
RETHINKING ACCOUNTABILITY AND TRANSPARENCY: BREAKING THE PUBLIC SECTOR BIAS IN MEXICO

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I. INTRODUCTION

The wave of freedom of information legislation and anti-corruption reforms sweeping the globe over the last two decades has strengthened the grip of oversight and control, but on an ever-smaller basis of public authority and social power.¹ Today, almost ninety

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1. See John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 85–86 (2006), available at http://www.humanrightsinitiative.org/programs/ai/rti/articles/admin_law_review_explosion_of_foi_2006.pdf [hereinafter Ackerman & Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*]; see also *Strategic Plan 2011–2016*, INT’L ORG. OF SUPREME AUDIT INST. 2–6 (Oct. 2010),

laws on national access to information are in effect throughout the world,² and each year governments compete to improve their rankings on the Transparency International, Global Integrity, Budget Accountability, World Bank, and Latin American Barometer “scoreboards.”³ Meanwhile, the economic orthodoxy of the past two decades has pushed central government functions out towards the private sector where public accountability is virtually nonexistent.⁴ Access to information laws historically developed as a way to control the new administrative state, or “fourth branch of government,” that emerged during the nineteenth and twentieth centuries in both the

<http://www.intosai.org/uploads/intosaispenglishv9web.pdf> (highlighting the United Nations’ Supreme Audit Institutions’ efforts to foster cooperation between accountability agencies of various countries, pursuant to the declarations of nations such as Peru and Mexico).

2. Roger Vleugals, *Overview of All FOI Laws*, FRINGE SPECIAL 3–9 (Oct. 2011), <http://right2info.org/resources/publications/Fringe%20Special%20-%2090%20FOIAs%20-%20sep%207%202009.pdf/view>.

3. See *Advancing Access to Information in MNA: Supporting Coalitions & Networks*, WORLD BANK 3–6 (Aug. 2013), <http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Regional%20dialogue%20on%20ATI-%20Newsletter%204%20Final%20English.pdf> (detailing exercises orchestrated by the World Bank in which representatives from Middle Eastern and North African states cooperated to formulate solutions to intra-national accountability problems); *Using the Right of Information as an Anti-Corruption Tool*, TRANSPARENCY INT’L 3, 4 (2006), http://www.transparency.org/policy_research/surveys_indices/cpi/2010 (comparing the strength and execution of various countries’ right of information laws, noting particularly that several states have strongly worded but poorly enforced right of information laws, that others have seemingly weak statutes made effective through vigorous advocacy, and that a handful of states have established information commissioners who can drastically reduce the costs and time constraints of executing right of information laws); see also Jason Levitis et al., *Promoting State Budget Accountability Through Tax Expenditure Reporting*, CTR. ON BUDGET AND POLICY PRIORITIES 1–3, 9, 14 (Apr. 9, 2009), <http://www.cbpp.org/files/4-9-09sfp.pdf> (asserting that sound budgetary accountability requires the publication of tax expenditure reports, outlining what features make such reports effective, and comparing which U.S. states publish such reports and how); *Global Integrity Report: 2011 Executive Summary*, GLOBAL INTEGRITY 9, 11–41, (Mar. 2012), <http://allafrica.com/download/resource/main/main/idatcs/00031214:34a8bcf80534115d922944f722e1206a.pdf> (examining the access of information laws of several states, and evaluating the strengths of these laws by comparing the actual wording and structure of the laws with a given state’s implementation).

4. See ALASDAIR ROBERTS, *THE LOGIC OF DISCIPLINE* 126–27 (2010) (asserting that the growing government reliance on private sector contracts to operate and maintain public infrastructure causes, among other problems, the weakening of public oversight).

global “north” and “south.”⁵ Transparency of government documents and spending has been one of the best ways to control large bureaucracies, but now the situation is different. “Public” functions such as schooling, healthcare, prison management, infrastructure, and insurance are increasingly taken up by private corporations, non-profit organizations, independent contractors, or quasi-governmental entities.⁶

The final result is a net accountability loss. The near total opacity of the enormous new responsibilities now in the hands of the private sector negates incremental gains in transparency and oversight of government entities.⁷ In the private sphere, concerns for accountability and answerability are normally subordinated to the demand for profits and competitiveness.⁸ Here, secrecy, not transparency, is the priority; tax secrets, corporate secrets, technological secrets, bank secrets, etc., are designed to protect the private sector from citizen oversight. Although recent economic crises have placed corporate responsibility in the public eye, it is still

5. Scholars like Katznelson have called the rise of the administrative state the “second great macroprocess of modernity,” comparable only to the rise of capitalist market relations in the nineteenth century. Ira Katznelson, *Structure and Configuration in Comparative Politics*, in *COMPARATIVE POLITICS: RATIONALITY, CULTURE, AND STRUCTURE* 91 (Mark I. Lichbach & Alan S. Zuckerman eds., 1997).

6. See JEFFREY DELMON, *PRIVATE SECTOR INVESTMENT IN INFRASTRUCTURE: PROJECT FINANCE, PPP PROJECTS AND RISK* 7 (2009) (asserting that the involvement of private entities is a critical component to providing infrastructure).

7. See Alasdair Roberts, *Structural Pluralism and the Right to Information*, 51 *U. TORONTO L.J.* 243, 243–44 (2001) (arguing that, since freedom of information laws were initially written with government institutions in mind, the shift towards private entities providing infrastructure services has undermined the effectiveness of these laws); see also Jerry Mashaw, *Accountability and Institutional Design: Some Thoughts on The Grammar of Governance*, in *PUBLIC ACCOUNTABILITY* 115, 135–38, 152 (Michael Dowdle ed., 2006) (claiming that numerous concerns necessarily frustrate holding private contractors accountable, such as the difficulty of applying accountability devices designed for public entities to private entities, the expectation that private entities are entitled to use secrecy to protect proprietary information, and the tendency to use private entities to provide infrastructure to encourage increased reliance on those entities).

8. See Robert Bloomfield & Maureen O’Hara, *Market Transparency: Who Wins and Who Loses?*, 12 *REV. FIN. STUD.* 5, 5–6 (1999), available at http://www.business.unr.edu/faculty/liuc/files/RUC/topic_markettransparency/Bloomfield_OHara_1999.pdf (noting that the British Securities and Investment Board believes that trade transparency should be restricted to protect private entities from undue economic risk).

generally accepted that too much transparency in this realm would lead to reduced innovation and unfair information theft between market rivals.⁹

This article analyzes the new context of “structural pluralism” in public authority to identify the shortcomings of old anti-corruption and transparency policies.¹⁰ It argues that such strategies are limited to reducing bribes and assuring basic bureaucratic “hygiene,” and that they are insufficient to facilitate the change in the relationship between the state and society necessary to better “deliver the goods” to citizens in a democratic context.¹¹ Part II discusses the public-sector bias toward anti-corruption studies in the context of the changing configuration of public authority. Further, Part II argues that the reality of Public-Private Partnerships (“PPPs”) and other new public management reforms warrant reconsideration of the stark separation between the public and private spheres, which represents an essential part of the modern “neoliberal creed.”¹²

9. See Alex Cukierman, *The Limits of Transparency*, 38 ECON. NOTES, 2009, at 1, 2–3, 13–18, 27 (arguing that excessive transparency in the marketplace should be avoided because it potentially forces financial institutions to utilize information inefficiently and makes them more susceptible to unwarranted political influence).

10. See generally ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 183–85 (1984) (arguing that the shift from tribal and class-divided societies to class societies coincided with the development of power centers—resulting from capitalism and codified administration—which affect large segments of society and could be detrimental to human survival); ANTHONY GIDDENS, *RUNAWAY WORLD: HOW GLOBALIZATION IS RESHAPING OUR LIVES* 23, 32, 34–37 (2000) (asserting that the globalization phenomenon has fundamentally changed the economic and technological challenges facing nation states, necessitating a reorganization of governmental institutions).

11. According to Mark Bovens, we should think of Information Rights as the fourth great wave of citizens’ rights, equivalent to the civil, political, and social rights outlined in T.H. Marshall’s classic text, *Citizenship and Social Class*. As the industrial era comes to an end and the “information society” age rises, states must update their constitutional frameworks to account for the new universal right to information. The author makes a crucial distinction between transparency as a question of “public hygiene” and information rights as an issue of “citizenship.” Mark Bovens, *Information Rights: Citizenship in the Information Society*, 10 J. POL. PHIL., no. 3, 2002, at 317–18, 327 [hereinafter Bovens, *Information Rights*].

12. “Neoliberal creed” refers to Karl Polanyi’s classic metaphor defining the “liberal creed” as a dangerous justificatory ideology for overlooking the enormous human suffering and economic devastation of community. See KARL POLANYI, *THE GREAT TRANSFORMATION* 135, 137–38, 142 (1964) (claiming that economic liberalism required an assumption of massive risk, which led to great suffering

Part III argues that the failure to adapt traditional policy approaches to transparency and “government openness” to account for new, complex structures of public authority should be understood not as a technical failure, but as a democratic failure. Part III also calls for the adoption of a new Democratic Expansive Project of Transparency based on a reform of the relationship between state and society.¹³ This debate is illustrated using Mexico as an example of how the bureaucratic and public relations projects of transparency have eclipsed the democratic expansive project by “freezing” democracy and other democratic achievements.¹⁴

Finally, this article concludes with some general reflections on corruption and the urgent need to rethink accountability and transparency, especially in highly unequal societies, like Mexico, which have a private sphere controlled by a small number of oligopolistic corporations.¹⁵ In this context, the private sphere is even more lawless and opaque than usual, and in greater need of the transparency and anti-corruption controls normally reserved for the public sector.

II. A NEW WORLD OF PUBLIC-PRIVATE PARTNERSHIPS

The general differentiation between the “public” and “private”

during the latter half of the nineteenth and the beginning of the twentieth centuries, causing inflation, unemployment, reduction in sovereignty, and diminished constitutional rights); *see also* IRMA E. SANDOVAL BALLESTEROS, *CRISIS, RENTISMO E INTERVENCIONISMO NEOLIBERAL EN LA BANCA: MÉXICO (1982-1999)* 345 (2011) (analyzing the political situation in Mexico stemming from the 1982 bank nationalization and the resulting financial harm that culminated in the 1990s).

13. *See generally* Irma E. Sandoval, *Transparency Under Dispute: Public Relations, Bureaucracy and Democracy in Mexico*, in *TRANSPARENCY FROM DIFFERENT PERSPECTIVES* 1–3, 18 (Robert Vaughn & Padideh A’lai eds., 2013) [hereinafter Sandoval, *Transparency Under Dispute*] (defining “democratic-expansive projects of transparency” as a regime focused on citizens’ rights that relies on the advocacy of private citizens).

14. *See id.* at 18–21, 27–28 (asserting that Mexican President Peña Nieto’s accountability agency reforms were in fact intended to centralize power and reduce governmental transparency).

15. *See, e.g.*, James M. Cypher, *NAFTA’s Lessons: from Economic Mythology to Current Realities*, 26 *LAB. STUD. J.* 5, 5–6, 10–12, 16 (2001) (positing that NAFTA allowed oligopolies like the automotive manufactures to diminish workers’ rights).

sectors has created a pocket of impunity and opacity for private actors who fulfill public functions. Private corporations in charge of public sector work frequently argue that they cannot publicly disclose their negotiations, details of their operations, or, in some cases, the contracts themselves because of commercial sensitivity.¹⁶ Revealing corporate details, they insist, would provide too much information to competitors and result in a less competitive bidding process because those with limited knowledge and expertise would gain an unfair advantage.¹⁷

These justifications are untenable in a world of expansive Public-Private Partnerships. Fair market competition is not going to improve by carefully protecting information that should be public.¹⁸ On the contrary, opacity will damage competition and open a dangerous space for impunity.¹⁹ The real motivation for private sector opacity, when fulfilling public functions, is thus not to foster better and more effective markets, but to safeguard narrow self-interest and keep potential conflicts of interest and other wrongdoings hidden.²⁰ This

16. See Helmut Willke, *Transparency After the Financial Crisis: Democracy, Transparency, and the Veil of Ignorance*, in TRANSPARENZ 61 (2010) (arguing that it is unreasonable to expect regulators to possess greater knowledge than those conducting regulated business and that most actors involved in regulated conduct have incomplete knowledge of the relevant instruments involved in a given venture, resulting in efforts imposing transparency being deleterious to economic efficiency).

17. See Wim Dubbink et al., *CSR, Transparency and the Role of Intermediate Organisations*, 82 J. BUS. ETHICS 391, 391–93 (2008) (suggesting that while current accountability institutions provide insufficient oversight, full transparency could produce unforeseen and undesirable consequences, such as decreased economic efficiency, information oversaturation, invasion of privacy, and industry backlash).

18. See Irma E. Sandoval, *Opacity in the Management of Public Resources: The Case of Government Trust Funds*, in MEXICO'S RIGHT TO KNOW REFORMS: CIVIL SOCIETY PERSPECTIVES 182–83, 185 (2007) [hereinafter Sandoval, *Opacity in the Management of Public Resources*] (arguing that the consequences of Mexico's financial sector's opaqueness demonstrate that government trusts should not enjoy trust secrecy).

19. See Daniel Kaufmann & Tara Vishwanath, *Towards Transparency: New Approaches and Their Application to Financial Markets*, 16 WORLD BANK RES. OBSERVER 41, 44 (2001) (claiming that such opacity is damaging to both political and economic interests by hindering the public's ability to judge government policy).

20. See Gillian Peele & Robert Kaye, *Regulating Conflicts of Interest: Securing Accountability in the Modern State*, INSTITUTO DE INVESTIGACIONES SOCIALES, UNAM 9–10, (2006), <http://www.corrupcion.unam.mx/documentos/>

motivation enforces the need to go beyond bureaucratic and institutional corruption approaches and adopt a new structural corruption perspective that centers on abuses of power regardless of whether the abuses emerge from the public or private spheres.

It is generally accepted that governments outsource due to advantages in managerial and administrative efficiency, efficacy, and flexibility.²¹ There are certainly many advantages to outsourcing, but one must also carefully evaluate losses and consider the possibility that initial benefits may come at a tremendous cost in long-term economic and democratic development.²² For better or worse, private contractors have become an integral part of public life and therefore represent an important challenge in the construction of a new strategy to confront structural corruption.²³

The growing expansion of PPPs and their wider propagation into areas and tasks previously reserved for the state create serious challenges for established democratic frameworks.²⁴ There are valid concerns that PPPs trade managerial notions of efficiency for democratic notions of accountability and legitimacy.²⁵ Recognition of this reality should create and drive new philosophical debates. For instance, there must be consideration of the direct opposition between the traditional public service ethos that rejects profit-making values long-established in the previously framed public services, and the new pragmatic focus on needs of the private firm, contractor, and

investigaciones/peelekaye_paper.pdf (hypothesizing that the autonomy available to political executives, coupled with access to privileged information, make them more inclined to pursue opacity).

21. See ALLISON STRANGER, *ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY* 6–8 (2009) (arguing that government has become overly dependent on contractors and NGOs in the foreign policy).

22. See Ackerman & Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, *supra* note 1, at 93, 111 (claiming that there are immense political and economic costs to opacity).

23. STRANGER, *supra* note 21, at 3.

24. “Areas and tasks” include but are not limited to the following: national security, defense, prisons, state surveillance, migration, elections, and even diplomacy. See, e.g., Phil Taylor & Christine Cooper, *‘It Was Absolute Hell’: Inside the Private Prison*, 96 *CAPITAL & CLASS* 3–5 (2008) (highlighting the rise in private prison contracts in the United Kingdom during the 1990s).

25. Ackerman & Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, *supra* note 1, at 93, 111.

consumer present in most PPP reasoning.

Concepts of ethics and democracy should not be thrown out when a government contracts a private organization to complete public functions. Some authors have called for exploration of the ethical dilemmas that PPPs bring to public action and decision-making as a means of managing the risks associated with corruption.²⁶ Jonathan Marks has advocated for the application of the institutional corruption framework to PPPs related to food and health to “draw attention to the limitations of prevailing analytical approaches to the ethics of PPPs, and suggest alternative ways of addressing the systemic ethical issues they raise.”²⁷

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

It is important to question the black-and-white manner in which the public-private distinction is normally conceived. As Karl Polanyi pointed out decades ago, this is a basic foundation of the “liberal credo” and liberal democratic theory in general.²⁸ The traditional private sphere is typically depicted as the site of synergies, initiatives, freedoms, and free individuals that make autonomous decisions. In contrast, the public sphere is responsible for resolving the conflicts that result from the autonomous decisions in the private sphere. The public sphere is therefore equated with conflict, controversy, and limits, whereas the private sphere is viewed as the locus of independence, harmony, convergence, and freedom.

26. See, e.g., Jonathan H. Marks, *What's the Big Deal?: The Ethics of Public-Private Partnerships Related to Food and Health* 4, 23 (Edmond J. Safra Research Lab Working Paper No. 11, 2013) (arguing that particular consideration must be given to the impact that PPPs have on the perceived integrity and public confidence in the government).

27. *Id.* at 4.

28. See POLANYI, *supra* note 12, at 136, 140–41 (stating that the bureaucratic institutions and reforms of the early nineteenth century sought to ensure a free market and create a *laissez-faire* system unhindered by regulation).

It is time to question this cornerstone of liberalism. The articulation of the public-private relationship should be analyzed according to the taxonomy offered by John Parkinson in his most recent book.²⁹ He states that there are four categories which apply to the concept of the public: (1) freely accessible places

where strangers are encountered whether one wants to or not, because everyone has free right of entry These are places where the spotlight of publicity shines, and so might not just be public squares and market places, but political debating chambers where the right of physical access is limited but informational access is not;

(2) common goods such as clean air, water, public transportation, and concerns about crime, children, and elderly people; (3) public figures or rulers; and (4) collective activity spaces “owned by the state . . . and paid for out of collective resources like taxes, government buildings, national parks, military bases and equipment, and so on.”³⁰

Building on this framework, the next question is how to conceptualize a public service. Here, it is not particularly useful to follow the traditional liberal understanding of the public-private distinction in which “public services” are limited to those services provided by the state or government.³¹ From this perspective, the idea of private provision of public services embodied in the PPP revolution simply makes no sense. Beyond and before any theoretical issues, the empirical reality of public service reform itself forces us to de-fetishize the concepts of the “public” and “private” and stop treating them as strictly independent domains.

Specifically, a service should be considered “public” if it meets the following criteria: (1) it affects communities, societies, or large groups of people, or it uses collective resources; (2) it cannot be parceled up and distributed to or owned by individuals; and (3) it is

29. See generally JOHN R. PARKINSON, *DEMOCRACY AND PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC* 51–52 (2012).

30. *Id.* at 51.

31. See Taylor & Cooper, *supra* note 24, at 4–5, 7 (noting how the drive for privatization has caused governments to rely on the private industries in fields such as corrections); see also PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 80 (2007).

an essential precondition for healthy, worthwhile, respectful, and safe living for communities, societies, or individuals.

Accordingly, every service funded with tax dollars is, in principle, a public service since it is paid for out of collective resources.³² The provisions of clean air, public water, or even energy resources are public services because these goods cannot be packaged or individually owned.³³ Additionally, healthcare, education, and health insurance should be considered public goods and their provision a public service because they constitute an essential precondition for healthy, worthwhile, and secure lives.³⁴

A central social and political challenge is to avoid the use of expanded privatization and corporate dominance as an excuse for reduced transparency and accountability.³⁵ Generally, governments must emphasize the basic principle of transparency and the free flow of information as a necessary precondition for (1) market actors to make informed and responsible decisions, and (2) for a healthy democracy in which the values of openness, accountability, and resistance cease to be under pressure.³⁶

Privatization, like the wider project of neoliberalism, has always been a highly disputed and contested process.³⁷ Most historic and

32. See Duncan Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1352 (1982) (relegating the free private market to “an artifact of public violence” because the government enforces public respect for property by force and that property “determines the distribution of income”).

33. See Marcus Taylor, *The Reformation of Social Policy in Chile 1973–2001: Questioning a Neoliberal Model*, 3 GLOBAL SOC. POL'Y 21, 30–31, 40 (2003) (criticizing the privatization of the Chilean social security system for the associated large financial costs and resulting exclusion of thirty percent of low paid Chilean workers).

34. See *id.* at 40–41 (asserting that the privatization efforts of Chile have left many citizens without secure access to healthcare or education, indicating that the privatization of public services has predominantly negative results).

35. Irma E. Sandoval, *Outsourcing Opacity: New Challenges to Public Accountability in Latin America*, LATIN AM. STUD. ASS'N (2013) [hereinafter Sandoval Ballesteros, *Outsourcing Opacity*].

36. See Hussein Soliman & Sherry Cable, *Sinking Under the Weight of Corruption: Neoliberal Reform, Political Accountability and Justice*, 59 CURRENT SOCIOLOGY 735, 738–40, 744–49 (2011) (using disaster relief to illustrate how the lack of transparency impedes the efficiency of emergency response).

37. See generally *id.* at 748 (criticizing the lack of transparency in private enterprises providing public services in the developing world).

analytic accounts place its emergence during the 1980s, but in reality the attack on government-provided public services began as early as 1968 to counteract the global tide of progressive politics and the wave of social and national independence movements.³⁸ This strategy was attempted to advance a pragmatic modernizing project of efficacy and efficiency for markets, but also had political motives as a way to confront and roll back the threat of socialism.³⁹

The neoliberal privatization agenda was an attempt to offer a competing utopia for societies at risk of following the socialist path to development.⁴⁰ A new utopia in which market individualism, voluntary exchange, and free markets would overcome “the Road to Serfdom”⁴¹ that an overgrown interventionist state implied. The freeing of the “entrepreneurial spirit” and “individual and private actors” from artificial controls, it is claimed, would lead to a betterment of humanity as a whole.⁴² Privatization and free markets would stop bureaucratic controls or trade union monopolies from impeding dynamic rises in productivity.⁴³ Each region of the world would be able to specialize in what they are best at doing, their comparative advantage.⁴⁴ Meanwhile, the rich might be getting richer, but the poorest would also be better off as a result of the trickle-down social policies of redistribution.⁴⁵ This neoliberal utopia

38. See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 8–9 (2005) (stating that the United States backed neoliberal reforms in South America to counteract the prevalence of left-wing politics, laying the groundwork for refined Western neoliberal reforms during the 1980s).

39. *Id.*

40. *Id.* at 19.

41. See FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* 28–31 (1944) (detailing historical commentary which holds that the concepts of democracy and socialism are, contrary to the beliefs of socialist thinkers, mutually exclusive and that socialist systems are inevitably totalitarian regimes).

42. See HARVEY, *supra* note 38, at 21–24, 26 (chronicling the efforts of the Thatcher and Reagan administrations in deregulating their respective countries’ economies as part of a neoliberal push to counteract socialism and Keynesian economics).

43. *Id.* at 11–12.

44. See MICHAEL PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 71–73 (1990).

45. See Philippe Aghion & Patrick Bolton, *A Theory of Trickle-Down Growth and Development*, 64 *REV. OF ECON. STUD.* 151, 151–52 (1997) (arguing that, despite its shortcomings, trickle-down economics improves economic efficiency by enabling the poor to invest more effectively).

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

However, today this utopia is increasingly under fire.⁴⁶ The increasing concentration of wealth, the global economic financial crisis, surges in unemployment, and the emergence of vast popular movements throughout the world have all pushed people to imagine a more stable and just alternative.⁴⁷ Rejection of the neoliberal utopia and privatization is made clear by increasing mobilization and discontent, including the Zapatista rebellion in Mexico in 1994, the 1997 mobilization against the World Trade Organization in Seattle, more recently the Occupy Wall Street movement in New York City, and extraordinary social movements in Spain, Turkey, Egypt, Chile, Brazil, and many other Latin American and European cities. Simultaneously, the fall of the bureaucratic-authoritarian version of communism, embodied in the old Soviet Empire, has opened space to creatively rethink the critiques of liberal capitalism.

Now that the neoliberal utopia has become a dystopia⁴⁸ with all the associated impoverishment, unemployment, violence, and economic and social upheaval, it is increasingly difficult to openly defend privatization or the wider project of neoliberalism.⁴⁹ The discrediting of privatization as a pragmatic tool to improve government emerges not only from its failure to promote prosperity, development, and growth, but also from the moral bankruptcy of a philosophy that vindicates ownership based solely in private property forms. Maintaining exclusively private or corporate control of social resources is an obvious negation of the social, economic, and cultural rights of today's society and individuals.

46. See, e.g., Toya Benski et al., *From the Streets and Squares to Social Movements Studies: What Have We Learned?*, 61 CURRENT SOC. 541, 543–44 (2013) (linking the economic crises in Thailand, Mexico, Brazil, and Argentina to neoliberal reforms during the 1980s and 90s); Lev Luis Grinberg, *The J14 Resistance Movement: The Israeli Mix of Tahrir Square and Puerta del Sol*, 61 CURRENT SOC. 491, 496–98 (2013) (arguing that the unrest caused by Israel's neoliberal economic policies weakened the bargaining power of workers).

47. See generally JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 233–52 (2002) (calling for renewed efforts to reform the IMF and WTO).

48. See NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 278–80 (2007) (arguing that recent economic crises in Asia have led to a backlash against free market globalization).

49. See *id.*

In an environment of growing privatization discourse and practice illegitimacy, the new PPP strategy has emerged. This leads to the question, what are the real purposes of the PPP strategy? Specifically, are PPPs genuinely looking to bring increased efficiency and efficacy to the delivery of core public services, or are they a new façade to give artificial life to the same political agenda of neoliberalism and exclusion that has met such widespread global rejection? In other words, the key issue is whether PPPs represent a new and more sophisticated social arrangement of the public, or whether they represent only a less contentious way to privatize government services and decision-making.

PPPs have been largely evaluated through a conceptual lens that emphasizes the administrative, managerial, financial, or technical dimensions of this governance strategy.⁵⁰ One should contextualize this literature within a broader political-economy approach, which accounts for the political tensions that the most enthusiastic advocates have largely overlooked.⁵¹

Typical portrayals of PPPs present them as “win-win arrangements” between states and private entities grounded in notions of flexibility, efficiency, efficacy, and earned autonomy for private sector contractors while maintaining public sector values and benefits.⁵² This standard approach pragmatically celebrates the involvement of private sector actors, frequently in long-term large infrastructure projects, that create synergies and operate through “complex multilayered networks.”⁵³ Accordingly, a PPP is best seen

50. See Aiden Vining & Anthony Boardman, *Public-Private Partnerships: Eight Rules for Governments*, 13 *PUB. WORKS MGMT. & POL’Y* 149, 149, 154, 158–59 (2008) (outlining eight rules for evaluating potential PPPs based on financial and technical concerns).

51. See John Forrer et al., *Public-Private Partnerships and the Public Accountability Questions*, 2010 *PUB. ADMIN. REV.* 475, 475, 480–81 (arguing for the consideration of different societal impacts when evaluating PPPs through an examination of each partners’ strategies, resulting environmental impacts, measures to address those impacts, and whether all potential stakeholders have been involved in the decision-making process).

52. See Matthew Flinders, *The Politics of Public-Private Partnerships*, 7 *BRITISH J. POL. & INT’L REL.* 215, 218 (2005) (indicating the PPPs are “seen as a way of improving performance, tackling social problems, and responding to political pressures”).

53. *Id.* at 219 (furthering this assertion by presenting the example of how a partnership between the British government and a consortium of airline companies

as “a risk-sharing relationship between the public and private sectors based upon a shared aspiration to bring about a desired public policy outcome.”⁵⁴

The very notion of a partnership between the public and private sectors has its conceptual underpinnings in the political and sociological framework of the “Third Way” as applied in British politics during the 1990s.⁵⁵ According to Giddens, this political project represents a “radical centre” insofar it avoids both ideological dogma and the binary divide between the public and private sectors.⁵⁶ As Jane Broadbent and her colleagues note, the “Third Way” “rejects both the neoliberal thrust of the previous conservative government’s reliance on the market and the centralized planning and delivery associated with traditional social democracy . . . [and] in its place, it posits an approach that is grounded in the notion of partnership.”⁵⁷

The typical arguments in favor of PPPs are that the scheme delivers efficiency, savings, and improvements in service standards.⁵⁸ Further, some argue that PPPs transfer risk from the public to the private sector, and that technocratic expertise and professional management skills can be applied to public projects via these initiatives.⁵⁹ However, the empirical record is mixed with regard to whether this actually survives in practice.⁶⁰

created National Air Traffic Services as a public interest company).

54. *Id.* at 216.

55. ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* viii–ix (1998) (recognizing that the “‘Third Way’ has been associated with the politics of Tony Blair and New Labour”).

56. *See id.* at 44–48 (setting forth the “radical centre” as lying between neoliberals and social democrats, where great importance is given to the role of government in markets).

57. Jane Broadbent et al., *Public Private Partnerships: Editorial*, 23 *PUB. MONEY & MGMT.* 135, 135 (2003).

58. *See* Ananya Mukherjee Reed & Darryl Reed, *Partnerships for Development: Four Models of Business Involvement*, 90 *J. BUS. ETHICS* 3, 12 (2009) (furthering that PPPs are classified according to their contributions).

59. *Cf.* Vining & Boardman, *supra* note at 50, at 150, 154 (highlighting that state-owned enterprises are less efficient than private enterprises and concluding that if the potential gains are large enough, PPPs can be “win-win” situations).

60. *See, e.g.*, Pauline Vaillancourt Rosenau, *The Strengths and Weaknesses of Public-Private Policy Partnerships*, 43 *AM. BEHAVIORAL SCIENTIST* 10, 27 (1999) (contending that there is no evidence that the PPPs execute some of the expected benefits, such as reduced regulation or increased access to vulnerable populations,

The contrasting hypothesis is that PPPs synthesize the worst of both the private and public spheres. They are not privatization as usual because they limit private risk and responsibility, nor are they traditional government services because they avoid the mechanisms of public accountability.⁶¹ As Jean Shaoul notes, “far from transferring risk to the private sector, PPP[s] [transfer] the risk to the government, workforce and the public as users and tax payers [T]he concept of risk transfer in the context of essential services is fundamentally flawed.”⁶² PPPs both increase public debt and therefore lead to a rise in taxes (public costs), and intensify the exploitation of labor through the elimination of labor rights.⁶³

Three key elements push an understanding of PPPs as principally a neoliberal facade. First, PPPs represent a buy now, pay later scheme for states that deepens the vulnerability of the public sector to private finance and is oriented towards expanding the hollowness of states. Second, such schemes institutionalize the financial and corporate bailouts that have taken place around the world and been the subject of bitter legal and budgetary disputes in most parliaments.⁶⁴ Third, and perhaps most importantly, PPPs effectively employ a “divide and conquer” strategy against labor movements and unions around the globe because there is virtually no room for labor rights in PPP arrangements.⁶⁵ While historically neoliberalism and privatization dealt with labor rights, unions, and to some extent, workplace

and further contends that PPPs “achieve cost reductions at the price of democracy and equity”).

61. Sandoval Ballesteros, *Outsourcing Opacity*, *supra* note 35.

62. Jean Shaoul, *A Financial Analysis of the National Air Traffic Services PPP*, 23 *PUB. MONEY & MGMT.* 185, 193 (2003).

63. See Irma E. Sandoval, *Financial Crisis and Bailout: Legal Challenges and International Lessons from Mexico, Korea, and the United States*, in *COMP. ADMIN. L.* 543, 556–57 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) [hereinafter Sandoval, *Financial Crisis and Bailout*] (presenting the Mexican PCCC bailout to highlight how a lack of transparency can result in serious abuses by the private sector, leading to bailouts using public funds, which in turn impose liability on citizens).

64. See *generally id.* at 559–61, (analyzing bailouts in the United States, Mexico, and Korea and describing the ways in which governments and lawmaking bodies approached the bailouts).

65. See Faranak Miraftab, *Public-Private Partnerships: The Trojan Horse of Neoliberal Development?*, 24 *J. PLAN. EDUC. & RES.* 89, 94 (2004) (clarifying that governments “ease” labor regulations to “gain competitive advantage” and to be more marketable to investors).

democracy in many liberal democracies, the PPP governance model aims to completely eliminate them.

In 1944, Karl Polanyi's *The Great Transformation* dissected the myths of the "liberal creed."⁶⁶ He believed market relations should not be the only economic relations between people because the market and trade-dominated society is an artificial creation of relatively new social structures built around specific laws that produced an extreme commodification of land, labor, and money. Polanyi warned that this ominous path would lead to societal upheaval and destruction.⁶⁷ Therefore, the excessive incursion and spread of market values and norms through heightened commodification processes into all areas of economic life must be regulated if wider social goals, such as environmental sustainability, healthy lives, economic democracy, and social justice are to be achieved.

Today is the perfect moment to reread and update Polanyi by exposing the dark side of today's "neoliberal creed." There is one crucial difference between liberalism and neoliberalism. While the liberal creed was relatively consistent between beliefs and policy, the neoliberal creed is openly hypocritical. Under the liberal creed, for markets to function properly they are and ought to be self-regulating.⁶⁸ However today, while many still publicly defend the invisible hand and the importance of free-market forces, public officials openly facilitate, accelerate, and enable state intervention.⁶⁹ The financial bailout following the 2008–2009 global economic crisis is a particularly clear example of state intervention.⁷⁰

66. See generally POLANYI, *supra* note 12, at 135–62 (narrating the introduction of the "liberal creed" and economic liberalism, and exposing the associated myths).

67. See *id.* at 157 (outlining how an economic process may lead to negative social implications, such as the loss of standards and class conflicts).

68. POLANYI, *supra* note 12, at 138–39 (asserting that a self-regulating market, where a *laissez faire* attitude is enforced, ensures the functioning of economic liberalism).

69. See, e.g., Sandoval, *Financial Crisis and Bailout*, *supra* note 63, at 545 (explaining some public officials' support of state intervention, specifically discussing the case of Timothy Kessler in Mexico and stating that the Mexican government's state-centric approach to financial management was driven by "political and personal interest in policymakers").

70. See *id.* at 560 (highlighting how the U.S. bailout granted "sweeping discretionary power" to the Secretary of the U.S. Department of the Treasury, and

In general, the idea that poorly performing private firms tend to go out of business is as much of a misrepresentation as the idea that elections guarantee democracy and the government of the people.⁷¹ The ideology of “too big to fail” has caused governments to give money and support to poorly performing private firms to overcome their shortcomings. With the spread of the PPP model of governance, this trend is institutionalized by normalizing continuous bailouts and government interventions. State-intervention or expropriation has been replaced by a constant process of state alleviation. Today’s neoliberalism is based upon regulation, intervention, and state arrangement much more so than more primitive forms of liberalism.

III. TOWARDS A “DEMOCRATIC-EXPANSIVE” UNDERSTANDING OF TRANSPARENCY

What ultimately will determine the future of transparency and its impact on accountability and democracy is the outcome of an ongoing dispute between three visions or conceptions of how transparency should be understood and practiced in the world today, what may be called the bureaucratic, public relations, and democratic expansive projects. Going forward, this article will define each of these three approaches, demonstrate them in practice, and show their potential either for advancing or freezing democracy, using the case of Mexico as an example.

A. BUREAUCRATIC TRANSPARENCY

The bureaucratic concept of transparency can be defined as a specific form of organizational rationalization of public administration that advocates for a basic dose of bureaucratic hygiene with the purpose of improving control, surveillance, and the establishment of a so-called culture of legality among citizens and public employees.⁷² The belief here is that corruption is only a matter

that the bailout’s purpose was to help lenders keep credit lines open and allow the Secretary to determine terms for the purchase of lenders’ troubled assets).

71. *But see* EMMANUEL S. SAVAS, *PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS* xiv (2000) (supporting the assertion that poorly performing private firms tend to go out of business and juxtaposing poorly performing public agencies which are “often given more money to try to overcome shortcomings”).

72. *See* Mark Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 *W. EUR. POLITICS* 946 (2010) (declaring that

of low-level public servants filling their pockets at the expense of common citizens, or principally an issue of reeducation or cultural transformation.⁷³

Based on this limited perspective, large teams of experts and advisers in the fields of law, political science, and public administration travel throughout the world issuing reports and recommendations on how to improve access to public information.⁷⁴ Academics, commissioners, and officials from institutions with access to public information continuously organize high-level forums, conferences, and costly meetings to analyze proposals and government responses.⁷⁵ Some of them might end up offering suggestions for the improvement and modernization of government processes and the treatment of public and government information to improve electronic Freedom of Information Act (“FOIA”) request capability, modernize internet procurement procedures, or decrease the amount of time it takes to respond to citizen requests.⁷⁶

This work is extremely important and valuable, but unfortunately it is not powerful enough to overcome the enormous resistance to transparency and accountability present in Mexico and other similar countries.⁷⁷ The root problem is not merely technical, nor cultural, but also political and structural. In principle, it is not in the immediate interest of top public servants, judges, and elected officials to reveal all information about their actions, decisions,

bureaucratic transparency is essential to citizenship and democracy).

73. See Guillermo M. Cejudo, *Public Management Policy Change in Mexico, 1982–2000*, 6 INT’L PUB. MGMT. J. 309, 317 (2003) (discussing the training activities in Mexico intended to educate public servants about the Public Administration Modernization Program to “develop a service oriented culture in the public administration”).

74. Irma E. Sandoval Ballesteros, *Las Máscaras de la Transparencia en el Marco de la Transición Democrática Mexicana*, in RUMBOS DE LA TRANSPARENCIA EN MÉXICO 228, 244 (2011) [hereinafter Sandoval Ballesteros, *Las Máscaras de la Transparencia*].

75. *Id.* at 244.

76. See Mauricio Merino, *La Fontanería de la Democracia*, EL UNIVERSAL (May 9, 2007), <http://www.eluniversal.com.mx/editoriales/37525.html> (advocating for transparency, objective evaluations, and other tools of “societal plumbing” that help the government function properly; further arguing that any defects in society or the community are “due to the fact that we have overlooked the *organizational plumbing*,” believing political checks and balances are sufficient).

77. Sandoval Ballesteros, *Las Máscaras de la Transparencia*, *supra* note 74, at 244.

budgets, and public expenditures. Transparency normally leads to scandal and this type of public attention can inflict significant damage on political careers. The tendency has therefore been to defend transparency discursively, without following up with any concrete steps to implement it or show firm commitment in practice.

B. PUBLIC RELATIONS TRANSPARENCY

The public relations understanding of transparency can be defined as a discursive façade that allows for the political abuse of the language of transparency and accountability. The main objective is to obtain legitimacy and stability for governments and gain trust for investors vis-à-vis growing social demands against opacity and corruption on the part of citizens.⁷⁸ In other words, the public relations approach focuses on transparency as a legitimizing tool. This approach fits particularly well in a country like Mexico where the government principally functions as a sophisticated mechanism for consolidating economic and political privilege, and defending the elite from the excessive demands of social groups.⁷⁹ The fact that a different political party controlled the federal government during a brief period of time, between 2000 and 2012, did not transform the basic way power and authority are managed in Mexico.⁸⁰

In Mexico, hardly a day passes when some leading public figure fails to sing the praises of the new, supposedly transparent, way of running government.⁸¹ Politicians, public servants, judges, and

78. See Brad L. Rawlins, *Measuring the Relationship Between Organizational Transparency and Employee Trust*, 2 *PUB. REL. J.* 1, 5 (2008) (noting that the use of the term “transparency” has increased after popular corporate scandals like those of Enron, WorldCom, and Tyco); see also SECRETARÍA DE LA FUNCIÓN PÚBLICA, *TRANSPARENCIA, BUEN GOBIERNO Y COMBATE A LA CORRUPCIÓN EN LA FUNCIÓN PÚBLICA* (2005).

79. Younghyun Jo, *The Elitism in Mexican Political Culture: The Case Salinas and Democracy*, 5 *KOREAN J. HISP. STUD.* 1, 16, 24 (2012).

80. See Arturo R. Guillén, *México: Alternancia Política, Estancamiento Económico y Proyecto Nacional de Desarrollo*, *CENTRE D’ÉTUDES SUR L’INTÉGRATION ET LA MONDIALISATION* (June 14, 2012), http://www.ieim.uqam.ca/spip.php?page=article-ceim&id_article=7691&lang=fr (describing how the administrations of Vicente Fox and Felipe Calderón were expected to change economic models, but instead continued the same fundamentalist policies).

81. For example, the Federal Judiciary of Mexico declared 2008 “the year of judicial transparency.” Cf. Guillermo I. Ortiz Mayagoitia, *Inauguración del Tercer Seminario Internacional de Acceso a la Información Judicial a 5 Años*, SUPREMA

members of Congress at all levels of government seem to be obsessed with demonstrating their commitment to the ideal of a transparent and open government.⁸² Nevertheless, in practice, the political class and top public servants in Mexico are attacking freedom of access to information.⁸³ To this day, almost seven years after the 2007 constitutional reforms were approved, the Federal Congress has simply refused to adjust the freedom of information law to the new Constitutional text and the proposed bill that the federal government has put forward presents serious problems.⁸⁴

Studies have revealed that federal bureaucrats have developed sophisticated ways to avoid freedom of information requests.⁸⁵ Nearly one-third of all public servants were willing to confess in an anonymous interview that the Mexican FOIA has led them to

CORTE DE JUSTICIA DE LA NACIÓN (Aug. 11, 2008), *available at* http://www.scjn.gob.mx/Presidencia/Documents/2008/Discurso52_2008.pdf (Mex.) (insinuating that in 2008 the focus in Mexico was to promote the culture of transparency since the theme of the International Seminar was “access to information justice,” specifically addressing topics related to transparency and access to information from a strictly legal standpoint); *Democracia Efectiva y Política Exterior Responsable*, PRESIDENCIA DE LA REPÚBLICA (Aug. 23, 2009), <http://calderon.presidencia.gob.mx/2009/08/democracia-efectiva-y-politica-exterior-responsable/> (conveying that in 2009 then-President Calderon highlighted his administration’s commitment to openness and declared that all Mexicans have the right to ask, through transparency mechanisms, how the Federal Government spends each peso).

82. *See, e.g., Promueve Gabino Cué Gobierno Transparente y Ordenado en el Manejo de Recursos Públicos*, GOBIERNO DEL ESTADO DE OAXACA (June 14, 2011), <http://www.oaxaca.gob.mx/?p=5953> (observing that in 2010 the governor of the State of Oaxaca established a new State Committee of Accounting Harmonization, which was described as an entity that would facilitate better accountability so that “order and transparency” would be the guiding principles of his government).

83. Rafael Gutiérrez-Girardot & Rafael Humberto Moreno-Durán, *Heterodoxias* 4 (R. H. Moreno Durán ed., 2004).

84. Irma E. Sandoval, *Publicidad y Transparencia Parlamentaria*, in MIGUEL ÁNGEL ERAÑA SÁNCHEZ, *PRINCIPIOS DEL DERECHO PARLAMENTARIO* (2010).

85. *See, e.g.,* Perla Gómez Gallardo, *Análisis de la Propuesta de Autonomía Constitucional del IFAI*, ERNESTO VILLANUEVA BLOG (Sept. 21, 2012), <http://ernestovillanueva.blogspot.com/2012/09/analisis-de-la-propuesta-de-autonomia.html> [hereinafter Gallardo, *Análisis de la Propuesta*] (identifying some of the elaborate ways bureaucrats and political parties have been able to sustain opacity and corruption, including the use of trusts that are shielded by banking secrecy statutes).

document their activities less.⁸⁶ Indeed, a review of the most recent annual reports of the Federal Institute of Access to Information shows that the number of times the government responds that requested information simply “does not exist” has increased steadily year by year.⁸⁷

Mexico’s equivalent of the Federal Deposit Insurance Corporation (“FDIC”) in the United States, the Institute for the Protection of Bank Savings (“IPAB”), a government agency in charge of insuring the bank deposits of Mexican citizens and other users of the country’s banking system, decided to stop registering or filing board meeting minutes to avoid having to hand over this information to curious citizens.⁸⁸ This decision came in response to an Institute of Access to Information and Data Protection (“IFAI”) ruling, which required the IPAB to make the minutes public.⁸⁹ Today, the IPAB only records general, abstract notes about final agreements without recording previous discussions or debates between the councilors.⁹⁰

86. See *La Cultura de los Servidores Públicos Alrededor de los Temas de Transparencia y Acceso a la Información: Encuesta*, INSTITUTO FEDERAL DE ACCESO A LA INFORMACIÓN PÚBLICA (2007), available at http://inicio.ifai.org.mx/Estudios/estudio_CulturaTransparencia.pdf (noting that thirty percent perceive that fewer documents are stored than in previous years).

87. *Estadísticas Semanales al 10 de Octubre de 2013*, INSTITUTO FEDERAL DE ACCESO A LA INFORMACIÓN PÚBLICA, (Oct. 10, 2013) (providing the official statistics for 2013 as of October, and stating that there have been 4,663 responses of “non-existence of the requested information”).

88. See Sandoval, *Financial Crisis and Bailout*, *supra* note 63, at 547 (stating that banks held bailout meetings behind closed doors and inferring, from extensive evidence, that the purpose for banks’ secrecy was that some banks received illegal favors and avoided significant punishments during the bailout due to political connections); see also Irma E. Sandoval, *Rentismo y Opacidad en Procesos de Privatización y Rescates*, 21 INVESTIGACIONES SOCIALES 121, 131 (2009) (noting that the last two administrations, specifically representatives from IPAB, have been unwilling to publish details relating to the financial bailout, arguing that it falls under the banking secrecy).

89. *But see* Sandoval, *Opacity in the Management of Public Resources*, *supra* note 18, at 183 (explaining that the government still argues that there is a “legal conflict” that prevents the executive branch from making the bailout information public).

90. The L.A. Times recently reported a similar case of opacity implicating the U.S. FDIC. Since 2007 the FDIC has lost \$92.5 billion through the failure of over 400 banks. Despite collecting only an insignificant \$787 million in losses, the FDIC has preferred to settle with no-press-release agreements and maintain the banks’ public images. Settlements accuse the banks of fraud, negligence, reckless loans to homeowners, falsified documents, and other abuses, but conceal these

Generally, Mexico has fallen behind regarding financial information access. In Mexico, the Secretariat of Finance is perhaps the agency that most often refuses access to public and government information.⁹¹ One of the key areas of opacity relates to information on off-budget government trust funds or “fideicomisos” (trust funds) which are established by the Secretary of Finance, controlled by the government, and typically mix government and private monies.⁹² A special exemption included in the Mexican FOIA law, which prohibits the government from sharing any information that might “harm economic or financial stability,” aids opacity in this area.⁹³ Such a blanket statement opens the door for widespread avoidance of the FOIA legislation. No other access to information law in the world has a similar reserve clause protecting economic stability in such a broad manner.

The most serious patrimonial wrongdoings, abuses, and irregularities involve ominous cases such as those regarding the corrupt management of the FOBAPROA⁹⁴ or the private trusts funds

findings from the public under nondisclosure agreements. The lack of commitment to financial transparency fails to deter future misconduct. See E. Scott Reckard, *In Major Policy Shift, Scores of FDIC Settlements Go Unannounced*, L.A. TIMES, Mar. 11, 2013, <http://articles.latimes.com/2013/mar/11/business/la-fi-fdic-settlements-20130311>.

91. See Perla Gómez Gallardo et al., Transparency and Access to the Information in the Financial Mexican System, *ECONOMÍA INFORMA* 74, 80 (2012), available at <http://www.economia.unam.mx/publicaciones/econinforma/373/05perla.pdf> (declaring that the financial sector is suffering the greatest lack of transparency and access to information relating to financial regulatory agencies).

92. See Irma E. Sandoval, *Rendición de Cuentas y Fideicomisos: El Reto de la Opacidad Financiera*, AUDITORIA SUPERIOR DE LA FEDERACIÓN 23 (2007), available at http://www.asf.gob.mx/uploads/63_Serie_de_Rendicion_de_Cuentas/Rc10.pdf [hereinafter Sandoval, *Rendición de Cuentas y Fideicomisos*] (noting that the government’s discretionary categorization helps create opacity and a lack of transparency surrounding government trusts).

93. *But see* Reckard, *supra* note 90 (suggesting that in the United States there is no law that prevents the government from sharing information that causes economic harm; instead, it seems that regulatory agencies like the FDIC have chosen to remain low-profile in settlements with banks without silence being legally binding).

94. The FOBAPROA or *Fondo Bancario de Protección al Ahorro* is the previous equivalent to the FDIC in the United States. See Sandoval, *Financial Crisis and Bailout*, *supra* note 63, at 549 (describing the FOBAPROA’s origins and functions, and detailing how the institution’s design led to “serious problems of opacity and lack of accountability”).

called Aduanas I and Aduanas II. The trust funds were established and controlled by the government to skim public resources from the collection of customs duties during the presidencies of Ernesto Zedillo and Vicente Fox. The Trust Fund for Natural Disasters, the Trust Fund for the Bailout of Private Highways, or the Trust Fund for Housing for Educators—to name a few—are examples that demonstrate how opacity in the management of public funds encapsulated in off-budget trust funds have resulted in corruption cases that are hidden from the public eye.⁹⁵

The Spanish word “fideicomiso” emerges from the fusion of the Latin words “fides,” meaning “fidelity” or “confidence,” and “committre” which means “to commit.”⁹⁶ Nevertheless, now more than ever, living in an era of transparency, government control, and accountability, it is clear that the exercise of public access should not be based on confidence. On the contrary, it should rest upon government responsibility. No one should be exempt from accountability. The 387.4 billion pesos of public funds that are managed through more than 300 public trust funds, which by 2014 may represent nearly a quarter of the Budget of Expenditures of the Federation (“PEF”), should be periodically inspected because they belong to all Mexicans and directly affect the rights of the nation’s citizens.⁹⁷

There are international examples that highlight best practices which should be applied to the management of trust funds. In Chile, for instance, a “blind trust fund” (a trust fund with no contact between the beneficiary and the benefactor) is used as a tool to avoid conflicts of interest in the investments of state entities.⁹⁸ In

95. See, e.g., Irma E. Sandoval, *Opacidad en el Manejo de Recursos Públicos: El Caso de los Fondos y Fideicomisos*, in *DERECHO A SABER: BALANCE Y PERSPECTIVAS CÍVICAS* 203, 208–09 (Jonathan Fox et al. eds., 2007) (discussing different controversies related to two particular trusts that affected the transparency of customs agencies).

96. Sandoval, *Rendición de Cuentas y Fideicomisos*, *supra* note 92, at 7.

97. See generally *Cuenta de la Hacienda Pública Federal: 2012*, SECRETARÍA DE HACIENDA Y CRÉDITO PÚBLICO (2012), available at http://www.apartados.hacienda.gob.mx/contabilidad/documentos/informe_cuenta/2012/docs/i01/i01d01.pdf (providing the overall figures of the PEF).

98. *XVI Asamblea General de la OLACEFS: Fideicomisos: Rendición de Cuentas y Fiscalización*, COLABORACION DE LA CONTRALORÍA GENERAL DE LA REPUBLICA DE CHILE (Nov. 7–10, 2006), available at <http://www.contraloria.cl/NewPortal2/portal2/ShowProperty/BEA%20Repository/Sitios/Olacefs/Cepat/doc/>

Guatemala, fiduciary institutions are obliged to send monthly financial status reports for public trust funds to the Office of Public Credit at the Ministry of Public Finance for periodic evaluation and oversight.⁹⁹ Organizations such as Transparency International also advocate for the implementation of an Integrated Information System in Financial Administration to combat opacity in fiscal matters, off budget accounts, and trust funds.¹⁰⁰ Unfortunately, instead of a real means of organizing public affairs, “fideicomisos” are typically used by Mexican government entities to access public resources without any form of oversight.¹⁰¹ A new general law regulating the use and management of public trust funds should be implemented to end the situation of total opacity that currently prevails in Mexico.¹⁰²

Many of the laws that Mexican state governments have passed in recent years, supposedly in compliance with the new constitutional text, but clearly under the same logic of public relations transparency, have ostensibly made things worse instead of better.¹⁰³ For instance, the states of Querétaro and Nayarit have created

PONENCIAS/Ponencias_XVI_OLACEFS/Fideicomisos/Colaboraciones/Colaboracion_Tema_I_Chile.pdf (adding that these blind trusts were established as presidential elections were forthcoming, reducing the time available for the development of unlawful and corrupt relationships between politicians and entrepreneurs before the newly elected officials took office).

99. *Colaboración Técnica para el Tema I de la XVI Asamblea General de la OLACEFS: Fideicomisos, Fondos y Mandatos: Rendición de Cuentas y Fiscalización*, CONTRALORÍA GENERAL DE CUENTAS REPUBLICA DE GUATEMALA (Aug. 2006) (recounting fiduciary obligations, which include sending a detailed report at least annually or as often as the trustee or settlor require).

100. Sandoval, *Rendición de Cuentas y Fideicomisos*, *supra* note 92, at 85 (adding that Guatemala has implemented this type of system and that success lies in the requirement that fiduciary institutions send reports to the Ministry of Public Finance regularly).

101. *Id.* at 8 (acknowledging that irregularities in public management and discretionary spending along with corruption have damaged national pride).

102. *Id.* at 73 (affirming that, in the absence of a general law, these trusts operate based on vague manuals and guides that facilitate opacity).

103. See Víctor S. Peña Mancillas, *Transparencia en los Estados y Ciudadanía: Incidencia de la Participación en la Gestión y Desarrollo del Tema en la Agenda Pública*, INSTITUTO TECNOLÓGICO Y DE ESTUDIOS SUPERIORES DE MONTERREY (2009), available at http://victorspena.com/uploads/1/flacso_ponencia.pdf (setting out research that suggests laws have not improved the situation, specifically stating that only thirteen out of thirty-two entities have reformed their bylaws in accordance with the new government laws, and the remainder have either just started their initiatives or implemented no changes).

“independent, specialized oversight institutions” composed of unpaid “volunteers” from “civil society,” most of whom happen to be close friends or allies of the sitting governor.¹⁰⁴ In other states, politicians have utilized the constitutional requirement to reform their freedom of information law as an opportunity to expand the list of permitted legal reasons to withhold information, often including new broad categories which can serve as catch-alls to hide information that they would not like to fall into the hands of a journalist or political enemy.¹⁰⁵

IFAI has proved to be highly inefficient and ineffective tool for requesting information from Congress.¹⁰⁶ IFAI is plagued by conflicts of interest because the parliamentary coordinators of each legislative group are in charge, along with three “external experts,” supposedly academics, who are actually politically close to the same representatives.¹⁰⁷

Reforms to the Federal Criminal Procedures Code under the past government of Felipe Calderón are another good example of the public relations approach to transparency.¹⁰⁸ In the midst of perhaps

104. Cf. Alfonso Nambo Caldera, *Reflexiones en torno a la Ley de Transparencia de Nayarit*, in *DERECHO A LA INFORMACIÓN, VALORES Y PERSPECTIVAS* 139, 139 (2009), available at <http://www.itei.org.mx/v3/documentos/divulgacion/DerechoInformacion.pdf> (highlighting the law passed in the state of Nayarit which contained various innovations, including the establishment of an agency that would ensure transparency).

105. See Guadalupe Pérez-Anzaldo, *Los Peligros de ser Mujer, Periodista y/o Defensora de los Derechos Humanos en el México Globalizado Actual*, 37 *LA REVISTA DE FILOLOGÍA Y LINGÜÍSTICA DE LA UNIVERSIDAD DE COSTA RICA* 55, 57 (2011) (elaborating on the type of anti-journalist laws politicians implement and adding that media companies refusing to follow these laws suffer persistently from harassment and censorship).

106. See Víctor Chávez, *Denuncian Transparencia Simulada en San Lázaro*, *EL FINANCIERO* (June 6, 2013), available at <http://www.elfinanciero.com.mx/opinion/columnas/gabriel-moysen-/17411-denuncian-transparencia-simulada-en-san-lazaro.html> (asserting that the transparency committee within the Mexican Congress is just for show, as the legislators manage the resources with complete discretion and an agreement to simulate transparency).

107. See *id.* (citing additional criticisms of the Regulatory Body for Transparency, which includes the coordinators of the political parties and three “consultants”—the Secretary General of the Camera, the Comptroller, and the Director of Legal Matters).

108. See *La Reforma Penal Propicia Opacidad del Ministerio Público Federal: Especialistas*, *INSTITUTO DE ACCESO A LA INFORMACIÓN PÚBLICA Y PROTECCIÓN DE DATOS PERSONALES DEL DISTRITO FEDERAL* (Feb. 17, 2009), available at

the most serious public security crisis Mexico has ever experienced, Congress passed a bill which envelopes the Attorney General's Office in a cloud of secrecy.¹⁰⁹ Specifically, the new law's text prohibits citizen access to public information, including versions of "averiguaciones previas," the files which document the investigative work of the public prosecutors or "Ministerios Públicos."¹¹⁰ This proposal goes against the "Principle of Maximum Publicity" included in Article 6 of Mexico's Constitution and violates Article 20, which holds that criminal procedure should be guided by the principle of publicity.¹¹¹ Additionally, the new legal text goes against numerous regional and international human rights mechanisms that the Mexican government has signed and ratified.¹¹²

To justify the violation of the Constitution and the Mexican FOIA Law, proponents of these measures have tried to frame the debate

http://www.infodf.org.mx/web/index.php?option=com_content&task=view&id=336&Itemid=217 (highlighting ways in which Code reforms were passed in a politicized context marked by opacity and a resistance to accountability).

109. See *La PGR Elimina el Consejo de Participación Ciudadana, Órgano de Transparencia y Rendición de Cuentas*, SINEMBARGO (Mar. 26, 2013), <http://www.sinembargo.mx/26-03-2013/571033> (discussing the elimination of the Citizen Participation Council, a civil society entity that provided a forum for addressing sensitive legal issues).

110. See Código Federal de Procedimientos Penales [CFPP] [Federal Criminal Procedure Code] art. 16, Diario Oficial de la Federación [DO], 18 de Septiembre de 2013 (Mex.); Irma E. Sandoval, *Opacidad en el Ministerio Público*, LA JORNADA (Mar. 5, 2009), <http://www.jornada.unam.mx/2009/03/05/politica/020a2pol> (arguing that the reform to Article 16 violates the public's right to information).

111. *But cf.* Ernesto González Cancino, *Rendición de Cuentas, Transparencia y Acceso a la Información Pública. El Dilema: Avanzar o Regresar* (Fundación Rafael Preciado Hernández, Documento de Trabajo No. 504, 2013), available at http://www.fundacionpreciado.org.mx/biencomun/bc223/Ernesto_Gonzalez.pdf (noting that, although the concept of a right to public information has a long history, it is relatively new in Mexico; the Mexican National Supreme Court of Justice did not recognize that Article 6 of the Constitution guarantees the right of every citizen to access and solicit information until 2005 and the principle of maximum publicity was not incorporated into the Constitution until 2007).

112. See, e.g., *Rules of Procedure of the Inter-American Commission on Human Rights*, INTER-AMERICAN COMM'N ON HUM. RTS. 15 (Aug. 1, 2013), available at <http://www.oas.org/es/cidh/mandato/Basicos/reglamentoCIDH.asp> (referring to the Rules of Procedure of the Inter-American Commission on Human Rights, which include "unconstitutional alteration[s] of the constitutional regime that seriously [impair] democratic order" in its criteria for assessing human rights violations in member states).

within the context of an “efficient” response to organized crime.¹¹³ They argue that indiscriminate access to government documents would help criminals defy the authorities.¹¹⁴ Defenders of this proposition also argue that it is necessary to preserve the reputation of persons who are implicated in an investigation. In reality, the underlying interest in this reform was neither efficiency improvements in investigative tasks nor the defense of implicated citizens. Instead, the reform was a result of the government’s discomfort with requests from journalists for access to information concerning political and public actors linked to power, money, and corruption.

There are of course plenty of reasons for not revealing personal data or more sensitive investigative strategies. However, closing down all public access in such a blanket fashion is not justifiable either on privacy or public security grounds. On the contrary, opening up the procedures of the Attorney General’s office to public scrutiny could significantly contribute to combating corruption and improving effectiveness. Unfortunately, the Mexican Congress under direct pressure from the executive branch apparently thinks otherwise.

C. DEMOCRATIC EXPANSIVE TRANSPARENCY

Finally, the democratic expansive project of transparency can be defined as a tool of democratic performance, a form of collective action designed to ensure accountability, resist corruption, and undo the system of impunity and privilege which is deeply entrenched in Mexico and similar countries today. This concept understands transparency as a matter of rights and citizenship, and not only bureaucratic hygiene.¹¹⁵ The principal goal of this transparency project is to serve as an engine of change that pushes forward

113. See Felipe Calderón, President of Mexico, Discurso durante la XXXII Sesión del Consejo Nacional de Seguridad Pública (July 31, 2013) (stating that the new laws signal a transition to a more transparent and efficient criminal justice system that will enable authorities to better protect the country’s citizens).

114. See *Pone Gobierno Candado por 12 Años a Información Sobre el Narco*, PROCESO (Oct. 11, 2013), <http://www.proceso.com.mx/?p=338329> (arguing that open access to information would also endanger the safety of persons directly related to organized crime).

115. Bovens, *Information Rights*, *supra* note 11, at 327.

normative and political achievements regarding accountability.

Civil society, social movements, investigative journalists, and normal citizens aided by social media have all been the principal actors of the democratic expansive project of transparency. Social actors have tremendous importance in the struggle to push transparency as a key element of democracy. Their actions and initiatives have been essential to the advancement of this project because they have demonstrated greater awareness in identifying and capability in documenting abuses than bureaucratic agencies, politicians, technocrats, or what may be called “corruption plumbers.” The struggle to fill transparency with meaning is a long one which ultimately depends on political will and social mobilization, not merely technical formulas.

Unfortunately, the public relations and bureaucratic approaches to transparency have emerged as the dominant approaches in Mexico and have generally eclipsed the democratic expansive project of transparency.¹¹⁶ For instance, at the beginning of his administration on January 15, 2013, Enrique Peña Nieto excellently displayed how public relations transparency can be used as a political cover-up instead of as a mechanism for citizen empowerment.¹¹⁷ He organized a high profile press conference to make the supposedly historic announcement that he and his cabinet would publicly release information about their assets. However, the audited published statements that he and other top cabinet members offered were not transparent at all. When the documents were made public they only

116. See Código Federal de Procedimientos Penales [CFPP] [Federal Criminal Procedure Code] art. 16, Diario Oficial de la Federación [DO], 18 de Septiembre de 2013 (Mex.); see, e.g., *OSCE Media Freedom Representative Expresses Concern About Access to Information Law Amendments in Bosnia and Herzegovina*, ORG. SEC. & CO-OPERATION IN EUR. (June 4, 2013), available at <http://www.osce.org/fom/102269> (suggesting that recent proposed amendments to the Law on Freedom of Access to Information of Bosnia and Herzegovina violate international standards and are another example of the world-wide trend opposing the most basic pillars of democracy).

117. See, e.g., Tania L. Montalvo, *Peña Nieto Publica su Declaración Patrimonial sin el Valor de los Bienes*, CNN MÉXICO, Jan. 16, 2013, <http://mexico.cnn.com/nacional/2013/01/16/pena-nieto-publica-su-declaracion-patrimonial-sin-el-valor-de-los-bienes> (reporting that, although Peña Nieto provided information on his assets in compliance with the law and his campaign promises, he did not consider himself obligated to disclose the total value of his assets).

contained monthly salaries, which are already public information, and a list of houses and other real estate belonging to the president and other cabinet members.¹¹⁸ No information was provided about the value or location of real estate, nor any information about financial or other assets.¹¹⁹ Further, no information was provided regarding the assets of family members.¹²⁰ In addition, many of the properties were listed as donations to the president without further explanation.¹²¹ According to Peña Nieto, revealing this information was clear evidence of his commitment to transparency.

Peña Nieto has been accused of authoritarianism and corruption ever since his time as Governor of the State of Mexico, a state which has been governed by the Institutional Revolutionary Party (“PRI”) for over ninety years. The President’s negative image grew exponentially with an enormous vote-buying operation deployed during the past presidential election.¹²² Independent electoral observers reported that almost one-third of voters, (twenty-eight percent) were significantly pressured to vote—over seventy percent of those for the PRI—and voter secrecy was violated in twenty percent of voting booths.¹²³ This is clearly only the tip of the iceberg, since domestic and international NGOs invested far less in electoral observation in 2012 than in past elections.¹²⁴ The current president

118. Ron Buchanan, *Mexico’s Strangely Opaque Transparency Drive*, FINANCIAL TIMES, Jan. 30, 2013, <http://blogs.ft.com/beyond-brics/2013/01/30/mexicos-strangely-opaque-transparency-drive/#axzz2hSd9XF11>.

119. *See id.* (stating that including the cabinet members’ property values in annual tax returns reveals no information to the public).

120. *See id.* (asserting Buchanan did not mention assets of family members when exhaustively describing all aspects of Peña Nieto and his cabinet’s recent statements).

121. *See id.* (noting that the statements give no information about the donors of Peña Nieto’s properties, nor any of the donors of his Cabinet’s houses, flats, watches, and cars).

122. *See generally Alianza Cívica: La Elección no Fue ‘Limpia’ ni ‘Equitativa’*, ADNPOLITICO, July 3, 2012, <http://www.adnpolitico.com/2012/2012/07/03/alianza-civica-la-eleccion-no-fue-limpia-ni-equitativa> (detailing various ways in which the election’s integrity was compromised).

123. Boletín de Prensa, ALIANZA CÍVICA (July 3, 2012), <http://www.alianzacivica.org.mx/archivos/pub/4434Informe%203%20de%20julio%202012.pdf>.

124. *See* Juan Pablo Mayorga, *La ONU Lidera Ejercicio de Observación en México; Recibe 1,300 Quejas*, CNN MÉXICO, July 2, 2012, <http://mexico.cnn.com/nacional/2012/07/02/la-onu-encabeza-ejercicio-de-observacion-en-mexico-recibe-1300-denuncias> (clarifying that the United Nations Development Program

also most likely grossly violated the campaign spending limits established by law and has been accused of triangulating enormous amounts of cash to his political campaign through financial institutions with dark pasts and links to money-laundering operations such as those through HSBC and Monex.¹²⁵

The rejection of Peña Nieto by the majority of Mexico's youth, particularly the growing student population embodied in the #YoSoy132 movement, is grounded in the impression that the new president represents the worst of the past and that his election was not free and fair.¹²⁶ In response, the president launched two new proposals on accountability to reconstruct his support base and gain the legitimacy that he failed to receive at the polls. The first proposal, the Draft Decree Project, seeks to transform the executive-branch-controlled IFAI, the agency responsible for guaranteeing the application of Mexico's FOIA, into a fully autonomous body.¹²⁷

spearheaded the development of an online platform for reporting election irregularities and that about thirty-nine civil society organizations used the platform to report problems).

125. See Jo Tuckman, *Mexico Presidential Runner-up Alleges Money Laundering in Election*, GUARDIAN, July 18, 2012, <http://www.theguardian.com/world/2012/jul/19/lopez-obrador-election-money-laundering> (detailing allegations by Andrés Manuel López Obrador of money laundering in Peña Nieto's campaign through Monex as true and pointing out that the allegations came amidst U.S. Senate spotlighting of money laundering at HSBC); see also Humberto Padgett, *PRIMERA PARTE: Monex, Ligado al Lavado de Dinero en Wachovia, al caso Yarrington, a Zhenli Ye Gon y... al PRI*, SINEMBARGO (Feb. 5, 2013), <http://www.sinembargo.mx/05-02-2013/516111> (clarifying that, in addition to the election incident, Monex has been linked to money laundering cases in the United States, Mexico, and China); Roberto González Amador, *La Operación Monex Encuadra en Lavado de Dinero: Especialistas*, LA JORNADA (Feb. 5, 2009), <http://www.jornada.unam.mx/2009/03/05/politica/020a2pol> (quoting money laundering specialists to assert that the PRI's activities transferring funds through Monex during the 2012 presidential election were a typical example of money laundering).

126. See Luz Estrella & Massimo Modonesi, *El #YoSoy132 y las Elecciones en México: Instantáneas de una Imposición Anunciada y del Movimiento que la Desafió*, 13 REVISTA DEL OBSERVATORIO SOCIAL DE AMÉRICA LATINA 219 (Nov. 2012) (insisting that public opinion of Peña Nieto's presidency is a product of the control that political and business interests exert over Mexican communication services).

127. See *Declaratoria de Publicidad de Dictámenes de las Comisiones Unidas de Puntos Constitucionales, de Transparencia y Anticorrupción, y de Régimen, Reglamentos y Prácticas Parlamentarias, Número 3842-A*, GACETA PARLAMENTARIA (Aug. 21, 2013), available at <http://gaceta.diputados.gob.mx/>

The second proposal advocates creating a new independent anti-corruption agency in charge of investigating and preventing corruption. Although both proposals sound appealing on the surface, a quick review of the bills' details reveals that they are actually designed to cover-up instead of expose and punish corruption and opacity.¹²⁸ The first proposal looks to centralize political control and dependency of the IFAI in the hands of the executive. The second seeks to eliminate both the federal government's civil service, today under the control of the current anti-corruption agency, the Secretary of the Public Function ("SFP"),¹²⁹ and the Federal Police Secretariat. Both initiatives represent a clear example of what has been called "transparency" for public relations.¹³⁰

Information is power, and Enrique Peña Nieto's proposal for transparency is not trying to modernize IFAI by granting it any real autonomy. On the contrary, its main purpose is to strengthen his control over the amount of information available and promote greater opacity, particularly to delicate political matters.¹³¹ The supposed autonomy of the new IFAI will be in name only because the proposal maintains, and even places in the Constitution, the president's near total control over the appointment of the IFAI's commissioners.¹³²

PDF/62/2013/ago/20130821-A.pdf (Mex.) (specifying that the Iniciativa con Proyecto de Decreto [Draft Decree Project], sponsored by a Senator representing the PRI, reforms and adds to the Mexican Constitution in a way that improves transparency).

128. See, e.g., Gallardo, *Análisis de la Propuesta*, supra note 85 (arguing that the proposal favors those in the legislature who promote institutional opacity through the creation of law or a lack of law).

129. See generally Irma E. Sandoval, *Calderon & Corruption*, NATIONAL AUTONOMOUS UNIVERSITY OF MEXICO 2 (May 1, 2007), available at <http://www.yale.edu/macmillan/mexicosdemocracy/sandoval.pdf> (arguing that the SFP, the agency responsible for preventing and combating corruption in the federal government, is ineffective largely because the recent heads of the SFP have been political appointees and Enrique Peña Nieto's new proposal seeks to perpetuate the same political dependency).

130. Sandoval, *Transparency Under Dispute*, supra note 13, at 20.

131. See *Iniciativa con Proyecto de Decreto por el que se Reforman los Artículos 21, 73, 76, 89, 102, 105, 110, 111, 134 de la Constitución Política de los Estados Unidos Mexicanos*, COMISIÓN NACIONAL ANTICORRUPCIÓN, available at <http://www.scribd.com/doc/113353915/cn-anticorrupcion-pdf> (last visited Nov. 26, 2013) (establishing a National Anticorruption Commission that has complete autonomy to determine how it will carry out its mission and the investigations it will conduct).

132. See Irma E. Sandoval, *El Frankenstein de la Transparencia*, PROCESO

The new IFAI, as envisioned by PRI, suggests no nomination hearings or public debates on the merits of potential commissioners, and no appearances in front of any legislative body.¹³³ As in Rome during the election of the pope, white smoke will one day emerge from the presidential residence in Los Pinos; in this way the Senate will have no alternative other than to accept the appointees.

As a mere formality, the Senate will have the opportunity to object to the appointees within thirty days, thus returning Congress to the humiliating days in which it operated as a simple rubberstamp institution.¹³⁴ If within thirty days the Senate does not issue any official response or reaction, the presidential nominations will be automatically ratified.¹³⁵ Should the senators dare to reject the president's nominations on two occasions, then the president will have the authority to directly appoint a third person of his choosing.¹³⁶ In other words, the only dilemma for the president will be whether he wants to try to dress his appointees with apparent legitimacy by getting Senate approval or not. Regardless of which strategy he chooses, only loyalists need apply.

The true reason for the president's proposal to increase the number of IFAI commissioners from five to seven is not to strengthen the institution with greater human resources, but to consolidate his own political power within the nation's federal transparency body. In addition, it is very worrisome that Peña Nieto is proposing that his new appointees remain in their positions until March 31, 2020, which would convert them into the lengthiest appointments in Mexican history.

Since the creation of the IFAI in 2003, Presidents Vicente Fox and Felipe Calderon have been highly effective at packing the agency with party loyalists. Peña Nieto is now looking forward to having his very own IFAI commissioners. The current president seeks to complete the transition of the IFAI from an institution originally designed to defend citizen rights to information into a personal

(Sept. 21, 2012), <http://www.proceso.com.mx/?p=320466> (clarifying that Peña Nieto's power to appoint commissioners is an extension of existing practices of favoritism).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

transparency bodyguard. The transition from the originally envisioned democratic expansive project of transparency to the bureaucratic and public relations use of accountability illustrates clearly this article's main hypothesis.

The transparency bill also includes a new way in which the government can guarantee opacity in practice. Today, all IFAI decisions are final and cannot be appealed by the government, not to the Supreme Court of Justice or any lower court. However, the reform proposes a modification which would allow the president to challenge any decision made by the IFAI which may "put national security at risk."¹³⁷ Such a broad catch-all category can quickly turn into a dangerous loop-hole. It is important to recall instances such as the landmark case concerning the electoral ballots used in the 2006 federal elections when conservative candidate Felipe Calderon was declared the winner by a margin of less than one point and with multiple allegations of electoral fraud.¹³⁸ Despite dozens of requests to review the ballots and conduct an independent citizen recount, the Mexican electoral authorities simply refused, again and again, to grant access based on an argument that there was a risk of harm to national security.¹³⁹ These refusals continue in clear violation of the access to information law and are a reminder that transparency in Mexico can only go as far as is politically feasible; the 2006 federal

137. *Id.*

138. See generally Michael Reed, *Time to Wake up*, *ECONOMIST* 1–3 (Nov. 16, 2006), available at http://www.economist.com/node/8131886/print?story_id=8131886 (arguing that 2006 presidential runner-up Andrés Manuel López Obrador's allegations of fraud were valid after an unexpected outcome in an election with a margin of less than 236,000 votes out of the more than forty-one million cast and pointing out Calderon won 35.9% of votes compared to Obrador's 35.3%); John M. Ackerman, *Autenticidad y Nulidad: Por un Derecho Electoral al Servicio de la Democracia*, INSTITUTO DE INVESTIGACIONES JURÍDICAS (2012).

139. See Andrés Manuel López Obrador, *Recounting Our Way to Democracy*, *N.Y. TIMES*, Aug. 11, 2006, <http://www.nytimes.com/2006/08/11/opinion/11lopezobrador.html> (asserting that the electoral tribunal ruling to ratify the 2006 presidential election results and release only 9% of ballot boxes for review was effectively a refusal to grant access because the small percentage of released ballot boxes is vastly insufficient to review an election where the tribunal itself acknowledged evidence of arithmetic fraud in nearly twelve thousand polling stations); John Ross, *Ballot Burning Time in Ol' Mexico*, *COUNTERPUNCH* (June 15–17, 2007), available at <http://www.counterpunch.org/2007/06/15/ballot-burning-time-in-ol-mexico/>.

election case is presently open in international tribunals.¹⁴⁰ Again, it is apparent that public relations for transparency is viewed as a nice idea to improve the public image of government, but quickly becomes dangerous and unacceptable when it touches highly sensitive areas of public power and gets closer to a democratic expansive understanding of the concept.¹⁴¹

With regard to the new anti-corruption agency, Peña Nieto has proposed exactly the same opaque, undemocratic, and discretionary method for the appointment of top commissioners as at the IFAI. In addition, with the fabrication of a new agency, the president will have a golden opportunity to distribute jobs and bureaucratic spoils to his friends and allies, as well as guarantee his influence over anti-corruption policy.

There are two additional tricks within this proposal. First, to make room for the new agency, the bill entirely eliminates the Secretary of the Public function, which is the executive agency created in 2003 to guarantee the application of Mexico's civil service law and oversee all public spending. The agency's former roles and responsibilities will be broken up and taken over by cabinet members and the

140. See Graciela Rodríguez Manzo, *Boletas 2006: Verdad y Justicia*, PROCESO (Oct. 29, 2012), <http://www.proceso.com.mx/?p=323780> (explaining that government authorities justified the destruction of election ballots by insisting that, because the ballots were an accurate reflection of the election results, there was no need to review them); see also Rosalía Vergara, *Da IFE Ultimo Visto Bueno a Destrucción de las Boletas 2006*, PROCESO (Sept. 4, 2013), <http://www.proceso.com.mx/?p=351918> (discussing the Federal Election Institute's approval of ballot destruction in spite of a U.N. Human Rights Committee directive to suspend such destruction).

141. See Netzaí Sandoval Ballesteros, *La Negativa del Derecho a la Información en las Boletas Electorales: una Violación a los Derechos Humanos*, Instituto de Investigaciones Jurídicas NUEVOS ESCENARIOS DEL DERECHO ELECTORAL: LOS RETOS DE LA REFORMA DE 2007–2008 (John M. Ackerman, coord., 2009). For two excellent analyses of the 2006 federal election case which equate the publication of electoral ballots with the publication of government budget information on the internet and argue that the 2006 election incident concerns the right to truth, see generally John M. Ackerman, *When Transparency Meets Politics: The Case of Mexico's Electoral Ballots*, in TRANSPARENCY FROM DIFFERENT PERSPECTIVES (Robert Vaughn & Padideh A'lai eds., 2012) (suggesting that public authorities can use the "rule of law" to subordinate transparency to political concerns, which directly correlates to the public relations understanding of transparency and its downfalls when it touches sensitive areas of public power).

Treasury Department.¹⁴² In short, the entire system of internal control over professionalization and public spending built up over the past thirty years will be dismantled, fragmented, and handed over to political operatives. The current system of internal control has, of course, serious problems, but the solution is not to eliminate it. The solution is to build on the existing strengths and fix the endemic problems.

Second, the new supposedly autonomous anti-corruption agency will be under the control of a new “National Public Ethics Council.”¹⁴³ The council’s main objective is to become a political body since it will be made up of the thirty-one state governors, the Federal Secretary of the Treasury, the Secretary of the Interior, and the Federal Prosecutor; ironically it will be presided over by none other than Enrique Peña Nieto himself.¹⁴⁴ Such an institutional design guarantees that political criteria will prevail in the new government’s supposed fight against corruption. This design fulfills the purpose of “Transparency for Public Relations” because it guarantees total impunity for the top officials who will sit on the council, as well as their friends and allies. In short, this council may put some “small fish in the frying pan,” but the big ones will continue to leisurely go about their business.¹⁴⁵ While governor of

142. Iniciativa con Proyecto de Decreto que Reforma u Adiciona los Artículos 22, 73, 79, 105, 107, 109, 113, 116 Y 122 de la Constitución Política de los Estados Unidos Mexicanos, SENADO DE LA REPÚBLICA, *available at* http://www.senado.gob.mx/comisiones/puntos_constitucionales/docs/Corrupcion/Iniciativa_PRI.pdf (explaining that Peña Nieto’s proposal also intends to establish a new Secretary position to supervise migration, Border Patrol, Coast Guard, Federal Protective Service, Interior Security, Secret Services, Federal Police, Emergency Police, Federal Prison System, all aspects of national security, and lead negotiations with various political actors, in particular human rights activists).

143. *See Rendición de Cuentas y Combate a la Corrupción*, 48 REVISTA DE ADMINISTRACIÓN PÚBLICA 1 (Jan. 2013).

144. Carlos A. Sepúlveda Valle, *Consejo Nacional por la Ética Pública*, MILENIO (Nov. 24, 2012), <http://www.milenio.com/cdb/doc/impreso/9165352>.

145. *See, e.g.,* Michael Weissenstein, *Ex-Official Seized in Mexico Corruption Case*, BLOOMBERG BUSINESSWEEK, June 10, 2013, <http://www.businessweek.com/ap/2013-06-10/ex-official-seized-in-mexico-corruption-case> (discussing the former governor of the state of Tabasco, who has been accused of leading the state into debt by squandering and embezzling millions and is recorded bragging about a lavish lifestyle, but has not been charged with any crimes despite claiming he was drunk and lying during recorded statements and employing a former state treasurer who was recently arrested on suspicion of embezzlement).

the State of Mexico, Peña Nieto perfected the art of using supposedly autonomous institutions to cover-up his abuses. His accountability strategy as president seems to replicate this experience by creating more white elephants at the national level.¹⁴⁶

Another remarkable aspect of these bills is that civil society has been entirely excluded from participating in their design and is clearly intended to have no role in the functioning of the new institutions. This is perhaps the most significant weakness of the proposed reforms. International research shows that the most effective anti-corruption strategies are those which are firmly grounded in the participation of society.¹⁴⁷ Non-profit organizations, social movements, investigative journalists, and normal citizens are often much more aware and capable of documenting abuses than are bureaucratic agencies.¹⁴⁸ Such strategies are off limits for the Mexican government because they risk uncovering what is really happening beneath the surface and thus putting at risk political careers and economic fortunes.

While the Peña Nieto administration adamantly denies problems with government control over the oil industry, it simultaneously looks to recentralize and hyper-bureaucratize government control over anti-corruption efforts. Citizens and journalists who expose corruption are punished instead of rewarded.¹⁴⁹ Today, Mexico is one of the most dangerous countries in the world for journalists, often

146. See generally John Ackerman, *Biden's Visit to Mexico: What You Should Know, Joe*, GUARDIAN, Sept. 19, 2013, <http://www.theguardian.com/commentisfree/2013/sep/19/joe-biden-mexico-enrique-pena-nieto/> (suggesting that the labor reform Enrique Peña Nieto pushed through while president-elect and his more recent education reform are actually hidden attacks on labor rights, despite his insistence that they are efforts to stop corrupt union leaders and further his benevolent image as a struggling reformist).

147. See Raza Ahmad, *Governance, Social Accountability and the Civil Society*, 3 JOAAG 10, 11 (2008) (emphasizing, through the 2000/2001 World Development Report, the need for effective state and citizen empowerment to improve governance).

148. See generally *id.* at 13 (identifying Bangladesh and Jemberana, Indonesia as areas where local non-government actors have been successfully favored over bureaucratic agencies in creating budgets; further advocating that the same non-government approach would be successful in documenting abuses).

149. See, e.g., Pérez-Anzaldo, *supra* note 105, at 55 (discussing the experiences of three female Mexican journalists who endured, among other things, persecution, incarceration, torture, and death threats in the course of their work uncovering government corruption).

compared to Afghanistan.¹⁵⁰

Beyond the extreme bureaucratization and over-politicization that Peña Nieto is proposing, transparency agencies have faced serious political difficulties in recent years. For instance, even the more autonomous oversight agencies run by fulltime professionals frequently take the side of government instead of society when deciding appeals.¹⁵¹ In a historic case, the IFAI rejected a citizen request for photographs of top public servants.¹⁵² Such a decision left citizens almost entirely defenseless before a faceless government.¹⁵³ In addition, oversight agencies are typically hesitant to ensure compliance with their decisions and almost never punish government officials for intentionally hiding or altering public information. During the years in which the federal access to information law has been in effect, only a dozen or so violations have been formally punished.¹⁵⁴

150. See Dino Grandoni, *More Journalists Killed in Mexico than Afghanistan*, ATLANTIC WIRE, Aug. 3, 2011, <http://www.theatlanticwire.com/global/2011/08/more-journalists-killed-mexico-afghanistan/40797/> (referencing a report from Reuters indicating that forty-two journalists have been killed in Mexico in the past five years, more than in Afghanistan). See generally *A WAN-IFRA and IPI Joint-Report on the Freedom of the Press in Mexico*, WAN-IFRA (Apr. 2013) (detailing the abuses and killings of journalists in Mexico since 2000).

151. Cf. John M. Ackerman, *El Instituto Federal de Acceso a la Información Pública: Diseño, Desempeño y Sociedad Civil*, PROGRAMA INTERINSTITUCIONAL DE INVESTIGACIÓN-ACCIÓN SOBRE DEMOCRACIA, SOCIEDAD CIVIL Y DERECHOS HUMANOS (2007), available at <http://ccs-ciesas.org/publicaciones/civil/CPDTexto10.pdf> (asserting that the National Commission of Human Rights and the Federal Electoral Institute were created to give the impression that the government was addressing human rights violations and election fraud, while in reality failing to make progress on these issues).

152. See *id.* at 31–32 (noting that, in five separate decisions on the publication of public servant photographs, three commissioners voted against publication on the ground that the photos constituted personal information, while two commissioners favored publication and argued that, even if the photographs were personal information, it was necessary to distinguish between “intimate” information and information relevant for publication purposes).

153. See Juan Pablo Guerrero Amparán, *Voto Disidente del Comisionado Ponente Juan Pablo Guerrero Amparán*, FIDEICOMISO FONDO NACIONAL DE HABITACIONES (2005) (Mex.), available at http://consultas.ifai.org.mx/pdf/resoluciones/2005/votos/934_2.pdf (maintaining that public servants have an obligation, both under specific laws and by nature of their positions, to identify themselves to the public).

154. See Elizabeth Velasco C., *Acusa el IFAI a la SFP de Ser “Omisa” en Sancionar a Servidores Públicos Incumplidos*, LA JORNADA (Aug. 3, 2012),

Worse, in recent months, there has been a severe internal political crisis at the IFAI involving an open dispute among commissioners about violations of the guarantee that citizen's requests will remain anonymous. The current commissioners are apparently more concerned with investigating which computers initiated the information requests than with punishing violations of the law.¹⁵⁵

Civil society organizations, journalists, and normal citizens lack knowledge of the new law and often use it out of general curiosity or in search of scandal, rather than to oversee and maintain government accountability. Statistics reveal that some of the most common requests are for an individual's personal medical records and for the salaries and expense reports of top public servants, instead of for specifics about the use of the federal budget or the impact of public policies.¹⁵⁶

The understanding of transparency and accountability must be expanded to include the private sector. To create the conceptual space to make this transition we need to move beyond the typical bureaucratic and public relations approaches to transparency and develop a new democratic expansive approach to transparency. The democratic expansive approach to transparency is best understood as a tool of democratic performance and a form of collective action designed to carry out accountability, resist corruption, and undo the system of impunity and privilege which is so deeply entrenched in

<http://www.jornada.unam.mx/2012/08/03/politica/021n2pol> (conveying that, out of over one hundred complaints presented by the IFAI to two adjudicating bodies, only eight have resulted in sanctions, while thirty-eight were dismissed and twenty-one have yet to be heard).

155. See generally *IFAI Under Fire from PRI Members in Mexican Congress*, JUSTICE IN MEXICO PROJECT (Jan. 26, 2013), <http://justiceinmexico.org/2013/01/26/ifai-under-fire-from-pri-members-in-mexican-congress/> (referring to an IFAI Internal Audit Unit investigation against Commissioner Sigrid Artz who was accused by her colleague, Commissioner Ángel Trinidad Zaldivar, of incurring a "conflict of interest" when Artz allegedly made requests for information from her personal computer under a pseudonym and then presented and defended the requests).

156. See, e.g., *9º Informe de Labores al H. Congreso de la Unión 2011*, INSTITUTO FEDERAL DE ACCESO A LA INFORMACIÓN Y PROTECCIÓN DE DATOS (2011), available at http://inicio.ifai.org.mx/Informes%202011/9o_informe.pdf (explaining that 44.6% of requests made to the Mexican Social Security Institute were for access to individuals' medical records and 38.8% of requests made to the State Workers' Insurance and Social Services Institute were for similar information).

Mexico and similar countries today.¹⁵⁷ This approach understands transparency as a matter of rights and citizenship, not of bureaucratic hygiene.¹⁵⁸ The principal goal of the democratic expansive transparency project is to serve as an engine of change that advances normative and political achievements related to accountability.

Civil society, social movements, investigative journalists, and normal citizens aided by social media, have been the principal actors in this democratic expansive project of transparency. These social actors have tremendous importance in the struggle to push transparency as a key element of democracy because they are more aware and capable of documenting abuses than bureaucratic agencies, politicians, technocrats, or “corruption plumbers.” In summary, the struggle to fill transparency with meaning is long and ultimately depends on political will and social mobilization, not technical formulas.

IV. CONCLUSION

This article outlined a new framework for understanding transparency and combatting corruption in response to recent developments in governance structure and failures of past accountability strategies in Mexico. Further, the public sector bias, and bureaucratic as well as public relations understandings of transparency are refuted for new democracies such as Mexico. This article also demonstrated that the proliferation of Public-Private Partnerships and related initiatives has begun to erode the existing empirical divisions between the public and private sectors. Instead of relying on past designations to explain recent phenomena, it is time to develop a new conceptual framework to advance the age-old struggles for greater public accountability and citizen participation. The democratic expansive approach includes the extension of transparency and accountability controls normally reserved for the public sector to the private sector. This framework calls for theorists and reformers to account for broader social and political power

157. Sandoval, *Transparency Under Dispute*, *supra* note 13, at 18.

158. See generally Bovens, *Information Rights*, *supra* note 11, at 327 (suggesting Bovens’ distinction between transparency as a question of public hygiene and information rights as an issue of citizenship as comparable to the democratic expansive project of transparency and how it can be defined as a tool of democratic performance).

structures and establish concrete links between accountability and democracy.

Corruption is not just a question of low-level public servants filling their pockets at the expense of common citizens, nor is combating corruption principally an issue of reeducation or cultural transformation. Corruption is an institutional and political problem that requires structural solutions. The primary issue is systemic corruption which invades the highest levels of government and interferes with the State's primary functions. In Mexico, corruption is a problem endemic to all political parties and government institutions.¹⁵⁹

The struggle for accountability must be citizen driven and intimately linked to demands for the expansion of democracy. Truly effective policies empower and protect brave journalists and citizen watchdogs who dare to challenge systems of impunity and privilege. Without effective policies, institutions and reforms will inevitably be coopted and controlled by the actors they intend to regulate. The experience of Mexico and similarly-situated countries will continue, unless there is a major rethinking of accountability strategy. To truly guarantee the progression of transparency in Mexico and other new democracies, societies should leave behind both the hegemonic public relations approach as well as the bureaucratic technocratic view of transparency and move toward a more political and structural democratic expansive vision based on active citizen participation and mobilization.

The right to access government documents is not only a good idea that improves the "hygiene of public administration," but is also a constitutive part of a fundamental "right to information" which is

159. See generally *Latinobarómetro Study*, CORPORACIÓN LATINOBARÓMETRO 35, 55 (2011), available at <http://www.latinobarometro.org/latino/latinobarometro.jsp> (observing that the Latino-barometer study recently revealed that 60% of people believe that "those who least comply with the law" in Mexico are "the rich" and only 22% believe "that Mexico is governed for the good of all the people," and imputing corruption to all of Mexico's political parties and government institutions); *Corruptions Perceptions Index 2012*, TRANSPARENCY INT'L (2012), available at <http://cpi.transparency.org/cpi2012/> (referencing the results of Transparency International's Corruption Perceptions Index 2012, with Mexico scoring just thirty-four out of one hundred and ranking worse than Egypt, Mali, Bolivia, Senegal, and Jamaica, and suggesting the results are so extreme that corruption must affect all Mexican political parties and government institutions).

crucial in the information age. Today's political struggle for public access to information is as important as past struggles for political, civil, and social rights. Mexico is still unfortunately far from successfully constructing a conscious and organized social force. The groups that exist in civil society are scarce and the agenda of transparency has failed to permeate the thoughts and actions of citizens. Mexico's persistent struggle is to develop a system of institutional, organizational, social, and political checks and balances that shift the priority of government institutions to public good instead of personal gain. This is perhaps the greatest challenge to transparency in Mexico's near future.

Thus the central question becomes how to construct a new organizational equilibrium from a structural, long-term perspective. Cultural and pedagogical solutions based on teaching bureaucrats or school children the correct values are doomed to fail. No matter how much one teaches citizens and public servants to behave correctly, if the surrounding environment punishes good behavior, even the most honest and effective bureaucrats will quickly regress and become bad apples.

In addition, the global shift of power from the public sector to the private sector imposes new challenges to transparency and accountability in Mexico and elsewhere. Markets are supposedly more efficient than governments, but they are often more opaque and susceptible to abuses of power. Mexico's experience in the last two decades effectively demonstrates that this is in fact the case.

In sum, to truly combat corruption in Mexico it is necessary to undertake a top-to-bottom cleaning, just as you would sweep the stairs. It is equally important to move beyond the confines of government and expose the internal accounts and practices of independent contractors and monopolistic corporations.