

# TRANSPARENCY IN THE JUDICIAL PHASE OF THE 2006 ELECTIONS

**Alfredo Orellana Moyao**

*Citizen access to information appears to end exactly when the Electoral Tribunal's activity begins.*

## Introduction

This essay attempts to answer a single question: *how transparent was the Mexican Federal Electoral Tribunal during the 2006 federal elections, especially in regard to the presidential contest?*

Although there were very few observers during the election itself, after July 2nd, when it became apparent how close the vote was, citizen interest increased considerably. Unfortunately, the General Council of the Federal Electoral Institute (IFE in Spanish) refused to give out the results of its much-heralded quick-count method, and moreover asked the political parties and the media not to publicize the outcome of their own poll samples. Solid statistical tools were at hand, but they were not made available to voters in a timely way. As a result, in spite of being in the 21st century, rumor and speculation predominated over hard facts and numbers in the aftermath of the election.

When the numbers coming in from the Preliminary Electoral Results Program, (PREP in Spanish) began to tilt away from the opposition, and to suggest a victory for the governing party—by barely half a percentage point—the spotlight turned on the Federal Electoral Tribunal: *could the ballot results be overturned through litigation? Could litigation adjust that mathematical sliver?* Citizens wanted to know, to research, to access; they wanted to be present for and to study each official decision in this unprecedented situation. But, institutional doors were closed against them.

The Federal Electoral Tribunal reported that 375 legal challenges were registered in relation to the presidential vote (10 were discarded as untimely, such that the Tribunal reported a final total of 365 on the internet), all of them lodged, basically, by only two

<sup>1</sup> The PREP is a system that reports electoral results as they come into the seats of electoral districts. It is reliable and reports data directly from the tabulation sheets of each poll. Its structure is not statistical, but simply additive. In 2006, for the first time, it was accessible on the internet and was broadcast continually via the national television networks.

parties.<sup>2</sup> Citizens, for their part, wanted to know what would happen with the votes they had cast. The official numbers were already showing a winner, albeit with a very slim margin, but he could not be declared as such until the Tribunal finished its deliberative work. The ultimate challenge, then, was this: how could the Federal Electoral Tribunal avoid becoming a black box, in which millions of votes would be fixed, via 375 judicial decisions that were formally independent and unconnected—regardless of whether the final result was to overturn the initial returns, or to confirm them?

### **The Undeniable Advances of 2006**

We should begin with a review of the positive aspects of the context in 2006, in order to give a balanced picture of the situation. In the first place, the Superior Court of the Electoral Tribunal had been functioning for a decade with the same judges. Their sessions in the central Tribunal had been made public and their approach and their precedents were well-known to interested parties. Moreover, the Tribunal's website provided reasonable access to its relevant legal opinions. In summary, the Tribunal was relatively well-known and information could be obtained about its work.

Secondly, as we moved into the new century, transparency had become a citizen's right in Mexico. A clear, resonant social consensus on that right had propelled lawmakers to develop a national public policy on it, and it was quickly taken up throughout the country. In 2006, the Electoral Tribunal already had a set of transparency regulations, which it had practically copied straight from the regulations issued by the Federal Supreme Court—about which more discussion will follow below.

Thirdly, the Federal Judicial System had launched its own cable television channel, which, though limited, did broaden public access to information about the Electoral Tribunal and its sessions.

Thus, by 2006 there had been important progress, which raised expectations considerably in regards to the degree of transparency of the institutions that would receive, count, and validate the votes that would determine who would hold public office.

---

<sup>2</sup> The two parties were the Partido Acción Nacional (National Action Party, or PAN) and the Coalición por el Bien de Todos (Coalition for the Good of All), which included the Partido de la Revolución Democrática (Party of the Democratic Revolution, or PRD), the Partido de Trabajo (Labor Party) and the Partido Convergencia (Convergence Party).

## The Unavoidable Limitations of 2006

We must also recognize the factors that limited transparency during the judicial phase of the elections:

**1. A structural deficit in the judicial system.** The Electoral Tribunal was made up of judges specialized in judicial and normative matters. They were as orthodox as many other judges, and their commitment to accountability was as scant as any other dictator of sentences, due to a structural defect in the Mexico's justice system more generally: judges are not to be rebuked; they are to be obeyed. Their legitimacy, as well as their legal and moral authority, is practically unquestioned as a matter of dogma. Clearly, Mexico needs a new outlook in its judicial system in order to democratize and mitigate this situation—to transform judicial work into a public service, subject to accountability just like any other state agency.

**2. Lack of protection of the public interest.** Essentially, the Electoral Tribunal copied its transparency regulations from the Federal Supreme Court, which not only demonstrates the lack of real interest and dedication that it invested in the project, but also created an underlying problem that actually worked to justify the Tribunal's opacity.

- a. The regulation of access to information in judicial institutions is naturally accompanied by a principle of confidentiality: citizens can only access information about final sentences that have already been issued, in order to protect the rights of those involved in an on-going legal process. This is a laudable principle when it pertains to individuals, since legal matters should be protected as private.
- b. However, in the 2006 challenge, which was a political-electoral matter, the cases hinged on the validity or nullification of citizen votes, not on the private interests of political parties. This was clearly a process that was operating in the public realm and was of general interest. At stake in the courts was citizen suffrage and the country's form of computing it; there was nothing in the case that merited confidentiality or any kind of related safeguard—in fact, it required precisely the opposite approach.
- c. When the Electoral Tribunal adopted the Supreme Court's criteria of transparency and confidentiality, it actually decreed that its operations would be opaque, not transparent; it would seem that as soon as citizens deposit their votes in the ballot box, they cede their rights over them. In this case, citizens were not taken into account even as affected bystanders.

These were the circumstances within which the Tribunal acted. It did not make a single institutional effort to notify citizens about the judicial processes that were pending in the cases of a number of specific polling places that had been called into question, nor did it even make a public announcement when its sentences finally eliminated those votes from the national totals. The electoral court challenges were conducted and concluded as though they were inheritance disputes among quarreling individuals, rather than controversies in the public domain.

**3. Prohibition of electoral observation.** The Electoral Tribunal ordered a formal recount in some districts, at a total of more than 10,000 polling places throughout the country. Some groups of observers expressed interest in being present during these judicial procedures, but the Superior Court of the Tribunal decided to explicitly deny them access, arguing that the citizen's right to observe vote counts could only be exercised in relation to the Federal Electoral Institute (or IFE in Spanish), not the Tribunal. It insisted that jurisdictional actions are of exclusive interest to the parties involved in litigation and not of "outside actors". Thus, each judicial official had the omnipotent and arbitrary power to grant or deny observers access to the recount, which was certainly one of the most important activities in Mexico's unprecedented 2006 post-electoral situation. Unfortunately, the Tribunal's Transparency Regulations were the basis for denying access to information instead of strengthening it.

**4. Zero accountability.** A number of individuals who belonged to the Citizens' Electoral Process Monitoring Committee requested information formally, in writing, from both the Tribunal and the two political parties that had registered legal challenges (the PAN and the Coalición por el Bien de Todos). Specifically, they asked for a database that would clearly show each one of the challenged poll booths, the reasons for each challenge, indication of the process of recount and/or nullification of votes from that booth, and any other relevant information. Neither of the parties even answered. The Tribunal's president, meanwhile, sent a letter indicating that all of the information the Committee had requested was under consideration by the Tribunal, and that any "relevant" information would be published on the internet.

It is also important to point out that the Tribunal's support staff's specialized legal skills turned out to be a weakness. Elections are about statistics and hard numbers; but of the almost 70 lawyers, who work in the Tribunal's Superior Court, as far as we know, none of them has any background or skills in statistics or informatics—much less the electoral judges themselves. The outcome is an institutional inability to satisfy the basic need for hard information.

Now, 2006 has come to a close and there is still no official list from the Tribunal— nor does it seem foreseeable that there will ever be one— showing each challenged voting booth, the bases for the claims, the result of the investigations, the adjusted vote count, and a variety of other electoral information issues. The 375 complaints generated hundreds of sentences and thousands of judicial recount documents that were posted over the internet in different formats (Word, PDF) without accompanying databases or mechanisms that would permit consolidation or comparison. In fact, many of the numbers and totals that the Tribunal posted on its website are not even internally consistent. Transparency demands an institutional commitment to generate information that is recognizably essential as the basis for public decision-making. Data does not constitute “information” unless it is arranged in a way that turns it into arguments and reasons.

Today, the fact of the matter is that we do not know which votes they counted and which ones they annulled. We do not know the reasons behind the Tribunal’s decisions, or those behind the parties’ charges. We do not know, ultimately, precisely how the electoral results were changed by those 375 cases. But, the worst part is, it would appear that no one has ever known, and that it is up to interested citizens to reconstruct what happened out of isolated data.

## Conclusions and Recommendations

Each social and political event generates lessons, and should, among other things, inspire procedural reforms in the future. Here are a few lines of thought that draw from this experience:

- a. The Electoral Tribunal is a legal body that should assume its role as part of a civic and political process to benefit the citizenry—and not just the citizens who belong to political parties. Its vision of the public interest and transparency should determine its center of gravity, and broaden citizens’ access to information, not limit it.
- b. Judicial activity in relation to elections should involve the generation of clear, useful information as a basic condition to move towards a greater degree of transparency. Simply publishing sentences does not explain either the results or the consequences of decisions, above all in matters involving electoral results.
- c. The creation of a judicial phase in electoral processes is unquestionably a democratic step forward. However, it cannot be kept separate, closed and different from the

rest of the electoral process. Observers must be guaranteed access to all activities related to voting, regardless of the agency in charge. Electoral information should be public and independent of the authority that generates it. When power changes hands, the process should be explained in a clear, accurate and timely way, and have the institutional backing of the authorities that participate in data production and review.

- d. Political parties should also be transparent in their legal proceedings and they should be held to specific obligations regarding access to their information, because they are citizen groups and it is in the public interest.