

THE REFORMS TO THE JUDICIAL POWER OF THE FEDERATION OF MARCH 2021: AN APPROACH TO ITS STRUCTURAL PERSPECTIVE AND FUNDAMENTAL CHALLENGES

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ABSTRACT: *The reform of March 2021 has generated a lot of tension in the journalistic area and seems to herald a lot of reflections in the academic field of law. However, to date, a good part of the discussions have focused on descriptively replicating its content, as well as on the short-term consequences. So, it is considered essential to move towards a discussion that inserts other variables that allow the fabric to become denser, in order to walk towards a much more comprehensive solution. This analysis puts into debate two of the articulating axes of the reform: the system of precedents, and the fight against corruption, placing special emphasis on some gaps, but, above all, pointing out its inability to solve problems of a structural nature. This insolvency results from a lack of reflection on the socio-historical fabric that, under the present reading, will lead to its results being modest, inoperative and/or even causing the intensification of the problems it intends to solve.*

KEYWORDS: *Judicial reform, precedent system, anti-corruption, meritocracy, discourse analysis.*

RESUMEN: *La reforma de marzo de 2021 ha generado mucha tensión en el terreno periodístico y parece anunciar una gran cantidad de reflexiones en el campo académico del derecho. Sin embargo, hasta la fecha buena parte de las discusiones se han centrado en replicar de manera descriptiva su contenido, así como en las consecuencias en el corto plazo. Se considera indispensable avanzar hacia una discusión que inserte otras variables que permitan volver el tejido más denso y caminar hacia una solución mucho más integral. Este análisis pone a debate dos de los ejes articulares de la mencionada reforma: el*

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sistema de precedentes y el combate a la corrupción, colocando especial énfasis en algunos vacíos, pero, ante todo, señalando su incapacidad para solucionar problemas de naturaleza estructural. Esta insolvencia resulta de una falta de reflexión sobre el tejido socio histórico que bajo la presente lectura llevará a que sus resultados sean modestos, inoperantes o incluso provoquen el recrudescimiento de las problemáticas que pretende resolver.

PALABRAS CLAVE: *Reforma judicial, sistema de precedentes, anticorrupción, meritocracia, análisis de discurso.*

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I. INTRODUCTION

Since the end of the last century, a good part of the countries in Latin America have been immersed in historical processes tending to modify the way in which power had been exercised. Mexico has not been the exception since, in recent decades, the country has fought for its democratization. In this context, judicial reform and the rule of law are considered essential elements to consolidate political democratization. However, being the recent reform of March 2021¹ one of its most significant corollaries, it is really a medium-term process that must be interpreted as part of a set of transformations of the judicial justice system that could have its clearest antecedents in the late 80s.

In 1987, a constitutional reform was carried out that conferred greater powers both to the Supreme Court of Justice, to the Federal Judicial Power, while incorporating in the Constitution guarantees and minimum guidelines for the Judicial Powers of the federative entities. Despite this, the most relevant aspect of this reform is that the Judicial Power of the Federation was granted a higher amount of financial resources, which, although at first, they certainly seemed to be more the product of a presidential decision than a judicial policy, they strengthened and stimulated changes within it, linked to its integrity and independence.²

¹ Ley Orgánica del Poder Judicial [L.O.P.J.], Organic Law of Judicial Power of the Federation, as amended, *Diario Oficial de la Federación* [D.O.F], 7 de junio de 2021 (Mex.).

² HÉCTOR FIX FIERRO, *EL PODER DEL PODER JUDICIAL Y LA MODERNIZACIÓN JURÍDICA EN EL MÉXICO CONTEMPORÁNEO* 137 (Instituto de Investigaciones Jurídicas, 2020).

Later, another important reform was carried out within the structure of the Judicial Power of the Federation, which was the result of processes related to the administration of justice, the collapse of public finances in 1982, the neo-liberal shift it had caused, as well as the frequent scandals that occurred during the previous decade that had resulted in the deterioration of the public image of the Judiciary. Thus, during December 1994, a series of modifications of 27 articles of the Constitution took place with the aim to strengthen the Supreme Court of Justice of the Nation by establishing powers that configured it as a constitutional court. These changes were a milestone in the structure of the Judiciary, and in its functions in terms of constitutional control and judicial guarantees.

In 1999, another reform was carried out that reversed some important aspects of the one implemented in 1994, submitting the Federal Judiciary Council to the control of the Court itself. This way it recovered part of the authority and influence within the Judicial Power of the Federation that it had lost at the hands of the Council. At the end of the same year, at its initiative, a commission was established made up of federal judges, lawyers and academics who took on the task of preparing a project for a new Amparo Law. The commission worked hard for a year, analyzing, and systematizing several hundred proposals. The project carried out by the commission was presented and discussed in a national legal congress at the end of 2000 and, after a review by the same ministers, it was sent to the corresponding instances.

The aforementioned project included important technical innovations, but the most significant aspect is that it was proposed to give greater force to the resolutions of the Judiciary through the general declaration of unconstitutionality, and the so-called declaration of consistent interpretation. Unfortunately, although a good part of the reflections favored these changes, the members of the other two powers did not speak out for their adoption until 2003. Around 2000, the president of the Supreme Court declared his open opposition to the budget restrictions to which the Power was bound, which led to a very notable increase during that year because it occurred at times of budget.

On March 11, the first year of its publication in the Official Gazette of the Federation, the last constitutional reform in judicial matters—which has been identified as a reform with and for the Judiciary—was completed. It is an event that could achieve a historical status since it addresses a series of transformations that are articulated through five federal ordinances related to the adequacy of judicial processes, the labor regime of public servants, the federal public defender, as well as the issuance of two new laws: one regarding the organization of the Judicial Power of the Federation and another one related to the judicial career.

In very general terms, it could be stated that the reform is shaped through the modification of the judicial reorganization in order to strengthen the role of constitutional court of the Supreme Court of Justice of the Nation (SCJN),

and to promote the judicial and public defender career. With respect to the first axis, the reform provided a wide margin of discretion to the Plenary of the SCJN so that, through general agreements, it established the matters that will be known to it and those that must be referred to the Regional Plenary Sessions and to the Collegiate Circuit Courts, in order to resolve only those matters of true constitutional control and not of mere legality. Likewise, it has been determined that the direct amparo trial proceedings against judgments that resolve on the constitutionality of general norms establish the direct interpretation of a precept of the Constitution or fail to decide on such matters when they have been raised, provided that they are of exceptional interest in constitutional or human rights matters. Hence, the previous condition is invalidated, consisting of the fact that a criterion of importance and transcendence was imperative. It also states that, against the order that rejects a review resource for not complying with such requirements, no means of challenge will proceed, thus eliminating the claim resource that was previously in order. Additionally, the Council of the Judiciary was empowered to concentrate on one or more jurisdictional bodies so that they deal with matters that constitute serious violations of human rights. This will be carried out considering the social interest and public order, constituting an exception to the rules of turn and competition.

The Unitary Circuit Courts will be replaced by Collegiate Courts of Appeal, which will retain their constitutional powers. But, also, within the circuits that the general agreements determine, their composition will be established by three magistrates to strengthen the deliberative process. Similarly, in order to expand the scope of jurisdiction by territory, the Circuit Plenaries, which represented the Courts of a particular federal entity, will be replaced to create Regional Plenaries, which will exercise jurisdiction over the circuits that the agreements define, with the aim to solve the contradictions of criteria that are generated by different circuits, so that only one persists in the respective region.

The reform is articulated under the premise that the Supreme Court will also hear constitutional controversies on the constitutionality of general norms, acts or omissions that arise among federal autonomous constitutional bodies, and between one of these and the Executive Branch of the Union or Congress of the Union. The foregoing occurs as long as the controversies deal with general provisions of the federal entities, of the Municipalities or of the territorial demarcations of Mexico City contested by the federative entities, or in the cases referred to in subsections c), h), k) and l) of article 105, section I, of the Federal Constitution, which were declared invalid by the resolution of the Supreme Court of Justice of the Nation. Said resolution will have general effects once it has been approved by a majority of at least eight votes. It is important to mention that in this type of controversies only violations of the Constitution can be asserted, as well as the human rights recognized in the international treaties in which the Mexican State is a party.

The backbone of the reform is the idea of strengthening the Supreme Court as a constitutional court. Consequently, the jurisprudence system was transformed into one based on precedents, very similar to the scheme used in other constitutional courts, as in the United States. According to this new model, the sentences issued by the Plenary of the SCJN by a majority of eight votes will be directly binding for the rest of the jurisdictional authorities (federal and local), and for the Chambers, by a majority of four votes, without the need to reiterate criteria.

On the other hand, with the aim to improve and promote the judicial and public defense career, it was established that the Council of the Judiciary will have a Federal Judicial Training School that must implement training and updating processes for the judicial and administrative personnel of the Judiciary and its auxiliary bodies. This school must also hold competitive examinations to access the different categories of the judicial career in order to ensure promotions based on meritocracy and equal conditions for all people, while at the same time train public defenders, through the Federal Institute of Public Defense. Similarly, the reform established that the entry, training, and permanence of *magistradas*, *magistrados*, *juezas*, *jueces*, *secretarias* and *secretarios*, as well as other personnel of the judicial career of the Courts and Courts, will be subject to the regulation established in the applicable provisions. Except for this condition, only the SCJN. will directly appoint and remove its officials and employees. Also, against the designations of *magistradas*, *magistrados*, *juezas*, *jueces*, *secretarias* and *secretarios*, there will not be any resource, but the results of the competitive examinations may be challenged before the Plenary of the Council.

Nevertheless, in a very general way, a description of the nature of the 2021 reform was made, which, as can be seen, is a complex change that will simply an enormous effort from this Power to restructure itself, as it intends to establish itself as a more efficient, close, and professional institution. However, like any reform that pretends to be a hurricane, as the mentioned case of March 2021, it has its strengths, but also its weaknesses, and its nature is such, that it is very possible that its ability to transform reality will be called into question since, as the trajectories of the previously implemented reforms have shown, the one that is the subject of this reflection faces many problems *per se*. It is necessary to start from the assumption that frequently the premises that articulate the changes are not the product of maturation processes, nor are they supported by solid evidence. This analysis aims to address some of the most problematic areas of the reform itself: the system of precedents and the fight against corruption, in order to evaluate the way in which the reform can impact the functioning of the Judiciary as a core part of the Mexican State. It is about the axes, as we already mentioned, that articulate the entire reform and from there derives the concern around them, while in a more conscientious analysis the reform does not seem to resist the socio-historical inertia in which a sentence has been passed, and the judiciary power has structurally functioned.

II. THE PRECEDENT SYSTEM

Through General Agreement Number 1/2021, the beginning of the 11th period of the Judicial Weekly of the Federation was mandated, and its bases were established, with which the plenary session of the Supreme Court of Justice of the Nation launched the system of precedents provided for in the 12th paragraph of article 94 of the Political Constitution of the United Mexican States.³ This agreement began the 11th season of the Judicial Weekly of the Federation (which began on May 1, 2021). Thus, from this agreement it was established that the reasons that justify the decisions contained in the sentences issued by the Plenary of the SCJN with a majority of eight votes, and by the Chambers, with a majority of four votes, will be mandatory for all jurisdictional authorities of the Federation and of the states. That does not mean the thesis system will disappear. However, obviously, it will be necessary to modify its format so that it is consistent with the new model of precedents.

Of course, it is a necessary process, which is part of larger-scale modifications in the world or more specifically in Latin America, since one of the most significant problems in Mexico is the low level of predictability in sentences, which is related to an acute lack of legal certainty. To reduce the risk that the courts arrive at alternative solutions in similar cases, the regulation of judicial precedent is presented as one of the possible solutions. If that fails, it is very useful to respond to massive conflicts, which occur in large amounts and with analogous characteristics, as could be the case of the Mexican reality.

However, it must be noted that it is not really a completely new phenomenon, since a diachronic review of the praxis reflected in the rulings, in the Mexican case, is enough to show that almost the center of judicial argumentation has always been moved towards the consideration of previous decisions, so that these have rarely been limited to the pure exegesis of legislative texts. In this sense, the precedents have really constituted a material with which the Mexican judicial system has always operated, with a view to make the “decision” to appear not to be of a personal nature, but to give it a much more objective nuance. However, the nature of the precedent must be understood more carefully, since the reform seems to have skipped the theoretical and methodological discussions around it, assuming or superficially addressing the complex doctrinal, jurisprudential, and normative scenarios referred to it.

Apparently, the reform will establish the precedent as a principle of the judicial body to follow and continue its own determinations of law previ-

³ Acuerdo General Número 1/2021, del 8 de abril de 2021, del Pleno de la Suprema Corte de Justicia de la Nación, por el que se determina el inicio de la Undécima Época del *Semanario Judicial de la Federación*, y se establecen sus bases [General Agreement Number 1/2021, of April 8, 2021, of the Plenary Session of the Supreme Court of Justice of the Nation, which determines the start of the Eleventh Period of the Judicial Weekly of the Federation, and establishes its bases], *Diario Oficial de la Federación* [D.O.F.], 15 de abril de 2021 (Mex.).

ously adopted, provided that the same topics are analyzed in the cases. In this context, the issues decided by the Supreme Court will have a binding effect on courts or tribunals of other ranks. In other words, under this new scheme, those precedents adopted by a qualified majority in the Plenary or Chambers of the Supreme Court will be binding and will tend to provide greater legal certainty to each of the parties subject to a constitutional conflict. There will be no radical changes on what to expect in the resolutions by district courts and collegiate circuit courts, since those that come to dictate must adhere to consistency within the constitutional doctrine in attention to vertical obligation.⁴ Under this dynamic, the Supreme Court in its capacity as Constitutional Court will act as final authority and as the original body (not exclusive) to define the object, scope, and purpose of the constitutional and conventional provisions in a concentrated control, and, therefore mandatory for the rest of the legal operators in the Mexican State.

In this way, the constitutional doctrine in charge of the Supreme Court will move away from the system of reiteration of thesis, configuring a discernment that seems qualitative in principle, but that is apparently ruled by a quantitative scheme. That is, whenever (necessary condition) the reasons adopted by the Plenary or the Chambers result in a qualified vote (eight or four, respectively), the determination will be considered a binding precedent to integrate the constitutional doctrine in the Eleventh Period. It was also specified in articles 222 and 223 of the reform of the Amparo Law that, since such a quantitative requirement was not met in the arguments analyzed by the ministers, then it can be considered that it is not a mandatory criterion for the rest of the legal operators of the Mexican State. This notion is reinforced by the content of the second article of the General Agreement 1/2021 of April 8, 2021, of the Plenary of the Supreme Court.

It should be noted that the March reform does not mention what will happen in regard to the thesis system included since the 10th Period, while, in the case of the reiteration system, there is no modification for the collegiate circuit courts, as stated in article 107 of the federal Constitution. The mandatory nature of prior determinations is still not entirely clear. However, it is inferred that, if such determinations comply with the qualitative and quantitative constitutional standard, they could be considered as precedents by the Chambers or the Plenary, maintaining continuity and dialogue intergenerational with previous decisions.

As can be seen, the reform places the Supreme Court as the authority constitutionally in charge of laying the first stone in this new system, which also implies the development of the considerations of the initial or original case. That is to say, the reform aspires to configure the structure that allows establishing the system of precedents in Mexico, and its defenders act as if

⁴ This vertical obligation derives from the systematic interpretation between articles 94, first and twelfth paragraphs; 105, section II, last paragraph; 106, and 107, section II, second paragraph, and section IX, of the Federal Constitution.

the problems that this implies were settled so that there are enough criteria to establish what is going to be considered as a precedent, from a theoretical but also a practical point of view. It suffices then to google the system of precedents and find some 14 million sites that deal with the subject, from those of a mere diffusion, journalistic nature to documents with scientific rigor.

The discussion around the possibilities of a tool for the application of justice should not be a sufficient cause to deny its possibilities as an invaluable resource to settle the problems that the current model has meant. The premise that this system has been operational and efficient in other realities, such as the United States, is a compelling reason to bet on this reform. Likewise, thought should be given to the fact that, as such, the precedent is not an element foreign to Mexican justice, since, really, the way in which jurisprudence was constituted in the country had in great part the heritage of Common Law, as was already mentioned.⁵

Under these two premises, the implementation of the system of precedents should herald its success. On one hand, it has shown its effectiveness in other judicial systems (in one as complex as the United States), but also on the other hand, the fact that, in the strict sense, its operation seems not to be absent from the historical reality of Mexico. Nevertheless, the reform has denied the presence of a sociohistorical process behind the articulation of the previous system that has implied a more plural trajectory on the process, which suggests that the current reform can cause a greater concentration of power in the dome of Power, Judicial, which is extremely dangerous, in terms of political power, but also administrative efficiency. The other great element that articulated the reform, the fight against corruption, looms with a problem of this same nature, which would imply the systematic failure of the entire reform. In this sense and due to the overlapping way in which one and the other axis are found, it is difficult to understand the problem because the elements touch constantly. However, this text will try to dissect the problem somewhat.

The system of reiteration of criteria dates to the 17th century, so its disappearance implies an important break insofar as it dislocates a historical way in which justice has been administered. Therefore, its constitution should have involved and must continue to involve a deep analysis in terms of scientific

⁵ Thus, through the so-called “theses” a legal criterion, used for the most important cases, which originally were centered in the Supreme Court of Justice and the collegiate circuit courts, has been built. Being one of the most notorious characteristics the obligatory nature of the jurisprudence resolved in the amparo processes, where the product was consolidated with a minimum vote of eight judges to see if it would be adopted by the Plenary of the Supreme Court, and of four judges, if the rooms were involved. It was also added that an uninterrupted ratification of five consecutive sentences in the same sense was necessary, after which its imperative character arose, and it could be contradicted or modified. The jurisprudence that did not meet the conditions described was granted the category of “thesis” when it did not reach the formality of five consecutive sentences, and “thesis of jurisprudence” that was mandatory.

rigor. Then, following this historical trajectory, the first tangible problem refers to the very incapacity that the Supreme Court has shown throughout its diachronic evolution. In this sense, the SCJN, has shown little ability to establish stable and consistent axes in matters of jurisprudence, which is essential for the constitution of the system of precedents. If we look at the time from the beginning of the Tenth Period of the Judicial Weekly of the Federation until March 2021, we find that 678 had already been issued. During the previous periods the same trend is noticeable: 1604 theses in the 6th Period (1957-1968), 1959 in the 7th Period (1969-1988), 751 in the 8th Epoch (1988-1995), and 3356 during the 9th Period (1995-2011). As for the results of the National Census of Federal Justice Administration (2021), they show that, of the 7270 revenue matters, only 5033 were resolved, which means that 31% of the total revenue matters were not addressed.⁶

Taking a general look at the justice administration censuses from 2011 to the one carried out at the end of 2020, we can observe the enormous number of issues that reach the plenary session of the Supreme Court, and the way in which it has responded to them. This challenge shows of course a notable inefficiency in its response. However, this did not seem to be a denied phenomenon, on the contrary, the reform itself emerges as a palliative response to this notable insufficiency. What does need to be discussed is that the complexity of the issues that have reached the Plenary has not changed, and in this sense, 2021 could become an example of the inertia that engages in the construction of sentences. So, there is a risk that the problem that should be solved, namely the lack of legal certainty, not only does not disappear or is mitigated, but also worsens, since, as has been observed historically, the Supreme Court of Justice has had serious difficulties in defining guidelines, while the system of precedents established from the reform determines that the sentences that are issued annually by the SCJN, as long as they have a majority of eight votes in plenary session and four in chambers, will become the binding criterion and part of the jurisprudential heritage, from which the sentencing guidelines must be formed.

These axes closely follow the model proposed by Ronald Dworkin and his category of “integrity as law”, which in very general terms is based on the consideration of integrity as a political virtue on the same level as justice, equity, and due process. For this theoretician, the foregoing is justified by the fact that it is this virtue that allows us to conceive our political community as

⁶ INSTITUTO NACIONAL DE GEOGRAFÍA, ESTADÍSTICA E INFORMÁTICA, CENSO NACIONAL DE IMPARTICIÓN DE JUSTICIA FEDERAL 2017 (2017); INSTITUTO NACIONAL DE GEOGRAFÍA, ESTADÍSTICA E INFORMÁTICA, CENSO NACIONAL DE IMPARTICIÓN DE JUSTICIA FEDERAL 2018 (2018); INSTITUTO NACIONAL DE GEOGRAFÍA, ESTADÍSTICA E INFORMÁTICA, CENSO NACIONAL DE IMPARTICIÓN DE JUSTICIA FEDERAL 2019 (2019); INSTITUTO NACIONAL DE GEOGRAFÍA, ESTADÍSTICA E INFORMÁTICA, CENSO NACIONAL DE IMPARTICIÓN DE JUSTICIA FEDERAL 2020 (2021); INSTITUTO NACIONAL DE GEOGRAFÍA, ESTADÍSTICA E INFORMÁTICA, CENSO NACIONAL DE IMPARTICIÓN DE JUSTICIA FEDERAL 2021 (2021).

an association of principles. In this sense, the law is articulated around the judicial principle of integrity, according to which judges who resolve difficult cases try to find the best constructive integration of the political structure and legal doctrine of their community, in some coherent set of principles regarding the rights and duties of people in that community. This conception presupposes the existence of a correct and true answer in difficult cases, which judges must seek, even though its truth cannot be demonstrated, and it always constitutes a controversial issue.⁷

Note that Dworkin's proposal has been subject to punctual criticism, some sufficiently argued, others not so much, precisely around his principle of the correct answer, and his strong air of defense of Natural Law. Thus, it has been pointed out that this theorist seems to limit himself to proclaiming some higher moral values that must be respected and carried out in the Law, without exhaustively explaining why we must respect and carry them out. Although it is true, one of the main Dworkin's contributions refers, accurately, to incorporating the social framework within the reflections around the administration of justice and putting on the table the dangers of fragmentation and the complexity of the legal experience. However, the foregoing is not enough to save the fact that his proposal seems to be that of a supporter of Natural Law, and that the superiority of certain values may be debatable.

Thus, thinking in theoretical terms of statements of this magnitude, even though they invite a somewhat more complex reflection on the administration of justice, does not necessarily mean that their usefulness has been sufficiently argued, especially in a country where syncretism has it sounded more like a state imposition on other cultural expressions other than the hegemonic one and where, historically, there have been movements of vindication around community rights, as is the case in Mexico. And this social plurality, which sometimes generates a spectacular level of work for the Judiciary, seems to want to be disappeared and in this sense, as mentioned before, there is a double risk that the system of precedents causes more dispersion and with-it legal uncertainty, or that the need to unify criteria generates, rather, the denial of the particularities that each case entails and with it each resolution. There is then a talk of a double risk, both equally tangible, which concerns evidently epistemological problems, but also of a political nature, which cannot be separated.

The premise of the superiority of Common Law has already been expressed before, often related to its effectiveness, and this in turn with the superiority of the justice systems and therefore with national superiority. Remember here the Theory of Legal Origins, according to which (colonial) inheritance in matters of law would play a fundamental role in national eco-

⁷ RONALD DWORKIN, *EL IMPERIO DE LA JUSTICIA: DE LA TEORÍA GENERAL DEL DERECHO, DE LAS DECISIONES E INTERPRETACIONES DE LOS JUECES Y DE LA INTEGRIDAD POLÍTICA Y LEGAL COMO CLAVE DE LA TEORÍA Y PRÁCTICA* 168 (Gedisa, 1986).

conomic growth. This theory was developed by four economists (Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W. Vishny⁸) who concluded that States belonging to the Common Law legal culture grant the highest degree of protection, source of an efficient financial market and synonymous with economic growth. In the 2000s, the theory was extended to other legal fields and focused on demonstrating more generally the general efficiency of the common law model. In such a way that, even later, this theory strongly influenced the highly commented Doing Business reports of the World Bank, whose eminently political objective is the establishment of a legal framework favorable to the expectations of the private sector. In 2008, the original authors —except for R. Vishny— met again, not to carry out a new empirical study, but to draw up an inventory of the Theory of Legal Origins. The article marked a true turning point, since from here the Theory of Legal Origins is now distinguished by its comprehensive, almost total character. More than an influence on the protection of investors, the legal origins of a state condition the style of social control of economic life.⁹

Legal Origins Theory took on a whole new dimension with the publication of the World Bank's Doing Business reports. Since, prior to this, it had been confined to the center of academic research, where innovation and originality are in principle in the spotlight, the reflection then moved to the field of practice to put results in motion, direct and concrete. The Doing Business¹⁰ reports advocated a clear reduction in regulation. However, it turns out that the countries that regulate the most are, on the one hand, low-income countries and, on the other, countries belonging to the civil legal culture, so that the reports asserted that legal origin was one of the important variables to explain the different levels of regulatory intervention. The World Bank advocated the path of system convergence based on the principle that 'one size fits all'. This expression, explicitly repeated in the 2004 report, considers that a model that works successfully in one State can be implemented, with the same success, in any other.¹¹

This serves, not to affirm that the Theory of Legal Origins is behind the proposal of Arturo Saldivar, but rather to understand that there always exists, as it happens in any trial, that the proposals, however objective they may seem, are loaded with ideology, which in turn has a strong sediment of our

⁸ Rafael La Porta et al., *Law and Finance*, 6 JOURNAL OF POLITICAL ECONOMY 1113-1155 (2008).

⁹ Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 (2) JOURNAL OF ECONOMIC LITERATURE 285-332 (2008).

¹⁰ These different reports were prepared by the Private Sector Development section of the International Finance Corporation (I.F.C.). I.F.C. It is one of five institutions that make up the World Bank Group, each of which is legally and financially independent.

¹¹ WORLD BANK & INTERNATIONAL FINANCE CORPORATION, *DOING BUSINESS IN 2004: UNDERSTANDING REGULATION* 86 (2004).

social place. For this reason, the sciences have a political character from the beginning, whether we discuss Economics, Physics or Law, if only through the postulates, most of the time implicit, at the origin of a demonstration, that is something that Thomas Kuhn¹² or Michel Foucault¹³ themselves established. In this sense, what, if last year's reform must be carried out, is to build in a world in which globalization reigns centered on the United States, and the temptation to consider that the world's dominant power necessarily holds the best of legal systems. In other words, the reform emerges in a world where cultural imperialism is a tangible reality, and more so in a country like Mexico where geopolitical closeness is often chilling, so that the American Way of Life has been the linchpin of the social practices, which also includes the generation of law.

Then it is necessary to evaluate that, although the Theory of Legal Origins does not seem to resist a more rigorous analysis in scientific terms, it is built as part of an imaginary that is vital at the time of the administration of justice. Equally important is the strong presence of the World Bank in the implementation of public policies in developing countries, as is the case of Mexico, which have tended to try to guarantee interests in favor of capital. Of course, these statements are just guidelines that need to be investigated in a more conscientious way to explain how the reform came about, but above all to understand its scope and its enormous limitations because then it would happen that there is a presumption that the system of precedents will generate positive results under the premises that there is a single correct answer that can help us solve the atavistic problems that the Judicial Power drags, which is strongly subordinated by models that do not correspond to the reality of Mexican society.

The speech of Arturo Zaldívar, architect of the reform, does not illustrate and explains little what was the reason for carrying out the changes that were made, rather it is plagued by triumphalism, profoundly, questionable only a year after having occurred the first steps to implement them.¹⁴ This lack of clarity in explaining what led to the integration of jurisprudence from a system of reiteration of criteria to one based on precedents, can be explained by the very way in which the reform was accepted. The exchange of arguments for the debate was left out of the sessions of the commissions and plenary sessions in both chambers, where the reform was supposed to be “discussed” from the beginning. Thus, beyond the rhetoric of some speakers, the sessions did not leave room for a reply or for a thorough revision of the text. This does not mean that there have not been some legislators who expressed their con-

¹² THOMAS KUHN, *LA ESTRUCTURA DE LAS REVOLUCIONES CIENTÍFICAS* (Fondo de Cultura Económica, 1971).

¹³ MICHEL FOUCAULT, *LA ARQUEOLOGÍA DEL SABER* (Siglo XXI ediciones, 1970).

¹⁴ Arturo Zaldívar, Minister President of the S.C.J.N, *Words by Minister Arturo Zaldívar, on his Third Annual Report on the Work of the Judicial Power of the Federation* (Dec. 15, 2021).

cerns or proposed alternatives, but they did not find an echo in the Plenary so that the majority voted against any possibility of discussing the reservations, both in the Senate last 27 November and in the Chamber of Deputies on December 9, both during 2020.

The fact that the reform was not analyzed and subjected to adequate scrutiny was so evident that the special rapporteur of the United Nations Organization, Diego García-Sayán, sent an urgent communication to the Mexican Government on November 30, in which he recommended “guarantee the maximum dissemination and official debate with civil society, including the organizations of magistrates and judges, on the meaning of a judicial reform” and “adapt the legislation in accordance with the international principles and guarantees in matters of judicial independence”, since it considered that “even when [the reform initiatives] partially strengthen the administration of justice, they present potential inconsistencies regarding international standards on judicial independence”.¹⁵

The silence of the Mexican State, including the Judiciary itself, in the face of this call is worrying, even after a year, more so because a few days after (December 8, 2020) the reform opinion sent by the Senate by part of the United Commissions of Justice and Constitutional Points of the Chamber of Deputies, was approved in less than an hour and with speeches of a maximum of three minutes, without real debate. This gave a glimpse of what finally happened later in the Plenary, where the majority supported the reform without further reflection and without discussing the reservations that were presented, even when some of its members said that it could be perfected. The hasty way in which this process was developed leaves much to speculation, in a country terribly exhausted by the alliances under the table of political power, it would be necessary to think then about how it is that a reform that intends to deal with corruption, was covered by a veil of suspicion even at the international level, without mentioning here, the controversial thirteenth transitory article that extends the presidency of Minister Arturo Zaldívar as head of the Supreme Court of Justice (S.C.J.N.) from 4 to 6 years, as well as the mandate of the advisors of the Council of the Federal Judiciary (C.J.F.).

However, although alarming, the transitory problem can hardly serve as a symptomatology to exhibit the way in which Mexican politics is dynamic, helping to diagnose in the short term the delegitimization that overshadows the reform and Zaldívar’s own career. It is thought then that the reflection around the anti-corruption axis, which is another of the strong arms of the reform, must advance beyond the transitory itself and the political agreements that, obviously, had to exist so that the reform could see the light.

¹⁵ OFICINA DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS, MANDATO DEL RELATOR ESPECIAL SOBRE LA INDEPENDENCIA DE LOS MAGISTRADOS Y ABOGADOS (2020).

III. THE FIGHT AGAINST CORRUPTION

The changes that articulate what has been called the anti-corruption axis of the reform, were structured from the transformation to article 97 second paragraph, and 99 last paragraphs from which it is established that the entry, training and permanence of the holders of the jurisdictional bodies and other personnel in the Judicial Power of the Federation will be subject to the regulation established in the applicable provisions. To promote gender parity, the Reform modified various constitutional articles (articles 97 first and second paragraph, and a hundred paragraphs tenth and eleventh) to build an inclusive language, namely, to appoint through concepts such as judges and magistrates, as well as judges and magistrates.

On the other hand, to combat nepotism and arbitrariness, article 97 in the 4th paragraph was modified, so that in the Circuit Courts and in the District Courts the appointment and removal of officials is carried out in accordance with what have the applicable provisions at the time. Only the Supreme Court of Justice of the Nation may freely appoint and remove its officers and employees. Likewise, the 11th paragraph of article 100 was changed, so from this, it was established that, against the appointment of judges and magistrates, no appeal will proceed. Only the results of competitive examinations may be challenged before the plenary session of the Federal Judiciary Council. The 7th paragraph of the same article was also reformed so that the Institute of the Federal Judiciary was transformed into the Federal School of Judicial Training, which will oversee implementing the processes of formation, training and updating of the jurisdictional and administrative personnel of the Power. Judiciary of the Federation and its auxiliary bodies, as well as to carry out competitive examinations to access the different categories of the judicial career.

As can be seen, from the outset, these are tools that seek to share corruption, but none of them concern a reform of a structural nature, and when they are seen, one cannot avoid thinking of the Federal Public Administration Career Professional Service Law, which since 2006 has not been efficient in bringing down nepotism and corruption. But in addition and with a direct relationship, to the previous reform, that is, the one of 1994, which included the judicial career as one of its key pieces, did not mean a significant change in the process of selection and promotion of federal judges despite that trust was placed in the merit or capacities of the individuals to guarantee the adequate qualification of the persons who were to assume the jurisdictional function, as was expressed in the explanatory memorandum. However, Julio Ríos Figueroa, in his popular report *El déficit meritocrático. Nepotismo y redes familiares en el Poder Judicial de la Federación*,¹⁶ managed to document exhaustively

¹⁶ JULIO RÍOS FIGUEROA, *EL DÉFICIT MERITOCRÁTICO. NEPOTISMO Y REDES FAMILIARES EN EL PODER JUDICIAL DE LA FEDERACIÓN* (2018).

that almost 25 years after this reform, although there is progress, there is also a meritocratic deficit in the Judicial Power of the Federation. The report identified that the deficit is the product of the limitations of the institutional architecture and administrative organization of the Judiciary as well as nepotism and the family networks that inhabit it, and that both factors feed off each other.

The changes in 2021 are intended to overcome the problems of the operation of the previous changes, which is obviously positive, however, think of a specific case: the modifications made to article 97 of the Constitution now propose to unlink the appointment and removal of personnel from the courts and courts of the decision of judges and magistrates. However, the wording is opaque insofar as it does not clarify that entry and promotion in all judicial career positions will be carried out through competitive examinations. That omission does not seem like an oversight; there's a reason the reformation didn't plan it that way. In the initiative of the Judicial Career Law, proposed in the same package of initiatives of this reform, it is established that the rule to access judicial career positions will be the winner in an opposition contest. Anyhow, exceptions are foreseen for certain positions, which are freely appointed: the project secretaries of courts and tribunals and, in general, the jurisdictional officials of the Supreme Court of Justice of the Nation and the Electoral Tribunal of the Judicial Power of the Federation.

The foregoing is extremely paradoxical, since Zaldívar's own speech recognizes that competitive examinations are the best antidote against practices of nepotism and cronyism, as derived from this, there is no explanation for this inequity and the judicial career is applied to some yes and not to others, giving the impression that those who are subject to the reform are the lowest echelons and not the top echelons of power, as occurs with the register of family relationships, a mechanism proposed in the Judicial Career Law, but it is not applicable to officials of the Supreme Court or the Electoral Tribunal. Similarly, the reform did not consider the possibility that the Office of the Comptroller of the Judicial Power of the Federation could play an essential role in terms of deconcentrating power and modifying the appointment process of the heads of the offices of the Comptroller, so that they no longer depend on the president of the Council, the Supreme Court or the Electoral Tribunal, as it happens today.

Another problem that could lie ahead is also a consequence of the reform to article 100 where the Federal Judiciary Council is empowered to concentrate on one or more jurisdictional bodies so that they hear matters related to events that constitute serious violations of human rights, which will constitute an exception to the rules of turn and jurisdiction that is decided only after the presentation of the issues, is a jurisdiction that expressly contravenes international treaties binding on Mexico. On the other hand, the criteria established to carry out the concentration are ambiguous and will not allow verifying that it is not an arbitrary decision, how much and more so that the request for

concentration does not go through the request of a party or consultation of the complainants, as if provided for in the Amparo Law. It is assumed that the great objective of the reform is to consolidate the role of the Supreme Court of Justice as a constitutional court, this argument has already been mentioned before, however what we have just pointed out contradicts this objective when it is easy to realize that, derived from the objective anti-corruption, the Supreme Court seems to consolidate several administrative functions that it did not have before the reform.

Before advancing on this, it is necessary to differentiate from where it is possible to review this anti-corruption axis that constitutes the reform. A good part of the reflections expressed so far have exerted pressure on the very nature of the discourse that structures the changes, or more specifically, on whether it is feasible that these modifications can overcome the absences and errors recognized by the 1994 operation, certainly extremely important elements, as we have tried to illustrate so far.¹⁷ But together with the proposals made, an attempt is made to build a fabric that allows us to understand the reform in a more complex dimension, pointing out its failures, but also how problematic its success also means. The foregoing refers to a phenomenon of a structural nature, concerning the endemic administrative corruption and the viability of meritocracy as the best way to abate nepotism.

Despite the efforts made in terms of democratic change and administrative reforms, aimed directly and indirectly at regulating the abuse of power and making government work more efficient, corruption continues to be one of the main problems in the country. The question that arises then is whether concentrating power in a group of “notables” may be enough to somewhat intimidate the problem of corruption within the Judiciary. Can the constitution of a school educate, and train judicial functions generate a change in terms of a phenomenon of an endemic nature? Of course, the strategy that supports the reform is highly questionable and, on the contrary, as multiple analysts have pointed out from different angles, it rather announces the recrudescence of nepotism and corruption, or else, be the seed of new forms of these. Giving ethics classes to officials or potential officials is insufficient to attack a social and historical problem that has been one of the main obstacles for the Mexican State.

The problem grows when we observe that in the spirit of the reform is the premise of meritocracy as a way out of nepotism, the redistribution of power and with it the resources, pretending through it to meet the demands of justice around the social order. In our country, it is necessary to analyze a little more the nature of the phenomenon, it serves for now to resort to the analyses that have already questioned the assumption that meritocracy is the way out to build a fairer society. Michael Sandel summed it up very well when he pointed

¹⁷ JOSÉ ANTONIO CABALLERO JUÁREZ, LA REFORMA JUDICIAL DE 2021. ¿HACIA DÓNDE VA LA JUSTICIA? (UNAM, 2021).

out that the root problem of meritocracy is that opportunities are not really the same for everyone.¹⁸ Note therefore, first, that a judicial career based on the idea of meritocracy would have to start, absurdly, from a Mexico with “equal opportunities”. Let’s take a very specific case, who will be able to enter the Federal School of Judicial Training? The truth is that a young person with one or two parents in the Judiciary can receive certain privileges, and this does not refer to an inheritance with large properties but to educational and cultural advantages to be admitted to them. Some of you will say that if it is so, this is fair, however, it is not the case or rather it should not be the case because, as we will see later, this brings with it serious problems of access to justice and the promotion of social inequality.

A second problem that is observed concerns what is going to be considered as merit or, more specifically, what knowledge or what experience must be had to access to be part of the Judiciary, that is, what is valuable or vital to be part of federal judges? The answer seems simple, but it really is not, it is a problem again of an epistemological nature but also an ethical one, around which action, executed with skill and effort, and generating socially relevant consequences, is “meritful” in relation to the imparting of Justice. Let’s take a case, an aspiring Circuit Court magistrate, with a Doctorate level and who has an impeccable track record within the Judiciary, but who has divorced and married a 20-year-old girl. The answer then no longer seems so simple in the heat of criticism from the contemporary feminist movement.

What happens is that really, the idea of meritocracy is related to a notion of justice that is eminently contingent. To ask ourselves if we “should” appoint this aspiring Circuit Court magistrate is to ask ourselves precisely about what we consider valuable or meritorious —income, wealth, duties and rights, powers and opportunities, positions and honors not only within the Judiciary itself but at a social level—. The answer about a judicial career based on merit seems to be the beginning of fairer ways to place the fit in these positions of the dispensing of justice, but doing so implies asking we about justice itself: who deserves what, and for what reasons. In English, “merit” and giving someone what they “deserve” do not really have many differences. However, the terms are not the same. The point in question is that merit is only one among many ways of deciding who deserves what, and the question of how convenient and how fair it is as a principle to make it an access route to occupy a place from where the justice at the national level is far from settled.

Another problem is constituted by the fact that the meritocratic system has generated scenarios, as shown by the implementation of the 1994 reform, where those who have access to positions within the Judiciary get all the privileges. This had already been pointed out by Eduardo Engel and Patricia Navia when they affirmed that within meritocracy, the court first seems to be

¹⁸ MICHAEL SANDEL, LA TIRANÍA DEL MÉRITO. ¿QUÉ HA SIDO DEL BIEN COMÚN? 125-126 (Debate, 2020).

leveled at the beginning of the game, and the “best” wins and takes the prizes. As Ríos Figueroa concludes in his report on meritocracy in the Judiciary: leveling the field was not enough, and it seems that it will not continue to be enough when the size of the field and the rules of the game are determined by a group of actors who will later be part of the party. In other words, the allocation mechanisms that are built to elect the officials of the Judiciary certainly affect the degree of fairness at the end of the game, as evidenced by the privileges that the Court itself granted itself in the recent reform. This analogy is crude because it ignores the dynamics of power, or more specifically, the circular nature of the game, in which it is the “notable”, that is, the winners who define the rules of the next game or, as Engel and Navia, “it’s not that the field is uneven, it’s that the game is fixed”.

A fourth problematic axis for the reform is articulated under the fact that a Judicial Power organized around the idea of meritocracy runs the risk of eroding the democratic bases of coexistence. Democracy is, in its simplest definition, the organization of collective decisions around the principle of equality among all participants. It is, applied to the national organization, the government of the people, and both the talented and the most disadvantaged, the strong and the weak, the fit and the inept participate in it. So then, a strong democracy cannot be, by definition, only a “government of the best”. The elites that govern and administer justice have convinced the citizenry that in a democracy, the law and the institutions rule, not the people. And if the institutions rule, then those who dispense justice are a technocratic elite that, as in any self-respecting modern bureaucracy, is structured around the NOTION OF MERIT.

IV. CONCLUSIONS

Analysis is needed in academics, social and political terms around the reform, and these must be articulated more in the medium and long term because it is in them that it is possible to reflect on its structural nature, being in this place where change does not resist an analysis, and it is possible to question its historical viability. Nor is it a question of rejecting it completely, quite the contrary, it is considered that there is an invaluable reflection on the fact that: the way in which the Judiciary has administered justice and has been organized until now, cannot constitute a fairer society, in this sense, awareness of a problem of this nature is an invaluable step for transformation.

However, awareness does not mean that a good diagnosis has been made, and this is the problem that runs through all this change. It seems that there is a denial or marginalization of phenomena of a structural nature such as, as already pointed out: corruption, the problem of objectivity and dispersion in the generation of law, as well as the way in which social organization has generated inequality. A misdiagnosis implies the administration of the wrong

medication or only to alleviate the symptoms when the root problem has not been resolved, then the patient will continue to be ill. Of course, it is an extremely crude reference, but it serves as a metaphor to show that what has been located up to this point is a lack of analysis around the socio-cultural processes that constitute the Mexican reality, and not only the Judiciary. But note that this does not discourage the fact that this is worrying, since it would be expected that, in the place from which justice radiates, there would be no nepotism, inequality or power games. To think this would be to fall into the traps into which the Zaldívar reform has fallen, to believe that the Judiciary can abstract itself from the social reality in which it was created and in which it must deliver justice.

The reform intends that the problems that cross the entire Mexican society stop there before entering the Judiciary or that when they enter; it is capable of reversing or intimidating them. It is a tough task, undoubtedly, that sounds almost unattainable for a mere change in the written discourse, which in this sense would have to be supported by a strong social mobilization for it to find legitimacy. The foregoing is complicated to happen because Mexican society has a view on the Judiciary, as an axis absent from the constitution of the State, but also and even more importantly as a group with too many privileges.

Again, the last thing mentioned is not an exclusive representation for this Power, however, once again the symbolic load that is constituted by “this should not happen here” plays brutally against it, and therefore also calls into question the operation of the power. Reform. This means accepting that the Judiciary itself requires legitimacy to continue operating, the reform itself is presented as an attempt to regain confidence in the administration of justice in Mexico. However, in addition to the problems of a more general nature that have been pointed out here, the messianic attitude with which Arturo Zaldívar has addressed the citizens cannot be marginalized and which was fueled by the famous transitory, as well as by the headline of the Executive Branch. Of course, this resonates and has consequences for the legitimacy of the legislative change, even though the process seems like an issue that has already happened in media terms, but we are not talking about the immediacy but about the readings that will be taken again in the long time on the process, invoking the delegitimization of its main architect. It is not a short-term issue, but something that will accompany the reform throughout its life history since, in discourse analysis, it is always a necessary process to see the margins or the processes that seem to be outside the content and, in this process, Zaldívar is core.

The reform has several absences and this point more towards maintaining or in some other cases, much more worrying, strengthening atavistic ways of administering justice, of negotiating power and resources within the Judiciary, than the look that can have on her is deeply overwhelmed with suspicion. Of course, the scope will end up being much more modest than what has been raised at first, that seems normal in the process of applying any law,

that is, the reform will not be able to end corruption, nor nepotism, neither with meritocracy, nor with the processes of appropriation of theses. However, it is thought that the results will be even more limited because the construction of the diagnosis was not exhaustive enough and did not attract a more multidisciplinary analysis of the existing problems. They would mean having thought, to mention an example, in other ways about the system of precedents, the limitations that it may have in a society as complex as Mexico's, and the very way in which law is taught in Mexico. In a few words, the reform seems to be out of the debates and contemporary realities both in the country and in global dynamics, as well as a complete denial of the historical processes that have dragged the administration of justice in Mexico, so that it has the face that have. Here only possible lines of reflection have been opened that intend to put on the table some of the problems that are observed around the reform of March 2021, which have not been intended to be exhaustive, quite the contrary, under the principle that it does more discussion is needed, it is necessary to obtain more complex tools at a methodological and theoretical level to face the dynamics of a change that transforms not only the Judiciary but, in principle, many dynamics of social organization in the country.

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