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REGIONAL BALANCE

INDEPENDENCE OF ELECTORAL MANAGEMENT BODIES



COMITÉ DE COORDINACIÓN

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INTRODUCTION

Elections are the fundamental axis of a democratic system. The Electoral Management Bodies (hereinafter EMB), both in terms of organization or logistics, arbitration and justice, display different arrangements in the various countries of the region, as a result of the political system, the democratic culture and, above all, the institutional settings aimed at providing trust and credibility to the electoral processes and results.

Regardless of the form of the electoral architecture that has been established in the different countries of the Americas, it is clear that the degree of independence is not defined by it, i.e., whether they are concentrated or deconcentrated EMB. Rather, the degree of independence can be determined by the level of compliance with a series of criteria or elements related to their arrangement and the level of autonomy in aspects such as their operation, technical capacity to develop their duties, and the type of relationship they have with the other branches of government, political organizations, and civil society.

In this analysis it is also important to take into account the distance between what the norm establishes regarding the above mentioned issues and what actually happens in practice. These differences are usually identified by electoral observation organizations. Finally, citizen perception is another mechanism for assessing the independence and credibility of the EMBs.

Therefore, within the framework of the meetings of the Roundtable for Safeguarding the Independence of Electoral Management Bodies of the GNSEI, this document examines the degree of autonomy of EMBs in the Latin American and Caribbean region. The objective is to contribute to understanding the extent and complexity of the problem while creating GNSEI's programs in the roundtables to address priority issues. With this in mind, the information and evaluation of the level of independence of the EBs was collected from the members of the Electoral Observation and Integrity Network/Lima Agreement (hereinafter referred to as the EOI Network/Lima Agreement), based on the electoral observation exercises in their countries.

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I. CHARACTERIZATION OF THE ELECTORAL MANAGEMENT BODIES

Although the electoral architecture of the EMBs is not related to their degree of independence, it is important to understand aspects of how their work and the challenges they eventually face. There are countries in which the duties are concentrated in a single EMB, responsible for managing, organizing, and leading the elections. They are also responsible for controlling and monitoring electoral campaigns to ensure that procedures and resolutions are in accordance with the law and protect or restore the exercise of political-electoral rights. They are also in charge of the judicial resolution of conflicts related to the electoral process. Examples of these cases are the Superior Electoral Court of Brazil, the Electoral Court of Uruguay, the Electoral Tribunal of Panama,

the Supreme Electoral Court of Costa Rica, and the Supreme Electoral Court of El Salvador.

Other countries have opted for a deconcentrated model, in which two or more EMBs are responsible for the logistical organization, arbitration or governance of elections and jurisdictional control of elections. In the region, examples of this model are varied and very different.

The following table presents a summary of the electoral architecture of Latin American and Caribbean countries based on whether their EMBs are concentrated or deconcentrated.

Table 1. Models of EMB by Latin American and Caribbean country

Country	Electoral Management Body	Functions	Characterization
Argentina	National Electoral Chamber (Cámara Nacional Electoral - CNE)	Judiciary	Deconcentrated
	National Electoral Directorate (Dirección Nacional de Electoral - DINE)	Administrative	
Bolivia	Pluri-national Electoral Body – Supreme Electoral Court (Órgano electoral Plurinacional - Tribunal Supremo Electoral - TSE)	Administrative and judiciary	Concentrated
Brazil	Superior Electoral Court (Tribunal Superior Electoral - TSE)	Administrative and judiciary	Concentrated
Colombia	National Electoral Council (Consejo Nacional Electoral - CNE)	Judiciary	Deconcentrated
	National Civil Registry (Registraduría Nacional del Estado Civil - RNEC)	Administrative	
	5th Section of the Council of State (Consejo de Estado sección 5ta)	Judiciary	
Costa Rica	Supreme Electoral Court (Tribunal Supremo de Elecciones - TSE)	Administrative and judiciary	Concentrated
Ecuador	National Electoral Council (Consejo Nacional Electoral - CNE)	Administrative	Deconcentrated
	Electoral Contentious Court (Tribunal Contencioso Electoral - TCE)	Judiciary	

El Salvador	Supreme Electoral Court (Tribunal Supremo Electoral -TSE)	Administrative and judiciary	Concentrated
Guatemala	Supreme Electoral Court (Tribunal Supremo Electoral -TSE)	Administrative and judiciary	Concentrated
Mexico	National Electoral Institute (Instituto Nacional Electoral - INE)	Administrative	Deconcentrated
	Electoral Tribunal of the Federal Judiciary Branch (Tribunal Electoral del Poder Judicial de la Federación - TEPJF)	Judiciary	
Panama	Electoral Tribunal (Tribunal Electoral -TE)	Administrative and judiciary	Concentrated
Peru	National Office of Electoral Processes (Oficina Nacional de Procesos Electorales - ONPE)	Administrative	Deconcentrated
	National Civil Registry (Registro Nacional de Identificación y Estado Civil)	Administrative	
	National Jury of Elections (Jurado Nacional de Elecciones - JNE)	Judiciary	
Dominican Republic	Central Electoral Board (Junta Central Electoral - JCE)	Administrative	Deconcentrated
	Superior Electoral Court (Tribunal Superior Electoral - TSE)	Judiciary	

Source: Own elaboration based on the normative review

II. FACTORS THAT MAY INFLUENCE THE LEVEL OF INDEPENDENCE OF ELECTORAL MANAGEMENT BODIES

Regardless of the EMB model of each country, there are several factors that may influence the level of institutional independence of the electoral bodies. Based on the principles of the independence of judicial bodies, although in many countries the nature of the EMBs is administrative, it is relevant to analyze the rules for their (i) appointment; (ii) permanence; (iii) financial autonomy, which includes having sufficient resources for the exercise of their duties; and (iv) measures to safeguard against external pressures.

1. Appointment of EMB members

Although a fundamental characteristic of an independent EMB is that the executive branch does not participate in its appointment, the participation of different bodies and specific procedures have been tes-

ted in the region, seeking political independence. In any case, it is necessary to establish an objective and transparent selection method and criteria.

In the Americas there are examples of EMB whose members:

- (i) Are nominated and appointed by the legislative body, with different majorities (Colombia -CNE, Uruguay -CE- and Dominican Republic - JCE);
- (ii) Are selected through a process that privileges merit and professionalism, and are appointed by a qualified majority of the legislative body (Mexico - INE), the judiciary (Colombia -RNEC), or another body (Ecuador - TCE);
- (iii) Are the result of a procedure in which both the judiciary and the legislature (Mexico -TEPJF) participate;

- (iv) Are chosen by each of the branches of government (Panama - TE);
- (v) Are selected by a qualified majority of a judiciary body (Costa Rica - TSE);
- (vi) Are nominated by the Judiciary and a Bar Association and appointed by the Executive (Brazil -TSE- and Argentina - CNE);
- (vii) Are directly selected by the Executive (Argentina - DINE); or
- (viii) Are nominated by the political parties and an organ of the judiciary and elected by different majorities in the legislature (El Salvador).

2. Permanence/immovability of EMB members

One of the basic conditions for EMB members to maintain their independence is the security of their tenure. Otherwise, they are susceptible to pressures from different actors, mainly, those who participate or influence on the renewal of their position.

In all the countries of the region analyzed, except Argentina, the members of the EMBs are appointed for a fixed term, which varies from country to country (minimum 2 years in Brazil and maximum 9 years in Mexico, with a gradual method of renewals every three years¹). In some countries, EMB members may be reelected (for example, in Brazil for another 2 years and in Costa Rica and in El Salvador, both indefinitely). Among these cases, the example of El Salvador stands out, since its appointment period is directly linked to the presidential term. In the case of Argentina, the members of the National Electoral Chamber are appointed on a permanent basis until their retirement, and the National Electoral Director remains in office until the end of the presidential term or until the Executive Branch decides.

Regarding special procedures and greater protection against removal during the period in which they hold office: in Mexico and Brazil it is through impeachment; in Colombia, through a special jurisdiction granted by the Supreme Court of Justice, upon ac-

cusation by the Prosecutor's Office. In Ecuador, they are subject to prosecution, except during electoral periods, and while in office they acquire immunity, so they may not be deprived of their liberty or criminally prosecuted². Finally, in El Salvador, the legislation does not contemplate removal from office, however, the cases of removal experienced so far are a consequence of impeachment and unconstitutional vices in their appointment.

3. Financial autonomy of EMBs

The EMBs need to have the necessary resources to perform their duties adequately. Limitations or conditions to financial autonomy may impact the EMB's independence, since the lack of resources may translate into an indirect control mechanism over its decisions and actions. Thus, there is a direct correlation between the EMBs' financial autonomy and their degree of independence. It is also essential to provide the EMBs with the capacity to administer and manage these resources, which must be accompanied by transparent accountability mechanisms for their use.

However, due to the different models of the EMBs, how financial resources are allocated varies from one country to another, through different mechanisms and with different impacts:

- (i) Complete budgetary autonomy and sufficient resources (Costa Rica, Dominican Republic and Brazil, the latter being part of the judiciary);
- (ii) Budgetary autonomy but with unjustified budget cuts (Mexico³) or an allocation of resources that is dependent on the government (Ecuador);
- (iii) With sufficient resources, but dependent on other bodies of the State to determine its budget (Colombia⁴); and
- (iv) No financial autonomy and dependent on the government for approval and the allocation of resources (El Salvador).

¹Other periods of fixed term are 4 years in Colombia and the Dominican Republic, 5 years in El Salvador and 6 years in Costa Rica.

²Except in cases of flagrante delicto, family violence and other exceptions provided by law.

³This has led to the extreme case where the INE had to organize a recall process in 2022 without having the resources allocated for it.

⁴Colombia is a sui generis case, because although the Constitution establishes the financial autonomy of the National Electoral Council -the body in charge of the surveillance, control and governance of the electoral process, the National Civil Registry is the body in charge of the budget, that receives, manages and distributes the resources among the electoral authorities.

4. Safeguard measures to external pressures

The responsibilities and obligations of the EMBs in the decision-making processes and the deployment of electoral logistics imply a high demand for access to information and transparency in the relationships with different actors involved in the electoral contest.

In this regard, it is important to have clear rules on the conflicts of interest that EMB members may have; the form and scope of relationships with their suppliers, political organizations, other state bodies, and civil society.

In this regard, in different countries of the region, the electoral authorities must fulfill an asset declaration at the beginning of their term in office and in some cases, at the end of their term (El Salvador and Mexico). In others, they are required to present these declarations and an authorization to access their bank accounts (Ecuador). And there will be others that also required to submit conflict of interest declarations (Mexico and Colombia).

III. PERCEPTION OF THE CITIZENRY AND OF THE ELECTORAL OBSERVATION ORGANIZATIONS

The legitimacy of public institutions is based on the citizenry's credibility and trust. This is particularly relevant in the case of the EMBs, since they are in charge of convening citizens to participate in the election processes of those who will govern and represent them. Internationally, there are different indexes that allow measuring the degree of credibility of the authorities.

In particular, the 2021 Americas Barometer showed that during 2012 and 2021, trust in Latin American electoral systems remained at an average of 40%⁵. In addition, a common latent concern in Latin American countries is the belief of an incorrect vote count by the EMBs⁶. Only in Uruguay and Chile more than 75% and 60% of the society, respectively, have the credibility and trust in the EMBs for a correct vote count⁷.

In this respect, it should be noted that the credibility of the results of a free and fair electoral process is based on the strength of the electoral legal framework, the integrity of the EMB, the dispute resolution processes, and the transparency and publication of the proceedings of the electoral system⁸. This prevents corrupt actors from seeking to preserve individual interests or political party

impositions through the manipulation of electoral judicial processes⁹.

However, according to the results of the observation carried out by the EOI Network on the EMBs, it is possible to appreciate the gap that exists between what are the standards regarding the issues described in the previous section and what actually happens in practice. In particular, the EOI Network identified the following:

- (i) In Argentina, the National Electoral Chamber enjoys the prestige of citizens and civil society organizations working on electoral issues. The most discussed institution is the National Electoral Directorate, which depends on the National Executive Power. Beyond this historical discussion on whether there should be an independent autonomous body, or whether the entire electoral process should pass to the Judiciary, the EMB in Argentina presents good performance standards.
- (ii) In Brazil, the Supreme Electoral Court is independent and impartial, but has a lot of protagonism, which generates the perception that some of its

⁵LAPOP. LAPOP's 2021 Americas Barometer takes the Pulse of Democracy, p. 40. Retrieved at: www.vanderbilt.edu/lapop/ab2021/2021_LAPOP_AmericasBarometer_2021_Pulse_of_Democracy_SA.pdf.

⁶Ibid., p. 44.

⁷Ibid.

⁸International Foundation for Electoral Systems. Election Audits: International Principles that Protect Election Integrity, p. 2. Retrieved at: www.ifes.org/sites/default/files/migrate/2015_ifes_di_election_audit_white_paper.pdf

⁹International Foundation for Electoral System. Judicial independence and integrity. Retrieved at: www.ifes.org/our-expertise/anti-corruption-democratic-trust/judicial-independence-integrity

decisions are political (more in response to its own political preferences than to a direct influence of the governments but impacting the elections and the outcome of the ballot box¹⁰). In some cases there have been allegations of partiality on the part of some judges, which has a direct impact on public trust and public opinion.

In terms of transparency, although electoral data is public, there are not many opportunities for citizens to participate in decision-making, although this depends on who occupies the presidency of the Tribunal. Specifically in the analysis of electoral reforms, there is little participation of civil society, despite the fact that different channels have been opened in recent years (such as public hearings and open data for public consultation). In fact, all the latest electoral reforms in Brazil were aimed at impacting the electoral process, with the objective of eliminating certain actors from the political game, although this is not publicly confessed.

(iii) In Colombia, the EMBs as institutions enjoy acceptable levels of trust. However, the greatest number of objections are focused on the election process of the CNE, since the intervention of political organizations in its nomination and the Congress in its election goes against the principle of partisan independence. On the other hand, in relation to the National Civil Registry, although transparency mechanisms have been proposed for the election of its head, one of the major criticisms made to this EMB is related to the risk of clientelism and loss of partisan independence on the part of its officials, since the highest levels are freely appointed and removed, which prevents their professionalization and specialization.

Regarding financial and administrative autonomy, there is a clear imbalance between the two bodies that comprise the electoral authority. The National Civil Registry has this autonomy, accompanied by a great discretion in the contracting processes due to the fact that these are covered by national security

contracting norms. On the other hand, the National Electoral Council, whose mission is the surveillance, inspection and total control of the electoral activity, depends financially on the National Civil Registry. Additionally, this Council does not have territorial presence and needs to be strengthened in its technical capacity to fulfill its responsibilities.

(iv) In Costa Rica, the Electoral Supreme Court enjoys full independence and professionalization in its organization, institutional performance and decision making. As a concentrated entity, it is considered the fourth power of the Republic. The Electoral Supreme Court members are perceived as very impartial and adherent to electoral regulations. In general, this court is quite transparent in its decision making and institutional performance; however, it is quite conservative in its media presence and less exposed to public scrutiny.

The Electoral Supreme Court has the initiative to present bills and reforms before the Legislative Assembly, which are never consulted nor are debates generated prior to their presentation before Congress. In this sense, the participation of civil society is null in terms of the presentation of reforms, which limits the participation of diverse groups.

(v) In Ecuador, the mechanism of appointment of the Electoral Contentious Court, citizen in its origin¹¹, has always been questioned. The selection processes implemented by the Council of Citizen Participation (part of the "Fifth Power") generate doubts since many times those selected have had a previous background of political militancy and/or closeness to the governments in power. In any case, the perception of the impartiality and technical work of its members is variable, depending on the people and the territories.

The latest reform process (2019) was perceived as more participatory than previous ones (2008 to 2017) where the existence of a hegemonic political force (in those periods) limited plural debate.

¹⁰This is very often the case with the application of the "clean record" law, which disqualifies many candidates, including elected ones, based on the grounds that may be considered discretionary and imprecise in its legal concept.

¹¹Prior to this model, the members of the EMB were representatives of the most voted parties (of purely political origin).

(vi) To date in El Salvador, the final results of electoral processes held since 1994 have not been questioned and important steps have been taken in terms of reforms to facilitate the exercise of suffrage and the development of political parties, among others. Nevertheless, the electoral observation missions have repeatedly pointed out flaws due to the lack of independence in the performance of the EMB because of the weight of the political parties in its integration, which has negatively influenced inclusion and control. It has also been highlighted the institutional weaknesses and little development of the Supreme Electoral Court's professionalism, which is evidenced in the low jurisdictional capacity, along with a weak regulation of the jurisdictional function, generating an almost null institutional development for the control of political party financing.

Today, facing the presidential, legislative and municipal elections of February and March 2024, the EMB is once again putting its independence and capacity to the test. Among others, delays are evident in the contracting of the company that will develop the electronic modality for the vote from abroad and continues to show weaknesses in the control of electoral propaganda. In the case of the presidential reelection, which was enabled by judicial means, the EMB has publicly stated that it will abide by the ruling. Likewise, eight months before the elections, the Legislative Assembly continues to approve reforms that have an impact on the integration of popularly elected authorities, modifications that the EMB complies with, making the adjustments almost immediately.

(vii) In Guatemala, in the last 8 years there has been a very marked deterioration of the electoral institutionality to the point that only 17 percent of the citizenry trusts its work. The current electoral authorities have been accused of corruption (with respect to the resources allocated to them) and lack of independence in the eyes of practically all actors in society.

As for the debates on electoral reforms, these are very poor and closed to partisan political actors; the participation of specialists and specialized organizations is highly limited.

(viii) In Mexico, the overall perception is that the performance of EMBs has been impartial to political parties and forces. However, their impartiality was highly questioned by the runner up (current president) in the 2006 elections. This undermined the credibility of the EMBs, particularly among their supporters, although with little resonance among the general public. During the last two or three years, this autonomy has been threatened by the president and the incumbent party, both formally through constitutional reform initiatives (recently dismissed by the Supreme Court), as well as through accusations of excesses and privileges of the councilors and conspiracy theories of a perverse exercise of power, generating a division in public opinion regarding the EMBs. As for the electoral prosecutors' offices, there have been accusations of links between the Electoral Prosecutor and the interests of executive powers, by the presidents and governors.

The EMBs are transparent in their decisions, information and agenda; however, the closeness between electoral institutions and social organizations has had ups and downs. In general, electoral institutions show more closeness with political parties than openness with citizens. On the other hand, although electoral reforms are common, the debates regarding them are totally co-opted by the political parties present in Congress, leaving aside the legal mandates to include citizens. This intensifies impunity in the face of the most common problems, such as electoral clientelism, illicit financing of electoral campaigns and electoral violence, commonly omitted from these reforms.

(ix) In Panama, in recent years, the credibility of the Electoral Court has been greatly reduced due to the lack of independence from the parties. This has increased distrust towards the electoral authorities. It is also perceived that there is a lack of transparency and integrity in decision making. On the other hand, the openness to participate in the debates on electoral reforms is minimal, limited and controlled.

(x) In the Dominican Republic, in the last 3 years, a greater independence of the members of the Central Electoral Board has become clearer since in its constitution a more diverse representation has been

achieved, with a slightly lesser weight given to the political parties. However, previously, the fact that EMBs have been linked to political parties has had an impact on the transparency of the processes, their decisions, possible favoring particular interests and obstacles for civil society to exercise control over their functions.

During the discussions on electoral reforms, multiple actors have been allowed to participate in diffe-

rent scenarios; however, partisan interests are predominant in Congress and have not allowed progress to be made on important reforms for the electoral regime.

(xi) In Uruguay, EMBs are political in nature and represent the entire partisan spectrum. Even so, they enjoy enormous respect across the spectrum, and a perception of impartiality. It is also an open and transparent institution.

IV. BEST PRACTICES

The analysis of electoral governance shows that there are still obstacles to overcome. Among them, ensuring the full independence, transparency, credibility and legitimacy of the EMBs. Therefore, the EOI Network/Lima Agreement identified the main shortcomings that makes impossible for the EMBs of the countries that join this network to enjoy independence and legitimacy. Nevertheless, the experiences of the different countries in the region highlight some good practices that have a positive impact on the independence of the EMBs.

- (i) Regarding the appointment of the members of the EMBs, it is essential to ensure transparency in the process and the establishment of spaces for civil society to participate either by asking questions (in case interviews are conducted) or by providing information relevant to the suitability of those who aspire to the position.
- (ii) The specialization and professionalization of the members of the EMBs is also essential for the fulfillment of their obligations, within the framework of the mandates set forth by the electoral regulations.

(iii) EMBs cannot develop their functions in isolation. It is necessary to establish spaces for dialogue with civil society organizations, as well as with political organizations and other interested actors, as this results in a better development of the electoral process. In particular, it is important to maintain a dialogue with national electoral observation organizations.

(iv) While the independence of EMBs is necessary to generate legitimacy in electoral processes and their results, transparency and accountability in their actions are equally important. Related to the previous point, effective citizen participation in democratic processes requires clear, accurate, proactive and open information.

(v) At the level of electoral reforms, although the power of legislative initiative of the EMBs can be positive, given their technical and impartial knowledge on the subject, it must also be accompanied by inclusive spaces for dialogue and participation, which take into account the barriers, obstacles, difficulties and needs of the different sectors of the population.

LISTA MIEMBROS DEL RED DE INTEGRIDAD ELECTORAL (ACUERDO DE LIMA)
TITULARES Y SUPLENTE
VERSIÓN 20 01 2023

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