

# **Judicial independence: Due process, the relationship between the branches of government and international standards**

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*General coordination: Board of the Observatory on Judicial Independence*

*Editorial committee: Technical Secretariat of the GNEJ*

*Academic coordination: Josep María Castellà Andreu, Professor of Constitutional Law at the University of Barcelona, and Andrea Pisaneschi, Professor of Constitutional Law at the University of Siena*

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## I. Context

The Observatory on Judicial Independence of the Global Network on Electoral Justice (GNEJ) aims to promote and advance the independence of electoral judges and safeguarding bodies, as a manifestation of the principle of the Rule of law, through the exchange and analysis among GNEJ participants and with the support of other international and academic actors. The Observatory analyzes the current internal factors that threaten judicial independence in the electoral field, issues periodic reports with good practices and recommendations, and calculates the impact of the Observatory's actions with customized indicators.

## II. Objective

Judicial independence provides citizens stability for the effective protection of their political-electoral rights. Hence, due process a central part of the autonomy of the Judiciary when it is time to administer justice. In this sense, it is not possible to understand the separation of powers without due process. As long as the former does not exist, it will be difficult for those who are subject to trial to enjoy their fundamental right to a fair trial.

Thus, the purpose of the study is to collect the international principles on due process and the separation of the branches of government, and their application on electoral justice and the protection of the political-electoral rights.

## III. Judicial independence

Judicial independence is **fundamental to maintaining the integrity of the judiciary**. Judges must feel free from external pressures to fairly evaluate the issues before them - based on the presented evidence and the applicable law. Judges who are subject to such external pressures and interests will be restricted in their faculties and decision-making abilities. Limits to judicial independence corrupt the function of the judiciary, subject it to external pressures, and undermine the transparency of the judicial functions (GJIN, 2020).

Judicial independence, particularly that of the Electoral Justice systems, generates public confidence in the judiciary. Judicial independence **implies that the judiciary operates in accordance with standards of fairness and impartiality and is immune from undue external or internal influence**. Therefore, judicial independence can create the conditions for members of society and participants in electoral processes to receive fair and equitable treatment before the law and increase their incentives to respect the results of judicial decisions.

**The Human Rights Committee of the United Nations (UN)** has stated that an impartial and independent tribunal is "an absolute right that admits of no exceptions" (United Nations, 1992). Moreover, the **Inter-American Court of Human Rights (IACHR)** has established that, since judicial independence "is indispensable for the protection of fundamental rights," it must be guaranteed in every situation (*ibid*). Also, the Inter-American Court has reiterated

that judicial independence "constitutes one of the basic pillars of the guarantees of due process, which is why it must be respected in all areas of the procedure and before all procedural instances in which the rights of individuals are decided" (Inter-American Court of Human Rights, 2009).

In turn, the first principle of the **Bangalore Principles of Judicial Conduct** states that "judicial independence is a prerequisite of the to the Rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects" (United Nations, 2013). Different agencies of the United Nations, the Council of Europe, and various bodies such as the International Commission of Jurists have adopted and promoted these Principles and have invited to take them into consideration for the elaboration of standards with respect to the professional and ethical conduct of members of the judiciary (*ibid.*).

In turn, the **Venice Commission** has pointed out that "the independence of the judiciary has an objective component as an indispensable quality of the judicial system as such, and a subjective component as the right of every person to have his [or her] rights and freedoms established by an independent judge"; hence, judicial independence should be considered not as an end, but as a need required by every democratic State (Venice Commission, 2010).

Moreover, the **Court of Justice of the European Union**, in an interpretation of Article 19(1), second paragraph of the **Treaty on European Union**, has established the guarantees of independence and impartiality of judges, required by Union Law. According to the Court of Justice, these guarantees imply, among other things, "that there must be rules making it possible to exclude any legitimate doubt in the minds of the judiciary as to the imperviousness of judges to external factors, in particular to direct or indirect influences from the legislative and executive powers, and as to the neutrality of judges in relation to the interests in dispute" (Court of Justice of the European Union, 2021).

However, it is important to remember that there are different mechanisms and domestic legal systems for the protection of political-electoral rights in the world, and regardless of these, it is essential that independence be one of the most important pillars in their decisions, to ensure a judiciary with integrity.

**In its handbook on "Electoral Justice" (2010), the International Institute for Democracy and Electoral Assistance (International IDEA)** proposes a classification of electoral dispute resolution systems (EDRs). In this manual, an EDR is defined as the "the legal framework within an electoral justice system that specifies the mechanisms established for resolving electoral disputes and protecting electoral rights". This classification takes as a reference the bodies of last instance -with powers and attributions related to the national legislative elections-. According to the classification proposed by International IDEA, the final decision on the electoral challenge may fall on:

- a) **A legislative body:** the final decision on the validity of the elections, including any filed challenges, is entrusted in the legislature, one of its committees or some other political assembly.
- b) **A judicial body:** the final decision on a claim related to a particular election is up to a judicial body.
  - a. Ordinary courts of the judiciary: the final decision on the outcome of elections falls on general courts that are not specialized in electoral matters, but which are part of the judiciary.
  - b. Constitutional courts or councils: the power to determine the validity of elections is entrusted in bodies with expressly constitutional competence, some of which are part of the judiciary.
  - c. Administrative courts: autonomous or judicial bodies that has jurisdiction over the final resolution of electoral challenges.
  - d. Specialized electoral courts: the last instance of resolution falls on courts specialized in electoral matters and that enjoy independence in their functions, either as part of the judiciary or independently of the three branches of government.
- c) **An electoral management body with judicial powers:** in addition to overseeing the organization and administration of electoral processes, it has judicial powers to resolve challenges and issue a final ruling on the validity of the electoral process.
- d) **Ad hoc bodies:** created with the participation of the international community or as an internal national institutional solution to a given electoral process.

International IDEA has registered that electoral dispute resolution systems (EDRs) tend to be mixed, combining legislative with administrative and/or judicial faculties, and require the participation and coordination between different branches to ensure free and fair election processes (International IDEA, 2010). Therefore, rather than distinguishing between branches of government with exclusive functions, one should consider a division of tasks performed by each branch within the constitutional framework that has been established. While the tasks are divided between branches, the functions would be shared. This view can facilitate the understanding of electoral justice and electoral dispute resolution systems in different contexts and facilitate their comparison.

For this coordination to operate efficiently, **it is required for each institution to have a margin of maneuver to develop its tasks and functions**, of mutual support -through respect for the other jurisdictions and self-control- in the sense of refraining from criticizing the decisions of the other branches, when doing so would undermine the capacity of this power to do its job well (Kavanagh, 2016).

One of the current main risks to functional coordination between the different branches of government can be seen in the unpredictable decisions of certain political elites. Since laws and institutions are tools, the effects they may have will depend on the intentionality and

political will of those who hold them. When partisan agendas strain the commitment to the institutional precepts of democratic competition and where a party or several actors become an anti-system force, democratic erosion becomes substantially more likely (Ginsburg and Huq, 2018).

In this sense, regardless of adopted the type of EDR, **all electoral justice systems and bodies must follow and apply certain universal principles and guarantees** to ensure the administration of complete and effective electoral justice. This ensures the holding of free, fair, and authentic elections, strictly in accordance with the law, as well as to protect, restore or redress the enjoyment of electoral rights. Thus, regardless of adopted EDR, fundamental rights must be ensured, such as effective recourse before a previously established independent and impartial court, a legal due process and access to a public hearing in which the defense of the electoral right is guaranteed.

Although the principles that the EDRs have in a State are defined from the different contexts, circumstances, and conjunctures, we can consider, based on the Bangalore Principles, that independence, jurisdiction, impartiality, legality and integrity, are the minimum principles that the bodies responsible for the administration of electoral justice must consider (United Nations, 2013).

Based on the discussions presented, **what coordination limitations or external or internal pressures does the jurisdictional-electoral authority currently face to ensure its independence in elections? Which principles of judicial independence could be updated, and which could be included?**

#### IV. Due process

Due process is understood as **a legal principle that must be analyzed in correlation with other principles, rights and liberties, such as the right to a hearing, and the principles of legality and legal certainty** (García Ramírez, 2006). **The principles and guarantees of due process are recognized in international covenants and conventions, but also in important declarations and resolutions on human rights**, adopted by the General Assembly of the United Nations (UN) and the Organization of American States (OAS), including the **International Covenant on Civil and Political Rights** and the **American Convention on Human Rights** (Meléndez, 2004).

International law **has recognized principles and guarantees of due process that are common to both parties to the judicial process (judges and defendants)**, some of which are indivisible guarantees, i.e., they cannot be suspended, affected, or limited under any circumstances.

These principles, such as the **right to a prompt and effective remedy**, the **right to a fair trial** and the **right to be heard** with the guarantees of a competent court, among others, emanate from consolidated supranational norms and jurisprudence, particularly the **European Convention for the Protection of Human Rights and Fundamental Freedoms** and the **American Convention on Human Rights**. These principles apply to all

aspects of the administration of justice, and therefore include electoral justice. Some of the most relevant sources are mentioned below.

**The Universal Declaration of Human Rights (Article 8)** establishes that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"; **and Article 10 establishes** that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him " (United Nations, 1948).

Also, **Article XVIII of the American Declaration of the Rights and Duties of Man recognizes the right to a fair trial**, establishing that "every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights" (Inter-American Commission on Human Rights, 1948).

Article 2.3 of the **International Covenant on Civil and Political Rights** establishes that: each State Party to the present Covenant undertakes: a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and, c) To ensure that the competent authorities shall enforce such remedies when granted (United Nations, 1966).

The **Covenant** also provides in Article 14.1 that: all persons are equal before the courts and tribunals. Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against him or of his rights and obligations in a suit at law (*ibid.*).

The **American Convention on Human Rights recognizes in Article 8** that "**every person has the right to a hearing**, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature" (Organization of American States, 1969).

It also states in **Article 25** that "**everyone has the right to simple and prompt recourse**, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties" (*ibid.*).

The **European Convention for the Protection of Human Rights and Fundamental Freedoms** also states, in **Article 6**, that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Article 13 states that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity" (European Court of Human Rights, 2021).

More specifically, paragraph 1 of Art. 6 grants every person the right to have his or her civil or criminal case examined fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law. Moreover, the judgment must be made public, subject to **possible exceptions justified by the safeguarding of interests of a collective order** (morals, public order, national security, administration of justice) or related to the subject matter of the judgment (interests of minors, protection of the private life of the parties involved).

Paragraphs 2 and 3 of Art. 6, on the other hand, refer to guarantees dictated specifically for persons prosecuted under criminal law. These are the presumption of innocence, which the accused enjoys until her or his guilt is legally established; the right to receive clear, timely and complete information on the nature and grounds of the accusation; the right to have the necessary time and facilities to prepare the defense; the right to defend oneself personally or through a trusted lawyer, benefiting from free legal aid when the conditions are met; the right to examine or have witnesses examined against him and to make use of witnesses on his behalf and the right to free assistance.

Hence, Article 6 expresses the right to a fair trial in two senses: as **a right to a trial** guaranteed in paragraph 1, such as reasonable length of trial and access to an independent and impartial tribunal, and as **a right at trial**, protected in paragraph 3, which includes a series of minimum procedural guarantees to protect the effective exercise of the defense, which every person charged with a crime must exercise. The list of rights in Art. 6, however, is not considered mandatory and, therefore, the latter have been expanded by case law, adding also the right to cross-examination, the right to participate in the trial, the right to remain silent and not to incriminate oneself (European Court of Human Rights, 2006).

It should be noted that the **European Court of Human Rights** (ECtHR) has ruled out the applicability of Art. 6 of the **European Convention on Human Rights** (ECHR) to electoral disputes because of the express reference contained in that article to civil and criminal matters (European Court of Human Rights, 1997).

Recently, this limit has been partly overcome by the Court, which in a recent decision *Mugemangango v. Belgium* 2020, while confirming the inapplicability of Art. 6 ECHR to electoral disputes, derives from Art. 3 Protocol 1 ECHR the obligation to provide adequate



tools for the protection of the right to vote, including effective systems of control of elections' regularity, which are not only impartial but also appear to citizens as such (European Court of Human Rights, 2020). In particular, the ECtHR defined three principles that are in part similar to those deriving from Art. 6: the presence of guarantees of impartiality of the judicial body; the delimitation by law of its discretion; the presence of a procedure capable of guaranteeing a fair, objective and sufficiently motivated decision.

Moreover, **Article 7 of the African Charter on Human and Peoples' Rights** stipulates that every individual has the right to have their case heard, which implies: (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force, (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; and (d) the right to be tried within a reasonable time by an impartial court or tribunal (United Nations, 1981).

On the other hand, over the last decades, the International Foundation for Electoral Systems (IFES), the Venice Commission and the International Institute for Democracy and Electoral Assistance (International IDEA), among other agencies, **have issued recommendations and provided technical assistance to countries in electoral matters. In particular, they seek to ensure that electoral complaints are effectively resolved** by national electoral institutions, thus guaranteeing the legitimacy of an electoral system.

For example, **IFES** has identified seven standards in the filing of electoral complaints, based on international electoral practices (Vickery, 2011). These standards derive from the fundamental right to political participation (the right to partake in government through citizen representation), which can be synthesized into the following: a) a right of regress for election complaints and disputes; b) a clearly defined regimen of election standards and procedures; c) an impartial and informed arbiter; d) a system that judicially expedites decisions; e) established burdens of proof and standards of evidence; f) availability of meaningful and effective remedies; and, g) effective education of stakeholders.

Specifically, regarding this last standard<sup>1</sup>, IFES considers that civil society, political parties and citizens need to know: a) which body will be in charge of receiving and resolving their complaints or means of challenge; b) the process for filing a complaint; and c) the procedural and substantive laws that govern the content of the complaint (Macedo, 2014).

Other entities, such as **the Venice Commission, incorporate another scale of standards based on the guarantee of due process and access to electoral justice**, as well as the maximization of substantive political rights, in what they call the *Code of Good Practice in electoral matters* (Venice Commission, 2002). Within the good practices, the need to have

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<sup>1</sup> States should implement training programs for election officials, as well as civic education programs to familiarize the public with electoral procedures and issues. Vickery, Chad, *Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections*, op. cit., pp. 13 and 66 et seq.

an electoral commission or tribunal that oversees the dispute resolution system is emphasized. This instance should be competent to nullify elections when irregularities violate the provisions of the law, to the point that it must be defined that a certain electoral process is invalid.

The same Code then goes on to define elaborately the procedures for the control of elections. For example, it recommends: the simplicity of the procedures for the control of elections, the clear division by law of the competences relating to these activities, the definition of short deadlines for the resolution of electoral disputes, the broad legitimacy to appeal the election results and the right to be heard by the judiciary body. The standards developed by the Venice Commission were recently reaffirmed in an *amicus curiae* produced on the occasion of a case decided by the ECtHR, *Mugemangango v. Belgium* (2020). On that occasion, the Commission recalled, among other things, the need to guarantee procedural rights such as the existence of an effective remedy and a method of dispute resolution based on the principles of due process; in particular, according to the Commission, the decision must be taken by a body established by law, which is independent of the executive and the legislature or which acts with complete independence and impartiality and provides sufficient institutional and procedural guarantees against arbitrary decisions. Moreover, the Venice Commission stresses that legal aid should be available to those who do not have the resources to provide it (Venice Commission, 2016).

In this regard, the **European Court of Human Rights has been active in the interpretation and expansion of political rights and their procedural guarantees**, as can be seen in the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (European Court of Human Rights, 1987).

Moreover, **International IDEA has held that access to justice must be guaranteed not only to the person or political party that is the plaintiff or petitioner, but also to those who have an interest contrary to it** -such as the interested third party-, for the latter to be ensured the guarantee of a hearing. Thus, the system will comply with the principles of due process related to the right to defense, since all parties have the right to resort to the process with equal opportunities to insist and argue what is in their interest (International IDEA, 2010).

In light of this, we ask ourselves: **how can the respect for and public trust in the judicial-electoral authorities be strengthened?**

## **V. Selection process and appointment of judges**

To ensure due process and neutrality in decision making, the selection process and the appointment of judges must be considered. In the absence of minimum standards, the selection mechanism could affect the impartiality of the authorities, resulting in partisan bias. The *Basic Principles on the Independence of the Judiciary* state that "**persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law**. Any method of judicial selection shall safeguard against judicial

appointments for improper motives." and "on the other hand, it means that the judiciary and its members should use resources responsibly, professionally, with integrity and in a transparent manner" (United Nations, 1985).

Moreover, **the procedures for the appointment of judges must meet certain minimum criteria** to "translate into a truly independent regime that allows access to justice" (Inter-American Commission on Human Rights, 2013). The Inter-American Court of Human Rights (IACHR) has explained that "it must be considered that not any procedure satisfies the conditions required by the Convention for the proper implementation of a truly independent regime. If basic parameters of objectivity and reasonableness are not respected, it would be possible to design a system that allows a high degree of discretion in the selection of career judicial personnel, by virtue of which the persons chosen would not necessarily be the most suitable" (Inter-American Court of Human Rights, 2009).

In turn, the Venice Commission has issued several opinions in this regard. The Commission has established that a basic condition for the proper functioning of the selection of constitutional judges is to accept that **this procedure must be to guarantee the independence of the constitutional court** (Venice Commission, 1997).

This is possible on the condition that **the constitutional court is composed of the best jurists, whose professional position must be so strong that the protection of the Constitution and independence from political interests are a priority** for them. Thus, they should be people of recognized competence, specialists in various fields, and both theoretical and practical jurists. Therefore, it would be expected that the candidates would be proposed by universities or by representatives of the legal professions, such as judges, prosecutors, and lawyers (Venice Commission, 2004).

On the other hand, the IACHR has established that the immobility of judges is "**a guarantee of judicial independence**, which in turn is composed of the following guarantees: tenure, an adequate promotion process, and no unjustified dismissal or free removal" and that it "must operate to allow the reinstatement to the status of judge of those who were arbitrarily deprived of it" (Inter-American Court of Human Rights, 2009). As the Inter-American Commission has pointed out, stability in the position of judges "is indispensable to guarantee their independence in the face of political or governmental changes" (Inter-American Commission on Human Rights, 2009).

The Court has also explained that "the irremovability of judges is **closely linked to the guarantee against external pressures**, because if judges do not have the security of permanence for a given period, they will be vulnerable to pressures from different sectors, mainly from those who have the power to decide on dismissals or promotions in the Judiciary" (Inter-American Court of Human Rights, 2009).

In turn, the Venice Commission in its *Report on the Independence of the Judicial System: The Independence of Judges* states that "**judges, whether appointed or elected, shall have guaranteed tenure** until a mandatory retirement age or the expiry of the term of office" (Venice Commission, 2010).

Also, the Commission considers that the establishment of interim periods may undermine the independence of judges, as they may feel pressured to decide cases in a particular way. This should not be interpreted as precluding any possibility of appointing temporary judges. The Commission emphasizes that States where the judicial system is relatively new, it may be necessary in practice to ensure in the first instance that a judge is actually capable of performing his or her functions before any permanent appointment. If temporary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office" (*ibid.*).

In this sense, the Commission holds that this is above all a matter of **excluding factors that could give rise to doubts as to the impartiality of judges**: "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value" (*ibid.*). This allows the independence of the judiciary in relation to other branches to be respected, which allows for the separation of powers that should exist in all democratic states.

Therefore, it is important to ask ourselves, **with the current problems faced by democracies, how has the independence of judges been affected in the global pandemic, both in terms of budget and decision-making?**

## VI. Separation of powers

The United Nations *Basic Principles on the Independence of the Judiciary* state that the judiciary should act free from external pressure and influence, whether direct or indirect, and that this should be guaranteed by the State and proclaimed by the respective Constitutions of each country (United Nations, 2021).

It is generally accepted that a modern democratic state should be based on the separation of powers. In Rule of law, the three branches of government must act based on and within the limits established by law (Venice Commission, 2020).

Article 3 of the **Inter-American Democratic Charter** establishes that essential elements of representative democracy include, among others, respect for human rights and fundamental freedoms; access to power and its exercise subject to the Rule of law; the holding of periodic, free, fair elections based on universal and secret suffrage as an expression of the sovereignty of the people; a pluralistic system of political parties and organizations; and the separation and independence of the branches of government (Organization of American States, 2001).

For example, **IFES** points out that in all States, the interaction between the main institutions of the State is of fundamental importance. While accepting that different forms of separation exist, it can also be argued that the separation of powers is not an "optional extra" but, on the contrary, separation must exist in one form or another to respect the Rule of law. A government structure committed to the Rule of law must necessarily provide for a separation

between the key functions of administration of the branches of government and the machinery of justice (Bradley, 2003).

Moreover, **International IDEA** establishes that a federation is composed of at least two levels of government, each of which has a degree of autonomy that is protected by a constitution. Countries with a federal system of government share powers between these levels differently, which affects their decision-making processes. In that sense, it notes that federal constitutions, including the division of powers, are enforceable through the courts. When this occurs, the court must interpret the constitution and decide how it applies; these decisions are usually binding (Saunders, 2019).

Recently, and due to the health crisis, in the *Report on the measures adopted in the Member States of the European Union as a result of the COVID-19 crisis and its impact on democracy, the rule of law and fundamental rights* (Venice Commission, 2020), the **Venice Commission** established that the principle of checks and balances requires that the different branches of government be endowed with different competencies, so that none of them has a monopoly of state power and can check each other. In this regard, it emphasized that when conducting long-term reviews, States must ensure that changes in the distribution of power do not interfere with the separation of powers and their mutual control.

In this regard, and considering the health crisis, we question **what will be its impact on judicial independence in the medium and long term? Considering that there may be interference by the branches of government as a result of this situation.**

## VII. Conclusion

The relationship between the branches of government represents the responsibilities of government in different divisions to limit one branch from exercising the basic functions of another. The intention is to avoid concentration of power and to provide for checks and balances.

On this note, a recent worldwide trend involving the judiciary, has specifically included the electoral-jurisdictional authorities in a way that has made them serve as the last instance in the protection of political-electoral rights, in most cases.

As has been observed in the mentioned principles, it is advisable that the electoral jurisdictional authorities have guarantees for the separation of powers and the protection of due process. International law (International Covenants on Human Rights and, especially, the American Convention, among others) recognizes such guarantees and principles, among which the principle of legality stands out. This principle contemplates the separation of powers as an indispensable element for the political stability of a country. Therefore, the independence of the electoral jurisdictional bodies is of vital importance in the face of any pressure from any other government branch or even political pressure.

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