

**CHECKS AND BALANCES: ELECTORAL
MANAGEMENT BODIES AS THE *THIRD*
DIMENSION OF ACCOUNTABILITY
IN LATIN AMERICA¹**

*Pesos y contrapesos: órganos electorales como la tercera
dimensión de la rendición de cuentas en América Latina*

*Freios e contrapesos: órgãos eleitorais como a terceira
dimensão da prestação de contas na América Latina*

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Abstract: The article focuses on the inclusion of the Electoral Management Bodies (EMBs) as the Fourth Branch of Power in El Salvador, Guatemala, Honduras and Nicaragua. These bodies have powers to ensure an impartial electoral administration, but also to control and fight non-democratic practices exercised by the executive, legislative, and judicial branches. Our objective is to understand both their reciprocal oversight relationship with the traditional branches, and their place in the vertex where Horizontal and Vertical Accountability converge. We conclude that the EMBs execute the *Third Dimension of Accountability*; being highly important for rebuilding functional democracies they are under increasing attack by political powers. Our main contribution is to insert the EMBs in the theoretical discussions on Checks and Balances.

Keywords: Checks and Balances, Electoral Management Bodies, Latin America, Vertical Accountability, Horizontal Accountability.

Resumen: Se aborda la inclusión de los órganos electorales en El Salvador, Guatemala, Honduras y Nicaragua como cuarto Poder. Estos órganos tienen competencias tanto para administrar imparcialmente las elecciones, como para controlar y luchar contra las prácticas no democráticas de los Poderes Ejecutivo, Legislativo y Judicial. El objetivo es analizar su relación de control recíproco con los poderes tradicionales y su posicionamiento en el vértice en el que convergen la rendición de cuentas horizontal y vertical. Se concluye que los órganos electorales configuran la tercera dimensión de la rendición de cuentas; siendo cruciales para construir democracias funcionales son atacados por los poderes políticos. Nuestra principal contribución es insertar a los órganos electorales en las discusiones teóricas sobre pesos y contrapesos.

Palabras clave: pesos y contrapesos, separación de poderes, órganos electorales, américa latina, rendición de cuentas.

Resumo: O artigo centra-se na inclusão dos Órgãos Eleitorais (EMBs) como o Quarto Poder em El Salvador, Guatemala, Honduras e Nicarágua. Estes órgãos têm poderes para garantir uma administração eleitoral imparcial, mas também para controlar e combater práticas não democráticas exercidas pelos poderes executivo, legislativo e judiciário. O nosso objetivo é compreender tanto a sua relação recíproca de supervisão com os poderes tradicionais, como o seu lugar no vértice onde convergem a Prestação de Contas Horizontal e Vertical. Concluímos que os EMBs executam a Terceira Dimensão da Prestação de Contas; sendo importantes para a reconstrução de democracias funcionais, estão sob ataque por parte dos poderes políticos. Nossa principal contribuição é inserir os EMBs nas discussões teóricas sobre freios e contrapesos.

Palavras-chave: Freios e contrapesos, separação de poderes, órgãos eleitorais, américa latina, prestação de contas.

1. Introduction

Latin America faces a systematic crisis of its institutions, which contributes to high indices of corruption and poverty and, in some countries more than others, democratic backsliding. Although, in theory, the Constitutions of the region contemplate a system of Checks and Balances to guarantee the independence of its branches, in practice such a system has proven inefficient. In order to strengthen it, one obvious remedy is to improve the quality of the three governing bodies. Another is to add further bodies with special competencies, hoping for a more democratic albeit more complex relationship. During Latin America's third wave of democratization, several institutions of this type have been added, a prominent one being so-called *Electoral Management Bodies* (EMBs). The overall theory on Checks and Balances seldom mentions EMBs as significant Latin American actors capable of performing accountability, despite being inserted in the system as a fourth branch of government and often being praised as an important regional institutional innovation.

Our research question is “What is the role of the Electoral Branch in the system of checks and balances?” The objective is to analyze the theory of Checks and Balances within a Latin America setting, by zeroing in on the EMBs in four critical cases: El Salvador, Guatemala, Honduras and Nicaragua. We follow the evolution of this body during the last 40 years and its insertion in the traditional triangular relation between the Executive, Legislative and Judicial branches. The article describes and analyzes the types of attacks that have been directed toward the independence and oversight functions of the EMBs, and if the latter have managed – or been allowed – to uphold their constitutional obligations amidst mounting political pressure. More generally, the ambition is to shed more light on those mechanisms of accountability that assist in fighting democratic backsliding in Latin America.

We turn our spotlight on the EMBs in Central America, a region marked by high levels of poverty and corruption and where signals of democratic backsliding are increasingly worrisome. We exclude Panama and Costa Rica (for having better economic and democratic indices) and Belize (for having a parliamentary system). However, although the remaining countries – El Salvador, Guatemala, Honduras and Nicaragua – share the aforementioned characteristics, they are not exceptions in Latin America. The article is comparative, descriptive and analytical.

2. Checks and balances

Our study departs from the failures of importing the praxis of checks and balances from the US and Europe to Latin America. It highlights the complex and historically weak systems of Checks and Balances and the process by which presidentialism has gone from three to four branches of power (Pérez Albo, 2011). The Electoral Branches are impersonated by the EMBs, which independently determines who can vote and also validate candidates and parties, administer elections, and count and publish votes (Catt et al. 2014). But, the mandate of the EMBs is even more extensive, equipped as they are with jurisdictional competences to oversight and sanction the other branches. Our vantage point is that the EMBs constitute a crucial innovation for the deepening and consolidation of Latin American democracies, for executing *vertical accountability* (VA) and – potentially and most importantly – for improving *horizontal accountability* (HA), that is, *checks and balances*. We argue that the EMBs may be the key to *transactional horizontality*, that is in building a relationship based on cooperation, oversight and self-restraint, positioned as they are in an expanding Latin American arena known as the *Fourth Branch of Power*.

2.1. Latin America and Checks and Balances

Towards the 1990s, the consensus among key observers of the Latin American political scene was that most countries had made successful transitions to democracy. Yet, the democratic experiments were still fragile. Popular disillusionment in the representative institutions was high, politicians were considered unresponsive to bottom-up preferences, and the levels of clientelism, political misconduct and corruption remained high. Against this backdrop, a new debate surfaced that paid attention to the *Quality of Democracy*. One of its strands focused on the answerability and transparency of public functionaries. Answerability was defined as the legal “obligation of public officials to inform about and to explain what they are doing” and as the “capacity of accounting agencies to impose sanctions on power holders who have violated their public duties” (Schedler, 1999, p. 14; Mainwaring, 2003, p. 13).

Already in the 18th century, Montesquieu presented his ground-breaking ideas on the separation of power between governmental branches. Subsequently, these ideas inspired the members of the American constitutional convention (Ervin, 1970, p. 110). Whereas the original formula had been framed within the context of European absolutism, the US founding fathers attached it to the project of democratic governance-building (Plattner, p. 1999, 66). In that significance, it was transported to democratizing settings across the globe, starting with Latin America. Fundamentally, the formula addressed the relationship between the three classic bodies of power (legislative, executive and judicial). It was adopted by democratizing states in order to prevent autocracy. On the one hand, the

formula emphasized the necessity to fight inter-governmental encroachments by upholding the functionality, responsibilities and relative independence of each branch of power (Samuels, 2009). On the other hand, the system required a mechanism of control. They were gathered under the heading of *Checks and Balances*, a term akin to O'Donnell's HA (1994).

O'Donnell (1994) introduced the distinction between VA and HA. VA refers to a relation between un-equals and to mechanisms by means of which the elected are accountable to the electorate. By contrast, HA refers to a relation between equals (Schedler, 1999, p. 23). In the Quality of Democracy debate, a common argument was that Latin America (and other Third Wave democracies) suffered from weak systems of VA and HA (Diamond *et al.*, 1999, p. 2). These deficiencies, in particular, and the weak implementation of rule of law, in general, have been associated with high levels of inequality and with political corruption (IDEA & UNDP, 2022, p. 7). Initially, the weakness was not primarily connected to VA. Elections in Latin America were not ideal, but were, at least on paper, free and fair. Checks and Balances (or HA), on the other hand, faced a crisis.

Although the functioning of *Checks and Balances* has its national variations, a US style separation of power had apparently not found a fertile ground in Latin America, be it due to ethnic divisions, democratically hostile political cultures or socio-economic inequality (Calabresi and Kyle, 2010, p. 5). O'Donnell (1994) argued that the weakness of HA was pivotal for understanding the difference between Latin American democracies and the more institutionalized ones in e.g. Europe; weak HA was for him a key explanatory factor for high levels of political corruption and the existence of delegative democracies. He was not alone. Ackerman (2000, 640) argued that transporting the system of checks and balances had proven "nothing less than disastrous". Similarly, the so-called *Linian Nightmare* (drawing on Juan Linz's pessimistic view on Latin American presidentialism) refers to the unfulfillment of the Madisonian formula in Latin America and to the separation of powers as "one of America's most dangerous exports, especially south of the border" (Ackerman, 2000, pp. 245-246).

Comparisons of US and Latin American presidential power frequently put forth that the latter is stronger, invested as it is with greater muscles in terms of veto, decree and emergency powers, and in relation to constitutional amendments and budget procedures (Cheibub *et al.*, 2011). This imbalance originates from the ambition of the Latin American founding fathers to create strong governments in weak states, thus downplaying the centrality of checks and balances, much more important for their US counterparts (Colomer, 2013, p. 93). It may thus be tackled by an institutional redesign prioritizing a functioning division of power. Montesquieu himself reasoned that power abuse by one branch could be stemmed by a proper institutional set-up. However, the imbalance – in Latin America but also elsewhere – may also relate to a presidential ability to enhance power by informal

means (Morgenstern *et al.*, 2013, pp. 38-39). Levitsky and Ziblatt (2018, p. 213) convincingly argue that constitutions are not merely upheld by formal institutions and rules. Analyzing the ongoing world-wide backsliding of democracy, they identify an increasing norm-breaking behavior among executives.

In order to explain the recurrent democratic backsliding in Latin America, one must consider how already strong presidents have broken deep-seated norms. However, key explanatory factors for the region's generally low quality of democracy are still largely institutional, that is, the failure to develop a formal system in which co-equal branches of government act independently of each other (O'Donnell 1994). While unrestrained congressmen, cabinets and presidents etc., pose a great danger to democracy, the branches of power must enjoy certain levels of independence. They cannot be entirely "constrained by an institutional infrastructure of 'checks and balances'" (Diamond *et al.*, 1999, p. 1). Their boundaries must be recognized and respected, which may be easier said than done considering that they often have overlapping jurisdictions (O'Donnell, 1999, p. 40). What needs to be stemmed, however, is the "unlawful encroachment" by one of the powers into the domain of another. Thus, a functioning system of HA needs to ensure equality between the branches, cooperation (*transactionality*) and certain levels of independence. At the more individual level, HA must also control that public functionaries do not give themselves unlawful benefits, a mechanism addressing corruption more directly (O'Donnell, 1999, p. 41).

In the late 20th and early 21st centuries, much has been written on VA and HA, but less on their interrelationship. Crisp and Shugart (2003) argue that a weak system of VA will impact negatively on the *horizontal exchange*, a term that does not include sanctions, but refers to the necessary communication (with its required answerability) between co-equal governmental branches. Emphasizing the importance of VA, they even stress that truly fair and free elections would make horizontal oversight redundant. Other scholars stress that VA and HA may be at loggerheads. Mainwaring (2003, p. 21) urges us not to exaggerate the effects of elections and Przeworski *et al.* (1999) reminds us that vertical oversight – particularly in societies marked by poverty, inequality, illiteracy etc. – is often hampered by the lack of responsiveness of the representatives and the asymmetry of information between principals and representatives. O'Donnell (1999, p. 30) adds that free and fair elections may be inefficient mechanisms for delivering punishments, particularly in Latin America considering the existence of, e.g., inchoate party systems, sudden policy shifts, and deep-seated cultures of clientelism. Moreover, concepts like plebiscitary presidency, populism and delegate democracy are launched to capture situations in which the executive power strengthens the vertical connection to the electorate as a means to bypass congress and, thus, weaken horizontal accountability.

Partly in order to strengthen both HA and VA, and with the aim to guarantee fundamental citizenship rights in a region plagued by inequality, poverty, corruption and other misuses of political power, the Latin American system of Checks and Balances has been subject to significant institutional innovation. Following Ackerman, we may speak of an emerging *Fourth Branch of Government*, implying a shift away from a triangular system of horizontal oversight to one composed by a new agent enjoying more or less the same formalized functions of oversight and sanction as the classical triad. In Latin America, the inclusion of a fourth branch is still under-theorized, which is unfortunate considering its importance for the dynamics of Checks and Balances (see Lopez-Pintor, 2000, regarding the importance of EMBs). With reference to this fourth branch, authors have listed a vast number of possible candidates, such as auditing agencies, truth commissions, anti-corruption bodies, ombudsmen, constitutional courts, human rights commissions and accounting officers etc (O'Donnell, 1999, p. 39). For some, like Pastor, the electoral tribunals, or EMBs as we label them, are quintessential candidates. At least on paper, they enjoy an independent status vis-à-vis the traditional branches of powers and a mandate that includes oversight and sanctioning. In our interpretation, they function as a *third dimension of accountability*, that is, are placed at the intersection of VA and HA.

Hence, we focus on actors that “have formalized responsibilities to oversee public officials” (Mainwaring, 2003). Our interest lies in entities whose functions of accountability are formalized parts of the system of Checks and Balances and/or possess the capacity to sanction, a necessity for true accountability, in our view. We adopt and adapt the concept of the *third dimension of accountability* to capture the capacity of the EMBs to control, sanction and operate in the intersection of HA and VA. Precisely for being invested with jurisdictional capabilities, the EMBs can decide on electoral matters, that is, they have the power, and an ample arsenal of tools at their disposal, to impose sanctions on the Executive and Legislative Branches when the latter are encroaching the electoral competences or acting against electoral rules.

2.2. Electoral Management Bodies

As Jaramillo (2007, p. 372) points out, the electoral processes in Latin America have been in the hands of the Executive and Legislative powers, generating a fraudulent and biased machine to favor the incumbent party. Under such circumstances Latinamerican countries have since the 1920s seen the formation of EMBs as institutions called-upon to serve independently in relation to the other branches.² With the Third Wave of Democracy, the region witnessed an explosion

2 Electoral Court (Corte Electoral) and National Civic Register (Registro Cívico Nacional) in Uruguay (1924), and the Supreme Electoral Tribunal (Tribunal Supremo de Elecciones) in Costa Rica (1949).

and consolidation of these institutions. Because of their constitutional and permanent status, they are considered pivotal bodies in the sphere usually named the Fourth Branch of Power.

As Pal (2016, pp. 88-89) argues, the “fourth branch model represents an evolution in democratic practice, constitutional design, and election administration that has implications for electoral integrity, but also for how we understand the separation of power”. For Ackerman (2000), the principal task of this branch is to safeguard fundamental democratic rights by insulating the state bureaucracy from the intervention of partisan politicians (see also Pal, 2016, pp. 94-96). Although the type of bodies that the fourth branch may include varies, the EMBs are often at the center, primarily in the form of electoral courts/tribunals charged with the task of protecting electoral rights and preventing tampering with electoral processes. In short, they are important for combatting the attempts by the executive power and/or the lawmaking majority to weaken the mechanisms that will expose them to VA (Ackerman, 2000, p. 716).

It is argued that the EMBs are less necessary in more equal and less corrupt societies, where the population normally have a cemented trust in the electoral institutions (Pastor, 1999). In Latin American democracies, however, they are of crucial importance. The region has witnessed a considerable increase in electoral courts (Orozco, 2006; Eisenstadt, 2002). The functions given to them by the constitutions vary, but often include elements like general electoral administration, ballot counting, organizing ballot stations, keeping an eye on electoral fraud, organizing polling, checking electoral finance laws, controlling levels of media exposure, and re-mapping electoral districts. Moreover, the creation of a separate and independent electoral power rests on the idea that citizens’ trust in political institutions hinges on them being confident that elections are fair and politically unbiased (Barrientos del Monte, 2010).

Gamboa (2022, pp. 3-33) stresses that several Latin American countries are today witnessing a process in which increasingly unchecked executives push for anti-democratic institutional reforms that not only weaken the system of HA, but also “skew the electoral playing field by thwarting electoral accountability”. In such a political environment, the EMBs have not only emerged as crucial institutions protecting democracy, but also a strategic arena of confrontation between autocracy-leaning presidents, Supreme Courts with various levels of independence, and more or less powerful oppositional congresses.

There are two primary types of EMBs. In some countries, they have gained the same independent status as the other three branches of government, that is, their independent status is constitutionally guaranteed. In others, they operate under the faculty of another branch and function more as “regular administrative bodies” (Pal, 2016, p. 87; Orozco, 2006, p. 51). Due to the historical tendency of politicians interfering in the elections, the first type of autonomous courts – those

with constitutional status – dominate in Latin America (Pal, 2016, p. 93). They are found in Bolivia, Costa Rica, Ecuador, Panama, Peru, Uruguay and, in our cases, El Salvador, Guatemala, Honduras and Nicaragua (Orozco, 2006, p. 54). But even within this group, differences can be detected and are related to country-specific historical and political circumstances.

Our interest in the EMBs is primarily centered on their position in the intersection of vertical VA and HA, that is, as a fourth power established, primarily, to ensure VA but also for having the capacity to balance the system of HA. Whereas the vertical dimension of the EMBs have been touched upon by some scholars (Pastor, 1999, p. 5), less attention has been paid to their role in controlling and sanctioning the other branches. As Pastor argues, the EMBs “have become important vehicles for ensuring both horizontal and vertical accountability” (Pastor, 1999, p. 75). Moreover, with an eye on how the EMBs have been inserted into the system of HA, Pal (2016, p. 94) emphasizes that they normally are autonomous from the other branches of government, meaning that they are capacitated with “both freedom from interference and freedom to act within their sphere of authority”. In our view, this intersectional role – the *third dimension of accountability* – may contribute to stem politicized and/or unlawful encroachments and assist in the struggle against corruption.

It is important to mention, however, that all scholars are not in agreement regarding the democratic importance of the EMBs, in particular, and the Fourth Branch, in general. A particular preoccupation is raised by Schmitter (1999, p. 61) who asks: “Would it not be likely that so many potential ‘veto players’ interacting with so many different interpretations of the law would simply produce a stalemate?” Moreover, the independence of the EMBs is a double-edged sword. On the one hand, strong independence may increase citizens’ trust in elections and assist in insulating the electoral process from inappropriate political influence. Even in cases when the EMBs are constitutionally protected, their independence may be threatened by e.g. the altering of the appointment processes or by cuts in funding. On the other hand, too much independence to the EMBs may generate difficulties to check possible internal mismanagement (Pal, 2016, p. 111). Hence, at the same time as it is important to guarantee the independence of the EMBs vis-à-vis the other branches, it is equally important to integrate them into the general system of checks and balances.

3. Case studies

We have decided to investigate EMBs in Central America, a region marked by poverty, political corruption and alarming tendencies of democratic backsliding. We analyze El Salvador, Guatemala, Honduras and Nicaragua, all of which have seen the rise of autonomous electoral courts enjoying constitutional status.

For reasons previously pointed out, we exclude Belize, Costa Rica and Panamá. This part follows the evolution of the EMBs during the last four decades and their insertion in the traditional triangularity of the Executive, Legislative and Judicial branches. Emphasis is placed on the last twenty years of increasing democratic backsliding across the Latin American political scene.

Our focus will be, firstly, on the procedure of appointment of electoral authorities; secondly on the role played by Executive and Legislative Branches on EMBs competences; and thirdly on the impact exercised by the Judicial Branch on the jurisdictional competences of EMBs. The objective is to describe the continuous and coordinated attacks on the EMBs, which constitute assaults on the *third dimension of accountability*, that is, on both VA and HA.

3.1. The politicization in the appointment of electoral authorities

In the 1983 Salvadoran Constitution, new arrangements were established for the Central Electoral Council (*Consejo Central de Elecciones*), an organ authorized to defend the electoral institution. The constitutional ambition was to guarantee the independence of the Council so that it could function as the supreme authority in electoral matters, a function particularly important in a context of internal warfare. Two of the three members were nominated by political parties and the third by the Supreme Court of Justice. The final appointment was in the hands of Congress. However, already from the onset, a critique held that the nomination procedure paid too much attention to political preferences of the candidates, downplaying meritocracy.

Primarily as a consequence of this critique, the council was short-lived. In the 1991 re-writing of the Constitution and amidst ongoing peace talks, it was replaced by the Electoral Supreme Tribunal (*Tribunal Supremo Electoral*). A noticeable change was an increase of members in the tribunal, from three to five, with an equal number of alternates. The procedure for selecting them was unaltered. Three would be nominated by the political parties and the remaining two by the Supreme Court of Justice, after which Congress would step in to appoint all five (Miranda, 2016, p. 230) for a five year administrative period. Compared to the previous Central Electoral Council, the new tribunal was endowed with more administrative and jurisdictional capabilities. Some of the new functions had priorly been under the jurisdiction of the Armed Forces, for instance, to monitor the executive and legislative elections so as to guarantee that they were conducted in a free and fair manner and to supervise president alternation (Santamaría, 2018, p. 779). In correspondence to the peace accords being negotiated in Mexico, the Constitution also called for a specific law that would guarantee the non-politicized composition of the tribunal (*III.1.a. Acuerdos de México de 27 de abril de 1991*). Nonetheless, in the subsequent legislation, such an emphasis on independence was nowhere to be found.

In the late 1970s, Honduras suffered from severe political turmoil and opted for constitutional change. In 1977, a National Tribunal of Elections (*Tribunal Nacional de Elecciones*) was created in order to organize and prepare the way for a Constituent Assembly. The Constitution, enacted in 1982, ensured the continued existence of the tribunal. It was judicially weaker than its Salvadoran counterpart, mainly having administrative functions. The Constitution determined that the tribunal would be composed of three members, elected by two-thirds majority in Congress; and that the main requirement for appointment would be disengagement from political activity (Art. 52, 1983 Honduran Constitution). Thus, in essence, the Constitution was to guarantee an independent organism (Art. 51, 1983 Honduran Constitution) with impartial authorities not subjected to any political party. In a seemingly contradictory way, however, the subsequent congressional legislation established that every congressional political party would have a representative among the tribunal members, leaving only one of the members to be nominated by the Supreme Court of Justice (two if the number of members was even) (Núñez, 1992, p. 82). Consequently, the tribunal no longer had a fixed number of members. Possibly therefore, its performance was severely criticized, chiefly for being too politicized.

The tribunal ended up as an overly politicized body, a fact that did not change with its substitution in 2004 by the Electoral Supreme Tribunal (*Tribunal Supremo Electoral*). As in El Salvador, the replacement aimed at creating a more neutral and expert-led nomination procedure based on joint congressional agreement, thus ending party-by-party nominations. However, the result consolidated the *status quo ante*. The members of the tribunal (now a fixed number of three) were still heavily identified with the parties (Valverde and Tello, 2013, p. 2).

Nowadays, the Honduran electoral system comprises two different oversight bodies, both created in 2019. The first one, the National Electoral Council (*Consejo Nacional Electoral*) with three members and two alternates with a mandate of five years (they have the possibility of one reelection), substituted the previously mentioned Electoral Supreme Tribunal and primarily had administrative functions. The second one, the Tribunal of Electoral Justice (*Tribunal de Justicia Electoral*), also with three members and two alternates for a period of five years, was equipped with jurisdictional power and was in that capacity an important addition to the electoral system. In theory, Honduras has today a final decision-maker in electoral matters, that is, an entity specialized in solving all the cases related with electoral justice. Although both the council and the tribunal are conceived as independent, autonomous and non-subordinate organs, in practice the electoral branch still has serious shortcomings.

Within Central America, Guatemala has suffered most severely from internal conflicts, reaching genocidal levels with an average of 200.000 victims of assassination and/or forced disappearances. In this light, peace-building entailed a

complete re-design of its institutions, a process that started already in 1983 when members of an incipient Electoral Supreme Tribunal were elected to administer elections and oversee the functions of the members of an upcoming Constituent Assembly. With the 1985 transition to civilian democratic rule amidst continued armed conflict, the new Constitution was accompanied by a Constitutional Electoral Law (Decree No 1-85) by which the Electoral Supreme Tribunal was officially instituted as an autonomous and independent organism with administrative and jurisdictional competences (Arts. 121-125 Decree No 1-85). For advancing and protecting the electoral system during dire times, the five original members were awarded by the government with the Grand Cross of the Order of Quetzal.

Since 1985, the members of the Guatemalan Electoral Supreme Tribunal have been elected for a period of six years. There are five members with an equal number of alternates, selected by two thirds of the Congress from a list of 40 candidates (later 20) proposed by the Nomination Committee (*Comité de Postulación*). Unfortunately, despite a 2009 legislation which tried to establish a more transparent nomination process, the committee was penetrated by governmental representatives, businessmen and *de facto* powers (Postema, 2014; Escobar, 2018). Guatemala shows a particular relationship between economic elites and power, in which family clans replace the State in periods of crisis (Casaús, 2007, pp. 253-258). The private economic sector has the capacity to act as veto players (Mainwaring and Pérez-Liñán, 2013, p. 65) even in matters such as selecting electoral members.

The electoral oversight function of Nicaragua has not passed through the same restructuring and re-naming as the other three cases, though significant changes have been made in terms of number of members and forms of appointment. The Electoral Supreme Council (*Consejo Supremo Electoral*) was in place prior to the democratic transition in 1990. During that year's elections a societal consensus emerged that the council had fulfilled its duties in a transparent and impartial way, an impressive achievement considering that the elections were performed amidst continued armed conflict (Torres, 1991, pp. 311-312).

Despite being cherished for its 1990 performance, the Chamorro administration decided to change the appointment procedure of the Council, an alteration that coincided with the constitutional reform of 1995. From being politically independent members their nomination now hinged on them being attached to a political party. As a direct response, the president of the council and the one who orchestrated the successful 1990 elections resigned (Marti, 2016, pp. 241-242). The gradual politicization of this electoral body is one factor behind the increasingly non-competitive elections from 2006 onwards and the fact that many observers today perceive Nicaragua as authoritarian. Nowadays, the seven members of the Electoral Supreme Council are elected by 60% of the National Assembly

from lists proposed by the President and/or members of the Assembly itself (Art. 6, Law No 331 of 2022).

In all four cases, significant actors (constituent members, peace mediators, international organizations, etc.) have sought to create, and have demanded, independent EMBs. They have met resistance primarily from the executive and legislative powers who by means of legislation have aimed at controlling the electoral function for partisan reasons. However, as Jaramillo underlines, in a context where the final appointment of the electoral authorities depends on the political parties, it is still possible to stem over-politicization by, firstly, legally ensuring the non-coincidence of the electoral mandate given to the EMB authorities with the mandate given to the Legislative and Executive alike and, secondly, that these very authorities are restricted from performing political activities before and while in exercise and, thirdly, that an organism other than the Legislative and Executive is equipped with the power to remove the EMB authorities (Jaramillo, 2004, p. 185). With a mandate of five years (six only in the case of Guatemala) it is unfortunate that almost within each presidential and congressional period there is a possibility to appoint authorities of the EMBs at least once and, for this reason, that the appointment does not imply any degree of continuity and political independence, rather obeying to the whims of particular presidents. Next part is dedicated to the power of removal and other forms of political pressure.

3.2. Pressure from the Executive and Legislative Branches

Once the authorities of the EMBs are appointed, due to the lack of mechanisms for protecting them, they face several mechanisms of pressure aimed at keeping them politically aligned. Most common are the political removal from duty, the limitation of immunity and the limitation of budget. As the EMBs have extended competencies that include a) administrative ones such as electoral administration, ballot counting, electoral geography, b) jurisdictional ones such as judicial decision on electoral fraud, political propaganda, finance misconduct, and political rights but also certain c) legislative competences like proposing new electoral laws and procedures, attacking them constitute an assault on both HA and VA.

Despite different denominations of the EMB authorities (“Ministros”, “Vocales”, “Magistrados”, “Jueces”), their jurisdictional power turn them into ‘real’ judges enjoying extraordinary guarantees of protection (IACtHR Cases: *Colindres Schonenberg v. El Salvador*; and *Aguinaga Aillón v. Ecuador*). One of the guarantees refers to the proper procedure of both appointment and dismissal, particularly since both aspects have been attacked in order to redirect the authorities’ loyalty towards dominant parties. Commonly, the ‘politicized’ appointment of the EMB authorities is accompanied with the menace of political dismissal.

Within our cases, a significant number of EMB authorities have resigned without clear explanations (Honduras, one in 2014) or fled the country to seek asylum (Guatemala, four in 2023). Some resigned, accused of alleged fraud (Nicaragua, two in 2016), corruption (Nicaragua, one in 2018), or after violations of constitutional norms perpetrated by the Executive or Legislative Branches (El Salvador, two in 1994 and 2017). For jeopardizing the independence of the EMBs and for demanding political obedience, these examples demonstrate a presidential and legislative conduct that severely challenges the mechanisms of checks and balances, in particular, and democracy, in general.

The 2014 Salvadoran Constitutional Chamber (Inc. 18-2014) clearly announces that political impartiality is a prerequisite when proposing candidates to the EMB. It is a requirement hitherto ignored. The authorities of the EMB have been appointed by political parties and obey party-lines rather than upholding non-partisan institutional responsibility and reaching decisions based on jurisdictional competency (Ulloa, 2017, p. 14). It would be wrong to say, however, that all EMB authorities had political strings. The absence of linkages was successfully defended with regards to the two authorities (out of five) nominated by the Supreme Court of Justice. When the latter tried to place political nominees, the Salvadoran Constitutional Chamber (*Sala de lo Constitucional*) declared unconstitutional the appointment of these authorities alleging lack of democratic legitimacy (Inc. 7-2011). Similarly, in 2014, the Constitutional Chamber blocked the election of the EMB's president, once again on the premise of political affiliation (Inc. 18-2014). In another case, the Constitutional Chamber even went as far as temporarily removing a sitting EMB authority while being investigated for unlawful political affiliation (Inc. 19-2016) (Santamaría, 2018, p. 786). However, it is worth stressing that absence of direct political linkages is no guarantee for non-partisanship.

On 7 June 2023 at 00:13 hours the Salvadoran Assembly enacted reforms to the Electoral Law which reduced the seats in congress from 83 to 60. In the build-up to this highly significant and president-promoted legislation, neither the Executive nor the Legislative asked the EMB for technical support or advice. Although the new method of distribution (D'Hondt) favors majoritarian parties such as the incumbent party, the EMB did not express any concern, limiting its acts to only adapt the electoral process to the new reality, thus ignoring its *de jure* capacities. Eugenio Chicas, the former president of the EMB, declared the reform as irresponsible, stressing the non-active participation of the Electoral Branch. The activity of the EMB, despite the clear preference towards Bukele among the electorate, has been problematic. After the 2024 election, the five alternate authorities of the EMB sent two public letters to the ordinary authorities accusing them of violating the electoral procedure. In a third letter, signed by four of them, they

declared their absolute distance with the entire process and the, according to them, unconstitutional decisions taken by the EMB.

The 2009 and 2017 electoral turbulence in Honduras opened for an intense debate about the necessity to depoliticize the EMB. It did not produce significant results. For example, during the 2021 elections, the new Electoral Council attempted but failed to autonomously perform its legally ratified functions, obstructed as it was by the other branches. The Council was primarily circumscribed by the fact that the Legislative did not approve its budget in time. The biased composition of the EMB and, consequently, its inability to properly manage the electoral administration have awakened international concerns. In 2005, 2013 and again in 2017, the Organization of American States strongly recommended the implementation of measures that would distance the electoral authorities from party interests. Likewise, in 2021, the European Union expressed preoccupations about the EMB composition (Jerez, 2021, p. 4).

Honduras is still fragile. Once elected as alternates of the Tribunal of Electoral Justice in 2020, one judge resigned almost immediately and the other followed suit in 2023. This body ought to have three incumbents and two alternates. However, since 2023 it has proceeded without alternates, resulting in that any absence of the incumbents could trigger a crisis. As happened in 2023 when the resignation of judge Bustillos – after being appointed Supreme Court judge – and the subsequent passing away of judge Paz, caused the stoppage of new laws and electoral regulation. Those vacancies were finally filled in 2024. However, Congress did not still reach an agreement regarding new names for the alternates, which led to a ruling from the Constitutional Court that Congress had to elect alternates within 30 days. Adding to the problematic situation was that some of the EMB members, like the aforementioned judge Bustillos, have been appointed to other branches. Alarming cases in point were judge Reina, who resigned in 2022 due his appointment as Minister of Foreign Affairs, and Electoral Counselor Rixi who resigned the same year assuming the position as Minister of Finance.

In January 2010, Nicaraguan President Daniel Ortega issued a decree extending the mandate of the electoral authorities and members of other judicial and prosecutorial organs, alleging that the reason was a power vacuum in Congress. According to Pérez-Baltodano, the purpose of the ruling was to ensure limitless presidential reelection. The move proved successful since the EMB authorities not only accepted it but also declared that the presence of international electoral observers was unnecessary. Although observers finally arrived, their work was obstructed by the EMB (Pérez-Baltodano, 2012, pp. 221-222).

The Guatemalan legislation gives the EMB authorities the same immunity rights as the highest judges (Arts. 124 Electoral Law and Political Parties). In December 2019, the General Prosecutor unsuccessfully asked Congress to revoke the immunity rights of the five EMB authorities for allegedly neglecting the

non-official vote counting. But in November 2023 Congress did indeed revoke the immunity rights of four of the five EMB authorities dubiously justified on the grounds of corruption. All four fled the country after having lost their immunity. Presently, the judicial practice states that EMB authorities can be detained and prosecuted at any moment during their tenure. This has been interpreted as political persecution against EMB authorities who did not suspend the legal status of the leading oppositional *Semilla* party.

In all four cases there is evidently a trend with regards to the resignations and dismissals of EMB authorities. Apart from being politically appointed, their positions are insecure, they have no guaranteed immunity and they are constantly forced to act within budgetary uncertainty. The overall effect is an inability to perform accountability, that is, to control abusive encroachments of the executive and legislative. In this scenario the authorities rather assume the role of accomplices in a gradual march towards authoritarianism. More than anything else, the later appointment of EMB authorities to other branches seems to follow the logic of rewarding loyalty.

3.3. Pressure from the Judicial Branch

In all our cases, Constitutions and Laws presuppose that EMBs are invested with final jurisdictional decision-making power regarding electoral procedures, including outlining the capacities of candidates, political parties and citizens. Accordingly, their specific electoral jurisdiction should mean that they have a significant impact on VA while also ensuring that the electoral procedures are detached from partisan interests. It also implies horizontal responsibility since they exercise control over the other branches of power, primarily in terms of outlining rules for restraining the legislative and executive powers from exercising undemocratic practices in the context of elections, that is, performing accountability through possible sanctions. Such a mandate rests on the historical incapacity of often corrupt judicial branches to fulfill these tasks. However, our cases show that EMBs are constantly superseded by politicized Judicial Branches who intervene in the ruling on electoral issues.

The Salvadoran Constitution establishes that the EMB has exclusive jurisdiction for imparting justice in electoral matters (Art. 208). Yet, a strong tendency to deprive the EMB from some of its jurisdictional competencies started already in 2009 when the new members of the Constitutional Chamber took charge of declaring unconstitutional not only the closed and blocked-party-list system but also the disqualification of independent candidacies (Inc. 61-2009). Some scholars argue that this event initiated a more progressive era of constitutional ruling (Rulings Inc. 57-2011, 59-2014, 43-2013, 139-2013, 48-2014) on electoral issues (Miranda, 2016, pp. 231-232; Cruz, 2018, p. 132). However, this constitutional

ruling also paved the way for the nullification of the jurisdictional competences of the electoral branch.

Since 2009, the Judicial Branch ruling on electoral matters has been normalized in El Salvador. As part of that branch, the Constitutional Chamber has developed a vast electoral jurisprudence, from ordering a reform of the Electoral Law to canceling parties that do not reach the minimum number of required votes (Santamaría, 2018, p. 785). Such decisions have obstructed the consolidation of an evermore unstable electoral authority (Miranda, 2016, pp. 238-239). As a consequence of the constant and intempestive ruling of the Constitutional Chamber on electoral issues, the 2015 elections were held with significant modifications that were ordered after the initiation of the electoral process. The result was that the electoral legislation was not updated on time which provoked a series of errors in the execution of the final counting. This prompted a new constitutional ruling that ordered the recounting of votes for some deputy candidates (Cruz, 2018, pp. 142-143). Altogether, the extended, repeated and self-imposed electoral competencies of the Judicial Branch have forced both the Legislative and the EMB to implement an electoral system that is not based on legislative consensus nor on the capacities and experiences of the EMB authorities (Cruz, 2018, p. 144).

The 2021 ruling of the Constitutional Chamber allowing presidential reelection was controversial (Inc. 1-2001). Previously, reelection was prohibited in the constitution and ratified by the very same Constitutional Chamber. In May 2021, President Bukele, backed by a friendly congress, dismissed all the high judges, and appointed new ones. With a new composition, the Constitutional Chamber re-interpreted the Constitution and ruled that it allowed an incumbent president to seek consecutive terms, provided he/she requested a license to seek a new term six months prior to the end of the present mandate. The path was cleared for Bukele's re-election. In November 2023, four of the five authorities of the EMB voted in favor of accepting the Bukele candidacy. One abstained from voting.

In 1990 (CIDH Inform 21/1994) and 1995, the Guatemalan EMB successfully defended with support from the Supreme Court of Justice (CSJ) its decision to not register the presidential candidacy of Ríos Montt (dictator from 82 until 83). In 2003, the EMB denied his registration again (TSE 0093-2003 and 0095-2003), once more backed by the Supreme Court of Justice (CSJ Ruling 4/July/2003). Within weeks, however, the Constitutional Court revoked the decision (CC Ruling 14/July/2003). In the resulting judicial chaos, the Supreme Court of Justice, at the demand of other presidential candidates, suspended the Constitutional Court's decision (CSJ Rulings 429-2003; 430-2003). The street violence installed by Ríos Montt pushed the Supreme Court of Justice to rule in his favor and EMB to register his candidacy.

The 2023 electoral process showed the fragility of Guatemala's institutionality. In July, after a Constitutional Complaint (*Amparo Constitucional*), the

Constitutional Court commanded the EMB to analyze the votes and acts of the first presidential electoral round (CC Exp. 3731-2003); this action was performed in an alleged violation of the Constitution. The following day, in an attempt to disqualify the triumph of the *Semilla* party over the incumbent party, the EMB suspended the results of the elections following the ruling of the Constitutional Court. Shortly thereafter, the General Prosecutor suspended the legal status of *Semilla*, a measure that only the EMB had the right to do. The prosecutor then issued a warrant against the vice-director of the public registration (*subregidora del Registro de Ciudadanos*), a dependent office of the EMB, and a judge asked for a registrar to be prosecuted.

Moving to Honduras, even if the international community consensually rejected the outcomes of the 2009 elections, key domestic actors in concert with the EMB succeeded in legalizing the newly elected government (Sonnleitner, 2010, p. 842). This maneuvering brought the country into a situation of intensified democratic deterioration, primarily manifested in a weakened respect for the rule of law. With an electoral authority marked by weak jurisdictional competence, a politicized Supreme Court of Justice encountered little institutional resistance when it, in 2016, made public the ruling declaring that the prohibition of presidential reelection could not be applied (CSJ RI-1343-14). In the upcoming 2017 elections, the EMB played an obscure role. The fact that it had not adequately informed about the preliminary election-day results provoked suspicions of fraud and provoked multiple demonstrations against the EMB across the country (Rodríguez, 2019, p. 54). In an election plagued by numerous irregularities, the sitting president Juan Orlando Hernández was re-elected for another four-year term, once again triggering sharp criticism from the international community, with the Organization of American States recommending new elections. An increasingly distrusted EMB did not give in.

In the following years, a mounting critique of the EMB finally led to its reorganization. The general elections of 2021 became the litmus test for a Tribunal of Electoral Justice that enjoyed autonomous jurisdictional competence when ruling on electoral issues (unlike its sister entity – the National Electoral Council – that only had administrative functions). However, a serious problem was a lack of time to enact any special legislation for regulating the functions of this new tribunal (Jerez 2021, 298). At least in two municipalities, electoral disputes had to be solved by the Constitutional Chamber of the Supreme Court of Justice, underlining again the unfortunate imbalances in the division of competences (CNE 56-71-2021-EG and 1241-2021). The Tribunal of Electoral Justice had not yet been positioned as the sole jurisdictional instance to rule on electoral matters.

In Nicaragua, the victory of Daniel Ortega in the 2006 elections was preceded by a substantial electoral reformation. Without opposition from the EMB, the legislative branch had reduced the threshold to win in the first round from 50

percent to 40, and only to 35 if the winner had a five-point margin to the closest competitor. Amidst the new framework, Ortega managed to win in the first ballot despite only gathering 36.9% of the votes (Sonnleitner, 2010, p. 826). As previously noted, breaking the common praxis, Ortega extended the mandate of several prominent functionaries, among them the EMB authorities. Following this presidential decree, the reinstated EMB declined to use its competence to rule on the issue of presidential reelection. Though pointing out a possible contradiction between the prohibition of reelection and the constitution, the EMB chose to forward the case to the Supreme Court of Justice, which gave its approval (CSJ Ruling 504-2009). In 2011, Ortega was re-elected for a consecutive term. In 2022 the Electoral Law established a simple majority of votes for the election of president (Art. 137 Law No 331).

As all cases demonstrate, the pressure from the Judicial Branch is accompanied by the political appointment and removal of EMB authorities. As the latter have no guarantees of tenure and could be submitted to unjust prosecution, they allow the Judicial Branch to rule over decisions that only correspond to the EMB. In some cases, they even supported the encroachment. Consequently, bereft of jurisdictional power, the ability of the EMBs to control and sanction the executive and legislative has been undermined, thus minimizing their capacity to perform accountability.

4. Conclusions

The new electoral authorities in Latin America's Third Wave democracies were inserted into a complex system of checks and balances, imported from an Anglo-Saxon tradition. The cases under scrutiny share common characteristics. Firstly, the creators of the EMBs envisioned organs composed of authorities capacitated to rule independently. Articles were incorporated in legislation, which opened for the appointment of non-political electoral authorities. In praxis, however, the Salvadoran, Nicaraguan, Guatemalan and Honduran cases show a congressional tendency to opt for appointment procedures that allow political parties to have complete power and control of the EMBs. Secondly, we identified significant flaws in how electoral authorities have been protected from unjust removals and prosecutions. Consequently, electoral authorities have resigned or been removed. Thirdly, a considerable number of rulings by the constitutional courts promote and ensure the compliance of the electoral authorities with party interests. Needless to say, the loss of competences of the electoral authorities in favor of the judicial branch weakens the structure of separated branches.

Within the system of checks and balances, the EMBs enjoy, theoretically, the same level of independence and authority as the three traditional branches. The jurisdictional exclusive competences given to the electoral branch would thus

constitute the basis for its mandate to sanction and, with that, enforce answerability from the other branches. In other words, aimed at serving as the highest authority in interpreting the electoral rules, the electoral branch was at the onset invested with the capacity of not merely insulating the state bureaucracy from party interventions, but also, and most importantly, controlling unlawful encroachments of the other branches into electoral matters by sanctioning power holders for violating democratic rules. Transactional horizontally not merely entails capacity of oversight, but also of being controlled by the other branches. After all, the interrelated system of accountability not only aims at producing guardians, but also guardians of the guardians. In accordance with this reciprocity, the judicial branch must be invested with the power to control the decisions of the EMB, but only in cases of serious affronts to the constitutional guarantees, not with respect to the broad array of electoral matters corresponding to the competences of the electoral branch. The Executive and Legislative also have a great responsibility in guaranteeing transactional horizontality by appointing and removing EMB authorities, as long as this is done in accordance with the legislation.

The EMBs not only play a key role in strengthening horizontal accountability but also, and primarily, in reinforcing a functioning system of vertical control, a task performed by administering the electoral process. Indeed, the EMBs are extraordinary actors with unique competences, placed as they are in the convergence of horizontal and vertical accountability. We label this combined capacity “the third dimension of accountability”, that is, the dual power to formally and independently sanction their co-equal branches of power and ensure that the electorate, by means of free, fair and periodic elections, is invested with the capacity to vote corrupt officials out of office. Ideally, the EMBs should guarantee the joint existence of strong horizontal and vertical accountability. Theoretically, the EMBs constituted the optimal solution. However, our cases reveal that they are engaged in an asymmetrical struggle and that corrupt behavior and the hierarchization between the branches often prevail. Today, autocratic-leaning executive and legislative branches across Latin America place EMBs at the center of their assaults, in a combined attack on horizontal and vertical accountability. Scholars must turn the spotlight in the same direction.

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