between* the minority and majority groups.”³³⁸ This more careful examination of the type of internal processes that define what culture is comes at the expense of giving a

³³⁵ *Ibid* at 168.

³³⁶ *Ibid* at 198.

³³⁷ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007) at 139. [Kymlicka, *Odysseys*]

³³⁸ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995) at 153[emphasis in original]. [Kymlicka, *Multicultural*]

more limited definition of culture. Indeed, after rejecting some concepts of culture as over or under-inclusive he states, “I am using ‘a culture’ as synonymous with ‘a nation’ or ‘a people’ –that is, as an intergenerational community, more or less institutionally complete, occupying a given territory or homeland sharing a distinct language and history.”³³⁹ Although Kymlicka now seems to oppose the restrictions of political rights of members within culturally distinct communities that he previously tolerated, his move to equate culture with nations or peoples is too restrictive for the working definition that I develop for this study. Furthermore, I find Kymlicka’s new position incompatible with his previous rejection of the concept of culture as a historical way of being.

Thus, Kymlicka solves the problem of distinguishing the “cultural structure” from the particular cultural expressions that it produces by, essentially, making them one and the same. However, whereas it is undeniable that there is a strong relation between culture and forms of human organization, these are going to be kept separate in this study if only for heuristic purposes. I will stay closer to Kymlicka’s initial definition of culture as a context of choice which can be a nation, yes, but also the workplace, the community (even if recently formed and not “historical” in Kymlicka’s sense), social class, or, as in our case, a particular form of organization based on the use of resources. In this particular aspect of

³³⁹ *Ibid* at 18.

the relation between culture and social organization my approach is closer to that of Iris M. Young who cautions against the idea of an essential group identity. Indeed, Young stresses that “[t]he most important criticism of the idea of an essential group identity that members share, however, concerns its apparent denial of differentiation within and across groups. Everyone relates to a plurality of social groups; every social group has other social groups cutting across it.”³⁴⁰ Thus, I recognize the *ejido* as a space that should provide its inhabitants with the proper tools and contextual information to make meaningful choices, but I will strongly argue against essentializing the type of identity dynamics that it creates.

Most of this discussion will have a more concrete expression as we deepen our study of the *ejido*; there is, however, one more issue to analyze before proceeding. Kymlicka has the right intuition, as there is something that smacks of unfairness if we allow decisions made within a certain community to be determined by people who do not inhabit that community. I take this concern seriously, but I do not think that this is a problem that should be defined in cultural terms or by identity politics. First, and again using Young’s theoretical insights, it is important to clarify that my use of culture does not diminish the importance of institutions of formal representation and that this applies even to

³⁴⁰ Iris M. Young, *Inclusion and Democracy* (New York: Oxford University Press, 2000) at 88 [Young, *Inclusion*].

small political units.³⁴¹ In this regard, a particular unit cannot claim that because of the nature of its political process it represents the cultural understandings of all of its members. All that can be concluded is that certain political processes enacted by the political leader(s) in a particular unit produced a certain outcome. What cannot be concluded is that this outcome represents the “essence” or true interpretation of culture for each and every member of the unit. The level of legitimacy of the outcome is determined by the decision-making process itself and how accurately this process took into account the different voices within the unit. Although far from creating a perfect distinction between the “cultural structure” and particular cultural expressions, we acknowledge that the decision-making process of a unit can never claim to represent the essence of its members. Furthermore, this approach clarifies that decision-making processes and governing units are only one expression of the “cultural structure” and not necessarily the most important ones. Accordingly, governing units cannot accurately claim to offer a comprehensive definition what culture means.

Culture, in this approach, is ubiquitous but, because of that same reason, it is impossible to be completely determined in any one instance and can only be approximated through a collage of human expressions, some of them contradictory among themselves. If culture does not constitute the members of a

³⁴¹ *Ibid* at 125.

political community, it is the political process and an understanding of the necessity to consider everyone as free and equal that defines the actors in the decision-making process. This is not a constitution that defines them “all the way through,” but one that recognizes that the level and quality of political participation of community members is defined by political, usually structural, decisions and not determined by any sort of *a priori* justification. This is a concept that I will develop in the rest of the study and in particular in chapter VII where I argue that there has been too much emphasis on the idea of community as an anthropomorphized entity obscuring the role of governance.³⁴²

The second important comment regarding the power of decision-making in communities is that the reason that non-members of cultural units should have limited political rights is not due to the “otherness” of outsiders. The reason is, rather, that decisions that primarily affect the quality of life of residents of a particular area require that those members have a bigger say than those who are only affected indirectly. Proper respect for a community, in this sense, does not translate into reifying it, but in recognizing it as one lens through which we can help explain the structural relations that develop within a political unit. These

³⁴² For R.A.W. Rhodes, “...*governance refers to self-organizing, interorganizational networks.*” [emphasis in original] Of particular interest for this study is that although these networks are not necessarily accountable to the state, “it [the state] can indirectly and imperfectly steer networks.” Thus, I consider governance not as a spontaneous or “natural” order but as the result of power struggles between competing “interorganizational networks.” R.A.W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Maidenhead, UK.: Open University Press, 1997) at 52-53. [Rhodes]

relations constitute an important basis for self-understanding and we recognize them as valuable for every member. Furthermore, as Young points out, if we understand communities in relational terms we are also in a better position to acknowledge the differences that the structure creates internally:

The positioning of individuals occurs through processes of communicative interaction in which persons identify one another as belonging to certain categories, as standing in specific relations to themselves or others, and enforce norms and expectations in relation to one another. While no individual is in exactly the same position as any other, agents are 'closer' or 'farther' from one another in their location with respect to the relations that structure that field. Agents who are similarly positioned experience similar constraints or enablement, particular modes of expression and affinity, in social relations.³⁴³

Understanding communities in this sense implies that whatever decision-making process takes place within a community should not be considered “natural” but constructed. Furthermore, if we recognize that what matters while making decisions is to give proper respect to all community members’ opinions and rights, then it follows that a simple “anything goes as long as it is endogenous” is not valid reasoning. For example, decisions that affect the quality

³⁴³ *Ibid* at 100.

of life of non-members (such as environmental issues) should take into consideration people outside the specific context of political choice.³⁴⁴

The Ejido as a Context of Choice

Therefore, to go back to the original question regarding the incompatibility of the *ejido* regime with the idea of a culturally distinct community, the reason for this incompatibility is, first, that the *ejido* is an expression of the hegemonic political interests that created it. This reason is external to the dynamics that take place within the *ejido* but they establish the first set of limitations to the meaningful choices that the *ejido*-citizen can make. Remember that we saw in the last chapter that the *ejido*'s first goal was to insulate a portion of the population that had been historically dispossessed from the rest of the population. From the start, one of the goals of the *ejido* was to keep its inhabitants severed from the rest of the population economically, socially, and legally. So, the *ejido* did emerge as a political unit but one where broader political dynamics took precedence over local ones. The inhabitants of the *ejido* were

³⁴⁴ I will come back to this notion in chapter VII, but for now I would like to stress that, as Young points out, the idea that local political processes sometimes have to take into consideration people outside of the political unit has as a corollary that regional institutions should create channels of communication with smaller political units. Indeed, she goes on to say that: "I argue that regional governance institutions can, and should, be designed so as to preserve or create neighborhood and town voice participation. The norms of differentiated solidarity can be applied by means of institutions of regional federalism that grant prima-facie value to local autonomy but require intergovernmental negotiation, mediation, joint planning, and regulation." *Ibid* at 198. See also Amartya Sen's notion of "open impartiality." Amartya Sen, *The Idea of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2009) [Sen, *Justice*] at 128-130.

deprived of a neutral place in which to engage in meaningful discussion as members of the larger political unit to which they belonged. All of their opinions were subsumed into the will of the assembly. One possible argument against this description is to say that the *ejido* provided the only place to make choices, as defective as it is, to a group of people who dispersed would not have counted at all. The assembly and the restrictiveness of its channels of communication were a simple way of protecting this place from outside influence. This, however, implies that what matters is nominal representation rather than actual representation. And to the argument that the assembly represents at least some of the interests of the individual *ejidatarios*, I have shown in previous chapters that the assembly, along with the other *ejido* governing bodies, do not respond to all the people who inhabit the *ejido*. First, only people with *ejido* rights have voice and vote, and second, the assembly is prone to capture by local *caciques*. Finally, the assembly remains an easy target for institutional capture by outside groups.

These problems show that the internal dynamics of the *ejido* that make it an unsuitable place for meaningful decision-making. Moreover, other negative internal dynamics emerge from the excessive fragmentation of property rights. As shown in chapter III, the fragmentation is so severe that it is sometimes very difficult to delimit who actually owns what and to what extent. Remember that

when analyzed under the lens of the bundle of rights theory the *ejido* only fully complied with one of the four of the “cardinal” features of the liberal conception of ownership (immunity from unreasonable expropriation). The other three features, the right to exclude, use, and the power to alienate, were dispersed *de jure* or *de facto* among the rest of the *ejidatarios*. This is another reason why de Soto’s analysis is helpful in this scenario, the *ejido* even though formally and legally constituted lacks certainty.

Finally, the lack of clarity in ownership in a proprietary political unit generates an environment in which the context of choice is subsumed under political calculations in a rigged game. The game is rigged because even though the promise of the *ejido* is to help empower individuals to participate meaningfully in society, in reality, the *ejido* entrenches the *status quo* in which the *ejidatario* is, *de jure*, a second-class citizen. As described in the Juchitán case, insular political units do not increase the political power of its members but, rather, they incentivize the development of *cacique*-style rule. In summary, the *ejido* does not provide a place where the *ejidatario* can make meaningful choices related to his most immediate environment (given the excessive fragmentation of property rights). In addition, the *ejido* also diminishes the ability of *ejidatarios* to make their voices heard outside of the *ejido* because of the political structure that the law created for the *ejido*.

Therefore, to say that the *ejido* is not culturally distinct is to say that the *ejido* is not a space where meaningful choices can be made. Furthermore, for many people it is not their choice to be in the *ejido*, and yet leaving the *ejido* comes with very high costs as discussed in the previous chapter. But, if the *ejido* is not culturally responsive, how is it that de Soto's dismissal of culture affects his analysis in this context?

3. The Bell Jar and the Social Contract

For de Soto, the most beneficial aspect of property is not its intrinsic value but its ability to produce more surplus value.³⁴⁵ The issue is not only that an asset has the capability of producing more value but it is necessary to *fix* it, that is, to entrench and institutionalize this dynamic. In order for property to have this function, de Soto argues that it is necessary to have a formal system of property law.³⁴⁶ What is needed, first of all, is a written representation of the economic and social capabilities of the asset.³⁴⁷ This document is the legal title and it is the vehicle through which the property navigates through the rest of the economy. Property, de Soto tells us, is not mainly about things, it is a concept that helps

³⁴⁵ This is the mystery of capital. De Soto, *Mystery*, *supra* note 317 at 42

³⁴⁶ *Ibid* at 50.

³⁴⁷ *Ibid* at 49.

people to communicate the social consensus of the economic use of assets.³⁴⁸

For de Soto, the formal system of property law liberates the asset from a network of informal relationships and its uncertainties, and allows it to enter the “impersonal” network of the law. What is relevant for our present study of the *ejido* is that if the *ejido* can truly be liberated from its informal context by proper legal representation, this would solve the problem of the *ejidatarios* since they could finally make use of their property. Such an outcome would remove the heavy burdens that have been discussed thus far and would mean that a legal reform succeeded in clearly defining what constitutes the boundaries of property and, correspondingly, eliminating the fuzziness of what is and what is not actually owned and by whom. The piece of land, now navigating free from the fate of its owner, could be more successful in the market than what the *ejidatario* could possibly accomplish on his or her own.

De Soto’s recipe, if effective, has several advantages. First, it helps us find a solution to the problem of distribution of power among the people in the circumstances that I have been describing. Remember that in the first chapter I discussed how a certain group of people have been historically dispossessed and abused by the power structure. Although initially those affected were indigenous populations who were singled out because of their ethnicity, now, in a

³⁴⁸ *Ibid* at 157.

country with 18 percent of the population below the poverty line, this is not the case.³⁴⁹ Poverty has a widespread effect across ethnicities. This fact, of course, does not deny that poverty does overwhelmingly affect indigenous populations.³⁵⁰ Nonetheless, this outcome seems to make de Soto's argument even stronger since providing legal title to poor people, indigenous or not, would seem to free them from their circumstances and empower them to use the property in the impersonal context of the law and thus avoid the informal power structures that abuse their privileged position.

The reason that a legal title is able to do so much, in de Soto's account, is because of the way that he identifies where the problem lies. The problem of poverty in certain countries, and the reason why the beneficial force of capitalism is not unleashed, is bad law.³⁵¹ For de Soto, law explains why some people are unable to use their property efficiently. Law constitutes a bell jar that keeps the elites inside enjoying progress and the poor outside unable to benefit from capitalism.³⁵² Law's job is to create the framework that permits a general

³⁴⁹ "Economic data from 2008" *Central Intelligence Agency*, online: CIA: The World Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html>>.

³⁵⁰ In fact, the World Bank has estimated that, in Mexico, the sole fact of being indigenous increases your chances of being poor by 25% when controlling other factors. Gillette Hall & Harry Anthony Patrinos, "Indigenous Peoples, Poverty and Human Development in Latin America: 1994-2004" *The World Bank*, online: The World Bank <http://siteresources.worldbank.org/INTLAC/Resources/FinalExecutiveSummary_Eng_May05.pdf> at 5. See also, Iván Guillermo González de Alba, "Poverty in Mexico from an Ethnic Perspective" (2010) 11:3 *Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People Centered Development* 449.

³⁵¹ De Soto, *Mystery*, *supra* note 317 at 158.

³⁵² *Ibid* at 156.

understanding, a unified social contract, regarding the different “social processes” that constitute property in these other social groups outside of the bell jar. It would seem that, for de Soto, each social group has its own bell jar, it is just that each one of these other bell jars are not constituted by law but by a network of informal local relationships that ties property to a very small context.³⁵³ People from other social contexts would not have any use for such a piece of property because, being from outside that particular bell jar, they know nothing about the characteristics of the property. The difference, then, between being inside an informal bell jar or a legal bell jar is that the later shares the same meaning as the broader economy with its financial institutions and commercial networks, whereas the informal bell jar only has meaning for its immediate surroundings.³⁵⁴ The result, according to de Soto, is that whatever is inside the informal bell jar becomes invisible for the broader economy.³⁵⁵

De Soto’s emphasis is not so much on the type of property rights presented in these different bell jars but in creating a framework where all these different regimes can communicate.³⁵⁶ The legal title is important insofar as it represents a sort of “passport” for the property to move across different social contexts.³⁵⁷ De Soto, in fact, is clear in that he is not looking for a uniform type of

³⁵³ *Ibid* at 163.

³⁵⁴ *Ibid* at 175.

³⁵⁵ *Ibid* at 32.

³⁵⁶ *Ibid* at 174.

³⁵⁷ Hernando de Soto, “What I Do, and How Philosophy Has Helped Me” in Barry Smith, David M. Mark

property right and that each approach to property inside the different social contexts should be respected.³⁵⁸ De Soto's interest is, rather, in "meta-rights," that is, in setting up a system that would allow people to represent their understanding of property in writing, a legal document, so that it becomes meaningful to people outside the specific context.³⁵⁹ This legal system is an institutional framework that gathers information that is fundamental to allow property to move freely. Law is, therefore, the universal language through which property moves across different social contexts.³⁶⁰

So, if law is the response to the problem of informality, the issue that de Soto analyzes, why is it that current law does not provide an adequate framework to allow the free flow of property? According to de Soto, the problem lies in the fact that current law is too complicated and bureaucratic.³⁶¹ These barriers keep poor people outside of the legal bell jar because poor people typically lack the means to overcome the challenges presented by bad law. Bad law, in turn, generates corruption, inefficiency, and high costs (in time and money) for those

& Isaac Ehrlich, eds, *The Mystery of Capital and the Construction of Social Reality* (Peru, Ills.: Carus, 2008) 1 at 3. [De Soto, Philosophy]

³⁵⁸ De Soto, *Mystery*, *supra* note 317 at 162.

³⁵⁹ *Ibid* at 106.

³⁶⁰ In this regard I disagree with those who, like David Lea, assert that de Soto argues against the plurality of property regimes. A more accurate way of interpretation, I believe, is to take into account that de Soto looks for a "meta-regime" that allows the plurality of different expressions of property to be compatible with each other so that all can participate in the market. Whether this is possible is a different question. See, David Lea, "Tully and de Soto on Uniformity and Diversity" (2002) 19:1 J. Appl Phil 55 at 59.

³⁶¹ De Soto, *Mystery*, *supra* note 317 at 154.

wanting to get inside the formal bell jar.³⁶² On the other hand, people inside the bell jar who benefit from the *status quo* have an interest in keeping formal property rights inaccessible for the poor. “[E]mancipating people from bad law is a political job,” de Soto tells us.³⁶³ Taken together, de Soto argues for two sorts of actions: 1) the creation of an efficient and inclusive property right system, if one did not exist; and 2) the empowerment of individuals to access this system.

Thus far, I have introduced a slightly different way of looking at de Soto’s analysis by defining the informal systems of property rights as bell jars in themselves. These informal bell jars are constituted not by law but by the so-called “social contract” have to recognize. Local communities, in turn, must administer property within the “contractual” boundaries set forth by these social contracts. Remember that for de Soto, property that is not properly regulated by law depends on informal agreements to function within the community. The informal bell jar serves as a way of keeping outsiders from acquiring property just as the legal bell jar keeps the poor outside of progress, to put it in de Soto’s terms. In what follows, I will argue for a broader redefinition of the bell jar metaphor by questioning the social contract account and the idea of the formal bell jar as purely constituted by law. However, first it is important to describe in

³⁶² *Ibid.*

³⁶³ *Ibid* at 158.

more detail the relation between the social contract and the concept of the bell jar.

For de Soto, in order to recognize the property rights of people in “informality” it is first necessary to recognize the conventions agreed upon in a particular community. If these conventions are not formalized in law or even a proper agreement, how are we to identify their terms? For de Soto, we have to pay attention not only to the way people behave but also to the type of “material trail” left by these arrangements. This material trail could be actual documents that people produce for each other or other tangible expressions of societal arrangements. Inspired by the ideas of John Searle,³⁶⁴ de Soto conceives property not as something established in law but as the agreement between people regarding how a piece of property should be managed. In this regard, it is meaningless to say that something is yours if there is no general agreement on this claim. In the informal sector, or the poorly regulated one in the *ejido* case, these agreements find expression in the local “social contract,” whereas in the formal sector the agreement find expression in law. However, in the *ejido* context, as discussed in chapter V, what we can find is *de facto* anti-commons dynamics that prevent “formal” property from transitioning to what de Soto conceives as a de-personalized context. As Heller pointed out, just making

³⁶⁴ De Soto, Philosophy, *supra* note 357 at 17.

formal changes does not decontextualize the piece of property. In fairness, de Soto is not unaware that formal law alone cannot change how people conceive their property, as demonstrated by his emphasis on “finding the law” in people’s behavior and on the plurality of understandings of the concept of property.³⁶⁵

For Searle, everything in the political realm, including property, is constructed by the shared experiences of a community. However, once these societal constructions are made we can make objective claims within this framework.³⁶⁶ *Grosso modo*, the reason, according to Searle, that we can make such durable and coherent constructions is because we are biologically capable of “collective intentionality” by assigning specific functions to objects or representations, creating “institutional facts,” and backing them up with the force of the state to make this agreement prevail over all others. All of the agreements regarding institutional facts are deontic, that is, “institutional facts are always matter of rights, duties, obligations, commitments, authorizations, requirements, permissions, and privileges,” and exist as long as the agreement exists.³⁶⁷ This account of the legitimacy of our political institutions draws a parallel between the formal way of conceiving property and the informal way, at least if we follow a de Soto-Searle reasoning process. The main difference between the two is the absence of a state in the informal sector, which is replaced by a sort of local

³⁶⁵ More on this in section 5 of this chapter.

³⁶⁶ Searle, *supra* note 320 at 21.

³⁶⁷ *Ibid* at 22-28.

authority, or “collective will.” In both cases, however, what constitutes property is the collective agreement, the “social contract,” that reflects the collective intentionality. This approach, I will argue, does not represent what has happened in the *ejido* context.

4. De Soto’s “Informality”

If we apply a de Soto-Searle analysis to the *ejido*, we could paint a picture where faced with a regulatory mess the *ejidatarios*, although not living in illegality, have uncertainty about their rights and turn to informal relations to protect their property. At the same time, this property becomes, for all intended purposes, invisible for the market since they are not allowed to sell it. The bell jar, as described by de Soto, is made of the laws that regulate the *ejido*, keeping it separate from the rest of the economy. In order to address this problem, the government created an option for *ejidatarios* to turn their individual parcels into private property. This solution would seem to comply with de Soto’s requirement that public policy does not force people to adopt a form of ownership that does not respect the local understanding of property. *Ejidatarios* who want to gain full ownership of their piece of land can do so and those who do not are under no obligation to follow this procedure. If de Soto’s theory was successful, those who

gained full ownership and inserted their property in the “rails” of the broader economy gained full access of the benefits of the market. And yet, things did not turn out that way. As we have seen, most *ejidatarios* chose not to convert their parcels into private property.³⁶⁸ Moreover, those who did convert their parcels did not become success stories.

So why is it that de Soto’s plan did not seem to have solved this problem? I provided a partial answer in the last chapter. First, the piece of land tends to be very small and outside of the *ejido* context has little economic impact. In addition, when the parcel is privatized, the anti-commons effect takes place preventing new owners from having the same kind of broad powers than an owner outside of the *ejido* would have. Secondly, the *ejido* carries more meaning than just being an economic asset; the *ejido* serves as a place where the *ejidatario* develops and expresses his peasant-identity. Finally, the *ejidatario* feels or is ill prepared to function outside of the *ejido* context. Remember, the *ejido* forces the *ejidatario* to socialize in a very small environment and diminishes his status as a citizen outside of the *ejido*.

Nonetheless, these points only explain part of the story. We must also ask, why “lifting” the bell jar did not solve these problems. Is it a matter of

³⁶⁸ While the vast majority of *ejidos* have gone through at least some of the PROCEDE stages to have their internal boundaries officially recognized, there was not a subsequent mass effort on part of the *ejidatarios* to privatize their property and those who have, had been reluctant to sell. In fact, according to Perramond, there seems to be many different outcomes in the *ejidos* after the reforms of 1992. Eric P. Perramond, “Rise, Fall, and Reconfiguration of the Mexican Ejido” (2008) 98:3 *The Geographical Review* 356 at 364, 366.

simplifying the laws even further? The answer lies in the way that the problem is analyzed, that is, as a bell jar constituted only by laws which are the product of this almost alien entity called the state. Above, I argued that we should view the local arrangements that protect property as bell jars. As such, lifting the formal bell jar will have little consequence unless the informal, or local, bell jars are lifted too. In practical terms, then, how are we to understand the concept of the bell jar?

Searle found that all that kept institutions from disappearing were the agreements that created them in the first place. The bell jar, as a political institution according to this theory, should be considered a creation of agreements as well. However, one would be stretching the concept of “agreement” if one said that the *ejidatarios* wanted to be in the position that they are right now. To portray the circumstances that keep *ejidatarios* diminished in their political and economic spheres as a “social contract,” instead of trapped in an informal bell jar, does a disservice to these people. I have argued that the legal framework that constituted the formal bell jar, which allowed *ejidatarios* more freedom to use their individual plots has not really “unleashed” the benefits of capitalism or created a strong entrepreneur class. This is not to say that the legal reform was sufficient, far from that, and I will come back to this point in the last chapter. First, however, it is necessary to recast the relation between the

formal and the informal, and between intentions and circumstances. This discussion will help create a better definition of the bell jar and a better understanding of how the bell jar's construction actually impedes the communication and sincere agreements between the *ejidatarios* and the rest of society.

It is common to portray the formal as the opposite of the informal and vice versa, as de Soto does. In this study, however, this binary can only be valid if we understand formalism as acting according to law whereas anything else is informal, that is, acting out of the prescribed rules. In the case of property, to act formally is to follow the rules and procedures established by law and accepted by society. Formal property gives certainty to every actor that if they follow the same procedures then they can have the same expectations regarding the outcome of their relations with others vis-à-vis an object. In the case of the *ejido*, as we have seen, changes in the law did not bring about more certainty to people inside or outside the *ejido*. One argument could be that what we need is even clearer laws that gather even more information. Still, that argument would not explain why within "informality" rules are not necessary to bring about that clarity and, which, according to de Soto, ensures that property is never in dispute.³⁶⁹ The answer is that property in informality is protected by consensus; everyone has agreed on

³⁶⁹ Even dogs are clear about the boundaries of each piece of property. De Soto, *Mystery*, *supra* note 317 at 162.

the boundaries and characteristics of the land of each person. People within this context would act according to the agreed upon terms of their agreement and since this agreement is endogenous to the region, it makes sense to them, and it requires little enforcement.³⁷⁰ De Soto, then, assumes that this agreement constitutes a social contract and that out of this contract we can “find the law.”³⁷¹ De Soto comes full circle in his parallelisms between formal law and informal law; they both have been legitimized in terms of a social contract and they both have the same standing with one exception: one has been properly codified and is suitable to be understood by the broader economy whereas the other remains obscure for those outside of its specific context.

But, if this is the case, then how is it that the sole fact that this “law” is not codified or written down, as de Soto recommends, makes it “informal”? Formality in law does not emerge from codification alone. According to David Trubek, Max Weber’s definition of formality means “‘employing criteria of decision intrinsic to the legal system’ and thus measures the degree of systematic autonomy, while ‘rationality’ means ‘following some criteria of decision which is applicable to all like cases’ and thus measures the generality and universality of the rules employed by the system.”³⁷² So, if de Soto’s description of what constitutes “extralegal law” is correct, then we have to conclude that, opposed to his

³⁷⁰ *Ibid* at 171.

³⁷¹ *Ibid* at 179.

³⁷² David Trubek, “Max Weber on Law and the Rise of Capitalism” (1972) 720 Wis L Rev 721 at 729.

characterization, this local law is both formal and rational. Local law is formal because it has its own internal criterion as prescribed by the terms of the social contract and because it is independent from the law of the state. Likewise, local law is rational because it has universality within its context since, according to de Soto's research, there is no single person who does not follow some locally accepted documentation of his or her property.³⁷³ There is no reason, then, to speak of informality; the problem is one, essentially, of conflict of laws and the solution is more laws: the creation of a legal framework to make these laws compatible with each other.

De Soto's conclusions, however, are very quick and he offers very little evidence that these arrangements deserve consideration as terms of social contracts and laws. In defense of his thesis that these social arrangements have widespread support within the community, he points out that any attempt to disrupt these agreements will be met with "the most impressive" resistance.³⁷⁴ Resistance, however, as impressive and violent as it may be, does not necessarily mean widespread agreement on local societal arrangements. The analysis of the Atenco case shows that there are more dynamics at play than a simple attachment to the *status quo*. Furthermore, those doing the violence are capable as well of quashing any internal dissent. It is too quick to assume that

³⁷³ De Soto, *Mystery*, *supra* note 317 at 183.

³⁷⁴ *Ibid* at 176.

because there is violence it means that it can only emerge from adherence to the *status quo*. This approach could be due to Searle's influence, as Searle considers force the factor that guaranteed the stability of one societal arrangement over all other arrangements.³⁷⁵ But if this is the case, then it is not really "the social contract" that determines the use of property, but the ability to make credible threats against others. Furthermore, violence can be due to several factors, some of which could have nothing to do with the broad theme of the conflict. Again, in Atenco some youngsters supported their parents out of affinity towards them and not towards the local arrangements. Some of their parents, in turn, acted out of a sense of solidarity with their neighbors and friends rather than loyalty to their local authorities. In fact, all traces of their local authorities were banished. As discussed in the third chapter, the dynamics of the conflict exacerbated the sense of identity with the *ejido* since it accentuated their status as a class by being more liable to be "acted upon" by the government. Furthermore, some acted out of pressure and fear since the movement captured all of the local branches of government and used them to punish all who did not follow their commands. This is not the picture of someone following a collective intentionality, unless we reduce intention to merely reacting to circumstances.

³⁷⁵ This is why for Searle government is the "ultimate institutional structure" since it monopolizes violence or, at least, it has the most advantages to mobilize violence to secure the assignment of functions that it determines. Searle, *supra* note 320 at 27-28.

5. “Extralegal Law” and Intentionality

Searle is correct in considering that political institutions are the product of societal arrangements but he places too much emphasis on intentionality. As discussed above, Searle himself admits that ultimately the force of the state sustains agreements. In the case of local arrangements, the same situation prevails, as the Atenco case shows. The place for intentionality exists at the moment of devising the rules, however, when applied, other factors intervene that might alter the original intentionality. The ideal, however, the product of the collective intentionality, if it ever took place, always remains as a reference to fight injustice. The trait of a good system, of “good law,” is not the fact that the force of the state backs the system, or that not following the rules would be met with “impressive resistance.” What makes a good legal system is the way, the form, in which “functions,” to use Searle term, were assigned in the first place. The process of assigning functions to people or institutions should reflect, to the greatest extent possible, the intentionality of the community, not as a reified entity but as a collection of individuals similarly, but never identically, *situated*.³⁷⁶ To this end, the process of assigning functions should generate individuals who are well aware of the purpose of rules and institutions and their place in the

³⁷⁶ The term “situated” refers to her place in the political structure but also in terms of her distance or closeness to other people. See the discussion on the plurality of overlapping identities that a person may have in section 2 of this chapter.

system. However, the sole fact that certain societal arrangements exist tells us little about intentionality. And this does not mean, as Marianne Constable argues, that it is only if pressed that the “natives” suddenly become conscious of the normative regularity of his or her actions and that before that moment “the native does what natives do,”³⁷⁷ as if whatever emerges from local processes has to be voluntary or at least “natural.”³⁷⁸ What it does mean is that it is dangerous to draw from pure observation an opinion of the legitimacy of a legal system, at least if we want to base such legitimacy on true agreement or intentionality. De Soto grounds the legitimacy of local arrangements on a social contract of which its main evidence of its existence is a certain regularity and enforceability. I, however, argue that this view diminishes both the idea of social contract and of intentionality.

Importantly, Searle makes a distinction between ontological objectivity and subjectivity. He considers that political facts are ontologically subjective, that is, their existence is not independent from observation. The legal system is ontologically subjective as well since its existence is a creation of our subjectivities.³⁷⁹ However, as Searle points out, within an ontological subjective

³⁷⁷ Marianne Constable, *The Law of the Other: The Mixed Jury and the Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago, Ills. University of Chicago Press, 1994) at 88 [Constable].

³⁷⁸ Robert Clark notes that the advantage of acting according to tradition is that it usually can dispense with scrutiny since its mere existence as a long-standing practice justifies its continuity. He further notes that there is a long tradition of holding “...that the superiority of tradition to ratiocinated principles lies in the accumulation and testing experience over generations.” Robert C. Clark, “Contracts, Elites, and Traditions in the Making of Corporate Law.” (1989) 89 Colum. L Rev 1704 at 1729 n. 58.

³⁷⁹ Sally Falk Moore also considers law as “cultural representations of fixed social reality, of continuity.”

reality it is possible to make epistemically objective claims.³⁸⁰ The fact that a legal system is created out of the subjectivities of individuals does not mean that any claim within that framework is subjective as well. For example, it may be true that the concept of property is socially constructed but that does not mean it is just a matter of opinion as to what belongs to a given person. The point of contention with de Soto's description of "extralegal law" is that it does not pass the test that he himself sets for the creation for these types of laws. In particular, de Soto's description falls short regarding agreement and intentionality.

I first take issue with de Soto's observation that regularity of action implies the existence of a social contract. De Soto claims that extralegal social contracts are the foundations of property rights and that any attempt to create a unified system of property rights must start with recognizing these contracts.³⁸¹ De Soto notes, correctly, that property, just like all other legal concepts, is a social construction; that is, property expresses the way that we behave regarding objects.³⁸² However, observing that we behave in a certain way vis-à-vis a particular object cannot lead to the conclusion that this behavior is the product of a social contract. There are multiple motivations to act in a certain way, which do not emerge from collective agreement – even if we observe certain regularity. In

Law, for Falk Moore, is also a social construction but one that has certain permanence and it is not reinvented with each thought. Sally Falk Moore, *Law as Process: An Anthropological Approach* (Boston, Mass.: Routledge & Kegan Paul, 1978) at 40 [Moore].

³⁸⁰ Searle, *supra* note 320 at 21.

³⁸¹ De Soto, *Mystery*, *supra* note 317 at 158.

³⁸² *Ibid* at 157.

order to support his claim, de Soto notes that both Plato and Kant mentioned the social contract as a source of legitimacy for laws in general and for property in specific. This agreement, de Soto argues, is sufficient to uphold convention as a right and even trump “formal law.”³⁸³ I will bracket for the moment the objection already raised that de Soto’s division between formal and informal law based on a lack of codification is misguided. For now, I will concentrate on the fact that neither Plato nor Kant can really help de Soto in grounding the legitimacy of property rights in the idea of the social contract if all that he observes is regularity and enforceability.

In Platonic doctrine, three elements are essential for understanding the relation between law and citizens: the *polis*, justice, and the good. First, the idea of the *polis* relates to the rule by “the making of law.” Thus, for Plato “... a good order of the polis could be secured only by the making of a basic law or nomos. But this nomos is seen by Plato as participation in the idea of justice, and through this participation, in turn, there is a reflection of the idea of the good.”³⁸⁴ Accordingly, it is not, as de Soto claims, that Plato founded legitimacy on a social contract. Instead, Plato locates the ultimate source of legitimacy in participation in the *polis*, which allows citizens to achieve virtue by living a good life. Laws are not good because they create uniformity or because they are enforceable, but

³⁸³ *Ibid* at 171.

³⁸⁴ Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective*, 2d ed. (Chicago, Ills.: The University of Chicago Press, 1963) at 16-17.

because they assist in the establishment of a political order that is the only place where this participation can take place. The process of creating law and the process of achieving virtue are one and the same; it is not something that you can create and then can withdraw from it. This is one reason why Plato emphasized on the preamble of laws. Citizens should be convinced that acting according to the law was compatible with the idea of the good and that participation did not end with the creation of the law, but it continued in its practice.³⁸⁵

Now, Kant did specifically mention a social contract, but his definition of the social contract had nothing to do with an historical fact. Kant's idea of the social contract is more of an ideal rather than an actual event. Kant did not intend to describe historical facts, but rather to provide a theory that justified political obligations. For Kant, the only justification for public law was if it emerged from the unified will of the people to whom it would apply. Much as with Plato, Kant only considered law legitimate if people had been convinced of its merits.³⁸⁶ As opposed to de Soto's idea of the social contract, for Kant the social contract had validity as an exercise of people's autonomy. Regularity and enforceability do not

³⁸⁵ *Ibid* at 18-19. Plato was not, however, a democrat; in fact, he considered it a concept that lead to anarchy. See, Thanassis Smaras, *Plato on Democracy* (New York: Peter Land, 2002) at 66.

³⁸⁶ J.W. Gough, *The Social Contract: A Critical Study of its Development*, 2d ed. (Oxford: Oxford University Press, 1957) at 181-183.

justify the social contract but instead, the social contract is legitimate if it represents what we would have consented to with our own free will.

De Soto, thus, turned both Plato and Kant's theory of political legitimacy upside down by using the observable facts of regularity and enforceability as proof of the legitimacy of local dynamics. Now, both Plato and Kant emphasized actively participating in the processes that ultimately produced our political obligations. Obligations are legitimate because they emerge out of our own free choices that conform to a particular pre-determined conception of the good, in the case of Plato, or to a set of pre-determined, or *a priori*, deontic principles, in the case of Kant. However, these ends are, or should have been, the product of our choices. Neither Plato nor Kant considers a political obligation valid just because it is enforceable.

Returning to the discussion of what constitutes making a true choice; Kant has a rather demanding notion of what entails making a choice that actually reflects our autonomy. To act autonomously, it is not enough that we have a set of available options to choose from. For Kant, it is necessary to find a moral truth that compels us to act because of its intrinsic value rather than following whatever our circumstances or inclinations make seem inevitable or easier to do.³⁸⁷ Even if we do not follow Kant's theory of choice, it seems plausible that

³⁸⁷ Dan-Cohen, *supra* note 327 at 130.

making a choice that truly reflects what we want and believe to be right cannot be completely determined by the circumstances present at the very moment we make this choice. Many “choices” taken in the *ejido* context, and it could also be what happens in some of the cases that de Soto investigates in informality, emerge purely out of necessity created by poverty rather than being a true choice that emerges out of people’s aspirations and conceptions of the good. People are trapped in a very complex web of historical, economic, and political circumstances that makes it impossible for them to make a choice that truly reflects their autonomy. Acting completely independent of context is not desirable, even if possible, since we could hardly make sense of why we are choosing one end over another out of a sea of possibilities. Likewise, our immediate circumstances cannot provide the appropriate context for choice since our ends cannot be explained by a moment, but by a narrative of who we are. In the end, what gives the appropriate context for a choice is culture, which, as defined by Kymlicka, provides a space for citizens to construct their idea of the good life by allowing them to define the way in which they understand their relation with each other and with their context. Each person’s definition of how that relation should be shaped ought to be respected. Here respect means that each person should be allowed to participate in the political process, to inform others of his or her conception of the good, to be informed by the ideas of others,

and to have a reasonable opportunity to live according to his or her aspirations.³⁸⁸ This does not mean that we would always get what we want but that we, initially, have an equal opportunity to participate as equal members of society in the decisions that end up shaping our public life.

6. Governance through Law

From his conclusion that local arrangements are “extralegal law,” de Soto then argues that a plurality of conceptions of property had been the norm in most nations and that integrated systems of property are quite recent. “Legal pluralism,” he notes, had been the norm until the fourteenth century.³⁸⁹ By using the term “legal pluralism,” de Soto adopts a discourse in legal academia that is as popular as it is controversial. The controversy lies, as Tamanaha has documented, in determining what the term conveys. In “Understanding Legal Pluralism,” Tamanaha describes how scholars using the term have struggled to define what law is since legal pluralist exponents often end up collapsing law with social, religious, and moral norms.³⁹⁰ For example, he notes that John Griffiths,

³⁸⁸ This has been a goal of several political theorists including, notably, John Rawls and his “idea of public justification” (John Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2001) at 27 [Rawls, *Restatement*]) and Amartya Sen with his emphasis on impartiality as socially constructed by wide discussions (Sen, *Justice*, *supra* note 344 at 117). I will come back to this issue in chapter VII with a more pragmatic view for law reform using the ideas of Jacques Lenoble and Marc Maesschalck.

³⁸⁹ De Soto, *Mystery*, *supra* note 317 at 53.

³⁹⁰ Brian Z Tamanaha, “Understanding Legal Pluralism: Past, Present, Local to Global” (2008) 30 *Sydney L*

the person who coined the term – calling it “a fact” and arguing that anyone who denied it should be ignored – ended up renouncing it, opting instead for the term “normative pluralism.”³⁹¹

Tamanaha remains a legal pluralist, but he recognizes the unique place of state law.³⁹² Tamanaha had previously described law as “whatever we attach the label law to...”³⁹³ This tautological definition does little to clarify what is distinctive about law, as opposed to other norms, and Tamanaha does not assert that every and all types of norms are ultimately law. Kleinhans and Macdonald do make that assertion, arguing that law is ubiquitous, just as politics and economics.³⁹⁴ In their article, “What is Critical Legal Pluralism,” Kleinhans and Macdonald refer to the idea that law influences all of our behavior, just as economic and political considerations influence our behavior. There is no one instance of economic or political influence that we can point to as the source of this influence and the authors insist that the enterprise to define the contours of law as such would be equally mistaken.³⁹⁵

Rev 375 at 393 [Tamanaha, Understanding].

³⁹¹ *Ibid* at 395.

³⁹² *Ibid* at 411.

³⁹³ Brian Z. Tamanaha, “A Non-Essentialist Version of Legal Pluralism” (2000) 27 *JL & Soc’y* 296 at 313 [Tamanaha, Non-essentialist].

³⁹⁴ Martha-Marie Kleinhans & Roderick A. Macdonald, “What is Critical Legal Pluralism” (1997) 12 *Can JL & Soc* 25 at 33.

³⁹⁵ *Ibid* at 36.

The debate regarding the precise definition of law is a very old one³⁹⁶ and arriving at this definition is not the goal of this study. Nonetheless, this section has several purposes distinct to defining law, while also presenting a specific approach to law. First, this section expands my argument against de Soto's legitimization of internal forms of organization because, as I have pointed out, he does not take into account a plurality of motivations that do not translate into a ratification of the *status quo* of a given community. Secondly, this section rejects de Soto's use of "legal pluralism" to define all observable forms of behavior regarding property in a given community. Finally, this section emphasizes the role of state law to coordinate complex socio-economic processes and how the democratic process factors into these coordinating efforts.

I have already argued that de Soto's claim that regularity of behavior and its enforceability do not deserve to be called law if by that term he means to convey the idea of internal consensus and shared intentionality. However, once we adopt this argument from de Soto, it is not too difficult to conclude that observable behavior is law. He uses the term "extralegal law" to express the idea that the state is not the only place where law emerges. The idea of non-state law is at the center of the legal pluralist discourse. However, the term "legal pluralism," as used by de Soto, denotes a collapsing of all forms of regularity of

³⁹⁶ William Seagle, *The History of Law* (New York: Tudor Publishing, 1946) at 3-5.

behavior into “law.” One could argue that there is much more emphasis on internal agreements than on the term law in de Soto’s account. While I agree with de Soto on the importance of looking into internal forms of organization, I have also pointed out that he moved too quickly in arguing that this order necessary represented shared understandings about the nature of property or one that respected people’s dignity as distinct individuals. This does not imply any sort of priority of the individual over the community, but only the observation that a community cannot be understood as separate from the distinct individuals that compose it. Furthermore, I argued, in agreement with Larry May, that the idea of belonging to a community does allow the individual to accomplish tasks that otherwise would have been impossible to do outside of a community framework. Thus, we must understand the empowerment of the individual in procedural and not essentialist terms, as it is the coordination of behavior, which allows a community to empower its members. The source of that empowerment imprints a quality in the behavior that allows identifying it as originating from a democratic process or from other dynamics. State law should always emerge from a democratic political process and simply observing regularity and enforceability do not provide evidence of true consent.

De Soto’s emphasis on internal agreements is correct but more attention should be placed on the conditions for agreement so a truly democratic process

can emerge. The only remaining issue to discuss is if all types of normativity, even those types that are not the product of internal agreements, can be called law. For the purpose of this study, I agree with Tamanaha,³⁹⁷ among other pluralists, that this approach obscures more than it clarifies.³⁹⁸ I adopt, instead, the term “normative pluralism” to recognize that there is a multiplicity of dynamics that create a certain expectancy of behavior in a given place.

A further question is whether *we should* see all type of normativity as law. This question is, for the purpose of this study, the point of departure with the broader discussion about legal pluralism. I will not support nor elaborate a theory that defines the boundaries of all that there is to say regarding the concept of law. Neither will I argue that it is not possible to do so. Instead, I will describe the characteristics that state law should have in order to improve the capabilities of individuals to achieve their goals. There is, thus, a strong emphasis on the empowerment of individuals, but it does not result in calling all of their behavior law since this tactic can easily backfire. As Boaventura de Sousa Santos has pointed out, there is nothing particularly emancipatory in the concept of legal pluralism.³⁹⁹ The question in this study is how to cut across a plurality of

³⁹⁷ Tamanaha, Understanding, *supra* note 390 at 394.

³⁹⁸ Tamanaha notes that Sally Falk Moore also rejects this notion (*Ibid* at 395-396). Other pluralist, de Sousa Santos, although strongly emphasizes the role of non-state law, now and throughout history, he has also admitted that the centrality of state-law is so paradigmatical that: “...questioning it amounts to an unthinking of law.” Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (London: Butterworths LexisNexis, 2002) at 68. [de Sousa Santos]

³⁹⁹ Indeed he goes on to argue that “[t]o my mind, there is nothing inherently good, progressive, or emancipatory about 'legal pluralism.' Indeed, there are instances of legal pluralism that are quite

normative orders to empower individuals so that they can make state law responsive to their needs.⁴⁰⁰ I do not call these other normative orders “law” because doing so could entrench and legitimize repressive dynamics. On the other hand, should these normative orders be more responsive to particular group needs than state law, it means that they already operate successfully without labeling them “law.” These other normative orders may also serve as a useful recourse in the legal reasoning process or as sites for contestation. To call them “law” could reify and formalize their dynamics; furthermore, members of given group may not consider these orders as law. Finally, an overly broad concept of “legal pluralism” could asphyxiate a plurality of normative orders by embracement.

My approach aims at taking de Soto’s emphasis on facilitating communication among different normative orders seriously. The purpose is to allow as many reasons as possible to be used in the democratic process to challenge state law, but also to facilitate the contestation of these other normative orders that should never be taken as simply given. Law, for our purposes, should help individuals transcend their circumstances by providing the

reactionary. Suffice it to mention here the highly repressive and violent legal orders established by armed groups - eg, paramilitary forces in connivance with repressive states - in the territories under their control. For this reason I prefer to speak of plurality of legal orders, instead of legal pluralism...” *Ibid* at 89.

⁴⁰⁰ Remember that in Chapter V, section 5, I expressed concern about the LDP dynamic which may keep individuals without proper protection of constitutional rights which, in turn, affects their exercise of political rights. Political rights are of the utmost importance for the purposes of this study since they help empower individuals to use state power to express their opinions and influence their surroundings.

necessary protection and empowerment to participate in democratic dialogue. Furthermore, law should also provide the tools and mechanisms necessary to implement the results of these discussions and to reconcile them with opposing – or simply different – plans. Contra Kleinhans and Macdonald, this study operates under the assumption that the law *can* be – rather than must be or always is – an explicit creation of human agency that aims at coordinating behavior to achieve a particular goal. This, the authors argue, is an example of “lawyerly *hubris*.”⁴⁰¹ I see it, however, as an affirmation of our capacity to reason and to act in a system of cooperation through law. If neither of these two capabilities is questioned, law, as a creation of our subjectivities, *can be made* sensible to these aspirations. Precisely because there is a recognition that the law is imperfect – in the sense that it can only claim to respond to procedural mechanisms, rather than to the true essence of individuals – that other normative expectations should be allowed to play out with as much freedom as possible in democratic dialogue. This mutual accommodation does shape the legal and non-legal normative orders, but this does not mean that everything is law. The conflation of law and the political process can end up damaging both.⁴⁰²

⁴⁰¹ Kleinhans and Macdonald, *supra* note 394 at 27[emphasis in the original].

⁴⁰² Critical legal studies (CLS) reject this distinction. As Zamboni puts it: “[f]or CLS, the law is so structurally embedded into the political dimension of the community’s life that all battles occurring at the political level between different visions and ideals are reflected in the legal language.” In this regard, while my approach does not deny that there is a *political dimension* to law, this does not translate into a “law = politics” type of equation. Going back to Zamboni, my approach resembles more “the intersecting model” where “... in contrast to the embedded one, the law only partially collides with politics, and it is not totally embedded into the political mass; the law does keep a certain degree of separation. Law is distinct from

The purpose of state law, in terms of this study, is to facilitate cooperation between individuals to achieve results that would be impossible to obtain in isolation. Social cooperation, as Rawls noticed, does not imply central planning but, rather, “social cooperation is guided by publicly recognized rules and procedures which those cooperating accept as appropriate to regulate their conduct.”⁴⁰³ The terms of social cooperation should not be considered as given or implicit. I will come back to this point in the next chapter, for now it is only important to mention that law plays a central role in positivizing agreements so that its terms are publicly known and subject to objections or improvements from every affected party. The process of creating law creates the opportunity for people to come together and discuss their interests to help coordinate their goals. As opposed to de Soto’s spontaneous agreements, which respond to immediate demands, the legal process should create a space for reflection and an opportunity to learn from one another. Law only has as much legitimacy as the people give it. Accordingly, the first task of the legal process is to assure that everyone has an equal opportunity to influence the content of law. Particularly in the context of deep economic inequalities, to rely on a concept of spontaneous order, can end up strengthening the Legally Distant Person (LDP) dynamics that

politics because the law has a normative core, an area which can be defined, can work and which can be investigated using only specific theoretical apparatus produced by and inside the legal world. This core consists of viewing the law as a mechanism of coercion that, regardless of its value-content, tends to be passed from one generation to the next.” [emphasis in original] Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Berlin: Springer, 2008) at 55, 86.

⁴⁰³ Rawls, *Restatement*, *supra* note 388 at 6.

were discussed in chapter three. That is, the more we take as given that local dynamics are the result of agreements that truly reflect a shared intentionality – ignoring a plurality of non-reflective or undemocratic normative dynamics – the more individual expectations are detached from the normative system.

The idea that “legal subjects” are also “law inventing” is already implicit in the democratic process, but in and of itself, this idea provides an incomplete account of law acts as an empowering mechanism for the worst-off. Since we are all “law inventing” there is a need to transcend this atomistic point in order to find common ground. Whereas it is true that this process of convergence could potentially take many forms, the demands of a complex society require that state law follow generally accepted procedures. Some in the legal pluralist camp contested this idea. For Bonilla Maldonado, for instance, the idea that a sole hierarchical legal order is necessary or sufficient to explain the existence of private property is mistaken.⁴⁰⁴ Bonilla Maldonado offers mainly three main arguments to substantiate his claim: 1) it is factually wrong that legal monism describes most property holding in “the global south”;⁴⁰⁵ 2) legal pluralism distributes the “cognitive burden” more equitably,⁴⁰⁶ and; 3) legal monism ignores

⁴⁰⁴ Daniel Bonilla Maldonado, “Extralegal Property, Legal Monism, and Pluralism” (2009) 40:2 U. Miami Inter-Am. L Rev 213 at 214.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid* at 225.

that extra-official property regimes can have emancipatory effects.⁴⁰⁷ I will address these arguments in turn.

Bonilla Maldonado argues that statistics show that a large percentage of property is held irregularly in Latin America and that state law does not account for how most people conceive of their property. The problem is not only, the author continues, that legal monism fails to describe reality, but that it diverts resources and attention to legal mechanisms that are not useful for citizens living in these conditions.⁴⁰⁸ Now, as for the first argument, the author recognizes that it can easily be answered that the fact that conditions do not fit the legal framework does not necessarily mean that we should not *try* to make it a reality.⁴⁰⁹ There are plenty of laws that do not eradicate antisocial behavior and there is no argument to eliminate these laws. As for the second argument, this is a perfect example of the conceptual problems of some legal pluralist approaches. If we go back to the original point of departure – the idea that a hierarchical legal order is necessary to sustain a plurality of property regimes – why is it that the “official” legal regime has to acknowledge or recognize these other legal orders? Bonilla Maldonado implies that both legal systems should adapt to each other and maintain open channels of communication.⁴¹⁰ The problem is, as I have

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid* at 222.

⁴⁰⁹ *Ibid* at 221-222.

⁴¹⁰ *Ibid* at 223.

pointed out, that once the “official” legal system makes this accommodation it can entrench an oppressive internal dynamic. Take the Atenco case, it was clear that the government legal action did not respond to some people’s interests (and I include here their interpretation of property), however, it was far from clear that these were “*the* community” interests as well.

This takes us to the second argument that Bonilla Maldonado makes: the recognition that unofficial legal regimes can be the result of oppressive dynamics and that unofficial holding of land is precarious.⁴¹¹ However, he argues that these regimes can be beneficial and empowering since, having a property regime created from the bottom up means that there is no monopoly of “technical legal knowledge.”⁴¹² However, this is not necessarily a positive outcome. Since there is no need to resort to legal means, actors may translate the raw use of power into “tradition.”⁴¹³ Furthermore, once the outcome of power relations is termed “law,” there is no recourse for the worst-off to fight their situation.

Finally, Bonilla Maldonado uses a case study to show how legal pluralism unfolds in a community. In his case study, he describes his approach to legal pluralism as “conventionalism,” which tantamount to Tamanaha’s definition of law

⁴¹¹ *Ibid* at 224.

⁴¹² *Ibid* at 224-225.

⁴¹³ Hobsbawm mentions several reasons why tradition may be invented. Of particular interest for this study is that inventing traditions may be more common when rapid changes occur in society and to which “old” traditions are no longer responsive. Hobsbawm, *supra* note 283 at 4-5.

as whatever we call law.⁴¹⁴ Applying this perspective, Bonilla Maldonado, and three other researchers, observe the residents of a poor district in Bogota City to study how these community members conceive and administer property. Bonilla Maldonado arrives at three main conclusions relevant to my study: 1) people can have order without state law, 2) this other “legal” order is simpler than the official state order, and 3) both legal systems accommodate to each other, which suggests that a hierarchical system of laws is not necessary.⁴¹⁵ For Bonilla Maldonado, the advantages of the unofficial legal system are obvious: a “legal” system built entirely by the people that the system will govern provides legitimacy. Most of the case study analyzes the rules used informally in the community. The looming question is how these rules were created in the first place. This question is not an argument against having people determining their own rules (a basic democratic principle), but a reminder that if we value these “agreements” because they respond to the interests of the people being affected, then we should place extraordinary emphasis on the conditions that allow certain agreements to be considered valid. Furthermore, we need to consider people who may be affected by these agreements, but are not part of the political unit. Bonilla Maldonado does not take these issues seriously enough.

⁴¹⁴ *Ibid* at 230.

⁴¹⁵ *Ibid* at 236.

To summarize, de Soto's definition of what happens in enclosed political units as "extralegal law" is not only an oxymoron but it diminishes the idea of law itself. I make this claim not by applying an external concept of law but by following de Soto's own elements of what constitutes extralegal law. De Soto observes regularity of action and concludes that this is the result of a social contract. However, regularity does not constitute a social contract. Social contract theory goes much further and expresses a way to conceptualize our political obligations as coming from our own free will. De Soto sees the fierce defense of the *status quo* as proof that this regularity does actually come from the true conventions of the locality. It is true that violence can be used to defend conventions, but violence may not necessarily represent a social contract, but rather a sense of duty or solidarity towards our family, friends, or "class." Concluding that this type of reaction is an endorsement of all policies that take place in the political unit is a difficult argument to maintain. Finally, de Soto's use of the "legal pluralist" discourse is not rigorous enough, but it does provide a framework to introduce the term "normative pluralism" in this study. Does this mean, thus, that de Soto's theory should be discarded? I think not. Instead, I argue that de Soto insights are correct once we address some of his shortcomings. Most importantly, it is necessary to rework the problematic aspect of the de Soto's approach, beginning with a redefinition of the bell jar.

7. Redefining the Bell Jar

De Soto, as explained at the beginning of the chapter, expels culture from his analysis to avoid fatalistic approaches that lead to complacency in the face of poverty. However, if, like de Soto recognizes, law is a social construction, and he defines the problem of the bell jar as one essentially of laws, then the attempt to analyze the problem of underdevelopment without taking into consideration cultural dynamics is bound to fail. De Soto recognizes the importance of respecting the idiosyncrasies that take place in localities. In fact, he considers them so important that he calls them “extralegal law” with the intention of signalling that these practices should be reconciled with the formal law rather than attempting to quash them. Still, in his effort to caution us about disregarding local practices de Soto rushed to legitimize them. It is true that one should approach local dynamics with caution to avoid making hasty judgments about other people’s practices. This caution, however, works both ways and just as we should not rush to condemn or disregard cultural practices, we should not rush to endorse or entrench whichever cultural practices we observe.

De Soto’s characterization of the dynamics that keep some people poor and other rich as a bell jar is very telling. First, it implies that people are the

beneficiaries, or victims, of their own social and political dynamics. What this means is that in spite of being part of the same national political system, people are affected differently and that legal reforms should be mindful of the different sector's vulnerabilities. Secondly, the idea of the bell jar conveys the image of citizens separate and indifferent to other's fate. The bell jar is usually pictured as made of crystal; where people can look from the inside to the outside, but, at the same time, they are prevented from actually engaging with those outside of the bell jar. Finally, the bell jar implies the idea of an internal order. The bell jar is a human construction and as such, it could not exist without the actions of the people within it helping to constitute it. We have started to reimagine the bell jar as much more than just laws and reintroducing the other elements that de Soto considered important in his analysis – human interactions, representations, and communication – is key to this study.

To complete the redefinition of the bell jar, I now turn to Nancy Fraser and take one by one these three images that the bell jar conveys to re-conceptualize them in terms of Fraser's justice claims. Fraser makes a distinction between three different justice claims: redistribution, recognition, and representation.⁴¹⁶

⁴¹⁶ Fraser made a lengthy defense of the distinction between redistribution and recognition in the book "Redistribution or Recognition: A Political-Philosophical Exchange" and added representation as a third distinct justice claim in "Scales of Justice: Reimagining Political Space in a Globalizing World." Nancy Fraser & Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso, 2003) [Fraser, *Redistribution*]; Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalized World* (New York: Columbia University Press, 2009) [Fraser, *Scales*].

Each justice claim relates to the others but they are also distinct entities.⁴¹⁷

Fraser's contribution provides the historical and philosophical background of these three claims, while also establishing the relation between them. Fraser's ultimate objective is to move us closer to meeting these distinct justice claims to obtain "parity of participation" among the members of a political unit and between members of distinct political units.⁴¹⁸ This objective fits nicely into the redefinition of de Soto's theory. Remember one of the strongest objections to de Soto was that he ignored the processes that lead to what he identifies as the social contract that justifies "extralegal law," that is, the informal conventions that legitimize the arrangements around property. By incorporating Fraser's clarity regarding the interrelation of justice claims we can finally construct an appropriate framework to propose a possible solution to the *ejido* problem addressing both the way that the *ejidatarios* treat each other and how the *ejido* should fit in the national political structure.

⁴¹⁷ Iris M. Young criticized Fraser's initial approach that all injustices could be categorized as claims on distribution or recognition. Young's position was that this approach was "too stark" and argued that recognizing a more plural categorization may be more sensible. I doubt that Fraser adding a third element in her analysis was going to be sufficient to answer all of Young's objections. My use of Fraser is not an endorsement that all issues of injustice should be approached through two, three, or five categories for that matter. For this particular study, Fraser's approach captured what I gathered were the most significant challenges in terms of justice claims for this study, but this does not mean that for a different study Young's categories may be more useful. Iris Marion Young, "Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory" 222 *New Left Review* (1997) 147 at 153.

⁴¹⁸ The first objective, that of parity of participation among members of a political unit, is emphasized in Fraser, *Redistribution* (*Ibid* at 36) and the second one, parity of participation among members of different political units is emphasized in Fraser, *Scales* (*Ibid* at 18-21).

The first image to analyze is the bell jar as a socio-economic context that forces people into a particular place in the power structure. In the case of the *ejido*, we can differentiate this process in two instances: 1) the dispossessed as a class subject to historic injustices and forced into the *ejido* regime by economic and political reason, and 2) the *ejidatarios* as normative creating agents who formed their own power relations, which allowed some people to have more economic resources, relatively speaking, than others. We have, thus, an overlapping of two bell jars, one inside the other. The *ejido*, in its present form, is impossible to conceive without understanding the national events that led to its creation. On the other hand, not all of the events that take place inside the *ejido* can be understood by national events. What is important to notice is that destitution contributes to both accounts. The dispossessed had no alternative but to accept what was offered to them, as they lacked the proper mechanisms to influence the terms of that offer. Within the *ejido*, its configuration led to a series of dynamics that created a class of destitute of their own making. In spite of being such close communities, deep differences arose among them, which shaped their political influence. The excessive fragmentation of private property did not lead to a fragmentation of power, but to conditions of uncertainty that were exploited by those who were in a position to take advantage of the legal mess to usurp power.

Both dynamics are related, then, to the distribution of property, both by the national government and then among the *ejidatarios*. For Fraser, issues of redistribution are a traditional liberal concern extended and elaborated by the likes of John Rawls and Richard Dworkin who, by synthesizing “the traditional liberal emphasis on individual liberty with the egalitarianism of social democracy, they propounded new conceptions of justice that could justify socio-economic redistribution.”⁴¹⁹ The solution to this type of problem then relates to a restructuring of the economic system that created these problems in the first place including, but not limited by, legal reform to the rules of ownership. The economic structure is not created solely by legal rules that prescribe a certain regulation of market transactions, but this structure is also related to what people can legitimately expect to receive as compensation for their efforts.⁴²⁰ The idea of redistribution, thus, is linked to the liberal concern of seeing each other as equal members of society since if there is going to be a redistribution of what people have obtained as product of their transactions there has to be an underlying shared agreement that justifies it.⁴²¹ This leads us to the second justice claim: recognition.

⁴¹⁹ Fraser, *Redistribution*, *ibid* at 10.

⁴²⁰ For Rawls, for instance, rules that place everyone at the same starting line in the pursuit of profit are not sufficient to overcome the problem of making morally arbitrary claims to compensation since natural endowments create inequalities. Rawls, thus, designs the difference principle to overcome this problem by using part of the profits of the most advantaged to help the least advantaged. John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999) at 57-73. [Rawls, *Theory*]

⁴²¹ Rawls’s concepts of the “well ordered society” and the “overlapping consensus” stress the importance of

The second image of the bell jar is that of people indifferent of each other and pursuing their own conceptions of the good while disregarding other people's fate. The Atenco case certainly illustrates this point. As explained in the last chapter, there were competing sets of claims that all had some legitimacy. On one hand, there was the government's preoccupation, and its legal obligation according to the Mexican constitution, of fostering economic progress. On the other hand, there were the two competing interests of the *ejidatarios*: 1) those who wanted to keep the *status quo* out of concern for the consequences of being left without land and thrown into a political and social context that they were socialized to distrust, and 2) the *ejidatarios* who finally saw a profitable way out of the stagnated conditions inside the *ejido* that only entrenched their position as the perpetually poor. What stands out in the Atenco case was the complete disregard to each side's legitimate concerns. There are many illustrations of this contempt for each other. We can look to the government's abuse of the *ejidatarios's* limited political influence to short-change their compensation, the abuse of the Del Valle group who harassed any dissenters within the *ejido* with vile tactics, or an indifferent political class and society in general that has largely ignored the plight of the *ejidatarios*.

For Fraser, issues of recognition are associated with Hegelian philosophy:

agreeing on a single conception of political justice even if we differ in our conceptions of the good. Rawls, *Restatement*, *supra* note 403 at 8-10, 32-38.

In this tradition, recognition designates an ideal reciprocal relation between subjects in which each sees the other as its equal and also as separate from it. This relation is deemed constitutive for subjectivity; one becomes an individual subject only in virtue of recognizing, and being recognized by, another subject. Thus, "recognition" implies the Hegelian thesis, often deemed at odds with liberal individualism, that social relations are prior to individuals and intersubjectivity is prior to subjectivity. Unlike redistribution, moreover, recognition is usually seen as belonging to "ethics" as opposed to "morality," that is, as promoting substantive ends of self-realization and the good life, as opposed to the "rightness" of procedural justice.⁴²²

Fraser points out that a traditional response to this type of justice claim involves reevaluating disrespected identities and cultural groups. This could be done by improving the ways in which we portray the other and our channels of communication with diverse cultural and social groups.⁴²³ This approach presents a problem, however, for who is going to be portrayed as the archetypical "other?" Who gets to define how we see and value an entire cultural or social group? In the case of Atenco, the government allowed the most vociferous voices to dominate the conversation. This attitude is consistent with de Soto's conception of what constitutes evidence of legitimacy, which relates to the "formidable" reaction to efforts that try to change the *status quo*. This,

⁴²² Fraser, *Redistribution*, *supra* note 416 at 10.

⁴²³ *Ibid* at 13.

however, creates a situation where a violent minority can speak for the group without necessarily being representative of every member of the community or even of the majority of opinions. Accordingly, the next justice claim to analyze is representation.

The third, and final, image of the bell jar is that of one containing a particular order. In the case of the *ejido*, this order is partially constituted by the federal legislation that created it in the first place. As previously discussed, the government created the mechanisms of representation for the *ejidatarios*. These mechanisms, however, do not represent everyone who lives inside of the *ejido*, even those who are, in theory, represented in the assembly do not have the same representative weight. Internal factors within the *ejido* skew people's influence in the assembly and some *ejidatarios* end up being more represented than others. In the Atenco case, the assembly's lack of legitimacy of the assembly facilitated a minority's ability to overthrow the local authorities who were seen as obeying the interests of the PRI-regime in the state rather than the interests of the *ejidatarios*. Finally, the excessive fragmentation of property rights has created a situation where there may be overlapping legitimate claims to represent the interests over either a particular parcel or of the entire *ejido*. With this picture in mind, whose interests can we consider as the "true" interests while

also considering solutions to the *ejido* problem and remaining cognizant of the challenges posed by legal pluralism?

Fraser finds that current accounts of justice do not provide an adequate response to this question.⁴²⁴ This is not necessarily a bad thing for Fraser since what this inadequacy illustrates is that we have expanded “the field of contestation,” that is, the types and number of theaters and subjects who are recognized to make justice claims.⁴²⁵ Fraser labels this new paradigm as “abnormal justice.” Abnormal justice not only reflects this new openness but it also can be defined negatively with the following question: “How can demands be fairly evaluated and injustices be legitimately rectified in contexts in which the ‘what,’ the ‘who,’ and the ‘how’ are in dispute?”⁴²⁶ The “what” refers to that which should be redistributed, the “who” refers to who is entitled to make this claim, and the “how” refers to the process, or “frame,” which properly gives an outlet to the other two questions. Fraser does not offer an answer to the problem that she articulated but she does provide an approach that could lead to a suitable answer:

To validate contestation, it [a theory of justice] must treat framing disputes dialogically, as political conflicts whose legitimate resolution requires

⁴²⁴ Fraser, *Scales*, *supra* note 416 at 51.

⁴²⁵ *Ibid* at 57.

⁴²⁶ *Ibid*.

unconstrained, inclusive public discussion. Rejecting appeals to authority, abnormal justice theorizing must envision a dialogical process for applying the all-subjected principle to disputes about the “who.”⁴²⁷

Fraser admits that dialogue by itself solves nothing and accepts that these new types of claims may never be absolutely settled. At the same time, Fraser recognizes that disputes must have a solution even if they are temporary. In order to accomplish this, she proposes an “institutional track” that requires, firstly, fair and democratic processes and, secondly, the power to have binding power to decide the question of the “who” by analyzing which power structure is involved and over whom it exercises its authority. The “how” of justice, then, “combines dialogical and institutional features.”⁴²⁸ It must be said that this approach is mainly about “global justice.” Nonetheless, stark inequality can create conditions within a political unit where people are in almost alien conditions vis-à-vis the rest of the population. Thus, Fraser’s problematization of justice is applicable to domestic conditions as well.

Although much still needs clarification, what is important to stress is that we now have a better description of the bell jar: the human construction that keeps certain people poor while other people prosper. It is not a construction purely made of laws and the solution cannot be purely legal. The solution that is already

⁴²⁷ *Ibid* at 68.

⁴²⁸ *Ibid* at 69.

being delineated here involves the concerns of both Plato and Kant: 1) participation in the *polis* to pursue and construct our conceptions of the good, and 2) the ability to make actual choices that reflect our autonomy having equal regard to the right of others to do the same thing. This returns us to de Soto's concern with "meta-rights" to reconcile the different expressions of property. How can we conceive of a meta-system of rights, once we have problematized de Soto's approach to the social contract? If *ejidatarios* see both government and community as potential sources of oppression, we must redefine the paradigms through which we approach both.

Chapter VII

Between Inertia and Choice

We can interpret the term “abnormal justice” as a call to be mindful of simply taking for granted existing paradigms of justice and trying to apply them to whatever conflict we might encounter. Fraser describes two main reasons for this: 1) the erosion of the Westphalian paradigm of the nation-State, and; 2) an increased awareness of the subjectivity of justice claims. This second point is not a relativistic argument, but the observation that justice claims are formed and resolved within certain pre-existing social and cultural paradigms. In the last chapter, I discussed how the term “culture” can be captured by small or partisan interest groups who calcify it so that it would always means one thing (“the historic way of being”), which leads to the emergence of guardians of its interpretation and purity. The solution proposed was to adopt Kymlicka’s early definition of culture, which was defined as a space where people negotiate their past and present and how they relate to the community looking forward. It is a dynamic concept in constant re-interpretation. But what to understand by the term “community”? In this chapter, I am going to focus on this broader term by analyzing the current paradigm that defines the relation between people and

government in Mexico. I look to shed light on the current framework through which society and government relate to each other. “People” and “community” are not the same concepts; the latter conveys certain attachments that the first does not. However, since “the people” are different from “the government,” they form a distinct unit of analysis.

The second part of this chapter will describe the movement from “people” to “community” and the effects that the current paradigm has on the emancipatory movements that emerge from it. Finally, the chapter will end with a proposal to redefine the current understanding of community to make it an appropriate concept through which a more inclusive dialogic process can take place. Democratic dialogue being the first step that Fraser proposes to approach issues of justice. The second has to do with power and adjudication, which will be analyzed in the following chapter.

1. Bad Government/Good People

Part of the reason to revise de Soto’s analysis was due to his emphasis on conceiving the bell jar as purely constituted by laws and, thus, assuming that since the problem resided in the government then the solution must come from the government alone as well. In the last chapter, I stressed the contradictions

that de Soto incurred since the solutions that he ultimately recommends point to a broader problem. De Soto's main concern is not, as he himself pointed out, to formulate a more refined legal definition of property rights, but in creating a system of communication between the different understandings and contexts of property. His confusion in the diagnostics, however, leads him to also consider that the law could actually separate the fate of property from that of its owner. In what follows, I will expand on why these two propositions are incompatible (on one hand, the idea that to fight informality we have to focus on creating a system of communication between different understandings and contexts of property and, on the other, thinking that this system of communication could separate property from the circumstances of its owner) and why is necessary, contrary to de Soto's claim, to consider culture.

In the previous discussion, I pointed out that a more appropriate way of conceiving the bell jar is to see it as attitudes and actions from all involved (government and society) that, using Fraser's justice framework, constituted impediments to appropriately implement policies of redistribution, recognition, and representation. This new prism to understanding the bell jar phenomenon is a first step to move away from the "bad government/good people" paradigm that dominates much of the discussion surrounding justice and development narratives. According to this narrative, bad outcomes are exclusively the fault of

bad government that perverts the natural and harmonious relations that people would have if it weren't because of the government. This anti-Hobbesian narrative was adopted by many critics of the Mexican government's actions as described in the first chapter and is also the narrative adopted by de Soto. The problem is that this narrative obscures and, in some cases, distorts reality. This narrative goes beyond a simplification of facts since it displays a profound misunderstanding of interpersonal relations that can lead to disastrous policies. The most important distortion is that it leads to essentialisms. In chapter IV, I described how this translated into lack of differentiation of the *ejidatarios* whose interests may intersect at times but also conflict. The series of limitations imposed on the *ejido*, as a legal regime, reflects a lack of consideration for the aims and aspirations of the *ejidatarios* as distinct individuals. A second problem, discussed below, is the lack of attention on checks and balances while discussing transactions among individuals in close-knit communities. The assumption is that in closed communities there is a certain type of shared understanding of the appropriate normative behavior that does not require scrutiny. These local normative dynamics, being endogenous, are considered to be, *per se*, more representative of the true aspirations of a given political unit.

As described in the last chapter, a representative of a similar way of thinking is Marianne Constable. In her criticism of Hart's understanding of

positivism, Constable notes that Hart's requirement of writing down normative propositions is, in fact, a narrow way of thinking about law. Some native populations, particularly those in small communities, may not understand law as propositions, Constable notes. Law consists not in a series of pre-given, propositional rules but "in knowing what to do."⁴²⁹ Disagreement about what to do is resolved "through what is done."⁴³⁰ For Constable, this is not a primitive form of understanding the law but a different one. This sort of law – portrayed as a the result of shared intentionality and not as what to put in writing – is more flexible and representative of the true and present demands of what needs to be done.⁴³¹ It is the invader, the foreigner who does not belong to the community, who might need a propositional type of law and by doing so the harmonious dealings of the community become formalized, rigid; conflicts are no longer about what to do, but about interpretations of written rules, about abstractions.

Written law is, of course, the law of the state, which, in this narrative, becomes almost alien to smaller political units that must adjust their practical reason, their response to practical problems with common sense solutions, to the demands of a distant and formalistic power structure. Natives would just do what

⁴²⁹ Constable, *supra* note 377 at 90.

⁴³⁰ *Ibid.*

⁴³¹ Indeed, Constable goes on to say that "is not that there are no conflicts in customary society, nor that such societies never change. The point, rather, is that conflicts do not consist of inconsistencies among written propositions or between writings and practices and that addressing conflict does not entail identification or interpretation of authoritative writings." This type of law deals with actual demands about what to do and not about what she considers abstract or inflexible written rules. *Ibid.*

they do – that is, what is natural for them to do – if it were not because of the state. The implication here is that the law produced by small political units is actually of a superior quality than that of the state – the more intractable the normative experience, the better. This is because we are considered to be essentially good and the more we just leave our natural normative capacities to take over, without introducing what for some authors are false pretenses of rationality, the result must be just because it is natural: no governments, no pre-given rules, no formality; just practical reason.

Some of the narrative at the beginning of this dissertation would seem to confirm the perspective of authors such as Constable. We started our discussion with a re-count of a series of injustices that seem to be reproducing themselves periodically with just a change of perpetrators. These perpetrators always seem to be a sort of “other” that violently disrupts the normal relations of a particular political unit or “community.” We started with a brief look at the tremendous violence of the Spanish colonial rule which brought not only the eradication of many cultures throughout the continent but, particularly in Mexico, the establishment of a despotic government that had as its only interest the pillage of the conquered territory and to enslave the native population under different legal and *quasi* legal disguises. The war of independence eventually used many of these grievances to gather support for the independentist movement from the

indigenous and mestizo populations but, as described in chapter III, the war of independence always remained a *criollo* movement that once it achieved victory did not have any rush to establish a liberal state and reproduced many of the injustices of the past. The revolution, in what by then was already called Mexico, was inspired by the lack of political liberties and social justice. However, I argued in chapter III that the revolution was really a civil war. The tyrant that all forces gathered to defeat fled the country even before the so-called revolution started and all the different forces fought for power among each other. One by one the different armies fell until one was left standing.

The Calles government, to prevent further rebellions, created a political system that gave small prerogatives to a society that was solely seen as a collection of different sectors.⁴³² Calles institutionalized the fight for power mainly through different political arrangements that were made always having in mind that what mattered was to preserve the system built around what was to become the PRI. A zero sum game was established and it was in the interest of the regime to pit one sector against the other so as to always remain the mediator between them and also to prevent the emergence of any type of unified opposition. The liberalization of the economy by latter regimes brought the

⁴³² The fragmentation of society into sectors was an important part of the political system. As a recent study put it: "In Mexico, society was conceived of as an organic whole composed of hierarchically interrelated segments. Representation was based on negotiated agreements reached between these segments." Larissa Adler-Lomnitz, Rodrigo Salazar-Elena, & Ilya Adler, *Symbolism and Ritual in a One-Party Regime: Unveiling Mexico's Political Culture*, translated by Susanne A. Wagner (Tucson, Arz.: The University of Arizona Press, 2010) at 16 [Adler-Lomnitz].

system down since it was unable to sustain the prerogatives that once were the bargaining chips of the system. However, in chapter I, I described how what appeared to be liberalization in reality meant the return of legal and economic uncertainty that increased the stakes of any conflict. While true that the central government lost much of its power and mediation capacity, the result was not more freedom, but the multiplication of little tyrants with great power in their jurisdictions (governors and *caciques*) and increased social inequality brought by a supposedly free market.

The conflict in Atenco took place within this context and within these inertias. Having this simplified narrative in mind it is not surprising that many saw the rebellion of poor *ejidatarios* as an emancipatory movement seeking to protect their lands not only from a government that has never taken into account their voice, but also from the depredation of unrestrained capitalism. However, a closer look at the conflict showed that many of the injustices that were the object of the protests were actually reproduced by the “community” itself. Furthermore, the *ejido* of Atenco, far from being that realm of equality and reciprocity in a growing sea of individualism, was in fact an isolating and undemocratic regime. A more careful examination exhibits victims that then take their turn to be victimizers and a large segment of the population that seem trapped between the reproduction of emancipatory movements that turn despotic as soon as they

gather power and, on the other side, paralysis and silence. In order to approximate this seemingly intractable problem it is first important to situate it in the theoretical framework that was set out in the last chapter.

2. Emancipation and Inertia

In the last chapter, I proposed to invert de Soto's analysis of seeing the proverbial bell jar as made of laws that ignored and altered communal arrangements and instead to recognize it as made of attitudes that ignored or altered the content of laws. Then, I turned the different images that the bell jar conveys into justice claims using Fraser's theoretical distinctions. This analysis acknowledges that more than an economic or legal problem, the institution of the *ejido* generally, and the conflict in Atenco in particular, requires heeding to the voices of the people who inhabit these places. The *ejido* system, although initially considered emancipatory – understood here as liberation from oppressive forces – soon turned into what it was designed to counter in the first place.⁴³³ In what follows, I will make a stronger case for why the narrative of bad government/good people is narrow minded and misleading.

⁴³³ Joseph and Nugent make the same observation about the initial popular (mostly rural) nature of emancipatory movements and their transformation, upon victory, into new oppressive orders that, in turn, have to be toppled. Gilbert M. Joseph & Daniel Nugent, "Popular Culture and State Formation in Revolutionary Mexico" in Gilbert M. Joseph & Daniel Nugent, eds, *Everyday Forms of State Formation: Revolution and Negotiation of Rule in Modern Mexico* (Durham, N.C.: Duke University Press, 1994) 3 at 4.

Remember that the movement of dissatisfied *ejidatarios* was plural initially; it encompassed those whose only concern was the amount of compensation, those who were concerned about opportunities outside of the *ejido*, those who did not want to leave the *ejido*, and those who needed more information. As explained in chapter II, the government initially sat to negotiate with the official representatives of the *ejido* of Atenco, but it was doing so in bad faith. The government had already decided to construct the airport on those lands even as it was pretending to obtain the consent of the *ejidatarios*. To add insult to injury, the government undervalued the economic worth of the lands. These two actions (the simulation and the shortchange) were not only unethical, but also contrary to the Mexican Constitution. The right to consultation is established in two different articles: in article 2nd, section B, IX, and in article 26. The first one is related to the duty that the federal government has to consult indigenous populations about development projects in their region and the second has to do with the duty in general that the government has to consult with the population about development projects. Given this broad mandate that the government has to consult it is irrelevant to discuss whether the government should have consulted based on article 2 or 26. As for the amount of compensation, article 10 of the *Ley de Expropiación* (Expropriation Law) establishes the guidelines that must be followed to set the amount; the

government does not have complete discretion for setting it.⁴³⁴ Perhaps for these reasons the government decided that it was better to solve the problem politically before the Supreme Court decided on the legal merits of the case.

What is important to note is that what the *ejidatarios* felt as an injustice was also most likely a violation of positive law. We will never know for sure how the Supreme Court would have decided the case, but it seems that there was a strong case to declare the expropriation unconstitutional in the terms that it was issued. The *ejidatarios* took the judicial path at the same time that they started protesting; however, once the official authorities of the *ejido* were ousted, the protests took central stage and the judicial proceedings became irrelevant since the movement's position was that they would get what they wanted regardless of what the legal procedures determined. In this process, the movement also radicalized its position and either ousted or coerced anyone who did not show unconditional support for the cause. The language that was used at this time was one that stressed the terms community and culture, both not understood as spaces that gave meaning to their decisions, but as rigid and inalterable ways of being. It is worth remembering at this point that even though there are people who still speak indigenous languages in the municipality of San Salvador Atenco, there were no signs of any type of indigenous practices in the *ejido* itself that

⁴³⁴ Ley de Expropiación [L. Exp.] [Expropriation Law], art. 10, Diario Oficial de la Federación [DO], 25 de noviembre de 1936 (Mex.).

were particularly threatened. That notwithstanding, the movement repeatedly claimed to be defending ancestral land and practices. Although this was a claim that the Mexican left quickly embraced, it is important to stress that, as a matter of fact, the majority of the *ejidos* affected by the expropriation supported the airport project, including the *ejido* of Atenco which initially was fighting for a better deal and not for the complete abandonment of the project.

This brings us back to the kind of legitimacy that the authorities that approved the project had in the community. Not because the protests of Atenco were the most vociferous we are going to conclude that they were the only ones that were not entirely happy with the airport project. It is telling, however, that the movement grew not because other *ejidatarios* joined them, but because there was an influx of outside groups (i.e. unions, Zapatistas, anarchists, and students to name a few) that saw the Atenco movement as way to pressure the government to advance their own agendas. But even if this had not been the case, the fact that the *ejido*'s bodies of representation do not take into account all the people affected by their decisions is reason enough to doubt their legitimacy and representativeness. So, even though the *ejido* was initially established as a temporary measure to help landless people keep real property, it was soon absorbed by the PRI-regime and turned into one more of its areas of control. The fall of the regime in the year 2000 did not alleviate the conditions within the *ejido*,

but it reinforced or created stronger *caciques* that felt little allegiance to anyone else but their interests.

This brief retelling hopefully helps explain why this study points out to a certain tragic fate of many emancipatory movements that start with lofty ideals only to follow the same type of inertias that they criticize. Even though I am concentrating on the *ejido*, this same narrative can be applied to many other initially emancipatory movements that succumbed to inertia: from the teacher's union that started with the goal of protecting teacher's rights and that later used them to obtain political gains for their leaders,⁴³⁵ passing through the Zapatista movement that started as criticism to central power only to recreate a ferocious grip over their areas of control,⁴³⁶ to the student movement of the UNAM that also started as movement to protect poor students from high fees and that later turned into a radicalized small movement that lingered even after their demands

⁴³⁵ Recently the SNTE, the largest teacher's union in Mexico, refused to submit its teachers to evaluations in spite of Mexico being consistently ranked very low in almost all of the categories analyzed by the OCDE, all of them, to be precise, except for spending in education where Mexico is above the average. The SNTE is a union that is widely perceived as corrupt and inefficient. Nurit Martínez Carballo, "Acuerdan SEP y SNTE Recortar la Evaluación" *El Universal* (29 March 2012), online: [El Universal <www.eluniversal.com.mx>](http://www.eluniversal.com.mx); David Agren, "Education system holding Mexico back, critics say" *USA Today* (30 March 2012), online: [USA Today <www.usatoday.com>](http://www.usatoday.com).

⁴³⁶ Even though de Sousa Santos describes the 1994 Zapatista uprising as a model emancipatory movement that uses "global action in furthering of local struggles for the protection of indigenous rights" (de Sousa Santos, 2002 at 252), the author ignores basic facts of the emergence of the Zapatista movement. To begin with, Rafael Sebastian Guillén Vicente (a.k.a "el subcomandante Marcos") initially started the movement to overthrow the central government and replace it with a Marxist-type of regime. He made use of those most desperate to advance his goal, but it was not until the international community chose to see the Zapatista movement as an indigenous movement that Mr. Guillén Vicente changed his narrative. Most importantly, however, is that hidden in the narrative of emancipation are the forceful displacements, the executions, the tight control and the isolation of the communities that were left at the mercy of Mr. Guillén Vicente. Bertrand de la Grange & Maite Rico, *Marcos, La Genial Impostura* (Mexico, DF: Alfaguara, 1997) at 429-439.

were met and kept hundreds of thousands of students without classes.⁴³⁷ What is the relation between the structural injustice and the “replicas” that emerge in smaller political units or movements? Is it that an unjust central structure changes the character of people indoctrinating them in repression? Or, is it that a society with repressive cultural dynamics finds an expression in the “basic structure” (to borrow the term from Rawls)? The argument that I make is that it is bit of both; that they feed off each other.

The three cases that I mentioned above also have in common with the *ejido* context the need to pool resources in order to achieve certain goals that hardly could have been obtained otherwise. This can strengthen the bad government/good people narrative by arguing that because the government forces people to form groups in order to achieve certain goals, it creates the opportunity for oppressive dynamics within these groups to emerge and their distancing from the society at large. However, it is far from a necessity that emancipatory movements develop an oppressive regime within their ranks and it seems counterintuitive that they would seek to antagonize with the rest of

⁴³⁷ The UNAM decided to increase fees by around 30% (students would have had to pay approximately \$53 per semester for their education). After a formidable student reaction, the dean decided to make the payments optional; however, by then the student movement was radicalized and overtaken by a minority. Even after the increase was dropped entirely, the protesting students kept seizing Mexico’s largest university for 10 months. In the end, federal forces removed approximately 632 students that had made the UNAM their private dwelling. María Esther Ibarra, “Aprueba el Consejo Universitario el aumento de cuotas en la UNAM” *La Jornada* (16 March 1999), online: [La Jornada <www.jornada.unam.mx>](http://www.jornada.unam.mx) ; María Esther Ibarra, “Pacíficamente, la ‘minoría’ consiguió parar casi toda actividad en la UNAM” *La Jornada* (25 March 1999), online: [La Jornada <www.jornada.unam.mx>](http://www.jornada.unam.mx); Silvia Otero et al., “Recupera la CU la PFP; detenidos, 632 estudiantes” *El Universal* (17 February 2000), online: [El Universal <www.eluniversal.com.mx>](http://www.eluniversal.com.mx).

society; on the contrary, one would assume that they would seek its support. And even though in all of the cases mentioned above the different groups did seek general support, they actively performed acts that were contrary to the interests of the general population or that downright violated their rights and freedoms. What allowed these groups to perform these types of actions was a proclaimed certainty in the rightfulness of their demands and the absolute injustice committed against them. In the Atenco case, the protesters argued that ancestral rights to land and communal practices were being threatened by an oppressive government and unbridled capitalism, the teacher's union almost always invokes the sanctity of prerogatives already earned, the Zapatistas used an anti-colonial discourse, and the students rebelled against what they considered to be the privatization of education which is contrary to the liberal character of the Mexican constitution. In sum, they all argue against changes to what they presume to be a historic way of being.

3. Community and Culture

In order to have a shared understanding of a historic way of being you need a group of people that strongly identifies itself with this image. The insider/outsider narrative that Constable stresses in her book is a pivotal part of

this dynamic that it does not circumscribe only to indigenous populations: there are those who strongly identify with the historic way of being (the insiders) and there are those who do not (the outsiders). In Constable's account, those who are the insiders are the ones who may not need to express their normative expectations in propositional terms (because "the native does what natives do"), their law is practice and not written, or even unwritten, rules that could be interpreted propositionally without losing their main characteristic which is that this is a behavior that reflects the close connection of the people living in the community. This unspoken bond is culture; a set of practices and understandings that are shared in a certain community. I have argued in this study, following Kymlicka's ideas, that culture should not be seen as irremediably set in the past, but as always evolving through processes of contestation and redefinition. Constable does not ignore the fact that practices might change, but she argues that these changes come when an old practice is substituted by a new practice.⁴³⁸ The need to have written rules responds to people who do not belong to the community in the first place. Instead of having a few selected "professionals in law" who interpret the written rules according to some body of knowledge that purports to be scientific, the community that is ruled by shared understandings would seem to democratize the establishment, interpretation,

⁴³⁸ Constable, *supra* note 377 at 90.

and derogation of practices by a natural process of interaction. This would make a strong case to defer to the communities the establishment of their own normative orders. An ideal nation, if such a thing it is still deemed necessary, would be mainly a coordinator of these different normative orders so that they do not conflict with each other: a “meta-legal system.”

A way to translate this specific conception of law and its relation to community is presented by Desmond Manderson. Manderson criticizes the liberal conception of the rule of law as inherently unjust.⁴³⁹ His argument is that the rule of law demands sameness in order to operate and in doing so it also justifies creating states of exception to safeguard it. The most important criticism is, however, that the rule of law can also demand “normalization,” that is, the destruction of the other in order to make him the same so the rule of law can apply.⁴⁴⁰ This is not only bad because it is intolerant, but because the “normal” that the liberal aspires to impose is not really neutral but partial – the reflection of the conception of the good of those with power.⁴⁴¹ Bracketing for the moment that, to my knowledge, this is not a conception of the rule of law embraced by any modern liberal, what is important to stress for this study is what Manderson considers a more suitable alternative to this conception of the rule of law. Using

⁴³⁹ Desmond Manderson, “Not Yet: Aboriginal People and the Deferral of the Rule of Law” (2008) 29 *Arena* 219 at 237. [Manderson].

⁴⁴⁰ *Ibid* at 238-239, 260-261

⁴⁴¹ *Ibid* at 262.

the Two-Row Wampum as an image of respect between cultures, Manderson considers that a more appropriate approach to an agreement on a normative order is to consider it a horizontal agreement between peoples and not as a vertical demand from the governors to the governed.⁴⁴² Peoples are to see each other not as a collection of individuals but as living in communities whose particularities are important to the people that inhabit them.⁴⁴³ Indeed, Manderson goes on to note that although there will be evidently points of contact between cultures, as opposed to what the Two-Row Wampum depicts with its parallel lanes, he insists that this conception invites us to recognize and respect each other's difference.

It is important to notice that Manderson is talking about encounters between different cultures. In particular, he is discussing a specific episode during the early period of colonization of Australia. I would also like to stress that I share Manderson's broader point that policies that affect traditionally marginalized groups should take into account their particularities and opinions. My aim in this discussion is to problematize the idea of deferring to "distinct" communities. If we apply the substantive arguments that Manderson makes, it should not matter if a community is defined as an aboriginal or not in order to decide whether to respect its particularities. If we see each other, as Manderson

⁴⁴² *Ibid* at 267.

⁴⁴³ *Ibid*.

says, not as individuals but as “members,”⁴⁴⁴ then at least the case should be made of what justifies respecting some memberships but not others. We belong, to different communities and not only to the more general ones that define us as aboriginal and English or as belonging to different ethnicities, clans, religions, clubs, political divisions, and a long etcetera. Society is, ideally, as Rawls argued, a social union hospitable to diverse social unions.⁴⁴⁵ Therefore, if we decide to see each other as members before individuals, which membership are we going to choose as the relevant one? Liberalism does not disregard communitarian values; on the contrary, it promotes as many communities as individuals feel that they want to form part of. It may not be possible to find one membership that can easily capture the complexity of the plurality of interpersonal contacts that we have.

A second problem for Manderson is that “community” seems to have a very specific meaning that is uncontroversial and widely shared. If we are to see each other not as individual but as members, we have to put some content to that definition which may only represent those with most power or that is shared by a majority but not by all members of a given community. The idea that we can, *a priori*, determine how a person interprets his or her own identity or what identity she considers the more salient for a particular circumstance may lead to

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Rawls, *Theory*, *supra* note 420 at 462.

essentialisms. As the Atenco case showed, each individual may make different, and sometimes contradictory, evaluations regarding the legitimacy of the demands that each community makes on him or her. Jeremy Webber has pointed out that communities are not blocks of uniform thinking.⁴⁴⁶ Indeed, Webber goes on to say:

Nor is it sufficient to say, "They belong to that culture; therefore that culture should decide." As I suggest below, cultures/communities/societies are never just given. Their boundaries can be drawn in many different ways. By the very fact of recognizing them in order to defer to them, we help to define them. We recognize certain characteristics rather than others as important. If, for example, we permit Roman Catholics to maintain separate schools, we, in effect, affirm that Catholicism is the salient element of the pupils' identities for the purposes of their education and lay aside such competing elements as mother tongue, language used, ethnic origin, or Canadian citizenship. Moreover, when we defer to a group, we recognize certain individuals as qualified to speak for the community. Recognition always presupposes judgments about what are often contested issues of identity and authority.⁴⁴⁷

Manderson and Constable see in culture a legitimate pattern of behavior which does not carry with it the defects of the positivist legal system. I have

⁴⁴⁶ "Communities are not just blocks, lined up in a row. There are communities within communities, so that a person is invariably a member of local, minority groups (...) and, at the same time, a member of a plurality of broader groups..." Jeremy Webber, "Multiculturalism and the Limits to Toleration" in André Lapierre, Patricia Smart & Pierre Savard, eds, *Language, Culture and Values in Canada at the Dawn of the 21st Century* (Ottawa: International Council for Canadian Studies and Carleton University Press, 1996) at 273.

⁴⁴⁷ *Ibid.*

argued, however, that issues of legitimacy, representation and utility should always form part of any discussion of normative dynamics when they determine people's life chances even before the individual makes a single choice. Constable saw natives just doing what they do instead of recognizing power dynamics at work and Manderson speaks of the recognition of difference as if every "member" were essentially a replica of the other.⁴⁴⁸ Now, Manderson stresses the need to listen to the concerns in a community rather than just listening what "a few authorized or self-proclaimed leaders"⁴⁴⁹ have to say. Except that, when we refer to members of communities as "peoples," there is already a very strong implicit normative claim on the member who is required to see himself or herself as having some "essential" characteristic(s) with other members.⁴⁵⁰ In a sense, then, Manderson does something very similar to what he criticizes of liberalism just under a different banner. Whereas he contends that the liberal conception of the rule of law disguises intolerance of difference among communities, his use of recognition justifies ignoring differences within communities.

⁴⁴⁸ In one instance, Manderson explains that the Two-Row Wampum expresses "an agreement between peoples." A more accurate description, however, could have been to say that it represented an agreement between leaderships; its validity tied to the processes that confer authority to such leaderships. Manderson, *supra* note 440 at 267.

⁴⁴⁹ *Ibid* at 271.

⁴⁵⁰ Manderson stresses as one of the qualities of the Two-Row Wampum that it depicts equality "between peoples rather than persons." *Ibid* at 269.

Finally, I contend that liberalism does not ignore or, worse, seek to destroy difference. It is exactly a great concern for respecting pluralism what animates Rawls's theory of justice, for instance. As Kymlicka notes, what liberals emphasize is not that the community is irrelevant, but that it is constructed by its members' practices and understandings. Ideological differences may exist not only among "members" of the same group but also exist even within a sole individual in the span of his or her life.⁴⁵¹ Here lies the importance of Fraser's theoretical framework of justice that incorporates the need for recognition, but that also calls for an examination of the forum in which these claims are settled and of issues of representation. Representation is a concept that can be used at several stages of examination of the conflict of Atenco, which would demand that we not only ask ourselves if the *ejidatarios* are properly represented in the central power structure (the officially recognized government levels), but also asks us to reflect if, by seeing them only as *ejidatarios*, we are ignoring that they may interpret this term differently or if they may not see themselves mainly as *ejidatarios*.⁴⁵² What it is needed, then, is the working out of a proper institutional framework that recognizes the importance of community at the same time that it recognizes its constructed nature. In order to do that, however, we have to be mindful in how are we going to identify the source of oppressive inertias.

⁴⁵¹ Kymlicka, *Liberalism*, *supra* note 281 at 48.

⁴⁵² This topic was already introduced in the specific context of the *ejido* in chapter II using Krantz's insightful empirical research.

4. The “Mentalist” Approach to Shared Understandings

Last chapter, I introduced de Soto’s theoretical framework with particular emphasis on his allegorical representation of people living within bell jars that prevented them from enjoying the benefits of the broader economy. The bell jar, according to de Soto, is made of bad laws that do not recognize the difference in circumstances and conceptions of property. This narrative conforms to Manderson’s position that the whole of idea of one law that should apply equally to everyone is inherently unjust. Both Manderson and de Soto argue instead for a sort of meta system of rights that allows non-hierarchical communication between systems.⁴⁵³ In the case of Manderson, he argues that we must essentially see each other as members and not as individuals. Whatever understanding we reach, thus, must reflect recognition of difference instead of ignoring it. For de Soto, we must create a system of property rights that recognizes the different ways in which people conceive and manage property. This is not to say that this system would supplant the different conceptions of property but that this system should create ways of communicating the different types of property. He calls this a meta system of rights, referring to a set of rights

⁴⁵³ Manderson, *supra* note 440 at 269; de Soto, *Mystery*, *supra* note 317 at 106.

that would allow people to represent their property in the larger economy as they do in their small social contexts. These theoretical understandings can dispense with mechanisms of checks and balances to assess or intervene in what “self-determined peoples” do since they simply defer to self-legitimized normative dynamics.⁴⁵⁴

The problem is not, then, that there are several ways to represent the property but that the legal system does not recognize them. A problem that resides exclusively in the law must be resolved by adjustments to the law exclusively as well. In our case, as I explained in the last chapter, it is not so much that there is no legal recognition of the *ejido* but that, as explained in chapter III, the legal framework has fragmented ownership to such an extent that it can become very difficult to determine who owns what and to what extent in some contexts. In addition, a group inside of the *ejido* claimed that the government’s actions were unjust because they ignored the community’s wishes. The idea behind the fragmentation of property rights was to prevent the worst-off from losing their lands to those with the most power. Since this form of property holding was supposed to be communitarian, the government also established the internal forms of organization of the *ejido*. As explained in chapter IV, the

⁴⁵⁴ It is import to stress that this is not an argument against Manderson’s very valid argument that public policies should respect the idiosyncrasies of communities but, rather, this is an argument about being more mindful of legitimizing or endorsing internal dynamics. In particular, this as an argument about the possibility of having across the board standards that allow for an assessment of state of affairs and, that, at the same time, respect difference; this will be more fully explored next chapter.

government treated the internal organization of the *ejido* as mainly an economic issue. As a result, property became the basis for political participation within the *ejido*. The system is cumbersome and inflexible; there are many extra-legal dealings inside the *ejidos*.⁴⁵⁵ If we apply de Soto's analysis, however, we would only notice that the *ejidatarios* have a particular way of coping with the very complex regulations that govern their property. This approach denies the possibility that this may be only a reaction to a set of government regulations and not a different way of perceiving property because of different cultural dynamics. More importantly, however, is that these shared understandings are not the reflection of a neutral interaction between the *ejidatarios*, but the result of small instances of oppression and injustice.

If we consider then, that we are going to defer to the "shared understandings" of the "community" we have to ask ourselves the main reason that motivates this behavior. For Manderson, the motivation comes from recognition that people are not individuals but members of communities and that these memberships have great importance in a person's life.⁴⁵⁶ De Soto relies on social contract theory and, in particular, he mentions the philosophical insights of Plato and Kant. I criticized both approaches for distinct reasons but what both

⁴⁵⁵ Indeed, Terzi Ewald argues that *ejidos* are actually regressive in economic terms and end up fomenting informality. Terzi Ewald, *supra* note 2 at 67.

⁴⁵⁶ Indeed, Manderson notes that "[t]he wampum belt does not treat people as isolated and commensurable individuals, but recognizes instead that they live their lives in 'vessels', communities whose difference is valuable to them and worthy of respect, and whose trajectories may therefore not be identical." Manderson, *supra* note 440 at 267.

approaches reveal, albeit in a concealed manner, is that the reasons that these shared understandings are important for people are that they value the community to which they belong and which produces these understandings and, secondly, because these shared understandings are a reflection of their own interactions with other members and, thus, they also reflect the way that they understand themselves and their environment. It is perhaps for these reasons that Constable thought that an understanding of a normative order did not need written rules or institutions. It is the attitudes and the practices that emerge from them that form the normative order in a natural fashion. Constable argues that the emergence of positive law "...coincides with the moment a conqueror imposes his will on a conquered people."⁴⁵⁷ These oppressors, in turn, always justify imposing their will based on a supposedly historic event that justifies it.⁴⁵⁸

Constable argues that customary rules are superior to the positivist approach because: 1) they represent the will of the people; 2) they do not have the problem of indeterminacy of interpretation; and 3) they do not appeal to some exterior source of legitimacy outside of the practical demands of the case in question.⁴⁵⁹ I have argued, however, that the shared understandings in the *ejido* context are the result of inertias embedded in political dynamics and the "basic structure" and that, therefore, they do not necessarily represent the will of the

⁴⁵⁷ Constable, *supra* note 377 at 85.

⁴⁵⁸ *Ibid* 69-70.

⁴⁵⁹ *Ibid* at 92.

community. What explains these very divergent conceptions of shared understandings? One option could be to say that Constable refers to a context untouched by the other, the outsider, the invader. This, however, would make her work irrelevant for a world increasingly interconnected. Secondly, in the Mexican context in general, and in the Atenco case specifically, I have pointed out that even the emancipatory movements that adopt many aspects of this discourse end up reproducing very similar oppressive regimes. In what follows, I will argue that the main difference between the different perspectives that I have described here and my own take lies in that all these three authors (Constable, de Soto and Manderson) rely on a “mentalist” approach to shared understandings.

In order to frame this interpretation, I am going to take Constable’s observations in turn as representative of the mentalist approach. First, Constable argues that customary rules respond to the will of the community because customary rules are neither centralized nor susceptible to be captured by special interests, but a collection of spontaneous interactions with the sole goal of resolving present, practical, instant problems.⁴⁶⁰ Positivism, on the other hand, looks to standardize and categorize problems, forcing actual circumstances to be fitted into pre-fabricated boxes and, in the process, sacrificing particularities and justifying, as Manderson pointed out, the elimination of difference. But how can

⁴⁶⁰ *Ibid* at 89.

we be so certain that these interactions are really solved by mutually agreed solutions and not as a result of impositions? For Constable, the answer is that by deciding what to do by doing, problems are solved by "...the practices and traditions that constitute a people, rather than [by] the truth of a proposition or the authoritativeness of a stated rule."⁴⁶¹ I have pointed out, however, that the mere observance of what is should not be considered an unqualified endorsement of what should be. This last statement does not require a complete divorce of the *ought* from the *is*. It is only sufficient to point out that following the inertia of what has been, while perhaps efficient, does not give much space for reflection. The fact that a completely different state of affairs may not be possible or desirable does not mean that improvements could not be made. Constable's argument that disagreements in traditional societies are only about what to do and not about proper interpretation of written rules is insufficient to answer this concern.

In order to raise the question about what should or should not be done, there must be a conception of what should or should not be happening. In order to assess what should or should not be happening there must be a comparison between what *is* and a *counterfactual*. This counterfactual cannot be, either, completely determined by what has been since, in that case, societies would remain always unchanged. It is misleading, then, to assert that customary rules

⁴⁶¹ *Ibid* at 92-93.

do not rely on something beyond the present demands and practical reason. There is something beyond that, a conception of the good that animates ideas about authority, about the proper order of things, and the proper balancing of values and present needs. The fact that they are not spoken about should not be interpreted as unanimity, a reflection that people “just know,” without expressing it, how to resolve conflicts between these different conceptions. That is what Constable assumes, that the connection between the members of the community is so strong that their differences are either just about technicalities or that differences do not involve any of the ghosts that have been haunting larger political units and that have to do with the legitimacy of coercion and authority. The agreements that allow this level of connection do not need to be addressed, according to Constable: just by doing they are created; they hover over a collective consciousness.

This mentalist approach⁴⁶² is criticized by Michael Bratman in the following terms:

...shared intention, as I understand it, is not an attitude in any mind. It is not the attitude of some fused agent, for there is no such mind; and it is not in the mind or minds of either or both participants. Rather, it is a state of affairs

⁴⁶² Bratman does not actually call it the “mentalist approach.” I take this term from Lenoble and Maesschalck analysis of his work. Jacques Lenoble & Marc Maesschalck, *Democracy, Law and Governance* (Burlington, VT.: Asgate, 2010) at 49-50.

that consists primarily in attitudes (none of which are themselves the shared intention) of the participants and interrelations between those attitudes.⁴⁶³

I am going to come back to this in the next section but for now I would like to make an explicit connection between shared understandings and shared intentions. Remember that for Constable customary law refers not to a primitive form of law but to a sophisticated one where people solve their problems by doing and do not get dragged into discussions about legitimacy or interpretation because there are no written rules that need legitimacy. For Bratman, shared intention refers to “a state of affairs consisting primarily of appropriate attitudes of each individual participant and their interrelations.” This state of affairs “performs at least three interrelated jobs: it helps coordinate our intentional actions; it helps coordinate our planning; and it can structure relevant bargaining.”⁴⁶⁴ For Constable, it is shared understandings, that is, common knowledge in a community, which facilitate shared intentions. However, this description does not provide a basis to differentiate the state of affairs that emerges even in the presence of misunderstandings or lack of information; or in the presence of oppression or of a true collaborative process. Understanding shared intentionality as emerging from the state of affairs itself allows us to question it since it relies on “appropriate attitudes” and not mere observation of regularity. As opposed to

⁴⁶³ Michael E. Bratman, “Shared Intention” (1993) 104 *Ethics* 97 at 107-108 [Bratman].

⁴⁶⁴ *Ibid* at 99.

Constable, Bratman does not think that shared intentionality exists either in a super body (the community) or in each of the minds of the participants alone.

Secondly, Constable argues that people do not have problem of interpreting any type of pre-set rules because there are no written rules. Any conflict is about what is to be done and is resolved by doing, according to her. She assumes that the people living in these types of communities can solve their problems without any type of reference to pre-conceived notions of right and order. Constable argues that “[f]or those living by practice, though, the uncertainty that accompanies propositional rules of behavior or the lack of a final and authoritative determination of the ‘fact of violation’ of a stated rule is without import.”⁴⁶⁵ It is hard to imagine any type of community that imposes limitations, sanctions, burdens and punishments on its members, does so only by appealing to present circumstances and demands, without any type of reference to what justifies making that determination, or to who gets to decide what is to be done. Either Constable believes that people under customary law lack this type of capacity or that their connection is so strong that no examination is necessary.

Finally, this discussion takes us to the final point that Constable makes; that is, that issues of legitimacy are not important in customary law. Customary law emerges from practices that are constitutive of people and therefore are not

⁴⁶⁵ Constable, *supra* note 377 at 92.

liable to any contestation. This is a very communitarian approach to the conception of the person and of law. Constable herself, however, admits that this “community” is formed by practices, by instances of problem-solving. If this is the case then issues of authority and legitimacy do emerge. What if a practice is considered to be contrary to the community by other members? To what are they going to appeal if there is nothing but deeds done and to be done? There must necessarily be an understanding about what really constitutes what “the community” considers the true reflection of themselves. In order to do this, people cannot solely appeal to practices but to conceptions of right and good that are always contentious and that always need to be addressed before “doing.” How do we understand shared understandings and shared intentions in a way that reflects that we do take into consideration our interactions with others but, at the same time, we always refer to something not present or completely formed at the time “of doing”?

5. Shared Intention and Community

In chapter IV, I made the argument that the *ejido* could not be considered only as property because, for all intended purposes, it became a political intermediary between the other levels of government and the *ejidatarios*. I also

made the argument that, given the present legal framework of the *ejido*, it becomes necessary to see it as a *sui generis* political unit. Finally, the chapter also ended making the argument that the *ejido* did not provide the space for the *ejidatarios* to become “autonomous centers of decisions” following the term used by Baechler. In this section, I flesh out Baechler’s emphasis on the distinction between the public and the private, and how these terms are related to the topic that I have been discussing concerning the connection between shared understandings and shared intentionality. But before going into that, it is important to address another communitarian critique, in this case, a critique of the liberal conception of property. This is not a detour from our main topic since its conclusion will leave us in a better position to understand the *ejido* as a socio-economic and legal unit. Remember that in chapter III I argued that the best way to approach the *ejido* was to see it as a legacy of two legal institutions of the Spanish colonial times: the *encomienda* and the Spanish *ejido*.

This description is contrary to what Baechler described as what property should look like in order to be an appropriate center for autonomous decisions. However, some communitarians believe that the concept of property, as currently conceived, is necessarily geared towards individualism. Baechler tried to strike a balance between community (since without it there would be no association) and the individual (since without him or her there would be no guarantee of freedom).

However, the mere distinction between the individual and community may prove to be a problematic concept for some communitarian conceptions of property. In order to assess this claim, I will use Jennifer Nedelsky's characterization of the liberal conception of property within the paradigm of boundaries and, particularly, within the paradigm of the bounded self.

Nedelsky makes the argument that it was the "boundary like structure" of property that shaped the way the American constitution was written.⁴⁶⁶ The problem with the boundary paradigm is that it involves "a picture of human beings that envisions their freedoms and security in terms of bounded spheres."⁴⁶⁷ Property emerged as a tool to define the boundaries of the reach of both government and the rest of society. According to Nedelsky, the problem is that if we need the free exercise of property rights to enjoy liberty, this would lead to inequality, which in turn creates a majority invested in infringing property rights. In order to protect freedom, the framers had to entrench and protect inequality from being reversed since its mere existence was evidence that liberty was effectively safeguarded.⁴⁶⁸ This description resembles what motivated the creation of the *ejido* in the first place. In order to prevent further rebellions that threatened the property rights of the well-off, the government entrenched

⁴⁶⁶ Nedelsky is referring to the common law conception of property, specifically in the American context. It is important to notice, however, that Mexico adopted a very similar constitution to that of the United States.

⁴⁶⁷ Jennifer Nedelsky, "Law, Boundaries and the Bounded Self" (1990) 30 *Representations* 162 at 163 [Nedelsky].

⁴⁶⁸ *Ibid* at 164.

inequality by encapsulating the *ejidatarios*, instead of creating the conditions where everyone had a fair chance of succeeding. Using this framework then, the *ejido* is not an aberration of the system of property rights, nor is it incompatible with liberty. As Nedelsky notes, liberty needs security in order to be meaningful; an entrenchment of the limitations to both the liberty and the economic prospects of some is necessary for securing and expanding the liberty and economic progress of others.⁴⁶⁹ The first group always happens to be the majority and the lucky second group always seems to be a minority, which makes the need to protect this inequality all the more urgent and calls for firm legislation.

Nedelsky stresses that there was no hypocrisy intended; the Framers took seriously the idea of protecting liberty for all which was impossible to safeguard without a strong property rights regime which, in turn, would inevitably lead to inequalities. Their mistake was in that they (the framers) "...cast the general problem in terms of the particular – and we have continued to think in those terms." The Framer's, she continues, "...were in fact focusing on protecting the few from the many, not the individual from the collective of which he or she is a part."⁴⁷⁰ The result was the diminished political power of the many and the insulation of the concept of property from democratic dialogue. Rights became associated with the idea of boundaries to keep others out. The cause of this was

⁴⁶⁹ *Ibid* at 165.

⁴⁷⁰ *Ibid* at 166.

a mistaken conception of autonomy in which "...the most perfectly autonomous man is the most perfectly isolated."⁴⁷¹ Instead of this interpretation, Nedelsky proposes to conceive autonomy as capacity and not as a static characteristic.⁴⁷² As such, in order to be effective, this capacity must be nurtured and practiced; both activities imply that we are interconnected with others and embedded in a particular community. The task ahead is then to "...focus on the complexities of the interpenetration of individual and collective."⁴⁷³ This is part of what this study has tried to do.

Nedelsky's analysis sheds light on an important development on how we perceive both property and liberty. We are left at the end, however, with a very broad program to follow. Simply dissolving property rights among the community or several people does not guarantee an appropriate approach to the tension created by the fact that, yes, we are partially constituted by our social relations but, on the other hand, this experience is unique for each individual. And it is not that Nedelsky proposes doing that; her argument is that we must see property under a different paradigm. In the case of the *ejido*, we saw that the fragmentation of property rights did not lead to an appropriate dynamic between community and individuals or even between the larger community and the other communities that cut across the *ejido*. Nedelsky is not unaware of the relation

⁴⁷¹ *Ibid* at 167.

⁴⁷² *Ibid* at 168.

⁴⁷³ *Ibid* at 182.

between power and property, but she sees this relation as being a problem only if we adopt the boundary conception of autonomy. The boundary approach, she argues, masks the fact that property is a right protected and enforced by the state.⁴⁷⁴ Once the consent of the community is no longer needed to protect property, since now the state performs that function, it seems easy to arrive at the conclusion that others keep out because the object “belongs” to us, that is within our sphere. This has created the illusion that private property is neutral and government regulation amounts to “intervention” even though both exhibit the role of the state.⁴⁷⁵ The boundary approach makes it easy to believe that property is not, essentially, about relationships. However, precisely because it is about relationships, property *is* a matter of boundaries; a relationship implies the connection (or opposition) of two or more distinct entities. The real task is about the negotiation of difference, that is, the determination of what constitutes “the other” and what should be the terms of the relationship; neither should be considered just given, they are always socially constructed.

Does the idea that we are constituted by several social experiences lead to the conclusion that property must be conceived as fragmented as well? Remember that Honoré’s theory does conceive ownership as a bundle of different rights, but these rights reflect a diversity of potential legal relations and

⁴⁷⁴ *Ibid* at 177.

⁴⁷⁵ *Ibid*.

not necessarily of social relations. It is the individual who might initially have all of these rights, the more he has the more “complete” his ownership is. These rights might be divided, but again, that division might not be the product of social relations but of market transactions. In the case of the *ejido*, there is much division of property rights and the result was that those with the most power managed to impose their will on others. Fragmented property rights might not, therefore, necessarily bring more awareness or balance to the complex relations in which people are immersed. Fragmented property rights can equally mask the fact that property is not a communal endeavor but managed by the interests of the few that cloak themselves in communitarian narratives that involve identity claims such as those emerging from a common history, culture and from solidarity. Fragmented property rights can also diminish the political capacity of the many when the few pretend to represent all the community. The Atenco case showed us that this can happen in at least two instances: 1) if the official power structure is captured by a bigger power structure (in this case the assembly by the PRI-regime), and 2) when an unaffiliated group captures power and imposes its will on others (in the Atenco case, the Del Valle group that purported to be an emancipatory movement to free the community from an oppressor).

The problem is that, of course, “community” is an abstraction that refers to a complex set of social relations. The community can never act as a unit because

it exists as a reductive concept. This is not to say that it is improper to talk about the community, in the end, each complex dynamic of social relations is different from another. And, as May pointed out, organizations (in this case a community) do have very practical effects in that they make possible actions that could not happen outside of this framework. What I mean by saying that the term “community” is reductive is that it is a term to refer to several phenomena and as such should never be anthropomorphized. You cannot point to a “community,” it does not think for itself or in one voice, it does not define the entirety of the people that inhabit it; to think otherwise is to fall into essentialisms. To think, however, that we belong to a community does make people behave in ways that they otherwise would not. The fact that we know that other people feel the same way is key for a concept such as community to function. The distinctive quality of a community can be observed in the state of affairs within it and not by the conception of it of elite members. Finally, we can now make the connection between community and shared intentionality. Bratman defines shared intentionality as consisting “...primarily of a web of individual psychological states and their interrelations. It would just turn out that the creation of this psychological web has normative consequences.”⁴⁷⁶ We can say, then, that a community shapes and channels shared intentionality without being completely

⁴⁷⁶ Bratman, *supra* note 463 at 112.

subsumed in it; that is, without conceiving of a community as the embodiment of collective will. The community as such can never have one shared intentionality, but a collection of them that in conjunction, and in turn, also help shape and channel the community. We can frame Nedelsky's theoretical insights within this framework and say that a proper way to approach a study of property is by emphasizing this dialectic between the universal concept of "community" and the more concrete subset concept of "shared intentionalities."

6. The Social Contract and the Fragmentation of Property Rights

As discussed before, de Soto follows Searle's theory of how we come to assign functions to different concepts including property. For Searle, this is possible thanks to the fact that we have the capacity for "collective intentionality" which allow us to coordinate and communicate the use of concepts and objects. De Soto stresses that the agreements that a community reaches to represent property ought to be respected and formalized through "meta-rights," that is, through a system that gathers information of property and recognizes the diverse representations that communities use to portray and prove their property rights. De Soto associates this process of agreement with the social contract, and as proof of its validity he argues that one may encounter great resistance if one tries

to go against social conventions. There were two problems with this description: 1) the *ejido* is not the product of a collective intentionality alone; and 2) the fact of resistance, by itself, is not sufficient to infer an endorsement of the *status quo*. Given the analysis made about community and collective or shared intentionality it is important to revisit these two objections.

The first objection has to do with the fact that the *ejido*, as opposed to the type of irregular holdings of property that de Soto focuses on is, in fact, heavily regulated by the state. The initial response to this objection was that even if the *ejido* is regulated, the legal framework is so confusing that it creates, nonetheless, legal uncertainty. The liberal policies of the 90s sought to solve this problem by providing a way of acquiring actual ownership of the piece of land. In chapter IV I argued, however, that this approach did not recognize that the *ejido* was more than simply property but an authentic political unit that gave identity and a meaningful place to develop social ties to people that were diminished politically and socially outside of the *ejido*. This brings us back to the initial problem discussed, which is the clash between valid conceptions of the good and justice claims, and the fragmented nature of property rights in the *ejido*.

De Soto's research leads him to conclude that by formalizing the informal, property detached itself from the circumstances of its owner. However, if we agree with de Soto that property exists thanks to the shared understandings

about what is property, how is it that the formalization of property rights separates the property from the circumstances of its owner? An answer could be, perhaps, that by sharing the characteristics of the property to the broader context the potential buyer or lender has the necessary specifications to make an informed decision. This is not a sufficient response, however; one would also need a certain degree of confidence that compliance of an agreement does not depend solely on the understanding of the party or community in question about the nature and interpretation of contracts. In case of lack of compliance, one would expect to count with government intervention to either enforce compliance or enforce penalties. This is beyond the agreement on the nature of property that each community may have. The question is now about the legitimacy of the state to intervene in such disputes. One could argue that since what gave birth to the property in the first place were those internal agreements, then the community itself should decide how to interpret the contracts that involve one of its inhabitants. But that would not separate the property from its owner and his circumstances as de Soto claims. On the other hand, there is no real acknowledgement of particular understandings of property if their interpretation and enforcement comes from a third party, in this case the state. There is a gap in de Soto's analysis about the proper communication between different

normative orders. The problem is even more complex when we move this analysis to the *ejido* context.

In the *ejido*, there is no clear distinction between what a government regulation is and what a community agreement is. Remember that even though the government has its official legal framework for the *ejido*, the *ejidatarios* themselves manage to shape these rules in several fashions.⁴⁷⁷ It is not that the rules do not exist but that they can take several forms depending on the context. One could say that this is the result of ignoring the particular understandings of property like de Soto warns us not to do. The reason for such variance in interpretations and applications of the law are not, on closer examination, idiosyncrasies of communities but the result of a very general problem: poverty and the lack of checks and balances. This is particularly important because if we start with de Soto's assumptions that diversity in property regimes is the result of social contracts within communities, what is there to say about the fact that people "enter" these contracts in a disadvantaged position and, on many occasions, are forced to accept unfair conditions? Nedelsky made the argument that the boundary approach to property creates the illusion that what makes us the owner of something is the idea that it belongs to us and not the power of the state backing that power. Similarly, de Soto's approach creates the illusion that

⁴⁷⁷ For a recount of how this happens generally in the *ejido* context see chapter IV, particularly the study made by Krantz. To see how this specifically happened in the Atenco case see chapter II.

the local arrangements around property are the result of mutual – “natural” – agreements and not the result of internal, potentially coercive mechanisms.

The main problem with the analysis is that, as we mentioned before, “the community” can never take a decision because when we talk of a community we really are referring to a complex set of socio-economic power dynamics. A similar analysis can be made of the state, but that is going to be addressed in the next chapter. For now, what is important to address is how is it that the fragmentation of property rights affects this power dynamic and the idea of the social contract seen as the ideal representation of how a group of people should arrive at a just form of organization. Remember that we entertained and discarded the mentalist approach to a fair organization because it relies on the existence of a supra subjectivity or because it interprets coordinated action as proof of shared intentionality. It is not necessarily the case, as Constable argues, that small communities do not have written rules because they are so “in sync” with each other that they create one subjectivity that makes it possible to speak of the “law of the community”⁴⁷⁸ rather than always recognizing the law as a product of political processes.⁴⁷⁹ The reason for appearance of shared understandings, particularly where there are strong economic inequalities, may reside with the

⁴⁷⁸ Constable, *supra* note 377 at 66.

⁴⁷⁹ The issue is not minor. To talk about “the law of the community” implies that it is shared by every member of the political unit. To consider law as a product of specific political processes allows for contestation without being liable to be considered as not a “true member” of the community.

fact of oppression and the LDP dynamic. Remember that in chapter IV, I discussed May's observation that even if you do not share strong ideological, cultural or ethnic ties with the rest of a group, the fact of being identified with it and, thus, being subject to share whatever fate awaits the rest of the group, creates strong "community" ties.⁴⁸⁰ Ironically, it is the fact that others situate you in that position that creates that identity that you suddenly find such an intimate part of who you are.⁴⁸¹ Finally, being always one step away from failing to meet sustenance also creates dynamics within the *ejido* that make reliance on others stronger and makes many *ejidatarios* much more risk averse than the rest of the population and may resist integration to the broader economy.⁴⁸²

The image of the *ejido* as a bell jar in itself becomes clearer now even without taking into account laws that prevent the easy transfer of property from this regime to the general economy. But what happens inside of the *ejido*? The Mexican Constitution created a mixed legal regime within the *ejido*. Part of the

⁴⁸⁰ In fact, strong identity bias can emerge from trivial characteristics that are emphasized at a certain point. In an empirical study by Vaughan, Tajfel, and Williams, it was shown that even small children quickly develop strong in-group bias from simply being part of the group that was given a card with a red or green circle. Graham M Vaughan, Henri Tajfel & Jennifer Williams, "Bias in Reward Allocation in an Intergroup and an Interpersonal Context" (1981) 44 Soc Psych Q 37 at 41.

⁴⁸¹ Indeed, Richard Jenkins describes this process in the following manner: "Your external definition of me is an inexorable part of my internal definition of myself – even if only in the process of rejection or resistance – and vice versa. Both processes are among the routine everyday practices of actors. Nor is one more significant than the other. At best I am indicating different modes of mutual identification which proceed, not side by side, but in the same social space. *It may be possible, and analytically necessary, to distinguish different kinds of collective identities – groups and categories – in terms of the relative significance to each internal or external moments of identification*, but this is only a matter of emphasis, and as far as one should take it." [emphasis added] Richard Jenkins, *Social Identity* (New York: Routledge, 1996) at 27.

⁴⁸² This analysis is taken from J C. Scott research of the peasant economy in Asia but he considers that many of his findings can be applied in other rural contexts where there is financial uncertainty. Scott, *Rebellion*, *supra* note 161 at 4, 36.

land was assigned individually and other was considered to be held communally, all of it belongs within the category of *ejido*. In chapter IV, I argued that this causes what Demsetz calls “compactness,” that is, that there is no way of taking a decision that does not affect others within the *ejido* because of interlocking interests. Privatizing your own parcel, as the reforms of the 90s allow, diminish the value of the *ejido* overall. Other *ejidatarios* have an interest in whatever a “private” owner does with his or her property. After all, the piece of land was within the *ejido* regime, even if it was an individual parcel within that framework, which one of them decided to turn it private unilaterally. To complicate things even further, that same chapter explained that society in general has also an interest in that legal regime since it is the result of a national movement (*la Revolución*) and the *ejido* is seen as part of the victories obtained during that time. Therefore, even if the property gets official recognition through whatever “meta-rights” system is chosen, the fact remains that the property cannot detach itself from the context in which it is embedded. A further question to ask ourselves is what would prevent internal agreements that would minimize the negative effects of individual actions. Going back to Krantz’s empirical findings,⁴⁸³ I argued that there is “unevenness” in the effects of a given decision since there is much differentiation between members of a community. Some of

⁴⁸³ See section 4 of chapter III.

that difference is due to the normal accumulation of individual transactions through time, and others are the direct result of corruption and unfairness in the initial distribution of land.

The *ejido*, even though it is a small community, is composed of different groups sitting on scarce land and within an environment of isolation and vulnerability. This situation creates zero sum games within the *ejido* itself. Whatever decision is made, *ejidatarios* will see as imperative to strengthen the internal group to which they belong. As the Atenco case shows, these internal conflicts can get very contentious and intensify the insular character of the *ejido* as a political unit. The excessive fragmentation of property rights creates instability and diminishes the ability of individuals to exercise their rights within the bigger political structure. This is because formal spaces of deliberation are closed in the name of “community unity” which can represent really just one faction. Many decisions are made in the name of “fraternity” and “solidarity” justified by a real or imagined past that looks to obscure the unevenness of the effects of a given decision. From this point of view, we can reject de Sousa Santos’s hypothesis that the “bureaucratic institutionalization of juridical production” is what diminishes the space for legal discourse.⁴⁸⁴ The retreat of the state from other normative orders does not necessarily translate in a greater

⁴⁸⁴ De Sousa Santos, *supra* note 398 at 89.

expression of legal discourse if by “legal” we mean the product of shared understandings and intentionality.⁴⁸⁵ In order to back this claim, though, it is necessary to explore the relation between law, power, and communication within our framework of culture and community.

To conclude this chapter, I will reiterate that a bad government/good people approach obscures the fact that it is not whether people are in government or outside of it that creates injustices. This narrative obscures the fact of the diminished space for dialogue and democratic participation in collective choices by other repressive dynamics. If there is something in common between some of the emancipatory movements described here that later turned oppressive it is the aggressiveness of the narrative of unanimity in shared intentionality. There was so much certainty in the legitimacy of their claims that these groups did not consider it necessary to strengthen their mechanisms of participation. Culture and membership in a community are the two most important concepts utilized by these emancipatory movements to reject the need to open themselves up to scrutiny. Any question is interpreted not only as a criticism of the movement but also as an attack on culture or community. These last two chapters tried to redefine how we approach these concepts to make

⁴⁸⁵ This should not be interpreted as an emphasis on bureaucracy for its own sake but as a call to pay more attention to the process that allow us to attach the label “legal” to normative dynamics. To the argument that too much bureaucracy is undeniably an obstacle to the free flow of information in legal discourse it can be responded that the same can be said of anything; too much discourse can also be an obstacle to bring about resolution to conflicts.

them compatible with democratic mechanisms. The next chapter will then tackle how the government can utilize law to strengthen the position of vulnerable individuals so that they can effectively shape law without capitulating their identities and conceptions of the good.

Chapter VIII

Between Overlapping Normative Dynamics: The Space for Reflection

Up to this point we have been analyzing the effects of a policy that focused almost exclusively on the re-distribution of land. This approach was mistaken not only because it turned out to be impossible to keep perpetually re-distributing land, but also because the approach ignored the causes that led so many people to be left without land. There has been always an implied or explicit admission by the Mexican government that a series of injustices have left millions of people in a vulnerable position, but the causes of such injustices have been perceived to be so intractable that it ultimately decided to administer the misery rather than work to overcome it. Remember that the *ejido*, initially, was designed as a temporary measure to help vulnerable people to keep land. More than 90 years later, while there is evidence that the *ejido* was successful in helping many people to obtain land,⁴⁸⁶ it is also clear that the measure entrenched a subordinate for a large proportion of individuals.

There has been resistance to making any type of profound transformation to this regime. This resistance cannot be viewed in isolation from the series of reforms that are deemed necessary for the country but that congress seems

⁴⁸⁶ See introduction.

unable to pass.⁴⁸⁷ As explained before, one cause of this is that any type of reform affects an existing prerogative that an interest group has over a territory or activity. The PRI-regime has governed the use of these prerogatives to control different sectors; it is not surprising that many people have come to see them as entitlements. The second main problem is that, in spite of the government's dismal record in actually solving the most entrenched problems in Mexico, many still see the state as the only legitimate actor to make reforms, while privatization is viewed as caving-in to small but wealthy interests groups. A widespread belief is that, with the right type of person in government, the needed reforms would go through. As the election of Vicente Fox showed, however, democracy needs to be seen as more than electing public officials.

In this chapter I'm going to question the idea that solving today's problems can really depend on one person regardless of how right and powerful he or she may be. The real challenge, I will argue, is to empower individuals to find solutions for themselves while assuring proper coordination so that everyone's capacity to influence collective decisions is respected. This chapter will revisit de Soto's conception of legal title, enriching it with Fraser's distinctions and interrelations between redistribution, recognition, and representation while taking into consideration the critiques made in the previous chapters.

⁴⁸⁷ María Amparo Casar, "Executive-Legislative Relations: Continuity or Change?" in Andrew Selee & Jacqueline Peschard eds. *Mexico's Democratic Challenges: Politics, Government and Society* (Washington, D.C.: Woodrow Wilson Center Press, 2010) 117 at 130.

1. Reflective Deliberation: Learning to Resist Inertia

Taking into consideration what we have discussed so far, we are facing a daunting challenge: on one hand, we discussed the need for people to have a bigger say in shaping the norms that govern them (including legal norms); on the other hand, I have been describing a series of cultural and socio-economic circumstances that turn emancipatory social movements into repressive ones. To complicate this scenario even further, I have acknowledged that the institutional framework is one that is often corrupt or at the service of elites. This dual challenge – that is, oppressive dynamics and a deficient institutional framework – makes it difficult to incorporate solutions that call for more deference to communities, since, without meaningful reform to procedures of democratic participation, it simply translates into a changing of the elite group doing the oppression. What is required is to address oppression itself.

Most of the literature analyzed here revolves around the idea of empowering and deferring to communities. Despite notable differences, de Soto, Manderson, Kymlicka, Constable, and Young all aspire to this goal. Except for Young's approach, I found that all of these theories relied too much on either an essentialist or a "mentalist" approach to normativity. My first critique, particularly

directed at Manderson and the later writings of Kymlicka, is based on the fact that people do not relate to just one essential group identity or, even if they did, not every group member may interpret it the same way. The second critique, directed in particular at de Soto and Constable, argued that insufficient attention was paid to positive deliberative processes that might provide some sort of assurance that the state of affairs truly reflected internal agreements rather than simply reflect the result of power struggles. Young's theoretical insights answer both problems: she recognizes that people live in a plurality of communities and she puts strong emphasis on the deliberative process.

Indeed, Young introduces the term "differentiated solidarity," which seeks to reconcile self-determination with our commitments to a plurality of communities, some of which we may not identify with but that we nevertheless belong to in relational terms.⁴⁸⁸ However, Young also recognizes that reconciling this plurality of claims with individual freedom requires a turn to the state as a unique agent of social coordination that can help correct imbalances of power and information. Young points out that "[t]o manage such co-ordination states must be centralized and regulative: they must gather useful information, monitor implementation and compliance, and rely on coercion in case of non-compliance".⁴⁸⁹ Young, then, supports the voluntary clustering of people with

⁴⁸⁸ Young, *Inclusion*, *supra* note 340 at 197.

⁴⁸⁹ *Ibid* at 186.

similar interests or life styles as long as these groups are not closed to the claims of outside groups and their leadership does not claim to represent the essence of their members. Although Young explicitly avoided going into the details of the institutional framework that could respond to all these aspirations,⁴⁹⁰ she did sketch the two main elements “of this model of the autonomy of local governments in institutionalized relation to others in a region”:⁴⁹¹

1. Locally autonomous units of participation and decision-making;
2. Regional governance institutions that set procedures for cross-local co-operation and decision-making (regional legislature).⁴⁹²

The purpose of this structure is “to strike a balance between attention to the needs and interests of diverse and distant strangers that commitment to justice requires, on the one hand, and desires for differentiated affiliation in more closely identifying communities of interest.”⁴⁹³ I have explained that the *ejido* structure had the opposite purpose to what Young describes: the *ejido* insulated its inhabitants in a federal bubble that severed it from its immediate surroundings. In section 5 of this chapter, I will propose a series of legal reforms to answer this

⁴⁹⁰ *Ibid* at 232.

⁴⁹¹ *Ibid* at 233.

⁴⁹² *Ibid* at 234.

⁴⁹³ *Ibid*.

and other problems of institutional coordination. This institutional framework gives a partial answer to Fraser's concern with the framing of justice claims, that regardless how one constructed the "what," the "who," and the "how" they were still liable to contestation.⁴⁹⁴ Furthermore, there is no assurance that Young's framework will prevent the inertias that were discussed in last chapter from occurring. While Young's framework helps to keep in check many of the institutional deficiencies that we have been discussing, particularly by emphasizing inclusion in the deliberative process, the fact remains that this still does not guarantee better outcomes. What is needed is not only to address decision-making processes but also the way that people approach them.

The idea of abnormal justice, as described by Fraser, requires at least a moment where we avoid turning to authority for guidance. As we do this, we must momentarily step out of a strictly legal and political project. However, it is necessary to provide an approach to tackle oppressive inertias embedded in culture and institutions. This approach focuses on attitudes but having in mind the issues discussed above regarding institutional governance. In this regard, Jacques Lenoble and Marc Maesschalck warn that it should not be assumed that by institutional design alone people would develop the behavior necessary to fulfill their normative expectations. Instead the authors argue that the appropriate

⁴⁹⁴ See section 7 of chapter VI.

behavior is the product of learned processes, which should be taken into account while devising governance mechanisms.⁴⁹⁵ In this sense, the concept of “governance” will have to strike a balance between allowing a plurality of “interorganizational networks”⁴⁹⁶ to operate autonomously by assuring that no network violently overcomes another. The role of the state in governance should not be that of “indirect steering,” but that of an active agent that safeguards a plurality of communities and coordinates communication between them.

Young's institutional framework is instructive; however, it is still incomplete. Without an internalization of the reasons why the institutional framework is just and necessary, the project is politically unstable and difficult to enforce. It is important to have an institutional framework that help individuals work out their normative expectations while, at the same time, accommodating the reasonable normative expectations of others. This applies to officials as well, as Lenoble and Maesschalck argue, “on what basis can we assume that those who will apply this mechanism [the external hierarchy that forces accommodation] will do so ‘in the same spirit’ as that which prevailed when the external system was set up?”⁴⁹⁷ And, indeed, in the case of Atenco, and in spite of structural deficiencies, nothing necessarily forced the assembly to become such an exclusionary body of representation. There is a limit to what laws and institutions can accomplish

⁴⁹⁵ Lenoble & Maesschalck, *supra* note 462 at 207.

⁴⁹⁶ “Interorganizational network” is a term used by Rhodes. Rhodes, *supra* note 342.

⁴⁹⁷ *Ibid* at 209.

without a cultural shift that becomes internalized. The authors' response to the limits of deliberative governance, particularly as a reflective learning mechanism, is what they call "the genetic approach to governance (GAG)."⁴⁹⁸

Following the insights of Chris Argyris and Donald Schön, the authors argue that, in order to be open to make adjustments to "...pre-existing behavioural models and approaches customarily used to solve problems, and to determine the strategies deemed the most rational," we need to address the "defensive strategies" that are used to resist the "reframing operation."⁴⁹⁹ In order to help individuals escape "repetition compulsion," Lenoble and Maesschalck present a four-point description of the internal capabilities that should be strengthened in order to approach the deliberative process in a way that truly reflects actual choices: (1) Capacity for self-representation through "terceization," which means that we should be able to recognize ourselves as capable of self-transformation; (2) "self-capacitation" as "reflectibility," that is, an awareness of "collective identity-making," and "destinability (ability to do) as related to our capabilities as an actor; (3) the ability to frame and re-frame, that is, learning to construct and re-construct mechanisms of choice; and (4) these mechanisms of choice, in governance terms, translate into a "reappropriation" of the actors' vigilance

⁴⁹⁸ *Ibid* at 213.

⁴⁹⁹ *Ibid* at 214.

mechanisms that help identify and contextualize “blockages” to the relation between normative expectations and actual normativity.⁵⁰⁰

Any type of account that asks of people to engage in a particular form of thinking has to come to terms with the possibility of non-compliance. While it is impossible for any governance mechanism to guarantee that people will engage in this type of reflective stance, what the GAG blueprint allows us to do is to create an institutional framework so that at least there are procedures that allow for reflection. Most of the learning experience involved in empowering people to see themselves not only as products of culture and identity-making processes but also as active agents in their constitution, lies in the education system and in the relational dynamics created by the appropriate institutional framework itself. The institutional framework helps create an expectation of compliance with rules rather than, as happens now, an expectation that conflicts in the end are resolved by raw power clothed in legal terms. Going back to the case of Atenco, the GAG framework would have allowed the parties to see themselves not only as actors in a particular struggle but as repeating a “collective identity-making” that has traditionally been charged with oppressive dynamics. While this realization means nothing without a power structure able to uphold the rule of law, without a process of reflection that connects reflective and democratic

⁵⁰⁰ *Ibid* at 217-223.

normative expectations with the actual norms being enforced, the rule of law can end up being repressive in itself or deeply unstable. However, the rule of law requires, in turn, that people recognize their own *reflective* normative expectations in the law.

2. Actualizing the *Ejido* as a Context of Choice

When discussing the reasons for reforming the *ejido*, the point is not that everyone should substitute their interests for those of other people, but rather that *ejidatarios* have to work through certain procedures that facilitate taking into account the interests of other people affected by the decisions made in the assembly. As I have described in chapter II, the *ejido* assembly in fact only represents those with *ejido* rights and it is prone to capture. Applying the theoretical insights from Fraser, Young, and Lenoble and Maesschalck, we can determine that this form of representation is severely lacking since it does not acknowledge a plurality of legitimate interests. The process of legislating the creation of the *ejido* had little input from the landless themselves to decide what was the best way to move forward, and then the *ejido* itself diminished their capacity to decide in the future. While the distribution of communal land without recognition of every individual as a free and equal member of society did improve

the *ejidatarios* overall position, when compared to their situation prior to the land reform policies, the *ejido* also made it easy for the rest of society and the government to postpone having to reflect on how we see each other as members of the same system of cooperation and on the role of class in Mexican political culture.

De Soto considered that only (bad) law, and not culture, was the obstacle to improving the economic conditions of the worse-off, while at the same time noting that law is a social construct. This evident contradiction can only be explained if we imagine law working in a vacuum; where once a legal path has been taken the individual is abstracted from his or her surroundings, with law separating our claims from our circumstances. This is why de Soto believed that property could transition from hand to hand without being encumbered by the fate of its owners. This is a particularly difficult proposition to sustain in the case of real property. De Soto's argument that only the representation of property, and not the thing itself, helps property navigate the capitalist world may be overstated. While it is true that, for instance, to get a loan only the title needs to be presented as collateral, it is the potential for using the actual physical piece of property in the specific context in which the property is located that makes the title valuable. Rarely is property valued exclusively by the worth of its bricks or

windows; this type of value can only go so far in the market.⁵⁰¹ The environment in which the property is located matters. The fact that most *ejidos* were not turned into private property shows that they have a value that is not easily translated into monetary terms.⁵⁰² On the other hand, this also illustrates that the value of the actual improvements on the land are of little worth if they are difficult to access by the general public; even if actual use is not imminent, the potential to be used is what gives value to the property. The social circumstances that surround the property are significant and legal title, by itself, does not change this fact.

The legal composition of the *ejido* shows a lack of regard for the fact that, although members of a community, the *ejidatarios'* experience in the *ejido* varied greatly; they were seen as an undifferentiated mass of peasants whose interests could all be subsumed in the interests of the assembly. Identity dynamics are a complex phenomenon that needs empirical examination in order to respect the distinctiveness of each individual; that is, in order to avoid claiming to know *a priori* what is the most salient identity of the *ejidatarios*. In this regard, this lack of recognition disempowered people from translating that unique experience in the *ejido* to public policies that enhanced the value of the land; all *ejidatarios* may

⁵⁰¹ One of the methods that de Soto uses to check the worth of “dead capital” is by assessing “the cost of building materials...” De Soto, *supra* note 317 at 31.

⁵⁰² The second method mentioned by de Soto to assess dead capital is by “observing the selling prices of comparable buildings.” *Ibid.*

have claims over the land but they each have different capabilities to make the most of it. De Soto had it wrong; the law by itself could not separate property from the fate of its owner. In the case of the *ejido*, the property was designed to be functional only within certain conditions in which a certain category of people were immersed. It was in the interest of the government to create a form of internal governance that was easily controlled by the federal government (through formal and informal mechanisms).⁵⁰³

Even the reforms of 1992 did not represent a true step towards recognition since they were enacted ignoring the particular circumstances in which most *ejidatarios* found themselves. The main objective was to create legal certainty not so much for the *ejidatarios* but for investors on the eve of the NAFTA negotiations. True reform to change the nature of the property should have started by consulting its owners and should have had as its main objective to empower the *ejidatarios* to pursue their own interests as they best saw fit. Given that there will be different ideas in a community about the best way forward, a governmental policy that truly recognizes everyone as free and equal can only be procedural, as Fraser herself pointed out. It is important to emphasize that this response does not pretend to be a completely neutral policy (some people may

⁵⁰³ More on this in section 4 of this chapter.

consider it to be contrary to their interests), but it offers more freedom for *all ejidatarios* than more substantial solutions.

Eliminating the *ejido* as a form of land tenure is the simplest and most straightforward way to help those who want to fully integrate into the wider economy.⁵⁰⁴ This policy has the advantage of reducing potential conflicts by not having to deal with a hybrid land tenure system that facilitates the anti-commons dynamics discussed in chapter IV. Although it would not completely eliminate all of the anti-commons effects, a full dismantling of the *ejido* regime would certainly lessen and shorten those effects. Although the better-off within the *ejido* are in the best position to transition into the wider economy, complete privatization of the *ejido* would also bring enormous pressure to bear on *ejidatarios* in poor conditions to sell on disadvantageous terms. As it is, many *ejidos* find themselves surrounded by cities and it is estimated that much of the growth of cities in the future will be at the expense of *ejidos*.⁵⁰⁵ Most *ejidatarios*, it is natural to assume, will then transition to those surroundings after many years of being governed by special federal legislation and thus probably largely unfamiliar with wider normative practices. In speaking of reforming the *ejido*, then, it is important

⁵⁰⁴ For arguments in favor of full ownership as the only path that respects the fundamental rights of *ejidatarios* see, Juan Carlos Solís Mendoza, “El dominio pleno, un derecho humano agrario fundamental” in Juan Carlos Solís Mendoza (ed.) *Derecho Agrario y Desarrollo Rural* (Mexico, D.F. Editorial Porrúa, 2012) 23 and Manuel I. Unánue Rivero, “El ejido mexicano: una doliente Injusticia. Apuntes para una historia. Algo de historia, de derecho y conflictividad agraria en México. Más de verdades” in Juan Carlos Solís Mendoza (ed.) *Derecho Agrario y Desarrollo Rural* (Mexico, D.F. Editorial Porrúa, 2012) 73.

⁵⁰⁵ Various authors, “The Austin Memorandum on the Reform of Art. 27, and its Impact upon the Urbanization of the Ejido in Mexico” (1994) 13:3 *Bulletin of Latin American Research* 327 at 328-329.

to keep in mind what have been the two concerns in this project: 1) the *ejido* as a site for communal and political activity; and 2) the *ejido* as an economic asset.

3. Back to Atenco: the need for a procedural response

The main challenge when thinking of reforming the *ejido* is the fact that any change in the rules that govern the *ejido* is bound to hurt the interests of some *ejidatarios*. That is, any change will leave someone worse off because, as explained throughout this study, the design of the *ejido* provided some with certain advantages at the expense of others. This is true even though many of the normative dynamics of the *ejido*, other than transactional, are informal. As Falk Moore has pointed out, the positive legal regime has great influence in positioning people differently in informal negotiations.⁵⁰⁶ Furthermore, there may be competing legitimate interests but given the fact that any change to the legal regime affects everyone, no legal change satisfy everyone's expectations or plans.

Both of these challenges are exemplified in the conflict of Atenco. The conflict of Atenco was analyzed not only by examining the legal framework that affects all *ejidos* but also through several anthropological studies on other *ejidos*

⁵⁰⁶ Moore, *supra* note 379 at 78.

to verify to what extent the experience of Atenco is unique. It turned out that what happened in Atenco supports what other studies, conducted at different times and for different purposes, have discovered. Imagining a different set of circumstances that could have helped minimize or constructively channel Atenco *ejidatarios'* differences can have wide implications to the *ejido* regime as a whole.

Let us start by stating that there is a need to empower people so that they can make real choices that reflect their particular experience in the *ejido* context, while, at the same time, aiming for stability, so that any policy change can have wide support and minimize resistance. Here is important to again consider the social contract theory that de Soto considered as a legitimizing process when analyzing property regimes. I agreed with de Soto that social contract theory is an important element, but disagreed with what he proffered as evidence of the existence of internal agreement, namely the “formidable” resistance to a change of the property regime and the fact that we can empirically observe people regularly behaving a certain way. Listening to the voices in Atenco gave us an insight into the highly varied reasons that people had to resist the government’s actions, and this insight defied the classic interpretations of strong identification with “the community” and the idea of shared understandings. After analyzing these two concepts, I concluded that they only tell a part of the whole story of resistance in Atenco.

In the case of Atenco, it was evident from the start that there was real tension within the community but the opposing sides were on very unequal footing in terms of the capacity to make their case. On several occasions differences inside a tight community (such as most *ejidos*) are not expressed openly and they are dealt with different social sanctions (e.g. gossiping or by making personal pleas). There are two problems with this approach, both of which already mentioned, one is that this type of social sanction usually can do no more than mitigate, rather than eliminate, oppressive behavior, and such sanctions are not particularly conducive to treating everyone with equal respect. The second problem is that the *ejido*, I have argued, as a federal creation and considered as an authentic political unit, should provide the very basic constitutional guarantees offered by the other levels of government. Otherwise, problems, such as the one that occurred in Atenco, can only become more acute and by the time the government tries to intervene it is already very difficult to find common ground.

Given the extent of the inequality and precarious conditions in which many *ejidatarios* live, it is necessary to set aside arguments based on intuitive agreements and to stress the importance of positive agreements; that is, agreements that are expressly made. In this regard, the job of the government is to create the procedures that ensure, to the extent that is possible given the

socio-economic conditions at the moment, that people reach fair deals within the *ejido* and that everyone, as a “citizen” who inhabits the same space as everyone else, can at least have a say.⁵⁰⁷ There are many advantages to a procedural approach to agreements in a small community: 1) it serves to establish a minimum set of requirements that have to be satisfied for agreements to be considered valid; 2) it does not impose a one-size-fits-all type of formula across all the *ejidos* in the country but allows each to evolve at its own pace and according to its own characteristics; 3) it increases transparency; and, 4) it can serve as a basis for future legal action where an agreement is reached under unfair circumstances (accountability). In order for this approach to be implemented, however, there must be changes to the way that the *ejido* is currently governed.

In thinking about how best to establish a new set of institutions for collective action it is important to avoid the either/or approaches that Elinor Ostrom succinctly describes: the theory of the firm and the theory of the state. In the theory of the firm an entrepreneur organizes contracts with several participants so they act in a coordinated manner to increase return. Since the entrepreneur retains some gains, it is in her best interest to create the most efficient mechanism. Participants, on the other hand, are not under the obligation

⁵⁰⁷ Section 1 of this chapter laid the theoretical foundations of this approach.

to participate in the firm but if they choose to do so they delegate certain prerogatives to the entrepreneur. In the theory of the state, by contrast, “[t]he ruler obtains taxes, labor or other resources from subjects by threatening them with severe actions if they do not provide the resources.” A ruler can then use those resources “to increase the general level of economic well-being of the subjects to a degree sufficient that the ruler can increase tax revenues while being able to reduce the more oppressive uses of coercion.” As Ostrom points out, in spite of having different dynamics to obtain cooperation, “[b]oth [theories] involve an outsider taking primary responsibility for supplying the needed changes in institutional rules to coordinate activity.”⁵⁰⁸

In the case of Atenco, both theories fail to properly address the fact that deep inequality might create incentives such that neither the entrepreneur nor the ruler necessarily looks to increase general returns. The group led by Del Valle used its power not to increase general well-being but to increase the returns of a certain partisan group. In the case of the different levels of government, there was a perverse incentive for the federal government to initially try to coerce the *ejidatarios* to leave their land in return for unfair monetary compensation. Furthermore, as the brief history of Mexico shown at the beginning helps to illuminate, most *ejidatarios* have deep distrust of official authorities. Any plan that

⁵⁰⁸ Elinor Ostrom, *Governing the Commons: The evolution of institutions for collective action* (New York: Cambridge University Press, 1990) at 40-41.

relies on a purely endogenous solution cannot provide assurance that the internal contracting would not result in plainly abusive situations.⁵⁰⁹ We will have nothing to note in the arrangements of communities other than that, left to their own devices, “the native does what natives do.”⁵¹⁰ Moreover, exogenous types of solutions have the same defect of the policies during the Echeverría government; that is, excessive micromanagement from the federal government is inefficient.

The conflict in Atenco illustrates that there was not one single conflict but several occurring in a context of deep inequality and a flawed institutional design. There was the conflict between the *ejido* and the federal authorities; there was the conflict among distinct groups of *ejidatarios* (those who supported the project and those who did not); finally, there was the conflict between the Del Valle group that captured the administrative offices of the *ejido* and the rest of the *ejido*. At each level of conflict the tactics became more brutal and systematic than in the level before. As explained in chapter II, undoubtedly the conflict between the government and the belligerent group had very dramatic moments, including one in which the group kidnapped employees of a private company and threatened to lynch them. As serious as that was, those affected were not in

⁵⁰⁹ This is different from “the problem of mutual monitoring” that Ostrom discusses. For Ostrom, the problem of mutual monitoring is one of incentives to monitor your neighbor; the passage above refers more to the problem that people are situated in very different positions of power even in small communities to assure that the rules being monitored are really commonly shared rules rather than instances of oppression. *Ibid* at 45.

⁵¹⁰ This is the reason why some legal pluralist approaches were considered deficient. In particular, in section 6 of chapter VI, I analyzed Bonilla Maldonado’s approach which although recognized the possibility that agreements can be the result of oppression, did not provide a coherent argument to redress it once no hierarchical order of laws was admitted.

intimate relationship, the people working for the private company were simply used as bargaining chips so that the Del Valle group could strengthen its position. What happened inside the *ejido* was even more worrisome: opposing groups divided the community and there is evidence that at least the Del Valle group took very serious actions against “the others,” including, in one instance, inflating the price of burials in the local cemetery.

Our job, then, is to determine at which level state law is more effective than direct negotiations between the participants. The response, as Rawls noted, is that formal law is more effective when it aims to protect people’s ability to make their own choices.⁵¹¹ In Atenco, many *ejidatarios* thought that the airport project was an almost picture-perfect embodiment of the “modernity” that was destroying their peasant identity and culture. The problem with that interpretation is that, as explained before, the *ejido* can hardly be considered an “autochthonous” form of communal organizing and, even if it were, the mere fact that people had different interpretations and experiences of what being a peasant meant is reason enough to revise the current legal framework of the *ejido*. In chapter IV, I explained why we should reject Kymlicka’s early argument that justified limiting internal political capabilities if a certain community does not have

⁵¹¹ This should not be interpreted as private transactions being completely divorced from the principles of justice. Rawls argues that defects on the principles that regulate free transactions are as a serious threat to the conception of justice as a whole as a failure on the principles that secure the “background of justice. Rawls, *Restatement*, *supra* note 388 at 59. See also, Kevin A. Kordana & David H. Tabachnick, “Rawls and Contract Law” (2005) 73:3 Geo Wash L Rev 598.

the necessary political strength, relative to that of other groups, to sustain its culture. However, it is worth briefly reiterating two arguments against Kymlicka: 1) there is never one culture even in small communities; 2) culture is not a static concept, but always evolving and always in contention. These two points, in fact, are part of what Kymlicka himself argues and it does not stop being true at the borders of small communities nor, I argue, does Kymlicka offer any reasoning strong enough to overcome these two points, particularly when compounded with the traditional liberal concern for respecting every individual's moral agency.

It was necessary to reiterate these particular thoughts to stress that the rigid legal framework of the *ejido* precisely presupposes that, inside small communities, there is only one way to understand what being a peasant or an *ejidatario* means. This led the government to create mechanisms to protect the *ejido* from change and "contamination" from the outside. These actions provided the government with a little socialist experiment to strengthen its "popular" *bone fides*. Without proper transparency and accountability mechanisms in the *ejido*, perceptions flourished that, to put it in Renato Rosaldo's words, "... social life appears to be regulated by clear-cut, uniformly shared programs of behavior. In this view, human beings simply follow the rules, rather than waiting to see what time will tell."⁵¹² Empirical examination, however, quickly uncovers that, even

⁵¹² Renato Rosaldo, *Culture and Truth: The Remaking of Social Analysis* (Boston: Beacon Press, 1993) at 92.

under the narrative of tradition and culture, people's actions tend to be more practical and fluid than what the "thick description" narrative would lead us believe in the first instance. Culture is not incompatible with or opposed to the GAG recommendations. Indeed, Rosaldo is skeptical that culture functions as a "cybernetic control mechanism" as, he claims, Clifford Geertz's suggests.⁵¹³ Rosaldo's approach is not to underestimate the influence of culture in our decisions but to de-center cultural dynamics. He goes on to say that:

... the classic vision of unique cultural patterns (...) emphasizes shared patterns at the expense of processes of change and internal inconsistencies, conflicts, and contradictions. By defining culture as a set of shared meanings, classic norms of analysis make it difficult to study zones of difference within and between cultures.⁵¹⁴

What Rosaldo proposes instead is to pay attention to the empirical narratives in context-specific circumstances that challenge a positivistic cultural approach. Rosaldo's approach aims at unmasking the limits of the analyst's own normative approach and highlights the complexity and tensions present when "the native does what natives do".⁵¹⁵ Every normative enterprise, even a procedural like the one that I will propose in the following section, must take into

⁵¹³ *Ibid* at 103.

⁵¹⁴ *Ibid* at 28.

⁵¹⁵ *Ibid* at 141-142.

consideration the actual narratives taking place in the community. This is one of the reasons why a historical approach, like the one used at the beginning of this research, and empirical observation, such as the analysis of the conflict in Atenco, must always be present while thinking about legal solutions. Both approaches destabilize and de-center narratives that seek to present the legal framework on one hand, and the informal normative dynamics on the other, under the hegemonic groups' terms.

Kymlicka warns about the dangers of incorporating the discourse of hegemonic groups who mask internal oppression in the guise of tradition even though the practice might be, in fact, quite recent. I have pointed out that I take claims of cultural sensitivity seriously even if they are not ancestral; the fact that people consider a certain set of conditions to be important as a context of choice is reason enough to protect it. However, if this is the reason to protect it, then the cultural context should really provide people the opportunity to relate to their environment in fair terms. The study of the interrelation of different normative orders that follows is critical to create a framework where a plurality of distinct communities can live without harming or ignoring each other. Kymlicka points out that what allows the repressive internal dynamics of a community to soften while safeguarding other important cultural aspects is precisely the "gravitational pull" of wider democratic institutions that allow people to have an actual choice in

determining which aspects of their culture are worth preserving and which need revising. Kymlicka points out that an illiberal wider political unit can only entrench the illiberal practices of smaller communities.⁵¹⁶

We can say, then, that the distinctive feature that characterizes those communities that move away from oppressive internal inertias, as opposed to those that seem unable to do so, is the cross-communication between that particular normative order and a wider liberal one. This “gravitational pull” creates a learning environment that local elites might eventually find too hard to fend off. People trapped in an illiberal structure may start to turn to more liberal options once they are aware of their existence and have the capacity to access them. Conversely, an illiberal wider political structure is not only unhelpful in protecting basic human rights in distinct communities, but it may actually entrench illiberal practices, as demonstrated by the Juchitán case. The legal project that will be described next will not limit itself to reforming the *ejido*, but it aims to create those wider conditions that will allow for a successful learning experience of liberal practices. This should not be interpreted as a top-down approach; there could not be a successful learning experience if the wider political structure does not also learn, in turn, from those localities with which it has to collaborate. Eventually, local communities can act as pockets of resistance against illiberal practices that

⁵¹⁶ Kymlicka, *Odysseys*, *supra* note 337 at 150-1.

may emerge from the wider political structure. Cross-communication between normative orders is thus essential for a project of empowering individuals to protect their context of choice.

4. Identifying the Multi-Layered Normativity of the *Ejido*

A common thread between de Soto's emphasis on the observation of on-the-ground property rules, Fraser's inclusion of representation as an essential and distinct justice claim, and Rosaldo's empirical approach to culture is the need to create the space for reflection. As the internal aspect of the GAG emphasizes, it is important for individuals to assess their capabilities and in order to do so they have to understand the multi-layer normative worlds that they inhabit. In the case of the *ejido*, this is essentially a call to create negotiating spaces that offer an opportunity to resist inertia. However, not every process within the *ejido* can be up for reconsideration in every instance. This is because: 1) certain processes need consistency and a slower pace of change; 2) certain processes may affect a great number of people and so changing them requires costly, albeit necessary, participation mechanisms; and 3) the proper protection of political processes may need a stronger role for transparency and oversight mechanisms that cannot be constantly launched. The Atenco example also exposed another

issue: the *ejido* is governed by distinct levels of normativity and their interaction is not always easily identifiable. The first task is then to critically approach these distinct levels of normativity and explain what creating a space for reflection will mean in each level.

A further consideration is that these levels, although different from each other, operate in the same context, influencing their respective empirical functioning. In the Mexican context, this is further complicated by the fact that the PRI-regime encouraged a parallel power structure alongside the positive legal framework. This parallel power structure, which was described in chapter II in relation to the *ejido*, cannot be said to be complete without government intervention (since, in fact, it was constituted by the government) and yet it operated outside of the positivistic normative framework. Since these two normative orders are not independent of each other, I start by analyzing the government-sponsored extra-legal power structure.

The Parallel Power Structure

In general terms, this structure will be analyzed through two prisms: first, its positive structuring and; second, its atomized “adjudication”. When we speak of the organization of centralized workers and peasant unions, for instance, or even the creation of the *ejido* as another instance, this was done through positive

law. Using the post-revolutionary narrative, the government utilized its power to pass laws that, in theory, strengthened the worst-off but that in practice created an atomized network of *caciques* who “adjudicated” controversies and made decisions in accordance with their own interests (which, in turn, were usually aligned with the interests of the regime). The narrative of inequality played a big role in the way that these decisions were justified. In the positive structuring, the government usually asserted that the weakness of the worst-off to defend their own interests that could only be overcome by turning them into a bloc.⁵¹⁷ As a result, and as seen in the *ejido* case, all interests were subsumed into “collective” interests. However, that same inequality also created incentives for those who were relatively better off to disguise their personal or group interest as collective interest. At the moment of adjudication, then, decisions made at the local level only benefit a small group, but always in the guise of the collective good.

As Hannah Arendt has pointed out while analyzing the French Revolution, the discourse of alleviating misery has some perverse side effects. Misery, such as the one left after the *Porfiriato* and the subsequent bloody struggles during and after the revolution, had the effect of putting a large class of similarly situated people under the urgent demands of their bodies. Since bodily demands are something that we all share, it was easy to subsume all interests into “collective”

⁵¹⁷ See section 3 of chapter IV.

interests. The tragedy of misery is the “dehumanizing force” that, according to Arendt, puts every man under the “dictate of necessity.”⁵¹⁸ When the government decided to create the parallel power structure, it was to protect a similarly situated group of people through central organization. The idea was to help them use their numbers to protect themselves from more powerful groups. This discourse created “us vs. them” narratives that were easily incorporated in a country already deeply divided along partisan lines after so many years of armed conflict. Unfortunately, that same narrative worked against creating an environment where people could use their strength in numbers fairly.

In the case of Atenco, the dynamic just described can be illustrated in several episodes during the conflict. First, the *ejido* itself was already the center of partisan divisions between the hegemonic party (the PRI) and the emerging force in the region (the PRD). Both were competing to prove that they truly represented the “collective interest”: the PRI through its historic narrative and control of the official bodies of representation of the *ejido*; and the PRD by pointing out that the PRI actually only represented a privileged fraction and that it was the PRD, in turn, truly represented the collective. When the PRD captured the bodies of representation it was quickly overwhelmed by an influx of other leftist groups that turned the movement into a tool to express the diverse

⁵¹⁸ Hannah Arendt, *On Revolution* (New York: Viking Press, 1963) at 54. [Arendt]

interests of the dissatisfied left. However, in the internal day-to-day ordering of the *ejido*, the Del Valle group showed little interest in being inclusive and was more concerned in purging the *ejido* of those who did not sympathize with the “true” cause of the collective.

The parallel structure, in the post-PRI era,⁵¹⁹ although likely to serve central power structures, can also be easily captured by other local groups if they are strong enough. The main reason for this is that the control exercised by the PRI-regime over these diffuse power centers is indirect. Never, for instance, was there a formal line of command between the bodies of representation of the *ejido* and the president. This meant that as the PRI-regime weakened, and other groups opposing the PRI strengthened, the authorities of the state of Mexico and the city of Atenco were not able to retain control over the parallel power structure. At the same time, less powerful groups (such as student activists and various union members) with a greater vested interest and who were there in person could exercise more influence and were able to take more daring actions than the government. The weakening of the PRI-regime strengthened the diffuse power of the parallel power structure that is governed by a mixture of positive law and informal mechanisms.

⁵¹⁹ Even though the PRI has regained the presidency again; it is not likely that things will go back to what they were before. See previous explanation in chapter III.

The Positive Legal System

The parallel power structure does not exist in a vacuum; most of it either is created or regulated by positive legislation. In the case of the *ejido*, I have pointed out the ways in which the government has used legislation to try to turn the *ejido* to whatever cause the government considers important. There were two important phases in the evolution of the positive legal framework and, in particular, the role of legislation. The first phase occurred during the PRI-regime and its main characteristic was the complete submission of positive law to the wishes of the executive branch.⁵²⁰ This occurred with the legislative rubber stamping the wishes of the president, the judiciary bending as well to the wishes of the president (whenever he had an interest),⁵²¹ or in the many administrative decisions made by the bureaucracy that were primarily guided by political calculations. As explained before, within the state structure, this dynamic was repeated at the state level. Governors themselves were appointed by the president and ratified by a sham electoral process.

⁵²⁰ These extraordinary powers of the president have been called “meta-constitutional” or even anti-constitutional. Emily Edmonds-Poly & David A. Shirk, *Contemporary Mexican Politics* (Plymouth, UK.: Rowman & Littlefield Publishers, 2009) at 78.

⁵²¹ The fact that the president dominated the judiciary had as an effect that the Supreme Court of Mexico tended to give preference to the social goals of the state over strengthening the traditional liberal guarantees. Although formally protected from political turmoil, informal rules allowed the president to oust any justice who did not follow his orders. Adler-Lomnitz, *supra* note 432 at 31-32.

The second phase, happened when elections became competitive and the PRI no longer had the same type of control of the political system. This had as an effect that at the federal level there was an actual division of powers for the first time in Mexico.⁵²² Conventional wisdom points to this change resulting from the PRI losing the 2000 federal elections for the first time in its history. The fact is, however, that by then the system had already been severely weakened for a host of reasons including the internal divisions within the regime.⁵²³ Without entering into more details about the causes of the demise of the PRI-regime, suffice it to say that it coincided, and brought about, by the semi-autonomy of many decentered power structures. The governors were largely left to their own devices as well. This change in the political landscape also had wide ranging consequences outside of politics. To begin with, in those states that had not yet undergone a political transition, the governors acquired unprecedented power since they no longer had to respond to the president nor to the parallel political power.⁵²⁴ For the positive legal framework, this was catastrophic. Many governors committed grotesque violations of the law in their states and, using the narrative of federalism,⁵²⁵ governors also fought federal attempts to control their

⁵²² The federal Congress, in particular, became more plural. *Ibid* at 267.

⁵²³ For a review of some of the conditions that brought about the end of the PRI-regime, see, Andrew Selee & Jacqueline Peschard, "Mexico's Democratic Challenges" in Andrew Selee & Jacqueline Peschard eds. *Mexico's Democratic Challenges: Politics, Government and Society* (Washington, D.C.: Woodrow Wilson Center Press, 2010) 1 at 10-13.

⁵²⁴ Oto Granados Roldán "¿Virreyes o Gobernadores?" *Nexos* (01 October 2011) online: Nexos en línea <<http://www.nexos.com.mx>>.

⁵²⁵ Tonatiuh Guillén López, "Federalism and the Reform of Political Power" in Andrew Selee & Jacqueline

excesses. Since legislators now depended on the support of the governor to get elected in their districts, many just followed their governors' directives.

In the case of Atenco, there were several opportunities to see the complicated role of positive law in Mexico. First, although initially the different *ejidos* affected were consulting with the authorities through proper channels, created by law, this quickly became unsustainable. The opposing group, later itself captured by the Del Valle faction, was successful in challenging these negotiations precisely because the president of the assembly was acting in line with the interests of the PRI in the state, and this supported the argument that he did not really represent the interests of all *ejidatarios*.

Secondly, if the legal framework did not create strong enough internal institutions within the *ejido*, it was even worse at providing alternatives for the average *ejidatario* to deal with internal conflicts. As I have stressed repeatedly throughout this study, the main problem was the assumption that all the interests of the *ejidatarios* could be reduced to communal interests and thus any other interest that they might have would have to take a back seat until they came out of their misery. In Atenco, this was illustrated by the group that wanted the benefits package that the government was offering but were not able to contact the government directly. Once the official bodies of representation were captured

Peschard eds. *Mexico's Democratic Challenges: Politics, Government and Society* (Washington, D.C.: Woodrow Wilson Center Press, 2010) 187 at 194-197.

by the Del Valle group there was little option for anyone else to voice their opinion in a meaningful way. The government had to deal directly with the official bodies of representation of the *ejido* since, by law, legitimate decisions could only be made through them. Absent such official bodies, the government dealt with the most vociferous group that claimed to represent everyone even though it was clear that they were quashing internal dissent and that there was a greater diversity of interests involved than those that this group represented. The idea that informal mechanisms are enough to control oppression in small communities is proven false even where there were still informal normative mechanisms at work.

Informal Mechanisms

It has been pointed out that one of the most important informal normative mechanisms in the *ejido* is necessity. As explained in the previous chapter, the often low productivity of the *ejidos* makes everyone dependent on each other. While this is conducive to conservative politics,⁵²⁶ it is also often argued that this reliance on each other ameliorates conditions of oppression due to the

⁵²⁶ A similar dynamic is detected by David Gavron in his analysis of the kibbutz: "... although it started as a revolutionary society aiming to change traditional ways of life and to create new human relationships, the kibbutz became in the ninety years of its existence an extremely conservative society. Radically different from the surrounding society, it was nevertheless set in its ways, conventions, and basic assumptions." David Gavron, *The Kibbutz: Awakening from Utopia* (Lanham, M.d.: Rowman & Littlefield, 2000) at 3.

importance of keeping one's reputation within the community. There are several reasons why, in the *ejido* context, this dynamic does not tend to work in this way and they can be illustrated by the conflict in Atenco. First, the close ties that are assumed to develop by proximity are disrupted by the fact that the institutional framework of the *ejido* being mandated by law and not developed endogenously. In the Atenco case, this particular *ejido* lost control of its own administrative bodies to a group that aligned itself with outside interest groups. Not only did the Del Valle group ignore and offend the sensibilities of other *ejidatarios*, but there was a clear atmosphere of intimidation. The existence of those administrative bodies creates an incentive to capture them, particularly if they tend not to be democratic, since the stakes are higher given its arbitrary power. On one hand, they might only be susceptible to capture when there is a conflict; thus there was an incentive to prolong and aggravate the conflict since that meant that the strongest group could rule the *ejido*. On the other hand, once captured there is a strong incentive to not cede control since the new self-proclaimed "authorities" must protect themselves from opposing groups.

Secondly, the composition of the *ejido* tends to be more heterogeneous than other small communities united by strong cultural or religious bonds. Because the government did not assign *ejido* land to particular ethnic groups, but rather to landless people in the vicinity, *ejido* members did not necessarily share

social bonds before coming together in the *ejido*. This is a characteristic that is very common in most *ejidos*. As Nuijten has pointed out, the idea of the *ejido* as a perfectly harmonious small indigenous community has long been questioned.⁵²⁷ In chapter II, I described the deep divisions that existed within the *ejido*, and among the *ejidos* affected, regarding how to respond to the government. The leading group opposing the airport project, the group that later fell completely in Del Valle's hands used the discourse of ancient tradition and indigenous rights to fight the government's actions. It did not take long for the weight of those arguments to asphyxiate all internal dialogue. If the reason to oppose the airport project was due to fidelity to ancient tradition, then any internal dissent was considered treasonous to the community or, at least, the person was not being true to herself.

Thirdly, and finally, the political dynamics that were explained in chapter I still have a strong influence on the way that people interact with the government in general. This has to be analyzed in two different ways: the way that the government itself operates and the way that people relate to the government. As explained before, the government that emerged from the revolution was very weak and there was a poor tradition of the rule of law. Even though the constitution was drafted based on the American model, the ideal of a

⁵²⁷ Nuijten observed strong internal divisions and resentments in her analysis of the *ejido* of La Canoa and also pointed out that this is a finding that has been noted in many other *ejidos*. Nuijten, *supra* note 206 at 74. See also, Shüren, *supra* note 288.

“government of laws and not men” was not concretized. Part of the problem was that the revolution did not answer “the social question,” as Arendt put it, adequately. Arendt notes that economic equality – the lack or promise thereof – has had a major role in all revolutions.⁵²⁸ The main consequence was that there was a constant need to provide the poor with enough resources to avoid further rebellions, rather than looking to consolidate democratic governance. A fully functioning democracy was simply not viable in the context of such stark an inequality. While the promise of material equality was what had generated support for the revolution, it was a promise that could not be fulfilled. The result was a form of government that had an official discourse at odds with its actual operations.

This split between discourse and practice had as a consequence a deep distrust in the population towards authorities that, in turn, made it difficult to trust other people as well.⁵²⁹ The corporatism of the Mexican political system⁵³⁰ resulted in a legal system that swayed according to the political influence of the “class” of the particular individual. The unofficial governing methods of the PRI-regime also affected how people interacted with each other. First, it made people

⁵²⁸ Arendt, in fact, considers “the social question” one of the most distinctive characteristics that separate the American and French revolutions; whereas in the first one extreme want was not a problem, in the French it was. This had as a consequence that the satisfaction of material necessities was considered a primary concern rather than freedom. Arendt, *supra* note 518 at 14, 54.

⁵²⁹ This distrust, in turn, helps create an expectation for corruption which, ironically, normalizes it. Morris & Klesner, *supra* note 302 at 1260-1261.

⁵³⁰ See chapter I for more on this.

more attached to smaller normative orders that could guarantee them better representation in bigger power structures, even at the expense of surrendering, to a lesser or greater degree, their freedom and individuality. Second, since the outcome of legal problems became so unpredictable, people either avoided making dealings outside of these structures or opted for highly formalized arrangements that increased the cost of transactions. This created an environment of distrust not only towards government officials but also towards the parallel power structures, which, in the name of solidarity, tended to be less subject to scrutiny, which, in turn, increased the level of distrust towards each other.⁵³¹

In chapter IV, I emphasized that issues of identity did not need to be analyzed in terms of cultural differences but in terms of power imbalances. In particular, I used Larry May's theoretical framework to stress that when an entity is able to identify you as a member of a group, even if you did not initially feel an affinity to it, you will be liable to be treated in the same way that other people in the same class are treated, creating or intensifying your sense of identity as part of the group. This worked for the PRI-regime since it made people attached to the parallel power structure that was easy to coopt.

⁵³¹ As Fukuyama has pointed out, a plurality of intermediary civil associations between the family and the state is prone to thrive and work cooperatively if there is a culture of trust among them. Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: The Free Press, 1995) at 7-8.

5. A Legal Reform Agenda in a Plurality of Normative Orders

The need to reform the *ejido* does not stem from the need to have “good laws.” I do not suggest that a change in laws alone could change the normative dynamics, some of which emerge from cultural dynamics, others from political history, and yet others from socio-economic circumstances. This is not to say that the legal order and the normative order are completely separate from each other, but they do follow different patterns. However, discussing these dynamics in the abstract provides little guidance for reforming legislation. This is why the historical-empirical approach of this study was necessary to sidestep rhetoric and have a closer look at the conditions that have brought us to this point. Taking into consideration what we have learned from the conflict in Atenco and the other cases studies analyzed (namely, Juchitán and the conclusions from other sociological studies on the *ejido*) we can proceed now to the recommendations for law reform that are sensitive to the plurality of normative orders that we inhabit.

The reforms proposed focus in three levels of analysis: 1) constitutional; 2) legislative; and 3) regulatory (formal and informal). Each of these levels affects the others and the direction of the influence might not be as straightforward as it may initially seem. Legislation (as the *ejido* case showcases) affects the

implementation and understanding of the constitution. For instance, by structuring the internal organization of the *ejido*, the assembly became, in effect, an extra-constitutional political body,⁵³² which, as the conflict in Atenco showed, affected the way that people interacted with other political bodies. On the other hand, informal mechanisms of behavior can also have profound effects on the understanding and interaction of certain regions with authorities, as the Juchitán case showed. Having the benefit of a historical and cultural description of these dynamics, we can proceed with reforms that do not entail a top-down approach, and that have a built-in understating of the back and forth between this set of normative orders and its effects on institutional design.

The Constitutional Level of Analysis

It is important to acknowledge that the constitution entrenched the perverse inertias of the past by incorporating two historical tendencies into its legal text: the separation of people by class and tutelage as a response to justice claims. Even though the constitution did not single out any particular class of people, it is evident, given our history and the characteristics of the *ejido*, that only people in a difficult economic position would have that kind of property

⁵³² It is important to stress that the three levels of governments are constitutional creatures; that is, the federal, state and municipal levels of government have specific duties assigned by the constitution that cannot be infringed by the other levels.

regime.⁵³³ My criticism of this entrenched distinction goes beyond a classical liberal prescription that everyone should be equal under the law. Rather, the criticism is that by separating people by class, the effects of this constitutional regime fell on a group of people that had reduced political influence, with the consequence that there was little feedback from those affected by the changes on how it was affecting their lives.

As described in chapter I, there has never been an attempt to involve the *ejidatarios* themselves in past administrations' reforms done to the *ejido* regime. Cárdenas was interested in creating a social army to support the emerging political system, Ávila Camacho was interested in the private sector so he ignored the *ejido* system, while Echeverría needed to strengthen his popular *bona fides*, and Salinas considered the *ejido* as a backward institution that needed to be phased out. None of these accounts took into consideration what the *ejidatarios* thought about the *ejido's* future. The political class usually considered that the worse-off were in that condition because they did not know better. As Arendt points out, the most ignominious part of being poor is its "de-humanizing force" that turns people into their most organic representation, devoid of the capacity to choose, devoid of freedom.⁵³⁴

⁵³³ Laborers also have a special treatment in the constitution which has also had detrimental effects to their political rights but I will not deal with that issue here.

⁵³⁴ Arendt, *supra* note 518 at 54.

One possible response to this complaint could be that there was no legal impediment for *ejidatarios* to vote deputies for congress that best represented their interests. There are three reasons why it is not that simple: 1) the nature of the political system; 2) the nature of the informal power structure; and 3) the internal dynamics of isolated political units that were shown in the Atenco and Juchitán cases. During the PRI-regime, congress followed the dictates of the president. Afterwards, it became even worse since *caciques* increased their strength and, while politics did become more local, it is also true that the political space became narrower. For instance, in the Atenco case we saw how the municipality and the *ejido* authorities were part of the PRI which only took into account the interests of the governor. Moreover, the informal political structure prevented the *ejidatarios* from exercising their vote, through a combination of positive law and political dynamics that created barriers not easily perceived unless one engages in a detailed analysis of instances of conflict such as the analysis of Atenco and Juchitán. Both Atenco and Juchitán, as sites of analysis of informal normative dynamics, show the reduced relevance of engaging in formal politics that takes place outside of these units and that have little effect in the daily lives of their inhabitants. Furthermore, in this scenario of fragmented interests, individuals have to face the undue influence possessed by governors to

sway elections in favor of the deputies of their choosing.⁵³⁵ Finally, the internal dynamics created by insular political units tend to create a narrative of shared unique understandings that quash the need for partisan politics. In both Atenco and Juchitán, popular movements prevented the *ejidatarios* from voting while certain groups were in power, all while professing deep attachment to local tradition and culture.

In view of all this, there are two obvious paths to take at the constitutional level: to formalize the *ejido* as another level of government or to eliminate the *ejido* from the constitution altogether. The first option would not be fair for those who do not want to be part of that lifestyle anymore, although this change would at least offer them more protections since formalizing their status as another level of government entails having more oversight of its internal politics by other levels of government. Nonetheless, my position is that this is the worst of the two options. The *ejido*, as shown by the Atenco case and other supporting sociological studies, is too small to be a full-fledged level of government and it would encourage parochialism and wasteful spending. The second option has the advantage of eliminating the isolation of the *ejido*, not only from the other levels of government but from the rest of society. The downside of this option is

⁵³⁵ Jay Langston, “Governors and ‘Their’ Deputies: New Legislative Principals in Mexico” (2010) 35:2 Legis Stud Q 235 at 240. [Langston]

that some people could lose their land and thus return to the circumstances that originally gave rise to the *ejido*.

The fact is, however, that there are still Mexicans without land today, that land distribution policies were officially finished in the reforms of '92, and that it is materially impossible to keep redistributing land perpetually since that would create the problem of the *minifundio* discussed earlier. To have the *ejido*, as a constitutional creature, to benefit some while not others only because of a series of morally irrelevant circumstances (such as the accident of having been born at the time of land distribution) is unfair. This is not just any type of unfairness but one that replicates the legal partitioning of the country's population by class, which is precisely one of the historical tendencies that have been reproducing themselves since Mexico's early history. It is a historical aberration that needs to be ended. Therefore, I propose that the *ejido* stop having constitutional status.

The Legislative Level of Analysis

Now, it is true that this action will have consequences. The first will be that the *ejido* would lose federal protection and would become subject to territorial jurisdiction, and thereby subsumed in state and municipal politics that, as I have pointed out, are often far from democratic. One of the problems mentioned

before, particularly in the Atenco case but that it has been reported in other sociological studies, is that the *ejido*'s isolation from the municipality hurt both.⁵³⁶ The *ejido* should be under the jurisdiction of the municipality in question and not that of the state. This is why, at the level of legislation, it is necessary to enact a series of reforms to democratize localities. As Young pointed out, not only do localities have to be more responsive to their surroundings, but bigger power structures have to be more responsive to small communities. At the state level, more federal oversight is needed to rein in the excesses of the governors. After the fall of the PRI-regime, governors, almost all of them PRI themselves, wrapped themselves in the flag of federalism to demand resources and block oversight.⁵³⁷ While lately, there have been efforts to curb the excessive borrowing of states and municipalities,⁵³⁸ this is just a first step. If the *ejido* is to be part of the municipality, the power of the governor cannot overshadow the democratic governance of the municipalities.

The municipality is a constitutional creation⁵³⁹ and, as such, there is need for legislation that protects its independence. The undue influence of governors in municipal affairs can happen through illegal or improper meddling in the

⁵³⁶ For more on this discussion, see section 4 of chapter III.

⁵³⁷ Langston, *supra* note 535 at 237-238.

⁵³⁸ Ricardo Gómez, "Impulsa el PAN en San Lázaro 'candados' a deudas de estados" *El Universal* (18 September, 2012) online: El Universal <<http://www.eluniversal.com.mx>>.

⁵³⁹ C.P., *supra* note 214 at art. 115.

election and by threatening to withhold funds.⁵⁴⁰ Dealing with these two problems goes beyond the scope of this study. I will point out, however, that since the right to vote is a constitutional right (regardless if you vote for the municipal president or the president of Mexico) there is a strong interest for the federal powers to protect this right. As to the second issue of undue political influence, again, as municipalities are constitutionally mandated to perform certain tasks, there is a strong interest for congress to enact legislation that effectively protects funding to municipalities from the abuse of authority at the state level.

Despite the municipality itself being recognized as a level of government, just as the federal and state levels, the constitutional structuring of its internal organization is far from democratic.⁵⁴¹ Part of the problem is that the municipalities lack an authentic internal division of powers and so end up having little oversight and little space for debate.⁵⁴² If the *ejido* becomes a sector of the municipality, this could put an already vulnerable group at the mercy of another

⁵⁴⁰ In chapter I it was discussed that during the PRI-regime the president chose the governors in turn. Usually this had, in turn, the extra-constitutional of choosing the mayors. Although after the fall of the regime this dynamic moved from an unwritten rule to depend on the characteristics of each state; there are states with mayors from different parties than that of the governor, there is still too much unchecked power in the hands of the governors.

⁵⁴¹ I should disclose that, during my LLM research, I dealt in detail with the constitutional structuring of municipalities and its effects on fiscal decentralization policies; in particular, I was focusing on the lack of accountability of city officials and the effects that the size of the locality might play as well. Although I focused in particular in the state of Coahuila, the constitutional analysis is relevant for any study of municipalities in Mexico. Enrique Boone Barrera, *Fiscal federalism and accountability in the municipalities of the Mexican state of Coahuila* (LLM Thesis) Queen's University, Faculty of Law, 2006) [unpublished].

⁵⁴² *Ibid* at 26-32. In this section, I discussed that although the constitution does establish a formal separation of powers, the lack of specific division of functions and of specific methods to elect the different members of the municipal council, leaves the municipality vulnerable to state intervention.

undemocratic political unit. This type of action would probably provoke a reaction similar to that observed in the Juchitán case where oppressive policies in the outside created or ratified internal oppressive dynamics of their own. Municipal reform is necessary to make this level of government more open and transparent.⁵⁴³ These reforms should strengthen the internal division of functions of the different city council members, and clarify the method to elect or designate them so as to encourage oversight and democratize decision-making rules, and ensure that there is, at least, an institutional venue to express dissatisfaction.⁵⁴⁴

Finally, moving the *ejidos* to the municipal level also means moving the agrarian justice system to the local level. Currently, controversies involving *ejido* land are resolved in federal tribunals. Once the *ejido* is moved to state and municipal jurisdiction, controversies will be resolved by traditional civil law procedures. I would suggest that the amount of budget devoted to create an alternative justice system for agrarian issues be allocated to the civil court system and, in particular, to hiring experienced personnel to assist in the transition, with judges new to certain terminology and past jurisprudence benefitting from their expertise. This will probably be the most difficult part of the process; however, this will also inspire a level of investment in *ejidatarios* to

⁵⁴³ Jones explains that one way to increase the participation of the *ejidatarios* (and *avecindados*) in municipal decisions is through the *Convenios de Desarrollo Social* (Social Development Agreements) that existed during the Zedillo administration. While a version of these agreements can certainly be part of the answer they have to take place within a comprehensive reform effort that makes them meaningful. Jones, *supra* note 274 at 196.

⁵⁴⁴ I made some recommendations towards this end elsewhere. *Ibid* at 79.

press for better access to justice, which will benefit everyone in the end. While there is no space to devote in this study about to the technicalities of moving agrarian matters from federal to civil jurisdiction, I do not think that the complexities should be overstated. Lower tribunals resolve disputes about property all the time, so the biggest challenge would be incorporating past jurisprudence. This seems to me not much more difficult than incorporating international human rights jurisprudence, as the constitution now mandates.⁵⁴⁵

In summary, reforms are needed at both the state and municipal level to make them respectful of the legal order, democratic, and transparent. The current mechanism of creating spaces of exception for groups of people most likely to turn to violent rebellion, while leaving the rest of the population to deal with the system according to their place in the power structure, does not work anymore and, in fact, it has not been working for a while. If not for ethical reasons, mere practical considerations should make it clear that these reforms are urgent and unavoidable.

The Regulatory Level of Analysis (formal and informal)

⁵⁴⁵ In June, 2011, it was published in the Official Federal Daily Gazette the reform to article 1st of the Mexican Constitution in which it established that all authorities, including judges, should interpret the Mexican legal system not only according to the Constitution but also according to the most favorable interpretation of human rights international treaties. C.P., *supra* note 214 at art. 1.

Although both the constitution and laws can be said to “regulate” conduct, by regulations this section means what in the Mexican legal system are called *reglamentos* (bylaws), which are different from laws in the way that they are approved and in their hierarchy. Some regulations are approved in similar ways to a law, in which case the *reglamento* is actually much closer to a law in spite of its designation. What I am referring to in this section are, however, the internal regulations of the *ejido*, which are approved by the assembly and, secondly, the regulations of the municipality. What makes this level of analysis distinctive is that although regulations greatly influence how laws are applied, they are usually issued by the smallest political structures and where there is very little oversight.

There are three reasons why the legal system does not usually pay too much attention to the regulatory level of normativity. First, customarily regulations only establish procedural mechanisms that should be fully compatible to the legal norm that they are complementing. Second, certain regulations only apply to very small areas of influence where there is an assumed high level of shared understandings and, therefore, where it is assumed that the regulations are responsive to the dynamics of a tight-knit community. Finally, regulations also are easily quashed in a tribunal if they infringe broader legal norms and, in the event of an abusive regulatory norm, it is easy to repeal them preventing serious harm from resulting.

In this section, I will justify why the regulatory level of analysis is as important, if not more so, than the broader levels. In doing this, I hope to show once more the importance of a historical/cultural analysis like the one done in the previous chapter analyzing the *ejido*. There are certain deficits that the *ejido* has been suffering since it emerged as a hybrid juridical institution taking the genetic material of the Spanish *ejido* and the *encomienda*. These deficits were addressed using de Soto's emphasis on the legal title as a device of representation and Fraser's distinction between three different justice claims: redistribution, representation, and recognition as my theoretical framework. As for de Soto, while it is true that the legal title is a device of representation, contrary to what he claims, I think that the title reveals more than a description of the property. The legal title tells the story of the owner and the social conditions of the property. This is one of the reasons that could explain why the *ejido* has not disappeared since the reforms of '92. It is not only that the piece of land might be small to be worth much; buying a piece of land which was previously *ejido* land means entering a different political structure. As for Fraser's approach, differentiating the particular characteristics of each justice claim at each level of analysis also serves as a communicative device that brings awareness about the plight of the worse-off.⁵⁴⁶ But the worse-off cannot be defined superficially; I

⁵⁴⁶ In this regard we have to be careful to distinguish what Rawls calls "the modus vivendi" acceptance of principles of justice or, at least initially, principles that assure peaceful cohabitation and what he calls an

already mentioned that the *ejidatarios* are not, in fact, the worst-off, although, no doubt, they are worse off than others.

In this sense, the theory that this study adopts is that 1) procedure passes its genetic code to laws; and that therefore, 2) form and substance are interconnected. The distinct procedures that gave rise to the *ejido*, as it stands today, passed the historic/cultural tensions imbedded in them to the *ejido* itself. Discourse alone, if not reflected in positive procedural mechanisms, can easily lead to failure, if not to outright contradiction. From the noble sentiments of Queen Isabelle II vis-à-vis the native population in New Spain to the socialist outbursts of the Mexican Constitution, if all these good intentions towards the worse-off had been translated into actual steps to help them, the situation would have been different today. The *ejido* could be considered one of those concrete expressions but, as Fraser pointed out, without submitting the framework of discussion itself to scrutiny and the tests of justice, it can only replicate what it sought to end; in this case, extreme inequality. There is a need for a space to

“overlapping consensus.” Rawls, Restatement, *supra* note 388 at 192-193. After the Mexican Revolution the political class made great strives to incorporate into the constitution principles of social justice. There was a recognition of the grave injustices that have dispossessed millions of Mexicans from any type of property. These higher aspirations for a more just country, however, did not resist the actual conditions on the ground. The laws were far from perfect, some of their defects were already mentioned in this study; however, the poor results obtained from the legislation of social goals were not the result of these shortcomings but from the fact of extreme inequality and cultural inertias. This is why I could not agree with de Soto that the problem of informality are the “bell jars” exclusively constituted by law while all the right responses could be found in tradition and empirical observation. I have maintained that a combination of weak institutions and strong inequality created a hybrid political system where people were treated according to their place in the power structure. This decentralization of power maintained a more peaceful cohabitation but without justice. This study takes into account the lessons from history.

reflect about the true nature of public policies which should be discussed broadly enough to generate a learning mechanism for an appropriate generation and sharing of normative expectations.

The common thread in all the procedures that gave birth to the *ejido* is the de-humanization and marginalization of the worse-off. From the conquest to the conflict in Atenco, the practice tragically repeats itself. Tragically I do not mean sad but rather inevitable; inevitable because the one thing that has to take place never does: the effective participation of all affected. In order for participation to be effective all three of the justice claims described by Fraser have to be met. Although, as she points out, all of them are related, representation is particularly important since the other two (distribution and recognition) are determined by the decisions of the representatives. The decision-making procedures established in a political body deeply affect who can influence an ultimate outcome. The process used to establish these rules should, itself, incorporate the voice of all affected. This is, then, the place for laws and regulations and this is why, as well, they must be democratic, positive, and public; no amount of presumed “shared understandings” or particular conceptions of culture or tradition can be permitted to overshadow these requirements. Relying on “mentalist” concepts is prone to persist in replicating the inertias of the past and to limiting the space for reflection. Open, public, and accessible spaces for deliberation, on the other

hand, allow people to express their opinions and learn from one another. Again, the rules for these meetings should also be clear and established by open mechanisms themselves. Given that the deep inequality in Mexico is not likely to end soon, and that this inequality risks being a pretext to consider the worse-off under the “tutelage” of those in higher classes; equality under the law is essential.

Equality under the law, in the face of deep inequality, is usually met with skepticism. As Arendt points out, however, it is precisely because equality of conditions are difficult to attain and sustain that the ancient Greeks considered isonomy a very important cornerstone in their legal system. Equality under the law was a necessary component of the idea of freedom and the *polis* was the institution through which men stood before each other as equals. It was the state, and not the human condition, which made men equal.⁵⁴⁷ Now, as Arendt herself notes, this equality only applied to free men, so even back then isonomy did not apply to everyone in the *polis*. This is a condition that, albeit to a much lesser extent, also affects the *ejido*; that is, not everyone is represented in the assembly since rights are tied to property. One of the reasons that I have pointed out that redistribution approaches alone were insufficient was precisely because equality of condition was never a realistic goal and, as Hegel pointed out in referring to

⁵⁴⁷ Arendt, *supra* note 518 at 24.

the lofty goal of equal division of land, even if attained it could only be momentary.⁵⁴⁸

In chapter VI, I mentioned that Fraser also rejects that issues of redistribution alone could incorporate adequately other justice claims such as representation and recognition. The *ejido* illustrates this: even within this small world there is inequality of condition, inequality before the law, and inequality before their own internal regulations. The mere fact of having access to common resources did not bring equal political rights. Recognition of the equal right that we all have to make our normative world responsive to our conditions cannot come either from having “good laws” as de Soto thought or from redistribution policies alone. While the Mexican constitution did pick up much of the revolutionary narrative that recognized the great injustices of the colonization period and the *Porfiriato*, narrative alone was unable to overcome the inertia of the past. Equality under the law must come, then, from practice that reflects itself into law and not the other way around. As Rawls understood it, there must be an acknowledgement that we all are moral beings not fully determined by our conditions. In our discussion, this means recognizing the historical tendencies that have assigned different sectors of society to different power positions in the

⁵⁴⁸ G.W.F Hegel, *Outlines of the Philosophy of Right* (Oxford: Oxford University Press, 2008) at 64.

political system. As much as possible, this arbitrariness must be diluted, in the legal system and not, as happens now, be governed by it.

Regulations have a special place in this regard; both formal and informal rules have the capacity to change how we treat each other in the political realm. They must not be left as an afterthought or be heavily determined by “shared understandings,” which, as we have seen, tend to be filtered by inertias detrimental to the recognition of everyone as moral beings capable of representing themselves before the *polis*. Inequality of condition has introduced distortions into political representation. There are two concrete actions that authorities could take in order to reduce the effects of inequality in the political arena: 1) continue to provide material assistance to reduce the effects of poverty; and 2) consider clarity and reduction of red tape as necessary conditions for the exercise of political rights.⁵⁴⁹ This is where the emphasis on positivism and the dismantling of the *ejido* as an insular political unit play an important role. Rules should be explicit and drafted after deliberation in a truly representative political unit. The assembly is not that place. If the assembly represents the interests of those with real property then the assembly should serve as a corporate institution for the economic management of assets and should not endeavor to govern the communal life of the *ejido*. Those decisions must pass to the municipality. Once

⁵⁴⁹ As opposed to de Soto’s position, the emphasis is on the reduction of red tape for political participation rather than for economic transactions.

the *ejido* has been removed from federal jurisdiction, the rest of the inhabitants of the *ejido* could turn to municipal or state authorities to intervene on their behalf in the *ejido*. The interests of the municipality and its development, and the interests of all of its inhabitants, including all people living within the *ejido*, should be taken into account when making decisions about *ejido* land. The assembly would serve those who wish to keep their land in association with others with land rights. Clear regulations are needed in order to establish whether and to what extent those with land rights can affect the living conditions of other *ejido* inhabitants.

The purpose of these reforms is to better protect political rights by providing legal and procedural tools to the worse-off that will help them access bigger power structures. Economic decisions can be left to smaller political units, associations, and individuals. In this regard, regulations are needed in order to give clear instructions for both how to incorporate the opinions of those at the periphery as well as how to publicize municipal and state action in remote locations. This will create a reasonable expectation about the intentions of authorities. As explained in chapter VII, this study agrees with Bratman that shared intentionality should not be interpreted as a “supra-mind” or a “supra-thought” that exists in the mind of every community member. Rather, in a reflective procedural approach, shared intentionality is achieved by an anticipation of behavior of others (i.e. that they will follow the rules) and by the

relation between representative and represented. So in this context, shared intentionality means that there is an expectation that authorities would behave in a way responsive to the inhabitants' wishes.⁵⁵⁰ However, this is something that cannot be completely left to cultural or historical inertias; it is, rather, a continuous learning process. This insight should be incorporated from the most general rule to the most specific one that strengthens democratic rules of governance. Every legal reform, regardless of whether it affects the *ejido* rules or the constitution, should incorporate the same spirit of recognition of every one as a "free and equal member of society."⁵⁵¹

Thus, democratic rules help channel people's opinions while at the same time being shaped by the opinions and information received from others. The insularity of the *ejido* severed a portion of the population preventing its members from benefiting from this dynamic of mutual understanding. Authorities learn from this process and democratic governance requires that they are responsive to the wishes of the political participants. Their decisions should, however, be compatible both with other people's ability to make the same type of decisions and their reasonable expectations. Regulations should be drafted in order to facilitate this flow of information from the smallest to the biggest political

⁵⁵⁰ Lenoble & Maesschalck, *supra* note 462 at 23.

⁵⁵¹ This goes back to Rawls's idea that society should be considered a system of social cooperation and not of coordination. In a system of cooperation, all of its members participate in the selection of goals which are not set by a single coordinating authority. Rawls, *Restatement*, *supra* note 388 at 5-8.

structure. In Atenco, the Del Valle group not only ignored the wishes of many *ejido* members but also of those in the vicinity that could have benefited from the construction of the airport. All of this was made possible by a narrative that held that only one interpretation of community, culture, and history was correct and no further exploration was necessary. A broader discussion might have led a different result but the *ejido* institution, as it exists, encourages the participation of few.

The regulatory level is as equally important as the constitutional or legislative because it is both better targeted to actualizing higher norms and it is the one that most affects the actual expectations of people interacting with authorities and with the political system in general. These regulations must particularly be clear in: 1) what should be governed by *ejido* rules and what should be governed by the municipality; 2) what type of participation can those inhabitants of the *ejido* who do not have *ejido* rights have in the development of the area; 3) making the voices of the *ejidatarios* heard at the municipal level; and 4) establishing the obligation of municipal authorities to provide information regarding municipal activities even in remote areas. This way, a proper learning mechanism can be put into place that allows for the possibility of democratic governance. The parallel power structure would not be one, then, where those with most resources and power get their way, but rather one that emerges from

interaction and reflective deliberation; it would be a set of expected normative behaviors, not completely captured by the positive system but allowing for its functioning.

One of the most pernicious dynamics reflected by the Atenco case is the lack of trust. The lack of trust and the absence of any expectation of acceptable behavior raise the stakes in any conflict. This causes oppressive internal dynamics within the group affected since the narrative of emergency quashes internal dissent. As the Juchitán case illustrated, this, in turn, even further isolates a segment of the population where the learning process is interrupted by a system that has historically privileged wealth as a source of access to public power. Clear rules that communicate both government objectives and procedures to channel grievances are thus a better tool to address conflicts than violent manifestations. I am not pretending that these reforms would necessarily be conflict free, or even less contentious; as both the Atenco and Juchitán cases illustrated, there are those who benefit from the *status quo*. They will oppose these reforms. However, if there is a proper dynamic of “shared intentionality” between the general population and authorities, as described in this study, then the segment opposing these reforms can be unmasked to reveal what I have been describing: that they represent the interests of a minority group. Thus, this dynamic can serve to isolate this minority, should they refuse to participate in the

political process, rather than having the *caciques* isolating the rest of the population in exchange for “protection” against authorities and outside interest groups.

Conclusion

To be effective, the reforms proposed here will themselves have to be clearly communicated to the main affected population. Nonetheless, the *ejidos* are a creation of, and are sustained by, the broader political system. They are not islands where the interests of everyone else stop mattering. The reforms that I have proposed take the interests of the whole, having as priority those of the worst-off regardless of their status as *ejidatarios* or not. This is why, to take into account the interests of those currently without a voice inside the *ejido*, I propose reforms that would affect the entire constitutional framework. No longer should the problems of the worst-off be considered an afterthought to be dealt with a state of exception from the general normative system. This, I have argued, tends to entrench the conditions that are supposed to be overcome by the state of exception. Furthermore, this also allows the political system to fragment political opposition to certain policies, thereby diminishing the power of those affected.

In contrast to this scenario, the reforms proposed here require everyone's participation and affect everyone's power position. Should these policies prove to be misguided, the pressure to change them would be immediate since the opposition to them would be unified rather than fragmented. In Mexico, as opposed to some other countries, there is a clear understanding that the

conditions of worst-off are caused by historical tendencies rather than by some sort of moral failing. The constitution recognized as much when the redistribution policies were adopted. That consciousness has to be translated into attitudes, which shape the legal system and are themselves shaped by it in a learning process.

Why would those with power acquiesce to these legal reforms recommendations? They do not have to acquiesce, even though it would be much better if they do. However, it should not be expected that the better-off will simply relinquish power. If we acknowledge, as the constitution does, that there has been a historic tendency to privilege wealth over rights in the political system, steps should be taken to correct that. While not all changes will be seen immediately, as the Mexican revolution showed, revolutionary movements are not necessarily much better at achieving results, and their destructive power could retard or block progress. The only path is that of deliberation and of reforms that tend to fortify political bodies as an essential first step, particularly those reforms that look to incorporate traditionally marginalized groups. In order to achieve this, the Mexican government must retain the policies to alleviate the most egregious effects of poverty. These policies are not without potential drawbacks and should be approached with caution since they can become a new form of tutelage now under the auspices of the welfare state. One way to avoid

this could be to amend these policies to apply to the whole population making certain services accessible to everyone regardless of wealth, although I will not expand on this here.

Although some of these policy recommendations do not address the *ejido* specifically, they do start by bearing in mind those who have been left out of broader political participation. There is no point in having “good laws,” even the best laws, to regulate the *ejido* in a general environment where the normative learning process described in the previous section does not take place. Given the positive effects of countries joining in concert with other countries to face certain regional or global challenges, the idea that the *ejido*, in isolation, could properly respond to the aspirations of its inhabitants is far-fetched. As the Atenco case showed, our fates are intertwined and political structures must respond to that. Whatever happens in the *ejidos* affects the general conditions of the country and vice versa. This should be incorporated into the legislation. This would address the apparent fatal choice described in the introduction: freedom with injustice or equality without freedom. Political deliberation, in an environment of mutual recognition, could reveal this choice to be false.

List of References

Legislation: Mexico

Código Agrario [Agrarian Code] [C.A. 1934], Diario Oficial de la Federación [D.O.], 22 de Marzo de 1934 (Mex.).

Código Agrario [Agrarian Code] [C.A. 1942], art. 33, Diario Oficial de la Federación [D.O.], 31 de Diciembre de 1942 (Mex.).

Código Civil Federal [C.C.F.], *as amended*, Diario Oficial de la Federación [D.O.] 9 de abril de 2012 (Mex.).

Constitución Política de la República Mexicana de 1857 [C.P. 1857] [Political Constitution of the Mexican Republic of 1857].

Constitución Política de los Estados Unidos Mexicanos de 1917 [C.P] [Political Constitution of the Mexican United States], *as amended*, art. 27, Diario Oficial de la Federación [DO], 11 de Junio de 2013 (Mex.).

Ley Agraria [Agrarian Law] [L.A.], *as amended*, Diario Oficial de la Federación [D.O.], 26 de Febrero de 1992 (Mex.).

Ley de *Ejid*os [L.E.] [*Ejido* Law] Diario Oficial de la Federación [D.O.], 8 de Enero de 1921 (Mex.).

Ley de Expropiación [L. Exp.] [Expropriation Law], Diario Oficial de la Federación [DO], 25 de noviembre de 1936 (Mex.).

Ley que Reforma la de Dotaciones y Restituciones de Tierras y Aguas

[L.R.D.R.T.A.] [Law that Reforms the one on Endowment and Restitution of Land and Water], Diario Oficial de la Federación [D.O.], 17 de Agosto de 1927, (Mex.).

Reglamento Agrario [R.A.] [Agrarian Regulation], *as amended*, Diario Oficial de la Federación [D.O.], 17 de Abril de 1922, (Mex.).

Reglamento de la Ley Agraria en Materia de Certificación de Derechos Ejidales y Titulación de Solares [Reg. Cer. Tit.] [Agrarian Law Bylaw for the Certification of *Ejido* Rights and the Registration of Solares], *as amended*, Diario Oficial de la Federación [D.O.], 6 de enero de 1993 (Mex.).

Jurisprudence: Mexico

Agrario. Conflicto Parcelario. Posesión. Tribunal Colegiado de Circuito. Época 9A. Tomo I Mayo 1995, Página, 332 (Mex.).

Ejidos y Comunidades Agrarias. Al Constituir Formas de Organización Interna Establecidas Constitucionalmente, El Funcionamiento de la Asamblea General, así como la Elección del Comisariado, son Actividades que no Forman Parte del Ejercicio del Derecho a la Libre Determinación de Los Pueblos y Comunidades Indígenas. Suprema Corte de Justicia de la Nación, [TA]; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; Tomo XXXI, Febrero de 2010; Página 115 (Mex.).

Parcela ejidal. Es indivisible bajo el régimen agrario en vigor. Tribunales Colegiados de Circuito Novena Época. Tomo XIV. Octubre 2001, Página 400 (Mex.).

Reconocimiento como posesionarios de tierras ejidales. Es requisito de procedibilidad del juicio agrario, previo a promoverlo, solicitarlo a la asamblea ejidal. Interpretación del art. 56, párrafo primero, y fracción II, de la Ley Agraria. Tribunales Colegiados de Circuito. Época: Novena. Tomo: XIV, Agosto de 2001. Página, 1173 (Mex.).

Secondary Materials: Monographs

Ackerman, Bruce A. *Private Property and the Constitution* (New Haven: Yale University Press, 1978).

- Adler-Lomnitz, Larissa, Rodrigo Salazar-Elena, & Ilya Adler. *Symbolism and Ritual in a One-Party Regime: Unveiling Mexico's Political Culture*, translated by Susanne A. Wagner (Tucson, Ariz.: The University of Arizona Press, 2010).
- Alcaya, Cristina. *Atenco, el peso del poder y el contrapeso de la resistencia civil* (México, D.F.: Miguel Ángel Porrúa, 2002).
- Arendt, Hannah. *On Revolution* (New York: Viking Press, 1963).
- Baechler, Jean. "Liberty, Property, and Equality" in J. Roland Pennock & John W. Chapman, eds, *Property: Nomos XXII* (New York: New York University Press, 1980).
- Becker, Lawrence C. "The Moral Basis of Property Rights" in Roland Pennock & John W. Chapman eds, *Property: Nomos XXII* (New York: New York University Press, 1980).
- Clark, David S. "The Idea of the Civil Law Tradition" in David S. Clark ed, *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Berlin: Duncker & Humblot, 1990).
- Constable, Marianne. *The Law of the Other: The Mixed Jury and the Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago, Ills. University of Chicago Press, 1994).

- Dan-Cohen, Meir. *Harmful Thoughts: Essays on Law, Self, and Morality* (Princeton, NJ.: Princeton University Press, 2002).
- De Icaza Dufour, Francisco. ed, *Recopilación de Leyes de los Reynos de las Indias*, 1st ed. (México: Porrúa, 1987).
- De Ita, Ana. "Land Concentration in Mexico after PROCEDE" in Peter Rosset, Raj Patel & Michael Courville, eds, *Promised Land : Competing Visions of Agrarian Reform* (Oakland, Calif., Food First Books, 2006).
- De la Grange, Bertrand & Maite Rico. *Marcos, La Genial Impostura* (Mexico, DF.: Alfaguara, 1997).
- De Sahagún, Fray Bernardino. "The General History of the Things of New Spain," as reprinted in Enrique Krauze. *Mexico: A Biography of Power: A History of Modern Mexico, 1810-1996*, trans. by Hank Heifetz (New York: HarperCollins, 1997).
- De Solano, Francsico. *Cedulario de Tierras: Compilación de Legislación Agraria Colonial* (Mexico: UNAM IIJ, 1984).
- De Soto, Hernando. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).
- . "What I Do, and How Philosophy Has Helped Me" in Barry Smith, David M. Mark & Isaac Ehrlich, eds, *The Mystery of Capital and the Construction of Social Reality* (Peru, Ills.: Carus, 2008).

- De Sousa Santos, Boaventura. *Toward a New Legal Common Sense* (London: Butterworths LexisNexis, 2002).
- Delgado de Cantú, Gloria M. *Historia de México: México en el Siglo 20*, Vol. II, 4th ed. (México: Pearson Educación, 2003).
- Díaz de León, Marco Antonio. *Historia del Derecho Agrario Mexicano* (México: Porrúa, 2002).
- Edmonds-Poly, Emily & David A. Shirk. *Contemporary Mexican Politics* (Plymouth, UK.: Rowman & Littlefield Publishers, 2009).
- Escriche, Joaquín. *Diccionario Razonado de Legislación y Jurisprudencia* (París-México: Ed. Bouret, 1925) at 999 cited in Marco Antonio Díaz de León, *Historia del Derecho Agrario Mexicano* (México: Porrúa, 2002).
- Fraser, Nancy. *Scales of Justice: Reimagining Political Space in a Globalized World* (New York: Columbia University Press, 2009).
- Fraser, Nancy & Axel Honneth. *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso, 2003).
- Friedrich, Carl Joachim. *The Philosophy of Law in Historical Perspective*, 2d ed. (Chicago, Ills.: The University of Chicago Press, 1963).
- Fukuyama, Francis. *Trust: The Social Virtues and the Creation of Prosperity* (New York: The Free Press, 1995).

- Garner, Paul. *Porfirio Díaz: Profiles in Power* (Harlow, UK.: Pearson Education, 2001).
- Gavron, David. *The Kibbutz: Awakening from Utopia* (Lanham, M.d.: Rowman & Littlefield, 2000).
- Gerring, John. *Case Study Research: Principles and Practices* (Cambridge: Cambridge University Press, 2007).
- Gonzales, J. Michael. *The Mexican Revolution, 1910-1940* (Albuquerque, NM.: University of New Mexico Press).
- Gough, J.W. *The Social Contract: A Critical Study of its Development*, 2d ed. (Oxford: Oxford University Press, 1957).
- Hart, John Mason. *Revolutionary Mexico: the coming and process of the Mexican Revolution* (Berkeley: University of California Press, 1987).
- Hegel, G.W.F. *Outlines of the Philosophy of Right* (Oxford: Oxford University Press, 2008).
- Hepburn, Samatha J. *Principles of Property Law* (London: Cavendish, 2001).
- Hobsbawm, Eric. "Introduction: Inventing Traditions" in Eric Hobsbawm & Terence Ranger eds, *The Invention of Tradition* (Cambridge, UK.: Cambridge University Press, 1983) 1.

Holden, Robert H. *Mexico and the Survey of Public Lands: The Management of Modernization 1876-1911* (DeKalb, Ill.: Northern Illinois University Press, 1994).

Home, Robert. "Outside de Soto's Bell Jar: Colonial/Postcolonial Land Law and the Exclusion of the Peri-Urban Poor" in Robert Home & Hilary Lim, eds, *Demystifying the Mystery of Capital: Land Tenure and Poverty in Africa and the Caribbean* (Portland, Or.: Cavendish, 2004) 11.

Honoré, A.M. "Ownership" in Anthony Gordon Guest, ed, *Oxford Essays in Jurisprudence: A Collaborative Work* (New York: Oxford University Press, 1961) 107.

Jenkins, Richard. *Social Identity* (New York: Routledge, 1996).

Jones, Gareth A. "Dismantling the *Ejido*: A Lesson in Controlled Pluralism" in Rob Aitken et al, eds, *Dismantling the Mexican State?* (Basingstoke, UK.: Macmillan Press, 1996) 188.

Joseph, Gilbert M. & Daniel Nugent, "Popular Culture and State Formation in Revolutionary Mexico" in Gilbert M. Joseph & Daniel Nugent, eds, *Everyday Forms of State Formation: Revolution and Negotiation of Rule in Modern Mexico* (Durham, N.C.: Duke University Press, 1994) 3.

Jaime, Edna. "Fox's Economic Agenda: An Incomplete Transition" in Luis Rubio & Susan Kaufman Purcell eds, *Mexico Under Fox* (Boulder: Lynne Rienner, 2004).

Krantz, Lasse. *Peasant Differentiation and Development: The Case of a Mexican Ejido* (Stockholm: Studies in Social Anthropology, 1991).

Krauze, Enrique. *Mexico: A Biography of Power: A History of Modern Mexico, 1810-1996*, trans. by Hank Heifetz (New York: HarperCollins, 1997).

Kymlicka, Will. *Liberalism, Community, and Culture* (New York: Clarendon Press, 1989).

———. *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995).

———. *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007).

Lenoble, Jacques & Marc Maesschalck, *Democracy, Law and Governance* (Burlington, VT.: Asgate, 2010).

MacLachlan, Colin M. & Jaime E. Rodriguez O. *The Forging of the Cosmic Race: A Reinterpretation of Colonial Mexico* (Los Angeles: University of California Press, 1990).

Markiewicz, Dana. *The Mexican Revolution and the Limits of Agrarian Reform, 1915-1946* (Boulder: Lynne Rienner, 1993).

Marx, Karl & Friedrich Engels. *The Communist Manifesto* (New York: Penguin Books, 2002).

May, Larry. *The Morality of Groups: collective responsibility, group-based harm, and corporate rights* (Notre Dame, Ind.: University of Notre Dame Press, 1987).

Merryman, John Henry. "Ownership and Estate (Variations on a Theme by Lawson)" reprinted in John Henry Merryman, David S. Clark & John O. Haley eds, *The Civil Law Tradition: Europe, Latin America and East Asia* (Charlottesville, Virginia: The Michie Company, 1994).

Moore, Sally Falk. *Law as Process: An Anthropological Approach* (Boston, Mass.: Routledge & Kegan Paul, 1978).

Morett Sánchez, Jesús Carlos. *Reforma Agraria: Del Latifundio al Neoliberalismo* (México: Plaza y Valdés, 2003).

Munzer, Stephen R. *A Theory of Property* (Cambridge: Cambridge University Press, 1990).

Nuijten, Monique. "What's in the land? The multiple meanings of land in a transnationalized Mexican village" in Annelies Zoomers ed, *Land and sustainable livelihood in Latin America* (Amsterdam: Royal Tropical Institute, 2001) 71.

- Ostrom, Elinor. *Governing the Commons: The evolution of institutions for collective action* (New York: Cambridge University Press, 1990).
- Rawls, John. *A Theory of Justice: Revised Edition* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999).
- . *Justice as Fairness: A Restatement* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2001).
- Ronfeldt, David. *Atencingo: The Politics of Agrarian Struggle in a Mexican Ejido* (Stanford, Calif.: Stanford University Press, 1973).
- Rosaldo, Renato. *Culture and Truth: The Remaking of Social Analysis* (Boston: Beacon Press, 1993).
- Rose, Carol M. "Invasions, Innovation, Environment" in D. Benjamin Barros ed, *Hernando de Soto and Property in a Market Economy* (Burlington, Vt.: Ashgate, 2010) 21.
- Rubin, Jeffrey W. *Decentering the Regime: Ethnicity, Radicalism and Democracy in Juchitán, México* (Durham, NC., 1997).
- Salinas de Gortari, Carlos. *Mexico: The Policy and Politics of Modernization* (Barcelona: Plaza Janés, 2002).
- Scott, James C. *The Moral Economy of the Peasant: Rebellion and Subsistence in South Asia* (New Haven, Conn.: Yale University Press, 1976).

———. *Domination and the Arts of Resistance: the hidden transcripts*

(New Haven: Yale University Press, 1990).

Seagle, William. *The History of Law* (New York: Tudor Publishing, 1946).

Searle, John R. "Social Ontology and Political Power" in Barry Smith, David M.

Mark & Isaac Ehrlich, eds, *The Mystery of Capital and the Construction of Social Reality* (Peru, Ills.: Carus, 2008) 19.

Sen, Amartya. *The Idea of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2009).

Shüren, Ute. "Economic strategies of rural producers: a comparison of ejido and

Mennonite agriculture" in Annelies Zoomers ed, *Land and sustainable livelihood in Latin America* (Amsterdam: Royal Tropical Institute, 2001) 209.

Signet, William D. *Introduction to the Mexican Real Estate System* (Durham, North Carolina: Carolina Academic Press, 2010).

Smaras, Thanassis. *Plato on Democracy* (New York: Peter Land, 2002).

Solís Mendoza, Juan Carlos. "El dominio pleno, un derecho humano agrario fundamental" in Juan Carlos Solís Mendoza ed, *Derecho Agrario y Desarrollo Rural* (Mexico, D.F. Editorial Porrúa, 2012) 23.

Tannenbaum, Frank. *Mexico: The Struggle for Peace and Bread* (New York: Alfred A. Knopf, 1964).

- . *The Mexican Agrarian Revolution* (Hamden, Conn.: Archon Books, 1968).
- Rhodes, R.A.W. *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Maidenhead, UK.: Open University Press, 1997).
- Scherer, Julio García & Carlos Monsiváis. *Parte de Guerra, Tlatelolco 1968: Documentos del General Marcelino García Barragán: Los hechos y la historia* (México: Nuevo Siglo, 1999).
- Selee, Andrew & Jacqueline Peschard. “Mexico’s Democratic Challenges” in Andrew Selee & Jacqueline Peschard eds. *Mexico’s Democratic Challenges: Politics, Government and Society* (Washington, D.C.: Woodrow Wilson Center Press, 2010).
- Simpson, Lesley Bird. *The Encomienda in New Spain; the Beginning of Spanish Mexico* (Berkeley: University of California Press, 1966).
- Terzi Ewald, Claudia. “La Certeza Jurídica de los Derechos de Propiedad y el Desarrollo Sustentable” in Juan Carlos Solís Mendoza ed, *Derecho Agrario y Desarrollo Rural* (Mexico, D.F.: Porrúa, 2012) 55.
- Tonatiuh Guillén López, “Federalism and the Reform of Political Power” in Andrew Selee & Jacqueline Peschard eds. *Mexico’s Democratic*

Challenges: Politics, Government and Society (Washington, D.C.:

Woodrow Wilson Center Press, 2010) 187.

Unánue Rivero, Manuel I. “El ejido mexicano: una doliente Injusticia. Apuntes para una historia. Algo de historia, de derecho y conflictividad agraria en México. Más de verdades” in Juan Carlos Solís Mendoza ed, *Derecho Agrario y Desarrollo Rural* (Mexico, D.F.: Porrúa, 2012) 73.

Van Young, Eric. *The Other Rebellion: Popular Violence, Ideology, and the Mexican Struggle for Independence, 1810-1821* (Stanford, Calif.: Stanford University Press, 2001).

Vázquez Castillo, María Teresa. *Land Privatization in Mexico: Urbanization, Formation of Regions and Globalization in Ejidos* (New York: Routledge, 2004).

Webber, Jeremy. “Multiculturalism and the Limits to Toleration” in André Lapierre, Patricia Smart & Pierre Savard, eds, *Language, Culture and Values in Canada at the Dawn of the 21st Century* (Ottawa: International Council for Canadian Studies and Carleton University Press, 1996) 269.

Young, Iris M. *Inclusion and Democracy* (New York: Oxford University Press, 2000).

Zamboni, Mauro. *Law and Politics: A Dilemma for Contemporary Legal Theory* (Berlin: Springer, 2008).

Zamora, Stephen, José Ramón Cossío, Leonel Pérez Nieto, José Roldan Xopa,
& David Lopez. *Mexican Law* (New York: Oxford University Press, 2004).

Secondary Materials: Articles

Barraca, Steven. "Gubernatorial Politics and the Evolution Toward Democratic
Federalism in Mexico" (2007) 17:2 Reg'l & Fedl Stud 173.

Bratman, Michael E. "Shared Intention" (1993) 104 Ethics 97.

Bonilla Maldonado, Daniel. "Extralegal Property, Legal Monism, and Pluralism"
(2009) 40:2 U. Miami Inter-Am. L Rev 213.

Clark, Robert C. "Contracts, Elites, and Traditions in the Making of Corporate
Law." (1989) 89 Colum L Rev 1704.

Craske, Nikki. "Dismantling or Rentrechment? Salinas and Corporatism" in Rob
Aitken et al, eds, *Dismantling the Mexican State?* (Basingstoke, UK.: Macmillan
Press, 1996) 78 at 81.

Demsetz, Harold. "Toward a Theory of Property Rights II: The Competition
between Private and Collective Ownership" (2002) 31 J Legal Stud S653.

Ellickson, Robert C. "Property in Land" (1993) 102 Yale LJ 1315.

- González de Alba, Iván Guillermo. "Poverty in Mexico from an Ethnic Perspective" (2010) 11:3 Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People Centered Development 449.
- Hansmann, Henry & Reinier Kraakman. "Property, Contract and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights" (2002) 31 J Legal Stud S373.
- Heller, Michael A. "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets" (1998) 111:3 Harv L Rev 621.
- Katz, Larissa. "Exclusion and Exclusivity in Property Law" (2008) 58 U.T.L.J. 275.
- Kleinhans, Martha-Marie & Roderick A. Macdonald. "What is Critical Legal Pluralism" (1997) 12 Can JL & Soc. 25.
- Kordana, Kevin A. & David H. Tabachnick, "Rawls and Contract Law" (2005) 73:3 Geo Wash L Rev 598.
- Langston, Jay. "Governors and 'Their' Deputies: New Legislative Principals in Mexico" (2010) 35:2 Legis Stud Q 235.
- Lea, David. "Tully and de Soto on Uniformity and Diversity" (2002) 19:1 J Appl Phil 55.
- Manderson, Desmond. "Not Yet: Aboriginal People and the Deferral of the Rule of Law" (2008) 29 Arena 219.

- Morris, Stephen D. & Joseph L. Klesner "Corruption and Trust: Theoretical Considerations and Evidence from Mexico (2010) 43 Comp Pol Stud 1258.
- Nedelsky, Jennifer. "Law, Boundaries and the Bounded Self" (1990) 30 Representations 162.
- Nutini, Hugo G. "Clan Organization in Nahuatl-Speaking village of the State of Tlaxcala, Mexico" (1961) 63:1 American Anthropologist, New Series, 62.
- Penner, J.E. "The 'Bundle of Rights' Picture of Property" (1996) 43 UCLA L Rev 711.
- Perramond, Eric P. "Rise, Fall, and Reconfiguration of the Mexican Ejido" (2008) 98:3 *The Geographical Review* 356.
- Santos, Francisco J. Andrés. "Encomienda y Usufructo en Indias: Reflexiones Romanistas en torno a la Doctrina de Juan Solórzano y Pereira" (2001) 69 Legal Hist Rev 245.
- Tamanaha, Brian Z. "A Non-Essentialist Version of Legal Pluralism" (2000) 27 JL & Soc'y 296.
- . "Understanding Legal Pluralism: Past, Present, Local to Global" (2008) 30 Sydney L Rev 375.
- Trubek, David. "Max Weber on Law and the Rise of Capitalism" (1972) 720 Wis L Rev 721.

Various authors. "The Austin Memorandum on the Reform of Art. 27, and its Impact upon the Urbanization of the Ejido in Mexico" (1994) 13:3 Bulletin of Latin American Research 327.

Vaughan, Graham M., Henri Tajfel & Jennifer Williams. "Bias in Reward Allocation in an Intergroup and an Interpersonal Context" (1981) 44 Soc Psych Q 37.

Young, Iris Marion. "Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory" 222 New Left Review (1997) 147.

Secondary Materials: Government Documents: Mexico

Consejo Nacional de la Evaluación de la Política de Desarrollo Social, Análisis y Medición de la Pobreza. *Pobreza 2010: Porcentaje de la Población en Pobreza Según Entidad Federativa, 2010 Estados Unidos Mexicanos*, <http://www.coneval.gob.mx/medicion/Paginas/Medici%C3%B3n/Pobreza-2010.aspx> (Mex.).

Decreto que reforma el artículo 27 [Decree that reforms article 27 of the Constitution], Diario Oficial de la Federación [D.O.], 10 de Enero de 1934 (Mex.).

Diario Oficial de la Federación [DO], [Official Federal Daily Gazette], 22 October 2001, online: <www.dof.gob.mx> (Mex).

Exposición de Motivos de la Iniciativa de Ley Federal de Reforma Agraria de 1971 [Exposition of Motives of the Agrarian Law Bill of 1971] (Mex.).

Exposición de Motivos de la Iniciativa de Reformas de 1992 al Artículo 27 Constitucional [Exposition of Motives of the 1992 Bill to Reform Article 27] (Mex.).

Secretaría de la Reforma Agraria. Press Release, No. 007, “El 96 por ciento de la propiedad social está regularizada y con certeza jurídica: Abelardo Escobar Prieto” 18 enero 2010, <<http://www.sra.gob.mx/sraweb/noticias/noticias-2010/enero-010/4685/>>. (Mex.).

Secondary Materials: Government Documents: United States

U.S., U.S. Congress, Office of Technological Assessment, *U.S. - Mexico Trade: Pulling Together or Pulling Apart* (ITE-545) (Washington, DC: U.S. Government Printing Office, October 1992).

Secondary Sources: Newspapers & News Wires

“De 13 núcleos ejidales, 11 habían avalado la construcción” *El Universal* (2

August 2002), online: El Universal <www.eluniversal.com.mx>.

“Mexican Supreme Court finds police committed abuses in retaking town” *EFE*

News Service (13 February 2009) online: ProQuest

<<http://www.proquest.com>>.

“Toman protesta 3 ayuntamientos” *El Universal* (1 December 2003), online: El

Universal <[www.eluniversal.com .mx](http://www.eluniversal.com.mx)>.

“Vargas Llosa: ‘México es la dictadura perfecta’” *El País* (1 September, 1990)

online: El País <<http://www.elpais.com>>.

Agren, David. “Education system holding Mexico back, critics say” *USA Today*

(30 March 2012), online: USA Today <www.usatoday.com>.

Alegre, Luis. “Traigan más gasolina” *Reforma* (12 July 2002), online: Grupo

Reforma <www.reforma.com>.

Almazán, Alejandro. “Temen represión en Atenco” *El Universal* (25 October

2001), online: El Universal <<http://www.eluniversal.com.mx>>.

Arvizu Arriola, Juan. “Pagarán a *ejidatarios* 500 mil por hectárea” *El Universal*

(23 July 2002), online: El Universal <<http://www.eluniversal.com.mx>>.

- Aviles, Jaime. "Pretende Marín salvarse; quita a Juanito la maquiladora de la cárcel" *La Jornada* (24 February 2006), online: La Jornada <www.jornada.unam.mx>.
- Corzo, Hugo. "Reiteran rechazo a elección" *Reforma* (5 July 2003), online: Grupo Reforma <www.reforma.com>.
- Cuenca, Alberto. "El aeropuerto no vale la pena si se construye con violencia" *El Universal* (14 July 2002), online: El Universal <www.eluniversal.com.mx>.
- Díaz, César. "Detienen vecinos a 'espías'" *Reforma* (26 October 2001), online: Grupo Reforma <www.reforma.com>.
- Espinosa, Arturo. "Descartan violentar Atenco" *Reforma* (6 July 2003), online: Grupo Reforma <www.reforma.com>.
- Espinosa, Arturo & Francisco Ortiz. "Congelan actas vs. Atenco" *Reforma* (23 July 2003), online: Grupo Reforma <www.reforma.com>.
- Fuentes, Víctor. "Pierden campesinos ganancias millonarias" *Reforma* (4 August 2002), online: Grupo Reforma <www.reforma.com>.
- Gómez, Enrique I. "Abogará Montiel por mejor indemnización" *Reforma* (29 October, 2001), online: Grupo Reforma <http://www.reforma.com>.
- . "Buscan a fraccionadores" *Reforma* (1 November 2001), online: Grupo Reforma <www.reforma.com>.

———. “Descartan usar la fuerza en contra de *ejidatarios*” *Reforma* (12 September 2002), online: Grupo Reforma <www.reforma.com>.

Gómez, Enrique I. & Erika Hernández. “Otorgan nuevo plazo a ejidatarios” *Reforma* (15 July 2002), online: Grupo Reforma <www.reforma.com>.

Gómez, Ricardo. “Impulsa el PAN en San Lázaro ‘candados’ a deudas de estados” *El Universal* (18 September, 2012) online: El Universal <<http://www.eluniversal.com.mx>>.

Haw, Dora Luz. “Naufraga la identidad si se pierde la tierra” *Reforma* (24 July, 2004), online: Grupo Reforma <<http://www.reforma.com/>>.

Hernández, Érika. “Aprueban contratar a Ignacio Burgoa” *Reforma* (2 November 2001), online: Grupo Reforma <www.reforma.com>.

———. “‘Corren’ a edil de San Salvador Atenco” *Reforma* (31 October 2001), online: Grupo Reforma <www.reforma.com>.

———. “Desairan ‘changarros’ de Fox” *Reforma* (5 November 2001), online: Grupo Reforma <www.reforma.com>.

———. “El ‘arrestre’ del pueblo” *Reforma* (2 December 2003), online: Grupo Reforma <www.reforma.com>.

———. “Entregan a topógrafos retenidos en Atenco” *Reforma* (4 June 2002), online: Grupo Reforma <www.reforma.com>.

———. “Exigen devolver Alcaldía de Atenco” *Reforma* (2 September 2002), online: Grupo Reforma <www.reforma.com>.

———. “Preparan en Atenco cambio de Gobierno” *Reforma* (16 August 2003), online: Grupo Reforma <www.reforma.com>.

———. “Priva incertidumbre en Atenco” *Reforma* (4 December 2003), online: Grupo Reforma <www.reforma.com>.

Hernández, Érika & Humberto Padgett. “Aprovechan protestas de *ejidatarios* de Atenco” *El Universal* (19 November 2001), online: El Universal <www.eluniversal.com.mx>.

———. “Divide a los campesinos los métodos de lucha” *El Universal* (17 November 2001), online: El Universal <www.eluniversal.com.mx>.

Hernández, Erika, Iván Ventura, Arturo Espinosa & César Díaz. “Truena crisis en Atenco” *Reforma* (12 July 2002), online: Grupo Reforma <www.reforma.com>.

Ibarra, María Esther. “Aprueba el Consejo Universitario el aumento de cuotas en la UNAM” *La Jornada* (16 March 1999), online: La Jornada <www.jornada.unam.mx>.

———. “Pacíficamente, la ‘minoría’ consiguió parar casi toda actividad en la UNAM” *La Jornada* (25 March 1999), online: La Jornada <www.jornada.unam.mx>.

Lázaro, Juan. "Cobran 5 mil por inhumar en Atenco" *El Universal* (19 May 2002),
online: El Universal <www.eluniversal.com.mx>.

———. "Obstaculizan estudios del plan del nuevo aeropuerto" *El Universal* (21 July 2001), online: El Universal <www.eluniversal.com.mx>.

———. "Entregan *ejidatarios* la alcaldía de Atenco" *El Universal* (2 December 2003), online: El Universal <www.eluniversal.com.mx>.

———. "Piden campesinos ser socios del aeropuerto" *El Universal* (2 August 2001), online: El Universal <www.eluniversal.com.mx>.

———. "Rechazan *ejidatarios* aeropuerto en Texcoco" *El Universal* (03 June 2001), online: El Universal <<http://www.eluniversal.com.mx>>.

Carballo, Nurit Martínez. "Acuerdan SEP y SNTE Recortar la Evaluación" *El Universal* (29 March 2012), online: El Universal
<www.eluniversal.com.mx>.

Mejía, Angelina, Georgina Howard & Ella Grajeda. "Gana Texcoco; hay protestas" *El Universal* (23 October 2001), online: El Universal
<www.eluniversal.com.mx>.

Mondragón, Alfredo. "Se deslinda Montiel de la crisis" *El Universal* (14 July 2002), online: El Universal <www.eluniversal.com.mx>.

Montaño Delgado, María Teresa. "Millonarias pérdidas en Edomex en inversión directa" *El Universal* (2 August 2002), online: El Universal <www.eluniversal.com.mx>.

Otero, Silvia, Jorge Ramos, Javier Cerón & Alberto Cuenca. "Recupera la CU la PFP; detenidos, 632 estudiantes" *El Universal* (17 February 2000), online: El Universal <www.eluniversal.com.mx.>.

Padgett León, Humberto. "Anuncia Resistencia" *Reforma* (9 September 2002), online: Grupo Reforma <www.reforma.com>.

———. "Bloquean campeonos autopista" *Reforma* (27 October 2001), online: Grupo Reforma <www.reforma.com>.

———. "Eligen en Atenco Consejo Popular" *Reforma* (9 September 2002), online: Grupo Reforma <www.reforma.com>.

———. "Establecen en Atenco un Gobierno Autónomo" *Reforma* (11 September 2002), online: Grupo Reforma <www.reforma.com>.

———. "Impedirán regreso de autoridades" *Reforma* (4 August 2002), online: Grupo Reforma <www.reforma.com>.

———. "Insisten en su autonomía" *El Universal* (09 August 2002) online: El Universal <http://www.eluniversal.com.mx>.

———. "Piden oportunidad de no ser 'campesinos'" *Reforma* (3 August 2002), online: Grupo Reforma <www.reforma.com>

- . “Respaldan 20 organismos acciones de los campesinos” *Reforma* (15 July 2002), online: Grupo Reforma <www.reforma.com>.
- Padgett León, Humberto & Erika Hernández. “Retienen a 5 trabajadores” *Reforma* (2 June 2002), online: Grupo Reforma <www.reforma.com>.
- Padgett, Huberto & Hugo Corzo. “Amplía Atenco sus exigencias” *Reforma* (3 August 2002), online: Grupo Reforma <www.reforma.com>.
- Saúl, Lilia & Ella Grajeda. “Alistan controversia por Texcoco” *El Universal* (24 October 2001), online: El Universal <www.eluniversal.com.mx>.
- Sevilla, Ramón. “Confía Burgoa en suspender expropiación” *Reforma* (10 November 2001), online: Grupo Reforma <www.reforma.com>.
- Vázquez Bravo, Almendra. “Aminora la tensión en zona de conflicto” *El Universal* (16 July 2002), online: El Universal <www.eluniversal.com.mx>.
- . “Protestan por acoso a *ejidatarios* de Atenco” *El Universal* (28 May 2002), online: El Universal <www.eluniversal.com.mx>.
- . “Quedan libres de culpas los 'cabecillas' de Atenco” *El Universal* (27 August 2003), online: El Universal <www.eluniversal.com.mx>.
- . “Realizan doble ‘Grito’ en San Salvador Atenco” *El Universal* (17 September 2002), online: El Universal <<http://www.eluniversal.com.mx>>.
- . “Retienen ejidatarios a académicos y funcionarios” *El Universal* (6 June 2002), online: El Universal <www.eluniversal.com.mx>.

Vázquez, Almendra & José Roldán. "Rechazan Aeropuerto en Texcoco" *El*

Universal (6 March 2001) online: El Universal <www.eluniversal.com.mx>.

Vázquez Almendra & Alejandro Almazán. "Liderazgo *ejidatario*, una pugna partidista" *El Universal* (05 November 2001), online: El Universal

<<http://www.eluniversal.com.mx>>.

Vázquez Bravo, Almendra & Rebeca Jiménez Jacinto. "Crece polémica por ubicación del aeropuerto" *El Universal* (27 February 2001) online: El

Universal <www.eluniversal.com.mx>.

Ventura, Iván., "Regresan a sus Orígenes" *Reforma* (28 October, 2001), online:

Grupo Reforma <<http://www.reforma.com>>.

———. "Van 1,500 a Los Pinos" *Reforma* (1 November 2001), online:

Grupo Reforma <www.reforma.com>.

Vidal, Míriam. "Comienza Atenco en situación precaria" *El Universal* (4

December 2003), online: El Universal <www.eluniversal.com.mx>.

Zúñiga, Mariel & Ramón Sevilla. "Despega Texcoco con Turbulencia" *Reforma*

(22 October 2001), online: Grupo Reforma <www.reforma.com>.

Secondary Sources: Magazines

Bourbeau, Heather. "Property Wrongs" *Foreign Policy* 127 (November-December 2001) 78.

Gil Olmos, José. "Grupo Atlacomulco" *Proceso* (10 September 2008), online: Proceso <www.proceso.com.mx>.

Granados Roldán, Oto. "¿Virreyes o Gobernadores?" *Nexos* (01 October 2011) online: Nexos en línea <<http://www.nexos.com.mx>>.

Secondary Sources: Websites

Consejo Nacional de la Evaluación de la Política de Desarrollo Social, Análisis y Medición de la Pobreza, *Pobreza 2010: Porcentaje de la Población en Pobreza Según Entidad Federativa, 2010 Estados Unidos Mexicanos*, <http://www.coneval.gob.mx/> (Mex.).

"Economic data from 2008" *Central Intelligence Agency*, online: CIA: The World Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html>>.

Hall, Gillette & Harry Anthony Patrinos. "Indigenous Peoples, Poverty and Human Development in Latin America: 1994-2004" *The World Bank*, online: The World Bank
<http://siteresources.worldbank.org/INTLAC/Resources/FinalExecutiveSumFina_Eng_May05.pdf>.

Instituto Nacional de Estadística y Geografía. *Indicadores seleccionados de la población por municipio, 2005*,
<http://www.inegi.org.mx/est/contenidos/espanol/rutinas/ept.asp?t=mpob103&s=est&c=3850&e=15> (Mex.).

Instituto Nacional de Estadística y Geografía. *Total de ejidos y comunidades según tipo de actividad agropecuaria o forestal y forma de explotación por entidad federativa, 2007*, online: INEGI <www.inegi.org.mx> (Mex.).

Salinas de Gortari, Carlos. *Primer Informe de Gobierno ante el Honorable Congreso de la Unión, 1989*, [First Government Report before the Honorable Congress of the Union], Biblioteca Garay
<http://www.biblioteca.tv/artman2/publish/1989_66/Mensaje_del_Primer_informe_de_gobierno_de_Carlos_S_77.shtml>.

Secretaría de Gobernación. *Enciclopedia de los Municipios de México, Tizayuca*, online: Enciclopedia de los Municipios de México, http://www.e-local.gob.mx/wb2/ELOCAL/EMM_hidalgo (Mex.).

Secondary Materials: Thesis

Boone Barrera, Enrique. Fiscal federalism and accountability in the municipalities of the Mexican state of Coahuila (LLM Thesis) Queen's University, Faculty of Law, 2006) [unpublished].