The suspension of political rights for criminal issues in Mexico

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Summary: *1. The political rights of Mexican citizens, 2. Constitutional cases of the suspension of the privileges of Mexican citizens under study 3. Background of the different fractions of constitutional Article 38, 4. The precedents of the courts of the Federation in criminal matters 5. The cases decided by the Electoral Tribunal of the Judiciary of the Federation; 6. Comparative jurisprudence, 7. Reflections on a new constitutional interpretation 8. Conclusions.*

1. The political rights of Mexican citizens

The relevance of political rights can be seen from the late eighteenth century coinciding with the change of paradigm on the organization of political power and the emergence of a new idea of representation that will revitalize the idea of democracy in the West. The change of status from subjects to citizens is accompanied by the recognition of a number of prerogatives that will take on the characteristic of universality in the following centuries. The right to vote will be extended and reach the profiles that we know today until well into the twentieth century, as evidenced in Mexico with the recognition of women's suffrage in the fifties.

The nineteenth-century charters realize the change that must undergo the rights of political nature. While the enjoyment of such rights or privileges have been

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limited in such texts and, where appropriate, reserved for the fulfillment of certain requirements, there have been very few restrictions. In the Mexican case, the exercise of political rights is for the Mexican citizens, i.e., Mexican nationals who are at the minimum eighteen years old and have an honest living.[1] The assumptions can vary due to the fact that the Mexican citizenship is not only obtained by birth within Mexican territory and having Mexican parents but also by different theoretical situations envisaged in the Constitution explicitly.

Unfortunately, it should be noted that political rights, even though in their basic context, have got a very different estimation and protection than other fundamental rights (the so-called "garantías individuales or Individual Rights") in Mexico. The fact that the Mexican amparo (injunction) is inappropriate for protection as well as the basic argument of such invalidity (the writ of amparo only protects the "individual rights" but not prerogatives of citizens) shows clear evidence of a distinction that served to leave totally abandoned to political rights which by definition are the indisputable basis of all democratic systems of government.

Effectively, it was not before 1996, i.e., 149 years after the establishment of a writ of amparo within the Mexican Federal Order, that in Mexico a tutoring jurisdictional mechanism of the political rights of Mexican citizens is established, actually, that is "the trial for the protection of political-electoral rights of citizens". Since then, not without some difficulties said trial has served more and more citizens, and especially, the militants of political parties to try to make their rights of participation in politics completely effective.

Additionally, it should be noted that the relationship between political rights and other fundamental rights is so inseparable, that the exercise of some is the prerequisite of others, especially, within a system of constitutional democracy. So, in order to participate in a competitive election process, for example, it is necessary for the voters to have access to plural sources of information. On the other hand, only a system of constitutional democracy guarantees the existence of effective mechanisms for the tutoring of the full exercise of freedom of expression and to information.

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1 On this particular see law thesis S3ELJ 18/2001 under MODO HONESTO DE VIVIR COMO REQUISITO PARA SER CIUDADANO MEXICANO. CONCEPTO. Available at: *Compilación Oficial de Jurisprudencia y Tesis Relevantes 1997-2005*, Pages 187-188. The thesis mentioned that the concept "refers to the appropriate behavior in order to enable the civil life of the people" or to be a "good Mexican."

The *Political Constitution of the United States of Mexico* establishes currently the prerogatives or rights and obligations of citizens under Article 35; however they may be related to rights under other constitutional provisions.

Article 35 of the Constitution of the United States of Mexico (CPEUM for its acronym in Spanish) provides:

The prerogatives of citizens:

I. Popular vote in elections
II. To be voted for all elected offices and appointed to any other office or commission being qualified as established by law
III. Freedom of association in order to take part peacefully in the political affairs of the country
IV. Take up arms in the Army or National Guard to defend the Republic and its institutions under the terms prescribed by law
V. Exercise the right of petition in all kinds of business

The common and ordinary meaning of Prerogative" is "privilege, grace or exemption granted to someone to exercise it, regularly attached to a dignity, employment or office"[2] the meaning of "privilege" is "an exclusive or special advantage of someone given by a superior or by own determination of their circumstances".[3] So, for example, popular vote in elections is an exclusive, special benefit of Mexican citizens, in other words, a privilege precisely for persons with such a citizenship. Ordinarily, the cited prerogatives are called "political rights". The Latin origin of the word suggests that the term comes from "praerogativa" which means "vote first" (praerogare) or comment before any other person.

However, not all political rights of Mexican citizens are required by the cited Article 35 of the Constitution. It is necessary to make a full reading of the federal Constitution and the laws of international origin that by Article 133 of the Constitution form parts of the Supreme Law of the Union in this matter.[4] The political rights of Mexican citizens as obtained by the full reading are to be announced as the following:

2 http://buscon.rae.es/draeI/SrvltConsulta?TIPO_BUS=3&LEMA=Prerrogativa

3 Ibidem.

4 Essentially, the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR).

a) Participate in public affairs, directly or through freely chosen representatives[5]
b) To have access, on general terms of equality, to public functions, i.e., to be appointed to any office or commission (other than elected office) having the qualifications established by law[6]
c) To have the right of freedom of expression and to information[7]
d) To gather in order to take part in political affairs[8]
e) To have the right of freedom of association in order to participate peacefully in the political affairs of the country[9]
f) To form political parties and affiliate to them individually in freedom and a peaceful manner[10]
g) To exercise the right of petition in politics[11]
h) Voting in elections[12]
i) To be voted for all elective offices, having the qualifications established by law[13]

It should be mentioned that this list is not exhaustive. As easily seen, there is excluded the right to bear arms to defend the republic and its institutions. In this regard, it should be highlighted that the doctrine has not been consistent in pointing out how many remain in the concept of political rights, which has allowed the development of several distinctions between these rights.

Section V of Article 99 of the Constitution has provided a basis to create a distinction of important practical effects[14] because it, as mentioned, it states that

5 Articles 25 ICCPR and Article 23 ACHR
6 Articles 35 CPEUM, 25 ICCPR and 23 ACHR
7 Articles 6 CPEUM, 19 ICCPR and 13 ACHR
8 Articles 9 CPEUM, 21 ICCPR and 15 ACHR
9 Articles 9 CPEUM, 22 ICCPR and 16 ACHR
10 Articles 41 and 99 CPEUM
11 Articles 8 and 35, Section V of CPEUM
12 Articles 35, Section I and 36, Section III, CPEUM, 25 ICCPR and 23 ACHR
13 Articles 35, Section II and 36, Section IV and V, CPEUM, 25 ICCPR and 23 ACHR
14 The listing of the Articles as mentioned above reflects the interest on: "Article 99. - The Election Tribunal shall be, except the provisions of Section II of Article 105 of this Constitution, the highest judicial authority in the field and specialized body of the Federal Judiciary. [...] The Election Tribunal must rule in a definitive and unassailable form under the terms of this Constitution and what the law provides on [...] V. contestations and decisions that violate the electoral-political rights of citizens as to vote, to be voted and to free and peaceful

it is the Electoral Supreme Court (TEPJF) to definitely and unassailably resolve on impugnation and resolutions that violate the rights of the citizens to election. If Article 41, section VI of the Constitution requires that the system of impugnation designed to ensure the principles of constitutionality and legality of the electoral acts and resolutions it will also ensure the protection of citizens' political rights to vote, be voted, to associate and affiliate, in terms of Article 99 of the Constitution, but does not expressly establish a subcategory of rights, i.e., political election rights.

From the above both in the *Organic Law of Judicial Power of the Federation* and the *General Law on the System on Electoral Impugnation Matters*, ordinary legislature created the aforementioned sub-electoral political rights, adding to the constitutional drafting a dash (-) that has led to restrictive interpretations. Thus, Article 186, Section III, Paragraph c) of the cited Organic Law Act prescribes that the TEPJF is competent to resolve in a definitive and unassailable way, among others, any disputes arising from acts and decisions that violate the "political election rights" of citizens when it comes to:

a) Vote in popular elections
b) Being eligible
c) Individual and free gathering in order to participate peacefully in the political affairs
d) Affiliate freely and individually to political parties

Article 79, Section 1, of the General Law above mentioned itself, provides that the trial exercised in order to protect *political-electoral rights* (JDC), only is possible if the citizens assert their alleged violations of their rights as the following:

a) To vote in popular elections
b) To be elected in popular elections
c) To have freedom of individual and free gathering in order to participate peacefully in the political affairs
d) To have freedom to affiliate freely and individually to political parties

affiliation in order to take part in national political affairs under Constitution and law terms .In order for a citizen to go to court to claim violations concerning political affiliation issues he would do it after previous exhausting of the settlement bodies under their internal rules .The law shall establish rules and deadlines [...]".

The federal legislature made a transcendental addition to section 2 of the cited Article prescribing the JDC also "admissible to process impugnation of acts and decisions of people who consider affected their *right to integrate the electoral authorities of the states.*"[15]

In other words, in 2007 the ordinary legislature recognized the existence of a ***political-electoral*** law different to ***traditionally*** recognized ones. It is a law that integrates the election authorities of the federal states which beyond doubt is nothing but a kind of generic political right of all Mexican citizens to have access to public functions, under general conditions of equality, i.e., to be appointed to any office or commission (other than elected office), having the qualifications established by law.[16]

A different issue and out of discussion in this speech is the determination of what are, in each case, the so-called election authorities.

So, also outside the discussion of constitutional right and it may be, it can be said that the legislation has drawn a distinction between political rights and political and election rights, the latter being a subset or subclass of the former. This subset would consist of rights to vote in popular elections to be voted in popular elections, to associate together individually to participate peacefully in political affairs and to affiliate individually and freely to political parties as well as to integrate electoral authorities of the federal states. This is the corpus of rights that finds protection through the aforementioned JDC, exclusively known by TEPJF.

2. Constitutional causes of the suspension of prerogatives of Mexican citizens under examination

Just as the Mexican Constitution establishes the political rights in detail it also provides for the suspension or loss of the same.

Article 38 of the CPEUM provides as following:

> The rights or prerogatives of citizens are suspended in case of:

15 Emphasis has been added.

16 Article 35, Section II, CPEUM, 25 ICCPR and 23 ACHR.

I. Failure to comply without justification any of its obligations under Article 36.[17] This suspension will last one year and shall be added to other penalties that could be applied at the same time by law
II. Being subject to a criminal trial for offense that causes imprisonment applicable from the date of the warrant of arrest.
III. During the extinction of prison sentence
IV. Through vagrancy or habitual drunkenness as declared by law
V. For being a fugitive from justice since the issue of the arrest warrant until the prescription of criminal proceedings and
VI. Through execution of sentence imposing a penalty such as suspension.

The law shall determine the cases of loss and others of suspension of the rights of citizenship, and the way of rehabilitation.

In this paper we will analyze the causes of suspension of prerogatives of citizens due criminal process and therefore will be excluded the analysis of the causes of sections I and IV.

So, after identifying the civil prerogatives as the so-called "political rights" (include the subcategory "political-electoral rights") the term "suspension of political rights" will be implemented indistinctly to refer to what the Article 38 of the Constitution provides as" suspension of privileges of citizens ". The question will be raised later whether the suspension provided in Article 38 of the Constitution deals only with the civil prerogatives (including necessarily the political-electoral) or also with the rest of the political rights as identified above.

So, now it will be analyzed the suspension of political rights for the following reasons:

[17] Article 36 of the CPEUM provides: "The obligations of citizens of the Republic: I. Enroll in the register of the municipality, stating the property they possess, the industry, profession or occupation by which they subsist as well as in the National Register of Citizens under law terms. The organization and ongoing operation of the National Register of Citizens and the issuing of documents to certify the Mexican citizenship are services of public interest so that the responsible ones are the Nation and the citizens under law terms. II. Enlisting in the National Guard. III. Voting in popular elections under law terms. IV. Performing the elective office of the Federation or State that in no case will be gratuitous. V. Performing counseling offices of the Municipality of their residence, electoral office and jury.

a) Under criminal trial for offense causing prison applicable since the date of issue of the arrest warrant
b) During prison term
c) Being a fugitive from justice since the issue of the arrest warrant until prescription of the sentence and
d) During extinction of a penalty of suspension expressly imposed by final sentence

3. Background of the different fractions of Article 38 of the Constitution

Here are some of the backgrounds that can be identified in the various Mexican regulatory bodies related to the causes of suspension of political rights that we would like to examine. The fact should be highlighted the fact that standards have been prescribed in order to suspend or deny the political rights to the citizens and primarily in times when our country adopted a centralistic state order.

a) *Under criminal trial for offense causing imprisonment from issuance of arrest warrant (Article 38, Section II):*

- Constitution of the Spanish monarchy which was promulgated in Cadiz on March 19, 1812: "Article 25. The exercise of these rights [of citizens] is suspended [...] Fifth: Due to process for criminal charges."
- Constitutional Laws of Mexico signed in Mexico City on December 29, 1836: "Article 10. The specific rights of citizens are suspended: [...] III. In case of criminal cause suspension is from the date of issuing an arrest warrant to the delivery of the acquittal. If the latter the interested was on the whole it may be considered to give the person in question the enjoyment of rights as if there had not been such a warrant of arrest, so that luckily it would not stop any kind of prejudice.[18]"

[18] Even they did not go further than being drafts it is important to note that draft amendments to the Constitutional Laws of 1836, dated in Mexico City on June 30, 1840, prescribed in Article 17, that "The citizen's rights are suspended: [...] III. For criminal cause from the date of writ of warrant of arrest until the detention of an individual in full and absolute liberty unless by previous suspension of citizenship because of the type of offence. "The

- Organic Bases of the Mexican Republic agreed by the Honorable Legislative Board and established under the decrees of 19th and 23rd December 1842, sanctioned by the Supreme Provisional Government under the same decrees of 15th June 1843 and published by the national side on 14th of the same: "Article 21. The rights of a citizen are suspended: [...] III. For being criminally prosecuted, since the act of imprisonment, or from the statement of having motives for the formation of a case to public officials to the sentence, if being an acquittal."
- First Draft Constitution of the Republic of Mexico dated in Mexico City on August 25, 1842: "Article 24. Citizen's rights are suspended [...] II. For criminal cause, from the date of issue of the arrest or statement is made have that there should be room for the formation of the facts, to the delivery of the final acquittal of the trial. " Incorporation and Amendments, sanctioned by the Extraordinary Constituent Congress of the United States of Mexico on May 18, 1847: "Article 3. The exercise of the rights of citizenship is suspended [...] under process on those crimes which cause the loss of the quality of citizen."
- Provisional Organic Statute of the Mexican Republic decreed by the Supreme Government on 15th May 1856: "Article 24. The rights of a citizen are suspended: [...] II. For being criminally prosecuted, since the ride by car heading for prison or from the statement that led to the formation of a case to public officials until sentencing, if being an acquittal."

It should be observed from the aforementioned that the regulatory provisions on the suspension of rights for or being criminally prosecuted or being subject to a criminal cause, is part of the recognition that the criminal justice system at the time implied the privation of freedom, that were related between the physical inability of exercising citizenship rights and the suspension of the same.

First Draft of the Political Constitution of the Republic of Mexico, dated in Mexico City on August 25, 1842, on its part provided in Article 24 the following : "The rights of citizens are suspended: [...] II. For criminal cause. It counts from the date of writ of arrest or declaration of reasons for the formation of facts until the statement the final acquittal of the trial".

As it will be discussed in the final reflection, the existence of these provisions left open the door to arbitrariness of those exercising governmental functions, because an indictment was enough for a public figure to see their stock rights restricted and, therefore, their potential political participation limited.

It should be highlighted that the Political Constitution of Mexico, sanctioned by the General Constituent Congress on February 5, 1857, prescribed in Article 38 that the law would set the cases and the form how to be lost and suspended the rights of citizens and the way of rehabilitation.

Thus, the constituent of 57 left the secondary legislature the task to determine the circumstances in which the rights of citizens would be restricted.

b) *During prison sentence (Article 38, Section III)*
While this reason in the constitutional backgrounds was not grounds for suspension of political rights, from the study of the same it can be seen that the sentencing positively was the ***cause*** of their loss, as well as shown in the following:

- Political Constitution of the Spanish monarchy, which was promulgated in Cadiz on March 19, 1812: "Article 24: The quality of Spanish citizen is lost: [...] Third: On the sentence imposing afflictive or infamous punishment, but when rehabilitation is obtained ".
- Constitutional Laws of Mexican Republic signed in Mexico City on December 29, 1836: "Article 11. The rights of citizens are completely lost [...] II.- By court order imposing infamous punishment."
- Draft Amendments to the Constitutional Laws of 1836, dated in Mexico City on June 30, 1840: "Article 18. Citizen's rights are lost: [...] II. By court order that imposes infamous punishment."
- First Draft Constitution of the Republic of Mexico dated in Mexico City on August 25, 1842: "Article 25. Citizen's rights are lost completely: [...] II. Court of law that imposes infamous punishment or by declaring a conviction of smuggling prohibited goods for the domestic industry or agriculture."
- Second Draft Constitution of the Republic of Mexico, dated in Mexico City on November 2, 1842: "Article 8. The exercise [of citizenship rights] is lost by a court ruling that infamous sentence imposed."

- Organic Bases in Mexico, agreed by the Honorable Legislative Board established under the decrees of 19th and 23rd December 1842, sanctioned by the Supreme Provisional Government under the same decrees of 15th June 1843 and published by the national side on the 14th of the same: "Article 22. The rights of citizenship are to be lost: I. In case of a ruling where infamous sentence is imposed."

Notably, in the texts cited above the suspension or, rather, the loss of political rights is directly linked to the charge with infamous penalties. It should be recalled that the latter take away the honorability or good reputation of whom condemned and consist of "attacking the fame or reputation of a person and consist in "attacking the fame and reputation of a person seeking to dishonor or discredit them indelibly and permanently with regard to others."[19] Under current Article 22 of the Constitution the imposition of such punishment as prohibited.

At this stage we have overcome era when the imposition of sentence was perceived as a kind of "vindicta publica", a public vengeance, and have adopted a system in which the offender's rehabilitation and reintegration into society after being released from prison become the motives to guide the punitive power of the Mexican state.

The reasons for suspension of the consistent political rights for being convicted, expressively imposed by sentencing and being a fugitive from justice, from issuing of arrest warrant to prescription of the prosecution are requirements dating back to 1917, since, according to constitutional precedent, they were not among the reasons to justify the suspension. In this sense, Venustiano Carranza said the following in his message to the Constitutional Congress to justify their constitutional proposals:

> I have the honor to propose a reform where on the occasion of the election law the suspension of the quality of a Mexican citizen to anyone who does not know to live up to the right of citizenship properly. The one, who does not care about the affairs of the Republic, whatever they might be, about other people, their own education or

[19] Law thesis 2a. LIV/2008, catagory: **OBRAS PÚBLICAS Y SERVICIOS RELACIONADOS CON LAS MISMAS. LA SANCIÓN PREVISTA EN LA FRACCIÓN III DEL ARTÍCULO 51 DE LA LEY RELATIVA NO CONSTITUYE UNA PENA INFAMANTE (PUBLIC CONSTRUCTIONWORKS AND RELATD SERVICES. THE SANCTION UNDER ARTICLE 51, SECTION III, RELATIVE LAW, IS NOT STATED INFAMOUS)**, *Semanario Judicial de la Federación y su Gaceta*, Novena Época, XXVII, May 2008, page 232.

> economic situation, is somebody who shows evidently a lack of interest in that, and this indifference should be punished with suspension of the prerogative in question.

The Chief Commander of the Constitutionalist Army identifies the two main reasons that made him propose the requirements of Article 38: firstly, the bad use given to citizenship and, secondly, the indifference towards the affairs of the Republic. In the latter, evidently Don Venustiano made reference to the fraction I of the referred Article of the Constitution that prescribed the prerogative of the citizen as to suspended in case of the unjustified lack of fulfillment of any of the obligations required by Article 36 as the following:

a) To enroll in the industry, to profession or subsistence work and also register on the National Register of Citizens
b) Enlist in National Guard
c) To exercise the elected offices of the Federation or the States
d) To serve in municipal council positions of residence, election and jury

In the opinion of the First Chief, who did not vote, being entitled to, or who did not take over office they had been elected to through popular election, or who refused to participate in the reception of the vote on election day, for example, like people , despite their quality of citizens, having little or no interest at all in the life of the Republic, did not deserve to keep that "grace" or "privilege" implied in the citizenship, i.e., the enjoyment of political rights. That lack of interest in the fulfillment of the obligations of every citizen justified, according to Carranza, the suspension of political rights of such careless persons.

However, essentially of this work is the interest in the fractions of Article 38 related to the suspension of the prerogatives of citizenship for criminal matters that justified the suspension of the privileges citizens by the brief statement of "not knowing how to make proper use of citizenship ". This phrase captures all the justification of political philosophy of the suspension of political rights. Accordingly, who has been issued an arrest warrant but not executed for evasion, or who was subject to criminal prosecution or who was sentenced to prison, over all these persons comes (not the presumption but) the sentence of "not having made proper use of citizenship."

It should be noted that in the original text of the Constitution of 1917 was enshrined as a fundamental right also called "freedom on bail" which was understood as a measure "precautionary" in favor of the accused so that during the criminal trial, he enjoyed freedom. Clearly, their inclusion in the constitutional provision was intended to recognize such a preventive measure a fundamental right enjoyed more easily than the accused, avoiding prior judicial practice in which bureaucratic simplicity shook the enjoyment of that right.

From practical reform on this issue in Article 20 of the Constitution, in 1948, has outlined the most beneficial practice, but also more rigorous, this precautionary measure, in order to comply fully with its purpose, i.e., to enable that the defendant follow the release process.

This should be considered when attempting a systematic interpretation of Article 38, Section II, the federal Constitution as not to lose sight of the release of the accused has been perceived as a constitutional value protection, even in situations in which a person is subject to criminal prosecution.

4. The precedents of the courts of the Federation in criminal matters

In comparison to other issues, there are just a few precedents of the criminal courts of the Judiciary of the Federation (PJF for its initials in Spanish), in relation to the suspension of rights. The systematization of the aforementioned precedents according to the various sections of Article 38 of the Constitution are interpreted as following:

- *Being under trial for a criminal offense punishable with corporal punishment, since the date of issuing an arrest warrant (Article 38, Section II)*

a) In November 1924, the Plenum of the Supreme Court established in an isolated thesis that the suspension of political rights by virtue of the provisions of Section II of Article 38 of the Constitution, "is of public order, and therefore, it cannot be interrupted by suspension through an amparo."[20]

[20] **DERECHOS POLITICOS (POLITICAL RIGHTS)**. Weekly: *Semanario Judicial de la Federación y su Gaceta*, Quinta Época, Instance: Plenum, Volume XV, Page: 1163, Seperate Thesis, Matter(s): Common

b) In February 2005, the Criminal Court issued a precedent that would result in the case I.6o.P. J/17[21] which stated that, in respect of Section II, Article 38 of the Constitution, no citizen's rights would be suspended before the issuance of a writ of attachment to the process, since the constitutionally imposed condition in order to operate the suspension is the existence of a formal arrest, if:

> the is linked to the existence of a sanctioned crime by corporal punishment or deprivation of liberty that deserves even preventive detention and even [in the case of writ of attachment to the process] the Code of Criminal Procedure in the Federal District, it is identified as that court decision issued to follow a cause for crimes that are not necessarily punishable by corporal punishment, such as those that demand only a fine, warning, among others, or alternative penalty, imposed to any person in liberty until reading of definite sentence. In this sense, if the constitutional provision expressly states and makes the restriction that the suspension of civil rights only is upgraded when an arrest warrant for a committed crime that punishes with corporal punishment had been issued, and there is a distinction between the arrest warrant and the trial attachment, in case of the latter not causing suspension of rights or prerogatives of the citizen under Article 38 as consequence, and supposing an attachment to trial was issued and the suspension of civil rights or prerogatives through issuing a sentence to imprisonment, then the suspension would be upgraded under the diverse fraction III of the said Article 38.

c) In June 2005 by the interpretation of Article 46 of the Federal Criminal Law, which states, that the suspension of political rights

[21] Catagory: **SUSPENSIÓN DE DERECHOS POLÍTICOS. ES IMPROCEDENTE DECRETARLA EN UN AUTO DE SUJECIÓN A PROCESO, EN TÉRMINOS DE LO DISPUESTO EN LA FRACCIÓN II DEL ARTÍCULO 38 DE LA CONSTITUCIÓN FEDERAL. (SUSPENSION OF THE POLITICAL RIGHTS. ADMISSIBLE ITS DECREE BY ORDER OF ATTACHMENT TO PROCESS UNDER THE TERMS OF ARTICLE 38, SECTION II, CONSTITUTION).** Weekly: *Semanario Judicial de la Federación y su Gaceta*, Novena Época. Instance: Circuit Courts (Tribunales Colegiados de Circuito), Volume XXVIII, August 2008. Page 996.

starts with the enforcement of the respective final sentence and will last throughout prison term, the Criminal Court held that in light of Article 38, Fraction II, Constitution Law of that referred Criminal Code *amplified* the guarantee related to the same Article of the Constitution in the sense that "it retards the imposition of the mentioned measure until it causes execution order of the according sentence which could be seen as a benefit for the defendant. Also a fact is that the guarantees embedded in the Supreme Law are minimal and can be broadened by the ordinary legislator since the presumption of innocence operates in favor of the defendant until guilty is proven in the criminal trial that culminates in a final sentence."

This led to the conclusion of the Court mentioned above that "the decision of the Judge who issued suspension of political rights of the offender that infringes the guarantees contained in Articles 14, third paragraph, and Article 16 first paragraph, both of the Federal Constitution[22] since issuance of detention order.

In a different case, the same jurisdictional body insisted that the numeral 46 of the Federal Criminal Law broadened the constitutional guarantee in Section II of Article 38 of the Constitution[23] as " presumption of innocence operates in favor of the defendant until proven otherwise, and this would be defined throughout the

22 **SUSPENSIÓN DE DERECHOS POLÍTICOS DEL INCULPADO. LA RESOLUCIÓN DEL JUEZ INSTRUCTOR QUE LA ORDENA DESDE EL AUTO DE FORMAL PRISIÓN, VULNERA LAS GARANTÍAS CONTENIDAS EN LOS ARTÍCULOS 14, TERCER PÁRRAFO, Y 16, PRIMER PÁRRAFO, AMBOS DE LA CONSTITUCIÓN FEDERAL. (SUSPENSION OF POLITICAL RIGHTS ORDERED BY A JUDGE INSTRUCTOR STARTING WITH ISSUANCE OF WARRANT OF ARREST STATES VULNERATION OF THE GARANTEES FROM ARTICLE 14, SECTION III AND ARTICLE 16, SECTION I, CONSTITUTION).** Weekly: *Semanario Judicial de la Federación y su Gaceta*, Novena Época, Instance: Circuit Courts (Tribunales Colegiados de Circuito), Volume: XXII, September 2005, Page: 1571, Law thesis I.10o.P.20 P separate.

23 Case I.10o.P. J/8, catagory: **DERECHOS POLÍTICOS SUSPENSIÓN DE. EL ARTÍCULO 46 DEL CÓDIGO PENAL FEDERAL AMPLÍA LA GARANTÍA CONSTITUCIONAL QUE PREVÉ LA FRACCIÓN II DEL ORDINAL 38 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS. (SUSPENSION OF POLITICAL RIGHTS. ARTICLE 46, FEDERAL CRIMINAL CODE, AMPLIFIES CONSTITUTIONAL GARANTEE OF ARTICLE 38, SECTION II, CONSTITUTION).** Weekly magazine: *Semanario Judicial de la Federación y su Gaceta*, Novena Época, Instance: Tribunales Colegiados de Circuito (Circuit Court), Volume XXIII, May 2006, Page 1525.

trial, which in case of issuing a final sentence in that sense, this would support the suspension of political rights of the plaintiff, and that secondary norm is indisputably the most beneficial one as it should not be overlooked that the guarantees of the Constitution are minimal and can be extended by the ordinary legislator."

This criterion was surpassed by resolution of the contradiction of the 29/2007-PS thesis in which the Supreme Court elaborated the case 1a. / J. 171/2007.

d) The Criminal Law of the State of Querétaro does not expressly refer to the suspension of political rights of the defendant from the date of issuing formal arrest, but does in Articles 55 and 56 to the suspension of rights in general when linked to a final sentence. In October 2007, the Circuit Court PJF held that the above is explained as an "omission" of the ordinary legislature of the mentioned State which was consistent in not "adapting timely the text of the ordainment to the reforms on the Constitution that would force the judge to suspend the political rights of the offender at the issuance of the order and at statement of final sentence of the criminal case."

The same court held not necessary to "interpret that the local legislature wanted to broaden the constitutional guarantees in favor of citizens by eliminating the possibility of suspension of the political rights starting with the issuance of the warrant of arrest". This is, because the legislator "had the intension to expand the warranty on the trial in process in which political rights should be suspended and where the legislature itself in the preamble to the Criminal Law in course would have put forward expressed arguments that would support this position".[24]

[24] **DERECHOS POLÍTICOS. AUNQUE EL CÓDIGO PENAL PARA EL ESTADO DE QUERÉTARO NO PREVÉ SU SUSPENSIÓN DESDE LA FECHA DEL AUTO DE FORMAL PRISIÓN, ATENTO AL PRINCIPIO DE SUPREMACÍA CONSTITUCIONAL, EL JUZGADOR DE INSTANCIA DEBE HACERLO DESDE ESE MOMENTO PROCESAL CONFORME AL ARTÍCULO 38, FRACCIÓN II, DE LA CONSTITUCIÓN FEDERAL. (POLITICAL RIGHTS. EVEN THAT THE CRIMINAL CODE OF THE STATE OF QUERETARO DOES NOT PROVIDE SUSPENSION STARTING WITH ISSUANCE OF PRISON ORDER THE JUDGE SHOULD ORDER IT SINCE PROCESS ACCORDING TO ARTICLE 38, SECTION II, FEDERAL CONSTITUTION.)** Weekly: *Semanario Judicial de la Federación y su Gaceta,* Novena Época, Instance: Circuit Courts (Tribunales Colegiados de Circuito). Volume XXVI, October 2007. Page. 3158 legal argument XXII.1o.21 P separate.

e) Also in October 2007, the Supreme Court's Office resolved the contradiction between the thesis that supported the Supreme Criminal and Administrative Court and the Circuit Criminal Court.

In Case 1a. /J. 171/2007[25] said Supreme Court ruled that if Article 46 of the Federal Criminal Law provides the suspension of the rights of citizens, it should be imposed as a sentence at the of the trial for criminal offense punishable with imprisonment starting with final sentence and lasting throughout the prison sentence according to Section III of Article 38 of the Constitution. However, this does **not** mean:

- That the suspension of political rights established in the Charta Magna had been subject to an extension of guarantees by the ordinary legislator in the code cited above[26] since Section II of Article 38 contains no privileges "but a restriction of the same it is not valid to state that Article 46 expands the rights of the defendant."
- Nor that there is a contradiction or conflict of laws, when these are two different trial stages, because it should not be confused the suspension through issuance of the said arrest warrant [formal prison] with the different suspensions such as the ones under the numeral 46 consequently of the convicting sentence among which there are the ones of the political rights, whereas the first has a temporary effects, i.e., only during the criminal trial, but the ones of the second are definite and are verified throughout extinction of the imposed corporal condemnation."

So, the rights of the citizen should be declared suspended from the moment of writ of arrest warrant for an offence that warrants a prison sentence in terms of

25 Catagory: **DERECHOS POLÍTICOS. DEBEN DECLARARSE SUSPENDIDOS DESDE EL DICTADO DEL AUTO DE FORMAL PRISIÓN, EN TÉRMINOS DEL ARTÍCULO 38, FRACCIÓN II, DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS. (POLITICAL RIGHTS. SUSPENSION TO BE ISSUED STARTING WITH WRIT OF ARREST WARRANT UNDER ARTICLE 38, SECTION II, CONSTITUTION).** Weekly magazine: *Semanario Judicial de la Federación y su Gaceta*, Novena Época, Instance: High Chamber, Volume XXVII, February 2008. Page 215.

26 As confirmed in law thesis I.10o.P.20 P, separate, by the Criminal Circuit Court.

Article 38, section II, the Federal Constitution, however, the Federal Crime Law does not prescribe it.

f) On May 28, 2009, through the resolution of the claim of unconstitutionality 33 / 2009 and its accumulated, the Plenum of the Supreme Court learned of the constitutionality of Article 7, Section I, the Election Law of the State of Coahuila, which required that among other impediments to vote, there that of being subject "to criminal prosecution of a felony punishable by deprivation of liberty. The impediment shall become effective from the moment of issuance of the detention order on. "The aforementioned plenum declared invalid a portion of the regulation of this requirement, just with the word "willful."

The following statements according to this issue made by the above mentioned court should be borne in mind:

- Article 38, Fraction II, Constitution Law, does not establish a fundamental right, a prerogative or warranty susceptible to expansion, but it is of different legal nature, since it figures as a constitutional restriction[27] or a temporary deprivation of the prerogatives of citizenship for the time under criminal prosecution.
- Such constitutional restriction "could be conceptualized as an incidental consequence of the subjection to trial and not as a penalty, punishment or injunction, because their nature and purpose are not related to the latter concepts."
- Such constitutional restriction is a security measure that does not suppose a penalty or a consequence at all.
- The suspension of political rights by virtue of a warrant of arrest occurs "by direct mandate of Constitution."
- Since Article 34 of the Constitution requires among other conditions for the enjoyment of citizenship to have an honest living, "which means to respect the law and by doing this to contribute to the maintenance of the legitimacy and the rule of law". However, the sentence does not explicitly state that whoever is under

[27] What had already been prescribed in law thesis 1a. /J. 171/2007 of citation.

detention order is not considered to have an "honest living" and it reads as seen in the following paragraph:

> In turn, the fundament of political rights provides the justification for the restriction imposed to someone whose acts show an indifference towards the Law because such behavior is linked to the rights of citizenship which are not lived out properly and therefore should be restricted by decree.

- The restriction ordered in Article 38, Section II, Constitution Law, is not contrary to the principle of presumption of innocence laid down in Article 20, subsection B, section I of the Federal Constitution because on one hand, Article 1 gives the authorization to it, and on the other, the suspension "does not mean nor imply the responsible cause for the alleged offence. Actually, said restriction has as consequence a temporary deprivation of rights as it leads to the final sentence, whether acquittal or guilt. Only if the defendant is guilty they will be declared criminally liable. Therefore, the suspended will continue with the fundamental right to be presumed innocent until declared guilty by verdict of the trial judge."

It should be noted that the decision of unconstitutionality, the Plenum of the Supreme Court states that, "as well as preventive detention has its reasons, the suspension of political rights has its own, but has likewise a security measure that does not suppose punishment or a consequence of a sanction at all since it is only a provisional constitutional restriction on the exercise of a right with precise purposes whose attention cannot be eliminated by ordinary legislation."

However, such sentence does not specifically express its "own motives" nor the "specific purposes" of the suspension of political rights by the issuance of a warrant of arrest. . At the same time, if it is said that the suspension of political rights is an ancillary consequence and not a penalty, then, it is true that the Constitution itself raises questions since according to section VI of Article 38 the suspension of political rights is the punishment itself to allow uncertainty make its way: why is the suspension of political rights is in some occasions an ancillary consequence and

in others the punishment itself? What element inherit to the suspension of political rights make it consequence or penalty?

The suspension of political rights is evidently a deprivation of those that are unlike other precautionary measures involving deprivation (e.g. judicial sequestration), and lacks of justification as such due to the condition of the implementation of being no help in conserving the litigation. In other words, if the trial is focused on finding out the verdict on the offender, so, to what extent the suspension of political rights tends to preserve this area of litigation? Rather, as the Constitution itself conceptualized the suspension of political rights as a punishment in itself is likely to be imposed independently, the suspension of such rights, before issuing a sentence about the criminal responsibility of processing, necessarily involves the imposition of a penalty punishment before trial.

According to the above, the suspension of the civil rights or prerogatives in case of prosecution for criminal offence with consequently conviction is to be counted from issue date of warrant arrest.

Such rights are not to be suspended before an issue of writ to attachment to trial.

To whom it has been issued a detention order is not to be considered someone with an "honest living."

Article 38, Section II, Federal Constitution Law, does not establish a fundamental right or a prerogative likely to be expanded, but to be a constitutional restriction in case of secondary legislation (local constitutions or criminal legislation, whether federal or state) prescribes that the suspension of political rights will operate until issuance of final sentence and not from the issuance of a warrant of arrest as well as it is to apply the Federal Constitution Law.

In this case, the suspension of rights operates directly by order of the Constitution Law.

This constitutional restriction is an "accessory consequence" of the detention order ("a security measure") that does not suppose any sanction at all.

The aforementioned restriction is not contrary to the principle of presumption of innocence because, on the one hand, Article 1, Constitution Law, authorizes it and, on the other hand, the suspension is nor equivalent to the fact either implicit that the citizen is believed responsible for the imputed offence. Actually, said restriction even means temporary deprivation.

- *During imprisonment (Article 38, Section III)*

a) In April 2002 the Criminal Court a criterion that ultimately would lead to case I.6o.P.J/7[28] in which it is required that even if the suspension of political rights is not specifically provided n order to punish, the same the suspension by operation of law, cannot be considered of administrative nature because it is a direct[29] and necessary consequence of the prison order for the committed offence.

b) Between June and November 2004 the same Court set several criteria that led to case I.6o.P. J / 8, which stipulates, that "the suspension of political rights as a direct and necessary consequence of prison must be ordered by the court, *even if there is no motion of the prosecuting body in its statement of findings*"[30], because the said suspension derives "from the provisions in the General Constitution Law and the only thing that proceeds is to send the respective information to the election authority in order to be suspended by the same."c) Between April and August 2005 the Criminal Court set up several precedents that gave

28 Catagory: **DERECHOS POLÍTICOS, SUSPENSIÓN DE. NO PUEDE CONSIDERARSE QUE SEA DE NATURALEZA ADMINISTRATIVA PORQUE NO SE PREVEA ESPECÍFICAMENTE COMO SANCIÓN, YA QUE SU IMPOSICIÓN DERIVA DE LOS ARTÍCULOS 45 Y 46 DEL CÓDIGO PENAL DEL DISTRITO FEDERAL, COMO CONSECUENCIA DIRECTA Y NECESARIA DE LA PRISIÓN IMPUESTA POR EL DELITO COMETIDO. (SUSPENSION OF POLITICAL RIGHTS. IT IS NOT OF ADMINISTRATIVE NATURE, BECAUSE IT IS NOT PROVIDED SPECIFICALLY AS PENALTY BY DERIVING FROM ARTICLES 45 AND 46 OF THE CRIMINAL COURT OF THE FEDERAL DISTRICT AS DIRECT AND NECESSARY OF THE PRISON SENTENCE).** Weekly: *Semanario Judicial de la Federación y su Gaceta*, Novena Época, Instance: Circuit Courts, Volume XXI, January 2005. Page 1554.

29 Catagory: **DERECHOS POLÍTICOS. CORRESPONDE A LA AUTORIDAD JUDICIAL DECRETAR SU SUSPENSIÓN, POR SER UNA CONSECUENCIA DIRECTA Y NECESARIA DE LA PENA DE PRISIÓN IMPUESTA, AUNQUE NO EXISTA PETICIÓN DEL ÓRGANO ACUSADOR EN SUS CONCLUSIONES. (POLITICAL RIGHTS. JUDICIAL AUTHORITY IS IN CHARGE OF SUSPENSION ORDER DUE TO ITS CHARACTER OF A DIRECT AND NECESSARY PRISON SENTENCE WITHOUT PETITION OF IT BY THE ACCUSING BODY).** Weekly magazine: *Semanario Judicial de la Federación y su Gaceta*, Novena Época, Instance: Circuit Courts, Volume XXI, January 2005, Page 1547.

30 Italics have been added. In case I.3o.P. J/16 the Criminal Court prescribed essentially the same but stressed, that it *must be ordered only by the Judicial authority* , which is the exclusively in charge of enforcement of the suspension of political rights of the governed as a direct and necessary consequence of the prison charge for criminal offense even there is no pediment of the accusing body in its statement of findings.

rise to case I.3o.P. J/16[31], which basically prescribes that regarding the suspension of the political rights as direct and necessary consequence of a prison sentence at statement of final sentence shall be decreed by the judicial authority only[32]. If the judge does not expressly order said suspension and only inform the Federal Election Register "for the purpose of evidencing its competence, the electoral authority might suspend the political rights of the sentenced without legal authorization to do so. Actually, it was precisely the intention of the legislator to assign the corresponding local or federal authority to enforce the order."

d) In May 2005, the Supreme Court prescribed in case 1a. / J. 67/2005 that the cause for suspension of political rights is established by operation of law as a necessary consequence of the imposition of a fine or imprisonment: "the suspension of rights is caused by operation of law produces in an intrinsic way as a necessary consequence of the imposition of a penalty or prison which the judge must inevitably take into account when sentencing"[33]

The fact that a the suspension of political rights imposed by operation of law implies that once ruled the hypothesis lies in the Constitution when a prison term ends, so that "a voluntary act is not required to be different to produce their effects but work immediately.

In consequence of the former "it is unnecessary in these cases

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31 Catagory: **POLITICAL RIGHTS. THE NATURAL JUSTICE TO ENACT EXPRESSLY BY STATEMENT OF FINAL SENTENCE THE SUSPENSION AND NOT THROUGH SIMPLE ORDER TO SHIPPING OF THE STATMENT WITH RESPECT TO THE ELECTION AUTHOTITY "FOR THE PURPOSES OF COMPETITION". ANY OMISSION OF IT VIOLATES THE GUARANTEE OF ACCURATE APPLICATION OF CRIMINAL LAW**. Weekly: *Semanario Judicial de la Federación y su Gaceta*, Novena Ëpoca, Instance: Circuit Courts, Volume XXII, September 2005. Page 1282.

32 Already in the aforementioned case I.6o.P. J / 8. It prescribed the suspension of the rights as a direct and necessary consequence of the prison sentence to be necessarily ordered in the ruling by the court and not by election authority, which is responsible to execute only the sentence imposed by the local or federal judicial authority."

33 **DERECHOS POLITICOS. PARA QUE SE SUSPENDAN CON MOTIVO DEL DICTADO DE UNA SENTENCIA QUE IMPONGA UNA SANCIÓN O LA PENA DE PRISIÓN, NO ES NECESARIO QUE ASÍ LO HAYA SOLICITADO EL MINISTERIO PÚBLICO. (POLITICAL RIGHTS. SUSPEND TO BE DELIVERED ON THE OCCASION OF A JUDGEMENT OF A PENALTY THAT MAY BE IMPOSED OR THE PRISON SENTENCE, SO NO NEED TO HAVE APPLIED FOR THE PUBLIC PROSECUTOR).** Weekly magazine: *Semanario Judicial de la Federación y su Gaceta*, Novena Época, Instance: First Chamber Volume: XXII, July 2005 Page: 128. Law thesis 1a. / J. 67/2005.

for the Public Prosecutor (the common law or federal law) to request the said suspension in the procedural stage while formulating accusatory conclusions. Consequently, the suspension of the political rights of the sentenced by the judicial body at stage of sentencing respectively and exercising its powers because such suspension is not a subordinate request of the Public Prosecutor but to the provisions of a constitution laws subject to the application of the Public Ministry, but the provisions of a constitutional provision, which is developed by a secondary law in the pointed terms.[34]

e) In September 2006 the Supreme Court lined out in the contradiction 8/2006-PS[35] thesis that section III of Article 38, Constitution Law provides supposedly "the suspension of the political rights as a penalty caused by a necessary consequence of the prison sentence, thus, of ancillary character for deriving from nature so it is incidental nature, deriving from the imposition of prison sentence and its duration."

In consequence, the referred court considered that the judge will not order the suspension of political rights contrary to autonomous penalties which are imposed on their use of judicial discretion and in accordance to their respective offense because of their *ancillary sanction* character.

It follows from the above that "in case of replacement of the prison sentence the suspension of political rights in its character of ancillary sentence of the first will suffer the same fate as the former because it should be understood that the complete sentence is substituted including the suspension of the political rights in its accessory character."[36]

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34 Ibidem

35 Case 1a. / J. 74/2006. Category: **SUSPENSIÓN DE DERECHOS POLITICOS. AL SER UNA SANCIÓN ACCESORIA DE LA PENA DE PRISIÓN CUANDO ÉSTA ES SUSTITUIDA INCLUYE TAMBIÉN A LA PRIMERA. (SUSPENSION OF POLITICAL RIGHTS. AS THIS PENALTY IS AN ANCILLARY OF THE PRISON SENTENCE IT INCLUDES THE FIRST ONE WHEN REPLACED).** Weekly magazine: *Semanario Judicial de la Federación y su Gaceta*, Novena Época. Instance: First Chamber. Volume XXIV. December 2006. Page 154.

36 Case 33/2009 and its accumulated unconstitutional. The Plenum of the Supreme Court's Office reiterated that "the suspension of political rights if of accessory nature the prison sentence initiates and concludes simultaneously and with the latter (the accessory follows the fortunes of the main)."

f) On May 28, 2009, in the Constitution case 33 / 2009 and its accumulated, the Plenum of the Supreme Court stated on that fraction that it is of "ancillary nature on the sentence, in other words, it is not an independent penalty but a one that emerges out of a prison sentence –by operation of law- because the main sentence in relation to the suspension is a ancillary penalty".[37]

Thus, according to the criteria of the PJF Criminal Courts it is found that regarding the suspension of rights or prerogatives of citizens during imprisonment it is concluded that:

1. The suspension for said reason is not of administrative nature since only a judge can order it even if there is no motion by the District Attorney's Office in the statement of findings.

2. The administrative election authority is responsible only execute the said suspension.
3. If the judge does not order the suspension referred to in the respective sentence, the administrative authority responsible for executing it cannot carry it out by motu proprio.
4. The suspension of rights for this cause is an ancillary penalty and its duration depends on one of the main sentence to prison.
5. So, if the prison sentence is substituted, so must be the suspension of political rights.

It should be noted that a reading of some part of the case 1a. / J. 67/2005[38] and certain part of the case 1a. / J. 74/2006[39] may give reason to the idea that the suspension of rights during the extinction of a prison sentence is an ancillary sanction that will not be ordered by the judge. Instead, the District Attorney's Office

37 What had already been affirmed in case 1a. / J. 74/2006.

38 The fact that the suspension of political rights is imposed by operation of law implies, that once the governed is under the constitutional hypothesis -as at the end of the prison sentence- *a different voluntary act is not required in order to produce their consequences, instead, they operate immediately.*

39 The suspension of political rights as *ancillary* sanction is not by the judge as it is in the case of autonomous penalties that are imposed on their use of judicial discretion and according to their offense.

is in charge to it by immediate operation of law and therefore no different act of will is required. So, the administrative election authority may run motu proprio that suspension without mediation of express command of the judge. In other words, in regards to this section of the case there are no clear criteria.

Overall, in the case 33/2009 Constitution Law and its accumulated the Plenum of the Supreme Court's Office identified three modes of suspension of political rights prescribed in Article 38 Constitution consisting of:

a) Suspension derived from the subjection to trial for an offence that deserves prison (fraction II)
b) Suspension resulting from a conviction with imprisonment Section III)
c) Suspension as independent penalty with or without a complementary conviction sentence (Section VI)

Around the same, the said Court stated that they "may be regulated by Local and Federal Criminal Law in the way that the ordinary legislator sees fit, -so established in the final paragraph of the same Article 38 Constitution- *"but in no case oppose the constitutional rule and, therefore, its implementation is preferential over any other provisions that might be contradictive. This is in difference to the principle of constitutional supremacy in Article 133 Constitution."* Italics are added.

Immediately after said judicial body highlighted that:

> The causes for such suspension may be ordered independently and have the autonomy to each other in the way to deprive that same person from their political rights for a period of time without solution of continuity. That is so for three different reasons:

a) Being subject to prosecution for an offence with prison charge
b) Being final sentence with prison charge
c) Compliance with a suspension of political rights

Regarding the reason in Article 38 Constitution for citizens' rights to be suspended in a case of someone *sentenced to suspension of political rights, expressly through final sentence* in the Constitution case 33/2009 and its accumulated the

Plenum of the Supreme Court's Office stated that the suspension of political rights "as autonomous penalty in section VI, Article 38, Constitution, can take two forms: when it is imposed as an only penalty which will take effect with the final sentence that imposes such penalty and establishes the duration of it and, when prison sentence is imposed simultaneously."

About the cause of the suspension of political rights consistent in being a fugitive of justice f there are no relevant precedents from the writ of arrest warrant until the prescription of criminal proceedings.

5. The cases of the Federal Election Tribunal of Mexico

The cases we will be looking at are those that reached the TEPJF and are relevant in the discussion of Article 38, Constitution, on the suspension of political rights for criminal matters. The cases Pedraza Longi, Orozco Sandoval, Sánchez Martínez and Godoy Toscano are the cases studies.

A. Case Pedraza Longi (SUP-JDC-85/2007)

On December 11, 2006, José Gregorio Pedraza Longi attended the corresponding citizen's service module of the Federal Election Register in order to enroll in the voter´s register. On January 19, 2007, the issuance of the voter identification was denied to him due to non validity of its proceedings arising from his legal situation.

On January 31, 2007, the above mentioned applied for the voter I.D. with picture at the referred module to which the number 0721062202379 was assigned. On January 16, 2007, the Board of Directors of the Federal Election Register in the State of Puebla issued a decision on the file before the administrative court's office calling inappropriate the request of Pedraza Longi due to the information the Board of Directors of the Federal Election Register obtained from the Criminal Justice of the Court of San Juan de los Llanos Libres de Puebla which indicated that a warrant of arrest for crimes punishable with imprisonment had been issued and that therefore a suspension of the political rights as provided in Article 38,Constitution. By then, Gregorio Pedraza was in liberty on bail during his trial because of having been accused of non grievous crimes.

Notified of the decision on February 19, 2007, Pedraza Longi filed a suit against the decision for the protection of the political-election rights of the citizen. During the proceedings the Justice tutor required on February 28, 2007, from the Judge of San Juan de los Llanos Libres, various information and documentation necessary for the conduct and termination of the trial.

In Case SUP-JDC-85/2007 the Federal Election Tribunal revoked the decision of the Federal Election Register and ordered his reinstating on the corresponding Electoral Register and nominal list and the issuance of the voter's I.D with photo to Pedraza Longi.

It is to be noted in the respective case study that José Gregorio Pedraza Longi had requested a voter's I.D. which was denied by considering suspended from his political and electoral rights based in this assumption on Article 38, Constitutional, Section II because being subject to criminal trial that deserves imprisonment from the date of the detention order.

In the case study the Federal Election Tribunal considered that the embodied guarantees in the Constitution shall be understood as minimum principles extended by the ordinary legislator or by international conventions that the very same Constitution states in Article 133 as "Supreme Law of the Union". By applying the conventions to the case in question Article 25 of *the Covenant on Civil and Political Rights* is applicable in the sense that people who are deprived of freedom but have not been convicted should not be excluded from exercising their right to vote and therefore should be allowed to exercise the right to vote, to be reinstated in the Electoral Register and issued a voter ID.

Additionally it relied on the provisions of Articles 14, second paragraph, 16, first paragraph, 19, first paragraph, 21, first paragraph and 102, section A, paragraph two, Constitution, regarding to the right to presumption of innocence, which is recognized through various international instruments as quoted by paragraph 8 of the American Convention on Human Rights: "Every person accused of crime has the right to be presumed innocent until established guilty." Therefore, they considered that until not being convicted with a final sentence that deprived him of liberty he should not be suspended of his political-electoral rights to vote.

It is argued that since there was no detention order that could have restricted the actor in his legal sphere or impaired him materially from exercising his constitutional rights and prerogatives there were no the grounds to justify the suspension of the political-electoral rights to vote.

In fact, the actor was set free on bail through final sentence on non-grievous crimes where the requirements of *Article of the Code of Procedure for Social Defense of the state of Puebla* were met. So, through expiration of the prison term the suspension of political rights for being an ancillary penalty follows the fortunes of the principal as grounds to its replacement, so that the suspension of rights fails to take effect.

Considering that Article 46, Federal Criminal Code, extends the constitutional guarantee of Section II, Article 38, Constitution Law, it is inappropriate to order the suspension of political rights of the acc used within the detention order, because the penalty starts from the state to cause the respective order and will last throughout conviction.

Political rights and prerogatives are inherent to citizenship and the latter cannot be divided. Based on Article 24 of the *Constitution of the state of Puebla* the actor continues with citizenship so that he can fully exercise his respective rights and prerogatives throughout the national territory and therefore can he vote, even under trial for criminal charges.

Therefore, the decision of the administrative authority was revoked by unanimous vote the reinstatement in the Electoral Register and the corresponding nominal list in order to issue the voter I.D. to the citizen José Gregorio Pedraza Longi with the purpose of not infringing his possibility of exercising the right to vote.

In the decision it is also recognized the possibility of a posterior sentence to suspend the rights of the actor. So, one of the paragraphs noted that in case of issuing custodial sentence the judge on duty of this trial should immediately notify the Federal Election Institute through the Federal Election Register to remove the processed from the voter register and corresponding nominal list of residence.

B. Case Orozco Sandoval (SUP-JDC-98/2010)

In a similar approach the Federal Election Tribunal (TEPJF) processed the case Martin Orozco Sandoval denying him to register as candidate of the National Action Party to run for the office of Governor of the State of Aguascalientes. The charge of several offenses during the term of office as Municipal President of the District of Aguascalientes gave reasons to the refusal.

Martin Orozco Sandoval then was under criminal trial and positively issued an arrest warrant but not running a prison sentence due to his bail condition and the definite

suspension of the act in question (detention and all the resulting consequences of facts and law) granted by the Justice of the Third District of Aguascalientes through an amparo trial. Similar to the Pedraza Longi case Martin Orozco Sandoval had not been convicted with a final sentence on effects of deprivation of liberty.

Through the amparo trials objecting the order to his detention and imprisonment he was granted liberty on bail throughout trial. At the same he was active in the vocation register and the nominal list of voters.

These considerations support the claim that he met the eligibility requirements to be State Governor under Article 37 of the Constitution of the state of Aguascalientes while being in full exercise of his rights because by then there were no grounds for the suspension of his right to vote and be voted nor for the denial of registering as State Governor candidate representing the Partido Acción Nacional.

Revoked was the decision by the General Council of the State Election Institute of Aguascalientes denying Martin Orozco Sandoval the registration application as Partido Acción Nacional candidate for Governor of the that state for the specified purposes in the enforcement ordered restoration into full use and enjoyment of the political- electoral rights by granting the aforementioned registration in advance.

According to the criterion of the jurisprudential thesis XV/2007 of the Federal Election Tribunal it is interpreted that the suspension of political election rights under section II of Article 38 proceeds just in case of prison conviction of a citizen. Stating that there are no valid grounds to justify a suspension the political-electoral rights of a citizen, even under criminal trial but at the same time being materially in liberty on bail since the fact of not have been deprived of his personal liberty and the condition of favoring presumption of innocence to him he should continue with the use and enjoyment of his rights.

C. Case Sánchez Martínez (SUP-JDC-157/2010 and SUP-JRC-173/2010 Accumulated)

The regular election process in the state of Quintana Roo started on March 16, 2010. Subsequently on the following 27 April representatives of the Partido de la Revolución Democratica, Convergencia and the Partido del Trabajo submitted an agreement to coalition and a common political platform to the General Council Board of the Election Institute of Quintana Roo for registration in the election process

for state governor which was approved to register under coalition "Mega Allianza Todos por Quintana Roo".

On May 1, 2010, Gregorio Sánchez Martínez presented the application for registration as candidate for governor of Quintana Roo to the Council as a candidate for Governor of Quintana Roo which was approved on May 6, 2010.

On June 1, 2010, the Justice of the Second Federal Criminal Court' office of El Rincón of the Municipality of Tepic in the state Nayarit ruled detention conviction to Gregorio Sánchez Martínez for his alleged responsibility of various crimes. In accordance, on June 1, 2010, Board of the General Council of the Election Institute of Quintana Roo determined to unregister Gregorio Sánchez Martínez as candidate for Governor of said State.

On June 4, 2010, Gregorio Sánchez Martínez filed before the Election Institute of Quintana Roo a law-suit for protection of his political-electoral rights as citizens under SUP-JDC-157/2010. On June 6 the representative of the aforementioned coalition filed to the same Electoral Institute a claim for constitutional electoral review (file SUP-JRC-173/2010).

The Court further found constitutional the *per saltum* requested by Gregorio Sánchez Martínez and the representative of "Todos para Quintana Roo" taking into account the proximity of the local election day to be held on July 4, 2010 wherein any delay in the resolution of these issues could cause irreparable damage to the actors of the trial on the outcome of the elections to the extend to prevent Gregorio Sánchez Martínez from being voted and as a consequence to the coalition through the impediment to run for governor of the said entity.

The grievances claimed by the coalition and Gregorio Sánchez Martínez can be divided into the following thematic pillars:

a) Procedural and formal violations in the issuance of the claimed agreement

The lawsuit argued that the assessment of eligibility of candidates can occur in two stages: first, during the registration process of candidates to the electoral authority, and second, during the process of the election qualification process. That fact made the actor consider his due process harmfully violated through the absence of legal conditions underlying the assessment of eligibility outside of legal and procedural hypothesis of the legislation application.

The injury was considered unfounded since the authority's performance was in compliance with a constitutional mandate because of the disqualification of one of the registered candidates in the race.

b) Profound violations in the statement of candidacy withdrawal

Mention that Gregorio Sánchez Martínez was convicted to prison presumptive responsible for the offenses as mentioned following:

1. Organized crime under Article 2, section I, (hypothesis of organized offenses against health) and III (hypothesis of illegal traffic) of the Federal Criminal Code.
2. Offenses against health in the mode of complicity in any way promoting offenses against health under Article 194, Section III, Federal Penal Code and
3. Operations with funds of illicit origin in its mode of money deposit within the national territory or resources in the knowledge their unlawful origin or being product of illicit activities for the purpose to encourage any unlawful activity under Article 400 bis and fourth paragraph of the Federal Criminal Code.

While filing for the law-suit Gregorio Sánchez Martínez was under criminal trial proceedings convicting him to prison without the benefit of the operation of bail for alleged grievous charges. As a result he was discharged on the electoral roll which meant that through this acts his voter I.D. he held lost its legal effects.

Therein it was estimated inconceivable a person deprived of their liberty from prison to exercise candidacy for popular election since they would be unable to assume or exercise the contended office. Later then his legal and physical condition of impediment to exercise his political-electoral rights was considered.

Since the cancellation of registration of Gregorio Sánchez Martínez for candidate for Governor of Quintana Roo was procedural he was not allowed to run a campaign as their intention is to convince the voter to give their vote a person capable of assuming and exercising office through popular election. Thus, the coalition that had nominated him candidate needed to request replacement of its candidate for governor in the election or otherwise lose the right to do so.

c) Grievances linked to the consequences through calling off respective bid

The judgmental coalition alleged in the accumulated plaint of constitutional review that the claimed act is contrary to law through ordering the withdrawal of

propaganda in a non-extendible period of five days without giving a chance to substitution of the same gender, to immediate withdrawal of the propaganda, the change of ballots and candidate, the mention of the finality of the ballots and the warning about the removal of the total of the propaganda, are not provided for by law, so that responsible ruled over by imposing these sanctions as unusual and important.

The claim was deemed unfounded because due to demonstrated impairment of Gregorio Sánchez Martínez to candidacy of the multiply mentioned coalition on grounds of his condition as detainee it was evident that his name could not be included among the options of being votes by citizens. He was not in the faculty to exercise office and such situation would harm the principle of certainty and the effectiveness on the right to vote for citizens of Quintana Roo.

After the confirmation the cancellation of the bid of Gregorio Sánchez Martínez for the coalition "Mega AlianzaTodos por Quintana Roo" the Federal Election Tribunal deemed it appropriate to link the General Counseling Board of the Electoral Institute of Quintana Roo with the issuance of an agreement to determine to grant the coalition a forty-eight hour term for the purpose to replace their candidate in addition to the replacement of the name on the ballots and other election documents for the election of state governor in the state of Quintana Roo as well as to ensure the run of the corresponding election campaign through the realization of campaign events and the implementation of relevant election propaganda.

It should be mentioned that the decision was adopted by majority vote with one vote against and two concurring.

D. Case Godoy Toscano

In the case Julio César Godoy Toscano, SUP-JDC-670/2009, the political-electoral rights were suspended immediately after his election for federal congressman because he was not allowed access to the official site for the swearing-in, registration and issuing of a badge to credit him in office on the grounds of his condition of fugitive from justice and being under a warrant of arrest fit immediately in Article 38, Section V, Constitution Law.

Thus, the approach is different in the case Godoy Toscano since section II makes allusion to suspension of political rights arising from criminal prosecution and section V from the fact of being a fugitive from justice since the impugned rule is not

section II of Article V, Constitution, but the fraction V referring to the suspension of political rights for being a fugitive from justice since the writ of arrest warrant until the prescription of criminal conviction.

However, we believe that at some point attend both fractions are concurrent. In order to be considered a fugitive from justice a arrest warrant must have been issued previously, however, the difference in its affection is the term of such suspension, put it that way, the rehabilitation of their prerogatives since the individual's state of being detained physically during the criminal trial the effect of fraction V is that the suspension of rights will be extinguished until the term of the arithmetic mean of the punishment in the crime in question runs out.

Indeed, the reasoning on the case Pedraza by the Federal Election Tribunal was to some extent the applied criteria on the case Godoy, especially the principle of innocence contained in Article 20, paragraph B, Section I, Constitution Law, as a right of all accused to be presumed innocent until declared their guilt by ruling of the trial judge.

But in the present case, being the citizen Julio César Godoy Toscano under the hypothesis of section V of Article 38 of the Constitution a fugitive from justice and outside the law through the writ of an arrest warrant against him it was found that the subject was a fugitive due to the demonstration of the fact that an investigation had been going on in order to find him and make him appear at trial which performance of it would not have been possible without his present.

In addition to this the criminal charges against him did not evidence any argument at all for a legal chance to concede him the benefit of bail during his trial as he had allegedly committed a grievous offense.

Finally, since the subject was not present in person he could not hold office wherein it was confirmative determined to deny him the register for federal congressman and the hold of a respective I.D.

It should be added that after the September 23, 2010, Godoy Toscano was sworn in as federal congressman, however, the statement of findings began that will allow, if procedural, his criminal prosecution outside the status of prosecution immunity granted by the investiture to public representative. Also, in October 2010, he abandoned the political party as militant.

In general terms it should be finally reflected on the delicate relationship between the topic of the present examination and the rights to vote and be voted. Indeed, in previous cases the protection of political right to vote and be voted was highlighted, but the study of the exercise of the same omitted.

In the point of view of voters that a registered candidate is suspended in the exercise of political rights, including being voted deprives him, in principle, of a political option, which can lead the election ceases to lose competiveness and therefore the interest of the citizens in the election process. In this sense, the suspension of political rights of a candidate should not receive attention only in relation to how his exercise of the fundamental rights is affected but also his election rights. That together may have a relevant impact on a Republic as governmental form.

In this, the participation of the public is vital, but if the electorate sees reduced their political choices, whether by the suspension of political rights of a candidate as result of the cancelation of choice or by decreasing interest of the citizen through fewer competitors in the election. If it is possible to say that this is to prevent the election from suspect of crime, also the fact remains that, even assuming that they elect a person that would later be of criminal acts, it is always possible to use the removal of constitutional immunity for due process.

6. Comparative jurisprudence

Here we review four cases that have been relevant in comparative law and can be related to the suspension of political rights analyzed here. The first case is *August and Another v. the Election Commission and Others* and was settled in South Africa in 1999.

The second case is *Mignone, Argentina, 2000.* The third case is *Sauvé v. Canada, 2002,* and the fourth *Hirst v. United Kingdom, 2005.*

However, before reviewing these precedents it is relevant to relate, at least, the paradigmatic case of Eugene Victor Debs, American leader of a labor union. On June 16, 1918, he delivered a famous speech to express his opposite stand to participation of his country in First World War. Based on that speech Debs was arrested and sentenced to 10 years in prison on charges related to laws to combat espionage at that time of war. Debs is also remembered for having conducted his defense on his own and having delivered one of the most memorable parts of U.S. forensic oratory. In 1920, while serving his prison sentence, Debs ran for the fifth and last time as a candidate for the presidency of his country for the Socialist Party. Even by running his campaign from his prison facility Debs received nearly a million civil votes (919.799), but no electoral one, however, he was placed third in popular preferences. So, he

had lost before the Republican candidate Warren G. Harding (16,152,200 popular votes), who, once president, commuted the sentence to Debs.

A. August and Another v. Electoral Commission and Others, 1999

This case dates back to 1999 when the Constitution Court of South Africa ushered in the claim of a group of prisoners demanding the Election Commission make the necessary adjustments to allow all imprisoned persons to register for vote from their prison facility. He argued assuming that the Constitution of South Africa is the supreme law of that nation and therefore it had to be respected the right to universal suffrage as provision of the law.

The Court argued in its ruling that universal suffrage by definition imposes positive obligations on the legislative and executive powers and for that reason the interpretation to the Election Act was to make effective the declarations and, warranties and their related constitutional responsibilities. The Court also recognized that many democracies had restricted the voting rights of prisoners but had said, that these constraints could be imposed only on the basis of a reasonable argument to prove that the rule protects the public interest beyond the principle of universal suffrage.

On the other side, the Court did not opine on whether the legislature has the right to limit voting of prisoners, but emphasized that its ruling did not intend to prevent that power referred to from classifying possible cases of prevention from the same. In the absence of such legislation the Court held that the Constitution protects the right to vote of prisoners and that neither the Election Commission nor the Court itself has the power to limit the universal suffrage.

One of the grounds was Article 10.1 of the International Convention on Civil and Political Rights. It states that the imprisoned offenders shall be treated with humanity and respect for their dignity as human beings. That is in accordance to Article 10.3 where it is determined that the prison system of the countries that signed up should aim at the reformation and social rehabilitation of prisoners.[40]

[40] Mandeep K. Dhami. "Prisoner disenfranchisement policy: A Threat to Democracy?" *Analysis of Social Issues and Public Policy.* Vol 5. No.1, 2005. Said Article determines in the following two provisions: "Article 10. 1. All persons deprived of liberty shall be treated humanely and with respect for the inherent dignity of human beings. (...) 3. The penitentiary system shall consist of treatment with the essential purpose of the reformation and social rehabilitation of prisoners". Francisco García Quintana. *Instrumentos básicos de derechos humanos.* Editorial Porrúa. México, 2003. Page 208-209.

In the conclusion of that Court the Election Commission was asked to make the necessary adjustments to allow all prisoners to vote for offices of the election from their detention facility. To date, all South African prisoners' right to vote is respected regardless the cause of imprisonment.

B. Case Mignone, 2000

The National Election Chamber in Argentina ruled in the case Mignone unconstitutional section three, subsection d of the National Electoral Code. Thus, "Those, arrested by order of the competent Justice until their reinstatement of liberty", must be excluded from the election register of voters. Further, "the law in question appears 'prima facie' as manifestly contrary to Article 18 of the Constitution as embodies the principle of innocence and to Article 23.2 of the American Convention on Human Rights which limits the regulation of political rights based on age, nationality, residence, language, education, civil and mental capacity or conviction by competent Criminal Court's office. In any case of doubt the maximum in dubio pro amparo would be appropriate".[41]

The amparo trial was requested in the abstract without any application of said law. However, that criterion would be reiterated in case Zárate. In the mentioned amparo trial the actor in his condition of a convicted to preventive custody solicited the insurance of his right to vote in the then upcoming election. Further, "the restriction of access to the election imposed on the appellant through his condition of having been convicted and that constitutes an incompatibility with respect to the inherent dignity of man". So, the decision ordered the responsible court "to arbitrate the means at its disposal to enforce Mr. Zárate's exercise of the right to vote and all related security measures".[42]

The issue would be due to legislation in 2003 to consider the exercise of the right to vote of those in preventive custody. Finally, Law 25,858 was issued, promulgated on December 29, 2003. Article 4 of that law added to the National Election Code the following Article:

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41 Case No. 2807/2000. National Electoral Chamber. October 10, 2000. http://www.pjn.gov.ar/Publicaciones/00008/00022158.Pdf looked up on September 23, 2010. The issue is relevant also for the fact that they discussed two issues of legal interest: the legitimating of case Mr. Emilio Fermin Mignone in the character of the legal representative of the Civil Association Center for Legal and Social and the admissibility of the amparo trial.

42 Case 3142/2003 of the National Electoral Chamber. May 20, 2003. http://www.pjn.gov.ar/Publicaciones/00017/0002208.Pdf looked up on September 23, 2010.

Article 3 bis. - The convicted offenders for preventive prison sentence shall be entitled to vote in all election acts run during the term of their detention.

That purpose in mind, the National Election Chamber shall elaborate an Election Register for the Deprived of Liberty which shall contain the data of the convicted in that prison facility according to the information that must be provided by the competent courts. Also, it shall provide voting tables in each of detention facilities and appoint its officers.

The convicted that are in an electoral district other to the corresponding one of housing are entitled vote at the facility where they are inmates. Their votes shall be adjudicated to the District of register.

This rule was subject to regulation for enforcement by the Executive Board in accordance with Article 5 of Law 25,656to enter into force. The regulation would be given until 2006.

C. Sauvé v. Canada (No. 2), 2002

The case dates back to 1992 when the Canadian Supreme Court found Section 51(e) of the 1985 Canadian Elections Act (hereinafter "Election Law") unanimously unconstitutional and therefore, the deprivation of prisoners of their right to prisoners. To meet the Court's ruling the Canadian Parliament amended that rule by allowing prisoners to vote whenever their reclusion was only for a two years term or less but did not allow it to the rest of the prison population. The case returned to the Court in 2002 which ratified the Election Law unconstitutional on the grounds of Section 51 (e) representing a flagrant violation of Articles 1 and 3 of the Canadian Charter of Rights and Freedoms.

In the opinion of the most the right to vote is a cornerstone of democracy and the rule of law what forces both, judges and legislators, to examine very carefully any attempt to restrict the universal suffrage. In this regard, the majority felt that the Canadian Government's arguments favoring deprivation of the right to vote of prisoners was not only inadequate but failed in its attempt to establish a rational connection between law and any public interest overriding universal suffrage. Also, the majority objected the idea of depriving criminals of their voting rights to be a mean to enhance civic values and respect for the rule of law while it is more likely to increase the disregard for the laws and electoral democracy instead. As the legitimacy of the laws and the duty of respect towards them emanates from the

right of every citizen to vote the fact to deprive inmates of the same is equivalent to missing a pedagogic key tool to inculcate democratic values and a sense of social responsibility. Therefore, this rule is against the inevitable democratic values such as equality and participation and furthermore, it also violates the dignity of any person and undermines the spine of Canadian democracy and the Canadian Charter of Rights and Freedoms.

Regarding the idea of depriving prisoners of their right to vote constituting a just punishment, the majority felt that the Government of Canada did not present a credible theory about why and in what cases the restriction of a fundamental democratic right would be helpful as punishment for a criminal. Furthermore, in the opinion of the majority, the arbitrariness of the rule lacks any legitimacy since it does not classify crimes that deserve such punishment nor present evidence of that idea that depriving prisoners of their right to vote would have a result of less crime or social rehabilitation of criminals.

Beginning with Sauvé v. Canada (No. 2) all adults have the right to vote in all elections for elected office in Canada in spite of the fact that to date Parliament has not amended the Election Law in order to harmonize the law with the sentence of the Court.

D. Hirst v. United Kingdom (No. 2), 2005

The case dates back to 2001 when a British citizen, John Hirst, sentenced to life imprisonment for manslaughter, appeared before the High Court of England and Wales (hereinafter "Supreme Court") claim for permission to vote in local and general elections of the United Kingdom. Hirst had been deprived of his right to vote based on Article 3 of the First Protocol of 1983 People's Representation Act prohibiting convicts the vote while remaining at a prison facility. In its ruling the High Court dismissed the case as inadmissible.

Hirst appealed in 2004 at one of the dependencies of the European Court of Human Rights (ECHR). The latter declared unanimously Article 3 of the 1983 People's Representation Act flagrant violation of universal suffrage. However, a few months later, this sentence was appealed by the United Kingdom at the High Chamber of the ECHR with the argument that the deprivation of the right to vote is to prevent crime and punish offenders, to strengthen their civic responsibility and inculcating respect for the rule of law. In addition, the UK government assured that breaching

the social bonds - that is, to commit a crime that deserves prison – makes convicts lose their right to participate in civic affairs for the duration of their sentence.

On October 6, 2005, the Grand Chamber of the ECHR ruled that the general prohibition of voting rights of British prisoners contradicted the agreements of the European Convention on Human Rights (ECHR) which was not only ratified by the British government but also incorporated into their legislation through the 1998 Human Rights Act approved by the British Parliament and promulgated by Queen Elizabeth II later that year. However, in its ruling, the Court did not request restoring of voting rights of all persons in prison but rather held up the idea that deprivation of this right must be compatible with Article 3 of First Protocol of the ECHR, thus, forcing the UK to prove whether the rule protects the public interest beyond the principle of universal suffrage. Therefore, the Court left open the possibility of eliminating the votes of convicts under determinate types of prison charges or for judges to rule deprivation of prisoners' right to vote as linked part of their sentence.

In spite of the Court's ruling that Article 3 of the First Protocol of the 1983 People's Representation Act presented a violation of the voting rights of prisoners and asking the British government to harmonize its Election Laws with the International Law and its own 1998 Human Rights Law, to date, British laws have been reformed in order to allow prisoners the suffrage.

7. Reflections on a new constitutional interpretation

One of the bases of the Mexican Constitution has been the elimination of inquisitorial tribunals and their procedures where it was to prove innocence when presumed guilty. However, the shadow of persons like Antonio Lopez de Santa Anna transcends to our days when through application of the suspension of political rights, automatically[43] any citizens "to be prosecuted for a offence from writ of arrest war-

[43] The same opinion of the Federal Electoral Tribunal as in separate law thesis in the beginning of its operation in 1999 with the title: **DERECHOS POLITICO-ELECTORALES DEL CIUDADANO, LA SUSPENSIÓN DERIVADA DE LA HIPÓTESIS PREVISTA EN LA FRACCIÓN II DEL ARTICULO 38 DE LA CONSTITUCION OPERA DE MANERA INMEDIATA.** The text is more categorical in stating that "The suspension arising from the hypothesis under section II of Article 38 of the Constitution operates *ipso facto* when under criminal prosecution, in other words, it is enough to be assumed of the stated in the constitutional provision, so that instantly the Electoral authority in charge of organizing all election matters is empowered through the rightful control of the election register as soon as it is known what happened in that regard to prevent from free exercise of political rights to suffrage without prior declaration of diverse authority (...)". law thesis

rant on" is stripped of their rights under Article 38, Section II, which still operates in the Mexican Constitution and comes from the so-called Constitutional Bases of 1843, Article 21, section III.

The constitutional history reflects the excesses of Santa Anna[44] in the apprehension of public persons, such as Francisco Zarco, which led to the inclusion of guarantees in the due trial from Article 16 of 1857 Constitution and, among others there, was surely the spoil of citizenship rights based on that provision.

In addition to this, the content of Article 38 regarding the suspension of rights was designed before inserting the Public Prosecutor within the executive power, a reform updated by initiative of Porfirio Díaz and approved on May 25, 1900. So, when the investigation of crimes is attached as an attribution not to judges but to subordinate staff of the federal and state executive power the appropriation of crimes before judges became a collaborative role of the jurisdictional body and the inquest of the Public Prosecutor offices that count on the presumption of legality and initiate a process that will prove the offender guilty.

In actuality, the offender under accusation of one or more offenses enjoys presumption of innocence through the reform on the Criminal Code of January 13, 1984, result of the ratification by Mexico on the *Convention American Human Rights or Pact of San José* on April 3, 1982.

However, the 1917 Constitution can be read with two conflicting provisions. On the one hand, the fraction II of Article 38 provides for the suspension of political rights from the moment of writ of warrant of "imprisonment". In addition, the same provision in section VI determines that the suspension of civil rights is admissible through final sentence ordering said suspension. Can they coexist logically hypothesized suspension of rights as a penalty coexist at the moment the accused is only linked to criminal trial with the provision —in the same hierarchy— require by writ final sentence? Is an order on request of the Public Prosecutor equivalent to a final sentence? In a nutshell, is it reasonable to impose sentence as it is the suspension of the rights of a citizen when there is only a presumption of guilt? In a nutshell, is it possible to impose a penalty, and suspension of civil rights, when there is only a presumption of guilt?

003/99 S3EL. *Relevant case and law thesis 1997-2005*. Federal Electoral Tribunal. *Compilación Oficial*. Page 491.

44 Victoriano Salado Alvarez. *De Santa Anna a la Reforma*. J. Ballescá. México. 1903.

This contradiction of constitutional regulations, in our view, cannot be solved by the isolated application of any of the precepts but through comprehensive and systematic interpretation of the core text based on the historical revision of the constitutional principles that have an impact on the performed analysis present.

To this effect, it should be taken in mind that the Constitution Reform, published on June 18, 2008, established in Article 20, paragraph B, section I, established the principle of presumption of innocence, where before applying any penalty, must be proven to the court the defendant's guilt. It is the case that the very same Mexican Constitution qualifies the suspension of political rights as punishment and the same way it is conceived by the legal doctrine.[45]

This and other constitutional reforms are in change of course which amply justifies the interpretation we propose, the same that is in charge of the protection of the political rights, recognized not only by the Mexican Constitution but also by international instruments which Mexico is committed to. This allows us to say that an interpretation is given to the same regulatory level in respect of constitutional mandates and also a consistent interpretation with the commitment of Mexico through signing up to conventions where the protection of the rights of Mexicans are made evident to be confirmed the correctness of the interpretation proposed here.

The suggested interpretation has as scope axis the revision of the suspension of political rights, here dealing with criminal matters, mainly with those related to the subjection to a criminal trial for offense with prison charges counting from the date of writ of arrest warrant formal prison, during serving a prison sentence and for serving the sentence of that suspension expressly imposed through final sentence. As it can be adverted, the topic is related to the deprivation of liberty or, more precise, to detention of citizens in order to be subject to the process or serving a prison term that affects personal liberty.

In this tenor it should be highlighted that the imprisonment of citizens is justified only in our current constitutional system with base on penitentiary system that seeks the reintegration of the **convicted** to society through rehabilitation as requires Article 18 of the Constitution after its amendment published on 23 February, 1965. It should be noted that when Section II of Article 38 was approved in 1917 there was no penitentiary nor was that purpose recognized since the original Constituent self did not surpass the Porfirian legacy in that field.

45 Mónica González Contró. "Comentario al Artículo Constitucional" (Commentary to Article 38 Constitution). *Derechos del Pueblo Mexicano (Mexican People's Rights). Mexico a través de sus Constituciones (Mexico throughout their Constitutions)* Volume XVII. Page 523.

Proof of this is acknowledgement of the possible implementation of the death penalty in the states in the absence of penitentiary system according to the original discussion of Article 22 of the Constitution.[46] The abolition of the death penalty through the constitutional reform of December 9, 2005 is contributed to the change of direction on penitentiary policy by abandoning the "prison concept" one had by then when Section II of Article 38 was approved.

The penalty of suspension of political rights has been called "civil death"[47] because it deprives de citizens of their political rights, as in this case, not only to be voted, but also to vote which has not been granted to persons deprived of their liberty.

Even in the United States, which has not signed the here mentioned conventions on human rights and where more than a half of the states still recognize the death penalty. In twenty states deprivation of the enjoyment of political rights is ordered with only more than one year prison sentence ordered by final sentence. It has been judicially recognized in other states such enjoyment to citizens serving in a prison sentence.[48] Therefore, Lyndon La Rouche ran for president of that country in 1992 from his confinement facility in Minnesota.[49]

We also believe that international treaties should be implemented with priority to domestic law, human rights treaties are more favorable to the person since representing the most favorable rights for a human being to a contrario sensu of Article I of our Constitution which prohibits the suspension of rights embodied in the very same Constitution. According to this, Section II of Article 38 is now superseded by the section VI thereof as well the permanent intention of the Constituent Power in its 2005 and 2008 Reforms related to death penalty and the presumption of innocence

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46 On January 12, 1917, the Article was discussed where the Constituent Congressman Gaspar Bolaños explained that penalties are the means to achieve the "moral correction" of the offender. He also observed that the vesting of such penalty leaves no room for amendment of miscarriages of justice by making it irreparable. Enrique Díaz Aranda. "La Pena de Muerte en México" (Death penalty in Mexico), www.unifr.ch/ddp1/derechopenal/articulo/a_20080521_64.

47 Nora V. Demleitner. "Continuing payment on one's Debt to Society: The German model of felon disenfranchisement as an alternative." *84 Minnesota Law Review 753*. April 2000. Page 757.South Africa, indeed, authorized the exercise of the right to suffrage to convicted prisoners.

48 Precedents like *Locke v. Farrakhan* of Washington State and *Hayden v. Pataki* of New York do so. At the contrary, there is case *Richardson v. Ramirez* 418 U.S. 24 (1974), where the Supreme Court rejected the claim of unconstitutionality of the penalty of suspension of political rights by State Law.

49 Even in the recent emerging countries of the defunct Soviet bloc, such as Latvia, Alfred Rubiks was allowed to run his campaign for the presidency of his country in 1996.

countersigned by the *American Convention on Human Rights* referred to and the *International Convention on Civil and Political Rights.*

The Supreme Law of the Union as specified in Article 133 of the Constitution supports the following conclusion *entirely* in all three systems, the Constitution itself, through its systematic interpretation, the federal law which is the criminal code and the international conventions:

- The suspension of political rights is an unconstitutional punishment, because it undermines the objectives of punishment as to be of rehabilitation character of the individual
- The penalty of suspension of political rights prejudges upon the verdict by infringing the constitutional principle of presumption of innocence of the accused.
- The penalty of suspension of political rights of a candidate in their intention to run in elections violates the obligation of the Mexican Union to observe the principle of the international law of reparability under Article 9.5 of the International Covenant on Civil and Political Rights.[50]
- The suspension of political rights has been regarded as a breach of the principle of free and universal suffrage

Although some jurisdictions the limitation of political rights is allowed on the grounds that the citizen is deprived of their liberty for having committed a crime which was not the case in the accumulated SUP-JDC-157/2010 and SUP-JRC-173/2010 (case Sánchez Martínez) since the actor was only linked to a process that would determine his responsibility in the future or not in the criminal matters these limitations must be "reasonable", "proportional" and "constitutional."

In effect, the suspension of political rights is a penalty imposed on a citizen who is already convicted for a crime. It cannot be a precautionary or preventive measure as pretended. In its quality of punishment it should be prescribed by law as such and specify the offenses that warrant the aforementioned penalty and obviously, the maximum term the competent might impose. There is no penalty at all that would not

[50] Stating: "9.5. Anyone shall have the effective right to compensation on the grounds of unlawful arrest. How could the right of a candidate to be voted repaired after the election which he was qualified to run for through acquittal?"

have a term defined by law. To admit otherwise would be imposing illegal penalties contradictive the idea of any democratic constitutional status.

For example, citing French legislation , it is provides that once a judge rules final sentence it may be imposed as a penalty the deprivation of the right to vote and /or be elected only in case of crimes specified by law and cannot be higher than ten or five years depending on the type of offense. The suspension of the political rights is not conceivable in a democracy, because it is an act that violates the dignity of the person and in some cases the damage could reach the extent of irreparability as in the case of a sanction imposed in the beginning for indefinite term.

The case *Re Bennett of* 1993 the Justice Authorities of New Zealand considered that the Election Act with amendments of 1993 for the suspension of civil rights civil rights to anyone deprived of liberty as a result of a conviction is contrary to section 12 of the Bill of Rights of that country that says that every citizen at age 18 has the right to vote and be elected in a genuine and periodic election.[51] This decision relied on Article 25 of International Covenant on Civil and Political Rights, to determine that every citizen shall have the right to participate in public affairs, to be elected in genuine periodic elections carried out by universal suffrage and generally have access to public office under the condition of equality in their country.[52]

Regarding the interpretation of Article 25 of International Covenant it was supported by the comment of the High Commissioner of the United Nations for Human Rights delivered in 1996. Of this comment it can be extracted that it is possible to impose the obligation on the participating nations to adopt the necessary legislation to guarantee the rights established in this Article.[53] Said legislation does not meet the requirements of Article 38 of the Constitution.

In the aforementioned comment it is noted:

> Any conditions imposed on the exercise of rights protected under Article 25 shall be based on objective and reasonable criteria [..] The exercise of these rights by citizens may not be suspended or

51 *The New Zealand Bill of Rights Act 1990*, states in Article 12: "Every New Zealand citizen who is of or over the age of 18 years, (a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall "be by equal suffrage and by secret ballot."

52 *Repport to the Attorney-General under the New Zealand Bill of Rights on the Electoral Act* 1990 (*Disqualification of Convicted Prisoners*) *Amendment Bill.* House of Representatives.

53 "General Comment no. 25" *Compilation of General Comments and General Recommendations adopted by bodies of Human Rights treaties*, United Nations, 2004, pp. 194-199.

> denied except for the grounds specified in the legislation and must be reasonable and objective.

The limiting of political rights must be "reasonable" in order to be compatible with a democratic regime according to the famous precedent of the Supreme Court of Canada R. v. Oakes (1986) 1 SCR 103. In that case it was concluded that the burden to prove the innocence of the citizens throughout a criminal trial is to assume guilt and, therefore, it will constitute an unreasonable restriction on fundamental rights of the individual.

The beauty of this foreign precedent that may well be applied in our country lies in the fact that it set two rules to identify the reasonableness of the restrictions on political rights:

1. The restriction on political rights and on human rights in general should be aimed at promoting the purposes of a democratic society.
2. The restriction must avoid arbitrariness or injustice and prevent the most possible damage by demonstrating its importance towards the affected right.

In Mexico it should be considered whether the suspension of political rights occurred after the registration of the candidate of a coalition to run in an upcoming election to be held in short term through a writ of attachment to due criminal process without being a final sentence promotes the purposes of a democratic society. Our response is resoundingly negative.

Also, by the standards of democratic nations contained in the judgments cited[54] the suspension of political rights by due process is arbitrary since it cannot promote the objective of a sentence, which is the rehabilitation. As a consequence it is disproportionate because it deprives a candidate of running an election campaign in a democratic election with full knowledge by the electorate of their situation violating election competitiveness and, therefore, impeding genuine elections.

It should be noted that these considerations are not away from some of the precedents approved by the Federal Election Tribunal (TEPJ) including SUP-JDC-98/2010 (case Orozco Sandoval) in which it was held that the suspension political rights of

[54] And what is learned from the famous *Havana Package* 175 U.S. 677 *(1900)* by the Supreme Court of the United States.

the plaintiff was not admissible on the grounds that even by existence of an arrest warrant the actor was on bail so that the presumption of innocence prevailed.

Indeed, for the reason of the above-mentioned contradictions of our Magna Charter that Chamber referred to as the Constitutional Court in Election Matters should, case by case, guarantee more and more the protection of political rights like the fomentation their potentializing as well as the continuity of democracy strengthening constitutional principles that prevailing over the whole election process. The role of election judges must not be limited to ensure the legality and constitutionality of the performance of election officials but also to look for legal solutions to prevent that extraordinary situations of the democratic life would harm the legitimate course of the election process and finally the legitimacy of the main powers of the nation.

These considerations are not regarding the criminal liability of public servants, which finally proved is still effective in case the candidate hade been elected. Since that may come the constitutional mechanism of authorization for prosecution ("*declaración de procedencia*"), widely known as impeachment, allowing a corresponding prosecution and punishment by the courts after the approval of criminal proceedings by the legislative body.

To this must be added that, finally, the arrest of a registered candidate on the campaign trail violates the constitutional principle of elections to be genuine. Democracy is not a situation right that lasts by its own but, instead, should be constantly reinforced by the intervention of the people together with the three branches of Government. So, if one of the elements of democratic elections is the voters may choose candidates whose experience and integrity are not in doubt these elections also may require certainty fairness throughout the election process by the active political parties and candidates.

8. Conclusions

The exhibition held here leads us to conclude that it is necessary that the powers together to reflect on the reforms needed to strengthen our democracy. In any democratic regime, the Executive proposed bills, the legislature discusses them and, where appropriate, approves, and the judiciary enforces those laws. At the end of this process, and over time, the judge is the link that most familiar of the shortcomings of the law and has the possibility of proposing reforms that, in his opinion, could improve law and order and improve social This paper echoes this view.

The protection of political rights is substantial to contribute to democratic development. In line with recent constitutional reforms is urgent that the reviewing body make the relevant adjustments to ensure that the suspension of political rights is inconsistent with the principle of presumption of innocence, which contribute to the achievement of electoral processes with a high degree of credibility and reliability.

While such adjustments are made legal and constitutional, courts must ensure the protection of political rights as a condition of the country's democratic life. In electoral matters, please note that to scenarios of increasing politicization, is a real possibility that criminal proceedings can be manipulated against candidates and voters, suddenly, by the literal application of the provisions discussed, would be stripped of their political rights at the expense of the credibility of the results of the elections.

Hence, it is the work of the courts, while modifications are made at the constitutional and legal, to help provide certainty in cases where the endowment is required to ensure that candidates and public servants hold the elections. With this action by the courts can ensure the elections be truly competitive.