

The State of Mexico's Democracy: Obstacles to Consolidation

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Certainties, Doubts and Lessons from Mexico's 2006 Election: the Electoral Court and the Presidential Election Disputes and Declaration of Validity Resolutions

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I will aim to discuss a couple of questions arisen from the appeals and the validation of the 2006 Mexican presidential election: I. Was it legally possible to undertake a total recount of the votes?, and II. Was it possible to nullify the presidential election?

For many years, electoral disputes were solved by political agencies such as the electoral colleges within Congress, according to political criteria. The 1996 constitutional and statutory reforms changed the Mexican system for the resolution of electoral disputes. Such reforms turned the system into one based on the Rule of Law; an Electoral Court was created within the federal judiciary and was constitutionally empowered to solve electoral disputes in a definitive way. Therefore, political deals were excluded as the way to solve electoral disputes.

There are not lacking scholars and media commentators as well as several political actors which have criticized the rulings and decisions of the electoral court regarding the 2006 presidential election. However, I am convinced that the Electoral Court resolutions were issued in both a constitutional and legal way. The Electoral Court's decisions were taken according to the Mexican Constitution, electoral law, legal precedents and according to the evidences in law proceedings.

Likewise, I am convinced that in 2006 the Mexican constitutional and statutory frameworks as well as the adjudication of the Electoral Court, complied with international and democratic standards. Moreover, the Electoral Court found some irregularities (such as the so-called

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“propaganda negativa”, that is, “infamous advertisement” among political parties; four presidential TV spots as well as several public statements by the President which were declared an unduly intervention in the electoral process, and two Entrepreneurs’ Coordinator Council TV spots) which would never be declared as something irregular in some other democratic countries. The judicial findings of the Mexican Electoral Court have never been used in other democratic countries to nullify an election.

I. Total recount

1. Political parties are legally obliged to appeal the electoral results of each single electoral district in the country. Besides, political parties have to clarify which electoral polling places’ ballots want to challenge. It must be said that there are 300 federal electoral districts in Mexico, and 130,477 polling places were set up in 2006.
2. According to articles 41, section IV, of the Constitution and 72 of the Federal Act for the Resolution of Electoral Disputes, when a ballot counting goes unchallenged, its result is therefore definitive and a valid one. Further judicial review is prohibited.
3. The Coalición Por el Bien de Todos appealed 230 district countings and something around 43,000 of the polling places. Moreover, that political coalition requested a recount over 22,000 polling places, out of which the Electoral Court ordered the recount of 11,724. Such resolution was made under the law and a broad interpretive criteria was used because the ballots’ results were registered inconsistently or mistakenly, *i. e.*, there was an “*error evidente*” in the official certificate.
4. The Electoral Court acts as an impartial referee and does not have an unlimited power. The Electoral Court’s reviewing activity can only be triggered through litigation. The Electoral Court’s judges are accountable; they cannot review or modify non-appealed electoral results in an arbitrary way.
5. The Electoral Court is empowered to request information which can help it to solve electoral disputes (that is the reason why it ordered a recount of the ballots derived from 9% of polling places). However, it can only request additional information in respect to those electoral results effectively appealed. The Electoral Court has neither power to order recounts nor to review non-appealed polling places.

6. As a result of the recount ordered by the Electoral Court, the difference between the winner candidate and the runner-up changed 0.01% (one centesimal, from 0.58% to 0.57%)
7. Some scholars have suggested a legal reform to adopt the legal mechanisms put into play in some other places (in some other countries such as Costa Rica or in some States within the US) which empower electoral authorities (administrative or judicial) to undertake total recounts either under the authorities' discretion or the request of any political party. In some cases, such a recount is undertaken after the interested party has deposit a fee.

A total recount of the ballots of a very narrow electoral result will stress the importance of the electoral packages' contents. In other words, the relevance of what happen in polling places will be diminished. Such a possibility, as well as the interest in preserving the electoral packages' integrity, has to be taken into account by a Congress interested in the reform of the electoral legislation. There are many security procedures in place to protect the electoral packages' integrity during such packages' travel from the polling places to the district electoral councils. However, their integrity could also be questioned had such packages been opened in the Electoral Court some weeks later.

That is the reason why almost all electoral regimes, including of course the Mexican one, prefer to uphold the electoral result registered in the official certificate signed by electoral officers and political parties' representatives (who keep a copy of that certificate) in the polling places when there is no inconsistency or "error evidente" at all in the official certificate. Such documents are trustworthy.

II. (Non) Validity of the presidential election

1. The Electoral Court solved 375 appeals filed by different political parties. After doing that, the Court validated the presidential election under the Constitution.
2. As a result of the ballots' counting, a couple of certainties came about: 41'557,430 mexican citizens voted (about 4'000,000 more than in the 2000 election) and 233,831 votes separated the winner from the runner-up.

The Coalición por el Bien de Todos' contention was also to nullify the ballots of 43,000 polling places. The Electoral Court analysed the case and found clear irregularities in 753 polling places, which were nullified. As a result, the difference between the winner and the runner-up narrowed 0.01 % (another one centesimal, until 0.56% which was the final difference).

3. I would like to focus on three kinds of irregularities that the Electoral Court ruled were proven by the Coalición por el Bien de Todos. However, the Electoral Court also ruled that there was not evidence that such irregularities affect the final result of the election and were therefore not enough to nullify it.

- a) The Electoral Court defined what “infamous advertisement” is. Such an unduly activity was identified to the broadcasting of TV spots by political parties and the coalition itself, which use illegal phrases against a particular candidate. Since the Federal Electoral Institute (IFE) and the Electoral Court declared unlawful several “infamous advertisements” during political campaigns, according to the Electoral Court’s view, such resolutions’ publicity had a compensatory effect and reversed the harmful consequences of the illegal activity.

Likewise, the Electoral Court argued that once a political party has used “infamous advertisement” against others, it cannot file for the election’s nullification on the same grounds.

- b) According to the Electoral Court the President of the Republic unduly intervened not only making public statements which have both a direct and an indirect relation to the electoral process, but also broadcasting four TV spots, saying that “if the track is followed, Mexico will have a better future”. In the Electoral Court’s view, such a phrase could have affected some voters’ will, because it presupposed an indirect support for the candidate of the President’s party.

Now, there was not clear evidence pointing towards the number of times that such a message was broadcasted. On the other hand, the Electoral Court considered that any harmful effect was mitigated by both the Supreme Court’s order to cancel such spots in February and the Federal Electoral Institute’s Neutrality Agreement (which implied the prohibition of any presidential broadcasting forty days before election-day took place).

c) Regarding a couple of TV spots broadcasted by the Entrepreneurs' Coordinator Council, the Electoral Court considered that the messages aimed at persuading voters to support public policies derived from the economic model followed by the Government as well as at persuading voters to reject alternative ones.

Therefore, the Electoral Court considered that such TV spots were against article 48, paragraph 13, of the Federal Electoral Code, according to which only political parties can pay to broadcast for or against candidates.

Even though it was proved that one spot was broadcasted 116 times, and the other one was broadcasted 138 times, the Electoral Court considered that there was not enough evidence to show that such irregularities affected the final result.

Anyway, it is important to bear in mind that those political parties which composed the Coalición por el Bien de Todos, received more public funds (in cash) and were entitled to a larger broadcasting official time than other parties. Besides such political coalition hired more TV spots (10,514) than PAN (8,491) did. It is worth mentioning that, according to the Federal Electoral Institute's monitoring system, such a difference was larger in June (2,864 to 753).

Certainly, there is an essential difference between exercising such a right by the coalition and the irregularities committed by the President and the Entrepreneurs' Coordinator Council. The last ones should not be minimized through the former and must be punished. However, the context must be taken into account in order to evaluate if such kind of irregularities actually affected the final result.

Furthermore, the media coverage for Coalición por el Bien de Todos was also larger than others'. Coalition's coverage represented 24.24% of the total time on T.V. news.

As a result, the Electoral Court did not find evidence to support the claim that all the proven irregularities affected the final result. Therefore, the Electoral Court did not find grounds to nullify the presidential election which was validated. In doing so, the Electoral Court protected the vote of more than 41'000,000 citizens who voted that day.

Anyone willing to challenge the Electoral Court's resolution on this particular issue has to precise his legal argument and, in doing so, has to take into account all relevant constitutional and statutory rules, as well as all the evidence filed through law proceedings. Eventually, such a challenger must point out what other pieces of evidence not analyzed by the Electoral Court supposedly were in the file or should be judicially required.

4. I have said that some of the irregularities found by the Electoral Court would never be considered as such by other judicial authorities in other democratic countries. In other words, such irregularities would never be seen as grounding an election's nullification at all.

However, it must be stressed that such conducts were considered as irregularities in the Mexican case, and having said that, we know that any kind of unlawful conduct has to be punished.

However, from this it does not follow that any kind of irregularity can bring about an election's nullification. According to the Mexican Constitution and the electoral law, like in any other democratic country, only those irregularities that can affect the ballots' final result, can ground such a decision.

Nonetheless, it is possible to enquire whether the law establishes another kind of punishment or not to fight such irregularities. The law may well allow certain irregularities to be prosecuted or punished by administrative authorities.

5. Bearing in mind the experience derived from the 2006 presidential election, and taking into account a legitimate need to have clear rules to solve electoral disputes, as part of the State Reform which is now in process, it would be convenient to promote a legal reform which empowers plaintiffs to specifically request the nullification of the presidential election as part of the dispute (*juicio de inconformidad*). In such a case, the extension of the so-called "generic nullification procedure" established by the federal procedural rules to solve senators and deputies electoral disputes, should be considered.

It is clear that a legal clarification of the consequences brought about by irregularities and substantial violations, could promote more responsible attitudes from anyone involved in the electoral process. Such a clarification could promote not only legal certainty but a

general respect towards the electoral legal system as well. In the same line of reasoning it can be claimed that as a consequence of such a move, political parties and coalitions involved in electoral litigation, could count on clearer rules related to what can be demanded from the Electoral Court.