THE MAKING OF LAW

THE SUPREME COURT AND LABOR LEGISLATION IN MEXICO, 1875–1931

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To Mimi and Moramay

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THE MAKING OF LAW

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Introduction

THIS BOOK IS A HISTORY of the development of labor law in Mexico from 1875 to 1931. Contemporaries from the late nineteenth century through the 1930s considered labor law progressive, reformist, or a threat to private property and capitalism. Arguably, labor law sometimes manifested these characteristics. It did, from almost any viewpoint, matter in the constitution of the state after 1917, as well as for workers and businesses negotiating conditions of employment and production both before and after the 1910 revolution. That labor law was important politically, socially, and economically in Mexico, however, may seem peculiar for two reasons. Since the country was predominantly agricultural throughout the period in which labor law largely evolved—1875 to 1931—it is counterintuitive that a field of law normally associated with industrial relations should have been so significant for the nation's polity and economy. Moreover, in view of the reality that "the rule of law," or *estado de derecho*, did not typify the nation's social and political systems in this period, it appears contradictory that legal institutions and discourses became central elements of industrial relations. Yet as peasants' lands were divided and then concentrated in large landholdings in the second half of the nineteenth century, more agricultural production was organized with wage labor.[1] By the turn of the century, Mexico had a substantial agricultural proletariat; and a large fraction of the peasantry performed wage labor at least part of the year.[2] And the country began to industrialize in the 1880s and 1890s, which led to the constitution of a working class. Although this working class remained a minority of the total population productively engaged, it was situated in the more dynamic sectors of the economy and, accordingly, could affect the nation's development.[3] Furthermore, liberal ideologies dominant after 1867 among political elites and other social actors were grounded in constitutional and legal vocabularies. Political and social leaders, even revolutionaries in some instances,

frequently expressed their positions in legal terms. Even if the rule of law remained an unrealized ideal, law was normally referenced in the political and social worlds ruled by men.[4]

Nineteenth-century liberal legal principles and institutions, however, were inadequate to accommodate fully workers' interests by the first years of the twentieth century. A new legal field was necessary if legal discourse was to be relevant in the modern world. The "social (or labor) question," as it came to be called, demanded an answer. That phrase had been used since at least the mid-1800s, and it circulated throughout the Atlantic world by the end of the nineteenth century, including Latin America.[5] By then, it normally referred to the problematic social consequences of industrialization. These encompassed the general indigence of workers, urban conditions of unhygienic overcrowding, crime—and industrial conflict, especially militant labor movements and strikes. In Mexico, intellectuals, including lawyers, perceived especially threatening to the economic and political order the strikes of 1906–8. And as legalistic liberalism proved incapable of addressing convincingly such conflict, an alternative response to the labor question short of revolution developed from principles of social legislation current among legal reformers in France in the early twentieth century. Among the social reform projects inspired by French legal thought that attracted interest in Mexico was labor legislation.[6]

Labor law like workers' movements in this country became interrelated with the events, political contests, and social struggles of 1910–20 and thereafter: the Mexican Revolution. Labor reform certainly was one item of the social agendas or pronouncements of the revolutionary factions who fought one another; still, the relationship among workers, other classes, revolutionary leaders, and social reform was complex. The insurrection and civil wars of 1910–17, insofar as they were not primarily political contests, largely had an agrarian social basis.[7] The role of industrial labor in the armed conflict was less extensive, in comparison. *Campesinos* and other rural people more than urban workers joined the armies to fight against the ancien régime.[8] The 1917 constitution nevertheless dedicated an entire chapter, Article 123, to stating the rights of workers, while in the ensuing years state governments passed labor stat-

utes; and the federal government enacted comprehensive labor legislation in 1931. At the same time, federal and several state government leaders formed alliances with labor organizations, preeminently the CROM (Confederación Regional Obrera Mexicana or Mexican Regional Labor Confederation). The constitution of 1917, of course, also contained a provision authorizing land reform and the nationalization of property, Article 27; agrarian property relations remained the nation's great problem through the period of this study.[9] But as scholars have noted repeatedly, labor law, along with workers' movements, came to play a central role in the organization of the new state and its corresponding revolutionary ideology.[10] This book suggests further that given the importance of labor law for the new state and workers' organizations, the federal judiciary's adjudication of labor disputes and interpretation of new legal principles were also significant in the evolution of the nation's political and social contours after 1917.

As the following chapters show, social and political actors paid attention to the rulings of Supreme Court justices in labor cases. Judge-made law sometimes could preoccupy contemporaries, notwithstanding the nation's civil law tradition, weak judiciary, authoritarian government, and pervasive corruption. Indeed, probably because of such presumptions or observations (not restricted to Mexico), the legal history of modern Latin America as a discipline has less scholarly production to its name than many other historical specialties.[11] But for Mexicans, that the judiciary was relatively weak, dependent on the executive power, or corrupt did not detract from the point that it mattered politically or in industrial relations. In his revealing parting message, on the cusp of a new generation of Supreme Court justices taking office in December 1928, the president of the Court, Jesús Guzmán Vaca, acknowledged many of the faults of the federal judiciary as well as the difficult circumstances confronting the justices.[12] The federal courts had faced armed revolt and powerful and defiant local bosses who disregarded judicial orders and legal norms. No other era had witnessed such corruption of judges as "these dangerous and ill-fated days." Yet Guzmán Vaca insisted that the Court for the most part had operated ably, dealing with backlogs of cases, applying the law assiduously. The editors of *El Universal*, a major Mexico City daily,

queried the high court's efforts to ameliorate corruption or hold government officials accountable for their failure to implement or obey judgments; but its editorial criticizing the departing justice's message recognized that most of the high court judges were not venal and that the social and political situation of the country had been abnormal.[13]

Consistent with these statements, while presenting a personal glimpse of Mexico's judicial system, is Ernest Gruening's *Mexico and Its Heritage*. Around 1927, this American writer and later senator interviewed numerous lawyers of the Mexico City bar about their perceptions of judicial corruption and judges' weaknesses or vulnerability to political pressures, especially from the presidency. His conclusion, derived from the interviews, was that corruption existed in the federal judiciary, was overstated, and was most extensive in cases involving petroleum companies. A couple of the justices whose terms ended in 1928 had been open to subornation, but the rest were honest. Historians have noted the notorious external pressure exerted on the federal judiciary in oil cases, some of which implicated the nation's security.[14] In most labor cases, however, it is apparent that the justices reacted to changing circumstances, ideologies, and constant litigation more than to direct pressure from the president.[15]

MEXICO'S LEGAL SYSTEM

Mexico's legal system partly resembles both continental Europe's civil law tradition and aspects of American constitutionalism. As in other Latin American countries with an Iberian legacy, Roman legal concepts, codified in the early nineteenth century by France and subsequently by Spain and other continental European states, influenced Mexican legal education and practice. In Europe, Roman-based law consisted mostly of judicial procedure and a set of categories of rules addressing relations between individuals—that is, private law, including contract and property law.[16] In the civil law tradition, clear distinctions have been drawn between private and public law and among the three branches of government (the separation of powers). Legal scholars theorized that the main source of written law should be the legislature. Judicial opinions have been accorded less weight as legal statements, frequently resulting in the absence of a rule of

stare decisis or controlling precedent. Thus, following the paradigm of the French civil code of 1804, legal experts drafted under legislative auspices detailed, statutory codes; in Mexico, the government codified the principal areas of private law with the promulgation of the civil code in 1870 for the federal district.[17]

Mexico's legal system also shares aspects of its American counterpart. The U.S. constitution impressed the drafters of the 1857 constitution, on which the 1917 constitution was modeled. Both the 1857 and 1917 texts outlined a federal system of government. Each state has a governor, legislature, and courts. The federal government similarly has three branches or powers: the presidency, a bicameral congress, and judiciary. The latter has consisted of federal district courts located throughout the republic, sometimes an intermediate level of appellate courts, and a supreme court that, among other tasks, regularly reviews appeals directly from district courts.[18]

If litigation has not been as pervasive in Mexican society as in the United States, courts still have been involved substantially since the colonial era in the resolution of individual and group conflict. And since the restoration of the liberal republic in 1867, the most important institution for challenging state action or seeking relief from its effects has been the *juicio de amparo*. In connection with the development of labor law, this has been a lawsuit initiated in federal court by an individual who seeks the judiciary's protection against an action of a public authority, including its application of a law, which violates the constitutional rights of the individual.[19] The remedy of the *amparo* (literally, support or protection) is essentially injunctive: the federal judge orders the public authority to carry out an action or refrain from doing so, on the grounds that otherwise the authority would infringe the petitioner's rights. Encompassed within such injunctive relief can be a federal judge's declaration that since a state court's decision, or that of an administrative agency, infringes the petitioning individual's rights, it is legally unenforceable.[20]

The distinctive characteristic of the *amparo* has been its "Otero formula." In the period of this study, the federal judiciary's order could protect only the individual petitioner granted the amparo. That is, the judicial ruling did not have general applicability, even if the court found a law,

widespread policy, or governmental practice unconstitutional. The judiciary could not derogate a law in general or enjoin an entire policy or practice of another branch of government except to the extent necessary to obtain relief for the individual in the particular case before it.[21] In actuality, after 1917, the Supreme Court's amparos declaring that a law or practice contravened an individual's rights, especially if more than one individual filed an action at the same time, had the practical effect of undermining the law in question.[22]

In the types of amparo cases examined in this book, the litigant filed a complaint in a federal district court, normally located in the state where the public authority's challenged action had occurred, while the Supreme Court, located in Mexico City, ruled as the final court of appeal.[23] These amparo actions normally had two basic, remedial stages: the judge's suspension order and the amparo judgment.[24] The individual petitioning for an amparo could request of the federal judge an order suspending execution of the offending state action at the time the complaint was filed. The judge might enter a provisional suspension order on the basis of whether the petitioner risked irreparable harm, balanced against the public interest, pending further review of the substantive merits of the amparo petition. Litigants could appeal the suspension order, as they could an amparo order of the federal judge. In the cases relevant to this study, during the Porfirian era (1876–1911), the Supreme Court issued the final decision. Since 1917, the policy of the Court's final review of amparo (and suspension) proceedings continued, although the volume of amparo cases pending before it increased through the 1920s.[25]

Under the post-1917 governments, as well as intermittently before then, the federal judiciary adhered to a narrow policy of *stare decisis*. In general, five consistent, consecutive rulings by the Supreme Court on a legal point (*tesis*) established a controlling precedent, *jurisprudencia*, on lower federal courts and on its own subsequent decision making, which only it could overrule if it did so explicitly.[26] A *tesis* typically is stated in a few sentences, phrased abstractly, and collected in the Supreme Court's reporter and other publications.[27] *Jurisprudencia*, the Court's interpretation of constitutional provisions, statutes, or other legal sources, in connection with cases before it, and as articulated in *tesis,* is a form of judge-

made law, or case law. Even in instances where the opinion of a Supreme Court ruling is not binding in subsequent cases (because it does not comprise one of five consistent rulings), it may have some persuasive effect. More broadly if inexactly, written and published opinions of the high court might be deemed a part of judicial doctrine on a legal issue, hence *jurisprudencia,* too, although such opinions technically would not be applicable as law in the same sense as a controlling decision.

The Porfirian Supreme Court ceased its operation in August 1914, following the defeat of Victoriano Huerta in the revolutionary civil war.[28] The victorious Constitutionalists reestablished the Court under the 1917 constitution. The Court with different justices began to operate again in June 1917. The constitution of 1917 conserved the amparo action, outlined in Articles 103 and 107, and directed that the Court would decide amparo appeals as one body: all eleven justices voting jointly, if present, in public conferences.[29]

The drafters of the 1917 constitution sought to ensure greater independence for the federal judiciary than it had under the authoritarian rule of Porfirio Díaz by gradually introducing between 1917 and 1923 lifetime tenure for justices and by placing the nomination of justices and judges outside of the control of the federal executive.[30] In 1928, amendments to the constitution modified the structure of the Supreme Court, increasing the number of justices from eleven to sixteen and dividing the tribunal into three chambers or *salas*, each of which would decide amparo appeals separately and specialize in specific legal areas. The second, administrative, chamber was to review most amparos involving labor matters, as they normally resulted from the determinations of administrative agencies. The amendments also changed the procedure for selecting justices. Henceforward the president nominated them, with the Senate ratifying the choices.[31]

LAW, POLITICS, AND IDEOLOGY

Liberal belief has distinguished law from politics at least since the nineteenth century.[32] To a degree, the constitutional separation of powers and the distinction between public and private law have the function of delegating political decision making to the sovereign (in modern republics

normally the legislature) and application of the laws to the judge. Jurisprudential theories have defined law variously and in turn have envisioned the social function of law and adjudication differently.[33] Advocates of social legislation in the early twentieth century engaged in a critique of what law was, who made it, and what its purposes were. In Mexico, justices opined about these issues, too, as concepts of law changed with the advent of labor legislation. At the same time, the belief persisted that judicial decision making differed substantially—and should—from politicking or legislating. In the editorials of major newspapers, politics had a pejorative connotation, and editors leaned toward tagging politics and politicians with corruption. Ideally, the judge or justice should be independent of such politics, knowledgeable in the science of law, and honorable. Such overarching values transcended the legal community, implicating political discourse—even revolution.

The formal separation of powers within the state that the drafters of the 1917 constitution designed did not result, as contemporaries and scholars since then have observed, in complete judicial independence. In the mid-1920s, Vicente Lombardo Toledano, an early scholar of labor law as well as then a CROM leader and lawyer, remarked that Mexico's federal government centered on executive power: it was a presidential system.[34] Scholars have used the word *presidencialismo* to describe an all-powerful presidential system, which, however, was not consolidated until the mid-1930s.[35] Given such appraisals, one can readily conclude that the judiciary was a dependent adjunct of the executive branch and law epiphenomenal of other political processes. But it is also evident that the state's chief executives from 1917 to 1935 presided over inherently weak administrations. Nor was the national legislature a strong, unified, law-making body during most of the 1920s; throughout much of the decade, successive presidents failed to control it.[36] The federal government barely maintained its authority over the nation between 1917 and the early 1930s. Each president during his administration confronted rural violence, army revolts, challenges from the Catholic Church and U.S. interests, or persistent regional opposition—as well as perennial labor conflict.

In such a political and social context, the federal judiciary is more accurately perceived as one among several weak but not insignificant

governmental actors. Contemporaries certainly realized this; more recently scholars have argued that the Supreme Court, which the federal executive efficiently subordinated with the 1934 constitutional reforms adopted by Lázaro Cárdenas, maintained a degree of autonomy in the 1920s, partly due not only to the weaknesses of the presidencies but also to the selection process of justices. A review of their nominations in 1917, 1919, and 1923 suggests that it was a political process, but not one completely determined by the president.[37]

The very nature of the amparo action, structured pursuant to the Otero formula so as not to implicate political issues, has an inherent political element. Until Díaz's first presidency, the Supreme Court had frequently played an independent and substantial role in the nation's politics.[38] Many of the justices sided with the president of the Court in his defiance of President Sebastián Lerdo de Tejada's attempt to orchestrate his reelection in the three-way struggle that resulted in Díaz's military overthrow of Tejada in late 1876. One early Díaz ally, the renowned justice Ignacio Vallarta, advocated for a more politically restrained judiciary while promoting judicial review and the value of jurisprudencia in amparo cases. By the early 1880s, Díaz regarded Vallarta a rival. Vallarta resigned, and soon the Court posed less of a challenge to Díaz.[39] The amparo action, however, continued to allow the Court to voice an independent position; but this occurred partly because the impact of its judgments was legally constrained—which was an initial political choice and premise about the amparo institution.[40]

Political factors external to the deliberative process of judicial decision making certainly have continued to influence it. But legal positions and judicial language are political acts, too, insofar as they are actions by state officers that imply a relationship between the state and individuals or relations between individuals and groups that the state attempts to govern. And as the judiciary operated in a context of social and political conflict, it could not have been immune to it. The recurring aspiration to segregate law from politics was perhaps utopian and was, in any event, unachievable in practice. In particular, the discourses around labor law tended toward acknowledging by the mid-1920s that the new legal field and its application were connected with the public interest. Justices