

INTERNATIONAL CONGRESS AND MEETING OF THE SUB-COMMISSION FOR
LATIN AMERICA OF THE VENICE COMMISSION

THE GUARANTEES OF DEMOCRATIC PROCESSES: INTERNATIONAL
STANDARDS AND CONSTITUTIONAL PRINCIPLES IN A COMPARATIVE
PERSPECTIVE

TERMS OF REFERENCE

THURSDAY 29 NOVEMBER

SESSION I

**Rule of Law and Democracy: International Standards and Good Practices in the
Americas and Europe**

- **Date:** Thursday, 29 November 2018
- **Time:** 11:30 a.m. to 1:00 p.m.
- **Venue:** Palacio de la Autonomía, Mexico City
- **Session format:** Panel
- **Presentation time:** 15 minutes per speaker. Afterwards, a space will be opened for questions and answers.

TERMS OF REFERENCE

Former United Nations Secretary-General Kofi Annan, in his 2004 report, established a broad definition of the rule of law as: a principle of governance according to which all persons, institutions and entities, public and private, including the State itself, are subject to laws that are publicly promulgated, equally enforced and independently applied, and are compatible with international human rights standards and principles. It also requires measures to ensure respect for the principles of primacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legality, non-arbitrariness, and procedural and legal transparency¹.

In the declaration at the high-level meeting of the United Nations General Assembly on the rule of law at the national and international levels (A/RES/67/1) adopted on September 24, 2012, it was stated that human rights, the rule of law and democracy are interlinked, mutually reinforcing and are part of the fundamental, universal and indivisible values and

¹ <https://undocs.org/es/S/2004/616>

principles of the United Nations², recognizing the importance of fair, stable and predictable legal frameworks.

The Rule of Law is fundamental to the proper development of democracy, protecting human rights and promoting inclusion, provided there are constitutional limits to power, a key feature of democracy itself (Tommasoli, 2012). Democracy and the rule of law therefore complement each other.

Human rights, recognized in a number of international treaties and instruments, are part of international soft law, in which international standards and good practices for their recognition and protection are found, as in the case of the Rule of Law Checklist of the Venice Commission, which mentions as one of its basic elements access to justice before an independent and impartial court and respect for human rights, among others.

Recently, trends have emerged worldwide related to the weakening of the independence of judges, including politicization in selection processes, as well as limits on the capacity of tribunals to review the constitutionality of executive branch decisions. This session aims to analyze these issues, as well as to exchange experiences in order to face these challenges.

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² 67/1. Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels. (2012). [pdf] United Nations, p.2. Available at: <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf> [Accessed 12 Nov. 2018].

Discussion Questions

1. What are some international standards that can help strengthen electoral integrity at the local level?
2. What are the main threats that the rule of law faces in democracies in the current global context?
3. Provide at least one successful good practice in your country or region regarding the strengthening of the rule of law and democracy.
4. Can the rule of law be consolidated in a society where generalized conditions of equality have not been achieved?
5. What is the importance of a nation's cultural and political factors regarding the strengthening of its legal framework and the rule of law?

SESSION II

Disaffection to Democracy: Challenges to Constitutional Justice in the 21st Century

- **Date:** Thursday, 29 November 2018
- **Time:** 3: 00 p.m. to 4:30 p.m.
- **Venue:** Palacio de la Autonomía, Mexico City
- **Session format:** Panel
- **Presentation time:** 15 minutes per speaker. Afterwards, a space will be opened for questions and answers.

TERMS OF REFERENCE

Citizens' support to democracy as a form of government has fallen to its lowest levels, as shown by this year's results in Latinobarometer, where 48% of people in Latin America support it and only 24% are satisfied with it. The result is the lowest since 2001 and represents the fifth consecutive decline since 2010.

Since 2010, the percentage of citizens who declare themselves indifferent to the type of regime has systematically increased, rising from 16% in that year to 28% in 2018. Citizens of the region who have stopped supporting the democratic regime prefer to be indifferent to the type of regime, moving away from politics, democracy and its institutions. Democracy as a form of government has 48% of support. However, it is important to point out that 25% prefer an authoritarian regime and 25% do not care how they are governed. (Latinobarometer, 2018).

This is not a Latin American phenomenon: in Europe, to the express question of feeling satisfied or dissatisfied with the functioning of democracy in their country, Eurobarometer 2018 teaches us that, on average, only 55% of people in the countries of the Union are "totally satisfied" with the functioning of what Churchill considered to be the worst system of government, with the exception of all the others that have been invented.

For Freedom House, 2017 represented the twelfth consecutive year in which political rights and civil liberties recede in favour of populist and authoritarian tendencies, as shown by the cases of Turkey, Poland and Hungary, which until a few years ago looked like success stories.

This disaffection of the citizenship before democracy, result partly of the great challenges, economic crises, politics, corruption, terrorism, organized crime and the increase of the use of social networks, this last one expressed by the Superior Administrative Court

of Finland, in the Fourth World Conference of Constitutional Justice, which faces the rule of law and therefore the constitutional courts and tribunals.

In this context, the relevance of constitutional justice becomes more important as one of the pillars for the protection of democracy, in the construction of the rule of law, in the submission of all acts of the State to an examination of legitimacy under the banner of the protection of human rights, and the organization and distribution of power. Therefore, this session will cover these issues from a constitutional law perspective, and how international regimes and constitutional courts are dealing with this global phenomenon.

Discussion Questions

1. What formulas or mechanisms have you implemented in your countries or regions to facilitate access to constitutional justice?
2. What vision do you have of the role of constitutional justice before the processes of democratic disaffection in the Latin American region and in Europe?
3. What do you consider to be the advances and challenges in your region for the strengthening of democracy through constitutional justice?

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SESSION III

International jurisdictional cooperation: presentation of reports

- **Date:** Thursday, 29 November 2018
- **Time:** 5:00 p.m. to 6:30 p.m.
- **Venue:** Palacio de la Autonomía, Mexico City
- **Session format:** Panel
- **Presentation time:** 15 minutes per speaker. Afterwards, a space will be opened for questions and answers.
- **TERMS OF REFERENCE**

The federal electoral process 2017 - 2018 was the largest in Mexico's history. About 89 million citizens were called to vote, of which 62.65% exercised their right to vote to renew members of the Legislative and Executive branches with concurrent elections in 30 states, in which a total of 18,299 federal and local positions were renewed.

The size of the election and the incentives and custom to judicialize every electoral act were the great challenges faced by the Electoral Tribunal of the Federal Judiciary. As of November 16, 2018, this jurisdictional body has received 17,573 cases of which 17,474³ have been resolved. Of all the appeals received, the majority correspond to local electoral processes with 66.98% and the preparation stage, being the longest and most complex, was also the one that generated the highest number of appeals with 56% of total challenges. In this stage, two issues (registration of coalitions and candidatures and sanctioning procedures) were the most recurrent.

As part of its international strategy, and in the interest of promoting transparency, the Electoral Tribunal received 20 international visits, in which delegations from the Organization of American States, the Inter-American Institute of Human Rights, the International Foundation for Electoral Systems, the International Institute for Democracy and Electoral Assistance, the Inter-American Union of Electoral Bodies, the Kofi Annan Foundation, and the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean participated.

Likewise, alliances were established to carry out cooperation projects with the University of Siena to monitor and analyze the jurisdictional work of the TEPJF during the electoral process from a European academic approach; with the International Foundation for Electoral Systems to apply a comparative international methodology specialized in the process of electoral dispute resolution. With the Inter-American Union of Electoral

³ See TEPJF Statistics http://contenido.te.gob.mx/informacion_juridiccional/estadistica/pdf/E1-Portal%20SGA.pdf

Organizations, through its Executive Secretariat IIDH/CAPEL, a project was implemented to conduct a jurisdictional analysis from a comparative perspective in Latin America in matters of conventionality control. Finally, with the United Nations Development Programme, an analysis was carried out with a South-South and triangular cooperation approach for the exchange of experiences and links with bodies, institutions and organizations related to the effective protection of political and electoral rights. During this session, the results of these technical accompaniment exercises to the jurisdictional component of the electoral process will be presented.

FRIDAY 30, NOVEMBER

SESSION IV

Inclusion mechanisms for direct and equal political participation

- **Date:** Friday, 30 November 2018
- **Time:** 09:30 a.m. to 11:00 am.
- **Venue:** Palacio de la Autonomía, Mexico City
- **Session format:** Panel
- **Presentation time:** 15 minutes per speaker. Afterwards, a space will be opened for questions and answers.

TERMS OF REFERENCE

Today's societies are complex both in their structure and in their composition. This means that different groups of people integrate them. While this brings cultural diversity to countries, it also presents new challenges for ensuring the inclusion of all groups in decision-making, and for having a diverse citizenship, but with equal conditions for access to and protection of their rights.

Social media, in particular, is a space where several groups of the population meet and interact without filters or limitations. This interaction has completely changed the dynamics of citizens' direct participation in politics. Political discussion has largely shifted to these forums, where anyone can participate on an equal footing with others. Societies are increasingly taking advantage of these available tools to have an active voice in politics. A citizen who uses Twitter can legitimately speak out, make petitions and question political leaders. But also has the option of taking part in degrading debates with hate language (Guerrero, 2017). Such is the freedom and power that people enjoy when using social media that have led to important discussions about their regulation. This discussion then presents a major challenge to electoral authorities, pondering whether there can or should exist a restriction on freedom of expression.

On the other hand, there are many other examples of the protection of political-electoral rights and their regulation. Despite advances in the protection of political and electoral rights, there are still population groups that are in a vulnerable situation, whether due to gender, ethnicity, age, among other factors. In order to continue this positive trend, it is necessary to promote the design of strategies focused on each group with the objective of creating mechanisms for equal inclusion.

The current members of the High Chamber of the Electoral Tribunal of the Federal Judiciary in Mexico have applied the figure of the certiorari that enables a judicial policy that

responds to structural cases that affect, above all, the fundamental rights of disadvantaged groups that would not normally have access to the tribunals. Thus, when the study of matters in this way proceeds, it allows this constitutional body to pronounce on relevant issues of constitutional importance for the legal order.

One of the main mechanisms of inclusion, deeply rooted in Latin America are gender quotas, 17 of the 18 countries in the region have this policy, while in the rest of the world only about a third of the countries implement it. This has allowed for Latin America to have five out of nine Lower Chambers with the highest number of women (*The Economist*, 2018).

In Mexico, Colombia and Bolivia there are seats in Congress exclusively for representatives of indigenous communities. The 1991 Constitution in Colombia establishes that two members of the Senate and one member of the House of Representatives must be occupied by native indigenous people, while in Mexico, starting in 2018 and due to the implementation of affirmative actions by the country's electoral bodies, 13 seats in the Chamber of Deputies correspond to representatives of indigenous peoples and communities. The Constitution of Bolivia goes further, establishing in Article 147, paragraph II, the obligation to guarantee the proportional participation of native indigenous and rural nations and peoples in the Plurinational Legislative Assembly.

Furthermore, the European Court of Human Rights has denounced discrimination against candidates for an elected office. In the case of Sejdic and Finci in Bosnia and Herzegovina, the ECtHR ruled against the requirement that candidates for Parliament be members of the "constituent communities" of the State, effectively excluding members of communities such as the Gypsy and Jewish communities. Additionally, in Canada there is express legislation protecting the rights of indigenous peoples, as well as regulation recognizing the self-government of the Inuit community.

In the case of persons with disabilities, in Latin America progress has been made in creating minimum conditions for the exercise of political and electoral rights in the most equal manner possible. In Mexico, for example, the TEPJF has resolved that the integration of political bodies should guarantee the inclusion of candidates from people with disabilities, so that this vulnerable group has real representation.

Discussion questions:

1. What mechanisms has your country/region created to measure success in implementing equal citizen participation mechanisms?
2. What role do technological innovations and social networks play in inclusion for direct and equal political participation?

3. How can mechanisms for direct political participation be guaranteed to be effective and carried out in strict adherence to the existing legal framework?

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SESSION V Challenges and Lessons Learned from the 2018 Election Processes in the Americas
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- **Date:** Friday, November 30, 2018
- **Time:** 11:30 a.m. to 1:00 p.m.
- **Venue:** Palacio de la Autonomía, Mexico City
- **Session format:** Panel
- **Presentation time:** 15 minutes per speaker. Afterwards, a space will be opened for questions and answers.

TERMS OF REFERENCE

Between 2017 and 2019, 17 countries of the American continent held or will hold elections. Only during this year 2018, three of the largest economies in the region had elections, in two of them, Mexico and Brazil, presidents were elected, candidates considered as anti-system, who took advantage of a great feeling of dissatisfaction towards the traditional parties, and a general and forceful rejection towards the corruption and insecurity that plagues both countries, on the part of the citizens.

In Colombia, the decision to continue with the same economic model was made and Iván Duque was elected, candidate of the Democratic Center Party, a party founded and managed by former President Álvaro Uribe, an arduous detractor of the peace process and plebiscite. In Costa Rica Fabricio Alvarado ended up losing in the ballotage against the moderate Carlos Alvarado. On the other hand, Brazil decided to give a chance to Jair Bolsonaro, the right-wing candidate, while in the USA, the left-wing Democratic Party regained the House of Representatives. These are examples of the variety of election results that have taken place throughout the continent.

This electoral cycle takes place in an environment of low economic growth, far below the Latin American commodity boom, where the middle class grew to 34.5% of the population by 2015. This middle class, together with the entire population as a whole, considers the economy, crime and corruption as its major concerns (Latinobarometre, 2018), which coincide with the major challenges of the rule of law and constitutional justice, as analyzed in Session II.

Although the judiciary has been a counterweight and guardian of political-electoral rights during this electoral cycle, in most countries of the region, it has a level of trust below the Church and the army, which continues to be the best-rated institutions in the aforementioned survey. Such is society's discontent that support for democracy in the region has fallen by 12% in the last 10 years, from almost 70% to 57.8% (Cohen, Luu and Zechmeister, 2017).

The greatest challenge to democracy in Latin America and in all parts of the world comes precisely from voters, their disaffection with this government system, and the

emphasis that the State places on elections and not on other key factors of democracy, such as guaranteeing the rule of law and the protection of human rights which, as we analyzed in Session I, are inherent characteristics of contemporary democracies. Latin American democracies must avoid the temptation that the majority, when winning elections, act in an arbitrary and reactionary manner (*The Economist*, 2014).

Discussion questions

1. Does trust in democratic institutions reflect a country's political, economic and social situation?
2. To what extent can populism and conservatism imply a regression in the full access to the electoral political right of all citizens (LGBTTI, migrants, refugees)?
3. How can democratic disaffection be addressed and what specific actions can electoral institutions take?
4. What consequences can the election of anti-system candidates have on the democracy and institutions of a country?
5. How did social media and fake news affect the continent's elections? Is the next step a regulation?

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