The incompatibility of indefinite presidential re-elections in presidential regimes with the inter-American human rights framework

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Title: L'incompatibilità delle rielezioni presidenziali a tempo indefinito nei regimi presidenziali con il quadro interamericano dei diritti umani

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1. – The Advisory Opinion (hereinafter, also 'the Opinion') adopted by the Inter-American Court of Human Rights (hereinafter, also 'the Court', the IACtHR, or 'the Inter-American Court') on June 7th, 2021, answers to questions made by the Republic of Colombia. It is a most important pronouncement deserving a careful analysis, but not devoid of controversies. This is revealed by two strong dissenting opinions that question the analysis of the majority. In a nutshell, what was at stake in *substantive* terms was exploring whether there are *limits* to what States can freely decide concerning their political systems in terms of presidential reelections. Furthermore, from the procedural angle, the Opinion sheds light on the advisory competence of the Court and its relevance. A critical analysis of the Opinion can provide reasons as to why adjudicative jurisdiction in contentious affairs is not enough for the sake of bringing about transformations in terms of improving human rights observance in the region. Needless to say, the substantive and procedural lessons can be transplanted to other regions as well.

The question about the limits of what States can sovereignly decide without hindrance is a classic one in international law. Reactions to it often have emotional undertones, with people claiming that pretending to recognize certain limits would supposedly be an affront to the sovereignty of States and populations. Indeed, the very questions in the cases of the Permanent Court of International Justice in the Wimbledon and Lotus cases tackled the question of what States can legitimately do under a legal system and whether legal commands that impose limits on their free decisions, even concerning aspects central to them such as territorial entry, are contrary to the sovereignty they have. The answer is a negative one, provided that the limits flow from a legal source (J. Klabbers, *International Law*, Cambridge, 2013, at 22-24).

This very same question is by no means unknown in the Inter-American system of human rights (hereinafter, also the Inter-American system). Quite conversely, it is germane to it and has been addressed by the Court in the past. In this sense, for instance, the Court has said both that the States cannot argue that

limits to their actions based on human rights obligations are a supposed limit to their sovereignty, because the latter were precisely *accepted* by them in the *exercise* of a sovereign right (IACtHR, *Castillo Petruzzi et al. v. Peru*, Preliminary Objections, 4 September 1998, paras. 101-102); and that accordingly States cannot ignore that, as the International Law Commission recalls, the act of *any* of their agents can engage their responsibility when it is contrary to said obligations (article 4 of the International Law Commission's articles on Responsibility of States for Internationally Wrongful Acts, 2001; article 2 of the Inter-American Convention on Human Rights).

Quite frankly, one cannot help but wonder if the accusations of disregard of sovereignty made by certain States and agents is a mere cynical tactic used to intimidate the decision-makers or rally enraged opinions. Courts are certainly subject to scrutiny and can be criticized, but on the basis of legal questioning or considerations that their case law reflects a law that must change -through the appropriate venues- *de lege ferenda*; not based on populist attacks.

I will now proceed to examine the Opinion, beginning, as the Court did, with the analysis of the issues about its competence, and will engage with the substantive considerations afterward. Rather than describing the opinions of the dissenting judges, which certainly merit being studied given the issues they raise, in a section of their own, I will explore their arguments as the questions they pose concerning the Opinion emerge.

2. – After determining that the requesting State satisfied the condition to identify relevant provisions to be interpreted by the Court, the IACtHR proceeded to examine the question of if the fact that there were pending *contentious* cases in which some issues related to the objects of the questions posed by Colombia were present implied that the Court was required to refrain from adopting an Opinion.

The answer of the Court, which to my mind is a commendable one, was in the negative. The IACtHR's position, in a nutshell, underscored the complementary aims of its different competences, which in this case were those related to its contentious and advisory jurisdictions. While by means of the former, the Court decides on a specific case, by means of the latter it helps all States in the region to honor their obligations -which, in turn, benefits the population of the Americas in an anticipated manner. Why so? Because with clarity on what can and should not be done, State agents and authorities cannot pretend that they ignored what was legally required of them from a human rights perspective when pertinent cases arise, and those acting in good faith can know precisely what the Court understands are legally appropriate and wrong behaviors. The Court itself said that "[t]he main purpose of the advisory function is to obtain a judicial interpretation […] intended to assist the OAS Member States and organs to comply fully and effectively with their relevant international obligations" (IACtHR, OC-28/21, para. 24). Granted, contentious decisions also tell States how the IACtHR interprets provisions they are to implement themselves. But their main function is to address an allegedly existing violation, that is to say, they are triggered *ex post facto*. In other words, while the uses of the different initiatives of the Court can coincide in part, their activation and temporal use –before or after a violation— is not identical.

This train of thought is something that would come up back later when, during its analysis of substantive questions, the Court insisted on how its advisory opinion is meant to assist States by indicating its interpretation in legal terms, which agents are required to consider by virtue of the control of conventionality (IACtHR, OC-28/21, paras. 40-41; M. Londoño-Lázaro and N. Carrillo-Santarelli, *The Control of Conventionality: Developments in the Case Law of the Inter-American Court of Human Rights and Its Potential Expanding Effects in International Human Rights Law*, in 22 *Max Planck Yearbook of United Nations Law*, 319, 2019). Thanks

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to the internalization that would take place if this were heeded, then conduct identified as wrongful in the Opinion could precisely be *avoided* rather than remedied. This preventive dimension is of the utmost importance, showing how the different competences of the Court are complementary, for the two following reasons. Firstly, were the Court to only have the power to decide on violations that have *already* taken place, then it would only have an *ex post facto* jurisdiction towards events in which suffering already took place. While their decisions would permit States to avoid similar future violations, some would have already happened necessarily, with suffering having been unjustly perpetrated and activation of the Court's jurisdiction having to wait for an alleged violation to take place.

Furthermore, advisory competence is very much in line with the subsidiarity considerations underlying the regional and universal human rights systems, understood as composed of different levels of governance. By means of interaction between them, heeding what the Opinion indicates in ways that lead State agents to abstain from engaging in problematic conduct is very much in line with procedural economy and human rights effectiveness considerations. While the dissenting opinion of judge Zaffaroni would later question the Court as endorsing a preventive attitude, his criticism aimed at something different: the anticipation of all possible contingent risks of human rights abuses identified as wrongful, rather than against the prevention that the advisory function can contribute to.

Concerning all of this, it is useful to note that the Court stressed afterward in a different subsection that its advisory function, while not merely speculative in nature, does not entail any pronouncement on specific cases. This means that, not being merely theorical, they have a practical purpose, in terms of sowing the seeds of lawful conduct guided by it (IACtHR, OC-28/11, paras. 32-33). To my mind, this underscores that there is no prejudgment involved in advisory opinions, which complement other competences, such as the (precautionary, one might add, and) contentious one, strengthening the protection of rights in the American region in synergic ways and filling gaps that the other competences cannot fill.

It is for these reasons, to my mind, that the Court ended up concluding that, in light of the assisting role of the advisory competence, its use cannot be understood as "constitut[ing] a prejudgment of cases or petitions that are pending before the Inter-American system" (IACtHR, OC-28/21, para. 24).

It is true, though, that Judge Pazmiño Freire too umbrage with this aspect of the majority's consideration. In his opinion, the fact that there were pending contentious proceedings against Bolivia and Nicaragua on potentially related issues required the Court to justify more exhaustively why the Opinion's issuing would not amount to a covert or premature decision on them. The English version of the opinion ("existence of petitions related to the purpose of the advisory opinion") does no justice to the Spanish original ("existencia de peticiones que se relacionarían con el objeto de dicha Opinión Consultiva"), because it fails to fully convey what the judge may have meant. Judge Pazmiño's original text in Spanish conveys a hypothetical, in terms of the petitions possibly being related to the advisory opinion.

Nonetheless, I agree with the majority. The fact that this is a contingency, plus the different aims of the Opinion, which could be and is actually very helpful for the sake of State conduct in terms of a potential beneficial contribution to the enjoyment of human rights, puts the *onus* on those who challenge the precedence of the competence exercise. Otherwise, the Court would have to anticipate every possible connection between the many cases pending before it and how they could be related and understood as eventually anticipating a given future ruling, which is too onerous and burdensome –especially one the *jura novit curia* principle enters into the equation! Rather, in this case the Court itself declared that no such prejudgment would take place, and by virtue of good faith, with nothing revealing

the contrary, one could be satisfied. After all, again, the advisory function is of tremendous importance in a multi-level framework with dynamics that differ from contentious ones. Should one wait until a case against a specific State is decided before giving guidelines that can help everyone to know what the human rights standards on a matter are, considering dimensions that perhaps are not raised by the specifics of a given case? Not to me.

3. – Another of the decisions made by the majority of the Court that Judge Pazmiño took issue with was a reformulation of one of the questions posed to it by the State of Colombia. While the dissenting judge did not object in general terms to the power of the Court to reformulate or precise questions (IACtHR, OC-28/21, dissenting opinion of judge Pazmiño Freire, para. 16), he challenged the specific conclusion in the Opinion on that matter.

Certainly, the Court makes clear that it enjoys the aforementioned power on the basis of article 64 of the American Convention on Human Rights (IACtHR, OC-28/21, para. 35). In this specific event, the Inter-American Court made some "precisions" that circumscribe the scope of the question.

Firstly, I would like to mention that the Opinion is circumscribed to presidential or "presidential political system[s]", as the Court made clear when addressing both procedural and substantive questions (IACtHR, OC-28/21, paras. 39, 87), rather than to others such as Parliamentary ones, given certain commonalities regarding attributions that presidents enjoy within those that are relevant in terms of democratic guarantees and checks and balances (IACtHR, OC-28/21, para. 89). They include, for example, powers to appoint or nominate State agents whose terms are not coincident with theirs, which can give rise to erosions in balances and control (IACtHR, OC-28/21, para. 140) were presidents to have no (reasonable) limits to the number of terms they can postulate themselves and be elected to. Judge Zaffaroni likewise words his dissenting opinion within the framework of those regimes (IACtHR, OC-28/21, dissenting opinion of judge Zaffaroni, at 3).

This precision is a most relevant one because it entails that the Opinion is limited to the aforementioned regimes rather than being an expansive one. The rationale for this can be found in the recognition of alternative checks on excessive and expanding presidential overreach in alternative regimes, such as those in which ongoing Parliamentary support is required for heads of government to remain in office, leading the Court to expressly say that "this advisory opinion does not address parliamentary systems" (IACtHR, OC-28/21, para. 87).

Going back to section III.E of the Advisory Opinion, in which the Court reformulated some questions posed by Colombia, it must be noted that the first thing it did was to indicate that, for the purposes of what it would answer, "presidential reelection without term limits" would be understood as any in which somebody could serve as president of the State "for more than two consecutive periods of reasonable duration". The Court added that it is not legitimate to change the duration of the terms while they are "being served" to benefit those in office (IACtHR, OC-28/21, para. 38).

Concerning the definition of indefinite reelections designed and used by the Court, one cannot help but notice that there is nothing inherent to the number two terms as the number after which of terms democratic guarantees are automatically eroded. These positions are after all socially constructed. But the Court does hint at "reasonableness" as a somewhat flexible criterion with which to appraise the length of a period as excessive or not (Ibid., para. 38). As to why two and not another number of terms was chosen, one can guess that perhaps the Court seems to be guided by State practice in a somewhat flexible comparative fashion. Later on, in a different section, the Court notes how in the region there were four States

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without limits as to the number of presidential reelections an individual can aspire to, with others varying in terms of their specificities (Ibid., paras. 98-99).

All of this notwithstanding, as Judge Zaffaroni noted, some robust democracies can exist in countries such as the United States of America in which an individual was reelected thrice and aspired to have a fourth term, and others aspired to have a third term (IACtHR, OC-28/21, dissenting opinion of judge Zaffaroni, at 11). It is true, though, that there is likely a point in which reelections are deemed excessive in light of the Court's considerations on the erosion of democracy and its guarantees –such as the one due to appointing agents. There might be controversies and discussions on the specific number –e.g., why stopping at two and not at three considering the US practice, etc.—, but it is also true that terms with excessive durations and multiple reelection options could amount *de facto* to an excessive duration in power, in which power can be dangerously concentrated and populations affected. Therefore, there is some validity in the question of Judge Zaffaroni. After all, when dealing with social constructs as these legal terms, it is hard to come by a specific number. Thus, some modulation in terms of the specificities of each society could have been given as a leeway by the Court in terms of self-determination exercises, as Judges Freire and Zaffaroni suggest (IACtHR, OC-28/21, dissenting opinion of judge Pazmiño Freire, paras. 1, 10; IACtHR, OC-28/21, dissenting opinion of judge Zaffaroni, at 15, -17), but making it clear that they could be found to be excessive in practice even if not unlimited in number on a case-by-case basis, and that in any case unlimited reelections are contrary to the system the Court oversees, for the very same reasons the IACtHR held –to be examined below.

After formulating the questions posed by Colombia, the Court proceeded to answer them. I will turn to examine the merits of the Opinion, but before doing this it is convenient to summarize what the Court understood that it had to answer to. These two questions are, on the one hand, whether there is a human right to indefinite presidential reelections in the Inter-American human rights system, and whether restrictions to the number of times individuals can be so reelected entails an unlawful restriction to their rights; and on the other hand, if indefinite presidential reelections permitted in a domestic political system would be contrary to the framework of human rights law. The Court mentions how the reformulation of the second question it carried out reflects, in its opinion, the essence of the matter brought forward by Colombia (IACtHR, OC-28/21, para. 36).

4. – After examining its competence to issue the Opinion, the Court introduces its examination of the matters presented to it with a very important analysis: that of the foundations underlying the issues it must opine on. This is something quite typical and commendable in the case law of the Inter-American Court of Human Rights. Oftentimes, decisions quite at odds with the logic of a given regime can be made if their foundations and objectives are not considered, along with all applicable normative components as a whole. What the justly famous article 31 of the Vienna Convention on the Law of Treaties mentions as elements of the general rule of interpretation is very well encapsulated by the Court's analysis, mindful of the special nature of human rights standards (IACtHR, *Blake v. Guatemala*, Reparations and Costs, 22 January 1999, Separate Opinion of Judge A.A. Cançado Trindade, paras. 21-32). As I have explored elsewhere, the IACtHR tends to interpret standards in ways that are consistent with the theoretical underpinnings of the values and foundations of the system (N. Carrillo-Santarelli, *Gender Identity, and Equality and Non-discrimination of Same-Sex Couples*, in 112 *American Journal of International Law*, 479, 2018), which in my opinion ensures harmony and failing to open the door to gaps when it comes to the protection of human rights.

In this specific advisory opinion, as it did in previous ones (IACtHR, OC, 8/87, para. 26; IACtHR, OC-9/87, para. 35), the Court draws attention to a "triad" of interrelated pillars, namely "the rights and freedoms inherent in the human person, the guarantees applicable to them, and the rule of law", all together in the context of "a democratic society" (IACtHR, OC-28/21, para. 43). This is the framework in light of which and on whose basis the different provisions to be resorted to in order to respond to the questions of the applicant State will be interpreted and understood in ways that guide States as to how they must act concerning the issue of presidential reelections –in a presidential system, it must be recalled.

Furthermore, the Court stressed how pluralism and respect for the rights of minorities are essential requirements for a democracy to be legitimate. This entails that there are limits to what majorities can decide (IACtHR, OC-28/21, para. 133); and paves the way for understanding that the contours of what is democratic are neither exhausted nor guaranteed in terms of what a majority decides –including, one might add, whether they would reelect a given individual infinitely. Those considerations are therefore an essential part of the opinion.

This is so because, according to what the Court discusses, possible endless reelections would permit individuals to amass excessive powers, exploiting the influence and powers they have in presidential regimes, and having an excessive media and other kinds of influence on the perceptions of citizens (IACtHR, OC-28/21, paras. 140-141), who may end up being accustomed to equating a given individual with the office or discourage the belief that the opposition could be elected (Ibid., paras. 133, 135-136). These considerations are quite important and necessary in my opinion. They are very much in line with the Court's indication that its opinions are not mere abstract theoretical disquisitions (Ibid., para. 32), because it shows how the Court pays attention to phenomena on the ground.

The Court's opinion is also very welcome in light of what philosophical insights can teach us. Phenomenology, for example, posits that our perceptions of what is real and possible are determined, among others, by unconscious and cultural factors that shape what and how we notice and interpret facts, dynamics which in turn are shaped by the roles we do not intentionally decide to adopt (J. Malpas, *Heidegger's Topology*, Massachusetts, 2006, at 53-55, 90, 343). This reinforces the idea that what citizens get used to and see as possible in terms of the management and control of the State could be influenced by who (or which families, one might add) they see as president over and over again and even across generations. Judge Zaffaroni raises this point but to say that, quite rightly, risks to democracy are not exhausted by endlessly reelected individuals and the abusive excessive power they can amass, but also include nepotist and (too) many other phenomena (IACtHR, OC-28/21, dissenting opinion of judge Zaffaroni, at 18-19), reason why the Court cannot be expected to opine on every single risk since that would be unfeasible or inadequate (Ibid., at 19, 23-24). I respectfully disagree with this dissenting consideration. To my mind, the latter objection is not fair at all, since the Court was opinion on *one* specific aspect that it was asked about. It is perfectly reasonable for States and organs to ask about a given risk to the human rights regime they are concerned with or have doubts about, and the Court's advisory competence can precisely help to clarify matters regarding them. Were other concerns to be expressed, they could then be answered. This is what a progression of jurisprudence and case law can help to achieve in terms of strengthening the system.

And moreover, it is actually quite ironic how reality in the problematic Latin American region shows how perversions of democracies can take place. While judge Zaffaroni (rightly) criticized, among others, Somoza in Nicaragua (IACtHR, OC-28/21, dissenting opinion of judge Zaffaroni, at 19), the Ortega family is now revealing that the other side of the ideological and political spectrum can likewise

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engage in autocratic and abusive practices inimical to genuine democracy and human rights. Both dissenting opinions curiously seem to approach the matters from a left-leaning political perspective, since they criticize certain prejudicial free market and globalization trends or (media and other) monopolies and oligopolies (IACtHR, OC-28/21, dissenting opinion of judge Pazmiño Freire, para. 19; IACtHR, OC-28/21, dissenting opinion of judge Zaffaroni, at 28-29) –factors which, I concur, can be problematic from a rights perspective. But neither are they the only ones, nor are threats and risks against rights and democracy the exclusive domain of right-wing movements in the Americas.

These discussions that the dissenting Judges are, of course, absolutely legitimate and important, since the exchange of views from all perspectives is necessary and, as Joseph Weiler has indicated (N. Carrillo Santarelli, *Apuntes del professor Joseph Weiler sobre realismo jurídico y judicial*, in *Aquiescencia*, 11 May 2019), collective bodies as tribunals are more legitimate the more they reflect different perspectives within societies. Furthermore, issues of inequality, other threats to democracy, and freedom that both dissenting judges raise are certainly problematic and most certainly require examination. But their arguments do not entail a denial of the problems examined in the Opinion, which in itself is a reason justifying its adoption. Furthermore, just as Judge Zaffaroni claims that "no judge stops being human, and therefore, the intellectual and sentimental or emotional spheres interact [...] easily dresses itself in rationality when exercising the power" of judges (IACtHR, OC-28/21, dissenting opinion of judge Zaffaroni, at 4), one cannot help but wonder if the same happened in their case concerning their (again, valid) selection of problems, when the region has shown the ones caused by regimes adopting indefinite reelections as being no less real.

Again, this is a possibly unavoidable phenomenon I have commented on in the past (N. Carrillo-Santarelli and C. Espósito, *The Protection of Humanitarian Legal Goods by National Judges*, in 23 *European Journal of International Law*, 2012, 67, at 76). Sadly, in the American region, both left- and right-wing politicians and individuals tend to quite properly question the problematic practices that others across the political spectrum engage in, but problematically oftentimes fall in a problematic silence on the equally worrisome ones that the ones in opposing sides engage in. There are certainly honorable exceptions to this, and in no way, this is a covert or open criticism of the dissenting opinions in this aspect, which this is not. But this is a trend that ought to stop in the region politically speaking, and this discussion is a good opportunity to be reminded about it.

A further important thing to note is how the Court refers to many sources and instruments, both of hard and soft law, among which the Inter-American Democratic Charter is included. Judge Pazmiño Freire disagreed with the majority on this point. According to him, whereas it is correct for the Court to resort to the OAS Charter as a treaty it has the power to engage with, it would be a travesty for the Court to directly interpret the Democratic Charter, because it is not a treaty.

According to him, its direct interpretation would end up equating that instrument with human rights treaties (IACtHR, OC-28/21, dissenting opinion of Judge Pazmiño Freires, paras. 9-12). In this regard, his criticism can be seen as based on the applicable sources of international law, with non-binding instruments not being pertinent sources to be directly used for the purposes of adopting an advisory opinion, since that would somehow elevate or "rais[e] it to the rank of a human rights "treaty" (Ibid., para. 11). That said, immediately after saying this, the judge has qualms with how the Court uses an instrument meant, in his opinion, to address inter-State relations in order to decide on a supposedly extraneous matter (Ibid., para. 12), that of human rights –the main subjects of which are individuals, one must add in order to understand his objection. Let us dissect his two objections,

which in my opinion are not persuasive enough to undermine the soundness of the opinion of the majority in this case.

To these interrogations, I present my opinion as follows. Firstly, the law of treaties makes it clear that there can be agreements and practices that, while being different from it, nevertheless can be taken into account for the purposes of ascertaining what the context of a treaty is, which in turn is relevant for the sake of interpretating it, according to systemic considerations (article 31.3 of the Vienna Convention on the Law of Treaties; Antonio Remiro Brotóns et al., *Derecho international*, Valencia, 2007, at 602-603). The Democratic Charter can be part of the relevant context, and therefore it is certainly relevant for the Court. And secondly, insofar as that Charter *mentions* human rights (Cf. Preamble, articles 3, 7 through 9, and 21 of the Inter-American Democratic Charter) and pertains to democracy, which as the Court indicated (see *supra*) is a context on the basis of which human rights guarantees are to be interpreted in the Inter-American system, what that instrument has to say is by no means extraneous or foreign but, quite conversely, rather *quite* pertinent for the purposes of finding out what the system requires concerning reelection, *especially* because they can shed light on what are specifically political rights in a representative democratic model.

In relation to the Inter-American Democratic Charter, the Court mentioned how the requesting State "explicitly requested" its interpretation, and that it "constitutes an interpretive text of both the OAS Charter and the American Convention. Consequently, in interpreting" those instruments, the IACtHR resorted "where pertinent, to the provisions of the Democratic Charter" (IACtHR, OC-28/21, para 29). Note that the Court insists on the Democratic Charter's relevance *qua* interpreting the treaties it would opine on, and that it would do so insofar as the Charter is pertinent rather than indiscriminately. This coincides with the arguments presented in the previous paragraph and shows that there is no "equivalence" or distortion of the nature of the sources that the dissenting judge referred to. Moreover, the first advisory opinion that the IACtHR ever adopted, which Judge Pazmiño Freire expressly refers to (IACtHR, OC-28/21, dissenting opinion of judge Pazmiño Freire, para. 11), actually quite clearly indicates that even if a treaty is mainly or mostly concerned with different matters, if it has at least a single human rights-pertinent provision, the latter can fall under the scope of the advisory competence of the Court (IACtHR, OC-1/82, para. 34). This dispels the alleged impertinence of the Democratic Charter *ratione materiae*, which the dissenting opinion refers to.

5. – As to whether there is a human right in the Inter-American system entitling individuals to have the possibility of being reelected indefinitely, the opinion says the following. Firstly, that neither in the instruments of the system nor in others is there an express or implicit mention of such a right existing. In its own words:

> "Regarding international treaties [...] there is no mention of presidential reelection without term limits [...] [t]he right expressly derived [...] is the right to vote and be elected [...] international human rights treaties do not recognize the existence of an autonomous right to be reelected to the office of the Presidency [...] [neither does] the *corpus iuris* of international human rights law" (IACtHR, OC-28/21, paras. 94-102).

Interestingly, Judge Pazmiño Freire mentions how indefinite reelection is not in itself a right of individuals but rather a feature that political systems must regulate, as decided by their societies (IACtHR, OC-28/21, dissenting opinion of judge Pazmiño Freire, paras. 26, 34). To my mind, however, this is not necessarily

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the case, because there is an individual right of citizens to present their candidacies for election. Article 23 of the American Convention on Human Rights, concerning certain political participation rights, indicates that citizens have a right to "be elected in genuine periodic elections". Therefore, limiting the number of times they could do that would potentially run contrary to the right in question. Thus, the IACtHR did well to examine the issues being commented.

Apart from indicating the fact that having the possibility of being indefinitely reelected as president is not internationally recognized as an autonomous right, the IACtHR mentions in its Opinion that limitations that forbid indefinite reelections do not necessarily amount to an undue restriction on human rights, considering that there are unavoidably limitations that electoral systems must have in place for them to function (IACtHR, OC-28/21, para. 112), such as registration requirements; and provided that the limits are to be clearly "established both formally and materially" in the law (Ibid., para. 115); that such a restriction pursues a legitimate goal "as it seeks to guarantee representative democracy by serving as a safeguard of the essential elements of democracy established in article 3 of the Inter-American Democratic Charter" (Ibid., para. 119, confirming the relevance of resorting to said Charter); and that the restriction in question "is suitable to achieve its aim" (Ibid., 120). For the Court, the restriction against indefinite presidential reelections prevents the degradation of democracy (Ibid., para. 124); and protects voters' right to "choose freely between registered candidates" (Ibid., para. 125), which cannot include those exceeding the term limits and permits to choose between those who can, even those belonging to the same party as the one(s) who can no longer be candidates, with political freedom being thus preserved (Ibid., para. 125). These institutional delimitations are an alternative to a rather personalist approach to power, I might add. It is necessary to add that, from the previous considerations of the IACtHR, it follows, firstly, that restrictions to indefinite elections could be wrongful, for instance, if they are not established by law; and secondly that, as the Court said later on, the Opinion is not an endorsement of all restrictions of "presidential elections in general", but rather considers that what is contrary to the human rights framework refers to:

> "[T]he absence of a reasonable limitation on presidential reelection or the implementation of mechanisms that materially allow existing formal limitations to be disregarded and directly or indirectly enable the same person to continue to serve in the office of president" (IACtHR, OC-28/21, para. 148).

The Court does take note of how a few States permit indefinite presidential reelections, and how three domestic decisions in the region indicated that forbidding it would amount to a discriminatory treatment (IACtHR, OC-28/21, para. 98). Yet again, such a right does not exist internationally. This is a very important distinction that raises an important question, as I will proceed to explain.

Even though the Court does not indicate this, the difference between domestic and international recognition is crucial because one can wonder whether domestic recognition of indefinite reelections entails progressiveness and an increased protection of human rights. This is why both questions the Court responded to are necessarily interrelated, and ultimately in my humble opinion entails that the Court would deem that domestic recognitions are not truly reflecting a properly understood human right, which is a fascinating implication concerning essence of rights considerations. I will explain myself. According to the *pro personae* principle and article 29 of the American Convention of Human Rights, if a more protective standard were to be found in domestic law, then it would not be possible for the respective State to invoke the regional law in order to restrict the most expansive domestic human rights provision.

But if, as the Court ended up saying, endless reelections are contrary to a democratic system, and political rights have both individual and collective dimensions (IACtHR, OC-28/21, para. 103), then permitting the former would erode democracy and affect all the members of the political community, reason why setting aside the provisions permitting infinite reelections to the presidency are not a restriction of a human right since such a right does not exist internationally and attempts to recognize it domestically would be seen as abusive given how they affect all other individuals and the regime in which the Court understands that rights can flourish and be properly protected. This is of course just my opinion, which I construct based on different elements found in the advisory opinion which to my mind underlie many of its conclusions, providing unity and foundations for them.

6. – After ascertaining that neither is there an internationally recognized human right for individuals to be endlessly reelected, nor an impediment for States to restrict the right to participate in elections as candidates in ways that prevent individuals from aspiring to indefinite reelections, the Court went on in a final moment to address what is perhaps the thorniest issue, as revealed by the attention both dissenting opinions dedicate to it. It is whether permitting indefinite presidential reelections in a presidential regime something that contradicts the regional human rights framework in the Americas.

As can be gleaned and anticipated from the preceding analysis, the Court answers in the affirmative. Before explaining why the Court concludes this, it is important to emphasize that this second issue is not the same one that was explored firstly, which in turn was comprised of two parts: if there was a right to indefinite presidential reelections in international human rights law, and whether restricting the possibility of aspiring to be reelected indefinitely amounted to a wrongful restriction of political rights in the same regime.

The Court answered both questions from the first set negatively, arguing that no individual rights were *violated* by the aforementioned limitations. But the second question is different because, instead of asking about the compatibility of said restrictions with the human rights regime, it explores a complementary aspect: if unlimited presidential reelections, were they present in a given legal system, would be *contrary* to international human rights law in the American region. In other words, in both cases we speak about compatibility with the human rights standards, but in one case we focus on *impediments to* indefinite reelections, and in the other one we look at indefinite reelections *themselves*.

The possibility of determining whether there is any incompatibility between the components and features of a given legal regime and the standards of the Inter-American system is well established in the latter. This can be found in substantive provisions such as Article 2 of the American Convention on Human Rights –which commands States parties to it to adjust their domestic provisions in a manner compatible with that treaty—, the identification of a customary norm requiring States parties to the Convention to make sure that their practices and norms are compatible with and give effectiveness to international human rights guarantees (IACtHR, *Olmedo Bustos et al. v. Chile*, Merits, Reparations and Costs, 5 February 2001, para. 87), and in the option found in article 64.2 of the same treaty, which permits States members of the Organization of American States to ask the Court about the consistency of their domestic laws with international human rights instruments. Likewise, the Inter-American Court of Human Rights has made it quite clear that States can have their responsibility engaged if their domestic law is contrary to human rights guarantees, both when they are implemented –applying it in a given case or when the norm performatively generates harm— and even *in the abstract* as a result of enacting an inconsistent domestic provision (IACtHR,

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Suárez-Rosero v. Ecuador, Merits, 12 November 1997, para. 98; IACtHR, OC-14/94, para. 58; IACtHR, *Olmedo Bustos et al. v. Chile*, Merits, Reparations and Costs, 5 February 2001, concurring opinion of judge A.A. Cançado Trindade, paras. 2-4).

As to the reasons provided by the Court to justify its consideration that indefinite presidential reelections in a presidential system *are* contrary to international human rights law, the IACtHR mentions the following. Firstly, that in order to be considered as an effective representative democracy, as understood in the Inter-American system, a political system requires the following conditions: "States must hold authentic regular elections [...] guarantee the *separation* of powers, the rule of law, political pluralism, and *rotation* of power, *and to prevent a single person from holding onto power*" (IACtHR, OC-28/21, para. 128, emphasis added). According to the Court, based on experience, those conditions are eroded if unlimited presidential reelections are permitted. Truly, in its own words, "the risks posed to democracy in the region by presidential reelection without term limits have materialized" (IACtHR, OC-28/21, para. 145, emphasis added). Furthermore, achieving the goal of protecting democracy might require imposing restrictions and regulations. As to the former, the Court already viewed favorably on them if certain conditions are satisfied. But the Court now goes on beyond this, by indicating that regulation is sometimes required, and not only tolerated, for the guarantees of the system to be upheld and effective in practice. This is why, for the Court, regulating political rights in ways *that prevent* the aforementioned erosion from happening is not contrary to their essence. Quite the contrary, this explains why for the Court "States have the obligation to guarantee the enjoyment of political rights, which means they must regulate" their exercise (Ibid., para. 129).

It is important to recall that, as indicated above, the Court limited its twenty-eighth advisory opinion to presidential regimes. It is thus natural and reasonable that the Court looked at their features so as to resolve the questions presented to it. Among them, "the Court note[d] that establishing a set time period for a popularly-elected president to serve in office is one of the main characteristics of presidential systems", with the robustness of the observance of this feature being a key element with which to appraise if the system remains a democratic one or, instead, has been perverted or "replaced by another—even opposite—system of government" (Ibid., para. 131), insofar as the limitations on presidential terms also limit the:

> "[E]ffective exercise of power" and "constitutes a mechanism of control [...] to facilitate succession in accordance with [...] established rules *in order to avoid the prolonged concentration of power in [a] single individual* and to preserve the balance inherent to the separation of powers and the system of checks and balances" (Ibid., para. 132, emphasis added).

As can be seen from the preceding passage, the Court draws attention to the danger of a regime becoming a personalist one, in which a given individual is more important than the rules and succession, which risks the concentration of power in their hands and thus the erosion of controls against abuses by other institutions according to rule of law characteristics. This is confirmed by the subsequent considerations of the Court, according to which:

> "[W]hen a single person remains the President of the Republic for a long period of time, it is harmful to the pluralistic regime (sic) [...] because it favors the hegemony of certain sectors or hegemonies [...] when a single person can hold the powers of the office of the president without limit, *it fosters hegemonic tendencies* that impair the political rights of minority groups and, consequently, undermine the plural

> regime of political parties and organizations *that impair the political rights of minority groups and, consequently, undermine the plural regime*" (Ibid., para. 133, emphasis added).

In this regard, there is a stark difference in the approach between the Court's majority and judge Zaffaroni. For the latter, apart from the fact that other risks to democracy exist and it would be exhausting and difficult for the Court to address them all (Cf. IACtHR, OC-28/21, dissenting opinion of judge Zaffaroni, at 18-24, especially at page 23 on "suffocating totalitarianism") –objection with which I disagree, for reasons I pointed out above about the importance of the assistance provided by advisory opinions and the fact that it is expressly permitted to ask the Court about compatibility of certain institutions with the human rights system—; the Court issued an opinion based on its desire to prevent mere risks rather than actual violations (Ibid., at 20-26).

But what the Court points out is that there is an *actual* erosion and that in practice indefinite reelections end up with an identification between the office of the president and a certain individual, which in presidential regimes gives them an enormous power that does weaken checks and balances and separation of State powers (IACtHR, OC-28/21, paras. 139-140) and makes society subservient to the president. The reference in paragraph 141 of the Opinion to the "exposure" advantages presidents "seeking reelection" have are neither fictitious nor impertinent. Indeed, people get used to seeing them, and the situation "can give the idea that keeping the same person in office is essential for the State to function) (Ibid, para. 141). One can say that the limitations on indefinite reelections are not discriminatory, since all would be subjected to them without distinction; and that they are not against pluralism or detrimental to the political party or ideology of those holding office either, because others from their same movements can aspire to succeed and replace them and the electors may cast their ballots in favor of them (Ibid., para. 125), without the personalist erosions and mutations of regime that indefinite reelection would entail and risk.

Concerning the Opinion's position against the erosion of the system that would be triggered by the allowance of indefinite presidential reelections, turning representative democracy into something altogether different according to the Court, it is useful to mention that for the Court the indication of "a finite period of time for the presidential term itself limits their expectations *and effective exercise of their power. It also constitutes a mechanism of control*, since limiting the length of the term places an obligation [...] to facilitate succession" (Ibid., para. 132, emphasis added). Additionally, the Court indicates that the "abrupt breakdown of the constitutionalist order" is not the only "danger facing the region's democracies", but also their "gradual erosion", being both thus contrary to the framework in which the rights are to be upheld and understood (Ibid., para. 145).

If effective controls are necessary in a representative democracy for it to be regarded as such, because they "guarantee the separation of powers", as indicated in the Opinion (Ibid., para. 119); and separation of powers and independence of State branches is an "[e]ssential elemen[t] of representative democracy", along with the respect of rights, rule of law, periodic free elections, and a pluralistic system, as indicated in article 3 of the Inter-American Democratic Charter; one can certainly infer that a necessary element of representative democracy would be missing as a result of action attributable to State agents, such as a legislative organ –which can engage State responsibility, just as constitutional-creation bodies can, per the Court's admission (IACtHR, *Olmedo Bustos et al. v. Chile*, Merits, Reparations and Costs, 5 February 2001, 72, 87-89; Ibid., concurring opinion of judge A.A. Cançado Trindade, paras. 2-5, 14, 16-17, 22). If, furthermore, a democratic system is essential and part and parcel of the Inter-American human rights system (IACtHR, OC-

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28/21, para. 43), then it is certainly reasonable and not far-fetched to conclude, as the Court did, that reelection is contrary to the human rights framework and system of *guarantees* –a word that is quite telling here.

7. – Based on the preceding considerations, how can one assess the Opinion or evaluate its soundness? This analysis cannot be carried out properly unless one bears in mind that the representative democratic framework is part and parcel of the human rights edifice in the American region, rather than being something extraneous to it; along with the threats against it in the region. Thus, the rule of law, guarantees, and specific individual (and collective or communal, as in the case of indigenous communities, cf. IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, 31 August 2001, para. 148) rights are dependent on and understood in light of them. If such a democratic system would cease to be one as a result of the removal of a proper separation of powers with controls that a permanent reelection possibility would bring about, impacting the attitudes of citizens in the *living* political dynamics, which is what an advisory opinion concerned with practicalities and not mere abstractions is concerned with per the Court's own reasoning, then one can see that the Opinion does provide very helpful guidance to democracies, preventing backslides such as those that have taken place in the region in countries as Venezuela and Nicaragua with authoritarian and concentration of power developments. Preventing and alerting about the risks of this erosion before it is too late when even the first steps are themselves opposed to the human rights *system* as such, which is composed not only of individual rights but also of collective ones, guarantees, rule of law, and democracy, it must be recalled, is thus a manner of protecting societies and human beings, a function which the advisory opinion does fulfill. The guidance the Opinion provides to democracies is certainly an assistance to States and societies (IACtHR, OC-28/21, para. 103).

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