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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**MEXICO**

**DRAFT OPINION**

**ON THE DRAFT CONSTITUTIONAL AMENDMENTS  
CONCERNING THE ELECTORAL SYSTEM**

**On the basis of comments by**

**Ms Paloma BIGLINO CAMPOS (Substitute Member, Spain)**

**Mr Srdjan DARMANOVIĆ (Member, Montenegro)**

**Mr Michael FRENDÓ (Member, Malta)**

**Mr Oliver KASK (Substitute Member, Estonia)**

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## I. Introduction

1. By letter of 28 June 2022, Mr Lorenzo Cordova Vianello, President Councilor of the National Electoral Institute (INE), requested an opinion of the Venice Commission on the draft constitutional amendments concerning the electoral system of Mexico (CDL-REF(2022)031).
2. Ms Paloma Biglino Campos (Substitute Member, Spain), Mr Srdjan Darmanović (Member, Montenegro), Michael Frendo (Member, Malta) and Mr Oliver Kask (Substitute, Member) acted as rapporteurs for this opinion.
3. On 21, 22 and 23 September 2022, a delegation of the Commission composed of the rapporteurs, accompanied by Mr Serguei Kouznetsov, visited Mexico to hold a series of meetings with the Speaker of the Congress of Deputies, Mr Santiago Creel Miranda, Senator Mr Héctor Vasconcelos and a group of senators from Morena,<sup>1</sup> Mr Lorenzo Cordova Vianello, President Councilor of the National Electoral Institute (INE), Mr Reyes Rodríguez Mondragón, President of the Electoral Tribunal of the Federal Judicial Branch of Mexico (TEPJF, Electoral Tribunal of the Federal Judicial Branch, hereinafter the Electoral Tribunal), as well as with representatives of civil society and the academia. The Commission is grateful to the National Electoral Institute (INE) and to the Permanent Mission of Mexico to the Council of Europe for their support in the organisation of this visit.
4. This opinion was prepared in reliance on the English translation of the draft law. The translation may not accurately reflect the original version on all points.
5. *This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 21 – 23 September 2022. [The draft opinion was examined at the meeting of the Sub-Commission on \*\*\* on \*\*\* 2022]. [Following an exchange of views with \*\*\*,] it was adopted by the Venice Commission at its \*\*\* Plenary Session (Venice, \*\*\*).*

## II. Background

6. The Constitution provides that Mexico is a pluralist democracy. There have been major changes in the country in the last thirty years from the time when one party, the PRI (*Partido Revolucionario Institucional*), traditionally in power for more than 70 years - as a result of a deficient electoral system and the lack of transparent elections in Mexico - was defeated in the 2000 election. Under the Presidency of Mr Ernesto Zedillo (1994-2000), the electoral system underwent significant changes in 1996. The reform marked a shift towards elections more in line with international standards and an increase in their competitiveness. In 2000, Mr Vicente Fox, the candidate of the PAN, an opposition political party, won the presidential election. Following the 2000 election, the Mexican electoral system changed once again and reinforced the role of both the Federal Electoral Institute (IFE), which had among its functions those of a Central Electoral Commission, and the Electoral Tribunal – a specialised jurisdiction dealing with electoral complaints and appeals.
7. The latest constitutional reform which took place in 2014 created a National Electoral Institute (INE). INE took over all responsibilities of the Federal Electoral Institute (which had existed from 1990 till 2014). It was also charged with oversight of all elections at local and state level, as well as referendums and the regulation of processes of citizen's participation in public administration. This electoral reform was submitted for opinion of the Venice Commission in 2013. The opinion adopted in June 2013 was very positive on the reform pointing out that "the electoral legislation has reinforced the powers of the IFE and the Electoral Court, established

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<sup>1</sup> Morena is a major Mexican left-wing political party (ruling party since 2018). It was led by three-time presidential candidate and current President of Mexico, Andrés Manuel López Obrador until 12 December 2017, when he registered as a candidate for the party's nomination and was succeeded by Yeidckol Polevnsky.

mechanisms for oversight of the public funding of political parties, declared the importance of freedom of expression and distributed equal media time among political parties and ensured a higher presence of women in politics through the establishment of quotas.”<sup>2</sup>

8. Article 41 of the Federal Constitution as amended in 2014<sup>3</sup> provides the list of different tasks entrusted to INE in the electoral field. Part V, Section A provides that:

*“The National Electoral Institute is an autonomous entity, which is endowed with legal personality and its own assets. The legislative branch, the national political parties and the citizens shall participate in the integration of the governing bodies of the Institute, according to the terms provided by law. The basic principles that guide the functions and performance of the Institute are certainty, legality, independence, impartiality, objectivity and maximum publicity.*

*The National Electoral Institute shall have electoral jurisdiction and independent character regarding its decisions and functioning, and its performance shall be professional. National Electoral Institute structure shall include managerial, executive, technical and surveillance organs.”*

9. Since 2014, INE has managed different electoral processes on national (presidential and parliamentary elections), state and local elections on a yearly basis.

10. International and regional organisations were allowed to closely follow different electoral processes in Mexico. After the latest elections in 2021 the role of INE as an independent electoral management body was recognised, among others, by the Organisation of American States (OAS). In its press release after the federal and local elections of June 6, 2021, the OAS underlined that:

*“The elections ratified the importance of the institutional strength, professionalism, and experience of autonomous and independent electoral authorities for Mexican democracy. Over the past 30 years, the former Federal Electoral Institute (IFE) and the current National Electoral Institute (INE) have organized 23 federal elections and, together with local public electoral bodies, 271 local elections. It was precisely the strength of the different institutions that make up the electoral system that made it easier to carry out the largest elections in the history of Mexico, particularly considering that they were held in the context of a pandemic.”<sup>4</sup>*

11. Since his election in 2018, President Lopez Obrador has been promoting institutional changes and the reform of the Constitution.

12. On April 28, 2022, the Federal Executive filed an initiative through Morena to change various articles of the Mexican Constitution on electoral matters (hereinafter “the Initiative”) with the Congress of Deputies, based on Article 71, section I, of the Political Constitution of the United Mexican States. The Initiative aims to reform articles 35, 41, 51, 52, 53, 54, 55, 56, 60, 63, 73, 99, 105, 110, 111, 115 and 122 of the Constitution; this is therefore a substantial electoral reform.

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<sup>2</sup> See Venice Commission, Opinion on the electoral legislation of Mexico (CDL-AD (2013)021), par. 69.

<sup>3</sup> Decreto por el que se Reforma, Adiciona y Derogan Diversas Disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia Política-Electoral, Diario Oficial de la Federación (Feb. 10, 2014).

<sup>4</sup> See [www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-062/21](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-062/21)

13. The main purposes of the constitutional reform, according to the Initiative, are the following:

- a. Provide the country with an electoral system that offers security, respect for voting, honesty and legality.
- b. Guarantee political freedom for all citizens, without censorship.
- c. Establish an environment in which independent parties and candidates have guarantees allowing for their free participation in the struggle for political power.
- d. Create a single national electoral mechanism with single electoral and jurisdictional institutions, under the principle of republican austerity.<sup>5</sup>
- e. Elect by secret, direct and universal vote the highest electoral, administrative and jurisdictional authorities, on the basis of candidacies proposed by the branches of the State.
- f. To reduce the number of federal deputies to 300 and the number of senators to 98.
- g. Elect the members of both chambers of the Congress of the Union by means of voting in each of the Federal Entities, using the method of lists prepared by the political parties and independent candidacies.
- h. Limit the public financing of political parties to campaign expenses and regulate the individual contributions to them and their use.

14. Among the proposed changes, three seem to stand out: 1) the creation of a new national electoral authority whose members would be directly voted in by 'the people' and also manage state and local elections; b) cuts to public funding and media time for political parties; and 3) reconfiguring of Congress not only by eliminating 200 (out of 500) proportional representation seats in the lower house, but also electing the remaining 300 by nation-wide lists from parties rather than districts.

15. According to the Constitution of Mexico, the constitutional reform needs to be approved by two thirds majority in both the Congress of deputies and in the Senate.<sup>6</sup>

16. This reform, if adopted, will radically change the electoral system in Mexico and the management of its electoral process. Previously all constitutional electoral reforms had been proposed by the opposition. This is the first time that the President whose political supporters have the majority in the Congress initiates such ambitious constitutional changes which will significantly affect the next elections to take place in 2024.

### **III. Scope of the Opinion**

17. Since the request was received from INE the Venice Commission's opinion can only focus on issues related to the reform of this electoral management body. However, several other aspects of the reform, notably the reform of the Electoral Tribunal, the new electoral system and new rules concerning political parties will be referred to if needed for the full understanding of the proposed system of election administration in Mexico.

18. The Opinion should also be read in conjunction with the following documents:
- a. Code of good practice in electoral matters CDL-AD(2002)023rev2-cor;
  - b. Guidelines on political party regulation - Second edition - CDL-AD(2020)032;
  - c. Election dispute resolution - CDL-AD(2020)025;
  - d. Report on Constitutional Amendment, CDL-AD(2010)001;

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<sup>5</sup> Mexican President López Obrador ran on an anti-corruption platform to win the 2018 election. He promised that eliminating corruption would save important resources and underlined this commitment to saving money by promising a severe government austerity program. On 20 November 2019, the Federal Republican Austerity Law and amendments to provisions of the General Law of Administrative Responsibilities and to the Federal Budget Responsibility entered into force.

<sup>6</sup> Article 135 of the Constitution of Mexico, [www.diputados.gob.mx/LeyesBiblio/pdf/CPEUM.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/CPEUM.pdf) .

- e. Compilation of Venice Commission Opinions and reports concerning the stability of electoral law, CDL-PI(2020)020, and the documents it refers to;
- f. Compilation of Venice Commission Opinions and reports concerning Election Dispute Resolution CDL-PI(2021)014, and the documents it refers to;
- g. Opinion on the electoral legislation of Mexico, CDL-AD(2013)021;
- h. Selected case-law of the European Court of Human Rights.

#### IV. Analysis

##### A. General remarks

19. The Explanatory Memorandum of the Initiative of 28 of April 2022 explains that the reform of the electoral administration seeks to “strengthen democracy and guarantee compliance with the will of the people.” It also stresses that “administrative and jurisdictional electoral authorities must be independent of political power, political parties and economic groups”, and that “in recent years, the actions of these authorities have been characterised by their lack of adherence to the principles of objectivity, independence and impartiality that are inherent to the electoral function.”<sup>7</sup> In addition, the authors of the constitutional reform point out to another serious problem of the Mexican political system which is “the cost of operation of its electoral processes, supposedly justified by their complexity.”

20. The Code of Good practice in electoral matters provides that elections should be organised by an impartial body; which is permanent in nature; political parties, if not nominating members to this body, must be able to observe its work; bodies appointing members of electoral commissions must not be free to dismiss them at will.<sup>8</sup> During the visit of the rapporteurs to Mexico from 21 to 23 September 2022 several interlocutors of the delegation were of the opinion that the existing constitutional and legal provisions enshrined these principles and the operation of INE provided sufficient evidence that these had been implemented. All interlocutors agreed that since 2012 there had been a regular changeover of power as a result of democratic elections.

21. The proposed constitutional amendments (and the explanatory report) are still being debated between different political forces and civil society, which leaves an opportunity to discuss both the proposed Initiative and alternative proposals and ideas. The Venice Commission was always of opinion that the process of introducing amendments to the Constitution should be marked by the highest levels of transparency and inclusiveness – in particular in cases where draft amendments, such as the current ones, propose extensive changes to key aspects of the Constitution.<sup>9</sup>

22. The Venice Commission underlines that any electoral system and electoral administration can be improved; however, changing a system and especially an electoral administration which have performed well requires particular caution; if the current system and administration have ensured independence, enjoy the trust of most electoral stakeholders and have proved to be capable of securing several consecutive successful electoral cycles, it is imperative that the new electoral management authorities and specialised jurisdictions should provide at least the same guarantees of independence and should be capable of offering at least the same quality of the electoral process as their predecessors.

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<sup>7</sup> See document CDL-REF(2022)031, Part III: Unification of the administrative and jurisdictional electoral authorities, and extinction of local public bodies and electoral tribunals of the federative the federative entities.

<sup>8</sup> Venice Commission, Code of good practice in electoral matters, CDL-AD(2002)023rev2-cor, II.3.1, II.3.1.c and II.3.1.f.

<sup>9</sup> See among others, Venice Commission, Report on Constitutional Amendment, CDL-AD(2010)001, Opinion on the Draft Law on the Review of the Constitution of Romania, CDL-AD(2014)010, Joint Opinion on the draft Law “On Introduction of changes and amendments to the Constitution” of the Kyrgyz Republic, CDL-AD(2015)014.

23. In this context it should be reminded that ODIHR and the Venice Commission have consistently expressed the view that any successful changes to electoral legislation should be built on at least the following three essential elements:

- a. a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations;
- b. the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and
- c. the political commitment to fully implement such legislation in good faith, with adequate procedural and judicial safeguards and means by which to timely evaluate any alleged failure to do so.

**B. Proposed change of the electoral system in which the new electoral management body (INEC) and the reformed Electoral Tribunal will operate**

24. The Initiative proposes to change the electoral system in Mexico since “for decades, the legitimacy of legislators in general, but especially of multi-member legislators, has been questioned.” It advocates an “election method that seeks to improve citizen representation in the Chambers of the Congress of the Union by reducing the number of members and electing them by means of a single list per state.”<sup>10</sup>

25. Currently, the legislators in the lower house of the Congress of Mexico are elected in a mixed system. Three hundred out of 500 deputies are elected by a first-past-the-post system in 300 hundred single-member constituencies, while the remaining two hundred are elected by a proportional representation method from the party lists in five multi-state districts (electing 40 representatives each). It should be noted that mixed or combined systems of elections are usually connected with the idea of balance. In some systems single-member constituencies lead to a higher natural threshold and restrict smaller groups of society to be represented in the parliament. One could also argue that a first past the post system is not so respectful of the popular choice with many votes being lost in a race where more than two parties are participating and that proportional representation systems more fairly represent the expression of the popular will. However, it seems that the mixed system has served Mexico well so far.

26. The Initiative proposes to completely eliminate the first-past-the-post system, to change the nature of the competition and to move to a party representation system. Under the proposed amendments, the 300 members of the Chamber of Deputies would be elected on party lists no longer based on the five multi-state districts, as was the case so far for 200 seats in the lower house, but in 32 electoral districts that would correspond to the existing Mexican federal entities (31 federal states plus Mexico City).

27. Numerically, this change would create proportional representation districts with an average of 10 representatives elected in each of them. Such proportional representation districts with a relatively small number of elected representatives tend to favour large parties, especially in small constituencies (which exist in Mexico, since the electoral geography is based on the federal structure);<sup>11</sup> moreover, as the proposed proportional system is based on closed lists, it will enable the political parties (in fact party leadership) to have the upper hand on the selection of those candidates who have a chance to be elected. This gives parties rather than citizens more influence on who gets elected. Under such system the respect of essential democratic principles and transparency is a serious challenge and there should be some kind of external scrutiny of

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<sup>10</sup> See document CDL-REF(2022)031, Part V: Election by list system by federal entity and reduction of the number of male and female legislators (Articles 51, 52, 53, 54, 55, 56, 56, 60, 63, 116 and 122, CPEUM).

<sup>11</sup> According to the statistical data provided in the Explanatory Memorandum to the Initiative (CDL-REF (2022)031, Part V), there is an important difference in population numbers. For example, the population of the City of Mexico is of 9,209,944 and that of the State of Campeche 928,363.

the respect by the political parties of the rules of internal democracy, notably during the process of selection of candidates for their electoral lists. The current in the Constitution and in the electoral Laws are very demanding on the selection of candidates in Mexico. The respect for the democratic principle and for transparency are guaranteed by the electoral authorities. Any changes concerning the electoral administration should guarantee the same level of protection of the right to stand for election.

28. The Senate of the Republic will be made up of 96 senatorial seats - three for each state - also elected by list, with simple quotient and major remainder. Independent candidates for the Senate will be allowed to participate in each state, as in the case of the election of deputies.

29. There is no international standard on which electoral system is to be chosen. It is up to the parliament of a given country to decide on a proportional, a majoritarian or a mixed system. The Code of good practice in electoral matters provides that if the main principles, including the organisation of election by an impartial body and an effective system of appeals (among others), are respected, “any electoral system may be chosen”<sup>12</sup>

30. According to the standards on electoral stability, notably the Code of good practice in electoral matters, the “fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election”. The initiative under consideration has been introduced sufficiently in advance of the next elections (to be held in 2024), leaving sufficient time for an inclusive public debate on the proposed changes to the electoral system, which is in line with international recommendations and best practices.<sup>13</sup>

31. It has to be noted that the newly proposed electoral system could lead to over-representation of large parties and under-representation or even non-representation of smaller political parties in elected bodies; this was admittedly also possible under the current system in which a number of seats are filled through a first-past-the-post system. It is unclear how that the objective declared by the authors of the Initiative to reinforce the legitimacy of legislators may be achieved through reducing the number of members and electing them by means of a single list per state. The impact of the constitutional change should be further evaluated and measured, and a thorough parliamentary and public debate should be held on all the consequences of the proposed amendment. It is proper to provide the public with more clarifications on how the parliamentary seats would be distributed based on recent election results or public opinion polls with the proposed election system compared to the existing one.

32. If the proposed constitutional reform of the electoral system in Mexico is adopted and the proportional system for elections is introduced, the new electoral management bodies will have to operate under conditions where the main political parties will play the same if not a more active role in the selection of candidates and the partisan influence during the pre-electoral period might increase. An additional challenge will consist in ensuring the equal treatment of smaller parties and independent candidates<sup>14</sup> who will not have the same capacity to mobilise both material and human resources in the absence of public funding for political parties – which has been abolished by the Initiative outside the electoral campaign period. The electoral administration will have to address these challenges, but also face additional pressure and will have to ensure (and convince different stakeholders) that it operates in an independent and non-partisan way.

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<sup>12</sup> Venice Commission, Code of good practice in electoral matters, CDL-AD(2002)023rev2-cor, II.4.

<sup>13</sup> Idem, II.2.

<sup>14</sup> Idem, I.2.3.b.



### C. The new INEC and the reform of the Electoral Tribunal

33. The declared objective of changing the way the electoral management body and judges of the Electoral Tribunal are selected is to “reinforce their independence of political power, political parties and economic groups.” One of the key proposals of the constitutional amendments for addressing this issue is the creation of a new national electoral authority (National Institute for Elections and Referendums – INEC) and the reform of the Electoral Tribunal, whose members would be directly elected by the voters. There are also important changes concerning the competences and attributions of the INEC and transitional provisions concerning both INEC and the Electoral Tribunal.

#### 1. Composition of the INEC and the Electoral Tribunal

34. The Explanatory Memorandum to the Initiative points out that “the current INE and TEPJF (Electoral Tribunal of the Judicial Power of the Federation) have been made up of party quotas and co-opted by power groups, to the detriment of their impartiality”. The authors seek to directly involve the citizens “as the source of power and representation of these key institutions in the functioning of the country's formal powers.”<sup>15</sup> The direct election of the new electoral management body (INEC) and judges of the Electoral Tribunal is therefore proposed.

35. According to the new Article 41.V, the INEC will be composed of 7 Councillors elected on the basis of proposals made by the three Powers of the Union. The INEC members will be elected according to the following procedure (new Article 41.V.A.a):<sup>16</sup>

*“The Chamber of Deputies shall issue the decree of convocation for the election of electoral councilors, which shall contain the complete stages of the procedure, its dates and non-extendable deadlines. Each of the Powers of the Union shall choose twenty persons on a parity basis: the Executive Power will do it through the person holding the Presidency of the Republic; the Legislative Power will choose 10 by each chamber through a vote by two thirds of present members; the Judicial Power of the Federation through the Plenum of the Supreme Court of Justice of the Nation with a majority of eight votes. The electoral process will be organized by the National Institute for Elections and Referendums.”*

36. According to Article 99.X, in the case of the election of judges of the Electoral Tribunal, the procedure will be the following:

*“The Executive shall nominate ten persons through the person holding the Presidency of the Republic; the Legislative Branch shall nominate ten persons for each Chamber, by a qualified vote of two thirds of its members present; the Judicial Branch of the Federation, through the Plenary of the Supreme Court of Justice of the Nation, with a majority of eight votes.”*

37. On the basis of candidacies presented by the Chamber of Deputies and the Senate, the Supreme Court of Justice of the Nation and the head of the Federal Executive, it is proposed that the popular vote will decide the composition of the Superior Chamber of the TEPJF and of the General Council of the INEC. The positions of the members of the General Council of the INEC and the judges of the Electoral Court will be held for a non-extendable period of six years. The election day to define the incumbents of these bodies would be held on the first Sunday of August, every six years, with the exception of the first election day. In both cases the National

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<sup>15</sup> See CDL-REF(2022)031, Part IV: Conformation of the National Institute of Elections and Consultations and the Superior Chamber of the Electoral Tribunal of the Federal Judiciary (Articles 41 and 99, CPEUM).

<sup>16</sup> See CDL-REF(2022)031.

Institute of Elections and Consultations (INEC) shall organise the election process of the members of the INEC and of the Electoral Tribunal. The results of the vote will be transmitted to the corresponding Chamber so that it can make and publish the sum; the latter will forward it to the Supreme Court of Justice of the Nation, which will have the power “to resolve the challenges, qualify the process and declare the results.”<sup>17</sup>

38. The Venice Commission notes at the outset that the proposed procedure where INEC will be in charge of the elections of its own members is unusual and creates risks to its status as an impartial body.

39. Article V, para. A of the current Constitution sets out the procedure for the election of INE Councillors, requiring that they be persons of recognised prestige. In addition, a public call and the intervention of a technical evaluation committee are prescribed. All these requirements are fully consistent with the technical and independent nature of the electoral administration. The text of the Initiative instead does not include any requirement regarding the technical preparation and qualifications of the Councillors. Moreover, while the text of the Constitution provides an extremely detailed description of the powers and specifics about the operation of the electoral management administration, the Initiative does not set out the rules for the elections to the INEC and the TEPJF (and the electoral system applied). The Venice Commission is of the view that this would be necessary: the composition of the electoral management bodies is an essential element for the credibility of elections. The Code of good practice in electoral matters provides that “[one] way of avoiding manipulation is to define in the Constitution or in a text higher in status than ordinary law the elements that are most exposed” and points to the membership of electoral commissions as one of them.<sup>18</sup> It appears that in the examined Initiative this essential element - ensuring the transparency of the process (the way the members of INEC are elected) - is left out while matters of more technical nature are part of the constitutional text.

40. Notwithstanding the attempt to be inclusive in terms of the nominations by each of the three powers of the State, a major issue of concern is the proposed type of electoral process which is a direct one and therefore implies campaigning with airtime dedicated to each of the candidates. Article 41.V.b of the Initiative provides that candidates will have equal access to radio and other media on the same basis as it is done for political parties during the elections. They can also participate in debates organised by the electoral management body on an equal basis or in free of charge debates organised by “any mass media” provided that the principle of equality is respected. Political parties cannot – at least formally - campaign in favour or against any candidate.

41. The Code of Good practice in electoral matters requires that the central election commission should be impartial and if nominated by political parties, have a balanced composition.<sup>19</sup> In the organisation of the elections, the election management bodies have to fulfil their tasks professionally and efficiently. A high level of expertise is required from all members of the central election management body (such as INEC). Thus, its composition should not be based on political preferences and choices. Even if it is set up with a balanced representation of political forces it should be based mainly on professional criteria. Thus, the members of INEC should not be elected directly, as the voters’ will is a political one. Even in case the candidates’ nomination by habilitated institutions requires a certain assessment of their expertise, a direct vote can easily lead to a situation where the commission members are politically oriented. As concerns the wish of the Mexican authorities to increase the democratic legitimacy of the electoral management body through the direct election of its members, the Venice Commission wishes to recall the Code of Good Practice in Electoral Matters requires that:

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<sup>17</sup> Idem.

<sup>18</sup> Venice Commission, Code of good practice in electoral matters, Explanatory report, II.2, par.66.

<sup>19</sup> Code of good practice in electoral matters, CDL-AD(2002)023rev2-cor, II.3.1.a, d and e.

“The central electoral commission must be permanent in nature.

d. It should include:

- i. at least one member of the judiciary;
- ii. representatives of parties already in parliament or having scored at least a given percentage of the vote; these persons must be qualified in electoral matters.

It may include:

- iii. a representative of the Ministry of the Interior;
- iv. representatives of national minorities.

e. Political parties must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality may be construed strictly or on a proportional basis (see point I.2.3.b).”

42. The Code of Good Practice in Electoral Matters further prescribes that “party delegates should be qualified in electoral matters and should be prohibited from campaigning.”<sup>20</sup> Indeed the composition of the electoral management body needs to ensure that all political parties, candidates and voters may trust that it will function impartially.

43. On the one hand, the proposed system formally does not allow political support for candidates to INEC and provides for a pre-selection which does not make it possible to apply all international standards on elections to this vote – even if it ensured its impartiality, which is very doubtful. On the other hand, a purely political election could ensure the balanced representation of political parties in INEC but would go against the requirement of impartiality since the prohibition from campaigning for elections could not be respected during the campaign for elections to INEC. Direct election of the electoral administration would therefore go against international standards.

44. With regard to the appointment of a substitute if an electoral councillor or magistrate is permanently unable to complete the term of office (Article 41.V), it could be problematic to grant the power of appointment to the Chamber that had called for the election of councillors or magistrates. It would be more advisable to design an objective procedure for the choice of such a substitute to serve for the rest of the term.

45. The same problems concerning the impartiality and independence arise in respect of the election of the judges of the Electoral Tribunal. In electoral matters like in other fields, the judiciary, including a specialised electoral jurisdiction, should represent a guarantee of impartiality of the whole process, and for this reason it should offer sufficient guarantees of independence.<sup>21</sup> In the case of *Mugemangango vs Belgium* (see especially para. 63 ff),<sup>22</sup> the European Court of Human Rights (ECtHR) established that:

*“Where electoral appeals did not concern political issues, the protection of the right to free elections implied the existence of a judicial remedy. The type of court was of little importance; what mattered was for the decision to be taken by a body that was established by law, was independent of the executive and the legislature or, in specific cases, acted wholly independently and impartially in determining legal matters in proceedings that were judicial in nature, and therefore afforded sufficient institutional and procedural safeguards against arbitrary and political decisions.”*

46. There exist several possible solutions concerning the selection of the members of an electoral management body. For example, part of the members of the central election commission can be nominated by the state auditor, the ombudsman, the judiciary or other similar

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<sup>20</sup> *Idem.*, par 75.

<sup>21</sup> Venice Commission, Report on election dispute resolution, CDL-AD(2020)025, para 46.

<sup>22</sup> <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-203885%22%5D%7D>.

non-political institutions.<sup>23</sup> A qualified majority in the Parliament to nominate election commissioners or electoral judges is in accordance with the best practices and international standards, as stipulated in the Code of good practice in electoral matters.<sup>24</sup> Transparent procedures for the selection of members of the election management body guarantee its impartiality and neutrality. A special expert committee appointed by the parliament to assess the high qualification of the candidates and obligatory public call for nominations may advance the impartiality and independence further. These options can provide sufficient guarantees of independence and transparency of an electoral management body.

47. In conclusion, the Venice Commission is of the opinion that the proposed system of selection of the members of the INEC and of the judges of the Electoral Tribunal does not provide sufficient guarantees of their independence and impartiality; in particular, the election of members of INEC and judges of the Electoral Tribunal by popular vote is not consistent with the existing electoral standards and best practices.

## *2. The new electoral authority and political parties*

48. The Initiative proposes changes aimed at reducing some of the powers of INEC compared to INE. The most important modification concerns the relations of INEC with political parties.

49. The constitutional amendments reduce the powers of the INEC to exercise control over political parties. The new amended Article 41.1 of the Constitution limits the powers of INEC with respect to political parties to cases of violation of the rules of procedure or the rights of citizens. Furthermore, the provision explicitly states that INEC cannot take any decisions in relation to leadership of political parties or candidates. The text provides that the law will establish the procedure in this field. However, if the proposed change to the electoral system is taken into consideration, the limitation of INEC's powers to intervene during the process of establishment of lists of candidates by political parties could be problematic.

50. The Venice Commission Guidelines on Political Party Regulation provide that "parties must have the ability to determine party officers and candidates, free from government interference";<sup>25</sup> however, the lack of strong democratic intra-party structures seems to have fostered the adoption of a quite detailed legislation as a way to strengthen internal democracy inside political parties in some countries in Latin America. On several occasions the Commission has expressed the opinion that any legal requirement imposed on political parties for selecting candidates should be effectively supervised by independent bodies, such as tribunals or electoral commissions, ensuring the existence of effective remedies available to protect the freedom of association of political parties and political rights of individuals.<sup>26</sup> In Mexico the Electoral Tribunal had already intervened in the past to uphold the constitutional requirement to promote the political

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<sup>23</sup> For example, in Latvia the chairperson plus seven of the members are elected by the Saeima (parliament), while the ninth member is chosen among the judges of the Supreme Court of Latvia (<https://www.cvk.lv/en/central-election-commission/central-election-commission>) ; in Spain the Electoral Commission (Junta Electoral Central) comprises eight judges from the [Supreme Court of Spain](https://www.cvk.lv/en/central-election-commission/central-election-commission), five active professors of law and sociology, a secretary, and the Director of the [Oficina del Censo Electoral](http://www.juntaelectoralcentral.es/cs/jec/inicio) (<http://www.juntaelectoralcentral.es/cs/jec/inicio>).

<sup>24</sup> Venice Commission, Code of good practice in electoral matters, CDL-AD(2002)023rev2-cor, II.3.b and e.

<sup>25</sup> CDL-AD(2010)024, para 113.

<sup>26</sup> The European Court of Human Rights, referring in the Yabloko judgment (application no. 18860/07, 8 November 2016) to the dichotomy between the egalitarian-democratic model and the liberal model, is sensitive to both views. On the one hand, it does not deny the competence of states to introduce some legislative requirements for the internal organisation and the selection of candidates for elections, in the interest of democratic governance. On the other hand, state authorities should not interfere too much with the internal matters of political parties: it is up to the parties themselves to determine how their conferences and decision procedures are organised (see CDL-AD(2020)032 pars 153 - 155).

participation of the indigenous groups and women in elections.<sup>27</sup> The prohibition of the electoral authorities to decide on the appointment of leaders and candidates proposed by the Initiative (amendments to Article 41.V.B.7) can be very detrimental to the effectiveness of the quotas imposed by the Constitution and the electoral Laws.

#### **D. The declared objective of reducing the cost of elections, electoral administration and electoral justice**

##### *1. Internal structure of INEC*

51. According to the Initiative the reason for reforming the electoral management authority is the wish to create “a single, truly national body with clearly delineated functions, providing citizens and political parties with greater legal certainty, clarity in the processes and efficiency in the development of electoral management functions.” The Explanatory Memorandum insists that “this unifies decision-making in different related processes and guarantees their correct development,” as well as spares the considerable resources that are spent on the different structures of electoral bodies.<sup>28</sup>

52. The Venice Commission notes that the tasks of INE and those of the Electoral Tribunal are similar to those of election management bodies or courts dealing with election dispute resolution in some other countries. They are enlisted in the current Constitution in a detailed way. As expressed by the authorities, INE is also responsible for issuing identity documents, a task which in other countries is often carried out by other institutions. INE is also tasked with carrying out a thorough overview of the media neutrality and balance. There are countries among the Venice Commission member states which do not provide for such a task but only foresee media overview based on complaints or during the campaign period. However, conferring these tasks to INE does not deviate from good practices as identified by the Venice Commission.<sup>29</sup> The Venice Commission wishes to stress that there is an inherent risk in reducing the tasks of INE because the current attributions have proved their efficiency in ensuring democratic elections in the past decade. The objective to reduce the cost of administration is understandable and legitimate; however, if the competences of the new INEC are less extensive compared to the current electoral body and some of its tasks are performed by different state institutions it is essential that the independence, impartiality, transparency and efficiency of the electoral process should be maintained and fully ensured under the new constitutional design.

53. An independent electoral administration needs proper funding.<sup>30</sup> INE is currently organised through four central bodies (the General Council as the highest decision-making body and its presidency, the General Executive Board, the Executive Secretariat and the internal control body), six executive directorates (of the Federal Register of Voters, of the National Electoral Professional Service, of Prerogatives and Political Parties, of Electoral Training and Civic Education, Electoral Organisation and Administration), ten technical units (social communication, gender equality and non-discrimination, international affairs, electoral litigation, IT services, liaison with local public bodies, legal, auditing, secretariat, transparency and protection of personal data), and delegate and oversight bodies in each of the federal entities (delegates: local executive boards, local councils, district executive boards and district councils, and oversight: a national oversight commission, 32 local and 300 district

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<sup>27</sup> Constitution Amendment Decree 14 August 2001, Article third. The Electoral Tribunal of Mexico has issued a decision on 8 April 2015 requesting political parties to respect the constitutional principles, mainly adopting a material approach to equality, and requiring the inclusion of indigenous candidates in the lists (SUP-JDC-824/2015).

<sup>28</sup> See CDL-REF(2022)031, Part III.

<sup>29</sup> See Venice Commission, Electoral law and electoral administration in Europe – synthesis study on recurrent challenges and problematic issues, CDL-AD(2020)023, para. 164

<sup>30</sup> Report on Electoral Law and Electoral Administration in Europe - Synthesis study on recurrent challenges and problematic issues, CDL-AD(2020)023, para 24.

commissions, and working groups). In addition, there are permanent and temporary commissions, committees and working groups of the General Council. The existing structure of INE and its subdivisions have so far allowed for planning the expenses of the electoral administration.

54. According to the Initiative, one of the means to enhance the efficiency of the electoral administration is the proposal that both INEC and the Electoral Tribunal become nation-wide institutions responsible respectively for the organisation of elections and for adjudicating electoral complaints and appeals on the whole territory of Mexico. Electoral management bodies and electoral tribunals at sub-national level are abolished. Both the management of elections and judicial appeals are centralised and will be handled by the new INEC and the Electoral Tribunal respectively. The number of permanent public officials in the electoral administrations will be considerably reduced and an important number of electoral management specialists will be hired on an ad hoc basis, which carries an inherent risk to the credibility of the management of the electoral process.

55. The explanatory memorandum of the Initiative insists that “the new INEC will be composed of temporary and auxiliary bodies, especially during electoral periods, that will consolidate the functions that have been fragmented (*in INE*) between numberless administrative offices, so that the indispensable structure to guarantee the functions established by law is in place.” How such “temporary and auxiliary bodies” will be less expensive than the current, well-established structures with experienced staff have not been specified.

56. The Venice Commission wishes to reiterate that the tasks which have so far been carried out by INE should be maintained, even if allocated to another body. In this respect, INEC would need to have a professional and solid structure, like INE.

## *2. Electoral administration and jurisdictions on the regional and local level*

57. Mexico is a federal state with 32 entities. There were 92,823,216 registered voters as of April 21, 2022.<sup>31</sup> The current INE is responsible for organising elections both at national and at regional and local level. The new INEC would in addition deal with referendums (“consultations” in the text of the Initiative).

58. There are no standards on the distribution of electoral competencies between federal and state level institutions. Centralisation of the competencies in the hands of federal institutions is thus possible, provided however, that such institutions are impartial, neutral and independent.

59. In the opinion of the Venice Commission, the centralisation of the administration of elections at all levels could have a negative impact on the transparency and credibility of the electoral processes on the level of the 32 constituencies, since Mexico is a federal state. It would also entail an onerous transformation that would go against international trends and could be in conflict with some of the basic principles of Mexican federalism. The Code of Good practice in electoral matters recommends that “independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level” (II.3.1.b). Since there is a high risk that the new INEC will be formed on a partisan basis, the trust in lower-level electoral bodies to be created on an ad hoc basis for each election on state and local levels could be seriously compromised (notably, taking into account the size of the country, an important number of minorities and its federal structure).

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<sup>31</sup> IFES, <http://www.electionguide.org/countries/id/140> .

60. The same logic can be applied to the proposal to eliminate the electoral courts of the states. The number of levels of appeals is another important element to be taken into account for assessing the effectiveness of the remedies regarding electoral disputes. Several levels of appeals may be a guarantee for electoral stakeholders. However, for certain types of pre-election disputes, multiple levels of administrative and judicial appeal can potentially disrupt the electoral calendar and create uncertainty. A balance is therefore necessary between an effective remedy and ensuring smooth and continuous electoral processes, i.e. without disruptions endangering the continuity of the electoral cycle as a whole.<sup>32</sup>

61. Moreover, the absence of a specialised jurisdiction on state level could overburden the Federal Electoral Court and create unacceptable delays in dealing with election-related complaints on the state and local levels.

### *3. Electoral officials and members of staff of INEC*

62. The Code of Good practice in electoral matters (II.3.1.a, d and e) requires that the central election commission should both be impartial and take actions based on knowledge and expertise. Elections in a democratic country based on the rule of law have to be managed according to the Constitution and electoral legislation. As it has been already pointed out in paragraph 38, that the highest level of expertise is required from all the members of central election management institution. High qualified INEC members do not suffice in order to ensure the smooth and efficient organisation of elections, as any electoral management body needs qualified staff.

63. The Explanatory memorandum to the Code of Good practice in electoral matters recommends that “appropriate staff with specialised skills” are required to organise elections.<sup>33</sup> Taking into consideration of complexity of modern electoral processes, central electoral commissions should be able to count upon legal experts, political scientists, mathematicians or other people with a good understanding of electoral issues.

64. The examined initiative proposes the elimination of the electoral districts along with the electoral district administrations. The dismantling of lower-level electoral management bodies will imply that there will be no permanent local electoral officials. The new INEC will include temporary and auxiliary bodies, especially during electoral periods. There are no indications on how these ad hoc bodies will be created and who will integrate them. Each election will require specific procedures for hiring electoral officials and other specialists, as well as providing their necessary training in a timely manner and ensuring their independence and impartiality. In the opinion of the Venice Commission, this will create additional administrative burdens and will certainly impact, at least initially, the quality and the credibility of management of electoral processes at different levels.

## **V. Conclusion**

65. In Mexico the main features of the electoral system as well as the rules for the establishment and operation of the electoral management body (INE) and the electoral justice are enshrined in the Constitution. Any electoral system and electoral administration can be improved, and it is a legitimate objective to promote institutional changes and the reform of the electoral system of a country with the aim of creating conditions for transparency, efficiency and accountability of electoral management bodies. However, changing a system that works well in general and enjoys the trust of different electoral stakeholders based on several electoral cycles and years of democratic evolution carries an inherent risk of undermining such trust.

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<sup>32</sup> Venice Commission, Report on election dispute resolution, CDL-AD(2020)025, para 47.

<sup>33</sup> Code of good practice in electoral matters CDL-AD(2002)023rev2-cor, Explanatory memorandum, para 83.



66. The stated objective of this constitutional reform is to ensure objectivity, independence and impartiality of the electoral administration (INEC) and the Electoral Tribunal. Any constitutional reform should be a product of thorough analysis of the existing problems and challenges and of large consensus between political parties and the society. The possible impact of such constitutional amendments, as well as their immediate implications for the electoral system, administration of elections and complaints and appeals procedures should be subject to further public discussion. The Venice Commission would like to recall that the composition of the electoral management body needs to ensure that all political parties, candidates and voters may trust that it will function impartially.

67. Both INEC and the Electoral Tribunal become nation-wide institutions responsible respectively for the organisation of elections and for adjudicating electoral complaints and appeals on the whole territory of Mexico. The Venice Commission wishes to reiterate that the tasks which have so far been carried out by INE should be maintained and even if allocated to another body, INEC would need to have a professional and solid structure.

68. The Venice Commission therefore makes the following observations and recommendations:

- a. The proposed amendments to the Constitution do not provide sufficient guarantees of the independence and impartiality of the INEC and of the judges of the Electoral Tribunal.
- b. The proposed procedure for direct election of the Councillors of the INEC and judges of the Electoral Tribunal should be reconsidered as it is not in line with the international standards and best practices in the electoral field which prescribe that the members of the EMB represent all parties equally. Members of EMBs should be impartial and professionally competent and should therefore not be allowed to campaign (to run as candidates in direct elections).
- c. The creation of a highly centralised INEC should be reconsidered since:
  - i. an onerous and complex centralisation might compromise the impartial and independent operation of the electoral administration at different levels of the Federation;
  - ii. if the electoral system is changed to a proportional one with 32 constituencies and taking into account the proposed INEC powers, its capacity to intervene during the process of establishment of lists by political parties will be very limited;
  - iii. the elimination of lower-level electoral management bodies and the creation of ad hoc structures with temporary staff will have a negative impact on the quality of elections at different levels.
- d. The concentration of the complaints and appeals process in the hands of a national Electoral Tribunal could also be problematic in the light of the federal structure of the Mexican State and will create a potentially very high burden since such national Electoral Tribunal will have to deal with all the electoral complaints and appeals in first instance. The corresponding provisions of the Initiative should be reviewed.

69. The Initiative introduces a new proportional electoral system for parliamentary elections in Mexico. MPs will be elected in 32 electoral districts. The impact of this constitutional change, including on the operation of the INEC and Electoral Tribunal, should be clearly evaluated and measured, and a thorough parliamentary and public debate held on all the consequences of the proposed amendments.

70. The Venice Commission remains at the disposal of the Mexican authorities for further assistance in this matter.