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Justice and equity: analysis and regulatory expectations regarding article 2 of the Mexican Constitution

Private projects are now legally required to respect justice and equity principles

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KEY ASPECTS

- The concepts of justice and equity in the context of indigenous and Afro-Mexican peoples and communities have become relevant for the private sector. They are now principles recognized at a constitutional level and may be found in current and developing legislation.
- The reform to article 2 of the Mexican Constitution represents a paradigm shift, since certain projects requiring administrative authorizations must now include consultation mechanisms and, where appropriate, benefits for the communities.
- Therefore, it is fundamental to reflect on the scope and contents of these concepts.

On September 30, 2024, the "Decree Amending, Adding, and Repealing Various Provisions of Article 2 of the Political Constitution of the United Mexican States Regarding Indigenous and Afro-Mexican Peoples and Communities" (the "**Constitutional Reform**") was published. This reform recognizes indigenous and Afro-Mexican peoples and communities as subjects of public law, and it establishes that when individuals or legal entities obtain a profit from administrative measures subject to prior consultation, the indigenous peoples and communities must obtain a "fair and equitable benefit" in line with "applicable laws." This right arises from the possible significant impacts these administrative measures may have on the life and environment of these communities. Under this article, for some projects, communities have the right to be consulted on administrative measures "to obtain their consent, or, where appropriate, to reach an agreement." It also mandates that those who profit from these measures must grant the communities a fair and equitable benefit.

The Constitutional Reform entered into force the day after its publication. Although its transitional provisions order Mexico's Federal Congress to issue the general law on the matter and to harmonize the applicable legal framework, this has not yet happened. Pending issuance of this act, it is important to reflect on the challenges involved in legally delimiting what constitutes a "fair and equitable benefit" granted in line with "applicable laws."

Challenges in the determination of the concepts "justice" and "equity"

When faced with an undetermined legal concept, two key challenges arise: the specific context of the matter and its compatibility with legal certainty.

The first thing to consider is that we are dealing with an undetermined legal concept and that its definition must consider the specific context of the matter. As it becomes necessary to define the basic elements that constitute justice and equity, it must be acknowledged that these concepts are inherently difficult to define with precision in advance. What one Indigenous or Afro-Mexican community may consider just or equitable can differ significantly from the perspective of another community. Similarly, the applicable legal framework aimed at promoting justice and equity will vary depending on the nature of the administrative measure in question. In the same vein, the degree of certainty regarding the place or location that conditions the granting of the just and equitable benefit must also be taken into account.

- A second challenge relates to the interpretation of what should be understood as "applicable laws" for determining justice and equity in the granting of a benefit. As mentioned, the Constitutional Reform mandates Congress to enact a general law on the matter. Currently, the draft General Law on the Rights of Indigenous and Afro-Mexican Peoples and Communities ("General Law") is pending review in the originating committees of the Chamber of Deputies[1]. If the legislative process is formally completed and the law enters into force, the General Law would undoubtedly be considered one of the applicable laws referred to in the constitutional provision.

However, even considering the current content of the draft, the General Law may prove insufficient for the proper interpretation and application of the concepts under discussion. This legislative proposal merely sets out certain general principles and delegates the provisions related to free, prior, and informed consultation to a forthcoming "subject-specific law." On the other hand, with respect to the consultation process, there is a separate draft law[2] on **climate justice**, which—although it outlines various consultation mechanisms—does not clarify what should be understood as a just and equitable benefit or establish the parameters by which such benefit should be determined.

In this context, it is possible to conclude that the concept of "applicable laws" must be interpreted based on the particularities of each specific case, taking into account: (i) the legal nature of the

[1] Initiative issuing General Act on the Rights of Indigenous and Afro-Mexican Peoples and Communities, available here: https://sil.gobernacion.gob.mx/Librerias/pp_HProcesoLegislativo.php?SID=&Asunto=4847116&Seguimiento=4850622

[2] Initiative issuing the General Act on Prior, Free and Informed Consultations for Indigenous Peoples and Communities regarding Climate Justice, available here: https://sil.gobernacion.gob.mx/Librerias/pp_HProcesoLegislativo.php?SID=&Asunto=4896350&Seguimiento=4900349.

administrative measure in question; (ii) the benefit or gain to be derived from such measure; and (iii) the specific characteristics of the community or people potentially entitled to the benefit. For instance, if the administrative measure relates to the authorization of a mining project, the Mining Law would be binding—and therefore applicable—as it sets forth criteria that, when interpreted systematically and harmoniously with constitutional principles, would help give substance to the concept of a "just and equitable benefit" based on the technical and legal standards of the sector. Article 13 of the Mining Law, for example, provides that the winner of a tender for a mining concession must enter into an agreement with the affected community to obtain land use authorization and must pay a minimum consideration equivalent to five percent of the amount resulting from deducting non-deductible tax expenses (as defined by the Income Tax Law) from the fiscal result. This reinforces the need for a harmonized interpretation of the legal system, in which the application of new constitutional mandates is articulated with preexisting sector-specific regulatory frameworks.

The Restorative Nature vs. the Participatory Nature: Interpretative Elements from International and Comparative Law.

The determination of the applicable laws is not the only element that requires interpretation. As previously mentioned, Article 2 of the Mexican Constitution enshrines the right to a benefit in favor of the consulted communities, stating that any individual or legal entity that obtains a gain derived from such activities must provide a just and equitable benefit. But what does it actually mean to have a right to a benefit?

This concept becomes particularly relevant when contrasted with examples found in both domestic legislation and international instruments, where financial obligations generally have a strictly restitutive nature—that is, the obligation to provide compensation typically arises in response to harm that has already occurred or is imminent. However, the Constitutional Reform appears to introduce a different logic—one that is not limited to reparations, but rather aimed at ensuring the active and ongoing participation of communities in the economic activities generating profit.

The draft General Law appears to reinforce this interpretation. Article 58, which addresses administrative measures likely to impact Indigenous and Afro-Mexican peoples and communities, expressly recognizes "the right (...) to the just and equitable participation in the benefits." This understanding transforms the traditional approach to compensating affected communities: it is no longer seen as a one-time indemnity payment or isolated transaction, but rather as an ongoing obligation that ties the beneficiary of the administrative measure to the impacted community for the duration of the project in question.

Internationally, the concepts of justice and equity regarding indigenous communities are reflected in different international to which Mexico is a party.

- Such is the case, for example, with the United Nations Declaration on the Rights of Indigenous Peoples, which refers to justice and equity, as well as to compensation measures that must reflect those principles; International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples, which highlights the need to provide equitable compensation for any damage communities may suffer as a result of resource exploitation on their lands; and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, which specifically aims to ensure the fair and equitable sharing of benefits resulting from the use of genetic resources. The Protocol, in fact, provides examples of both monetary and non-monetary benefits that may be agreed upon, such as participation in product development, capacity building, technology transfer, and access to human and material resources, among others.

- Additionally, international standards developed by the Inter-American Commission on Human Rights provide further interpretive guidance. In particular, it has been emphasized that the property rights of Indigenous peoples over their ancestral lands encompass not only the use and enjoyment of natural resources, but also effective participation in the benefits derived from their exploitation. This implies that any administrative measure authorizing economic

activities in Indigenous territories must incorporate clear mechanisms to ensure the just and equitable distribution of the resulting benefits.

From a comparative law perspective, other Latin American countries like Colombia and Peru offer valuable references.

The Colombian Constitution recognizes the right of indigenous people to participate in the benefits arising from the exploitation of natural resources on their land. This is channeled through the General System of Royalties and has been strengthened in case law through binding agreements with economic, social and governmental commitments[3].

- In Peru, the General Consultation Law[4] resulted in agreements with social investment and infrastructure commitments, while the country's fiscal regime for the energy sector allows for the redistribution of a portion of revenues to producing communities. Both cases reflect a shift from traditional compensatory mechanisms toward models of active and sustainable participation in the economic benefits generated.

From this brief analysis, it becomes clear that the way in which the concepts of justice and equity have been applied internationally—both in treaties and in foreign legal systems—in terms of community participation or benefit-sharing, reveals certain key elements that the Mexican legislature is likely to recognize as a result of the Constitutional Reform: (i) the need for the benefit or participation to be negotiated or agreed upon between the parties; and (ii) the benefit or participation may be economic or non-economic in nature, but in all cases, it must represent a tangible and meaningful gain for the affected community.

Conclusions

In conclusion, the implementation of the new constitutional mandate requires a systematic interpretation that goes beyond the enactment of a general law, and must also take into account sector-specific regulatory frameworks and applicable international standards. The construction of the concept of a "just and equitable benefit" cannot be separated from the specific context in which profit is generated, nor from the regulatory frameworks governing the activity authorized by the administrative measure. Until a General Law is enacted establishing the minimum parameters for granting benefits to Indigenous and Afro-Mexican communities, it will fall primarily to the private sector and to the authorities involved in administrative measures—and likely, ultimately, to the judiciary—to interpret these concepts and apply Article 2 of the Constitution in accordance with principles of conventionality and effective judicial protection.

[3] Article 330 of the Political Constitution of Colombia, and judgment T-129 of 2011 of the Colombian Constitutional Court, available here: https://www.corteconstitucional.gov.co/relatoria/2019/t-129-19.htm?

[4] Available here: https://consultaprevia.cultura.gob.pe/sites/default/files/pi/archivos/Ley%20N%C2%B0%2029785.pdf?

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