



Suprema Corte
de Justicia de la Nación



**DERECHOS
HUMANOS**

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**GENDER PARITY AND FREEDOM OF EXPRESSION IN ELECTORAL MATTERS
(PARIDAD DE GÉNERO Y LIBERTAD DE EXPRESIÓN EN MATERIA ELECTORAL)**

CASE: *Acción de Inconstitucionalidad 35/2014*

REPORTING JUDGE: Arturo Zaldívar Lelo de Larrea

DECISION ISSUED BY: Plenary of Mexico's Supreme Court of Justice

DATE OF THE DECISION: October 2, 2014

KEY WORDS: political-electoral rights, right to equality and non-discrimination, right to freedom of expression, gender parity, affirmative action, voting abroad.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Acción de Inconstitucionalidad 35/2014*, Plenary, Arturo Zaldívar Lelo de Larrea, J., decision of October 2, 2014, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2021-10/AI%2035-2014.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Acción de Inconstitucionalidad 35/2014*, Mexico.

SUMMARY OF THE *ACCIÓN DE INCONSTITUCIONALIDAD 35/2014*

BACKGROUND: The Democratic Revolutionary Party [*Partido de la Revolución Democrática*] (PRD), the Labor Party [*Partido del Trabajo*] (PT) and the National Action Party [*Partido Acción Nacional*] (PAN), filed unconstitutionality actions against Decree number 514 establishing the Eighteenth Reform of the Constitution of the State of Chiapas (Chiapas Constitution), and Decree number 521 amending the Elections and Citizen Participation Code of the State of Chiapas (CEPCEC). The mentioned political parties argued that the decrees violated articles 1, 4, 6, 7, 35, section I, II and III, 41, and 116 of the Federal Constitution.

ISSUE PRESENTED TO THE COURT: Whether the reforms were constitutional, particularly those related to the gender parity rules for the election, the freedom of expression of the political parties and the possibilities of voting abroad.

HOLDING: Articles 24, 35 Bis and 40, section IV of the CEPCEC were declared valid for the following reasons. It was considered that those norms establish affirmative measures to guarantee the principle of gender parity contemplated in the Federal Constitution, by establishing that the candidate lists for deputies and the slates for the assignment of city council members by the principle of proportional representation be headed by women. For its part, it was considered constitutional that citizens of Chiapas residing abroad may not vote for city council members since a decisive element is that they represent those who live in the community. In contrast, articles 69, sections XI and XXIII and 234, sixth paragraph were declared invalid basically for the following reasons. It was reasoned that the exception to the obligation of observing parity requirements in the case of candidacies obtained through internal selection processes of the parties is contrary to the principle of parity, since it subjects them to processes in which the inertias toward men can prevail. Finally, the prohibition on the expressions that denigrate institutions was invalidated, given that article 41 of the Federal Constitution only protects persons from the political or electoral propaganda that slanders or denigrates them, not

institutions; in addition, the restrictions on the freedom of expression cannot be given in advance, without analyzing a specific case.

VOTE:

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=168595>

EXTRACT OF THE *ACCIÓN DE INCONSTITUCIONALIDAD 35/2014*

- p. 1 Mexico City. The Plenary of the Mexico's Supreme Court of Justice (this Court), in session of October 2, 2014, issues the following decision.

BACKGROUND

- p. 1-3 On July 20 and 30, 2014, the political parties Democratic Revolution Party [*Partido de la Revolución Democrática*] (PRD), Labor Party [*Partido del Trabajo*] (PT) and National Action Party [*Partido Acción Nacional*] (PAN), filed an unconstitutionality action against the Decree number 514 establishing the Eighteenth Reform of the Constitution of the State of Chiapas (Chiapas Constitution), published on June 25, 2014; and the Decree number 521, amending the Elections and Citizen Participation Code of the State of Chiapas (CEPCEC), published on the 30th of the same month and year.
- p. 3-8 The political parties specified as violated constitutional provisions, among others, articles 1; 4; 6; 7; 35, sections I, II and III; 41; and 116 of the Federal Constitution, with respect to the obligation of establishing gender rules, the restrictions permitted on the freedom of expression, and the right of citizens of Chiapas living abroad to vote in the town council elections.
- p. 18-19 On July 31, 2014, it was declared that they were joined into the same case file. By resolution of August 4, 2014 it was ordered to send the case to Judge Arturo Zaldívar Lelo de Larrea.

STUDY OF THE MERITS

I. Principle of gender parity

- p. 157-158 The PT challenges articles 24, section II and 40, section IV last paragraph of the CEPCEC, since it considers they discriminate based on gender by requiring that women must head the list of candidates for deputies by proportional representation and the slates of candidates for town council of proportional representation; and that those rules give preferential treatment and disproportionate protection to the female gender, excessively protecting their right to stand for election, in detriment of the male gender, which

contradicts the principle of equality between men and women and violates the right of self-determination and the internal life of the parties, by not permitting them to decide in what order to present their lists of candidates.

p. 158 For its part, the PRD considers that the sixth paragraph of article 234 violates the principles of equality and non-discrimination, as well as the human right to equality between men and women before the law, by establishing an exception to the obligation that the candidacies for deputies of the relative majority and members of the town councils be in parity, since in spite of the fact that the apparent end of the rule is to privilege the democratic processes inside the parties, it could result in conflict of laws and become a method to try to avoid the obligation that there be gender parity.

p. 159 Finally, the petitioning party argues that there is a partial omission in the Chiapas Constitution with respect to the obligation to establish gender rules, since they are only established with respect to the deputies and not for the members of the town councils.

a) Constitutional framework on gender parity in electoral matters

p. 160 The principle of gender parity contained in the second paragraph of section I of article 41 of the Constitution establishes as a principle of substantive equality in electoral matters, a human right that the legislator should take into account when designing the rules for the presentation of candidacies for both federal and local legislators.

Equality is a concept prior to parity. Equality has two aspects, one formal that implies equality in the law and before the law; and one substantive, that can become an indirect discrimination or of consequences. The first refers to the general rules that should guarantee equality and the possibility of revising those that are considered discriminatory; the second tries to approach the actual impacts of the rule.

p. 161 This Court has held that the right to substantive equality or de facto equality lies in reaching a parity of opportunities in the real and effective enjoyment and exercise of the human rights of all persons, which means that in some cases it is necessary to remove and/or

diminish the social, political, cultural, economic or any other kind of obstacles that prevent the members of certain vulnerable social groups from enjoying and exercising those rights.

p. 161-162 The official data of the National Statistics and Geography Institute [Instituto Nacional de Estadística y Geografía] (INEGI) show conditions of structural discrimination that have affected women in the political and public sphere. It was the lack of female candidacies that led to the incorporation of those constitutional obligations, which leads to the need to implement actions and design formulas that generate conditions that allow the equal enjoyment and exercise of the political-electoral rights of women, with which the principles of equality set forth in articles 1 and 4 of the Constitution are made effective.

p. 162-163 In this way, the State is obligated to ensure representation as a political dimension of justice that makes participation possible, under conditions of equality, in the public deliberation through which the frame of reference of justice is defined, and the form in which the rights will be guaranteed and protected.

p. 163 For the proper fulfillment of the right to substantive equality, the establishment of affirmative action is feasible, which involves administrative and/or legislative measures that imply a preferential treatment to a certain group or sector that has a disadvantage or is discriminated against, and that by its nature should be temporary, until the situation it is intended to correct is repaired, since once the objective of equality has been reached, the differentiated treatment should disappear.

p. 165 This right constitutes a mandate of optimization, and therefore to the extent that it is not displaced by an opposing reason (another guiding principle in electoral matters, such as the democratic principle or effectiveness of suffrage), the principle of parity will be the measure to guarantee substantive equality between genders, in both candidacies and the membership of the representative bodies.

b) Preference for the female gender in the formation of the candidate lists for deputies and the slates for the assignment of town council members by the principle of proportional representation

- p. 168 The rules in question establish a differentiation between the candidates depending on their gender, with respect to the determination of the place on the candidate formulas list by the principle of relative majority, as well as the candidacies for town council of proportional representation contained on the slates.
- p. 168-169 When article 24 of the CEPCEC says that the order of priority of the candidate formulas lists will be for the odd numbers of female gender, and for the even numbers of male gender, or in 40 section IV second paragraph that in the event that the number of town council seats assigned by this principle is uneven, the majority must correspond to the female gender and must be headed by a person of that gender, it is establishing a distinction based on the gender of the candidates.
- p. 169 In this regard, the standard for reviewing the constitutionality of these rules should be, in principle, the prohibition on making distinctions based on any of the suspect categories contained in the non-discrimination clause of the last paragraph of article one of the Constitution. However, sometimes it is not only permitted to make distinctions based on those criteria, it is constitutionally required.
- p. 169-170 This Court has stated that the strict analysis of the legislative classifications based on the criteria expressly enumerated in the first article must be applied with full awareness of the purposes that the legislator pursues through that explicit mention, since it is clear that its purpose is to protect persons or groups that have a history of disadvantage or victimization, such that according to article 1, the legislative classifications based on suspect categories should not be submitted to intense scrutiny when they are intended to fight against permanent and structural causes of disadvantage for certain groups. In effect, there are certain pro-equality measures that would be difficult to implement or apply without making use of the identification criteria of the groups traditionally discriminated against, whose opportunities the law tries to increase. It would be absurd in these cases for the constitutional judge to contemplate such measures with special suspicion.
- p. 170 Similarly, this Court has stated that in cases where the legislator includes groups historically discriminated against in the sphere of the rule, whether expanding or equalizing

their rights (and it does not involve their restriction), this is a relevant distinction that must be analyzed under the principle of reasonableness. This reasonableness analysis will consist of the verification of whether or not the legislative measure subverts constitutionally protected legal interests. This is the case of the provisions analyzed here.

p. 170-171 In the statement of purpose for the reform of article 24, the Chiapas legislator reasoned that it was necessary to introduce a gender quota to promote and ensure greater participation of women in the bodies of popular representation and of the municipal government. For its part, it was explained that it was essential to correct the referenced omission in order to grant women the opportunity to access membership in the town councils under the principle of proportional representation.

p. 171 This shows that the purpose of the measure is to comply with the principle of equality between men and women in the political arena, but primarily, this measure addresses the principle of gender parity of the candidacies for federal and local legislators established in article 41 of the Constitution.

p. 172 Thus, the local legislator pursues an end not only constitutionally valid but constitutionally required, which is the principle of parity, and the justification for the introduction of this specific measure is found in the structural discrimination that women have suffered in electoral politics.

p. 174 Based on the arguments put forth here, this Court considers that the challenged measures contained in articles 24, section II, and 40, section IV, second paragraph, are reasonable since they comply with an end not only constitutionally valid but constitutionally required and they do not involve an excessive violation of the rights of the male gender.

The affirmative action consisting of preferring women in cases of uneven membership does not constitute an arbitrary treatment since it is constitutionally justified having a purpose in accordance with the principles of a democratic State under the rule of law and it is adequate for achieving that end.

c) Exception to the obligation to observe parity requirements, in the case of candidacies obtained through internal selection processes of parties

p. 176 The portion of the rule challenged establishes that, of all the requests for registration for proprietary candidates for deputies of the relative majority for the Congress of the State, as well as for members of the Town Councils, that the political parties present, the common coalitions and candidacies before the Institute must be composed with parity between the two genders and that when the number of candidacies is uneven, the majority must be female. Candidacies that are a result of a democratic election process, according to the bylaws of each party, are exempt from the above.

In the judgment of this Court, such exception is contrary to the constitutional mandate contained in the second paragraph of section I of article 41.

Permitting that the candidacies that result from internal election processes not observe the principle of parity, would practically speaking make the requirement of parity meaningless, by conditioning it to democratic processes in which the inertias that historically favor candidates of the male gender can prevail.

p. 176-177 The above implies the risk that the number of women that obtain candidacies would be very low, or non-existent, affecting the participation of that gender in democratic processes and harming their possibility of participating in public representation bodies, which violates article 41 of the Constitution requiring that the political parties guarantee parity in the candidacies for legislatures, as well as obligations derived from international human rights norms applicable through article 1 of the Constitution.

p. 177 Therefore, the invalidity of the sixth paragraph of article 234 of the CEPCEC must be declared in the portion that exempts the candidacies that result from an election process according to the bylaws of each party.

d) Failure to establish gender rules for the composition of the town councils

p. 188 It is indicated that there is a partial omission in the Chiapas Constitution with respect to the obligation to establish gender rules, since they are only established with respect to the

deputies and not for the members of the town councils, when constitutionally and conventionally there must be equity of gender in all the pluri-personal positions. This argument is unfounded.

p.189 The partial omission indicated does not exist, because while the Chiapas Constitution does not establish the parity rules in question, the secondary legislation does, without there being a constitutional mandate that they be contemplated in the local constitutions; in other words, the Federal Constitution does not establish that parity matters must be addressed in the local constitution.

II. Restriction on the freedom of expression with the duty to refrain from denigrating institutions, other parties or persons

p. 196-197 The PT indicates that article 69, section XXIII of the CEPCEC violates articles 1, 6, 7 and 41, Base III, Part C of the Federal Constitution and 19, paragraph 3, subsection a) of the International Covenant on Civil and Political Rights, 11 and 13, paragraph 1, subsection a), of the American Convention on Human Rights. This is because it strongly prohibits any expression that denigrates institutions, given that the Federal Constitution expressly establishes the restrictions permitted on the freedom of expression, which do not prohibit or sanction the expressions that denigrate institutions.

p. 199-200 This concept of invalidity has grounds. The starting point for the analysis of the provision challenged is the modification that the legislator made to article 41, base III, part C of the General Constitution through the reform of February 10, 2014. From the reform, the article only protects people from political or electoral propaganda that slander them, but not institutions from expressions that may denigrate them.

p. 200 The question is, if under this premise, the legislative branch of the State of Chiapas could maintain the obligation that the political parties must refrain in their political or electoral propaganda from any expression that denigrates institutions and the parties, whose violation is sanctioned with measures that may go from a public warning to the reduction of public financing and even the cancellation of the registration of the political party.

- p. 201 The freedom of expression of the political parties has special relevance since through its exercise they provide information to citizens so they can participate in the public debate, which is to say democratic life. In fact, through the information they provide they contribute to ensuring that the vote is free and that citizens have the information necessary to evaluate their representatives.
- p. 201-203 The importance of protecting the freedom of expression of the political parties has already been recognized by this Court in the *Acción de Inconstitucionalidad* 61/2008 and in the *Acción de Inconstitucionalidad* 45/2006. Those precedents emphasize the fact that the exercise of the freedom of expression has not only an individual dimension but also a social one, since it also implies a collective right to receive any information and hear the expression of the thoughts of others and points to the need for the restrictive measures to be submitted to a strict proportionality test.
- p. 203 Furthermore, it must be kept in mind that according to the precedent of the Inter-American Court of Human Rights, the freedom of expression protects not only the information or ideas that are favorably received or considered as inoffensive or indifferent, but also those that clash with, disturb or offend the State or a part of the population.
- p. 203-204 Thus, the obligation imposed by article 69, section XXIII on the political parties consisting of refraining from disseminating in their political or electoral propaganda any expression that denigrates institutions and the parties, constitutes a restriction on the freedom of expression of the political parties. This Court considers that the obligation imposed on the political parties does not pass a strict scrutiny test and, therefore, is unconstitutional.
- p. 204 The Constitution does not have an imperative end that justifies excluding from political and electoral propaganda the expressions that denigrate institutions and political parties. First because as already stated, such restriction was eliminated through the constitutional reform of February 10, 2014 to article 41, base I, part C. Such elimination of the constitutional text may even be interpreted to mean that the limitation of the political discourse that denigrates institutions is no longer a valid restriction of the freedom of expression.

In addition, the measure has no place within article 6 of the Constitution, since the political or electoral propaganda that denigrates institutions or political parties does not attack *per se* morals, privacy or the rights of others, provoke any crime, or disturb the peace.

p. 205 To be able to determine that this is the case, it is necessary to analyze specific political or electoral propaganda; otherwise, it would be like censoring in advance. In the case analyzed here, that conclusion cannot be reached in advance.

p. 206 This conclusion is reinforced because the obligation imposed by article 69, section XXIII protects institutions and the political parties, which given their public nature must have a greater tolerance threshold than any private individual.

This is also the case because the purpose of the restriction is not to promote the participation of the people in democratic life or the exercise of the free and informed vote, but the contrary. On the one hand, it limits the information that the political parties can provide to the citizens on matters of public interest, which information is essential for public debate and for citizens to exercise their vote freely. In addition, by restricting the expression of the political parties, it limits the public debate, since this requires that the political parties freely choose the most effective form to transmit their message and question the existing order, for which they may consider it necessary to use expressions that denigrate institutions. Furthermore, the consequence of the violation is the imposition of the established sanctions, which leads to an inhibitory effect for the expression of the political parties.

p. 207-208 Therefore, since it is a measure that restricts the freedom of expression of the political parties that does not overcome the first degree of strict scrutiny, it must be declared unconstitutional, with no need to carry out the other steps of the proportionality test.

III. Limitation on the right to vote from abroad in the elections for town councils

p. 234 The PT indicates that article 35 Bis of the CEPCEC is contrary to articles 1 and 35, section I, of the Federal Constitution, since such rule unduly limits and restricts the right of citizens

of Chiapas abroad to vote in the town council elections, because it only authorizes them to vote in the elections for Governor and for the formula of migrant Deputies.

p. 235 According to the criteria of this Court, the rights to vote and be voted for are fundamental in nature, and they enjoy constitutional protection through the control processes established in the Constitution, but they are not absolute; rather they must be subject to the limits and terms established in the electoral laws issued by the corresponding legislature, according to the principles protected in the Constitution.

Article 116, section IV, of the Federal Constitution establishes that, according to the rules established therein, and in the general laws on the matter, the electoral legislation of the states must guarantee, among other aspects, that the elections of the governors, members of the local legislatures, and members of the city councils be carried out through universal, free, secret and direct suffrage.

p. 238 The challenged provision establishes that the representation of Chiapas citizens residing abroad must be guaranteed, who may vote for the candidates that the political parties and coalitions put forward in the elections for Governor of the State and the formula of migrant Deputies.

The states are free to regulate the vote of their citizens abroad, provided they do not violate what is established in the Electoral Institutions and Procedures Law, and therefore the states may establish the voting model abroad that best fits their needs and interests. For this reason, it is not unconstitutional that the rule establishes the possibility that those who are in this situation do not vote for members of town councils.

Furthermore, it is a reasonable measure given that a decisive element in the election of town councils is that their members represent the interests of the community that elects them, as the first level of government with which the community interacts, which justifies that they be voted for only by those who immediately, within the specific community, want certain persons to work for their specific and actual interests.

p. 238-239 Under this logic, it is reasonable that only those who reside regularly in the municipality vote for the members of the corresponding town council and, under this logic, there is no

vice of unconstitutionality in the challenged provision that prevent residents living abroad from participating in the respective voting processes.

DECISION

p. 241-243 The validity of articles 24, 35 Bis and 40, section IV of the CEPCEC is recognized; and the invalidity is declared of articles 69, sections XI and XXIII and 234, sixth paragraph. In addition, the omission in the Chiapas Constitution relative to the establishment of gender rules is unfounded.