

**Inter-American Court of Human Rights**

**Case No. 12.668**

**Leopoldo López Mendoza**

**v.**

**The Bolivarian Republic of Venezuela**

*Amicus curiae* brief filed by:

**Human Rights Foundation**



Human Rights Foundation

**New York, February 25, 2011**

**Honorable Judges of the Inter-American Court of Human Rights:**

Javier El-Hage, author of this amicus curiae brief on behalf of the Human Rights Foundation, 350 Fifth Ave., Ste. 4515, New York, NY 10118, U.S.A, respectfully presents this 36-page brief and its 6-page annex to you, pursuant to the provisions outlined in Articles 44 and 28.1 of the Rules of Procedure of the Inter-American Court of Human Rights.

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Inter-American Court of Human Rights (Case No. 12.668)  
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## I. Executive Summary

Political rights, as recognized by Article 23 of the Inter-American Convention on Human Rights, include, on one hand, the right to vote or elect authorities, and, on the other hand, the right to run for or to be elected to public office. In other words, the Convention recognizes the rights of the citizens to exercise their active right to vote and the opportunity for the citizens to exercise their passive right to vote. These political rights, or active and passive rights to vote, are protected by the Convention for the Protection of Human Rights and Fundamental Freedoms in Europe, and universally by the International Covenant on Civil and Political Rights.

With the goal of outlining a reasonable regulative framework for the exercise of these rights, the Convention recognized an exhaustive number of “enabling conditions” that the State can establish so that the citizens can exercise the active and passive right to vote. These conditions are: “age, nationality, residence, language, education and civil or mental capacity.” As it will be noted ahead, the Inter-American Court of Human Rights (hereinafter, “the Court” or “the IACtHR”) has already determined through *jurisprudence constante* that the regulation of these “enabling conditions,” as well as other “conditions or formalities,” must be “provisioned by law, not be discriminatory, be based on reasonable criteria, serve a useful and suitable purpose which makes it necessary to satisfy an imperative public need, and it must be proportional to said objective.”

Finally, the Convention established “sentencing by a competent court in criminal proceedings,” as a guarantee against arbitrary suspension or deprivation of political rights. This guarantee, established by the Convention, implies that the State may suspend or deprive someone of their political rights only after they have been sentenced as a result of a judicial process which meets the guarantees of due criminal process. As it will be noted hereinafter, in accordance with the ordinary meaning given to its terms and the preparatory works of the Convention, the “sentencing by a competent court in criminal proceedings” clause established in Article 23, section 2 constitutes a safeguard against the arbitrary deprivation or suspension of political rights.

The Venezuelan State suspended the political rights of Leopoldo López Mendoza, former mayor of the Chacao Municipality, State of Miranda, Venezuela, through administrative resolutions No. 01-00-000206 of August 24, 2005 and No. 01-00-235 of September 26, 2005, issued by the Office of the Comptroller General of the Republic and upheld in Article 105 of the Organic Law of the Comptroller General of the Republic and the National Fiscal Control System (LOCGRSNCF in Spanish). This article grants the Office of the Comptroller General of the Republic the power to declare a public servant, who committed an “offense,” administratively responsible and, “without any additional proceeding,” to impose the ancillary penalty of “disqualification” from the exercise of political rights.

However, Articles 42 and 65 of the Constitution of Venezuela establish that political rights can only be deprived or suspended as a consequence of a final judgment in criminal proceedings for crimes committed during their time in public office. Based on these constitutional provisions, López Mendoza filed a motion of unconstitutionality challenging Article 105 of the LOCGRSNCF before the Supreme Court of Venezuela. Nevertheless, the Supreme Court determined that the challenged Article “is constitutional and it is also compatible with the current inter-American system of protection of human rights.”

The Human Rights Foundation (HRF), acting as *amicus curiae*, respectfully considers, first of all, that the Court should make clear that, according to the ordinary meaning of Article 23, section 2 and the preliminary works of the Convention, no one can be deprived of their political rights (active and passive rights to vote) or have them suspended unless this is the result of a final judgment, which in turn is the result of a judicial process that meets the guarantees of due process. Based on this standard, the Court must analyze the case in question and determine if the Venezuelan State is internationally responsible for violating Article 23, section 2 of the Convention.

In spite of it not being a controversial matter in the current dispute, HRF considers that the case in point provides an excellent opportunity for the Court to determine, in accordance to jurisprudence at European and universal levels, that in cases where the suspension or deprivation of political rights constitutes an ancillary penalty to a criminal sentence, the person who has been deprived of liberty cannot be, as a general rule, deprived of the active right to vote. Likewise, the Court must make it clear that, in these cases, the suspension or deprivation of the opportunity to be elected or the passive right to vote can be legitimate, as long as it is an ancillary penalty to a criminal sentence, and it does not exceed the duration of the main penalty.

Likewise, in spite of it not being a controversial matter in the current dispute, HRF considers that the case in point provides an excellent opportunity for the Court to determine, in accordance to jurisprudence at European and universal levels, that those who has been deprived of liberty, but have not yet received a sentence, may never be deprived of their political rights.

Finally, and in spite of it not being a controversial matter in the current dispute, HRF considers that the case in point provides an excellent opportunity for the Court to determine, in accordance to jurisprudence at European and universal levels, that the period of suspension or deprivation of political rights, whether as a result of a main or ancillary penalty, must always be proportionate to the offense and the sentence.

## II. International Law: Inter-American standard on the protection of political rights

### i. Political rights or passive and active rights to vote

Article 23 of the American Convention on Human Rights (the Convention hereinafter) establishes:

Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:

a. to *take part in the conduct of public affairs, directly* or through freely chosen representatives;

b. to vote and to *be elected in genuine periodic elections*, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c. to *have access*, under general conditions of equality, *to the public service of his country*.

2. *The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.*

(Emphasis added)

The political rights recognized in the American Convention on Human Rights include, on the one hand, the right to vote or elect authorities and, on the other hand, the right to run for or be elected into public office. Regarding the content of these political rights, in the *Case of Yatama*, the Court established:<sup>1</sup>

Article 23 of the Convention establishes the rights to take part in the conduct of public affairs, to vote and to be elected, and to have access to public service, which must be guaranteed by the State under conditions of equality.

The exercise of the rights to be elected and to vote, which are closely related to each other, is the expression of the individual and social dimension of political participation.

Citizens have the right to take part in the management of public affairs through freely elected representatives. The right to vote is an essential element for the existence of democracy and one of the ways in which citizens exercise the right to political participation. This right implies that the citizens may freely elect those who will represent them, in conditions of equality.

Participation through the exercise of the right to be elected assumes that citizens can stand as candidates in conditions of equality and can occupy elected public office, if they obtain the necessary number of votes.

The right to have access to public office, under general conditions of equality, protects access to a direct form of participation in the design, implementation, development and execution of the

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<sup>1</sup> IACtHR, *Case of Yatama vs. Nicaragua*. Judgment of June 23 2005. Series C No. 127, par. 194, 197, 198, 199 and 200.

State's political policies through public office. It is understood that these general conditions of equality refer to access to public office by popular election and by appointment or designation.

Furthermore, in the same decision, the Court used the terms "active and passive right to vote". Therefore, in general terms, by recognizing political rights, the Convention is protecting the rights of the citizens to exercise both active and passive rights to vote.<sup>2</sup> These political rights, the active and passive right to vote, are also protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, "the Convention"), at the European level<sup>3</sup> and the Covenant on Civil and Political Rights (hereinafter "the Covenant"), at the universal level.<sup>4</sup>

The European Court of Human Rights (hereinafter, "ECtHR"), has held in *jurisprudence constante* since the *Case of Mathieu-Mohin and Clerfayit*, that the political rights protected under Article 3 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms include both the right to vote and the right to stand for election, in spite of these rights not being mentioned specifically in said Article.<sup>5</sup> In addition, the United Nations Human Rights Committee (hereinafter, "the Committee"), in its General Observations on Article 25 of the Covenant on Civil and Political Rights, established that the Covenant "recognizes and protects" all citizens' "rights to vote and to be elected," and "requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects."<sup>6</sup>

## ii. "Enabling Conditions" and other "conditions and formalities" for the exercise of political rights

According to the Court's jurisprudence, State regulations with the purpose of fulfilling the State's "positive obligation" of designing a "system that allows the election of representatives to conduct public affairs" may be regulated by the "enabling conditions" established by Article 23, section 2, or by other "conditions and formalities," as long as this regulation follows "the principles of legality, necessity and proportionality in a democratic society."

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<sup>2</sup> IACtHR, Case of Yatama, par. 32.

<sup>3</sup> Cf. Art. 3, Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Article 3. Right to free elections The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.")

<sup>4</sup> Cf. Art. 25, International Covenant on Civil and Political Rights ("Article 25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.")

<sup>5</sup> European Court of Human Rights, *Case of Mathieu-Mohin and Clerfayit v. Belgium*. Judgment of March 2, 1987, A 113. Par. 52.

<sup>6</sup> U.N. Human Rights Committee. General Comments Adopted by the Human Rights Committee. General Comment No. 25, 57<sup>th</sup> Session, 1996, par. 1.

**a. “Age, nationality, residence, language, education, civil and mental capacity” as “enabling conditions” for the exercise of political rights**

In the *Case of Castañeda Gutman*, the IACtHR clarified that “age, nationality, residence, language, education, civil and mental capacity”, constitute “enabling conditions” that can “legitimately” be established by the States.<sup>7</sup>

The provision that limits the reasons for which it is possible to restrict the use of the rights of paragraph 1 has only one purpose – in light of the Convention as a whole and of its essential principles – which is to avoid the possibility of discrimination against individuals in the exercise of their political rights. It is evident that the inclusion of these reasons refers to *the enabling conditions that the law can impose to exercise political rights*. Restrictions based on these criteria are common in national electoral laws, which provide for the establishment of the minimum age to vote and to be elected, and some connection to the electoral district where the right is exercised, among other regulations. Provided that they are not disproportionate or unreasonable, these are limits that *the States may legitimately establish to regulate the exercise and enjoyment of political rights* and that, it should be repeated, they refer to certain requirements that the titleholders of political rights must comply with so as to be able to exercise them.

(Emphasis added)

**b. Other “conditions and formalities” for the exercise of political rights**

According to the IACtHR, in the *Case of Castañeda Gutman*, State regulations with the purpose of fulfilling the State’s “positive obligation” of designing a “system that allows representatives to be elected to conduct public affairs” may also be determined by other “conditions and formalities,” besides those specifically set forth in Article 23, section 2:<sup>8</sup>

In addition to the above, Article 23 of the Convention imposes certain specific obligations on the State. From the moment that Article 23(1) establishes that the right to participate in the conduct of public affairs may be exercised directly or through freely chosen representatives, *the State has a positive obligation that is manifested with the obligation to carry out certain actions or conducts, and to adopt measures* that arise from the obligation to ensure the free and full exercise of human rights to all the persons subject to their jurisdiction (Article 1(1) of the Convention) and of the general obligation to adopt measures in their domestic law (Article 2 of the Convention).

This positive obligation consists in *designing a system that allows representatives to be elected to conduct public affairs*. Indeed, for political rights to be exercised, the law must establish regulations that go beyond those related to certain State limitations to restrict those rights, established in Article 23(2). The States *must organize their electoral systems and establish a complex number of conditions and formalities to make it possible to exercise the right to vote and to be elected*. (Emphasis added).

In the same case, the Court made it clear that Article 23 “merely establishes certain aspects or reasons (such as, civil or mental capacity and age) on the basis of which political rights may be

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<sup>7</sup> IACtHR, *Case of Castañeda Gutman v. México*. Preliminary objections, merits, reparations and costs. Judgment of August 6, 2008. C Series No. 184, par. 155.

<sup>8</sup> IACtHR, *Case of Castañeda Gutman*, paragraphs 156 and 157.

regulated in relation to their titleholders”<sup>9</sup>. In fact, without this being considered a violation of the exhaustive list in Article 23, section 2 of the Convention, the States have the obligation of establishing and regulating other enabling “conditions and formalities” (apart from age, nationality, residence, language, instruction or civil or mental capacity) to make the exercise of political rights effective.

For example, in the cases of *Yatama* and *Castañeda Gutman*, the IACtHR examined the international legality of enabling conditions such as “membership” of a political party or certain formalities relating to the “registration” for the participation in an electoral process.<sup>10</sup>

**c. International Legality test applicable to the “enabling conditions” and other “conditions and formalities” which regulate the exercise of political rights**

In the *Yatama* case, the IACtHR established that regulation of the “enabling conditions” and other “conditions and formalities” permitted by Article 23, section 2 of the Convention should “respect the principles of legality, necessity and proportionality in a democratic society.” In other words, this restriction “should be established by law, non-discriminatory, based on reasonable criteria, respond to a useful and opportune purpose that makes it necessary to satisfy an urgent public interest, and be proportionate to this purpose.”<sup>11</sup>

Instituting and applying requirements for exercising political rights is not, per se, an undue restriction of political rights. These rights are not absolute and may be subject to limitations<sup>12</sup> [13]. Their regulation should respect the principles of legality, necessity and proportionality in a democratic society. Observance of the principle of legality requires the State to define precisely, by law, the requirements for voters to be able to take part in the elections, and to stipulate clearly the electoral procedures prior to the elections. According to Article 23(2) of the Convention, the law may regulate the exercise of the rights and opportunities referred to in the first paragraph of this Article, only for the reasons established in this second paragraph. The restriction should be established by law, non-discriminatory, based on reasonable criteria, respond to a useful and opportune purpose that makes it necessary to satisfy an urgent public interest, and be proportionate to this purpose. When there are several options to achieve this end, the one that is less restrictive of the protected right and more proportionate to the purpose sought should be chosen.<sup>14</sup>

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<sup>9</sup> Ibid., par. 181 (“Contrary to other rights that, in the Article embodying them, specifically establish the legitimate purposes that could justify restrictions to a right, Article 23 of the Convention does not explicitly establish the legitimate causes or permitted purposes by which the law may regulate political rights. Indeed, this Article merely establishes certain aspects or reasons (such as, civil or mental capacity and age) on the basis of which political rights may be regulated in relation to their titleholders, but does not determine explicitly either the purposes or the specific restrictions that will necessarily have to be imposed when designing an electoral system, such as electoral districts and others. However, the legitimate goals that the restrictions should pursue arise from the obligations that can be inferred from Article 23(1) of the Convention, which the Court referred to above.”)

<sup>10</sup> IACtHR, Case of *Yatama*, pars. 210 and 217, and Case of *Castañeda Gutman*, pars. 170-173.

<sup>11</sup> IACtHR, Case of *Yatama*, par. 206.

<sup>12</sup> Cfr. *Case of Hirst v. the United Kingdom* (no. 2), no. 74025/01, § 36, ECHR-2004.

<sup>13</sup> Footnotes on indented paragraphs are the original notes from the quoted documents.

<sup>14</sup> Cfr. Case of *Ricardo Canese*, [...], pars. 96 and 133; Case of *Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, pars. 121 y 123; y *Compulsory membership in an association prescribed by law for the practice of journalism* (arts. 13 y 29 American Convention on Human Rights) Advisory Opinion AO-5/85 of November 13, 1985. Series A No. 5, par. 46. Likewise cfr. Eur. Court H.R., Case of *Barthold v. Germany*, Judgment of 25 March

In *Castañeda Gutman*, based on Article 29.a of the Convention, the IACtHR established that any restrictive measure, as a part of the “complex number of conditions and formalities” that the State must establish with the purpose of designing a “system that allows the election of representatives to conduct public affairs,” must fulfill the principles of legality, purpose, necessity in a democratic society and proportionality.<sup>15</sup>

With the exception of some rights that cannot be restricted in any circumstance, such as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, human rights are not absolute. As the Court has established previously, the establishment and application of requirements to exercise political rights is not, per se, an undue restriction of political rights<sup>16</sup>. However, the power of the States to regulate or restrict rights is not discretionary, but is limited by international law, which requires compliance with certain obligations that, if they are not respected, make the restriction unlawful and contrary to the American Convention. As established in Article 29(a) in fine of this instrument, no provision of the Convention shall be interpreted as restricting them to a greater extent than is provided for therein.

The Court has defined the conditions and requirements that must be fulfilled when regulating or restricting the rights and freedoms embodied in the Convention<sup>17</sup>, and will proceed to analyze the legal requirement being examined in this case in light of them.

In this case, just as in *Yatama* and *Castañeda Gutman*,<sup>18</sup> the IACtHR must analyze the requirement of legality of the enabling condition,<sup>19</sup> the requirement of purpose,<sup>20</sup> and, finally, the requirement of necessity in a democratic society and the proportionality of the condition.<sup>21</sup> With the purpose of analyzing the fulfillment of the last condition, the Court must assess if the enabling condition: “(a) fulfills an urgent social need; in other words, that it is designed to fulfill an essential public interest; (b) is the measure that least restricts the protected rights, and (c) is closely adapted to achieving the legitimate purpose.”<sup>22</sup>

#### **d. Similarities between the legality test at European and universal levels**

The test that the Court has applied to determine the international legality of the “enabling conditions” and other “conditions and formalities” established by the States to regulate the exercising of political rights, is similar to the test that has been being applied at European and universal levels.

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1985, Series A no. 90, par. 58; Eur. Court H.R., Case of Sunday Times v. United Kingdom, Judgment of 26 April 1979, Series A no. 30, par. 59; U.N., Human Rights Committee, General Comment N° 27, Freedom of Movement (art. 12) of November 2, 1999, pars. 14 y 15; y U.N., Human Rights Committee, General Comment N° 25, The right to participate in public affairs, voting rights and the right of equal access to public service (art. 25) of July 12, 1996, pars. 11, 14, 15 y 16.

<sup>15</sup> IACtHR, Case of *Castañeda Gutman* pars. 174 and 175.

<sup>16</sup> Cfr. Case of *Yatama*, [...] par. 206.

<sup>17</sup> Cfr. COMPULSORY MEMBERSHIP IN AN ASSOCIATION PRESCRIBED BY LAW FOR THE PRACTICE OF JOURNALISM (ARTS. 13 AND 29 AMERICAN CONVENTION ON HUMAN RIGHTS). Advisory Opinion AO-5/85 of November 13, 1985. Serie A No. 5, par. 39; and Case of *Kimel*, supra note 4, par. 52

<sup>18</sup> See supra note 10.

<sup>19</sup> IACtHR, Case of *Castañeda Gutman*, pars. 176ff.

<sup>20</sup> Ibid, pars. 180ff.

<sup>21</sup> Ibid, par. 185.

<sup>22</sup> Ibid., pars. 186ff.

According to the ECtHR in *jurisprudence constante* since *Mathieu-Mohin and Clerfayt*, the ECtHR has determined that the “conditions [established by the States] should not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.” Likewise, the ECtHR established that these conditions should be “imposed in pursuit of a legitimate aim” and that “the means employed should not be disproportionate.” In particular, according to the ECtHR, “such conditions must not thwart ‘the free expression of the opinion of the people in the choice of the legislature’.”<sup>23</sup>

Likewise, in its general observations on Article 25 of the Covenant, the UN Human Rights Committee (hereinafter “UNHRC” or “the Committee”) has stated:<sup>24</sup>

Any conditions which apply to the exercise of the rights protected by Article 25 should be based on *objective and reasonable criteria*. [...] The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.

The inter-American test’s similarities with those at the European and universal levels stem from the common understanding that a “specific electoral system or a specific method for the exercise of the right to vote and be elected” has not been established neither at the Inter-American nor at the European and universal levels. According to the IACtHR itself, in *Castañeda Gutman*:<sup>25</sup>

The European Court of Human Rights, as of the very first case in which it was asked to rule on the right to vote and to be elected that can be inferred from Article 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms indicated that this provision does not create any obligation to introduce a specific system. It has also indicated that, “there are numerous ways of organizing and running electoral systems and a wealth of differences, inter alia, historical development, cultural diversity and political thought within [the States].” The European Court has emphasized the need to assess any electoral system “in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another.

The inter-American system also *does not impose a specific electoral system or a specific means of exercising the rights to vote and to be elected*. The American Convention establishes general guidelines that determine a minimum content of political rights and allows the States to regulate those

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<sup>23</sup> European Court of Human Rights, Case of *Mathieu-Mohin and Clerfayt*, pars. 46 and 52. (“46. Since the Court is being asked to determine complaints under Article 3 of Protocol No. 1 (P1-3) for the first time, it deems it necessary to indicate the meaning it ascribes to that Article (P1-3) in the context of the instant case. [...] 52. The rights in question are not absolute. Since Article 3 (P1-3) recognizes them without setting them forth in express terms, let alone defining them, there is room for implied limitations (see, mutatis mutandis, the Golder judgment of 21 February 1975, Series A no. 18, pp. 18-19, § 38). In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 (P1-3) (Collected Edition of the “Travaux Préparatoires”, vol. III, p. 264, and vol. IV, p. 24). They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 (P1) have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see, amongst other authorities and mutatis mutandis, the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 71, § 194). In particular, such conditions must not thwart ‘the free expression of the opinion of the people in the choice of the legislature’.”)

<sup>24</sup> UN Human Rights Committee, *supra* note 6, par 4.

<sup>25</sup> IACtHR *Caso de Castañeda Gutman*, pars. 165 y 166.

rights, within the parameters established in the Convention, according to their historical, political, social and cultural needs, which may vary from one country to another and even within one country, at different historical moments.

Finally, according to the UNHRC:<sup>26</sup>

Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by Article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.

### **iii. "Sentencing by a competent court in criminal proceedings," as a guarantee against the deprivation of political rights**

According to the IACtHR in *Castañeda Gutman*, Article 23 of the Convention not only establishes "enabling conditions" and other "conditions and formalities," which the State can use to legitimately regulate the exercise of political rights, but Article 23, section 2 also imposes "certain State limitations to restrict those rights." According to these guidelines, the regulation of "enabling conditions" and other "conditions and formalities" – that the State must carry out to fulfill its "positive obligation" of designing a "system that allows the election of representatives to conduct public affairs" – cannot exceed the "limitations to restrict those rights" established in Article 23, section 2.<sup>27</sup>

The highest restrictive measure for the exercise of a right is its deprivation or, the temporal equivalent, its suspension;<sup>28</sup> both are measures that prevent the exercise of the right. For example, the right to freedom of movement is restricted whenever the State takes the restrictive measure of depriving or suspending a person's right to freedom of movement by forcefully incarcerating him for a period of time (imprisonment). To guarantee that the restrictive measure or penalty that results in the deprivation of freedom has been carried out legitimately, the Convention establishes conditions that the States must meet (art. 8). These conditions work as a safeguard against the arbitrary deprivation or suspension of this right, and therefore are known as "judicial guarantees."

Likewise, the highest restriction for the exercise of political rights takes place whenever the State deprives or suspends the active or passive rights of a person to vote, who otherwise complies with the enabling conditions related to age, nationality, residence, language, education and civil or mental capacity, or others. As a safeguard against the arbitrary deprivation or suspension of political rights, Article 23, section 2 of the Convention established that, in order for any person

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<sup>26</sup> U.N. Human Rights Committee, *supra* note 6, par. 21.

<sup>27</sup> IACtHR, *Case of Castañeda Gutman*, par. 157 ("This positive obligation consists in *designing a system that allows representatives to be elected to conduct public affairs*. Indeed, for political rights to be exercised, the law must establish regulations that go beyond those related to *certain State limitations to restrict those rights, established in Article 23(2)*. The States must organize their electoral systems and establish a complex number of conditions and formalities to make it possible to exercise the right to vote and to be elected".)

<sup>28</sup> See Merriam-Webster Dictionary (2011) (Deprive: 4 to withhold something from, Suspend: 1 to debar temporarily especially from a privilege, office, or function)

to be legitimately deprived of their political rights, the State must first determine that the person committed a crime, which must be determined after meeting all the conditions typical of a judicial process.

This safeguard against the arbitrary deprivation or suspension of political rights is consistent with the provisions of Article 27 of the Convention, which assigns a special hierarchical rank to political rights (art. 23), along with the right to juridical personality (art. 3), life (art. 4), personal integrity (art. 5), freedom from slavery (art. 6), freedom from arbitrary or retroactive dispositions (ex post facto laws) (art. 9), freedom of conscience and religion (art. 12), the protection of the family (art. 17) and children (art. 19), a name (art. 18), and a nationality (art. 20). Article 27 of the Convention specifically prohibits the suspension of political rights, as well as the fundamental rights stated above, even in the extraordinary cases of “war, public danger, or any other emergency that threatens the independence or security of a State Party.”

**a. “Sentencing by a competent court in criminal proceedings,” in accordance with the ordinary meaning to be given to those terms**

Interpreting Article 23, section 2 in accordance with the “ordinary meaning” of its terms,<sup>29</sup> the term “sentencing by a competent court in criminal proceedings” is not comparable with the terms “age, nationality, residence, language, education and civil or mental capacity.” While the latter terms are open and undefined and, therefore, must be developed and defined by the States’ own laws to be effective; the term “sentencing by a competent court in criminal proceedings” is closed and defined, and, hence, must simply be adopted through domestic legislation to come into effect.

**i. The State must develop and define rules regarding the “age, nationality, residence, language, education and civil or mental capacity” for the exercise of political rights**

For instance, regarding the term “age,” the State must define if the active right to vote can be exercised at the age of 16, 18 or 21, and if the minimum age to exercise the right to be elected or passive right to vote is the same in the case of a candidate to a local legislature, as it is for a regional or national candidate, if the responsibilities of a legislative chamber require a higher age than another one in a bicameral system, or if the age required to run for the presidency of a nation is the same as the one required to run for city mayor. Also, in regards to the terms “nationality” and “residence,” the State must necessarily define if it will allow foreign nationals

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<sup>29</sup> Vienna Convention on the Law of Treaties, art. 31 (which codifies the general rules of interpretation of treaties: “Article 31. General rule of interpretation. 1. A treaty shall be interpreted in good faith *in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”)

to exercise the right to vote within its territory after having resided there for at least 2, 3 or 5 years, if they can be candidates for local legislatures, but not the national government, or if the people holding dual nationality should be mandated to choose only one place to exercise their political rights.

The same rationale applies to the terms “language, education and civil or mental capacity.” To make the political rights of the people within its territory effective, the State may have to determine that the information and materials provided by the electoral body and destined to areas mostly populated by indigenous peoples must be in their native language, as opposed to the language spoken by the majority of the population on a national level, or that the ballots should be in both languages. The State may likewise have to determine whether the same level of education is required to enter the judiciary as to run for governor; and whether the “age of majority” or “civil capacity” marks the minimum age required to exercise the active right to vote, or whether the technology available in certain States allows it to identify different levels of “mental capacity,” by which, above certain level, voting may be deemed to reflect the informed will of the person, although not yet his ability to hold public office.

This is the “margin of appreciation” the States are entitled to according to the ECtHR,<sup>30</sup> which they may exert “according to their historical, political, social and cultural needs, which may vary from one country to another and even within one country, at different historical moments,” as stated by the IACtHR.<sup>31</sup> Hence, the “enabling conditions” for a person to run for the legislature of a county in the Northeastern United States in the sixties may not be reasonable and proportional today in that same part of the country, and they may never have been or may never be reasonable for a county in the Northwest, or for a rural municipal council in Nicaragua. To make effective the exercise of political rights of the people in their territories, States must necessarily develop and define the terms “age, nationality, residence, language, education and civil or mental capacity” through their domestic legislation.

**ii. The State must adopt the “sentencing by a competent court in criminal proceedings,” as a safeguard for the exercise of political rights**

Unlike the open and undefined terms “age, nationality, residence, language, education and civil or mental capacity” which must be defined and developed by the States, the term “sentencing by a competent court in criminal proceedings” is closed and defined and, therefore, must be adopted by the State’s domestic legal system to come into effect. In this case, the Convention does not refer to an enabling condition that must be defined by the States to enable the exercise of political rights; instead, it establishes a mandatory safeguard against the arbitrary suspension or deprivation of political rights.

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<sup>30</sup> European Court of Human Rights, Case of Mathieu Mohin and Clerfayt, par. 52 (“In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 (P1-3) (Collected Edition of the “Travaux Préparatoires,” vol. III, p. 264, and vol. IV, p. 24). They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 (P1) have been complied with.”).

<sup>31</sup> IACtHR, Case of Castañeda, par. 166.

As it was previously described, the highest possible restriction to the exercise of political rights is a State depriving or suspending the active and passive rights to vote of its citizens, who otherwise meet all the enabling conditions related to age, nationality, residence, language, education, civil or mental capacity, or others. As a safeguard against the arbitrary suspension or deprivation of political rights, Article 23, section 2 of the Convention established that in order for any person to be legitimately deprived of their political rights, the State must first determine that the person committed a crime, after meeting all the conditions required of a just criminal proceeding.

To better understand the context and purpose of the term “sentencing by a competent court in criminal proceedings,” let us take a look at the “travaux préparatoires” of the Convention.

**b. “Sentencing by a competent court in criminal proceedings,” in the travaux préparatoires of the Convention**

According to the travaux préparatoires<sup>32</sup> of the American Convention on Human Rights, the article regarding political rights in the Draft of the American Convention on the Protection of Human Rights<sup>33</sup> broadly stated that the States could establish “exceptions” to the fulfillment of political rights, as long as these are determined by law and are non-discriminatory. After expressing concerns that the States may use this clause as a justification for the arbitrary deprivation or suspension of the political rights of their citizens, the participating delegates first proposed an “exhaustive list” of matters upon which the States could legislate “reasonable requirements” for the fulfillment of these rights. Subsequently, with the purpose of providing the strongest safeguard possible against the arbitrary deprivation or suspension of political rights, the signatory States of the Convention approved the incorporation of the term “sentencing by a competent court in criminal proceedings” as a guarantee against the arbitrary deprivation or suspension of these rights.

**i. The signatory States of the Convention expressed their concern in order to prevent the arbitrary deprivation or suspension of political rights, and, initially proposed an exhaustive list of “reasonable requirements”**

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<sup>32</sup> Vienna Convention on the Law of Treaties, art. 32 (which establishes that preparatory works are the main means of interpretation of treaties: “Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable).

<sup>33</sup> OAS, Minutes and Documents, November 7-22, 1969, page 13ff. (“Anteproyecto de Convención Interamericana sobre Protección de Derechos Humanos preparado por la Comisión Interamericana de Derechos Humanos, a fin de que la Conferencia Especializada decida acerca de la aprobación y firma de una Convención sobre Derechos Humanos. Adoptado por el Consejo de la Organización de los Estados Americanos, ‘con el carácter de documento de trabajo para la Conferencia Especializada Interamericana contemplada por la Resolución XXIV de la Segunda Conferencia Interamericana Extraordinaria.’”) Available at (Spanish only): <http://www.corteidh.or.cr/tablas/15388.pdf>

Article 21 (later to be approved as Article 23) of the Draft Convention of October 1968, prepared by the Inter-American Commission on Human Rights, established:<sup>34</sup>

#### Article 21

1. All citizens shall enjoy, with the exceptions established by their national laws, which cannot include any of the distinctions mentioned in Article 22 of the present Convention [<sup>35</sup>], the following rights and opportunities,

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- c) to have access, under general conditions of equality, to the public service of his country.

After formal observations were made by Uruguay, Chile, Argentina and the Dominican Republic, who did not fully agree with the text of Article 21, the United States proposed that the article be modified as follows:<sup>36</sup>

1. All citizens of a State shall enjoy the following rights and opportunities

a) – c) (unchanged)

2. (new) To promote the informed and effective exercise of these rights, *the State Parties may establish reasonable conditions by law*, such as those concerning age, residence, language, education and civil and mental capacity.

3. (new) By complying with the provisions of this article, each State Party shall strive to make it possible for all citizens to participate at all levels of government, even local. (Emphasis added)

The United States explained that its amendment sought to avoid States from using the term “exceptions” to “claim unlimited power to restrict the participation in government,” and proposed that any future exceptions be more limited and specific. The United States justified its proposal, stating:<sup>37</sup>

*The language “exceptions established by their national laws” is too broad; this would allow States to claim unlimited power to restrict the participation in government with the only condition that they do not breach the principle of non-discrimination. Also, this exception clause does not recognize the normal requirements for suffrage, such as age, residence, language, education and civil and mental capacity. Hence, we propose that the exceptions be more limited and specific. At the same time, the principle of non-discrimination should not be mentioned, since repeating it in specific articles tends to weaken the application of the principle in those where it is not mentioned. Paragraph 3 (new): We propose a new paragraph 3 in an effort to recognize that the right to participate in government should not only include the freedom to participate in national elections, but also the freedom to participate in*

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<sup>34</sup> Ibid. art. 21.

<sup>35</sup> Ibid. art. 22 (“All persons are equal before the law. The law shall prohibit all forms of discrimination and guarantee all persons equal and effective protection from any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”)

<sup>36</sup> OEA, supra note 33, p. 66

<sup>37</sup> Ibid., p. 65 (Original in Spanish).

local governments which carry most of the everyday responsibility in the practice of human rights. (Emphasis added)

During the twelfth session, which took place on November 15, 1969, the United States' delegate ratified its critique of the article proposed in the first draft, stressing that the "exception was extremely broad and the clause did not provide enough safeguards against its bad implementation."<sup>38</sup> According to the minutes of the session, in the condensed version, Colombia, Uruguay and Chile openly supported the motion of the American delegation. Following this, the United States successfully suggested the creation of a working group to discuss and redraft Articles 21 and 22.<sup>39</sup>

On Monday, November 17, 1969, during the thirteenth session, a working group composed of the delegates of the United States, Colombia, El Salvador, and Uruguay proposed the inclusion of the term "exclusively," followed by an exhaustive list (*numerus clausus*) of enabling conditions subject to legitimate regulation:<sup>40</sup>

#### Article 21

1. All citizens of a State shall enjoy the following rights and opportunities

a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

d) to have access, under general conditions of equality, to the public service of his country; and,

e) to freely become members of a political party, whose functioning must be protected by law.

2. The law may regulate the exercise of the rights and opportunities referred to in sections a) and b) in the preceding paragraph *exclusively on the basis of age, nationality, residence, language, education, civil and mental capacity as appropriate.*" (Emphasis added)

#### **ii. The delegate from Brazil and member of the Inter-American Commission on Human Rights proposed that a "sentencing by a competent court in criminal proceedings" guarantee be included**

Subsequently, the delegate from Brazil who was at the time also a member of the Inter-American Commission on Human Rights, Dr. Carlos A. Dunshee de Abranches,<sup>41</sup> proposed that at the end of article 21, section 2 the line "as appropriate" be removed and "or sentencing by a competent court in criminal proceedings" be added. The amendment proposed by Dunshee de Abranches aimed at incorporating a safeguard against arbitrary deprivation or suspension of political rights as the one in force in Brazil under the Constitution of 1967, according to which "the loss or

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<sup>38</sup> Ibid., p. 250.

<sup>39</sup> Ibid., p. 250ff.

<sup>40</sup> Ibid., p. 253ff.

<sup>41</sup> Dr. Carlos A. Dunshee de Abranches was a member of the IACHR from 1964 to 1983. Available at: <http://www.cidh.oas.org/Previous%20members.htm>

suspension of political rights” could only be declared by “a judicial order” in the case of “total civil incapacity” or “criminal conviction, while its effects last.”<sup>42</sup>

The safeguard proposed by the Brazilian delegate was successfully incorporated, and Article 21 was unanimously approved with the text Article 23 of the Convention has today:<sup>43</sup>

Section 2 along with its previously approved amendments was put to vote immediately. In favor: El Salvador, Trinidad and Tobago, Ecuador, United States, Honduras, Paraguay, Panama, Argentina, Brazil, Chile, Guatemala, Nicaragua, Venezuela and Costa Rica. Against: None. Abstentions: Colombia, Uruguay and Peru. The paragraph was approved.

Article 21 was approved as follows:

1. Every citizen shall enjoy the following rights and opportunities:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, *or sentencing by a competent court in criminal proceedings.*

Today, the safeguard against the deprivation or suspension of political rights set forth in Article 23, section 2 of the Convention is incorporated, with minor variations, in the constitutions of Bolivia, Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, and Venezuela.<sup>44</sup>

### **c. Due process in criminal proceedings as the international legality test for a measure depriving political rights**

As stated above, the highest possible restriction to the exercise of political rights is a State depriving or suspending the active and passive rights to vote of its citizens, who otherwise meet

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<sup>42</sup> Brazilian Constitution of 1967, art. 149. Available at (Portuguese only): [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Emendas/Emc\\_anterior1988/emc01-69.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc_anterior1988/emc01-69.htm) Years later, the Brazilian Constitution of 1988 would eliminate the possibility of suspension or loss of political rights through a presidential decree. Article 149 of the Brazilian Constitution of 1967 established: “*Art. 149. Assegurada ao paciente ampla defesa, poderá ser declarada a perda ou a suspensão dos seus direitos políticos. § 1º O Presidente da República decretará a perda dos direitos políticos: a) nos casos dos itens I, II e parágrafo único do artigo 146[42]; b) pela recusa, baseada em convicção religiosa, filosófica ou política, à prestação de encargo ou serviço impostos aos brasileiros em geral; ou c) pela aceitação de condecoração ou título mobiliário estrangeiros que importem restrição de direito de cidadania ou dever para com o Estado brasileiro. § 2º A perda ou a suspensão dos direitos políticos dar-se-á por decisão judicial: a) no caso do item III do artigo 146; b) por incapacidade civil absoluta, ou c) por motivo de condenação criminal, enquanto durarem seus efeitos. § 3º Lei complementar disporá sobre a especificação dos direitos políticos, o gozo, o exercício a perda ou suspensão de todos ou de qualquer deles e os casos e as condições de sua re aquisição.*” (Emphasis added)

<sup>43</sup> OEA, supra note 33, p. 258.

<sup>44</sup> See attached documents, infra p. 39, charts 1 and 2.

all the enabling conditions related to age, nationality, residence, language, education, civil or mental capacity, or others. As a safeguard against the arbitrary deprivation or suspension of political rights, Article 23, section 2 of the Convention established that, in order for a person to be legitimately deprived of his or her political rights, the State must first determine that the person committed a crime, after meeting all the conditions of a just judicial process.<sup>45</sup>

In *jurisprudence constante*, the Court has established that to determine whether a measure which restricts fundamental rights as a result of a criminal process is subject to international law, it must first be analyzed if the process which led to the measure met all due process guarantees.<sup>46</sup> Likewise, according to the safeguard against the arbitrary suspension of political rights, provisioned in Article 23, section 2 of the Convention, in order to determine the international legality of a measure restrictive of political rights, the Court must apply Article 8 of the Convention<sup>47</sup> “and also [...] the rules of the ‘right to judicial protection’ outlined in Article 25.”<sup>48</sup>

Sergio Garcia Ramirez, a former judge of the IACtHR, in a collection of that Court’s jurisprudence in matters of due criminal process, indicated that a criminal process must meet, among others,<sup>49</sup> the following conditions so that its results comply with international law:

- a) An independent, impartial and competent court.<sup>50</sup>

The rulings of the Court have stressed that the existence of due process “entails the intervention of an independent and impartial judicial organ, having the power to determine the lawfulness of measures adopted [...]”<sup>51</sup> In other words, “the right to be judged by civil courts under legally established procedures constitutes a basic principle of due process of law.”<sup>52</sup>

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<sup>45</sup> It is important to point out that this test is not the same test the Court must apply to verify the legality of a certain regulation related to the enabling conditions of “age, nationality, residence, language, education and civil or mental capacity, or others.” The Court correctly applied this test in the cases of Yatama and Castañeda Gutman, in both cases to determine the legality of the requirement of membership of a political party in order to exercise the right to passive vote. See *supra* note 10.

<sup>46</sup> GARCIA RAMIREZ, Sergio, Sergio, *Panorama del debido proceso (adjetivo) penal en la jurisprudencia de la Corte Interamericana*, en ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 2006, p. 1115 (“esta materia se halla presente en la mayoría de las sentencias sobre asuntos contenciosos y en un buen número de opiniones consultivas del tribunal interamericano”)

<sup>47</sup> *Ibid.*, p. 1119. See Also HUERTA GUERRERO, Luis Alberto, *El debido proceso en las decisiones de la Corte Interamericana de Derechos Humanos (analysis of Article 8 of the American Convention on Human Rights)*. Available at (Spanish Only):

<http://190.41.250.173/RIJ/bases/nuevdh/dh2/lh-deb2.HTM>

<sup>48</sup> GARCÍA RAMÍREZ, Sergio, *supra* note 47, p. 1126.

<sup>49</sup> *Id.* Other due process guarantees not explained in this document are the ones regarding the compliance with reasonable deadlines, the publishing of the proceedings and the minimum rules on the validity of the investigation and the evidence.

<sup>50</sup> *Ibid.*, p. 1134ff

<sup>51</sup> Case of Lori Berenson Mejia, par. 144; Case of Castillo Petruzzi et al, par. 131; Judicial Guarantees during states of emergency (arts. 27.2, 25 y 8 of the American Convention on Human Rights), par. 20, y Habeas corpus under the suspension of guarantees (arts. 27.2, 25.1 y 7.6 of the American Convention on Human Rights), par.

30. Likewise, case of Las Palmeras, par. 53, y case of the Constitutional Court, par. 77.

<sup>52</sup> Case of Lori Berenson Mejia, par. 143 and Case of Castillo Petruzzi et al par. 129. Likewise, case of 19 merchants, par. 165; case of Las Palmeras, par. 51-53; case of Carpio Nicolle et al, par. 131-133, and *Basic Principles of an independent judiciary*, adopted by Seventh United Nations Congress on the Prevention of Crime

b) Presumption of innocence:<sup>53</sup>

The Court has stated that the principle of presumption of innocence is founded upon the existence of judicial guarantees, by affirming the notion that a person is innocent until proven guilty.<sup>54</sup> Article 8.2 of the ACHR regarding this issue states that a person should not be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted.<sup>55</sup> An important element of this principle is the one regarding the burden of proof for the alleged offenses which may result in adverse legal consequences. The burden of proof lies in the prosecution: the right of the presumption of innocence “implies that the defendant does not have to prove that he has not committed the offense of which he is accused, because the onus probandi is on those who have made the accusation.”<sup>56</sup>

c) Adversarial principle:<sup>57</sup>

The Court has stated that in any process all necessary elements must be present “for the greatest possible balance to exist among the parties to duly defend their interests and rights. This involves, among other things, application of the principle of participation of both parties in the proceedings.”<sup>58</sup>

As for its own rulings, the court has repeatedly established that “The adversarial principle applies to evidentiary matters, and it involves respecting the parties’ right to defense. This principle is contained in Article 44 of the Court’s Rules of Procedure, regarding the time frame in which evidence must be produced, in order to secure equal rights for both the parties.”<sup>59</sup>

d) Right to appeal a judgment:<sup>60</sup>

So, “the right to appeal a judgment is an essential guarantee that must be respected as part of due process of law, so that a party may turn to a higher court for revision of a judgment that was unfavorable to that party’s interests.”<sup>61</sup>

[...]

The appeal referred to in Article 8 is brought before a specific court level: a judge or a higher court sitting on the appeal must also meet the conditions of independence and impartiality required by any court. Therefore, “the concept of a tribunal previously established by law and the principle of due process [...] must be observed in all the various procedural instances. If the court

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and the Treatment of Offenders, which took place in Milan, from August 26 to September 6, 1985, and ratified by the U.N. General Assembly in resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985.

<sup>53</sup> GARCÍA RAMÍREZ, Sergio, supra note 47, p. 1137ff.

<sup>54</sup> Cf. Case of Ricardo Canese, par. 153, and case of Suárez Rosero, par. 77.

<sup>55</sup> Case of Ricardo Canese, par. 153, and case of Cantoral Benavides, par. 120.

<sup>56</sup> Caso of Ricardo Canese, par. 154.

<sup>57</sup> GARCÍA RAMÍREZ, Sergio, supra note 47, p. 1137ff.

<sup>58</sup> Juridical Condition and Human Rights of the Child, par. 132. Likewise, Meftah et al v. France, n.º32911/96, 35237/97, ¶ 51, ECHR 2002-VII

<sup>59</sup> Cf. *inter alia*, caso Acosta Calderón, párr. 40; case of Yatama, par. 106; case of Fermín Ramírez, par. 43; case of the Yakye Axa indigenous community, par. 29, y and the case the Moiwana Community, par. 76.

<sup>60</sup> GARCIA RAMIREZ, Sergio, supra note 47, p. 1140ff.

<sup>61</sup> Case of Herrera Ulloa, par. 158.

of appeals fails to satisfy the requirements of a competent, independent and impartial tribunal, previously established by law, then the proceedings conducted before it cannot be deemed either lawful or valid.”<sup>62</sup>

[...]

The Court has considered that “regardless of the label given to the existing remedy to appeal a judgment, what matters is that the remedy guarantees a full review of the decision being challenged.”<sup>63</sup>

e) Right to effective remedies:<sup>64</sup>

According to the Court, when considering “the right to effective remedies, in the terms of Article 25 of the Convention, it is indispensable that such remedies be processed in accordance with the rules of due process, enshrined in Article 8 of the Convention...”

[...]

Undoubtedly, it is important that the remedies planned and provided by the domestic order satisfy the condition of effectiveness which is required for all state measures and instruments linked with the protection of human rights. [...] This applies to both the right to appeal provisioned in Article 8, as well as those provisioned in other precepts, among them, Article 25 of the Convention.

[...]

On Article 25, it has been stated that “the formal existence of remedies is not sufficient; these must be effective, in other words, they must provide results or responses to the violations of rights enshrined in the Convention.”<sup>65</sup> The court has pointed out that “those remedies that, given the general conditions of the country or even the particular circumstances of a case, are illusory, cannot be considered effective”<sup>66</sup>

f) The sentence or final resolution must be duly founded, and it must not be ostensibly in violation of the Convention.<sup>67</sup>

In a case regarding electoral matters, the Court considered that “the decisions that the Supreme Electoral Council issued on electoral matters and which affected the political rights of the persons

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<sup>62</sup> Case of Lori Berenson, par 192, and case of Petruzzi et al, par 161.

<sup>63</sup> Case of Herrera Ulloa, par 165.

<sup>64</sup> GARCIA RAMIREZ, Sergio, supra note 47, p. 1141ff.

<sup>65</sup> Cf. Case of 19 Merchants, par. 192; case of Baena Ricardo et al. Competence, par. 77; case of Maritza Urrutia, par. 117; case of Juan Humberto Sánchez, par. 122; case of Five pensioners, par. 126; case of Cantos, par. 126; case of Hilaire, Constantine and Benjamin et al, par. 150; case of Las Palmeras, par. 58; case of the Mayagna (Sumo) Awas Tingni Community, par. 113; case of Ivcher Bronstein, par. 136; case of the Constitutional Court, par. 90; case of Cantoral Benavides, par. 164; case of Durand and Ugarte, par. 102; case of the “Street Children” (Villagrán Morales et al), par. 235; case of Cesti Hurtado, par. 125; case of Castillo Petruzzi et al, par. 185; Case of the “White Van” (Paniagua-Morales et al.), par. 164; case of Suárez Rosero, par. 61; case of Fairén Garbí and Solís Corrales, par. 87; case of Godínez Cruz, par. 66; case of Velásquez Rodríguez, par. 63, y *Judicial Guarantees in states of emergency* (arts. 27.2, 25 and 8 of the American Convention on Human Rights), par. 24.

<sup>66</sup> Cf. Case of the 19 Merchants, par. 192; case of Baena Ricardo et al. Competence, par. 77; case of Maritza Urrutia, par. 117; case of Juan Humberto Sánchez, par. 122; case of Five pensioners, par. 126, case of Las Palmeras, par. 58; case of Ivcher Bronstein, par. 136, case of Cesti Hurtado, par 125, and *Judicial Guarantees in states of emergency* (arts. 27.2, 25 and 8 of the American Convention on Human Rights), par. 24.

<sup>67</sup> GARCÍA RAMÍREZ, Sergio, supra note 47, p. 1162ff.

proposed [...] as candidates to take part in the municipal elections [...], should have been duly founded, which involved indicating the norms on which the requirements that [the concerned political organization] failed to comply with were based, the facts regarding non-compliance, and the consequences of non-compliance.”<sup>68</sup>

Finally, the Court has established that the sentence or final resolution of an interim court is contrary to international law if it constitutes a “blatant violation of the State’s international obligations under the Convention.” In the *Case of Caesar v. Trinidad and Tobago*, the IACtHR ruled:<sup>69</sup>

The Court feels bound to put on record its profound regret that the presiding officer in the State’s High Court saw fit to exercise an option which would manifestly have the effect of inflicting a punishment that is not merely in blatant violation of the State’s international obligations under the Convention, but it is also universally stigmatized as cruel, inhumane and degrading.

#### **d. Similarities between the legality test of a measure restrictive of political rights in the European and universal levels**

In spite of not being established in express conventional dispositions as that of Article 23, section 2 of the Convention, the due process guarantees against the arbitrary deprivation of political rights are also present at the European and universal levels.

In the recent judgment of January 6, 2011, in the *Case of Paksas*, the ECtHR determined that the deprivation of political rights can only be legitimately established when the following requirements are met simultaneously or cumulatively: “a) that the deprivation be established by a court of law, as a consequence of a criminal conviction for a serious offense; b) that this decision meets the principles of legality and proportionality.”

To reach this conclusion, the ECtHR referred to the *Guidelines on Elections adopted by the European Commission for Democracy through Law* (“the Venice Commission”) as a valid reference based on Article 3, protocol 1 of the Convention:<sup>70</sup>

##### **I. Principles of Europe’s electoral heritage**

The five principles underlying Europe’s electoral heritage are *universal, equal, free, secret and direct suffrage*. Furthermore, elections must be held at regular intervals.

##### **1. Universal suffrage**

##### **1.1. Rule and exceptions**

Universal suffrage means in principle that all human beings have the right to vote and to stand for election. This right may, however, and indeed should, be subject to certain conditions:

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<sup>68</sup> Case of Yatama, par. 153.

<sup>69</sup> IACHR, Case of Caesar Vs. Trinidad y Tobago. Merits, Reparations and Costs, Judgment of March 11, 2005 Series C No. 123, par. 74.

<sup>70</sup> European Court of Human Rights, Case of Paksas v. Lithuania. Judgment of January 6, 2011 (Application no. 34932/04), par. 59ff.

- a. Age ...
- b. Nationality ...
- c. Residence ...
- d. Deprivation of the *right to vote and to be elected*:
  - i. *provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:*
    - ii. it must be provided for by law;
    - iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;
    - iv. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;
    - v. furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law. (Emphasis added)

The Explanatory Report, adopted by the Venice Commission at its 52nd session (18-19 October 2002), reads as follows (footnote omitted):

*...provision may be made for clauses suspending political rights. Such clauses must, however, comply with the usual conditions under which fundamental rights may be restricted; in other words, they must:*

- be provided for by law;
- observe the principle of proportionality;
- be based on mental incapacity or a *criminal conviction for a serious offence*.

Furthermore, the withdrawal of political rights *may only be imposed by express decision of a court of law*. However, in the event of withdrawal on grounds of mental incapacity, such express decision may concern the incapacity and entail *ipso jure* deprivation of civic rights. (Emphasis added)

At the universal level, judging from its final observations on Costa Rica and Nicaragua in 1980 and 1983, respectively, in relation to their domestic laws regarding Article 25 of the Covenant, the UNHRC also understood that political rights can only be suspended or deprived legitimately by the States as a result of a criminal conviction.

In regards to Costa Rica, the Committee made the following final observations:<sup>71</sup>

The members of the Committee asked for a *clarification regarding a reference that Article 91 of the Constitution [of Costa Rica] allowed for the suspension of political rights... [...] Costa Rica replied that in accordance with the Criminal Code there were some offenses which entailed the*

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<sup>71</sup> U.N. Human Rights Committee, *Compilación de observaciones finales del Comité de Derechos Humanos sobre países de América Latina y el Caribe (1977-2004)*, par 316, 318 and 319 (Spanish Only)

*suspension of the active and passive right to vote* [...] The members of the Committee thanked the State's delegation for having maintained an excellent and constructive dialogue with the Committee. (Emphasis added)

Regarding Nicaragua, the Committee stated:<sup>72</sup>

Several members of the Committee asked [...] *for how long and through what process it is possible to determine the loss of political rights*. In its response, the [Nicaraguan] representative said that [...] the suspension of civil and political rights of a person takes place once they are *convicted and their sentence has been passed* against them for offenses against the public order [...] Several members of the Committee *congratulated the State Party* for having presented an *excellent report*, and praised the delegation for their cooperation and the competence displayed when answering the questions of the Committee. (Emphasis added)

**e. The legality test of the ancillary penalty of deprivation of political rights, at the European and universal levels**

Finally, in cases where the suspension or deprivation of political rights is an ancillary penalty to a criminal conviction, both the ECtHR and the UNHRC have determined that a person who has been deprived of liberty, in principle, should not be deprived of their active right to vote.

In the *Case of Hirst*, the ECtHR determined that suspension for an undefined period of time of the active right to vote of persons who have been convicted in the United Kingdom was contrary to the Convention for lack of proportionality.<sup>73</sup>

It could be inferred that the ECtHR believes the ancillary penalty of suspension of the passive right to vote could in turn be considered legitimate if the nature of the offense committed is taken into consideration, as well as the proportionality to the main penalty. The UNHRC seems to have reached a similar conclusion in its general comments on Article 25 of the Covenant.<sup>74</sup>

In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. *If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence*. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

[...]

Bearing in mind the provisions of Article 5, paragraph 1 of the Covenant, the rights recognized and protected by Article 25 may not be interpreted as implying an authorization or validation of any act whatsoever aimed at the destruction or limitation of the rights and freedoms protected by the Covenant to a greater extent than what is provided for in the present Covenant. (Emphasis added)

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<sup>72</sup> Ibid, pars. 422 and 425.

<sup>73</sup> European Court of Human Rights, *CASE OF HIRST v. THE UNITED KINGDOM* (Application no. 74025/01), par. 32ff.

<sup>74</sup> U.N. Human Rights Committee, *supra* note 6, pars. 14 and 27.

In accordance with the rules of interpretation of Article 29 of the Convention,<sup>75</sup> the Court could adopt an understanding similar to those already adopted by the ECtHR and the UNHRC in relation to the cases in which the suspension or deprivation of political rights is an ancillary penalty to a criminal conviction. To the extent this would provide a greater guarantee than a criminal conviction against the restriction of political rights, this understanding would not contradict Article 23, section 2 of the Convention.

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<sup>75</sup> “Article 29: No provision of this Convention shall be interpreted as: a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; [...] c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.”

### **III. Internationally relevant actions: The Venezuelan State, through administrative resolutions, suspends or deprives its citizens of political rights**

In this section, we will present the most important facts, which, in accordance with the principle of the unity of the State in international law,<sup>76</sup> are attributable to the Venezuelan State in order to determine its possible international responsibility.<sup>77</sup> These are the most important legislative<sup>78</sup>, administrative<sup>79</sup> and jurisdictional<sup>80</sup> actions, which, in accordance to international law, must be examined by the Court in the present case.

#### **i. Legislative actions: Article 105 of the LOCGRSNCF authorizes the suspension or deprivation of political rights through administrative resolutions**

Article 105 of the Organic Law of the Comptroller General of the Republic and the National Fiscal Control System (LOCGRSNCF in Spanish) of Venezuela grants the Office of the Comptroller General of the Republic the power to determine the administrative responsibility of any public servant who may have committed an “offense,” and “without any additional proceeding,” set the fine, suspend or remove them from their position and impose the ancillary penalty of “disqualification” for the exercise of public office, depending on the gravity of the offense.

Article 105 of the LOCGRSNCF establishes:

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<sup>76</sup> U.N. International Law Commission, *Comments on the Draft Articles on Responsibility for Internationally Wrongful Acts*, approved by the Commission on its 53rd session, 2001, chap. IV p. 40 and 41 (“The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. [...]The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot [...] virtually any State organ may be the author of such an act. [...]The State is treated as a unity, consistent with its recognition as a single legal person in international law.”)

<sup>77</sup> U.N. International Law Commission, *Draft articles on Responsibility of States for internationally wrongful acts*, Extract from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10), chap. IV. E.1), 2001. (“Article 4. *Conduct of organs of a State* 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State”).

<sup>78</sup> Internal laws which violate international law constitute internationally illicit acts and make the State internationally responsible. Cf. *German Settlers in Poland*, 1923, P.C.I.J., Series B, N° 6, p. 35 y 36; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932, P.C.I.J., Series A/B, N° 44, p. 4, p. 24 y 25; *Phosphates in Morocco, Preliminary Objections*, 1938, P.C.I.J., Series A/B, N° 74, p. 10, pp. 25 y 26; *Rights of Nationals of the United States of America in Morocco*, I.C.J., Reports 1952, p. 176, en las pp. 193 y 194.

<sup>79</sup> Administrative acts which violate international law constitute internationally illicit acts and make the state internationally responsible. Cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14; *Elettronica Sicula S.p.A. (ELSI)*, C.I.J., Reports 1989, p. 15. As for executive acts related to judicial actions, cf. *Application of the Convention of 1902 Governing the Guardianship of Infants*, I.C.J., Reports 1958, p. 55, en la p. 65.

<sup>80</sup> Internal Jurisdictional actions which violate international law constitute internationally licit acts and make the State internationally responsible Cf. *Lotus*, 1927, P.C.I.J., Series A, N° 10, on p. 24; *Jurisdiction of the Courts of Danzig*, 1928, P.C.I.J., Series B, N° 15, on p. 24; *Ambatielos*, Merits, I.C.J., Reports 1953, p. 10, on pages 21 y 22.

Article 105. The declaration of administrative responsibility, according to Articles 91 and 92 of this Law, will be sanctioned with a fine determined by Article 94, in accordance with the severity of the transgression and the amount of damage caused. It is the exclusive responsibility of the Comptroller General of the Republic, without any additional proceeding, to decide—pursuant to a declaration of administrative responsibility as a result of an illicit act—the suspension from public office without pay for a period of no more than twenty-four (24) months or the destitution of the entity. This decision shall be executed by the maximum authority. The Comptroller General of the Republic may also *impose, taking into account the severity of the irregularity committed, disqualification from public office for a maximum of fifteen (15) years*, in which case the Comptroller General of the Republic must send the pertinent information to the human resources administration of the government office in which the transgressions occurred to facilitate the pertinent administrative processes. (Emphasis added)

**ii. Administrative actions: The Comptroller General of the Republic suspends the rights of Lopez Mendoza, through administrative resolutions, pursuant to Article 105 of the LOCGRSNCF**

The suspension of the political rights of Leopoldo López Mendoza, mayor of the Chacao Municipality, took place through administrative resolutions No. 01-00-000206 of August 24, 2005<sup>81</sup> and No. 01-00-235 of September 26, 2005<sup>82</sup>, issued by the Office of the Comptroller General pursuant to Article 105 of the LOCGRSNCF.

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<sup>81</sup> The internationally relevant facts presented here have been taken entirely from Inter American Commission on Human Rights (IACHR) suit of December 14, 2009 in relation to this case (Case 12.668). According to the suit of the IACHR: “Official Note No. 08-01-881 of August 30, 2005, by which is attached Resolution No. 01-00-000206 of August 24, 2005, by which the Office of the Comptroller General of the Republic considers that given the irregularities committed, which were sanctioned, as appears in the order of October 29, 2004 [PDVSA Grants], resolves: “In keeping with the provision of Article 122 of the Organic Law on the Office of the Comptroller General of the Republic of the Republic, in place at the time of the irregular acts, and Article 105 of the then-in-force Organic Law on the Office of the Comptroller General of the Republic of the Republic and the National Fiscal Oversight System, to impose on citizen LEOPOLDO LOPEZ MENDOZA ... the sanction of disqualification for performing public functions for a period of three years, counted from the execution of this Resolution. Information also contained in Annex G produced by the State, attached to the communication of September 24, 2008 (folio 522). The relevant sections of Article 122 of the Organic Law on the Office of the Comptroller General of the Republic, published in the Gaceta Oficial de la República de Venezuela No. 5,017, Special, of December 13, 1995, established: “Article 122: Once the decision on administrative liability is firm, and without prejudice to the judicial remedy that may be brought against this decision, the Office of the Comptroller shall forward the corresponding order and all other documents to the agency where the irregular acts occurred, or in which the public servant is providing service, for the top-level authority, within thirty (30) calendar days, to impose the sanction of removal, without any further procedure. The Comptroller General of the Republic of the Republic or the highest level authority of the respective agency, depending in the seriousness of the breach and the amount of the damages caused, may impose, in addition, disqualification from holding public office for a period of no more than three (3) years. If the person found liable has been removed from public office, the Comptroller may apply the sanction of disqualification, for up to the same period as indicated in this article. The decision that imposes disqualification shall also be forwarded to the Central Personnel Office of the Presidency of the Republic to have the corresponding effects and to incorporate into the respective file in the registry that said Office shall keep of the officials and public employees to whom Article 84 of this Law is limited. The pertinent section of Article 105 of the Organic Law currently in force reads: It is up to the Comptroller General of the Republic of the Republic exclusively and to the exclusion of all others, without any other procedure, to decide, based on the importance of the offense committed, to suspend the exercise of the position without salary for a period not greater than twenty-four (24) months or the

The resolutions ruled the disqualification of López Mendoza for periods of three and six years, respectively, beginning on 2008, the year López Mendoza's term as a mayor would come to an end. Both administrative resolutions were "ancillary penalties" to the administrative fines which had been established nine and eleven months earlier through another two administrative resolutions issued by the Office of the Comptroller General of the Republic, which declared López Mendoza's administrative responsibility.

Both administrative resolutions of disqualification were challenged by López Mendoza before the Office of the Comptroller General of the Republic itself, through reconsideration motions. The Comptroller General of the Republic dismissed both motions, through resolutions 01-00-000004 and 01-00-000005 of January 9 and 11, 2006.

### **iii. Jurisdictional actions: The Supreme Court of Venezuela rules on the constitutionality of Article 105 of the LOCGRSNCF**

Articles 42 and 65 of the Constitution of Venezuela set forth that political rights can only be suspended or deprived as a consequence of a final judicial decision, or conviction, for crimes committed in office. Article 42 of the Constitution of Venezuela provides:

Article 42. Anyone who loses or renounces his nationality loses citizenship. The exercise of citizenship or any political rights *can be suspended only by a final judicial decision in the cases provided by law.* (Emphasis added)

Article 65 of the Constitution of Venezuela establishes:

Article 65. *Persons who have been convicted of crimes committed while holding office or other offenses against public property, shall be ineligible to run for any office filled by popular vote, for such period as may be prescribed by law after serving their sentences, depending on the seriousness of the offense.* (Emphasis added)

Based on these constitutional provisions, López Mendoza filed a motion of unconstitutionality challenging Article 105 of the LOCGRSNCF before the Constitutional Chamber of the Supreme Court of Venezuela. According to the petition by the Inter-American Commission of Human Rights, López Mendoza's motion requested that said article be declared unconstitutional, and that both disqualification resolutions against him be annulled.<sup>83</sup>

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removal of the person declared liable ... and to impose, in view of the gravity of the irregularity committed, his or her disqualification from holding public office for up to a maximum of fifteen (15) years." Annex 11.

<sup>82</sup> According to the IACHR law suit: "Resolution No. 01-00-235 of September 26, 2005, by which the Office of the Comptroller General of the Republic of the Republic considers that given the irregularity committed [budgetary modifications Office of the Mayor], sanctioned by the finding of administrative liability of November 2, 2004, ... as well as the repetition of irregular conduct that has been sanctioned in the terms alluded to above. Resolves: "In keeping with the provision of Article 105 of the Organic Law on the Office of the Comptroller General of the Republic of the Republic and the National Fiscal Oversight System, to impose on citizen LEOPOLDO LOPEZ MENDOZA, ... the sanction of disqualification from holding public office for a period of six (6) years, counted from the execution of this Resolution." Annex 12

<sup>83</sup> Inter-American Commission of Human Rights, *supra* note 82, par. 43ff. See also, *supra* note 13.

On June 21, 2006, Leopoldo López Mendoza brought forward a precautionary constitutional protection claim<sup>84</sup> before the Constitutional Chamber of the Supreme Court (hereinafter “Constitutional Chamber”) challenging Article 105 of the Organic Law as unconstitutional and asking that the confirmatory acts of the sanctions of disqualification imposed on him be annulled (which is to say, Resolution 01-00-000004 and 01-00-000005).<sup>85</sup>

[...]

On August 6, 2008, the Constitutional Chamber dismissed the appeal for annulment of Article 105 of the Organic Law.<sup>86</sup> On considering the arguments put forth by the representative of López Mendoza, among others, the Constitutional Chamber first set out to describe the legislative history of the development of provisions similar to Article 105 of the Organic Law. This is by virtue of considering that “the provision challenged is part of the country’s republican tradition.” And in that context it referred to Article 84 of the first Organic Law on the Office of the Comptroller General of the Republic of the Republic of 1975, in which a finding of administrative liability could entail the sanction of disqualification from holding public office for a period no greater than three years. It continued its presentation noting that said article was amended in 1984 (Article 84) and subsequently in 1995 through Articles 121 and 122. It indicated that it is in that context of evolution of the fiscal oversight sanctions regime, that one must understand the drafting of Article 105 of the Organic Law. In that judgment the Constitutional Chamber of the Supreme Court reasoned that Article 105 of the Organic Law authorizes the Comptroller to impose the sanction stemming from administrative liability,

... without any further procedure, it being the manifestation of two administrative acts of the same sanction-imposing power, in that sense, the Chamber considers that the provision challenged does not violate the constitutional right of due process, which must necessarily be observed in order to establish administrative liability. The sanctions that correspond to the finding of administrative liability do not merit a new procedure because they are the consequence of the act that declares administrative liability.

In regards to the allegations of breach of the principle of proportionality, the Constitutional Chamber stated that:

... proportionality is the parameter required to assess the reach of the discretion of the fiscal control body in the severity of the penalty, which must carefully take into account the relationship between the wrongful act and the rigorousness of the penalty. Having said this, the Chamber observes that the challenged legal rule does not contravene the principle of proportionality of the sanctions in any form. [...] To impose them, the

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<sup>84</sup> Petitioner’s original brief in which, among other aspects, an application is made to the Constitutional Chamber of the Supreme Court to issue injunctive relief intended to “suspend the application of Article 105 [of the Organic Law], with respect to the specific legal situation before us for the duration of the proceeding on the motion to vacate initiated with this complaint, such that the application of that article by the Comptroller is also suspended ... with respect to our clients.” Annex 24.

<sup>85</sup> See the petitioner’s original brief which, among other things, notes that they challenge Article 105 of the Organic Law as they consider it violative of several constitutional provisions and principles, namely: (i) Article 65 of the Constitution, which limits the sanction of disqualification from holding public office to having committed offenses against government property and never with an administrative sanction; (ii) the principle of proportionality between sanctions and infractions, derived from the rule of law and the guarantee that punishments must be legal provided for at Article 2 and Article 49.6 of the Constitution; (iii) the prohibition on being tried twice for the same facts, provided for at Article 49.7 of the Constitution; (iv) the right to defense, provided for at Article 49; and (v) the principle of the presumption of innocence provided for at Article 49.2 of the Constitution. Annex 24.

<sup>86</sup> Constitutional Chamber of the Supreme Court of Justice, Decision of August 6, 2008. Annex 27.

agency where the damage was caused as well as the degree of responsibility must be taken into consideration.

[...]

The Chamber observes that in the case of the rule in Article 105 the relation of dependency between the fine and the suspension, removal or disqualification is not exact, as the plaintiff claims; but this relation of dependency exists between the declaration of administrative responsibility and the multiplicity of penalties; those [...] are *the main consequences of all those in the declaration of administrative responsibility*<sup>87</sup>.

In regards to the allegations related to the breach of the principle of legality, the Constitutional Chamber stated that:

*... at the administrative level, the implementation of what legal doctrine calls “undetermined legal concepts” is not provided; what’s more, they are used in the verification of the gradation of the penalty, but not the offense itself. It is, then, a standard margin of discretion offered to the sanctioning agency which does not contravene the principle of legality, since it must be composed of the required norms, through a detailed and precise examination of the facts and an evaluation, in order to justify the sanction imposed.*

[...]

...when the Constitutional Chamber referred to the arguments related to the breach of political rights and the contradictions of the challenged rule with Articles 42 and 65 of the Constitution it made a distinction between the suspension of political rights and the disqualification for the exercising of public office by saying:

*...Citizenship gives individuals the right to participate in the forming, exercising and controlling political power, through the recognition of their activities destined to enable their democratic intervention, such as: suffrage (both active and passive), plebiscites, referendums, popular consultations, [...] etcetera.*

It is important to point out that the criminal sentence alluded to in Articles 42 and 65 of the Constitution of the Bolivarian Republic of Venezuela suspends the exercise of political rights, whereas the one issued by the Office of the Comptroller General of the Republic disqualifies a person from holding public office [...] This means that, as a consequence of disqualification, the person is made ineligible to become a civil servant [...] it is important to note that it refers to any civil servant, even those elected by popular vote, making the person ineligible to become a government worker.

Based on this distinction, and understanding that they are two different disqualifications which arise from several constitutional precepts, which are Articles 42, 65 and 289.3, it is up to of the agencies of Public Administration not to allow the sanctioned citizens to hold public office, in other words, not to designate them or allow them to apply; and up to the Electoral Power to make sure the electorate does not become the subject of a fraud by allowing the registration, application and election of a citizen who is banned from exercising administrative functions in government.

[...]

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<sup>87</sup> Idem

Therefore, *the text of the challenged provision is constitutional and it is also compatible with the current Inter-American system for the protection of human rights.* (Emphasis added)

**IV. Conclusion of the *amicus curiae*: The Court must apply the international standard for the protection of human rights in the case in question, and must determine Venezuela's international responsibility**

1. The Human Rights Foundation (HRF), acting as *amicus curiae*, respectfully considers that the Court should make clear that, according to the ordinary meaning of Article 23, section 2 and the travaux préparatoires of the Convention, no one can be deprived of their political rights (active and passive right to vote) or have them suspended, unless this is the result of a final judgment, which, in turn, is the result of a judicial process that meets the guarantees of due process. Based on this standard, the Court must analyze the case in question and determine if the Venezuelan State is responsible for violating Article 23, section 2 of the Convention. In particular, the Court must:

1.a) Determine whether Article 105 of the LOCGRSNCF, pursuant to which the resolutions that decreed the suspension or deprivation of López Mendoza's political rights, establishes that the suspension of political rights must come as a result of a final judgment, which, in turn, must be the result of a judicial process that meets the guarantees of due process. In case these guarantees against the deprivation or suspension of political rights are not met, the Court must declare that Article 105 of the LOCGRSNCF makes the Venezuelan State responsible for violating Article 23, section 2 of the Convention. In this case, the Court must determine whether the Venezuelan State is obligated to repeal Article 105 of the LOCGRSNCF to bring its domestic laws up to the international standard.

1.b) Determine whether administrative resolutions No. 01-00-000206 of August 24, 2005 and No. 01-00-235 of September 26, 2005, issued by the Office of the Comptroller General of the Republic, which determined the deprivation or suspension of López Mendoza's political rights, came as a result of a final judgment, which, in turn, was the result of a judicial process that met the guarantees of due process. In case these guarantees against the deprivation or suspension of political rights were not met, the Court must declare that the decision taken by the Comptroller General of the Republic made the Venezuelan State responsible for violating Article 23, section 2 of the Convention. In this case, the Court must determine whether the Venezuelan State is obligated to repeal the administrative resolutions that established the deprivation or suspension of López Mendoza's political rights, in order to bring its domestic legal system up to the international standard.

1.c) Determine whether the Supreme Court's decision of August 6, 2008, which declared the constitutionality of Article 105 of the LOCGRSNCF, establishes that the disqualification to exercise political rights must come as a result of a final judgment, which, in turn, has to be the result of a judicial process that meets the guarantees of due process. In case the Venezuelan Supreme Court has not applied this understanding, the Court must declare that said decision, since it ostensibly violates Article 23, section 2 of the Convention, makes the Venezuelan State internationally responsible. In this case, the Court must determine whether the Venezuelan State is obligated to repeal the decision of August 6, 2008 of the Supreme Court of Venezuela, in order to bring its domestic legal system up to the international standard.

2. In spite of it not being a controversial matter in the current dispute, HRF considers that the case in point provides an excellent opportunity for the Court to determine, in accordance to jurisprudence at European and universal levels, that in cases where the suspension or deprivation of political rights constitutes an ancillary penalty to a criminal sentence, the person who has been deprived of liberty cannot be, as a general rule, deprived of the active right to vote. Likewise, the Court must make it clear that, in these cases, the suspension or deprivation of the opportunity to be elected or the passive right to vote can be legitimate, as long as it is an ancillary penalty to a criminal sentence, and it does not exceed the duration of the main penalty.

3. Likewise, in spite of it not being a controversial matter in the current dispute, HRF considers that the case in point provides an excellent opportunity for the Court to determine, in accordance to jurisprudence at European and universal levels, that those who has been deprived of liberty, but have not yet received a sentence, may never be deprived of their political rights.

4. Finally, and in spite of it not being a controversial matter in the current dispute, HRF considers that the case in point provides an excellent opportunity for the Court to determine, in accordance to jurisprudence at European and universal levels, that the period of suspension or deprivation of political rights, whether as a result of a main or ancillary penalty, must always be proportionate to the offense and the sentence.

## V. Petition

The Human Rights Foundation, hopeful that this amicus curiae brief may aid the Court in the resolution of the current dispute of international law, respectfully asks the Court:

- 1) To admit the Human Rights Foundation (HRF) as *amicus curiae* in this case;
- 2) To annex this *amicus curiae* brief to the case file; and
- 3) To take the international law concepts outlined in this brief into consideration.

A handwritten signature in black ink, appearing to read 'Javier El-Hage', written over a horizontal line.

**Javier El-Hage**  
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## ANEXO ÚNICO

**Cuadro N° 1: Países de América Latina en los que sólo la sentencia penal, y no el procesamiento penal, es causal de suspensión o privación de los derechos políticos**

País	Sentencia penal como causal de privación o suspensión de los derechos políticos
Venezuela (Constitución arts. 39, 42 y 65, y Ley Orgánica del Sufragio y Participación Política art. 85)	<p>Artículo 39.- Los venezolanos y venezolanas que no estén sujetos o sujetas a inhabilitación política ni a interdicción civil, y en las condiciones de edad previstas en esta Constitución, ejercen la ciudadanía y, en consecuencia, son titulares de derechos y deberes políticos de acuerdo con esta Constitución.</p> <p>Artículo 85 (LOSPP).- Todos los venezolanos mayores de dieciocho (18) años, no sujetos por sentencia definitivamente firme, a interdicción civil, ni a condena penal que lleve consigo inhabilitación política, tienen el derecho y están en el deber de votar en las elecciones que rige esta Ley para los poderes públicos que correspondan a su lugar de residencia.</p> <p>Los miembros de las Fuerzas Armadas no ejercerán el sufragio mientras permanezcan en el servicio militar activo.</p> <p>Artículo 42.- Quien pierda o renuncie a la nacionalidad pierde la ciudadanía. El ejercicio de la ciudadanía o de alguno de los derechos políticos sólo puede ser suspendido por sentencia judicial firme en los casos que determine la ley.</p> <p>Art. 65.- No podrán optar a cargo alguno de elección popular quienes hayan sido condenados o condenadas por delitos cometidos durante el ejercicio de sus funciones y otros que afecten el patrimonio público, dentro del tiempo que fije la ley, a partir del cumplimiento de la condena y de acuerdo con la gravedad del delito.</p>
Bolivia (Constitución arts. 28)	<p>Art. 28.- El ejercicio de los derechos políticos se suspende en los siguientes casos, previa sentencia ejecutoriada mientras la pena no haya sido cumplida:</p> <ol style="list-style-type: none"> <li>1. Por tomar armas y prestar servicio en fuerzas armadas enemigas en tiempos de guerra.</li> <li>2. Por defraudación de recursos públicos.</li> <li>3. Por traición a la patria.</li> </ol>
Colombia (Constitución arts. 98, 99).	<p>Art. 98. La ciudadanía se pierde de hecho cuando se ha renunciado a la nacionalidad, y su ejercicio se puede suspender en virtud de decisión judicial en los casos que determine la ley.</p> <p>Quiénes hayan sido suspendidos en el ejercicio de la ciudadanía, podrán solicitar su rehabilitación.</p> <p>Art. 99. La calidad de ciudadano en ejercicio es condición previa e indispensable para ejercer el derecho de sufragio, para ser elegido y para desempeñar cargos públicos que lleven anexa autoridad o jurisdicción.</p>
Costa Rica (Constitución arts. 91, 92)	<p>Art. 91.- La ciudadanía sólo se suspende:</p> <ol style="list-style-type: none"> <li>1) Por interdicción judicialmente declarada;</li> <li>2) Por sentencia que imponga la pena de suspensión del ejercicio de derechos políticos.</li> </ol> <p>Art. 92.- La ciudadanía se recobra en los casos y por los medios que determine la ley.</p>

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Cuba (Constitución art. 132)	Art. 132.- Tienen derecho al voto todos los cubanos, hombres y mujeres, mayores de dieciséis años de edad, excepto: a) los incapacitados mentales, previa declaración judicial de su incapacidad; b) los inhabilitados judicialmente por causa de delito.
Ecuador (Constitución art. 64)	Art. 64.- El goce de los derechos políticos se suspenderá, además de los casos que determine la ley, por las razones siguientes: 1. Interdicción judicial, mientras ésta subsista, salvo en caso de insolvencia o quiebra que no haya sido declarada fraudulenta. 2. Sentencia ejecutoriada que condene a pena privativa de libertad, mientras ésta subsista.
Guatemala (Constitución art. 148, y Ley Electoral y de Partidos Políticos art. 4)	Art. 148.- Suspensión, pérdida y recuperación de la ciudadanía. La ciudadanía se suspende, se pierde y se recobra de conformidad con lo que preceptúa la ley.  Art. 4 (LEPP).- Los derechos ciudadanos se suspenden: a. Por sentencia condenatoria firme, dictada en proceso penal; b. Por declaratoria judicial de interdicción
Honduras (Constitución 41)	Art. 41.- La calidad del ciudadano se suspende: 1. Por auto de prisión decretado por delito que merezca pena mayor; 2. Por sentencia condenatoria firme, dictada por causa de delito; y, 3. Por interdicción judicial.
Nicaragua (Constitución art. 47)	Art. 47.- Son ciudadanos los nicaragüenses que hubieran cumplido dieciséis años de edad. Sólo los ciudadanos gozan de los derechos políticos consignados en la Constitución y las leyes, sin más limitaciones que las que se establezcan por razones de edad. Los derechos ciudadanos se suspenden por imposición de pena corporal grave o penas accesorias específicas y por sentencia ejecutoriada de interdicción civil.
Panamá (Constitución art. 133)	Art. 133.- El ejercicio de los derechos ciudadanos se suspende: 1. Por causa expresada en el artículo 13 <sup>1</sup> de esta Constitución. 2. Por pena conforme a la Ley.
Paraguay (Constitución art. 153)	Art. 153.- Se suspende el ejercicio de la ciudadanía: 1. por la adopción de otra nacionalidad, salvo reciprocidad internacional; 2. por incapacidad declarada en juicio, que impida obrar libremente y con discernimiento, y 3. cuando la persona se hallara cumpliendo condena judicial, con pena privativa de libertad. La suspensión de la ciudadanía concluye al cesar legalmente la causa que la determina.

<sup>1</sup> El art. 13 de la Constitución panameña regula la renuncia de la nacionalidad panameña.

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Perú (Constitución art. 33)	Art. 33.- El ejercicio de la ciudadanía se suspende: 1. Por resolución judicial de interdicción. 2. Por sentencia con pena privativa de la libertad. 3. Por sentencia con inhabilitación de los derechos políticos.
República Dominicana (Constitución art. 15)	Art. 15.- Los derechos de ciudadanía quedan suspendidos en los casos de: 1. Condenación irrevocable a pena criminal, hasta la rehabilitación. 2. Interdicción judicial legalmente pronunciada, mientras ésta dure. 3. Por admitir en territorio dominicano función o empleo de un gobierno extranjero sin previa autorización del Poder Ejecutivo.
Brasil (Constitución art. 15)	Art. 15. Está prohibida la privación de derechos políticos, cuya pérdida o supresión sólo se producirá en los casos de: I.- cancelación de la naturalización por sentencia firme; II.- incapacidad civil absoluta; III.- condena penal firme, mientras dure sus efectos; IV.- negativa a cumplir una obligación a todos impuesta o la prestación alternativa, en los términos del artículo 5, VIII; V.- Improbidad administrativa en los términos del artículo 37, § 4. <sup>2</sup>

<sup>2</sup> Según el art 37, § 4 de la Constitución brasilera, “Los actos de improbidad administrativa comportarán la suspensión de los derechos políticos, la pérdida de la función pública, la indisponibilidad de los bienes y el resarcimiento al erario, en la forma y graduación prevista en la ley, sin perjuicio de la acción penal procedente”.

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**Cuadro N° 2: Países de América Latina en los que tanto el procesamiento penal como la sentencia penal son causales de suspensión o privación de los derechos políticos<sup>3</sup>**

País	Procesamiento penal como causal de privación o suspensión de los derechos políticos	Sentencia penal como causal de privación o suspensión de los derechos políticos
<p style="text-align: center;">Argentina (Código Electoral Nacional art. 2, y Ley Orgánica de los Partidos Políticos art. 33)</p>	<p>Art. 33 (LOPP).- No podrán ser precandidatos en elecciones primarias ni candidatos en elecciones generales a cargos públicos electivos nacionales, ni ser designados para ejercer cargos partidarios:</p> <p>a) Los excluidos del padrón electoral como consecuencia de disposiciones legales vigentes;</p> <p>b) El personal superior y subalterno de las Fuerzas Armadas de la Nación en actividad o en situación de retiro, cuando hayan sido llamados a prestar servicios;</p> <p>c) El personal superior y subalterno de las fuerzas de seguridad de la Nación y de las provincias, en actividad o retirados llamados a prestar servicios;</p> <p>d) Los magistrados y funcionarios permanentes del Poder Judicial nacional, provincial, de la Ciudad Autónoma de Buenos Aires y tribunales de faltas municipales;</p> <p>e) Los que desempeñaren cargos directivos o fueren apoderados de empresas concesionarias de servicios y obras públicas de la Nación, provincias, Ciudad Autónoma de Buenos Aires, municipalidades o entidades autárquicas o descentralizadas o de empresas que exploten juegos de azar;</p> <p>f) <i>Las personas con auto de procesamiento por genocidio, crímenes de lesa humanidad o crímenes de guerra, hechos de represión ilegal constitutivos de graves violaciones de derechos humanos, torturas, desaparición forzada de personas, apropiación de niños y otras violaciones graves de derechos humanos o cuyas conductas criminales se encuentren prescriptas en el Estatuto de Roma como crímenes de competencia de la Corte Penal Internacional, por hechos acaecidos entre el 24 de marzo de 1976 y el 10 de diciembre de 1983;</i></p> <p>g) Las personas condenadas por los crímenes descriptos en el inciso anterior aun cuando la resolución judicial no fuere susceptible de ejecución.</p> <p>Los partidos políticos no podrán registrar candidatos a cargos públicos electivos para las elecciones nacionales en violación a lo establecido en el presente artículo.</p>	<p>Art. 2 (CNE).- Están excluidos del padrón electoral:</p> <p>a) Los dementes declarados tales en juicio;</p> <p>b) <i>Los condenados por delitos dolosos a pena privativa de la libertad, y, por sentencia ejecutoriada, por el término de la condena;</i></p> <p>c) Los condenados por faltas previstas en las leyes nacionales y provinciales de juegos prohibidos, por el término de tres años; en el caso de reincidencia, por seis;</p> <p>d) Los sancionados por la infracción de deserción calificada, por el doble término de la duración de la sanción;</p> <p>e) Los declarados rebeldes en causa penal, hasta que cese la rebeldía o se opere la prescripción;</p> <p>f) Los inhabilitados según disposiciones de la Ley Orgánica de los Partidos Políticos.</p> <p>g) Los que en virtud de otras prescripciones legales y reglamentarias quedaren inhabilitados para el ejercicio de los derechos políticos.</p>

<sup>3</sup> La legislación de muchos países de Latinoamérica utiliza como sinónimos los términos “derechos de ciudadanía” y “derechos políticos”. Ver PICADO, SONIA, III. DERECHOS POLÍTICOS COMO DERECHOS HUMANOS en NOHLEN, Dieter, ZOVATTO, Daniel, OROZCO, Jesús y THOMPSON, José (compiladores), TRATADO DE DERECHO ELECTORAL COMPARADO DE AMÉRICA LATINA, 2007, p. 48. (“Los derechos políticos son aquel grupo de atributos de la persona que hacen efectiva su participación como ciudadano de un determinado Estado. En otras palabras, se trata de facultades o, mejor, de titularidades que, consideradas en conjunto, se traducen en el ejercicio amplio de la participación política [...] En realidad, cuando hablamos de derechos políticos, hacemos referencia a las titularidades de las que se desprenden los mecanismos por medio de los cuales la ciudadanía se ejerce.”

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<p style="text-align: center;">Chile (arts. 13, 16 y 17)</p>	<p>Art. 16.- El derecho de sufragio se suspende:  1°. - Por interdicción en caso de demencia;  2°. - <i>Por hallarse la persona acusada por delito que merezca pena aflictiva o por delito que la ley califique como conducta terrorista, y</i>  3°. - Por haber sido sancionado por el Tribunal Constitucional en conformidad al inciso séptimo del número 15° del artículo 19 de esta Constitución. Los que por esta causa se hallaren privados del ejercicio del derecho de sufragio lo recuperarán al término de cinco años, contado desde la declaración del Tribunal. Esta suspensión no producirá otro efecto legal, sin perjuicio de lo dispuesto en el inciso séptimo del número 15° del artículo</p>	<p>Art. 13.- Son ciudadanos los chilenos que hayan cumplido dieciocho años de edad y que no hayan sido condenados a pena aflictiva. La calidad de ciudadano otorga los derechos de sufragio, de optar a cargos de elección popular y los demás que la Constitución o la ley confieran.</p> <p>Art. 17.- La calidad de ciudadano se pierde:  1°. - Por pérdida de la nacionalidad chilena;  2°. - <i>Por condena a pena aflictiva, y</i>  3°. - <i>Por condena por delitos que la ley califique como conducta terrorista y los relativos al tráfico de estupefacientes y que hubieren merecido, además, pena aflictiva.</i>  Los que hubieren perdido la ciudadanía por la causal indicada en el número 2°, la recuperarán en conformidad a la ley, una vez extinguida su responsabilidad penal. Los que la hubieren perdido por las causales previstas en el número 3° podrán solicitar su rehabilitación al Senado una vez cumplida la condena.</p>
<p style="text-align: center;">El Salvador (Constitución arts. 74 y 75)</p>	<p>Art. 74.- Los derechos de ciudadanía se suspenden por las causas siguientes:  1.- <i>Auto de prisión formal;</i>  2.- Enajenación mental;  3.- Interdicción judicial;  4.- Negarse a desempeñar, sin justa causa, un cargo de elección popular; en este caso, la suspensión durará todo el tiempo que debiera desempeñarse el cargo rehusado.</p>	<p>Art. 75.- Pierden los derechos de ciudadano:  1- Los de conducta notoriamente viciada;  2- <i>Los condenados por delito;</i>  3- Los que compren o vendan votos en las elecciones;  4- Los que suscriban actas, proclamas o adhesiones para promover o apoyar la reelección o la continuación del Presidente de la República, o empleen medios directos encaminados a ese fin;  5- Los funcionarios, las autoridades y los agentes de éstas que coarten la libertad del sufragio.  En estos casos, los derechos de ciudadanía se recuperarán por rehabilitación expresa declarada por autoridad competente.</p>
<p style="text-align: center;">México (Constitución art. 38)</p>	<p>Art. 38.- Los derechos o prerrogativas de los ciudadanos se suspenden:  Por falta de cumplimiento, sin causa justificada, de cualquiera de las obligaciones que impone el artículo 36 [de obligaciones del ciudadano de la República]. Esta suspensión durará un año y se impondrá además de las otras penas que por el mismo hecho señalare la ley;  <i>Por estar sujeto a un proceso criminal por delito que merezca pena corporal, a contar desde la fecha del auto de formal prisión;</i>  Durante la extinción de una pena corporal;  Por vagancia o ebriedad consuetudinaria, declarada en los términos que prevengan las leyes;  Por estar prófugo de la justicia, desde que se dicte la orden de aprehensión hasta que prescriba la acción penal; y  Por sentencia ejecutoria que imponga como pena esa suspensión.  La ley fijará los casos en que se pierden, y los demás en que se suspenden los derechos de ciudadano, y la manera de hacer la rehabilitación.</p>	<p>Art. 38.- Los derechos o prerrogativas de los ciudadanos se suspenden:  I. Por falta de cumplimiento, sin causa justificada, de cualquiera de las obligaciones que impone el artículo 36 [de obligaciones del ciudadano de la República]. Esta suspensión durará un año y se impondrá además de las otras penas que por el mismo hecho señalare la ley;  I. Por estar sujeto a un proceso criminal por delito que merezca pena corporal, a contar desde la fecha del auto de formal prisión;  I. Durante la extinción de una pena corporal;  V. Por vagancia o ebriedad consuetudinaria, declarada en los términos que prevengan las leyes;  V. Por estar prófugo de la justicia, desde que se dicte la orden de aprehensión hasta que prescriba la acción penal; y  I. <i>Por sentencia ejecutoria que imponga como pena esa suspensión.</i>  I. La ley fijará los casos en que se pierden, y los demás en que se suspenden los derechos de ciudadano, y la manera de hacer la rehabilitación.</p>

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<p style="text-align: center;">Uruguay (Constitución arts. 74)</p>	<p>Art. 74.- La ciudadanía se suspende:</p> <ol style="list-style-type: none"> <li>1) Por ineptitud física o mental que impida obrar libre y reflexivamente.</li> <li>2) <i>Por condición de legalmente procesado en causa criminal de que pueda resultar pena de penitenciaria.</i></li> <li>3) Por no haber cumplido dieciocho años de edad.</li> <li>4) Por sentencia que imponga pena de destierro, prisión, penitenciaria o inhabilitación para el ejercicio de derechos políticos durante el tiempo de la condena. Por el ejercicio habitual de actividades moralmente deshonrosas, que determinará la ley sancionada de acuerdo con el numeral 7 del artículo 77.</li> <li>5) Por formar parte de organizaciones sociales o políticas que, por medio de la violencia, o de la propaganda que incitase a la violencia, tiendan a destruir las bases de la nacionalidad. Se consideran tales, a los efectos de esta disposición, las contenidas en las Secciones I y II de la presente Constitución.</li> <li>6) Por falta superviniente de buena conducta exigida en el artículo 75.</li> </ol> <p>Estas dos 'últimas causales sólo regirán respecto de los ciudadanos legales.</p> <ol style="list-style-type: none"> <li>7) El ejercicio del derecho que otorga el artículo 78 se suspende por las causales enumeradas precedentemente.</li> </ol>	<p>Art. 74.- La ciudadanía se suspende:</p> <ol style="list-style-type: none"> <li>1) Por ineptitud física o mental que impida obrar libre y reflexivamente.</li> <li>2) Por condición de legalmente procesado en causa criminal de que pueda resultar pena de penitenciaria.</li> <li>3) Por no haber cumplido dieciocho años de edad.</li> <li>4) <i>Por sentencia que imponga pena de destierro, prisión, penitenciaria o inhabilitación para el ejercicio de derechos políticos durante el tiempo de la condena. Por el ejercicio habitual de actividades moralmente deshonrosas, que determinará la ley sancionada de acuerdo con el numeral 7 del artículo 77.</i></li> <li>5) Por formar parte de organizaciones sociales o políticas que, por medio de la violencia, o de la propaganda que incitase a la violencia, tiendan a destruir las bases de la nacionalidad. Se consideran tales, a los efectos de esta disposición, las contenidas en las Secciones I y II de la presente Constitución.</li> <li>6) Por falta superviniente de buena conducta exigida en el artículo 75. Estas dos 'últimas causales sólo regirán respecto de los ciudadanos legales.</li> <li>7) El ejercicio del derecho que otorga el artículo 78 se suspende por las causales enumeradas precedentemente.</li> </ol>
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