

The Role of an International Constitutional Court vis-à-vis the Inter-American Court of Human Rights and it's Democratic Principles

André Ramos Tavares¹

Resumo: A criação de uma Corte Constitucional Internacional que pretenda uma posição supranacional inevitavelmente implicará em interações. Se estivermos falando de princípios eleitorais comuns, deverá ser imperativo exaurir a jurisdição nacional e entender o que se chama de “triângulo judicial”. Mas uma nova jurisdição só fará sentido para agregar princípios e garantias, como as condições de uma *democracia econômica*, tornando-se, assim, um organismo supremo na defesa da Democracia.

Palavras Chave: Tribunais internacionais – Nova jurisdição internacional – Princípios e condições da Democracia – Democracia Economia.

Abstract: The creation of an International Constitutional Court - ICC, encompassing a supranational scope, will inevitably imply interactions. If we are talking about *common* electoral principles, it should be imperative to exhaust all the internal (national) levels of jurisdiction and understand the “judicial triangle”. But a new jurisdiction only makes sense as it is to improve and add principles and guarantees, like the *economic democracy* conditions, thus becoming a supreme body in the defense of Democracy.

Keywords: International Courts – New international jurisdiction – Democratic principles and conditions – Economic Democracy.

1. Common background in electoral issues

The creation of an International Constitutional Court should be performed towards the defense of democracy through the examination of cases that violate democratic “conditions” and “principles” in elections².

Upon analysis of the international context in which elections are found one can infer that the creation of a body driven towards these purposes is more than advisable. In a survey I conducted published under the title “The crises of the electoral legitimation”, in Spain and in Italy, I presented several examples of countries where the election process has been severely challenged, either by electors or even by the candidates. An example is the election held in Iran in 2009. The main point here is to know how improper legal treatment of elections can negatively impact the protection and development of fundamental rights.

That's the case of the 2000 presidential elections in the United States. That year, Bush ran against Al Gore for the presidency of the country and won by a slim margin in the State of Florida, which automatically required a recount, but this was suspended by the Supreme Court of the United States and there was no ruling as to whether electoral fraud had been committed.

The first example shows a nebulous decision by the Iranian supervising body, which undeniably failed to clear the doubts concerning the legitimacy of the election.

¹. Full Professor at Universidade de São Paulo. President of the Brazilian Association of Constitutional Procedure Law.

² PROJECT. For the establishment of an International Constitutional Court. Studies and documents prepared by The *ad hoc* committee for the creation of an international Constitutional court. ICCo, Comité ad hoc pour la creation d'une Cour Constitutionnelle Internationale - la Commission Juridique Présidence de la République Tunisienne: Tunis, 2013, p. 15: “Contentious function: The Court rules on serious violations of democratic principles and democratic conditions for elections subject to the exhaustion of domestic legal remedies. These material violations can take the form of serious facts and / or legal acts.”

As for the elections in the USA, one finds an idle Supreme Court and gives room to question its impartiality.

Therefore, the interest in establishing an international jurisdiction to combat fraudulent elections is extremely feasible, lawful and necessary, especially in cases such as the afore mentioned, where the national body in charge of supervising the elections has not exercised its functions, even upon request by the interested parties.

There is another justification for an International Constitutional Court. In a decision rendered by the Inter-American Court of Human Rights involving political rights, to which Nicaragua was a party, it was found that no appeal is allowed against a judgment of the highest jurisdiction of that country, the “Consejo Supremo Electoral”, when it comes to election issues. The fact that no right of appeal is provided by national jurisdictions constitutes another justification for the need of an international body with powers over national elections. This same problem occurred in Brazil, in the huge case of bribery called “mensalão” in which the Supreme Court of Brazil decided to split its jurisdiction between its two sections.

But now I would like to address the insertion of this new Court taken into consideration the existing regional courts which also play a role in that subject. I will develop my arguments considering the American scene.

2. Democracy as a goal of many courts and the economic democracy

Ever since the creation of the Organization of American States - OAS, the defense of democracy has always been among its goals, as one can see from the preamble of and throughout its Charter. As years went by, the Organization has reinforced this ideal by creating and approving norms to safeguard democracy.

In 1969, the American Convention of Human Rights dedicated an article specifically to political rights, article 23.

However, the Organization of American States efforts to defend democracy have not ceased. In the years 1992 and 1993, the Protocols of Washington and Managua amended the Organization of American States Charter by adding new provisions to its text, with the purpose to make **the promotion and consolidation of democracy more explicit**.

The core of such concern, however, came in 2001, upon approval of the Inter-American Democratic Charter. The new Document deepens the abovementioned ideal, by providing for the manner in which the States must act in order to defend Democracy. To illustrate this, one can mention articles 5, 6 and 28 of the Charter which, respectively, state the need for strengthening political parties and other political organization, the need to focus on the issues involving electoral campaigns and their financing, besides fostering and promoting the means for citizens to take part in the decisions, and the need of full and equal participation of women in political institutions. These aspects are stated as *conditions* for fostering democracy.

Accordingly, the role of this regional body is unquestionably that of a guardian and a promoting agent of democracy. It is worth emphasizing that the Organization goes beyond the **consolidation of democracy as a purpose**, and undertakes the enactment of rights and guidelines supporting such ideal, which its members must strive for.

As a jurisdictional body of Organization of American States, the Inter-American Court of Human Rights (ICHR) has powers to interpret and enforce the American Convention of Human Rights. Therefore, the Court can analyze electoral

matters, because, as I already stated, this document prescribes political rights (article 23) that are directly related to the conditions under which elections are held.

Despite the existence of a consistent normative apparatus on electoral issues, particularly as regards the defense of such rights, one can see that only few cases (actually only two³) have discussed the conditions of the elections.

Another important issue is the **consolidation of democracy as a Economic Democracy, not only a Political and electoral Democracy**. This is particularly related to Latin America and Africa, because the Welfare State is still a goal for so many countries.

3. Interaction between courts in a third decision-making jurisdiction

The first lesson we can get from this system is that creating an International Constitutional Court encompassing a supranational scope will inevitably imply interaction with already existing national and regional jurisdictions. We must consider that it is imperative to **exhaust all the internal (national) levels** of jurisdiction before resorting to the international body, if we are talking about *common* electoral principles and conditions. However, even in this scenario, the matter gains complexity as a third decision-making jurisdiction is added to this international system; such is the case of countries that are members of the Organization of American States.

This is a real complexity because the Inter-American Court already acts in defense of democracy, particularly in electoral issues. Then, one must determine how the regional and supranational judicial bodies will coexist.

This difficulty has already been observed on the European Continent when it comes to protecting human rights. Currently, on this matter we have national judges and courts, the European Court of Human Rights and the Court of Justice of the European Union interacting and forming what Maria Luisa Duarte refers to as “judicial triangle”⁴. The main concern would be to harmonize the **roles played by multiple jurisdictions**.

In Europe, the interaction between these three bodies ended up governed so as to acknowledge one of them as a superior guarantor, when it comes to defending human rights. **The most specific jurisdictional body with the broadest competencies in the defense of human rights ended up assuming a predominant position in this scenario of coexistence among the courts**. In that case it means The European Court of Human Rights.

The creation of a new International Court would also signify a “**judicial triangle**” in the Americas, for the defense of Democracy.

Therefore, based on the European experience, a new jurisdiction in this context only makes sense as it is to improve and add principles (like the conditions to create a economic democracy) and guarantees to those which other regional courts are already competent to ensure, thus becoming a supreme body in the defense of

³ Information available at: <http://www.corteidh.or.cr/cf/Jurisprudencia2/index.cfm?lang=en>.

⁴ “The intercommunitarian system protecting fundamental rights, as we know it – a plural and inter-normative system as to the sources, pretorian as to the criteria for applying decisions, and cooperative through the “dialogue between judges” – will suffer no risk of radical transformation by virtue of the Lisbon Treaty. Even if the EU joins the European Convention for the Protection of Human Rights and Fundamental Liberties, assuming this solution becomes real, one must acknowledge that it will amount to a formalization of a model of judicial coexistence, which already functions in terms somewhat asymmetric as “dialogue between judges”, and that we had the opportunity to characterize as “European judicial triangle””. (DUARTE, Maria Luísa. *Estudos sobre o Tratado de Lisboa*. Almedina: Coimbra, 2010, p.114).

democratic elections. This same construction can be extended to other scenarios, which will also find themselves before multiple jurisdictions with powers to address this same subject. Otherwise, the new body will make no difference in the States that already have an international jurisdiction with powers to rule within the same scope intended by the International Constitutional Court.

Consequently, in determining the law that will be interpreted and applied by this new Court, the definition of which democratic “conditions” and “principles” are indispensable (at the elections) will have to reach and ensure a broader and deeper scope than the one presented by the American Convention.

This point is addressed in Section “Applicable Law” in the Project for the International Constitutional Court. The text provides for rules and principles connected with democracy and civil liberties, in addition to several international documents as the set of norms to be interpreted and applied by the Court. However, the Court is able to become a strong jurisdictional institution within the international scenario as a predominant body in the defense of democratic elections, given that the development of democracies imposes new “conditions” and “principles” such as the conditions to achieve a economic and social democracy.

To such effect, among the rights to be applied by the Court one must add the fostering of several forms of association, beyond the traditional party model, considering the increase of the political significance of social organizations other than political parties. This phenomenon is also becoming stronger in Brazil, with the non-partisan political demonstrations that have been seen since 2013. Thus, one must defend the existence of norms which avoid complicating factors that might impair the creation of these forms of associations; one must defend a transparent and supportive legislation and system. This was not, for example, what we have seen upon creation of the new party *Rede Sustentabilidade*, in Brazil, which could not run for presidential elections in 2014 due to formal conditions⁵.

Also connected with the equality principle, the *protection of minorities* is a condition that must be included among the set of powers held by the Court in defense of democratic elections. **Among the norms to be applied, it is imperative that rules are imposed so as to ensure special protection to the candidacy of groups that are historically subrepresented or not even represented, despite their relevance in society.** This is a problem faced not only by underdeveloped countries, given that ethnic and gender issues are quite problematic in many developed States.

When it comes to a decision declaring a candidate ineligible, the law to be applied by the Court must guarantee that the motives grounding such declaration be examined so as to not violate fundamental principles such as the presumption of innocence, the right to equal treatment, and equality. **This discussion took place recently in Brazil, upon the so-called “Clean Record Act” (*Lei Ficha Limpa*), which prohibited convicted candidates, or those pending appeal, to run for an office.** More than that, it also included criminal issues involving persons that can only be judged by The Supreme Court and have no right to appeal. This matter also took place recently in Brazil, in the *Mensalão* case.

There are more “principles” and “conditions” to be taken into consideration by the Court. However, one must also consider the importance of the formal aspects involving the means by which access will be implemented by such Court. I see a key point here: the persons who hold the right of action before the Court. Only a member-State or the Commission can assert rights under the ICHR. Therefore, an individual

⁵ This Party was approved by the Electoral Supreme Court of Brazil in september, 22, 2015.

seeking remedies by the ICHR must first submit their claim to the Commission, which will analyze it and determine whether the case is to be taken to the ICHR.

The project for the creation of the Constitutional Court has already evolved in such aspect as it allows individuals, political parties, associations, professional organizations and NGOs to assert their rights before the Court. **It is extremely reasonable that this very Court focus on its own democratic access** as a decision-making jurisdiction committed to defending democracy.

Nevertheless, the project and its implementation may go even further. Towards this sense of **democratization**, the Court may provide for means that simplify the exercise of the right to access. Providing technical staff to act in the capacity of legal representatives for these groups must be a goal. Especially because in many nations elections fail to observe democratic principles and conditions.

4. Main conditions and conclusions concerning the creation of an international constitutional court

In view of the contemporary international scenario, where democracy has consolidated as the ideal form of government, a body whose purpose is to guarantee democracy is extremely suitable within this context.

Democracies, even those in the developed States, may be threatened. More than that, even if they are not put at risk, most of them can still be improved, specially when we think about economic democracy. Thus, the International Constitutional Court may be an extremely relevant actor in such way.

Nonetheless, aware of the contemporary context, **a new body intended to defend democracy must have concerns that overtake traditional classification**. The Court must be innovative and expand its competence beyond elementary democratic principles and conditions, to the effect of safeguarding others, which improve and strengthen our current democracies, as pointed by new requirements within this scenario. In the same course of reasoning, the Court must be created also according to the changes intended for the democratization of the access to Justice.

Should the new Court reproduce what already exists, the Court is not to be discarded, as in many States democracy is still undergoing its initial stages, which justifies safeguarding traditional democratic principles and conditions. However, should it fail to innovate, it will certainly narrow its scope, thus losing the opportunity to be even more significant within a context where improving democracies is always a goal.

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