



Por la defensa de la independencia de la justicia en Colombia

Executive Summary

Judicial independence is a fundamental part of any democracy: It is a precondition for the separation of powers, a fundamental guarantee to impede the consolidation of absolute power, which endangers the rule of law. It is also essential for the judicial branch to be able to administer justice without any interference. It guarantees that no one is above the law – independent of how powerful they may be – while protecting fundamental rights and giving assurance to citizens that if they turn to the judicial system they will be able to have a fair trial in keeping with the rules and procedures established in a legal framework suitable for government under the rule of law, respectful of the fundamental rights of all persons.

The principle of judicial independence has been extensively developed in Colombian constitutional law, from the text of the Constitution and the case law to the international instruments that are part of what in Colombia is known as the *bloque de constitucionalidad* (the sphere of core constitutional principles), such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the International Convention for the Protection of All Persons from Enforced Disappearance (Article 11(3)), and Additional Protocol II to the Geneva Conventions on the protection of victims of non-international armed conflicts (Article 6(2)), which establish that every person shall have the right to an effective remedy before competent domestic courts that afford protection from any act in violation of fundamental rights, in addition to the right to be heard by an independent and impartial court in conditions of equality, and open to the public.



While judicial independence is intended to safeguard the judicial branch so it can operate in the absence of external pressures, that is not the sole purpose. In Colombia judicial independence is not only a democratic value and a principle that guides how the State should be organized to realize the separation of powers, guarantee the integrity of the judicial function, and protect society from despotism and authoritarianism, concentration of power, and arbitrary acts. It can also be understood as a substantive right that protects citizens and enables them to enforce constitutional guarantees.

It is essential that every judge, and in general every judicial officer, act and be able to act independently, in keeping with their statutory and constitutional obligations, in observance of the international standards that inform all judicial activity and entail very clear obligations for states.

Nonetheless, the guarantee of judicial independence and its attainment is not determined exclusively by it being enshrined in the law and by its extensive development internationally and nationally. The Campaign is committed to engaging in a sustained study of the administration of justice, denouncing the attacks it has suffered and pursuing a line of action that makes it possible to consolidate a form of justice that can support and advance the genuine attainment of democracy and the rule of law.

Based on the evidence and analysis set forth in this report on the four most important problems facing judicial independence in Colombia at this time – (1) underfunding plus initiatives to limit judicial autonomy, (2) harassment and persecution of judicial officers, (3) failure to comply with judicial decisions that place checks on the presidential power, and (4) politicization of appointments and elections of judicial officers, favoring clientelism over meritocracy – it is worrisome how in Colombia, beyond the institutional deficits that have accumulated historically, the authoritarian political project being pushed by President Iván Duque has picked up steam. This project and this president are contemptuous of judicial independence; seek the political cooptation of judicial bodies – and the oversight agencies – at their highest levels; and act in contempt of, are disrespectful of, and seek to eliminate judicial bodies that regulate his power or may stand in the way of his political ambitions.

The action of the justice system has also been blocked by procedural changes and different ways of evading justice. For example, the Duque administration nominated and promoted the election of Juan Carlos Granados (former governor of Boyacá and former Comptroller of Bogotá), who is facing an investigation in the Supreme Court of Justice related to the massive Odebrecht bribery scandal, to be a member of the Commission on Judicial Discipline. Sectors of public opinion interpreted the move as a means of preventing justice from being done since his case would now be taken up not by the Supreme Court but by the Committee on Accusations of the House of Representatives. Plus, as a way of eluding justice, the President has decided, by



decree, to vest jurisdiction over *tutela* motions against the highest-level actions of the administration in the Council of State, in a context in which the Duque administration seeks to elude constitutional checks and balances, among other things to resume aerial spraying with glyphosate, which has been halted by judges in other cases to protect the fundamental rights of communities that have suffered its negative consequences, in particular for their rights to health and well-being.

The Duque administration has displayed a pattern of not abiding by judicial decisions that limit its power and publicly attacking the legitimacy of such decisions, thus undermining a key pillar of democracy, namely the separation of powers and judicial independence. The list includes the failure to comply with the judgment in the *tutela* action to guarantee the rights of older adults in the midst of the pandemic; this judgment came in response to a motion filed by the group called “rebellion of the gray-hairs” (“*rebelión de las canas*”). The administration also repudiated in principle the judgment that required that persons wanting to enter the country have a negative CPR test for COVID-19; and refused to comply fully with the Supreme Court judgment on the fundamental right to peaceful protest, among others.

The way in which these judgments are greeted with contempt is further cause for concern. In all of the above-cited cases the President of the Republic and several cabinet ministers publicly attacked the judgments, asserting that they would not meet with compliance but rather that they were completely absurd, and that the judges who had handed them down were endangering democracy. The President and these cabinet ministers have waged an intense media campaign aimed at instilling the same discourse in the citizenry and in important sectors that create public opinion nationally.

To this already serious problem is added the bold effort by President Iván Duque and the government coalition to introduce reforms that impair the operation of vital institutions in the administration of justice. The most serious and most visible is the Special Jurisdiction for Peace (known by the Spanish acronym JEP), as on numerous occasions and by various channels the President has attempted to thwart the work of the JEP – if not do away with it entirely. The JEP was established as part of the Final Peace Agreement; it is absolutely essential to secure the rights to truth, justice, reparation, and guarantees of non-repetition for millions of victims of the armed conflict. In addition to the objections to the legislation (in the form of what is known as a *ley estatutaria*) that defines a considerable part of the procedures within the JEP, the members of the Colombian Congress who support the Duque administration have introduced at least five bills ostensibly aimed at thwarting the purpose and spirit of the JEP. With the ratification of the Final Peace Agreement in late 2016 the JEP became an integral part of the judicial branch in Colombia.

During this moment of historical transition in Colombia, with the possibility of either making a break with the tradition of war and exclusion or continuing to feed



the rise of new armed conflicts, the judicial system may define the outcome. In large measure the armed conflict in Colombia could be explained as a result of a judicial system that does its work whilst turning its back on social needs, and moving slowly as the economic resources of the parties to litigation dwindle, along with their faith in a possible solution.

All this occurs in a context in which the judicial branch has been reduced to its bare bones and attacked, putting at risk its most basic survival. The public servants who work in the judicial branch in Colombia have been victims of multiple forms of persecution and intimidation aimed at impairing and illegally impacting their procedures and decisions; such attacks result from a variety of factors, among them those associated with the armed conflict and criminal activity carried out from the State. This phenomenon is of such a magnitude that the organization Fondo de Solidaridad con los Jueces (Fasol: Fund for Solidarity with Judges) has documented 1,340 public servants who work in the judiciary who have been victims of violent acts from 1989 to 2019. From January 2019 to April 2021 there were five homicides, 19 persons threatened, 11 subject to attacks, three persons prosecuted, two displaced, and one person was a victim of rape. These cases were documented and addressed by Fasol in the course of its work; they suggest an absolute lack of guarantees by the State institutions.

The refusal to go forward with the full implementation of the Final Peace Agreement and to foster a diversified presence of the State in all the counties or *municipios* of Colombia has made it possible for old and new actors in the armed conflict to clearly place the administration of justice – and those who work in the judiciary – in jeopardy across vast stretches of Colombia. Using pamphlets, threats, and various forms of harassment, these armed actors obstruct the free work of the justice system on a daily basis and force judicial personnel to limit their movements to the county seats.

The Campaign is especially concerned by the threats and coercion directed against judicial personnel involved in land restitution proceedings in areas openly controlled by groups associated with the paramilitaries. Also of concern are the very scant protection mechanisms available to judicial personnel who must make decisions that affect powerful political and economic actors. One example is the case of judge Andrés Rodríguez, who denounced and recorded former Senator Eduardo Pulgar while he was offering the judge a bribe, after which the judge had no option other than to go into exile, given the imminent risk to his life. A similar case is the effort to weaken protection for former judge Iván Velásquez, who is playing a key role in the investigations into the *parapolítica* (a political scandal involving many elected officials who represented the interests of paramilitary groups, especially in the 2000s) as well as the smear campaigns directed against those members of the Supreme Court who decided to place former President Uribe under house arrest, endangering the life, integrity, and privacy not only of the judges, but of their family



members as well. Such was the case in December 2020, when former justice of the Chamber of Criminal Cassation of the Supreme Court, José Luis Barceló Camacho, was called to appear by the Committee on Investigation and Accusation of the lower chamber of the National Congress to make a statement on his actions in the matter against former Senator Álvaro Uribe for alleged witness tampering. To this is added the action of Prosecutor Delegate Gabriel Jaimes, designated directly by Prosecutor General Barbosa, who has undertaken to defend former Senator Uribe in a case in which it is his job to investigate him for the crime he allegedly committed.

President Iván Duque has not seen fit to denounce any of these acts; he even made a speech rejecting the actions of the justice system in that case, to which were added many attacks by members of his own political party and former officials of his administration who now hold other positions.

The attacks on judges and prosecutors are attacks on judicial independence, for those who administer justice must be able to do their job free from any pressure or interference, and with full guarantees to make decisions autonomously. The example of these upright public servants who have faced off with criminal powers by having recourse to the weapons of justice should encourage us, as citizens, to continue defending the human right to judicial independence, and the democratic value embodied in judicial independence. In this respect, the Campaign considers it to be fundamental that each branch of government, institution, political and economic actor, and communications outlet cease all threats, meddling, attacks, and discrediting of the activity of judicial personnel.

In addition to these problems, the current institutional design promotes the meddling of political actors in the judiciary and in turn the direct involvement of the judiciary with those actors. The electoral powers of the courts may well contribute more to such a damaging entanglement than any other single factor. As a result, some harmful elements of the Colombian political system such as corruption and clientelism have been carried over to the judiciary, increasing citizen distrust in the courts and worsening the enormous problem of impunity.

One expression of this reality has been the so-called “cartel of the toga,” a scandal in which judges who are members of the Supreme Court, working with high-level members of the Office of the Prosecutor General, engaged in influence-peddling and asked for large sums of money from politicians and powerful persons in exchange for acquittals and benevolent treatment in the investigations in which those same persons were the targets. Members of the Constitutional Court and the Council of State have also been implicated in serious cases; all these incidents affect the majesty of the justice system and the necessary legitimacy and probity that it must enjoy lest citizens cast a veil of doubt over its acts, especially its decisions.

The Duque administration has done absolutely nothing to help put an end to this problem; to the contrary, it has taken several actions that reproduce this reality,



including by promoting appointments of persons with clear conflicts of interest – and in some cases, even with criminal proceedings against them for corruption – to key positions in the judicial branch and the oversight agencies.

This entire situation causes deepening citizen distrust of the institutions in general, and in particular of the judicial branch, thus strengthening the construction of an authoritarian political culture that justifies violations of human rights and the rule of law not only by the executive branch, but also by the different armed groups that control different parts of the national territory.

The Campaign clearly understands that attacks on judicial independence are on the rise in Colombia. In addition to the figures compiled in this report, another telling episode occurred last March 15, 2021, in the hearing in the case of journalist Jineth Bedoya Lima before the Inter-American Court of Human Rights. There, in an unprecedented action, the representatives of the State withdrew from the hearing, calling into question the impartiality of the Court. In response, the Inter-American Court answered that “the State decided *motu proprio* to abandon the hearing on the first day it was in session, after the statement by the alleged victim, in an act without precedent in the history of this Court; lacking, as explained previously, any justification, and in an absolutely disproportionate fashion, all of which has also entailed the revictimization of Ms. Bedoya Lima.”¹

With its attacks the Duque administration has explicitly aggravated the situation of the judicial system and, thereby, the system for protecting citizens’ rights. In a context marked by violence, human rights violations, and the denial of these occurrences it is evident that various sectors will be ready to maintain and expand denialist positions and prolonged periods of violence, mainly through impunity and rupture of the social fabric.

The judicial branch has been a mainstay of democracy; it has defended the Constitution and the rule of law in the face of efforts to destroy or control them. In the view of the Campaign, the various branches of government and especially those who preside over them should fully engage in a commitment to respect judicial independence and the rule of law. Doing so requires, at a minimum, fully abiding by judicial decisions; censuring those who attack the judiciary, its personnel, and its judgments; and full protection for the judicial function. In the Campaign’s view those who preside over the various branches of government should lead and promote a national political pact for the defense of judicial independence, democracy, and the rule of law, appealing to all economic and political actors, media outlets, and citizens to cease and desist from attacks on the judicial branch, its judgments, and its personnel.

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1- Resolution of the Inter-American Court of Human Rights, March 17, 2021, Case of Bedoya Lima and one other v. Colombia.



With that, the Office of the Inspector General of the Nation (Procuraduría General de la Nación) should put forward a set of strategies and actions for promoting and ensuring full respect for judicial independence by all public servants, no matter their rank. It is urgent that the Office of the Inspector General issue a specific circular on the subject and that it set in motion disciplinary proceedings when they are called for. The Office of the Human Rights Ombudsperson (Defensoría del Pueblo), in turn, with its moral standing, and in light of its responsibility for promoting human rights, should make a categorical pronouncement on judicial independence, democracy, and the rule of law; and it should prepare a specific and detailed report that provides a complete account of the attacks that have been directed against the judicial branch, its personnel, and its rulings with the respective recommendations.

It is the view of the Campaign that the Colombian Government cannot continue repudiating Colombia's multiple commitments to judicial independence, commitments it has entered into pursuant to human rights treaties ratified by Colombia in both the universal system of human rights and the inter-American human rights system; in addition to what is mandated by the Colombian Constitution. The Colombian State must guarantee that international standards on judicial independence are met and incorporated into the domestic legal system, thus imposing specific binding obligations on the various branches of government, and the political and economic institutions and actors; such obligations cannot be repudiated under any circumstance and compliance with them must be subject to adequate oversight.

These obligations require that measures be taken, that mechanisms be put in place, and that the proposed reforms to the administration of justice truly be in keeping with international standards and constitutional principles. Such measures should contribute to overcoming the barriers and interests that have stood in the way, in practice, of the right to the administration of justice and judicial guarantees, as well as structural shortcomings.

We recognize a number of areas in which the judicial branch is precarious; yet its autonomy and budgetary sufficiency are the basic minimum for guaranteeing the best possible operation of the justice system. Today's gains in justice essentially depend on implementing cutting-edge technologies in the operation of the judicial branch; otherwise it will not be possible to improve efficacy and effectiveness in the protection of rights. Another structural shortcoming is the failure to adopt a clear gender perspective or a provision respecting and ensuring the autonomy of ethnically differentiated peoples. The ethical commitment of judicial personnel is essential for achieving this aim, along with having independent internal oversight and a judicial career service that extends to the high courts and the position of Prosecutor General of the Nation.

The military and police forces, as key institutions for the rule of law, insofar as they have a legitimate monopoly on the use of force, must refrain from participating



in any kind of harassment, meddling, or attack on judicial independence. Illegal practices – such as following persons, wiretapping them, and deploying individual or collective smear campaigns against members of the judicial branch by members of the armed forces or National Police – have a serious detrimental impact on judicial independence and constitute human rights violations. It is urgent that these practices cease in Colombia.

The Campaign invites the political parties and social movements to promote a national political pact that guarantees respect for justice, understood as guaranteeing the full operation of the judicial system and especially the high courts; armoring the transitional justice system with the aim of implementing the Final Peace Agreement; and complying as required by law with the judgments, recommendations, and/or modifications of the legislative or executive initiatives that are undertaken. In particular, the political parties and social movements should commit to furthering the demands and proposals of civil society regarding judicial independence, as key matters to be taken up by the nation, the Congress, and the Executive, for the organization and operation of the judicial system must be brought into line with the relevant international standards with the aim of strengthening the rule of law.

The social movements and the widest array of political sectors should be able to increase the political oversight of incidents and actions that tend to undercut the independence and autonomy of the judiciary. Doing so will have direct and indirect implications for the interests and agendas promoted by the political sectors, but also by the national government. Such political checks and balances should help guarantee the strategic and constitutional interests of the State.

At the end of the day justice requires a fundamental political change: the citizens and public servants must appropriate for themselves the defense of the judicial branch and must become citizen monitors of its sound operation. Achieving this requires planning a pedagogical and media strategy for the short, medium, and long term capable of building a collective consciousness of institutional recognition and empowerment.

With the support of:



INDEPENDENCIA DE LA JUSTICIA

