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## The Risk of Partyarchy and Democratic Backsliding: Mexico ´s Electoral Reform

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## Abstract

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*Following the 2006 post-electoral crisis, important changes were made to the Constitution and several ordinary laws in Mexico. Authorities touted that electoral reform as a major triumph for the country's democracy. However, this paper will document at least four serious drawbacks: (1) weakening electoral institutions, (2) solidifying the hegemony of party bosses within their parties, (3) reducing freedom of speech during campaigns to protect the parties' image, and (4) monopolizing political communication in the hands of parties. I analyze such problems based on a detailed reading of the new law, a scrutiny of legislative opinions, a review of the public debate, and interviews with top officials in charge of implementation. I argue that Mexico illustrates two risks that other third-wave democracies may be facing too: democratic backsliding and partyarchy.*

## Resumen

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*A raíz de la crisis postelectoral del 2006 se hicieron importantes cambios a la Constitución así como a varias leyes secundarias en México. Las autoridades argumentaron que dicha reforma electoral fue un gran logro para la democracia en México. Sin embargo este ensayo va a documentar cuatro problemas causados por la reforma: (1) debilitar de la autonomía de las instituciones electorales, (2) solidificar la hegemonía de las élites partidistas dentro de sus partidos, (3) reducir la libertad de expresión durante las campañas para proteger la imagen de los partidos, y (4) monopolizar la comunicación política en manos de los partidos. Analizo dichos problemas en base a una lectura minuciosa de las nuevas normas, un examen de los dictámenes legislativos, una revisión del debate público y entrevistas con altos funcionarios a cargo de implementar la ley. Argumento que México ilustra dos riesgos que otras nuevas democracias también pueden estar enfrentado: retroceso democrático y partidocracia.*



## Introduction

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### *Mexico as a possible case of partyarchy and democratic backsliding*

Democratic gains should never be taken for granted. Following the contentious election of 2006, Mexico engaged in a reassessment of the way it conducts elections. Throughout 2007, the election law was deeply revised in Congress. The result was the most profound electoral reform the country had seen for a decade. The leaders of all major political parties along with the Mexican president touted the reform as a major triumph. My essay will argue, however, that important aspects of the new law represent a reversal of Mexico's democratization process.

This reform illustrates how precarious democratic institutions can be, especially in third-wave democracies. Such vulnerability will become apparent by studying the legislation that was recently negotiated and approved in Mexico. The ambition and depth of that legislation were remarkable, as were some of its achievements. A comprehensive review of the electoral system initially seemed like a good idea: other new democracies have used controversial elections as an opportunity to strengthen their institutions.<sup>1</sup> The disputed 2006 election justified such an exercise in Mexico. There were at least two worthwhile goals in discussing the rules governing future elections: healing the wounds and divisions left by the 2006 election; and producing a new legal framework that could avoid such conflicts in the future. The former seems to have been achieved, as all the major political parties succeeded in reaching a joint endorsement of the reform. The latter was not quite achieved, however, since the new laws do not fully dispel the risk of future conflicts.

Furthermore, new problems were created. Based on a close reading of the law, I will document four problems. First, weakening electoral institutions. The autonomous and independent nature of the main electoral organizations was infringed upon by the parties represented in Congress. Second, solidifying the hegemony of party bosses within their parties. The dominance of party elites over party militants was reinforced to the detriment of intra-party democracy and accountability. Third, reducing freedom of speech during campaigns to protect the parties' image. The public debate was impoverished by censoring the criticism of parties and their candidates. And fourth, monopolizing political communication in the hands of parties. Civic society

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<sup>1</sup> As described by Laurence Whitehead, "Closely Fought Elections and the Institutionalization of Democracy," *Taiwan Journal of Democracy* 2, no. 1, (2006), 6.

and regular citizens are now banned from broadcasting political advertisements on television and radio.

The goal of this essay is to document those problems and discuss their effects. This endeavor has particular value given that such problems have not been properly pointed out in the literature. Unlike previous reforms in Mexico, which have been extensively discussed among scholars of comparative politics, the reform of 2007 remains scarcely studied.

The problems mentioned above are uncomfortably reminiscent of two trends observed in other regions: *democratic backsliding* and *partyarchy*. Both trends can provide us with a theoretical framework to make sense of the recent events analyzed in this paper. I describe the two trends now, and throughout the paper I analyze whether they are actually occurring in Mexico or not.

The first trend, *democratic backsliding*, refers to the reversal of a recent democratic transition. It can be observed in several regions around the world. Scholars of eastern and central Europe, for example, have recently noted it.<sup>2</sup> Countries in that region abandoned decades of authoritarian rule by successfully democratizing in the 1990s. But in several of them, the level of democracy followed an inverse-U shape: it improved in the early 1990s but then worsened after 2000. Steven Fish identified nine such backsliders.<sup>3</sup>

Events in several Latin American countries have prompted similar worries. Bolivia, Colombia, Ecuador and Venezuela are often mentioned as possible backsliders whose democratic institutions are deteriorating. Beyond those recent examples, the issue of democratic consolidation in Latin America has actually been a concern among scholars for a long time.<sup>4</sup> My analysis shows that Mexico's consolidation is precarious as well.

But is the cause of Mexico's backsliding the same as the cause of backsliding in those other regions? Fish hypothesized that democracy in post-communist Europe was degraded by a constitutional system that conferred excessive power to the executive branch.<sup>5</sup> Recent presidents in those countries have concentrated authority on the executive to the detriment of other branches of government and civic organizations. Fish called such regimes "superpresidentialism."

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<sup>2</sup> For a survey see Jeffrey Kopstein, "Review Article. Postcommunist Democracy: Legacies and Outcomes," *Comparative Politics* 35, no. 2, (2003): 231-250.

<sup>3</sup> Those countries are Albania, Armenia, Belarus, Bulgaria, Croatia, Kazakhstan, Kyrgyzstan, Russia and Ukraine. See M. Steven Fish, "The Dynamics of Democratic Erosion," in *Postcommunism and the Theory of Democracy*, eds. Richard D. Anderson Jr., M. Steven Fish, Stephen E. Hanson and Philip G. Roeder (Princeton, New Jersey: Princeton University Press, 2001), 54-95.

<sup>4</sup> See for example Guillermo A. O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarianism: Tentative Conclusions and Uncertain Democracies* (Baltimore, MD: Johns Hopkins University Press, 1986); Juan J. Linz and Alfred C. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD and London: Johns Hopkins University Press, 1996); and Laurence Whitehead, *Democratization: Theory and Experience* (Oxford: Oxford University Press, 2002).

<sup>5</sup> Fish, "The Dynamics of Democratic Erosion." For a similar view see Kopstein, "Review Article. Postcommunist Democracy: Legacies and Outcomes," footnote 10.



A similar hypothesis could be formulated by looking at the South American and Central American experience: the challenges to democracy have come from the executive branch. In Bolivia, President Evo Morales politicized the justice system by appointing loyal supporters as judges and prosecutors. In Colombia, President Álvaro Uribe changed the Constitution to allow his second term, and subsequently attempted to change it again to allow his third term. In Ecuador, President Rafael Correa promoted a referendum to dissolve Congress and increase his power over lawmaking. In Venezuela, President Hugo Chávez did all of the above. Each of those presidents stifled freedom of speech by threatening political opponents and media outlets in one way or another. They exemplify how democracy is at risk of deteriorating when a regime becomes “superpresidential”.

It is germane to investigate whether the same theory could be applied to Mexico.<sup>6</sup> To be sure, Mexico has not yet seen the kind of backsliding observed in the regions mentioned above. But this paper will document that some undemocratic measures have already been implemented. Was superpresidentialism the cause? Or is an altogether different explanation needed? Studying the Mexican legislation sheds light on this question. Contrary to Fish's theory, my analysis suggests that Mexico's troubles do not come from an excessive concentration of power on the executive. Actually, the Constitution establishes a relatively weak presidency. So, if the analysis in this paper is correct, it highlights that existing theories of democratic backsliding are not readily generalizable across the globe. Fish's hypothesis of superpresidentialism might hold true in some regions, but it does not apply to Mexico. Rather, Mexico is experiencing an excessive concentration of power on political parties, not on the executive.

This leads us to the second trend: *partyarchy*. Michael Coppedge defines it as a regime in which parties monopolize the formal political process and politicize society along party lines.<sup>7</sup> Such monopolization was most clearly seen in Venezuela where two parties, AD and COPEI, used to be the sole agenda setters in politics. The centralization of decision-making in a handful of extremely disciplined parties led to the deterioration of democratic institutions. Those monopolistic parties excluded many constituencies and societal groups from the public debate. They also ignored important policy issues, which generated disenchantment among citizens.

Coppedge hypothesized that partyarchy is particularly detrimental when it appears in a presidential system.<sup>8</sup> In fact, problems in Venezuela were accentuated by the presidency's weakness relative to the political parties.

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<sup>6</sup> Fish himself suggested that his theory could be generalized to other regions, and he gave postcolonial Africa as an example of excessively strong executives leading to democratic degradation. See “The Dynamics of Democratic Erosion,” 93-95.

<sup>7</sup> Michael Coppedge, *Strong Parties and Lame Ducks: Presidential Partyarchy and Factionalism in Venezuela*, (Stanford, California: Stanford University Press, 1994).

<sup>8</sup> *Ibid.*, 157-162.

Mexico provides an ideal case to test his hypothesis, being a presidential system where parties are becoming increasingly dominant.<sup>9</sup>

I argue that Mexico is starting to display several of those characteristics. In particular, we are starting to see three political parties, the PRI, the PAN and the PRD, who are gradually monopolizing the public debate, excluding smaller parties from the decision process, silencing the critiques from civil society, challenging the president's leadership, and accentuating the vertical hierarchy between party leaders and militants. As I document below, the electoral reform of 2007 reinforced those trends.

To be clear, we do not yet observe the levels of dominance that AD and COPEI enjoyed in Venezuela's political life. In particular, Coppedge described a society that had been penetrated by party organizations at all levels, such that virtually all civic groups were politicized along party lines. Mexico's society has not yet been penetrated by parties to that degree, but the analysis in this paper suggests that such a process has begun.

Succinctly, this essay will attempt to evaluate the following three conjectures. First, did Mexico suffer some degree of backsliding with its latest electoral reform? My answer will be positive. Second, did such backsliding come from an excessively powerful executive branch? The answer will be negative. Third, did it come from three large parties coalescing into an incipient partyarchy? My answer will again be positive. These findings let us draw a lesson for democratic theory. As elaborated in the conclusions, different sources of backsliding clearly exist. I argue that instability may come from the president or from political parties, depending on the circumstances of each region.

### *Analyzing the election law*

Such being the theoretical goals of the paper, I proceed to describe my empirical approach. My empirical data is the law itself. This paper is original in directly comparing all the relevant electoral laws in their versions immediately before and immediately after the reform. My hope is that an inspection of the primary source, down to the exact article and clause, will expose the true goals of the legislators, even the goals intentionally buried in legalistic detail. The laws examined for this paper include the Constitution, the Federal Code for Electoral Institutions and Procedures (COFIPE), the Federal Law on Radio and Television (LFRT), the General Law on the System of Means to Challenge in Electoral Matters (LGSMIME), the Law of Political Organizations and Electoral Processes (LOPPE), and the Organic Law of the Federal Judicial Power (LOPJF).

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<sup>9</sup> Another country that might be moving towards partyarchy is Nicaragua, where Congress has endeavored to constrain the executive branch and weaken presidential powers.

In order to interpret the law and acquire more insight into the legislators' thinking, I take advantage of the multiple reports and legal opinions that legislators themselves have produced. Those legal opinions are the best empirical source to understand the "spirit of the law." They were found in several issues of the official publications issued by the Mexican Senate (*Gaceta del Senado*) and the Mexican Chamber of Deputies (*Gaceta Parlamentaria*).

Context and background are needed for an accurate interpretation of the reform and a detailed understanding of its causes and consequences. The events and episodes described in this paper are based on my own observation of political events in Mexico as well as a large number of newspaper and magazine articles. The newspapers consulted include *El Economista*, *El Financiero*, *El Universal*, *Excélsior*, *La Jornada*, *Los Tubos*, *Milenio*, and *Reforma*. The weekly and monthly magazines consulted included *Milenio Semanal*, *Nexos*, *Proceso*, *Reporte Índigo*, and *Voz y Voto*.

Such a complex law is bound to have unforeseen consequences. To identify the more subtle effects of the reform, I interviewed a number of public officials who are directly in charge of its implementation. My interviews included current and former members at high ranks of the Federal Electoral Institute<sup>10</sup> and the Federal Electoral Tribunal of the Judicial Branch.<sup>11</sup> Those officials have a different perspective than legislators do because they were not in charge of *writing* the law. Rather, they are now responsible of *interpreting* it and *implementing* it.

My analysis of the new law is based on those sources. The paper proceeds by providing some background about the conditions under which the 2007 reform was undertaken. Then I analyze the substance of the resulting legislation, particularly the four problems mentioned above. Throughout the analysis I point out the foreseen and unforeseen challenges that were faced in implementing the new law during the 2009 midterm election, which was the first contest under the new rules. I conclude by assessing the degree to which Mexico is displaying two trends observed in other regions: backsliding and partyarchy. The paper ends by drawing implications for the theory of democratic consolidation.<sup>12</sup>

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<sup>10</sup> From the IFE, I interviewed Luis Carlos Ugalde (President from 2003 to 2007) and Benito Nacif (current Electoral Councilor since 2008).

<sup>11</sup> From the TRIFE, I interviewed Roberto Martínez Espinosa (current Justice since 2008) and Arturo Espinosa Silis (current Secretary of Study in charge of writing sentences since 2011).

<sup>12</sup> A note about translations is in order. I have translated to English all the names of institutions, but acronyms are preserved in the original Spanish form. I have also translated to English all the passages from laws and legal opinions quoted in the paper.

## *Institutional and political background*

### ❖ The COFIPE, the IFE and the TRIFE

Throughout most of the twentieth century, the president in turn enjoyed an unmatched influence in all public affairs. The overwhelming power of the president was based on the support of the political party that dominated Mexican politics at all levels, the Institutional Revolutionary Party (PRI). As the hegemonic period of one-party rule started to wane, political power gradually shifted from the executive branch towards Congress and other branches of government.<sup>13</sup> Legislators played an increasingly assertive role in politics, in particular those from the two major opposition parties, the National Action Party (PAN) and the Party of the Democratic Revolution (PRD). Accordingly, a number of democratizing bills were initiated by legislators in the late 1980s.

After much negotiation between the incumbent and opposition parties, a new electoral law was finally approved and published in 1990. The new law, called the Federal Code for Electoral Institutions and Procedures (COFIPE), considerably leveled the playing field. The COFIPE has provided the legal framework for all federal elections since then. Further reforms were passed throughout the 1990s, each of them ensuring that political competition would be more *transparent*, meaning that vote-counting would not have irregularities, and more *equitable*, meaning that incumbency would not be an overwhelming factor in obtaining resources.<sup>14</sup>

At the heart of those reforms was the creation of two institutions with the mandate to guarantee the legality and fairness of elections: the Federal Electoral Institute (IFE) and the Federal Electoral Tribunal of the Judicial Branch (TRIFE).<sup>15</sup> The IFE is an autonomous agency in charge of organizing all national elections. Its responsibilities include registering candidates and parties, monitoring the campaigns, and auditing the parties' finances. It is also in charge of the delicate task of counting votes and declaring a winner.<sup>16</sup> The TRIFE was created to solve legal disputes during elections, and is the *court of last resort* on all electoral matters. It is also the *high court* in charge of validating or revoking the election results announced by the IFE.<sup>17</sup> As such,

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<sup>13</sup> For excellent accounts of the PRI's decline see Beatriz Magaloni, *Voting for Autocracy: Hegemonic Party Survival and Its Demise in Mexico* (New York: Cambridge University Press, 2006) and Kenneth F. Greene, *Why Dominant Parties Lose: Mexico's Democratization in Comparative Perspective* (New York: Cambridge University Press, 2007).

<sup>14</sup> Joy Langston, *The Dinosaur that Did not Die: Mexico's PRI*, book manuscript.

<sup>15</sup> The official acronym for the Federal Electoral Tribunal of the Judicial Branch is actually TEPJF, but TRIFE is most commonly used in academic writing and political commentary.

<sup>16</sup> Mexican Constitution (Constitución Política de los Estados Unidos Mexicanos), Article 41-V, *Diario Oficial de la Federación*, June 19, 2007.

<sup>17</sup> Mexican Constitution, Article 99, *Diario Oficial de la Federación*, June 19, 2007.

the TRIFE has the same hierarchy as the Supreme Court of Justice of the Nation (SCJN), which reviews all constitutional controversies except the electoral ones.

The profound effects of those reforms have been documented in much academic research. Scholars have found, for example, that party funding became more balanced,<sup>18</sup> vote buying was made more difficult,<sup>19</sup> the list of registered voters was made accurate,<sup>20</sup> and electoral institutions became politically neutral and independent.<sup>21</sup> As a result, elections became gradually more transparent and equitable, as deemed by national and international observers. It was in the 2000 election when the PRI was finally unseated, and an opposition candidate took office for the first time in more than seven decades. That candidate was Vicente Fox of the National Action Party (PAN).

In spite of this remarkable transformation, Mexico's transition to democracy remained precarious. Most civic organizations are still underdeveloped and underfunded. And most public organizations do not yet share the large credibility of the IFE and the TRIFE. In 2004, for example, a public-opinion survey found that the IFE enjoyed high levels of trust (an average grade of 6.7 out of 10) compared to low levels of trust in deputies (4.2) and senators (4.7).<sup>22</sup> Those lingering weaknesses were vividly manifest in the contested election of 2006.

#### ❖ The 2006 election

The presidential and congressional elections held in July 2006 posed an unprecedented challenge to Mexican institutions. The campaigns were exceptionally heated, the election results were strikingly close, and the post-electoral crisis was deeply divisive. For space reasons, I cannot give a detailed account of all the important events which have, in any case, been extensively reviewed elsewhere.<sup>23</sup> Rather, I focus on the features that had a direct influence on the subsequent electoral reform, which is the topic of this paper.

<sup>18</sup> Roderic Ai Camp, "Citizen Attitudes toward Democracy and Vicente Fox's Victory in 2000," in *Mexico's Pivotal Democratic Election*, eds. Jorge I. Domínguez and Chappell Lawson, (Stanford, California: Stanford University Press and Center for U.S.-Mexican Studies, UCSD, 2004), 25-46.

<sup>19</sup> Wayne A. Cornelius, "Mobilized Voting in the 2000 Elections: The Changing Efficacy of Vote Buying and Coercion in Mexican Electoral Politics," in *Mexico's Pivotal Democratic Election*, eds. Jorge I. Domínguez and Chappell Lawson, (Stanford, California: Stanford University Press and Center for U.S.-Mexican Studies, UCSD, 2004), 47-66.

<sup>20</sup> Chappell Lawson and Joseph L. Klesner, "Political Reform, Electoral Participation, and the Campaign of 2000", in *Mexico's Pivotal Democratic Election*, eds. Jorge I. Domínguez and Chappell Lawson, (Stanford, California: Stanford University Press and Center for U.S.-Mexican Studies, UCSD, 2004), 67-90.

<sup>21</sup> Chappell Lawson, "Mexico's Unfinished Transition: Democratization and Authoritarian Enclaves in Mexico," *Mexican Studies/Estudios Mexicanos* 16, No. 2 (2000): 267-287.

<sup>22</sup> Consulta Mitofsky, "Índice de Confianza en Instituciones," April, 2004.

<sup>23</sup> For excellent accounts of the pre-electoral campaigns and post-electoral protests see Luis Estrada and Alejandro Poiré, "Taught to Protest, Learning to Lose", *Journal of Democracy* 18, no. 1 (2007): 73-87; Eric Magar and Vidal Romero, "México: La Accidentada Consolidación Democrática," *Revista de Ciencia Política*, special volume (2007): 183-204; and Andreas Schedler, "The Mobilization of Distrust", *Journal of Democracy* 18, no. 1 (2007): 88-102.

A salient feature of the 2006 campaigns was their negative tone. The three main parties made recurrent use of criticism. Negative advertisements were not only produced by candidates: the activism of business organizations was particularly controversial. Several business groups produced television commercials warning voters of the prospect of a Chávez-like candidate winning the presidency. To avoid breaking the existing electoral law, the adverts were careful not to mention specific names and did not suggest who to vote for. However, it was evident that those messages were referring to the PRD candidate. Other wealthy organizations, such as labor unions, campaigned against the PAN. So both parties developed grievances during the election process.

The election resulted in a breathtakingly narrow margin of victory. According to the IFE's tally, the PAN candidate had won the highest vote share, 36.7%, closely followed by the PRD with 36.1%, while the PRI placed third with 22.7%. Therefore, the official tally yielded a difference of barely 0.6% between the first-place and second-place candidates.

Upon learning results, the PRD chose to challenge them. Andrés Manuel López Obrador, the PRD candidate, proclaimed himself the true winner and forcefully argued that a fraud had allegedly robbed him of his victory. On that basis, López Obrador initiated a series of mass protests to delegitimize the results. He also launched an aggressive rhetoric against government institutions.<sup>24</sup> Concurrently, his party filed a lawsuit with the TRIFE accusing the IFE of massive vote-rigging.<sup>25</sup>

Following due process, the TRIFE accepted the file submitted by the PRD. After close examination of the evidence, the TRIFE decided to uphold the IFE's verdict: it ruled that the actual irregularities did not amount to fraud and were not significant enough to upset the result.<sup>26</sup> The PAN was declared winner of the presidential election and its candidate, Felipe Calderón, was sworn in office on December 1<sup>st</sup>, 2006, in the midst of intense protests.

As a result of the continuous protests and accusations, several institutions lost public support, especially the electoral ones. As suggested by Laurence Whitehead, this hindered Mexican democracy as public support is crucial for democratic institutions to work effectively. He explained:

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<sup>24</sup> Andreas Schedler, "The Mobilization of Distrust".

<sup>25</sup> For statistical analyses of the PRD's claims see Alejandro Poiré and Luis Estrada, "Allegations of Fraud in Mexico's 2006 Presidential Election," presented at the annual meeting of the American Political Science Association, Philadelphia, September, 2006; José A. Crespo, 2006: *Hablan las Actas* (Mexico City, Mexico: Random House Mondadori, Debate, May 2008); and Javier Aparicio, "Análisis estadístico de la elección presidencial de 2006 ¿fraude o errores aleatorios?," *Política y Gobierno*, thematic volume – elections in Mexico, (2009): 225-243.

<sup>26</sup> All the statistical studies mentioned above agreed that evidence of fraud cannot be found. The international observers also concurred that the election had been clean and well organized. It is thus feasible that the fraud accusations were part of a post-election strategy, and hence do not directly reflect a failing of Mexico's electoral institutions on election day.

In the case of Mexico's July 2006 presidential election, it remains to be seen whether the country's institutions will prevail (...). The IFE's effectiveness depends only in part on its own internal structure and legal powers. It needs to be buttressed and reinforced by the media, academia, external supporters, and ultimately and above all by the Mexican electorate at large.<sup>27</sup>

Unfortunately the IFE did not receive enough support from political actors. On the contrary, a set of interested politicians and organizations saw benefits in weakening the IFE. Chief among them were the three large political parties who, as I elaborate throughout the paper, endeavored to revamp the electoral institutions. The accusations of fraud were often used to justify those changes.

❖ Negotiations leading to the electoral reform

Talks to reform the electoral code and to overhaul the IFE started early on. Negotiations among the major political actors were in full swing immediately after the new government was inaugurated. I do not narrate those negotiations in detail given that my goal is to evaluate the end result, meaning the electoral law. Indeed, the focus of this paper is the legislation itself rather than the legislative process. In any case, insightful narrations of that process can be found elsewhere.<sup>28</sup> I do remark on the most influential players in the negotiations.

All the political parties represented in Congress had a seat at the negotiation table, but not all carried equal weight. The small parties had little success in asserting their interests. Only the three large parties—PRI, PAN and PRD—were significantly influential. The executive branch was also involved, but it was in a position of weakness. Indeed, the bargaining power of the Chief Executive was compromised by the relentless claims of fraud that questioned his legitimacy. President Calderón did not even have full control of his own party, whose members in Congress were quick to establish a certain distance. As a result, the large parties were repeatedly successful in extracting concessions from the President.

The President did play an integral role in developing the proposal, but he failed to defend it when some powerful legislators started adding partisan amendments. As narrated by the former head of IFE in his memoirs, Felipe

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<sup>27</sup> Laurence Whitehead, "The Challenge of Closely Fought Elections", *Journal of Democracy* 18, no. 2 (April, 2007): 14-28.

<sup>28</sup> Joy Langston, "Las reformas al Cofipe, 2007," *Política y Gobierno*, thematic volume – elections in Mexico (2009): 245-272; Flavia Freidenberg, "Oportunistas, Idealistas y Adversarios en el Proceso de Reforma Electoral en México (2007/2008)," in *México, el Nuevo Escenario Político ante el Bicentenario*, eds. Manuel Alcántara Sáez y Ernesto Hernández Norzagaray (Salamanca Spain: Ediciones Universidad Salamanca, 2009), 269-306.

Calderón was intrinsically inclined to respect the electoral institutions, but he eventually yielded to those who wished to undermine their independence.<sup>29</sup> Manlio Fabio Beltrones, a prominent member of the PRI and leader of the Senate, was de facto in control of the legislative agenda.

The negotiations culminated in a number of bills that were passed with the votes of the three major parties. Most of the smaller parties voted against them. The reforms to the Constitution were published on November 13, 2007, and a new version of the COFIPE was published on January 14, 2008. Those changes affected eighteen secondary laws, which needed to be updated for consistency. Two of those secondary laws<sup>30</sup> were discussed and reformed on July 1, 2008, and the rest remained pending.

Such being the political and institutional context behind the reform, I now proceed to analyze its content. The reform included both positive and negative changes. Indeed, a mixture of virtues and problems can be found by reading the law, observing its implementation and interviewing experts. However, in this paper I only focus on the problems rather than the virtues because my goal is to assess the possibility of backsliding in Mexico. A description of the positive virtues of the reform can be found in previous academic work,<sup>31</sup> and of course, in the writings of the legislators themselves.<sup>32</sup> Accordingly, I proceed to analyze the four problems mentioned in the introduction.<sup>33</sup>

### *First problem: weakening electoral institutions*

Given that IFE is one of the pillars of Mexican democracy, weakening its independence would be a sign of backsliding. There is indeed a consensus among scholars that preserving the autonomy of electoral institutions is crucial for the credibility and legitimacy of elections.<sup>34</sup> In Mexico, this view was shared not only by scholars but also by most political actors. Opposition leaders had espoused that view when they fought for the independence of the IFE and the TRIFE during reforms in the 1990s.

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<sup>29</sup> Luis Carlos Ugalde, *Así lo Viví: Testimonio de la Elección Presidencial de 2006, la más Competida en la Historia Moderna de México*, (Mexico City, Mexico: Grijalbo, Random House Mondadori, 2008).

<sup>30</sup> The Organic Law of the Federal Judicial Power (LOPJF) and the General Law of the System of Means to Challenge in Electoral Matters (LGSMIME).

<sup>31</sup> See for example Gilles Serra, "Una lectura crítica de la reforma electoral en México a raíz del 2006," *Política y Gobierno XVI*, no. 2, Semester II, (2009): 411-427.

<sup>32</sup> See for example the Opinion of the Governance Committee of the Chamber of Deputies, *Gaceta Parlamentaria*, No. 2401-V, December 11, 2007.

<sup>33</sup> I only analyze the problems that are most indicative of a possible partyarchy and backsliding in Mexico, which are the main concerns of this paper. But the electoral law has problems of other kinds too, as described for example in, Gilles Serra, "La reforma electoral en México: ¿un retroceso democrático?," in *Caleidoscopio de la Innovación Democrática en América Latina*, eds. Yanina Welp and Laurence Whitehead (Mexico City, Mexico: FLACSO, 2011) 75-95.

<sup>34</sup> Eric Magar y Vidal Romero, "México: Reformas pese a un gobierno dividido," *Revista de Ciencia Política* 28, no. 1 (2008): 265-285.



As a result, each new reform succeeded in further stripping those institutions of external influences, especially from the executive branch, the legislative branch and the political parties. The goal was to devolve the management of elections to civic society. In accordance with that goal, today the IFE is headed by nine citizens without formal party affiliations or other government positions. Those nine citizens are called Electoral Councilors and they are ultimately responsible of managing all aspects of elections. Their autonomy was guaranteed *de jure* and respected *de facto*.

The law was designed not only to safeguard the autonomy of electoral institutions, but also their impartiality. The IFE is especially expected to be a neutral umpire of political competition. To be sure, each Electoral Councilor is bound to have a political preference. Their allegiance is publicly known from the selection process: Electoral Councilors are selected by Congress, and it is always clear which party is sponsoring them. Partisan sponsorship of candidates to head the IFE was particularly blatant after 2003. But even then, the political preferences of Electoral Councilors had not significantly determined their decisions. Proof is provided by Estévez, Magar and Rosas who analyzed their voting records.<sup>35</sup> Those authors did find some partisan voting, but actually the bulk of IFE's decisions was taken by consensus or even unanimously. This implies that all Electoral Councilors have generally agreed on pardoning or sanctioning an accused party. Hence, for the most part, they have voted their conscience instead of yielding to party pressure. According to Estévez, Magar and Rosas, this independence was partly explained by a secure tenure.

However, the autonomy and impartiality of electoral institutions were compromised with the electoral reform of 2007. One of the features that violated IFE's the autonomy was the removal of several Electoral Councilors. When the IFE was conceived, its councilors were supposed to be "irremovable," akin to a judge of the Supreme Court. They were designated for seven years, and the Constitution protected their tenure in office until the end of their terms. Nevertheless, the newly elected Congress decided to sack the General Council. In order to do so, Congress had to overturn the Constitution. For that purpose, the legislators of all major parties wrote an interim constitutional article forcing the immediate substitution of three councilors in February 2008 (including the president of IFE), and three other councilors a few months later in August of 2008. Only three of the nine councilors were allowed to finish the remainder of their terms until 2010.<sup>36</sup>

Reportedly, the goals for sacking the senior staff at IFE were political, financial and personal. Politically, parties wished to increase their influence

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<sup>35</sup> Federico Estévez, Eric Magar and Guillermo Rosas, "Partisanship in non-partisan electoral agencies and democratic compliance: Evidence from Mexico's Federal Electoral Institute," *Electoral Studies* 27, (2008): 257-271.

<sup>36</sup> Mexican Constitution, Interim Article 4, *Diario Oficial de la Federación*, November 13, 2007.

in the institution in charge of supervising campaign behavior.<sup>37</sup> Financially, parties wished to avoid the enormous fines that most of them were facing for violating the campaign-spending limits.<sup>38</sup> And personally, a vindictive reason also loomed large, namely a retribution for mishandling the 2006 election.<sup>39</sup> Hence the three major parties, for different reasons, agreed in their desire to fire the sitting members of IFE's General Council.

It should be noted that parties were expedient at removing the old Electoral Councilors, but were sluggish at appointing the new ones. They were in no rush. Parties seemed oblivious to the dangers of a partially headless IFE, including the possible mismanagement of the ongoing elections. The final batch of Electoral Councilors was only chosen in December 15, 2011, more than one year after the supposed deadline established by the Constitution.<sup>40</sup>

The removal of Councilors before they finished their original mandate, which violated the tenure firmly granted to them by the Constitution, established an unfortunate precedent. The reputational effects will be long lasting. As national and international observers have pointed out, future councilors will now fear they can be removed if they offend the political class.<sup>41</sup> Parties only need to pass a new "interim" statute to remove these officials. The shockwaves of this overhaul were even felt beyond the IFE. Now, given this precedent, the fear of a premature removal by Congress also looms large in the minds of Justices at the TEPJF.<sup>42</sup>

Not surprisingly, the new Electoral Councilors, although professional and experienced, were suspected to be more lenient than previous cohorts. Evidence of leniency was quick to surface: one of their first actions was to pardon the large parties for significant violations of the party-finance laws. The newly staffed IFE proceeded to close important investigations of campaign expenses during the 2006 election.<sup>43</sup> As a result, the new councilors allowed the PRD, the PAN, the PRI and several smaller parties to save millions of pesos in fines that should have been paid for exceeding spending caps.<sup>44</sup>

In sum, political parties jeopardized the autonomy and independence of the IFE by revamping its General Council.<sup>45</sup> By doing so, they reversed the course taken by those same parties when they originally created the institute more than a decade ago. They are thus responsible for some democratic backsliding in Mexico. While the executive branch remained firmly excluded

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<sup>37</sup> Freidenberg, "Oportunistas, Idealistas y Adversarios".

<sup>38</sup> Ugalde, *Así lo Viví*.

<sup>39</sup> Langston, "Las reformas al Cofipe."

<sup>40</sup> *Excélsior*, "Rinden Protesta los Tres Nuevos Consejeros Ante el IFE," December 16, 2011.

<sup>41</sup> *The New York Times*, "Editorial: Hobbling Mexico's Democracy," September 13, 2007.

<sup>42</sup> Interview with a high-rank official of the TEPJF.

<sup>43</sup> *Excélsior*, "El IFE le da la vuelta de hoja a los spots," February 16, 2008.

<sup>44</sup> *La Jornada*, "El IFE optó por ocultar que en 2006 se rebasaron toques de gastos," February 18, 2008.

<sup>45</sup> Other measures not described in this paper also decreased IFE's autonomy from political parties, such as the creation of an Internal Comptroller to selectively sanction IFE officials (see Serra, "Una lectura crítica de la reforma electoral").

from the IFE's General Council, political parties increased their influence, which is symptomatic of a nascent partyarchy.

***Second problem: solidifying the hegemony of party bosses within their parties***

The PRI used to be hierarchical and centralized to an extreme rarely seen in other parties around the world. Nominations, for example, used to be ultimately decided by one person only, namely the president of the country who directly appointed candidates to all offices. The PAN was also a centralized party where party affiliation was restricted. However in the last decades, party life in Mexico had significantly opened and internal processes had democratized. Primary elections became popular in all parties, especially the three large ones; and party affiliation increased, especially in the PAN. Unfortunately, the electoral reform of 2007 has put some of that party democratization at risk.

Two aspects of the new law are symptomatic in that respect. First, political parties were shielded against the scrutiny of government authorities regarding a large number of internal affairs. Second, the process to challenge a party's internal decisions was rendered more difficult. I now document those two features of the legislation.

Indeed, the new law states that "the electoral, administrative and jurisdictional authorities" will not be able to intervene in the "internal affairs" of the parties.<sup>46</sup> The list of matters that were placed outside of the government's jurisdiction is almost exhaustive. Most crucially, it includes the nomination of candidates and the selection of leaders. This is what legislators included in their definition of internal affairs:

The following constitute internal affairs of the political parties:

- a) The development and modification of its basic documents;
- b) The requirements and mechanisms for the free and voluntary affiliation of citizens to the party;
- c) The selection of members for its committees;
- d) The procedures and requirements for the selection of its precandidates and candidates for elected office; and
- e) The deliberations to define its political and electoral strategies and, more generally, the decision-making

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<sup>46</sup> The law does allow for a few specific affairs where the authorities can intervene, for example the parties' finances. See Article 46, Paragraph 2 of the COFIPE, Diario Oficial de la Federación, January 14, 2008; and Article 116-IV-f of the Mexican Constitution, Diario Oficial de la Federación, November 13, 2000.

processes of its committees and membership organizations.<sup>47</sup>

In addition to the COFIPE and the Constitution, this protection against government oversight was reiterated in other laws as well. It was included in the secondary laws on electoral matters when Congress began revising them a few months later. A new clause read as follows:

The electoral authorities must consider the preservation of the political parties' freedom of political decision-making and their right to self-regulation whenever they are resolving any dispute regarding the parties' internal affairs.<sup>48</sup>

It is interesting that this paragraph did not exist in the original proposal made by the Senate in April 2008, but was added a few weeks later by the Chamber of Deputies as part of its observations.<sup>49</sup> This suggests that such paragraph was an afterthought rather than essential part of the amendment concerned. The goal was to reiterate, once more, that parties should fall beyond the reach of the executive's authority.

The legislators justified that change by arguing that political parties have "the right to organize themselves according to their aims". Therefore, they concluded, the law should uphold "the due respect that the electoral authorities, both administrative and jurisdictional, must keep with respect to the internal decisions of parties".<sup>50</sup> Nevertheless, relaxing the supervision of political parties can have serious drawbacks, such as hampering the representation of party members within their parties. In the past, when political parties have been granted this so-called "due respect" they have tended to become vertical organizations dominated by a small elite. A classic example was the PRI where the president used to squelch any internal dissent.<sup>51</sup> A more recent example is the Ecological Green Party of Mexico, PVEM, where the party founders, a father and his son, used to make most decisions bypassing party affiliates. These examples illustrate how the autonomy of political parties, when taken too far, could end up solidifying the hegemony of a small party elite.

A second related setback was to decrease the legal safeguards of party militants when they are at odds with party bosses. As I will describe below,

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<sup>47</sup> COFIPE, Article 46, Paragraph 3, Diario Oficial de la Federación, January 14, 2008.

<sup>48</sup> LGSMIME, Article 2, Paragraph 2, Diario Oficial de la Federación, July 01, 2008.

<sup>49</sup> Compare the Gaceta del Senado, No. 232, April 21, 2008 to the Gaceta Parlamentaria, No. 2530-IV, June 19, 2008.

<sup>50</sup> Opinion of the Governance Committee of the Chamber of Deputies, Gaceta Parlamentaria, No. 2530-IV, June 19, 2008.

<sup>51</sup> Joy Langston, "Breaking Out is Hard to Do: Exit, Voice, and Loyalty in Mexico's One-Party Hegemonic Regime," *Latin American Politics and Society* 44, no. 3 (2002): 61-88.

the changes tend to leave the party's rank and file unprotected vis-à-vis their leaders.

As background, it should be noted that the IFE and the TRIFE had traditionally been fairly active in supervising the internal life of parties. When they were created, the electoral institutions were legally mandated to hear any cases of party officials in dispute with their foot soldiers. As it turns out, those cases are increasingly frequent: in 2006-2007 they reached 55% of all electoral complaints, according to TRIFE's annual report. Electoral tribunals are saturated with stories of party bosses imposing their loyalist nominees in smoke-filled rooms rather than holding transparent nominations as mandated by law. This has led observers to claim that the three large parties in Mexico are becoming less internally democratic through time.<sup>52</sup>

This undemocratic trend was reinforced by some new clauses of the COFIPE. Concretely, several amendments make it more difficult for regular party members to defend their political rights. Previously, if a party was believed to have broken a law during an internal process such as a candidate nomination or a leader selection, it was fairly straightforward to bring up the case to the government authorities. Now, three amendments were written to obstruct such accusations. First, a complaint about the internal statutes of a party must be filed before a fixed deadline of fourteen days; after that deadline, the party charters cannot be challenged.<sup>53</sup> Second, such complaints can exclusively be filed by registered members of the party; ordinary citizens and government officials are no longer allowed to challenge the legality of a party's charter.<sup>54</sup> And third, any party militant wishing to complain about his or her party's internal affairs, must exhaust all the official party channels before bringing up the controversy to an external authority.<sup>55</sup>

By introducing those clauses, party elites were intending to increase the central control of their organizations. Their main justification comes in the following report, which is worth quoting. As can be seen, the parties' discomfort with any outside intervention is surprisingly explicit.

The increasing number of judicial controversies regarding the parties' internal lives in the past several years is an undesirable phenomenon; we assert that it is a negative phenomenon because it contradicts the view of parties as groups of citizens united by a same ideology, a same program, and rules agreed on by all. While it is true that parties are, according to the

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<sup>52</sup> María Amparo Casar, "Anatomía de una Reforma Electoral," *Nexos*, August (2009): 68-73.

<sup>53</sup> COFIPE, Article 47, Paragraph 2, *Diario Oficial de la Federación*, January 14, 2008.

<sup>54</sup> *Ibid.*

<sup>55</sup> COFIPE, Article 46, Paragraph 4, *Diario Oficial de la Federación*, January 14, 2008.

Constitution, public entities, they are not and should not be made into public bodies within the State's sphere.<sup>56</sup>

This passage reflects the way party leaders justify the autonomy they granted themselves. Regarding challenges from below, they considered the judicial challenges promoted by their affiliates to be "undesirable" and "negative". Regarding challenges from above, they have called for parties to be considered outside of the "State's sphere". In other words, the national committees of each party should be given leeway to conduct business as they see fit. In particular, they should be allowed to centralize nominations and other internal processes.<sup>57</sup>

It must be noted that centralized nominations were a basic feature of partyarchy in Venezuela. Actually, Coppedge made them an integral part of his definition. In a partyarchy, he wrote, "parties control all nominations for public office, which limits eligibility to citizens who are considered reliable defenders of the parties' interests."<sup>58</sup> This similarity with the Venezuelan experience is an additional sign that Mexico is increasingly conforming to the definition of a partyarchy.

In sum, the new law hampers the government's ability to monitor parties' internal processes, and reinforces the dominance of party elites over party adherents. In other words, parties have suffered some internal backsliding. Moreover, this reversal has not come from an overreaching executive branch. It certainly does not indicate the kind of superpresidentialism described by Fish.<sup>59</sup> On the contrary, this backsliding can be attributed to the autonomy from the law that parties have granted themselves. In fact, as shown by their public statements, parties have literally come to think of themselves as being beyond the authority of the State. This trend is thus indicative of an incipient partyarchy. A centralization of party processes of the kind we are observing in Mexico was actually part of the original definition given by Coppedge.

### ***Third problem: reducing freedom of speech during campaigns to protect the parties' image***

During the PRI's hegemonic period, political commentary was stifled by self-censorship and government control. With democratization came the freedom to criticize politicians at all levels: the public debate in Mexico became exceptionally open, and political parties turned extremely vocal during

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<sup>56</sup> Opinion of the United Committees of Governance and Legislative Studies, Gaceta del Senado, No. 170, December 5, 2007.

<sup>57</sup> As it stands, the new law reinforces previously existing laws that also contribute to partyarchy, most notably the no-reelection rule that has allowed party leaders to mold the careers of their candidates at the end of each period.

<sup>58</sup> Coppedge, *Strong Parties and Lame Ducks*, 20-22.

<sup>59</sup> Fish, "The Dynamics of Democratic Erosion".

election campaigns. Unfortunately some of that newfound freedom was lost with the electoral reform.

I focus on one change of major concern: the attempt to prohibit negative campaigning. Criticizing the opponent is now punishable by law. Indeed, one of the main articles of the new legislation prevents candidates from issuing any message that "denigrates" or "slanders" their rivals.<sup>60</sup> The language used in that article is regrettably vague. For example, it does not define "slander" precisely enough, and does not specify the criteria to distinguish "denigration" from other types of criticism. So the law allowed for a large grey area between acceptable critiques and liable remarks. As illustrated by subsequent events, such vagueness was a recipe for confusion and litigation. The law's ambiguity can be appreciated by quoting the statute exactly:

The following are obligations of the national political parties: (...) To abstain, in their political or electoral advertisements, of any expression that denigrates institutions or parties, or slanders individuals.<sup>61</sup>

A similar provision existed already in the previous law,<sup>62</sup> but the current COFIPE reinforced it by making it punishable,<sup>63</sup> and by adding the "right to respond" of the person who is being allegedly denigrated.<sup>64</sup> Moreover, the language prohibiting parties from slandering and denigrating was elevated to the constitutional level.<sup>65</sup>

The official justification for these measures was the aggressive tone of the 2006 election, where parties from all stripes leveled intense attacks on each other. Those negative exchanges were unsettling to many citizens, which gave legislators the perfect excuse to create a new regulation. The actual goal, however, was probably to protect the image and reputation of candidates and their parties—another sign of party leaders colluding to protect themselves from outside criticism.

Moreover, I claim that those regulations carry several detrimental consequences. Firstly, they compel political commentators to sanitize their comments, restricting them to platitudes or flattery. As Schedler stated in his call to reaffirm the principle of free speech in Mexican elections: "If the current trend toward regulating and censoring the content of campaign messages persists, election campaigns (...) will develop into baroque exercises of self-praise by candidates cut off from their critical faculties."<sup>66</sup>

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<sup>60</sup> COFIPE, Article 38, Paragraph I, Clause p, Diario Oficial de la Federación, January 14, 2008.

<sup>61</sup> Ibid.

<sup>62</sup> COFIPE, Article 38, Paragraph I, Clause p, Diario Oficial de la Federación, April 24, 2006

<sup>63</sup> COFIPE, Article 342, Paragraph I, Clause j, Diario Oficial de la Federación, January 14, 2008.

<sup>64</sup> Mexican Constitution, Article 6, Diario Oficial de la Federación, November 13, 2007.

<sup>65</sup> Mexican Constitution, Article 41-III, Section C, Diario Oficial de la Federación, November 13, 2007.

<sup>66</sup> Schedler, "The Mobilization of Distrust," 100.

Secondly, the new measures deprive citizens of valuable information. Given its ambiguous language, authorities can interpret the new law as banning all types of accusations, even the truthful and documented ones. And indeed the TEPJF has tended to interpret the law in such a broad way.<sup>67</sup> Yet, the critiques and accusations among parties and candidates, when true and well-documented, should be considered a public good. As previous academic research has argued, negative advertisements are valuable in a democracy. They actually provide more information to voters than positive advertisements do.<sup>68</sup> This is especially important in a country where corruption and drug money are serious concerns in elections. As it stands, the law makes it illegal for a candidate to accuse another candidate of being dishonest, having links with *narcos*, or having committed a crime. It is illegal to make such public accusations even if they can be documented with concrete evidence. So it has now become harder to learn the personal history, past deeds and actual allegiance of candidates.

Recent elections provide several examples of how some valuable information might be muted by this new provision. During the gubernatorial contest of 2009 in Nuevo León, a candidate accused the previous administration of leaving the state finances in "ruins". He provided figures to back his claim. The referenced party reacted by complaining to the electoral authorities that such words were degrading. In accordance with the new law, the electoral authorities charged the candidate a large fine for denigration and forced him to remove his "ruins" remark from all future advertisements.<sup>69</sup>

On a separate incident, one of the candidates used elderly masks and costumes to mock the advanced age of another candidate. He wanted to publicize the fact that he was the youngest candidate in the race while his rival was much older. But he ended up being charged a large fine for denigrating his rival.<sup>70</sup> It can be argued, however, that those two characteristics—the previous performance of parties and the age of candidates—should be fair game. Citizens can benefit from watching candidates debating those issues. But the new reform is stifling to some degree the vigorous debates that Mexican elections had started to display. It can thus be considered a regressive feature.

This restriction is not only questionable on principle, but it also created implementation problems in practice. It overburdened the IFE and the TRIFE who must now enforce a much more complex law, as demonstrated by the 2009 campaigns. The PRI was the first to file a complaint against the PAN for slander and denigration. Accordingly, the IFE imposed a large fine on the PAN and ordered it to retrieve its negative adverts from all newspapers and

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<sup>67</sup> Interview with a high-rank official at the TEPJF.

<sup>68</sup> John Geer, *In Defense of Negativity* (Chicago, IL: University of Chicago Press, 2006).

<sup>69</sup> Proceso, "Sancionan a candidatos de PRI y PAN en Nuevo León," June 22, 2009.

<sup>70</sup> Los Tubos – Noticias Monterrey, "Crece la guerra sucia," June 23, 2009.



magazines.<sup>71</sup> The PAN, however, objected to the IFE's verdict arguing that it infringed upon its freedom of speech. So it decided to appeal the verdict to the TRIFE.<sup>72</sup> This process was later repeated in reverse. The PAN took the PRI to court for slander and denigration, while the PRI defended its negative adverts on the basis of freedom of speech.<sup>73</sup> Clearly, parties were either defending or condemning the rules at their convenience. In the eyes of many voters, this revealed the contempt that parties have for the law, including a law that they themselves wrote, promoted and passed in Congress.<sup>74</sup>

On balance, the results from that provision are disappointing: a decrease in information for voters and an increase in litigation. Moreover, it has diminished the competitiveness of elections. By restraining political discourse, the strong candidates are more secure while underdogs have more difficulty catching up.<sup>75</sup> It should therefore not come as a surprise that many academics and intellectuals have criticized the prohibition to "slander and denigrate" in elections. Many of them have even called for the provision to be eliminated altogether from the law.<sup>76</sup>

In sum, the ban on negative advertising during elections can be considered undemocratic as it constrains freedom of speech.<sup>77</sup> Furthermore, this democratic reversal came from the big parties' desire to protect their image to the detriment of citizen's right to be informed. It may thus be indicative of a nascent partyarchy protecting itself.

#### ***Fourth problem: monopolizing political communication in the hands of parties***

Another change that fortified parties in detriment of citizens was the restriction on political advertisements. The 2007 reform prohibits citizens from purchasing political ads on radio and television, as explained in detail below. The decision was justified by alluding to the controversial messages sponsored by private organizations during the 2006 campaigns. As I mentioned before, in 2006 business corporations and trade unions produced several attack ads against the leftwing and rightwing candidates, respectively. Many reformers argued that those messages had an undue influence on the electorate. There was a general feeling that some sort of regulation was needed.

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<sup>71</sup> El Economista, "IFE ordena al PAN suspender 'sopa de letras' contra el PRI," April 3, 2009.

<sup>72</sup> Proceso, "Impugna el PAN ante el TEPJF el fallo del IFE por la sopa de letras," April 7, 2009.

<sup>73</sup> Proceso, "Multo el IFE al PRI con 54 mil pesos por 'Scrabble'," May 22, 2009.

<sup>74</sup> More details about the negative ads by the PAN and the PRI can be found in Serra, "La reforma electoral en México: ¿un retroceso democrático?"

<sup>75</sup> Interview with a high-rank IFE official.

<sup>76</sup> Reforma, "Anhelan académicos campañas negras," June 10, 2009.

<sup>77</sup> In non-electoral contexts, it should of course note be noted that freedom of speech remains very strong in Mexico.

The legislators' response, however, was unexpectedly radical: they banned paid messages altogether. In a new article, the COFIPE prohibits the purchase of spots on radio and television with electoral content.

No person or entity, on his own right or on behalf of others, will be allowed to contract advertising on radio or television geared to influence the electoral preferences of citizens, or to favor or oppose political parties or candidates running for elected office.<sup>78</sup>

That article covers all individuals and all organizations, and thus no one will be allowed to purchase airtime to promote their political views during elections.<sup>79</sup> Political opinion can still be disseminated on TV and radio, but not if the media outlets receive payment for it. To give a clarifying example: a common citizen can freely express her opinion if a TV network interviews her, but she is not allowed to pay that TV network to broadcast an advertisement expressing that same opinion. In effect, the article eliminates from the Mexican radio and television all *paid* contracting of political advertising.

It should be noted that political parties will still be able to broadcast their messages through a large allocation of *free* airtime.<sup>80</sup> Parties will not be covered by the article quoted above, because they will not be "contracting" their advertising; the airtime will technically be given to them as a prerogative. In fact, Mexican viewers were bombarded with an unprecedented amount of party propaganda during the 2009 campaigns. Clearly it was civic organizations and common citizens who were actually left out of electoral advertising, not the parties.

Not surprisingly, this regulation has received strong criticism from civic organizations, media corporations and global NGOs like the International Association of Broadcasting. Many academics interpreted it as an affront to freedom of speech.<sup>81</sup> In fact, a large group of intellectuals, in conjunction with private-sector representatives, formally appealed to the Supreme Court for the new electoral law to be repealed.<sup>82</sup>

Even the supporters of this new regulation agreed that it would limit the freedom of speech of regular citizens. Those who supported this ban argued that such sacrifice was worthwhile, as it would decrease the influence of money in politics. In particular, it would prevent wealthy individuals and

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<sup>78</sup> COFIPE, Article 49, Paragraph 4, Diario Oficial de la Federación, January 14, 2008.

<sup>79</sup> In addition to the COFIPE, the Constitution was also changed for this purpose. A new article forbids any type of contract with radio and television companies for political advertising (article 41-II-A). The modification at the constitutional level also forbids the broadcast in national territory of political advertisements produced abroad.

<sup>80</sup> COFIPE, Articles 49 to 76, Diario Oficial de la Federación, January 14, 2008.

<sup>81</sup> Such as Magar and Romero, "México: Reformas pese a un gobierno dividido".

<sup>82</sup> El Financiero, "Admite la Corte amparo de la IP contra COFIPE," July 10, 2008.

corporations from telecasting their political views.<sup>83</sup> This was expected to improve the *equity* of political competition, as rich citizens and poor citizens would have the same access to political advertising (namely, no access at all). The supporters also pointed to other countries with that kind of regulation: the United Kingdom and much of continental Europe have similar laws. In Latin America, two countries have followed that path as well: Brazil and Chile.<sup>84</sup> The theoretical argument in favor of this ban was thus to sacrifice some freedom in favor of more equity.<sup>85</sup>

As of today, it is unclear whether the gains in equity have been enough to compensate the loss in freedom of expression. But that is secondary to the main argument in my paper. The point I wish to emphasize is that parties granted themselves the exclusive right to political advertisement while taking that right away from civic organizations and regular citizens. Whatever the merits in other regards, this undeniably shifted the balance of power from civil society to political parties. One may even suspect that legislators were aiming at monopolizing political discourse at least as much as increasing equity during campaigns. As such, this law represents a big step toward creating a partyarchy.

In addition to strengthening the dominance of parties and weakening the voice of civic society, the new law also hampered the efficacy of electoral institutions. Indeed, implementing the new prohibition during the 2009 election proved to be an enormous challenge for the IFE and the TRIFE. Above all, they had to face the ire of radio and television stations, which resented losing millions of dollars from missed advertisements. Indeed, the reform carried the loss of a substantial source of income that used to come from selling spots to politically motivated groups. This led some media corporations to search for ways to circumvent the law, such as illicitly selling airtime without written contracts, or receiving under-the-table payments for favorable interviews.<sup>86</sup> In turn, these new surreptitious practices forced the IFE and the TRIFE to monitor media coverage much more closely. In 2009, they spent a significant amount of time and effort investigating any coverage that might have been somehow purchased for political communication.

Consequently, in their attempt to uphold the law, the IFE and the TEPJF found themselves in constant legal battles against media companies.<sup>87</sup> Those corrosive battles proved to be a costly distraction. Furthermore, the instances

<sup>83</sup> Voz y Voto, "La Reforma a Prueba. Mesa I: Modelo de Comunicación Política," No. 200, October 2009.

<sup>84</sup> Daniel Zovatto, "América Latina," in Dinero y Contienda Político-Electoral, eds. Manuel Carrillo, Alonso Lujambio, Carlos Navarro and Daniel Zovatto (Mexico City, Mexico: Fondo de Cultura Económica, 2003), 33-96.

<sup>85</sup> As argued for example by José Woldenberg, "Estampas de la Reforma," in Estudios Sobre la Reforma Electoral 2007: Hacia un Nuevo Modelo, eds. Lorenzo Córdova Vianello and Pedro Salazar, (Mexico City, Mexico: Tribunal Electoral del Poder Judicial de la Federación, November 2008), 25-43.

<sup>86</sup> Milenio, "Rechaza Sodi haber pagado por entrevista en el partido Pumas-Puebla," 26 May, 2009.

<sup>87</sup> For details of these confrontations with TV companies see Serra, "La reforma electoral en México: ¿un retroceso democrático?"

where the nine Electoral Councilors decided not to apply strong sanctions were widely interpreted by the public as signs of weakness and trepidation. In short, the electoral authorities were criticized both for being too strict (by TV companies) and for being too lax (by political pundits). Their authority was undermined on all fronts.

Political parties were unhelpful in this conflict. They failed to defend the electoral authorities against the TV networks, for example by publicly supporting the IFE and TRIFE while admonishing the television duopoly. Parties were simply unwilling to have any friction with the TV and radio industries during the election. Once again, they refused to take responsibility in upholding the law they had just written and passed in Congress.

In sum, the prohibition of paid advertisements on television and radio for campaign purposes had two collateral effects. First, it concentrated mass communication in the hands of political parties in detriment of civic society. As such, it cemented the state of partyarchy in the country. And second, it eroded the authority and efficacy of electoral institutions. As such, it represented another instance of democratic backsliding.

### ***Discussion: is Mexico backsliding and is it becoming a partyarchy?***

In contrast to the previous electoral reforms in Mexico, which have been extensively analyzed and documented, the one initiated in 2007 remains understudied in the academic literature. This essay endeavored to identify and document some of its most consequential aspects, both in terms of substance and implementation. The analysis was based on a close examination of the law and the extensive public debate surrounding it. To help us understand recent events in Mexico, I compared them with two trends observed in other regions: democratic backsliding and partyarchy. The theories developed to explain those two trends proved useful in shedding light on Mexican politics.

I did find some indication of democratic backsliding in the electoral law of 2007. I identified problems in four areas: the strength of electoral institutions; the internal democracy of parties; freedom of speech and political communication. Recent legislation in those areas represent a concern for the consolidation of the country's successful democratization process of previous decades.

But some of the most frequently mentioned theories of democratic backsliding do not seem to apply to Mexico. To be specific, Mexico does not validate the conjecture of an excessively strong executive. Fish hypothesized that *superpresidentialism* might be one of the causes of democratic

backsliding in post-communist Europe.<sup>88</sup> A similar hypothesis could be formulated by observing the recent developments in Bolivia, Colombia and Venezuela. Mainwaring and Shugart provided more examples of excessively dominant presidencies in Latin America.<sup>89</sup> However, in my analysis of the Mexican legislation I did not find evidence of superpresidentialism. On the contrary, the Chief Executive has a diminishing bargaining power. In contrast, the three large parties enjoyed a dominant role in re-writing the electoral code. As a result, party delegations in Congress succeeded in including many advantageous amendments for their leaders.

Hence, a different theory of backsliding would seem appropriate. I argued that Mexico has started to experience several of the effects that Coppedge observed in Venezuela as it became a *partyarchy*.<sup>90</sup> Coppedge argued that partyarchies will tend to block channels of participation, suppress issues from the political debate, and politicize civic organizations. The effects are worsened when the presidency is weak with respect to the parties. My analysis of the last electoral reform suggests that such is becoming the state of affairs in Mexico: the PAN, the PRD and the PRI show signs of gradually becoming a partyarchy, monopolizing politics in the hands of their leaders while presidential power wanes. Coppedge's claim that partyarchy and presidentialism are a detrimental combination for democracy appears to hold true in Mexico.

These observations carry broad implications for the consolidation of new democracies. Specifically, they help us test two important theories of democratic backsliding. The first theory predicts that unchecked executives in new democracies will tend to concentrate power on themselves to the detriment of other branches of government.<sup>91</sup> It was developed for Eastern and Central Europe, and seems plausible for some South American and Central American nations. But it does not explain recent events in Mexico. The second theory postulates that excessively strong parties in presidential regimes will tend to monopolize power.<sup>92</sup> It was developed for Venezuela, and seems plausible for Nicaragua. Moreover it does explain events in Mexico. This suggests caution when trying to generalize our theories of consolidation. It may be true that backsliding remains a possibility around the world—regions in the third wave of democratization are especially vulnerable. But the source of instability may vary across countries. My analysis indicates that such backsliding might be executive-driven in some regions, while it might be party-driven in other regions. Thus both potential risks ought to be monitored.

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<sup>88</sup> Fish, "The Dynamics of Democratic Erosion".

<sup>89</sup> Scott Mainwaring and Matthew S. Shugart, *Presidentialism and Democracy in Latin America* (Baltimore, MD: Johns Hopkins University Press, 1997)

<sup>90</sup> Coppedge, *Strong Parties and Lame Ducks*.

<sup>91</sup> Fish, "The Dynamics of Democratic Erosion".

<sup>92</sup> Coppedge, *Strong Parties and Lame Ducks*.

In terms of Mexico's future, the country seems to be at a crossroads. One possible path is to strengthen civil society and the civic organizations that are already involved in the democratization process.<sup>93</sup> This includes consolidating the civic character of electoral institutions and continuing to remove partisan interests from the management of elections. However, the reforms that were recently enacted by Congress seem to indicate that Mexico has taken a very different path, namely cementing the hegemony of party elites to the detriment of citizen representation. In other words, the regime is at risk of becoming a *partyarchy*. As a consequence, Mexico might be joining the group of countries that have recently suffered a democratic reversal. The literature calls them *backsliders*.

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<sup>93</sup> Sharon F. Lean, "Democracy Assistance to Domestic Election Monitoring Organizations: Conditions for Success," *Democratization* 14, no.2 (April, 2007): 289–312.



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