

A TALE OF TWO LATIN AMERICAN COUNTRIES: THE DEMOCRATIC RULE OF LAW IN MEXICO AND URUGUAY

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Résumé de l'article

Pourquoi l'état de droit démocratique est-il plus fortement ancré en Uruguay qu'au Mexique ? Cet ouvrage met l'accent sur l'état de droit démocratique au Mexique et en Uruguay en procédant à une comparaison des systèmes les plus similaires. La prémisse de ce travail générateur d'hypothèses montre qu'il existe des lacunes dans la documentation portant sur les causes qui ont historiquement fait de l'Uruguay le pays où l'état de droit démocratique est le plus établi en Amérique latine, par opposition au Mexique où il est le moins présent. En se servant de l'institutionnalisme historique, nous démontrons comment l'évolution de l'enchaînement des régimes politiques tout comme celle des relations civilo-militaires peuvent expliquer les résultats divergents. En soulignant cette relation, cette analyse est menée à l'aide d'une méthodologie privilégiant le processus de traçage. Cette recherche sert à mettre en avant des propositions sous forme d'hypothèse vérifiable sur les causes qui ont conduit le Mexique et l'Uruguay sur des chemins différents en ce qui concerne l'état de droit. Elle sert également à combler une lacune dans la documentation dans un contexte où les différences entre pays quant à l'état de droit en Amérique latine, n'ont pas été suffisamment bien explorées.

A TALE OF TWO LATIN AMERICAN COUNTRIES: THE DEMOCRATIC RULE OF LAW IN MEXICO AND URUGUAY

*Joaquín Bardallo Bandera**

Why is the democratic rule of law stronger in Uruguay than in Mexico? This work focuses on the state of the democratic rule of law in these countries by conducting a most similar systems comparison. The premise of this work is that there is a gap in the literature on factors that have historically made Uruguay the country with the strongest democratic rule of law in Latin America, and Mexico the one with the weakest democratic rule of law. Historical institutionalism is used to see how the sequence of political regimes, as well as the evolution of civil-military relations in the two countries, may explain the divergent outcomes. Emphasizing path dependency, this analysis is conducted using a methodology of process tracing. This research serves to put forward propositions in the form of a testable hypothesis on the causes that have led Mexico and Uruguay down different paths in relation to the rule of law. It also serves to fill a gap in the literature as cross-national differences on rule of law in Latin America have not been sufficiently well explained.

Pourquoi l'état de droit démocratique est-il plus fortement ancré en Uruguay qu'au Mexique? Cet ouvrage met l'accent sur l'état de droit démocratique au Mexique et en Uruguay en procédant à une comparaison des systèmes les plus similaires. La prémisse de ce travail générateur d'hypothèses montre qu'il existe des lacunes dans la documentation portant sur les causes qui ont historiquement fait de l'Uruguay le pays où l'état de droit démocratique est le plus établi en Amérique latine, par opposition au Mexique où il est le moins présent. En se servant de l'institutionnalisme historique, nous démontrons comment l'évolution de l'enchaînement des régimes politiques tout comme celle des relations civilo-militaires peuvent expliquer les résultats divergents. En soulignant cette relation, cette analyse est menée à l'aide d'une méthodologie privilégiant le processus de traçage. Cette recherche sert à mettre en avant des propositions sous forme d'hypothèse vérifiable sur les causes qui ont conduit le Mexique et l'Uruguay sur des chemins différents en ce qui concerne l'état de droit. Elle sert également à combler une lacune dans la documentation dans un contexte où les différences entre pays quant à l'état de droit en Amérique latine, n'ont pas été suffisamment bien explorées.

¿Por qué el estado de derecho democrático está más fuerte en Uruguay que en México? Este trabajo se centra en Estado de derecho democrático en México y Uruguay mediante la realización de una comparación de sistemas más similares. La premisa de este trabajo generador de hipótesis es que existe un vacío en la literatura sobre las causas que históricamente han hecho Uruguay el país donde se aplica más el estado de derecho democrático en América Latina a diferencia de México donde está menos aplicado. El institucionalismo histórico se utiliza para ver cómo la evolución de la secuenciación de los regímenes políticos, así como la evolución de las relaciones cívico-militares en los dos países puedan explicar los resultados divergentes. Haciendo hincapié en esta relación, este análisis se lleva a cabo utilizando una metodología de proceso de rastreo. Esta investigación sirve para presentar proposiciones en la forma de una hipótesis comprobable sobre las causas que han llevado a México y Uruguay por caminos diferentes cuando se trata del Estado de Derecho. También sirve para llenar un vacío en la literatura en un contexto donde las diferencias en la aplicación del Estado de derecho democrático entre los países no han sido bien detalladas.

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This work aims at answering the question of why the democratic rule of law is stronger in Uruguay than in Mexico. It is crucial to understand the importance of the selection of this particular research question. The Rule of Law Index of the World Justice Project shows that in a regional ranking, out of 16 countries, Uruguay ranks first or second in every single one of these factors. Therefore, it is the country with the strongest rule of law in the Latin American region. On the contrary, Mexico ranks anywhere between fifth and fifteenth, making it the country in Latin America in which the rule of law is the weakest. For example, in civil justice and fundamental rights, Mexico ranks fourteenth and eleventh, respectively, while Uruguay ranks first in both categories.¹ However, this is not the only reason that Uruguay and Mexico are crucial cases to be studied.

The research intends to explain the strength of the democratic rule of law in two different Latin American countries: Uruguay and Mexico. Throughout this article, we present extensive research that aims to analyze that hypothesis that is an integral part of making a contribution to the literature of the democratic rule of law by doing a comparison between Uruguay and Mexico. We have chosen to compare Uruguay and Mexico because they are both important cases to study since the strength of their democratic rule of law differs significantly. The premise of this work is to articulate a comparative comprehension of the democratic rule of law in Uruguay and Mexico that complements existing literature in this subject, which generally analyzes Mexico and Uruguay relative to other countries, but not in comparison with each other.

There are certain works that deal with judicial reforms in Uruguay;² others that look into judicial performance and reforms in a comparison with diverse Latin American countries;³ others that look at institutional change⁴; and even others that look at the protection of human rights after the dictatorship ended in Uruguay.⁵ However, there is less investigation on the topic of this article that deals with the historical factors that have placed Uruguay in such a prominent position. On the other hand, in the case of Mexico, work has been done on the democratic rule of law⁶, but there is less investigation on the historical factors that have placed Mexico in such an unfavorable position with respect to the democratic rule of law.

¹ World Justice Project, “WJP Rule of Law Index”, online: World Justice Project <<http://worldjusticeproject.org>>.

² Elin Skaar, “Un Análisis de las Reformas Judiciales de Argentina, Chile y Uruguay” (2003) 34 *América Latina Hoy* 147.

³ Joseph L Staats, Shaun Bowler & Jonathan T Hiskey, “Measuring Judicial Performance In Latin America” (2005) 47:4 *Latin American Politics and Society* 77; Fiona MacAulay, “Knowledge Production, Framing and Criminal Justice Reform in Latin America” (2007) 39 *Journal of Latin American Studies* 627.

⁴ Jeffrey W Cason, “Electoral Reform, Institutional Change, and Party Adaptation in Uruguay” (2002) 44:3 *Latin American Politics and Society* 89.

⁵ Elin Skaar, “Truth Commissions, Trials or—Nothing? Policy Options in Democratic Transitions” (1999) 20:6 *Third World Quarterly* 1109; Elin Skaar, “Legal Development and Human Rights in Uruguay: 1985-2002” (2007) 8:2 *Human Rights Review* 52; Jo-Marie Burt, Gabriela Fried Amilivia & Francesca Lessa, “Civil Society and the Resurgent Struggle Against Impunity in Uruguay (1986-2012)” (2013) 7 *The International Journal of Transitional Justice* 306.

⁶ Emily Edmonds-Poli & David A Shirk, *Contemporary Mexican Politics*, 2d ed (New York: Rowman & Littlefield Publishers, 2012) at chapter 11.

There are several works dealing with judicial reforms in Mexico;⁷ other works that deal with democracy and the importance of the rule of law for democratic stability;⁸ others that deal with corruption, law enforcement and the enforcement of laws by the judiciary;⁹ and even others that deal with the armed forces role as well as their impunity.¹⁰ However, the analysis is insufficient to explain why Mexico has such a low place in the Rule of Law Index.

For the purpose of this article, we have chosen new institutionalism to investigate the first hypothesis which is how the historical nature of the civil-military relations in the nineteen nineties and two thousands¹¹ is necessary for the outcome of weak democratic rule of law. For Uruguay, the second hypothesis stipulates the opposite, as the historical nature of the civil-military relations in the nineteen nineties and two thousands¹² (e.g. restriction of the *fuero militar*) is necessary for strong democratic rule of law. The relationship between civil-military relations and the rule of law is ambiguous in the case of Mexico as there is a gap between the judicial system and the military system, as well as a gap between the judicial system and the protection of human rights. As it will be demonstrated throughout this article, there have been creations such as *casas de arraigo*¹³ that trump the justice system directly. Furthermore, since the War on Drugs started there have been violations of human rights that have not been accounted for. In contrast, after the dictatorship ended in Uruguay in 1985, the military justice system eliminated the *fuero militar*, and the rule of law protected by a stronger civil judicial system came into existence. Thus, there has not been a gap between the judiciary and the military since 1985.

⁷ Gabriela Beatriz González-Gómez & María De Lourdes González Chávez, “La Reforma Judicial de 1994 en México” (2007) 15:1 *Revista Crítica de Ciencias Sociales y Jurídicas* 403; Edmonds-Poli, *supra* note 6; Silvia Inclán Oseguera, “Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?” (2009) 62:4 *Political Research Quarterly* 753 [Inclán Oseguera].

⁸ Enrique Krauze, “Furthering Democracy In Mexico” (2006) 85:1 *Foreign Affairs* 54 [Krauze].

⁹ Luz E Nagle, “Corruption of Politicians, Law Enforcement, and the Judiciary in Mexico and Complicity Across the Border” (2010) 21:1 *Small Wars and Insurgencies* 95; Julio Ríos-Figueroa & Matthew M Taylor, “Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico” (2006) 38 *Journal of Latin American Studies* 739; Julio Ríos-Figueroa, “Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002” (2007) 49:1 *Latin American Politics and Society* 31 [Ríos-Figueroa, “Fragmentation”].

¹⁰ Jordi Díez, “Legislative Oversight of the Armed Forces in Mexico” (2008) 24:1 *Mexican Studies/Estudios Mexicanos* 113 [Díez, “Oversight”]; Roderic A Camp, *Mexico’s Military On The Democratic Stage*, (Westport, Washington D.C.: Greenwood Publishing Group in collaboration with the Center for Strategic and International Studies, 2005) [Camp, *Military*]; Roderic A Camp, *Mexico: What Everyone Needs To Know*, (New York: Oxford University Press, 2011).

¹¹ The historical existence and persistence of the *fuero militar* in Mexico has been one of the main causes of the weak rule of law in Mexico.

¹² The restriction of the *fuero militar* in Uruguay has been necessary to strengthen the rule of law in this country.

¹³ *Casas de arraigo* are undeclared detention houses, where civilians can be detained for as long as 40 days and this period can be extended to 80 days.

I. Theoretical and Methodological Framework

Historical institutionalism has been selected as the theoretical approach because it is the most appropriate to analyze how institutions shape action. A central reason for choosing historical institutionalism is that we are analyzing how judicial institutions were created, how they have evolved, and how they have affected or constricted stakeholders' actions through the existence and persistence of institutional weaknesses.

On the other hand, we have used process tracing as the methodology to be employed for this work. Because we are using a historical institutionalism approach to the study of politics, we have decided to choose this methodology as they go hand in hand. One of the most important aspects of process tracing is that it is related to a historical analysis of events that occurred that determine the causal mechanism, that will aid the understanding of the causality between the independent variable and the dependent one.

While different experts on Latin America have provided different definitions of the rule of law, it is O'Donnell who provides the most encompassing definition of the core aspects of this concept. O'Donnell defines a truly democratic rule of law as that which "ensures political rights, civil liberties, and mechanisms of accountability which in turn affirm the political equality of all citizens and constrain potential abuses of state power".¹⁴ O'Donnell goes even further to argue that without the presence of "vigorous rule of law, defended by an independent judiciary, rights are not safe and the equality and dignity of all citizens are at risk".¹⁵ What this definition implies is that all State institutions and officials, along with individuals that comprise a society, have to be held accountable to the law. Thus, nobody is *de legibus solutus*,¹⁶ or above the law. The importance and main characteristic of the rule of law, as defined in English language, is that it "does not refer directly to any state agencies other than courts."¹⁷ However, O'Donnell expands this definition to encompass a true democratic rule of law, *estado de derecho* and *état de droit*.¹⁸ He conceives the definition to be more than just a mere understanding of a country's legal system and the performance of the judiciary. O'Donnell defines the democratic rule of law as an integral part of a "legally based rule of a democratic state".¹⁹ In his holistic definition there are central premises such as the fact that there has to be a legal system in a specific country for it to be democratic. By democratic it means that the legal system should protect the freedoms, political rights and basic guarantees of all individuals, a system that upholds and protects civil rights as well as the creation of accountability and responsibility, where everybody is subject to appropriate legal sanctions through

¹⁴ Guillermo O'Donnell, "The Quality of Democracy: Why the Rule of Law Matters?" (2004) 15:4 *Journal of Democracy* 32 at 32 [O'Donnell].

¹⁵ *Ibid.*

¹⁶ *Ibid* at 37.

¹⁷ *Ibid* at 36.

¹⁸ *Estado de derecho* and *état de droit* are the equivalent of "rule of law" in Spanish and French.

¹⁹ O'Donnell, *supra* note 14 at 36.

legally established controls when committing unlawful acts such as crimes.²⁰ Once a state has achieved this level it is more than just the rule of law or *estado de derecho*; it then becomes a state that enacts and upholds democratic rule of law and an *estado democrático de derecho*. Furthermore, O'Donnell highlights several flaws that are present in the democratic rule of law application in the Latin American region. He highlights flaws in the law such as: judicial criteria and administrative regulations discriminating against women and minority groups, especially indigenous groups.²¹ Another flaw is that elites are usually exempt from the application of the law.²² There are “flaws in the relationships between state agencies and citizens”, such as disadvantaged citizens being deprived of their human and civil rights.²³ Finally, O'Donnell also highlights the flaws in fair access to the judiciary and due process, with an ineffective, expensive and slow system that denies equal access to everyone in society.²⁴ For the purpose of this article, O'Donnell's extended definition is key, as it embodies a more holistic approach. Basing my work on this specific definition, I evaluate what has caused the difference in the democratic rule of law in Mexico and Uruguay.

This paper provides a specific analysis of Mexico and Uruguay in regards to the nature of their civil-military relations explained through path dependence. The first part of the essay analyzes the case of Mexico. The second part of the essay concentrates on the case of Uruguay. Finally, the paper concludes with an overall analysis of both cases and their central differences. This serves to highlight the discrepancies in strength and weakness in their respective democratic rule of law levels.

II. Introduction to Mexico's Case

The democratic rule of law in Mexico has been historically weak. In order to fully answer the research question of why the rule of law is stronger in Uruguay than in Mexico, the nature of civil-military relations has to be looked at individually. Thus, the case of Mexico is examined thoroughly throughout this section. We aim to elucidate key areas where civil-military relations have been under stress causing great difficulty in the consolidation of the democratic rule of law in Mexico. In short, the civil-military relations in Mexico suffer from a historical delay and institutional malfunctioning that did not advance with the onset of democracy in the year 2000. Furthermore, it is imperative to analyze this relationship, as the gap between civil and military justice is a major obstacle to strengthening the democratic rule of law in Mexico. Within a democracy, the legal system should protect the freedoms, political rights and basic guarantees of all individuals, the judicial system should uphold and protect civil rights as well as the creation of accountability and responsibility, where

²⁰ O'Donnell, *supra* note 14.

²¹ *Ibid* at 39-40.

²² *Ibid* at 40.

²³ *Ibid*.

²⁴ *Ibid* at 40-41.

everybody is subject to appropriate legal sanctions through legally established controls when committing unlawful acts such as crimes.²⁵ However, this has been limited in the case of Mexico.

The *fuero militar* is a means of avoiding accountability that has been historically present since Spain conquered the Americas.²⁶ This institution of Spanish origin blurs the line between the military and civilian justice, and creates a parallel justice system with separate laws and legal functions. Historically, the military inherited this system from the new independent republics that were formed with this legal tradition.²⁷ Specifically, the *fuero militar* is defined as “constitutional provisions that allow the military to be controlled by a separate body of laws [...]”²⁸. Another author has explained it as a privilege that allows the military to be “unaccountable to the judicial branch [...]”²⁹ Furthermore, civil courts are placed below military courts that are in fact located above all.³⁰ In sum, the existence of the *fuero militar* serves to reinforce the presence of a separate military judicial system parallel and unaccountable to the civilian one. The *fuero militar* has therefore been historically interfering with the civil justice system and it has not been changed in Mexico’s history. This is due to the fact that the judicial system does not uphold and protect civil rights. Additionally, the creation of accountability and responsibility, where everybody is subject to appropriate legal sanctions through legally established controls when committing unlawful acts such as crimes remains historically weak in Mexico.

III. Background Conditions: Civil-Military Relations 1917–1946

Historically, Mexico had a long period of military presence in power as it basically saw “the arrival of eighteen presidents through military coups” between 1821 and 1934.³¹ Furthermore, since Mexico became an independent country, it has had 29 civilian governments as well as 39 military ones.³² Historically then, Mexico has had more military governments than it has had civilian ones, which affects not only the regime type in this country, but also the independence and strength of the judiciary. This historical evidence serves to reinforce the imminent fact that Mexico has had a long history of military presence in power or as an active institution under

²⁵ O'Donnell, *supra* note 14.

²⁶ Juan C Calleros, *The Unfinished Transition to Democracy in Latin America*, (New York: Routledge, 2009) at 115 [Calleros]; Jordi Díez, “Civil-Military Relations in Mexico: The Unfinished Transition” in Roderic A Camp, ed, *The Oxford Handbook of Mexican Politics*, (New York: Oxford University Press, 2012) 265 at 265-66 [Díez, “Relations”]; Raúl Benítez Manaut, “Reforming Civil-Military Relations during Democratization” in Andrew Selee & Jacqueline Peschard, eds, *Mexico’s Democratic Challenges: Politics, Government, and Society* (Washington, D.C.: Woodrow Wilson Center Press, 2010) [Benítez Manaut].

²⁷ Calleros, *supra* note 26 at 115-16; Benítez Manaut, *supra* note 26.

²⁸ Díez, “Relations”, *supra* note 26 at 274.

²⁹ Cailleros, *supra* note 26 at 114.

³⁰ *Ibid.*

³¹ Díez, “Relations”, *supra* note 26 at 266.

³² Benítez Manaut, *supra* note 26 at 162-63.

civil governments. Thus, this fact demonstrates that democratic elected leaders have not dominated historically, thereby making it harder to establish a full, strong, democratic rule of law. This directly affects the rule of law, as without the presence of a “vigorous rule of law, defended by an independent judiciary, rights are not safe and the equality and dignity of all citizens are at risk.”³³

The military’s political governing power decreased after the Mexican Revolution ended in 1917 and kept decreasing considerably until 1946 when the first civilian President, Miguel Alemán Valdés, was finally elected. Ever since 1946 there have been civil governments in Mexico.³⁴ However, even though the political governing power of the Mexican Armed Forces decreased after the pact was signed in 1946, the military kept the *fuero militar* that only served to reinforce a parallel military power by allowing to hold their own courts and keeping military judicial power outside of civilian control. Certain specialists point to the fact that Mexico since the nineteen thirties has been the “only country in the region not to have experienced a military coup.”³⁵ This is in part because after the end of the Mexican Revolution, the military’s power started to decrease symbolically as civil-military relations saw the coming of a “political pact” between the military and the civil government.³⁶ However, this does not mean that it has achieved a strong democratic rule of law. On the contrary, the civil-military relation in Mexico might not have caused specifically a coup d’état since the nineteen thirties and a dictatorship might not have arisen, however the democratic rule of law is not defined in terms of number of coups, it rather encompasses a large number of factors that builds a country.³⁷

After the Mexican Revolution ended in 1917, the military’s power started to decline in comparison to the period during the Mexican Revolution (1910–1917). Also, this decline in power accelerated after the onset of World War II. On the one hand, the first reason to explain this historical change is the fact that with the onset of World War II, there was international pressure on the Mexican Government to professionalize the Mexican Armed Forces, thus forcing the Mexican Government to modify the Mexican military apparatus.³⁸ Secondly, there were internal institutional changes within the Mexican Military. For example, during the presidency of Plutarco Elías Calles (1924–1928), the Colegio Militar (Military College) was reconstituted and reopened ready to create a new generation of “professionally trained officers”.³⁹

Politically, the appearance of political parties, syndicates, confederations of commerce and industry, among others, such as the bankers’ association, were all considered pressure and interest groups, and they all demanded more of a real political presence with diverse ideas, and not merely a charismatic military which is

³³ O’Donnell, *supra* note 14 at 32.

³⁴ Luis Medina, *Historia de la Revolución Mexicana: civilismo y modernización del autoritarismo*, vol 20, ed by Luiz González (Mexico, D.F.: Gustavo Casasola, 1979) at 7 [Medina].

³⁵ Díez, “Relations”, *supra* note 26 at 266.

³⁶ *Ibid.*

³⁷ O’Donnell, *supra* note 14.

³⁸ Medina, *supra* note 34 at 5; Camp, *Military*, *supra* note 10 at 19.

³⁹ Camp, *Military*, *supra* note 10 at 19.

what had dominated until the elections of 1946.⁴⁰ Likewise, in the 1940-1946 presidential period, the number of strictly military members that were going to participate in the following election, which was going to be held in 1946, was already significantly declining. Five civilian candidates ran, as did four military candidates, and politically, the former were held in the same esteem as the latter.⁴¹ The significance of this remark is that even though some of the candidates were an integral part of the military ranks, most of them had already held civil positions before the elections, such as those of governor and senator. For example, Enrique Calderón, a candidate with a military education, had already served as General Consul in San Francisco, thus gaining diplomatic experience.⁴² All in all, even though there were four military candidates that presented themselves for the 1946 presidential elections, they were academically, politically and economically more prepared than the military counterparts that were ruling the country until this period. Additionally, from 1940 to 1946 under the presidency of Manuel Ávila Camacho, the *Partido de la Revolución Mexicana* (PRM)⁴³ was further separated from the army.⁴⁴ Conversely, hand in hand with the aforementioned changes, there was the transformation of what used to be the National Revolutionary Party into a civilian party, the *Partido Revolucionario Institucional* (PRI)⁴⁵ that would end up governing Mexico until the year 2000.⁴⁶ Despite the fact that the modern professional Mexican military was not similar to the less professional Mexican military before 1946 due to the different national and international necessities the country faced in the 1940's, it does not mean that the military power disappeared after the Mexican civil-military pact was agreed upon in 1946. On the contrary, after agreeing to the pact in 1946, the military reinforced the *fuero militar* that gave the military larger leeway outside of politics to protect the establishment and protect their soldiers. Finally, the political problems were not in themselves the only issue, as Mexico was also facing economic problems that required serious attention.⁴⁷

Economically, there were changes needed inside the country as almost 35 years had already passed since the Mexican Revolution had finished and Mexico was facing a deep economic crisis. Added to this is the fact that there was an internal urge

⁴⁰ Medina, *supra* note 34 at 10.

⁴¹ *Ibid* at 11.

⁴² *Ibid* at 11.

⁴³ Revolutionary Mexican Party

⁴⁴ Arturo Garmendia, "Los obreros sin cabeza" in Enrique Semo, ed, *Mexico un pueblo en la historia: nueva burguesía 1938-1957*, vol 5 of *México, un pueblo en la historia* (Mexico, D.F, Alianza Editorial Mexicana, 1989) at 136 [Garmendia].

⁴⁵ Institutional Revolutionary Party

⁴⁶ Sara Schatz, *Murder and Politics in Mexico: Political Killings in the Partido De La Revolución Democrática and its Consequences*, (New York: Springer, 2011) at 11 [Schatz]; Paul Gillingham, "Mexican Elections, 1910–1994: Voters, Violence, and Veto Power" in Roderic A Camp, ed, *The Oxford Handbook of Mexican Politics*, (New York: Oxford University Press, 2012); Daniel C Levy. & Kathleen Bruhn, *Mexico: The Struggle for Democratic Development*, 2d ed (Berkeley: University of California Press, 2006) at 295 note 35 [Levy]; Camp, Military, *supra* note 10; Torcuato S Di Tella, *History of Political Parties in Twentieth-Century Latin America*, (New Brunswick: Transaction Publishers, 2005) at 176-78; Martha Anaya, *1988 el año que calló el sistema*, (Mexico City: Random House Mondadori, 2009).

⁴⁷ Medina, *supra* note 34 at 7.

to professionalize the army to be more capable of coping with newer demands.⁴⁸ Hence, during the years between 1917 and 1946, the *caudillo* military figures were in decline, as the population was having other problems such as the onset of World War II and a large economic backlash that required the knowledge of economic, as well as, political solutions, instead of military ones.⁴⁹ Overall then, the Mexican Revolution had left an image of hardships and internal war. The Mexican citizens after 1917 wanted more tranquility and stability, politically and economically. Hence, there existed a general will or “desire for a lasting peace”.⁵⁰ At this point in history, Miguel Alemán Valdés, before being elected President in 1946 and while acting as the secretary of government, said “the politico-military went into a second-in-command position and left the political-civil power, with increased support in place.”⁵¹ However true this is, it is essential to underline that after leaving the direct political power the military managed to keep the *fuero militar*. All in all, Mexico at the turn of the nineteen forties was at a historical point where the country was experiencing benefits from having a larger participation in the international sphere. Nevertheless the military power was still persistent. Each of the limitations aforementioned have been analyzed and emphasized separately by various specialists, thus pointing out to the diversity of problems that coexisted between 1917 and 1946 for the Mexican society.⁵²

IV. Institutional Existence and Persistence: *Fuero Militar*

The civil-military pact concluded in 1946 with the arrival of the first civil President, Miguel Alemán Valdés, who governed the country from 1946 to 1952, marking what is historically understood as the new beginning of civil-military relations in Mexico.⁵³ At the time, the arrival of Miguel Alemán Valdés represented “a new kind of professional politician”, distinct from the military figures seen until this point in history and an upcoming promise of a different presidency with a civilian in power.⁵⁴ At the time, the pact seemed to be a positive solution envisioned nationally by the upcoming civil government, as well as internationally, by other countries such as the United States⁵⁵. It was a way of directly removing the military from political power and establishing a new political order with hopes of economic success. However, in the years after 1946, the decision to sign the pact marked what could be observed today as a detrimental blockage to the full establishment of a complete and coherent democratic rule of law. In reality, when the pact was signed in 1946, the military kept the *fuero militar* that is protected under the *Mexican*

⁴⁸ Medina, *supra* note 34 at 7; Camp, *Military*, *supra* note 10.

⁴⁹ Medina, *supra* note 34 at 7 and 10; Camp, *Military*, *supra* note 10. Levy, *supra* note 46.

⁵⁰ Camp, *Military*, *supra* note 10 at 18.

⁵¹ Medina, *supra* note 34 at 7.

⁵² Camp, *Military*, *supra* note 10; Medina, *supra* note 34; Garmendia, *supra* note 44; Diez, “Relations”, *supra* note 26; Benítez Manaut, *supra* note 26.

⁵³ Medina, *supra* note 34 at 91.

⁵⁴ Camp, *Military*, *supra* note 10 at 25.

⁵⁵ *Ibid*, *supra* note 9 at 25.

*Constitution*⁵⁶ and, in exchange, left the direct political power to the civil government.

The *fuero militar* allows for crimes that are committed by the military against civilians to be judged and tried behind closed doors in a military compound. The civilian cannot attend the judgment, neither be present when the soldier that violated his rights is in trial. This is no different than other OECD countries. However, the application of the *fuero militar* in Mexico has been very different and has allowed for violations of human rights to remain unaccounted for, for example, the existence of *casas de arraigo* as will be explained below. Therefore, the protection of human rights and access to justice has been limited, thus affecting the strength of the democratic rule of law. Also, once the crime or action has been committed and the Armed Forces notify the civil authorities, they usually take a long time in doing this.⁵⁷ Moreover, article 13 of the *Mexican Constitution* stipulates that the corresponding civil authority will be notified in case that a civilian has been affected.⁵⁸ However, it has been constantly argued by experts that civil-military relations in Mexico in the pre-transition period as well as in the post-transition period have been marked by the incapacity of the judiciary to bring the military to justice.⁵⁹ More specifically, Calleros argues, “autonomy of the military from the civilian rule of law creates an oasis of impunity [...]”⁶⁰. Even within the democratic political transition that Mexico experienced in the year 2000, this limited reform has given the Mexican military and the military institution a large degree of autonomy both politically and institutionally.⁶¹ Among the institutional limitations that force the civil authority outside the military jurisdiction is the fact that under the *Military Code of Justice*,⁶² the “military authorities [are allowed] to punish soldiers for not obeying an order, irrespective of whether such punishment violates a civil law or the constitution.”⁶³ All of the examples provided above point to the fact that the jurisdiction of civilian courts over military affairs is extremely limited in Mexico. Also, it is extremely difficult to bring the military to account for violations of human rights. Thus, this process favors a culture of impunity within Mexican democratic institutions serving to weaken the democratic rule of law.

Furthermore, military tribunals where soldiers are tried are not independent, as specialist on the matter Jordi Díez argues, “as judges and the military attorney general are appointed directly by the ministers of defense and the navy and can be

⁵⁶ *Political Constitution of the United Mexican States* (1911), s 13, online: <<http://portal.te.gob.mx/en/consultations/political-constitution-united-mexican-states>> [*Mexican Constitution, Constitution*].

⁵⁷ Human Rights Watch, “*Impunidad Uniformada: Uso indebido de la justicia militar en México para investigar abusos cometidos durante operativos contra el narcotráfico y de seguridad pública*” (29 April, 2009), online: Human Rights Watch <<http://www.hrw.org>> [Human Rights Watch].

⁵⁸ *Mexican Constitution*, *supra* note 56.

⁵⁹ Calleros, *supra* note 26 at 134.

⁶⁰ *Ibid.*

⁶¹ Díez, “Relations”, *supra* note 26 at 272.

⁶² *Código de Justicia Militar*, online: Justicia México <http://docs.mexico.justia.com/federales/codigo_de_justicia_militar.pdf> [*Military Code of Justice*]

⁶³ Díez, “Relations”, *supra* note 26 at 275.

removed at any time.”⁶⁴ Thus, if the judgment is not the one that superiors expected, the judges could be removed at any time; therefore, they will not follow certain specific cases of violations of human rights to protect their jobs. Thus, all of this directly affects the democratic rule of law, as Calleros argues: “*Ad hoc* tribunals, especially military ones are inconsistent with a democratic rule of law, because the protections of due process established in ordinary court systems for producing fair trials are not as valid there.”⁶⁵

In order to be able to forge a strong democratic rule of law, the military tribunals should have “jurisdiction over military personnel only, while on duty or in wartime for violations of military regulations”⁶⁶. Several authors have highlighted the military institutional limitation in particular with reference to equality before the law, together with access and protection of human rights under the law.⁶⁷ All of the aforementioned authors emphasized the clear limitations of human rights, which points directly to the larger void in the existence of a strong democratic rule of law. This void and the constant impunity can be clearly seen through the constant human rights violations that go unpunished or unobserved in Mexico. The fact that Mexico has not experienced a coup d’état does not mean that it has not seen a constant violation of human rights by the military in particular due to the War on Drugs that took place from 2006 to 2012, which will be further analyzed below.⁶⁸ In all of these instances of human rights violations, it is usually impunity and extra-legal solutions that are an integral part of the military justice system in Mexico. Therefore, the inexistence of a dictatorship has acted as a disguise, where the military remains under a parallel justice system without accountability, without respecting human rights and without providing equal access to justice for everyone in society.

In Mexico’s particular case, the structural persistence of the *fuero militar* has in fact continued to allow the Mexican military to administer a parallel justice system in several different areas.⁶⁹ For example,

[f]rom 1999 until 2004 the National Human Rights Commission received 1,069 complaints of abuses perpetrated by the armed forces, and the commission issued [only] nine recommendations⁷⁰.

This is because the National Human Rights Commission does not have access to any of the Armed Forces’ members that have committed these abuses. In the words of an expert in the subject matter, Jorge Díez, “the transition to democratic rule in Mexico has not been accompanied by a fundamental reform to civil-military relations.”⁷¹ Díez also highlights that between the civil and military power “their most

⁶⁴ *Ibid.*

⁶⁵ Calleros, *supra* note 26 at 127.

⁶⁶ *Ibid.*

⁶⁷ Camp, *Military*, *supra* note 10; Díez, “Relations”, *supra* note 26; Benítez Manaut, *supra* note 26; Calleros, *supra* note 26 at 114-35.

⁶⁸ Díez, “Relations”, *supra* note 26 at 276-80.

⁶⁹ *Ibid* at 274.

⁷⁰ Díez, “Relations”, *supra* note 26 at 273.

⁷¹ *Ibid* at 266.

fundamental characteristics have remained intact.”⁷² Due to the fact that civil-military relations have remained unchanged it has been and will be extremely difficult to bring the military to account for their constant violations of human rights. More importantly, as is highlighted below, in Mexico the *fuero militar* trumps the criminal justice system and this can be clearly seen through the use of *casas de arraigo*.

V. Civil-Military Repercussions

The active role of the Mexican Armed Forces is analyzed in this section together with an extensive explanation of the military justice system’s limitations seen through the violations of human rights that go unpunished. All of these have been an integral part of the civil-military history of Mexico, as has been pointed out by several experts in the matter.⁷³ There are two inter-related problems that need to be studied individually. The first one is the inefficiency of other law enforcement agencies to secure the country from drug-trafficking operations and drug cartels. The second one is the timing and sequencing of the War on Drugs and the repercussion that this had for the civil-military relations.

During the first democratic presidential period for Mexico, and Vicente Fox’s Quesada first term as president from 2000 to 2006, delinquency, crime, impunity and insecurity were at centre stage in national politics.⁷⁴ More specifically, there were homicides that would “account for between 20 and 30 percent of total violent deaths each year”.⁷⁵ Furthermore, federal jurisdiction figures show that drug-trafficking crimes increased from “75,000 crimes per year at the end of the nineteen nineties, rising to almost 90, 000 in 2005”.⁷⁶ However, Vicente Fox Quesada was unable to correct these problems at a macro scale. Moreover, the Mexican Military has been further involved in national security missions due to the failure of the 1,661 separate police forces that exist nationally, which had been unable to cope with drug-related challenges. During the democratic years of Mexico, “in 2001, 7.61 percent of judicial police had criminal proceedings against them”, and in 2003 it went down to

⁷² *Ibid.*

⁷³ Todd A Eisenstadt & Jennifer Yelle, “Ulysses, the Sirens, and Mexico’s Judiciary: Increasing Precommitments to Strengthen the Rule of Law” in Roderic A Camp, ed, *The Oxford Handbook of Mexican Politics* (New York: Oxford University Press, 2012) [Eisenstadt]; José M Cruz, Rafael Fernández de Castro & Gema Santamaría Balmaceda, “Political Transition, Social Violence, and Gangs: Cases in Central America and Mexico” in Cynthia J Arnsen, ed, *In the Wake of War: Democratization and Internal Armed Conflict in Latin America* (Washington, D.C.: Woodrow Wilson Center Press, 2012) 317 at 336 [Cruz]; Schatz, *supra* note 46; Calleros, *supra* note 26.

⁷⁴ Cruz, *supra* note 73 at 325; Peter H Smith, “Mexican Democracy in Comparative Perspective” in Roderic A Camp, ed, *The Oxford Handbook of Mexican Politics* (New York: Oxford University Press, 2012) 77; Eisenstadt, *supra* note 73; José R Cossío Díaz, “Reforming Civil-Military Relations during Democratization. In Mexico’s Democratic Challenges: Politics, Government, and Society” in Andrew Selee & Jacqueline Peschard, eds, *Mexico’s Democratic Challenges: Politics, Government, and Society* (Washington, D.C.: Woodrow Wilson Center Press, 2010); Diez, “Oversight”, *supra* note 10;

⁷⁵ Cruz, *supra* note 73 at 325.

⁷⁶ *Ibid.*

only 6.56 percent.⁷⁷ Although the numbers improved, these numbers depict the corruption, impunity and lack of accountability within the police forces in Mexico. Added to the aforementioned security problems of crime, impunity, insecurity and corruption within the police institutions in Mexico, there is a more severe problem of drug trafficking and drug cartels that has affected Mexican civil-military relations. Due to a constant failure of the police in controlling drug trafficking and drug cartels, as well as, the presence of large levels of corruption within the police forces, the military is usually the chosen institution to provide security in the country. The role of the Mexican Military has mainly been in DN2. The DN2 operations stand for “to protect the internal security of the country”.⁷⁸

Thus, since the nineteen nineties there has been a shift away from traditional military roles, into more active roles particularly in drug trafficking. Even during the democratic political period of Vicente Fox Quesada, just in the year 2005, there were 338,000 Federal Judicial Police members in Mexico, almost half of these members were also in the military.⁷⁹ Although these members belonged to the police, they had been trained and were an integral part of the military. The main problem rests in the fact that in Mexico, as Benítez Manaut argues, “the strong-arm approach has always been identified with the use of the armed forces and possible violations of human rights.”⁸⁰ These violations of human rights usually go unpunished or unresolved as the *fuero militar* protects the military from being tried in civil courts. The military’s presence and the military’s impunity have increased exponentially since 2006. Furthermore, the year 2006 marked the beginning of a new presidential period, that of Jesús Felipe Calderón Hinojosa, who became Mexico’s 56th President from 2006 to 2012. During this period, ex-President Calderón Hinojosa initiated the War on Drugs.

The initiation of the War on Drugs marked an important point in Mexican history, as the timing and sequence of events after this war started have been detrimental for civil-military relations and the existence of a strong democratic rule of law. When the War on Drugs started in 2006, there was the persistence and existence of the *fuero militar* in Mexico, which still remains. The timing and sequence of events of the War on Drugs was detrimental for this, as these institutional limitations are still unreformed. Therefore, within the more than 60,000 deaths during the War on Drugs, there have not been so many cases where the military has been charged.⁸¹

Since the War on Drugs started in 2006, less than 5 % of drug murders have been investigated.⁸² Despite the changes envisioned by President Felipe Calderón Hinojosa and the reform plan already in effect, by mid-2010, there were still severe institutional limitations persistent at the judiciary, which as argued by Sara Schatz, “remain[ed] a serious cause of impunity for homicide (civil, political, and drug-

⁷⁷ Benítez Manaut, *supra* note 26 at 175.

⁷⁸ *Ibid* at 165.

⁷⁹ *Ibid* at 175.

⁸⁰ Benítez Manaut, *supra* note 26 at 175.

⁸¹ Human Rights Watch, *supra* note 57.

⁸² Peter Watt & Roberto Zepeda, *Drug War Mexico: Politics, Neoliberalism and Violence in the New Narcoeconomy* (New York: Zed Books, 2012).

trafficking related”.⁸³ More specifically, despite the introduction of oral trials in December 2006, by 2009, out of 2,082 drug-related homicides, only 584 were reported by state courts to have reached the court agenda with only 100 sentences delivered.⁸⁴ Furthermore, in a report for the University of Miami’s Center for Hemispheric Policy, scholar Luis Rubio wrote “there are regions of the country where all vestiges of a functioning government have simply vanished.”⁸⁵ Due to the limited power of the judiciary to imprison the persons guilty of participating in organized crime or any other related killings, there are areas of the country lacking a proper, functioning government. More importantly, in certain areas of the country there is a “climate of impunity, extortion, protection money, kidnapping and, in general crime has become pervasive”⁸⁶. The present reality is that “forty-three out of 63 federal penal judges (68%) receive protection and have increased their own security in the face of ‘veiled or direct’ threats from jail organized crime members.”⁸⁷ A poll conducted by Castillo from the Mexican newspaper *Reforma* argued that 40 % of Mexican citizens were concerned with the judiciary’s independence and impartiality, while 80 % thought that corruption is the biggest and most pressing issue of the judiciary.⁸⁸ Although there have been many limitations at the judicial level, it does not help that during the War on Drugs, the military has gone unpunished, thus reinforcing the weak civil-military relations especially in the continuation of the *fuero militar*.

On June 18th, 2008 President Felipe Calderón Hinojosa introduced a judicial reform package that introduced the major sets of changes to the Mexican criminal justice system. Several experts have indicated that these reforms included the introduction of oral trials, stronger due process protections for the accused, police and procedural reforms to strengthen public security, and efforts to combat organized crime.⁸⁹ Although, the reform package was approved in 2008, the reforms will not be implemented throughout the country until 2016.⁹⁰ Thus, the reforms seemed to point to a better future for Mexico, but the case backlog statistics indicate that of all prisoners in Mexico, roughly 40 % are defendants awaiting a sentence.⁹¹ Thus, impunity is still existent and persistent in Mexico. Access to the law and to a fair trial is far from happening, and the democratic rule of law is very weak due to the circumstances aforementioned. Furthermore, the largest limitation that Calderón confronted, was the “inadequate resources and too little time to properly implement the reforms.”⁹²

⁸³ Schatz, *supra* note 46 at 19.

⁸⁴ *Ibid.*

⁸⁵ As cited in George W Grayson, *Mexico: Narco-Violence and a Failed State?* (London: Transaction Publishers, 2010) at 271. Original source untraceable.

⁸⁶ *Ibid.*

⁸⁷ Schatz, *supra* note 46 at 20.

⁸⁸ Javier S Castillo, “Suprema Corte: ¿Facultad de Iniciativa?”, *Reforma* (21 February 2010), online: *Reforma* Newspaper <www.reforma.com>.

⁸⁹ Schatz, *supra* note 46; Edmonds-Poli, *supra* note 7 at 269.

⁹⁰ Edmonds-Poli, *supra* note 7 at 269.

⁹¹ *Ibid.*

⁹² *Ibid.*

Several human rights violations occurred without receiving appropriate sanctions nor attention during the War on Drugs, which started in 2006. Between 2006 and 2010, there have been 4,944 complaints for violations of human rights; among these were cases of torture, forced disappearances, among others such as murders.⁹³ As well, out of these 4,944 complaints there had only been 72 recommendations emitted, but no actions taken.⁹⁴ A clear example of the *fuero militar* in action and the weakness of the Mexican criminal justice system can be clearly seen through the use of *casas de arraigo*. This was originally introduced in the *Mexican Constitution* in the year 2008, the original idea was to have a federal initiative to detain and deprive of liberty those suspects of belonging to organized crime.⁹⁵ However, it has been demonstrated by a report prepared by the Mexican Commission for the Defense and Promotion of Human Rights that this violates basic human and fundamental rights as people can be detained for 40 days and this period can be extended to 80 days.⁹⁶ Thus, the very existence of *casas de arraigo* is a direct violation of human rights, and the way this has been implemented in Mexico has been random and that has been abused by the Mexican Government and the Mexican Armed Forces during the War on Drugs as the use of the *arraigo*⁹⁷ has increased by more than 100% each year since 2008.⁹⁸ Once again, the aforementioned *fuero militar* complicates the situation even further, by making it impossible to bring the soldiers that committed the human rights violations to justice. In 2010 alone, “Mexico had, on average, at least thirty drug-related murders per day.”⁹⁹ In addition, Human Rights Watch, which has been one of the few non-governmental organizations following the War on Drugs in Mexico, has pointed out clear violations of human rights carried out by the military in a report that includes 17 cases of atrocious crimes committed by the Mexican military against more than 70 victims.¹⁰⁰ The conclusions have been gone unheeded as none of these military investigations have concluded in a legal punishment. Instead of protecting civilians from drug cartels and narco-traffickers, the military have themselves violated human rights that have in turn deteriorated civil-military relations as the population lost confidence in the military.¹⁰¹ More specifically, a clear example happened on May 1st, 2007 in Michoacán, where five soldiers abused, randomly detained, beaten and tortured 36 civilians and sexually

⁹³ Jorge Carrasco Araizaga, “La simulación castrense” (2011) Proceso 20 at 24.

⁹⁴ *Ibid.*

⁹⁵ Mexico, Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C., *El arraigo hecho en México: violación de los derechos humanos. Informe ante el Comité Contra la Tortura con motivo de la revisión del 5° y 6° informes periódicos de México*. (October 2012) online: United Nations Office of the High Commissioner for Human Rights <tbinternet.ohchr.org> at 2.

⁹⁶ *Ibid* at 3.

⁹⁷ It was introduced to the Mexican Constitution in 2008 as a federal preventive measure to detain people suspected of belonging to organized crime. The *Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C.* argues that *arraigo* is used as a means to investigate suspected criminals, but in practice, it is used as a kind of public scrutiny that allows more time for the authorities to determine whether the detained is guilty or innocent (at 2).

⁹⁸ *Ibid* at 3.

⁹⁹ Edmonds-Poli, *supra* note 7 at 260.

¹⁰⁰ Human Rights Watch, *supra* note 57 at 4.

¹⁰¹ Javier Sicilia, *Estamos hasta la Madre* (Mexico City: Temas de Hoy, 2011).

assaulted 4 civilians.¹⁰² Thus, the legal system does not protect the freedoms, political rights and basic guarantees of all individuals, and the system does not uphold and protect civil rights.

VI. Introduction to Uruguay's case

The democratic rule of law in Uruguay has been much stronger than in Mexico. In order to fully answer the research question of why the rule of law is stronger in Uruguay than in Mexico, the historical nature of civil-military relations has to be looked at individually.

Before 1973, Uruguay was seen as one of the most democratic countries in Latin America.¹⁰³ The reasons for this label relate to two main facts: first, contrary to Mexico, this country did not have a professional army during the political development of the country, and second, from early on in its political history, there were historical pacts and agreements achieved between the two traditional political parties, the Blancos and the Colorados. In general, the country received the title of Switzerland of the Americas because it enjoyed a stable, participatory, pluralist and liberal democracy for most of the twentieth century.¹⁰⁴ Thus, in fact Uruguay represented what Sondrol states as “exceptional in Latin America when juxtaposed to a rather monotonous history of reactionary dictators, oligarchs and praetorian militaries elsewhere.”¹⁰⁵

Before 1973, Uruguay and its population were viewed as and appreciated for being an almost European nation, composed of democratic citizens living in a democratic country built upon strong democratic institutions.¹⁰⁶ However, in 1973, the Uruguayan Armed Forces started ruling by imposing themselves through violence, repression and intolerance. In addition, a series of institutional changes took place in 1967 paving the way to what later became the dictatorship. These central changes are analyzed below.

¹⁰² Human Rights Watch, *supra* note 57 at 45.

¹⁰³ Russell H Fitzgibbon, “Adoption of a Collegiate Executive in Uruguay” (1952) 14:04 *The Journal of Politics* 616 at 639 [Fitzgibbon]; David Altman, “Collegiate executives and direct democracy in Switzerland and Uruguay: Similar Institutions, Opposite Political Goals, Distinct Results” (2008) 14:3 *Swiss Political Science Review* 483 at 486 [Altman]; Paul C Sondrol, “1984 Revisited? A Re-examination of Uruguay's Military Dictatorship” (1992) 11:2 *Bulletin of Latin American Research* 187 at 189 [Sondrol]; Luis Roniger, “Human Rights Violations and the Reshaping of Collective Identities in Argentina, Chile and Uruguay” (1997) 3:2 *Social Identities* 221 at 233 [Roniger, “Human”]; MHJ Finch, “Three perspectives on the crisis in Uruguay” (1971) 3:2 *Journal of Latin American Studies* 173 at 182 [Finch]; Philip B Taylor, “Interparty Co-operation and Uruguay's 1952 Constitution” (1954) *The Western Political Quarterly* 391 at 391 [Taylor].

¹⁰⁴ Fitzgibbon, *supra* note 103 at 639; Altman, *supra* note 103 at 486; Sondrol, *supra* note 103 at 189; Roniger, *Human*, *supra* note 103 at 233; Finch, *supra* note 103 at 182; Taylor, *supra* note 103 at 391.

¹⁰⁵ Sondrol, *supra* note 103 at 189.

¹⁰⁶ Roniger, “Human”, *supra* note 103 at 233; Finch, *supra* note 103 at 182.

VII. Background Conditions Leading Up To The 1973 Dictatorship

Óscar Diego Gestido was President of Uruguay from March 1st, 1967 until he died on December 6th, 1967. Before President Gestido's sudden death in 1967, he had already issued an order to ban the Socialist Party because it portrayed the wrong political ideas for the future of Uruguay. More specifically, the party had called for guerilla warfare within Uruguay.¹⁰⁷ Furthermore, upon Gestido's sudden death, Jorge Pacheco Areco, who was the Vice-President at the time, assumed the presidency from December 6th, 1967 to March 1st, 1972. Once he assumed power, Pacheco Areco "introduced nonparty technocrats into the cabinet, began to rule by emergency decree, and used the military to repress strikes".¹⁰⁸ In addition, in September 1971, the MLN-Tupamaro guerrilla had gained strength and was being directly repressed by the military.

A year before, on July 28th, 1970, Daniel A Mitrione, who was posing as an expert for the United States Agency for International Development, but who was in fact a spy for the American Government within the Uruguayan Security Services, was apprehended by the MLN-Tupamaros.¹⁰⁹ On August 9th, 1970, Mitrione was shot dead by the guerrilla group.¹¹⁰ As a result of these actions, in 1971, there was the "suspension of the right of *habeas corpus* on the basis of a declaration of 'internal war.'" ¹¹¹ [Emphasis added.] Additionally, President Pacheco Areco bypassed parliament to intervene against the guerilla groups.¹¹² This action led to the creation of the Estado Mayor Conjunto (ESMACO) or the Joint Chiefs of Staff.¹¹³ Simultaneously, the Junta de Oficiales Generales or Military Junta was also created. This Junta was composed of 21 top-ranking generals that oversaw the Joint Chiefs of Staff.¹¹⁴

That same year, due to Uruguay's precarious economic and political environment, there were contested and heated elections that were held in November 1971, that were won by the Colorado candidate, Juan María Bordaberry, who was inaugurated in March 1972.¹¹⁵ A year after, Juan María Bordaberry, suspended a range of constitutional guarantees and approved the *Law of State Security and Public*

¹⁰⁷ Charles G Gillespie. *Negotiating Democracy, Politicians and Generals in Uruguay* (New York: Cambridge University Press, 1991) [Gillespie].

¹⁰⁸ *Ibid* at 33.

¹⁰⁹ Alain Labrousse, *Les Tupamaros. Des armes aux urnes* (Paris: Éditions du Rocher, 2009) at 66-67 [Labrousse]; Eduardo Rey Tristán, *La izquierda revolucionaria uruguaya: 1955-1973*, vol 17 (Seville: Editorial CSIC-CSIC Press, 2005) at 5 [Tristán].

¹¹⁰ Labrousse, *supra* note 109 at 73; Tristán, *supra* note 109.

¹¹¹ Gillespie, *supra* note 107 at 33.

¹¹² *Ibid* at 42.

¹¹³ *Ibid*.

¹¹⁴ Gillespie, *supra* note 107 at 42.

¹¹⁵ Ronald M Schneider, *Latin American Political History: Patterns and Personalities* (Boulder: Westview Press, 2007) at 367 [Schneider].

Order.¹¹⁶ This law permitted the military to try “alleged subversives.”¹¹⁷ Even with Bordaberry as elected President, the economic and political situation of the country remained stagnant. Inflation and devaluation of the currency were an integral part of his presidency.¹¹⁸ Furthermore, violence and repression were increasing. On the one side, the military was consolidating its strength and, on the other, the MLN-Tupamaros were mobilizing more than before and struck more often. During that historical period, the presence of a truly democratic rule of law in Uruguay was in-existent as there was no civil authority or active civil courts that could provide political rights, civil liberties, and political equality for all citizens by protecting them from potential State power abuses.¹¹⁹ The only rule of law that existed was the one provided by the military. The military had the superior control through the military judicial power, and the civil courts could not intervene in their decisions. In sum, the MLN-Tupamaros took several guerrilla-type actions that sparked military repression, which would eventually open the space for larger military strength and power aided by the civilian government at the time. Taken together, these factors explain why a dictatorship took place from 1973 to 1985.

In February 1973, observing an significant deterioration of the national security situation, Bordaberry decided to give a larger degree of executive power to the military. Henceforth, military law became the rule, undermining the existent democratic rule of law defended by an independent judiciary. Seeing as the Uruguayan Congress did not agree with these measures, “Bordaberry dissolved the congress, installing in its place a twenty-five member appointed Council of State dominated by the military.”¹²⁰ After this decision, on July of 1973, there was a strike that was broken and “a month later the government ended union autonomy and banned labor’s central organization.”¹²¹ The opposition parties and Bordaberry’s own Colorado party, did not support him in some of these extreme measures, therefore Bordaberry “went to the Boisso Lanza air-force base outside Montevideo to negotiate a pact with the military.”¹²² As part of this pact, the National Security Council dominated by the military was created to control promotions to general ranks.¹²³ However complicated this period was for Uruguay, once the military had managed to acquire institutional control, it kept increasing its power and was in full control of the dictatorship. For example, the elections that were supposed to occur in 1976 were cancelled.¹²⁴ The military handpicked Aparicio Méndez Manfredini, a former Public Health Minister and a civilian representing the National Party (Partido Nacional).

¹¹⁶ Schneider, *supra* note 115 at 367; Gillespie, *supra* note 107 at 33; *Ley 14.068*, online: República oriental del Uruguay Poder Legislativo <<http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=14068&Anchor=>> [*Ley de seguridad del Estado y el orden interno, Law of State Security and Public Order*].

¹¹⁷ Gillespie, *supra* note 107 at 33.

¹¹⁸ Schneider, *supra* note 115 at 367.

¹¹⁹ O'Donnell, *supra* note 14 at 32.

¹²⁰ Schneider, *supra* note 115 at 368.

¹²¹ *Ibid.*

¹²² Gillespie, *supra* note 107 at 47.

¹²³ *Ibid.*

¹²⁴ *Ibid.* at 51; Arturo C Porzecanski, “Authoritarian Uruguay” (1977) 72:424 *Current History* 73 [Porzecanski].

Méndez Manfredini became the civilian “puppet” to represent the executive branch of government for a five-year term.¹²⁵ However, the fact that a civilian assumed power did not mean that the democratic rule of law was restored, on the contrary, “he promptly deprived of their political rights individuals actively involved in political affairs during the 1966-1973 period.”¹²⁶ Even though hard measures were being taken and the military was gaining more control as years went by, the economic and political situation of the country was worsening overall. Therefore, since economic problems were not improving within Uruguay and, having defeated the MLN-Tupamaros, the military started to have external, as well as internal, problems, such as not having any future vision for the regime. In addition, the Navy did not always partake in the Army’s general decisions.¹²⁷ More importantly, once the MLN-Tupamaros were defeated, the military envisioned bringing the “Uruguayan traditions” back to the table, thus handing the power back to civilians.¹²⁸ Even if the military wanted to bring the traditions back to Uruguayans, there was no talk about human rights violations, or about the existence of the *fuero militar*. However, considering that the economic and political situation of the country was stagnant, the military proposed a change in the Constitution through a referendum.

VIII. Conditions Towards The Restriction Of The *Fuero Militar*

A new constitution was proposed in 1980. Instead of imposing the Constitution, the military decided to consult the population via a referendum. In the words of Gillespie, “[i]n 1980, in an extraordinary referendum, Uruguayans decisively rejected the military’s proposed repressive new constitution, opening the way to the final phase of the regime.”¹²⁹ This demonstrates that even though the regime was extremely coercive and abrupt, it had kept certain democratic traces that were existent before the dictatorship took place, such as the use of referendums as a method of direct democracy. Furthermore, the military regime decided to abide by the results that rejected the new constitution, instead of acting against the population. They realized that their time in power was coming to an end as the Armed Forces were experiencing a legitimacy crisis. The military saw its own demise and was in need of an urgent change after Uruguayans denied the newly proposed constitution. They envisioned holding elections that would turn out to be different than those experienced in 1976. In these elections, political parties, especially the Blancos and Colorados were invited to run against the military government. However, the Left was kept at the margins and was not allowed to run for office. Historically, it has not been exactly established why the military decided to hold elections allowing the participation of traditional parties.¹³⁰ However, this was the first move towards the possibility of restoring democracy in Uruguay.

¹²⁵ Schneider, *supra* note 115 at 368.

¹²⁶ Schneider, *supra* note 115 at 368.

¹²⁷ Gillespie, *supra* note 107 at 109 and 136-137.

¹²⁸ *Ibid* at 138.

¹²⁹ *Ibid* at 51.

¹³⁰ *Ibid* at 68.

At the end of January 1983, there was a meeting between the Armed Forces Commission on Political Affairs (COMASPO) and a group of moderate members of the Blanco and Colorado parties.¹³¹ On the one hand, the Blancos, advocated and wanted “a return to the 1967 constitution, immediate elections, changes in economic policy, and contacts with other political and social organizations”.¹³² On the other, the Colorado party wanted “the complete restoration of the constitution and derogation of the institutional acts”.¹³³ This first meeting proved to be completely ineffective. First of all, both parties demanded too much. More specifically, given the economic and political hardships that were being experienced in Uruguay at the time, it was impossible for the military to change their economic policies, and they could not accept having political contact with the Left, which they had been fighting for years. Secondly, the parties did not exactly explain how they were going to approach important questions of transition of power, such as upholding that power and achieving a peaceful transition to democracy. Thirdly, there were disagreements between different members within the parties. This was partly because the parties had been internally divided over the years and not everyone within the party wanted the same outcome. There were also external pressures coming from some political leaders that were living in exile, who wanted to see more immediate and drastic changes. Furthermore, the military generals wanted to retain the National Security Council among other things, such as “allowing the president to declare a state of subversion, the holding of suspects for 15 days, and incorporation of military judges into the judiciary[...].”¹³⁴ All of these demands would be the responsibility of the executive branch of government once the President was democratically elected after the transition. In fact, most of these demands had already been present in the military proposed referendum in 1980¹³⁵. However, the most important part needed for a successful negotiation was not present, namely the full restoration of *habeas corpus*. The full restoration of *habeas corpus* would bring all prisoners to be tried in a civilian criminal court with an appointed civilian judge. This would not only help bring democracy back, but would also re-establish the strong democratic rule of law understood as the “legally based rule of a democratic state.”¹³⁶ Furthermore, especially with tortures and disappearances¹³⁷ encouraged by political propaganda during the dictatorship, a full restoration of freedom of expression was necessary for a change to occur. At the time, this first attempt to negotiate did not bring about the necessary changes. All parties present at Parque Hotel, where the negotiations took place, felt that their points of agreement in the negotiation were not exactly any better than before and did not promise a feasible change.¹³⁸ However, the negotiations opened the space for political parties to come face to face with the military and re-think and re-plan their strategies so as to reach an agreement that would satisfy both

¹³¹ *Ibid* at 116.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid* at 117.

¹³⁵ Gillespie, *supra* note 107 at 117-20.

¹³⁶ O'Donnell, *supra* note 14 at 36.

¹³⁷ Juan Rial, « La clausura del pasado. Los conflictos del cono sur de America » (2006) 6 *Revue des civilisations contemporaines et Europe/Amériques* 17.

¹³⁸ Gillespie, *supra* note 107 at 117-20.

parties. Although the first negotiations failed, there was an attempt to organize a second set of negotiations that took place at the Naval Club. In the end, these second negotiations were the ones that allowed the restoration of the democratic rule of law in Uruguay in 1985.

IX. Institutional Change: *Fuero Militar*

In 1984, the negotiations held at the Naval Club resulted in a civil-military pact. The military allowed the full restoration of the democratic rule of law by a civilian government and accepted their return to the barracks by yielding some formal direct power in the dictatorship, as well as the control of military judicial power that was historically existent in Uruguay through the existence and persistence of the *fuero militar*. The *fuero* was an integral part of the negotiations achieved at the *Naval Club Pact* of 1984 where there was the simultaneous creation of *habeas corpus*, full legal mechanisms and the derogation of the *Organic Military Law*.¹³⁹ As argued in the previous section about Mexico, the importance of the *fuero militar* is that the military has a parallel justice system unaccountable to civil courts. As Calleros argues “one of the privileges enjoyed by the military is to be unaccountable to the judicial branch by virtue of the military ‘*fuero*’ that allows the armed forces to have their own justice system: the military judicial system.”¹⁴⁰ This military privilege has been restricted in Uruguay since 1984. Therefore, there is a judicial system that upholds and protects civil rights, that promotes the creation of accountability and responsibility, and in which everybody is subject to appropriate legal sanctions through legally established controls when committing unlawful acts such as crimes. This process did not occur immediately, it was rather a gradual process that took years to be accomplished. How this process was achieved is the subject matter of the analysis provided below.

It is crucial to understand that previous to the *Naval Club Pact*, there had been certain attempts at other agreements or pacts between the political and military powers. However, none of the previous negotiations finished in a pact because the military and the political parties were each asking for too much. Overall, both sides were not willing to give up major points, such as human rights violations.¹⁴¹ A clear example of these previous talks is the one held in Parque Hotel.¹⁴² Even if these previous negotiations failed, Julio María Sanguinetti who became President elect in 1985, succeeded in organizing the Naval Club Pact. The Pact became officially the Civil-Military Naval Club Pact that was agreed in August 1984 between the Broad Front (FA in Spanish), the Colorados and the Unión Cívica (UC).

¹³⁹ Calleros, *supra* note 26 at 132; Alexandra Barahona De Brito, *Human rights and democratization in Latin America: Uruguay and Chile* (Oxford: Oxford University Press, 1997) at 75 [De Brito]; Gillespie, *supra* note 107 at 177; *Ley N° 14.157, Ley organica militar*, online: República oriental del Uruguay Poder Legislativo <<http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=14157&Anchor=>> [*Ley organica militar*, *Organic Military Law*]; *Pacto del Club Naval* [*Naval Club Pact*].

¹⁴⁰ Calleros, *supra* note 26 at 114.

¹⁴¹ De Brito, *supra* note 139 at 76; Gillespie, *supra* note 107 at 117-20.

¹⁴² *Ibid.*

In August 1984, *Institutional Act N° 19*¹⁴³ marked the end of the dictatorship and the beginning of a new democratic era for Uruguay. This act evolved so that on June 30th, 1985, the military agreed that the National Security Council would be kept just as an advisory body under the new executive's command.¹⁴⁴ Another extremely important change that occurred is that military justice would only be applied by the military during periods of emergency. It was later defined that the military justice would be applied during a state of insurrection, but this could only be declared by the President and approved by parliament¹⁴⁵. This was part of the necessary changes, as the *fuero militar* was finally restricted, and the military was subordinated to the executive. Among other changes, there is the system of military promotions that started to be overseen by the President, and it would be him or her who would promote generals from a list of possible candidates provided by the military.¹⁴⁶ All of these changes played an important role, however, there is a critical difference in regards to military justice that became the envy of other Latin American countries that made Uruguay a crucial case in comparison to other cases such as Mexico.

This important change is, as Barahona de Brito argues, “[t]he military justice system was limited to military crimes in time of war and, if voted by the parliament, in times of State of Insurrection.”¹⁴⁷ This decision was taken after a long negotiation, because originally, the military wanted to keep their *fuero militar* and maintain their jurisdiction over civilians. However, as time passed and negotiations progressed, the military finally agreed that “common crimes committed by military personnel in time of peace, wherever they are committed would be submitted to the ordinary justice system.”¹⁴⁸ Thus, the democratic rule of law returned in full form and the courts were re-established to ensure access to civil justice for citizens. These courts would ensure political and civil liberties, as well as, the presence and existence of an independent judiciary that would safeguard the dignity of all citizens at risk. After this decision was taken, the Uruguayan military court system lost its legal authority to protect military personnel in a civilian trial, as is the case in Mexico. Also, if new violations of civil rights occurred after the dictatorship ended, civil courts would try those accused of them. This was a significant move towards the consolidation of a democratic rule of law that would “ensure political rights, civil liberties, and mechanisms of accountability, which in turn affirm the political equality of all citizens and constrain potential abuses of state power.”¹⁴⁹ However, an issue remained when it came to considering previous violations of human rights committed during the dictatorship years and how to rectify them.

A solution to long-standing arguments between the parties and the military over the violations of human rights during the dictatorship was proposed on

¹⁴³ *Acto Institucional N° 19* [*Institutional Act N° 19*].

¹⁴⁴ Gillespie, *supra* note 107 at 177; De Brito, *supra* note 139 at 74; Gros Espiell, *supra* note 114.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ De Brito, *supra* note 139 at 74.

¹⁴⁸ Seregni interviewed in: ‘*A Través de la Justicia Militar las FF. AA Buscaron en la Club Naval Poner Una Valla al Revisionismo*’, Búsqueda, 13 April 1989 as cited in De Brito, *supra* note 139 at 77.

¹⁴⁹ O'Donnell, *supra* note 14 at 32.

December 19th 1986, by the Partido Blanco, who presented to the lower house an amnesty law named *Ley de caducidad de la pretensión punitiva del Estado*.¹⁵⁰ The *Amnesty Law* was passed in the Chamber of Deputies with 60 out of 97 votes on December 20th, 1986 and on December 21st, 1986 it passed the Senate with 22 out of 31 votes and it was finally adopted as an official law on December 22nd, 1986.¹⁵¹ There has been much debate nationally and internationally from a political and a legal point of view in regards to the *Amnesty Law*. However, the reality of Uruguay's violations of human rights during the dictatorship came to an end with the ratification of *Amnesty Law*. On April 16th, 1989 in a national referendum in Uruguay, 57 % of the electorate voted for the ratification of the *Amnesty Law*.¹⁵² With this decision, the past was closed, and there was a new democratic beginning with the full restoration of the democratic rule of law took place in Uruguay. On the one hand, the newly elected democratic President, Julio María Sanguinetti, strived for stability as being necessary for maintaining a robust democracy and a strong democratic rule of law in the future. Therefore, having an amnesty law was central to uphold stability in Uruguay, and to be able to fully reinstate democratic institutions existent in the country before the dictatorship took place. On the other hand, legal specialists are not fully convinced on this point. Their arguments have been analyzed elsewhere.¹⁵³ However, their basic argument is that amnesty laws violate international human rights standards. Despite the different views regarding the transition, it is important to put the emphasis on the fact that a referendum on this matter was voted and supported by the Uruguayan citizens in a democratic way. The *Amnesty Law* was ratified by 57 % of the electorate during a referendum on April 16th, 1989, where the participation rate was 84.78 %.¹⁵⁴ Therefore, once again the transition shows that there have been extensive institutional changes where the *fuero militar* was severely restricted. Furthermore, there was full restoration of the democratic rule of law. The executive and the judiciary recovered their institutional power and independence that they enjoyed in previous democratic periods. In addition, citizens were able to ensure their political, civil rights, as they had access to a proper justice system that could enforce these rights. Despite the human rights violations, the referendum that provided the creation of the *Amnesty Law* showed that most people who voted, agreed with the decision to leave human rights violations in the past. However, certain sectors of the Uruguayan population did not necessarily agree with this resolution and they undertook other measures to make the military accountable for the abuses committed during the dictatorship years. For

¹⁵⁰ Gros Espiell, *supra* note 114 at 415; Luis Roniger & Mario Sznajder, "The Legacy of Human Rights Violations and the Collective Identity of Redemocratized Uruguay" (1997) 19:1 Hum Rts Q 55 at 59 [Roniger, "Legacy"]; Rial, *supra* note 103 at 8; Mariana Achugar, "Between Remembering and Forgetting: Uruguayan Military Discourse About Human Rights (1976–2004)" (2007) 18:5 Discourse & Society 521 at 525; *Ley N° 15.848*, online: República oriental del Uruguay Poder Legislativo <<http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=15848&Anchor=>> [*Ley de caducidad de la pretensión punitiva del Estado, Amnesty Law*].

¹⁵¹ De Brito, *supra* note 139 at 126-127; Gros Espiell, *supra* note 114 at 415, 421-424.

¹⁵² Calleros, *supra* note 26; De Brito, *supra* note 139; Roniger, "Legacy", *supra* note 150; Rial, *supra* note 94 at 17; Gillespie, *supra* note 107.

¹⁵³ Oscar Adolfo López Goldaracena, *Derecho internacional y crímenes contra la humanidad*. (Montevideo: Fundación de Cultura Universitaria, 2008); Gros Espiell, *supra* note 114 at 399-433.

¹⁵⁴ Roniger, "Legacy", *supra* note 150 at 65.

example, the imprisonment of Juan María Bordaberry has been a move forward towards larger accountability on the military side.¹⁵⁵ Thus, Uruguay managed to implement a stronger judicial system that upholds and protects civil rights. Also, by the elimination of the *fuero militar*, this country managed to establish a strong democratic rule of law which grants access to justice, as well as protects the fundamental human rights of its citizens.

Throughout this article we have used O'Donnell's definition of the democratic rule of law that looks not only at the fundamental and civil rights that need to be protected by an independent judiciary, but also looks at the importance of having judicial institutions operating within a democratic government. Thus, we have looked at the democratic rule of law from this perspective, because it offers not only an understanding of the rule of law, but also acknowledges the importance of democratic stability in order to achieve an operable level of the judicial institutions. This understanding has also enlightened our analysis of the "*fuero militar*" that, as demonstrated throughout this article, has been central for Uruguay to seek a return to having a strong democratic rule of law after the dictatorship ended in 1985. Meanwhile in Mexico, even within the changes taken to improve the judicial system and the military justice system since 2008, the "*fuero militar*" has continued to intercede with the strengthening of the democratic rule of law, as exemplified throughout this thesis with the existence of *casas de arraigo*.

After the last phase of the Mexican Revolution ended in 1917, there was a long period of military governments that took place from 1917 to 1946, after which the first civilian President, Miguel Alemán Valdés, was finally elected. However true this is, the fact is that the existence and persistence of historical institutional weakness remained in Mexico even after 1946, therefore there has been no critical juncture that allows the change of institutions and the strengthening of these. More specifically, Mexico's military kept the *fuero militar* that only served to reinforce the parallel military justice system by maintaining their own courts, and keeping and military judicial power, outside of civilian control. The direct political power of the military seems to have decreased at first sight, however, by analyzing the limited evolution of Mexican military and judicial institutions, it is clear that the critical juncture that Mexico should have experienced in 1946 did not bring about necessary changes to strengthen these institutions. Even after the 2000 democratic change, Mexico's civil-military relations remained stagnant. This demonstrates that there has been a clear path-dependence relationship in the nature of civil-military relations, especially in regards to the existence and persistence of the *fuero militar*. This has been the case for Mexico, but the case of Uruguay presents rather different results.

¹⁵⁵ Elin Skaar, "Wavering Courts: From Impunity to Accountability in Uruguay" (2013) 45:3 *Journal of Latin American Studies* 494.

During Uruguay's democratic political origins, there was no organized professional army that could bring the monopoly of the use of force to the country. More specifically, the country did not have a professional army during its early political development. Also, there was no presence of strong military caudillo figures that were an integral part of the military, as was the case in Mexico. Instead, Uruguay saw historical pacts and agreements achieved between the two traditional political parties, Blancos and Colorados that resulted in a creation of democratic institutions and democratic representation for its citizens. However, once Uruguay achieved independence and evolved politically, it saw the presence of the *fuero militar* just as Mexico did for much of the 20th century. However, the dictatorship that started in 1973 and ended in 1985 restricted this institutional framework.

The main difference between Uruguay and Mexico is that by having had a dictatorship from 1973 to 1985, Uruguay saw the existence of a critical juncture that forced the restriction of the *fuero militar*. More specifically, in 1984, the negotiations held at the Naval Club known as the *Naval Club Pact* resulted in a civil-military pact where the military allowed the full restoration of the democratic rule of law by a civilian government. In addition to this, the Armed Forces accepted the return to the barracks by yielding some of their formal direct power in the dictatorship and their power in the military justice system. For Uruguay, the simultaneous establishment of *habeas corpus*, the full legal mechanism and the derogation of the *Organic Military Law*¹⁵⁶ was achieved after the dictatorship ended. Thus, all State institutions, officials, military officials and individuals that are an integral part of the Uruguayan society, have to be held accountable to the law. On the other hand, Mexico continues to see weak institutions that cannot provide the protection of its citizens and make their population accountable to the law. Therefore, in Uruguay nobody is above the law. On the contrary, the presence and existence of the *fuero militar* and the *Military Code of Justice*¹⁵⁷ in Mexico, has continued to favor certain elite sectors of society over others, and certain institutions over others, directly affecting the strength of the democratic rule of law. Ultimately, in order to see how civil-military relations impact the strength of the rule of law in other countries, a larger case study analysis should be undertaken. Although outside the scope of this text, it might be important to see civil-military relations in OECD countries to see how they have played out in those countries in comparison to Mexico and Uruguay.

¹⁵⁶ *Organic Military Law*, *supra* note 139.

¹⁵⁷ *Military Code of Justice*, *supra* note 62.