

TRANSITION TO DEMOCRACY IN 2000 PERU: THE RESTORATION OF THE CONSTITUTIONAL PRINCIPLE OF CHECKS AND BALANCES

Daniel Soria Luján *

1. Alberto Fujimori's administration (1992-2000): A traditional dictatorship?

Between April 1992 and November 2000, Alberto Fujimori ruled not as a traditional dictator but as a leader of a government with a hegemonic power among constitutional entities such as: the Congress, the Judiciary, the Constitutional Court, the Electoral Court and so on. He did not kill, torture, imprison or deport opposition politicians or journalists using the military or security forces in broad daylight, or cancel political elections indefinitely. Nevertheless, Fujimori used subtle legal and political ruses to obtain, in many cases, the same results of traditional autocratic methods.

That is why Fujimori's administration could be considered as a 'competitive authoritarian regime'. According to Steven Levitsky and Lucan A. Way, in this kind of regime, *'rather than openly violating democratic rules (...), incumbents are more likely to use bribery, co-optation, and more subtle forms of persecution, such as the use of tax authorities, compliant judiciaries, and other state agencies to 'legally' harass, persecute, or extort cooperative behavior from critics'*. These authors also affirm that, in competitive authoritarianism, elections are regularly held and generally free of massive fraud (Levitsky and Way, 2002:53).

This context allowed the President to weaken checks and balances system regulated in the Peruvian Constitution of 1993. The attacks to the constitutional principle of checks and balances -also defined as 'horizontal accountability' from a Political Science perspective (O'Donnell, 1998:117)- were not executed at once but in a progressive way and by unscrupulous legal or political means.

* The author is a Peruvian lawyer and holds a master degree in Political Science from the Pontificia Universidad Católica del Perú (Pontifical Catholic University of Peru). He is a Constitutional Law Professor at the aforesaid university since 2000.

2. The progressive erosion of the constitutional principle of checks and balances

We find an accurate description of the progressive weakening of horizontal accountability in the Third Annual Report of the Ombudsman to Congress (Defensoría del Pueblo, 2000:656-660, 677-682). This document is very important because the Ombudsman Office was the only constitutional entity that resisted government pressure along Fujimori's regime.

In the abovementioned report, the Ombudsman stated that constitutional design was distorted because of the following situations, among others, happened up to April 2000:

- Ineffectiveness of judicial review of legislation as a competence of the Constitutional Court, due to the unconstitutional dismissal of three members by impeachment.
- Political intervention of the Judiciary and the Prosecutors Office through the so called 'Executive Commissions'.
- High rate of provisional (not appointed) judges and prosecutors.
- Restriction of National Council of Magistracy competence to dismiss members of the Supreme Court (called 'Supreme Judges') and prosecutors of the highest level (called 'Supreme Prosecutors').
- Withdrawal of the competence of the Inter-American Court of Human Rights.
- Violation of freedom of speech.
- Violation of international standards of human rights in criminal law related to terrorism and military justice.
- Lack of control of intelligence agencies.
- Stagnation of territorial decentralization at regional level.

Indeed, in an eight-year period (between 1992 and 2000), the Congress could pass legislation knowing that Constitutional Court could not carry out judicial review. Likewise, the government could enact decrees and make illegal activities against political opposition knowing that possible legal actions will be settled by provisional

judges controlled by Executive Commissions and protected from a harmless National Council of Magistracy.

On the other hand, provisional prosecutors did not have independence and impartiality to investigate crimes committed by government officials. And if these crimes were related to human rights violations, citizens could not obtain justice in courts because judicial procedure legislation -like *habeas corpus* or *amparo*- did not guarantee due process of law.

Besides, the Electoral Court was controlled by Fujimori. This court was comprised by a Supreme Judge, a Supreme Prosecutor, a member of the Lima Bar Association, a former dean of a public university law school, and a former dean of a private university law school. The government could control at least the majority because the first two members were elected by their peers (most of them provisional and controlled by Executive Commissions) and the most important public universities were also controlled by commissions appointed by the Executive.

As we can see, Fujimori's presidency with the support of political followers as majority party in Congress, had indirect influence in the Judiciary and public entities established in the Constitution causing a serious damage in the checks and balances system. This hegemonic political power got stronger because of the criminal network built up with extortion, bribes, threats and homicides by Vladimiro Montesinos, Fujimori's Svengali.

3. OAS intervention: not electoral fraud but the need to strengthen democratic institutions

In April 2000 Alberto Fujimori runs for a third period in office. Despite he had more than the 50% people approval due to the achievements during eight years such as: the defeat of terrorism, the peace agreement with Ecuador resulted from a border treaty signing, the economic stability and the public works, education and health infrastructure and food supply for the poor (Tanaka and Marcus-Delgado, 2001:15), the government was not impartial in the electoral campaign. Fujimori -and Montesinos- wanted to guarantee the victory.

With the use of public resources to buy the media (specially the newspapers and TV) and some members of the opposition, and get votes from poor citizens, Fujimori's administration started to cross the thin line between a competitive authoritarian regime and a traditional authoritarian regime, because the only connection to democratic institutions in the first mentioned regime is the regular elections. If a political regime does not have elected officials in free and fair elections, among other features (Dahl, 1989:221), that political order is not a democratic one.

This circumstance provoked the cohesion of the opposition parties and the reaction of the human rights community, and also the involvement of the Organization of American States (OAS) as an electoral observer.

After first round of presidential elections, the OAS Electoral Observation Mission (OAS-EOM) made a report stating that *'according to international standards, Peruvian elections are far from be considered free and fair'*, and asserted as general assessment *'the persistence of insufficiencies, irregularities, inconsistencies and non equitable conditions that led to consider electoral process as irregular'* (OAS, 2000a). However, the OAS-EOM did not mention the existence of electoral fraud.

The OAS-EOM understood that Peruvian elections were irregular as a consequence of the constitutional interpretation made by Congress that allowed Fujimori to be nominated for a third period and the 'supposed' control of the Judiciary and other constitutional entities, among other reasons. Besides, the OAS-EOM suggested some actions to improve electoral management and to strengthen free and fair elections like equitable access of opposition candidates to the media, banning use of public resources in favor of any candidate and cease opposition candidates harassing.

Electoral entities did not accept those suggestions so the OAS-EOM formally concluded observation activities and submitted its report to the OAS Secretary-General. The Permanent Council of this organization decided to put the Peruvian elections in the agenda of the OAS General Assembly because several countries, based on the principle of non-intervention, refused to declare an electoral fraud and take measures against Peru.

The General Assembly assumed the point of view of the Permanent Council but, at the same time, passed Resolution 1753 drawn up from a Canadian proposal that stated to send to Peru a diplomatic High Level Mission comprised by the President of the General Assembly (Canadian Minister of Foreign Affairs Lloyd Axworthy) and the OAS Secretary-General (César Gaviria), to the end of the exploration, with Peruvian government and political community, recommendations to strengthen democracy in this country, on the grounds that electoral results were discredited as a consequence of persistent reports of irregularities non satisfactory evaluated, and because there is an urgent need to strengthen democratic institutions such as Judiciary, Prosecutors Office, Constitutional Court and National Council of Magistracy, to reform electoral procedures and to strengthen freedom of speech.

Resolution 1753 passed with the acceptance of the members of the General Assembly including Peru. To this respect, Lloyd Axworthy mentioned in his memoirs that this resolution was written to allow all parties to have a 'slice of the pie' (Axworthy, 2004:219): Peruvian diplomacy blocked any attempt to declare electoral fraud and the Inter-American community implemented a brand new but uncertain mechanism of international political intervention to achieve the restoration of the constitutional principle of checks and balances in Peru.

4. The agenda for democratization

The High Level Mission created by Resolution 1753 sent to Peru two envoys to obtain proposals from opposition parties, civil society organizations (for instance human rights non-governmental organizations) and the Ombudsman Office related to strengthen democratic institutions.

With this information collected by the envoys, Axworthy and Gaviria prepared an agenda of 29 items related to the following main issues and actions needed to accomplish it:

- Independence of the Judiciary: Dissolve Executive Commissions, solve the problem of provisional judges and prosecutors, restore full independence of

the National Council of Magistracy, reform the Military Justice and restore in office the three members of the Constitutional Court dismissed by Congress.

- Human rights protection: Return to the competence of the Inter-American Court of Human Rights, draw up a national program of protection of human rights and request an *in loco* visit to the Inter-American Commission of Human Rights.
- Freedom of speech: Solve indirect government intervention in two TV corporations, solve the annulment of the Peruvian nationality granted to the TV broadcaster Baruch Ivcher, assure media independence and free access to the media to all political parties, pass legislation related to the right of access to public information, and fair management of government advertising.
- Electoral reform: Redesign electoral entities (in particular: appointment of members of Electoral Court and accountability competences) and establish multiple constituencies.
- Congress checks and balances: Strengthen accountability to public administration by Congress and draw up a national program against corruption.
- Accountability to military and intelligence bodies: Civil and parliamentary control, and reform of the Army Forces.

The High Level Mission asked Fujimori if he could send ministers and congresspersons of his political party to dialogue with opposition parties about the implementation of the agenda. The President and the opposition agreed to this proposal.

5. The Dialogue Table

The circumstance abovementioned brought about a Dialogue Table with two parties: the government and the opposition. A person designated by the High Level Commission held the chair of the Dialogue Table: Ambassador Eduardo Latorre, former Minister of Foreign Affairs of Dominican Republic. As well, there were representatives of civil society (for instance the human rights community), Peruvian

Episcopal Conference (assembly of Roman Catholic bishops) and Ombudsman Office to support the success of the dialogue.

The Dialogue Table began on August 21st with no expectation from both parties: Fujimori's administration wanted to maintain *statu quo* (lack of horizontal accountability) while opposition wanted to fulfill the agenda for democratization.

This stagnation of the dialogue had no change for four weeks. During this period both parties only agreed to give priority to the discussion of the following issues: return to the competence of the Inter-American Court of Human Rights, solve indirect government intervention in two TV corporations, solve the annulment of the Peruvian nationality granted to the TV broadcaster Baruch Ivcher, civil and parliamentary control of Army Forces and intelligence bodies, and restore in office the three members of the Constitutional Court dismissed by Congress.

For this purpose, the Dialogue Table constituted four commissions to perform proposals about the aforesaid issues. Each commission was comprised by two members of the government, two members of the opposition and one representative of the civil society. Nevertheless, an unexpected event had changeover the political situation.

6. Videos, transition and restoration of checks and balances

On September 14th one of the opposition parties called for a press conference to broadcast a video showed Vladimiro Montesinos -advisor to the President and true head of the National Intelligence Service- committing bribery by paying US\$ 15,000 in cash to an opposition elected congressman to join Fujimori's party. Two days later, the President made an official announcement: the reduction of the current presidential and parliamentary terms of office to one year and, as a consequence, the call for new elections, and the dissolution of the National Intelligence Service. While Fujimori addressed to the country to explain these measures, Montesinos was taking a flight to Panama.

With the Fujimori's announcement began the political transition period. However, his administration kept the support of the OAS, the Latin-American countries and the United States of America to guarantee political stability and because they believed that Montesinos was dangerous for the Peruvian democracy. That is why several countries such as: United States, Brazil, Argentina, Chile, Mexico and Colombia asked Panama's president, Mireya Moscoso, to grant asylum in favor of Montesinos.

The new political situation provided a motive to the Dialogue Table to play a new role: give an impulse to transition accomplishing the agenda to restore checks and balances. Ten days after the beginning of transition, the Dialogue Table had a first result agreed unanimously: a bill dissolving the National Intelligence Service, Montesinos's façade to obtain hegemonic power among public entities using extortion, bribery and threats. The proposal passed in Congress two days later.

The second important achievement of the Dialogue Table was the proposals of constitutional amendments banning immediate reelection of the President and reducing the current presidential and parliamentary terms of office to one year. The third one was the approval of the bill repealing the parliamentary act that put provisional and appointed judges and prosecutors on a same level.

However, the results of the dialogue were temporally interrupted because of a new political circumstance occurred on September 23rd: Vladimiro Montesinos returned to Peru from Panama. In the same day, the government presented to the Dialogue Table a draft of an amnesty in favor of the military as a condition to pass constitutional amendments in Congress. Both facts were clearly related and gave a reason to the opposition to reject the draft. As well, this situation provoked the division of the representatives of government in the Dialogue Table, because some of them were against Montesinos.

The aforesaid facts also caused the reaction of the OAS Secretary-General, Cesar Gaviria, who was very upset because he felt betrayed and manipulated by Fujimori (Arnson, 2001:128). As a result, the same day of Montesinos arrival, Gaviria declared that *'Fujimori's administration authorized [Montesinos] to be back as something natural and compatible to democracy in Peru and not like something than seriously*

put in jeopardy democratic stability in Peru” (OAS, 2000b). Gaviria flew immediately to Peru to support the Dialogue Table and the agreements between government and the opposition needed to assure the restoration of democratic institutions in Peru.

The OAS Secretary-General arrived in Peru and went directly to meet Fujimori. Gaviria told him forcefully that the Dialogue Table will be over if the government insists in an amnesty in exchange of new elections. Besides OAS, the Dialogue Table also had the support of other regional organizations like the European Union and MERCOSUR and many Latin-American and European democratic countries.

These events set up a point of no return of the political transition because the government and the opposition in the Dialogue Table approved fast-track measures to restore checks and balances, like call for elections, full restitution of National Council of Magistracy competence, dissolution of Executive Commissions created to control Judiciary and Prosecutors Office, reform of electoral legislation and return to the competence of the Inter-American Court of Human Rights. The rest of the issues of the agenda were fulfilled later by the Transition Government leaded by the opposition leader Valentín Paniagua.

The situation abovementioned caused a temporary relocation of political legitimacy from the government (the Executive and the Congress) to the Dialogue Table, where a group of politicians devoted to Fujimori and the representatives of the opposition, with the assistance of representatives of the civil society (specially the human rights community), the Roman Catholic Church and the Ombudsman Office, approved without difficulties both constitutional amendments and bills to reform legislation that affected the principle of checks and balances.

Why the Dialogue Table was successful? As Daniela Donno asserts, regional intergovernmental organizations (IGO) -such as OAS- could have an indirect effect on the government by influencing the balance of power between government and the opposition. To this respect, the intervention of IGO increases the incentives of the opposition mobilization. Donno adds that *‘both opposition mobilization and regional IGO involvement significantly increase the probability that a country experiences*

democratization', and both *'are mutually empowering (each is more effective in combination with the other than when implemented alone)'* (Donno 2008).

In fact, the unity and progressive strengthen of the Peruvian opposition parties against Fujimori is the result of the OAS support to their democratization agenda. As former Ombudsman Jorge Santistevan told the author in an interview, the Dialogue Table was the sound box of the democratic forces.

7. Epilogue: The Inter-American Democratic Charter

The political events which occurred ten years ago in Peru motivated the Transition Government to propose to the members of the OAS the approval of an international agreement to promote and defend democracy in the Americas through collective action specially in the diffused area between classical coup d'état and antidemocratic measures of lawful governments (Cooper, 2004:97). The proposal passed in the OAS General Assembly held in Lima, Peru on September 11th 2001 as the Inter-American Democratic Charter (IDC).

Article 1 of the IDC states that *'the peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it'*. As well, according to article 7, democracy is indispensable for the effective exercise of fundamental freedoms and human rights. Furthermore, the Charter promotes electoral observation (articles 23, 24 and 25) and democratic culture (articles 26, 27 and 28).

Chapter IV of the IDC entitled 'Strengthening and Preservation of Democratic Institutions' establishes measures to face situations that could affect democratic regimes in the Americas. These are wide range measures, from good offices to suspension of a member state, to protect and strengthen the 'democratic political institutional process' or the 'legitimate exercise of power'.

Unfortunately, the IDC was born on September 11th 2001, a day that changed the international criteria (at least US criteria) about arbitrary use of force. On the other hand, the use of the IDC was not effective to confront coups d'état occurred in

Venezuela (2002) and Honduras (2009), and this international agreement have not proved yet its usefulness in cases of regimes with weakened horizontal accountability.

8. Conclusion

In the last political transition process in Peru, democratic forces did not fight against a traditional dictatorship but a competitive authoritarian regime that weakened the constitutional principle of checks and balances. This principle was restored at the end of transition.

Peruvian transition was a consequence of fortune -the release of a video- and a result of joint international and domestic actions. As Niccolò Machiavelli stated, *'fortune is the arbiter of one-half of our actions, but that she still leaves us to direct the other half, or perhaps a little less'*. Likewise, in *Carmina Burana* lyrics we found these verses: *'O Fortune / like the moon / you are changeable'*.

However, Machiavelli warns that *'the prince who relies entirely upon fortune is lost when it changes'*. That is why, taking into account the events in Peru, countries of the Americas gathering in the OAS created mechanisms to preserve and strengthen democratic regimes in the Inter-American Democratic Charter.

Could these mechanisms be used in cases of violations of the constitutional principle of checks and balances? Unfortunately, the IDC proved its ineffectiveness in two coups d'état in Latin America, and in the present time we can identify countries in which their respective Executives have hegemonic pretensions and the horizontal accountability is severely eroded.

Taking into consideration the case of Peru, the OAS should contribute to support and empower democratic opposition and domestic civil society organizations (like human rights community) of those countries, because isolated international or local actions will never be enough.

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