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Perspective from the Right: National Action Party (PAN)

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IV. THE MEXICAN ELECTION SYSTEM AS A VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW

Perspective from the Right: National Action Party (“PAN”)

JAVIER LIVAS*

I. MEXICO: GOVERNED BY LIARS AND CHEATS

“Mexico is the perfect dictatorship,” said Mario Vargas Llosa, a Latin-American writer, not long ago. I want to add that “the perfect dictatorship” is kept as such by liars and cheats.

I am well aware that this assertion sounds rather insulting, but I make it to illustrate a point. I know I am at a law school surrounded by lawyers and law professors, and, therefore, I feel obligated to give proof of what I am saying.

Article 128 of the Political Constitution of the Mexican United States requires all public servants, without exception, to take a special oath of office whereby they swear to “uphold the Constitution and the laws that emanate from it.”¹

Articles 39 and 40 of the Constitution define the origin and essence of the Constitution. Article 39 states: “National sovereignty resides essentially and originally in the people. All public power derives from the people and is instituted for their benefit. The people have the inalienable right to alter or modify their form of government.”² In turn, Article 40 of the Constitution states: “It is the will of the Mexican people to constitute themselves into a

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1. CONST. art. 128 (Mex.).
2. *Id.* art. 39.

representative, democratic and federal republic, made up of free and sovereign States in all matters concerned with their internal regime, but united in a federation established according to the principles of this fundamental law.”³

In so far as government officials promise to uphold the Constitution and do not do so, they are liars. In so far as they establish a parallel order and other laws that contradict the spirit of the Constitution as a means to preserve their own power or that of the group they belong to, they are cheats.

They are also liars and cheats when they arrange electoral fraud and deny its existence. The whole world knows what is going on, but Mexican government officials will not acknowledge this publicly as a problem. They only talk in terms of how much we have advanced in perfecting our democracy. One is left to wonder, if so much advancement has been going on for so long, and we never get anywhere, then where were we when we started moving forward?

The truth is that our government officials change the electoral laws marginally and deceitfully, thereby shifting attention away from demands for real change; they are only “hustling” for ways to remain in power.

Maybe these lies become laws because very few oppose them. Maybe the reason for this is that there are not enough brave democrats in Mexico. But perhaps it is also true that their numbers are small because the people have learned to fear their government. Maybe someone from America’s Watch can comment on how this could be happening. Could it be that there are people interested in turning us into a country of cowards and submissives?

Having untruthful people in public office is certainly bad, but when, in addition to this, these people are cheats, it is much worse. A liar can be voted out of office, but the same does not hold true for a cheat. The trickster will set his mind on trying to hold on to office by whatever means possible.

An extralegal order outside the Constitution has been created and fostered in Mexico. The electoral laws have been structured to achieve this unlawful purpose.

This was done recently by adding a new paragraph to Article 41 that says: “The organization of federal elections is a State func-

3. *Id.* art. 40.

tion that is exercised by the legislative and executive branches of the Union, with the participation of national political parties and the citizens in accordance of the Law.”⁴ It sounds as if the PRI-government believes that this amendment gives it the right to guide elections, depriving the people of their inalienable rights.

Article 40, mentioned above, has also been perverted. Let’s examine, one by one, the concepts there contained.

II. REPUBLIC?

Why is Mexico not a republic?

A. *Power Renovation*

Mexico is not a republic because the essence of a republic is the renovation of those holding power, and this does not happen in Mexico—at least not in real terms. The Government reelects itself using the official party, the Party of the Institutional Revolution (“PRI”), as its electoral agency.

B. *PRI Monopoly of Electoral Laws*

The PRI’s monopoly of the electoral laws undermines Mexico’s ability to be a republic. The PRI was born a majority party in 1929. It conducts itself as the inheritor of the Mexican Revolution and claims the right to administer the revolutionary process. It has used its original majority in both Houses of Congress to approve electoral laws that assure the party stays in power.

C. *Protection of the PRI’s Dominance*

The laws also protect the PRI’s dominance. Even during the 1950s, when opposition was indeed minor, the PRI had the intelligence to grant itself access to enter Congress through a proportional representation method. By anticipating events, the PRI managed to build and strengthen a more-or-less loyal opposition that it got to know well, and brought the opposition into the unique rules of play that the PRI was preparing. In the meantime, the Government and its party, the PRI, held on to a very safe and overwhelming majority, and kept for itself the last word on every conceivable political decision.

4. *Id.* art. 41.

It is undeniable that a single party has remained in power for over sixty years. This single-party rule has not survived that of the Russian communist party just by chance. The PRI has been dishonest, but nobody can say that it has not been smart. This becomes particularly clear if we follow the events that led to the enactment of the so-called "governability clause."

When the Constitution was reformed to allow the new Federal Electoral Code ("CFE") in 1987, then-President Miguel de la Madrid proposed a change that, when put into law, would give automatic majority control to the party that won the highest number of seats in the House of Representatives in the direct, relative-majority electoral contests. I must point out that this occurred shortly after the PRI-government went through the Nuevo León elections in 1985 and the Chihuahua elections in 1986, in which the PAN candidates had an unprecedented and visible popular support to which the Government responded with a scandalous fraud of international fame.

So it is reasonable to infer that the Government foresaw that something bad was likely to happen, and, thus, created the governability clause. It was on target because, in the 1988 Presidential elections, the whole political system collapsed to the ground. The PRI suffered the resignation of Cuauhtémoc Cárdenas, Porfirio Muñoz Ledo, and other PRI members, and witnessed an increased challenge coming from the conservative PAN and its national candidate, Manuel Clouthier, a businessman from the State of Sinaloa.

The fraud of the July 1988 elections was enormous. The PRI machinery went full speed ahead in spite of the figures produced by chicanery that amounted to barely 50.74% of total votes. But nobody believed those results.

Carlos Salinas took office in the midst of many unanswered questions. Thus, he promised in-depth political reform; however, he did not deliver. Conveniently, for the first time in history, the President did not send the political reform initiative himself; rather, it was the PRI that sent it. The new proposed reform gave the party gaining a simple plurality in the direct vote for Congress the right to half the seats plus one in that body. Given the circumstances, this reform meant that the PRI would assure itself control of the Congress in the next elections.

The PAN is often mistakenly blamed for having approved the governability clause. The truth is that the governability clause was installed in the Constitution by the 1987 political reform package that was criticized and opposed by the PAN at the time. The political reform of 1989 was approved by the PAN under the assumption that it was better than remaining under the aegis of the 1987 reform and the CFE. I do not deny that the PAN's decision to go along with the PRI's 1989 proposal has many delicate and equivocal aspects. At this time, however, I cannot comment on this issue because of the lack of time.

D. Federal Funding

The law gives more money to the PRI than to all other political parties combined. This is another competitive advantage that the PRI has institutionalized for its own benefit. When it comes to getting official subsidies, the PRI gets the lion's share.

The Government has worked out the subsidies given by law in such a way that gives the PRI a bigger share than any other party. This can be calculated from the content of Article 49 of the Federal Code of Electoral Institutions and Procedures ("COFIPE") that approves subsidies in accordance with the electoral results of previous elections.⁵

Through this formula, and in a very legal fashion, the official party found the avenue to put a stop to the public outcry against the PRI's known practice of putting its hand into the Government's coffers. The PRI can now cover up its fraudulent practices through an open subsidy law that they themselves passed through Congress. This allowance upholds the PRI's advantage by giving it resources in proportion to the numerical advantage it already had. Of course, this is done without considering the illegitimacy of the votes used to calculate the initial allocation.

III. A FEDERATION OF DEPENDENT STATES?

Now, let us turn our attention to another matter.

Why is Mexico not a federation of states?

Mexico is not a federation of states because a federation, by definition, is an agreement among truly free and sovereign states.

5. C.O.F.I.P.E. art. 49 (Mex.).

In Mexico, the states are in many ways subject to a central authority.

A. *Economic Dependence*

In terms of budget and resources, the taxes providing the highest income to the Government are federal taxes that are shared according to an agreement with the states. Income tax, value-added tax, special taxes on consumption such as car ownership, telephone, gasoline, tobacco, and liquor, and taxes on imports and exports are all federal taxes. There are no income taxes or sales taxes coming from the State legislature because the Federal Government strong-armed the states into accepting these arrangements and the resulting concentration of income at the federal level. States and municipalities are thus left to collect some real property taxes and other income from driver's license fees, administrative fees, and penalties.

Less collection means less financial autonomy and less capacity to build public works. Less income also means less money to spend and invest.

On the spending side, there is the *Programa Nacional de Solidaridad* ("PRONASOL"), a federal program of subsidies that deprives the states of up to one half of their truly disposable income, which is often as little as 10% of total resources available. The states use 90% of their income to pay for expenses such as education, public safety, healthcare, transportation, gasoline, office supplies, etc. For example, in the case of the State of Nuevo León, the Federal Government, working through the PRONASOL program, takes 5% of the budget for its activities. Thus, the state is left with one out of every twenty pesos for investment, a truly ridiculous figure. It suffices to say that the Federal Government keeps about 85% of all taxes collected at the national level, and all the states, including the municipalities and Mexico City itself, have to make ends meet on the remaining 15%. The states, of course, are not capable of doing so. Thus, they are in a perpetual state of economic ruin and are dependent on Presidential favors to obtain federal investment.

All of these arrangements are to be found in laws and agreements between the Federal Government and the state governments.

B. Federal Election Law Influence

Mexico is not a federation of states because federal electoral laws contaminate the state electoral laws. Electoral laws are not independently drafted; rather, they are imitations of federal laws. In Mexico, the three levels of government— federal, state, and municipal—serve only one purpose, to allow federal law to smother state law. This overlapping of jurisdictions enhances the preponderance of federal authorities and the official party.

Some months ago, we (a group working for democracy) had a congress to compare state electoral laws. The findings confirmed our suspicions. State electoral laws follow the model of the federal electoral codes. Some of these local laws have adopted, with small variations, the solutions proposed by the CFE; others have suffered the influence of the newer COFIPE. Still others remain under the influence of the Law for Political Organizations and Electoral Processes, which goes back to the times of President Lopez Portillo. Not one single state law places the control of its electoral process in the hands of an organization that is not controlled by law or by virtual majority by the PRI. The presidency of these organizations is almost invariably in the hands of the lieutenant governor, who is directly appointed by the Governor. Similarly, at the federal level, the Secretary of Governance (a key internal security body) has been presiding over the main electoral body at the federal level for decades. This body still exists, although it is now called the Federal Electoral Institute (“IFE”).

The laws and the organizations change names, but the mechanisms of control remain the same. Lying is the PRI’s main political weapon.

C. Presidencialismo

The government officials abide by the rules of *presidencialismo*, not by the laws they swear to obey. The golden rule of *presidencialismo* is called “*el dedazo*.”⁶ The Governors are recipients of *el dedazo* when they are hand-picked or designated by the President to become candidates of the PRI. These are sufficiently important jobs as to require the President’s direct involvement in each decision. It is a function that is not delegated or entrusted to

6. *El dedazo* is a colloquial expression for the process whereby the President hand-picks individuals for key political positions. “*Dedo*” literally translates as “finger.”

anyone else. While this is a despicable practice, the effect it has on creating a submissive and undignified Governor are still more despicable.

In the case of the voter registration lists, for example, the Governor's submissiveness has resulted in the state legislatures' inclusion in their electoral law of authorization for the State Electoral Commission to reach agreements with the National Voter Registry to use the federal voter registration list. This agreement is always carried out in the expected manner. All the states use the federal voter's list. They no longer have offices to make their own lists. The enrollment and cancellations are managed by a computer in Mexico City.

In one instance that I became personally aware of, the state electoral law was simply put to shame. This happened in the State of San Lu s Potosi in the 1991 gubernatorial elections, when Dr. Salvador Nava was a candidate. Perhaps due to a mistake during the copying of the law, or for whatever reason, the state electoral law said that the federal voter list could be used but that a new additional list should be compiled to complement the federal one. This obligation was never fulfilled and the election was almost annulled, but nobody even noticed the fault. The election was carried out following the federal rules only.

After seeing this happen, can we still call this country a federation?

IV. DEMOCRACY?

Why is it clear that this is no democracy?

A. *Election Fixing*

Mexico is clearly not a democracy because a democracy means a government of the people, by the people, and for the people. In a democracy, everything is done through clean and reliable electoral processes.

In Mexico, elections are rigged. The votes are either not counted or are bought by the Government. Elections are organized by the Government for its own benefit. The Government dominates the integration of the different electoral bodies. At the local level, electoral laws are drifting slowly in the direction of the COFIPE. But let us note that the recent code is nothing to emulate.

The COFIPE furnishes the organizations of the IFE. Under the COFIPE, the IFE's general council is to be presided by the Secretary of Governance, the President's appointee. This is set forth in Article 74, paragraphs 1 and 2 of the COFIPE.⁷ The advisor-magistrates, supposedly learned and independent figures, are to be approved by a two-thirds majority of the members of the House of Representatives. It turns out, however, that the law provides for the President of the Republic to furnish the names of the candidates for magistrates. Out of eighteen candidates, six must be nominated; then, a ridiculous formula is applied whereby if some or all are not approved, the result is decided by chance from the list of eighteen. This is an absurd mechanism, provided by law, that allows the President, the person making the original selection, to make the ultimate decision regardless of what Congress decides. This does not really provide for a choice.

Presidencialismo also manifests itself at the polling place level. Any of the electoral laws we consider have the same solution. The president of the polling place has absolute power over events in his polling place. According to Article 198 of the CFE,⁸ Article 122 of the COFIPE,⁹ or any of thirty-one state laws, the president of the polling place, or *casilla*, is the only one who will identify the voters, take their voting cards, sign tally sheets, authenticate papers, keep the peace, call in the police, dismiss representatives, suspend or restart voting, and bring the materials needed to set up the polling place. He is also the one responsible to take the ballots to the Commission after the election is over. Federal authorities only have to name the right person for the job, and he will produce the desired results.

B. Lack of Judicial Review

Mexico is clearly not a democracy because democracy implies the rule of law and an impartial system of justice through the work of honest tribunals.

Mexico has no judicial review of electoral events. The Constitution itself is silent on this matter. Article 107, which sets up the famous *Judicio de Amparo* (a unique federal constitutionality pro-

7. C.O.F.I.P.E. art. 74, paras. 1-2 (Mex.).

8. C.F.E. art. 122 (Mex.).

9. C.O.F.I.P.E. art. 122 (Mex.).

ceeding or trial),¹⁰ has limited effects in other matters. The Article states: "The resolution shall always be such that it will only refer to private individuals, limiting itself to protect them in the case in question, but without making a special declaration about the law or act that generated it."¹¹ In addition to this general limitation, the Mexican Supreme Court has made it clear that electoral rights are not included in the first twenty-nine articles of the Constitution. They are not individual rights and are, therefore, not protected by the *Amparo* trial.

C. Limited Electoral Tribunal Power

The powers of the recently created electoral tribunals are limited in two different ways.

1. Rules of Evidence

The rules of evidence in cases before the electoral tribunal involving accusation of electoral fraud are such that they are limited to public documents. These public documents consist only of those signed by a public official, a notary, or an election official. This translates into a whole range of absurdities. For instance, if all the voters of a precinct gather and allege that the voting did not even take place at all, their declaration cannot be considered as evidence by the tribunal. On the contrary, if two corrupt election officials hide in a garage and invent a tally sheet and sign it, this public document is enough to certify the election. This absurd proposition prompted me to speak about the possibility of a new mode of elections that I call "desktop elections" (invented tally sheets). Many of the 1988 results of the Presidential elections that gave Salinas his victory were, indeed, desktop elections. This explains why the packages with election results were never opened for inspection at the electoral college. The PRI majority ordered the army into the Legislative Palace to guard the packages and prevent the Congressmen from performing their legal duty. This is an example of how the PRI understands the majority rule. There are many instances at the state legislative level where the same kind of arbitrary behavior has been observed.

10. CONST. art. 107 (Mex.).

11. *Id.*

2. Limited Effect of Tribunal Rulings

The effects of the rulings of the electoral tribunals are very limited. The decisions can be revoked by (1) the organ overseeing the final qualifying of the election, (2) the electoral college if it is a national level election, or (3) the local legislature if it is a state level election.

The only possible conclusion to draw from this is that the inclusion of an electoral tribunal in the electoral laws has been a maneuver to draw attention away from other, more important events at the close of an electoral period. Nobody I know asked for an electoral tribunal. It is well known that no election will be decided by a tribunal. The only tribunal is the people, and it has to have the chance to choose its government in an orderly procedure from start to finish.

V. REPRESENTATIVE GOVERNMENT?

Why doesn't Mexico have a representative government?

A. *Citizen Nomination of Candidates*

The people are not represented properly because they do not have the liberty to seek their own representatives. Citizens are not entitled to be nominated for public office independent of political parties. There is no mechanism in the law to let this happen. The possibility of having one's name written hundreds of times in the candidate write-in space of the ballot is practically nil. Although ballots have the write-in space, someone winning by using that alternative is only a theoretical possibility, and no more.

The Government has created a monopoly in accessing public office. Access is given only to political parties. For instance, Article 175 of the COFIPE states: "The right to request the registration of candidates for public office belongs exclusively to the political parties."¹² The same monopoly exists at the state level where, even in the case of the smallest municipal mayors, their candidacy must be registered by a political party.

The requirements that the political parties must meet for such registration are enormous. Articles 24 to 35 of the COFIPE deal with this bureaucratic nightmare.¹³ So many formalities have to be

12. C.O.F.I.P.E. art. 175 (Mex.).

13. *Id.* arts. 24-35 (Mex.).

met that no party will ever comply with them: there must be 3,000 members in at least one half of all the states or 300 or more members in at least 150 federal electoral districts, and not less than 65,000 in either case. Then, you need to hold an assembly with all the members at the same time in one place, and the members must have their voter cards with them. Even the PRD could not comply with the requirements and had to fuse itself with the PMS party, a socialist organization.

B. Changes in the Law

Mexico does not have a representative government because recent changes in the law protect the established system. Modifications made in the COFIPE were the result of the 1988 election scare. The COFIPE makes forming alliances and coalitions more difficult because such alliances and coalitions had enabled opposition parties to beat the PRI.

Also, in the case of the PRD, the Government prohibited its use of the colors of the Mexican flag, alleging that those are the colors of the PRI and that the law requires that each have a distinct emblem. The IFE council upheld the decision.

VI. INTERNATIONAL MISFIT

Let us take a few last moments to analyze how the Mexican Government's obligations toward other nations are evaded.

Mexico ratified the American Convention of Human Rights¹⁴ on April 3, 1982.¹⁵ One of the obligations set forth in the Convention is to be respectful of the political rights of the people. Article 23, paragraph (b) of the Convention explicitly addresses the periodic and authentic elections through universal suffrage and secret voting that guarantees the free will of the voters.¹⁶

Mexico has been denounced for violating Article 1 of the Convention by not honoring and protecting the rights and freedoms of the people¹⁷ and for violating Article 2 of the Convention calling

14. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970) (entered into force July 18, 1978).

15. See Recent Actions Regarding Treaties to Which the United States Is Not a Party, 30 I.L.M. 575 (1991) (listing 22 countries that have ratified the Convention as of 1991).

16. American Convention on Human Rights, *supra* note 14, art. 23(b).

17. *Id.* art 1.

for Member States' adoption of necessary legislative or similar measures to make these freedoms and rights effective.¹⁸

The Inter-American Commission on Human Rights has asked Mexico to modify its laws to comply with the terms of the Convention. Mexican officials, however, have chosen not to comply. In fact, Mexico's ambassadors to the Organization of American States ("OAS") have responded by arguing that (1) the Commission lacks jurisdiction, (2) the complaints deal with matters that are foreign to it, (3) internal laws of Mexico cannot be discussed, (4) Mexico's sovereignty is put at risk, and (5) Mexico has followed internal proceedings correctly.

Why, then, did Mexico sign the Convention if it never has made any effort to comply with its terms? It seems that Mexican officials follow the same pattern of contempt internationally that they show toward their own people.

The governability clause has also been a ground for denunciation. I personally presented the Inter-American Commission with the papers duly signed by a team of independent PAN legislators from Nuevo León. If the Commission decides to follow its own precedent relating to a similar clause approved by the dictatorial regime in Paraguay some years back, then the Commission will prove us right in the claim that there are serious human rights violations in Mexico.

18. *Id.* art 2.

