

TERRUM

Constitutional Crossroads in Mexico.

By Ricardo Nerio



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"DILIGITE JUSTITIAM QUI JUDICATIS TERRAM." "Ye who judge the earth, give diligent love to justice"

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Since former President of Mexico Andrés Manuel López Obrador issued a decree reforming the federal judiciary within the Political Constitution of the United Mexican States¹ in February of this year, followed by its approval and official publication on September 15, 2024², significant questions have arisen both domestically and internationally, focusing on the extent of constitutional reform powers and the mechanisms available to challenge reforms that might violate the constitution itself and/or international treaties; particularly in light of the controversial package of constitutional reforms proposed by the majority parliamentary group, Morena. Beyond the socio-political motivations underlying these reforms, a purely legal analysis is underway to assess potential inconsistencies between the proposed and approved reforms and the core principles of the constitution, as well as the evolving landscape of human rights in the nation.

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The Reforming Power of the Constitution.

In accordance with Article 135 of the Federal Constitution, the special -so called- 'permanent constituent assembly' is empowered to add to or reform the constitution following a rigorous process that requires the involvement of both the Congress and the state legislatures. Although since the 'original constituent assembly' intended for the constitution to maintain its integrity and that a complex reform process be followed to express the true sovereign will of the Mexican people, it is true that the constitution has, at no point, been designed to explicitly constrain its own capacity for reform, and what's worse, since its promulgation in 1917, the constitution has undergone 793 modifications through 263 reform decrees³, making it one of the most frequently amended constitutions globally.

Now, the problem presented by the limits of the reforming power does not imply an inherent absence of limits for the permanent constituent assembly within the historical, political, and legal framework in which the constitution operates integrally and dependently. There exists a formative content that determines the very essence and form of the Mexican state, defined by the original constituent assembly prior to and independently of the issuance of the written constitution: what Carl Schmitt terms the 'fundamental political decisions,' which justify the totality of the Mexican people's political union and imply the state's unique form of existence, embodied in a particular constitution. In other words, there are supreme bases and principles within the constitution that provide the necessary framework for its content, but which meta-juridically are not autonomous, being directly related to the will of those who structured the nation⁴. These principles represent the true limits of the permanent constituent assembly, as the constitution itself is the limit for all constituted power derived from it.

This does not mean that the constitution, a liberal and democratic document, should never be amended or reformed. Nor does it mean that the sovereign will of the Mexican people should not have the power to self-determine according to current needs. Rather, there are fundamental principles that underpin the

1.-For further information, see Bezares, E. (2024, March 15). Unfeasibility of judicial reform. TERRUM, 18(10). <https://asyv.com/wp-content/uploads/2024/03/TERRUM-MARCH-2024.pdf>

2.- Official Gazette of the Federation. (2024, September 15). DECREE amending, adding, and repealing various provisions of the Political Constitution of the United Mexican States, regarding the reform of the Judiciary. https://www.dof.gob.mx/nota_detalle.php?codigo=5738985&fecha=15/09/2024#gsc.tab=0

3.- Chamber of Deputies. (1917). Political Constitution of the United Mexican States. Retrieved November 11, 2024, from <https://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm>

4.- Castillo Porras, G. D., & Muñoz Díaz, P. F. (2022). The constitutional superstructure or the fundamental political decisions. *Revista de Investigaciones Jurídicas*. Pp. 74-78. <https://www.eld.edu.mx/Revista-de-Investigaciones-Juridicas/RIJ-46/Capitulos/4.-la-superestructura-constitucional-o-las-decisiones-politicas-fundamentales.pdf>

structure that gives us unity and a unique identity, which cannot be compromised. Some of these principles, which have been intensely debated this year in light of ongoing constitutional changes in Mexico, include human rights, federalism, popular sovereignty, the separation of powers and the system of checks and balances, and constitutional control and congruence.

Additionally, with Mexico's increasing internationalization and the imperative to recognize universal human rights that protect the dignity of all human beings, especially following the transformative 2011 constitutional reform that significantly elevated the status and protection of human rights within the country's legal framework, as enshrined in both the federal constitution and international treaties to which Mexico is a party, these fundamental rights now exist as primary blocks without which those pillars of the Mexican state's structure would not find sustainability; which also function as the ultimate goal for all powers operating within the state. Thus, beyond being a limit imposed by the original constituent assembly, they represent the *desiderátum* of the international will, to which the permanent constituent assembly must necessarily adhere to maintain constitutional consistency.

Constitutional Control

Constitutional and conventional control mechanisms are enshrined within the constitution to safeguard its integrity and ensure adherence to its mandates, as well as those of international treaties. These mechanisms verify that acts of authority and secondary legal norms align with constitutional principles. Following the 2011 reform, Mexico employs two primary methods of constitutional control:

1. Ex Officio Control: All state authorities are obligated to independently assess laws and regulations within their respective jurisdictions. If a law or regulation is found to violate the constitution or international treaties, it must not be applied.
2. Concentrated Control: Specific judicial bodies, as designated by the constitution, exercise concentrated control through specialized procedures like amparo suits, actions of unconstitutionality and constitutional controversies. These procedures aim to prevent and remedy violations of fundamental rights or declare secondary legal norms unconstitutional.

In such context, can the outcome of a constitutional reform be subject to constitutional control? In other words, can a constitution become unconstitutional? From a strictly formal and positivist perspective, the answer is no. Explicitly, such a scenario is not provided for. However, from a technical standpoint, it is possible and indeed obligatory for constitutional bodies tasked with concentrated control, as the core purpose of such review is to safeguard the fundamental principles and rights embedded within the constitution, even when challenged by the actions of the permanent constituent assembly. It's crucial to note that this analysis pertains to the substance of a constitutional reform, not procedural violations that may occur during the amendment process, which may constitute distinct legal issues.

In recent years, various scholars and the Supreme Court of Justice of the Nation have engaged in debates regarding whether a constituted jurisdictional authority is empowered to review the content of the very constitution that empowers and governs its existence. Opponents have argued that the constitution itself must expressly define the processes and substantive parameters through which it can be limited, that judicial review cannot curtail popular sovereignty, and that it is not possible to confront constitutional norms as if attempting to establish a hierarchy of rights⁵.

5.- González Schmal, R. (1998). Can a constitutional reform be unconstitutional? Instituto de Investigaciones Jurídicas - Universidad Nacional Autónoma de México. Pp. 343-344 <https://archivos.juridicas.unam.mx/www/bjv/libros/1/130/18.pdf>

However, we can argue that the permanent constituent assembly's power is not solely constrained by political considerations. It cannot, through a particular reforming body naturally influenced by various interests, undermine the fundamental nature of the Mexican state, its core values and principles, or disregard the system of checks and balances. Furthermore, in a state committed to human rights and their progressive realization, it is unacceptable to enact supreme provisions that permanently violate human dignity. As the prime numbers of the legal order, these principles establish a hierarchy that must be respected. This became evident in the Supreme Court's late October 2024 decision to accept five challenges of unconstitutionality against the controversial judicial reform, as an urgent initial need to protect the judiciary institutions, despite previous interpretations⁶.

The Tyranny of the Reforming Power

To further contextualize the current legal and political situation in Mexico, the ruling political party, Morena, holding a majority in Congress and state legislatures, has not only proposed and approved constitutional reforms that undermine the justice system, weaken the system of checks and balances, and threaten the existence of autonomous constitutional bodies⁷, but it has also taken a more extreme step. Following the approval and the official publication of a constitutional reform on October 31, 2024⁸, commonly referred to as the "constitutional supremacy" reform, the reforming power aimed to limit existing mechanisms of the concentrated constitutional and conventional control explained above, specifically to prevent challenges to constitutional reforms by any means. This situation demonstrates a clear attempt by the ruling power to desperately "safeguard" the package of constitutional reforms it seeks to implement, disregarding the potential social, economic, and legal consequences that are sure to follow. Concurrently, the ruling power not only compromises the integrity of one branch of government, as seen with the judicial reform, but also imperils the stability of all public institutions and the fundamental rights of every citizen, leaving society vulnerable to legal destitution due to the absence of effective countermeasures against the immense force of the reforming power.

If further conflicting reforms continue to be implemented as strategic political maneuvers rather than genuine legal improvements, our Magna Carta could face irreparable harm, and the hard-won advancements in human rights protection could be irrevocably compromised. While our constitution is definitely not perfect and indeed requires reform to align with the aspirations of our society, hasty changes made without careful consideration undermine the democratic process and signal a dangerous power struggle, a reckless approach that not only weakens the state but also hinders the development of Mexican society.

Nevertheless, as I have argued in this article, there remains an opportunity to defend our most cherished principles against upcoming constitutional reforms, within the framework intended by our constitutional forefathers. By harmoniously applying current constitutional provisions, we can address potential human rights violations and any inconsistencies with the constitution as a whole. Whether the Supreme Court can withstand mounting political pressure and legal constraints remains uncertain in the coming months, as, following the debate on November 5, 2024, the ministers failed to reach a consensus on the relativity of the constitution's supremacy and decided to dismiss all five challenges to the judicial reform during the plenary session, despite discussing the issues raised in this analysis.

6.- Carrasco, C. (2024, October 22). Supreme Court to analyze judicial reform; minister admits five unconstitutionality actions. *Animal Político*. <https://animalpolitico.com/politica/ministro-admite-acciones-inconstitucionalidad-reforma-judicial>

7.- For further information, see Vargas, J. (2024, April 15). Constitutional reforms in Mexico. *TERRUM*, 18(11). <https://asyv.com/wp-content/uploads/2024/04/TERRUM-APRIL-2024.pdf>

8.- Official Gazette of the Federation. (2024, October 31). DECREE amending the first paragraph of section II of Article 107, and adding a fifth paragraph to Article 105, of the Political Constitution of the United Mexican States, regarding the non-appealability of amendments or reforms to the Federal Constitution. https://www.dof.gob.mx/nota_detalle.php?codigo=5742105&fecha=31/10/2024#gsc.tab=0

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