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COMMENTS

ON

THE USE OF PUBLIC FUNDING FOR ELECTION PURPOSES

THE PRACTICE IN MEXICO

by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

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I. CONTEXT

1. A highly frequent and widely documented feature of the Mexican political system, especially during the nineteenth and twentieth century, has been the intervention of governments in the selection and registration of candidates who would run for office in order to impose those succeeding them. This was too evident during the consolidation period of the hegemonic party in Mexico throughout quite a long time of the past century, though this practice began even before the Mexican Revolution (1910). Among the contenders in the elections who represented the governing party used to be "the official candidate".

2. The practice of supporting an "official candidate" implied the use of public funds in order to achieve the victory over the so-called opposition parties. Although such political opposition in the electoral arena did not come true before the 1977 Constitutional reform which, among other things, established the direct public financing, however, rules for a fair allotment had not been not established, as they would be a decade later, in 1987.[1]

3. So that, while there were no restrictions on public financing, the support by government bodies was crucial for the survival of the governing hegemonic party. The lack of resources for the opposition parties before 1987 limited their chances of success. The government support of a candidate was what determined their victory.

4. National history shows the recurrent practice of supporting one candidate over the others. An interesting record dating back to 1848 shows how state governor, Julian de los Reyes, of San Luis Potosi made use of the institutions linked to the Executive to support one of the candidates to win the elections by forcing three member of the Electoral College of San Luis Potosí City. The misuse of public funds is clearly seen in the amparo remedy filed by Vicente Busto, accusing the governor of "manipulation of voter lists, coercing the vote, sending opponents to prison and restricting freedom of expression, among other crimes. Fortunately, this case states that voters, in that occasion, exercised their right to vote and took care of their freedom and independence of the Voter Board by meeting their electoral obligations they were entitled to.[2]

5. This would not be the only existing case, prior to the promulgation of the 1857 Constitution. Antonio López de Santa Anna would use untrue criminal prosecutions to avoid the political participation of quite a lot of opponents and journalists, including Francisco Zarco the recorder of the Constitutional Convention. Similarly, during the Porfiriato, the Executive would use political cliques to intervene on elections. It was like elections by then had not stopped being a mechanism to formalize the decisions of the President of the Republic, such as in case of General Luis Mier y Terán, who became governor of the State of Oaxaca in 1884 promoted by Porfirio Diaz due to the fact that he was the only candidate in all districts and received the total votes cast[3] thanks to the "persuasion" endeavor of the political leaders.

6. With the creation of the National Revolutionary Party in 1929 an innovative era began, where decisions started to be legitimized not only through the elections, but also through the rulings of the Legislative. For example, at the resignation of President Pascual Ortiz Rubio, the discussion on the appointment of who should succeed in office took place in the Revolutionary National Bloc of the House of Representatives.[4] This process of interference by the Presidency

[1] See the evolution of public financing of the political parties in Mexico, in Manuel Carrillo and others, cords. *Dinero y Contienda Politico-Electoral. Reto de la Democracia.* Mexico. Fondo de la Cultura Económica, 2003, pages 368-386.
[2] Manuel González Oropeza, *Los amparos primigenios,* in press.
[3] See Manuel González Oropeza and Francisco Martínez Sánchez, *El derecho y la justicia en las elecciones de Oaxaca*, Mexic, Supreme Court for Elections of the Federal Judiciary, 2011, page 158.
[4] David Cienfuegos Salgado, Régimen Jurídico Electoral del Presidente de los Estados Unidos Mexicanos, Mexico, Institute for Parliament Studies "Eduardo Neri", El Colegio de Guerrero, 2012, pages 51-53.

on electoral choices and the victory of the ruling party candidate had been evidenced since the office term of Lázaro Cárdenas. Such practice became common in the following presidential administrations so that the President who was going to terminate the mandate decided who was going to take over the Executive by appointing him an “official candidate” of the ruling party.[5] This practice was in effect for sixty years until the murder of an official candidate, Luis Donaldo Colosio, in 1994.

7. The participation share of those who formed the Presidency in their effort to support the official candidate had rigged the use of resources available to the benefit one of the contenders in the election. This situation was repeated in the states, where governors participated by supporting the candidates for local representatives or city Mayors, or where the outgoing Municipal officials supported the designated candidates by the hegemonic party.

8. This became more evident, the repercussions in the local elections in the State of Tabasco in the year 2000. State governments supported the official candidate for Governor, resulting in violation of constitutional principles that should exist in the elections. Faced with challenge, the State electoral court confirmed the triumph, but the constitutional amendment that had created the federal electoral court declared the election invalid whenever is proved use of resources in the campaign and that the winning candidate support had been decisive for the victory. It is well marked for the first time in a landmark court based on the possible consequences to the use of public resources to influence the electoral process, in particular, because it represented a violation of the principles established in the Constitution itself in spite of the absence of legal dispositions.[6]

9. But this was not the only approach how to use public election financing. More recently, the President was accused before the electoral administrative body, the Federal Electoral Commission, arguing that his participation in a program called "Mexico: The Royal Tour" had been intended for electoral support to the National Action Party which the President belongs to. In said television program, the President appears as tourist guide promoting various touristic sites in the country, but there were also images and references relating to the political career and the National Action Party. The administrative disciplinary proceedings against the Executive Branch concluded that there was no evidence showing that the dedicated public funds for the demand, production, making and broadcast of the sued program. Also, it was specified that there was no element, either, that would allow to claim that the program had a content of electoral nature. The Supreme Court for Elections of the Federal Judiciary upheld that decision.[7]

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[5] About that it can be cited from texts analyzing such proceedings: Jorge G. Castañeda, *La Herencia. Arqueología de la Sucesión Presidencial en México,* Alfaguara, 1999, pages 552 and following, and Enrique Krause, *La Presidencia Imperial,* Mexico, Tusquet, 2002, page 556.

[6] The criteria, derived from the judgments on SUP-JRC 487/2000, 96/2004 and 99/2004, was contained in the thesis S3ELJ 23/2004, which indicated on what matters "REVOCATION OF ELECTION. AN ABSTRACT CAUSE. (Legislation of Tabasco and similar). - [The local and federal constitutions] establish fundamental principles such as: the universal, free, secret and direct vote; the organization of the elections through a public and autonomous organism; the certainty, legality, independence, fairness and objectivity as the guiding principles of the electoral process; the establishment of equal conditions for access of political parties to the social media, the supervision of control of constitutionality and legality of the electoral acts and rulings, as well as the financing of political parties and election campaigns should prevail the principle of equity. These principles must be observed in the elections, to consider whether the elections are free, periodic and genuine as enshrined in said Constitution Article 41, adherent to a democratic regime. [...] Consequently, if the above principles provide sustenance and support any democratic election, it is that serious and widespread involvement of either of them would cause the election in question lack of full constitutional support and therefore, it would be proper to declare such election null for having adhered to the constitutional guidelines which every election should be subject to.” It should be mentioned that this thesis ceased to have effect after the 2007 Constitutional Reform.

[7] See Judgment and record (SUP-RAP-29/2012), March 22, 2012. All Judgments of the Supreme Court for Elections of the Federal Judiciary can be looked up on the site of the institution: http://www.te.gob.mx. A related issue has also been discussed in the 2012 US campaign in which Barack Obama seeking reelection, he is been campaigning taking advantage of all the resources as an incumbent President.

10. An academic analysis has gone so far as to consider it plausible to ban the radio and television broadcast of all government advertising.[8] This view is considered because of the cost generated to the treasury as well as for the possibility to use such spaces for propaganda that may influence the electorate either, for or against, certain political options.

11. To avoid such practices, new reforms at the federal level on constitutional[9] and legal provisions have been passed. Among them the principle related to public servants to implement public resources under their responsibility impartially and without affecting the competition fairness between political parties.

12. The 2007 Amendment of the Constitution was the result of a number of discussions on what was called State Reform. The principle items of that reform can be summarized as follows:

1) Shrinking public funds for electioneering;
2) Shrinking public expenditure on regular party activities;
3) Making election campaigns for President, Senator and Congressman shorter;
4) Backing the authority of the Federal Election Commission on the settlement of electoral disputes;
5) A staggered shifting of the office terms of directors (Federal Election Commission) and Justices on election matters (Supreme Court for Elections of the Federal Judiciary);
6) Preventing actors outside the electoral process from influencing on the outcome by using the media, and
7) Establishing Rules of Procedure in the Constitution governing government advertising.

13. At the time an *Opinion* has been drawn up by the Joint Committees on Constitution and Interior. In that document, with regard to the new Article 134 stated:

> The three Sections which said Opinion proposes adding to this Constitutional clause are, in the opinion of these Joint Committees, of the greatest importance for the new model of electoral jurisdiction which they try to establish in Mexico.
>
> In one part, the obligation is established for all public servants to apply the resources under their responsibility in a fair manner without influencing on the fairness of competition between political parties. The standard shall allow the establishment more and better legal control for this purpose and applicable sanctions on violators. [...]
>
> This Joint Committees fully share the meaning and purpose of legislating so that they support the additions to said Article 134. Fairness for all public servants in relation to political parties and their electioneering must have the solid foundation of our Constitution in order for the Congress to establish in the law the sanctions which violators of such laws are to be subject to. [...][10]

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[8] Ciro Murayama, "Elecciones 2009: Menos Costo, Mas Equidad", in Jorge Alcocer and Lorenzo Córdova Vianello, comps., *Democracia y Reglas del Juego*, Mexico, Nuevo Horizonte Editores, UNAM, 2010, page 201.

[9] From the wording contained in Constitution Article 134, Section 7-8 sates: "All public servants at all levels of government are those targeted. In this regard, the rulings of the Supreme Court of Elections have been consistent in pointing out specific cases of public officials". // "Advertising in any form of media in order to disseminate, the branches of government, autonomous bodies, agencies and entities of public administration and any entity other than the three branches of government as such must be of institutional nature and pursue informational, educational or social purposes. In no case, it propaganda will include names, images, voices or symbols to personally promote a public official.

[10] In the *Boletín del Centro de Capacitación Judicial Electoral,* Mexico City, Mexico, Special Edition 1, "Proceso de la Reforma Constitucional del 13-11-2007", 2008, pages 169-170.1

14. The inclusion of such issues in the Federal Constitution strengthened the electoral legal framework, especially by linking several principles considered guiding the electoral function[11] with the secondary legislation. Here it should be noted that the electoral organization model in Mexico is comprised of three different bodies: one autonomous administrative agency in charge of the organization and supervision of election processes (Election Commission –IFE), a court of electoral justice responsible for the final settlement of disputes arising from this area (Supreme Court for Elections of the Federal Judiciary -TEPJF) and a specialized body responsible for the prosecution of electoral offenses (Special Prosecutor for Electoral Crimes - FEPADE). Additionally, in very specific areas, the Supreme Court of Justice of the Nation also hears constitutional disputes against electoral laws with no enforcement.

15. These governmental organizations are in charge of all the different topics intertwined into federal electoral matters. The design is replicated in the Mexican states with some variations and peculiarities.

16. Concerning the purposes of this paper, it should be reiterated that the Mexican Constitution recognizes a set of principles that rule elections and have a varied legislative development. One of the principles governing electoral matters is fairness in the competition.[12] Its constitutional enshrinement has derivations on the administrative and jurisdictional mandate whose principle mark is the ban on using public funds and resources to benefit parties or candidates in elections.

17. The Supreme Court for Elections of the Federal Judiciary considered that the fundamental purposes of the 2007 Constitution Reform were the following:[13]

1) On politics and electioneering: less money, more society.
2) In relation to the holders of office in electoral institutions: capacity, liability and fairness.
3) Regarding those holding government offices:
   a) Acting with complete impartiality in elections.
   b) Not using the office they hold in favor of the promotion of their ambitions.[14]

18. We are interested in reviewing the third point on how the performance of people in government office and therefore having access to public funds that eventually may be misused for or against parties, coalitions or candidates in elections was regulated.

19. The constitutional requirements were supplemented by the legislator through various rules related to the implementation of government advertising or State of the Union (States) reports contained in the *Federal Code of Electoral Institutions and Procedures* (specifically in Articles

[11] There are possibly at least seventeen principles in the Federal Constitution that can be related to electoral matters, which are those of constitutionality, legality, impartiality, objectivity, accuracy, independence, definitiveness, equality, advertising, audience, gratuitousness, fairness, professionalism, excellence, honesty, proportionality in the people's representation and proportional representation. In addition to this, you can also find in Mexican local constitutions more principles such as procedural concentration, economy, rationality, loyalty, proportionality and gender alternation, to name a few.

[12] This equality is understood in terms of funding received by political parties and, as such, it was considered that "it is the equal right as stated in the law, so that all political parties conduct their ordinary [and] related to de universal vote activities, attending the circumstances of each party, in such manner that everyone will perceive corresponding proportional part, according to their degree of representativeness and that the delivery of such funding may not be conditioned, at all". SJFG9, page XII, September 2000, page 399, Thesis P. / J. 94/2000. IUS Registration: 191106. Under the heading: "EQUIDAD EN MATERIA ELECTORAL. ARTICLE 28 OF THE ELECTION CODE OF THE STATE OF AGUACALIENTES, AMENDEND BY DECREE, PUBLISHED IN THE OFFICIAL GAZETTE OF THE ENTITY ON APRIL 10, 2000, WHICH ESTABLISHES THAT THE GENERAL RULES ON THE DISTRIBUTION OF ANNUAL PUBLIC STAE FUNDING FOR NATIONAL POLITICAL PARTIES IN ORDER TO OBTAIN THEIR REGISTER AS SUCH, DOES NOT VIOLATE SAID PRINCIPLE."

[13] See the Judgment (SUP-RAP-119/2010) AND CUMULATIVE.

[14] These items are contained in the initiative introduced by Senator Manlio Fabio Beltrones Rivera and other elected representatives on August 31, 2007.

2.1 and 228.5).[15] In this Code included the system of various methods for the investigation and punishment of behavior that violate the electoral principles and standards.

20. Meanwhile, the electoral administrative agency has covered various aspects linked to advertisement of the public image of authorities through General Rules, such as, the G A 38/2008 which approved the *Rules of Procedure of the Federal Election Commission on Institutional and Political Election Advertising for Public Officials* and CG193/2011 *by which regulations on fairness for the use of public resources referred to in Article 347, Section 1, Subsection c) of the Federal Code of Electoral Institutions and Procedures in conjunction with Constitution Article 134, Sections 7 and 8,[16] are issued*. This regulation has determined some of the behaviors that are considered contravening constitutional principles of fairness and equality.

21. This set of requirements has been asserted through various procedures by the Federal Electoral Commission, challengeable before the Supreme Court for Elections of the Federal Judiciary with the intention to guarantee the constitutionality and legality of its procedures and rulings of said Commission.[17] In this regard, within the set of remedies available to political

[15] The contents of these sections as following:
Article 2. […] 2. During federal electioneering until the conclusion of the Election Day any media dissemination of all governmental advertising shall cease, both federal and local. The only exceptions to this are the publishing of information by the electoral authorities, the education and health services, or the civil protection department in case of emergency.
Article 228. […] 5. For the purposes of the provision of Constitution Article 134, Section 7, the annual report of work or management of public servants and the messages published in the social media are not to be considered as advertising, provided that it is limited to a sole radio and television broadcast with regional coverage of the public servant's corresponding geographical work area and to not more than seven days before and five after the date of delivering the report. In no case, the spots related to such reports shall have electoral purposes, or run during the election campaign.

[16] Constitution Article 134, sections 7-8, states:
Federal and Local public officials and from the Mexico City Government and its branches, at all times have the obligation to apply public resources of their responsibility fairly, without affecting the fairness of competition between political parties.
Advertising in any form of media in order to disseminate, the branches of government, autonomous bodies, agencies and entities of public administration and any entity other than the three branches of government as such must be of institutional nature and pursue informational, educational or social purposes. In no case, it propaganda will include names, images, voices or symbols to personally promote a public official.

[17] In most of the twentieth century it was preserved in Mexico's political system the electoral self-rating of the members of the Federal Legislature, with little perceptible involvement of the Supreme Court of Justice of the Nation. In the context of the so-called political reform promoted by the Executive on December 6, 1977, was published in the Official Gazette of the Federation, Decree by which the power of revising legislator of the Constitution amended and added several provisions of the Constitution including them to Article 60.
Under the circumstance of such little legal significance the contentious- electoral intervention was attributed to the Supreme Court of Justice, under historical reality the traditional self-rating system had not been amended in a substantial manner until 1987 when a new constitutional reform was implemented with the enactment of the Federal Electoral Code by Decree of December 29, published in the Official Gazette of the Federation on February 12, 1987.
In the eighth book of this ordainment the Electoral Contentious Court legally instituted. The creation of this Court prompted severe critics from some legal scholars, politicians and political scientists, and even the general public, arguing that, in their opinion, this body rated Electoral Contentious Court was not the proper Court to settle disputes
Unquestionably, the existence of Electoral Contentious Court was fleeting but very valuable as it was the primary intent to frame and limit the phenomenon of political-electoral disputes in the strictly legal field.
Another modification was made in 1990 on Constitution Article 60 by adding Section 41 in order to expressly establish in the text of the Supreme Law the existence of a system of legal appellation on federal elections, whose knowledge was given to the public body in charge of developing and conducting the elections, as well as to a constitutionally qualified Court as jurisdictional electoral body, by which all deficiencies were overcome.
Among key aspects of this reform the founding of the Supreme Court for Elections stands out which replaces the Electoral Contentious Court. *The new Court was defined by the Political Constitution of the United Mexican States* as the autonomous jurisdictional body on electoral matters in charge of ensuring that the acts and decisions are subject to the principle of legality.
As a result of the constitutional reform of 1996, the Supreme Court for Elections was incorporated into the sphere of the Federal Judiciary, thereby leading the way to set of modifications the Mexican federal electoral disputes system, expressed in the legal reform of that same year. Thus, the Supreme Court for Elections of the Federal

parties and citizens, is the appeal in order to challenge the procedures and opinions of that administrative body.

22. Here are some of the relevant issues the Supreme Court of Elections has decided as to norms and principles for the prohibition on the use of public funds for the benefit of parties or candidates in an election. In some of them an electoral jurisprudence thesis has been issued.

II. ANALYSIS OF THE LEGAL REQUIREMENTS

23. As already mentioned, after the constitutional amendment, the legislature addressed the secondary legislation, specifically, the *Federal Code of Electoral Institutions and Procedures*. The enforcement of the rules contained in the Code has been appealed before the Supreme Court for Elections. So, the ruling on such issues sometimes established precedents on the content of the electoral law.

24. The Federal Judiciary Act states that judicial precedents are mandatory in all cases of the same Court for Elections[18] and its local offices, to the Federal Election Commission and all local election authorities in certain cases.[19]

25. Here are some of the relevant issues the Supreme Court of Elections has heard as to norms and principles for the prohibition on the use of public funds for the benefit of parties or candidates.

1. Targets of the rules of prohibition

26. From the wording contained in Constitution Article 134 we see that public servants at all levels of government are those targeted to be subject to. In this regard, the rulings of the Supreme Court of Elections have been consistent in pointing out specific cases of public servants. Thus, Constitutional Article 134, Section 8, has been established to refer to advertisement of State authorities.[20] Some of the derived assumptions of this interpretation are the following:

a) It has been clearly stated that popular representatives, either federal or local, as well as senators and parliamentary groups are subject to prohibitions governing governmental advertising.

27. This holding reads as follows: PARLIAMENTARY GROUPS AND LEGISLATORS OF THE CONGRESS BEING SUBJECT TO PROHIBITIONS GOVERNING GOVERNMENTAL ADVERTISING ALIKE (10/2009), which states that such prohibitions apply to them "both individually and in parliament groups, because even they do not constitute the legislature in

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Judiciary was (TEPJF) established. This institution was endowed with new powers, its organizational structure and decision-making capacity strengthened and, except as provided in Fraction II of Constitution Article 105, constituted as highest judicial authority in its competence.
It has five Local Courts, which by reform of 2007 would operate on a permanent basis, as well as their faculties, instead of temporarily, as occurred since 1991 to then, and with faculties that operated only during federal elections.

[18] The Local Courts are:
Local Court Guadalajara, I Circuit, comprising the State of Baja California, Baja California Sur, Chihuahua, Durango, Jalisco, Nayarit, Sinaloa and Sonora.
Local Court Monterrey, II Circuit, comprising the State of Aguascalientes, Coahuila, Guanajuato, Nuevo León, Querétaro, San Luis Potosí, Tamaulipas and Zacatecas.
Local Court Xalapa, III Circuit, States of Campeche, Chiapas, Oaxaca, Quintana Roo, Tabasco, Veracruz and Yucatán.
Local Court Mexico City, IV Circuit, for Mexico City and the State of Guerrero, Morelos, Puebla and Tlaxcala.
Local Court Toluca, V Circuit, for the State of Colima, Hidalgo, Estado de México and Michoacán.

[19] See Articles 232, 233, 234 y 235 Federal Judiciary Act.

[20] See Judgment SUP-RAP-147/2008.

themselves, they are part of it and cannot be dissociated from the House of Representatives or the Senate they belong to, under which they perform the functions inherent to the Legislature they form part of. A contrary interpretation would lead to the possibility of violating the principles of impartiality and fairness in elections protected by the constitutional disposition cited".[21]

b) In the same manner, the presidential figure has given rise to various statements in respect of being obliged to respect the constitutionally and legally established limits regarding government advertising. For example, the appeal SUP-RAP-119/2010 denounced the possible violation of electoral legislation through the broadcast of messages on "National Chain", speeches at public events and press conferences. One of the discussions reflected in the judgment was on the restrictions to presidential immunity enshrined in Constitution Article 108. The relevance of the discussion is the conclusion that the constitutional provision does not protect the President when the alleged infringement stems from a constitutional provision as found in Constitution Article 41, Base III, Section C, paragraph 2.

28. Hence, it may be feasible to determine the existence of a specific liability for the **President**, understood as an electoral **liability based on the Constitution and legal settings**.

29. In that vein, by calling on a comprehensive Constitutional interpretation the previous rationale makes us come to conclusion that the **established constitutional immunity for the President of the Republic, does not reach to the extent of exemption of liability for infringements on the Constitution or Election Code** means that he or she does be subject to an administrative sanctions on electoral matters.[22]

c) It is also seen that regulatory agencies are required to comply with the restrictions established in the Constitution at both, federal and the state level. In this category fall the Human Rights Commissions, the Elections Commissions, the electorate, the National Institute of Statistics, Geography and Informatics and the Bank of Mexico.

d) The catalog is large if it is understood that any other entity or agency of government, at all levels of government, federal, state or city, are subject to any legal system of public status. The same should be understood when addressing the standard supported by the Plenary of the Supreme Court of Justice of the Nation, in the following:

30. THE MEXICAN STATE, LEGAL ORDERS COMPRISING IT. It is pointed out in [...] of the Constitution of the United Mexican States that there are five legal orders in the Mexican state, including: federal, state or local, municipal, the Federal District and the constitutional. The latter provides in its organic aspect the system of competences which the Federation, States, Counties and the Federal District should adhere to and report to the Supreme Court of the Nation as the Constitutional Court to establish the scope of competence of such legal orders and, if necessary, protect it (136/2005).

31. This group may include State Departments (Ministries) and Agencies, Institutions and any other legal body of the government orders. In the aforementioned SUP-RAP-147/2008, it was emphatically highlighted that the term "entity" referred to "any organization or entity with legal personality, especially when it is related to the State."

32. Here, it should not left out the mentioning that the concept of public servant has earned different interpretations.

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[21] This holding derives from Judgments on election disputes as following; Appeal SUP-RAP-75/2009 and cumulative, Appeal SUP-RAP-145/2009 and Appeal SUP-RAP-159/2009 *Gaceta de Jurisprudencia y Tesis en Materia Electoral*, Mexico City, nr. 4, 2009, pages 20-21.

[22] See Judgment on Appeal SUP-RAP-119/2010.

33. The Federal Criminal Code states in Article 212, included in the chapter of offenses committed by public officials:

> **Article 212**. For the purposes of this and subsequent Title a public servant is a person who holds a position, office or commission of any nature in the centralized Federal Government or the Federal District, decentralized agencies, majority state-owned companies, organizations and societies assimilated to them, public trust funds, in the Congress, or in the Federal Judiciary and the Judiciary of the Federal District, or with who manage federal financial resources. The provisions of this Title, apply to State Governors, deputies, local legislature and Justices and Local Courts for the commission for federal crimes under this title.
>
> They shall impose the same penalties for the offense in question to any person involved in committing any offense under this or the following Title.

34. This provision is supplemented by Article 401 of the same legal code, whose Fraction I states that also “officials and employees of the State and Municipal Government” are considered “public officers”.

35. Administrative legislations have used similar definitions. For example, the *Rules of Procedure on the use of public resources, institutional and government advertising and anticipated pre-campaign or campaign events for regular elections of the Federal District*, state that a public official is "Anyone who has a position, office or a commission of any kind in the Executive, Legislature and Judiciary Branch at all levels -federal, state or municipal- in the centralized Federal Administration, or in the Federal District, in decentralized bodies, corporations with majority share by the States, organizations and societies assimilated to them, public trust funds, bodies which the Constitution, local constitutions and the Statute of the Federal District Government grant autonomy and those persons who manage or implement local and federal financial funds".

2. Public Resources

36. In the holding 106/2010, the Supreme Court of Justice of the Nation, by referring to public resources in relation to Constitutional Article 134 referred to them as "resources received by the State" for a specific purpose, that is, the resources raised by the state., It also held that case that " Constitution Article 134 decrees that the financial resources available to the State should be managed with efficiency, effectiveness, economy, transparency and honesty to meet the intended objectives, and provides that the laws shall guarantee the aforementioned disposition. For this, in order to comply with this provision, it is necessary that the laws enacted in relation to the use of public resources adopt, develop these principles and constitutional mandates and allow them to be effectively performed".

37. Regarding the concept of public resources, a definition of it can be found in the laws relating to the auditing. For example, the *Law of Supreme Audit of Public Resources for the State of Baja California and its Counties*, October 22, 2012, states that public funds are "the income, regardless of their provenance, outflow and assets collected, managed and implemented by the Entities, and the rights and duties inherent to them".

38. In our opinion, the concept of public resources must be understood as the total of revenues obtained by the state, which are designated by means of an expenditure budget to government programs and actions in a given period, and whose corresponds to specific government departments and agencies.

39. These public resources are monitored by a specialized panel in charge of reviewing its proper implementation by governmental agencies and competences who executed them.

40. As seen, these government agencies or competences essentially are all legal organizations or entities related to the Mexican State. However, in the Mexican legal system there is also the phenomenon that certain legal entities without public status have been given constitutional recognition as entities of public interest, as it is the case of political parties.

41. It is noted here, as political parties are subject to a special system of control on public sources as it orders the Constitution. So, by the constitutional requirement as for political parties the state is meant to be in charge of contributing the most to the financing of their activities. In this respect Constitutional Article 41, Base II, states the following:

> The law ensures that national political parties have on a fair basis the means to carry out their activities and provides the rules of financing their own parties and their electioneering will be subject to owing the guarantee that public resources should prevail over those of private precedence.

42. The system of monitoring elections, especially since the legal reform of 2008, is extremely complex and led to the need to appoint a specialist officer in the Federal Electoral Commission itself to be in charge of the procedures set forth in the *Federal Code of Institutions and Electoral Procedures.*

43. In this paper we focus on the criteria held by the Supreme Court for Elections on the misuse of public electioneering resources, and hence it may not address the criminal perspective, however, we consider it necessary to, at least, make referrals to them. Federal criminal law includes within offenses committed by public officials, to embezzlement, whose type allows relating quite evidently to the notion of public funds. Even the legislature contemplated the assumption that the offense may be committed by persons without the status of public official, so as stated in the Federal Criminal Code Article 223:

> **Article 223**. Committing the Crime of Embezzlement:
> **I**. - Any public servant who for their own or others' purposes distracts of their object money, values, property or anything else belonging to the State, a decentralized agency or an individual, as if by virtue of their office received by administration, deposit or otherwise.
> **II**. The public servant who misuses public funds or grants any of the acts referred to the Article on misuse of power and authority in order to promote their own political or social image, or t of their superior officer and a third involved or to denigrate anyone [...] and
> IV. Any person without the federal public servant status of and being legally bound to the custody, administration or implementation <u>of federal public funds, who distracts them of their object t for their own or others' purposes or gives a different application as to which they were allocated</u>.

44. It cannot be ignored with regard to electoral offenses the normative assumptions are related to public servants and public resources. Thus, Federal Criminal Code Article 407 states:

> Article 407. It shall be sentenced to a fine of two hundred to four hundred days and imprisonment of one to nine years the **public servant** who: [...]
> II. Conditions the provision of public services, compliance of programs or public construction works, within their competence, for the vote in favor of a political party or candidate;
> **III**. Illegally draws funds, assets or services at their disposal by virtue of their office such like vehicles, real estates and equipment, to support a political party or a candidate, not objecting penalties which may apply for the crime of embezzlement **T-.-I-**
> Article 412. It shall be sentenced with a term of imprisonment of two to nine years **the partisan official** or the campaign organizers who knowingly take advantage of funds,

assets or services violating Fraction III of Article 407 of this Code. There shall be no benefit of parole for this crime.

45. The agency in charge of investigation and, at the time, appropriation for the commission of these offenses is the Special Prosecutor for Electoral Crimes Care (FEPADE). This agency actually is represented in all Mexican states.

3. Sanctioning Administrative misdemeanors in Electoral Matters

46. To hear the violation of the rules and principles mentioned the public servants are bound to as for the fair application of public resources under their responsibility, referring especially to the possibility of influencing on the electoral equity is constitutionally attributed to the Federal Election Commission.

47. To meet this end, the *Federal Code of Electoral Institutions and Procedures* (COFIPE) established a set of procedures aimed at the accountability for election rules infringement. The liable subjects are according to article 341 (COFIPE): a) Political parties b) The national political groups, c) Applicants, candidates and candidates for elected office; d) Citizens or any person or legal entity; e) Election observers or organizations of election observers f) The authority or public servants of any of the Federal and local Branches; Municipal Government Agencies; Agencies of Government of Mexico city; Autonomous Agencies and any other public entity; g) A notary public, h) Foreigners; i) Licensees and Permit holders of Radio and Television Broadcasters j) Organizations of citizens who wish to form a political party; k) Trade, labor or corporate unions or any other group with social attribution other than the establishment and register of political parties; l) Ministers of religion, associations, churches or groups of any religion; and m) Any other subject liable under the terms of COFIPE itself.

48. Regarding public servants COFIPE Article 247.1 marks possible violations such subjects may commit, some of which are linked evidently to the requirements of Constitution Article 134:

1) It constitutes violations of this Code by authorities or public servants, as applicable, of any of the Federal Branches of Government, of Local Authorities, Municipal Governing Bodies, Bodies of the Mexico City Government, autonomous agencies, and any other public entity:

a) The omission or breach of the liability to provide cooperation and assistance or to provide, in a timely and formal manner, the information that may be requested by the organs of the Federal Election Commission;

b) The dissemination, by any means, government advertising during the period covered since the start of the campaign until the end of the Election Day, except information on education and health services or necessary to civil protection in emergencies;

c) Breach of the principle of impartiality set by Constitution Article 134 in case that such behavior affects the fairness of competition between political parties, aspirants, primary election candidates or candidates for the elections;

d) During the election, the dissemination of advertising, in any social media, which contravenes the provisions of the seventh paragraph of Constitution Article 134, Section 7.

e) The use of social programs and of federal, state, municipal, or Federal District resources in order to induce or coerce citizens to vote for or against any political party or candidate, and

f) The breach of any of the provisions of this Code.

49. In the administrative sanction proceedings the Federal Election Commission is aware of, it has been recognized the possibility of application for offenses on both, federal and local level. In case SUP-RAP-23/2012, the Supreme Court for Elections held that the Federal Election Commission "is not the only body with jurisdiction over election issues, but those corresponding

to the States or Mexico City are entrusted to the local authorities instituted for that purpose". And, in relation to the possibility to supervise the obligations imposed by Constitution Article 134 it stated:

> The confirmation of the existence of different areas of competence between the Federation and the States or the Federal District for the enforcement of Article 134 at analysis is strengthened by the provisions of Decrees 3 and 6, 6 November, 2007, published in the Official Gazette of the Federation, 13 November, 2007 (to which, among others, the three final paragraphs of the Federal Constitution Article 134 are added) under which both, Congress and State legislatures and the Federal District Legislative Assembly, are required to make the corresponding adjustments on the laws of their respective jurisdiction and periods, in order to achieve so that effective implementation and operability of the commandments of merit in each of these areas.

50. In said SUP-RAP-23/2010 (and others like SUP-RAP-5/2010) some general bases as to the competence corresponding to the Electoral Federal Commission are stated:

> 1) The Federal Electoral Commission shall only hear issues about the behaviors that are deemed infringing the provisions of the antepenultimate and penultimate Sections of Constitution Article 134 on advertising by the Government, the governing bodies of the three levels, autonomous bodies, agencies and entities of government or other public agency and public servants, **that influences or may influence on a federal election**.
> 2) Violations must refer directly or indirectly, immediately or not, to the federal elections by themselves, or, when concur with local elections and provided by the continence of the cause it turns out to be legally impossible to divide the subject of the complaint.
> 3) It may be the subject of knowledge in the respective procedures any kind of political election or institutional propaganda which violates any of the principles and values protected by Constitution Article 134, namely, the impartiality or fairness in relation with competition between political parties or in federal elections.

51. In other issues the following rules would be add:

> 4) The Federal Election Commission is attributed exclusively the competence of the radio and television broadcast of advertising that may violate Constitution Article 134..
> 5) Exceptionally, the Federal Election Commission may hear the violations of the rules laid down in above Article 134 for advertising that may influence on state, municipal or the Federal District elections if there is a properly concluded agreement to undertake the arrangement of this kind of election.

52. By settling different cases it was held that every time a public servant uses advertising it falls into de jurisdiction of the Federal Election Institute to know whether it is an anticipated act of campaign.[23] It was also noted that in the absence of data to identify the public office associated with advertising the Federal Election Commission world be the competence to hear the case.[24]

53. In any case, if electoral matters are linked to the federal level, a special proceeding is the appropriate way to analyze the behaviors related to the diffusion of electoral or political propaganda in the social media. The establishment of said proceedings the Federal Election Commission is in charge of could occur at any time, which implies the precedence from inside or outside the electoral process.

[23] See all Judgments on Appeals SUP-RAP-173/2008, SUP-RAP-197/2009 and SUP-RAP-106/2009.
[24] See Judgment on Appeal SUP-RAP-23/2010.

54. The beginning of any penalizing proceedings and the respective emplacement of the public servant for the alleged violations linked to Constitution Article 134 requires the compliance with a set of requirements. In case SUP-RAP-173/2008, the Superior Chamber said it should be verified that it is found in presence of political or electoral propaganda advertising; that it implies that the personal promotion of a public servant (precisely the one who is being prosecuted); that from the set of all the evidence collected the assumption of a violation of the principles contained in Sections 7 and 8 of Constitution Article 134 and, of course, any indication of probable liability of the public servant.

55. The sentences of the Supreme Court for Elections have also identified some very important elements, such as the essential formalities of administrative disciplinary proceedings. In several judgments there are noted the following: 1) To determine whether the reported facts have an impact on electoral matters, 2) If no consequences of that kind are found to dismiss as unfounded the respective proceedings; 3) If the allegations influence on the subject, to analyze whether they constitute an electoral law violation. Likewise, it has pointed out in RAP-102/2009 that the complaints or law suits may be dismissed for lack of evidence, but not for the failure of the same.

56. Finally, in the disciplinary proceedings it has been determined (SUP-RAP-58/2009) that the authorities and public servants have the duty to provide, in a timely and formal manner the information requested by the authorities of the Federal Election Commission.

57. At the end it can be said that Article 354 of the COFIPE contains the provision for punishment on infringements committed in electoral matters.

III. CRITERIA OF THE SUPREME COURT FOR ELECTIONS

58. From the rulings of the Supreme Court for Elections of the Federal Judiciary the following can be classified criteria in relation to the use of public electioneering funds:

- The use of public resources for public servants to run non institutional advertising without the characteristics of personalized promotion constitutes a violation of election regulations.[25]
- What is intended to inhibit by Article 134 is any behavior that by reason of the office to be held may derive an improper use of public funds during the election processes for government programs to induce citizen voting, that is, an ostensible legal material power may operate against all governed of a certain locality, so that eventually, in their voter faculty they may vote in favor of a determined candidate or political party distorting state resources in their own benefit; however, as noted, this ban cannot be carried to the extent that public officials abstain from coping with their assigned responsibilities, including the participation in delivering assets and services to the community, because the ban is only intended, it is reiterated, to prevent public officials or elect representatives in pursuit of holding an office from taking some advantage resulting from the office they hold such as the use of public resources or the conditioning of social program which may eventually turn out votes, but may not refrain from appearing in public with those they chose to hold such public office.[26]
- In order to fall into violation of the provisions of Federal Constitution Article 134, Sections 7 and 8, it is not enough to demonstrate the application of

[25] See Judgments on Appeals SUP-RAP-74/2008 and SUP-RAP-75/2008.
[26] See Judgments on Appeals SUP-RAP-14/2009, SUP-RAP-69/2009 and SUP-RAP-106/2009.

public funds by a public servant, but also it should be proved that such application affects the equity in competition between political parties.[27]

- The misuse of public funds is not updated when donations of members from a Legislature are given in favor of a political party through fees taken from Representatives and Senators on agreement with the Treasury, where the purpose of the wage deduction of such legislators is to pay statutory dues.[28]
- For the purposes to have the violation of Constitution Article 134 on misuse or diversion of public funds configured, there is no need of full proof that a public official provided gave public financing to a political party, but it is enough to show that through government advertising run by this official some customized promotion is made for the same official or it was spread in order to position the party and their candidates before the electorate.[29]
- The violation of the governing regulations of the supervision procedure of political parties is ground enough for the penalization without proving the misuse of public funds as the simple obstruction or decrease of the possibility to verify income and expenditure of the political institutions have as a result the violation of the protected value consistent with the certainty of the employment of the public funds under the terms established by law.[30] For substantive violations, such as the misuse of public funds, the amount involved should be considered so that the penalty is proportional to it, because it harms public funds granted to political parties for the fulfillment of their purpose.[31]
- In the SUP-RAP-76/2008 case which had to do with a material (a billboard rental located on Highway Guamúchil-Guasave) of Government of the State of Sinaloa in favor of the campaign of the candidate of the coalition "Alliance for Mexico "during the election of 2006, the Court held that "the misuse of public state funds for aforementioned candidate's campaign hinders the continuous development of democratic life of the country, undermining the principles of certainty, legality, fairness, independence and objectivity as thought to govern throughout the complete election process . Also, the exceeding of the expenditure ceiling agreed by the Board General diminishes the legal value protected by the rule breached, namely, the development of the democratic life of the country as they attacked the principle of equity in the competition that should govern any electoral process". A fine corresponding to 428 days of general minimum wage for the Federal District in 2006 was determined which is equivalent to $ 20,830.76 (twenty thousand eight hundred and thirty pesos 76/100) * which is an amount divided in two parts, 76.28% for the Revolutionary Institutional Party and 23.71% for Green Ecologist Party of Mexico.
- In "The Royal Tour" case (SUP-RAP-29/2012) on the alleged misuse of public funds by the President for the recording of the program, the Court held that "due to the Presidential status the [President] is entitled to use a security corps provided by the Mexican state, which has the means of various vehicles and aircrafts that are intended to safeguard and protect the Holder of the Federal Executive Office in all personal and official activities during the Presidential office term so that it is lawful that for the implementation of this program he has been protected by elements of the Presidential Security Corps and used official vehicles and aircrafts provided by the aforementioned

[27] See Judgment on SUP-JRC-273/2010 and cumulative.
[28] See Judgment on SUP-RAP-291/2009.
[29] See Judgment on SUP-RAP-136/2009 and cumulative.
[30] See Judgment on SUP-RAP-91/2007.
[31] See Judgment on Appeal SUP-RAP-29/2007.
* Roughly less than two thousand dollars

public entity as this protection of the Federal Executive Branch Holder is permitted by Articles 1, 2, 3 and 4, Fractions I and VI of Procedure of the Presidential Security Corps which is a technical military body that assists the President during the conducting of official activities so that, as pointed out by the responsible, said program had the purposes to foment and encourage tourism in our country while the President of the Republic derived from such duties for safety reasons commuted on said wheeled vehicles and aircrafts".[32]

- The Federal Election Commission has jurisdiction to rule on the merits of the alleged violations of Article 134, Sections 7 and 8 paragraphs, only when they influence or may influence on a federal election.[33]
- The local administrative electoral authorities are competent to hear complaints and law suits made against public servants for applying public funds in order to influence on the fairness of competition between political parties at the local level or for running government advertising involving customized promotion and affecting the federal election in question.[34]
- The ban provision of Constitution Article 134 does not prevent officials from failing to perform their duties as public servants as it is the active participation in the delivery of assets and services to citizens of their corresponding territorial demarcation.[35]
- The sole assistance 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 mean by itself the misuse of State funds.[36]

59. This set of criteria accounts for the developed interpretation efforts of the judicial head office as to the principle of fairness expected from public officers in the use of public funds.

60. It is very likely that in upcoming elections new problems of implementation will arise and, once again, they will be addressed and ruled by the Supreme Court for Elections of the Federal Judiciary.

IV. RESTRICTIONS ON ELECTIONEERING EXPENDITURE

61. To ensure fairness in the election Mexico has established a set of legal mechanisms that enable the administrative election authority to set the limit to the resources which political parties may use, in addition to receiving other privileges, such as tax exemptions or access to official airing times on radio and television.

62. The 2007 constitutional reform took into account one of the demands of political actors related to decreasing the expenditure on electioneering considered wasteful by the electorate.

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[32] See Judgment on Appeal SUP-RAP-29/2012.
[33] See SUP-RAP-145/2011 and cumulative.
[34] Holding 3/2011 under the heading of “JURISDICTION. THE LOCAL ASMINISTRATIVE ELECTORAL BODIES SHALL HEAR COMPLAINTS OR REPORTS ON VIOLATION OF CONSTITUTION ARTICLE 134 (LEGISLATION OF ESTADE DE MEXICO)", derived from Judgments SUP-JRC-5/2011, SUP-JRC-6/2011 and SUP-JRC-7/2011. *Gaceta de Jurisprudencia y Tesis en Materia Electoral*, Mexico City, number 8, 2011, pages 12-13.
[35] XXI/2009 Thesis, under the heading of "PUBLIC OFFICIALS. PARTICIPATING IN ACTS RELATED TO THE DUTIES ASSIGNED TO THEM DOES NOT VIOLATE THE PRINCIPLES OF FAIRNESS AND EQUITY IN THE ELECTIONS", derived from the Judgments on appeal SUP-RAP-69/2009 and Appeal SUP-RAP-106/2009. *Gaceta de Jurisprudencia y Tesis en Materia Electoral*, Mexico City, number 5, 2010, pages 82-83.
[36] Jurisprudence 14/2012, under the heading of "ACTS ELLECTIONEERING. THE SOLE PRESENCE OF PUBLIC OFFICIALS AT NON WORKING DAYS AT SUCH ACTS 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 11-12.

63. The constitutional basis of the limits or spending ceilings on campaigns and primaries is in the second base of Article 41 mentioning in its operative part that "The law shall set limits on expenditures in the internal processes of candidate selection and election campaigns of political parties".

64. However, the legal regulation of primary campaign expenditure ceilings are covered in paragraph 1 of Article 214 of the Federal Code of Electoral Institutions and Procedures, which states that "No later than November of the year prior to the election, the General Council of the Federal Electoral Institute shall determine the primary campaign spending ceilings by primary candidate and election type what they pretend to run for. The ceiling shall be equal to twenty percent of that established for the immediate previous campaigns according to the election in question".

65. In the case of expenditure ceilings within the campaign Article 229 of the cited Federal Election Code states that "Expenditures made by political parties, coalitions and their candidates in electioneering and campaigning activities shall not exceed the ceilings that the General Council may agree on for each election". Also, in this article there is given a description and mentioned the following concepts of campaigning expenses: a) advertising expenses, b) campaign operation expenses; c) expenses for advertising in newspapers, magazines and other print media, and d) production costs for radio and television broadcast advertising.

66. Clearly specifying "expenses made by political parties for their ordinary operation and to sustain their executive boards and organizations shall not be considered within the campaign expenditure ceilings".

67. Continuing the description of the paragraph in question it is mentioned that the electoral administrative authority (General Council of the Federal Electoral Institute) shall implement different rules in order to determine such restrictions. With respect to the electoral process to elect the President of the Republic, it shall proceed to issue an agreement considering a twenty percent of the public financial campaign funding established for all parties in the year of the Presidential election by the last day of November of the year preceding the election, how the cap campaign spending is equivalent to twenty percent public financing of campaign set for all parties in the Presidential election year.

68. Now, the last day of January of the election year, said General Council shall set up as campaign spending ceiling in regard to the representatives by the principle of relative majority the amount obtained by dividing the campaign spending ceiling established for the Presidential election by three hundred. For the year of the election of the House o Representatives, the amount this fraction is referred to shall be updated by the growth rate of the daily minimum wage of Mexico City, and as to the senators by the same principle, for each formula, the ceiling on campaign expenditure shall be the amount obtained by multiplying the amount of the campaign expenditure ceiling for the election of the representatives by the number of districts that comprise the entity in question, explaining that in no case the number of districts to be considered shall be higher than twenty.

69. For the 2011-2012 elections, the General Council of the Federal Electoral Institute issued several agreements in order to comply with the Articles previously specified.[37] For the Presidential election, the primary campaign spending ceiling or pre-candidate for President of the United Mexican States was set at 67,222,416.83 pesos (about 5.25 million U.S.

[37] Highlighting the agreements CG382/2011, CG432/2011 and CG434/2011 on the election for President of the United Mexican States and the agreements CG433/2011, CG435/2011 and CG436/2011 on the elections for Representatives and Senators.

Dollars) while in the case of the election for President the ceiling was set at 336,112,084.16 Mexican Pesos (approximately 26.25 million U.S. Dollars).

70. The agreements issued by the electoral administrative authority can be challenged before the Supreme Court for Elections of the Federal Judiciary. In the 2011-2012 elections political parties used in several occasions these agreements, for which reason modifications were ordered thereof.

71. Furthermore, the administrative authority, who regularly receives reports of political parties regarding the expenditure on election campaigns, is in charge of monitoring for the compliance of the agreements by political parties and candidates. It is complemented by the system of complaints and suits that can be filed by individuals, parties, candidates and, generally by any person on presumptive excessive campaign spending.

72. In the 2012 Presidential election, one of the arguments submitted to the Supreme Court for Elections was the excess on the expenditure ceiling established by the administrative authority, which were considered unfounded in the Judgment of the 539/2012 trial of disagreement. It was intended to found such argument on the fact that the complaints filed at different stages of the electoral process allowed to accredit, all together, that the ceiling established for that Presidential election had been overdrawn.
The exercise of these administrative and legal mechanisms in Mexico allows adverting that the issue of excessive use of resources on election campaigns represents a delicate topic for citizens as well as political groups.

73. Against this scenario, it should be mentioned that the similarities in the Mexican regulation are in the Latin American legislations while European and U.S. legislations do not contain the same type of regulations.

74. In the United States the legal discussion focuses more on input from private individuals, as is noticeable from the ruling *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010). In November 2012, Americans will elect a new President. The participation of current President, Barack Obama, is relevant because he is seeking re-election facing his competitor, Mitt Romney.

75. It is noteworthy that for the first time in the history of American electoral system (which dates back from the mid-seventies of the twentieth century), the contestants refused to use public resources for the campaigning.

76. Please note that in the Code of Federal Regulations only some rules related to the use or management of resources and state property were set, which should be destined exclusively to official affairs.

77. Against this there are no other restrictions, as even, as has been done in Mexico, the President in office seeking or re-election can make use of public resources destined to his protection, logistics and maintenance to name those more evident.

78. Unlike the U.S. model in Mexico there exist positively restrictions on government advertising and on the involvement of officials in election campaigns, as well as a ban on re-election to several offices (at least for consecutive re-election).