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**Judicial independence in Mexico:
appointment, safeguards and legal responsibilities**

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INTRODUCTION

According to the theory and several international instruments, the necessary values and principles of the judicial branch to properly foster the rule of law are, among others: impartiality, integrity, accessibility, objectivity, professionalism, legal certainty, transparency, equality and, of course, independence. Therefore, we can assert that independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial.¹

Judicial independence has been a historically relevant concept. It goes as far as the English Establishment Act of 1701, which implied it. Since then, this principle has been considered a cornerstone of the rule of law.²

In this essay, I will first address the concept of judicial independence in a broad and theoretical way. That is: what does it actually mean and why is it important? Afterwards, I will focus, with a more practical approach, on how that principle can be effectively preserved, analysing the case of Mexico and how its legal and constitutional system guarantees judicial independence before, during and after the mandate of constitutional justices, while detecting good practices and areas of opportunity.

Before I tackle these matters, it is very important to mention that we cannot give judicial independence for granted. It implies an active role of all the involved actors in order to be effectively and constantly respected. In the context of the electoral justice system in particular, this effort is fundamental. We cannot overlook the fact that the political parties are, at the same time designers and recipients of the rules of the democratic dynamics, including the role and structure of the electoral courts.

Beyond institutional challenges to overcome, electoral judiciary, as any other, is always under external pressures, due to its conflict-solver nature. To clarify this situation, I will provide two examples that recently took place in Mexico:

- a) When the High Chamber of the Electoral Tribunal of the Federal Judicial Branch (TEPJF, for its acronym in Spanish) was studying the possible annulment of the election of a state's governor, some federal congressmen of one of the involved parties (which has majority in the Congress and is also the party of the President) made public their intention to reduce the constitutional mandate of the justices of the Electoral Tribunal.³
- b) A few months ago, in Mexico, the head of the Senate submitted the proposal to create a new Chamber within the Supreme Court, specialised in corruption. This proposal would involve the appointment of 5 new justices (in addition to the 11 that are already in office) by the senators of the political party with the majority of the seats, which would imply the possibility of changing the majority of the Supreme Court.⁴

In this context, the importance of constitutional and legal safeguards for a strong and independent judiciary becomes evident.

¹ *Bangalore Principles of Judicial Conduct*. 2002. Link: <https://bit.ly/2FylrD3>

² ASENSIO, Rafael. *Imparcialidad Judicial y Derecho al Juez imparcial*. Editorial Aranzadi. 2002.

³ Iniciativa del Sen. Cruz Pérez Cuéllar, del Grupo Parlamentario Morena, con proyecto de decreto para reformar el Artículo Cuarto de las disposiciones transitorias de la Ley Orgánica del Poder Judicial de la Federación (reformado el 3 de noviembre de 2016), correspondientes al Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Orgánica del Poder Judicial de la Federación y de la Ley General del Sistema de Medios de Impugnación en Materia Electoral (publicado el 1 de julio de 2008). Link: http://www.senado.gob.mx/64/gaceta_del_senado/documento/86365

⁴ ARVIZU Arrijoa, Juan. "Monreal va por reforma para "sustituir" la Judicatura Federal". El Universal. 05 de abril de 2019. Link: <https://www.eluniversal.com.mx/nacion/politica/monreal-va-por-reforma-para-sustituir-la-judicatura-federal>

WHAT IS JUDICIAL INDEPENDENCE?

Recommendation (94)12 of the Council of Europe on the Independence, Efficiency and Role of Judges provides that “in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”.⁵

Judicial independence means that a judge is able to interpret law free from any external influence (positive dimension) and without subjective biases or preconceived political loyalties (negative dimension).⁶

As stated by the General Assembly of the United Nations in the “Basic principles regarding the independence of the judiciary”⁷:

- States must guarantee judicial independence and, consequently, all public institutions must respect it;
- This implies that each State has to provide the necessary means for the judiciary to adequately perform its duties; and finally
- Judges must be protected by freedom of expression and association.

Judicial Independence is essential for the adequate jurisdictional function of a constitutional rule of law, it is a foundation of the principle of the separation of powers and a necessary condition for impartial conflict resolution and effectivity of human rights.

JUDICIAL INDEPENDENCE IN MEXICO

As stated previously, due to its litigious nature, the judicial function is frequently subject to external pressures, and in the case of the Federal Electoral Tribunal of Mexico, such pressures are common precisely because of the political nature of the disputes it must resolve. For instance, the case I just mentioned, regarding the possible annulment of the election of a state’s governor.

But pressure can also come from external actors. For example, last year, when the Tribunal was solving a famous controversy regarding the inclusion of an independent candidate in the presidential ballot, there was enormous and unprecedented pressure from the media to solve the issue in a certain way, even though the suggested solution could have been contrary to the presumption of innocence of the candidate.

The independence of the judiciary cannot depend exclusively on the ethics of the judge; it must also be protected by the Constitution and a set of legal and institutional safeguards. In the following paragraphs, I will briefly analyse the guarantees of judicial independence in Mexico, particularly regarding the High Chamber of the Federal Electoral Tribunal.

⁵ Council of Europe. *Recommendation (94)12 of the Council of Europe on the Independence, Efficiency and Role of Judges*. Principle 1.2.d. P. 2. Link: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c84e2>

⁶ LINARES, Sebastián. *La independencia judicial: conceptualización y medición*. Política y gobierno. Vol. XI. No. 1. CIDE. 2004.

⁷ United Nations. *Basic principles on the independence of the judiciary*. 1985. Link: <https://bit.ly/2JfeGrC>

A. BEFORE THE MANDATE: SELECTION AND APPOINTMENT.

In the Mexican system, the justices of the High Chamber of the Electoral Tribunal are selected and appointed according to the following process:

- i. After a public announcement to all interested parties is made, the Supreme Court selects three candidates for each vacant seat (of 7) and submits three proposals to the Senate.
- ii. If the Senate accepts the Court's proposals, it must select and appoint the new justices within the next 15 days by the vote of 2/3 of its present members.
- iii. If the Senate rejects the Court's proposal, then a new proposal must be submitted within the next three days, and the Senate must select and appoint the new justices within the next five days.

This appointment mechanism has some advantages. On one hand, the required legislative majority (2/3 of the Senate) to select and appoint a justice guarantees that most parties should reach a consensus, which strengthens the political legitimacy and impartiality of the appointed judge. On the other hand, the previous public announcement promotes the selection of specialised and highly professional profiles, as well as the transparency of the designation process. The disadvantage is that the law does not consider a mechanism to avoid the stagnation of the designation process.

B. DURING THE MANDATE

1. Irremovability / stability

The judicial guarantee of stability or irremovability from the mandate intends to protect the independence of the judge from external pressures, either from private or public actors. In that sense, the Mexican Constitution (Article 99) provides that the justices of the High Chamber shall remain in office for nine years. The Constitution also establishes that they can only be removed from their position only in two cases:

- a. If, during their mandate, their actions or omissions seriously damage fundamental public interests, in which case the Congress must proceed to a "political judgement"; and
- b. If during their mandate, they commit a serious crime, in which case the Chamber of Deputies must initiate an indictment procedure and, given sufficient proof, remove the justice from his/her position for the duration of the criminal trial.

2. Remuneration

The Venice Commission recommends that, for judges, a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the scope of their duties.

In a similar fashion, the *Universal Charter of the Judge* states that judges "must receive sufficient remuneration to secure true economic independence", and that such "remuneration must not depend on the results of the judge's work".⁸

In Mexico, the Constitution (Article 94) provides that the remuneration of justices, magistrates and judges shall not be reduced during their mandate.

Regardless of that, in Mexico, recently all the judges of the Federal Judiciary voluntarily reduced their income by 25%, as a result of the pressures of the new Executive Branch.

⁸ International Association of Judges. *Universal Charter of the Judge*. 1999. Link: <https://bit.ly/2xgE4aS>

3. Case allocation

The Venice Commission has stated that, in order to enhance impartiality and independence of the judiciary, it is highly recommended that the procedure of distribution of cases between judges should follow objective and transparent criteria.

In Mexico, the Internal Statute of the Electoral Tribunal states that all cases shall be assigned to the justices according to the alphabetical order of their last name and following the chronological and successive order in which each case is presented to the Tribunal. Besides that, the Tribunal is currently developing an automatised electronic allocation system.

4. Safeguards of independence must be recognized at Constitutional level

The Venice Commission strongly recommends that the basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts.

In that sense, the Mexican Constitution establishes the general structure, designation processes, attributions, competences, responsibilities and safeguards of the Judicial Branch, which includes the Electoral Tribunal.⁹ Few essential aspects are left to the secondary legislation (such as the details of the designation process of the justices of the Electoral Tribunal).

5. Budgetary (financial) autonomy

According to the Venice Commission, decisions on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and the judiciary should have an opportunity to express its opinion about the proposed budget to parliament.

In this sense, it is essential for the judicial branch to be completely independent from the other two branches of the government in all matters related to the proposal and management of its financial resources. Otherwise, the judiciary would be subject to extreme political pressures since the amount and allocation of its resources is a necessary condition to fulfil its constitutional duties.

According to the Mexican Constitution (Articles 99 and 100), the Judicial Branch is in charge of directly proposing its own budget to the Chamber of Deputies, and of the administration of its resources.

6. Jurisdiction (internal independence)

The Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination in their judicial decision-making activity.

The establishment of specific and limited jurisdictions strengthens the independence of lower judges, from undue influence or pressure of the higher courts, and reduces the risk of assigning cases according to private interests.

⁹ Articles 94 to 101 of the Mexican Constitution.

In Mexico, both the Constitution and the Organic Law of the Judicial Branch clearly settle the competences and jurisdictions of each court and judge. Furthermore, the six lower chambers of the Electoral Tribunal have absolute independence in their decisions, as long as they respect the jurisprudence of the High Chamber.

7. Transparency

The transparent processing of the cases resolved in a court sets a barrier to, and discourages, all those actors who seek to exert external pressure on judicial decisions.

The Mexican Constitution (Article 99) establishes that the sessions of the High and the Regional Chambers of the Electoral Tribunal, must be public.

Nowadays, new technologies allow to boost the effects and scope of open and transparent justice.

8. Security and protection

According to the Report on guarantees for the independence of justice operators, issued by the Inter-American Commission on Human Rights in 2013, the situation in Mexico is delicate, since, as a consequence of the violence related to organised crime, on many occasions, the judges cannot act with full independence because they are subject to threats, intimidation, harassment and other illegal pressures.¹⁰ Moreover, as mentioned before, the litigious nature of the judiciary – particularly in electoral matters – makes it a subject of constant political pressure.

9. Excuse or recusation

The excuse or recusation is an interlocutory provision or injunction during the course of a legal action that seeks to excuse or impede a judge from performing his/her legal duties in a particular case because of a potential conflict of interests or lack of impartiality. It can be voluntarily requested by the judge (in this case, the ethical behaviour of the judge is crucial) or promoted by any of the involved parties in the trial.

According to the Mexican legal system¹¹, precisely, all judges may propose to excuse themselves from participating in the adjudication of a particular case, because of a potential conflict of interest, and the parties are also enabled to request the recusation of a judge from the case. The excuse or recusation petitions must be solved by the Plenary of the respective Tribunal's chamber.

10. System of responsibilities

None of these judicial independence safeguards are enough if they are not reinforced by a parallel system of responsibilities. In this sense, the Mexican Constitution (Article 111) establishes that the justices of the Supreme Court, the counselors of the Federal Judiciary and the justices of the Electoral Tribunal may be subject to trial, in which case the Chamber of Deputies will have to declare, by absolute majority of its members, whether or not to level the charges against the accused. Through this mechanism, it is guaranteed that the constitutional immunity to safeguard the independence of the judges, does not imply impunity.

¹⁰ Organization of American States. *Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas*. 2013. Link: <https://bit.ly/2a99PZF>

¹¹ Organic Law of the Judicial Branch.

On the other hand, several international organisations, such as the United Nations or the Venice Commission, recommend that States encourage the creation of an independent body in charge of the administration, selection, appointment and disciplinary regime of the judicial branch, as a guarantee of independence. In this regard, the Mexican Constitution (Article 94) establishes that the Council of the Federal Judiciary is the body in charge of the administration, vigilance and discipline of the judicial branch.

C. AFTER THE CONCLUSION OF THE MANDATE: SAFEGUARDS TO REDUCE THREATS TO JUDICIAL INDEPENDENCE AT THE END OF THE MANDATE

In the case of judges who were appointed for a specific period, the judicial independence at the final stage of their mandate, can be secured through the existence of a legal impediment to perform positions related to their function for a certain period of time.

In Mexico the members of the Electoral Tribunal may not act as lawyers or representatives in any trial before the organs of the Judiciary of the Federation, within the next two years following the date of their retirement.

I believe that the legal recognition of a pension system helps to guarantee judicial independence at this stage. In Mexico, justices of the Supreme Court are entitled to a pension for lifetime retirement. Nevertheless, there is no equivalent or similar prescript applicable to the justices of the Electoral Tribunal.

CONCLUDING REMARKS

Up to this point, we have explored the different dimensions and the importance of judicial independence, both in Mexico and the world. In summary, it could be said that judicial independence is a necessary condition:

- For judicial impartially;
- For the legitimacy of the judiciary; and
- For the preservation of the rule of law and the effective separation of powers.¹²

To conclude, I would like to recall what Adam Smith stated, while referring to the separation of powers and judicial independence:

*“When the judicial is united to the executive power, it is scarce possible that justice should not frequently be sacrificed to, what is vulgarly called, politics. The persons entrusted with the great interests of the state may, even without any corrupt views, sometimes imagine it necessary to sacrifice to those interests the rights of a private man. But **upon the impartial administration of justice depends the liberty of every individual**, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the **judicial should be separated from the executive power**, but that it should be rendered **as much as possible independent of that power.**”*

I would add: “and of any other improper influence, whether it comes from a public or a private actor.”

¹² MASTERMAN, Roger. *The separation of powers in the contemporary Constitution: judicial competence and independence in the United Kingdom*. Cambridge University. 2010.

REFERENCES

- ARVIZU Arrijoa, Juan. "Monreal va por reforma para "sustituir" la Judicatura Federal". El Universal. 05 de abril de 2019. Link: <https://www.eluniversal.com.mx/nacion/politica/monreal-va-por-reforma-para-sustituir-la-judicatura-federal>
- ASENSIO, Rafael. *Imparcialidad Judicial y Derecho al Juez imparcial*. Editorial Aranzadi. 2002.
- *Bangalore Principles of Judicial Conduct*. 2002. Link: <https://bit.ly/2FylrD3>
- Council of Europe. *Recommendation (94)12 of the Council of Europe on the Independence, Efficiency and Role of Judges*. Link: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c84e2>
- International Association of Judges. *Universal Charter of the Judge*. 1999. Link: <https://bit.ly/2xgE4aS>
- LINARES, Sebastián. *La independencia judicial: conceptualización y medición*. Política y gobierno. Vol. XI. No. 1. CIDE. 2004.
- MASTERMAN, Roger. *The separation of powers in the contemporary Constitution: judicial competence and independence in the United Kingdom*. Cambridge University. 2010.
- Organization of American States (OAS). *Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas*. 2013. Link: <https://bit.ly/2a99PZF>
- SMITH, Adam. 1776 [1981]. *An Inquiry into the Nature and Causes of The Wealth of Nations*. R.H. Campbell, A.S. Skinner, and W.B. Todd, eds., Indianapolis: Liberty Fund.
- United Nations (UN). *Basic principles on the independence of the judiciary*. 1985. Link: <https://bit.ly/2JfeGrC>