

# Revista de Administración Pública

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## Rule of law and accountability in democracy

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### Introduction

Accountability and the validity of the rule of law are, among others, elements that make up the institutional bases of democracy. Fulfilling legal mandates and being responsible for the making of decisions, actions and omissions while exercising political attributions, shower political and social systems with legitimacy in the exercise of power.

In this sense, accountability and rule of law are closely related to one another. They share the purpose of monitoring and controlling power to place it within a democratic environment, they build communication bridges, and products belonging to one of them become supplies for the other. For example, the existence of a culture of legality, as suggested by the rule of law, nourishes politicians' and public administrators' responsible and efficient ways of acting because they can be punished, as demanded by accountability. On the other hand, public function which can be scrutinized permanently creates smaller deviations from what the law establishes as mandatory and of common interest.

Thus, an efficient interaction between the two of them is the key to make a democracy work. This is the goal of this essay, which will be organized as follows: firstly, an analytical framework on open society will be proposed, the latter promotes the relationship between rule of law and accountability and makes them the institutional bases of contemporary democracy. Secondly, the prescriptive content of rule of law is emphasized, as well as its importance in the generation and implementation of normative instruments that promote political power control. Thirdly, the scope and meaning of accountability in democratic contexts and rule of law are analyzed. Finally,

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the need to include citizens' participation in accountability practices is mentioned. The latter also refers to its institutional and normative propensity.

### **State, democracy and open society**

The birth of modern State in the late 18<sup>th</sup> and early 19<sup>th</sup> century brought on two important political changes: subjects became citizens, which meant the vindication of man's universal rights<sup>1</sup> and the acknowledgment that society is capable of providing laws for itself; that is, to be the author, responsible and recipient of the laws that regulate it. As a result of these changes, the relationship between State and society began to change substantially: political power was limited by constitutions and declarations of principles; the public sphere increased its interactions through the inclusion of political actors with renewed strength, such as parliaments; the economy acquired new vigor from greater commercial activity and social groups increased their range of interaction and responsibility regarding to the problems they face, like workers and peasant movements.

To properly understand the way the State-society relationship has evolved, a central idea of Karl Popper's *The Open Society and Its Enemies* must be studied. In this book, the author poses an essential question that even today cannot be answered univocally: who should rule? This question is especially important in institutional design processes and Popper poses another question: How can we so organize political institutions that bad or incompetent rulers can be prevented from doing too much damage?<sup>2</sup>

This interpretation of the way the public body is institutionally formed emphasizes the fact that institutions are human creations, products of individuals' reasoning and prone to mistakes. In the face of this situation, Popper suggests an answer to the aforementioned questions: institutions need to be redesigned according to political powers' liberal principles; that is, include elements that encourage citizens to participate in public debates, exercise their critical powers and be a part of public decision making processes and their implementation.<sup>3</sup>

Ergo, control exercised by the ruled over their rulers becomes the liberal prerogative of modern societies because it entails government control and its institutional balance of power. The State becomes not only an instrument of domination per se, but also "a system of institutions based on order, stability, ability and competency principles".<sup>4</sup> This perspective

<sup>1</sup> See: Habermas, J. (1998). *Más allá del Estado nacional*. Mexico: FCE. pp. 185-186.

<sup>2</sup> Popper, K. (2006). *La sociedad abierta y sus enemigos*. Barcelona: Paidós. p. 137.

<sup>3</sup> *Ibidem*, pp. 138-140 and Rawls, J. (1995). *Liberalismo político*. Mexico: FCE.

<sup>4</sup> Uvalle, R. (2000). "Espacio público, misión del Estado y gestión pública", *Revista Convergencia*, Number 1, January-April, Year 7. Mexico: Universidad Autónoma del Estado de México. p. 263.

suggests the rise of a new government pattern based on a different way of governance; democratic administration stops being totalitarian, opaque, centralized, vertical and bureaucratic. Totalitarian because it addresses in the same manner different problems, it plans according to “shared goals” and not based on individual impulses and it also develops apparent “agreements” that answer to submissive practices. Opaque because we cannot know clearly what is being done, answers and explanations on results obtained thanks to public resources cannot be demanded; thus, there are no punishments or sanctions for those who do not act according to the law. Centralized because community and local elements are not relevant political factors to make decisions; the energy of certain groups are repelled and rejected because of the fear of losing control. Vertical because options are imposed, public decisions have been previously defined and citizenry is more of a discursive category than an empirical one; that is, subjects are still hidden in management of public affairs by authorities. Bureaucratic because it focuses on fulfilling administrative procedures –often cumbersome and without any articulation– instead of working on goals and results.<sup>5</sup>

Despite these unfavorable conditions, the new pattern of governance<sup>6</sup> includes recognizing governmental and non-governmental actors; exercise of more horizontal and less hierarchical controls; fulfillment of collective goals through the interaction of different sectors and groups; a new way of ruling, managing and taking control of collectivity; demand responsibility from politicians and public employees; provide trustworthy information –that is, non-asymmetric and without the maximization of advantage of political and bureaucratic jobs– and prudent and responsible fulfillment of public duties.

To fulfill these objectives, democracy is organized weights and counterweights system based on constitutionality and legality of organization and exercise of power. It materializes due to articulated institutions which process the exercise of power thanks to the help of agendas, rules, times, jurisdictions and responsibilities; its efficient operation is found in monitoring, self-containment and quality of power before pressures that want to direct it into centralized models and vertical relationships.<sup>7</sup> In this sense, democracy needs the rule of law and accountability to dissolve discretionality in the exercise of power and promote decentralized, horizontal and delegational

<sup>5</sup> Peters, G. (2005). “Gobernanza y burocracia pública: ¿nuevas formas de democracia o nuevas formas de control?” *Revista Foro Internacional*, Volume XLV, October-December. Mexico: El Colegio de México. p. 585.

<sup>6</sup> Mayntz, R. (2001). “El Estado y la sociedad civil en la gobernanza”, *Revista Reforma y Democracia*, Number 21. Caracas: Centro Latinoamericano de Administración para el Desarrollo. pp. 7-22.

<sup>7</sup> Ayala, J. (2000). *Instituciones y economía. Una introducción al neoinstitucionalismo económico*, Mexico: FCE. pp. 25-54 and Ayala, J. (2000). *Fundamentos institucionales del mercado*. Mexico: Facultad de Economía (UNAM) pp. 31-62.

relationships; that is, form governments with institutions typical of liberal societies.

Thus, social and democratic integration can be achieved if individuals agree on the State's spheres of action and the latter adheres to them. This agreement is written into a basic document of modern States: the Constitution. In an open society, political constitutions are especially relevant; they guarantee individuals' basic rights –which in turn are the pillar of the liberal perception of political power– and at the same time try to make them positive by giving states the power to punish those who violate them. This does not mean unconditional power; on the contrary, to ensure respect for the fundamental rights of men and citizens constitutions establish a system of weights and counterweights characteristic of organic sections of said fundamental rules.

The transition time between including rights into the Constitutions and effectively enforcing them requires a series of complex and rough processes; by trying to make them a positive thing, life under the lights and my life behind closed doors is affected directly or indirectly as well as rights and obligations regarding properties, liberty, equality and legal security.<sup>8</sup> Constitutions then stop being a compendium of values to start being the pillar of democratic order which enforces the rights it protects thanks to bodies it creates. When these normative conditions are violated, rights to equality and freedom are at risk due to public institutions' actions of massification, homogeneity and verticality. As a result, governments do not recognize dissention and heterogeneity which are frowned upon or even punished.

According to Popper, democracy provides the framework to reform political institutions; in other words, makes it possible to reform without violence and allows the use of reasoning to create modify or suppress institutions. In this sense, intellectual liberty is considered precious because it avoids the State's interests to be invoked without justification at the expense of the level of individual action. One of the characteristics of authoritarianism is that is has to be free of criticism and control, making it difficult to know if its measures fulfill or not public goals which have been previously defined in a unilateral fashion.<sup>9</sup>

On the other hand, open society is one where individuals have the ability to adopt personal decisions and assume the responsibility; in other words, citizens and authorities conduct themselves rationally and accept their responsibilities –one of the pillars of accountability–. This way, social relationships stop being based on patronage and domination systems and become abstract relationships based on free exchange and

<sup>8</sup> Habermas, J. (*op. cit.*) p. 170.

<sup>9</sup> Popper, K. (*op. cit.*) pp. 143-147.

cooperation.<sup>10</sup> The possibility of giving criticism is an essential feature of modern democratic societies, once we start trusting reason –not just the subjective and the divine– society evolves and heeds the call of individual and collective responsibility to improve life's conditions. If the State bet on the elimination of reason and truth, it would be a return to “the harmonious state of nature”; however, it should rely on pushing into “the unknown, the uncertain and the unstable” and doing it through defending reason.<sup>11</sup>

Democracy permits and even promotes reason-based criticism, people who question procedures and institutions are not necessarily anti-democratic. Questioning and asking explanations from public authorities is part of the exercise of citizenry. Popper clearly expresses it by taking up Pericles of Athens' speech and using the following ideas as an argumentative axis: “When not making policy ourselves, we are shrewd judges of it, since we do not consider discussion an enemy of dispatch; our fear is to adopt policy without prior debate. In sharp contrast with others, we are ready to take risks and to calculate the risk”.<sup>12</sup> This opportunity, right and ability to judge politics is important to accountability for the possibility to monitor and sanction public power lies underneath.

In effect, open, modern and democratic society's logic opposes closed society's principles which have homogeneous pretensions; it offers answers to practices exercised in totalitarian, opaque, centralized and vertical States and praises an essential democratic principle: the need to control power. Consequently, regulation and monitoring of the exercise of public power are efficient instruments to preserve liberal exercise of political power which equals to reason and responsibility for individual and social acts.

Particularly, democratic control of power allows us to thwart efforts to define with fixed criteria the way actors are articulated according to matters of interest. This democratic control starts by recognizing different world views and abilities in the management of public affairs, rejecting the idea that authorities “should be free from the democratic procedure”.<sup>13</sup> Additionally, two of the most effective and emblematic instruments of these power control practices are the rule of law and accountability; each one of them in their specific area –and their interconnecting ones– promote horizontality and corresponsibility in the exercise of their public powers and respect to individual rights.

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<sup>10</sup> *Ibid.*, pp. 189-192.

<sup>11</sup> *Ibid.*, p. 201.

<sup>12</sup> *Ibid.*, p. 202.

<sup>13</sup> Hayek, F. (2007). *Camino de Servidumbre*. Madrid: Alianza Editorial. p. 100.

## Rule of law's foundation and design

An element that distinguishes governments' institutional maturity and democratic consolidation has to do with the existence of clear laws and their enforcement –when it is entirely voluntary it becomes more valuable–. In this case, the strengthening of legal institutions makes democratic processes a more tangible reality; law promotes conducts which are desirable, sanctioning undesirable ones.<sup>14</sup> Nonetheless, the construction of bridges among norms and their positive validity becomes difficult when there are matters that affect the States' organic bases or when certain structural problems like opacity, inefficiency, corruption and impunity want to be counteracted in institutional frameworks. Especially when these elements are rules and not exceptions; that is, when they are considered binding factors among de facto and formal powers<sup>15</sup> which affect institutional quality of governments.

From this point of view, law is characterized by a set of provisions which define which type of human behavior society considers acceptable and promotes peaceful coexistence of its members; because the main elements of conflict resolution are institutional pathways created for this purpose.<sup>16</sup> Therefore, the law does not only describe community life through a pile of regulations; but also guides it so it can correct negative factors and promote positive ones. The point is that law –used as a control or change mechanism– should offer individuals certainty regarding permitted and prohibited things and the ensuing consequences. Individuals develop various processes under legal certainty, which shows society's degree of civility. The point is not only to have institutions demotivate the transgression of the law, but also to reconstitute certain rights, examine citizens' and authorities' ability to discern the enforcement or non-enforcement of the law and why to choose either option.<sup>17</sup>

According to this framework, the rule of law is one of the main liberal properties of open societies; thanks to it individuals interact freely. Hayek mentions that rule of law embodies two general principles: the first one is that the State is subject to fixed and known norms and the second one is that these norms allow us to prevent with enough certainty how the authority will use in each particular circumstance its coercive power. This makes it easier to manage one's individual affairs according to this knowledge.<sup>18</sup>

<sup>14</sup> See Rodríguez, J. (2001). *Estado de derecho y democracia*, Cuadernos de Divulgación de la Cultura Democrática, number 12. Mexico: Instituto Federal Electoral. p. 9.

<sup>15</sup> Lasalle, F. (2004). *¿Qué es una constitución?* Mexico: Gernika.

<sup>16</sup> Rodríguez, J. (*op. cit.*) p. 32.

<sup>17</sup> Ackerman, S. (2005). "Rendición de cuentas y el Estado de Derecho en la consolidación de las democracias", *Perfiles Latinoamericanos*, number 026, July-December. Mexico: Facultad Latinoamericana de Ciencias Sociales. p. 10.

<sup>18</sup> Hayek, F. (*op. cit.*) p. 105.

Both matters are articulated around the rule of law's main goal which is control of power; that is, reduce as far as possible discretion given to bodies of authority –especially those with coercive power– so individuals can be free to fulfill their personal wishes and goals. The State is only in charge of “dictating decisive norms of conditions through which available resources can be used, leaving individuals to decide the way they use them”.<sup>19</sup> Thus, norms are not viewed as ends, but as means that allow citizens to fulfill their aspirations based on the certainty of their public and private exchanges.

In this sense, it is indispensable to have the legal framework regulated by liberty and equality principles, especially in public spaces; this where citizens' legal status will ensure the possibility of influencing government decisions and processes. Thus, the democratic rule of law possesses strength as long as groups can access public spaces to articulate their political, economic and social needs within a system ruled by the weights and counterweights principle.

In this sense, the idea of justice is not only an abstract model, but also legal aspects which limit equitably freedoms, law and courts' impartiality and distribution of social advantages in the most symmetric way. Habermas states:

“As soon as the normative substance evaporates; as soon as, for example, those who turn to the courts did not feel they have the opportunity to receive justice, the law becomes a behavioral control instrument and the majority democratic decision would become a show of deceptions and self-deceptions; with no consequences”.<sup>20</sup>

This is why the degree of obedience to norms is not enough to have a full rule of law, elements such as legitimacy and efficiency of said law still have to be included, as well as the possibility of having norm promote social, community and individual development processes –this was included recently to the academic debate<sup>21</sup>–. State governed by the rule of law does not equal social justice, consequently, “democracy does not equal equitable distribution of wealth; democratic powers make it possible to distribute social wealth without severe injustice or bloodshed”.<sup>22</sup>

<sup>19</sup> *Ibid.*, p. 106.

<sup>20</sup> Habermas, J. (*op. cit.*) p. 150.

<sup>21</sup> Ackerman, J. (coord.) (2008). *Más allá del acceso a la información. Transparencia, rendición de cuentas y Estado de Derecho*. Mexico: Siglo XXI, Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México/ Universidad de Guadalajara/Cámara de Diputados, LX Legislatura/Centro Internacional de Estudios sobre la Transparencia y el Acceso a la Información. p. 53.

<sup>22</sup> Rodríguez, J. (*op. cit.*) p. 23.



The rule of law is not consumed, when building a legal system it is only its formal expression; it is necessary to materialize it through an effective exercise of institutions, culture and actors' political practices. According to Rodríguez Zepeda, in the rule of law, "a government of law and not of men prevails... it is a common patrimony which must be created, protected and consolidated... it prevents and punishes politics' arbitrary acts and offers certainty and political order".<sup>23</sup> This certainty is not immutability; on the contrary, the rule of law itself defines spaces and procedure for criticism and dissent, it has to consider these possibilities and provide legal means to channel it, it must be open to pluralism, tolerance and social change.

This starting point can be considered as "active tolerance principle"<sup>24</sup>, the legal structure is understood as illegitimate domination. The validity and importance of the law is not derived from its codification or existence per se, but from the ability to create consensus among the individuals subject to it. Its goal is voluntary submission based on the fact that citizens trust public powers make decisions based on impartiality principles and the defense of individual rights; this requires democratic culture and instruction that values the necessity of norms and not punishments, the benefit and the sense of belonging.

This democratic and liberal approach of the rule of law widens its nature and becomes a mean to promote the control of power through a system of weights and counterweights whose institutional channels direct its efforts to fight corruption and impunity in the actions of public and private de facto powers.<sup>25</sup>

"Unless there is punishment for abuses committed by authorities, there is no rule of law or accountability".<sup>26</sup> In this sense, the monitoring of the fulfillment of accountability obligations becomes a useful mechanism for legitimacy and effectiveness of formal rules. The fact that authorities violate norms, exercise resources badly or does not yield results cannot be ignored. Therefore, we face rule of law's and accountability's deterrent character before the temptations of misuse of public powers.

### **Democratic meaning and scope of accountability**

Habermas describes two models regarding the way civil society affects the government's operation: the siege model and the sluice - gate model which complement each other. The first one refers to deliberation, debate and public scrutiny as instruments that influence authorities' decisions as long as they do not try to overcome it, but dedicate themselves to prosecute its

<sup>23</sup> *Ibid.*, p. 7.

<sup>24</sup> *Ibid.*, p. 29.

<sup>25</sup> Ackerman, S. (*op. cit.*) p. 14.

<sup>26</sup> *Ibid.*, p. 19.



action. The second one refers to the gradual and progressive advance of individuals within the political system; citizens can go from its periphery to its center and become part of the decision-making process—communicative power becomes administrative power—. <sup>27</sup> Both models consider accountability a relevant proposal because it promotes public scrutiny of authorities and the appropriate allocation of responsibilities. In other words, it opens democratic channels which citizens use to access the decision-making process.

Open societies praise surveillance, rationality, visibility and responsibility to express a more direct citizen-politicians and State administrators relationship; the meaning of “accountability” is pre-eminently democratic because it refers to liberal political principles: to know how the government works and control the exercise of its powers—especially coercive ones—regarding individual rights. Thus, accountability is an institutional need created thanks to social configurations and relationships regarding public and governmental space; which emphasize the need citizens have to be part of authorities’ administration of democracy.

This liberal meaning of accountability is based on classical authors such as Hobbes, Locke, Rousseau and Kant who analyze State, sovereignty, law, government regime and control of power. Accountability’s goal is to favor and preserve democratic practices through an effective control of public power which can be diverted into closed forms of actions, far away from citizens, even secret ones; matters which are opposite to the public nature of government activity. <sup>28</sup>

In this sense, if we want accountability to work as a way of controlling power in a democracy, it is necessary to establish rules and procedures which can be reduced—in declarative and not in restrictive terms—to three: 1) knowledge of government tasks; 2) argumentation and justification of authorities’ decisions and acts and 3) possibility of sanction.

Knowledge of government tasks refers to the opportunity citizens have to make inquiries, to ask questions—sometimes uncomfortable ones—about public resources and how the government uses them without having to justify their interest. <sup>29</sup> In operational terms, this means institutions have to make important efforts in areas like development of information systems, especially the collection of specific data, classification of general and classified information and the existence of administrative structures created to give efficient and appropriate answers and ensuring the availability of files.

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<sup>27</sup> Habermas, J. (*op. cit.*) p. 152.

<sup>28</sup> Uvalle (*op cit.*) pp. 258-260.

<sup>29</sup> Ackerman, S. (*op. cit.*) p. 27.

In this sense, the ability institutions have to answer citizens' questions is efficient as long as it gives society in a timely and appropriate way the necessary and convenient information. Otherwise, this information could be used in a deficient way and promoting opacity in the work of public employees. Government responses should provide data with sufficient quality in order to endorse the behavior of public employees or make complaints regarding anomalies and fighting impunity openly.<sup>30</sup> Nonetheless, it is of no use to know how the government works if it does not generate systematic evaluations and public debates or if data cannot be used as evidence of possible responsibilities of public employees on their performance or exercise of public resources.

This matter does not sacrifice efficiency and professional skills of public employees, it increase their legitimacy by being subject to public scrutiny and jurisdictional review and ultimately allows the correction of mistakes in policies and government programs thanks to continuous evaluation and feedback. This is why the participation of citizen is important in accountability strategy. This lead to the second procedural element: argumentation and justification of authorities' decisions and acts.

In a democracy, accountability allows the correct exercise of the weight and counterweight system which essentially define it. It makes the right citizens have to affect and control government's acts visible, effective and tangible. This means an improvement of the representative democracy's classical conception of the theoretical possibility of peaceful and continuous renewal of the governing body.<sup>31</sup> In other words, the notion of accountability moves towards more participative and deliberative democracies<sup>32</sup> by evaluating and allowing public scrutiny of public employees who develop, implement, evaluate and redesign policies. In this case, accountability is implemented through multidimensional processes such as performance audit, monitoring, review of public accounts, programming and budgeting of results, etc.

Accountability's complexity is due not only to the way legal obligations are implemented and enforced, but also to the economic, social and cultural impact; the government is then forced to answer questions in regards to the use of public resources, the exercise of its powers and the fulfillment of its responsibilities. According to Andreas Schedler, accountability includes an operational duality: it is not just the possibility of asking questions on government's decisions and actions, but also answerability; that is, through argumentation, dialogical conception to justify the exercise of public power

<sup>30</sup> del Castillo, A. (2003). *Medición de la corrupción: Un indicador de la rendición de cuentas*. Mexico: Auditoría Superior de la Federación.

<sup>31</sup> Behn, R. (2001). *Rethinking democratic accountability*. Washington: Brookings Institution Press.

<sup>32</sup> Ackerman, S. (*op. cit.*) p. 38.

in accordance with the valid legal framework and citizens' intelligence which give or does not give credibility to public management through public reasoning.<sup>33</sup>

Accountability in new governance appeals to multidirectional critical dialog, where citizen representations make questions, demand reasons and expect answers from public institutions and authorities who must use arguments which become important factors in accountability: if they are not compelling enough, there is risk of political, administrative, monetary or penal sanction.<sup>34</sup>

This is precisely the third procedural element of accountability: possibility of sanction. The liberal conception of the modern State and open society includes government actions in the executive, legislative and judicial areas—for therein lies the liberal principle of weights and counterweights—which become multidimensional—not one dimensional, autocratic and authoritarian—allowing debate and public argumentation in several public affairs.<sup>35</sup>

In this framework, if authorities are subject to public scrutiny there are forced—thanks to political capital—to justify their decisions, explain the reasons that support their decisions and conduct, their usefulness, public nature and the way society participates within them. To ensure effectiveness, it must include a series of regulations which establish sanctions; this is the importance of accountability—even though it is pretty obvious—: every goal and commitment must be expressed in a feasible way, it must be capable of being evaluated and measured through previously established parameters in order to define responsibilities, especially of those who exercise public resources and benefit themselves from them.<sup>36</sup>

Ergo, the possibility of being sanctioned means—in procedural terms—the existence of efficient and appropriate government information systems capable of giving citizens the answer they demand; relationships of power built tanks to the weight and counterweight rules; efficient and independent judicial channels to make complaints due to possible unfulfillment or digression from government activity; clear sanction for those responsible: removal from office (political sanction), monetary (administrative and civil sanctions) and corporal punishment (penal sanctions). This democratic process has to be supported on a valid and positive framework that describes in a simple and clear fashion the steps authorities have to take

<sup>33</sup> Schedler, A. (*op. cit.*) p. 14.

<sup>34</sup> *Ibid.*, p. 16.

<sup>35</sup> Majone, G. (1997). *Evidencia, argumentación y persuasión en la formulación de políticas*. Mexico: Fondo de Cultura Económica, Colegio Nacional de Ciencias Políticas y Administración Pública, A.C.

<sup>36</sup> Ackerman, S. (*op. cit.*) p. 12.

to enforce norms, timelines and types of processes and sanctions; in other words, the basic principles of the rule of law.

The possibility of punishment, in regards to the way government works stops being a concession and becomes an obligation, which includes responsibilities and sanction which cannot be negotiated but established in legal instruments which enforce them. Under this premise, a clearer obligations-rights relationship is established; fulfilling ones satisfies the demands of others within a reciprocal circle, its dynamics promotes –unlike other instruments– flexibility, democratization and legitimacy in the exercise of power.<sup>37</sup>

Procedural interconnection of these three elements discloses the scope of accountability in democracy: the real and effective possibility of power being controlled thanks to pre-established norms and processes. According to Susan Ackerman, the establishment of accountable governments is a delicate balance act. Firstly, we have to know what we want to evaluate, who develops this activity and the (positive or negative) consequences; especially when accountability processes are implemented in the exercise of public budget. Thus, it is important to create, promote and protect means that allow citizens to present freely opinions and complaints; that is, free of punishments. This task has to be developed by the State, who is responsible of creating institutions and designing processes to favor and allow these democratic practices. Nonetheless, we have to be very careful and avoid simulations as well as situations which are still controlled by political and economic forces within the government.<sup>38</sup>

Accountability used to control power promotes democratic practices by counteracting government “self-monitoring” which can be shady because “government bodies which discover and denounce acts of villainy may suffer severe consequences. Thus, they have little incentives to monitor closely the behavior of their employees”.<sup>39</sup> It is essential to define the institutional framework which is subject to audits. Those in charge of developing it, the way they do it and the ensuing consequences affect the main elements than ensure the healthy operation of modern democratic states governed by the rule of law: trust, credibility and respect for institutions.

Ergo, it is important to note that the complexity of modern societies emphasizes the *ex post* nature –so to speak– of accountability. Due to heterogeneity, multiculturalism, diversification of interests and the ever growing presence of citizens in public spaces it is difficult to regulate situations *ex ante*. In other words, law –from a democratic perspective– is compelled to explain down to the last detail what accountability entails and

<sup>37</sup> Schedler, A. (*op. cit.*) p. 11.

<sup>38</sup> Ackerman, S. (*op. cit.*) pp. 11 y 26.

<sup>39</sup> *Ibid.*, p. 27.

the way of processing it. This is why Habermas states that even though norms must address procedure viability, they must focus the debate on their own foundation and allow the administration and court develop law's materialization and development tasks based on their institutional experience. The latter implies greater need to give said bodies democratic legitimacy, because they become "co-legislators".<sup>40</sup>

#### *a) Political and legal value of accountability*

Accountability favors the design and implementation of mean of control such as performance audits, uncomfortable questions, answerability, dialogic exercise among rulers and ruled, argumentation regarding act, justification of government acts and enforcement. This is why accountability is a practice which cannot be measured in absolute terms<sup>41</sup>, it stands closer to category of degrees by giving value and added value to societies and governments that seek to promote democratic practices.

Taking this into account, political and legal value of accountability refers to the creation of a democratic culture which makes citizens feel safe by knowing they control the government and they can rule themselves by sanctioning public employees who commit offences or putting their credibility on the line if their policies fail. Both cases –sanction and credibility– have different degrees of accountability, one is more institutionalized than the other and the other is still in the consolidation period, but the important thing is that government and society send each other reciprocal signs that public space is addressed continuously with public resources. In this sense, the main idea does not involve disappearing the exercise of power, but guiding it, controlling it and promoting it through democratic processes that give it certainty, dimension and scope and reduce its injustices, abuses and excesses.<sup>42</sup>

The legal value of accountability refers to, specifically, an essential piece of the institutionalization of the democratic game because it allows the prevention and solution of abuses. This way the exercise of power becomes predictable and is kept within the boundaries of pre-established procedures. Thus, accountability helps create a legal framework that has a more positive validity and is fulfilled due to its democratic intrinsic value and not because of its obligatory nature. In other words, because we think of it as a socially valid and accepted value and behavior which promotes peaceful coexistence and not because fear of punishment. Accountability's control is not total, omnipotent, omnipresent or infallible (because it would commit the same abuses we are trying to correct), it has only been placed on top of those who make public decisions and guides them legally and

<sup>40</sup> Habermas, J. (*op. cit.*) p. 153.

<sup>41</sup> Schedler, A. (*op. cit.*) p. 26.

<sup>42</sup> *Ibid.*, pp. 21-24.

institutionally without undermining their authority or liberty to act publically and responsibly.<sup>43</sup>

On the other hand, accountability's political value refers to the revaluation of policies in democracies, especially in two areas: 1) making citizens favor a more assertive point of view of institutional tasks; because, at least in formal terms, they can possibly have an impact on political and administrative government tasks and 2) thwart the authoritarian desire of "simplifying a complex world with the use of simple recipes and strong men".<sup>44</sup> In other words, accountability helps create new legitimation thanks to different public, social and individual democratic interaction; the categories of interconnection –which can be at the same time normative and empirical– of citizens and institutions. Both of them modify political decision structures through control of power, the same way subjective rights are protected and preserved by a liberal legal framework: that is, democratic rule of law. According to Hayek:

"the price of democracy is that the possibility of explicit control must be restricted to areas which have real agreements; however, some areas have to be left alone (...) It might be true that our generation speaks and thinks too much of democracy and too few of the values it encompasses".<sup>45</sup>

The systematic practice of accountability's democratic exercises promotes the construction of public spaces because free associations, domesticated media and free and rational political culture are created.<sup>46</sup> From this point of view, accountability in democracies is a liberal principle within the creation of political culture. Homogenous, all-embracing, centralizing and opaque categories are substituted by open practices, horizontal exercise of power, responsibility shown by authorities to citizens and control of power.

### **Accountability, citizens and institutions**

One of the most important topics in the accountability agenda –from the perspective of the public and open societies– is the inclusion of citizen participation in the decision-making process and the operation of the government. That is, within the cycle of policies –design, implementation and evaluation–. This requires institutional effort within and without these bodies; we need to find the necessary balance between legitimacy (participation) and efficiency (technical operation) in government tasks.<sup>47</sup>

<sup>43</sup> *Ibid.*, p. 26.

<sup>44</sup> Habermas, J. (*op. cit.*) p. 173.

<sup>45</sup> Hayek, F. (*op. cit.*) pp. 102-103.

<sup>46</sup> Habermas, J. (*op. cit.*) p. 162.

<sup>47</sup> Camou, A. (2000). "Estudio introductorio". *Los desafíos de la gobernabilidad*. México: Instituto de Investigaciones Sociales de la Universidad Nacional Autónoma de México, Facultad Latinoamericana de Administración para el Desarrollo. pp. 9-58.

Nonetheless, it is worth to make the effort, citizen participation which has been adequately channeled is one of the most productive accountability mechanisms; society and its groups are directly involved in government operations, they know what happen, how it works, how much is spent, how much time it takes and if goals are fulfilled.

From this perspective, citizens view themselves as an instrument that controls the actions of the government and of other civil groups; continuous monitoring, scrutiny, participation in policies and electoral sanctions intertwines means of evaluation of public-governmental participation. To analyze this information, in terms of accountability, the existence of organized groups and free media is important because public activity is constantly monitored thanks to their actions.<sup>48</sup>

Citizens' participation, translated into institutional instruments such as social accounting, must be promoted to boost collaboration and co-responsibility avoid unproductive interventions, trying not to design channels that solely favor organized groups which have resources (economic or political), but promote the participation of the unstructured, low-educated mass of citizens who have access to asymmetrical and less than perfect information, but have legitimate demands regarding their living conditions. This is how society can be considered more democratic and this helps accountability.

It can be said that citizens' participation implies the existence of a wide democratic culture within societies; it considered wide because it affects –so to speak– “microscopic” levels of the social framework. In other words, the way decisions are made and the way tasks are assigned in families, schools, leisure groups, etc. To create this kind of participation citizens to have some type of specialization and technical training to affect in an organized way politics, laws or government programs.<sup>49</sup> Nonetheless, it is important to know that this participation is the result of social dynamics; that is, the inclusion of these groups into more plural and heterogeneous environments, as well as long-term commitments made by government institutions with democratic processes of the exercise of power. Especially by societies whose citizens need time to learn how to exercise political power in a responsible way.<sup>50</sup> This does not mean all citizens should participate in every single decision, it means those who wish to intervene can do it according to this democratic foundation.

From this point of view, constantly issuing democratic norms –such as the ones that refer to professionalization, decentralization, transparency and even accountability– does not ensure day-to-day exercise of democratic practices, these do not make up for the issuance of administrative

<sup>48</sup> Ackerman, S. (*op. cit.*) p. 30.

<sup>49</sup> *Ibid.*, p. 33.

<sup>50</sup> Schedler, A. (*op. cit.*) p. 18.



regulations. Accountability has to be able –in writing and in facts– to promote citizens' participation in public affairs, relevant or structural ones.

Finally, another accountability trend related to public space is that it is exercised more and more in a multidirectional way. According to Andreas Schedler, there are two important directions: horizontal accountability which refers to control exercised by government agencies and vertical accountability which means society exercises control over the government. These two directions have given birth to other intermediate categories: diagonal or oblique accountability.<sup>51</sup> International accountability is very important for the government; even though legal commitments have been signed with the internal legislation; multinational organizations have been created to work exclusively with this topic such as Transparency International.<sup>52</sup> This side of accountability is new and it will require especial attention in the near future from academics and institutions.

## CONCLUSIONS

Rule of law – accountability relationship pragmatically summarizes the connection between the abstract concepts of institution and democracy. The latter implies dynamic and long-term processes of rule of law's construction and consolidation, as well as visible and day-to-day exercises of accountability, which makes them important elements in the institutional construction of modern democracies. In other words, they are categories of great force for the analysis of State, government, administration and public affairs.

Norms play an important part because it defines which behaviors are socially acceptable to promote peaceful coexistence in certain time and space. In this sense, law moves away from immobility or rigidity and comes closer to permanence, stability and certainty parameters and conditions that allow it to “experiment” forms of organization, participation and control that solve its political, social, economic, administrative and cultural needs.

These institutional “experimentation” exercises –which are not trial and error schemes– must be guided by basic parameters, also known as individual rights. The latter interact with each other and continuously update the relationship held by individuals and their government. Thus, rule of law and accountability represent dynamic and multidimensional processes which articulate, disarticulate, build, rebuild and disassemble social processes. This way, they generate a series of coexistence and social interaction conditions which bring democratic institutions closer to citizens, because they are included in basic matters for peaceful social lives

<sup>51</sup> *Ibid.*, p. 34.

<sup>52</sup> See Organización para la Cooperación y el Desarrollo Económico OCDE (2003). *Public Sector Transparency and Accountability: Making it Happen*. Paris: OCDE.

such as access to justice, respect for public and private property, certainty in the exercise of individual rights, promotion of citizen' participation and access to government procedures based on laws which are respected, fulfilled an updated.

This is why, nowadays, new democracies have an important task: educate tomorrow's citizens, citizens capable of conceiving and perceiving democratic practices as everyday processes; citizens interested in participating in administration due to public service vocation and not because they see it as means of subsistence or access to political booties; citizens who can make informed, conscious and reasoned decisions; citizens that build institutions with greater capabilities; citizens who do not promote legal frameworks born from authoritarian or opaque pasts, but born from innovative, avant-garde laws and citizens who are not afraid of establishing down complex and current norms for complex future realities. Democracy uses instruments such as the rule of law and accountability as means to protect social peace and individual freedom. Democracy was created by humans; therefore, it is not infallible or perfect, it is a social rational construction through which people formally interact as free and equal individuals thanks to controlled power to rule themselves.

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