Mexican Review Law New Series XVI-1

REPORT ON ABUSIVE JUDICIAL REVIEW OF ELECTORAL MATTERS

José Oliveros Ruiz*

Abstract: *It is commonplace to state that the borderline courts are the last obstacle in the defense of fundamental rights, the rule of law, the division of powers, and hence, of constitutional democracy. Nevertheless, there are judgments of last resort which are very illustrative examples of argumentative practices used to conceal decisions that may be systematically politicized, and therefore can be detrimental to fundamental electoral rights, to the certainty and legality of electoral acts and resolutions, as well as to the holding of free, authentic, and periodical elections. The practice of using the democratic legitimacy of the judicial function to intentionally undermine the core of democracy is barely theorized. However, it is highly possible that in the future these types of attack will be part of the authoritarian tools used by groups of an anti-democratic nature. That is to say, the circumstance that the courts and not the political actors are the ones that implement undemocratic measures with the advantage of the difficulty for its identification, given the traditional role assigned to the judiciary in the democratic constitutional state of law, makes it essential to review the use of the weighting of the argumentative representation. This, in order to prevent democracy from being damaged by constitutional interpretation and to avoid the tolerance for the absence of a minimum social consensus on the arguments that it intends to sustain with relative temporary stability. Even more so, when it comes to those who make up the constitutional jurisdiction specialized in elections and democracy. In Mexico, the Superior Court of the Electoral Tribunal of the Federal Judiciary (TEPJF) is the highest electoral court. This body has issued controversial and transcendent decisions for electoral democracy which can be subject to critical legal analysis as an input for legislative activity. This is particularly related to issues concerning*

* Researcher at the Universidad Veracruzana and founder of *electoraltech.com.mx*. PhD and Master in Law with honors from UNAM. Master in Electoral Law from the Electoral Judicial School of the TEPJF. Specialist in Human Rights from the Complutense University of Madrid and the International Institute of Human Rights "René Cassin", Strasbourg, France. Specialist in Constitutional Law and Political Science from the Center for Political and Constitutional Studies, Madrid, Spain. Author of the Book: Electoral Justice in Mexico, Editorial Vlex, Mexico, 2020. Available on Twitter: *@magdooliveros*. Email address: *joseoliveros@outlook.com.* He is the author of specialized books and papers on electoral justice and democracy. Magistrate President of the Electoral Court of Veracruz (2017-2019).

citizen participation such as the revocation of mandate and the imposition of sanctions due to its diffusion by public servants, as well as cases of gender-based political violence (VPG, by its acronym in Spanish) and the deprivation of an honest way of living (MHV, by its acronym in Spanish) as a sanction. Another topic worth considering is the rulings on the modification or defective abandonment of the jurisprudence in matters such as the assumption of competence over parliamentary acts in the integration of the administrative or government bodies by the Congress of the Union, and the messages of the legislators, which are not protected by the principle of parliamentary immunity, as has been established.

KEYWORDS: *Constitucional Democracy, Human Rights, Abusive Judicial Review, Electoral Jurisdiction, Constitucional Interpretation.*

RESUMEN: *Es un lugar común señalar que los órganos jurisdiccionales límite son la última barrera de defensa de los derechos fundamentales, el estado de derecho, la división de poderes, y por lo mismo, de la democracia constitucional. No obstante, existen sentencias de última instancia que constituyen ejemplos muy ilustrativos de las prácticas argumentativas que se utilizan para disimular decisiones que pueden estar sistemáticamente politizadas, y por tanto, ser perjudiciales para los derechos electorales fundamentales, para la certeza y legalidad de los actos y resoluciones electorales, así como para la celebración de elecciones libres, auténticas y periódicas. La práctica de utilizar la legitimidad democrática de la función judicial para socavar intencionalmente el núcleo de la democracia está poco teorizada. No obstante, es muy posible que hacia el futuro estas formas de ataque se añadan al conjunto de herramientas autoritarias ejercidas por parte de grupos de talante antidemocrático. Esto es, la circunstancia de que sean los tribunales y no los actores políticos los que adopten una medida antidemocrática con la ventaja de la dificultad para su identificación, dada la tradición asignada al poder judicial en el estado constitucional democrático de derecho, hace indispensable revisar el uso de la ponderación propia de la representación argumentativa. Esto, para evitar que mediante la interpretación constitucional se erosione la democracia y se tolere la ausencia del consenso social mínimo sobre los argumentos que se propone sostener con relativa estabilidad temporal. Más todavía, cuando se trata de quienes integran la jurisdicción constitucional especializada en materia de elecciones y democracia. En México, el máximo órgano jurisdiccional electoral es el TEPJF. Dicho órgano ha emitido decisiones controversiales y trascendentes para la democracia electoral que permiten un análisis jurídico crítico, el cual sirva de insumo a la actividad legislativa, sobre todo en temas de participación ciudadana como la revocación de mandato y la imposición de sanciones por su difusión por parte de servidores públicos, así como en los casos de violencia política en razón de género (VPG) y la privación del modo honesto de vivir (MHV) como sanción. Asimismo, resulta notorio el tema de las sentencias sobre la modificación o abandono defectuoso de la jurisprudencia en tópicos como la asunción de competencia sobre actos parlamentarios en la integración de los órganos administrativos o de gobierno del Congreso de la Unión, y los mensajes de los legisladores sobre los cuales se ha determinado que no están protegidos por el principio de inviolabilidad parlamentaria.*

PALABRAS CLAVE: *Democracia constitucional, derechos humanos, revisión judicial abusiva, jurisdicción electoral, interpretación constitucional.*

Table of contents

I. Introduction

This paper explores the apparent argumental legitimacy of judiciary discourse, specifically for the electoral democratic armor, because it represents the risk of granting advantages to the power groups involved in the appointment of the court directors of the final court heads on electoral matters.[1] This analysis

[1] This seems to be the case of the current configuration of the Superior Chamber of the TEPJF, whose activity has been critically reviewed in the following terms: "If, *from the beginning of the integration of the SSTEPJF, circumstantial political interests were obeyed, which generated a defect in the original integration of the body, it is inevitable that all its subsequent decisions are evaluated under this sieve*, in

is also applicable in the case of the members of the national administrative authority when it performs jurisdictional functions.

Furthermore, this also comes into play when the changes in the applicable criteria instead of being discarded by the highest electoral court, are presented as interpretative developments resulting from a stricter interpretation parameter. Nonetheless, those "developments" are coincidentally held when the ideology in power has changed. In such a context, the competent electoral court fails to justify why the criteria was not timely applied to those who are no longer heads of the powers or have turned into parliamentary minorities. And there is the particularity that those who have previously taken part in the appointment of the members of the court of last instance or of the constitutional autonomous body with electoral functions, constitute the opposing political group contrary to the party or force coalition that now preside over the executive federal, state or municipal power.

Or rather, the change in jurisprudence criteria comes about when there has been a modification in the integration of the parliamentary majorities that originally elected the members of the terminal bodies and whose interpretative activity has been detrimental to the free exercise of fundamental rights, and in particular, of the political-electoral ones.

The doctrine has called this practice *abusive judicial review*, which is characterized by the use of the legitimacy of the courts to decide the cases submitted to their authority with an ideological nuance and *ad hoc* to each matter. That is to say, the undue advantage that can be obtained from the judicial function, materialized through arguments with a democratic appearance, is evident, since it cannot be easily detected and inhibited at the national and even international level.

This essay aims to identify leading cases ruled by the TEPJF, in which this phenomenon might be observed, and, that being the case, the methodology that can help its timely detection and eradication, as it represents a risk to constitutional democracy in Mexico. Only the citizenry, by criticizing the rulings on transcendental issues for the effectiveness of political-electoral rights, can demand and achieve the institutional culture in the behavior of those who constitute the jurisdictional bodies.

In particular, three central issues essential for Mexican democracy are analyzed. First, the change in the criteria to consider appealable before the electoral jurisdiction the acts corresponding to administrative or government decisions of the Legislative Power. In this regard, the new interpretation considers it

---

order to then verify whether or not the guarantee of judicial independence of its members was violated and if they were left vulnerable to the interests of the bodies politicians of the Mexican State and if, therefore, the autonomy that should be the basis on which a supreme body of these characteristics must act was violated". Mejía Garza, Raúl Manuel y Rojas Zamudio, Laura Patricia, *El acto político de ampliación del periodo de duración de cuatro magistrados de la Sala Superior del Tribunal Electoral avalado por la Suprema Corte. Acción de inconstitucionalidad 99/2016 y su acumulada 104/2016.* Available at: *https://archivos.juridicas.unam.mx/www/bjv/libros/13/6499/27.pdf*.

sufficient, in order to update the competence of the TEPJF, to claim the violation of the right to passive suffrage or any other related fundamental electoral right. Consequently, the contested act may be subject to review in the electoral jurisdiction.

This perspective grants wide discretionary power to the electoral courts, which can result in ideological biases in the assumption of competence, with the risk of arbitrariness or abusive judicial review. That possibility of unjustified assumption in topics of material competence reveals the need to delimit, through clear constitutional guidelines, the powers of the terminal or last resort courts. This delimitation should be made in order to avoid authoritarian jurisdictional intervention in matters that should be decided exclusively by another power of the State, and to prevent a detriment to the checks and balances of constitutional democracy.

The second area analyzed relates to the fact that sanctions imposed to public officials due to the promotion of the mandate revocation and the declaration of loss of an Honest Way of Living, and the resulting ineligibility for positions of popular representation, entail an extremely wide range of extralegal faculties and competences. These bring about a serious threat to the democratic electoral system since they allow for the self-assignment of powers beyond the Constitution. Consequently, the possibility of issuing arbitrary decisions unnecessarily increases, due to the lack of clearly defined guidelines and boundaries that constrain the political participation of the citizens. Also, there is an increased possibility of limiting other fundamental electoral rights, through sanctions that do not have a constitutional basis, and whose regulatory provision, being regressive, corresponds to the legislator.

Certainly, decisions issued by the highest electoral court, when they are systematically politicized to the detriment of the impartiality of the judicial body can turn into an authoritarian device disguised as legality aimed at removing from the contest the political opponents who do not agree with the ideology or the dominant interests of the members of a judicial body, or those derived from the political interests generated during the procedure of appointing each judging person.

Also the third issue analyzed in this paper examines the judicial ways to prevent the abusive judicial review in cases of political violence based on gender (VPG, by its acronym in Spanish), in order to define if, constitutionally, the up-dating of violent political conducts against women, would, in every case and due to their seriousness, lead to the application of the ultimate electoral sanction, such as the annulment of an election or else, that the inclusion in a list of those sanctioned due to VPG, only in cases of conducts considered serious, result directly in the deprivation of the right to be voted because of the loss of MHV.

Based on the mentioned issues, the research aim at to shedding light on the possible existence of an abusive judicial review in the strong sense. The same abusive review that, even in a weak sense, if corroborated, would require a col-

lective effort to promote institutional culture, to eliminate those anti-democratic judicial biases, through the necessary constitutional and legal changes that grant legality, certainty, and legal security to the performance of the members of the electoral judiciary in Mexico.

II. How Does the Capture of the Terminal Bodies Affect Democracy?

The so called procedural or formal democracy is characterized by describing democracy

> …according solely to the forms and procedures that are ideal to legitimize the decisions which are the direct or indirect expression of the popular will. Therefore it is defined, in other words, in accordance with the *who* (the people or their representatives) and the *how* of the decisions (the universal vote and the rule of the majority), regardless of *what* is decided.[2]

Nevertheless, in order to achieve an effective protection of constitutional rights it is necessary to recognize, in the dimension of formal or procedural democracy, only one of the elements that must be limited or controlled by the institutions and procedural guarantees created to protect those rights, since formal or representative democracy, when assumed as the whole democracy, risks to promote the tyranny of the majorities or the political blackmail of the parliamentary minority, thus leaving the Constitution submitted to the will of the legislative, or the judiciary.

Thus, the autonomous right of the exercise of the political representation position is conditioned in two ways: by reviewing the appointment under the principle of constitutional legality and the compliance of the secondary laws of the electoral process; and by controlling the legality of the creation of the secondary law and the accordance of the contents with the Constitution.

Now, if formal democracy constitutes a necessary but partial aspect of democracy, in which legislative, judicial, and governmental powers are legally limited, then the complement should be found not only in the judicial legitimacy of their appointment, but also in what relates to the content or substance of their decisions.

The limits established by the constitutional rights can be identified, according to Ferrajoli, as the "*sphere of the undecidable*: the sphere of the *not decidable that*, integrated by the rights to freedom that ban as invalid the decisions that

[2] Ferrajoli, L., Poderes Salvajes. La crisis de la democracia constitucional, 27 (2011). Ferrajoli maintains that this thesis is shared by most democracy theorists, such as H. Kelsen, Essence and value of democracy; J. A. Shumpeter, Capitalism, Socialism, and Democracy; N. Bobbio, The future of democracy; G. Sartori, Democrazia e definizioni; R. Dahl, Democracy and its critics; and M. Bovero, A grammar of democracy: against the government of the worst.

contradict those rights, and the sphere of *not decidable that not*, formed by social rights, that impose as due to the decisions aimed at satisfying them".[3]

Stated otherwise, the minimal notion of democracy should include not only the procedural aspects of the democratic system but also a clear commitment to follow high standard of protection of fundamental liberties and rights, such as: "the freedom of expression, the right to assembly, and association, as well as the universality of both active and passive voting rights". After all, these rights are directly related to free and authentic elections, and also to institutions capable of organizing, qualifying, and legitimizing the results of the electoral process.

Especially attention must be paid to the threat that the outgoing members of the political bodies of the Mexican state decide to capture the autonomous constitutional bodies and the judiciary, as a protective measure of the political interests of the group leaving power. The affected bodies can be mostly the members of the courts of last resort in whose appointment the outgoing groups participated, since that practice has become part of the anti-democratic tools surreptitiously used to systematically obtain favorable interpretations and resolutions.

Indeed, the seizure or capture of the autonomous bodies and courts of last instance, particularly of members of the electoral bodies, as organs that can review and, if necessary, protect their political interests, seems to head the list of priorities of the leaders or factual powers having those intentions.

On the contrary, as long as autonomous bodies or courts of last resort, specially electoral ones are not captured, they are considered the last defense line of constitutional democracy. Thus, the judiciary and the deference towards the legislative power, particularly when it acts as permanent constituent are balanced since the legislators exercise the political representation resulting from the elections, and the confirmation of democratic legitimacy of the popular election of the members of the legislative by the court, in the exercise of its specific constitutional powers.

In sum, as described by Zagrebelsky: "the legislator must resign to seeing his laws as «parts» of the Law, and not as the whole Law. *But he can expect, both from the justices and from the Constitutional Court, that they keep open the possibilities of exercising his right to contribute politically to the creation of the legal system*".[4]

III. The Abusive Judicial Review of Terminal Organs and Electoral Justice

In democracies that are identified as defective,[5] there are factual powers and actors which promote the capture of State bodies in order to have valuable

[3] *Ibid.* at 29. The highlighting is my own.

[4] Zagrebelsky, G., El derecho dúctil. Ley, derechos, justicia, 153 (1995).

[5] According to the "Democracy Index 2021", EIU. It should be noted that by the year 2022, even Mexico has been classified as a hybrid regime.

allies within the three traditional powers as well as in the autonomous constitutional bodies. That can happen even if the actors do not formally hold public power, and at the expense of the democratic system. The foregoing practice, in the case of terminal jurisdictional bodies, results in the granting of undue judicial advantages for those who have the support or internal sympathy, since the interpretative activity and the legitimacy of the judicial function are used to issue sentences that systematically affect the liberties in a constitutional election.

A typology to identify an abusive judicial review is proposed by Rosalind Dixon and David Landau,[6] for whom the tasks undertaken by judges in their possibly abusive cases are classified into two main categories. The abusive judicial review, in a "weak" sense, happens when the courts of last resort uphold the legislation, the exercise of regulation powers by the autonomous constitutional bodies, or the decisions of the executive. Those decisions are characterized by undermining the democratic armor or the preserve of fundamental rights, legitimizing the harmful acts of the political actors.

As to the "strong" sense, this kind of abusive review is characterized by the court itself taking the initiative of removing or undermining the democratic protections established in the Constitution of a country. Coincidentally, this exacerbated judicial activism occurs whenever there is a change in the political regime, which is tried to limited or restrained through judicial decisions that are frequently justified as "protective of the Constitution".

However, said democratic protections should always favor and not constrain fundamental electoral rights, and even less should they foster meta-constitutional powers of the terminal jurisdictional bodies, since in expanding on their own initiative the range of action of the judiciary, the scope of decision reserved to the legislative power could be invaded, which leads us to the recurring question, not yet satisfactorily elucidated: In a constitutional democracy who watches over the custodian?[7] Therefore, the democratic legislator must continue to act as the check, counterweight, and balance of the judicial power.

Thus, for example, guidelines should be defined for the effectiveness of political-electoral rights, the respect for the division of powers, as well as the duty of administrative and jurisdictional authorities to adjust their actions to what is strictly established in the Constitution and the law. With these principles it is possible to prevent the monopolization of the interpretation of the Constitution from generating the "politicization of justice" instead of the "judicialization of politics", but also to put aside the interference in the peaceful transmission of public power.

---

[6] *See* document visible in section III, *A Typology of Abusive Judicial Review: Weak and Strong Forms,* available at: *https://lawreview.law.ucdavis.edu/issues/53/3/53-3_Landau_Dixon.pdf.*

[7] *See* on the discussion between Schmitt and Kelsen on the guardian of the Constitution and the existence of a constitutional court, available at: *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjy6YSrtev6AhW2j2oFHRnBAxgQFnoECCgQAQ&url=https%3A%2F%2Fdialnet.unirioja.es%2Fdescarga%2Farticulo%2F27301.pdf&usg=AOvVaw0PuMf8ooEa7JE4Y0dox26I.*

Indeed, the control of constitutionality as argumentation and interpretation of the Constitution cannot allow everything, it requires the exercise of reinforced argumentation to decide, because, as Alexy states: "not only it is necessary for the courts to hold that these arguments are arguments of the people, but also for a sufficient number of people to accept, at least in the long term, these arguments as reasons for correctness".[8]

As can be seen, the hardest or most intrusive ways of judicial review can be an anti-democratic resource with a great advantage for the actors who control *ex ante* the courts of last resort. That is so in spite of the limits established by the Constitution to the exercise of powers and the corresponding field of competence, since tools of judicial interpretation are frequently used to modify or confer a different meaning to those constitutional limits or restrictions. Hence, there is a need to clearly reinforce the guidelines that would exceptionally allow to overcome the limits of the interpretative activity.

Precisely, in relation to the possibility that in some cases the courts can abuse the weighting of principles, or the deficiency in giving the reinforced reasons to distinguish the precedents, professor José Juan Moreso takes up Guastini's approach, in which two consequences can be observed, expressed as follows:

> a) Weighting is the result of a radically subjective activity. This is so, according to Guastini, because the axiological hierarchy between principles in conflict is the result of a value judgment of the interpreter and, for Guastini, value judgments have a radically subjective nature. This should not be strange, if we remember Guastini's general conception of interpretation, since any interpretive statement is, according to Guastini, the result of a volition (and, in that sense, presupposes a value judgment) and not of an activity of a cognitive nature.
>
> b) The weighting results in a form of what we can call legal particularism. Particularism is a widely discussed doctrine in general philosophy, but less discussed in legal theory… This is precisely the conclusion that Guastini drew from the fact that the hierarchies between principles are mobile and they are valid just for the specific case.[9]

Now, in the specific case of electoral constitutional jurisdiction in Mexico, the limit court is the Superior Courtroom of the TEPJF, whose specialized competence is established in the article 99 of the Federal Constitution, a pro-

---

[8] R. Alexy, *Ponderación, Control of Constitutionality and Representation*, in: Cátedra Ernesto Garzón Valdés 2004, Theory of Discourse and Constitutional Rights, México, Fontamara, 2005, p. 103. With these reasons, Alexy considers that the answer to the question about the foundations and reasons for privileging representation based on arguments over representation based on elections is fully answered, but establishes for its update the existence of certain assumptions as he concludes: "Discursive constitutionalism, as a whole, is an enterprise to institutionalize reason and correctness. If there are correct and reasonable arguments, as well as rational people, reason and correctness will be better institutionalized through constitutional review than without such review".

[9] José Juan, Moreso. *Conflicts between constitutional principles*. In: Neoconstitutionalism(s), 2006, Trotta, 103-104.

vision that empowers the court in the fifth, sixth, and seventh paragraphs, to rule in a definitive and unassailable way the means of contestation in electoral matter, as well as to determine the criteria of mandatory jurisprudence.

In turn, the binding force of the jurisprudence upheld by the highest jurisdictional body in electoral matters is provided for in articles 214 and 215 of the Organic Law of the Federal Judiciary.[10] It should be noted that the system of precedents was not incorporated in the aforementioned ordinance for electoral matters.[11] Thus the jurisprudence is established only by reiteration of the criterion in three sentences of the Superior Courtroom, by ratification of the proposals submitted by the Regional Courtrooms, or else by contradiction criteria between the courtrooms of the TEPJF.

Therefore, even if a relevant criterion could be established in a single electoral sentence, approved by a qualified majority of five votes, it would still need to be sustained in three uninterrupted sentences, in order to form a binding jurisprudence both for jurisdictional electoral bodies federal and local, as well as for the administrative authorities of both spheres.

Consequently, any modification to a mandatory jurisprudence must be made in a specific section of the modifying resolution, with the respective reinforced argumentative load. That is to say, it must be justified with technical rigor, and expressly state the interruption of the previous jurisprudence, with the reasons on which the change of criterion is based by the qualified majority. The foregoing is the minimum necessary for the limiting court to be able to legitimately deviate from a mandatory criterion approved by reiteration in three cases, since

---

[10] "Article 214. The jurisprudence of the Electoral Tribunal will be established in the cases and in accordance with the following rules: I. When the Superior Chamber, in three sentences not interrupted by another to the contrary, sustains the same criteria of application, interpretation or integration of a norm; II. When the Regional Chambers, in five sentences not interrupted by another to the contrary, hold the same criterion of application, interpretation or integration of a norm and the Superior Chamber ratifies it, and III. When the Superior Chamber resolves in contradiction of criteria held between two or more Regional Chambers or between these and the Superior Chamber itself…".

"Article 215. The jurisprudence of the Electoral Tribunal will be obligatory in all cases for the Chambers and the National Electoral Institute… Likewise, it will be for the local electoral authorities, when jurisprudence is declared in matters related to electoral political rights of citizens or in those in which acts or resolutions of those authorities have been challenged, in the following terms: Terms provided by the Political Constitution of the United Mexican States and the respective laws".

[11] As the Reform with and for the Judiciary points out, "the Court's judgments are strengthened so that all parties to the lawsuit can demand their compliance and thus protect the rights of the citizens more efficiently and quickly. In addition, this also prevents ministers from having to discuss the same issue several times so they can focus on continuing to strengthen and specify their constitutional doctrine… 4. Interruption of Jurisprudence. In order to strengthen the precedents of the amparo courts, the duty of the bodies to follow their own jurisprudence is strengthened. Thus, it is clarified that, although the courts are not obliged to follow their own jurisprudence, in order for them to deviate from them they must provide sufficient arguments to justify the change of criteria". Available at: *https://www.scjn.gob.mx/sites/default/files/carrusel_usos_multiples/documento/2020-02/Proyecto%20de%20Reforma%20Judicial_1%20%283%29.pdf.*

only in this way it is possible to inhibit the arbitrariness in the decision to abandon the original jurisprudential interpretation.

Establishing these mandatory guidelines for the TEPJF in the Federal Constitution would prevent the highest electoral justice body from modifying or abandoning a jurisprudential line, without giving adequate, necessary, and sufficient reasons to interrupt the jurisprudence originated by reiteration. Hence, abusive judicial review practices would also be inhibited, since a regulated and transparent procedure is required to change criteria, without it being sufficient for the respective justification to defend it only based on the particularities or requirements of the specific case. In that way, fluctuations in judicial criteria or decisions on controversial issues would also be prevented, without considering the respective deference to the members of the other constitutional powers or autonomous organs.

Definitely, depending on the specific cases, this type of modifications or abandonment of the criteria, coming from the highest jurisdictional body in the matter, represent a risk, to the extent that, through a systematic judicial activism, with some legitimacy, the distinctive checks and balances of the division of powers can be evaded, as well as the constitutional limits established for the exercise of the functions and powers of the electoral jurisdiction, to the detriment of fundamental electoral rights (DEF), and in contravention of the elements that define the Democratic Constitutional State of Law. Hence, the need, as identified by Bovero, to strengthen controls and guarantees in order to prevent the concentration and confusion of powers, even in borderline jurisdictions.[12]

As an epilogue to this section, it is convenient to state that, although this document refers specifically to the TEPJF, the characteristics of unjustified activism in a "strong" sense also work in non-judicial bodies, but with electoral constitutional autonomy and competence to investigate violations of the electoral law or materially jurisdictional functions, as in the case of the National Electoral Institute (INE). The changes or abandonment of criteria sustained by the electoral administrative authorities, previously used, must also pass through

[12] Bovero relies on Ferrajoli to warn about the "(in)civil society" groups that concentrate factual power. One way would be precisely the control of those who exercise the electoral constitutional review. The Italian professor points it out in the following terms: "To improve the democratic quality of a complex decision-making process, it is necessary to make it, in any case, even more complex, adding corrective control mechanisms and guarantee, oriented above all to protect it against the assault of the «wild powers», as Luigi Ferrajoli calls them: those powers that grow in (in)civil society through the accumulation and concentration of «*means*» of different kinds, devoid of restraints and constitutional limits… *To the extent that there is a great concentration and confusion of powers at the apex, the ascending sequence of the rules of the democratic game will be completely emptied of meaning, because the voter, instead of choosing, will be chosen, created, shaped, by the chosen ones.* In other words, the election runs the risk of becoming a mere rite of external legitimation. The electing citizen is no longer the beginning of the decision-making process. This process actually has a different starting point, located in the power of whoever has the preponderant means to be elected and re-elected indefinitely, and consequently presents a first decisive downward trait, that is, autocratic". M. Bovero, Una gramática de la democracia. Contra el gobierno de los peores, 159 (2002). The highlighting is my own.

the sieve of a reinforced justification, with technical rigor and express motivation to support the change of interpretation. Along with the foregoing, and for greater clarity, a specific section should also be included among the considerations that support an electoral administrative determination.

IV. The Constitutional Interpretation of the TEPJF and Democratic Responsibility

Constitutional interpretation can be defined as the "activity that the judge undertake to establish through a reasoning based on law, the meaning of a constitutional rule that is understood differently by the parties in a litigation".[13]

This first notion refers of course to the submission of a controversy to the decision of the constitutional court. However, in addition to the litigious nature, the essence of constitutional interpretation is the development of this activity based on the values and principles included in all constitutional provisions.

Díaz Revorio points out that the authentic specialty of constitutional interpretation consists in "the political rooting of the evaluations inherent to constitutional doubts and interpretative options".[14]

So, the presence of values and principles will be constant in all constitutional interpretation, especially if the role of the constitutional jurisdiction in the adaptation of these values and principles to social reality is considered, and of course, the possibility of provoking a change of course in that reality through the implementation of the interpreted norm.

Among other guidelines of constitutional interpretation,[15] Rodolfo Vigo identifies that of "respecting the relative stability of the precedent", in which the constitutional interpreter takes the burden of justifying the reasons for the change of criteria in the decisions made when dealing with similar cases.

"But this does not entail the propensity to the immobility of the jurisprudence". The best option would rather be the intermediate position that implies the reinforced justification, in each case, of the reiteration of the criterion or, on the contrary, its abandonment or modification.

Also, decisions need "to be properly based", since the ones of the constitutional judge being final, it is essential that for the study of the arguments on constitutionality to be exhaustive, coherent, and consistent. In addition, "the written expression of the logical reasons for a decision guarantees social control over arbitrariness and contributes to the legitimacy, the knowledge, and the adherence, or else to the criticism of those decisions by the citizenry", as well as to the dissemination and understanding of the constitutional norm.

---

[13] F. J. Díaz Revorio, Valores superiores y actividad interpretativa, Madrid, 40 (1997).

[14] *Ibid.* at 312.

[15] *See* Rodolfo L. Vigo, Interpretación Constitucional, Abeledo-Perrot, Buenos Aires (1993).

Then, as a necessary element for the due foundation and motivation, and for the same reason, for the use and respect of the precedent in all the sentences of the TEPJF, it is necessary to distinguish the divergence techniques from the reasons for the divergence. With respect to the first, the *distinguishing* technique serves to strictly interpret the norm that must be considered from the perspective of the precedent (it allows to differentiate the norm in order to make an exception). Whereas the technique of *overruling* consists of the rejection of the precedent. For both techniques, legal reasons are required to serve as a foundation. But the rejection of the precedent changes the core of the rule interpreted for the specific case, or for future cases.[16]

In addition to the justification for the abandonment of jurisprudence, it is necessary for the new interpretation proposed, in each sentence or precedent, to be also fully submitted to the pertinent verification, through the use of the three interpretative criteria in electoral matters, namely: grammatical, systematic, and functional, provided for by the federal adjective law (LGSMIME) applied by the TEPJF. Only in this way could the institutional and citizen demands to the country's highest electoral court be met, since a reinforced, contextual, and technically rigorous motivation is required to abandon the jurisprudence or precedents contained in previous administrative or jurisdictional determinations.

V. Fundamental Electoral Rights and their Effective Protection against Abusive Electoral Jurisdiction

The Establishment of a Specific Section in the Considerations of the Sentenced for the Reinforced Justification in Cases of Change of Criteria

The quality of the sentences issued by the limit or last instance courts is directly related to the consistency and the use of the best arguments to explain why a decision was reached and not another, since the legitimacy of the jurisdiction, according to Robert Alexy's idea, comes from argumentative representation, typical of deliberative democracies.[17]

---

[16] *See* R. Alexy, Teoría de la argumentación jurídica, Center for Constitutional Studies of the Constitution, Madrid, 261-266 (1989). Other authors specify and add on the rejection of the precedent, that: "the overruling technique allows changing a precedent in its «normative core» by applying the new precedent, either to the case under analysis (retrospective effectiveness) or, in most of the assumptions, to cases of the future (prospective overruling). Precisely, the prospective overruling technique is used when a judge warns the population of the imminent change that he is going to make in his rulings".

[17] *See* R. Alexy, *Ponderación, Control de Constitucionalidad y Representación*. In: Cátedra Ernesto Garzón Valdés 2004, Teoría del Discurso y Derechos Constitucionales, 99 (2005).

Given the need to improve the clarity and quality of the decisions of the courts of last instance, so that the citizens can qualify and understand the reasons that support the judicial determinations in relevant or border cases, it is necessary to improve the design, structure, and accountability of the model of electoral sentences in which the modification or abandonment of a jurisprudence or precedent is noticed.

The foregoing is attained through the inclusion of a specific section, before the thorough study of the matter, where the reasons for a new interpretation of the main issue contained in a jurisprudence or precedent are justified in an exhaustive, pertinent, and consistent manner, and also clearly exceeding the quality of the argumentation and the validity of the abandoned criterion. Otherwise, the principle of legal certainty and security to which citizens are entitled would be affected, and for the same reason the citizens could demand that this type of decisions go through a reinforced scrutiny sieve that avoids the political use of electoral justice.

Indeed, the structure of the sentence is essential for a consistent, brief and exhaustive justification of the decision made by any court. Among other fundamental and ordinary elements of the judgments there are: the background or context of the case, the considerations that support it, along with the ordered effects and the operative points of the ruling.

However, a broader and more specific argumentative structure is required for cases in which the constitutional bodies of last instance deal with crucial issues, such as the modification or abandonment of jurisprudence, given the relevant and extraordinary nature of this type of decisions. For this, it is proposed to include an express section in the considerations that support the decision in order to explain —with technical rigor and a reinforced argumentation, in a coherent and consistent way, and through superior quality arguments compared to those it intends to surpass— the reasons that justify the change of criteria, and where appropriate, the interruption of the respective jurisprudence.

In said structure of the decision, it should at least be made explicit why the political, institutional, and social context is different from the one that was presented at the moment when the original criterion was supported, and also why the new interpretation better protects fundamental electoral rights, emphasizing the quality of the arguments used and those that it aims to adopt.

Last but not least, it should be expressly stated why it is considered that an abusive or arbitrary judicial criterion is not updated by varying the interpretation of the criterion previously applied to solve similar cases, about which the citizens already had relative certainty and knowledge, in addition to the commitment to apply the new criterion in all cases to be resolved in the future, without trying to differentiate them in a forced or artificial way from other matters with similar legal problems, in order to avoid judicial decisionism.

Briefly, in order to achieve the verification of interpretation methods and the use of all plausible arguments to solve the specific case, it would be con-

venient to establish a sentence model containing a specific section of the considerations part, with the reasons for the modification of the jurisprudence, or where appropriate, the interruption and express substitution of the original motivation, or the abandonment of the precedent, as well as the demonstration of the superior quality of the novel argumentation with respect to the one that is abandoned, and the *reciprocal verification* of the methods of interpretation in electoral matters.[18]

VI. Threats for the Constitutional Democracy Due to the Judicial Decisions Systematically Unfair for Free Elections

According to the definition proposed by Rosalind Dixon and David Landau, a judicial decision is an act of abusive judicial review if it has a significant negative impact on the minimum core of constitutional democracy. It should be noted that this impact implies a deeper questioning than the one that is limited to ask whether an electoral decision can be considered partisan, in the sense of favoring a contending political option. Surely, identifying a pattern of favoritism in the sentences can affect over time their legitimacy and exceed fairness in the contest, but they will be abusive judicial decisions only if they make the elections *systematically unfair*.

Thus, in electoral cases decided through sentences with a deep anti-democratic impact, judges can distort the constitutional meaning and can often take

[18] On the subject of reinforced motivation, this paper follows the same normative-practical analysis methodology for the study of sentences and the reciprocal verification of interpretation methods as a structural part of judicial decisions, which is contained in Justicia Electoral en México. Avances y retrocesos a 20 años de la reforma electoral de 1996, Vlex, Mexico (2020). In the same context, when resolving the constitutional controversy 209/2021, in the session of June 1, 2022, the First Courtroom of the Supreme Court of Justice of the Nation determined the invalidity of the budget assigned to the National Electoral Institute (INE), for the 2022 fiscal year, after noticing that the Chamber of Deputies "did not strongly motivate the modification it made to the preliminary project that said Institute presented; coupled with the fact that such an adjustment compromises the functions of that autonomous constitutional body, which could result in a violation of fundamental rights of a political-electoral nature". It concluded that the controversial act lacked a reasoning that demonstrated that the resources assigned to the INE were, in principle, sufficient to pay the expenses generated in compliance with the constitutional obligations of that Institute. Based on these considerations, the First Chamber declared the 2022 Budget invalid, in relation to the resources assigned to the INE, and instructed the Chamber of Deputies to analyze and determine in public session what corresponded with respect to the preliminary draft of the budget presented by that autonomous body. Likewise, if the authorization of additional resources was deemed appropriate, the essential measures for the effective transfer of the resources to that Institute had to be adopted, or, in the event of a negative decision, "reinforced motivation of its decision had to be presented with technical rigor".

advantage of, or conveniently use, concepts and doctrines designed to protect liberal democracy. But they do so in a way that reverses their essential meaning, and turns them into tools to systematically attack substantive democracy and fundamental rights.

In the specific case of electoral matters, the jurisdiction of last instance holds constitutional legitimacy, the legal instruments, and the technique to decide cases of high social and political impact. However, it can undermine constitutional democracy when it conveniently changes the interpretations of the fundamental text, by omitting the protection of the fundamental electoral rights directly or indirectly involved in the controversy, or by repeatedly trying to justify new points of view with the use of arguments that are not the best to explain the evolutions, modifications, or abandonments of the jurisprudence, or the previous criteria.

Said forms of undemocratic judicial review can occur, among others, in the following ways: 1) the proposed interpretation is superficial or it incorporates the form but not the substance of the constitutional norms (the protection of the Constitution is invoked as a mere formalism); 2) the result of the interpretation is extremely subjective, since it includes and opts for certain elements of constitutional democracy, but omits others; 3) it is not contextual, and hence, it ignores the differences in the social and political context with respect to the original criterion; and 4) the purpose of the democratic norms and ideas is inverted, and for this reason, they have an opposite effect to the one previously sustained (the progressive interpretation of the DEF, among which the one of voting and being voted stands out).

As can be observed, the borderline courts that practice forms of abusive judicial review in general, and in particular in the case of the TEPJF, can use different methodologies of analysis or interpretative techniques as ways to try to reconcile the requirement of respect for jurisprudence or precedents, as well as the compliance with the elements to formulate ordinary legal reasoning, with anti-democratic effects. In other words, instead of simply ignoring it, they repeatedly cite the doctrine in a decontextualized way to reverse the purpose of democratic ideas, or else, they ignore and fail to apply existing jurisprudence, through the use of figures or concepts found in other countries, in a context where the existence of a differentiated legal or social framework, or local political conditions, make its use problematic.

Also, international doctrine or treaties are used in an ostensibly selective way, for example, by echoing interpretations that favor the interests of the political forces that have promoted the appointment of the members of the court of last instance. Therefore, the methodological inconsistency, in varying the meaning of the doctrine or jurisprudence to support forced interpretations, thereby achieving the expansion of the powers of the jurisdiction, or to impose sanctions or restrictions not provided for in the Constitution, constitutes a form of interpretive simulation for malicious decision making.

Thus, following the work of Dixon and Landau as applicable, the most effective forms of abusive judicial review will seek to be well reasoned and be more true to the legal reasoning process, with the aim of making it more difficult to detect if there are abusive motives in the decision. That is, the border court will increase efforts to achieve legal justification whenever it anticipates criticism or political opposition. However, in the specific case of the electoral precedent, the argumentative effort will be insufficient and questionable, if the reasons put forward in the enforceable judgments that support the modified jurisprudential criterion are constantly left subsisting, and it turns out that they are not interrupted or expressly defeated in the new interpretation.

Consequently, when the TEPJF makes a fundamental change in long-standing jurisprudence, on controversial issues, such as the imposition of sanctions on public servants consisting of the loss of an honest way of living and the respective political and legal disqualification, basically it is playing a role of an interested party in the strategy of the faction(s) whose interests it protects. This same function becomes a threat to constitutional democracy because in the hands of anti-democratic groups it represents a rationalized tool that, taken to the limit due to its systematic nature, leads to the modification of the original meaning of fundamental electoral rights and of the principles of free elections provided for by the Federal Constitution.

In other words, the electoral court of last instance, through the creation of extra-legal procedures, such as the one concerning the possibility of judicially ordering the registration of offenders, as well as through the consent for the high discretion of the first instance judges to analyze specific cases, basically confers on itself the power to veto *ex ante* from electoral contest the politically relevant persons. Consequently, the rules of electoral democracy, where everyone votes and can be voted for, are undermined in a dangerous and authoritarian way, without it being valid to prevent the registration of candidates for popularly elected positions, or to revoke the registration previously granted, due to the imposition of a sanction and/or legal, ethical, or political disqualification, not provided for at the constitutional level. As much as the intention is, paradoxically, the protection of the constitutional text, but through meta-constitutional restrictions.[19]

[19] Thus, for example, in the Contradiction of criteria 228/2022, resolved on March 7, 2023, the top court in México (SCJN) determined the existence of the contradiction of criteria with the Superior Chamber of the TEPJF, since the maximum court in the country considered that having an "honest way of living" is an invalid legal requirement that, due to its high subjectivity, cannot be evaluated as a condition for holding public office, while the TEPJF, in a restrictive interpretation of the Fundamental Electoral Right to be voted, considered that the members of the local and federal electoral jurisdiction were obliged to analyze and, where appropriate, declare unfulfilled this requirement of eligibility for positions of popular election, provided for in article 34.II of the Federal Constitution. That, of course, opened up the possibility that the people sanctioned with the loss of that quality will be considered ineligible for that only reason.

1. *The Legal Weakening of the Division of Powers (Case of Integration of the Administrative and Government Parliamentary Bodies)*

The Supreme Court of Justice of the Nation (SCJN) has indicated that the justiciability of acts of a parliamentary nature is feasible in the case of violation of the fundamental rights of legislators, but provided that explicit constitutional powers of the Legislative Branch are not transgressed.[20] That is, there is the possibility that a constitutional body can review acts of a parliamentary nature, but always exceptionally, since the idea is to make the right to passive suffrage effective in the performance of the position, but without interfering with the substantive functions of the legislative body. Especially, since the electoral courts are also limited by the constitutional principle of legality, which guarantees that all authorities abide by the assignments and responsibilities established by the Magna Carta itself.

So, when the court of last instance decides to deviate from a criterion supported by the two previous integrations[21] of the highest electoral jurisdictional body, and even from precedents on the justiciability of legislative acts, established by the integration in turn,[22] then it would have to deal not only with giving the best arguments in a specific section of the sentence structure, but also with expressly justifying why the political, economic, and social context is different from the moments in which the previous decisions were made. Additionally, it would have to explain how the new interpretation better protects fundamental electoral rights and respects the constitutional powers of the electoral jurisdiction and the division of powers.

Undoubtedly, in the case of the abandonment of the jurisprudence regarding the fact that the electoral tribunals lack competence to hear acts of parliamentary functioning, the TEPJF has the institutional responsibility of interrupting the jurisprudence. And it also has the argumentative responsibility of expressing why it now considers that the electoral political right to be voted held by the popular representatives is directly involved at the time of the integration of the administrative or government commissions of the legislative

[20] In A. I. 62/2022 (*interna corporis acta* doctrine) and (SCJN. ADR 27/2021) Amparo 27/2021, the SCJN has accepted the possibility of filing the amparo trial in the presence of intra-legislative acts that might violate human rights, such as fundamental electoral rights, with the clarification that parliamentary acts recognized in the Federal Constitution cannot be grounds for review to respect the balance of powers.

[21] Jurisprudence 34/2013, "Political-Electoral Right to Be Voteed. Its Guardianship Excludes Political Acts Corresponding to Parliamentary Law"; Jurisprudence 44/2014, "Legislative Committees. Its Integration Is Regulated by Parliamentary Law"; Thesis XIV/2007, "Trial for the Protection of the Political-Electoral Rights of the Citizen. The Removal of the Coordinator of a Parliamentary Faction Is Not Challenged (Campeche Legislation)".

[22] Criterion sustained in case file SUP-JDC-1212/2019.

body, for influencing the election, the proclamation or the access to the position of deputies or senators.

Likewise, the TEPJF must express in what way the integration of the internal commissions of the Legislative Power or its government bodies transcend the merely administrative parliamentary character, and why the acts of internal operation have a direct impact on the fundamental electoral right of performance of the individual legislators, since political-electoral rights belong to individuals and not to groups or collectivities.

Thus, for example, in the considering part of the TEPJF (judgment of January 26, 2022, issued in the file SUP-JDC-1453/2021, and cumulative), the justification is limited to indicating that the right to be voted is affected, "but the reasons for the decision contained in jurisprudences 34/2013 and 44/2014 are not expressly exceeded". Also, it is not justified why the rights exercised by individual senators are the same that correspond to parliamentary fractions, since it only maintains that they cannot exercise their right to vote or express their opinion in the appointment of officials, or express the reasons for the suspension of constitutional rights.[23]

Therefore, strictly speaking, if the express analysis of these aspects is omitted, the quality of the original arguments prevails, and what would actually be protected is the right of parliamentary groups to have representation in government bodies, more than the fundamental electoral right of legislators to be voted.

On this matter, if the jurisprudential line sustained by the TEPJF since its incorporation into the Federal Judiciary,[24] and at least until January 2021,[25] no longer considers parliamentary administrative matters as non-electoral, then the current integration of the judiciary of the Superior Chamber of the TEPJF should explain with the best arguments why the rejection of this criterion is alien to the mere political context of the current configuration of the legislative majorities in parliament. And it should also clarify why protecting

---

[23] In the following terms (TEPJF. SS, SUP-JDC-1453/2021 and accumulated): "Failing to consider the plaintiff in the formation of the Permanent Commission, without justified cause, beyond the fact that they are not part of a parliamentary group properly speaking, is to deny them the right to integrate that legislative body, which affects their right to be voted, in their exercise of office. *Preventing them from integrating that Commission, despite being a force within the Senate, means that they cannot exercise their right to vote, much less express their opinion individually or as a group*, in the appointments of officials, in the possibility of promoting constitutional controversies or expressing their reasons on the need or not to suspend constitutional rights". The highlighting is my own.

[24] Criterion sustained in case file SUP-JDC-1711/2006.

[25] Until January 2021, it has been considered by the Superior Chamber of TEPJF, that Parliamentary Law: "includes the set of rules that regulate the internal activities of the legislative bodies, the organization, operation, division of work, carrying out of tasks, exercise of attributions, duties and prerogatives of the members, as well as the relations between the parliamentary groups and the publication of their acts, agreements and determinations". Criterion sustained in case file SUP-JDC-10231/2020.

now, in the electoral court, the integration of administrative commissions or the parliamentary governing bodies "justifies the systematic suppression, at the local and federal level, of the due deference on the part of the electoral jurisdiction to the powers of the Legislative Power and to the Law of Congress itself", which characterizes constitutional democracies.[26]

On the other hand, it is evident that, if the quality of the arguments that support the original criterion is exceeded, which is perfectly feasible, legitimate, and reasonable for the electoral jurisdiction of last instance, as well as to meet the principles of legal certainty and security, it must be declared expressly the abandonment of TEPJF. SS, Jurisprudence 34/2013 and 44/2014, whose items are: "Political-Electoral Right to Be Voted. Its Guardianship Excludes Political Acts Corresponding to Parliamentary Law" and "Legislative Committees. Its Integration Is Regulated by Parliamentary Law". Because if the declaration of interruption of the jurisprudence is omitted, even when there is a pronouncement to the contrary by a majority of five votes, the consequence is contempt for them, and the implicit subsistence of the original arguments, given their argumentative solidity, to judge future cases.

Moreover, as was pointed out, a specific section of the considering part of the respective decision should include the best reasons for justifying the prevalence of the new interpretation, derived in turn from a different political context. Or else, to specify why, in specific cases, the criterion of the SCJN is set aside regarding the express powers conferred to the Legislative Power in articles 75 to 78 of the Constitution and in the Law of Congress, and which are the fundamental electoral rights that are restored individually to a legislator, to justify the repeated application of said novel interpretation until jurisprudence is established.

In short, the interference caused to the balance of powers by the abandonment of the criterion on the lack of express competence of the TEPJF to hear parliamentary administrative acts, without fully defeating the quality of the previous arguments, as well as the indifference regarding respect for the exercise of the express powers granted by the Constitution and the Law of Congress to the Legislative Power generates legal uncertainty not only for the citizens,

---

[26] In the public session of January 26, 2022 (minute 1.10.00 of the video), the Superior Chamber of TEPJF discussed the issues of change of criteria on the competence of the TEPJF to hear parliamentary acts (SUP-JDC-1453/2021 and SUP-JE-281/2021). In which essentially it was considered that "it was not necessary to interrupt the jurisprudence, since the *evolutionary analysis* of it allowed to distinguish the competence of the TEPJF to hear parliamentary legal acts that affect political rights ethical-electoral, from political or organizational acts". Likewise, on February 16, 2022 (minute 41.00.00 of the video of the session) in SUP-REC-49/2022, the same topic was addressed. These sentences originated TEPJF. SS, Jurisprudence 02/2022, under the heading: "Parliamentary Acts. They Are Reviewable at the Electoral Jurisdictional Headquarters, When They Violate the Human Right of a Political-Electoral Nature to Be Voted, in its Aspect of Effective Exercise of Position and Representation of the Citizenship". Available at: *https://www.te.gob.mx/IUSEapp/tesisjur.aspx?idtesis=2/2022&tpoBusqueda=S&sWord=44/2014*.

litigants, and other public powers, but also for the TEPJF regional courts and the electoral courts of first instance, since the jurisprudence in which the original incompetence criterion is contained remains in force. Therefore, the local and regional electoral jurisdictions may incur the undue judicial review of any legislative act by proceeding to the respective analysis with the mere mention in the lawsuit of the alleged violation of the right to perform the position.[27]

Said lack of interpretative clarity would be caused by the omission of establishing a certain, general and abstract criterion to judge on these complex issues in which the delimitation of the fundamental right to be voted and the constitutional faculties of the public powers are involved, and even those that correspond to autonomous constitutional bodies. It is the same lack of jurisprudential definition that is inexplicable and even questionable, in the performance of a specialized body on the matter, and therefore, generates the risk of updating a form of abusive judicial review by the top electoral court in an obviously undemocratic way.

2. *The Creation of Restrictions on Fundamental Electoral Rights in a Jurisdictional Area (Case Loss of Honest Way of Living by VPG)*

The first integration of the Superior Court of the TEPJF was characterized by the expansion of the DEF, even in borderline cases. Among other relevant issues, for example, the court determined that, in order to meet the eligibility requirements and be able to exercise the right to passive suffrage, it should be considered, when proving the honest way of living (MHV), that it is an *iuris tantum* requirement. That is, it is presumed fulfilled, unless proven otherwise.[28]

In the same sense, the country's highest electoral court, in jurisprudence 20/2002, essentially established that, in the case of someone who has committed a crime and has been sentenced for it, it is possible that, due to time

[27] This decision-making vocation of the current integration of the Superior Court of TEPJF can be expressly noted when it is argued that "the evolution of the jurisprudential line consists of analyzing whether in the controversy there is a right that is violated by a decision of the legislative bodies. That is, *to examine whether, in each specific case, there is the possibility that an act of a legislative body violates the right to be voted for whoever comes to this Electoral Tribunal*". *See* Judgment of SUP-JDC-1453/2021 and accumulated. The highlighting is my own.

[28] Additionally, the Superior Court of TEPJF considered that, in order to refute said legal presumption, a history of life and antisocial behavior must be reliably proven, added to the lack of means to subsist, derived from socially useful work, and without counting with sufficient economic solvency, since consuming satisfiers to live without acquiring them with the product of work, or with that which comes from goods of licit origin, suggests a dishonest life, since the law allows livelihoods that society considers decent and licit, disapproving those that do not fulfill such characteristics (SUP-JRC-440/2000 and SUP-JRC-445/2000, accumulated). This sentence would be one of the three that originated Jurisprudence 18/2001, under the heading "Honest Way of Living as a Requirement to Be a Mexican Citizen. Concept".

circumstances, mode and place of execution of illicit or administrative infractions, it could contribute in an important way to undermine that presumption of having an honest way of living. However,

> …when the penalties imposed have already been completed or extinguished and a considerable time has elapsed from the date of the conviction, the indication that tends to undermine the presumption pointed out is greatly reduced, because the offense committed by an individual in some time in his life does not define him or mark him forever, nor make his behavior questionable for the rest of his life.[29]

Nevertheless, the current composition of the Superior Court of TEPJF has modified those protective criteria of the right to passive suffrage by implementing de facto, in jurisdictional area, the cause of ineligibility due to the loss of an honest way of living in cases without that express constitutional restriction. And, on the contrary, they can unjustifiably affect fundamental electoral rights such as the freedom of expression of legislators under the constitutional principle of parliamentary inviolability and political participation, or even of the general public to express themselves on social networks.

Certainly, the regional courts of the TEPJF have considered, for example, that in the event of being penalized for VPG, since the offense is classified as ordinary or special, serious, it can directly result in the loss of an honest way of living, and therefore, the impossibility of being registered as a candidate in accordance with local law, or if one already has registration, the cancellation of the same.[30]

This stance has been taken up even for digital spaces, such as social networks, in order to review the conformity of the expressions of different citizens, some with the quality of public officials, with the constitutional limitations on discrimination and VPG. This consideration has resulted in protection measures and sanctions that have led to the loss of an honest way of living, and therefore, to the temporary ineligibility of the sanctioned person.

Nevertheless, these exclusive effects of the honest way of living are ordered discretionally, even when the infraction is proven, since the Superior Courtroom itself has considered that with the full updating of the VPG, "it is optional to deal with declaring the loss of the honest way of living". That is, said

---

[29] TEPJF. SS, Jurisprudence 20/2002, under the heading "Criminal Records. Its Existence Does Not Prove, by Itself, a Lack of Probity and an Honest Way of Living".

[30] In these terms, SUP-REC-911/2021 and accumulated was resolved by arguing that: "This Superior Courtroom considers that the defendant is not right because, contrary to what it affirms, the Xalapa regional courtroom did reason that the *questioned cause of ineligibility should not be applied automatically, but should be applied only for offenses classified as serious*. In this regard, the responsible authority considered that this ground of ineligibility must be interpreted in light of article 22 of the Constitution, to conclude that only in the case of infractions of gender-based political violence classified as serious —whether ordinary or special— it is proportionate that the person in question is ineligible". The highlighting is my own.

act makes it depend on other conditions such as non-compliance with the sentence itself, or the reiteration of the violent conduct denounced. Although, once again, not in all cases of recidivism the legal presumption of having an honest way of living has been considered overcome.[31] The drawback of this interpretative criterion is the margin of uncertainty that it generates, since it fails to establish, at the jurisprudential level, which are the parameters to consider the fully accredited conduct of VPG as mild or very mild, or which are the rules to follow to prove the recidivism of the behavior.

Here it is convenient to warn about the risk that the legitimate judicial discretion to interpret and apply the Constitution and the law to specific cases becomes an arbitrary or abusive review, when the elements that must be taken into account to consider the denounced conduct are serious or recidivist, and not just isolated, mild or very minor, since the opacity in the parameters prevents the formation of a solid jurisprudential line that gives confidence, coherence and consistency to the judicial criteria.[32] Especially since the deliberative legitimacy of judges is precisely based on compliance with the constitutional limits of their powers and democratic standards on the quality of the arguments or discursive elements used.

---

[31] Cf. SUP-REC-185/2020. Zongolic Case, Veracruz. In the aforementioned file, the Superior Court held that "the concatenated analysis of the behaviors [*was accredited in three sentences of the Electoral Tribunal of Veracruz, that he was not systematically summoned to the council sessions and neither did they answer his requests related to the exercise of his position in the three years that he had held it*] assumed by the Municipal President to the detriment of the appellant, the statements of the plaintiff and that the defendant did not irrefutably disprove the non-existence of the facts that were the basis of the offense, allows us to conclude that the Municipal President does exercise political violence against the appellant. In this way, the constitutional and conventional principle of equality and non-discrimination is protected". In this case, it is noted that the Superior Court, despite the fact that the systematic conduct consisting of VPG was accredited, failed to rule on the loss of the honest way of living (MHV), so with this omission it left the aforementioned presumption intact (the highlighting is my own).

[32] An example of this inconsistency is the criteria of the Superior Court, in the file SUP-REC-165/2020 (Tuxpan Case), to nullify hearings ordered by one of the regional courtrooms of the TEPJF, in relation to accredited acts of Political Violence based on Gender (VPG), in which it determined that it is not the corresponding OPLE (local authority) that must rule on the eligibility of a candidate, but the local court at the time of issuing the corresponding sentence. Likewise, that the accredited acts of VPG were not such, but an obstruction to the exercise of the position, and therefore, they did not actualize the criminal conduct foreseen in the criminal law, and for the same reason, it should also be left without effect the hearing ordered to the Attorney General of the State. "Without taking into account, much less dismissing, that the Xalapa Regional Court had already considered in paragraphs 111 to 116 of the sentence issued in file SX-JDC-199/2020, the accreditation of the VPG and the corresponding determination had already been the subject of analysis in the local instance. Especially since this decision had not been questioned, and so it had acquired finality". Therefore, the highest jurisdictional body determined to revoke, without any analysis of the evidence submitted and assessed by the local and regional instances, that the VPG did not exist, thereby incurring in the excessive exercise of its powers of review as a limiting body, by disregarding the constitutional principle of finality of electoral acts and resolutions.

Thus, the decisiveness of the electoral jurisdiction to interpret the constitutional and legal norms leads to systematically justify exceptions in specific cases, in which the reasons are non-existent or weak to explain the qualification of mild or very mild applied to the accredited conducts of VPG. Consequently, the door is opened for the federal and local administrative and jurisdictional electoral authorities to determine subjectively, on a cause of extra-legal ineligibility, and therefore, with signs of arbitrariness or judicial abuse, when generating the recurring exclusion, in judicial area, of citizens to participate in fully democratic exercises, such as elections for positions of popular election.

It should be noted that in the specific case of administrative procedures in which the imposition of the loss of the MHV (honest way of living) has been decided legally viable, the SCJN in the contradiction of criteria 228/2022, established that it should not be considered as a sanction provided for at the constitutional level nor could that quality be reviewed in the decisions issued in such proceedings.

In other words, the country's highest court established the majority opinion that the requirement of having an honest way of living, due to its ambiguity, is discriminatory and contrary to legal certainty, both for the recipients of the individualized norm, and for those who apply it. For the same reason, this criterion cannot be used as a restriction of a constitutional nature to access public office since, in any case, under the principle of reserve of law it is the responsibility of the democratic legislator to regulate it.[33]

Even the creation of tools and records of offenders, such as the list of those sanctioned by VPG (which has been justified as a measure of reparation and diffusion), has been a matter of dissent by the members of the Superior Courtroom of TEPJF. Above all, the dissidents emphasize the opacity in the effects of the registration, to generate the automatic perception about the defeat of the presumption of the MHV (honest way of living), and as a consequence, that the sanctioned be declared ineligible, since in the corresponding individual vote the warning is made about generating a judicial policy that implies the creation of a cause of ineligibility, the same that must be reserved to the Legislative Power, and not to the jurisdictional courts.[34]

Therefore, to avoid the abusive exercise of judicial review in cases of VPG, it is necessary to define at the constitutional level if the updating of violent political behaviors against women, due to its intrinsic seriousness, in all cases, will lead to applying the maximum sanction in electoral matters, such as the annulment of an election,[35] or that the registration in the list of those sanctioned

---

[33] *See* Stenographic version of the session of March 7, 2023, regarding the Contradiction of criteria 228/2022. At 7-53.

[34] *See* Particular vote of two magistracies members of the TEPJF in the file SUP-REC-91/2020 and accumulated.

[35] The nullity of the election by VPG, provided for in the local electoral codes, has also been the subject of debatable interpretations. Given the ambiguity of the elements that the electoral jurisdiction can take into account to determine the nullity of an election, even though

by VPG would have as a direct consequence the deprivation of the right to be voted for the loss of MHV, only in cases where the conducts had been considered serious. Or at least, to establish clear rules and parameters in the general laws of the matter,[36] so that the electoral jurisdictional authorities, local and federal, can objectively define (without biases that generate uncertainty) the updating of conducts of such seriousness, that if updated, there would be no possibility of correcting them, and also the mitigating factors that could solve or fix up this defect of nullity or ineligibility, in order to timely incorporate them into the democratic rules of the contest.

In conclusion, for legal certainty and security, the electoral jurisdictional bodies should apply fully identifiable and predictable criteria for citizens, for the sake of transparency, independence, and impartiality in their decisions, since before similar legal facts there must be the same legal consequences. In accordance with the general principle of law that can be seen in the aphorism: *ubi eadem ratio, idem ius* (where there is the same reason, there must be the same provision). Of course, that principle is not fulfilled in cases with VPG, in which the Superior Court of TEPJF has systematically maintained that, despite being fully accredited, the court must decide, case by case, in freedom of jurisdiction, if it warrants the express declaration about the loss of the honest way of living.

In other words, it would be enough that the responsible body, even when it has accredited the VPG, omits to declare the respective loss, to consider saved the presumption of the honest way of living, which of course opens an undesirable door to subjectivity, by not requiring a strict justification of why it is omitted, in those cases of VPG with a serious qualification, to declare

---

the requirements are met to consider this serious and determining conduct, in some cases it has been considered that the principle of conservation of validly held acts should prevail. Thus, for example, it was textually held in paragraph 134, of the judgment issued in case file TEV-RIN-24/2021 and accumulated, that: "derived from the resources SUP-REC-1388/2018 and SUP-REC-1861/2021, the Superior Courtroom of the Electoral Tribunal of the Federal Judiciary, established that it is not enough to update political violence based on Gender and the minor percentage difference to five percent between the first and second place, so that the nullity of an election is automatically declared" and further on, in paragraph 137, that: "although as the plaintiff argues, the stated expressions contain discriminatory language, they are not of sufficient entity to overcome or set aside the principle of conservation of validly executed acts, taking into consideration the circumstances of time, manner and place in which the acts of Political Violence Against Women in Reason of Gender occurred". That decision was confirmed by the Xalapa Regional Courtroom, as the acts of VPG were not decisive for the result of the election, November, 2021, in file SX-JRC-0532/2021.

[36] This was argued, for example, in case file SUP-RAP-138/2021 and accumulated, where it was established that: "in order to have defeated the presumption of showing an honest way of living in cases related to VPG, the administrative authority requires that a jurisdictional authority *previously not only declare the existence or commission of VPG, but also, in the same sentence, establish that the conduct merits the loss of the presumption of an honest way of living*" (the highlighting is my own). That is to say, it is enough that the respective loss is not declared expressly, to consider saved the presumption of the honest way of living.

the drastic legal consequence of the so-called "civil death". And with this, it contributes to the perception of arbitrariness by generating differentiated legal consequences for situations that must follow the same jurisprudential line regarding the seriousness of the conduct and the corresponding sanction.

3. *The Meta-Constitutional Expansion of the Jurisdictional Powers of the TEPJF (Sanctions to Public Servants for the Diffusion of the Revocation of Mandate and Creation of Causes for Ineligibility)*

In relation to citizen participation and the diffusion of the revocation of mandate, and in accordance with the provisions of articles 1 and 35, section IX, numeral 7, as well as 134, eighth paragraph, of the General Constitution of the Mexican Republic, it is noted that the rules relating to fundamental electoral rights must be interpreted to guarantee people their broadest protection at all times.

Moreover, all authorities, within the scope of their powers, have the obligation to promote, respect, protect, and guarantee human rights, among which are political-electoral rights related to voting in citizen participation processes. Also, within this framework of broad protection, and during the time that includes the process of revocation of mandate, from the call and until the conclusion of the conference, the dissemination in the media of all government propaganda of any kind must be canceled, as well as that which implies personalized promotion.

In this context, article 134, eighth paragraph of the General Constitution of the Republic, provides as an "express limitation for public servants", the use of public resources and institutional propaganda that implies their personalized promotion, "but not the possibility of disseminating the processes as that of revocation of mandate, nor the restriction to promote the participation of the citizenry in these exercises of direct democracy", as long as they do not carry out political proselytism.

The foregoing, because if we agree that the Mexican State is a democratic regime, then said acts must be understood within the activities that a public servant can validly carry out, since their purpose is to ensure the respect and integral exercise of that human right of political participation for the citizens.

Therefore, contrary to what has been resolved by the TEPJF,[37] by disseminating the process of revocation of mandate, through acts and demonstrations

[37] *See* SUP-REP-362/2022, judgment that: "B) confirms the contested decision, in accordance with the following: 1. they are existing violations of diffusion of government propaganda in prohibited period, during the mandate revocation process; personalized promotion and violation of the principle of neutrality, attributable to the indicated persons who act as holders of the Executive in different States of the Republic, as well as the hearings ordered to the Legislative Power of such federative entities; and *2. it binds the jurisdictional authorities in electoral matters, as of the notification of this executory, so that, in the commission of subsequent events, before the accreditation for the commission of illicit constitutional acts, should analyze the possible suspension of the presumption of the hon-*

related to inviting the vote and its diffusion to encourage the participation of the citizenry, it must be concluded that public servants do not incur any irregularity or violation of electoral regulations, nor of the principles that govern all electoral contests, since it is not about the use of public resources or political proselytism.

Certainly, article 1 of the Political Constitution of the Mexican United States establishes, among other protective aspects, that the norms related to human rights will be interpreted in accordance with the Constitution itself and with the international treaties on the matter, favoring in all the broadest protection to people, and in accordance with the principles of universality, interdependence, indivisibility and progressivity. Consequently, the State must prevent, investigate, punish, and repair violations of human rights, in the terms established by law. But it also has the obligation to restrictively interpret prohibitions or unjustified limitations on fundamental rights.

In relation to the aforementioned article 1, articles 6 and 7 of the constitutional text recognize freedom of expression and the press as fundamental rights. Therefore, in principle, the manifestation of ideas cannot be the subject of any judicial or administrative inquisition, unless morality is attacked, the rights of third parties are affected, a crime is provoked, or public order is disturbed.

Similarly, article 61 of the Federal Constitution guarantees the freedom of expression to the members of the Legislative Power, due to their function, considering as inviolable the opinions that they manifest in the performance of their positions, and even regarding possible sanctions, said article indicates that they can never be reprimanded for them.

Thus, in general, freedom of expression finds its limits in the rights of other people or other legal rights that affect society, including democratic principles and values, given that the restriction is justified as an exceptional measure that cannot be ignored or nullified in its core or legal nature.

Therefore, it is clear that as in the case of the other fundamental rights provided for in the Magna Carta, "the restrictions, duties, or limitations on the exercise of the right to free expression must be expressly provided" for in the Political Constitution. For this reason, this human right must be guaranteed by legal instruments to "avoid abusive or arbitrary impairment to the detriment of the possibility of expressing one's own ideas or thoughts". Under this protective perspective, the right of everyone to receive any information and to know the expression of the thoughts of others is better guaranteed, which is associated with the collective or social dimension of the exercise of this fundamental right.

In this matter, among other express constitutional restrictions on fundamental electoral rights, are those provided for in article 134, eighth paragraph, of the General Constitution of the Mexican Republic, which establishes that:

---

est way of living with respect to public servants whose responsibility is accredited, for the purposes of the requirement of eligibility" (the emphasis is mine).

> …propaganda, under any form of social communication, that is disseminated as such by public authorities, autonomous bodies, public administration agencies and entities, and any other entity of the three levels of government, must be institutional in nature and for informational, educational, or socially oriented purposes. In no case will this propaganda include names, images, voices or symbols that imply personalized promotion of any public servant.

Likewise, regarding the dissemination of the revocation of mandate, article 35, section IX, numeral 7 of the Magna Carta provides that the National Electoral Institute (INE) and local public bodies, as appropriate, will promote citizen participation and will be the only instance in charge of their diffusion. Also, it establishes that the promotion will be objective, impartial and for informational purposes, "without there being an express constitutional restriction so that citizens, even with the character of public servants, are prevented from disseminating and inviting to vote in the aforementioned revocation process".

Now, regarding the promotion of voting in federal electoral processes, articles 6 and 30 of the General Law of Electoral Institutions and Procedures (LGIPE) determine:

- The promotion of citizen participation in the exercise of the right to vote in federal processes corresponds to the National Electoral Institute.
- The Institute itself will issue the rules to which vote promotion campaigns carried out by other organizations will be subject.
- It is the obligation of the National Electoral Institute, among others, to ensure the authenticity and effectiveness of the vote, as well as to carry out the promotion of the vote and contribute to the dissemination of civic education and democratic culture.

In line with the normative framework invoked, it is observed that the Federal Constitution and the general electoral law establish that the promotion of citizen participation for the exercise of the right to vote in the process of revocation of mandate corresponds to the National Electoral Institute, but as it will be seen, such activity can also be carried out by other citizens, such as public servants. However, there are certain limits, since they cannot disseminate the exercise of citizen participation with public resources, nor carry out acts of proselytism or political propaganda.

Thus, in accordance with articles 1, 35, section IX, numeral 7, 61 and 134, paragraph VIII of the General Constitution of the Republic and also articles 6 and 30 of the General Law of Electoral Institutions and Procedures, and given that norms relating to human rights should be interpreted progressively (that is to say, without regressing on the benefits), it is possible to maintain that citizens in general, and public officials in particular, can carry out acts or demonstrations tending to disseminate and encourage citizen participation in the process of revocation of mandate.

This is so because public officials, among which are the members of the Legislative, Executive, and Judicial Powers, as well as the members of the autonomous constitutional organs, also enjoy the fundamental rights recognized by the General Constitution of the Republic for all citizens, with the restrictions established by the Constitution itself and the laws applicable to the specific case of the diffusion of the mandate revocation process and even the invitation to vote in it.

Therefore, it is feasible to conclude that, concerning the revocation of mandate, public officials are expressly restricted by the General Constitution of the Republic from proselytizing in favor of or against the head of the federal or local executive, as well as from disseminating the revocation of mandate with public resources, or through institutional propaganda that represents personalized promotion of the same.

Consequently, it is legally possible to maintain that, within the process of mandate revocation, federal and local public officials do not have the prohibition to carry out acts that disseminate it, with the aim to promote citizen participation in electoral processes, as long as said acts are in accordance with the principles of neutrality and impartiality, and the others that are governing the electoral processes, and in the event that any constitutional and legal violation occurs, the competent authority must take the appropriate legal measures to repress and penalize conducts that violate electoral regulations.[38]

Unconstitutionality of the Sanctions for Diffusion of the Revocation of Mandate

As has been seen, abusive judicial review, in the "strong" sense, is actualized when the limiting jurisdictional bodies make decisions to systematically remove or undermine democratic protections.

On this basis, if we agree that there is no fundamental right in favor of the exclusivity of the INE for the dissemination of the mandate revocation process, then it would have to be accepted that there is no constitutional basis to sanction citizens, who also have the quality of being public officials, for disseminating said exercise of citizen participation in use of their freedom of expression. About this topic, the SCJN has determined, in the contradiction of criteria 228/2022, that the legal requirements to access a position of popular election such as having an "honest way of living" cannot be considered an

[38] Similar considerations were supported by the Superior Court of the TEPJF, on the restriction of fundamental electoral rights such as freedom of expression in electoral matters, in the files SUP-JRC-342/2016 and accumulated. Essentially, it held the following: "it is not legally valid to restrict a fundamental right, such as freedom of expression, under the presumption that its exercise would violate constitutional or legal principles and norms, but, in any case, should *such exercise be privileged, and in the event that any constitutional and legal violation is incurred, the competent authority must take the appropriate legal measures to repress and punish conduct that transgresses electoral regulations*" (the highlighting is my own).

eligibility requirement, or a sanction, to suspend access to the position, given the great ambiguity to objectively determine its scope.[39] Especially since there is not, expressly, the jurisdictional competence of the TEPJF to determine or create a catalog of *ad hoc sanctions* to impose them on those who have been considered disseminators of the revocation of mandate.

Even more, in the case of legislators, there is also the principle of parliamentary inviolability. The same fundamental right must be understood progressively, to allow its exercise within the reinforced freedom of expression that the Magna Carta guarantees for popular representatives. That is, they can invite the population in general, and their representatives in particular, to participate in said process of revocation of mandate, since the involvement of citizens in the affairs of the Republic strengthens the links of popular representatives with their represented, as well as the exercises of transparency and accountability that characterize constitutional democracies.

In this context, imposing sanctions that are not expressly provided for in the Constitution or in the law implies an exercise of repression of democratic liberties and, for the same reason, the abusive exercise of the judicial function, since they expressly generate consequences of law tending to limit the fundamental rights of citizens, without the coercive exercise being duly founded and motivated.

Definitely, it is paradoxical that the limit constitutional body in electoral matters decides to bind all the jurisdictional authorities, so that they analyze and discretionally decide on the suspension of the eligibility requirement related to having a MHV for the commission of a "constitutional illicit", without specifying the scope, parameters, and limits, at least at the jurisprudential level, to have them accredited. With this effect of the sentence, political participation can be undermined discretionally, by preventing registration and the permanence of registered candidacies, under the sole argument of protection of the constitutional text and the democratic system.

By systematically sustaining this position, sight is lost of the fact that the main function of the electoral jurisdiction is, precisely, the effective, progressive, and comprehensive protection and guardianship of the fundamental rights of citizens with deeply democratic roots, such as the right to vote and be voted for, the primary objective that characterizes a democratic constitutional state of law, and not its restrictive interpretation.

---

[39] That reasoning, *mutatis mutandis*, invalidates the criteria of the TEPJF on the imposition of the sanction consisting of the "declaration of ineligibility, and the consequent refusal or loss of registration due to non-compliance with the requirement of having an honest manner of living, which, excessively, was granted as a meta-constitutional and discretionary power in charge of the local electoral courts or the federal electoral courts of the TEPJF in last instance", in cases in which the repeated contempt of a sentence is updated (SUP-JE-281/2021), for conducts of political violence based on gender that are considered to be of ordinary or special gravity by the respective jurisdictional body (SUP-REC-911/2021 and accumulated), or else, due to the dissemination of the mandate revocation process (SUP-REP-362/2022).

Additionally, with the unilateral expansion of the sanctioning competence by a terminal body such as the TEPJF, the principle of division of powers is also infringed, and the permanent search for power to control power, because by going beyond what is expressly authorized by the Federal Constitution, underlies the teleology that the end justifies the means, which of course cannot be legally sustainable, let alone democratic.[40]

VII. Concluding remarks

a) The outstanding moment of electoral justice is the protection of Fundamental Electoral Rights, which cannot be restricted for the sake of a supposed protection of the constitutional text, democracy and the guiding principles of the electoral process. Hence, it is up to the citizens to demand the full effectiveness of their rights, through the strengthening of the institutional culture and the critical review of the decisions of the terminal electoral court, as well as the request to the Legislative Power to modify the respective general electoral laws, in order to establish interpretative guidelines or constitutional and legal parameters that avoid abusive judicial review.

b) Out of respect for the principle of legality, electoral judicial activism must have limits, parameters, and guidelines. Therefore, when changing criteria, the terminal body must expressly state that the jurisprudence or precedent, as appropriate, is erroneous and, if necessary, declare its interruption, as well as expressly attend to the quality of the argumentation that is intended to be overcome with the new criterion, in order to avoid judicial decisionism for each specific case. Nothing is above the Constitution; no one is above the Constitution, not even the electoral constitutional judges.

---

[40] As noted in the case of the record of those sanctioned by VPG, with the creation of tools and records of offenders such as the Catalog of Sanctioned Subjects (CASS), the perception is generated automatically about the defeat of the presumption of the honest way of living, and as a consequence, that the sanctioned person can be declared ineligible, and for the same reason, a judicial policy implying the creation of a cause of ineligibility is also generated. The same should be reserved to the Legislative Power, and not to the jurisdictional bodies. Notwithstanding, the highest jurisdictional body with respect to sanctioned public servants has maintained this restrictive position of the DEF, arguing, in the judgment of June 8, 2022, issued in case file SUP-REP-362/2022 and accumulated, that: "As part of *a judicial policy aimed at complying with and enforcing the Constitution, this Court, as the limiting body and of the total legal order, deems it necessary to link all jurisdictional electoral authorities of the federal level and local, as of the notification of this determination; so that, at the moment of resolving the sanctioning procedures, said authorities analyze and, where appropriate, declare the suspension of the eligibility requirement consisting of having an honest way of living, based on electoral constitutional offenses committed by public servants*, when their responsibility for this type of constitutional violations is proven. In order to analyze and resolve such determination, they must consider the repeated and serious transgression of the principles of the Federal Constitution, the recidivism and fraud in the commission of the offense by the person public servant" (the highlighting is my own).

c) Abusive judicial review affects the democratic armor of Fundamental Electoral Rights, and therefore represents an internal risk to the democratic constitutional state of law. Tolerating judicial activism without limits, parameters, and/or democratic guidelines is the lure to allow the rule of judges, as well as the possibility of using the discursive legitimacy of the jurisdiction to decide what is constitutional in an arbitrary manner, and therefore, the patent that allows jurisdictional operators to act contrary to the general will agreed upon and consigned in the Constitution.

d) The *ad hoc reasons* for simulating motivation are basically fulfilling a role as an interested party in the strategy of the faction whose interests are being protected. That same function becomes a threat for constitutional democracy, because it represents a rationalized tool in the hands of anti-democratic groups, and taken to the limit, it leads to the alteration of the original meaning of fundamental electoral rights and the principles of free elections provided for by the Constitution.

e) When the TEPJF makes a fundamental change in long-standing jurisprudence on controversial issues, it is not feasible to consider it an evolution, but rather a rejection of the previous criterion and a possible case of abusive judicial review, when there is no argumentative exercise to overcome the quality of the previous argumentation or when the argumentative exercise carried out is insufficient to consider the new interpretation correct, and at the same time, the possibility of applying both criteria at the level of jurisprudence is left open, due to the omission of interrupting the previous one.

f) In this context, it is necessary to include an express section in the considerations that support the decision, in order to explain with technical rigor and with a reinforced argument, why the previous criterion is considered erroneous, as well as in a coherent and consistent manner, the reasons that exceed the quality or argumentative intensity of the previous criterion, and consequently, justify the change. In said structure of the decision, it should at least be made explicit why the political, institutional, and social context is different from the one that was presented at the moment in which the original criterion was supported. Likewise, why the new interpretation better protects fundamental electoral rights, and why it is considered that an abusive or arbitrary judicial criterion is not updated by varying the interpretation on which the state organs, citizens, and litigants had already certainty about the previously applied criterion to resolve analogous cases. In addition, the commitment to apply it must be assumed in accordance with the principle of universality of the argumentation rules. That is, the commitment to keep it in the future to resolve all cases, and only in a truly exceptional manner, distinguishing cases with similar issues, and assume the burden of expressly justifying the abandonment or the failure to apply the binding precedent.

g) The interference caused to the balance of powers by the abandonment of the criterion on the lack of express competence of the TEPJF to hear parliamentary administrative acts, without fully defeating the quality of the previ-

ous arguments, as well as the indifference regarding the respect for the exercise of express powers granted by the Constitution and the Law of Congress to the Legislative Power, generate legal uncertainty not only for the citizenry, litigants, and other public powers, but also for the regional courts of the TEPJF, and the electoral courts of first instance, since the jurisprudence in which the original criterion of incompetence is contained is still valid. Therefore, the local and regional electoral jurisdictions may result in the undue judicial review of any legislative act, by making the respective analysis with the mere mention in the lawsuit of the alleged violation of the right to perform the position.

h) Said lack of interpretative clarity regarding the justiciability of parliamentary acts at the electoral area would be caused, in turn, by the failure to establish a certain, general and abstract criterion to judge these complex issues, which involve the delimitation of the fundamental right to be voted on and the constitutional attributions of public powers or those of the autonomous constitutional organs. This lack of jurisprudential definition is inexplicable and even questionable in the performance of a specialized body on the matter, and therefore, it brings about the risk of updating a form of abusive judicial review by the terminal electoral body in an obviously undemocratic way.

i) In order to avoid the abusive exercise of judicial review in cases of VPG, it is necessary to define, at the constitutional level, if the updating of violent political behaviors towards women due to its intrinsic seriousness, in all cases, will lead to apply the maximum sanction in electoral matters, such as the annulment of an election. Or, if the registration on the list of those sanctioned by VPG, only in cases where the conduct has been considered serious, would have as a direct consequence the deprivation of the right to vote due to the loss of MHV. Or at least, clear rules and parameters should be established in the general laws of the matter, so that the electoral jurisdictional authorities, local and federal, can objectively define (without biases that cause uncertainty), the update of conducts of such seriousness, that if updated, there would be no possibility of correcting them, and the mitigating factors that could solve or correct this defect of nullity or ineligibility, so that the democratic legislator could timely incorporate them into the democratic rules of the elections.

j) For legal certainty and security, electoral jurisdictional bodies should apply criteria that are fully identifiable and predictable by state organs, citizens, for the sake of transparency, independence, and impartiality in their decisions, since in the face of similar legal events there must be the same legal consequence. This general principle of law can be verified in the aphorism: *ubi eadem ratio, idem ius* (where the same reason exists, the same disposition must exist). Of course that principle is not fulfilled in cases with VPG, in which the Superior Court of TEPJF has systematically maintained that, despite being fully accredited, the court must decide, case by case, in freedom of jurisdiction, if it warrants the express declaration about the loss of the honest way of living. Especially, since the SCJN has already determined the legal infeasibility of the MHV as an eligibility requirement or as an applicable sanction in administrative sanctioning procedures.

k) It can be stated that, in principle, any entity, organization, and physical or legal person could carry out the diffusion of the process of revocation of mandate and the promotion of the vote, as long as it is subject to the guiding principles of electoral matters, particularly those of neutrality and impartiality. The foregoing because it is not legally valid to restrict a fundamental right, such as freedom of expression, under the premise of exclusivity of the diffusion for the INE, but, in any case, such exercise must be privileged for all citizens, including those who serve as public officials, and, in the event that any constitutional and legal violation is incurred, the competent authority must take the appropriate legal measures to repress and punish any conduct that violates electoral regulations.

l) Based on the three main issues raised in this document, in which the current integration of the TEPJF looks like it moves away from the principles of electoral integrity, and so, the systematic action characteristic of "abusive judicial review" can be updated, it is necessary to warn that it is not enough to raise the discourse of the defense of the constitutional text to maintain legitimacy, trust, and credibility before society. Because you cannot protect the Constitution or democracy by violating them. As a result, regardless of the questioning of the exercise of meta-constitutional powers by the electoral magistracies of last instance, it is necessary to reform the Federal Constitution and the general laws of the matter, in order to establish guidelines, rules, and parameters that allow inhibiting judicial decisionism, which promotes the weakness of discursive constitutionalism and the argumentative representation of electoral judges, and even the politicization of justice. On this basis, to preserve democracy in Mexico, citizens must demand a greater institutional culture from the members of the electoral jurisdiction, as well as effective protection, through progressive interpretation, of fundamental electoral rights, guaranteed in turn through the coherence, certainty and predictability of judicial criteria.

Received: November 23rd, 2022.
Accepted: March 21st, 2023.