Authoritarianism, Judicial Independence and Democratic Transition

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Abstract
This paper evaluates major threats to judicial independence around the world, especially the threats of the growing wave of authoritarianism and corruption. Special emphasis is put on Latin American countries. Their problems, but also their transition from authoritarianism to democracy could be a good example for other countries facing similar challenges. Transitional schemes should not be limited only to institutional instruments, such as the composition of the judiciary. They have to address the issues of reparations, seeking for truth and reconcilitation. They have to take into account that the level of internal corruption within a judiciary and political system may require more intensive actions and support of international organizations.
Keywords: rule of law, Latin America, transitional justice, Peru, Colombia, Guatemala, El Salvador, truth commission, reconciliation, judicial independence, corruption, retirement age for judges, authoritarianism, democracy

I. Introduction

The rule of law implies the need for measures to ensure adherence to the principles of supremacy of the law, equality before the law, separation of powers, participation in decision-making, legality, avoidance of arbitrariness, and procedural and legal transparency. It requires a system in

which judicial independence is guaranteed and ensured. However, the independence of the judiciary is currently under attack around the world and, including in Latin American countries.

Some challenges from Latin American countries may also appear in other continents, especially due to the growing wave of authoritarianism and corruption. In addition, certain countries face problems relating to transitional justice, when they come back to the family of democratic countries or after peace processes following internal armed conflicts.

The authoritarian wave that is sweeping the world dilutes the separation of powers. It subjugates the justice system to the political power. It impacts on judicial independence and includes significant attacks on judges and prosecutors. It also limits the free exercise of the legal profession in a wide range of countries.

The corruption and international organized crime is another phenomenon affecting judicial independence. Authoritarian trends and the concentration of power create favorable conditions for those threats. The devastating consequences of corruption on human rights have been proven. Corruption has a direct impact on the obligation of states to provide the maximum available resources to satisfy the economic, social, and cultural rights of the population. Rule of law is one of the most important weapons to fight against corruption.

But there are countries which could be portrayed as successful examples of transition from authoritarianism to democratic systems. This paper looks into some of the practices of transitional justice and considers to what extent they may be adopted in other parts of the world, particularly in those countries that are experiencing rule of law and democratic backsliding.

II. Major Global Threats to Judicial Independence

The judiciary is currently under attack and this is a problem not only of the "global south". This phenomenon has arisen due to the voracity of authoritarian currents or governments or by organized crime seeking impunity. Sometimes it also arises on account of a close and volcanic interaction between both.

There are extreme and even gruesome cases worldwide of attacks on justice, almost daily, such as assassination or harassment of judges or arbitrary dismissals with impunity. But also, the selection and appointment

processes for judges are not always transparent, thus creating a space for politicians to have an influence on them.

Some time ago, independence of judiciary was subject of interest of mostly lawyers. Issues that were once perceived as "lawyerly"—such as the appointment of the high courts or compliance with their decisions—are increasingly seen as matters linked to the exercise of power. Now, this issue is increasingly putting societies on alert. There is a growing understanding that judicial independence is key to democracy.

Between political interference and the murderous hand, there is a wide range of grey areas. This includes the appointment processes of judges of the highest courts, which are sometimes the result of obscure and non-transparent negotiations under the table and contaminated by political "quotas". The general understanding of the need for judicial independence, including the choice of judges on the basis of their professional excellence and integrity, is limited among politicians.

As a result, the justice system has become an institutional target of growing authoritarian vocations and realities. This justice system is often dynamically linked to networks of corruption and human rights violations. But, in fact, there is no other way to prevent corruption and human rights' abuses than to rely on independent judiciary.

III. A Growing Threat of Authoritarianism and Regional Responses

An authoritarian wave now is sweeping across countries on different continents and has at its core the subjugation of justice by political power. There is one common element of this trend. Both global and regional international organizations have limited powers to stem the tide.

In the European Union, among many instruments there are financial instruments that were used with respect to Poland and Hungary.[1] The lack of respect for judgments of the EU Court of Justice results in significant fines and suspension of funds from the EU Recovery Plan. Nevertheless,

1 On 16 February 2022, CJEU delivered important ruling on so-called "Conditionality Regulation", C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, C-157/21, *Poland v Parliament and Council,* ECLI:EU:C:2022:98. The CJEU dismissed Hungary's and Poland's actions for annulment against the general regime of conditionality for the protection of the EU budget.

there is still a question of the effectiveness of those measures.[2] In the Council of Europe, a prominent role is played by the European Court of Human Rights, which has taken important decisions on judicial independence. Nevertheless, practice of non-implementation of its judgements and interim measures continues.[3]

When it comes to Latin America, one should consider the example of El Salvador[4], where the demolition of judicial independence happened in three stages.[5]

First, in 2021, the arbitrary dismissal of all the members of the Constitutional Chamber of the Supreme Court and the Attorney General was accomplished. They did not have a right to defence or receive fair trial. The UN Special Rapporteur on Judicial Independence expressed its public concern on May 2021.[6] Second, laws have been passed that have swept away the principle of irremovability. As a result, 1/3 of judges have been removed from the bench. Third, the age limit for judicial posts has been lowered to 60 years or 30 years of service in the judiciary. At a time when retirement ages are tending to rise all over the world as life expectancy has increased, this measure can only be explained by the aim of getting rid of many

2 On standards and practical mechanisms to protect rule of law in the European Union: Armin von Bogdandy et al., *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Berlin: Springer 2021).

3 Since January 2022, the ECHR, has received a total of 60 requests for interim measures from Polish judges in 29 cases concerning the independence of the Polish judiciary. The Polish Government informed the Registry of the Court that interim measures ruled by the European Court of Human Rights on 6 December 2022 Court in the cases *Leszczyńska-Furtak v. Poland* (application no. 39471/22), *Gregajtys v. Poland* (no. 39477/22) and *Piekarska-Drążek v. Poland* (no. 44068/22) will not be respected. See press release issued by the Registrar of the Court No. 053 (2023) of 16 February 2023.

4 In March 16, 2022, a public hearing was held before the Inter-American Commission on Human Rights (IACHR) to address the situation of judicial independence in El Salvador. Petitioning organizations presented to this international body a reading of various decisions, facts and arbitrary reforms that occurred in 2021, as a strategy to capture the justice system, executed with the deliberate aim of neutralizing its ability to control power and protect human rights. On 3 June 2022, IACHR called on El Salvador to comply with its international committments regarding judicial indpendence. See press release of 3 June 2022, https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/126.asp [access: 12 June 2023].

5 Human Rights Watch, *World Report 2023 – Events of 2022*, New York, 2023, 199–207.

6 Press release: El Salvador: UN expert condemns dismissals of top judges and Attorney General, 5 May 2021, https://www.ohchr.org/en/press-releases/2021/05/el-salvador-un-expert-condemns-dismissals-top-judges-and-g?LangID=E&NewsID=27061 [access: 12 June 2023].

judges or prosecutors who are considered distant or "alien" by the political powers[7]. As a consequence of those measures, at least 156 members of the judiciary in El Salvador were dismissed, most of them chamber magistrates or judges with a long track record, including several judges in charge of emblematic cases.[8]

Some financial mechanisms should be activated in case of such democratic threats in El Salvador. However, there are no signs in this direction. Moreover, there are no specific political and legal instruments being used at the level of Organization of American States to push for compliance with democratic standards. While in Europe the regional system has shown more financial "teeth", in the Latin American region this is practically non-existent.

The multilateral regional development bank, for example, could theoretically have some instruments to react. However, the Inter-American Development Bank (IDB) and the Development Bank of Latin America (CAF) have no reference to rule of law or democratic standards in their constitutive agreement. But there are some possibilities to act in other documents. In the case of the IDB, its current institutional strategy establishes that one of the three cross-cutting themes to be taken into account for strategic priorities is the rule of law, although this does not seem to operate as a condition. While the IDB does recognize the importance of good governance and rule of law, its operational capacity to directly address issues,

7 Early retirement of judges has been a weapon not only al El Salvador to attack independence of the judiciary in several countries, but also in Hungary. The Fundamental Law of Hungary, which entered into force on 1 January 2012, forced around 274 judges into early retirement, including six of the twenty court presidents at the county level, four of the five appeals court presidents, and twenty of the seventy-four Supreme Court judges. Gabor Halmai has emphasized that "it is not the termination of employment due to the retirement age which is unlawful, but its rapid execution without an appropriate transitional period". The issue was subject of attention of the CJEU in C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687. However, according to G. Halmai, the CJEU "missed the opportunity to clarify the meaning of judicial independence in the Charter of Fundamental Rights of the European Union, and the criteria for the de facto dismissal of the judges". See on this Gabor Halmai, 'The Early Retirement Age of the Hungarian Judges' in: Fernanda Nicola and Bill Davies (eds), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge: Cambridge University Press 2017), 471–488.

8 For example, Jorge Guzmán, the judge in charge of the criminal trial for the army massacre in El Mozote became a problematic person. In his investigation, among other things, he asked the prosecutor's office to determine whether there had been a crime, when the military high command prevented him from accessing his files.

such as judicial independence, is limited. Its interventions are primarily focused on infrastructure projects, education, health, and economic policy reforms.

On the other hand, since the Summit of the Americas in Quebec (2001), the importance of the relationship between democracy, development and its financing has been emphasised. The Summit proposed the urgent need to adopt an Inter-American Democratic Charter, to reinforce OAS instruments for the active defense of representative democracy.[9] Peru prepared the first text and the final version was adopted at the General Assembly of the OAS in Lima, Peru, on 11 September 2001.

The dynamics of threats to judicial independence are different in Europe and Latin America. But still, pressure by international organizations, courts and bodies do not seem to have had a decisive impact to change the course of things or the political decisions affecting judicial independence. If anything, they draw attention to serious facts. They ensure that those problems are not swept under the carpet. But what really matters is the internal political and institutional dynamics in each country, as well as the active and leading role of its citizens and institutions to respond to attacks on democracy.

IV. Corruption and Judicial Independence

1. General remarks

Corruption finds a very fertile territory in the context of authoritarian processes in which one of their patterns is the concentration of power by the executive. These sorts of processes have a reinforced impact on several aspects of human rights. At the global level, the economic losses caused by transnational crime amount to 1.5 % of the global GDP and close to 7 % of the world's merchandise exports.[10]

Corruption has a direct impact in the functioning of public institutions, in general, and for those organs responsible for ensuring the rule of law and

9 Declaration of Quebec City adopted during the Third Summit of Americas on 20-22 April, 2001, http://www.summit-americas.org/iii_summit.html [access: 12 June 2023].

10 A/72/140 Report to the General Assembly of The United Nations by the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, 25 July 2017, https://www.ohchr.org/en/documents/thematic-reports/a72140-report-special-rapporteur-independence-judges-and-lawyers-note [access: 12 June 2023].

the administration of justice, in particular. Corruption and organized crime are severely undermining the capacity of many States to promote systems of governance accountable to and compliant with human rights standards by diminishing the confidence of the citizens in the administration of justice. As it was stated by Kofi Annan "Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."[11]

Seeking impunity, corrupt networks have not hesitated to influence high officials of Governments. The judicial system is the key instrument that can protect societies from corruption. Judicial corruption, at any stage of a judicial process, presents a substantial impediment to an individual's right to a fair trial and severely undermines the public's confidence in the judiciary. In this context, individuals working for the judicial system are targets for criminal groups, which attempt to interfere with their independence and impartiality to obtain impunity or legitimacy for their criminal activities.

Evidence of corruption in the judiciaries of many countries has been consistently growing in recent decades. According to one of the latest Latin American surveys carried out on this matter by Transparency International,[12] only 27 % of the population trust in the judiciary.[13] This is very sensitive considering that corruption among professionals in the judicial system and the prosecution service can be particularly damaging to the rule of law in countries going through a process of institutional reform or consolidation.

The two types of corruption that most often affect independence of the judiciaries and their proper functioning in a democratic society are (i) political interference in judicial processes, and (ii) abuse of power and impunity connected to bribery.

Political influence over the courts is nowadays a key component and source of judicial corruption. Decision-making processes become compromised when judges face potential reprisals, such as losing their post

11 Kofi Annan, UN Secretary General, *Foreword of the United Nations Convention against Corruption*, New York, 2004.

12 Barómetro Global de la Corrupción América Latina y el Caribe, Transparency International 2019, https://files.transparencycdn.org/images/Global-Corruption-Barometer-Latin-America-and-the-Carribean-2019-ES.pdf [access: 12 June 2023].

13 Ibid., 11.

or being transferred to a remote area, if they hand down unpopular judgments.

Undue interference in the judiciary, however, may also be violent, especially in the contexts of authoritarian processes. In particular when it comes directly from members of organized criminal groups. Such interference is intended to secure specific outcomes, such as the dropping of a particular case or the acquittal of a specific individual. It is frequently accompanied by threats, intimidation and/or extortion.

Corruption of the judiciary extends from pretrial investigations and procedures through trial proceedings and settlements, to the enforcement of decisions by judicial or executive officers. Attempts are frequently made to corrupt judges in charge of criminal proceedings for a variety of objectives: avoid pretrial detention; prevent the commencement of a trial or obtain its delay or conclusion; or influence the outcome of a case, for instance by obtaining an acquittal or a lesser sentence, fine or term of imprisonment, by altering the location or type of prison involved — from maximum to minimum security — or by preventing a sentence from being applied.

Without prejudice to the crucial importance of preventive measures and policies, the key to the issue is to have an independent, energetic and courageous judicial and prosecutorial system. Without that, all will remain just in words, good intentions.

Judges and prosecutors are therefore the essential tools that society has to defend itself. They are crucial to the extent that they can act without undue interference, for which society should pay them more attention and support. The arbitrary and unjustified transfer of prosecutors or judges is, according to current international standards, undue interference with judicial independence and a violation of the principle of irremovability.

2. Colombia and Guatemala – case studies

Two examples from the practice of the UN Special Rapporteur on Judicial Independence should be mentioned here: Colombia and Guatemala.

In Colombia, the UN Special Rapporteur received an information in 2022, that prosecutor Monsalve had been investigating the city council of Bogotá for alleged serious acts of corruption, such as incompatibilities in public tenders and improper interest in the conclusion of contracts. Prosecutor Monsalve had charged a former Bogotá councillor and his two uncles with the crime of 'improper interest in public contracts'. The prosecutor

managed to identify the two uncles as the real owners of a company that obtained the concession to collect payments for Bogotá's huge public transport service (Transmilenio). However, the Attorney General decided to transfer the prosecutor to Putumayo, a highly dangerous area far removed from the investigation she had been conducting. The life of the prosecutor was put in danger.[14]

In Guatemala, the Government has been intimidating various officials, especially prosecutors, involved in the anti-corruption task force. More than 30 prosecutors and judges have had to flee Guatemala over the past two years to avoid harassment, attacks or arrest. In January 2023, the Government took an additional and astonishing step announcing that it was investigating the former and respected Attorney General Mrs Thelma Aldana and Iván Velásquez, the current Colombian defence minister. Aldana has been exiled since 2019 in the United States. Velásquez led CICIG (International Commission against Impunity in Guatemala), a United Nations investigating body against corruption created for Guatemala in 2006.[15]

Thelma Aldana has denounced the "criminalisation" of the fight against corruption in the Central American country and said that many women have been forced into exile due to reprisals.[16] The current Attorney General, Mrs Consuelo Porras, and the current head of the FECI ("Fiscalía Especial contra la Impunidad"; Prosecutor office against Impunity), Rafael Curruchiche (appointed by Porras) are the key actors in these processes against former investigators against corruption, which include Velásquez and Aldana. Porras[17] and Curruchiche are now barred from entering the United States.

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14 *Policía confirma plan para atentar contra Fiscal Angélica Monsalve,* Revista Semana, 5 April 2022, https://www.semana.com/nacion/articulo/policia-confirma-plan-para-atentar-contra-fiscal-angelica-monsalve/202215/ [access: 12 June 2023].

15 *Comisión Internacional contra la Impunidad en Guatemala* (CICIG) was a United Nations-backed body established in 2006 to support the Guatemalan government in its efforts to combat corruption, strengthen the rule of law, and promote justice in the country.

16 Europa Press. https://www.europapress.es/internacional/noticia-ex-fiscal-general-guatemala-thelma-aldana-denuncia-criminalizacion-lucha-contra-corrupcion-20221125172057.html.

17 In the case of Porras, the US Department of State designated Attorney General of Guatemala Maria Consuelo Porras Argueta de Porres ("Porras"), as ineligible for entry into the United States. According to the US Department of State "During her tenure, Porras repeatedly obstructed and undermined anticorruption investigations in Guatemala to protect her political allies and gain undue political favor. Porras's

3. UN Convention against Corruption

It is important to underline that Latin American countries have been enthusiastic in signing up to anti-corruption efforts. All of them are parties to the United Nations Convention against Corruption.[18] The Convention has a very clear operational objective, in that it assigns a central role to the justice system and international judicial cooperation so that it does not remain a dead letter. It is one of the most successful treaties in force, with 189 State parties.

For the Convention to have "teeth" and for it not to be merely decorative however, there is an obvious sine qua non-requirement: that there be an interaction between independent justice systems. Would a democratic country with an independent judiciary extradite an individual to a country where the judiciary has a noose around its neck from an authoritarian ruler? The conference of the States parties to the Convention has made a specific reference to the core UN instruments on judicial independence, has been included in the respective General Assembly resolution,[19] the Basic Principles on the Independence of the Judiciary of 1985[20] and the Guidelines on the Role of Prosecutors.[21]

In Article 11, paragraph 1 recognizes the crucial role played by the judiciary in combating corruption. The Convention also highlights the critical importance of international cooperation between judicial systems for that purpose. It, therefore, stipulates that the judiciary must not be corrupt, and in article 11, paragraph 1, each State party is called on to take measures to

pattern of obstruction includes reportedly ordering prosecutors in Guatemala's Public Ministry to ignore cases based on political considerations and firing prosecutors who investigate cases involving acts of corruption." Press Statement of Anthony Blinken of 16 May 2022, https://www.state.gov/designation-of-attorney-general-maria-consuelo-porras-argueta-de-porres-for-involvement-in-significant-corruption-and-consideration-of-additional-designations/ [access: 12 June 2023].

18 The United Nations Convention against Corruption is the only legally binding universal anti-corruption instrument, General Assembly resolution 58/4 of 31 October 2003.

19 Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation – General Assembly Resolution of 2 June 2021, A/RES/S-32/1.

20 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985.

21 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990.

strengthen the integrity and independence of the judiciary and to prevent opportunities for corruption among members of the judiciary.

One of the recommended measures is adopting a code of conduct for members of the judiciary. Article 11, paragraph 2, also recommends the elaboration and application of similar measures within the prosecution service in those State parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

4. Specific role of transitional justice in the context of corrupted judiciary

This problem—or challenge—has to do, obviously, not only with the situation that facilitates the development of immunity within anti-corruption systems, but also makes the transition to democratic processes much more difficult. Considering that in authoritarian regimes, several judges—especially at the upper level—tend to be part of the "group in power," they are a crucial component in blocking the transition to democracy. A corrupt judiciary creates robust structures of cooperation and networking. This places a challenge that transitional processes need to deal with, for instance, with vetting processes of corrupt and corrupted judges or Truth Commissions.

V. Justice and Democratic Transitions

1. General remarks on democratic transitions

Democratic transitions over the last decades have taken on various characteristics, modalities and outcomes. It is generally conceptually and historically impossible to determine standard "models" or processes that result in simple, schematic classifications. But while this is always a relevant issue, it is even more so in the current context of flourishing authoritarianism that will have to give way, in due course, to democratic transitions. This is a crucial issue with its complexities.

What is certain, in any case, is that certain constants have emerged from the historical development of these processes that have proved valuable and convenient for moving forward placing an independent justice as a crucial component and gradually constructing the concept of "transitional justice".

In this way, the component of "truth", in its different possible meanings, is central and, with it, that of reparation for the victims.[22]

For "transitions", in and of themselves, are far from being a univocal concept. There is no standard "format" of transition from one common thing to another. Just as there are transitions from dictatorships or authoritarianism to democratic systems, there are also transitions from internal—or international—armed conflicts to peacebuilding, just as there can be transitions from a context of collapse or disruption of the state and institutions, in general, to the reconstruction—or construction—of institutions.

Each of these processes has historically obeyed particular routes, and their contents have often been built made by walking the path, as the Spanish poet Antonio Machado would have said. Many of the 20th-century transitions have yet to yield a successful balance in light of today's prevailing legal concepts and instruments of the 21st century; for instance, in the area of justice. This could be the case of some transitions from war to peace after international or national conflicts, which could leave—in retrospect—the feeling that something may have been lacking in terms of justice, truth or reparation.[23]

However, historical truth shows that in real social and political processes, its content, meaning and outcome do not respond to a "laboratory" or cabinet design but is the result of a complex mixture of expectations, possibilities and the impact of the articulations between social and political actors and the corresponding correlations of forces.

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22 Diego García-Sayán, The State of Democracy in Latin America: a Decade of Mix-ups and Progress in: *A Decade of Change. Political, Economic, and Social Developments in Western Hemisphere Affairs* (Washington DC: Inter-American Dialogue 2011), 71–88; Diego García-Sayán, *Cambiando el Futuro* (Lima: Lapix Editores 2017).

23 Among many publications on this topic please refer to: Guillermo O'Donnell and Philippe C. Schmitter (eds), *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: Johns Hopkins University Press 2013); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton & Company 2011); Jeffrey K. Staton and Emily Hencken Ritter (eds), *Judicial Power and Strategic Communication in Mexico* (Cambridge: Cambridge University Press 2010) – this book focuses on Mexico's judiciary and analyzes how strategic communication between judges, politicians, and the public affects judicial decision-making during political transitions; Agnès Hurwitz and Reyko Huang (eds), *Civil War and the Rule of Law: Security, Development, Human Rights (*Boulder, CO: Lynne Riener Publishers 2008) – the book explores the interplay between the rule of law and transitional justice in societies transitioning from conflict or authoritarian rule. It delves into the challenges and opportunities for the judiciary in promoting accountability and reconciliation.

It is essential that responses are generated to implement adequate solutions that allow for progress towards democracy and reconciliation with an independent and effective justice, truth and reparations for the victims. Institutional formats and the type of challenges posed by the specific contents of transitional justice have particularities in each case.

The historical experiences of the last two decades make it possible to advance in constructing a definition of "transitional justice" in which the "truth" component is central. In this sense, it would be possible to work operationally the concept of transitional justice used in the United Nations, based on a report by the Secretary-General in 2004. In this report, transitional justice is defined as *"the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation. These may include judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof"*.[24]

In any case, this is far from being just a "turning the page" project without doing anything about the past or from being a mere "technical" process or confined to the legal sphere. Instead, it is a scenario in which the state and society are required to promote convergent processes that generate fertile ground for the three essential and interdependent ingredients of transitional justice—justice, truth and reparation—as the "package" of democratic reconstruction and reconciliation.

2. Role of truth commissions

In this context, the broad space of truth continues to have in truth commissions—since the first Truth and Reconciliation Commission of South Africa in 1996—a decisive and fundamental contributory element that interacts vigorously with that of justice.[25] Whether to fill gaps and slowness in the judicial machinery or to offer participatory spaces to society in which the truth of each individual can be narrated and known and reconciliation put on the agenda. And that—as happened, for example, in the South African

24 Report of the Secretary-General. The rule of law and transitional justice in conflict and post-conflict societies. S/2004/616, 27 August 2004, 6.

25 Miguel Giusti, Gustavo Gutierrez and Elizabeth Salmón (eds), *La Verdad nos Hace Libres* (Lima: Pontificia Universidad Católica del Perú 2015).

experience—it could be one of the spaces in which those responsible for atrocities admit them and give information about them (for example, the location of graves or clandestine burials), express repentance and ask for forgiveness from the victims.

In this sense, the core component of truth with the participation of victims in its construction is complementary—and not competitive—with criminal justice and the "judicial truth" derived from it. Among other reasons, because truth-telling *"[...] provides recognition in ways that [...] rarely disclose facts that were previously unknown, they still make an indispensable contribution to the official acknowledgement of facts"*, as argued by Thomas Nagel, quoted by the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Pablo de Greiff.[26]

As de Greiff pointed out,[27] truth commissions *"have proven capable of making significant contributions to transitional processes in the more than 40 countries that have instituted commissions since the 1980s."*[28] To achieve the ambitious goal of "social reconciliation", the institutions established must be *"reliable and truly embody the idea that each person is a rights-holder"*,[29] which, translated into a truth commission, requires, among other things, a good selection of commissioners and adequate staff and resources.[30] Of course, a crucial aspect to be resolved beforehand is the "national" or "international" character of the Commission.

One should underline the point by De Greiff on the relevance of highlighting and taking into account the "victims' perspective": *"Criminal prosecutions, particularly considering their scarcity, [...], can nevertheless be interpreted by victims as a justice measure, as something more than scapegoating, if other truth-seeking initiatives accompany them."*[31]

However, it should be borne in mind that truth-seeking and truth-telling need not be confined to truth commissions or similar entities. As an essential ingredient of judicial processes in the context of transitional justice

26 Pablo De Greiff, Theorizing Transitional Justice, in: Mellisa Williams, Rosemary Nagy and Jon Elster (eds), *Transitional Justice* (New York: New York University Press 2012), 43.

27 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Pablo de Greiff. A/HRC/24/42, 28 August 2013.

28 Ibid., 7.

29 Ibid., 15.

30 Ibid., 18.

31 De Greiff (n. 26), 37–38.

policies and goals, "judicial truth" can also be a significant outcome of such methods. And as such, it interacts with other truth-telling processes. Especially if one imagines or envisions judicial processes in which mass atrocities can be analysed in a broader context of truth-telling and acknowledgements of responsibility by perpetrators.

In its jurisprudence, the Inter-American Court of Human Rights (IACHR) has established, for instance, that the pursuit of truth is a fundamental aspect of justice and the protection of human rights. The Court considers truth-seeking as an essential component of its mandate to investigate human rights violations, establish responsibility, and provide reparations to victims. The IACHR's jurisprudence has acknowledged the importance of transitional justice processes, such as truth commissions, in addressing systemic human rights violations.

3. Peru's success story – transition from Fujimori regime to democracy

Two Latin American transitions may be of particular interest for analysis. One, in Peru, from the autocracy/dictatorship of Alberto Fujimori's regime (1990–2000) to democracy.[32] The other notable transition process, from war to peace in Colombia, followed the peace agreement concluded in 2016 between the government and the armed group Fuerzas Armadas Revolucionarias de Colombia (FARC).[33]

The case of Peru and its democratic transition in 2000 is an excellent example of a creative combination of three concurrent factors: (i) the active role of a society mobilised to end an authoritarian and corrupt regime, (ii) a reasonably articulated democratic opposition, and (iii) a simultaneous presence of the international community—particularly the Organisation of American States (OAS)—to facilitate mechanisms of political dialogue that made a peaceful transition viable.

The fundamental contextual component was that of active mobilisation in the streets, of a press struggling to regain its freedom, and of a society which had become the victim of a justice system subjugated to political power that validated corruption and serious human rights violations. The internal process occurred in an international context, in which the OAS was a relevant reference point and progressively assumed decisive importance in favour of the democratic transition.

32 García-Sayán (n. 22, *Cambiando el Futuro*).
33 De Greiff (n. 26), 38.

The OAS promoted the initiative to set up a High-Level Mission, chaired by the then Canadian Foreign Minister Lloyd Axworthy, from which emerged the so called "Dialogue Table" ("Mesa de Diálogo") between the government and the democratic opposition, which played a crucial role in the transition to democracy. The Mission set a 29-point agenda that included, in essence, the opposition's entire democratisation programme. Those points in the agenda included the cessation of intervention in the judicial system (terminating with the commissions or interventions by governmental appointees), the return of the seized television channels, the end of the regime's political police operations and the renovation of the subdued electoral system.

The OAS "Mesa de Diálogo" was attended by representatives of the government and the democratic opposition as well as, as observers, representatives of civil society, including churches, the National Human Rights Coordination organization[34] and representatives of business and labour unions. It became, for many purposes, a sort of "parallel government" with the legitimacy that the regime that had emerged from a fraudulent election lacked.

There, key steps were taken to advance the democratisation of the country. Among other aspects, fundamental criteria were discussed and agreed upon. They included renewing the Attorney General's office, given the incumbent's severe questioning, redefining the system for appointing judges, and overhauling a very biased electoral system. All these political agreements were then formalized or legally established by the Congress or the Government, depending on the nature of the matter.

When, amid this process, Fujimori fled the country at the end of 2000, and the transitional government was installed, important foundations were laid in the transition process for the institutional renewal that followed. After the collapse of the autocratic regime and the installation of the transitional government, in which I had the honour of accompanying President Paniagua and Javier Pérez de Cuellar, President of the Council of Ministers, as Minister of Justice, all along the Government for its eight months until it was replaced by a democratically elected President. During that short period of transition—Paniagua´s Government—it was not yet a time when the concept of "transitional justice" was routinely used. But that is what was being done. Unweaving the web left by corruption and authoritarianism

34 Coordinadora Nacional de Derechos Humanos – non-governmental organization from which several local human rights organizations coordinate their activities.

and, on the other hand, establishing an independent justice system and building a transparent public administration.

The results were unprecedented for Latin American standards in its results in the fight against corruption, dismantling by judicial means—with recently re-assumed independence—a network of organised crime that had taken over the running of the state. At the same time, independent judicial institutions were able to operate to investigate and, if necessary, punish the grave human rights violations committed during the 1990s. Major processes began against former President Alberto Fujimori and his intelligence officers. Fujimori was finally convicted to 25 years in prison.

Part of the wide range of decisions and actions taken during the transition government was creating and installing the Truth Commission in June 2001, after an intense process of citizen consultation. The method of preparing the report was broadly participatory. The presentation of the report in 2003 constituted in fact—without using those terms—a space for "transitional justice" in Peru, thus providing an essential experience for Latin America and the world.[35]

4. Colombia – transition from FARC

The other transition process to which it is crucial to refer here is the transition from war to peace in Colombia following the 2016 peace accords, as well as the design and implementation of a transitional justice system and a Truth Commission. The Colombian government and the FARC-EP invited the Secretary General of the United Nations, the Criminal Chamber of the Colombian Supreme Court, the International Center for Transitional Justice, the Permanent Committee of the State University System in Colombia and the president of the European Court of Justice and Human Rights to appoint the members of the Commission in charge of operating as a selection panel for the Special Jurisdiction for Peace (JEP) and the Truth Commission.[36]

This Commission was the body in charge of choosing the 72 magistrates—even at the supreme court level—and judges that now make up

35 *Comisión de la Verdad y Reconciliación Informe Final*, report was officially concluded on 27 August 2003 and was composed of nine volumes, https://www.cverdad.org.pe/ifinal/ [access: 12 June 2023].

36 Author of this chapter has been appointed by the UN Secretary-General as member of the selection commission.

the Special Jurisdiction for Peace (JEP) and the members of the Truth Commission. The latter completed its work and made its report public in July 2022. The JEP continues its activities and publishes permanently very valuable information about its activities presenting periodical the results being obtained.[37]

In the Colombian context, transitional justice is understood as a political and institutional process in which legal elements are inserted to balance the rights to peace and justice.[38] Five elements have been highlighted as components of transitional justice in operation in Colombia today.[39]

The first is an investigation so that those responsible for committing crimes, severe violations of human rights or international humanitarian law, are tried and, if necessary, punished by international standards of due process.[40] The second is the right to the truth, including *"both the right of the victims of gross violations of human rights and their families to know the facts and circumstances in which such violations occurred, and the right of society as a whole to know the reasons why such acts took place."*[41] The third element is integral reparation,[42] aimed at providing material and symbolic

37 Reports from activities are available at: https://www.jep.gov.co/Paginas/Informes-de-gestion.aspx [access: 12 June 2023].

38 Rodrigo Uprimny Yepes, María Paula Saffon Sanín, Catalina Botero Marino and Esteban Restrepo Saldarriaga (eds) *Justicia transicional sin transición? Truth, justice and reparation for Colombia,* (Bogota: Centro de Estudios de Derecho, Justicia y Sociedad 2006), 19, http://www.dejusticia.org/files/r2_actividades_recursos/fi_name_recurso.201.pdf [access: 12 June 2023].

39 Diego García-Sayán and Marcela Giraldo Muñoz, Reflexiones sobre los procesos de iusticia transicional, EAFIT Journal of International Law 7 (2016), 96–143, https://publicaciones.eafit.edu.co/index.php/ejil/article/view/4581 [access: 12 June 2023].

40 Guidance Note of the Secretary General: United Nations Approach to Transitional Justice, No. ST/SG(09)/A652, March 2010, 7, https://digitallibrary.un.org/record/682111 [access: 12 June 2023].

41 Rodrigo Uprimny Yepes and María Paula Saffon Sanín, Derecho a la verdad: alcances y límites de la verdad judicial, in: Rodrigo Uprimny Yepes et al, *Justicia transicional sin transición?* (Bogota: Dejusticia 2006), 143–144.

42 The concept of "integral reparation" derives from Article 63.1 of the American Convention on Human Rights ("ACHR" or "American Convention"). It encompasses the accreditation of material and non-material damages, and the granting of measures such as: investigation of the facts; restitution of rights, goods and liberties; physical, psychological or social rehabilitation; satisfaction through acts for the benefit of the victims, guarantees of non-repetition of the violations and compensatory damages for material and non-material injuries. Through this power, the IACtHR has ordered emblematic measures for many countries in the region. The jurisprudence of the IACtHR has referred extensively to the type of measures that make it possible to obtain full reparation, from its first judgment on reparations to its most recent

benefits to the victims.[43] The fourth is institutional reforms so that those institutions that are part of the conflict become others aimed at sustaining peace and the rule of law. The last element refers to national consultation processes aimed at designing transitional measures.

The vigorous functioning of the JEP stands out, as it adopted decisions on several critical issues for the performance of its role in the complex situation of Colombia. Among them one should indicate the decision to hold all members of the former FARC secretariat responsible in the ongoing process for more than 20,000 kidnappings and the inhumane treatment they suffered. Another important decision concerned the case of more than 140 "false positives"[44] committed in the Catatumbo region, that were attributed responsibility for these acts to several high-ranking military officers.

The progress made in the judicial process in the JEP includes what Uprimny rightly describes as *"... two of the most atrocious crimes of the armed conflict: the kidnappings committed by the FARC and the so-called "false positives", that is, the assassinations by members of the army of young people to present them as guerrillas killed in combat."*[45] In both processes, the alleged perpetrators have accepted their responsibility in the severe events under examination.

Through the judicial examination of cases such as these, in which those responsible tend to admit their responsibility, the JEP *"...reconstructs, as no previous judicial decision has done, the magnitude of these crimes, their impact on the victims and their families, the evidence of responsibility of those charged and the dynamics that fuelled these atrocities and turned them*

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jurisprudence. In this regard, see for example: IACtHR, *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs,* judgment of 21 July 1989, Series C No. 7, para. 26, I/A Court H.R., *Case of Rodríguez Vera et al (Disappeared from the Palace of Justice) v. Colombia. Preliminary Objections, Merits, Reparations and Costs*, judgment of 14 November 2014, Series C No. 287, para. 579.

43 Jorge F. Calderón Gamboa, *La reparación integral en la jurisprudencia de la Corte Interamericana de Derechos Humanos: estándares aplicables al nuevo paradigma mexicano* (Mexico: Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM Instituto de Investigaciones Jurídicas, Suprema Corte de Justicia de la Nación 2013), https://www.corteidh.or.cr/tablas/r33008.pdf [access: 12 June 2023].

44 Persons killed by military units were presented as FARC combatants but were innocent civilians not involved in guerrilla or violent activities.

45 Rodrigo Uprimny, 'JEP, kidnapping and false positives', El Espectador newspaper, 19 July 2021.

into systematic attacks against the population, thus qualifying them not only as war crimes but also as crimes against humanity."[46]

VI. Final Remarks

Unfortunately, the international context has paved the way for authoritarian currents exercising public power, broad organized crime networks and corruption, with their corresponding manifestations in the violation of judicial independence and the fundamental rights of the population. These trends are occurring worldwide and not only in Latin American countries.

Outstanding challenges for the independence of judicial systems should be connected to the 2030 Agenda, the broadest initiative agreed upon at the global level for the elimination of extreme poverty, the reduction of inequality and the protection of the planet. It entails an essential commitment to human rights, justice, accountability and transparency as prerequisites for ensuring an enabling environment in which people can live free, secure and prosperous lives. The independence, impartiality and integrity of the justice system are indispensable components of the rule of law and the goal of ensuring that justice is administered fairly. During transition processes they turn out to be, in most cases, the most relevant component to measure the speed and relevance of the political transition.

The different measures taken to address the challenges posed relating to the administration of justice, namely authoritarianism and corruption, can only be articulated by promoting the institutions and principles governing the rule of law. To overcome these challenges and threats, strong political and institutional awareness and decisions are indispensable.

In this regard, robust links should be reinforced between "soft law" instruments, such as the Basic Principles on the Independence of the Judiciary or the Bangalore Principles of Judicial Conduct and—the international treaty—United Nations Convention against Corruption. Thus, with the prevailing updated approach to the Basic Principles, they should be interpreted jointly with the Guidelines on the Role of Prosecutors, the Bangalore Principles and the Convention to fill any gaps that may exist in any of these instruments.

Controlling the judiciary and ending or limiting its independence is a notable characteristic of all authoritarian processes. This has been the

46 Ibid.

experience in Latin America and is the situation today in some countries of democratic Europe. For this reason, any steps taken by the political powers to limit this kind of authoritarianism deserve special attention and vigilance on the part of citizens and the international community. Conversely, the protection and defense of judicial independence is a crucial component in confronting authoritarianism and an issue that is always central to the agenda of democratic reconstruction. Moreover, Latin America countries' experience of transition from authoritarianism to democracy could serve as a good example for other countries facing similar challenges.