

# Political Conflicts Over the JEP: A Sociolegal Perspective<sup>1</sup>

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## *Abstract*

This article describes and analyses political debates related to the creation of the Special Jurisdiction for Peace (JEP) in Colombia. Drawing on a critical sociopolitical and sociolegal perspective, it analyses transitional justice as a field in which different social and institutional actors with diverse levels of power and interests struggle to persuade or impose their meanings on justice, victims' rights and peace. In consequence, the analysis about the JEP should comprehend the context, the discursive constructions, and the political disputes that frame it. The article is based on archival research that included academic references, institutional reports, news media information and other documents on the matter. The first part of the article presents an account of the sociopolitical context that made possible designing the JEP. Subsequently, it describes the main political and legal disputes to transform the JEP. The article finally provides an analysis that highlights the contradiction between a selective retributivist approach, mainly sustained by those who have opposed the Peace Agreement, and a holistic perspective, led by those who have supported the advantages of a negotiated peace.

## *Introduction*

The signing of the Peace Agreement (PA) between the Colombian Government and the former Revolutionary Armed Forces of Colombia (FARC) on 26 September 2016 represented a glimmer of hope for a society that had endured the longest and one of the most destructive armed conflicts in the hemisphere. This armed conflict lasted more than fifty years, caused more than two hundred thousand deaths and more than eight million

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1 This chapter is an updated version of one published in Spanish in *Vniversitas* 2020: 'Las disputas por la Jurisdicción Especial para la Paz (JEP): una reflexión crítica sobre su sentido político y jurídico'.

displaced people (Centro de Memoria Histórica, 2013). However, the optimism expressed by the international community contrasted with the political tensions within Colombian society. This contradiction is the tip of the iceberg in this complex case in the Latin American context. It is not a transition from dictatorship to liberal democracy as was the case in countries such as Argentina, Chile, Uruguay or Brazil, nor is it a single transition from war to peace, as in El Salvador or Guatemala in the nineties (Skaar, García-Godos & Collins, 2016). It is rather a case of using transitional justice mechanisms in a still active political conflict (ICRC, 2019) with partial transitions from war to peace, characterized by the participation of different armed actors that have demobilized in different moments.

This is a challenging experience of transition from war to peace for different reasons such as the length of the armed conflict, the participation of diverse armed actors (left-wing guerrillas, right wing paramilitary forces and state armed forces), and the existence of illegal economies that have fuelled outstanding amounts of resources for armed actors that compete with state institutions in controlling territories. All these factors have taken place in one of the most unequal societies in the hemisphere and where the state institutions have failed to exert their functions in vast parts of the Colombian territory (Revello & García-Villegas, 2018).

The PA between the Colombian Government and the FARC was very significant and promising for diverse international and national social actors because it represented the possibility of transforming the history of political violence in Colombia. Nevertheless, very influential right-wing political sectors in the country<sup>2</sup> opposed the path of a negotiated peace based on the argument that the FARC were terrorists who needed to be militarily defeated by the State power. In consequence, for those political sectors, the PA was portrayed as concessions to terrorists, and transitional justice institutions, such as the Special Jurisdiction for Peace (JEP by its Spanish acronym), were thought of as mechanisms of impunity.<sup>3</sup> In this context, Colombian society has undergone intense political and legal debates over the legitimacy and legality of these mechanisms during more than four years.

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2 These sectors were integrated by right wing parties, such as the Democratic Centre, led by the former president Alvaro Uribe, and the Conservative Party; interest groups, such as Fedegan, an association of landowners devoted to livestock farming, and banana growers; big mass media owners, such as RCN; associations of retired armed forces members, such as ACORE; and religious groups, such as conservative Catholics and Evangelists.

3 See also Ambos & Aboueldahab's contribution to this volume.

This chapter describes and analyses those political and legal debates regarding JEP through a critical sociolegal perspective. Drawing on Pierre Bourdieu's theoretical point of view, I sustain that transitional justice is a field in which diverse political, institutional and social actors with different levels of power and experiences struggle to defend their approaches to understanding the political conflict, how to reach justice, and how to protect the victims' rights (Bourdieu & Wacquant, 1992). In this regard, transitional justice, its mechanisms, and practices do not reflect a social consensus but rather a space of social conflict. From this approach relations between politics and law differ from both legalist and structuralist views. While legalist approaches conceive social reality as a product of the legal domain, structuralist theories portray law as an outcome of economic or political forces. From a constructivist view, law is both an expression of a social dynamic as well as the possibility of creating a new social reality (Bourdieu, 1986).

Regarding the field of transitional justice, Ruti Teitel (2000) suggests a similar perspective when she makes a distinction between realist and idealist approaches. For realists, power relations frame and define the contents of legality, while for idealists, from liberal theoretical perspectives, law should be a rational constraint that frames the scope of politics. According to Teitel, both perspectives fail to explain the complexity of relations between law and politics in times of political change. Realists fail to give an account of ethical and legal dimensions, while idealists neglect to consider the relevance of understanding political and social contexts as well as the constraints of power relations in the legal process. Teitel draws on a legal constructivist approach based on which law is the outcome of a political and social context as well as a mechanism and a language capable of enhancing social transformations.

Based on this constructivist theoretical framework, I highlight the relationships between the political debates and the institutional framing of transitional justice mechanisms in Colombia. In this sense, the project of transitional justice institutions in the PA represented a relevant ending point in the political negotiations since approximately one year was required to agree on their design (Martínez, 2018; Freeman & Orozco, 2020). Such institutions were comprised of a Unit for the Search of Missing Persons, a Truth Commission, the Special Jurisdiction for Peace (JEP) as well as reparation mechanisms. The negotiators also agreed that these mechanisms should follow the principle of the centrality of the victims, which meant they should pursue the protection of victim's rights (Colombia, 2016).

After the partial agreement on section five of the PA, diverse debates related to mechanisms of transitional justice emerged in Colombian society, mainly with regards to JEP. These debates, which had started in 2016, increased when the PA was signed, and gained momentum by the time of the referendum in October that same year. By 2017, in the phase of implementation of the PA, the debates moved from the electoral battles of the referendum to the sessions of the Colombian Congress. In 2018, before the presidential elections, the debate about impunity played a significant part of the campaign that led to the election of Ivan Duque, the right-wing candidate who had opposed the PA. Later in 2019 and 2020, the government of Ivan Duque and his party deployed different political actions to undermine the legitimacy of JEP and to transform it.

These political debates, which persist today, have had strong impact on the legal and institutional realm. In this regard, the design, implementation and operation of JEP have been affected by the tension between two main discursive constructions: on the one hand, a holistic perspective that was the basis of the mechanisms designed by the PA and that supports the relevance of a negotiated peace, even in spite of its possible imperfections; and on the other, the political opposition to the PA that considers this negotiation was not legitimate and that transitional justice mechanisms enhance impunity in favour of former FARC leaders.

To spell out these political debates and its consequences, this chapter initially provides a context to better understand the different interests and perspectives at stake. It also provides an account of the way these debates took place in the political and legal arena. Finally, the article analyses these tensions based on three main ideas: political and legal meaning of JEP, conception of justice at stake and challenges for the future. These political battles over JEP have had, and will have, consequences on the functioning of JEP and the protection of victims' rights. The description and the analysis of this article is based on a research project that drew on document analysis of newspapers, official documents, reports about political debates and legal norms, such as Congress laws and Constitutional Court decisions.

### *1. JEP: The Outcome of a Political Negotiation*

As mentioned above, the Colombian experience is a case of partial transitions in which mechanisms of transitional justice were introduced after political agreements with armed and social actors. A first moment is related to the demobilization of right-wing paramilitary forces between 2003 and

2006 during the presidential terms of Alvaro Uribe Vélez (2002–2006 and 2006–2010). To enhance this demobilization, the Government of Alvaro Uribe and Congress promoted a legal framework (Law 975 from 2005) that granted special treatment to paramilitary commanders based on a reduction of punishment without the condition of disclosing the truth about their crimes (Comisión Colombiana de Juristas, 2008). A second moment, between 2007 and 2011, consisted of the political and legal mobilization of human rights organizations to demand a legal framework for victims' rights. Up to that moment the existing legal framework was focused on the demobilization of perpetrators, but for victims and social organizations there was no public policy to protect their rights. These mobilizations created the political environment that led to the enactment of the Victims and Land Restitution Law (Gómez, 2014; Uprimny & Saffon, 2009).

A third moment, which is the focus of this chapter, is related to the peace negotiations between the Colombian government and the left-wing FARC guerrilla after 2012. This process is highly relevant to the extent that it attempted to overcome a longstanding armed conflict that had persisted since the foundation of the FARC in 1964. The PA included a component related to the Integral System of Truth, Justice, Reparation and Non-Repetition (Colombia, Gobierno Nacional & FARC-EP, 2016). Even after the demobilization of the right-wing paramilitary groups (2003–2006) and the largest left-wing guerrilla group in the country (2012–2016), the political armed conflict is still active because of the existence of other armed actors, such as the guerrilla group National Liberation Army (ELN) and a set of powerful armed groups associated with drug trafficking (ICRC, 2019).

In addition to that context, the peace process with the FARC took place in a politically contested scenario that confronted those sectors that distrust the guerrilla groups, and those social sectors that consider the only way to solve the armed conflict is by means of a negotiated peace. It is necessary to consider that during the past three decades the FARC had reached a very low level of legitimacy and credibility within Colombian society. The expansion of their military capacity during the nineties, the increasing actions against civilian populations and the failure of the peace negotiations during the government of Andrés Pastrana (1998–2002) had created a negative social reaction against this group (Pecaut, 2001). This collective feeling led to the election of Alvaro Uribe, who ran for presidency under a platform based on a project of security and the recovery of the state's sovereignty. Uribe's government (2002–2006 and 2006–2010) was characterized by introducing policies on the war on terror and framing the guerrilla groups as terrorists who had to be defeated (Medellín, 2010).

Juan Manuel Santos, who was Uribe's former Minister of Defence, was elected in 2010 under the same political platform of security and war on terrorism. However, Santos (2010–2014 and 2014–2018) adopted more practical policies, such as restarting bilateral relations with Venezuela and the initiation of a peace process with the FARC. Uribe and his followers began a fierce opposition against the Santos government and the Peace Process. In this context, the peace negotiations (2012–2016) and the PA of 2016 took place in a highly contested political scenario that blocked political consensus on the PA within Colombian society.

The fifth chapter of the PA, related to victims' rights, was the outcome of an intense and complex political negotiation between those parties who, recognizing the existence of an armed conflict, had different perspectives on how to achieve peace and justice. The Santos government, which sustained a maximalist perspective, insisted on the need to respect international standards on human rights and the creation of tribunals capable of imposing prison to those responsible for gross human rights violations and war crimes (El Tiempo, 2018). The FARC initially portrayed themselves as rebels who exerted the right to resistance and who deserved general amnesties and leaned toward restorative justice sanctions rather than prison punishment (Semana, 2015). Finally, after one year of hard negotiations and the participation of a group of experts nominated by both the Colombian government and the FARC, the parties agreed on creating a mechanism that combines principles of both restorative and retributive justice (Martínez, 2018). According to this agreement, those who had perpetrated war crimes or gross violations of human rights should recognize their actions, make significant contributions to disclose the truth and repair the harm done to the victims. Based on recognition and contribution, perpetrators would receive sanctions consisting of restorative justice principles, otherwise they would be processed and punished with prison sentences up to twenty years (Colombia, Gobierno Nacional & FARC-EP, 2016; Gómez, 2017; Martínez, 2018).

## *2. The Referendum: Exacerbation of Political Passions*

The achieved consensus among negotiators in Havana contrasted with the emerging polarization in Colombian society. According to the President of the Colombian Truth Commission Francisco de Roux (2018), the four-year long process and dialogue in Havana helped negotiators transform their initial views of each other. In addition to the impact of this social interaction, the victims' participation in the discussions on transitional jus-

tice mechanisms highly contributed to the transformation of the FARC's attitudes towards the victims. However, according to de Roux, this subjective transformation process was not visible in the political arena. Conversely, because of insufficient government educational efforts to show the advances and advantages of the PA and the right-wing mediatic strategy to undermine the legitimacy of the peace process, public opinion about the peace process in Colombia was divided.

By September 2016 when the PA was signed, despite the acknowledgment that it might include controversial issues, the whole agreement was considered a significant move toward reaching peace in the country for the Colombian government, the centre and left-wing political parties, civil society organizations as well as the international community at large. Nevertheless, the opponents of the process, which included mainly right-wing parties and some social sectors who distrusted the real commitment of the FARC, supported their opposition with the following discursive postulates: First, in Colombia there is no armed conflict but a terrorist threat, in consequence, terrorists should be defeated and a political negotiation with the FARC represents a surrender of the state's sovereignty. Second, the transitional justice mechanisms created in the PA, mainly JEP, are mechanism of impunity to the extent they do not impose prison sentences on the FARC leaders. Third, the possibility that former FARC commanders might be part of the Colombian Congress without being processed and sanctioned is unacceptable.

In fact, the opponents of the peace process were highly concerned with JEP and the conception of justice it represented. One illustrative example of the formation of a discourse against JEP was framed by the opinion of former president Alvaro Uribe, according to which the PA:

ignores that there has been a narco-terrorist action against democracy in Colombia, different from other parts of Latin America where armed civilian insurgencies confronted dictatorships, which earned this the name of a conflict. Our armed forces have not been in favour of dictatorships, on the contrary, they are characterized by their respect for democracy. (quoted in *El Colombiano*, 2016)

After the signing of the first version of the PA in September 2016,<sup>4</sup> the political debate got more heated, just before the referendum that took place on 2 October. The political discussion was characterized by the

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4 The first version of the Peace Agreement was signed on September 30, 2016 in Cartagena before a large group representing the international community.

polarization and the exaltation of strong passions on both sides, those who supported the peace process and those who opposed it. On the one hand, the Santos government and promoters of the peace process attempted to legitimate the process by means of educational campaigns trying to explain the contents of the negotiations as well as delivering messages of hope. On the other hand, the right-wing leaders deployed mediatic strategies that enhanced negative feelings based on social indignation. For instance, there were messages in social networks that repeatedly affirmed the PA was a ‘pact of impunity’, and it would ‘turn the country into the FARC’ (Botero, 2017). The most visible sign of the exaltation of political passions and social polarization was the outcome of the referendum. The NO campaign (50,23%) defeated the YES (49,76%) campaign by a very small difference. A few days later, the opposition’s campaign manager admitted that the winning strategy was based on making people angry to vote (La República, 2016).

Days after the referendum, the Santos government met to negotiate with the leaders of the NO campaign, who demanded 68 changes in the PA. Despite this adverse result, the social movement for peace, as well as the government, tried to reframe the new circumstances as the opportunity to consolidate a better PA. Multiple social organizations and students called for mobilizations nationwide demanding a ‘Peace Agreement Now!’ (Fundación Ideas para la Paz, 2016). After the meetings between the leaders of the NO campaign and the Santos government, the negotiators met again in Havana to reform the initial PA.

Regarding JEP, a great number of changes were introduced in order to make clear some of the aspects that concerned the leaders of the NO campaign, such as those related to possible tensions with ordinary jurisdiction, the period of functioning of JEP, the scope of truth disclosure, the legal framework, the treatment of state agents, the scope of political crimes, the accountability for higher commanders, the application of *tutela* writ against JEP decisions, and the composition of JEP, among others.<sup>5</sup> However, for the government and FARC negotiators, there were two red lines impossible to cross: the imposition of prison punishment for commanders of the FARC and restrictions of political representation in Congress (El Tiempo, 2017). Once the new PA was reached, the Santos government and the FARC commanders signed it at the Colon Theatre in Bogotá on 24 November 2016. In this opportunity, the government avoided a

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5 The main changes were introduced in section 5.1.2 of the PA. See also Gobierno Nacional (2016).

new referendum and requested the National Congress to approve the new version of the PA. This finally happened on 30 November 2016.

### *3. Political Disputes in the Implementation in Congress (2017–2018)*

In 2017, the National Congress had to enact the legal framework to implement the PA. This crucial step consisted of constitutional and legal reforms to apply the negotiations in the Colombian legal system. A first Constitutional Amendment was introduced to simplify the procedure to reform the Constitution and pass new bills for those topics related to the PA (Congreso de la República, 2016). This mechanism, called fast-track, was introduced to guarantee implementation, and avoid the experiences of other countries where peace agreements were not implemented because of delays in Congress. However, the political debates took longer and the initial term of six months to enact the legal framework of the peace process had to be extended for another period of six months (El País, 2017).

Even if the Santos Government had the support of the majoritarian coalition integrated by centre and left parties that were in favour of the PA,<sup>6</sup> the political environment was not favourable to a speedy enactment of the bills. According to the Observatory for Monitoring the Implementation of the Peace Agreement (OIAP), only ten out of twenty-four bills presented by the government to implement the PA were enacted by the National Congress (OIAP, 2018, p. 5). In fact, during the period 2017–2018, a new scenario of political debate over JEP took place in Congress. First, the right-wing parties that had led the NO campaign in the referendum crafted a narrative according to which they had been misled by the Santos government after the referendum. For the right-wing leaders, the NO campaign had won and therefore the PA should have been substantially altered, even if it meant breaking up the peace negotiations with the FARC. Second, the political environment previous to the presidential elections of 2018 eroded the support of some of the parties that were part of the majoritarian coalition.

These contradictions affected the implementation process since March 2017 when Congress started discussing the Constitutional Amendment that introduced the transitional justice mechanisms in the Constitution.

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<sup>6</sup> The political parties that were part of the majoritarian coalition named National Unity, were: Partido de la U, Partido Liberal, Partido Verde, Cambio Radical y Polo Democrático.

By the second semester of 2017, the political debates increased when members of JEP were appointed, and the National Congress started debating the JEP Statutory Law Bill. In 2018, political debates over JEP gained momentum when Congress debated the Procedural Law Bill for JEP.

#### *4. Main Aspects of the Political Debate*

The right-wing parties' purpose of transforming JEP led to reforms in the following aspects: restrictions to the nominations of members of JEP; the possibility of investigating and summoning entrepreneurs that financed armed groups; differentiated treatment for state agents; and the possibility of assessing evidence related to extradition claims.

##### *4.1. Composition and Restrictions to the Nomination of JEP Members*

According to the PA and the Constitutional Amendment 01 from 2017, a Selection Committee comprised of international experts on human rights would be in charge of determining the members of the transitional justice institutions, that is to say, the Truth Commission, the Unit for the Search of Missing Persons, and the Special Jurisdiction for Peace (JEP). The selection was based on public hearings and a scrutiny of the experience and trajectory of the aspirants (Congreso de la República, 2017). From the moment the Selection Committee began its work, it was attacked by the opponents of the peace process based on the idea that they were biased and left-wing supporters. The Democratic Centre, a right-wing party led by Alvaro Uribe, had already objected to the participation of international experts on human rights on the Selection Committee (El Espectador, 2017). In addition to this party, Radical Change, a political party that was initially part of the majoritarian coalition that supported the PA, published a press release in September 2017 saying that 'the majority of the recently appointed magistrates have a clear political bias that, from the start, generates no guarantees for civil society...' (Cambio Radical, 2017).

By the time Congress was discussing the JEP Statutory Law Bill, Radical Change proposed new restrictions to the members of JEP. According to the initiative, those persons who legally represented victims on human rights cases against the Colombian state could not be eligible to be part of JEP. In response to this reform, human rights organizations questioned this initiative and vindicated the trajectory of the selected members of JEP,

as well as the dignity of human rights defenders (El Espectador, 2017). The Interamerican Commission on Human Rights also sustained that ‘in case this restriction would be approved by Congress, this reform might constitute an obstacle for protection of human and victims’ rights in the functioning of JEP’ (Comisión IDH, 2017). Despite these reactions and the advice of international human rights organizations, the restrictions were included in the JEP Statutory Law Bill (Colombia, Ministerio de Justicia, 2017).

#### *4.2. Accountability of Private Entrepreneurs*

Another aspect that highly worried right-wing parties (Democratic Centre and Radical Change) was the possibility that private entrepreneurs would be summoned by JEP. According to the PA, JEP ought to prosecute former members of armed groups as well as private entrepreneurs that financed them for perpetrating war crimes, crimes against humanity and gross human rights violations. Participation of private sectors in the armed conflict was not a novelty, as has been demonstrated by judicial investigations, reports, and academic studies (Sánchez et al., 2018). However, the Democratic Centre led a strong opposition against JEP in Congress arguing that it was a ‘mechanism of impunity’ made to fit ‘the FARC’s desire for revenge’ against entrepreneurs and state agents (Centro Democrático, 2017). While Radical Change sustained that it had the duty ‘to protect all productive sectors, particularly the citizens that have invested in rural Colombia, who were victims of the conflict, and who might be victimized again by a tribunal that does not provide sufficient legal warrants’ (Cambio Radical, 2017). Due to the political pressure, the National Congress introduced a reform in the JEP Statutory Law Bill establishing that private entrepreneurs could not be summoned by JEP. They could take part in the process only based on voluntary participation. This discussion was revived in 2018 while Congress debated the JEP Procedural Law Bill. In this case, the Democratic Centre proposed a change in the structure of JEP introducing a special group of judges in charge of trying state military force members (Colombia, Senado, 2018).

### 4.3. Competence to Assess Evidence Regarding Extradition Claims

In April 2018, Jesús Santrich, a former FARC negotiator, was captured by the Prosecutor's Office based on an extradition claim made by a United States Court (El Tiempo, 2018b). This event brought about another political debate. On the one hand, opponents of JEP considered that this capture confirmed that Santrich continued his criminal activities such as drug trafficking, and therefore, the Supreme Court should authorize his extradition to the USA immediately (RCN Radio, 2018). On the other hand, former FARC members affirmed it was a conspiracy against the peace process and there was no legal certainty for demobilized commanders (El Espectador, 2018b). Those who supported the peace process and the autonomy of JEP, as well as the judiciary, asserted the need to clarify the facts based on which the US court required Santrich's extradition. Finally, JEP decided to request evidence and assess it before authorizing his extradition. (El Espectador, 2018c). In 2020, the newspaper El Espectador (2020) revealed that this capture was part of a trap led by the Drug Enforcement Agency (DEA) of the United States and the Colombian Attorney General's Office.

By the moment of enactment of the JEP Procedure Law Bill in 2018, these political debates affected the discussion of the legal framework. The Democratic Centre proposed another restriction to JEP which consisted of forbidding the assessment of evidence in cases of extradition claims (Semana, 2018). At the same time, those who were suspicious about the political use of extradition and its negative effect on the peace process made it clear that the Colombian State did not have a legal obligation to extradite anyone. It was rather an autonomous decision based on the previous approval of the courts and the assessment of the existing evidence (Uprimny, 2018).

### 5. Debates in the Constitutional Court

By 2018 and 2019, the political battles and discussions moved from a polarized political arena to the legal field, a space that required more rational scrutiny and legal argumentation. According to the Constitutional Amendment of 2016 (A.L. 01, 2016), the Constitutional Court had to revise the reforms that carried out the PA, as well as the JEP Statutory Law Bill. After the enactment of the JEP Procedural Law (Ley 1922, 2018), a group of human rights NGOs (Dejusticia, 2018) filed a constitutional action against this law before the Constitutional Court. All these cases

opened the path to declare unconstitutional some of the reforms introduced by the National Congress. In this section, I spell out the main political and legal discussions.

### *5.1. Restrictions to Appointments of JEP Members*

One of the reforms introduced by two right-wing parties (Democratic Centre and Radical Change) consisted of barring those lawyers who had represented victims of human rights violations against the Colombian State during the previous five years from being appointed JEP judges. In response to this restriction, national and international human rights NGOs presented amicus curiae briefs before the Constitutional Court arguing the unconstitutionality of those provisions. Human rights NGOs claims mainly relied on two arguments: First, the provisions that restricted the appointment of former human rights defenders violated international treaties to which the Colombian State was bound, such as the International Pact of Civil and Political Rights, the American Convention on Human Rights, as well as the international principles on judiciary independence. Secondly, the restriction contradicted the Constitutional Amendment that incorporated the Mechanisms of Transitional Justice in the Constitution (A.L. 01, 2017). Finally, the Constitutional Court overthrew those provisions in Sentence C-080 from 2018 (Corte Constitucional de Colombia, 2018).

### *5.2. Private Entrepreneurs and State Agents*

As already mentioned, according to right-wing parties, JEP was supposedly designed as an instrument of vengeance against the productive sector that had been victimized by kidnappings perpetrated by the FARC (Colombia, 2020). This perspective inspired different provisions for the JEP Statutory Law Bill, such as those related to the institution's jurisdiction. In the final version of the Bill, the private entrepreneurs who had supported or financed armed actors could not be summoned by JEP. They could only voluntarily attend JEP in the time frame of three months from the enactment of the JEP Statutory Law (*Verdad Abierta*, 2017). In response, human rights NGOs presented amicus curiae briefs before the Constitutional Court arguing that these provisions disregarded international standards in the struggle against impunity. The Constitutional Court, however, in a very controversial decision, upheld the provision (Corte Constitucional de

Colombia, 2018). In consequence, those private entrepreneurs who took part in the armed conflict, such as those who financed armed groups, as well as state agents (former functionaries) could not be summoned by JEP. They could only take part in JEP processes voluntarily. Nevertheless, those entrepreneurs can be summoned before ordinary justice.

### *5.3. Differentiated Treatment for Members of the Armed Forces*

Another debate was related to the legal treatment of members of the armed forces. Under the Colombian legal framework, public officials, because of their condition, cannot commit political crimes such as rebellion. To avoid the paradox of granting amnesties to members of the FARC and prosecuting members of the armed forces, negotiators agreed to grant them differentiated legal treatment before JEP. However, the opponents of the PA, such as the Democratic Centre, insisted that armed force members were subjected to unfair treatment (El Colombiano, 2016). A similar argument was sustained by the Colombian Association of Retired Officials (ACORE) in the public hearings before the Constitutional Court (Corte Constitucional de Colombia, 2018).

Regarding this differentiated legal treatment, the Constitutional Court sustained:

The differentiated legal treatment prevents transitional justice from becoming an instrument of political retaliation. On the contrary, it promotes the comprehensive closure of the armed conflict and fosters reconciliation based on strengthening the Rule of Law in relation to those who are accountable, but also based on granting special treatment and legal certainty for all (Corte Constitucional de Colombia, 2018).

Despite the support of the Constitutional Court for mechanisms of differentiated legal treatment for armed force members, the Democratic Centre insisted that the legal framework introduced in the Constitution (AL 01 2017) and the JEP Statutory Law Bill were not sufficient. In consequence, this party proposed a provision to the Bill delaying the trials of those armed force members until a special legal framework was enacted for them. This provision was challenged by human rights NGOs and overthrown by the Constitutional Court (Corte Constitucional de Colombia, C-112, 2019).

#### *5.4. Prohibition to Assess Evidence in Cases of Extradition Claims*

Finally, the Democratic Centre also tried to change the JEP Procedural Law Bill in 2018, by introducing a new provision forbidding JEP to assess evidence in cases of extradition claims. The Colombian Commission of Jurists and Dejusticia, two prestigious human rights NGOs, filed a lawsuit challenging this provision before the Constitutional Court. Multiple human rights NGOs also participated in the controversy writing amicus curiae intervention briefs before the Court. Finally, the Court declared that restriction unconstitutional because it violated constitutional principles such as due process and judicial autonomy (Corte Constitucional de Colombia, 2019).

#### *6. The Political Counterattack: Presidential Veto against the JEP Statutory Law Bill*

On 10 March 2019, the new President Ivan Duque announced his government would veto part of the Statutory Law Bill and introduce different reforms to JEP. In his speech, he affirmed these objections could unify Colombian society and overcome the political division among friends and enemies of the PA (Colombia, Presidencia de la República, 2019). Nonetheless, social organizations, the political opposition to the new right-wing government, human rights defenders and scholars expressed their concern regarding this veto. In response to the presidential speech, the political opposition argued that the veto's motivation contradicted the Constitutional Court decision concerning the JEP Statutory Law Bill (La Silla Vacía, 2019).

This fact opened a new chapter in the political dispute regarding the JEP reforms and the transformation of its legal and institutional design. During the first semester of 2019, this political debate once again raised tensions in Colombian society and submitted the Constitutional Court and JEP to a new adverse political environment (El Tiempo, 2019). By May, the Colombian Congress rejected the presidential veto against the JEP Statutory Law Bill. It became evident these political pressures not only came from the Colombian Government, but also from the United States embassy and the Colombian Attorney General's Office. For instance, the US embassy cancelled visas to some Congress Members and Justices of the Constitutional Court (Semana, 2019). On 15 May, however, JEP granted a former FARC negotiator the guarantee of no extradition based on the insufficient evidence contained in the extradition claim.

In response to this decision, Humberto Martínez, by then the Attorney General who apparently knew about the entrapment against the FARC negotiators (El Espectador, 2020), resigned allegedly because of his disagreement with the Court's decision. In addition to the Attorney General's move, the Democratic Centre strengthened its political attacks against JEP (El Tiempo, 2019b). Despite this political pressure on 29 May, the courts made two significant decisions. First, the Supreme Court ordered the freedom of Jesus Santrich, who had by then been captured again (Semana, 2019). Second, considering the Congressional rejection of the presidential veto, the Constitutional Court ordered the government to sign the JEP Statutory Law Bill (El Espectador, 2019). These decisions ended, at least partially, the disputes to define the JEP's legal framework.

Nevertheless, the political attacks on the PA and JEP undermined the trust in the process and the state institutions for some FARC former negotiators. On July 2019, Jesús Santrich abandoned the peace process and one month later, he and Iván Marquez, another former FARC negotiator, released a video announcing their return to insurgency (Caracol, 2019).

## *7. JEP: Challenges to Peace Building*

This section attempts a brief sociolegal analysis of the relations between law and politics regarding three main ideas: social and political meaning of JEP, conceptions of justice and challenges for the future.

### *7.1 Political and Social Meaning of JEP*

JEP is the expression of a political negotiation supported by social organizations and democratic sectors of society. However, the PA did not consolidate a consensus in Colombian society. Contrarily, its political and social meaning has been disputed and its legitimacy has been questioned by right wing parties. For the supporters of the PA, the political meaning of JEP is related to the context in which the peace negotiations took place, that is a political negotiation after a longstanding armed conflict without winners and losers. On the other hand, the most salient sector opposed to the PA, persisted in denying the existence of a political armed conflict and sustained the Colombian case was one of terrorist violence. According to this perspective, the construction of the 'other as a terrorist' demanded a different political and legal treatment. Instead of relying on a

political negotiation, it was necessary to defeat the enemy either by means of military or legal tools. However, this political contradiction between supporters and critics of the PA generated diverse undesirable outcomes for Colombian society. First, the political dispute reinforced an existing division inside the Colombian population and eroded the reliance on the peace process. Second, the centrality of the political debate reduced the visibility of victims and undermined the possibility of promoting more transformative political processes and public policies.

## *7.2. Discursive Visions of Justice*

This political contradiction spans the tension between two main discursive trends. On the one hand, a form of retributive justice that is selective in its targets and promotes an instrumental conception of law that serves the struggle against political enemies and negotiations with political allies; and on the other hand, a holistic perspective that envisions the reconstruction of the social fabric by means of restorative justice mechanisms. Nonetheless, this contradiction has different manifestations in the political and legal fields. Within the political field, political opponents to the PA and JEP have deployed mediatic and political tactics in order to delegitimize JEP, delay the implementation of the PA and undermine trust, not only on transitional justice mechanisms, but also on the courts and rule of law principles. In the legal field, the political discourse of opposition to JEP manipulates the arguments of maximalist retributive justice to claim more severe legal measures against former FARC leaders. It is worth mentioning that the Constitutional Court constrained those political forces and recognized the relevance of transitional justice mechanisms in order to pursue victims' rights protection and to achieve sustainable peace. Even so, some decisions were problematic, such as JEP's restriction to summon private entrepreneurs since it affects the possibility of achieving truth disclosure about participation of private sectors in financing armed groups.

Despite political opposition to JEP, there is an institutional basis leading relevant processes to bring disclosure of truth as well as contributing to reconciliation in Colombian society. According to the PA and the new constitutional and legal framework, JEP is a special jurisdiction created with a legal time framework in order to contribute to the transformation of the Colombian political armed conflict and to protect victims' rights. JEP was not designed to reproduce the legal rationality of ordinary courts, but rather to develop a holistic approach based on restorative justice for those committed to truth disclosure, recognition of their crimes and con-

tribution to reparation, and retributive justice, in the cases where the indicted are not willing to submit to those conditions.

Inversely, opponents of the PA and JEP envision a mechanism based on retributive justice capable of submitting the ex-FARC commanders, and providing generous treatment for state agents and private entrepreneurs, otherwise they believe this institution should not exist. Political debates during the implementation process show their interest in changing the original design of JEP by restricting human rights defenders from being appointed members, restricting the possibility of summoning private entrepreneurs and armed force members, and impeding the assessment of evidence in US extradition claims. The political opposition to JEP attempted to erode its legitimacy and transform its institutional framework.

### *7.3. Challenges for the Future*

Fortunately, these obstacles did not prevent JEP from fulfilling its functions. JEP has built its institutional capacity amid political attacks. Meanwhile it must respond to the expectations of more than ten million victims, the Colombian society, and the international community. These challenges entailed the design of procedures to receive reports from victims' organizations, to guarantee their participation in the hearings, to define the macro cases and to articulate its activities with the Truth Commission and the Unit for the Search of Missing Persons. By December 2020, JEP had received more than 300 reports from victims' organizations, more than 12,000 people among demobilized FARC combatants, security force members and civilians, and it has initiated seven macro-cases that address sensitive crimes, such as kidnaping and extrajudicial executions. FARC former commanders as well as some members of the security forces have already started disclosing the truth about their crimes. This is a major achievement considering that ordinary justice had not been capable of resolving those crimes during decades of political conflict (JEP, 2020). Relying on the support of civil society and the international community, JEP is moving forward beyond the resistance of its political opposition, disclosing the hidden truth that has remained in the dark for decades, facilitating encounters among victims and perpetrators, creating a different practice of justice and narratives that erode the remaining polarization, and healing the deep wounds that have persisted after the long-standing political conflict in Colombian society.

## *Conclusions*

This chapter has shown the political debates related to the design and implementation of JEP. These debates took place in a complex scenario characterized by a long standing armed political conflict and an experience of partial transition from war to peace. In this political scenario, Colombian society faces the challenge of reaching sustainable peace and building a project of rule of law. This endeavour is even more critical considering the difficulty of healing historical wounds and traumas that come from the past and persist in our consciousness through the construction of 'the other' by means of the language of hate and fear. Law and legal forms have been used as instruments of institutional and symbolic violence to defeat an enemy in the name of justice. But if we are more cautious, they might open doors to transform narratives and practices of hate and help us understand ourselves as a complex society.

Drawing on Bourdieu's perspective of social fields, this chapter also suggest that transitional justice is a field of dispute among diverse actors, discourses, and interests. In this case, JEP's design has been subjected to intense political and legal debates between two main discursive perspectives: on the one hand, those who supported the possibility of a negotiated transition and an institutional design based on a holistic approach that emphasizes principles of restorative justice; and on the other hand, those who have promoted a project of selective retributivism based on hard punishment against former FARC commanders, and soft treatment for state agents and private entrepreneurs. Notwithstanding, the fact that Colombian society had to endure this political contradiction during more than three years postponed the possibility of addressing debates on how to actually construct a future society.

Finally, drawing also on Bourdieu and Teitel's viewpoints, the fact that the institutional design of JEP emerged during a political battle and against strong opposition does not mean it is dependent on political forces. The language of law and the new institutional practices along with its symbols, argumentative narrative, and practices, can create new realities able to construct new paths of institutional and social action. This challenge relies on strengthening the possibilities of the dialogic procedure and restorative practices in JEP cases. In this perspective, participation of victims, disclosure of truth and transformation of perpetrators are critical in the process of dignifying the memory of the victims and starting to build practices of reconciliation in Colombia society.

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