IADC

2025 Midyear Meeting

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Defending Against Attempts to Politicize the Judiciary: Ethical Dilemmas and Global Solutions

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Defending Against Attempts to Politicize the Judiciary: Ethical Dilemmas and Global Solutions

IADC 2025 Midyear Meeting

Mary Massaron[1]

An independent judiciary is a human right and a vital hallmark of a democratic society. The principles that help foster an independent judiciary are described by the United Nations. *Basic Principles on the Independence of the Judiciary.* United Nations Human Rights Instruments, adopted by Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan, 1985. See also Marha Kiela, *Promises and Pitfalls of UN Regulation of Judicial Regulation*, 23 Northwestern Journal of Human Rights 15 (2023). The European Union also describes an independent judiciary as a key principle. European Convention on Human Rights and Fundamental Freedoms, Article 6. The European Union and the United Nations both identify similar elements that typify judicial independence, including the separation of powers, a secure appointment process, tenure, and immunity.

[1] Mary Massaron, a past president of DRI and a past president of Lawyers for Civil Justice, co-chairs Lawyers for Civil Justice's Public Trust in the Courts Committee. She remains a "cockeye optimist" about the problems facing our judiciary and the ability of lawyers to help solve them. Rodgers and Hammerstein, *A Cockeye Optimist*, song from South Pacific.

In the United States, the Constitution's creation of provisions to help ensure judicial independence was a key part of Alexander Hamilton's argument for ratification. In Federalist No. 78, he contended that the Constitution would protect the judiciary's independence by providing for the separation of powers and by providing for lifetime tenure. The Federalist No. 78, Alexander Hamilton (Jacob E. Cooke ed., 1961). Article III grants judges lifetime tenure and also mandates that their salaries "not be diminished" while they are in office. U.S. Constitution, Article III. The Framers sought by these provisions to insulate those holding judicial office against efforts by the legislative or executive branch to control their decisions. The Framers' belief in the need to assure judicial independence by adopting these measures was strongly supported and they were adopted with little debate. See generally, Max Farrand, The Records of the Federal Convention (1911). See also Michael G. Collins, *Judicial Independence and the Scope of Article III – A View from the Federalists*, 38 University of Richmond Law Review 675 (2004). Most Framers believed that this independent judiciary would provide a check on the other branches through the power of judicial review. See, e.g., Federalist No. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the

former.") One scholar explained that the history of the various states after the revolution prompted the Framers to desire measures to guard the new Republic from the problems they had seen emerge in the states:

> It took a decade of experience under the state constitutions to expose the triple danger that so alarmed Madison in 1787: first, that abuse of legislative power was more ominous than arbitrary acts of the executive; second, that the true problem of rights was less to protect the ruled from the rulers than to defend minorities and individuals against factious popular majorities acting through government; and third, that agencies of central government were less dangerous than state and local despotisms.

Stephen B. Burbank, *The Architecture of Judicial Independence,* 72 Southern California Law Review 315 (1999) discussing Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 290 (1996).

We can debate whether the same dangers exist in the same way today. But no one could seriously debate that one current danger is the ever-decreasing trust that the public has in the United States judiciary. As Lawyers for Civil Justice said when it created its Public Trust in the Courts Committee:

> Lagging public trust in our judicial system is a problem for our country. Lawyers and parties who engage regularly in the civil justice system rely on public acceptance of judicial decisions and depend on jurors to respect the judicial process and judges' instructions. LCJ is concerned that attacks on the judiciary make it more difficult for courts, parties, and lawyers to achieve the "just, speedy, and inexpensive" resolution of all cases as FRCP Rule 1 aspires.

LCJ Mission Statement for Public Trust in the Courts Committee.

Of course, in our concern about the present, it is easy to forget that attacks on the courts are not new. Even the foundational decision for the principle of judicial review in the United States judiciary continues to spark controversy. *Marbury v. Madiso*n, 1 Cranch 137 (1803); Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 Supreme Court Review 329 (1994); Robert J. Reinstein and Mark C. Rahdert, *Reconstructing Marbury*, 57 Arkansas Law Review 729 (2005). *Marbury* has been described as "one of the most frequently criticized and misunderstood" judicial decisions. Reinstein, supra, at 730. Despite longstanding debates about the role and scope of proper judicial review, the United States judiciary – and the Constitution – have lasted.

Doomsday thinking has been with us since the country began. Prophecies of the imminent collapse of the United States and its institutions are not new. Through many past times of drastic change and partisan divide, the institutions and the framework of the American experiment in democratic self-rule has endured. I trust it will continue to do so. Like you, I want to do my part in passing on this precious heritage. So how can we help?

Let's first think about the tension between criticizing our imperfect courts and undermining their legitimacy. Lawyers can and should critique

judicial decisions or propose changes to improve the structure of the judiciary. Lawyers can and should consider whether reform is needed based on problems with the operation of the courts. But these efforts differ from the kinds of broadscale personal attacks that we see launched in social media or by some politicians and news commentators today. Compare the discussions of Judith Resnick, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 Alabama Law Review 133 (1997) and Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission On Separation of Powers and Judicial Independence, Washinton D.C., December 13, 1996*, 12 St. John's Journal of Legal Commentary 69 (Fall 1996) with the attacks on the courts discussed by James E. Moliterno and Peter Curos, *Recent Attacks on Judicial Independence: The Vulgar, The Systemic, and the Insidious*, 22 German Law Review 1159 (2021)(describing "vulgar efforts" at "direct interference with particular judges in particular cases and issues"). Judges and the judiciary are properly held accountable for their conduct and for their decisions. A part of that accountability no doubt involves criticism. But at the same time, the relentless assault on the courts in the media and elsewhere results in survey after survey showing a downward spiral in public trust. Is this a line-drawing problem? Or are there qualitative aspects of comments

about the courts that can distinguish efforts at accountability from unfair attacks on the judiciary that undermine its legitimacy?

Guidance can be found in the rules governing the lawyers' professional obligations. American Bar Association Model Rule of Professional Conduct 8.2 addresses judicial and legal officials and prohibits lawyers from making false statements or in reckless disregard of the truth when speaking about judges:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications and integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election of appointment to judicial or legal office.

ABA Model Rule of Professional Conduct 8.2(a). The rule subjects lawyers to discipline if they falsely impugn a judge. So a lawyer's accusation that a judge must be on the take would be subject to discipline unless the lawyer had some basis in fact for making it.

The Comment to the Rule recognizes that lawyers may express their "honest and candid opinions" on matters about the professional or personal fitness of persons to serve as judges as part of efforts to help improve the justice system. The line between rude and disrespectful personal attacks and thoughtful assessments of a judge's fitness to serve as judge may be thin. See Lonnie T. Brown, *Criticizing Judges: A Lawyer's Professional Responsibility*, 56 Georgia Law Review 161 (2021). But the First Amendment protects lawyers'

rights to criticize judges. The Restatement of the Law Governing Lawyers bars a lawyer from making a defamatory comment when the statement is made knowingly and recklessly, is made publicly, and is a "false statement of fact concerning the qualifications or integrity" of a judge or candidate for judicial office. Restatement, Third, The Law Governing Lawyers § 114.

The legal prohibition may be narrowly drawn – but as lawyers seeking to uphold the highest standards of our profession, we likely want to be more careful about what we say when we speak about judges and their decisions. As one scholar urges, "a lawyer's judicial critique would not include such things as 'intemperate statements,' 'petty criticisms,' or statements of any kind not issued for the purpose of improving the legal system." Brown, supra, 56 Georgia Law Review at 188. And while lawyers will not be sanctioned for failing to defend the courts, the comments to the ABA Model Rules of Professional Conduct include language urging them to come to the defense of judges and the judiciary against unjust criticism. American Bar Association Model Rule of Professional Conduct 8.2, Comment 3. This duty stems from the difficulties judges have in defending themselves.

Lawyers for Civil Justice has developed *Guidance for Lawyers Commenting on Judicial Decisions* to help provide common sense pointers for speaking publicly about judicial decisions. They are short and helpful:

- **Don't namecheck the judge.** It's the decision – not the author – that matters.
- **Avoid mentioning who appointed the judge or the judge's political party.** The process of electing or appointing a judge is political. The practice of judging is not. When commenting on *a decision*, politics do not matter.
- **Don't personalize the decision.** Rather than, "the Judge said X," consider "the decision held X." Again, it's the law (not the author) that counts.
- **Take the opportunity to educate; state the holding.** Before you criticize a decision, consider summarizing it in plain English, so the commentary is accessible to the lay public. When something is wrong, explain why.
- **Debate the substance and be civil.** Commenting on legal reasoning, legal precedent, methods of interpretation, language used, and the ramifications of a decision are all fair game. Allegations of judicial bias are not. Lawyerly commentary should reflect the actual substance of the opinion. It should also avoid emotional and inflammatory language.
- **Criticize the result, not the decision-maker**. Judges can get it wrong (why we have appellate courts) and challenging the basis of a decision is always fair game.

Lawyers for Civil Justice, Guidance for Lawyers Commenting on Judicial Decisions (emphasis in original).

The main point is to avoid ad hominem attacks on the judge or court when you dislike the outcome of a case. Also, when lawyers repeatedly discuss rulings in terms of a judge's political party or who appointed the judge, it suggests to the public that courts are partisan. A key – but oft ignored – point is that different political parties and appointing persons in the United States may ascribe to competing judicial philosophies. These differences are not

political – they are judicial. Judges appropriately adhere to varied methods of judicial decision-making. You can compare Justice Scalia's textual approach with Justice Breyer's pragmatic approach. Both were jurists of high integrity and intelligence who cared passionately about the United States Constitution and how to interpret it. Both wrote highly persuasive books about their views on competing interpretative philosophies. Both tried to explain why they chose the one they did. When criticizing an opinion, it is easy to use the political party responsible for the judge's appointment as shorthand for these philosophical differences. But doing so is likely to undermine respect for the courts with a public that merely concludes that the judiciary is just another partisan battlefield. It may take a few more words to explain, but you can formulate a comment that explains that you disagree with an originalist interpretation or you believe that a pragmatic approach to deciding constitutional questions is the better view. Or you can suggest that the court placed insufficient weight on facts that you believe a decision turned on. Or you can point out that the court followed the wrong line of precedent, or ignored precedent, or expanded precedent when it should not have done so.

Some groups and scholars have also focused on how to discuss courts and judges. See, e.g., American Board of Trial Advocates, Protocol for Responding to Unfair Criticisms of Judges; Daniel J. Weiner and Alicia Bannon,

How to Criticize a Judge, Brennan Center for Justice, July 24, 2018; Erika Howard, *How Lawyers Should Discuss Supreme Court Decisions in a Polarized Environment*. Civility, June 15, 2023. Many great minds are thinking about these problems in the United States and around the world. The ethical issues and steps lawyers can take to create and protect a strong independent judiciary can seem meaningless faced with the relentless social media and news coverage by opinion leaders and politicians. But I am writing this paper as the "cockeyed optimist" that I remain after being a lawyer for thirty-five years.

Materials:

Importance of an Independent Judiciary

1. Federalist Paper No. 78:
    - "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

2. Federal Judicial Center
    - Judicial Independence: Talking Points
    - https://www.fjc.gov/history/talking/judicial-independence-talking-points

3. UN Human Rights: Basic Principles on the Independence of the Judiciary
    - https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary
    - "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures,

threats or interferences, direct or indirect, from any quarter or for any reason."

4. Fed. Bar Association Statement on the Importance of an Independent Judiciary
    - https://www.fedbar.org/government-relations/fba-statements-letters-and-testimony/statement-of-the-fba-board-of-directors-on-the-importance-of-an-independent-judiciary-july-2016/
    - "An independent judiciary is central to our democracy and the preservation of public trust in the rule of law. At the same time, litigants in our courts must have the right to challenge a judge's ruling for reasons based in fact, law or policy. Indeed, we affirm and embrace the right of litigants to assert claims of judicial bias under applicable laws, as well as every person's right of free speech. But we exhort all people to refrain from attacks on our judiciary based solely on ethnic, racial, religious, gender or sexual-orientation grounds. We urge all to accord the judiciary the respect and dignity necessary for judges to conduct their constitutional responsibilities."

5. UN – Int'l Standards for the Independence of the Judiciary
    - https://peacemaker.un.org/documents/international-standards-independence-judiciary
    - This briefing paper sets out international standards for judicial independence and highlights the essential functions of an independent judiciary in a constitutional democracy. Drawing on a combination of both hard and soft sources of international law, the paper reveals a definition of judicial independence that can be met in various legal and constitutional contexts, while allowing courts to protect human rights, secure the rule of law, and ensure the principles of a constitutional democracy. Keywords: Judicial/ Judiciary, Independence of the Judiciary. Example.

UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER

Human Rights Instruments

UNIVERSAL INSTRUMENT

Basic Principles on the Independence of the Judiciary

ADOPTED

06 September 1985

BY

the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985

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Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia , their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons c incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Tags

Independence of judges and lawyers

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ANALYSIS
OF THE JUDICIAL REFORM IN MEXICO

Problems regarding the judicial constitutional reform presented on February 5, 2024

OFFICIAL VERSION

Suprema Corte de Justicia de la Nación

Centro de Estudios Constitucionales SCJN

This study does not represent an institutional position of the Supreme Court of Justice of the Nation, but rather constitutes an academic analysis carried out by the members of the Center for Constitutional Studies.

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Executive Summary

Analysis of the Judicial Reform in Mexico

Context of the Judicial Power in Mexico

The Federal Judicial Power (PJF) includes 932 jurisdictional bodies (besides the SCJN and the TEPJF), distributed in 77 cities or municipalities of the country (June 10, 2024), which require the work of 1,580 heads of jurisdictional bodies (judges, and magistrates). Between the administrative and jurisdictional personnel, there is a total of 54,388 public servants working in the PJF, according to the National Census of Federal Justice Administration of INEGI (2023).

During 2023, Federal Judicial Power dealt with 1,473,133 cases, while the number of cases finished during the same period was 1,413,724. This means that, on average, each judge solved 895 cases during that year.

The local judicial powers are composed of 5,315 jurisdictional and administrative bodies that require the work of 73,000 public servants. During the year 2022, the state judicial powers dealt with 2,154,768 cases, of which 1,320,702 were concluded. During that year, each state judge was responsible for solving an average of 428 cases.

Main changes proposed by the judicial reform

The bill presented on February 5, 2024 includes important changes in the federal and state justice system, among which the following stand out:

- Election of judges by popular vote
- Creation of a new judicial administration body
- Creation of a court of judicial discipline
- Procedural changes to ensure prompt and expeditious justice

Problems identified in judicial reform and their practical implications

The analysis of the main changes proposed by the reform showed some of the problems associated with such modifications. The following is a summary of the practical implications of these changes and their possible effects on access to justice for individuals and the work rights of judicial branch employees.

A. Problems associated with the legitimacy and quality of justice

1. The popular election of judges does not guarantee greater legitimacy for judicial powers.
2. The popular election of judges does not guarantee a higher quality of judicial decisions.
3. The popular election of judges does not guarantee that those elected have the necessary knowledge and skills to perform the judicial function.
4. The popular election will affect access to justice and the legal security of persons involved in judicial proceedings.

B. Problems associated with the process of electing judges

1. Unjustified dismissal of federal and state judges.
2. High and unnecessary costs derived from the popular election of the federal and state judiciary.
3. The process of selecting candidates does not guarantee that the persons chosen will be suitable to perform the judicial function.
4. The process of selecting candidates for reelection compromises their impartiality during their term of office.
5. The popular election of judges may place them in a situation of vulnerability to political violence and/or organized crime.

6. The popular election poses risks in terms of possible undue influence from private interests and organized crime.

7. The popular election of the members of highly specialized tribunals compromises their ability to resolve conflicts effectively and impartially.

C. Problems associated with the integration and operation of a new judicial administration body

1. The annual negotiation of the PJF's budget compromises its independence.

2. The decisions of the judicial management body are not subject to appeal, which may lead to arbitrariness or abuse in its decisions.

3. The commission in charge of labor conflicts in the PJF disappears and no replacement is established.

4. There are no mechanisms for open justice and/or citizen participation in judicial administration bodies.

D. Problems associated with the Court of Judicial Discipline

1. The popular election of the Tribunal's judges compromises its independence and impartiality.

2. The coincidence between the terms of office of the members of the Tribunal and the authorities that nominate them is detrimental to their independence in the performance of their duties.

3. The mechanism for appointing members of the Tribunal does not guarantee that they have the ideal profile to perform the function.

4. Disciplinary procedures may be influenced by political preferences or affiliations.

5. The impossibility of challenging the decisions of the Disciplinary Tribunal transgresses the human right to a fair trial and judicial independence.

6. The assumptions of disciplinary sanctions constitute open clauses that violate the legal certainty of the judges and may lead to abuses.

E. Problems associated with the changes to ensure prompt and expeditious justice

1. Tackling the judicial backlog without a proper diagnosis does not guarantee prompt and expeditious justice.

2. The reform does not comply with the principle of gradual implementation, which compromises its success.

In this context, any attempt at judicial reform or policy must necessarily consider its potential impact on the day-to-day operation of the courts and on people's access to justice. A modification that is not properly planned and executed may aggravate and compromise the thousands of cases that are subject to the jurisdiction of Mexican judges.

1. Current situation of justice in Mexico

a. Federal Judiciary (PJF)

According to the National Census of Federal Justice Administration (2023),[1] the Federal Judicial Power (PJF) includes 932 jurisdictional bodies (besides the SCJN and the TEPJF), which require the work of 1,580 heads of jurisdictional bodies (judges, and magistrates). The jurisdictional and administrative bodies are divided as follows:

Supreme Court of Justice of the Nation (SCJN)	**Electoral Tribunal of the Judiciary of the Federation (TEPJF)**
1 Plenum 2 Rooms 32 Administrative bodies or units	1 Superior Chamber 5 Regional Chambers 1 Special Room 31 Administrative bodies or units
Federal Judiciary Council	
270 Collegiate Circuit Courts 25 Unitary Circuit Courts (until December 2022) 39 Collegiate Courts of Appeal 447 District Courts	42 Federal Criminal Justice Center 1 National Center for Specialized Justice 128 Federal Labor Courts 5 Regional Plenary Sessions

The 932 jurisdictional bodies (except for the SCJN and the TEPJF) are composed of 1,580 federal judges, divided into 981 magistrates and 599 judges. During the year 2023, 1,473,133 cases entered the Federal Judicial Branch, while the number of cases solved in the same period was 1,413,724. This means that, on average, each judge solved 895 cases during that year.

[1] Available at: "https://www.inegi.org.mx/programas/cnijf/2023/".

b. Profile of federal judges

According to the most updated data available,[2] the majority of district judges grew up in a middle-class household (52%); 25%, in a lower middle-class household; 12.7%, in a lower-class household; and only 9.9% report coming from an upper middle-class household.[3] At the same time, more than 70% of district judges studied elementary, secondary and high school education in public institutions, and more than 80% studied a bachelor's degree in public institutions. Likewise, judges who have studied a postgraduate degree (67%) have mostly done so in Mexican institutions; only 8% have done so abroad.[4]

c. Selection process for judges in the federal Judicial Branch

The Judicial Career Law of the PJF, published in 2021, established new rules, consistent with a meritocratic and equal opportunity scheme, so that people are chosen based on their knowledge, skills and abilities, and not through subjective selection criteria.[5] Although there were no major changes in the requirements to fill the positions of magistrates or judges,[6] the law established exams and mandatory courses for entry and promotion in all the different levels of the judicial career (judicial officer, judicial clerk, court clerk, district judge and circuit magistrate).

In accordance with the Judicial Career Law, competitive examinations are carried out in three phases: 1) application of questionnaires, 2) admission of the best averages for the judges' training course and 3) evaluation by a jury through oral examinations, resolution of practical cases, simulated hearings or any other evaluation mechanism established by the Federal Judicial Training School (EFFJ).

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[2] The information in this section was obtained from Aguiar Aguilar, Azul A., *Legal Culture, Sociopolitical Origins and Professional Careers of Judges in Mexico*, Palgrave Macmillan Cham, 2024, especially, Chapter 4, "Who Inhabits the Federal Judiciary? Sociopolitical Origins and Professional Trajectories of the Judicial Elite", pp. 65-87.

[3] Aguiar Aguilar, A., *op. cit.,* p. 71.

[4] *Ibidem*, pp. 73-75.

[5] Suprema Corte de Justicia de la Nación, *Proyecto de reformas con y para el Poder Judicial de la Federación*, Mexico, 2020, p. 18.

[6] Be a Mexican citizen by birth, not acquire another nationality, be in full exercise of his or her rights, be older than 35 or 30 years of age, respectively, have a law degree, have at least five years of professional practice, be of good reputation and not have been convicted of a felony punishable by deprivation of liberty.

d. State judiciaries

According to the National Census of State Justice Administration (2023),[7] the local judicial powers are composed of 5,315 jurisdictional and administrative bodies that require the work of 73,000 public servants. The judicial and administrative bodies are divided as follows:

- 2,886 courts
- 381 revision courts
- 135 sentence enforcement courts
- 390 trial courts and sentence enforcement courts
- 1,523 administrative bodies or units

The Superior Courts of Justice of the different states have a total of 603 magistrates; the local courts of the different states have 4,398 judges. During 2022, 2,154,768 cases were filed in the state judiciaries, of which 1,320,702 were concluded in the same period. Given that for that year there were 627 magistrates and 4,398 local judges, each state judge was responsible for the solution of 428 cases on average.

e. Selection process for judges in the state judiciaries.

Given that 52% of the cases pending resolution in the local judiciaries are grouped in five states (State of Mexico, Mexico City, Veracruz, Jalisco and Nuevo Leon) and that one out of every three local judges are concentrated in these states, a description of the selection process for judges in these entities is presented below.

In these states, magistrates are appointed by the local congresses, except for the State of Mexico, where the local Judiciary Council is the body in charge of approving and appointing judges. This appointment requires the prior accreditation of the examination conducted by the same Congress or by the State Judiciary Council. To appoint a judge, the interested parties are summoned and must pass a competitive examination conducted by the local Judiciary Council. Afterwards, the same institution ratifies them in the position.

[7] Available at: "https://www.inegi.org.mx/contenidos/programas/cnije/2023/doc/cnije_2023_resultados.pdf".

f. Strengthening of the judiciary

As can be seen, the federal and state judiciaries show high levels of efficiency despite their limited personal and institutional resources. In this sense, it is impossible to directly attribute the current lag to the current methods of appointment, judicial training or the indolence of the judges; it is more likely that these deficiencies are due to the scarcity of human and institutional resources and workloads.

Therefore, it is necessary for the Mexican State to make greater efforts to increase the operational capacities of the judiciaries (i.e., the number of judges and jurisdictional and administrative personnel), without neglecting the professionalization and continuous training of these legal operators. In this context, any attempt at judicial reform or policy must necessarily consider its potential impact on the day-to-day operation of the courts and on people's access to justice. A modification that is not properly planned and executed may aggravate and compromise the thousands of cases that are subject to the jurisdiction of Mexican judges.

2. Election of judges by popular vote.

a. Problems associated with the legitimacy and quality of justice.

i. The popular election of judges does not guarantee a greater legitimacy of the judicial function.

Reform proposal

The initiative proposes the election by popular vote of justices of the Supreme Court of Justice of the Nation, circuit magistrates, district judges, local magistrates, local judges, magistrates of the Judicial Disciplinary Tribunal and magistrates of the Electoral Tribunal. In this regard, it is proposed to amend Articles 94, 95, 96, 97, 99, 100, 116 and 122 of the Political Constitution of the United Mexican States (CPEUM). Specifically, the explanatory memorandum argues that "[o]ne relevant aspect to consider in order to affirm the need to structurally reform the method for the integration of the Judicial Power is the perception that the population has had regarding this Power during the last few years. Since the 1990s, the Mexican population has indicated that it does not trust the courts, judges and magistrates (...)".

Problems identified

Argument 1. The legitimacy of the judges does not depend exclusively or mostly on the method of designation.

The legitimacy of judges, understood as the social recognition of their authority and power to decide,[8] does not depend exclusively or mostly on the method of appointment. The legitimacy of judges is mainly linked to the quality of their performance and decisions once in office. In other words, substantive legitimacy, or legitimacy of the exercise of the function, is more relevant than formal legitimacy, or legitimacy of origin, to build credibility and citizen confidence in a sustained manner over time.

[8] Tayler, Tom R., "Psychological Perspectives on Legitimacy and Legitimation," *Annual Review of Psychology*, vol. 57, 2006, pp. 375-376. Available at: «https://doi.org/10.1146/annurev.psych.57.102904.190038».

In this regard, it is important to emphasize that the election of judges does not ensure the quality of their performance and decisions. Therefore, elected judges are not - as one might mistakenly believe - a guarantee of assured legitimacy. On the contrary, the disappearance of competitive examinations and the probable absence of judicial experience and/or training may lead to deficient performance and decision making that will not solve the current problems of institutional credibility that the reform intends to address.

In this sense, it is possible to concede that the election has the potential to provide initial legitimacy to those elected, but the conditions foreseen will most likely be insufficient to sustain their legitimacy in the medium or long term. An intermediate scheme could consist of opening all competitive examinations to the general public, as recently occurred with the exams to appoint new labor judges.

Given the counter-majoritarian nature of the judicial function, judges must be independent of majorities.

A constitutional democratic system is one in which political power is the power of majorities and in which such majorities are limited by the principles and rules of the Constitution. In this context, the judges must be independent of the majorities, to be able to guarantee the limits imposed by the Constitution, even when they are contrary to the interests of the majorities. If the judges depend on the will of the people to assume or remain in office, it is likely that their decisions are intended to please the majority political forces. In this sense, the attempt to endow judges with legitimacy, via popular election, could have a negative impact on the possibility of ensuring compliance with the Constitution itself.

Judges are not the only State officials who do not have direct democratic legitimacy.

Many public servants assigned to the Executive Branch in strategic positions (e.g. secretaries of state) and even some legislators (e.g. elected via proportional representation), both federal and state, are not directly elected by the citizenry. For example, the federal public administration is made up of 277 persons in charge of highly

relevant bodies or areas, such as secretaries of state or decentralized bodies, who are not democratically elected.[9] In the federal Congress there are 200 deputies and 32 senators that are also not directly elected by the people.[10] This group of public servants is appointed directly by people who were elected or elected indirectly, without controls or robust filters to ensure their suitability for the position.

On the contrary, the current system for the appointment of justices contemplates the participation of the Executive Branch and the Senate to address the absence of direct election. Likewise, the appointment of federal and state judges -in most states- is the result of promotion within the judicial career ladder (with multiple exams and mandatory courses), as well as a competitive examination that ensures that those who occupy judicial positions have the necessary knowledge and skills to perform them satisfactorily.

Argument 4. The election of judges is a process of low information and participation that does not ensure the legitimacy of those elected.

International experience, especially in the United States, suggests that judicial elections are low-information elections; that is, it is difficult for people to acquire sufficient knowledge about the judicial function and the competencies of the candidates to make an informed decision when casting their vote. The initiative, by limiting the acts, times and financing of campaigns, proposes conditions for this dynamic to be replicated in Mexico as well. This means that judicial elections are often influenced by issues of little relevance to the judicial function -such as the candidate's position on the ballot-. This lack of quality information in the election process is likely to undermine the legitimacy of the elected judges.

Empirical evidence for the arguments

The case of the United States

Extensive empirical research has shown that the method of appointment of judges is marginal to the trustworthiness of the institution. What is more relevant in determining

[9] INEGI, National Census of Federal Government (CNGF), 2023.
[10] INEGI, National Census of State Governments (CNGE), 2023.

judicial legitimacy is the quality of the performance of the judges and not so much how they were appointed.[11] In this regard, the election of judges does not ensure, to any degree, that they will perform better than current judges.

A study conducted in the United States, where local judges are elected, showed that, under certain circumstances, the election of judges can be counterproductive to judicial legitimacy. Specifically, the study found that when there is a high level of electoral activity, the legitimacy of elected judges is lower than that of appointed judges because their promotional activities undermine the perception of judicial impartiality.[12] A series of studies conducted in the United States confirms that the public is particularly uninformed in the case of judicial elections. The selection of the candidate rarely responds to the candidate's profile or competence, but rather to shortcuts such as the party that nominates him or her. [13]

The case of Bolivia

A study conducted in Bolivia, where constitutional judges are elected, showed that the legitimacy of the constitutional court increased only among people sympathetic to the government in office, but decreased significantly among the general public.[14] Likewise, it is important to note that in Bolivia there have been two elections of constitutional judges, in 2011 and 2017. In both, there was a very high number of invalid votes (59 and 65.8%,

[11] Tayler, Tom R., "How Do the Courts Create Popular Legitimacy? The Role of Establishing the Truth, Punishing Justly and/or Acting Through Just Procedures," *Albany Law Review*, vol. 77, 2014, pp. 101-143. Available at: "https://ir.law.fsu.edu/articles/123"; Lerner, Melvin J., *Critical Issues in Social Justice. The Social Psychology of Procedural Justice*, Springer New York, 1988; Tyler, Tom R. and Jackson, Jonathan, "Popular Legitimacy, and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement," *Psychology, Public Policy, and Law*, vol. 20, 1, 2013, pp. 78-95. Available at: "10.1037/a0034514".

[12] Woodson, Benjamin, "The Two Opposing Effects of Judicial Elections on Legitimacy Perceptions," *State Politics & Policy Quarterly*, vol. 17, 2017, pp. 24-46. Available at: «https://doi.org/10.1177/1532440016647410».

[13] Bam, Dmitry, "Voter Ignorance and Judicial Elections," *Kentucky Law Journal*, *vol.* 102, issue 3, 2013-2014, pp. 553-599. Available at: "http://digitalcommons.mainelaw.maine.edu/faculty-publications/27"; McKenzie, Mark J., Rugeley, Cynthia R. and Unger, Michael A., "Investigating How Voters Weigh Issues and Partisanship in Judicial Elections," *American Review of Politics*, *vol.* 33, 2012-2013. Available at: "https://doi.org/10.15763/issn.2374-7781.2012.33.0.295-321"; Lim, Claire S.H. and Snyder, James M., "Is more information always better? Party cues and candidate quality in U.S. judicial elections," *Journal of Public Economics*, vol. 128, 2015, pp. 107-123. Available at: «https://doi.org/10.1016/j.jpubeco.2015.04.006».

[14] Driscoll, Amanda and Nelson, Michael J., "Judicial Selection and the Democratization of Justice: Lessons from the Bolivian Judicial Elections," *Journal of Law and Courts*, vol. 3, 1, 2015, pp.115-148, doi: "10.1086/679017".

respectively) as a sign of rejection of the nominated candidates. Therefore, the balance of these exercises suggests a low effective electoral participation that does not contribute to the social legitimization of the institution, as intended. [15]

In Bolivia, new judicial elections were to be held in December 2023, but since the ruling party did not have a majority, it was not possible to define the list of candidates.[16] This has led to a political and judicial crisis that has resulted in extensions to the election, publication and repeal of special laws and citizen mobilizations.

ii. The popular election of judges does not guarantee a higher quality of judicial decisions.

Reform proposal

The initiative proposes the election by popular vote of justices of the Supreme Court of Justice of the Nation, circuit magistrates, district judges, local magistrates, local judges, magistrates of the Judicial Disciplinary Tribunal and magistrates of the Electoral Tribunal. In this regard, it is proposed to amend Articles 94, 95, 96, 97, 99, 100, 116 and 122 of the CPEUM. Specifically, the explanatory memorandum states, "that the judicial system has not been able to respond to the demands of society and, therefore, to guarantee the population a prompt and expeditious justice" and that, therefore, the judicial reform is necessary to correct this situation.

Problems identified

Argument 1. The election of judges leads to judicial decisions that obey the preferences of those who nominate and elect them.

[15] Due Process Foundation, *Judicial elections in Bolivia: did we learn our lesson,* Washington DC, 2018, p. 20. Available at: "https://www.dplf.org/sites/default/files/informe_dplf_elecciones_judiclaes.pdf".

[16] Molina, Fernando, "La elección popular de jueces en Bolivia se atasca en el Congreso", *El País*, August 30, 2023. Available at: "https://elpais.com/internacional/2023-08-31/la-eleccion-popular-de-jueces-en-bolivia-se-atasca-en-el-congreso.html.".

Having elected judges does not guarantee that better decisions will be made in terms of access to justice. The judicial function necessarily involves making unpopular decisions, given that through sentences the claims of one party are confirmed and those of another are denied; this dynamic is inherent to the function itself. This is because the purpose of the judicial function is not to produce popular decisions, but rather correct decisions that are in accordance with the law and that resolve the conflicts that arise. Stability in office makes it possible for judges to make correct decisions, even though they may be unpopular or contrary to the interests of various groups.

Conditioning the job stability of judges on political-electoral cycles can have a negative influence on the quality of their decisions. This is because it opens the possibility that they may prioritize decisions that please their future constituents or the political, economic and/or social groups that support them instead of making correct and lawful decisions. This, as the evidence shows, can occur in the case of constitutional judges as well as in the case of judges of first and second instance.

Argument 2. The election of justices of the SCJN may hinder the continuity in the protection of the rights and freedoms of individuals.

In the specific case of the Supreme Court of Justice of the Nation, its decisions establish binding precedents for the entire national, federal and local judiciary. In this regard, it is important to recognize that recent decisions have promoted the protection of the rights and freedoms of individuals, for example, the right to a widow's pension for same-sex couples, the right to social security for domestic workers or the right of children to be free from *bullying* in schools, among others.

In this context, the immediate change in the composition of this court compromises the stability of relevant precedents; this can be risky in aspects that have been controversial from a moral perspective and compromises the permanence of these decisions for fear that they may displease some sector of the citizenry or the political or economic interests of the persons who will propose the judges.

Empirical evidence for the arguments

The case of the United States

Studies in the United States, where some of the local judges are elected, have shown that judges tailor their decisions to try to retain office; this is especially noticeable in criminal proceedings. One study found that judges tailor their decisions to the ideological affinities of their constituents; that is, judges in liberal districts were more lenient in criminal sentencing, while judges in conservative districts imposed harsher sentences.[17]

Similarly, judges tend to adopt more punitive stances as elections approach: one study found that judges tend to impose longer sentences and death sentences as the election approaches,[18] and another study showed that incarceration rates increase in the last six months of the election cycle (especially for defendants of African descent in largely white and conservative communities).[19]

The case of Bolivia

In Bolivia, where constitutional judges have been elected since 2011, the Constitutional Court, made up of elected judges, ruled to allow the then president to run for a third time despite the existence of an express prohibition in the Constitution. Subsequently, in a 2017 decision the Constitutional Court overturned a constitutional prohibition that enabled the president to participate again in elections in 2019. [20]

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[17] Boston, Joshua and Silveira, Bernardo S., "The Electoral Connection in Court: How Sentencing Responds to Voter Preferences," *Journal of Law and Courts,* vol. 12, no. 1, 2024, pp. 23- 44. Available at: « https://doi.org/10.1017/jlc.2022.19».

[18] Abrams, David, Galbiati, Roberto, Henry, Emeric and Philippe, Arnaud, "Electoral Sentencing Cycles Get access Arrow," *The Journal of Law, Economics, and Organization,"* vol. 39, no. 2, 2023, pp. 350- 370. Available at: " https://doi.org/10.1093/jleo/ewab037."; Dippel, Christian and Poyker, Michael, "Rules versus norms: How formal and informal institutions shape judicial sentencing cycles," *Journal of Comparative Economics*, vol. 49, no. 3, 2021, pp. 645-659, Available at: "https://doi.org/10.1016/j.jce.2021.02.003"; Berry, Kate, "How Judicial Elections Impact Criminal Cases," *Brennan Center for Justice at New York University School of Law* 2015. Available at: "https://www.brennancenter.org/sites/default/files/2024-01/written_materials_-_panel_6.pdf".

[19] Park, Kyung H. , "The Impact of Judicial Elections in the Sentencing of Black Crime," *Journal of Human Resources,* vol. 52, no. 4, 2017, pp. 998-1031. Available at: « https://doi.org/10.3368/jhr.52.4.0415-7057R1».

[20] Vivanco, José Miguel and Pappier, Juan, "Evo Morales manipulates human rights to cling to presidency," *Human Rights Watch,* November 9, 2017. D is available at: "https://www.hrw.org/es/news/2017/11/09/evo-morales-manipula-los-derechos-humanos-para-aferrarse-la-presidencia"; Driscoll, Amanda and Nelson, Michael J., "Chronicle of an Election Foretold. Bolivia's 2017 judicial elections," *Politics and Government,* no. 1, 2019, pp. 41-64.

iii. Popular election does not guarantee that those elected have the necessary knowledge and skills to perform the judicial function.

Reform proposal

The initiative proposes the election by popular vote of justices of the Supreme Court of Justice of the Nation, circuit magistrates, district judges, local magistrates, local judges, magistrates of the Judicial Disciplinary Tribunal and magistrates of the Electoral Tribunal. Various articles (95, 97, 99) establish criteria for access to judicial election;[21] states in the Explanatory Memorandum that, in addition to such requirements, the selection of judges must take into consideration their abilities, ethical and moral soundness, sensitivity and closeness to the problems and concerns of society.

Problems identified

The judicial career guarantees that the selection of judges is based on merit, objective processes and rigorous quality standards.

The judicial career is the system in charge of the entry, training, evaluation, promotion, permanence and dismissal of Judicial Branch personnel. Through a system of this type, with competitive examinations, academic programs, evaluations and incentives, the selection of suitable profiles to hold different jurisdictional positions is encouraged, based on merit and through rigorous, transparent and objective processes. Likewise, the judicial career fosters a sense of identity and commitment to the role of the Judicial Branch: to protect rights and impart justice in an effective and sensitive manner to people's circumstances.

Although one of the main objectives of the judicial career is to develop the technical skills and specialization necessary to perform the judicial function, it does not end there. It also has as a fundamental component the teaching of certain administrative and managerial skills

[21] Be a Mexican citizen, in full exercise of rights, 35 years of age for Justices and magistrates, and 30 years of age for judges, have a law degree with five years of seniority, five or ten years of professional practice, good reputation, without criminal conviction, with at least one or two years of residence in the country and without having held a series of state offices or positions.

that cannot be overlooked for the proper performance of judicial work, as well as raising awareness so that judicial officials act with empathy towards the people who come to them.

Therefore, the role of training through judicial schools is essential, as it is the ideal space to contribute to the professionalization of judicial officials. The judicial career is responsible for strengthening knowledge, skills and competencies, both in the different areas of law as well as those specific to the jurisdictional function and those related to administrative and judicial management. In this sense, the requirements provided by the initiative are insufficient to ensure the knowledge and skills necessary to perform the judicial function among those who are elected.

Judicial schools and institutes do not have the capacity to train all persons elected to the judicial function.

The immediate replacement of all federal and local judges (around 7,000) poses risks related to education and training, which could result in significant lags in the administration of justice, as well as in deficient judicial sentences. Although Mexico has a Federal Judicial Training School, as well as judicial training institutes in the 32 states, the fact is that these centers are not sufficient to train all the people who could enter judicial positions at the same time.

On the other hand, the proposal for the immediate replacement of all judges eliminates an essential element in the training of judicial personnel: socialization and learning from the experiences of other judges and the study of their cases. As in any field, it is essential to share experiences and learn through practice knowledge that is transmitted from one person to another. Amalia Amaya Navarro[22] points out that judicial socialization is crucial, since judicial virtues are acquired through imitation and habit, so a central part of an education oriented to the development of virtues must consist of interaction among people and the study of cases decided by exemplary judges. The substitution of all judges at the same time is a proposal that would make it very difficult to continue with this type of learning.

Empirical evidence for the arguments

[22] Amaya Navarro, María Amalia , *Temas Selectos de Derecho Electoral 6. Una aproximación a la ética jurídica,* Mexico, Tribunal Electoral del Poder Judicial de la Federación, 2011.

The case of Mexico

In an investigation conducted by México Evalúa,[23] it was found that the judicial career has had a positive impact on the professionalization of judicial officials, and that its consolidation is a key element for the Rule of Law. The same study identified three levels of impact of the judicial career that demonstrate the first argument:

- Institutional level: the judicial career provides legitimacy to the judiciary and contributes to its efficiency to the extent that the processes of selection, promotion, evaluation, and permanence are clearly established and tend to the professionalization of the institution's personnel.

- Individual level: the judicial career provides members of the Judicial Branch with jurisdictional guarantees that allow them to be certain that the mechanisms for selection and promotion, evaluation, ratification and permanence are based on meritocratic criteria and not on arbitrary decisions. Therefore, the judicial career also involves two important elements: job security and immobility, since it is based on the idea that there is the possibility of climbing the ladder to reach the top.

- Social level: the judicial career guarantees the right of access to justice because it allows the population to have independent judges, with suitable profiles for the position, selected on merit, with transparent and objective criteria.

iv. The popular election will affect access to justice and the legal security of the persons involved in judicial **proceedings.**

Reform proposal

The initiative proposes that all judges of the Federal Judicial Branch will conclude their term of office on the day on which the persons elected through the extraordinary electoral process are sworn in; this is established in the second and seventh transitory articles. Likewise, it indicates, in articles 116, section III, and 122, section A, section IV, that the

[23] Mexico Evalúa, *20 recommendations to consolidate the judicial career,* 2021, pp. 5-17.

implementation of the reform at the local level will be carried out according to the same bases as the Judicial Power of the Federation. It states that the election modalities and the duration of the term of office of the judges of the local judicial powers will oversee by the states in their constitutions and laws.

Problems identified

Argument 1. The popular election of judges will immediately and severely disrupt all criminal proceedings in the country.

The abrupt change of the entire federal judiciary will immediately interrupt all active criminal proceedings in the country, which will probably imply the loss of relevant evidence and irreparably affect the rights of victims and defendants. From one day to the next there will be new criminal judges in charge of oral criminal proceedings already underway; the new judges will have to conduct oral hearings, without previous experience, and interact with prosecutors and expert defense attorneys, in cases they will not know in depth. This will later be replicated in the local judiciaries of the states.

The immediate substitution of criminal judges will affect the principle of continuity, included in the Constitution, which mandates that the proceedings take place without interruptions. It will also violate the principle of immediacy, also established in the Constitution, which mandates that the judge must be present at all hearings and that the same person must attend all procedural acts at the same stage. Thus, for example, the judge who decides on the control of the detention of a person, as the first act within the initial stage, must be the same person who decides on the last act of this stage. [24]

The initiative will make it impossible to comply with this principle and, in this regard, the SCJN has established that the change of a judge within the same procedural stage entails the reinstatement of the proceeding. Therefore, the substitution of criminal judges may result in the reinstatement of the current criminal proceedings and consequently in a severe delay in their conclusion. In addition, this reinstatement may imply that certain evidence

[24] Several months may validly elapse between the completion of certain acts of the criminal proceeding. For example, the period for the complementary investigation implies a separation of up to six months between the moment of its authorization and the moment in which the judge or judge of control could issue a dismissal, if so required, or the Prosecutor's Office could present its accusation.

loses quality or validity due to the passage of time, which in turn could lead to the sentence issued in the oral trial not having sufficient and adequate information to resolve the case.

Argument 2. The popular election of judges will seriously affect the continuity of active judicial processes.

If judges are replaced immediately, they will need time to learn the details of the cases already in process and to develop technical skills for the proper management of the judicial office. It should be noted that each of the more than 1,500 federal judges solves, on average, 19 cases per week. It is very likely that the lack of technical skills of the new judges and the need for training will result in delays in the solution of cases already in process (about 1,500,000 federal cases in the country).

In this regard, although the reform proposes the obligation to solve cases within a maximum of six months, compliance would be unfeasible if the judiciary does not have sufficient knowledge to do so, which would lead to a significant backlog in the administration of justice or to the need for the new Judicial Disciplinary Tribunal to sanction elected judges for their lack of experience.

In 2021 there was an important change in the Mexican jurisprudence system and a transition to a system of precedents that includes thousands of mandatory criteria. People without a broad knowledge of the mandatory jurisprudence issued by the Supreme Court and the regional plenary courts will require a long time to become familiar with them, in any legal matter. The elected judges will hardly have this knowledge, so their decisions could easily deviate from binding criteria, affecting the rights of the parties in the proceedings, legal certainty and directly violating Article 94 of the Constitution. In this scenario, there will be no certainty as to the rules to be applied by the new courts.

The issue is aggravated if one takes into consideration the importance of knowledge in interpreting and applying international human rights norms contained in treaties, the jurisprudence of the Inter-American Court of Human Rights and other binding instruments. This problem will later be replicated in the local judiciaries of all the states.

Empirical evidence for the arguments

The case of Mexico

According to the most recent data, during 2023 the Federal Judicial Branch processed 1,413,724 cases, out of a total of 1,473,133, which were submitted to it. Regarding the number of judges, by the end of 2023 the PJF had 981 magistrates and 599 federal judges. This means that, on average, each judge solved 895 cases during that year.

At the state level, in 2022, 2,154,768 cases entered the state judiciaries. These cases were distributed among 627 magistrates and 4,398 local judges. On average, each local judge resolved 428 cases during the year. In summary, the immediate replacement of federal and local judges will jeopardize the continuity and conclusion of approximately 3,000,000 cases that are tried annually in Mexico.

b. Problems associated with the process of choosing judges.

i. The election will lead to the unjustified removal of federal and state judges.

Reform proposal

The second transitory article of the initiative establishes that justices, circuit magistrates, district judges, magistrates of the Electoral Tribunal of the Judiciary of the Federation and councilors of the Judiciary will conclude their term of office on the date on which the persons resulting from the extraordinary election are sworn in.

Problems identified

Argument 1. The dismissal without just cause of all currently active federal judges violates international obligations of the Mexican State.

The initiative proposes to remove in a single moment the entire federal judiciary without any justified and individualized reasons. This flagrantly violates the standard set by the Inter-American Court of Human Rights (IACHR). This international court has insisted that the decision to remove judges from office must be based on the permitted grounds, such

as having completed the term of office or period of office, reaching retirement age, having been proven to have committed serious disciplinary offenses, or having been incompetent in the performance of their duties.[25] In addition, the IACHR Court has said that job stability entails the guarantee that, in the event of arbitrary dismissal or termination, the worker may appeal the decision before the relevant authorities.

Therefore, it is likely that the arbitrary dismissals will result in legal action by the affected judges. The removal of the entire Mexican judiciary means the dismissal of almost 1,580 federal judges (magistrates and judges) and more than 5,000 state judges (magistrates and judges). This could lead, in the first place, to a high-pressure scenario for the justice system, as there is a possibility that around 6,580 people will file legal actions. The substitution also poses a complicated economic situation for the granting of the corresponding pensions or indemnities. Secondly, it is likely that many cases will be brought before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, which could result in condemnatory sentences against the Mexican State.

ii. High and unnecessary costs derived from the popular election process of the federal and state judiciary.

Reform proposal

The initiative proposes the election by popular vote of justices of the Supreme Court of Justice of the Nation, circuit magistrates, district judges, local magistrates, local judges, magistrates of the Judicial Disciplinary Tribunal and magistrates of the Electoral Tribunal. In this regard, it is proposed to amend Articles 94, 95, 96, 97, 99, 100, 116 and 122 of the CPEUM.

The sixth transitory provision proposes that during the transition period for the judges of the Disciplinary Tribunal to be sworn in, the Federal Judiciary Council will implement a work plan for the transfer of material, human, financial and budgetary resources to the

[25] See I/A Court H.R., Case of Quintana Coello et al. v. Ecuador (Preliminary Objections, Merits, Reparations and Costs), Judgment of August 23, 2013, Series C No. 266.

Judicial Disciplinary Tribunal with respect to the disciplinary functions of the members of the Federal Judiciary, and to the judicial administration body with respect to its administrative, judicial career and internal control functions.

Problems identified

The electoral process to elect judges will represent a very high and unnecessary cost to the treasury.

According to the civil organization *Laboratorio Electoral*, "the electoral budget for 2024 is $60,451,351,931". In the 2024 electoral process, a little more than 19,000 positions of popular election will be disputed. In the case of the election of the national judiciary, around 7,000 positions would have to be elected out of a universe of more than 40,000 candidates.[26] The cost of the process would be about half the cost of the federal elections.

This is an unnecessary budgetary allocation, since there are more effective, objective and reasonable mechanisms for the selection of judges, which guarantee their independence and impartiality and allow these resources to be used for substantive improvement of the judicial function or other strategic areas of the State.

Argument 2. The removal of the current judges may result in high costs associated with legal conflicts and the payment of indemnities and acquired rights.

The proposal to dismiss all female and male judges (approximately 7,000) at the same time generates a high risk that they will file labor lawsuits or litigation in the international arena, which would imply a significant cost to compensate them for the impact on their guarantees of tenure and their acquired labor rights. On the other hand, there is a risk that unionized personnel in courts and tribunals may suffer unjustified dismissals. It is likely that judicial support personnel (clerks, court clerks and court officers, among others) will not be evaluated by the new judges according to the quality of their work, but rather

[26] See Angel, Arturo, "Plan C implicaría mega elección de más de 7 mil jueces y magistrados entre casi 44 mil candidatos". Available at: "https://wradio.com.mx/2024/06/19/plan-c-implicaria-mega-eleccion-de-mas-de-7-mil-jueces-y-magistrados-entre-casi-44-mil-candidatos/". [accessed June 23, 2024].

according to their ideological affinity, their usefulness to achieve personal or group objectives or based on other political criteria.

There are approximately 54,000 people working in the Federal Judiciary and a massive dismissal would represent an unusual number of labor lawsuits and a complex financial operation for the immediate payment -to which they are entitled- of their severance insurance and other benefits derived from the violation of labor rights.

iii. The process of selecting candidates does not guarantee that the persons chosen are suitable to perform the judicial function.

Reform proposal

The initiative proposes the election by popular vote of justices of the Supreme Court of Justice of the Nation, circuit magistrates, district judges, local magistrates, local judges, magistrates of the Judicial Disciplinary Tribunal and magistrates of the Electoral Tribunal.

Article 96 establishes the direct and secret election on the first Sunday of June. In the case of justices, the Executive Branch shall nominate 10 persons, the Federal Congress shall nominate 10 persons and the Judicial Branch shall nominate 10 persons. In the case of magistrates and federal judges, each branch will nominate two persons per judicial circuit. Specifically, the Explanatory Memorandum states that the selection of judges "must consider, in addition to their abilities, their ethical and moral soundness, their sensitivity and closeness to the problems and concerns of society".

Problems identified

Argument 1. The method of designating candidates to judicial positions favors their proximity to political authorities, political parties or judicial leaders.

The judicial career and judicial immobility mean that members of the judiciary do not need to be linked to associations, parties or political authorities to ensure job opportunities or

professional development. Their promotion in the judicial career depends mainly on their ability to pass exams and courses.

The system proposed by the initiative establishes that each of the branches of government proposes one third of the candidates for each position. This favors that the persons proposed by the Executive and Legislative branches (two thirds of each group of candidates) require a certain degree of partisan or political ties to be nominated. This will probably have an impact on the profile of the nominees, since their chances of being considered will increase with their closeness to these political authorities.

Even in the case of persons proposed by the Judiciary, it is likely that their knowledge and technical skills are secondary variables, and their nomination depends on their proximity to the judicial leadership. This will be a significant impediment for profiles of competent and virtuous lawyers, but lacking the political skills that would allow them to access the nominations. Ultimately, these conditions may favor the arrival of political/partisan profiles to judicial positions and inhibit the nomination of technical profiles without political protagonism.

The probable proximity of candidates to political authorities, political parties or judicial leaders will affect the perception of their impartiality.

The legitimacy of the judiciary depends largely on their being perceived as impartial institutions that build their decisions on public reasons and not on personal preferences or affinities -political, religious or of any other kind-. This is justified because the judges make decisions linked to the most important values and assets of all people, such as their life, their family, their property and their liberties. In this sense, the impartiality of the courts must be both real and apparent. The very likely closeness of the nominees to the Executive Branch and Congress (therefore, to certain political parties) will undermine the perception of impartiality among the citizenry and may generate suspicions about their ability to decide based on facts and law.

Empirical evidence for the arguments

The case of Bolivia

A study conducted in Bolivia, where constitutional judges are elected, showed that the legitimacy of the constitutional court increased only among people sympathetic to the government in office, but decreased significantly among the general public.[27] Likewise, during the first elections held in 2011, the Mixed Commissions of the Plurinational Legislative Assembly (Legislative Branch), in charge of evaluating the profiles of individuals to verify that they met the requirements demanded by law, did not use a homogeneous work methodology, which led to errors in the verification of requirements and, ultimately, that those who were nominated were not the ideal profiles. [28]

iv. The process of selecting candidates for reelection compromises their impartiality during the performance of their duties.

Reform proposal

The initiative proposes that magistrates and judges serve for nine years and that they may be reelected "each" time their term ends, without further details on the rules for reelection. This proposal is found in Article 96.

Problems identified

Argument 1. The initiative does not define the number of possible reelections, which generates uncertainty for the judges regarding their future employment.

The initiative does not establish the possible number of reelections for judges and merely mentions that they are eligible "each time their term ends". This will generate uncertainty for these persons with respect to their future employment. In this regard, as has been insisted, stability in judicial office makes it possible for judges to make correct and lawful

[27] Driscoll, Amanda and Nelson, Michael J., "Judicial Selection and the Democratization of Justice: Lessons from the Bolivian Judicial Elections," *Journal of Law and Courts*, vol. 3, 1, 2015, pp. 115-148. .

[28] OAS, C-052/12, Informe Verbal del Jefe de Misión Presidente Martín Torrijos, Misión de Observación Electoral en Bolivia, Washington DC, November 10, 2011.

decisions, even though they may be unpopular or contrary to the interests of political, economic and social groups.

Argument 2. The initiative does not define the nomination process for reelection, which could lead to closeness during the term of office with the persons or groups that nominated them.

The initiative does not specify whether the judges in office are considered for automatic reelection or whether they must be nominated by the authorities, again, to opt for reelection. In the second scenario, the tenure of elected judges would be subject not even to the vote of the citizens, but to the opinion of the authorities that nominated them in the first place. This will probably compromise their decisions, especially in cases of direct interest of the Executive, Congress or the Judiciary to the detriment of the quality of the decision. In addition, it is likely that the judges will make use of the human and institutional resources of the jurisdictional bodies to promote their reelection.

Empirical evidence for the arguments

The case of Switzerland

In the case of Switzerland - one of the examples mentioned in the initiative, where judges are elected by Parliament and only a minority by the citizens - there have been cases of judges initially proposed by political parties who were not supported in their reelection due to their decisions, without these being illegal or wrong. For example, Judge Yves Donzallaz, who made a progressive decision on migration that did not please the party that nominated him. [29]

In Switzerland itself, because of these problems, an initiative has been presented for an Expert Commission to propose judges based on their knowledge and skills,[30] and a recent report by the Group of States against Corruption of the Council of Europe (GRECO) has

[29] Peter, Theodora, "The independence of justice under question," *Swiss Community*, September 30, 2021. Available at: "https://www.swisscommunity.org/es/news-medios/panorama-suizo/articulo/la-independencia-de-la-justicia-en-tela-de-juicio".

[30] Justiz Initiative, *"The Justice Initiative Brings Justice."* Available at: " https://www.justiz-initiative.ch/startseite.html".

determined that the current election system in Switzerland does not guarantee quality and efficiency in its judicial decisions.[31]

v. The popular election of judges may place them in a situation of vulnerability to political violence and/or organized **crime.**

Reform proposal

The initiative proposes the election by popular vote of justices of the Supreme Court of Justice of the Nation, circuit magistrates, district judges, local magistrates, local judges, magistrates of the Judicial Disciplinary Tribunal and magistrates of the Electoral Tribunal.

Article 96 proposes a campaign period for candidates, during which they will have the right to time on radio and television, as well as the right to participate in debate forums organized by the National Institute of Elections and Consultations. The initiative states that public or private financing of their campaigns will be prohibited, as well as the contracting by themselves or through an intermediary of spaces on radio and television. It also establishes that political parties may not carry out acts of proselytism.

Problems identified

Argument 1. The current security conditions in the country represent a threat to the integrity of candidates for judicial office.

Since 2013, the UN Rapporteur expressed its concern about the possible interference of organized crime in justice institutions through corruption and threats to public

[31] Council of Europe Group of States against Corruption, "Fourth Evaluation Round of the Second Compliance Report on the Prevention of Corruption in respect of Members of Parliament, Judges and Prosecutors" (Appendix to the Second Compliance Report adopted by GRECO at the 92nd Plenary Meeting 2 December 2022). Available at: "https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680ab2e3a".

servants. Faced with such facts, the Judiciary Councils, both federal and state, have implemented special security measures to protect the conditions of judges.[32]

The proposal to appoint judges through popular elections may place them in a situation of vulnerability to political violence or organized crime. Like political party candidates, candidates for judicial positions run the risk of suffering aggressions during the campaigns, such as threats, intimidation, harassment, and even homicide.

Empirical evidence for the argument

Mexico

Violence associated with political campaigns has escalated due to the presence of criminal organizations. The 2018, 2021 and 2024 electoral periods were recorded as the most violent in the country. According to the monitoring of political-criminal violence "*Votar Entre Balas*" (Voting Between Bullets), a total of 73 candidates were murdered during that period and 875 officials and family members suffered direct attacks.[33] The year 2023 was the most violent year since 2018 and registered a total of 574 aggressions by organized crime against people linked to politics and public servants of federal, state and municipal governments. The states with the most aggressions were Guerrero, with 91; Guanajuato, with 64; Zacatecas, with 43; Veracruz, with 42; and Michoacán and Chiapas, with 38 each.

The phenomenon of violence and insecurity has influenced the electoral participation of Mexicans.[34] For example, in the municipality of San Pedro Tlaquepaque, Jalisco, electoral participation dropped from 54 to 21% because the alderman suffered an attack by organized crime in 2018. Another case was in Apaseo el Grande, Guanajuato, which

[32] United Nations Commission on Human Rights, A/HRC/17/30/Add.3, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to Mexico, April 18, 2011, paras. 51-53.

[33] Data Cívica, "Periodo electoral 2023-2024 cerró con 34 asesinatos y otras 95 agresiones a candidaturas", 1 0 June 2024. Available at: "Comunicado: Periodo electoral 2023-2024 cerró con 34 asesinatos y otras 95 agresiones a candidaturas (datacivica.org)."

[34] Hernández-Gutiérrez, José Carlos and Recuero-López, Fátima, "Violencia, inseguridad y participación electoral en México", *Revista Española de Investigaciones Sociológicas*, no. 185, 2024, pp. 79-96. Available at: "10.5477/ cis/reis.185.79-96".

had a drop from 50 to 39% of electoral participation due to the homicide of the candidate for councilman and two party militants in 2021. [35]

The violence generated by organized crime has permeated the candidacies of political parties, as candidates have preferred to stop campaigning for their safety and that of their families. In total, the violence led to the resignation of more than 1,000 candidates.[36] There is no reason to assume that candidates for judicial office would be exempt from these dynamics.

vi. The popular election poses risks in terms of possible undue influence of private interests and/or organized crime. viii.

Reform proposal

The initiative proposes the election by popular vote of justices of the Supreme Court of Justice of the Nation, circuit magistrates, district judges, local magistrates, local judges, magistrates of the Judicial Disciplinary Tribunal and magistrates of the Electoral Tribunal.

Article 96 proposes a campaign period for candidates, during which they will have the right to time on radio and television, as well as the right to participate in debate forums organized by the National Institute of Elections and Consultations. The initiative states that public or private financing of their campaigns will be prohibited, as well as the contracting by themselves or through an intermediary of spaces on radio and television. It also establishes that political parties may not carry out acts of proselytism.

Problems identified

[35] Data Cívica, "Por cada agresión a candidatos baja 1.3% la asistencia a votar, revela Votar Entre Balas," February 16, 2024. Available at: "https://media.datacivica.org/pdf/Comunicado_Por_cada_agresi%C3%B3n_a_candidatos_baja_1.3_porciento_la_asistencia_a_votar_VotarEntreBalas.pdf".

[36] S. a., "Violence forced more than a thousand candidates to resign during the campaign: Laboratorio Electoral," May 31, 2024. Available in: "Violencia obligó a renunciar a más de mil candidatos durante la campaña: Laboratorio Electoral - Proceso".

Argument 1. Private or criminal interests may exert undue influence in the process of electing judges.

The election by popular vote of the persons in charge of imparting justice generates a risk of co-optation of jurisdictional bodies by private interests, such as large business groups or even criminal organizations. Although the initiative foresees control mechanisms to avoid the infiltration and influence of other actors in the electoral processes, the Mexican experience shows that these types of mechanisms have not been effective in preventing other actors from influencing or getting involved in the processes to favor their interests. The mechanisms foreseen by the initiative do not shield the electoral processes from such a possibility.

The proposed reform to the Judiciary establishes the National Institute of Elections and Consultations as in charge of organizing and overseeing the election process; however, as the Mexican experience shows, it is very difficult to ensure that candidates and political parties do not engage in proselytizing or receive illegal financing, especially in local environments controlled largely by organized crime organizations.

vii. The popular election of the members of highly specialized tribunals compromises their ability to resolve conflicts in an effective and impartial way.

Reform proposal

The initiative proposes the election by popular vote of justices of the Supreme Court of Justice of the Nation, circuit magistrates, district judges, local magistrates, local judges, magistrates of the Judicial Disciplinary Tribunal and magistrates of the Electoral Tribunal.

Various articles (95, 97, 99) establish the criteria for access to judicial election.[37] In addition to these requirements, the Explanatory Memorandum states that the selection of judges

[37] Be a Mexican citizen, in full exercise of rights, 35 years of age for justices and magistrates, and 30 years of age for judges, have a law degree with five years of seniority, five or ten years of professional practice, good reputation, without criminal conviction, with at least one or two years of residence in the country and without having held a series of state offices or positions.

must take into consideration their abilities, ethical and moral soundness, sensitivity and closeness to the problems and concerns of society.

Problems identified

Argument 1. The lack of technical specialization of the persons who sit on tribunals in specific matters will prevent cases from being resolved in an efficient manner.

Currently, in Mexico there are several courts that are highly specialized, either because they deal with highly technical matters or because they solve controversies whose procedure is particular and different from the others. The problems identified in previous sections regarding the popular election of judges are equally applicable to the members of the Electoral Tribunal, of the regional circuit plenary courts and of courts specialized in specific matters; however, it is important to highlight a particular dimension of this specialized jurisdictions.

The Electoral Tribunal oversees settling legal controversies of an eminently political nature. The regional plenary courts, which are specialized by subject matter, have as one of their main functions to resolve contradictions of criteria among the collegiate circuit courts of the same region. The courts and tribunals specializing in antitrust, broadcasting and telecommunications cases were created to provide greater certainty to economic agents by applying the complex regulatory frameworks governing telecommunications and antitrust activities in a more efficient and technically informed manner, to avoid contradictory criteria that complicate the application of the law and generate legal uncertainty. [38]

It is evident that the knowledge, skills, experience and technical solvency of the judges in charge of these specialized tribunals must be greater. Their impartiality and independence must also be reinforced to deal with the interests involved in this type of conflicts and to comply with standards that guarantee the functioning of a democratic state.

Regarding the Electoral Tribunal, the European Commission for Democracy through Law (Venice Commission), in its Opinion on the draft constitutional amendments on the

[38] Decree amending and adding several provisions of Articles 6, 7, 27, 28, 28, 73, 78, 94 and 105 of the Political Constitution of the United Mexican States, regarding telecommunications. Published in the *Official Gazette of the Federation* on June 11, 2013.

electoral system addressed to Mexico,[39] pointed out that the proposed procedure of election by popular vote is unusual and creates risks for its status as an impartial body. For the Commission, the composition of electoral tribunals should not be based on political preferences and choices, but primarily on professional criteria.

It also argued that, even if the nomination of candidates required a certain evaluation of their experience, direct voting could easily lead to a situation in which members are politically oriented. On the other hand, in the *Report on the resolution of electoral conflicts*, the Commission held that "in electoral matters, as in other areas, the judiciary, including a specialized electoral jurisdiction, must represent a guarantee of impartiality of the whole process, and therefore must offer sufficient guarantees of independence". [40]

With respect to courts specializing in economic competition, broadcasting and telecommunications, the Organization for Economic Cooperation and Development (OECD) and the Secretariat of Economy[41] stated that the specialization of these jurisdictional bodies provides at least three advantages: 1) greater efficiency, through specialized procedures, personnel and judges, 2) greater uniformity, as a result of dealing with an exclusive jurisdiction over a particular area of law, and 3) quality decisions, due to greater expertise and experience in the correct application of the law to the facts.

The same organization pointed out that these judicial authorities are more frequently required to provide economic support for the arguments presented in the context of competition law, as well as to use economic methods that help to clarify the hypotheses in dispute and to present evidence that contributes to prove them.[42] For this reason, it is essential that the persons who make up these tribunals have the necessary technical knowledge to resolve the matters presented to them.

The replacement of the total number of judges specialized in these matters jeopardizes the timely and technically correct resolution of the cases pending before these bodies at the time it occurs.

[39] Venice Commission, Opinion No. 1087/2022 on the draft constitutional amendments on the electoral system, October 24, 2022, paragraphs 38- 45.
[40] Venice Commission, Opinion No. 913/2018, Report on Electoral Dispute Resolution, paragraph 46.
[41] OECD , *The resolution of competition matters by bodies of specialized and general jurisdiction: a balance of international experiences*, 2016, pp. 13-14.
[42] *Ibidem,* p. 73.

3. New administrative body in the Federal Judicial Branch

a. Problems associated with the integration and operation of the new judicial administration body.

i. The annual negotiation of the PJF's budget compromises its independence.

Reform proposal

The reform centralizes in the judicial administration bodies (OAJ), at the federal and local levels, the management and administration of the budget of the judicial branches. The OAJs will oversee preparing the general budgets and submitting them to the competent body of the Executive for inclusion in the Federal Expenditure Budget. In this regard, it proposes to amend Articles 99 and 100 of the Political Constitution of the United Mexican States (CPEUM) and to establish transitory Article 6.

Problem identified

Argument 1. The annual negotiation of the Judicial Branch budget with the Executive Branch affects the human right to judicial independence.

In accordance with international human rights standards on the subject, the boards of administration of the Judiciary must have organizational management autonomy. This is a necessary but not sufficient condition for the protection of judicial independence.[43] The financial autonomy of the judiciary is an international obligation of States. It is a commitment to allocate sufficient resources to this public power, in a transparent manner and based on objective criteria. Therefore, this allocation should not depend on specific political situations or on other public authorities or entities.

The optimal way to protect the resources of the Judiciary from annual political haggling is to establish in the Constitution a fixed percentage of the budget. The UN Special

[43] Inter-American Commission on Human Rights (IACHR), *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas,* 2013. Available at: "https://www.oas.org/es/cidh/defensores/docs/pdf/operadores-de-justicia-2013.pdf".

Rapporteur on the Independence of Judges and Lawyers, in her visit to Mexico in 2011,[44] stressed that the functioning of the Judiciary and the administration of justice need adequate and independent budgets. She suggested that it is necessary to establish a fixed allocation of 2% of the general annual budget. This would help strengthen the financial independence of this power at the federal and state levels.

Empirical evidence for the argument

The case of Mexico

The Presidency of the Supreme Court informed that, according to the inflation expectations established by the Ministry of Finance at the end of 2023, the PJF requested a real increase of 4% with respect to the budget approved for 2023. The resources requested would translate, approximately, into the equivalent of 0.26% of the country's Gross Domestic Product. In the same exercise, legislators cut $6,454,000 to the PJF and, therefore, its budget for 2024 represents the lowest amount of the six-year term due to a cut of 3.6% in real terms, in relation to 2023. The amount allocated for the Judicial Branch in 2024 is $78,327,278,245 distributed as follows:

- Supreme Court of Justice of the Nation: $5,787,183,598.00
- Council of the Federal Judiciary: $68,917,261,195.00
- Electoral Tribunal of the Judiciary of the Federation: $3,622,833,452

From a comparative perspective, the participation of the PJF in the country's public spending is notoriously lower than that of other Latin American countries. According to information presented by the Economic Commission for Latin America and the Caribbean (ECLAC), the regional average in 2020 was 0.56% of the Gross Domestic Product (GDP), while in Mexico it was the equivalent of 0.29% of the national GDP. That proportion decreased in 2023 to 0.26%. [45]

[44] Report of the Special Rapporteur on the independence of judges and lawyers. Mission to Mexico, 2011. Available at: "www.hchr.org.mx/wp/wp-content/themes/hchr/images/doc_pub/informe_final_independencia_jueces_.pdf".

[45] In this regard, see "4. Expenditure policy of the legislative and judicial branches and autonomous entities". Available at:

ii. The decisions of the judicial administration body are unassailable, which may lead to arbitrariness or abuses.

Reform proposal The initiative proposes that the decisions of the OAJ be final and unassailable and, therefore, no appeal may be filed against them. Consequently, it proposes to amend Article 100 of the CPEUM.
Problem identified **Argument 1. The unassailable nature of the OAJ's decisions violates international standards on the right of judicial officials to access to justice and to recourse against judicial and administrative decisions**. The reform's explanatory memorandum emphasizes the enormous concern that, at present, the CJF's decisions are unassailable. The text recalls that the United Nations Rapporteur for Judicial Independence recommended, during her visit to Mexico in 2011, that administrative decisions that have an impact on judges should be subject to review by another independent entity. However, the same initiative, in Article 100, exempts all decisions of the OAJ from any appeal against them. Disregarding the right of judicial operators to challenge before an impartial review body the administrative decisions that affect them violates their human rights and international standards. The possibility of resorting to the *amparo* trial in these cases should not be unknown to any person, which includes individuals dedicated to the administration of justice.[46] It is often believed that matters of administration only impact issues ancillary to the administration of justice, but this is not the case. The decision on how resources are

"www.ppef.hacienda.gob.mx/work/models/7I83r4rR/PPEF2024/oiqewbt4/docs/exposicion/EM_Capitulo_4.pdf".

[46] Inter-American Dialogue, *A threat to judicial independence Analysis of the constitutional reform initiative in Mexico.* Available at: "www.law.stanford.edu/wp-content/uploads/2024/05/ES_Informe-Mexico_Independencia-Judicial.pdf".

distributed directly affects the exercise of fundamental rights, in this case, of judicial personnel.

iii. The commission in charge of labor disputes in the PJF disappears and no replacement is established.

Reform proposals

The tenth transitory article of the initiative to reform the Political Constitution of the United Mexican States establishes that, for purposes of the last paragraph of article 100 of the reformed Constitution, the labor rights of the employees of the PJF will be respected. It specifies that the expenditure budgets of the corresponding fiscal year will consider the necessary resources for the payment of supplementary pensions, medical support and other labor obligations, under the terms established by the applicable laws or general working conditions.

The last paragraph of the amended Article 100 CPEUM provides that, within the scope of the Federal Judicial Branch, no funds, trusts, mandates or similar contracts that are not provided for by law may be created or maintained in operation.

Problem identified

Argument 1. The reform initiative does not establish which organ or entity will be competent to process labor disputes previously heard by the Labor Disputes Commission of the CJF.

Although the reform states that the labor rights of the PJF will be respected, the commission in charge of hearing such matters disappears in the initiative. The reform bill does not say anything about who will be the authorities responsible to handle such conflicts. With this, there would be no competent authority to handle labor and social security conflicts of such personnel.

Current regulations stipulate that the Labor Disputes Commission of the PJF is competent to hear labor disputes between Supreme Court and CJF officials and their employers.

With the disappearance of the CJF, the fate of the labor commission remains in limbo and, with it, the possibility of CJF and Supreme Court personnel to claim possible violations of their rights as workers.

In short, if the Disputes Commission was already highly questioned because it did not comply with international human rights standards, since it was not an impartial judge and did not have jurisdictional status, the precariousness of the rights as workers of this type of civil servants is deepened because the reform initiative does not specify which will be the competent entity to process these matters.

iv. There are no mechanisms for open justice and/or citizen participation in the judicial **administration body.**

Reform proposal

The opinion states that one of the main reasons for proposing the constitutional reform is the deep rift between society and the jurisdictional authorities.

Problems identified

Argument 1. The initiative fails to incorporate an open justice and citizen participation perspective.

An important part of open justice[47] is citizen participation, which is a "strategy to generate social legitimacy and citizen justice".[48] In Mexico, open justice practices and mechanisms for citizen participation in the judicial sphere have already been developed. From 2017 to

[47] This is defined as the existence of norms, policies and institutional capacities that guarantee transparency, access to information and citizen participation in jurisdictional and non-jurisdictional functions performed by judicial institutions, within a framework of integrity and accountability through innovation in the use of technologies. See Cortez Salinas, Josafat and Saavedra Herrera, Camilo, *Observatorio de Justicia Abierta 2019,* Mexico, INAI/UNAM, "Mensaje" de la comisionada Blanca Lilia Ibarra Cadena .

[48] EQUIS Justicia para las mujeres A.C., *Mecanismos de participación ciudadana en los poderes judiciales de México,* Mexico, EQUIS Justicia para las mujeres, 2023, p. 6.

2021, *Equis Justicia* documented 31 open justice exercises promoted by different courts in Mexico. [49]

The reform initiative only contemplates one mechanism for citizen participation in the Judicial Branch: the popular vote. However, as mentioned above, this has several drawbacks and problems. Therefore, it is necessary to point out that it is problematic that although the initiative proposes the "democratization" of the Judicial Branch, it does not contemplate other mechanisms that bring citizens closer to the judiciary.

Argument 2. The initiative does not contemplate any collegiate body to collaborate with the OAJ in its administrative functions.

The opinion indicates that the initiative to reform the Judicial Branch is motivated by the distancing between society and the jurisdictional authorities. However, the initiative lacks mechanisms of open justice and/or citizen participation; it does not contemplate bodies or mechanisms that directly involve citizens in the administration and oversight of the judiciary. This omission is especially worrisome if we consider that several judicial powers already have such bodies (State of Mexico,[50] Oaxaca[51] and Coahuila).[52]

[49] EQUIS Justicia para las mujeres A.C., *Modelo de justicia abierta feminista. Primeros pasos para la igualdad y no discriminación en los Poderes Judiciales,* Mexico, EQUIS Justicia para las mujeres, 2023, p. 34.

[50] The Judicial Branch of the State of Mexico has an Accessible and Inclusive Advisory Council, which is a body "in charge of giving opinions, proposing and advising the Judicial Branch of the State of Mexico in matters related to policies and actions that contribute to the effective social inclusion, participation and accessibility of judicial servants and service users with disabilities. It is formed with members of the Judicial Branch of the State of Mexico, but also includes members of three public, social or private institutions related to the issue of disability and two persons representing the group of persons with disabilities. Agreement of the Plenary of the Judiciary Council of the Judicial Branch of the State of Mexico, in ordinary session of October 16, 2023, approving the creation of the Accessible and Inclusive Advisory Council of the Judicial Branch of the State of Mexico. Available at: "https://legislacion.edomex.gob.mx/sites/legislacion.edomex.gob.mx/files/files/pdf/gct/2023/octubre/oct261/oct261c.pdf". [Accessed June 18, 2023].

[51] The Judicial Branch of the State of Oaxaca has a Consultative Council, which is a participation mechanism that involves the citizenry. It is made up of civil society organizations and serves as a specialized and consultative body to generate guidelines, projects and activities in the areas of human rights, gender and transparency in the Judicial Branch of Oaxaca. See Judicial Branch of the State of Oaxaca, "Buenas prácticas en Oaxaca consolidan la justicia abierta," Wednesday, November 11, 2020. Available at: "https://www.tribunaloaxaca.gob.mx/Home/getPublicacion?idInformacion=214037." [Accessed June 18, 2024].

[52] Similarly, there is the Judicial Observatory of the Judicial Branch of the State of Coahuila, which is attached to the Presidency of the Superior Court of Justice. It is a citizen body for consultation and support to the judicial branch of the state. It also contributes "in the supervision and monitoring of the

4. Court of Judicial Discipline

a. Problems associated with the Court of Judicial Discipline

i. The popular election of the Tribunal's judges compromises its independence and impartiality.

Reform proposals

The initiative proposes eliminating the Federal Judiciary Council (CJF) and placing the oversight and discipline of public servants of the Federal Judicial Branch in a Judicial Disciplinary Tribunal, composed of five magistrates elected by popular vote. For each of the positions of magistrate, the citizens may elect from a list of 30 candidates, of which 10 will be proposed by the Federal Executive, five by each House of Congress, by a qualified vote of two thirds of the legislators present, and 10 by the Plenary of the Supreme Court of Justice of the Nation, by a majority of six votes. [53]

The Explanatory Memorandum of the initiative states that the creation of the Court of Judicial Discipline responds to the low rate of complaints, prosecution, trials and sanctions against judicial officers, despite the "generalized knowledge of inappropriate behavior". The opinion of the Constitutional Points Commission adds that the performance of the Judiciary Council in disciplinary matters has been questionable because acts of corruption persist, as well as "unjustified delays and delays in the attention and conduct of trials".

work of the jurisdictional and non-jurisdictional bodies of the Judicial Branch to identify problems in the operation of the same and formulate, if necessary, recommendations and proposals for their better operation. It has a General Technical Council, Regional Chapters and Citizen Observers. The General Technical Council is made up of members of the private sector and academia. The positions are honorary. The Citizen Observers are an auxiliary body of the General Technical Council and the Regional Chapters. The Citizen Observers are citizens". Judicial Branch of the State of Coahuila de Zaragoza, "Observatorio Judicial Coahuila. Citizen Consultation Body. Available at: "https://www.pjecz.gob.mx/observatorio-judicial/quienes-somos/#:~:text=El%20Observatorio%20Judicial%20es%20un,y%20no%20no%20jurisdiccionales%20del%20Poder." [Accessed June 18, 2024].

[53] Pursuant to the third section of the second paragraph of Article 100 of the reform initiative, the Powers of the Union that do not send their nominations to the Senate within the term established in the call will lose the right to propose candidates to the Disciplinary Tribunal and will have no way to remedy the omission.

Problems identified

Argument 1. Judicial discipline procedures must respect the guarantee of independence and impartiality.

The Mexican Constitution[54] and the American Convention on Human Rights[55] recognize that every person facing proceedings that could affect his or her personal sphere has the right to be tried by an independent and impartial tribunal. These procedural guarantees extend to the disciplinary sphere and contain specific standards for judicial officials. In this regard, the Inter-American Court has established that all disciplinary proceedings brought against judges must be resolved in accordance with standards of conduct established in fair procedures that ensure the competence, objectivity and impartiality of the disciplinary body. [56]

Argument 2. The intervention of other public authorities in the appointment of the authorities of the disciplinary tribunal transgresses the guarantee of independence and impartiality.

The reform initiative grants the Executive and the Legislature the power to select the persons who will compete in the elections to integrate the Disciplinary Tribunal, transgressing international and Inter-American standards that oblige the Mexican State to guarantee judicial officials the right to have disciplinary proceedings processed by an independent and impartial body.

One element that may lead to presume a lack of impartiality in disciplinary proceedings is precisely the dependence on other branches of government and the conditions for the exercise of the position. In the same sense, both the Inter-American Commission[57] and the Office of the United Nations Rapporteur for the Independence of Judges and

[54] See Articles 14 and 16 of the Political Constitution of the United Mexican States.
[55] See Article 8 of the ACHR, on judicial guarantees.
[56] Cf. I/A Court H.R., Case of López Lone et al. v. Honduras. Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs. Judgment of October 5, 2016. Series C No. 302. Case of the Constitutional Tribunal v. Peru. Judgment of January 31, 2001, paras. 74 and 84.
[57] IACHR, Guarantees for the Independence of Justice Operators, Toward Strengthening Access to Justice and the Rule of Law in the Americas, OEA/Ser.L/V/II. Doc. 44, December 5, 2013, para. 197.

Lawyers[58] have expressed that independence is compromised when there is interference by other branches of government in the appointment of persons who make up the judicial disciplinary bodies.

Empirical evidence for the arguments

The case of Bolivia

Bolivia is the only State in which the body in charge of disciplining judicial officials is made up of persons elected by citizen vote. The Council of the Judiciary was established in 2012 and its disciplinary powers extend to the ordinary, agro-environmental and specialized jurisdictions. Persons aspiring to the position of councilor of the magistrature may apply directly to the legislative body or may be proposed by social organizations, indigenous nations or peoples, public or private universities, professional associations and duly recognized civil institutions.[59] In this way, the public powers, particularly the Executive and Legislative, do not formally interfere in the selection of candidates for the Council who will compete through popular vote.

The members of the Council are empowered to appoint disciplinary judges, who in turn are competent to hear in the first instance disciplinary proceedings against judicial officials for minor and serious misconduct, in addition to gathering evidence for the substantiation of proceedings for disciplinary offenses considered to be very serious. When a judicial official is denounced for a very serious offense, the disciplinary judge draws lots to appoint two citizens registered in the electoral roll to form a Collegiate Disciplinary Tribunal. [60]

The sentences issued by the disciplinary courts or tribunals may be appealed before the Disciplinary Chamber of the Council of the Magistracy.[61] In other words, in Bolivia there is a complex system of judicial discipline, in which the Councilors elected by popular vote only intervene as a second instance in the case of disagreement of the officials with the

[58] Report of the Special Rapporteur on the independence of judges and lawyers Diego García Sayán, A/75/172 Independence of judges and lawyers, July 17, 2020, para. 31.
[59] Article 170 of Law 025. Available at: "https://tsj.bo/wp-content/uploads/2019/11/ley-025-ley-del-organo-judicial.pdf".
[60] Article 189 of Law 025.
[61] *Idem*.

resolution of a disciplinary court or tribunal. The Mexican initiative does not comply with the standards and mechanisms of the Bolivian case.

ii. The coincidence between the terms of office of the members of the Tribunal and the authorities that nominate them is detrimental to their independence in the performance of their duties.

Reform proposals

According to the fifth paragraph of Article 100 of the reform initiative, the judges of the Disciplinary Tribunal shall hold office for six years, without the possibility of reelection. The renewal of the Tribunal will be staggered. The fifth transitory provision establishes that in the first integration of the Disciplinary Tribunal, the magistrates will have different terms, depending on the number of votes with which they are elected: three members of the Tribunal will hold office for five years, ending in 2030, while the remaining two will have a term of eight years, ending in 2033.

Problem identified

Argument 1. The duration of the term of office contemplated in the initiative compromises judicial independence.

International bodies such as the European Court of Human Rights[62] and the Inter-American Court[63] have recognized that the duration of the term of office of the members of the disciplinary body or tribunal has an impact on its independence. It is essential to guarantee that there will be no overlapping in the exercise of the positions of the persons responsible for judicial discipline and the authorities that appoint them.

[62] In this regard, see Report of the Special Rapporteur on the independence of judges and lawyers, Diego García Sayán, A/75/172, July 17, 2020, paras. 25-27.
[63] IACHR Court. *Case of Villarroel Merino et al. v. Ecuador.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 24, 2021. Series C No. 430.

Under the judicial reform initiative, a percentage of the magistrates of the Disciplinary Tribunal will be elected on the same day that the head of the federal Executive and the representatives of the Legislature are elected. The rest of the members of the Tribunal will conclude their term of office on the same date as the legislators, so that their replacements will be elected on the same day the legislature is renewed.

This increases the risk that the election of the magistrates of the Disciplinary Tribunal will be conditioned by party affiliations or political preferences. Not only will the Executive and the Legislature have broad discretion to select the candidates for the Tribunal, but it is also very likely that they will be part of the same political project or party to which the person who nominated them as candidates belongs.

iii. The mechanism for appointing members of the Tribunal does not guarantee that they have the ideal profile to perform the function.

Reform proposals

Article 100, third paragraph of the judicial reform initiative establishes that in order to be eligible for the position of magistrate of the Disciplinary Tribunal, candidates must meet the requirements set forth in Article 95 of the Constitution and be distinguished by "their professional capacity, honesty and honorability in the exercise of their duties".

Problem identified

Argument 1. The mechanism for appointing members of the Judicial Disciplinary Tribunal does not guarantee that they have the appropriate profile to perform the function.

By subjecting the appointment of the members of the Judicial Disciplinary Tribunal to the political-electoral cycles, it is highly probable that the citizenry will vote for the magistrates proposed by the authorities of the political party of their preference, leaving in second

place the professional capacity, suitability and ethics of the candidate.[64] This will lead to the court being made up of political/partisan profiles instead of technical ones.

This implies the risk that elected magistrates will channel disciplinary procedures to sanction judges whose decisions do not conform to the political preferences of the regime in power, or that the disciplinary system will be paralyzed by the coincidence of political affinities among the magistrates and judicial officials subject to scrutiny. If the disciplinary magistrates and judges belong to the same political formula and are elected in the same elections, they will have incentives to avoid sanctioning disciplinary offenses, so as not to affect the political preference of the electorate.

Empirical evidence for the argument

The case of Bolivia

In a 2024 report on the human rights situation in Bolivia, the Inter-American Commission noted that the judicial elections do not meet their objective of democratizing the composition of the high courts, since the nominations proposed by the Plurinational Legislative Assembly were made based on political criteria, leaving aside the capacity of the candidates. [65]

The selection of candidates for judicial positions with political profiles like those of the parliamentary majority provoked the discontent of the population. As a reflection of this dissatisfaction, the percentage of invalid votes has been very high and the percentage of citizen participation in the elections continues to decrease, which strengthens questions about the legitimacy of the Bolivian model for the selection of judges.

[64] Inter-American Dialogue, *A Threat to Judicial Independence. Análisis de la iniciativa de reformas constitucionales en México*. May 2024, p. 15. Available at: "https://law.stanford.edu/wp-content/uploads/2024/05/ES_Informe-Mexico_Independencia-Judicial.pdf".

[65] IACHR Commission. Report "*Social Cohesion: the Challenge for the Consolidation of Democracy in Bolivia*", approved on January 20, 2024, chapter V. Justice System, p. 145 et seq. Available at: "https://www.oas.org/es/cidh/jsForm/?File=/es/cidh/prensa/comunicados/2024/053.asp".

iv. Disciplinary procedures may be influenced by political preferences or affiliations.

Reform proposals

The function of the Judicial Disciplinary Tribunal shall consist of hearing, investigating, substantiating and, as the case may be, sanctioning judicial officials for 1) acts or omissions contrary to the law, the public interest or the proper administration of justice, including acts of corruption, influence peddling, nepotism, complicity or concealment of alleged criminals, and 2) sanctioning judicial officials whose decisions violate the principles of objectivity, impartiality and impartiality, nepotism, complicity or concealment of alleged criminals, and 2) also sanctioning officials of the Federal Judicial Branch whose decisions violate the principles of objectivity, impartiality, independence, professionalism or excellence, in addition to those determined by law. These powers are established in the fourth paragraph of Article 100 of the judicial reform initiative.

Problem identified

Argument 1. Disciplinary criteria must respond to the characteristics, goals and purposes of the administration of justice.

The members of the PJF are public servants whose conduct is subject to administrative responsibility. However, unlike other public authorities in which the conduct of public servants is conditioned to supra-subordinate relationships, the work of judges has a double dimension: they are public servants and at the same time they are holders of the jurisdictional power granted to them by the Constitution. In this second dimension, judges must have autonomy to solve the controversies raised by citizens in accordance with the applicable law and with the guarantee that they will not be subject to personal, political, economic or any other kind of pressure. [66]

Freedom of jurisdiction" is a guarantee for the citizens who turn to the courts in search of an adequate solution to the conflicts they face. However, freedom of jurisdiction is not synonymous with impunity. The justice system must include mechanisms to sanction

[66] *Cf.* Lubert, Steven, "Judicial Discipline and Judicial Independence," in *Law and Contemporary Problems,* Duke University School of Law, Vol. 61, No. 3, 1998, p. 61. 3, 1998, p. 61.

judges who engage in objectively incorrect conduct, such as discrimination, sexual harassment or receiving bribes.

However, it is crucial to be clear that the purpose of disciplinary proceedings is not to prosecute or punish, but to preserve the integrity of the justice system and the trust of the citizens, as well as to safeguard justice and those who are not suitable to exercise the jurisdictional function. The initiative does not contain sufficient safeguards to prevent the judicial discipline regime from becoming an instrument of political pressure, altering the purposes for which it was created[67] and becoming a tool to pressure the judges to modify their decisions and judicial criteria.

Empirical evidence for the argument

The case of the United States

In the United States, the oversight and discipline of state judges, who are selected through different electoral mechanisms, is in the hands of collegiate bodies identified as "judicial discipline councils". The members of the disciplinary councils are appointed by the local Executive, respecting an equitable number of judges, lawyers and civil society. In this legal system, it has been emphasized that the intervention of the disciplinary councils does not imply replacing the criminal jurisdiction nor should it result in the review of the judicial decision, a task that is the sole responsibility of the appellate bodies.

v. The impossibility to challenge the Tribunal's decisions violates the human right to a fair trial and judicial independence.

Reform proposal

[67] In this regard, see I/A Court H.R., Constitutional Court (Camba Campos et al. v. Ecuador). *Constitutional Tribunal (Camba Campos et al.) v. Ecuador.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013.

The initiative to reform Article 100 of the Constitution explicitly establishes that the decisions of the Disciplinary Tribunal "shall be final and unassailable and, therefore, there shall be no trial or appeal whatsoever against them".

Problem identified

The impossibility of appealing the decisions of the Court of Judicial Discipline violates the human right to judicial independence.

International standards applicable to judicial discipline recognize the right of Judicial Branch officials to have a recourse to request that an independent and impartial judicial body review the decisions of the disciplinary body. Such recourse must be suitable and effective. Therefore, the Judicial Branch reform initiative must include, in the national legal framework, an effective remedy for judicial officials to appeal sanctions imposed through disciplinary proceedings. Its absence in the initiative contravenes the provisions of Articles 8 and 9 of the American Convention on Human Rights.

In this regard, the United Nations Special Rapporteur on the Independence of Judges and Lawyers expressed her concern about the fact that in Mexico "according to the Constitution itself, the decisions of the Council of the Federal Judiciary [in disciplinary matters] are final and unassailable and, therefore, there is no trial or appeal against them".[68] Therefore, it "recommended that all disciplinary and administrative decisions that have an impact on the status of judges and magistrates should have the possibility of being reviewed by another independent jurisdictional body."[69]

For its part, the IACHR Court[70] has indicated that "the right to job stability of judicial officials includes the guarantee that, in case of dismissal or termination of a judicial official, this is done under justified causes and that the worker can appeal the decision before the

[68] Report of the Special Rapporteur on the Independence of Judges and Lawyers, April 18, 2011, referred to on page 27 of the initiative presented by the Federal Executive. Available at: "https://gaceta.diputados.gob.mx/PDF/65/2024/feb/20240205-15.pdf".
[69] *Idem.*
[70] IACHR Court. *Case of Aguinaga Aillón v. Ecuador.* Merits, Reparations and Costs. Judgment of January 30, 2023. Series C No. 483, para. 99.

relevant authorities". For the IACHR Court, this guarantee is an elementary condition for the due fulfillment of judicial functions. [71]

vi. The assumptions of disciplinary sanctions constitute open clauses that violate the legal certainty of the judges and may lead to abuse.

Reform proposal

Article 100 of the initiative and of the opinion lists the grounds for sanctioning public servants of the PJF. The first is "incurring in acts or omissions contrary to the law, the public interest or the proper administration of justice, including those related to acts of corruption, influence peddling, nepotism, complicity or concealment of alleged criminals".[72] The second reason is "when its determinations do not conform to the principles of objectivity, impartiality, independence, professionalism or excellence, in addition to the matters determined by law".[73]

Problems identified

Argument 1. The disciplinary grounds do not comply with the principle of taxativity in administrative matters.

The initiative contains grounds for punishment that are ambiguous and very open, particularly those referring to conduct contrary to the law, the public interest or the proper administration of justice. Accordingly, it is worrisome what the Judicial Disciplinary Tribunal may understand by "acts contrary to the public interest or the law". For example, if a judge issues an injunction that is not in the interests of the other branches of government, such as the federal Executive, this could be considered an act contrary to the public interest.

[71] I/A Court H.R., Case of Lagos del Campo v. Peru, supra, para. 150. *Case of Lagos del Campo v. Peru*, supra, para. 150 and *Case of Nissen Pessolani v. Paraguay,* supra, para. 102.
[72] Initiative, pp. 82- 83; Opinion, pp. 53- 54.
[73] *Idem.*

In this regard, one of the principles of administrative law is taxativity. It has been considered that "[t]he principle of exact application of the law, in its aspect of taxativity, provided for in the third paragraph of Article 14 of the Constitution, modulated to administrative matters, (...) may be defined as the requirement that the texts containing the punitive rules describe with sufficient precision what conducts are prohibited and what sanctions will be imposed on those who incur in them".[74] The aforementioned is absent in the sanction assumptions contemplated in the initiative.

Argument 2. The disciplinary cause related to the "concealment of possible offenders" transgresses the right to the presumption of innocence.

The initiative contemplates a ground for sanction consisting of "concealment of possible offenders". This assumption raises important questions; for example, whether the release of an accused person by a judge could be considered by the Disciplinary Tribunal as "concealment of possible offenders".[75] There are multiple constitutional and legal reasons why a judicial authority could release an accused person: for example, when the accused person was illegally detained or when certain investigative procedures, such as searches, were not carried out in accordance with constitutional and international standards. However, the initiative would open the possibility that judges could be sanctioned for making such determinations.

Argument 3. Disciplinary grounds transgress the human right to judicial independence because they allow the judge to be sanctioned for the sense of his or her decisions.

The grounds that refer to acts or omissions contrary to the law, the public interest or the proper administration of justice and the one that refers to the concealment of alleged criminals are aimed at punishing the judges for the meaning of their judicial decisions and not for their behavior. However, judges may in no way be punished for the meaning of their decisions.

[74] Unconstitutionality Action 47/2016. Voted on April 23, 2018. Speaker: Alberto Pérez Dayán.

[75] In this regard, Article 20(B)(I) of the Constitution states that the accused person shall have the right to be presumed innocent until his or her responsibility is declared by a sentence issued by the judge in the case.

In this regard, the Inter-American Court has pointed out that judges cannot be removed or punished based on the meaning of their decisions.[76] The same court has emphasized that "international law has formulated guidelines on the valid reasons for the suspension or removal of a judge, which may be, among others, misconduct or incompetence. However, judges cannot be removed from office solely because their decision was overturned on appeal or review by a higher judicial body.[77] The IACHR Court is very clear in stating that the disciplinary control of judges is only intended to "assess the conduct, suitability and performance of the judge as a public official",[78] but not to punish them for the sense of their decisions.

For its part, the Human Rights Committee noted that "[j]udges may be removed only on serious grounds of misconduct or incompetence, in accordance with fair procedures guaranteeing objectivity and impartiality established by the Constitution or by law. The removal of judges by the executive branch, for example before the expiration of the term for which they were appointed, without any specific reason being given to them and without their having effective judicial protection to challenge the removal, is incompatible with the independence of the judiciary. This also applies, for example, to the removal by the executive branch of government of allegedly corrupt judges without any of the procedures established by law being followed".[79]

[76] Inter-American Court of Human Rights, *Case of Apitz Barbera et al ("Corte Primera de lo Contencioso Administrativo") v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C, No. 182, para. 78.
[77] *Ibidem,* para. 84.
[78] *Ibid.*, para. 86.
[79] Human Rights Committee of the Covenant on Civil and Political Rights, "General Comment 32 on Article 14: The right to a fair trial and to equality before courts and tribunals," para . 20.

5. Prompt and expeditious justice

a. Problems associated with changes to ensure prompt and expeditious justice.

i. Tackling the judicial backlog without an adequate diagnosis and solution does not guarantee prompt and effective justice.

Reform proposals

It is proposed to amend Article 17 of the Constitution to require judges to issue rulings within a maximum period of time based on quantitative criteria. Both Articles 17 and 20 of the Constitution provide that the authorities that do not comply with the determined time limits must themselves initiate an accountability procedure before the Judicial Disciplinary Tribunal, which will determine the consequences of the unjustified delay.

Problems identified

Argument 1. The six-month period established in Article 17 for resolving matters is not supported by any national or international standard.

According to international (IACHR Court) and national (SCJN) standards, the adequacy or inadequacy of a time period to resolve a judicial matter is not based on a certain number of months, but on the review of four criteria: 1) the complexity of the matter, 2) the procedural activity of the interested party, 3) the conduct of the judicial authorities and 4) the effect generated on the legal situation of the person involved in the process. The six-month term proposed in the reform does not consider the Inter-American criteria and does not consider the complexities that must be analyzed to determine whether a case was resolved within a "reasonable" term.

Argument 2. The fear of an arbitrary sanction for failure to comply with the deadlines may affect the jurisdictional work.

The lack of reasonableness of the deadline may cause the judges, to avoid a sanction, not to analyze the cases with sufficient care, so long as they are solved within the

established term. Likewise, the reform does not establish what sanction the judges who do not resolve the cases within the constitutional time limit would face.

Argument 3. The creation of a disciplinary measure when a judge exceeds the time limit for sanctions is an inadequate response to the judicial backlog.

The judicial backlog is a function of a series of factors, such as the number of judicial officials to solve cases and its consequences on the workload. There are multiple normative and procedural problems that generate delays, such as delays in notifications, delays in the production of evidence, delays in scheduling hearings, loss of files, limited physical space, procedural simulations; problems of corruption and inefficiency of judicial officials and those belonging to other public institutions, among others. It is also necessary to consider the speed or delay in the performance of other organs of the justice system, such as the Prosecutor's Office. A real and pertinent response to the backlog of judicial processes must consider measures in all the factors described above. The initiative proposes a superficial measure that does not start from the recognition of the structural problems faced by the justice system.

ii. The reform does not comply with the principle of gradualism in its implementation, which compromises its success.

Reform proposals

The transitory articles of the reform do not contemplate a gradual implementation plan that considers the complexities of a transformation of this magnitude. The initiative proposes that all judges of the Judicial Branch of the Federation will conclude their term of office on the day on which the persons elected through the extraordinary electoral process are sworn in. This is established in the second and seventh transitory articles of the proposal. Likewise, it establishes, in articles 116, section III and 122, section A, section IV, that the implementation of the reform at the local level will be carried out according to the same bases as the Judicial Power of the Federation. It states that the election

modalities and the duration of the term of office of the judges of the local judicial powers will be defined by the states in their constitutions and laws.

Problem identified

Argument 1. The absence of a gradual implementation plan compromises the success of any type of judicial reform.

The reform proposal does not consider gradualness in the achievement of its objectives or in the effective implementation of its proposals. It proposes the overnight replacement of the entire federal judiciary (approximately 1,580 male and female judges) as well as the replacement of the entire state judiciary without a critical path that considers the complexities of an institutional transformation of this magnitude. In other words, the reform proposal does not consider implementation scenarios that assess type of cases (criminal, administrative, civil, family, mercantile or labor), type of processes (oral, written, amparo trials, etc.) or regional or geographical variables (circuits, states, cities, etc.). These absences can result in an abrupt and uneven implementation with high institutional, social, political and economic costs.

Empirical evidence

The case of Mexico

In Mexico, the last 20 years have been characterized by judicial reforms (especially those related to the transition to oral proceedings) in areas such as criminal, commercial, labor and family/civil law. All these experiences have shown the importance of effective planning and implementation to ensure the effectiveness of regulatory change. They have also shown that the processes of institutional transformation and reorganization require several years for their consolidation (for example, the penal reform established a period of eight years for its implementation, which turned out to be insufficient).

6. Annexes

a. Analysis of the Judicial Branch Reform Initiative based on the jurisprudence of the Inter-American Court of Human Rights.

Judicial guarantees		Reform Initiative presented by the Executive Branch	Inter-American standard	Cases
Internal independence (of the judges, vis-à-vis judicial disciplinary bodies)	Judicial guarantees in judicial discipline proceedings	It is proposed to abolish the Federal Judiciary Council and replace it with a judicial administration body and a Judicial Disciplinary Tribunal. The Judicial Disciplinary Tribunal "...will have a collegiate composition, made up of five members elected by the citizens at the national level in accordance with the procedure established in Article 96 of the Constitution for Justices of the SCJN" (p. 52, first paragraph). The Court, "...is empowered to hear, investigate and, as the case may be, sanction administrative responsibilities and conduct contrary to the principles of excellence, professionalism, objectivity, impartiality and independence of the Justices of the SCJN, the Circuit Magistrates, the District Judges, as well as the personnel of the Federal Judicial Branch, in addition to the matters determined by secondary law" (p. 52, second paragraph). (p. 52, second paragraph) "...it is proposed to empower the Disciplinary Tribunal to request information, summon	1. The principle of judicial independence derives not only from the right of individuals to be judged by an independent judge, but also from the rights of judges themselves to irremovability and stability in office, expressed in judicial guarantees during removal proceedings and in the right of access to and permanence in public office on general terms of equality.	Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 266
			2. Job stability entails the guarantee that, in the event of arbitrary dismissal or termination, this is carried out under justified causes and that the worker may appeal the decision before the relevant authorities, who have the obligation to verify that the causes of dismissal are not arbitrary. This guarantee is an elementary condition of independence in the exercise of the judicial function for the due fulfillment of judicial functions.	Aguinaga Aillón v. Ecuador. Merits, Reparations and Costs. Judgment of January 30, 2023. Series C No. 483

		and warn the public servants of the Judicial Branch that it deems necessary to assist in its investigations, as well as to file criminal complaints before the competent authorities for the commission or omission of acts that could constitute a crime, and also to request the Chamber of Deputies the trial of proceeding against Justices and Justices of the SCJN. Given their nature, it is foreseen that the resolutions and sanctions imposed by the Court are final and unassailable, therefore, no lawsuit or appeal may be filed against them". (p. 52, last paragraph) "The new Court of Judicial Discipline is also empowered to hear matters related to the discipline of the members of the Electoral Tribunal, including the investigation and sanctioning of the public servants who are part of it, since, being part of the Federal Judiciary, it must be subject to the same mechanisms and procedures that govern all the organs that comprise it" (p. 56, third paragraph). Article 97 (fourth paragraph) ... Any person or authority may report to the Judicial Disciplinary Tribunal facts that could be subject to sanction committed by any public servant of the Federal Judicial Branch, including Justices, magistrates and	1. The guarantee of irremovability must allow the reinstatement of a judge who has been arbitrarily deprived of his or her status as a judge. Otherwise, States could remove judges and intervene in the Judiciary without major costs or control. Moreover, this could provoke fear in other judges who observe that their colleagues are removed and not reinstated, even if the removal was arbitrary. Such fear may also affect judicial independence because it could encourage judges to follow instructions or refrain from challenging the appointing or sanctioning body. Therefore, an appeal declaring the nullity of a judge's dismissal as unlawful must necessarily lead to the reinstatement of the official. ... 4. In terms of Article 8(1) of the American Convention on Human Rights, the subject of the right to be heard by an independent judge or court is the justiciable, that is, the person placed before the judge who will resolve the case submitted to him.	Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197

		judges, for the purpose of investigating and, if appropriate, sanctioning the conduct denounced. The Judicial Disciplinary Tribunal will conduct its investigations in a prompt, complete, expeditious and impartial manner, in accordance with the procedure established by law. ... Article 100. "The Disciplinary Tribunal will function in Plenary. It may hear, investigate, substantiate and, as the case may be, sanction public servants of the Federal Judicial Branch who incur in acts or omissions contrary to the law, the public interest or the proper administration of justice, including those linked to acts of corruption, influence peddling, nepotism, complicity or concealment of alleged criminals, or when its determinations are not in accordance with the principles of..." (p. 82). Article 100 The decisions of the Disciplinary Tribunal shall be "final and unassailable and, therefore, there shall be no trial or appeal whatsoever against them" (p. 83).	2. In the disciplinary sphere, it is essential that the act that constitutes an offense and the arguments on which the sanctioning decision is based be precisely stated. In the case of decisions that are not necessarily punitive, if they are not duly grounded, discretion transforms them into arbitrary acts that violate the duty to state reasons. This violation of the duty to state reasons also violates the right to fully exercise an adequate defense.	Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227
			The use of open-ended disciplinary types does not per se violate the American Convention. The vagueness of a disciplinary type must be analyzed, first, based on the purpose of the disciplinary rules to protect the judicial function, and, second, it is necessary to review the motivation of the decision when using an open-ended ground. The motivation must prove that the parties were heard during the process and identify the facts, reasons and legal grounds that allowed the authority to decide the case.	Martínez Esquivia v. Colombia. Preliminary Objections, Merits and Reparations. Judgment of October 6, 2020. Series C No. 412

			2. The guarantee of stability and irremovability implies specific protections for judges. In particular, a removal process must respect the standards derived from the guarantee of judges to remain in office, in order to protect them from arbitrary removal. This implies that removal from office must be based exclusively on permissible grounds, either by means of a process that complies with due process guarantees or because the term or period of office has expired. Thus, judges may only be removed from office for serious breaches of discipline or incompetence and any disciplinary process against them must be resolved in accordance with the standards of judicial conduct established in fair procedures that ensure objectivity and impartiality according to the Constitution or the law.	López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302
			3. The application of the procedural guarantees established in Article 8.2 of the American Convention on Human Rights is part of the set of minimum guarantees that must be respected	Urrutia Laubreaux v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of

			when a sanctioning process is carried out. Respect for these guarantees in turn allows for the judicial independence of judges, which is necessary for the exercise of the judicial function.	August 27, 2020. Series C No. 409
External independence (vis-à-vis other public authorities)	Impeachment	"...the Magistrates of the Court of Judicial Discipline, as well as the members of the Plenary of the judicial administration body may be subject to impeachment... Similarly, grounds are provided for the members of the Disciplinary Courts and local administration bodies that are created in the federal entities to be subject to impeachment" (p. 57, third paragraph).	1. In political trials against judges, the legislative authorities exercise materially jurisdictional functions. Therefore, States must respect the guarantees of due process of law, in the terms of Article 8 of the American Convention. In particular, for the removal of judges there must be a previously established procedure conducted by a competent, independent and impartial body. In addition, the judicial authorities must be allowed to exercise their rights of defense, to be heard and to participate in the process. 2. The process of removing judicial authorities from office through impeachment is subject to legal norms that must be strictly observed by the members of Congress. Consequently, States must ensure that persons who have been removed from judicial office have a prompt,	Constitutional Tribunal v. Peru. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71

			simple and effective judicial remedy to challenge the acts issued during the impeachment trial. 3. The fact that an appeal is decided by the same persons who filed the initial accusation violates the guarantee of impartiality, since it prevents the appeal from producing the expected result, since there is a preconception of the persons who must resolve it.	
			Political trials do not, per se, violate the American Convention, as long as their regulatory framework complies with the guarantees of due process and there are criteria that limit the discretion of the judging bodies, specifically, the one that processes and decides the case against a judge. These trials should not be initiated for reasons of political expediency or opportunity. Throughout the process, the prosecuting entity must apply objective legal criteria to define whether the accused incurred in the behaviors previously defined in the regulations as grounds for dismissal.	Ríos Avalos et al. v. Paraguay. Merits, Reparations and Costs. Judgment of August 19, 2021. Series C No. 429

		"...criminal proceedings may be brought against the Magistrates of the Judicial Disciplinary Tribunal, as well as the members of the Plenary of the judicial administration body, for the commission of crimes during their term of office when the Chamber of Deputies declares by an absolute majority of its members present whether or not to proceed against the accused person" (p. 57, last paragraph).	In accordance with inter-American standards, the legislative authorities of a State party should not promote political trials and remove judges for the purpose of revoking the sentences adopted by them because they affect the conditions of impartiality that a judge must have to decide his cases. The possibility of political trials for the decisions that a judge makes may generate pressure on him or her at the time of ruling because of the risk of being subjected to sanctions that do not guarantee the rights to due process and judicial protection.	Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Series C No. 268.
	Stability and tenure	"...the present initiative proposes that Circuit Magistrates, as well as District Judges, serve for a term of nine years, with the possibility of re-election for one or more additional terms" (p. 45, first paragraph).	3. The guarantee of stability or irremovability of judges is fulfilled when the criteria and procedures for their appointment, promotion, suspension and dismissal are reasonable and objective and they are not discriminated against in the exercise of this right. Equal opportunity of access and stability in office, in part, guarantee freedom from undue interference and political pressure.	Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs. Judgment of February 4, 2019. Series C No. 373

	Transitory regime and dismissal of judges	"...the Justices of the Supreme Court of Justice of the Nation, the Magistrates of Circuit Courts, the Judges of District Courts, the Magistrates of the Superior Chamber and the regional chambers of the Electoral Tribunal of the Federal Judiciary and the Councilors of the Federal Judiciary who are in office at its entry into force conclude their term of office on the same date on which the public servants emanating from the extraordinary election to be held for the renewal of the positions of command of the Federal Judiciary are sworn in" (p. 60, first paragraph). 60, first paragraph).	2. In order for a Congress to be able to remove judicial officers from office, this power must be previously established in the Constitution or the law and the reason for the removal must be justified and motivated. In addition, the decision to remove judges from office must be based on the grounds permitted for removing a judge from office, i.e., having completed the term of office or period of office, reaching retirement age, or having been proven to have committed serious disciplinary offenses or to have been incompetent.	Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 266
			Both the grounds for removing a judge from office and the competent body to carry out the process must have been previously established in the Constitution or the law. When the grounds for dismissal are not provided for in the rules applicable to judges and, nevertheless, the officials are dismissed based on those grounds, the State violates the principle of prior judicial rule and, therefore, judicial independence.	Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Series C No. 268

			2. Job stability entails the guarantee that, in the event of arbitrary dismissal or termination, this is carried out under justified causes and that the worker may appeal the decision before the relevant authorities, who have the obligation to verify that the causes of dismissal are not arbitrary. This guarantee is an elementary condition of independence in the exercise of the judicial function for the due fulfillment of judicial functions.	Aguinaga Aillón v. Ecuador. Merits, Reparations and Costs. Judgment of January 30, 2023. Series C No. 483
			2. The guarantee of stability and irremovability implies specific protections for judges. In particular, a removal process must respect the standards derived from the guarantee of judges to remain in office, in order to protect them from arbitrary removal. This implies that removal from office must be based exclusively on permissible grounds, either by means of a process that complies with due process guarantees or because the term or period of office has expired. Thus, judges may only be removed from office for serious breaches of discipline or	López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302

			incompetence and any disciplinary process against them must be resolved in accordance with the standards of judicial conduct established in fair procedures that ensure objectivity and impartiality according to the Constitution or the law.	
Selection and appointment of judges	Judicial career	"...the admission, training and permanence of judicial career personnel of the Federal Judicial Branch shall be subject to the regulations established in the applicable provisions, excluding from such parameters the Circuit Magistrates and District Judges, whose admission and permanence shall be subject to the constitutional provisions applicable to their direct election by citizen vote" (p. 53, third paragraph).	1. Judicial Branch officials play an important role in the administration of justice, and must therefore be free from any interference or pressure in their work. For this reason, the guarantees of equal opportunity in access to and stability in the position and the minimum guarantees of due process are applicable to them, as well as to judges, when administrative, constitutional, administrative and labor proceedings involving the possibility of dismissal are followed. 2. In the processes of continuous evaluation of personnel in charge of the administration of justice, the personnel must be able to i) know precisely the general evaluation criteria used by the competent authority to determine their permanence in office; ii) know the	Moya Solís v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 3, 2021. Series C No. 425

			reasons why the competent authorities may consider them unsuitable to perform their functions; iii) present, before a decision is taken, the arguments to refute their alleged failures; and iv) offer evidence of the suitability of their performance. Likewise, it is essential to adhere to the principle of legality and the right to have duly motivated resolutions.	
			1. The ratification processes in which the conduct and suitability of a judicial officer is evaluated, and which involve the possibility of dismissal, may become materially punitive proceedings. Therefore, they must comply with the same due process guarantees that apply to disciplinary proceedings, although their scope is different in content and intensity. Judicial officials evaluated as part of a ratification process have the right to know the reasons why the evaluators consider that they are incompetent to continue in the exercise of their duties, to present arguments of defense before a final decision and, in general, to offer evidence of their suitability in the	Cuya Lavy et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 28, 2021. Series C No. 438

			performance of their duties.	
	Appointment of judges	Election by popular vote of Justices of the SCJN, Circuit Judges, District Judges, Magistrates of the Electoral Tribunal, as well as Magistrates of the Judicial Disciplinary Tribunal.	1. In relation to judicial independence, judges should be appointed for their professional abilities and suitability to hold office and should have guarantees of irremovability.	Valencia Hinojosa et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 29, 2016. Series C No. 327
			In relation to judicial independence, judges must be appointed for their professional abilities and suitability to hold office, so that no pressure is generated by the nominators, and they must have guarantees of irremovability. Regarding impartiality, the judge is required to objectively analyze the facts and minimize the doubts of the persons subject to judicial proceedings in relation to their impartiality, which is allegedly affected when there is functional dependence on other branches of power and conditions of the exercise of the position such as time limits for the exercise of their functions.	Villarroel Merino et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 24, 2021. Series C No. 430

b. Summary of proposals associated with the election of judges by popular vote.

	Proposal	Normative source
1	Reduce the number of Justices of the Supreme Court of Justice of the Nation (SCJN) from 11 to 9.	Article 94, second paragraph
2	Eliminate the Chambers of the SCJN to operate only in Plenary.	Article 94
3	Popular election of Justices, district judges, circuit magistrates, magistrates of the Superior Chamber and Regional Chambers of the Electoral Tribunal of the Federal Judiciary (TEPJF), magistrates of the Judicial Discipline Tribunal, judges and magistrates of the local judicial branches throughout the country.	Article 94, eighth paragraph; Article 96
4	An extraordinary election will be held to renew all judgeships of the Federal Judicial Branch. All incumbent judges of the Judicial Branch of the Federation shall conclude their term of office on the day on which the winners of the extraordinary election are sworn in. The Justices who complete their term of office shall not receive a retirement bonus.	Second transitory and seventh transitory articles
5	Procedure for the extraordinary election: I. The Senate will have 30 calendar days from the entry into force of the reform decree to issue the call for the list of candidates; II. The Powers of the Union shall nominate the number of candidates corresponding to them in accordance with Articles 96, 99 and 100 of the Decree; III. The Senate shall verify eligibility requirements;	Second transitory article

	IV. The public electoral body must organize and carry out the election process within a term not to exceed one year from the date of the Decree's entry into force; V. The Electoral Tribunal of the Federal Judicial Power will qualify the election; VI. Those elected will be sworn in before the Senate of the Republic.	
6	The Justices elected in the extraordinary election will serve until 2033, 2036 and 2039 -in groups of three-. Whoever obtains the most votes will serve the longest. The term of office of all circuit magistrates, judges and district judges elected during the extraordinary process will expire in 2030. The persons occupying such positions when the Decree enters into force will be eligible for such positions.	Third transitory article
7	Four of the magistrates of the Superior Chamber of the TEPJF elected in the extraordinary election will conclude their term of office in 2030, three more will do so in 2033. Whoever obtains more votes will last longer in office. In each regional chamber, two magistrates will serve until 2030 and one until 2033. Whoever obtains more votes will serve longer.	Fourth transitory article
8	Three of the magistrates of the Judicial Disciplinary Tribunal elected in the extraordinary election will finish their term in 2030, two more will finish in 2033. Whoever obtains more votes will last longer in office. The counselors of the Federal Judiciary may participate in the process to join this Tribunal.	Fifth transitory article
9	Reduce the qualified majority from eight to six votes to generate binding precedents.	Article 94, twelfth paragraph
10	Establish that the remuneration of no official of the Judicial Branch of the Federation may be higher than that of the President of the Republic.	Article 94, thirteenth paragraph

11	Reduce the term of office of Justices from 15 to 12 years.	Article 94, fourteenth paragraph
12	The election of Justices and federal judges will be held during the ordinary election day of the corresponding year.	Article 96, first paragraph
13	The requirements of age, seniority with a professional degree, residence and incompatibility with the exercise of certain positions during the previous year to be a Justice are maintained. It is added as an impediment to have been a magistrate of the Electoral Tribunal of the Judicial Power of the Federation.	Article 95
14	For the election of the nine Justices, the Senate will issue a call for nominations. The President of the Republic will nominate up to 10 persons, the Legislative Branch up to five persons for each Chamber -elected by two thirds of its members present- and the Plenary of the Supreme Court up to 10 persons -elected by a majority of six votes-. The Senate will qualify the profiles and send them to the National Institute of Elections and Consultations to organize the process. The Electoral Tribunal of the Judiciary of the Federation will qualify the election. The winners will be sworn in on the day of the beginning of the first ordinary session of the Senate (September 1).	Article 96, base I
15	The election of circuit magistrates and district judges will be carried out by judicial circuit and according to the same procedure as for Justices. Each Power of the Union shall nominate up to two persons on a parity basis for each vacant position.	Article 96, base II
16	Circuit magistrates and district judges will serve for nine years and may participate in the electoral process for reelection at the end of their term.	Article 96, base II

17	Access to radio and television for candidates in official times determined by INEC. Prohibition of campaign financing and contracting of radio and television time. No pre-campaign stage.	Article 96
18	Prohibition of reinstatement of judges outside the judicial circuit where they were elected. Only the Judicial Disciplinary Tribunal may remove them.	Article 97, first paragraph
19	To be a magistrate, magistrate, judge or judge, a person must be a Mexican citizen by birth; be 35 years old for magistrates and 30 years old for judges; have a law degree with five years of seniority and professional practice of at least five years in an area related to the candidacy.	Article 97, second paragraph
20	The judicial career for the rest of the personnel of the Federal Judicial Branch remains in effect.	Article 97, third paragraph
21	The seven magistrates of the Electoral Tribunal of the Federal Judicial Power will be elected through the same procedure as the members of the Supreme Court of Justice of the Nation. The qualification of the election will be in charge of the latter. The requirements to become a member of the Superior Chamber or the regional chambers are the same as for the Supreme Court.	Article 99
22	The magistrates of the regional chambers and the Superior Chamber of the Electoral Tribunal shall hold office for a term of six non-renewable years.	Article 99, twelfth and thirteenth paragraphs
23	The five magistrates of the Court of Judicial Discipline will be elected through the same procedure as the members of the Supreme Court of Justice of the Nation. The qualification of the election will be in charge of the Electoral Tribunal of the Judicial Power of the Federation. The requirements are the same as for the Supreme Court.	Article 100, second paragraph

24	The judges of the Judicial Disciplinary Tribunal will serve for six years, will be replaced on a staggered basis and will not be eligible for reelection.	Article 100, fifth paragraph
25	The election of male and female judges of the local judicial branches will be carried out in accordance with the bases that govern the Federal Judicial Branch. The modalities of the election and the duration of the term of office shall be regulated by the local constitutions and laws, but the possibility of reelection is established.	Articles 116, item III, and 122, paragraph A, item IV
26	The Mexican Congress and local legislatures will have 180 calendar days to adapt federal legislation and local constitutions to the reform. In the meantime, the Constitution will apply directly.	Eighth transitory article

c. Synthesis of proposals related to the new judicial governing body.

	Proposal	**Normative source**
1	Transfer the administration of the Judicial Branch of the Federation to a judicial administration body (OAJ).	Article 94, first paragraph
2	The OAJ will be in charge of determining the number, division into circuits, territorial jurisdiction and specialization by subject matter, including broadcasting, telecommunications and economic competition, of the Collegiate Circuit Courts, the Collegiate Courts of Appeal and the District Courts.	Article 94, fifth paragraph
3	The law shall establish the form and procedures by means of open competitions for the integration of the jurisdictional bodies. Exceptions are made for circuit magistrates and district judges.	Article 94, sixth paragraph
4	When elections of circuit magistrates and district judges are to be held, the OAJ shall issue and forward the call to the Senate of the Republic, in a list	Article 96

	indicating the number of vacancies, the subject matter and the respective judicial circuit.	
5	The licenses of circuit magistrates and district judges may be granted by the OAJ, provided that they do not exceed a term of two years.	Article 98
6	In the event of death, resignation or definitive absence of circuit magistrates and district judges, the OAJ shall submit a list of three candidates for consideration by the Senate of the Republic. The Senate will elect, by the qualified vote of the majority of the members present, an interim person to fill the vacancy until the person elected to the position in the next ordinary election takes office. The persons proposed in the slate must meet the requirements to be elected	Article 98
7	The OAJ shall be in charge of the administration and internal control of the Electoral Tribunal. The Electoral Tribunal will propose its budget to the judicial administration body for inclusion in the proposed budget of the PJF.	Article 99, II to X
8	The OAJ shall have technical and managerial independence. It shall be responsible for administration, internal control and the judicial career.	Article 100
9	The OAJ will define the number, division into circuits, territorial jurisdiction and specialization by subject matter of the Collegiate Circuit Courts, the Appellate Courts and the District Courts.	Article 100
10	The OAJ shall be responsible for examining and deciding on the admission, tenure and dismissal of judicial personnel, as well as their training, promotion and performance evaluation.	Article 100
11	The OAJ shall carry out the internal control of the administration of human, material and financial resources of the Judicial Branch.	Article 100
12	The decisions of the OAJ shall be final and unassailable and, therefore, no appeal shall lie against them.	Article 100
13	The OAJ will function as a Plenary and will be composed of five persons, for individual non-renewable terms of six years. Its composition will be as	Article 100

	follows: one will be appointed by the Presidency of the Republic, one by the Senate of the Republic (by a qualified vote of two thirds of its members present) and three by the plenary of the Supreme Court (by a majority of six votes). The presidency of the AOJ will last two years and will be rotating.	
14	The members of the plenary of the OAJ must be Mexican by birth, in full use of their civil and political rights; be at least 35 years old on the day of the appointment; have a degree in Law, Economics, Actuarial Science, Administration, Accounting or other related to the activities of the OAJ. The degree must be at least five years old; they must not have been disqualified from holding a job, position or commission, nor have been convicted of a felony punishable by deprivation of liberty.	Article 100
15	The removal of the members of the Plenary of the OAJ will be made in accordance with Title IV of the CPEUM, on the responsibilities of public servants, individuals linked to serious administrative misconduct or acts of corruption and State assets. If for any reason it is necessary to replace any of the members of the OAJ, the authority that nominated him/her shall do so, and he/she shall remain in office for the remaining term of the appointment of the person who was replaced.	Article 100
16	The OAJ will have a Federal Judicial Training School, in charge of implementing the training, education and updating processes for the jurisdictional and administrative personnel of the PJF and its auxiliary bodies. It will also conduct competitive examinations for access to the different categories of the judicial career.	Article 100
17	The OAJ will be in charge, through the Federal Institute of the Public Defender's Office, of public defense services in federal matters. The Federal Judicial Training School will train public defenders and conduct the competitive examinations.	Article 100
18	The OAJ shall have the power to issue general agreements for the exercise of its functions.	Article 100

	The Court of Judicial Discipline may request the OAJ to issue general resolutions or to execute resolutions necessary to ensure the proper exercise of the federal jurisdictional function in matters within its jurisdiction.	
19	At the request of the plenary of the Supreme Court, the OAJ may concentrate in one or more jurisdictional bodies the knowledge of matters related to serious human rights violations.	Article 100
20	The OAJ will prepare the budget of the PJF, who will submit it for inclusion in the Federal Expenditure Bill.	Article 100
21	The members of the plenary of the OAJ may not accept or perform any employment or assignment from the Federation, the federal entities or private individuals, except for unpaid assignments in scientific, educational, literary or charitable associations. Persons who have served as members of the plenary of the OAJ may not, within two years from the date of their retirement, act as patrons, attorneys or representatives in any proceedings before the bodies of the PJF.	Article 101
22	The members of the plenary of the OAJ may be subject to impeachment, as well as the members of the plenary of the OAJs of the local judiciaries.	Article 110
23	In order to proceed criminally against the members of the OAJ Plenary for crimes committed while in office, the Chamber of Deputies shall declare by an absolute majority of its members present in session whether to proceed against the accused person.	Article 111
24	At the state level, the independence of magistrates and judges in the exercise of their functions must be guaranteed by the Constitution and the law, which will establish, among others, the creation of an OAJ with technical, managerial and ruling independence. The OAJs will be in charge of the administration of the admission, training and permanence of those who serve the judicial branches of the states.	Article 116, III
25	At the state level, the exercise of Judicial Power is deposited, among others, in the OAJ. Local laws will establish the conditions for the operation of the OAJ with technical and managerial independence and the power to issue	Article 122, A IV

	resolutions. They will also be in charge of the admission, training, permanence and specialization of the members of the Judicial Branch.	
26	The Council of the Federal Judiciary (CJF) will continue to exercise its powers and duties of administration, oversight and discipline of the PJF, with the exception of the Supreme Court, until the OAJ is created.	Fifth Transitory
27	The members of the CJF in office when the reform decree enters into force will conclude their term of office on the date on which the elected judges of the Judicial Disciplinary Tribunal are sworn in.	Fifth Transitory
28	The OAJ will begin its functions on the date on which the judges of the Disciplinary Tribunal are sworn in. On the same date, the CJF will cease to exist. During the transition period, the CJF will implement a work plan to transfer material, human, financial and budgetary resources to the OAJ, with respect to its administrative, judicial career and internal control functions. The CJF will approve the general and specific agreements necessary to implement this work plan, according to the plans established in this plan.	Sixth Transitory
29	The CJF will continue the substantiation of the proceedings pending resolution. It will deliver all pending files and their documentation to the OAJ, as appropriate.	Sixth Transitory
30	The members of the Plenary of the OAJ shall be appointed to begin their functions on the same day on which the judges of the Judicial Disciplinary Tribunal are sworn in.	Sixth Transitory

d. Summary of proposals related to the Judicial Disciplinary Tribunal

	Proposal	**Normative source**

1	Establish a Court of Judicial Discipline composed of five magistrates elected by popular vote, from the lists of the Federal Executive, the Chambers of Congress and the Supreme Court of Justice of the Nation.	Article 100, first and second paragraphs.
2	The judges of the Disciplinary Tribunal shall hold office for six years, without the possibility of reelection. The renewal of the Tribunal shall be staggered.	Article 100, fifth paragraph.
3	To be eligible for the position of judge of the Disciplinary Tribunal, candidates must meet the requirements set forth in Article 95 of the Constitution and be distinguished by "their professional capacity, honesty and honorability in the exercise of their duties".	Article 100, third paragraph.
4.	The decisions of the Court of Judicial Discipline "shall be final and unassailable and, therefore, there shall be no trial or appeal whatsoever against them".	Article 100
5	The grounds that will give rise to the sanction of public servants of the Federal Judiciary are the following: A) "Incurring in acts or omissions contrary to the law, the public interest or the proper administration of justice, including those linked to acts of corruption, influence peddling, nepotism, complicity or concealment of alleged criminals." B) "When its determinations do not conform to the principles of objectivity, impartiality, independence, professionalism or excellence, in addition to the matters determined by law."	Article 100

e. Summary of proposals related to prompt and expeditious justice.

	Proposal	**Normative source**
1	A maximum period of six months to resolve matters depending on the amount in proceedings; otherwise, an investigation process will be initiated by the disciplinary body.	Article 17 CPEUM

2	In the event of failure to comply with the constitutional deadlines for the adjudication of criminal proceedings, an investigation will be initiated by the disciplinary body.	Article 20 CPEUM B. The rights of any person charged

International Standards For The Independence Of The Judiciary

This briefing paper sets out international standards for judicial independence and highlights the essential functions of an independent judiciary in a constitutional democracy. Drawing on a combination of both hard and soft sources of international law, the paper reveals a definition of judicial independence that can be met in various legal and constitutional contexts, while allowing courts to protect human rights, secure the rule of law, and ensure the principles of a constitutional democracy. Keywords: Judicial/ Judiciary, Independence of the Judiciary. Example.

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DEMOCRACY REPORTING INTERNATIONAL

INTERNATIONAL STANDARDS FOR THE INDEPENDENCE OF THE JUDICIARY[1]

EXECUTIVE SUMMARY

The independence of the judiciary gives concrete expression to two essential elements of democracy, namely the rule of law and the separation of powers. In a constitutional democracy, the political process and any state function must take place within the confines of the law. Judges are tasked to uphold the rule of law. To ensure that they do so without improper influence, they must be independent from the executive and legislative branch of power. Their role for democracy is particularly important in safeguarding human rights.

Under international law the following working definition of judicial independence can be discerned: an independent judiciary must (a) be *impartial*; (b) approach cases in an *unbiased* manner; (c) display *no prejudice;* (d) be *politically independent*; and (e) operate *without fear*. On the basis of international law these principles can be translated into the following operational guidelines:

a) The power to make judicial appointments should not lie in the hands of a single political actor, especially the executive, with the ability to exercise wide discretion in the selection and appointment of judges. It is preferable for judicial appointments to be made through a process that provides for the participation of other sectors of government and society, for example judges, the legal profession, opposition political parties, civil society, the legislature, or members of government responsible for judicial administration.
b) Security of tenure requires that judicial appointments be for life, until mandatory retirement, or for a set term of office.
c) Terms of service and remuneration cannot be reduced unfavourably, and must be secured by law.
d) Judges must remain accountable for their conduct: judges may only be dismissed or disciplined for serious misconduct, incompetence or incapacity, on the basis of objective standards and criteria that are set out beforehand, and through fair procedures with a right of judicial review.
e) Transfer and re-assignment of judges within the judiciary must be determined by the judiciary internally and lie beyond the sole control of the legislature or executive.
f) All courts must be established by law: the court structure must not be subject to summary modification by the executive, and *ad hoc* courts must be prohibited.
g) The judiciary, or an independent judiciary council, must be responsible for the administrative management of the judiciary.
h) Tribunals other than traditional courts are subject to the same principles of judicial independence as the ordinary courts.
i) Courts must be provided adequate financial resources to fulfil their functions. The judiciary itself or a judiciary council must be solely responsible for managing the judiciary's budget.
j) The allocation of cases to judges is a matter of internal judicial administration. Ideally, case allocation should be randomized or routinized.
k) Military tribunals must have no jurisdiction to try civilians.
l) Prosecuting authorities must be impartial, and operate fairly.
m) A judiciary council, if established, should be composed primarily of judges, and its powers and functions set out clearly in law.

This Briefing Paper sets out international standards for judicial independence and complements DRI's Report, *International Consensus: Essential Elements of Democracy* (2011),[2] and the DRI/Carter Center Report, *Strengthening International Law to Support Democratic Government and Genuine Elections* (2012).[3]

[1] This Briefing Paper was written by Richard Stacey and Sujit Choudhry from the Center for Constitutional Transitions at NYU Law. It was edited by Michael Meyer-Resende, Evelyn Maib-Chatré, Geoffrey Weichselbaum and Mehdi Foudhaili of Democracy Reporting International.

[2] Available online at http://www.democracy-reporting.org/files/essential_elements_of_democracy_2.pdf.
[3] Available online at http://www.democracy-reporting.org/files/dri_report_strengthening_democratic_governance_.pdf

1. INTRODUCTION: JUDICIAL INDEPENDENCE IN CONSTITUTIONAL DEMOCRACY

The independence of the judiciary is as much an essential element of constitutional democracy as human rights and the rule of law that the courts are mandated to protect. The United Nations General Assembly recognized this link in the 2004 declaration on the "essential elements of democracy".[4] The discussion of international law on judicial independence in this Briefing Paper is anchored in an understanding of the essential functions of courts in constitutional democracy. Courts in constitutional democracies serve two functions. First, the judiciary is the ultimate guarantor of human rights in a democratic system. Human rights and in particular political rights enjoyed by all on equal terms are crucial to democratic government, because they ensure that the people can freely express their political will and preferences. The link between the people's free expression of popular will and democratic government is expressed in Art. 21(3) of the Universal Declaration of Human Rights (UDHR).[5] Second, the judiciary in a democracy must secure the rule of law by ensuring that the conduct of the executive and administrative branches of government is consistent with previously enacted laws, with rights, and with the constitution. In order to discharge both functions, courts must enjoy judicial independence.

1.1. WORKING DEFINITION OF JUDICIAL INDEPENDENCE

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) is the "hard" law basis of the international law definition of judicial independence.[6] The article states that all persons are equal before courts and tribunals, and that all persons are entitled to a fair and public hearing before a competent, independent and impartial tribunal (see further section 2). The United Nations Human Rights Committee provides an authoritative interpretation of the article in General Comment No. 32,[7] which yields the following working definition of judicial independence:

(1) Courts must treat all parties *impartially* without discrimination.
(2) Courts must display *no bias* or *favour* towards particular parties.
(3) Courts must not pre-judge cases (i.e., there is no *prejudice*).
(4) Courts must be *politically independent*; they must not be beholden to, or subject to manipulation or influence from the executive, administrative or legislative branches of government, which will often be parties before the courts.
(5) Courts must be able to fulfil their functions *without fear*: courts cannot act independently if they face retribution for judgments unfavourable to private parties or government.

The principles of this working definition ensure that two functions of judicial independence in a constitutional democracy – to guarantee human rights and the rule of law – can be fulfilled.

The UN Basic Principles on the Independence of the Judiciary bring these elements of judicial independence together in a succinct definition:[8]

> The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

In addition, constitutional democracies around the world have encoded versions of this working definition in domestic constitutions. One example is the South African Constitution, which provides (Art. 165(2)):

> The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

The Kenyan Constitution emphasises fidelity to the Constitution and the law and prohibits interference in the work of the courts (Art. 160):

> In the exercise of judicial authority, the Judiciary ... shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

The 2012 Egyptian Constitution (Art. 74)[9] recognized these requirements in principle. The provision is identical to Art. 65 of the 1971 Egyptian Constitution:

> The independence and immunity of the judiciary are two basic guarantees to safeguard rights and freedoms.

[4] Adopted 20 December 2004, the resolution was officially published in 2005. See: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/59/201&Lang=E. See also DRI, *International Consensus: Essential Elements of Democracy*.
[5] Universal Declaration of Human Rights, 10 December 1948, General Assembly resolution 217 A(III), (UDHR).
[6] See in this regard, DRI and The Carter Center, *Strengthening International Law to Support Democratic Government and Genuine Elections* (2012), p. 13.
[7] UN Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007.
[8] UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985, endorsed by General Assembly resolutions 40/32, 29 November 1985 and 40/146, 13 December 1985, para 2.
[9] The 2012 Egyptian Constitution was suspended on 8 July 2013, and at the time of writing is in the process of being amended. A 10-member technical committee, composed of six judges, one professor and three retired academics, was appointed by the interim government to propose changes to the 2012 Constitution. These proposals were published on 20 August 2013. On 1 September 2013 a presidential decree called for the establishment of a 50-member committee to prepare a complete draft Constitution.

In Tunisia, the June 2013 draft Constitution provides (Arts. 100, 101 and 106):

> The judiciary is an independent authority that ensures the prevalence of justice, the supremacy of the Constitution, the sovereignty of law, and the protection of rights and freedoms.
>
> Judges are independent. No power shall be exercised over their rulings other than the power of the Constitution and law.
>
> A judge must be competent. He must commit to impartiality and integrity. He shall be held accountable for any shortcomings in the performance of his duties.
>
> Any interference in the judiciary is prohibited.

The principles of judicial independence in Tunisia's June 2013 draft Constitution recognize an important distinction between judges' personal independence and the institutional independence of the judiciary. Alongside this distinction, this Briefing Paper recognizes two more: the distinction between the judiciary itself and the institutions that support the work of the judiciary, and the distinction between judicial independence in common law countries and civil law countries.

1.2. THE DISTINCTION BETWEEN JUDGES' PERSONAL INDEPENDENCE AND THE INSTITUTIONAL INDEPENDENCE OF THE JUDICIARY

Ensuring that judges decide cases fairly and independently is only one element of judicial independence. Just as individual judges themselves must be independent, the judiciary as an institution must remain impervious to manipulation and outside influence. Judicial independence implies both that judges must be individuals of integrity and must decide cases before them in accordance with the principles of judicial independence and be free from outside interference, and also that the judiciary as an institution functions autonomously, without interference from the other branches of government, in regulating its own administrative and internal arrangements. The distinction between judges' personal independence and the institutional independence of the judiciary is reflected in section 3.1 and section 3.2 below, which deal respectively with constituting the judiciary and the functioning of the judiciary.

1.3. THE DISTINCTION BETWEEN THE COURTS AND THE INSTITUTIONS THAT SUPPORT THE WORK OF THE JUDICIARY

Judges do not operate the judicial system by themselves; they are supported by other institutions. Judges must make decisions on the basis of information and facts that are presented to them by lawyers (on the distinction between common law and civil law judicial systems in this respect, see section 1.4 below). The legal representatives who appear in court, as well as institutions and individuals responsible for prosecutions, investigations and the collection of evidence, must act impartially if judicial decisions are to uphold the rule of law and respect and protect human rights.[10] In section 3.3 below, the Briefing Paper deals with the international law on how the institutions that support the judiciary affect judicial independence. International law reflects the distinction between the independence of courts themselves and the independence of the institutions that support the work of the courts.

1.4. THE DISTINCTION IN THE JUDICIAL SYSTEMS OF COMMON LAW AND CIVIL LAW COUNTRIES[11]

Differences between the common law and civil law traditions affect the role of the courts and influence how judicial independence should be understood in each context. First, judges in common law countries are usually appointed on the basis of their achievements during a long career as a legal professional (the recognition model), while judges in civil law countries are appointed as civil servants soon after a basic legal qualification (the career model). Although politicians may play a more important role in the appointment of judges in the recognition model, and judges themselves play a more important role in appointments in the career model, opportunities for improper interference in the appointments process exist under both models. Careful attention to the rules for appointment in both civil law and common law countries must ensure the independence of judges. Tunisia follows the civil law tradition, as set out in the June 2013 draft Constitution: the judiciary, the administrative courts and the financial courts are structured on the career model, with judges appointed as civil servants (Arts. 112-114). However, the Constitutional Court is an exception, and is structured on the common law, recognition model: judges are to be appointed to the Constitutional Court after at least 15 years of "high expertise" (Art. 115).

Second, judges in civil law systems generally play a more active role in criminal prosecutions (the inquisitorial system), as opposed to judges in the common law system who act as passive adjudicators of opposing legal teams (the adversarial system). While the distinction is not absolute (common law judges play a role in pre-trial proceedings in identifying relevant evidence, and trial lawyers in civil law countries are active in suggesting evidence to inquisitorial judges), the distinction emphasizes that the personal independence of judges in civil law systems must receive special attention,

[10] UN Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[11] In countries with a common law tradition, the courts play a central role in the development of the law. Judicial decisions create binding legal 'precedent', which guides other courts in subsequent cases dealing with similar matters. The 'common law' is the law that develops in this way through the decisions of the courts. In countries with a civil law tradition, comprehensive legal 'codes' purport to set out the law in its entirety. Judges apply the law as it is stated in these codes, but their decisions do not create precedent that other courts are bound to follow. In contrast to common law countries, in civil law countries the law does not develop through the decisions of the courts.

while the fairness of the judicial process and the impartiality of prosecution authorities must receive special consideration in common law systems.

2. JUDICIAL INDEPENDENCE AND INTERNATIONAL LAW

Under international law, there is a distinction between "hard" law and "soft" law. "Hard" law refers to agreements and rules of international law that impose precise and legally binding obligations on states. "Soft" law refers to international agreements that are not formally binding or impose no clear or precise obligations on state parties, or to interpretive statements on treaties, such as the General Comments issued by the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights, which carry no binding legal force. Relevant sources of international law on judicial independence fall into both categories. This Briefing Paper refers to both hard and soft law sources on judicial independence.

2.1. RELEVANT SOURCES OF INTERNATIONAL LAW: "HARD LAW"

2.1.1. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The ICCPR is a multilateral treaty adopted by the UN General Assembly on 16 December 1966. The states party to the Covenant are legally bound by its provisions.[12] The Covenant includes a clear statement of the requirement of judicial independence in the right to fair trial. Article 14 provides in part:

> (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
>
> (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

[12] Details of the member states and states party to the ICCPR can be found online at http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

2.1.2. REGIONAL TREATIES

As with the ICCPR, regional multilateral treaties impose legally binding obligations on states party to the treaty. A number of these treaties include a requirement of judicial independence in the form of a right that mirrors Art. 14 of the ICCPR. Examples include:

- African Charter on Human and Peoples' Rights: Art. 3 guarantees equality before the law and equal protection of the law; Art. 26 imposes a direct obligation on state parties to guarantee the independence of the courts. The European Convention on Human Rights: Art. 6 guarantees the right to a fair trial before an independent and impartial tribunal and the right to be presumed innocent.
- The American Convention on Human Rights: Art. 8 guarantees the right to a fair trial before a competent, independent and impartial tribunal and the right to be presumed innocent.

2.2. RELEVANT SOURCES OF INTERNATIONAL LAW: "SOFT" LAW

2.2.1. UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The UDHR is a non-binding declaration of the United Nations General Assembly, although some of its provisions are considered customary international law. The UDHR affirms the right to a fair trial before an independent and impartial tribunal (Art. 11), the right of accused persons to be presumed innocent (Art. 11), and the guarantee that all are equal before the law and enjoy all rights and freedoms equally. The UDHR imposes no legal obligations on countries, but is an important interpretive guide to the ICCPR and other international treaties that do impose obligations of rights protection and judicial independence.

2.2.2. UN BASIC PRINCIPLES AND GUIDELINES

The UN has adopted several sets of basic principles and guidelines as framework models for how a country's domestic laws and institutional structures can protect the independence of the judiciary. These documents are not legally binding, but are intended instead as a resource for countries committed to judicial independence.

These documents include:

- Basic Principles on the Independence of the Judiciary;[13]
- Basic Principles on the Role of Lawyers;[14]
- Guidelines on the Role of Prosecutors;[15]

[13] UN Basic Principles in the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985, endorsed by General Assembly resolutions 40/32, 29 November 1985 and 40/146, 13 December 1985.

[14] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

- Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary;[16] and
- Draft Universal Declaration on the Independence of Justice (the "Singhvi Declaration").[17]

2.2.3. UNITED NATIONS HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 32

The United Nations Human Rights Committee periodically issues General Comments which offer authoritative interpretations of the rights included in the ICCPR (the Committee on Economic, Social and Cultural Rights does the same for the International Covenant on Economic, Social and Cultural Rights). While the General Comments themselves are not legally binding, the rights in the ICCPR, which they interpret, do impose legally binding obligations on states party to the Covenant. Accordingly, the General Comments are an important source of information about what obligations and duties states party bear under the ICCPR.

General Comment No. 32 deals specifically with the fair trial rights in Art. 14 of the ICCPR. It is valuable in understanding what Art. 14 means for individual states as they seek to fulfil the right to fair trial and ensure judicial independence in their domestic legal systems. It is an influential document.

2.2.4. RAPPORTEUR'S ANNUAL REPORTS AND RAPPORTEUR'S MISSIONS

The United Nations Special Rapporteurs are individuals who bear either a thematic or a country-specific mandate from the United Nations Human Rights Council to investigate human rights issues on behalf of the United Nations. Since 1994, the United Nations has appointed a Special Rapporteur on the Independence of Judges and Lawyers, and the Special Rapporteur has filed Annual Reports.

Alongside the Annual Reports, the Special Rapporteur undertakes periodic missions to selected countries. The reports compiled on the basis of these missions are in-depth case studies of judicial and legal institutions in individual countries, and an assessment of how those structures and institutions succeed or fail in upholding the principles of judicial independence. Both kinds of documents offer useful analyses of how principles of judicial independence can be translated into practice in domestic contexts. At the same time, the documents offer warnings of how domestic judicial and legal systems can fail to uphold principles of judicial independence.

The reports of other thematic Special Rapporteurs are also valuable as soft law sources for judicial independence. For instance, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights developed the Draft Principles Governing the Administration of Justice through Military Tribunals.[18]

2.2.5. REGIONAL STATEMENTS

A handful of regional organizations have made declarations or statements of judicial independence. These statements are not binding, and thus occupy a similar status to the United Nations Basic Principles and Guidelines (section 2.2.2). While they reflect the opinions of regional international organizations rather than the opinions of the global international community, they are nevertheless instructive in indicating the universal nature of many principles of judicial independence, as well as assisting in understanding judicial independence in specific regional contexts. Relevant regional statements include:

- The Association of South East Asian Nations Human Rights Declaration: Art. 20(1) guarantees the presumption of innocence and the right to a fair trial before a competent, independent and impartial tribunal.[19]
- The Consultative Council of European Judges (Council of Europe) Magna Carta of Judges;[20]
- Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges;[21]
- African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa;[22]
- The Beijing Statement of Principles of the Independence of the Judiciary in the Law Asia Region (the Law Association for Asia and the Pacific);[23]
- Commonwealth Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence;[24] and
- Inter-American Democratic Charter.[25]

[15] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[16] Economic and Social Council resolution 1989/60, endorsed by General Assembly resolution 44/162, 15 December 1989.
[17] Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur on the Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, endorsed by Commission on Human Rights resolution 1989/32 (the 'Singhvi Declaration').

[18] Draft Principles Governing the Administration of Justice through Military Tribunals, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/2006/58, 13 January 2006.
[19] Adopted by the Heads of State of the Association of South East Asian States, Phnom Penh, 18 November 2012.
[20] Adopted by the Council of Europe Consultative Council of European Judges, Strasbourg, 17 November 2010.
[21] Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.
[22] Adopted as part of the African Commission's activity report at 2nd Summit and meeting of heads of state of the African Union, Maputo, 4-12 July 2003.
[23] Adopted by the Conference of Chief Justices of Asia and the Pacific Resources, Beijing, 19 August 1995.
[24] Adopted on 19 June 1998 at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association.
[25] Adopted by the OAS General Assembly at its special session held in Lima, Peru, 11 September, 2001.

2.2.6. INTERNATIONAL NGO STATEMENTS

A handful of international associations and non-governmental organizations have issued statements and handbooks on judicial independence in domestic judiciaries. Two are:

- International Association of Judges, Universal Charter of the Judge;[26] and
- Judicial Group on Strengthening Judicial Integrity and Round Table Meeting of Chief Justices, Bangalore Principles of Judicial Conduct.[27]

3. JUDICIAL INDEPENDENCE IN PRACTICE: KEY AREAS WHERE INTERNATIONAL LAW OFFERS GUIDANCE

The three subsections in this section consider judicial independence in three areas: the constitution of the judiciary (section 3.1); the functioning of the judiciary (section 3.2); and the institutions that support the functions of the judiciary (section 3.3). International law seeks to uphold the components of judicial independence, as set out in the working definition in section 1.1 above, in all three of these contexts.

3.1. CONSTITUTING THE JUDICIARY: BALANCING ACCOUNTABILITY AND INDEPENDENCE

The personal independence of judges is protected, in large part, by the mechanisms and procedures for the appointment of judges and the extent to which politicians or private parties are able to influence judicial behaviour after judges are appointed. However, judges who fail to perform their tasks competently, independently or impartially must be accountable for their actions. Judicial independence cannot permit judges to act without any degree of accountability. The rules for the appointment, terms of service, dismissal, discipline and sanction of judges must strike a delicate balance between the need for protecting judges from undue external influence, and the need for judicial accountability. General Comment No. 32 of the United Nations Human Rights Committee sets out this need for balance:

> States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. ...
>
> Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. ...
>
> [J]udges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.[28]

3.1.1. APPOINTMENT

The United Nations Basic Principles on the Independence of the Judiciary note that the mechanisms for judicial appointment must make appointment dependent on integrity and ability and include safeguards against appointment for improper motives.[29] The Basic Principles on the Independence of the Judiciary do not set out what these appointment mechanisms should be, instead leaving the details to the determination of domestic law.[30] Appointment procedures must prohibit discrimination.[31]

In civil law countries, although judicial appointments are usually made under the career model, appointment to constitutional courts or supreme courts often occurs according to a different mechanism. Because important questions of policy or constitutional interpretation come before constitutional courts and supreme courts, it is widely accepted that political actors should play a role in selecting judges on those courts. The same consideration applies to the selection of judges in supreme courts and lower courts in common law countries, where judicial decisions influence the development of the law. Appointment to constitutional and supreme courts is thus an issue of importance in both civil law and common law countries.

The procedures for constitutional court appointments merit careful attention.[32] Three common models for constitutional court appointments include the legislative supermajority model (e.g. Germany, where each of the two chambers of the legislature appoint half of the total judges on the Federal Constitutional Court by a two-thirds majority vote), the multi-constituency model (e.g. Turkey, where after constitutional amendments in 2010, the legislature appoints three constitutional court judges and the President appoints the

[26] Approved by the International Association of Judges on 17 November 1999.
[27] The Bangalore Draft Code of Judicial Conduct 2001, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

[28] Paras 19-21.
[29] Para 10.
[30] See also the International Association of Judges, Universal Charter of the Judge, para 9; Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, para 1(2); African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principles A(4)(i) and (k).
[31] Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, para 13; Commonwealth Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, principle II(1).
[32] For a detailed treatment of these models, see the forthcoming report on constitutional court appointments by the Center for Constitutional Transitions and International Institute for Democracy and Electoral Assistance, available at http://constitutionaltransitions.org/.

remaining 14; here the executive constituency is over-emphasised), and the judicial council model[33] (e.g. South Africa's Judicial Services Commission). The UN Special Rapporteur on the Independence of Judges and Lawyer's Annual Report 2009 notes that appointments procedures dominated by either the legislature or the executive carry risks to judicial independence. Opportunities for legislative and executive domination arise more easily in the legislative supermajority model and the multi-constituency model. The Special Rapporteur therefore recommends the judicial council model be followed, since an independent, corporatist and deliberative body offers the greatest prospect of an independent appointment process.[34] The Council of Europe and the African Union concur in this assessment.[35]

A related issue is the appointment of the Chief Justice. In many countries, the Chief Justice holds specific powers over the judiciary and plays an important administrative role. In some cases, the Chief Justice is appointed through unique procedures that do not apply to the appointment of other judges.[36] The Special Rapporteur's Annual Report 2009 recommends that judges on a specific court elect their own head of court.[37]

The 2012 Egyptian Constitution provided that the judges of the Supreme Constitutional Court would be appointed on decree by the President, but that ordinary legislation would determine "the judicial or other bodies and associations that nominate them, the manner in which they are to be appointed, and the requirements to be satisfied by them" (Art. 176). This mechanism put some constraint on the President's discretion to appoint judges, because judicial or other bodies would nominate candidates for appointment. However, leaving important details to ordinary legislation, such as which bodies are to nominate candidates, the manner of appointment and the requirements and qualifications for appointment, creates the risk that the legislature will fail to impose meaningful limits to the President's discretion to appoint judges. It is preferable for the details of the appointment process to be entrenched in the Constitution itself.

Tunisia's June 2013 draft Constitution proposes a multi-constituency model for appointments to its "recognition-model" Constitutional Court (see section 1.4 above). The Tunisian appointment model involves members of the legislature, the executive, and an independent judicial council established under Arts. 109-111. Art. 115 prescribes a two-step appointments process. First, the President, the Speaker of the Chamber of Deputies, the Prime Minister, and the Supreme Judicial Council each nominate six candidates. Second, the legislature's lower house selects the Court's judges from the four lists of candidates, selecting three judges from each list of six candidates. Judges must be elected by a three-fifths supermajority of the Chamber of Deputies. This requirement of a legislative supermajority ensures that usually no one political party can control appointments to the Constitutional Court. These measures minimize the risk that a single actor can dominate appointments to the Constitutional Court, and provides safeguards to ensure that candidates who are not independent and impartial, or who are perceived as such, will not be appointed. By contrast, with respect to appointments to its other, "career-model" courts, the June 2013 draft Constitution provides only that "Judges shall be nominated by virtue of an order made by the President of the Republic based on the assent of the Supreme Judicial Council" (Art. 103), and that "A law shall regulate" the mandate, procedures, organization and terms of reference of these courts (Arts. 112, 113 and 114).

3.1.2. SECURITY OF TENURE

Security of tenure ensures that judges cannot be dismissed, except in specific circumstances, until the expiry of their term of office. The international law is clear on this point.[38] This protects judges from summary dismissal by executives, legislatures, or even a judicial council dissatisfied with particular judges' decisions.[39] In particular, the Special Rapporteur's Annual Report 2009 raises concerns about short terms of office and regular judicial performance reviews. The Special Rapporteur concludes that short terms of office weaken judicial independence, and that in post-authoritarian transitions term length should gradually be extended so as to progressively introduce life tenure.[40]

Whether judges are appointed until a mandatory retirement age, or for set terms of office, however, is a matter for the determination of each legal system. The Commonwealth Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence recognize this point, even while they indicate a preference for permanent appointments.[41] The African Union Guidelines are clear that security of tenure must be guaranteed for the duration of the term of office, whether this is until a mandatory retirement age or until the expiry of a set term, although appointment under fixed-term contracts is prohibited.[42]

The 1971 Egyptian Constitution provided only that judges would not be removed from office (Art. 168). The 2012 Egyptian Constitution expanded on these provisions to some extent (Art. 170):

[33] See section 3.3.2 for details on judicial councils.
[34] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, A/HRC/11/41, 24 March 2009, paras 25-28.
[35] Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, para 1(2)(c); African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(4)(h).
[36] See the South African Constitution, Art. 174.
[37] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, paras 48-50
[38] See generally, DRI and The Carter Center, *Strengthening International Law to Support Democratic Government and Genuine Elections* (2012), p. 17.
[39] UN Basic Principles on the Independence of the Judiciary, para 12.
[40] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, paras 54-55.
[41] See para II(1).
[42] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principles A(4)(l), (m), and (n)(3).

> Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment and disciplinary actions against them are defined and regulated by the law. When delegated, their delegation is absolute, to the destinations and in the positions defined by the law, all in a manner that preserves the independence of the judiciary and the accomplishment of its duties.

As in many other cases in the 2012 Egyptian Constitution, the danger here lies in the relegation of important details to ordinary law. This creates a danger that the legislature will be able to insulate itself from the scrutiny of an independent and impartial court by passing laws for the appointment, discipline, and conditions of service of judges that are favourable to the legislature. These important details should be set in the Constitution itself to reduce the possibility that the legislature can influence the composition of the judiciary by amending relevant legislation with a simple majority.

3.1.3. TERMS OF SERVICE

Guaranteeing judges' remuneration, and otherwise guaranteeing that the conditions and terms of their service will not be reduced unfavourably, is an important element of judicial independence. Threats of reductions in pay or less favourable terms of service can be used to influence judges' decisions.

The Basic Principles on the Independence of the Judiciary provide that "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."[43] The Consultative Council of European Judges' Magna Carta of Judges provides:[44]

> In order to avoid undue influence, judges shall receive appropriate remuneration and be provided with an adequate pension scheme, to be established by law.

The Special Rapporteur's Annual Report 2009 notes the principle that judges' salaries must be guaranteed by law,[45] and refers to the recommendation in the Basic Principles on the Independence of the Judiciary that judges' salaries should be "adequate".[46]

While a constitution may provide that the remuneration and benefits of judges shall not be varied in ways that are disadvantageous to judges (e.g. Constitution of Kenya, Art. 160; Constitution of South Africa, Art. 176), the constitution need not stipulate what the remuneration and benefits of judges shall be. These details can be left for determination by ordinary legislation or government regulation, applicable to all judges or classes of judges. Embedding these details in a constitution limits the ability of the system to adapt to changes, since these details can only be changed by means of a demanding constitutional amendment procedure.

3.1.4. DISMISSAL, DISCIPLINE AND SANCTION

The Basic Principles on the Independence of the Judiciary provide that judges should not be removed or suspended from office except for reasons of incapacity, inability to discharge their duties, or a lack of fitness for the position. Further, all disciplinary proceedings must adhere to standards of procedural fairness, with judges subject to discipline, removal or sanction only for violation or non-fulfilment of established standards of judicial conduct. All such proceedings must be subject to independent review.[47] Human Rights Committee General Comment No. 32 states that judges should only be removed in cases of serious misconduct or incompetence.[48]

With respect to disciplinary procedures, the Special Rapporteur's Annual Report 2009 states that an independent body should be tasked with the discipline of the judiciary, including questions of dismissal, rather than the legislative or executive branches. In addition, the requirements of "natural justice" or procedural fairness[49] must be observed in any proceeding that may lead to the dismissal or suspension of a judge, and any decision of such a body must be susceptible to judicial review.[50]

Tunisia's June 2013 draft Constitution accordingly provides (Art. 104):

> No judge may be transferred without his consent, no judge may be dismissed, and no judge may be suspended, deposed, or subjected to a disciplinary punishment except in such cases and in accordance with the guarantees provided for by the law and by virtue of a justified/reasoned decision issued by the Supreme Judicial Council.

These measures are consistent with the international law on judicial security, but it is important to realize that countries in transition from authoritarian regimes may require special dismissal and appointment mechanisms. The Special Rapporteur's Annual Report 2009 recognises that in transitional periods, the processes for the removal of judges associated with previously authoritarian regimes are exceptional.[51]

[43] Para 11.
[44] Para 7.
[45] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, paras 73ff.
[46] Para 11.
[47] UN Basic Principles on the Independence of the Judiciary, paras 17-20.
[48] UN Human Rights Committee, General Comment No. 32, para 20. See also DRI and The Carter Center, *Strengthening International Law to Support Democratic Government and Genuine Elections* (2012), p. 17.
[49] Natural justice or procedural fairness, as the concept has developed in common law countries in particular, is a requirement of proceedings in court or in other tribunals and forums. It consists of two components: First, natural justice prohibits bias on the part of the adjudicator or person presiding over proceedings, including the perception of bias. Second, every party to the proceedings must have a fair opportunity to present his or her case to the forum, ensuring that the forum hears all sides of the dispute.
[50] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, para 61.
[51] *Ibid.*, para 64.

3.1.5. TRANSFER AND PROMOTION

Transfer of judges to less favourable postings can be used as a threat to influence judicial behaviour. Rules for transfer must be carefully constituted to eliminate this threat, but allow for reasonable and necessary administrative re-assignment and transfer of judges.[52] While transfer and re-assignment can act as a threat to influence judicial decisions if not properly controlled, promotion can be used as an incentive to reward judicial behaviour that is favourable to political elites. Any system of promotion must eliminate judicial advancement as a reward for political bias. The Basic Principles on the Independence of the Judiciary require that promotions occur through a system based on "objective factors, in particular ability, integrity and experience",[53] and Human Rights Committee General Comment No. 32 recommends that there be clear procedures and objective criteria for the promotion of judges.[54]

The Special Rapporteur's Annual Report 2009 supports this with the recommendation that judges' promotion should be decided on by an independent body composed of at least a majority of judges.[55]

3.1.6. COURT STRUCTURE

The status of courts and the organization of the judicial system are sometimes embedded in constitutions, albeit to different degrees. The United States Constitution, for example, establishes only the United States Supreme Court and leaves the establishment and functioning of all the other courts to ordinary legislation (Art. III, cl. 1). The South African Constitution, on the other hand, establishes all courts, sets out the judicial hierarchy, and outlines the jurisdiction of each court in that hierarchy (Art. 166). Where the constitution does not establish courts, it may be open to the legislature and the executive to establish special or *ad hoc* courts, at their discretion, such as special courts to try those accused of acts of terrorism. The power to create special courts could be abused to allow special courts to circumvent ordinary (and perhaps often onerous) fair trial procedures, in so doing undermining judicial independence or at least the perception of judicial independence. In this regard, the Basic Principles on the Independence of the Judiciary provide:[56]

> Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

3.2. THE JUDICIAL FUNCTION: INSTITUTIONAL INDEPENDENCE OF THE JUDICIARY

3.2.1. CONSTITUTIONAL VERSUS STATUTORY RULES FOR THE INTERNAL FUNCTIONING OF THE JUDICIARY

The Basic Principles on the Independence of the Judiciary state that judicial independence must be set out in the constitution or the laws of a country: "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country."[57] Entrenching rules in the constitution provides protection against political manipulation, but must be balanced against the need to leave a degree of flexibility to adapt to changing circumstances, which can be best achieved through ordinary legislation. Also, courts must be flexible enough to react and adapt to the conditions and circumstances presented by each case, which means a constitution should not be too detailed in prescribing how courts should function in their day-to-day operations. The Beijing Statement of Principles of the Independence of the Judiciary states that the judiciary should be largely responsible for developing its own rules of administration.[58] Accordingly, some constitutions allow that the "internal" functioning of the courts shall be determined by the courts themselves, usually within a framework of legislation or the constitution.[59]

3.2.2. JUDICIAL VS. ADMINISTRATIVE REMEDIES

The right of access to justice and the right to an effective remedy are recognized by the UDHR (Art. 8). The right to a fair trial and to an effective remedy for the violation of rights in the ICCPR (Arts. 2(3) and 14), as well as in the other "hard" sources of international law, imply that the determination of any individual's rights shall be through a fair hearing before a competent, independent and impartial tribunal. Human Rights Committee General Comment No. 32 recognizes with respect to Art. 14 of the ICCPR, access to justice is an inherent element of the right.[60]

Does this right require that individuals have access to courts and judges to determine their rights, or will administrative review processes suffice? The Special Rapporteur's Annual Report 2008 notes the trend to broaden the definition of "access to justice" to mean "the effective availability of institutional channels for the protection of rights and the resolution of various types of conflict in a timely manner and in accordance with the legal order".[61] Art. 2(3) of the ICCPR, for example, confers a right to an effective remedy in respect of

[52] Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur on the Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, endorsed by Commission on Human Rights resolution 1989/32 (the "Singhvi Declaration"), para 15.
[53] UN Basic Principles on the Independence of the Judiciary, para 13. The African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa reproduces this statement in principle A(4)(o).
[54] UN Human Rights Committee, General Comment No. 32, para 19.
[55] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, paras 68-72.
[56] Para 5.
[57] Para 1.
[58] Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, para 36.
[59] See DRI and The Carter Center, *Strengthening International Law to Support Democratic Government and Genuine Elections* (2012), p. 17.
[60] UN Human Rights Committee, General Comment No. 32, para 9.
[61] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2008, A/HRC/8/4, 13 May 2008, para 16.

the rights enumerated in the Covenant, while Art. 25 of the American Convention on Human Rights provides for the "right to simple and prompt recourse" for the violation of rights "recognized by the constitution or the laws of the state concerned or by this Convention." Neither provision requires that the remedy be provided by a court. In principle, alternative forums for the resolution of legal disputes provide benefits of cost and speed,[62] but such alternative forums should (a) not close off routes of access to courts, especially to protect rights, and (b) operate with similar safeguards for independence and impartiality as ordinary courts.

3.2.3. BUDGET

The Basic Principles on the Independence of the Judiciary provide that courts must have adequate resources to properly serve the judicial function.[63] The Beijing Statement reiterates the requirement that judges have the "resources necessary" to perform their functions, and emphasizes the principle that executive power "which may affect judges in their office ... or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges."[64] The Commonwealth Latimer House Principles are detailed on this issue, protecting funds, once allocated, from reduction.[65]

The Special Rapporteur's Annual Report 2009 recommends that a fixed percentage of national budget be allocated to the judiciary, and the Special Rapporteur has recommended that a baseline of two to six per cent of GDP be devoted to the judiciary.[66] Sometimes a fixed percentage of GDP or annual budget is entrenched in the national constitution. For example, Art. 177 of the Constitution of Costa Rica provides:

> The budget shall allocate to the Judicial Branch an amount of no less than six percent of the ordinary income estimated for the fiscal year. However, when this amount is greater than the sum required to cover the basic needs budgeted by said Branch, said Department shall designate the difference as excess revenue, together with a plan for additional expenditure, in order that the Legislative Assembly may take the appropriate measures.

Art. 172 of the Constitution of El Salvador provides:

> The Judicial Organ shall have at its disposal an annual allocation of no less than six percent of the current income of the State's budget.

The Beijing Statement addresses the issue of limited resources, indicating that the judiciary's budget should always occupy a high priority in the allocation of resources.[67]

A second issue that concerns the finances of the judiciary goes to how its budget is spent. The management and allocation of the budget is as important a consideration in the judiciary's independence as the resources it is allocated in the first place. The Special Rapporteur has recommended that judicial independence is best served when the judiciary or an independent body, rather than the executive or legislative branches, is responsible for the judiciary's budget.[68]

3.2.4. CASE ASSIGNMENT

The right to a lawful judge is an element of the right to fair trial and the requirements of judicial independence. It requires that the political branches not be empowered or authorized to assign or allocate particular judges to hear particular cases. The Basic Principles on the Independence of the Judiciary accordingly state that case allocation is a matter to be determined within the walls of the judiciary without any room for interference or intervention from the other branches of government.[69]

The Special Rapporteur's Annual Report 2009 extends this principle to include an objective mechanism for allocating cases that safeguards judges from interference from within the judiciary, e.g. the drawing of lots or the use of the alphabetic list of judges. It is possible to imagine that case allocation may be in the hands of a single person within the judiciary, such as the Chief Justice;[70] but this may raise concerns when the Chief Justice is appointed through a different process than other judges and may therefore have a closer relationship to the executive.[71]

Further, the Special Rapporteur has noted that the practices of several countries that allow select senior judges exclusive control over case allocation has led to abuse.[72] The Special Rapporteur's Annual Report 2009 therefore recommends either some form of randomized allocation procedure, or allocation according to a highly detailed management plan based on objective criteria.[73]

3.2.5. SPECIAL COURTS AND MILITARY TRIBUNALS

Special courts and military courts, as distinct from the ordinary civilian courts, raise special considerations for judicial independence and for democracy. Human Rights Committee General Comment No. 32 accepts the existence of special courts, and notes that the ICCPR neither prohibits the existence of special courts nor the trial of civilians in special

[62] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2008, para 35.
[63] Para 7.
[64] Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, paras 38 and 41.
[65] Para II(2).
[66] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, para 37.
[67] Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, para 42.
[68] Special Rapporteur's Mission to Kazakhstan, 2005, E/CN.4/2005/60/Add.2 11 January 2005, para 26.
[69] Para 14.
[70] See, for example, Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, para 35.
[71] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, para 47.
[72] Special Rapporteur's Mission to Kazakhstan, 2005, para 59; Special Rapporteur's Mission to Russia, 2009, A/HRC/11/41/Add.2, 23 March 2009, para 61; Special Rapporteur's Mission to Kyrgyzstan, 2005, E/CN.4/2006/52/Add.3, 30 December 2005, para 67.
[73] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, para 47.

courts. Indeed, military courts remain necessary in democracies because military codes of justice and laws that govern the armed forces often have no equivalent in the civilian legal system. Military and security institutions operate their own courts to uphold the codes of law that are necessary to maintain an efficient and well-functioning military.[74] The standards of fairness, independence and impartiality that govern ordinary civilian courts, however, must apply to these special courts.[75]

The African Commission of Human and Peoples' Rights has held that while "a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process", military tribunals must be subject "to the same requirements of fairness, openness, and justice, independence, and due process" as any other court.[76] By contrast, the view of the Special Rapporteur on the Independence of Judges and Lawyers is that the use of military courts to try civilians should be prohibited or at least drastically restricted.[77] This line is also taken by the Inter-American Commission on Human Rights, which has stated that civilians should never be subject to military tribunals,[78] and the Inter-American Court of Human Rights, which has held that the "basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law."[79]

In order to address the concerns that military and special courts pose, the Special Rapporteur has recommended the adoption of Draft Principles on Military Tribunals prepared by the Special Rapporteur to the Sub-commission on the Promotion and Protection of Human Rights.[80] These draft principles explicitly avoid the question of the legitimacy of military courts, focusing instead on ensuring that those courts comply with the international law of judicial independence.[81] The draft principles provide, however, that military courts must not try civilians, that military courts may try only military personnel for military offences, and that the jurisdiction of the ordinary courts should be preferred over military courts in specific circumstances.[82]

[74] Brett J. Kyle and Andrew G. Reiter, *Militarized Justice in New Democracies*, Law and Society Review (2013), 375.
[75] UN Human Rights Committee, General Comment No. 32, para 22.
[76] African Commission in Human and Peoples' Rights, decision of May 2001, Communication 218/98 (Nigeria), para 44.
[77] Special Rapporteur's Mission to Peru, 1998, E/CN.4/1998/39/Add.1, 19 February 1998, para. 78
[78] Annual Report of the Inter-American Commission on Human Rights, 1997, Chapter VII, Recommendation 1, para. 4
[79] *Castillo Petruzzi et al v Peru*, Inter-American Court of Human Rights, judgment of 30 May 1999, Series C No. 52, para 129.
[80] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2007, A/HRC/4/25, 18 January 2007, para 29; Draft Principles Governing the Administration of Justice through Military Tribunals, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/2006/58, 13 January 2006.
[81] Draft Principles Governing the Administration of Justice through Military Tribunals, 2006, para 14.
[82] Draft Principles Governing the Administration of Justice through Military Tribunals, 2006, Principles 5, 8 and 9, paras 20-21 and 29-35.

While the 1971 Egyptian Constitution did not include a prohibition on the trial of civilians in military courts, the 2012 Egyptian Constitution provided that civilians could not be tried in military courts except where their actions harmed the military (Art. 198). That provision was not only vague, but it also left open the possibility of trying civilians in military courts. The Tunisian June 2013 draft Constitution provides (Art. 107):

> Courts shall be classified by virtue of a law. No exceptional courts or procedures that may prejudice the principles of fair trial may be established or adopted.
>
> Military courts are responsible for military crimes. A law shall regulate the mandate, structure, and organization of the military courts, their applicable procedures and the statue of military judges.

In Tunisia, existing law allows the trial of civilians in military courts. These provisions of the June 2013 draft Constitution do not change this position, and, as in Egypt, maintain the status quo under which civilians can be tried "for military crimes" in military courts.

3.3. THE NETWORK OF INSTITUTIONS SUPPORTING JUDICIAL INDEPENDENCE

3.3.1. PROSECUTING AUTHORITIES

International law is clear about the need for domestic arrangements to ensure the impartiality of the prosecuting authority. The United Nations Guidelines on the Role of Prosecutors are intended to assist states in ensuring the effectiveness, impartiality and fairness of prosecutors, and should be taken into account and reflected in national legislation and practice.[83]

It is important to note that international law does not require that prosecuting authorities be independent, since in many cases the institutions responsible for prosecution are under the control of or form part of the executive or judiciary. Many civil law systems today have a mixed prosecutorial system, or a "soft" inquisitorial system, with a two-stage criminal process. In the first stage, a "prosecuting judge" directs prosecutors in the investigation of possible crimes and the collection of evidence. At the end of the investigation and on the basis of the evidence, the prosecuting judge will decide whether to formally institute criminal charges. The second stage involves the criminal trial. If the prosecuting judge decides to institute charges, a new judge is appointed to preside over the criminal trial, which then proceeds in a largely adversarial setting with prosecutors and defence lawyers appearing before the impartial judge.

In civil law systems, the impartiality of prosecuting judges is important because they play a role in directing criminal prosecutions. As long as the impartiality of judges is assured,

[83] United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

there is no reason that prosecutorial services will not be impartial, even though they are not "independent" of the judiciary as in common law systems. It is important that judges in civil law systems remain independent vis-à-vis the executive, and shielded from improper manipulation or influence by members of the executive. Similarly, the public prosecutors who try the cases before the judge presiding at trial must be impartial. The Guidelines on the Role of Prosecutors therefore emphasize that prosecutors be impartial and fair, and make clear the connection between an impartial prosecuting authority and the right to a fair trial before an independent tribunal.

This partly inquisitorial character of civil law systems is in contrast to the "adversarial" nature of criminal proceedings in common law countries, where judges are referees between lawyers representing the prosecution and the defence, and at no stage formally direct criminal investigation or participate in decisions to prosecute. It is common in common law systems for the prosecuting authority to be an institution entirely independent of the executive, and thus less susceptible to manipulation or influence from the executive. Prosecuting services can be housed within the executive, but must in these cases be shielded from influence from members of the executive and must continue to operate impartially vis-à-vis the executive.

In Tunisia, Art. 112 of the June 2013 draft Constitution provides that the "public prosecution is part of the judicial system", and that the "judges belonging to the public prosecution shall practice their tasks within the framework of the penal policy of the State according to the procedures established by the law". The existing procedures established by law in Tunisia, however, allow the executive to exercise a degree of control over public prosecutors. The question that remains is whether Art. 112 provides prosecutorial functions with enough independence from executive interference, by placing them within the judiciary, to ensure that they can function independently vis-à-vis the executive.

With respect to the appointment of prosecutors, the Guidelines require that selection criteria must prohibit appointments based on partiality or prejudice, and exclude any discrimination based on a range of grounds including race, colour, sex, religion and political opinion.[84] The Guidelines require that the operations and functions of prosecutors be insulated from political interference:

> States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.[85]

As with judges, prosecutors must enjoy security of tenure, adequate remuneration, and promotion and transfer based on objective factors and decided on in accordance with fair and impartial procedures.[86]

3.3.2. JUDICIARY COUNCIL

A judiciary council is an independent, corporatist body comprised of members of the judiciary, the executive and legislative branches of government, the legal profession and civil society, mandated with the performance of specific tasks related to constituting the judiciary and the functions of the judiciary. These tasks vary, but they usually are taken to include the nomination or appointment of judges, decisions on discipline, dismissal and promotion of judges, and administrative matters related to the internal functions of the courts. The establishment of such a body has been supported by a number of regional soft law instruments, including those issued by the Council of Europe[87] and the African Union,[88] and the Beijing Statement.[89] All of these statements emphasize the need for independence in such a body, and the need for representation, even majority representation, by members of the judiciary on such a body. Roughly 60 per cent of countries have established a judiciary council.[90]

The Special Rapporteur's Annual Report 2009 offers a useful summary of the principles to be borne in mind in constituting a judiciary council.[91] These can be summarized as follows:

- The composition of a judiciary council should include legislators, lawyers, academics and civil society, but judges should constitute the majority of its membership;
- The representation of political representatives should be minimized;
- The judiciary should have a substantial say in selecting the members of a judiciary council; and
- The powers of a judiciary council – which could include conducting competitive examinations and interviews for judicial postings, or direct powers to nominate or appoint judges at its discretion – must be carefully set out in law.

The 1971 Egyptian Constitution provided for a council to administer the common affairs of the judiciary (Art. 173). It was to be composed of the heads of the various courts, but the President was to be its chair. The 2012 Egyptian Constitution did not provide for the establishment of an independent corporatist body or judiciary council, providing instead that '[t]he law determines the judicial or other bodies and associations that nominate [judges], the manner in which

[84] Guidelines on the Role of Prosecutors, para 2(a).
[85] *Ibid.*, para 4.
[86] *Ibid.*, paras 6-7.
[87] Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, para I(2)(c)(i).
[88] African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(4)(h).
[89] Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, para 15.
[90] Tom Ginsburg, *Judicial Appointments and Judicial Independence*, United States Institute for Peace, January 2009 (available online at http://www.constitutionmaking.org/files/judicial_appointments.pdf), at 4.
[91] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, paras 28-30.

they are to be appointed, and the requirements to be satisfied by them' (Art. 176). These provisions do not meet the basic requirements set out in the Special Rapporteur's Annual Report 2009. With the President as the chair of the body, and with ordinary law setting out the details and requirements of judicial appointment, the risk existed that the President would be able to dominate judicial appointments as well as the operation of the judiciary, thus compromising the independence of the judiciary and the impartiality of judges.

The June 2013 draft Constitution of Tunisia establishes a Supreme Judicial Council divided into four separate councils representing the administrative court, financial courts, ordinary courts, and a fourth organizing council ("the judicial councils board") (Art. 109). The membership of each of the four councils is to be composed half of judges and half of non-judges. Each council is responsible for the discipline of the judges of the courts it represents, while the Supreme Judicial Council as a whole "shall ensure the judiciary's sound performance and respect for its independence" (Art. 111). The head of the Supreme Judicial Council is to be elected by its members, from among its most senior member judges (Art. 109). This model would appear to be consistent with the recommendations included in the Special Rapporteur's Annual Report 2009.

4. CONCLUSION

The importance of judicial independence to constitutional democracy cannot be overstated. Courts serve to protect human rights and to secure the rule of law, and in so doing help to ensure that the principles of constitutional democracy are upheld. In order to do so, it is critical that courts operate consistently with the tenets of judicial independence. International law provides a working definition of judicial independence, comprising five components, which every legal system must meet: courts must (a) be *impartial*; (b) approach cases in an *unbiased* manner; (c) display *no prejudice;* (d) be *politically independent*; and (e) operate *without fear*.

The international law offers both "hard law", binding rules for judicial independence, and "soft law" guidelines for judicial independence. International law permits these rules and guidelines to be met in a variety of ways in different domestic legal and constitutional contexts, and does not demand that specific models of the judiciary be established or that specific mechanisms and procedures for regulating judicial conduct be put in place. Assessing whether a country's rules and mechanisms for the operation of the judiciary are consistent with the international law requires detailed and thorough analysis of relevant rules and mechanisms in light of the international law.

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Judicial Independence: Talking Points

1. Constitutional Protections and Political Debates

A central principle of the United States system of government holds that judges should be able to reach decisions free from political pressure. The framers of the Constitution shared a commitment to judicial independence, and they organized the new government to ensure that federal judges would have a proper measure of independence from the executive and legislative branches. The Constitution guaranteed that judges would serve "during good behavior" and would be protected from any reduction in their salaries, thus preventing removal by a President who opposed their judicial philosophy and congressional retaliation against unpopular decisions. These twin foundations of judicial independence were well established in the British judicial system of the eighteenth century and had been enacted by many of the new state constitutions following independence from Great Britain. But the constitutional outline for the judiciary also ensured that the court system would always be subject to the political process and thus to popular expectations. The Constitution's provision for "such inferior courts as the Congress may from time to time ordain and establish," granted the legislative branch the

most powerful voice in deciding the structure and jurisdiction of the nation's court system. The appointment of judges by the President, with the advice and consent of the Senate, further ensured that important aspects of the judiciary would be part of the political process. The inherent tension between provisions for judicial independence and the elected branches' authority to define the court system has led to recurring debates on judicial tenure and the federal courts' jurisdiction.

Throughout United States history, unpopular court decisions and the general authority of the federal judiciary have prompted calls to limit judges' terms of office, to define more narrowly the jurisdiction of the federal courts, or to limit judicial review-the courts' authority to determine the constitutionality of laws. Underlying the debates on judicial independence have been basic questions about the proper balance of Congress's authority to define the court system and the need to protect a judge's ability to reach decisions independent of political pressure. The debates have also addressed the extent to which the judiciary should be independent of popular opinion in a system of government where all power is based on the consent of the governed. Other debates have raised the need for safeguards for judicial independence in addition to those provided by the Constitution.

2. Debates on the Constitution

The delegates to the Constitutional Convention accepted with little debate the provisions for service during good behavior and for protected salaries. Only during the ratification debates in the states did political writers more fully explore the Constitution's definition of judicial independence. The most famous commentary came in The Federalist essays of Alexander

Hamilton, who argued that "the complete independence of the courts of justice is peculiarly essential in a limited Constitution," by which he meant a Constitution that placed limits on the authority of all government officeholders. The judiciary's responsibility, according to Hamilton, was to enforce the people's will as expressed in the Constitution and thus to prevent the abuse of power by the executive and especially the legislature. "Permanent tenure" was the most important foundation of the courts' role as "bulwarks . . . against legislative encroachments."

A prominent Anti-Federalist critic of the Constitution acknowledged the importance of judicial independence as secured by service during good behavior, but "Brutus" also recognized that the judicial independence envisioned by the Constitution was unprecedented. Judges would be removable only by impeachment and conviction of "high crimes and misdemeanors" rather than by a vote of the legislature, as was the case in most other governments with judicial tenure during good behavior. "Brutus" warned that regardless of errors of judgment or inability to carry out their duties, federal judges would be "independent of the people, of the legislature, and of every power under heaven." He also worried that these largely unaccountable judges would have the final say on the meaning of the Constitution, but Hamilton and other framers of the proposed government thought that the courts' responsibility to determine the constitutionality of laws, and thus to protect individual rights, was precisely the reason for the extraordinary protections of judicial independence. Hamilton dismissed concerns about unchecked judicial power, since the courts had "no influence over either the sword or the purse."

3. Political Parties and the Federal Courts

The framers' hopes for judicial independence were quickly challenged by the unexpected emergence of political parties in the 1790s. By the end of the decade, nominations of judges and any legislation relating to the courts became intertwined with the intense political struggle between Federalists and Republicans. After passage of the Sedition Act of 1798, Federalists used prosecutions in the federal courts to silence political opposition, and in 1801 the Federalist majority in Congress expanded federal jurisdiction at the expense of state courts and created new courts with additional judgeships that were filled by the lame-duck President, John Adams. Republicans came into power soon thereafter determined to curb what they saw as the partisan bias of federal judges. The Republican Congress abolished the new courts and judgeships and impeached two highly partisan judges. Republicans argued that the Constitution granted Congress full authority to establish the judicial system and that the constitutional protections of tenure during good behavior and undiminished salary did not prevent Congress from abolishing courts that were no longer needed. Republicans also argued that the partisan actions of Federalist judges, particularly in the Sedition Act prosecutions, had undermined all pretense of impartiality and judicial independence. Federalists meanwhile decried what they saw as an assault on the constitutional guarantee of tenure during good behavior. The Constitution, they declared, made the judges independent so as "to control the fiery zeal, and to quell the fierce passions" of a newly elected party. Repeal of the Judiciary Act of 1801 and the precedent of depriving judges of their office, Federalists warned, would render all judges the tools of political parties and bring about the collapse of constitutional government.

Despite the private doubts of Chief Justice John Marshall and other justices, the Supreme Court in 1803 issued a decision that let stand the law abolishing the courts and judgeships established in 1801. Republican fears about the judiciary were heightened, however, by the Supreme Court's decision one week earlier, in which Chief Justice Marshall, in Marbury v. Madison, asserted the judiciary's right to declare an act of Congress unconstitutional and, more alarming to Republicans, the Court's authority to compel executive compliance with an act of Congress. After the Senate failed to convict Supreme Court Justice Samuel Chase in his impeachment trial of 1805, a truce of sorts fell into place as Republicans abandoned their impeachment plans and the most overtly partisan Federalist judges, like Chase, curtailed their political activity. The temporary lull in public debates, however, did not signify a consensus on the proper measure of judicial independence. Throughout the early decades of the nineteenth century, unpopular decisions in the Supreme Court and, more often, in the federal trial courts, sparked recurring demands for restricting judicial tenure or limiting federal jurisdiction. Thomas Jefferson, as President and during his long retirement, advocated fixed, renewable terms of office for federal judges. Jefferson asserted that with impeachment the only means of removal, the judges "consider themselves secure for life; they skulk from responsibility to public opinion." Members of Congress and the majorities of several state legislatures repeatedly called for restrictions on the authority of federal courts to review the decisions of state courts or an end to federal jurisdiction over suits between residents of different states. Others submitted amendments to allow for the removal of judges on the vote of super-majorities in Congress or to place age limits on judicial service. None of these proposals succeeded, but their introduction into

nearly every Congress before the Civil War indicated that judicial independence remained a subject of political debate.

4. An Independent Judiciary in a Reconstructed Union

The crisis of union surrounding the Civil War brought new challenges to judicial independence. Unionists and supporters of the anti-slavery movement were highly suspicious of the federal courts because of decisions in support of slavery and particularly because of the Supreme Court's 1857 Dred Scott decision, which, among other things, denied all African Americans any rights under the Constitution. Following the close of the Civil War, Republicans in Congress feared that the federal courts would disallow much of their ambitious legislation designed to ensure full citizenship rights for freedpeople and all other African Americans. Congress debated numerous proposals to strip the federal courts of specific jurisdiction and to reorganize the courts. Congress redrew circuit boundaries to ensure that Southern states would no longer hold a majority of seats on the Supreme Court. In 1868, the Congress repealed the Supreme Court's jurisdiction over appeals of habeas corpus petitions, thus preventing former Confederates from challenging the custody of military courts. The House of Representatives in 1868 approved legislation that would have required a majority of seven justices for the Supreme Court to disallow any congressional statute, although the Senate Committee on the Judiciary failed to report the bill.

The willingness of Congress to reorganize the judiciary and to restrict jurisdiction in pursuit of the goals of Reconstruction was counter-balanced by the congressional Republicans' reliance on the federal courts to enforce federal

law in the former Confederate states. In 1869, Congress established nine circuit judgeships in the hope, as expressed by Senator Lyman Trumbull, that "nothing would do more to give quiet and peace to the southern country than an efficient enforcement of the laws of the United States in the United States courts." In 1875, Congress extended federal jurisdiction to encompass all cases arising under the Constitution and federal law, so that by the close of Reconstruction in 1877 the federal courts had unprecedented authority and independence.

5. The Federal Courts and the Politics of an Industrial United States

The most sustained effort to make federal judges more directly accountable to public opinion and to the elected branches of government arose between the 1890s and the 1920s when the federal courts became involved in labor struggles and in debates over government regulation of the economy. The federal courts' approval of injunctions to halt labor strikes and the Supreme Court's disallowance of regulatory legislation contributed to support for various restrictions on judicial authority. Populists seeking to regulate railroad shipping rates, labor unions trying to establish the right to strike, and Progressives defending their extensive program of social welfare and regulation of corporations all in turn advocated legislation to restrict the jurisdiction of the federal courts or to make judges more responsive to shifts in public opinion. The most common proposals included the election of federal judges, fixed judicial terms, narrow limits on federal jurisdiction, and the abolition of judicial review or requirements for a super-majority of the Supreme Court to invalidate federal or state laws. For nearly thirty years, Justice Walter Clark of the North Carolina Supreme Court cultivated national support for

the election of federal judges and limits on judicial review. Senator George Norris of Nebraska personally favored the abolition of the lower federal courts and introduced more widely supported bills to restrict judicial review, impose fixed terms on judges, and strip the courts of authority to issue labor injunctions. In 1924, Senator Robert LaFollette, the Progressive Party candidate for President, proposed a constitutional amendment that would have prohibited the lower federal courts from invalidating any congressional statute and would also have authorized Congress to reenact any legislation overturned by the Supreme Court.

Although the House of Representatives Committee on the Judiciary in 1894 reported a bill to limit judges to 10-year terms, few of the proposals to limit judicial independence gained much ground in Congress over the next 40 years, and the diverse critics of the courts never unified behind a common program. The critique of the federal courts, however, was steady and became an important part of the broader public debates on the effectiveness of government in a time of rapid social and economic change. The proposals to limit the authority of the federal judiciary paralleled the movement in the states to subject local judges to recall by popular vote. Throughout the early decades of the twentieth century, the defense of the existing judicial system was led by the organized bar, especially the American Bar Association. Defenders of tenure during good behavior and judicial review warned that a judiciary beholden to public opinion would never be able to protect civil liberties and economic rights. William Howard Taft, as President, then as dean of Yale Law School, and after 1921 as Chief Justice of the United States, was an important advocate for the established protections of judicial independence. Taft conceded that the federal courts would always

be subject to popular criticism because their role was to protect "the guaranties of personal liberty . . . against the partisan zeal of the then majority."

6. "Court Packing" and the Defense of Judicial Independence

After several years of Supreme Court decisions that challenged key New Deal programs, President Franklin Roosevelt in 1937 proposed a sweeping change in the appointment of all federal judges. Never in United States history had a proposal about the judiciary excited such political debate. The Judicial Reorganization bill would have authorized the President to appoint an additional judge whenever a sitting judge on any federal court did not retire within six months of reaching the age of 70. If approved, the bill would have allowed Roosevelt to appoint immediately as many as 50 new federal judges, including six Supreme Court justices. Roosevelt alleged that the declining abilities of aging judges contributed to a backlog of cases, but he also argued that a regular appointment of new judges was necessary "to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work."

For months, the judiciary proposal dominated public debate throughout the nation. While many New Dealers supported the bill, defections from Roosevelt's own party doomed the legislation and led the Senate Committee on the Judiciary to recommend that the bill not pass. The Senate committee report described the bill as "an invasion of judicial power such as has never been attempted in this country" and warned that the bill would set a dangerous precedent allowing a Congress or a President to impose constitutional

beliefs on the courts. While some attributed the lack of support to the Supreme Court's recent willingness to uphold New Deal legislation (the so-called "switch in time that saved nine"), the opposition to Roosevelt's bill rested on fundamental beliefs about the independence of the judiciary. Roosevelt had clearly challenged a widely shared, popular commitment to the balance of power between the branches of government. Even older Progressives who had supported limited tenure for judges and restrictions on federal jurisdiction shied away from what they saw as Roosevelt's attempted power grab for the executive branch. The administration drafted a revised bill, but that too met with opposition, and the Senate never voted on it. The retirement of Supreme Court justices soon gave Roosevelt the opportunity to appoint a majority of that court, but the court-packing crisis in many ways strengthened support for an independent judiciary and discouraged further proposals for any comprehensive reorganization of the judiciary.

7. The Persistence of Court Critics

Despite greater public acknowledgment of the principle of judicial independence in the years following the New Deal, critics of federal court decisions continued to call for limits on federal jurisdiction or for changes in judicial tenure. In the 1950s, in response to Brown v. Board of Education and subsequent court enforcement of school desegregation, segregationists advocated various measures to deprive federal courts of jurisdiction over issues related to local schools. In the 1960s, a series of Supreme Court decisions on the rights of criminal defendants, school prayer, and reapportionment of congressional seats fueled a campaign to impeach Chief Justice Earl Warren. To this day, controversial court decisions are often followed by proposals to

"strip" the federal courts of specific jurisdiction or even challenges to judicial tenure during good behavior. Like similar proposals dating back 200 years, few have gained serious congressional consideration.

8. Institutionalization of Judicial Independence

Over the course of the twentieth century, judicial independence was greatly strengthened by the development of institutions for the federal courts' self governance. In an address to the American Bar Association in 1914, William Howard Taft recognized that widespread public criticism of the courts imposed on judges and lawyers the responsibility to ensure a court system worthy of public respect. Taft became a leader in the development of institutions that have allowed the judiciary to govern itself and to guarantee the public a fair and efficient system of justice. Through much of the country's history, the courts received administrative support from various departments of the executive branch. Taft's support for the establishment in 1922 of a conference of chief judges from each circuit was the first step toward independent judicial administration. In 1939, Congress established the Administrative Office of the U.S. Courts, which reported to the conference of judges and provided courts with the support formerly given by the Department of Justice. The congressional act of 1939 also established in each circuit judicial councils with responsibility for improving the administration of all courts within the circuit. The establishment of the Federal Judicial Center in 1967 gave the federal courts their own agency for education of judges and court staff and for research on improving judicial administration.

9. Public Trust

As Taft recognized in the early decades of the twentieth century, the independence of the judiciary depends not only on the constitutional protections of judges, but also on public faith in a fair and responsive court system. The debates on Roosevelt's court-packing plan revealed that public trust in the judiciary was also based on confidence that the federal courts would not be dominated by another branch of government or by one political party. Critics of judicial independence have always been part of political life in the United States, but in the 200 years following the debates between Federalists and Republicans, the changing majorities in Congress have been reluctant to endorse sweeping changes in the federal judiciary, especially in response to specific court decisions or to further partisan policy.

ARBITRATION OVER LITIGATION – AN EXPECTED CONSEQUENCE TO THE RECENTLY PASSED JUDICIAL REFORM IN MEXICO

Mexico has well established law on arbitration. Mexico is a party to international treaties regulating arbitration, including but not limited to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the United States-Mexico-Canada Agreement and 30 bilateral investment treatises.

A judicial reform was recently passed by the Mexican Congress. Such reform has created concerns on local and foreign investors in Mexico with respect to the rule of law and the independence of the Mexican judiciary once the reform is implemented. Therefore, arbitration becomes a practical and recommended way to mitigate risks of corporations and to resolve disputes limiting the intervention of courts in Mexico. Under these circumstances, advantages of arbitration over litigation, including flexibility, confidentiality, rules of evidence, independence of arbitrators and process control gain notoriety, as well as importance on corporations.

Based on the above, domestic and foreign corporations are increasingly asking our firm about amending their existing agreements to add or modify arbitration clauses and to explore legal options to re-agree on collateral structures for their projects in Mexico with an aim to have such collateral enforced outside of Mexico.

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Our legal reports are part of our firm's commitment to providing information about legal issues affecting our clients, friends and contacts. Our reports are for informational purposes only and should not be regarded as legal advice. If you like to discuss the topic further, please contact Manuel Moctezuma at mmoctezuma@moctezumacastro.com

About Moctezuma Castro, S.C.

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SHUTDOWN OF THE FEDERAL COURT SYSTEM IN MEXICO

On August 19TH, 2024, the Federal Judiciary Council *(Consejo de la Judicatura Federal)* (CJF) issued an official communication *(Circular 16/2024)*, acknowledging notifications and correspondence regarding the shutdown of the federal courts in Mexico. Such suspension of activities derives from the proposed reforms to the Federal Judiciary in Mexico, particularly reforms aiming to regulate the appointment of Supreme Court Justices and federal judges by peoples' vote.

In order to preserve legal certainty, the CJF provided that urgent judicial proceedings, including but not limited to those involving deprivation of liberty, threat to peoples' life, health, integrity and access to public services, such as water and electricity, must continue to be processed.

Furthermore, pursuant to additional official communication *(Circular 17/2024)* issued by the CJF on August 23rd, 2024, court deadlines in ongoing proceedings are suspended starting from August 19, 2024 until further notice.

Shutdown of the Federal Court System will certainly impact ongoing judicial proceedings as well as those proceedings to be initiated. Business entities are assessing implications and remedies available from a legal standpoint, including agreeing on ADR mechanisms, as an option to limit their exposure before Mexican courts in case the aforementioned reform is passed. We will monitor how this situation continues to evolve.

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Statement on the Importance of an Independent Judiciary

July 2016

An independent judiciary is central to our democracy and the preservation of public trust in the rule of law. At the same time, litigants in our courts must have the right to challenge a judge's ruling for reasons based in fact, law or policy. Indeed, we affirm and embrace the right of litigants to assert claims of judicial bias under applicable laws, as well as every person's right of free speech. But we exhort all people to refrain from attacks on our judiciary based solely on ethnic, racial, religious, gender or sexual-orientation grounds. We urge all to accord the judiciary the respect and dignity necessary for judges to conduct their constitutional responsibilities.

A message from the FBA Board of Directors (July 2016)

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President's Message published in the Fall 2024 issue of The Federal Lawyer magazine It is my pleasure to be writing…