

# Opinion on the Electoral Legislation of Mexico

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## I. Introduction

1. On December 2011, the President of the Federal Electoral Institute (IFE), Mr Leonardo Valdés Zurita, requested the Venice Commission to provide an opinion on the electoral legislation of Mexico. In view of the presidential elections, which were to be held in July 2012, the IFE was interested in several specific areas, such as:

- administrative complaints and penalties for electoral offences,
- procedures concerning the oversight on political parties resources,
- access to media and means of communication.

2. In addition, other topics should be considered for review, such as: regulation of the pre-campaign period, grounds for annulling an election, freedom of expression and defamation, opinion polls, representation of minorities and vulnerable groups in the Congress, gender quotas, vote of migrants, prosecution of electoral offences, vote buying and coercion and participation of public officials during electoral campaign.

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3. In order to avoid any interference with the presidential elections, as well as with the long procedure before the new President took office, it was agreed that the Venice Commission would prepare the opinion on the electoral legislation after December 2012.

4. A delegation of the Venice Commission, composed of Ms Paloma Biglino, Mr Srdjan Darmanovic and Mr Evgeni Tanchev, members of the Venice Commission, as well as Ms Amaya Ubeda de Torres, from the Secretariat, visited Mexico in November 2012. They held several meetings and exchanges with different actors, such as the Speaker of the Mexican House of Representatives, several representatives and senators from all three main political parties (*Partido de Acción Nacional* (PAN), *Partido Revolucionario Institucional* (PRI) and *Partido de la Revolución Democrática* (PRD), the Federal Electoral Tribunal of Mexico, the Federal Electoral Institute (IFE), representatives of the civil society, pollsters and media.

5. The presidential election took place on 1 July 2012 and the new President of Mexico, Enrique Peña Nieto, took office on 1 December 2012. The electoral results had to be validated by the Federal Electoral Court (hereinafter, the Electoral Court). The 2012 electoral results were challenged by one candidate in the Electoral Court, which on 31 August 2012 issued a 1400 pages judgment, rejecting the complaints and confirming the results of the elections. The judgment analysed, among other issues, the allegations concerning vote buying, the abuse of media and polls and the misuse of financial resources by political parties.

6. This draft opinion is based on the official English translation of the Federal Code of Electoral Institutions and Procedures of Mexico (COFIPE, CDL-REF(2013)002). However, other texts have been used in the preparation of this opinion, which are essential to understand the global picture of the extensive Mexican electoral legislation, notably the Mexican Constitution,<sup>1</sup> the General Law on the System for Filing Complaints concerning electoral matters (LGSMIME)<sup>2</sup> and the Criminal Code. The Electoral Court's judgment, issued on 31 August 2012,

<sup>1</sup> Available in English in <http://portal.te.gob.mx/en/consultations/political-constitution-united-mexican-states>.

<sup>2</sup> Available in English in <http://portal.te.gob.mx/en/consultations/law-means-impugment>.

which concerned the validity of the presidential elections, has also been taken into account in order to understand the major challenges identified during elections and the electoral reforms at stake.<sup>3</sup>

7. This draft opinion should also be read in conjunction with the following documents:

- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990);
- Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report, adopted by the Venice Commission at its 52<sup>nd</sup> session (Venice, 18-19 October 2002), CDL-AD (2002) 023 rev.;
- Code of Good practice in the field of Political Parties, adopted by the Venice Commission at its 77<sup>th</sup> Plenary Session (Venice, 12-13 December 2008) and Explanatory report adopted by the Venice Commission at its 78<sup>th</sup> Plenary session (Venice, 13-14 March 2009), CDL-AD(2009)021;
- Guidelines on political party regulation adopted by OSCE/ODIHR and the Venice Commission at its 84<sup>th</sup> Plenary Session (Venice, 15-16 October 2010), CDL-AD(2010)024;
- Guidelines and report on the financing of political parties, adopted by the Venice Commission at its 46<sup>th</sup> Plenary Session (Venice, 9-10 March 2001), CDL-INF(2001)8;
- Report on Electoral systems- Overview of available solutions and selection criteria, adopted by the Venice Commission at its 57<sup>th</sup> Plenary session (Venice, 12-13 December 2013), CDL-AD(2004)003;
- General Comment No 25 (1996) of the United Nations Human Rights Committee to Article 25 of the International Covenant on Civil and Political Rights (ICCPR);
- General Comment No 34 (2011) of the United Nations Human Rights Committee to Article 19 of the ICCPR;
- The American Convention on Human Rights, as well as the recommendations and reports issued by the Inter-American Commission on Human Rights and the case-law of the Inter-American Court on Human Rights on political rights;

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<sup>3</sup> The judgment came once that the Electoral Court had decided on 365 district results claims and one challenge to the constitutionality of the whole Presidential elections.

8. This opinion was adopted by the Council for Democratic Elections at its 45<sup>th</sup> meeting (Venice, 13 June 2013) and by the Venice Commission at its 95<sup>th</sup> Plenary Session (Venice, 14-15 June 2013).

## II. Background of the opinion

### A. On the context of the 2012 Presidential elections

9. According to its Constitution and legislation, Mexico is a pluralist democracy. There have been major changes in the country from the time when one party, the PRI (*Partido Revolucionario Institucional*), traditionally in power for the last 72 years -as a result of a deficient electoral system and the lack of transparent elections in Mexico- was defeated in the 2000 election. Under the Presidency of Mr Ernesto Zedillo (1994-2000), the electoral system underwent significant changes. The reform marked a shift towards more free and fair elections and an increase in their competitiveness. In 2000, Mr Vicente Fox, the candidate of the PAN, an opposition political party, won the presidential election. Following the 2000 election, the Mexican electoral system changed once again and reinforced the role of both the Federal Electoral Institute (IFE), which has among its functions those of a Central Electoral Commission, and the Electoral Tribunal. Mexico is therefore one of the very few countries which has both a central electoral commission and a specialised Electoral Court.<sup>4</sup>

10. In spite of these changes, the 2006 presidential election results were challenged by the defeated candidate, Mr Manuel López Obrador, from the Revolutionary Democratic Party (PRD).<sup>5</sup> This provoked a temporary political crisis in the country which led to new important changes in the electoral legislation in 2007 and 2008, seeking to avoid similar problems in future elections and providing for better legitimacy.

<sup>4</sup> See Electoral Oversight, 2008, <http://constitutionmaking.org/reports.html>. Last accessed on 20 March 2013. *Is the last sentence useful?* PG

<sup>5</sup> he PRD formed a coalition with the Labour Party (PT) and Democratic Convergence party (CONV).

11. Disputes over the outcome in some electoral districts also appeared after the presidential elections of July 2012, when the PRI, through his candidate, Mr Enrique Peña Nieto, returned to power at the federal level, after being in the opposition for 12 years. Along with the disputes over the result of the elections in a number of specific areas, the issue of the regularity and fairness of the elections as such, emphasising especially the role of the media in the elections and the practice of buying votes, has been challenged and been the subject of political debate by main parties in the opposition (PAN, PRD). The debate on electoral reform is open once more for debate and discussion in Mexico.

### **B. On the scope of the opinion**

12. This draft opinion aims to assist the Mexican authorities, political parties and civil society in their efforts to bring the legal framework for elections further in line with international standards. The following comments are, nevertheless, limited to certain areas of particular interest to the authorities, as the legislation is very extensive and covers a wide range of topics. The COFIPE alone contains over 200 pages of legislation and combined with the other texts, such as the relevant provisions of the Constitution and other relevant laws on procedural matters, is composed of 500 pages of provisions.

13. From a general point of view, it should be noted that the electoral legislation is overly complex. The large number of provisions in the domestic legislation and their complex character aim to cover every possible situation, which needs to be described and regulated in writing. This seems to imply, *a contrario*, a formalistic approach, which gives the impression that any behaviour which is not expressly covered by the electoral legislation is allowed. It may also create certain accessibility problems to the regulation, as certain topics are sometimes regulated in different texts in a complex manner.

14. The opinion will focus on different parts of the COFIPE, read in the light of the Mexican Constitution, the General Law on Complaints in Electoral Matters and the Mexican Criminal Code. This will include:

- a general overview of the electoral system in Mexico;
- a comment on the political parties system, with a focus on the oversight over political parties resources existing in Mexico;
- access to media in the electoral context, which includes an analysis of freedom of expression, denigration and defamation in elections, as well as the regulation of electoral opinion polls;
- Minorities, vulnerable groups and gender representation;
- Administrative procedures for imposing penalties;
- Fighting vote buying and coercion, as well as prosecution of electoral offences and the role of public officials.

### III. General overview on the electoral system in Mexico

15. The national legislative body, the Mexican General Congress, is elected by a mixed electoral system. The representatives of both chambers of the Congress, the House of Representatives and the Senate, are elected in two different ways and procedures. In the case of the lower chamber, 300 representatives are elected “*according to the principle of majority voting, by means of uninominal electoral district system*”;<sup>6</sup> while the 200 remaining representatives in the 500-member House of Representatives are elected “*in accordance with the principle of proportional representation, by means of the regional lists voted in the plurinominal districts*”.<sup>7</sup> The same principle is applied to the 128-member Senate, where three-quarters of the senators are elected in the way that “*in each State and the Federal District (Mexico City)*”,<sup>8</sup> two (senators - S.D.) will be elected by the principle of relative majority voting, and one will be assigned to the largest minority”,<sup>9</sup> while the rest

<sup>6</sup> *Mexican Federal Code of Electoral Institution and Procedures* (the Electoral Code), Article 11.

<sup>7</sup> *Ibidem*.

<sup>8</sup> Distrito Federal is the capital - Mexico City.

<sup>9</sup> *Electoral Code*, Article 11.

of the 32 senators “will be elected by the principle of proportional representation, voted in only one plurinominal district.”<sup>10</sup>

16. In order to reduce the influence of political parties and their leadership in the legislative process, efforts have been made in the recent past to substitute the proportional clause in the electoral system with a full-fledged first-past-the-post system both for electing members of the House of Representatives and for the Senate. These attempts have failed. The President of Mexico, has not been able to control the majority in the House of Representatives since 1997. A part of the Mexican political class sees this as a consequence of the proportional clause, while at the same time a first-past-the-post system is perceived as a way to favour the biggest party in power.

17. There is a wide variety of electoral systems with proportional representation in different States<sup>11</sup>. The Venice Commission has no preference for any specific method or degree of proportionality regarding the distribution of seats. States enjoy a broad margin of appreciation as these choices are political decisions<sup>12</sup>. There are two different interests at stake which have to be balanced: to honour as much as possible the representation principle (which is enshrined in the proportionality principle); or to favour the creation of majorities, letting the main political coalition govern<sup>13</sup>. Both electoral principles, majoritarian and proportional, as well as their combination in a mixed system are legitimate choices and it is up to the Mexican political class to make its choice.

18. Article 11 of the Mexican Electoral Code stipulates that both chambers of Congress, i.e. the House of Representatives and the Senate, “*will be totally reformed*” after their mandating period - three years for the House of Representatives and six years for the Senate”. This provision introduced, as early as 1934 under the presidency of

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<sup>10</sup> *Ibidem*.

<sup>11</sup> For example, in some countries with a proportional system, the establishment of open lists has been considered to possibly reduce the influence of leadership of political parties. However, this system has also its drawbacks.

<sup>12</sup> Venice Commission, CDL-AD(2012)012.

<sup>13</sup> See *Quelques éléments à prendre en compte dans le choix d'un système électoral*, Jean-Claude COLLARD, *Réunion sur lessystèmes électoraux en Tunisie*, CDL-EL(2012)007.

Lázaro Cárdenas, bans on the immediate re-election of members of the legislative body. As a consequence, each and every member of the House of Representatives and the Senate may be re-elected only after the break of three or six years (depending on the chamber) and the principle is applicable on each possible new term.

19. The ban on re-election of the President reflected the legacy of the Mexican revolution of 1910 and the political ideas followed by president Cárdenas for members of the legislative body. This principle has survived in the Mexican politics to today. The intention behind such a principle was clear: to discourage the creation of an immovable and fixed political class that might stay in Parliament for life without a clear democratic basis. However, it is arguable whether this measure is still needed in a democratic State.

20. The Venice Commission has considered the issue of the limitation and duration of the terms of office of elected representatives on several occasions, such as in the *Report on Democracy, limitation of mandates and incompatibility of political functions*<sup>14</sup>. Indeed, the limitation of mandates is a challenge not only for the principle of representation as such, but also for contemporary democratic practice. The Constitution of Mexico is among the rare constitutions in the world that does not foresee the possibility of a consecutive parliamentary mandate<sup>15</sup>. The limitation of mandates may be criticised or praised. According to the Venice Commission,

*“62. The critics say that the frequent replacement of the holders of public (political) functions in the country can have a negative impact on the quality and on the continuity of the public policies in the country and that it brings about major political uncertainty. The supporters of the limited mandate believe that it is a positive aspect of the system seen through the prism of an influx of fresh ideas, pluralism in political thought, avoidance of political domination and, most importantly, avoidance of the concept of irreplaceability in the political establishment.”*<sup>16</sup>

<sup>14</sup> CDL-AD(2012)027.

<sup>15</sup> Article 59 of the Constitution of Mexico – Senators and deputies in the Congress of the Union cannot be re-elected. See CDL-AD(2012)027, para. 44.

<sup>16</sup> *Ibidem*, para. 62.



21. The Venice Commission is of the opinion that prohibiting the re-election of parliamentarians involves the risk of a legislative branch of power being dominated by inexperienced politicians. This may lead to an increased imbalance in favour of the executive, even if the Head of State and possibly ministers, are not re-eligible, since the executive is seconded by a permanent public service”<sup>17</sup>.

22. Taking into account that there is a long tradition and practice concerning the re-election ban of Parliament members in Mexico, the Venice Commission encourages nevertheless all the stake-holders to consider the fact that most other democracies avoid to introduce this principle in their Constitutions and/or electoral legislation.

## **IV. On the oversight of political parties’ resources**

### **A. The monitoring authority**

23. Since public funding is the general rule for political parties, the oversight on these resources is regulated in Articles 79 to 86 of the COFIPE. This regime has its constitutional basis in Article 41.II.c) of the Mexican Constitution, which states that:

*“Public funding for specific activities, related to education, training, socioeconomic and political research and publishing activities, shall be equal to the 3% of the total public financing for all parties according to paragraph “a” per year. The 30% of the amount obtained by such calculus shall be equally distributed among political parties, 70% shall be distributed according to the vote percentage they have obtained at the previous House of Representatives election.*

*(...)*

*The law shall establish procedures to help parties to pay their liabilities in the event that they loss registration, as well as to regulate the way their properties will be transferred to the State.”*

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<sup>17</sup> *Ibidem*, para. 71.

24. A “technical” body has been created inside the IFE in order to conduct the oversight of political parties’ resources - the Unit of the Political Parties Resources. All income and expenses of political parties are subject to oversight, through the presentation of periodic reports between elections and through specific reports during the electoral process, after the pre-campaign and campaign.

25. The fact that a “technical body”, which has “autonomy” (Article 79 of the COFIPE), is in charge of controlling political parties financing seems to suggest that there is no political interference in the operation of political parties<sup>18</sup>. As the Venice Commission has stated, in its *Guidelines on political parties regulation*, “Monitoring can be undertaken by a variety of different bodies, including a competent supervisory body or state financial bodies. Whichever body is responsible to review the party’s financial reports, effective measures should be taken in legislation and in state practice to ensure its protection from political pressure and its commitment to impartiality. Such independence is fundamental to this body’s proper functioning and should be strictly required by law”.<sup>19</sup> The COFIPE further defines the procedure for appointing members of the Special unit inside the IFE. The Director General of the Unit will be chosen by the General Council of the IFE, with the same requirements of age, residence, nationality, training and lack of political affiliation in the previous four years as the other General Directors of the IFE.

## B. Electoral and ordinary expenditure

26. In Mexico, political parties receive public funding both for their ordinary and for their electoral expenditure. One of the most controversial issues of the oversight of political parties’ resources is precisely the differentiation between these categories of expenditure.

<sup>18</sup> This appears to be in accordance with the Council of Europe Committee of Ministers’ Recommendation Rec(2003)4, which states that: “States should provide for independent monitoring in respect of the funding of political parties and electoral campaigns. The independent monitoring should include supervision over the accounts of political parties and the expenses involved in election campaigns as well as their presentation and publication.”

<sup>19</sup> Venice Commission and OSCE/ODIHR, *Guidelines on political parties regulation*, CDL-AD (2010)024, para. 212, [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)024-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)024-e.pdf)

This is crucial in the Mexican case, as only electoral expenditure can be taken into account (according to the law) to fix the maximum spending limit (the so called *tope*). It is very important that campaign expenditure is not considered as ordinary expenditure and therefore exceed the limit established in the legislation, breaching the principle of equal opportunities for political parties.<sup>20</sup>

27. The COFIPE contains a list of contributions in Article 229 to be considered as electoral expenditure. This type of approach could be criticised, as there is always a margin of interpretation in order to identify which expenditure is ordinary and which one is related to the electoral process. Norms cannot always take into account all the possible situations which may arise in practice. Therefore, the main temporal criterion would be a positive element, helping to classify the type of expenditure only on the basis of the period of time in which it is done.

### C. Sanctions

28. Sanctions foreseen in Articles 361-371 of the COFIPE are subject to long and complex procedures. In 2007-2008, a new special sanctioning procedure was introduced, with two sets of norms: the first one concerns the prohibition of electoral propaganda during elections as a way to seek equality and to establish limits to expenditure of candidates and political parties during electoral campaign; the second set of rules introduced are of a procedural nature. The IFE is in charge of deciding as the highest administrative authority and the Electoral Court is the judicial body reviewing the administrative decisions and sanctions imposed.

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<sup>20</sup> Venice Commission and OSCE/ODIHR, *Guidelines on political parties regulation*, CDL-AD (2010)024, para. 212, [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)024-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)024-e.pdf), para. 196: It is reasonable for a state to determine a maximum spending limit for parties in elections in order to achieve the legitimate aim of securing equality between candidates. However, the legitimate aim of such restrictions must be balanced with the equally legitimate need to protect other rights such as rights of free association and expression. This requires that spending limits to be carefully constructed so that they are not overly burdensome. The maximum spending limit usually consists of an absolute sum or a relative sum determined by factors such as the voting population in a particular constituency and the costs for campaign materials and services. Notably, the Council of Europe Committee of Ministers has supported the latter option, with maximum expenditure limits determined regardless of which system is adopted in relation to the voting population of the applicable electorate. Whichever system is adopted, such limits should be clearly defined in law.

29. Sanctions for offences committed during the electoral period require that a balance be found between the need for a timely solution and the respect for the principles of a fair trial. Concerning the violation of the political parties' funding expenditure, a debate is necessary on whether the fact that a candidate has exceeded the campaign spending limit is a ground for annulling the election. A regime of sanctions resulting in the cancelation of elections or in the ineligibility of candidates can be, nevertheless, difficult to establish.

## IV. Freedom of expression, the issue of denigration and defamation in the Mexican electoral legislation

### A. General remarks

30. The *Code of Good Practice in Electoral Matters*<sup>21</sup> underlines the vital role played by the freedom of speech during the electoral process. Paragraph II.1 of the Code, according to the standards stated in international declarations of human rights and the case-law of international Courts of Human Rights<sup>22</sup>, proclaims that democratic elections are not possible without respect for human rights, in particular for the freedom of expression and of the press.

31. There are two different kinds of requirements regarding the freedom of expression. First, this right must be guaranteed not only for candidates themselves, but also for the mass media in order to respect the voter's freedom to form an opinion. Secondly, freedom of expression must be compatible with the equal opportunity principle. According to the *Explanatory report to the Code of good practice*<sup>23</sup>, the neutrality requirement applies to the *electoral campaign and coverage*

<sup>21</sup> Venice Commission, 2002, CDL-AD(2002)23rev.

<sup>22</sup> See, for example, the case-law of the Inter-American Court of Human Rights on the issue. Particularly, the Consultative opinion OC-5 on the Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, 13 November 1985..

<sup>23</sup> Adopted by the Venice Commission at its 52<sup>nd</sup> Plenary session, Venice, 18-19 October 2002, paragraphs 18 and 19.

*by the media*, especially the publicly-owned media. The basic idea is that the main political forces should be able to voice their opinions in the main media of the country.

32. From a general perspective, the Mexican electoral legislation regulates the electoral process according to the principles listed above. On the one hand, the free expression of ideas is guaranteed by Article 6 of the Mexican Constitution, which also proclaims the right to information. In addition, Article 7 of the Constitution proclaims the freedom to write and publish a text on any topic, limited only by the respect for private life, morality and public peace. Article 7 also prohibits any kind of previous censorship, an aspect in line with the international commitments ratified by Mexico.<sup>24</sup> On the other hand, Article 1 of the Constitution bans any form of discrimination which violates human dignity or seeks to annul or diminish the rights and freedoms of the people. Furthermore, the Constitution proclaims the principle of equality in Articles 25 and 26 (although both Articles are only related to the development of the Mexican nation). The Mexican Constitution seems therefore to depart from other texts, which not only declare formal, but also substantive or material equality, or equity, as a general principle of the constitutional system<sup>25</sup>. However, the principle of “material equality” has been introduced through International Conventions according to Article 133.<sup>26</sup>

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<sup>24</sup> Such as Article 13 of the American Convention on Human Rights, which prohibits prior censorship.

<sup>25</sup> For example, Art 3.2 of the Italian Constitution declares that, “It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.” In a similar way, Art 13.2 of the Colombian Constitution states that, “The State will promote the conditions necessary in order that equality may be real and effective and will adopt measures in favor of groups which are discriminated against or marginalized. The State will especially protect those individuals who, on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction any abuse or ill-treatment perpetrated against them.”

<sup>26</sup> See, for example, the case-law of the Electoral Court SUP-JDC-1895/2012.

## B. Freedom of expression during elections

33. The first paragraph of Article 228 of the COFIPE defines the electoral campaign. According to this Article, an electoral campaign is the group of activities carried out by national political parties, coalitions and registered candidates to obtain the vote. The second and third paragraphs of Article 228 establish that acts of campaign and electoral propaganda are activities carried out by candidates, political parties and their sympathisers addressed to present and promote their candidacies to the voters.

34. It is possible to infer from these provisions that only political parties and candidates are allowed to campaign. If this is the correct interpretation of Article 228, other social groups such as Trade Unions, business organisations or others are not allowed to campaign.<sup>27</sup> However, this prohibition is only expressly stated in Article 130. 3 of the Constitution concerning Church ministers. According to this Article, “*Church ministers cannot join together for political purposes nor proselytise in favour of a certain candidate, party or political association or against them*”.

35. For these reasons, it would be better to clearly state what the legal position of individuals is that are not candidates nor members of political parties during the electoral campaign. The prohibition of electoral campaigning should be expressly defined and needs to be precise enough. In any case, it must be pointed out that an electoral campaign is an organised sequence of activities characterised by repetition and general diffusion. Therefore, the restriction of campaigning does not limit the citizens’ freedom of expression or opinion during the electoral period. During this period, individuals and groups can express their political preferences since the mere expression of ideas is not campaigning.

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<sup>27</sup> Trade Unions are forbidden to form a political party as, according to Article 41, section I, of the Constitution, only citizens as such may integrate these political organisations; the same provision is repeated in Article 22.2 of the COFIPE. Business organisations are forbidden to pay any money for candidates, political campaigns or parties under Article 77.2.g) of COFIPE; they also cannot pay advertisements in radio or television because Article 49.4 of COFIPE bans these activities.

36. Mexican electoral legislation seems to meet in its main features the international legal standards on freedom of speech. However, there are two issues that need a more detailed analysis. Article 232.2 of the COFIPE states that propaganda diffused by graphic means is limited by the respect to private life of the candidates, authorities, third parties and institutions and democratic values during an electoral campaign. Furthermore, Article 41.III.C of the Mexican Constitution provides that, “*in the political and election campaign advertising, the political parties cannot use terms or expressions that denigrate or insult institutions or political parties, or that slander people*”. The General Council of the Federal Electoral Institute has the right to immediately suspend the messages on the radio or television that do not respect this regulation.

37. These provisions must be analysed taking the requirements stated by the *Code of Good Practice on Electoral Matters* into account. According to paragraph 61 of the *Explanatory report* this kind of prohibition, if restrictively interpreted, may just be acceptable. However, in practice, “*they may lead to the censoring of any statements which are critical of government or call for constitutional change, although this is the very essence of democratic debate*.” The *Code* expressly contemplates the case of an electoral law “*which prohibits insulting or defamatory references to officials or other candidates in campaign documents, makes it an offence to circulate libellous information on candidates, and makes candidates themselves liable for certain offences committed by their supporters*”. Paragraph 61 of the *Explanatory report* clearly states that, in such a case, the European standards would be violated.

38. Finally, Article 6 of the Mexican Constitution recognises the right of reply and refers its implementation to a further law. Article 233 of the COFIPE also proclaims the said right in electoral period, regarding information presented by media. According to this Article, political parties, pre-candidates and candidates could use the right to reply when they consider that the media has distorted events or situations regarding their activities. However, the last paragraph of Article 233 again remits the implementation of the right to reply to a further law.

39. Recommendation R(99) 15 of the Committee of Minister of the Council of Europe, on Measures concerning Media Coverage of Election Campaigns, stresses the importance of the right to reply. According to paragraph III.3 of the Recommendation, “*given the short duration of an election campaign, any candidate or political party which is entitled to a right of reply under national law or system should be able to exercise this right during the campaign period*”. Although tribunals in Mexico recognise the right to reply in their case-law,<sup>28</sup> adoption of a specific law mentioned by the Constitution and the COFIPE would be useful.

### C. Media coverage of elections

40. Media, mainly radio and television, play a central role in modelling the public opinion during elections. *The Code of Good Practice in Electoral Matters* underlines that the main political forces should be able to voice their opinion in the main organs of the country’s media, in order to guarantee equal opportunity. This right must be clearly regulated, with due respect for the freedom of expression (paragraph 16 of the *Explanatory report*).

41. Article 41.III of the Mexican Constitution recognises the political parties’ right to use radio and television by giving them free time during the electoral period. Paragraph e) of the said Article lists the criteria for distributing free time. Meanwhile 30% of airtime is equally distributed among political parties, 70% of airtime is distributed according to the vote percentage that parties have obtained at the previous elections. Thus, the Constitution combines the strict equality and the proportional equality mentioned in paragraph 18 of the *Explanatory report of the Code of Good Practice on Electoral Matters*<sup>29</sup> Article 41.A of the Mexican Constitution strictly prohibits buying propaganda on the radio and television. Furthermore, paragraph g) of the said Article states that political parties cannot buy airtime on television or radio by themselves or through a third person. No private individual or

<sup>28</sup> SUP-JIN-359/2012 is a good example.

<sup>29</sup> CDL-AD(2002)23.



legal entity can buy airtime on television or radio to influence political preference or to promote or attack a certain candidate or party.

42. This prohibition, that mainly affects the media freedom of commerce, meets the requirements set out by international human rights standards. In fact, the ban is based on the law; it is in the general interest and respects the proportionality principle. The goal of the prohibition is a legitimate one, since it aims to ensure equality without putting at risk the freedom of expression. It should be highlighted that Mexican legislation does not explicitly impose neutrality and objectivity to radio and television. Perhaps both requirements can be deduced from other legal and constitutional prohibitions, such as the ban from buying propaganda and the definition of electoral campaign, both analysed before, or the limits on electoral funding. However, the main instrument to guarantee that media does not interfere in the campaign, breaking equality in favour or against certain candidates, is the Federal Electoral Institute (IFE).

43. According to Article 49.7, IFE must prepare and present the general outlines for the radio and television news regarding the information on the activities of pre-campaign and campaign of political parties. These outlines are elaborated by the General Council of the IFE with the media representatives. Generally, the outlines stress the necessity of guaranteeing equity and the citizens' right to receive true and objective information.<sup>30</sup> Furthermore, Article 76.8 of the COFIPE establishes the way in which IFE can verify media behaviour during the elections. This Article establishes that IFE's General Council will monitor the transmissions of the electoral campaigns on radio and television programmes. The monitoring results will be published at least every fifteen days.

44. These guarantees respect international standards on the freedom of expression, since they safeguard the editorial independence of the media. Indeed, the respect of pluralism and neutrality is mainly left to media self-control, since the outlines elaborated by the IFE are not mandatory and the IFE cannot impose sanctions when outlines are disregarded. Nevertheless, there are two

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<sup>30</sup> For example, during the last presidential election, Decision CG291/2011.

sets of issues which could become problematic. The first one derives from the almost irrelevant role of public television in Mexico. The second and most relevant difficulty is generated by the private radio and television situation in Mexico. There is a very high concentration of broadcasting media in the country.<sup>31</sup> According to the Report<sup>32</sup>, only two television companies (Televisa and Televisión Azteca) gather 96% of the audience and nearly the entire amount of publicity income.

45. The broadcasted media “duopoly” has been very controversial during the last presidential election in 2012. The criticism about the close proximity between the interest of one of the candidates and the opinions and information broadcasted by the major television channels was one of the main issues that tainted the electoral campaign. It should be underlined that Article 1 of the Mexican Federal law on Radio and Television declares that the Nation has dominion over the medium in which electromagnetic waves are propagated. This dominion is inalienable and has no time limit. Broadcasting is a public service that can be rendered only by previous government’s concession or permission.

46. In such circumstances, the private media regulation should conciliate equality and respect for editorial independence. The Code of Good Practice in Electoral Matters also emphasises that, in conformity with the freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audio-visual media with regard to the election campaign and to advertising for all participants in elections.<sup>33</sup> The Recommendation of the Committee of Ministers of the Council of Europe on measures concerning media coverage of election campaign, 2007 (CM/Rec (2007) 15), in paragraph 2 on measures concerning broadcast media, states that:

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<sup>31</sup> See, in this respect, The Final Report on the Presidential Elections of 1 July of 2012, made by European Union Election Observation mission experts, available at <http://www.ife.org.mx/docs/IFE-v2/CNCS/CNCS-IFE-Responde/2012/Octubre/InfMEuro/InfMEuro.pdf>.

<sup>32</sup> *Ibidem*.

<sup>33</sup> See I.2.3.c of the Code of Good Practice in Electoral Matters.

*“During election campaigns, regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media.*

*With due respect for the editorial independence of broadcasters, regulatory frameworks should also provide for the obligation to cover election campaigns in a fair, balanced and impartial manner in the overall programme services of broadcasters. Such an obligation should apply to both public service media and private broadcasters in their relevant transmission areas”.*

47. In addition, and where self-regulation does not provide for this,

*“...Member states should adopt measures whereby public service media and private broadcasters, during the election period, should in particular be fair, balanced and impartial in their news and current affairs programmes, including discussion programmes such as interviews or debates.”*

48. The problem of these limitations on private media is the risk for freedom of opinion and information. In the *Report on Measures to Improve the Democratic Nature of Elections in Council of Europe Members States*, adopted by the Venice Commission at its 90th Plenary Session, the question remains open, as it states that *“this is an area where rules have yet to be written, and at the moment we are only at the very initial stages”*. Democratic elections largely depend on the ability and the willingness of the media to work in an impartial and professional manner during election campaigns. The failure of the media to provide impartial information about the election campaign and the candidates is one of the most frequent shortcomings that arise during elections.<sup>34</sup>

49. In any case, objectivity and neutrality during the electoral period can be achieved by other means, respectful of the plurality of the media. A stronger service of public radio and television could be useful, as long as it is independent from political power and able to inform in a neutral and plural form. It would also be recommendable to improve pluralism in the broadcast media, by taking proper measures aimed at increasing the number and variety of the media and to limit

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<sup>34</sup> CDL-AD(2002)023rev, para. 19.

broadcasting monopoly. The Venice Commission welcomes the recent reform of the Federal Law on Telecommunications as a step forward towards a better media pluralism.

## V. Opinion polls

50. Opinion polls play an important role during elections; they can indeed not only reflect the views of a representative group of voters on the day in which the poll was conducted, but may shape the views of others in a positive or negative way. For this reason, although opinion polls are sometimes not regulated, there are many countries which contain provisions on the prohibition of the publication of opinion polls shortly before election day.<sup>35</sup> The regulation of broadcasting coverage of opinion polls and other relevant information is a positive element.<sup>36</sup> In the Mexican legislation, it is compulsory, according to Article 237 of the COFIPE, for opinion polls to abide by the IFE's scientific guidelines and a publication ban comes into force three days before the election day. The existence of such a deadline is welcome and can be considered reasonable.<sup>37</sup>

51. Proposals are currently under discussion for laying down formal requirements to guarantee the scientific rigour of opinion polls prior to their publication or, possibly, prohibiting their publication during election campaigns. As stated, the existing publication ban is consistent with International standards. It would be advisable, in order to ensure transparency, that the opinion polls published contain information about sources used and methods followed in order to make it available to the public. It is clear that the validity/correctness of opinion poll results and the methodology used are difficult to verify and can be

<sup>35</sup> See the *Joint Opinion on Draft Amendments and addenda to the Law on "elections to the Oliy Majlis of the Republic of Uzbekistan" and "on elections to the regional, district and city councils (Kengesh) of people's deputies of Uzbekistan*, CDL-AD(2012)25, para. 35.

<sup>36</sup> Venice Commission, Report on electoral law and electoral administration in Europe, CDL-AD (2006)018, par. 121.

<sup>37</sup> See, among others, *Joint Opinion on the Electoral Code of Moldova*, CDL-AD(2006)001, para. 78; *Opinion on the Law on elections of people's deputies of Ukraine*, CDL-AD(2006)002, para. 68.

manipulated;<sup>38</sup> however, transparency and publicity are key elements to ensure a better contribution to form free opinions.<sup>39</sup>

## VI. Gender quotas

52. In the current Mexican Parliament, there are 37% women in the House of Representatives and 34% in the Senate. These are quite high percentages; in this regard, Mexican legislation seems to be quite progressive, as according to Article 219 of the COFIPE, a quota of 40% of candidacies for the offices of senator or deputy is reserved to the underrepresented gender. This provision allows for the possibility of derogating from this rule for those candidacies that are the outcome "of a democratic election process". The Venice Commission is aware of the existence of a judgment by the Electoral Court of 2011, which has stated that the quota should apply without exception. However, the revision of this exception is recommended, in order to clarify and avoid a possible misuse of the legislation in this respect.<sup>40</sup>

53. According to the United Nations Committee of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the quota should be at least of 30-35% (stated in 1997<sup>41</sup>); since 2001, the European Parliament has established a quota of 40%. The Council of Europe Committee of Ministers has considered that ensuring 40% of candidates from the underrepresented gender is

<sup>38</sup> See *Joint Opinion on the Election Code of Georgia*, CDL-AD(2006)037, para. 100.

<sup>39</sup> It is important to note that IFE adopted some rules on 14 December 2011, requiring that all published results should include: the entity that paid for the study, the day in which the poll was collected; the category of citizens; the probability of errors, etc. See [http://www.ife.org.mx/docs/IFE-v2/Principal/NoticiasAvisos/NoticiasAvisos-2011/estaticos2011/diciembre/CG411\\_2011.pdf](http://www.ife.org.mx/docs/IFE-v2/Principal/NoticiasAvisos/NoticiasAvisos-2011/estaticos2011/diciembre/CG411_2011.pdf).

<sup>40</sup> The Committee on the Elimination of Discrimination Against Women recommended Mexico to "Ensure that political parties are complying with the federal and state electoral legal frameworks, including by amending or repealing discriminatory provisions against women, such as paragraph 2 of Article 219 of the Federal Code of Electoral Institutions and Procedure and by establishing sanctions in cases of non-compliance with the gender quota..."; <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/455/36/PDF/N1245536.pdf?OpenElement>.

<sup>41</sup> See CDL-AD(2010)031, PACE recommendation 1899(2010) "increasing women's representation in politics through the electoral system", Venice Commission comments in view of the reply of the Committee of Ministers.

welcome. When representation quotas cannot be established for the seats which are obtained by majoritarian principle of elections, political parties may decide to nominate a certain percentage of women candidates. It is possible, however, to introduce some gender-formula expressed in numbers (percentages) for the congressional seats obtained by the proportional clause. During the visit and the exchanges held in preparation of this opinion, several stakeholders expressed concern about political parties' occasional manipulations in this issue; several judgments issued by the Electoral Court faced for example the misuse of the rule, by using political parties' lists respectful of the 40% quota, but in which men-substitutes were introduced to take seats in the Congress instead of their women colleagues.<sup>42</sup>

54. There is a discussion underway concerning the introduction of gender quotas on political party leaders (Article 38.s of the COFIPE), in order to ensure a higher proportion of women among the higher positions inside political parties. There are no international standards that establish an obligation in this respect; however, it would be a positive further step to consolidate an already progressive legislation in this field.

## VII. Minorities and vulnerable groups

55. Although the Mexican Constitution provides that Mexico has a multicultural composition based on its indigenous peoples (Article 2), these groups have been historically largely under-represented in Congress. As regards the indigenous peoples, the Constitution provides that, in establishing single-member districts, consideration shall be given to indigenous peoples and communities so as to promote their political participation.<sup>43</sup>

56. According to the Code of good practice in electoral matters of the Venice Commission and to the principles of International Law, "the electoral law must guarantee equality for persons belonging to

<sup>42</sup> The so called "Juanitas" case.

<sup>43</sup> Constitution, third transitional article.

national minorities, which includes prohibiting any discrimination against them. In particular, the national minorities must be allowed to set up political parties<sup>44</sup>.” The Inter-American Court has further required that the political representation of indigenous populations should be ensured, accepting their organisation in alternatives to a classical political party structure.<sup>45</sup> Therefore, measures taken to ensure minimum representation for minorities, either by reserving them seats or by providing for exceptions to the normal rules on seat distribution do not infringe the principle of equality<sup>46</sup> and should be considered.

## VIII. Grounds for annulling an election

57. Article 71 of the General Law on the System for Filing Complaints concerning electoral matters (LGSMIME)<sup>47</sup> regulates the scope of nullity to be considered by the Electoral Tribunal. This provision seems to have covered and exhausted all the possible areas of cancellation of an election, starting with a booth and ending with a presidential or general election for both Houses of the Congress. To safeguard certainty, Article 72 of the LGSMIME rules out electoral contestation beyond a certain time limit. The Mexican legislator has invoked the universally accepted rule that ineligibility under proportional representation leads to replacement by the substitute of the ineligible candidate. Nevertheless, Article 73 of the LGSMIME does not clarify whether the substitute is next on the party list or whether the party’s leadership might pick one at their own discretion. This has to be read in light of Article 20 of the COFIPE, which states that the replacement of a member of the House of Representatives or of the Senate will be filled by the candidate which follows in the regional list.

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<sup>44</sup> CDL-AD(2002)023rev, para. 22.

<sup>45</sup> Inter-American Court of Human Rights, *Yatama v. Nicaragua*, 23 June 2005.

<sup>46</sup> CDL-AD(2002)023rev, para. 23.

<sup>47</sup> Available in English in <http://portal.te.gob.mx/en/consultations/law-means-impugment>.

58. Title VI, Chapter II of the Law is devoted to the different grounds justifying an annulment of a given election. There is an attempt to exhaust all possible and sound breaches that might affect the voting result, twist the electorate's will and lead to challenging the vote. All grounds listed in Article 75 of the LGSMIME resulting in rendering the votes null seem sound and are in consonance with the universal and comparative standards in this area. However, several precisions might be proposed:

- concerning Article 75, par.1.b, it would be good to indicate the extent of the omission that might be envisaged and the deadline in which this option should be enforced;
- Article 75, par.1 "h" should clarify the reason that could justify expelling representatives of the parties.
- Article 75, par.1 "j" should include a clarification of the justified reason that could prevent the exercise of the right to vote.

59. As concerns the possibility of other grounds being considered, this provision is very ambivalent. On the one side, the Electoral Tribunal might be able to declare the nullity of an election of representatives or senators when substantial widespread violations have been committed on the electoral day in the district or entity where the voting is taking place; this would be possible if it is fully proved and established that the violations committed were significant for the result of the election, except if the irregularities are imputable to the promoter parties or their candidates. However, if Article 78 of the LGSMIME makes it possible to annul elections of senators and deputies in the event of substantial violations on polling day, it does not allow for this possibility for presidential elections. There is no justification for this ground for cancellation of the elections not being available for presidential elections.

60. For annulling congressional and senatorial election or presidential elections, Mexico has traditionally applied a quota system. For example, at present, a ground of invalidity must affect 20 % polling stations in congressional and/or senatorial election and 25% of polling stations for the presidential election to be annulled (Article 77 bis of the LGSMIME). However, it does not seem justified to have



20% for congressional elections and 25% for Presidential elections as the margin required for the annulment of the election. Sometimes a much lesser percentage might be sufficient for affecting the electoral result. The annulment does not depend on a quantitative measurement of the number of booths, the extent of the votes cast, the territory of the electoral precincts or districts concerned, but should be based on the fact that the contested votes could have overturned the result and that the loser of the elections could become the winner (and *vice versa*).<sup>48</sup>

61. There is a debate as to whether or not a presidential election can be annulled on grounds other than those set out in the law. The Electoral Court has interpreted that an election can also be invalidated in the event of a breach of constitutional principles (free and genuine elections, certainty, lawfulness, independence, impartiality and objectiveness).<sup>49</sup> However, so far this possibility has never effectively resulted in the cancellation of a presidential election.

62. The grounds for judicial protection against violations of voting rights as well as legitimising the votes have been drawn up carefully. The exhaustion of other remedies as a precondition to introduce complaints before the Electoral Tribunal has to be welcomed, as it aims to reduce claims that might be resolved by other means. Measures to reduce the complexity and the important institutional tasks and work of IFE and the Electoral Court are to be considered in this respect.

## IX. Participation of public officials

63. Article 134 of the Constitution requires public officials to be impartial in their use of public resources. It also prohibits communication materials from being disseminated by government institutions to include content involving the individual promotion

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<sup>48</sup> See formula proposed by Jean –Claude Colliard, Electoral disputes in *The Cancellation of Election Results, Science and Technique of Democracy*, N 46, Council of Europe, 2010, p.14. See also *Code of Good Practice*, II.3.3.e.

<sup>49</sup> Electoral Tribunal, Judgment on the 1 July 2012 elections, 31 August 2012.

of any official. To safeguard the principles of efficiency, effectiveness and honesty and to rule out partisanship or partiality, the use of such resources shall be assessed by the agencies created by the federal, state and local governments.

64. All contracts made by the authorities and entities on acquisitions, renting, transfers, provision of services and works shall be awarded by open tender, where qualified bidders submit their sealed bids. These sealed bids are opened in public for scrutiny in order to assess their offers about price, quality, financing, opportunity and other appropriate conditions.

65. When a tender is not appropriate to guarantee the conditions mentioned in the previous paragraph, the law shall establish the bases, procedures, regulations, requirements and other conditions necessary to prove the good price, effectiveness, efficiency, impartiality and honesty of the process for the benefit of the state.

66. Article 347 of the COFIPE outlaws partial behaviour by public officials where this affects the fairness of the contest between political parties, party hopefuls, shortlisted prospective candidates or candidates in an electoral process. It also prohibits them from disseminating government propaganda during the campaign and from using social programmes in order to compel people to vote in a given way.

## **X. Vote buying and coercion**

67. Vote buying and coercion is an issue which interferes with the essential element of freedom or voters to express their wish. Any mechanisms which can undermine the principle of free suffrage are key to the legitimacy of elections and measures to reduce the risk of vote-buying should be carefully considered and enforced. In this view, there is a clear need to review the classification of the offences of vote buying and coercion in electoral matters. Evidence of vote buying is extremely complex and it is not very clear whether the possibility of giving presents to voters can (in any case) be regarded as vote buying.

## XI. Conclusions

68. This opinion is intended to support the authorities, political parties, and civil society of Mexico in their stated objective to improve the legal framework for democratic elections and to bring it more closely in line with the international standards for democratic elections.

69. The legislation has positive elements and has evolved in order to introduce freer and fairer elections in Mexico. Notably, the electoral legislation has reinforced the powers of the IFE and the Electoral Court, established mechanisms for oversight of the public funding of political parties, declared the importance of freedom of expression and distributed equal media time among political parties and ensured a higher presence of women in politics through the establishment of quotas.

70. However, as detailed in the introduction and throughout this opinion, several recommendations can be made, such as:

- Simplifying the legislation, which is overly complex and could be improved by being clearer and more concise so that it is easily understandable to all electoral stakeholders. The lengthiness of the legislation implies, *a contrario*, that a formalistic approach is retained and there is a constant need to review the legislation.
- Reconsidering the ban in re-election of parliamentarians.
- Establishing in a clearer and more concise manner the limits to expenditure by political parties, avoiding long lists and different categories in the type of expenditure to be considered. Considering the introduction of an objective criterion to establish limits of expenditure for political parties, such, as for example, the time period in which the expenses take place, could be of help for ensuring both oversight and equality. Sanctions should be effective in this respect.
- Defining clearly the scope of the prohibition of electoral campaigning and the position of individuals who are not candidates nor members of political parties in this respect.
- Reviewing the provisions concerning the prohibition of denigration of political parties or candidates, as they may lead to

the censoring of any statements which are critical of government or call for constitutional change, although this is the very essence of democratic debate.

- Regulating the right to reply.
- Improving further media pluralism.
- Promoting the participation of minorities in elections.
- Reforming the percentages for annulling congressional and senatorial election to make them coherent and introducing the possibility of annulling presidential elections in case of substantial violations on polling day.
- Reinforcing effectiveness of measures against vote-buying.

71. The Venice Commission stands ready to assist the authorities of Mexico in their efforts to revise the legal framework for democratic elections in order for it to be in full conformity with the international standards for democratic elections.