Suprema Corte de Justicia de la Nación

4 de diciembre de 2023
*Año **XXI,** no. 4,633*

Reporte sobre la Magistratura en el Mundo

(Reserva de Derechos: 04-2011-102610220300-102)*

Día Internacional de los Bancos

Argentina (Diario Judicial):

- **La Corte Suprema dejó sin efecto una caducidad decretada porque un expediente no se elevó a Cámara durante un año.** El fallo aclaró que no cabe extender al justiciable una actividad que no le es exigible y que su pasividad no puede ser presumida como abandono. La Corte Suprema de Justicia dejó sin efecto este pronunciamiento que declaró de oficio la caducidad de la segunda instancia respecto del recurso de apelación deducido por la actora, al entender que no cabe extender al justiciable una actividad que no le es exigible. En el caso, la Cámara Federal de Apelaciones de Posadas declaró, de oficio, la caducidad de la segunda instancia respecto del recurso de apelación deducido por la actora por considerar que, desde la última actuación tendiente a impulsar el proceso, había transcurrido el plazo previsto en el artículo 310, inciso 2°, del Código Procesal Civil y Comercial de la Nación, sin que el interesado hubiera realizado algún acto procesal impulsorio del procedimiento. En dicha decisión, los jueces advirtieron que si bien la elevación de los autos a la cámara era una actividad que incumbía al oficial primero del juzgado de primera instancia, "subsistía sobre el apelante la carga del impulso procesal, que le imponía instar la realización de los actos omitidos por aquel funcionario". La actora, sin embargo, alegó que se puso en su cabeza la carga de impulsar la causa pese a que el avance del expediente dependía exclusivamente de un trámite que correspondía al oficial primero del juzgado de primera instancia y que no había ninguna actividad pendiente a su cargo. De este modo, los supremos concluyeron que "no cabe extender al justiciable una actividad que no le es exigible –en tanto la ley adjetiva no se la atribuye-, sin riesgo de incurrir en una delegación no prevista. En otros términos, si la parte está exenta de la carga procesal de impulso, su pasividad no puede ser presumida como abandono de la instancia, porque ello importaría imputarle las consecuencias del incumplimiento de las obligaciones que corresponden a los funcionarios judiciales responsables". De las constancias surge que, el 10 de diciembre de 2020 y con motivo de la apelación de la sentencia, el juzgado de primera instancia dispuso conceder el recurso libremente y con efecto suspensivo, de conformidad con lo previsto en el artículo 251 del Código Procesal Civil y Comercial de la Nación. Asimismo, ordenó la remisión de los autos a la cámara federal de apelaciones, pero el juzgado omitió dar inmediato cumplimiento a la elevación correspondiente, la que recién se materializó el 12 de noviembre de 2021. "(...) la cámara, al concluir en que la demora en el envío de las actuaciones a ese tribunal no eximía a las partes de urgir la prosecución del juicio, soslayó lo dispuesto en el artículo

251 del Código Procesal Civil y Comercial de la Nación citado, que coloca en cabeza del oficial primero del juzgado de primera instancia la obligación de remitir los expedientes a la alzada una vez contestado el traslado previsto en el artículo 246, como así también, lo establecido en el artículo 313, inciso 3°, del aludido código", explicó el máximo tribunal. De este modo, los supremos concluyeron que "no cabe extender al justiciable una actividad que no le es exigible –en tanto la ley adjetiva no se la atribuye-, sin riesgo de incurrir en una delegación no prevista. En otros términos, si la parte está exenta de la carga procesal de impulso, su pasividad no puede ser presumida como abandono de la instancia, porque ello importaría imputarle las consecuencias del incumplimiento de las obligaciones que corresponden a los funcionarios judiciales responsables".

Perú (La Ley/Diario Constitucional):

- **Los argumentos del juez de Ica que declaró improcedente el indulto a Alberto Fujimori.** El juez de Ica a cargo del Primer Juzgado de Investigación Preparatoria debía ejecutar la sentencia que indultó a Alberto Fujimori (de acuerdo a la resolución de aclaración del TC), pero declaró improcedente la ejecución del indulto. En virtud a una interpretación del artículo 27 del Nuevo Código Procesal Constitucional (NCPC), llegó a la conclusión de que carecía de competencias para ejecutar el indulto a Fujimori. Aquí explicamos sus postura de forma sencilla. Leamos con mucha atención el artículo 27 del NCPC: en los procesos de hábeas corpus las sentencias estimatorias las ejecuta el juez o la sala que las expidió, sin necesidad de remitir los actuados al juzgado de origen. El artículo exige dos requisitos para la ejecución de una sentencia de hábeas corpus: 1. Una sentencia estimatoria (a favor del indulto) 2. Y al juez que la haya expedido. **1. Juez de Ica nunca estimó la demanda de hábeas corpus, la declaró improcedente.** Estimar significa aceptar o dar la razón: una sentencia estimatoria es un fallo a favor del indulto. Pero el juez de Ica nunca estimó la demanda de hábeas corpus, por el contrario, la desestimó (improcedente) en primera instancia. Por eso no podría ejecutar la sentencia, ya que el artículo 27 del NCPC exige que la ejecute "el juez que expidió la sentencia estimatoria". El juez de Ica nunca expidió una sentencia estimatoria. No se cumpliría el requisito 1 para ejecutar la sentencia. **2. En el caso, el juez (que ejecuta sentencia) del art. 27 es el TC (?)**. El TC fue quien expidió la sentencia estimatoria y tendría que ser el propio TC quien la ejecute, en virtud al artículo 27 del NCPC: "las sentencias estimatorias las ejecuta el juez o la sala que las expidió". Si el juez de Ica (prima instancia) y la Sala (segunda instancia) declararon improcedente el hábeas corpus, y solo el TC la estimó, le corresponde ejecutarla. En sencillo: quien expidió la sentencia a favor del indulto a Fujimori fue el TC, el TC debe ejecutarla. Sí se cumpliría el requisito 1 y 2 para ejecutar la sentencia. Así las cosas, el juez de Ica entendería que el NCPC hace referencia al TC cuando refiere al juez que haya expedido una sentencia estimatoria, en el caso de Alberto Fujimori. Por ende, los únicos que podrían ejecutar la sentencia sobre su indulto son los miembros que componen el TC.

- **Tribunal: no asignar labores efectivas al trabajador puede configurar un acto de hostilidad que lesiona su dignidad.** El Tribunal de Fiscalización Laboral (Perú) desestimó el recurso de revisión deducido por un estudio jurídico que fue sancionado en sede administrativa por incurrir en actos que lesionaron los derechos de una trabajadora. Dictaminó que no asignar labores determinadas al empleado puede lesionar su dignidad, pues ello limita su desarrollo personal y sus perspectivas profesionales. La recurrente fue objeto de un procedimiento administrativo sancionador luego que una de sus trabajadoras interpusiera una denuncia en su contra. La mujer alegó haber sufrido actos hostiles que afectaron su dignidad, luego que fuera reubicada en otra oficina de su empleador que no contaba con los medios necesarios para desempeñar sus labores. Aseguró que la decisión fue antojadiza e injustificada. Tras ausentarse unos días fue despedida disciplinariamente. En su contestación, la empresa aseguró que "no contaba con un puesto disponible en el lugar de labores para que la denunciante cumpliera sus funciones en los términos contractuales y que, sin embargo, con la medida buscaron evitar su despido. La intendencia le impuso una multa de S/ 9,450.00 soles al estimar que había incurrido en una infracción muy grave. En su análisis de fondo, el Tribunal observa que, "(…) es importante resaltar que cuando un trabajador se compromete a prestar sus servicios personales y subordinados, naturalmente, ello se debe corresponder con el ofrecimiento de funciones por parte del empleador. Y es que no solamente en una relación laboral está la acreencia de una remuneración, cuando se compromete con su contraparte laboral, no solo lo hace por la contraprestación económica que percibirá, dado que subyacen a su contratación, intereses de índole profesional y personal de igual, o quizás de más relevancia para el trabajador que el móvil económico referido". Comprueba que "(…) la lesión a la dignidad del trabajador, no solo supone el realizar actos que puedan interferir en el desempeño de sus funciones o a los supuestos descritos en la

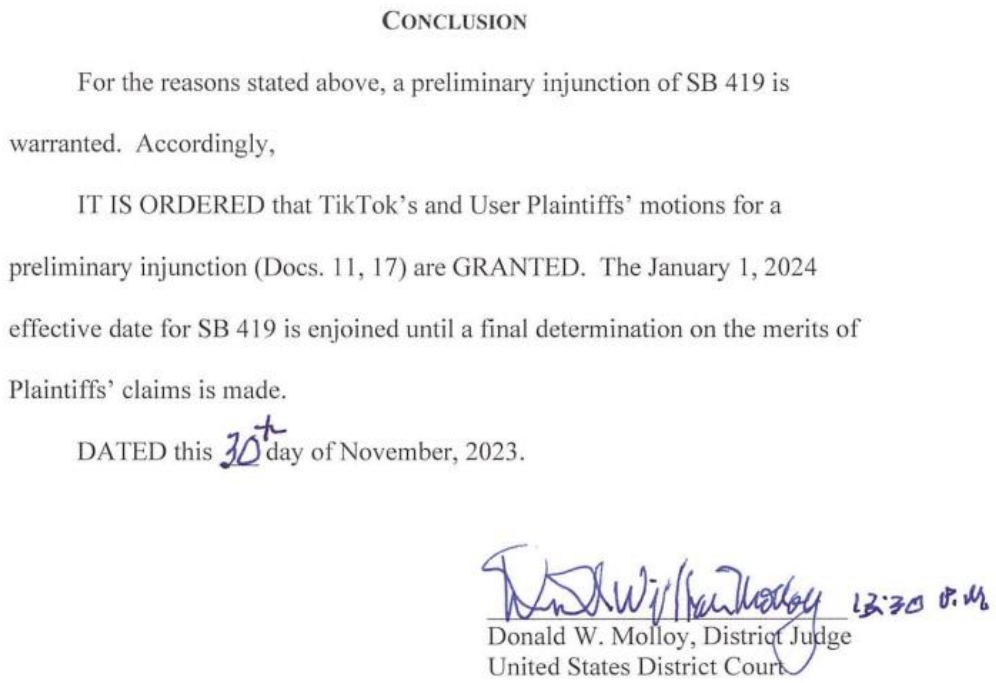
norma, sino que también se le agrede, cuando el empleador decide no encomendarle tareas a realizar, estando el trabajador en una inactividad profesional, que es contraria al desarrollo de sus capacidades y potenciales profesionales". Agrega que "(…) tomando en cuenta lo indicado por la doctrina, cabe indicar que el derecho a la ocupación efectiva sienta también sus raíces en concreciones de la dignidad de la persona como la protección de su profesionalidad, con lo cual, creemos que el menoscabo a su dignidad se materializa con la no designación de tareas a realizar que afecta su derecho de ocupación efectiva". El Tribunal concluye que, "(…) la impugnante ha vulnerado el derecho al trabajo, lo cual comprende no solo el acceso al empleo, sino también el derecho a la ocupación efectiva del puesto de trabajo, esto es, el derecho al desarrollo de la prestación laboral en forma ordinaria, siendo que realizar un trabajo supone un medio por el cual el individuo no solo logra obtener un sustento económico, sino también, consigue desarrollar su persona, su propio profesionalismo o su proyecto de vida". En mérito de lo expuesto, el Tribunal declaró infundado el recurso y confirmó la resolución impugnada en todas sus partes.

Estados Unidos (AP/RT):

- **Tribunal ordena a Texas mover barrera de boyas que suscitó el rechazo de México.** Texas tiene que mover una barrera flotante que instaló en el río Bravo y que suscitó el rechazo de México, falló el viernes una corte federal de apelaciones, asestando un duro golpe a una de las agresivas medidas del gobernador republicano Greg Abbott destinadas a frenar la entrada ilegal de migrantes en Estados Unidos. La decisión de la Corte Federal de Apelaciones del Quinto Circuito exige a Texas que detenga cualquier obra en la barrera de aproximadamente 300 metros (1.000 pies) y la traslade a la orilla del río. La orden ratifica la decisión que emitió un tribunal de menor instancia en septiembre, que Abbott calificó de "incorrecta" y había pronosticado que sería revocada. En cambio, esta semana el tribunal con sede en Nueva Orleans asestó a Texas una segunda derrota jurídica relativa a sus operaciones fronterizas. Una jueza federal el miércoles permitió que los agentes de la Oficina de Aduanas y Protección Fronteriza (CBP por sus iniciales en inglés) sigan cortando el alambre de púas que el estado instaló a lo largo de la orilla del río, a pesar de las protestas de funcionarios texanos. Texas ha afirmado durante meses que secciones del río Bravo (o Grande) no están sujetas a las leyes federales que protegen las aguas navegables. Pero los jueces argumentaron que el tribunal de menor instancia había dado correctamente la razón al gobierno de Biden. "Se tuvo en cuenta la amenaza para la navegación y para las operaciones del gobierno federal en el río Grande, así como la amenaza potencial para la vida humana que creaba la barrera flotante", escribió la jueza Dana Douglas en su dictamen. Abbott escribió en X que la decisión era "claramente errónea" y dijo que el estado buscaría de inmediato una nueva audiencia del tribunal. "Iremos hasta la Corte Suprema de Estados Unidos si es necesario para proteger a Texas de las fronteras abiertas de Biden", publicó Abbott. El gobierno de Biden demandó a Abbott por las boyas después de que el estado instalara la barrera a lo largo de la frontera internacional con México. Las boyas se ubican entre la ciudad fronteriza texana de Eagle Pass y Piedras Negras, Coahuila. Miles de personas estaban cruzando ilegalmente hacia Estados Unidos a través de esa zona cuando se instaló la barrera. El tribunal de menor instancia ordenó al estado mover las barreras en septiembre, pero la apelación de Texas aplazó temporalmente la entrada en vigor de dicha orden. El gobierno de Biden entabló una demanda en virtud de la Ley de Ríos y Puertos, que protege las aguas navegables. En un disenso, el juez Don Willet, designado por el expresidente Donald Trump y exmagistrado de la Corte Suprema de Texas, dijo que la orden de mover las barreras no disolverá las tensiones que, según el gobierno de Biden, han aumentado entre los gobiernos de Estados Unidos y México. "Si el tribunal de distrito dio crédito a las afirmaciones de daño hechas por Estados Unidos, entonces debería haber ordenado que la barrera no sólo se moviera, sino que se retirara", escribió Willet. "Sólo la retirada completa eliminaría la 'construcción y presencia' de la barrera y satisfaría las demandas de México". Casi 400.000 personas intentaron entrar en Estados Unidos a través de la sección de la frontera suroeste, que incluye Eagle Pass, el pasado año fiscal. En la decisión del tribunal de menor instancia, el juez federal David Ezra puso en duda la justificación de la barrera por parte de Texas. Escribió también que el estado no había producido "pruebas fehacientes de que la barrera de boyas instalada haya reducido significativamente la inmigración ilegal". Funcionarios de la CBP no hicieron comentarios por el momento.

- **Juez impide la prohibición de TikTok en el estado de Montana.** Un juez federal estadounidense impidió que entrará en vigor una ley que pretendía prohibir la red social TikTok en el estado de Montana, al dictaminar que esa norma viola los derechos de los usuarios a la libertad de expresión. El juez de distrito Donald Molloy emitió una orden preliminar para bloquear la prohibición de la aplicación, que iba a entrar en vigor el 1 de enero de 2024. En su fallo, argumentó que la prohibición estatal "viola la Constitución" en

más de un sentido y "se extralimita en el poder estatal". Molloy sostuvo que Montana podría asumir el papel de líder en la protección de sus residentes contra el daño que pueda causar TikTok, pero para ello debe "actuar dentro del contexto jurídico constitucional". Agregó que una prohibición de la aplicación de origen chino muy probablemente violaría la Primera Enmienda, referente a las limitaciones a la libertad de expresión, así como una cláusula que otorga al Congreso el poder de regular el comercio con naciones extranjeras. "El expediente actual no deja lugar a dudas de que el poder legislativo y el fiscal general de Montana estaban más interesados en perseguir el ostensible papel de China en TikTok que en proteger a los consumidores de Montana", escribió el juez en su dictamen, añadiendo que la "incursión" de Montana en asuntos exteriores "interpreta los intereses actuales de la política exterior de EE.UU. y se inmiscuye en ellos". TikTok vs. Montana. TikTok, propiedad de la empresa china ByteDance, presentó en mayo una demanda ante un tribunal federal de la ciudad de Missoula (Montana) para revertir la decisión del gobernador local, Greg Gianforte, de prohibir el funcionamiento y las descargas de la popular aplicación en el territorio del estado. "Desafiamos la prohibición inconstitucional de TikTok por parte de Montana, para proteger nuestro negocio y a los cientos de miles de usuarios de TikTok en Montana. Creemos que nuestro reclamo legal prevalecerá, con base en un conjunto extremadamente sólido de precedentes y hechos", anunció la red social en un comunicado. En la demanda, presentada contra el fiscal general del estado, Austin Knudsen, TikTok argumentaba que la nueva ley de Montana constituye una violación a la libertad de expresión y se basa en la "especulación infundada" de que el Gobierno de China podría acceder a datos de los usuarios y de que la red social expone a los menores de edad a contenidos nocivos.



CONCLUSION

For the reasons stated above, a preliminary injunction of SB 419 is warranted. Accordingly,

IT IS ORDERED that TikTok's and User Plaintiffs' motions for a preliminary injunction (Docs. 11, 17) are GRANTED. The January 1, 2024 effective date for SB 419 is enjoined until a final determination on the merits of Plaintiffs' claims is made.

DATED this 30th day of November, 2023.

12:30 P.M.

Donald W. Molloy, District Judge
United States District Court

tiktok pi final.pdf (documentcloud.org)

España (Poder Judicial):

- **El Tribunal Supremo fija que acoso sexual en sanciones administrativas y disciplinarias puede ser explícito, pero también implícito si es inequívoco.** La Sección Cuarta de la Sala de lo Contencioso-Administrativo del Tribunal Supremo ha dictado una sentencia en la que se pronuncia por primera vez sobre el acoso sexual en el ámbito administrativo y disciplinario, y fija que su sanción no exige que el comportamiento, físico o verbal, de naturaleza sexual sea explícito, sino que puede ser implícito, siempre que resulte inequívoco. La Sala considera que el apartado primero del artículo 7 de la ley Orgánica 3/2007 sobre igualdad efectiva entre mujeres y hombres, que regula el acoso sexual, no puede ser interpretado únicamente como contacto físico o como requerimiento de este mediante palabras. Tan es así "que ese precepto legal significativamente no dice que el comportamiento, verbal o físico, de naturaleza sexual haya de ser explícito. Hay formas de conducirse que, aun siendo implícitas, resultan inequívocas dentro

de un determinado ambiente cultural", subraya el tribunal. La sentencia, ponencia del magistrado Luis María Díez-Picazo, explica que, si bien la jurisprudencia penal sobre el delito de acoso sexual (art. 184 del Código Penal) puede servir de orientación en el ámbito administrativo, la definición del acoso sexual es más amplia a efectos disciplinarios que a efectos penales. Ello se debe -según la sentencia- "no solo a que el Derecho Penal opera solo contra las transgresiones más graves de los bienes jurídicos, sino también a que en la esfera disciplinaria se tutela también el correcto funcionamiento de los servicios públicos y, por tanto, pueden y deben sancionarse conductas que no serían penalmente reprochables. Esta mayor amplitud de lo disciplinario no supone, como se ha visto, merma de la exigencia de tipicidad". La Sala establece las características que deben concurrir en un comportamiento implícito para subsumirlo en la definición establecida sobre acoso sexual en dicha ley. A este respecto, señala que aparte de que se trate de un comportamiento "guiado o determinado por la libido o deseo sexual", se tienen que valorar al menos tres datos: "A) La existencia o inexistencia de aceptación libre por parte de la persona afectada. Además, incluso si hubiera consentimiento, un comportamiento objetiva y gravemente atentatorio contra la dignidad de la persona afectada podría constituir acoso sexual. B) El contexto (profesional, docente, etc.) en que el comportamiento se produce, valorando hasta qué punto la persona afectada ha podido eludir los requerimientos y las molestias. C) La dimensión temporal, pues a menudo no tiene el mismo significado -ni la misma gravedad- un suceso aislado que toda una serie sostenida y continuada de actos". El tribunal indica que estos elementos habrán de valorarse a la vista de las circunstancias de cada caso y subraya que se trata de criterios o indicios racionales de que un comportamiento es constitutivo de acoso sexual, sin que hayan de darse todos ellos cumulativamente. Confirma sanción a jefe médico por acoso sexual a subordinada. La sentencia confirma una sanción de suspensión de funciones durante seis meses a un exjefe del Servicio de Oncología del Hospital Universitario Fundación de Alcorcón por una infracción muy grave de acoso sexual continuado a una médico de dicho servicio, a la que nunca requirió expresamente favores sexuales, ni se propasó físicamente con ella. El caso examinado tiene su origen en una denuncia por acoso sexual presentada por una médico contra su superior basándose en "constantes muestras de atención no requeridas entre junio de 2016 y junio de 2018". Estas muestras se concretaban en convocatorias al despacho del jefe del Servicio por motivos no profesionales, llamadas de este al móvil y al busca, y trato diferente en lo relativo a la inclusión de fotografías en la página web del servicio y otras actividades de este. Tras abrirle un expediente disciplinario, el Rector de la Universidad Rey Juan Carlos, de la que depende este hospital, le impuso la citada sanción. Posteriormente, un juzgado de lo Contencioso-Administrativo de Madrid consideró que el pliego de cargos formulado en el expediente disciplinario no respetaba el derecho fundamental del sancionado a ser informado de la acusación, al no contener los elementos esenciales del hecho sancionable y de su calificación jurídica y, por consiguiente, no permitir el adecuado ejercicio del derecho de defensa. El Tribunal Superior de Justicia de Madrid, por su parte, descartó cualquier vulneración de este derecho y resolvió que hubo acoso sexual por más que el sancionado no requiriese expresamente favores sexuales de su subordinada, ni se propasara físicamente con ella. Disconforme con el fallo, el exjefe médico recurrió ante el Tribunal Supremo que ahora ha desestimado su recurso y ha confirmado la sanción. La Sala subraya que, "dado que la sentencia impugnada razona muy atinadamente que el comportamiento del recurrente estuvo guiado por la libido, fue continuado durante dos años y no tuvo ninguna clase de acogida por parte de la persona afectada, que además era su subordinada, no cabe sino concluir que la calificación como infracción muy grave de acoso sexual es ajustada a Derecho".

Israel/Gaza (RT):

- **Publican imágenes de bombardeo israelí al Tribunal Supremo en la Franja de Gaza.** Las Fuerzas de Defensa de Israel (FDI) bombardearon el domingo el Tribunal Supremo en la Franja de Gaza, informa Channel 12, que publicó imágenes del ataque. Anteriormente, The Times of Israel difundió una foto que muestra aparentemente a soldados de la brigada israelí Nahal en las afueras del edificio. Durante la noche del domingo al lunes, las FDI han atacado alrededor de 200 objetivos del movimiento palestino Hamás. El Ejército israelí también difundió videos de los ataques. Asimismo, aseguró haber destruido una instalación de Hamás ubicada en una escuela en la ciudad de Beit Hanun, desde la que se habría llevado a cabo un ataque contra las fuerzas del país hebreo.

De nuestros archivos:

- **A propósito del reciente fallecimiento de la justice de la Corte Suprema de Estados Unidos, Sandra Day O´Connor, este Reporte reproduce la conferencia que dio en el Tribunal Electoral del Poder Judicial de la Federación el 21 de octubre de 2008.**

THE JUDICIAL TRAINING INSTITUTE OF THE
SUPREME FEDERAL ELECTORAL COURT

International Seminar on the Interpretation of Fundamental Rights in Mexico and the United States
Mexico City, Mexico
October 21, 2008

Remarks By
Sandra Day O'Connor
Associate Justice, Retired
Supreme Court of the United States

"Fundamental Rights in America and the Right To Vote"

The United States has only two next door neighbors: Canada and Mexico. I have lived most of my life much closer to the Mexico side of our borders, for I was born in El Paso, Texas, and grew up on a ranch in Arizona and New Mexico. That experience gave me a great appreciation not only for the border, but also for the history and challenges that the United States and our neighbor to the south share.

In the 1860s, both Mexico and the United States were mired in deadly conflict. Mexico, of course, faced a threat from without -- in the form of the French Intervention. The United States faced a threat from within - a civil war - as the division over where, and then whether, to allow slavery pitted the northern and southern parts of the Nation against one another.

From these two struggles, two great leaders emerged. In the United States, Abraham Lincoln fought to preserve the young republic that he governed, and managed to succeed with an army that was itself full of divisions and short on qualified, dedicated soldiers. In Mexico, Benito Juarez fought to preserve the young republic that he had governed after Napoleon III -- the namesake of a famous general – deposed the government and installed his own minion.

President Abraham Lincoln and President Benito Juarez each share a place in the pantheon of their nations' heroes. They also shared a vision for each of their countries: a vision of an independent federal union with individual opportunity for all, free from slavery, and free from foreign invaders. Both Lincoln and Juarez were trained in the law and were strong advocates of individual liberty as guaranteed by a written constitution. As President Lincoln said, "[The Constitution] must be maintained, for it is the only safeguard of our liberties."
In my first dwelling on Virginia Avenue in Washington, D.C., my window provided a view of the magnificent statue of President Benito Juarez there. It is inscribed with Juarez's words: "Respect for the rights of others is peace." Each day, I drove past that statue on my way to the Supreme Court, and it served to remind me of two of the many interests that our two nations share on both sides of our common border: we share a common history of a struggle to gain independence and freedom from foreign rule; and we share a republican form of government backed by a written constitution reflecting the high value that we place on individual rights, and on opportunities and responsibilities.

In the United States, our high regard and respect for the individual is manifested most particularly in the first ten Amendments to our Constitution, which we call the Bill of Rights. Mexico's Constitution also guarantees various individual rights, many of which are similar to those protected in the U. S. Bill of Rights. For example, both nations provide for freedom of speech and of the press, the right of peaceable assembly, freedom of religion, and the privilege against self-incrimination.

The primary difference in the treatment of these guarantees of individual liberty in our two countries is in the nature and extent of their judicial enforcement. In the United States, both our state and federal courts can review governmental action that is alleged to infringe on individual rights. A single decision of any of those courts can not only provide relief to the individual whose rights are infringed, but also can determine the outcome of future actions in similar circumstances by virtue of the precedent which is established. Our courts can review legislation passed by Congress or the states to determine whether that legislation is itself constitutional.
In Mexico, by contrast, the weight of precedent of a single court decision seems to be less. Courts in Mexico, as I understand it, also lack a general power to invalidate laws or official acts of government -- although, through the writ of amparo, the courts can act in individual cases to enforce the constitutional rights of the particular applicant.

These differences in the power of judicial review lead to what is surely the most remarkable distinction between the judiciary in the United States and its counterparts in Mexico and in most other countries: judges in the United States are routinely called upon to address issues that would, in Mexico and elsewhere, be decided by the legislature or the executive.

Despite the differences in our governments, there is a great similarity in our goals. Both of our nations are committed to the cause of fundamental rights. This is an ongoing effort—it has no end. In the case of the United States, many of the rights we enjoy today were not part of our law when our country was founded. Instead, they have been developed since. For example, President Lincoln's war to preserve the unity of our Nation was fought to eliminate slavery. This was about a century after the United States declared its independence as a Nation in a document that described as a self-evident truth the proposition that all men are created equal. When that document, our Declaration of Independence, was written, all men did not mean all men, it meant

white men who owned property. Men did mean men, however; American women, white or otherwise, were not granted most of the rights that formed the basis of our Nation.

Today the United States does, of course, recognize and guard the equality of African-Americans and women, and indeed every one of its citizens. But we traveled a long road to get here, and as I mentioned, the journey never ends. Indeed, just five years ago, the Supreme Court once again took up the challenge of racial equality in law school admissions in a case called Grutter v. Bollinger, which challenged a so-called affirmative action program at the University of Michigan's law school. I authored that decision, in which the Court reaffirmed the importance of diversity in education. The case also illustrated that complex issues of racial equality, and civil rights in general, remain unsolved. I am certain that the same is true of Mexico's commitment to human rights. You can celebrate great progress, but must also recognize the problems that remain, and you like we must continue the work to secure human rights.

Now I'm sure you do not want to hear from me this morning a complete history of the evolution of civil rights in America. And that would take a bit longer than the time we have together. In light of your country's recent electoral reforms and the composition of the audience here today, I will focus on the right to vote. I also want to use the right to vote as an example of larger themes in the development of fundamental rights in America. The right to vote is a very appropriate example to use, because in American law, our understanding of the right to vote is often shaped by our commitment to other, distinct rights. For example, many of the controversies in our Nation's history involving the right to the vote have played out as struggles about equality and equal rights.
Moreover, America has recognized that the right to vote is special because it helps citizens protect all of their other rights. As the Supreme Court put it in a 1964 case I will discuss later, Reynolds v. Sims, "[e]specially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." That is, the right to vote in America is understood as a critical safeguard against the erosion of all liberties. So it is a very sensible place to start when thinking about fundamental rights in America.
The first thing I will say about the vote in America is that it is a great example of our country's Federalist structure, which balances power between our limited Federal government and our fifty independent State governments. Our Constitution sets forth a basic right to vote and leaves the details to the States. This is consistent with our Founders understanding of how power should be balanced between the federal government and the States.

Most disputes about elections involve State laws, and they are litigated in State courts. Not specialized courts, but almost always State courts of general jurisdiction. Again, this is true even when the candidates are seeking Federal office.

The problem with details is that there are a lot of them. Too many to list, especially as we are talking about fifty different States, each with its own election system. It would be a mistake to try to focus today on all of those details. Instead, I will move to a discussion of some overarching principles that have developed under American constitutional law and through momentous legislative initiatives. Do not forget, however, that elections in the United States are for the most part State issues.

I want to turn to two questions that seem simple: First, who has the right to vote? Second, what does it mean to have that right? The first question seems simple, I hope, because today it has only one defensible answer: every citizen of appropriate age must have the right to vote. That answer is dictated by our commitment to the idea of equality. Put simply, every citizen must be treated equally under the law. Equal treatment under the law means that if one citizen has the right to vote, all do. Yet as I have already mentioned, it took some time for our Nation to arrive at this understanding of equality. So, too, it took some time for all citizens to gain the right to vote.

In fact, the story of the right to vote in America must be understood as a story about equal treatment under the law.

African-Americans did not gain recognition as full citizens of the United States until our Civil War was fought in the mid-1800's to achieve that end. After the Civil War, three amendments to our Constitution were made in succession. The Thirteenth Amendment, ratified in December 1865, abolished slavery. The Fourteenth Amendment, proposed in 1866 and ratified in 1868, recognized African-Americans as citizens and guaranteed them "equal protection of the laws." Though it provided the States incentives to grant African-Americans the right to vote—specifically, it reduced a State's representation in the Federal Congress if the State failed to do so—the Fourteenth Amendment did not secure African-Americans the right to vote. The Reconstruction Act of 1867 made the extension of the franchise to African-Americans a condition of readmission to the Union for Confederate States, which was progress, but left northern States free to continue disqualifying voters on the basis of race. In any event, it fell far short of constitutional protection. That came only with the Fifteenth Amendment, which was proposed in 1869 and enacted one year later. It did not come easy, however. It passed mainly because former Confederate States were pressured to ratify the voting Amendment as a condition of readmission to the Union. Even after the Civil War was won, many fought to deprive African-Americans the right to vote. That right was won only through arm-twisting and political compromise.

When it was won—when African-Americans gained the right to vote—there was still a long way to go until the reality of the promise was realized. The same is true of the Fourteenth Amendment's guarantee of equal treatment. After the Civil War and the short "reconstruction" period that followed, many States took steps to deny African-Americans both the general promise of equality and their specific right to vote. Segregation was the main method for denying equality. Under the slogan "separate but equal," States enacted laws to separate African-Americans from other citizens in virtually all aspects of civic, political, and religious life. Separation was a reality, but equality was pure fiction. Facilities for African-Americans were almost always inferior, and segregation was in all but name a State endorsement of racial stigma.

In one of its darkest moments, in 1896, the United States Supreme Court failed to put an end to segregation. The case was called Plessy v. Ferguson. In Louisiana, white and black train passengers were separated by law, but Mr. Plessy defied that law by refusing to move from a "white" rail car to a "colored" rail car. He claimed that Louisiana's law violated his rights under the Fourteenth Amendment. The Supreme Court upheld his conviction, in an opinion full of sentiments that will, I hope, seem terrible and foreign today. It held that laws requiring the separation of the races "do not necessarily imply the inferiority of either race to the other" and were normally within the power of States to enact. As examples, the Court offered State laws segregating schools and forbidding interracial marriage—it thought that such laws were allowed under the Constitution. In fact, the Court thought that the legal separation of the races was not a problem at all because it had nothing to do with political or legal equality. If any such law created a "badge of inferiority" for African-Americans, it was, and I quote: "solely because the colored race [chose] to put that construction upon it."

Some states went and administered literacy tests at the polls in order to make it impossible for illiterate African-Americans to do vote. As a result, they were widely used in some States as late as the 1950s and 1960s. These tests were also often administered in racially discriminatory ways. For example, illiterate white voters might be given assistance completing their tests, while African-Americans were left on their own. Or white voters might not face the test at all.

As a last example, I will return to the poll tax, which I mentioned earlier. In 1877, Georgia enacted a poll tax to discriminate against African-American voters, who were disproportionately poor, often destitute. In short, they could not afford to pay to vote, and so they didn't. By 1904 every one of the former States of the Confederacy had adopted a poll tax.

We have so far seen that African-Americans gained the promise of equality and the right to vote after the Civil War, but they were still prevented from doing so for about a century. In practical terms, segregation was outlawed in 1954, in the landmark case of Brown v. Board of Education, which cast aside the mistaken judgments of Plessy. This is an oversimplification; of course, many incremental steps led up to that decision, and many more were needed to implement it. But in general terms, as a doctrinal matter, the segregation of African-Americans was outlawed by Brown, in which the U. S. Supreme Court held that "separate but equal" was unconstitutional as applied to public schoolchildren. It struck down the legal fiction that children of different races received the equal protection of the law even though they were forced to attend separate schools. This was a groundbreaking success for a vigorous Civil Rights movement that had labored for decades in the name of racial equality.

The Twenty-Fourth Amendment, ratified in 1964, banned poll taxes in Federal elections, and two years later the Supreme Court ruled that the imposition of a poll tax violated the Equal Protection Clause in any election, in a case called Harper v. Virginia Board of Elections. With the landmark Voting Rights Act of 1965, the United States Congress implemented a temporary ban on the use of literacy tests, which was extended several times before it was ultimately made permanent. Along with eliminating literacy tests and other similar tactics, the Act established a comprehensive framework for Federal oversight of elections in States that had demonstrated a record of disregard for racial equality. The 1982 amendments to the Voting Rights Act mandated that any voter who needs assistance because of illiteracy—or blindness or any other disability—is entitled to receive it from a person of his or her choice. Thus, as African-Americans gained increasingly equal treatment under our laws, they gained increasingly meaningful access to the ballot box.

We have come to the end of our story of African-American enfranchisement. I will note that a similar story can be told about women's struggle to gain access to the polls. Some critical details are different. For example, African-Americans gained superficial protections in law relatively early, as compared to women, but waited roughly a century for the meaningful implementation of those protections.

Women, on the other hand, waited much longer to gain the legal right to vote. In 1875, the Supreme Court ruled in a case called Minor v. Happersett, that the Fourteenth Amendment did not guarantee women the voting franchise. Over the succeeding decades, several States nonetheless granted women the right to vote, including Wyoming, Colorado, Utah, Idaho, Washington, and New York. My home State of Arizona amended its Constitution to give women the right to vote through a ballot initiative passed in 1912. I will pause here to stress again the theme of Federalism and the role of State innovation in advancing civil rights in America. In 1920, largely due to the example of these pioneering States, the women's suffrage movement secured the ratification of the Nineteenth Amendment, which finally guaranteed women the right to vote nationwide. Unlike the experience of African-Americans with the Fifteenth Amendment, for the most part, once the Nineteenth Amendment was ratified, women had meaningful access to the polls. But as with African-Americans, the struggle to secure equal treatment of women remains unfinished today.

What does it mean to have the right to vote? This is not an abstract, philosophical question; it is a practical one. For example, consider a State that divides its land into legislative districts of unequal population. One district might have ten times as many residents as another, but both would have the same number of representatives in the State government. In a sense, residents of the less populated district would be over-represented in their State government, and residents of the more populated district would be under-represented. That said, residents of both would nonetheless have the right to vote for their representatives.

The Supreme Court considered such a scheme in the 1964 case Reynolds v. Sims. Specifically, the Court confronted the question whether the disproportionate allocation of representatives in the

State of Alabama violated the right to vote. The Supreme Court held that it did, announcing a rule that has come to be referred to as "one person, one vote." In companion cases decided on the same day, the Court struck down similar State legislative districts in New York, Maryland, Virginia, Delaware, and Colorado. The Court explained:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. . . . [T] he right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. . . . It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a State law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of State legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.

As the Court stated, [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in State government requires, therefore, that each citizen have an equally effective voice in the election of members of his State legislature. Modern and viable State government needs, and the Constitution demands, no less.

Though the rule "one person, one vote" sounds simple, it has profound consequences. The Court's decision in Reynolds v. Sims required the restructuring of at least one House of the legislature in just about every State in the Nation. And it created a series of controversies testing the limits of the principle announced.
For example, as a mathematical proposition, how large a disparity is too large? And how is such a disparity even measured? Should the courts count the total number of people in a district, or only those eligible to vote? Clearly, there must be flexibility in assessing the size of the population deviations against the importance, consistency, and neutrality of the State policies alleged to require the disparities. That is, equal representation cannot simply be a matter of numbers. If not, however, how are these competing ideals weighed? The United States is still working through these many complicated questions, in its Federal and State courts. I doubt there will ever be a true end to the inquiry.

What is important to stress, however, is that our law has evolved to guard both the right to vote and the value of every vote. Every citizen must be granted a vote, and every vote must be counted equally. Though it took us some time to commit our Nation to these principles, they were well worth the wait. I hope Mexico will also work to protect these values.

I could end my remarks here. However, I do not want to leave you with too ideal a picture of elections in America. And I suspect that some of you would like to hear a word or two about the Supreme Court's 2000 decision in Bush v. Gore. So I will tell you about that case while presenting a third issue America continues to face. We have recently given much attention to the challenges of administering votes. I am speaking now of the nuts and bolts of an election—the nature of the ballot, the device for registering votes, systems to monitor the accuracy of vote counts, and processes for recounts when disputes arise.

I have told you that every State has its own system for administering elections. It gets even more complicated. Within each State, often the responsibility for administering elections is in turn delegated to a multitude of localities, each with its own system. As a result, when we discuss the

administration of elections in America, we are really talking about thousands of systems comprised of the various county and city entities charged with running elections in each of the fifty States. This decentralization creates some problems, though it also has its benefits. One major concern is ensuring that despite the many different physical voting systems, votes within a State are treated similarly and counted fairly. I don't mean counted fairly in the sense of "one person, one vote;" we can assume that every voter gets one vote. I mean counted fairly in the sense that the way in which votes are registered is fair—the manner in which an actual ballot is evaluated to determine the intent of each voter ensures that the voter has an equal opportunity to express his preference for a candidate.

Here is an example: Imagine a State with two voting districts, "A" and "B." District "A" is predominantly populated by members of political party "A." District "B" is predominantly populated by members of political party "B." Now imagine that party A controls the State government and gets the clever idea that people in voting District A should get to vote simply by circling their choice on a simple ballot that lists two names for each position to be filled. People in District B, however, will receive a blank piece of paper, on which they must write the complete names of every candidate of their choice, in the proper order in which the positions to be filled are ranked. If a voter misspells a candidate's name or fails to indicate a candidate for any of the positions, his ballot will be disqualified. As a result, many more votes from district "A" will be counted and candidates from party "A" will almost always be elected. This is a pretty extreme example, but it illustrates the point that the manner in which elections are administered can deprive citizens of their vote. The same would be true if the ballots were the same in both districts, but misspellings by the voter disqualified votes in only one of the districts, while in the other a poll worker would endeavor to determine if the voter's choice of candidate was clear despite a misspelling. In the extreme case where there is intentional manipulation, it is clear that the voters' rights are being violated.

The problem gets more complicated when we are not talking about intentional manipulation, but the opposite: a system for administering an election that applies arbitrary and different standards to count different votes. And imagine that we are not talking about the original count, but a recount of votes in only limited areas. This is roughly the problem the Court confronted in Bush v. Gore, and roughly speaking, we concluded that the recount procedures ordered by the Florida Supreme Court were so arbitrary and would result in such disparate treatment of voters as to deprive Florida voters of their fundamental right to vote.

Clearly, many people disagreed with our decision. Indeed, four of them were Supreme Court Justices. It is important to recognize, however, that regardless of one's opinion on the proper outcome, the problem we all perceived was ensuring that the administration of the vote and the recount in Florida would not effectively strip the State's citizens of their right to vote. It should be heartening that Americans cared so much about the specter of an inaccurate vote. It is a testament to our commitment to the franchise. Certainly the case exposed a major problem: our national elections depend upon the proper functioning of thousands of different systems, many antiquated, and the uniform application of standards is inherently difficult. However, in recognizing that problem, our Nation also committed itself to the development of a solution, and our respect for the value of the voting franchise in our society was reinvigorated. That is a good thing.

With its recent election reforms, Mexico also recommitted itself to the fundamental right to vote. Our nation's share this in common. I want to close today by stressing the importance of your judiciary in your endeavor, and in the protection of civil rights generally. Our Chief Justice John Marshall long ago explained the importance of the judicial branch in any society and the crucial need for an independent judiciary free from political or private pressure:

"The Judicial Department comes home in its effects to every man's fireside: It passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that [the judge] should

be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?"

I am sure that we do not always succeed in striking precisely the right balance between law and freedom. But we must never stop trying to strike that balance. Both north and south of our common border, we believe in law. At the same time, we believe in freedom. Each of these things, if unchecked, can destroy the other. It is, in the last analysis, the Judicial Branch that must preserve both law and freedom, keep each operating effectively for the common good, and assure justice.

Sandra Day O'Connor (1930-2023)

Elaboración: Dr. Alejandro Anaya Huertas

---

* *El presente Reporte se integra por notas publicadas en diversos medios noticiosos del ámbito internacional, el cual es presentado por la SCJN como un servicio informativo para la comunidad jurídica y público interesado, sin que constituya un criterio oficial para la resolución de los asuntos que se someten a su consideración y sin que asuma responsabilidad alguna sobre su contenido.*