La justicia electoral mexicana en el foro internacional.

El TEPJF en la Comisión de Venecia

Tomo I

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del Poder Judicial de la Federación

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Presentación

La democracia se cimienta en valores como la dignidad humana, la libertad y la igualdad, así como en la soberanía popular que se ejerce mediante las instancias de representación política que al efecto se han creado, y encuentra su fuerza vital en las personas que se congregan en localidades, regiones y naciones para encontrar, de manera pacífica, soluciones conjuntas a problemas compartidos.

En razón de ello, es necesario señalar que la democracia inicia y termina con el ejercicio de los derechos de la ciudadanía en cada estado; sin embargo, su consolidación en las sociedades y en los gobiernos no puede concebirse sin el apoyo mutuo que se ofrece en la comunidad internacional, ya que la cooperación entre las instituciones que salvaguardan el andamiaje democrático de las naciones rinde frutos que benefician a un número cada vez más grande de países.

Durante las últimas décadas, México se ha afianzado como un país abierto al escrutinio internacional. Esta dinámica de apertura a las observaciones y recomendaciones internacionales ha facilitado la creación de instituciones conforme a los más altos estándares democráticos.

Actualmente, la cooperación internacional electoral se desarrolla en dos direcciones: por un lado, observadores, expertos, representantes de organizaciones civiles y académicos de todo el mundo analizan los procesos y las leyes electorales del país, obteniendo información completa para sus diagnósticos y recomendaciones; por otro, las autoridades integrantes de las instituciones democráticas son protagonistas en

foros internacionales especializados, misiones de observación electoral y como representantes expertos del Estado mexicano. En ambas direcciones se atestigua diariamente un intenso intercambio de mejores prácticas entre una amplia diversidad de actores.

Producto de lo anterior, el concierto de las naciones ha reconocido estos avances en México, abriendo espacios en foros de alto nivel para exponer los resultados de esos esfuerzos. De esta forma, el modelo electoral mexicano es referente para otros regímenes democráticos, tanto los consolidados como los más jóvenes.

Es por ello que se ofrece en esta publicación un panorama documental de la actividad de cooperación internacional del Tribunal Electoral del Poder Judicial de la Federación (TEPJF), con énfasis en el trabajo realizado en el marco de la Comisión Europea para la Democracia a través del Derecho, mejor conocida como Comisión de Venecia.

Al inicio de esta publicación se encuentran los mensajes del presidente de este Tribunal y de Gianni Buquicchio, presidente de dicha Comisión, con motivo de su visita a México en octubre de 2014. En el capítulo 1 se ofrece una síntesis de la estrategia de colaboración internacional que ha seguido el TEPJF, con especial relevancia en las labores de divulgación de los conocimientos acerca de la garantía y el ejercicio de los derechos fundamentales, en su vertiente política y electoral. Asimismo, se señalan algunas actividades de vinculación, como el acompañamiento de procesos electorales, el intercambio documental y de información con autoridades especializadas de otros países, así como la concertación de acuerdos para la cooperación técnica y el intercambio de mejores prácticas en materia electoral. Entre otros, destacan proyectos, como la base de datos VOTA, que han permitido la difusión del marco legal de diversas democracias en el mundo.

Los capítulos 2 a 7 describen la participación del TEPJF en el seno de la Comisión de Venecia, ilustrando los beneficios que ofrece la cooperación multilateral para el fortalecimiento democrático. Se compilan contribuciones específicas de los miembros de México ante la Comisión —la magistrada María del Carmen Alanis Figueroa y el magistrado Manuel González Oropeza—, las cuales incluyen opiniones técnicas de cuestiones electorales de otros países, informes de actividades vinculadas con la Comisión, así como documentos que refieren el sistema electoral mexicano en perspectiva comparada.

Los capítulos 8 a 10 muestran documentos que se han elaborado en el contexto de la presidencia de México en la Subcomisión de América Latina de la Comisión de Venecia, la cual concluyó en 2014. Es importante mencionar que el país impulsó una importante reflexión en torno a las democracias en la región, al lograr que, por primera vez en la historia de la Subcomisión, se llevara a cabo una sesión fuera de Europa.

Por útimo, en los capítulos 11 a 15 se aborda, de manera detallada, el sistema electoral mexicano con énfasis en el ámbito jurisdiccional electoral. En éstos se pone de manifiesto la importancia del Estado de Derecho y el papel de los tribunales y sus jueces para la protección de los derechos políticos en cualquier democracia, mediante documentos que se han presentado en el seno de la Comisión de Venecia o en otros foros internacionales convocados por diversas instancias del Consejo de Europa.

Esta compilación estaría incompleta sin un amplio agradecimiento al doctor Gianni Buquicchio, quien ha impulsado decididamente la colaboración interinstitucional con México. Su presencia como socio estratégico en el impulso de los valores democráticos y la de los miembros de la Comisión de Venecia en este país, con motivo del desarrollo de estudios especializados de la legislación mexicana o para participar en conferencias de alto nivel, ha generado un mensaje de confianza a esta nación.

En esta historia de éxito es necesario reconocer, de igual manera, la labor de la Secretaría de Relaciones Exteriores y de su cuerpo diplomático. Desde las gestiones para el ingreso de México a la Comisión, realizadas por la embajadora Sandra Fuentes-Berain Villenave, entonces representante del Estado mexicano ante el Reino de Bélgica, el Gran Ducado de Luxemburgo y la Misión ante la Unión Europea, hasta las labores emprendidas durante la actual gestión del embajador Santiago Oñate Laborde, observador permanente de México ante el Consejo de Europa, para facilitar la interlocución con actores clave. Sus buenos oficios han propiciado oportunidades de colaboración como las que documenta esta obra.

La publicación que tiene el lector en sus manos es una muestra de la intensa colaboración entre el TEPJF y la Comisión de Venecia, en el

empeño por expandir la cultura democrática, que revela la importancia de la cooperación internacional y, por tanto, de la presencia del Estado mexicano en foros especializados en los que se dialoga y decide acerca de las mejores estrategias para el fortalecimiento democrático.

José Alejandro Luna Ramos
Magistrado presidente del Tribunal Electoral
del Poder Judicial de la Federación

Mensaje de José Alejandro Luna Ramos*

El Tribunal Electoral del Poder Judicial de la Federación y la ampliación de los derechos político-electorales de los pueblos indígenas de México

Señoras y señores, buenos días a todas y todos.

Agradezco la invitación para participar en esta 89 sesión plenaria de la Comisión de Venecia y, así, tener el privilegio de hacer uso de la palabra en esta ágora de la democracia y el derecho.

Como magistrado presidente del Tribunal Electoral del Poder Judicial de la Federación (TEPJF), es motivo de regocijo acompañar a dos de mis colegas magistrados, la maestra María del Carmen Alanis Figueroa y el doctor Manuel González Oropeza, quienes fungen como representantes del país y como miembros en esta distinguida Comisión Europea para la Democracia a través del Derecho.

Empiezo mi exposición refiriendo la importante y reciente reforma a la Constitución Política de los Estados Unidos Mexicanos (CPEUM) que ha dispuesto una nueva vía de control de constitucionalidad a la justicia mexicana y, por lo tanto, a su Tribunal Electoral.

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* Magistrado presidente del Tribunal Electoral del Poder Judicial de la Federación.

Hago mención a la reforma del artículo 1º constitucional publicada en el Diario Oficial de la Federación (DOF) el 10 de junio de 2011, en la que se establece un modelo progresista y garantista que incorpora el goce de los derechos humanos reconocidos en la Constitución y en todos los tratados internacionales que haya ratificado México, así como de las garantías para su protección.

La citada reforma también incluye la interpretación conforme a la CPEUM y a los tratados internacionales en la aplicación de las normas de derechos humanos, así como el principio propersona.

De esta forma, cuando cualquier Tribunal mexicano se enfrente a la aplicación de un derecho fundamental que tenga su equivalente en un tratado internacional de derechos humanos, estará obligado a adoptar la interpretación del que sea más acorde con dicho tratado.

Conforme a esta exigencia constitucional, resulta inexcusable que las autoridades mexicanas, y especialmente las de carácter jurisdiccional, deben realizar un control de legalidad y constitucionalidad no sólo atendiendo a sus competencias, sino también al control de convencionalidad.

Hoy en día, el TEPJF es un verdadero Tribunal de constitucionalidad y convencionalidad que salvaguarda los derechos fundamentales de todo ciudadano en el ámbito de sus competencias, y por ello la participación y colaboración con la Comisión de Venecia resulta fundamental.

Para el Tribunal Electoral, la reforma referida es una magnífica noticia que viene a reforzar la convicción garantista y progresista. En sus resoluciones, ha establecido criterios relevantes en torno a la tutela de los derechos fundamentales, como los de acceso a la jurisdicción completa y efectiva, la protección amplia de los derechos político-electorales del ciudadano, las elecciones de los pueblos y comunidades indígenas, la protección del derecho de las mujeres a votar y a ser votadas, juzgando con perspectiva de género, y al control efectivo de la regularidad constitucional en materia electoral.

El TEPJF ha transitado con paso firme por el camino que garantiza con plenitud los derechos políticos de los pueblos indígenas, al reconocer que el régimen del derecho consuetudinario indígena resulta integrante y, por tanto, consustancial del régimen constitucional y legal de la democracia electoral mexicana, que toca al Tribunal cumplir y hacer cumplir.

En ese sentido, refiero dos casos emblemáticos. En primer lugar, comparto con ustedes el juicio para la protección de los derechos político-electorales del ciudadano (JDC) número 11, de 2007, resuelto a propuesta de un servidor y que es conocido también como el caso Tanetze; en éste, pobladores del municipio de Tanetze de Zaragoza, en el estado de Oaxaca, promovieron un JDC para impugnar la determinación de las autoridades locales de no celebrar elecciones municipales, argumentando la falta de condiciones necesarias para su realización.

En México, el juicio aludido establece la posibilidad de suplir la deficiencia en las defensas de los actores. Sin embargo, en el caso referido las deficiencias de la demandas eran tan evidentes que, a fin de maximizar los derechos de los miembros de la comunidad indígena de Tanetze, se resolvió que la suplencia de los agravios era todavía más amplia, esto es, casi absoluta para los integrantes de comunidades indígenas.

Lo anterior se resolvió con base en interpretaciones de la legislación mexicana, en los principios y valores del derecho, así como en algunos instrumentos internacionales, como la Convención Americana de Derechos Humanos (CADH), el Pacto Internacional de Derechos Civiles y Políticos (ICCPR) y la jurisprudencia de la Corte Interamericana de Derechos Humanos (Corte IDH).

En segundo lugar, refiero el JDC número 9167 de 2011, que se resolvió en el TEPJF también como propuesta de la Ponencia a mi cargo. Este asunto es conocido como el caso Cherán y fue consecuencia de un juicio presentado por 2,312 integrantes de la comunidad de San Francisco Cherán, en el estado de Michoacán, localidad indígena perteneciente al pueblo purépecha.

En el caso, los integrantes de la comunidad solicitaron al Instituto Electoral de Michoacán (IEM) que se hicieran todos los actos necesarios para que sus elecciones municipales se realizaran con el sistema de usos y costumbres y no con el sistema de elección occidental que establecía la Constitución local.

El IEM determinó que carecía de competencia para conocer el caso y, por lo tanto, no dio entrada a la petición de los integrantes de la comunidad indígena, argumentando que no había regulación legal. Ante esto, la Sala Superior revocó el acuerdo impugnado, al otorgar la razón a los actores, porque de conformidad con la CPEUM y el Convenio

sobre Pueblos Indígenas y Tribales en países independientes —conocido como Convenio 169 de la Organización Internacional del Trabajo—, es derecho de las colectividades indígenas y de quienes las integran un acceso pleno a la justicia, considerando sus usos y costumbres, siempre que se respeten, debidamente, los principios constitucionales.

Cabe precisar que, en relación con esta determinación de autonomía, se sostiene la necesidad de eliminar cualquier obstáculo técnico o fáctico que impida o inhiba el ejercicio de las comunidades indígenas, o de cualquiera de sus integrantes, a un acceso pleno a la jurisdicción del Estado.

Por lo anterior, ninguna entidad estatal o nacional puede permanecer indiferente a las obligaciones que derivan del artículo 1º constitucional, motivo de la reciente reforma referida, así como de todos aquellos instrumentos jurídicos nacionales y del orden internacional en los que se desarrolla la exigencia de reconocer y proteger la diversidad étnica y cultural de los pueblos indígenas.

En consecuencia, la Sala Superior ordenó al IEM que instrumentara las medidas administrativas necesarias para que se resolviera, en definitiva, la petición de los ciudadanos indígenas y, con ello, garantizar sus derechos fundamentales. En la argumentación de la sentencia, se encuentran preceptos de diversos tratados internacionales ratificados por el Estado mexicano, así como de jurisprudencia de la Corte Europea de Derechos Humanos (ECHR).

En este mismo contexto, debe señalarse que, particularmente, los criterios que ha establecido la Corte Europea acerca de libertad de expresión en campañas electorales, así como de discriminación, entre otros, han sido referentes para el TEPJF y son muy valiosos para la justicia electoral mexicana.

Señoras y señores:

El Tribunal Electoral de México ha entrado en una nueva etapa en su función jurisdiccional, al ser un Tribunal de constitucionalidad y de convencionalidad encargado de proteger y maximizar los derechos fundamentales de los ciudadanos en su vertiente político-electoral.

En este marco, adquiere una gran relevancia asistir y ser miembro de esta honorable Comisión de Venecia, cuyos trabajos fortalecen la consolidación de la democracia en Europa y, ahora, en México.

Como magistrado presidente del TEPJF, me comprometo a realizar mis mayores esfuerzos a fin de colaborar con profunda voluntad en la cooperación internacional e interinstitucional.

Mis compañeros magistrados aludidos y mis otros cuatro colegas que conforman el Pleno del Tribunal Electoral somos parte de un equipo que comparte estas mismas inquietudes e intereses, el cual desea participar activamente en las tareas de la Comisión, convencidos de que, con ello, fortalecemos nuestra función jurisdiccional y la impartición de justicia electoral que requiere el avance de la democracia y el derecho en México.

Palabras de Gianni Buquicchio*

Influencia de la cooperación internacional en la consolidación democrática. El papel de la Comisión de Venecia

Muchas gracias, señor presidente.

Buenos días a todos, de nuevo.

El tema que voy a desarrollar será el de la contribución de la cooperación internacional a la consolidación de la democracia y del Estado de Derecho, y, concretamente, el papel que ha jugado y juega hoy en día la Comisión de Venecia.

Estoy orgulloso de decir que hoy la Comisión de Venecia, cuyo nombre completo es Comisión Europea para la Democracia a través del Derecho, se conoce como una herramienta indispensable, en Europa y más allá de ella, de la consolidación democrática. Me gustaría desgranar aquí las claves de este éxito. Para ello, no puedo dejar de comenzar por el principio, y debo recordar la gran labor del jurista italiano Antonio La Pergola, quien tuvo la idea y la tenacidad de establecer en el Consejo de Europa un órgano consultivo de constitucionalistas. Tuvo, además, la fortuna de que la historia le ayudara a culminar su propuesta.

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* Presidente de la Comisión Europea para la Democracia a través del Derecho (Comisión de Venecia).

El año 1989 fue un *annus mirabilis* que reunió a Europa. Con la caída del muro de Berlín, lo que parecía un anhelo, un deseo con tintes puramente académicos, se convirtió en una necesidad práctica: los países de Europa central y oriental abrazaron los valores del Consejo (derechos humanos, Estado de Derecho y democracia).

La Comisión de Venecia estuvo dispuesta a llevar a cabo la tarea de acercar a los países de Europa a un entendimiento común de estos principios y nos convertimos en influyentes consejeros de las nuevas constituciones y textos legislativos en el área del derecho público.

Aunque hoy esto parezca formar parte de un ejercicio rutinario, en aquel momento fue una oportunidad única, histórica. Creo que nunca antes tantos países habían estado dispuestos a escuchar el consejo de expertos de otro país ni permitido su influencia en temas tan ligados a la soberanía nacional. Antes de 1989, incluso los derechos humanos estaban considerados como una cuestión predominantemente nacional, a pesar de los tratados internacionales en vigor.

Por tanto, con más razón esta reticencia a abrir el debate era predicable de los principios de la democracia, la separación de poderes, del Estado de Derecho, de la organización del Poder Judicial o del derecho electoral; todas éstas, áreas clave de la soberanía nacional, en las que es difícil establecer una línea de separación clara entre el derecho y la política.

La Comisión consiguió aprovechar esta oportunidad y convertirse en una interlocutora influyente y apreciada por las autoridades nacionales en la redacción o la modificación de los textos constitucionales y legislativos. No se trató de una tarea sencilla, ya que en muchas áreas no había estándares internacionales claros, sobre todo en el campo de la democracia y del Estado de Derecho.

Por tanto, desde el principio de nuestra actividad, utilizamos el derecho comparado y las lecciones aprendidas de las experiencias nacionales como base de reflexión.

Comenzamos, pues, en 1990, con los países de Europa central y oriental, y en ese momento parecía que esta cooperación iba a ser puramente temporal. Sin embargo, continúa en el presente y no parece que vaya a terminarse en un futuro cercano.

Más y más países modifican sus constituciones para adaptarlas a las necesidades de las sociedades del siglo XXI, y estos cambios ya no

ocurren sólo en una parte de Europa, sino en muchos otros países, incluyendo los de Europa occidental, como Finlandia o, más recientemente, Islandia, que han reconocido la utilidad de compartir las experiencias nacionales.

La otra actividad tradicional de la Comisión ha sido la preparación de estudios de carácter general. Hemos tratado cuestiones muy diversas a lo largo de los años, por ejemplo, en materia de federalismo, de referendos de autodeterminación; se ha tratado de los derechos de las minorías, del Estado de Derecho y, más recientemente, a propuesta de la Subcomisión de América Latina, de la puesta en práctica de los tratados de derechos humanos y del papel de los tribunales nacionales e internacionales en visión comparada.

México ha sido, con mucho, el artífice de este estudio, que será discutido en Roma durante el Plenario número 100 de la Comisión de Venecia. En efecto, la reforma constitucional en México y la discusión acerca del estatus de los tratados en materia de derechos humanos han abierto numerosos intercambios y discusiones acerca de cómo asegurar una aplicación uniforme de los derechos humanos por el juez nacional, puesto que la Corte Interamericana de Derechos Humanos (Corte IDH), en el famoso asunto Radilla Pacheco, había considerado al Poder Judicial como responsable directo de la aplicación de los tratados.

Por supuesto, la Comisión de Venecia no puede establecer estándares internacionales obligatorios para los estados, pero algunos de sus textos, como el Código de Buenas Prácticas en Materia Electoral, fue asimilado por el Comité de Ministros y la Asamblea Parlamentaria del Consejo de Europa (PACE) y se ha convertido en una referencia internacional en el campo electoral.

El estudio del Estado de Derecho que hemos elaborado en el seno de la Comisión contiene una *check list*, una lista aneja con elementos, ingredientes que forman parte de la noción destinada a tener efectos prácticos que puedan ayudar a los estados en su tarea de realzar su respeto.

Desde sus inicios, la Comisión fue también consciente de la necesidad de trabajar no sólo en textos constitucionales y legislativos, sino también de cooperar directamente con los órganos que se encargan de hacerlos efectivos.

Cooperamos, por tanto, de forma estrecha con los tribunales constitucionales y equivalentes. Hemos iniciado, en este sentido, la Conferencia Mundial de Justicia Constitucional, que cuenta hoy en día con más de 90 miembros.

He mencionado el papel clave de México también en este campo y la cooperación internacional emprendida: en efecto, con ocasión de la VII Conferencia Iberoamericana de Justicia Constitucional, realizada en Mérida, en abril de 2009, justo después de la primera reunión con motivo de la Conferencia Mundial de Justicia Constitucional, en Ciudad del Cabo, en enero de 2009, se discutió, con el auspicio de la presidencia mexicana de la citada Conferencia Iberoamericana, un primer proyecto de estatuto de la Conferencia Mundial, y recuerdo con agrado el apoyo que hemos recibido de los tribunales de Iberoamérica para concretar este esfuerzo. Desde entonces, el estatuto entró en vigor y la Conferencia Mundial de Justicia Constitucional es cada vez más amplia.

Permítanme recordar que, mientras que en la Comisión de Venecia la membresía está abierta a los gobiernos, la adhesión al Estatuto de la Conferencia Mundial de Justicia Constitucional está abierta a los tribunales constitucionales y cortes equivalentes, siendo el foro clave de cooperación entre los mismos.

Precisamente, vengo de Seúl, Corea, donde hemos celebrado la tercera Conferencia Mundial de Justicia Constitucional con gran éxito. La expansión de la cooperación con América Latina en este campo es una de las vías para fortalecer los contactos con aquellos países que no son miembros de la Comisión de Venecia, pero cuyos tribunales constitucionales y equivalentes aportan una jurisprudencia especialmente relevante para nuestro trabajo.

La Comisión ha apostado, desde sus comienzos, por la idea del diálogo de jueces, entendida en su sentido más amplio. En efecto, el diálogo se entiende como un intercambio de puntos de vista, sin que necesariamente implique el acuerdo o la aceptación, sino también el desacuerdo, el debate.

Si la Comisión tiene como meta la construcción de un proyecto común de constitucionalismo democrático, entonces es necesario que los jueces constitucionales conozcan las experiencias de los demás países y su jurisprudencia y puedan utilizarlas para ilustrar, convencer,

disuadir o persuadir en sus argumentos jurídicos. Ésta es una de las tareas principales que la Comisión se ha propuesto desempeñar con la celebración de la Conferencia Mundial.

La Comisión de Venecia trabaja igualmente con los órganos electorales, coorganizando la conferencia anual de órganos electorales en Europa, a la que están invitados organismos electorales de todas partes del mundo. El Instituto Nacional Electoral (INE), antes conocido como Instituto Federal Electoral (IFE), ha sido uno de los participantes más asiduos.

Pero la Comisión de Venecia ha sido algo más que un órgano consultivo para los estados europeos en materia constitucional:

1) Ha asumido un papel clave en el proceso de seguimiento de los compromisos de los estados miembro del Consejo de Europa, cooperando activamente con la Asamblea Parlamentaria.
2) Se ha convertido en un actor influyente, vis a vis, de la Unión Europea, especialmente en las relaciones con los países candidatos.
3) Ha extendido su campo de actuación más allá de Europa (a Asia central, al norte de África y a Latinoamérica).

Permítanme hacer referencia a cada uno de estos puntos.

En lo que respecta al seguimiento, la Comisión de Venecia no es un órgano de seguimiento; sin embargo, de acuerdo con nuestro estatuto, los órganos del Consejo de Europa (Comité de Ministros, Asamblea Parlamentaria, Secretaría General) pueden solicitar una opinión a la Comisión. Lo más frecuente ha sido que el Comité de Seguimiento de la Asamblea Parlamentaria nos haya solicitado una opinión para tener una base legal sólida en su actuación y asesoramiento.

Un ejemplo de este tipo de actuación ocurrió cuando el presidente Leonid Kuchma quiso incrementar sus poderes mediante un referéndum constitucional en Ucrania; el Comité de Seguimiento de la Asamblea Parlamentaria pidió nuestra opinión y el intento fracasó. La experiencia ha demostrado que los casos más sensibles y complejos conciernen a la distribución de poderes más que a los derechos humanos; frecuentemente, se trata de intentos de incremento de poder de los presidentes.

Otro de los factores importantes de influencia de la Comisión de Venecia es su cooperación con la Unión Europea. Aunque la tendencia general de ésta es usar el Consejo de Europa como una herramienta para preparar a los estados candidatos para su acceso, utiliza cada vez más las opiniones de la Comisión de Venecia como instrumentos en sus relaciones con los países candidatos. La cooperación de la Unión Europea con Ucrania o Bosnia-Herzegovina en los últimos meses es un ejemplo de dicha acción.

Incluso, también recientemente, la Comisión de Venecia ha jugado un papel clave cuando ha habido problemas vinculados al Estado de Derecho en países miembro de la Unión, como Hungría o Rumania. La crisis húngara demostró que la Unión Europea no está preparada para hacer frente a estados miembro problemáticos, desde el punto de vista de los valores de la Unión.

El acervo de la Unión es bastante técnico. Mientras que la Comisión Europea puede tomar acciones contra los estados que violen el acervo, es reticente a pronunciarse acerca del riesgo de violaciones futuras de los valores básicos y de los principios.

Como ejemplo de ello, la Comisión Europea enfocó el problema desatado en Hungría que ponía en tela de juicio la organización judicial concentrándose en el descenso en la edad de jubilación de los jueces en ese país, cuestión que se planteó como un posible problema desde el punto de vista del principio de no discriminación en razón de la edad. Sin embargo, no hizo ninguna intervención desde el punto de vista de la interferencia de las medidas y los cambios legislativos adoptados en Hungría con la independencia judicial. Para poder hacer frente de forma más global al posible atentado a la independencia judicial, la Comisión Europea pidió a las autoridades húngaras que respetaran las recomendaciones de la Comisión de Venecia.

No puedo tampoco dejar de mencionar nuestra colaboración con la Organización para la Seguridad y la Cooperación en Europa (OSCE) y con la Oficina para las Instituciones Democráticas y los Derechos Humanos (ODIHR), que aunque es distinta de la que tenemos con la Unión, es muy fructífera, sobre todo, aunque no sólo, en el campo del derecho electoral.

Señoras y señores, en 2002, el Comité de Ministros del Consejo de Europa cambió el estatuto de la Comisión de Venecia y ésta se convirtió

en un acuerdo ampliado, por lo que se encuentra abierta a la participación de países no europeos y cuenta con un total de 60 integrantes; 13 se han adherido desde 2002: Túnez, Argelia, Marruecos, Israel, Kazajistán, Kirguistán, Corea, Brasil, Chile, México, Perú, Estados Unidos de América y, el último en añadirse a esta lista, Kosovo. Mientras que los países del Magreb y de Asia central han sido principales beneficiarios de nuestras actividades, otros países, como México y Brasil, han contribuido intelectualmente a nuestro trabajo.

La Comisión tiene una larga tradición de cooperación con América Latina. Incluso, el fundador de la Comisión de Venecia, Antonio La Pergola, tenía un sueño, que era establecer una comisión hermana, como la Comisión de Venecia, para América Latina. Además de nuestros miembros, Argentina y Uruguay son observadores.

La cooperación con los estados de América Latina se ha multiplicado en los últimos años gracias a la participación tan activa de sus miembros. Ya he mencionado que México ha tenido la primera presidencia de la Subcomisión de América Latina y, actualmente, el magistrado presidente del TEPJF José Alejandro Luna Ramos es el vicepresidente de ésta.

Igualmente, la Subcomisión de América Latina se reunió por primera vez fuera de Europa, en México, Distrito Federal, en octubre de 2013, gracias al apoyo proporcionado por los miembros mexicanos y por el Tribunal Electoral del Poder Judicial de la Federación, que fue sede de una gran conferencia internacional en la que se lanzó la discusión en torno al primer estudio comparado del papel de los tribunales nacionales e internacionales en la aplicación de los tratados internacionales de derechos humanos y, concretamente, de los convenios europeo y americano.

Señoras y señores, ¿hay alguna indicación de que existan tendencias concretas acerca de los temas clave de actuación de la Comisión de Venecia para la consolidación democrática? En gran medida, seguimos ocupándonos de las mismas cuestiones: el equilibrio en la distribución de poderes entre el presidente, el gobierno y el parlamento; las elecciones; la independencia del Poder Judicial; la justicia constitucional y la protección de las libertades fundamentales.

Todas estas cuestiones, aunque basadas en los valores clave del Consejo de Europa, reflejan ya valores y principios universales y, como

tales, siguen formando parte esencial de las agendas de nuestros estados miembro, tanto europeos como de otras regiones del mundo.

En estos últimos 24 años, la Comisión estuvo muy involucrada en la fase de transformación constitucional y legislativa de algunos estados y, posteriormente, en la fase de puesta en práctica. Ninguna de las dos fue fácil. Hoy en día somos testigos de la fase de consolidación de nuevas estructuras institucionales, que han sido el fruto de la transición democrática y cada vez aparece con más claridad la importancia de la cultura política, constitucional y jurídica.

Los cambios culturales pueden tomar tiempo y vemos con preocupación que en muchas nuevas democracias, y no tan nuevas, aún está presente la idea de que la mayoría que gana las elecciones ejerce un control absoluto del Estado.

La Constitución no es un marco en el que la política se inserta y que refleja el consenso con la sociedad, sino, más bien, un instrumento mediante el cual la mayoría impone su voluntad. A menudo, el hecho de que la independencia de los tribunales constitucionales y de otras instituciones —como los defensores del pueblo— debe ser respetada, no es automático. Los equilibrios y contrapesos constitucionales aparecen a veces como un obstáculo y no como una garantía necesaria de un gobierno democrático.

Creo que la Comisión tiene un papel clave en subrayar la necesidad de reglas estables, de un Estado de Derecho que proteja también los derechos de las minorías nacionales y asista a los países no sólo a desarrollar su legislación, sino también su cultura jurídica.

La fase de consolidación de las instituciones democráticas es tan importante como la de transición, así que nunca deberíamos considerar que la democracia y el Estado de Derecho han sido adquiridos ni que las transiciones democráticas no tienen vuelta atrás, sobre todo si la mentalidad de respeto a la democracia no es, en sí misma, irreversible.

Para ello, es esencial compartir experiencias y, en esto, Latinoamérica y México pueden tener mucho que enseñar y con qué contribuir a la construcción de un entendimiento común de la consolidación democrática, del Estado de Derecho y de los derechos fundamentales.

La democracia es, sin ninguna duda, un anhelo compartido por las sociedades. La Revolución de las Rosas en Georgia o la Revolución Naranja en Ucrania, así como la Primavera Árabe, han dado testimonio

de ello. Pero el anhelo democrático se corresponde, a veces, más con la búsqueda de una identidad nacional, una identidad que, a menudo, busca marcar una diferencia con un pasado políticamente conflictivo y difícil, mediante la transición a la democracia.

La experiencia de los estados de América Latina en su transición a la democracia y en la elección de sus sistemas de gobierno es muy útil y, a veces, cercana para otros países que se hallan en una fase de cambio político profundo.

Recientemente, Túnez, miembro también de la Comisión de Venecia, ha avanzado hacia la democracia tras la revolución, emprendiendo una reforma global del sistema político, electoral y constitucional. Aunque Túnez tenía un consejo constitucional en el antiguo régimen, espera reemplazarlo por un Tribunal constitucional sólido y con plenas competencias. En Marruecos, el reciente referéndum ha aumentado los poderes del Consejo Constitucional. En Egipto, la Suprema Corte Constitucional ha jugado un papel clave en las elecciones. Para todos estos países, la experiencia de México, compartida en reuniones organizadas y auspiciadas por la Comisión de Venecia, ha sido de sumo interés.

Señoras y señores, la Comisión de Venecia considera la justicia constitucional como la piedra angular en el fomento del respeto a la Constitución, a la democracia y al Estado de Derecho, así como a los derechos fundamentales. La justicia constitucional es la llave de la protección de los principios y valores del Estado democrático contenidos en la Constitución y el impacto de las decisiones de los tribunales constitucionales y equivalentes es decisivo para la sociedad. El uso de referencias cruzadas a otros tribunales se ha convertido, por mucho, en un instrumento clave para construir argumentos sólidos en materia de derechos fundamentales y del Estado de Derecho, que, según el informe que adoptamos del tema en 2011, está basado en ocho "ingredientes":

1) La accesibilidad del derecho y la previsibilidad de ésta para el ciudadano.
2) Los derechos legales no deben ser garantizados de forma discrecional.
3) Igualdad jurídica.
4) El poder debe ser ejercido de forma legal, justa y razonable.
5) Protección de los derechos humanos.

6) Existencia de recursos para resolver litigios sin coste o retrasos indebidos.
7) Los juicios deben ser justos.
8) Respeto por los estados de sus obligaciones en derecho internacional y en derecho nacional.

Les he facilitado una visión muy amplia de nuestras actividades en muchos campos y países. Pero las preguntas que quedan son: ¿qué efectividad tenemos?, ¿escuchan los países nuestros consejos?

Obviamente, no todos los países siguen siempre nuestras recomendaciones. Nos ocupamos de cuestiones sensibles, relacionadas con los intereses nacionales y con el control del poder en un ambiente democrático; para los políticos, puede ser clave tener, por ejemplo, una ley electoral que les permita ganar las elecciones más fácilmente, y pueden preferir esto antes que una ley electoral justa y equilibrada. Por tanto, hay resistencia a nuestras propuestas. También debemos respetar el principio democrático: los parlamentos nacionales son los que deben decidir qué soluciones son las más apropiadas y cuáles no pueden ser impuestas.

Si un parlamento nacional considera y sostiene un amplio abanico de posibilidades en debates inclusivos, pero se decanta por una conclusión diferente de la recomendada por la Comisión de Venecia, es algo que tenemos que aceptar y que es legítimo, a menos de que dicha solución vaya claramente en contra de estándares obligatorios internacionales.

Puedo afirmar, sin alguna duda, que nuestras opiniones tienen, en general, un impacto considerable por una serie de motivos:

1) En los estados en los que trabajamos de forma habitual, la reputación de la Comisión de Venecia es muy alta. Los gobiernos suelen ser reticentes a declararse abiertamente contrarios a las opiniones de ésta y la oposición puede utilizar las opiniones para enriquecer el debate nacional.
2) Aunque no tenemos algún mecanismo para forzar a un Estado a adoptar una reforma positiva, la publicidad de las opiniones y el debate sí pueden llevar a evitar que el Estado vaya en la dirección equivocada.

3) A menudo, las mismas cuestiones se plantean varias veces en el mismo país; la Comisión contribuye así a la discusión pública, a generar debate y a impulsarlo.
4) Nuestras opiniones no están basadas en consideraciones teóricas, sino que tratamos de ser realistas y tener en cuenta lo que ocurre en el país y en el Estado en cuestión, escuchando a todos los actores interesados.

Vivimos en un mundo globalizado y hay cada vez más necesidad de asesoramiento jurídico en áreas tradicionalmente consideradas como domésticas. Es gracias al impulso y a los esfuerzos de los miembros de la Comisión y de sus tribunales, como garantes y piezas clave de la garantía de los derechos, que es posible avanzar en la consolidación democrática.

Gracias, señor presidente.

Les deseo a todos un trabajo muy fructífero.

Política electoral internacional. Estrategia de vinculación del Tribunal Electoral del Poder Judicial de la Federación*

Introducción

Son antecedentes conocidos de la historia del Tribunal Electoral del Poder Judicial de la Federación (TEPJF) la creación en el año 1987 del Tribunal de lo Contencioso Electoral (Tricoel) y en 1990 su sustitución por el Tribunal Federal Electoral (Trife), para posteriormente, en 1996, convertirse en el TEPJF. Estas transformaciones institucionales, que han facilitado el desarrollo democrático de México, están vinculadas tanto a la dinámica política nacional como al contexto internacional de la época.

Por ejemplo, el 17 de mayo de 1990, en la resolución No. 01/90, la Comisión Interamericana de Derechos Humanos (CIDH) publicó un informe acerca de tres casos referidos a procesos electorales estatales y municipales de México.[1] En dicho documento, la Comisión valoró la importancia de que el país contara con:

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* Una primera versión de este texto está disponible en TEPJF. Tribunal Electoral del Poder Judicial de la Federación. 2014. *Política electoral internacional. Estrategia de vinculación del Tribunal Electoral del Poder Judicial de la Federación*. Disponible en http://portales.te.gob.mx/laborinternacional/sites/default/files/Pol%C3%ADtica%20Electoral%20Internacional_1.pdf (consultada el 16 de abril de 2015).

1 El documento completo en español está disponible en https://www.cidh.oas.org/annualrep/89.90span/Cap3d.htm.

> medios adecuados o de un recurso sencillo y rápido o de "cualquier otro recurso efectivo ante los jueces o tribunales competentes, independientes e imparciales" que amparen a quienes recurran contra "actos que violen sus derechos fundamentales" como son los derechos políticos.[2]

La Comisión también declaró tener conocimiento de la reforma a la legislación electoral de la época —que se publicó sólo tres días después, el 20 de mayo, y que incluyó la publicación del Código Federal de Instituciones y Procedimientos Electorales (Cofipe), en la que se mandataba la creación del Tribunal Federal Electoral como órgano jurisdiccional especializado en la materia, dotado de plena autonomía—.[3] En ese sentido, la máxima autoridad jurisdiccional electoral del país tiene una clara vocación internacional en su origen y su actuación.

La interacción entre factores nacionales e internacionales para el fortalecimiento democrático hace necesaria una vinculación de las autoridades electorales con diversos actores en todo tipo de democracias —maduras y jóvenes, con tradiciones jurídicas diversas y en contextos institucionales varios—. Por ello, el TEPJF considera importante sintetizar en el presente documento su principal actividad internacional, tanto la desarrollada en coordinación con el Instituto Nacional Electoral (INE) como la que desempeña de manera independiente.

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2 Las referencias de esta valoración son los artículos 23 y 25 de la Convención Americana sobre Derechos Humanos, las cuales versan, respectivamente, acerca de derechos políticos y protección judicial. El documento completo en español está en http://www.oas.org/ dil/esp/ tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos.htm.

3 Un aspecto importante de la reforma fue la adición del numeral 41 al artículo 60 constitucional, en el cual se estableció, conforme a los criterios expuestos por la Comisión Interamericana de Derechos Humanos (CIDH), la existencia de un sistema de medios de impugnación en materia electoral federal, cuyo conocimiento se otorgó al organismo público encargado de preparar y realizar las elecciones, así como a un Tribunal calificado constitucionalmente como órgano electoral jurisdiccional. Este Tribunal es antecedente directo del actual y sus decisiones han cobrado mayor importancia al convertirse en la máxima autoridad en la resolución de controversias electorales.

Política electoral internacional de México

Como se dijo en la introducción de este documento y en otros trabajos de investigación,[4] los factores internacionales juegan un papel importante en el fortalecimiento de los referentes legales y diseños institucionales de una democracia. Por ejemplo, sólo en materia de protección de los derechos políticos de las mujeres, pueden identificarse nueve instrumentos internacionales firmados por México desde 1981 hasta la fecha.[5] Estos documentos constituyen compromisos del Estado mexicano que impactan directamente en las actividades y estrategias de vinculación de las autoridades electorales con sus contrapartes e instituciones afines en otros países.

Por ello, tanto el INE como el TEPJF cuentan con unidades especializadas en las relaciones con socios internacionales encargadas de visibilizar los conocimientos desarrollados en México en foros relevantes, respecto a la garantía y el ejercicio de los derechos fundamentales. Asimismo, constituyen instancias que facilitan actividades específicas que incluyen la observación y el acompañamiento de procesos electorales en otros países, intercambio de mejores prácticas y asistencia técnica, así como la creación de espacios de reflexión especializada con actores clave.

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4 Centro Nacional de Competencia en Investigación. 2007. The Quality of Democracy: Democracy Barometer for Established Democracies (cuaderno de trabajo 10). Zúrich: Marc Bühlmann, Merkel Wolfgang, Bernhard Wessels y Lisa Müller. [Disponible en http://www.nccr-democracy.uzh.ch/publications/workingpaper/pdf/WP10.pdf (consultada el 16 de abril de 2015)]. Acerca del caso mexicano y su relación con el contexto internacional en la década de 1980, véase Loaeza, Soledad. 2010. "La política de acomodo de México a la superpotencia. Dos episodios de cambio de régimen: 1944-1948 y 1989-1994". *Foro Internacional*, vol. L, núm. 3-4 (julio-diciembre): 627-60. [Disponible en www.redalyc.org/pdf/559/59921045003.pdf (consultada el 15 de abril de 2015)].

5 La lista puede encontrarse en Guevara Castro, Alberto. 2015. "Lessons Learned in Removing Barriers to Women´s Participation in the Mexican Federal Congress". En *Extracted from Improving Electoral Practices: Case Studies and a Practical Approaches*, ed. Raúl Cordenillo, 181-200. Estocolmo: IDEA. [Disponible en www.idea.int/publications/improving-electoral-practices/loader.cfm?csmodule=security/getfile&pageid=67051 (consultada el 15 de abril)].

Coordinación de Asuntos Internacionales del Instituto Nacional Electoral[6]

La Coordinación de Asuntos Internacionales (CAI) del Instituto Nacional Electoral (INE) es una unidad técnica especializada, adscrita a la presidencia del Consejo General, creada por acuerdo de la Junta General Ejecutiva en enero de 1993 y formalizada mediante acuerdo del Consejo General del INE en diciembre de 1997.

Desde su creación ha sido responsable de planear e instrumentar la estrategia de información, acercamiento y vinculación con la comunidad internacional en seis vertientes fundamentales que reflejan el conjunto de actividades que se llevan a cabo en esta unidad técnica:

1) Promoción de la imagen del INE ante la comunidad internacional mediante mecanismos permanentes de acercamiento, vinculación y cooperación con instituciones, organismos y autoridades electorales.
2) Atención de las solicitudes de asistencia técnica y cooperación que formulen organismos internacionales y autoridades electorales de otros países.
3) Proposición y organización de encuentros con actores de la comunidad internacional interesada en el desarrollo de la organización electoral mexicana y la promoción de la democracia.
4) Elaboración de productos informativos para promover el conocimiento del sistema electoral mexicano, así como el impulso de proyectos de investigación especializada en política electoral comparada.
5) Promoción de la participación de funcionarios del INE en foros de carácter internacional que permitan difundir y promover los aspectos más relevantes del régimen electoral mexicano, y conocer las prácticas y los procedimientos electorales de otros países
6) Instrumentación de programas de profesionalización y capacitación que promuevan el intercambio de experiencias y prácticas

[6] Esta sección reproduce contenidos que están publicados en http://www.ine.mx/portal/site/ifev2/Coordinacion_de_Asuntos_Internacionales/.

electorales, con el fin de coadyuvar al fortalecimiento institucional de los organismos encargados de la administración electoral.

Coordinación de Relaciones con Organismos Electorales del Tribunal Electoral[7]

Por su parte, el Tribunal Electoral, desde su primer informe de labores como integrante del Poder Judicial de la Federación (1996-1997), da cuenta del impulso a "las relaciones de cooperación e intercambio en áreas de interés común con organismos electorales", incluyendo "diversas actividades con organismos electorales internacionales y de otros países".[8] Ya en el Informe Anual 1997-1998, éstas aparecen como responsabilidad de la Coordinación de Relaciones con Organismos Electorales (Coroe), instancia encargada del establecimiento y la promoción de las relaciones institucionales con los organismos electorales nacionales e internacionales.

Desde entonces, y con el propósito de consolidar las relaciones de cooperación del TEPJF, la Coroe mantiene una constante interlocución y un intercambio de información con autoridades electorales, instituciones académicas y expertos en la materia, por medio de la participación y la realización de talleres y actividades nacionales e internacionales; la concertación de acuerdos y convenios de cooperación y asistencia técnica electoral, y la recepción de visitantes y delegaciones extranjeros y de otras entidades de la República mexicana en actividades y reuniones de trabajo organizados por el Tribunal.

Con el objetivo de planear y proponer políticas de vinculación de relaciones institucionales del Tribunal Electoral con organismos electorales de la República mexicana e instituciones interesadas en la materia electoral, tanto de México como del extranjero, la Coroe desarrolla las siguientes funciones:

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7 Esta sección reproduce contenidos del Manual de Organización Específico de la Coordinación de Relaciones con Organismos Electorales (COROE-OR-MOE-200), disponible en http://portales.te.gob.mx/normateca/manual-de-organizaci-2.

8 Informe Anual 1996-1997 del Tribunal Electoral del Poder Judicial de la Federación, disponible en http://rimel.te.gob.mx:89/repo/ArchivoDocumento/15312.pdf.

1) Establece los mecanismos y procedimientos para la vinculación con organismos electorales, nacionales e internacionales, que permitan captar propuestas que fortalezcan el ámbito electoral nacional, así como el desarrollo de proyectos en la materia.
2) Asegura el establecimiento y la promoción de relaciones con instancias y autoridades electorales nacionales e internacionales, como embajadas, universidades e instituciones educativas, sociedad civil organizada y todas aquellas instituciones u organizaciones interesadas en la materia.
3) Coordina la celebración de convenios, acuerdos, bases y cualquier otro instrumento jurídico de naturaleza análoga con autoridades electorales de las entidades federativas, dependencias e instituciones, para el desarrollo de programas, proyectos y ejecución de las acciones que competen al Tribunal Electoral.
4) Coordina las acciones relacionadas con los arreglos logísticos y las gestiones financieras para la realización de actividades académicas institucionales dentro o fuera de las instalaciones del Tribunal Electoral; así como la integración de los expedientes de las actividades relacionadas con el ejercicio del gasto público.
5) Promueve la difusión de investigaciones y análisis acerca de temas electorales nacionales o extranjeros de relevancia en el ámbito de la justicia electoral.

Centro Internacional de Capacitación e Investigación Electoral

La convergencia en gran parte de los objetivos, estrategias y actividades en materia internacional entre el INE y el TEPJF, por conducto de sus respectivas coordinaciones, ha derivado en sinergias para fortalecer la participación de México en la comunidad electoral internacional.

Ejemplo de ello es que, a partir de 2004, el entonces Instituto Federal Electoral (IFE), el TEPJF y el Programa de las Naciones Unidas para el Desarrollo (PNUD) en México han colaborado en la impartición de talleres de administración electoral, los cuales, desde mayo de 2006, se insertaron en un esquema de cooperación internacional horizontal denominado Programa Internacional de Capacitación e Investigación Electoral (PICIE), con la finalidad de profesionalizar a los tomadores de

decisiones de las autoridades electorales, y que en septiembre de 2010 se convirtió en el Centro Internacional de Capacitación e Investigación Electoral (CICIE).

El CICIE es, en síntesis, un instrumento del nuevo tipo de cooperación horizontal internacional que brinda una serie de herramientas de capacitación, asistencia e investigación en materia electoral, tales como talleres de administración electoral, cursos de profesionalización y grupos de asistencia técnica.

Desde su creación, se ha especializado en programas de capacitación y asistencia que coadyuvan en tres ejes:

1) El fortalecimiento de las instituciones democrático electorales.
2) La profesionalización y la modernización de las autoridades y sus sistemas.
3) El análisis y la evaluación de los procesos y sus legislaciones.

Es importante señalar que, como parte de las actividades del CICIE como espacio internacional para el fortalecimiento de capacidades democráticas, convergen esfuerzos de actores nacionales e internacionales. Entre estos últimos se encuentran diversas instancias de las Naciones Unidas, el Instituto Internacional para la Democracia y la Asistencia Electoral (IDEA Internacional), el Centro de Asesoría y Promoción Electoral (Capel) del Instituto Interamericano de Derechos Humanos (IIDH), la Organización de los Estados Americanos (OEA), la Fundación Internacional para Sistemas Electorales (IFES), además de las autoridades electorales nacionales que han buscado un acercamiento directo, ya sea como proveedores de conocimiento o como solicitantes de los programas que imparte el CICIE.

En las más de 50 ediciones de los talleres de capacitación ofrecidos por éste desde su creación y hasta 2014, la participación del TEPJF ha sido fundamental para ofrecer un panorama completo del desarrollo democrático de México y su estructura institucional. Específicamente, el Tribunal participa con expositores que incluyen a sus magistradas y magistrados, funcionarios jurisdiccionales y otros servidores públicos especializados en comunicaciones, administración y gestión del conocimiento en materia de justicia electoral.

Espacios internacionales de participación sistemática del Tribunal Electoral

La creciente necesidad de contenidos especializados en la garantía de los derechos políticos y la resolución de controversias en el contexto de los procesos electorales en otros países han incrementado la presencia del TEPJF, tanto en agrupaciones regionales y globales de autoridades electorales como en foros de alto nivel, que van desde las conferencias de expertos hasta los órganos especializados en derecho constitucional y justicia electoral. Tanto en las asociaciones de la primera categoría como en los foros de la segunda, el TEPJF ha hecho contribuciones significativas a la construcción de los puentes entre la democracia mexicana y las de otros países.

Agrupaciones regionales y globales de autoridades electorales a las que pertenece el Tribunal Electoral

La primera categoría agrupa a asociaciones de autoridades electorales con las que, ya sea como miembro de pleno derecho u observador, el TEPJF ha forjado relaciones que facilitan el intercambio de sentencias, tecnologías y políticas para el análisis comparado de sus funciones. Entre otros, este grupo incluye a la Asociación de Autoridades Electorales Europeas (ACEEEO), la Asociación Mundial de Organismos Electorales (A-WEB), la Unión Interamericana de Organismos Electorales (UNIORE) y a las dos asociaciones que le anteceden: el Protocolo de Tikal y el Protocolo de Quito. Al igual que en el caso de la ACEEEO, las dos últimas asociaciones agrupan exclusivamente a autoridades electorales que, por criterio geográfico, excluyen a México, pero a cuyas reuniones y actividades vinculadas ha sido invitado el TEPJF en diversas ocasiones.

Merece particular atención la participación del Tribunal Electoral en la UNIORE, a la cual pertenece formalmente desde el 3 de julio de 1996. El ingreso de México a dicha asociación permitió visibilizar cambios profundos y mejoras sustantivas en los procesos y la integración de sus autoridades electorales en el continente americano. Al ingresar, el entonces IFE y el Tribunal Electoral asumieron la presidencia de la UNIORE, dándole un impulso decisivo a la integración electoral continental. Asimismo, como en su momento lo señaló el secretario ejecutivo de la UNIORE, la membresía de México también significaba

contar con un mecanismo que le permitiera maximizar su vocación de formar parte de la comunidad electoral americana.[9]

La vocación y el liderazgo de México se refrendaron en la X Conferencia de la UNIORE, en la cual nuevamente asumió la presidencia del organismo, en el año 2010. Los documentos de trabajo que se generaron en esa nueva etapa todavía son el punto de partida para discusiones en la UNIORE acerca de temas fundamentales, como su estrategia de vinculación interna y externa, protocolos técnicos para la observación electoral y otros asuntos torales.

Comisión Europea para la Democracia a través del Derecho (Comisión de Venecia)

En la categoría de foros de alto nivel en los que participa sistemáticamente el TEPJF, entre los más importantes se encuentra la Comisión Europea para la Democracia a través del Derecho, también llamada Comisión de Venecia.

Antecedentes de la Comisión

En una entrevista concedida al diario *El País*, Antonio La Pergola, entonces ministro italiano para las relaciones con la Comunidad Europea, hablaba de las potenciales contribuciones de Europa para el desarrollo del concepto "democracia a través del derecho", y de la ley como punto de partida para la consecución de los valores democráticos. En esa conversación, comentaba al periodista:

> piense en el problema de Argentina, por ejemplo, y en general en la consolidación de la democracia en América Latina, o bien la democracia que empieza a soplar como un viento de primavera en los países de Europa oriental. ¿Qué tipo de democracia se puede imaginar que tome y tenga en cuenta la experiencia común de los países europeos?[10]

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9 La importancia del ingreso de México a la UNIORE, año 4, número 1, año 1998, pág. 10-3. Disponible en http://rimel.te.gob.mx:89/repo/ArchivoDocumento/16312.pdf.

10 Arias, Juan. 1989. "Antonio La Pergola: 'El derecho amplía las atribuciones comunitarias'". *El País*. 27 de marzo, sección Internacional. [Disponible en http://elpais.com/diario/1989/03/27/internacional/606952808_850215.html (consultada el 3 de enero de 2014)].

Así visualizaba su fundador los cimientos de lo que se convertiría en un foro de debate para la consolidación de la democracia en todo el mundo. Lo que en 1989 se pensaba como un espacio desde el cual las democracias de diversas latitudes podrían obtener de Europa experiencias para su propio fortalecimiento, hoy constituye un órgano consultivo formal que no sólo cumple con el objetivo inicialmente planteado, sino que permite un auténtico intercambio entre expertos de más de 50 países, del cual el propio continente se beneficia.

La Comisión de Venecia fue creada en 1990 como órgano consultivo del Consejo de Europa (CoE) en materia constitucional. Se creó por la necesidad de prestar apoyo y asesoría a nuevas democracias en el diseño de sus constituciones. El contexto histórico de su instauración enfocó sus esfuerzos en Europa central y del este, pero desde la caída del muro de Berlín, las funciones de la Comisión de Venecia se han ampliado para trabajar temas como la independencia del Poder Judicial, derechos fundamentales, derecho electoral y cuestiones relativas a las minorías nacionales, por citar algunos ejemplos. Actualmente, el trabajo de la Comisión de Venecia se apega a cuatro ejes fundamentales:

1) Asistencia constitucional.
2) Cooperación con tribunales constitucionales.
3) Elecciones, referendos y partidos políticos.
4) Estudios, informes y seminarios transnacionales.

La Comisión de Venecia es un órgano integrado por expertos independientes con experiencia de trabajo en instituciones democráticas o que han contribuido al desarrollo del derecho y la ciencia política. Los representantes son académicos reconocidos en el ámbito del derecho, magistrados y ministros, o incluso legisladores. Aunque éstos son nombrados por los estados participantes de la Comisión de Venecia —para un periodo de cuatro años—, es importante recalcar que, debido a que es un órgano consultivo y no deliberativo, ellos no toman decisiones a nombre de los estados o instituciones de las que forman parte, ya que la representación es a título personal.

La Comisión cuenta con 60 estados miembro: 47 pertenecen al Consejo de Europa y 13 son naciones de Asia, América y África.[11]

[11] Los miembros del Consejo de Europa son Albania, Alemania, Andorra, Armenia, Austria, Azerbaiyán, Bélgica, Bosnia-Herzegovina, Bulgaria, Croacia, Chipre, República Checa,

Esto debido a que, en 2002, el Comité de Ministros del CoE modificó los estatutos para permitir que países no europeos pudieran acceder como estados miembro. En el artículo 2, párrafo 5, de la versión revisada de los Estatutos de la Comisión de Venecia se especifica que el Comité de Ministros puede, por una mayoría de dos terceras partes, invitar a países que no pertenezcan al Consejo de Europa a formar parte de ésta, en el marco de un acuerdo ampliado (*Enlarged Agreement*). Esto abrió la puerta para que países como México ingresaran formalmente.

La Comisión alberga estados miembro, observadores y asociados, además de entidades con estatus especial. Una de las diferencias entre los miembros de pleno derecho y los observadores es que los últimos sólo son invitados a las sesiones plenarias cuando el organismo así lo decide, y los documentos de trabajo no les son mostrados antes de que hayan sido aprobados. Además, sus intervenciones son determinadas por la Secretaría de la Comisión, tanto en lo relacionado con la duración como con el tema. Finalmente, los estados observadores no pueden votar las mociones ni los proyectos.

Pertenencia de México a la Comisión

Dado el alto grado de especialización que han alcanzado los debates en la Comisión de Venecia, y considerando su reconocimiento internacional, desde 2007 el TEPJF recibió y aceptó una invitación para participar como observador en diversas actividades del organismo europeo.

El 24 de febrero de 2009, la comisionada para el Desarrollo Político de la Secretaría de Gobernación (Segob), Blanca Heredia Rubio, remitió a la Unidad de Asuntos Jurídicos de la dependencia la opinión de la Unidad para el Desarrollo Político acerca de la modificación de la membresía de México ante la Comisión de Venecia, y esta última unidad concluyó que la propuesta resultaba viable y conveniente.

Dinamarca, Eslovaquia, Eslovenia, España, Estonia, Finlandia, Francia, Georgia, Grecia, Hungría, Islandia, Irlanda, Italia, Letonia, Liechtenstein, Lituania, Luxemburgo, Macedonia, Malta, Moldavia, Mónaco, Montenegro, Noruega, Países Bajos, Polonia, Portugal, Reino Unido, Rumania, Rusia, San Marino, Serbia, Suecia, Suiza, Turquía y Ucrania. El resto de los integrantes de la Comisión de Venecia son: Kosovo, Kirguistán, Kazajstán, Chile, Corea del Sur, Marruecos, Argelia, Israel, Túnez, Perú, Brasil, Estados Unidos y México.

Por su parte, el 17 de abril de 2009, la subsecretaria de Relaciones Exteriores, Lourdes Aranda Bezaury, emitió un comunicado a la Subsecretaría de Hacienda y Crédito Público, en el que señaló, entre otras cuestiones, que la participación de México como miembro de la Comisión de Venecia tendría las siguientes ventajas:

1) Apuntalar del reconocimiento internacional por los esfuerzos en el avance democrático del país.
2) Apertura de una plataforma adicional para una mayor interacción con los procesos de avance democrático en Europa y otras regiones.
3) Aprovechar las experiencias y el conocimiento especializado de temas de relevancia para el país, incluyendo, entre otras cuestiones, los derechos políticos de las minorías, democracia directa y temas vinculados con el financiamiento y la conducta de los partidos políticos.
4) Elaborar estudios específicos de temas de interés para las instituciones mexicanas.

El 10 de noviembre de 2009, el director general de la Subsecretaría de Egresos de la SHCP, Nicolás Kubli, informó al entonces secretario administrativo del TEPJF, Diego Gutiérrez Morales, que, con base en lo establecido en el artículo 99 de la Constitución Política de los Estados Unidos Mexicanos (CPEUM),[12] en el cual se le confiere autonomía presupuestaria al TEPJF, éste se encontraba en facultad de considerar en su presupuesto autorizado para ese año la cuota correspondiente a la membresía de México ante la Comisión de Venecia y podía programar, para los ejercicios subsecuentes, el pago de ésta.

El 17 de noviembre de 2009, mediante el acuerdo 371/S11(17-XI-2009), la Comisión de Administración del TEPJF determinó lo siguiente:

> **PRIMERO.** La Comisión de Administración autoriza que el Tribunal Electoral del Poder Judicial de la Federación haga una aportación del equivalente en

[12] DOF. Diario Oficial de la Federación. 1996. Decreto mediante el cual se declaran reformados varios artículos de la Constitución Política de los Estados Unidos Mexicanos. 22 de agosto. [Disponible en http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_136_22ago96_ima.pdf (consultada el 16 de abril de 2015)].

> moneda nacional de 60,000.00 euros (Sesenta mil euros) que serán utilizados para el pago de la cuota anual de membresía a la "Comisión Europea para la Democracia a través del Derecho" también conocida como "Comisión de Venecia".
> **SEGUNDO.** Se instruye a la Secretaría Administrativa para que programe de manera oportuna en los Anteproyectos de Presupuesto de Egresos del Tribunal Electoral del Poder Judicial de la Federación de los ejercicios subsecuentes, el pago de la cuota anual de membresía a la "Comisión Europea para la Democracia a través del Derecho", también conocida como "Comisión de Venecia".
> **TERCERO**. Se instruye al Comité de Adquisiciones, Arrendamientos, Prestación de Servicios y Obra Pública, a efecto de que determine en el ámbito de sus atribuciones y en cumplimiento a la normatividad aplicable la procedencia del pago de la cuota anual de la membresía de mérito.

El 18 de noviembre de 2009, la embajadora de México ante el Reino de Bélgica, el Gran Ducado de Luxemburgo y la Misión ante la Unión Europea, Sandra Fuentes-Berain, presentó oficialmente a Thorbjørn Jagland, secretario general del Consejo de Europa, la solicitud de membresía de México a la Comisión de Venecia. El 3 de febrero de 2010, durante la reunión 1,076 del Comité de Ministros del Consejo de Europa, se aprobó por unanimidad la solicitud.

El 8 de marzo de 2010, la representación de México ante el Consejo, por vía de su titular —Lydia Madero—, informó al secretariado de la Comisión que el gobierno de México, por medio del TEPJF, había designado a la magistrada María del Carmen Alanis Figueroa como representante titular del país ante dicho organismo. Por la misma vía, el 5 de mayo de 2010 se informó al secretariado de la Comisión acerca de la designación del gobierno mexicano, por medio del TEPJF, del magistrado Manuel González Oropeza como representante alterno.

El secretario de la Comisión de Venecia respondió en dos comunicados, fechados el 16 de marzo y el 18 de mayo de 2010, dándose por enterado de la designación de la magistrada y del magistrado para el periodo que culminó el 2 de febrero de 2014. Asimismo, por parte de la Suprema Corte de Justicia de la Nación (SCJN), a la que se invitó a formar parte de la representación del Estado mexicano ante la Comisión, fue designado para el mismo periodo, en calidad de representante alterno, el ministro Arturo Zaldívar Lelo de Larrea.

Desde febrero de 2014, el representante titular de México ante la Comisión es el magistrado presidente del TEPJF, José Alejandro Luna Ramos, y los representantes alternos son la magistrada María del Carmen Alanis Figueroa y el magistrado Manuel González Oropeza.

Resultados de México ante la Comisión

Con la membresía, México ha participado en:

1) Sesiones plenarias de la Comisión de Venecia y reuniones del Consejo para las Elecciones Democráticas (cuatro veces al año).
2) Reunión del Consejo Conjunto de Justicia Constitucional (anual).
3) Conferencia Europea de Organismos Electorales (anual).
4) Reuniones de subcomisiones especializadas, como las de Derechos Fundamentales, Instituciones Democráticas o la de América Latina (cuando son convocadas).

Estudios y opiniones expertas

Los representantes de México ante la Comisión de Venecia han participado en los siguientes proyectos en calidad de relatores (*rapporteurs*):

1) Revisión del Código sobre la Observación Electoral en el Reino Unido y elaboración de una opinión experta, adoptada por el Pleno de la Comisión de Venecia en diciembre de 2010 (con los comentarios de la magistrada María del Carmen Alanis Figueroa).[13]
2) Opinión *amicus curiae* respecto de un caso acerca de crímenes de lesa humanidad en Perú (caso Santiago Brysón de la Barra), adoptada por el Pleno en octubre de 2011 (con los comentarios del magistrado Manuel González Oropeza).[14]
3) Estudio y análisis del nuevo Código Electoral de Georgia, en vista de las elecciones parlamentarias (2012) y presidenciales (2013) en

[13] Disponible en http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)045-e.

[14] Disponible en http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)041-e.

ese país. Se revisó y adoptó en la Sesión Plenaria de la Comisión de Venecia de diciembre de 2011 (con los comentarios del magistrado Manuel González Oropeza).[15]

4) Opinión acerca de la Ley Federal sobre la Elección de Diputados de la Duma Estatal en la Federación Rusa, adoptada por el Consejo para las Elecciones Democráticas de la Comisión de Venecia durante la 90ª Sesión Plenaria de la Comisión de Venecia, en marzo de 2012 (con los comentarios de la magistrada María del Carmen Alanis Figueroa).[16]
5) Reporte acerca del mal uso de recursos públicos en procesos electorales, revisado y adoptado durante la 97ª Sesión Plenaria de la Comisión de Venecia, en diciembre de 2013 (con los comentarios del magistrado Manuel González Oropeza).[17] Para la elaboración de este reporte, el TEPJF también tuvo participación en un seminario celebrado en Tiblisi, Georgia.[18]
6) Participación en la misión de observación en las elecciones anticipadas de Bulgaria (con las contribuciones del magistrado Manuel González Oropeza).[19]
7) Opinión conjunta acerca de la propuesta de reforma a la legislación electoral de la República de Moldavia, adoptada por el Consejo para las Elecciones Democráticas en su 47ª Sesión y en la 98ª Sesión Plenaria de la Comisión de Venecia, en marzo de 2014 (con los comentarios del magistrado Manuel González Oropeza y la participación del experto Alberto Guevara Castro).[20]

También en este rubro cabe destacar la visita de los relatores de la Comisión de Venecia al TEPJF, para emitir una opinión acerca de

15 Disponible en http://www.legislationline.org/download/action/download/id/3569/fileJoint%20VC%20ODIHR%20Opinion%20on%20draft%20Law%20amendments%20and%20additions%20to%20the%20Georgian%20Law%20on%20POLIT_Unions_22%20Dec%202011_en.pdf.

16 Disponible en http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)002-e.

17 Disponible en http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)033-e.

18 Disponible en http://cesko.ge/files/2013/CONFERENCE/Misuse_of_administrative_resources_-_Alberto_GUEVARA_CASTRO.pdf.

19 Disponible en http://www.te.gob.mx/comisiones/comisiones/A08BF999-9684-400B-A079-CE7EA4F4707D/Informe.pdf.

20 Disponible en http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)003-e.

la legislación mexicana en materia electoral. Ellos fueron recibidos en las instalaciones de la Sala Superior los días 12 y 13 de noviembre de 2012. El reporte atestigua la complejidad de la legislación electoral mexicana y destaca la alta responsabilidad de este Órgano Jurisdiccional. Sus elementos de análisis coinciden con preocupaciones atendidas en la última reforma a la legislación electoral mexicana, en el primer semestre de 2014. Este reporte fue presentado durante la 95ª sesión plenaria, dejando testimonio del compromiso con las mejores prácticas internacionales para continuar a la vanguardia de la justicia electoral.

Versión en español del Código de Buenas Prácticas en Materia Electoral

Con base en un proyecto conjunto entre la Comisión y el TEPJF, se llevó a cabo la publicación —y posterior difusión— de una versión en español del Código de Buenas Prácticas en Materia Electoral de la Comisión de Venecia. Este documento contiene directrices generales para optimizar el funcionamiento de los procesos y las prácticas electorales.

Subcomisión sobre América Latina

En el marco de la 87ª Sesión Plenaria (junio de 2011), se determinó restablecer la Subcomisión sobre América Latina, presidida por la magistrada María del Carmen Alanis Figueroa e integrada por el magistrado Manuel González Oropeza.

Algunas de las actividades que se realizan en el marco de ésta son las siguientes:

1) Cuando haya casos en los que se solicite una opinión acerca de algún país de América Latina, se puede determinar que alguno de los miembros de la Comisión de Venecia que pertenecen a esta región geográfica (México, Brasil, Chile o Perú) funja como uno de los relatores (*rapporteurs*) o expertos durante los trabajos de análisis e investigación correspondientes. Incluso, se busca involucrar a los países de la región que no son miembros en la provisión de

insumos para la elaboración de estudios. Ejemplo de ello es el estudio de democracia interna en los partidos políticos, en el que participan miembros de la Subcomisión, incluidos los representantes mexicanos, y para el cual ya se han recabado insumos de países como Argentina, Bolivia, Costa Rica, Paraguay, Uruguay y Venezuela, entre otros.

2) Se amplía la posibilidad de trabajo conjunto con los organismos electorales del continente americano —mediante la UNIORE, por ejemplo— y con otras instituciones internacionales preocupadas por el fortalecimiento de la democracia y el Estado de Derecho, como la Conferencia Mundial de Justicia Constitucional.
3) La creación de la Subcomisión facilita el acercamiento de la Comisión de Venecia a diversas ámbitos de países de esta región geográfica desde el punto de vista de los derechos de grupos minoritarios, particularmente respecto a los pueblos indígenas.
4) Se promueve la difusión de sentencias de las cortes constitucionales participantes —por medio del Boletín de Justicia Constitucional y la base de datos CODICES—, así como la traducción al inglés de las distintas legislaciones electorales actualizadas de los países latinoamericanos, a fin de que puedan ser incorporadas a la base de datos VOTA. Lo anterior permitirá una mayor difusión de las sentencias de cortes y tribunales, así como de los códigos y leyes electorales de los países de América Latina, a fin de que puedan servir como apoyo para la resolución de conflictos de índole electoral en otros estados.
5) Se facilita la producción de estudios y publicaciones en materia electoral en temas de interés de los países de la región. Tal es el caso del estudio acerca de la aplicación de tratados internacionales de derechos humanos, el cual motivó la organización de un congreso durante la presidencia de la Subcomisión por parte de México.

En el contexto de estas responsabilidades, en octubre de 2013, por primera vez en la historia la Subcomisión sesionó en América Latina, en el marco del Congreso Internacional sobre la Aplicación de Tratados de Derechos Humanos, celebrado en la Ciudad de México. Ahí se acordó la realización de una segunda reunión en Ouro Preto, Minas Gerais, Brasil, en la cual se abordaría el tema del papel de los jueces en situaciones de crisis económicas.

En mayo de 2014, con la presidencia de Brasil y la vicepresidencia de México, la Subcomisión volvió a reunirse conforme a lo acordado y se exploró la posibilidad de establecer un órgano permanente e independiente para América Latina, como una institución hermana de la Comisión de Venecia.[21]

Participación en la base de datos CODICES

El sistema CODICES se compone de una base de datos administrada por la Comisión de Venecia de sentencias seleccionadas emitidas por cortes nacionales constitucionales (o su equivalente) y órganos supranacionales, así como de leyes nacionales de los países de Europa, Asia, América y África que participan en el proyecto.

La Comisión desarrolla importantes trabajos de cooperación con los tribunales constitucionales de los países miembro por medio de su Consejo Conjunto de Justicia Constitucional, integrado por miembros de la propia Comisión y agentes de enlace de las cortes y tribunales constitucionales invitados, entre otros.

En el Secretariado de la Comisión de Venecia, la División de Justicia Constitucional es la que se encarga de la organización del contenido de la base de datos. En general, los tribunales o cortes participantes envían tres veces al año sentencias relevantes acompañadas por resúmenes de menos de 1,200 palabras (*précis*), y deben presentarse en inglés o francés, aun cuando las decisiones o sentencias se envíen en un idioma diferente.

El TEPJF participa activamente en el enriquecimiento de la base de datos CODICES mediante el envío —aproximadamente tres veces al año— de su normatividad interna actualizada, así como de resúmenes de sentencias de temas relevantes, como la suspensión de derechos político-electorales, la protección del derecho a la honra durante las campañas electorales y su difusión en los medios de comunicación, la protección de las prerrogativas de pueblos indígenas en el país, entre otros.

[21] Los reportes de la comisión en Ouro Preto están disponibles en http://www.te.gob.mx/comisiones/comisionesp/ConsComActDet.aspx?pAccion=M&pIdCom=4C7C15EC-7EB2-4641-B6B7-F2FDE9439E1B y http://www.te.gob.mx/comisiones/comisionesp/ConsComActDet.aspx?pAccion=M&pIdCom=F2C6183E-EB98-4A9D-B89C-38E1D37649CE.

Administración conjunta de la base de datos VOTA

La base de datos VOTA (http://vota.te.gob.mx/) es una colección de la legislación electoral de los estados miembro de la Comisión de Venecia, y de opiniones y estudios preparados por ésta, además de otros documentos internacionales en la materia. Fue creada en 2002 y contiene las legislaciones electorales de más de 50 países que colaboran con la Comisión.

En noviembre de 2011, se inició un proyecto entre la Comisión de Venecia y el TEPJF para compartir la administración de la base de datos VOTA, con el propósito de alcanzar los siguientes objetivos:

1) Mejorar el catálogo sistemático en tres idiomas (español, francés e inglés).
2) Mejorar el motor de búsqueda y la interfaz virtual.
3) Crear una sección de documentos jurídicos electorales en español.
4) Incluir la legislación electoral mexicana y sistematizarla de acuerdo con el catálogo jurídico electoral de la base de datos VOTA. Este ejercicio abre la posibilidad de expandir la nueva versión de VOTA, con documentos de otros países de América Latina.

La base de datos anterior incluía un tesauro sistemático que permitía obtener la selección de documentos o artículos específicos de un tema concreto. Lo más importante era una tabla de referencias mediante la cual se creaban vínculos entre los artículos o las secciones de una ley o un documento con las clasificaciones del tesauro. Funcionarios de la Dirección General de Sistemas y de la Coordinación de Jurisprudencia, Seguimiento y Consulta del TEPJF evaluaron el funcionamiento de éste y sugirieron mejoras para su administración, mantenimiento y operación, mediante la utilización de herramientas técnicas y programación más avanzadas.

En abril de 2012 se celebraron dos reuniones técnicas en la Ciudad de México, con la presencia de Serguei Kouznetsov, de la División de Elecciones y Referéndum del Secretariado de la Comisión de Venecia. Dada la complejidad del proyecto, por parte del TEPJF participaron funcionarios de diversas áreas, incluyendo el Centro de Capacitación Judicial Electoral (CCJE), la Coordinación de Jurisprudencia,

Seguimiento y Consulta (CJSC), la Coordinación de Relaciones con Organismos Electorales (Coroe), la Dirección General de Sistemas (DGS), la Coordinación de Información, Documentación y Transparencia (CIDT), y la Dirección General de Estadística e Información Jurisdiccional (DGEIJ).

En esas reuniones, la Comisión y el TEPJF desarrollaron un plan conjunto para renovar la base de datos y su página web. Éste incluyó un nuevo diseño gráfico y un formato de búsqueda de contenidos más funcional, con mayor rapidez y precisión en los resultados. Las labores se programaron en cinco etapas:

Etapa 1. Diseño del proceso de captura.

Duración: un mes (de abril a mayo de 2012).

Se identificaron 312 documentos contenidos en el VOTA original y se elaboró una matriz de relación entre términos específicos y artículos, lo que permitió mostrar resultados más concretos en la búsqueda de documentos.

Etapa 2. Captura de datos.

Duración: cinco meses (de mayo a septiembre de 2012).

1) Todos los artículos disponibles en el VOTA original se capturaron en el nuevo.
2) La captura se realizó de forma manual, ya que el método de almacenaje de información del VOTA original no coincide con el esquema del nuevo, lo que impidió migrar la información automáticamente.
3) El TEPJF apoyó en la indexación de los documentos que se adicionaron a la base, incluyendo los textos en idioma español, así como en el mantenimiento, éste y su enriquecimiento con nuevos documentos necesitaron acciones en tres ámbitos, por lo que la contribución del TEPJF consistió en lo siguiente:

    a) Los textos (legislación, instrumentos internacionales y otros documentos en materia electoral en español) fueron indexados por un funcionario especializado en el tema.
    b) La información indexada se incorporó a la parte técnica de la base por medio de una tabla en la que se marcaron las referencias correspondientes con base en el tesauro.

c) En una etapa simultánea, se desarrollaron los componentes tecnológicos del VOTA nuevo y se designó a personal de la DGS para su mantenimiento permanente.

Etapa 3. Desarrollo informático del nuevo sistema VOTA.

Duración: cinco meses, el desarrollo inicial (de junio a octubre de 2012), y esfuerzos permanentes de mantenimiento (hasta la fecha).

1) La DGS del TEPJF elaboró los componentes tecnológicos del nuevo VOTA: un administrador de contenidos, una base de datos y una colección de documentos.
2) Actualmente, personal de la DGS atiende las solicitudes de mejora de la base de datos y supervisa su buen funcionamiento.

Etapa 4. Consolidación de contenidos.

Duración: 12 meses (de octubre de 2012 a septiembre de 2013). Actualmente se realiza una revisión en busca de inconsistencias, omisiones y errores en el índice de la base de datos, tomando en cuenta la retroalimentación del Secretariado de la Comisión de Venecia. Esta revisión se lleva a cabo periódicamente, después de cada actualización.

Etapa 5. Nueva administración de contenidos compartida.

Duración: a partir de septiembre de 2013.

1) Una vez que los contenidos se hayan consolidado hasta la fecha de la última actualización, se capacitará al personal del Secretariado de la Comisión de Venecia encargado de solicitar actualizaciones de información a los estados miembro.
2) El personal especializado del TEPJF será responsable de la administración de la información de los países de habla hispana en América Latina.

Durante la instrumentación de este plan, se atendieron varias solicitudes de la Comisión de Venecia, en los rubros de formato, contenido y funcionalidad.

Cuadro 1. Mejoras de contenido a solicitud de la Comisión de Venecia

Solicitud	Respuesta
En algunas secciones, la clasificación de los documentos conforme al tesauro es incorrecta.	Se han revisado todos los errores reportados, corrigiendo la clasificación de contenidos conforme a los criterios de indexación acordados. Se espera la validación de la Comisión de Venecia.

Fuente: Elaboración propia con base en datos de la Comisión de Venecia.

Cuadro 2. Mejoras de formato a solicitud de la Comisión de Venecia

Solicitud	Respuesta
Incorporar un mapa de Europa a la página web o uno de todo el mundo.	El mapa de Europa se muestra en la página de bienvenida, ofreciendo acceso interactivo por país.
Al desplegar un listado de documentos, el primer resultado aparece con sangría.	Se eliminó la sangría para desplegar el listado de resultados de manera uniforme.
La lista de resultados del buscador no es visible y hay mucho espacio vacío debajo de la misma.	Se distribuyó el formulario del buscador con la finalidad de tener un mejor espacio entre los elementos.
En el buscador, los rubros “Date Adoption (Min):” y “Date Adoption (Max)” deben ser, respectivamente, “Date from” y “Date until”.	Ahora el texto del buscador dice “Date from” y “Date until”.
Cuando se realiza una consulta, no está claro para el usuario en qué documento se encuentra.	En el encabezado de las páginas consultadas se menciona el documento desplegado en pantalla, para mayor referencia.
Existe un problema con la apóstrofe en la referencia a “Europe’s”.	Se revisaron todos los contenidos con la referencia y no se encontró el error. Se espera validación de la Comisión de Venecia.
Al ejecutar búsquedas, los títulos de algunos documentos continúan en el espacio del siguiente encabezado.	Se modificó la altura de la caja que contiene el título del artículo para que se adaptara automáticamente al texto contenido.

Fuente: Elaboración propia con base en datos de la Comisión de Venecia.

Cuadro 3. Mejoras de funcionalidad a solicitud de la Comisión de Venecia

Solicitud	Respuesta
Hay un problema de homogeneidad en el mapa interactivo: al señalar los países con el ratón, sólo algunos se iluminan (por ejemplo, Canadá lo hace y Estados Unidos no). Cada país para el cual se tiene información en la base de datos debe estar habilitado en el mapa interactivo.	Se actualizó la configuración del mapa interactivo y, a la fecha, todos los países con contenido funcionan como está especificado.
Existen problemas técnicos al ingresar a la base de datos con Internet Explorer versión 9.	Se actualizó la programación de la página web para desplegarse adecuadamente en los exploradores más comunes (Internet Explorer desde la versión 8, Safari, Google Chrome, entre otros).
En la versión actualizada de la página web, algunas categorías en las pestañas y enlaces ya no son necesarios. Por ejemplo, el enlace a "Tratado internacional" que aparece al hacer clic en cualquier país, ya no tiene sentido. Sería mejor eliminarlo.	El contenido ahora está organizado conforme a criterios que, en lo posible, evitan la duplicidad de información. Algunas subcategorías desaparecieron y la legislación está indexada conforme a definiciones compartidas.
Eliminar el enlace "Ver documento" que se despliega debajo de cada resultado al realizar una búsqueda por tema o país.	Se preservó el vínculo, ya que en muchos casos aparece más de un documento o mayores detalles del mismo. El criterio que prevalece es ofrecerle al usuario la posibilidad de acceder a la información de la manera más ágil, sencilla y clara posible. Se espera validación de la Comisión de Venecia.
El primer resultado en cada país no debería desplegarse automáticamente.	En la versión más actualizada no se despliegan resultados hasta que el usuario los solicita.
La fecha de incorporación de los documentos no es relevante; se sugiere que se elimine.	El rubro ha sido eliminado.
Al realizar una búsqueda, el enlace a "Ver documento" no debe estar en la lista de resultados, sino en el artículo individual y debe decir "Ver documento completo".	En la versión actual, las búsquedas despliegan los artículos relevantes y, debajo de ellos, se incluyó el enlace "Ver documento completo".
En el buscador, el criterio "Autor" no tiene efecto y debe ser eliminado.	Los criterios de búsqueda se han simplificado, eliminando el rubro "Autor".

Fuente: Elaboración propia con base en datos de la Comisión de Venecia.

Cuadro 4. Mejoras realizadas por iniciativa del Tribunal Electoral durante pruebas piloto y en la etapa de consolidación de contenidos

Contenido	Se han contrastado los contenidos de la versión anterior de la base de datos con los que se cargaron en el servidor del TEPJF. Esto permitió identificar y depurar enlaces sin contenido, documentos duplicados y otras omisiones.
Contenido	Se han agregado e indexado nuevos documentos, incluyendo la legislación relevante de México. La base de datos ampliará su cobertura al incorporar legislación de otros países de América Latina que no son miembros de la Comisión de Venecia.
Formato	El usuario ahora tiene la opción de ver el mapa de América Latina. El diseño de la página web permite incorporar otros mapas en el futuro, conforme evolucione la base de datos.
Funcionalidad	La velocidad de búsquedas y navegación entre distintas secciones es significativamente más rápida.

Fuente: Elaboración propia con base en datos de la Comisión de Venecia.

La revisión continua de la base de datos ha derivado en los siguientes resultados concretos.

1) El TEPJF hospeda en sus servidores la nueva versión de la base de datos y la ha puesto a disposición de los usuarios en la dirección electrónica http://vota.te.gob.mx/. Además, personal capacitado para administrar la base de datos revisará periódicamente los contenidos y solicitará formalmente a las autoridades correspondientes la legislación electoral de América Latina para su indexación y publicación en VOTA. Éstas y otras mejoras han sido planteadas por iniciativa del TEPJF, como parte de la colaboración con la Comisión de Venecia.
2) El TEPJF cuenta con un oficial de enlace reconocido por el Secretariado de la Comisión de Venecia para tramitar consultas periódicas

acerca de temas especializados. Éste, además de dar respuesta a preguntas originadas por los oficiales de enlace de otros países miembros en el Foro de Venecia Clásico, atiende las actualizaciones a la documentación albergada en la base de datos.

3) El formato y la accesibilidad actuales de la página de la base de datos reflejan la expansión geográfica y temática del trabajo de la Comisión de Venecia, también impulsada por el TEPJF.

Otras contribuciones

Además de los trabajos publicados y adoptados en el seno de la Comisión de Venecia, el TEPJF ha hecho otras contribuciones que se sintetizan a continuación.

Cuadro 5. Otras contribuciones del Tribunal Electoral

Actividad	Fecha
"Minorities in the Mexican electoral system". Conferencia presentada en la 75th Plenary Session of the Venice Commission.	13 y 14 de junio de 2008
A brief commentary on the state of Mexican electoral justice. After the 2007 constitutional reform. Distribuido en el Forum for the Future of Democracy Council of Europe. Kiev. Ukraine.	Del 21 al 23 de octubre de 2009
El juicio ciudadano: un instrumento para la tutela de los derechos político-electorales en México (en colaboración con la magistrada María del Carmen Alanis Figueroa, presidenta del TEPJF) presentada en la 83 Sesión plenaria de la Comisión de Europa para la democracia a través del derecho. Comisión de Venecia.	4 y 5 de junio de 2010
La inaplicación de normas jurídicas por el Tribunal Electoral del Poder Judicial de la Federación. Presentado en la 10ª Reunión de la conferencia del Consejo de Justicia Constitucional. Corte Constitucional de Turquía, Ankara. Comisión de Venecia.	Del 30 de junio al 1 julio de 2011
El Estado de Derecho. Aproximaciones para México, presentado en la 86 Sesión plenaria de la comisión europea para la democracia a través del derecho. Comisión de Venecia.	Del 24 al 26 de marzo de 2011
Separación de cargos y responsabilidad político penal. Comisión de Venecia. Estrasburgo, Francia.	19 de julio de 2012
Delegación de observadores de las elecciones parlamentarias en la República de Georgia. Tbilisi, Georgia.	Del 25 de septiembre al 4 octubre de 2012

Continuación.

Actividad	Fecha
Asistencia a la Comisión de Observación de las Elecciones Parlamentarias en Tbilisi, Georgia, con el tema: la utilización de recursos públicos con fines electorales.	Del 27 de septiembre al 3 de octubre de 2012
Report to the Venice Commission. Use of public funding for election purposes. The practice in México. Venice Commission.	29 de noviembre de 2012

Fuente: Elaboración propia con base en datos de la Comisión de Venecia.

El juicio ciudadano.
Un instrumento para la tutela de los derechos político-electorales en México*

María del Carmen Alanis Figueroa**
Manuel González Oropeza***

I. Introducción

Históricamente se ha hecho una marcada diferencia entre los derechos civiles y los derechos políticos; los primeros, se ha sostenido, son propios de todas las *personas*, en tanto que los segundos corresponden en exclusiva a un grupo específico de personas: los *ciudadanos*. Esta clásica distinción es, en buena medida, la razón por la cual en nuestro texto constitucional se habla de *prerrogativas*, mas no de derechos de los ciudadanos.

La separación entre derechos de las personas y derechos de los ciudadanos ha dado lugar a que se pueda entender con claridad que es posible hablar de liberalismo sin ser demócrata, y que la democracia no necesariamente sea respetuosa de los derechos de todas las personas. De aquí la importancia de la Constitución en un Estado democrático.

La diferenciación entre derechos civiles y derechos políticos reconoce diversos antecedentes, derivados todos de la tradición liberal, y se

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* Comisión de Venecia. 83 Sesión Plenaria de la Comisión Europea para la Democracia a través del Derecho, 4 y 5 de junio de 2010.

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manifiesta en los requisitos exigidos para que las personas se identifiquen como ciudadanos: el género, la edad, el color de la piel o la raza; pero sobre todo en el capital con el que cada hombre blanco (o caucásico), por lo regular mayor de 21 años, contaba, es decir, los bienes que constituían su propiedad.

El 26 de octubre de 1923, la Suprema Corte de Justicia de la Nación definió, por primera vez, lo que debe entenderse por derecho político, estableciendo que es todo acto amparado por una ley que funda el modo como se afirma el poder público o se desarrolla en sus funciones. Asimismo determinó que todo acto que tienda a establecer a los poderes públicos, impedir su funcionamiento o destruir su existencia, son actos que importan derechos políticos.

Posteriormente, en 1938, al resolver un amparo en revisión, la Corte determinó que los derechos políticos son aquellos actos ejecutados en el ejercicio de una facultad soberana y no limitada. De una revisión exhaustiva de las diversas jurisprudencias, se desprende que fue sólo en la Quinta Época en la que la Corte definió vía Jurisprudencia el concepto de derechos políticos. Con ello, advertimos que éstos fueron ignorados o subestimados tanto por el legislador como por la Jurisprudencia durante varias décadas. Y, no sólo se evitó precisar el contenido y el alcance de estos derechos, sino que se les privó también de toda protección judicial.

México sigue la doctrina de las "cuestiones políticas" de los Estados Unidos, y esta porción se presentó en el control de la constitucionalidad de las elecciones hasta el año de 1996, en el que se creó una jurisdicción especializada dentro de la Judicatura federal, lo cual fue reproducido en los 31 estados y en el Distrito Federal.

Estos tribunales electorales tuvieron como antecedente en el año de 1987, a los tribunales administrativos sobre elecciones, pero su independencia fue cuestionada en dos recomendaciones de la Comisión Interamericana de Derechos Humanos, las que fueron la base para la creación de los tribunales judiciales y de los recursos correspondientes.

El tribunal administrativo no fue la primera institución creada para proteger los derechos políticos derivados de las elecciones, desde la adopción de la última Constitución de México de 1917 —en efecto a partir de la Ley Electoral de 6 de febrero de 1917—, se crearon recursos que se promovían ante la autoridad administrativa, así como ante

órganos jurisdiccionales, ya sea especializados o no en la materia electoral,[1] y que fundamentalmente se referían a rectificaciones al padrón electoral por los ciudadanos.

El avance de la justicia electoral en México ha sido paulatino. Cada ley en México ha dado un paso lento del ámbito administrativo hacia el jurisdiccional, al tiempo que se han ido construyendo los cimientos del juicio ciudadano, principal medio de impugnación para la tutela de los derechos político-electorales en México.

En 1996, sin embargo, se da un vuelco al crearse una jurisdicción especializada dentro de la Judicatura federal, lo cual fue reproducido en los 31 estados del país y en el Distrito Federal. A ésta le corresponde resolver el juicio para la protección de los derechos político-electorales del ciudadano, por mucho, el medio de impugnación que con mayor frecuencia se presenta.

Si bien en sus orígenes este medio de impugnación se usó primordialmente para solicitar correcciones al padrón electoral y lista nominal, lo cierto es que en la actualidad ha sido un instrumento muy eficaz para que la justicia electoral federal coadyuve a proteger, por ejemplo, los derechos político-electorales de los militantes de los partidos políticos que consideran violados sus derechos al interior del partido.

Aun más, a través de este recurso se han fijado importantes interpretaciones en términos de equidad de género, comunidades indígenas o derechos políticos de personas sujetas a procesos penales. Con ello, el Tribunal Electoral del Poder Judicial de la Federación ha logrado expandir los derechos político–electorales de los ciudadanos y ha incursionado en temas de vanguardia, como los que se discuten en el Consejo para Elecciones Democráticas.

Así, actualmente, puede sostenerse válidamente que tanto los civiles como los políticos son derechos que, junto con otros de generaciones posteriores, se consideran fundamentales, es decir, esenciales para la existencia libre y digna de un ser humano. Y como tales reclaman plena eficacia. En este sentido, cabe precisar que los derechos civiles y

[1] Al respecto *véase:* "Ley Electoral", edición impresa facsimilar de la obra impresa por la Secretaría de Gobernación en 1916, México, Tribunal Electoral del Poder Judicial de la Federación, 2007; y García Orozco, Antonio, *Legislación electoral mexicana,* México, Reforma Política, Gaceta Informativa de la Comisión Federal Electoral, 1978.

políticos reclaman del Estado, por lo regular, una conducta omisita, es decir, un no hacer, una abstención; a diferencia de los derechos de generaciones posteriores que exigen para su plena eficacia una conducta positiva del Estado, un hacer determinado.

En el caso de los derechos políticos, lo que se exige del Estado es que no realice acciones que impidan o dificulten irracionalmente su ejercicio. Para evitar que eso suceda, órganos del propio Estado (los tribunales) se encargan de tutelar el ejercicio eficaz de tales derechos. Adicionalmente, las personas cuentan con órganos supranacionales de protección, en caso de que las instancias del propio país resulten insatisfactorias.

II. Funcionamiento del juicio para la protección de los derechos político-electorales del ciudadano

A) Noción de los derechos político-electorales del ciudadano

El artículo 99, párrafo cuarto, fracción V, de la Constitución Política de los Estados Unidos Mexicanos establece, entre otras cuestiones, que al Tribunal Electoral del Poder Judicial de la Federación le corresponde resolver en forma definitiva e inatacable, en los términos que disponga la Constitución y según lo disponga la ley sobre las impugnaciones de los actos y resoluciones que violen los derechos político electorales de los ciudadanos de votar, ser votado y de afiliación libre y pacífica para tomar parte en los asuntos políticos del país.

Por su parte, el artículo 79, párrafo 1 de la Ley General del Sistema de Medios de Impugnación en Materia Electoral establece, en lo que interesa, que el juicio para la protección de los derechos político-electorales, sólo procederá cuando el ciudadano por sí mismo y en forma individual, o a través de sus representantes legales, haga valer presuntas violaciones a sus derechos de votar y ser votado en las elecciones populares, de asociarse individual y libremente para tomar parte en forma pacífica en los asuntos políticos y de afiliarse libre e individualmente a los partidos políticos.

El precepto en comento, en el párrafo segundo señala que dicho juicio resultará procedente para impugnar los actos y resoluciones por quien teniendo interés jurídico, considere que indebidamente se afecta su derecho para integrar las autoridades electorales de las entidades federativas.

Del marco normativo a que se ha hecho referencia se desprenden los siguientes derechos político-electorales que son tutelados mediante el juicio para la protección de los derechos político-electorales del ciudadano:

a) Derecho de votar en las elecciones populares.
b) Derecho de ser votado en las elecciones populares.
c) Derecho de asociarse individual y libremente para tomar parte en forma pacífica en los asuntos políticos.
d) Derecho de afiliarse libre e individualmente a los partidos políticos.

Asimismo, en el marco de la reforma a la Ley General del Sistema de Medios de Impugnación en Materia Electoral del 1 de julio de 2008, se reconoció la posibilidad de que, quien teniendo interés jurídico, pudiese impugnar a través del juicio referido, los actos y las resoluciones que considerara que indebidamente afectaran su derecho para integrar las autoridades electorales de las entidades federativas.

Es importante destacar el criterio sostenido por la Sala Superior del Tribunal Electoral del Poder Judicial de la Federación, en la tesis de jurisprudencia S3ELJ 36/2002, cuyo rubro es del tenor siguiente: "JUICIO PARA LA PROTECCIÓN DE LOS DERECHOS POLÍTICO--ELECTORALES DEL CIUDADANO. PROCEDE CUANDO SE ADUZCAN VIOLACIONES A DIVERSOS DERECHOS FUNDAMENTALES VINCULADOS CON LOS DERECHOS DE VOTAR, SER VOTADO, DE ASOCIACIÓN Y DE AFILIACIÓN".

De lo anterior se desprende que la Sala Superior ha considerado que la efectiva tutela de los derechos políticos, conlleva a proteger derechos fundamentales estrechamente vinculados a los referidos derechos, como pueden ser los derechos de petición, de información, de reunión o de libre expresión y difusión de las ideas.

Aunado a lo anterior, resultan de especial interés los siguientes criterios de la Sala Superior, de la Cuarta Época, los cuales fueron aprobados

por mayoría de votos: "DERECHO POLÍTICO-ELECTORAL DE SER VOTADO. SU TUTELA EXCLUYE LOS ACTOS POLÍTICOS CORRESPONDIENTES AL DERECHO PARLAMENTARIO", Tesis XVIII/2007.

"JUICIO PARA LA PROTECCIÓN DE LOS DERECHOS POLÍTICO-ELECTORALES DEL CIUDADANO. LA REMOCIÓN DEL COORDINADOR DE UNA FRACCIÓN PARLAMENTARIA NO ES IMPUGNABLE. (Legislación de Campeche)", Tesis XIV/2007.

B) Supuestos en los que el ciudadano puede promover el juicio

El artículo 80, párrafo 1, incisos a) al g), de la ley adjetiva señala que el juicio puede ser promovido por el ciudadano cuando:

- Habiendo cumplido con los requisitos y trámites correspondientes, no hubiere obtenido oportunamente el documento que exija la ley electoral respectiva para ejercer el voto.
- Habiendo obtenido oportunamente el documento antes mencionado, no aparezca incluido en la lista nominal de electores de la sección correspondiente a su domicilio.
- Considere haber sido indebidamente excluido de la lista nominal de electores de la sección correspondiente a su domicilio.
- Considere que se violó su derecho político-electoral de ser votado cuando, habiendo sido propuesto por un partido político, le sea negado indebidamente su registro como candidato a un cargo de elección popular.
- Habiéndose asociado con otros ciudadanos para tomar parte en forma pacífica en asuntos políticos, conforme a las leyes aplicables, consideren que se les negó indebidamente su registro como partido político o agrupación política.
- Considere que un acto o resolución de la autoridad es violatorio de cualquier otro de los derechos político-electorales a que se refiere el artículo 79 de la ley adjetiva, y
- Considere que los actos o resoluciones del partido político al que está afiliado violan alguno de sus derechos político-electorales. Lo anterior es aplicable a los precandidatos y candidatos a cargos de

elección popular aún cuando no estén afiliados al partido señalado como responsable.

C) Competencia

De conformidad con el artículo 189, fracción I, inciso e), de la Ley Orgánica del Poder Judicial de la Federación, la Sala Superior es competente para conocer y resolver, en forma definitiva e inatacable los juicios para la protección de los derechos político-electorales del ciudadano, en única instancia y en los términos de la ley de la materia:

- Que se promuevan por violación al derecho de ser votado en las elecciones de Presidente Constitucional de los Estados Unidos Mexicanos, de diputados federales y senadores por el principio de representación proporcional, Gobernador o de Jefe de Gobierno del Distrito Federal.
- Los que se promuevan por violación al derecho de asociarse individual y libremente para tomar parte en forma pacífica en los asuntos políticos.
- Así como los que se presenten en contra de las determinaciones de los partidos políticos en la selección de sus candidatos en las elecciones antes mencionadas o en la integración de sus órganos nacionales.

Por su parte, de los artículos 83, párrafo 1, inciso a), fracciones I a la IV, en relación con los artículos 80, incisos b), d), e), f) y g), y 82, párrafo 1, inciso b), de la de la Ley General del Sistema de Medios de Impugnación en Materia Electoral, se tiene que la Sala Superior es competente para resolver el juicio en comento en única instancia, en los siguientes casos:

- Cuando el ciudadano considere que se violó su derecho político-electoral de ser votado cuando, habiendo sido propuesto por un partido político, le sea negado indebidamente su registro como candidato a un cargo de elección popular, en relación con las elecciones de Presidente Constitucional de los Estados Unidos Mexicanos, Gobernadores, Jefe de Gobierno del Distrito Federal y

en las elecciones federales de diputados y senadores por el principio de representación proporcional.

- Cuando el ciudadano habiéndose asociado con otros ciudadanos para tomar parte en forma pacífica en asuntos políticos, conforme a las leyes aplicables, consideren que se les negó indebidamente su registro como partido político o agrupación política.
- Cuando el ciudadano considere que los actos o resoluciones del partido político al que está afiliado violan alguno de sus derechos político-electorales. Lo anterior es aplicable a los precandidatos y candidatos a cargos de elección popular aún cuando no estén afiliados al partido señalado como responsable.
- Cuando el ciudadano considere que un acto o resolución de la autoridad es violatorio de cualquier otro de los derechos político electorales a que se refiere el artículo 79 de la ley en comento, por determinaciones emitidas por los partidos políticos en la elección de candidatos a los cargos de Presidente de los Estados Unidos Mexicanos, Gobernadores, Jefe de Gobierno del Distrito Federal, diputados federales y senadores de representación proporcional, y dirigentes de los órganos nacionales de dichos institutos, así como en los conflictos internos de los partidos políticos cuyo conocimiento no corresponda a las Salas Regionales.
- Asimismo, tratándose de los procesos electorales de las entidades federativas, el candidato agraviado sólo podrá promover el juicio a que se refiere el Libro Tercero, cuando la ley electoral correspondiente no le confiera un medio de impugnación jurisdiccional que sea procedente en estos casos o cuando habiendo agotado el mismo, considere que no se reparó la violación constitucional reclamada, cuando se refiere a la elección de Gobernadores o Jefe de Gobierno del Distrito Federal.

Por otra parte, de conformidad con el artículo 195, fracción IV, incisos a) al d), de la Ley Orgánica mencionada, cada una de las Salas Regionales, en el ámbito de su jurisdicción tiene competencia para conocer y resolver en única instancia y en forma definitiva e inatacable, los juicios para la protección de los derechos político-electorales del ciudadano que se promuevan por:

- La violación al derecho de votar en las elecciones constitucionales;
- La violación al derecho de ser votado en las elecciones federales de diputados y senadores por el principio de mayoría relativa, en las elecciones de diputados locales y a la Asamblea Legislativa del Distrito Federal, ayuntamientos y titulares de los órganos político-administrativos en las demarcaciones territoriales del Distrito Federal, siempre y cuando se hubiesen reunido los requisitos constitucionales y los previstos en las leyes para su ejercicio;
- La violación al derecho de ser votado en las elecciones de los servidores públicos municipales diversos a los electos para integrar los ayuntamientos, y
- La violación de los derechos político-electorales por determinaciones emitidas por los partidos políticos en la elección de candidatos a los cargos de diputados federales y senadores por el principio de mayoría relativa, diputados locales y a la Asamblea Legislativa del Distrito Federal, ayuntamientos, titulares de los órganos político-administrativos en las demarcaciones territoriales del Distrito Federal y dirigentes de los órganos de dichos institutos distintos a los nacionales.

Asimismo, del artículo 83, párrafo 1, inciso b), fracciones I a V, en relación con el 80, párrafo 1, incisos a), b) c), y d), y con el 82, párrafo 1, inciso b), de la Ley adjetiva se tiene que la Sala Regional que ejerza jurisdicción en el ámbito territorial en que se haya cometido la violación reclamada, es competente para resolver el juicio ciudadano en los siguientes casos:

- Cuando el ciudadano habiendo cumplido con los requisitos y trámites correspondientes, no hubiere obtenido oportunamente el documento que exija la ley electoralrespectiva para ejercer el voto.
- Cuando el ciudadano habiendo obtenido oportunamente el documento antes referido, no aparezca incluido en la lista nominal de electores de la sección correspondiente a su domicilio.
- Cuando el ciudadano considere haber sido indebidamente excluido de la lista nominal de electores de la sección correspondiente a su domicilio.

En estos tres casos cuando sean promovidos con motivo de procesos electorales federales o de las entidades federativas.

- Cuando considere que se violó su derecho político-electoral de ser votado cuando, habiendo sido propuesto por un partido político, le sea negado indebidamente su registro como candidato a un cargo de elección popular, en las elecciones federales de diputados y senadores por el principio de mayoría relativa, y en las elecciones de autoridades municipales, diputados locales, así como a la Asamblea Legislativa del Distrito Federal y titulares de los órganos político-administrativos en las demarcaciones del Distrito Federal.
- Por la violación al derecho de ser votado en las elecciones de los servidores públicos municipales diversos a los electos para integrar el ayuntamiento.
- Por la violación de los derechos político-electorales por determinaciones emitidas por los partidos políticos en la elección de candidatos a los cargos de diputados federales y senadores por el principio de mayoría relativa, diputados a la Asamblea Legislativa del Distrito Federal, en las elecciones de autoridades municipales, diputados locales, y de los titulares de los órganos político-administrativos en las demarcaciones del Distrito Federal; y dirigentes de los órganos de dichos institutos distintos a los nacionales.
- Asimismo tratándose de los procesos electorales de las entidades federativas, el candidato agraviado sólo podrá promover el juicio a que se refiere el Libro Tercero, cuando la ley electoral correspondiente no le confiera un medio de impugnación jurisdiccional que sea procedente en estos casos o cuando habiendo agotado el mismo, considere que no se reparó la violación constitucional reclamada, cuando se refiere a las elecciones de autoridades municipales, diputados locales, diputados a la Asamblea Legislativa del Distrito Federal y titulares de los órganos político-administrativos en las demarcaciones del Distrito Federal.

Con motivo de la competencia de la Sala Superior y de las Salas Regionales en el juicio multicitado, en la Cuarta Época, la primera de las mencionadas ha aprobado las siguientes tesis jurisprudenciales,

cuyo rubro es: "COMPETENCIA. CORRESPONDE A LAS SALAS REGIONALES CONOCER DE LAS IMPUGNACIONES VINCULADAS CON EL ACCESO Y DESEMPEÑO DE CARGOS PARTIDISTAS ESTATALES Y MUNICIPALES", jurisprudencia 10/2010.

"ACCESO AL CARGO DE DIPUTADO. COMPETE A LA SALA SUPERIOR CONOCER DE LAS IMPUGNACIONES RELACIONADAS CON ÉL.", jurisprudencia 12/2009.

"COMPETENCIA. CORRESPONDE A LA SALA SUPERIOR DEL TRIBUNAL ELECTORAL DEL PODER JUDICIAL DE LA FEDERACIÓN CONOCER DE LAS IMPUGNACIONES RELACIONADAS CON LA INTEGRACIÓN DE LAS AUTORIDADES ELECTORALES DE LAS ENTIDADES FEDERATIVAS", jurisprudencia 3/2009.

D) Algunos aspectos de procedencia

Requisitos de forma

El artículo 9, párrafo 1, de la Ley General del Sistema de Medios de Impugnación en Materia Electoral requiere, entre otras cuestiones, que en la demanda se realice el señalamiento del nombre del actor, el domicilio para recibir notificaciones, la identificación de la resolución impugnada y del responsable, la mención de los hechos y de los agravios que afirma, le causa el acto reclamado, además de la firma autógrafa del enjuiciante.

Plazo para presentar la demanda

De conformidad con el artículo 8, de la ley de la materia, los medios de impugnación se deben presentar dentro de los cuatro días contados a partir del día siguiente a aquél en que se tenga conocimiento del acto o resolución impugnado, o se hubiere notificado de conformidad con la ley aplicable.

Es importante señalar que si lo que se impugna es una omisión de una autoridad electoral, ésta se considera de tracto sucesivo, con lo que el plazo legal no ha vencido.

Legitimación activa

Como regla general de conformidad con el artículo 79 de la ley de la materia, se prevé que únicamente los ciudadanos pueden incoar el juicio para la protección de los derechos políticos del ciudadano.

Cabe destacar que este requisito se flexibiliza tratándose de comunidades indígenas, tal y como se desprende de la tesis XX/2008 de esta Sala Superior, cuyo rubro es: "COMUNIDADES INDÍGENAS. EL ANÁLISIS DE LA LEGITIMACIÓN ACTIVA EN EL JUICIO PARA LA PROTECCIÓN DE LOS DERECHOS POLÍTICO-ELECTORALES DEL CIUDADANO, DEBE SER FLEXIBLE POR LAS PARTICULARIDADES DE SUS INTEGRANTES".

Personería

De conformidad con el artículo 79, párrafo 1 de la ley adjetiva, el juicio para la protección de los derechos políticos sólo procede cuando el ciudadano por sí mismo y en forma individual, o a través de sus representantes, haga valer presuntas violaciones que ahí se indican.

De lo anterior se tiene que en el juicio de mérito se admite la representación del ciudadano.

Interés jurídico

La Sala Superior ha sostenido en la tesis de jurisprudencia S3ELJ 07/2002, cuyo rubro es: "INTERÉS JURÍDICO DIRECTO PARA PROMOVER MEDIOS DE IMPUGNACIÓN. REQUISITOS PARA SU SURTIMIENTO" que el interés jurídico procesal se surte, si en la demanda se aduce la infracción de algún derecho sustancial del actor y a la vez éste hace ver que la intervención del órgano jurisdiccional es necesaria y útil para lograr la reparación de esa conculcación, mediante la formulación de algún planteamiento tendiente a obtener el dictado de una sentencia, que tenga el efecto de revocar o modificar el acto o la resolución reclamados, que producirá la consiguiente restitución al demandante en el goce del pretendido derecho político-electoral violado.

Al respecto resultan de interés los siguientes criterios de la Sala Superior: "INTERÉS JURÍDICO. LOS PRECANDIDATOS REGISTRADOS LO

TIENEN PARA IMPUGNAR LOS ACTOS RELATIVOS AL PROCESO ELECTIVO INTERNO EN QUE PARTICIPAN", tesis XLII/2009.

"INTERÉS JURÍDICO. MILITANTES Y SIMPATIZANTES CUYA CONDUCTA GENERÓ LA IMPOSICIÓN DE UNA SANCIÓN A LOS PARTIDOS POLÍTICOS POR CULPA *IN VIGILANDO,* RECONOCIMIENTO DE", tesis XXIX/2008.

Definitividad y firmeza de la resolución reclamada

Este requisito es exigible a todos los medios impugnativos que se instauran ante esta Sala Superior, con base en el artículo 99, fracción IV, de la Constitución Política de los Estados Unidos Mexicanos y del artículo 10, párrafo 1, inciso d), de la Ley General del Sistema de Medios de Impugnación en Materia Electoral, en los cuales se establece, que para la procedencia de los medios impugnativos es indispensable agotar las instancias previas establecidas en la Ley para combatir los actos o resoluciones impugnadas, en virtud de los cuales puedan ser modificadas, revocadas o anuladas.

Derivado de lo anterior, el artículo 80, párrafo 2 dispone que el juicio sólo será procedente cuando el actor haya agotado todas las instancias previas y realizado las gestiones necesarias para estar en condiciones de ejercer el derecho político-electoral presuntamente violado, en la forma y en los plazos que las leyes respectivas establezcan para tal efecto.

Del artículo 80, párrafo 3 de la ley de la materia se desprende que tratándose de los actos o resoluciones del partido político al que el ciudadano está afiliado, y considere que violan sus derechos político-electorales, el quejoso debe agotar previamente las instancias de solución de conflictos previstas en las normas internas del partido de que se trate, salvo que los órganos partidistas competentes no estuvieren integrados e instalados con antelación a los hechos litigiosos, o dichos órganos incurran en violaciones graves de procedimiento que dejen sin defensa al quejoso.

E) Efectos de las sentencias

De conformidad con el artículo 84, párrafo 1, incisos a) y b) de la Ley General del Sistema de Medios de Impugnación en Materia Electoral las sentencias que resuelvan el fondo del juicio para la protección de los derechos político-electorales del ciudadano, serán definitivas e inatacables y podrán tener los efectos siguientes:

- Confirmar el acto o resolución impugnado, y
- Revocar o modificar el acto o resolución impugnado y restituir al promovente en el uso y goce del derecho político-electoral que le haya sido violado.

En principio, pareciera que la redacción de los textos constitucional y legal, conducen a una reducción tajante: de los derechos políticos antes enunciados, sólo se tutelan, a través del JDC, los derechos políticos *expresamente* prescritos y *directamente* relacionados con una elección: el de votar, el de ser votado, el de afiliación partidista y el de asociación política. Sin embargo, la jurisprudencia del citado Tribunal Electoral ha ampliado paulatinamente el ámbito protector del JDC, pues se ha sostenido que éste procede no sólo cuando directamente se hagan valer presuntas violaciones a cualquiera de los derechos político-electorales, sino también cuando se aduzcan violaciones a otros derechos fundamentales que se encuentren estrechamente vinculados con el ejercicio de los derechos de votar y ser votado, de asociarse individual y libremente para tomar parte en forma pacífica en los asuntos políticos del país, y de afiliarse libre e individualmente a los partidos políticos.[2]

Entre esos derechos fundamentales que, sin ser político-electorales, pueden ser protegidos mediante el JDC, en razón de su estrecha vinculación con los derechos político-electorales y cuya protección resulta indispensable a fin de no hacer nugatorio cualquiera de éstos, figuran los de petición, de información, de reunión o de libre expresión y difu-

[2] Jurisprudencia 36/2002, de rubro "JUICIO PARA LA PROTECCIÓN DE LOS DERECHOS POLÍTICO-ELECTORALES DEL CIUDADANO. PROCEDE CUANDO SE ADUZCAN VIOLACIONES A DIVERSOS DERECHOS FUNDAMENTALES VINCULADOS CON LOS DERECHOS DE VOTAR, SER VOTADO, DE ASOCIACIÓN Y DE AFILIACIÓN".

sión de las ideas. En este sentido, cabe señalar que el Tribunal Electoral del Poder Judicial de la Federación, ha entendido que su labor no se limita en exclusiva a proteger sólo los derechos directamente vinculados a la elección, sino también aquellos cuya existencia y plena eficacia es un presupuesto esencial de una forma democrática de gobierno.

III. Juicios ciudadanos recientes de relevancia

A. Protección a pueblos indígenas y sus miembros

Suplencia de la queja de comunidades y pueblos indígenas

México se ha unido a la tendencia internacional de reconocimiento de los derechos de los pueblos indígenas que habitaban en territorio del país antes de la conquista, y el Tribunal Electoral no podría ser la excepción.

La reforma constitucional de 2001 reconoce la composición pluricultural del Estado Mexicano, así como los usos y costumbres bajo los cuales los pueblos indígenas se desarrollan, reconociéndolas y otorgándoles efectos dentro del sistema jurídico, incluso para elegir a sus autoridades de acuerdo con sus tradiciones.

En 2007, pobladores del municipio de Tanetze de Zaragoza, Oaxaca,[3] promovieron un juicio electoral ciudadano para impugnar la determinación de las autoridades locales para no celebrar elecciones municipales por falta de las condiciones necesarias para hacerlo.[4]

El juicio ciudadano[5] establece la posibilidad de suplir la deficiencia de las defensas de los actores.[6] Para el caso de los integrantes de grupos indígenas se fue más allá, al considerar que cuando los derechos

3 En el estado de Oaxaca 418 de los 570 municipios eligen a sus autoridades mediante el sistema de usos y costumbres.

4 SUP-JDC-11/2007, resuelto el 6 de junio de 2007.

5 Juicio para la protección de los derechos político-electorales del ciudadano.

6 Artículo 23, apartado 1, de la Ley General del Sistema de Medios de Impugnación en Materia Electoral.

en juego se relacionen con la autonomía de los pueblos y comunidades indígenas, como una medida tuitiva especial, el juzgador puede corregir cualquier tipo de insuficiencia, incluso determinar el acto de autoridad que realmente afecta a los comparecientes.

Para llegar a tal conclusión, la Sala Superior consideró lo siguiente.

La Constitución Mexicana impone al Estado la impartición de justicia pronta, imparcial y expedita. En reconocimiento a la situación de marginación y exclusión en la que históricamente se han encontrado los pueblos indígenas, que los ha colocado en una posición de desventaja, impone al Estado Mexicano, la adopción de medidas particulares para estos grupos, a fin de lograr el acceso pleno a la jurisdicción, en las que se tomen en cuenta sus prácticas culturales, su cosmovisión de la vida, a fin de revertir la situación de desventaja en el que se han encontrado.

Como sustento de ello, se consideró que el ámbito de derechos fundamentales reconocido para todo individuo no ha sido suficiente para que las comunidades indígenas superaran las condiciones precarias en las que subsisten, por lo que se requiere un reforzamiento al ámbito de protección extendido, con un reconocimiento más general y previo de las situaciones y características que identifican y dan sentido a estas colectividades y sus miembros.

Conclusión que encuentra sustento en la protección de la libertad de pensamiento y expresión de esas comunidades; la libertad de formas de vida y maneras de vivir, así como la libertad de creación, mantenimiento y desarrollo de culturas, garantizadas en el artículo 27, apartado 1, del *Pacto Internacional de Derechos Civiles y Políticos*; así como el *Convenio 169 de la Organización Internacional del Trabajo, sobre Pueblos Indígenas y Tribales en Países Independientes,* que establece la responsabilidad de los gobiernos de desarrollar una acción coordinada y sistemática para la protección de los derechos de los pueblos y comunidades indígenas.

Con base en ese marco jurídico, se concluyó que la Sala Superior tenía el deber de adoptar medidas positivas y compensatorias a favor de las comunidades indígenas, que resulten adecuadas e idóneas para frenar la inercia social de desigualdad.

En ese contexto, la Sala corrigió las irregularidades relacionadas con el acto reclamado, al precisar cuál era el que realmente afectaba

a los demandantes (determinación del legislativo local que determinó la no existencia de condiciones para la celebración de las elecciones) y consideró que de acuerdo con las condiciones particulares de la comunidad, la publicación en el órgano oficial de difusión no vinculaba a la comunidad, por lo que el juicio se presentó oportunamente.

De no aplicarse esos criterios, el juicio hubiera sido improcedente, lo cual hubiera impedido dictar una sentencia sobre el conflicto planteado, en la que finalmente se ordenó a los órganos estatales la realización de las elecciones en el municipio referido, que desde 2002 no se habían realizado.

Acción afirmativa en la selección de candidatos a favor de indígenas

El Partido de la Revolución Democrática (PRD) establece en sus estatutos acciones afirmativas para la selección de los integrantes de las listas de representación proporcional con base en el género, la juventud, la condición migratoria y la condición étnica.

En el marco del proceso de elección de diputados de 2009, un ciudadano en su carácter de miembro de una comunidad indígena promovió juicio electoral ciudadano para impugnar la determinación del PRD de no incluirlo en la lista de representación proporcional, a pesar de tener esa calidad.[7]

Con base en el reconocimiento constitucional del carácter pluricultural de México, así como los tratados internacionales mencionados y la Declaración sobre los Derechos de las Personas pertenecientes a Minorías Nacionales, Étnicas, Religiosas o Lingüísticas, la Convención Internacional sobre la eliminación de todas formas de Discriminación Racial y la Declaración de las Naciones Unidas sobre Derechos Indígenas, la sentencia fue relevante en dos aspectos:

El primero consistió en la demostración de la calidad de indígena del demandante, al no existir una definición universal al respecto, ni la exigencia de una prueba especial sobre esa calidad subjetiva, por lo que no se exigió la demostración fehaciente y absoluta de esa condición.

7 SUP-JDC-488/2009 resuelto el 10 de junio de 2009.

El segundo aspecto tuvo que ver con la aplicación de la norma que prevé la acción afirmativa. La regla del partido únicamente establece que en la lista de candidatos se incluirán candidatos indígenas, por lo menos equivalente al porcentaje de población indígena del ámbito correspondiente.

Esta disposición podría ser entendida en el sentido de que con la inclusión del porcentaje correspondiente en la lista, aunque fuera al final (en los lugares que menos posibilidad de asignación tienen) se cumpliría la norma.

Sin embargo, la Sala Superior consideró que la inclusión de cuotas indígenas debe ser por bloques, esto es, si la lista se integra con 30 lugares y los lugares reservados para estos candidatos son 3, debe incluirse a uno de ellos en el primer bloque de 10, otro en el segundo bloque de 10 y el último en el tercer bloque, como sucede con otras acciones afirmativas.

Esta consideración se sustentó en la finalidad de establecer acciones afirmativas, que se conciben como un mecanismo encaminado a establecer políticas que den a un determinado grupo social, étnico, minoritario o que históricamente haya sido excluido o que no contaba con oportunidades de acceso a los cargos públicos, la posibilidad de poder ser incluido y participar activamente. Para ello, se utilizan instrumentos que operan en sentido inverso al excluyente, para ahora funcionar como mecanismos de compensación a favor de dichos grupos minoritarios.

Por tanto, para lograr su finalidad, se consideró que la inclusión de las candidaturas indígenas debía hacerse mediante el sistema de bloques antes mencionado.

El resultado de la sentencia fue que el demandante debía ser incluido en la lista de candidatos a diputados por el principio de representación proporcional del PRD en la elección de 2009.

B. Derechos políticos su no restricción por sanciones penales, a la luz de la Constitución Federal y de los tratados internacionales

Derecho a votar[8]

En este asunto la Sala Superior revocó la resolución de la autoridad administrativa electoral, en el sentido de excluir al ciudadano del padrón electoral y, por consecuencia, no entregarle su credencial para votar con fotografía, por habérsele dictado auto de formal prisión.

La revocación tuvo como base la ponderación de la importancia del derecho de votar, sobre la base de que conforme a una interpretación garantista de la norma constitucional prevista en la fracción II del artículo 38 de la Constitución Política, la suspensión de derechos político-electorales debe entenderse actualizada con la sujeción a proceso del ciudadano, lo cual opera a partir de que exista un auto formal de prisión, el cual obligue irremediablemente al procesado a ser privado físicamente de su libertad, en razón de que no fue recurrida o concedida una medida de menor entidad como lo es la libertad bajo caución, misma que consiste en que el procesado sea puesto en libertad caucional y de esta forma continúe en la defensa de su inocencia. Lo anterior, siempre y cuando haya satisfecho requisitos tales como: a) La garantía del monto de la reparación del daño; b) La garantía de las sanciones pecuniarias que en su caso puedan imponérsele; c) Que caucione el cumplimiento de las obligaciones a su cargo, que la ley establece en razón del proceso; y d) Que no se trate de alguno de los delitos calificados como graves.

8 SUP-JDC-85/2007 resuelto el 20 de junio de 2007.

Derecho a ser votado

Caso Julio César Godoy Toscano[9]

La Sala Superior confirmó la imposibilidad de que el actor tomara protesta del cargo para el que había sido electo, por encontrarse en la hipótesis de suspensión de los derechos político-electorales de un ciudadano electo para un cargo de elección popular, por hallarse prófugo de la justicia.

A diferencia del asunto SUP-JDC-85/2007, este caso cobra relevancia porque, en la sentencia se pondera que mientras en el criterio anterior se privilegió la presunción de inocencia, mientras no se demostrara lo contrario, con el dictado de una sentencia, en el caso, se trataba de una situación reconocida por el propio actor, de mantenerse al margen del orden legal por estar prófugo de la justicia (art. 38, fracción V, CPEUM).

Caso Martín Orozco Sandoval[10]

La Sala Superior revocó el acuerdo que negaba el registro de la candidatura del actor, al considerar la responsable que se encontraba suspendido de sus derechos político-electorales, por estar sujeto a proceso que mereciera pena corporal.

Se destacó nuevamente la importancia de privilegiar el principio de la presunción de inocencia, además de que no existía un auto de formal prisión, pues el actor estaba sujeto a proceso penal, pero en libertad, condicional, lo cual, en una visión garantista no tenía por qué afectar sus derechos político-electorales.

C. Obligación de los órganos intrapartidistas de respetar las garantías del debido proceso en la resolución de sus conflictos internos

La codificación electoral federal en México reconoce la potestad de los partidos políticos para resolver ante sus propias instancias los

9 SUP-JDC-670/2009 resuelto el 1 de octubre de 2009.

10 SUP-JDC-98/2010 resuelto el 13 de mayo de 2010.

conflictos suscitados con sus afiliados. El agotamiento previo de los medios de impugnación intrapartidistas constituye un requisito de procedibilidad para que los afiliados a un partido político acudan al Tribunal Electoral en defensa de sus intereses, salvo cuando los órganos partidistas competentes, entre otros supuestos, incurran en violaciones graves de procedimiento que dejen sin defensa al quejoso, en cuyo caso, acudirán directamente al Tribunal Electoral.

En el expediente SUP-JDC-344/2008,[11] la Sala Superior conoció de la infracción del derecho de acceso a la justicia intrapartidista en perjuicio de los afiliados a un partido político.

Para controvertir el cómputo realizado por una comisión técnica electoral respecto de la elección de delegados en una entidad federativa (Baja California), diversos militantes de un partido político (PRD) presentaron un recurso de inconformidad previsto en las normas reglamentarias.

En el caso, los órganos competentes intrapartidistas incumplieron con el procedimiento establecido en su propia normativa, pues la comisión técnica nacional que recibió la impugnación, no envió el escrito de demanda y sus anexos a la instancia superior que resolvería, mientras que ésta, no solicitó al inferior la remisión de tales documentos. Ante tales hechos, los afectados acudieron directamente ante la Sala Superior cuestionando estas omisiones.

La relevancia del asunto estriba en que los órganos que tenían una intervención destacable en el trámite y la resolución del medio de impugnación intrapartidista, habían vulnerado en perjuicio de sus afiliados la garantía del debido proceso, al no haber atendido, pronta y expeditamente, sus solicitudes de impugnación.

La Sala Superior observó que el medio de defensa agotado internamente para combatir un acto relacionado con la integración de un órgano de representación nacional, resultaba ineficaz, en atención a que la omisión combatida negaba el acceso a la justicia intrapartidista a los afiliados y les dejaba en estado de indefensión.

Por tanto, a fin de privilegiar la garantía del debido proceso a favor de los enjuiciantes, la ejecutoria del 7 de mayo de 2008 ordenó a los

[11] Resuelto el 7 de mayo de 2008.

órganos competentes intrapartidistas tramitar y resolver, en un plazo perentorio y conforme a sus atribuciones estatutarias, los recursos de inconformidad planteados por sus militantes.

D. Equidad de género

***Caso Guajardo*[12]**

Las constituciones federal y de los estados, así como la legislación electoral en general, garantizan el acceso de las mujeres al servicio público y a los cargos de elección popular, en condiciones de equidad frente a los varones.

En el caso específico, la Comisión Nacional de Garantías del Partido de la Revolución Democrática desestimó la pretensión de Mary Telma Guajardo Villareal, de ser trasladada del lugar cuatro, al tres, de la lista de candidatos a diputados plurinominales, al estimar que la alternancia de dos candidaturas de género distinto en un segmento de cinco, permitía su ubicación una en seguida de otra en la lista, lo cual se cumplía, al haberse colocado a una mujer, seguida de dos hombres y luego de dos mujeres.

Inconforme con lo anterior, la enjuiciante hizo valer ante el Tribunal Electoral que no bastaba con que en cada segmento de cinco candidatos se garantizara que cada género contara por lo menos con 50% de representación, sino que, además, se debía respetar la regla de alternancia que significa intercalar, de manera sucesiva, a un hombre y a una mujer, entre sí.

En la ejecutoria dictada el 6 de mayo de 2009, la Sala Superior consideró que la regla de alternancia para ordenar las candidaturas de representación proporcional prevista en el código electoral (art. 220, párrafo 1, parte final), consiste en colocar en forma sucesiva una mujer seguida de un hombre, o viceversa, en cada segmento de cinco candidaturas hasta agotar dicho número, de modo tal que el mismo género no se encuentre en dos lugares consecutivos del segmento respectivo.

12 SUP-JDC-461/2009 resuelto el 6 de mayo de 2009.

Esta regla tiene como finalidad el equilibrio entre los candidatos a elegirse por el principio de representación proporcional, de ambos sexos, y lograr la participación política efectiva en el Congreso de la Unión de hombres y mujeres, en un plano de igualdad sustancial o real y efectiva. Asimismo, permite que los partidos políticos cumplan con el deber de promover y garantizar la igualdad de oportunidades, procurar la paridad de género en la vida política del país y desarrollar el liderazgo político de las mujeres a través de postulaciones a cargos de elección popular.

De esta ejecutoria derivó el criterio relevante intitulado "REPRESENTACIÓN PROPORCIONAL EN EL CONGRESO DE LA UNIÓN. CÓMO SE DEBE APLICAR LA ALTERNANCIA DE GÉNEROS PARA CONFORMAR LAS LISTAS DE CANDIDATOS", y dada su trascendencia en materia de equidad de género, tuvo el privilegio de participar en el concurso "Género y Justicia al Descubierto", convocado por la organización internacional de derechos humanos Women's Link Worldwide.[13]

Caso González Saavedra[14]

En otro asunto, se analizó la impugnación presentada por la Magistrada María Teresa González Saavedra, que cuestionaba la designación del Tribunal Electoral de Sonora, en razón de que la misma iba en contra de los principios de alternancia y rotación establecidos en la constitución local.

Con apoyo en el marco jurídico aplicable, la ejecutoria del 10 de marzo del año en curso, se señaló que los tres magistrados del Tribunal Estatal Electoral de Sonora duran en su encargo 9 años, que el cargo de Presidente se ejerce por tres años, y que la institución de la Presidencia es rotativa, lo cual permite, en su momento, que los tres magistrados sean electos como Presidente.

De esta manera, si el Pleno del Tribunal se integra con tres magistrados y dos de ellos no han ocupado el cargo de Presidente, entonces,

13 http://uncovered.womenslinkworldwide.org/nominations/2010.

14 SUP-JDC-28/2010 resuelto el 10 de marzo de 2010.

válidamente cualquiera de éstos es elegible para acceder al mismo; sin embargo, si sólo uno de ellos es el que no ha ocupado dicho cargo, entonces, éste sería el único por el que válidamente se podría votar, dado que los otros dos magistrados ya habían ejercido ese cargo.

Se estimó que para la designación del Presidente debía atenderse, tanto al sistema de votación de sus tres integrantes, como al principio de equidad y alternancia de género previsto en la Constitución Política local (art. 22, párrafo vigésimo cuarto), en la cual establece que en la integración de los órganos electorales habrá paridad de género y se observará en su conformación el principio de alternancia de género, y además, que en la integración del Tribunal, será obligatorio conformarlo por ambos géneros; y que el principio de no reelección se refleja en la presidencia del Tribunal Electoral, a razón de la figura de la rotación de la presidencia, la cual excluye a quien ya ha ejercido dicho cargo.

Con apoyo en lo anterior, la Sala Superior revocó el acuerdo de elección de Presidente del Tribunal Electoral, recaído en el magistrado Luis Enrique Pérez Alvídrez y, consecuentemente, ordenó la designación inmediata de quien debía ocupar dicho encargo, esto es, de la magistrada María Teresa González Saavedra.

Opinion on the Federal Law on the Election of the Deputies of the State Duma

María del Carmen Alanis Figueroa*
Paloma Biglino Campos**
Paul Craig***

I. Introduction

1. At the request of the chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE), the European Commission for Democracy through Law ("the Venice Commission") has prepared the present opinion on the Federal Law on Elections of Deputies of the State Duma of the Federal Assembly of the Russian Federation ("the Law on State Duma Elections"; CDL-REF(2012)002rev).[1]

2. The Law on State Duma Elections establishes the electoral framework of Russia's lower Chamber, together with the Constitution and the Federal Law on Basic Guarantees of Electoral Rights and the Rights of Citizens of the Russian Federation to participate in a Referendum ("the Law on Basic Guarantees"). As agreed with the chair of the Monitoring Committee, the present opinion will therefore deal with some aspects of the Law on Basic Guarantees when necessary.

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* Member, Mexico.

** Member, Spain.

*** Substitute Member, United Kindgom.

1 Official translation of the Federal Law on Elections of Deputies of the State Duma of the Federal Assembly of the Russian Federation.

3. This opinion is also based upon:

- The Constitution of the Russian Federation;
- The Final Report of the Organization for Security and Co-Operation in Europe ("OCSE/ODIHR") on the Election Observation Mission to the Russian Federation Elections to the State Duma of 4 December 2011;
- The Report of the Parliamentary Assembly of the Council of Europe on the observation of the parliamentary elections in the Russian Federation (4 December 2011) (Doc. 12833, 23 January 2012).

as well as upon the following documents of a general character:

- Venice Commission, Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev);
- Venice Commission, Code of Good Practice in the Field of Political Parties (CDL-AD(2009)021)
- OSCE/ODIHR and Venice Commission, Guidelines on Political Party Regulation (CDL-AD(2010)024);
- Venice Commission, Interpretative Declaration on the Stability of the Electoral Law (CDL-AD(2005)043);
- Venice Commission, Report on the Impact of Electoral Systems on Women's Representation in Politics (CDL-AD(2009)029);
- Venice Commission, Declaration on Women's Participation in Elections (CDL-AD(2006)020);
- Venice Commission, Electoral Law and National Minorities (CDL-INF(2000)4);
- Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE;
- Venice Commission, Report on Electoral Systems. Overview of Available Solutions and Selection Criteria (CDL-AD(2004)003);
- Venice Commission, Guidelines on an Internationally Recognised Status of Election Observers (CDL-AD(2009)059).

4. The Venice Commission invited Ms Alanis Figueroa (member, Mexico), Ms Biglino Campos (member, Spain) and Mr Craig (substitute

member, United Kingdom) to act as rapporteurs. On 16 and 17 February 2012, Mr Tuori and Mr Hamilton, as well as Mr Markert and Ms Ubeda de Torres, from the Secretariat of the Venice Commission, had meetings with the different authorities concerned – in particular both Chambers of Parliament and the Central Election Commission -, as well as with members of the civil society, political parties not represented in the *Duma* and associations which have tried to register as political parties and have not been successful. The present opinion is based on the comments by the members as well as on the input obtained in those meetings.

5. The Venice Commission is aware that President Medvedev proposed amendments to the electoral legislation, but it was not in a position to assess them at this stage.

6. The Institute of Legislation and Comparative Law under the Russian Federation Government provided comments on the Federal Law on Elections of Deputies of the State Duma of the Federal Assembly of the Russian Federation (CDL(2012)026), which were duly taken into account in the drafting of the opinion.

7. This opinion was adopted by the Council for Democratic Elections at its 40th meeting (Venice, 15 March 2012) and by the Venice Commission at its 90th plenary session (Venice, 16-17 March 2012).

II. Scope of the opinion

8. According to the Constitution, the Russian Federation is a democratic, federal and republican State.[2] Russia's State power is exercised through a separation of three powers: executive, judicial, and legislative.[3] The legislative power rests on the Federal Assembly, composed by the Council of the Federation, which functions as a high Chamber, and the State Duma, which functions as the lower Chamber.[4] The Council of the Federation is not directly elected; rather, territorial political

2 Russian Constitution, art 1.

3 Russian Constitution, art 10.

4 Russian Constitution, art 11.

representatives designate its deputies.[5] The State Duma is composed by 450 deputies elected through proportional representation who stay five years in office, as established in a 2008 constitutional amendment.[6]

9. The opinion of the Commission is based on the text of the law, but takes also into account the context of the last elections for the State Duma, which took place on 4 December 2011. As a result of these elections, the governing party, United Russia, maintained its majority presence in the State Duma, although it diminished from 315 deputy seats to 238. Immediately after the elections took place, a number of allegations of irregularities were raised[7] and demonstrations took place, which resulted in several arrests.[8]

10. The present opinion does not deal with all details of the Law on State Duma Elections, but focuses on the most important provisions and in particular on those which could be amended in order to ensure a better conformity with the principles of the European electoral heritage. The issue of registration of political parties will be mentioned shortly, since another opinion (CDL-AD(2012)003) has been adopted on the law on political parties.

IIII. Complexity of the Electoral Legal Framework

11. The electoral legal framework is disseminated in several pieces of legislation, as stated in Article 2 of the Law on State Duma Elections: these are first of all the Constitution, the Law on State Duma Elections and the Federal Law on Basic Guarantees of Electoral Rights. However, other rules relating to elections may be found in the Law on Political Parties, the Law on the "State Automated System of the Russian Federation Vibory", in the Law on the "Guarantees of Equality of the

5 Russian Constitution, art. 95.3

6 Russian Constitution, art 95, 96

7 --, 'Russian media see election flaws' BBC (5 December 2011) <http://www.bbc.co.uk/news/world-europe-16033460>

8 --, 'Russia election: Hundreds rally against Putin in Moscow' BBC (5 December 2011) <http://www.bbc.co.uk/news/world-europe-16042797>

Parliamentary Parties in the Coverage of their Activity by the Staterun Public TV Channels and Radio Channels", in the "Law on Mass Media and the Law on Assemblies, Meetings, Rallies and Pickets", in the Code of Administrative Offenses and the Law on Rallies, Meetings, Demonstrations, Marches and Picketing.

12. Such a framework is overly complex, duplicative, and open to interpretation, and may lead to its inconsistent application, as this happened in the recent elections.[9] In particular, paragraph 23 of the report of the Parliamentary Assembly on the 4 December 2011 elections to the State Duma states that "there was a degree of confusion about, and inconsistent application of, legal provisions. The lack of clarity in the legal framework allowed for it to be implemented mostly in favour of one party over the others."

13. Such complexity goes against the requirement established in the Code of Good Practice in Electoral Matters that the electoral procedure be as simple as possible in order to safeguard the freedom of citizens to vote and to be elected.[10]

14. The existence of both the Law on State Duma Elections and the Law on Basic Guarantees could be the result of the Russian federal power allocation. On the one hand, the Law on Basic Guarantees could be understood as the implementation of the Russia Federation competence on "the regulation and protection of the right and freedoms of the individuals and citizens" stated in Art 71 of the Russian Constitution and binding all the subject of Russian Federation. On the other hand, the Law on State Duma Elections should only rule the election of one of the chambers of the Federal Parliament. For this reason, it does not apply to the subjects of the Russian Federation. However, this fact does not justify the reiterations, complexity and ambiguities of the system.

15. To remedy this, the Commission would strongly encourage a consolidation and simplification of the electoral legal framework in order to avoid repetition and to foster clarity and precision in the application of the law. The elaboration of a comprehensive electoral code applying to all elections should be envisaged.

9 OSCE/ODIHR Final Report, p. 5.

10 Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I.3.2.i. and par. 31.

IV. Analysis of the Law on State Duma Elections

Chapter I. General Provisions

16. Article 5 deals with electoral rights of citizens at the elections of the State Duma. Firstly, it states who is entitled to elect and to be elected. Secondly, Article 5 imposes restrictions and provides for causes of deprivation of these rights that meet only partly the requirements of the European electoral heritage set up by the Code of Good Practice in Electoral Matters adopted by the Venice Commission.[11]

17. However, some aspects of this provision appear as excessive. This is the case of the rules on ineligibility to be elected, applied to double citizens or persons with a right to reside on the territory of another state, if they are actually resident of the Russian Federation (Article 5.4.1 of the Law on State Duma Elections and Article 8.3 of the Law on Basic Guarantees).

18. Article 5.4.2 is also too extensive. Deprivation of the right to be elected should be limited to cases of criminal conviction for a serious offence, upon a specific decision of a court of law and in conformity with the principle of proportionality, and not be extended to administrative penalty for committing administrative offenses and to "extremist" activities without a criminal character (Article 5.4.2.4 of the Law on State Duma Elections combined with Article 76.8.g of the Law on Basic Guarantees).

19. Moreover, the obligation to mention any record of conviction that has not been withdrawn or spent in the act of candidacy (Article 38.4.2) as well as in the list of signatures (Article 40.3) and the ballot (Article 73.6) may *de facto* lead to preventing citizens who would not fall under Article 5.4.2 from being candidates.

20. Article 6 establishes terms and proceedings for calling the elections. The decision to call the elections shall be taken by the President of the Russian Federation no earlier than 110 days and no later than 90 days prior to the election day. This period of time coincides with the terms established in other democratic countries

[11] CDL-AD(2002)023rev, I.1.1.

and should be sufficient for guaranteeing the proper development of the electoral process.

21. However, in the case of Duma elections, the voters' list is not a permanent document but it is the result of a complex process repeated for every election. The procedure for collecting voter's signatures in order to register non parliamentary parties' candidates is also highly complex. For these reasons, the term established in the Law seems to be too short for the proper fulfilment of the legal requirements by political parties or election commissions. Moreover, the term for appealing the resolution of the Central Election Commission on the registration of a federal list of candidates is five days (Article 44.7) but there is no deadline for the Supreme Court decision. This lack of regulation could infringe the right to participate in elections in equal conditions and due process of law.

22. Article 7 deals with the right to nominate candidates. Its content is very limitative, due to the following reasons:

- Only political parties are allowed to nominate candidates, which is very restrictive since it prevents independent candidacies or formation of electoral blocs.
- Political parties are entitled to participate in the elections only if they are registered according to the complex and detailed procedure laid down in Chapter III of the "Federal Law on Political Parties".

23. Article 8 and Article 9 deal with the preparation and conduct of elections by the election commissions. In conformity with international standards, these Articles impose independence and transparency in the preparation and conduct of elections. However, levels and procedure of formation of election commissions are set up in Chapter III of the Law on Elections which in turn refers to the Basic Law on Guarantees. This overlapping could generate some disturbing effects on the legal certainty principle and on the correct functioning of the election commissions, issues that will be analysed below.

Chapter II. Election Precincts. Voters' Lists

24. The proper maintenance of electoral registers is vital in guaranteeing universal suffrage.[12] However, Chapter II does not fulfil all conditions that have to be met if the registers are to be reliable.

25. According to Article 15, voters' lists are not permanent documents since they must be prepared by the relevant election commission separately for each election precinct in accordance with the form established by the Central Election Commission. The permanent character of the electoral registers is however an important guarantee of universal suffrage.[13] It might be replaced by a transfer of data from another permanently updated register to the voters' register, but such a guarantee is not enshrined in the law. The Commission suggests that electoral registers be made permanent, rather than only compiled before the start of each election.

26. Article 16 of the Law establishes the requirements to include citizens of the Russian Federation in the voters' lists, such as nationality and habitual residence. These restrictions on the vote are compliant with the principle of universal suffrage, since the right to vote may be subject to restrictions of age, nationality, and residence, among others.[14] However, the Commission notes that this Article is particularly complex, and, since it is of such vital importance for voters, it would encourage its simplification.

27. There are different cases in which a voter can be entered into the voters' list the day preceding the day of elections or on the very day of election (*e.g.* Article 16.4, 16.9 and, perhaps, Article 16.10). At any rate, in order to avoid frauds, registration should not take place at the polling station on election day.[15]

28. Furthermore, the procedure for the compilation of voters' lists is very complex and detailed. The apparent absence of a unique and permanent register for the whole Russian Federation could be a serious

12 Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev, I.1.2.

13 CDL-AD(2002)023rev, I.1.2.

14 Code of Good Practice in Electoral Matters, I.1.1.

15 Code of Good Practice in Electoral Matters, I.1.2.iv.

obstacle for the exercise of voters' rights and it carries the risk that a citizen is entered into the list of voters at different polling stations.

Chapter III. Election Commissions

Composition of election commissions

29. Election commissions are central to the electoral regime established by the Law on State Duma Elections. This is made clear by Articles 18-29, which specify the basic composition and types of election commission. It is even more evident when one considers the role played by election commissions in the running of the election itself, which is dealt with by Chapter XI, Articles 78-88.

30. Article 8.2 establishes the basic principle of the independence of election commissions, with the corollary that they must be free from state interference. Were this basic principle properly applied, it should resolve any contested case concerning the independence/impartiality of the electoral commissions. However, experience in the Russian Federation like in other countries shows that the mere reference to such a principle is generally not sufficient and should be accompanied by other rules which ensure proper independence of and trust in the electoral management bodies.

31. Articles 18-29 deal with election commissions more in detail. There are various levels of commissions. The Central Electoral Commission, CEC, sits at the apex of the scheme, but there is also provision in descending order for electoral commissions of subjects of the Russian Federation, ECSRFs, territorial election commissions, TECs, and precinct election commissions, PECs. Parties that contest elections are entitled to nominate non-voting members to all commissions.

32. Article 19 of the Law on State Duma elections provides that the rules concerning the creation of the CEC and ECSRFs are contained primarily in the Law on Basic Guarantees. The rules concerning the CEC are contained in Articles 20-21 of this law.

33. Thus in terms of composition of the CEC Article 21 of the Law on Basic Guarantees of Electoral Rights provides that the CEC should have a five year period of office and should be composed of 15 members. Five members are appointed from candidates proposed by factions in the

Duma, or individual members of the Duma etc. Five members of the CEC are appointed by the Federation Council of the Federal Assembly of the Russian Federation from among candidates nominated by the legislative (representative) bodies of state power of subjects of Russian Federation and top executives of subjects of the Russian Federation (the heads of the highest executive bodies of state power of subjects of the Russian Federation). The remaining five members of the CEC are appointed by the President of the Russian Federation.

34. Independent and impartial electoral commissions are necessary to ensure that elections are properly carried out. The creation of a permanent central body, the Central Electoral Commission (CEC), complies with European standards.[16] However, there is a lack of procedural safeguards to ensure the independence and impartiality of the electoral authorities, particularly of the Territorial Electoral Commissions (TEC) and the Precinct Electoral Commissions (PEC).

35. The Law on Basic Guarantees establishes some guarantees of the independent status of Central Electoral Commission members. This Law establishes a five-year term and the members of the Central Election Commission cannot be removed from their duties except by the causes and in the forms established by law. There are also detailed norms about the incompatibility and ineligibility of the members. However, except in the case of the five members appointed by the Duma, there are no sufficient guarantees of the pluralistic composition of the Central Electoral Commission. Nor are there guarantees of the impartiality of its members since the majority of them may share the same political orientation. This would go against the principles of the European electoral heritage, as enshrined in the Code of Good Practice in Electoral Matters.[17] Moreover, legislation does not ensure that members of election commissions – including the Central Election Commission - are experts in electoral legislation and receive standard training.[18]

16 Code of Good Practice in Electoral Matters, II.3.1.

17 CDL-AD(2002)023rev, II.3.1.

18 CDL-AD(2002)023rev, II.3.1.g and par. 83-84.

36. The composition of the ECSRFS is dealt with in Article 23.6 of the Law on Basic Guarantees of Electoral Rights, which provides that 50% of members are appointed by the legislative body of state power, and 50% by the head of the highest executive body of state power of the subject of the Russian Federation. Here again, political balance is not ensured.

37. The formation of other election commissions is also regulated in the Law on Basic Guarantees and is quite complex. In general, the problems mentioned above when referring to the Central Election Commission are repeated or increased because the members of lower level election commissions are appointed by higher election commissions in the case of territorial election commissions (Article 26.5 Law on Basic Guarantees) and precinct commissions (Article 27.4 Law on Basic Guarantees). The Law on Basic Guarantees states several requirements and limitations to these appointments. Thus, it disposes that the appointment must be done on the basis of proposals made by political parties and public associations (Article 26.6, 27.5). No more than one representative of each political party or public association can be appointed to an election commission (Article 22.4). However, there are no clear fixed rules about the criteria that should guide these appointments. In practice, most election commissioners have been appointed by state and local authorities, thus creating an informal link between them.[19]

38. Furthermore, some provisions of the Law on Basic Guarantees can seriously endanger autonomy and neutrality of elections commissions. That is the case, for example, of Article 22.5. It allows that half of the members of election commissions be state and municipal officials. Furthermore, the chairman of territorial and precinct commission can be removed from position by decision of higher election commissions (Article 28.11 of the Law on Basic Guarantees).

39. According to Article 75.15 of the Law on the State Duma elections, a member of a precinct election commission shall be immediately barred from participation in its work if he or she commits any violation of the election legislation. Such a provision should be qualified in order to be

[19] OSCE/ODIHR Final Report, p. 5.

applied in conformity with the principle of proportionality. The same is true concerning the rules on dissolution of an election commission for violation of the electoral rights of citizens (Article 31 of the Law on Basic Guarantees).

40. The present composition of election administration leads to a high degree of distrust in the independence and impartiality of election commissions at all levels.[20] It should therefore be reconsidered in order to be more balanced.

Powers and functioning of election commissions

41. The detailed tasks of the CEC are set out in Article 21.9 of the Law on Basic Guarantees of Electoral Rights, and Article 25 of the Law on the Election of the State Duma. Thus the CEC must exercise control over observance of the electoral rights of citizens of the Russian Federation and the right of citizens to participate in a referendum; develop standard quotas for technological equipment such as voting booths, voting boxes for precinct commissions, and arrange for the manufacture of such material; ensure implementation of measures related to the preparation and conduct of elections, referendums, and improvement of the electoral system in the Russian Federation, including legal education of voters, and professional training of other commission members; implement measures aimed to ensure a uniform procedure for allocation of air time and space in print media to registered candidates, electoral associations etc; determination of vote returns and establishment of the results of elections, including procedure for release of the vote returns; implement measures for the funding of the preparation and conduct of elections/referendums; distribute the funds allocated from the federal budget as financial support to the preparation and conduct of elections, referendums; control the proper use of the above funds; give legal, methodological, organisational, and technical support to commissions; implement international cooperation in the field of electoral systems; set standards

[20] OSCE/ODIHR Final Report, pp. 2, 6; Report of the Parliamentary Assembly of the Council of Europe on the observation of the parliamentary elections in the Russian Federation (4 December 2011), par. 33.

by which lists of voters, referendum participants and other electoral documents and documents related to the preparation and conduct of referendums are to be produced; consider appeals (grievances) against decisions and actions (omissions) of lower commissions, and take reasoned decisions on such appeals (grievances).

42. Although the law is detailed and precise when enumerating these kinds of organic competences, the regulation of the citizens' *complaints* is not clear at all. Article 26.22 only states that the Central Electoral Commission shall "consider complaints (applications) concerning decisions and actions (inaction) of the territorial election commission and their officials and take reasoned decisions regarding such complaints (application)". Article 90 of the Law on State Duma Elections is slightly more detailed. It states that election commissions shall be obliged to consider applications received during election campaign, carry out inquiries and provide written answers to the claimants within five days. However, Article 90 fails to mention who is entitled to file a complaint, the procedure and deadlines for submitting it and types of appeals to Court of Justice. Article 20.4 of the Law on Basic Guarantees regulates more precisely this election commissions' competence since it contains rules about competence, procedure and terms for filling appeals apply to each election commission. However, it is difficult to decide if the appeals of Article 20.4 of the Law on Basic Guarantees coincide with the complaints mentioned in Article 25 of the Law on Elections. If not, the result could be confusing and limit the rights of citizens and political parties.

43. This problem appeared in practice at the occasion of the 4 December 2011 parliamentary elections. As established by the report of the Parliamentary Assembly, only five complaints were decided upon by the CEC. The CEC qualified **most** correspondence concerning allegations of violations of the election legislation as "applications" and did not treat them as complaints that needed to be dealt with in accordance with legal procedures, thus not complying with the requirement that all complaints must be acted upon and responded to in writing within five days.[21]

[21] Report of the Parliamentary Assembly of the Council of Europe on the observation of the parliamentary elections in the Russian Federation (4 December 2011), par. 58-59.

44. Articles 26, 27 and 28 deal with powers of lower election commissions and they present similar problems. For this reason, the previous conclusions can be extended to them.

General remarks

45. More generally, the provisions concerning commissions are complex and contained in a number of different laws. It is not always easy to understand how they inter-relate or what the practical impact of the provisions actually is in terms of the independence of the commissions. Thus to take one example, Article 29 guarantees openness of electoral commission meetings. This gives rights to, *inter alia,* registered candidates and members of electoral associations to attend commission meetings. This may serve to enhance impartiality and independence of TECs and PECs, but it might equally be capable of intimidating ordinary commission members in the discharge of their business.

46. The Commission therefore recommends that legislation that regulates the composition and powers of election commissions foster their independence from the State.

Chapter IV. Observers, Foreign (International) Observers, Mass Media Representatives

National observers

47. Article 30 of the Law on State Duma Elections regulates the presence of national observers in the elections. A political party that has registered candidates can have observers, and a Russian citizen who can vote can also be an observer. Those who hold public office, heads of top executive bodies and others such as judges cannot be observers. There are detailed rules concerning accreditation of observers.

48. While this Article allows the presence of partisan observers, the Commission notes that the participation of non-partisan or civil society observers[22] is not provided for. In practice, civil society groups may

[22] Cf. Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), par. 87.

be allowed to observe elections only as media representatives (Article 32 of the law)[23]. Election observation is one of the most important procedural safeguards of an election. The presence of national partisan as well as non-partisan observers is very important. Therefore, the Commission highly recommends that the law be adjusted to ensure their presence, a recommendation supported by the OSCE in its final report.[24]

49. The rights of observers are specified in Article 30.6. Article 30.7 provides for a number of limitations; in particular, it prohibits the observers from doing "anything that could interfere with the work of election commissions". This limitation is set up in too general terms, and precinct commissions could interpret it in a restrictive way, hindering the faculties recognised to observers by law. This would go against international principles.[25]

International observers

50. International observers play a very important role when it comes to the impartial verification of the lawfulness of an election,[26] and election observers should be given the widest possible opportunity to participate in the election process,[27] which includes the pre-voting phase, the voting day, and the post-voting phase.[28]

51. Article 31 deals with international observers and once again refers to other norms, stated in international treaties or federal laws. Article 30 of the Law on Basic Guarantees does not clarify international observers' position. It is not always clear which provisions apply to all observers, and which ones only to national, respectively to foreign/international observers. Article 30.13 of the Law on Basic Guarantees states that foreign (international) observers "shall conduct their activities in compliance with the federal law", which adds references.

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23 Report of the Parliamentary Assembly of the Council of Europe on the observation of the parliamentary elections in the Russian Federation (4 December 2011), par. 21.

24 OSCE/ODIHR Final Report, p. 2.

25 Code of Good Practice in Electoral Matters, II.3.2.

26 Code of Good Practice in Electoral Matters, par. 89.

27 Guidelines on Election Observers (CDL-AD(2009)059), par. 11.

28 Guidelines on Election Observers, ch. II.

52. For example, Article 29.5 specifies that foreign/international observers can be present at polling stations, and that they can also be present in other election commissions when they determine the vote returns, election results, work on the protocols of vote returns, election results and when votes are being recounted. Moreover Article 79(20) states that foreign/international observers can check the correctness of the vote counting in PECs. Article 86.1 in addition makes provision for foreign/international observers to check the electoral returns broadly interpreted for any electoral commission. Foreign/international observers are only allowed to make observations about the conduct of the election after it has been concluded (Article 31.9). This restriction appears as disproportionate, since public remarks before the end of the electoral process should help improving the electoral process when it is still time to do so. Article 31.10, prohibiting international observers from taking advantage of their status to carry out activities unrelated to monitoring preparation and conduct of elections, could also lead to excessive restrictions to fundamental rights.

53. Article 31.5 of the Law establishes that the mandate of foreign or international observers ends on the day that the official result of the election is announced. The Commission suggests the extension of this mandate up to the final resolution of the electoral disputes.

54. More generally, the basic problem of Chapter IV seems to be the discretion recognised to the Central Electoral Commission in order to provide certificates, the moment in which they should be issued, powers granted to international observers and conditions for revoking accreditations.

55. Moreover, according to Article 75.15 of the Law on the State Duma elections, an observer shall be immediately removed from the polling station if he or she commits any violation of the election legislation. Like for members of election commissions, such a provision should be qualified in order to be applied in conformity with the principle of proportionality.

56. The legislation does not accommodate long-term election observation methodology, including the observation of the pre-electoral campaign and post-election developments. The legislation focuses only on the observation of election-day and early voting procedures. This should be revised.

Chapter V. Political Parties

Registration of Political Parties

57. The main law concerning political parties in Russia is the "Law on Political Parties", rather than the State law on Duma Elections.[29] However, the provisions in this chapter do establish certain requirements for a political party to participate in the elections to the State Duma. Article 35, which details the requirements to appoint the authorised representatives of political parties, provides that such an appointment is subject to registration by the CEC (par. 7).

58. The ability of all political parties to access the ballot should be equal and free from discrimination.[30] The European Court of Human Rights has dealt with the issue of denial of registration to candidates to the State Duma and, at least in one instance, has found that the authorities have acted with the lack of a clear legal basis.[31] As regards registration of political party themselves, the Court recently established that the domestic law concerning registration of parties is not formulated with sufficient precision,[32] and that Russian authorities interfere beyond any legitimate aim in the internal functioning of political parties.[33] Additionally, the OSCE documented in its final report on the 4 December 2011 elections that several non-registered parties and civil society activists complained of the strict restrictions to political party registration, claiming that this led to a lack of choice for voters.[34] The Commission would thus recommend a reassessment of the electoral legislation concerning requirements for the registration of political parties in order for all parties to be allowed to participate in elections without discrimination.

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29 Law on State Duma Elections, Article 33.

30 European Commission for Democracy Through Law (Venice Commission), 'Guidelines on Political Party Regulation', CDL-AD(2010)024 (Guidelines on Political Parties), par. 143.

31 Krasnov and Skuratov v Russia (App nos. 17864/04, 21396/04) ECtHR 19 July 2007 [60].

32 Republican Party of Russia v Russia (App no 12976/07) ECtHR 12 April 2011 [85].

33 Republican Party of Russia v Russia [89].

34 OSCE/ODIHR Final Report, p. 4.

Chapter VI. Nomination and Registration of Federal Lists of Candidates

Federal list of candidates – absence of constituencies

59. The lists of candidates are partly established at federal level (Article 36), even if they must be divided into regional lists, according to a rather complicated procedure. In the biggest country of the world, moreover with a federal structure, such system tends to create a distance between the voters and their representatives. A minimal step would be to make regional lists coincide with the subjects of the Federation. The drawing of proper constituencies should however be envisaged.

60. The Venice Commission takes note that President Medvedev proposed amendments to the law on State Duma Elections which would reintroduce constituencies.

Limitation of the right to present candidates

61. Articles 36 and 37 of the Law on State Duma Elections establish the rules governing the nomination of the federal lists of candidates that each political party must submit to participate in the election; Article 36 establishes the rules for parties to nominate candidates within the party, while Article 37 details how citizens who are not members of a particular political party can still be nominated by said political party. However, there is no regulation that allows for independent candidates.

62. Only political parties which are registered not later than a year before the voting day can register candidates (Article 38.1). Even if there were no restrictive provisions on registration, this requirement would appear excessive. The Venice Commission suggests that all parties registered before the registration of candidates starts are allowed to present candidates, and that unregistered groups may present lists of independent candidates.

63. The Commission has stated, in its Guidelines on Political Parties[35], that the right of individual candidates to run for office free from party associations is an important one, and the OSCE Copenhagen Document also highlighted its importance.[36] Thus, the Commission would recommend that the Law on State Duma Elections be revised in order to include non-partisan candidates in the elections.

64. The proceedings imposed to political parties in order to nominate a federal list of candidates are very strict and must be complied with in a very short period of time.

65. More generally, the rules on registration of candidates could be interpreted in a restrictive way. This could be for example the case of the information on the size and sources of the income of each candidate (Article 38.4.2). Such provisions should at least be interpreted in conformity with the principle of proportionality.

66. Moreover, collection of two hundred thousand voters' signatures in a very short period of time from different parts of Russia is necessary for parties which are not yet represented in the State Duma (Article 39, in particular par. 3, and par. 4). Such rule appears excessive due to the already stringent rules on political parties' registration. Prohibiting submitting a number of signatures exceeding the number required by more than 5 percent (Article 42.2.1) could lead to the invalidation of a list which would otherwise have a sufficient number of signatures, if the number of invalid signatures is higher than this 5 percent.

67. According to international standards, all signatures should be checked, except when it has been established beyond doubt that the requisite number of signatures has been collected.[37] Selective verification of signatures (Article 43.9, 18-20) should be avoided. What is important is that a sufficient number of signatures is obtained, not that the number of invalid signatures – or the number of signatures collected in places where collection of signatures is prohibited – is low (cf. Article 44.3.3-4). Put together with the rule quoted in the previous paragraph, this provision may lead to refuse the registration

35 Guidelines on Political Parties (CDL-AD(2010)024), par. 130.

36 Copenhagen Document [7.5].

37 CDL-AD(2002)023rev, I.1.3.iv.

of a list which would normally have obtained the required number of signatures. Opponents to a party could introduce forged signatures in a number proper to make its list of signatures invalid. Moreover, the control of validity of signatures should be ensured in a way that prevents any arbitrariness and in conformity with the principles of data protection. The broad list of bodies that are allowed to verify signatures – including any administrative body and –citizens on contract, as established in Article 43.7 of the Law on State Duma Elections as well as in Article 38.3 (and Article 28.19) of the Law on Basic Guarantees–, should be revised in this regard.

68. As a result of all these elements, the process of presenting candidates to elections stated in Chapter VI seems to be thought not to promote, but rather to hinder passive suffrage.

69. Moreover, Article 38.24-26 of the Law on Basic Guarantees is still more restrictive, by providing for a very extensive number of formal and material grounds for not registering a list of candidates, without any reference to the principle of proportionality. See also Article 76.6-8 of the latter law on the cancellation of a candidate's registration.

70. The Venice Commission therefore recommends revising the provisions on registration of candidates in order to help and not to restrict political competition.

Representation of Women and Minorities

71. The Commission takes note of the fact that there are no specific provisions concerning the representation of women or national minorities in the Law on State Duma Elections. The effective representation of women and national minorities is part of the principle of equal suffrage.[38] According to the Code of Good Practice in Electoral Matters, "Legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as

[38] Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev) , II.2.4 and II.2.5.

contrary to the principle of equal suffrage if they have a constitutional basis".[39]

72. One of the most effective ways to ensure the balanced representation of women in a parliament elected by way of proportional representation is to institute gender quotas that specify the minimum percentage of female candidates that should be included within the party lists, usually with certain provisions concerning ranking order in that list.[40]

73. Additionally, electoral law must guarantee equality for persons belong to national minorities.[41] One of the ways to do this is to encourage the creation of political parties that represent minorities,[42] or to ensure that parties include minority candidates in their lists, so as to have a fair balance of majority and minority candidates represented.[43]

74. The Commission notes that the Russian Constitution establishes that equality between men and women must be guaranteed,[44] and that all citizens, regardless of race or culture, must be treated equally.[45] It could therefore be envisaged that the Russian electoral legal framework incorporate provisions of the kind mentioned above, to properly ensure the representation of women and of national minorities, in line with the Constitutional guarantees already in place.

Chapter VII. Status of Candidates

75. Article 45 establishes equality of candidates: *prima facie* all candidates have the same rightsand duties.

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39 CDL-AD(2002)023rev, I.2.5. See also Declaration on Women's Participation in Elections (CDL-AD(2006)020).

40 European Commission for Democracy Through Law (Venice Commission), 'Report on the Impact of Electoral Systems on Women's Representation in Politics', CDL-AD(2009)029, par. 19.

41 Code of Good Practice in Electoral Matters, II.2.4.

42 European Commission for Democracy Through Law (Venice Commission), 'Electoral Law and National Minorities', CDL-INF(2000)4 (Electoral Law and National Minorities), III.A.

43 Electoral Law and National Minorities, III.B.1.a.

44 Russian Constitution, art 19.3.

45 Russian Constitution, art 19.1.

76. Article 46 of the Law on State Duma Elections imposes several restrictions to avoid the use of public means in favour of any political party that contends for elections. This should ensure the *neutrality of State Authorities.* The Law specifies the meaning of the expression "take advantage" by enumerating several strictly forbidden behaviours, such as the involvement of subordinated people, the use of public premises and the use of telephone and so on.

77. In particular, it establishes that any candidate, who occupies a state or municipal position, or a high-influence job, may not take advantage of their office or official position. Also persons, who are not candidates, cannot take advantage of their office or official position. This complies with the requirements of neutrality in elections established in the Code of Good Practice in Electoral Matters[46] and the Copenhagen Document.[47]

78. Moreover, Article 47 contains protections for registered candidates. Thus Article 47.1 provides in effect that the employer must relieve the candidate from work or service from the day of the candidate's registration by the Central Election Commission to the day of the official publication of the results of elections of deputies of the State Duma. Article 47.2 protects the candidate from dismissal and provides that the period during which a candidate participates in elections of deputies of the State Duma shall be included in his overall employment record. Article 47.3 stipulates that a registered candidate shall not be subjected to criminal prosecution, arrest or administrative court convictions without the consent of the Prosecutor-General of the Russian Federation.

79. The preceding provisions are reinforced by Article 55.7, which states that no election campaign shall be conducted and no kind of campaign materials shall be produced and distributed by bodies of state power, other state bodies, or bodies of local government. In addition, Article 55.8 states that persons who hold state or elected municipal office shall not engage in electioneering on TV and radio channels and

46 Code of Good Practice in Electoral Matters, I.2.3 and explanatory report, par. 18-19.

47 Copenhagen Document [5.4].

in the print media unless such persons are on a registered federal list of candidates.

80. However, the Commission takes note that paragraph 43 of the Parliamentary Assembly report on the Observation of the parliamentary elections in the Russian Federation as well as the OSCE/ODIHR[48] underlined that in the recent elections there was a noted lack of neutrality, that the distinction between the state and the governing party was often blurred, and that many candidates took advantage of their official position. For example, billboards were observed stating that metro construction works were performed by the local branch of United Russia. This was perceived by other parties as campaigning for United Russia, paid out of state funds. The Commission strongly recommends that procedural safeguards be put in place to prevent this and ensure that all candidates are in full compliance with Article 46. The Law should for example forbid the use of public means in any kind of action or campaigning that could play in favour of any candidate, including activities which contain references to the achievements reached by public institutions ruled by parties that contend elections. Separation from current office prior to becoming an official candidate is one option. Furthermore, the inauguration of public works or services should be limited during the election period. The Venice Commission also suggests implementing a system through which complaints may be filed regarding the violation of this Article, to be decided by an independent authority."

Chapter VIII. Informing of Voters and Electioneering

Equal Access to Media Outlets

81. The general principle concerning *balance in the media* is contained in Article 10.4, which states that: 'equal conditions of access to state mass media for election campaigning shall be guaranteed to the political parties which registered their federal lists of candidates'. The more detailed provisions are to be found in Chapter VIII.

48 OSCE/ODIHR Final Report, p. 10.

82. Equal access to the media by all political parties is paramount in order to fulfil the requirement of equality of opportunity in an election.[49] Article 51 of the Law on State Duma Elections establishes that all political parties must have equal access to both visual and written media. Article 51 contains the rules about electioneering: Informational materials carried by the mass media or disseminated by other methods must be objective and accurate and not violate the equality of political parties provided for in this Federal Law. Mass media organisations shall be entitled to inform voters freely with an exception of restrictions imposed by this Federal Law, and the Law on Basic Guarantees. In TV and radio news programs and in newspaper publications, the reports concerning election events must be presented in the form of separate news items, without any comments. Such news items cannot be paid for by political parties/candidates; and must not discriminate against or give preference to any political party, in particular with regard to the time devoted to highlighting their election activities, and the amount of space allocated in the print media for such reports. There are protections for journalists to prevent them from being fired during coverage of the elections. There are also rules preventing information being made public about the election on the day of voting, before voting has ended.

83. A number of media outlets in Russia are government-owned or at least partly government-funded. In addition, the OSCE reported that there was a disproportionate coverage of the governing party by the media in contrast with other parties competing in the election.[50] Additionally, the observers noted an unequal treatment of the political parties by service providers in favour of the governing party.[51] Accordingly, the Commission suggests the adoption of legal provisions that ensure that there is an effective sanction for a violation of neutrality when it comes to access to the media. An independent oversight body to ensure that all parties receive equal treatment in this regard would also help ensure the compliance of all participants with such standards.

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49 Code of Good Practice in Electoral Matters, I.2.3.a.ii., explanatory report, par. 18ff.

50 OSCE/ODIHR Final Report, p. 13.

51 OSCE/ODIHR Final Report, p. 4.

84. As Paragraph II.1 of the Code of Good Practice in Electoral Matters states, "democratic elections are not possible without respect for human rights, in particular freedom of expression and of the press". An open debate of ideas is vital in a democratic system, especially in an election period. Actually, freedom of the press is more vital in campaigning than in any other moment of political life, since it permits to express opinions on candidate programs and to criticize public powers. Voters cannot form their will properly without free debate of ideas, not only between candidates, but also by journalists and citizens in the media.

85. As established by the case-law of the European Court of Human Rights, restrictions of these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality. According to this principle, fewer restrictions may be admitted concerning private media than public media.

86. However, there are a number of limitations on media that can restrict freedom of speech disproportionately. For example, Article 51.4 imposes neutrality on public or private media and prohibits any comments or information given on election campaigning events. Article 55.2 defines as election campaign any action performed by members of the press if their professional actions are repeatedly performed to encourage voters to vote for or against some federal list of candidates.

87. It is true that the restrictions cited above are in the public interest, since their aim is to guarantee equality. However, these limitations put the proportionality principle at risk because the damages caused to freedom of expression are heavier than the benefits generated to equality. It must be added that similar ends could be reached with less dangerous means for the freedom of the press.

88. Article 57 provides for the distribution of air time on TV Channels and space in print periodicals, as well as for equal access to media. According to Article 57.4, state-owned and municipal TV and radio broadcasters and print media outlets are obliged to ensure that political parties have equal terms and conditions for electioneering and, in particular, for the presentation of their election programs to voters. According to Article 57.5, nation-wide state-owned TV and radio broadcasters and print media outlets shall offer free air time

and free print space to political parties for electioneering. Article 57.6 contains an analogous obligation for regional state-owned TV and radio broadcasters and print media outlets. Article 57.9-11 contains the rules relating to non-state-owned TV, radio broadcasters and print media. The basic approach here it that they may provide air time etc. for a charge, but that the amount charged must be the same for all parties. The limitation of these rules to media registered not less than one year before the day of the official publication of the decision to call the elections is however difficult to understand.

89. This "strict" equality is one of the possibilities that the Code of Good Practice in Electoral Matters admits in order to ensure equality of opportunity (par. I.2.3). However, Article 57.1 and 2 provide free time and space only to political parties that registered federal lists of candidates and received more than 3 per cent of voters at the most recent Duma election. This distribution is in breach of equal treatment between parties and seriously damages small parties in favour of main parties.

Other issues

90. Article 55.7 prohibits campaigning by a number of categories of people. If such restrictions may favour neutrality of the state when applied to public officials, they do not appear as justified concerning members of the press (Article 55.7.8). The extension of such prohibition without any exception or qualification to foreign nationals (Article 55.7.6)[52] or persons having been sentenced for whatever violation of Article 56.1 of the Law on basic guarantees – referring to the Law "on Countering Extremist Activity"[53] – appears as disproportionate.

91. Article 55.10, on the possibility for an election commission to ask for submission of an election campaigning material, should not be understood as allowing for a restriction to freedom of expression.

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52 The same question could also be raised concerning the general prohibition of donations to electoral funds by foreign nationals (Article 64.7).

53 The "Law of Countering Extremist Activity" will be examined in another opinion of the Venice Commission.

92. Article 62.5.2.3 of the Law on State Duma elections restricts candidates from disseminating any negative information regarding other political parties or candidates (negative campaigning). The protection of free speech is paramount to achieving a truly free election and therefore an electoral law should not contain provisions, such as Arts 62.5.2(3), which can be construed so as to prevent the vigorous campaigning that is a hallmark of a proper electoral contest.[54] The Commission recommends the modification of the provision prohibiting negative campaigns in the electoral process of the State Duma.

Chapter IX. Funding of the Election of Deputies of the State Duma. Electoral Funds

93. Under Article 63 of the Law on State Duma Elections, the preparation and realisation of elections is paid through public funds, which is consistent with international and European standards.[55] However, under Article 64.1 political parties must establish their own electoral campaign funds, and they do not receive public funding. This leads to a practical inequality between the governing party and other political parties, since, as was reported by the OSCE, the governing party spent far more than other competing political parties in the recent elections of 4 December 2011.[56]

94. The regulation of the funding of political parties and electoral campaigns is a very important factor of the regularity of the electoral process.[57] The Commission's Guidelines on Political Parties establish that public funding and its corresponding regulations, are a way to prevent corruption, support the role played by political parties and, quite importantly, a way of ensuring that all parties are able to participate in elections according to the principle of equal opportunity.[58]

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54 Code of Good Practice in Electoral Matters, par. 61.

55 Code of Good Practice in Electoral Matters, par. 111; Guidelines on Political Parties (CDL-AD(2010)024), par. 176 ff.

56 OSCE/ODIHR Final Report, p. 11.

57 Code of Good Practice in Electoral Matters, par. 107ff; Guidelines on Political Parties (CDL-AD(2010)024), par. 176 ff.

58 Guidelines on Political Parties, par. 38.

95. The Commission recognises that a cap on campaign expense is already in place.[59] However, it suggests that the establishment of public funding for political parties and further supervision and regulation is needed in order to achieve effective equality between the political parties participating in the elections. The Code of Good Practice in the Field of Political Parties strongly encourages the creation of an independent supervisory body in order to achieve the desired transparency in the matter of political party spending.[60]

96. Relatively small violations of rules on campaign financing (5 % excessive expenditure or expenditure from illegal sources) lead to the disqualification of a list (Article 44.3.7-8). Such provisions go against the principle of proportionality. Financial sanctions should be sufficient expect perhaps in case of gross violations.

Chapter X. Voting

97. In general, the provisions of Chapter X are in conformity with the principles of the European electoral heritage. However, some measures could be taken to improve transparency. Without entering all details, the following remarks may be done.

98. Article 72.2 states that polling stations shall have a hall with booths or other places for secret voting. Secrecy of the vote is one of the main guarantees of voters' freedom. For this reason, booths should be closed spaces in which privacy must be guaranteed. The use of booths should be mandatory to avoid pressures on the exercise of voters' rights.

- Article 72.12 provides for stationary ballot boxes inside the polling station. Ballot boxes should be transparent to avoid ballot box stuffing.
- Article 74 deals with absentee certificates. According to this provision, a voter unable to come to the polling station on the voting day may receive an absentee certificate from the respective territorial

59 Law on State Duma Elections, Article 64.3.

60 European Commission for Democracy Through Law (Venice Commission), 'Code of Good Practice in the Field of Political Parties', CDL-AD(2009)021, par. 167 ff.

election commission or the precinct commission. Upon presentation of the certificate, the voter is included in the voters' list at the election precinct in the territory in which he/she stays on the voting day. The proceedings for applying for an absentee certificate, issuing it, and registering it are quite complex and bureaucratic. However, different elements can limit transparency:

- The lack of a national and stable voters' register could make a double issue of absentee certificates possible.
- Article 74.5 does not specify the election commission which is competent. The proceeding and the authority in charge of issuing an absentee certificate are not clearly specified in Article 74.7.
- The use of the certificate is decided by the voter the very election day, without previous notice to election commissions. Article 16.9 allows the deliverance of an absentee certificate on election day on the basis of an oral request.
- A register with the name of the voters with absentee certificates drawn on the election day is kept (only) at precinct commission level.
- Finally, the Law does not establish sufficient checks to prevent the issue of unlawful absentee certificates or the abusive use of absentee certificates.

99. Article 75 rules on the voting procedure. According to Article 28 of the Law on Basic Guarantees decisions of election commissions are generally taken according to the collegiate model. However, during the voting procedure, each of the precinct commission voting members acts on his or her own. Each of them, acting alone, receives ballots from the chairman, controls identity documents, checks voters' lists and issues ballots to voters. Although observers may be present at the polling station, it is very difficult for them to follow closely all actions carried out by each member of the commission. Furthermore, the presence of observers at some of the actions mentioned above is quite threatening to voters' freedom and intimacy. As a general result, this procedure lacks the transparency and publicity necessary in a democratic system.

100. Article 76 deals with early voting and Article 77 rules on voting outside polling stations (mobile voting). Both Articles reproduce many of the problems discussed above:

- The cases in which it is possible to vote outside the polling stations are too general and the criteria for allowing such exceptions not defined precisely enough.
- A request for voting outside the polling station can be made on election day orally and even by a third party (Article 76.2).
- The Code of Good Practice in Electoral Matters points out that the use of mobile ballot boxes is highly undesirable, since they may very easily lead to misuse and electoral fraud.[61] The Commission also notes that the OSCE/ODIHR expressed some concern with the use of mobile ballot boxes.[62] The procedure stated to apply for and to vote with mobile ballot boxes does not ensure transparency.
- The decision to send mobile ballot boxes must be taken by the precinct election commission immediately and at least two of its voting members have to leave the polling station.
- The high number of mobile ballot boxes allowed in each polling station and the short period of time stated to make the decision of sending them can pose a problem for appointing observers.
- It is difficult to guarantee secret suffrage in the process of voting outside polling stations as established by the legislation.

101. Taking this into account, the Commission recommends the inclusion of strict conditions to allow for the use of mobile ballot boxes, as well as to reinforce the means to prevent fraud in their use, for example, by using transparent boxes.

Chapter XI. Counting of Votes and Election Results

Transparency in Vote Counting

102. The Law on State Duma elections contains detailed provisions designed to ensure accountability and transparency in the counting and transmission of results. The general principle is contained in Article 9, which provides that the preparation and conduct of elections to the

61 Code of Good Practice in Electoral Matters, par. 40.

62 OSCE/ODIHR Final Report, p. 7.

Duma shall be exercised openly and transparently. The further rules are contained primarily in Articles 78-88. These rules must however be seen against the background of the legal provisions concerning ballot papers and voting arrangements contained in Articles 72-77, which will therefore be dealt with first.

103. Considerable effort and thought has been put into the Law on State Duma elections in order to ensure both *ex ante* (Articles 72-77) and *ex post* (Articles 78-89) that the counting and transmission of results is fair, and that electoral fraud is prevented. In particular, Article 79 of the Law on State Duma elections outlines the procedure to be followed for vote counting once the voting time is over. It establishes that vote counting should be open and transparent, and that votes should be counted at the polling station, which complies with the recommendations of the Commission.[63] The Law on State Duma elections therefore contains highly specific provisions aimed at securing the honesty of the election through *ex ante* rules to dealing with the printing of ballot papers, the distribution of absentee ballots etc. It also has detailed provisions designed to ensure that the counting and transmission of results *ex post* is accountable and transparent. These operate at each stage of the process in ascending order from PECs, to TECs, ECSRFs and then on to the CEC itself. The information that must be provided is specified in great detail, as are the procedures that must be complied with when counting votes and distributing ballot papers.

104. However, the OSCE/ODIHR reported that problems in vote counting were present in every third polling station observed, as well as problems in the entry of result data, and correct application of the legal procedure.[64] A number of problems also appeared in the tabulation of results at the TEC level.[65] As the OSCE also pointed out, some of the CEC-issued instructions for administrative and electoral procedure were overly long and not user-friendly,[66] which may have had something to do with the irregular conduct of certain polling

63 Code of Good Practice in Electoral Matters, par. 45.

64 OSCE/ODIHR Final Report, p. 18.

65 OSCE/ODIHR Final Report, pp.20-21.

66 OSCE/ODIHR Final Report, p. 6.

stations. In this regard, the Commission would suggest a simplification of the vote counting and result compiling procedure, as well as stronger safeguards against misconduct of the election commissioners.

105. For the rest, the elimination of such irregularities should not be found in a revision of the legislation, but in its proper implementation by independent and impartial bodies. Moreover, it is axiomatic that the holding of an election in conformity with international standards requires not only the correct application of the rules considered in this section, but also more generally respect for free speech and assembly during the election period. These rights must be respected not just by the electoral authorities, but also by other state organs such as the police.

106. Article 82 deals with the final result of the election as pronounced by the Central Election Commission, CEC, on the basis of data contained in submissions from the ECSRFs and some other electoral commissions. The CEC must compile a protocol on the results of elections of the deputies of the State Duma, which must include a great deal of information, which is based on the data that has come to it from ECSRFs and TECs. The CEC shall declare the election invalid if violations committed in the course of voting or establishment of the vote returns make it impossible to reliably determine the results of the voters' expression of will; or if the vote returns are declared invalid at such number of electoral precincts that the number of voters in them, included in the voter lists at the end of voting, in the aggregate comprise not less than 25 percent of the total number of voters included in the voter lists at the end of voting. The CEC shall declare the elections to be legally null and void if not a single federal list of candidates received 7 percent or more than 7 percent of the votes cast; or if all federal lists of candidates in the aggregate received 60 percent or less than 60 percent of the votes cast. The remainder of Article 82, as well as Article 82-1 and Article 83, deal with the distribution of seats between parties and candidates inside the party, in particular those on federal and regional lists. The threshold is in principle 7 % (Article 82.7); parties obtaining between 5 and 6 % of the vote are given one seat and those between 6 and 7 % are given two seats (Articles 82-1.2-3).

Chapter XII. Filling of vacant deputy seats

107. According to Article 89.1, if the powers of a deputy of the State Duma are terminated before the expiry of the mandate, a political party may decide which other candidate may replace him or her. This appears contradictory with Article 83.8 which provides for detailed rules on filling vacancies. At any rate, the way of filling vacant posts should be established by the law before the elections and not by the parties after them.

Chapter XIII. Complaints about Violations of Electoral Rights of Citizens and the Responsibility for Violation of the Legislation of the Russian Federation on the Election of Deputies of the State Duma

108. The right to an effective remedy and fair hearing by an impartial tribunal is a well-established international principle.[67] Accordingly, failure to comply with electoral law must be open for challenge before an effective appeal body.[68] Both challenges before ordinary courts or before electoral commissions are possible options in an appeal system; however, the explanatory report to the Code of Good Practice in Electoral Matters states first instance appeals before electoral commissions could be more desirable, due to their better knowledge of electoral law.[69] At any rate, a final appeal to a court must be possible.[70] Additionally, expedited consideration of electoral campaigns is necessary for the appeal system to be fair and effective.[71]

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67 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 14; European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222, Article 23; Guidelines on Political Parties, (CDL-AD(2010)024),ch. XIII.2.

68 Code of Good Practice in Electoral Matters, II.3.3.

69 Code of Good Practice in Electoral Matters, par. 93.

70 Code of Good Practice in Electoral Matters, II.3.3.a.

71 Guidelines on Political Parties, par. 229.

109. Article 90 of the Law on State Duma Elections establishes the appeal system for decisions and actions that violate electoral rights by referring to the Law on Basic Guarantees, which details this procedure in Chapter X. Under this Law, an appeal may be heard either by the Supreme Court, an ordinary court, or electoral commissions.[72]

110. Article 75 is the key provision. The protections are framed in terms of violations of electoral rights, the definition of which is provided in Article 2.11 of the Law on Basic Guarantees (LBG): the guarantee of the electoral rights and the right to participate in a referendum is defined to mean, 'conditions, rules, and procedures established by the Constitution of the Russian Federation, a law or other regulatory acts and intended to assure implementation of electoral rights of citizens of the Russian Federation, and their right to participate in a referendum'.

111. Article 75.1 LBG provides a right of appeal to a court against acts or omissions of public bodies broadly conceived that violate electoral rights. Appeals against decisions and actions/omissions that violate electoral rights of citizens and the right of citizens to participate in a referendum can be submitted by voters, referendum participants, candidates, their agents, electoral associations, and their agents, other public associations, a referendum initiative group, its authorised representatives, observers, and commissions, Article 75.10 LBG.

112. The court to which an appeal is taken is specified in Article 75.2 LBG. Thus for example, appeals against decisions/omissions of the CEC go to the Supreme Court, while appeals against decisions/omissions of the ECSRFS go to state supreme courts. The resulting court decisions are binding on the commissions.

113. Article 75.6 LBG provides in the alternative for appeals against acts/omissions of election commissions that violate electoral rights of citizens to be submitted to the commission of the next higher level which can then: reject the appeal; cancel the disputed decision in full or in part; cancel the disputed decision in full or in part and demand the lower commission to reconsider the issue and make a decision. A prior application to a higher commission is not however a condition for submitting an appeal in court, Article 75(8) LBG, but

[72] Federal Law on Basic Guarantees of Electoral Rights and the Rights of Citizens of the Russian Federation to Participate in a Referendum, Article 75.

a higher commission should suspend hearing a case concerning a lower commission if an individual has taken the same case to a court, Article 75(9) LBG.

114. The possibility for the applicant to choose between various appeals bodies, and in particular between election commissions and courts, may lead to *forum shopping*. The Commission recommends therefore abolishing this possibility of choice.[73]

115. Moreover, as already said, provisions on complaints to election commissions and the way for these bodies to deal with them should be clarified (*supra* par. 41-42), in order to prevent them from considering complaints as "applications" not needing a legal decision.

116. Article 76 LBG contains grounds for annulment of candidates that have been placed on the registered list. The relevant rules are long and complex. Suffice it to say for the present that registration of an individual candidate may, under Article 76(7) LBG, be cancelled by a court for, inter alia, violation of campaign finance rules; taking advantage of an official position; bribery; extremism; instigating social, race, national or religions dissent, derogation of national dignity, propaganda of exclusivity, prevalence or inferiority of citizens by their attitude to religion, social, racial, national, religious or linguistic affiliation, or promoted and publicly displayed Nazi attributes or symbols; and concealment by the candidate of information as to his/her conviction. There are related rules concerning cancellation by a court of a list of candidates, Article 76(8) LBG and Article 91 of the Law on State Duma elections. This very extensive list appears very difficult to reconcile with the principle of proportionality; at any rate, it should be applied in a restrictive manner.

117. Article 77 LBG and Article 92 of the Law on State Duma elections deal with repeal of decisions of election commissions that relate to votes and voting returns. Article 92(1) provides in effect that prior to the determination of the overall electoral results a higher level electoral commission can repeal the decision of a lower level electoral commission if there has been violation of the Law on State Duma Elections or of the Law on Basic Guarantees of Electoral Rights.

[73] Code of Good Practice in Electoral Matters, II.3.3.c.

If the violations prevent reliable establishment of the voters' will then the election in, for example, that precinct can be declared invalid. When the overall electoral result has been declared then the decision of a lower level commission can only be overturned by a court, Article 92.2-3. Allowing higher election commissions to rectify or set aside *ex officio* decisions taken by lower election commissions is in conformity with international standards,[74] but such rules should be applied systematically and not in a selective manner.

118. There are two more problems with Article 92:

- The first one affects paragraph 2, which deals with the reversal of the decision of a subordinate election commission. The main difficulty is the ambiguity and lack of detail about the appeal procedures the way the Court decides.
- The second one refers to reversal of decision of the Central Election Commission on the result of the election ruled in paragraph 4. According to it, the reversal is only possible on the basis of certain facts listed in the Article. The list is very detailed, but imprecise. These are in essence where a political party: violated the campaign finance rules; is guilty of bribery, which precludes establishment of the actual will of voters; has broken the electioneering rules in Article 62.1, and this precludes establishment of the actual will of voters; a leader of a political party has taken improper advantage of his office or position in the public service, and this violation precludes establishment of the actual will of voters. Article 92.5 provides additional grounds on which a court can repeal a decision of an electoral commission on vote returns further to the violation of the procedure of voter lists compilation and establishment of electoral commissions; illegal refusal to register a federal list of candidates if such illegality is recognised after the election day; and other violations of the electoral legislation, if those violations preclude establishment of the actual will of voters. There are analogous provisions relating to annulment of decisions in Article 77.2-3 LBG. It would suitable to simplify these provisions and to

[74] Code of Good Practice in Electoral Matters, II.3.3.i.

focus on the possible impact of any irregularity, whatever its nature, on the outcome of the elections.[75]

119. The time limits for bringing claims are contained in Article 78 LBG and Article 90 of Law on the State Duma election. According to Article 78.2 LBG, an appeal against a decision of a commission about registration, refusal to register a candidate/list of candidates, or refusal to certify the list of candidates can be submitted within ten days after the decision appealed against was made. It is also open to a complainant to make an application for annulment of registration of a candidate/list of candidates to a court not later than eight days before voting day, Article 78.5 LBG.

120. There are also rules concerning the time within which the claim must be dealt with. The basic rule in Article 90.2 is that complaints made to election commissions before the election should be dealt with in 5 days; complaints made after the election must *prima facie* be dealt with immediately, although the time can extended to 10 days if the complaint requires further investigation. A court must make a decision with regard to an appeal against a commission's decision on vote returns, the results of an election, referendum within two months after the day on which the appeal was submitted, Article 78.4 LBG.

121. Article 17.2 of the Law on State Duma Elections gives a person a right to complain to the PEC that he/she has not been placed on the voting list, or about other mistakes in the list. The PEC must address the matter, respond in 24 hours or not later than before polling day. The resolution by the PEC can be appealed to a higher election commission or a court, and there are once again time limits within which the response must be given. Applicants can be present when the complaint is considered and can submit evidence, Article 29.5.

122. The resolution of the CEC concerning the registration or refusal to register the list of candidates can be appealed to the Supreme Court, which must give its decision in 5 days, Article 44.7.

75 Code of Good Practice in Electoral Matters, II.3.3.e.

123. All these deadlines appear as reasonable and should lead to an expeditious treatment of appeals. By contrast, the time limit for complaints to court after the publication of the election results concerning violation of electoral rights during the election campaign is one year from the date of publication of those results (Article 78.3 of the Law on Basic Guarantees). This last deadline is excessive[76] and will probably make any cancellation of election results and repetition of elections very difficult.

124. The OSCE/ODIHR reported that several complaints were filed over the course of the elections of 4 December 2011, both at the PECs and at prosecutors' offices and the courts, and that many of these complaints were not dealt with or were summarily dismissed. The CEC heard one complaint, but refrained from ordering a recount, and the complaints before district courts had not been solved by the time the OSCE's observing mission departed.[77]

125. The Commission recommends strengthening and streamlining the electoral appeal system. The concentration of complaints before electoral commissions, followed by an appeal to ordinary administrative courts, would help the efficiency and specialisation of the appeal system. Moreover, procedural safeguards should also be put in place to ensure that complaints do not go unanswered or are summarily dismissed.

126. Some aspects should also be dealt with in a more precise manner. For example, it is not clear how far the existing rules can be enforced against, for example, those running the media who breach the obligations imposed on them under the Electoral Laws, and whether media bias, which affects the freedom of voters to form an opinion, could lead to the invalidation of elections.

127. For example, it may be worth considering whether an Elections Ombudsman might oversee this aspect of the work of election commissions.

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76 Code of Good Practice in Electoral Matters, II.3.3.g.

77 OSCE/ODIHR Final Report, p. 19-20.

V. Conclusions

128. The legislation applicable to State Duma Elections is detailed and deals with nearly all aspects of elections. However, improvements are still needed in order to put it in full conformity with international standards. They will be summarised below.

129. The Law on State Duma Elections is a long, complex piece of legislation. It inter-relates with the Constitution and with other laws, notably those on Basic Guarantees of Electoral Rights, and on Political Parties. The Venice Commission therefore recommends simplifying and consolidating the electoral legislative framework.

130. The main substantial issue to be addressed is that of impartiality of the election administration. Independent and impartial electoral commissions are necessary to ensure that elections are properly carried out. The present rules are insufficient to ensure the impartiality of the election administration. The Venice Commission therefore recommends modifying the rules on the composition of election commissions, and in particular their appointment procedures, in order to effectively ensure their independence and impartiality. This is crucial to ensure that elections are held in conformity with international standards.

131. The main other issues where improvement is required are the following ones.

132. The Law on State Duma Elections includes detailed rules on election observers. These rules should be amended in order not to be interpreted in a too restrictive way, and to avoid any discrimination between national and international observers. Moreover, non-partisan national observers should be admitted, and election observation should be extended to the post-electoral process, in conformity with international standards.

133. Neutrality of the authorities during the election campaign is essential for ensuring equality of opportunity between candidates. In particular, effective separation between state and party, as well as equal access to the media should be guaranteed. The rules aimed at ensuring such equal access should be reconsidered in order to prevent excessive restrictions to freedom of expression.

134. In order to ensure effective equality of opportunity, it is advisable to reconsider the rules on funding of the electoral campaigns and to envisage some public financing.

135. The Law on State Duma Elections, combined with the Law on Basic Guarantees, provides for a quite complete, but also complex system of complaints and appeals. It should be simplified but also clarified in order to fill any loophole and to prevent rejection of complaints without any legal reasoning.

136. Other issues which need consideration are addressed in the opinion and will not be dealt with more in detail in these conclusions, such as:

- Restrictions to the registration of federal lists of candidates, in particular concerning the verification of signatures;
- The issue of constituencies;
- The obstacles to the registration of political parties, which are dealt with in another opinion of the Venice Commission *(CDL-AD(2012)003)*;
- The prohibition of individual candidacies;
- The representation of women and minorities;
- The provision prohibiting negative campaigning;
- The rules on mobile voting, which should be reconsidered in order to ensure the respect of the principles of free and secret suffrage.

137. The Venice Commission also underlines that the conduct of genuinely democratic elections not only depends on a detailed and solid Electoral Code, but also on full and proper implementation of the legislation.

138. The Venice Commission takes notes of the steps taken by the Russian Federation, and in particular President Medvedev, in order to amend the legislative framework in the field of elections. It stands ready to assist the authorities in their efforts to bring the electoral legislation and practice in the Russian Federation fully in line with international standards.

Informe sobre la observación electoral de las elecciones parlamentarias anticipadas de la República de Bulgaria

Manuel González Oropeza*

Introducción

Bulgaria cuenta con un sistema parlamentario de gobierno con un primer ministro y un presidente como jefe de Estado. Este país es miembro del Consejo de Europa desde el 7 de mayo de 1992 y forma parte de la Unión Europea a partir de 2007.

En las elecciones parlamentarias de 2009, el entonces alcalde de Sofía, Boiko Borisov, le ganó con el partido Ciudadanos para el Desarrollo Europeo de Bulgaria (GERB) al gobierno socialista de Serguéi Stánishev, quien había firmado el tratado de ingreso a la Unión Europea. La campaña de GERB se basó en promesas para acabar con la corrupción y el crimen, así como mejorar la justicia. De la misma manera, se prometió abatir la pobreza y la desigualdad que sufren las minorías étnicas, entre ellas, la población de gitanos conocida como Roma.

Las elecciones entre 2001 y 2007 se han caracterizado por pugnas y alternancia entre los partidos de izquierda y derecha, lo cual no ha permitido la reelección de ninguna corriente o partido.

Ya como primer ministro, Borisov promovió reformas a la ley electoral en diciembre de 2011, en las que afloraron preocupaciones

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acerca de la doble ciudadanía para búlgaros residentes en el extranjero, la composición partidista de la autoridad electoral —Comisión Electoral Central (CEC)—, la propiedad oligopólica de los medios de comunicación, así como el procedimiento de elección de los jueces, en el que intervienen los partidos políticos y el gobierno, mediante la oficina de Seguridad Nacional Estatal.

El presidente Georgi Parvanov vetó las reformas propuestas de 12 meses como requisito de residencia, así como otras medidas acerca de elección directa de alcaldes. Las iniciativas también fueron sometidas a escrutinio judicial por la Corte Constitucional, como se dio, por ejemplo, con la declaración de inconstitucionalidad del requisito de residencia de 12 meses en las elecciones municipales, por lo que se redujo a seis meses.

Igualmente, se ha estimado como desproporcionado el requisito de conseguir cinco mil firmas para apoyar las candidaturas independientes, cuando se requieren siete mil para las candidaturas de partidos políticos.

Sin embargo, se ha considerado oportuna la reforma electoral de 2011, pues representa una codificación de las disposiciones electorales anteriores. No obstante, los medios de impugnación contra los resultados de las elecciones permanecen restringidos, según el artículo 150.1 de la Constitución actual, ya que sólo están legitimados para impugnarlas ante la Corte Constitucional de Bulgaria: un quinto de la Asamblea Nacional, el presidente, el Consejo de Ministros, la Suprema Corte de Apelaciones y la Suprema Corte Administrativa, así como el fiscal general, por lo que los ciudadanos, candidatos, partidos políticos o coaliciones están excluidos de la jurisdicción electoral.

En 2009, la Corte Europea de Derechos Humanos determinó, en el precedente Petkov & others v. Bulgaria,[1] que el sistema restringido de acceso a la justicia vulnera los derechos consagrados en la Convención Europea de Derechos Humanos, aunado a que los plazos para la interposición de los medios de impugnación es de 24 horas, por lo que el problema estructural es la falta de acceso a la justicia para impugnar las cuestiones electorales.

[1] European Court of Human Rights. 2014. Case of Tsvetelin Petkov v. Bulgaria. Sentencia del 15 de julio. Application no. 264/06.

Como alternativa para desahogar los agravios electorales de los ciudadanos, se dio el precedente de que dos de ellos —a los que no se les permitió votar en 2011 por encontrarse en una lista de votantes limitados— acudieron ante el ombudsman, quien le ordenó a la autoridad electoral que publicitara con anticipación a las elecciones estas listas para que el ciudadano estuviera informado de su situación electoral.

La ineficacia del sistema de justicia electoral se puso en evidencia cuando en 2011 un candidato para la alcaldía de la ciudad de Varna, una de las principales del país, no pudo defenderse de los resultados electorales por haber excedido el plazo de 24 horas para interponer sus recursos.

En enero de 2013, varias protestas populares provocaron la renuncia del primer ministro Borisov, que se hizo efectiva en febrero del mismo año; como saldo de éstas, seis personas resultaron muertas por inmolación, dada la crisis económica del país.[2] El presidente Rosen Pleveneiev nombró a un encargado del despacho el 12 marzo de 2013 y las campañas para elecciones corrieron del 12 de abril al 10 de mayo del mismo año.

Desde las elecciones de 2011, el presidente del partido político Ataka, Volen Siderov, ha basado su plataforma electoral en un discurso de odio y desprecio hacia las minorías étnicas. Por otra parte, la organización Transparencia Internacional ha declarado que 10% de los electores, por lo menos, ha sufrido la presión de ofrecimiento de dinero a cambio de su voto, lo que provocó que en Nesebar tres personas fueran detenidas por ofrecer dinero, incluido un candidato del partido GERB en las elecciones municipales.

Las minorías étnicas han sido objeto de hostigamiento. Un conflicto reciente se da en el uso de otras lenguas, pues la Constitución del país establece el búlgaro como lengua única, por lo cual se cuestionó sobremanera el discurso en turco que pronunció Ahmed Dogan en 2011, al representar a la organización política "Movimiento turco", en un acto de campaña.

[2] Las altas cuotas de energía eléctrica figuraron entre los agravios persistentes.

Aspectos generales

En la elección del 12 de mayo de 2013 se presentaron 71 partidos políticos para registrarse; sin embargo, sólo 63 fueron debidamente acreditados. De cualquier manera, quedó incólume el derecho de estas organizaciones políticas para apelar ante la Suprema Corte Administrativa de Bulgaria.

La Constitución búlgara expedida en 1991 ha sido cuestionada por dos aspectos fundamentales, que consisten en la prohibición de la doble nacionalidad para el ejercicio de los derechos políticos, lo cual impacta a la población que ha sido altamente migrante por las circunstancias históricas del país, y las limitaciones en el interés jurídico para impugnar ante los tribunales competentes. Ambas deficiencias son repetidas en los reportes internacionales de The Organization for Security and Co-operation in Europe/the Office for Democratic Institutions and Human Rights (OSCE/ODIHR), así como en la Comisión de Venecia.

La Ley de Partidos Políticos de 2005 y las enmiendas de 2013 al Código Electoral,[3] en el que, por cierto, se consigna como derecho la observación electoral, conformaron el marco normativo que reguló la elección de mayo de 2013. Sin embargo, las campañas políticas se caracterizaron por ser nacionalistas, con expresiones difamatorias para los candidatos y acusaciones de compra de votos y de espionaje telefónico por parte del Ministerio del Interior.

Motivo de preocupación es la equidad en la contienda electoral mediante los medios de comunicación, ya que la televisión privada está

[3] Estas enmiendas provocadas por las observaciones de The Organization for Security And Co-Operation in Europe/The Office for Democratic Institutions and Human Rights (OSCE/ODIHR), y la Comisión de Venecia se refieren al régimen de transparencia adoptado en las sesiones de la Comisión Central Electoral y las comisiones distritales electorales, mediante la transmisión por internet, así como por el sistema de impugnaciones establecido para controvertir las decisiones de las comisiones electorales. No obstante, otras reformas igualmente propuestas quedaron pendientes: Reglas para la cobertura en medios con el fin de garantizar la equidad en la transmisión de promocionales (un antiguo jefe del partido en el poder GERB, Tsvetan Tsvetanov, concentra la propiedad de la mayoría de estaciones, lo que provoca un serio conflicto de interés); protección de los derechos lingüísticos de las minorías; mejoramiento del procedimiento de impugnaciones, especialmente en lo relativo a los plazos de interposición de los recursos; mecanismos para evitar y sancionar la compra de votos, y una reforma judicial que garantice la independencia e imparcialidad de sus juzgadores.

concentrada en pocos propietarios y todos los promocionales se cobran sin ninguna intervención del Estado; ni siquiera con la identificación apropiada de ser un *spot* de campaña. Por ello, en abril de 2013 el Consejo de Medios Electrónicos llegó a un acuerdo entre la Asociación de Concesionarios Búlgaros y la Comisión Central Electoral para que se identificaran los promocionales con un cintillo que indicara si se trataba o no de propaganda pagada por el partido político correspondiente. En abril 19, la organización OSCE/ODIHR comenzó a monitorear dichas transmisiones.

En la elección se renovaron las 240 curules de los distritos uninominales de la Asamblea Nacional, organizándose la elección por medio de un Comité Central de Elecciones, 31 comités distritales electorales y 12,000 comisiones electorales de precinto. No obstante que hubo impugnaciones hacia la integración de algunas comisiones distritales electorales,[4] la mayoría de ellas fue improcedente, según las resoluciones del Tribunal Supremo Administrativo.

Aspectos específicos de la observación

El 28 de febrero de 2013, la Asamblea Nacional de Bulgaria acordó que el ministro de Asuntos Exteriores de ese país, Nickolay E. Mladenov, extendiera al presidente de la Asamblea Parlamentaria del Consejo de Europa, Jean-Claude Mignon, una invitación para que enviara observadores internacionales a las mencionadas elecciones anticipadas para renovar la Asamblea Parlamentaria, a celebrarse el 12 de mayo de 2013 (Anexo 1).

La Comisión de Venecia, por su parte, extendió una invitación al suscrito para ser acreditado como observador internacional de dichas elecciones, mediante la carta del señor Thomas Markert, en su carácter de director-secretario de dicha Comisión. El fundamento de esta invitación se encuentra en el Convenio de Colaboración entre la Asamblea Parlamentaria del Consejo de Europa y la Comisión de

[4] Se presentaron 37 medios de impugnación acerca de la integración de las comisiones distritales electorales, de los cuales sólo cuatro fueron favorables a los actores en su resolución.

Venecia signado el 4 de octubre de 2004. En dicha carta se comisionó a Amaya Úbeda de Torres como enlace de la Comisión en la misión de observación (Anexo 2).

En sesión privada del 22 de abril de 2013, en el Pleno de la Sala Superior de este Tribunal se informó y aprobó, en primer término, acerca de la misión de observación referida a cargo del suscrito, lo cual provocó el registro correspondiente ante las autoridades de Bulgaria (Anexo 3).

La primera reunión del Comité ad hoc de la Asamblea Parlamentaria del Consejo de Europa —Parliamentary Assembly of the Council of Europe (PACE)— para la observación electoral se llevó a cabo el 10 de mayo con una bienvenida de Andreas Gross, jefe de la delegación, así como una conferencia del suscrito llamada "Desarrollos recientes en la legislación electoral de Bulgaria", en carácter del suscrito como miembro de la Comisión de Venecia y observador acreditado. El programa completo de la observación, así como la integración completa de este comité ad hoc, se encuentran en el Anexo 4.

Los partidos políticos contendientes más relevantes fueron GERB y la "Coalición por Bulgaria" (BSP).[5]

Para la observación, la PACE hizo la distribución de los lugares de Bulgaria donde mayormente se realizaría la observación electoral de los equipos de observadores, asignando al suscrito la ciudad de Blagoevgrad, ubicada aproximadamente a 77 kilómetros al sur de Sofía (Anexo 5). En el camino, se visitó el Monasterio de Rila para observar la votación de los monjes, que se efectuó en la oficina del parque del mismo nombre, a una distancia adicional de 20 kilómetros, aproximadamente.

Con el objeto de acreditar debidamente la observación, se extendió un documento con mi nombre y procedencia, así como un gafete que me identificó como observador (Anexo 6).

[5] Integrada por el Partido Socialista Búlgaro, el Partido Social Demócrata Búlgaro, la Unión Agraria.
Alexander Stamboliyski y el Movimiento por un Humanismo Social.

Desarrollos recientes de la legislación electoral en Bulgaria

Con base en el Reporte adoptado por el Consejo de Elecciones Democráticas de la Comisión de Venecia, aprobado en sesión plenaria el 17 de junio de 2011 (Opinión 607/2011), se llevó a cabo la plática el 10 de mayo ante los integrantes de la PACE (Anexo 7), con la presidencia de Andreas Gross, parlamentario europeo por Suiza, dando cuenta de las reformas a la ley electoral realizadas en febrero de 2013.

La delegación de la PACE fue clara al determinar que más que observar los escándalos denunciados en los medios, la operación se reducía a la observación de la elección del 12 de mayo, con una campaña electoral previa del 12 de abril al 11 de mayo. Un memorándum circulado entre los asistentes explica lo anterior (Anexo 8), al igual que los lineamientos que se debían observar por parte de la PACE (Anexo 9). La experiencia acumulada de esta organización parlamentaria en la observación electoral de Bulgaria se remonta fácilmente a 1990, tal como se observa de la relación adjunta (Anexo 10).

La ley electoral de Bulgaria fue aprobada en enero de 2011 como la primera legislación unificada del país, luego reformada en febrero de 2013, para implementar algunas recomendaciones propuestas por la OSCE/ODIHR y la Comisión de Venecia del Consejo de Europa, adoptadas en junio de 2011. Entre estas reformas se encuentra el reconocimiento legal de la observación electoral como un derecho, sobre todo el proceso electoral, así como la transparencia en las actividades electorales administrativas. Si bien en la observación fuera de Sofía este reconocimiento fue respetado en las casillas visitadas, en el informe se da cuenta de una casilla en el área de Sofía que pretendió desconocer la acreditación.

Aunque estas reformas legislativas mejoraron el marco normativo electoral del país, la Comisión de Venecia y la OSCE/ODIHR habían previsto posibles complicaciones ante lo anticipado de su adopción, ya que sólo mediaron dos meses entre la reforma legislativa y las elecciones celebradas, entre las cuales se contaba con la nueva función del CEC para transmitir resultados y difundir las quejas que fueran recibiendo, sin contar con la infraestructura adecuada. Otra de las peculiaridades de esta reforma fue la de dotar a cada casilla con una fotocopiadora,

para que cualquier persona pudiera obtener copia de los protocolos resultantes del día de la jornada electoral, situación que se comprobó durante la observación.

Sin embargo, uno de los elementos perniciosos que subsisten en la ley electoral de Bulgaria es la limitación hacia los ciudadanos con doble nacionalidad, debido al excesivo requisito de residencia de 12 meses para el ejercicio de sus derechos políticos, así como ciertas disposiciones restrictivas en relación con elecciones locales y municipales.

Otras recomendaciones de dichos organismos electorales que no fueron atendidas por Bulgaria se refieren a:

1) La falta de balance de los partidos políticos en la asignación de coordinadores y secretarios en todos los niveles de la administración electoral.
2) La necesidad de reforzar el criterio en cuanto a los partidos políticos y el financiamiento de campañas electorales, particularmente respecto de las sanciones.
3) La falta de acceso plural a los medios de comunicación y de cobertura mediática.
3) La garantía de los derechos lingüísticos de las minorías (turco).
4) La reducción de la privación de los derechos políticos sólo a las personas condenadas a prisión por la comisión de delitos graves.
5) La apertura de los medios de impugnación a los electores para discutir los cómputos finales de las elecciones.

Jornada electoral

En las elecciones anticipadas para renovar la Asamblea Nacional de Bulgaria, efectuadas el 12 de mayo de 2013, participaron alrededor de seis movimientos políticos: GERB (partido en el gobierno); "Coalición por Bulgaria" (reunión de cuatro partidos políticos); Movimiento por derechos y libertades (DPS); Ataka (partido de extrema derecha); "Coalición azul" (reunión de tres partidos políticos), y el Movimiento de orden, derecho y justicia (Anexo 11).

Se formaron 12 grupos de observadores integrados con dos personas cada uno para la misión de la PACE. El grupo 8, en el que estuvo el

suscrito, contó con la presencia de Amaya Úbeda de Torres, integrante de la Comisión de Venecia, con destino final a la ciudad de Blagoevgrad (Anexo 12), distante 100 kilómetros al sur de Sofía.

Se visitaron 10 casillas, en su mayoría, rurales; en una de éstas se concentró la votación de los monjes del monasterio más grande de Bulgaria, ubicado en Rila, donde se presenció la votación de tres de ellos, de un total de 51. Destaca la presencia femenina en la integración de las mesas directivas de casillas. Los lugares visitados fueron:

1) Usoika (100500004)
2) Kocherinovo (102700003)
3) Rila (103800004)
4) Riltsi (010300112)
5) Selen-Dol (010300114)
6) Blagoegrad (010300119)
7) Blagoegrad (010300028)
8) Sofía (254619027)
9) Sofía (244603016)
10) Sofía (244601010)

Sólo en la casilla listada en último lugar, ubicada en la Preparatoria Francesa, en un céntrico lugar de la ciudad de Sofía, ocurrieron varias irregularidades, cometidas por Avelina Aleksandrova, jefa de la mesa directiva de casilla:

1) Desconocimiento de la observación electoral internacional. A pesar de mostrarle las acreditaciones oficiales, intentó expulsar al grupo del centro de votación.
2) Trató de expulsar a la traductora acreditada para acompañar al grupo.
3) Hubo un excesivo retraso en el cómputo de la votación, con la clara intención de que abandonáramos el local. Se tardó más de una hora en el cómputo (20:00 a 21:00 horas) de 450 votos (listado de 800 electores) y más de dos horas en el llenado del acta o protocolo de resultados (21:00 a 23:00 horas), el cual se anexa (Anexo 13).
4) Hubo amenazas para que los observadores no hablaran, ni siquiera en voz baja, dentro del recinto; ni tampoco podían moverse libremente en el local correspondiente, por lo que los integrantes del

grupo estuvieron más de cuatro horas sentados y callados en un rincón del centro de votación.

De todo ello se dio cuenta en la reunión de la PACE. Adicionalmente se pudo observar:

1) Defectuosa representación de los partidos políticos en las casillas visitadas.
2) Boletas sin número de identificación, ni sellos ni cómputos en cada casilla.
3) Falta de capacitación de los integrantes de las mesas directivas de casillas.
4) Imposibilidad de observación en los centros de recuento y concentración distrital de los votos.

El resultado fue una paradójica victoria de Boiko Borisov (GERB), el mismo jefe de Estado que había sido obligado a dimitir dos meses y medio atrás, con una votación de 31% que, en opinión de la prensa internacional, era insuficiente para gobernar al más pobre de los países de la Unión Europea. Dicho porcentaje alcanzó para contar con tan sólo 97 diputados de 240 que integran la Asamblea Nacional. Le seguirían los candidatos de la coalición BSP, con un porcentaje cercano a 25%.

Las denuncias de fraude electoral también permearon inmediatamente las elecciones con la requisa de 350,000 boletas falsas, lo cual, con seguridad, sería objeto de investigación. Finalmente, el pulso del descontento sigue latente con la celebración de estas elecciones.[6] El mismo Borisov mostró su descontento al pedir la anulación de la elección el 16 de mayo de 2013, ante la penalización de su partido, GERB, que, de manera inequitativa, según él, se le había impuesto.[7]

6 Blanco, Silvia. 2013. "El Gobierno búlgaro que cayó por las protestas resucita en las urnas". *El País,* 13 de mayo, sección Internacional.

7 "Bulgarie: Borissov demande des nouvelles élections". 2013. *Le Monde*, 16 de mayo, sección Europe.

REPUBLIC OF BULGARIA

MINISTER OF FOREIGN AFFAIRS

№33-00-180

MR. JEAN-CLAUD MIGNON
PRESIDENT OF THE PARLIAMENTARY ASSEMBLY
OF THE COUNCIL OF EUROPE

Sofia, 12 March 2013

Dear Mr. Mignon,

I would like to inform you that in accordance with the Decision of the Bulgarian National Assembly of 28 February 2013, I am authorized to extend an invitation on behalf of the National Assembly to the Parliamentary Assembly of the Council of Europe to send observers to the Parliamentary elections in Bulgaria, which will take place on 12 May 2013. The National Assembly has expressed its will to invite an expanded Election Observation Mission.

Please accept, Mr. President, the assurance of my highest consideration.

Sincerely yours,

Nickolay E. MLADENOV
Minister

2, ALEXANDER ZHENDOV ST., SOFIA 1113, BULGARIA
TEL. +359 (2) 9482999, FAX +359 (2) 9713405
E-MAIL: MINISTER@MFA.BG, WEB PAGE: WWW.MFA.BG, FOLLOW US: TWITTER/MFABULGARIA

ANEXO: 1

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

JDem. 149
AU/br

Strasbourg, 17 April 2013

Dear Sir,

I would like to invite you to provide legal assistance to the Parliamentary Assembly of the Council of Europe delegation observing the Parliamentary Elections in Bulgaria. This assistance will take place in Sofia from 10 (10 am) to 13 May 2013 (2 pm).

In conformity with the co-operation agreement signed between the Parliamentary Assembly and the Venice Commission on 4 October 2004, you are invited to join the Assembly's election observation mission as a legal adviser.

I note that your institution will cover your travel expenses and costs related to this trip. I would be grateful if you could inform the secretariat of your travel details so that we can make arrangements for you to be met at the airport.

Specific travel-related risks are covered by a ***CHARTIS*** *insurance policy* ***(No. 2.004.761)****, which provides cover for persons up to their 76th birthday. If the need arises, the* ***CHARTIS round-the-clock helpdesk*** *can be called on* ***+32 3 253 69 16****.*

Ms Amaya Úbeda de Torres is responsible for the organisation of this meeting for the Venice Commission. Do not hesitate to contact her by telephone +33 (0)3 90 21 55 90 or by e-mail: amaya.ubeda@coe.int) or her assistant, Ms Brigitte Rall, on +33 (0)3 88 41 31 72, on fax +33 (0)3 88 41 37 38 or by e-mail brigitte.rall@coe.int for any further information.

Yours faithfully,

Thomas Markert
Director, Secretary of the Commission

Mr Manuel González Oropeza
Magistrate, Federal Electoral Tribunal
Carlota Armero N° 5000
Colonia CTM Culhuacan
Piso 4 edificio sede
Mexico City
eugenia.perez@te.gob.mx
alberto.guevara@te.gob.mx

ANEXO: 2

Venice Commission - Council of Europe Commission de Venise – Conseil de l'Europe
F-67075 Strasbourg Cedex Tel. +33 (0) 3 90 41 55 90 Fax +33 (0) 3 88 41 37 38
E-mail: venice@coe.int Web site: www.venice.coe.int

AD HOC COMMITTEE FOR THE OBSERVATION OF THE PARLIAMENTARY ELECTIONS IN BULGARIA
COMMISSION AD HOC POUR L'OBSERVATION DES ELECTIONS LEGISLATIVES EN BULGARIE
12 May - *mai* 2013
ELECTORAL MISSION : 9-13 May - *mai* 2013

Ms/Mr
Mme/M.... MANUEL GONZALEZ OROPEZA ...Delegation/*délégation* ... MEXICO ...

Tel No . +... 55 52 57282445 ... GSM N° + ... e-mail ...

Contact person : MA. EUGENIA PEREZ CASTAÑO ...Tel No . + 55 54374985 ... e-mail eugenia.perez@te.gob.mx

Nationality / *nationalité* ... MEXICANA ...

Passport n° ..D0036534.. expiry date/*date d'expiration* 05 /11/ 2016 Issued by / *délivré par*: MINISTRY OF FOREIGN AFFAIRS, MEXICO

Hotel "Sheraton Sofia – Hotel Balkan" Rate (80€ Classic Room) YES /oui ☐ NO /non ☐
per night including free WIFI (in common areas), buffet breakfast and 9%VAT (Additional charge: 0.67 Tourist tax per person per night), 5 Sveta Nedelya Square, Sofia Tel: +359 2 9816541, *Web:* www.luxurycollection.com/Sofia

You are kindly requested to send the attached credit card form IN PDF FORMAT directly to the hotel to guarantee your room/ ***Vous êtes prié(e)s de bien vouloir envoyer le formulaire de carte de credit ci-joint EN FORMAT PDF directement à l'hôtel à fin de garantir votre séjour.:*** sofia.reservations@luxurycollection.com

Arrival in / *Arrivée à* Sofia		Departure from / *départ de* Sofia	
Date - time/*heure*:	MAY 9, 22:10	Date - time/*heure*:	MAY 14, 7:10
Flight/ *vol n°* :	LH 1706	Flight/ vol *n°* :	LH 1707

Language / *langue* ☒ English/Anglais ☐ French/Français

Deployment on election day / déploiement le jour des élections:
Please indicate more than one option / Merci de bien vouloir indiquer plus d'un choix

*Area**	*Option 1*	*Option 2*	*Option 3*
Sofia and surrounding area	X		
Plovdiv			
Blagoevgrad			
Montana - Vratsa			
Pazardzhik			
*Veliko tarnovo**			
*Varna**			
Other (precise).....			

**These deployments require a pre-deployment on Saturday and a return on Monday*

ANEXO: 3

Kindly return this form **by 23 April 2013 to**: Ms Anne GODFREY PACE Secretariat
Tel n : +33 388 41 31 34 Fax n° + 33 388 41 27 76 e-mail elections.pace@coe.int

Parliamentary Assembly
Assemblée parlementaire
http://assembly.coe.int

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

3 May 2013

AD HOC COMMITTEE FOR THE OBSERVATION OF THE EARLY PARLIAMENTARY ELECTIONS IN BULGARIA (12 May 2013)

Draft programme for joint meetings of international election observation delegations

Thursday, 9 May 2013

Arrival at the Sofia international airport and transfer to the Sheraton hotel

Sheraton Sofia Hotel Balkan
5, Sveta Nedelya Square
1000 Sofia, Bulgaria
theluxurycollection.com/sofia
Contact person: Ms Silva Hovsepian-Petkova (silva.petkova@sofiabalkan.net)
Phone (mobile): +359 899 900 268

Friday, 10 May 2013

10.00-11.00	PACE Ad hoc Committee meeting *Sheraton Hotel, Presidential Suite* • Briefing on the pre-electoral mission by Mr Andreas Gross, Head of the Delegation, and members of the pre-electoral mission • Recent developments in the field of election legislation of Bulgaria by Mr. Manuel González Oropeza, Member of the Venice Commission (Mexico) • Practical and logistical arrangements, Secretariat
14.00 – 18.00	**Joint meeting of international election observation delegations** ***Conference Room Anel, Hotel Anel, 14 Todor Alexandrov blvd. Sofia***
14.00-14.15	Opening remarks: • Mr Eoghan Murphy, Special Coordinator, Leader of the short term OSCE observer mission • Mr Roberto Battelli, Head of the OSCE PA delegation • Mr Andreas Gross, Head of PACE delegation
14.15-15.15	Meeting with Mr. Miklos Haraszti, Head of OSCE/ODIHR mission and members of his team
15.15-18.00	Meeting with the leaders and representatives of main political parties and coalitions PP GERB BSP

ANEXO: 4-1

Parliamentary Assembly
Assemblée parlementaire

http://assembly.coe.int

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

AS/BUR/BUL (2013) 01 REV6
25 April / avril 2013

AD HOC COMMITTEE FOR THE OBSERVATION OF THE EARLY PARLIAMENTARY ELECTIONS IN BULGARIA

COMMISSION AD HOC POUR L'OBSERVATION DES ELECTIONS LEGISLATIVES ANTICIPEES EN BULGARIE

12 May / mai 2013

List of members / Liste des membres

ANDREAS GROSS*, HEAD OF THE DELEGATION / CHEF DE LA DÉLÉGATION (SWITZERLAND / SUISSE, SOC)

GROUP OF THE EUROPEAN PEOPLE'S PARTY (EPP/CD)
GROUPE DU PARTI POPULAIRE EUROPEEN (PPE/DC)

VIOREL BADEA	ROMANIA / ROUMANIE
ŞABAN DIŞLI	TURKEY / TURQUIE
ALEKSANDAR NIKOLOSKI	"THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA / "EX-REPUBLIQUE YOUGOSLAVE DE MACEDOINE"
MARIETTA DE POURBAIX-LUNDIN*	SWEDEN / SUÈDE

SOCIALIST GROUP (SOC)
GROUPE SOCIALISTE (SOC)

LENNART AXELSSON	SWEDEN / SUÈDE
PAOLO CORSINI	ITALY / ITALIE
RENÉ ROUQUET	FRANCE
KOSTAS TRIANTAFYLLOS	GREECE / GRÈCE
DANA VAHALOVA	CZECH REPUBLIC / RÉPUBLIQUE TCHEQUE

EUROPEAN DEMOCRAT GROUP (EDG)
GROUPE DEMOCRATE EUROPEEN (GDE)

MEVLÜT ÇAVUŞOĞLU*	TURKEY / TURQUIE
GIACOMO STUCCHI	ITALY / ITALIE
ØYVIND VAKSDAL	NORWAY / NORVÈGE

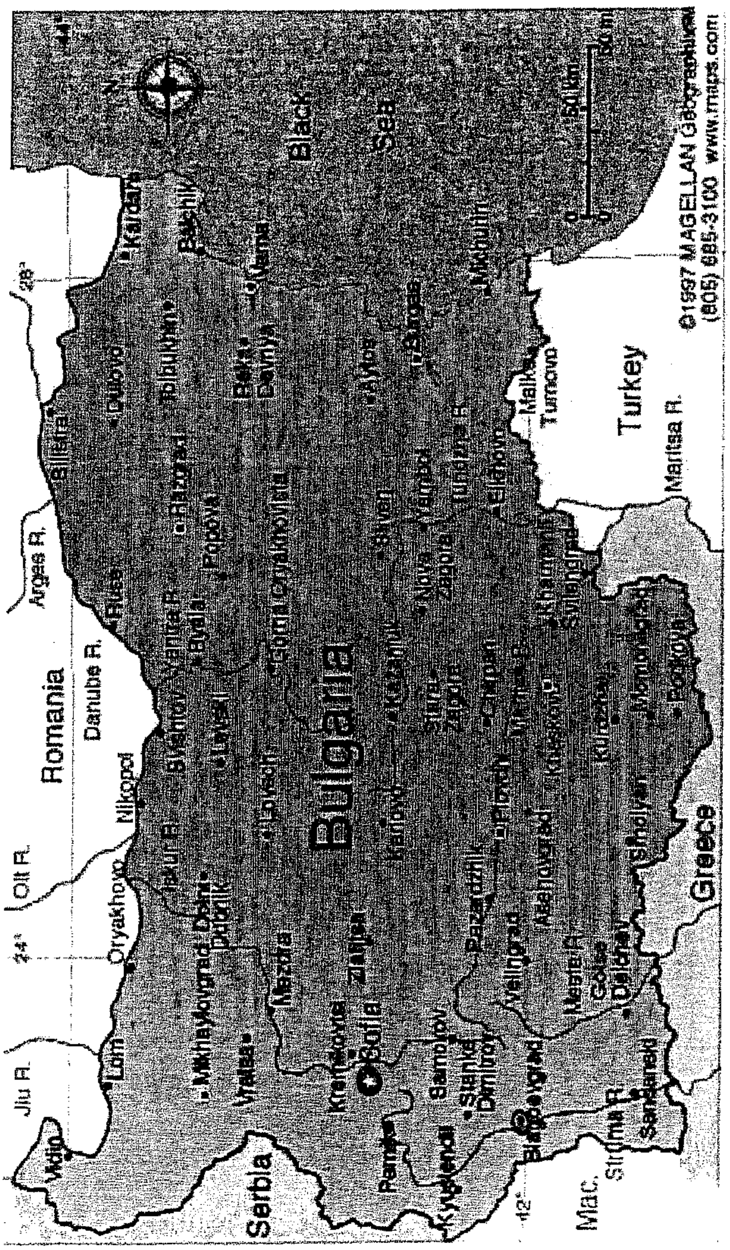
ALLIANCE OF LIBERALS AND DEMOCRATS FOR EUROPE (ALDE)
ALLIANCE DES DEMOCRATES ET DES LIBERAUX POUR L'EUROPE (ADLE)

ALFRED HEER	SWITZERLAND / SUISSE
TINATIN KHIDASHELI*	GEORGIA / GÉORGIE
ANDREA RIGONI	ITALY / ITALIE
IONUT STROE	ROMANIA / ROUMANIE

GROUP OF THE UNIFIED EUROPEAN LEFT (UEL)
GROUPE POUR LA GAUCHE UNITAIRE EUROPÉENNE (GUE)

NIKOLAJ VILLUMSEN*	DENMARK / DANEMARK

ANEXO: 4-2



ANEXO: 5-1

Приложение № 34

ЦЕНТРАЛНА ИЗБИРАТЕЛНА КОМИСИЯ

УДОСТОВЕРЕНИЕ

за наблюдател

№ 1-М-32 / 26.04.2013 г.

(по чл. 26, ал. 1, т. 26 и чл.101б във връзка с § 1, т.18, б. „а" от ДР на Изборния кодекс)

Централната избирателна комисия удостоверява, че с

Решение № 2482-НС / 26.04.2013 г.

МАНУЕЛ ГОНСАЛЕЗ ОРОПЕЗА

от Мексико

е регистриран(а) за наблюдател на изборите за народни представители на 12 май 2013 г.
в качеството на представител на:

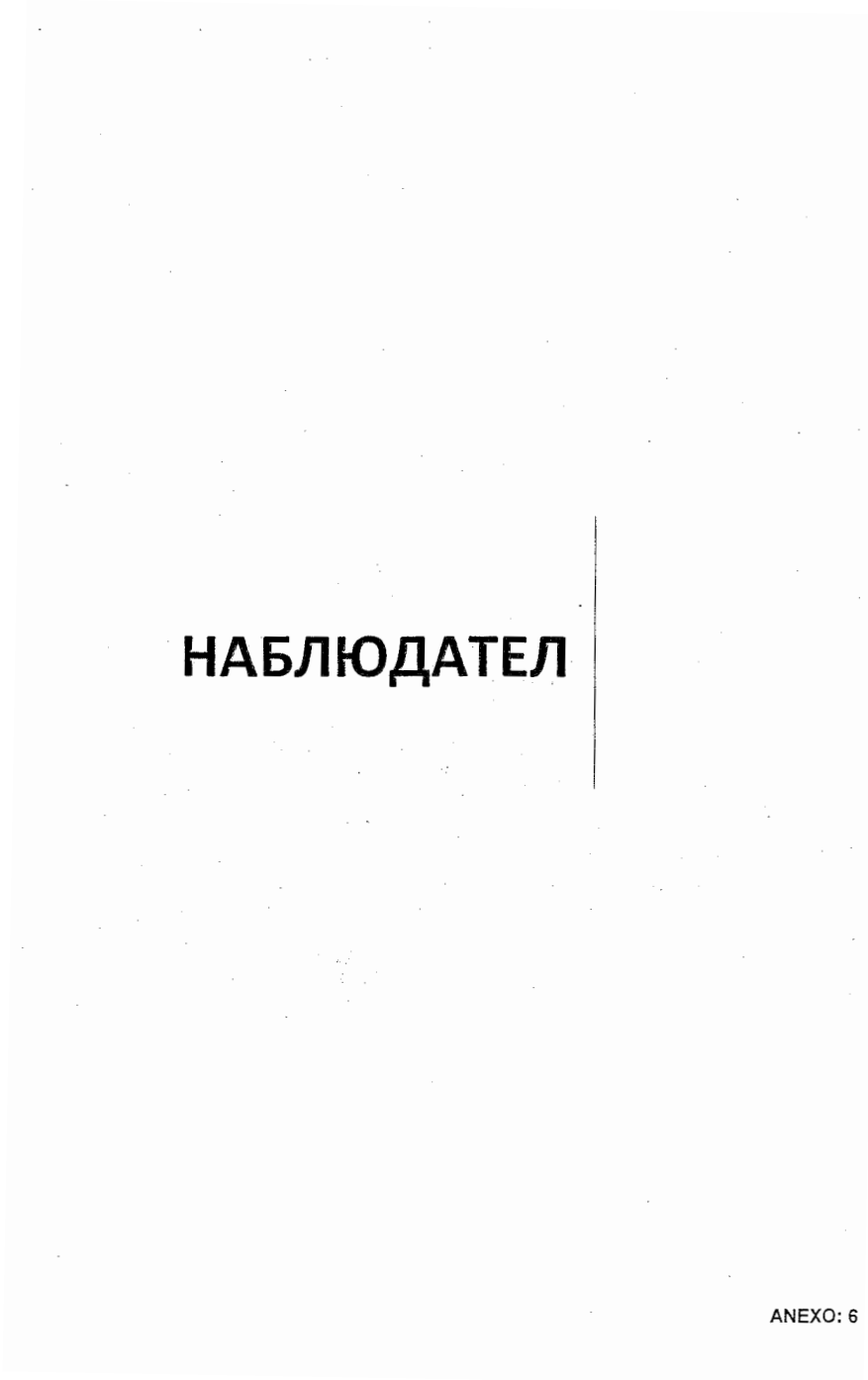
Парламентарната асамблея на Съвета на Европа (ПАСЕ)

26.04.2013

Председател:
Красимира Медарова

Секретар:
Севинч Солакова

ANEXO: 6



Strasbourg, 21 June 2011

Opinion No. 607 / 2011

CDL-AD(2011)013
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AND

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

JOINT OPINION ON THE ELECTION CODE OF BULGARIA

Adopted by the Council for Democratic Elections
at its 37th meeting
(Venice, 16 June 2011)
and by the Venice Commission
at its 87th plenary session
(Venice, 17-18 June 2011)

based on comments by
Mr Oliver KASK (Member, Estonia)
Mr Ugo MIFSUD BONNICI (Member, Malta)
Mr Kåre VOLLAN (Expert, Norway)
Mr Denis PETIT (Expert, OSCE/ODIHR)

This document will not be distributed at the meeting. Please bring this copy.
www.venice.coe.int

ANEXO: 7

Table of contents

I. Introduction

1. On 3 December 2010, the President of the Congress of Local and Regional Authorities of the Council of Europe ("the Congress") requested the Venice Commission to prepare an opinion on the Election Code of Bulgaria ("the Code").

2. This request followed a monitoring visit to Bulgaria by a delegation of the Congress from 24-26 November 2010. At the time of the request, the Election Code was still a draft. On 19 January 2011 the National Assembly of Bulgaria adopted the Election Code, which entered into force in January 2011.[1] The Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) decided to provide a joint legal opinion on the adopted Code.

3. The Election Code of Bulgaria is the first unified electoral legislation in Bulgaria, bringing together previous separate electoral laws. The Election Code supersedes the followings acts:

- Act on the Election of Members of Parliament (2001 and last amended in 2009);
- Act on the Election of President and Vice President of the Republic of Bulgaria (1991 and last amended in 2006);[2]
- Act on the Election of Members of the European Parliament from the Republic of Bulgaria (2007); and
- the Local Elections Act (1995).

4. The adoption of the unified Election Code of Bulgaria was preceded by a debate between the President and the National Assembly regarding certain provisions of the Code. In early January 2011, President Georgi Parvanov vetoed the Code adopted by the National Assembly. The Code was returned to Parliament for reconsideration of a wide range of its provisions. The presidential veto was eventually overridden by a "majority of more than half of all Members of the National Assembly".[3]

5. Among the reservations voiced by President Parvanov were the following: the 12-months residency requirement in order to participate in local elections; limitations on voting rights of citizens with dual citizenship, preventing certain parts of the population holding dual citizenship, particularly Bulgarians of Turkish ethnicity, from being eligible to stand as candidates; abolition of the direct election of district mayors; increased population threshold for the election of mayors of villages or "settlements"; and reduction of the number of municipal councillors.

6. Following its monitoring visit, the Congress raised the following concerns:

> "[...] the draft text introduces major changes regarding local elections which will henceforth take place only in the territory of the country. Active and passive electoral rights in the future will be limited by a residency requirement of 12 months. The mayor will still be elected under the majority system, while the municipal councillors under the proportional system, but the number of municipal councillors will be reduced by 20% according to the new thresholds defined by the different sizes of municipalities. A reduction in the number of political parties being represented at local

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1 Election Code of the Republic of Bulgaria in force as of 19 January 2011 (CDL-REF(2011)008).www.venice.coe.int/docs/2011/CDL-REF(2011)008-e.pdf.
2 www.legislationline.org/documents/action/popup/id/6202.
3 As required by Article 101(2) of the Constitution.

level is also expected along with further constraints for registration of political parties and coalitions.

Moreover, this draft bill introduces an increased population threshold to elect the mayors of mayoralties, which goes up from 150 to 500 inhabitants. It also limits the number of designated deputy mayors and as a consequence the powers of the mayors to determine their own internal administrative structures as stated in Article 6, paragraph 1 of the European Charter of Local Self-Government."[4]

7. This joint opinion is based on an English translation of the Code provided by the National Assembly of Bulgaria to the Venice Commission on 11 February 2011. The accuracy of the translation as well as of the numbering of articles, clauses, and sub-clauses cannot be guaranteed, and therefore the interpretation of the latter as reflected in the comments made hereafter may have been affected by inaccuracies in the translation.

8. On 12-13 May, the Venice Commission and OSCE/ODIHR conducted a joint expert visit to Sofia. They had meetings with the Speaker of the National Assembly, the Legal Affairs Committee of the National Assembly, the president and judges of the Constitutional Court, the chairperson and other members of the Central Election Commission, the National Association of Municipalities as well as representatives of the main political parties of the Republic of Bulgaria. The visit took place a few days after the Constitutional Court handed down its decision on a petition filed by opposition political parties.[5] The Court declared unconstitutional several provisions of the Election Code, which have been matters of discussion during the expert visit. The information and views shared with the delegation during and after the visit have been taken into consideration in this opinion.

9. Following the ruling of the Constitutional Court on 4 May 2011, the National Assembly of Bulgaria on 2 June adopted a series of amendments to the Election Code, some of which addressed OSCE/ODIHR and Venice Commission recommendations.

10. The recommendations and comments offered in this opinion are intended to assist the authorities in bringing the Election Code closer in line with OSCE commitments as well as Council of Europe and other international standards. The Venice Commission and OSCE/ODIHR remain committed to providing assistance to further improve the legal framework for elections in Bulgaria. It is important to note that the ultimate test for assessing compliance of the Election Code with international standards lies with its implementation, particularly the level of political will exhibited by state institutions and officials responsible for implementing the legislation.

11. In the course of drafting this opinion, due consideration was given to provisions of the Constitution of the Republic of Bulgaria[6] of relevance to electoral matters. Other legal acts, such as the Political Party Act[7] and the electoral laws repealed by the Code, have also been taken into consideration.[8] However, this joint opinion does not provide an analysis of the laws

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4. Congress of Local and Regional Authorities of the Council of Europe, Congress Monitoring visit to Bulgaria, Meetings in Sofia, Veliko Tarnovo, Pernik (24-26 November 2010):. https://wcd.coe.int/wcd/ViewDoc.jsp?id=1709041&Site=Congress.
5. Constitutional Court of Bulgaria, Decision no. 4/2011, 4 May 2011.
6. Promulgated, State Gazette No. 56/13.07.1991 (effective 13.07.1991), amended and supplemented, SG No. 85/26.09.2003, SG No. 18/25.02.2005, SG No. 27/31.03.2006, Decision No. 7 of the Constitutional Court of the Republic of Bulgaria of 13.09.2006 - SG No. 78/26.09.2006, SG No. 12/6.02.2007,www.vks.bg/english/vksen_p04_01.htm.
7. Political Party Act of the Republic of Bulgaria, as amended by State Gazette No. 6 2009,http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN016314.pdf, http://www.legislationline.org/documents/action/popup/id/15811.
8. *See* para. 3 of this joint opinion for details on these laws.

that are cross-referenced in the Code. More specifically, it does not include a review of the Criminal Code, the Political Party Act, the Administrative Violations and Sanctions Act, the Meetings, Rallies and Demonstrations Act, the Territorial Administration of the Republic of Bulgaria Act, the Local Self-Government and Local Administration Act, the Citizens' Direct Participation in Central Government and Local Self-Government Act, the Ministry of Interior Act, the Civil Registration Act, and the Constitutional Court Act.

The recommendations hereafter are based on international electoral standards and commitments as well as good practices for the conduct of democratic elections. Among the documents relied upon are the following:

- the 1990 OSCE Copenhagen Document;[9]
- OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulation;[10]
- Venice Commission documents:
  i. Code of Good Practice in Electoral Matters;[11]
  ii. Code of Good Practice in the field of Political Parties;[12]
- the Council of Europe European Charter on Local Self-Government;[13]
- Council of Europe Parliamentary Assembly ("the PACE") documents:
  i. Post-monitoring dialogue with Bulgaria, Report;[14]
  ii. Post-monitoring dialogue with Bulgaria, Resolution;[15]
  iii. Observation of the parliamentary elections in Bulgaria (5 July 2009) – Report;[16]
- OSCE/ODIHR election observation mission reports:
  i. OSCE/ODIHR Election Assessment Mission Report on the Presidential Election (22 and 29 October 2006);[17]
  ii. OSCE/ODIHR Limited Election Observation Mission Report on the Parliamentary Elections (5 July 2009).[18]

12. This opinion takes also into consideration standards and principles recognized by the United Nations Human Rights Committee and the European Court of Human Rights. Bulgaria has ratified both the International Covenant on Civil and Political Rights and the Optional

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9 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. Copenhagen, 29 June 1990. www.osce.org/odihr/elections/14304.

10 OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulation, adopted by the Venice Commission at its 84th session (Venice, 15-16 October 2010, CDL-AD(2010)024).

11 Venice Commission of the Council of Europe, Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002, CDL-AD(2002)023rev), www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.pdf.

12 Venice Commission of the Council of Europe, Code of Good Practice in the field of Political Parties, adopted by the Venice Commission at its 78th session (Venice, 13-14 March 2009, CDL-AD(2009)021). www.venice.coe.int/docs/2009/CDL-AD(2009)021-e.pdf.

13 Strasbourg, 15 October 1985, ETS 122. Ratified by Bulgaria on 10 May 1995, http://conventions.coe.int/treaty/en/Treaties/Html/122.htm.

14 Post-monitoring dialogue with Bulgaria, Report by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Rapporteur: Mr Serhiy HOLOVATY, Ukraine, Alliance of Liberals and Democrats for Europe (Doc. 12187, 29 March 2010). http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12187.htm.

15 Resolution 1730 (2010). Text adopted by the Assembly on 30 April 2010 (18th Sitting). http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1730.htm.

16 Council of Europe, Parliamentary Assembly, Observation of the parliamentary elections in Bulgaria (5 July 2009), Report of the ad hoc Committee of the Bureau of the Assembly. Rapporteur: Mr Tadeusz IWIŃSKI, Poland, Socialist Group (Doc. 12008, 16 September 2009). The 2006 Presidential election was not observed by the Parliamentary Assembly of the Council of Europe.http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC12008.pdf.

17 Published on 22 July 2007, www.osce.org/odihr/elections/bulgaria/24138.

18 Published on 30 September 2009, www.osce.org/odihr/elections/38934.

Protocol to the International Covenant on Civil and Political Rights as well as the European Convention on Human Rights.[19]

13. The present opinion was adopted by the Council for Democratic Elections at its 37th meeting (Venice, 16 June 2011) and by the Venice Commission at its 87th plenary session (Venice, 17-18 June 2011).

II. General Comments

14. The unified Election Code provides the regulatory framework for the conduct of all types of elections. It provides for direct election of members of the National Assembly, the President and Vice-President, the Bulgarian members of the European Parliament as well as municipal councillors and mayors.[20] Codification of the different laws regulating elections is a welcome step. It minimizes the risks of discrepancies and overlaps, facilitates the administration of elections and greatly contributes to a uniform application of the law. This was a recurrent recommendation made by OSCE/ODIHR in its election observation reports since 2006. This reform is regarded as an important step toward the consolidation of the legal framework regulating the conduct of democratic elections.[21] Nevertheless, further improvements are still possible. They do not necessarily involve major changes to the overall legal framework, rather adjustments or additions that may, however, prove decisive in addressing recommendations made by OSCE/ODIHR in connection with the 2009 parliamentary elections. The recommendations offered in this opinion should be given consideration as soon as possible so that they can be applied to the upcoming presidential and local elections. Not all of them may require amendments to the Code; they may be given effect through CEC instructions or other legal means. On the other hand, the Venice Commission and OSCE/ODIHR are fully aware that some of the recommendations made below would require amendments to the Constitution, which cannot be envisaged in the short term. They should however be examined and discussed with a view to a possible constitutional reform in the long term.

15. The Code provides that in parliamentary elections there are 31 multi-member constituencies for 240 seats of the National Assembly. The number of mandates in a multi-member constituency may not be less than four. In elections to the European Parliament, all members are elected from a single constituency. In municipal elections, municipal councillors are elected in a single constituency for the municipality. The electoral system for parliamentary elections is proportional (seats are allocated using the Hare-Niemeyer method) and a national threshold of 4 per cent of valid votes for political parties and coalitions is applied. Parliament is elected for four years. Political parties, coalitions and independent candidates may take part in the elections. They have to be registered with the electoral administration in order to be or to nominate candidates. In parliamentary, presidential and European Parliament elections, political parties have to collect 7,000 signatures in order to be registered with the Central Election Commission (CEC). Coalitions can only consist of political parties which have been registered by the CEC.

III. Right to Vote and be Elected

16. Article 42(1) of the Constitution grants the right to vote to Bulgarian citizens who are at least 18 years old, are not under a judicial interdiction and are not serving a prison sentence.

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19 The United Nations Human Rights Committee has adopted a General Comment (General Comment 25) interpreting the principles for democratic elections set forth in Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

20 Article 2(1) of the Code.

21 *See* the OSCE/ODIHR Election Assessment Mission Report on the 22 and 29 October 2006 Presidential Election (www.osce.org/odihr/elections/bulgaria/24138).

Article 65(1) of the Constitution grants the right to be elected to the National Assembly to Bulgarian citizens at least 21 years of age, who do not hold citizenship of another country, are not under a judicial interdiction and are not serving a prison sentence. Article 93(2) stipulates that any natural born Bulgarian citizen over 40 years of age, qualified to be elected to the National Assembly and who has resided in the country for the five years preceding the election can run for the presidency. In addition to the limitations spelled out in the Constitution, the Code foresees further limitations to electoral rights.

17. Both the Constitution and the Code restrict the right to vote for persons serving a custodial sentence. From clarifications obtained during the expert visit, it seems that '*custodial sentence*' applies to all persons in prison regardless of the severity of the sentence incurred. Article 45(2) however provides that detainees who are not subject to an "enforceable sentence" shall be placed on the electoral roll. Deprivation of voting rights should only be possible when a person has been convicted of a criminal offence of such a serious nature that forfeiture of suffrage rights may be considered proportionate to the crime committed.[22] Therefore, the OSCE/ODIHR and the Venice Commission recommend that this restriction be narrowly defined to apply only to persons convicted of a serious crime.

18. Bulgarian citizens holding the citizenship of another country cannot stand as candidates in parliamentary, presidential and municipal elections. While the prohibition of dual citizenship for parliamentary and presidential elections is spelled out in the Constitution, the same prohibition for municipal elections in the Election Code is not supported by the Constitution. In its Opinion on the Constitution of Bulgaria,[23] the Venice Commission did not comment on the limitation of the right to be elected for Bulgarian citizens who hold dual citizenship. Asked to examine the matter, the Constitutional Court ruled that the prohibition of dual citizenship for municipal elections was not contrary to the Constitution. While there is now growing consensus that recognition of dual citizenship is not a problem under international law and while there are more countries that have opted to accept it, no international treaty or instrument contains an obligation for States that prohibit dual citizenship to repeal such prohibitions. That said, the consequences attached to such prohibitions have come under closer scrutiny by international bodies as they may entail discrimination on the ground of nationality that may exceed what is permissible under relevant human rights instruments. In this context, while OSCE/ODIHR and Venice Commission are aware of the reservation made by Bulgaria to Article 17.1 of the European Convention on Nationality,[24] they would like to draw attention to the evolving jurisprudence of the European Court of Human Rights on matters of dual citizenship. In its judgement in the case *Tanase v. Moldova*,[25] the European Court of Human Rights has considered that the exclusion of citizens holding dual citizenship from eligibility to vote and to be elected is a disproportionate measure and thus contrary to Article 3 of the First Protocol of the European Convention on Human Rights. The reasoning followed by the Court could *mutatis mutandis* be applied to Bulgaria, and there is indeed a risk that the existing legal framework in Bulgaria

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22 See European Court of Human Rights, *Hirst (2) v. the United Kingdom*, judgment of 6 October 2005, Application no. 74025/01; *Frodl v.* Austria, judgment of 8 April 2010, Application no. 20201/04, paragraph 25; *Greens and M. T. v. the United Kingdom*, judgment of 23 November 2010, Applications nos. 60041/08 and 60054/08. *See* also the Code of Good Practice in Electoral Matters, I 1.1 d.

23 Venice Commission, Opinion on the Constitution of Bulgaria Adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008; CDL-AD(2008)009). www.venice.coe.int/docs/2008/CDL-AD(2008)009-e.pdf.

24 Council of Europe, European Convention on Nationality, Strasbourg, 6 November 1997, ETS no. 166, http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm, Article 17.1. "Under the terms of this reservation, the Republic of Bulgaria shall not apply in respect of the nationals of the Republic of Bulgaria in possession of another nationality and residing on its territory the rights and duties for which the Constitution and laws require only Bulgarian nationality."

25 European Court of Human Rights, *Tanase v. Moldova*, 27 April 2010, application no. 7/08.

be considered in contradiction to the European Convention on Human Rights if a case were filed to the Court on similar grounds.

19. With regard to the right of foreigners to vote in local elections, the Code limits this right to residents who are citizens of EU Member States. According to the Code of Good Practice in Electoral Matters, "it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence".[26] It may be worth considering extending the right to vote at municipal elections to foreign citizens other than citizens of EU Member States.[27]

20. The Code stipulates that the right to vote and be elected is also subject to residency requirements.[28] The principle of universal elections implies the right to vote and to stand in elections for all citizens, but these rights are not absolute and may be subject to reasonable restrictions that should, however, not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness. In principle, a length-of-residence requirement may be imposed on nationals for local and regional elections only, and the requisite period of residence should not exceed 6 months. A longer period may be required only to protect national minorities.[29]

21. Before the 2 June amendments, the required length of residence for candidates was 5 years in presidential elections, 2 years in any EU Member State for European Parliament elections and 12 months for municipal elections. In its decision of 4 May 2011, the Constitutional Court ruled that the 12-months residency requirement for municipal elections is in contradiction of the Constitution. Following that ruling, the National Assembly adopted amendments to lower the residency requirement for the right to stand for municipal elections from 12 to 6 months. For the upcoming 2011 municipal elections, the residency requirement for the right to stand will be reduced from 6 to 4 months. These are welcome amendments.

22. In its decision of 4 May 2011, the Constitutional Court ruled that the 12-months residency requirement to vote in municipal elections was in contradiction of the Constitution. Following 2 June amendments, the National Assembly decreased the residency requirement for the right to vote in municipal elections for both citizens from Bulgaria and the European Union from 12 to 6 months. For the 2011 municipal elections, this requirement was reduced from 10 to 4 months. These amendments are welcome.

23. Regarding the right to stand for European Parliament elections, a European Union directive provides that voting rights may be conditioned by length of residence – as is the case in other EU Member States – as far as the conditions applying to citizens of another EU Member State, including those related to the period and proof of residence, are identical to those applying to Bulgarian citizens.[30] This condition is met in the Code, which imposes the same length of residence for citizens of other EU Member States and Bulgarian citizens. Nevertheless, requiring a 2-year residence in Bulgaria or in any other EU Member State from

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26 Code of Good Practice in Electoral Matters, I 1.1 b. Same reference is included in the Explanatory Report of the Code of Good Practice: "Furthermore, under the European Convention on Nationality persons holding dual nationality must have the same electoral rights as other nationals."

27 See the Convention on the Participation of Foreigners in Public Life at Local Level (ETS No.: 144)

28 Articles 3, 4, 53, 60-64 of the Code. Moreover, in the Supplementary Provisions, the Code defines a Bulgarian citizen who has resided in Bulgaria during the last five years as "any such citizen who had actual residence and permanent abode within the territory of Bulgaria during more than half of the time of each of the five years preceding the date of the election" (Supplementary Provisions, paragraph 1.1).

29 Code of Good Practice in Electoral Matters, I 1.1 c iii-iv: *iii. a length of residence requirement may be imposed on nationals solely for local or regional elections;* iv. the requisite period of residence should not exceed six months; a longer period may be required only to protect national minorities.

30 Council Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, Articles 4 and 13.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0109:EN:HTML.

citizens of Bulgaria or other EU Member States significantly deviates from the standards applied in other EU Member States. The National Assembly decreased the length of the residency requirement to stand for European Parliament elections from 2 years to 6 months. This amendment is welcome.

24. There are concerns that the provisions of the Code on the compilation of voter lists for local elections may result in impediments to the right to vote for voters in health care facilities[31] as well as voters detained "without an enforceable court sentence".[32] In such instances, voters are not allowed to vote at the hospitals, health care facilities or detention centres if their habitual residence in the constituency where these facilities are located has been less than 12 months. It is not clear what impact such a condition may have on voting rights as it obviously depends on whether people frequently undergo medical treatment or are placed in a detention centre not located in the constituency where they have their habitual residence. The situation is particularly problematic for voters in detention centres, as they do not themselves decide where they will be placed. It may be advisable to reconsider the 12-month provision and reduce it based on an assessment of the impact of such a measure. On another but related note, it may be worth specifying in Article 45(3) that voter lists at detention centres should be closed 48 hours before election day, as is the case for voter lists at health care facilities.[33]

IV. Election Administration

25. The elections are administered by a three-tiered administration composed of:
   a. the Central Election Commission;
   b. constituency or municipal election commissions; and
   c. section election commissions.[34]

26. The 19 members of the CEC are appointed by decree of the President for a term of five years after consultations and "*on a proposal by the parties and coalitions of parties represented in Parliament and by the parties and coalitions of parties which have Members of the European Parliament but are not represented in Parliament*".[35] It is important that the establishment of the CEC as a permanent body, a long-standing OSCE/ODIHR and Venice Commission recommendation, be confirmed in the Code.

27. Article 23(7) indicates that upon "appointment of the complement of the Central Election Commission, the proportion of the parties and coalitions of parties represented in Parliament shall be retained". While the first sentence of the same article stipulates that the 19 CEC members nominated by parties and coalitions represented in parliament must include the chairperson and the deputy chairpersons nominated by each party or coalition of parties represented in parliament, it is not clear whether the calculation made for determining the share of each party or coalition of parties include the chairperson and the deputy chairpersons. It is recommended that this provision be clarified so that the calculation made for determining the share of each party and coalition of parties includes the chairperson and the deputy chairperson.

28. The Code should ensure a balance of political parties in the appointment of chairpersons and secretaries at all levels of election commission.[36] Furthermore, it is essential that

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31 Article 42(2) of the Code.
32 Article 45(2) of the Code.
33 Article 42(3) of the Code.
34 Articles 14-15 of the Code.
35 Article 23(1) of the Code.
36 OSCE/ODIHR Limited Election Observation Mission Report on the Parliamentary Elections (5 July 2009) Section on Recommendations, page 23.

opposition parties be included in these leadership positions at all levels of the election administration. An allocation of leadership positions among political parties with no consideration given to whether they belong to the ruling coalition may not be sufficient to dismiss perceptions of possible bias.

29. According to the Code of Good Practice in Electoral Matters, the CEC should include "at least one member of the judiciary" or a law officer.[37] During the expert visit, it was confirmed to the Venice Commission and OSCE/ODIHR that three members of the recently appointed CEC are former members of the judiciary. This is a welcome step. As the legal capacity of lower election commissions would also need to be strengthened, it is recommended that Article 16(4) of the Code which recommends that members of the CEC as well as of constituency and municipal election commissions "be qualified lawyers" be implemented in practice.

30. According to Article 20(2), decisions in election commissions are made by a two-thirds majority. As a matter of good practice, it is recommended that electoral commissions take decisions by a qualified majority or by consensus.[38] With members of electoral commissions being appointed by political parties, there is a risk of polarization, if not politicization of discussions in election commission with a possibility that key decisions may be blocked. It is recommended that the two-thirds majority rule be reassessed in light of the experience gained in the next elections.

31. The Code provides that the credentials of members of all electoral bodies may be terminated at the request of the nominating party or coalition of parties.[39] The Code of Good Practice in Electoral Matters underlines that the bodies appointing members of election commissions should not be free to dismiss them at will, as this casts doubt on their independence.[40] The discretion given to political parties to request that members nominated by them be recalled is compounded by the fact that they may be recalled at any time, since the Code does not provide any time-limit for the termination of the mandate.[41] A system where members of election commissions can be dismissed upon request and at any time by the political parties who appoint them is likely to be perceived as not fulfilling the requirement of independence and neutrality. The Constitutional Court held these provisions unconstitutional on the ground that they would seriously undermine the independence of the election administration. Thus these provisions are repealed, which is welcome.

V. Political Party Registration

A. Signatures and deposits

32. For political parties and independent candidates to have access to the ballot, the Code requires the payment of a monetary deposit and the collection of supporting signatures. These requirements are different depending on the type of election and on whether they apply to political parties or independent candidates. The requirements are summarized in the tables below:

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37 Code of Good Practice in Electoral Matters, II 3.1 d i.
38 Code of Good Practice in Electoral Matters, II 3.1 h.
39 Articles 25(1)6; 26(1)6; 29(1)3; 30(10); 34(3) and 37(12).
40 Code of Good Practice in Electoral Matters, II 3.1 f.
41 Furthermore, the CEC decision to recall a member can be appealed before the Supreme Administrative Court. It is not clear what the Court would be asked to consider in cases where the ground for dismissal is a request by the nominating party. The Code does not require that the request in question be motivated. Therefore, the Court's assessment may be limited to acknowledging the request and confirming the dismissal.

Deposits required (in BGN)

	Parties and party coalitions	Independent candidate nomination committees
Type of election		
- National representatives - President, Vice President - European Parliament	10 000[42]	10 000

Signatures required

	Parties and parties coalitions	Independent candidate nomination committees
Type of election		
- National representatives	7 000	Not less than 3 per cent but no more than 5 000 voters (from within the relevant constituency)
- President, Vice President - European Parliament	7 000	7 000
- Municipal elections	7 000	No less than 1 per cent for municipal councillors No less than 2 per cent for mayors (from within the relevant constituency) One-fifth of the voters for elections of "mayoralty majors" but no more than 500 voters

33. In the last parliamentary elections, applications required 15,000 and 20,000 supporting signatures and a 50,000 BGN and 100,000 BGN deposit for parties and coalitions respectively. The Code now requires a 10,000 BGN deposit from political parties and coalitions of parties for presidential, parliamentary and European Parliament elections and 7,000 signatures in support of their applications.[43] Under the previous legislation, independent candidates were required to pay a deposit of 15,000 BGN and support their applications with at least 10,000 signatures of voters with a permanent address in the particular constituency. Under the Code, they are required to collect as many signatures as political parties and coalitions of parties for parliamentary, presidential and European Parliament elections and to pay a smaller deposit than political parties and coalitions of parties (see the table above) for parliamentary and municipal elections, but the same amount for presidential elections. The changes made in the Code are positive. They strike the right balance between the legitimate goal of discouraging frivolous candidacies and the obligation not to prevent legitimate political parties and independent candidates from obtaining ballot access.

34. A concern remains however with regard to the fact that while political parties and coalitions of parties may compete in parliamentary elections based on applications supported by 7,000 signatures of voters residing anywhere in the country, independent candidates in parliamentary elections must collect signatures of 3 per cent of voters residing in the respective constituencies only but no more than 5,000 signatures.[44] This may need to be reconsidered as it constitutes a comparatively high barrier for independent candidacies.

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[42] 10,000 BGN equals about 5,100 EUR. As of 25 May 2011, 1 EUR equals to 1.95 BGN.
[43] Articles 78 and 79(1) of the Code.
[44] Code of Good Practice in Electoral Matters, I 1.3 ii.: "The law should not require collection of the signatures of more than 1% of voters in the constituency concerned".

B. Registration

35. Article 26(1)12 stipulates that "[the] Central Election Commission shall: [...] refuse registration of a party where establishing that the said party has not held the meetings of the supreme body thereof as provided for in the statute more than two successive times but not less frequently than once in five years, and has not submitted the complement of the new leadership to the court for recording...". As a rule, bodies in charge of organizing and conducting the electoral process should not be granted powers over party activities that exceed what may be necessary to ensure the integrity of the process. It is not clear why the CEC would need to interfere with matters that may be reasonably perceived as internal party matters and should only come to the attention of State authorities or other entities such as the CEC in exceptional circumstances. Furthermore, while States may require political parties to meet certain obligations to be placed on a ballot in elections, the system for ballot access should not add requirements directly not connected to the elections to those requirements political parties already had to fulfil in order to get registered. Most importantly, the system for ballot access should not discriminate against new parties. Therefore, it is recommended that this provision be repealed or amended so that it does not discriminate against new parties.

36. The refusal of registration of political parties or coalitions of parties may be appealed to the Supreme Administrative Court.[45] In case the Court overrules the non-registration decision of the CEC, the political party or the coalition has to be registered, but not later than 50 days (for presidential, parliamentary and European Parliament elections) or 65 (for municipal elections) before election day. There seems to be a contradiction between Article 26(8), which specifies that CEC decisions cannot be appealed and Articles 83(3) and 90(3), which indicate that a CEC decision on party registration may be appealed to the Supreme Administrative Court. Also, these rules seem to imply that a party or a coalition of parties may be denied registration if the Court does not respect the time-limits laid down in the Code. If the court decision was made within 50 or 65 days (depending on the type of elections) before election day, registration would no longer be possible, and the party or coalition in question would be *de facto* denied registration. This situation may not occur very often; however, there ought to be safeguards for applicants that registration cannot be denied on grounds that have no connection with the failure of applicants to meet the criteria set out in the law. In this spirit, it would be important that deadlines for notifying denials of registration to the parties concerned be specified in Articles 83(5) and 84(7) and 90(5).

VI. Political Party and Campaign Financing

37. The Code provides detailed provisions on election campaign financing.[46] Among the measures laid down in Section VI of Chapter VIII are the imposition of expenditure limits upon political parties and independent candidates (that differ depending on the type of elections), an obligation to keep records of all direct and in-kind contributions given to political parties as well as strict reporting requirements, with an indication of time-limits for submission of financial reports and sanctions for non-compliance with this requirement. These measures provide a sound basis for a transparent election campaign financing system. Enforcement mechanisms may, however, need to be strengthened. As noted by the Council of Europe's Committee of Ministers, political parties should be subject to "effective, proportionate and dissuasive sanctions."[47] It does appear that the sanctions provided in Article 289 may not be proportionate to breaches of the requirements regarding financing of

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45 Articles 83(3) and 90(3) of the Code.
46 Section VI of Chapter VIII of the Code.
47 Recommendation REC(2003)4 of the Committee of Ministers to Member States on common rules against corruption in the funding of political parties and electoral campaigns, article 16.

the election campaign and therefore not dissuasive enough.[48] That said, the Venice Commission and OSCE/ODIHR are not in a position to further comment on these provisions as they would need to be read and analyzed in conjunction with those of the Political Party Act. It remains to be seen how these arrangements will be enforced in practice. Their efficiency to a large extent depends on the scope of verification and investigation powers assigned to the National Audit body.

38. The Final and Transitional Provisions of the Code contain amendments to the Political Party Act concerning the rules on donations for the purpose of election campaigning. This law has not been assessed by the Venice Commission and OSCE/ODIHR. Nevertheless, both institutions express concerns regarding these amendments since they seem to restrict conditions of donations.[49] This should be carefully considered. This new provision will have to be assessed in light of the upcoming elections.

VII. Voter Lists and Voters' Registration

39. The voter lists are compiled by municipal administrations.[50] Additionally, it is stipulated that "[the] voter lists [...] shall be printed out on the basis of the National Population Register by the Directorate General of Civil Registration and Administrative Services at the Ministry of Regional Development and Public Works".[51] During the expert visit, OSCE/ODIHR and Venice Commission experts were informed that a national census has been completed two months ago. According to this census, Bulgaria has 7,380,000 citizens out of which the voting-age population accounts for approximately 6,800,000. These numbers have been communicated verbally to OSCE/ODIHR and Venice Commission experts at a meeting with the CEC, but would need to be checked for their accuracy. If they were confirmed, there would be grounds for concern. The OSCE/ODIHR Limited Election Observation Mission Report for the 2009 Parliamentary Elections refers to 6,884,271 registered voters to be compared with an estimated population of 7.6 million.[52] On voter lists issues, a census can be no more than indicative, revealing a trend rather than providing an accurate picture. Having said that, the unrealistic ratio between the number of inhabitants and the voting-age population shown by this census points to a need to ensure that the process through which voter lists are established be consolidated.

40. There will be a supplementary voter list in the polling stations where voters who are not in the voter lists may be entered if they are allowed to vote. Articles 47 and 197(6) seem to allow any voter with a permanent address in the precinct to be added to the list during election day. Other articles, however, are more restrictive, allowing only election staff, students with certain documents, persons with disabilities needing special assistance, citizen of another EU country wishing to vote in the European Parliament elections or local elections and who have sent in a form before the elections. A very extensive use of supplementary lists may raise questions of possibilities for multiple voting and should only be used for good reasons. It should, therefore, be made clear in Article 47 that the supplementary lists are restricted to those groups which are defined in subsequent articles and is not open to anyone who is not on the voter lists. If that is not done, the set of documentation needed to be registered on election day must be clearly defined.

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48 *See* OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulation (CDL-AD(2010)024, October 2010).

49 Paragraph 20 of the Transitional and Final Provisions of the Code, referring to change of Article 24 of the Political Parties Act.

50 Article 40(1) of the Code.

51 Article 52(4) of the Code.

52 OSCE/ODIHR Limited Election Observation Mission Report on Parliamentary Elections (5 July 2009), Section on Election Administration, page 9.

VIII. Campaign

41. Article 134(2) stipulates that campaign material shall contain a warning against vote buying covering at least ten percent of the 'face space' of the material. This requirement can only be effective if the term 'campaign material' is clearly defined in the Code. It probably means leaflets and posters, and not other types of publications or internet pages. This would need to be clarified in the Code.

IX. Media

42. OSCE/ODIHR recommended that "the Election Law could be amended to provide for the requirement for the Council for Electronic Media (CEM), in co-operation with the CEC, to monitor the implementation of media-related provisions of the Election and Broadcasting Laws and to take prompt and effective action against violations, including identification of any inequitable and preferential news coverage of candidates and parties."[53] This recommendation is still valid.

43. The OSCE/ODIHR Limited Election Observation Mission for the 2009 parliamentary elections expressed concern in its final report that there was no provision for free airtime, and contestants had to pay for almost all campaign programmes on public broadcasters, including debates. Although the prices adopted by the public broadcaster were equal for all, some political parties complained that the prices were rather high, especially when they had to pay for all election-related coverage. It may be worth reviewing the policy of requiring candidates to pay for almost all campaign-related appearances as this may limit the public's access to information and candidates' ability to convey their messages.

X. Voting Process

44. Following recommendations from the OSCE/ODIHR election observation mission for the 2006 presidential election,[54] envelopes have been introduced to enhance the secrecy of the vote.[55] This is a welcome step.

45. After the ballot paper and envelope have been collected by the voter and until it has been dropped in the ballot box, they should not be touched by anyone else than the voter. According to the Code, the ballot for presidential and municipal elections should be stamped before the voter enters into the booth and a second time before the voter casts the ballot into the box. During the expert visit, OSCE/ODIHR and Venice Commission experts raised this issue. The explanation provided in support of this measure was that it was aimed at ensuring that the ballot paper and envelope had not been brought from outside the polling station, which was viewed as an additional safeguard against vote buying. It is not clear though how stamping the ballot paper twice (before and after voting) could serve that purpose. This procedure may risk infringing the principle of secrecy of the vote.[56] It is therefore recommended that it be reconsidered or adjusted so that the principle of secrecy of the vote is upheld.

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53 OSCE/ODIHR Limited Election Observation Mission Report on the Parliamentary Elections (5 July 2009), Section on Recommendations, page 24.

54 OSCE/ODIHR Election Assessment Mission Report on the Presidential Election (22 and 29 October 2006), Section on Election Management and Administration, page 10..

55 Articles 165 and 169 of the Code.

56 According to Paragraph 7.4 of Copenhagen Document OSCE participating States should "ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public". See also Code of Good Practice in Electoral Matters, I 3.2.2, § 34.

46. The Code introduces new provisions according to which voters would have to place an X-mark in the box of the candidate they voted for. During the expert visit, several interlocutors of the OSCE/ODIHR and Venice Commission experts, particularly among political parties, voiced concern about the risk that voters may get confused with the new rule and that many ballots may thus be declared invalid. To minimize this risk, it is recommended that measures are taken by the CEC to effectively inform voters about the new rules, i.e. by conducting a voter education campaign targeting voters and poll workers.

47. The Code provides voting by means of mobile ballot boxes.[57] Article 176 refers to "voters with permanent disabilities which prevent them from exercising their franchise in the polling site" but does not clarify whether there may be other grounds for voters to request the use of mobile ballot boxes. As the law does not exhaustively specify the categories of voters who may request mobile voting, there is a risk that this procedure may be abused. In line with good electoral practice, it is recommended that Article 176 indicates explicitly that mobile voting is for the exclusive use of voters with permanent disabilities.[58]

48. There were concerns raised by the PACE Ad Hoc Committee in 2009 as well as by OSCE/ODIHR Limited Election Observation Mission for the 2009 presidential election about instances of vote buying and intimidation.[59] In addition to Article 180 of the Code, which prohibits the display of the voters' choice, a new provision in the Code bans "[the] use of mobile telephones, still cameras or other image reproducing equipment for the purpose of recording the voting choice...".[60] This constitutes an improvement. However, the enforcement of these measures requires a consistent approach to sanctioning violations of this provision. It is not clear how Article 294 of the Code, which provides for a fine of 1,000 BGN for violation of the above-mentioned provisions, relates to Article 167 of the Criminal Code, which provides for sentences of up to 6 years imprisonment, fines of up to 20,000 BGN and possible deprivation of the right to hold certain state and public positions. Furthermore, while the specific measures foreseen in the Code are welcome,[61] it is also advisable to organize training for poll workers and a public awareness campaign for voters.

XI. Internet Voting

49. Paragraph 11 of the transitional provisions of the draft Election Code provides for testing of voting via the Internet for five polling stations within and five sections outside Bulgaria during the upcoming presidential elections. While remote voting via the Internet and other forms of electronic voting are generally considered compatible with the standards of the Council of Europe, this compatibility largely depends on whether adequate technical security has been provided and social conditions in the country have been taken into account.[62] As electronic voting via the Internet is an alternative voting channel to paper-based voting, its legal basis has to be drafted in an equally detailed and accountable manner.[63] The Code

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57 Article 205 of the Code.
58 Code of Good Practice in Electoral Matters, I 3.2.2.1, §§ 39 & 40.
59 See OSCE/ODIHR Limited Election Observation Mission Report on the Parliamentary Elections (5 July 2009), Section on Legal Framework and Electoral System, page 6 and Section on Complaints and Appeals, page 17 and Observation of the parliamentary elections in Bulgaria (5 July 2009), Report of the Ad Hoc Committee of the Bureau of the Assembly, paragraph 42.
60 Article 181 (1) of the Code.
61 See for instance Article 134 (2), which stipulates that campaign materials should contain a statement that vote-buying is a criminal offence.
62 See the Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004); CDL-AD(2004)012), in particular paragraph 56.
63 For guidance on regulating electronic voting see Council of Europe Committee of Ministers' Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting, Strasbourg, https://wcd.coe.int/wcd/ViewDoc.jsp?id=778189, as well as the recently published Guidelines of the Committee of Ministers of the Council of Europe on certification of e-voting systems

does not sufficiently describe the voting process, the setup, the testing, and the opening and closing of electronic voting via the Internet nor does it provide for data destruction or how observation of these procedures will be enabled. Including five polling stations outside Bulgaria adds considerable complexity to the project, as they include voters with voting rights from more than one constituency. This is not only organisationally challenging, but also challenges the secrecy of the vote in cases where only few votes are received for a specific constituency. The Constitutional Court declared that the provisions on Internet voting contradict the Constitution, thus provisions of paragraph 11 of the transitional provisions of the Code do not apply. Following the Constitutional Court decision, on the 2 June, the National Assembly also repealed paragraph 14 (2) of the transitional provisions that required the CEC to adopt a procedure for the experimental electronic voting via the Internet for the 2011 presidential election. These are welcome changes.

XII. Counting Process

50. The Code provides a list of reasons to validate or invalidate ballot papers. Conditions for the validity of ballot papers are quite restrictive.[64] Good practice suggests that if the voter's choice is clear despite violating the exact voting procedure (no blue ink for instance) or if there are no signs or symbols identifying the voter, the vote should be taken into account as a valid vote.[65]

51. Articles 216(5), 223(2) and 227(2) state that the number of voters who have voted shall equal the number of envelopes and ballots found in the box. This requirement should rather be part of an explicit reconciliation process so that commission members do not think that such numbers are simply entered into the tally sheets. The reconciliation should be done after filling in all figures. If they do not tally, the commission may be required to recount ballots, and if it still does not tally, to enter the discrepancies into the protocol with a comment.

52. The transitional and final provisions of the Code stipulate that a counting commission will be set up in 2011 for the next elections on an experimental basis.[66] If the intention is to prevent manipulations and enhance the integrity of the process, it is certainly laudable. However, establishing a separate commission to perform the counting could prove problematic in practice. Several constraints must be taken into consideration. First, the count must take place immediately after the vote has been completed in order to ensure transparency of the process and to minimize the risk of manipulations, as it is recommended by the Code of Good Practice in Electoral Matters.[67] Second, there are obvious safety risks for the electoral material if it has to be transported elsewhere to process the count. Considering that transportation is foreseen to take place under the responsibility of the Ministry of Interior, it may affect public trust in the process. If this measure is to be implemented, it is recommended that it be complemented with specific arrangements addressing the above-mentioned concerns.

53. The OSCE/ODIHR Limited Election Observation Mission Report on the 2009 parliamentary elections recommended that the legislation should be amended to

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(2011), and Guidelines of the Committee of Ministers of the Council of Europe on transparency of e-enabled elections (2011) www.coe.int/t/dgap/democracy/Activities/GGIS/E-voting/E-voting%202010/Biennial_Nov_meeting/Guidelines_transparency_EN.pdf.

64 Article 198(3)2 and (4), Article 216(4)2 and 3, Article 221(4)5 and 6 and Article 225(4)5 and 6 of the Code.

65 Code of Good Practice in Electoral Matters, I 3.1.

66 Transitional and Final Provisions of the Code, §§ 12 and 12(8).

67 Code of Good Practice in Electoral Matters, I 3.2.2.4, § 45.

foresee recounting of votes.[68] The same concern was raised by the PACE Ad Hoc Committee, in particular with the introduction of a majoritarian component shortly before the 2009 parliamentary elections.[69] This recommendation was not addressed.

XIII. Complaints and Appeals Procedures

54. There is a dual system of complaints and appeals: decisions and actions of election commissions may be challenged in the higher election commissions, whereas all other complaints are adjudicated by courts.

A. Complaints against Election Commissions' Decisions and Actions

55. The lack of possibility for judicial review for a number of decisions of the election management bodies appears problematic. The 1990 OSCE Copenhagen Document underlines that "everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity." The Code of Good Practice in Electoral Matters underlines that the judicial supervision should at least apply to decisions on "right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding."[70] It is therefore recommended that a final appeal to a court be made available more broadly.

56. In connection with the 2009 parliamentary elections, concerns were expressed by both OSCE/ODIHR and the PACE Ad Hoc Committee with regard to the lack of written procedural rules concerning the review of complaints and appeals lodged with the CEC.[71] The criteria upon which the CEC based its decision of what constituted a complaint were unclear, as was the appropriate form of its decisions. It is recommended that the Code explicitly require that the CEC adopts procedural rules for its decisions in writing as well as for those applying to lower election commissions. All election commissions should be required to issue written decisions and duly argue all their decisions. The format of decisions should also be standardized. This should apply to all decisions, whether or not they can currently be appealed to the Supreme Administrative Court.

B. Contesting Election Results

57. According to Articles 264(1), 265(1) and 267(1) of the Code, election results may be challenged either before the Constitutional Court (for national or European elections) or the relevant administrative court (for municipal elections). With regard to national and European elections, Article 150(1) of the Constitution confers the right to initiate proceedings before the

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68 OSCE/ODIHR Limited Election Observation Mission Report on Parliamentary elections (5 July 2009), Section on Recommendations, page 22. .

69 Observation of the parliamentary elections in Bulgaria (5 July 2009), Report of the ad hoc Committee of the Bureau of the Assembly, § 16.

70 See 1990 OSCE Copenhagen Document, para. 5.10 and comment 32, para 18 of International Covenant on Civil and Political Rights: "whenever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence." Furthermore, Paragraph 18 of the 1991 OSCE Moscow Document provides that "to the same end, there will be effective means of redress against administrative regulations for individuals affected thereby." See also Code of Good Practice in Electoral Matters, II 3.3 a and para. 92-93. Moreover, "it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second."

71 See OSCE/ODIHR Limited Election Observation Mission Final Report on Parliamentary elections (5 July 2009), Section on Complaints and Appeals, pages 16-17 and Council of Europe, Parliamentary Assembly, Observation of the parliamentary elections in Bulgaria (5 July 2009), Report of the ad hoc Committee of the Bureau of the Assembly. Rapporteur: Mr Tadeusz IWIŃSKI, Poland, Socialist Group (Doc. 12008, 16 September 2009).

Constitutional Court upon a few institutions.[72] In order to challenge election results, a political party, a coalition or a candidate must approach one of these institutions within 7 days of the CEC's decision validating the results; they then have 15 days to file a petition with the Constitutional Court. This means that there is no effective judicial procedure for challenging election results. In June 2009, the European Court of Human Rights concluded that similar provisions laid down in the then applicable Parliamentary Election Law did not provide for effective remedy due to the limited category of persons and bodies which may refer a case to the Constitutional Court.[73] The above-mentioned articles should be amended accordingly so that the Code provides effective remedies for challenging election results.

58. Furthermore, the Code does not allow election results to be disputed by voters but only by political parties, coalitions and candidates (through the institutions listed under Article 150(1) of the Constitution). These restrictions are not in accordance with good electoral practice. All candidates and voters registered in the constituency concerned must be entitled to contest the election results.[74] The right to vote is as important in a democratic state as the right to be elected. Allowing a wide range of persons to appeal decisions concerning elections protects the legality of the elections. As it is possible to consider similar appeals together, the workload of courts after elections should not be affected. The Venice Commission explained in its Report on the Cancellation of Election Results that "[...] [in] case the elections are carried out unlawfully the individual constitutional right to vote or to be elected is violated. Such right should be protected by individual complaint, though it might not always lead to the cancellation of election results. The cancellation of election results is not necessary if the violations of electoral law are at small scale and do not influence the electoral results [...]."[75]

C. Time-limits

59. In many cases, the Code provides for very short time-limits for appeals. This is the case especially for disputes concerning registration of parties and coalitions and their candidates where the appeal shall be brought before the competent court no later than 24 hours after the CEC decision has been issued.[76] It is important to avoid lengthy disputes on such sensitive matters; however, parties concerned should have access to effective remedy. Within the extremely short timeframe stipulated in the Code it might prove difficult for the appellants to bring forward all the relevant arguments in support of their case. The Code of Good Practice in Electoral Matters calls for a time-limit from three to five days.[77] The same comment also applies to the timeframe for deciding on the case, which is also 24 hours and may not be sufficient to allow for the case to be considered thoroughly.[78]

60. According to Article 93(6) of the Constitution, the Constitutional Court shall rule upon any challenge of the legality of a presidential election no later than one month after the election. Article 264 does not provide any time-limit for the decision-making in the Constitutional Court

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72 One-fifth of the parliament, the President, the Council of Ministers, the Supreme Court of Appeals, the Supreme Administrative Court and the General Prosecutor.

73 European Court of Human Rights, First Section, *Petkov and others v. Bulgaria*, 11 June 2009.

74 Code of Good Practice in Electoral Matters, II 3.3 f, Explanatory Report, paragraph 99, 3rd sentence: "A reasonable quorum may, however, be imposed for appeals by voters on the results of elections", that is to say that appeals will be admissible only if made by a minimum number of voters. See also OSCE/ODIHR Guidelines for Reviewing a Legal Framework for Elections, http://www.osce.org/odihr/elections/13960.

75 Report on the Cancellation of Election Results (CDL-AD(2009)054), IV B 2, § 49.

76 Articles 26(8), 83(3) and (5), 107(8), 110(3), 112(6), 113(5), 115(3), 117(4), 119(8), 120(3), 122(9) and 125(7) of the Code.

77 Code of Good Practice in Electoral Matters, II 3.3 g.

78 OSCE/ODIHR Limited Election Observation Mission Report on Parliamentary Elections (5 July 2009), Section on Complaints and Appeals, pages 16-17.

for other elections. For local elections, the time-limits for deciding on the appeals are long.[79] The procedure may take 24 days in first instance courts and 14 days in the Supreme Administrative Court. Time-limits for contesting the election results are longer than recommended in the Code of Good Practice in Electoral Matters which provides that "time-limits for lodging and deciding appeals must be short (three to five days for each at first instance)"[80] since appeals may be lodged in seven days.[81] According to Article 267(11), the proceedings before competent courts on appeals concerning local elections shall be concluded in three months. It is recommended to reconsider the time-limits for the appeals on the decisions made by electoral bodies to ensure an effective system of appeal. In case the time-limits for the decision-making are too long, the legitimacy of the elections may be questioned and it is difficult for the elected bodies to fulfil their duties.

XIV. Specific Issues Concerning the Local Self-Government Bodies

61. The Code appears to affect features of the local self-government system by introducing changes that may have to be reflected in the Local Self-Government and Local Administration Act. This opinion does not include a review of the latter Act, and limits itself to examine the provisions relevant to these matters that are set forth in the Electoral Code. All of the matters discussed below have been subject to a petition before the Constitutional Court. The Constitutional Court decision released on 4 May 2011 has been taken into consideration in the comments and recommendations made below.

A. Municipal councillors

62. One of the elements of the reform is the amendment to Article 19 of the above-mentioned Act, which reduces the number of councillors in self-government bodies. In its recent decision, the Constitutional Court ruled that there is a constitutional standard of representation involved in this matter, and therefore held this amendment unconstitutional.

B. The direct election of mayors of "local settlements"

63. Before the adoption of the Code, mayors of "small settlements" with more than 150 inhabitants were directly elected, while those with less than 150 inhabitants were elected by municipal councils at the level of the municipality (which may contain many such settlements). Under the newly adopted Code, this threshold has been raised to 350 inhabitants, which seems to imply that more than one thousand such mayors would no longer be directly elected. In its recent decision,[82] the Constitutional Court has seen no contradiction with the Constitution with regard to these changes considering that the legislators have a broad margin of discretion on such matters. There are no international standards imposing the direct election of mayors.

C. Election of "district mayors"

64. "District mayors" were first introduced in 1995. These are mayors of "districts" with the three biggest cities of Bulgaria accounting for one million citizens. According to the Code,[83] "district mayors" are no longer directly elected, but elected indirectly by municipal councils. The Constitutional Court, in its recent decision,[84] did not find this rule in contradiction with the Constitution. However, it expressed concern that this new rule could be seen as a step

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79 As in Article 267(3), (5) and (7) of the Code.
80 Code of Good Practice in Electoral Matters, II 3.3 g.
81 Articles 264(1), 265(1), 267(1) and (8) of the Code.
82 Constitutional Court of Bulgaria, Decision no. 4/2011, 4 May 2011, item 1.
83 Final and Transitional Provisions of the Code, Article 37b.
84 Constitutional Court of Bulgaria, Decision no. 4/2011, 4 May 2011, item 8.

backward in the process of decentralization susceptible to weaken the democratic legitimacy of local authorities. As already mentioned, there are no international standards imposing the direct election of mayors.

XV. Other issues

65. OSCE/ODIHR previously recommended that persons belonging to minorities should be allowed to use their mother tongue in the electoral campaign in order to promote their effective participation in public affairs.[85] This recommendation has not been taken into consideration in the Code as evidenced by Article 133(2), which requires that "the election campaign shall be conducted in the Bulgarian language." It is essential that persons belonging to minorities be provided voter information and other official election materials in their languages. This would enhance the understanding of the electoral process for all communities.

66. Regarding domestic and international election observers, the OSCE/ODIHR Limited Election Observation Mission for the 2009 parliamentary elections recommended that the full scope of rights and responsibilities of observers be defined in the law.[86] To bring the election legislation closer in line with paragraph 8 of the 1990 OSCE Copenhagen Document which provides for the presence of observers, this recommendation should be reflected in the Code at least through a requirement that the matter be specifically addressed by the CEC.[87]

XVI. Concluding remarks

67. The Election Code of Bulgaria provides a sound legal basis for the conduct of democratic elections. The harmonization of the rules and procedures governing the conduct of elections and their consolidation in one single Code is a decisive step towards ensuring the consistency of these rules and procedures and facilitating their uniform application. Most importantly, this is beneficial to Bulgarian citizens, voters and potential candidates alike.

68. The Code is comprehensive, covering in details rules and procedures regulating all stages of the electoral process for all types of elections. It is important that crucial aspects of the process be subject to detailed regulations, however it would have been more appropriate that some aspects be regulated through by-laws or CEC instructions given the need to retain a margin of flexibility, particularly on practical matters. This may for instance be the case with regard to provisions regulating the format of ballot papers. Furthermore, the structure of the Code could be improved to avoid unnecessary repetitions and make it easier for those in charge of its application to identify which rules or procedures apply to one particular election without having to look in too many different parts of the text. This may require that some of these rules and procedures be simplified or streamlined.

69. On the substantive aspects, the high quality of the Code must be underscored. There is, however, still room for further improvements in areas where public trust is much needed as the sensitivities may be high. This is the case specifically with regard to the remedies available for challenging decisions and actions of election commissions and the results of elections. The Constitutional Court decision resulted in welcome changes on several key

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85 OSCE/ODIHR Limited Election Observation Mission Report on Parliamentary Elections (5 July 2009), Section on Participation of Minorities, page 19.

86 OSCE/ODIHR Limited Election Observation Mission Report on Parliamentary Elections (5 July 2009), Section on Domestic Observers, pages 20.

87 *See* also, Venice Commission, Guidelines on an internationally recognised status of election observers adopted by the Council for Democratic Elections at its 31st meeting (Venice, 10 December 2009) and by the Venice Commission at its 81st plenary session (Venice, 11-12 December 2009; CDL-AD(2009)059). www.venice.coe.int/docs/2009/CDL-AD(2009)059-e.pdf.

issues: the discretionary dismissal by political parties of members of election commissions appointed by them, the residency requirements to vote and to stand in elections, and internet voting. These provisions have been declared unconstitutional and thus were either repealed or amended by the National Assembly.

70. Successful electoral reform requires adequate time for all those involved and interested to participate in the reform. Considering the proximity of the next presidential and local elections scheduled for autumn 2011, it is recommended that the comments and recommendations offered by OSCE/ODIHR and the Venice Commission that do not require constitutional amendments be given due consideration ahead of the next elections with a view to improving the Code. This calls for broad consultations with key political stakeholders, including opposition parties, should any significant change to the current legal framework be considered. The Venice Commission and the OSCE/ODIHR stand ready to provide their support in this process. In the longer term, constitutional amendments would be required to clarify the voting rights of persons serving prison sentences and of citizens with dual citizenship.

71. To ensure the integrity of the election process and increase public confidence and considering the high level of involvement of political parties in the electoral management (i.e. the composition of the election administration), it is essential that the Election Code of Bulgaria be implemented in good faith and with a high level of political maturity.

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

MEMORANDUM

To: The Ad hoc Committee for the observation of the Parliamentary Elections in Bulgaria on 12 May 2013

Date: 6 May 2013

Re: Bulgarian legislation on the Parliamentary elections.

I. INTRODUCTION

1. Early parliamentary elections will be held on 12 May 2013. The 240 members of Parliament will be elected under a proportional electoral system. The Electoral Code provides that there are 31 multi-member constituencies for 240 seats of the National Assembly. The changes recently introduced in the Electoral Code of Bulgaria (in February 2013) establish a closed list system[1].

2. The candidate lists of 67 political parties were registered by the Central Electoral Commission. According to the information provided by the 1st interim report of the OSCE/ODIHR pre-electoral mission, only two independent candidates have been registered by District Electoral Commissions. This seems to confirm what was stated by the Joint Opinion of the Venice Commission and OSCE/ODIHR in 2011 on the Electoral Code of Bulgaria, concerning the high barriers established for independent candidacies[2]. The Central Election Commission (CEC) rejected the registration of 4 parties because of the lack of valid supporting signatures.

II. GENERAL REMARKS

3. The main piece of legislation governing the forthcoming election is the Electoral Code of 2011, modified in February 2013. Other pieces of relevant legislation include the Constitution, the Law on Political Parties as well as instructions and resolutions of the Central Election Commission (CEC).

[1] Article 5 of the Electoral Code.
[2] See CDL-AD(2011)013, para. 34

ANEXO: 8

4. Parliamentary elections are administered by a three-level system of election commissions: the Central Electoral Commission, 31 District Electoral Commissions (DECs), one in each of the 31 multi-mandate constituencies, and 12,000 Precinct Electoral Commissions (PECs - polling stations). The members of each election administration body are formed based on political nominations. The CEC appoints DEC members and DECs appoint PECs. The same parties and coalitions that form the CEC nominate members to DECs and PECs.

5. The new electoral Code was adopted in January 2011, being the first unified electoral legislation in Bulgaria. It was modified in February 2013. A number of changes addressed several OSCE/ODIHR and Council of Europe's Commission for Democracy through Law (Venice Commission) recommendations, *inter alia* the fact that observers have also now rights over the entire electoral process and the increased transparency of the activities of the electoral administration (DEC sessions are streamed online).

6. The 2011 Code provides a detailed and comprehensive regulation and it gives a good and appropriate framework for the forthcoming anticipated parliamentary elections if implemented properly. However, as stated in many occasions by the Venice Commission and the OSCE/ODIHR, the introduction of changes to the Code in February 2013, hence, two months before the election, can make it difficult to implement them and challenge the stability of the system. This can be specially difficult for the CEC's new responsibilities, as it has to broadcast sessions in real time and keep an updated and public database of complaints and appeals.

7. For these forthcoming elections, the new amendments introduced the obligation to equip all polling stations with copy machines in order to ensure that anyone present in PECs can get a copy of the protocols, as a result of a new provision aiming to improve transparency in the tabulation process and results.

III. LEGAL FRAMEWORK IN THE LIGHT OF THE NEW AMENDMENTS TO THE ELECTORAL CODE INTRODUCED IN FEBRUARY 2013

III.A. On the electoral system of Bulgaria

8. The electoral system of Bulgaria is proportional for the 240 members of Parliament. There are 31 multi-member constituencies for 240 seats of the National Assembly and the amendments introduced in February 2013 to the Electoral Code establish a closed list system. The allocation of seats follow the Hare-Niemeyer Method (or largest reminder method). The right to the allocation of seats shall be limited to the parties and coalitions of parties which have gained not less than four per cent of the valid votes within Bulgaria and abroad. In parliamentary, presidential and European Parliament Elections, political parties have to collect 7,000 signatures in order to be registered with the CEC. Coalition can consist of political parties registered by the CEC.

III.B. The legal framework

9. The joint Venice Commission - OSCE/ODIHR opinion on the Electoral Code of Bulgaria was adopted in June 2011. The Code was vetoed by the President, Georgi Parvanov, on the basis of the 12-months residency requirement in order to participate in local elections, the limitations on voting rights of citizens with dual citizenship and certain provisions relating to local and municipal elections. The presidential veto was overridden by the majority of

more than half of all the members of the National Assembly. Although the limitations of voting rights based on dual citizenship were criticised in the 2011 Joint opinion in the light of the European Court of Human Rights case-law[3], this provision is still valid.

III.C. The new amendments introduced in February 2013 to the Electoral Code

10. The new changes introduced in February 2013 to the Code improve transparency of the election administration decisions, by establishing now a mandate to broadcast sessions and keep a public database on appeals procedure (the appeals introduced and decisions taken should be published and be accessible in their Website). There are also important improvements on the rights of national observers, admitted to all the different stages of the electoral process.

11. However, many of the changes introduced to the Code in February 2013 can be considered of a technical nature and do not address some of the key recommendations stemming from the joint Venice Commission - OSCE/ODIHR 2011 opinion, mainly concerning:

a. Lack of balance of political parties in the appointment of chairpersons and secretaries at all levels of elections administration, which may result in a lack of trust in the election administration. New provisions to the Code introduced in February 2013 have nevertheless established an independent budget and permanent administrative staff for the Central Electoral Commission, although it is not clear whether this will be set into place for these forthcoming elections due to time constraints;

b. Need to reinforce criteria concerning political party and campaign financing, mainly regarding sanctions, an important measure in the background of fight against corruption in Bulgaria;

c. Building further a pluralistic media access and coverage; in February 2013, Article 138.a of the Electoral Code has introduced nevertheless better transparency in media, as it requires that the providers of media services shall be obliged to announce on the Internet page the entire content of contracts entered with the parties, coalition of parties and nominating committees which participate in the elections.

d. Ensuring rights of minorities, mainly concerning the use of their mother tongue during electoral campaign and materials.

e. Establish that the deprivation of voting rights should be further defined to apply only to persons convicted of a serious crime[4].

f. Improve the remedies for contesting electoral results, as the Electoral Code does not allow election result to be disputed by voters but only by political parties, coalitions and candidates[5].

[3] ECtHR, *Tanase v. Moldova*, 27 April 2010. See CDL-AD(2011)013, para. 18.
[4] See among others ECtHR, *Hirst v. UK*, G. Ch., judgment of 6 October 2005; *Greens and M.T. v. United Kingdom*, judgment of 23 November 2010. See CDL-AD(2011)013, para. 17.
5 See CDL-AD(2011)013, paras. 57 and 58.

IV. SOME PRACTICAL ISSUES TO TAKE INTO ACCOUNT FOR THE FORTHCOMING ANTICIPATED PARLIAMENTARY ELECTIONS

12. Parliament is elected for a four-year term. However, the forthcoming elections are organized following the dissolution of the Parliament in March 2013, after the resignation of Prime Minister Boyko Borisov following protests against the crisis, poverty and high electricity bills. The Parliament was dissolved by the President on 12 March 2013, as forming a new government was not possible.

13. In 2009 parliamentary elections, the GERB (Citizens for European Development of Bulgaria) had 117 out of 240 seats, and had formed a minority government. The Coalition for Bulgaria (BSP) had 40 seats, the Movement for Rights and Freedoms (MRF) got 37 seats and ATAKA (far-right) got 21 seats. Finally, Blue Coalition received 15 seats and Order, law and Justice received 10 seats.

14. The electoral campaign has focussed on poverty and fight against corruption mainly. There have been allegations of vote-buying, intimidation and pressure on voters (with forms of the so-called "controlled voting"[6]), allegations of bribery of election commissioners and lack of transparency on paid media coverage.

15. Concerning voters lists, voters can be added to a voter list on election day based on their permanent address. Concerning registration of candidate's lists and support by voters, according to the recent amendments, each voter can sign in support of only one political party.

16. Electoral campaign is to be conducted only in Bulgarian language. The elections take place against the backdrop of minorities being perceived as vulnerable to electoral irregularities and the need to grant effective equal access to media.

17. Finally, tabulation and counting of results is to be followed, mainly concerning the respect for the obligations introduced by the amendments to the Electoral Code and the access to the results protocols, such as the existence of the necessary equipment at all DECs with scanning machines, the requirement to scan all PEC protocols at the district level and its posting on the CEC website.

[6] OSCE/ODIHR, Needs Assessment Report, 12 May 2013.

Parliamentary Assembly
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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

AD HOC COMMITTEE FOR THE OBSERVATION OF THE EARLY PARLIAMENTARY ELECTIONS IN BULGARIA
12 May / 2013
List of members

ANDREAS GROSS*, HEAD OF THE DELEGATION (SWITZERLAND, SOC)

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Parliamentary Assembly
Assemblée parlementaire

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AS/Bur (2012) 85
18 December 2012

Guidelines for the observation of elections by the Parliamentary Assembly

Bearing in mind the objectives and the political nature of the Parliamentary Assembly's observation missions as well as the problems deriving from the past co-operation arrangements with other international institutions, the following Guidelines were adopted by the Bureau of the Assembly on 24 May 2004 and updated by the Bureau on 7 October 2005, 16 November 2006, 23 May 2007, 8 October 2010, 27 January 2012, 29 June 2012 and 17 December 2012.

A. Elections to be observed

1. For the Parliamentary Assembly of the Council of Europe, the observation of elections plays an important role in the assessment of the overall political situation of the country in question. In practical terms this entails the systematic observation of elections in any state whose parliament has requested or enjoys special guest status, partner for democracy status, which has applied for membership, or is subject to the monitoring procedure.

2. Observation of parliamentary and presidential elections as well as of referenda in an applicant State or a State under the monitoring procedure should be an inalienable right of the Assembly. A State's lack of cooperation with the Assembly, its refusal to accept an election observation mission from the Assembly should give rise to a debate at the part-session or Standing Committee meeting following the elections in question. It may result in sanctions, such as a freezing of the application procedure or the challenge of the credentials of the national delegation concerned on the basis of Rule 8.2.b.(lack of cooperation under the Assembly's monitoring procedure).

3. The Bureau may also decide to observe parliamentary and/or presidential elections, as well as referenda, in a State that is subject to the post-monitoring dialogue.

4. The observation of regional and local elections is the responsibility of the Congress of Local and Regional Authorities of the Council of Europe (the Congress). If the Assembly receives an invitation to observe such elections and the Bureau decides to observe them, the Assembly ad hoc committee shall cooperate with the election observation mission the Congress may deploy. A report on these elections by the Congress, sent to the President, should be referred, on a Bureau's proposal, to the Monitoring Committee.

5. The Bureau of the Assembly may decide to observe elections in other States when exceptional circumstances have been brought to its attention.

B. Elections as a process

6. In conducting election observations, the Assembly shall proceed from the understanding that an election is not a one-off exercise, but rather a continuous process involving several stages, all of which need to be analysed in order to assess an election. The timeline, below, based on various Venice Commission documents, shall serve as an aid in the assessment process.

7. The process starts with the elaboration of electoral legislation. The quality of that legislation is a major, although not the unique criterion to assess an election.

8. Electoral legislation should not be subject to constant change. According to Venice Commission recommendations, "the fundamental elements of electoral law… should not be open to amendment less than one year ahead of an election, or should be written in a constitution or at a level higher than ordinary law."[1] ANEXO: 9 certain circumstances, exceptions to the one year rule could be accepted, namely where there is a need to

[1] Venice Commission (CDL-AD(2010)037).

rectify, through legislation, unforeseen problems or to provide redress to violations of internationally recognised rights where they had been built into the electoral law.

9. The second stage starts with the date when an election is called. That date, in normal circumstances involving regular elections, should be reasonably distant from the voting day to allow all political stakeholders to prepare for an electoral contest.

10. The third stage starts with the opening of the electoral campaign.

11. The fourth stage is the voting day proper, and the vote counting.

12. The next stage is the declaration of results of an election, followed by a complaints period stage.

C. Regarding observation and co-operation in the field

13. Considering the role played by OSCE/ODIHR in the field, the Assembly should stress the political objectives of its participation in the observation process: full respect of Council of Europe values and standards. This should be possible thanks to the Assembly's comparative assets such as the high political level of its delegations and the experience of its members.

14. Practical assistance to Assembly delegations to observe the elections, particularly the organisation of the programme for the observation mission, should be provided by the national parliament, in order to supplement properly the programme for short-term observers organised by OSCE/ODIHR.

15. Co-operation with OSCE/ODIHR and other international organisations will be continuous during the observation process in order to ensure, in so far as possible, that assessments of the elections do not differ. However, if, after the election, a joint final assessment cannot be achieved in the framework of the IEOM, the Assembly's ad hoc committee reserves itself the right, to hold -if necessary- its own press conference and issue a separate press release containing its own assessment. In this respect, it is essential that the Assembly's ad hoc committee, when organising briefings, invites the OSCE/ODIHR. Reciprocity is expected in briefings organised by OSCE/ODIHR.

D. Regarding the practical organisation of the observation

16. On the basis of past experience, the following rules will be applied:

i. the Assembly will observe elections mentioned in Section A above (any refusal to send an invitation will constitute an evaluation criterion in itself);

ii. the Assembly observers will receive accreditation from the Central Electoral Commission; the national parliament concerned will be responsible for facilitating the issuing of this accreditation;

iii. the ad hoc Committees will cover a geographical area of the country which is as wide as possible when observing elections. Members of the ad hoc Committee must be ready to accept deployment beyond the capital city of the country in which the elections are observed.

iv. the membership of ad hoc committees for elections will vary between 5 and 40 members and include any already appointed rapporteurs of the Political Affairs Committee, Committee on Legal Affairs and Human Rights and the Monitoring Committee for the country concerned; in special cases the Bureau can decide to increase this number. The composition of the ad hoc committees is determined according to an appointment system taking into account the numerical size of the political groups on the understanding that each political group should be represented;

v. while rapporteurs for the monitoring of, or post-monitoring dialogue with, a given country should be encouraged to join an ad hoc committee to observe an election in that country, they should not be appointed chairpersons thereof. This is to ensure a distinction between election observation as such and monitoring and post-monitoring dialogue in the context of which the findings of an ad hoc committee are followed up. Where the said rapporteurs join an ad hoc committee to observe an election, their participation in the ad hoc committee shall be *ex-officio*, and they shall not be included in the quota allotted to their political group within the meaning of paragraph iv;

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vi. the Chairmanship of the ad hoc committees shall rotate between political groups to ensure, generally, an overall political balance over a 12-month period;

vii. a standard programme will be established for observation missions: three days for political meetings (organised by the national parliament), one day for the elections themselves (with cars, guides and interpreters paid for by the Assembly), one day for evaluation/assessment and the press conference;

viii. where the Bureau deems it necessary, a pre-electoral and/or a post-electoral 5-member cross-party mission may be dispatched;

ix. to enhance the mission's public profile, the ad hoc committees will be referred to as "delegations" headed by a "leader of the delegation" appointed by the Bureau;

x. while every effort should be made to ensure a political balance of ad hoc committees to observe elections, in the event when some political groups fail to come up with candidates while others put forward more candidacies than they are entitled to, the principle of a political equilibrium may be foregone in the interests of having a strong PACE presence during election observation. In such circumstances, a notification by the Secretary General of the Parliamentary Assembly will suffice;

xi. political groups should bear it in mind that any appointment to an ad hoc committee to observe elections should aim to ensure the principle of gender balance of such a committee. Political groups should endeavour to include, in the list of representatives appointed, members of the under-represented sex in the same percentage as is present in the group;

xii. political groups should bear it in mind that any appointment to an ad hoc committee should respect fair geographical representation and be based on the candidate's express capability, language-wise, to meaningfully participate in the work of the mission, in particular, given that on the spot the Council of Europe only provides interpretation to and from English or French. It should be pointed out that English is the de facto working language of the OSCE/ODHIR election observation mission;

xiii. members of an ad hoc committee are encouraged to plan their travel arrangement in a way that would allow them at least to participate in the ad hoc committee debriefing on the morning following the elections. It is understood that those members who are unable to attend the debriefing in the capital because they were deployed outside it may report their conclusions by phone;

xiv. members of the ad hoc committee should be aware that as far as the funding of their participation in the work of the ad hoc committee is concerned, Article 38 of the Statute of the Council of Europe shall apply ("*Each member shall bear the expenses of its own representation in the Committee of Ministers and in the Parliamentary Assembly*");

E. Local staff

17. Staff recruited locally by the Council of Europe for the specific purposes of a pre-electoral, electoral or post-electoral mission (eg interpreters, drivers) are expected to declare any actual or potential conflict of interest by signing a written statement and not to take any action which would cause damage to the reputation and integrity of the mission.

F. Conflict of interest and code of conduct of members of ad hoc committees

18. Members of ad hoc committees for the observation of elections shall abide by the provisions of the Code of Conduct for members of the Parliamentary Assembly of the Council of Europe appended to Resolution 1903 (2012).

19. In particular, members of ad hoc committees, in the accomplishment of their pre-electoral, electoral or post-electoral duties, shall avoid conflicts between any actual or potential economic, commercial, financial of other interests on a professional, personal or family level and their election observation activity in the country concerned; if a member is unable to avoid such a conflict of interest it should be disclosed.

20. Members shall not request or accept any fee, compensation or reward intended to affect his or her conduct as a member of an ad hoc committee. They shall avoid any situation that could appear to be a conflict of interest or receiving an inappropriate payment or gift.

21. All candidates for membership of an ad hoc committee, at the time of putting forward their candidacy shall make a written declaration regarding the absence or otherwise of any actual or potential conflict of interest in connection with the country concerned by an election observation. In accordance with paragraph 14 of the Code of Conduct, they shall also register with the Secretariat of the Assembly any gifts or similar benefits (such as travel, accommodation, subsistence, meals or entertainment expenses) of a value in excess of 200 euros that they have accepted in the last twenty four months from the authorities of the country concerned, either directly or indirectly.

22. The aforementioned declarations shall be made available to the Bureau when it approves the composition of an ad hoc committee. Failure to sign such declarations shall disqualify the member concerned from being appointed to the ad hoc committee in question.

23. Members of an ad hoc committee shall refrain from engaging in public statements interviews, press conferences or communications via social networks which could contradict or conflict with the final assessment made by the ad hoc committee. This applies at all stages of the process: during the pre-electoral period, including in the context of a pre-electoral mission, during and following the election day, including in the context of a post-electoral mission.

24. Members of an ad hoc committee shall abstain from engaging in public activities which could appear to interfere in the electoral process or could be considered as partisan. This applies at all stages of the process: during the pre-electoral period, including in the context of a pre-electoral mission, during and following election day, including in the context of a post-electoral mission.

25. Additionally, the provisions stipulated in the Code of Conduct for rapporteurs of the Parliamentary Assembly (Resolution 1799 (2011)) shall apply *mutatis mutandis* to chairpersons of ad hoc committees over and above the provisions of the Appendix to Resolution 1903 (2012).

26. Alleged breaches of paragraphs 18-21 and 23-25 above shall be dealt with in the manner prescribed in paragraphs 17 to 20 of the appendix to Resolution 1903 (2012).

G. Election observation reports

27. The Chairperson of an ad hoc committee shall draft a report on the election observation mission, which is submitted to the Bureau and subsequently to the Assembly as part of the progress report of the Bureau.

28. This report shall be based on the information received during the meetings held during the mission, in line with the press release and preliminary findings and conclusions of the International election observation mission (IEOM), and take into account the comments and assessments of members of the ad hoc committee regarding election day made during the ad hoc committee's meeting on the day following the vote or in written form within a deadline fixed by the Chairperson, as well as relevant documents of the Monitoring Committee, the Venice Commission and other reliable sources. In principle, all members of the ad hoc committee shall be consulted on the draft before the report is issued.

H. Form of Election Observation by PACE

29. The observation of elections by PACE can take place in one of the following three forms upon decision of the Bureau.

a. *Election Observation Missions.* These take the form of an ad hoc Committee set up for this purpose. The size may vary from 5 to 40 members, Committees are composed on the basis of proposals by the Political Groups taking into account the D'Hondt rule. The Chairperson of the ad hoc Committee is appointed by the Bureau of the Assembly. Chairmanship rotates between political groups. PACE Election Observation Missions issue a statement of their findings immediately following the elections, where applicable in the framework of an IEOM. A pre-electoral mission shall be conducted following a Bureau's decision.

b. *Election Assessment Missions.* These take the form of an ad hoc Committee specifically set up for this purpose. Election Assessment Missions are normally composed of five members, but never less than three members, in order to guarantee a minimum political and geographical balance of the ad hoc Committee. The Chairperson of the ad hoc Committee is appointed by the Bureau. Chairmanship rotates between political groups. The ad hoc Committee will report its findings in the form of a memorandum by its Chairperson to the Bureau. No pre-electoral mission will be conducted.

c. *Presence on the Occasion of Election* of Assembly members during and/or just before an election without a formal observation or assessment of it. Accordingly, the Bureau does not set up an ad hoc Committee but decides on the dates of the mission. These missions are normally composed of the country rapporteur(s) of the Monitoring or Political Affairs Committee. In exceptional cases, the Bureau can appoint one of its members to participate in these missions. This mission will report their findings in the form of a memorandum to the Bureau.

30. Election Observation Missions for which less than five members are identified shall be considered as Election Assessment Missions. In the event that three members cannot be identified for an assessment mission, the mission shall be cancelled. Time allowing, the possibility of ensuring a presence could then be considered by the Bureau of the Assembly.

Appendix

DECLARATION ON CONFLICT OF INTEREST OF CANDIDATES FOR ELECTION OBSERVATION MISSIONS OF THE PARLIAMENTARY ASSEMBLY

Ad hoc committee to observe the elections in ...

1. I hereby declare that I have no actual or potential economic, commercial, financial or other interests on a professional, personal or family level in connection with the country concerned by the election observation. ☐*

   I hereby declare that I have an actual or potential conflict of interest in connection with the country concerned by the election observation. ☐*
   Please specify the nature of the actual or potential conflict of interest:

   .....
   .....
   .....
   .....

2. I also declare that I have not accepted in the last twenty four months gifts or similar benefits, of a value in excess of 200 €, from the authorities of the country concerned, either directly or indirectly. ☐*

   I also declare that I have registered with the Secretariat gifts or similar benefits, of a value in excess of 200 €, that I have accepted in the last twenty four months from the authorities of the country concerned, either directly or indirectly. ☐*

   .....
   .....
   .....
   .....

3. I note that the present declaration will be made available to the Bureau when it approves the composition of the ad hoc committee.

Name .....

On.....

Signature:

* Please tick the appropriate box.

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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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27 March 2013

BULGARIA

PACE ELECTION OBSERVATIONS 1990 – 2011

Chairperson/ Rapporteur	Delegation	Ref Doc	Main Concerns	Remarks
Parliamentary Elections 10 June / 17 June 1990 (second round)				
First round Mr Martinez (SPA/SOC) *Chairperson and Rapporteur*	8 members	6279 Addendum I	• The Bulgarian Socialist Party has had a serious advantage in being the ruling party and having a number of state instruments at its disposal.	Conclusion: *"The elections may indeed be regarded as free and fair, in the light of our observations of the actual elections and of information currently available"*
Second round Sir Smith (UK/EDG) *Chairperson and Rapporteur*	5 members			
Parliamentary Elections 13 October 1991				
Mr de Puig (SPA/SOC) *Chairperson* Mr Soares Costa (POR/LDR) *Rapporteur*	9 members	6543 Addendum I	• Banning of the formation of parties on ethnic or religious grounds. • The main problem anticipated and experience throughout the country was the registration of unregistered voters. • Minor infractions of the electoral procedure.	Special Guest Status on 3 July 1990 Conclusion: *"Although irregularities may have affected local results, we have no reason to believe that significant fraud or malpractice took place to the national benefit of any single party or coalition. We were however unable to judge how free the electorate really was, in vuew of the newness of the democratic tradition in*

F – 67075 Strasbourg Cedex | e-mail: assembly@coe.int | Tel: +33 3 88 41 2000 | Fax: +33 3 88 41 27 33

ANEXO: 10

				Bulgaria".
Parliamentary Elections 19 April 1997				
Mr Columberg (SWI/EPP) *Chairperson* Mr Onaindia (SPA/SOC) *Rapporteur*	5 members	7830 Addendum I	*No major concern*	Accession on 7 May 1992 Conclusion: *"Despite the country's economic plight and the political showdown at the beginning of the year, these elections were free, fair and democratic".*
Parliamentary Elections 17 June 2001				
Mr Gjellerod (DK/SOC) *Chairperson and Rapporteur*	4 members	9134	• Lack of independence of the judiciary. • Generalisation of corruption. • The regulatory framework for public media was felt to be overly restrictive and not encouraging open debate among the contestants. • Extensive coverage of government officials by the public media during the election campaign. • The election law makes no provision for mobile voting stations which would have allowed all disabled and home-bound voters to cast their ballot. • Lustration laws. • Underrepresentation of national minorities.	Conclusion: *"The elections were carried out in a calm and orderly manner and in compliance with the election law. The international observers did not report any significant problems or disturbances. (...) The results of these elections have drastically changed the political landscape in Bulgaria. These results and the high voter turnout are a clear indication of the desire for change favoured by the Bulgarian electorate".*
Parliamentary Elections 25 June 2005				
Joint report of the members	3 members	10663	• The competence of the Central Election Committee vis-à-vis the Cabinet of Ministers should be defined. • Need of a better administration of voters' lists, absentee certificates and means of identification of voters as means of avoiding multiple voting. • The election law makes no provision for mobile voting	Conclusion: The elections *"demonstrated the credibility and stability of the election process in general, though some politico-administrative issues added a note of uncertainty and decreased voter confidence in the election system".*

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Restricted – *Internal Document* ***27 March 2013***

BULGARIA

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ANEXO: 10

				stations which would have allowed all disabled and home-bound voters to cast their ballot.	
Parliamentary Elections 5 July 2009					
Mr Iwiński (POL/SOC) *Chairperson*	11 members		12008	• Last minute changes of the electoral legislation run counter to the recommendations set out in the Code of Good Practice in Electoral Matters. • Lack of public confidence in the democratic process resulting in wide-scale electoral cynicism • The establishment of a permanent CEC in Bulgaria would be most advisable. • Lack of legal provisions for free airtime on public broadcasting channels for those running in the elections. • Need to tighten up the existing rules on financial disclosure in the electoral context, in particular, by introducing effective enforcement mechanisms.	Accession to the EU on 1st January 2007 Very late invitation and lack of co-operation by the Bulgarian authorities. Conclusion: The elections *"were generally in accordance with OSCE commitments and Council of Europe standards; however further efforts are necessary to ensure the integrity of the election process and increase public confidence".*
Presidential Election 23 and 30 October 2011					
Mr Binley (UK/EDG) *Chairperson*	10 members		12796	• All complaints should be considered in a short time-frame and according to similar procedure. • Access to media need drastic improvement to ensure a level playing field for all concerned. • CEC should improve transparency. • More thorough training of MECs and PECs members. • A proper dedicated voter register should be established.	Conclusion: The elections *"PACE welcomed Bulgaria's continuous progress towards the implementation of its commitments vis-à-vis the Council of Europe in the field of democratic elections", although "certain aspects need to be addressed" (see conclusions)*

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ANEXO: 10

Note prepared by the Secretariat

29.04.2013

Main political parties running in the early parliamentary elections in Bulgaria on 12 May 2013

1. National Assembly of Bulgaria

The National Assembly (*Narodno Sabranie*) has 240 members, it is elected for a four-year term by proportional representation in multi-seat constituencies with a 4% threshold.

Composition of the Parliament elected in 2009

GERB – Citizens for European Development of Bulgaria – Boyko Borissov – 117 seats

BSP - Coalition for Bulgaria– Sergei Stanishev – 40 seats

- Bulgarian Socialist Party
- Party of Bulgarian Social Democrats
- Agrarian Union "Aleksandar Stamboliyski"
- Movement for Social Humanism

DPS - Movement for Rights and Freedoms– Müfti Mestan – 37 seats

ATAKA – Volen Siderov – 21 seats

Blue Coalition – 15

- Union of Democratic Forces
- Democrats for a Strong Bulgaria
- United Agrarians

Order, Law and Justice – 10

2. Parties running in the early parliamentary elections

CITIZENS FOR EUROPEAN DEVELOPMENT OF BULGARIA (GERB)

The party was founded in April 2006 as a civil movement (NGO). In December 2006, the NGO was registered as a political party. The leader of the party is Tsvetan Tsvetanov, a former police officer, at that time working for municipality of Sofia. In January 2010 – Borisov was elected as party leader and Tsvetanov – as vice-President.

The party is in government since the last parliamentary elections in 2009, the party is represented in the EP, holds the majority of the mayors' offices and municipal councilors in municipalities (all large and medium sized cities). It is a centre right party, member of the European People's Party. The basis of its

ANEXO: 11

POLITICAL PARTY ATAKA

The party is considered to have a right wing nationalist tendency, it held 2 mandates in the Parliament (2005-2009) and holds 21 seats in the current Parliament. This party was founded in 2005 by Voden Siderov, journalist, TV SKAT is considered as anti-Roma, racist, anti-Semitic, xenophobic political party. The party has a strong influence in the mixed regions. The only party that left the current Parliament and used the street manifestations for political aims

Leader – Volen Siderov

BULGARIA OF THE CITIZENS

The leader of the party is Ms Meglena Kuneva (EC commissioner until 2009). The party was founded as a civil association in October 2011, after the Presidential elections in Bulgaria, in which Ms Kuneva came third, taking 14% of the votes. The founders of the Bulgarian for Citizens Association include politicians and officials from the National Movement for Stability and Progress – the party was initially founded around former monarch Simeon Saxe-Coburg, and was the partner of the government from 2001 to 2005 and then in opposition to the government from 2005 to 2009.

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ANEXO: 11

membership is police officers and staff, as the leaders used to be in the highest levels of the police system. Many political analysts consider that this party has populist tendencies with a strong leadership.

Leader Boyko Borissov.

Born 1959, his father was a policeman and his mother a teacher. He graduated from the Police faculty – specialty "Fire protection". Since 1985 he has been a lecturer at the High police institute – PhD in 1990 (Psycho-physical readiness of the police staff). In 1990 left the Police academy – "major".

After 1991 founded a bodyguard company which protected the ex-communist leader Todor Zhivkov. In 2001, he was appointed as Chief Secretary of the Ministry of Interior and closed his companies. Since 2002 he is general – major.

In October 2005 he was elected as mayor of Sofia and since 2009 an MP and leader of the largest parliamentary group.

BULGARIAN SOCIALIST PARTY

The party continues the tradition and history of Bulgarian Communist Party, the ruling party from 2005-2009.

Leader Sergei Stanishev

MOVEMENT FOR RIGHTS AND FREEDOM

The party was registered in January 1990 after a decision by the ECHR, since then the party has had members in all parliaments, holding the mandate twice, and ruling in coalition 2005-2009. This party is considered to be relying on the votes of the ethnic Turkish minority. The party is a member of Liberal International and Alliance of Liberals and Democrats for Europe. The party has Mayors and municipal councils in almost all of the mixed population regions of Bulgaria.

The Leader of the party is Mr. Lutvi Mestan (Mr. Ahmet Dogan led the party from 1990 to 2013)

POLITICAL PARTY ATAKA

The party is considered to have a right wing nationalist tendency, it held 2 mandates in the Parliament (2005-2009) and holds 21 seats in the current Parliament. This party was founded in 2005 by Voden Siderov, journalist, TV SKAT is considered as anti-Roma, racist, anti-Semitic, xenophobic political party. The party has a strong influence in the mixed regions. The only party that left the current Parliament and used the street manifestations for political aims

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3. The latest poll results

National Centre for Public Opinion (NCOM)

10-15April 2013, *1120 interviews by random selection*

GERB – 23.9%

BSP – 17.5%

MRF – 6.2%

Ataka – 5.2%

On the very edge of the threshold is Bulgaria to Citizens' – 3.1%

Expected participation is 55%

Centre for Development of Regions

9-15 April 2013, 1300 interviews by random selection

- GERB – 24%
- BSP – 18.9%
- Ataka – 5.4%
- MRF – 5.00%

On the very edge of the threshold is the party Bulgaria to the Citizens and the party Order, Protection, Security.

Parliamentary Assembly
Assemblée parlementaire

DRAFT DEPLOYMENT- BULGARIA – 12 May 2013 **Version 7 May 2013**

Team #	NAMES	L	AREA	Long Term Observers Name / GSM	Interpreter Name / GSM	Driver Name / GSM
1	Mr Andreas GROSS Mr Chemavon CHAHBAZIAN	E	SOFIA (Sofia region)			
2	Mr Luca VOLONTE Mr Nikolaj VILLUMSEN	E	SOFIA			
3	Mr Mevlüt CAVUSOGLU Mr Andrea RIGONI	E	SOFIA			
4	Mr Aleksandar NIKOLOSKI Mr Øyvind VAKSDAL	E	SOFIA (Sofia region)			
5	Mr Saban DISLI Mr Viorel BADEA	E	SOFIA (Sofia region)			
6	Mr René ROUQUET Mr Paolo CORSINI	French	SOFIA (Sofia region)			
7	Mr Giacomo STUCCHI Ms Anne GODFREY	French	SOFIA (Sofia region)			
8	Mr Manuel Gonzales OROPEZA Ms Amaya UBEDA DE TORRES	E	BLAGOEVGRAD			
9	Ms Dana VAHALOVA Ms Marietta de POURBAIX-LUNDIN	E	PAZARDZHIK			
10	Ms Daniele GASTL Mr Konstantinos TRIANTAFYLLOS	E	KIUSTENDIL			
11	Mr Alfred HEER Mr Ionut-Marian STROE	E	VRATSA-MONTANA (Direction Vidin)			
12	Ms Tinatin KHIDASHELI Mr Lennart AXELSSON	E	VARNA			

ANEXO: 12

Приложение № 86

Секционният протокол е в четири идентични екземпляра, изработен на четирипластова индигирана хартия и е защитен с полиграфическа защита. Образецът се одобрява от ЦИК.

ЦИК ИЗБОРИ 2013 5152

ПРОТОКОЛ

на СЕКЦИОННАТА ИЗБИРАТЕЛНА КОМИСИЯ в ИЗБИРАТЕЛНА СЕКЦИЯ

№ 24 - 46 - 01 - 010

Изборен район | община | адм. район | секция

за избиране на НАРОДНИ ПРЕДСТАВИТЕЛИ на 12 май 2013 г.

аселено място гр. София **кметство** Средец **община** Столична

дминистративен район 01 Средец **изборен район София № 24**

нес, 12.05. 2013 г., в 21 30 часа, СЕКЦИОННАТА ИЗБИРАТЕЛНА КОМИСИЯ в състав:

редседател: Светлина Александрова Александрова

аместник-председател: — Секретар: Веркиния Петова Балк

ленове: 1. Борислав Иванов Боровинов 2. Мирослава Димитрова Петрова

3. Петър Иванов Белчев 4. Стоянка Горинска Миланова

5. — 6. —

а основание чл. 213 от Изборния кодекс (ИК) състави този протокол за установяване на резултатите от гласуването за ародни представители в секцията.

зборът започна в 07.00 часа на 12.05 2013 г. и завърши в 20.00 часа на същия ден, когато председателят а секционната избирателна комисия обяви гласуването за приключило и се пристъпи към установяване на резултатите.

При отварянето на избирателната урна и при установяването на резултатите от гласуването присъстваха кандидати, застъпници, представители на партии, коалиции от партии и инициативни комитети, наблюдатели и журналисти, както следва:

Иван Кадиянинолов – застъпник

(посочват се имената им и качеството, в което присъстват)

ЧАСТ I

Попълва се преди отваряне на избирателната урна

СЕКЦИОННАТА ИЗБИРАТЕЛНА КОМИСИЯ УСТАНОВИ:

. Брой на регистрираните кандидатски листи на партии, коалиции от партии и независими ндидати за народни представители

четиридесет и пет (с думи) — 45 (с цифри)

. Брой на бюлетините, получени по реда на чл. 187, ал. 1 от ИК, вписани в т. 2 протокола чл. 187, ал. 3 от ИК – Приложение № 80 от изборните книжа

осемстотин и петдесет (с думи) — 850 (с цифри)

ДАННИ ОТ ИЗБИРАТЕЛНИТЕ СПИСЪЦИ:

. Брой на избирателите според избирателния списък при предаването му на СИК: осемстотин тридесет и две (с думи)	832 (с цифри)
писете числото по т. 4 от протокола за приемане на избирателния списък – Приложение № 74 от изборните книжа	
. Брой на избирателите, вписани в допълнителната страница (под чертата) на избирателния писък в изборния ден: нула (с думи)	0 (с цифри)
Пребройте и впишете само избирателите, вписани под чертата на избирателния списък в изборния ден	
. Брой на избирателите, вписани в допълнителния избирателен списък в изборния ден: тридесет и четири (с думи)	34 (с цифри)
КОНТРОЛА – числото по тази точка трябва да е равно на сумата от числата по т. 6, букви „а“, „б“ и „в“	

Приложение 86

ANEXO: 13

СИК
[illegible] 465
(с думи) (с цифри)

КОНТРОЛА – числото по т. 4 трябва да е равно на числото по т. 10 и да е по-малко или равно на сумата от числата по т. 1, 2 и 3.

ДАННИ ИЗВЪН ИЗБИРАТЕЛНИТЕ СПИСЪЦИ И СЪДЪРЖАНИЕТО НА УРНАТА:

Приложение към избирателните списъци

5. Приложения към избирателния списък:

а) декларации по чл. 194 от ИК от лицата, заети в произвеждането на изборите като членове на СИК и охрана на съответната секция – Приложение № 72 от изборните книжа
нула (с думи) — 0 (с цифри)

б) декларации по чл. 57 от ИК – Приложение № 73 от изборните книжа
нула (с думи) — 0 (с цифри)

в) удостоверения по чл. 48б, ал. 1 от ИК – Приложение № 14 от изборните книжа
нула (с думи) — 0 (с цифри)

6. Приложения към допълнителния избирателен списък:

а) декларации по чл. 203, ал. 3 от ИК – Приложение № 70 от изборните книжа
двадесет и девет (с думи) — 29 (с цифри)

б) декларации по чл. 207, ал. 1, т. 3 от ИК - Приложение № 71 от изборните книжа
четири (с думи) — 4 (с цифри)

в) удостоверения за гласуване на друго място (чл. 206 във връзка с чл. 49 от ИК) - Приложение № 18 от изборните книжа
едно (с думи) — 1 (с цифри)

КОНТРОЛА – Сумата от числата по т. 6, букви „а", „б" и „в" трябва да е равна на числото по т. 3

Други участващи лица

7. Брой на придружителите:

а) вписани в графа „Забележки" в избирателния списък
девет (с думи) — 9 (с цифри)

б) вписани в Списъка за допълнително вписване на придружителите
осем + една изпуснати (с думи) — 8+1 (с цифри)

8. Брой на лицата, присъствали в изборните помещения в изборния ден и при установяване на изборните резултати:

а) брой застъпници, вписани в Списъка на застъпниците
четири (с думи) — 4 (с цифри)

б) брой на представители на политическа партия, коалиция от партии и инициативен комитет, вписани в Списъка за вписване на представителите
нула (с думи) — 0 (с цифри)

в) брой на наблюдателите, вписани в Списъка за вписване на наблюдателите
три (с думи) (1 приходи) — 3 (с цифри)

9. Бюлетини извън урната

а) брой на неизползваните бюлетини
триста осемдесет и една (с думи) — 381 (с цифри)

б) брой на унищожените от СИК бюлетини по други поводи (за създаване на образци за таблата пред изборното помещение и увредени механично при откъсване от кочана и станали неизползваеми)
три (с думи) — 3 (с цифри)

в) брой на недействителните бюлетини по чл. 180 от ИК
нула (с думи) — 0 (с цифри)

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240010

г) брой на недействителните бюлетини по чл. 181 от ИК
нула — (с думи) — 0 (с цифри)

д) брой на сгрешените бюлетини по чл. 201, ал. 2 от ИК
една — (с думи) — 1 (с цифри)

След като впишете броят на бюлетините по т. 9, букви „а", „б", „в", „г" и „д", опаковайте ги в отделни пакети, надпишете пакетите и ги отстранете от мястото за броене!

ЧАСТ II

Попълва се след попълване на част I и отстраняване на всички вещи и книжа от масата, с изключение на черновата от протокола и отваряне на избирателната урна

СЛЕД КАТО ОТВОРИ ИЗБИРАТЕЛНАТА УРНА, СИК УСТАНОВИ:

10. Брой на намерените в избирателната урна бюлетини
четиристотинишестдесет и пет — (с думи) — 465 (с цифри)

КОНТРОЛА – Числото по т. 10 трябва да е равно на сумата от числата по т. 12 и т. 13

11. Брой намерени в урната недействителни гласове (бюлетини), както следва:

а) бюлетини, които не са по установен образец;
нула — (с думи) — 0 (с цифри)

б) бюлетини върху които има изписани специални символи, като букви, цифри или други знаци);
три — (с думи) — 3 (с цифри)

в) бюлетини по установен образец, в които не е отразен със знак „Х" и с химикал, пишещ със син цвят, вотът на избирателя;
една — (с думи) — 1 (с цифри)

г) бюлетини по установен образец, в които не е отразен вотът на избирателя;
две — (с думи) — 2 (с цифри)

д) бюлетини по установен образец с отбелязан знак „Х" или друг знак и с химикал, пишещ със син цвят или друг цвят, вот на избирателя за две или повече кандидатски листи;
четири — (с думи) — 4 (с цифри)

е) бюлетини по установен образец с отбелязан знак „Х", който засяга повече от едно квадратче за гласуване и не може да се установи еднозначно волята на избирателя;
нула — (с думи) — 0 (с цифри)

ж) бюлетини по установен образец, които не съдържат два броя печата на съответната секционна избирателна комисия.
нула — (с думи) — 0 (с цифри)

12. Недействителни гласове – сумата от числата по т. 11, букви „а", „б", „в", „г", „д", „е" и „ж".
десет — (с думи) — 10 (с цифри)

КОНТРОЛА – Числото по т. 12 трябва да е равно на сумата от числата по букви „а", „б", „в", „г", „д", „е" и „ж" от т. 11.

13. Брой на действителните гласове (броят на действителните гласове е равен на броя на бюлетините по установения образец, съдържащи два печата на гърба на съответната СИК, върху които вотът на избирателя е отбелязан със знак „Х" с химикал, пишещ със син цвят, само в едно от квадратчетата за гласуване)
четиристотинипетдесет и пет — (с думи) — 455 (с цифри)

КОНТРОЛА – Числото по т. 10 трябва да е равно на сумата от числата по т. 12 и т. 13

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14. РАЗПРЕДЕЛЕНИЕ НА ДЕЙСТВИТЕЛНИТЕ ГЛАСОВЕ ПО КАНДИДАТСКИ ЛИСТИ

№	Наименование на партия/коалиция от партии и/или имената на независим/и кандидат/и	БРОЙ НА ПОЛУЧЕНИТЕ ГЛАСОВЕ с думи	с цифри
1.	ПП НОВА АЛТЕРНАТИВА	нула	0
2.	ПП ДЕМОКРАТИЧЕСКА ПАРТИЯ	нула	0
4.	ПП НАЦИОНАЛЕН ФРОНТ ЗА СПАСЕНИЕ НА БЪЛГАРИЯ (НФСБ)	единадесет	11
5.	КП КОАЛИЦИЯ ЗА БЪЛГАРИЯ	сто и шест	106
6.	КП ЦЕНТЪР – СВОБОДА И ДОСТОЙНСТВО	три	3
8.	ПП Национал-демократична партия	нула	0
9.	КП ГРАЖДАНСКА ЛИСТА „МОДЕРНА БЪЛГАРИЯ"	две	2
10.	КП СЪЮЗ НА ДЕМОКРАТИЧНИТЕ СИЛИ – СДС, Обединени земеделци, Движение „Гергьовден", РДП, БСДП	седемнадесет	17
11.	ПП ЛИБЕРАЛЕН АЛИАНС	нула	0
12.	ПП ХРИСТИЯН-СОЦИАЛЕН СЪЮЗ	две	2
14.	ПП АТАКА	девет	9
15.	ПП ГЕРБ	сто петдесет и шест	156
17.	ПП РЕД, ЗАКОННОСТ И СПРАВЕДЛИВОСТ – РЗС	две	2
18.	ПП ВМРО – БЪЛГАРСКО НАЦИОНАЛНО ДВИЖЕНИЕ	шест	6
19.	ПП ДЕМОКРАТИЧНА ГРАЖДАНСКА ИНИЦИАТИВА	нула	0
20.	ПП ХРИСТИЯНДЕМОКРАТИЧЕСКА ПАРТИЯ НА БЪЛГАРИЯ	три	3
22.	ПП СРЕДНА ЕВРОПЕЙСКА КЛАСА	едно	1
23.	ПП НАЦИОНАЛНО ПАТРИОТИЧНО ОБЕДИНЕНИЕ	едно	1
25.	ПП ЛИДЕР	две	2
26.	ПП ЗЕЛЕНИТЕ	двадесет	20
27.	КП Демократи за силна България и Български демократически форум (ДСБ, БДФ)	осемдесет и три	83
28.	ПП СОЦИАЛДЕМОКРАТИЧЕСКА ПАРТИЯ (СДП)	две	2
29.	ПП ДРУГАТА БЪЛГАРИЯ	нула	0
30.	ПП БЪЛГАРСКАТА ЛЕВИЦА	нула	0

Таблицата продължава на лист 3, стр. 5

ОИК [illegible]

Екземпляр за ЦИК
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№	Наименование на партия/коалиция от партии и/или имената на независим/и кандидат/и	БРОЙ НА ПОЛУЧЕНИТЕ ГЛАСОВЕ с думи	с цифри
32.	ПП КАУЗА БЪЛГАРИЯ	едно	1
33.	ПП Движение България на гражданите	петнадесет	15
34.	ПП ДАНО – Демократична алтернатива за национално обединение	нула	0
35.	КП Българска пролет (Българска Социалдемокрация, Партия на Зелените)	нула	0
36.	КП ГОРДА България	нула	0
37.	ПП ГЛАС НАРОДЕН	единадесет	11
38.	ПП БЗНС	едно	1
40.	ПП ДПС – Движение за права и свободи	едно	1
41.	ПП Национално движение Единство	нула	0
42.	ПП ПАРТИЯ НА БЪЛГАРСКИТЕ ЖЕНИ	нула	0
44.	ПП ЕДИННА НАРОДНА ПАРТИЯ	нула	0
45.	ПП Съюз на комунистите в България	нула	0

КОНТРОЛА – Числото по т. 13 трябва да е равно на сумата от числата по т. 14.

Поредността на изписване е според поредността на номерата на кандидатските листи в бюлетината.

ОИК ИЗВЪНРЕДНО

по тях решения и бележките и възраженията на членове на комисията по взетите решения:

............................/...

....

(отбелязва се по кои точки от протокола са споровете, взети ли са по тях решения и има ли особени мнения. Протоколът по чл. 215в, ал. 4 от ИК, както и текстовете на особените мнения се прилагат и са неразделна част от протокола на СИК)

След откриване на изборния ден и при установяване на резултатите от гласуването в СИК постъпиха следнит заявления, жалби и възражения и брой на взетите решения по тях:

............................/...

....

(посочва се от кого и в какво качество е подадена жалбата или заявлението, и взето ли е решение от СИК. Жалбите, заявленията и взетите по тях решения, както и особените мнения, ако има такива, се прилагат към протокола и са неразделна част от него)

Изборите в секцията бяха произведени при следната обстановка:

....нормална..........................

Този протокол беше съставен в четири еднообразни екземпляра.

Брой на приложените жалби, възражения, заявления, особени мнения и решения по тях, представляващи неразделн част от този протокол:

....................................../ няма.............. (с думи) ..../ 0 (с цифри)

Брой на поправките, извършени преди обявяването на протокола и заверени на съответните места с означението "поправка" и с подписите на всички членове на СИК:

....................................../ няма.............. (с думи) ..../ 0 (с цифри)

Подписите в протокола се положиха в 21:45 часа на 12. 05. 2013 г.

ПОДПИСИ НА ЧЛЕНОВЕТЕ НА СЕКЦИОННАТА ИЗБИРАТЕЛНА КОМИСИЯ

ПРЕДСЕДАТЕЛ: .... ЗАМ.-ПРЕДСЕДАТЕЛ: .... СЕКРЕТАР: ....

ЧЛЕНОВЕ:

1. .... 3. .... 5. ..../................

2. .... 4 .... 6. ..../................

Протоколът се подписва от всички членове на комисията след съставянето му. **Член на комисията не може д откаже да подпише протокола.** Член, който не е съгласен с отразеното в протокола, го подписва с особено мнение, коет се прилага към протокола и става неразделна част от него. Когато член на комисията е обективно възпрепятстван да подпише протокола, това се отбелязва, като се посочват и причините. Член на СИК, който откаже да подпише този протокол с наказва с глоба от 1000 лв. **Неподписването на протокола от член на комисията не го прави недействителен.**

При определяне на изборните резултати СИК трябва задължително да провери дали са спазени следните условия:

1. Числото по т. 4 трябва да е равно или по-малко от сумата на числата по т. 1, 2 и 3.
2. Числото по т. 4 трябва да е равно на числото по т. 10.
3. Числото по т. 10 трябва да е равно на сумата от числата по т. 12 и т. 13.
4. Числото по т. 13 трябва да е равно на сумата от числата по т. 14.
5. Числото по т. 3 трябва да е равно на сумата от числата по т. 6, букви „а", „б" и „в".
6. Числото по т. 12 трябва да е равно на сумата от числата по букви „а", „б", „в", „г", „д", „е" и „ж" от т. 11.

Всеки екземпляр на протокола се оформя на листове с обособени страници. Всяка страница се номерира. На всяка страница се отпечатва номерът на листа от протокола, номерът на страницата и фабричният номер на формуляра. На всяка страница се поставят визуални маркери, дефиниращи ориентацията на протокола.

6

Екземпляр за ЦИК
Приложение 86

Joint Opinion on the Electoral Code of Georgia

Manuel González Oropeza*
James Hamilton**
Klemen Jaklic***
Jessie Pilgrim****

I. Introduction

1. At the request of Georgian authorities, the European Commission for Democracy Through Law ("the Venice Commission") of the Council of Europe and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe ("OSCE/ODIHR") have prepared the present opinion on the draft Election Code of Georgia ("the draft Code")[1]. The most recent previous joint opinion of the Venice Commission and OSCE/ODIHR is dated 9 June 2010 and contains comments on amendments up to March 2010.[2] This Joint Opinion contains commentary and recommendations on the Code as drafted through 22 November 2011 and based on draft revised amendments sent by the authorities to the Venice Commission on 8

* Substitute member, Mexico.

** Substitute member, Ireland.

*** Member, Slovenia.

**** Expert, OSCE/ODIHR.

1 Draft Election Code of Georgia (CDL-REF(2011)044rev). Source: http://www.venice.coe.int/docs/2011/CDL-REF(2011)044-e.pdf.

2 Joint Opinion on the Election Code of Georgia (CDL-AD(2010)013); see details in par. 5. Source: http://www.venice.coe.int/docs/2010/CDL-AD(2010)013-e.pdf.

December 2011.[3] Additionally, the Venice Commission and the OSCE/ODIHR are aware that additional amendments were prepared on 10 December; these amendments, however, are not commented upon in this review.

2. This Opinion does not warrant the accuracy of the translated text that was reviewed, including the numbering of articles, paragraphs, and sub-paragraphs. Any legal review based on translated text may be affected by issues of interpretation resulting from translation. Further, while discrepancies in translation have been reconciled as best as possible, the accuracy of relevant terminology cannot be guaranteed.

3. This Opinion is offered for consideration by the authorities of Georgia, in support of their efforts to develop a sound legal framework for democratic elections. The extent to which any amendments to the draft Code can have a positive impact will ultimately be determined by the political will of state institutions and officials responsible for implementing and upholding the Code once adopted.

4. The OSCE/ODIHR and the Venice Commission have previously commented on the legal framework for elections in Georgia, including within the context of final reports of OSCE/ODIHR election observation missions to Georgia. This opinion should be viewed as complementary to earlier comments and recommendations provided by OSCE/ODIHR and the Venice Commission.

5. This Opinion is based on:

- An official translation of the Draft Election Code as of 1 September 2011 provided by the Parliament of Georgia (CDL-REF (2011)044rev);
- Draft amendments to the draft Election Code of Georgia (CDL-REF (2011)044add);
- Joint Opinion on the Election Code of Georgia as amended through March 2010, adopted by the Council for Democratic Elections at its 33rd meeting and by the Venice Commission at its 83rd Plenary Session (CDL-AD(2010)013, 9 June 2010);

[3] Draft amendments to the draft Election Code of Georgia (CDL-REF(2011)044add). Source: http://www.venice.coe.int/docs/2011/CDL-REF(2011)044add-e.pdf.

- Joint Opinion of the Election Code of Georgia adopted by the Council for Democratic Elections at its 26th meeting and by the Venice Commission at its 77th plenary session (CDL-AD(2009)001, 9 January 2009);
- Joint Opinion on the Election Code of Georgia adopted by the Council for Democratic Elections at its 16th meeting and by the Venice Commission at its 67th plenary session (CDL-AD(2006)023, 16 June 2006);
- OSCE/ODIHR Election Observation Mission Final Report Georgia Municipal Elections, 30 May 2010 (13 September 2010);
- OSCE/ODIHR Election Observation Mission Final Report Georgia Parliamentary Elections, 21 May 2008 (9 September 2008);
- OSCE/ODIHR Election Observation Mission Final Report Georgia Extraordinary Presidential Elections, 5 January 2008 (4 March 2008);
- Parliamentary Assembly of the Council of Europe, Report on the Parliamentary Elections, 21 May 2008;
- Parliamentary Assembly of the Council of Europe, Report on the Extraordinary Presidential Elections, 5 January 2008;
- Venice Commission Code of Good Practice in Electoral Matters. Guidelines and explanatory report, adopted by the Venice Commission at its 52nd session (CDL- AD(2002)023rev, Venice, 18-19 October 2002);
- Venice Commission Guidelines on an Internationally Recognised Status of Election Observers adopted by the Council for Democratic Elections at its 31st meeting (Venice, 10 December 2009) and by the Venice Commission at its 81st Plenary Session, Venice, 11-12 December 2009 (CDL-AD(2009)059);
- Guidelines on Media Analysis during Election Observation Missions by OSCE/ODIHR and the Venice Commission adopted by the Council for Democratic Elections at its 29th meeting and by the Venice Commission at its 79th plenary session, Venice, 12-13 June 2009 (CDL-AD(2009)031);
- Existing Commitments for Democratic Elections in OSCE Participating States (2003); and
- Regional and international documents as articulated by the United Nations, Council of Europe, and OSCE.

6. On 26-27 October 2011, the Venice Commission and OSCE/ODIHR conducted a joint expert visit to Tbilisi in light of the preparation of this opinion. Meetings were held with representatives of the governing majority in parliament, the drafting committee of the parliament, representatives of the parliamentary and extra-parliamentary opposition, of civil society, as well as the Ambassadorial Working Group. The information and views shared with the experts during and after the visit have been taken into consideration in this opinion.

7. An effective, fair, and duly stated electoral legislation in any country is of crucial importance for the development of orderly, transparent, and just electoral processes. The legal framework for such electoral processes must take into consideration issues such as: the definition of which persons are entitled to vote and the procedures for their registration as electors; the definition of which persons are entitled to hold office and the procedures candidates must follow in order to be elected; the manner by which political parties may select candidates to run for political office; the requirements for creating electoral districts and delineating them; the financing of elections; the role of the media in electoral processes; the way votes are cast, counted and recounted in an election; the definitions of electoral fraud and other legal violations of electoral procedures; and how voters, candidates, political parties, and citizens in general may file legal actions in a court of law or a competent institution in these matters. This opinion addresses how these matters are regulated by the draft Code.

8. The present Joint Opinion was adopted by the Council for Democratic Elections at its 39th meeting (Venice, 15 December 2011) and by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011).

II. Executive summary

9. The draft Code is generally a complete and methodical law conducive to the conduct of democratic elections. The draft Code includes the necessary elements for organising and administering elections and addresses some of previous recommendations of the

Venice Commission and OSCE/ODIHR. The draft Code takes steps to ensure that:

- Elections are conducted in a transparent and open manner by providing rights for observers and public access to election materials and information;
- Registered candidates have access to broadcast and print media;
- Voting is accessible to persons with disabilities and persons who cannot vote in their designated polling station; and
- Ballots are available in minority languages.

10. It is important to note that it was recommended in the OSCE/ODIHR Election Observation Mission Report on the Parliamentary Elections in Georgia of 21 May 2008 and the Joint Opinion on the Election Code of Georgia (CDL-AD(2010)013), that the Georgian Parliament could enact a new Election Code at least one year ahead of the next federal elections, instead of adopting further amendments. It is therefore commendable that a new Code was drafted before the next parliamentary (2012) and presidential (2013) elections in Georgia. Nevertheless, several recommendations previously made by the Venice Commission and the OSCE/ODIHR still remain unaddressed. In particular, the authorities in Georgia should give additional consideration to issues concerning:

- Restrictions on the right to stand for election, including overly long residency requirements for candidates;
- The formation of electoral districts in a manner that undermines the principle of equality of suffrage;
- Lack of effective mechanisms to facilitate the participation of women in elections;
- Remaining shortcomings in the regulation of political party and campaign finances; and
- Shortcomings in the processes for resolving electoral complaints and appeals.

11. Additionally, election observers continue to note that some provisions of the draft Code, such as those regulating the use of administrative resources by government candidates, continue to be

insufficiently implemented. These issues and other recommendations for improving the draft Code are discussed in the Joint Opinion.

III. General principles

12. Article 1 of the draft Code sets forth that the Code regulates the election of the President of Georgia, Parliament of Georgia, Mayor of Tbilisi, and representative bodies of local self-government (Sakrebulo). Article 1 also provides that the draft Code regulates referendums and plebiscites.

13. Voters elect members of 63 governing bodies of local self-government units (municipalities and self-governing cities), the Tbilisi city Sakrebulo and the mayor of Tbilisi. Except for the mayor of Tbilisi, who is directly elected, the chief executives of local self-government units are selected by the local council. No international standard imposes the direct or indirect election of mayors. According to the European Charter of Local Self-Government, the local executive organs must be responsible to the local council.[4]

14. Article 3 of the draft Code states that elections are conducted on the basis of universal, equal and direct suffrage by secret ballot. The principle of universal suffrage requires that all citizens have the right to vote and stand for election, subject to reasonable restrictions that may apply. As noted in the Venice Commission Code of Good Practice in Electoral Matters, such restrictions are usually about age, nationality, and residency.[5]

15. Considering the issue of age, Article 3(a.a), of the draft Code provides that, with the exception of people have restricted suffrage by law, "any citizen of Georgia who by the elections/referendum has attained or is on the day of election/referendum attaining the age of 18 and who meets the requirements prescribed" by the draft Code shall enjoy the right to vote. This age limit is consistent with the practice in the majority of countries.

4 ETS No. 122, Article 3.2.

5 Code of Good Practice in Electoral Matters. CDL-AD(2002)023rev, I. 1.1.

IV. Electoral system

Electoral Districts

16. According to the draft examined, the Parliament of Georgia consists of 190 members, elected under a mixed electoral system. One hundred-seven (107) members are proportionally elected based on lists of candidates presented in a single, nationwide constituency. Eighty-three (83) members are elected by majority vote in single-mandate electoral districts. All members are elected for a period of four years (Article 109). However, the Venice Commission and the OSCE/ODIHR were informed that, as a result of internal political debate, the increase of number of MPs from 150 to 190 will most likely not take place. However, the Georgian authorities also informed of their intention to engage in reform of the administrative system, which would lead to changes in the size of districts. The Venice Commission and the OSCE/ODIHR strongly recommend such redistricting.

17. Article 14(1)(e) mandates the Central Election Commission (CEC) to establish electoral districts and to specify their boundaries. Likewise, Article 18 directs the CEC to establish, by resolution, electoral districts, "their boundaries, titles and numbers". While the draft Code does not provide explicit criteria to be used in forming the majoritarian districts, the delegation visiting Tbilisi was informed that, in most cases, the boundaries of majoritarian districts coincide with those of municipalities. According to the legislators, this follows from Article 19(2) of the draft Code, which tasks the CEC to establish at least one District Election Commission (DEC) in each self-governing unit. The legislators have also stated the intention to further amend the current draft Code, possibly before its adoption, to require the division of the largest electoral districts into two; it is foreseen that 10 electoral districts in big cities with more than 100,000 voters would be split. In its present form, the draft Code does not require that electoral districts be of equal or comparable size, thus failing to guarantee one of the main principles of electoral rights, equality of the vote.[6]

[6] Paragraph 7.3 of the 1990 OSCE Copenhagen Document commits OSCE participating States to "guarantee universal and equal suffrage to adult citizens." The United Nations Human Rights

18. Municipalities in Georgia are very unequal in terms of population size and numbers of registered voters. In the May 2008 parliamentary elections, the number of registered voters in electoral districts ranged from around 6,000 in some districts (in remote areas) to more than 160,000 voters. Such large variations in voting populations undermine equality of vote weight. The intention of legislators to split some of the biggest electoral districts in the draft Code would go in the direction of addressing this problem. This measure alone, however, is not sufficient as there will continue to be considerable differences (from about 6,000 to more than 90,000 voters) in the size of electoral districts. During the visit, legislators explained that it would be too difficult politically to carry out a complete redistricting and to move away from the confluence of district and municipal boundaries. In this context, it should be underscored that the principle of equality of voting weight is one of the key elements that should be ensured by any electoral system. If, as stated, it is not possible to ensure this relative equality of vote weight in the single-mandate districts, a revision of the electoral system could be envisaged (see below, para. 20).

19. As regards local elections, there were also wide differences in voter populations in electoral districts for the May 2010 municipal elections. Across the country, the number of registered voters in a single-mandate constituency varied considerably within the same local government unit; at times, by more than 1,000 per cent.[7] Even in Tbilisi, where a large population of voters should make it easier to establish comparable electoral districts, there were deviations of up to 30 per cent. Such large deviations undermine the principle of the equality of the vote.[8]

Committee has adopted a General Comment (General Comment No. 25) interpreting the principles for democratic elections set forth in Article 25 of the International Covenant on Civil and Political Rights. *See also* Code of Good Practice in Electoral Matters, I. 2.2. iv.

7 For instance, in the municipality of Kvareli the number of registered voters per single-mandate constituency ranged from 665 to 8,204, in the municipality of Lagodekhi from 470 to 5,680, in the municipality of Baghdati from 311 to 4,299, and in the municipality of Kobuleti from 553 to 14,222. *See* OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 6.

8 In line with paragraph 7.3 of the 1990 OSCE Copenhagen Document, participating States undertake to guarantee universal and equal suffrage to adult citizens. Paragraph I. 2.2 of the Venice Commission Code of Good Practice in Electoral Matters recommends that the admissible

20. Some deviation in the number of voters in each electoral district may be unavoidable due to geographic or demographic factors. The Venice Commission Code of Good Practice in Electoral Matters stipulates that the maximal departure from the distribution criterion should not be more than 10 per cent, and should certainly not exceed 15 per cent, except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity). While the legislators have stated the intention to somewhat reduce the discrepancies in the size of districts for future elections, these discrepancies would likely remain excessive throughout the country. **The Venice Commission and the OSCE/ODIHR recommend that the Code be amended to require single-mandate electoral districts to be of equal or similar voting populations. The Code should specifically address how electoral districts are to be established in all types of elections, including the specific criteria that must be applied and respected. The Code should require that those bodies responsible for creating electoral boundaries should be independent and impartial. The delimitation process should be transparent and involve broad public consultations. The Code should also foresee periodic boundary reviews that would take into account population changes.**[9]

Independent Candidacy

21. The draft amendments submitted to the Venice Commission on 8 December allow independent candidates to run for all types of election.[10] These amendments are welcome as they respond to a previous Venice Commission and OSCE/ODIHR recommendation to allow independent candidates to stand.

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departure from the norm "should seldom exceed 10% and never 15%, except in really exceptional circumstances".

9 Code of Good Practice in Electoral Matters, I 2.2 v.: "In order to guarantee equal voting power, the distribution of seats must be reviewed at least every ten years, preferably outside electoral periods."

10 Article 116(1) of the draft Code for parliament, Article 141 for election to a local self-government Sakrebulo, Articles 157 and 159 for election to the Tbilisi Sakrebulo and Article 167(2) for the Tbilisi mayoralty elections.

Electoral System Choice

22. The choice of an electoral system is the sovereign decision of a state, provided the system conforms with principles contained in OSCE commitments, the Venice Commission Code of Good Practice in Electoral Matters[11] and other international norms, including requirements for transparency, universality and equality of suffrage of voters and non-discrimination among candidates and political parties. The mixed electoral system chosen in Georgia, as such, is in line with international standards. However, it has hitherto not been possible to provide for constituencies of an approximately equal size in Georgia (see above, para. 16) and, thus, to guarantee the equality of the vote within the framework of the mixed system. **The Venice Commission and OSCE/ODIHR recommend that the electoral system for both parliamentary and local self-government elections be reviewed in order to ensure the equality of suffrage.**[12] The Parliament could consider the work of the Venice Commission on electoral systems,[13] with a view to identifying an optimum relationship between genuine representation and stability of government, while respecting the principle of equal suffrage.

V. Candidacy and suffrage rights

Guarantee of Suffrage Rights

23. It is a universal civil and political right that every citizen can, on a non-discriminatory basis and without unreasonable restrictions: (1) take part in the conduct of public affairs, directly or through freely chosen

11 Code of Good Practice in Electoral Matters, II. 4: "Within the respect of the above-mentioned principles, any electoral system may be chosen".

12 Code of Good Practice in Electoral Matters, II, 4.

13 Venice Commission, Report on Electoral Systems: Overview of Available Solutions and Selection Criteria adopted by the Venice Commission at its 57th Plenary Session (CDL-AD(2004)003, 12-13 December 2003); particularly Section 4. Source: http://www.venice.coe.int/docs/2004/CDL-AD(2004)003-e.pdf.

representatives; (2) vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and (3) have access, on general terms of equality, to public service in his or her country.[14] The draft Code does not fully satisfy these basic principles as it contains certain provisions that unduly limit candidacy rights. These restrictions should be reconsidered.

Restrictions on the Right to Vote

24. The 2010 Joint Opinion on the Election Code of Georgia[15] recommended amending the provisions that prohibit citizens who are in penitentiary institutions from participating in elections and referenda. This recommendation has been addressed in the draft Code following draft amendments of 8 December. Draft Article 3(a.c.) narrows the application of a restriction on voting rights of prisoners and stipulates that persons in penitentiary institutions, "except persons who have committed less grave crime and are sentenced not more than five years of imprisonment" do not have the right to take part in elections and referenda. This is a welcome amendment, in accordance with the case-law of the European Court of Human Rights.[16]

25. There appears to be an inconsistency in the draft Code as some text in the English translation suggests that prisoners can vote using

14 *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR), Article 25.

15 CDL-AD(2010)013.

16 ECtHR, *Hirst v. United Kingdom* (No. 2), Application no. 74025/01, 6 October 2005. *See also Frodl v. Austria*, Application no. 20201/04, 8 April 2010. *See also* Code of Good Practice in Electoral Matters, I. 1.1. d. It is also important to note that Article 10 of the ICCPR provides that "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. [...] 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. […]". In addition, General Comment No. 25, adopted by the United Nations Human Rights Committee under Article 40 § 4 of the ICCPR concerning the political and electoral rights guaranteed under Article 25, states, *inter alia*: "14. In their reports, State parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote."

mobile ballot boxes (Article 33(1)(b)).[17] The Code in force specifies that a special list of voters would be compiled, among others, for voters who, on the election day, are in preliminary custody (former Article 10.c.). These citizens would thus be included in the mobile ballot box list (former Article 11.b.).

Considering the current version of the Code and Article 3(a.c.) of the draft Code, it would seem that the term "in prison" refers to "preliminary custody" and that voters in a penitentiary institution are indeed deprived of the right to vote. This issue should be clarified, unless this stems from an imprecise translation.

Restrictions on the Right to be Elected

Residency requirements

26. In the draft Code as amended on 8 December, Article 96 provides a 5-year residency requirement for running for the presidential office with an additional requirement that a candidate must have lived in Georgia for 3 last years before the announcement of elections, Article 110 establishes a 5-year residency requirement for the possibility of being elected to Parliament, with the same additional requirement, and Article 134(1) stipulates a 3-year requirement for elections to local self-government. Amendments proposed on 8 December indicate that authorities undertook an effort to reflect the Venice Commission and OSCE/ODIHR recommendations to reduce the residency requirements. Nevertheless, the residency requirements in Georgia still appear long.

27. Although reasonable residency requirements may be imposed, such requirements should be in the pursuit of a legitimate aim and the means employed must not be disproportionate. The Code of Good Practice in Electoral Matters stipulates that, where local and regional elections are concerned, residency requirements may be imposed.[18] It is recommended that these periods should only exceed six months to protect national minorities. For example, in the *Polacco and*

[17] See also Articles 34(2)(d) and 66(9) of the draft Code.

[18] Code of Good Practice in Electoral Matters, I. 1.1.c.iv.

Garofalo v. Italy case, only those persons who had been continuously living in the Trentino-Alto Adige Region for at least four years could be registered to vote for the regional council elections.[19] The European Commission determined that this requirement was neither disproportionate nor unreasonable because it was intended to ensure a thorough understanding of the regional context so that the citizens' vote could take into account the concern for the protection of linguistic minorities. The residency requirements in Georgia, which are not aimed at protecting national minorities and are instituted not only for local elections, are overly long. Therefore, following the Code of Good Practice in Electoral Matters and the comments of the United Nations Human Rights Committee on residency requirements,[20] **the Venice Commission and the OSCE/ODIHR recommend that requirements on the length of residency should be further reconsidered and reduced for all elections.**

"Health" requirement

28. Articles 2(f.a.), 110(3) and 132 deny the right of passive suffrage to "drug addicts" and "drug users". They require elected members of parliament to undergo a "drug test" with a possible loss of mandate in case the test is failed. These articles are ambiguous and subject to abuse because they fail to (1) provide reference to the relevant legislation pertaining to what chemical compounds are considered as "drugs" under the law, (2) define what quantity of a particular chemical compound ("drug") measured in the body of a tested person is indicative of "use" of a legally defined "drug", and (3) specify how many positive "drug" tests during what period of time are equivalent to "drug addiction".[21] These provisions are problematic vis-à-vis the principle of universal suffrage and are not in line with paragraph 7.9 of the 1990

19 See European Commission of Human Rights, *Polacco and Garofalo v. Italy*, no. 23450/94, decision of 15 September 1997.

20 UNHRC General Comment No. 25, para. 15. *See also* Code of Good Practice in Electoral Matters, I.1.1.c.4.

21 Such a prohibition on "drug addicts" might be considered discrimination and a violation of international standards protecting citizens with disabilities in the exercise of suffrage rights.

OSCE Copenhagen Document, which requires that "candidates who obtain the necessary number of votes required by law are duly installed in office." **As recommended in previous Venice Commission and the OSCE/ODIHR opinions, these articles of the draft Code should be removed.**

Language requirement

29. Article 110.1, which deals with "passive electoral rights" for parliamentary elections, provides that "any citizen of Georgia, having the right to vote, may be elected as a member of parliament if she/he has attained the age of 25, has lived in Georgia for no less then 10 years, and knows the Georgian language." Such a language requirement is not replicated for other levels of election. If retained, this provision should provide fair and objective standards for determining knowledge of the Georgian language so that candidates would know how it is measured, and so that voters and observers would be able to judge whether candidates have been treated fairly and in conformity with the objective standards stated in the law. This requirement may also be particularly disadvantageous for candidates from national minorities. The Venice Commission and the OSCE/ODIHR recommend that this matter be reviewed and the draft Code be amended accordingly.

Signature Requirements

30. In line with the draft Code, the number of support signatures that political parties are obliged to submit in order to be able to contest all types of elections, including presidential (Articles 97(2), 99(2), 100(b) and 107(6), parliamentary (Articles 113(9), and local self-government elections (Article 142(3)) has been reduced from 30,000 to 25,000. Following the 8 December amendments, there is also a provision requiring that independent candidates nominated by voter initiative groups be supported by 1 per cent (not less than 500)[22] signatures of voters

[22] The Georgian authorities indicated that the minimum requirement of 500 signatures would be removed from the Code at a later stage.

registered on the territory of the respective electoral district where the candidate is standing, except if the candidate was elected to the Parliament in the last elections. The reduction of signature requirements for political parties and institution of a reasonable requirement for independent candidates are welcome and address long-standing recommendations by the Venice Commission and the OSCE/ODIHR. Signature support requirements should, however, be clarified with regard to parliamentary and local elections in order to stipulate that these requirements apply countrywide.[23] As noted in the OSCE/ODIHR Final Report on 2008 parliamentary elections, in some cases it was possible for a parliamentary candidate to be elected with as few as 1,800 votes in a single-mandate electoral district. Also, as previously noted, many single-mandate electoral districts in certain municipalities during the 2010 local self-government elections had fewer than 1,000 voters. In line with the Venice Commission's Code of Good Practice in Electoral Matters, **the Venice Commission and the OSCE/ODIHR recommend that Articles 113(9) and 142(3) be considered for further amendment to stipulate that the required signatures do not exceed one per cent of the number of voters in the respective electoral unit for which elections are held.**

31. In response to previous OSCE/ODIHR and Venice Commission recommendations, Article 38(2) of the draft Code was amended on 8 December in order to clarify the provisions for checking signatures by the CEC. The revised draft provision requires that signatures be checked in order to establish that there is a required number of valid signatures. The provision also gives parties and candidates two days to correct any identified mistakes and to submit additional signatures in case the number of signatures following the verification has fallen below the required minimum. These amendments are welcome.[24]

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23 Code of Good Practice in Electoral Matters, I. 1.3. ii. The Code of Good Practice in Electoral Matters states that the number of required signatures should not exceed 1% of the electorate within the respective electoral unit for which the elections are held.

24 The Venice Commission Code of Good Practice in Electoral Matters (I.1.3 iv and § 8) recommends that "[t]he signature verification procedure must follow clear rules, particularly with regard to deadlines, and be applied to all the signatures rather than just a sample; however, once the verification shows beyond doubt that the requisite number of signatures has been obtained, the remaining signatures need not be checked."

Withdrawal of Candidacy

32. The draft amendments submitted to the Venice Commission on 8 December take into consideration the respective previous Venice Commission and OSCE/ODIHR recommendation by stipulating (in Articles 100(5) and 120(1)) more realistic deadlines for the withdrawal of candidacies from parliamentary and presidential elections (10 days before election day). These are welcome amendments.

VI. Participation of women

33. Georgia has the lowest proportion of women in the lower house of parliament in the OSCE region (6.5 per cent).[25] In the 2010 municipal elections, only 10 per cent of elected councillors were women, which is a decrease from previous elections. Only 14 per cent of the elected councillors in Tbilisi were women.[26] This is well below the OSCE average of 22 per cent and significantly below the United Nations target of 30 per cent women in decision-making positions. Women have also been under-represented in election administration.[27] Women's under-representation in the legislature and political and public life, more generally, has been consistently noted in the election observation reports of the OSCE/ODIHR.[28]

34. The draft Code does not establish any requirements that candidate lists or membership in election administration reserve a minimum number of positions for women. Although neither the Council of Europe nor OSCE require gender quotas, both recognise that legislative measures are effective mechanisms for promoting women's

25 *See* Gender Equality in the Elected Office: A Six-Step Action Plan, p.12 available at www.osce.org/odihr/78432 and the Inter-Parliamentary Union's Women in Parliament database available at http://www.ipu.org/wmn-e/classif.htm.

26 *See, e.g.*, OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 17.

27 *Id.*

28 *Id.*

participation in political and public life.[29] Further, Article 4 of the Convention on the Elimination of all Forms of Discrimination Against Women emphasises that "adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination".

35. There are several areas where the draft Code could be improved to facilitate the participation of women in public life and the elimination of discrimination against women. **The Venice Commission and OSCE/ODIHR make the following recommendations in this regard:**

- The electoral system could be revised, either through the use of quotas or other recognised methods for facilitating the election of women candidates, so that current percentages of women who are elected is increased substantially;
- Minimum representation for both sexes in election administration, including in leadership positions, could be guaranteed;
- Some portion of public funding for political parties could be linked to the proportion of women nominated as candidates by political parties and/or included on party lists.

VII. Election commissions

General Comments

36. Although there is no standard model for the composition of election commissions, the electoral law should guarantee that election commissions are established and operate in an independent manner and that commission members act impartially.[30] Moreover, in practice, a commission and its members should abide by these standards. Although the draft Code provides the basics for such principles, in

[29] OSCE Ministerial Council, Decision No. 7/09 in Women's Participation in Political and Public Life, para. 2; Council of Europe, Parliamentary Report of 22 December 2009 on Increasing women's representation in politics through the electoral system.

[30] Existing Commitments for Democratic Elections in OSCE Participating States, par. 4; Venice Commission Code of Good Practice in Electoral Matters, II. 3.1.

some respects the draft Code can be improved to provide a greater assurance of their implementation.

37. It should be noted that the provisions for the appointment of the election administration have been improved with amendments over the last several years. The draft Code attempts to establish an element of pluralism in the election administration and transparency in the activities of election commissions. These are positive features of the draft Code.

38. Article 7 of the draft Code establishes the status, system, and composition of the election administration in Georgia. The election administration is composed of the CEC, High Election Commissions of the Autonomous Republics of Abkhazia and Adjara, DECs and Precinct Election Commissions (PECs) (Article 7.2).

Central Election Commission

39. The CEC is the highest body of the election administration of Georgia. It oversees the work of election commissions at all levels and ensures the implementation of the election law throughout the country (Article 7.3). The CEC is composed of a chairperson and 12 members: 5 members of the CEC shall be appointed by the Georgian parliament upon submission of the President of Georgia and 7 other members are appointed by political parties (Article 10.1). As noted in previous Joint Opinion on the Election Code of Georgia,[31] it is a positive improvement that amendments have been made so that the chairperson of the CEC is elected by commission members appointed by parties, except the members appointed by the party with the best results in the previous parliamentary elections (Article 10.5).

40. In a welcome measure and in response to recommendations from domestic civil society, the draft Code requires that half of the membership of the competition commission, which is mandated to review the applications and suggest candidacies for CEC membership, be composed of representatives of civil society. This measure helps enhance the inclusiveness of the process.

[31] CDL-AD(2010)013, par. 27.

41. Under Article 14.1(c), "in exceptional cases," the CEC is "entitled under its resolution to determine the election activities and terms of the forthcoming election/polling" if the requirements and terms stated in the law are "impossible to meet". This text should be clarified.

Protection from Termination

42. Termination of terms of office of election commission members for disciplinary reasons is permissible provided that the grounds for this are clear and exhaustively specified in the law. However, the draft Code does not clearly outline the grounds for possible termination. Article 12(12) provides that parliament can terminate early the terms of office of non-party appointed CEC members. Article 13(5) specifies that a CEC member's mandate may be terminated if the party that nominated the member loses eligibility to receive state funding or if another party starts receiving more funding from the state. In such case, the position will be filled from the party that receives more funding. Article 29(1)(f) provides that the authority of an election commission member is terminated if the party, which appointed the member, "recalls" the member. Article 29(8), which prohibits "recalling members of elections commission 15 days before the election," attests to the legislators' intent to ensure the stability of PECs. Nevertheless, Article 29(8) does not address the fundamental problem of vesting discretionary recall authority with the appointing party. In addition, Article 28(1) sets out the potential forms of disciplinary action that DECs can employ against PECs, including termination of authority.

43. In light of Article 8(22), which states that members of election commissions are independent and are not representatives of the body that appoints them, the rationale for recall is therefore questionable. The terms of office of election commission members should not be terminated on a discretionary basis, as it casts doubt as to the independence of the members and undermines the impartiality, independence and stability of the whole election administration. While the above-mentioned provisions list relevant sanctions, they should do more to ensure that the sanction of termination is not abused and is only applied with careful consideration to proportionality. **The Venice Commission and the OSCE/ODIHR recommend that the Code**

protect election commission members from arbitrary removal by setting out on what grounds a removal is justified as compared to what grounds require a lesser sanction. This is necessary to enhance the ability of election commission members to perform their duties independently, impartially, and professionally.[32]

Majority Voting Requirements

44. Article 30(3) provides that decisions on resolutions of the CEC are taken by a 2/3 vote of the whole membership. The issues that may be the subject of a CEC resolution are defined in Articles 14 and 30. The requirement of a 2/3 vote of the whole membership is a positive measure, especially in cases of decisions on such important issues as the annulment of election results or the possibility to recount the ballots.

Training for Commissioners

45. Article 17 establishes the Election Systems Development, Reforms, and Training Center (the "Training Center"), which is tasked, in part, with training election commission members. This has the potential of enhancing the professionalism of the election administration and helping standardise the training received by commission members. The Training Center was created as the result of amendments to the Code in 2009. It will only be possible to assess the full impact and the role of the Training Center in the course of next elections as it is still a relatively new institution. During the 2010 municipal elections, OSCE/ODIHR election observers assessed training provided to election commission before election day positively, overall. However, problems observed on election day suggest that in the future, this training should especially focus on counting procedures and the completion of results protocols.[33]

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32 Code of Good Practice in Electoral Matters, II.3.1.f.

33 OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 7.

Terminology

46. The English translation of the draft Code uses both the terms "Precinct Election Commission" and "Polling Station Commission". If this is not an issue of translation, it is recommended that the use of these terms be harmonised in the Code and only one term be used to describe the election commission that administers elections at the lowest level.

VIII. Lists of voters

47. The CEC is responsible for the maintenance of a centralised and computerised voter register in accordance with Article 31(4). Article 31(5), which provides that various government agencies – including the Ministry of Justice, local self-government units, Ministry of Refugees, Ministry of Probation and Legal Assistance, Ministry of Internal Affairs, Special Services of Foreign Intelligence and State Security – are responsible for providing the CEC with updated voter information. Article 31(6) requires the CEC to update the electronic database of registered voters every quarter during the calendar year. Under Article 31(8), the lists of voters must also be "considered and resolved" by the DECs no later than fourteen days prior to the elections. Article 31(12) also provides for the registration of those "who were not able to register within the timeframe specified by law…" DECs should review applications from such citizens "within 2 days of receipt, or immediately, if there are less than two days left before election day." Individuals identified in this article include returning expatriates, released patients, and paroled prisoners.

48. Although not specifically identified in the draft Code, OSCE/ODIHR election observation mission reports have noted that the Civil Registry Agency ("CRA") is the body within the Ministry of Justice that provides the basic electronic database of voter records to the CEC. This electronic database is based on the civil register managed by the CRA. It has been positively noted by observers that the quality of voter lists has improved in recent elections.[34] However, one issue

[34] OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010

identified by observers is that the law allows civil registration without a specific address and that such persons cannot be assigned to a specific precinct. In the 2010 municipal elections, these voters could only vote in the proportional elections and not in the majoritarian elections. Consideration should be given to reviewing aspects of the civil registration system, such as the possibility to register without providing an address, in order to ensure that voting rights of those entitled to vote are guaranteed. Particularities and shortcomings in the civil registration system should not impact voting rights of citizens.

49. The Venice Commission and the OSCE/ODIHR recommendation that voter lists be published in relevant minority languages was taken into account by a draft amendment submitted on 8 December (Article 14(1) w), which is welcome.

50. Article 184 of the transitional provisions of the draft Code provides for the establishment of a temporary commission for the verification of voter lists ahead of the 2012 elections, regulates its composition and outlines its authority. This commission is to be formed of representatives of the government, non-governmental organisations, and political parties. The establishment of such commission as a measure aimed at involving political parties and the civil society in the review of voter lists is generally a welcome step. However, the impact of this commission in practice will have to be assessed more precisely and, in particular, in the context of the next elections due to be held in 2012.

IX. Observers

General Comments

51. The presence of international observers from OSCE participating States to observe elections is provided for in the 1990 OSCE Copenhagen Document.[35] Election observation can enhance the integrity of

(13 September 2010), page 8.

35 1990 OSCE Copenhagen Document, para. 8.

an electoral process, promote public confidence, encourage electoral participation, and mitigate the potential for an election-related conflict.[36] In addition, it is recognised that domestic observers should also be allowed to observe an electoral process. In general, the draft Code adequately addresses these requirements, granting observers broad rights and requiring election commissions to prepare and conduct elections in a transparent manner. However, the draft Code could be improved to further facilitate observation efforts.

Application Procedures

52. Article 39(2) of the draft Code as revised on 8 December provides that accreditations will only be issued to those domestic observer organisations that have been registered under Georgian law "no later than one year before polling day". This rule is still restrictive. **The Venice Commission and the OSCE/ODIHR recommend that the limitation of one year in Article 39(2) be reduced to a shorter period to facilitate the accreditation of domestic observer organisations.**

53. Regarding application procedures, it should be noted that there is a differentiated treatment of national and international observer organisations. Articles 40(3) and 40(4) specify that, to be registered, a domestic organisation shall apply no later than 10 days before polling day while international organisations have to apply no later than seven days before election day. While the distinctions between the aforementioned registration periods were reduced by the previous amendments to the Election Code in force, the remaining differences do not seem to be justified. Articles 40.6 and 40.7 also stipulate different periods for the submission of lists of observers to the respective election commissions - two days before polling day for international observer organisations and five days before that day for domestic organisations. The above-mentioned differences could be reviewed with the view to bringing the requirements for international and domestic organisations closer to each other.

[36] United Nations, Declaration of principles for International election observation and Code of conduct for International election observers, commemorated on 27 October 2005, New York, pp. 1-2.

54. Article 40(3) of the draft Code also states that the domestic organisation's "application shall include the name of the election district (districts) where the organisation will conduct the observation." Therefore, consistent with past Venice Commission and OSCE/ODIHR recommendations, the draft Code could be amended to remove the requirement for domestic observers to report in advance where they are going to observe. In addition, the badge that has to be worn by the observer (Article 40.9) could indicate that the observer is permitted to observe at any election commission.[37]

55. Under Article 40(4), an international organisation must submit with its application for registration a copy of its "constituent document", while a domestic organisation must submit a copy of its statute under Article 40(3). What constitutes a "constituent document" for an international organisation could be subject to different interpretations. It is recommended that the term "constituent document" be clarified in Article 40(4).

Rights of Observers

56. Article 41 provides a list of the rights of observers. Previous election observation mission reports of the OSCE/ODIHR have noted that some observers have encountered limitations of their rights during the counting of ballots and tabulation of results. Even the most recent election observation mission report from the 2010 municipal elections notes that the Code "should clearly state that PEC members, observers and proxies have the right to scrutinise the validity of ballots and the correctness of counting and tabulation procedures."[38] Article 41(1)(f) of the draft Code allows observers to "attend the procedures of counting of votes and summing up of results." Furthermore, draft Article 41(5) obliges election commissions to create all the necessary conditions for election observers to perform their duties. Such provisions are welcome.

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37 Guidelines for an internationally recognised status of election observers, III. 1.4 vi.

38 OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 28.

57. By amending Article 41(n) on 8 December, the draft Code positively responds to the Venice Commission and the OSCE/ODIHR recommendation that this Article be reformulated to specifically state that observers have the right to obtain copies of all protocols completed by election commissions.[39] More widely, the Code should ensure that observers be able to follow all elements and stages of an electoral process, including such aspects as the delimitation of electoral districts and the financing of electoral campaigns.[40]

58. Article 41(4) provides for sanctions against observers, as well as electoral subjects and mass media representatives, for violating the conduct requirements set forth in Article 41(2)(a & d). Article 92 provides for a fine of 500 GEL for violating these provisions. Article 91 provides for a fine of 500 GEL for restricting the rights of an observer, electoral subject or representative of mass media. Failure by an election commission to provide copies of summary protocols on elections, referendum or plebiscite, or to deny access to observers, shall lead to the fining of the commission chair and/or secretary with a 1000 GEL fine (Article 89). The possibility to impose sanctions can potentially have positive impact on the conduct of those following an electoral process and enhance the implementation of the law.

X. Election campaign provisions

Freedom of expression

59. According to Article 45(3), "[t]he election program must not contain propaganda of war and violence, of overthrowing the existing State and social system or replacing it through violence, of violating the territorial integrity of Georgia, of calling to foster citizen hatred and enmity, religious and ethnic confrontation." This prohibition could constitute infringement on freedom of expression and could be reconsidered to ensure the right of people to advocate change through

39 Guidelines for an internationally recognised status of election observers, III. 1.7 v.

40 Guidelines on an internationally recognised status of election observers, pp. 3-4.

peaceful means. Furthermore, the draft Code does not stipulate what sanctions apply in case of violation of this provision.

Use of Public Resources

60. Article 48(1) allows the use of administrative resources for campaign purposes - that is, the provision allows the use of state-funded buildings, communication means, and vehicles provided that equal access is given to all election subjects. On the face of it, this provision appears to adhere to the equal opportunity principle. However, in practice such equality may quickly be undermined as political parties in government have easier access to such resources (government facilities, telephones, computers and vehicles). Moreover, Article 48(2) allows civil servants to use their official vehicles for purposes of campaigning, provided the fuel costs are reimbursed.

61. OSCE/ODIHR election observation mission reports from past elections have consistently identified the use of administrative resources in Georgian elections as a significant problem. This problem is due in part to the lack of clarity and specificity in the legislation, as reproduced in the draft Code. The draft Code provisions blur the line between the state and political parties and fall short of OSCE commitments.[41] **The Venice Commission and the OSCE/ODIHR recommend revising the provisions on the use of administrative resources.** Additionally, the last Evaluation Report by the Council of Europe Group of States against Corruption (GRECO) on transparency of party funding in Georgia raises similar concerns and "recommends to take further measures to prevent the misuse of all types of administrative resources in election campaigns."[42]

41 Paragraphs 5.4 and 7.6 of the 1990 OSCE Copenhagen Document; the former calls for a clear separation between the State and political parties and the latter commits the state to "provide… necessary legal guarantees to enable [political parties] to compete with each other on the basis of equal treatment before the law and by the authorities."

42 GRECO, Evaluation Report on Georgia on Transparency of party funding, Third Evaluation Round, Strasbourg, 27 May 2011, Adopted by GRECO at its 51st Plenary Meeting (Strasbourg, 23-27 May 2011; Greco Eval III Rep (2010) 12E), paragraph 69.

Officials campaigning

62. Article 49(1) prohibits persons "holding offices in state or local authorities" from combining campaign activities in support (or against) electoral subjects with the conduct of their official duties, specifically by using subordinates in campaigning, gathering signatures during an official business trip, or conducting "pre-election agitation." Persons "holding offices in state or local authorities" are not listed in Article 49 and there are varying interpretations among stakeholders as to which public officials are legally considered to be persons "holding offices in state or local authorities". Further, the matter is complicated by Article 2(z[5]), which provides a list of "public officials". Although it is not clear how exhaustive this list is, it should include those persons specifically listed in Article 45(4) as being prohibited from engaging in the election campaign. It is also recommended that this list include governors and mayors. Considering the current overall dominance of one party in various elected bodies, the State and local public structures may be too easily confused with the dominant party. **The Venice Commission and the OSCE/ODIHR recommend that the draft Code be amended to provide clearer and more explicit provisions defining "public officials" and "persons holding office". The Code should further prohibit such individuals from directly or indirectly using administrative resources and from engaging in electoral campaign activities on behalf of any party/candidate, in order to ensure a level playing field for all contestants.**

63. The Venice Commission and the OSCE/ODIHR commented positively in the last Joint Opinion on the introduction of Article 49(3) of the Election Code in force, which stipulates that state and local governments, between the day of announcement of the elections and the day of determining the election results, are not allowed to launch any special programs apart from those envisaged in their annual budgets. The same provision is included in the draft Code. The previous Joint Opinion advised that, although a positive provision, implementation should be "assessed in practice during the next elections".[43] During

[43] Joint Opinion on the Election Code of Georgia, CDL-AD(2010)013, 9 June 2010, para. 45.

the 2010 municipal elections, observers noted that this provision was violated by some local governments.[44] **The Venice Commission and the OSCE/ODIHR recommend that authorities in Georgia make a more concerted effort to enforce laws governing the abuse of administrative resources during election campaigns.**

Campaigning by religious and charitable organisations

64. Article 45(4) of the draft Code prohibits charity and religious organisations from participating in pre-election agitation. It would appear that this is intended to prevent undue influence by religious and charitable organisation and to prevent improper influence through charitable donations. However, this may be overly restrictive. Although this might seem like a logical provision, this provision violates the principles of freedom of religion and non-discrimination. **The OSCE/ODIHR and the Venice Commission recommend that Article 45(4) be amended to conform to international standards protecting freedom of religion and the right to non-discrimination in the exercise of speech through campaigning.**

Prohibition of campaigning for foreign citizens

65. Article 45(4) of the draft Code prohibits aliens from participating in election campaigns. This prohibition is also problematic. The rights of freedom of expression and association, according to Articles 10 and 11 of the European Convention of Human Rights, belong to all persons within the jurisdiction of a member State. Even if non-citizens (stateless and alien residents) do not have the right to vote, they do have the right to freely express their opinion, associate and participate in political debates during election campaigns. Such a clause limits fundamental rights of non-citizens residing in Georgia and conflicts with the basic human rights protected by the regional and global

[44] OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 13.

international conventions recognised by Council of Europe member states and OSCE states. **The OSCE/ODIHR and Venice Commission recommend that this prohibition be deleted from Article 45(4).**

Prohibition of election-day campaigning

66. The draft Code does not include any general campaigning curfew or any prohibition against election-day campaigning in and around polling stations. The only limitation is contained in Article 51(12), which prohibits "any pre-election paid and/or free advertising on TV or radio". Undue influence in the last 24 hours before an election can take place in various contexts, such as agitation at the actual polling place or its vicinity and door-to-door campaigning on the day of voting. During the 2008 parliamentary elections and 2010 municipal elections, campaigning activities and materials were, in fact, observed on election day both inside and in the vicinity of polling stations. **It is recommended by the Venice Commission and the OSCE/ODIHR that consideration be given to including a general prohibition against any type of campaign activity during the last 24 hours prior to elections. Campaigning and campaign materials in and around polling stations on election day should be prohibited.**

XI. Media

General Comments

67. Provisions regulating the media during election campaigns are found in Articles 50 and 51. According to the Council of Europe's and the OSCE/ODIHR's reports on the 2008 parliamentary and extraordinary presidential elections, Georgia has a free and a diverse media environment, which offers the citizens access to a wide range of political views. The Ad Hoc Committee of the Parliamentary Assembly of the Council of Europe observed that during the extraordinary presidential elections "both print and broadcast media offered a wide and diverse coverage of the election campaign,

enabling the voters to become familiar with the platforms of different candidates."[45]

68. Article 51(1) of the draft Code stipulates that the requirements of equitable treatment apply only to "qualified" electoral subjects. In order to be granted the status of a "qualified electoral subject" status, the contestant must establish a level of "popular support" through either prior electoral success (3 per cent of the vote in the last local elections or 4 per cent of the vote in the last parliamentary elections) or 4 per cent in not less that five public opinion polls held during the election year, or in an opinion poll held no later than a month before the elections. Although the legal provisions appear to provide an adequate framework for fair campaign conditions for electoral contestants, a problematic element remains. New political parties, which should have equal opportunity with political parties that have participated in previous elections, are limited to "qualifying" through the usage of opinion poll results. This potentially limits the ability for new political parties to compete on an equal basis in elections.

69. The methodological requirements for opinion polls for obtaining "qualified electoral subject" status appear strict, as does the requirement about the number of times (five times in a year or once not less than 30 days before election day) that a poll must yield a certain result in order to qualify a particular subject for free airtime. Moreover, it is not entirely clear who is the appropriate body for assessing and enforcing these requirements as the final decision seems to be left to the broadcaster. **It is recommended that Article 51 be amended to address these concerns. In accordance with the Venice Commission Code of Good Practice in Electoral Matters and the Venice Commission and OSCE/ODIHR Guidelines on Media Analysis during Election Observation Missions, public media "should provide**

[45] Council of Europe, Parliamentary Assembly, Report on the observation of the Extraordinary Presidential Elections in Georgia (5 January 2008), Doc. 11496, 21 January 2008), p. 6, paragraph 34; OSCE/ODIHR, Election Observation Mission Final Report on the Parliamentary Elections in Georgia of 21 May 2008, Warsaw, 9 September 2008, pages 14-17 and OSCE/ODIHR Election Observation Mission Final Report on the Extraordinary Presidential Election in Georgia of 5 January 2008, Warsaw, 4 March, pages 12-15.

parties and candidates in elections with equal access and fair treatment."[46] This should be reflected in Article 51.

Common Advertising Rates

70. The standard of equality of campaign conditions for all electoral contestants includes the right to have access to the same commercial rate for electoral ads offered to political parties and candidates and that the times and locations of the advertising be similar. Such equality is guaranteed in print space (Article 50(2)) and with the revision of Article 50(1)b on 8 December this requirement also seems to apply to TV and radio public broadcasters. The latest revision is welcome and corresponds to a previous Venice Commission and OSCE/ODIHR recommendation.

News Coverage and Other Programs

71. Articles 50 and 51 could also be improved as they are currently limited to providing conditions for contestants to convey messages through free airtime and do not extend to coverage of contestants in the news or other programs. The Council of Europe's Committee of Ministers has recommended that "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."[47] **It is recommended by the Venice Commission and the OSCE/ODIHR that Articles 50 and 51 be amended to require that public media provide comprehensive information on all aspects of the election process through a variety of programs, outside the current free-of-charge slots, in order to create a forum for discussion for all contestants. It is also recommended that**

46 Code of Good Practice in Electoral Matters, I. 2.3. a and Guidelines on Media Analysis during Election Observation Missions , par. 57. Source: http://www.venice.coe.int/docs/2009/CDL-AD(2009)031-e.pdf.

47 *Ibid.*, para. II 2.

these articles be amended to require that public media should be obliged to treat all contestants on equitable terms, not only in special election programs, but also during all other programs, including its news broadcasts. It is further recommended that private broadcasters be encouraged to produce informative and discussion programmes involving parties and candidates. Where they do so, they should comply with the same conditions as public broadcasters.

XII. Campaign finance

General Comments

72. Article 52 of the draft Code provides that the costs incurred by the election administration regarding the preparation and conduct of elections and referenda, as well as the activities carried out by the election administration, shall be financed from the State Budget of Georgia. Each year the CEC has to submit budget estimates to the Ministry of Finance for the election administration of the subsequent year.

73. Articles 54 through 57 of the draft Code regulate campaign contributions and election campaign funds. These articles are generally positive steps for transparency and accountability in elections. However, there remain areas in these articles that should be improved.

74. Article 56(1) establishes a legal threshold of five per cent of valid votes cast as a barrier for receiving public campaign funds. Some funding should be extended to all political parties and electoral contestants who receive a minimum level of citizen support in order to promote political pluralism and provide voters genuine election choices. This is particularly important in the case of new political parties, who must be given a realistic opportunity to compete with existing political parties in elections. Consideration should be given to lowering the threshold for the allocation of public campaign funds.[48]

[48] See paragraphs 188 and 190 of the Guidelines on Political Party Regulation by the OSCE/ODIHR and the Venice Commission, 2011; available at www.osce.org/odihr/77812.

75. In addition to general party funding, Article 56(1) of the draft Code grants political parties, which receive over five per cent of votes in the parliamentary elections, additional funding in reimbursement of election campaign expenses, including those related to pre-electoral advertising on television. The article stipulates that reimbursements will be disbursed based on the financial statements on actual expenses incurred. These provisions are welcome as they could help create equitable minimum campaign conditions for electoral contestants and encourage accountability. However, Article 56(1) could be strengthened to make reimbursements more clearly conditional on the fulfilment of all reporting and audit requirements established by Article 57(6). **The Venice Commission and the OSCE/ODIHR recommend that Article 56(1) be amended to condition disbursement of public funding upon fulfilment of all reporting requirements established by Article 57(6).**

76. The provision in Article 55(6), which exempts "the sums given by parties from their resources for the election fund of their election subject", is of concern. This provision effectively removes the limits established in Article 55(4) & (5) on contributions to election campaign funds. Not only does such a provision give unfair advantage to wealthier political parties, it will also encourage contributions to be made in a manner that circumvents the very limits established by Article 55(4) & (5), as well as preventing the timely disclosure before the elections of the name of the person who originally made the donation.[49] **The Venice Commission and the OSCE/ODIHR recommend that the exemption provided in Article 55(6) be deleted from the draft Code. Further, in order to enhance transparency, general reports of political parties, which are required on an annual basis by existing law, should also be filed within a reasonable period of time before the elections so that voters know the identities of contributors to political party funds.** In this context, as recommended by GRECO in the

[49] Observers noted in the 2010 municipal elections that, in the case of one particular political party, a significant proportion of donations to its campaign funds came from the party itself. *See* OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 13. This is especially problematic because general reports on political party accounts are not due until February of the following year, which is several months after the elections. *Id.*

Third Evaluation Report on transparency of party funding in Georgia, the authorities should "establish a standardised format for the annual financial declarations to be submitted by political parties, seeing to it that financial information (on parties' income, expenditure, assets and debts) is disclosed in an appropriate amount of detail and (ii) to ensure that information contained in the annual financial declaration (including donations above a certain threshold) is made public in a way which provides for easy access by the public."[50]

77. Another concern is the distinction established in Article 55(4) & (5) related to campaign contributions of natural persons and "legal persons" or "legal entities". "Legal" persons or entities, which are presumed to include companies formed under Georgian law, can contribute three times as much to a campaign fund as a regular citizen. Not only does this provision discriminate against citizens, it will also encourage some contributors to create legal entities in order to at least triple the amount of a campaign contribution. **The Venice Commission and the OSCE/ODIHR recommend, absent an articulated and justifiable basis for this discrimination, that these provisions be amended to provide the same contribution limit for natural persons as is applicable to "legal persons".**

78. Article 55(8)f of the draft Code tightened the rules regarding the contributions to campaign funds by legal entities in which the State is a shareholder. The article has been clarified compared to its previous version in the Code currently in force (Article 47(5)f), which states that "it is prohibited to accept donations in the election campaign fund from (...) Georgian entrepreneurial legal entity partially owned by the state" (Article 47(5)f). While the language in the current Code may be subject to interpretation as to what "partially owned" means, the draft Code makes it clear that any degree of state participation in a legal entity disqualifies it from making contributions to campaign funds.

79. In the framework of this section, it should be noted that the OSCE/ODIHR and the Venice Commission are also due to publish a Joint Opinion on the draft Law on Amendments and Additions to the Organic Law of Georgia on Political Unions of Citizens. In this context,

[50] GRECO, Evaluation Report on Georgia on Transparency of party funding, Third Evaluation Round, para. 81. ii.

it should be pointed out that the amendments to the Law on Political Unions of Citizens prohibit all legal entities from financing general activities of political parties. If both laws are adopted as drafted, legal entities would be prohibited from financing political parties, but would be permitted to contribute to their election campaign funds. Such differences in the sources of funding of political parties during and outside of campaign periods raise questions as to the objectives pursued and may also be counterproductive from the perspective of a prohibition included in the Law on Political Unions of Citizens.

80. Initiative groups of voters are able to participate in elections and present candidates. However, there are no provisions in the draft Code on the funding of initiative groups of voters or their candidates in elections. Nor are there any provisions requiring that the principle of equal access to media be applied to candidates presented by initiative groups of voters. **The Venice Commission and the OSCE/ODIHR recommend that the draft Code be amended to provide funding mechanisms and access to media for candidates presented by initiative groups of voters.**

81. The draft Code fails to address how political activities in referenda and plebiscites are to be funded. There are no provisions specifying how groups in support or opposed to referenda and plebiscite proposals are funded in these types of processes. **The Venice Commission and the OSCE/ODIHR recommend that the draft Code be amended to include regulations on funding and media access during referenda and plebiscites.**

Election Campaign Funds

82. Articles 54(1) and 55(1) specify that goods and services given "free of charge" come within the definition of a campaign contribution and are subject to limitations and legal obligations for financial reporting. These articles should be strengthened by including goods and services provided at a discount or below market value in the definition of a campaign contribution.

83. Article 55(3) provides that "the funds deposited without indication of the data provided for by the paragraph 2 of this article shall be considered anonymous", and shall thus "be transferred immediately

to the State budget of Georgia". This measure runs the risk of being disproportionate. It curtails the right to property (First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms) in an excessive way in order to prevent improper deposits while, at the same time, there seem to be far less drastic means to achieve the same end with no lesser level of efficacy. For instance, the law could simply prohibit both, the attempt of making a deposit as well as the actual processing (by bank officials) of such requests. They could be characterised as a criminal offence according to the Criminal Code and thus left to the courts to apply the prescribed sanction for such acts in accordance with the principle of proportionality. **The Venice Commission and the OSCE/ODIHR recommend that Article 55(3) be accordingly amended.**

84. Article 56 would benefit from explicitly stating that leaders and members of political parties are prohibited from applying or converting campaign funds, received from both public and private sources, for personal use. The lack of such a provision opens the possibility for abuse and corrupt activities by political party leaders or members who have access or control of campaign funds.

Accountability, Reporting and Audit Requirements

85. Article 57(4) states various duties of the election campaign fund manager, such as monthly reporting to the CEC on sources and amounts of contributions. These measures contribute to the transparency and are positive. However, the provision requires financial reporting only on a monthly basis, which was seen to be inadequate in practice during the 2008 parliamentary elections and 2010 municipal elections. **It is recommended by the Venice Commission and the OSCE/ODIHR that this provision be revised to ensure the financial report is submitted to the Financial Monitoring Group of the CEC and published in a timely manner in advance of election day. This provision should also include an obligation to report on expenditures (not only contributions) in both the pre-election and post-election periods.**

86. Article 57(6) outlines post-election reporting requirements related to campaign funds, which contributes to the overall transparency

of campaign financing. Also Article 55(13) requires that the final audit report submitted by election contestants be "open, public and available to everyone." The CEC is compelled to give this information and all such reports are accompanied by relevant supporting documentation (apparently "mentioned information") and posted on the CEC website within two (2) business days of its adoption.

Monitoring Body

87. Article 57(12) requires the CEC to establish a Financial Monitoring Group, tasked with reviewing and auditing the financial reports that all election subjects are required to submit during an election period. This provision defines the role and responsibilities of this Financial Monitoring Group. The group is composed of "social representatives, lawyers and licensed financial auditors" who study the information provided in reports and present it to the CEC.

88. Observers noted in the 2010 municipal elections that the Financial Monitoring Group's effectiveness was limited by the lack of clarity about its mandate and the limited instruments at its disposal. According to group members, they were not authorised to check the accuracy of financial statements provided by electoral subjects.[51] The group did not have access to the source documents, i.e. electoral subjects' accounting records, which supported the supplied financial statements. **The Venice Commission and the OSCE/ODIHR recommend that Article 57(12) be amended to clearly define the role and responsibilities of the Financial Monitoring Group overseeing the implementation of campaign finance provisions. The Finance Monitoring Group should be empowered to carry out its own checks of the supporting documentation provided by electoral subjects. The Financial Monitoring Group should also have the authority to issue subpoenas to compel the production of receipts, invoices, bank statements and other documentation in order to verify the completeness and accuracy of all financial reports.**

[51] OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 13.

89. In the context of this section, it should be pointed out that while the draft Election Code tasks the Financial Monitoring Group of the CEC with the monitoring of election campaign finances, Article 34 of the draft amendments to the Law on Political Unions of Citizens stipulates that "monitoring over legality and transparency of financial activities of a political party shall be carried out by the Chamber of Control of Georgia." While the provisions of these two laws, which vest two different institutions with authority over related tasks, are not necessarily contradictory, the legislators are encouraged to take these differences into account when finalising both pieces of the legislation. Consideration should particularly be given to ensuring that there is no overlap or conflicts of jurisdiction between the two bodies.

Sanctions

90. Article 57(8) of the draft Code provides that a court ruling can restrict an electoral subject "from participation in future elections" if the electoral subject did not "represent fund account" to an election commission. This article does not provide any limitation on the length of the restriction and does not require that the court ruling define the period of time for the restriction. An indefinite restriction, which is a permanent forfeiture of political rights, for violating campaign reporting requirements would appear to be excessive. **The Venice Commission and the OSCE/ODIHR recommend that Article 57(8) be accordingly amended.**

91. Article 57(9) of the draft Code foresees that if an electoral subject violates campaign finance regulations, the appropriate DEC or the CEC can "apply to the court with the request of consolidation of the results of the elections without taking into account the votes received by these election subjects". The election commission's application must be based on a violation that is "substantial" and which "could affect the results of the election". This text will be extremely difficult to apply and provides a disproportionate remedy for a campaign finance violation. "Could affect the results" is hard enough to apply when considering physical ballots that are contained in ballot boxes. Applying this phrase to events occurring outside of the polling station and without reference to mathematical probabilities

that can be applied to quantitative measures such as physical ballots will be extremely difficult.

92. The above sanction is also disproportionate. Such a sanction, amounting to cancellation of votes received by a contestant when consolidating the results, on the mere basis of a late delivery of campaign accounts, is disproportionate and could easily be abused in order to "cancel" an electoral subject once the results are known. It is also not clear how courts, which are normally not in charge of consolidating the results, would handle such cases. The draft Code does not seem to indicate that the contestant, whose votes are cancelled, would benefit from the same type of protection as he/she would in a fully-fledged court process. Finally, the draft Code does not specify whether courts could act on their own motion or whether election commissions would have to submit evidence and present expert opinion on how the alleged violation "could affect the results of the election". **The Venice Commission and the OSCE/ODIHR recommend that the provisions of Articles 57(9) be reviewed to address the above concerns.**

93. The Venice Commission Code of Good Practice in Electoral Matters notes that the principle of transparency in campaign funding consists of two "levels".[52] While the requirement of opening campaign accounts and filing reports represents the first level of the principle, the second level consists of the additional requirement of enforcement mechanisms after elections. The withholding of public funds until compliance is established, as noted above, is one such mechanism. Another mechanism, which is the form of a sanction, is the forwarding of monitoring documentation to the public prosecutor's office for criminal prosecutions. Consideration should be given to amending the Code to require that the Financial Monitoring Group be required to forward relevant information to the prosecution authorities where the campaign finance provisions are deemed violated.

52 Venice Commission Code of Good Practice in Electoral Matters, II.3.3.

XIII. Voting and tabulation of results

Special Provisions for Disabled Voters and Minority Voters

94. The draft Code contains positive provisions to assist disabled voters and voters with limited physical abilities. Article 23(4) requires the establishment of election precincts at hospitals and in-patient institutions. Subparagraphs (a) and (c) of Article 33(1) provide that voters with limited physical abilities or medical conditions that require hospitalisation be included in the mobile ballot box list. As for the location of the polling stations, Article 58(3) contains special provisions to facilitate polling station access for disabled voters upon application no later than 25 days prior to voting day. With regard to the preparation of ballot papers for the election precincts, Article 63(2) stipulates that the CEC shall ensure the use of technology that will enable voters with vision problems to fill in the ballot papers independently. Article 65(3) entitles a person who is unable to vote independently "to ask any person for help in the voting booth", except for those personnel listed in subparagraphs (a-d). These are positive features that address the specific needs of persons with physical disabilities. However, Article 65(3) could be further clarified to specify the physical arrangements that must be in place in a polling station to enable illiterate or physically disabled persons to vote and the specific steps to be undertaken by the polling station election administration to ensure the exercise of voting rights by disabled and illiterate voters.

95. Articles 62(2) and 63(1) suggest that the 'book of records' in a polling station and ballots be printed in languages other than Georgian where necessary for local populations. Article 63(1) expressly identifies the Abkhazian language as necessary for ballots in Abkhazia. Article 70(10) directs that the final minutes of an election commission be printed in Abkhazian or other local minority languages. These are positive provisions. However, the English translation of Article 62(2) uses the word "might" instead of "shall". **In order to further facilitate the participation of all societal groups in elections, the Venice Commission and the OSCE/ODIHR recommend that consideration be given to amending the Code to require that all**

elections materials in areas with significant national minority populations be printed in minority languages.

Military Voting

96. Articles 23(4) and 23(6) address the establishment of special polling stations for military units, military commands and on ships. Article 66(9) also provides for voting by a mobile ballot box "on territory of which there is a military base" if it meets the requirements of Article 33(1)(d) of being "located far away from the electoral area." While it is acceptable for the electoral law to have special provisions ensuring that a member of the military is able to exercise the right to vote while on active duty, these provisions must be written carefully, as voting by the military can be subject to abuse. There may also be confusion as to which electoral district the military voter should receive a ballot from. This recommendation has been included in previous opinions, but still not adequately addressed in the draft Code.

97. Voting by the military and police personnel have proved to be controversial in past elections in Georgia due to the failure of the legislation to provide sufficient clarity on arrangements for these types of voters. The draft Code continues to be ambiguous in defining the conditions under which these voters can vote for the majoritarian component of elections if their place of service is away from their residence. In the 2010 municipal elections, the Tbilisi city court ruled that 17,000 servicemen registered by the Ministry of Interior could only vote in the proportional component of local self-government elections.[53] However, prior to this court ruling, the CEC held the view that these servicemen would be able to vote in both the majoritarian and proportional elections.[54] Thus, the confusion over military and police voting remains unaddressed by the draft Code. **The Venice Commission and the OSCE/ODIHR again recommend that the Code clearly stipulate all the requirements in an unambiguous manner, and state how these requirements are to be applied, including in**

[53] OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 10.

[54] *Id.*

determining which majoritarian ballot a member of the police or military should receive in elections.

Mobile Voting

98. Mobile voting should only be allowed under strict conditions, avoiding all risk of fraud.[55] Article 33(3) states that "only handicapped electors are included into the list for a mobile box, who are not able to independently visit the electoral commission". Article 33(1), however, expands the list to electors in prison, hospitals, those in military service, and those "on territory of the electoral district, but in a place if difficult to access". Further, Article 33(2) expands the list to voters who cannot "visit the voting premises" if the voter applies for mobile voting not later than two days prior to election day. Article 33(2) also provides that an application to vote by the mobile ballot box can be made by telephone. Thus, it would appear that the opportunities for mobile voting are very broad and not limited to those voters who have no opportunity to vote except through the use of the mobile ballot box. **It is recommended by the Venice Commission and OSCE/ODIHR that Article 33 be revised to insure that mobile voting is available only to those in a hospital or who have illnesses or physical disabilities, which prevent them from visiting a polling station. Further, the Code should require that all applications for mobile voting be in writing, except in case a physical disability prevents the voter from writing.**

99. Article 66, which regulates the process of mobile voting, provides that a single mobile ballot box is used by a precinct election commission. Article 66 does not address the possibility that one ballot box may not be sufficient to accommodate all special voters who may need to vote by mobile voting. It is recommended that Article 66 be amended to address this possibility and specify when more than one mobile ballot box may be used by a precinct election commission.

100. Article 66(4) requires that two PEC members, who are chosen by ballot, conduct voting at the addresses of eligible mobile

[55] Code of Good Practice in Electoral Matters, I. 3.2. vi.

voters. This follows in part the recommendation from the previous Venice Commission and OSCE/ODIHR opinions on the matter, which recommended that "there should be two members of the PEC for administering mobile voting". However, it does not follow another part of that same recommendation which stated that the two selected members "should not have been appointed to the PEC by the same appointing authority."[56] Article 66 also does not reflect the third part of the recommendation from that opinion: "Article 56 [now 66] should expressly state that all procedures for identifying a voter, issuing a ballot, marking a ballot, and for observation and transparency are applicable to the mobile voting procedure".[57] Improvements along the described lines would clearly add important safeguards to minimise the possibilities for fraud in the process of voting by means of a mobile ballot box. **The Venice Commission and the OSCE/ODIHR recommend that Article 66 be amended to incorporate these safeguards for mobile voting.**

Voting Procedures

101. An amendment to the Code in 2009 introduced the possibility for video surveillance and recording in polling stations for the purpose of recording violations of the law. Article 58(6) of the draft Code provides that "it is restricted to take photos or video films within the cabin for voting."[58] The Venice Commission and the OSCE/ODIHR previously recommended the deletion of this provision as it could result in some voters being intimidated by the recording of activities in the polling station even though the stated intention is to create more transparency and control. Despite the prohibition included in draft Article 8(18) to conduct photo and video recording inside voting booths, **the Venice Commission and the OSCE/ODIHR reiterate previous recommendations to remove the provisions for video surveillance in polling stations altogether.**

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56 Joint Opinion of the Election Code of Georgia (CDL-AD(2006)023), page 24.

57 *Id.*

58 See also Article 8(18).

Determination of Election Results

102. Articles 67 through 71 contain detailed provisions on opening of ballot boxes, determination of results of voting, compilation of summary protocols of voting, and the consolidation of election results. Provisions for how the ballots in mobile ballot boxes are accounted for are of concern.

103. Article 68(4) requires that all ballots (special envelopes containing ballots) in a mobile ballot box be invalidated if the number of ballots in the mobile ballot box exceeds the number of signatures in the list of voters using the mobile ballot box. It would go against the principle of proportionality for one hundred legitimate and valid mobile ballots to be invalidated just because one extra ballot is found in the mobile ballot box. A better practice may be to note any discrepancy in the number of mobile ballots in the protocol, thereby preserving an evidentiary basis for later consideration should there be a mathematical possibility that an extra ballot in the mobile box could have affected the result. Furthermore, since similar provisions do not exist for invalidating ballots in regular ballot boxes, this provision amounts to unequal treatment of voters using a mobile ballot box. **It is recommended by the Venice Commission and OSCE/ODIHR that this requirement in Article 68(4) be removed from the draft Code.**

Publication of results

104. Article 71 outlines the procedures for the completion of summary protocols on voting results by election commissions in an electoral constituency. Article 71(9) as revised on 8 December 2011 requires that the DECs "hand over" signed and certified "photocopies of the Precinct Electoral Commission summary protocols…(these protocols shall have the same legal power of the Precinct Electoral Commission summary protocols)." This Article further stipulates that a representative/observer receives a photocopy of a PEC protocol and confirms the receipt by signing the DEC book of registration. Article 71 does not expressly require the DEC to complete its own protocol summarising the results from individual PECs within the district. However, Article 21(1)(f) indicates that a "summary protocol of dec voting results shall be drawn up." This would be consistent with previous Venice Commission and OSCE/ODIHR

recommendations that the DEC complete a protocol, which includes results from individual PECs within the district as an integral part of the DEC protocol, thereby enabling parties and observers to audit the results. The Venice Commission and the OSCE/ODIHR recommend that Article 71 include text similar to that in Article 21(1)(f), which requires that "summary protocol of DEC voting results shall be drawn up."

105. Article 76(4) stipulates that the CEC "ensures upload of the final minutes of the election results on the web site of the commission in parallel with the receipt of the final minutes". Article 76(7) directs the CEC to "publish on its web site the information about election results according to each election precinct" and deliver this information to the press and other media. Article 76(8) directs the CEC to "publish it (PEC summary protocols) immediately on its web site." These transparency mechanisms are welcome as they allow both observers and political parties to check the accuracy of the results and of their consolidation. These provisions are in line with previous opinions of the Venice Commission and OSCE/ODIHR that recommended publication by the CEC of the results per polling station.

Invalidation of Results

106. Provisions regulating the invalidation of election results should be clarified. Indeed, the inadequacy in the area of invalidation of election results has been shown by the experience of past elections.[59] As noted in previous Joint Opinions, there is an inconsistency in the draft

[59] OSCE/ODIHR Final Report on Georgia Parliamentary Elections, Part 2, 28 March 2004, page 23, for a detailed explanation of the CEC's decision concerning the Khuol and Kobuleti constituencies. *See* the following case: *The Georgian Labour Party v. Georgia*, Application no. 9103/04, 8 July 2008: "141. (…) the Court concludes that the CEC's decision of 2 April 2004 to annul the election results in the Khulo and Kobuleti electoral districts was not made in a transparent and consistent manner. The CEC did not adduce relevant and sufficient reasons for its decision, nor did it provide adequate procedural safeguards against an abuse of power. Furthermore, without resorting to additional measures aimed at organising elections in the Khulo and Kobuleti districts after 18 April 2004, the CEC took a hasty decision to terminate the country-wide election without any valid justification. The exclusion of those two districts from the general election process was void of a number of rule of law requisites and resulted in a *de facto* disenfranchisement of a significant section of the population (see, *mutatis mutandis, Matthews v. the United Kingdom* [GC], no. 24833/94, §§ 64-65, ECHR 1999-I). There has accordingly been a violation of the applicant party's right to stand for election under Article 3 of Protocol No. 1 on account of the *de facto* disfranchisement of the Khulo and Kobuleti voters."

Code between Articles 21(1)(e), 72(3), 75(3), and 78(21), which give the authority to invalidate election results to DECs, and Articles 14(1)(k) and 78(22), which appear to extend some invalidation powers to the CEC as well. It is recommended by the Venice Commission and the OSCE/ODIHR that all articles which relate to invalidation of election results be thoroughly reviewed and amended to ensure their clarity and consistency, and that they expressly state the authority of the CEC in regard to invalidation of results. The 8 December amendments, by suppressing the possibility for election commissions to cancel election results *ex officio*, go against the Code of Good Practice in Electoral Matters, which provides that, "[w]here the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions".[60] Such discretion must of course be exercised in conformity with the principle of equality.

107. Article 150(1) provides: "A district electoral commission may annul vote results in an electoral precinct where this law was grossly violated." This provision amounts to granting DECs an extraordinary discretion in annulling the election in a precinct since judging whether the law has been "grossly" violated is a question of subjective appreciation. The 8 December amendment to Article 150(2), if it were to be understood as applying to cases when irregularities may influence the results of the elections and were introduced into Article 150(1), would be welcome. **The Venice Commission and the OSCE/ODIHR recommend that Article 150(1) be reviewed in this sense.** The Venice Commission Code of Good Practice counsels that an election commission "should have authority to annul elections, if irregularities may have influenced the outcome, i.e. may have affected the distribution of seats,"[61] including significant deviations from campaign finance regulations.[62]

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60 Code of Good Practice in Electoral Matters, II.3.3.i.

61 Code of Good Practice in Electoral Matters, II.3.3.e. *See also* European Court of Human Rights, *Namat Aliyev v. Azerbaijan*, Application no. 18705/06, 8 April 2010, about cases of gross violations; para. 74: "it is first necessary to separately assess the seriousness and magnitude of the alleged election irregularity prior to determining its effect on the overall outcome of the election."

62 Code of Good Practice in Electoral Matters, II.3.5, par. 109: "In the event of significant deviations from the norm or if the statutory expenditure ceilings are exceeded, the election must be annulled."

Recount of Ballots

108. Following the 8 December draft amendment, Article 14(1)(k) grants the CEC the power to order a recount of ballots from a polling station only on the basis of a complaint and not anymore on its own initiative. However, neither Article 14(1)(k), nor any other provision in the draft Code provides any criteria for when a recount is required. **It is recommended that the Code be amended to state what circumstances justify a recount. Further, it is recommended that the Code specify the procedures to be used during the recount. It is also recommended for the Code to provide that reasonable notice of the recount be given and that this notice be given to relevant stakeholders, including accredited observers.**

XIV. Legal protections

General Comments

109. Previous joint opinions and final reports of election observation missions have commented extensively on shortcomings in the legislation related to the resolution of election complaints and appeals. Recommendations have been made to adopt simple, understandable, and transparent procedures that will ensure both effective remedies and the adjudication of electoral disputes before an impartial tribunal in a fair and public hearing. Articles 72-74 and Articles 77-78 of the draft Code make changes to previous legal provisions, but do not introduce any significant improvements. Thus, the draft Code continues to require improvement in the area of election complaints and appeals.

110. During the 2010 municipal elections, a number of shortcomings related to the complaints and appeals procedures were evident. The OSCE/ODIHR Final Report stated that "there was an apparent lack of understanding of provisions regulating election disputes among commissions and complainants alike. More than half of the appeals that were filed at the CEC were submitted after prescribed deadlines."[63]

63 OSCE/ODIHR Election Observation Mission Report, Georgia, Municipal Elections, 30 May 2010, p. 19.

It was also noted that complaints and appeals were frequently filed with non-competent bodies and that the DECs and CEC inconsistently determined which complaints to adjudicate. Observers have noted that the "lack of understanding of procedures and of competences of commissions and courts was even more evident in the post-election period than before election day. Several complaints and appeals were submitted to the CEC instead of competent DECs and courts. The CEC took an inconsistent approach and examined some of these complaints on their merits, overstepping its competence as it was not the competent body to examine them."[64] Yet, despite these inadequacies in the Code currently in force, the lawmakers have only made minor adjustments in the relevant articles when drafting the new Code. Thus, the election dispute resolution system remains complex and vague. **The text of the draft Code provisions regulating complaints and appeals must be improved.**

"Forum Shopping"

111. The draft Code contributes to the existing confusion over the competencies of different bodies involved in the review of complaints and appeals by creating a parallel complaint system. Separate complaints, based on the same alleged violation but filed by different complainants, can proceed independently of each other in election commissions as well as in courts. Instead of specifying where a complaint must be filed, the draft Code only contributes to the confusion and leaves the possibility for the complainant to "shop" for his/her forum. **The Venice Commission and the OSCE/ODIHR recommend that consideration be given to specifying in the Code where a complaint must be filed based on the nature of the complaint and not on the personal, subjective preference of the complainant.**[65]

112. As noted above, the draft Code provisions for the resolution of election disputes are complex and at times ambiguous. These provisions should be clarified and streamlined so as to eliminate inconsistencies,

64 *Id.*, at page 24.

65 Cf. Code of Good Practice in Electoral Matters, II.3.3.c last sentence.

ambiguities, and gaps. Most importantly, the competence of all bodies involved in the review of complaints and appeals should be clearly defined.

Administrative Sanctions

113. Articles 79 - 92 of the draft Code establish administrative sanctions for violations of the law. These articles set out monetary fines between 500 GEL and 5,000 GEL imposed for a range of election offences. While these provisions attempt to ensure objectivity and transparency in the punishment of electoral violations, it is recommended that each sanction be periodically reviewed to ensure that proportionality in punishment is maintained.

XV. Concluding remarks

114. Overall, the draft new Election Code is conducive to the conduct of democratic elections and has many positive features. Efforts have been made through a package of additional amendments submitted on 8 December 2011 by the Parliament of Georgia, aiming at implementing recommendations made in the draft Joint Opinion. Nevertheless, concerns remain due to the fact that the text of the draft Code is ambiguous or lacks clarity in certain areas. Among these issues are: restrictions on the passive suffrage rights of citizens; the formation of electoral districts that undermines the principle of equality of suffrage; long residency requirements for candidates; lack of effective mechanisms to facilitate the participation of women in elections; remaining shortcomings in the regulation of political party and campaign finances; and shortcomings in the complaints and appeals process.

115. The most important among these issues is the notable inequality in the size of electoral districts, which according to the lawmakers is due to the fact that the boundaries of districts correspond to those of municipalities, which range in size. Hitherto, election districts in parliamentary elections ranged between some 6.000 some 160.000 registered voters. The Georgian authorities informed of their intention

to engage in reform of the administrative system, which would lead to changes in the size of districts. The Venice Commission and the OSCE/ODIHR strongly recommend such redistricting.

116. Relevant public authorities should be fully informed of their obligations under the Code, once adopted. Public servants and officials at all levels should also be fully informed of the restrictions related to an electoral campaign that apply to them. Enhanced enforcement of election-related laws by all levels of the election administration, the Ministry of Interior, the General Prosecutor, and the courts is also required. Therefore, as in former opinions, the Venice Commission and the OSCE/ODIHR reiterate that apart from improving the legal framework itself, full and effective implementation of the law is necessary in order to ensure conduct of elections in line with international standards.

Report on the Misuse of Administrative Resources During Electoral Processes

Manuel González Oropeza*
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Oliver Kask***
Serhii Kalchenko****

I. Definition and scope

A. Scope

1. After more than twenty years of election observation in Europe and more than ten years of legal assistance to the Council of Europe member states, many improvements were observed regarding electoral legislation and practice. These improvements were materialised thanks to political will and to a rather successful implementation of international recommendations in the electoral legal framework. Nevertheless, the practical implementation of electoral laws and laws related to political parties (including financing of political parties and electoral processes) remains problematic to several extents. The conduct of elections according to the rule of law involves the setting of a mechanism that would ensure the respect of democratic principles, the guarantee of equal treatment in the exercise of the right to vote and to be elected, the development of a political culture, as well as transparency in the

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exercise of rights and duties by the electoral actors, preventing therefore any kind of abuse. One of the most crucial, structural and recurrent challenges, raised on a regular basis in election observation missions' reports in most of the countries observed, is the misuse of administrative resources, also called public resources, during electoral processes. This practice is an established and widespread phenomenon in many European countries, including countries with a long-standing tradition of democratic elections. Several generations of both incumbents and civil servants consider this practice as normal and part of an electoral process. They seem even not to consider such practice as illegitimate action *vis-à-vis* challengers in elections. It may be consequently harder for these challengers to take advantage of administrative resources. This phenomenon seems part of an established political culture and keeps a relation not only with practices potentially regarded as illegal but also with the ones caused by the lack of ethical standards related to the electoral processes of the public authorities in office.

2. Considering this widespread phenomenon, the Venice Commission decided to prepare a report on the issue as well as to draw guidelines, on the basis *inter alia* of the contributions of three Venice Commission members, Messrs Gonzalez Oropeza,[1] Hirschfeldt and Kask, and one election expert, Mr Serhii Kalchenko. In order to assess the situation among the Venice Commission member states, the report aims at answering two questions: 1) what are the inherent weaknesses in legislation and in practice in the member states that lead to misuse of administrative resources during electoral processes? 2) How to address this problem in law and in practice?

3. The report proposes in this **introductory part** a definition of the notion of administrative resources during electoral processes. The report also defines in this introductory part the scope of this analysis in a comparative perspective. For the purpose of this comparative approach, the Secretariat of the Venice Commission prepared a table comparing legal provisions, opinions and election observation missions' reports dealing with this topic in the various

[1] Use of public funds for election purposes, the practice in Mexico, Report by Mr Manuel González Oropeza (CDL(2012)076). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL(2012)076-e. Remark: All website references are updated up to 15 October 2013.

Venice Commission member states, with the help of the members who contributed to this comparative table (CDL-REF(2012)025rev). This table exclusively analyses electoral laws. Therefore, other pieces of legislation related to the misuse of administrative resources, though relevant, are not covered in the report. The report also benefits from the contributions of the Fourth Eastern Partnership Seminar held in Tbilisi, Georgia, on 17-18 April 2013, and presentations on relevant practice in Latin America, France, Armenia, Azerbaijan, Georgia, Ukraine and Moldova.[2]

4. After an executive summary (**part two**) the **third part** of the report focuses on the legal environment and the practice in member states, making reference to other countries for the purpose of comparison. A **fourth part** elaborates on the distinction between legitimate or illegitimate use of administrative resources during electoral processes. The **fifth part** of the report suggests recommendations in order to prevent the misuse of administrative resources and limit the phenomenon.

5. Finally, in a **sixth part**, the Venice Commission draws **guidelines** aiming at fighting misuse of administrative resources during electoral processes, for the consideration of the states and lawmakers.

6. *This report was adopted by the Council for Democratic Elections at its 46th meeting (Venice, 5 December 2013) and by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013).*

B. Sources, reference documents

7. This report is mainly based on the following sources:

- Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms;[3]
- OSCE, Copenhagen Document 1990;[4]

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2 Reports of the Seminar: CDL-EL(2013)007. Available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2013)007-bil.

3 Available at: www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

4 Available at: www.osce.org/odihr/elections/14304.

- Case-law of the European Court of Human Rights;[5]
- Council of Europe, Parliamentary Assembly, election observation missions' reports;[6]
- Council of Europe, GRECO reports;[7]
- Council of Europe, Parliamentary Assembly, Lobbying in a democratic society (Doc. 11937);[8]
- Council of Europe, Venice Commission, Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev);
- Council of Europe, Venice Commission, Report on media monitoring during election observation missions (CDL-AD(2004)047);
- Guidelines on Media Analysis during Election Observation Missions Prepared in co-operation between the OSCE's Office for Democratic Institutions and Human Rights, the Council of Europe's Venice Commission and Directorate General of Human Rights, and the European Commission (CDL-AD(2005)032);
- Guidelines on Media Analysis during Election Observation Missions by the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Venice Commission (CDL-AD(2009)031);
- Council of Europe, Venice Commission, Code of Good Practice in the Field of Political Parties (CDL-AD(2009)021);
- Council of Europe, Venice Commission, Guidelines on political party regulation by OSCE/ODIHR and Venice Commission (CDL-AD (2010)024);
- Council of Europe, Venice Commission, Report on the role of the opposition in a democratic parliament (CDL-AD(2010)025);
- Council of Europe, Venice Commission, Comparative table on legislation, opinions and election observation missions' reports dealing with administrative resources, updated after consultation of the Venice Commission members (CDL-REF(2012)025rev);

5 Available at: http://hudoc.echr.coe.int.

6 The reports by country are detailed in the report.

7 Available at: www.coe.int/t/dghl/monitoring/greco/default_en.asp.

8 Available at: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=12205&lang=EN&search=MTE5Mzc=.

- OSCE/ODIHR, Review of electoral legislation and practice in OSCE participating states;[9]
- Council of Europe, Venice Commission and OSCE/ODIHR, Guidelines on political party regulation (CDL-AD(2010)024);[10]
- Fourth Eastern Partnership Facility Seminar on the "use of administrative resources during electoral campaigns" – Tbilisi, Georgia, 17-18 April 2013 – Reports of the Seminar (CDL-EL (2013)007); and
- OSCE/ODIHR, election observation missions' reports.[11]

C. Definition

8. The "misuse of public resources" is widely recognised as the unlawful behaviour of civil servants, incumbent political candidates and parties to use their official positions or connections to government institutions aimed at influencing the outcome of elections. Nevertheless, this definition does not cover the exact scope of this report. Indeed, the report highlights the problem of constant, or frequent, practice of **misuse** of **administrative** resources by both incumbents and civil servants during electoral processes. The assumption is therefore the following: there are among the Venice Commission member states inherent weaknesses in legislation and in practice that may lead to misuse of administrative resources, giving an undue advantage to **incumbent** political parties and candidates vis-à-vis their challengers, thus affecting the equality of electoral processes.[12]

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9 Publication issued on 15 October 2013. Available at: www.osce.org/odihr/elections/107073. This publication is indicated for information as it was not used by the rapporteurs for completing this report due to its recent publication.

10 Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)024-e; and www.osce.org/odihr/77812.

11 Available at: www.osce.org/odihr/elections/. The reports by country are detailed in the report.

12 The OSCE/ODIHR Guidelines on political party regulation define the incumbency advantage as follows: "While there is a natural and unavoidable incumbency advantage, legislation must be careful to not perpetuate or enhance such advantages. Incumbent candidates and parties must not use state funds or resources (i.e., materials, work contracts, transportation, employees, etc.) to their own advantage".

9. An **electoral process** as understood in the report is a period going **beyond** the electoral campaign as strictly understood in electoral laws, it covers the various steps of an electoral process as starting from, for example, the territorial set-up of elections, the recruitment of election officials or the registration of candidates or lists of candidates for competing in elections. This whole period leads up to the election of public officials. It includes all activities in support of or against a given candidate, political party or coalition by incumbent government representatives before and during election day. An electoral campaign as defined in the report starts at such an early stage. Hence, the report alludes to domestic provisions that for some of them strictly refer to the electoral campaign, for some others to larger periods. Electoral campaigns are part of the electoral process. Hence, it does not impact the comparative dimension of the methodology used for this report (in particular regarding the comparative table on legislation, opinions and election observation missions' reports dealing with administrative resources).[13] The report retains therefore a broad definition of the electoral process.

10. The report also clearly distinguishes the **use** and the **misuse** of administrative resources. The **use** of resources should be permitted by law; it implies a lawful possibility of using administrative resources during electoral processes for the proper functioning of the institutions and providing that such a use is not devoted to campaigning purposes. On the contrary, the **misuse** of administrative resources should be sanctioned by law due to the unlawful use of public resources by incumbents and civil servants for campaigning purposes.

11. The allocation of **public funds** for campaigning purposes provides political parties and candidates with a specific public financial support, limiting risks of unbalanced financial means for campaigning. In this respect, there are examples of laws stipulating that parliamentarians and cabinet ministers have the right to travel within the country free of charge, including during electoral processes. If such political activities are financially supported by public funds, in conformity with the principle of equality among parliamentarians and

[13] CDL-REF(2012)025rev. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2012)025rev-e.

under independent supervision, such measures will not fall under the definition of misuse of administrative resources.

12. Therefore, the following **definition of administrative resources** can be retained for the purpose of this report:

> **Administrative resources are human, financial, material, *in natura*[14] and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public sector staff, finances and allocations,[15] access to public facilities as well as resources enjoyed in the form of prestige or public presence that stem from their position as elected or public officers and which may turn into political endorsements or other forms of support.[16]**

13. The misuse of administrative resources includes accordingly the use of equipment (i.e. the use of phones, vehicles, meeting rooms, etc.) as well as access to human resources (i.e. civil servants, officials…) in ministries and among territorial and local public institutions aimed at promoting the campaigns' activities of the incumbents. Such abuses lead to inequality between candidates, particularly between incumbents and other political parties or candidates and even more for those having no representation in parliament. Moreover, it should be noted that despite the focus of the report on elections to parliaments, the report could also apply to territorial and local self-government bodies. Furthermore, in order to limit the scope of the study, the report retains the public institutions as main actors of misuse of administrative resources. This does not exclude semi-public bodies such as state-owned enterprises, semi-public institutions, public agencies and their employees, which are subject to political pressure and can be abused for the purpose of electoral campaigning.

14. The notion of misuse of administrative resources during electoral processes should also be defined throughout the existing

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14 Like some benefits from social programmes, including goods and in kind resources.

15 As well as state-owned media, which will not be addressed here.

16 This definition aims at harmonising various expressions that can be found in domestic legislation such as "public resources" or "state resources". Both expressions refer to "administrative resources".

international binding texts and soft law. In this respect, the 1990 Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE (OSCE) underlines the need for "a clear separation between the State and political parties." Political parties should be provided "with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities."[17] The International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention against Corruption (UNCAC) are also part of the applicable international standards, as well as the Council of Europe Committee of Ministers 2003 Recommendation on common rules against corruption in the funding of political parties and electoral campaigns.[18]

15. This requirement of equal treatment – the principle of equality of opportunity – implies that there is an effective remedy against misuse of administrative resources by both the incumbent political parties and civil servants during electoral processes but also during the period under which they are in power and especially during the period

17 Respectively para. 5.4 and 7.6 of the 1990 Copenhagen Document. Available at: www.osce.org/odihr/elections/14304.

18 See respectively:
ICCPR, Article 25: "(…) Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind".
Available at: http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf.
UNCAC, Article 17: "each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position". Available at: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-14&chapter=18&lang=en.
CoE Committee of Ministers Recommendation Rec(2003)34, Section IV: "(…) Objective, fair and reasonable criteria should be applied regarding the distribution of state support (…)" (art. 1) and "(…) States should prohibit legal entities under the control of the state or of other public authorities from making donations to political parties" (art. 5. c). Available at: www.coe.int/t/dghl/monitoring/greco/general/Rec(2003)94_EN.pdf.

immediately foregoing the electoral process.[19] Following the principle of neutrality that guarantees a level playing field for all political contestants and that entails an impartial behaviour by civil servants during the whole electoral process, it is important that authorities of all levels stay away from the election process in order to avoid any kind of interference and guarantee fairness and impartiality during the entire electoral process.[20] Moreover, in countries where re-election is allowed, officials in public positions that are running for office should not use their opportunities as officials when they campaign and act as candidates. Norms dealing with misuse of administrative resources by public officials aimed at consolidating repetitive practices identifiable as democratic principles, the guarantee of equality for each political party and the safeguard of the principle of free and fair elections.[21]

16. The report is based on the above definition of misuse of administrative resources during electoral processes. It does not therefore cover the issue of abuse of administrative resources through state-owned media or limits to campaign expenditures, even if these are also widespread phenomena. Moreover, specific provisions apply to media coverage during electoral campaigns and prescribe in general that airtime is devoted to all competitors on an equal basis.[22] If abuses do exist, the purpose of this report is not to reflect such considerations.

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19 See also Guidelines on political party regulation by OSCE/ODIHR and Venice Commission (CDL-AD(2010)024), p. 207-210, where some of the general problems concerning abuse of state resources are presented. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)024-e.

20 2006 Ruling on the final count result of the Presidential elections in the United States of Mexico, declaration of validity of the election and the President elect, Mexico, TEPJF, 2008, p. 392. Available at: www.tedf.org.mx/sentencias/index.php/sentencias.

21 As acknowledged by the Constitutional Court of Germany in a judgement of 1977, actions by state authorities have an influential effect on the electorate's opinion and how to vote. Therefore, they are forbidden, with regard to their public function, to identify themselves with political parties or candidates during elections and to use administrative resources in favour or against them, particularly through advertising aimed at influencing the voters' decision (see BverfGE 44; 125; C; I; 4; para. 49). See *inter alia*: http://www.kommunalbrevier.de/kb.epl?dn=ou%3D%C2%A7%2011%20Unterrichtung%20der%20Einwohner%2Cou%3DLandkreisordnung%20%28LKO%29%2Cou%3DGesetzestexte%2Cou%3DKommunalbrevier%2Cdc%3Dkomb%2Cdc%3Dgstbrp.

22 In this respect, the Venice Commission's Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev) states that:
I. 2.3. **Equality of opportunity**

II. Executive summary

17. Despite many improvements in Europe in the field of electoral legislation and practice, the practical implementation of electoral laws and laws related to political parties (including financing of political parties and electoral processes) remains problematic to several extents. One of the most crucial, structural and recurrent challenges, raised on a regular basis in election observation missions' reports in most of the countries observed, is the misuse of administrative resources, also called public resources, during electoral processes. This practice is an established and widespread phenomenon not only in Europe but also for example in the Americas and in Central Asia, including in countries with a long-standing tradition of democratic elections. The Venice Commission believes that there are among the Venice Commission member states inherent weaknesses in legislation and in practice that may lead to the misuse of administrative resources, potentially giving an undue advantage to incumbent political parties and candidates vis-à-vis their challengers, thus affecting the equality of electoral processes and the freedom of voters to form an opinion.

18. The report underscores that the misuse of administrative resources during electoral processes can threaten some of the basic requirements of a democratic constitutional state. Nevertheless, the political will of the highest state authorities to ensure free, fair and balanced elections remains a key factor. Furthermore, what is crucial here is how the legislative instrument is used, the executive power is exercised and the judiciary or independent relevant bodies apply the law. The implementation of sanctions against abuse of administrative power is possible only if the investigation, auditing, prosecution and justice systems are independent from the ruling political power.

19. Legal provisions on prevention and sanction of the misuse of administrative resources can be divided into six categories. Certain sub-sections refer to similar laws but emphasise distinct provisions:

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a. Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by state authorities, in particular with regard to:

i. the election campaign;

ii. coverage by the media, in particular by the publicly owned media;

iii. public funding of parties and campaigns.

- The first category does not distinguish between material and human resources. Albania, Georgia, Turkey and Ukraine for instance prohibit the misuse of administrative resources while the Russian Federation imposes several restrictions in order to avoid the use of public means in favour of any political party that contends for elections.
- The second category emphasises particular types of resources. The countries concerned are *inter alia* Armenia, Georgia, Kazakhstan, Moldova and Montenegro. In the case of Moldova and Montenegro, the legal provisions on the prohibition of the misuse of administrative resources target candidates instead of public servants. In Kazakhstan, the relevant regulations deal with the misuse of public real estate properties for instance. Regarding the misuse of human resources, most regulations focus on public servants taking advantage of their positions and develop very detailed hypothesis of possible misconduct. Some European countries fit in a general restrictive clause, *inter alia,* Armenia, Azerbaijan, Georgia, Kazakhstan and Moldova.
- A third category focuses on provisions forbidding any kind of intervention by public servants in favour of a candidate. This is notably the case in Greece, Ireland, the Kyrgyz Republic, Portugal and Spain. Four analysed legislations refer to temporary circumstances where public servants cannot campaign while in

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(…)

I. 3.1. **Freedom of voters to form an opinion**

a. State authorities must observe their duty of neutrality. In particular, this concerns:

i. media;

ii. billposting;

iii. the right to demonstrate;

iv. funding of parties and candidates.

See also the Report on media monitoring during election observation missions (CDL-AD (2004)047), para. 9,14.5, 22.1, 22.3, 26, 41, 46, 49.1, 58, 60, 62-63, 147-148 and 166. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)047-e.

See also Guidelines on Media Analysis during Election Observation Missions Prepared in co-operation between the OSCE's Office for Democratic Institutions and Human Rights, the Council of Europe's Venice Commission and Directorate General of Human Rights, and the European Commission (CDL-AD(2005)032); as well as Guidelines on Media Analysis during Election Observation Missions (CDL-AD(2009)031) in particular para. 60-61. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)032-e; and at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)031-e.

office or only during their workdays, i.e. Albania, Armenia, Kyrgyz Republic and Ukraine.

- A fourth category of provisions contains rules focusing on the preservation of free suffrage against possible influence of public servants through gifts, donations or promises. Such prohibition is explicitly stipulated in the electoral laws of Belgium, France, Luxembourg and Monaco.
- A fifth category includes media coverage as a possible misuse of public funds (see the electoral codes of Armenia and Georgia).
- A sixth and last category mentions the states that have no explicit provisions on the misuse of administrative resources during electoral processes but implicit rules, which may be intended at dealing with this issue.

20. In countries without provisions on misuse of administrative resources during electoral processes, constitutional courts or equivalent bodies interpreted the law through a corpus of decisions, by giving a judicial interpretation of constitutional principles about equality in electoral processes and contributing to ensure neutrality of government authorities in electoral processes. The report also mentions several topical decisions of the European Court of Human Rights.

21. The Venice Commission considers that codes of good practice and ethical standards – particularly with regard to electoral administration and electoral disputes – should be identified and incorporated materials should be readily available to public servants. The importance of respecting the role of the opposition in a democratic parliament has also to be highlighted. It could be looked upon as a first important step against misuse of political power.

22. Moreover, the report underlines that satisfactory criminal laws against misuse of administrative resources are in force in most countries, but an effective implementation remains a general problem. To effectively implement the legislation, a mutual understanding and a sense of responsibility are required among all political stakeholders. There is a need for a shared understanding and consensus on the importance of constitutional values. However, this does not concern only criminal law but also general legislation.

23. The integrity of all relevant stakeholders, *inter alia* police, prosecutors, courts, judges, as well as auditors, is clearly vital to tackle the misuse of administrative resources. Media under the principle of freedom of information can also play an important role in countering abuses and support the effective administration of justice in this field. The Venice Commission reminds that the fundamental principles of transparency – in electoral processes – and of freedom of information are *sine qua non* pre-conditions for preventing misuse of administrative resources.

24. Guidelines aimed at fighting the misuse of administrative resources during electoral processes can be found in chapter V. These guidelines are based on this report.

III. Legal environment and practice

A. Principles

25. Traditionally, an electoral process is a highly competitive period, sometimes far from political platforms that should be proposed to the citizens. Electoral processes are often characterised by harsh rhetoric between competitors; by pressure on voters and on candidates; by defamation; by vote buying and sometimes by illegal campaigning means. The latter practice is persistent throughout electoral processes in many elections. Indeed misuse of administrative resources during the whole electoral process does impact public institutions (ministries, territorial and local bodies and other state-funded bodies) and human resources within the public sector.

26. Despite the need to regulate the use of administrative resources during electoral processes, in many countries, domestic electoral laws do not provide rules and/or sanctions. As a result, the principle of balance of powers can be threatened by a misuse of administrative resources due, *inter alia*, to unbalanced electoral processes in favour of incumbents. Moreover, general pieces of legislation, such as laws against corruption, on conflict of interest or on public service may be too general to effectively respond to the need for tackling specific situations of misuse of such resources. Where there is no legislation

on the issue, public authorities should act based on ethical principles, guaranteeing conditions of equality for all political competitors. The respect of a balanced electoral process and consequently of basic requirements of a democratic constitutional state implies an obligation for the State to protect such principles, notably for new political parties and candidates, especially those without representation in parliament and/or local self-government bodies and particularly during electoral processes, where the environment is the most competitive and too often the most unbalanced. In this sense, electoral legislation should be developed to provide efficient and sufficient means for tackling the misuse of administrative resources, which must be applied ethically by public servants, following the principle of neutrality in exercising their functions, with a clear, understandable and predictable system of appropriate sanctions.

27. In democratic institutions, a distinction should be made regarding the access to public facilities of political parties which are or not represented in parliament, considering that candidates without representation in parliament do not have easily access to such public facilities. Opposition parties and candidates should have access to administrative resources following the principle of equality. Governmental action and political campaigning should be distinct activities, following the separation of roles for political actors, which include state authorities and political parties. It is therefore important to design appropriately the law, including public funding of political parties and electoral campaigns, in order to reflect these various situations, both in presidential and parliamentary systems.

28. The misuse of administrative resources during electoral processes can threaten some of the basic requirements of a democratic constitutional state.[23] The balance of powers and freedom of opinion must be guaranteed and promoted by parliament in its role as a legislator supervising the government, by the government in its executive role, by an independent judiciary and by free media and opinions. Moreover, a body independent from government and political structures could be in charge of tackling the misuse of administrative resources, according

[23] See para. 25.

to the practice established for equivalent independent bodies in the countries. The format of an inter-agency, as set up in Georgia for instance, seems to be an interesting approach, bearing in mind that such a body does not have a judicial dimension. It is logically associated to electoral commissions – and in particular to the central electoral management body – and courts dealing with electoral matters.[24] Nevertheless, the political will of the highest state authorities to ensure free, fair and balanced elections remains a key factor. Without such a will, widely shared among political stakeholders, establishing an independent body that monitors the use of administrative resources during electoral processes may remain a superficial initiative.

29. Accordingly, a well-functioning democratic state under the rule of law requires that certain overarching common values within the society can be developed and maintained. The goal must be a political and legal culture of fair play, where politicians – in particular the incumbents –, judges, civil servants and all social leaders, intervening in the election process for the renewal of public authorities, should not only comply with the law but also seek to maintain high ethical standards in their task. The public should also take part in a comprehensive and responsible social debate.

30. The report clearly takes into account the various traditions and views of the political parties' positions. Some countries, such as the Nordic countries, have traditionally preferred self-regulation and voluntary agreements of party life to more detailed laws. Such gentlemen's agreements may be more difficult to achieve in other regions of Europe where the tradition of a pluralistic political scene is still recent or less developed.

31. A national legislation may guarantee some privileges for oppositions political forces, including seats in parliamentary committees and majority in a central electoral management body for instance.[25]

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24 See para. 62.

25 In the case of Sweden, it is now an accepted practice within Parliament that a representative of the opposition parties is in charge of the office of President of the Constitutional Committee, while the majority of the committee stays in the hands of the party(-ies) in government as long as the ruling party or the ruling coalition has the majority in parliament.

32. It is important to note that both in countries with strong and longstanding legal traditions and in those with thin legal frameworks, there are two key elements to protect administrative resources during the whole electoral process: firstly, the enforcement of existing laws and secondly, the well-functioning of institutions where self-regulation can be exercised by the political community. The latter involves a real possibility for non-incumbent political parties and candidates to publicise and institutionally channel grievances against the misuse of administrative resources. Independent, impartial and open institutions strengthen and incentivise a culture of legality and a democratic environment.

33. In the end, however, what is crucial here is how the legislative instrument is used, the executive power is exercised and the judiciary or independent relevant agencies apply the law. As in corruption cases, the implementation of sanctions against abuse of administrative power is possible only if the investigation, prosecution and justice systems are independent of the ruling political power.

B. Comparative analysis

34. Regarding the legal environment and based on the comparative table provided,[26] several Venice Commission member states do not have specific provisions against the misuse of administrative resources during electoral processes in their electoral legislation. Nevertheless, a more thorough analysis of other pieces of legislation may cover such provisions such as criminal or administrative legislation or laws on political parties.[27] For the countries providing legislation on the misuse of administrative resources during electoral processes, the level of details and of effective sanctions stipulated by law is variable and does not ensure the same level of safeguards. If electoral processes are often regulated regarding financing of campaigns and political parties, media coverage or defamation, laws are weaker in regulating misuse

26 CDL-REF(2012)025rev.

27 To find further information on relevant provisions dealing with the misuse of administrative resources, please refer to the International IDEA Political Finance Database. Available at: www.idea.int/political-finance/index.cfm.

of administrative resources during electoral processes, including sanctions. The law is therefore absent or insufficient in domestic electoral laws to face this long-standing practice.[28] Overall, the judiciary does not cover enough the phenomenon and other existing complaints as well as appeals procedures are not systematically adapted to this issue. In countries like Mexico, constitutional principles have helped the Judiciary to adjudicate controversies over the misuse of administrative resources based on the equality principle.

35. It should be noted that the list of OSCE/ODIHR reports referenced in the present report is not exhaustive. Moreover, no mention of issues of misuse of administrative resources in OSCE/ODIHR reports does not necessarily mean that there was no issue. The same consideration applies to the election observation missions' report of the Parliamentary Assembly of the Council of Europe.

36. The following sub-sections aim at distinguishing various categories of provisions dealing with the use of administrative resources. Certain sub-sections refer to similar laws but emphasise distinct provisions.

37. **a. The first category of provisions regulates the use of administrative resources during electoral processes, without distinguishing between material and human resources.**[29]

38. The Election Code of **Georgia**, newly enacted in 2011, provides for exhaustive provisions both on "prohibition of the abuse of administrative resources during the pre-election agitation and

[28] In Latin America, at least 18 countries provide special regulations on the misuse of administrative resources during campaigns. In cases such as Mexico and Uruguay, there are constitutional provisions that mandate civil servants to perform impartially, avoiding influencing political competitors. There is evidence that Supreme Courts and Specialized Electoral Courts have taken actions with regard misuse of administrative resources that provide evidence of good practice, although challenges are still pervasive.

[29] Countries described in para. 38-44 belong to this category. In the Americas, countries like Bolivia, Guatemala, Honduras, Mexico, Panama, Dominican Republic, the United States and Venezuela are concerned by this category. Regarding more precisely the United States, the Hatch Act 1939 restricts the partisan political activity of any individual employed by the state, an executive agency, or someone working in connection with a program financed by federal loans or grants. The Hatch Act has undergone a reform in 2011 (The State and Local Law Enforcement Hatch Act Reform Act 2011).

campaign" (Article 48) and on "prohibition of the use of budget funds, occupational status or official capacity" (Article 49).[30, 31]

39. In the **Russian Federation**, Article 46 of the Law on State Duma Elections imposes several restrictions to avoid the use of public means in favour of any political party that contends for elections. In practice, the OSCE/ODIHR notes in its report following the presidential election of 4 March 2012 that "[t]here was an evident mobilization of individuals and administrative resources in support of Mr Putin's campaign, which was observed by the OSCE/ODIHR EOM [Election Observation Mission]. In several regions, participants in campaign events reported that they had been ordered to take part by their superiors. Various levels of public institutions instructed their subordinate structures to organize and facilitate Mr Putin's campaign events. Local authorities also used official communication, such as their institutional websites or newspapers, to facilitate Mr Putin's campaign."[32] The PACE Report following the same elections recommends "strict rules […] with regard to the use of administrative resources in campaign periods."[33]

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30 The expressions "Electoral Code" or "Election Code" are used in the report on purpose, depending on the original version used by the country, in opinion or all other relevant documents.

31 Mexican regulations are also quite specific in the matter of use of public funds during elections. Article 134 of the Constitution establishes that financial resources of the federal, state, municipal and Mexico City governments with their political administrative sub-agencies of their territorial demarcations shall be managed with efficiency, economy, transparency and integrity in order to achieve the objectives they are destined to, and that public officials shall be accountable for the enforcement of these provisions. Federal, State and municipal public officials, as well as the ones of Mexico City and its boroughs are under the obligation to use the public resources under their responsibility with impartiality without affecting fairness in the competition of political parties. For a more exhaustive report on the misuse of public funding for election purposes and practice in the filed in Mexico, including electioneering expenditure and case-law of the Supreme Court of Elections on public resources, see the report of Mr Manuel Gonzalez Oropeza (CDL(2012)076). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL(2012)076-e.

32 OSCE/ODIHR, Russian Federation, Presidential Election, 4 March 2012, Election Observation Mission Final Report, page 1. Available at: www.osce.org/odihr/90461.

33 Council of Europe, Parliamentary Assembly, Observation of the Presidential Election in the Russian Federation (4 March 2012), Election observation report (Doc. 12903, 23 April 2012), para. 61.
Available at: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=18168&lang=EN&search=MTI5MDM=.

40. In **Turkey**, the Law on Basic Provisions on Elections and Voter Registers prohibits in Articles 63-65 the misuse of administrative resources during electoral campaigns by public authorities. In practice, following the 2011 parliamentary elections, the misuse of administrative resources was not brought to the attention of the OSCE/ODIHR Election Observation Mission.[34]

41. In **Ukraine**, the Law on Elections of People's Deputies prohibits misuse of administrative resources during campaigns by public authorities.[35] Article 74 of the Law stipulates the restrictions regarding the conduct of electoral campaigns, banning *inter alia* canvassing for civil servants during their working hours or placing campaign material in public administration's buildings. In practice, the OSCE/ODIHR reported in its final report following the 28 October 2012 parliamentary elections a "lack of a level playing field, caused [*inter alia*] primarily by the abuse of administrative resources […]." The report also underlines that this misuse of administrative resources during the electoral campaign "demonstrated the absence of a clear distinction between the State and the ruling party in some parts of the country, contrary to paragraph 5.4 of the 1990 OSCE Copenhagen Document."[36]

42. In **Albania**, the use of material assets and human resources belong to similar provisions but both notions are explicitly distinguished. The Electoral Code covers the misuse of administrative resources during electoral campaigns as follows:

> Article 88 - Prohibition of the use of public resources for the support of electoral subjects:

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34 OSCE/ODIHR, Republic of Turkey, Parliamentary Elections, 12 June 2011, Final Report. Available at: www.osce.org/odihr/84588.
Council of Europe, Parliamentary Assembly, Observation of the parliamentary elections in Turkey (12 June 2011), Report (Doc. 12701, 5 September 2011). Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=12999&lang=en.

35 Articles 6.2, 68.4, 68.10, 74.1, 74.4, 74.13, 74.21 and 74.24 of the Law.

36 International Election Observation Mission, Ukraine, Parliamentary Elections, 28 October 2012, Final Report, Executive Summary, pages 3-4. Available at: www.osce.org/odihr/elections/98578.
Council of Europe, Parliamentary Assembly, Observation of the parliamentary elections in Ukraine (28 October 2012), Election observation report (Doc. 13070, 29 November 2012), para. 7. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19213&lang=en.

> 1. Except for the cases provided by law, resources of public organs or entities of a central or local level, or of any other entity where the state owns capital or shares or/and appoints the majority of the supervisory or administrative body of the entity, regardless of the source of the capital or ownership, cannot be used or made available for the support of candidates, political parties or coalitions in elections.
> 2. For purposes of this article, movable and immovable assets provided in article 142 of the Civil Code, as well as any human resource of the institution, are considered "resources". The use of "human resources" is understood as the use of the administration of the institution during working hours for election purposes. Even hiring, dismissing from work, release, movement and transfer of duty, with the exception of motivated cases, are considered to be activities of the public institution.[37]

43. In this provision, assets and human resources are considered as administrative resources as soon as they are used for electoral purposes during working hours. This provision is interesting as it covers at least in the law the requirements for preventing misuse of administrative resources. Nevertheless, the last joint opinion of the Venice Commission and the OSCE/ODIHR[38] on the Electoral Code of Albania underlines that the expression "with the exception of motivated cases" (Article 88.2) "appears as very broad and needs some specification". Therefore, "the Venice Commission and OSCE/ODIHR recommend amending Article 88.2 in order to limit the scope of this exception".[39]

44. In practice, the OSCE/ODIHR Final Report following the 28 June 2009 parliamentary elections underlines that "[t]here were substantiated allegations of misuse of administrative resources by the [Democratic Party] for campaign purposes. Such actions blurred the distinction between state and party activities, in contravention of

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37 Article 88 of the Electoral Code of Albania (CDL-REF(2011)038). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2011)038-e.

38 All references made to joint opinions in the report are opinions prepared jointly by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR).

39 CDL-AD(2011)042, para. 85-86. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)042-e.

paragraph 5.4 of the OSCE Copenhagen Document."[40] The report of the Parliamentary Assembly of the Council of Europe (PACE) following the same elections raises the same concerns:

> "38. The ad hoc committee considered worrying the information supplied by the opposition parties about cases of administrative resources being used for the purposes of the election campaign and public servants threatened with loss of employment, specifically schoolteachers and medical personnel, chiefly in the rural regions supporting the opposition candidates.
> 39. The ad hoc committee was informed that a large number of ceremonies to open roads, hospitals and a hydro-electric plant, and other official functions had been organised during the election campaign in Tirana and in the regions by the authorities, with public servants, students and schoolchildren allegedly participating under coercion. Nevertheless, one of the main objectives of the election campaign should be to inform the citizens of the programmes and ideas of the political parties before asking citizens for a mandate."[41]

Following the 23 June 2013 parliamentary elections, the report of the Parliamentary Assembly of the Council of Europe underlines that "[l]egislation did not adequately regulate or penalise the misuse of administrative resources. The enforcement of provisions against campaign misconduct, including vote buying, was weak."[42] The OSCE/ODIHR stresses in its report that "[t]he framework fails to detail a comprehensive system of sanctions for misuse of administrative resources, including public servants, involvement of schoolchildren in campaigning, and misappropriation of public official positions and government events, for campaign purposes" and recommends that "[t]he abuse of state resources, including human resources, for campaign

40 OSCE/ODIHR, Republic of Albania, Parliamentary Elections, 28 June 2009 Election Observation Mission Final Report, page 2. Available at: www.osce.org/odihr/elections/albania/38598.

41 Council of Europe, Parliamentary Assembly, Observation of the Parliamentary Elections in Albania (28 June 2009), Report, (Doc. 12007; 16 September 2009), para. 38-39. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=12831&lang=EN.

42 Council of Europe, Parliamentary Assembly, Observation of the Parliamentary Elections in Albania (23 June 2013), Report (Doc. 13296; 3 September 2013), para. 22. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20055&lang=en.

purposes could be more effectively prevented through improved enforcement and by holding those in violation accountable."[43]

45. **b. There is another category of provisions that draw attention to some particular types of resources.**[44]

46. The Electoral Code of **Armenia** covers the misuse of administrative resources during electoral campaigns since 2011, following up recommendations from the OSCE/ODIHR and the Venice Commission to address in the Armenian legal framework the chronic issue of separation of state resources from party and/or candidate resources. In this respect, Article 22 provides:

> 1. Candidates occupying political, discretionary, civil positions, as well as candidates occupying a position of state or community servant shall conduct election campaigns taking into account the following restrictions:
> (...)
> (2) use of areas for election campaign purposes, of transportation and communication means, of material and human resources provided for performing official responsibilities, shall be prohibited, except for security measures applicable in respect of high-ranking officials subject to state protection under the Law of the Republic of Armenia "On ensuring the safety of persons subject to special state protection".
> These candidates shall make use of state property on the grounds equal to those provided for other candidates.
> (...)

47. Another example of this subdivision in Europe[45] is the Election Code of **Georgia**, whose Article 48.1 allows the use of administrative resources for campaign purposes. The provision allows the use of state-funded buildings, communication means, and vehicles, provided that equal access is given to all election subjects. The joint opinion

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43 OSCE/ODIHR, Republic of Albania, Parliamentary Elections, 23 June 2013 Election Observation Mission Final Report, part V, page 7; also page 14 and Recommendation no. 18. Available at: www.osce.org/odihr/elections/106963.

44 This group not only distinguishes material and human administrative resources but also includes other criteria that are country specific

45 In the Americas, the cases are Bolivia, El Salvador and Nicaragua.

on the draft Election Code of Georgia of the Venice Commission and the OSCE/ODIHR raises once again concerns regarding continuous risk of misuse of administrative resources. The opinion states that "this provision appears to adhere to the equal opportunity principle. However, in practice such equality may quickly be undermined as political parties in government have easier access to such resources (government facilities, telephones, computers and vehicles). Moreover, Article 48(2) allows civil servants to use their official vehicles for campaign purposes of campaigning, provided that the fuel costs are reimbursed."[46]

48. In its final report on the 1 October 2012 parliamentary elections, the OSCE/ODIHR underlines the possibility given by the law to misuse "some administrative resources for campaign purposes, in particular state-funded buildings, provided that equal access is given to all election subjects." Nevertheless, the report relays the concerns expressed in the joint opinion as "[i]n practice, such equality may be undermined as political parties in government have easier access."[47] The Parliamentary Assembly report underlines that "[t]he campaign centred mostly on issues of abuse of administrative resources and the advantages of incumbency by the ruling party and on the abuse of private financial resources by opposition leaders" and noted that "[t] he abuse of administrative resources continued to be an issue during these elections, including allegations of pressure on civil servants and opposition activists. International observers noted that the distinction between State and the ruling party was often blurred. Local civil society organisations played an important watchdog function in this respect. In a number of cases, the IATF [Inter Agency Taskforce for Free and Fair Elections] made recommendations to address both proven cases and allegations of misuse of administrative resources."[48]

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46 CDL-AD(2011)043, para. 11 & 60 ss. Available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)043-e.

47 OSCE/ODIHR, Georgia, Parliamentary Elections, 1 October 2012, Election Observation Mission Final Report, page 6. Available at: www.osce.org/odihr/98399.

48 Council of Europe, Parliamentary Assembly, Observation of the parliamentary elections in Georgia (1 October 2012), Election observation report (Doc. 13068, 29 November 2012), para. 59 & 61.

49. **Kazakhstan** also has regulation for misuse of public real estate properties (para. 63-64). Similarly, **Moldova** (para. 65-66) and **Montenegro** (para. 50-51) have this kind of legal provisions, although the prohibitions of using administrative resources for electoral purpose are not aimed at public servants, but at candidates, probably in the context of re-election.

50. **Montenegro**´s legal provisions focus in a special way on the use of material resources; Article 22 of the Law on the election of the President provides:

> The candidate for President of Montenegro may not use the facilities, financial resources, vehicles, technical means and other state property for the purpose of the electoral campaign.

51. The Law on the Election of Councillors and Representatives of Montenegro provides in its Article 50.2 that "[n]o property (money, technical equipment, facilities etc.) of state authorities, state-owned enterprises, public institutions and funds, or of the Chamber of Commerce and Economy of Montenegro can be used for the presentation of electoral lists."

52. In practice, the OSCE/ODIHR final report following the early parliamentary elections of 14 October 2012 underlines that "[a]llegations of abuse of state resources and reported violations of the public sector recruitment ban during the electoral campaign blurred the line between state activities and the campaign of the ruling coalition."[49] The Council of Europe Parliamentary Assembly report following the early parliamentary elections of 14 October 2012 reports misuse of administrative resources and in particular pressure and intimidations on civil servants to vote in favour of ruling political forces.[50] Following the 7 April 2013 presidential election, the

[49] OSCE/ODIHR, Montenegro, Early Parliamentary Elections, 14 October 2012, Limited Election Observation Mission Final Report, page 1. Available at: www.osce.org/odihr/97940.

[50] Council of Europe, Parliamentary Assembly, Observation of the early parliamentary elections in Montenegro (14 October 2012), Election observation report (Doc. 13069, 29 November 2012), para. 5, 33, 42 & 45. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19196&lang=en.

OSCE/ODIHR final report indicates that "[a]llegations of the misuse of state resources and mistrust in public institutions and the judiciary diminished public confidence in the electoral process and should be addressed."[51] The Parliamentary Assembly report underlines that "[t]he ad hoc committee was informed by the ODIHR limited election observation mission and by the NGO and media representatives of cases of alleged vote-buying and of misuse of administrative resources by the ruling coalition inasmuch as the dividing line between the activities of the State and the election campaign was blurred. Some 40% of jobs in Montenegro are directly or indirectly tied to the various public administrations." The report recommends that misuse of administrative resources "should be tackled at the earliest opportunity by the Montenegrin authorities."[52]

53. Regarding the misuse of human resources, most regulations focus on **public servants taking advantage of their positions** and develop very detailed hypothesis of possible misconduct.

54. Some European countries fit in the general restriction clause, *inter alia,* **Armenia**, **Azerbaijan**, **Georgia**, **Kazakhstan** and **Moldova**.[53]

55. In **Armenia** (as mentioned in para. 46), Article 22 provides:

> 1. Candidates occupying political, discretionary, civil positions, as well as candidates occupying a position of state or community servant shall conduct election campaigns taking into account the following restrictions:
> (1) making direct or indirect statement urging to vote for or against a candidate, political party, alliance of political parties while performing official duties, as well as any abuse of official position to gain advantage at elections, shall be prohibited. (...)

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51 OSCE/ODIHR, Montenegro, Presidential Election, 7 April 2013, Limited Election Observation Mission Final Report, pages 1, 2, 11 & 12; and Recommendation 19. Available at: www.osce.org/odihr/elections/103093.

52 Council of Europe, Parliamentary Assembly, Observation of the presidential election in Montenegro (7 April 2013), Election observation report (Doc. 13217, 30 May 2013), para. 29, 32, 46, 49 & 52. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19735&lang=en.

53 In the Latin American context, the following countries fall within the scope of general restriction clause: Costa Rica, El Salvador, the United States and Venezuela.

56. Moreover, the representative of the Central Election Commission of Armenia also indicated during the Seminar of April 2013[54] that the Election Code bans the use of premises for campaigning in buildings occupied by state government bodies and local self-government bodies (except for cases where electoral campaign's offices occupy an area not belonging to such bodies), or in buildings in which electoral commissions are functioning.[55] The Electoral Code further stipulates that community leaders should designate spaces for putting campaign posters up. Campaign posters are provided free of charge to all the candidates in order to safeguard equal conditions.[56]

57. The joint opinion on the Electoral Code of Armenia (as of 26 May 2011) underlines that "[t]he separation of state resources from party and candidate resources has been a problem cited in every OSCE/ODIHR election report since 1996. The governing party network exercises influence on national government, but also the governors' offices and local self-government in most regions. During a national election, the resources under the control of these offices are called on to campaign on behalf of the government candidates. This creates a disparity in resources available with the added problem of creating the perception that employees are obligated to work for, attend rallies on behalf of and vote for the government candidates for fear for their employment. This practice is neither in conformity with the Code of Good Practice in Electoral Matters, where the principle of equality of opportunity entails a neutral attitude by state authorities,[57] nor with OSCE commitments which call for a separation of party and State

54 Fourth Eastern Partnership Facility Seminar on the "use of administrative resources during electoral campaigns" – Tbilisi, Georgia, 17-18 April 2013 – Reports of the Seminar (CDL-EL(2013)007). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2013)007-bil.

55 Article 20.9 of the Electoral Code of Armenia adopted on 26 May 2011. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2011)029-e.

56 Article 21.2 of the Electoral Code of Armenia adopted on 26 May 2011. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2011)029-e.

57 Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I, 2.3, a. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023rev-e.

and campaigning on the basis of equal treatment.[58] The changes to Articles 19 and 22, if implemented fully and properly, could contribute significantly to address problems noted in past elections."[59]

58. In practice, criticisms remain. Following the last parliamentary elections of 6 May 2012, the OSCE/ODIHR Election Observation Mission Final Report stresses that "[s]ome violations of campaign provisions by electoral contestants, including the use of administrative resources and attempts to limit voters' freedom of choice, created an unequal playing field."[60] Following the same elections, the Council of Europe Parliamentary Assembly underlines that "administrative resources were misused, in direct contradiction with the Electoral Code. The RPA [Republican Party of Armenia, ruling party] actively involved teachers and pupils in campaign events, including during school hours. In one case, teachers and local authorities even asked parents to attend an RPA event. RPA campaign material and party flags were present on a number of school buildings."[61] The OSCE/ODIHR final report following the presidential elections of 18 February 2013 underlines that "the campaign regulations were not always interpreted or implemented properly by the authorities and contestants, especially with regard to campaign-finance provisions. This proved to allow for abuse of administrative resources and did not provide for a level playing field among candidates or protect voters from undue influence. In addition, the Criminal Code does not include specific offenses for abuse of office and state resources in an election campaign. These factors contributed to an undue advantage of the incumbent during the campaign."[62] The Parliamentary Assembly indicates in its report following the same

58 OSCE, Copenhagen Document 1990, para. 7.6. Available at: www.osce.org/odihr/elections/14304.

59 CDL-AD(2011)032, para. 50. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)032-e.

60 OSCE/ODIHR, Republic of Armenia, Parliamentary Elections, 6 May 2012, Election Observation Mission Final Report, page 1. Available at: www.osce.org/odihr/91643.

61 Council of Europe, Parliamentary Assembly, Observation of the Parliamentary Elections in Armenia (6 May 2012), Election observation report (Doc. 12937, 24 May 2012), para. 30. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=18720&lang=en.

62 OSCE/ODIHR, Republic of Armenia, Presidential Election, 18 February 2013, Election Observation Mission Final Report, page 5. Available at: www.osce.org/odihr/elections/101314.

election that "[t]he campaign regulations did not provide sufficient protection against the misuse of administrative resources, nor against the blurring of the distinction between the State and the ruling party."[63]

59. The Electoral Code of **Azerbaijan** prohibits the misuse of administrative resources during electoral campaigns as well. Article 55 aims at "[e]nsuring Equal Status for Candidates during their Nomination". This provision underlines that "[a]ll candidates shall have equal rights and responsibilities" (Article 55.1). Article 55.2 develops the actions considered by the Electoral Code as abuse of position. Moreover, a list of persons and institutions prohibited to implement charitable activities during electoral campaigns is highlighted in Article 55.3. Pursuant to Article 115 of the Election Code, the persons who misuse their powers and administrative resources in order to influence the results of elections shall be accordingly subject to criminal, civil or administrative liability. The Criminal Code of the Republic of Azerbaijan also implies that the incumbents who violate electoral rights by misusing their official powers shall be relevantly punished by penalty, deprivation of the right to take official position for some period or imprisonment.

60. In practice, the OSCE/ODIHR Final Report following the parliamentary elections of 7 November 2010 underlines *inter alia* that "misuse of administrative resources as well as interference by local authorities in favour of candidates from the ruling party created an uneven playing field for candidates." The Report details that "[t]he misuse of administrative resources was reported from 20 constituencies where employees of state institutions were involved in campaigning for a particular candidate during working hours." The OSCE/ODIHR Report recommends that "[t]he continuous problems regarding undue interference of local executive authorities in the election process, in particular regarding [...] the misuse of administrative resources in favour or certain candidates, should be resolutely addressed as it is the responsibility of the State to enable contestants to compete on a basis of

63 Council of Europe, Parliamentary Assembly, Observation of the Presidential Election in Armenia (18 February 2013), Election Observation Report (Doc. 13172, 22 April 2013), para. 34. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19556&lang=en.

equal treatment…" .[64] The Council of Europe Parliamentary Assembly Report following the same elections also underlines "allegations of abuse of administrative resources".[65] Following the 9 October 2013 presidential election, the International Election Observation Mission stated that "YAP's campaign on behalf of the incumbent President appeared well-organized and resourced, including rallies and concerts. While the incumbent President did not directly campaign, he toured the country in his official capacity and frequently appeared at public events. The campaigns of the other candidates were more modest, involving small-scale meetings, door-to-door canvassing, and social media on the internet, with few large-scale rallies. Some of the candidates did not hold any rallies or produce posters."[66]

61. Article 49.1 of the Election Code of **Georgia** prohibits persons "holding offices in state or local authorities" from combining campaign activities in support of (or against) electoral subjects with the conduct of their official duties. This applies specifically when those persons use subordinates in campaigning, gathering signatures during official business trips, or conducting "pre-election agitation." The joint opinion criticises this provision because "[p]ersons 'holding offices in state or local authorities' are not listed in Article 49 and there are varying interpretations among stakeholders as to which public officials are legally considered to be persons 'holding offices in state or local authorities'." The opinion recommends to clarify the list of officials concerned by this provision and to include governors and mayors, who are entitled to campaign. According to the joint opinion, "[t]he Code should further prohibit such individuals from directly or indirectly using administrative resources and from engaging in electoral campaign activities on behalf of any party/candidate,

64 OSCE/ODIHR, Republic of Azerbaijan, Parliamentary Elections, 7 November 2010, Election Observation Mission Final Report, pages 1, 11 & 24. Available at: www.osce.org/odihr/elections/azerbaijan/75073.

65 Council of Europe, Parliamentary Assembly, Observation of the parliamentary elections in Azerbaijan (7 November 2010), Report (Doc. 12475, 24 January 2011), para. 30 & 49. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=13086&lang=en.

66 International Election Observation Mission, Republic of Azerbaijan, Presidential Election, 9 October 2013, Statement of Preliminary Findings and Conclusions, page 7. Available at: www.osce.org/odihr/elections/106901.

in order to ensure a level playing field for all contestants."[67] On the contrary, the joint opinion welcomes the provision "which stipulates that state and local governments, between the day of announcement of the elections and the day of determining the election results, are not allowed to launch any special programs apart from those envisaged in their annual budgets."[68]

62. In practice, "OSCE/ODIHR election observation mission reports from past elections have consistently identified the [mis]use[69] of administrative resources in Georgian elections as a significant problem. This problem is due in part to the lack of clarity and specificity in the legislation, as reproduced in the draft Code. The draft Code provisions blur the line between the state and political parties and fall short of OSCE commitments. The Venice Commission and the OSCE/ODIHR recommend revising the provisions on the misuse of administrative resources. Additionally, the last Evaluation Report by the Council of Europe Group of States against Corruption (GRECO) on transparency of party funding in Georgia raises similar concerns and "recommends to take further measures to prevent the misuse of all types of administrative resources in election campaigns".[70] As a consequence, the Inter-agency Commission (IAC) was set up to administrate the misuse of administrative resources during the electoral campaign. The IAC is a body composed of senior officials of the executive mandated to consider complaints or allegations of violations by civil servants. Mr Zurab Kharatishvili, former President of the Central Election Commission, highlighted the efficiency of such mechanism. It played a pro-active role in deterring campaign violations through issuing 12 recommendations on corrective measures. However,

67 CDL-AD(2011)043, para. 62. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)043-e.

68 CDL-AD(2011)043, para. 63.

69 The original text says *use*. The Rapporteurs added the prefix *mis* to preserve conceptual coherence in the report.

70 CDL-AD(2011)043, para. 61. Additional reference: GRECO, Evaluation Report on Georgia on Transparency of party funding, Third Evaluation Round, Strasbourg, 27 May 2011, Adopted by GRECO at its 51st Plenary Meeting (Strasbourg, 23-27 May 2011; Greco Eval III Rep (2010) 12E), paragraph 69. Available at: www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3%282010%2912_Georgia_One_EN.pdf.

certain recommendations raised concern over the actual scope of the IAC's authority, which at times exceeded its mandate and challenged the principle of separation of powers.

63. The **Kazakhstan** Constitutional Act on elections states that (Article 27.5):

> "Taking advantages of the official status by the candidates, who are officials of the state bodies, shall be forbidden. Under the use of advantages of the positional or official status, this Constitutional Act shall consider the following:
> 1) involvement of persons, who are subordinated or dependent on a candidate, to the conduct of a pre-election campaign, except the cases when the above-mentioned persons conduct campaigning as proxies of a candidate;
> 2) using the premises occupied by the state bodies to promote the election of a candidate or a political party that nominated a party list, if other candidates, political parties are not guaranteed by the use of these premises on the same conditions."

64. In practice, the OSCE/ODIHR report following the 15 January 2012 early parliamentary elections does not explicitly refer to administrative resources. Nevertheless, the electoral process as a whole was assessed as not having met "fundamental principles of democratic elections."[71]

65. The Election Code of **Moldova** states in Article 47.6 that "[c]andidates may not use public means and goods (administrative resources) during the electoral campaigns, and public authorities/institutions and other related institutions may not send/grant to the electoral competitors public goods or other benefits unless on a contract basis, providing equal terms to all electoral competitors." The 2010 joint opinion underlines that "this new paragraph is welcomed and addresses previous recommendations."[72] The risk of misuse of administrative resources is higher among the candidates who hold a public position at the time of registration on the electoral candidate

71 OSCE/ODIHR, Republic of Kazakhstan, Early Parliamentary Elections, 15 January 2012, Election Observation Mission Final Report, page 1. Available at: www.osce.org/odihr/elections/89401.

72 CDL-AD(2010)014, para. 37. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)014-e.

list. The Election Code therefore imposes their suspension from function for the entire duration of the electoral campaign.[73]

66. In practice, following the 2011 local elections (5 and 19 June 2011), the OSCE/ODIHR reported the distribution of illegal electoral gifts to voters during the electoral campaign.[74] The report also indicates that interlocutors "complained about the misuse of administrative resources at the local level, especially by incumbents running for re-election, although the scale was difficult to determine."[75] In its 2010 report following early parliamentary elections, the PACE states that "[a] number of people expressed anxiety about the [mis]use of administrative resources during the election campaign." The document reports allegations of gifts to voters bearing the names of political leaders, including food and sundry items.[76]

67. **c. Among European countries, there are provisions forbidding any kind or intervention in favour of a candidate, i. e. prohibition of endorsement by public officials or civil servants**.[77]

68. In **Portugal**, the Law on Election to the Parliament prohibits the abuse of public functions for campaigning purposes (Article 153). In practice, misuse of administrative resources during the electoral campaign, following the parliamentary elections of 27 September 2009, was not brought to the attention of the OSCE/ODIHR Election Observation Mission..[78]

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73 Article 44.1 g) of the Election Code of Moldova. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL(2008)082-e.

74 It should be taken into account that the financing of campaigns in Moldova is mainly public.

75 OSCE/ODIHR, Republic of Moldova, Local Elections, 5 and 19 June 2011, Limited Election Observation Mission Final Report, pages 10-11. Available at: www.osce.org/odihr/elections/85409.

76 Council of Europe, Parliamentary Assembly, Observation of the Early Parliamentary Elections in Moldova (28 November 2010), Report (Doc. 12476, 24 January 2011), para. 40. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=13085&lang=en.

77 In Latin America, the general prohibition of acting in favour of any particular candidate can be found in the legal provisions of Bolivia, Colombia, Costa Rica, Haiti, Honduras, Nicaragua and Panama. See also footnote no. 31.

78 OSCE/ODIHR, Portugal, Parliamentary Elections, 27 September 2009, Election Assessment Mission Report. Available at: www.osce.org/odihr/elections/41003.

69. In **Greece**, the provision is included in the Constitution:

> Article 29
> 3. Manifestations of any nature whatsoever in favor of or against a political party by magistrates and by those serving in the armed forces and the security corps, are absolutely prohibited. In the exercise of their duties, manifestations of any nature whatsoever in favor or against a political party by public servants, employees of local government agencies, of other public law legal persons or of public enterprises or of enterprises of local government agencies or of enterprises whose management is directly or indirectly appointed by the State, by administrative act or by virtue of its capacity as shareholder, are absolutely prohibited.

70. The Electoral Act of **Ireland** prohibits "officer[s] acting as agent of candidate or furthering a candidature" (Article 144):

> "A returning officer, an assistant, deputy or acting returning officer or any person employed by any such officer for any purpose relating to a Dáil election who acts as agent for any candidate at that election or who is actively associated in furthering the candidature of any candidate or promoting the interests of any political party at the election shall be guilty of an offence".

71. In practice, the OSCE/ODIHR underlines in its Needs Assessment Mission Report following the 25 February 2011 early parliamentary elections that "[t]here is [...] a very high level of confidence of all stakeholders in the electoral process and the election administration". Therefore, no concern was raised regarding misuse of administrative resources during electoral campaigns.[79]

72. According to the Constitutional Law of the **Kyrgyz Republic** on the Presidential and Parliamentary Elections, "[m]embers of election commissions, observers, international observers, judges, representatives of religious organizations, charity organizations, individuals under 18 years of age, foreign citizens and organizations have no right to carry out election campaign, issue and disseminate

[79] OSCE/ODIHR, Ireland, Early Parliamentary Elections, 25 February 2011, Needs Assessment Mission Report, page 11. Available at: www.osce.org/odihr/elections/75725.

any campaign materials. Officers of government and self-governance bodies can carry out campaign and disseminate any campaign materials when they are outside of their official positions" (Article 22.15). The joint opinion on the electoral law underlines that by prohibiting certain groups from campaigning, Article 22.15 introduces 'unreasonable restrictions on individual citizens' and may be considered as 'overly restrictive'."[80]

73. In practice, the OSCE/ODIHR report following the 30 October 2011 presidential election underlines that "[a]llegations of misuse of institutional authority in the form of pressure and intimidation were raised throughout the pre-election period, which undermined confidence in the electoral process." The report also indicates that "[o]n 29 September the parliament adopted a decree on "Measures to ensure the implementation of the Law on Presidential and Parliamentary Elections", reinforcing the electoral law and imposing strict measures in cases such resources are misused."[81]

74. In **Spain**, the Law on the Regime of General Elections includes different provisions regarding misuse of administrative resources. Article 52 prohibits officials from campaigning; Article 139 sanctions infractions committed by civil servants during electoral campaigns; and Article 140 sanctions civil servants misusing their positions for campaigning purposes. In practice, the misuse of administrative resources was not brought to the attention of the OSCE/ODHIR Election Observation Mission in its report following the early parliamentary elections of 20 November 2011.[82]

75. Other more specific prohibitions include the use of staff and employees, as in Georgia (para. 61-62) and in Kazakhstan (para. 63-64).[83]

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[80] CDL-AD(2011)025, para. 73. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)025-e.

[81] OSCE/ODIHR, The Kyrgyz Republic, Presidential Election, 30 October 2011 Election Observation Mission Final Report, pages 2 & 10. Available at: www.osce.org/odihr/elections/86926.

[82] OSCE/ODIHR, Spain, Early Parliamentary Elections, 20 November 2011, Election Assessment Mission Final Report. Available at: www.osce.org/odihr/elections/Spain/88222.

[83] In the Americas, this kind of provisions can be found in Bolivia, Colombia and the United States.

76. **Only four analysed legislations refer to temporary circumstances where public officials cannot campaign while in office or only during their work-day**, i.e. the legislations of Albania (para. 43), Armenia (para. 55), the Kyrgyz Republic (para. 72-73) and Ukraine (para. 41).[84, 85]

77. Also related to campaigning, the Electoral Code of **"the former Yugoslav Republic of Macedonia"** stipulates that:

> (1) As an election campaign is considered: public gathering and other public events organised by the campaign organiser, public display of posters, video presentations in public areas, electoral media and internet presentation, dissemination of printed materials and public presentation of confirmed candidates by official electoral bodies and their programmes.
> (2) The election campaign commences 20 days prior the Election Day and in the first and the second round of election cannot continue 24 hours before elections and on the Election Day (Article 69-a).

78. The joint opinion on the Electoral Code underlines that "[t]his definition could be considered as limiting regular political activities held prior to the start of the official campaign period" and that "[t]he Code should specify what political activity is not permissible before the start of the official campaign period."[86]

79. In practice, the OSCE/ODIHR report following the 5 June 2011 early parliamentary elections describes that "certain aspects [of the elections] require attention", including "measures to ensure an adequate separation of state and party structures." Moreover, "[t] he OSCE/ODIHR EOM [Election Observation Mission] received a number of allegations that party activists had requested civil servants to list a certain number of voters who would vote for the ruling party. According to these allegations, employees of state and public

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84 In the Americas, this is the case of Chile, Costa Rica, Guatemala, Honduras, Panama, the United States and Uruguay.

85 In Mexico, there is a judicial criterion (Supreme Court of Elections, 14/2012) regarding the same issue: Political Proselitysm Acts. The sole attendance of public servants in non-working days to such acts is not restricted by law.

86 CDL-AD(2011)027, para. 46. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)027-e.

institutions were intimidated and threatened with loss of their jobs if they did not comply with these requests. Other allegations included threats that citizens would lose their pensions or social services if they did or did not support certain parties or candidates. The overwhelming majority of these allegations concerned actions by state officials and activists of the principal governing party. Any partisan actions by state employees taking place during working hours represent a misuse of state resources for party purposes."[87]

80. Apart from Article 134 of the Constitution,[88] the specific relevant piece of legislation for **Mexico** is the Federal Code of Electoral Institutions and Procedures. Article 134.8 of the Constitution states that representatives, either at federal or at local levels as well as senators and parliamentary groups are banned from campaigning with governmental facilities. The catalogue of restrictions on officials is large as it includes the Human Rights Commissions, the Elections Commissions, the National Institute of Statistics, Geography and Informatics and the Bank of Mexico. This catalogue also includes any other entity or government agencies, which are subject to any legal system of public status at all levels of government (federal, state or city). This legislation is completed by Article 212 of the Federal Criminal Code, which prohibits offenses committed by public officials.[89] These rules establish the separation of all public officials from their duties for the time they compete for an elective position which is different from the one they hold. It should be taken into consideration that immediate re-election is prohibited. In the 2012 presidential election, it was alleged that the winning candidate's party distributed bank and store cards in order to favour the presidential candidate. However, the

87 OSCE/ODIHR, "The former Yugoslav Republic of Macedonia", Early Parliamentary Elections, 5 June 2011, Election Observation Mission Final Report, pages 1, 6 & 11. Available at: www.osce.org/odihr/elections/83666.

88 Article 134 of the Constitution establishes an explicit mandate for public servants to make impartial use of administrative resources, avoiding influencing equality in the competition between political parties. Available at: www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf.

89 For a more exhaustive report on the use of public funding for election purposes and practice in the filed in Mexico, including electioneering expenditure and case-law of the Supreme Court on public resources, see the report of Mr Manuel Gonzalez Oropeza (CDL(2012)076). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL(2012)076-e.

evidence presented was not detailed enough to confirm an influence on the final results.

81. **d. Another category of provisions contains rules focusing on the preservation of freedom of vote against possible influence of public servants through gifts, donations or promises.**[90]

82. The Electoral Code of **Belgium** sanctions persons who promise jobs in public or private sectors (Article 182). The Code also prohibits promises made to persons against their vote or their abstention (Article 187).[91] In practice, the OSCE/ODIHR underlines in its report following the 10 June 2007 federal elections that the legal framework "is in some aspects advantageous to established parties, but this has not hindered new parties from emerging in the last decades, contributing to an already heterogeneous political landscape".[92]

83. The Electoral Code of **France** prohibits any gifts, donations and promises aimed at influencing the vote as well as those accepting such gifts, donations or promises.[93] In practice, misuse of administrative resources during the electoral campaign, following the parliamentary elections held on 10 and 17 June 2012, was not brought to the attention of the OSCE/ODIHR Election Observation Mission.[94] Nevertheless, France's National Commission for Campaign Accounts and Political

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90 In the Americas, there are cases in Brazil and El Salvador. In Canada, candidates are forbidden from accepting gifts or any other advantage during electoral campaigns.

91 Available at: www.droitbelge.be/codes.asp.

92 OSCE/ODIHR, Belgium, Federal Elections, 10 June 2007, Election Assessment Mission Report, page 1. Available at: www.osce.org/odihr/elections/belgium/28213.

93 (Only in French) République française, Code électoral, Article L106 (modifié par Ordonnance n°2000-916 du 19 septembre 2000 - art. 1 (V) JORF 22 septembre 2000 en vigueur le 1er janvier 2002):
Quiconque, par des dons ou libéralités en argent ou en nature, par des promesses de libéralités, de faveurs, d'emplois publics ou privés ou d'autres avantages particuliers, faits en vue d'influencer le vote d'un ou de plusieurs électeurs aura obtenu ou tenté d'obtenir leur suffrage, soit directement, soit par l'entremise d'un tiers, quiconque, par les mêmes moyens, aura déterminé ou tenté de déterminer un ou plusieurs d'entre eux à s'abstenir, sera puni de deux ans d'emprisonnement et d'une amende de 15 000 euros.
Seront punis des mêmes peines ceux qui auront agréé ou sollicité les mêmes dons, libéralités ou promesses. Available at: http://www.legifrance.gouv.fr/; and http://www.legifrance.gouv.fr/telecharger_pdf.do?cidTexte=LEGITEXT000006070239.

94 OSCE/ODIHR, Republic of France, Parliamentary Elections, 10 and 17 June 2012, Election Assessment Mission Final Report. Available at: www.osce.org/odihr/elections/93621.

Financing (CNCCFP)[95] underlines in its 2011 annual activity report[96] that the Commission took 2,899 decisions of approbation with reformation of candidates' accounts (for a total of accounts of 7,047 scrutinised). The accounts approved with reformation represent a bit more than 40% of all accounts (twice more than for the 2008 elections), which tends to demonstrate the inclusion by many candidates of costs qualified as electoral expenses that are not considered by the Commission as expenses for electoral purposes. These candidates' accounts were approved mainly after reformation of the following expenses: interest rates, equipment, receptions, phone and communication costs.[97] However, these rules are not always easily enforceable as it was observed during the campaign of the former French President Nicolas Sarkozy in 2012. In this case, France's National Commission for Campaign Accounts and Political Financing estimated that Mr Sarkozy had to incorporate in his campaign expenses the cost of public meetings he had held in the province as part of his mandate of President, even if some of them were hold before he declared his candidacy. In July 2013, the French Constitutional Council rejected the 2012 presidential campaign accounts of Mr Sarkozy.[98] Consequently, his Party (U.M.P) shall reimburse 11 million euros to the State. This case highlights that despite the existence of excellent instruments against any kind of abuse, it remains difficult to do a clear distinction between the use of administrative resources for the campaign of a candidate and the use of these resources by the incumbents in their official capacities.

84. The Electoral Law of **Luxembourg** prohibits to give or to receive donations, gifts or promises between electoral contestants and voters (Article 95). The Law also prohibits to give or to receive donations as well as gifts or promises in order to obtain a specific vote or abstention (Article 96).

95 www.cnccfp.fr/presse/kit/cnccfp_en.pdf.

96 www.cnccfp.fr/docs/commission/cnccfp_activite_2011.pdf.

97 CNCCFP, 2011 Activity Report, pages 54-55. Available at: www.cnccfp.fr.

98 French Republic, Constitutional Council, Decision of the Constitutional Council following an appeal from Mr Nicolas Sarkozy against the decision of 19 December 2012 of the National Commission for Campaigns Accounts and Political Financing (Decision n° 2013-156 PDR of 4th July 2013). Available at: www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-n-2013-156-pdr-of-4th-july-2013.137967.html.

85. The Electoral Law of **Monaco** on national and municipal elections prohibits gifts and promises in the electoral context (Article 69). Misuse of administrative resources during the electoral campaign was not brought to the attention of the OSCE/ODIHR Election Observation Mission.[99]

86. **e. Two European countries include provisions related to media coverage as a possible misuse of public funds.**[100]

87. In addition to **Georgia**,[101] the Electoral Code of **Armenia** also refers to this issue in its Article 22:

> 1. Candidates occupying political, discretionary, civil positions, as well as candidates occupying a position of state or community servant shall conduct election campaigns taking into account the following restrictions:
> (...)
> (3) coverage via mass media of activities of these candidates shall be prohibited, except for the cases prescribed by the Constitution, official visits and receptions, as well as activities carried out by them during natural disasters.
> 2. Where coverage of other activities of a candidate referred to in this Article is made, mass media exercising terrestrial broadcast transmission must consider this when making coverage of the activities of other candidates, in order to comply with the non-discriminatory principle of equality of coverage laid down by Article 19 of this Code.[102]

88. **f. In a number of states, there are no explicit provisions on the misuse of administrative resources during electoral processes but implicit rules, which may be intended at dealing with this issue.** This will be developed hereafter (para. 89-91 as well as chapter C).

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99 Council of Europe, Parliamentary Assembly, Observation of the elections to the National Council of Monaco (10 February 2013), Election observation report, (Doc. 13137, 27 February 2013). Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19506&lang=en.

100 In the Americas, this is the case of Bolivia, Ecuador, El Salvador, Honduras, Mexico, Paraguay and Peru.

101 See para. 60 of the report.

102 Electoral Code of Armenia adopted on 26 May 2011. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2011)029-e.

89. The Elections Act of **Finland** does not cover explicitly the misuse of administrative resources during electoral processes but sanctions breaches of their official duties by members of electoral commissions:

> Section 185 — *Criminal responsibility of an election official*
> If a member of an election district committee, central election committee of a municipality, election committee or an electoral commission or an election assistant or any other person functioning as an election official as defined in this Act, neglects his or her duties, he or she is punished as if he or she had committed an offence in office.[103]

90. In practice, the OSCE/ODIHR did not recommend deploying an election-related activity for the last presidential election (22 January 2012) as "[a]ll interlocutors met by the OSCE/ODIHR NAM [Needs Assessment Mission] expressed a high level of confidence in all aspects of the electoral process." The remaining recommendations made in previous missions do not refer to the issue of misuse of administrative resources during electoral campaigns.[104]

91. Finally, the 2000 Act on Political Parties, Elections and Referendums of the **United Kingdom** regulates expenses when they are incurred for election purposes. Besides, the 2006 on Electoral Administration[105] includes rules on breach of official duty – as for **Finland** – that might include the issues at stake (Article 63). In practice, misuse of administrative resources during the electoral campaign, following the 6 May 2010 general election, was not brought to the attention of the OSCE/ODIHR Election Observation Mission.[106]

92. An additional issue is that only **Georgia** and **Montenegro** base their legal provisions on the principle of safeguard of public resources,[107] while most laws focus on electoral equity.

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103 Available at: www.finlex.fi/en/laki/kaannokset/1998/en19980714.pdf.

104 OSCE/ODIHR, Republic of Finland, Presidential Election, 22 January 2012, Needs Assessment Mission Report, page 2 and conclusions on page 8. Available at: www.osce.org/odihr/elections/85410.

105 Available at: www.legislation.gov.uk/ukpga/2006/22/pdfs/ukpga_20060022_en.pdf.

106 OSCE/ODIHR, United Kingdom of Great Britain and Northern Ireland, General Election, 6 May 2010, Final Report. Available at: www.osce.org/odihr/elections/69072.

107 Like in the case of Argentina, Chile, Ecuador, Guatemala, Mexico, Nicaragua, Paraguay, Dominican Republic, the United States and Venezuela.

C. Judicial standards established by case-law

93. The overview of the existing legislation on misuse of administrative resources during electoral processes on the one hand, and the practice observed during elections on the other hand, show that the implementation of legal provisions in the field remains difficult in many countries. Practice too often presents a contradiction between incumbents' interests and fairness of the electoral process.

94. Up to now, the report has dealt with existing provisions on the use and misuse of administrative resources during electoral processes. It has not addressed in detail the Venice Commission member states that do not have specific legal provisions in electoral laws or other specific means against the misuse of administrative resources during electoral processes.[108]

95. However, such specific legal provisions can be developed in other pieces of legislation, such as general criminal or administrative legislation as well as anti-corruption or public service legislation. These provisions could be as effective as a narrower or specific legislation (such as an electoral legislation) when appropriately applied to both incumbents and civil servants. They could be even more effective in general legislation as they can underline the severity of such abuses.

96. In countries without provisions on misuse of administrative resources during electoral processes,[109] **constitutional courts or equivalent bodies** interpreted the law through a corpus of decisions, delivering therefore a judicial interpretation on constitutional principles about equality in electoral processes. Such interpretation contributes chiefly to ensure the neutrality of government authorities in electoral processes.

97. In the European context, it should be referred to the following decisions of the **European Court of Human Rights** and of the **Constitutional courts** (or equivalent bodies) (by chronological order):

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[108] See para. 87-91 of the report.

[109] Austria, Croatia and Czech Republic (CDL-REF(2012)025rev). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2012)025rev-e.

- **European Court of Human Rights' case-law:**
  United Kingdom, case of Ahmed and others v. the United Kingdom, on the need of governmental neutrality during electoral campaigns in the United Kingdom;[110]
  Russian Federation, case of Republican Party of Russia v. Russia, on the dissolution of the Republican Party of Russia and illustrating the misuse of administrative resources;[111]
  Russian Federation, case Russian Communist Party and Others v. Russia, on media access, in the European Court of Human Rights, ruling of 19 June 2012;[112] and
- **Constitutional courts' case-law** (or equivalent bodies)**:**
  France, on municipal servants' intervention in electoral campaign;[113]
  Armenia, on neutrality required from Armenian public servants standing for election;[114]
  Ireland, in the case McCrystal v. Minister for Children and Youth Affairs & ors, on an Irish referendum, which refers to the British Electoral Commission principle that every democratic exercise, such as elections or referendums, should be based on trust and participation, and must stay away from any undue influence;[115]
  Ukraine, in the case on Election of the President of Ukraine, the Constitutional Court highlights the importance to safeguard the voters' will to elect a candidate running for the presidency. The legislation bans the bodies of executive power and local self-governance, as well as their officials and officers from participating in electoral campaigns so as to avoid pressure on voters and ensure freedom of expression.[116]

110 Decision ECH-1998-2-011. Available at: www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/ech/eng/ech-1998-2-011.

111 Decision available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104495.

112 Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111522.

113 Decision FRA-2002-3-007. Available at: www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/fra/fra-2002-3-007?fn=document-frame.htm$f=templates$3.0.

114 Decision ARM-2012-2-002. Available at: www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/arm/arm-2012-2-002?f=templates$fn=document-frameset.htm$q=%5Bfield,GRP%3A%5Borderedprox,0%3ACCCOCND%5D%5D%20$x=server$3.0#LPHit1.

115 Decision IRL-2012-3-005, Available at: www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/47c2796248c9a70280257ad1005980df?OpenDocument.

116 Decision of the Constitutional Court of Ukraine № 3-рп/2005 dated 24 March 2005. Available (in Ukrainian) at: www.ccu.gov.ua/uk/doccatalog/list?currDir=8847.

98. In the judicial practice of the **United States of America**, there are also relevant cases:

People v. Sperl:[117] in 1976, the Marshal for Los Angeles County put a vehicle at the disposal of a candidate, his staff and family. Mr Sperl was sentenced to prison; the execution of the sentence was suspended and he was placed on probation for a period of four years, on certain terms and conditions, one thereof being that he spent the first six months in the county jail and was fined $500.

People v. Battin:[118] in 1974, Battin was Supervisor of the First District of Orange County, while he decided to seek the Democratic Party's nomination for Lieutenant Governor of California. During the five months up to the time of the primary, he used his office, equipment and staff to promote his candidacy. Mr Battin was given three years' informal probation on the condition that he served six months in the county jail and paid a $3,500 fine plus penalty assessments.

Stanson v. Mott:[119] in June 1974 in California, voters approved a $250 million bond issue to provide funds for the future acquisition of park land and recreational and historical facilities by state and municipal authorities. One day before the election, plaintiff Sam Stanson filed a taxpayer suit, alleging that defendant William Penn Mott, Jr., Director of the California Department of Parks and Recreation (department), had authorised the department to spend more than $5,000 of public funds to promote the passage of the bond issue. Asserting the illegality of such use of public funds, the plaintiff sought a judgment that would require Mr Mott personally to repay the funds to the state treasury and any other appropriate relief. The Supreme Court unanimously found that the director had acted unlawfully, and stated that "...The selective use of public funds in electoral processes, of course, raises the specter of just such an improper distortion of the democratic electoral process."

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117 People v. Sperl. 54 Cal. App. 3d 640. Crim. No. 26259. Court of Appeals of California, Second Appellate District, Division Five. January 21, 1976. Available at: http://law.justia.com/cases/california/calapp3d/54/640.html.

118 People v. Battin (1978) 77 Cal. App. 3d 635. Crim. No. 9051. Fourth Dist., Div. Two. Jan. 18, 1978. Available at: http://law.justia.com/cases/california/calapp3d/77/635.html.

119 Stanson v. Mott, 17 Cal.3d 206. L.A. No. 30567. Supreme Court of California. June 22, 1976. Available at: http://scocal.stanford.edu/opinion/stanson-v-mott-27987.

99. In the Latin American context, there are also several examples that include decisions by the **Colombian Supreme Court** (which imposed limits to public servants to prevent influencing electoral campaigns),[120] as well as the **Peruvian National Electoral Jury** (by establishing restrictions to participation of State entities as soon as there is a call for elections).[121]

IV. Legitimate use or misuse of administrative resources during electoral processes: elements for an analysis

A. Assessing a situation of use or misuse of administrative resources during electoral processes

100. It appears legitimate, in accordance with the laws observed and the practice assessed in Part III of the report, to adopt legislation relating to the use of administrative resources during electoral processes as well as provisions prohibiting the misuse of such resources. It is also necessary to ensure continuity in implementing policies and political platforms that are established *before* the starting-point of the electoral process.

101. For instance, the Supreme Court of Elections of Mexico considered that the involvement of civil servants on non-working days to political campaigning events in support of a particular party, primary election candidate or election candidate, does not imply by itself the misuse of State funds.[122]

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120 Sentencia de la Corte Constitucional, Decision C1153-2005. Article 38. Available at : www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=18212.

121 Jurado Nacional de Elecciones, Decision 136-2010-JNE. Available at: http://portal.jne.gob.pe/informacionlegal/Constitucin%20y%20Leyes1/Reglamento%20de%20proganda%20electoral.pdf.

122 Jurisprudence 14/2012, under the heading of "Acts Electioneering. The sole presence of public officials at non-working days at such acts is not is not restricted by law", derived from the appeals SUP-RAP-14/2009 and cumulative, SUP-RAP-258/2009 and SUP-RAP-75/2010. *Gaceta de Jurisprudencia y Tesis en Materia Electoral* Mexico City, number 10, 2012, pages 11-

102. Hence, in order to establish a clear distinction between use and misuse of administrative resources during electoral processes, the timeframe that established these policies will be the main criterion. There is a legitimate use of administrative resources during electoral processes by elected persons and senior civil servants when a political platform (and more precisely the events implementing this platform, such as inaugurations of public buildings, launching new public building programmes, increased salaries or pensions in the public sector, etc.) arises from a long-term established plan, i.e. established at the beginning of the legislature (or mandate) or at the latest at the beginning of the budgetary year. Moreover, the outcome of such a policy is not intended to be seen during electoral processes. The number of inaugurations of public buildings, for instance, should be on a similar level during electoral processes compared to other periods without elections. An electoral process is not the appropriate timeframe for establishing new programmes and actions with budgetary impact that were not planned before the campaign. Such programmes and actions can therefore be more easily qualified as misuse of intangible administrative resources.

103. The line – especially when the law is silent – between use and misuse of administrative resources during electoral processes concerns also human resources involved directly or indirectly in elections, insofar as their use would cause breach of the fairness commitment which should be the governing spirit of any electoral process. These resources are in particular the senior civil servants. These public officials are either politically appointed by political authorities (elected people or government) or issued by career from the Civil Service, i.e. issued from the non-political branch of the public administration. No matter their initial appointment (or promotion and position), these public officials should effectively, fairly and competently contribute in implementing policies with their knowledge and sound judgment.

12. More details in the report of Mr Gonzalez Oropeza (CDL(2012)076). Available at: www.seatlax.gob.mx/JURIS/14_2012.htm. http://portal.te.gob.mx/colecciones/sentencias/html/SUP/2009/RAP/SUP-RAP-00014-2009.htm; www.te.gob.mx/Informacion_juridiccional/sesion_publica/ejecutoria/sentencias/SUP-RAP-0258-2009.pdf; and www.te.gob.mx/Informacion_juridiccional/sesion_publica/ejecutoria/sentencias/SUP-RAP-0075-2010.pdf.

104. Also, a distinction should be made whether these public officials are politically appointed or not. Then it has to be assessed whether they performed their duties in conformity with the law and impartially (i.e. in the public interest) or whether they performed them still in conformity with the law but also with loyalty and good faith vis-à-vis the public political authority which appointed them. Public officials should not perform their duties for purely political interests of the party(ies) in power. Moreover, public officials should not be subject to pressure and influence in the professional context. In order to draw a distinction between both categories, using legislation is not sufficient. There is also a need that those civil servants strive to develop and maintain high ethical standards in their work. Therefore, it is not only a question of the culture of political stakeholders but it is also a question of the professional standards of conduct of the civil servants or of a professional culture of public administration. Codes of good practice and ethical standards – particularly with regard to the issues of electoral administration and electoral disputes – should be identified and incorporated into readily available resources for public servants.

B. Government versus incumbent party, majority and opposition parties with or without seats in parliament

105. The legitimate activities of a government have to be distinguished from those of the ruling party, especially during electoral processes. Legal and ethical obligations have to be set up in order to distinguish usual governmental activities from ruling party activities during electoral processes. For measuring the balance in electoral processes, the governmental activities have to be compared with the opposition role in a democratic parliament.

106. It is therefore crucial to distinguish between the ruling party's (or coalition) internal work and preparations for reform policies on different societal matters, and the design and follow-up work of the reform programmes that the government is responsible for. For the latter, both elected persons and civil servants have their tasks and obligations and have to co-operate under certain legal and ethical principles (as proposed in the previous chapter A, above).

107. The legitimacy of the operating activities of the government may for example come under critical discussion or be seen as a mere abuse when special limited social support campaigns immediately linked to an electoral process are staged, e.g. with financial contributions, for certain specific groups of voters.

108. The issue of misuse of administrative resources also needs to be analysed from the perspective of the constitutional obligation of the state to protect the freedom of voters to form their opinion and consequently to protect and promote equality and neutrality in relation to the upcoming existence of new political parties that have not yet achieved representation in parliament and to the already established political parties. This is particularly relevant in the context of electoral processes. It can also have an impact on how legislation governs transparency of private financing of political parties and the individual interests behind the legal design of systems supporting public funding of political parties. The implementation of a specific rule should be based on the fact that the value to be protected is fairness in the elections. Such rule should gather the following characteristics: avoiding anything that could harm its efficiency, especially activities at state level; highlighting the role of the media; as well as adding provisions that impede the excessive private funding, in particular the funding coming from organised crime.

109. It is also important to respect the role of the opposition in a democratic parliament.[123] Opposition parties clearly do not have the same possibilities to use the competent services of the non-political public branch of government as the parties in power, including among the local and regional administrations. Opposition can be subject to discrimination in terms, *inter alia*, of premises' facilities, staff and communication sources. However, it is possible to introduce some balancing structures within the constitutional system. The opposition parties in parliament may be given the equivalent resources through participation in committees and access to investigative resources that parliament makes available for individual members of parliament

[123] Report on the role of the opposition in a democratic parliament (CDL-AD(2010)025), see especially p. 116 – 124. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)025-e.

or political parties represented in parliament. The internal rules of parliaments should provide for such guarantees as well as for an equal access to facilities proper to parliaments as well as to local and regional administrations.

110. The objective of laws providing measures tackling the misuse of administrative resources is in principle to secure a free and equal vote. However, the risk of too drastic provisions is that they may conflict with other principles or be unworkable or counter-productive in practice, or may deter some people from seeking public office altogether. Electoral laws and elections-related texts should therefore seek to strike a balance. Such balance can be reached by providing enough safeguards to persons holding political offices against the risk of being prosecuted after losing elections. Such laws should also ensure continuity and efficiency of on-going policies even during electoral periods while providing opposition parties – including those outside the parliament – with sufficient resources to carry out their electoral campaigns.

111. The report, based on the comparative analysis of legislation and practice developed above, will suggest preliminary recommendations in Part IV, before drawing guidelines (Part V).

V. Towards Recommendations

A. Self-regulation – A first step

112. The use of standards of ethical conduct could be looked upon as a first important step against misuse of political power. In this respect, political parties can informally agree – i.e. without going through legal provisions – on charts of ethics or agreements related to electoral processes including concerning the misuse of administrative resources. According to the principles of transparency, such agreements should be publicly discussed so that citizens can also discuss the issue and hold back possible sanctions agreed by the convention in case of breach of the assumed commitments. If such agreements are not respected or if abuses are observed in practice, this has to be reported, including in the media. Such self-regulation models are widely applied in the Scandinavian countries. They could be defined as belonging to a

concept of consensual approach. The parties may organise themselves very freely.[124]

113. The alternative model, which is less developed, is a strategy where legislation plays an important role in regulating the political parties.

B. Legislation sanctioning bribery and corruption

114. In its worst form, the misuse of administrative resources in electoral processes (where services and favours are exchanged) is a crime and a very serious form of corruption in a country. Satisfactory criminal laws against misuse of administrative resources are in force in most countries, contributing to prevent issues such as embezzlement and breach of trust. These criminal laws can or should be directed against the most serious forms of misuse of administrative resources during electoral processes. The huge problem of providing an effective enforcement or implementation remains in general. Costs in enforcement and pervasive behaviours, clearly unethical but perhaps legal, represent additional challenges in this respect.

115. The integrity of all relevant stakeholders, *inter alia* police, prosecutors, courts, judges, as well as auditors, is clearly vital to tackle the misuse of administrative resources. Media, under the principle of freedom of information, can also play an important role in countering abuses and support the effective administration of justice in this field. It seems fruitful to build similar perspectives on abuses during electoral processes as on corruption in general.

C. Other legislative measures

116. The basic instrument against abuse is the law and its enforcement. This includes not only criminal law but also legislation in general, as it is the case in many European countries. In order to fully understand the implications of these provisions, it also seems necessary to be informed about the overall context where these provisions are inserted

[124] See also para. 104 of the report.

into the legislation as a whole. Otherwise it is not possible to thoroughly evaluate the effects of these provisions. This question requires to take into account several areas of law.

117. First, it is crucial to emphasise the constitutional provisions in this respect in order to determine how the constitution deals with the separation of powers, the rule of law, the supervision of the government by parliament and parliamentary committees, the constitutional court (or equivalent body), electoral courts or commissions, the Ombudsman and the Auditor General. Such bodies and institutions should therefore perform their duties with regard to the principle of equality of all citizens before the Law. Furthermore, in their decisions and actions, they should ensure objectivity and impartiality. Such principles should clearly apply to electoral processes as a whole as well as to the supervision of such processes. Indeed, the equal access for political parties to public resources and to media should prevail. Moreover, the State should be constantly neutral throughout the electoral process.[125]

118. Abuses of administrative resources in electoral processes that originate in or that could be seen as typical general crimes should preferably be left to the general criminal code and not be regulated in special electoral acts. Different kinds of unauthorised actions before elections (improper reward for voting, etc.) should be seen as severe general crimes in the same way as bribery and corruption, severe misconduct or malpractice by public officials and economic crime, such as embezzlement of administrative resources and breach of trust. Political parties, candidates, media and public officials that incur misuse of administrative resources should be subject to sanction. Ensuring the implementation of standards in the various levels of government within the federal systems shall also be an important aspect to be contemplated by legislation.

119. In public law, it may be important to set up provisions establishing clear distinctions between politically active officials and civil servants and to determine how tasks and responsibilities should

[125] In Latin America, Bolivia, El Salvador, Mexico and Uruguay are examples of countries with specific constitutional provisions against misuse of administrative resources for political purposes. For instance in Mexico, the Electoral Court of the Federal Judiciary is the highest authority in the application of constitutional principles in electoral matters.

be distributed between them. Furthermore, well-developed, detailed and transparent legal regulations on the state budget and its allocation and proper use are needed. Otherwise, internal and external auditing controls will not be an effective countermeasure against abuse. It is also important to decide on detailed provisions on certain budgetary matters such as the use of official premises, communications and transport and other technical resources, complemented by the adoption of values and good practices in the area.

120. Public officials who breach the rules governing the conditions of the civil service must be sanctioned either for crimes or for breaches of their duties with disciplinary sanctions (including dismissal from office). Different provisions are appropriate for political positions (ministers, political staff of the government institutions, staff of parliament factions, etc.).[126] In this area, there is also a need for an independent review, and ultimately decisions pronounced by the courts. In addition to the criminal charges and the considerations expressed earlier in this report, the application of administrative sanctions seems to be a convenient solution compared to political impeachments when misuse of administrative resources is conducted by public officials.

D. The correct and effective implementation of legislation

121. To effectively implement the legislation, a mutual understanding and a sense of responsibility is required among all political stakeholders. There is a need for a shared understanding and consensus on the importance of constitutional values. There is a need, for example, to share a common view on the role of the opposition within society and an explicit reference to good practice.

122. If there is such a consensus, it opens up for the possibility to exercise a more effective parliamentary supervision in parliamentary

[126] See for instance the Venice Commission Opinion on the draft Law on conflict of interest in Moldova (CDL-AD(2007)044). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)044-e.

standing committees bearing responsibility for constitutional and related issues such as electoral matters. Similarly, in presidential regimes, the opposition finds more incentives to participate through institutional channels where certainty prevails with regard to the interpretation and implementation of laws.

123. An independent national audit office reporting to the parliament can also play an important role by supervising spending and financial management of the Government. It can also investigate and take action against financial irregularities within the Government.

124. In the end, it is of course crucial that constitutional courts or equivalent bodies, electoral courts or bodies, prosecutors and ordinary courts take the ultimate responsibility for the administration of justice in matters of abuse of administrative resources during electoral processes.

125. It is also important that the functions mentioned here are performed with transparency and respect the principle of freedom of information.

E. The requirement for transparency and freedom of information

126. The fundamental principles of transparency – in electoral processes – and of freedom of information are *sine qua non* pre-conditions for preventing misuse of administrative resources. The statutory system and its implementation through various institutions must also be subject to public reporting and discussion. It is essential that any shortcomings and errors can be debated openly in the media and in public. Behaviours of ministers, elected persons, civil servants and public officials as a whole, as well as judges and auditors, are therefore liable before the citizens, with possibly further consequences like investigations and political, civil or criminal actions against abusers. In addition to these liabilities, in case where the interference of the state in the elections is so strong that it jeopardises the fairness between the different political contenders and the liberty of the citizens, the ultimate sanction is the cancellation of the election as long as the own legal tradition and the specificities of electoral legislation provide for this ultimate option.

F. Public grants to political parties[127]

127. One recurrent problem is the risk of mismatch of possibilities, that is to say an inequality between the government party(-ies) and the opposition party(-ies). Such imbalances can be somehow counteracted by a system of public financing of parties' activities. This system must be established under a thorough legislation on public grants to political parties based on the principle of equality. On another related issue, the report also highlights the need to provide proper conditions for parties without representation in parliament (see para. 13). This report provided a number of examples on public grants to political parties. However, it does not cover in depth the topic.[128]

128. In the context of a system of financial grants to political parties, it may be envisaged to establish some financial compensation so that the opposition parties would have an additional contribution in the course of a legislature, compared to the ruling parties. This is intended to compensate them up to a certain extent for the advantage in resources the party(-ies) in power get by having access to the human resources of the government as well as local and regional administrations.

129. In such context, another important element can also be the establishment of a public system of financing. This system could permit printing of ballot papers and provide financial support, e.g. free or subsidised facilities and office services.

130. Legislation could also provide for members of parliament and ministers the right to free domestic travels at public expense, and this even during electoral campaigns.

131. Finally, a system of public grants to political parties could provide a good starting point for a certain public inspection and auditing of the economic conditions of the parties. There is here an opportunity to implement different protective mechanisms against misuse of administrative resources for electoral processes. Such a grant system based on the principle of equality, ultimately reviewed by courts or specific bodies, may fulfil legitimate aims within a democratic

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127 See the Venice Commission - OSCE/ODIHR Guidelines on political party regulation, para. 176-192.

128 Parts III and IV of the report.

society, like in Mexico, where rules are exhaustive and judicial review is guaranteed in every step of the public financing.

132. The report suggests considering the coming guidelines, based on the analysis of the phenomenon of the misuse of administrative resources during electoral processes, and aimed at improving the legal framework and the relevant practice of the member states in this field.

VI. Guidelines

I. Principles

1. The **principles of transparency** and **of freedom of information** are *sine qua non* pre-conditions for preventing the misuse of administrative resources.
2. The **principle of equality of opportunity** is also a key principle in order to ensure fair electoral processes. This entails two prerequisites:
   - Firstly, a neutral and ethical attitude should be adopted by state authorities – including public and semi-public bodies –, in particular with regard to: the pre-electoral period, including through the candidates' registration process; the coverage by the media, in particular by publicly owned media; and the funding of political parties and electoral campaigns, in particular public funding;
   - Secondly, incumbents should ensure non-discrimination towards their challengers by providing equal access to administrative resources.
3. The **principle of neutrality** should apply to civil servants while performing their professional duties as well as to public and semi-public bodies.

II. Legal framework for implementing the principles

1. The **electoral** and **criminal laws** as well as **the laws on funding of political parties and electoral campaigns** are the core texts which should provide measures for tackling the misuse of administrative resources during electoral processes.
2. Such measures must be **proportionate**, **clear** and **foreseeable** for all contestants.
3. For this purpose, these provisions have to **distinguish activities** inherent to the state's responsibility from those of political parties and candidates, notably incumbents.

III. Measures for implementing in good faith principles and provisions aimed at tackling the misuse of administrative resources[129]

1. **Charters of ethics** or **agreements** could be appropriate steps to tackle the misuse of administrative resources during electoral processes. In this respect, political parties would agree on such charters or agreements. Publicity and the thorough dissemination of these instruments are crucial to increase their effectiveness.
2. During electoral processes, officials in public positions who are standing for election should not use their opportunities as officials when they campaign and act as candidates.
3. An **independent national audit office** reporting to the Parliament plays an important role by supervising the use of administrative resources, including the public funding of political parties and electoral campaigns. An **independent body**, established according to the law, could be in charge of tackling all issues related to the misuse of administrative resources, including non-financial ones, as long as it is provided with enough resources and adequate rules to fulfil this task.

[129] Beyond the principles and the legal framework, political willingness remains a key factor for effectively implementing measures aimed at tackling the misuse of administrative resources.

4. Competent bodies in charge of tackling the misuse of administrative resources should use preventive measures to stop unlawful activities as soon as possible before the elections.
5. Political parties, candidates, public media and public officials who misuse administrative resources should be subject to **sanctions**.
6. In this respect, an **independent judiciary** is a *sine qua non* condition for sanctioning the misuse of administrative resources.
7. It is therefore crucial that **constitutional courts, electoral courts, or equivalent bodies, as well as prosecutors and ordinary courts** take the ultimate responsibility for the administration of justice dealing with the misuse of administrative resources.
8. Ensuring the **integrity** of the **police**, **prosecutors**, **judges** as well as **auditors** of political forces is of crucial importance. Concrete legislative measures should address the issue of integrity so as to assure the neutrality of these persons vis-à-vis the entire electoral processes.

Opinion on the Draft Law Amending the Electoral Legislation of Moldova

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I. Introduction

1. In November 2013, the Speaker of the Parliament of Moldova, Mr Igor Corman, requested the Venice Commission to comment on a text sent to him by a faction from the Democratic Party of Moldova (DPM), concerning a draft proposal to reform the electoral legislation of Moldova (CDL-REF(2014)001). In line with standard practice, the Venice Commission and the OSCE/ODIHR have undertaken a joint opinion of the draft legislation.

2. In the request submitted to the Venice Commission, it was stated that the draft intended to replace the existing proportional electoral system with a mixed parallel electoral system, under which members of parliament would be elected through single-mandate constituencies and party lists in a nationwide proportional constituency. The draft has yet to be registered in the parliament. Parliamentary elections are scheduled to take place in Moldova by the end of 2014, or, at the latest, in February 2015.

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3. This joint opinion should be read in conjunction with prior joint opinions of the Venice Commission and the OSCE/ODIHR on the Election Code of Moldova, as well as numerous election observation reports from previous OSCE/ODIHR and Parliamentary Assembly of the Council of Europe (PACE) election observation missions (EOMs) to Moldova, which provide good background for understanding the development of the electoral legislation in Moldova.[1] It should also be read in conjunction with the Joint Opinion on Draft Legislation pertaining to political parties and election campaigns, adopted in March 2013 (CDL-AD(2013)002).

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

- European Convention on Human Rights, Article 3 of the First Protocol;[2]
- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990);[3]
- International and regional documents, which are binding on Moldova;
- Venice Commission and OSCE/ODIHR, Joint Opinion on the *draft working text amending the Election Code of Moldova*, CDL-AD(2010)022;
- Venice Commission and OSCE/ODIHR, Joint Opinion on the *election code of Moldova as of 10 April 2008*, CDL-AD(2008)040;
- Venice Commission and OSCE/ODIHR, Joint Opinion on the *election code of Moldova*, CDL-AD(2007)040;
- Venice Commission documents:

1 All OSCE/ODIHR and Venice Commission joint opinions on the Moldovan legal framework can be found at: http://www.osce.org/odihr/elections/moldova and http://www.venice.coe.int/webforms/documents/?country=48&year=all. All OSCE/ODIHR election observation mission reports can be found at: http://www.osce.org/odihr/elections/moldova. All PACE reports can be found at: http://assembly.coe.int/defaultE.asp.

2 Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No.: 005), available at: www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

3 Available at: www.osce.org/odihr/elections/14304.

i Code of Good Practice in Electoral Matters;[4]
ii Code of Good Practice in the field of Political Parties;[5]
iii Guidelines on an internationally recognised status of election observers;[6]

- The Constitution of Moldova;
- The Electoral Code as of 17 January 2012 (CDL-REF(2012)039).

5. On 20-22 January 2014, a delegation made up of Venice Commission and OSCE/ODIHR experts participated in a working visit to Chisinau. This opinion is prepared on the basis of the comments by Ms Paloma Biglino, Mr Srdjan Darmanoviç, Mr Manuel Gonzalez Oropeza and Ms Gaëlle Deriaz, as well as Mr Alberto Guevara Castro (expert, Mexico). The delegation met with civil society, the Speaker of the Parliament, the parliamentary caucuses of political parties in the ruling coalition as well as the Communist Party in the opposition, the Ministry of Justice, the Central Electoral Commission, the Constitutional Court and the international organisations working in the electoral field in Moldova.

6. This opinion is provided in response to the above-mentioned request for review and with the goal of assisting the authorities in Moldova, political parties, and civil society in their efforts to develop a sound legal framework for the conduct of democratic elections.

7. *This opinion was adopted by the Council for Democratic Elections at its 48th meeting (Venice, 20 March 2014) and by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014).*

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4 Venice Commission of the Council of Europe, Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002, CDL-AD(2002)023rev),available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023rev-e.

5 Venice Commission of the Council of Europe, Code of Good Practice in the field of Political Parties, adopted by the Venice Commission at its 78th session (Venice, 13-14 March 2009, CDL-AD(2009)021), available at: www.venice.coe.int/webforms/documents/?pdf=CDLAD(2009)021-e.

6 Venice Commission of the Council of Europe, Guidelines on an internationally recognised status of election observers, adopted by the Venice Commission at its 81st plenary session (Venice, 11-12 December 2009, CDL-AD(2009)059), available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)059-e.

II. Scope of the review

8. The scope of the Opinion covers only the draft proposal submitted by the Speaker of the Parliament of Moldova. Thus limited, the Opinion does not constitute a full and comprehensive review of all available legislation on elections in the Republic of Moldova.

9. The Opinion raises key issues and indicates areas of concern. The ensuing recommendations are based on the relevant international standards, including Council of Europe and OSCE commitments, as well as on the Venice Commission Code of Good Practice in Electoral Matters (2002) (hereinafter "the Code of Good Practice").

10. This Opinion is based on the English translation of the draft proposal. This Opinion cannot guarantee the accuracy of the translation reviewed, including the numbering of articles, clauses, and sub-clauses. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

III. Executive summary

11. The Venice Commission and the OSCE/ODIHR have issued many opinions on the various changes to the Election Code of Moldova. The Election Code currently in force provides a good basis for the conduct of democratic elections in the country, although it could be improved, in particular concerning the seat allocation methodology and the thresholds established in the last reform.[7] Nevertheless, the key challenge for the conduct of genuinely democratic elections remains the exercise of political will by all stakeholders, to uphold the letter and the spirit of the law, and to implement it fully and effectively.

12. While the choice of an electoral system is a sovereign decision of a State, the proposed amendments in the draft submitted for consideration, which specify changing from a proportional to a

[7] See, among others, Joint Opinions on the electoral legislation of Moldova CDL-AD(2007)040 and CDL-AD(2008)022. See also OSCE/ODIHR *Election Observation Mission Final Report*, early parliamentary elections, 28 November 2010, Moldova.

mixed system within a year of parliamentary elections, raise serious concerns:

- The Code of Good Practice stipulates that basic elements of the electoral system should not be changed within a year of an election, and that when changing fundamental aspects of an election law, "care must be taken to avoid not only manipulation [of the election system] to the advantage of the party in power, but even the mere semblance of manipulation."[8] Enough time for discussion and the construction of consensus around this major change in the electoral system should be allocated, and the main rules for an election should not be changed in an election year. A reform such as the one proposed by the draft should be introduced at an earlier stage, not only a few months before the next general elections.
- Public discussion will enrich the comparative perspective and the analysis of other experiences on mixed electoral systems, as well as the understanding of the various factors that may explain advantages and shortcomings of such an electoral option. The draft reform has not yet been discussed with all electoral stakeholders in Moldova. It is strongly recommended that the choice of the electoral system of Moldova is the result of an open and inclusive debate. This will also enhance the transparency of the process of developing electoral legislation as well as ensure public participation and confidence in the adopted electoral legislation.
- The proposed mixed electoral system, in which 51 Members of Parliament (MPs) out of the 101 shall be elected by a proportional closed-list system in one single nationwide constituency and 50 MPs shall be elected in as many single-member constituencies is a fundamental reform. In the present Moldovan context, the proposed reform could potentially have a negative effect at the local level, where independent majoritarian candidates may develop links with or be influenced by local businesspeople or other actors who follow their own separate interests.

8 Para. 2, 63-65 of the Code of Good Practice.

- Achieving better accountability of the political institutions towards the citizens is a key goal in Moldova, which requires adopting pending legislation, rather than launching a new comprehensive electoral reform. To that end, it is strongly recommended to approve pending legislation regarding political parties and electoral campaign finance, as advised in the Joint Opinion of the Venice Commission and OSCE/ODIHR on Draft legislation of the Republic of Moldova pertaining to financing political and election campaign (CDL-AD(2013)002).
- Although the creation of electoral districts could improve representation of minorities, it presents important challenges. A clearer methodology for the delimitation of constituencies, further assessment and provision for periodical review are highly recommended.
- The problem of the representation of Transnistria and of Moldovan citizens living abroad has not been addressed in a convincing and implementable solution in the present draft.

13. The proposed reform is not yet presented in an official draft, as it has not been registered with the parliament. Recent Moldovan history has shown that changes have been carried out in the Election Code within a very short period of time. The Venice Commission and the OSCE/ODIHR therefore welcome the effort of the Moldovan authorities to seek their opinion before launching any reform, but public discussion and consensus with all electoral stakeholders remain essential.

14. The proposed reform lowers minimum representation thresholds, reverting back to the provisions prior to the amendments to the Election Code in May 2013. This is a welcome provision, which could be implemented if there is the necessary consensus and time to carry out such a reform.

15. Should this proposal be registered with the parliament and become an official draft, the Venice Commission and the OSCE/ODIHR remain ready to assist authorities of Moldova in support of their efforts to improve election-related legislation and bring it more closely in line with OSCE and Council of Europe commitments and international standards.

IV. Analysis and recommendations

A. Preliminary comments and background of the reform

16. Amending the electoral system is not a novelty in Moldova. The country has previously used both majoritarian and proportional electoral systems. In the first parliamentary elections of 1990, deputies of the National Assembly were elected by a purely majoritarian system through single-member constituencies. This system became fully proportional in the parliamentary elections of 1994, with the entire country being considered one nationwide constituency. The proportional system has remained in place since 1994, but specific provisions have been adjusted through the introduction of different thresholds for parties, independent candidates and electoral coalitions, as well as with a change in the seat allocation method. In this respect, an amendment to the Election Code was made in June 2010, which changed the method for allocating seats in party-list proportional representation from the D'Hondt formula to a new method (see more details below, on the description of the electoral system). The introduction of this new mandate allocation formula occurred some four months before the early parliamentary elections, which took place on 28 November 2010. These amendments raised concerns as they seemed to work to the advantage of the incumbent parties. While the Venice Commission and the OSCE/ODIHR issued an opinion on draft amendments in June 2010,[9] the changes to the seat allocation formula took place after the opinion was adopted.

17. In 2013, a further reform of the electoral legislation was hastily added to the agenda of the parliament in the midst of a political crisis, which resulted in the collapse of the government. The purpose of the draft amendments introduced in April 2013 was to alter the electoral system from a single nationwide constituency through proportional representation from party lists to a mixed member proportional system. Of the Moldovan Parliament's 101 MPs, 51 MPs were to be elected

[9] Joint Opinion on the Draft Working Text Amending the Election Code of Moldova, Opinion No. 576/2010,CDL-AD (2010) 014.

through a proportional system from party lists and 50 MPs through single-mandate constituencies. No discussions or consultations with the opposition party, the parties within the coalition and the rest of the electoral stakeholders, including any specialised body or institution from civil society, took place at that stage. The bill was adopted on 19 April 2013, in its second reading with 63 votes. Different stakeholders as well as the international community voiced their concerns about these changes. Subsequently, an *ad hoc* parliamentary committee determined that the law would violate constitutional provisions guaranteeing voting rights and that its adoption did not comply with parliamentary rules of procedure. These amendments to the electoral system were repealed shortly thereafter on 3 May 2013 and the Election Code reverted back to the proportional electoral system. However, in addition to repealing the amendments, the parliament raised the thresholds for representation (see below).

18. Electoral reform, which may include amending the electoral system, could contribute to the democratic process. As stated in Venice Commission and OSCE/ODIHR joint opinions, "the choice of an electoral system is the sovereign right of each state; however it should be decided and agreed upon through broad and open discussions in the parliament with the participation of all political forces".[10] When the draft proposal was submitted for analysis, there had been no open debate with other political parties in the ruling coalition or in the opposition, and the document had not been shared with civil society.

19. Taking into account the recent history of the electoral reform in Moldova, the submission of a request for an opinion at such an early stage of a potential reform process is to be welcomed. However, any electoral reform process should be subject to open debate and to expert opinions. Broad consensus is only possible when the public is well informed and all electoral stakeholders can express their opinion on the electoral changes under consideration. There has not yet been any consultation with political parties and civil society concerning

[10] See, among many others: Joint Opinion on the Draft Amendments to the Laws on Election of People´s Deputies and on the Central Election Commission and on the Draft Law on Repeat Elections of Ukraine, CDL-AD(2013)016, para 16, and Joint Opinion on the Draft Law on Election of the People's Deputies of Ukraine, CDL-AD(2011)037, para 22.

this reform, and, if it were to move forward, public debate should be guaranteed. Inclusiveness and transparency are key aspects related to electoral reform and should be specifically ensured when modifying the electoral system.

B. On the timeframe of the reform

20. As noted, the draft proposal has not been yet officially registered in parliament. Beyond the short time frame of adopting the legislation, the new provisions would need to be implemented by the electoral administration. The Central Election Commission would require sufficient time and resources to conduct a range of activities both at the central and lower levels, including staff training, voter education, expanded oversight of campaign finance, and boundary delimitation (see below). Citizen observer groups and other civil society organizations engaged in the electoral process would also require time to review and understand the changes and adjust their programs accordingly. Furthermore, political parties will need enough time to adjust their internal candidate selection process to the new system. The mandate of the current Moldovan parliament expires on 28 November 2014. Elections should be held within three months from this date, therefore, by the end of February 2015, at the latest.

21. According to the Code of Good Practice and its explanatory report, the stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. This also applies to the electoral system, due to its decisive role in the election results. Thus care must be taken to avoid not only manipulation to the advantage of the party in power but to avoid even the mere semblance of manipulation. Even when no manipulation is intended, changes will appear to be dictated by immediate party political interests. Additionally, rules that change frequently and that are complicated may confuse voters. The Code of Good Practice notes that the fundamental elements of electoral law, including the electoral system should not be open to amendment *less than one year before an election*. [11]

[11] CDL-AD(2002)023rev, explanatory report, paras. 2.b, 64, 65.

22. The proposed reform that focuses on changing the electoral system, if adopted, will have to be implemented and put into force in less than one year before the next parliamentary elections. This not only raises serious concerns in terms of feasibility, but also in terms of building confidence of voters and other stakeholders, including political parties (in particular from the opposition) and civil society. Such a fundamental reform should not be perceived as manipulation of the electoral legislation in an electoral year. Thus, a sufficient and clear timeframe for implementation of such a significant change is essential.

C. On the proposed mixed electoral system

23. According to the Election Code currently in force in Moldova, the 101 seats of the unicameral assembly are elected in one nationwide constituency through a proportional representation system from closed party-lists. MPs serve four-year terms. The minimum representation thresholds for parties to enter parliament are as follows: 6% for a political party; 9% for an electoral block of two political parties and/or socio-political organizations; 11% for an electoral block of 3 or more political parties and/or socio-political organizations; 2% for an independent candidate. Concerning the formula for mandate allocation, a reform in the Election Code of 2010 replaced the D'Hondt formula with a new method which allocates "remainder seats" on an equal basis to all parties that pass the threshold to enter parliament rather than on a proportional basis, resulting in a possible distribution of a greater number of seats to small parties.[12]

[12] According to Article 87 of the Election Code, mandates are first allocated to successful independent candidates. The votes cast in favour of these candidates are subtracted from the total number of valid votes. The remaining number of valid votes is then divided by the number of mandates remaining to obtain the electoral quotient. The number of votes cast for each party passing the threshold is then divided by the electoral quotient to obtain the number of mandates allocated to that party. If the resulting fraction is greater than 0.5, the party receives an additional mandate. Any remaining mandates are then allocated to the parties that crossed the threshold, starting with the party that received the largest number of mandates after the first distribution. One additional seat is given to each party until all mandates have been allocated. The timing and lack of public consultation on the amendment were criticised in the OSCE/ODIHR *Election Observation Mission Final Report*, early parliamentary

24. The draft proposes a mixed parallel electoral system, in which 51 MPs shall be elected by a proportional closed-list system in one single nationwide constituency; and 50 MPs shall be elected in as many single-member constituencies, under a plurality system requiring the winning candidate to receive more than half of the valid votes or a second round of voting is required. The thresholds for mandate distribution under the proportional component for political parties also change: 4% for a party; 7% for blocks of 2 parties; and 9% for blocks of 3 or more. A 2% threshold is also required for independent candidates. The proposed thresholds are the same as those in place prior to the amendments to the Election Code in May 2013.

25. The decision on an electoral system is a political one that must be undertaken by political forces on a political basis, although broad consensus achieved through a process of public consultation is highly recommendable. Each electoral system has both advantages and disadvantages, this depend on various factors, such as party system, tradition, and territorial structure. According to the explanatory statement of the draft proposal, the aim of the electoral change would be to combine the advantages of both the majority and the proportional systems. According to the stated rationale of this reform, the amendments are intended to bring:

- A remedy to the concerns on the perceived distance between elected representatives and their constituents;
- More direct representation for Moldovan citizens residing abroad;
- Direct representation of the population residing in the Transnistrian region;
- A shared experience with other countries in the region (Romania and Ukraine have recently introduced a change towards a similar mixed electoral system).

26. There are several aspects of the proposal that require a more detailed analysis.

elections, 28 November 2010, Moldova, pp. 5 and 6. It was also criticised in the PACE Election observation report, early parliamentary elections, 28 November 2010, Moldova, paras. 17-19.

1. On the risks of moving to a mixed electoral system in Moldova

27. The explanatory statement of the submitted draft proposal refers to the fact that mixed electoral systems exist in different countries, such as Ukraine, Romania or Germany. However, the practical consequences of similar electoral systems can vary, since party systems, institutional structures or social environment are always different. In other countries, the choice of a mixed system may be the result of a consensual sovereign decision, and the way in which it is implemented in other cases is key to building trust in the democratic process and to adjust and solve possible concerns accordingly. Germany is a recurrent example in comparative law of a mixed system, which has been able to build trust, but it is unlikely to be comparable with the Republic of Moldova. This is the case not only because of the specifics of the Federal State, the size or the different institutional structure, but also because it is a system of proportional representation, which also includes provisions for compensation through additional seat distribution to maintain the overall proportionality of the parliament with that of votes received by the political parties.

28. Majority or plurality systems in single-member constituencies can improve and further strengthen the link between citizens and their representatives; however, this is not always the case. If there is an influence of local businesspeople or other non-electoral stakeholders on their communities, this could potentially serve to negatively develop the links with or have an influence on independent majoritarian candidates more than between the local MPs and the citizens. This was, for example, the case of Ukraine. According to the first Interim Report No. 1 of the OSCE/ODIHR EOM on the 2012 parliamentary elections in Ukraine,[13] "the new mixed electoral system has changed the dynamic of these elections in comparison with the 2007 parliamentary elections, as party-nominated and independent candidates are competing strongly at the local level. A number of independent candidates are linked to wealthy businesspeople, some of whom are also supporting political parties financially."

[13] OSCE/ODIHR Election Observation Mission, Ukraine, Parliamentary Elections, 28 October 2012, Interim Report No. 1, p. 2.

29. Some of the political parties, NGOs and experts consulted during the working visit expressed their concern about similar consequences occurring in Moldova if the proposal for electoral system reform were to be approved. In this context, alternative solutions could be considered to enhance the fairness and transparency of elections and increase accountability. These include the supervision of the voter registry, auditing electoral and campaign financing, and the adoption of measures to further improve internal accountability and democracy within political parties. These types of measures could work within a proportional or a mixed electoral system, and specific recommendations have already been presented in the Venice Commission and OSCE/ODIHR Joint Opinion adopted in March 2013 (CDL-AD(2013)002). Therefore, any electoral system chosen, in particular one that contains single-member constituencies implies the need for clear campaign finance regulation and oversight that guarantee a level playing field for all electoral contestants. Moldova already uses both proportional and majoritarian components to elect representatives in local elections. However, the last OSCE/ODIHR EOM report to the 2011 local elections in Moldova stated: "Campaign finance oversight mechanisms are insufficiently developed, lacking precision and enforcement. None of the relevant bodies actively undertook measures to address breaches of campaign financing regulations."[14]

2. On the delimitation of constituencies

30. The current Election Code stipulates one nationwide constituency, with a proportional distribution of seats. As stated in a previous joint opinion:

> "Very few countries are electing the Parliament in one constituency only. In Europe the Netherlands represent a prominent exception. In most other countries there is a degree of geographical representation secured by elections held in a number of constituencies. If a country is rather uniform in terms of population or other

[14] OSCE/ODIHR Limited Election Observation Mission, Republic of Moldova, Local Elections, 5 and 19 June 2011 Final Report, p. 12.

> relevant criteria, elections in one constituency may work well. It will then be up to the parties to secure the geographical representation when compiling their lists of candidates. However, when minorities are concentrated in certain areas, constituencies can be the most effective instruments for securing reasonable minority representation in the Parliament."[15]

31. The draft submitted also establishes single-member constituencies. However, the proposal raises concerns on two different sets of questions: the *size* of the constituencies and the *manner* in which they are determined.

32. Concerning the *size* of the constituencies, the draft foresees the allocation of constituencies without including or explaining the criteria applied. According to the Code of Good Practice, "Equal voting power […] entails a clear and balanced distribution of seats among constituencies on the basis of one of the following allocation criteria: population, number of resident nationals (including minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged. […] The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration."[16]

33. The draft does not provide clear criteria for *constituency delimitation nor for periodicity of review*. Article 74 provides that the delimitation of boundaries is the responsibility of the Central Electoral Commission. This creates a double risk: a risk of politicisation for the Central Electoral Commission, as well as the risk of overloading it. Indeed, in order to ensure the fairness of the electoral process, decisions of the Central Election Commission may be challenged by any of the electoral stakeholders. This would include any single decision

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15 CDL-AD(2003)001, para. 17.

16 CDL-AD(200223rev, section 2.2(ii) and (iii). See also paragraph 7.3 of the 1990 OSCE Copenhagen Document, which requires the equality of the vote, and point 3.2 of the Existing Commitments for Democratic Elections in OSCE Participating States, ODIHR, Warsaw, October 2003.: "The delineation of constituencies in which elections are conducted must preserve the equality of voting rights by providing approximately the same ratio of voters to elected representatives for each district. Existing administrative divisions or other relevant factors (including of a historical, demographic, or geographical nature) may be reflected in election districts, provided the design of the districts is consistent with the equality of voting and fair representation for different groups in society."

concerned with the delimitation of constituencies and could lead to an exponential increase in the number of complaints, as well as requiring more resources for the Central Electoral Commission. With regard to the periodicity of review, the OSCE/ODIHR states that "redistricting should be conducted periodically to ensure that equality among voters is not diminished due to population movement."[17] "When necessary, redrawing of election districts shall occur according to a predictable timetable and through a method prescribed by law and should reflect reliable census or voter registration figures. Redistricting should also be performed well in advance of elections, be based on transparent proposals, and allow public information and participation."[18] According to the Code of Good Practice, "in order to avoid passive electoral geometry, seats should be redistributed at least every ten years, preferably outside election periods, as this will limit the risks of political manipulation",[19] population variance among constituencies should also be taken into consideration.

34. To avoid criticism on gerrymandering and to guarantee the necessary confidence in the Central Electoral Commission, the draft should provide for a transparent districting process, performed well in advance of the next parliamentary elections and be based on clear, publicly announced rules, taking into account the existing administrative divisions, and historical, geographical and demographic factors. In particular, the delimitation of single-mandate district boundaries in areas with high levels of minority settlements needs to ensure respect for the rights of national minorities, and electoral boundaries should not be altered for the purpose of diluting or excluding minority representation. Moreover, as established in the Code of Good Practice, "the maximum admissible departure from the distribution criterion adopted depends on the individual situation, although it should seldom exceed 10% and never 15%, except in really exceptional circumstances"[20] (see below the comments on the constituencies of Transnistria and Gagauzia).

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17 *Existing Commitments for Democratic Elections in* OSCE *Participating States.*, p. 55.

18 Ibidem, point 3.3, p. 14.

19 VC code p. 17, section 2.2 para 16:

20 Point 2.2. para. 15.

3. The constituency of Gagauzia

35. Already in the 2007 and 2010 joint opinions, the Venice Commission and the OSCE/ODIHR stressed the importance of taking into account sizable national minorities living on the territory of the Republic of Moldova when deciding on an electoral system. It was then recommended that "the electoral system for the Parliament should create possibilities for adequate participation in public life of national minorities and mainstream interests at regional level."[21]

36. The choice of the electoral system – proportional representation, majoritarian or a mixed system – is not what dictates or determines minority inclusion or exclusion. However, the choice of system is not irrelevant to the participation of members of minorities in the electoral process. It is often considered that "the more an electoral system is proportional, the greater the chances minorities have to be represented in the elected bodies and majoritarian systems are often seen as not appropriate."[22] This is, however, only relative. Much depends on both the legal and the practical situation in a given state, nevertheless, the delimitation of electoral constituencies should facilitate equitable representation of the entire population and can be a tool to ensure the representation of national minorities.

37. Article 74.2 of the submitted proposal establishes that three constituencies should be created in the Autonomous Territory Unit of Gagauzia. The aim of this provision seems to follow recommendations made by the Venice Commission and the OSCE/ODIHR in previous opinions on the representation of minorities. According to the proposal, citizens of Gagauzia would be represented not only by the MPs elected in the national constituency, but also by MPs elected in their majoritarian constituencies. However, the methodology to implement such provisions is unclear. The choice of allocating three majoritarian constituencies in the region could be challenged as arbitrary, taking into account the population data, showing deviations between different constituencies of more than the recommended 10% (15% in special

21 Joint Opinion on the *Election Code of Moldova*, CDL-AD(2007)040, para. 12; Joint Opinion on the *draft working text amending the Election Code of Moldova*, CDL-AD(2010)014, para. 12.

22 J. Velaers, *Electoral Law and representation of minorities*, CDL-UD(2012)006, para. 9.

circumstances), and therefore, presenting an unequal distribution of mandates.[23]

38. Therefore, while the introduction of constituencies could be welcome in the electoral system of Moldova in terms of representation of minorities, the criteria to implement such provisions should be further considered and established clearly in the legislation, as a result of a broad consensus.

4. The constituencies of Transnistria

39. According to Article 74.2 of the submitted proposal, three majoritarian constituencies should be created in the localities on the left bank of Nistru and Dubasari district. As previously stated, population data should be taken into account in establishing the number of constituencies created. The feasibility of organising elections in Transnistria raises a number of concerns. This territory is currently outside of the control of the central authorities, thereby making election-activities such as the electoral campaign, and voting and counting by precinct commissions difficult to implement. In previous parliamentary elections, voting could not take place on the territory under the control of the Transnistrian *de facto* authorities, and polling stations were established in government-controlled territory at which persons residing in Transnistria could vote.

40. The proposed reform does not contain any precise indication about how to overcome possible implementation problems. Any change in the Election Code in this respect should enumerate clear criteria for the creation of constituencies in the Transnistria region, as well as take into account feasibility issues.

5. The constituency abroad

41. Out-of-country voting is a central issue in Moldova, due to the large number of citizens living abroad.[24] Voters abroad are already eligible to

[23] Code of Good Practice, point 2.2., para. 15.

[24] According to various sources, these citizens account for up to 500,000 of a total of 2.6 million voters registered on voter lists, although there are differing estimates on these numbers. See *Observation of the early parliamentary elections in Moldova (28 November 2010) Report*, Parliamentary Assembly, Council of Europe, 24 January 2011.

vote in parliamentary elections. The 2010 OSCE/ODIHR EOM report on the parliamentary elections noted that, while there was an attempt to include Moldovans abroad in voting, the allocation of polling stations abroad did not correspond to the distribution of citizens of voting age residing abroad. Article 74.2 of the draft proposal establishes one single-member constituency abroad. While the practice of facilitating out-of-country voting varies among countries, there is a noted lack of consensus in the Moldovan context on the fairness and basis of establishing only one constituency. As previously stated, equality in voting power should be respected and the number of effective voters residing abroad taken into consideration to establish the constituencies abroad.

42. According to Article 90.4, "in the uninominal [majoritarian] constituency established abroad will be considered elected those three candidates who have accumulated the highest number of votes". Three representatives will therefore be allocated, according to this draft proposal, to the citizens residing and voting abroad. There is an inconsistency in the terms used, as the constituency abroad is considered to be majoritarian, and therefore, it should be a single-member constituency. Moreover, the proposal does not take into account important matters such as the low number of representatives elected by such a large number of citizens, the difficulties for campaigning in such a large constituency, or the peculiarities of financing candidates abroad.

43. It would be highly recommendable that the draft proposal is more detailed and specific on such important provisions.

D. On the representation thresholds

44. Article 86 of the present Election Code, modified in May 2013, raised the minimum representation thresholds for parties to enter parliament as follows:

- 6% for a political party;
- 9% for an electoral block of two political parties and/or socio-political organizations;
- 11% for an electoral block of 3 or more political parties and/or socio-political organisations;

- 2% for an independent candidate.

45. The threshold for participating in seat allocation in the parliament has been repeatedly amended. The OSCE/ODHIR and the Venice Commission have constantly recommended to lower the thresholds and "avoid(ing) reversing the reduction."[25] The draft submitted for assessment reverts back to the threshold levels that existed before the last elections, by requiring, in its Article 88.2, 4% for political parties, 7% for blocks of 2 parties and 9% for a block of 3 or more parties. Independent candidates would have the same minimum threshold of 2%. As stated in previous opinions on the electoral law of Moldova, this is a positive step, which could increase pluralism and reduce number of wasted votes.

E. On the impact of the proposed reform on women's representation

46. The submitted draft does not take into consideration provisions of ensuring women's representation under the proposed electoral system. The number of women MPs in the Moldovan Parliament is very low. In the parliamentary elections of 2010, only 19 women were elected out of the 101 mandates.[26] Until now, Moldova has not followed the recommendations of the Parliamentary Assembly of the Council of Europe to increase women's representation in politics.[27] The new electoral proposal does not improve gender equality, and could further limit women's representation in parliament. As the European Parliament stated more than fifteen years ago, the countries

25 See CDL-AD(2007)040, para. 16; CDL-AD(2008)022, para. 14.

26 Morozova, Galina, Underrepresentation of women in the parliament of the Republic of Moldova. A gender perspective on democratic development in the country. Lund University, Faculty of Social Sciences, Department of Political Sciences, 2011, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=2155527&fileOId=2155528

27 PACE, resolution 1706(2010), available at: http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1706.htm; see also Recommendation 1899(2010), available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/EREC1899.htm. See also the OSCE/ODIHR election observation mission final report in both 2011 local elections and 2010 parliamentary elections, which also recommended to promote women's participation.

with majority or plurality electoral systems in one-member constituencies have the lowest level of female political representation. In single-member constituencies, political forces often prefer male candidates because, in such a way, they expect better electoral results than when selecting women.[28]

V. Conclusion

47. The draft proposal submitted for consideration introduces a fundamental reform, changing the proportional electoral system into a mixed system, in which 51 Members of Parliament (MPs) out of the 101 shall be elected by a proportional closed-list system in one single nationwide constituency and 50 MPs shall be elected in as many single-member constituencies. The proposed reform is not yet presented in an official draft, as it has not been registered with the parliament of Moldova.

48. The choice of an electoral system is a sovereign decision of a State, but in the present Moldovan context, the proposed reform raises serious concerns and could have important shortcomings. Moreover, a clearer methodology for the delimitation of constituencies and further provisions on the representation of Transnistria and of Moldovan citizens living abroad should be included.

49. The Venice Commission and OSCE/ODIHR, although welcoming the effort of the Moldovan authorities to seek their opinion before launching any reform, urge caution in introducing such fundamental changes to the electoral system in the limited time ahead of the next parliamentary elections. Additionally, prior to proceeding with such fundamental changes, it is essential to have inclusive public discussions and to seek consensus with electoral stakeholders on the electoral system and related provisions.

[28] Differential impact of electoral systems on female political representation, Directorate-General for Research, Working document, Women's rights Series, W-10, Electoral Systems, http://www.europarl.europa.eu/workingpapers/femm/w10/2_en.htm

50. The Venice Commission and the OSCE/ODIHR stand ready to assist the authorities of Moldova in their efforts to improve the legal framework for democratic elections and bring it more closely in line with OSCE commitments, Council of Europe and other international standards for democratic elections.

Amicus Curiae on the Case Santiago Brysón de la Barra et al.

Veronika Bílková*
Manuel González Oropeza**
Anne Peters***

1 Introduction

1. By letter dated on the 7th June 2011, the Constitutional Court of Peru requested that the Venice Commission submit an amicus curiae brief on the case *Santiago Brysón de la Barra et al.* (case No. 1969-2011-PHC/TC) concerning the punishment for crimes against humanity.

2. The Constitutional Court of Peru submitted to the Commission three questions:

a. What case-law has been issued on crimes against humanity by other courts and constitutionally equivalent bodies?
b. How have the crimes against humanity been defined and established?
c. On the basis of this case-law, what types of facts have been considered as constituting crimes against humanity?[1]

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* Member, Czech Republic.

** Substitute Member, Mexico.

*** Substitute Member, Germany.

1 In the original request, in Spanish, the questions were: *1.¿Cómo han sentenciado los casos vinculados a la comisión de crímenes de lesa humanidad, otros tribunales o cortes constitucionales del mundo?. 2. ¿Cómo han definido y configurado este delito? 3. A raíz de esta jurisprudencia, ¿qué hechos han sido calificados como tales?*

3. Ms Bílková, M González Oropeza and Ms Peters acted as rapporteurs on this issue (CDL(2011)072, 071 and 073).

4. The present *amicus curiae* brief was adopted by the Venice Commission at its 88th plenary session (Venice, 14-15 October 2011).

2 Background

5. The background to this request is the lodging at the Constitutional Court of Peru of several complaints (and among them, the one introduced by Mr Bryson and others) against the criminal proceedings and sentencing of those related to the facts which happened in June 1986 in the prison "El Frontón".

6. On June 18th several uprisings took place simultaneously in different prisons, including "El Frontón" prison. After taking some of the guards hostage and seizing some weapons, the prisoners took over pavilions. The President of Peru issued several orders in which he declared a state of emergency in the region and considered the prisons as "restricted military zones". No civilians or judicial authorities were admitted into the prison and only the Navy of Peru had control. As the Inter-American Court of Human Rights considered proven facts in the *Durand Ugarte* case, even though the riot was already under control on June 19th, the Navy carried out the demolition of one of the pavilions of the prison, resulting in the injury or death of over one hundred prisoners. 111 people died and 34 survived, amounting to a total of 145 persons, while the unofficial list handed by the President of the Penitentiary had concluded that there were 152 inmates. Only 7 corpses were identified after autopsies. The Inter-American Court concluded in the above-mentioned case that:

> *118. In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not.*

7. The National Congress of Peru designated an investigating commission, formally established in August 1987. In December of that year, a report by the majority and one by the minority were submitted to the Congress by this commission. Concerning the criminal proceedings, the State ordered the military justice syste, to be in charge of the investigation of the events, which carried out such investigation and dismissed the charges brought against the liable military parties[2].

8. The Inter-American Court of Human Rights found the Peruvian state in violation of the American Convention on Human Rights, considering that the exclusively military court did not constitute an effective recourse to protect the victims and relatives' rights. It further stated that:

> *122. Regarding the proven facts of this case, victims or their relatives did not have an effective recourse that could guarantee their rights leading among other things to a lack of identification of the liable parties during proceedings followed by the military court and the failure to use due diligence to identify and establish the victims' whereabouts. The data involved in the rulings allow considering the investigation of events in El Frontón in anticipation by military tribunals was simply formal.*

9. The Inter-American Court also found that the Peruvian State had a duty to investigate these events.

3 On the notion of crimes against humanity

3.1 General remarks

10. Crimes against humanity belong among the most serious crimes under international law.[3] They are "particularly odious offences constituting a serious attack on human dignity or a grave humiliation

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2 Inter-American Court of Human Rights, *Durand and Ugarte v. Peru,* judgment of 16 August 2000, Series C No. 68, para. 119.

3 See generally, M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law,* Second Revised Edition, Kluwer Law International, The Hague, 1999; L. May, *Crimes Against Humanity. A Normative Account,* Cambridge University Press, Cambridge, 2005.

or degradation of one or more human beings".[4] Used for the first time in 1915, to denote the massacres against the Armenian population, the term entered into the legal vocabulary after the World War II with the prosecution of German and Japanese war criminals. It was included in the Charters of the Nuremberg and Tokyo International Military Tribunals. The main purpose behind the incorporation of this category of crimes, previously undefined in any international treaty, was to prevent impunity being granted to those who committed crimes which were comparable in their gravity and seriousness to war crimes but which could not be technically qualified as such. In the Nuremberg trial alone, 15 out of the 24 accused were found guilty of crimes against humanity. The principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgments of the Tribunal, including those referring to crimes against humanity, were officially affirmed by the UN General Assembly in Resolution 95(I) of 11 December 1946.[5] Despite this evolution at the international level, it was not uncommon for national states in the post-WWII setting to prosecute war criminals for common offences such as murder (Czechoslovakia, France, Poland etc.), applying their pre-WWII criminal legislation.

11. During the Cold War period, two international instruments relating to crimes against humanity were adopted at the universal (UN) level, namely the 1968 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (in force since 1970) and the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid* (in force since 1976). The latter instrument inspired the Council of Europe to adopt, in 1974, the *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* (in force since 2003).

12. During the sixties and seventies, several countries introduced "crimes against humanity" as a specific category of crimes into their

4 *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,* Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, par. 178.

5 G. A. Res. 95(I) *Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal,* 11 December 1946.

national criminal law systems (such as Czechoslovakia – Penal Code No. 140/1961 Coll.[6], France – Loi du 26 décembre 1964[7]). Various national prosecutions for crimes against humanity were also led from the late 1940s to the early 1990s, mostly still for offences committed during World War II in Europe by the Nazis or by their collaborators in various European states (Israel: *Eichmann* 1961, France: *Barbie* 1987[8]).

13. The category of crimes against humanity has undertaken a rapid evolution in the post-Cold War period. At the international level, these crimes were incorporated into the Statutes of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and for Rwanda, created by the UN Security Council the early 1990s; the Rome Statute of the permanent International Criminal Court established in 1998; and the statutes of various mixed tribunals (Special Court for Sierra Leone etc.). The statutes as well as the case-law of the tribunals have contributed to the clarification of the definition of crimes against humanity, which now seems more or less settled. Occasionally, other, non-criminal international courts and tribunals, such as the International Court of Justice, the European Court of Human Rights or the Inter-American Court on Human Rights have been called upon to pronounce on the definition of crimes against humanity or some aspect of their prosecution (immunities, statutory limitations etc.). The UN International Law Commission decided to include crimes against humanity among crimes against the peace and security of mankind, which were codified in the 1996 *Draft Code of Crimes against the Peace and Security of Mankind.*

14. The changes on the international level have propelled a similar evolution at the domestic level. Over the past two decades, many states

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6 The Penal Code contained a specific chapter of crimes against humanity, which included the following crimes: genocide, torture and other inhuman and cruel treatment, promotion and propagation of movements aimed at suppressing human rights and freedoms, as well as several war crimes.

7 Loi n°64-1326 du 26 décembre 1964 tendant à constater l'imprescriptibilité des crimes contre l'humanité. The law constituted of a single article, which stated: "*Les crimes contre l'humanité, tels qu'ils sont définis par la résolution des Nations Unies du 13 février 1946, prenant acte de la définition des crimes contre l'humanité, telle qu'elle figure dans la charte du tribunal international du 8 août 1945, sont imprescriptibles par leur nature.*"

8 France, *Barbie,* Cour d´assises du department du Rhone, 4 July 1987 and Court of Cassation, 3 June 1988.

have enacted specific legislation on crimes against humanity or have amended their older laws in the light of the new development in the area (Belgium, France, Spain, the United Kingdom, etc.). Moreover, recently an increased number of national courts have been confronted with cases involving past or present crimes against humanity (e.g., France: *Touvier* 1994 and *Papon* 1998, Netherlands: *Bouterse* 2001, Estonia: *Kolk and Kislyiy* 2003, Germany: *Demjanjuk* 2011, Spain: *Pinochet* 1998, Belgium: *Pinochet* 1998, UK: *Pinochet* 1999, etc.). As a result of these events, there is now a substantive body of international instruments, national legislation and international and national case-law which defines crimes against humanity and specifies the conditions under which those who have (allegedly) perpetrated such crimes may be prosecuted. Some of the rules applicable in this area have gaines the status of customary international law, an issue that will be discussed further (see *infra*).

15. Several issues will be analysed in this *amicus curiae* brief: first, the different elements which define a crime against humanity will be reviewed in the light of the facts related to the case; second, legal dilemmas stemming from the prosecution of crimes against humanity will be studied; finally, the issue of the sentencing of crimes against humanity will be analysed. The brief has taken into account relevant case-law from international and national courts and it has an annex with the references to this case-law.

3.2 The elements of a crime against humanity

16. A crime against humanity (which can be committed in various forms) normally consists of the following elements: One or several **objective elements** (an inhumane act/conduct, such as murder), a **contextual element** (widespread or systematic attack against civilian population), a **subjective (or mental) element** (knowledge of both the objective element and of the contextual element). For example, the "Elements of Crime", the authoritative explanation of the crimes codified in the ICC Statute, adopted by the states parties to this Statute,[9] define the crime against humanity of murder (Art. 7(1)(a)

[9] Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of

ICC-Statute) as follows: *"(1) The perpetrator killed one or more persons; (2) The conduct was committed as part of a widespread or systematic attack directed against a civilian population; (3) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population."* Some other forms of crime against humanity may consist of four or five elements.[10] The Elements of Crimes state that the provisions of article 7 ICC-Statute must be "strictly construed, because crimes against humanity are among the most serious crimes of concern to the international community as a whole."[11]

3.2.1. The objective elements: the conduct

17. A conduct constitutes a crime against humanity, if – in the context of the attack as defined above – an inhumane act is committed with knowledge. There are only two types of conduct which may be relevant for the *Brysón* case, murder and extermination.

18. Concerning murder, the objective element is that the perpetrator kills one or more persons.[12] (Even conduct against *one single victim* can constitute a crime against humanity if it is committed in the context of a widespread attack.[13]) No other elements are required. In particular, premeditation is not required. Also, defences arising from domestic law, e.g. the need to combat terrorism or the like, are not admitted.[14]

19. The crime against humanity of extermination is characterised by an element of **mass killing**.[15] According to the statutory definition

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the International Criminal Court, first session, New York, 3-10 Sept. 2002.

10 See the Elements of Crimes at pp. 5-12.

11 Elements of Crimes, p. 5.

12 Elements of Crimes, p. 5.

13 ICTY, *Prosecutor v. Kupreskic et al.*, TC judgement of 14 January 2000 (IT-95-16-T). para. 550; ICTY, *The Prosecutor v. Mile Mrksi et al.*, Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, ("Vukovar Hospital case"), para. 30.

14 Cf. Art. 6 c) Nuremberg Statute: "... whether or not in violation of the domestic law of the country where perpetrated."

15 ICTY, Prosecutor v. Radislav *Kristic*, TC judgment of 2 August 2001, IT-98-33-T, AC judgment of 19 April 2004, IT-98-33-A, para. 502. ICTR, *Kayishema*, TC judgment of 21 May 1999, ICTR-

of Art. 7(2) ICC-Statute, the crime against humanity of extermination "includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population". Extermination notably covers measures of "slow death".

3.2.2. The contextual elements

3.2.2.1. Inside and outside an armed conflict

20. It is acknowledged that, under *customary law*, the crime can be committed in times of peace. The requirement of a link to a armed conflict, still made in the Nuremberg Charter, in the Charter for the Far East Tribunal ("before or during the war") and in the ICTY Statute[16]. is no longer part of the customary international law definition.

21. This has been stated by the Inter-American Court of Human Rights in several cases concerning amnesties issued by the former governments avoiding the prosecution of State agents, military forces or policemen who participated in killings. In *Almonacid Arellano v. Chile*, the facts referred to the killing of a civilian by the army in 1973. The Inter-American Court acknowledged in this case that "*the Nuremberg Charter played an important role in establishing the elements that characterize a crime as a "crime against humanity." This Charter provided the first articulation of the elements for such a crime. The original conception of such elements remained basically unaltered as of the date of the death of Mr. Almonacid-Arellano, with the exception that crimes against humanity may be committed during both peaceful and war times.*[17]" The systematic mass killings of a part of the civilians, as well as the forced disappearances, illegal detentions and torture committed during the dictatorship, which lasted from 1973 to

95-1-T, paras144-145; ICTR, *Akayesu*, TC judgment of 2 September 1998, ICTR-96-4-T, para. 591. For the ICC-Statute: Elements of Crimes, p. 6.

16 ICTY, *Prosecutor v. Dusko Tadic,* AC judgment of 15 July 1999, IT-94, 1, A,, para. 251.

17 Inter-American Court of Human Rights, *Almonacid Arellano v. Chile*. Judgment of 26 September 2006, Series C nª154, para. 96.

1990, lead to finding Chile in violation of the American Convention on Human Rights.

22. The war nexus requirement has been commented on in a few domestic cases as well. In the *Salgotarjan* case, relating to the 1956 Hungarian insurrection, the Hungarian Supreme Court confirmed that the requirement of wartime action was (still) in place in the 1950s and that, therefore, offences committed outside an armed conflict could not qualify as crimes against humanity and had to be prosecuted as common crimes. In more recent cases (e.g. German border shooting cases), the war nexus has not been mentioned anymore, which indicates its gradual disappearance from the definition in the second half of the 20th century.

3.2.2.2.The "attack"

23. The texts state that an act must be committed "as part of" an attack. This is called the "**nexus requirement**" between the acts of the perpetrator and the attack.[18] In determining whether a nexus exists, the ICC pre-trial chamber II has considered "the characteristics, the aims, the nature or consequences of the act."[19] The nexus would be met if the act (or acts) and attack were the same behaviour.

24. The prototypical cases of crimes against humanity were the killing, persecution, and denouncement of Jews in the context of a larger national socialist policy. In that historical situation, what would now be called the "attack" formed the *surrounding, background, or context* of individual crimes. If such a context were needed, the bombardment of a prison could only be qualified as a crime against humanity if the overall policy of the state at the time could be qualified as an "attack". However, it seems that the acts and the attack can be formed by one and the same behaviour.[20] This understanding is corroborated by the statutory definition of "attack" in Art. 7(2) a) of the ICC-Statute which

18 ICC, - Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08 of 15 June 2009 ("Bemba confirmation decision"), para. 84.

19 ICC, *Bemba confirmation decision*, para. 86.

20 K. Ambos, *Internationales Strafrecht*, München, Beck, 2011, pp. 251 and 257.

says: " '*Attack directed against any civilian population' means* ***a course of conduct involving the multiple commission of acts*** *referred to in paragraph 1 against any civilian population, ...*". This clause implies that the commission of the acts themselves (or the single act itself, see below) in itself forms the "attack". In that sense, the ICC pre-trial chamber II held that "[t]he commission of the acts referred to in article 7(1) of the [ICC-]statute constitute the 'attack' itself and, besides the commission of the acts, no additional requirement for the existence of an 'attack' should be proven."[21]

25. To conclude, the "act" and the "attack" can happen *uno actu*. This means that the **blowing up of a prison** itself might constitute **both the "attack" and the "act" (murder)** in the sense of a crime against humanity, if the further requirements are met.

26. The acknowledgement that the crime can be committed in peace times implies that the "attack" is not necessarily an attack in the sense of international humanitarian law. **It need not be a military attack**.[22] The attack can be structural violence.[23] This understanding is corroborated by the statutory definition in Art. 7(2) ICC-Statute: "a course of conduct involving the multiple commission of acts". The "course of conduct" need not be a military one. Laying dynamite may be an "attack".

27. The ICC-Statute in Art. 7(2) defines that the "'[a]ttack directed against any civilian population' means a course of conduct involving the **multiple commission** of **acts**". But according to the case law of the ICTY and the ICTR, the attack can consist in one single act with many victims. It need not consist in a series[24], which is logical. It would be irrational not to punish a mass killing performed by, e.g., a weapon of mass destruction in one act, while punishing a perpetrator who used a different type of weapon and committed a series of killings.

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21 ICC, *Bemba confirmation decision*, para. 75..

22 Elements of Crimes, at p. 5.

23 R. Kolb, *Droit international penal*, Basel, Heibnig and Lichtenhahn, 2008., p. 98.

24 ICTY: *Prosecutor v. Dario Kordic and Mario Cerkez*, TC judgement of 26 February 2001 (IT-95-14/2-T), AC judgement of 17 December 2004 (IT-95-14/2-A), para. 178; *Prosecutor v. Blaskic*, TC judgement of 3 March 2000 (IT-95-14-T), AC judgement of 29 July 2004 (IT-95-14-A), para. 206; *Prosecutor v. Kupreskic et al.*, TC judgement of 14 January 2000 (IT-95-16-T), para. 550; *Tadic Ibid.*, TC, para. 648. ICTR, *Prosecutor v. J. Kajelijeli*, case No. ICTR-98-44A-T, para. 867.

28. The **targeted group of the attack** and the actual victims of the act (e.g. murder) are normally not fully identical. But if the attack and the act fall into one (see above), they are identical. It can be "***any civilian population***" and this means the following:

a. *The functional analogy to "hors de combat" in times of peace*: the term "civilian population" is a term of international humanitarian law (IHL), and a relic of the origin of the crime in that body of law. Given the fact that the crime can also be committed in times of peace, the term is misleading. "Civilian population" cannot mean "civilian" in the sense of the Geneva Conventions and the Additional Protocols. The term must be understood broadly.[25] It must be construed by analogy to civilians in armed conflict.[26] A **functional analogy to those "hors de combat"** must be drawn.[27] This means that all persons who are not able to use arms, and who cannot defend themselves are "civilians" for the purposes of the crime. **The crucial criteria are the incapacity to use arms,[28] and/or the need for protection.**[29]
b. With regard to the *different* situation of persons carrying arms, it is disputed whether these persons always fall out of the group of civilians (narrower definition of civilians), or whether those carrying arms only fall out of the group of civilians when they are allowed to use those arms (e.g. soldiers, police, etc.).[30] The latter view would imply that rebels, criminals, etc., who carry arms although they are not allowed to do so under domestic law, would still form a part of

25 ICTY, *Kuprescic*, Ibid., para. 547; ICTY, *Jelisic*, TC judgement of 14 December 1999 (IT-95-10-T), para. 54; ICTY, *Krajisnik*, judgement of 27 September 2006 (IT-00-39-T), para. 706.

26 ICTY, *Tadic* TC, para. 639.

27 R. Kolb Ibid., p. 97.

28 R. Kolb Ibid., p. 97.

29 K. Ambos, Ibid., p. 256.

30 ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1, TC Judgement of 21 May 1999, para. 127: " The Trial Chamber considers that a wide definition of civilian is applicable and, in the context of the situation of Kibuye Prefecture where there was no armed conflict, includes all persons except those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the FAR, the RPF, the police and the Gendarmerie Nationale."

the "civilians" (broader definition of civilians). Detainees in a camp have been qualified as civilian population for the purposes of a crime against humanity by an Israeli court.[31] In general, prisoners are without arms and can not defend themselves. They form a "civilian population" in the sense of the definition of the crime.

c. *Not necessarily the entire population of a geographic entity*: "Any civilian population" does not need to comprise the entire population of a geographic entity.[32] An attack against parts of the population suffices. In contrast, attacks against "limited and randomly selected individuals", or "single and isolated acts" would not fulfil the requirement of an attack against any civilian population.[33] On the other hand, an ICTY trial chamber in *Limaj* stated that "killing of a number of political opponents" is **not** an "attack" in the sense of the crime.[34] Prisoners are of course only a limited part of the population. However, these prisoners are not randomly selected. Blowing up a prison with a hundred persons inside need not fall outside the scope of the crime merely because it is not directed against the entire population.

d. *The targeted group may include persons who once performed acts of resistance*. Their previous resistance does not bring those persons outside the ambit of the targeted group.[35] Along that line, the French

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31 D.C. (T.A.), *Attorney-General of the State of Israel v. Enigster, 13(B)(5), 1952*: "The detainees at the Greiditz camps and the detainees at the Paulbrick camp consisted of a civilian population in the sense of the aforementioned definition". In the alternative, the court might have found that the fate of those civilian detainees is closely related to that of other civilians, notably those living in the area where those people were captured, and that they therefore only constitute one part of a larger "civilian population." Under such circumstances, the prosecution could establish that the detention and mistreatment reserved to the civilian detainees was just one aspect of a broader criminal campaign which covered a given area and which, for example, saw the burning of houses, the killing and rape of civilians and other violence generally attached with such campaigns."

32 ICTY: *Tadic* TC, Ibid., para. 644; *Kunac* AC, Ibid., para. 90; *Stakic*, AC judgement of 22 March 2006 (IT-97-24-A), para. 247; *Laletilic* TC, Ibid., para. 235; *Brdanin* TC judgement of 1 September 2004 (IT-99-36-T), para. 134. ICTR, *Bisegimana* TC judgement of 13 April 2006 (ICTR-00-60-T) para. 50. ICC, *Bemba confirmation decision*, para. 77.

33 ICC, *Bemba confirmation decision*, para. 77.

34 ICTY TC, *Limaj*, TC judgement of 30 November 2005 (IT-03-66-T), para. 187.

35 ICTY, *Kupresic*, Ibid., para. 549; *Limaj* TC, Ibid., para. 186; *Prosecutor v Naletilic & Martinovic*, TC judgement of 31 March 2003 (IT-98-34-T), para. 235.

Cour de Cassation had, in the *Barbie* case, stated that a crime against humanity can also be performed against political opponents.[36]

e. *Irrelevance of the presence of soldiers or police.* The presence of non-civilians, such as soldiers or policemen, does not deprive the targeted group of its quality as "any civilian population". It is sufficient that the group is predominantly civilian.[37]

29. Occasionally, European courts and the ECHR have expounded on the notion of "civilians" in the definition of crimes against humanity. In the *Korbely* Case,[38] the Hungarian courts had to decide whether armed insurgents taking part in the 1956 Hungarian insurrection could count as "civilians" under this definition. They came to an affirmative answer, qualifying the killing of an armed leader of one insurgent group, Tamás Kaszás, as a crime against humanity. In 2008, the decision was reviewed by the ECHR, which found it in violation of Article 7 of the European Convention. Criticising the approach of the Hungarian courts, the ECHR argued that *"Tamás Kaszás did not fall within any of the categories of non-combatants protected by common Article 3. Consequently, no conviction for crimes against humanity could reasonably be based on this provision in the present case in the light of relevant international standards at the time".*[39] Moreover, already in the 1980s, an interesting debate over whether crimes against humanity could be committed against non-civilians occurred in France. While the Court of Appeal[40] concluded that they could not and that all crimes committed against combatants had to count as war crimes, the Court of Cassation[41] was less categorical in this respect, leaving open the option that such crimes could qualify as war crimes and crimes against humanity at the same time.

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36 French Cour de Cassation, 20 Dec. 1985, *Barbie*, ILR 78 (1988), p. 125 *et seq.* (128).

37 ICTY, *Blaskic*, TC judgement of 3 March 2000 (IT-95-14-T), AC judgement of 29 July 2004 (IT-95-14-A), para. 214; *Galic*, AC judgement of 30 November 2006 (IT-98-29-A), para. 144; *Brdanin* TC, para. 134; *Limaj* TC, Ibid., para. 186; *Naletilic*, TC, Ibid., para. 235. ICTR, *Akayesu* TC, Ibid., para. 582.

38 Hungary, *Korbely Case,* Budapest Regional Court, 18 January 2001.

39 ECHR, *Korbely v. Hungary,* Application No. 9174/02, Judgment, 19 September 2008, par. 94.

40 France, Court of Appeal of Lyon, *Decision of 4 October 1985.*

41 France, Court of Cassation, *Judgment of 20 December 1985.*

30. **The requirement that the attack must be "widespread or systematic"** features in Art. 3 ICTR-Statute and in Art. 7 ICC-Statute (and in soft law in the ILC drafts of 1991 and 1996). Although the term does not appear in the ICTY-statute, the ICTY has used it in its case law as well. It depends on the definition of the targeted group whether these qualifications are fulfilled, and therefore the group needs to be defined first (see above para. 28). During the drafting process of the ICC-statute, this had been controversial. Some states had favoured a cumulative requirement, but were defeated. A compromise was the adoption of the "policy requirement" (see below para. 35).

31. The requirement of a "widespread" attack refers to the **scale** of the attack. The attack is widespread when it causes a number of victims, a multiplicity of victims.[42] This reading is borne out by the texts of the ILC Draft Codes of 1991 and 1996 which use the term "mass scale" and "large scale", respectively. The quantitative criterion is not objectively definable.[43] In a recent decision, the ICC pre-trial chamber II considered "that the term 'widespread' connotes the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[44]

32. A conduct is **systematic** if it is organised or follows a plan or pattern. It need not be a formal policy of the state.[45] An attack is not systematic if it is a random or isolated attack.[46]

33. The statutory definition in Art. 7(2) a) ICC-Statute of an "attack" mentions that the attack must be "*pursuant to or in furtherance of a State or organizational policy to commit such attack*". So the ICC- introduces the so-called "policy-element". The phrase in the provision has been interpreted by ICC pre-trial chamber II as implying "that the attack follows a regular pattern", and that the attack "is planned, directed or organized – as opposed to spontaneous

42 ICTY, *Tadic* TC, Ibid., para. 648, ICTY, *Blaskic*, Ibid., para. 206. ICTR, *Akayesu* TC, Ibid., para. 580, ICTR, *Bisengimana* TC, Ibid., para. 44.

43 ICTY, *Blaskic*, para.1148.

44 ICC, *Bemba confirmation decision*, para. 83.

45 ICTR, *Akayesu*, para. 580.

46 ICTY, *Tadic* TC, para. 649.

acts of violence".[47] It has been and still seems to be **controversial whether the** "policy-element" **is an additional requirement**.[48] The insertion in Art. 7 ICC-Statute was a compromise between those negotiating State parties which sought "systematic" and "widespread" as cumulative requirements, and those which sought them as alternative requirements. The wording in Art. 7(1) posits them as alternative ("or"). But the understanding of "systematic" is that the attack must be organised or follow a plan or pattern (see above). So the additional mentioning of "a State or organizational policy" seems to reduplicate the requirement of "systematic". As a result, this means that an attack which is only widespread but not systematic (i.e. not following a policy in the sense of Art. 7 sec. 2) will not fulfil the requirement.

34. The issue of the general policy requirement has repeatedly come up in the European case-law. It indicates whether crimes against humanity need to be committed as part of a state action or policy. European courts have been divided on the matter. Some have indeed confirmed the need for such an element. Thus, in the *Barbie* (1988) and *Touvier* (1992) cases, the French Court of Cassation required that *"the criminal act be affiliated with the name of a state practicing a policy of ideological hegemony"*.[49] Similarly, in the *Menten* Case (1981), the Dutch High Council claimed that *"the concept of crimes against humanity /.../ requires that the crimes /.../ form part of a system based on terror or constitute a link in consciously pursued policy directed against particular groups of people"*.[50] Yet, in other cases, the general policy requirement has not been required. Ruling in the *Papon* Case (1997), the French Court of Cassation stated that the definition of crimes against humanity did not require that an individual adhere to a policy of ideological hegemony or join part of a criminal organization.

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47 ICC, *Bemba confirmation decision*, para. 81.

48 See the arguments against an additional policy requirement in G. Mettraux, Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, *Harvard International Law Journal* 43 (2002), 237-316, pp. 270-282.

49 Cit. in M. E. Badar, From the Nuremberg Charter to the Rome Statute, 5 *San Diego Int´l L J,* 2004, at 112.

50 Cit. in ibid., at 112-113.

3.2.3. The mental (subjective) element

35. The mental element of a crime against humanity requires that the perpetrator knew that his conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population. But the mental element does not require proof "*that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization*."[51]

36. Discriminatory grounds are in most formulations of the crime required only for the act of persecution. The Statute of the International Tribunal for Rwanda (Art. 3) is exceptional in requiring discriminatory grounds for all forms of acts.[52] It is unclear whether discriminatory grounds are an objective or a subjective element of the crime.[53]

3.3 The dilemmas faced

37. The prosecution of crimes against humanity gives rise to various factual and legal dilemmas. This is particularly true when prosecution takes place before national judicial organs and/or when it pertains to crimes committed in the past, e.g. under the previous political regime. Unlike international criminal tribunals, national organs do not always have the possibility of prosecuting –or, for judicial organs; trying- crimes under international law as such. And even if they do, such crimes are not necessarily defined in the same way as under international law, nor do they apply under the same conditions as at the international level. Moreover, the relevant provisions of national penal codes relating to crimes against humanity are often of a rather recent date, enacted over the past years or decades, which makes their applicability to crimes committed in the past, before their enactment, questionable. Yet, as opposed to international criminal tribunals, national judicial organs usually do not have any *a priori* limits of the jurisdiction *ratione temporis* imposed upon them and, thus, cannot

51 Elements of Crimes, p. 5.

52 See in that sense also the ILC Draft Code of 1954.

53 ICTR, *Akayseu* AC, para. 464 speaks of "discriminatory *intent*", which has a subjective connotation.

divest themselves of the case by invoking temporal inadmissibility. They have to deal with it and pronounce upon the guilt or innocence of alleged perpetrators.

38. In so doing, national judicial organs may, depending on their respective domestic legal orders, prosecute alleged perpetrators either for common crimes (such as homicide, murder, rape etc.), mostly with aggravating circumstances, or for specific offences inspired by international law (defined generally as "crimes against humanity" or as individual crimes such as attacks against humanity, torture, persecution, apartheid, enforced disappearance etc.). Both options give rise to certain legal problems. The prosecution for *common crimes* often faces the obstacles of statutory limitations, amnesties, and immunities. Even with those obstacles overcome, national judicial organs still have to decide, in what ways and to what extent they are to take into account the serious nature of the relevant offences – this factor is particularly relevant when deciding upon the sentence. In some cases, they also need to deal with questions of jurisdiction, especially if the concept of universal jurisdiction is used, and modes of participation in the commission of crimes.

39. The prosecution for *specific offences* is in turn often confronted with the objections alleging violations of the principles of non-retroactivity and *nullum crimen sine lege*. National judicial organs have to find out, whether the relevant act could have been qualified as a crime against humanity at the moment of its commission. If no national legislation was available at that moment, they may be induced – if their national legal order permits so – to look for the legal basis in conventional or customary international law. In so doing, they have to discuss both the general definition of crimes against humanity and the concrete offences falling into that category in a specific (past) period. The issue of statutory limitations, amnesties, immunities, jurisdiction and modes of participation may arise in this context as well. In general, the questions relating to the principles of retroactivity/*nullum crimen sine lege,* the definition of crimes against humanity, the sentences applied in this context and the applicability of statutory limitations, seem to be the most general and most cogent and will be therefore dealt with in this opinion.

3.3.1 The principle of legality: nullum crime sine lege

40. The principle of legality, including the prohibition of retroactivity, is enshrined in various international human rights instruments (Article 15 of the ICCPR, Article 7 of the European Convention, Article 27 of the American Convention) and it is even ranked among non-derogable human rights. One of the main facets of this principle concerns the prohibition of the retrospective application of the law. As it has been summed up by the Venice Commission,: *"The prohibition of the retrospective application of criminal law relates to the principle of the legality of punishment and is as such part of the wider principle of the rule of law. This prohibition is necessary from the viewpoint of legal certainty, which means that an individual can be prosecuted only for actions, which were foreseeable as criminal offences at the time when they were committed. It would not be fair to be sentenced for actions that were not considered criminal offences at the time they were committed Another argument for the need to prohibit the retroactive application of criminal law is the principle of impartiality and objectivity of the State governed by the rule of law, which means that the State itself must respect the laws in force and must not change them to obtain a specific result in relation to a previous situation."*[54] It is one of the main principles of modern criminal law that individuals can only be held accountable for acts which were criminal at the time of their commission (*nullum crimen sine lege*).[55] The use of retroactive laws, which would criminalise certain acts *ex post facto,* is considered a serious violation of human rights.

41. The prosecution of past crimes against humanity often gives rise to allegations of the violation of the principle of non-retroactivity and of the principle of legality and legal certainty. This is especially true in cases in which specific provisions on crimes against humanity,

54 Venice Commision, *Amicus Curiae Brief for the Constitutional Court of Georgia,* Opinion No. 523/2009, March 2009, par. 5-6.

55 See also M. Boot, Nullum Crimen Sine Lege *and the Subject Matter Jurisdiction of the International Crminal Court. Genocide, Crimes against Humanity and War Crimes,* Intersentia, 2002.

incorporated into national legal orders rather recently, are used in the prosecution of crimes committed several decades ago. A similar problem may arise in situations in which individuals are prosecuted under the legislation in force at the time of the commission of the crimes, but this legislation is interpreted and/or applied in the light of more recent developments. This happens, when, for instance, some grounds of justification enshrined in the original legal regime are subsequently made unavailable to the alleged criminals or when the legislation on statutory limitations is retroactively changed to render some crimes imprescriptible.[56]

42. When confronted with these objections, national judicial organs can invoke the principle, explicitly stated in several human rights instruments, that the non-retroactivity does not *"prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations"* (Article 15-2 of the ICCPR, see also Article 7-2 of the European Convention). A prosecution which is *prima facie* retroactive can therefore be fully lawful under both international and national law, if it is established that already at the time of its commission, the relevant act qualified as a crime against humanity or another crime under international law. Moreover, the legal system of the state needs to contain rules making it possible for individuals to be held accountable on the basis of international law either by rendering international law directly applicable in the territory (the principle of monism) or by endowing its rules with the domestic legal force by means of transformation (the principle of dualism).

43. Over the past decades, national judicial organs in various European countries have dealt with the objection of retroactivity and the issue of legal certainty and the foreseeability of the law in cases relating to past crimes against humanity. Most of them have persistently rejected this objection, following the line of argumentation outlined in the previous paragraph. French courts have done so in a series of cases relating to crimes committed during World War II (*Barbie* 1987, *Touvier* 1994, *Papon* 1998). Retroactivity was the most

[56] This latter issue is dealt with in the final section of this opinion.

actively discussed in the course of the proceedings in the *Touvier case.* In the early 1970s, Paul Touvier who had served as a commander of the Second Unit of the French militia in Lyon in the 1940s was charged with crimes against humanity consisting of ordering the murder of several Jewish hostages. Since the legislation on crimes against humanity was enacted in France only in 1964, French courts faced the problem of the retroactive application of this legislation to the events that occurred 20 years earlier. They solved this problem by invoking Article 7-2 of the European Convention and by claiming that this provision, as the French Ministry of Foreign Affairs in its report on the matter suggested, *"did provide both for the past and the future".*[57]

44. After 1990, the same approach has been followed by the courts of the three Baltic countries (Estonia, Latvia, and Lithuania) in the prosecution of crimes committed during the Soviet era. For instance, in the *Kolk and Kislyiy* case,[58] the two applicants were accused of having participated in 1949 in a deportation of the civilian population from Estonia to remote areas of the USSR. This act was qualified as a crime against humanity under the Criminal Code of the Republic of Estonia, adopted in 2001, by the Saare County Court. In their appeal against the first instance court decision, the applicants raised the issue of retroactivity, arguing that the Criminal Code of the RSFSR which had been applicable in the territory of Estonia in 1946, had not known the category of crimes against humanity. These crimes were only made punishable in Estonia in 1994. Rejecting the claim, the Tallinn Court of Appeal invoked both the provisions of the Criminal Code, which make *"crimes against humanity ... punishable, irrespective of the time of the commission of the offence"*[59] and Article 7-2 of the European Convention which *"did not prevent punishment of a person for an act which, at the time of its commission, had been criminal according to the general principles of law recognised by civilised nations".*[60]

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57 Cit. in ECmHR, *Touvier v. France,* Application No. 29420/95, Decision, 13 January 1997, p. 5.

58 Estonia, *Kolk and Kislyiy Case,* Saare County Court, 10 October 2003; Estonia, *Kolk and Kislyiy Case,* Tallinn Court of Appeal, 27 January 2004;

59 Cit. in ECHR, *Kolk and Kislyiy v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006, p. 3.

60 Ibid.

45. Yet, though dominant, this approach is not uniformly shared. In some cases, national courts have refused to apply recent legislation to crimes committed in the past. Some of them have also shown reluctance to rely on the rules of international law, valid at the time of the commission of the crime. This stance was taken by the Netherlands Supreme Court in the *Bouterse case.*[61] Desi Bouterse is the former guerrilla leader from Suriname, responsible for the 1982 "December murders" in which 15 persons opposing the military rule in the country were executed. In 2000 he was sentenced under the 1988 *Act Implementing the Torture Conviction* by the Amsterdam Court of Appeal. In 2001, the Supreme Court quashed the decision arguing that the retroactive application of the 1988 Act to the events occurred in 1982 violated the principle of legality enshrined in the Dutch Constitution, which made no exception for international crimes. The Court also refused to apply customary international law, holding that the Dutch Constitution did not permit national courts to disregard domestic statutes conflicting with customary international law. A similar line of argument was held, though indirectly, by the UK House of Lords in the *Pinochet Case.*[62] The case primarily revolved around the extradition of the former Chilean dictator, Augusto Pinochet, from the UK to Spain, where he was accused of torture and assassination of political opponents. Yet, when deciding upon the extradition, the House of Lords had to clarify, whether the crimes Pinochet was accused of would be criminal in the UK. In its final decision issued in March 1999, it held that only crimes committed after 1988, when the Criminal Justice Act implementing the UN *Convention Against Torture* was adopted in the UK, would be prosecutable in the UK[63].

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61 The Netherlands, *In re Bouterse,* Supreme Court, 18 September 2001.

62 United Kingdom, *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte,* 3 W.L.R. 1456 (H.L. 1998), 2 W.L.R. 272 (H.L. 1999), 2 W.L.R. 827 (H.L. 1999). In many other countries, the case would have been seen as a retroactive removal oif an existing crimes such as torture.

63 In Mexico, the Supreme Court has followed the same restrictive approach to this issue as the Dutch and UK courts. In the *Echeverria* case, although related to genocide and not to crimes against humanity, the Supreme Court stated that the principle of non retroactivity, which appears in Article 14 of the Constitution, can not be respected on the bases of an international treaty such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (Supreme Court of Mexico, judgment, 15 june

46. The issue of retroactivity relating to the grounds of justification has been discussed especially by German courts in cases concerning the intentional shooting of people trying to escape from Eastern to Western Germany over the intra-German border. In a series of decisions[64] German courts have rather consistently rejected the argument that the shooting at the borders had been justified by the Eastern German legislation in force before 1989 and that attempts to subsequently remove this ground of justification subsequently away would constitute a violation of the principle of legality. In the most elaborate decision on the matter, the German Federal Constitutional Court stated that the grounds of justification aimed at *"exonerate(ing) the intentional killing of persons who sought nothing more than to cross the intra-German border unarmed and without endangering interests generally recognised as enjoying legal protection",* collided with fundamental human rights and, as such, had to be rejected. The Constitutional Court recognised that this rejection derogated from the principle of legality, yet it held such derogation justifiable on the basis of *"the requirements of absolute justice".* Unlike the courts in France or the Baltic countries which have relied on positivist arguments drawn from national and international law, German courts have resorted to a more natural-law like argumentation influenced by the post-WWII theorists.

2005, appeal 1/2004, derived from the action on jurisdiction 8/2004). In the *Cavallo* case, the Supreme Court of Mexico also considered that the statutory limitations should be analyzed in the framework of the Law existing at the time of the commission of the crime and that, therefore, some limitations may apply. In the specific case, the Court considered that the crime of torture had prescribed (Supreme Court of Mexico, judgment in *amparo*, 10 June 2003). However, on the basis of the constitutional reform adopted in 2011 on Human Rights and of the reception of international case-law on this matter, such as the Inter-American Court of Human Rights case-law, the Supreme Court case-law could evolve recognising the non applicability of statutory limitations. In Portugal, the Constitutional Court stated that the non applicability of limitations to the prosecution of crmies under the jurisdiction of the International Criminal Court could violate some constitutional principles, such as legal certainty and the nulla pena sine lege (Acórdão 483/2002, published in Diário da República, II Série. No. 8, 10th January 2003). In the United States, limitations have been treated as equitably tolled and not as entirely inapplicable. See in this respect *Chavez v. Carranza*, 559 F.3d 486 (United States Court of Appeals, 6th Circuit, 17 March 2009); Cabello v. Fernandez-Larios, 402 F.3d 1148 (US Court of Appeals 11 Circuit, 14 March 2005); *Doe v. Savaria,* 348 F. Supp. 2d 1112 (United States District Court for the Eastern District of California, 3 September 2004).

64 For more details, see ECHR, *Streletz, Kessler and Krenz v. Germany,* Applications No. 34044/96, 35532/97, 44801/98, Judgment, 22 March 2001; and ECHR, *K. – H. W. v. Germany,* Application No. 37201/97, Judgment, 22 March 2001.

47. The European Court of Human Rights (ECtHR) has so far had only limited opportunity to expound itself on the retroactivity in the prosecution of crimes against humanity, with most cases focused on the issue of statutory limitations (dealt with below). Yet, in the few cases available, it has shown a clear preference for the approach taken by the courts in France, Germany and the Baltic states. In *K. – H. W. v. Germany* (2001) and *Streletz, Kessler and Krenz v. Germany* (2001), the ECtHR claimed that the subsequent removal of the ground of justification for the border shootings did not violate Article 7 of the European Convention, since *"a State practice such as the* GDR*'s border-policing policy, which flagrantly infringes human rights ... cannot be covered by the protection of Article 7 § 1 of the Convention".*[65] In *Kolk and Kislyiy v. Estonia* (2006), it concluded that *"even if the acts ... could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. The Court sees no reason to come to a different conclusion".*[66] In *Korbely v. Hungary*[67], though finding a violation of Article 7, the Court indicated that should the elements of crimes against humanity as applicable under international law in the 1950s be present in the case, the applicant could have been lawfully prosecuted for his crimes despite the absence in the Hungarian Criminal Code in force in the 1950s of specific provisions relating to international crimes. In *Kononov v. Latvia*[68], the Court concluded that Latvia could prosecute the applicant for crimes committed in 1944 based on international law in force at that time. Though the case pertained to war crimes, the judgment's general statements suggest that the same conclusion would apply to other crimes under international law, including crimes against humanity.[69]

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65 Ibid., par. 90.

66 ECHR, *Kolk and Kislyiy v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006, par. 9.

67 ECHR, *Korbely v. Hungary,* Application No. 9174/02, Judgment, 19 September 2008.

68 ECHR, *Kononov v. Latvia,* Application No. 36374/04, Grand Chamber Judgment, 17 May 2010, paras. 115-213, esp. 208.

69 See also ECHR, *Van Anraat v. The Netherlands,* Application No. 65389/09, 6 July 2010; *Polednová v. The Czech Republic,* Application No. 2615/10, Decision, 21 June 2011 and *Kononov, op. cit.*, para. 208.

48. The survey of the European practice shows that both national courts of various European countries and the ECHR have, with some notable exceptions, a tendency not to regard the prosecution of past crimes, based on International customary law, as unlawful. The dominant trend today is to prosecute past crimes specifically as "crimes against humanity" and to ground the prosecution on the rules of international law applicable at the time of the commission of the alleged crimes. This approach is compatible with Article 15-2 of the ICCPR and Article 7-2 of the ECHR and Articles 8 and 25 of the ACHR; yet, it can only be applied in countries which allow for prosecutions based on international law. In some countries, past crimes are prosecuted as common crimes, under the national legislation in place at the time of their commission. In these countries, the objection of retroactivity mostly arises in relation to the interpretation and application of the given legislation (grounds of justification, statutory limitations etc.). The tendency in these cases is to resort to natural-law based arguments and to reject the use of provisions, which would collide with the standard of justice.

49. It is clear that the criminalisation of such inhumane acts as crimes against humanity crystallised into customary law quickly after 1949, through the intense judicial activity of national and international criminal tribunals in the aftermath of the Second World War. As a result, crimes against humanity were international crimes under international customary law already in the seventies and in the eighties and have been considered so by several national and international courts[70].

[70] A. Cassese, Crimes against Humanity, in Cassese/Gaeta/Jones (eds), *The Rome Statute of International Criminal Court: A Commentary*, vol. 1, Oxford, OUP, 2002, p. 356. See also ECHR, *Korbely v. Hungary,* Application No. 9174/02, Judgment, 19 September 2008, mainly para. 90; see also, IACHR, *La Cantuta v. Peru,* judgment, 29 November 2006, par. 225; and *Almonacid Arellano v. Chile*, judgment, 26 September 2006, paras. 105 and 106, in which it is stated that "*According to the International Law corpus iuris, a crime against humanity is in itself a serious violation of human rights and affects mankind as a whole. [...] Since the individual and the whole mankind are the victims of all crimes against humanity,the General Assembly of the United Nations has held since 1946 that those responsible for the commission of such crimes must be punished. In that respect, they point out Resolutions 2583 (XXIV) of 1969177 and 3074 (XXVIII) of 1973.178 [...] Crimes against humanity are intolerable in the eyes of the international community and offend humanity as a whole. The damage caused by these crimes still prevails in the national society and the international community, both of which demand that those responsible be investigated and punished. In this sense, the Convention on*

3.3.2 The statute of limitations of the crime

50. The Statute of limitations (*prescription*) in criminal law sets the maximum period of time, within which the prosecution of a certain offence may be lawfully initiated.[71] Once this period expires, the prosecution should be time-barred. There is a division between legal scholars as to whether the institution is substantive or procedural in nature and whether the expiration of the period therefore has an impact only upon the jurisdiction to prosecute a certain act or also upon the very criminality of this act.[72] The statute of limitations (prescription) is well-known in both *common law* and *civil law* countries. It has traditionally

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the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity clearly states that "no statutory limitation shall apply to [said internationally wrongful acts], irrespective of the date of their commission." the Court believes that the non applicability of statutes of limitations to crimes against humanity is a norm of General International Law (ius cogens), which is not created by said Convention, but it is acknowledged by it. Hence, [the State] must comply with this imperative rule." The Inter-American Court concluded that in 1973 (year in which Mr Almonacid died) the commission of crimes against humanity was in violation of a binding rule of international law. In the Nuremberg decisions, it was already stated that crimes against humanity are crimes against international law and its punishment is a non violation of the "ex post facto principle": *u.s. v. Josef Altstötter and others*, United States Military Tribunal, Nuremberg, 17 February- 4 December, 1947, in *Law reports of Trials of War Criminals/selected and prepared by the United Nations War Crimes Commission, London, Stationary Office*, vol. VI, 1949, pp. 45-48 and 41-45 (concerning the punishment of these crimes) and *u.s. v. Friedrich Flick and five others*, United States Military Tribunal, Nuremberg, case No. 48, 20 April-22 December 1947, in *Law reports of Trials of War Criminals/selected and prepared by the United Nations War Crimes Commission, London, Stationary Office*, vol. IX, 1949, pp. 26-28. See also in this sense Hans Globke, Oberstes Gericht der DDR, judgement of 23 July 1963, Neue Justiz 1963, 449, 507 *et seq.* ; Horst Fischer, Oberstes Gericht der DDR, judgement of 25 March 1966, Neue Justiz 1966, 193, 203 *et seq*

71 For more details on the topic, see R. A. Kok, *Statutory Limitations in International Law,* T.M.C. Asser Press, The Hague, 2007.

72 For more details, see Venice Commision, *Amicus Curiae Brief for the Constitutional Court of Georgia,* Opinion No. 523/2009, March 2009. As it is stated in this report, if limitations "*are to be regarded as substantive in nature, then clearly the expiration of a period of prescription not only means there is no longer jurisdiction to punish that crime but that its criminality is extinguished at that time. On the other hand, if limitation periods are regarded as procedural only, all that the expiry of the period of prescription means is that the crime is no longer prosecutable, not that the act has ceased to be criminal. On this view, prescription periods may be extended even if they have already run. A third school of thought, while holding that prescription periods are procedural, would nevertheless argue that once prescription periods have already expired they may not be revived without infringing the principle of legality. It is not decisive that the statutes would be qualified as criminal law or as criminal procedure law in a formal perspective but their functional role within the legal system has to be considered*" (paras. 7-10).

applied to most, if not all, common crimes. Yet, in the recent decades, the trend has been to remove it for the most serious offences, including crimes against humanity and other crimes under international law.

51. In 1969, the UN adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[73] Peru ratified this convention on 11 Aug 2003, with the following declaration: "In conformity with article 103 of its Political Constitution, the Peruvian State accedes to the 'Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity', adopted by the General Assembly of the United Nations on 26 November 1968, with respect to crimes covered by the Convention that are committed after its entry into force for Peru." This means that non-limitation for a possible crime against humanity in 1986 is not operative *by force of that Convention*[74].

52. However, the UN-Convention of 1968 only confirms (in a declaratory fashion) that crimes against humanity are not subject to any limitation of prosecution. Its preamble states: "Recognizing that it is necessary and timely to *affirm* in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, …". The non-limitation follows from the very nature of the crime. Non-limitation has, on those grounds, been asserted by numerous domestic courts all over the world.[75]

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73 UN GA 2391 of 26 Nov 1968. United Nations Treaty Series, vol. 754, p. 73. Other conventions (not pertinent for the *Fronton* case) are the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly of the United Nations on 30 November 1973, in force for Peru since 11 Dec. 1978; and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (in force since 2003).

74 The Legislative Decree No. 1097 which established that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity would only apply as of 9 November 2003, was repealed on 14 September 2010 by the Peruvian Congress by a majority of 90 votes in favour to one against, see "Peru's Congress votes to overturn Decree 1097", in *Andean Air Mail and Peruvian Times*, accessible in http://www.peruviantimes.com. See further on this issue M. Scheinin, Special Rapporteur of the United Nations on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Report, Mission to Peru*, A/HRC/16/51/Add.3, paras. 18 and 19.

75 French Cour de Cassation, 6 Oct. 1983, *Barbie*, ILR 78 (1988), p. 125 *et seq.* (126). Cour de Cassation, 20 Dec. 1985, ibid., p. 128. Argentinia, Corte suprema de Justicia de la Nacion, Arancibi Clavel etc., causa no 259, 24 August 2004 (A 533, XXXXVIII), para. 25. Italy, Tribunale

53. A somewhat modified view of the issue came from Hungary. In a series of the so called retroactive cases, the Hungarian Constitutional Court was asked in the 1990s to decide upon the compatibility with the national Constitution of several subsequently adopted acts suspending statutes of limitations for crimes committed during the communist period. The first three cases[76] related to acts which did not specifically refer to crimes against humanity or other crimes under international law. The Constitutional Court found those acts retroactive and in violation of the principle of legality. The last two cases focused on the 1993 *Act concerning the procedures in the matter of criminal offences during the 1956 October Revolution and Freedom Struggle*, which contained provisions on the non statutory limits to crimes against humanity and war crimes. In the fourth decision[77] rendered in 1993, before the respective act was promulgated, the Court approved of it in principle, suggesting nonetheless some corrections to be brought into its text. The approval was explained by the fact that Hungary had in 1970 ratified the 1968 UN Convention and thus *"assumed the international obligation to declare, even with retroactive force, that the statutes of limitation may never expire with respect to ... crimes against humanity"*.[78] In 1996, the Court reviewed the 1993 Act once again,[79] this time after its promulgation. Since the suggestions made in the 1993 decision had not been taken into account, the Court struck the Act down as unconstitutional. Yet even then, it confirmed its previous position on the inapplicability of the statute of limitations to crimes against humanity.[80]

Militare di Roma, judgement of 22 July 1997, para. 12.d). Belgium, Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), judgement of 8 November 1998, a judgement in the Pinochet affair (see Reydams Luc, In re Pinochet, AJIL 93 (1999), 700-703, p. 703).

76 Hungary, Decisions No. 2086/A/1991/15, 41/1993 and 42/1993, Constitutional Court, 1992-1993.

77 Hungary, Decision No. 53/1993, Constitutional Court, 1993.

78 Ibid., §V-3.

79 Hungary, Decision No. 36/1996, Constitutional Court, 1996.

80 *"The non-applicability of statutes of limitation applies only with respect to those crimes, which were already exempted from statutes of limitation according to Hungarian law at the time of their commission, except when customary international law qualifies the element as a war crime or a crime against humanity, determines or allows its imprescriptibility, and when Hungary has an international obligation to exclude the application of statutory limitations."* Ibid., p. 4673.

54. Non-limitation can therefore be said to be either a principle of **customary international law** or a **general principle of law**[81] (in the sense of art. 38 lit. b) and c) of the ICJ statute). This international legal principle was accepted before 1986, as the domestic courts shows. Many countries in Latin America have dealt for example with the issue of amnesties and statutory limitations to crimes against humanity. The Supreme Court of Justice of Argentina stated in the judgment of 24th August 2004 (*Enrique Lautaro Arancibia Clavel* case) that "*the very basis of the non statutory limitations to the prosecution of these crimes stems from the fact that the crimes against humanity are in general perpetrated by the same State agents acting outside the criminal law, id est, avoiding any legal control (...). Therefore, it is not possible to sustain logically that it is necessary to guarantee the extinction of the criminal proceedings for the lapse of time in crimes of these nature*"[82]. Chile has also followed this same reasoning in the *Paulino Flores Rivas and others case* (Supreme Court,. Judgment of 13 December 2006) or Uruguay in the framework of the proceedings concerning the (in) famous Condor Operation[83].

A crime against humanity committed in 1986 is therefore not subject to statutory limitation.

55. The Peruvian Constitutional Court itself has already pronounced itself in this sense recently. In a judgment issued on the 21 March 2011, the Constitutional Court quoted the Inter-American Court of Human Rights, which has declared that "*all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law* (*Barrios Altos v. Peru*, Judgment of 14 March 2011,

81 See also in this respect ECHR, *Kononov v. Latvia*, Grand Chamber, judgment 17 May 2010, paras. 232-233 for war crimes.

82 The translation has been done by the Secretariat of the Venice Commission. For the full reference in Spanish, see the Individual Comments to the amicus curiae, CDL(2011)071.

83 *José Nino Gavazzo Pereira et al,* judgment issued by the Criminal Judge 19º, 26 March 2009

Series C, nº 75, para. 41). Moreover, the Inter-American Court stated that "*the statute of limitations is inadmissible in connection with and inapplicable to a criminal action where gross human rights violations in the terms of International Law are involved*" (*Albán Cornejo v. Ecuador*, judgment of 22 November 2007, Series C, nº 171, para. 111). On the basis of this case-law, the Constitutional Court considered that the rule of non applicability of statutory limitations applies not only after but before the moment Peru ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity in 2003. "*These crimes cannot prescribe, no matter the date in which they were perpetrated*".[84]

4 Sentencing crimes against humanity

56. Crimes against humanity belong among the most serious crimes under international law. Considered odious and brutal acts which shock the conscious of humanity, they are outlawed by both customary and treaty rules of international law. They can be prosecuted at either the international or the national level – in both cases, their prosecution is invariably done in the interest of the international community as a whole. It seems logical to expect that the serious nature of these crimes should also be reflected in the severity of sentences inflicted upon their perpetrators. This issue is mainly left to the regulation by national legal orders and/or statutes of international criminal tribunals. Customary international law merely requires that sentences be proportionate to the gravity of the crime. This relatively simple principle gets more difficult to apply, when past crimes are concerned. Here, the lapse of time could cast doubts on how well the sentence is able to perform the corrective, deterrent and preventive function which are normally entrusted to it. While the prosecution certainly is, even after several decades, warranted, the fact that it takes place and that impunity is prevented is often seen as more important than the sentence itself. Humanitarian factors, such as the (often high) age and (often weak)

84 Constitutional Court of Peru, judgment of 21 March 2011, para 68.

health state of the alleged perpetrators, who moreover usually do not pose any real threat to society any more, also may play a role in this area.

57. When deciding upon sentences for past crimes against humanity, national (and also international) judicial bodies are therefore confronted with uneasy dilemmas. The **case-law of the European courts** shows that they have mostly sought to cope with these dilemmas on an *ad hoc* manner, carefully considering the specific circumstances of each individual case. As a result, sentences – even for identical offences and perpetrators in similar positions – vary extensively among courts and cases. For instance, while the officers of the Vichy regime were sentenced to rather harsh punishments by the French courts (*Barbie* – life imprisonment, *Touvier* – life imprisonment, *Papon* – 10 years of imprisonment and suppression of all civil and political rights), the former leaders of the GDR got milder sentences (*Streletz* – 5.5 years of imprisonment, *Kessler* – 7.5 years of imprisonment, *Krenz* – 6.5 years of imprisonment). The fact that the former were formally charged with crimes against humanity, while the latter were prosecuted for common crimes, could have played a role here. Other factors might have included – in addition to the nature of concrete offences and the personal profile of the perpetrators – the general scope of the crimes committed by the respective regimes and the very nature of those regimes (WWII regime versus socialist Cold War regime).

58. One element which seems to be common in the European case-law despite all the other differences, pertains to the distinction regularly made between, on the one hand, those who ordered and organised the relevant crimes against humanity and, on the other hand, those, who merely executed them. It is considered that members of the former group ("big fish") should be penalised more severely, for they must have had adequate knowledge and capacity to preview the consequences of their acts and to understand the nature of the crimes they ordered. As the leaders or high rank officials of the former regime, moreover, they can hardly claim to have acted under duress or out of mistake or ignorance. Members of the latter group ("small fish") are, on the contrary, often treated with some clemency. It is accepted that they could have had more problems to correctly understand the context in which they acted and to foresee the legal consequences of their acts.

The arguments of duress, lack of knowledge or simple mistake are also more easily available to them. The distinction made between the two groups could be well illustrated on the decisions rendered by German courts and the ECHR in the border shooting cases.

59. The first case, *Streletz, Kessler and Krenz,* concerned three senior officials of the GDR, who participated in the determination of the general policy of the country, including the policy with respect to the borders. German courts found them guilty of the death of a number of people who had tried to flee the GDR across the border in 1971-1989, and sentenced them, as indirect principals in homicide, to 5.5-7.5 years of imprisonment. The second case, K.-H. W., involved a German citizen who in 1972, during his regular military service, shot a man trying to cross the inter-German border. In 1993, he was sentenced for intentional homicide for one year and 10 months juvenile detention, suspended on probation. In passing the sentences, the German courts *"duly took account of the differences in responsibility between the former leaders of the* GDR *and the applicant".*[85] This approach was upheld by the ECtHR. The Court stressed that the first three applicants *"because of the very senior positions... could not have been ignorant of the* GDR*'s Constitution and legislation, or of its international obligations and the criticisms of its border-policing regime.... Moreover, they themselves had implemented or maintained that regime* /and/ *were therefore directly responsible for the situation which obtained at the border between the two German States".*[86] The fourth applicant, on the contrary, had *"undergone the indoctrinations"*[87] and *"was in a particularly difficult situation on the spot, in view of the political context in the* GDR *at the material time".*[88] In the ECtHR view, it was legitimate for the German courts to take these factors into account when determining the sentence.

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85 ECHR, *K. – H. W. v. Germany,* Application No. 37201/97, Judgment, 22 March 2001, par. 81.

86 ECHR, *Streletz, Kessler and Krenz v. Germany,* Applications No. 34044/96, 35532/97, 44801/98, Judgment, 22 March 2001, par. 78.

87 ECHR, *K. – H. W. v. Germany,* Application No. 37201/97, Judgment, 22 March 2001, par. 71.

88 Ibid., par. 76. See also Lithuania, *Misiūnas Case,* Case No. 1-119, Appeal Court of Lithuania, 26 March 2003, in which the fact that the accused committed the crime due to service subordination and the difficulty to choose a way of right conduct thereto, was regarded as an extenuating circumstance.

60. Concerning the **international criminal tribunals' experience**, the penalties imposable by the ICTY and the ICTR are limited to imprisonment (Art. 23 ICTY statute; Art. 23 ICTR-Statute). The death penalty is not foreseen. Perpetrators who have been sentenced for crimes against humanity had always committed other crimes as well, mostly war crimes, sometimes even genocide. The ad hoc tribunals have always imposed one single sentence. It is therefore not possible to isolate the penalty for the crime against humanity. The crimes were in some cases only committed in the form of aiding and abetting.

61. The ICTY has imposed sentences ranging from life imprisonment (in one case, *Galic,* concerning Sarajevo) to three years (*Kolundzija*). Penalties in between were 40 years (*Stakic*), 35 years (*Kristic*, concerning Srebrenica), 30, 28, 25, 20, 18, 15, 12, and 6 years.

62. The ICTR has imposed life imprisonment in four cases (*Akayesu, Musema, Muhimana*, and *Rutaganda*). Besides crimes against humanity, all four perpetrators also committed genocide. The ICTR imposed 45 years of imprisonment on *Semanza*, 15 years on *Bisingimana*, 6 years of imprisonment on *Rutaginara*.

63. The crimes against humanity tried by the ICTY and ICTR were mostly committed in the following forms (roughly in order of frequency): persecution, extermination, murder, other inhumane acts, forcible transfer, torture, rape, enslavement. The penalties for crimes against humanity have not *per se* been more serious than for war crimes. The ICC has so far not convicted any perpetrator.

5 Conclusions

64. Due to the troubled history in the 20th century, there has been a wide number of experiences in prosecuting past crimes against humanity. The term entered into the legal vocabulary after World War II with the prosecution of German and Japanese war criminals in the Nuremberg and Tokyo Tribunals and the definition was definitively settled in the Rome Statute. This codification in International Law has been slowly followed by a progressive inclusion of a definition of crimes against humanity in domestic laws, a practice which has increased mainly after the end of the Cold War.

65. In Europe, experience has been gained especially in the prosecutions of crimes committed during World War II, crimes of communism, and crimes committed by autocratic or totalitarian regimes in other parts of the world but which have arrived before the European courts. The prosecutions have confronted national courts of the European countries, and occasionally also the ECtHR, reviewing many of the national decisions.

66. In the Latin-American experience, dictatorships and so called State terrorism have resulted in forced disappearances, extra-judicial executions, torture, etc. Often, these actions could qualify as crimes against humanity and many countries have had to face their past and try to handle it. Argentina, Chile, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay... all of these countries have been faced with the duty to prosecute and to ensure the right to truth to victims. The Inter-American Court of Human Rights has built a consistent case-law, holding that crimes against humanity cannot have statutory limitations and the criminal procedural rules on *prescriptibility* do not apply to them. In the *Barrios Altos* and *La Cantuta* cases *v. Peru*, which referred to massacres and extrajudicial killings, the Inter-American Court identified the facts as part of a systematic mechanism of repression to which certain sectors of the population were submitted, having been labelled as "subversive". The implication of the intelligence services and the framework of impunity that existed were key elements to qualify the facts as crimes against humanity[89].

[89] In *Barrios Altos v. Peru* (Inter-American Court of Human Rights, judgment, 14 March 2001), the Inter-American Court stated that "all amnesty provisions, **provisions on prescription** and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law" (para. 41. Enphasis added). In *La Cantuta v. Peru* (judgment, 29 November 2006), the Inter-American Court further added that "*Under Article 1(1) of the American Convention, the States have the duty to investigate human rights violations and to prosecute and punish those responsible. In view of the nature and seriousness of the events, all the more since the context of this case is one of systematic violation of human rights, the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states for such purpose.* Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States' erga omnes obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those

67. All these experiences have resulted in a series of uneasy dilemmas, which can be summarised up as follows:

1. *Definition of crimes against humanity.* Quite a general consensus exists that the category of crimes against humanity emerged in international law (at the latest) by the mid-20th century. There have been no extensive discussions on the general requirements of crimes against humanity and the concrete offences falling into this category, in national European courts and the ECtHR. The definition of crimes against humanity which has been used by national Latin-American jurisdictions has been the definition contained in the Statute of the International Criminal Court. The case-law indicates a gradual disappearance of the war nexus requirement in the second half of the 20th century, a hesitation over the general policy requirement and an uncertainty about the notion of civilians. Most prosecutions have involved charges of murder, forced disappearances, extra-judicial killings or deportation, which seem relatively clear.
2. *Legality/Nullum crimen sine lege.* The prosecution of past crimes is not considered retroactive or in violation of the principle of legality if it is proved that at the time of their commission, those crimes could have been qualified as crimes against humanity under applicable rules of international law. In that case, prosecution and punishment were foreseeable for perpetrators. Past crimes may also be prosecuted under common criminal legislation. Then, the objections mostly arise in respect of the interpretation and application of this legislation and can be addressed by means of natural-law (justice) based arguments.
3. *Statutory limitations for crimes against humanity.* Crimes against humanity are largely seen as not having statutory limitations. This quality is ascribed to them by virtue of international law, though there is uncertainty as to whether this constitutes an inherent feature of those crimes or has developed gradually by

responsible for such events *(…)",* para. 160, enphasis added. There is a clear link between the Inter-American and the European Courts of Human Rights' case-law in this respect, as the Inter-American Courts quotes in its decision the European Court of Human Rights judgments, such as *Kolk and Kislyiy v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006.

means of treaty or customary rules. Those in favour of the latter view moreover disagree as to whether such a rule/treaty provision only produce effects towards events occurred after its creation/adoption or whether it can (or even must) be applied to any crimes against humanity irrespective of the date of their commission. The non-applicability of statutory limitations to crimes against humanity (qualified as such or as common crimes), or their suspension for the period in which these crimes could not be prosecuted due to political reasons is also sometimes derived from the principles of objective justice and internal morality of law.

4. *Sentences for crimes against humanity.* Various countervailing factors play a role in the determination of the severity of sentences to be imposed upon perpetrators of past crimes against humanity. Usually, the decision has to be made on an *ad hoc* basis, taking into account the concrete circumstances of the individual case. Yet, there is a clear tendency in Europe and in the international criminal courts case-law to distinguish between those who ordered the crimes and those who merely executed them and to impose harsher penalties upon members of the former group.

68. The Venice Commission expresses its readiness to assist the Peruvian Constitutional Court further.

6 Annex of most important decisions and judgments

6.1 International Courts

6.1.1 ICTY

*(*TC = *trial chamber.* AC = *appeals chamber).*

Prosecutor v. Dusko ***Tadic***, TC judgement of 7 May 1997 (IT-94-1-T), AC judgement of 15 July 1999 (IT-94-1-A).
Prosecutor v. ***Jelisic***, TC judgement of 14 December 1999 (IT-95-10-T).

Prosecutor v. ***Kupreskic et al.***, TC judgement of 14 January 2000 (IT-95-16-T).
Prosecutor v. ***Sikirica et al.***, TC judgement of 13 November 2001 (IT-95-8-S).
Prosecutor v. ***Blaskic***, TC judgement of 3 March 2000 (IT-95-14-T), AC judgement of 29 July 2004 (IT-95-14-A).
Prosecutor v. ***Kunarac et al.***, TC judgement of 22 February 2001 (IT-96-23-T & IT-96-23/1-T), AC judgement of 12 June 2002 (IT-96-23 & IT-96-23/1-A).
Prosecutor v. Dario ***Kordic*** *and Mario* ***Cerkez***, TC judgement of 26 February 2001 (IT-95-14/2-T), AC judgement of 17 December 2004 (IT-95-14/2-A).
Prosecutor v. ***Stakic***, TC judgement of 31 July 2003 (IT-97-24-T), AC judgement of 22 March 2006 (IT-97-24-A).
Prosecutor v. ***Krnojelac***, TC judgement of 15 March 2002 (IT-97-25-T).
Prosecutor v ***Naletilic & Martinovic***, TC judgement of 31 March 2003 (IT-98-34-T).
Prosecutor v. ***Vasiljevic***, TC judgement of 29 November 2003 (IT-98-32-T).
Prosecutor v. ***Kristic***, TC judgement of 2 August 2001 (IT-98-33-T), AC judgement of 19 April 2004 (IT-98-33-A).
Prosecutor v. ***Brdanin***, TC judgement of 1 September 2004 (IT-99-36-T).
Prosecutor v. ***Limaj et al.***, TC judgement of 30 November 2005 (IT-03-66-T).
Prosecutor v. ***Krajisnik***, TC judgement of 27 September 2006 (IT-00-39-T).
Prosecutor v. ***Galic***, TC judgement of 5 December 2003, (IT-98-29-T), AC judgement of 30 November 2006 (IT-98-29-A).
Prosecutor v. ***Mrksic***, AC judgement of 5 May 2009 (IT-95-13-1-A).

6.1.2 ICTR

Prosecutor. v Ignace ***Bagilishema***, TC judgement of 7 June 2001 (ICTR-95-1A-T), AC judgement of 3 July 2002 (ICTR-95-1A-A).
Prosecutor v. Jean-Paul ***Akayesu***, TC judgement of 2 September 1998 (ICTR-96-4-T).

Prosecutor v. ***Musema***, TC judgement of 27 January 2000 (ICTR-96-13-A), AC judgement of 16 November 2001 (ICTR-96-13-A).
Prosecutor v. ***Rutaganda***, TC judgement of 6 December 1999 (ICTR-96-3-T).
Prosecutor v. ***Muhimana***, TC judgement of 28 April 2005 (ICTR-95-1B-T).
Prosecutor v. ***Bisengimana***, TC judgement of 13 April 2006 (ICTR-00-60-T).
Prosecutor vs. ***Semanza***, TC judgement and Sentence of 15 May 2003 (ICTR-97-20-T), AC judgement of 20 May 2005 (ICTR-97-20-A).
Prosecutor v. ***Kayishema***, TC judgement of 21 May 1999 (ICTR-95-1-T).
Prosecutor v. ***Rutaganira***, TC judgement of 14 March 2005 (ICTR-95-1C-T).

6.1.3 ICC

- *The Prosecutor v. Omar Hassan Ahmad* ***Al Bashir***, ICC-02/05-01/09. So far only arrest warrant.
- Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08 of 15 June 2009 ("**Bemba** confirmation decision").

6.1.4 European Commission and European Court of HR

ECmHR, *X. v. Belgium,* Application No. 268/57, Decision, 20 July 1957
ECmHR, ***Jentzsch*** *v. Federal Republic of Germany,* Application No. 2604/64, Decision, 6 October 1970
ECmHR, *X v. the Netherlands,* Application No. 9433/81, Decision, 11 December 1981
ECmHR, ***Altmann*** *(Barbie) v. France,* Application No. 10689/83, Decision, 4 July 1984
ECmHR, ***Touvier*** *v. France*, Application No. 29420/95, Decision, 13 January 1997
ECHR, *K. – H. W. v. Germany,* Application No. 37201/97, Judgment, 22 March 2001
ECHR, **Streletz**, ***Kessler and Krenz*** *v. Germany,* Applications No. 34044/96, 35532/97, 44801/98, Judgment, 22 March 2001
ECHR, ***Sawoniuk*** *v. the United Kingdom*, Application No. 63716/00, Decision, 29 May 2001
ECHR, ***Papon*** *v. France,* Application No. 54210/00, Decision, 15 November 2001
ECHR, ***Farbtuhs*** *v. Latvia*, Application No. 4672/02, Judgment, 2 December 2004
ECHR, ***Kolk and Kislyiy*** *v. Estonia,* Applications No. 23052/04 and 24018/04, Judgment, 17 January 2006
ECHR, ***Brecknell*** *v. the United Kingdom* Application No. 32457/04, Judgment, 27 November 2007
ECHR, ***McCartney*** *v. the United Kingdom* Application No. 34575/04, Judgment, 27 November 2007
ECHR, ***McGrath*** *v. the United Kingdom* Application No. 34651/04, Judgment, 27 November 2007
ECHR, ***O'Dowd*** *v. the United Kingdom*, Application No. 34622/04, Judgment, 27 November 2007
ECHR, ***Reavey*** *v. the United Kingdom,* Application No. 34640/04, Judgment, 27 November 2007
ECHR, ***Korbely*** *v. Hungary,* Application No. 9174/02, Judgment, 19 September 2008

ECHR, ***Kononov*** *v. Latvia,* Application No. 36374/04, Judgment, 24 July 2008 and Grand Chamber Judgment, 17 May 2010
ECHR, ***Polednová*** *v. The Czech Republic,* Application No. 2615/10, Decision, 21 June 2011

6.1.5 Inter-American Court of HR

Velásquez Rodríguez *v. Honduras,* judgment 26 June 1987
Barrios Altos *v Peru*, judgment 14 March 2001
Almonacid Arellano *et al. v. Chile,* judgment 26 september 2006
Goiburú *et al. v. Paraguay,* judgment 22 september 2006
La Cantuta *v. Peru*, judgment 29 november 2006
Heliodoro Portugal *v. Panama*, judgment 12 August 2008

6.2 National Courts

6.2.1 Argentina,

Complaint filed by the Chilean authorities (Enrique Lautaro Arancibia Clavel), Supreme Court of Justice, judgment 24 August 2004

6.2.2 Belgium

In re Pinochet Ugarte, Tribunal of First Instance, 6 November 1998.

6.2.3 Canada

R. v. Finta, Supreme Court of Canada 1 (1994), 701 in ILR 104 (1997) & Ontario Court of Appeal, judgement of 29 April 1992, in ILR 98 (1994), 520 *et seq.*

6.2.4 Chile

Molco de Choshuenco (Paulino Flores Rivas y otros), Supreme Court, judgment of 13 December 2006

6.2.5 Czech Republic

Decision on the Act on the ilegality of the Communist Regime, Constitutional Court, 21 December 1993.

6.2.6 Estonia

***Paulov** case,* Supreme Court (2000)
***Kolk and Kislyiy** case,* Saare County Court, 10 October 2003
***Kolk and Kislyiy** case,* Tallinn Court of Appeal, 27 January 2004

6.2.7 France

Cour de Cassation, 3 June 1988, JCP 1988 II Nr. 21, ***Barbie***, ILR 78 (1988), pp. 136 *et seq.*, and ILR 100 (1995), pp. 330 *et seq.*
Court of Appeal of Paris, ***Touvier***, judgement of 13 April 1992, Court of Cassation, judgement of 27 November 1992 and 19 April 1994.
Cour d'assises de Gironde, ***Papon***, judgement of 2 April 1998, Court of Cassation, judgement of 11 April 2004.

6.2.8 Former German Democratic Republic

Hans Globke, Oberstes Gericht der DDR, judgement of 23 July 1963, Neue Justiz 1963, 449, 507 *et seq.*
Horst Fischer, Oberstes Gericht der DDR, judgement of 25 March 1966, Neue Justiz 1966, 193, 203 *et seq.*

6.2.9 Hungary

Decisions No. 2086/A/1991/15, 41/1993, 42/1993 and 53/1993,Constitutional Court (1992-1993)
Decision No. 36/1996, Constitutional Court (1996)

6.2.10 Israel

D.C. (T.A.), Attorney-General of the State of Israel v. **Enigster**, 13(B) (5), 1952.

District Court of Jerusalem, Adolf **Eichmann**, judgement of 12 Dec 1961, ILR 36 (1968), 18 *et seq.* and Supreme Court of Israel, 29 May 1962

6.2.11 Lithuania

Baranauskas *Case,* Case No. 1A-498, Appeal Court of Lithuania (2001)
Misiūnas *Case,* Case No. 1-119, Vilnius Regional Court, (2002) and Appeal Court of Lithuania, 26 March 2003
Vilčinskas *Case,* Case No. 1-91, Vilnius Regional Court, 2005)

6.2.12 Mexico

Raúl Alvarez ***Garín*** *et al case,* Supreme Court of Justice, amparo en revisión 968/1999
Ricardo Miguel ***Cavallo****,* Supreme Court of Justice, Amparo en revisión 140/2002
Los Halcones *case (Echeverría et al.),* Supreme Court of Justice, solicitud de facultad de atracción 8/2004
Radilla Pacheco case, Supreme Court of Justice, Consulta a trámite. Varios 912/2010

6.2.13 Netherlands

Supreme Court of the Netherlands, ***Menten***, 13 January 1981, ILR 75 (1987), 362 *et seq.*

6.2.14 Peru

Ernesto Rafael Castillo Páez, Sala Penal Nacional, Judgment of 20 March 2006

6.2.15 Spain

Pinochet *Case,* Audencia Nacional Madrid,18 December 1998

6.2.16 Uruguay

Caso"Plan Cóndor" (José Nino Gavazzo Pereira et al), judgment issued by the Criminal judge 19º Turno, 26 March 2009

6.2.17 United States of America

Chavez v. Carranza, 559 F.3d 486, United States Court of Appeals, 6th Circuit, 17 March 2009
Cabello v. Fernandez-Larios, 402 F.3d 1148, US Court of Appeals 11 Circuit, 14 March 2005
Doe v. Savaria, 348 F. Supp. 2d 1112, United States District Court for the Eastern District of California, 3 September 2004
On the general definition of crimes against humanity, see also:
Abagninin et al. v. Amvac Chemical Corporation et al., 545 F.3d 733, United States Court of Appeals, 9th Circuit, 24 September 2008
Almog et al. v. Arab Bank et al., 471 F. Supp.2d 257, United States District Court for the Eastern District of New York, 29 January 2007
L. Bowoto et al. v. Chevron Corp. et al., United States District Court for the Northern Distrrict of California, 21 August 2006 and 13 August 2007
In re "agent orange" et al. v. The dow chemical company et al., 373 F. Supp. 2d 7, US District Court for the Eastern District of New York, 10 March 2005
S. Balintulo Khulumani v. Barclay National Bank Ltd., 504 F.3d 254, US Court of Appeal, 2nd Circuit, 12 October 2007
L.A. Galvis Mujica et al. v. Occidental Petroleum Corp. et al., 381 F. Supp. 2d 1164, US District Court for the Central District of California, 28 June 2005.
The Presbyterian church of Sudan et al. v. Talisman Energy inc. et al., 226 FRD 456, US District Court for the Southern District of New York, 25 March 2005.

6.2.18 Follow-up cases of Nuremberg

u.s. v. Friedrich ***Flick*** *and five others*, United States Minilitary Tribunal, Nuremberg, case No. 48, 20 April-22 December 1947, in

Law reports of Trials of War Criminals/selected and prepared by the United Nations War Crimes Commission, London, Stationary Office, vol. IX, 1949.

u.s. v. Josef ***Altstötter*** *and others*, United States Military Tribunal, Nuremberg, 17 February- 4 December, 1947, in Law reports of Trials of War Criminals/selected and prepared by the United Nations War Crimes Commission, London, Stationary Office, vol. VI, 1949.

El papel del juez en el acceso a la justicia y la tutela efectiva de los derechos sociales y difusos

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Introducción

La reforma constitucional en materia de juicio de amparo publicada en el Diario Oficial de la Federación (DOF) el 6 de junio de 2011,[1] sin duda alguna, estableció un cambio sin precedentes en la cultura jurídica mexicana, pues no sólo renovó aspectos estructurales indispensables para la eficacia procesal de este instrumento de tutela, sino que puso al sistema jurídico mexicano en sintonía con el internacional en lo relativo a la salvaguarda de los derechos humanos.

Desde hace años se había intentado realizar una modificación sustancial al juicio de amparo.[2] Ciertas reticencias del Estado, principalmente, y de algunos sectores del foro jurídico fueron las causas del retraso de lo inevitable: adecuar al más que centenario juicio de amparo a las

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1 DOF. Diario Oficial de la Federación. 2011. DECRETO por el que se reforman, adicionan y derogan diversas disposiciones de los artículos 94, 103, 104 y 107 de la Constitución Política de los Estados Unidos Mexicanos. 6 de junio.

2 La Ley de amparo reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, de 2013, puso las bases para la concreción de esta importante reforma constitucional, cuya viabilidad política en aquel momento fue complicada, lo que provocó una dilación de casi una década, véase Cámara de Diputados. 2014. Ley de amparo reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos. México: Cámara de Diputados.

necesidades actuales de las personas, haciéndolo realmente un medio eficaz de tutela de los derechos humanos.

Si bien es cierto que este medio procesal constitucional, surgido en el Acta de reformas de 1847,[3] en plena invasión de los Estados Unidos de América a México, había sido el precursor del desarrollo de los sistemas y los medios de protección de derechos humanos, era un hecho notorio que su garantía había dejado de ser eficiente y eficaz para las exigencias de la actualidad.[4]

Es por lo anterior que, desde la última década del siglo xx, se han incluido nuevos medios de protección constitucional que han tratado de ofrecer diversas alternativas para completar el control constitucional que antes sólo se circunscribía al juicio de amparo. No obstante, dos de estos medios, la controversia constitucional y la acción de inconstitucionalidad, resultan recursos disponibles sólo para las propias autoridades en la defensa de sus competencias, o en la constitucionalidad de las leyes y los tratados internacionales, con una restringida legitimación también para las autoridades afectadas.

Sólo quedan los medios de impugnación en materia electoral, con su diversidad de juicios, como los únicos capaces de ofrecer medios de defensa de los derechos políticos de los individuos. No obstante, a pesar de la celeridad y del desarrollo de la justicia electoral, ésta se encuentra imbuida por la protección individualista del ciudadano, que le imprime el modelo del juicio de amparo, y sólo en los asuntos relativos a los derechos indígenas se ha incursionado para flexibilizar la legitimación y las acciones colectivas en la materia.

Por otra parte, el diseño primigenio del amparo en nada se parece al actual, pues su espectro de protección se fue ampliando para dar respuesta a la complejidad de los derechos humanos, reproduciendo procedimientos de diversa índole, pero sin adecuar una apertura en su

[3] Acta Constitutiva y de Reformas. 1847. Disponible en http://www.ordenjuridico.gob.mx/Constitucion/1847.pdf (consultada el 10 de junio de 2014).

[4] La restricción cada vez más férrea para su accesibilidad, el aumento cuantitativo de causales de improcedencia, así como la generación de regímenes de excepción en lo relativo a la declaratoria de inconstitucionalidad de normas de alcance general, amparando sólo a aquellos que tuvieran la posibilidad económica de interponer la demanda, agotando todos sus recursos, convirtieron el juicio de amparo en un medio de protección poco eficaz, sujeto a condiciones de tipo legal y no de índole constitucional.

procedencia ni una amplitud en sus efectos, configurando un medio complejo y dilatado.

Evolución en la tutela y acceso a la justicia

En la actualidad, los sistemas constitucionales han tendido a reorientar sus estructuras hacia sistemas materiales de valores,[5] que permitan mayor amplitud y eficacia en lo relativo a la recepción de derechos humanos regulados por tratados internacionales.

Como resultado del proceso de positivación internacional de los derechos humanos,[6] a partir de la Segunda Guerra Mundial y de la consolidación de una conciencia colectiva internacional, los estados han tenido que adecuar sus constituciones conforme a los contenidos de los tratados internacionales[7] y a los criterios jurisprudenciales emanados de los tribunales internacionales encargados de la aplicación y el cumplimiento de éstos.

A partir de la reforma constitucional de 2011 y de la resolución del caso Rosendo Radilla por la Corte Interamericana de Derechos Humanos (Corte IDH),[8] las autoridades mexicanas tienen la obligación

5 Véase Aragón Reyes, Manuel. 1999. *Constitución y control del poder. Introducción a una teoría constitucional del control.* Colombia: Universidad del Externado.

6 Véase Hernández Gómez, Isabel. 2002. *El proceso de positivación y protección de los derechos humanos a través de la historia*. España: Dykinson.

7 Véase Nogueira Alcalá, Humberto. 2005. La soberanía, las constituciones y los tratados internacionales en materia de derechos humanos: América Latina y Chile. En *Derecho procesal constitucional*, coord. Eduardo Ferrer Mac-Gregor, 1844. México: Porrúa.

8 El 10 de junio de 2011, el Ejecutivo promulgó una de las reformas constitucionales más importantes en la historia moderna del sistema jurídico mexicano. La trascendencia y alcances de ésta han sido tales que, como consecuencia, se han erigido nuevos paradigmas jurídicos, sustituyendo a los que habían prevalecido durante la etapa del positivismo jurídico y del Estado decimonónico. Esta reforma es el resultado de una lucha constante de diversos grupos y sectores de la sociedad que durante años buscaron la consolidación de un reconocimiento constitucional de los derechos humanos como elementos de primacía en el sistema jurídico. De igual forma, la influencia ejercida por los sistemas internacional e interamericano de derechos humanos determinó en buena medida este cambio. Pero, sin duda, el hecho que aceleró esta transformación de forma conjunta a la reforma fue la sentencia condenatoria del caso Rosendo Radilla Pacheco dictada por la Corte Interamericana en contra del Estado mexicano. Uno de los aspectos más trascendentes de la reforma es el referente a la inclusión del término "derechos humanos" en el texto constitucional; además de la consecuencia semántica, implica la

de aplicar el control de constitucionalidad y convencionalidad en todos los ámbitos, lo que generaría, en principio, una mayor protección de derechos; no obstante, faltan los criterios jurisprudenciales que den las reglas para resolver el conflicto de leyes y tratados, así como los límites y contenidos de dichos derechos en caso de conflictos entre ellos. La solución no está en adaptar los criterios de la jurisprudencia de los Estados Unidos de América, a pesar de las obvias similitudes entre su régimen constitucional y el de México.

Más allá de una discusión acerca de competencias, jerarquías normativas y aspectos de soberanía, la idea de que los derechos humanos se hayan consolidado como elementos supremos en los ordenamientos constitucionales, por una influencia del exterior hacia los estados, tiene su base en el hecho de favorecer permanentemente a la persona no sólo en lo individual, sino en el contexto colectivo o social.

En buena medida, el desarrollo económico y social de los países condiciona el ejercicio pleno de los derechos humanos, principalmente los de índole colectivo o difuso, por lo que requieren no sólo de una norma constitucional e internacional que los consagre, sino de acciones que garanticen su tutela y vigencia efectiva. Pareciera que esta tutela se vuelve difícil en contextos de crisis en los que la economía no es del todo estable y solvente. Hablar del papel de los jueces para la protección de los derechos en tiempos de crisis es, prácticamente, hablar de la función jurisdiccional en la normalidad. Las crisis económicas parecen un signo que ha estado presente a lo largo de la historia.[9]

Un antecedente importante en el sistema jurídico mexicano en cuanto a la defensa de los derechos humanos se dio en 1847, con la designación de Ponciano Arriaga como procurador de pobres en San Luis Potosí, figura que evidencia, desde entonces, la idea de proteger a los grupos vulnerables y sus derechos aun cuando no existía una concepción jurídica ni un desarrollo acerca de los derechos sociales. La

trasformación sustancial del marco constitucional en dos sentidos: 1) la transición de un modelo positivista a un modelo cimentado en la persona y 2) la creación de un vínculo de apertura con el orden internacional, en el que los derechos humanos previstos en los instrumentos internacionales son asimilados constitucionalmente.

9 La actual crisis es mundial y proviene del año 2008, por lo menos, con la debacle financiera provocada por las instituciones bancarias de los Estados Unidos de América, que afectó a países desarrollados y también a los que se encuentran en vías de desarrollo.

función del procurador era eminentemente social, ya que tanto los indígenas como las personas de escasos recursos podían acudir ante su competencia cuando sus intereses o derechos fueran vulnerados o desconocidos.[10]

Sin embargo, desde mediados del siglo XIX, en la discusión de los textos constitucionales mexicanos, se advertía la necesidad de contar con un contexto económico adecuado para el desarrollo social y el disfrute de los derechos de las personas. Ponciano Arriaga señalaba, en el marco del Congreso Constituyente mexicano, en 1856:

> El pueblo no puede ser libre, ni republicano, y mucho menos venturoso, por más que cien constituciones y millares de leyes proclamen derechos abstractos, teorías bellísimas, pero impracticables, a consecuencia del absurdo sistema económico de la sociedad.[11]

Desde los orígenes del reconocimiento de los derechos, en el siglo XVIII, la Constitución francesa de 1793, en el artículo 23, consideraba la garantía social como la asistencia social de los seres humanos a los propios humanos: "Artículo 23. La garantía social consiste en la acción de todos para asegurar a cada uno el goce y conservación de sus derechos. Esta garantía se apoya en la soberanía nacional".[12]

Esto de alguna manera representaba la antítesis del pensamiento de Thomas Hobbes, y del liberalismo político imperante en los siglos XVI y XVII, que se sostenía en la idea de la frase "el hombre es el propio lobo del hombre".

En la década de 1920, Georges Gurvitch, en su obra *La idea del derecho social: noción y sistema del derecho social. Historia doctrinal desde el siglo XVII hasta el fin del siglo XIX,* advertía que el derecho

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10 Véase Oñate, Santiago. 1974. *El procurador de pobres, instituido en San Luis Potosí en 1847, y la protección de los derechos humanos.* México: IIJ-UNAM. [Disponible en http://biblio.juridicas.unam.mx/libros/7/3187/17.pdf (consultada el 20 de junio de 2014)].

11 Véase Villegas Moreno, Gloria y Miguel Ángel Porrúa Venero. 1997. *De la crisis del modelo borbónico al establecimiento de la República Federal.* México: Instituto de Investigaciones Legislativas de la Cámara de Diputados.

12 Carbonell, Miguel. 2012. Acta Constitucional de 24 de junio de 1793. Declaración de los derechos del hombre y del ciudadano. En *En los orígenes del Estado constitucional: la declaración francesa de 1789*, 187-96. Lima: Fondo Editorial de la Universidad Inca Garcilaso de la Vega.

social deriva de los fenómenos sociales que han motivado la incorporación del individuo a los nuevos grupos sociales o a la comunidad, que dan como origen un nuevo "derecho de comunión de relación de integración".[13]

El surgimiento de distintos grupos sociales y la exigencia para que fueran atendidas y resueltas sus necesidades propiciaron que se elevaran al plano constitucional los derechos sociales, como ocurrió en la Constitución Política de los Estados Unidos Mexicanos (CPEUM) de 1917, lo que la erigió como el primer texto constitucional que consagró derechos de esta naturaleza.

Sin duda, el reconocimiento de los derechos sociales en la mencionada Carta Magna colocó las bases para su desarrollo en distintos sistemas jurídicos, tal como ocurriría dos años después, al promulgarse la Constitución de Weimar, la cual también, con el paso del tiempo, se constituyó como un referente. Pero, como se afirmó en párrafos anteriores, la consagración normativa no garantizó la vigencia y la tutela plena de los derechos sociales.

Tutela de derechos difusos y reconocimiento de interés legítimo en el siglo XIX

Si bien es cierto que fue a partir de la Constitución mexicana de 1917 cuando se reconocieron expresamente los derechos sociales en el ámbito constitucional, existen algunos antecedentes relevantes de finales del siglo XIX en los que se puede advertir cómo los tribunales de amparo tutelaron derechos humanos, sobre todo, de carácter social y difuso.

Un antecedente relevante en materia de tutela de derechos difusos mediante el interés legítimo se dio el 5 de diciembre de 1872, cuando la Suprema Corte de Justicia de la Nación (SCJN) concedió el amparo al representante de la menor Concepción Pérez contra actos del ayuntamiento de Ciudad Guzmán, Jalisco. El recurso fue promovido contra la orden de demolición de un pórtico en la plazuela en la que se ubicaba la casa de la quejosa. La SCJN otorgó el amparo, a pesar de que la

[13] Véase Gurvitch, Georges. 2005. *La idea del derecho social: noción y sistema del derecho social. Historia doctrinal desde el siglo XVII hasta el fin del siglo XIX.* España: Comares.

autoridad no pretendía destruir la casa, sino sólo un elemento arquitectónico del entorno natural y del paisaje en el que se encontraba la propiedad. Con la sentencia emitida por la Corte, no sólo se protegió a la quejosa, sino a los vecinos y al ambiente de la comunidad.[14]

Como se puede observar en este caso, previamente a la etapa en la que los criterios y la legislación se concentraran en reconocer únicamente el interés jurídico, ya se advertía que el juicio de amparo debía ser lo suficientemente amplio para proteger los derechos de las personas, incluyendo, como se advierte en la resolución en comento, los de carácter difuso, en concreto, un derecho cultural, lo cual resultaba avanzado para la época, pues este tipo de derechos aún no estaban conceptualizados y mucho menos reconocidos en el marco constitucional.

Este juicio evidencia cómo, desde aquel entonces, mediante el interés legítimo, se podía tutelar y mantener la vigencia de derechos difusos, los cuales requieren formas amplias y flexibles en cuanto al acceso y a la valoración de derechos que se han vulnerado, lo que no puede ocurrir por medio del interés jurídico.

Existen otros casos comprendidos durante la primera época jurisprudencial, contenidos en el *Semanario Judicial de la Federación*, que evidencian que durante la etapa posterior al restablecimiento de la República, en 1867, la Suprema Corte operó con un progresismo inusitado para su época, protegiendo no sólo los derechos individuales, sino los de índole política y social, situación que cambiaría cuando arribó a la presidencia de dicho organismo el célebre jurista Ignacio Luis Vallarta, y el individualismo predominó sobre el interés social, en buena medida, por la influencia del liberalismo científico y del positivismo jurídico en la formación de los juristas de aquellos años.

Uno de los asuntos que se consideran relevantes para demostrar que el juicio de amparo tuteló derechos de carácter difuso, aun cuando en ese tiempo no se había desarrollado una teoría al respecto, es el de la sentencia emitida por la SCJN el 24 de febrero de 1873, mediante la cual se le concedió a Cipriano Pérez el amparo en contra de la prohibición de un ayuntamiento para que arrendara parte de su casa con

[14] Véase Cabrera Acevedo, Lucio. 1993. La tutela de los intereses colectivos o difusos. En *XIII jornadas iberoamericanas de derecho procesal*. Universidad Nacional Autónoma de México, 211-43. México: UNAM.

fines comerciales, ya que ésta daba al portal de una plazuela. La Corte determinó que arrendar esa parte de su propiedad no provocaba perjuicio alguno a los transeúntes ni a la población en general, en cambio, la negativa de la autoridad provocaba una violación de los artículos 16 y 27 de la Constitución de 1857.[15]

Otro caso citado en el estudio realizado por Lucio Cabrera Acevedo, apreciado historiador de la justicia en México, en su artículo "La protección de los intereses difusos y colectivos en el litigio civil mexicano",[16] es el amparo concedido por el máximo Tribunal, el 25 de marzo de 1873, mediante el cual se protegió a los vendedores de la calle Porta Coeli de la Ciudad de México, ubicada frente al actual edificio de la Suprema Corte, a quienes se les había prohibido ejercer el comercio en esa vía pública, ya que, se argüía, impedían el tránsito. En su sentencia, la SCJN determinó que no existían actos de molestia, y que dicha actividad correspondía al ejercicio legítimo del derecho a la libertad de comercio.[17] Decisión correcta en su momento, sin embargo, en la actualidad, el razonamiento sería contrario, ya que el comercio ambulante es una evidente molestia para los transeúntes.

Posteriormente, tal como se refirió, desde finales del siglo XIX hasta principios de la primera década del presente, el formalismo jurídico imperante restringió el acceso de intereses distintos a los suyos, por lo que muchos derechos humanos, sociales y difusos quedarían sin tutela efectiva.[18]

15 Véase nota 14.

16 Cabrera Acevedo, Lucio. 1983. "La protección de los intereses difusos y colectivos en el litigio civil mexicano". *Revista de la Facultad de Derecho de México* (enero-junio): 113-35.

17 Véase nota 14.

18 Tanto la academia como el ámbito jurisprudencial concebían a los derechos de carácter social como no accionables, es decir, que no contaban con una garantía jurisdiccional para ser tutelados, véase Ruiz Massieu, Francisco. 1985. "El derecho a la salud". *Anuario Jurídico XII*. 257-66.

Exclusión del control jurisdiccional en la tutela de los derechos humanos

En cuanto a la tutela de los derechos sociales, durante mucho tiempo, el juicio de amparo no fue un instrumento de protección real, ya que la vigencia de tales derechos se supeditó única y exclusivamente a la eficacia de las políticas públicas que pudiera emprender el Poder Ejecutivo, así como al presupuesto que estuviera destinado para su realización por parte del Legislativo.

Hoy en día se sabe que, para que esta clase de derechos puedan tener un ejercicio adecuado y sean plenamente garantizados, es necesario que tanto el Poder Legislativo como el Ejecutivo y el Judicial trabajen desde el campo de sus atribuciones. El juez ya no puede ser ajeno a las políticas sociales; en caso de que éstas no sean suficientes para materializar la eficacia de los derechos, él deberá judicializarlas y establecer las medidas de apremio idóneas para lograr su adecuada implementación.

Anteriormente, los derechos sociales y difusos no eran susceptibles de judicialización, pues eran definidos, erróneamente, como de naturaleza programática y presupuestal. Esto implicaba que su proyección y tutela se limitara, como se señaló, a los planes, programas y presupuestos que el gobierno diseñara y en los cuales estuvieran previstos. Se puede advertir que existía sólo un diálogo entre el legislador y el Ejecutivo en cuanto al impulso de los mencionados derechos, excluyendo al juez de cualquier posibilidad de tutelarlos y mantener su vigencia. Esta composición híbrida convirtió al amparo en un instrumento poco efectivo, alejado del fin para el cual fue instaurado: la protección integral de los derechos humanos.[19]

Debido a esto, fue indispensable adecuar el juicio de amparo al contexto jurídico actual, lo que comprendía varios cambios significativos, entre ellos, desprenderse de los viejos paradigmas jurídicos, que a la luz de la realidad que imperaba resultaban inoperantes y desfasados,

[19] Fix Zamudio, Héctor. 2003. *Ensayos sobre el derecho de amparo*. Porrúa: México.

y originaban un déficit grave en la eficacia y la protección de los derechos humanos. Sin embargo, aún subsisten algunos de los principios individualistas y los procedimientos lentos y formalistas que lo han acompañado, por lo que, quizá, sea necesaria una revisión más estructural.

Resultaba paradójico que el juicio de amparo, el instrumento jurisdiccional de tutela por antonomasia, restringiera en su implementación la protección plena y efectiva de ciertos derechos y, por ende, la posibilidad de que aquellas personas o grupos que hubieran sufrido una afectación o vulneración en sus derechos pudieran recibir una restitución o reparación óptima y oportuna.

La disposición normativa contenida anteriormente en el artículo 103, fracción I, de la CPEUM[20] limitaba de manera considerable la posibilidad de proteger, de forma efectiva, no sólo derechos de carácter social y difuso, sino cualquier derecho humano, ya que únicamente las personas que fueran titulares de alguna prerrogativa derivada, o prevista normativamente, podían acceder a la justicia constitucional para buscar una reparación: "Artículo 103. Los tribunales de la Federación resolverán toda controversia que se suscite: I. Por leyes o actos de la autoridad que violen las garantías individuales[...]".

De igual manera, la ley reglamentaria del anterior precepto constitucional limitaba la procedencia de la tutela del amparo en caso de violaciones si y sólo si existiera la vulneración de un derecho subjetivo o reconocido expresamente en algún dispositivo normativo.[21]

Esta condición sine qua non —tal como se advirtió— reducía la protección efectiva de los derechos humanos, pues la defensa sólo era procedente en la medida que la positivación de éstos fuera explícita e individualizada.

De igual forma, la SCJN reiteró, por vía jurisprudencial, que la condición para la procedencia del amparo era que el derecho vulnerado se encontrara regulado en alguna norma jurídica determinada; tal situación se puede apreciar en el contenido de la tesis aislada P. XIV/2011 emitida por el Pleno del máximo órgano, que a continuación se muestra:

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20 Véase CPEUM. Constitución Política de los Estados Unidos México. 2014. México: Cámara de Diputados.

21 Véase Zaldívar Lelo de la Rea, Arturo. 2002. *Hacia una nueva ley de amparo*. México: IIJ-UNAM.

> INTERÉS JURÍDICO PARA EFECTOS DE LA PROCEDENCIA DEL AMPARO. SU INTERPRETACIÓN POR LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN NO HA SUFRIDO UNA GRAN VARIACIÓN, SINO QUE HA HABIDO CAMBIOS EN EL ENTENDIMIENTO DE LA SITUACIÓN EN LA CUAL PUEDE HABLARSE DE LA EXISTENCIA DE UN DERECHO "OBJETIVO" CONFERIDO POR EL ORDENAMIENTO JURÍDICO.
>
> La Suprema Corte de Justicia de la Nación tiene un amplio abanico de pronunciamientos históricos sobre el concepto de "interés jurídico" para efectos de la procedencia del juicio de amparo, muchos de los cuales provienen de la Quinta Época del Semanario Judicial de la Federación, pero con posterioridad el tema ha sido abordado por la jurisprudencia del Alto Tribunal. Contra lo que podría pensarse, el entendimiento del concepto de interés jurídico no ha sufrido una gran variación en su interpretación. Lo que ciertamente ha cambiado es lo que se entiende que está detrás de los conceptos jurídicos a los que hacen referencia las tesis sobre interés jurídico y, en particular, el entendimiento de la situación en la cual puede hablarse de **la existencia de un derecho "objetivo" conferido por las normas del ordenamiento jurídico,**§ en contraposición a una situación de la que simplemente los individuos derivan lo que se denomina como "un beneficio" o una ventaja "fáctica" o "material".[22]

Como se puede advertir, el interés para poder actuar en un juicio de amparo conforme a las disposiciones constitucionales y legales anteriores a la reforma mencionada era a instancia de la parte agraviada, lo cual se limitaba a proteger el derecho subjetivo; esto se conoció como agravio personal y directo.[23]

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§ Énfasis añadido.

22 Tesis P. XIV/2011. INTERÉS JURÍDICO PARA EFECTOS DE LA PROCEDENCIA DEL AMPARO. SU INTERPRETACIÓN POR LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN NO HA SUFRIDO UNA GRAN VARIACIÓN, SINO QUE HA HABIDO CAMBIOS EN EL ENTENDIMIENTO DE LA SITUACIÓN EN LA CUAL PUEDE HABLARSE DE LA EXISTENCIA DE UN DERECHO "OBJETIVO" CONFERIDO POR EL ORDENAMIENTO JURÍDICO. (ta); 9ª. Época, Pleno; S.J.F. y su Gaceta; XXXIV, agosto de 2011; pág. 34. [Disponible en http://suprema-corte.vlex.com.mx/vid/tesis-jurisprudencial-pleno-aislada-326721171 (consultada el 28 de junio de 2014)].

23 Ferrer Mac-Gregor, Eduardo y Rubén Sánchez Gil. 2013. *El nuevo juicio de amparo*. México: Porrúa.

La procedencia del amparo por la vía del interés jurídico debía contener los siguientes elementos:[24]

1) La existencia de un derecho establecido en una norma jurídica o del reconocimiento judicial de éste.
2) La titularidad de ese derecho por parte de una persona.
3) La facultad de exigencia para el respeto de ese derecho.
4) La obligación correlativa a esa facultad de exigencia.

Por tanto, el interés jurídico entendido como la facultad o potestad de exigencia reconocida en ley[25] ya no era una figura que pudiera satisfacer las necesidades de la sociedad contemporánea, pues un sinnúmero de actos que vulneraban los derechos humanos no se encontraban sujetos al control jurisdiccional del juicio de amparo.[26]

Esta estructura de procedencia dejaba sin tutela a aquellos derechos humanos en los que, por su naturaleza, no era posible identificar la titularidad o grado de afectación directa, situación poco favorable para hablar de un verdadero Estado de Derecho constitucional, cuya característica principal radica en el hecho de que, ante cualquier violación de derechos humanos, la persona o la colectividad agraviada puede acceder a una instancia jurisdiccional que solvente y repare la afectación; de ahí la importancia y la trascendencia de las reformas del 6 y 10 de junio de 2011 en materia de amparo y derechos humanos, que permitieron redimensionar los derechos humanos, ubicándolos como objetos primarios de protección sin anteponer elementos formales o reduccionistas, que, como herencia del régimen decimonónico,[27] habían afectado la efectividad del amparo como medio de control constitucional.

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24 El interés simple corresponde a su concepción más amplia y se identifica con las acciones populares. En ellas se reconoce la legitimación a cualquier ciudadano *quivis ex populo,* por el mero hecho de ser miembro de una sociedad, sin necesidad de que invoque un interés legítimo, mucho menos un derecho subjetivo. La situación jurídica, legítimamente, sería el mero interés en la legalidad, véase Ferrer Mac-Gregor, Eduardo. 2011. *Amparo colectivo en México: hacia una reforma constitucional y legal.* México: IIJ-UNAM.

25 Véase nota 21.

26 Véase nota 21.

27 Véase Vigo, Rodolfo. 2003. *De la ley al derecho*. México: Porrúa.

Ampliación de la legitimación procesal y acceso a la justicia

Principio propersona. Eje central en el actuar constitucional

Los principios constitucionales propersona y de interpretación conforme, insertos en el artículo 1 constitucional reformado el 10 de junio de 2011,[28] no hacen más que evidenciar el carácter universal de los derechos humanos, lo cual impera en toda actuación por parte de cualquier autoridad que trata de proveer un ejercicio pleno y eficaz de éstos. Particularmente, sobresale la labor del juez, quien se erige como un defensor directo del orden constitucional, al efectuar interpretaciones que favorezcan la vigencia de los derechos humanos.

El principio propersona[29] implica la exaltación y ubicación de la persona como centro de la actuación en el Estado, buscando que la dignidad de cualquier ser humano sea protegida por la aplicación y la ejecución de la autoridad de la norma jurídica que mejores beneficios conlleve, es decir, aquella que favorezca a la persona.

El hecho de que la autoridad aplique la norma que mejor beneficie a la persona implica la consolidación de la equidad como elemento de medición y operación del Estado, dejando atrás el modelo de abstracción formal, que tan injusto y arbitrario era, pero, sobre todo, evidencia el triunfo de los derechos humanos como factor principal en todo sistema constitucional.[30]

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28 DOF. Diario Oficial de la Federación. 2011. Decreto por el que se modifica la denominación del capítulo I del Título Primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos. 10 de junio.

29 El principio *pro homine*, al cual se le denominará principio propersona por tener esta definición un sentido más amplio y con perspectiva de género, tiene como fin acudir a la norma más protectora y preferir la interpretación de mayor alcance de ésta al reconocer o garantizar el ejercicio de un derecho fundamental, o bien, en sentido complementario, aplicar la norma y la interpretación más restringida al establecer limitaciones o restricciones al ejercicio de los derechos humanos. Véase Castilla, Karlos. 2009. "El principio pro persona en la administración de justicia". *Revista Mexicana de Derecho Constitucional Cuestiones Constitucionales* 20 (enero-junio): 65-85.

30 Sepúlveda Iguiniz, Ricardo. 2009. El reconocimiento de los derechos humanos y la supremacía constitucional. En *Supremacía constitucional*, coord. Marcos del Rosario Rodríguez, 210. México: Porrúa.

Esta primacía de los derechos humanos propicia la desaparición de las reglas tradicionales de jerarquía y competencia, puesto que se proyectan en cualquier nivel y orden, ya sea interno o externo.

Los tratados internacionales en los cuales se encuentra reconocido algún derecho humano, al momento de incardinarse a determinado sistema jurídico, en vez de mantener a dichos derechos encapsulados y preservados en los límites normativos de tales acuerdos, se dispersan a lo largo de la estructura estatal, fortaleciendo la esfera jurídica de las personas, engrosando, de manera sustancial, el número de derechos que pueden ejercerse de forma plena y efectiva.

Así, el principio de interpretación conforme[31] es indispensable para que aquellos derechos humanos contenidos y reconocidos en algún ordenamiento internacional se dimensionen y se tutelen realmente, ante una posible vulneración o reducción. Es aquí cuando el papel del juez constitucional se vuelve determinante, ya que él es quien, mediante las valoraciones y mediciones jurídicas que realice, deberá armonizar y entrelazar los derechos humanos reconocidos en el ámbito constitucional, tanto los previstos en la Constitución como los que estén regulados en tratados internacionales.[32]

La idea esencial es que el juez otorgue, por medio de este ejercicio valorativo, interpretativo y argumentativo, un resultado óptimo en el caso concreto,[33] con el fin de preservar y garantizar el principio propersona.

Es importante señalar lo anterior, pues no se puede separar la reforma constitucional en materia de derechos humanos de la relativa al juicio de amparo, ya que ambas deben ser vistas como una unidad, de lo contrario, su eficacia se vería seriamente afectada.

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31 Caballero Ochoa, José Luis. 2011. *Cláusula de interpretación conforme y el principio pro persona*. México: IIJ-UNAM. [Disponible en http://biblio.juridicas.unam.mx/libros/7/3033/6.pdf (consultada el 25 de junio de 2014)].

32 "[…] en términos generales, podríamos sintetizarla como la técnica hermenéutica por medio de la cual los derechos y libertades constitucionales son armonizados con los valores, principios y normas contenidos en los tratados internacionales sobre derechos humanos signados por los estados, así como por la jurisprudencia de los tribunales internacionales (y en ocasiones otras resoluciones y fuentes internacionales), para lograr su mayor eficacia y protección", véase Ferrer Mac-Gregor, Eduardo. 2011. *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*. México: UNAM.

33 Alexy, Robert. 2003. *Tres escritos sobre los derechos fundamentales y la teoría de los principios*. Colombia: Universidad del Externado.

Es insoslayable la importancia del papel del juez en esta nueva etapa constitucional, en la que paradigmas como los derechos humanos se erigen en parámetros supremos de validez, y que reclaman para sí ser protegidos y potenciados al máximo sus contenidos y alcances.

En ese mismo sentido, Jaime Murillo Morales señala en su artículo Las acciones colectivas en México. La nueva ocupación de los jueces, las características y los rasgos que deben tener los operadores jurisdiccionales hoy en día:

> El nuevo modelo de juez requiere personas capaces de solucionar los problemas, actuar en favor de la defensa de los derechos colectivos, alejados del viejo modelo de jueces espectadores o simples árbitros neutrales.[34]

Configuración de un juicio de amparo efectivo mediante el interés legítimo

Con la inclusión de los principios constitucionales señalados, resultaba evidente que cualquier disposición normativa que limitara la proyección y la vigencia universal y suprema de los derechos humanos tendría como consecuencia no sólo una contradicción al mandato constitucional, sino la inadecuación e invalidez de la disposición.

Como resultado de la reforma constitucional de 2011, se amplió la legitimación activa, así como el concepto de agravio, pasando de un interés jurídico de carácter individual y condicionado a la existencia de una afectación personal y directa, al interés legítimo individual o colectivo,[35] lo que fortaleció la tutela efectiva de los derechos humanos, al incluir, en el ámbito del control constitucional, diversos sectores que anteriormente carecían de una protección adecuada.[36]

Se puede advertir que uno de los aspectos más importantes de la reforma constitucional en materia de juicio de amparo es la inclusión del

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34 Murillo Morales, Jaime. 2013. Las acciones colectivas en México. La nueva ocupación de los jueces. En *Acciones colectivas. Reflexiones desde la Judicatura Federal*, coords. Leonel Castillo González y Jaime Murillo Morales, 57. México: Consejo de la Judicatura Federal.

35 Véase nota 23.

36 Véase nota 21.

interés legítimo,[37] erigiéndose como factor esencial para la procedencia del mencionado juicio. El artículo 107, fracción I, prevé su regulación de acuerdo con el siguiente supuesto:

> **Artículo 107.** Las controversias de que habla el artículo 103 de esta Constitución, con excepción de aquellas en materia electoral, se sujetarán a los procedimientos que determine la ley reglamentaria, de acuerdo con las bases siguientes:
> **I.** El juicio de amparo se seguirá siempre a instancia de parte agraviada, teniendo tal carácter quien aduce ser titular de un derecho o de un interés legítimo individual o colectivo, siempre que alegue que el acto reclamado viola los derechos reconocidos por esta Constitución y con ello se afecte su esfera jurídica, ya sea de manera directa o en virtud de su especial situación frente al orden jurídico.[38]

El interés legítimo, a diferencia del interés jurídico, se basa en la afectación que se genere en la esfera jurídica de una persona o un grupo social, ya sea de forma directa o en virtud de una situación especial frente al orden jurídico, y no de la vulneración per se de algún derecho subjetivo conferido por un dispositivo normativo.

Esto implica que, derivado de la incorporación constitucional del interés legítimo, el juicio de amparo podrá ser promovido por cualquier persona que considere afectado el orden jurídico en perjuicio de sus derechos, o bien, que posea un interés difuso o colectivo en relación con un acto determinado que viole sus derechos humanos. Es decir, se protege a las personas de cualquier acto que, de forma directa o indirecta, vulnere su esfera jurídica.

En el caso de los derechos de carácter social y difuso,[39] éstos se tutelan de una forma mucho más efectiva mediante el interés legítimo,

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37 Gómez Montoro, Ángel. 2000. "El interés legítimo para recurrir en el amparo. La experiencia del Tribunal Constitucional Español". *Revista Cuestiones Constitucionales. Revista Mexicana de derecho Constitucional* 9 (julio-diciembre): 159-87.

38 Véase nota 20.

39 "[...] Se ha evidenciado la estricta correlación entre los derechos humanos 'individuales' y los derechos económicos, sociales y culturales [...] Los derechos civiles y políticos, para que puedan tener significado, necesitan apoyarse en la existencia y en el goce garantizado de los derechos económicos y sociales, pues de otros forma son formas vacías, meros adornos insubstanciales [...] También ha sido puesto enfáticamente de relieve que, en realidad, no existe una distinción de esencia entre los derechos humanos individuales o de la primera generación y los

ya que el hecho de demostrar la afectación en la esfera jurídica, sin evidenciar la titularidad del derecho o una violación directa, permite que este tipo de derechos puedan garantizarse, sobre todo por su condición expansiva o difuminada en cuanto a su ejercicio, el cual puede darse de forma individual o colectiva.[40]

Estos beneficios se reflejan en el ámbito jurisprudencial, en el que se han comenzado a desarrollar tesis tendientes a solventar el acceso a la justicia de cualquiera que haya sufrido la violación de algún derecho humano.

El 1 de diciembre de 2013, en la tesis XXVI.5o. (V Región) 14 K,[41] se establecieron, de forma precisa, los factores que condicionan y posibilitan la existencia del interés legítimo y sus elementos característicos, haciendo hincapié en la naturaleza administrativa de éste y cómo tal condición lo diferencia, en esencia, del jurídico, ya que su sustento radica en un interés cualificado que el gobernado pueda tener respecto de la legalidad de determinados actos de autoridad, por lo que debe evidenciar la especial situación que guarda, y no la titularidad y afectación directa de un derecho subjetivo.[42]

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derecho sociales, económicos y culturales, o sea, los de la segunda generación. Todos ellos tienen la misma jerarquía. Todos ellos son igualmente importantes. Todos ellos merecen tutela. […] Desde 1948 la Organización de los Estados Americanos no sólo el señalar que los derechos económico-sociales y culturales son también como los otros, derechos humanos, que se encuentran indudablemente ligados con el desarrollo social y económico de los Estados, sino también señalar que merecen protección […], así como la carta Americana de Garantías Sociales, debida en mucho a la autoridad intelectual del profesor Mario de la Cueva[…] la Comisión Interamericana de Derechos Humanos la función de velar por los derechos consignados en esa Declaración, reconociéndose así su carácter eminentemente obligatorio", véase Sepúlveda, César. 1985. "Posibilidad y conveniencia de elaborar un protocolo adicional sobre derechos económicos, sociales y culturales, anexo a la Convención de San José de 1969". *Anuario Jurídico XII:* 283-7.

40 Los derechos humanos individuales y colectivos forman un todo armónico y equilibrado, y la mejor manera de protegerlos es incorporando a los que le faltan a la Convención de San José, mediante su Protocolo "[…] Debe considerarse también que con la tutela de los derechos económicos, sociales y culturales se consigue un mayor grado de paz interna, se avanza en la justicia social y se evitan conflictos que conducen a la violación de los otros derechos", véase nota 39.

41 Tesis XXVI.5o. (V Región) 14 K (10a.). INTERÉS LEGÍTIMO EN EL AMPARO. SU ORIGEN Y CARACTERÍSTICAS. Tribunales Colegiados de Circuito. Décima Época. *Gaceta del Semanario Judicial de la Federación*. Libro 1, diciembre de 2013, 1182. [Disponible en http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/2005/2005078.pdf (consultada el 8 de julio de 2014)].

42 "EN EL AMPARO. SU ORIGEN Y CARACTERÍSTICAS. El interés legítimo tiene su origen en las llamadas normas de acción, las cuales regulan lo relativo a la organización, contenido y

Uno de los criterios jurisprudenciales más recientes es el contenido en la tesis III.4º. (III Región) 17K[43] de enero de 2014, en la que se precisan las características del método que debe utilizar el juez para identificar si se encuentra ante un interés de carácter jurídico, lo cual conlleva la afectación directa de un derecho subjetivo, o bien, si se trata de un interés legítimo, mediante el cual se pretende evidenciar la afectación directa o indirecta de un derecho humano individual o colectivo. El juez, una vez que haya identificado el interés imperante en el caso, excluirá la existencia del otro, puesto que no puede aducirse la presencia simultánea de ambos intereses. Esta tesis es importante, pues en ella se hace énfasis en que el interés jurídico sigue prevaleciendo para el caso de ciertos derechos, eminentemente de índole individual.[44]

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procedimientos que han de regir la actividad administrativa, y constituyen una serie de obligaciones a cargo de la administración pública, sin establecer derechos subjetivos, pues al versar sobre la legalidad de actos administrativos o de gobierno, se emiten con el fin de garantizar intereses generales y no particulares. En ese contexto, por el actuar de la administración, un determinado sujeto de derecho puede llegar a tener una ventaja en relación con los demás, o bien, sufrir un daño; en este caso, los particulares únicamente se aprovechan de la necesidad de que se observen las normas dictadas en interés colectivo, por lo que a través y como consecuencia de esa observancia resultan ocasionalmente protegidos sus intereses. Así, el interés legítimo tutela al gobernado, cuyo sustento no se encuentra en un derecho subjetivo otorgado por la normativa, sino en un interés cualificado que de hecho pueda tener respecto de la legalidad de determinados actos de autoridad. Por tanto, el quejoso debe acreditar que se encuentra en esa especial situación que afecta su esfera jurídica con el acatamiento de las llamadas normas de acción, a fin de demostrar su legitimación para instar la acción de amparo", véase nota 41.

43 Tesis III.4o. (III Región) 30 A (10a.) RENTA. LA DEDUCCIÓN DE INTERESES DERIVADOS DE CRÉDITOS HIPOTECARIOS PREVISTA EN EL ARTÍCULO 176, FRACCIÓN IV, DE LA LEY DEL IMPUESTO RELATIVO, SÓLO PROCEDE RESPECTO DE UN INMUEBLE DESTINADO A CASA HABITACIÓN. Disponible en http://www.prodecon.gob.mx/PORTAL/BoletinesActualizacionFiscal/boletines2014/BOLETIN_2014_ENERO_TESIS_Y_JURISPRUDENCIAS.pdf (consultada el 21 de julio de 2014).

44 "INTERÉS JURÍDICO E INTERÉS LEGÍTIMO EN EL AMPARO. CARACTERÍSTICAS DEL MÉTODO CONCRETO QUE DEBE UTILIZAR EL JUEZ PARA SU DETERMINACIÓN. Del texto del artículo 107, fracción I, de la Constitución Política de los Estados Unidos Mexicanos, a partir de su reforma publicada en el Diario Oficial de la Federación el 4 de octubre de 2011, se advierte que la intención del Constituyente es continuar en el juicio de amparo con la tutela del interés jurídico y agregar al ámbito de protección el interés legítimo, los cuales tienen diversos alcances, pues el primero requiere, para su acreditación, el perjuicio de un derecho subjetivo del cual es titular el agraviado; en cambio, el segundo comprende únicamente la existencia de un interés cualificado respecto de la legalidad de los actos impugnados, y proviene de la afectación a la esfera jurídica del individuo, ya sea directa o derivada de su situación particular respecto a la norma que establezca el interés difuso en beneficio de una colectividad, identificada

Interés colectivo o difuso

El interés colectivo o difuso es un concepto que se ha desarrollado en los últimos años a la par de la concepción de los derechos difusos; han sido llamados así por Karel Vasak, en 1972, y, posteriormente, por la doctrina francesa, derechos humanos de tercera generación.[45]

El interés difuso es un medio de acceso a la justicia y la tutela efectiva de aquellos derechos humanos que derivan de una situación contextual y emergente, y que, por su trascendencia para el desarrollo de la sociedad actual, su atención y adecuada protección se vuelve indispensable. Estos derechos derivan de factores científicos, tecnológicos, económicos, demográficos, urbanos y ecológicos.

En la actualidad, se puede advertir que los derechos difusos poseen un carácter social, por derivar de factores, como se señaló, de dimensión universal y supranacional.

Si bien tanto los derechos sociales como los difusos hacen referencia a colectividades y poseen cualidades como la supraindividual y la indivisibilidad, éstos se diferencian entre sí por varios aspectos.

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e identificable, lo cual supone que el quejoso pertenece a ella; en ese contexto, dichas figuras están referidas u orientadas a cuestiones de legitimación en la causa, pues en ambas se pretende la protección de derechos bajo modalidades distintas, pues reconocer la tutela de dichos intereses a nivel constitucional, sólo tiene por efecto posibilitar, en el interés jurídico, la protección de los derechos subjetivos individuales directos y, en el legítimo, aquellos de grupo o individuales indirectos. A partir de las anteriores premisas el Juez, en función del caso concreto, determinará si se está o no en presencia de un supuesto donde deba analizar el interés jurídico o el legítimo, es decir, el método concreto consiste en atender a la condición legal del sujeto frente al acto calificado de transgresor de sus derechos para precisar cuál es su pretensión, lo que se logra mediante la revisión de la demanda en su integridad, las pruebas, la naturaleza jurídica del acto reclamado e, incluso, de la autoridad responsable, dado que estos factores, conjuntamente, influyen para determinar cuál interés busca protegerse; por ejemplo, si se reclama de una autoridad la orden, ejecución, desposeimiento y embargo de un vehículo de motor en el procedimiento administrativo en materia aduanera, cuya propiedad el quejoso adujo probar con documentos específicos, como la factura con su traducción por ser de procedencia extranjera, este planteamiento permite advertir que se reclama la afectación a un interés jurídico, dada la protección pretendida al derecho de propiedad sobre el automotor. Por tanto, a partir de la diferencia de los intereses descritos, no se está en posibilidad de examinar la afectación de los dos en torno a un acto reclamado, en tanto no excluye al otro, dado sus particulares orientación y finalidad, sin ser dable perfilar el estudio en sede constitucional por la vía del interés legítimo sólo porque así lo refiere el quejoso, pues ello equivaldría a desnaturalizar la función del órgano jurisdiccional en su calidad de rector del juicio", véase nota 41.

45 Véase nota 14.

Los derechos sociales de naturaleza predominantemente prestacional buscan que grupos, principalmente vulnerables, sean protegidos, de tal forma que, mediante una serie de acciones, puedan ubicarse en un estado de igualdad jurídica y social.

Un rasgo distintivo es que los colectivos pertenecientes a los derechos sociales son perfectamente determinables, es decir, que los titulares de estos derechos son identificables por su condición étnica, económica, social, racial sexual o política, además de que, normalmente, se encuentran organizados. En cambio, los difusos hacen referencia a un colectivo indeterminado y disperso, cuya tutela originaria se da en el ámbito administrativo y posee efectos extraterritoriales.

En el caso de la legitimación procesal activa para interponer una acción de tutela o protección, existen rasgos distintivos que hay que considerar. Los derechos sociales pueden ser promovidos sólo por los integrantes de ese colectivo, grupo o subgrupo, para lo cual se tendrá que demostrar su identidad o pertenencia. En cambio, tratándose de intereses difusos, cualquier persona tiene legitimación activa para exigir su protección en instancias jurisdiccionales.

Como se ha señalado, es un hecho que, desde siempre, ha existido una preocupación para que se tutelen de forma adecuada los derechos difusos. Es el caso del sistema jurídico mexicano, que ya desde finales del siglo XIX, mediante el juicio de amparo, protegía los derechos políticos, ambientales y urbanísticos.

Los intereses colectivos que pretenden el bienestar general y la defensa de la legalidad, entre otros valores inmateriales, aspiran a lograr el ideal más alto de la sociedad, tal como lo prevé el artículo 1 de la Constitución de California (1849),[46] que establece el derecho a alcanzar la felicidad.

Interés legítimo y acceso a una tutela efectiva

El interés legítimo surgió en distintas materias jurisdiccionales. En el derecho administrativo español tuvo como objetivo dar respuesta a los

[46] Biblioteca de Leyes Supremas. Constitution of the state of California. Disponible en http://www.supremelaw.org/ref/calcon49/biblio.htm (consultada el 22 de julio de 2014).

problemas de ambigüedad y lagunas de las disposiciones normativas de la administración pública, los cuales conllevaban confusiones y perjuicios a los particulares para determinar con precisión los alcances de los derechos y las obligaciones contenidos en tales normas.[47]

Por tanto, se puede decir que el interés legítimo, al estar relacionado con el derecho subjetivo, tiene una pretensión distinta a la del subjetivo, que busca lo siguiente:

1) Eliminar la situación ilegal imperante.
2) Exigir una conducta —acción u omisión— legal y sustituta a la autoridad, para defender y restablecer la integridad de intereses propios.[48]

Para una mejor comprensión de lo que implica la dimensión conceptual del interés legítimo, se puede decir que éste se encuentra en medio del jurídico y del simple,[49] ya que para su existencia no se requiere evidenciar la afectación de un derecho subjetivo reconocido en la ley y tampoco implica que cualquier persona posea legitimación procesalmente activa para presentar una demanda de amparo.

Ahora bien, resulta evidente que el interés legítimo no es igual al colectivo o difuso, más allá de que pueda tutelarse la vigencia de derechos de esta naturaleza, ya que poseen alcances y efectos distintos. Por eso es necesario analizar la naturaleza del interés difuso y, de esta forma, advertir con claridad sus diferencias con los otros tipos.

Para la doctrina administrativa, el interés legítimo y el derecho subjetivo atípico dependen de una actuación administrativa que infringe la legalidad, así como del agravio cometido a una persona o a una colectividad.[50]

Algunos autores hispanos, como María Isabel González Cano, señalan que su existencia y eficacia es de carácter reaccional. Esto significa que, a partir de que se materializa la afectación, activa la protección

47 Tron Petit, Jean Claude y Gabriel Ortiz Reyes. 2005. *La nulidad de los actos administrativos.* México: Porrúa.

48 Véase nota 47.

49 Véase nota 21.

50 Véase nota 21.

para salvaguardar, defender o reparar la situación del agraviado como persona o grupo. Se puede decir que para que se dé el interés legítimo debe evidenciarse el agravio al sujeto.[51]

De acuerdo con la noción del derecho administrativo, el interés legítimo se explica en razón de la observancia o no que se dé por parte de algunos particulares a ciertas normas o disposiciones normativas emitidas por algún organismo de la administración pública; dichas disposiciones generan un beneficio o perjuicio en concreto para ellos, sin que impliquen los mismos efectos para los demás. Esto puede derivar de una situación particular, en la que una o algunas personas se encuentren y las haga más sensibles que otros frente a un determinado acto administrativo.[52]

Por su parte, María Graciela Reirz define de una forma muy clara lo que implica que una persona tenga una particular o especial situación que condiciona la existencia del interés legítimo:

> Esta particular situación hace que estos particulares posean un interés calificado y esa calificación no se debe al hecho de que el acto administrativo incida en su esfera jurídica; pues si esa incidencia fuera válida tendrían que aceptarla. Sino a la circunstancia de que, si el acto administrativo es inválido, su supresión —operada como sanción de la invalidez— los beneficia también a ellos en cuanto los libera de la pretensión indebida de la Administración. Ese interés calificado del administrado, que autoriza únicamente a su titular (con exclusión de todos los otros sujetos que no se hallen en su particular situación) a provocar un control administrativo o jurisdiccional sobre la validez de los actos administrativos, recibe el nombre de interés legítimo, que es la proyección procesal del interés calificado.[53]

Si bien es cierto que la figura del interés legítimo tuvo su origen y desarrollo primario en el derecho administrativo español, esto no impide que pueda funcionar en otros ámbitos y materias, de ahí que se haya pensado que su inclusión en el juicio de amparo posibilitaría de una forma más efectiva el acceso óptimo a la tutela efectiva y real de los

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51 González Cano, María Isabel. 1997. *La protección de los intereses legítimos en el proceso administrativo*. España: Tirant lo Blanch.

52 Véase nota 47.

53 Véase nota 47.

derechos humanos, principalmente, los sociales y difusos, situación que por vía del interés jurídico resultaba inviable, por la reducción y estrechez de su naturaleza.

El interés legítimo, al basar su procedencia en la posición que guarda la persona en relación con el acto que le genera un perjuicio en su esfera jurídica al violarse un derecho humano, garantiza el acceso integral a la justicia y, con ello, también la posibilidad de una verdadera defensa o reparación.

Uno de los grandes problemas que el juicio de amparo había enfrentado previamente a la reforma constitucional y la promulgación del nuevo ordenamiento reglamentario era el relativo a las causales de improcedencia, las cuales fueron haciéndose cada vez más difíciles de solventar, impidiendo una tutela integral de todos los derechos humanos.

Se puede afirmar que el interés legítimo democratiza el acceso al juicio de amparo y, en general, a los tribunales, haciendo efectiva la garantía de acceso a la justicia, que es, por sí misma, un principio constitucional.

Un ejemplo que puede evidenciar el acceso restringido para hacer valer la vigencia de un derecho no subjetivo se encuentra en el contenido de la siguiente tesis aislada de la Suprema Corte:

> QUEJA PREVISTA EN LA FRACCIÓN VI DEL ARTÍCULO 95 DE LA LEY DE AMPARO. ES IMPROCEDENTE CUANDO SE IMPUGNA UN ACUERDO DE INADMISIÓN DE PRUEBAS Y EL AFECTADO DEMUESTRA UN INTERÉS DIFUSO Y NO JURÍDICO.
>
> Conforme al artículo 95, fracción VI, de la Ley de Amparo, para que proceda la queja contra el auto que desecha una prueba, tal desechamiento debe, por su naturaleza trascendental y grave, ocasionar un perjuicio no susceptible de ser reparado en el dictado de la sentencia, lo cual implica una efectiva afectación a los derechos subjetivos del quejoso; por tanto, si de las constancias del juicio respectivo aparece que el quejoso tiene un interés difuso, derivado de los peligros a los que eventualmente puede estar expuesto él, el medio ambiente y el equilibrio ecológico, y tomando en cuenta que su salvaguarda no la prevé la legislación en materia de amparo, es evidente que el recurso es improcedente, pues al no estar de por medio la protección a un interés jurídico, resulta inocuo el desechamiento de las pruebas ya que no influirán en el fondo del asunto.[54]

[54] Tesis III.1o.A.57 K. QUEJA PREVISTA EN LA FRACCIÓN VI DEL ARTÍCULO 95 DE LA LEY DE AMPARO. ES IMPROCEDENTE CUANDO SE IMPUGNA UN ACUERDO DE

En ese sentido, tal como lo refiriere Arturo Zaldívar en su obra *Hacia una nueva ley de amparo*, el célebre procesalista Mauro Cappelletti señalaba que:

> En el proceso jurisdiccional hay un núcleo democrático, y que, si existe un elemento fundamental de democracia, éste consiste en hacer que todos tengan acceso al sistema jurídico, a sus organismos, derechos, tutelas y beneficios; en sentido amplio, el acceso a la justicia.[55]

El interés legítimo permite que estas restricciones de accesibilidad a la justicia constitucional sean disipadas, lo que conlleva que cualquier persona o grupo que haya sufrido una afectación o vulneración en sus derechos humanos, o bien, que guarde una situación especial frente al orden jurídico,[56] pueda interponer un juicio de amparo, salvaguardándose, de esta manera, la eficacia y la vigencia constitucional de los derechos humanos.

Ahora bien, resulta pertinente hacer algunas aclaraciones acerca de la naturaleza y los alcances del interés legítimo. El hecho de que éste sea un vehículo mucho más dúctil y óptimo para consolidar una justicia constitucional efectiva en aquellos casos en los que se involucren derechos sociales o difusos, no implica, de ninguna manera, que sólo éstos puedan ser sujetos de acceso y tutela; tampoco implica que el interés legítimo sea referido, exclusivamente, a las acciones de carácter colectivo.

El interés legítimo puede ser aducido por una persona o por un grupo ante la afectación y violación de un derecho humano individual, social o difuso de ocurrencia pasada, presente o inminente. Es decir, para que se configure, no depende del número de personas que acudan a interponer un juicio de amparo, sino del derecho que ha sido vulnerado y de la posición que guarden una o varias personas en una situación determinada.[57]

INADMISIÓN DE PRUEBAS Y EL AFECTADO DEMUESTRA UN INTERÉS DIFUSO Y NO JURÍDICO. Tribunales Colegiados de Circuito. Novena Época. *Semanario Judicial de la Federación y su Gaceta*. Tomo XXIV. Agosto de 2006, pp. 2322. [Disponible en http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/174/174381.pdf (consultada el 25 de julio de 2014)].

55 Véase nota 21.

56 Véase nota 24.

57 Véase nota 24.

En cambio, las acciones colectivas sólo refieren a la prerrogativa que tiene un grupo determinado ante la afectación de un derecho de naturaleza colectiva para acudir ante una instancia jurisdiccional, la cual deberá resolver con base en dicha pretensión. Por ende, el interés legítimo no se encuentra circunscrito sólo a la tutela de derechos sociales o a pretensiones colectivas. Y, por supuesto, no todos los derechos colectivos poseen la naturaleza de sociales o difusos, aunque, por sus rasgos externos, puedan confundirse.

De ahí la importancia de considerar como un factor determinante la incidencia colectiva que pueda producir la afectación que se pretenda impugnar o controvertir por la vía del juicio de amparo, la cual puede hacerse valer de forma individual o colectiva.[58]

Un aspecto que debe analizarse a partir de la inclusión del interés legítimo en el sistema de protección constitucional es el relacionado con las sentencias de amparo, cuyos efectos siguen siendo particulares o relativos, lo que implica que sólo trasciende para la persona o el grupo que promovió el juicio.

El hecho de que los efectos de la sentencia de amparo sigan siendo relativos, pareciera constituir un obstáculo en el desarrollo de los amparos sociales y colectivos,[59] pues el beneficio que pueda conllevar a la comunidad la contravención de un acto o una norma que ponga en riesgo la vigencia de los derechos humanos sólo beneficia a aquellas personas que hayan interpuesto la acción de acuerdo con el principio procesal *pro actione.*

En el caso de derechos humanos de carácter social y difuso, como los derechos al medio ambiente, a la salud, culturales, entre otros, sería un tanto contradictorio pensar que las sentencias, al momento de su aplicación, no tuvieran efectos *erga omnes*, ya que se restringiría a la sociedad de la tutela efectiva y vigencia de los derechos humanos en cuestión.

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58 Acuña, Juan Manuel. 2011. El caso Mini Numa. Nuevos rumbos para la protección de los derechos sociales a través del juicio de amparo en México. En *El juicio de amparo. A 160 años de la primera sentencia,* coords. Manuel González Oropeza y Eduardo Ferrer Mac-Gregor, 41-5. México: IIJ-UNAM.

59 Véase nota 23.

Se puede decir, como lo considera el jurista Eduardo Ferrer Mac-Gregor, que las sentencias estimatorias[60] que se dicten en materia de amparo, cuando esté de por medio la tutela de un derecho humano de carácter social o difuso, deberán tener efectos generales y vinculantes para todos los interesados, aun cuando no hayan participado en el proceso.[61]

Los efectos de la cosa juzgada son de carácter expansivo, situación que conlleva la generación de beneficios generales, los cuales no pueden limitarse o circunscribirse, única y exclusivamente, a las partes que promovieron el amparo. Esto se explica en razón de que un bien jurídico social es indivisible y concurrente, por lo que la protección y los beneficios derivados de éste se extienden en la comunidad.[62]

Los bienes jurídicos individuales poseen una naturaleza divisible, por lo que, cuando existe una afectación, las consecuencias de la tutela se limitan a la persona o al individuo que ejerció la acción procesal, y no trascienden a la esfera jurídica de otras personas. En cambio, cuando la afectación transgrede la esfera jurídica individual y alcanza bienes colectivos o públicos, los derechos vulnerados, una vez que son protegidos y restituidos en su vigencia, trascienden y se expanden en la esfera colectiva o social.

Así, la afectación debe valorarse de forma cualitativa, en relación con los bienes jurídicos que puedan ser afectados por un acto u omisión. Por tanto, si en un caso determinado está de por medio un bien colectivo o público, los efectos de la resolución que tenga como fin la protección o tutela de dichos bienes trascenderán más allá de la esfera jurídica de las partes que promueven el juicio.

Un aspecto que no es del todo claro es el relativo a los efectos que puedan producir las sentencias de carácter desestimatorio, pues se corre el riesgo de dejar a los interesados en estado de indefensión. Esto,

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60 Díaz Revorio, Francisco Javier. 2008. Tipología y efectos de las sentencias del Tribunal Constitucional en los procedimientos de inconstitucionalidad ante la reforma de la ley orgánica del Tribunal Constitucional Español. En *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho,* tomo IV, coords. Eduardo Ferrer Mac-Gregor, Arturo Zaldívar Lelo de Larrea, 291-319. México: IIJ-UNAM/IMDPC/Marcial Pons.

61 Véase nota 23.

62 Véase nota 58.

sin duda, es un tema que la jurisprudencia deberá ir construyendo, con el fin de generar certeza y dar protección efectiva a todos los derechos humanos, más allá de que sean de índole individual, colectiva o difusa.

De cualquier manera, en el fondo de esta discusión debe aceptarse el principio lógico de que todo control constitucional de normas, a diferencia de los actos, debe contar con efectos generales, pues una ley declarada inconstitucional no puede serlo sólo para el caso concreto, pues, al considerarla así, con tales efectos limitados desnaturalizaría los de revisión judicial de la constitucionalidad, e incurriría en el dislate de permitir la aplicación de la ley inconstitucional al resto de la sociedad que no litigó el caso concreto, promoviendo la desigualdad ante la ley.

Implementación de un acceso efectivo a la justicia de los derechos sociales y difusos

Tutela efectiva del derecho a la salud. El paradigmático caso Mini Numa

Previamente a la reforma constitucional del 6 de junio de 2011, se dictaron algunas sentencias en las cuales se evidenció una apertura en el acceso y la protección de los derechos humanos por la vía del interés legítimo, salvaguardando, así, su vigencia, aun cuando no estaba formalizada su existencia en el texto constitucional ni en la ley reglamentaria.

Un caso que puede considerarse paradigmático es el relativo al juicio de amparo identificado en el expediente 1157/2007,[63] mediante el cual se resolvió el juicio de amparo promovido por la comunidad de Mini Numa, municipio de Metlatónoc, Guerrero, México, con fecha del 11 de julio de 2008, dictada por el juez séptimo de distrito en el estado de Guerrero.[64]

63 Juicio de amparo administrativo 1157/2007-II. Disponible en http://www.cjf.gob.mx/reformas/boletin/0812/2.5-21-JD07-MX-AI-2007-1157.pdf (consultada el 28 de julio de 2014).

64 Gutiérrez Rivas, Rodrigo y Aline Rivera Maldonado. 2009. "El caso Mininuma: un litigio estratégico para la justiciabilidad de los derechos sociales y la no discriminación en México". *Revista de la Facultad de Derecho*, 251 (enero-junio): 89-91.

Mini Numa es una comunidad indígena na savi (mixteca), cuyas condiciones de pobreza extrema y falta de acceso a los servicios de salud provocaban que 1 de cada 4 niños muriera por enfermedades relacionadas con la desnutrición, principalmente. Esta situación se agravaba al no contar con una clínica en la comunidad, pues el centro de salud más cercano se ubicaba a más de una hora y media a pie; además, carecía de infraestructura adecuada para dar servicio óptimo a la población.

Derivado de lo anterior, autoridades de la comunidad hicieron una petición a la Secretaría de Salud del gobierno del estado de Guerrero para que se construyera una clínica. La respuesta fue negativa, aduciéndose que la población no contaba con una casa de salud, por lo cual se tenía que acondicionar algún inmueble y disponerlo para estos fines.

En 2005, las autoridades de la propia comunidad indígena informaron a la Secretaría que ya habían construido una casa con las condiciones para que ahí se prestaran los servicios de salud, pero desafortunadamente la autoridad estatal nunca envió el personal ni los recursos médicos para que comenzara a operar. Ante tal situación, en 2006, de nueva cuenta, el delegado municipal y el comité de salud de la comunidad presentaron una petición ante el jefe de jurisdicción sanitaria, para que se dispusiera de un médico que diera atención de lunes a viernes. La autoridad respondió que no contaba con presupuesto para atender lo solicitado.

En 2007, algunos integrantes de la comunidad acudieron ante la organización no gubernamental denominada Centro de Derechos Humanos de la Montaña Tlachinollan, para que les brindaran asesoría jurídica. Así, se presentó una nueva solicitud, esta vez ante el gobernador del estado de Guerrero, para que se construyera una unidad médica. En atención a la petición, el Ejecutivo, por medio del secretario de Salud, contestó, mediante el oficio 4083, que, con fundamento en el Modelo Integrador de Atención a la Salud (MIDAS), para poder construir una unidad, clínica u hospital se requería de una población de entre 2,500 y 3,000 habitantes, y que no se ubicara en un radio de 15 kilómetros de algún otro centro hospitalario.

Contra el oficio mediante el cual se les negó la construcción de una unidad médica, los miembros de la comunidad mininuma promovieron un juicio de amparo indirecto ante el juzgado séptimo de distrito

en el estado de Guerrero, y presentaron como agravio la violación del derecho a la salud de la comunidad por parte de las autoridades locales.[65]

Entre los elementos que, de alguna manera, tuvo que sortear el juez de distrito para tutelar el derecho social vulnerado, estuvo la legitimación activa de los miembros de la comunidad, que si bien poseían un interés legítimo válido, carecían de uno jurídico conforme a lo dispuesto por la normatividad vigente en ese tiempo, así como de representación legal conforme a la Ley orgánica del municipio libre del estado de Guerrero.[66]

Para admitir la demanda, el juez argumentó que se había vulnerado lo dispuesto en el artículo 4 de la Constitución federal, así como en los instrumentos internacionales que el Estado mexicano ha ratificado. Ahora bien, para justificar el agravio personal y directo como condición necesaria para la procedencia —y, por ende, evidenciar la existencia de una legitimación procesal activa—, derivado de la afectación que pudo haber generado la negativa de la autoridad local de la construcción de la unidad médica, se determinó que, más allá de la naturaleza colectiva del derecho a la salud, la violación se había materializado e individualizado en cada uno los integrantes de la comunidad, ya que, de una forma u otra, había sido violado su derecho a la salud de forma directa, por lo que decidió reconocer el interés jurídico a los quejosos en lo individual, y no en su carácter de representantes de la comunidad.

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65 "La salud se ha acabado de reconocer, es causa y efecto del desarrollo […] Por el contrario, salud y desarrollo están sujetos a una severa regla de concomitancia que lleva a que se muevan juntos y en la misma dirección, pues no hay pueblos saludables sin desarrollo, y éste no puede darse con bajos niveles de salud. Por ello, no puede aceptarse que entre gasto en desarrollo social y gasto en actividad productiva medie una dialéctica, que conduzca a que uno de los extremos sea pospuesto […] creo que en el marco de costos sociales de las crisis latinoamericana, el reforzamiento de los programas institucionales de salud es inaplazable […] la salud no depende sólo de las acciones de atención médica y de salud pública, por una lado, y los mecanismos de financiamiento de los distintos servicios institucionales de salud cobijan marcadas inequidades, por el otro. Por lo que se refiere al primer elemento, cabe señalar que los niveles de salud están firmemente condicionados por la alimentación, la educación y por la disponibilidad de determinados servicios públicos –agua potable en particular- todo ello, a su vez, dependiente del ingreso, de suerte que la atención médica predominantemente se aboca a restaurar la salud, más que a preservarla y a promoverla, y la salud pública sólo parcialmente lo logra […] Se ha dicho –y con razón- que democracias que no son igualitarias, y yo añadiría, que no son igualitarias en salud, no son democracias", véase nota 18.

66 Véase nota 58.

Esta argumentación construida para garantizar el acceso de la comunidad a la administración de justicia y la tutela efectiva de su derecho a la salud, a la luz del interés legítimo, sería hoy en día innecesaria, pues basta con que los integrantes de la comunidad demuestren una afectación directa o indirecta, o simplemente su situación, para que se proceda a la admisión de la demanda. El acto impugnado no sólo transgredió la esfera jurídica de las personas a quienes se les vulneró el derecho a la salud, sino que trascendió a la esfera colectiva, violando, así, un bien jurídico social. Por tanto, el argumento del juez, que de alguna manera puede ser calificado como progresista o garantista, permitió la tutela efectiva del derecho a la salud de la comunidad referida, reconociendo, de facto, la figura de interés legítimo, y permitiendo la justiciabilidad de derechos que anteriormente carecían de una protección adecuada.[67]

En aquel entonces, al no contemplarse el interés legítimo, se requería una condición necesaria de individualidad-exclusividad, la cual no estaba presente en el caso,[68] pues la pretensión es concurrente e inescindible, por tratarse de un derecho y un bien de carácter colectivo, cuya incidencia no puede dividirse o individualizarse. Construir una unidad médica conlleva un beneficio generalizado para todos los habitantes, con independencia de quienes hayan promovido el juicio de amparo, pues se trata de un derecho de incidencia colectiva y no personal o particular.

En el fondo, el juez argumentó que, toda vez que los lineamientos y las obligaciones de las autoridades administrativas se encontraban en disposiciones normativas, y, en función de éstas, se encontraban obligadas a ejecutar lo contenido en las normas jurídicas. Para fundamentar y motivar sus razonamientos, el juez llevó a cabo una interpretación conforme a la Constitución federal y los instrumentos internacionales, tomando como base el deber que tiene el Estado de asegurar una adecuada atención de los servicios de salud, y que cualquier persona tenga la posibilidad de acceder a éstos, los cuales deberán funcionar en todo momento y en cualquier circunstancia.

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67 Véase Cossío Díaz, José Ramón. 1998. *Los derechos sociales como normas programáticas y la comprensión política de la Constitución*. México: Cámara de Diputados/IIJ-UNAM.

68 Véase nota 58.

De igual forma, el juez refirió en su sentencia lo dispuesto en la Ley General de Salud y la Ley número 159 de Salud del Estado de Guerrero, en las que expresamente se señala la obligación de vigilar que las instituciones de salud presten los servicios a los habitantes de la entidad que lo requieran, conforme a los criterios de universalidad y gratuidad.

Entre las normas de derecho internacional referidas como parte de su fundamentación y motivación, el juez señaló los artículos 7 y 25 de la Declaración Universal de los Derechos Humanos,[69] así como 24 y 25 de la Convención Americana sobre Derechos Humanos,[70] los cuales reconocen el principio de igualdad y el derecho a la salud. Además de estas normas, resalta el fundamento realizado al tomar como base las interpretaciones del Comité de Derechos Económicos, Sociales y Culturales de la Oficina del Alto Comisionado de las Naciones Unidas, en relación con el artículo 12 del Pacto Internacional de Derechos Económicos, Sociales y Culturales,[71] ya que en ese año aún no estaba inserto en el texto constitucional mexicano el bloque de constitucionalidad, lo que hace más admirable la labor interpretativa y progresista del juez.

Finalmente, el juez advirtió que era un hecho que, conforme a lo dispuesto por la normatividad de la materia, en concreto, por el MIDAS, no existe la obligación de construir unidades médicas si no se cumplen con los requisitos establecidos; sin embargo, ese mismo ordenamiento prevé la construcción de casas de salud en aquellas comunidades rurales que no dispongan de este servicio. Por tanto, declaró que las autoridades habían sido omisas de cumplir con lo dispuesto por el propio marco legal que las regula, por lo que, en su resolutivo, determinó que, a fin de dar cabal cumplimiento al marco constitucional, internacional y

69 ONU. Organización de las Naciones Unidas. 1948. Declaración Universal de los Derechos Humanos. Disponible en http://www.un.org/es/documents/udhr/ (consultada el 31 de julio de 2014).

70 OEA. Organización de los Estados Americanos. 1969. Convención Americana sobre Derechos Humanos suscrita en la Conferencia especializada Interamericana sobre Derechos Humanos. Disponible en http://www.oas.org/dil/esp/tratados_b-32_convencion_americana_sobre_derechos_humanos.htm (consultada el 2 de agosto de 2014).

71 ONU. Organización de las Naciones Unidas. 1948. Declaración Universal de los Derechos Humanos. Pacto Internacional de Derechos Económicos, Sociales y Culturales. Disponible en http://www.ohchr.org/SP/ProfessionalInterest/Pages/CESCR.aspx (consultada el 2 de agosto de 2014).

legal, deberían abatirse las carencias que impedían la prestación óptima de los servicios de salud, tales como la falta de agua potable, mobiliario, luz eléctrica y medicamentos, entre otros.

En el resolutivo, en una sentencia digna de encomio, se amparó a los quejosos y se les ordenó a las autoridades locales de la materia que cumplieran con lo dispuesto en el MIDAS. Esto es, que se construyera una casa de salud debidamente acondicionada, con mobiliario y medicinas, y que el centro de salud ubicado en la cabecera municipal también fuera acondicionado y le fueran suministrados los insumos necesarios, así como el personal médico adecuado.[72]

Cabe señalar que aun cuando se emitió la sentencia 1157/2007-II, no significó que las autoridades vinculadas actuaran de forma inmediata en la concreción de los resolutivos, en específico, en lo relativo al centro de salud ubicado en la cabecera municipal.

La sentencia determinó dos obligaciones para las autoridades sanitarias del estado de Guerrero. Por una parte, que el lugar donde se prestarían los servicios de salud en la comunidad mininuma tuviera los elementos básicos o necesarios para su buen funcionamiento, lo cual implicaba el acondicionamiento indispensable de mobiliario y medicamentos, conforme al MIDAS emitido por la Secretaría de Salud de la entidad. La otra obligación consistía en que la cabecera municipal contara con un inmueble adecuado para el funcionamiento de un centro de salud que pudiera prestar los servicios de necesarios, esto es, que tuviera la infraestructura, el personal adecuado y los medicamentos conforme a lo dispuesto en el MIDAS.

Ante el incumplimiento de las autoridades sanitarias del estado, integrantes de la comunidad acudieron de nueva cuenta ante el juez de distrito para solicitar la ejecución total de la sentencia de amparo, ya que, derivado del incumplimiento, prevalecía la violación del derecho al acceso de justicia, así como una discriminación a los miembros de la comunidad por su condición étnica.

Con el caso Mini Numa quedó evidenciado que el juez juega un papel determinante en la aplicación y construcción de políticas sociales por medio de sus resoluciones, pues, en muchas ocasiones, se requiere

72 Véase nota 63.

de una serie de impulsos de carácter judicial que permitan que los derechos humanos de carácter social alcancen su vigencia óptima.

Otros casos relevantes

Otro caso relevante en el que se puede evidenciar el reconocimiento del interés legítimo en materia de amparo, de forma previa a su inserción formal en el texto constitucional, es la sentencia del amparo directo 496/2006,[73] promovido por la asociación de nativos y colonos de la comunidad de San Pedro Tláhuac, mediante la cual se pretendía revertir el permiso otorgado por la autoridad administrativa para que fuera instalada una estación de distribución de gas, lo que implicaba un riesgo inminente para la población.

El Tribunal valoró el interés legítimo de la comunidad y decidió proteger los derechos humanos que podrían estar en peligro, lo cual implicó una acción de tutela de actos futuros que, en caso de generarse, podrían provocar una afectación colectiva.

En 2014, la Suprema Corte de Justicia de la Nación atrajo un amparo presentado en contra del Instituto Mexicano del Seguro Social (IMSS) ante su negación de otorgar un medicamento específico para el tratamiento de una enfermedad huérfana, también conocida como rara, por ser poco frecuente su padecimiento.

La discusión de este asunto posibilitará al máximo Tribunal determinar los alcances de la obligación que las instituciones de seguridad social tienen de proveer los fármacos que sean necesarios para tratar las enfermedades, aun cuando no se encuentren en el cuadro básico de medicinas.

El hecho de no proveer a un enfermo de un medicamento debido a que padece una enfermedad rara y, por ende, éste no está en el denominado cuadro básico, conlleva una violación al derecho a la salud, ya que la vigencia de éste no se debe limitar por ninguna circunstancia o condición; el acceso a la atención médica debe ser óptimo e integral.

[73] Amparo en revisión 496/2006. Ticic Asociación de Nativos y Colonos de San Pedro Tláhuac, A.C. 17 de enero de 2007. Unanimidad de votos. Ponente: Jean Claude Tron Petit. Secretaria: Sandra Ibarra Valdez. [Disponible en http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/173/173001.pdf (consultada el 3 de agosto de 2014)].

El caso se suscitó mediante el juicio de amparo promovido por un derechohabiente del IMSS que en abril de 2013 solicitó la atención para que se le tratara la enfermedad denominada hemoglobinuria paroxística nocturna. Ante la negativa de la institución de proporcionarle los medicamentos necesarios para la atención médica eficaz y adecuada, decidió ampararse, ante la violación de su derecho a la salud.

De ahí la trascendencia del caso, ya que la Suprema Corte podrá establecer los alcances del derecho a la salud, en cualquier caso y ante cualquier circunstancia, sin que medien argumentos que puedan llevar a discriminaciones por el predominio de formalismos legales.

Papel de los organismos no jurisdiccionales en el acceso efectivo a la justicia

Ante la obligación de agotar todas las instancias, sobre todo en casos en los que se tienen que impugnar vulneraciones de derechos en órganos administrativos, muchas personas y grupos sociales han optado por buscar protección mediante instancias y mecanismos no jurisdiccionales, entre los cuales destaca acudir a la competencia de la Comisión Nacional de los Derechos Humanos (CNDH).

Este organismo, constitucionalmente autónomo, mediante sus recomendaciones, ha logrado promover y garantizar, de forma efectiva, en muchos casos, derechos de carácter social y difuso, aun cuando no es un ente que ejerce un control jurisdiccional ni sus recomendaciones son legalmente obligatorias.

Una de las ventajas de los organismos de protección no jurisdiccional de derechos humanos, a diferencia de los jurisdiccionales, es que facilitan notablemente el acceso a la justicia de toda persona a la que haya sido quebrantado algún derecho, así como a los grupos vulnerables que son afectados en sus derechos. Por medio de su facultad de investigación y las recomendaciones emitidas, muchas violaciones han sido reparadas en un tiempo razonable, lo que en ocasiones no sucede en los procedimientos jurisdiccionales.

La eficacia que ha alcanzado el cumplimiento de las recomendaciones de este órgano constitucional ha sido alta, lo cual posibilita que se

convierta en un mecanismo idóneo para resolver violaciones a derechos humanos que, por su gravedad y urgencia, requieren de un pronunciamiento y una actuación rápida y efectiva.

En los informes dados por el entonces ombudsman Raúl Plascencia Villanueva, se refiere un porcentaje cercano a 90% de acatamiento de las autoridades en relación con las recomendaciones emitidas por la CNDH. Desafortunadamente, no existe un mecanismo de seguimiento puntual de esta entidad que posibilite advertir si efectivamente la autoridad ha cumplido con lo dispuesto en las recomendaciones. Sin embargo, aunque estos índices muestran la eficacia funcional de la Comisión, esto no resulta suficiente para garantizar integralmente la vigencia de los derechos humanos, sobre todo en los casos en los que existe una negativa de la autoridad de aceptar alguna recomendación, o bien, ante el incumplimiento de dicha recomendación cuando ha sido aceptada, lo que conlleva una falta de restitución o reparación del derecho violado.

Si bien con la reforma constitucional en materia de derechos humanos de 2011 se reforzaron las atribuciones de la Comisión para hacer más efectivas sus recomendaciones, resultaría propicio transitar hacia un esquema más idóneo, que asegure el cumplimiento de los deberes y las obligaciones de las autoridades en cuanto a la defensa de los derechos humanos.

Un ejemplo de la importancia de estos medios de tutela no jurisdiccionales en la atención oportuna de reclamos de grupos sociales (principalmente vulnerables) ante violaciones a sus derechos humanos son los casos presentados en distintas entidades de la Federación, principalmente en Oaxaca, en los que se ha evidenciado la falta de atención médica a mujeres en labor de parto, lo que ha puesto en peligro su vida y la de los recién nacidos.

El derecho humano a la salud implica una serie de acciones que el Estado tiene que impulsar para garantizar su vigencia, como la implementación de protocolos y procedimientos que permitan el acceso de cualquier persona a los servicios de salud.

Una atención deficiente limita el acceso a la salud de las personas, también, por el principio de interdependencia, la violación a otros derechos humanos, tales como el derecho a la seguridad e integridad personal, así como el derecho al trato digno.

Como parte de las acciones que se han emprendido para garantizar el derecho de no repetición de tales actos violatorios, la CNDH emitió recomendaciones al gobierno del estado de Oaxaca, con la finalidad de evitar, en lo sucesivo, la violación a tales derechos, así como la reparación efectiva de los daños ocasionados a las madres y sus recién nacidos.

En la recomendación No. 8/2014[74] acerca del caso de la negativa al derecho de la protección de la salud e inadecuada atención médica en el centro de salud rural de San Felipe Jalapa de Díaz, Oaxaca, del 27 de marzo de 2014, así como en la recomendación 15/2014[75] del caso de la negativa al derecho a la protección a la salud en el centro de salud rural del municipio de San Antonio de la Cal, Oaxaca, del 25 de abril de 2014, la Comisión fue enfática en que la falta de atención del personal médico de las instituciones de salud puso en riesgo grave a las mamás y a los recién nacidos, vulnerándose su integridad física, su derecho a la protección de la salud y el derecho al trato digno, acentuándose su condición de indígenas del sexo femenino, lo que implica la configuración de una acción discriminatoria.

Las recomendaciones emitidas se encaminan a tomar las medidas necesarias con el objeto de reparar el daño a las mujeres que no fueron atendidas al momento de dar a luz, así como a sus hijos, derivado de la responsabilidad directa del personal administrativo y médico de los centros de salud referidos.

De igual forma, se hizo hincapié en la necesidad de que exista una adecuada formación y capacitación del personal médico, tanto técnica y profesional como en materia de derechos humanos, pues es un factor

74 Véase CNDH. Comisión Nacional de los Derechos Humanos. 2014. RECOMENDACIÓN No. 8/2014 SOBRE EL CASO DE LA NEGATIVA AL DERECHO A LA PROTECCION DE LA SALUD E INADECUADA ATENCIÓN MÉDICA EN EL CENTRO DE SALUD RURAL DE SAN FELIPE JALAPA DE DÍAZ, OAXACA, EN AGRAVIO DE V1 Y SU RECIÉN NACIDA V2. Disponible en http://www.cndh.org.mx/sites/all/fuentes/documentos/Recomendaciones/2014/REC_2014_008.pdf (consultada el 10 de agosto de 2014).

75 Véase CNDH. Comisión Nacional de los Derechos Humanos. 2014. RECOMENDACIÓN No. 15/2014 SOBRE EL CASO DE LA NEGATIVA AL DERECHO A LA PROTECCIÓN DE LA SALUD EN EL CENTRO DE SALUD RURAL DEL MUNICIPIO DE SAN ANTONIO DE LA CAL, OAXACA, EN AGRAVIO DE V1 Y SU RECIÉN NACIDO V2. Disponible en http://www.cndh.org.mx/sites/all/fuentes/documentos/Recomendaciones/2014/Rec_2014_015.pdf (consultada el 10 de agosto de 2014).

determinante para garantizar el derecho social a la salud y demás derechos relacionados con éste.

La obligación constitucional y convencional de las autoridades de promover y proteger los derechos humanos se debe extender a la realización de acciones concatenadas de diversa índole, que permitan mantener la vigencia plena de dichos derechos, principalmente los de carácter asistencial, en los que el papel del Estado es fundamental para que se puedan ejercer eficazmente.

Actualmente, la Comisión da seguimiento al cumplimiento de las recomendaciones dadas al titular del Ejecutivo del estado de Oaxaca, Gabino Cué Monteagudo, para, de esta forma, asegurar el derecho a la reparación y la no repetición de los actos violatorios de derechos humanos.

Diálogo entre jueces y poderes. Su papel en la vigencia de los derechos humanos

Hoy en día, como consecuencia de las reformas constitucionales del 6 y 10 de junio de 2011, así como del reconocimiento del bloque de derechos y la vinculatoriedad de la jurisprudencia de la Corte Interamericana, la función jurisdiccional adquiere una nueva dimensión y trascendencia en la tutela y vigencia efectiva de los derechos humanos, ya que, mediante la interpretación, se pueden reconocer derechos implícitos y ampliar de forma más favorable aquellos contenidos en el marco constitucional o en instrumentos internacionales.

Para garantizar el ejercicio efectivo de estos derechos humanos, el mero reconocimiento normativo no resulta suficiente, sino que es indispensable una labor de implementación por parte de la autoridad en sus respectivas competencias y atribuciones. En el caso del juez, éste deberá garantizar el acceso a la justicia de cualquier persona o colectividad, para que puedan tutelarse los derechos que han sido vulnerados. La función jurisdiccional permite ordenar los límites y alcances de los derechos humanos, sobre todo cuando las normas constitucionales y leyes hayan sido omisas al respecto.

De ahí la trascendencia de que se haya ampliado el acceso de toda persona a la justicia por medio del interés legítimo, lo cual implica la configuración de una legitimación procesal más idónea.

La justicia se ha globalizado, y el derecho comparado se ha centrado en el diálogo jurisprudencial que existe entre los jueces de distintos sistemas jurídicos e internacionales. Dichos diálogos permiten un mejor entendimiento de los alcances de los derechos humanos y su aplicación efectiva.

De igual forma, como se señaló, los jueces pueden, mediante su función interpretativa, dar vigencia a derechos no reconocidos por los marcos constitucionales e instrumentos internacionales.[76] Estos derechos, que muchas veces se encuentran en la penumbra,[77] requieren de una activación jurisdiccional para que sean reconocidos y, por ende, efectivos, ya que, con independencia de que no estén previstos normativamente, deben ser sujetos de protección. Tal como lo prevé la novena enmienda constitucional de los Estados Unidos de América: "El hecho de que en la Constitución se enumeren ciertos derechos no deberá interpretarse como una negación o menosprecio hacia otros derechos que son también prerrogativas del pueblo".[78]

Derivado de la trascendental reforma a la Constitución Política del Estado Libre y Soberano de Veracruz de Ignacio de la Llave en 2000, en un afán por ampliar y garantizar de forma efectiva el goce y ejercicio de los derechos de las personas, se estableció en el artículo 4 que

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76 Un ejemplo son los derechos y principios generales del derecho internacional, los cuales dominan la dinámica de las relaciones internacionales de forma implícita. Son un instrumento eficaz para la adecuada aplicación e interpretación de los ordenamientos jurídicos internacionales. El principio de buena fe, la prohibición del abuso del derecho, el principio de cosa juzgada, entre otros, son algunos de los principios comunes para los estados, véase Valencia Restrepo, Hernán. 2007. "La definición de los principios en el Derecho Internacional contemporáneo". *Revista de la Facultad de Derecho y Ciencias Políticas*, 106 (enero-junio): 69-124.

77 En el caso Griswold v. Connecticut (1965), la Suprema Corte de los Estados Unidos de América decidió que la Constitución protege el derecho a la intimidad. El caso versó acerca de un ordenamiento vigente en el estado de Connecticut que prohibía a cualquier persona tomar cualquier medicamento o droga para prevenir el embarazo. Por mayoría de 7 votos contra 2, la Corte declaró la invalidez de la ley, arguyendo que se vulneraba el derecho a la intimidad marital. Si bien la *Bill of Rights* no reconocía explícitamente el derecho a la privacidad, el juez William O. Douglas señaló ante el Pleno que éste se encontraba en las penumbras de la tutela constitucional, pero aun cuando tuviese un reconocimiento expreso, existía como un derecho implícito perfectamente garantizado, véase US Supreme Court. 1965. Griswold v. Connecticut. Disponible en https://supreme.justia.com/cases/federal/us/381/479/ (consultada el 10 de agosto de 2014).

78 Administración de Archivos y Registros Nacionales de Estados Unidos. Novena enmienda a la Constitución Política de los Estados Unidos de América. 1791. Disponible en http://www.archives.gov/espanol/constitucion.html (consultada en 12 de agosto de 2014).

no sólo mediante las normas constitucionales, internacionales y legales es que se puede dar paso al reconocimiento de derechos humanos, sino también por medio de la labor jurisdiccional de los jueces, quienes pueden construir los límites y alcances de un derecho humano al resolver un caso favoreciendo de la mejor forma a la persona.[79]

Hacia un modelo idóneo de protección de los derechos humanos

A lo largo de este texto se ha podido advertir la evolución que, en tiempos recientes, ha tenido la función jurisdiccional en cuanto a la protección efectiva de los derechos humanos, particularmente, en aquellos que anteriormente no estaban sujetos a una judicialización, lo que reducía el margen de defensa constitucional, restándoles eficacia a éstos y al propio orden constitucional.

De ahí la trascendencia de que aquellos derechos carentes de tutela, principalmente los sociales y difusos, hoy en día gocen de una eficacia y vigencia que en años anteriores no tenían, sin que esto implique que se encuentren totalmente garantizados.

Existen varios aspectos que han incidido a favor de esta mejora en la protección de los derechos humanos, como se ha señalado anteriormente, entre ellos, la apertura en el acceso a la justicia en el juicio de amparo, mediante la inclusión de la figura del interés legítimo, así como las nuevas atribuciones y responsabilidades del juez constitucional y de toda autoridad,[80] derivado de la reforma constitucional en materia de

79 "Los habitantes del Estado gozarán de todas las garantías y libertades consagradas en la Constitución y las leyes federales, los tratados internacionales, esta Constitución y las leyes que de ella emanen; así como aquellos que reconozca el Poder Judicial del Estado, sin distinción alguna de origen, raza, color, sexo, idioma, religión, opinión política, condición o actividad social", véase Constitución Política del Estado Libre y Soberano de Veracruz de Ignacio de la Llave. 2014. Veracruz: Congreso del Estado de Veracruz. [Disponible en: http://www.legisver.gob.mx/leyes/ConstitucionPDF/CONSTITUCION%20POLITICA%2009-01-15(1).pdf (consultada el 15 de abril de 2014)].

80 En el artículo 1 de la Constitución federal se establece el deber que tienen "todas las autoridades, en el ámbito de sus competencias, de promover, respetar, proteger y garantizar los derechos humanos de conformidad con los principios de universalidad, interdependencia, indivisibilidad y progresividad. En consecuencia, el Estado deberá prevenir, investigar, sancionar y reparar las

derechos humanos y del caso Rosendo Radilla. Sin embargo, aún existen áreas de oportunidad para incrementar la solvencia en la defensa y el reconocimiento de los derechos.

Una de estas áreas se sitúa en la deficiente aplicación de las disposiciones legales y de las políticas públicas, principalmente en lo referente a los derechos sociales y difusos, cuya naturaleza requiere de esos impulsos para su adecuado ejercicio.

Como se ha advertido, los derechos sociales y difusos son derechos humanos, por lo que no poseen una naturaleza programática o presupuestal; así, su reconocimiento y tutela no debe supeditarse única y exclusivamente a la concreción de leyes y políticas públicas, mucho menos a cuestiones presupuestales, ya que su vigencia estaría reduciéndose a meras intenciones.

Como se señaló, la vaguedad de las disposiciones legales y constitucionales de los derechos humanos es una oportunidad para que el juez fije progresivamente el contenido y los alcances de éstos. De ahí que su labor ya no se limite a la aplicación normativa al caso concreto, sino que, a fin de garantizar la vigencia de los derechos humanos como parámetros supremos de validez, debe efectuar una actividad constructiva para subsanar dichas vaguedades.

Estos esfuerzos de complementación y construcción consisten en la aplicación directa de un derecho humano reconocido por la Constitución o por los instrumentos internacionales, incluso, aquellos derechos implícitos o en penumbras que para su ejercicio requieren del establecimiento de directrices claras y precisas que limiten de forma adecuada sus alcances y límites, así como la definición de disposiciones constitucionales, legales y de políticas públicas para su adecuada materialización.

Para garantizar la vigencia de los derechos sociales y difusos es necesario que exista coordinación entre los poderes Legislativo, Ejecutivo

violaciones a los derechos humanos, en los términos que establezca la ley", véase nota 20. De igual forma, en el caso Gelman vs. Uruguay, la Corte Interamericana emitió una jurisprudencia en la que se estableció el criterio de que toda autoridad tiene la obligación de llevar a cabo el control difuso de convencionalidad, véase Corte IDH. Corte Interamericana de Derechos Humanos. 2013. Caso Gelman vs Uruguay. Resolución de la Corte Interamericana de Derechos Humanos. Supervisión de cumplimiento de sentencia. 20 de marzo. Disponible en http://www.corteidh.or.cr/docs/supervisiones/gelman_20_03_13.pdf (consultada el 15 de agosto de 2014).

y Judicial, ya que para alcanzar su eficacia requieren de leyes que reglamenten y encaucen su ejercicio, así como de políticas públicas que materialicen y definan su alcance.

Pero, como se señaló, no es posible supeditar la vigencia de estos derechos a aspectos legales y programáticos, por lo que el papel del juez es determinante, y debe supervisar que las disposiciones normativas y las políticas públicas tiendan a favorecer el adecuado ejercicio de estos derechos. Por tanto, el control jurisdiccional del juez no sólo se limita a las normas, sino a las políticas públicas encargadas de desarrollar estos derechos.

En el supuesto concreto de que exista una omisión normativa y programática de algún derecho, el juez tiene la responsabilidad de que el reconocimiento y la tutela se hagan efectivos, por lo que en sus resoluciones tiene que diseñar disposiciones y políticas públicas que tiendan a ello.

Ahora bien, para asegurar que exista una protección integral y uniforme de todos los derechos humanos, como se señaló anteriormente, se debe transitar a un modelo de defensa más eficaz, en el que no exista ningún margen de impunidad ni vulnerabilidad para los derechos. Esto se puede generar si hay un diálogo entre los diversos mecanismos de protección de derechos humanos, particularmente entre los no jurisdiccionales y los jurisdiccionales.

Un esquema de índole consultivo-jurisdiccional ha mostrado ventajas, particularmente en el sistema interamericano de derechos humanos, en el cual la restitución al derecho humano se garantiza en un alto porcentaje. Primero, por una vía consultiva ante un órgano no jurisdiccional, que tras la emisión de una recomendación busca asegurar la vigencia del derecho mediante la buena fe del Estado en resarcir la afectación; en caso de que no se acepte la recomendación o subsista la violación, por vía jurisdiccional se vincula al responsable para actuar en consecución. Este modelo, trasladado al ámbito local, puede resultar mucho más efectivo, pues si bien existen órganos consultivos que por medio de recomendaciones pretenden salvaguardar la vigencia de los derechos humanos, es un hecho que existe poca vinculación con los órganos jurisdiccionales encargados de su tutela. En la medida que se generen diálogos y vínculos entre estos órganos, se llegará a un Estado ideal para el ejercicio y la defensa adecuada de todos los derechos, con independencia de su carácter individual, colectivo o difuso.

Consideraciones finales

Sin duda, con las reformas constitucionales en materia de juicio de amparo y de derechos humanos del 6 y 10 de junio de 2011, respectivamente, se ha propiciado la generación de nuevos paradigmas, cuya característica se cimienta en la ampliación de los derechos humanos y una mejor tutela de los mismos, mediante un nuevo diseño constitucional que facilita el acceso y la protección de éstos ante cualquier posible violación.

Si bien los rasgos de estos paradigmas son visibles, es un hecho que se encuentran en un proceso de permanente evolución. Una de las figuras que ha sido incluida en el sistema constitucional, y que ejemplifica la aparición de dichos paradigmas, como se ha mencionado y analizado en este estudio, es el interés legítimo en el juicio de amparo, cuya finalidad es garantizar el acceso y la protección efectiva de toda persona que lo solicite a la justicia federal.

La inclusión del interés legítimo implica que los derechos humanos de carácter colectivo y difuso, que anteriormente se encontraban en estado de indefensión por no ser derechos subjetivos, sean perfectamente justiciables.

Ahora bien, el interés legítimo tiene una capacidad de tutela mucho más amplia, pues no se limita a la configuración de un agravio personal y directo, sino que, como se ha podido advertir, extiende su defensa a violaciones directas o indirectas, incluyendo a aquellas personas que poseen una posición especial frente al orden jurídico, aspecto que permite que derechos e intereses difusos puedan ser garantizados jurisdiccionalmente. Con ello se permite que todos los tribunales, constitucionales por su vocación desde 2011, revisen y protejan los derechos humanos en su integridad, desde su dimensión constitucional, internacional y legal.

Sin embargo, la función jurisdiccional requiere de la complementariedad de todas las autoridades para el cumplimiento de sus sentencias, así como para que, en el ámbito de su competencia, protejan todos los derechos del hombre, tal como lo prescribe el nuevo artículo 1 de la Constitución mexicana.[81]

[81] Véase nota 20.

Uno de los beneficios de la ampliación de la tutela de todos los derechos humanos son los efectos de la cosa juzgada derivada de las sentencias de amparo, en particular, cuando se trate de derechos colectivos o difusos, ya que dichos efectos no se limitan a beneficiar a las partes que promovieron el juicio de amparo, sino que, por su propia naturaleza, se expanden colectivamente.

Los efectos de las crisis económicas desde una visión de género[1]

María del Carmen Alanis Figueroa*

Las crisis económicas recientes han tenido impactos sobre el constitucionalismo contemporáneo. Lo mismo en Europa que en América, los andamiajes institucionales han debido ofrecer respuestas ante los desafíos impuestos por crisis económicas de gran profundidad y extensión en el tiempo.

Mucho se ha ganado en entender cuáles son las respuestas constitucionales ante las crisis, pero quedaba un punto pendiente: comprender cómo las crisis afectan en forma diferenciada a algunos colectivos sociales. Como ocurre con casi todos los temas de la realidad social, cuando se revisan desde esa visión, aparecen resultados asombrosos.

De ahí que se propone revisar los impactos de las crisis económicas desde el siguiente lente conceptual que puede hacer evidente sus impactos.

- El aporte de la visión de género para observar el desarrollo de los países;

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1 El presente artículo resume la ponencia presentada por la suscrita en el "Foro Internacional: Protección de los derechos económicos y sociales en tiempos de crisis económica: ¿qué papel tienen los jueces?" organizado por la Subcomisión de América Latina de la Comisión de Europea para la Democracia a través del Derecho (Comisión de Venecia), en Ouro Preto, Brasil, los días 5 y 6 de mayo de 2014.

- Los efectos diferenciados que las crisis tienen sobre hombres y mujeres, así como la manera en que éstas afectan a las políticas de igualdad de género, y
- Las respuestas que podrían emprenderse para mitigar los efectos que las crisis tienen sobre mujeres y niñas.

I. Observar las crisis desde una visión de género

La historia del capitalismo ha estado marcada por periodos de auge y de estancamiento; de progreso y retroceso. El sistema económico predominante está marcado por los famosos "ciclos".

Pero el tipo de crisis que hoy ocupa a buena parte del mundo capitalista no es la de aquellos tiempos en los que se reduce el ritmo de crecimiento, sino algo más profundo, más generalizado. Se trata más bien de momentos en que los modos de producción, inversión y consumo han sido puestos en entredicho. Es decir, de aquello a lo que Habermas denominó "crisis de legitimidad".[2]

Esas crisis se presentan, a veces, en forma geográficamente localizada como la que México vivió en 1995 o Argentina en 2001. Pero, las que en serio desafían al sistema vigente son las crisis globales, las crisis internacionales. Por ejemplo, en las crisis de los sistemas de precios mundiales que en el último cuarto del siglo XIX[3] ocasionaron el auge de los aranceles y los proteccionismos; o en la famosa gran depresión de 1929, que después de décadas de políticas ortodoxas encontró salida en el *new deal* y el aumento al gasto público. Quizás, convenga también pensar en las crisis de deuda de los años setenta[4] del siglo pasado, o bien en las crisis financieras que aparecieron en forma nítida desde 2008.

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2 HABERMAS Jürgen. *Legitimation crisis*. Sugiere que la gente espera que el gobierno intervenga exitosamente en la economía para generar prosperidad.

3 1873-1896.

4 1971.

¿Qué tienen en común todas ellas? Que las crisis permiten poner al descubierto las flaquezas de cada sistema y explorar en torno a nuevos paradigmas, nuevas opciones. Parafraseando a Gourevitch, las crisis son *"momentos de flujo propicios para evaluar los debates teóricos y analizar las pautas históricas".*[5]

Quizás conviene pensar en los tiempos difíciles como opciones de cambio. Parecería que las crisis son neutras en cuanto al género. Es decir, que afectan por igual a hombres y mujeres. Esto no es así: de hecho, la teoría económica ha podido demostrar una estrecha relación entre género y desarrollo económico. Desde los años setenta del siglo pasado comenzó a cuestionarse la famosa "división sexual del trabajo" que no tiene un ápice de natural. Además, se demostró que el trabajo de las mujeres, aun cuando sea impago como el que se desarrolla dentro del hogar, contribuye a la riqueza nacional y por tanto, debe ser computado.

A partir de esos hallazgos cobró forma la economía feminista, como crítica a la aparente neutralidad de género en los supuestos del mercado. Pero, ¿qué herramientas de la economía feminista sirven para estudiar las crisis? Aquí tres rutas:[6]

- Estudiar los sesgos de género que están introyectados dentro de las instituciones sociales que posibilitan el funcionamiento del mercado, incluyendo por supuesto a las empresas, las familias y al Estado.
- Estudiar el rol que juega esa economía no monetizada que subyace a la reproducción de la fuerza de trabajo y, por supuesto, a los sistemas de poder que ocurren en ese proceso.
- Ponderar el valor que aporta el "cuidado de personas" y el "trabajo doméstico", roles históricamente asignados a las mujeres.

En efecto, los periodos de auge y crisis de las economías pueden ser revisados desde una visión de género que no asuma que los costos o beneficios del desarrollo económico se distribuyen homogéneamente al interior de las familias, empresas o sociedades.

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5 GOUREVITCH Peter. *Politics in Hard Times: Comparative Responses to International Crisis.* Es un politólogo de la universidad de Harvard y Profesor Emérito de la de San Diego.

6 BOSERUP, Ester. *Woman's role in economic development.*

¿Cómo las crisis actuales están afectando a hombres y mujeres, y cuáles son sus efectos sobre las políticas de igualdad?

II. Efectos de las crisis

Para revisar qué tan fuertes son los efectos de las crisis sobre hombres y mujeres se necesita un parámetro de referencia, algo que permita saber si se está afectando algún tema de relevancia.

Por eso se pueden agrupar los Objetivos de Desarrollo del Milenio, el más importante consenso que jamás haya alcanzado la humanidad en cuanto a sus anhelos más deseados. Los Objetivos fueron seleccionados no sólo por el gran consenso que causaron entre los países, sino también porque a principios de siglo - antes de que las crisis hicieran su aparición - se antojaban como propósitos factibles.

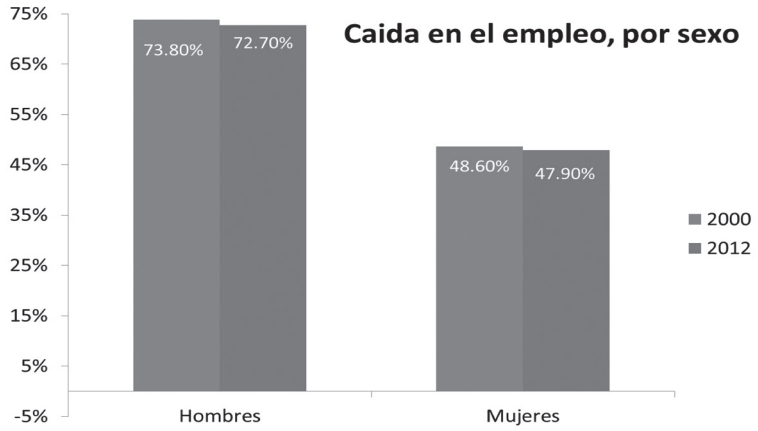
Objetivo uno. Erradicar la pobreza

En cuando a ese Objetivo, la propia ONU ha reconocido la carencia de indicadores cuantitativos en los sistemas estadísticos de las naciones que permitan detectar cómo las familias distribuyen el gasto a su interior. Las cifras actuales no permiten diferenciar si ellas o ellos son más pobres, cuando forman parte de la misma familia. Habría, sin embargo, suficientes elementos para sospechar alguna disparidad, cuando el 41.8% de las mujeres embarazadas de mundo tienen anemia, como resultado de problemas en su nutrición.

Los Objetivos de Desarrollo del Milenio fijaron una condición necesaria para lograr la reducción en la pobreza: alcanzar el empleo productivo para todas y todos. El milenio no ha dejado buenas noticias para ninguno de los sexos. Como se puede ver en la gráfica, entre 2000 y 2012, las tasas de empleo de los hombres cayeron de 73.8% a 72.7%, mientras que las de las mujeres cayeron de 48.6% a 47.9%. En promedio, las mujeres tienen una tasa de empleo 24.8% menor que la de los hombres.[7]

[7] NACIONES UNIDAS. *Retos y logros en la aplicación de los Objetivos de Desarrollo del Milenio para las Mujeres y las Niñas. Informe del Secretario General.*

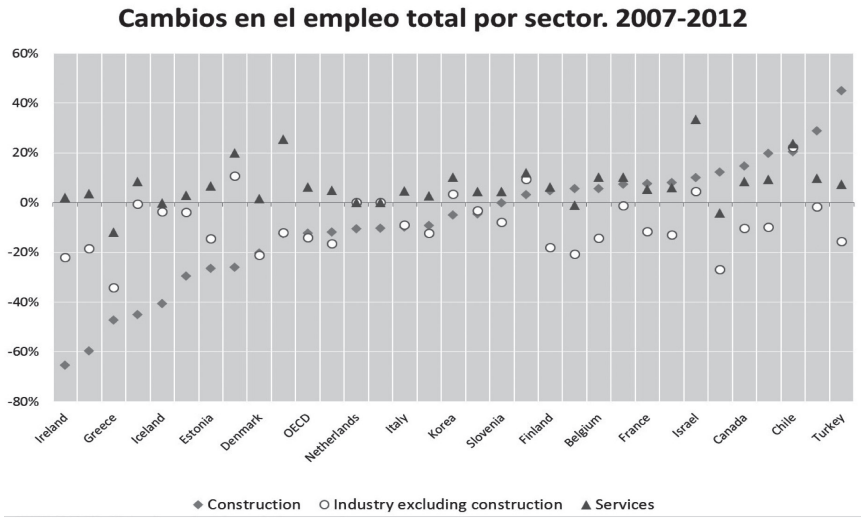
Gráfica 1



NACIONES UNIDAS. Retos y logros en la aplicación de los Objetivos de Desarrollo del Milenio para las Mujeres y las Niñas. Informe del Secretario General.

La responsable de esa caída es evidentemente la crisis iniciada en 2008, pero sus efectos sobre hombres y mujeres deben revisarse en forma diferenciada para los países desarrollados para aquellos en vías de desarrollo. Esto es así porque, si bien todas las regiones del mundo perdieron empleos con las crisis, los países desarrollados los perdieron principalmente en industrias dominadas por varones.

Gráfica 2



OCDE. Crisis, cuotas y recortes de género en los empleos, todos pierden.

La OCDE ha señalado los cambios en el empleo total por sector (2007-2012).Los cuadros corresponden a un sector masculinizado: la construcción.

Por eso no puede sorprender que, en Europa por ejemplo, la crisis haya ocasionado una reducción en la brecha de género en el empleo, al pasar de 14.1% en el periodo pre-crisis a 10.9% a finales del 2012.[8] En los países en vías de desarrollo la respuesta ha sido desigual.

- En algunos donde las mujeres se empleaban en un sector manufacturero-exportador que resultó afectado por la crisis, las tasas de empleo femenino se fueron al suelo.[9]
- En Latinoamérica la situación fue distinta: la brecha de género en el empleo se redujo porque la proporción de mujeres con trabajo aumentó casi 6.5%.[10] No hay, sin embargo, evidencia que permita saber si ese incremento se tradujo en un mayor ingreso personal.

Parecieran buenas noticias para América, pero deben tomarse con cuidado. El aumento en el empleo femenino estuvo dado por:

- Una mayor disposición por parte de las mujeres para trabajar por salarios reducidos;
- Una mayor propensión de las mujeres para trabajar por medias jornadas;
- Una mayor disposición de las mujeres para trabajar en condiciones de vulnerabilidad, y
- La necesidad, en algunas parejas donde sólo trabajaba el varón, de que las mujeres ingresaran al mercado de trabajo para compensar el salario.

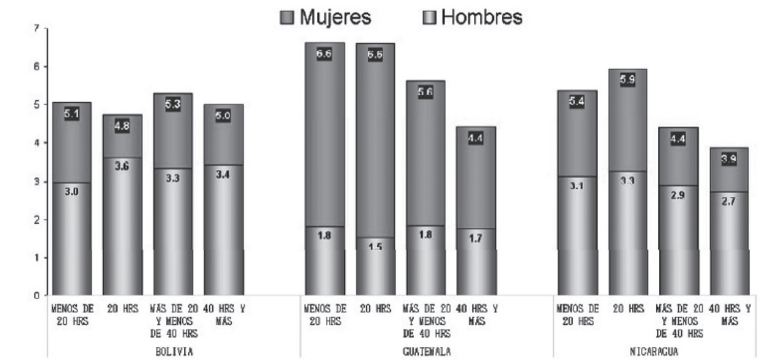
8 EUROPEAN COMMISSION. *The impact of the economic crisis on the situation of women and men and on gender equality policies.*

9 Nicaragua, Bangladesh, Filipinas, Uganda y Tailandia.

10 UNITED NATIONS. *Challenges and achievements in the implementation of the Millenium Development Goals for Women and Girls. Report of the Secretary General.*

Gráfica 3

PROMEDIO DE HORAS DIARIAS EN ACTIVIDADES RELACIONADAS A LOS QUEHACERES DEL HOGAR, SEGÚN DURACIÓN DE LA JORNADA LABORAL



BARCENA, Alicia. Análisis de la crisis económica y financiera desde la perspectiva de género: impacto sobre la pobreza y el trabajo de las mujeres. CEPAL, p. 26.

¿Puede el ingreso de las mujeres al mercado laboral reducir el trabajo doméstico? No. CEPAL dio una muestra en tres países latinoamericanos. Aún en los casos en que las mujeres dedican de 20 a 40 horas o más de 40 horas semanales al mercado de trabajo, su carga de trabajo doméstico permanece constante: 4 o 5 horas diarias de quehaceres del hogar, contra 1.7 horas que dedican los hombres.

Pero las consecuencias de la crisis sobre el empleo están todavía por verse. En todas las regiones, éstas dependerán de la profundidad y magnitud de la crisis. Lo que sí sabemos es que la distribución de costos será diferenciada sobre hombres y mujeres y ahí, la cultura patriarcal arroja una desigualdad estremecedora. Una encuesta aplicada en 2005 preguntó a ciudadanos de todo el mundo qué se debería hacer cuando los empleos escasean. El 40% de quienes contestaron piensan que los hombres tienen mayor derecho de conservar sus empleos que las mujeres. Para ellos es un "derecho original", un "derecho legítimo".[11]

11 SEGUINO, Stephanie. *The global economic crisis. Its gender and ethnic implications and policy responses. Gender and development* no. 18. Datos de la encuesta de *World's Values Survey* 2009.

Objetivos dos y tres. Alcanzar la educación primaria universal y eliminar las disparidades de género en la educación

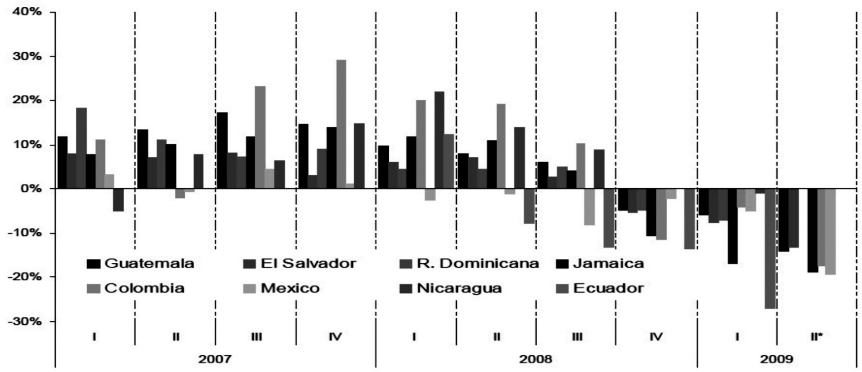
A nivel mundial se cree que el objetivo de la educación primaria universal será un éxito, ya que la tasa de cumplimiento en cuanto haber cursado un tramo de la primaria está muy cercana al 100 por ciento.

Pero la crisis debe prender focos de alarma, ya que la experiencia muestra que la pobreza y el género pueden generar retrocesos. En el quintil más pobre de la población mundial, el 31% de las niñas y 28% de los niños en edad de estudiar están fuera de la escuela.[12] Esto es preocupante, ya que la evidencia recopilada de otras crisis y de la actual muestra riesgos de pauperización, especialmente para las mujeres. Es evidente que los desafíos fundamentales de las crisis están dados por las posibilidades de que incremente la pobreza y desigualdad social.

En la gráfica 4 se aprecian los elementos que prenden focos rojos sobre la educación, aunque evidentemente éstos afectan la posibilidad de cumplir otras metas del milenio

Gráfica 4

Se observa una marcada reducción de las remesas



BARCENA, Alicia. Análisis de la crisis económica y financiera desde la perspectiva de género: impacto sobre la pobreza y el trabajo de las mujeres. CEPAL, p. 26.

[12] UNITED NATIONS. *Challenges and achivements in the implementation of the Millenium Development Goals for Women and Girls. Report of the Secretary General.*

Tres signos hacen necesario prender las alarmas:

- La caída en los niveles de empleo ha provocado menores niveles de recaudación fiscal en Europa, Estados Unidos e inclusive economías Latinoamericanas.
- Como consecuencia de lo anterior, muchos países han reducido sus programas de bienestar social o transferencias. Un importante estudio de la Comisión Europea demuestra que los recortes han sido ciegos ante las disparidades de género en 16 naciones europeas cuando menos, lo que — sabemos bien — sólo profundiza las diferencias.[13]
- En el caso de los países en vías de desarrollo, además, la recepción de remesas ha caído dramáticamente, con lo que se perdió la principal válvula de salvamento ante los fenómenos de crisis.[14]

En cuanto a la educación, el problema de la depauperización de familias y mujeres es un riesgo. Estudios del Banco Mundial demuestran que en determinados países[15], cuando las familias experimentan una caída en sus ingresos, comienzan por sacar a las niñas de las escuelas para recortar el gasto.[16]

Objetivos cuatro y cinco. Reducir la mortalidad infantil y las muertes maternas

Para el los objetivos de este análisis se agrupan estos Objetivos de Desarrollo del Milenio, toda vez que ambos están vinculados a la salud. Al día de hoy sabemos que la meta de reducir en dos tercios la mortalidad infantil no se alcanzará, ya que de 1990 a 2012 la reducción fue de la

13 EUROPEAN COMMISSION. *The impact of the economic crisis on the situation of women and men and on gender equality policies*, 2013.

14 BÁRCENA, Alicia. *Análisis de la crisis económica y financiera desde la perspectiva de género. Impacto sobre la pobreza y el trabajo de las mujeres*. CEPAL.

15 El estudio encontró que eso ocurre en aquellos países donde alguna vez existió una disparidad entre mujeres y hombres en el acceso a la educación primaria.

16 BUVINIC Mayra. *The gender perspectives of the financial crisis World Bank 2009*.

mitad[17]. El Banco Mundial estima que 200,000 a 400,000 muertes de niño se adicionarán cada año a la tendencia, como consecuencia de las crisis.[18]

Las estimaciones empeoran: por cada punto porcentual que caiga el PIB aumenta, en promedio, 7.4 niños y 7.5 niñas muertas por cada mil habitantes.[19] La meta de salud de las madres tampoco se alcanzará en el mundo. La reducción de 47% en el radio de mortalidad[20] que se alcanzará para 2015 está muy por debajo del objetivo de disminución que era de 75%. No podría ser de otra manera: de los 135 millones de niños que nacieron en el mundo durante 2011, 26 millones lo hicieron sin el auxilio de un médico.[21] Además, cada año se realizan en el mundo 21.6 millones de abortos inseguros. De ellos, 47 mil terminan en la muerte de la madre.

La crisis deteriora este panorama por tres vías:

- Muchos de los países han emprendido planes de austeridad en respuesta a las crisis. Éstos han reducido el financiamiento público a los planes de salud, lo que ha encarecido la prestación de servicios. Ello encarece proporcionalmente más la salud a quienes menos tienen: ya sabemos, las mujeres.
- Al reducir los planes de salud, las sociedades han debido recaer mayormente en que sean miembros de las propias familias quienes cuiden a los enfermos. Hemos dicho ya que ese rol, históricamente, le ha sido asignado a las mujeres, ya sea en sustitución de un trabajo remunerado o en adición a ésta (doble jornada).

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17 Pasó de 90 niños muertos por cada 1,000 (en 1990) a 48 niños muertos por cada 1,000 (en 2012).

18 WORLD BANK. *The impact of the financial crisis on progress towards the Millenium Developent Goals in Human Development*. 2009.

19 BAIRD Friedman and N SCHADDY. "Aggregate income shocks and infant mortality in the developing world". *World Bank Policy Research*, 2007. La evidencia aplica para 59 países en vías de desarrollo que fueron incorporados al estudio.

20 Radio de mortalidad = La mortalidad de un grupo social comparada con la mortalidad de la población.

21 Cada año se realizan en el mundo 21.6 millones de abortos inseguros. 47,000 de éstos terminan en la muerte de la madre (13% del total de muertes maternas).

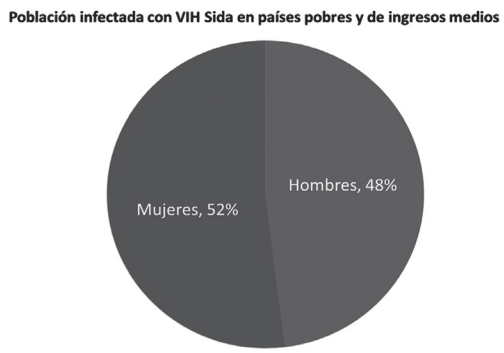
Objetivo ocho: Alianza global para el desarrollo.

La tercera vía está vinculada al objetivo de la cooperación hacia los países menos desarrollados, por lo que entro ahí de una vez. En efecto, una consecuencia de la crisis es que los apoyos de los países más ricos a los más pobres se redujo. En 2011, por ejemplo, los países de la Organización para la Cooperación y el Desarrollo Económico (OCDE) redujeron tres por ciento su apoyo a países en vías de desarrollo.[22] El dato es particularmente dramático en países pobres. En África, por ejemplo, el 50% de los fondos de salud pública dependen de la asistencia internacional.[23] Están particularmente carentes de fondos los programas para reducir las muertes maternas.[24]

Objetivo seis: Combatir el VIH-Sida, la Malaria y otras enfermedades

Al día de hoy, las mujeres representan el 52% de la población infectada en los países pobres y de ingresos medios. En África y el Caribe esta proporción se incrementa hasta 57%.

Gráfica 5



NACIONES UNIDAS. Retos y logros en la aplicación de los Objetivos de Desarrollo del Milenio para las Mujeres y las Niñas. Informe del Secretario General.

22 *Development aid to development countries falls because of global recession*. Paris, Organization for Economic Co-operation and Development. 2011.

23 SEGUINO, Stephanie. The global economic crisis. Its gender and ethnic implications and policy responses. *Gender and development* no. 18.

24 Deen T UN. *Decries stagnant funding for population goals*. April 2011.

¿Cómo se relaciona ese dato con la crisis? Un documento de ONU-Sida relata que la evidencia de las crisis anteriores demuestra que cuando las mujeres pierden sus medios de subsistencia tienen mayores probabilidades de ser víctimas de tráfico o explotación sexual. En países de ingresos bajo o medio, este factor puede incrementar el grado de avance del VIH-Sida.

III. Respuestas institucionales ante los efectos de la crisis

Ha quedado de manifiesto lo profundo de la crisis y sus efectos en el cumplimiento de los objetivos que la humanidad se planteó a inicios del siglo. Pero también se puso de relieve que, en forma inequívoca, los efectos más agudos de la crisis recaen sobre las mujeres. Hacía falta una lente de género para percibir esas desigualdades.

Las crisis son, también, oportunidades para cambiar las cosas, para cuestionar la manera en que las hacemos siempre.

¿Por qué no aprovechamos esta crisis para preguntarnos sobre lo absurdo que resultan algunas políticas anti-crisis que, arropadas en una aparente neutralidad, no hacen sino profundizar las desigualdades que el patriarcado nos impuso hace miles de años?

a) Transversalidad

Una recomendación en la que insisten agencias internacionales, europeas y latinoamericanas es en la adopción del famoso principio de *mainstreaming* según el cual la igualdad de género debe ser central a toda la actividad pública. Tal y como el principio se adoptó en la Cumbre de Beijing (1995) no puede haber espacios del quehacer público que queden ajenos a una visión de género.

Esto que es válido para todo tiempo tiene mayor valor en tiempos de crisis por dos razones. La primera es que sobre las mujeres sigue recayendo la mayor parte del cuidado de niños y adultos mayores, de manera que orientar recursos a ellas implica también destinarlos a esos propósitos. La segunda es que, como ha demostrado el Banco

Mundial en estudios realizados a varias naciones, entre ellas Brasil, el bienestar de los niños mejora más cuando el dinero se deposita en mujeres que en hombres.[25]

No es casual la conclusión a la que llega el propio organismo financiero internacional: *"las opciones de política que hacen de las mujeres agentes económicos aunadas a su capacidad de invertir recursos en el bienestar de los niños pueden generar importantes avances al mitigar los efectos de las crisis".* [26]

Por eso son preocupantes datos, como los proporcionados por la Comisión Europea, que indican que el impacto de género fue considerado en apenas 10 por ciento de las políticas de ajuste implementadas en el viejo continente en respuesta a la crisis.[27]

b) Incrementar participación de mujeres en la toma de decisiones

Difícilmente nos podría sorprender que las instituciones y las políticas estén tan fuertemente masculinizadas si la toma de decisiones recae casi por entero en mujeres.

Por eso resultaron tan importantes las cuotas de género congresionales que, desde su primera implementación[28] en Argentina 1991, han permitido a 27 países pasar del umbral del 30% de representación en los Congresos para hacer la política de manera distinta.

Pero en tiempos de crisis, quizás debamos prestar más atención a esa corriente que propone incrementar la participación en la toma de decisiones no sólo en Parlamentos y organizaciones públicas, sino también en empresas privadas. Noruega estableció cuotas en los consejos empresariales desde 2008 con relativo éxito. De ahí que ahora han seguido también países como Bélgica, España, Holanda, Islandia

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25 Los otros países fueron Bangladesh, Kenya y África del Sur. FUENTE: BUVINIC Mayra. *The gender perspectives of the financial crisis World Bank 2009*.

26 SABARWAL S et.al. *The global financial crisis: assesing vulnerability for women and children. World Bank 2009*.

27 EUROPEAN COMMISSION. *The impact of the economic crisis on the situation of women and men and on gender equality policies*.

28 Argentina 1991.

e Italia. Brasil es pionero en Latinoamérica al implementar una cuota en las empresas del 40%, aunque por el momento sólo abarca empresas públicas.

Existe la certeza de que esas medidas pronto contribuirán a visibilizar los sesgos que aún subsisten en las empresas y a erradicarlos.

c) Protección de derecho fundamentales

Pero a decir verdad, muchos de los temas de los que he hablado son evidentes violaciones a derechos fundamentales. Las medidas de austeridad han impactado derechos a un trabajo digno, a la seguridad social, al acceso a la justicia, entre otros.

Por eso es relevante lo dicho por el Comisario para los Derechos Humanos del Consejo de Europa, quien advirtió que "no se puede prescindir de los derechos civiles, políticos, económicos, sociales y culturales consagrados en el derecho internacional en materia de derechos humanos en épocas de penuria, ya que dichos derechos son esenciales para una recuperación sostenible e inclusiva".[29]

Ello coloca nuevamente el dedo en el renglón en que los jueces debemos estar atentos a los imperativos que impone la crisis en términos de austeridad, pero al mismo tiempo garantizar los derechos sociales ya reconocidos de manera enérgica.

En ocasiones podrían justificarse reducciones en el fondeo de programas sociales, pero de ser el caso dichas reducciones tendrían que estar plenamente justificadas, ser razonables y probar que no existe una mejor alternativa.

Pero especialmente tenemos que garantizar el principio de progresividad en el caso de los grupos prioritarios y vulnerables. A mi modo de ver, respecto de éstos cualquier titubeo en garantizar el ejercicio de derechos fundamentales puede ocasionar retrocesos más allá del inicio de la crisis.

Llaman la atención las recomendaciones del Comisario para los Derechos Humanos del Consejo de Europa. Se incluye la sugerencia

[29] COMISARIO PARA LOS DERECHOS HUMANOS DEL CONSEJO DE EUROPA. *La protección de los derechos humanos en tiempos de crisis económica*. 2013.

de hacer una evaluación de los efectos de las medidas de austeridad en el plano de la igualdad, pues el ajuste no debe ser discriminatorio ni es justificante para reducir el impacto de las medidas afirmativas a las que se hayan comprometido los Estados, en tanto garantes de la igualdad.

Por otra parte, como también reconoce la Organización de las Naciones Unidas, dadas las consecuencias que las políticas de ajuste pudieran tener en individuos o grupos, es necesario que éstos tengan pleno acceso a la justicia, mecanismos de denuncia y organismos jurisdiccionales independientes.

Valdría la pena retomar lo que algunas estudiosas han detectado en cuanto a los obstáculos que enfrentan las mujeres en su acceso a la justicia. Los costos de ésta; las probabilidades de ser nuevamente victimizadas; la impericia y sesgos de género de algunos operadores jurídicos, y el rechazo de la comunidad para aquellas que defienden sus derechos por la vía jurídica son —entre otros— elementos que vale la pena tomar en cuenta cuando el juzgador analiza un caso.

De ahí a importancia de que el funcionamiento del Poder Judicial no se comprometa en tiempos de austeridad. Han sido cortes constitucionales las que han podido defender derechos políticos y sociales en las crisis, por lo que bien vale la pena tener bien aceitados esos mecanismos para evitar actos desproporcionados en el ajuste que pudieran afectar las capacidades del Estado Constitucional de derecho para resolver sus propias convulsiones.[30]

[30] BIRMONTIENE Toma. *Challenges for the constitutional review: protection of social rights during an economic crisis.*

Prefacio a la justicia electoral en México*

Manuel González Oropeza**

El contencioso electoral en México

Introducción

Como es sabido, la democracia en el Estado moderno tiene un papel muy importante. Gracias a ella se concibe a México como un Estado de Derecho que adopta frente al orden jurídico una doble función: la activa, por la cual crea al derecho, lo aplica, interpreta y sanciona mediante las funciones tradicionales de sus poderes públicos —Legislativo, Ejecutivo y Judicial—, y la pasiva, al someterse al derecho cuando se comete alguna arbitrariedad con sus gobernados.

De ahí que sea posible afirmar que el Estado sin derecho no puede existir, sería un fenómeno de coacción, y que el derecho sin Estado sería una norma sin eficacia, una mera idealidad normativa. El Estado y el derecho, entonces, tienen una relación mutua en un régimen constitucional como el de México. Todo Estado de Derecho presupone un régimen democrático y una aplicación constante del principio de legalidad. En el país, dicho Estado no surgió repentinamente, es el fruto de una larga evolución histórica y producto de largas e intensas

* Election Administration in Lebanon, Beirut, 4-5 december, 2008.

** Magistrado de la Sala Superior del Tribunal Electoral del Poder Judicial de la Federación.

luchas sociales. La Constitución Política de los Estados Unidos Mexicanos (CPEUM) es la ley suprema que estructura sus órganos, define el régimen político y tutela los derechos fundamentales; en ésta se determinan la forma de gobierno, la organización y las atribuciones de los poderes públicos, así como las garantías que aseguran los derechos del hombre y del ciudadano. La facultad absoluta de un pueblo para autodeterminarse mediante la expedición de una ley suprema es parte de su soberanía.

La Carta Magna no sólo contiene los principios jurídicos que se designan a los órganos supremos del Estado, sino también los modos en que se crean, sus relaciones mutuas, su ámbito de acción y la situación de cada uno respecto del poder estatal. La importancia y trascendencia de la CPEUM queda manifestada en los artículos 40, 41, 49, 99, 116, 128, 133 y 135. Estos preceptos dan la esencia de su constitucionalismo.

Todas las autoridades de México, independientemente de su jerarquía (federal, estatal o municipal), tienen el deber o la obligación de aplicar la Constitución ante cualquier ley que se oponga a ésta y deben ceñir su actuación a sus mandamientos, así lo proclama el principio de la supremacía constitucional contenido en el artículo 133.

De igual forma, la propia CPEUM plantea la introducción de derechos políticos y acciones, competencias, procedimientos, órganos que conozcan de éstos, resoluciones, y efectos de las sentencias y cumplimiento de los mandatos que contienen, todo ello por medio de un sistema electoral que permite confirmar la soberanía del pueblo mexicano, su federación y la democracia representativa que impera en su territorio. En este contexto, se encuentran regulados los mecanismos que el pueblo de México tiene para dar solución a las controversias que se derivan de los procesos electorales.

En el sistema legal mexicano se ha considerado, casi en todos los casos, que la regulación de las elecciones para la renovación periódica de los poderes públicos es una atribución del Estado. Al respecto, existe una historia rica en experiencias constitucionales que han dado cierta regularidad en la aplicación de las leyes y en el funcionamiento de las instituciones electorales.

Desde la primera Constitución Federal de los Estados Unidos Mexicanos de 1824 se reconoció como forma de gobierno para el país, la

de una República representativa, lo que conlleva la necesidad de realizar procesos electorales periódicos para elegir a los ciudadanos que habrán de integrar los órganos de gobierno. De igual manera, desde esa época y hasta 1993, rigió el principio de calificación política de las elecciones de diputados y senadores —con un sistema de autocalificación mediante colegios electorales, cuya integración sólo tuvo algunas modalidades a lo largo del tiempo— y, hasta 1996, para la de presidente de la República —mediante un sistema de heterocalificación por medio de la Cámara de Diputados erigida en Colegio Electoral—, lo cual generaba que dichos órganos resolvieran, en última instancia, las dudas o los conflictos acerca de las elecciones federales.

A continuación se esbozarán algunos aspectos que se estiman importantes para clarificar la regulación de las elecciones en México de 1977 a 1996, periodo durante el cual predominó lo que la doctrina ha denominado el contencioso administrativo electoral, que hace referencia a los principios rectores de la función electoral y a ésta como responsabilidad del Estado.

Función electoral como responsabilidad del Estado

Es importante señalar que la posición constitucional acerca de la función electoral como responsabilidad del Estado ha existido desde 1824 y hasta nuestros días; el texto de las siguientes leyes da cuenta de ello.

1) Ley Federal de Organizaciones Políticas y Procesos Electorales (LOPPE), del 28 de diciembre de 1977. Dicho ordenamiento legal fue producto de la reforma constitucional del 6 de diciembre de 1976, en cuyo artículo 2 se estableció lo siguiente:

> Las autoridades competentes y los organismos político-electorales, tendrán a su cargo velar por el libre desarrollo de las actividades de las organizaciones y garantizarán la efectividad del sufragio y la autenticidad e imparcialidad de las elecciones en los términos de esta ley.

2) Con la reforma constitucional del 11 de diciembre de 1986, se retoma el tema de la corresponsabilidad, y en el artículo 60 de la CPEUM se estableció:

Corresponde al Gobierno Federal la preparación, desarrollo y vigilancia de los procesos electorales. La ley determinará los organismos que tendrán a su cargo esa función y la debida corresponsabilidad de los partidos políticos y de los ciudadanos.

3) La reforma a la Constitución mexicana del 5 de mayo de 1990, en su artículo 41, párrafo 7, señaló:

La organización de las elecciones federales es una función que se ejerce por los Poderes Legislativo y Ejecutivo de la Unión, con la participación de los partidos políticos nacionales y de los ciudadanos según lo disponga la ley. Esta función se realizará a través de un organismo público (Instituto Federal Electoral) dotado de personalidad jurídica y patrimonio propios. La certeza, legalidad, imparcialidad, objetividad y profesionalismo serán principios rectores en el ejercicio de esa función estatal.

4) Con la reforma constitucional del 19 de abril de 1994, se dispuso en el artículo 41, párrafos 8, 9 y 10, lo siguiente:

La organización de las elecciones federales es una función estatal que se realiza a través de un organismo público autónomo, dotado de personalidad jurídica y patrimonio propios, en cuya integración concurren los Poderes Ejecutivo y Legislativo de la Unión, con la participación de los partidos políticos nacionales y de los ciudadanos según lo disponga la ley. En el ejercicio de esa función estatal, la certeza, legalidad, independencia, imparcialidad y objetividad serán principios rectores.

El organismo público será autoridad en la materia, profesional en su desempeño y autónomo en sus decisiones; contará en su estructura con órganos de dirección, ejecutivos, técnicos y de vigilancia. El órgano superior de dirección se integrará por Consejeros y Consejeros Ciudadanos designados por los Poderes Legislativo y Ejecutivo y por representantes nombrados por los partidos políticos. Los órganos ejecutivos y técnicos dispondrán del personal calificado necesario para prestar el servicio profesional electoral. Los órganos de vigilancia se integrarán mayoritariamente por representantes de los partidos políticos nacionales. Las mesas directivas de casillas estarán integradas por ciudadanos.

El organismo público agrupará para su desempeño, en forma integral y directa, además de las que le determine la ley, las actividades relativas al padrón electoral,

preparación de la jornada electoral, cómputos y otorgamiento de constancias, capacitación electoral y educación cívica e impresión de materiales electorales. Asimismo, atenderá lo relativo a los derechos y prerrogativas de los partidos políticos. Las sesiones de todos los órganos colegiados electorales serán públicas en los términos que disponga la ley.

5) La reforma a la Constitución federal del 22 de agosto de 1996, en su artículo 41, párrafo 2, base III, estableció:

III. La organización de las elecciones federales es una función estatal que se realiza a través de un organismo público autónomo denominado Instituto Federal Electoral, dotado de personalidad jurídica y patrimonio propios, en cuya integración participan el Poder Legislativo de la Unión, los partidos políticos nacionales y los ciudadanos, en los términos que ordene la ley. En el ejercicio de esa función estatal, la certeza, legalidad, independencia, imparcialidad y objetividad serán principios rectores.

El Instituto Federal Electoral será autoridad en la materia, independiente en sus decisiones y funcionamiento y profesional en su desempeño; contará en su estructura con órganos de dirección, ejecutivos, técnicos y de vigilancia. El Consejo General será su órgano superior de dirección y se integrará por un consejero Presidente y ocho consejeros electorales, y concurrirán, con voz pero sin voto, los consejeros del Poder Legislativo, los representantes de los partidos políticos y un Secretario Ejecutivo; la ley determinará las reglas para la organización y funcionamiento de los órganos, así como las relaciones de mando entre éstos. Los órganos ejecutivos y técnicos dispondrán del personal calificado necesario para prestar el servicio profesional electoral. Las disposiciones de la ley electoral y del Estatuto que con base en ella aprueba el Consejo General, regirán las relaciones de trabajo de los servidores del organismo público. Los órganos de vigilancia se integrarán mayoritariamente por representantes de los partidos políticos nacionales. Las mesas directivas de casilla estarán integradas por ciudadanos.

El consejero Presidente y los consejeros electorales del Consejo General serán elegidos, sucesivamente, por el voto de las dos terceras partes de los miembros presentes de la Cámara de Diputados, o en sus recesos por la Comisión Permanente, a propuesta de los grupos parlamentarios. Conforme al mismo procedimiento, se designarán ocho consejeros electorales suplentes, en orden de prelación. La ley establecerá las reglas y el procedimiento correspondientes.

El consejero Presidente y los consejeros electorales durarán en su cargo siete años y no podrán tener ningún otro empleo, cargo o comisión, con excepción

de aquellos en que actúen en representación del Consejo General y de los que desempeñen en asociaciones docentes, científicas, culturales, de investigación o de beneficencia, no remunerados. La retribución que perciban el consejero Presidente y los consejeros electorales será igual a la prevista para los Ministros de la Suprema Corte de Justicia de la Nación.

El Secretario Ejecutivo será nombrado por las dos terceras partes del Consejo General a propuesta de su Presidente.

La ley establecerá los requisitos que deberán reunir para su designación el consejero Presidente del Consejo General, los Consejeros Electorales y el Secretario Ejecutivo del Instituto Federal Electoral, los que estarán sujetos al régimen de responsabilidades establecido en el Título Cuarto de esta Constitución.

Los consejeros del Poder Legislativo serán propuestos por los grupos parlamentarios con afiliación de partido en alguna de las Cámaras. Sólo habrá un Consejero por cada grupo parlamentario no obstante su reconocimiento en ambas Cámaras del Congreso de la Unión.

El Instituto Federal Electoral tendrá a su cargo en forma integral y directa, además de las que le determine la ley, las actividades relativas a la capacitación y educación cívica, geografía electoral, los derechos y prerrogativas de las agrupaciones y de los partidos políticos, al padrón y lista de electores, impresión de materiales electorales, preparación de la jornada electoral, los cómputos en los términos que señale la ley, declaración de validez y otorgamiento de constancias en las elecciones de diputados y senadores, cómputo de la elección de Presidente de los Estados Unidos Mexicanos en cada uno de los distritos electorales uninominales, así como la regulación de la observación electoral y de las encuestas o sondeos de opinión con fines electorales. Las sesiones de todos los órganos colegiados de dirección serán públicas en los términos que señale la ley.

Como puede apreciarse, la función electoral en México, durante el periodo que se comenta y hasta la fecha, ha correspondido al Estado, el cual la ejerce por medio de un órgano constitucional autónomo, en cuya integración participan el Poder Legislativo de la Unión, los partidos políticos nacionales y los ciudadanos; se ha excluido al Poder Ejecutivo de la integración y del funcionamiento de los órganos electorales federales, a fin de garantizar la autonomía e independencia del organismo público que tiene a su cargo el ejercicio de dicha función.

Principios rectores de la función electoral

El control de constitucionalidad es producto de la evolución histórica del pueblo mexicano, ya que juega un papel muy importante para la democracia en el país. Dicho principio puede definirse como el primero de todos los principios electorales, en tanto implica que todo acto o resolución en esta materia debe quedar sujeto a lo dispuesto en la CPEUM.

No fue sino hasta la consolidación del sistema de justicia electoral, en 1996, cuando tal principio se estableció de manera general y permanente, ya que con anterioridad existió parcialmente, tal y como podrá constatarse más adelante.

Así, en la citada LOPPE (1977) se previó, únicamente, en su artículo 77, lo siguiente:

> ARTICULO 77.- La Comisión Federal Electoral es el organismo autónomo, de carácter permanente, con personalidad jurídica propia, encargado de **velar por el cumplimiento de las normas constitucionales**,[§] las contendidas en esta ley y demás disposiciones que garantizan el derecho de organización política de los ciudadanos mexicanos y responsable de la preparación desarrollo y vigilancia del proceso electoral.

Con la reforma de 1996, logró establecerse un sistema de justicia electoral integral, el cual cubrió prácticamente todo el universo de leyes, actos y resoluciones electorales, tanto federales como locales, desde el doble ángulo de legalidad y constitucionalidad que, sin embargo, no será objeto de estudio del presente trabajo.

Además del principio que define la forma de gobierno —vigente desde la Constitución de 1917— como una República representativa, democrática y federal, existen otros principios rectores de la función electoral, como la renovación de poderes mediante elecciones libres, auténticas y periódicas (artículo 41, párrafo 2); sufragio universal, libre, secreto y directo (artículo 41, apartado I, párrafo 2), y el principio de definitividad de las distintas etapas del proceso electoral (artículo 41, apartado IV).

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§ Énfasis añadido.

Asimismo, es de resaltarse el hecho de que con motivo de la reforma constitucional del 6 de abril de 1990, la organización de las elecciones debe sujetarse a los principios de certeza, legalidad, imparcialidad y objetividad, tal y como se advierte del texto original que a continuación se transcribe:

> La organización de las elecciones federales es una función estatal que se ejerce por los Poderes Legislativo y Ejecutivo de la Unión, con la participación de los partidos políticos nacionales y de los ciudadanos según lo disponga de [sic] ley. Esta función se realizará a través de un organismo público dotado de personalidad jurídica y patrimonio propios. La certeza, legalidad, imparcialidad, objetividad y profesionalismo serán principios rectores en el ejercicio de esta función estatal.

A dichos principios se adicionó el de independencia, a partir de la reforma constitucional del 19 de abril de 1994, como a continuación se constata:

> La organización de las elecciones federales es una función estatal que se realiza a través de un organismo público autónomo, dotado de personalidad jurídica y patrimonio propios, en cuya integración concurren los Poderes Ejecutivo y Legislativo de la Unión, con la participación de los partidos políticos nacionales y de los ciudadanos según lo disponga la ley. En el ejercicio de esa función estatal, la certeza, legalidad, independencia, imparcialidad y objetividad serán principios rectores.

Cabe señalar que, con anterioridad a las citadas reformas constitucionales, en las leyes reglamentarias únicamente se hizo referencia a los principios relativos a la efectividad del sufragio, a la autenticidad e imparcialidad de las elecciones y a la equidad en la contienda.

Es importante precisar, a continuación, lo que debe entenderse por cada uno de los citados principios rectores de la función electoral, partiendo de la definición que el propio Instituto Federal Electoral (IFE)[1] ofrece en su portal de internet, a saber:

[1] A partir de la reforma constitucional en materia político-electoral publicada en el Diario Oficial de la Federación (DOF) el 10 de febrero de 2014, el Instituto Federal Electoral (IFE) es sustituido por el Instituto Nacional Electoral (INE).

1. Certeza. Alude a la necesidad de que todas las acciones que desempeñe el Instituto Federal Electoral estén dotadas de veracidad, certidumbre y apego a los hechos, esto es, que los resultados de sus actividades sean completamente verificables, fidedignos y confiables.
2. Legalidad. Implica que en todo momento y bajo cualquier circunstancia, en el ejercicio de las atribuciones y el desempeño de las funciones que tiene encomendadas el Instituto Federal Electoral, se debe observar, escrupulosamente, el mandato constitucional que las delimita y las disposiciones legales que las reglamentan.
3. Independencia. Hace referencia a las garantías y atributos de que disponen los órganos y autoridades que conforman la institución para que sus procesos de deliberación y toma de decisiones se den con absoluta libertad y respondan única y exclusivamente al imperio de la ley, afirmándose su total independencia respecto a cualquier poder establecido.
4. Imparcialidad. Significa que en el desarrollo de sus actividades, todos los integrantes del Instituto Federal Electoral deben reconocer y velar permanentemente por el interés de la sociedad y por los valores fundamentales de la democracia, supeditando a éstos, de manera irrestricta, cualquier interés personal o preferencia política.
5. Objetividad. Implica un quehacer institucional y personal fundado en el reconocimiento global, coherente y razonado de la realidad sobre la que se actúa y, consecuentemente, la obligación de percibir e interpretar los hechos por encima de visiones y opiniones parciales o unilaterales, máxime si éstas pueden alterar la expresión o consecuencia del quehacer institucional.

Autoridades administrativas electorales

En México, la organización de las elecciones federales estuvo a cargo de las autoridades estatales y municipales hasta 1946, fecha en la que se federalizó la función electoral; dichas actividades se concentraron en un organismo administrativo dependiente de la Secretaría de Gobernación, denominado Comisión Federal de Vigilancia Electoral, mismo que a partir de la legislación de 1951 se denominó Comisión Federal Electoral, la cual subsistió hasta la vigencia del Código Federal Electoral de 1987, pues en aquel momento se creó el IFE.

A continuación se formulan algunas consideraciones en torno a las leyes del periodo que se comenta en el presente estudio, que resultan esclarecedoras de los avances que se han dado con relación a la organización de las elecciones en México.

Así, en 1977, durante el sexenio del presidente José López Portillo, se expidió la LOPPE, que abrogó la Ley Federal Electoral del 5 de enero de 1973. Entre las novedades que trajo consigo esa legislación electoral, se encontraron las siguientes: la organización política que deseara obtener su registro definitivo como partido político, debía solicitarlo ante la Comisión Federal Electoral y no ante la Secretaría de Gobernación, como se hacía anteriormente. En cuanto al registro condicionado al resultado de las elecciones, la Comisión referida debía convocar oportunamente a las organizaciones que pretendían obtener ese tipo de registro y señalar los plazos para presentar la solicitud y los requisitos para obtenerlo. Dicho organismo, dentro del plazo máximo de 45 días naturales, debía resolver lo conducente y su resolución era definitiva e inatacable.

Ahora bien, en el sexenio del presidente Miguel de la Madrid, se publicó en el Diario Oficial de la Federación (DOF), el 12 de febrero de 1987, el Código Federal Electoral, que regulaba los derechos y obligaciones político-electorales de los ciudadanos; la organización, la función, los derechos y las obligaciones de los partidos políticos nacionales, y las elecciones ordinarias y extraordinarias de los poderes Legislativo y Ejecutivo de la Unión.

En cuanto a la organización de las elecciones, dicha norma electoral tuvo como novedades las siguientes: establecer que correspondía a las autoridades federales, estatales y municipales, a la Comisión Federal Electoral, a las comisiones locales, a los comités distritales y a las mesas de casilla, en el ámbito de sus respectivas competencias, vigilar y garantizar el desarrollo del proceso electoral, la efectividad del sufragio y la autenticidad e imparcialidad de las elecciones federales; modificar la integración de los organismos electorales, a efecto que los comisionados de los partidos políticos correspondieran a la fuerza electoral de dichos institutos políticos, y conferir a la Comisión Federal Electoral la facultad de integrar las subcomisiones que considerara necesarias, así como registrar concurrentemente, con los otros organismos electorales, a los candidatos a puestos federales.

El 1 de diciembre de 1988, al tomar posesión como presidente de la República, el licenciado Carlos Salinas de Gortari propuso a la nación un nuevo acuerdo político. La situación obedeció, entre otras razones, a lo controvertido del proceso electoral de 1988, a las demandas de los ciudadanos y los partidos políticos expresadas en multitud de foros

de revisar la legislación federal electoral, y al deseo gubernamental de modernizar y perfeccionar la vida democrática del país.

Con respecto de la convocatoria formulada por el presidente de la República, la Comisión Federal Electoral acordó, por unanimidad, en la sesión del 9 de enero de 1989, la creación de una comisión especial para la consulta pública acerca de la reforma electoral y la concertación entre los partidos políticos nacionales, que tuvo como propósito primordial convocar a ciudadanos, partidos políticos, asociaciones políticas, organizaciones sociales e instituciones académicas, a expresar sus opiniones y propuestas en esta importante materia. Dicha comisión especial se instaló el 17 de enero de 1989 y convocó a la celebración de audiencias públicas de consulta. Como resultado de ello, el 5 de abril de 1990, el presidente Carlos Salinas de Gortari expidió el decreto por el que se reformaron y adicionaron los artículos 5; 35, fracción III; 36, fracción I; 41, 45, 54, 60 y 73, fracción VI, base 3; también se derogaron los artículos transitorios 17, 18 y 19 de la Constitución, lo cual fue publicado en el DOF el 6 de abril de 1990.

Uno de los aspectos más importantes de la mencionada reforma política fue la modificación del artículo 41 constitucional para establecer, entre otras cuestiones, que la organización de las elecciones federales es una función estatal que se ejerce por medio de los poderes Legislativo y Ejecutivo de la Unión, con la participación de los partidos políticos nacionales y de los ciudadanos, según lo disponga la ley, así como la creación del IFE, organismo público dotado de personalidad jurídica y patrimonio propios, encargado de realizar la función estatal de organizar las elecciones según los principios de certeza, legalidad, imparcialidad, objetividad y profesionalismo.

Por primera vez en la historia de México, en el ámbito constitucional, se le reconoció al organismo encargado de organizar las elecciones su calidad de autoridad electoral, de profesional en su desempeño y autónomo en sus decisiones.

Se estatuyó una nueva integración del órgano superior encargado de organizar las elecciones, al incluir la figura de consejero magistrado, que al no pertenecer ni a los Poderes de la Unión ni a las organizaciones partidistas, representaba, en su momento, un elemento de balance, de contrapeso, en la toma de decisiones.

Asimismo, se elevó a rango constitucional la integración de un servicio civil de carrera en materia electoral, que dio objetividad e imparcialidad al desarrollo de las tareas electorales.

Desde la fecha en que se creó el IFE, la normatividad constitucional y legal en la materia experimentó tres importantes procesos de reforma (1993, 1994 y 1996) que impactaron de manera especialmente significativa en la integración y en los atributos del organismo depositario de la autoridad electoral encargada de organizar las elecciones federales.

Entre los principales cambios e innovaciones que resultaron de esos procesos de reforma, destacan los siguientes:

1) En la reforma de 1993 se facultó a los órganos del IFE para llevar a cabo la declaración de validez y la expedición de constancias para la elección de diputados y senadores, así como para establecer topes a los gastos de campaña en las elecciones.
2) La reforma de 1994 incrementó el peso e influencia de los consejeros ciudadanos en la composición y el proceso de toma de decisión de los órganos de dirección, y les confirió la mayoría de los votos, además de ampliar las atribuciones de los órganos de dirección en los ámbitos estatal y distrital.
3) La reforma de 1996 reforzó la autonomía e independencia del IFE al desligar por completo al Poder Ejecutivo de su integración y reservar el voto en los órganos de dirección a los consejeros ciudadanos exclusivamente.

A diferencia de los organismos electorales que le precedieron, el IFE se constituyó como una institución de carácter permanente. Tiene su sede central en el Distrito Federal y se organiza con un esquema desconcentrado que le permite ejercer sus funciones en todo el territorio nacional. Por su naturaleza jurídica, reconocida constitucionalmente, el referido Instituto tiene como atributos:

1) Autonomía. Significa que no depende de ninguna autoridad ni tampoco forma parte de los Poderes de la Unión para el desempeño de sus funciones.
2) Personalidad jurídica y patrimonio propio. Se traduce en que se le otorga reconocimiento como órgano del Estado, con derechos y

obligaciones, con capacidad para disponer de los recursos públicos para la realización de las tareas que tiene encomendadas.
3) Carácter de permanente. Condición necesaria para fortalecer el desarrollo y cumplimiento de sus programas, fines y principios.
4) Profesionalismo en su desempeño. Implica el alto grado de eficiencia en sus funciones debido a que debe contar con personal capacitado y evaluado constantemente, mediante un servicio civil de carrera.

Es de resaltarse que el IFE tiene a su cargo, de forma integral y directa, todas las actividades relacionadas con la preparación, organización y conducción de los procesos electorales, así como aquéllas que resulten consecuentes con los fines que la ley le fija.

Entre sus actividades fundamentales pueden mencionarse las relacionadas con los siguientes rubros: capacitación y educación cívica; geografía electoral; derechos y prerrogativas de los partidos y las agrupaciones políticas; padrón y listas de electores; diseño, impresión y distribución de materiales electorales; preparación de la jornada electoral; cómputo de resultados; declaración de validez y otorgamiento de constancias en la elección de diputados y senadores, y regulación de la observación electoral, de las encuestas y de los sondeos de opinión.

Para cumplir con sus fines, el IFE cuenta con tres tipos de órganos que le permiten operar en todo el territorio nacional: de dirección, ejecutivos y técnicos, y de vigilancia. Si se atiende al principio de desconcentración en que se sustenta la organización y el funcionamiento del Instituto, dichos órganos se encuentran representados en los ámbitos central, estatal y distrital.

El Consejo General del Instituto Federal Electoral es el órgano superior de dirección; como órganos desconcentrados de la misma naturaleza existen 32 consejos locales (uno en cada entidad federativa) y 300 consejos distritales (uno en cada distrito electoral uninominal). A diferencia del citado Consejo, que es un órgano permanente, los consejos locales y distritales se instalan y sesionan únicamente durante los procesos electorales. Se integran de manera colegiada y sólo tienen derecho al voto los consejeros.

Además de estos órganos, se consideran las mesas directivas de casilla, que son las instancias facultadas para recibir la votación y realizar

el conteo inicial de los sufragios; se instalan y funcionan únicamente el día de la jornada electoral.

El referido Consejo General es responsable de vigilar el cumplimiento de las disposiciones constitucionales y legales en materia electoral, así como de velar que los principios de certeza, legalidad, independencia, imparcialidad y objetividad guíen todas las actividades de la institución.

El máximo órgano de dirección del IFE se encuentra integrado por 1 consejero presidente, 8 consejeros electorales, 1 consejero del Poder Legislativo por cada grupo parlamentario, representantes de los partidos políticos y el secretario ejecutivo. Los 9 consejeros que integran el Consejo tienen derecho a voz y voto, no así los demás miembros que componen dicho órgano.

Cabe señalar que las mesas directivas de casilla tienen a su cargo, el día de la jornada electoral, respetar y hacer respetar la libre emisión y efectividad del sufragio, garantizar el secreto del voto y asegurar la autenticidad del escrutinio y cómputo de la elección.

Como se sabe, las mesas directivas de casilla se integran por ciudadanos. Es de destacar que los partidos políticos tienen el derecho de designar representantes en dichas mesas.

En cuanto a los órganos ejecutivos y técnicos, se puede decir que éstos son permanentes y responsables de ejecutar todas las tareas técnicas y administrativas requeridas para el desarrollo del proceso electoral en cuestión, así como de dar cumplimiento a las resoluciones adoptadas por el Consejo General.

Autoridades jurisdiccionales

La regulación legal de los procesos electorales y las reglas referentes a la solución de controversias en esta materia tienen una añeja trayectoria en la historia del país. Desde la convocatoria a Cortes de 1809, cuando la Nueva España envió diputados a Cádiz, se han celebrado procesos eleccionarios con diferentes matices de justicia electoral. Se puede decir que durante casi 187 años prevaleció un sistema de calificación política en el que los Tribunales no tenían nada que decir, los conflictos electorales eran resueltos por los inconformes, es decir, por los propios partidos y candidatos, por medio de colegios electorales,

y la negociación, el arreglo, el consenso y la composición de intereses eran privilegiados frente al análisis jurídico: un sistema que de alguna manera funcionó por el propio arreglo institucional que existía en el país. Es indudable que el dominio hegemónico del Partido Revolucionario Institucional (PRI) contaba con un fuerte aliado en el sistema de calificación política; sin embargo, también hay que reconocer que gracias a una evolución importante de la sociedad civil y de los partidos políticos, la competencia electoral a partir de la década de 1970 se incrementó y empezó a demostrar que el sistema de la calificación política no era el más racional para solucionar el conflicto electoral, pues en México la mayoría de un solo partido no provocaba más que una respuesta parcial y falta de objetividad, siempre acomodada a esos intereses mayoritarios.

En esa época, a las oposiciones débiles en el país no les tocaban espacios de solución, los triunfos que obtenían eran fácilmente arrebatados por la composición política y, muchas veces, los intereses de esos grupos, no de poder sino de cierta protección de una parcela específica de la sociedad, eran satisfechos por medio de otras prebendas y composiciones; sin embargo, desde 1977 empezaron a idearse y a exigirse mecanismos para someter los conflictos electorales a las reglas de la ley.

Las bases para lograr la unidad del orden jurídico mexicano en materia electoral que rigen en la actualidad se encuentran en la creación del Tribunal de lo Contencioso Electoral (Tricoel) y del Tribunal Federal Electoral (Trife).

Tribunal de lo Contencioso Electoral

Con motivo de la reforma al artículo 60 de la CPEUM, del 12 de diciembre de 1986, se estableció en México el primer Tribunal especializado en materia electoral: el de lo Contencioso Electoral.

No obstante que el diseño de dicho Órgano Jurisdiccional fue muy limitado, calificado como Tribunal administrativo, dependiente presupuestal y administrativamente de la Secretaría de Gobernación, en cuyo procedimiento sólo eran admisibles las pruebas documentales y sus resoluciones eran exclusivamente declarativas y no vinculativas para los colegios electorales, el Tricoel ayudó a distensionar la situación

generada con motivo de la elección de 1988, puesto que la Comisión Federal Electoral —antecesora del IFE—, con base en las resoluciones de dicho Tribunal, coadyuvó a que no se desbordaran los conflictos antes de que llegaran a los colegios electorales.

El Tribunal de lo Contencioso Electoral se integraba por 7 magistrados numerarios y 2 supernumerarios designados por el Congreso de la Unión o su Comisión Permanente, a propuesta de los grupos parlamentarios, y tenía un carácter temporal, pues sólo funcionaba durante el proceso electoral.

El Código Federal Electoral, en su Libro Séptimo relativo a los recursos, nulidades y sanciones, contemplaba cuatro recursos impugnativos, cuya procedencia se vinculaba a las etapas del proceso electoral.

Así, durante la etapa preparatoria de la elección procedían los recursos de revocación, de revisión (RRV) y de apelación (RAP); en tanto que, para impugnar los cómputos distritales y la validez de cualquier elección, el recurso de queja.

La Comisión Federal Electoral era competente para resolver los recursos de revocación interpuestos en contra de sus propios actos; las comisiones estatales de vigilancia, respecto de los RRV interpuestos en contra de los actos de las delegaciones del Registro Nacional de Electores; las comisiones locales electorales, respecto de los recursos de revisión interpuestos en contra de los actos de los comités distritales electorales, y el Tribunal de lo Contencioso Electoral, respecto de los RAP interpuestos durante la etapa preparatoria y de los recursos de queja.

En las elecciones presidenciales de 1988, el Tricoel resolvió 21 recursos de apelación y 593 recursos de queja, de los cuales 529 fueron desechados y tan sólo 64 fueron declarados parcialmente fundados, sin que las resoluciones modificaran los resultados oficiales.

Las resoluciones que emitía el referido Tribunal sólo podían tener los siguientes efectos: confirmar, modificar o revocar el acto impugnado; ordenar a la Comisión Federal Electoral no expedir las constancias de mayoría cuando en la elección respectiva se hubieran dado los supuestos de nulidad de la elección previstos en dicho ordenamiento legal; ordenar a la mencionada Comisión no expedir constancia de asignación cuando en la elección respectiva se hubieran dado los supuestos de nulidad contemplados en esa ley, y ordenar a las comisiones locales electorales no expedir constancia de mayoría cuando en

la elección de senadores se hubieran dado los supuestos de nulidad previstos en la ley.

Expresamente, en el Código Federal Electoral se establecía que la nulidad (de votación y de elección, en su caso) únicamente podía ser declarada por el Colegio Electoral que calificara la elección respectiva. De su experiencia como Órgano Jurisdiccional, deben destacarse tres casos que revistieron, en su momento, una gran importancia. El primero fue el relativo al RAP número 2/87 interpuesto por el Partido Acción Nacional (PAN), en contra de actos de la Comisión Federal Electoral, en relación con la distribución de los distritos electorales uninominales entre las entidades federativas. El asunto fue resuelto el 12 de noviembre de 1987, por el cual se estableció el criterio que a continuación se transcribe:

> DISTRITOS ELECTORALES UNINOMINALES.- CRITERIO PARA DETERMINAR SU DEMARCACIÓN.- Conforme a lo dispuesto por el artículo 53 Constitucional en relación con los artículos 170 fracción XXI y 104 fracción VI del Código Federal Electoral, la expresión "teniendo en cuenta", no establece una obligación para que la división territorial de los Distritos Electorales Uninominales rehaga exclusiva y necesariamente de acuerdo con el último Censo General de Población sino que establece la referencia para que la autoridad competente tome la decisión que considere más adecuada. Debe sumarse a esto, la consideración de que pueden tenerse en cuenta otros datos valiosos que contribuyan a la mejor decisión de los órganos competentes en la distribución territorial. De sostenerse que sólo y exclusivamente el Censo General de Población debe determinar la distribución territorial de los Distritos Electorales Uninominales, independientemente de que resultaría una interpretación equivocada del artículo 53 constitucional, sería privar a los organismos competentes de la posibilidad de usar oros medios eficaces a su alcance y consecuentemente de hacer una más equitativa y conveniente distribución territorial, que es el fin último de dicho precepto constitucional. Expediente: RA/2/87 P.A.N. VS. Comisión Federal Electoral. Resuelto por mayoría de votos.

El segundo de los casos correspondió al recurso de queja número 315/88 interpuesto por el PRI en contra del XI Comité Distrital Electoral del Estado de Michoacán con cabecera en Jiquilpan, en relación con los requisitos de elegibilidad del candidato a diputado federal postulado por los partidos Popular Socialista (PPS), Auténtico de

la Revolución Mexicana (PARM) y Frente Cardenista de Reconstrucción Nacional (PFCRN), para la elección correspondiente al XI Distrito Electoral de la citada entidad federativa. El asunto fue resuelto el 9 de agosto de 1988, del cual se estableció el criterio que a continuación se transcribe:

> REQUISITOS DE ELEGIBILIDAD.- El Código Federal Electoral establece en su artículo 337 fracción V, que una elección será nula cuando el candidato a diputado de mayoría relativa, que haya obtenido constancia de mayoría en la elección respectiva, no reúna los requisitos de elegibilidad previstos por la Constitución Política de los Estados Unidos Mexicanos.
>
> El artículo 55 de la Carta Magna precisa cuáles son los requisitos para ser diputado así como el artículo 58 establece los que deben satisfacerse por los senadores y el artículo 82 consigna los relativos para Presidente de la República.
>
> Por lo que, de conformidad al principio de supremacía constitucional consagrado en el artículo 133 del máximo ordenamiento y en base al principio de aplicación estricta que impera en materia contenciosa electoral es de lógica-jurídica concluir que deben satisfacerse los requisitos de elegibilidad previstos por la Constitución Política de los Estados Unidos Mexicanos y a los cuales remite el propio artículo 337 del Código Federal Electoral. Expediente: rq/315/88 P.R.I. VS. XI Comité Distrital Electoral del Estado de Michoacán. Resuelto por unanimidad. Expedientes relacionados: RQ/219/88 y RQ/278/88.

El tercer asunto correspondió al recurso de queja número 07/88 interpuesto por el PARM en contra del cómputo distrital efectuado por el Comité Distrital del VII Distrito Electoral del Estado de Guerrero. El asunto fue resuelto el 10 de agosto de 1988.

El Tribunal de lo Contencioso Electoral no estableció criterio alguno en relación con este asunto, sin embargo, por la trascendencia del mismo, amerita esbozar la problemática a la que se enfrentó dicho Órgano Jurisdiccional.

El PARM sostuvo en su recurso de queja que el VII Comité Distrital del Estado de Guerrero había violado el procedimiento legal de cómputo porque se contabilizaron actas alteradas que no coincidían con las copias en poder de los partidos políticos. El Tribunal se enfrentó ante la situación de tener que examinar y valorar todas las pruebas documentales aportadas por las partes contendientes y estimar válidas las

actas finales de escrutinio y cómputo de casillas aportadas por el actor y no las remitidas por el citado Comité, por la razón principal de que las actas no coincidentes remitidas por la responsable no se encontraban firmadas por los representantes de los partidos políticos ni se advertía que no las hubieran firmado por ausencia o negativa de éstos. Sin embargo, ante lo limitado de sus atribuciones y de la imposibilidad jurídica y material de tener acceso a los paquetes electorales que se encontraban en la Oficialía Mayor de la Cámara de Diputados, el Tricoel consideró infundado el recurso de queja y dejó a salvo los derechos del enjuiciante para que los hiciera valer en la vía y forma que estimara pertinente.

Lo trascendente de este fallo fue el hecho de que, con base en el análisis jurídico de las actas finales de escrutinio y cómputo realizado por el referido Órgano Jurisdiccional, la Comisión Federal Electoral decidió no expedir la constancia de mayoría a los candidatos del PRI; por su parte, el Colegio Electoral de la Cámara de Diputados hizo lo propio, toda vez que adoptó el criterio de no abrir los paquetes electorales en cuestión y otorgar, ante la evidencia detectada por el mencionado Tribunal, el triunfo al PARM.

Con la actuación del Tricoel, se demostró que la solución de controversias electorales no era cuestión política sino jurisdiccional, dilucidable mediante la aplicación estricta de la ley.

Es importante señalar que la inequidad en los procesos electorales y la presión de los partidos políticos ante instancias internacionales provocaron la creación del Tribunal de lo Contencioso Electoral, concebido como un órgano autónomo e independiente de los poderes públicos. Éste fue el primer ejercicio de ruptura con la división tradicional de los poderes públicos, pues se requería de un órgano objetivo que no tuviera vinculaciones directas con los tres poderes tradicionales.

El referido Órgano Jurisdiccional tuvo, sin embargo, grandes deficiencias en su creación, en realidad se le consideró un mecanismo para que los actos de los órganos electorales —entonces dependientes exclusivamente del Poder Ejecutivo por medio de la Secretaría de Gobernación, cuyo titular presidía la Comisión Federal Electoral— pudieran ser revisados no por el mecanismo que se tenía anteriormente, mediante el recurso administrativo, sino por uno jurisdiccional, por conducto de ese nuevo órgano, distinto y autónomo.

Tal vez el proceso electoral de 1988 fue uno de los más discutidos en la historia de México; en realidad, las conciencias de los partidos y de la sociedad despertaron gracias a una participación extraordinaria que rebasó las expectativas del propio sistema tal y como estaba diseñado.

Cuando llegó el momento de que el Colegio Electoral calificara la elección presidencial, éste se encontró con una Cámara por primera vez dividida; no había en el país una mayoría que pudiera tomar decisiones, lo que originó que la actuación de ese órgano electoral fuera un desorden, una vergüenza para México, pues sucedieron infinidad de actos que fueron desde la toma de la tribuna hasta el bloqueo de cualquier posible solución, lo que hizo imposible que pudiera dictaminarse la validez de la elección presidencial.

El sistema de autocalificación o el sistema político de calificación empezaba a pasar por sus primeras incongruencias; no era posible que por medio de negociaciones se calificara el acto más importante para la vida política nacional, es decir, la calificación de la elección presidencial. Entonces, a pesar de haber sido concebido legalmente el Tricoel como un órgano autónomo de carácter administrativo y temporal, al poder ser modificadas sus resoluciones recaídas a los recursos de queja —vinculados con los resultados de las elecciones de diputados y senadores, así como la presidencial—, libremente, por los colegios electorales de las Cámaras —únicos facultados en aquel entonces para declarar la nulidad de alguna elección—, se preservó el contencioso electoral de carácter político.

Tribunal Federal Electoral

Después de grandes debates se convocó a una reforma política nacional y se creó un nuevo mecanismo de solución jurídica a los problemas políticos. Del resultado de las elecciones presidenciales de 1988, se reformó el artículo 41 constitucional en 1990 con el fin de crear el Trife como Órgano Jurisdiccional autónomo, que resolvería en forma definitiva los conflictos electorales federales, cuya limitante a su potestad fue el hecho de que las resoluciones que se dictaran con posterioridad a la jornada electoral podrían ser revisadas y, en su caso, modificadas por los colegios electorales mediante el voto de las dos terceras

partes de sus miembros presentes, cuando de su revisión se pudiera deducir que existían violaciones a las reglas de admisión y valoración de pruebas, y en la motivación del fallo, o cuando el mismo fuera contrario a derecho.

Las resoluciones de los colegios electorales seguían siendo para aquella época definitivas e inatacables, sin embargo, debe destacarse que se dio mayor fuerza vinculativa a las resoluciones del Trife.

El Tribunal Federal Electoral se estructuró, originalmente, de una Sala Central, de carácter permanente, integrada por 5 miembros, y de 4 Salas Regionales de carácter temporal —sólo funcionaban durante el proceso electoral— conformadas por 3 miembros. Los magistrados debían satisfacer los mismos requisitos que se exigían para los ministros de la Suprema Corte de Justicia de la Nación (SCJN), además de aquéllos que aseguraran su desvinculación política; eran designados por las dos terceras partes de los miembros presentes de la Cámara de Diputados, de entre los propuestos —por lo menos 2 para cada vacante—, por el Ejecutivo federal.

En 1993 se modificó el sistema de autocalificación electoral y se creó una Sala de Segunda Instancia en el Trife, la cual conoció del recurso de reconsideración (REC). Con su creación, el Colegio Electoral de la Cámara de Diputados se limitó sólo a calificar la elección de presidente de los Estados Unidos Mexicanos y el control de las elecciones de diputados y senadores quedó a cargo del referido Tribunal, con lo que sus resoluciones devinieron definitivas e inatacables, lo que terminó con el principio de autocalificación política que dominó la historia del país por más de 100 años.

Al efecto, la facultad de determinar la legalidad y validez de la elección de senadores y diputados pasó a ser una atribución de los órganos del IFE y, sólo en caso de controversia, el Trife intervenía en última instancia y previa interposición del medio de impugnación correspondiente, cuya resolución era definitiva e inatacable.

Es importante precisar que la Sala de Segunda Instancia se integraba por el presidente del Tribunal Federal Electoral, quien la presidía, y 4 miembros de la Judicatura federal designados por las dos terceras partes de la Cámara de Diputados o, en su caso, por la Comisión Permanente, a propuesta del Pleno de la SCJN. Esta Sala sólo funcionaba

para conocer de las impugnaciones (los llamados REC) en contra de las resoluciones de fondo recaídas a los recursos de inconformidad, así como contra la asignación de diputados por representación proporcional, otorgándoles a sus resoluciones, como se apuntó, efectos definitivos e inatacables.

Cabe señalar que en el proceso electoral de 1991, el Trife conoció de 465 recursos de inconformidad y 2 RAP. Fortalecido el Trife, resolvió en el proceso electoral de 1994, 80,083 RAP y 1,232 recursos de inconformidad.

De la experiencia del mencionado órgano como máxima autoridad jurisdiccional, deben destacarse las nulidades de las elecciones de diputados de mayoría relativa en el V Distrito Electoral Federal en Coahuila, en el XXII Distrito Electoral Federal en Veracruz y en el IV Distrito Electoral Federal en el estado de Puebla.

En el proceso electoral correspondiente a 1991, el Trife declaró la nulidad de elección de diputado de mayoría relativa del V Distrito Electoral Federal en el estado de Coahuila, ello en virtud del recurso de inconformidad interpuesto por el PAN, el PFCRN y el Partido del Trabajo (PT), en contra de los resultados consignados en la correspondiente acta de cómputo distrital. El recurso se resolvió el 5 de octubre de 1991, al que le correspondió el número de expediente SD-II-RI-019/91.

De conformidad con las pruebas aportadas por los actores, quedaron acreditadas las irregularidades consistentes en la entrega extemporánea de los paquetes electorales en 114 casillas, sin justificación, por lo que se actualizó la causal de nulidad de la elección.

Por otra parte, durante el proceso electoral de 1994, se declaró la nulidad de la elección correspondiente al Distrito Electoral Federal XXII en el estado de Veracruz, con motivo del recurso de inconformidad interpuesto por el Partido de la Revolución Democrática (PRD), que fue resuelto el 30 de septiembre de 1994. Esto debido a que, de las constancias que obraban en el expediente SX-III-RIN-264/94, quedaron acreditadas las causales de nulidad consistentes en la no instalación de casillas en el lugar señalado por la ley y la integración indebida de los órganos receptores de la votación, principalmente, y, al haberse acreditado en un total de 80 casillas, se declaró la nulidad de la elección respectiva, dado que el Código Federal de Instituciones y Pro-

cedimientos Electorales (Cofipe) requería únicamente la comprobación de las irregularidades en 62 de dichas casillas.

Igualmente, se declaró la nulidad de la elección de diputado por el principio de mayoría relativa en el IV Distrito Electoral Federal en el estado de Puebla, con motivo del recurso de inconformidad interpuesto por el PRD en contra de los resultados consignados en el acta de cómputo distrital respectiva, al que le correspondió el número de expediente SC-I-RIN-199/94, que fue resuelto el 5 de octubre de 1994.

Lo anterior fue así en virtud de que se acreditaron las irregularidades consistentes en la ubicación de las casillas en un lugar distinto al señalado por la ley, así como por haberse realizado el cómputo y escrutinio en un local diferente al autorizado, entre otras, en un total de 79 casillas, lo que representó 28% de las instaladas en el mencionado distrito. De igual manera, se detectaron diversas irregularidades de manera generalizada, lo que originó que se decretara la nulidad de la elección respectiva.

A continuación se enuncian algunas tesis emitidas por el Tribunal Federal Electoral, que permiten apreciar su importancia para la consolidación de la justicia electoral en México.

1) Autoridad responsable en el RAP presentado por un ciudadano. Se considera al vocal del Registro Federal de Electores de la junta local ejecutiva correspondiente.
2) Casillas especiales. La falta de boletas electorales no constituye causa de nulidad.
3) Credencial para votar con fotografía. Cuando el ciudadano ha cumplido con los requisitos de ley es obligación de la autoridad competente expedirla, previa inscripción del mismo en el padrón electoral.
4) Credencial para votar con fotografía. Obligación de la autoridad de orientar adecuadamente a los ciudadanos para su expedición.
5) Error en la computación de los votos. Se entiende como las boletas contabilizadas de manera irregular para los efectos de la causal de nulidad.
6) Error o dolo en la computación de los votos. Análisis de la causal de nulidad cuando aparecen en blanco datos relativos al acta de escrutinio y cómputo.

7) Error o dolo en la computación de los votos. Cuando la diferencia entre el número de boletas entregadas y las sobrantes e inutilizadas configura la causal de nulidad.
8) Homonimias que no implican, necesariamente, una duplicidad de registros o de credenciales para votar.
9) Naturaleza del interés jurídico en el recurso de inconformidad.
10) Padrón electoral y listas nominales de electores. Su declaración de validez no requiere de la resolución total de los recursos de apelación interpuestos por los ciudadanos.
11) Partidos políticos. Carecen de interés jurídico para impugnar supuestas violaciones a los derechos políticos de los ciudadanos.
12) Acreditamiento de la personalidad de los ciudadanos en el recurso de apelación.
13) Principio de conservación de los actos públicos válidamente celebrados. Su aplicación en el recurso de inconformidad.
14) Efectos jurídicos de la falta de protesta constitucional.
15) Recurso de inconformidad. No procede su desechamiento de plano por falta de ofrecimiento o aportación de pruebas.
16) RAP interpuestos por ciudadanos. Efectos del allanamiento de la autoridad.
17) Interpretaciones *in dubio pro cive* en los RAP interpuestos por ciudadanos.
18) Sufragar sin credencial para votar o sin aparecer en la lista nominal de electores. La recepción de votación de ciudadanos favorecidos con una resolución del Trife no actualiza la causal de nulidad.
19) Suplencia de la deficiencia en la argumentación de los agravios; su alcance en el recurso de inconformidad.
20) El Tribunal Federal Electoral debe proveer los mecanismos necesarios que aseguren el eficaz cumplimiento de sus resoluciones.

Ésos fueron algunos de los principales retos a los que se enfrentaron tanto el Tribunal de lo Contencioso Electoral como el Tribunal Federal Electoral, órganos que cumplieron cabalmente su misión de consolidar una Judicatura electoral profesional y respetable que sirviera como plataforma para que pudiera darse el siguiente paso a un sistema de justicia electoral integral, lo que ocurrió con motivo de la

reforma electoral de 1996 que, como se ha indicado con anterioridad, no es materia de este trabajo.

Participación del Poder Judicial en los conflictos político-electorales

Tal y como se ha advertido en lo expuesto con anterioridad, durante el periodo de 1977 hasta principios de 1996, el Poder Judicial intervino muy poco en los conflictos político-electorales.

En México, con la creación del juicio de amparo (JA) en 1841 y su introducción en el sistema jurídico, integrantes del Poder Judicial dieron cabida a la posibilidad de que mediante las solicitudes de amparo acerca de la falta de competencia de las autoridades, los jueces y ministros pudieran revisar la legalidad original del nombramiento o elección de los funcionarios; la tesis de la incompetencia de origen, así denominada, fue sostenida por el jurista José María Iglesias, quien fungía como presidente de la SCJN. Sin embargo, la desaseada elección de 1876 y la participación en ésta del propio Iglesias, provocaron su salida del país, la llegada de Porfirio Díaz a la presidencia de la República y el arribo a la presidencia de la SCJN de Ignacio Luis Vallarta, quien se pronunció en contra de dicha tesis, misma que fue desechada totalmente. Esta situación generó la idea de que el Poder Judicial de la Federación no debería intervenir en conflictos político-electorales, salvo cuando supusieran implícita violación de garantías individuales. Es por tales razones que, hasta 1997, prácticamente no hubo intervención de los Tribunales en esas cuestiones.

Con la reforma constitucional del 6 de diciembre de 1977, se introdujo un nuevo intento de participación del Poder Judicial de la Federación en los conflictos político-electorales, al adicionar la siguiente fracción en su artículo 97:

> La Suprema Corte de Justicia está facultada para practicar de oficio la averiguación de algún hecho o hechos que constituyan la violación del voto público, pero sólo en los casos en que a su juicio pudiera ponerse en duda la legalidad de todo el proceso de elección de alguno de los Poderes de la Unión. Los resultados de la investigación se harán llegar oportunamente a los órganos competentes.

Dicho mandato constitucional se materializó en la Ley Federal de Organizaciones Políticas y Procesos Electorales, al regular el recurso de reclamación en los siguientes términos:

> ARTICULO 235.- Procede el recurso de reclamación ante la Suprema Corte de Justicia de la Nación, contra las resoluciones que dice el Colegio Electoral de la Cámara de Diputados sobre la calificación de la elección de sus miembros.
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> Podrán interponer el recurso los partidos políticos tratándose de la calificación tanto de la elección de los diputados electos por mayoría relativa en los distritos uninominales, como de las listas regionales en las circunscripciones plurinominales.
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> El recurso deberá interponerse dentro de los tres días siguientes a la fecha en que el Colegio Electoral hubiere calificado la elección de todos los miembros de la Cámara de Diputados, presentándose por escrito en la Oficialía Mayor de ésta.
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> ARTICULO 236.- Es admisible el recurso cuando se haga valer contra las declaratorias que dicte el Colegio Electoral al resolver en la calificación de la elección respectiva sobre las presuntas violaciones a que se refieren los artículos 223 y 224 de esta Ley, siempre que las mismas se hayan combatido oportunamente, sin haber omitido ninguna instancia, ante los organismos electorales competentes en los términos de esta Ley.
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> ARTICULO 237.- La Cámara de Diputados, una vez comprobado que se satisfacen los requisitos formales para la interposición del recurso, remitirá dentro del término de tres días a la Suprema Corte de Justicia de la Nación, el escrito mediante el cual se interpone, así como los documentos e informes relacionados con la calificación hecha por el Colegio Electoral. No se admitirá la presentación ante la Suprema Corte de Justicia de la Nación de alegatos o pruebas diversas a las que contenga el expediente u ofrecidas en el escrito por el cual se interpone el recurso.
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> ARTICULO 238.- Al interponer el recurso el promovente acompañará a su escrito los documentos probatorios de los hechos o actos en que apoya su reclamación, tal como aparecen probados en las diversas instancias previas, así como las constancias de que fueron interpuestos previamente todos los recursos ordinarios en los términos de esta Ley.
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> ARTÍCULO 239.- La Suprema Corte de Justicia de la Nación al recibir las constancias a que se refiere el artículo 237 de esta Ley, examinará si están satisfechos los requisitos necesarios para la procedencia de la reclamación y desechará el recurso cuando no se satisfaga.

> ARTICULO 240.- La Suprema Corte de Justicia de la Nación declarará si son o no fundados los conceptos de reclamación expresados por el recurrente, dentro de las 24 horas siguientes lo hará del conocimiento de la Cámara de Diputados.
> ARTICULO 241.- Si la Suprema Corte de Justicia de la Nación considera que se cometieron violaciones sustanciales en el desarrollo del proceso electoral o en la calificación misma, la Cámara de Diputados emitirá nueva resolución que tendrá el carácter de definitiva e inatacable.

Es importante señalar que la SCJN no resolvió de fondo ninguno de los recursos de reclamación interpuestos; dicho medio de impugnación desapareció con motivo de la reforma de 1986, con la creación del primer Tribunal especializado en materia electoral.

Aproximación a la justicia electoral mexicana después de la reforma constitucional de 2007

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I. Reforma electoral y transición democrática en México

La reforma electoral de 2007, publicada en el Diario Oficial de la Federación el 13 de noviembre de 2007, constituye una "tercera generación de reformas electorales".

Puede afirmarse que entre 1977 y 1986 el sistema electoral mexicano vivió lo que ha dado en denominarse como "primera generación de reformas", cuyo sentido fundamental fue el reconocimiento en el texto constitucional de los partidos políticos y de la competencia electoral, ampliándose para tal fin los espacios de la representación política.

Con la reforma de 1977, se reglamentó la integración de un Colegio Electoral de la Cámara de Diputados y Senadores, basado en un sistema electoral mixto preponderantemente mayoritario con elementos de representación proporcional. Se creó por vez primera, un instrumento contencioso en materia electoral, denominado "recurso de reclamación", siendo competente para su sustanciación y resolución la Suprema Corte de Justicia de la Nación, el cual sólo procedía una vez que la Cámara de Diputados hubiera calificado la elección de los presuntos diputados.

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Luego, el 12 de febrero de 1987, se publicó el Código Federal Electoral, el cual constituyó la expresión electoral del proceso de renovación política del gobierno mexicano en turno. En éste se derogó el recurso de reclamación, pues se estimó que el prestigio y las facultades de la Suprema Corte debían quedar apartadas del debate político, sin dejar de proporcionar una instancia para vigilar y controlar el desarrollo del procedimiento electoral y su apego a la ley en la materia, lo cual dio lugar al nacimiento de un Tribunal especializado con plena autonomía para resolver todas las controversias de carácter electoral, dejando al Colegio Electoral de cada cámara su facultad de autocalificación como última instancia en la materia, con el fin de mantener el equilibrio y la división de poderes prevista en nuestra Constitución.

En ese año se creó el Tribunal de lo Contencioso Electoral, como organismo autónomo de carácter administrativo, dotado de plena autonomía, el cual se convirtió en el instrumento legal que dotó a los partidos políticos y demás entes políticos de un elemento más de garantía y confianza, con el propósito de que fuera el encargado de controlar la imparcialidad y legalidad de los procesos electorales. En materia de nulidad de elecciones, el Tribunal de lo Contencioso Electoral no era sino una instancia previa, constituyendo la última instancia la calificación del Colegio Electoral del Congreso de la Unión, el cual resolvía en definitiva sobre la validez o nulidad de una elección.

De 1989 a 1996, podríamos hablar de una "segunda generación de reformas", las cuales transformaron de raíz las instituciones que conforman el Sistema Electoral Mexicano. En 1990 surgieron el Instituto Federal Electoral y el Tribunal Federal Electoral, enmarcados por una legislación renovada de manera integral; en 1994 nuevas reformas propiciaron la ciudadanización del Consejo General del Instituto Federal Electoral o integración de la autoridad electoral por ciudadanos sin militancia en partidos políticos o adscripción al gobierno en turno, así como nuevas atribuciones hacia sus integrantes, e implantaron un vasto conjunto de normas y procedimientos para asegurar la legalidad de todo el proceso electoral.

Como resultado de dichas reformas constitucionales se precisó que la organización de las elecciones federales se consideraría una función estatal ejercida a través de los Poderes Legislativo y Ejecutivo de la Unión, con la participación de los partidos políticos nacionales y de los

ciudadanos. Esta función se realizaría a través de un organismo público denominado Instituto Federal Electoral, considerado como autoridad en la materia, autónomo en sus decisiones y cuyas actuaciones se ceñirían a los principios de certeza, legalidad, imparcialidad, objetividad y profesionalismo.

Asimismo, se dispuso la creación de un Tribunal Federal Electoral, al cual se le confirió el carácter de organismo jurisdiccional y autónomo, se le atribuyeron más facultades, lo que fortaleció de manera importante su autoridad e independencia en el ámbito electoral. El Congreso de la Unión aprobó el Código Federal de Instituciones y Procedimientos Electorales, que regulaba la organización y funcionamiento del citado Tribunal Federal Electoral, contra cuyas resoluciones no procedía juicio ni recurso alguno y las que dictara con posterioridad a la jornada electoral sólo podrían ser revisadas y modificadas, en su caso, por los colegios electorales, con el voto de las dos terceras partes de sus integrantes presentes.

Así, se estableció un sistema de calificación que comprendía dos instancias separadas y diferenciadas:

a) El administrativo, que se efectuaba en el seno de los Consejos General, Locales y Distritales del Instituto Federal Electoral, ya que se les facultaba para formular la declaración de validez de las elecciones de diputados de mayoría relativa y de senadores; así como declarar la validez de la elección y hacer la asignación de diputados de representación proporcional de primera minoría, y
b) El jurisdiccional, que iniciaba en el momento en que algún partido político impugnase ante las salas del Tribunal Federal Electoral el cómputo de alguna elección, las correspondientes declaraciones de validez, o la expedición de las constancias de mayoría o de asignación; lo anterior significaba que le correspondería al Tribunal, como máxima autoridad electoral, calificar a través de un procedimiento contencioso las elecciones impugnadas.

En cuanto a la calificación de la elección de Presidente de la República, seguía siendo facultad exclusiva de la Cámara de Diputados erigirse en colegio electoral a fin de realizar tal función, cuya decisión era definitiva e inatacable; circunstancia que desde luego le restaba eficacia al entonces Tribunal Federal Electoral.

La reforma de 1996 tuvo un importante impacto en la democracia mexicana, puesto que introdujo un sistema mixto de heterocalificación de las elecciones, que se reproduce en todo el país, porque corresponde tanto al Instituto Federal Electoral y sus órganos locales, y al Tribunal Electoral del Poder Judicial de la Federación, así como a los diferentes Tribunales Electorales de las entidades federativas, participar en la calificación de las elecciones y en la resolución de las controversias surgidas de las mismas.

Con la reforma de 1996 se dio por concluida la calificación política de las elecciones, al desaparecer el Colegio Electoral, en definitiva, para la elección de Presidente de la República y se inició una etapa de judicialización de los procesos electorales, adoptando un sistema de estricta heterocalificación jurídica, definitiva e inatacable, a cargo de la Sala Superior del Tribunal Electoral para que califique la elección Presidencial y haga la declaración de validez de Presidente electo, correspondiéndole a la Cámara de Diputados del Congreso de la Unión, la facultad de expedir el bando solemne. Asimismo, es de destacarse que por vez primera se implementa un procedimiento de financiamiento a los partidos políticos, el cual se encontraba regulado en el Código Federal de Instituciones y Procedimientos Electorales.

Aunque la reforma de 1996 fue la última reforma integral al sistema electoral, en los años siguientes el Congreso de la Unión aprobó otras adecuaciones a la ley, de las cuales cabe mencionar, por ejemplo, la reforma del año 2003, en la cual se establecieron reglas para impulsar la equidad de género en las candidaturas a cargos de elección popular y, por último, la reforma de 2005, por la cual se reglamentó el derecho de voto de los ciudadanos mexicanos residentes en el extranjero, que fue aplicada por vez primera en la elección presidencial del año 2006.

Hasta aquí los aspectos fundamentales de las reformas electorales que engloban las dos generaciones de reformas electorales que ha tenido el Estado mexicano y que anteceden a la reforma de 2007, sobre la cual abundaremos a continuación.

La reforma constitucional de 2007 fue publicada en el Diario Oficial de la Federación el 13 de noviembre de 2007 y entró en vigor al día siguiente.

Con esta reforma se da paso a una "tercera generación de reformas electorales", la cual sustancialmente fue impulsada para dar respuesta

a dos grandes problemas que enfrenta la democracia mexicana: el excesivo gasto en las campañas electorales y la inequidad en el uso de los tiempos de los medios de comunicación por parte de los propios institutos políticos, entre otros conceptos.

En ese sentido, el primer objetivo fue disminuir en forma significativa el gasto en campañas electorales, lo que se proponía alcanzar mediante la reducción del financiamiento público, y otros mecanismos que generaran claridad y transparencia sobre el costo de las campañas electorales entre los propios actores políticos y para la sociedad mexicana misma.

Un segundo objetivo fue el fortalecimiento de las atribuciones y facultades de las autoridades electorales federales. De esta manera, el Instituto Federal Electoral vería fortalecida su capacidad para desempeñar su papel de árbitro en la contienda, mientras que al Tribunal Electoral del Poder Judicial de la Federación se le fortalece entre otros aspectos, al reconocérsele su facultad para decidir la no aplicación de leyes electorales que estime contrarias a la Constitución Federal, en armonía con su calidad de tribunal constitucional.

El tercer objetivo que se perseguía con la reforma era de importancia destacada: impedir que actores ajenos al proceso electoral incidieran en las campañas electorales y sus resultados a través de los medios de comunicación; así como elevar a rango de norma constitucional las regulaciones a que debería sujetarse la propaganda gubernamental, de todo tipo, tanto durante las campañas electorales como en periodos no electorales.

Con las menciones hechas, podríamos concluir que, si bien es cierto que la democracia no se agota en las elecciones, también lo es que su esencia radica o se funda en ellas. En ese tenor la reciente reforma electoral del Estado mexicano, del año 2007, representa, como veremos, un paso más hacia la consolidación del Estado Constitucional de Derecho en México.

II. La justicia electoral en la reforma constitucional en materia electoral y la contribución del Tribunal Electoral

Si bien, la reforma electoral de 2007 se ocupó en general del sistema electoral mexicano, conviene destacar cuál fue el impacto en el área de la justicia electoral. Y en este rubro es importante señalar que el Tribunal Electoral tuvo una gran contribución a través de la jurisprudencia que en la última década emitió al interpretar la ley para adaptar su función jurisdiccional a la realidad política del país.

La reforma determinó la permanencia de esta actividad jurisdiccional, al establecer[1] que el Tribunal Electoral funcionará de manera permanente, tanto en su Sala Superior como en sus salas regionales. En efecto, con anterioridad a esta reforma, sólo la Sala Superior funcionaba de manera permanente, en tanto las salas regionales se instalaban durante los procesos electorales federales, es decir cada tres años.

Asimismo, resulta trascendente la reforma electoral porque de manera clara se señalan las atribuciones del Tribunal Electoral en diversos ámbitos específicos.

Respecto de la nulidad de las elecciones con la reforma se establece la limitación de que sólo se podrá anular una elección por las causas expresamente señaladas en la propia ley, con lo cual se pretende dar mayor certeza en el ámbito jurisdiccional. El principio de legalidad en la actuación de las autoridades electorales y partidos políticos se eleva a nivel constitucional con la reforma de 2007.

Con relación a la nulidad abstracta, cabe hacer mención que con anterioridad, la Sala Superior, aun cuando no estuviera fijada expresamente en las leyes la causa de nulidad abstracta de una elección, o bien la genérica tratándose de las entidades federativas, estaba en aptitud de poder anular una elección cuando estimaba que se habían conculcado cualitativamente los principios fundamentales de una elección al sufragio universal, libre, secreto y directo; la organización de las elecciones a través de un organismo público y autónomo; la certeza, equidad, legalidad, independencia, imparcialidad y objetividad como

[1] Artículo 99, segundo párrafo de la Constitución Política.

principios rectores del proceso electoral, derivados de una interpretación sistemática y funcional de los principios constitucionales.

En ese sentido, si alguno de esos principios fundamentales era vulnerado en una elección de manera grave y generalizada, poniendo en duda fundada la credibilidad o la legitimidad de los comicios y de quienes resultaban electos en ellos, era inconcuso que dichos comicios no eran aptos para surtir sus efectos legales y, por tanto, la Sala Superior decretaba actualizada la causa de nulidad de elección de tipo abstracto.[2]

Sin embargo, el Congreso determinó que debido a una preocupación respecto a los límites interpretativos que cabe o no señalar, desde la propia Constitución federal, a toda autoridad de naturaleza jurisdiccional, arribó a la conclusión relativa a la necesidad de que, sin vulnerar la alta función y amplias facultades otorgadas por la Carta Magna al Tribunal Electoral del Poder Judicial de la Federación, éste debía ceñir sus sentencias, en casos de nulidad, a las causales que expresamente le señalaran las leyes, sin poder establecer, por vía de jurisprudencia, causales distintas.

En consecuencia, se estableció[3] que las salas Superior y regionales del Tribunal sólo podrán declarar la nulidad de una elección por las causales que expresamente se establezcan en las leyes.

Respecto de la elección presidencial la Sala Superior del Tribunal Electoral, conforme con el nuevo texto constitucional, realizará el cómputo final de la elección de Presidente de los Estados Unidos Mexicanos, una vez resueltas las impugnaciones que se interpongan sobre la misma, procediendo a formular, en su caso, la declaración de validez de la elección y la de Presidente Electo respecto del candidato que hubiese obtenido el mayor número de votos.

Tratándose de la facultad de atracción y delegación de la Sala Superior, estos mecanismos de organización y funcionamiento coadyuvan a la satisfacción de la expeditez que requiere la resolución de los medios de impugnación en materia electoral. Con esta reforma[4] la

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2 Lo anterior cobra sustento en la tesis S3ELJ 23/ 2004. Nulidad de elección. Causa abstracta.

3 Artículo 99, fracción II, de la Constitución Política.

4 Artículo 99, párrafo noveno, de la Constitución Política.

Sala Superior podrá, de oficio, a petición de parte o de alguna de las salas regionales, atraer los juicios que conozcan éstas; asimismo, podrá enviar los asuntos de su competencia a las salas regionales para su conocimiento y resolución, conforme con las reglas y los procedimientos que en la ley respectiva se establezcan.

Respecto de la democracia interna de los partidos políticos, la reforma constitucional enfatiza la necesidad de garantizarla. Para conseguir tal objetivo, al referirse a las impugnaciones de los ciudadanos afiliados a partidos políticos, se señala que para acudir a la jurisdicción del Tribunal Electoral, deberán agotarse previamente las instancias de solución de conflictos previstas en sus normas internas.

La Sala Superior había sostenido en dos jurisprudencias[5] que los militantes de los partidos políticos, antes de promover el juicio para la protección de los derechos político-electorales del ciudadano, tienen la carga de agotar los medios de impugnación intrapartidarios, en acatamiento estricto al principio de definitividad. Asimismo, estos medios de impugnación que prevean los partidos políticos en su normativa interna deberán contener en esencia los siguientes elementos:

1. Órganos partidistas competentes establecidos, integrados e instalados con antelación a los hechos litigiosos;
2. Que se garantice la independencia e imparcialidad de sus integrantes;
3. Que se respeten las formalidades esenciales del procedimiento exigidas constitucionalmente, y
4. Que formal y materialmente resulten eficaces para restituir a los promoventes en el goce de sus derechos político-electorales transgredidos. De manera que, cuando falte alguno de estos elementos tales instancias internas quedan como optativas, ante lo cual el afectado podrá acudir directamente a las autoridades jurisdiccionales, *per saltum*, siempre y cuando acredite haber desistido previamente de las instancias internas que hubiera iniciado.

[5] La Sala Superior emitió las tesis S3ELJ 05/2005, S3ELJ 04/2003, cuyos rubros son: "Medio de impugnación intrapartidario. Debe agotarse antes de acudir a la instancia jurisdiccional, aun cuando el plazo para su resolución no esté previsto en la reglamentación del partido político", "Medios de defensa internos de los partidos políticos. Se deben agotar para cumplir el principio de definitividad, respectivamente".

En esa tesitura, se reformó[6] el texto constitucional para establecer que un ciudadano podrá acudir a la jurisdicción del Tribunal por violaciones a sus derechos por el partido político al que se encuentre afiliado, sólo si agotó previamente las instancias de solución de conflictos previstas en sus normas internas.

Al respecto, los legisladores estimaron que dicha reforma era congruente con la necesidad de fortalecer la vida interna de los partidos políticos evitando la continua e indebida judicialización de sus procesos internos.

Como hemos dicho, en lo relativo al control constitucional que realiza el Tribunal Electoral, la reforma reconoció que las salas del Tribunal Electoral podrán resolver sobre la no aplicación de leyes electorales que sean contrarias a la propia Constitución. Se establece que sus resoluciones se limitarán al caso concreto sobre el que verse el juicio, es decir, no se tratará de una declaración con carácter general. En tales casos, al dejar de aplicar cualquier norma electoral la Sala Superior informará a la Suprema Corte de Justicia de la Nación.

A partir de la reforma de 1996, hasta mediados del año 2001, el Tribunal Electoral resolvió diversos asuntos[7] en los cuales podía ejercer un control concreto, relativo a la facultad que tenía de analizar la constitucionalidad de leyes electorales, a partir de actos concretos de aplicación, y si estimaba que eran contrarios a la ley fundamental, estaba en la aptitud de desaplicarlas, tal y como sucedió en los expedientes anotados. En 1999, la Sala Superior asentó en una tesis jurisprudencial lo resuelto en dichos juicios.[8]

Sin embargo, la referida tesis quedó sin efectos, con motivo de la contradicción de tesis 2/2000–PL, en la cual, la Suprema Corte de Justicia de la Nación sostuvo que el Tribunal Electoral carecía de facultades para pronunciarse sobre la constitucionalidad de una norma electoral, ni siquiera bajo el argumento de determinar su posible inaplicación a un caso concreto, situación que originó desde luego un

6 Artículo 99, fracción V, Constitución Política

7 Ver SUP-JRC-041/99, SUP-JRC-127/99, SUP-JRC-015/2000, SUP-JRC-016/2000.

8 S3ELJ 05/99, cuyo rubro era: "Tribunal Electoral del Poder Judicial de la Federación. Tiene facultades para determinar la inaplicabilidad de leyes secundarias cuando éstas se opongan a disposiciones constitucionales".

vacío institucional, que generó zonas de inmunidad en la actuación de las autoridades legislativas, al restringirse el control de la constitucionalidad de las leyes electorales a un solo medio de control denominado acción de inconstitucionalidad, cuya exclusividad competente era la propia Corte.

Por tal motivo, en la reforma electoral de mérito, el legislador reconoció tal facultad al Tribunal Electoral, para que ejerza plenamente sus facultades y alcance constitucional, para poder desaplicar aquellas normas que se tilden de inconstitucionales.[9]

No debe obviarse que la falta de reconocimiento de esta facultad al Tribunal Electoral, generaba una disfuncionalidad en el sistema electoral, ya que el citado órgano jurisdiccional estaba convalidando actos que tenían su fundamento de validez en normas que pudieran ser inconstitucionales, sin que hubiese posibilidad de preservar y hacer cumplir el principio de supremacía constitucional.

En el ámbito de la libertad de expresión en el espacio político la Sala Superior estableció límites en la propaganda electoral relacionados con el respeto a la honra y dignidad de las personas,[10] y determinó que, en el marco del debate político, las expresiones o manifestaciones de cualquier tipo que hagan quienes intervienen en la contienda electoral, con el fin primordial de denigrar o degradar la honra y dignidad, del nombre, estado civil, nacionalidad o la capacidad de sus oponentes, implica vulneración de derechos de tercero o reputación de los demás, por apartarse de los principios rectores que ha reconocido el Constituyente y los Pactos Internacionales signados por el Estado mexicano.

Con motivo de lo anterior, el legislador tomó en cuenta la *ratio essendi* de la tesis y precedentes que dieron origen a la misma, para

9 En ese sentido, se adicionó en el artículo 99, fracción IX, lo siguiente: "Sin perjuicio de lo dispuesto por el artículo 105 de esta Constitución, las salas del Tribunal Electoral podrán resolver la no aplicación de leyes sobre la materia electoral contrarias a la presente Constitución. Las resoluciones que se dicten en el ejercicio de esta facultad se limitarán al caso concreto sobre el que verse el juicio. En tales casos la Sala Superior informará a la Suprema Corte de Justicia de la Nación".

10 Ver la tesis de jurisprudencia 14/2007, cuyo rubro es: "Honra y reputación. Su tutela durante el desarrollo de una contienda electoral se justifica por tratarse de derechos fundamentales que se reconocen en el ejercicio de la libertad de expresión".

establecer en el texto constitucional[11] que en la propaganda política o electoral que difundan los partidos deberán abstenerse de expresiones que denigren a las instituciones y a los propios partidos, o que calumnien a las personas.

Con relación a la liquidación de partidos, la Sala Superior ha establecido[12] que aun cuando no exista una referencia expresa en los procedimientos legales y contables para la liquidación de un partido político que pierde su registro, no implica, por un lado, que exista una falta de regulación que impida el cumplimiento con su obligación de presentar sus informes sobre el origen y monto de los ingresos que haya recibido por cualquier modalidad de financiamiento, y por otro, que se extinga la supresión de las obligaciones y responsabilidades que derivan de la actuación que haya tenido el partido político nacional, mientras conservó su registro correspondiente.

En consecuencia, con la reforma se determinó que la ley establecerá el procedimiento para la liquidación de las obligaciones de los partidos que pierdan su registro y los supuestos en los que sus bienes y remanentes serán adjudicados a la Federación.

Por lo que hace al secreto bancario, la Sala Superior, a través de diversos criterios jurisprudencial y relevantes,[13] ha fortalecido al Instituto Federal Electoral, en el sentido de concederle mayores facultades, al establecer que son inoponibles los secretos bancarios, fiduciarios, ministerial y fiscal, tratándose de la fiscalización de los partidos políticos.

Atendiendo dicho criterios, el legislador federal propuso reformar el texto constitucional[14] para establecer que la fiscalización de las finanzas de los partidos políticos nacionales estará a cargo de un órgano técnico del Consejo General del Instituto Federal Electoral,

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11 Artículo 41, fracción III, Apartado C, de la Constitución Política.

12 Ver la tesis S3ELJ 49/2002, cuyo rubro es: "Registro de partido político. su pérdida no implica que desaparezcan las obligaciones adquiridas durante su vigencia".

13 Ver las tesis identificadas con las claves S3ELJ 01/2003, S3ELJ 02/2003, S3EL 043/2004, S3EL 167/2002, cuyos rubros son: "Secreto bancario. Es inoponible al Instituto Federal Electoral en ejercicio de facultades de fiscalización"; "Secreto fiduciario. Es inoponible al Instituto Federal Electoral, en ejercicio de facultades de fiscalización"; "Secreto ministerial. El establecido en el artículo 9o. de la ley federal contra la delincuencia organizada es inoponible al Instituto Federal Electoral"; "Secreto fiscal. Es inaplicable al Instituto Federal Electoral en ejercicio de facultades de fiscalización, respectivamente".

14 Artículo 41, fracción V, décimo párrafo de la Constitución Política.

dotado de autonomía de gestión, cuyo titular será designado por el voto de las dos terceras partes del propio Consejo a propuesta del consejero Presidente.

La ley desarrollará la integración y funcionamiento de dicho órgano, así como los procedimientos para la aplicación de sanciones por el Consejo General. En el cumplimiento de sus atribuciones el órgano técnico no estará limitado por los secretos bancario, fiduciario y fiscal.

En el ámbito de los actos anticipados de precampañas y de campañas electorales el Tribunal ha establecido[15] que, aun cuando una ley no regule expresamente los actos anticipados de campaña, esto es, aquellos que, en su caso, realicen los ciudadanos que fueron seleccionados en el interior de los partidos políticos para ser postulados como candidatos a un cargo de elección popular, durante el tiempo que medie entre su designación por los institutos políticos y el registro formal de su candidatura ante la autoridad administrativa electoral, ello no implica que éstos puedan realizarse, ya que el legislador estableció la prohibición legal de llevar a cabo actos de campaña fuera de la temporalidad prevista legalmente. Lo anterior, en razón de garantizar el valor jurídicamente tutelado en cualquier elección, relativo al acceso a los cargos de elección popular en condiciones de igualdad, por lo que, el hecho de que se realicen actos anticipados de campaña provoca desigualdad en la contienda por un mismo cargo de elección popular, ya que si un partido político inicia antes del plazo legalmente señalado la difusión de sus candidatos, tiene la oportunidad de influir por mayor tiempo en el ánimo y decisión de los ciudadanos electores, en detrimento de los demás candidatos, lo que no sucedería si todos los partidos políticos iniciaran sus campañas electorales en la misma fecha legalmente prevista.

A su vez, el Constituyente estableció en la reforma[16] que la ley deberá señalar los plazos para la realización de los procesos internos que los partidos lleven a cabo para la selección de sus candidatos a cargos de elección popular, así como las reglas aplicables a las precampañas y campañas electorales. De igual manera, determinó nuevos plazos de

15 Ver la tesis S3EL 016/2004, emitida por la Sala Superior, cuyo rubro es: "Actos anticipados de campaña. Se encuentran prohibidos implícitamente".

16 Artículo 41, Base IV, Constitución Política.

duración de las campañas electorales, los que tratándose del año de la elección en que se renuevan el Poder Ejecutivo Federal y las dos Cámaras del Congreso de la Unión, serían de noventa días para todas las campañas; mientras que en la elección intermedia, las campañas para diputados federales tendrían una duración de sesenta días. Asociado con lo anterior, se proponía establecer que las precampañas no podrán tener una duración mayor a las dos terceras partes de la establecida para las campañas constitucionales.

Finalmente, la reforma también se preocupó por el cumplimiento de las resoluciones de las salas del Tribunal Electoral, al señalar que éstas harán uso de los medios de apremio necesarios para hacer cumplir de manera expedita sus sentencias y resoluciones, remitiendo a lo que disponga la ley de la materia.

Con estas nuevas características, reconocidas en el texto constitucional, la justicia electoral mexicana se fortalece, toda vez que las facultades del Tribunal Electoral del Poder Judicial de la Federación se ven potenciadas.

Finalmente, cabe señalar que siendo México un estado federal, están ligados los sistemas jurídico-electorales estatales a los principios del pacto federal reconocidos en la Constitución Política de los Estados Unidos Mexicanos, por lo que resulta evidente que la reforma constitucional de 2007 tiene también repercusión en la organización electoral de las entidades federativas. Máxime que ha sido tradicional la reiteración en el ámbito local de las reformas federales, lo cual, ahora se ve reforzado por el dictado expreso de normas relativas a la organización de los sistemas electorales locales.

En efecto, en la Constitución federal se modificaron diversos numerales relacionados con la vida interna de las entidades federativas.[17] En lo relativo a los Estados de la República Mexicana, la reforma impactó en diversos temas, de los cuales se señala como una obligación para los Estados el reflejar tales modificaciones en sus constituciones y leyes, para lo cual disponen de un año.

Si bien no será posible hablar de un pleno federalismo judicial en materia electoral, lo cierto es que estas previsiones constitucionales,

17 Artículos 116 y 122 de la Constitución Política.

que obligan a los Estados, constituyen un paso importante para la consolidación de un Estado Constitucional de Derecho.

DECRETO QUE REFORMA LOS ARTÍCULOS 6º, 41, 85, 99, 108, 116 Y 122; ADICIONA EL ARTÍCULO 134 Y DEROGA UN PÁRRAFO AL ARTÍCULO 97 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS

Martes 13 de noviembre de 2007

(Primera Sección) DIARIO OFICIAL Martes 13 de noviembre de 2007

PODER EJECUTIVO
SECRETARIA DE GOBERNACION

DECRETO que reforma los artículos 6o., 41, 85, 99, 108, 116 y 122; adiciona el artículo 134 y deroga un párrafo al artículo 97 de la Constitución Política de los Estados Unidos Mexicanos.

Al margen un sello con el Escudo Nacional, que dice: Estados Unidos Mexicanos.- Presidencia de la República.

FELIPE DE JESÚS CALDERÓN HINOJOSA, Presidente de los Estados Unidos Mexicanos, a sus habitantes sabed:

Que el Honorable Congreso de la Unión, se ha servido dirigirme el siguiente

DECRETO

"EL CONGRESO GENERAL DE LOS ESTADOS UNIDOS MEXICANOS, EN USO DE LA FACULTAD QUE LE CONFIERE EL ARTÍCULO 135 DE LA CONSTITUCIÓN GENERAL DE LA REPÚBLICA Y PREVIA LA APROBACIÓN DE LA MAYORÍA DE LAS HONORABLES LEGISLATURAS DE LOS ESTADOS, DECLARA REFORMADOS LOS ARTÍCULOS 6o., 41, 85, 99, 108, 116 Y 122; ADICIONADO EL ARTÍCULO 134 Y DEROGADO UN PÁRRAFO AL ARTÍCULO 97 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS.

ÚNICO. Se reforma el primer párrafo del artículo 6o.; se reforman y adicionan los artículos 41 y 99; se reforma el párrafo primero del artículo 85; se reforma el párrafo primero del artículo 108; se reforma y adiciona la fracción IV del artículo 116; se reforma el inciso f) de la fracción V de la Base Primera el artículo 122; se adicionan tres párrafos finales al artículo 134; y se deroga el párrafo tercero del artículo 97, todos de la Constitución Política de los Estados Unidos Mexicanos, para quedar como sigue:

Artículo 6o. La manifestación de las ideas no será objeto de ninguna inquisición judicial o administrativa, sino en el caso de que ataque a la moral, los derechos de tercero, provoque algún delito, o perturbe el orden público; el derecho de réplica será ejercido en los términos dispuestos por la ley. El derecho a la información será garantizado por el Estado.

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Artículo 41. El pueblo ejerce su soberanía por medio de los Poderes de la Unión, en los casos de la competencia de éstos, y por los de los Estados, en lo que toca a sus regímenes interiores, en los términos respectivamente establecidos por la presente Constitución Federal y las particulares de los Estados, las que en ningún caso podrán contravenir las estipulaciones del Pacto Federal.

La renovación de los poderes Legislativo y Ejecutivo se realizará mediante elecciones libres, auténticas y periódicas, conforme a las siguientes bases:

I. Los partidos políticos son entidades de interés público; la ley determinará las normas y requisitos para su registro legal y las formas específicas de su intervención en el proceso electoral. Los partidos políticos nacionales tendrán derecho a participar en las elecciones estatales, municipales y del Distrito Federal.

Los partidos políticos tienen como fin promover la participación del pueblo en la vida democrática, contribuir a la integración de la representación nacional y como organizaciones de ciudadanos, hacer posible el acceso de éstos al ejercicio del poder público, de acuerdo con los programas, principios e ideas que postulan y mediante el sufragio universal, libre, secreto y directo. Sólo los ciudadanos podrán formar partidos políticos y afiliarse libre e individualmente a ellos; por tanto, quedan prohibidas la intervención de organizaciones gremiales o con objeto social diferente en la creación de partidos y cualquier forma de afiliación corporativa.

Las autoridades electorales solamente podrán intervenir en los asuntos internos de los partidos políticos en los términos que señalen esta Constitución y la ley.

II. La ley garantizará que los partidos políticos nacionales cuenten de manera equitativa con elementos para llevar a cabo sus actividades y señalará las reglas a que se sujetará el financiamiento de los propios partidos y sus campañas electorales, debiendo garantizar que los recursos públicos prevalezcan sobre los de origen privado.

El financiamiento público para los partidos políticos que mantengan su registro después de cada elección, se compondrá de las ministraciones destinadas al sostenimiento de sus actividades ordinarias permanentes, las tendientes a la obtención del voto durante los procesos electorales y las de carácter específico. Se otorgará conforme a lo siguiente y a lo que disponga la ley:

a) El financiamiento público para el sostenimiento de sus actividades ordinarias permanentes se fijará anualmente, multiplicando el número total de ciudadanos inscritos en el padrón electoral por el sesenta y cinco por ciento del salario mínimo diario vigente para el Distrito Federal. El treinta por ciento de la cantidad que resulte de acuerdo a lo señalado anteriormente, se distribuirá entre los partidos políticos en forma igualitaria y el setenta por ciento restante de acuerdo con el porcentaje de votos que hubieren obtenido en la elección de diputados inmediata anterior.

b) El financiamiento público para las actividades tendientes a la obtención del voto durante el año en que se elijan Presidente de la República, senadores y diputados federales, equivaldrá al cincuenta por ciento del financiamiento público que le corresponda a cada partido político por actividades ordinarias en ese mismo año; cuando sólo se elijan diputados federales, equivaldrá al treinta por ciento de dicho financiamiento por actividades ordinarias.

c) El financiamiento público por actividades específicas, relativas a la educación, capacitación, investigación socioeconómica y política, así como a las tareas editoriales, equivaldrá al tres por ciento del monto total del financiamiento público que corresponda en cada año por actividades ordinarias. El treinta por ciento de la cantidad que resulte de acuerdo a lo señalado anteriormente, se distribuirá entre los partidos políticos en forma igualitaria y el setenta por ciento restante de acuerdo con el porcentaje de votos que hubieren obtenido en la elección de diputados inmediata anterior.

La ley fijará los límites a las erogaciones en los procesos internos de selección de candidatos y las campañas electorales de los partidos políticos. La propia ley establecerá el monto máximo que tendrán las aportaciones de sus simpatizantes, cuya suma total no podrá exceder anualmente, para cada partido, al diez por ciento del tope de gastos establecido para la última campaña presidencial; asimismo ordenará los procedimientos para el control y vigilancia del origen y uso de todos los recursos con que cuenten y dispondrá las sanciones que deban imponerse por el incumplimiento de estas disposiciones.

De igual manera, la ley establecerá el procedimiento para la liquidación de las obligaciones de los partidos que pierdan su registro y los supuestos en los que sus bienes y remanentes serán adjudicados a la Federación.

III. Los partidos políticos nacionales tendrán derecho al uso de manera permanente de los medios de comunicación social.

Apartado A. El Instituto Federal Electoral será autoridad única para la administración del tiempo que corresponda al Estado en radio y televisión destinado a sus propios fines y al ejercicio del derecho de los partidos políticos nacionales, de acuerdo con lo siguiente y a lo que establezcan las leyes:

a) A partir del inicio de las precampañas y hasta el día de la jornada electoral quedarán a disposición del Instituto Federal Electoral cuarenta y ocho minutos diarios, que serán distribuidos en dos y hasta tres minutos por cada hora de transmisión en cada estación de radio y canal de televisión, en el horario referido en el inciso d) de este apartado;

b) Durante sus precampañas, los partidos políticos dispondrán en conjunto de un minuto por cada hora de transmisión en cada estación de radio y canal de televisión; el tiempo restante se utilizará conforme a lo que determine la ley;

c) Durante las campañas electorales deberá destinarse para cubrir el derecho de los partidos políticos al menos el ochenta y cinco por ciento del tiempo total disponible a que se refiere el inciso a) de este apartado;

d) Las transmisiones en cada estación de radio y canal de televisión se distribuirán dentro del horario de programación comprendido entre las seis y las veinticuatro horas;

e) El tiempo establecido como derecho de los partidos políticos se distribuirá entre los mismos conforme a lo siguiente: el treinta por ciento en forma igualitaria y el setenta por ciento restante de acuerdo a los resultados de la elección para diputados federales inmediata anterior;

f) A cada partido político nacional sin representación en el Congreso de la Unión se le asignará para radio y televisión solamente la parte correspondiente al porcentaje igualitario establecido en el inciso anterior, y

g) Con independencia de lo dispuesto en los apartados A y B de esta base y fuera de los periodos de precampañas y campañas electorales federales, al Instituto Federal Electoral le será asignado hasta el doce por ciento del tiempo total de que el Estado disponga en radio y televisión, conforme a las leyes y bajo cualquier modalidad; del total asignado, el Instituto distribuirá entre los partidos políticos nacionales en forma igualitaria un cincuenta por ciento; el tiempo restante lo utilizará para fines propios o de otras autoridades electorales, tanto federales como de las entidades federativas. Cada

partido político nacional utilizará el tiempo que por este concepto le corresponda en un programa mensual de cinco minutos y el restante en mensajes con duración de veinte segundos cada uno. En todo caso, las transmisiones a que se refiere este inciso se harán en el horario que determine el Instituto conforme a lo señalado en el inciso d) del presente Apartado. En situaciones especiales el Instituto podrá disponer de los tiempos correspondientes a mensajes partidistas a favor de un partido político, cuando así se justifique.

Los partidos políticos en ningún momento podrán contratar o adquirir, por sí o por terceras personas, tiempos en cualquier modalidad de radio y televisión.

Ninguna otra persona física o moral, sea a título propio o por cuenta de terceros, podrá contratar propaganda en radio y televisión dirigida a influir en las preferencias electorales de los ciudadanos, ni a favor o en contra de partidos políticos o de candidatos a cargos de elección popular. Queda prohibida la transmisión en territorio nacional de este tipo de mensajes contratados en el extranjero.

Las disposiciones contenidas en los dos párrafos anteriores deberán ser cumplidas en el ámbito de los estados y el Distrito Federal conforme a la legislación aplicable.

Apartado B. Para fines electorales en las entidades federativas, el Instituto Federal Electoral administrará los tiempos que correspondan al Estado en radio y televisión en las estaciones y canales de cobertura en la entidad de que se trate, conforme a lo siguiente y a lo que determine la ley:

a) Para los casos de los procesos electorales locales con jornadas comiciales coincidentes con la federal, el tiempo asignado en cada entidad federativa estará comprendido dentro del total disponible conforme a los incisos a), b) y c) del apartado A de esta base;

b) Para los demás procesos electorales, la asignación se hará en los términos de la ley, conforme a los criterios de esta base constitucional, y

c) La distribución de los tiempos entre los partidos políticos, incluyendo a los de registro local, se realizará de acuerdo a los criterios señalados en el apartado A de esta base y lo que determine la legislación aplicable.

Cuando a juicio del Instituto Federal Electoral el tiempo total en radio y televisión a que se refieren este apartado y el anterior fuese insuficiente para sus propios fines o los de otras autoridades electorales, determinará lo conducente para cubrir el tiempo faltante, conforme a las facultades que la ley le confiera.

Apartado C. En la propaganda política o electoral que difundan los partidos deberán abstenerse de expresiones que denigren a las instituciones y a los propios partidos, o que calumnien a las personas.

Durante el tiempo que comprendan las campañas electorales federales y locales y hasta la conclusión de la respectiva jornada comicial, deberá suspenderse la difusión en los medios de comunicación social de toda propaganda gubernamental, tanto de los poderes federales y estatales, como de los municipios, órganos de gobierno del Distrito Federal, sus delegaciones y cualquier otro ente público. Las únicas excepciones a lo anterior serán las campañas de información de las autoridades electorales, las relativas a servicios educativos y de salud, o las necesarias para la protección civil en casos de emergencia.

Apartado D. Las infracciones a lo dispuesto en esta base serán sancionadas por el Instituto Federal Electoral mediante procedimientos expeditos, que podrán incluir la orden de cancelación inmediata de las transmisiones en radio y televisión, de concesionarios y permisionarios, que resulten violatorias de la ley.

IV. La ley establecerá los plazos para la realización de los procesos partidistas de selección y postulación de candidatos a cargos de elección popular, así como las reglas para las precampañas y las campañas electorales.

La duración de las campañas en el año de elecciones para Presidente de la República, senadores y diputados federales será de noventa días; en el año en que sólo se elijan diputados federales, las campañas durarán sesenta días. En ningún caso las precampañas excederán las dos terceras partes del tiempo previsto para las campañas electorales.

La violación a estas disposiciones por los partidos o cualquier otra persona física o moral será sancionada conforme a la ley.

V. La organización de las elecciones federales es una función estatal que se realiza a través de un organismo público autónomo denominado Instituto Federal Electoral, dotado de personalidad jurídica y patrimonio propios, en cuya integración participan el Poder Legislativo de la Unión, los partidos políticos nacionales y los ciudadanos, en los términos que ordene la ley. En el ejercicio de esta función estatal, la certeza, legalidad, independencia, imparcialidad y objetividad serán principios rectores.

El Instituto Federal Electoral será autoridad en la materia, independiente en sus decisiones y funcionamiento y profesional en su desempeño; contará en su estructura con órganos de dirección, ejecutivos, técnicos y de vigilancia. El Consejo General será su órgano superior de dirección y se integrará por un consejero Presidente y ocho consejeros electorales, y concurrirán, con voz pero sin voto, los consejeros del Poder Legislativo, los representantes de los partidos políticos y un Secretario Ejecutivo; la ley determinará las reglas para la organización y funcionamiento de los órganos, así como las relaciones de mando entre éstos. Los órganos ejecutivos y técnicos dispondrán del personal calificado necesario para prestar el servicio profesional electoral. Una Contraloría General tendrá a su cargo, con autonomía técnica y de gestión, la fiscalización de todos los ingresos y egresos del Instituto. Las disposiciones de la ley electoral y del Estatuto que con base en ella apruebe el Consejo General, regirán las relaciones de trabajo con los servidores del organismo público. Los órganos de vigilancia del padrón electoral se integrarán mayoritariamente por representantes de los partidos políticos nacionales. Las mesas directivas de casilla estarán integradas por ciudadanos.

El consejero Presidente durará en su cargo seis años y podrá ser reelecto una sola vez. Los consejeros electorales durarán en su cargo nueve años, serán renovados en forma escalonada y no podrán ser reelectos. Según sea el caso, uno y otros serán elegidos sucesivamente por el voto de las dos terceras partes de los miembros presentes de la Cámara de Diputados, a propuesta de los grupos parlamentarios, previa realización de una amplia consulta a la sociedad. De darse la falta absoluta del consejero Presidente o de cualquiera de los consejeros electorales, el sustituto será elegido para concluir el periodo de la vacante. La ley establecerá las reglas y el procedimiento correspondientes.

El consejero Presidente y los consejeros electorales no podrán tener otro empleo, cargo o comisión, con excepción de aquellos en que actúen en representación del Consejo General y de los que desempeñen en asociaciones docentes, científicas, culturales, de investigación o de beneficencia, no remunerados. La retribución que perciban será igual a la prevista para los Ministros de la Suprema Corte de Justicia de la Nación.

El titular de la Contraloría General del Instituto será designado por la Cámara de Diputados con el voto de las dos terceras partes de sus miembros presentes a propuesta de instituciones públicas de educación superior, en la forma y términos que determine la ley. Durará seis años en el cargo y podrá ser reelecto por una sola vez. Estará adscrito administrativamente a la presidencia del Consejo General y mantendrá la coordinación técnica necesaria con la entidad de fiscalización superior de la Federación.

El Secretario Ejecutivo será nombrado con el voto de las dos terceras partes del Consejo General a propuesta de su Presidente.

La ley establecerá los requisitos que deberán reunir para su designación el consejero presidente del Consejo General, los consejeros electorales, el Contralor General y el Secretario Ejecutivo del Instituto Federal Electoral; quienes hayan fungido como consejero Presidente, consejeros electorales y Secretario Ejecutivo no podrán ocupar, dentro de los dos años siguientes a la fecha de su retiro, cargos en los poderes públicos en cuya elección hayan participado.

Los consejeros del Poder Legislativo serán propuestos por los grupos parlamentarios con afiliación de partido en alguna de las Cámaras. Sólo habrá un Consejero por cada grupo parlamentario no obstante su reconocimiento en ambas Cámaras del Congreso de la Unión.

El Instituto Federal Electoral tendrá a su cargo en forma integral y directa, además de las que le determine la ley, las actividades relativas a la capacitación y educación cívica, geografía electoral, los derechos y prerrogativas de las agrupaciones y de los partidos políticos, al padrón y lista de electores, impresión de materiales electorales, preparación de la jornada electoral, los cómputos en los términos que señale la ley, declaración de validez y otorgamiento de constancias en las elecciones de diputados y senadores, cómputo de la elección de Presidente de los Estados Unidos Mexicanos en cada uno de los distritos electorales uninominales, así como la regulación de la observación electoral y de las encuestas o sondeos de opinión con fines electorales. Las sesiones de todos los órganos colegiados de dirección serán públicas en los términos que señale la ley.

La fiscalización de las finanzas de los partidos políticos nacionales estará a cargo de un órgano técnico del Consejo General del Instituto Federal Electoral, dotado de autonomía de gestión, cuyo titular será designado por el voto de las dos terceras partes del propio Consejo a propuesta del consejero Presidente. La ley desarrollará la integración y funcionamiento de dicho órgano, así como los procedimientos para la aplicación de sanciones por el Consejo General. En el cumplimiento de sus atribuciones el órgano técnico no estará limitado por los secretos bancario, fiduciario y fiscal.

El órgano técnico será el conducto para que las autoridades competentes en materia de fiscalización partidista en el ámbito de las entidades federativas puedan superar la limitación a que se refiere el párrafo anterior.

El Instituto Federal Electoral asumirá mediante convenio con las autoridades competentes de las entidades federativas que así lo soliciten, la organización de procesos electorales locales, en los términos que disponga la legislación aplicable.

VI. Para garantizar los principios de constitucionalidad y legalidad de los actos y resoluciones electorales, se establecerá un sistema de medios de impugnación en los términos que señalen esta Constitución y la ley. Dicho sistema dará definitividad a las distintas etapas de los procesos electorales y garantizará la protección de los derechos políticos de los ciudadanos de votar, ser votados y de asociación, en los términos del artículo 99 de esta Constitución.

En materia electoral la interposición de los medios de impugnación, constitucionales o legales, no producirá efectos suspensivos sobre la resolución o el acto impugnado.

Artículo 85. Si al comenzar un periodo constitucional no se presentase el presidente electo, o la elección no estuviere hecha o declarada válida el 1o. de diciembre, cesará, sin embargo, el Presidente cuyo periodo haya concluido y se encargará desde luego del Poder Ejecutivo, en calidad de Presidente interino, el que designe el Congreso de la Unión, o en su falta con el carácter de provisional, el que designe la Comisión Permanente, procediéndose conforme a lo dispuesto en el artículo anterior.

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Artículo 97. ...

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Artículo 99. El Tribunal Electoral será, con excepción de lo dispuesto en la fracción II del artículo 105 de esta Constitución, la máxima autoridad jurisdiccional en la materia y órgano especializado del Poder Judicial de la Federación.

Para el ejercicio de sus atribuciones, el Tribunal funcionará en forma permanente con una Sala Superior y salas regionales; sus sesiones de resolución serán públicas, en los términos que determine la ley. Contará con el personal jurídico y administrativo necesario para su adecuado funcionamiento.

La Sala Superior se integrará por siete Magistrados Electorales. El Presidente del Tribunal será elegido por la Sala Superior, de entre sus miembros, para ejercer el cargo por cuatro años.

Al Tribunal Electoral le corresponde resolver en forma definitiva e inatacable, en los términos de esta Constitución y según lo disponga la ley, sobre:

I. Las impugnaciones en las elecciones federales de diputados y senadores;

II. Las impugnaciones que se presenten sobre la elección de Presidente de los Estados Unidos Mexicanos que serán resueltas en única instancia por la Sala Superior.

Las salas Superior y regionales del Tribunal sólo podrán declarar la nulidad de una elección por las causales que expresamente se establezcan en las leyes.

La Sala Superior realizará el cómputo final de la elección de Presidente de los Estados Unidos Mexicanos, una vez resueltas las impugnaciones que se hubieren interpuesto sobre la misma, procediendo a formular, en su caso, la declaración de validez de la elección y la de Presidente Electo respecto del candidato que hubiese obtenido el mayor número de votos.

III. Las impugnaciones de actos y resoluciones de la autoridad electoral federal, distintas a las señaladas en las dos fracciones anteriores, que violen normas constitucionales o legales;

IV. Las impugnaciones de actos o resoluciones definitivos y firmes de las autoridades competentes de las entidades federativas para organizar y calificar los comicios o resolver las controversias que surjan durante los mismos, que puedan resultar determinantes para el desarrollo del proceso respectivo o el resultado final de las elecciones. Esta vía procederá solamente cuando la reparación solicitada sea material y jurídicamente posible dentro de los plazos electorales y sea factible antes de la fecha constitucional o legalmente fijada para la instalación de los órganos o la toma de posesión de los funcionarios elegidos;

V. Las impugnaciones de actos y resoluciones que violen los derechos político electorales de los ciudadanos de votar, ser votado y de afiliación libre y pacífica para tomar parte en los asuntos políticos del país, en los términos que señalen esta Constitución y las leyes. Para que un ciudadano pueda acudir a la jurisdicción del Tribunal por violaciones a sus derechos por el partido político al que se encuentre afiliado, deberá haber agotado previamente las instancias de solución de conflictos previstas en sus normas internas, la ley establecerá las reglas y plazos aplicables;

VI. Los conflictos o diferencias laborales entre el Tribunal y sus servidores;

VII. Los conflictos o diferencias laborales entre el Instituto Federal Electoral y sus servidores;

VIII. La determinación e imposición de sanciones por parte del Instituto Federal Electoral a partidos o agrupaciones políticas o personas físicas o morales, nacionales o extranjeras, que infrinjan las disposiciones de esta Constitución y las leyes, y

IX. Las demás que señale la ley.

Las salas del Tribunal Electoral harán uso de los medios de apremio necesarios para hacer cumplir de manera expedita sus sentencias y resoluciones, en los términos que fije la ley.

Sin perjuicio de lo dispuesto por el artículo 105 de esta Constitución, las salas del Tribunal Electoral podrán resolver la no aplicación de leyes sobre la materia electoral contrarias a la presente Constitución. Las resoluciones que se dicten en el ejercicio de esta facultad se limitarán al caso concreto sobre el que verse el juicio. En tales casos la Sala Superior informará a la Suprema Corte de Justicia de la Nación.

Cuando una sala del Tribunal Electoral sustente una tesis sobre la inconstitucionalidad de algún acto o resolución o sobre la interpretación de un precepto de esta Constitución, y dicha tesis pueda ser contradictoria con una sostenida por las salas o el Pleno de la Suprema Corte de Justicia, cualquiera de los Ministros, las salas o las partes, podrán denunciar la contradicción en los términos que señale la ley, para que el pleno de la Suprema Corte de Justicia de la Nación decida en definitiva cuál tesis debe prevalecer. Las resoluciones que se dicten en este supuesto no afectarán los asuntos ya resueltos.

La organización del Tribunal, la competencia de las salas, los procedimientos para la resolución de los asuntos de su competencia, así como los mecanismos para fijar criterios de jurisprudencia obligatorios en la materia, serán los que determinen esta Constitución y las leyes.

La Sala Superior podrá, de oficio, a petición de parte o de alguna de las salas regionales, atraer los juicios de que conozcan éstas; asimismo, podrá enviar los asuntos de su competencia a las salas regionales para su conocimiento y resolución. La ley señalará las reglas y los procedimientos para el ejercicio de tales facultades.

La administración, vigilancia y disciplina en el Tribunal Electoral corresponderán, en los términos que señale la ley, a una Comisión del Consejo de la Judicatura Federal, que se integrará por el Presidente del Tribunal Electoral, quien la presidirá; un Magistrado Electoral de la Sala Superior designado por insaculación; y tres miembros del Consejo de la Judicatura Federal. El Tribunal propondrá su presupuesto al Presidente de la Suprema Corte de Justicia de la Nación para su inclusión en el proyecto de Presupuesto del Poder Judicial de la Federación. Asimismo, el Tribunal expedirá su Reglamento Interno y los acuerdos generales para su adecuado funcionamiento.

Los Magistrados Electorales que integren las salas Superior y regionales serán elegidos por el voto de las dos terceras partes de los miembros presentes de la Cámara de Senadores a propuesta de la Suprema Corte de Justicia de la Nación. La elección de quienes las integren será escalonada, conforme a las reglas y al procedimiento que señale la ley.

Los Magistrados Electorales que integren la Sala Superior deberán satisfacer los requisitos que establezca la ley, que no podrán ser menores a los que se exigen para ser Ministro de la Suprema Corte de Justicia de la Nación, y durarán en su encargo nueve años improrrogables. Las renuncias, ausencias y licencias de los Magistrados Electorales de la Sala Superior serán tramitadas, cubiertas y otorgadas por dicha Sala, según corresponda, en los términos del artículo 98 de esta Constitución.

Los Magistrados Electorales que integren las salas regionales deberán satisfacer los requisitos que señale la ley, que no podrán ser menores a los que se exige para ser Magistrado de Tribunal Colegiado de Circuito. Durarán en su encargo nueve años improrrogables, salvo si son promovidos a cargos superiores.

En caso de vacante definitiva se nombrará a un nuevo Magistrado por el tiempo restante al del nombramiento original.

El personal del Tribunal regirá sus relaciones de trabajo conforme a las disposiciones aplicables al Poder Judicial de la Federación y a las reglas especiales y excepciones que señale la ley.

Artículo 108. Para los efectos de las responsabilidades a que alude este Título se reputarán como servidores públicos a los representantes de elección popular, a los miembros del Poder Judicial Federal y del Poder Judicial del Distrito Federal, los funcionarios y empleados y, en general, a toda persona que desempeñe un empleo, cargo o comisión de cualquier naturaleza en el Congreso de la Unión, en la Asamblea Legislativa del Distrito Federal o en la Administración Pública Federal o en el Distrito Federal, así como a los servidores públicos de los organismos a los que esta Constitución otorgue autonomía, quienes serán responsables por los actos u omisiones en que incurran en el desempeño de sus respectivas funciones.

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Artículo 116. ...

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I a III. **...**

IV. Las Constituciones y leyes de los Estados en materia electoral garantizarán que:

a) Las elecciones de los gobernadores, de los miembros de las legislaturas locales y de los integrantes de los ayuntamientos se realicen mediante sufragio universal, libre, secreto y directo; y que la jornada comicial tenga lugar el primer domingo de julio del año que corresponda. Los Estados cuyas jornadas electorales se celebren en el año de los comicios federales y no coincidan en la misma fecha de la jornada federal, no estarán obligados por esta última disposición;

b) En el ejercicio de la función electoral, a cargo de las autoridades electorales, sean principios rectores los de certeza, imparcialidad, independencia, legalidad y objetividad;

c) Las autoridades que tengan a su cargo la organización de las elecciones y las jurisdiccionales que resuelvan las controversias en la materia, gocen de autonomía en su funcionamiento e independencia en sus decisiones;

d) Las autoridades electorales competentes de carácter administrativo puedan convenir con el Instituto Federal Electoral se haga cargo de la organización de los procesos electorales locales;

e) Los partidos políticos sólo se constituyan por ciudadanos sin intervención de organizaciones gremiales, o con objeto social diferente y sin que haya afiliación corporativa. Asimismo tengan reconocido el derecho exclusivo para solicitar el registro de candidatos a cargos de elección popular, con excepción de lo dispuesto en el artículo 2o., apartado A, fracciones III y VII, de esta Constitución;

f) Las autoridades electorales solamente puedan intervenir en los asuntos internos de los partidos en los términos que expresamente señalen;

g) Los partidos políticos reciban, en forma equitativa, financiamiento público para sus actividades ordinarias permanentes y las tendientes a la obtención del voto durante los procesos electorales. Del mismo modo se establezca el procedimiento para la liquidación de los partidos que pierdan su registro y el destino de sus bienes y remanentes;

h) Se fijen los criterios para establecer los límites a las erogaciones de los partidos políticos en sus precampañas y campañas electorales, así como los montos máximos que tengan las aportaciones de sus simpatizantes, cuya suma total no excederá el diez por ciento del tope de gastos de campaña que se determine para la elección de gobernador; los procedimientos para el control y vigilancia del origen y uso de todos los recursos con que cuenten los partidos políticos; y establezcan las sanciones por el incumplimiento a las disposiciones que se expidan en estas materias;

i) Los partidos políticos accedan a la radio y la televisión, conforme a las normas establecidas por el apartado B de la base III del artículo 41 de esta Constitución;

j) Se fijen las reglas para las precampañas y las campañas electorales de los partidos políticos, así como las sanciones para quienes las infrinjan. En todo caso, la duración de las campañas no deberá exceder de noventa días para la elección de gobernador, ni de sesenta días cuando sólo se elijan diputados locales o ayuntamientos; las precampañas no podrán durar más de las dos terceras partes de las respectivas campañas electorales;

k) Se instituyan bases obligatorias para la coordinación entre el Instituto Federal Electoral y las autoridades electorales locales en materia de fiscalización de las finanzas de los partidos políticos, en los términos establecidos en los dos últimos párrafos de la base V del artículo 41 de esta Constitución;

l) Se establezca un sistema de medios de impugnación para que todos los actos y resoluciones electorales se sujeten invariablemente al principio de legalidad. Igualmente, que se señalen los supuestos y las reglas para la realización, en los ámbitos administrativo y jurisdiccional, de recuentos totales o parciales de votación;

m) Se fijen las causales de nulidad de las elecciones de gobernador, diputados locales y ayuntamientos, así como los plazos convenientes para el desahogo de todas las instancias impugnativas, tomando en cuenta el principio de definitividad de las etapas de los procesos electorales, y

n) Se tipifiquen los delitos y determinen las faltas en materia electoral, así como las sanciones que por ellos deban imponerse.

V. a VII. **...**

...

Artículo 122. ...

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A **...**

B. **...**

C **...**

BASE PRIMERA.- **...**

I. a IV. **...**

V. La Asamblea Legislativa, en los términos del Estatuto de Gobierno, tendrá las siguientes facultades:

a) al e) **...**

f) Expedir las disposiciones que garanticen en el Distrito Federal elecciones libres y auténticas, mediante sufragio universal, libre, secreto y directo; sujetándose a las bases que establezca el Estatuto de Gobierno, las cuales cumplirán los principios y reglas establecidos en los incisos b) al n) de la fracción IV del artículo 116 de esta Constitución, para lo cual las referencias que los incisos j) y m) hacen a gobernador, diputados locales y ayuntamientos se asumirán, respectivamente, para Jefe de Gobierno, diputados a la Asamblea Legislativa y Jefes Delegacionales;

g) al o) **...**

BASE SEGUNDA a BASE QUINTA **...**

D al H **...**

Artículo 134. ...

...

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...

Los servidores públicos de la Federación, los Estados y los municipios, así como del Distrito Federal y sus delegaciones, tienen en todo tiempo la obligación de aplicar con imparcialidad los recursos públicos que están bajo su responsabilidad, sin influir en la equidad de la competencia entre los partidos políticos.

La propaganda, bajo cualquier modalidad de comunicación social, que difundan como tales, los poderes públicos, los órganos autónomos, las dependencias y entidades de la administración pública y cualquier otro ente de los tres órdenes de gobierno, deberá tener carácter institucional y fines informativos, educativos o de orientación social. En ningún caso esta propaganda incluirá nombres, imágenes, voces o símbolos que impliquen promoción personalizada de cualquier servidor público.

Las leyes, en sus respectivos ámbitos de aplicación, garantizarán el estricto cumplimiento de lo previsto en los dos párrafos anteriores, incluyendo el régimen de sanciones a que haya lugar.

TRANSITORIOS

Artículo Primero. El presente Decreto entrará en vigor el día siguiente al de su publicación en el Diario Oficial de la Federación.

Artículo Segundo. Por única vez el Instituto Federal Electoral deberá establecer, conforme a las bases legales que se expidan, tope de gastos para campaña presidencial en el año 2008, sólo para efecto de determinar el monto total del financiamiento privado que podrá obtener anualmente cada partido político.

Artículo Tercero. El Congreso de la Unión deberá realizar las adecuaciones que correspondan en las leyes federales en un plazo máximo de treinta días naturales contados a partir del inicio de la vigencia de este Decreto.

Artículo Cuarto. Para los efectos de lo establecido en el tercer párrafo de la base V del artículo 41 de esta Constitución, en un plazo no mayor a 30 días naturales contados a partir de la entrada en vigor del presente Decreto, la Cámara de Diputados procederá a integrar el Consejo General del Instituto Federal Electoral conforme a las siguientes bases:

a) Elegirá a un nuevo consejero Presidente, cuyo mandato concluirá el 30 de octubre de 2013; llegado el caso, el así nombrado podrá ser reelecto por una sola vez, en los términos de lo establecido en el citado párrafo tercero del artículo 41 de esta Constitución;

b) Elegirá, dos nuevos consejeros electorales, cuyo mandato concluirá el 30 de octubre de 2016.

c) Elegirá, de entre los ocho consejeros electorales en funciones a la entrada en vigor de este Decreto, a tres que concluirán su mandato el 15 de agosto de 2008 y a tres que continuarán en su encargo hasta el 30 de octubre de 2010;

d) A más tardar el 15 de agosto de 2008, elegirá a tres nuevos consejeros electorales que concluirán su mandato el 30 de octubre de 2013.

Los consejeros electorales y el consejero Presidente del Consejo General del Instituto Federal Electoral, en funciones a la entrada en vigor del presente Decreto, continuarán en sus cargos hasta en tanto la Cámara de Diputados da cumplimiento a lo dispuesto en el presente artículo. Queda sin efectos el nombramiento de consejeros electorales suplentes del Consejo General del Instituto Federal Electoral establecido por el Decreto publicado en el Diario Oficial de la Federación de fecha 31 de octubre de 2003.

Artículo Quinto. Para los efectos de la renovación escalonada de los Magistrados Electorales de la Sala Superior y de las salas regionales del Tribunal Electoral del Poder Judicial de la Federación a que se refiere el artículo 99 de esta Constitución, se estará a lo que determine la Ley Orgánica del Poder Judicial de la Federación.

Artículo Sexto. Las legislaturas de los Estados y la Asamblea Legislativa del Distrito Federal deberán adecuar su legislación aplicable conforme a lo dispuesto en este Decreto, a más tardar en un año a partir de su entrada en vigor; en su caso, se observará lo dispuesto en el artículo 105, fracción II, párrafo cuarto, de la Constitución Política de los Estados Unidos Mexicanos.

Los Estados que a la entrada en vigor del presente Decreto hayan iniciado procesos electorales o estén por iniciarlos, realizarán sus comicios conforme lo establezcan sus disposiciones constitucionales y legales vigentes, pero una vez terminado el proceso electoral deberán realizar las adecuaciones a que se refiere el párrafo anterior en el mismo plazo señalado, contado a partir del día siguiente de la conclusión del proceso comicial respectivo.

Artículo Séptimo. Se derogan todas las disposiciones que se opongan al presente Decreto.

México, D.F., a 6 de noviembre de 2007.- Dip. **Ruth Zavaleta Salgado**, Presidenta.- Sen. **Santiago Creel Miranda**, Presidente.- Dip. **Antonio Xavier López Adame**, Secretario.- Sen. **Adrian Rivera Pérez**, Secretario.- Rúbricas.**"**

En cumplimiento de lo dispuesto por la fracción I del Artículo 89 de la Constitución Política de los Estados Unidos Mexicanos, y para su debida publicación y observancia, expido el presente Decreto en la Residencia del Poder Ejecutivo Federal, en la Ciudad de México, Distrito Federal, a los doce días del mes de noviembre de dos mil siete.- **Felipe de Jesús Calderón Hinojosa**.- Rúbrica.- El Secretario de Gobernación, **Francisco Javier Ramírez Acuña**.- Rúbrica.

DECLARATORIA de Desastre Natural por la ocurrencia de lluvias extremas e inundaciones atípicas ocurridas del 24 al 30 de octubre de 2007, en los 17 municipios del Estado de Tabasco.

Al margen un sello con el Escudo Nacional, que dice: Estados Unidos Mexicanos.- Secretaría de Gobernación.

LAURA GURZA JAIDAR, Coordinadora General de Protección Civil de la Secretaría de Gobernación, con fundamento en lo dispuesto por los artículos 27, fracción XXIV de la Ley Orgánica de la Administración Pública Federal; 12, fracción IX, 29, 32, 34, 35, 36 y 37 de la Ley General de Protección Civil; 10 del Reglamento Interior de la Secretaría de Gobernación; y numerales 19, 20, 21, 22, 26 y 27 y Anexo I del Acuerdo por el que se emiten las Reglas de Operación del Fondo de Desastres Naturales (FONDEN) vigentes, y

CONSIDERANDO

Que mediante escrito de fecha 27 de octubre de 2007, el Gobernador del Estado de Tabasco, solicitó a la Comisión Nacional del Agua (CONAGUA) su opinión técnica respecto a las lluvias e inundaciones que se presentaron del 23 al 27 de octubre de 2007, afectando 6 municipios, Cardenas, Centla, Comalcalco, Huimanguillo, Paraíso y Tenosique. De igual forma, en alcance al escrito anterior, con fecha 30 de octubre del año en curso, el Gobernador le solicitó por escrito a la CONAGUA otra solicitud de opinión técnica para los municipios de Balancan, Centro, Cunduacan, Emiliano Zapata, Jalpa de Méndez, Jalapa, Jonuta, Macuspana, Nacajuca, Tacotalpa y Teapa de esa Entidad Federativa.

Que mediante oficio No. BOO.-1485 de fecha 29 de octubre de 2007, la CONAGUA emitió su opinión técnica respecto de dicho evento, mismo que en su parte conducente dispone lo siguiente: derivado del análisis de la información cualitativa y cuantitativa, en opinión de la Comisión Nacional del Agua, de acuerdo a las Reglas de Operación del FONDEN, se corrobora la ocurrencia de inundaciones atípicas del 24 al 27 de octubre de 2007, en 6 municipios: Cárdenas, Centla, Comalcalco, Huimanguillo, Paraíso y Tenosique del Estado de Tabasco. Asimismo con oficio BOO.- 1500 de fecha 1 de noviembre de 2007, la CONAGUA emitió su opinión técnica, respecto del fenómeno natural en cuestión, mismo que en su parte conducente dispone lo siguiente: derivado del análisis de la información cualitativa y cuantitativa en opinión de la Comisión Nacional del Agua, de acuerdo a las Reglas de Operación del FONDEN, se corrobora la ocurrencia de lluvias extremas e inundaciones atípicas del 28 al 30 de octubre de 2007, en 11 municipios: Balancán, Centro, Cunduacán, Emiliano Zapata, Jalapa, Jalpa de Méndez, Jonuta, Macuspana, Nacajuca, Tacotalpa y Teapa del Estado de Tabasco.

Que con fecha 31 de octubre de 2007, se llevó a cabo la sesión de Instalación del Comité de Evaluación de Daños.

En consecuencia, con fecha 12 de noviembre de 2007 se llevó a cabo la primera sesión de Entrega de Resultados parcial del Comité de Evaluación de Daños, en la cual se presentaron los primeros resultados parciales de los trabajos de evaluación de daños, así como la solicitud de Declaratoria de Desastre Natural respectiva.

Con base en lo anterior, se determinó procedente emitir la siguiente:

DECLARATORIA DE DESASTRE NATURAL POR LA OCURRENCIA DE LLUVIAS EXTREMAS E INUNDACIONES ATIPICAS OCURRIDAS DEL 24 AL 30 DE OCTUBRE DE 2007, EN LOS 17 MUNICIPIOS DEL ESTADO DE TABASCO

Artículo 1o.- Se declara como zona de desastre a los municipios de Cárdenas, Centla, Comalcalco, Huimanguillo, Paraíso, Tenosique, Balancán, Centro, Cunduacán, Emiliano Zapata, Jalapa, Jalpa de Méndez, Jonuta, Macuspana, Nacajuca, Tacotalpa y Teapa Estado de Tabasco.

Artículo 2o.- La presente Declaratoria de Desastre Natural se expide para efectos de poder acceder a los recursos del FONDEN, de acuerdo con lo dispuesto por la Ley General de Protección Civil y las Reglas de Operación vigentes de dicho Fondo.

Artículo 3o.- La presente Declaratoria se publicará en el Diario Oficial de la Federación de conformidad con el artículo 37 de la Ley General de Protección Civil y en cumplimiento a lo dispuesto por el numeral 27 de las Reglas de Operación del FONDEN.

México, Distrito Federal, a doce de noviembre de dos mil siete.- La Coordinadora General, **Laura Gurza Jaidar**.- Rúbrica.

La inaplicación de normas jurídicas por el Tribunal Electoral del Poder Judicial de la Federación

Manuel González Oropeza*

En 1996 inició una etapa importante en la evolución del Tribunal Electoral del Poder Judicial de la Federación (TEPJF), con las reformas a la Constitución Política de los Estados Unidos Mexicanos (CPEUM). En éstas se estableció que el Tribunal formaría parte del Poder Judicial de la Federación; que estaría integrado por una Sala Superior y por cinco Salas Regionales; que todos los magistrados electorales serían propuestos por la Suprema Corte de Justicia de la Nación (SCJN) y elegidos por el voto de las dos terceras partes de los miembros presentes de la Cámara de Senadores, o en sus recesos por la Comisión Permanente. También se señaló que la Sala Superior del TEPJF realizaría el cómputo final de la elección de presidente de la República, la declaración de validez de la elección presidencial y la declaración de presidente electo.

Esta etapa del Tribunal Electoral se relaciona de manera estrecha con la inaplicación de leyes de carácter electoral, y se puede exponer de la siguiente forma:

El Poder Judicial de la Federación en México ha tenido una larga trayectoria en materia de salvaguarda de las garantías individuales, sobre todo a través del juicio de amparo. En una de sus vertientes, este juicio se promueve con el objeto de que se declare la inconstitucionalidad de una ley, reglamento, tratado o norma jurídica en particular.

* Magistrado de la Sala Superior del Tribunal Electoral del Poder Judicial de la Federación.

En este caso, es promovido por las personas o por los representantes legales de las personas morales que consideran que una ley, reglamento, tratado o norma jurídica, le genera un perjuicio en sus garantías individuales. Los efectos de sus sentencias sólo son para las partes en conflicto y la inconstitucionalidad de la ley se transforma en su inaplicación al caso concreto, sin afectar la vigencia de la norma.

Por otra parte, el 10 de junio de 1995 entró en vigor una reforma al artículo 105 de la Constitución, con la que se instauró un mecanismo denominado acción de inconstitucionalidad, que tiene por objeto plantear ante la SCJN un caso en que posiblemente exista una contradicción entre una norma de carácter general (ley, reglamento, tratado, norma jurídica) y la CPEUM.

A diferencia del juicio de amparo, que es promovido de manera concreta por el particular o por el representante legal de la persona moral que se considera afectada, la acción de inconstitucionalidad es un recurso de las minorías de ciertos poderes o funcionarios públicos para solicitar la declaración de inconstitucionalidad de alguna ley, reglamento, tratado o norma jurídica.

La acción de inconstitucionalidad puede ser promovida por 33% de los integrantes de la Cámara de Diputados del Congreso de la Unión; por 33% de los integrantes del Senado; por el procurador general de la República; por 33% de los integrantes de alguno de los órganos legislativos estatales, y por 33% de los integrantes de la Asamblea Legislativa del Distrito Federal.

Con motivo de la incorporación del Tribunal Electoral al Poder Judicial de la Federación, también se otorgó legitimidad a las dirigencias nacionales de los partidos políticos para plantear la acción de inconstitucionalidad en contra de leyes electorales federales o locales; y a las dirigencias de los partidos políticos estatales para plantear dicha acción en contra de leyes electorales estatales. La única vía para plantear la no conformidad de las leyes electorales a la CPEUM es la acción de inconstitucionalidad.

De igual forma, en el nuevo artículo 99 se indicó lo siguiente:

> Cuando una Sala del Tribunal Electoral sustente una tesis sobre la inconstitucionalidad de algún acto o resolución o sobre la interpretación de un precepto de esta Constitución, y dicha tesis pueda ser contradictoria con una sostenida por las

> Salas o el Pleno de la Suprema Corte de Justicia, cualquiera de los Ministros, las Salas o las partes, podrán denunciar la contradicción, en los términos que señale la ley, para que el Pleno de la Suprema Corte de Justicia de la Nación decida en definitiva cual tesis debe prevalecer. Las resoluciones que se dicten en este supuesto no afectarán los asuntos ya resueltos.

Así, se le confería al Tribunal Electoral la facultad de interpretar la CPEUM a partir de sus facultades de control de la constitucionalidad y de la legalidad de los actos y resoluciones de las autoridades electorales.

Esto se reforzaba, además, con el artículo 41 constitucional, que señalaba lo siguiente: "IV- Para garantizar los principios de constitucionalidad y legalidad de los actos y resoluciones electorales, se establecerá un sistema de medios de impugnación en los términos que señalen esta Constitución y la ley...".

Si se relacionan estas disposiciones constitucionales, se puede afirmar que de ellas se desprende el mandato constitucional de que el TEPJF se sujete invariablemente a la Constitución, lo que comprende la posibilidad de interpretarla, lo cual hace del Tribunal un órgano de control constitucional y no sólo para la legalidad electoral.

La Ley General del Sistema de Medios de Impugnación en Materia Electoral (LGSMIME)

El 22 de noviembre de 1996 entró en vigor la LGSMIME. En esa ley se establecieron los diferentes medios de defensa para impugnar los actos y resoluciones de las autoridades electorales y, asimismo, se estableció que ese sistema de medios de impugnación tenía por objeto garantizar que todos esos actos y resoluciones se sujetaran invariablemente a los principios de constitucionalidad y de legalidad.

Los medios de impugnación fueron los siguientes: recurso de revisión, para garantizar la legalidad de actos y resoluciones de la autoridad electoral federal; recurso de apelación, juicio de inconformidad y recurso de reconsideración, para garantizar la constitucionalidad y legalidad de actos y resoluciones de la autoridad electoral federal; juicio para la protección de los derechos político-electorales del ciudadano; juicio de revisión constitucional electoral, para garantizar la constitucionalidad

de actos o resoluciones de las autoridades locales en los procesos electorales de las entidades federativas; y juicio para dirimir los conflictos o diferencias laborales entre el Instituto Federal Electoral y sus servidores.

El juicio para la protección de los derechos político-electorales del ciudadano es el juicio más abundante en resoluciones, pues durante el primer semestre de este año, se han resuelto cerca de 5,000 demandas. Destaca el hecho de que la LGSMIME señaló expresamente que uno de los objetivos del sistema de medios de impugnación consistía en que los actos y las resoluciones de las autoridades electorales debían sujetarse a los principios y las reglas constitucionales. La Sala Superior y las Salas Regionales tendrían a su cargo la resolución de dichos medios.

El cotejo de los actos y las resoluciones de las autoridades electorales con el texto constitucional se lleva a cabo necesariamente a través de la interpretación. Si no se realiza una interpretación de la Constitución y de las leyes electorales, no existe una verdadera verificación de la constitucionalidad y de la legalidad de los actos y resoluciones de las autoridades electorales.

El caso del principio de no reelección del estado de Chiapas

El tema de la inaplicación de una ley electoral surgió con la sentencia emitida el 16 de julio de 1998, por la Sala Superior del TEPJF, en el juicio de revisión constitucional electoral SUP-JRC-033/98. La historia de este asunto es la siguiente: el Consejo Estatal Electoral del Estado de Chiapas expidió un acuerdo en el que confirmaba que las personas que ocuparan el cargo de regidor propietario en un ayuntamiento, podían ser candidatos al cargo de presidente municipal o síndico para el próximo periodo, pues así lo permitía el artículo 23 de la Ley Orgánica Municipal del Estado de Chiapas. El Consejo Estatal Electoral consideró que no se contravenía el principio de no reelección, porque en este caso el regidor no se estaría postulando para el mismo cargo.

Dos partidos políticos impugnaron este acuerdo ante el Tribunal Electoral del Estado de Chiapas, el cual resolvió que debía revocarse

y determinó que los integrantes propietarios de los ayuntamientos no podían ser registrados como candidatos para el periodo inmediato, aunque se postularan para ocupar un cargo distinto al que desempeñaban.

Posteriormente, un partido político promovió un juicio de revisión constitucional electoral en contra de esa sentencia. La Sala Superior se encontró así con el siguiente dilema:

> ... se hace necesario determinar si en la resolución de un medio de impugnación de la jurisdicción de este órgano jurisdiccional se puede determinar legalmente la inaplicabilidad de preceptos de las leyes secundarias en que se funde o pueda fundar el acto o resolución impugnado, por considerarlos opuestos a las disposiciones de la Constitución Política de los Estados Unidos Mexicanos, y en caso afirmativo dilucidar cuál es el alcance y los efectos de ese pronunciamiento.

La Sala Superior señaló en esa sentencia que:

> ... la jurisdicción para el control de su constitucionalidad se confirió expresamente al Tribunal Electoral del Poder Judicial de la Federación, cuando tales actos o resoluciones se combaten a través de los medios de impugnación de su conocimiento.

Por tanto, consideró que tenía la posibilidad de analizar "[l]a inconstitucionalidad de los actos y resoluciones en materia electoral..." fundamentalmente, por dos motivos:

> 1. Por no encontrarse apegados a preceptos constitucionales que contengan disposiciones que las autoridades electorales deban respetar y aplicar directa e inmediatamente, sin necesidad de reglamentación o regulación mediante la expedición de leyes, reglamentos o normas generales de cualquiera especie para ese objeto; y
> 2. Cuando los actos o resoluciones estén sustentados en leyes o normas generales de cualquiera índole que sean contrarias a los contenidos y principios establecidos por la Constitución Política de los Estados Unidos Mexicanos.

De esta forma, la Sala Superior determinó en su sentencia que el artículo 23 de la Ley Orgánica Municipal del Estado de Chiapas sí contravenía el principio de no reelección, establecido en el artículo 115 de la Constitución, que dice:

> 115. ... I. ... Los presidentes municipales, regidores y síndicos de los ayuntamientos, electos popularmente por elección directa, no podrán ser reelectos para el período inmediato. Las personas que por elección indirecta, o por nombramiento o designación de alguna autoridad desempeñen las funciones propias de esos cargos, cualquiera que sea la denominación que se les dé, no podrán ser electas para el período inmediato. Todos los funcionarios antes mencionados, cuando tengan el carácter de propietarios, no podrán ser electos para el período inmediato con el carácter de suplentes, pero los que tengan el carácter de suplentes sí podrán ser electos para el período inmediato como propietarios a menos que hayan estado en ejercicio.

Con ello, la Sala Superior confirmó la sentencia del Tribunal Electoral del Estado de Chiapas y autorizó la siguiente tesis relevante: "TRIBUNAL ELECTORAL DEL PODER JUDICIAL DE LA FEDERACIÓN. TIENE FACULTADES PARA DETERMINAR LA INAPLICABILIDAD DE LEYES SECUNDARIAS CUANDO ESTAS SE OPONGAN A DISPOSICIONES CONSTITUCIONALES."

Para los magistrados no era ajena a su cultura y a su formación jurídica la posibilidad de que un tribunal, integrante del Poder Judicial de la Federación, pudiera suspender la aplicación y los efectos de una norma jurídica, cuando ésta fuera inconstitucional y le causara un perjuicio a la esfera de garantías individuales de una persona, aplicando el principio de relatividad de la sentencia. El principio de relatividad de la sentencia significa que ésta solamente se ocupa de la persona que aduce una afectación a su esfera jurídica, y no de otras personas a las que también pudiera afectarles la norma jurídica pero que no recurren al juicio de amparo.

En el caso que se comenta del estado de Chiapas, los magistrados adecuaron esta posibilidad y la hicieron efectiva a través del juicio de revisión constitucional electoral. Debe destacarse, por cierto, que la inaplicación del artículo 23 de la Ley Orgánica Municipal fue realizada por el Tribunal Electoral del Estado de Chiapas; la Sala Superior únicamente confirmó la constitucionalidad de la sentencia.

En consecuencia, la inaplicación de una norma jurídica de carácter electoral debe entenderse como la suspensión de los efectos de esa norma jurídica con respecto a la persona que promovió un medio de impugnación ante un tribunal electoral federal.

El caso de la asignación de diputados por el principio de representación proporcional del estado de Guerrero

Un segundo caso de inaplicación de una ley electoral es el siguiente: el 3 de octubre de 1999 se llevó a cabo la elección de diputados locales en el estado de Guerrero; el Consejo Estatal Electoral realizó el cómputo de la elección de diputados por el principio de representación proporcional y otorgó un escaño al Partido Acción Nacional, siete al Partido Revolucionario Institucional, nueve al Partido de la Revolución Democrática y uno al Partido de la Revolución del Sur.

Dos partidos políticos impugnaron esa asignación de diputados ante el Tribunal Electoral del Estado de Guerrero. Los partidos políticos alegaron que había un error aritmético en el cómputo estatal y cuestionaron la aplicación de la fórmula de asignación de diputados por el principio de representación proporcional. El principio de representación proporcional implica que un partido político tiene derecho a cierto número de escaños en el Congreso del estado, tomando en cuenta el número de votos que hubieran conseguido sus candidatos a diputados, aunque el partido político no haya ganado alguna diputación por el principio de mayoría relativa.

El Tribunal Electoral del Estado de Guerrero confirmó la legalidad de la resolución del Consejo Estatal Electoral. Sin embargo, uno de los partidos promovió un juicio de revisión constitucional electoral ante la Sala Superior (SUP-JRC-209/99). Éste argumentó básicamente que la sentencia del Tribunal Electoral del Estado de Guerrero era ilegal, porque vulneraba las bases constitucionales aplicables a la elección de diputados por el principio de representación proporcional. Las bases constitucionales fueron establecidas por la Suprema Corte al resolver la acción de inconstitucionalidad 6/98, el 23 de septiembre de 1998.

El actor solicitó la no aplicación de una porción del artículo 29 de la Constitución Política del Estado de Guerrero, porque permitía que un partido político obtuviera hasta 30 escaños del Congreso del estado: "En ningún caso un partido político podrá contar con más de treinta diputados por ambos principios."

En cambio, la jurisprudencia 69/1998 de la Suprema Corte, que derivó de la acción de inconstitucionalidad 6/98, había señalado que el número máximo de escaños que podía obtener un partido político en una elección de diputados debía ser igual al número de distritos electorales en el estado. Entonces, si el número de distritos electorales en el estado de Guerrero era 28, un partido político sólo podía obtener hasta 28 escaños en el Congreso del estado.

En este caso, la Sala Superior señaló en su sentencia que no existían razones jurídicas suficientes para determinar la inaplicación de esa porción normativa del artículo 29 de la Constitución del Estado de Guerrero, aunque se apartara de las bases constitucionales establecidas por la Suprema Corte en la jurisprudencia 69/1998, que derivó de la acción de inconstitucionalidad 6/98.

La contradicción de tesis 2/2000-PL

El 15 de noviembre de 1999, el presidente de la Sala Superior denunció ante la Suprema Corte la posible contradicción de criterios entre la sentencia emitida por la Sala en el juicio de revisión constitucional electoral SUP-JRC-209/99 y la jurisprudencia 69/1998, que derivó de la acción de inconstitucionalidad 6/98.

La Corte emitió su sentencia el 23 de mayo de 2002, en la que estableció esencialmente lo siguiente:

- Que el Tribunal Electoral no tiene competencia para interpretar un precepto de la Constitución con el objeto de pronunciarse sobre la inconstitucionalidad de una norma general en materia electoral.
- Que la única vía para plantear la no conformidad de leyes electorales federales y locales con la Constitución es la acción de inconstitucionalidad, y que la única autoridad competente para conocer y resolver una acción de inconstitucionalidad es la Suprema Corte, por lo cual el Tribunal Electoral no podía pronunciarse sobre la inconstitucionalidad de leyes electorales, aunque existiera el pretexto de determinar su posible inaplicación.
- Que el Tribunal sólo puede pronunciarse sobre algún acto o resolución de carácter electoral o sobre la interpretación de un precepto

constitucional, siempre que la interpretación que realice no sea para corroborar la constitucionalidad.

- Que el Tribunal no está facultado para hacer consideraciones ni pronunciarse sobre la constitucionalidad de una norma general de carácter electoral, por ser una atribución exclusiva de la Corte, y que las tesis o criterios que había emitido el Tribunal o que llegara a emitir sobre la inconstitucionalidad de leyes electorales no podían dar lugar a jurisprudencia obligatoria.

Como se puede observar, esta sentencia dejó al Tribunal sin posibilidades para pronunciarse sobre la inaplicación de disposiciones legales de carácter electoral, y con ello se debilitó de cierta forma su papel de salvaguarda del orden constitucional en esta materia. Así, los criterios que había sostenido el Tribunal Electoral con respecto al tema de la inaplicación de leyes de carácter electoral habían quedado sin efectos.

Finalmente, en noviembre de 2007, el Congreso de la Unión aprobó reformas a la CPEUM, de las que derivaron cambios importantes para el Tribunal Electoral. Específicamente, en cuanto a la inaplicación de leyes de carácter electoral, se modificó el artículo 99 en los términos siguientes:

> Sin perjuicio de lo dispuesto por el artículo 105 de esta Constitución, las salas del Tribunal Electoral podrán resolver la no aplicación de leyes sobre la materia electoral contrarias a la presente Constitución. Las resoluciones que se dicten en el ejercicio de esta facultad se limitarán al caso concreto sobre el que verse el juicio. En tales casos la Sala Superior informará a la Suprema Corte de Justicia de la Nación.

Esta reforma constitucional ha sido muy importante, porque a partir de aquí el Tribunal electoral ha resuelto un número importante de casos de inaplicación de leyes electorales.

El caso de San Luis Potosí

Se trató de un juicio para la protección de los derechos político-electorales del ciudadano, promovido por Eugenio Guadalupe Govea Arcos, quien había sido aceptado como precandidato para participar en el proceso interno de selección de candidato a la gubernatura del estado de San Luis Potosí.

El 7 de octubre del mismo año, Eugenio Guadalupe Govea Arcos, ya con el carácter de precandidato, realizó una consulta por escrito ante el Consejo Estatal Electoral y de Participación Ciudadana de San Luis Potosí —que es la autoridad electoral encargada de preparar, desarrollar, calificar y vigilar los procesos electorales estatales y municipales—.

La consulta tenía por objeto que el Consejo Estatal Electoral y de Participación Ciudadana de San Luis Potosí fijara su posición y su interpretación con respecto al artículo 154, párrafo octavo, de la Ley Electoral del Estado de San Luis Potosí, que imponía una limitante a los precandidatos de los partidos políticos, que consistía en que únicamente se les permitía la realización de reuniones de carácter privado, siempre que a estas reuniones no asistieran más de 500 personas y que no se celebraran en lugares públicos.

El precandidato del partido preguntaba en su consulta, entre otras cuestiones: si estaban restringidas las reuniones, cuáles eran las reuniones de carácter privado, si podía realizar reuniones de carácter privado a las que asistieran más de 500 personas, cuáles eran los lugares públicos, cuáles eran las reuniones públicas, cómo establecería el Consejo Estatal Electoral y de Participación Ciudadana si a la reunión asistieron más de 500 personas, cuáles eran las sanciones por realizar reuniones de más de 500 personas.

El 8 de octubre de 2008, el Consejo Estatal Electoral y de Participación Ciudadana de San Luis Potosí le notificó la respuesta al precandidato del Partido Acción Nacional. En su contestación, la autoridad electoral estatal le decía esencialmente que la respuesta a sus preguntas estaba en el artículo 154 y, que la verificación del número de personas que asistieran a una reunión organizada por un precandidato de partido político se realizaría cuando hubiera alguna denuncia.

El precandidato del partido interpuso una demanda de juicio para la protección de los derechos político-electorales del ciudadano. En su demanda, Eugenio Guadalupe Govea Arcos sostuvo que el artículo 154, párrafo octavo, contraviene el artículo 41 constitucional, porque limita la participación de la población en actividades democráticas; que obstruye el derecho de reunión, contemplado en el artículo 9o de la Constitución y que al afectarse ese derecho también se vulnera el de ser votado para un cargo de elección popular, previsto en el artículo 35 constitucional.

En la sentencia se estableció que sí se vulneraba indebidamente el derecho de reunión previsto en el artículo 9o, con lo cual también se afectaba el derecho de ser votado previsto en el artículo 35, porque el ejercicio del derecho de reunión resulta indispensable para el ejercicio del derecho de ser votado para un cargo de elección popular.

A la fecha, la Sala Superior del TEPJF ha establecido una jurisprudencia y una tesis relevante sobre el tema de la inaplicación de leyes:

RECURSO DE RECONSIDERACIÓN. PROCEDE SI EN LA SENTENCIA LA SALA REGIONAL INAPLICA, EXPRESA O IMPLÍCITAMENTE, UNA LEY ELECTORAL POR CONSIDERARLA INCONSTITUCIONAL. (J. 32/2009).

RELATIVIDAD DE LA SENTENCIA. SUPUESTO DE INAPLICACIÓN DEL PRINCIPIO, EN EL JUICIO PARA LA PROTECCIÓN DE LOS DERECHOS POLÍTICO-ELECTORALES DEL CIUDADANO. (T. LXII/2001).

Opinion on the Electoral Legislation of Mexico

Paloma Biglino Campos*
Srdjan Darmanovic**
Evgeni Tanchev***

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,[1] the General Law on the System for Filing Complaints concerning electoral matters (LGSMIME)[2] and the Criminal Code. The Electoral Court's judgment, issued on 31 August 2012,

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

[2] Available in English in http://portal.te.gob.mx/en/consultations/law-means-impugnment.

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.[3]

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 52nd 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 77th Plenary Session (Venice, 12-13 December 2008) and Explanatory report adopted by the Venice Commission at its 78th 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 is 84th 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 46th 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 57th 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;

[3] 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 45th meeting (Venice, 13 June 2013) and by the Venice Commission at its 95th 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.[4]

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).[5] 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.

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

5 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*",[6] 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*".[7] 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)*[8], *two (senators - S.D.) will be elected by the principle of relative majority voting, and one will be assigned to the largest minority*",[9] while the rest

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

7 *Ibidem*.

8 Distrito Federal is the capital - Mexico City.

9 *Electoral Code*, Article 11.

of the 32 senators "will be elected by the principle of proportional representation, voted in only one plurinominal district."[10]

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[11]. 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[12]. 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[13]. 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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10 *Ibidem*.

11 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.

12 Venice Commission, CDL-AD(2012)012.

13 See *Quelques éléments à prendre en compte dans le choix d'un système électoral*, Jean-Claude COLLIARD, *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*[14]. 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[15]. 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.*"[16]

14 CDL-AD(2012)027.

15 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.

16 *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"[17].

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.*"

[17] *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[18]. 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*".[19] 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.

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18 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."

19 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*

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. [20]

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.

[20] 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*, 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*[21] 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[22], 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*[23], the neutrality requirement applies to the *electoral campaign* and *coverage*

21 Venice Commission, 2002, CDL-AD(2002)23rev.

22 See, for example, the case-law of the Inter-American Court olf 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..

23 Adopted by the Venice Commission at its 52nd 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.[24] 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[25]. However, the principle of "material equality" has been introduced through International Conventions according to Article 133.[26]

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24 Such as Article 13 of the American Convention on Human Rights, whcih prohibits prior censorship.

25 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."

26 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.[27] 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.

[27] 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 *Cod*e 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,[28] 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*[29] 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

[28] SUP-JIN-359/2012 is a good example.

[29] 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.[30] 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

30 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.[31] According to the Report[32], 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.[33] 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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31 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 .

32 *Ibidem*.

33 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.[34]

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

[34] 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.[35] The regulation of broadcasting coverage of opinion polls and other relevant information is a positive element.[36] 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.[37]

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

35 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.

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

37 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;[38] however, transparency and publicity are key elements to ensure a better contribution to form free opinions.[39]

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.[40]

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[41]); 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

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

39 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 .

40 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.

41 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.[42]

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.[43]

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

42 The so called "Juanitas" case.

43 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[44]." 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.[45] 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[46] 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)[47] 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 cancelation 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.

44 CDL-AD(2002)023rev, para. 22.

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

46 CDL-AD(2002)023rev, para. 23.

47 Available in English in http://portal.te.gob.mx/en/consultations/law-means-impugnment.

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*).[48]

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).[49] 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

48 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.*

49 Eletoral 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.

Minorities in the Mexican Electoral System

Salvador Olimpo Nava Gomar*
Manuel González Oropeza**

Thank you Mr. Secretary. It is with great pleasure that I speak here today, humbly hoping to open a window into the path that electoral institutions in Mexico have taken to ensure the rights of minorities to strengthen our democracy.

I. Background information

- Mexico is one of the most culturally diverse countries in the world. There are 12.7 million people from indigenous communities, which represent 13% of our national population.
- These communities are spread out through Mexico and posses close to a fifth of the territory.
- The states with the highest concentration of indigenous communities are: Yucatán (59%), Oaxaca (48%), Quintana Roo (39%), Chiapas (28%), Campeche (27%), Hidalgo (24%), Puebla (19%), Guerrero (17%) and San Luis Potosí y Veracruz (15%, each).
- 62 native languages are spoken in Mexico and over 10 million people speak at least one indigenous tongue.
- In 2005 the Federal Electoral Institute, in charge of organizing federal elections, divided the Mexican territory in 300 electoral districts. Indigenous peoples were taken into consideration during the territorial division, and as a result, 28 districts were considered indigenous electoral districts, with at least 40% of indigenous population.

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** Justice of the Supreme Federal Electoral Court of Mexico.

II. Indigenous peoples rights' and the mexican Constitution

- The collective rights of indigenous peoples and communities are specified in article 2 of Mexico's constitution. These are rights that can be invoked by individuals because they belong to indigenous communities.
  They include:
  - The right to recognized as an indigenous people or community.
  - The right to self-identification.
  - The right to autonomy.
  - The right to self-determination.
  - The right to use their own laws and institutions within their communities.
  - The right to be consulted and to participate in the public affairs of the state.
  - The right to due process and complete access to judicial protection.

The right to recognized as an indigenous people or community

- This right ensures that indigenous communities and peoples are legally recognized as such, by obligating federal and local laws to acknowledge their legal character as collective beings.

The right to self-identification

- Self-identification means that whoever considers themselves as a part of an indigenous community or group must be considered as such, and their cultural heritage and differences must be respected. This, in accordance to Convention 169 of the International Labor Organization (ILO).

The right to autonomy

- Can be summarized as the right of indigenous peoples to make and live under their own laws, and choose their own authorities.

Self-determination

- A broader concept than autonomy, this right ensures that indigenous peoples decide their social, economic, political and cultural organization. Self determination is only limited by the respect of fundamental rights of individuals.

The right to use their own laws and institutions within their communities

- Derived from the right to autonomy, this right allows indigenous communities the ability to settle internal disputes. The mechanism to solve these disputes should be integrated into formal legal documents and should be respected, and in some cases applied, by judges and courts.

The right to be consulted and to participate in the public affairs of the State

- The right to be consulted suggests that both federal and local governments should consult indigenous communities when drafting and implementing development policies. However, the results of these consultations are not binding.
- As for the right to participate in the public affairs of the state, apart from electing their own authorities, indigenous persons can also participate in municipal government.

The right to due process and complete access to judicial protection

- Although members of indigenous communities have the right to settle their disputes through their own laws and procedures, they also have the choice to appeal to the ordinary jurisdiction. This grants them complete equality under the law.

III. The Electoral Court

- The distribution of competences regarding electoral matters works on two levels: First, both the federation and the thirty-two federal entities have their own electoral regulations, institutions and procedures. Second, administrative (preparation, organization and conduction of elections) and judicial authority (dispute resolutions and application of electoral justice) are clearly differentiated and are conferred to different bodies of each government level.
- At a federal level the Federal Electoral Institute (IFE) is provided with the administrative responsibility and organizes the elections. The Electoral Court is the specialized body of the Federal Judiciary invested with legal jurisdiction in electoral matters. The Federal Electoral Court, as opposed to the IFE, is entitled to adopt resolutions in certain cases and to give final rulings on federal and local electoral controversies.
- The jurisdictional powers granted to the Electoral Court, are to resolve, in a definitive way, the following electoral disputes:
  - Challenges to the federal elections of Congress and the President of Mexico through the Suit of Nonconformity.
  - The challenges against the acts and resolutions of the Federal Electoral Institute through Appeal.
  - The challenges against acts and resolutions of local authorities through Constitutional Review.
  - The acts and resolutions of federal and local authorities that violate the political/electoral rights of citizens: to vote, to be candidates of the political parties, run for office, right of

association, and to freely and individually affiliate themselves to political parties, through the Suit for the Protection of the Citizen's Political-Electoral Rights.
- For the High Chamber, the revision of the resolutions of the Regional Chambers through the Petition for Reconsideration.
- The labor disputes and differences between the Federal Electoral Institute and its officers.

IV. The protection of minorities by the Mexican Federal Electoral Court

- The protection of fundamental political rights by the Superior Chamber of the Federal Electoral Court has primarily focused on defending minorities that can suffer discrimination because or their ethnic origin, public opinions (party minorities), or place of residence (migrants), but has also protected minorities in labor unions.

Ethnic minorities

- The court has said that any member of an indigenous community has judicial standing to promote a complaint against irregular electoral processes that takes place under a system based on indigenous customs or traditions.
- Furthermore, the court has considered that procedural norms, specially those that impose additional legal burdens, should be interpreted in the most favorable way when indigenous communities are involved.
- This consideration includes the Court's power to correct any type of flaw or insufficiency in the initial complaint.[1].
- However, it is important to say, that even though the Constitution recognizes indigenous peoples rights' to hold elections based

[1] Case SUP-JDC-11/2007, June 6th, 2007: «COMUNIDADES INDíGENAS. SUPLENCIA DE LA QUEJA TOTAL EN LOS JUICIOS ELECTORALES PROMOVIDOS POR SUS INTEGRANTES».

on their customs and traditions, this does not mean that if these traditions can contravene fundamental rights.

Rights of minorities within political parties

- To ensure that majorities within political parties do not abuse their power, the Federal Electoral Court has recognized several rights for minority groups within political parties. These rights include:
  - The freedom to create and organize different ideological movements within a political party as long as they do not contravene the basic ideas on which the party was founded.
  - Freedom of speech, as a way of inspiring an open debate of official party positions without worrying about being unjustly punished by the majority.
  - This right is protected not only in statements made within the party, but also those made in public. As long as the statements made by the minority do not jeopardize the stability of the party, this right is guaranteed.
  - The right to summon the main body of the political party is usually reserved for the majority; however, the Electoral Court has granted party minorities this right to discuss important issues.
  - The right of emigrants to participate in the internal life of political parties. No matter where in the world Mexican citizens reside, they have a right to participate in political parties, as long as they are affiliated members, and the party statute grants them that right.
  - The right to dissent from the majority in legislative votes. Party members have the right to vote against the party line in the legislative branch without being sanctioned.
  - The right to information. Minorities have the right to be informed of the decisions taken by party majorities. This guarantees a more democratic and transparent internal life of political parties.

Rights of minorities in labor unions

- To avoid the less than democratic union between political parties and labor unions, the Electoral Court has expressed that it is against all types of coercion from labor leaders to force their workers to vote for a particular political party.

I would like to conclude by saying that Mexico's democracy has come a long way in the past few decades, and one of the major changes has to do with respecting minorities. Ethnic minorities no longer are expected to change and adapt to western ways of thinking and living. Our institutions are now designed to life with diversity and respect the authenticity of indigenous cultures. There is no such thing as a perfect democracy but surely by respecting minorities it is a little more just.

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Su tiraje fue de 2,500 ejemplares.