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The Unforeseen Guardians of Constitutional Democracy: Lessons from the Guatemalan 2023 Electoral Process

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Abstract

This Article analyzes the role played by international actors, indigenous peoples, and independent lawyers as guardians of democracy in a context where democratic backsliding, abusive judicial review, and institutional takeover has taken place. Using the Guatemalan 2023 electoral process as a case study, this Article sheds new light on authoritarian constitutional practices, evidenced through the judgments of the Guatemalan Constitutional Court and activities of its Criminal Prosecutor's Office. This Article also considers how foreign governments, international organizations, indigenous peoples, and independent lawyers came to play a guardianship role in the face of the decline of core institutions of constitutional democracy. Techniques such as transnational sanctions, judicial challenges, diplomatic “shaming,” and protest movements were successful in upholding constitutional democracy by discouraging attempts by the courts and government officials to derail the transition of power and annul the electoral results. This Article analyzes how and why these techniques had an impact in the Guatemalan context and extracts lessons and insights, both positive and negative, for dealing with abusive constitutional practices in theory and in practice.

Keywords: Judicial accountability; international organizations; sanctions; democratic backsliding; protest; electoral processes; transition of power; Guatemala

A. Introduction

This Article explores the role played by foreign governments, regional organizations, indigenous groups, and independent lawyers in safeguarding the electoral results and transition of government in the Guatemalan 2023 electoral process. The Article describes this role as unforeseen because these actors are not conceived as conventional actors in safeguarding electoral results and the lawful transition of power. Usually this responsibility is placed on the judiciary. This Article highlights how these actors, using a novel mix of techniques for judicial accountability, were successful in ensuring a constitutional transition of power by influencing the courts to act in compliance with the rule of law and Guatemala's constitution. These techniques include transnational sanctions, diplomatic “shaming,” protest movements, and repeated litigation. This Article extracts the lessons from the role played by these unforeseen guardians of democracy in the Guatemalan electoral process of 2023. It examines the actions of foreign governments, regional organizations, indigenous groups, and independent lawyers and highlights the contexts in which they were effective against the abusive constitutional practices of the justice system, the tools and methods they used, and the outcomes they achieved. This examination illustrates the many and different abusive constitutional practices of both the Guatemalan

Criminal Prosecutor's Office and High Court in attempting to derail a democratic transition and how they were countered by these unforeseen actors.

Recent comparative legal scholarship has engaged in the study of abusive constitutional practices by governments, leaders, and other state actors. This phenomenon has been referred to by scholars as "abusive constitutionalism".¹ This scholarship has focused on authoritarian practices of courts, otherwise known as abusive judicial review.² This comparative scholarship has offered initial insights into this phenomenon, its causes and consequences, as well as potential responses to these abusive practices. Potential responses to this phenomenon vary from constitutional design to intervention by international or regional institutions and organizations. However, the Guatemalan experience provides a different context for authoritarian practices and judicial review to that usually described in the scholarship. This case study therefore provides a new scenario for the study of abusive constitutional practices by prosecutors and courts in a moment of transition of power. This Article highlights how abusive constitutional practices by courts can arise as a result of judicial clientelism, and that both phenomena need to be studied together when analyzing the short-, medium-, and longer-term effects on democracy and democratic transitions.

The case study of the Guatemalan 2023 electoral process is therefore informative in three respects. First, it serves as a diagnosis of constitutional and democratic decay and the abusive constitutional practices of courts in the broader Central American region. Second, it reveals a novel use of techniques for judicial accountability to counter these pathologies of governance and abusive judicial review in a difficult democratic transition period. While these democratic pathologies and political remedies are contextually dependent, they nevertheless provide a successful example of the defense of democracy. Third, the case study is significant because it moves away from the study of courts as guarantors of democracy and focuses on a context where democracy has already been compromised and abusive constitutionalism has been enabled by the judiciary. Therefore, it provides a new case study that can set out new paths for inquiry in the study of not only Latin American and Inter-American constitutionalism, but more generally of the phenomenon of abusive constitutionalism globally.

To show how democracy was defended in Guatemala, this Article proceeds as follows. Section B provides a description of the 2023 Guatemalan electoral process. It describes the many abusive constitutional practices by courts, particularly the Guatemalan Constitutional Court ("GCC"), by showing their involvement in the disqualification of candidates in the months leading up to the election and initial support for the tactics used by the *Ministerio Público*, the Guatemalan Criminal Prosecutor's Office, to call for the annulment of the elections. Section C discusses the need to review the activities and roles of high courts beyond their judgments and dispute resolution powers. It shows that the responsiveness of courts to safeguard democracy is far more complex and dependent on context. As such, this Article examines the issues of judicial clientelism that prevented the courts acting as guardians of the constitution and the roots and consequences of judicial clientelism and institutional capture of the GCC in Guatemala. Section D explains how, in this time, a range of actors within and beyond the state worked to hold the judiciary accountable in its responsibility to uphold the constitution. Section E draws two insights from the dynamics of judicial clientelism and judicial accountability traced here. First, the examination of the legitimacy of national and international political and de facto interventions, especially where they are intended to influence judicial decision making, suggests that diplomacy can be more effective tool to other forms of international judicial scrutiny. Second, the defense of democracy cannot rely on

¹See David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 195 (2013) (coining the term "abusive constitutionalism"); ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING* 3 (2021) (expanding the term further).

²See David Landau & Rosalind Dixon, *Abusive Judicial Review*, 53 U.C. DAVIS L. REV. 1313, 1317 (2020).

the use of doctrine by courts in a context where judicial clientelism and democratic backsliding has already taken place.

To conclude, this Article calls for the reevaluation of judicial accountability in times of democratic backsliding and transition. The Guatemalan 2023 electoral process shines a light on insights and lessons from the use of a novel use of a series of instruments, and the role taken by actors (national and international) to make high courts uphold the Constitution and rule of law. Ultimately, this Article advances the idea that judicial accountability cannot longer be considered as a national activity, but an international and transnational exercise.

B. The 2023 Guatemalan Electoral Process

This section of the Article provides a description of the 2023 Guatemalan electoral process culminating on January 14, 2024 with the transition of executive power to a new President. This description highlights the role of the Guatemalan Constitutional Court and its change of attitude during the electoral process. More importantly, it shows many abusive judicial review practices of the GCC during a democratic transition. Overall, this section contextualizes why the GCC has a strong role in defining politics overall in Guatemala and why new forms of accountability for courts are necessary to guarantee power transitions.

I. The Central American Context

Guatemala is a country in the Central American subregion of the Americas. It shares much of its history with other countries of the subregion—Honduras, El Salvador and Nicaragua—which were all once part of the Central American Federal Republic from 1824 to 1838.³ Guatemala has a higher proportion of indigenous peoples than other countries in the subregion.⁴ Like its neighbors, and due to its colonial past, it is highly dependent on foreign trade and agriculture, particularly with the United States.⁵ Like other countries in Central America, Guatemala reinvented its democracy after civil conflict that spanned over thirty years from 1960 to 1996.⁶ This conflict saw the rise of military dictatorship, civil oppression, systematic human rights violations, and acts of genocide.⁷ The region was also a site of U.S. intervention against communism, fueling violence against civil opposition. Peace came to the subregion in the late 1980s with the Esquipulas Process.⁸ This was a broader subregional process that saw the adoption of new constitutions in Central America⁹ and a series of international obligations with the signature of peace agreements

³The Central American Federal Republic was composed of Costa Rica, El Salvador, Honduras, Guatemala, and Nicaragua. For a historical recount of Central America, see generally RALPH LEE WOODWARD JR., *CENTRAL AMERICA: A NATION DIVIDED* (3d ed. 1999).

⁴The 2018 national census held by the Instituto Nacional de Estadística Guatemala shows that forty one percent of the population is of Mayan descent. See INSTITUTO NACIONAL DE ESTADÍSTICA DE GUATEMALA, MINISTERIO DE ECONOMÍA DE GUATEMALA, 2018 CENSUS DATA (2018).

⁵See generally Edelberto Torres Rivas, *Central America Since 1930: An Overview*, in 7 *THE CAMBRIDGE HISTORY OF LATIN AMERICA* 159 (Leslie Bethell ed., 1990).

⁶See Salvador Martí i Puig & Diego Sánchez-Ancochea, *Central America's Triple Transition and the Persistent Power of the Elite*, in *HANDBOOK OF CENTRAL AMERICAN GOVERNANCE* 4, 5 (Salvador Martí Puig & Diego Sánchez-Ancochea eds., 2013).

⁷For a detailed, report on the thirty-six year Guatemalan civil conflict, see COMISIÓN DE ESCLARECIMIENTO HISTÓRICO, *GUATEMALA: MEMORIA DEL SILENCIO* 314–423 (1999) (providing the findings of the UN-backed Commission for Historical Clarification).

⁸See generally Johanna Oliver, *The Esquipulas Process: A Central American Paradigm for Resolving Regional Conflict*, INT'L CTR. FOR ETHNIC STUD. (July 1999), https://web.archive.org/web/20110722031032/http://www.ices.lk/publications/esr/article_s_jul99/ESR-Oliver.pdf.

⁹These new Central American constitutions came in Honduras in 1982, El Salvador in 1983, Guatemala in 1986, and Nicaragua in 1989. See Enrique Napoleón Ulate Chacón, *Del Patrimonio Constitucional Centroamericano, Hacia Un Derecho Constitucional Centroamericano*, in *DEL PATRIMONIO CONSTITUCIONAL CENTROAMERICANO AL DERECHO CONSTITUCIONAL CENTROAMERICANO* 26 (Enrique Napoleón Ulate Chacón ed., 2015).

in each of the countries.¹⁰ Guatemala signed fourteen peace accords between 1992 and 1996, which aimed to strengthen democracy, broaden the inclusion of indigenous peoples in politics, and entrench human rights.¹¹

After the adoption of its new Constitution in 1986, Guatemala promoted democratic stability and adopted new institutions to safeguard democracy, such as a constitutional court, independent ombudsman, and an independent Criminal Prosecutor's Office to avoid the concentration of power.¹² Countries in the Central American subregion, including Guatemala, opened their economies, signed free trade agreements, participated in regional organizations, and ratified the jurisdiction of supranational bodies such as the Inter-American Court of Human Rights.¹³ However, from the early 2010s, Guatemala has seen steady democratic backsliding and institutional capture. This trend is not unique to Guatemala, but also observed in other countries in Central America, which have also seen the rise of populist leaders—like Daniel Ortega in Nicaragua and Nayib Bukele in El Salvador—and the entrenchment of narcotic-trafficking rings with close connections to governments, like those of Honduras and Guatemala. Corruption has eroded institutions and compromised democratic state-building efforts.¹⁴ Courts have been complicit in legitimizing this democratic backsliding using the language of human rights. “Judicial clientelism”—the appointment of judges by informal networks to favor certain results and outcomes and maintain the privileges of certain groups or people without any regard to the rule of law or judicial standards—is common.¹⁵

As an experiment to tackle the entrenched corruption within the state, Guatemala signed a treaty with the United Nations to create the *Comisión Internacional Contra la Impunidad en Guatemala* [International Commission Against Impunity in Guatemala] (“CICIG”).¹⁶ CICIG was created in 2006 with a mandate to investigate criminal groups in Guatemala, support the *Ministerio Público* in its criminal investigation efforts, and promote reforms to strengthen the justice system.¹⁷ During its lifespan from 2006 to 2019, the CICIG was able to successfully prosecute a former Guatemalan president and vice-president, as well as other high-level officials

¹⁰These two agreements between the presidents of Costa Rica, El Salvador, Guatemala, Nicaragua, and Honduras are commonly called Esquipulas I and II. Esquipulas Declaration, May 25, 1986, UN PEACEKEEPER, <https://peacemaker.un.org/sites/default/files/document/files/2024/05/cr20h20gt20ni20sv860525esquipulasi.pdf> (Esquipulas I); Procedure for the Establishment of a Firm and Lasting Peace in Central America, Aug. 7, 1987, UN PEACEKEEPER, <https://peacemaker.un.org/sites/default/files/document/files/2024/05/cr20h20gt20ni20sv870807esquipulasii.pdf> (Esquipulas II).

¹¹See Carlos Arturo Villagrán Sandoval, *Soberanía y Legitimidad de Los Actores Internacionales en la Reforma Constitucional de Guatemala: El Rol de la CICIG*, 1 *POLÍTICA INTERNACIONAL* 36, 40 (2016).

¹²See generally Carlos Arturo Villagrán Sandoval, *Guatemala: Un Constitucionalismo Transaccional*, in *SISTEMAS CONSTITUCIONALES DE AMÉRICA LATINA* 275–281 (María Elena Attard, Lilian Balmant Emerique, Rubén Martínez Dalmau & Roberto Viciano Pastor eds., 2021).

¹³See generally Aaron Schneider, *The Great Transformation in Central America: Transnational Accumulation and the Evolution of Capital*, in *HANDBOOK OF CENTRAL AMERICAN GOVERNANCE*, *SUPRA* NOTE 6, AT 25, 29.

¹⁴For more context, see generally Otto Argueta, *Drug-Trafficking and Governance in Central America*, in *HANDBOOK OF CENTRAL AMERICAN GOVERNANCE*, *SUPRA* NOTE 6, AT 198; Christine J. Wade, *Central America Since the 1990s: Crime, Violence, and the Pursuit of Democracy*, in *THE OXFORD HANDBOOK OF CENTRAL AMERICAN HISTORY* 359 (Robert H. Holden ed., 2022); Samuel Issacharoff, *The Corruption of Popular Sovereignty*, 18 *INT'L J. CONST. L.* 1109 (2020) (providing a general overview of how corruption affects democracy).

¹⁵See Raul Sanchez Urribarri, *Between Power and Submissiveness: Constitutional Adjudication in Latin America*, in *COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA* 284 (Tom Ginsburg & Rosalind Dixon eds., 2017) (coining the term “judicial clientelism”).

¹⁶Acuerdo Entre la Organización de Naciones Unidas y el Gobierno de Guatemala Relativo al Establecimiento de una Comisión Internacional Contra la Impunidad en Guatemala [Agreement Between the United Nations and the State of Guatemala on the Establishment of an International Commission Against Impunity in Guatemala], *Guat.-UN-*, art. 1(a), Dec. 12, 2006, 2472 U.N.T.S. 47.

¹⁷Carlos Arturo Villagrán Sandoval, *International Actors in the Guatemalan Constitutional Reform: The Story of the CICIG*, *CONST. MAKING & CONST. CHANGE* (Feb. 6, 2017), <https://www.constitutional-change.com/international-actors-in-the-guatemalan-constitutional-reform-the-story-of-the-cicig/>.

involved in major embezzlement rings.¹⁸ It also revealed major tax fraud schemes by influential business groups. Under the CICIG's leadership, a new constitutional reform campaign in 2016 was launched to strengthen the judiciary and *Ministerio Público*, as well as to recognize indigenous justice. The success of the CICIG led to the creation of similar missions, like the *Misión de Apoyo Contra la Corrupción y la Impunidad en Honduras* [Support Mission Against Corruption and Impunity in Honduras] ("MACCIH").¹⁹ MACCIH had broader powers and revealed many corruption rings within the Honduran state and government.²⁰ However, both CICIG and MACCIH were victims of their own success. CICIG initially had major backing from the U.S., which it lost under the first Trump administration. Governments, traditional economic elites, and strong influential actors retaliated, which led to the closure of the missions in the late 2010s and the dismissal of their proposed constitutional reforms.²¹

By 2020, the Central American region had seen the consolidation of power by populist leaders. As described in Section C.II, courts of the region have assisted these leaders by bypassing constitutional bans on re-election, misusing human rights instruments in the process.²² New populist figures have reformed state institutions to give them a stronger grip on power, have shut down universities, and expelled many dissidents.²³ Central America is facing a new era of democratic decay.²⁴

II. The 2023 Guatemalan Elections

Guatemala conducts elections every four years. The Executive—both president and vice-president, members of Congress, and authorities of the local municipalities are all elected at the same moment and for the same period of time, four years.²⁵ The Supreme Electoral Tribunal [*El Tribunal Supremo Electoral*] ("TSE") is the institution in charge of overseeing the Guatemalan electoral process.²⁶ By law, the TSE must open the electoral period between the "second or third" week of January.²⁷ The electoral period is divided in three stages. The first stage spans from the day after the opening of the electoral process to the day prior to the campaigning period. During this stage, political parties must register their candidates.²⁸ The second stage is electoral campaigning. This period starts ninety days before the general election date.²⁹ The third stage is the actual election date, which must be on a Sunday in June.³⁰ When it comes to the presidential race, if a

¹⁸See Ed. Bd., *Guatemala's Embattled President*, N.Y. TIMES (Aug. 26, 2015), <https://www.nytimes.com/2015/08/27/opinion/guatemalas-embattled-president.html>.

¹⁹Convenio Entre el Gobierno de la República de Honduras y la Secretaría General de la Organización de los Estados Americanos para el Establecimiento de la Misión de Apoyo Contra la Corrupción y la Impunidad en Honduras [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], Jan. 19, 2016, ORG. AM. STATES, https://www.oas.org/en/spa/dsds/docs/maccih_%20agreement_e.pdf.

²⁰See Carlos Arturo Villagrán Sandoval, *Foreign Judges in International Corruption Mission in Central America*, in THE CAMBRIDGE HANDBOOK OF FOREIGN JUDGES ON DOMESTIC COURTS 140, 145–147 (Anna Dziedzic & Simon Young eds., 2023).

²¹*Id.* at 155–56.

²²Gráinne de Búrca & Katharine Young, *The (Mis)Appropriation of Human Rights by the New Global Right: An Introduction to the Symposium*, 21 INT'L J. CONST. L. 205, 205 (2023) (observing this phenomenon).

²³Ismael López & Mary Beth Sheridan, *Nicaragua Strips Universities' Legal Status in New Attack on Dissent*, WASH. POST (Feb. 3, 2022), <https://www.washingtonpost.com/world/2022/02/03/nicaragua-ortega-closes-universities/>.

²⁴See INSTITUTO INTERNACIONAL PARA LA DEMOCRACIA Y LA ASISTENCIA ELECTORAL, EL ESTADO DE LA DEMOCRACIA EN EL MUNDO Y LAS AMÉRICAS 48–49, 60–61, 62 (2023).

²⁵Decreto No. 1-85, Mar. 2017, Ley Electoral y de Partidos Políticos [Law of Elections and Political Parties], arts. 199, 207 (Guat.) [hereinafter Decreto No. 1-85].

²⁶*Id.* at art. 193.

²⁷*Id.* at art. 196.

²⁸*Id.* at art. 196(a).

²⁹*Id.* at art. 196(b).

³⁰*Id.* at art. 196(c).

candidate does not get a majority on the election date, the candidates that finish in first and second place proceed to a run-off.³¹ The run-off needs to take place forty five to sixty days after the initial election, and the winner of this second round is elected president.³² After this second round, the president takes office on the fourteenth of January of the following year.³³

Governing electoral processes are two key institutions: The TSE and the GCC. The TSE is the institution that deals with all matters related to electoral processes.³⁴ This includes the registration, sanctioning, and dissolution of political parties; the qualification, admittance, and exclusion of political candidates—presidential, congressional, and municipal; and the settling of electoral dates.³⁵ Under Guatemalan law, the TSE is the only institution that can scrutinize the electoral process, political parties, and ballots.³⁶ This institution, as well as its powers and functions and everything related to electoral processes, is regulated by the *Ley Electoral y de Partidos Políticos* [Law of Elections and Political Parties]. This is a law of constitutional rank created by the 1986 Constitutional Assembly to operate alongside Guatemala's Constitution. It is the only law that regulates electoral processes and political parties in the country. However, during its lifespan, many of the powers of the Electoral Tribunal have been assumed by the GCC.³⁷ This is as a result of legal interpretation by the GCC, which has slowly over decades had the final word in resolving high stakes cases in electoral matters as constitutional cases.

The Constitutional Court was created in 1986. Its main purpose is to uphold and defend the Guatemalan constitutional system.³⁸ The court has jurisdiction over all constitutional matters. The *Ley de Amparo, Exhibición Personal y de Constitucionalidad* [Law of Constitutional Procedures, Habeas Corpus, and Constitutionality] details the powers of the GCC and its competences.³⁹ For decades, the court has resolved issues ranging from civil matters to the legality of coups and recognition of foreign governments.⁴⁰ Over time, the GCC has taken over many of the powers of the TSE by resolving against it in cases regarding electoral law. It has gone so far as to determine that the TSE is a mere administrative body without adjudicative powers and therefore subject to the GCC's jurisdiction and interpretation.⁴¹ All major issues related to electoral law, including the qualification and exclusion of candidates and interpretation of electoral law, are now resolved by the GCC.⁴² This is for two reasons: First, the *Law of Constitutional Procedures, Habeas Corpus, and Constitutionality* establishes that the TSE's activity can be constitutionally reviewed by the Supreme Court and later the GCC;⁴³ and second, the GCC

³¹*Id.* at art. 201.

³²*Id.*

³³This is following the strict four-year term limit set out in the constitution starting in 1986. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [Constitution of Guatemala] tit. VIII, May 31, 1985, as amended by Legislative Agreement No. 18-93, Reforma Parcial a la Constitución Política de la República de Guatemala, Nov. 17, 1993 [hereinafter GUAT. CONST.] (outlining the provisions for transition of government and term limits).

³⁴See Decreto No. 1-85 at art. 121.

³⁵*Id.* at art. 125.

³⁶*Id.* at art. 243.

³⁷This has been observed by Guatemalan authors. See, e.g., Edgar Ortiz, *Corte de Constitucionalidad: ¿Árbitro de Última Instancia del Juego Político? La Ruptura con el Legalismo*, in CONSTITUCIONALISMO GUATEMALTECO FRENTE A LO GLOBAL 51 (Carlos Arturo Villagrán Sandoval ed., 2020).

³⁸GUAT. CONST. art. 268.

³⁹Decreto No. 1-86, Jan. 8, 1986, Ley de Amparo, Exhibición Personal y Constitucionalidad [Law of Constitutional Procedure, Habeas Corpus and Constitutionality], arts. 11, 15, 16, 133, 149, 163–65 (Guat.) [hereinafter Decreto No. 1-86].

⁴⁰See Elena Martínez Barahona, *Central American (High) Courts*, in HANDBOOK OF CENTRAL AMERICAN GOVERNANCE, SUPRA NOTE 6, at 173.

⁴¹See Expedientes Acumulados 2124–2016 y 2267–2016, 21 June 2017, Corte de Constitucionalidad p. 30–31 (Guat.).

⁴²One such case was the GCC's interpretation of honorability of candidates, interpreting that the only measure to review the honorability of these is through the *Constancia Transitoria de Inexistencia de Reclamación de Cargos* extended by the Guatemalan Comptroller office. See Expediente 2052–2016, de las 00:00 a.m., 4 Apr. 2016, Corte de Constitucionalidad (Guat.).

⁴³Decreto No. 1-86 at art. 12(a).

has considered all electoral matters as constitutional matters, thereby positioning itself as the final interpreter of Electoral Laws.

The 2023 Guatemalan electoral process was anything but straightforward. The campaign process began on January 20, 2023, and it started with the exclusion of many election frontrunners.⁴⁴ The first candidates to be excluded were the left-wing indigenous leader, Thelma Cabrera, and her vice-presidential candidate, Jordán Rodas, a former Human Rights Ombudsman.⁴⁵ At the time Rodas was accepted by the TSE as a candidate, and he held a *Constancia Transitoria de Inexistencia de Reclamación de Cargos* [Provisional Certificate of Non-Existence of Charges],⁴⁶ a certificate extended by the Comptroller to every state bureaucrat who manages public funds to signify that there are no pending cases of corruption against a bureaucrat.

However, after Cabrera and Rodas were gaining traction in the polls, the Comptroller removed Rodas's certificate. This action led the TSE to exclude Rodas and Cabrera as candidates. The GCC reviewed an appeal brought by the candidates and resolved that the withdrawal of the certificate of the vice-presidential candidate was valid.⁴⁷ The GCC stated that the requirement of a valid certificate of the Comptroller's office did not violate the American Convention on Human Rights and was necessary for political candidates as evidency of honorability.⁴⁸ This decision ran contrary to jurisprudence of the Inter-American Court of Human Rights,⁴⁹ which previous benches of the GCC have declared as binding and of similar rank to the Constitution in Guatemala.⁵⁰

Another candidate to be excluded in this early stage was Roberto Arzú, a right-wing contender also gaining traction in the polls.⁵¹ The GCC held that Arzú's campaign violated the equality of political competition because he started his campaign before the opening of the electoral campaign by the TSE.⁵² As a result, the GCC interpreted that Arzú's actions were not honorable, and the TSE was constitutionally enabled to exclude him from the presidential race.⁵³ The last excluded contender was Carlos Pineda, an outsider presidential candidate who was for a time leading in the polls.⁵⁴ His exclusion came a month prior to the elections, as result of a provisional injunction from the GCC.⁵⁵ The GCC resolved that he could not run due to alleged inconsistencies found in his political party's internal selection process for candidates the year prior, even though his candidacy had been originally accepted by the TSE.⁵⁶ The GCC held that these inconsistencies

⁴⁴See Simon Romero, Natalie Kitroeff & Jody García, *In This Election, Some Candidates Lost Before a Single Vote Was Cast*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2023/06/22/us/guatemala-presidential-election.html> (providing background on the exclusion of Thelma Cabrera, Roberto Arzú, and Carlos Pineda from the 2023 Guatemalan presidential election, as well as offering accounts of allegations of bribery and corruption in the election process).

⁴⁵See Sonia Pérez, *Indigenous Farmworker Leader Bids for Guatemala Presidency*, ASSOCIATED PRESS (Mar. 15, 2023, 12:09 PM), <https://apnews.com/article/guatemala-elections-thelma-cabrera-indigenous-candidate-cfa5ae69b72fd1b36431e8be371f4071> (explaining that TSE refused to let Cabrera register her candidacy; that her running mate, Jordán Rodas, was excluded for not having his *Constancia Transitoria* from the Comptroller; and that at least twenty six members of Cabrera's group, the Committee for Rural Development, had been killed between 2019 and 2023).

⁴⁶See Decreto 31-2002, June 5, 2002, Ley Orgánica de la Contraloría General de Cuentas [Organic Law of the Comptroller General of Accounts], art. 22 (Guat.).

⁴⁷See Expediente 2075-2023, 2 May 2023, Corte de Constitucionalidad p. 27-29 (Guat.).

⁴⁸Expediente 2075-2023 at 37-88. See also *Petro Urrego v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 406 (July 8, 2020).

⁴⁹Expediente 2075-2023 at 37-88. See also *Petro Urrego v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 406 (July 8, 2020).

⁵⁰See Expediente 3438-2016, 8 Nov. 2016, Corte de Constitucionalidad (Guat.).

⁵¹Romero et al., *supra* note 44.

⁵²See Expedientes Acumulados 2350-2023, 2414-2023 y 2415-2023, 25 May 2023, Corte de Constitucionalidad p. 30-31 (Guat.).

⁵³*Id.* at p. 33.

⁵⁴See Mary Speck, *What's at Stake in Guatemala's Election Pause?*, U.S. INST. PEACE. (July 6, 2023) (explaining that Pineda was banned in late May 2023 "after his candidacy began to surge in the polls"). See also Romero et al., *supra* note 44.

⁵⁵See Expedientes Acumulados 2839-2023, 2851-2023 y 2852-2023, 26 May 2023, Corte de Constitucionalidad (Guat.).

⁵⁶See *id.*

were a risk to the electoral process, to the political party system, and to Guatemalan democracy.⁵⁷ The GCC also called upon the *Ministerio Público* to investigate any violation of law.⁵⁸

The GCC not only disqualified some presidential frontrunners, but also allowed others subject to constitutional prohibitions to run for office. Such was the case with right-wing leader Zury Ríos. Zury Ríos is the daughter of General Efraín Ríos Montt, who led a coup in 1982 and was charged with crimes against humanity and genocide.⁵⁹ The Guatemalan constitution prohibits those who have a close family relationship to people who have led or instigated coups d'état in Guatemala from standing for election. In the 2019 electoral process, the GCC upheld this prohibition and Zury Ríos was not allowed to run for presidential office.⁶⁰ Yet in 2023, a new bench of the GCC permitted her to run on the basis that the constitutional prohibition was no longer valid and that Guatemala's democracy had evolved such that the prohibition could be set aside.⁶¹ The court's decision made no reference to precedent, international human rights instruments, or need of constitutional reform to allow her to run.⁶²

The initial round of voting for president took place on June 25, 2023. In an unexpected result, Bernardo Arévalo was runner-up, with the second highest number of votes.⁶³ Arévalo was a center-left-wing candidate who ran a strong campaign against corruption.⁶⁴ Many political parties called for a revision of the ballots and attempted to delay the certification of the results.⁶⁵ The GCC ruled that any revision of the results of the electoral process should be done in accordance with the Electoral Law and remitted the case to the Supreme Court to oversee the scrutiny process and conduct of the TSE.⁶⁶ After a few days, the Supreme Court ruled that the TSE had acted in a lawful manner and dismissed calls for any recount of the ballots.⁶⁷ However, on July 12, 2023, the *Ministerio Público* launched a series of criminal suits against Arévalo and his political party, Semilla. The allegations against Semilla were based on the supposed use of fake signatures in the constitution process of the political party in 2018.⁶⁸

⁵⁷See *id.* at p. 19–24.

⁵⁸See *id.* at p. 23.

⁵⁹He was effectively tried and found guilty. See Elisabeth Malkin, *Court Papers Detail Killings by the Military in Guatemala*, N.Y. TIMES (Dec. 3, 2009), <https://www.nytimes.com/2009/12/04/world/americas/04guatemala.html> (providing background on the trial against General Ríos Montt); Carrie Kahn, *Former Guatemalan Dictator Found Guilty of Genocide*, NAT'L PUB. RADIO (May 10, 2013, 7:17 PM), <https://www.npr.org/2013/05/10/182967537/former-guatemalan-dictator-found-guilty-of-genocide> (detailing the findings of the three-judge panel). Yet, the GCC later reversed the verdict on procedural grounds. See Carlos Arturo Villagrán Sandoval & Sara Larios, *Guatemala*, IN THE I-CONNECT-CLOUGH CENTER 2018 GLOBAL REVIEW OF CONSTITUTIONAL LAW 125, 128 (Richard Albert, David Landau, Pietro Faraguna & Simon Drugda eds., 2018).

⁶⁰See Expediente 1584–2019, 13 May 2019, Corte de Constitucionalidad (Guat.).

⁶¹See *id.*

⁶²More so, the GCC has been endowed with initiative to promote reform to the constitution. See GUAT. CONST. art. 277.

⁶³See Jody García & Simon Romero, *Guatemala Voters Cast Ballots in Contentious Election*, N.Y. TIMES (June 25, 2023), <https://www.nytimes.com/2023/06/25/world/americas/guatemala-presidential-election.html> (explaining that in a field of more than twenty candidates for president, frontrunner Sandra Torres placed first with twenty one percent of the vote, Arévalo finished second with fifteen percent, while the other expected frontrunners, Edmond Mulet and Zury Ríos, finished fifth and sixth, respectively). See also Jody García & Simon Romero, *What an Election Surprise in Central America Means for Democracy*, N.Y. TIMES (June 26, 2023), <https://www.nytimes.com/2023/06/26/world/americas/guatemala-election-runoff-arevalo.html>; Speck, *supra* note 54 (“Guatemalan voters defied predictions on June 25 by sending [Arévalo] to runoff elections for the country's presidency.”).

⁶⁴See Simon Romero & Jody García, *Anticorruption Crusader Wins in Guatemala*, in *Rebuke to Establishment*, N.Y. TIMES (Aug. 20, 2023), <https://www.nytimes.com/2023/08/20/world/americas/arevalo-wins-election-guatemala.html>.

⁶⁵Speck, *supra* note 54 (noting that nine political parties joined the complaint to the GCC to prevent certification of the results, and that the EU had sent an observation mission to watch the polls on election day, which were “largely calm and generally organized”).

⁶⁶See Expediente 3731–2023, 1 July 2013, Corte de Constitucionalidad (Guat.).

⁶⁷See Amparo 2119–2023, 10 July 2013, Corte Suprema de Justicia p. 12–13 (Guat.).

⁶⁸See Sonia Pérez & Christopher Sherman, *Fiscalía de Guatemala Seguirá Investigación al Movimiento Semilla Pese a que Arrecian las Críticas*, ASSOCIATED PRESS (July 14, 2023), <https://apnews.com/world-news/general-news-9a7f14ce198795acbd10bb7160632b07>.

The *Ministerio Público* is Guatemala's criminal prosecutor's office. This institution investigates and prosecutes all crimes and felonies in the country.⁶⁹ The Guatemalan Constitution provides it with full autonomy and with the duty to ensure the "correct application of the law".⁷⁰ This institution is not politically nor legally accountable to other state institutions.⁷¹ It is endowed with a high share of the state's annual budget and has a presence across the whole country. The Office also has its own internal hierarchy that is designed to follow the orders of the General Prosecutor, who is regulated by statute.⁷² The only accountability mechanism is to challenge its actions through the courts. These features also make the *Ministerio Público* a target of clientelism.

The *Ministerio Público* brought these criminal suits hours before the TSE certified the first round of electoral results.⁷³ In a bid to block Arévalo's participation in the second round of voting, a judge from a criminal court jurisdiction (*Primera instancia penal*) suspended the legal status of Semilla at the request of the *Ministerio Público* based on Guatemala's *Ley Contra la Delincuencia Organizada* [Law Against Organized Crime].⁷⁴ On July 13, 2023 the GCC granted a provisional injunction in favor of Semilla and Arévalo,⁷⁵ which allowed Arévalo to continue in the second round of voting.⁷⁶ However, the GCC stated that the *Ministerio Público* should carry out any investigation and the *Ley del Crimen Organizado* was applicable to political parties,⁷⁷ allowing the *Ministerio Público* to pursue its investigation and continue its efforts to annul the elections. These efforts also included the prosecution of TSE personnel for their alleged disobedience and disrespect of the court's orders by not suspending Semilla and allowing the run-off election.⁷⁸

On July 26, 2023, the Permanent Council of the Organization of American States ("OAS") assembled to analyze the situation in Guatemala. The OAS, as well as the European Union, had sent electoral missions to Guatemala to observe the voting process.⁷⁹ Both entities certified that the electoral process was carried out in legitimate fashion. However, after the actions of the *Ministerio Público*, the OAS Secretary General led a mission to Guatemala to mediate and ensure the second round of the electoral process. The U.S. proceeded with sanctioning judges and officials of the *Ministerio Público* due to their actions to "undermine democratic processes or institutions by leading a politically motivated investigation to cast doubt on certified election results to disrupt the presidential transition."⁸⁰

The presidential run-off took place on August 20, 2023. Arévalo won with a clear majority.⁸¹ Yet, this result did not stop the *Ministerio Público*. On September 12, 2023, it raided the location where the TSE deposited the electoral ballots.⁸² It also started to investigate and interrogate

⁶⁹GUAT. CONST. art. 251.

⁷⁰*Id.*

⁷¹It has an obligation, however, to report certain activities when required by Congress or the Executive. See GUAT. CONST. art. 134.

⁷²See Decreto No. 40-94, May 12, 1994, Ley Orgánica del Ministerio Público [Organic Law of the Public Ministry], § XII (Guat.).

⁷³Pérez & Sherman, *supra* note 68.

⁷⁴See Sofia Menchu, *Fears for Guatemala's Democracy After Court Excludes a Top Party from Election*, REUTERS (July 12, 2023) (providing background on the events); Decreto No. 21-2006, Aug. 2, 2006, Ley Contra la Delincuencia Organizada [Law Against Organized Crime], art. 82 (Guat.).

⁷⁵See Expediente 3985–2023, 13 July 2023, Corte de Constitucionalidad (Guat.).

⁷⁶*Id.* at p. 7–8.

⁷⁷*Id.* at p. 8.

⁷⁸See, e.g., Merlin Delcid, *Allanan Nuevamente las Instalaciones del Tribunal Supremo Electoral de Guatemala*, CNN ESPAÑOL (July 20, 2023, 5:52 PM), <https://cnnespanol.cnn.com/2023/07/20/guatemala-elecciones-allanamiento-tribunal-supremo-electora-orix>.

⁷⁹For a more historically descriptive account of the process, see Rachel A. Schwartz & Anita Isaacs, *How Guatemala Defied the Odds*, 4 J. DEMOCRACY 31 (2023).

⁸⁰U.S. DEP'T OF STATE, SECTION 353 CORRUPT AND UNDEMOCRATIC ACTORS REPORT: 2023 (2023).

⁸¹Acuerdo No. 1659–2023, 28 Aug. 2023, Tribunal Supremo Electoral art. 1–4.

⁸²See Sonia Pérez, *Guatemala President-Elect Suspends Transition After Agents Raid Election Facilities, Open Vote Boxes*, ASSOCIATED PRESS (Sept. 12, 2023, 8:57 PM), <https://apnews.com/article/guatemala-election-bernardo-arevalo-raid-af132f2b3a19f2b6d6bdc682cb926efd>.

volunteers who helped in the electoral process and other TSE officials in charge of managing the ballot-counting software. This action was swiftly condemned by the OAS.⁸³ The Government of Guatemala was forced to accept the intervention of the OAS Secretary General as an accountability figure during the transition of power from the incumbent government to Arévalo's team.

The *Ministerio Público*'s actions also sparked a reaction from a historically marginalized group in the country's politics—Guatemala's Indigenous peoples—who in late September 2023 took to the streets to protest the actions taken by the *Ministerio Público*.⁸⁴ Indigenous peoples blocked key sections of major highways in the western part of the country for many weeks and called for the resignation of the leadership of the criminal prosecutor's office. By early October 2023, many stores and supermarkets were empty, paralyzing parts of the economy.⁸⁵ The organized business sector, which had remained silent during the electoral process, launched legal action against the blockades. On October 18, 2023, the GCC issued a ruling which characterized the protest movement as *crímenes de lesa humanidad* [crimes against humanity]⁸⁶ and ordered the government to take necessary measures to break up the protests.⁸⁷ This did not stop the indigenous peoples, who kept their protest measures and gained recognition from other groups, like university students and strong economic actors.⁸⁸ The mestizo population, which rallied with these groups, supported the blockade made from the indigenous groups. Protesters sought to show that the prosecutor's actions were partisan and political, not based on law. This led to the resignation of the Minister of Interior of the government, who resigned rather than use violent tactics as ordered by the GCC and the President, Alejandro Giamattei.⁸⁹

During these months, the GCC dismissed a series of legal challenges brought by independent lawyers who sought stronger accountability of the *Ministerio Público*'s conduct,⁹⁰ challenged the application of the *Law Against Organized Crime* to political parties during the electoral process,⁹¹ and sought orders respecting the electoral results. The GCC dismissed many of these claims and held consistently that the *Law Against Organized Crime* was applicable to political parties.⁹² Without any oversight from the GCC, on December 8, 2023, the *Ministerio Público* held a media conference calling for the annulment of the elections, the cancellation of the Semilla party, and prosecution of Arévalo and his vice-presidential candidate.⁹³

In reaction to these events, the OAS and U.S. ramped up their activities. On November 15, 2023, the Permanent Council of the OAS called upon all institutions of the Guatemalan state to stop all intimidation activities against Semilla and the TSE.⁹⁴ It also swiftly condemned various attempts by the *Ministerio Público* to strip Arévalo and other elected officials of Semilla of their

⁸³Press Release, Org. Am. States, E-054/23, OAS Mission Expresses Deep Concern About Actions of the Public Prosecutor's Office Against the Integrity of Electoral Material in Guatemala (Sept. 12, 2023).

⁸⁴Manuel Melendez-Sanchez & Laura Gamboa, *How Guatemalans Are Defending Their Democracy*, J. DEMOCRACY (Oct. 2023), <https://www.journalofdemocracy.org/online-exclusive/how-guatemalans-are-defending-their-democracy/>.

⁸⁵See Juan Montes, *Protests in Guatemala Close Roads, Choke Exports*, WALL ST. J. (Oct. 17, 2023, 1:56 PM), <https://www.wsj.com/world/americas/protests-in-guatemala-close-roads-choke-exports-cab9923d?msockid=13ae09a8c8036dcb32931d48c9116c10>.

⁸⁶Expediente 6217-2023, 15 Oct. 2023, Corte de Constitucionalidad p. 45 (Guat.).

⁸⁷*Id.* at p. 49–51.

⁸⁸See Montes, *supra* note 85.

⁸⁹*Renuncia el Ministro de Gobernación de Guatemala en Medio de Protestas y Bloqueos*, CNN (Oct. 17 2023), <https://cnnespanol.cnn.com/2023/10/17/renuncia-ministro-gobernacion-guatemala-barrientos-orix/>.

⁹⁰See generally Expedientes Acumulados 6237–2023, 6288–2023 y 6295–2023, 25 Dec. 2023, Corte de Constitucionalidad (Guat.).

⁹¹Expediente 5602–2023, 5 Oct. 2023, Corte de Constitucionalidad (Guat.).

⁹²See, e.g., Expediente 3985–2023 at p. 7.

⁹³See Sofia Menchu, *Guatemala's Arevalo Slams "Perverse" Bid to Scrap Election Result*, REUTERS (Dec. 8, 2023), <https://www.reuters.com/world/americas/oas-condemns-attempted-coup-guatemala-2023-12-08/>.

⁹⁴Org. Am. States Res. 1236, CP/RES 1236 (Nov. 15 2023).

immunity.⁹⁵ The OAS's strongest statement came on December 12, 2023, when the Permanent Council voted to apply Chapter IV of the Inter-American Democratic Charter,⁹⁶ which refers to the suspension of member states. This resolution came a day after the U.S. sanctioned nearly three hundred Guatemalans, including congressmen, government officials, and private citizens because of their activities "undermining democracy and the rule of law".⁹⁷ The EU also released a press statement that followed in the footsteps of the U.S. and sanctioned officials who had attempted to derail the transition process.⁹⁸

Days after these international events, the GCC resolved a constitutional injunction brought by independent lawyers seeking to ensure the presidential transition.⁹⁹ The GCC held that the change of government must occur, and that all elected candidates must take office.¹⁰⁰ The GCC nevertheless upheld the powers of the *Ministerio Público* to investigate Semilla. In addition, the GCC provisionally declared without effect the 2024 State Budget,¹⁰¹ which had been negotiated and drafted by the outgoing Congress and Executive without any consideration or consultation with the incoming government of Semilla and then-President-elect Arévalo. This budget would have taken away much of the incoming government's capacity to promote policy and access funds. On January 14, 2024—the date of President Arévalo's inauguration—there was a convoluted attempt by the outgoing Congress to stall the newly elected Semilla Congress members taking office. Foreign diplomats and indigenous peoples who were present at the presidential inauguration ceremony rallied and called upon the Congress to enable the newly elected members to take office. The GCC acted swiftly and *motu proprio*—for the second time in its history—and ordered the Congress to enable the transition of power.¹⁰² These events showed how much the GCC has changed its approach over the course of the electoral process.

C. The Roots and Consequences of Abusive Judicial Review: Understanding Judicial Clientelism

Over the 2023 electoral process, the GCC changed its position drastically in reaction to political events, nationally and internationally. Changes of this sort are not uncommon and may be observed over history. They are, however, usually linked to the changing composition of the bench of the GCC,¹⁰³ which reveal deeper structural issues in Guatemala. Guatemala's judicial appointment system explains both the entrenchment of judicial clientelism and the roots of abusive judicial review, both of which came to the fore during the electoral process.

I. Studying Courts Beyond Judicial Decision Making

As seen in the previous section, the attempted derailment of Guatemala's democratic transition was supported by the GCC and its endorsement of the activities of the Criminal Prosecutor's Office. During this process, the GCC used international human rights standards, anti-corruption

⁹⁵Press Release, Org. Am. States, E-085/23, OAS Electoral Mission in Guatemala Rejects New Attempt by Public Prosecutor's Office to Violate Popular Will (Dec. 8, 2023).

⁹⁶Org. Am. States Res. 2476/23, CP/RES 1240 (Dec. 12, 2023).

⁹⁷Press Release, U.S. Dep't. State, Additional Steps Taken to Impose Visa Restrictions in Response to Anti-Democratic Actions in Guatemala (Dec. 11, 2023).

⁹⁸EEAS Press Team, *Guatemala: Statement by High Representative Josep Borrell on the latest developments in Guatemala*, EUR. UNION EXTERNAL ACTION (Aug. 12, 2023), https://www.eeas.europa.eu/eeas/guatemala-statement-high-representative-josep-borrell-latest-developments-guatemala_en.

⁹⁹Expediente 6175–2023, 14 Dec. 2023, Corte de Constitucionalidad (Guat.).

¹⁰⁰*Id.* at p. 61.

¹⁰¹Expedientes Acumulados 7258–2023 y 7343–2023, 18 Dec. 2023, Corte de Constitucionalidad (Guat.).

¹⁰²Expediente 242–2024, de las 00:00 a.m., 14 Jan. 2024, Corte de Constitucionalidad p. 1 (Guat.).

¹⁰³Carlos Arturo Villagrán Sandoval, *The Guatemalan Constitutional Court: Political Arbiter or Political Servant?*, 78 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 463, 475–476 (2023).

conventions, the vocabulary of the rule of law, and other judicial techniques to exclude strong opposition figures from the presidential race, delegitimize indigenous protests, and allow the prosecution of public officials who sought to secure the election results. In other words, it transformed the terminology of liberal democracies into oppressive vocabulary. This transformation of terminology for oppressive use can be categorized as “abusive constitutionalism”. Abusive constitutionalism refers to “the appropriation of liberal democratic constitutional designs, concepts, and doctrines in order to advance authoritarian projects.”¹⁰⁴ These appropriations can come in the shape of constitutional reform, new legislation, practices by governments and other state institutions, and judicial review.¹⁰⁵

Taking the particular case of abusive judicial review, Dixon and Landau have studied the abusive constitutional practices of courts around the world.¹⁰⁶ They have provided reasons for why authoritarian regimes and leaders would want to capture high courts for their own political benefit and advancement of their cause.¹⁰⁷ The authors also detail the means and instruments of capture mostly employed by authoritarians, such as court-packing and court-curbing.¹⁰⁸

In presenting solutions to abusive judicial review by courts, Dixon and Landau set out a series of national and international responses. At the national level, the authors discuss a range of constitutional design solutions relating to the appointment processes of judges. These include processes that share appointments equally through a range of state actors, a wider basis for participation of institutions and other civil society actors within the appointment process, and the staggering of appointments over time.¹⁰⁹ At the international level, the authors recommend that international actors should call out authoritarian practices in a modest manner similar to national actors.¹¹⁰ This is to avoid any counter-claims of violations of sovereignty or imperialism by other states.¹¹¹ The authors recommend that the international community should respond in an advisory fashion, by providing arguments that may aid local actors in calling out abusive practices by state officials or abusive judicial review.¹¹²

The Guatemalan case study offers additional lessons, insights, and successful responses to Dixon and Landau’s comparative engagement with the phenomenon of authoritarian judicial review. First, the GCC was not responding to an authoritarian leader or regime seeking to consolidate power. Rather, the GCC’s behaviour responded to the capture of its members by various elite groups. Moreover, and as shown in the next section, the GCC’s appointment process is diverse and complex, involving many state powers, institutions, and actors, much as recommended by Dixon and Landau as a potential strategy to prevent abusive constitutionalism. Rather than be captured by one institution, the GCC has become a site for the struggle for power by various political, economic, and social factions, leading to judicial clientelism. Second, the GCC’s decisions during the electoral process show the extent of the use of liberal language—human rights, anticorruption, crimes against humanity—to delegitimize protest by indigenous groups. Third, it shines light on new actors, international and national, their role, activities, and methods in providing a counterweight to the rulings of the GCC. These are regional organizations, indigenous groups, and independent lawyers. Last, it provides a context and illustrates how these

¹⁰⁴See Landau, *supra* note 1, at 195 (coining the term). See also DIXON & LANDAU, *SUPRA* NOTE 1, AT 3 (developing its meaning).

¹⁰⁵See Jan Petrov, *How to Detect Abusive Constitutional Practices*, 20 EUR. CONST. L. REV. 191, 196 (2024).

¹⁰⁶Landau & Dixon, *supra* note 2, at 1318–22.

¹⁰⁷*Id.* at 1338–40.

¹⁰⁸*Id.* at 1340–45.

¹⁰⁹*Id.* at 1376–77.

¹¹⁰*Id.* at 1382.

¹¹¹*Id.*

¹¹²*Id.* at 1383. David Landau goes further in discussing the need for a International Constitutional Court to prevent and resolve issues related to democratic backsliding. Landau, *supra* note 1, at 255–58.

political, de facto and de jure responses to authoritarian judicial review were effective in a short time span and in a scenario of transition of power.

II. Judicial Appointments

One of the manifestations of Guatemalan democratic decay is the politicization of the appointment process for judges, leading to judicial clientelism.¹¹³ Raul Sanchez Urribari, who has observed this phenomenon in Latin America and elsewhere, explains that judicial clientelism refers to the informal networks which have direct impact on the allegiance of judges and which define their posture in specific topics and cases.¹¹⁴ The phenomenon explains why courts adjudicate claims to favor certain actors and outcomes.¹¹⁵ Judicial clientelism is tied to corruption and the degradation of judicial review.¹¹⁶

In Guatemala, the problem of judicial clientelism is exacerbated by the central role that the GCC has played in Guatemala's constitutional system and political affairs since 1986¹¹⁷ and the extreme constitutionalization of Guatemalan public and private law.¹¹⁸ This is partly due to the GCC's own history and initial democratic successes. In one of its early cases, the GCC declared *motu proprio* unconstitutional a 1993 coup d'état and commanded the army to uphold the constitution.¹¹⁹ The GCC was also able to command constitutional compliance by the Executive and the Supreme Court, the latter seen historically as a puppet figure of the former.¹²⁰ It therefore positioned itself as an actor that could balance the military with civil society after Guatemala's democratic transition.¹²¹ The strength and legitimacy of the GCC made it a target for strong powers and political players who wanted to appoint sympathetic judges to preserve their interests.¹²²

Five distinct entities are responsible for the appointment of the five members of the GCC and their substitutes. One judge each is elected by the Executive, the Legislative, the Judicial branches of government, in addition to the selection of one judge each by the Bar of Lawyers [*Colegio de Abogados y Notarios*] and the University of San Carlos of Guatemala.¹²³ The five judges and their substitutes are all elected at the same time. Spreading the power to appoint judges across different entities was intended to safeguard judicial independence. However, a strong political faction needs only three judges to control the GCC and secure a commanding influence over politics and policymaking.¹²⁴ This has led not only to the politicization of the

¹¹³Sanchez Urribari, *supra* note 15, at 284.

¹¹⁴See generally Raul Sanchez Urribari, *Politicization of the Latin American Judiciary via Informal Connections*, in LEGITIMACY, LEGAL DEVELOPMENT AND CHANGE 307 (David K. Linnan ed., 2012) (mentioning similar patterns in Africa and post-communist Europe).

¹¹⁵Sanchez Urribari, *supra* note 15, at 284.

¹¹⁶*Id.*

¹¹⁷See generally Gretchen Hemke & Julio Rios-Figueroa, *Introduction: Courts in Latin America*, in COURTS IN LATIN AMERICA 1 (Gretchen Hemke & Julio Rios-Figueroa eds., 2011) (discussing the history of the GCC and its role in Guatemalan politics).

¹¹⁸There is very little scholarship on these issues. As a brief note, see Juan Pablo Gramajo, *¿Es Celestial la Corte?*, PLAZA PÚBLICA (Mar. 6, 2021), <https://www.plazapublica.com.gt/content/es-celestial-la-corte>. On the topics where the GCC expanded its jurisdiction early on, see CORTE DE CONSTITUCIONALIDAD, REPERTORIO DE JURISPRUDENCIA CONSTITUCIONAL 1986–1991: DOCTRINAS Y PRINCIPIOS CONSTITUCIONALES (1992).

¹¹⁹Expediente 225–93, 25 May 1993, Corte de Constitucionalidad (Guat.).

¹²⁰Martínez Barahona, *supra* note 40, at 173.

¹²¹Specifically to Guatemala, see Ortiz, *supra* note 37, at 56. See also JULIO RIOS-FIGUEROA, CONSTITUTIONAL COURTS AS MEDIATORS: ARMED CONFLICT, CIVIL-MILITARY RELATIONS, AND THE RULE OF LAW IN LATIN AMERICA (2016) (more generally on the role of courts as mediators).

¹²²Sanchez Urribari, *supra* note 114, at 307.

¹²³GUAT. CONST. art. 269.

¹²⁴Estuardo Sebastian Morales & Rawill de Jesus Guzman, *Loyalty and Willpower: Strategic Designing of Judicial Appointments in Constitutional Courts: The Case of the Dominican Republic and Guatemala*, 99 REVISTA DE DERECHO PÚBLICO 53, 59–60 (2023).

GCC itself, but also of the institutions that appoint the judges.¹²⁵ The most recent appointment process of GCC judges in 2021 showed the extent of this institutional takeover. The executive elected its judge in a secretive fashion. The executive also favored the change of Chancellor at the University of San Carlos, who in return annulled the original selection made by the University and appointed a new judge to the GCC closer to the executive. This led to protests at the university and the shutdown of classes for almost a year.¹²⁶ For its part, the Guatemalan Bar selected a former judge of the Supreme Court linked to a ring that manipulated judicial appointments and who had already been sanctioned by the U.S. in 2021.¹²⁷ Last, Congress reelected a judge who was strongly aligned to conservative, religious, and right-wing groups and who supported Zury Ríos's candidacy.¹²⁸

To try to tackle this issue of judicial clientelism, many reform proposals have been proposed. None have yet been passed.¹²⁹ One of the main reform proposals related to term limits for the GCC's judges.¹³⁰ Currently, the judges of the GCC serve for a term of five years.¹³¹ The five judges, and their substitutes, are all appointed simultaneously,¹³² there are no limitations on reappointment.¹³³ It is usual for judges to pursue reappointment, making this process a political one. Renewability can pose a risk to judicial independence, because judges can be influenced to decide in favor of those responsible for renewing their appointment, rather than acting independently.¹³⁴ This same can be said for other courts of the country, where the phenomenon of judicial clientelism is also observed. The Guatemalan Supreme Court and Courts of Appeals also are elected for similar term lengths by Congress.¹³⁵ These renewable appointments, combined with the fact that congress elects each judge, poses a risk to judicial independence and politicizes the judiciary. Lawyers and political players have created rings around particular judges to ensure their re-appointment. This has also led to vices within the judiciary, like the abuse of time limits to resolve high stake cases against certain individuals, in an effort by judges to appease those responsible for their reappointment.¹³⁶

¹²⁵For a more thorough explanation, see DANIEL M. BRINKS & ABBY BLASS, *THE DNA OF CONSTITUTIONAL JUSTICE IN LATIN AMERICA: POLITICS, GOVERNANCE AND JUDICIAL DESIGN* 108 (2018).

¹²⁶Regina Pérez, *Toma del MUSAC, movilización y amparos detienen por ahora elección de rector en la USAC*, PRENSA COMUNITARIA (Apr. 27, 2022), <https://prensacomunitaria.org/2022/04/toma-del-musac-movilizacion-y-amparos-detienen-por-ahora-eleccion-de-rector-en-la-usac/>.

¹²⁷Heidi Loarca Oliva, *Nester Vásquez, sancionado por EE. UU., asumirá presidencia de la CC*, LA HORA (Apr. 5, 2024), <https://lahora.gt/nacionales/hloarca/2024/04/05/nester-vasquez-sancionado-por-ee-uu-asumira-presidencia-de-la-cc/>.

¹²⁸Irving Escobar, *Dina Ochoa y Luis Rosales son elegidos por el Congreso para ser magistrados de la CC*, PRENSA LIBRE (Mar. 2, 2021), <https://www.prensalibre.com/guatemala/politica/dina-ochoa-es-elegida-magistrada-de-la-cc-designada-por-el-congreso-breaking/>. In 2019, Dina Ochoa presented a dissident opinion to the judgment that ruled out Zury Ríos's participation in the electoral race of that year. See Jody García, *Los argumentos de la CC que dejaron a Zury Ríos fuera de las elecciones y el voto razonado de Dina Ochoa*, NÓMADA (May 14, 2019), <https://nomada.gt/pais/entender-la-politica/los-argumentos-de-la-cc-que-dejaron-a-zury-rios-fuera-de-las-elecciones-y-el-voto-razonado-de-dina-ochoa/>.

¹²⁹Edgar Ortiz Romero, *Guatemala*, in *THE 2022 INTERNATIONAL REVIEW OF CONSTITUTIONAL REFORM* 101 (Luis Roberto Barroso & Richard Albert eds., 2022).

¹³⁰See COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA [CICIG], *INFORME DE CIERRE: EL LEGADO DE JUSTICIA EN GUATEMALA* 41–45 (2019).

¹³¹See GUAT. CONST. art. 269.

¹³²See Decreto No. 1–86 at art. 153.

¹³³See *id.* at art. 162.

¹³⁴ANNA DZIEDZIC, *FOREIGN JUDGES IN THE PACIFIC* 144 (2021).

¹³⁵See GUAT. CONST. art. 217. See also Expedientes Acumulados 4251–2019 y 4862–2019, de las 00:00 a.m., 16 Sept. 2019, Corte de Constitucionalidad (Guat.) (resolving the issue on the selection of judges.).

¹³⁶*RUNNING OUT THE CLOCK. HOW GUATEMALA'S COURTS COULD DOOM THE FIGHTS AGAINST IMPUNITY*, HUM. RTS. WATCH (Nov. 13, 2017), <https://www.hrw.org/report/2017/11/13/running-out-clock/how-guatemalas-courts-could-doom-fight-against-impunity>.

III. Impact on Case Law

The politicization of judicial appointments and judicial clientelism has had a direct impact on the case law of the GCC. The GCC, during its existence, has shifted its jurisprudence considerably in ways that maintain its political status and reflect the political inclinations of its judges.¹³⁷ It is not unusual to see many changes to legal criteria and the sacrifice of precedent in high-stakes cases.¹³⁸

An example is the GCC's case law on the eligibility of presidential candidates.¹³⁹ In 1990, the court excluded Efraín Ríos Montt, a former general who led a coup d'état in 1982, from running for president, upholding the constitutional provision disqualifying coup leaders.¹⁴⁰ Ríos Montt took his case to the Inter-American Commission on Human Rights, which shared the Guatemala's Supreme Court view and stated that the prohibition was not incompatible with the American Convention on Human Rights.¹⁴¹ In 2003, before a new bench of the GCC, Ríos Montt refiled his complaint. In contrast to the previous occasion, the GCC accepted his claim and held that this prohibition was not applicable because the constitution had no retrospective effect.¹⁴² Ríos Montt was allowed to run for office, but he was not successful in getting elected. In 2006, a new bench of the GCC was called to review the precedent of the previous bench regarding Ríos Montt and declared the 2003 judgment without any jurisprudential effect.¹⁴³

As noted in Section B.II, in 2019, the GCC prohibited Zury Ríos from running for president because of her family relationship to coup-leader Ríos Montt.¹⁴⁴ Her vice-presidential candidate at that time was previously a GCC judge who had voted to annul the genocide case brought against Ríos Montt in 2010.¹⁴⁵ He was re-appointed as a GCC judge in 2021 and was a member of the GCC bench which allowed Zury Ríos to run for office in the 2023 election.¹⁴⁶ This shows how judicial clientelism has had a direct effect in politics and in the electoral process. However, judicial clientelism has not only been focused on defining electoral candidates. On many other topics, the GCC has changed its precedent because of the composition of its bench. This situation has favored different actors,¹⁴⁷ including trade measures to the benefit of right-wing presidents and economic elites.¹⁴⁸ Therefore, judicial clientelism has sacrificed the value of many precedents, doctrines, and legal concepts.¹⁴⁹

A more recent phenomenon in judicial decision-making that is a consequence of judicial clientelism is the abuse of the language of rights in judicial decisions.¹⁵⁰ An example is the use of the expression of "crimes against humanity" by the GCC to categorize the protest movement of indigenous groups during the 2023 electoral process. This is a phenomenon also seen in other

¹³⁷ See Sandoval, *supra* note 103, at 468–76.

¹³⁸ See RACHEL E. BOWEN, *THE ACHILLES HEEL OF DEMOCRACY: JUDICIAL AUTONOMY AND THE RULE OF LAW IN CENTRAL AMERICA* 154–59 (2017).

¹³⁹ See Sandoval, *supra* note 103, at 463.

¹⁴⁰ See Expediente 280–90, 19 Oct. 1990, Corte de Constitucionalidad (Guat.).

¹⁴¹ See Ríos Montt v. Guatemala, Case No. 10.804, Inter-Am. Comm'n H.R., Report No 30/93, OEA/Ser.L/V/II.85 doc. 9 rev. para. 22 (1993).

¹⁴² See Expediente 1089–2003, 14 July 2003, Corte de Constitucionalidad p. 42–43, 45–47 (Guat.).

¹⁴³ See Expediente 2395–2006, 10 Oct. 2006, Corte de Constitucionalidad p. 7 (Guat.).

¹⁴⁴ See Expediente 1584–2019, 13 May 2019, Corte de Constitucionalidad p. 24–28 (Guat.).

¹⁴⁵ See Expediente 4371–2011, de las 00:00 a.m., 9 Oct. 2012, Corte de Constitucionalidad p. 1 (Guat.).

¹⁴⁶ See Expediente 2065–2023, de las 00:00 a.m., 18 May 2023, Corte de Constitucionalidad p. 41–43 (Guat.).

¹⁴⁷ See generally Sara Larios Hernández, *El Precedente Judicial y su Aplicación en el Sistema Guatemalteco*, in *DERECHO GUATEMALTECO EN CONTEXTO* 135 (Carlos Arturo Villagrán Sandoval ed., 2023).

¹⁴⁸ See generally Expediente Acumulados 44–2004 y 61–2004, 20 June 2004, Corte de Constitucionalidad (Guat.). See also Expediente 1589–2002, 23 Oct. 2003, Corte de Constitucionalidad (Guat.); Expediente 162–2004, 1 July 2004, Corte de Constitucionalidad (Guat.); Expediente 184–2004, 20 Mar. 2006, Corte de Constitucionalidad (Guat.).

¹⁴⁹ See Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 298, 294–308 (2021). See also Edgar Ortiz Romero, *Central America: A Turn Towards Politically Charged Courts*, IACL-AIDC BLOG (Sept. 27, 2022), <https://blog-iacl-ai dc.org/central-america/2022/9/27/central-america-a-turn-towards-politically-charged-courts>.

¹⁵⁰ See De Burca & Young, *supra* note 22, at 211–14.

Central American countries with judicial clientelism issues.¹⁵¹ Other examples are the use of the language of human rights by high courts in the subregion to avoid upholding constitutional bans on reelection.¹⁵² This is in spite of the fact that every Central American constitution incorporates banning the reelection of executives after they have served a specified term.¹⁵³ In Costa Rica, the Constitutional Chamber of the Supreme Court used the language of the Universal Declaration on Human Rights and the American Convention to allow the reelection of Óscar Arias without following the process of reform, as stipulated in the Costa Rican constitution and the American Convention on Human Rights.¹⁵⁴ Nicaragua¹⁵⁵ and Honduras¹⁵⁶ later followed suit, in 2009 and 2015 respectively, with the Supreme Courts of both countries citing provisions from international human rights instruments to counter the constitutional prohibition on reelection. In both cases, the executive directly appointed the judges of each court. This same tactic was later utilized in El Salvador in 2021, when the party of Nayib Bukele appointed a new bench of the Constitutional Chamber of the Supreme Court without following conventional procedures,¹⁵⁷ which swiftly held that the constitutional prohibition on reelection did not apply and allowed Bukele to seek an extra term in office.

Judicial clientelism is a manifestation of broader governance and institutional issues in Central America. It can have detrimental effects on jurisprudence, as seen in the use of international human rights law to override constitutional safeguards against authoritarianism. In these scenarios, responses to judicial clientelism from within the judiciary are limited.

D. The Unforeseen Actors Safeguarding Democracy in 2023

In other contexts, where the results of elections are not respected and the transfer of power threatened, people often turn to the courts to uphold the constitution.¹⁵⁸ Yet, in Central America, courts have often been collaborators in the problem and are unwilling to commit to democratic outcomes. This section of the Article turns to analyze the role played by a diverse range of unforeseen actors—regional organizations and other states, indigenous peoples, and independent lawyers—in the 2023 electoral process in Guatemala. This analysis shows how these unforeseen actors worked to hold the judiciary and the *Ministerio Público* accountable in their duty to uphold the constitution and suggests some reasons why their interventions were seen as legitimate and effective.

Judicial accountability works through mechanisms by which judges are scrutinized in the performance of their constitutional role by executives, legislatures, independent state actors, and

¹⁵¹See Carlos Arturo Villagrán Sandoval, *The Use and Abuse of International Law in Central American Constitutional State Building*, IACL-AIDC BLOG (Sept. 29, 2022), <https://blog-iacl-aidc.org/central-america/2022/9/29/the-use-and-abuse-of-international-law-in-central-american-constitutional-state-building>.

¹⁵²See DIXON & LANDAU, *SUPRA* NOTE 1, AT 11–16, 132–36 (2021).

¹⁵³See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA [Constitution of Costa Rica] Nov. 7, 1949, art. 132(1); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR [Constitution of El Salvador] Dec. 15, 1983, art. 152(1); CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS [Constitution of Honduras] Jan. 11, 1982, art. 240; GUAT. CONST. art. 187; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Constitution of Nicaragua] Jan. 1, 1987, art. 147.

¹⁵⁴See Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, Res. No. 2003/02771, Apr. 4, 2003.

¹⁵⁵See Sentencia [S.] No. 504, 19 Oct. 2009, Sala Constitucional [Constitutional Chamber of the Supreme Court of Justice] (Nicar.).

¹⁵⁶See Sentencia [S.] No. RI-1343-14, 22 Apr. 2015, Sala Constitucional [Constitutional Chamber of the Supreme Court of Justice] (Hond.).

¹⁵⁷See Sentencia [S.] No 1-2021, 3 Sept. 2021, Sala Constitucional [Constitutional Chamber of the Supreme Court of Justice] (El Sal.).

¹⁵⁸See, e.g., Declan Walsh & Abdi Latif Dahir, *Kenya's Supreme Court Upholds Presidential Election Results*, N.Y. TIMES (Sept. 5, 2022), <https://www.nytimes.com/2022/09/05/world/africa/kenya-election-supreme-court.html>. See also *Nigeria: Supreme Court Upholds Tinbu's Election Victory*, DEUTSCHE WELLE (Oct. 26, 2023), <https://www.dw.com/en/nigeria-supreme-court-upholds-tinubus-election-victory/a-67221459>.

private actors.¹⁵⁹ David Kosar has explained how these mechanisms may be political, legal, and institutional in nature.¹⁶⁰ Guatemala's experience during the 2023 electoral process shows how mechanisms for judicial accountability may also be economic—that is, through sanctions; diplomatic; and societal.

I. The International Actors: Regional Organizations and Diplomacy

International actors played a vital role in upholding the electoral results and ensuring the constitutional transfer of power after the 2023 electoral process, utilizing tools such as international sanctions and diplomatic “shaming”. Foremost among the international actors involved in the 2023 electoral process were the U.S. and the OAS.

Historically, the United States has a long track record of involvement in Guatemala, and Central America more broadly.¹⁶¹ Since the late nineteenth century, the U.S. has consolidated itself as the region's main trading partner and source of investment.¹⁶² However, Central America has also been a site of the U.S.'s hegemonic international constitutionalism project.¹⁶³ Through a series of treaties and protocols, in 1907¹⁶⁴ and in 1923,¹⁶⁵ under the influence of the United States, the Central American countries adopted the international obligation to not recognize any government that came to power via an unconstitutional revolution or coup d'état and the principle of non-reelection of executives.¹⁶⁶ Many of these international obligations were later incorporated at the national level within the countries' constitutions, creating in the words of the Inter-American Commission on Human Rights a “constitutional custom”.¹⁶⁷

U.S. intervention has also been determinative in democratic backsliding in the region.¹⁶⁸ There are many examples of this, like the United States's intervention in the 1954 coup d'état against President Jacobo Arbenz,¹⁶⁹ and its legitimization at the OAS,¹⁷⁰ and, more recently, the failure to support CICIG under the first Trump administration. A direct example of U.S. involvement in Guatemalan electoral affairs was in the 1930s, when Guatemalan President Jorge Ubico sought to reelect himself. The United States opposed this move, invoking the 1923 Washington Treaty. The Guatemalan Minister of Foreign Relations, Alfredo Skinner Klee, pressured diplomats of the

¹⁵⁹See DAVID KOSAR, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES 40–58 (2016).

¹⁶⁰See *id.* at 121–44.

¹⁶¹See *id.*

¹⁶²See VICTOR BULMER-THOMAS, THE POLITICAL ECONOMY OF CENTRAL AMERICA SINCE 1920, 18–19 (1987).

¹⁶³See Juan Pablo Scarfi, *Excepcionalismo Estadounidense y Hegemonía Legal Hemisférica: La Corte Suprema de Estados Unidos Como Modelo Imperial de Justicia Internacional Para Centroamérica y América Latina, y Su Influjo En El Sistema Interamericano (1906–1938)*, 4 REVISTA LATINOAMERICANA DE DERECHO INTERNACIONAL 9 (2016).

¹⁶⁴See General Treaty of Peace and Amity and Additional Convention Between Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador, Dec. 20, 1907, 206 C.T.S. 63.

¹⁶⁵See General Treaty of Peace and Amity, Feb. 7, 1923. See also Chander P. Anderson, *The Central American Policy of Non-Recognition*, 19 AM. J. INT'L L. 164–66 (1925) (including the language of the 1923 Treaty). For context, see Mónica Toussaint Ribot, *La Paz en Centroamérica y Los Intereses de Estados Unidos en el Ámbito Regional: La Conferencia de Washington de 1923*, 45 REVISTA DE ESTUDIOS HISTÓRICOS 105, 119 (2007).

¹⁶⁶See Convención Adicional al Tratado General de Paz y Amistad [Additional Convention on Non-Recognition of Constitutional Coups], art. 1, Dec. 20, 1907, 206 C.T.S. 63.

¹⁶⁷Villagrán Sandoval, *supra* note 151 (citing *Informe No. 30/93, Caso 10.804, Guatemala*, INTER-AM. COMM'N ON HUM. RTS. (Oct. 12, 1993), <https://www.cidh.oas.org/annualrep/93span/cap.III.guatemala10.804.htm>) (discussing the constitutional custom as described by the Inter-American Commission).

¹⁶⁸See Michel Gobat, *Central America and the United States*, in THE OXFORD HANDBOOK OF CENTRAL AMERICAN HISTORY, SUPRA NOTE 14, AT 309.

¹⁶⁹See James R. Kurth, *The United States and Central America: Hegemony in Historical and Comparative Perspective*, in CENTRAL AMERICA: INTERNATIONAL DIMENSION OF THE CRISIS 51 (Richard E. Feinberg ed., 1982).

¹⁷⁰TENTH INTER-AMERICAN CONFERENCE, DECLARATION OF CARACAS (1954), https://avalon.law.yale.edu/20th_century/intam11.asp.

United States by stating that it was the will of the people to reelect Ubico.¹⁷¹ Skinner Klee also stated that Ubico was an ally in the fight against communism in the Americas, therefore it was better to keep him in power than to elect a left-wing leader. The U.S. turned a blind eye and allowed the continuance of the Guatemalan president without democratic election.¹⁷² Ubico stayed in power for 14 years and was known for his repressive and brutal tactics against civil society.¹⁷³ This softening by the U.S. also led to the rise of other dictators in El Salvador, Honduras, Costa Rica, and Nicaragua with a similar style of governing. A second example was the United States's interference in the 1963 elections, involving Bernardo Arévalo's father.¹⁷⁴ The United States's support for a military coup d'état that year prevented Arévalo's father from standing for election. He fled the country, even when polls showed him as a clear winner. The coup led to a new era of military dictatorship, censorship, and violence in Guatemala.¹⁷⁵ However, and with the exception in the first Trump administration, since the 1990s the U.S. has maintained an attitude generally consistent with supporting democracy in Central America.¹⁷⁶

Today, populist dictators are again on the rise in Central America. The Biden administration renewed the U.S.'s efforts to safeguard what little is left of Guatemala's democratic institutions. In contrast to the use of treaty provisions of the kind in the 1907 and 1923 Washington treaties, the use of sanctions has become the preferred tool of choice to put pressure on government officials, including judges, to uphold the constitution. The U.S. paved the way for other actors, such as the European Union, to also apply such measures to Guatemalan citizens, placing pressure on Guatemalan courts to act in a manner consistent with the Constitution and democracy.

In addition to the U.S., regional organizations, particularly the OAS, played a pivotal role during and after the electoral process. The OAS Secretary General followed closely the process and reacted vocally against any interference in the electoral outcomes.¹⁷⁷ The OAS reports highlighted the undue pressure from the *Ministerio Público*, courts—including criticizing the GCC's judgments—and other national actors on the Semilla party, the TSE, and other actors close to Arévalo. The OAS became a forum to expose and call out the government and state institutions and make openly accountable the process for the transition of power to the new government.

At the Permanent Council, other Latin American countries openly criticized the activities of the GCC and the Guatemalan government's passivity. Governments of the Americas challenged the narratives provided by the Guatemalan Ministry of Foreign Affairs and called for the cessation of the prosecutions against Semilla.¹⁷⁸ They argued that Guatemala could not shield itself from criticism by reference solely to "sovereignty" and its constitution. Many countries argued that the protection of democracy and human rights were essential to sovereignty and the rule of law.¹⁷⁹

The OAS Secretary General closely followed the transition process, even witnessing the activities of the *Ministerio Público* sequestering the electoral ballots.¹⁸⁰ The OAS Secretary General

¹⁷¹See Kenneth Grieb, *The United States and General Jorge Ubico's Retention of Power*, 71 REVISTA DE HISTORIA DE AMERICA 119, 131–132 (1971).

¹⁷²See *id.* at 132.

¹⁷³See *id.* at 123–24.

¹⁷⁴See THOMAS MELVILLE & MARJORIE MELVILLE, GUATEMALA: THE POLITICS OF LAND OWNERSHIP 148–50 (1971). See also JAMES DUNKERLEY, POWER IN THE ISTHMUS: A POLITICAL HISTORY OF MODERN CENTRAL AMERICA 443, 505 (1988).

¹⁷⁵See EDELBERTO TORRES-RIVAS, REVOLUCIONES SIN CAMBIONES REVOLUCIONARIOS 429 (2011).

¹⁷⁶See Héctor Perla, Salvador Martí i Puig & Danny Burridge, *Central America's Relations with the United States*, in HANDBOOK OF CENTRAL AMERICAN GOVERNANCE, SUPRA NOTE 6, AT 309, 313–15.

¹⁷⁷See Luis Almargo, Sec'y Gen. Org. Am. States, Report to the Permanent Council on the Situation in the Republic of Guatemala, After Leading a Mission that Visited the Country Between August 1 and 4, 2023 (Aug. 10, 2023) (transcript available at https://www.oas.org/en/media_center/press_release.asp?sCodigo=S-010/23).

¹⁷⁸See Org. Am. States, Permanent Council, CP/DEC.8 (24446/23) (Sept. 1, 2023).

¹⁷⁹See, e.g., Org. A., States, Special Session of the Permanent Council, *The Intervention of the Representative of the Dominican Republic at the Special Session of the Permanent Council of the Organization of American States* (Dec. 12, 2023).

¹⁸⁰See Org. Am. States, *Report of the Secretary General on the Mission for the Transition Process In Guatemala*, CP/INF.9909/23 (Sept. 19, 2023).

became an actor who would meet with, and gather and secure information from, the TSE, indigenous groups, and experts in an independent fashion. The OAS thus became a platform through which national actors could communicate and expose the activities of the *Ministerio Público* and condemn the activities of the courts.

II. The National Actors: Indigenous Groups and Independent Lawyers

There were likewise important and influential local actors that intervened in the process of safeguarding Guatemala's democratic transition process. Two of the most important were indigenous groups and independent lawyers. Each group, through their actions, provided social pressure and legal avenues to allow the GCC to eventually change its position and confirm the electoral results.

Historically, indigenous groups have been neglected in Guatemala's state-building process.¹⁸¹ Guatemala has a long history of racism and discrimination against indigenous peoples.¹⁸² This is revealed through the many Guatemalan constitutions, laws, and judgments of its courts.¹⁸³ As an example, Guatemala's constitution gives the state a tutelage and paternalistic role over indigenous peoples and their resources.¹⁸⁴ Moreover, many judgments of the Inter-American Court of Human Rights have found there to be structural discrimination towards indigenous peoples in the law, citing failures to enact legal arrangements that secure their self-determination, to provide indigenous communities access to radio communication, and to redress for the systemic violation of their rights during Guatemala's domestic conflict.¹⁸⁵

Indigenous groups were influential in defending the electoral results and positioning the newly-elected president as someone who could represent all groups from Guatemalan society.¹⁸⁶ This was the first major social movement of this nature in Guatemala by indigenous peoples. Through communication by their leaders, indigenous peoples assumed a position as electoral guardians.¹⁸⁷ In their communications, they no longer viewed the GCC or other Guatemalan institutions as legitimate, but rather as corrupt.¹⁸⁸ Indigenous opposition showed how the silence and complicity of economic and political elites in the efforts to resist the election results were harmful and allowed for further democratic backsliding. The protest measures taken by the indigenous groups pushed the government and economic elites to exert pressure on courts and other actors with strong political ties to government.¹⁸⁹ In this, the indigenous protest movement can be positioned in the broader literature on the legitimacy of civil disobedience and protest. John Rawls characterizes civil disobedience as political, public, non-violent, and conscious movements to bring change in

¹⁸¹See generally Rachel Sieder, *Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Juridification in Guatemala*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 161 (Alexandra Huneus Alexandra Huneus, Javier Couso & Rachel Sieder eds., 2010)

¹⁸²See generally CARLOS GUZMAN BOCKLER & JEAN-LOUP HERBERT, *GUATEMALA: UNA INTERPRETACIÓN HISTÓRICO-SOCIAL* (1970).

¹⁸³On the history of their marginalization and subjugation, see generally JEFFERY M. PAIGE, *COFFEE AND POWER: REVOLUTION AND THE RISE OF DEMOCRACY IN CENTRAL AMERICA* (1997); PAUL J. DOSAL, *POWER IN TRANSITION: THE RISE OF GUATEMALA'S INDUSTRIAL OLIGARCHY, 1871-1994* (1995).

¹⁸⁴See GUAT. CONST. arts. 66–69.

¹⁸⁵See *Río Negro Massacres v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250 (Sept. 4, 2012); *Maya Kaqchikel Indigenous Peoples of Sumpango v. Guatemala*, Interpretation of the Judgment on Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 457 (July 27, 2022).

¹⁸⁶See Vaclav Masek, *Guatemala's Indigenous-Led National Strike Rejects Authoritarianism*, 55 NACLA REP. ON THE AMS. 340, 340 (2023).

¹⁸⁷See, e.g., Redacción Nacional, *Autoridades Indígenas denuncian la instrumentalización de la Corte de Constitucionalidad*, CRN NOTICIAS (Jan. 29, 2024), <https://crnnoticias.com/autoridades-indigenas-denuncian-la-instrumentalizacion-de-la-corte-de-constitucionalidad/>.

¹⁸⁸See *id.*

¹⁸⁹*Id.*

law or policy.¹⁹⁰ For Rawls, their legitimacy is found in the fact that these movements, although may be considered as illegal, appeal to higher communal values such as democracy. They are even more legitimate in the face of persistent and deliberate violations of basic principles of society—democracy, human rights, and equality.¹⁹¹ Moreover, as Roberto Gargarella explains, the legitimacy of some indigenous movements in Latin America stems from their historical exclusion and the lack of legal avenues to express their disagreement.¹⁹² In the case of Guatemala, this is certainly the reality. This is because of the historical exclusion of these groups from politics since colonial times.¹⁹³

Another group of actors that were influential in defending the electoral results were independent lawyers. These were lawyers from private practice and were not linked to any political party or traditional economic group. Rather, they represented a younger generation of lawyers that distanced themselves from any political status quo.¹⁹⁴ Throughout the 2023 electoral process, independent lawyers launched a series of suits against the activities of the *Ministerio Público* challenging the constitutionality of laws that shielded prosecutors from political and legal accountability and sought to safeguard the competencies and functions of the TSE.

As described earlier, many of these challenges were dismissed by the GCC. Despite this, these court cases were important for two reasons. First, the rulings on these cases revealed to the international community and other actors the clientelism of the GCC. The many challenges presented by lawyers to the court showed that the GCC's reasoning was not consistent with Inter-American rights standards, and exposed inconsistencies in its judicial reasoning. This signaled to the OAS and foreign governments the abuse of the law by the court. It was through these judgments that the GCC also held that criminal law was applicable to political parties and that indigenous peoples were committing “crimes against humanity”.

Second, and more decisive, the challenges brought by lawyers provided various opportunities for the GCC to react at different stages of the electoral process. As outlined above, the GCC changed its approach after a series of sanctions and international resolutions. However, it was only through the legal cases presented by independent lawyers that the court could formalize its position in a regular and legalistic fashion, as a response to a legal challenge, and not in direct response to the pressure of international actors and protest movements. This allowed the GCC to assume a posture that it was resolving issues for a national audience in a legitimate and legal manner.

E. Insights and Lessons for Dealing with Abusive Constitutional Practices

The Guatemalan experience shows that the defense of electoral processes and judicial accountability is not only a national affair. The 2023 Guatemalan electoral process is a successful example of monitoring, protecting, and securing democracy from further backsliding. It shows how international and regional actors, together with national groups, can entrench and safeguard democracy, national constitutions, and electoral processes.¹⁹⁵ Therefore, the Guatemalan

¹⁹⁰See John Rawls, *Teoría de la Desobediencia Civil*, in *LA FILOSOFÍA DEL DERECHO* 203–09 (Ronald Dworkin eds., trans. Javier Sainz de los Terreros, 2018)

¹⁹¹*Id.*

¹⁹²See ROBERTO GARGARELLA, CARTA ABIERTA SOBRE LA INTOLERANCIA: APUNTES SOBRE DERECHO Y PROTESTA 33–48 (2006).

¹⁹³See generally SEVERO MARTINEZ PELAEZ, LA PATRIA DEL CRIOLLO. AN INTERPRETATION OF COLONIAL GUATEMALA (2009).

¹⁹⁴See Oscar García & Carlos Kestler, *Abogados presentan acción en la CC para que se respete amparo que busca garantizar resultados de las elecciones*, PRENSA LIBRE (Dec. 11, 2023), <https://www.prensalibre.com/guatemala/elecciones-generales-guatemala-2023/abogados-presentan-accion-en-la-cc-para-que-se-respete-amparo-que-busca-garantizar-resultados-de-las-elecciones-breaking/>.

¹⁹⁵See KOSAR, *supra* note 159, at 25–120.

experience invites us to analyze and review a new series of accountability instruments for courts and review the role of international actors in defending democracy from abroad.¹⁹⁶ It is also a new example that can inform and provide new insights, lessons, and development to be addressed by the literature on authoritarian judicial review and other theoretical agendas. This section sets out three areas for further analysis raised by the Guatemalan experience.

I. Accountability from Abroad: Sanctions and Diplomacy

1. Sanctions and Human Rights

Sanctions were the main instrument utilized by the U.S. against Guatemalan actors that sought to undermine the 2023 electoral process. It was through these sanctions that the GCC was finally pressured to uphold the results of the election. The sanctions applied to specified individuals, but had an effect on the state as a whole: A day after the US announced sanctions against three hundred Guatemalans—including members of congress, government, and traditional economic elites—Guatemalan bond prices plummeted.¹⁹⁷ Under a humanist approach, sanctions can be seen as an injury to human rights.¹⁹⁸ Sanctions affect the rights of individuals and their families, and are applied without due process or access to remedies. However, sanctions did afford a deterrence to safeguard the Guatemalan electoral results. Like any state or governmental function, these measures need to be balanced under a democratic and rights framework.

The use of sanctions to safeguard democratic processes is a new area of study,¹⁹⁹ but some of the issues have been explored by European supranational courts—the European Court of Justice (“ECJ”) and European Court of Human Rights (“ECHR”)—and Supreme Courts of other jurisdictions.

The *Kadi* saga under the ECJ is an example of the problem of sanctions for the failure of remedies and due process at the international level. In *Kadi I* and *II*, the ECJ dealt with lack of remedies within the UN system after states applied travel bans and the freezing of assets pursuant to a resolution of the UN Security Council.²⁰⁰ In particular, the ECJ analyzed how the EU Commission and EU member states implemented UN Security Council decisions within the European Union, and their potential impact on fundamental rights of individuals. In *Kadi I*, the ECJ found that the lack of remedies within the UN system problematic.²⁰¹ The ECJ found that, although there were no legal avenues for individuals to legally challenge a UN Security Council resolution, it could review the form it was implemented by EU institutions and states. The ECJ was of the viewpoint that when implementing UN Security Council decisions, these must comply with the fundamental rights recognized within the EU.²⁰² In *Kadi II*, the ECJ held that the UN sanctions regimen must ensure a “balance is struck between the requirements of international peace and security, on the one hand, and the protection of fundamental rights, on the other.”²⁰³ Similar views were shared by the ECHR and the Canadian Supreme Court. The first held similarly that sanctions

¹⁹⁶See Jonathan Havercroft, Jacob Eisler, Jo Shaw, Antje Wiener & Val Napoleon, *Decolonising Global Constitutionalism*, 9 GLOB. CONSTITUTIONALISM 1, 5–6 (2020).

¹⁹⁷See Michael D. McDonald & Maria Elena Vizcaino, *Guatemala’s Bond Prices Plummet After Attempts to Overturn Presidential Election*, BLOOMBERG (Dec. 11, 2023), <https://www.bloomberg.com/news/articles/2023-12-11/risk-of-pariah-status-makes-guatemala-bonds-biggest-em-losers>.

¹⁹⁸See generally G.A. Res. 73/167 (Dec. 17, 2018) (signaling the negative effects of sanctions to human rights.)

¹⁹⁹See Alena Douhan (Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights), *Unilateral Coercive Measures: Notion, Types and Qualification*, 5–6, U.N. Doc. A/HRC/48/59 (July 8, 2021).

²⁰⁰See Antonio Tzanakopoulos, *Domestic Court Reactions to the UN Security Council Sanctions*, in CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 54, 57 (August Reinisch ed., 2013).

²⁰¹See ECJ, Joined Cases C-402 & C-415/05 P, *Kadi v. Council*, ECLI:EU:C:2008:461 (Sept. 3, 2008), paras. 314–18, <https://curia.europa.eu/juris/liste.jsf?num=C-402/05>.

²⁰²See *id.* at para. 281.

²⁰³ECJ, Joined Cases C-584, C-593 & C-595/10 P, *Comm’n v. Kadi*, ECLI:EU:C:2013:518 (July 18, 2023), paras. 84–96, <https://curia.europa.eu/juris/liste.jsf?num=C-584/10>.

burden rights to people with sanctions and states must seek to act internationally in a manner to harmonize international obligations with human rights.²⁰⁴ Meanwhile, the Canadian court's judgment focused on providing remedies to human rights violations when these are non-existent in the UN scheme.²⁰⁵

The comparative examples show that the use of sanctions for safeguarding international values still warrants the protection of human rights even when democracy seems compromised. It would be self-defeating if democratic values are compromised when upholding democracy.²⁰⁶ Human rights still need to be afforded in a balanced and proportional manner.²⁰⁷ The U.S. affords no right to due process or redress under its transnational sanctions scheme. Under a humanist sovereignty view, sanctions must be evaluated according to their dual function: The preservation of democracy must be considered the framework for the full development of individuals and their rights; and rights of individuals are still subject to their performance within and towards democracy.²⁰⁸ Therefore, and as the European and Canadian experiences show, the right to due process and remedies from prerogative powers must still be regulated and upheld.

In addition to the human rights caveats, other issues with sanctions arise that need attention. The U.S. has developed a regime to sanction corrupt practices against foreign officials. The Magnitsky Act authorizes the executive to sanction foreign bureaucrats for corruption or human rights violations.²⁰⁹ However, these decisions are discretionary. Sanctions can be used to dissuade prosecutors and courts—directly and indirectly—to resolve in certain ways contrary to their beliefs.²¹⁰ Under these schemes, the U.S. has sanctioned prosecutors, judges—including from the Guatemalan Supreme Court—and other officials.²¹¹ Judicial independence is at risk if foreign powers sanction judges in order to influence their decision-making to act in a fashion aligned to foreign interests. The distinction between unwarranted interference in the ability of judges to come to an independent decision and incentivizing judges to uphold the constitution can be a fine one. Sanctions might be a means of judicial accountability, but they might also become illegitimate coercion against judges and other bureaucrats. The context of judicial clientelism becomes an important factor in deciding whether sanctions are a problematic interference in judicial decision making or warranted in defense of democracy.

Rather than sanctions at the discretion of individual states, it may be that regional or international organizations provide stronger accountability for the use of sanctions under political and human rights considerations and legitimate their use in the process. For example, the use of sanctions in the Guatemalan context might have been more legitimate if contemplated under an OAS framework with human rights guarantees. The U.S. sanctions came separate and independent to OAS Permanent Assembly resolutions condemning the activities of the *Ministerio Público* and other Guatemalan actors in attempting to derail the electoral process. The

²⁰⁴ See *Nada v. Switzerland*, App. No. 10593/08, para. 63 (Sept. 12, 2012), <https://hudoc.echr.coe.int/eng?i=001-113118>.

²⁰⁵ See *Abdelrazik v. Minister of Foreign Affs.*, [2010] 1 F.C.R. 267 (Can. Fed. Ct.). See also Antonios Tzanakopoulos, 'Abdelzarik v Canada and United Nations Sanctions in Domestic Courts', 8 J. INT'L CRIM. JUST. 249, 253–55. See also *HM's Treasury v. Ahmed* [2010] UKSC 2 (appeal taken from Eng.) (providing another example of domestic judicial review).

²⁰⁶ See Organization of American States, Inter-American Democratic Charter art. 7. See also G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 29 (Dec. 10, 1948).

²⁰⁷ In this instance, I take Kumm's approach to the legitimacy of international action. See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 294–95 (Jeffrey Dunoff & Joel Trachtman eds., 2009).

²⁰⁸ See Jon Elster, *Accountability in Athenian Politics*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 260–62 (Adam Przeworski, Susan C. Stokes & Bernard Manin eds., 1999) (explaining that this idea is neither new nor radical, and as has its first roots in Athenian ostracism).

²⁰⁹ 22 U.S.C. § 10101 *et seq.* For more on the Magnitsky Act, see *The Global Magnitsky Sanctions Program*, U.S. DEP'T STATE, <https://www.state.gov/global-magnitsky-act/> (last visited Mar. 3, 2025).

²¹⁰ See DAVID KOSAR, *supra* note 159, at 108–13 (discussing pathological mechanism for judicial accountability).

²¹¹ See *U.S. Sanctions Guatemalan Officials over "Undemocratic" Activity*, AL JAZEERA (July 19, 2023), <https://www.aljazeera.com/news/2023/7/19/us-sanctions-guatemalan-officials-over-undemocratic-activity>.

OAS therefore may provide a platform to avoid discretionary use of sanctions, as well as a forum for the accountability of the use of these same instruments.

2. Diplomacy, the OAS, and its Limitations

Judicial clientelism is endemic in Guatemala and Central America. To resolve this issue, reform and change of judicial culture, as proposed by Dixon and Landau, can be a solution. Nevertheless, this is a solution that involves constitutional and legislative reform and, more importantly, time. The Guatemalan constitution sets out a series of procedures to amend it.²¹² This process can be lengthy.²¹³ However, in a scenario of transition of government that just spans a few months, with many members of congress, public officials, and private citizens sanctioned because of their opposition to the transition of government, a discussion of wider reform was not an option. The reality of safeguarding the electoral results to January 14, 2024 was the priority.

The Guatemalan example highlights the importance of timing when dealing with authoritarian actors. The effectiveness of international and national actors stemmed from the fact that they acted swiftly in response to changing circumstances. The OAS and other countries were able to keep up with the events happening in Guatemala and determine quickly the steps to take to prevent further backsliding. The Inter-American Democratic Charter provides the means for such quick reaction from the OAS's Permanent Council and the Secretary General against potential threats to democracy in the Americas.²¹⁴ This international instrument sets out the principles by which political action can be taken by member states through the OAS.²¹⁵ Article 20 of the Charter establishes that either the Secretary General or Permanent Council may assess an unfolding situation of "an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime" and take decisions as "deemed appropriate" to manage the situation.²¹⁶ It was through these powers that allowed a quick response from the Secretary General of the OAS. The OAS electoral missions kept the Permanent Council and other international actors informed on the situation in Guatemala and created a legitimate basis for quick response to steer the GCC and *Ministerio Público* towards upholding the electoral results.

The Guatemalan experience serves as an example of international action to safeguard democratic outcomes in key moments of governance. This case study shows the value of political outcomes through the Permanent Council and the Secretary General in preventing further backsliding. This experience provides new lessons and insights beyond that traditionally seen in the Americas and exposes the value of political negotiations rather than legal and judicial procedures.²¹⁷

One important lesson relates to the organization of the regional institutions of the Americas. There has historically been a disconnection within the OAS between the political branch of the OAS and the Inter-American Human Rights System. Human rights bodies in the Americas have a long history of calling out human rights abuses by governments.²¹⁸ In the cases of Venezuela and Nicaragua, both the Inter-American Human Rights Commission and Court have found these countries responsible for infringing political rights by revealing broader democratic institutional

²¹²See GUAT. CONST. arts. 278–80.

²¹³See Carlos Arturo Villagrán Sandoval, *supra* note 12, at 270–72 (explaining that this was after Guatemala's self coup d'état in 1994).

²¹⁴See Organization of American States, Inter-American Democratic Charter art. 7.

²¹⁵See Timothy D. Rudy, *A Quick Look at the Inter-American Democratic Charter of the OAS: What Is It and Is It "Legal"?*, 33 SYRACUSE J. INT'L L. & COM. 236, 237 (2005).

²¹⁶Organization of American States, Inter-American Democratic Charter art. 20.

²¹⁷In the case of Venezuela, the Permanent Council was ineffective to pass a resolution on the situation of the Venezuelan 2024 Electoral Process. See Press Release, Org. Am. States, AVI-111/24, OAS Permanent Council to Address Results of Electoral Process in Venezuela (July 29, 2024).

²¹⁸See Alexandra Huneeus & Mikael Rask Madsen, *Between Universalism and Regional Law and Politics: A Comparative History of the American, European and African Human Rights Systems*, 16 INT'L J. CONST. L. 136 (2018).

backsliding.²¹⁹ The Inter-American Human Rights Court has also used the Inter-American Democratic Charter as the basis for many of its recent decisions involving political rights and democratic backsliding.²²⁰ Yet, as several authors have shown, these human rights bodies have been ineffective to enforce their decisions and respond in practice to democratic backsliding.²²¹

The political branches of the OAS are rarely connected to the human rights system. The Inter-American Democratic Charter makes no mention of the human rights institutions their role in safeguarding democracy in the Americas, or how the Secretary General and Permanent Council should uphold judgments and findings of both the Inter-American Human Commission and Court.

In the case of Guatemala, the Inter-American Human Rights Commission has reported on the situation within the country and the institutional backsliding for over two decades.²²² However, these findings did not feature in the discussions of the Permanent Council or the OAS Secretary General. In addition, Guatemala has been found responsible for violating human rights by the Inter-American Human Rights Court.²²³ Yet, compliance with the Court's rulings and its supervision over state authorities is also not addressed at the OAS political forums. This disconnection between law and politics has negative effects on the ability of the regional organizations to uphold democracy.

The success of the intervention in Guatemala's electoral process provides valuable lessons for how the political and legal arms of the regional organization might better work together in the future. Particularly for the OAS, it shows the need for diplomacy to be coordinated with politics and law. It shows how countries and organizations can be effective through political actions at an international level, and, as a result, have an impact in judicial outcomes. Yet, the Guatemalan experience shows that the role played by the OAS is merely one part of a larger puzzle on the synergy between international and national actors to safeguard electoral results.

II. The Role of National Actors and Ownership

An understudied group of actors in scholarship are indigenous groups and independent lawyers, which had a key role in defending democracy in Guatemala. These actors represented an attitude of ownership of the role of guarantors of the democratic transition of power. While indigenous groups pressured through de facto measures, independent lawyers provided a safety valve for the final legal outcome. As Tarunabh Khaitan argues, these groups serve as discursive accountability actors.²²⁴ As he explains, these actors pressure state actors through discourse and other measures, such as through the media, campaign groups, and judicial challenges, among others.²²⁵ In other

²¹⁹See Gonzalo Candia, *Regional Human Rights Institutions Struggling Against Populism: The Case of Venezuela*, 20 GERMAN L.J. 141, 141 (2019); Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005); Press Release, Inter-Am. Comm'n H.R., IACHR Publishes Report on the Concentration of Power and the Weakening of the Rule of Law in Nicaragua (Oct. 28, 2021).

²²⁰See Herrera-Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107 (July 2, 2004). See also López Soto v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 379 (May 14, 2019); Petro Urrego, Inter-Am. Ct. H.R. (ser. C) No. 406.

²²¹See Candia, *supra* note 219, at 147–53.

²²²See Press Release, Inter-Am. Comm'n H.R., Justice and Social Inclusion: The Challenges of Democracy in Guatemala (Dec. 29, 2003) (highlighting the systemic challenges faced by the Guatemalan judiciary). For reports by the Inter-American Commission on Human Rights, see The Inter-Am. Comm'n H.R., *Country Reports*, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/reports/country.asp>.

²²³For recent cases, see, for example, Former Employees of the Judiciary v. Guatemala, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 445 (Nov. 17, 2021); Maya Kaqchikel Indigenous Peoples of Sumpango, Inter-Am. Ct. H.R. (ser. C) No. 457.

²²⁴See Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & ETHICS HUM. RTS. 49, 57 (2020).

²²⁵See *id.* at 49–50.

words, they serve as accountability actors which can legitimize or delegitimize public activities and courts, and mobilize when these actions are of abusive nature.

On the topic of protest movements, the United States's January 6, 2021 experience reveals the problems of these sort of actions. Strong leaders can influence and spark strong protest movements, as seen in the US and Brazil in 2023 after their presidential transition. Rather than being a tool for judicial accountability or legitimate disobedience, in some contexts, protest is used to pressure institutions and can compromise judicial independence by dissuading courts to favor certain results.²²⁶ It is therefore important to understand how and why the protests by indigenous groups to secure the electoral results in Guatemala were different.

As mentioned previously, the Guatemalan indigenous protests lasted well over a month. The protests affected trade and the transportation of produce. Many stores were unable to stock up in Guatemala City due to these measures. This social pressure highlighted the cause and pushed citizens and other influential actors, such as economic elites, to recognize the electoral results. However, it also highlighted the GCC's abusive usage of liberal and international law language and the racist tone when it called these activities "crimes against humanity." This experience made indigenous groups visible. They were acknowledged as political force outside of the traditional institutional settings, in which they have been long excluded and in which elite interests dominate. In this sense, indigenous groups have become a legitimating voice with capacity to safeguard democratic results outside of politics and the law. This recognition transforms these groups into key players and important actors when authoritarian practices, by various state powers, have already diminished any legal or political response to abusive conduct. Therefore, the use of protest became legitimate as no other political or legal means was available to guarantee a democratic transition. However, it is to be noted that the participation of indigenous peoples as a political force outside of the traditional institutional settings need further comparative study.

On the topic of independent lawyers, the Guatemalan experience provides many insights for the use of litigation in guaranteeing democratic transitions. Independent lawyers through their many legal challenges exposed the activity of the *Ministerio Público* and the ruling of the GCC and other courts to a wider national and international audience. They became key actors in shining a light on the illegalities committed by criminal prosecutors by continuously challenging their actions. It also forced the GCC and other courts to keep ruling and make public their rulings to public and social scrutiny. It was through this activity that allowed the GCC to change its position. In other words, judicial challenges afforded the GCC a venue to legally express itself and react to public scrutiny and international and national pressure. In this way, the Court became a guardian of democracy despite itself.

Consequently, it needs to be mentioned that it was the synergy of international and national actors, through political, de facto, and legal measures that kept Guatemalan democracy from further backsliding. No single actor can be attributed sole responsibility for this feat, rather it was a series actions by external and local groups that provided a successful experience of defending democracy in a highly complicated and strenuous moment in Guatemalan political history. Without international condemnation, local social pressure, and the legal escape routes, the Guatemalan transition of government would have been derailed. Although the *Ministerio Público* continues with its efforts to investigate the 2023 electoral outcome²²⁷ and the GCC maintained the suspension of Semilla as a political party,²²⁸ Arévalo assumed the presidency and has continued in power. Moreover, he has invited the OAS to support in the judicial appointment process for the Supreme and Appellate courts in Guatemala, as detailed in the next section.

²²⁶See KOSAR, *supra* note 159, at 68–72 (referring to this as accountability perversion).

²²⁷El MP insiste en investigar los resultados electorales de 2023, PRENSA COMUNITARIA (Mar, 18 2024), <https://prensacomunitaria.org/2024/03/el-mp-insiste-en-investigar-los-resultados-electorales-de-2023/>.

²²⁸See *Máxima corte Guatemala avala suspensión del partido Semilla*, DEUTSCHE WELLES (Feb. 2, 2024), <https://www.dw.com/es/m%C3%A1ximo-tribunal-de-guatemala-ratifica-suspensi%C3%B3n-del-partido-del-presidente-ar%C3%A9valo/a-68148925>.

III. Studying in and with Context and Providing Systemic Solutions

A great deal of scholarship is focused on the resilience of national courts, their role as guardians of democracy, and the doctrines they utilize as bulwarks against authoritarianism.²²⁹ Intellectual agendas studying democracy, the rule of law, and constitutionalism in the Latin American region and beyond have focused on courts as one of the main actors in the transformation of democracy in that continent. This is the case of *Ius Constitutionale Commune* in Latin America (“ICCAL”).²³⁰ In a nutshell, this scholarly agenda focuses on the role of the Inter-American Court of Human Rights as the main agent in the transformation of democracy in Latin America, through judicial dialogue between the regional and national courts.²³¹ It theorizes a court driven democracy, positioning courts as its main transformative agents and keepers.²³² However, the Guatemalan experience, and more broadly, Central America’s experience with authoritarian constitutionalism, provide new scenarios with which these scholarly agendas need to engage further.²³³ The reality of judicial clientelism, the capture of judicial institutions and abusive judicial review compromise the potential for courts to be agents for democratic change. The disconnection of law and politics in the Inter-American regional system further compromises the vision of regional and national courts acting together to address democratic backsliding. As outlined above, the political solutions to the problems of judicial clientelism—such as sanctions and diplomacy—present challenges to traditional conceptions of judicial independence and involve unforeseen actors beyond the courts. The Guatemalan experience shows that it is necessary to think about democracy, the rule of law, and judicial independence beyond the realm of the courts alone. It suggests that solutions to abusive judicial review can come from a mix of political intervention, protest, and legal challenges against the abusive actions taken by courts and justice institutions.

The Guatemalan case study, and Central America more generally, show how courts have been taken over by strong political and economic actors. The Guatemalan example, as this Article highlights, shows how free courts are to change doctrine, leave jurisprudence aside, and misuse concepts, such as crimes against humanity. It is under these strenuous situations that law loses its normative effects and compliance. Studies have been made of the ease with which Central American courts have avoided constitutional bans on presidential reelection. One example is the study of the Honduran Supreme Court’s judgment on allowing the reelection of President Orlando Hernandez.²³⁴ Yet, this type of study does not consider broader shared pathological governance problems in the subregion, nor their historical background of the U.S. constitutional hegemony of 1907 and 1928. As a result, these studies provide doctrinal solutions or critiques

²²⁹See, e.g., ROSALIND DIXON, *RESPONSIVE JUDICIAL REVIEW: DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE* (2023). For a critical and nuanced approach, see TOM DALY, *THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS* (2017).

²³⁰See generally Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi & Ximena Soley, *Introduction*, in *TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 1* (Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi & Ximena Soley eds., 2016).

²³¹On how these topics are avoided with a focus on the impact of the Inter-American Court in national jurisdictions, see Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor & Mariela Morales Antoniazzi, *Introduction*, in *THE IMPACT OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: TRANSFORMATIONS ON THE GROUND 1* (Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor & Mariela Morales Antoniazzi eds., 2024).

²³²See Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan & Ximena Soley, *Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism*, (Max Planck Inst. for Compar. Pub. L. & Int’l L., Research Paper No. 2016-21, 2016).

²³³For a critical stance on ICCAL, see Alejandro Rodiles, *The Great Promise of Comparative Public Law for Latin America: Towards Ius Commune Americanum?*, in *COMPARATIVE INTERNATIONAL LAW 504* (Anthea Roberts ed., 2018). See also A. Coddou McManus, *A Critical Account of Ius Constitutionale Commune in Latin America: An Intellectual Map of Contemporary Latin American Constitutionalism*, 11 *GLOB. CONST.* 110, 114–121 (2022).

²³⁴See generally David Landau, Rosalind Dixon & Yaniv Roznai, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, 8 *GLOB. CONSTITUTIONALISM* 40, 52–53 (2019).

informed by transnational examples with limited contextual and historical reflection.²³⁵ The 2023 electoral process in Guatemala shows the need to review the abuse of constitutional law, human rights, and rule of law concepts and doctrines within a broader institutional and contextual analysis. It shows that the legal interpretations of the court are secondary to a culture of judicial clientelism and institutional takeover in weak democracies and hybrid regimes.

As a final insight and caveat, the Guatemalan experience must be taken as a short-term and first step solution that is contextually and temporarily specific. Guatemala cannot rely each time on foreign intervention or de facto measures. As highlighted by the Inter-American Human Rights Commission²³⁶ and the UN High Commissioner of Human Rights²³⁷ in recent visits, the appointment of judges still is susceptible to clientelism. The need for constitutional reform to strengthen the judiciary to diminish clientelist practices is an ongoing challenge in the country.²³⁸ However, steps have been taken to diminish this susceptibility by the new government. Soon after assuming power, Arévalo asked the OAS to install a new mission to observe the appointment process of judges for the Guatemalan Supreme Court and Courts of Appeals.²³⁹

OAS missions of these kind have been rare, but Guatemala was not the first. This new mission may trigger a new trend in Latin America in safeguarding against interference by strong or corrupt actors in the judicial appointment processes in the many countries of the region.²⁴⁰ The results of these missions are still pending.²⁴¹ The novelty of these missions, still not engaged with in scholarship, may afford new insights on international collaboration with local institutions to oversee the appointment of judges and avoid further backsliding.

To conclude, the safeguarding of democratic electoral results may provoke spillover responses to the larger systemic governance issues and authoritarian judicial review. The election of a democratic government, such as that of Arévalo, has consequently been followed up with the calling of new missions and interest from national civil society in the appointment process of Supreme and Appellate court judges. Stronger public international and national scrutiny of the judicial appointment process may become a new piece of the puzzle dealing with authoritarian judicial review.

F. Conclusion

The Guatemalan experience shines a light on the detrimental effects of judicial clientelism and the need to understand judicial interpretation not as a closed system, but as a broader effect of the institutional takeover of courts. It also shows how courts can bend their interpretation of human

²³⁵See *id.* at 60–66.

²³⁶See Comisión Interamericana de Derechos Humanos, *Conferencia de Prensa - Visita in Loco a Guatemala*, YouTube (July 30, 2024), <https://www.youtube.com/watch?v=kZvcHq5h3Hc>.

²³⁷See UN Human Rights Chief Volker Türk Concludes Official Visit to Guatemala, UN OFF. HIGH COMM’R ON HUM. RTS. (July 19, 2024), <https://www.ohchr.org/en/statements-and-speeches/2024/07/un-human-rights-chief-volker-turk-concludes-official-visit-guatemala>.

²³⁸For more reform attempts and their procedures, see Ortiz Romero, *supra* note 129, at 101–03.

²³⁹See Sofia Menchu, *U.S. to Provide \$170 Million to Guatemala to Prevent Irregular Migration*, EL PAÍS (March 28, 2024), <https://english.elpais.com/international/2024-03-28/us-to-provide-170-million-to-guatemala-to-prevent-irregular-migration.html>.

²⁴⁰The first request was from Bolivia in 2011, after the new constitution introduced elections for judges. See Press Release, Org. Am. States, E-059/12, Electoral Observation Mission in Bolivia Says Judicial Elections “Strengthened Will to Build a State with Higher Levels of Inclusion” (Feb. 12, 2012). Later the OAS was invited back in 2017 to again observe judicial elections. See Press Release, Org. Am. States, E-088/17, Electoral Experts Mission Observed Normalcy in Judicial Elections in Bolivia (Dec. 5, 2017). In April 2024, the Inter-American Commission on Human Rights announced a process of technical cooperation with the Plurinational Legislative Assembly of Bolivia regarding the selection of candidates for the country’s judiciary. See Press Release, Org. Am. States, E-073/24, IACHR Announces Technical Cooperation with the State of Bolivia (Apr. 15, 2024).

²⁴¹See Press Release, Org. Am. States, E-039/24, Observation Mission of Elections of Judicial Authorities in Guatemala Begins Work in the Country (June 24, 2024).

rights concepts, thus sacrificing values of precedent and juridical certainty along the way. However, this Article showed that courts, even constitutional courts, can be dissuaded and change their positions through strong opposition. New instruments and actors, both international and national, can influence the decision-making of courts to uphold democratic values and outcomes. It provides a new form of judicial accountability within and beyond the state.

However, it is to be noted that the effectiveness of these actors and their actions are contextually contingent. An analysis of their effectiveness needs to consider history and context. For the Guatemalan experience, analysis needs to be informed by how local actors respond to international and foreign pressures. The U.S.'s influence has been determinative in the promotion or backsliding of democracy in Guatemala. This partly explains why U.S. sanctions were well received by many in Guatemala, legitimating their use in this case. Openness to outside actors is a trait in Guatemala since the 1990s. Openness is associated to the guarantee and legitimation of electoral results and was given legal shape under the OAS and its electoral mission, which practice started in Central America after the subregion's democratic transition in the late 1980s.²⁴² It was through this interaction of local and international actors that ultimately upheld democratic results and allowed the transition of power in Guatemala.

Lastly, this Article provides new lessons and insights for scholars in expanding their theoretical inquiries in the topic of abusive constitutionalism in Latin America and beyond. The Guatemalan case study provides a new set of features and inquiries to that already analyzed by scholars, which serves to complexify the study of the phenomenon of abusive constitutional practices by courts and offer potential short-, medium-, and long-term solutions to it.

Acknowledgements. I would like to give special thanks to Anna Dziedzic, Mateo Merchan Duque, Tomas G. Daly, Raul Sanchez-Urribari, Anna Betina Kaiser, Cheryl Saunders and the anonymous peer reviewer from the first submission of this Article. I also give thanks to the GLJ editing team for their great editorial assistance. Last, I would like to give thanks to the Jean Monnet Center of International and Regional Law and Justice for housing me during 2023-2024 academic year.

Competing interests. The author declares none.

Funding statement. No specific funding was given for the preparation, drafting or submission of this Article.

²⁴²See Carlos Arturo Villagrán Sandoval, *Central America*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW AND THE AMERICAS (Liliana Obregón Tarazona, Laura Betancur-Restrepo & Juan Manuel Amaya Castro eds., 2023).