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1. The Legitimacy of Legality: An Overview of Legal Modernization in Mexico with Reference to the Law and Culture of China

SUMMARY: I. Introduction. II. A Brief Description of Legal Change in Mexico (1982-2010). III. Legal Change as a Transition Process. IV. The Role of Comparative Law in Legal Reform. V. The Rule of Law in Mexico and China. VI. Conclusion. VII. Bibliography.

I. Introduction

Taking as a starting point the magnificent paper by Professor Li Lin, which provides us with a first comparative approach to the legal systems of China and Mexico,[1] it is easy to perceive that numerous and significant similarities, as well as differences, exist between both nations with respect to their recent process of modernization, especially in the field of law. First of all, once they decided to open up and integrate into the world economy, both the Mexican and the Chinese government quickly understood that law was a necessary instrument for channeling and consolidating the changes that economic modernization required. Secondly, both countries have equally understood that it is convenient to promote a much broader legal reform, comprising not only strictly economic issues, but also individual and collective rights, including social development in a broad sense, as well as the organization, management and operation of state structures. This becomes fairly clear if the impressive schedule of laws passed in the People's Republic of China after 1978, but especially in the last ten to fifteen years, is considered. Regarding Mexico, this paper will later show that federal legislation has almost been completely reformed and updated in the past twenty five years. Thirdly, and as a consequence of the above elements, in recent years both countries have given particular emphasis to the Rule of Law and respect for legality, not only as a foundational principle of the legal system, but also, and above all, as an aspiration of society capable of promoting a higher degree of stability and legitimacy in the exercise of political authority.

It is also convenient, however, to underline significant differences in the legal development of both countries. Such differences stem from historical, cultural and political factors, and many of them seem fairly obvious.[2] Both Mexico and China have completely adopted a modern legal system

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[1] Li (2008).
[2] For an introduction to Mexican legal culture, see López Ayllón (1995).

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of European origin, i.e., the civil legal tradition. Although such an adoption has been, to a great extent, a consequence of foreign intervention, the truth is that the historical circumstances and effects surrounding it are different. In Mexico, Spanish culture was imposed on the original indigenous culture by means of armed conquest, displacing it completely as the dominant culture of the ruling group. Not surprisingly, a similar development occurred with Spanish law. China, by contrast, never ceased to be a sovereign empire. Even if it was subjected to imperialist pressure, China's adoption of Western law was –the same as Japan's– a domestic, rational and pragmatic choice among different models and systems of law. It was not only a means of modernization, but also a means of defense against foreign aggression.

The symbolic value and the degree of penetration of Western law in Mexican and Chinese society are also different for reasons that pertain to history and culture. As a country, Mexico is in a certain way an artificial invention of the law and lawyers. Certainly, no one denies that history and culture confer a definite identity on the country. But Octavio Paz, the great Mexican writer, has argued in *The Labyrinth of Solitude* (1950) that after Independence in 1821, our history was determined by a denial of both our indigenous and our colonial past, as well as of the Catholic religion that encompassed both. Therefore, it is easy to understand why our founding fathers and first legislators were impelled to design in the laws a country that did not yet exist in reality, and why Mexico can be considered a legitimate child of Western legal culture. This gap between the "legal" and the "real" country, which exists everywhere, has been particularly deep in our country. But for this very reason, it has become a powerful factor of change, so that the absence of reality of that time may be transformed into the reality of today. Moreover, the legitimacy crisis that the Mexican political regime experienced since the late 1960s has turned Mexico into a country that is much more "legalized" and "judicialized" than economic modernization would otherwise warrant. Legal institutions provide now the ultimate and indispensable support to the legitimacy of political structures, to the extent that they are capable of guaranteeing a fair, rational and depoliticized processing of social conflicts, with reference to the universal values embodied in human rights.

China, by contrast, is not as dependent on modern Western law. Its millenary history and culture do not warrant the "escape forward" that has defined Mexico's identity since independence from Spain in 1821. In China, modernization is much more of a pragmatic than an existential project. It chooses to adopt foreign elements to the extent that it finds to be convenient and necessary for the achievement of certain purposes, without any fear of losing its cultural identity. In this sense, modern law is a flexible and useful tool, a means of communication and understanding with the outside world, but not necessarily a decisive factor in daily social behavior. It may be expected, therefore, that traditional Chinese legal culture, which in many respects is different and even opposite to Western legal culture, will remain quite strong. It is even argued that Chinese legal

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culture is better adapted to the needs of global economic exchange than modern Western law. This is supposed to be one of the reasons for the tremendous success of the Chinese economy in contemporary world trade.[3]

For a comparison to have any sense, both similarities and differences between legal cultures must be highlighted. A comparison centered only on similarities is inevitably superficial, while comparison focused only on differences seems to be absurd, granting that only differences could be identified. But if similarities and differences are to be analyzed at the same time, comparison calls for a certain level of depth and sophistication. The purpose of the paper is not to provide a comparison between Chinese and Mexican law, but only a first approach. Nevertheless, this first consideration of the differences and similarities existing between the Mexican and the Chinese legal culture may contribute to a more clear perception of the process of legal change in Mexico.

This paper offers a synthetic description and an interpretation of the process of legal change in Mexico in the past twenty eight years. In so doing, it takes as its starting point –or at least as a background element– some of the similarities and differences with respect to Chinese legal experience we have sketched above. In the first section, the process of legal change in Mexico, especially after 1982, is briefly described. In the second section, an interpretation of this process using the concept of "legal transition" is proposed. It is further explained why, as defined by different legal paradigms, law has become a much more significant element of social regulation in Mexico than before. In the next section, the example of the Institute of Legal Research of the National University of Mexico shows the importance of comparative law and comparative legal experiences in times of legal reform. As a conclusion, in the final section some final considerations are offered regarding the cultural and political challenges the Rule of Law faces in both Mexico and China. The ultimate expectation of this essay is that it may some day serve as point of reference for our Chinese colleagues for a better understanding of the trajectory of the Mexican and their own process of legal change.

II. A Brief Description of Legal Change in Mexico (1982-2010)[4]

The Constitution and Federal Laws

The Political Constitution of the United Mexican States was promulgated on 5 February 1917. Since 1921, the year it was amended for the first time, until 31 December 2009, the constitutional

[3] Appelbaum (1998).
[4] For an overview of the process of legal change in Mexico between 1970 and 2000, see López Ayllón and Fix-Fierro (2003).

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text has undergone 489 changes or amendments.[5] The amending activity has clearly increased from 1982 onwards, as 310 of all those changes, i.e., almost two thirds (63.4%), have been undertaken after that year.

The constitutional changes of the last decades have not only been quantitative in character, but also qualitative. In general terms, constitutional amendments have aimed at strengthening the legislative and judicial branches of government *vis-à-vis* the federal executive; they also have broadened the scope and protection of fundamental rights, and they have established the legal foundations for governmental transparency and accountability. In particular, significant amendments have been introduced into the Constitution in the following subject matters:

- Self-government and administration of municipalities.
- Electoral system.
- Fundamental rights, both individual and social, and their means of protection.
- Rights and autonomy of indigenous peoples
- Land property and agrarian courts.
- Transparency and access to governmental information.
- System of criminal justice and public security.
- Budget and control of public expenditures.
- Judicial review of legislation.
- Relations between religious communities and the State.

In the context of these changes, new public authorities have been established and the existing institutions have been deeply reformed:

- Creation of so-called constitutional autonomous bodies, such as the National Commission of Human Rights (CNDH, 1992-1999), the Federal Electoral Institute (IFE, 1990), the Bank of Mexico (BM, 1993), and the National Institute for Statistics and Geography (INEGI, 2005).
- Establishment of the Superior Auditing Entity of the Federation (1999) as an organ of the Chamber of Deputies of the Federal Congress, charged with supervising and auditing the financial behavior of public authorities.
- Creation of the Council of the Federal Judiciary as the governance and administrative body of the Federal Judiciary (1994-1999).
- Establishment of the Federal Electoral Court (1990-1996) and the Agrarian Courts (1992).

[5] The number of constitutional amendments results from counting the number of articles of the Constitution amended in a single amending decree. Thus, all the modifications introduced into a single article in a single decree are counted as *one* amendment.

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- New composition of the Supreme Court of Justice (1994) and enhancement of its powers of constitutional review (1994-1996-1999).
- New system of justice for children and teenagers (2005).
- Constitutional recognition of the public agencies for transparency and access to governmental information (2007).

As we can observe, these changes imply long-range transformations that have accelerated the dynamics of the constitutional order as a whole.

With respect to legislation, as of 15 December 2009, there were 254 federal laws (see Annex).[6] Similarly to the process of constitutional change, the great majority of those laws has been passed after 1982. The rhythm of change has been particularly intense in the fields of economic, commercial and financial activities, especially around the time the North American Free Trade Agreement (NAFTA) with the United States and Canada was negotiated and came into force (1991-1994). Moreover, laws passed before 1982 have been also extensively amended in recent years. The following table shows the number of existing federal laws by period of enactment (six-year periods of the federal government):

Table 1

Existing federal laws by period of enactment

(As of 15 December 2009)

Period	Existing laws	%
Until 1970	45	17.7
1971 to 1982	28	11.0
1983 to 1988	21	8.3
1989 to 1994	30	11.8
1995 to 2000	37	14.6
2001 to 2006	62	24.4
2007 to 2009	31	12.2
Total	**254**	**100.0**

Source: Chamber of Deputies of the Congress of the Union <www.diputados.gob.mx>.

[6] Mexico is a federal country. Consequently, the legislatures of the 31 states and the Federal District may also legislate on the subject matters reserved to them by the Constitution (see Article 124 of the Political Constitution of the United Mexican States of 1917). Nevertheless, the power to legislate on the most important subject matters from the point of view of their social and economic significance has been conferred on the Congress of the Union. Incidentally, the article of the Constitution of 1917 that deals with the legislative powers of the Congress (Article 73) is also the most amended article since 1921, as more and more legislative powers have been entrusted to the federal authorities, many times in detriment of local legislative powers.

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The preceding table confirms the hypothesis that a major part of existing federal legislation was passed in recent years. 71.2% of federal laws were passed after 1982; 63%, after 1988; 51.2%, after 1995, and more than a third (36.6%) correspond to the period 2001 to 2009. These figures have to be viewed in context, however. In a dynamic legal system it is fairly obvious that existing laws tend to be of recent date. In any case, the effort of the last decades aimed at modernizing and updating federal laws is quite notable, because even less recent laws are constantly amended. So, for example, 23 out of the 44 laws passed before 1971 (i.e., 52.3%) have been significantly amended in the period between 2004 and 2009.

Table 2 offers an overview of the main categories of federal laws according to their subject matter and period of enactment. This allows for a more differentiated picture of the moments when particular sectors of the law have been modernized:

Table 2
Existing federal laws by subject matter and period of enactment
(As of 15 December 2009)

Subjects	Period of enactment							Total
	Until 1970	1971-1982	1983-1988	1989-1994	1995-2000	2001-2006	2007-2009	
Human rights				4	2	8	2	**16**
Labor and social security	3	1	1		2	2	1	**10**
Social development		1	1	1	1	6	1	**11**
Environment and natural resources			2	1	1	2	2	**6**
Education, culture, science and technology	3	5	1	1		4	1	**15**
Economy and trade	6	2	1	12	10	9	9	**47**
Financial services	2		5	3	3	8	2	**22**
Public finance	4	7		1	1	2	5	**19**
Public services	2	1	1		1		1	**6**
Public organization and administration	1	2	7	2	5	8	1	**26**
Armed forces	3	1	1			6		**11**
Foreign relations	3	2		1		1	1	**8**
Civil and commercial law	7	1		1	2	1		**12**
Justice	6	1		3	4	2	2	**18**
Criminal law and public security	2	1			2	1	2	**7**
Other	3	3	1		3	2	1	**13**

SOURCE: Elaboration using data from the Chamber of Deputies of the Congress of the Union <www.diputados.gob.mx>

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The preceding table merits several comments which cannot be fully developed here. First, it should be noted that we are dealing with a numerical exercise that, as already explained, does not necessarily reflect the degree of innovation or the qualitative differences in legislation. Moreover, the classification of laws within a single category cannot avoid a certain degree of subjectivism. Nevertheless, the table does reflect some differentiated patterns of considerable interest. For example, legislation in the field of human rights and social development is fairly recent (it is concentrated mostly in the period 2001-2006), because they are relatively new concepts in our legal system. The modernization of economic and trade legislation is concentrated in the period 1989-2000 –particularly in the years from 1991 to 1996, in which 22 of 49 existing laws were passed, i.e., 44.9% of the total– whereas the sector of financial services begins its modernization in the period between 1983 to 1988, as a consequence of the financial crash of 1982, and continues to be updated until today by way of an important number of new laws passed in the period 2001 to 2006. A similar phenomenon occurs in the field of the economy (investment and trade), with 18 new laws passed between 2001 and 2009, i.e., 36.7% of the laws in this category.

With respect to public finances, it is interesting to note that the majority of laws establishing and regulating federal taxes, i.e., 11 out of 20 existing laws (55%) were passed before 1983, although they have been practically amended each year since their enactment. The subject matter we are calling "public organization and administration", which comprises the laws that regulate the structure and operation of federal public authorities, mainly of an administrative nature, display a more permanent process of updating. Finally, the common laws (civil, commercial and criminal), as well as laws concerning criminal prosecution and the administration of justice, were mainly passed before 1970, and start their modernization after 1989.

In sum, the preceding tables show that Mexican federal laws, including the Constitution, are undergoing a permanent process of revision, updating and modernization. No doubt, there are some sectors that have fallen behind, like labor or the energy sector, but economic and political liberalization of the past decades have had such impact on the modernization of the legal system that we may safely foresee its continuation at an accelerated pace in the years to come.

The Judiciary and the Legal Profession

Changes in the Judiciary and the legal profession show, on the one hand, that the legal system finds itself in the middle of a process of growth and expansion, and, on the other hand, that such process is unequal, thus generating particular challenges for the consolidation of the Rule of Law. In this section we provide some statistical data for the analysis of this dimension of legal change in Mexico.

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The Federal Judiciary

The Federal Judiciary is the most important court system in the country. It does not only deal with ordinary federal cases, but its jurisdiction comprises *amparo* matters, which allows it to review the constitutionality and legality of all acts or legal provisions by any public authority, including other federal and all state courts, whenever citizens consider such acts or provisions to be in violation of their constitutional rights. Indeed, the greatest proportion of cases brought before the Federal Judiciary belong to its jurisdiction in *amparo* matters.

The Federal Judiciary comprises presently the following courts:

- The Supreme Court of Justice of the Nation (11 justices)
- The Circuit Collegiate Courts
- The Circuit Unitary Courts
- The District Courts
- The Electoral Court (comprising the Superior Chamber and five Regional Chambers)

Starting in the 1980s, the Federal Judiciary began, after many years of very limited growth, a policy of rapid increase in the number of courts, which accelerated in the 1990s, as shown in the following table:

Table 3
Ratio between Federal Courts and Population
(1970-2005)

Year	DC	CCC	UCC	Population (in 1000)	Population/courts (in 1000)		
					DC	*CCC*	*UCC*
1970	55	13	9	48 225	877	3 710	5 358
1980	92	21	12	66 846	727	3 183	5 571
1990	148	66	30	81 249	549	1 231	2 708
1995	176	83	47	91 120	518	1 098	1 939
2000	217	138	56	97 400	448	705	1 739
2005	290	172	67	103 300	356	601	1 542

SOURCE: Data taken from the *Annual Report of Activities of the Supreme Court of Justice* 1970-2005.
NOTES: DC=district courts; CCC=collegiate circuit courts; UCC=unitary circuit courts. Data on population are obtained from the preliminary results of population censuses and counts carried out by the National Institute for Statistics and Geography (INEGI) in the respective year.

From Table 3 we may conclude that growth in the number of courts has been, on average, more rapid than population growth, since the ratio between population and courts has been constantly declining, thus bringing about a relative improvement in the access of citizens to justice. In 1970 there were only eight federal judicial circuits. That year only 39 cities in the whole country were the seat of a federal court, and only 25 among them were the capital city of a state, i.e., six

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states did not have any federal courthouse in their capital city. In 2005, by contrast, there were already 29 federal judicial circuits (almost all circuits comprised a single state), and a total of 63 cities, including all state capitals, had at least one federal courthouse.[7]

The considerable growth of the Federal Judiciary has been made possible by a significant increase in its budget, as shown in the following table:

Table 4
Federal Judicial Budget
(1980-2005)

Year	Nominal (N$)	Constant (N$ 1994)	% of Federal Budget	Per capita (N$ 1994)	Per federal judgeship (N$ 1994)
1980	1 000 017	237 623 021	0.06	3.6	1 231 207
1985	15 168 687	355 360 221	0.08	4.8	1 468 431
1990	257 000 000	427 476 548	0.13	5.3	994 131
1995	1 385 915 000	1 026 618 913	0.39	11.3	2 129 915
2000	6 723 350 703	2 076 389 963	0.56	21.3	2 974 771
2005	19 862 089 561	5 863 001 317	1.09	56.8	6 632 354

Source: Data from Cossío Díaz (1996, 56) and the *Diario Oficial de la Federación* 1995-2005.
Notes: The budget "per capita" and "per federal judgeship" is expressed in new constant pesos (N$) for the year 1994. It was estimated on the basis of the national index of consumer prices (INPC) published by the Bank of Mexico (www.banxico.org.mx). The exchange rate in 1994: was approximately 3.50 pesos for one USD.
The number of JUDGESHIPS results from adding the number of Supreme Court justices to the number of circuit and district judges for the respective year. The table does not consider the judges sitting at the Electoral Court.

Once again, the table shows that the increase in the federal judicial budget has been more rapid than the growth of the federal budget, the population and the number of federal judges (except in 1990). The federal judicial budget increases, as a percentage of the federal budget, from 0.06% to 1.09%, the *per capita* budget goes from 3.6 pesos in 1980 to 56.8 pesos in 2005 (a sixteen-fold increase), and the budget per federal judgeship increases from 1 million 231 thousand pesos in 1980 to 6 million 632 thousand pesos in 2005. For the year 2008, the total (nominal) budget of the Federal Judiciary (without the Electoral Court) reached 29 billion 529 million pesos, an amount that represents 1.11% of the federal budget for that year, and an approximate total of 30 million 480 thousand current pesos per federal judgeship.[8]

[7] SOURCE: *Annual Report of Activities of the Supreme Court of Justice*, 1970 and 2005. A similar trend can be observed in the states and the Federal District, although at a much more reduced scale. .

[8] Once again, a similar trend can be detected at the local level. The total judicial budget of the 31 states and the Federal District went from 2 billion 200 million pesos in 1997 to 11 billion 600 million pesos in 2006, a nominal increase of almost five times (Source: for 1997, Sarre and López Ugalde (2002); for 2006, Websites of the local judiciaries). However, the increase in the local judicial budgets has not been able to keep pace with the federal judicial budget. In 2006, the budget of the Federal Judiciary was more than double the total amount assigned to the local judiciaries. In terms of the budget per judgeship, the disparity between the federal and the state levels was five times (26 to 5 million pesos).

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Both the growth in the number of courts and the budget are a response to the problem of increasing caseloads that the Federal Judiciary has been facing in recent decades. This does not mean, however, that they are dealing here with a veritable "litigation explosion". The following table provides some date on total and average caseloads of district and circuit courts for the period 1970 to 2005:

Table 5
Caseloads of District and Circuit Courts
(1970-2005)

Year	Caseloads					
	DC		UCC		CCC	
	Total	*Average*	*Total*	*Average*	*Total*	*Average*
1970	62 849	1 143	5 749	639	29 586	2 276
1975	82 040	1 302	10 000	1 000	26 008	1 530
1980	114 668	1 246	8 448	704	37 142	1 769
1985	155 283	1 479	11 383	632	64 633	2 084
1990	249 589	1 686	27 419	914	78 553	1 034
1995	170 947	977	30 770	655	112 684	1 358
2000	209 630	966	35 740	638	252 502	1 830
2005	368 764	1 272	47 101	704	295 999	1 721

Source: *Annual Report of Activities of the Supreme Court of Justice* 1970-2005.
NOTES: DC=district courts; UCC=unitary circuit courts; CCC=collegiate circuit courts. Figures for DC only take *amparo* suits into account. Figures for UCC comprise only appeals in civil and criminal cases. "Caseload" is defined as the sum of PENDING cases at the beginning of a year and new cases. .

The preceding table shows that, in general terms, total caseloads have been constantly growing in the period. Nevertheless, the increase in the number of courts allows to keep average caseloads relatively constant, and even to reduce them in some years. Thus, even though the total caseload of district courts has increased six-fold and the caseload of circuit courts almost ten times, average caseloads are more or less what they were in the 1960s, if not lower.

To close this section, we should point out that changes in the Federal Judiciary have not been only of a quantitative character. Moreover, growth in the number of courts, caseloads and financial resources cannot be fully explained if they did not reflect somehow a change in the role and institutional position of the judicial system itself, as a response to new demands and expectations of Mexican society vis-à-vis the legal system. Any observer of Mexican life can easily perceive that today new and difficult questions of public policy and social behavior are raised before the courts. This is justly reflected in the public discourse on the Rule of Law and "judicial reform" in the last fifteen years.[9]

[9] On the significance and scope of judicial reform and policies in Mexico, see Fix-Fierro (2003).

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Legal Education and the Legal Profession[10]

The growth and expansion of legal education and the legal profession in Mexico can be taken also as an indicator –though not an overwhelming one– of the increasing relevance of the legal system in contemporary Mexican society. In this section we provide some data on the growing number of law schools and law students, as well as some fragmentary information on the legal profession.

Law school enrollment has been rapidly expanding in the last decades, and particularly in the 1990s, as shown by the following table, which displays statistical information compiled by the National Association of Universities and Institutions of Higher Education (ANUIES):

Table 6
Law Students and Law Schools
(1979-2004)

Year	Law students				Graduates *(previous year)*		Professional certificate *(previous year)*		Programs
	Total	*/100 K Inhab.*	*% Women*	*% Enroll.*	*Total*	*% Women*	*Total*	*% Women*	
1979	57 973	89	28.2	8.3	6 011	n.a.	n.a.	n.a.	87
1991	111 025	132	41.0	10.0	12 781	n.a.	6 077	n.a.	118
1997	155 332	162	46.7	11.9	20 983	45.7	10 960	42.0	309
2004	204 828	199	49.8	10.6	31 111	50.5	20 290	48.8	630

Source: ANUIES (1979-2004).
NOTE: The number of programs is higher than the number of law schools, since a law school may have two or more independent FACILITIES in two or more states, in addition to the Federal District. "N.a." means "not available".

As shown by the preceding table, the greatest increase in the number of law schools and law students occurred in the 1990s, not only in absolute terms –enrollment practically doubles between 1991 and 2004 – but also in relative terms (number of law students per 100 thousand inhabitants). The number of students who have finished their studies and the number of graduates who are authorized to practice law (after obtaining a "professional certificate"), show that a certain proportion of students do not complete their studies. Nevertheless, the percentage of students who manage to graduate has been increasing in recent years, as has the number of women enrolling in law school.

A spectacular growth rate –a real explosion– can be observed in the number of law school programs, which increases six-fold between 1991 and 2004. The majority of new law schools are small-size private institutions: in 2001, 40% did not have more than 100 students. The states with the highest number of law schools, as reported by ANUIES in 2004, were the State of Mexico, with

[10] For a general overview, see Fix-Fierro and López Ayllón (2005).

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83; the Federal District, with 76; the state of Puebla, with 52, and Veracruz, with 45. These figures mean, at least, that legal education is being made available to more young persons, as more and more law schools are established in cities and villages where no institutions of higher education existed before.

Unfortunately, the numbers provided by ANUIES are not complete. A significant number of law schools still go unreported in the official statistical yearbooks. According to more accurate data compiled by Luis Fernández Pérez Hurtado, the actual number of law students and law schools in Mexico is much higher. He identified approximately 930 institutions offering a law degree through 1,130 law programs, with a total enrollment of 240 thousand students during the academic year of 2006-2007.[11] These data, however, do not essentially detract from the overview already provided by Table 6 above.

Growth in the number of law schools can be explained in several ways. An important factor is undoubtedly the still large and unsatisfied demand for higher education. The motivations students have for studying law are also very varied. In general terms, students have both pragmatic ("job opportunities") and idealistic motivations ("settlement of conflicts", "making justice") for pursuing a legal career.[12] We may conclude, therefore, that the expansion of legal education does not necessarily reflect the growing relevance of law in social life, although this effect cannot be completely discarded.

Data on the actual practice of law in Mexico are much more scarce and fragmentary. To begin with, we do not know for certain how many persons perform professional activities related to the law, although we may infer some results from existing data.

According to the general population census, in 1990 there were 141 thousand persons older than 25 years who had completed at least four years of legal studies, for a total national population of 81 million. For the year 2000, the number of persons with a legal education has been estimated at about 320 thousand. If we take into account that between 25 and 30 thousand students have been graduating from law school every year during the past decade, the corresponding figure for 2010 may have reached almost 600 thousand "legal professionals". Certainly, not all these persons do actually perform professional activities related to the law. The actual percentage of practitioners in all fields of legal activity may lie around 50% to 60% of the total number of persons with a legal education. Another governmental source on legal professionals –the National Poll on Occupation and Employment– reports 474 thousand persons employed with a legal education for the year 2006. 66% of those persons were salaried, 34% women, and 37% were concentrated in the central region

[11] Pérez Hurtado (2009).
[12] Fix-Fierro and López Ayllón (2005). .

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of the country, 39% provided professional, financial, and corporate services, while 45% considered themselves as professionals of the social sciences.[13]

Legal education and the legal profession remain relatively backwards with respect to the legislative and institutional changes described above. There are indications that the average quality level of legal education in Mexico is not good. This is partly attributed to the lack of an effective regulation of the establishment and operation of law schools,[14] as well as to the lack of filters for the access to professional practice. Professional practice, in turn, is characterized by a low level of specialization, by a very marked stratification between a small and dynamic elite and the bulk of professionals who work under precarious conditions; by the existence of weak, fragmented and politicized professional organizations, and by the absence of effective mechanisms for enforcing professional liability.

In sum, the present-day situation of legal education and the legal profession in Mexico operates as an obstacle to the consolidation of the Rule of Law and respect for legality. There are significant indications, however, of an increasing awareness of the role this factor plays in legal modernization, such as the process of accreditation of law schools or the reform of the public institutions that provide legal advice. Nevertheless, these changes are deemed completely insufficient with respect to the demands and expectations of society.

III. Legal Change as a Transition Process

The previous section provided a short overview of the quantitative and qualitative changes that the Mexican legal system has been undergoing in the last decades. A more general analysis and theoretical interpretation of these changes remains to be done. In this sense, there are indications to assume that such changes run still deeper than revealed at first glance. Therefore, we may be actually witnessing a transformation of the functions accomplished by the legal system in Mexican society. An indication of such transformation can be observed in relation to the new role played by the judiciary in public life. In this section, I argue that the recent process of legal change amounts to a "transition" between two models of law.

Taking as a starting point the interrelationship between culture and institutions, I propose a simple model of the legal transition on two levels: the level of *decisions*, and the level of *expectations*. The selection of these two dimensions is not arbitrary, since they incorporate the

[13] SOURCE: Federal Secretariat for Labor (Secretaría del Trabajo y Previsión Social, at <http://www.stps.gob.mx and www.observatoriolaboral.gob.mx>, visited on April 2007).
[14] See Pérez Hurtado (2009).

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central elements of a legal system, i.e., rules, procedures, institutions, legal operators, and legal culture.

The level of political-institutional decisions comprises political decisions in a broad sense, that is, binding collective decisions that result from a specific institutional dynamics, and which can eventually translate into legally binding decisions. The relevant variables are the following: 1) the powers of decision conferred on the competent organs by both formal and informal rules; 2) their degree of independence vis-à-vis other organs; 3) the concentration or dispersion of organs charged with making particular decisions, and 4) procedure.

The level of expectations comprises the expectations of all relevant actors (groups and individuals, including the heads of organs of decision, to the extent that their expectations cannot be attributed to the organ itself) with respect to the process of political-institutional decisions.

The model's unity, i.e., the articulation between both levels, is guaranteed to the extent that a decision is defined as an action responding to an expectations addressed at it,[15] as well as by the existence of procedures aimed at incorporating and transforming expectations in the decisional process. Thus, expectations motivate the production of decisions, and decisions, in turn, influence the reproduction and transformation of expectations. Although the model tends to privilege institutional decisions and, therefore, "official" law, it does not exclude "informal" norms that may be equally if not more effective than "formal" rules. On the other hand, the level of expectations guarantees the articulation of decisions with "social reality", however defined.

The model thus described may be used to explain the trends of the legal transition in Mexico (see Figure 1, below). The purpose is to generalize some aspects identified in the analysis of legal change in Mexico using two "paradigms" that characterize two ideal moments in the process of legal transformation:

Figure 1
Paradigms of the Mexican legal transition

	Paradigm 1	Paradigm 2
Decisions	Concentrated Closed Administrative	Differentiated and plural Open Judicials
Expectations	Interests y favors Evasion Pressure and negotiation	Rights Claims Strict legality
	Domestic	Global

[15] This definition in Luhmann (1988, 278).

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At the level of decisions, Paradigm 1 defines a legal-political system in which only one organ, the Presidency, enjoys undisputable political supremacy and, therefore, directly or indirectly dominates all processes of creation, interpretation and application of the law. Through its political dominance over the Congress, the Presidency operates as a key factor in all constitutional and legislative changes, as well as in the negotiation of international treaties. The President's hegemony impacts on the composition and powers of the judicial organs, and is reflected in a relatively simple governmental structure in which administrative agencies perform a social role that is particularly prominent. Finally, the mechanisms of political control themselves prevent decisions from being public and transparent.

Transition to Paradigm 2 is essentially characterized by the fact that the decisional process becomes more differentiated and plural. The Presidency commands still great influence on the legislative process, but the Congress and other political actors increasingly behave in an autonomous manner through negotiations and agreements among them. By the same token, decisions tend to become open, public, and transparent. At the same time, the judicial process assumes greater relevance as an autonomous arena for social decision-making. Judges become arbitrators in the political decision-making process. The legitimacy of their decisions is predicated on the impartial and rational procedures provided for by the legal system. This is why the judiciary, and particularly the Supreme Court of Justice, has become a central actor in the process of definition and implementation of public policy.

A few recent events in Mexico may serve as an example of this transition. Elections, for instance, have gone from being under the complete dominance of the Executive over the creation and application of electoral rules, to a scenario where a diversity of actors enjoy a considerable degree of autonomy. The Zapatista rebellion in Chiapas in 1994 is another case in point. As we may recall, the Zapatista rebels negotiated several agreements with the federal government, which are known as the Agreements of San Andrés Larráinzar (1996). These agreements were not automatically accepted by the increasingly autonomous legislative bodies, who did not feel constrained by the political, not legal, agreements entered into by the President. This circumstance has motivated the rejection of the constitutional amendments of 2001, even to this day, by some sectors of the indigenous movement.

On the level of expectations, Paradigm 1 is characterized by the indifference or ambiguity of social expectations with respect to the law. Indeed, social actors do not trust legal channels, or are otherwise not used or motivated to have recourse to the law. Instead of legal proceedings, they prefer political pressure as a means of promoting personal and group interests, as well as the exchange of favors. Corruption is also a path that allows and justifies evading legality.

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On this level, a transition to Paradigm 2 implies the redefinition of expectations, which are now decidedly focused on the legal system, at least as an ultimate possibility. Social demands are increasingly clothed in the language of rights. Instead of evading the law, social actors frequently call for the "strict application of the law". Once again, elections provide an example of a social arena in which expectations are increasingly directed towards the legal system.

Lastly, it should be noted that in Paradigm 1 the interplay of expectations and decisions takes place for the most part within the domestic sphere, while Paradigm 2 is subject to the influence of decisions and expectations originated in the international or transnational arenas (in connection with this, elections and the Zapatista movement should be mentioned again).

In sum, the legal transition model reveals, in essence, a process of increasing autonomy of the law vis-à-vis politics. This process does not proceed in a single direction, nor does it imply the abolition of the structural dependence between the legal and the political system. It is not a consummated event, but an ongoing process of plural and unequal developments.

IV. The Role of Comparative Law in Legal Reform

This section briefly explores a significant element of legal reform in Mexico. I am referring to the role played by the comparative analysis of legal institutions, which becomes relevant and even indispensable in moments of innovation and openness towards new legal concepts.

As long as a closed economy and a low-competition political system managed to prevail in Mexico, the legal system operated also under relative isolation with respect to foreign legal developments. Such isolation was further reinforced by what we could call "Mexican legal nationalism", an attitude which was increasingly disseminated from the 1940s onwards and which was consistent with other manifestations of Mexican nationalism, for example in the field of culture (music, cinema, etc.).

In the perspective of legal nationalism, Mexico had historically achieved, especially through the Constitution of 1917, the institutions that were adequate in terms of both its needs and level of development. Thus, it was neither necessary nor convenient to search for foreign legal institutions for the purposes of domestic legal reform. In the same vein, foreign legal concepts and theories should not be used to explain the nature and operation of national legal institutions. It is fairly obvious that this type of nationalism did not sufficiently take into account the fact that even the most genuinely "national" among Mexican legal institutions –the suit of *amparo* – had emerged as a combination of diverse foreign influences, originating mostly in the United States, France and Spain. The merit of Mexican jurists lay precisely in the adaptation of the solutions they believed to be best suited to the problems they faced, without paying much attention to their national origin.

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When the process of social, political and economic change made the modernization of existing institutions and the introduction of new institutions unavoidable, only a handful of Mexican jurists had systematically analyzed some of the institutions that legal reform required, such as electoral courts, judicial review, the *ombudsman* or judicial councils. In an environment that was fundamentally oblivious to foreign legal developments, a group of legal scholars belonging to the Institute of Legal Research of the National Autonomous University of Mexico (UNAM) stands out.

Since its foundation in 1940 by a Spanish professor in exile (Felipe Sánchez Román), the then Institute of Comparative Law of Mexico (this name was changed in 1967) had the explicit aim of contributing to the enhancement of the national legal system through the use of comparative analysis. This perspective may seem evident nowadays, but it was much less than obvious at the time, not only due to the considerable difficulties of having access to foreign legal sources, but also because nationalism was already taking hold of Mexican legal culture. The authorities of the National School of Jurisprudence of UNAM –of which the Institute was a subsidiary until 1948– were well aware of the significance of having an institute devoted to comparative legal studies and, above all, they knew well about "legal nationalism" and its dangers. In his address on occasion of the inauguration of the Institute on May 7th, 1940, Manuel Gual Vidal, then director of the National School of Jurisprudence, pointed out that the foundation of the Institute had to be referred "to the situation of Mexico in the continent, to our relations in spirit, language and legal traditions, and on the other hand, to the fact, proven and painful, that Mexico has been separating itself from the currents of this law". [16] And he went on to say:

> *Mexico not attending the congresses taking place in South America; Mexico not doing studies in comparative law, except for the individual and personal efforts of some comparative scholars; Mexico, despite having the merit of leading this movement, has abandoned the movement itself. And we find it completely isolated, without knowing the legislation of other countries to which we are linked by legal tradition, disoriented by the diverse influences that these countries have experienced. It is therefore a definite and concrete purpose of the Institute of Comparative Law of Mexico to review such problems, to study the law of other countries, but particularly those of the (Latin) American continent, pursuing a trend, but only a trend... towards achieving unification, in each subject matter, of (Latin) American law.*[17]

According to two distinguished socio-legal scholars, Yves Dezalay and Bryant Garth, the Institute was formed by scholars who lacked political and social capital, but who, for this very reason, had

[16] See Gual Vidal (1965).
[17] Gual Vidal (1965).

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decided to invest in "pure law" instead, i.e., the revaluation of law as an autonomous element of the State according to a more technical, open and international perspective in the study of the law.[18] It was at the Institute that began the systematic study of some institutions that had shown a remarkable degree of development abroad in the postwar period, like the *ombudsman*, the judicial council, and constitutional courts. Some of them would be later introduced into Mexican law when reformers realized they were indispensable for the renewal of public life.

Later on, Dezalay and Garth point out that several members of the Institute, belonging to a new, young generation, would go into government at different times:

> *...the Institute of Legal Research used its academic production to gain relative prestige, and its elite status helped attract some of the most talented and ambitious law students, including some of the best connected... a new generation had taken advantage of international events and their investments in law for the purpose of developing a new legal policy within the ruling elite of the state.*[19]

We should ask ourselves at this point whether the intervention of the legal scholars of the Institute of Legal Research in the process of legal change and in the new legal policies displayed a particular orientation. Consider, for example, that members of the Institute participated in the creation, development or reform of the following institutions, among others: the Ombudsman of the National University (1985); the National Commission of Human Rights (1990); the Federal Electoral Court and the Federal Electoral Institute (1990); the Agrarian Superior Court (1992); the Supreme Court of Justice (1987-1994); the Council of the Federal Judiciary (1994); the Federal Institute for Access to Public Information (2002); the National Council Against Discrimination (2004). Furthermore, several researchers or ex-members of the Institute have participated in other important projects of constitutional and legal reform, both at the federal and state levels, including recent reforms in the field of criminal justice ("oral trials").

The majority of institutions and reforms mentioned above have an element in common: *human rights* in a broad sense. Quite apart from the "objective" need to analyze and promote these rights in the contemporary world, if we take into account the authoritarian nature of the prevailing political regime and the ancestral backwardness of the country in this area, in the conscious or unconscious choice of human rights as an instrument of legal policy lies a powerful, legitimate and strategic decision, not only because the discourse on human rights may preemptively disarm any open political resistance on the part of the ruling groups, but also because they naturally belong to a context that transcends the nation-State.[20]

[18] Dezalay and Garth (1995).
[19] Dezalay and Garth (1995).
[20] This is one of the reasons why Dezalay and Garth refer to "international strategies".

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The above considerations are still not sufficient for explaining the significant role played by legal science. Since the Mexican legal transition did not occur by rupture, there emerged the need to legitimate the new legal institutions within the context of the existing legal system and, above all, in the eyes of the old legal actors, who would inevitably be in charge of operating them in a more demanding social environment. This is why legal scholarship becomes relevant, in terms of its role in linking positive laws with broader philosophical and theoretical models. The operational abilities of legal scholars are well appreciated for the same reason. They have not only appropriated these new models, but enjoy the advantage –the legitimacy, in a word– of not being linked to the established interests and practices of the old system.

The overall significance of the professionalization and institutionalization of legal research achieved at the Institute of Legal Research may be fully appreciated in this context. In their particular language, influenced by Pierre Bourdieu (1930-2002), the noted French sociologist, Dezalay and Garth might say that, within the framework defined by the economic and political constraints imposed by globalization, academic capital is transformed into legal-political capital, a form of capital that confers upon its owners a level of influence in correspondence with the ruling elite's need to regain, through the law, a portion of their lost legitimacy.

This should make it fairly clear why it is important to institutionalize a mode of reflection which is capable of exploring the horizons and trends of legal change in a particular country and the world at large. Comparative analysis is, in the end, a vital factor that serves to keep the legal system open at all its levels.

V. The Rule of Law in Mexico and China

At the end of his paper, Professor Li identifies the struggle for the Rule of Law as a crucial struggle for the future development of China.[21] The same applies to Mexico, where respect for the Rule of Law and legality has become a recurring topic of public discourse and the public's expectations.[22] Many scholars approach the presence or absence of the Rule of Law in countries such as Mexico and China from the ideal perspective of the Western model prevailing in developed countries. It should come as no surprise, therefore, that their assessment turns out to be negative in most instances. Certainly, whenever particular cases and situations are examined, it can be ascertained whether certain rights or standards recognized in the domestic law of a country, or accepted by the

[21] Li (2008). On the recent introduction of the concept of Rule of Law in the Chinese Constitution and the program of the Chinese Communist Party, see Backer (2006). See also generally Perenboom (2002).
[22] The concept of Rule of Law has occupied a central place in the last three versions of the *National Development Plan* (1995-2000, 2001-2006, and 2007-2012).

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international community, have been respected or not. But to pronounce a global judgment turns out to be much more risky, not only because different conceptions of the Rule of Law exist, but also because the historical, social, political and cultural context should also be taken into account. In light of this perspective, the considerable efforts at legal modernization undertaken by both Mexico and China during the last decades should be duly noted.

In order to be able to make an adequate comparative assessment of the reality and challenges of the Rule of Law in Mexico and China, in the following sections I consider this issue from three interrelated angles: 1) the contribution of the legal system to economic development; 2) the affinity of the Rule of Law with particular cultural values; and 3) the contribution of the legal system to the legitimacy of the governance system of a country.

Rule of Law and Economic Development

One of the most debated issues during the past decades concerns the role of law and legal institutions in economic development. The international development agencies like the World Bank and the Inter-American Bank for Development have expressly introduced the concept of Rule of Law in their policies and projects as an indispensable factor for economic development. The underlying idea is that the legal system's function is to provide legal certainty for the fulfillment of contracts, as well as for the protection of property rights. Both elements are required for the purposes of the long-term development of trade and investment.

This view on the role of the legal system in economic growth and development finds its theoretical underpinning in Max Weber's assertion that capitalism (market economy) requires a rational legal order that provides certainty and calculability in economic exchange. Moreover, Max Weber thought that, with the relentless onslaught of the market, modern rational law, supported by the legitimate monopoly on violence in the hands of the State, would tend to displace or destroy those particularistic social orders that had been the source of economic certainty in traditional societies.[23] Recently, the new institutional economics has underlined the significance of institutions, both formal and informal, as a factor that helps explain economic performance over time.[24]

Some countries in East Asia, like China and Japan, seem to contradict the preceding assumptions, and particularly Max Weber's hypothesis on the ultimate predominance of modern rational law.[25] Both countries have achieved a spectacular level of economic development without an equivalent degree of development of their formal legal institutions, as we can find in Western

[23] Weber (1967). Obviously, the relationship between law and the economy are much more complex. Weber himself points out that the law and the economy enjoy mutual autonomy in modern society. A fundamental consequence, in his view, is that the capitalist market economy is compatible with different types of law.
[24] North (1990).
[25] On the current debates on law and economic development, see Gessner (2009).

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advanced capitalist nations. Moreover, it has been even asserted that social and cultural mechanisms which frequently give support to economic exchange, like reciprocal relations of friendship and trust (*guanxi*) or Confucian ethics, are more effective and better adapted to the context of the global economy than the Western-type of legal rules.[26] In this sense, the notion of an "Asian exceptionalism" has been even put forward. Socio-legal research, however, has demonstrated that formal legal institutions are avoided, to a larger or lesser degree, in all societies, regardless of their level of economic development, and that non-state or private mechanisms (for example, so-called "private legal systems") are preferred as a source of certainty for economic exchange. In any case, law is seen mostly as a means of last resort.[27]

Thus, while it is true that China and Japan have followed a different path as compared with other economically developed nations, due to certain particular elements in their respective cultural and legal traditions,[28] their consideration as anomalous or even exceptional examples is not warranted either. In fact, there are indications that the role played by the formal (modern) legal system in China is on the rise. First, links to investors and traders abroad have necessarily led to the enactment of modern economic laws that channel and facilitate exchange, as required by each stage of development and according to a pragmatic approach. Second, there are indications that common citizens are also taking advantage of formal legal institutions. Litigation before the courts has multiplied several times since 1978, and large efforts are being made at present in terms of judicial modernization and reform.[29] Nevertheless, a recent study examining three dimensions of the role of law in Chinese economic development –property rights, commercial contracts and corporate governance– comes to the conclusion that even if law plays an increasing role, formal legal institutions have not yet decisively contributed to the enormous success of the Chinese economy.[30]

In the case of Mexico, we lack specific empirical studies on the role of law in economic development. We know that the population has traditionally had little access to formal institutions. For this reason, informal arrangements have played a central role in the production of certainty for social exchange.[31] However, and similarly to China, the opening up of the economy has prompted the enactment of modern laws regulating trade and investment. Such laws are being effectively used by both domestic and foreign economic agents. Data on the expansion of the judiciary, litigation

[26] Appelbaum (1998).
[27] The literature related to this issue, including empirical studies, is already enormous. See the classical study by Macaulay (1963). For an example of a "private legal system", see Bernstein (2001).
[28] See Haley (2006). Haley claims that the two main differences between the Western and the Asian legal tradition is the absence, in the latter, of a private law tradition (although this is less true of Japan) and of the idea of natural law as a valid law that forms a part of the legal tradition itself.
[29] See Landry (2008).
[30] Clarke, Murrell and Whiting (2006).
[31] See Gessner (1977). This study refers to an empirical investigation carried out in Mexico in 1969-1970, but its results may be still largely valid today.

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rates, legal education and the legal profession are also indicators of a growing orientation of social expectations and behaviors toward the formal legal system, as compared to previous periods.

In sum, the cases of Mexico and China may still come, in the long run, to confirm Weber's assertion of the need of a rational and calculable legal order, supported by state power, for the development of the capitalist market. However, such system does not necessarily have to follow a single legal model or tradition, nor does it have to emerge as a unified order. Finally, formal law will not be the only factor giving certainty to economic exchange relations.

Rule of Law and Culture

In a previous section we have put forward the notion that differences in the level of development of a modern legal system in Asian societies, like China and Japan, is due to particular cultural factors. This argument would turn out to be trivial had it not triggered an intense debate on the impact of these cultural factors on the present and future possibilities of establishing the Rule of Law according to a Western conception.[32] Several essays and studies examine the Chinese perspective on the role of the individual in society, the ethical and cultural views underlying certain legal practices, the existing notion on property and rights. Their aim is to determine whether it is possible to conciliate the respective Chinese views with Western notions of the Rule of Law in particular economic spheres, such as intellectual property rights (patents, trademarks, etc.).[33]

The cultural argument has to be dealt with exercising extreme caution. First, there is always a risk that cultural causes are used to explain whatever can more easily be attributed to institutional effects.[34] Second, there is also a danger of conceiving of culture as a kind of residual explanation or "black box" whenever other explanations of social behavior fail.[35] We should accept, on the contrary, that institutions and culture are related to each other in a circular fashion: thus, institutional policies may transform into cultural practices which, in turn, mold and channel institutional structures and behavior. This is what John Haley means when he argues that culture may reflect rational choices over time.[36] In a context of rapid social change, institutions seem to dominate. As rational and organized structures, they enjoy the advantage of responding to deliberate change and policies. In a second moment, it is likely that new institutional practices are further

[32] See, for example, Chew (2005) and Mayeda (2006); from an Australian perspective Sheehy (2006).
[33] See Miller II (2004) and Wei (2008).
[34] A good example is the low litigation rates observed in Japan after the end of World War II. While some scholars explain this phenomenon in terms of a kind of "legal consciousness" adverse to litigation, other authors have shown the existence of institutional barriers and deliberate governmental policies designed to discourage the use of the courts. In some cases there are actually cultural influences at play, as for example the social shame that comes from displaying in public certain physical deformities when taken before a court. See Haley (2006).
[35] Haley (2006).
[36] Haley (2006).

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molded and adjusted by the cultural environment. This apparent return to the past, however, does never reach the same point of departure.

In light of the above considerations, it should be fairly clear that China's dual legal tradition –the "legalist" tradition and the Confucian school– poses particular challenges to the establishment of the Rule of Law. Nevertheless, we may take it also for granted that none of these schools is able to sustain alone, and by itself, a modern legal system and culture that are well adapted to the needs of the global economy. This is why China will have to find ways to combine both traditions and, at the same time, promote their transformation through policies aimed at institutionalizing a Rule of Law with enhanced levels of professional performance and technical sophistication.

With respect to Mexico, it is much less evident that the obstacles faced by the Rule of Law are of a cultural nature, if we understand culture as a positive set of shared values, beliefs and attitudes. Notwithstanding the view entertained by some Mexican anthropologists, like Guillermo Bonfil Batalla, about the existence of a "deep Mexico" that is to be considered as the culturally true and genuine Mexico,[37] I do not observe in the general population –with the possible exception of indigenous peoples– an alternative legal culture to the Western-type Rule of Law. Opinion polls reveal that a group of citizens –oscillating between the 25% and 40% of respondents– displays a consistent commitment to the values of legality and the Rule of Law. The rest of the population is ready to disregard or disobey legal rules, some for moral reasons (for example, if injustice is not undone), but most display just opportunistic motives (for example, fear of being caught and punished).[38] Nevertheless, this is good news, because it the latter group clearly responds to rational incentives, it means these incentives can be altered. It is not surprising, therefore, that the public debate on the Rule of Law in Mexico has strongly turned around institutional issues, not culture.

Perhaps the debate on the influence of cultural factors on the Rule of Law could take a more fortunate turn if we made a distinction between "Western" and "modern" legal culture.[39] Although the latter contains many elements of the former, modern culture is broader, distinct and, in some respects, opposite to Western culture. No one would dispute that China does not belong to Western culture, and there might be some doubts that Mexico is to be counted among Western nations, but it is fairly evident that both countries are modern, or on the road to modernity: a modernity that is arguably incomplete and unequal, but modernity it is, nonetheless.

[37] Bonfil Batalla (1987).
[38] See, among other studies, Beltrán et al. (1996) and Concha et al. (2004).
[39] Of course, much depends on the definition of modernity used. Lawrence M. Friedman (1999) finds that modern society –which he calls the "horizontal society", where individuals are increasingly free to choose the elements of their own identity– does not coincide with traditional Western values and traditions.

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Rule of Law and Legitimacy

The most glaring difference between the legal evolution of Mexico and China may be found in the dimension of legitimacy. If we consider the case of Mexico, we can easily conclude that the production of political legitimacy has been transferred, to some extent, to the legal system, in general, and to the judiciary, in particular. Law displays specific values –like fairness, rationality, procedural justice, depoliticization– that increasingly helped compensate the process of decay in the legitimacy of the Mexican post-revolutionary regime that began in the late 1960s. Thus, popular elections could become the new source of legitimacy of political authority only the regime managed to institutionalize them according to the values, principles and procedures of the law, i.e., when the organization of elections and the resolution of electoral disputes, were entrusted to special public authorities generally regarded as fair and independent. This development is of enormous significance for both the potential and the limits of the Rule of Law in Mexico in the next years.

With respect to China, the legitimacy of its system of government is not based on the formal legal order, which is not considered to be supreme over political authority. The central role of the Chinese Communist Party in the representation and mobilization of the interests of the *whole* society prevents the possibility of assigning legal institutions an arbitral function that is only meaningful in the presence of interests that are openly contradictory. Therefore, law is viewed exclusively as an instrument that may be used, alongside others, for the purpose of achieving particular public policies. To the extent that such aims are realized, the instruments that have proven to be effective may play a limited role as factors of political legitimacy. However, the introduction of values such as the Rule of Law and human rights in the Chinese Constitution of 1982 is a novelty that may have an independent effect on the interaction among governmental authorities, between such authorities and the Chinese Communist Party, and between all the latter and the citizenry.[40]

VI. Conclusion

In the preceding sections we have found that there are significant differences between Mexico and China in three fields –economy, culture, and legitimacy– related to the concept of the Rule of Law. From a broader perspective, we may conclude that a "legal transition" like the one we have described in the Mexican context does not appear to be developing at present in China, notwithstanding the increasing significance of the notion of Rule of Law –its incorporation into the Chinese Constitution of 1982 is a clear indication of this – and the fact that citizens are taking

[40] See the enthusiastic but somewhat premature reaction of Killion (2005).

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advantage, more and more, of the formal legal system. Of course, this does not mean that China should, or should not follow a similar path in the future.

In his paper, Professor Li insists that the Rule of Law in China will necessarily possess its own characteristics, but he equally points out that the Chinese legal system should incorporate the experiences of Western countries and developing nations.[41] We believe we have managed to show in this paper that, beyond the difference sketched above, significant convergences between Mexico and China can be identified in their recent legal evolution. This should allow jurists in both countries to open a fruitful exchange of opinions and experiences.

VII. Bibliography

- Asociación Nacional de Universidades e Instituciones de Educación Superior (1979-2004). *Anuarios estadísticos. Población escolar de licenciatura en universidades e institutos tecnológico*. México City: Author.
- Appelbaum, R. P. (1998). The Future of Law in a Global Economy. *Social and Legal Studies*, 7(2), 171-192.
- Backer, L. C. (2006, Fall). The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The Three Represents), Socialist Rule of Law, and Modern Chinese Constitutionalism. *Transnational Law and Contemporary Problems*, Vol. 16, 29-102.
- Beltrán, U. et al. (1996). *Los mexicanos de los noventa*. México City: UNAM.
- Bernstein, L. (2001). Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions. *Michigan Law Review*, Vol. 99, 1724-1788.
- Bonfil Batalla, G. (1987). *México profundo. Una civilización negada*. Mexico City: Grijalbo-CONACULTA.
- Cantú, C., Hugo A. et al. (2004). *Cultura de la Constitución en México. Una encuesta nacional de actitudes, percepciones y valores*. Mexico City: UNAM-TEPJF-COFEMER (available at www.bibliojuridica.org).
- Chew, P. K. (2005). The Rule of Law: China's Skepticism and the Rule of People. *Ohio State Journal on Dispute Resolution*, Vol. 20, 43-67.

[41] Li (2008).

DR © 2012, Instituto de Investigaciones Jurídicas e Institute of Law, Chinese Academy of Social Sciences

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx http://biblio.juridicas.unam.mx

- Clarke, D., Murrell, P. & Whiting, S. (2006). *The Role of Law in China's Economic Development*. Washington, DC: The George Washington University Law School (Public Law and Legal Theory Working Paper No. 187, available at http://ssrn.com/abstract=878672).
- Cossío Díaz, J. (1996). *Jurisdicción federal y carrera judicial en México*. México City: UNAM (available at www.bibliojuridica.org).
- Dezalay, Y. & Bryant, G. (1995). *Building the Law and Putting the State into Play: International Strategies among Mexico's Divided Elite*. Chicago: American Bar Foundation (ABF Working Paper 9509).
- Fix-Fierro, H. (2003). Judicial Reform in Mexico: What Next? In Jensen, E. G. & Heller, T. (eds.), *Beyond Common Knowledge. Empirical Approaches to the Rule of Law* (pp. 240-289). Stanford: Stanford University Press.
- ---------- & López Ayllón, S. (2005). Legal Professionals Aplenty, But No Legal Profession? Law and Lawyers in Contemporary Mexico. In Felstiner, W.L.F. (ed.), *Reorganisation and Resistance. Legal Professions Confront a Changing World* (pp. 237-279), Oxford-Portland: Hart Publishing.
- Friedman, L. (1999). *The Horizontal Society*. New Haven-London: Yale University Press.
- Gessner, V. (1977). Forms of Dispute Settlement in Mexico. An Example of the Empirical Assessment of the Effectiveness of Law. In Blegvad, B. M,. Campbell, C. M. & Schuyt, C. J. (eds.), *European Yearbook in Law and Sociology* (pp. 53-70). The Hague: Martinus Nijhoff.
- ---------- (2009). Towards a Theoretical Framework for Contractual Certainty in Global Trade. In Gessner, V. (ed.), *Contractual Certainty in International Trade. Empirical Studiess and Theoretical Debates on Institutional Support for Global Economic Exchanges* (pp. 3-27). Oxford-Portland: Hart Publishing.
- Gual Vidal, M. (1965). Speach of Manuel Gual Vidal, Director of the National School of Jurisprudence, at the inauguration of the Mexican Instituto of Comparative Law on May 7, 1940. In Alcalá-Zamora y Castillo, N. (ed.), *XXV. Aniversario del Instituto de Derecho Comparado de México (1940-1965)* (pp. 137-140). Mexico City: UNAM (available at www.bibliojuridica.org).
- Haley, J. O. (2006, spring). Law and Culture in China and Japan: A Framework for Analysis. *Michigan Journal of International Law*, 27(3). 895-915.
- Killion, M. U. (2005). China's Amended Constitution: Quest for Liberty and Independent Judicial Review. *Washington University Global Studies Law Review*, Vol. 4, 43-80.

DR © 2012, Instituto de Investigaciones Jurídicas e Institute of Law, Chinese Academy of Social Sciences

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx http://biblio.juridicas.unam.mx

- Landry, P. (2008). The Institutional Diffusion of Courts in China: Evidence from Survey Data. In Ginsburg, T. & Moustafa, T. (eds.), *Rule by Law. The Politics of Courts in Authoritarian Regimes* (pp. 207-234). Cambridge-New York: Cambridge University Press.
- Li Lin (2008). El derecho chino y el derecho mexicano desde una perspectiva comparada. In Oropeza García, A. (coord.). *México-China. Culturas y sistemas jurídicos comparados* (pp. 51-96). México City: UNAM-AAADAM-Agentes Aduanales de Tijuana y Tecate-Asociación de Agentes Aduanales de Nuevo Laredo.
- López Ayllón, S. (1995): Notes on Mexican Legal Culture. *Social and Legal Studies*, 4(4), 477-492.
- ---------- & Fix-Fierro, H. (2003). 'Faraway, So Close!' The Rule of Law and Legal Change in Mexico, 1970-2000. In Friedman, L. & Pérez Perdomo, R. (eds.), *Legal Culture in the Age of Globalization. Latin America and Latin Europe* (pp. 285-351). Stanford: Stanford University Press.
- Luhmann, N. (1988). *Die Wirtschaft der Gesellschaft*. Frankfurt: Suhrkamp.
- Macaulay, S. (1963, February). Non-Contractual Relations in Business: A Preliminary Study. *American Sociological Review*, 28 (1), 55-67.
- Mayeda, G. (2006, Autumn): Appreciate the Difference: The Role of Different Domestic Norms in Law and Development Reform; Lessons from China and Japan. *McGill Law Journal*, Vol. 51, 578-579.
- Miller II, C. (2004, Summer). A Cultural and Historical Perspective to Trademark Law Enforcement in China. *Buffalo Intellectual Property Law Journal*, Vol. 2, 103-126.
- North, D. (1990). *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press.
- Perenboom, R. (2002). *China's Long March Toward Rule of Law*. New York: Cambdrige University Press.
- Pérez Hurtado, L. (2009, January-June). An Overview of Mexico's System of Legal Education. *Mexican Law Review*, new series, I(2), 53-89 (available at www.bibliojuridica.org).
- Sarre, M. & López Ugalde, A. (2002, August). Administración de Justicia en México. Indicadores en materia mercantil e hipotecaria. *Este País*, No. 138. Mexico.
- Sheehy, B. (2006, Winter). Fundamentally Conflicting Views of the Rule of Law in China and the West & Implications for Commercial Disputes. *Northwestern Journal of International Law and Business*, Vol. 26, 225-266.

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Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx http://biblio.juridicas.unam.mx

- Weber, M. (1967). *Max Weber on Law in Economy and Society*. Edition by Edward Shils and Max Rheinstein. New York: Clarion.
- Wei Shi (2008, Spring). The Paradox of Confucian Determinism. Tracking the Root Causes of Intellectual Property Rights Problem in China. *John Marshall Review of Intellectual Property Law*, Vol. 7, 454-468.

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