

**Article: “The Origins and Rationality of the “Legal versus Legitimate”
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The Origins and Rationality of the “Legal versus Legitimate” Dichotomy Invoked in Mexico’s 2006 Post-Electoral Conflict

Months after Mexico’s independent electoral institute had validated the July 2, 2006, presidential elections, and weeks after the autonomous electoral court had certified National Action Party (PAN) candidate Felipe Calderón as president, runner-up Andrés Manuel López Obrador continued to cry foul. Days before the court’s final September 5 ruling, López Obrador (known widely as “AMLO”), representing the Party of the Democratic Revolution (PRD) and the Coalition for the Good of All, decided to disband the mobilizations blocking some of Mexico City’s main transportation arteries, but to continue protesting indefinitely, and to name a “shadow cabinet,” to press Calderón. López Obrador lost the election by a hair (a mere 233,831 votes, out of over 41,700,000 cast—the final certified number after electoral court rulings), but he did lose, and in a “free and fair” contest¹ organized by one of the world’s

more respected electoral institutions.

What rational explanations might justify López Obrador’s continued intransigence? What does it say about the

state of democracy in Mexico, where “loser consent,” a critical standard of democratic elections, as famously claimed by Adam Przeworski (1991) and others (Nadeau and Blais 1993; Anderson et al. 2005), did not apply? This article argues that López Obrador’s continued contestation, first by mobilizing hundreds of thousands of supporters, and more recently through non-recognition of President-elect Calderón, is rational, but only when viewed through the lens of post-electoral conflicts prevalent during the thousands of local elections that constituted Mexico’s protracted and centripetal democratization in the 1980s and 1990s.

Losing at the Polls While Winning in the Smoke-Filled Rooms: The Logic of *Concertación* Post-Electoral Bargaining

During Mexico’s protracted transition to democracy, scores of post-electoral conflicts were settled via informally negotiated *concertaciones*, or “gentleman’s agreements.” Invoked

in nearly a dozen national high-profile cases—and scores of lesser ones—during the 1990s, these informal bargaining tables became the principal arena of negotiation between the long-ruling Institutional Revolutionary Party (PRI) and its oldest opponent, the right-of-center PAN. The PAN—and in a few cases, the PRD—usually lost in the PRI-state’s famously corrupt elections, but got something back—an interim mayorship or at the very least a proportional representation city-council seat—in exchange for continued participation. The electorate’s preferences were put aside, as mayors- and governors-elect resigned, under pressure from the PRI, to make way for negotiated “interim” executives from the deals struck.

Concertaciones (referred to as the *segunda vuelta* or “second time around,” by the PRD)² operated at the margins of—and in lieu of—formal institutions designed to resolve electoral disputes (see Eisenstadt 2006, 237 for table with examples of some major *concertaciones*). The demand for informal post-electoral bargaining tables was driven by the poor reputations of formal electoral and judicial institutions (deserved in most cases), as well as by PRI and PAN leaders’ recognition that informal institutions offered them flexibility to tailor electoral outcomes to the parties’ mutual needs. Once the PRI and PAN learned of the discretion afforded them by the informal institutions, without any of the inflexible legalism or transparency required by formal institutions, *concertaciones* supplanted formal electoral institutions for a decade. At a time when electoral courts were still widely viewed with suspicion, they provided politicians with temporary solutions flexible enough to accommodate national and local circumstances. Over a thousand post-electoral conflicts occurred between 1989 and 2000, although they have diminished markedly in the twenty-first century, except in the still-conflictive state of Oaxaca.³

The PRI and the PAN shared these implicit agreements between about 1989 and 1996, but they left out the PRD. While the PRD and other left-wing parties were involved in hundreds of post-electoral conflicts during Mexico’s democratic transition,⁴ the PRI, whose strategy was to co-opt the conservative PAN and repress the left, utterly refused to engage PRD national leadership (although

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AMLO's movements were a partial exception). In any case, the national PRD lacked the discipline to deliver the compliance of its local activists. Hence, it was the PAN, which prioritized regional governance positions in its centripetal strategy to achieve national governance in the longer term, that benefited from *concertación*. PAN leaders readily undermined formal institutions through the late 1990s, but with the zealous belief that by accepting "partial restitution" of electoral injustices, they could pave the way later for truly autonomous and transparent electoral institutions (Eisenstadt 2004, 177–9). Some moralistic PANistas acknowledged the contradictions between *concertación* and representative democracy, and they ended the practice immediately upon taking power.

Among his first important presidential acts, President Vicente Fox insisted in 2000 that the era of *concertación* was over; that elections (and the resulting spoils) would be decided by vote tallies only, without regard to the losing parties' mobilization capacities or legislative blackmail potential. PRI negotiators seeking to "trade" the Jalisco governorship they narrowly lost to the PAN for the "good behavior" they expressed by certifying Fox's presidency without complaint acknowledged after the 2001 federal electoral court ruling against them that they had mistakenly labored under the *quid-pro-quo* assumptions of *concertación* (Eisenstadt 2004, 252). Refusing to dictate terms from the center in Tabasco's 2000 post-electoral conflict, Fox declared instead: "This is an issue for Tabasco to decide and not for the Federal Executive. . . . Other presidents were accustomed to doing that [interfering with states' political matters], but it is not happening now" (cited in Eisenstadt 2004, 248 fn 16). Fox reiterated his non-interventionist position in Yucatán's 2001 post-electoral conflict, where the PRI-majority legislature sought to bully the federal Interior Secretariat into imposing a "rubber-stamp" electoral commission to represent PRI "dinosaur" Governor Victor Cervera Pacheco's hand-picked aspirant, although a federal electoral court ruling restrained the governor and his party. Strong enough to gain national public office without the assistance of informal bargaining tables, and possessing electoral commissions and courts with the credibility to act as genuine third-party enforcers, the PAN and Fox disbanded the informal institution of *concertación*—that is, until AMLO tried to resurrect it in 2006.

The PAN, the PRD, and AMLO's Rise through Post-Electoral Conflicts

AMLO claimed the 2006 election was the most important since 1910, when Francisco I. Madero deposed more than three decades of dictatorship by Porfirio Díaz and launched the Mexican Revolution with the slogan: "Effective suffrage; no re-election!"⁵ However, a much more accurate referent for the left was 1988. The 1988 presidential election was so fraudulent that even with vast majorities in both legislative chambers, the PRI-state needed PAN complicity in the Electoral College (the lower chamber of Congress) to ratify President Carlos Salinas' victory without extreme embarrassment. The president-elect, in need of PAN support against PRD challenger Cuauhtémoc Cárdenas, signed a letter of intent with the PAN promising to enact the

PANista-backed electoral reforms in exchange for his opponents' complicity in certifying the 1988 election. While the PRD only joined the PAN's enduring electoral reform crusade—halfheartedly—years later, the PAN seized its opportunity in 1989 not only to push its legislative agenda, but also to force Salinas to—in effect—rescind local PRI victories and throw them to the opposition (Eisenstadt 2004, 176).

The PAN's escalating costs of cooptation were also driven by the PRI's need to re-establish its lost two-thirds majority in the Chamber of Deputies, required to pass constitutional reforms. In addition to needing a coalition partner and a legitimizer from the opposition, Salinas also was said to dislike Cárdenas, thought by most to have been stripped of victory in 1988, despite official certification of Salinas' victory by 51% to 31%. The PRD's 1995 insistence that successor Ernesto Zedillo resign so that the PRD might lead a "government of national salvation" alienated them from Zedillo. Cárdenas' non-recognition of Zedillo (elected much more convincingly than Salinas) offers the most recent parallel to AMLO's non-recognition of Calderón. Cárdenas abandoned this anti-regime opposition, however, after an internal battle, and in 2006 declared his support, against AMLO, for certifying Calderón.

López Obrador was a Cárdenas ally in 1988, when he was recruited by the National Democratic Front (soon-to-be PRD) as its gubernatorial candidate in Tabasco's November 9 election. López Obrador lost that rigged election, and the PRD fared poorly in Tabasco's 1991 municipal elections. However, taking a page from the PAN, López Obrador sought recognition of three PRD Tabasco municipal wins, and when preliminary negotiations with President Salinas' Interior Secretary failed, he and hundreds of supporters marched from Tabasco to Mexico City in protest. Arriving at Mexico City's central plaza just before the January 1992 signing there of the El Salvador peace accord, AMLO (by his own admission in López Obrador 1995, 122–6) received favorable "resolutions" from the Interior Secretary to all three Tabasco petitions, plus three from neighboring Veracruz.

In 1994, President Zedillo also offered AMLO a *concertación* in the aftermath of AMLO's second fraud-ridden Tabasco gubernatorial election. As per the Salinas years, Zedillo's Interior Secretary and the national PRI engaged local PRIista-turned-opponent

López Obrador to end two months of PRD oil field blockages and street protests. AMLO again set off from Tabasco for Mexico City on another march timed to arrive at another inopportune moment for the PRI-state: Zedillo's December 1 inaugural (López Obrador 1995, 170). The Tabasco PRI had violated campaign spending limitations with impunity and committed flagrant Election-Day "engineering" (including a mysterious blackout of the vote-tallying computer, which turned back on with 4% fewer votes cast; see Eisenstadt 1999, 281). The PRD never expected electoral justice, but López Obrador, taking a cue from the PAN, explained: "Whatever we do, it will be construed as acting outside the law, so we must proceed through strict legal channels [in addition to extra-legal channels] to avoid these criticisms. We must follow this legal course, even as we mobilize citizens, knowing that it [the law] does not work" (cited in Eisenstadt 2004, 112). The Tabasco *concertación* ultimately failed, as word of the negotiation was greeted



A cornered federal electoral court (TRIFE) judge clutches a ballot box containing a "vote" extinguisher, presumably for the political pressure "time bomb." The sign on the wall reads, "In case of social discontent, break the urn [black box]." Courtesy of Jaime Sifuentes and Reforma Newspaper.

in Tabasco by riots led by local PRI leaders. This “Rebellion of the PRI” threatened widespread violence and Zedillo rescinded the forced resignation of Governor-elect Roberto Madrazo, who had been offered a cabinet position in exchange for his sacrifice (Eisenstadt 1999, 285–7). The episode marks the beginning of the end of PRI hegemony, as Zedillo proved unable to control the PRI’s Tabasco minions; it was an influential moment in López Obrador’s career.

The Tabasco 1994 post-electoral conflict, although thwarted, helped propel AMLO to the national presidency of the PRD, moving the social movement leader/politician to Mexico City in 1996, where he was elected mayor in 2000, after a mobilization of supporters helped his campaign circumvent eligibility restrictions. His mayoral term was also marked by mobilizations for desired policies, sometimes beyond the limits of the law. In his populist turn as Mexico City mayor, AMLO conducted over a half dozen plebiscites (Grayson 2006a, 211) and implemented over a dozen targeted welfare programs (Grayson 2006a, 212–3), some with electoral purposes clearly in mind. Still, it bears mention that AMLO’s accomplishments as mayor were considerable, the corruption taint in his administration never reached the top, and AMLO left office as perhaps Mexico City’s most beloved mayor in some time.

In addition to implementing popular measures, López Obrador also helped bolster his political future through continued mobilization of his supporters. With his 2006 candidacy jeopardized in 2005 by lawsuits over his mayoral administration’s expropriation of land without due process to construct a hospital access road, AMLO countered federal investigations with mass mobilizations. Indeed, the Fox administration’s effort to depict López Obrador as a lawbreaking radical in this controversy backfired, as AMLO again adopted the comfortable underdog role. AMLO’s earlier challenges of “kangaroo” electoral courts in Tabasco and the blatantly politicized federal allegations during his Mexico City mayoral election and administration were validated by the obvious lack of credibility of the legal channel institutions available. However, Mexico’s federal electoral institutions had been given independence and fortitude, removing such doubts about their legitimacy in 2006, although AMLO made similar claims.

How AMLO Framed the 2006 Election

While most observers argue that the Federal Electoral Institute’s (IFE) collective decision-making and professionalized bureaucracy and structure are conducive to administering free and fair elections, the PRD leadership and the López Obrador campaign repeatedly alleged otherwise—months before the election. The PRD leadership continued to complain that the nine IFE ombudsmen citizen counselors were selected in 2003 without PRD support, which was a break from the past, when the IFE policymakers had been selected consensually by the three largest parties. Yet, a systematic study of IFE General Council votes for a decade ending just prior to the 2006 election (including several years of votes by the “new” IFE) found no partisan bias (see Rosas, Estévez, and Magar 2005).

The IFE’s “sin of origin,” as the PRD refers to its exclusion from the process, was cited well in advance of the election as justification for contesting the entire electoral process in the

event of a narrow PRD loss. PRD President Leonel Cota’s retention of the Mexican office of the Brazilian Institute of Public Opinion and Statistics (IBOPE) to systematically document all parties’ national television advertising spots was seen as an indication that the party was gathering evidence of a non-level playing field. In another controversy, AMLO’s Coalition complained last spring that Calderón’s ads were impugning his character with outright lies, and although in a divided decision the IFE originally took a more moderate stance to avoid censoring campaign advertising, the electoral court forced the IFE to remove objectionable PAN ads. This prompted the IFE to intervene and censor spots both from the PRD and the PAN for “smearing” competitors without evidence.

In contesting the 2006 presidency, AMLO ignored Fox’s dismantling of the *concertación* bargaining tables in 2000 and 2001. Possessing a razor-thin margin of defeat, the first prerequisite for a *concertación*-stimulating post-electoral conflict, López Obrador harkened back to this practice, and to the rhetoric accompanying it. However, he erroneously generalized from the regime’s historical moment of the 1980s and 1990s to conclude that such deals could be negotiated at high levels by opposition parties besides the PAN, and with a ruling party that was not the authoritarian PRI. Recall that *concertaciones* were rarely extended to the PRD, but that López Obrador had been an exception after the fraudulent 1991 and 1994 Tabasco elections, until, in 1994, PRI state legislators disobeyed President Zedillo and refused to sacrifice Roberto Madrazo’s governorship for a cabinet secretariat.

AMLO framed the 2006 controversy in historic proportions, recalling the historical injustices of 1988, and—in a conceptual stretch—the 1910 Mexican Revolution itself. By lumping the 2006 contest with pre-1997 refusals by the then-authoritarian Mexican government to recognize the left’s electoral victories, and especially the documented 1988 massive fraud against Cuauhtémoc Cárdenas, López Obrador tried to recapture the rampant citizen suspicion of that earlier era. Invoking that era’s conspiracy theory (justified then, but ungrounded in the post-1996 era of free and competitive elections and autonomous electoral institutions), AMLO threatened to renew the cycle of fraudulent-elections-leading-to-rebellion characterizing Mexico’s pre-Mexican Revolution history if his victory went unrecognized. Brandishing an inconclusive, out-of-context video as proof of fraud, he chastised opponents and doubters. His successful agitations for political opening in Tabasco occurred in the 1990s, a time when street demonstrations had much more effect than legal petitions; these tactics were out of date in 2006.



At a crossroads, wistful candidate Calderón waits endlessly for the electoral court (TRIFE) hourglass to empty while an acrobatic López Obrador tries to light a fire under the soon-to-be president-elect’s tightrope of support. Courtesy of Paco Calderón and Reforma Newspaper.

The 2006 Challenges to Mexico’s Credible Electoral Institutions

In 1996, constitutional reforms further bolstered the autonomy of the IFE and gave the federal electoral court jurisdiction over appeals of local electoral disputes; in 2000, Mexico was lauded internationally for its smooth and peaceful transition to its first non-PRI president since well before World War II. The country’s Election Management Bodies (EMBs) were roundly

praised, with IFE Council General “gurus” sent on international missions, such as to help design Iraq’s interim electoral system, while the magistrates of the Electoral Tribunal of the Judicial Power of the Federation (TEPJF) became globetrotting celebrities whose perspectives were widely sought. The cost of electoral transparency in Mexico was high; the two EMBs in the election years of the 1990s absorbed more funds from Mexico’s public budget than the judicial and legislative branches combined (see Eisenstadt and Poiré 2005). But Mexicans were justifiably proud of their great success in converting one of the most fraudulent electoral systems in the world to one of the cleanest in less than a decade, and with few exceptions, the institution’s image carried forward to 2006.⁶

The PRD’s post-electoral complaint was typical of those commonly filed in the elections of the 1990s, indeed, harkening back to 1994, when the PRD filed hundreds of groundless allegations with the intent of undermining the election in the “court of public opinion” despite strategists’ own realizations that they had little to show as evidence in the court of electoral law (Eisenstadt 2004, 80–3). AMLO’s complaint rebuked the entire electoral process based on the lack of a level playing field of party finance, accused President Vicente Fox of actively campaigning for Calderón, and charged the federal government with “buying votes” by tying the provision of social services to partisan support. It also made routine procedural claims: that the IFE manipulated the preliminary results program (PREP), botched district-level vote tallying and reporting, and mysteriously replaced poll-station workers at the polls and prior to Election Day.

Critics outside the PRD did raise concerns. Alianza Cívica (2006, 2), a non-government electoral watchdog, identified party finance⁷ and “vote buying” as the greatest remaining obstacles to electoral transparency, which the group said otherwise had made great advances in the 2006 election overall. Their evidence, based on an exhaustive survey of 11,562 citizens in the two months preceding the election, did show some cases of vote buying, although the percentage was low (6% of the total sample), and the problem could not have been determinant in the presidential race (here measured arithmetically) because, according to the NGO, the PAN was only identified by respondents to have been the beneficiary of 23% of the vote buying, whereas the PRI stood to gain in 40% and the PRD in 25% of the cases (with the rest of this behavior conducted on behalf of smaller parties, see Alianza Cívica 2006, 25). Indeed, while acknowledging the continued existence of “holdover” local behaviors from the *concertación* era of PRI hegemony, electoral authorities and academic specialists have identified no national systematic pattern which would constitute organized electoral fraud.

As with the IFE, the electoral court’s 2006 performance largely confirmed that body’s institutional integrity. The court’s large and still-growing body of case law precedents restrained temptations even by any imaginary “wayward” magistrates. The Coalition for the Good of All’s “vote by vote” call for a full recount was belied by their submission of fewer than 30% of ballot boxes for legal reconsideration. The electoral court did conduct an unprecedented recount of some 9% of the ballot boxes (or a third of those “called out” in the complaint), by a coherent standard of “evident arithmetic errors,” annulling nearly 235,000 votes. The recounts revealed no widespread pattern of electoral fraud that was deliberate and “determinant” in the outcome (unlike in the 2000 Tabasco and 2003 Colima gubernatorial races, where sitting governors were found to have intervened dramatically in electoral processes), and thus did not invoke the “generic cause of annulment” as demanded by López Obrador.⁸ The electoral court’s final certification argued that it was an administrative act (rather than a judicial inquiry), and thus not admitting of new evidence, such as was admitted dur-

ing the electoral court’s prior two months of inquiries, public sessions, and verdicts regarding vote tallies.

Conclusions: From “Legal vs. Legitimate” Elections to Legal, Legitimate Elections

Usually a shrewd politician and one who had experienced great success in understanding the public’s needs and desires, AMLO on this occasion misread the historical context of his defeat, despite explicit claims that “you have to know history to know what to do in circumstances” (Thomson 2006). One highly credible analyst went so far as to imply that AMLO’s problems were psychological, that the presidential loser-turned-movement leader might be suffering a messianic obsession (on AMLO’s view of himself literally as a “savior” of the poor, see Grayson 2006a, and in relation to the election, see Grayson 2006b). This interpretation, while meticulously researched and judiciously considered, may have been partially challenged by AMLO’s recognition of the objective effects of his movement. The Coalition for the Good of All candidate did acknowledge in late August that his month-long mobilization in downtown Mexico City was not bolstering support for his cause. He acknowledged his declining popularity, but justified the mobilization, whatever voters thought, on grounds that “you can’t stop them [those committing the fraud] unless you take these kinds of steps” (Thomson 2006).

Although he continued his movement well beyond his September 15 decision to abandon the blockades in downtown Mexico City, López Obrador failed in his bid for a total recount, a new election, and any other negotiated solution. Mexico’s electoral institutions really had earned the international accolades bestowed upon them, and public opinion had shifted quickly after the race from AMLO and in favor of the electoral court and the IFE (Parametría 2006). The domestic media was divided as usual, and after initial editorials supporting recounts and appeals, international media bellwethers like the *Washington Post* opposed AMLO’s continued post-electoral campaign.

As the IFE and court deliberated with even-handed rigor, AMLO’s declarations began to appear more strident, by comparison, and the gap broadened between AMLO’s discourse and media and public opinion valuations. Loser consent was granted by many of López Obrador’s former supporters, who were dismayed at their candidate’s defiance, if not by López Obrador himself. And the electoral loser-turned-protector sent more bystanders running for political cover with each pledge to disobey Mexico’s electoral institutions. The vast majority of the PRI’s 17 powerful state governors openly sided with Calderón well before the electoral court’s final verdict, and even within the PRD a divide emerged as prominent leaders including the pragmatic Michoacán and Zacatecas governors, both presidential hopefuls for 2012, spoke out through disciplined silence.

Affinities between López Obrador’s success in using political mobilization as a tool, and Mexico’s not-so-distant tradition of *concertación*, gave López Obrador’s movement a useful frame in 2006. Having weathered his post-electoral contention this time, it would seem unlikely, assuming that Mexico continues to consolidate strong and independent electoral institutions, that future post-electoral mobilizations based on historic claims rather than on empirical evidence will achieve such resonance. The considerable success of Mexico’s electoral institutions in channeling—and ultimately defusing—López Obrador’s challenges has helped unite two related concepts—“legal” and “legitimate.” As a result of the electoral institutions’ endurance of stringent post-electoral tests in 2006, these terms in 2012 should be mutually-reinforcing rather than dichotomous.

Notes

1. Most domestic observer groups viewed the election as “free and fair,” as did delegations of international observers from the United Nations Development Program and the European Union. Critics of the process, such as several scholars at the renowned Institute for Judicial Research at Mexico’s National Autonomous University, based at least important portions of their critiques on normative claims that recounting all ballots would dispel doubts about the outcome, rather than on concrete legal arguments that violations had occurred to invalidate any stage of the highly codified process (see Ackerman and Sandoval 2006, for example). Poiré and Estrada (2006) debunk AMLO’s arguments systematically, as does the Mexican electoral court’s 340-page final verdict, accessed on October 12, 2006, at www.trife.org.mx/acuerdo/dictamen.pdf.

2. The term “*concertación*” (originating in a Mexican slang combination of the words for “concertation” and “concession”) gained such cachet as a concept of Mexican political culture as to merit inclusion in the country’s most important electoral dictionary (Martínez Silva and Salcedo Aquino 2002, 99).

3. Post-electoral conflicts have increased in Oaxaca since the mid-1990s, probably due to particularities in the conduct of local elections there in accordance with traditional customary law (see Eisenstadt 2007 forthcoming).

4. Between 1989 and 2000, the PRD staged 750 post-electoral conflicts, while the PAN staged some 200 (and the PRI and smaller opposition parties staged a few hundred more). See Eisenstadt 2004, 141.

5. No effective electoral institutions existed in 1910 and Díaz had been in power (directly and through “puppets”) for well over three decades. Yet AMLO opened his *New York Times* op-ed, his principal English-language statement during the entire post-electoral conflict, with the sentence: “Not since 1910, when another controversial election sparked a revolution, has Mexico been so fraught with political tension” (López Obrador 2006).

6. Political corruption scandals afflicting all three major parties did taint Mexicans’ views of elections. At the national level, the most damaging were the “PEMEXGate” scandal in which some \$US 45 million was laundered to the PRI during the 2000 campaign from the public oil company’s employee union, and, also during the 2000 campaign, Amigos de Fox’s laundering of some \$30 million in campaign contributions through a special interest PAC for then-candidate Fox. To the credit of the IFE and the electoral court, the political scandals ended in public embarrassment and stiff civil sanctions, although criminal investigations failed to yield any successful prosecutions.

7. Regarding the fairness of party finance, see Poiré 2006.

8. SUP-JRC-487/2000 was the PRD’s 2000 Tabasco gubernatorial complaint, yielding the “abstract cause of annulment” jurisprudence. It was upheld in the PAN’s complaint after the 2003 Colima governors’ race (SUP-JRC-221/2003).

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