IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 1:17-cv-01315-GAM

MÁXIMA ACUÑA-ATALAYA, et. al.

Plaintiffs

v.

NEWMONT MINING CORPORATION, et. al.

Defendants

_____/

EXPERT DECLARATION OF
JAN-MICHAEL SIMON AND CÉSAR BAZÁN SEMINARIO IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ON THE GROUNDS OF *FORUM NON CONVENIENS*

Freiburg im Breisgau, June 21, 2019

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I. Experience and credentials

1. Jan-Michael Simon

(1) I have more than 20 years of progressively responsible experience in addressing human rights issues related to Grand corruption, organized crime, criminal justice, transitional justice, public security, peacebuilding and the rule of law. I have worked in academia, for international organizations, and with governments and civil society partners. My different positions entailed carrying out research, investigations and evaluations, delivering lessons learned, providing strategic planning, policy and expert advice, technical assistance, as well as drafting and publishing reports and academic articles. I graduated as a lawyer at the Rheinische Friedrich-Wilhelms-University Bonn in Germany (German State examination in law, J.D. Equivalent).

(2) I have participated in several international missions against human rights violations, corruption and organized crime in the Latin American region:

- Having been an International Investigator for an independent, United Nations-affiliated truth commission on violations of international human rights and humanitarian law in Guatemala (Commission for Historical Clarification, “CEH” by its Spanish initials), where I interviewed victims and witnesses and established patterns of violations, I contributed to findings on acts of genocide, crimes against humanity and sexual violence against indigenous women. This was instrumental for later national court convictions of those bearing the highest responsibility for the violations.

- As Senior Legal Officer in the UN-affiliated International Commission Against Impunity in Guatemala ("CICIG", by its Spanish initials), I contributed to strategic justice sector reforms and in narrowing impunity gaps, including through applying international human rights and anti-corruption instruments. I provided strategic advice to the Mission's leadership on its plan of action and organization, also based on experiences with UN investigation commissions (e.g. Lebanon). This work contributed to dismantling several criminal networks responsible for human rights abuses and violations, including organized crime and Grand corruption.
- In light of this experience, the General Secretariat of the Organization of American States (OAS) requested that I participate in the negotiations to establish a similar mission in Honduras, in the context of civil unrest triggered by corruption. Later, as Special Advisor to the Mission to Support the Fight against Corruption and Impunity in Honduras ("MACCIH" by its Spanish initials) I contributed to its setup and actions against corruption networks. This included the establishment of a vetted unit for joint national-international investigations, a specialized jurisdiction for corruption, and risk-assessment, protection and safety of witnesses.

(3) I have worked in different countries providing technical assistance to strengthen justice sectors, including:

- In Honduras –in a post-coup d'état context– I worked with the Office of the United Nations High Commissioner for Human Rights (OHCHR) to bolster capacities of the Special Prosecutor's Office for Human Rights to strategically prosecute cases of human rights violations.

- In Guatemala, I contributed, as team leader, to the design of a European Union support program (22m euros) to strengthen the security and justice sectors of the country. The program was based on a broad spectrum of human rights issues related to the rule of law, criminal justice and public security.
- In Peru, I advised the Ministry of Justice and Human Rights on reparation claims, having provided a conceptual framework on human rights violations suffered by victims of Grand corruption in the "Odebrecht" case, challenging the notion of Grand corruption as a victimless crime.
- In Peru, I advised and provided support to several State agencies to the implementation of the criminal procedure reform, with an emphasis on the fight against corruption and organized crime. This included the analysis of its progress, the formulation of recommendations and the design of performance indicators, based on human rights standards on access to justice.
- In Ecuador, I provided advice to the Ministry of Culture and Heritage, drafting a legislative proposal on crimes against "nature or *Pacha Mama*" (Mother Earth in Quechua) including an explanatory statement, which was introduced into the Justice Commission of the National Congress of Ecuador for the legislative debate on the Comprehensive Organic Criminal Code.
- In Bolivia, I provided advice to the Vice-Ministry of Justice and Fundamental Rights, drafting the legislative proposal to reform the General Part of Bolivian Criminal Law, including draft legislation on indigenous peasant jurisdiction and the cultural defense

objection, environmental criminal law and on international criminal law, including explanatory statements.

(4) Throughout my career, I have worked closely with civil society. I have collaborated pro bono on protocols and legal opinions on human rights and anti-terrorism policies, social protest, and human rights defenders in Brazil and regionally. Recently, I joined an independent panel set up by the Due Process of Law Foundation (DPLF), the Center for Justice and International Law (CEJIL) and the Washington Office on Latin America (WOLA) for the selection of magistrates of the constitutional chamber of the Supreme Court of El Salvador.

(5) During my long-standing academic experience in the Max Planck Institute for Foreign and International Criminal Law, as Head of the Latin American Section, I have been able to produce sound solutions to complex human rights problems and to transfer them from academia to the field and other fora. These included contributions to:

- the UN International Criminal Tribunal for the former Yugoslavia (ICTY) (expert opinion) on criminal liability within chains of command in the "Prosecutor vs. Brdjanin" case (*Brdjanin*'s conviction as principal perpetrator was upheld on appeal);
- the Inter-American Court of Human Rights (IACtHR) (expert opinion) on State obligations to investigate chains of command for the violation of human rights, and prosecute and punish the perpetrators in the "Favela Nova Brasília vs. Brazil" case (Brazil was held responsible for violating rights to judicial protection and judicial guarantees);

- the Inter-American Court of Human Rights (amicus curiae brief) on clemency and State obligations to investigate, prosecute and punish human rights violations in the "Barrios Altos and La Cantuta vs. Peru" case (the clemency was later overturned);
- the Committee of Hemispheric Security of the Permanent Council of the OAS (expert brief) on the challenges faced by regional plans of action against transnational organized crime (this contributed to the creation of the Department against Transnational Organized Crime within the OAS General Secretariat).

(6) In Peru, I am an honorary professor at the law faculty of Universidad Nacional/Huánuco, visiting professor at the law faculty of Universidad Católica de Santa María/Arequipa and honorary member of the Bar Association of Ica. I have been awarded honorary doctoral degrees from Universidad San Pedro/Chimbote, Universidad Andina/Juliaca, and Universidad Particular de Chiclayo/Chiclayo.

(7) I am a member of the editorial board of five law journals in Chile, Brazil and Costa Rica. While much of my work has been in the Americas, I have been able to convey lessons learned to the Middle East and Sub-Saharan Africa (e.g. on restorative justice and conflict resolution).

2. César Bazán Seminario

(8) I am an academic researcher. Currently, I am writing my doctoral thesis in the Sociological Institute of the Albert Ludwig University in Freiburg, and I am an ALMA Fellow of Arnold Bergstraesser Institut. Previously, I did my Master's in Latin American Studies in

the Latin American Studies Institute of the Free University of Berlin, and I graduated as an attorney at law from the Pontifical Catholic University of Peru.

(9) Between 2012 and 2014 I was an advisor to the Professors Commission to foster debate on reform to the justice system in Peru, Legal Faculty of the Pontifical Catholic University of Peru (PUCP). As part of this Commission, we drafted three documents that were debated at public events of the PUCP. The documents were the following: "Selection, appointment, evaluation, ratification and destitution of judges and public prosecutors by the National Magistrate Council. Brief balance and some question" (2014), "The Supreme Court of Justice: role and independence" (2014) and, "Educating lawyers, justice, and corruption of judges and public prosecutors. Analysis of the national-urban survey of Ipsos, headed up by the Legal Faculty of the PUCP" (2014).

(10) In 2008, I was a part-time professor for the General Theory of Processes course at the University of San Martín de Porres, and between 2015 and 2016, I was a part-time professor for the Law course in the Pontifical Catholic University of Peru. Additionally, I have given courses to judges of the superior courts of San Martín and Cusco, police officers with the Lima Regional Police Department, social leaders of the regional government of Puno, the provincial municipality of Morropón, Piura and the Lima Regional Police Department, and interpreters in indigenous languages with the Ministry of Culture, among others.

(11) During two periods, from 2003 through 2009, and from 2011 through 2016, I worked in the NGO Instituto de Defensa Legal (IDL) in Peru. Throughout these years, I was part of the IDL-Living Justice Area, regarding justice reform, for Indigenous Nations Rights, and I

was the head of the Citizen Security area. Additionally, between 2012 and 2016, I was a member of the Board of Directors of the IDL. As part of the IDL, I have carried out many different actions in the country and abroad, promoting judicial reform, police reform, and fostering greater protection for the rights of indigenous nations in Peru.

(12) In 2012, I was a consultant for the Peruvian feminist NGO, DEMUS, and I drafted the document, "Proposal for the incorporation of a bonus for education regarding questions of gender in procedures to select and promote judges and public prosecutors".

(13) I have written books and articles, given conferences and training to public academic and non-academic bodies, and interviews to the media regarding the Peruvian justice sector. Among the books, the following can be mentioned: "The Silent Restructuration. The Work of the National Council of the Magistrate in Selecting and Appointing Magistrates" (2004), "Separating the Straw from the Wheat? Destitution of Judges by the National Council of the Magistrate between 2003 and 2007" (2008), "Plural Rule of Law. Bases for Redefining the Concept of Rule of Law regarding Legal Pluralism" (2012), and "How are Police Trained? Human Rights and Community Policing (2018); as well as articles, such as: "The Peruvian Justice System Eight Years from the Final Report of the Truth and Reconciliation Commission" (2014), among others.

(14) Due to my work, I have received scholarships and acknowledgements. As of 2016, and through the current date, I have received a scholarship for doctorate studies granted by Brot für die Welt, a Wissenschaftliche Gesellschaft scholarship from the University of Freiburg to give a presentation at an academic event in Krakow in April 2019, a DAAD scholarship to give a presentation in Buenos Aires in November 2018, the State Department

scholarship of the United States of America for the International Visitor Leadership Program regarding Law Enforcement and Community Policing between July and August 2015, and a Katholischer Akademischer Ausländer Dienst Master's scholarship between 2009 and 2011. I received an honorary citizen recognition from the city of Pensacola, Florida, in August 2015, the official thanks and recognition of the Provincial Municipality of Cangallo, Ayacucho, in May 2014, and I was a returning expert under the Centre for International Migration and Development program of the GIZ of Germany, among other acknowledgements.

II. Overview

(15) This declaration sets out a framework which could be applied to measure the time horizon required, hypothetically, in case of reforms addressing systemic judicial corruption in a country (part III). This framework is applied to the concrete case of Peru in part IV of this declaration.

(16) Based on a definition of judicial corruption, this declaration elaborates what the impact of judicial corruption on human rights is, and what are the determining factors and general characteristics of the former. It then sets out the specific features of systemic judicial corruption, establishing, for analytical purposes, a typology of the phenomenon. The declaration concludes that the time frame required for genuine reforms in Latin American countries aimed at overcoming systemic judicial corruption is commensurate to the time needed to reform the justice sector in its entirety. This is, without any doubt, a long-term

endeavor due to the fact that the determining factors of systemic judicial corruption are similar to those that determine effective reforms of the overall justice sector of a country.

(17) This declaration, however, does not suggest that most of the Latin American countries suffer from systemic judicial corruption. This is beyond the scope of this study. Moreover, it does not indicate, generally, that in cases where reforms of the justice sector have not achieved their aims or are not fully effective, systemic judicial corruption must exist or vice versa.

(18) In contexts with systemic judicial corruption, vulnerable individuals and groups with limited access to economic and political resources are disproportionately affected in their right to access to justice, amongst other rights. This applies especially to indigenous peoples. Their vulnerability is especially serious in the case of indigenous women, particularly in the context of extractive industries that operate in indigenous lands or in the surrounding areas. Their rights will continue to be affected as long as such dynamics persist and no effective access to justice can be guaranteed due to the existence of systemic judicial corruption.

(19) Part IV applies this framework to Peru, including the current judicial corruption crisis and attempts at judicial reform. The declaration concludes that the current crisis reflects a problem of systemic judicial corruption, with components of Grand corruption and elements of inclusive-exclusive corruption. It explains that despite different attempts for judicial reform over the course of various decades, some of which were more ambitious than current attempts, the problem of judicial corruption in Peru has not been resolved. The declaration evaluates recent measures proposed by the government, and concludes that

they neither have the necessary force nor consistency to be effective because they fail to target key stakeholders and address the critical components of judicial corruption in Peru. Additionally, the reform attempts face parliamentary boycotts, including from parliamentary groups whose leaders are being investigated for belonging to corruption networks, generating uncertainty and further calling their efficacy into doubt. The declaration concludes that achieving real and sustainable change in the justice sector in Peru is without a doubt a long-term task, especially in case where the asymmetry of power among the parties is evident.

(20) Part III of the declaration was elaborated by Jan-Michael Simon and part IV of the declaration was prepared by César Bazán Seminario. For the purpose of the present, both experts take ownership of the declaration in its integrity.

III. Time horizon for a reform that seeks to overcome systemic judicial corruption

(21) While it is generally considered that the administration of justice sector[1] (hereinafter: justice sector) is responsible for responding to corruption, the same sector can also be a source of corruption. This case of corruption, which we define as "judicial corruption", is

[1] For the purposes hereof, we use the term "administration of justice" in a broader sense than the public authority to adjudicate only ("*ius dicere*"). We include in the term the public authority for *all* kinds of decisions relating to the provision, management and oversight of justice.

not a specific problem of Latin America. No country in the world is immune to judicial corruption,[2] and this is not a new phenomenon, as it has existed since the old days.[3]

(22) The case of judicial corruption is a serious case of corruption. Judicial corruption makes the justice sector not only not comply with its role to respond to corruption, but additionally makes the justice sector become a source of corruption.[4] This is particularly serious when the source of judicial corruption is the judges. Judicial corruption involving this type of public officials represents, in a certain sense, the archetype of corruption, as the judge is considered to be *the* model of administrative authority that must observe strict neutrality when making decisions based on the public trust bestowed upon its public function.[5]

(23) The case of judicial corruption is even more serious when it is systemic – in particular, when it is part of a "*pacto de impunidad*" ("impunity pact"), that is, corruption beyond the justice sector, involving other branches of the State. It is especially in this case that the time horizon for generating changes in the justice sector to overcome judicial corruption blends in with perpetual agendas of fighting corruption, fostered by endless sequences of scandals arising from a social dynamic of systemic corruption in the State.

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[2] T. SØREIDE (2016), *Corruption and criminal justice. Bridging economic and legal perspectives*, Edward Elgar Publishing, Cheltenham & Northampton-MA, pg. 113.
[3] This shows the fact that the corruption of judges has taken place since the old days in criminal law; see T. ZIMMERMANN (2018), *Das Unrecht der Korruption. Eine strafrechtliche Theorie*, Nomos, Baden-Baden, pg. 537.
[4] DPLF (2007), *Controles y descontroles de la corrupción judicial. Evaluación de la corrupción judicial y de los mecanismos para combatirla en Centroamérica y Panamá*, Due Process of Law Foundation (DPLF), Washington DC, pg. 28.
[5] T. ZIMMERMANN (2018), *op. cit. supra* n. 3, Nomos, Baden-Baden, pg. 555. Legally, the State administration in general must adhere to the principle of neutrality.

(24) Based on the particular severity of systemic judicial corruption, we develop (1.) a general definition of the concept of judicial corruption; building on this fundamental concept, we explain (2.) the general impact of judicial corruption on human rights, (3.) the determining factors of its existence, (4.) the general characteristics of judicial corruption and the specific features of systemic judicial corruption, concluding with an estimate of (5.) the time horizon for a reform that would seek to overcome systemic judicial corruption.

1. Definition of judicial corruption

(25) There is no conceptual consensus regarding what "corruption"[6] is, and there is no definition of "corruption" or "judicial corruption" in legal instruments adopted on an international level. Nevertheless, research into the matter, as well as observations by international experts, coincide on three basic elements that constitute an act of judicial corruption:

- harms the principle of judicial impartiality (*i.*);
- is performed for private gain (*ii.*);
- takes place under the framework of a mutually beneficial exchange between (at least) two parties, one being a justice sector official (or equivalent) (*iii.*).

(26) For the purposes of this report, we understand judicial corruption as an exchange that harms the principle of judicial impartiality for private gain between (at least) two parties, one being a justice sector official (or equivalent).

[6] J.-M. SIMON (2015), *El caso de Corrupción Política como recurso normativo de poder estratégico frente a la autoridad política – Corruption and political authority: the two faces of the term "political corruption"*, Colección Derecho Penal y Filosofía del Estado, Ara Editores, Lima, pg. 32. https://pure.mpg.de/rest/items/item_2499224_7/component/file_3039892/content (6/21/2019).

i. Harm to the principle of judicial impartiality

(27) Judicial corruption is a form of harming the principle of judicial impartiality.[7] From the perspective of a reasonable observer, the latter is understood as the impartiality regarding a matter and/or the parties of the process,[8] in the sense of fair and balanced treatment,[9] not only regarding a judicial decision, but also the process through which this decision is made.[10]

(28) In addition to the principle of judicial impartiality, the principle of judicial independence is frequently mentioned as a target of judicial corruption.[11] Although the two principles are closely related[12] –also in judicial corruption matters in the region of Latin America[13]– for the purposes of this report, we do not incorporate infringement upon the principle of judicial independence as one of the elements of our understanding of judicial corruption.

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[7] CIJL (2000), *Policy framework for preventing and eliminating corruption and ensuring the impartiality of the judicial system*, CIJL Yearbook 9, Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (CIJL), Geneva, pg. 127–134, 129. See also IBA & BIG (2016), *The International Bar Association Judicial Integrity Initiative: Judicial systems and corruption*, International Bar Association (IBA) & Basel Institute on Governance (BIG), pg. 12. https://www.ibanet.org/Legal_Projects_Team/judicialintegrityinitiative.aspx (6/21/2019).

[8] See HUMAN RIGHTS COMMITTEE (1992), *Karttunen v Finland*, Merits, Letter No. 387/1989, UN doc. CCPR/C/46/D/387/1989 (November 5, 1992), paragraph 7.2. and *id.* (2007), *General Comment No. 32, Article 14. Right to equality before courts and tribunals and to a fair trial*, UN doc. CCPR/C/GC/32 (August 23, 2007), paragraph 21.

[9] See M. VILLORIA (2002), *La corrupción judicial: razones de su estudio, variables explicativas e instrumentos de combate en España*, Congreso Internacional del CLAD 07, pg. 13. https://cladista.clad.org/handle/123456789/2311 (6/21/2019).

[10] See Value No. 2 (Impartiality) of the "Bangalore Principles of Judicial Conduct", endorsed by Resolution No. 2006/23 of the UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, ECOSOC Res. 2006/23 (2006), UN doc. E/2006/INF/2/Add.1 (August 22, 2006), pg. 77–86, 82.

[11] See D. GARCÍA SAYÁN (2017), *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN doc. A/72/140 (July 25, 2017).

[12] OHCHR (2003), *Human rights in the administration of justice: a manual on human rights for judges, prosecutors and lawyers*, Professional Training Series No. 9, Office of the United Nations High Commissioner for Human Rights (OHCHR), New York-NY & Geneva, pg. 119; see *infra* pg. 23 and onward (3. Determining factors of judicial corruption, iii. Judicial independence).

[13] See J. RIOS-FÍGUEROA (2006), *Judicial independence and corruption: an analysis of Latin America*, (PhD thesis New York University). SSRN: https://ssrn.com/abstract=912924 (6/21/2019).

This is why we consider the principle of judicial impartiality to be the main target of judicial corruption. In fact, judicial independence in and of itself can foster judicial corruption.[14] Institutional independence of the justice sector in Latin America "not always goes with the necessary impartiality of the judges in the region, who choose to receive benefits from the powerful or put a price on their judgements".[15]

ii. Private gain

(29) To be considered as judicial corruption, the harm to the principle of judicial impartiality must be geared toward private gain.[16] The private benefit for harming the principle of judicial impartiality can be material or financial, or can involve immaterial objects.[17]

iii. Corrupt exchange

(30) Harming the principle of judicial impartiality for private gain must be part of a transaction, which benefits both, the corruptor *and* the corrupted, or a third party.[18]

(31) Our definition of judicial corruption includes persons who harm (directly or indirectly) the principle of judicial impartiality whilst performing the function as justice sector officials. Justice sector officials can be, among others, judges, public prosecutors, public

[14] ROSE-ACKERMAN (2007), *Judicial independence and corruption*, in Transparency International (ed.), Global corruption report 2007 – Corruption in judicial systems, Cambridge University Press, Cambridge, pg. 15–24, 16.
[15] L. PÁSARA (2015b), *Una reforma imposible. La justicia latinoamericana en el banquillo*, Instituto de Investigaciones Jurídicas de la UNAM, Mexico DF, pg. 328.
[16] We do not share the additional opinion that the benefit should qualify, separately, as undue or illegal, and even less so as "undue and illegal," as defined by DPLF (2007), *op. cit. supra* n. 4, pg. 7. In this sense, the report of GARCÍA SAYÁN (2017) is also inaccurate, *op. cit. supra* n. 11, paragraphs 46 onward. From a criminal policy perspective, the aim of obtaining private gain, if linked to harming the principle of judicial impartiality in a mutually beneficial exchange between two parties, indicates by itself – in *all* circumstances – that the benefit is undue *and* illegal.
[17] DPLF (2007), *op. cit. supra* n. 4, pg. 7.
[18] *Ibid*.

investigators, public defenders, law clerks, assistant administrative personnel, and other public officers linked to the justice sector, as well as individuals who perform a functional equivalent role regarding the sector, particularly, regarding the (s)election of officials of the justice sector and their accountability ("*rendición de cuentas*", in Spanish).[19]

(32) The definition also includes individuals who, whilst being related to the sector, without being justice sector officials or equivalent officials within the sector, infringe upon the principle of judicial impartiality. Individuals related to the justice sector can be, among others, the parties of a judicial process or those who are attorneys at law.[20]

2. Judicial corruption and human rights

(33) At the individual level, the case of judicial corruption is a concrete example of the negative impact of corruption on the enjoyment of human rights.[21] While corruption, in all forms, threatens the rule of law, democracy and human rights, in the case of judicial corruption, the right to equal access to justice and an impartial trial is directly affected,[22] in addition to giving way to non-compliance with the obligation to ensure substantive rights.[23]

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[19] Not everyone who has analyzed the concept in the Spanish language considers the terms "accountability" and "*rendición de cuentas*" to mean the same thing. For a conceptual analysis of this problem, see A. CORTÉS ARBELÁEZ (2014), *El concepto de accountability: una mirada desde la ciencia política*, Cuadernos de Ciencias Políticas, pg. 15–25, 15 onward.

[20] Notwithstanding the fact that some legal systems consider attorneys at law as organs of the administration of justice (for example, see Art. 1 of the Federal Lawyers' Act of Germany).

[21] HUMAN RIGHTS COUNCIL (2015), *Final Report of the Advisory Committee of the Human Rights Council on the issue of the negative impact of corruption on the enjoyment of human rights*, UN doc. A/HRC/28/73 (January 5, 2015), paragraph 19; see also G. KNAUL (2012), *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN doc. A/67/305 (August 13, 2012), paragraph 33.

[22] *Ibid*. Also see, referring to the right to be tried without undue delay, A. PETERS (2018), *Corruption as a violation of international human rights*, European Journal of International Law 29, pg. 1251–1287, 1256 onward.

[23] See the example on the right to life in the case of an extrajudicial execution that can remain unpunished due to judicial corruption, C. NASH ROJAS, P. AGUILO BASCUÑAN & M. L. BASCUR CAMPOS (2014), *Corrupción y derechos humanos: una mirada desde la jurisprudencia de la Corte Interamericana de Derechos Humanos*, Centro de Derechos Humanos de la Facultad de Derecho de la Universidad de Chile, Santiago de Chile, pg. 28.

(34) On a structural level, and in contexts where judicial corruption is generalized and the possibility of corrupting the justice sector is primarily based on the individual economic capacity, judicial corruption becomes one of the main forms of violating and/or harming the human right of equal access to justice. This disproportionately affects people of limited resources,[24] as it turns justice into a supply and demand market.

(35) Justice converted into a supply and demand market increases the cost of accessing justice,[25] granting the highest bidder an advantage that the other person with opposing interests cannot counteract with arguments of justice.[26] Additionally, this erodes the trust in the public justice sector[27] and distorts the capacity of the sector to perform its functions as an impartial arbiter of conflicts, and to ensure compliance with the law,[28] which in turn gives way to multiple negative impacts on the enjoyment of human rights.[29]

3. Determining factors of judicial corruption

(36) Similar to the case of the definition of judicial corruption, there is no consensus on the factors that explain the presence of the phenomenon. Nevertheless, taking into

[24] See OHCHR (2013), *The human rights case against corruption*, Office of the United Nations High Commissioner for Human Rights (OHCHR), Geneva, pg. 4.
[25] Also see *infra* pg. 29 and onward (4. Characteristics of judicial corruption, iv. Types of judicial corruption).
[26] J. CORREA SUTIL (1999), *Acceso a la justicia y reformas judiciales en América Latina ¿Alguna esperanza de mayor igualdad?*, Revista Jurídica de la Universidad de Palermo, edición especial, pg. 293–308, 302.
[27] E. BUSCAGLIA (2001), *An analysis of judicial corruption and its causes: An objective governing-based approach*, International Review of Law and Economics 21, pg. 233–249, 247, expressing doubts on the capacity of community-based, private conflict-resolution mechanisms since they do not generate stability on a macroeconomic level.
[28] S. GLOPPEN (2014), *Courts, corruption and judicial independence*, in T. Søreide & A. Williams (eds.), *Corruption, grabbing and development: real world challenges*, Edward Elgar Publishing, Cheltenham & Northampton-MA, pg. 68–79, 70; also see the report issued by GARCÍA SAYÁN (2017), *op. cit. supra* n. 11, paragraph 40.
[29] See the reference to the jurisprudence of the Inter-American Commission on Human Rights in NASH ROJAS, AGUILO BASCUÑAN & BASCUR CAMPOS (2014), *op. cit. supra* n. 23, pg. 42.

consideration the conceptual discussion, as well as the empirical evidence of the phenomenon on a Latin American,[30] European[31] and global[32] level, different factors can be identified that, *jointly*, are determining factors for the existence of judicial corruption.[33] These can be grouped as (*i.*) endogenous factors, of a professional, economic and institutional nature; and, (*ii.*) exogenous factors, of a social, institutional and political nature. Upon making this classification, it is not necessary to establish the specific influence of each factor, nor the influence that the interaction of two or more of these factors could have on judicial corruption.[34] A factor that has multiple exogenous and

[30] See E. BUSCAGLIA (1997), *An economic analysis of corrupt practices within the judiciary in Latin America*, in C. Ott & G. von Waggenheim (eds.), Essays in Law and Economics 5, Kluwer, Amsterdam, pg. 289–321; *id.* (2001), *An analysis of judicial corruption and its causes: An objective governing-based approach*, International Review of Law and Economics 21, pg. 233–249; A. BINDER (2006), *Corrupción y sistemas judiciales*, Sistemas Judiciales 11, pg. 18–21; J. RIOS-FÍGUEROA (2012), *Justice system institutions and corruption control: Evidence from Latin America*, The Justice System Journal 33; pg. 195–214. S. BASABE-SERRANO (2013), *Explicando la corrupción judicial en las cortes intermedias e inferiores de Chile, Perú y Ecuador*, Perfiles Latinoamericanos 42, pg. 79–108; R. LAVER (2014), *Judicial independence in Latin America and the (conflicting) influence of cultural norms*, Edmond J. Safra Working Papers no. 35, pg. 14 onward. https://ssrn.com/abstract=2384125 (6/21/2019).

[31] See C. DANILEŢ (2009), *Corruption and anti-corruption in the justice system*, C.H. Beck, Bucharest, pg. 41 onward.

[32] See E. BUSCAGLIA & M. DASKOLIAS (1998-1999), *An analysis of the causes of corruption in the judiciary*, Law and Policy in International Business 30, pg. 95–116; E. BUSCAGLIA (1999), *Judicial corruption in developing countries: its causes and economic consequences*, UC Berkeley, Berkeley Program in Law and Economics. https://escholarship.org/uc/item/48r8474j (6/21/2019); M. N. PEPYS (2007), *Corruption within the judiciary: causes and remedies*, in Transparency International (ed.), *op. cit. supra* n. 14, pg. 3–11; ROSE-ACKERMAN (2007), *op. cit. supra* n. 14, *passim* e *id.* & B. J. PALIFKA (2016), *Corruption and government. Causes, consequences, and reform*, Cambridge University Press, New York-NY, 2ª Edition, pg. 387 onward; E. BUSCAGLIA (2007), *Judicial corruption and the broader justice system*, in Transparency International (ed.), *op. cit. supra* n. 14, pg. 67–77; S. VOIGT & J. GUTMANN (2015), *On the wrong side of the law – causes and consequences of a corrupt judiciary*, International Review of Law and Economics 43, pg. 156–166; GARCÍA SAYÁN (2017), *op. cit. supra* n. 11, paragraphs 48 onward, and based on a global quantitative and qualitative study on judicial corruption, IBA & BIG (2016), *op. cit. supra* n. 7, pg. 17 onward.

[33] To select the most significant predictive variables, see the quantitative empirical study of VOIGT & GUTMANN (2015), *op. cit. supra* n. 32, pg. 163 and qualitative empirical study of IBA & BIG (2016), *op. cit. supra* n. 7, pg. 17 onward.

[34] In this context, regarding methodological problems and issues related to the access to sufficiently specific and reliable data, see BASABE-SERRANO (2013), *op. cit. supra* n. 30, pg. 105.

endogenous relations is (*iii*.) the principle of judicial independence, which is dealt with separately.

i. Endogenous factors

(37) Endogenous factors that determine judicial corruption include, among others:

- transparency of the justice sector;
- efficiency of integrity and accountability mechanisms of the sector;
- professional training of justice sector officials;
- quality of the career of justice sector officials;
- mobility and availability of positions in the justice sector;
- institutional incentives for ethical conduct;
- family relations between justice sector officials;
- group thinking and conformity;
- protection mechanisms for justice sector officials against threats and intimidation, including protection for whistleblowers;
- salary level;
- workload;
- rigidity of the monopoly of the power to prosecute held by the public prosecution service;
- concentration of jurisdictional and administrative competence in the same justice sector official;
- delegation of functions, including strictly personal functions;

- margin of discretion due to the lack of quality and clarity of laws, standards and regulations;
- complexity of the judicial proceedings;
- formality of the judicial proceedings;
- (dis)organization and (il)legality of procedural routines;
- judicial delay.

(38) These endogenous factors should not be considered as having an impact in each of the justice sector institutions only. Instead, it must also be taken into account that judicial corruption is determined by the interaction between different justice sector institutions, and therefore, by the quality of each one of these institutions that is, in turn, determined by the endogenous factors as a whole.[35]

ii. Exogenous factors

(39) Exogenous factors that determine judicial corruption include, among others:

- Prevalence of corruption in the society;
- social acceptance of corruption;
- social trust in State institutions, combined with general social trust and the importance of family relations in society, and the informality of social relations;
- public knowledge regarding rights and how the justice sector works;
- participation of civil society in monitoring the justice sector;

[35] BUSCAGLIA (2007), *op. cit. supra* n. 32, pg. 76.

- justice sector officials joining the same schools, universities, associations and circles with powerful individuals in the political and economic field;
- family relations and/or "godfatherhood" (span. "*compadrazgo*") with individuals of political and economic power and/or attorneys at law;
- presence of organized crime groups;
- makeup of political power (heterogeneous/homogeneous, fragmented/united, etc.);
- performance of public anti-corruption agencies.

iii. Judicial independence

(40) In addition to the abovementioned factors, judicial independence has been identified as a determining factor of judicial corruption.[36] Despite the international efforts to establish basic principles,[37] the term "judicial independence" lacks a precise definition.[38]

(41) With respect to the authority of adjudicating, meaning, the judging authority, judicial independence is its "characteristic institutional feature … in a State governed by the rule of law. It is a quality conferred on (and required by) courts so that they may adequately perform the specific function conferred on them, exclusively, by the State, in accordance with the principle of the separation of powers. It is an instrumental quality, secondary to

[36] ROSE-ACKERMAN (2007), *op. cit. supra* n. 14, pg. 24.
[37] See, regarding the public authority to adjudicate, the "Basic Principles on the Independence of the Judiciary", endorsed by Resolutions 40/32 and 40/146 of the UNITED NATIONS GENERAL ASSEMBLY, GA Res. 40/32 (1985), UN GAOR, 40th Sess., Supp. No. 53, pg. 204, UN doc. A/40/53 (August 6, 1986); GA Res. 40/146 (1985), UN GAOR, 40th Sess., Supp. No. 53, pg. 254, UN doc. A/40/53 (August 6, 1986); also see Value No. 1 (Independence) of the "Bangalore Principles of Judicial Conduct", *op. cit. supra* n. 10, pg. 81 onward. In terms of the Latin American region, see the LATIN AMERICAN FEDERATION OF JUDGES (2008), *Declaration of Minimal Principles about Judiciaries and Judges' Independence in Latin America ("Declaration of Campeche"), approved on April 10, 2008 in Mexico by the Ordinary General Assembly of the Latin American Federation of Judges (FLAM).* http://scm.oas.org/pdfs/2014/CP32727SDECLARACION.pdf (6/21/2019).
[38] ROSE-ACKERMAN (2007), *op. cit. supra* n. 14, pg. 16.

the function which it serves"[39] – "(it) is the specific institutional guarantee that allows the judicial branch to act *subject only* (emphasis is ours) to the law".[40]

(42) For the purposes of this report, given the specific characteristics of the Prosecutor General's Office (hereinafter "PGO") in Latin America, be it as an autonomous or "extra-power" entity, or an entity affiliated to the judicial power of the State (span. "*Poder Judicial*", hereinafter "Judiciary") but with functional autonomy,[41] in addition to the public function of adjudication, we also include the function of prosecution within the concept of judicial independence,[42] understood as the guarantee of the *autonomy* of the decision-making by an individual judge or public prosecutor through mechanisms that block the influence of undue pressure within or outside of the justice sector during the decision-making of the sector.[43]

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[39] COURT OF JUSTICE OF THE EUROPEAN UNION (2019a), *Minister for Justice and Equality v O.G. and P.I.*, Joined Cases C-508/18 and C-82/19 PPU, Opinion of Advocate General Campos Sánchez-Bordona, delivered on 30 April 2019, paragraph 24. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CC0508 (6/21/2019). See, for the Inter-American context, in the same sense, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (2013), *Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas*, OAS/Ser.L/V/II. doc. 44 (December 5, 2013), paragraph 13.

[40] COURT OF JUSTICE OF THE EUROPEAN UNION (2019a), *op. cit. supra* n. 39, note 7, emphasizing that the institutional guarantee of judicial independence is not comparable to the status of other State institutions that must act within the law, subject to the political direction of the legitimate Government. This is the case of the PGO of Germany, according to the jurisprudence of the Court of Justice of the European Union, in the case: COURT OF JUSTICE OF THE EUROPEAN UNION (2019b), *Minister for Justice and Equality v O.G. and P.I.*, Joined Cases C-508/18 and C-82/19 PPU, judgment of the Court (Grand Chamber), 27 May 2019. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0508 (6/21/2019); and, moreover in other countries, such is the case of the PGO of France; see T. SØREIDE (2016), op. cit. supra n. 2, pg. 200 onward.

[41] M. DUCE (2005), *Reforma Judicial*, Revista Mexicana de Justicia 6, pg. 173–209, 185 onward.

[42] In this sense, see more generally, beyond Latin America, the report published by the European Commission for Democracy of Law ("Venice Commission") VENICE COMMISSION (2011), *Report on European standards as regards the independence of the judicial system: part II – the prosecution service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010)*, doc. CDL-AD(2010)040 (3 January 2011).

[43] BUSCAGLIA (2007), *op. cit. supra* n. 32, pg. 75. Given that the PGO in Latin America is based on a system of hierarchical subordination, the prosecutor's autonomy (in the sense of internal independence) is naturally not an absolute value as opposed to the case of a judge.

(43) Judicial independence is directly related to the majority of the factors that determine judicial corruption.[44] Thus, Art. 11 of the United Nations Convention against Corruption (UNCC)[45] acknowledges the fundamental role of judicial independence to fight corruption, and at the same time, obliges the States to fight the problem of judicial corruption.[46]

(44) At first glance, it would not seem hard to determine the effect of judicial independence on judicial corruption. In fact, results of empirical studies indicate that independent judges are less vulnerable to corruption, including when the political system and other areas of the State have been captured by organized crime.[47] However, upon carrying out in-depth research on the relationship between judicial independence and judicial corruption, one realizes that the problem lies in the fact that the direction of this relationship is not clear.[48] On the one hand, judicial independence has been identified as one of the possible sources of judicial corruption;[49] and on the other, it is claimed that judicial corruption can affect judicial independence. Illustrative in this sense is the economic analysis of individual

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[44] J. C. DONOSO (2009), *A means to an end: judicial independence, corruption and the rule of law in Latin America*, (PhD thesis Vanderbilt University) https://etd.library.vanderbilt.edu/available/etd-07152009-154311/unrestricted/donoso.pdf (6/21/2019), pg. 68 onward.

[45] UNITED NATIONS (2003b), *United Nations Convention against Corruption*, October 31, 2003, in effect since December 14, 2005, UNTS vol. 2349, pg. 41, UN doc. A/58/422 (October 7, 2003), 186 party States (in June of 2019).

[46] See also, in a broader sense, Article 9, paragraph 2 of the UNITED NATIONS (2000), *United Nations Convention Against Transnational Organized Crime*, November 15, 2000, UNTS vol. 2225, pg. 209, UN doc. A/RES55/25 (January 8, 2001), 190 party States (in June of 2019). The international obligation set forth in Art. 11 UNCC only extends to taking measures against the corruption of judges (Art. 11, paragraph 1) and not the corruption of the personnel of the public prosecution service (Art. 11, paragraph 2); see W. SLINGERLAND (2019), *Article 11. Measures relating to the judiciary and prosecution service*, in C. Rose, M. Kubiciel, O. Landwehr (eds.), The United Nations Convention Against Corruption. A commentary, Oxford University Press, Oxford & New York-NY, pg. 114–125, 122. This is due to the different models of the position of the PGO within the State structure in comparative law (see *supra* n. 40 and n. 41).

[47] E. BUSCAGLIA & J. VAN DIJK (2003), *Controlling organized crime and public sector corruption: results of the global trends study*, United Nations Forum on Crime and Society 3, pg. 3–34.

[48] DONOSO (2009), *op. cit. supra* n. 44, pg. 69.

[49] See *supra* n. 14 and n. 15.

behavior[50] of stakeholders in judicial corruption, which in the short term resist against reforms to the justice sector, while the objective of the justice sector reform is strengthening their independence in the long-term.[51]

(45) Art. 11 of the UNCC acknowledges the complex relation between judicial independence and judicial corruption when it emphasizes the balance between the independence of the justice sector and its *accountability*.[52] In other words, the integrity of the justice sector requires a sector to generally be independent and *accountable,* and that its officials behave in a similar fashion.[53] This planning is backed by empirical research on the determining factors of the judicial corruption around the world.[54]

(46) There is no perfect system that can touch on all the imperatives of the independence of the justice sector and its *accountability* simultaneously.[55] Nevertheless, in addition to the aforementioned factors in numerals (*i.*) and (*ii.*), personal and organizational structural factors have been identified that determine the judicial corruption in the balance between the independence of the justice sector and its *accountability*; among others, such as:[56]

- methods for selecting judges, in particular, the role of judicial councils;
- ways to define the budget and allotments (including salary scales);

[50] For an economic analysis on individual behavior in corrupt interchanges in general, see S. ROSE-ACKERMAN (1999), *Corruption and government: causes, consequences and reform*, Cambridge University Press, New York-NY, 1st Edition, pg. 7–88.
[51] BUSCAGLIA (2001), *op. cit. supra* n. 27, pg. 248.
[52] SLINGERLAND (2019), *op. cit. supra* n. 46, pg. 115.
[53] IBA & BIG (2016), *op. cit. supra* n. 7, pg. 18.
[54] VOIGT & GUTMANN (2015), *op. cit. supra* n. 32, pg. 161.
[55] IBA & BIG (2016), *op. cit. supra* n. 7, pg. 18.
[56] ROSE-ACKERMAN (2007), *op. cit. supra* n. 14, pg. 18.

- criteria for the destitution and sanctioning standards against corrupt justice sector officials and the existence of functional immunities;
- standards regarding the disclosure of conflicts of interest and personal assets;
- existence of a Constitutional court, specialized courts and separate courts on all different levels;
- position of the PGO within the structure of the State;
- participation of juries, or of non-professional or lay judges;
- case management systems, in particular, the assignment of cases;
- standards regarding judicial communications without the presence of the parties;
- public access and access of the press to judicial proceedings.

4. Characteristics of judicial corruption

(47) In order to understand how the determining factors of judicial corruption are developed in the justice sector, we differentiate between (*i.*) forms, (*ii.*) currency, (*iii.*) objectives, (*vi.*) types and (*v.*) means of contact of judicial corruption.

i. Forms of judicial corruption

(48) Judicial corruption occurs in different manners, affecting the decision-making in the justice sector, among others: bribing and receiving bribes, trafficking of influences, granting and

receiving gifts, "greasing",[57] "preferential treatment",[58] nepotism and all classes of *kick-backs*.[59]

ii. Currency of judicial corruption

(49) It is generally presumed that the "currency"[60] to pay for the harm to the principle of judicial impartiality as part of a judicial corruption exchange is money or any other type of asset or advantage that can be monetized in the broadest sense. Likewise, judicial corruption exchanges frequently use the currency of bureaucratic and/or political power, professional status, social reputation, the spirit of belonging to a group (including the family), and benefits of other types, including sexual.[61]

iii. Objectives of judicial corruption

(50) One of the main objectives of judicial corruption involves requesting or offering an advantage to distort the normal development of a judicial process and/or to gain privileged access to information in the justice sector. This includes the start, evolution and result of a judicial proceeding.[62] This may also include phases prior to the proceeding, and even

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[57] In the sense of receiving benefits in exchange for accelerating the progress of the legal process or to prevent a party from intervening first.
[58] In the sense of helping friends, associates, etc., to get jobs in the justice sector due to their connections rather than their personal merit.
[59] DANILEŢ (2009), *op. cit. supra* n. 31, pg. 48 onward.
[60] The phrase "currency of corruption" is developed by C. NYAMU-MUSEMBI (2007), *Gender and corruption in the administration of justice*, in Transparency International (ed.), *op. cit. supra* n. 14, pg. 121–128, 122 and onward.
[61] *Ibid*. The reports published by KNAUL (2012), *op. cit. supra* n. 21, paragraph 23 and GARCÍA SAYÁN (2017), *op. cit. supra* n. 11, paragraph 58, use the term "sexual favors". This does not take into account how gender relationships condition the currency of (judicial) corruption. Therefore, it must be conceived from the standpoint of the person who demands payment ("pleasure") or from a neutral one ("benefit"), but not from the perspective of the person who pays ("favor").
[62] For a broad list of the great variety of specific technical objectives, particularly for the case of criminal proceedings, see the reports published by IBA & BIG (2016), *op. cit. supra* n. 7, pg. 18 and onward and by GARCÍA SAYÁN (2017), *op. cit. supra* n. 11, paragraph 65 onward.

phases that are only remotely linked to the specific proceeding, such as the handling of the selection of justice sector officials (or their equivalent).[63]

(51) Additionally, a benefit may be requested or offered that is not related to distorting the proceeding, but rather to assure that another party distorts the process in its favor,[64] or simply for the justice sector official (or its equivalent) to do what it is supposed to do, by all means.[65] This last determining factor does not appear to be a case of judicial corruption – not because the benefit of the payment of an "extra fee" is not undue or illegal, but rather because it appears not to harm the principle of judicial impartiality. However, the payment of an "extra fee" not provided for by law results in a relationship and/or interdependency between the justice sector official and the person who pays said "rate", which place the neutrality of the former at risk. Thus, it is justified that this interaction between both parties be considered as harming the principle of judicial impartiality, and therefore, to be considered as judicial corruption.[66]

iv. Types of judicial corruption

(52) Generically, that is, in ideal terms for analytical purposes, we can differentiate between judicial corruption within a single justice sector institution (administrative judicial corruption) from judicial corruption in the overall justice sector (operational judicial

[63] See *infra* pg. 35.
[64] DANILEȚ (2009), *op. cit. supra* n. 31, pg. 52.
[65] IBA & BIG (2016), *op. cit. supra* n. 7, pg. 21.
[66] See T. ZIMMERMANN (2018), *op. cit. supra* n. 5, pg. 537; however, considering this case as "proto-corruption", restating (*ibid.*, p. 503) the term used by J. C. SCOTT (1972), *Comparative political corruption*, Prentice-Hall, Englewood Cliffs-NJ, pg. 8.

corruption).[67] In general, the existence of administrative judicial corruption fosters the growth of operational judicial corruption, and vice versa.[68]

(53) Administrative judicial corruption refers to the violation of formal or informal proceedings in every day cases.[69] On the other hand, operational judicial corruption refers to situations where, if part of Grand corruption schemes, considerable political and/or economic interests are in play.[70]

(54) Administrative judicial corruption can be sporadic or systemic, with the latter being the most relevant to this report. In the event of systemic administrative judicial corruption, a significant part of the justice sector institution(s) operates systemically, based on opportunities for judicial corruption. Under these conditions, the corruption in the justice sector becomes the norm, reducing the moral costs of the judicial corruption, and establishing, in general, precise rates for payments to access justice.[71] All members of society who are willing to offer incentives in the form of illicit payments for a quick solution to their problems access to the justice sector under these conditions, if they have the resources to do so, including the resources to offer greater amounts than the other person with opposing interests.[72] This situation shows that not all individuals exposed to

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[67] BUSCAGLIA (2001), *op. cit. supra* n. 27, pg. 235; *id*. (2007), *op. cit. supra* n. 32, pg. 68 onward; and INTERNATIONAL COMMISSION OF JURISTS (2016), *Judicial accountability: international standards on accountability mechanisms for judicial corruption and judicial involvement in human rights violations*, Practitioners Guide no. 13, International Commission of Jurists (ICJ), Geneva, pg. 107.
[68] BUSCAGLIA (2001), *op. cit. supra* n. 27, pg. 235.
[69] *Ibid*.
[70] *Ibid*.
[71] Regarding this kind of corruption in general, see D. DELLA PORTA & A. VANUCCI (2012), *The hidden order of corruption. An institutional approach*, Ashgate, Farnham, pg. 57 onward, and 89.
[72] For the economic analysis on individual behavior in corrupt interchanges in general, see S. ROSE-ACKERMAN (1999), *op. cit. supra* n. 50, *passim*.

systemic judicial corruption are victims. On the contrary, empirical data in Latin America and the Caribbean regarding corruption, in general, indicate that there are "rational-choice corruptors", which approve corruption as a matter of accelerating transactions with the public administration, recurring to corruption and admitting having engaged in corruption when asked about the subject in surveys.[73] On the other hand, the members of society that neither can nor are willing to offer illicit incentives are the authentic victims of systemic judicial corruption, as they are excluded from accessing justice;[74] in other words, they are victims of an *inclusive-exclusive judicial corruption system*.

(55) On the other hand, operational judicial corruption is usually systemic. In the case that operational judicial corruption is part of Grand corruption schemes, it generally qualifies as "power crime".[75] If part of Grand corruption schemes, operational judicial corruption is part of a broader dynamic in various State institutions. This dynamic generally and systematically builds the opportunity for private gain in the functioning of State institutions for a few powerful stakeholders, merging the public and the private in an institutionalized system of exchanges between the power of public decision making and personal benefit.[76] Under these conditions, no common member of society has the ability to successfully access the judicial corruption system, regardless of whether it is willing to offer incentives,

[73] S. R. BOHN (2012), *Corruption in Latin America: understanding the perception-exposure gap*, Journal of Politics in Latin America 4, pg. 67–95, 90.
[74] BUSCAGLIA (2001), *op. cit. supra* n. 27, pg. 247.
[75] For the concept of Grand corruption as power crime, see J.-M. SIMON (2018), *Gran corrupción y la lucha contra la impunidad de la delincuencia del poder*, Revista Análisis de la Realidad Nacional 7 (No. 153), pg. 41–56, 43 onward. https://pure.mpg.de/rest/items/item_3033541_2/component/file_3039867/content (6/21/2019).
[76] *Ibid*. This can also include members of organized crime; see the works in I. BRISCOE, C. PERDOMO & C. *Uribe Burcher* (2014), *Redes ilícitas y política en América Latina*, IDEA Internacional, Stockholm, *passim*.

such as illegal payments, or not in order to confront people of Grand corruption. In other words, this is an *exclusive judicial corruption system*.

(56) Both judicial corruption systems – inclusive-exclusive and exclusive – can coexist in the same justice sector. Both systems disproportionately affect groups of vulnerable people, with little access to resources, economically and politically, such as is the case with indigenous people.[77] Their vulnerability is especially serious in the case of indigenous women,[78] particularly, in the context of extractive industries that operate in indigenous lands or in the surrounding areas.[79]

v. Channels of contact of the judicial corruption

(57) Corruption is crime based on social connections. Like in any case of corruption that implies mutually beneficial exchanges, the beneficiaries of judicial corruption must establish contact between each other.[80] Generically, there are two channels for establishing contact to carry out judicial corruption.[81]

[77] Final report of the Advisory Committee to the HUMAN RIGHTS COUNCIL (2015), *op. cit. supra* n. 21, paragraph 20(b).
[78] See, in general, regarding the right of access to justice, HUMAN RIGHTS COUNCIL (2013), *Access to justice in the promotion and protection of the rights of indigenous peoples. Study by the Experts Mechanism on the Rights of Indigenous Peoples*, UN doc. A/HRC/24/50 (July 30, 2013), paragraphs 62–65; in the case of Latin America, see R. SIEDER & M. T. SIERRA (2011), *Indigenous women's access to justice in Latin America*, CMI Working Paper 2010/2, Chr. Michelsen Institute, Bergen, pg. 11–22.
[79] Regarding the right to access to justice in this specific case, see HUMAN RIGHTS COUNCIL (2014), *Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities. Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN doc. A/HRC/27/65 (August 7, 2014), paragraph 38.
[80] J.-M. SIMON (2013), *La política criminal anticorrupción*, Contraloría General de la República (ed.), Redes para la prevención de la corrupción, IV Conferencia Anticorrupción Internacional, Contraloría General de la República, Lima, pg. 59–79, 64. https://pure.mpg.de/rest/items/item_2640386_4/component/file_3039899/content (6/21/2019).
[81] See DANILEȚ (2009), *op. cit. supra* n. 31, pg. 51.

(58) The first option consists of establishing direct contact. For this aim, the parties must have significant mutual trust. Mutual trust is primarily based on kinship, "godfatherhood", daily contact or a previous relationship (in work or social environments) or at the recommendation of another trusted party under the same conditions. Additionally, direct contact can result in the application of pressure based on authority or through extortion.[82]

(59) The second option consists of establishing indirect contact. For this aim, an intermediary is required, who must be trustworthy, in accordance with the conditions set forth for direct contact between the corruptor and the corrupted.

(60) While the means of establishing contact for administrative judicial corruption is generally through individuals of the justice sector in lower levels, in the case of operational judicial corruption, contact tends to take place with the highest level of the justice sector.[83]

(61) In Latin America, in addition to family members and "godfathers/godmothers" related to justice sector officials, it is frequent for intermediaries to be members of law firms.[84] This experience in the region coincides with data validated by empirical research around the world,[85] which also indicates a relative prevalence of public prosecutors and administrative personnel in intermediary roles in judicial corruption schemes.[86]

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[82] IBA & BIG (2016), *op. cit. supra* n. 7, pg. 20.
[83] BASABE-SERRANO (2012), *op. cit. supra* n. 30, pg. 197.
[84] In the case of Central America and Panama, see DPLF (2007), *op. cit. supra* n. 4, pg. 8, 24, despite the fact that the study data is not statistically representative, it provides valuable indicators of the reality of judicial corruption (*ibid.*, pg. 29); see also BINDER (2006), *op. cit. supra* n. 30, pg. 20 and y L. PÁSARA (2015a), *Reforma de la justicia en América Latina: aprender de los errores*, in Ministerio de la Presidencia & Ministerio de Justicia (eds.), Reforma judicial en América Latina y el desafío de la revolución de la justicia en Bolivia, PIEB, La Paz, pg. 5–24, 17, as well as M. P. CHUMBERIZA TUPAC YUPANQUI & L. A. GUZMÁN ESTRADA (2015), *¿Cómo marcha la reforma de la justicia en América Latina? Entrevista al Dr. Luis Pasara Pazos*, Derecho & Sociedad 48, pg. 269–274, 273, in the specific case of Peru.
[85] IBA & BIG (2016), *op. cit. supra* 7, pg. 7, and 29 onward.
[86] *Ibid.*, pg. 30 and onward.

(62) While sporadic judicial corruption generally involves no more than three people (corruptor, corrupted, and if necessary, intermediary), systemic judicial corruption generally involves more than three people.

(63) As it involves more than three people, the inclusive-exclusive and the exclusive judicial corruption system tends to take place in networks. Whereas in the first case, the person seeking access to the judicial corruption system tends to access via the network as an *outsider*, in the second case, if the judicial corruption system is part of Grand corruption schemes, the person is an *insider* of the network.[87]

(64) From the logic of social network[88] and patron-client analysis,[89] the networks of inclusive-exclusive judicial corruption systems tend to be structured as a pyramid, based on asymmetrical reciprocal personal relationships. At the top of the pyramid is the patron, and at the bottom, the client (or clients), and in the middle is the intermediary (or intermediaries).[90]

(65) On the other hand, the networks of exclusive judicial corruption systems, if part of Grand corruption schemes, tend to be part of extensive illicit networks within the State structure (beyond the justice sector), with small and hermetically closed illicit-corrupt associations

[87] *Ibid*., pg. 24 and onward.
[88] For this kind of analysis of criminal structures in general, see P. CAMPANA (2016), *Explaining criminal networks: strategies and potential pitfalls*, Methodological Innovations 9, pg. 1–10; for the case of the justice sector, following the same analytical perspective but from a broader viewpoint analyzing informal networks in general, see B. DRESSEL, R. SÁNCHEZ-URRIBARRI & A. STROH (2018), *Courts and informal networks: towards a relational perspective on judicial politics outside western democracies*, International Political Science Review 39, pg. 573–584.
[89] Based on this logic of analyzing the structure of corruption in general, see W. MUNO (2013), *Clientelist corruption networks: conceptual and empirical approaches*, Zeitschrift für Vergleichende Politikwissenschaft. Comparative Governance and Politics 7, Special Issue 3, pg. 33–56, 38 onward.
[90] *Ibid.*, pg. 39.

at the core of the networks.[91] Illicit-corrupt associations represent the "back room" where individuals of the public and private sectors agree on their interests, objectives and strategies, while the illicit networks are the relational structure that connect the "back room" with all the different stakeholders and groups.[92]

(66) When the political and economic power is concentrated, as power crime, in these types of informal networks, they can deliberately manipulate the political, economic, juridical and judicial structures and decisions of the State.[93] This can take place through strategical appointment of an insider in the public sector, including in high positions within the judicial branch that ensure the protection and impunity of those who are in power.[94]

5. Time horizon for overcoming systemic judicial corruption

(67) As of the beginning of the 1980s, during the "third wave of democracy" in Latin America, the countries of the region have undertaken numerous efforts to strengthen democracy and the rule of law under the framework of their political transformation agendas. This dynamic placed corruption and the lack of accountability at the top of the list[95] and justice sector bodies among the most reformed institutions of the public sector.[96] While combating

[91] Regarding this structure of corruption, using the example of organizing corruption between bureaucrats and powerful businessmen in Italy, see J. COSTA (2017), *Networks and illicit associations in corrupt exchanges: representing a gelatinous system in Italy*, Global Crime 18, pg. 353–374.
[92] *Ibid.*, pg. 356.
[93] Based on their global data, see IBA & BIG (2016), *op. cit. supra* n. 7, pg. 24 onward.
[94] *Ibid.*
[95] M. LANGER (2007), *Revolution in Latin American criminal procedure: diffusion of legal ideas from the periphery*, American Journal of Comparative Law 55, pg. 617–676, 633.
[96] See also, in general, RIOS-FÍGUEROA (2012), *op. cit. supra* n. 30, pg. 201.

judicial corruption was not a frequent explicit objective,[97] justice sector reforms placed the majority of the determining factors of judicial corruption[98] in their agenda for change.[99]

(68) Based on the foregoing, it is evident that the agenda for reforms to the justice sector in Latin American countries has also been an agenda for reforms against judicial corruption.[100] Taking into account the experience with this dynamic, to estimate the time horizon for generating changes against systemic judicial corruption, we will analyze (*i.*) the minimum amount of time and (*ii.*) the minimal conditions necessary for generating an effective change in the justice sector against judicial corruption, (*iii.*) concluding, finally, on the time horizon in Latin American countries for reforms that aim at overcoming systemic judicial corruption

i. Minimum amount of time for generating effective change

(69) After three decades of reforms to the justice sector in Latin America, which in the specific case of the criminal justice system took place in three phases,[101] the diagnosis among the most well-known experts on the matter only gives more to think about. While *Alberto Binder* seeks to reclaim, despite the fundamental problems over the course of the thirty

[97] HAMMERGREN (2007), *Fighting judicial corruption: a comparative perspective from Latin America*, in Transparency International (ed.), *op. cit. supra* n. 14, pg. 138–146, 139.
[98] See pg. 19 and onward (3. Determining factors of judicial corruption).
[99] HAMMERGREN (2007), *op. cit. supra* n. 97, pg. 139 (about one of the most renowned subject matter experts).
[100] In the context of justice sector reforms in Eastern Europe, DANILEŢ (2009), *op. cit. supra* n. 31, pg. 179, even affirms that the fight against judicial corruption should be considered as a means for reforming the overall justice sector. Given the *universal* complex relation of the determining factors of judicial corruption with others – such as judicial independence (see *supra* pg. 23 and onward) – that determine the adequate performance of the justice sector institutions, we do not share this claim for a means-to-an-end relation.
[101] A. M. BINDER (2016), *La reforma de la justicia penal en América Latina como política de largo plazo*, Catalina Niño (coord.), La reforma a la justicia en América Latina: las lecciones aprendidas, Friedrich-Ebert-Stiftung en Colombia, Bogota, pg. 54–100, *passim*.

years of efforts in the region that "the reform of the (criminal) justice system in Latin America … has finally become a long-term policy",[102] *Luis Pasará* doubts that the region "is still progressing toward a true reform"[103] and ends his work entitled "An impossible reform. Latin American justice on the bench", classifying that "what will follow will be, with or without reform, a matter of speculation".[104]

(70) The foregoing does not mean that among the problems of the reform to the justice sector in the region and the prevalence of and/or the reform against judicial corruption, there is a "one-to-one" correspondence. Without a doubt, the recent corruption scandals in Latin America – mostly *not* about judicial corruption, except in the case of Peru –, following scandals of the magnitude of the "Fujimori-Montesinos" case in Peru at the beginning of the new millennium,[105] have generated, once again, among others, new opportunities for reforms.[106] Also, in the region, there exist currently "dissident" judges and public prosecutors committed to their work, who were previously scarcer,[107] which is indispensable for generating change in the justice sector and specifically against judicial corruption.

(71) Nevertheless, what is not subject to speculation is the minimum amount of time necessary in Latin-American countries to create an eventual real and sustainable positive change (not

[102] *Ibid.*, pg. 54.
[103] See the interview of Luis Pásara by CHUMBERIZA TUPAC YUPANQUI & GUZMÁN ESTRADA (2015), *op. cit. supra* n. 84, pg. 270.
[104] PÁSARA (2015b), *op. cit. supra* n. 15, pg. 329.
[105] See *infra* pg. 47 and onward (IV. Systemic judicial corruption and judicial reforms in Peru).
[106] K. CASAS-ZAMORA & M. CARTER (2017), *Beyond scandals. The changing context of corruption in Latin America*, Inter-American Dialogue, Washington DC, pg. 24.
[107] DPLF (2018), *Entrevista a Luis Pásara, sobre los desafíos de la justicia en América Latina* (February 7, 2018), http://dplf.org/sites/default/files/entrevista_luispasara_vf_20_02_2018.pdf (6/21/2019).

formal) in the justice sector – that is, effective change – against judicial corruption. The minimum amount of time necessary for generating this change is similar to the amount of time necessary to effectively generate positive change in the justice sector in general, as the majority of the variables that determine the positive change in judicial corruption matters coincide and are related in a complex manner to those that determine positive change in the justice sector, and according to the opinion of experts, the latter is currently an undoubtedly long-term task in the countries of Latin America.[108]

ii. Minimum conditions for generating effective change

(72) In order to further determine this term, it is necessary to determine the minimum conditions for an effective change in the justice sector against judicial corruption. For this purpose, it is fundamental to take into account the optimal organizational condition of the phenomenon of judicial corruption: justice sector officials (or their equivalent) have a monopoly on the decisions of the sector and the discretion for making decisions, without accountability for the latter (judicial C-orruption = M-onopoly of decision + D-iscretion in decision – A-ccountability for the decision).[109]

(73) Similar to any mathematical equation, logically, reducing judicial corruption means doing the contrary of what is defined in the formula. This is not an easy task, as can be easily

[108] BINDER (2016), *op. cit. supra* n.110, pg. 100 *et passim*; PÁSARA (2015b), *op. cit. supra* n. 15, pg. 326 *et passim*.
[109] C = M + D – A; basic formula of corruption based on organizational conditions, developed by R. KLITGAARD (1988), *Controlling corruption*, University of California Press, Berkeley, pg. 75. The United Nations Development Program considers, as significant additional determining factors to monopolies and discretion in decision-making the integrity and transparency of the decision making. Therefore, the equation is C-orruption = (M-onopoly + D-iscretion) – (A-ccountability + I-ntegrity + T-ransparency), according to UNDP (2004), *Anti-corruption. Practice note*, United Nations Development Program (UNDP), pg. 2. http://www.undp-aciac.org/publications/finances/anticor/undp-ati04e.pdf (6/21/2019).

seen in the complex relation analyzed above[110] between judicial corruption and judicial independence, as well as between the latter and the accountability of justice sector officials (or their equivalent). Nevertheless, a series of elements necessary for generating effective change in the justice sector against judicial corruption can be identified, (a) generally, for all types of judicial corruption and (b) specifically, for systemic judicial corruption.

a) General elements

(74) Based on the results of the worldwide empirical analysis of *Voigt* & *Gutmann*[111] regarding organizational conditions of judicial corruption and of *Basabe-Serrano*[112] in Latin America, in the case of judges of inferior and intermediate level courts of Chile, Peru and Ecuador, some of the general elements necessary for effective reforms in the justice sector against judicial corruption seem obvious:

- ensure that the salaries of justice sector officials remain constant in real terms;
- demand and verify conflicts of interest and asset declarations of justice sector officials ;
- ensure that the decisions of the sector are published regularly;
- reduce the monopoly of accusation of the public prosecution service on behalf of the victim and interested third parties, particularly with respect to (judicial) corruption;
- increase judicial independence of the institution of the sector that, compared with others, has less independence in the sector;

[110] See pg. 23 and onward (3. Determining factors of judicial corruption, iii. Judicial independence).
[111] VOIGT & GUTMANN (2015), *op. cit. supra* n. 32, pg. 163.
[112] BASABE-SERRANO (2013), *op. cit. supra* n. 30, pg. 105.

- reduce the number of procedural actions that must be performed to produce a decision of the executable sector (procedural simplification);
- increase the need for justice sector officials to justify their decisions in legal terms;
- increase the level of professional training of justice sector officials;
- increase the respect for judicial and public prosecutor positions.

b) Specific additional elements in case of systemic judicial corruption

(75) Additionally, best practices and lessons learned from different regions of the world have been identified that we specifically consider necessary to confront effectively systemic judicial corruption:[113]

- map the main areas of risk for judicial corruption exchanges among justice sector officials that belong to different institutions of the sector;[114]
- develop precise and related criteria for appointments, promotions and dismissals of justice sector officials;
- develop uniform management systems for cases between the institutions of the sector, accompanied by transparent, coherent and consistent rules for the assignment of cases and changes of site, as well as to share information;

[113] See BUSCAGLIA (2007), *op. cit. supra* n. 32, pg. 75 onward, and UNDP (2016), *A transparent and accountable judiciary to deliver justice for all*, United Nations Development Program (UNDP), pg. 2. http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/democratic_governance/RBAP-DG-2016-Transparent-n-Accountable-Judiciary.pdf (6/21/2019) and UNODC (2015), *The United Nations Convention Against Corruption implementation guide and evaluative framework for article 11*, United Nations Office on Drugs and Crime (UNODC), New York-NY, *passim*.

[114] See instrument edited by R. E. MESSICK & S. A. SCHÜTTE, eds. (2015), *Corruption risks in the criminal justice chain and tools for assessment*, U4 ISSUE no. 6, U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute, Bergen, *passim*. https://www.u4.no/publications/corruption-risks-in-the-criminal-justice-chain-and-tools-for-assessment.pdf (6/21/2019).

- develop uniform and foreseeable administrative measures regarding personnel and budgets, based on positive and negative sanctions, fostered by performance based indicators;
- ensure compliance of clear organizational roles among justice sector officials who judge, investigate and prosecute;
- improve the capacity and effectiveness of judicial revision of decisions of the sector;
- allow for monitoring by civil society.

(76) Regarding other elements that have been identified to confront systemic judicial corruption, many have produced such contingent results that they are not very trustworthy. According to the opinion of *Luis Pásara*,[115] this is in particular the case of Judicial Councils. As if that were not enough, independently from the quality of the powers granted to this type of justice sector institution and their highly contingent results, the need for the very existence of these institutions is not verifiable when comparing their contingent results with the situation in countries that do not have Judicial Councils, whether on the regional[116] or on the global level.[117] Along the same lines, no model for the selection of senior positions in the justice sector has provided sufficiently solid results for one specific

[115] See the interviews of Luis Pásara by CHUMBERIZA TUPAC YUPANQUI & GUZMAN ESTRADA (2015), *op. cit. supra n*. 84, pg. 272 and DPLF (2018), *op. cit. supra* n. 107.
[116] BASABE-SERRANO (2013), *op. cit. supra* n. 30, pg. 84 onward, comparing Chile and Uruguay to Ecuador and Bolivia.
[117] See UNDP (2016), *op. cit. supra* n. 113, pg. 23 onward, regarding the balance between judicial independence and accountability, comparing Austria and Germany to countries such as, among others, Bulgaria and Romania.

model to be considered a necessary element of a reform strategy against systemic judicial corruption.[118]

(77) On the other hand, vetting of justice sector officials (or their equivalent) can be a useful element against expansive and in-depth networks of systemic judicial corruption.[119] Nevertheless, this is only recommended when the risk of capture of the justice sector by those who control the vetting process is, for its part, controlled.[120] In any case, "purges" of the justice sector or its equivalent (such as "lustration" processes) have been counterproductive.[121]

(78) Additionally, one may create specific (specialized) units within justice sector institutions, when these units are located in critical spaces of the sector where they can generate changes in other areas[122] and, thus, strategically close spaces for systemic judicial corruption. For this purpose, the mobilization of "dissident" judges and public prosecutors

[118] See the expert opinion on the interviews *cit. supra* n. 115; likewise, in the case of Mexico, see the resilience of patron-client networks observed by A. POZAS-LOYO & J. RÍOS FIGEROA (2018), *Anatomy of an informal institution: the 'gentlemen's pact' and judicial selection in Mexico, 1917-1994*, International Political Science Review 39, pg. 647–661. Regarding El Salvador, see the critical analysis of A. MALDONADO, M. HENAO & J.-M. SIMON (2018), *Informe final del Panel independiente. Selección de magistradas y magistrados de la Sala de lo Constitucional de la Corte Suprema de Justicia de la República de El Salvador 2018*, Due Process of Law Foundation (DPLF), Washington DC (June 20, 2018), *passim*. https://www.mpicc.de/media/filer_public/55/f3/55f34cc1-028a-4046-a38c-46b320edde1e/simon_2018-2.pdf (6/21/2019).

[119] INTERNATIONAL COMMISSION OF JURISTS (2016), *op. cit. supra* n. 67, pg. 92. For a case concerning Eastern Europe, see the position of the Venice Commission in its final resolution on State measures taken in Albania regarding its judiciary, VENICE COMMISSION (2016), *Final Opinion on the revised draft constitutional amendments on the judiciary of Albania, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)*, Opinion No. 824 / 2015, doc. CDL-AD(2016)009 (14 March 2016), paragraph 52.

[120] VENICE COMMISSION (2015), *Interim opinion on the draft constitutional amendments on the judiciary of Albania, adopted by the Venice Commission at its 105th Plenary Session (Venice, 18-19 December 2015)*, Opinion No. 824/2015, doc. CDL-AD(2015)045 (21 December 2015), paragraph 98 onward. See also the caveat expressed by INTERNATIONAL COMMISSION OF JURISTS (2016), *op. cit. supra* n. 67, pg. 95.

[121] PÁSARA (2015b), *op. cit. supra* n. 15, pg. 304; HAMMERGREN (2007), *op. cit. supra* n. 97, pg. 139 and 145.

[122] See, in a general sense, without the specific standpoint of facing an exclusive system of judicial corruption, PÁSARA (2015b), *op. cit. supra* n. 15, pg. 304.

as stakeholders of change is key, if carefully selected, certified, overseen and evaluated by (and/or advised and accompanied by international support) a *truly* impartial and independent institution.[123]

(79) Additionally, it is possible to create a national body separate from all other State entities, *truly* impartial and independent, with its own authority to investigate and prosecute cases of systemic judicial corruption.[124] Likewise, depending on the magnitude of the systemic judicial corruption, there exists the option to introduce a *truly* impartial, independent and professional international entity into the national institutional order, mandated to investigate and (co)prosecute cases of systemic judicial corruption, inter alia.[125]

(80) Finally, given the fact that the networks of systemic judicial corruption, if part of Grand corruption schemes, tend to be part of more widespread illicit networks that include other State branches, dismantling them would include the capacity of creating impact beyond just the justice sector. Although the stakeholders of change in the justice sector (eventually accompanied by an international component) can deal with this matter, their efforts are

[123] In Latin America, in the case of Honduras, the task of international support corresponds to the model of ORGANIZATION OF AMERICAN STATES (2016), *Agreement between the government of the Republic of Honduras and the General Secretariat of the Organization of American States for the establishment of the Mission to Support the Fight Against Corruption and Impunity in Honduras*. https://www.oas.org/documents/eng/press/agreement-MACCIH-jan19-2016.pdf (6/21/2019). This Mission ("MACCIH" by its Spanish initials) includes the active support for the investigation and prosecution of cases of corruption (selected by the Mission) by the specialized unit of the PGO of Honduras through teams consisting of specialized personnel from the Mission and the specialized unit https://www.oas.org/es/sap/dsdme/maccih/new/docs/Publicacion-Diario-Oficial-La-Gaceta-detalles-para-creacion-de-UFECIC.pdf (6/21/2019).

[124] See P. COOMARASWAMY (2000), *Report on the mission carried out in Guatemala by the Special Rapporteur on the Independence of Judges and Lawyers*, UN doc. E/CN.4/2000/61/Add.1 (January 6, 2000), paragraph 169(f).

[125] In Latin America, in the case of Guatemala, this corresponds to the models of UNITED NATIONS (2003a), *Commission for the Investigations of Illegal Groups and Clandestine Security Organizations in Guatemala ("CICIACS")*. https://www.un.org/News/dh/guatemala/ciciacs-eng.pdf (6/21/2019); and CICIG (2006), *International Commission Against Impunity in Guatemala ("CICIG")*. http://www.cicig.co/uploads/documents/mandato/cicig_acuerdo_en.pdf (6/21/2019).

limited in term of immunities and other types of obstacles (not always formalized), which due to their own nature, are outside of the scope of the justice sector. The experience with this limitation has been summarized in Latin America with the *dictum*: "*pacto de impunidad*".[126]

iii. Conclusion

(81) Based on the experience in Latin America regarding reforms to the justice sector in the last three decades, we can conclude that the time horizon in the countries of the region in case that a reform would seek to overcome systemic judicial corruption is similar to the amount of time for achieving real and sustainable positive change in the countries' justice sectors, which is without a doubt a long-term task.

(82) In the case that judicial corruption operates based on an exclusive corruption system, particularly, when it is based on "impunity agreements", the time horizon to overcome this type of corruption surpasses the time horizon to overcome ordinary systemic judicial corruption. This is the case, because the scope of the latter only includes the justice sector, while the former has the magnitude of an authentic transformation of the State, which is undoubtedly a task that requires a longer time horizon than overcoming ordinary systemic judicial corruption.

(83) In both scenarios, with every passing day without overcoming the system of judicial corruption, vulnerable individuals with limited access to economic and political resources,

[126] See, in a recent example, R. GARGARELLA, R. LO VUOLO & M. SVAMPA (2019), *El riesgo de un pacto de impunidad*, Centro Interdisciplinario para el Estudio de Políticas Públicas (CIEP)https://www.ciepp.org.ar/images/Gargarella-Lo_Vuolo-Svampa_2019_El_riesgo_de_un_pacto_de_impunidad_LN_15-5-19.pdf (6/21/2019).

such as indigenous people, are the most affected victims. Their vulnerability is especially serious regarding indigenous women, particularly, in the context of extractive industries that operate in indigenous lands or in the surrounding areas.

IV. Systemic judicial corruption and judicial reforms in Peru

(84) In the following, we maintain that the current crisis regarding the justice sector in Peru reflects a problem of systemic judicial corruption. Corruption is a long-standing systemic problem in Peru; it is widespread, both in public institutions, including the justice sector, and the society. In this context, judicial corruption has not been resolved despite different attempts for judicial reform over the course of several decades. Rather, judicial corruption is a problem of the present time, with components of Grand corruption and elements of inclusive-exclusive corruption. In light of the magnitude of this problem, the measures proposed by the government of Peru are insufficient and cannot be classified as an effort sufficiently strong for an effective judicial reform, since these measures are only born as a matter of urgency. Additionally, these reform attempts face parliamentary boycotts, including from parliamentary groups whose leaders are being investigated for belonging to corruption networks, generating uncertainty and further calling their efficacy into doubt. Achieving real and sustainable change in the justice sector in Peru is, therefore, without a doubt a long-term task, especially in case where the asymmetry of power among the parties is evident.

1. The current justice crisis in Peru and measures to confront it: insufficient, stuck in Congress, and boycotted

(85) We have indicated that in order to make reforms against judicial corruption, time and effort addressing the general and specific elements are required, in addition to combatting corruption not only in the justice sector, but also in other sectors of the State at the same time.[127] We are convinced that judicial reform would be an important step to overcoming the problems of justice. However, it would not be one hundred percent true to state that judicial reforms are currently underway in Peru.

(86) The current crisis of justice in Peru was triggered in July 2018 by an authentic operational judicial corruption case involving Grand corruption. Secretly recorded phone conversations were obtained legally[128] that revealed judges, public prosecutors and council members of the National Council of the Magistracy [129] negotiating amongst themselves and together with politicians, businesspersons and authorities regarding different matters related to the exercise of public authority, such as the selection of presiding magistrates, the designation of provisional judges, or judicial decisions. The background to these negotiations were alleged crimes involving high authorities of the justice and the private sector, and other State representatives. As is logical, the corrupt practices involved different stakeholders

[127] See *supra* pg. 35 and onward (III. Time horizon for a reform that seeks to overcome systemic judicial corruption, 5. Time horizon for overcoming systemic judicial corruption).
[128] The first report was done by IDL-REPORTEROS (2018), *Corte y corrupción*, July 07, 2018. https://idl-reporteros.pe/corte-y-corrupcion/ (21/06/2019).
[129] The practices of networks of corruption to co-opt the National Council of Magistrates have been described previously through official testimony submitted by an important activist of IDL-Justicia Viva; see C. SILVA DEL CARPIO (2016), *Paren la farsa. Apuntes sobre la elección y fiscalización a los consejeros del Consejo Nacional de la Magistratura*, IDL, Lima, *passim*. http://www.justiciaviva.org.pe/new/wp-content/uploads/2016/12/2_Todo_libro_Paren-la-farsa.pdf (21/06/2019).

and interests, and evidenced the maliciousness of the justice sector. This also proved one of the main insufficiencies of the measures taken by the government to generate changes in the justice sector: these measures focused on the stakeholders of the justice sector and forgot about the other stakeholders of corruption, such as businesspersons, members of Congress, etc.

(87) Nevertheless, and even when taking into account only the stakeholders of the justice sector, the measures proposed by the government do not have the necessary force or consistency to be considered a judicial reform. In fact, the Consultative Commission for the Reform of Justice,[130] immediately established after the secretly recorded phone conversations were published in July 2018, was conscious of its limits and did not have the ambition to deal with the broad spectrum of the reform, but rather:

> *the work has focused on drafting proposals of urgent and concrete measures to deal with the emergency and open the road for reform that leads to the construction of effective, timely, transparent and efficient justice,* free of corruption (emphasis added).[131]

(88) The Consultative Commission proposed nine recommendations and qualified them as the first measures for change:[132] 1. Creation of the National Authority for the Integrity and

[130] The commission was created through Supreme Resolution No. 142-2018-PCM, published on July 13, 2018, and consisted of Allan Wagner Tizon, Delia Revoredo Marsano, Hugo Sivina Hurtado, Samuel Abad Yupanqui, Eduardo Vega Luna, Ana Teresa Revilla Vergara y Walter Alban Peralta. Their report was dated July 25, 2018.
[131] COMISIÓN CONSULTIVA PARA LA REFORMA DEL SISTEMA DE JUSTICIA (2018a), *Carta de entrega del informe al presidente de la República*, pg. 1.
[132] COMISIÓN CONSULTIVA PARA LA REFORMA DEL SISTEMA DE JUSTICIA (2018b), *Hacia un Sistema de Justicia honesto y eficiente. Informe de la Comisión Consultiva para la Reforma del Sistema de Justicia*Lima, July 25, 2018, pg. 8–24. https://www.transparencia.org.pe/sites/default/files/media/documentos/archivos/Informe%20del%20Comisión%20Consultiva%20versión%20firmada.pdf (21/06/2019).

Control in the Judiciary and the Public Prosecutor's Office, 2. Constitutional reform of the National Council of the Magistracy, 3. A Specialized National Justice System for the Protection and Sanction of Violence against Women and Family Members, 4. Procedural Discharge in the National Social Security Office and exclusion of the participation of the PGO in cases involving administrative procedural law, 5. Objective selection of provisional judges and public prosecutors, 6. Creation of a senior Anti-Corruption Public Prosecutor's Office, 7. Transparency and accountability in the justice sector, 8. Measures to promote ethics of lawyers, 9. the Creation of the Council for the Reform of the Justice System. These measures deal with urgent and specific issues, which do not reach as far as previous efforts, such as those elaborated by the Special Commission for the Integral Reform of the Justice System ("CERIAJUS" by its Spanish initials).[133]

(89) Following the publication of the Consultative Commission's report, the proposals for reform contained therein were sent to Congress by the President on July 28, 2018, and subsequently, adopted as Constitutional and legal reform projects. In his discourse from July 28, 2018, President *Martín Vizcarra* stated that after eighteen years of corruption scandals in the government of Fujimori, the country was once again on the brink of a serious crisis due to judicial corruption.[134]

(90) While the judicial corruption revealed by the secretly recorded phone conversations caused significant reaction within civil society and by the President of Peru, and resulted in the resignation of the president of the Judiciary as well as in the removal of the members of the

[133] Compare *infra* paragraphs (100) and (108) onward.
[134] M. VIZCARRA (2018), *Mensaje a la nación*, July 28, 2018, pg. 4. https://www.presidencia.gob.pe/docs/mensajes/MENSAJE-NACION-28-07-2018.pdf (21/06/2019).

National Council of the Magistracy, investigations against a Supreme Court magistrate (who fled the country), imprisonment of the president of the superior court of El Callao, and other members of the organized crime group "the seaport's white-collars" (span. "*Los Cuello Blanco del Puerto*"), the resistance and boycotts of the actions taken against the judicial corruption were also strong.

(91) The emblematic case of resistance and boycott against change is the role played by the former Chief Public Prosecutor, *Pedro Chávarry*, and both parliamentary groups in Congress who supported him. This example shows how members of corruption networks are not only involved in the justice sector but also in the legislative branch, with considerable power to confront the Executive Branch, even though their corrupt background is evident. The Chief Public Prosecutor was secretly recorded in a conversation with former Supreme Court judge *César Hinostroza Pariachi*, who fled the country, coordinating the support of *Hinostroza* and other individuals to become the next Chief Public Prosecutor.[135] *Chávarry*, accused by the PGO of being a member of the organized crime group "the seaport's white-collars", harassed prosecutors who investigated him; officials linked to *Chávarry* stole evidence entering a sealed office of the PGO. Despite of all of this, the Chief Public Prosecutor was defended on repeated occasions by

[135] EL COMERCIO (2018), *Difunden dos nuevos audios de César Hinostroza y Pedro Chávarry*, July 31, 2018. https://elcomercio.pe/politica/difunden-dos-nuevos-audios-cesar-hinostroza-pedro-chavarry-noticia-541768 (21/06/2019). CANAL N (2018), *Audios CNM: Chávarry e Hinostroza coordinaron reunión, informó El Comercio*, October 26, 2018. https://canaln.pe/actualidad/chavarry-hinostroza-se-habrian-reunido-mayo-segun-audio-difundido-comercio-n344460 (21/06/2019).

opposition forces in Congress, including against investigations by Congress against him.[136] Due to evidence of his relationship with organized crime, the pressure for *Pedro Chávarry* to step down as Chief Public Prosecutor was massive by the end of 2018. Massive social protest, gatherings of public prosecutors, and representatives of the government and Congress, publicly expressed their desire for his resignation. In January 2019, *Chávarry* finally stepped down as Chief Public Prosecutor, only after he had got rid of the public prosecutors who were investigating the Grand corruption case called "Operation Car Wash" (port. "*Lava Jato*"), which involves the corrupt operations of the Brazilian multinational company "Odebrecht" in Peru (including, illegal party funding, bribing highest public officials and money laundering, inter alia). On this occasion, the extent of the public outrage was so overwhelming that those who support the *Fujimori* political movement and the *Aprista* Party declined to support *Chávarry*. *Chávarry* resigned as the Chief Public Prosecutor, but he still holds the position of a senior public prosecutor.

(92) Nevertheless, the *Chávarry* case is not the only example of Congress boycotting change in the justice sector, especially regarding the fight against judicial corruption. The resistance to debate modifications to the Constitution, the obstruction of investigations against organized crime by judicial authorities linked to the organized crime group "the seaport's white-collars", as well as their efforts to avoid discussions and to undermine legislative projects on the justice sector reform presented by the Executive Branch are evidence of boycotts.

[136] LA REPÚBLICA (2019), *Fujimorismo y Apra blindan nuevamente a Pedro Chávarry*, April 2, 2019. https://larepublica.pe/politica/1442137-pedro-chavarry-fujimorismo-apra-archivan-denuncia-ex-fiscal-nacion-deslacrado-ilegal-oficina-ministerio-publico (21/06/2019).

(93) The word "boycott" was used by President Vizcarra in his message to the nation on May 29, 2019:

> *Yesterday, in the Permanent Congress Commission, we observed shameless shielding, despite all indications that point toward starting an investigation in the corresponding bodies, as determined by justice. The Congressional majority made the decision to throw out Constitutional claims against Mr. Pedro Chavarry Vallejos. I feel the same indignation as you all regarding these acts.*
>
> *Faced with this boycott of the anti-corruption fight, the government, and society, cannot standby and not state our profound concern that this causes us. (what is highlighted is ours).*[137]

(94) The attempts of the government to promote the fight against judicial corruption and to overcome the Parliamentary boycott opened the door to great uncertainty beyond the justice sector of Peru, reached a breaking point in which constitutionally shutting down Congress and convening new elections was seriously considered.

2. Corruption and systemic judicial corruption: an old and serious problem

(95) The problems in the Peruvian justice sector are long standing, and the current crisis is another chapter in its history. These problems have existed, including prior to the foundation of the republic. Even though there is a difference between the concept of public assets from that era and what is now understood as a public asset, during the viceroyalty era, there are reports that describe cases that, with the terminology used in this report,

[137] M. VIZCARRA (2019), *Mensaje a la nación del Presidente de la República, Martín Vizcarra Cornejo*, May 29, 2019.

could be classified as judicial corruption. For example, the Ministers of the Royal Hearing of viceroyalty of Lima of the XVII Century were accused of excessive greed for putting their interests or those of their families first, in addition to other abuses of jurisdictional power.[138] During the Republic, the problems of the justice sector were not resolved. Among these problems, corruption was significant.

(96) Judicial corruption has been denounced on various occasions throughout the history of the Republic of Peru. *Gonzales Prada*, the former director of the National Library and an intellectually important figure at the end of the XIX Century and the beginning of the XX Century, criticized the wide range of judicial corruption, which in this era appeared generalized, with an inclusive-exclusive nature:

> *There is no unfeasible iniquity nor unavoidable challenge, when there is money, influence or power… And no proof or rights are valid. As a bad man is sought for payback, a judge is sought for intricate cases in order to nullify a ruling, fabricate a new ruling, and hand down a sentence that expunges the guilty and sacrifices the innocent.*[139]

(97) Currently, there are various ongoing investigations by national and international agencies, academics, journalists and even public prosecutors that demonstrate corruption in Peru, and particularly the systemic corruption in the justice sector. These investigations show the strong presence of the determining exogenous and endogenous factors of the corruption.

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[138] J. DE LA PUENTE (2006), *Codicia y bien público: los ministros de la audiencia en la Lima seiscentista*, Revista de Indias, LXVI (no. 236), pg. 133–148.
[139] M. GONZALES PRADA (1902), *Nuestros Magistrados*, http://blog.pucp.edu.pe/blog/jaimedavidabantotorres/2015/12/13/nuestros-magistrados/ (21/06/2019).

According to the *Corruption Perception Index* 2018,[140] Peru holds position 105 of 180 countries with a score of 35/100, which is worse than the previous year. Additionally, the *Control of Corruption* indicator of the *World Bank* is not favorable for Peru either, and in 2017, it received a score of -0.50 with a range of between -2.5 (*weak*) to 2.5 *(strong) governance performance*.[141] The population is not safe from daily corruption and has developed levels of tolerance. According to the Corruption Perceptions Index of Ipsos, one out of every two Peruvians has a high to medium tolerance of corruption.[142] Parting from the general panorama, the Organization for Economic Cooperation and Development (OECD) explains that the low score of Peru in the Public Integrity Indicator 2015 is the result of its low score in the Judicial Independence subindicator,[143] which is exactly what we are concerned with: the justice sector.

(98) The justice sector, led by the Judicial Branch, has a low approval rating from Peruvians. According to national urban and rural data of Ipsos, between August 2016 and May 2019, approval of the management of the Judicial Branch averaged approximately 25%, except during the critical months of July, August and September of 2018, when only 1 out of every 10 Peruvians gave a favorable rating for this State branch.[144] Additionally, when

[140] TRANSPARENCY INTERNATIONAL (2018), https://www.transparency.org/cpi2018 (21/06/2019).
[141] WORLD BANK (1996-2017), https://tcdata360.worldbank.org/indicators/hc153e067?country=BRA&indicator=364&viz=line_chart&years=1996,2017 (21/06/2019).
[142] IPSOS (2018), https://www.ipsos.com/es-pe/indice-de-propension-la-corrupcion (21/06/2019).
[143] OECD (2017), *Estudio de la OCDE sobre integridad en el Perú: Reforzar la integridad del sector público para un crecimiento incluyente*, Èditons OCDE, Paris, pg. 22.
[144] IPSOS (2019), *Opinión Data, mayo de 2019*, pg. 12, https://www.ipsos.com/sites/default/files/ct/news/documents/2019-05/opinion_data_mayo_2019.pdf (21/06/2019).

Peruvians are asked, what do you think the main problems regarding justice are? The main answer is stunning: 76% say corruption.[145]

(99) According to the Transitory Council of the Judicial Branch, created after the fall of the corrupt government of Alberto Fujimori (1990-2000), the corruption mechanisms of within the judicial realm that were of great incidence included: 1. Lobbies, 2. Clandestine illicit networks within judicial instances, 3. Appropriation, 4. Undue influence, 5. Information networks, 6. Exchange of favors to influence functional will, 7. Use of personal vulnerabilities of the judge (substitute or replacement, mediocre or lack of education, lack of experience in judicial office duties), 8. Preferences in designation, 9. Irregular access to judgeship, 11. Irregular financing of periodic publications.[146]

(100) Judicial corruption is a topic that has been dealt with in different diagnostics and plans for the reform of Peru's justice sector. If we focus on one of the stakeholders, the lawyers, we find, for example, that the National Plan of the Special Commission for the Integral Reform of the Justice System (CERIAJUS) identified the following as possible channels that corrupt lawyers: "(i) law firms associated with judges or assistant administrative personnel of the justice sector, (ii) judges who act as intermediaries".[147] Additionally, *Luis Pásara* quantitatively describes the ineffectiveness of ethical disciplinary control of the Bar

[145] IPSOS (2016), *Opinión Data, noviembre de 2016*, pg. 4, https://www.ipsos.com/sites/default/files/publication/2016-11/Opinion%20Data%20Noviembre.pdf (21/06/2019).
[146] CONSEJO TRANSITORIO DEL PODER JUDICIAL (2001), *Informe final. Comisión de Planificación de Políticas de Moralización, Eticidad y Anticorrupción*, 2001 pg. 63–66, citado por DEFENSORÍA DEL PUEBLO (2006), *Informe Defensorial No. 109. Propuestas básicas de la Defensoría del Pueblo para la reforma de la justicia en el Perú. Generando consensos sobre qué se debe reformar, quiénes se encargarán de hacerlo y cómo lo harán*, Defensoría del Pueblo, Lima, pg. 83.
[147] COMISIÓN ESPECIAL PARA LA REFORMA INTEGRAL DE LA ADMINISTRACIÓN DE JUSTICIA (CERIAJUS), *Plan Nacional de Reforma Integral de la Administración de Justicia*, Lima, pg. 50.

Association of Lima,[148] while the Ombudsman's Office states that corruption of judges only occurs through actions of the other parties involved, such as lawyers, and questions the impact of the ethical courses in the faculties of law, as well as the controls of the bar association.[149] Likewise, specialized literature offers an in-depth casuistic understanding of the inclusive-exclusive corruption practices and the corruption networks that involve lawyers.[150]

(101) Beyond the corrupt use of the law, criminal organizations use their expert knowledge of law and the functioning of the justice sector in order to commit crimes. This does not only involve corruption in the justice sector, but also criminal use of the law, as demonstrated by police, public prosecutors and judicial investigations into the criminal organization associated with the attorney at law *Rodolfo Orellana*.[151] *Luis Pásara* has mentioned in a recent interview:

> *When I published Judges, Justice and Power in Peru, in 1982, I believed that the main problem involving justice resided in the close relation with power, which gave way to all of the other problems. This was true, but my analysis was limited to the associations of dependence regarding the power of the State. Now, these associations exist -as we have heard in the audio- but they are not the most important. The true*

[148] L. PÁSARA (2005), *Los abogados de Lima en la administración de justicia. Una aproximación preliminar*, Consorcio Justicia Viva, Lima, pg. 83.
[149] DEFENSORÍA DEL PUEBLO (2006), *op. cit. supra* n. 146, pg. 78.
[150] Consult J. MUJICA (2011), *Micropolíticas de la corrupción. Redes de poder y corrupción en el Palacio de Justicia*, Asamblea Nacional de Rectores, Lima, *passim*; y H. D. QUIÑONES ORE (2018), *Etnografía de la corrupción de abogados de Lima* (Tesis para optar el Grado de Magíster en Antropología), Universidad Nacional Mayor de San Marcos, Lima, *passim.*
[151] C. BAZÁN SEMINARIO (2016), *El uso criminal del derecho*. https://elcomercio.pe/opinion/colaboradores/criminal-derecho-cesar-bazan-seminario-153329 (21/06/2019).

centers of control are not in Congress or the Government Palace, but in the hands of organized crime, those who control the drugs, human trafficking, illegal economic activities, etc.[152]

(102) Perhaps, this is why it is not strange that Peruvian attorneys at law have been associated with the network of corruption that benefited the Brazilian multinational company "Odebrecht" and therefore the PGO performed investigations regarding the relationship between various important law firms of Lima and cases of corruption,[153] and various attorneys at law currently have preliminary criminal injunctions placed against them.[154]

3. Judicial reforms of the last half century: between the instrumentalization of justice and the boycott of reforms

(103) The problems of the justice sector and the fight against judicial corruption has been motivated by attempts for judicial reform in recent decades of Peruvian history. Nevertheless, these problems have not been resolved, and they are currently very active.

(104) At the end of the 1960s, the revolutionary government of the armed forces, led by Army General *Juan Velasco Alvarado,* took some measures to create a special agrarian tribunal to resolve agrarian reform conflicts, removing and replacing the representatives of the Supreme Court, and creating the National Justice Council, among others. This reform

[152] L. PÁSARA (2019), *La reforma judicial: balance y perspectivas reales de cambios,* Revista Argumentos 13, pg. 18.
[153] DIARIO CORREO (2017), *Odebrecht: lista de estudios de abogados que asesoraron a la constructora brasileña*, May 19, 2017, https://diariocorreo.pe/politica/caso-odebrecht-esta-es-la-lista-de-estudios-de-abogados-de-la-constructora-brasilena-750637/ (21/06/2019). DIARIO LA REPÚBLICA (2018), *Levantarán secreto tributario de 60 estudios de abogados por contratos con Odebrecht*, July 24, 2018, https://larepublica.pe/politica/1284591-lava-jato-secreto-bancario-60-estudios-abogados-contratos-odebrecht (21/06/2019).
[154] This is the case of lawyer, former parliament member, and arbitrator Horacio Cánepa.

intended to move the Judicial Branch closer to the political project of the nationalist court and more critical of capitalism. In this sense, despite the fact that significant jurists were called upon,[155] the reform looked to instrumentalize justice on behalf of the Executive Branch.

(105) Subsequently, during the government of *Alberto Fujimori*, judicial reform was proposed that likewise included various elements, and this was supported by international agencies. There are various documents drafted regarding the critical situation of the justice sector during the times of *Fujimori*. An example is the report of the International Commission of Jurists, popularly known as the Goldman Report,[156] drafted at the beginning of the 1990s. Years later, the president of congress and university professor *Henry Pease* described the cooptation of the Judicial Branch during this era:

> *Intervention by the Judicial Branch began with Law (26546). The attributes of this Commission were expanded through Law 26623 approved on 06.15.96 …. Little by little, the country would understand that this did not involve minor problems of justice, as the justification stated, nor was it about reforming a State Branch essential for citizens whose corruption had been so much denounced.. It involved, once again, the main point of corruption: that of the magistrates with political power at the time.*[157]

[155] L. ZOLEZZI (1995), *El Consejo Nacional de la Magistratura*, Revista Derecho PUCP 49, pg. 124–125.
[156] COMISIÓN DE JURISTAS INTERNACIONALES (1993), *Informe de la Comisión de Juristas Internacionales sobre la Administración de Justicia en el Perú*, International Joint Commission, Washington DC, *passim*.
[157] H. PEASE GARCÍA (2000), *Así se destruyó el Estado de derecho. Congreso de la República. Perú. 1995-2000*, n/e Lima, *passim*.

(106) With the fall of Fujimori, a promising political and institutional moment began for Peru, which regretfully was short lived. We must also remember that during these years, Peru was getting out of an internal armed conflict, with harsh consequences for the population and institutional democracy. As of this time, the efforts to recover the historical memory were expressed through the creation of a truth commission in order to generate a record of what took place during the conflict (1980-2000). Said commission, in its final report, proposed a balanced critique of the actions of the justice sector during those years of political violence:

> *123. The TRC must indicate that the abdication of the democratic authority included the functions of the administration of justice. The judicial system did not adequately comply with its mission; neither (with its mission) to convict, based on the rule of law, the actions of subversive groups, nor to safeguard the rights of those detained, or to put a stop to the impunity with which State agents acted to commit serious violations of human rights.*[158]

(107) This harsh judgement regarding the actions of the justice sector within the context of political violence, along with the fall of the regime of *Alberto Fujimori*, resulted in conditions for the final ambitious attempt for judicial reform in Peru, which unlike the previous attempts, did not attempt to instrumentalize justice under the political project of the Executive Branch.

[158] COMISIÓN DE LA VERDAD Y RECONCILIACIÓN (2003), *Informe Final*, tomo VIII (Conclusiones generales), pg. 336. http://cverdad.org.pe/ifinal/pdf/tomo%20viii/conclusiones%20generales.pdf (6/21/2019).

(108) This primarily involved efforts directed through the Special Commission for the Integral Reform of the Justice System (CERIAJUS). Said commission was created through Law No. 28083, published on October 4, 2003, and was made up by the heads of the justice sector and members of civil society. The national plan of the CERIAJUS, dated April 23, 2004, had approximately 650 pages and was divided into proposals for the following areas: Access to justice, anti-corruption policies, modernization of jurisdictional and fiscal offices, human resources, government, administration and budget, predictability and jurisprudence, criminal justice, and improvements to legislation. The plan had the aim of proposing an integral reform, and not only focusing on the urgent and specific matters.

(109) Regarding anti-corruption measures in the plan of the CERIAJUS, this was a sub-area of the anti-corruption, ethics and transparency policies, as it was understood that judicial corruption was part of a series of problems of the justice sector and of the State. The strategic aim of the area was:

> *Establish permanent and coordinated policies that consolidate an ethical and transparent practice of the operators and institutions of the SISJUS and that help identify, sanction and eradicate corrupt practices within.*[159]

(110) The sub-area had the following proposals:[160]

[159] PODER JUDICIAL *et al.* (2004), *CERIAJUS. Preguntas y respuestas*, pg. 17. http://biblioteca.cejamericas.org/bitstream/handle/2015/1491/ceriajus-preguntas.pdf?sequence=1&isAllowed=y (21/06/2019).
[160] *Ibid.*

- drafting of an integral plan to prevent and sanction corrupt acts within the justice sector and improve the disciplinary control bodies, eventually resulting in a sole external control body;
- reformulation of criteria for the evaluation of judges;
- strengthening of the judicial anti-corruption subsystem, jointly with the national plan to fight corruption of the Ministry of Justice;
- imprescriptibility of disciplinary administrative processes against magistrates;
- reopening of disciplinary proceedings against magistrates removed from positions due to protective actions;
- prohibition for five years to hold a public position for magistrates removed from their position due to corruption.

(111) Regretfully, said judicial reform efforts, as well as the efforts to fight corruption, and the reforms to other sectors (for example, military or police) were boycotted in recent years by the government of President *Alejandro Toledo* (2001-2006), and put to the side by the following government of *Alan García* (2006-2011), during which time the second *apristización* of justice took place, according to *David Lovatón*,[161] when describing the efforts for cooptation of the justice sector taken by the government and the leaders of the Aprista Political Party.

[161] D. LOVATÓN PALACIOS (2010), *La segunda "apristización" de la justicia*, Revista Ideele (December 2010), *passim.*

4. Conclusions: What can be expected?

(112) In this section we affirmed that judicial corruption in Peru is a long-running systemic problem, which involves elements that we have called Grand corruption. Thus, the necessary minimum term for efficient reform against this phenomenon in Peru is similar to the amount of time necessary to achieve real and sustainable change in the justice sector in Peru as a whole, which is without a doubt a long-term task.

(113) Upon investigating the current attempts to improve justice in Peru, *Luis Pásara*, who has spent more than forty years studying these matters, was skeptical, "regarding the possibility of changing the justice systems without greater changes taking place, not just in the justice system, but in society."[162]

(114) Additionally, *Marisa Ramos,* upon analyzing various countries of the region, states that the initiatives for judicial reform of the second decade of the XXI Century are not effective, losing centrality in the political agenda, and not aiming at planned and comprehensive measures, but rather expedient measures and the promotion of alternative conflict resolution. This, combined with a lack of interest on the part of stakeholders of justice and the difficulties in coordinating with them, as well as the instability of political positions, paints a somewhat lifeless panorama regarding changes in justice in Latin America.[163]

(115) Following the proposal of general and specific elements to fight against judicial corruption,[164] we agree with both *Pásara* and *Ramos*, and we put an emphasis on the fact

[162] L. PÁSARA (2019), *op. cit. supra* n. 152, pg. 20.
[163] M. RAMOS ROLLÓN (2017), *La efectividad de las políticas de justicia de la última década en América Latina*, Revista del CLAD Reforma y Democracia No. 68, pg. 5–42.
[164] *Supra* pg. 39 onward. (5. Time horizon for overcoming systemic judicial corruption, ii. Minimum conditions for generating effective change).

that, as there has been no attempt at an ambitious and integral reform of justice –as proposed by the CERIAJUS in 2004– and as there are ongoing boycotts, the expectations for in-depth and long-lasting changes are limited. Thus, there is reasonable doubt as to the minimization of corruption in the justice sector of Peru in the short-term, and the ability to assign judicial proceedings free of corruption, especially in cases where the asymmetry of power among the parties is evident.

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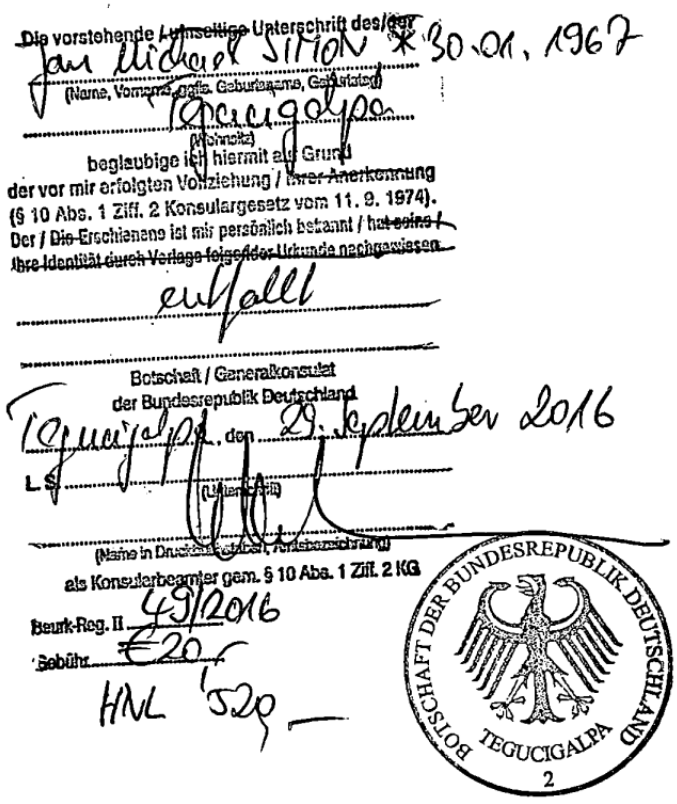
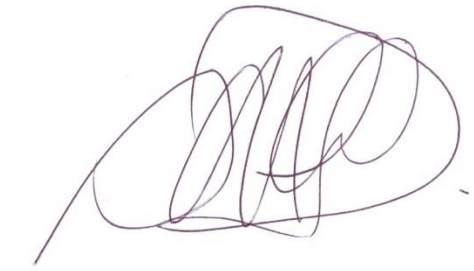
I, Jan-Michael Simon, affirm that the above information is true and correct under the penalty of perjury, in accordance with the laws of the United States.

Jan Michael Simon



Signed in Freiburg im Breisgau, June 21, 2019.

I, César Bazán Seminario, affirm that the above information is true and correct under the penalty of perjury, in accordance with the laws of the United States.



César Bazán Seminario

Freiburg im Breisgau, June 21, 2019