

WHISTLEBLOWERS AND THE RULE OF LAW IN MEXICO

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The fundamental right to information is complemented by the right to protection for whistleblowers, who are public servants who leak information about governmental activities that they consider to be illicit or criminal. The right to protection for whistleblowers involves a series of legal protections with the following characteristics:

First, when public servants have reason to believe that their superiors or the government agencies where they are employed may be breaking the law, these protections give them the tools to reveal— or threaten to reveal— that information. In situations where those public servants are doctors or health care workers, the protections allow them to point out any inadequacies in the quality of patient care.

Second, whistleblower rights also allow public servants to provide information for or testify in any investigation, consultation or inquiry conducted by a legally authorized investigative body in regards to any violation of the law. This is also true in cases involving health care services.

Third, they oblige supervisors to keep whistleblower protection rights posted in a visible place in public workplaces.

Fourth, when public servants are fired for coming forward with information on official corruption or malfeasance, they have the right to file a civil suit for damages, and to be re-hired in the same or in a comparable position. The legal presumption is that the employee in question has been fired without just cause; the protections put the burden of proof on the supervisor to present evidence that, if the employee had not disclosed conduct that he or she believed was illegal, his or her job performance did not justify continued occupation of that position. (This safeguard is the primary legal tool to protect honest public servants who witness or have knowledge of acts occurring at the margin of the law or in violation of it).

Thus, government insiders who disclose information about violations of the law, serious cases of administrative misconduct in government, a serious threat to health, safety

or the environment, or a violation of human rights or humanitarian rights, should be protected against legal, administrative or workplace sanctions—as long as they have acted in *good faith*.¹

In Mexico, the very idea of the whistleblower is new, and there is little recognition of how important it would be to incorporate these protections into legal norms. Meanwhile, to fill this vacuum, people resort to anonymous leaks about the corruption that everyone knows about. Those who leak the information end up choosing this route because, for now, it is the only possible way to denounce corruption.

Compared to leaking information, establishing a structure to support and protect inside informants would seem to offer greater mechanisms for social impact, legal security and administrative relevance. However, this has not been the option chosen in Mexico, for two main reasons.

In the first place, the legal framework for these issues should be reviewed. In 2002, the Federal Law on the Administrative Responsibilities of Public Servants (*Ley Federal de Responsabilidades Administrativas de los Servidores Públicos* in Spanish) was published.² This new set of rules launched a new era in the governance of federal officials' responsibilities. It is worth emphasizing that this new law did not abrogate the 1982 Federal Law on Responsibilities, but instead sought to separate responsibilities that are simply administrative from those that carry legal weight, like political trials or legal declarations, both of which are handled by legislative bodies.

Article 8 lays out the new obligations, and Fraction XVIII establishes that public servants must, “denounce in writing to the Ministry or internal affairs office any acts or omissions that they have observed in their own course of duty involving any other public servant, that could constitute administrative responsibility as defined by the Law or other applicable statutes.” In other words, it limits denunciations to written accusations which can only be presented to the Ministry or its internal control office. Finally, Article 31 establishes that, “it shall be at the discretion of whoever resolves the matter to decide whether to suspend, dismiss or disqualify.”

¹ United Nations Special Rapporteur on the Freedom of Opinion and Expression, *Declaration on Access to Information*, December 6, 2004.

² Published in the *Diario Oficial de la Federación* March 13, 2002; the law has been in effect since March 14, 2002.

One of the reasons to reform the responsibility regime was to enhance the sense of trust and respect for what public officials do; as the legislator who proposed the reform said explicitly, this is important, given that their public image has deteriorated notably.³

So there have been relevant legal reforms, but none of them takes into account the protection of internal whistleblowers. Critically, they leave the decision of whether or not to address their charges to the discretion of the Ministry of Public Administration or the internal affairs department, which leaves citizens vulnerable.

Secondly, we should ask ourselves why the reforms of the law did not include whistleblower protections. Is this just ignorance about the issues on the legal agenda regarding international democratic standards, or is something else going on? The question does not allow for a simple answer; to the contrary, it is complex. There are elements of legal laziness and absence of imagination, but above all there is still a political culture that does not create incentives for this kind of reform. In a national survey on legal culture, Diego Valadés, Hugo Concha and Héctor Fix-Fierro argue: “The prevalent disregard for legal norms, and for the deep-seated ways institutions should function, is not just worrisome; it also leads to speculation about the existence of a culture of illegality, and the relative strength of informal institutions over formal ones. In other words, the domination of politics over the law in Mexico has not just perverted the functioning of the component parts of the Rule of Law, but has generated a culture that is contrary to the respect and sincere observance of the law.”⁴

In this sense, the struggle to include whistleblower protections in our legal framework is also a matter of transforming perceptions among the political class. There are those who might think that this approach would be tantamount to “rewarding disloyalty”, and it is necessary to explain the systematic benefits of these kinds of legal norms in the fight against corruption. In contrast, from the point of view of the governed, these reforms represent part of the move toward the right to access public information: it would constitute an additional or complementary source of information regarding the performance of public agencies, their leadership and staff, which would allow for increased public scrutiny of government activity.

³ Cámara de Diputados, “Exposición de Motivos que Reforma y Adiciona Diversas Disposiciones de la Ley Federal de Responsabilidades Administrativas de los Servidores Públicos” of the Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental and of the Ley Federal de Procedimiento Administrativo. **Drafted by Representative Arturo Nahle García** of the Parliamentary Group of the PRD. *Gaceta Parlamentaria*, núm. 1711_1, 14 March, 2005.

⁴ UNAM, *Cultura de la Constitución en México. Una Encuesta Nacional de Actitudes, Percepciones y Valores* (Mexico: UNAM, 2004) p. 21.

Between these two positions, it is necessary to coordinate efforts to raise awareness about the importance of whistleblower rights as a strategic tool for the right to know. Yes, legal reform is needed, but so is cultural reform, for this kind of initiative to be legally viable in Mexico. We are now at that turning point.