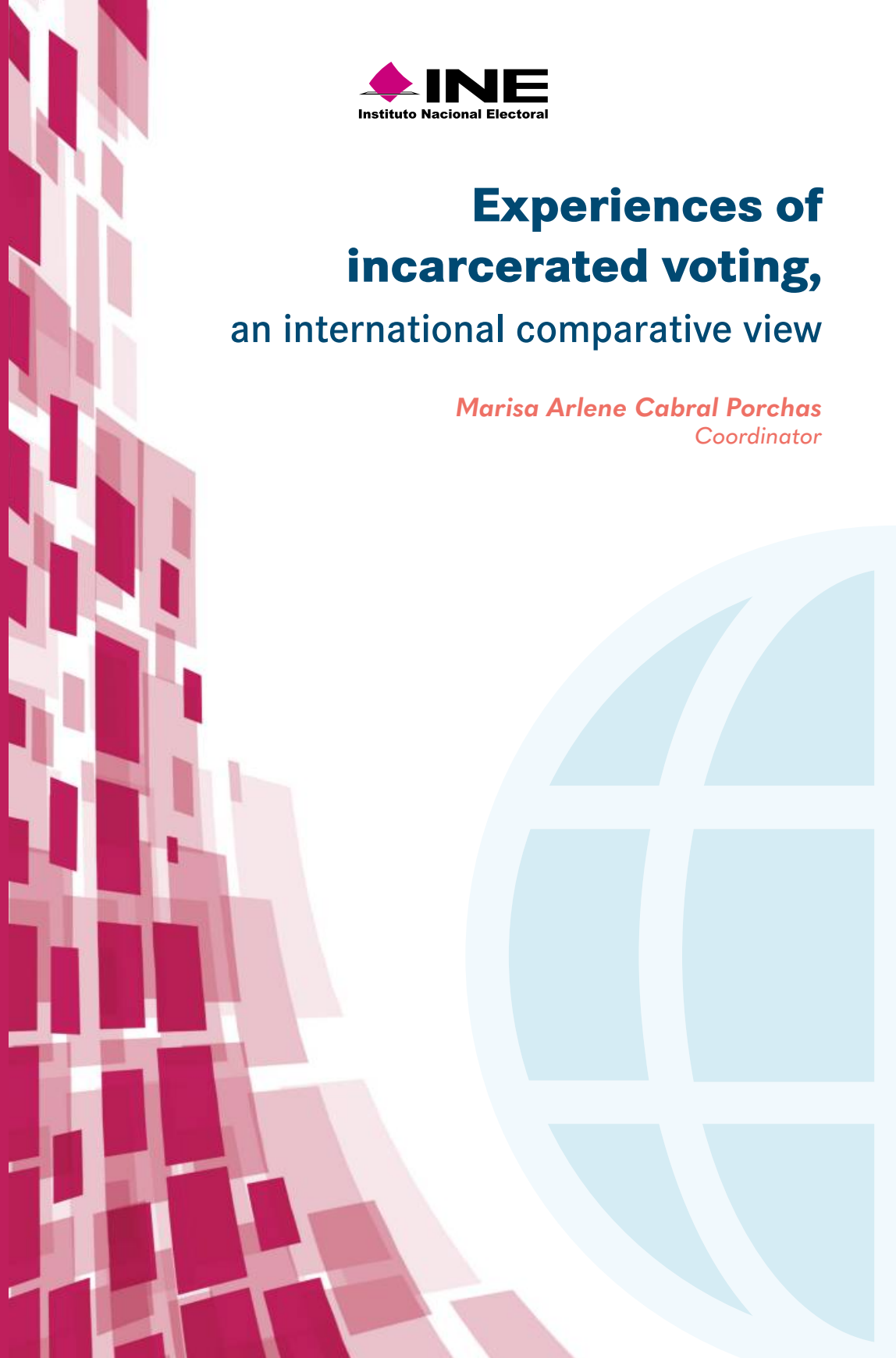


Experiences of incarcerated voting, an international comparative view

Marisa Arlene Cabral Porchas
Coordinator



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Table of contents

- 7 Foreword
- 11 Prologue
Marisa Arlene Cabral Porchas
- 15 The right to vote for persons deprived
of liberty in Argentina
Alberto R. Dalla Via
- 33 Incarcerated Voting in Canadian Federal Elections
Elections Canada
- 49 Implementation of the vote for persons deprived
of liberty in Costa Rica
Hugo Picado León
Ileana Aguilar Olivares
- 61 The vote of persons on remand in Mexico
Nohemí Vázquez Cervantes
- 83 In-prison voting in the Republic of Panama
Gilberto Estrada de Icaza
- 97 Comparative table of case studies
- 101 About the authors

Foreword

The enfranchisement that was initially reserved for certain sectors of the population has expanded over time to include excluded groups –women, members of the LGBTI+ community, indigenous and Afro-descendant populations.

Enfranchisement was initially reserved for certain sectors of the population. Over time, the excluded groups’ –women, members of the LGBTI+ community, indigenous and Afro-descendant populations– right to vote was recognised. This volume on *Experiences of incarcerated voting, an international comparative view*, addresses how some countries have eliminated the disenfranchisement enforced on those who are deprived of their liberty.

The regional and international human rights protection systems have had a direct and positive impact in the furtherance of the political rights of more sectors of the population. They have had a progressive development, and are considered to be an achievement of the individual to balance the State-citizenship relationship.

The authors of this work refer to various international legal instruments that have steered the advancement of the political rights of persons deprived of liberty, including the American Convention on Human Rights, that came into effect in 1978 and is part of the treaties of the Inter-American Human Rights System; the Inter-American Democratic Charter, which was adopted in 2001 and was furthered by the Organization of American States to advance democratic culture in the countries of the region; and, the International Covenant on Civil and Political Rights –in force since 1976–that defends these rights of the population in general.

These instruments have brought about several arguments in support of ensuring the right to vote for those deprived of their liberty. Upon the recognition of political rights as human rights, several countries have undertaken to revise their enfranchisement legislation in recent years to eliminate the restrictions imposed on certain sectors of society, including the incarcerated ones.

While the right to vote is a cornerstone of any democratic society, for it is how people express their will and participate in their country's political decision-making processes, elections promote the equality of citizens by allowing their intervention in the selection of their authorities. Conversely, laws that prevent the enfranchisement of those who are deprived of liberty tend to accentuate inequality.

The advocates of the enfranchisement of incarcerated persons emphasise that the issue goes beyond legal considerations, as it is raised as part of the ethical debate on their fundamental rights and their rehabilitation.

The reforms being furthered seek to guarantee that incarcerated voters can vote like any other citizen and that the ideal voting protocols to increase their participation are put in place.

The book *Experiences of incarcerated voting, an international comparative view* addresses the constitutional and legal regulations of Argentina, Canada, Costa Rica, Mexico and Panama, where those who are in this situation can currently exercise their right to vote.

The authors recount how have incarcerated persons come to take part in their countries' political life through voting. They point out the reforms made to the legal frameworks and how has incarcerated voting been put into practice in prisons. They also highlight the electoral authorities' commitment in preparing materials and

implementing campaigns that encourage that those who are deprived of their liberty can cast their vote in an informed manner.

Other issues discussed are the integration of polling stations, the possibility of observers watching over the election, how are the votes counted, and the existence of means of challenge. That is, the procedures to ensure fair and transparent processes, as well as the due respect for the secrecy of the vote. They have also included some data on the turnout of incarcerated voters.

The volumes that make up the *Institutional Works* collection review issues inherent to the duties of the National Electoral Institute, and *E Experiences of incarcerated voting, an international comparative view* is no exception, as it examines the legislation, advancements and challenges around the enfranchisement of incarcerated voters. The relevance of its publication lies in the fact that it is a means of encouraging its readers to reflect on the positive impact that derestricting enfranchisement has on society.

National Electoral Institute

Prologue

The vote of persons in pre-trial detention is part of the international trend to guarantee that ever more people can fully and effectively exercise their rights, with a view to guaranteeing them for the population at large. Since voting is considered the key to access other civil and political rights, this is particularly relevant. Not only is denying it to those who, despite going through a judicial process, retain their rights a double sanction, but it contributes to perpetuating structural inequalities in society.

Since one essential feature of universal suffrage is, precisely, that all the members of a society are on the same level, its restriction must only be allowed in abundance with fully founded and motivated reasons.

Therefore, guaranteeing that prisoners on remand can vote is a good thing. For decades, this issue was neither included in the electoral reform agenda nor publicly debated. The prisoners' inability to go to the polling stations was a *de facto* obstacle that was deemed natural, which reveals a set of prejudices and stigmatizations that violate the principle of presumption of innocence and are incompatible with a society that assumes itself to be democratic.

It was only in 2018 —due to two Tsotsil indigenous citizens in pre-trial detention demanding the exercise of their political rights— that the punitive paradigm changed in Mexico. The jurisdictional analysis of the case revealed that denying their right to participate politically led to, or enhanced, other undesired effects, such as the government's neglect and made it impossible to make their

causes visible. The claimants had been held for over 10 years without conviction.

The Court's ruling—referred to in the chapter on Mexico—ordered INE to progressively guarantee the right to vote of the prisoners on remand. This was a huge challenge that required all of the Institute's capacities and accumulated experience. In 2021, INE's first ever pilot plan in some federal correctional facilities was successfully carried out, so, in 2024, it was possible to enfranchise prisoners of remand throughout the country. Thus, the universality of the vote gained more space.

As previously mentioned, these efforts are spreading in the Americas. In recent years, we have witnessed notable changes in electoral legislations to remove restrictions on the participation of still-excluded populations. Analysing those experiences and learning from them is an ever-enriching experience. Hence this comparative analysis that delves into the constitutional and legal regulations of five countries in the Americas: Argentina, Canada, Costa Rica, Mexico and Panama, where the enfranchisement of prisoners is already a reality; however, it is important to emphasise that each of these countries has followed their own path to achieve this.

The analysis goes beyond the normative sphere, for it also addresses the jurisprudential evolution that has, in some cases, triggered the implemented changes. Thus, key court rulings are highlighted because they have forced different legal systems to regulate the vote of pre-trial prisoners.

The text also addresses the challenges for providing voting information within correctional facilities, which is essential to ensure that inmates understand the process and exercise their right to vote in a conscious and informed manner. The debate on the need to review the current legislation to advance in the implementation

of various voting mechanisms for incarcerated persons, and thus guarantee greater participation of this especially vulnerable group, is also mentioned.

The implementation of these changes has been complex and conscientious. Specific voting methods were established for incarcerated voters, including the use of special ballots within correctional facilities and, in countries where house arrest is an option, postal voting. Not only do these methods guarantee they can vote, but they are also meant to ensure their decision's secrecy and avoid coercion.

The make-up of polling stations within correctional facilities and the provision of electoral materials adapted to this particular situation have become cornerstones that enable those who –unavoidably– find themselves incapable of attending to their corresponding polling stations, to vote. Voting operations, voter registration and vote counting must be adapted to guarantee a fair and transparent process.

This work details the backgrounds, regulations, stakeholders and applicable protocols for persons deprived of liberty throughout the electoral processes of the five aforementioned countries. It is a testament to how a country can evolve to guarantee equal rights to all its citizens.

The electoral participation of inmates is a milestone in the ongoing pursuit of a more inclusive and fairer democracy. This change, while broadening civic participation, reaffirms the fundamental principles of justice and human rights in the democratic fabric by laying the foundations for a more equal and representative society.

It must be noted that the vote of incarcerated persons transcends legal considerations. It is an ethical and social debate on the

Prologue

rehabilitation, citizen participation and guarantee of fundamental rights of those who are deprived of liberty. It is an ongoing discussion in the region that seeks a balance between criminal justice and the exercise of political and electoral rights and reflects on the impact that fulfilling this civic right and duty can have on the inmates' social reintegration. This book is meant to contribute to that debate.

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The right to vote for persons deprived of liberty in Argentina

Alberto R. Dalla Via

I. Introduction

Political rights are a category of rights that, from a classical point of view, have been associated with the condition of citizenship. Hence, their ownership and exercise were reserved for members of the political community who met certain conditions. However, from the protection afforded by international human rights (HR) instruments, they have come to be considered as rights of political participation that go beyond being subjective or individual, because they are substantially based on a right that peoples and individuals have to democracy.

Thus, political rights are human rights of essential importance to the functioning of the democratic system since they, along with other fundamental rights –such as freedoms of expression, assembly and association– make the "democratic game" possible, and have even come to be considered as the "human right to democracy" (Dalla Via, 2012, p. 5).

Article 23 of the American Convention on Human Rights, or Pact of San José (Costa Rica), provides:

1. Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot

that guarantees the free expression of the will of the voters; [...] 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

In this context, it is worth noting that the Convention has given the aforementioned importance to political rights by prohibiting their suspension and the suspension of the judicial guarantees indispensable for their protection, and the Inter-American Court of Human Rights (IACHR) emphasised it when it asserted that "[the system of t]he Convention itself expressly recognizes political rights (Art. 23), which are included among those rights that cannot be suspended under Article 27[, which] is indicative of their importance in the system" (1986, pt. 34). This criterion was reiterated in the cases of *Yatama v. Nicaragua* (2005, pt. 191) and *Castañeda Gutman v. México* (2008, pt. 92).

Thus, in the international human rights protection system, political participation is the political right par excellence, since it recognises –and protects– the right and duty of citizens to participate in the political life of their country (García Roca and Dalla Via, 2013). In fact, the Inter-American Commission on Human Rights (IACHR) has said that Article 23 also refers to political rights as opportunities, so States must remove obstacles to create acceptable conditions and mechanisms to enable the holders of such rights to exercise them effectively (2009, pt. 20). This is a progressive conception of fundamental rights that require the State to be more than a mere neutral or abstentionist guarantor, for it must actively guarantee political participation.

In this sense, political rights promote the strengthening of democracy and political pluralism, since –as Castañeda Gutman suggests– "[their] effective exercise [...] is an end in itself and

also a fundamental means that democratic societies possess to guarantee the other human rights established in the Convention" (2008, pt. 143), since "[t]he right to vote is an essential element for the existence of democracy and one of the ways in which citizens exercise the right to political participation. This right implies that the citizens may freely elect those who will represent them, in conditions of equality" (Inter-American Court of Human Rights, 2005, pt. 198).

Now, based on the above, and on the understanding that the political-democratic regime supposes the government of the people as a whole and not of a specific group, it is clear that governmental representation must reflect that global political community as faithfully as possible, favouring its active participation. Hence, the problem has always arisen from the electoral incorporation of the masses and the recognition of their legitimacy to exercise the right to vote; that is, to decide the destiny of the democratic regime.

In fact, it cannot be ignored that we are currently witnessing a profuse development of the right to political participation, which presupposes "a broad concept of what constitutes representative democracy [that] rests upon the sovereignty of the people. The functions through which power is exercised are performed by individuals chosen in free and authentic elections" (IACHR, 2002, pt. 11) through the political-electoral right which—in the words of Alberdi (1920, p. 9)—is the most fundamental of freedoms.

To strengthen this idea, we will address the right to vote of persons deprived from liberty in the Argentine experience, in the light of the Inter-American Human Rights System.

II. The right to vote in Argentina. Constitutional and legal regulations

In the last reform of the Constitution of the Argentine Nation (National Constitution) of 1994, Article 37 was incorporated to "constitutionalise" universal, equal, secret and mandatory suffrage, thus reflecting the tradition in electoral matters that has its beginnings in the "Sáenz Peña Law" No. 8.871 of 1912. The Article states:

This Constitution guarantees full enjoyment of political rights, in accordance with the principle of popular sovereignty and with the laws dictated pursuant thereto. Suffrage is universal, equal, secret and mandatory. True equality of opportunity between men and women in standing for elected and party offices shall be guaranteed through positive actions in the regulation of political parties and in the electoral system.

In addition, Article 75, clause 22, incorporates various human rights treaties with constitutional hierarchy into our domestic positive law that reinforce the constitutional recognition of the right to vote. In the same vein, Article 25 (b) of the International Covenant on Civil and Political Rights provides:

Every citizen shall have the right and opportunity, without any of the distinctions referred to in article 2 and without unreasonable restrictions: [...] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

On the other hand, among the infra-constitutional legislative framework on the matter in our country is the National Electoral Code (Law No. 19.945) and its amending regulations.

Thus, the description above demonstrates the eminent place that political participation rights have in the articulation of our representative democracy, the essence of which lies in the right of citizens to participate in public affairs and freely elect their rulers. In this way, an institutional tradition wielded by the first inspirers of the National Constitution —among whom we highlight Esteban Echeverría, who found all democratic systems were rooted in suffrage— is collected.

III. Jurisprudential and legislative evolution of the enfranchisement of persons on remand in Argentina

In our country, the enfranchisement of persons on remand arises in a praetorian manner. Thus, the right to vote of detainees in pre-trial detention and not yet convicted has been admitted, as declared by the National Electoral Chamber (CNE) in the "Mignone" case (Ruling CNE 2807/00), promoted by the Center for Legal and Social Studies (CELS), a non-governmental organization (NGO) specialised in the defence of human rights that filed a collective writ of amparo on behalf of persons detained in different prisons to raise the "unconstitutionality" of Article 3 of the National Electoral Code (CEN) for excluding from the electoral roll those in that condition, that is, detainees with ongoing criminal proceedings.

The basis invoked in the writ of amparo was Article 23 of the Pact of San José and Article 25 of the United Nations Covenant on Civil Rights, given that both instruments establish that one of the reasons for disenfranchising persons is being convicted by a competent judge (García Roca and Dalla Via, 2013).

The ruling of the Electoral Chamber declaring the unconstitutionality of Article 3 of the National Electoral Code was later

confirmed by the Supreme Court of Argentina (CSJN), and granted the Legislative and Executive Branches 180 days to regulate a voting mechanism for persons on remand in federal and provincial correctional facilities throughout the country.

In turn, in the Zárate case of 2003, as the Electoral Chamber ruled again on the issue, it emphasised that

[with] the disenfranchisement of citizens who are in this procedural condition, [which] amounts to breaching the principle of [presumption of] innocence that is inherent to Article 18 of the National Constitution and expressly provided for in Article 8, paragraph 2, of the American Convention on Human Rights and Article 14, paragraph 2 of the International Covenant on Civil and Political Rights, arbitrary discrimination was carried out (Ruling CNE 3142/03).

By virtue of this jurisprudence, Act No. 25.858 and its regulatory decrees Nos. 1291/06 and 295/09 were enacted in 2003 to enfranchise remand prisoners. Currently, since these prisoners have the right –but not the obligation– to vote (voluntary suffrage), a special electoral roll for prison polling stations is put together, and it is the Chamber who counts their votes at its headquarters. As for the voting system, instead of using several paper ballots per category, as in the general polling stations, a single ballot is provided.

IV. The enfranchisement of convicted persons: current situation

The doctrinal debate and jurisprudential advancements in our country were later limited to addressing the issue of the right to vote of convicted individuals. Such exclusion, which is still dominant in the legal sphere, has been strongly challenged in recent

years, and has raised questions in the orbit of the federal justice system and led to pronouncements on the matter by the National Electoral Chamber and the Supreme Court of Argentina.

Although several local judgments on the issue had been previously handed down –being noteworthy the 2013 ruling of the Superior Court of Justice of the Autonomous City of Buenos Aires (CABA)– since the highest national authority in the matter is the National Electoral Chamber (cf. Arts. 5 and 6, Law 19.108), its rulings are considered guiding principles for the electoral behaviour, thereby exercising a cassation function.

In the aforementioned judgment, the Buenos Aires Court –by majority, with Dr. Casás’ dissent– declared the article of the National Electoral Code that restricts the vote of convicted citizens through their exclusion from the registry unconstitutional, mostly because it considered there is no legitimate public interest in disenfranchising a group of people based on their social status and on account of the universality of suffrage established in the Constitutions of the country and of the City of Buenos Aires.

In this context, it was said that legislators cannot regulate the right to vote on the basis of differentiating between persons, otherwise, it would be tantamount to a revision of the will of the Constituent Assembly, which deemed everyone to be equal. It was also held that, since these are fundamental human rights, the interpretative rule should aim at the least possible restriction. Finally, regarding Article 23 of the American Convention on Human Rights, it was stated that it does not authorise limiting the scope of or imposing restrictions on rights enshrined in other instruments of equal rank or in the National Constitution itself. Upon the Supreme Court of Argentina's rejection of the City's government appeal, the decision became final.

Later, a federal case on the same issue was submitted to the National Electoral Chamber so that convicted persons could vote to elect authorities in national elections. Therefore, the Court was only asked to elucidate whether the Articles 12 and 19, clause 2, of the National Criminal Code and Article 3, clauses e), f) and g), which excludes from the electoral roll:

(e) Persons convicted of intentional offences to imprisonment and, by an enforceable judgment, for the term of the sentence; (f) Persons convicted of offences under the national and provincial laws on prohibited games, for a term of three years; in the case of recidivism, six; (g) Those sanctioned for the offence of qualified desertion, for the double term of the duration of the sanction.

For that purpose, it analysed the fundamental rights at stake (to political participation, equality, dignity, freedom of expression, security, among others), and whether it understood them to be effectively breached in light of our National Constitution—of humanist content— and of the Inter-American System for the Protection of Human Rights, through its own control of constitutionality and conventionality.

As this was being debated and to provide the appropriate legislative treatment, several draft laws have been submitted over the years to the Chamber of Deputies of the Nation (files 0169-D-2014; 8034-D-2012; 0992-D-2012 and 6153-D-2010) proposing the repeal of the Electoral Code's legal provisions at issue.

Hence, they also propose to repeal Article 12 of the Criminal Code, which establishes—as far as is relevant here—that "confinement and imprisonment for more than three years entail absolute disqualification throughout the sentence, which may last up to three more years, if the court so decides, in accordance with the nature of the crime", and Article 19, clause 2, of the same body of

laws that complements the aforementioned provision and dictates that absolute disqualification entails disenfranchisement.

This is so because the lawful deprivation of the political rights of those who serve sentences of over three years is at issue. It is an accessory penalty to the deprivation of liberty, and could, therefore, be considered unconstitutional as unreasonable, since there is no direct relationship between the deprivation of liberty itself and the incarcerated persons' loss of political rights while under an imprisonment regime whose objective is the resocialisation of the convicts.

The loss of political rights as an autonomous sanction is not at question here, since it may well result from the application of a sentence handed down in a judicial venue—for example, for the commission of electoral offences— or as a particular sanction, which also exists in comparative law. However, the suspension of the right to vote as an accessory penalty to any custodial sentence of over three years would be unconstitutional.

It should be noted that there is an interdiction known as the "civil incapacity of convicted persons" in Argentine law—also in Article 12, of the Criminal Code— that establishes the incapacity of persons sentenced to incarceration for more than three years to exercise parental authority, administer, and dispose of their property for the entire duration of the sentence, so the guardianship regime provided for in the Civil Code for the incapacitated is applicable to them. This is a repressive measure that is part of the penalty, and it is declared lawful (*ipso jure*) by the judge when sentencing, for the duration of the conviction.

Differentiating persons due to their situation goes against the current conceptions of human rights enshrined in international declarations. Moreover, contemporary criminal law seeks to combat crime by applying penalties that tend to re-educate and

rehabilitate individuals for social life, rather than marginalise them from it.

At present, there is no justification for maintaining repressive accessory penalties that are not part of a conviction. In view of this circumstance, Sebastián Soler proposed to abolish the civil incapacity of convicted persons in a 1960 Draft Penal Code, on the grounds that the institute had yet to historically detach itself from the criminal indignities and infamies from which it came, and that a "vestige of the idea of civic indignity" (Soler, 2000, p. 453) remained.

In the past, such indignities went as far as *civil death*, which was a legal fiction whereby living persons were equated to dead persons, denying them the enjoyment or exercise of almost all civil and political rights. It has been defined as "the state of a person who, despite being alive, is refuted dead in the eyes of society as to most of his rights" (Baudry Lacantinerie as quoted in Dalla Via, 1986, p. 780).

The automatic deprivation of political rights refers to these remote antecedents, which is why such extremes must be taken into account by the Honourable Congress of the Nation when reviewing the substantive legislation.

In fact, the National Electoral Chamber, on 24 May 2016, ruled the unconstitutionality of the legal provisions questioned –Art. 3, clauses e), f) and g), National Electoral Code; and Articles 12 and 19 of the Penal Code of the Nation– in the case of the National Penitentiary Prosecutor's Office (File No. CNE 3451/2014/CA1), and requested the National Congress to review the regulations in force on the enfranchisement of convicted persons (pt. 2) as soon as possible, since it would only be possible to include the affected persons in the electoral roll once the Legislative Branch –in the

exercise of its own and exclusive powers— enacted an appropriate law.

This criterion was later confirmed by the Supreme Court of Argentina, in the Orazi case (rulings 345:50) of February 2022, when it upheld a decision of the National Electoral Chamber and expressly adjudged that any convicted person who demands to be enfranchised, can also request that the sentence be enforced based on the passage of time in which the Congress of the Nation did not pass any of the draft laws on the implementation of the right to vote of convicted persons, as required by the various judicial bodies.

In order to comply with the provisions of that High Court, and to correct the disparity of interpretation criteria of the federal judges with electoral jurisdiction in each district, the National Electoral Chamber ordered that, in each specific case submitted to the electoral justice, the magistrates of the jurisdiction must arbitrate the means that allow the citizens whose situation falls within the unconstitutionality declared in the precedent "Penitentiary Prosecutor's Office" to vote. That is, they are to incorporate them into the electoral roll. Conversely—as the sentence that also urges the Congress to adapt related laws clarifies— should the disqualification not be a result of a generic and automatic application due to the imposition of a criminal conviction, but be one specially provided, it will stand (File CNE No. 669/2022/1/CA1, judgment of 6 December 2022).

Finally, as stated in the above-mentioned judgment on equality for the full enjoyment of political rights, a distinction must be made between active suffrage (to vote) and passive suffrage (to be elected). Regarding the latter, there is an important doctrine that has pointed out the limitations that can be set on the right to be elected with respect to those that can be tolerated by the right

to choose (Bidart Campos, 2001; Aquino Britos, 2001, among others). In addition to the difficulties in the legal-political consequences of electing a candidate who is incarcerated (CNE Ruling 4195/09), if they were elected and it was decided to release them in advance to hold office, this would serve as an efficient means of circumventing the dictates of the jurisdiction by appealing to the simple means of submitting their proclaimed innocence to plebiscite (Midón, 2002, p. 66).

Under Argentine law, Act No. 26.571 provides for the exclusion of candidates who have been indicted for crimes against humanity, even if there is no criminal conviction or, if there were, it was not enforceable.

V. Final remarks

Electoral processes play a fundamental role in the democratic system. It is through elections that people exercise their sovereignty by directly or indirectly constituting the nation's authorities.

As previously stated, Article 23.1 of the American Convention on Human Rights imposes the States with the positive obligation of designing an electoral system where political rights are exercised through "genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the electors." In this context, it has been emphasised that one of the fundamental aspects of conducting "free and democratic elections" is making sure that a series of practices that guarantee equal opportunities and electoral fairness take place.

In this regard, this contribution has referred to the guidelines established in the Inter-American System for the Protection of

Human Rights for equal opportunities in electoral contests —so as to effect the right to political participation— focusing on the enfranchisement of persons deprived of liberty.

Therefore, it is always good and appropriate to recall the classic principles in these cases, like Article XVI of the French Declaration of Human and Civic Rights, whereby a State in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.

The starting point of the debate on the enfranchisement of convicted persons —that is yet to be settled by law— is the protection of fundamental principles of the Constitutional Rule of Law, such as universal suffrage (Art. 37, National Constitution), equality (Art. 16, National Constitution), and the dignity of convicted persons awaiting their rehabilitation (Art. 18, National Constitution), as well as their ability to exercise their freedom of expression —fully and without hindrance— by effectively participating in the political debate through their vote.

Thereon, the Supreme Court has declared that any system that maintains restricted suffrage (that keeps the people from accessing power), instead of aiming at the universality of suffrage, denies the equality of citizens, the latter's function of making the government of the people —or of one of their majorities— possible, and effectively hinders the likelihood of bringing the democratic ideal closer to the realities of life. Our history shows the struggle for the full consecration of universal suffrage and the successive abandonment of classifications that took into account the sex, status or condition of the voter, as formerly provided for in Article 2 of Law No. 8871.

That first legislation was a significant civil advancement in the construction of the representative democracy designed in our historic

Constitution. In this regard, the 1994 Constitutional Reform was also a very important political reform for participatory democracy, and it translates into greater fairness in electoral processes.

For this reason, the implementation of the universal suffrage by the Sáenz-Peña Law inspired other norms that have continued to expand the composition of the electorate through actions such as the acknowledgement of women's suffrage; the inclusion of the inhabitants of the then-called national territories; the vote of Argentines living abroad, of remand prisoners and of young people, among other actions to eliminate legal and factual barriers and extend electoral participation.

Hamilton (2012) explains very accurately that for a democracy that adheres to the principle of universal suffrage as a normative ideal—that is, an inclusive democracy—everyone is enfranchised and what must be justified is the expulsion of a subject, or group of subjects, from that *circle* of voters. The view of Olsson (2008, p. 57) is similar.

The democratic political system is the one that best guarantees that as many individual points of view and interests as possible are represented in the making of norms. As we have pointed out (Dalla Via, 2013), the more pluralistic and participatory the democracy, the more legitimate the decisions will be, as the community will put the individual needs forth.

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Incarcerated Voting in Canadian Federal Elections

Elections Canada

I. Background

Since Canadian Confederation in 1867, Canadians have had the opportunity to elect Members of Parliament from across the country to the House of Commons of Canada a total of 44 times. Early Canadian elections featured limited suffrage, however, with many groups not being afforded the right to vote until later.

One of these groups were Canadians who were incarcerated. From 1867 to 2002, incarcerated citizens were ineligible to vote in all Canadian federal elections. As the prison population in Canada continued to grow over time, reconsideration of incarcerated individuals' voting rights was prompted, and addressed in the Supreme Court case, *Sauvé v. Canada (Chief Electoral Officer)*, which struck down the restriction on incarcerated individuals' voting rights.

1. *Sauvé v. Canada (Chief Electoral Officer)*

At the time, section 51(e) of the *Canada Elections Act* (1985) read as: "The following persons are not qualified to vote at an election and shall not vote at an election: Every person who is imprisoned in a correctional institution serving a sentence of two years or more."

The leading Supreme Court of Canada decision, *Sauvé v. Canada (Chief Electoral Officer)*, of October 31, 2002, rendered that this was unconstitutional and violated section 3 of the Canadian

Charter of Rights and Freedoms, which reads “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein”, by a 5-4 majority. The case rose to the Supreme Court after it was appealed from the Federal Court of Appeal.

As a result of this decision, Canadians in provincial correctional institutions and federal penitentiaries have since been able to vote by special ballot in federal general elections or by-elections regardless of the length of their sentences. The 38th general election in 2004 was the first in which incarcerated Canadians were able to vote. (Kingsley, 2004).

Parliament later amended the *Canada Elections Act* to codify this into law.

2. The Elections Modernization Act

The *Elections Modernization Act*, also known as Bill C-76, was given royal assent on December 13, 2018. It established Part 11, Division 5 of the *Canada Elections Act*, which outlines the special voting rules for incarcerated voters. This amendment ensures that incarcerated electors are afforded the exact same federal voting rights as that of regular electors, while providing specific registration and voting procedures for incarcerated voters.

In addition, the changes brought by this Act included, but were not limited to, the establishment of spending limits for third parties and political parties during a defined period prior to a general election held on a fixed day, implementing measures to reduce barriers for participation and increase accessibility, modernization of voting services, and general improvement of the administration of elections and political financing.

II. Implementation

1. Type of election

Canada's democracy follows the Westminster parliamentary system and has a bicameral legislature. During federal elections, a representative from each of the 338¹ electoral districts across Canada are elected to its lower house, the House of Commons, using the first-past-the-post voting system, also known as single-member plurality voting. Senators, on the other hand, are appointed by the Governor-General on the advice of the Prime Minister; they are not elected. The Governor-General then invites the leader of the largest political party in the House by seat count to form the government.

The Office of the Chief Electoral Officer, commonly known as Elections Canada, is an independent, non-partisan agency that reports directly to Parliament and has the mandate to conduct federal general elections, by-elections and referendums. Provincial, territorial, and municipal elections are administered by their respective electoral management bodies, who are independent from Elections Canada.

2. Method of voting

Incarcerated voters in Canada vote in-person by special ballot at correctional facilities. In addition, voters who are on house arrest can vote by mail by special ballot.

¹ Following the decennial redistribution of federal electoral districts, this number will increase to 343 districts beginning with the next general election that is called on or after April 23, 2024.

Voting by special ballot (Elections Canada, 2023b) is available for all electors who cannot or do not want to vote at an advance or election day poll in their electoral district. This includes Canadian electors voting by mail in their own district, Canadian electors temporarily away from their electoral districts, Canadian citizens residing outside Canada, Canadian Forces electors and incarcerated electors.

As opposed to the regular ballot available on election day or at advance polls which shows a list of candidates from which to choose, special ballots have a blank space for the voter to write the name of the candidate for whom they wish to vote. Since candidates can file their nomination papers until three weeks before election day, regular ballots with candidate names are only available at advance polls and on election day.

To vote by special ballot, electors receive a special ballot voting kit which includes the special ballot, instructions on how to fill in the special ballot, an inner envelope, an outer envelope and if applicable, a mailing envelope with postage. Voters are instructed to write the first and last name of the candidate on the special ballot, they do not have to write the name of the political party. However, if they only write the name of a political party, their vote won't be counted. They are then instructed to place their completed special ballot in the unmarked inner envelope provided and seal it, then place the inner envelope in the outer envelope showing their information and seal it. Lastly, they must sign and date the declaration on the front of the outer envelope. The declaration states that the elector's name is as shown on the envelope, and that they have not already voted and will not attempt to vote again in the current electoral event. They can then either submit their vote in person or put it into the mailing envelope and mail it.

2.1. In-person vote by special ballot in correctional facilities

Incarcerated electors can vote in-person, in their correctional facility, by special ballot on the 12th day before election day; the poll closes at 8:00 p.m. Special ballots are used in correctional facilities due to the nature of correctional institutions which include electors from various parts of the country, and thus from different electoral districts, and it takes place earlier due the requirement for special ballots to be received by Elections Canada headquarters by no later than 6 p.m. Eastern Time on election day.

2.2. Vote by mail with special ballot for individuals under house-arrest

Along with any electors who cannot or do not want to vote at an advance or election day, electors under house-arrest can vote by mail. They can apply to vote by mail and receive a special ballot voting kit. It is the same special ballot used for in-person voting, however electors can complete their ballot from home and submit it by mail. Electors can apply to vote by special ballots until 6 p.m. on the Tuesday before election day.

3. Voting requirements

Canadians who will be 18 years of age or older on polling day must follow indications for incarcerated electors in order to vote: Canadians in provincial correctional institutions and federal penitentiaries, and those in youth facilities who are serving the custodial portion of a custody and supervision order issued pursuant to the Youth Criminal Justice Act; and are facing a level of custody (e.g., secure custody) or specific custody conditions that would effectively prevent the elector from voting at an advance polling station

or at a polling station on polling day. For the purpose of this paper, the term correctional institution is used to refer to all three.

Incarcerated electors must fill out an *Application for Registration and Special Ballot* (Elections Canada, n.d. [a]), which is available from the liaison officer responsible for assisting with elections-related affairs once an election has been called; the elector in question will also return the filled form to the liaison officer for validation purposes.

Incarcerated electors must also define their place of ordinary residence, as the correctional institution in which they are incarcerated does not count as their place of ordinary residence. This is done when filling out the *Application for Registration and Special Ballot*. Their place of ordinary residence is the first of the following places for which the elector knows the civic and mailing addresses: their residence before incarceration; the residence of a spouse, relative, or dependent; the place where they were arrested; or the place where they attended court (Elections Canada, 2019).

4. Registration and compilation of the voters' lists

4.1. In-person vote by special ballots in correctional facilities

The registration and compilation of the voters' lists of incarcerated electors begins as soon as the election is called. The Ministers responsible for correctional institutions at the federal, provincial, and territorial levels appoint a coordinating officer for the election, who then appoints liaison officers from each correctional facility within their jurisdiction. All relevant information relating to the liaison officers is then shared with the Chief Electoral Officer of Canada.

Each liaison officer's job is to ensure that all eligible electors within their designated correctional facilities have been given the opportunity to complete the *Application for Registration and Special Ballot*. It is important to note that voting and voter registration in Canada is optional and not compulsory, meaning that incarcerated electors are allowed to refuse to fill the form.

The liaison officer is responsible for ensuring that only citizens over the age of 18 have completed the form. The final list of incarcerated electors is considered to be the list of all valid *Applications for Registration and Special Ballot* that have been filled.

4.2. Vote by mail for individuals under house-arrest

Electors who wish to vote by mail must complete an *Application for Registration and Special Ballot*, which may be completed by calling Elections Canada, online, or by visiting a local Elections Canada office. The first two options are available to individuals under house arrest.

5. Integration of polling stations in prisons

Polling stations are set up in correctional institutions across Canada on the 12th day prior to election day, to allow incarcerated electors to vote. The exact placement of these polling stations is up to the institution.

In addition, mobile polling stations, which go to individual electors one by one, as opposed to remaining in only a single location, may be struck at the discretion of the liaison officer of the correctional institution. Common situations in which a liaison officer may strike a mobile polling station include when incarcerated voters are confined to their cells or the infirmary and are thus unable to get to the polling station. Returning officers may also strike a mobile

polling station in collaboration with liaison officers, but only in correctional institutions of fewer than 50 electors that are within the electoral district over which they have jurisdiction.

6. Electoral materials

6.1. In-person vote in correctional facilities

Elections Canada provides all electoral materials, from the special ballot voting kits to the list of all candidates, to liaison officers, who then distribute them to election officers who are stationed at the polling stations in the correctional institution.

When all electors who want to vote have done so, but no later than 8:00 p.m., the election officers close the polling station(s) and return all ballots and material to the liaison officer. The liaison officer is responsible for returning this material to Elections Canada as soon as possible once the polls at the correctional institution close. Elections Canada's designated courier contacts the liaison officer before voting day to arrange a time and place for pick up. The material is shipped to Elections Canada headquarters in Ottawa in time to be processed.

6.2. Vote by mail for individuals under house-arrest

Depending on how the elector applied, they will either receive a special voting kit in-person or they will be sent one in the mail. The latter applies to individuals under house-arrest. They must then follow the instructions in their special voting kit and mail in their ballot.

7. Electoral campaign and informed voting

Elections Canada's mandate does not include the distribution of electoral campaign materials to electors, including electors who are incarcerated.

8. Vote counting, integration and dissemination of results

8.1. Vote counting

8.1.1. *In-person vote in correctional facilities*

The ballots of incarcerated electors are counted at the same time as those of Canadian residents temporarily absent from their electoral districts, Canadian citizens residing outside Canada and Canadian Forces electors, provided they have been received at Elections Canada in Ottawa no later than 6:00 p.m., Eastern Time, on polling day.

The counting of special ballots is conducted by special ballot officers, who are appointed on the recommendation of the Prime Minister, the Leader of the Opposition, who is the leader of the largest non-government party in the House of Commons, and the leader of the third party in the House of Commons.

These special ballot officers first check the outer envelopes to ensure that each one has been completed properly. After verifying, they open the outer envelopes, take out the unmarked inner envelopes containing the ballots, and deposit each sealed inner envelope in a ballot box for the appropriate electoral district.

The special ballot officers then open the ballot boxes for each electoral district, take the ballots out of the inner envelopes and

proceed to count them. After this has been completed, the special ballot officers complete a *Statement of the Count* and deliver it to the Special Voting Rules Administrator at Elections Canada.

8.1.2. Vote by mail for individuals under house-arrest

The ballots of electors voting by mail in their own electoral districts are counted in the office of each returning officer, after the polls close on election day, by a deputy returning officer and a poll clerk appointed by the returning officer. Prior to the close of the polls on polling day, the deputy returning officer and poll clerk open the ballot box and check each outer envelope to ensure that it is from a registered voter and that no previous ballot has been received from that elector. They open the outer envelopes, remove the sealed inner envelopes containing the ballots and deposit them in a sealed ballot box. After the polls close, the ballot box is opened and the ballots are removed from their inner envelopes and the votes are counted. The procedure ensures the secrecy of the vote (Elections Canada, 2014).

8.2. Integration and dissemination of results

As soon as all the special ballots are counted at Elections Canada headquarters in Ottawa, the Special Voting Rules Administrator informs the Chief Electoral Officer of the results of the special ballot vote for each electoral district (Elections Canada, 2019). The Chief Electoral Officer totals the results, by electoral district, of the vote by special ballot of Canadian Forces electors, Canadian citizens residing outside Canada and incarcerated electors. These three categories are designated as Group 1. After the polls close on election day, the Group 1 results for each electoral district are sent to the appropriate returning officer.

The other category of electors whose votes are counted in Ottawa is Canadian electors temporarily away from their electoral

districts. The results of these votes are tallied separately from Group 1 and sent to the appropriate returning officer, who adds them to the results for electors voting by special ballot in their own electoral districts. These two categories – Canadian electors temporarily away from their electoral districts and electors voting by special ballot in their own electoral districts – are designated as Group 2.

The results of the two groups are reported separately on election night. All the results of the special ballot votes are then added to the total results for each electoral district.

9. Applicable dispute or challenge mechanisms

Incarcerated voters can use the same electoral dispute and challenge mechanisms available to the public. There are no specialized electoral dispute or challenge mechanisms for incarcerated voters, however, some complaints could fall within the scope of the Commissioner of Correctional Services Canada's mandate (Correctional Service of Canada, 2023).

Electors who may be denied their right to vote or want to declare any other kind of wrongdoing linked to the running of an election can submit a complaint to the Commissioner of Canada Elections (CCE, 2022). A proxy may also submit a complaint in their place. If the complaint falls within the mandate of the CCE, an investigation may be carried out, after which the Commissioner will choose the most appropriate compliance or enforcement tool, and lay charges if it is deemed necessary due to the severity of the claim (Canada Elections Act, 2000). It is worth noting that, although the CCE is located within the Office of the Chief Electoral Officer (CEO) and is appointed by the CEO upon consultation with the Director of Public Prosecutions, the Commissioner and their office acts independently of the CEO in the performance of their compliance and

enforcement mandate. Consequently, the CEO may not interfere with the conduct of any investigation or with the decisions of the Commissioner as they relate to the exercise of the Commissioner’s mandate (Elections Canada, 2023a).

It is worth noting that, although the CCE is located within the Office of the Chief Electoral Officer (CEO) and is appointed by the CEO upon consultation with the Director of Public Prosecutions, the Commissioner and their office acts independently of the CEO in the performance of their compliance and enforcement mandate. Consequently, the CEO may not interfere with the conduct of any investigation or with the decisions of the Commissioner as they relate to the exercise of the Commissioner’s mandate (Canadian Heritage, 2021). They can also file an application for judicial review (Federal Court of Canada, 2022).

III. Electoral turnout of incarcerated voters from previous years

The following table provides a summary of the number of eligible incarcerated electors that have voted, which is shared as part of the Statutory Report (Elections Canada, n.d. [b]) that is released after every election by Elections Canada or a supplementary report in the case of the 44th General Election. Note that not all reports provide a number for the total number of eligible incarcerated electors.

Election	Total ballots cast	Total eligible electors
September 20, 2021 (44th)	14,193	No data available
October 21, 2019 (43rd)	16,372	41,261 (39.7%)

Continued...

Experiences of incarcerated voting, an international comparative view

Election	Total ballots cast	Total eligible electors
October 19, 2015 (42nd)	22,362	44,296 (50.5%)
May 2, 2011 (41st)	17,207	No data available
October 14, 2008 (40th)	13,531	No data available
January 23, 2006 (39th)	11,594	35,314 (32.8%)
June 28, 2004 (38th)	9,250	36,378 (25.4%)

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Implementation of the vote for persons deprived of liberty in Costa Rica

Hugo Picado León
Ileana Aguilar Olivares

I. Introduction

Upon the recognition of political rights as fundamental human rights, a process to review the legislation on the exercise of suffrage has taken place in the Latin American context in recent years to eliminate restrictions suffered by some sectors of society, including those deprived of their liberty. Human rights instruments provide a number of arguments in favour of ensuring the enfranchisement of this population. These arguments include the following:

- Prisons are not places alien to the law. Persons held in correctional facilities continue to be members of society, and their special relationship of submission with the State for the commission of a crime do not deprive them of their political rights.
- In most countries, losing the right to vote is an administrative penalty, rather than a criminal one. Disenfranchising an incarcerated person for a criminal offence is a double penalty when a specific judgment has already been passed for said offence. The excessiveness of the measure is even more evident in the cases of remand prisoners.
- In general, disenfranchising laws can aggravate society's structural inequality. Elections equalise citizens in the process of selecting government authorities. The disenfranchisement of persons deprived of their liberty labels them as second-class citizens.

These arguments in favour of non-discrimination in the right to vote for persons deprived of liberty have been based on the American Convention on Human Rights (1970), which in its Article 23, referring to political rights, states in its first paragraph:

1. Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) to have access, under general conditions of equality, to the public service of his country.

This text—which focuses on the Costa Rican case—will first detail the background information to the vote of persons deprived of liberty. Then, the regulatory sources, the duties of the actors involved, and the applicable protocols will be stated. Finally, the electoral participation data on the vote of persons deprived of liberty will be referred to.

II. Background in Costa Rica

In Costa Rica, until the second half of the 1990s, there were no conditions for incarcerated persons vote, because the existing legal system—Article 168 of the now-repealed Electoral Code—prohibited the installation of polling stations (*juntas receptoras de votos*, JRVs) in prisons. The only alternative to such prohibition was for the Ministry of Justice to transfer the incarcerated voters to polling stations outside the correctional facilities, with the administrative and security inconveniences that could arise.

Efforts were made over several years by various individuals and institutions, including the Ministry of Justice and correctional

authorities, to change this situation.¹ The discussions on the issue resulted in the Supreme Court of Elections (*Tribunal Supremo de Elecciones*, TSE) sending the Legislative Assembly a bill in 1993 for amending Article 168 of the Constitution and eliminating the prohibition on setting polling stations up within correctional facilities.

In the preamble of the bill, the TSE (as quoted in *Tribunal Supremo de Elecciones of Costa Rica*, 2014) indicated that

[...] the ratification by the Costa Rican State of basic instruments such as the Universal Declaration of Human Rights and the Pact of San José postulates suffrage, as does our Constitution, as a primary civic function, which means that this is a basic, elementary and first-rate right that does not admit or tolerate any restriction. For this reason, the provision contained in Article 168 constituted an illegitimate restriction on the exercise of a constitutionally enshrined right, since it expressly prohibited the installation of polling stations in prisons, thereby establishing a veiled and actual prohibition of voting on those who, while only being restricted from their right to free movement, should enjoy and have the same rights and duties as the rest of the citizenry.

The Supreme Court of Elections also held that a veiled prohibition on voting has been established since—in practice, from any point of view, and for security reasons—the size of the Costa Rican prison population is such that it is inconvenient to transport them to their respective polling stations (pp. 12-13).

¹ Along this route, the efforts made by the then Minister of Justice, Elizabeth Odio Benito, by the defence lawyer of Vernor Muñoz (inmate of the correctional system), and the specific requests and enquiries of several people deprived of liberty were noteworthy.

As a result of this process, Law 7653 was passed on 28 November 1996 and the amendment to Article 168 was approved. The reform that entered into force on that very day provided:

Those who are entitled to vote, but were detained or serving in barracks and prisons, shall have the right to be allowed to turn out and vote freely. The Supreme Court of Elections shall regulate voting in correctional facilities, and the Ministry of Justice shall provide the logistical material and support required by the Court (para. 2).

While it is true that the Costa Rican legal system already recognised the principle of enfranchisement without discrimination until the loss of citizenship were proven prior to the 1996 reform, the legal prohibition on the installation of polling stations in correctional facilities was an insurmountable organisational and logistical restriction for the effective exercise of suffrage. The reform made it possible for persons deprived of their liberty to exercise their constitutional right to vote as of the national elections of February 1998.

Once the installation of polling stations within correctional facilities was authorised, the institutions involved took the necessary steps to ensure the right to vote for the population deprived of liberty. Given the regulatory powers in electoral matters of the Supreme Court of Elections, it immediately issued the Regulations for the Exercise of Suffrage in Correctional Facilities, published in the Official Gazette on 22 September 1997, under which votes have been received in correctional facilities across the country since the first Sunday of February 1998.

III. Regulations and operation

The right to universal suffrage was established by Costa Rica's 1949 Political Constitution and by the 1953 Electoral Code.² It was also confirmed by international instruments ratified by the country, such as the Universal Declaration of Human Rights (Article 21), the International Covenant on Civil and Political Rights (Articles 10 and 25), and the American Convention on Human Rights (Pact of San José, Article 23). However, it was Act 7653 (1996) –which amended Article 168 of the now repealed Electoral Code– and the Regulations for the Exercise of Suffrage in Correctional Facilities (1997) that made voting possible for persons deprived of liberty. In 2009, a new Electoral Code that maintained the provisions that allow the TSE to set up polling stations in correctional facilities was enacted.

The Supreme Court of Elections, as the electoral body responsible for organising independent elections and which concentrates the functions of electoral administration and justice, provided in the Regulations for the Exercise of Suffrage in Correctional Facilities that all incarcerated citizens must be enfranchised, the exception being those whose sentence suspend their political rights, or those whose transfer to the polling station was not authorised for security reasons in accordance with the criteria and justification of the appropriate authorities of the Ministry of Justice.

Therefore, TSE must take the necessary measures to install polling stations in the country's main correctional facilities, for which it may order that the corresponding electoral districts are created in advance to enfranchise the incarcerated persons who so request. Following TSE's regulations and protocol, officials of the Ministry

² Article 30 of the current Electoral Code (2009) provides that the Supreme Court of Elections shall regulate the setting up of polling stations for incarcerated persons to vote.

of Justice are responsible for the transfer and custody of incarcerated voters to the polling stations, as well as for guaranteeing security conditions for the secrecy of their vote.

Regulations guarantee the right of political parties to carry out political and electoral propaganda within correctional facilities and to oversee the voting process. Actually, prior to the 2014 elections, the University of Costa Rica collaborated with the authorities of a correctional facility to organise and hold a debate between the candidates for the Presidency of the Republic in its premises.

Since electoral registration in correctional facilities is optional and does not operate automatically, TSE has ordered periodic enfranchising tours so that those deprived of liberty can be enrolled at the correctional facility where they are held.

At the same time, being the judge of the Republic with sole and exclusive jurisdiction over electoral matters, the judgments passed by TSE have always facilitated that the persons deprived of liberty could actually vote. For instance, TSE authorised updates to the electoral roll even after its closure so that those who have been transferred to another precinct by the prison administration could vote (resolutions Nos. 080-E-2002; 0370-E1-2008; 1967-E1-2014; and 0804-E1-2022). Conversely, electoral jurisprudence is cognisant that what the legal system protects is the exercise of suffrage for the selection of national or local governors and for consultative processes organised by TSE, not for political parties' internal democracy exercises (resolutions Nos. 2544-E1-2009; and 3401-E1-2017).

a. Actors involved in the process

Four actors actively take part in guaranteeing that persons deprived of their liberty can vote: the Supreme Court of Elections (TSE), the correctional authorities, the political parties and the elector.

The Supreme Court of Elections (TSE)

Article 2 of the Regulations for the Exercise of Suffrage in Correctional Facilities establishes that TSE—in coordination with the authorities of each correctional facility— must take the necessary measures to ensure that the incarcerated electorate can vote. These are:

1. Creation of the necessary electoral districts to include correctional facilities as polling centres.
2. Installation of polling stations inside the correctional facilities.
3. Granting the necessary facilities to the inmates to arrange their electoral transfer and due registration in these polling stations.
4. Carrying out periodic visits to correctional facilities to complete the transfer of electoral address or process the ID application of the persons deprived of liberty.

Correctional authorities

The Ministry of Justice is responsible for the security measures needed for the persons deprived of their liberty to vote. These include:

1. Define security measures so that persons deprived of liberty can cast their vote.
2. Transfer of voters to polling stations.
3. Establish the appropriate transfer schedules and mechanisms.
4. Provide the pertinent conditions and security measures for the polling officers, other electoral officials and party

representatives to access and exit from correctional facilities, as well as those necessary for the proper transfer and custody of electoral material.

5. Facilitate and collaborate in the identification and transfer procedures that are carried out.
6. Prohibition of confiscating or seizing the identity cards of persons deprived of their liberty.

Regarding the security measures adopted by the correctional authorities for when voters cast their votes, it should be noted that they will be searched and led by the correctional security, in the pre-established order, to the polling station. However, all these security measures must be kept within the parameters of legality, reasonableness, and proportionality.

Political parties

The competing political groups must lodge a written request before the correctional authorities at least three days in advance to campaigning inside their facilities. The presence is limited to a maximum of five people per party, and they must comply with the security prohibitions the prison establishes (neither the entry nor the use of sound and/or lighting equipment or handouts, like stickers, are allowed). In addition, the restrictions in the first and fourth paragraphs of Article 136 of the Electoral Code —on campaigning periods and the limitations to electoral propaganda dissemination— must be taken into account.

It is important to note that correctional facilities must give equal treatment and opportunities to all political parties for the dissemination of their government programmes.

Voter

As far as voters are concerned, they must make sure their electoral address is transferred and their identity card is valid –or has not been expired for more than one year on Election Day.

b. Applicable protocols

The Supreme Court of Elections has established a protocol for the persons deprived of liberty to vote. Its objective is "to guide those involved, in any way, with the electoral process, the development of actions, and the determination of support to standardise conditions and eliminate attitude, information, and communication barriers that limit the electoral participation of persons deprived of liberty" (TSE, 2014, p. 10).

The protocol, called *Accessible Costa Rican Electoral Process to Persons Deprived of Liberty*, provides detailed guidance on how to support this electorate's needs to exercise their political rights under equal conditions to the others involved in the process. This includes the participation, aside of TSE itself, of different electoral agents, such as advisors, delegates, members of the polling stations, and, as previously indicated, the electorate, political parties and correctional authorities.

IV. Voter turnout in correctional facilities

Polling stations were first installed in correctional facilities at the 1998 national elections. Table 1 details the numbers of polling stations established for this purpose, as well as the voting behaviour of the electorate. Turnout is between 30 and 41 per cent for presidential and legislative elections, and around 20 per cent in municipal elections, which is similar to the national trend, where there is lower voter turnout in local elections.

Table 1
Voter turnout at Institutional Care Centres, by Process, 1998-2022

Electoral process	Number of polling stations	Electorate	Turnout
1998 national election	36	9,575	32.50
2002 national election	19	3,821	41.50
2006 national election	18	5,148	35.21
2010 national election	37	6,103	35.80
2014 national election	30	8,713	32.50
2016 municipal election	34	9,861	18.40
2018 national election	36	9,575	32.58
2020 municipal election	39	10,148	20.00
2022 national election	27	8,594	30.50

Source: Self-elaboration based on Tribunal Supremo de Elecciones (n.d.). *Estadísticas de procesos electorales [Statistics of electoral processes]*. https://www.tse.go.cr/estadisticas_elecciones.htm

Conclusions

Persons deprived of their liberty have been able to vote in Costa Rica since the 1998 national elections. Previously, this right was limited –in practice– due to a legal provision prohibiting the creation of polling stations in correctional facilities. The 1996 legal reform allowed the electoral management body to take the necessary regulatory and administrative measures to enable voting inside the country's correctional facilities. Since then, voter turnout in prisons for presidential and legislative elections has ranged between 30 and 41 per cent, while for municipal elections it has remained between 18 and 20 per cent.

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Implementation of the vote for persons deprived of liberty in Costa Rica

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The vote of persons on remand in Mexico

Nohemí Vázquez Cervantes

The effectual acknowledgement of the right to vote for people who are in pre-trial detention in Mexico was through a ruling issued by the Electoral Court of the Federal Judiciary in February 2019.

I. Background

In 2018, Mexico held presidential elections, along with federal legislative elections and local elections in some states. It was in the context of this electoral process that two persons of the Tsotsil indigenous community¹—who had already been imprisoned for 15 years without sentence—filed a lawsuit to protect their political and electoral rights through which they asked that the National Electoral Institute (INE, for its acronym in Spanish) be ordered to regulate the mechanisms that would ensure the vote of persons on remand, i.e. awaiting judgment.

It ought to be mentioned that Mexico’s criminal justice system underwent a constitutional reform in 2008. It mandated the transition to an adversarial system of hearings, which incorporated the presumption of innocence into Article 20 of the Constitution.

Moreover, although Article 38, section II, of the Mexican Constitution provides that: “Citizens’ rights and prerogatives can be suspended: [...] II. If the person is on trial for a crime that deserves

¹ The Tsotsil indigenous community is located in the southeastern region of Mexico, in the state of Chiapas, and is present in 22 communities to the northeast and southeast of San Cristóbal de las Casas—the second most important city in Chiapas.

corporal punishment, from the date the detention order was issued [...]”, the Supreme Court of Mexico interpreted this section and determined that said Article contains three cases that may lead to the suspension of rights. In relation to section II, and the suspension of a person’s political and electoral rights, the ruling indicated that:

Section II, is a result of being on trial for a crime that deserves corporal punishment, which could conventionally be conceived as an accessory consequence of the trial process and not as a penalty, sanction or precautionary measure, for its nature and purpose do not respond to that of the latter concepts (SUP-JDC-352/2018; SUP-JDC-353/2018).

The 2011 constitutional reform on human rights, which amended 11 constitutional articles to strengthen the recognition and protection of fundamental rights in Mexico was just as important.²

One of this human rights reform’s most relevant additions was the obligation of the Mexican State to act under the *pro homine* principle, whereby decisions must be made in consideration of what is most favourable to the person.

Upon these grounds, the judgment passed by the Electoral Court to the joint trial of the cases SUP-JDC-352/2018 and SUP-JDC-353/2018 on 20 February 2019 determined the acknowledgment of the right to vote³ of persons on remand.

2 It incorporates the constitutional acknowledgement of all the fundamental rights addressed by the international treaties that Mexico has signed.

3 It is *active voting* which is acknowledged for persons on remand, that is, the right to choose their representatives.

The judgment ordered INE to guarantee the population in pre-trial detention their right to vote in the 2024 presidential, legislative and concurrent local elections,⁴ for which a stepwise program must be implemented prior to that date.

II. Implementation

It is important to note that the Mexican electoral system is configured nationally. The National Electoral Institute (INE) is the national electoral administrative authority, and each state has its own electoral management authority, known as local public body, generically referred to as an OPL (*organismo público local*). These two authorities work in coordination, exercising their own functions and budget, to implement the voting method for persons on remand.

Four voting exercises for inmates in pre-trial detention have taken place in Mexico between 2020 and 2023. One national pilot test (2021), and three with binding results in the local elections of the states of Hidalgo (2022), Coahuila and the State of Mexico (2023).

The first pilot exercise prepared by INE followed the indication of the Court to consider a representative sample covering the country's five regional circumscriptions⁵, therefore including several men's and women's correctional facilities, and observing a gender and intercultural perspective.

4 In the 2024 elections, 20,375 public positions will be voted: 629 at the national level: President of the Republic, 128 senators and 500 House representatives; in addition to 19,746 local positions.

5 The regional circumscriptions encompass several states and electoral sections upon which proportional representation House members are elected in Mexico.

In compliance with the progressiveness rendered by the sentence, the exercise is currently being organised nationally for the 2024 presidential and local concurrent elections in three states: Chiapas, Mexico City and Hidalgo, where an electorate of around 92,792 persons on remand are held in 282 correctional facilities.

a. Type of Election

The vote of persons on remand is guaranteed for the presidential election and at the local elections whose state laws so provide for. So far, only three out of the country's 32 states have legislated for voting while on remand: Hidalgo, Chiapas and Mexico City.

In the case of Hidalgo, Article 5 of its Electoral Code enables persons on remand to vote at all electoral processes and local direct democracy mechanisms organised in the state. In the case of Mexico City, Article 6 of its Electoral Code guarantees the right to vote for its head of government, local congresspersons, mayors, as well as at any local direct democracy mechanism.

The most recent case is that of Chiapas. Its Law on Electoral Institutions and Procedures establishes—in Article 6, numerals 2 and 8—that persons on remand may vote in advance for the renewal of the state's Executive and Legislative branches, as well as to elect the members of the city councils.

At the 2024 local electoral processes, INE determined that voters on remand would be able to even vote for municipal authorities (2023), what added about 459 positions distributed among the three aforementioned entities (n.d.). This is due to the Court's ruling that granted INE the power to determine the type of election in which voting while on remand could be enabled once “the needs

and administrative and financial possibilities” were considered (joint trial for cases SUP-JDC-352/2018 and SUP-JDC-353/2018).

b. Voting method

The method decided by INE was in-person early voting.⁶ In the two scenarios of the Mexican case, the early voting period is foreseen to span from one to five days for a local election and, when presidential and local elections concur, it can be extended for up to 15 days.

The 2024 presidential and concurrent local elections timetable scheduled that early voting in correctional facilities would take place from 6 to 20 May, that is, 10 to 15 days prior to Election Day at a recommended time of 8:00 to 17:00 hours.

c. Voting requirements

The person in pre-trial detention must meet a series of general requirements to be deemed qualified as voter: expressly request to be included in the List of Voters on Remand (*Lista Nominal Electoral de Personas en Prisión Preventiva*, LNEPPP); that their political and electoral rights are not suspended; that their biometric data—collated and delivered by the correctional authorities to INE—matches with that of the electoral roll; and that their remand status is maintained throughout the electoral process.

For local elections, the positions for which the persons on remand can vote are those of the state where the respective correctional

⁶ In the 2021 pilot test, it was called *early postal voting* (Agreement INE/CG97/2021), and through the Agreement INE/CG602/2023 for its implementation in the 2023–2024 electoral process, the name was adjusted, although the implemented mechanism remained the same.

facility is located. Markedly, an additional requirement for Hidalgo's gubernatorial election (2022) was that the inmate's last electoral registered address were in that state.

The registration in the LNEPPP considers the addresses of correctional facilities.

d. Make-up of lists of enfranchised and actual voters

Among the actions that the National Electoral Institute (INE)⁷ undertakes, over the six months prior to Election Day, to put together the List of Voters on Remand (LNEPPP) and enable these voters' early voting are the information dissemination of the exercise among the imprisoned population, the inquiry to the correctional authorities on the potential number of voters—as well as on the correctional facilities where the vote will be allowed—and the delivery of notification letters and individual registration applications to potential incarcerated voters.

Upon the applicants' request, their electoral registration status is verified by comparing their biometric data, which is then delivered to the overseeing body of the federal registry of voters⁸ for its lawful review and whichever observations it might render. The final voters' list is printed in duplicate to be included in the electoral materials delivered to the corresponding polling station.

A specific list of the voters who actually cast their vote is printed by INE for the scrutiny and tallying of the votes. It reflects the

7 The National Electoral Institute is responsible for putting together the national electoral roll and issuing the Voting Card. In Mexico, this is not made automatically; each voter must request it.

8 It is a permanent body called the National Surveillance Commission, and is composed of representatives of all national political parties.

data from the safeguarded ballot envelopes and is delivered to the scrutiny-and-tallying stations installed upon the national closing of Election Day.

e. Integration of polling stations for voting while on remand

There are two distinct moments in this voting method: first, the early voting period inside the correctional facilities; and, second, the scrutiny and tallying of the votes, which is deferred to the closure of Election Day. Two separate bodies take over the activities of each moment.

It is INE's personnel of the corresponding electoral district⁹ who operate the early voting for those on remand in the correctional facilities within their jurisdiction; in the case of concurrent elections, the local electoral management body (OPL) may appoint an officer of its own to join the polling station. At least one of them must be an attesting officer. The number of polling stations inside the correctional facilities and the operational logistics are agreed on with the authorities of each facility.

Over the early voting period, chain of custody safeguards are implemented at the end of each day, such as filling out detailed minutes by the attesting officers, the physical review of the material or taking photographic evidence.

Once the deferred vote-counting day comes—at the end of Election Day—a tallying station [*mesa de escrutinio y cómputo*] is put together for every 750 ballot envelopes. These bodies are made

⁹ For federal elections, Mexico is divided into 300 single-member electoral districts, and INE maintains a permanent decentralised office in each of them.

up of citizens selected and trained under the same procedures as the rest of the polling stations throughout the national territory.¹⁰

The number citizens of appointed as polling officers varies depending on whether it is only a national election or concurrent local elections are also taking place. The former is made up of four full members and two substitutes, while the latter, by six and three, respectively.

INE is responsible for appointing and training all polling officers mentioned in this section; as well as for the location where tallying stations are installed. Likewise, INE puts together a list of its personnel that might fill in as substitutes should there not be enough citizens for the tallying stations, all of whom go through the training needed to carry out the early voting specific functions.

f. Election materials

Both INE and the local electoral management bodies (OPLs) are separately responsible for producing the materials for national and local elections respectively, as well as for their timely distribution.

As previously mentioned, voters on remand use a postal voting method, meaning there are no ballot boxes at the polling stations. Instead, once the vote is cast, the voter places it inside an unmarked envelope that is in turn entered into a referenced one, sealed and handed to the polling officers for safekeeping.

At least 31 different materials are prepared for this voting method. From complementary items —such as stamps, ink cushions,

¹⁰ INE adds an extra 1 per cent to the usual percentage of citizens drawn for making up the ordinary polling tables —for a total of 13 per cent— to be able to put together the tallying stations and count the votes of the persons on remand.

garbage bags, sealing tape— to sensitive documentation —like ballots, certificates to record the days’ development, information on the competing candidates, the enveloped voting kits with the voters’ data— as well as the voters’ lists. The 2024 election will be the first in which indelible liquid to impregnate the right thumb of the voters on remand will be used.

It must be noted that the two materials for local elections designed by the corresponding OPL —which INE must validate— are the ballots and the informative documents on the candidates.

g. Election campaign and Informed voting

The informative documents mentioned in the previous section are the mechanism used in Mexico to encourage informed voting among those in pre-trial detention. The document has technical specifications issued —or validated— by INE, and is included in each enveloped voting kit delivered to the voters on remand.

The guidelines provide that the voters cannot be pressured or rushed to cast their vote while they go through the candidates’ proposals.

The decision to implement other informed voting mechanisms is taken on a case-by-case basis according to the coordination with the correctional authorities and the means and spaces available to carry them out. For instance, during Hidalgo’s gubernatorial electoral process (2022), two of the three debates were broadcast inside the correctional facilities, as well as a *spot* recorded by the candidates —which was repeated over the four days of the week prior to early voting.

The 2024 general elections were the first ones in which all three presidential debates were broadcast inside the prisons, while one debate amongst the candidates vying to head Mexico City's government was specifically organised to target those inside a correctional facility. The actions for the informed vote of incarcerated voters were a coordinated effort with the correctional authorities and took place in accordance with the security measures adopted by those detention centres. For the 2024 elections, 87.5% of the correctional facilities had access to, at least, one of the broadcasts.

The third presidential debate, held on 19 May 2024, was the one broadcast within the correctional facilities of six states¹¹. As for the subnational exercise, it was a deferred broadcast of a pre-recorded session.¹²

h. Counting of votes, addition and dissemination of results

As already mentioned, in Mexico, the scrutiny and tallying of the votes cast by the persons on remand takes place once Election Day concludes throughout the national territory¹³ –at 6:00 p.m., upon the installation of the tallying station. Both the required material and the electoral documentation are delivered to the tallying station by the custodian –whether INE, in the case of federal elections, or the corresponding OPL, in the case of local elections.

11 According to the Fifth Progress Report on the Organisation of the Vote for People in Pre-trial Detention in the 2023–2024 Concurrent Electoral Process, the states were Baja California, Chiapas, Jalisco, Nayarit, Puebla and San Luis Potosí.

12 In this case, the debaters were representatives of the candidates.

13 In Mexico, the date of federal elections is set in the Constitution; it is the first Sunday of June of the corresponding year. The 2014 political and electoral reform established the gradual concurrence of local elections.

The early in-person voting method uses ballot envelopes, meaning the voters on remand receive their ballots in a sealed blank envelope, which is inside another envelope with their data. If there are local elections, another blank envelope is provided to insert the corresponding ballots.

When the polling station receives the envelope, the data on the outer envelope is verified against the scrutiny-and-tallying voters' list. Then, the second envelope –or envelopes, in the case of concurrent elections– is taken out, opened to draw the vote out and place it in a ballot box. For local elections, the last step is repeated with the corresponding envelope. From then on, the process continues as in any other polling station in the country, recording the results in the provided certificates.

The results entered in the tallying system and the preliminary electoral results programme are referred to the relevant electoral district; in the case of local electoral results, each OPL determines how they are incorporated. Hence, the mechanism used for the dissemination of early voting results in correctional facilities is the same as for the federal and local elections' results.

i. Applicable challenge mechanisms

Mexico's system of challenge means in electoral matters provides for a lawsuit to protect the citizens' political and electoral rights. It can be filed due to acts of the electoral authority—from the refusal to issue the Voting Card to hindering the freedom of association. It is the lawsuit that citizens can file when their voter ID is denied or when their registration has not been included in the voters' list.

Through the preparations for early voting while on remand, 18 assessments of voter's ineligibility and their ensuing exclusion from

the list of voters on remand had been challenged. All the lawsuits were filed for the 2023 local processes. Of the 11 notifications in Coahuila de Zaragoza, 4 were challenged, and they were all upheld; in the case of the State of Mexico, from the 1,561 notifications, 14 were challenged, of which 5 were overturned and the claimants were entered in the voters' list. Conversely, no challenge against the voting itself has been raised so far.

It is important to note that, as of 2020, online follow-up for lawsuits on electoral matters is possible. Moreover, claimants can file lawsuits –both in person and digitally– either by themselves or through legal representatives.

During the 2024 general election, 556 records of people who filed a lawsuit for the protection of their rights were added to the List of Voters on Remand who obtained favourable sentences. Of these, 98.8% are voters in Mexico City.¹⁴

III. Voter turnout in previous years

In summary, early voting while on remand has been implemented five times in Mexico within a five-year span: one national non-binding pilot test, three local elections, and one presidential election.¹⁵

6,071 enfranchised voters on remand had voted by 2023, the average turnout was 91.3%, and the voting took place in 30 correctional facilities. The disaggregated data is shown in the following table:

¹⁴ With data from the Report of the Issuance of Voting Cards to Persons in Pre-trial Detention presented to the General Council of the INE on 27 June according to information updated to June 2024.

¹⁵ Along with the national election, three local elections took place: Chiapas, Hidalgo, and Mexico City.

Experiences of incarcerated voting, an international comparative view

State	Correctional facility	Voters listed	Full Participation	Turnout
Sonora	CEFERESO No. 11 (Men's)	260	234	90%
Guanajuato	CEFERESO No. 12 (Men's)	356	343	96.34%
Chiapas	CEFERESO No. 15 (Men's and Intercultural)	91	89	97.80%
Morelos	CEFERESO No. 16 (Women's)	148	141	95.27%
Michoacán	CEFERESO No. 17 (Men's)	95	91	95.78%
Hidalgo	Jaltocan la Huasteca	3	3	100%
	Tula de Allende	24	23	95.80%
	Tulancingo de Bravo	42	41	95.80%
	Pachuca de Soto	61	49	80.30%
Estado de México	Ecatepec	687	610	88.79%
	Ixtlahuaca	59	55	93.22%
	Tenancingo South	58	51	87.93%
	Texcoco	305	284	93.11%
	Lerma	105	98	93.33%
	Neza Norte	14	11	78.57%

Continued...

The vote of persons on remand in Mexico

State	Correctional facility	Voters listed	Full Participation	Turnout
	Neza Sur	17	17	100%
	Santiagoito	710	678	95.29%
	Jilotepec	45	40	88.88%
	Tenango del Valle	112	93	83.03%
	Tlanepantla	741	693	93.52%
	Detention Center	10	7	70%
	Neza Bordo	910	831	91.31%
	Otumba Tepachico	56	52	92.85%
	Valle de Bravo	56	54	96.42%
	Zumpango	104	83	79.80%
	Chalco	461	435	94.36%
	Cuautitlán	455	359	77.87%
	El Oro	68	65	95.58%
	Sultepec	6	2	33.33%
Coahuila	Women's Saltillo	12	12	100%
	Total	6,071	5,544	91.3%

The number of enfranchised voters rose significantly for the 2024 general election. It was of 30,947 voters in 214¹⁶ correctional facilities throughout 31 states.¹⁷

¹⁶ The data was taken from the Fifth Progress Report on the Organisation of the Vote for Persons in Pre-trial Detention in the 2023–2024 Concurrent Electoral Process. (28 June 2024).

¹⁷ Yucatán was the only state where those on remand did not vote. The reason is the preparations between INE and the state's security agency outran the legal deadlines for its implementation.

According to the 2024 early-voting results, published on 26 June 2024, a total of 26,563 votes were cast by the persons on remand—a turnout of 85.83%—of which 91.71% were deposited by men and only 8.28% by women.

Furthermore, the published data shows that young people—between 25 and 34 years old—have the highest turnout, while the lowest one belongs to seniors—65 years old or older.

The three main reasons for not casting the remaining 4,384 votes were: i. the issuance of a sentence (conviction or freedom), 75.7%; ii. refusal to participate, 12.5% and iii. probation, 6%.

The three largest lists of voters on remand for the 2024 election were from the State of Mexico, Jalisco and Nuevo León, and were also the ones with the highest turnouts.

This chapter concludes by highlighting that electoral observation and representation of political parties or independent candidates throughout the early voting process is guaranteed, save for the access to correctional facilities, since—for security and custody reasons—such a decision falls under the jurisdiction of the authorities of each correctional facility.

The possibility of a limited number of people being allowed to access the correctional facilities to watch the early voting process attentively is already taken into account, so the mechanism for—if needed—selecting those who would be able to access the correctional facility is a lottery amongst the ones who expressed their interest as they were being accredited.

In the most recent electoral process—the 2024 general elections—112 observers were granted access to different correctional facilities to observe early voting. As for the other group surveilling the

early-voting process, 296 accredited political party representatives were granted access.

Another relevant consideration is the enforcement, as warranted, of INE's Trans Protocol during early voting. This means that the use of surnames is preferred when addressing a member of the LGBTI+ community, as a means to guarantee they are treated equally and without discrimination while voting.

Lastly, the alignment of INE's, its decentralised bodies', and the OPLs' institutional efforts at the national and local levels ought to be highlighted. Each one has responsibilities that bring about the preparations, operation and completion of the vote of persons on remand.

Mexico's 2024 mechanism for remand prisoners to vote set a new precedent that –due to a ruling of the Electoral Court– binds INE to include provisions in its regulatory framework of future exercises that consider any modification to the pre-trial detention and guarantee the right to vote for those registered at a detention centre.¹⁸ This obligation stems from a lawsuit filed by a person who –in the middle of the electoral process– was granted house arrest and requested to vote from his home.

¹⁸ The sentence was dictated on May 28, 2024 by the Regional Court Toluca of the Electoral Court of the Federal Judiciary in the ST-JDC-307/2024 file.

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Appendix 1

Correctional facilities enabled for early voting in Mexico's 2024 elections

State	Correctional facilities	Voters listed
Aguascalientes	2	247
Baja California	5	727
Baja California Sur	4	185
Campeche	2	93
Coahuila de Zaragoza	3	211
Colima	4	170
Chiapas	15	1,131
Chihuahua	9	913
Mexico City	7	1,459
Durango	4	1,181
Guanajuato	3	343
Guerrero	11	422
Hidalgo	12	924
Jalisco	12	3,208
State of Mexico	21	5,067
Michoacán de Ocampo	12	986
Morelos	8	748
Nayarit	4	830
Nuevo León	4	2,411
Oaxaca	9	964

Continued...

The vote of persons on remand in Mexico

State	Correctional facilities	Voters listed
Puebla	14	1,759
Querétaro	4	155
Quintana Roo	3	892
San Luis Potosí	5	814
Sinaloa	5	616
Sonora	14	2,035
Tabasco	8	648
Tamaulipas	5	634
Tlaxcala	2	253
Veracruz de Ignacio de la Llave	1	272
Zacatecas	3	93

Source: Appendix 9. Report on the make-up of the List of Voters on Remand INE/CG454/2024.

In-prison voting in the Republic of Panama

Gilberto Estrada de Icaza

I. Background

The right to social and political participation is one of the foundations of the democratic State. Article 6 of the Inter-American Democratic Charter of the Organization of American States provides that:

It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy (2001).

The right to participation is included in the scope and content of the political rights enshrined in Articles 25 of the International Covenant on Civil and Political Rights and 23 of the American Convention on Human Rights, as transcribed:

Article 25. Every citizen shall have the right and the opportunity, without any of the distinctions referred to article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country (1976).

Article 23. Right to Participate in Government 1. Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) to have access, under general conditions of equality, to the public service of his country. 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil or mental capacity, or sentence by a competent court in criminal proceedings (1978).

The right to vote is a cornerstone for all democratic societies and, especially, for all citizens. It is the way by which citizens can express their will and take part in the political decision-making process of their country. Even if this right is guaranteed by the constitutions, enforcing it depends on each country.

The constitutions of the Republic of Panama—ever since the country’s free and independent outset— have established the criteria for the suspension of citizenship. In this regard, Article 14 of the 1904 Constitution provided that citizenship could be suspended due to pending criminal proceedings upon the issuance of an arrest warrant by a judge.

The 1941 Constitution referred to citizenship in the following terms: “Article 60. Citizenship consists of the right to elect and to be elected to popularly elected public positions. Citizenship is required to hold commanding and jurisdictional official positions.” And, according to Article 63, it was suspended:

1. By court ruling, in the cases determined by law.

2. By judicial interdiction.
3. For pending criminal proceedings —where there was no right to release— upon the issuance of an arrest warrant by a judge.

Article 101 of the 1946 Constitution also provided that —in cases where there was no right to release— citizenship was suspended for pending criminal proceedings upon the judge’s issuance of an indictment.

Article 127 of the 1972 Constitution established that citizenship was suspended by penalty in accordance with the law, which meant that the right to elect and to be elected was also suspended. The 1978, 1983 and 2004 constitutional reforms laid the same terms.

On 18 May 2007, Law 14 gave the Republic of Panama a new Penal Code. Since its enactment, it has undergone multiple reforms on some aspects of Book I of the Code which dismantled the suspension of civil rights and include debarment from holding public office as an accessory punishment.

Our country’s 2006 electoral reforms of 2006 established that inmates have the right to vote in elections as long as they meet certain requirements. This electoral reform took an important step towards guaranteeing the right to vote for this segment of the population. The basic requirements have to do with proving their identity and being registered in the electoral roll (Valdés, 2022).

II. Implementation

a. Type of election

Those deprived of liberty can only vote for President, not for the positions of Assembly members, mayors nor council members since —in most cases— correctional facilities are not located in the electoral district of those they hold.

b. Voting method

It can be asserted that it is a limited vote, for they are only allowed to do so for a national elective office: the presidential one. It is in-person voting, so the Electoral Court must set polling stations up within the correctional facilities that were granted the necessary permits by the Ministry of Government and the General Directorate of Correctional Facilities. Before accessing the prisons, a list of the polling station officers, representatives of political parties and coordinator of the voting centre must be sent; as well as all the equipment, furniture and electoral bags¹, which are checked upon entry.

The voting process is similar to that at the other polling stations nationwide, the difference being that the inmates do not hold their own identification cards, since they are all kept by the correctional facilities' management in transparent acrylic boxes, arranged in numerical order one day ahead of the election. On Election Day, incarcerated voters stand before the polling station and say their ID number aloud for the polling station officers to locate it and verify that the photograph and data on the document match the person's and the photographic voters' list included in the electoral materials –which the inmate must sign upon voting.

c. Voting requirements

Article 9 of the current Electoral Code of the Republic of Panama establishes the following voting requirements:

1. Be a Panamanian citizen.
2. Be registered in the Final Voters' List of the respective polling station.

¹ T/N: Electoral bags contain all the materials and sensitive documents that are used on Election Day.

3. Produce their identity card.
4. Be in full enjoyment of their civil and political rights (2023).

It should be clarified that, upon entering the correctional facility, the inmates' identity cards are left in the hands of the correctional authority to be safeguarded and then returned once their sentence has been served.

d. Registration and make-up of the voters' list

For the 2024 General Election in Panama, as of Monday 6 November 2023, the Ministry of Government –through the General Directorate of Correctional Facilities– started submitting monthly reports to the Electoral Court on the number of incarcerated voters and of custodial officials for each correctional facility, because the guards and police officers on service that day at the correctional facilities also vote at those polling stations, unless they opt for early voting –known as List of Early Voters (*Registro de Electores para el Voto Adelantado*, REVA).

At youth detention facilities –under the responsibility of the Ministry of Government's Institute of Interdisciplinary Studies (*Instituto de Estudios Interdisciplinarios*, IEI)– polling stations are also set up for adolescents who are of age but who have not been transferred to public correctional facilities.

The special centres' photograph voters' list was to be issued on 5 April 2024. The correctional facilities where polling stations were installed on 5 May 2024 were included among those centres.

The official figure on the number of voters included in the special voters' list for the polling stations in correctional facilities was disclosed in April 2024.

In-prison voting in the Republic of Panama

By the end of 2023, there were 23,076 detainees throughout the country, for whom 80 polling stations were to be distributed as follows:

Region	Polling stations per correctional facility
Correctional Facility of Bocas del Toro (Bocas del Toro Province)	2
Correctional Facility of Chiriquí (Chiriquí Province)	10
Correctional Facility of Los Algarrobos (Chiriquí Province)	1
Correctional Facility of Santiago (Veraguas Province)	2
Correctional Facility of Aguadulce (Coclé Province)	2
Correctional Facility of Llano Marín (Coclé Province)	1
Correctional Facility of Penonomé (Coclé Province)	3
Correctional Facility of Las Tablas (Los Santos Province)	1
Correctional Facility of Tinajitas (San Miguelito, Panamá)	2
Correctional Facility of El Renacer (Panamá)	1
Women's Correctional Facility Cecilia Orillac (Panamá)	2
La Joya Correctional Facility (Panamá)	41
La Joyita Correctional Facility (Panamá)	
Nueva Joya Correctional Facility (Panamá)	

Continued...

Region	Polling stations per correctional facility
Nueva Esperanza Correctional Facility (Men's) (Colón Province)	8
Youth Detention Facilities	Polling stations per detention facility
Correctional Facility of Las Garzas (Panamá)	1
Basilio Lakas Correctional Facility (Colón)	1
Detention Facility of La Menor (Herrera)	1
Aurelio Granados Hijos Detention Facility (Chiriquí)	1
TOTAL	80

e. Make-up of polling stations at correctional facilities

Polling stations at correctional facilities are made up of a presiding officer, a secretary, a polling station member and a substitute, in addition to one representative per political party, independent candidate or electoral alliance.

The polling station members will verify, among themselves, the authenticity of the credentials against their identity cards, which must be in perfect condition; they must not show any indication, whatsoever, of being altered, crossed out, erased or modified.

The polling station is autonomous, and its decisions are taken by a majority of the full members appointed by the Electoral Court. On Election Day, the acrylic box containing the enfranchised inmates' IDs, along with the all the necessary materials, will be available at the polling station.

f. Electoral materials

The electoral materials are as follows:

Quantity	Material	Quantity	Material
2	Transparent bags for the certificates		Incident sheets
1	Toilet paper	3	Carbon paper sheets
1	Garbage Bag		Voter control sheets
2	Masking tape		Signboard with polling station number
1	Set of 4 pencils and 4 pens		Withdrawal of custody form
3	Markers		Prohibition poster
5	Yards of wick thread		Arrest form
4	Badges for polling station officers		Ruler
1	Calculator		Polling station instructions
1	"Annulled" stamp		Evaluation of polling station officers
1	Pad		
1	Matchbox		
1	Sharpener		
	Flashlights (optional)		
4	Screens		Voters' list for signature

Continued...

Quantity	Material	Quantity	Material
1	Ballot box		Polling station's Voters' list
1	Paper towel		Set of polling station certificates
	"Blank ballots" signboard		Presidential ballot papers
	"Null ballots" signboard		Presidential TER Forms for the Unofficial Transmission of Results (<i>Transmisión Extraoficial de Resultados, TER</i>)
	"Valid ballots" control sheets		
	Manila paper		
	Flow chart of voters at the polling station		
	Poster on how to vote		
	Envelope with documents		
1	<i>Polling station's general kit</i>		
	Prohibitions' poster		
	Straps		

g. Electoral campaign and informed voting

Regarding informed voting, the Directorate of Electoral Organization, through the Electoral Training Department in each province, assists the correctional facilities in explaining the voting mechanism

to both the inmates and the guards and police members assigned to these facilities.

It should be noted that the guards and National Police members can opt for early voting only for the presidential office.

h. Counting of votes, addition and dissemination of results

At the end of the election –at 4:00 p.m.– the ballot boxes are moved to the voting centre closest to the corresponding correctional facility. Once there, they are opened and the votes are publicly counted according to the tallying procedures –in front of political parties’ and independent candidates’ representatives– in a classroom set up for that purpose, and are recorded in the [Tallying] Certificate for President.

The certificates shall be taken to the Presidential [Tallying] Circuit Board of each electoral constituency to be added to others of the same circuit. A certificate will be then sent to the National Elections Council for it to proclaim winners the most-voted candidates who appear on the ballot as a binomial. Should two or more parties nominate the same candidates, the total votes obtained by the respective parties will be added.

i. Applicable challenge mechanisms

According to Article 464 of the Electoral Code (2023), the affected candidates or parties, and the electoral administrative prosecutor can file an annulment claim against any election or proclamation.

That annulment claim must be grounded on the provisions of Article 465 and on one of the following causes:

1. The elections are held without the prior official call of the Electoral Court or take place on a date other than that indicated, in accordance with the terms described in this Code.
2. There are errors or alterations in the tallying recorded in the polling stations' or in the general scrutiny's certificates.
3. The make-up of tallying board or the polling stations was unlawfull.
4. The voting cannot be carried out normally or is suspended due to the failure to install a polling station, or to it being incomplete.
5. The lack of essential materials to carry out the vote. Indispensable materials are those without which certainty about the will of the people is not possible, such as ballot papers, voters' lists, certificates and ballot boxes. The Electoral Court shall detail them for each election.
6. The filling of the tallying board's or polling stations' certificates by persons not authorised by this Code, or outside the established places or terms.
7. Alteration or falsification of the polling station's voters' list or ballots papers.
8. Violation of polling stations or violence or threats against polling station officers or tallying board members while performing their functions.
9. Holding of the tallying or ballot in a place other than that designated by the Code and the Electoral Court.
10. The commencement of voting after noon [12:00 p.m.], provided that less than fifty percent of the voters listed in the respective polling station vote.
11. The acts of violence or coercion against voters so as to prevent them from voting or to force them to do it against their will. The delivery of sops, donations, cash or in-kind gifts and the simulation of raffles with the veiled or express purpose of receiving votes, by [the candidates or parties] themselves or through intermediaries, is also considered an act of coercion.

12. That the corresponding tallying certificate failed to include all the polling station certificates within the constituency in question.
13. The closing of polling stations before the stipulated time, in violation of the rules that regulate it.
14. If –from the outset of the electoral process– the rights and prohibitions established in the Political Constitution and the Electoral Code are violated, thereby affecting the results.
15. Exceeding the expenditure ceilings established in Article 244.

III. Electoral turnout in previous years (quantitative reference data)

Ever since the establishment of the vote to elect the presidential ticket in the country’s correctional facilities, the following results have been obtained:

Electoral Court of the Republic of Panama **Correctional facilities’ Voting Centres** **Results in three periods**

Year	Votes cast	Valid votes	Blank votes	Null votes
2009	6,311	5,953	42	316
2014	8,095	7,864	59	172
2019	10,168	9,825	53	290
TOTAL	24,574	23,642	154	778

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Comparative table of case studies

Country	Argentina	Canada	Costa Rica	Mexico	Panama
Legal framework	Electoral Code and Sentence	Judgment on appeal	Electoral Code	Political Constitution, Judicial Ruling	Electoral Code
Year of Acknowledgement	2003 ¹ 2016 ²	2002	1996	2019	2006
Year of implementation	2003	2004	1998	2021	2009
Binding	Yes	Yes	n/d	Yes	Yes
Kind of election	National & Local positions	Lower Chamber ³	National and Local positions & Referendums	Presidential, House members & Local positions ⁴	Presidential
Coordination with the correctional authority	Yes	No ⁵	Yes	Yes	Yes
Method	In-person Single Ballot	Early / In-person or postal ⁶	In-person	Early in-person	In-person
Specific Requirements	No (pre-trial detention) Yes (sentenced)	Yes	Yes	Yes	Yes
Differentiated electoral material	Yes	Yes ⁷	n/d	Yes	Yes

Continued...

Comparative table of case studies

Country	Argentina	Canada	Costa Rica	Mexico	Panama
Informed Voting	Yes	No	Yes	Yes	n/d
Selection of the polling station members by the electoral authority	Yes	Bimodal ⁸	n/d	Yes	Yes
Make-up of the polling station	n/d	n/d	n/d	6 or 9 people ⁹	4 people
Election Observation and Candidate Representation	Yes, both	n/d	Yes, both	Yes, both	Yes, both
Scrutiny and Tallying	Deferred from In-Prison Election Day	Deferred from In-Prison Election Day	n/d	Deferred from In-Prison Election Day	Same day
Place for scrutiny and tallying	Headquarters of the National Electoral Chamber	Early voting: Headquarters of the electoral authority Postal vote: at district headquarters	n/d	Local Boards	Circuit Boards
Set up of Specific tallying tables	n/d	Yes	n/d	Yes	No
Challenge Means	Yes	Yes	n/d	Yes	Yes

1 In 2003, the National Electoral Code and its regulations were amended to enfranchise those deprived of their liberty without a sentence.

- 2 In the case of persons deprived of liberty with a final sentence, it derives from a lawsuit brought before the National Electoral Chamber on 24 May 2016, which declared various legal provisions of the National Electoral Code and the Penal Code of the Nation unconstitutional and ordered the National Congress to review the regulations in force as soon as possible. However, to date, they have not been reformed, so the electoral body attends to and resolves each case.
- 3 Canada is a federated union under the Crown of the United Kingdom of Great Britain and Northern Ireland, set up under a parliamentary system in which the members of the Senate are appointed by the Governor-General, not elected officials.
- 4 Mexico's federal system allows each state to legislate on the enfranchisement of persons in pre-trial detention for local positions, in the case of Chiapas, Mexico City and Hidalgo, this right is recognised for all their elective positions.
- 5 In the case of Canada, the ministries in charge of the correctional facilities at all administrative levels appoint an official to carry out the electoral work, and the electoral authority is informed of said appointments and work.
- 6 Voting in person is only possible for those who are in a correctional facility, while postal voting is only applicable to those under house arrest.
- 7 Special ballot with no printed names, just a box to write the name of the candidate.
- 8 In the case of early voting, the prime minister and the leaders of the parties designate the poll workers. In the case of postal voting, the electoral authority appoints district officials.
- 9 If the polling station is only for the federal election it is composed of six members, while when for a concurrent election —federal and local— the composition increases to nine people.

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She holds a degree in Political Science from the University of Hermosillo and has Master's studies in Social Sciences with a research line in Theory and Analysis of Public Affairs. She has been involved in electoral matters since 2011, over which she took part in the organisation of 5 federal elections and more than 10 local processes. During October 2014, she joined the Mexico's National Professional Electoral Service collaborating in several positions and offices of the National Electoral Institute (INE) of Mexico throughout different states of the country. She served as the Executive Secretary of the Electoral and Citizen Participation Institute of Sonora. She has been a professor on Electoral Law and Discourse and Federal Electoral Processes Analysis, among other subjects, at several universities. Currently, she is the Head of the International Affairs Unit of INE.

Argentina

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He was the runner-up for the 2002 National Academy of Law and Social Sciences of Buenos Aires Award. He was the winner of the 2003 Belgrano University Annual Award, of the Judges of the Last Decade category of the 2008 Konex Awards, of the Constitutional Law category of the 2016 Konex Awards, and the 2018 United Provinces Award from the National Academy of Law and Social Sciences of Córdoba.

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Canada

International, Provincial and Territorial Relations division, Elections Canada

Elections Canada is the independent, non-partisan agency responsible for conducting Canadian federal elections and referendums. The International, Provincial and Territorial Relations division (IPTR) manages the agency's relationships with international stakeholders and with provincial and territorial counterparts. IPTR takes

forward Elections Canada's international mandate by developing and maintaining strong and trusted relationships, participating in key events, sharing the agency's expertise, learning from the experiences of partners, and contributing to the development of electoral knowledge.

Costa Rica

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He is a senior international consultant in the areas of electoral organisation, civil registry, identity cards, legal advice and electoral criminal justice. His professional experience, of over 28 years, includes leadership and coordination positions of technical-electoral projects with the Organization of American States (OAS), the International Foundation for Electoral Systems (IFES), the United Nations (UN), Democracy International (DI) and the Latinobarómetro Corporation, in Central and South America and the Caribbean, in addition to having worked for 19 years in the Electoral Management Body of the Republic of Panama. He is an alternate magistrate of the Electoral Tribunal of Panama and national director of Registration. He is the author of several articles on electoral criminal, electoral and national and international identification matters.

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