

## The Constitutional Permeability Principle: Guidelines towards a Constructive Constitutional Theory in Mexico\*

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### Abstract

*The Mexican Constitution easiest way to change shows the lack of limits to respect its basic principles. The absence a regular and methodological basis and the pitfalls of instrumental social deliberation is the background of the Constitutional change since 1917, with 618 amendments until July 2014. This situation has ended in a deformability of the understanding of what kind of norms must contain, and how can we construct a new qualitative dimension of the Constitution in a complex society taking into account the necessity of a contribution to the global governance and politics. In this regard, the Constitutional amendments try to reach the social goals trough a prescriptive dimension trying to repair dysfunctions about economics, human rights, accountability, electoral reforms, and so on; this situation has prompted normative inflation of the Constitutional body. Under these considerations, this article will discuss the failures of the Mexican Constitutional text in a society with high degree of changes and lack of democratic paths.*

**Keywords:** Constitutional reform, democracy, societal participation, permeability

### 1. Introduction: Dysfunctions between Reality of Social Demands and Normative Constitutional Context

The reforms to the Mexican Constitution did not follow a uniform pattern or methodology either. There is an indeterminate and even colloquial conceptualization of the terms "Constitutionalization" and "Constitutional reform". The implementation of reforms has not been a significant problem; the Constitution is very loose and does not establish formal limits or materials on the process of reform. Then we will address these issues, first the high incidence of reforms and secondly, the lack of understanding of the issues to be Constitutionalized.

In the last five years, Mexican Constitution have changed many times.<sup>3</sup> Issues related to: human rights (2011), content of basic education (2012 and 2013), defining quality food (2011), right to safe drinking water (2012), expulsion of aliens by administrative procedure (2011), right to free birth registration (2014), the right of access to information principles (2014), popular consultation on issues -that do not impact on state revenues- sustainable development (2013), creation of the National Council for Evaluation of Social Development Policy (2014), creation of Federal Telecommunications Institute, Federal Competition Commission, National Commission of Hydrocarbons and Energy Regulatory Commission (all these, 2013), suspension of rights and guarantees (2011 and 2014); assumptions for the loss of citizenship (2013) and so on. Continuously, the work plan of the legislature, as constituent power derived, does not have a program or planning to implement changes in the structure of the Constitution, nor a qualitative methodology to define the scope of each amendment, deletion, repeal or addition to the Constitutional *corpus*.

When a the reform procedure of Constitution occurs several times *per* year, is a signal of high flexibility; changes as if it were any body of laws, code, or *infra law*. This is the first pathological symptom of the Mexican Constitution; variability of reforms implies a lag of political and social changes in the written Constitution.

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<sup>3</sup> Based on the official Mexican Congress database, with quantitative and historic information from: Cámara de Diputados, [http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum\\_art.htm](http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_art.htm).

On the other hand, indicates the existence of agreements between legal forces of the constituent power to add or remove what they considered within the Constitution. This agreement -superficially democratic- lacks mechanisms for public deliberation: shows a separation between state and society, due to the absence of bases, standards and specific objectives to modify or create new rules of Constitution. Especially before the signals of failed social contract and lack of confidence in Mexican government and political parties (Bailey, 2014, pp. 33, 80).

This draft constitutional changes accuses formal high mutation rate of the Constitution, without any projection to the future, the sacredness of the Constitution gives in to any hint of political, financial or social pressure that means confrontation demand for government (in any subject of urgent attention in the public sphere<sup>4</sup>) text to be reformed. The Constitutional changes, themselves, cannot be entirely wrong; on the contrary, those relating to the enforceability of human rights have demonstrated the urgent need to adapt demands of society, which aims to build a course a substantial and accountability of democratic governance.

Although the regulatory changes, human rights are due to factors of a political speech, that departs from the social reality and human rights that have had multiple real setbacks in the daily life of the country. Enough to analyze the problem of forced disappearance, or absence of direct citizen participation mechanisms in the development of government activity, or the lack of legal means to control public spending and embezzlement.

Therefore, the failure of Constitutional reform to propagate a culture of compliance with its legal content is letto the political will of the operators. By example, the mistaken belief that regulatory reform is sufficient to alter the reality and the refusal of the Supreme Court to allow public participation in the reform. Then, inserting Constitutional text does not necessarily reflect the values of a society but the political group embodied in the constituent power. In their extended study on comparative Constitutional change, Fusaro& Oliver (2011, p. 5) says that Constitutions and systems of government of many democracies are responding to a range of pressures, internal and external, and in the process their *de facto* operation is changing, or they are undergoing, processes of formal Constitution amendment or reform.

## **2. Theoretical Approaches: Societal Influence of the Constitutional Change**

A state Constitutional change reflects the divergence of corporate interests versus institutional determinations; shows that the social, economic reality and political fragmentation beyond the formal Constitution. Therefore, the common condition and the consensus of the relations between state agents and society, Constitutional mutations occur. Fusaro and Oliver and their theory of Constitutional change (2011, p. 405) call *Constitutional arrangements*, that is to say the entire written or unwritten rules which regulate the functioning of the structures and powers of the state including national, sub-national and local relations, as well as the relations between society (individuals and groups, citizens and non-citizens) and public authorities.

On this regard, the changes required of the constituent power -by political influence- *the post national* scenario is the real influence factor; in this case, changes are an external pressure of government agencies to undergo States (enforcement of human rights through sentences of Interamerican Human Rights Court). For Preuss, (2010, p. 37) the phenomenon arises from the disconnection of the idea of sovereignty linked to the territory of the state, and connects with “the idea of collective self-rule of a multitude [...] the factor which affects the metamorphosis of a multitude into a nation or a people is the constituent power of the people themselves.

Contemporary examples of a dialogic Constitutional process is the case from Bolivia Constitution (2007), with a background to address the political and economic inequities; in this case, through an indigenous revolution, the reloaded constitutional text is set to bring together the demands of a multicultural society. Differently, in political terms, but with the same social deliberative idea, United Kingdom proposed, since 2014, the possibility of having written from an informative, argumentative and open -between Parliament and society- a Constitution process. The Committee points: There are few things more fundamental than the arrangements that determine how the state operates and exercises power in a democracy, and how it interacts with the people (UK Parliament, *A new Magna Carta?*, 2014).

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<sup>4</sup>With the reference to the systemic corruption in Mexico, Deputy ZuleymaHuidobro González argued: “For some it is a first step in this reform is very respectable, but most people out there are not content with this [...] all Mexicans must be punished for corruption, starting with the federal Executive, (Versiónestenográfica de la sesión del día 26 de febrero de 2015).

In other constitutional contexts the reform process is together between governments and the people: Austria, any Constitutional reform is subject to a referendum<sup>5</sup>. Peru calls for discussion and dissemination among civil society<sup>6</sup>; in Switzerland, the partial reform is managed by society and its limit is *no violation of international law*<sup>7</sup>. In France, the amendment to the Constitution may be submitted to referendum<sup>8</sup>. In Italy, the process of Constitutional reform requires an absolute majority of the cameras and popular referendum<sup>9</sup>. Therefore, various Constitutional contexts call for popular legitimacy in the process of Constitutional reform, possibly with a different taste of Habermas concept of *Constitutional patriotism* (cited in Wallace Brown, 2012, p. 221).

In other countries, the Constitutional changes legitimacy has been widely analyzed in Spain, Germany, United Kingdom, specially, on the fiscal compact and debt limits<sup>10</sup>. Teubner pone de manifiesto esta falta de guía para fortalecer la constitución estatal en el ámbito supranacional, y afirma que: transnational politics suffers from chronic deficits for example, the non existence of a demos, cultural homogeneity, political funding myths (Teubner, 2012, p. 2). On this way, constituent power, as can be seen in different constitutional geographies, can build a deliberative process to define the fundamental decisions. Each Constitutional context demands a particular study. People shapes the legal and political framework according to qualitative necessities. There are indicators, facts, actors and extra bearers of power. Democracy, as political and dynamic process, is the most important indicator is the assertive political deliberation process between society and its government.

However, from the supranational perspective, we can say that there is convergent and positive influence on issues such as human rights with undeniable acceptance to strengthen its domestic enforceability. This contact point helps to make real the aspirational content because of domestic deficits to fulfill their international human rights obligations.

### 3. Identity of Constitutional Issues

This section aims to discern the following questions: What issues are viable for "Constitutionalisation"? Why they deserve to be in fundamental political decisions"? Both answers can have different approach. In Constitutional democracy, the answer has an inclusive starting point.

First, the conceptual importance of terminological scope of Constitutional content which should be modified, deleted or changed, it is essential to delineate the issues that deserve a look in the fundamental law. A primary classification is taken as overriding objective power relations (including human rights, who after all represent individual and collective freedoms of citizens against public and private institutions of power) between the political bodies, judicial and legislative; this represents a definitive quality or the Constitution as a process born of the reconfiguration of the political theory (Laughlin, 2010, p.61).

Thus, it can be argued strongly, that the Constitutional definition of thematic structure is rooted in the decisions of the political society, as part of the original source of legitimacy and legal system governing that company. In modern constitutional theory is an accepted idea that the Constitution does not have a purely legalistic sense, but political - corporate that comes from the popular legitimacy, to pinpoint when specific exercises of collective power within particular sectors of civil society (Sciulli, 1992, pp. 15-16). Under this standard, the semantic significance of Constitution is not an empty construction. In fact, the content is not preexistent; on the contrary, it

<sup>5</sup> Article 44 of Austrian Constitution: (2) Any total revision of the Federal Constitution shall upon conclusion of the procedure pursuant to Article 42 but before its authentication by the Federal President be submitted to a referendum by the entire nation.

<sup>6</sup> Article 3, and LEY 27600, (*Ley que suprime firma y establece el proceso de reforma constitucional*).

<sup>7</sup> Article 194, Switzerland Constitution: 1) A partial revision of the Federal Constitution may be requested by the People, or be decreed by the Federal Parliament.

<sup>8</sup> French Constitution, article 84: [...] A Government or a Private Member's Bill to amend the Constitution must be considered within the time limits set down in the third paragraph of article 42 and be passed by the two Houses in identical terms. The amendment shall take effect after approval by referendum.

<sup>9</sup> Italy Constitution article 138: Laws amending the Constitution and other Constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. [...] The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes.

<sup>10</sup> Constitutional reforms in Germany (2009, 29th July, article 115); Spain, 27th September 2011) on fiscal compact and limits to the public expense and national budgets.

is the *political will* of people, within the normative idea of the aspiration projections, the big trend to create social tools for power modulation.

This terminologic precision *seems to reveal that the modern Constitution is fundamental only with respect to the office of government, and the Constitution's authority derives from a more basic construct, that of the people however conceptualized* (cited in Loughlin, 2010, p. 51). Ultimately, the importance of politics in society means validity and legitimacy of the Constitution. In the modern sense, it cannot be dissociated from the nation building and governance, as both constructs are the backbone of the social dynamics for the State's activities. Paine also notes that government makes but a small part of civilized life, as civilization evolves, government dissipates, since civil society becomes more able to regulate its own affairs and to govern itself (cited in Loughlin 2010, p. 54).

In contemporary Constitutionalism, the political decision provided by social origin is the starting point of Constitutional decisions. Thus, the government is merely a link in the structure of a society, with a basic conducting compliance with the aims of a society due to cultural conceptions the civilization of which it is part. For this reason, the term "Constitutionalise" should not be synonymous of textual changes in the Constitution, but a specific action to pursue political and regulatory purposes, well-defined around the governance.

The omission clear objectives link between the process of Constitutionalized political norms, rights and institutional functions break the general harmony and consistency, which should contain the Constitutional text. The trickiest part is that there are no proposals aimed towards a Constitutional process than more of the same and stay cloistered in the normative dimension without theoretical or political basis. Therefore, the democratization of the Constitutional process is an important factor in the definition of Constitutional content. For Walker the idea of democracy and Constitutionalism as fundamentally mutually supportive ideals (2010, p. 7)

Here it comes the first difficulty has derived constituent power to change large text, under the authority -well absence of limits defined in the regulation itself to narrow Constitutional reform. Therefore, the sum of reform has completely overtaken the content of the Mexican Constitution of 1917 that has been deformed to become a multinormative text that mixes fundamental and banal norms (which need not be in the Constitution<sup>11</sup>).

### 3.1 Discussion of the Constitutional Status

To define what issues are subject of *Constitutional status*, we need to set various parameters of political, economic, social, deliberative and dialogical important issues about the control of power, therefore constituted bodies such as society: mechanisms of participatory and deliberative democracy to define the inclusion of the issues of Constitutional significance. One elemental subject is the legislative measures to provide devolutionary relations on regulatory economics (as well as the production regulations specially protecting public goods). Periodic review of financial expenditure, is subject to structural importance because the decisions of economic stewardship (which cannot argue that belongs to the unilateral decision of the government). This issue has significant impact in development. Constitutional reforms effects on economic policy have been recently studied by Constitutional theory. Torsten and Tobellini,(2003, pp. 2-3) talk about this 'missing link between economic development and Constitutions'; like positive relation between stable democracy promoting the pace of economic development, and economic development promoting the consolidation of democracy.

In this sense, to have a general map of the Constitutional issues is necessary to define the political importance of popular empowerment in decision-making. A true construction from foundation to sustain the decisions that would modulate the power towards public goods, e.g. sharp, with Constitutional basis, the immediate economic future and encourage the development of many excluded groups through the setting and regulatory recognition of socio-economic rights such as due and allocable values. In this area, they play an important role as socio-economic rights distributive measures that create access to essential goods for development. King (2012, pp. 322-323) stress the importance of how various state institutions can give effect to such obligations, and in particular, the role of legislatures, the executive of adjudicative institutions outside of Constitutional law, and of the Constitution and Constitutional adjudication. [...] the conclusion was that Constitutional social rights can play an important role in protecting the social minimum.

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<sup>11</sup> To cite just one example of many such rules: 'Article 41 Section II, Section A. b): During their primaries, political parties will have to set one minute per hour of broadcast radio station and each tv channel.'

Only through these construction lines, and the spread of the Constitutional culture as a means of democratic participation, we will get real outcomes in order to repair the theoretical and pragmatic Constitutional questions; hence, the purpose of the reform, first, is to generate a broad discussion on the urgent and essential in the Constitutionalization issues. This leads to make a real Constitutional prophylaxis to avoid the pathology of convenience of amendments (created by political groups) and to generate dynamic roots of Constitutionalism based on societal consensus.

A first step is to establish intangibility clauses to provide a fundamental core to give a prescriptive dimension of political and economic decisions, the foundation of the relationship between society and state; relationships that cannot be modified with a non-deliberative minority.

Another version towards the creation to a new Constituent power is the rescue of the democratic sense avoiding the risk of the multiple actors. Thornhill (2012, p. 376.) explain this very clear when he refers to the Constituent power, to be viewed as a reality projected for and within the political system, through which the political system simplifies and adaptively orders its functional structure. Thus, the relationship between constituent power and the development of democracy is that provides the systematic structure of the Rule of law. The Constitutional structure holds all the institutional and civilized activity, is not alone, but is the foundation of the state, in this lays the importance of a legitimate and democratic conceptualization.

With the democratic dimension of Constitutional making-process the political stability in fragmented societies (the case of the Mexican one) could contribute with epistemic tools, to create deliberative and constructive solutions for attend political problems, through the creation of specific and accountable governance lines. Therefore, the need to provide a social package to process the constituent decision is not only urgent but of greater political importance to the sustainability of the structure of governance. Divide the process of Constitutional change from its social genesis is not the best way to legitimize the Constitutional culture as a means of identity and dialogic joint, as the Jeffrey Jacobsohn's conceptualization (2010, pp. 103-107).

Now, build a constituent process with a shift towards social institutional forces is a new way to recognize the changes that have occurred in society and that can be the cornerstone of a new Constitution. The modern Constitutional theory must overcome this paradox to make the process of change and definition of Constitutional issues comprising a societal consensus to legitimize state power and to modulate its activity in favor of society, not just a segment to meet claims minority. The solution is finding that both concepts revolve around social inclusion, for the Constitutionalization have an evolutionary sense to collect social voices in each historical moment is necessary to recognize in the Constitution.

As of Constitutional patriotism, as elementary concept for a new conception of: constituent power and Constitutional issues; it is possible to rethink the structural way to a Constitutional process with its own identity, sui generis, in accordance with projections necessary to harmonize and modular power and its exercise; as a new form of political philosophy and Constitutional culture.

Although, Constitutional patriotism is a concept under construction, a theory that provides one possible language for exercises in collective ethical self-clarification (Müller, 2007).

With the recognition of that normative, cultural and theoretical categories, we can create guidelines provides the analytical understanding of Constitutional theory; this is the main objective to rebuilt the constitutional status term, constitutional amendments and constitutional culture. So far, we have clarified some elementary concepts to sharpen the sense of constitutional principles, which hold the frame of the Constitution. These categories need a more accurate framework, at least in the Mexican context.

By one side, a more inclusive, deliberative democracy: implies that in all transactions about policy decisions, legal, financial and social structures and outcomes, are involved the diversification of the use of power and decision-making is all about: taking direct means for participatory democracy, holding private operators (companies and unlawful sources) to Constitutional policy parameters. By other side, mechanisms of accountability and good governance are an inseparable pair that any Constitution must maintain as axes of public action. In addition, public power concert to the public interest, with administrative, political, and judicial watchers. The UNESCAP (2009) has defined governance like the process of decision-making and the process by which decisions are implemented (or not implemented). With this Constitutional performance the public environment would with analytic steps, more substantive than the nominal discourse or semantic dimension on Constitutional issues.

#### **4. Conclusion: A New Framework Permeability and Constitution in Flux**

If the discussion of amendments is allocated in the social, institutional, academic, and broad fields, the Constitution will be a body of political and normative inputs and outputs. In this context, Constitutional law is a polycentric frame, and the path for reconstruct the public sphere as public good. The responsibility to protect and improve it through the process of reform and the changes required by the Constitution with the participation of the sectors mostly involved. (Here you can create specialized committees with society and influential groups such as the academic, business, NGOs and others, carry out deliberative processes to reform the Constitution ), and in the end, can carry out the referendum on the Constitutional decisions to change it.

The principles explained lines behind, can be the conceptual basis for a more useful constitutional theory and he floor for transformation and possible trends for the constituent power. Indeed, for a constitutional revision, like a substantive process, in order to avoid the emptiness of the "structural reforms" that have been lodged for more than thirty years in Mexico without any positive transformation of the state and its functions. Therefore, the simplicity of Constitutional reforms without an axis considering the Constitutional objectives as public goods (including the right) and efficiency in governance cannot prosper and remain in the linguistic dimension without zero influence on reality.

Finally, this evolutionary quality draws a solid base of institutional stability, certainty on fundamental policy decisions Fusaro and Oliver (2011, p. 426) identified in the process of change: *formal Constitutional change promotes transparency, contestability and stability*. Under these theoretical considerations, we could draw the first reconstructive lines scaffolding of the Mexican Constitution, far from 98 years of its creation, the text has suffered lethargy institutionalization of many problems facing the Mexican state. The main objective, of a series of Constitutional reforms, is to have a theoretical projection to be placed on the path of its development. The intent of the Constitutional changes must be the achievement of a systemic effect in seeking to achieve the goals of the State, the common good, values that a society shares; and above all make these changes continue holding the political, cultural, social, economic system to reach a realistic progress and human dignity.

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