

A MEANS TO AN END: JUDICIAL INDEPENDENCE, CORRUPTION AND THE  
RULE OF LAW IN LATIN AMERICA

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Dissertation

Submitted to the Faculty of the  
Graduate School of Vanderbilt University  
in partial fulfillment of the requirements

for the degree of

DOCTOR IN PHILOSOPHY

in

Political Science

August, 2009

Nashville, Tennessee

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To my parents, Carlos and Alegría, with all my love.

## ACKNOWLEDGEMENTS

This dissertation would not have been possible without the help and support of a lot of people. First, I would like to thank my advisor, dissertation co-chair and friend during my four and a half years at Vanderbilt, Mitchell Seligson. In these years he has inspired me with his work ethic and dedication and has taught me more than I thought possible to learn. It has been an honor to work alongside him and I hope to continue to do so for many years. I also deeply appreciate the support of the Chair of the Department of Political Science, and co-chair on my own dissertation, Neal Tate. He is a legend in the field of judicial politics and it has been a privilege to work with him. Jon Hiskey's helpful comments and suggestions made this work better and for that and all the advice that he has given me over the years I am most thankful. Finally, I want to thank Stephanie Lindquist for her support during this process, all the way from Texas.

During the months of October and November of 2007, I was fortunate enough to interview several Supreme Court Justices and former justices, current and former legislators, lawyers and lower court judges on the subject of judicial independence and its effects on corruption. I will not name them to protect their identities, but I am most grateful for their time and the invaluable amount of information they provided. I especially want to thank Dr. Francisco Diaz Garaycoa for helping me arrange some of those interviews.

I have been fortunate to receive many criticisms, suggestions, help and encouragement, academic and otherwise, from various friends and colleagues who I would like to acknowledge. To all my friends at the Latin American Public Opinion

Project [LAPOP], I owe a huge debt of gratitude. Thanks to Dominique Zephyr for making those easy STATA graphs possible and to Abby Cordova, for all her help with STATA syntax. Miguel Cruz, Rubi Arana and Daniel Montalvo were constant sources of support and encouragement during the hours spent at the LAPOP offices writing the dissertation. Special thanks to Maria Fernanda Boidi, who was of great help every time I was stuck in my own head. My gratitude also to: Daniel Moreno, Vivian Schwarz, Jenna Lukasik, Corey Bike and Irek Kusmierczyk, members of my graduate class and dear friends.

I gratefully acknowledge the support of several institutions that made my doctoral studies possible. First, Vanderbilt University and in particular the Department of Political Science, that provided not only financial support but a fantastic learning environment where the doors were always open to students. I am also deeply indebted to the United States Agency for International Development [USAID], particularly to its mission in Ecuador. The financial support provided by USAID made my studies at Vanderbilt possible, but I am most grateful for the help and friendship extended to me by the people working there. My eternal gratitude to Cuqui Tola, Maria Palacios, Isabel Santillan and Alexi Panehal, mission director in Ecuador. Finally, the Latin American Public Opinion Project was like a second home during these years, and it provided me with learning opportunities that made my tenure here at Vanderbilt an even richer experience. I reiterate my desire to maintain my association with this fantastic project for many more years.

The completion of my doctoral studies would not have been possible without the support of my family, both in Ecuador and in the United States. I want to thank my

parents-in-law, Nick and Susan Miller, for their support and encouragement throughout these years, even though they never quite knew what to say when someone asked them what their son-in-law does for a living. My dear sister and her husband, Ana María and Javier, have been a constant source of friendship and advice, and my niece and nephew, Micaela and Ignacio, have given me much happiness and also much to miss. My parents, Carlos and Alegría are largely responsible for my being here. Their example of hard work, dedication, honesty and pride in what one does will stay with me forever. Their unwavering support is one of the main reasons I have made it this far. I dedicate this work, as well as everything else good in my life, to them. Finally, this journey would never have been possible without the help of my lovely wife, Aimee. Her intelligence, her seemingly unending capacity for caring about others, her dedication to her job, her house and her husband, among many other outstanding qualities, have made her the person I admire most in the world. Thank you for everything babe, I love you.

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## CHAPTER I

### INTRODUCTION

What does judicial independence mean? This is the first of two questions that have been the driving force behind my doctoral research during the last couple of years. When I began reading about the subject, I was amazed at the large quantity of answers, their diversity and lack of consensus that I found. Judicial independence has been deemed a slippery concept (Rios Figueroa 2006:2). The term “independence” is generally used to characterize the relationship of the judiciary to other institutions or agencies. An independent judge is one who is not under the influence or control of somebody else. The problem arises when one considers that there are several kinds of institutions and agencies from which the judge is supposed to be independent. Some even claim that good judges must also maintain “independence from ideology” (Kahn 1993:89). So, who are the judges supposed to be independent from? One form of independence is what Owen Fiss (1993) calls party detachment, which requires the judge to be independent from the parties in the litigation. This aspect of independence, Fiss claims, is rooted in the idea of impartiality and is uncompromising in its demands (58). A second form of independence identified by Fiss is individual autonomy. This form of autonomy concerns collegial relationships or the power of one judge over another. In civil law countries, higher court judges exercise control over their lower court colleagues through regular appellate procedures. These forms of collegial control do not threaten the independence that rightly belongs to a judge. However, other bureaucratic measures that allow higher court judges

to review the work of an individual judge and discipline him or her outside the appellate procedures may threaten a judge's independence and his claim for individual autonomy. Finally a third form of independence is what Fiss calls political insularity. This form of independence requires that the judiciary be independent of political institutions and the public in general. However, one must not confuse political insularity with anarchy. While the judiciary must be autonomous from other political institutions and the public, to safeguard horizontal accountability and the rule of law, the judicial system and all of its members are also accountable to the constitution (Kahn Zemans 1999).

While defining judicial independence has prove to be a difficult task for both lawyers and scholars, measuring it brings a whole new set of problems. A precise measure of judicial independence would require some sort of statistical comparison between judicial preferences and judicial results (Linares Lejarraga 2004). This measure, however, is very hard to obtain due to the large number of intervening variables that will inexorably affect the results, and are not always related to judicial independence. Given that, the existing literature has opted for more indirect forms of measurements. These consist on establishing the existence of variables that, according to theory, can impede coercion or undue influences on judicial decisions. From these measurements one can identify two separate types: Formal or *de iure* and practical or *de facto*. The first type consists of the identification of formal provisions that are supposed to have a favorable impact on the elimination of undue interferences. The problem with formal measures of independence is their detachment from reality, since most of these provisions can be easily ignored. Moreover, several research papers have obtained clear results on the subject. Some claim that formal provisions do not constitute a guarantee for the

maintenance of judicial independence (Domingo 2000, Feld and Voight 2003). On the other hand, other studies state that it is possible to find judicial independence in some countries that do not have the formal provisions to guarantee it (Salzberger 1993, Salzberger and Fenn 1999). The second types of measurements, known as *de facto*, verify the fulfillment of those formal provisions put in place to prevent the influence of third parties on judicial decisions. These measurements depart from normative standards that have a theoretical justification, which are later compared and contrasted to reality through different ways [surveys, expert opinions, subjective valuations] (Linares 2004:112).

The first goal of this dissertation is to contribute to our understanding of what judicial independence is and how we have learned to identify it. Chapter II begins with a theoretical discussion on judicial independence. Beyond Owen Fiss' description of the different forms of independence, I look at the separate dimensions of the concept, and identify at least three. The first one is autonomy, which is the independence of the Supreme Court as an institution, from the other branches of government as well as from other private institutions and individuals (Prillaman 2000). The second dimension of judicial independence has to do with the judge himself. External independence tackles the relationship between individual judges and the other branches of government; it covers the rules regarding judicial appointment, tenure, salary and removal. External independence exists when a judge is appointed by more than one branch of government or by the judiciary itself and when the terms of tenure, removal and salary are clearly established in the constitution and do not depend upon the executive (Rios Figueroa 2006). The third dimension of independence deals with the collegial relations of judges

within the judiciary. Internal independence focuses on the interaction between Supreme Court judges and their hierarchically inferior colleagues. It exists when lower court judges are free to fulfill their administrative, procedural and substantive duties without interference from their superiors.

The second section of Chapter II explores the different ways in which judicial independence has been measured. After discussing previous measurements, I present four different indexes of independence; two formal and two practical that I later use as independent variables to test the effect of an independent judiciary on corruption victimization and on individual attitudes towards the institutions of the rule of law. The first *de iure* measure I use was created by Julio Rios Figueroa (2006) and it taps into the different dimensions of independence that I mentioned above. By coding the constitutions of several Latin American countries, Rios Figueroa looked at formal provisions that would guarantee autonomy, external and internal independence within a country. The second formal measure of independence was created by Tate and Keith (2006). The authors use judicial independence as an independent variable related to the protection of human rights in various countries. Tate and Keith also coded national constitutions to devise an index of judicial independence, looking specifically at nine constitutional provisions: Guaranteed terms for judges, finality of decisions, exclusive authority, a ban against exceptional or military courts, fiscal autonomy of the judiciary, a proclamation of the principle of separation of powers, enumerated qualifications for Supreme Court judges, judicial review and a hierarchical system within the judiciary.

The two *de facto* measures I present on Chapter II are also existing indexes of judicial independence. The first one is based on the US State Department country reports

for the protection of human rights. These reports have a short section that deals specifically with the judiciary and in it its authors make a short assessment about the independence of the judicial system in each country. Replicating what other scholars have done before, (Howard and Carey 2004, Yamanashi 2002) I devised a coding scheme which assigned each country a value on a scale from 1 to 3, where one indicates low judicial independence and three indicates high independence. The final practical measure presented in the next chapter is a subjective evaluation of the independence of the judiciary in Latin America, made by the people living and working in those countries. The World Economic Forum conducts a survey of executives every year, which asks them to rank the independence of the judiciary in the countries where they work on a scale from 1 to 7, where seven means completely independent and 1 means heavily influenced.

The third and final section of Chapter II adds a qualitative component to the dissertation by focusing on the case of one particular country. The tension between qualitative and quantitative works as well as the benefits of multi method approaches and triangulation in the social sciences has been well documented by the existing literature (Brady 2004, Goemans 2007, King, et al. 1994, King, et al. 2004). Case studies, like any other form of research in the social sciences, have to be used in accordance with the researcher's goals. If a study is aimed at generating a theory instead of testing it, prioritizing external rather than internal validity, or is seeking insight into causal mechanisms and effects, a case study is a valuable tool to achieve that goal (George and Bennett 2004, Gerring 2004). In the case of this dissertation, a more intensive study of a single unit [in this case a country] could serve all three functions. This case study will

advance my understanding of judicial independence, add an element of external validity to my research and provide me additional insight into causal mechanisms that lie beneath the empirical results. In the social sciences, the cases one chooses can affect the answers one gets, therefore the case selection has to be carefully done (Geddes 1990, Hempel 1965). In this case, I chose Ecuador. I based my selection on a couple of factors. The first one is that as a citizen of the country and a former law student, I have a better understanding of the legal system as well as easier access to judicial experts and decision makers than if I chose to do my fieldwork elsewhere. Ecuador is a country where democratic procedures were established before the creation of an autonomous judiciary. This has rendered the country's judicial institutions powerless against strong and even weak executives.

Looking at the formal provisions of judicial independence specified in both *de iure* measures one finds that Ecuador lacks the majority of them, making it a country with very low levels of judicial independence according to these indexes. However, there are, as I stated above, cases of countries where judicial independence flourishes even without the existence of constitutional provisions. Such is the case of Uruguay, a country with very low scores on the formal measures of independence that scores very high on the practical indexes, and a place where the Supreme Court is generally regarded as independent and incorruptible.<sup>1</sup> On the other hand, low formal protections for judicial independence in Ecuador translate into a heavily influenced judiciary in practice. My intention is to go beyond the measures of independence and try to understand the causes

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<sup>1</sup> Quote obtained from field research conducted by Neal Tate and Fernanda Boidi in Uruguay, during August of 2008.



for the lack of judicial independence in Ecuador that weren't captured by the measures I presented before, as well as its consequences. To that effect I traveled to Ecuador on October of 2007 and met with several judicial experts, including Supreme Court Justices, lower court judges, lawyers, legislators and elected members to the National Constitutional assembly that was set to begin on January of 2008.

As I mentioned before, two rather large and complex questions have been the driving force behind my doctoral research in the last couple of years. The first one had to do with what judicial independence means. The following chapter attempts to provide an answer to that question. However, one more question remains; what is judicial independence good for anyway? I am not the first to ask that question, neither am I the first to come up with an answer. Other scholars before me have looked at the usefulness of having independent judiciaries in consolidating democracies (Beer 2006, Dodson and Jackson 2001, Magaloni and Sanchez 2006). Nevertheless, Chapters III and IV provide a novel answer to that question. The first one shows the effect that judicial independence, at a country level, has on corruption victimization, measured as the paying of bribes by individuals in public and private instances, such as a government office or a private hospital.

Corruption in Latin America has been measured on several ways. The most common corruption measure in the region is the Corruption Perception Index [CPI] developed by Transparency International. The CPI, which is the most widely used measure of corruption, is a composite index that measures the perception of corruption in a country derived from several different surveys administered to business men in that country. Based upon the results of the surveys, the CPI assigns each country a value on a

scale from 1 to 10, where 1 stands for the highest corruption score and 10 is the lowest. As an effort to complement the Corruption Perception Index, Transparency International also created the Global Corruption Barometer. This measure of corruption deals with actual citizen experiences with bribery. However, the surveys are only applied to approximately half the countries in the region and the different sampling strategies used in each country result on a somewhat unreliable regional corruption score. The measure of corruption used for the empirical analysis conducted in Chapter III is based on the corruption victimization series from the Americas Barometer. This battery of questions looks at personal experiences with corruption in several public and private instances, which include having to pay off a police officer or somebody from their own work. Unlike the Global Corruption Barometer, the 2006 corruption victimization index stems from nationally representative surveys conducted in 20 countries in the region.

Finally, using the corruption victimization index and other individual level data from the Americas Barometer and the four measurements of judicial independence, described in Chapter II, I look at the effects of independence on corruption victimization. I explore this relationship in the context of Latin American countries for 2006 and find evidence that suggests a positive incidence of judicial independence on the reduction of corruption victimization, especially when independence is measured *de facto*.

Chapter IV once again uses the four different measures of judicial independence to assess its effect on individual attitudes toward the institution of the rule of law in Latin America. I define the rule of law based on the institutions responsible for safeguarding its standards and on the principles that rule its values. I claim that there are several requisites for the rule of law to exist within a country, such as law against private coercion, a

congruence of the law with social values, a government that operates under the law and an application of the law that gives its citizens certainty and equality.

Based on that definition, I once again resort to the data on the 2006 round of the Americas Barometer to operationalize the dependent variable, which I call “support for the institutions of the rule of law”. The variable is an index built upon five questions that measure the legitimacy of certain government institutions like the office of the Public Prosecutor, the National Police and the Supreme Court, as well as citizen beliefs in the justice system and its ability to provide a fair trial.

The statistical analysis conducted controlling for socio-demographic variables such as age, education, sex and size of town produced evidence which suggests that judicial independence, when measured by practical indexes, has a positive effect on individual feelings of trust for the institutions of the rule of law. A second set of regressions that controlled for theoretical variables like presidential approval, evaluation of the government’s economic performance, crime and corruption victimization and preference for a democratic regime partially confirmed those results, since only one of the two practical measures of independence had a positive and statistically significant relationship with individual support for the institutions of the rule of law. Meanwhile, the formal measures of independence turned out to be insignificant.

This dissertation hopes to contribute to existing literature on judicial independence. Hopefully, the discussion on the various ways of defining independence combined with the information provided by the judicial experts I interviewed during my field work will advance the discussion on what judicial independence means and move it

forward to achieve a general and comprehensive definition. This dissertation also aims to broaden the understanding of judicial independence and the scope of its importance. The evidence obtained in the following chapters suggests that independence is not a static concept but a dynamic one, affected by the actions of other political players and by the strength and resolve of its own members.

## CHAPTER II

### JUDICIAL INDEPENDENCE: CONCEPTS AND MEASUREMENTS

Judicial independence is a highly contested concept (2006). The question of what judicial independence means is one that has led scholars to more queries than certainties. The problem is that the term is open to almost endless interpretations. Does it refer to the judiciary in general, or only to the Supreme Court, or to the judges themselves, or to all of them? While most scholars and legal commentators portray judicial independence as a normative ideal, there are heated debates about its practical and even empirical usefulness (Burbank and Friedman 2002, Kornhauser 2002). This chapter will deal with the many components, prescriptions, definitions and measurements of judicial independence. I will start by looking at the nature of judicial independence itself, later I will review what many argue are the necessary conditions for independence and the definitions that derive from those conditions. Finally I will take a look at the different ways in which judicial independence has been measured over the years and analyze a few of those measurements in depth.

After comparing the results of four separate measurements of judicial independence in Latin America, I will examine the validity and reliability of these indicators by examining how they match up against reality. To that end, I have conducted a case study of the country of Ecuador. I have chosen this particular country for two main reasons. First, its recent history; in the last decade Ecuador has experienced some

extreme political turmoil that its judicial system has not been able to escape untouched. Second, as a citizen of Ecuador, I had access to interview Supreme Court judges, legislators and legal experts who provided invaluable insight into the realities of the Ecuadorean judicial system and its struggles with independence.<sup>2</sup>

### What Does Judicial Independence Mean?

While there is no consensus when it comes to formulating a definition of judicial independence or an operationalization of the concept, there is a consensus on a few requirements of which the ever growing literature on the subject should abide. First, a theory of judicial independence must have analytical clarity about the kind of phenomenon being referred to when we talk about it (Russell 2001).<sup>3</sup> Is judicial independence just about the relationship between the judiciary and the executive? Does it involve other political institutions? Is it about the way judges relate to one another and the public in general? Or is it all these things? Absolute clarity is necessary if we are to understand what is being discussed when we talk about judicial independence.

A second requirement is to have a clear idea of the purpose of judicial independence, which leads me to this important statement: Judicial independence is not

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<sup>2</sup> Interviews conducted by author in Quito and Guayaquil during November of 2007. IRB Certification number 071095

<sup>3</sup> Russell makes this statement in advocacy for a general theory of judicial independence. While I do not agree with the necessity of a general theory of independence, I do believe that every definition of the concept, as different as they may be, should aim for analytical clarity and a lucid description of the phenomenon they seek to explain.

an end in itself, but a means to an end (Brashear 2006, Burbank and Friedman 2002, Rubin 2002, Yamanashi 2002). It makes no difference whether one looks at independence as a vehicle to achieve better human rights protection (Cross 1999, Tate, et al. 2006), economic growth (Feld and Voight 2003, Henisz 2000) or even democratization (Howard and Carey 2004). If statements about judicial independence are to be evaluated and judged, theories on the subject must deal with the reason why independence is considered to be a valuable feature of a political regime.

The third major task for definitions of judicial independence is to identify the components, elements, and factors that influence independence. If we are to understand judicial independence as a relational concept, then it is vital to establish and enumerate what these relationships are and what are the factors that influence them. I do not believe in a single general theory of judicial independence. There are too many relationships to unpack, too many dimensions and too many differences among judiciaries around the world to come up with one single general theory that can encompass it all. This dissertation is not about creating a single global theory of independence; it is about taking a careful look at previous and current definitions and measurements of judicial independence and evaluating the effect that independence has in the real world, by influencing people's attitudes and experiences.

Theodore Becker (1987:144) defined judicial independence as "the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of the judicial role, in opposition to what others who have or are believed to have political and judicial power think about or desire in like matters". At first glance one might think that this definition sums up judicial

independence quite well. The truth is that while Becker's definition does contain several of its core components, it only begins to scratch the surface. Christopher Larkins argues that an important element to be considered when attempting to define judicial independence is the scope of the judiciary's authority as an institution, in other words, its relationship to other parts of the political system and society and its legitimacy as an entity entitled to determine what is legal and what is not.

Judicial independence has been deemed "extraordinarily difficult to ascertain or measure" (Rossen 1987:8). This qualification, however, has not stopped scholars from attempting any of those tasks. Formulating a definition of independence is not an easy task, which is why scholars have unpacked various traits of this concept. At its most basic level, judicial independence is related to the notion of the resolution of conflicts by a third and neutral party (Larkins 1996, Shapiro 1981); this means that impartiality is a core component of judicial independence. Judges must be independent from the litigants who appear before them in court. Impartiality demands that judges base their decisions on law and facts rather than on their preference toward one of the litigants. Although this is a quality that is not easy to identify, it can be thought of as related to the judges' attitudes and beliefs toward others. The violation of impartiality as the result of a bribe or a claim of kinship would compromise the second trait of independence, which Owen Fiss (1993) called "party detachment". This attribute requires the judges to be autonomous from the parties involved in the litigation process. If we assume that independence is partly rooted on impartiality, then the more detached a judge is from the parties, the better.

A third concept identified by Owen Fiss is that of collegial relationships, or the power of one of more judges over another. Fiss calls this "Individual Autonomy". This



principle cannot be violated by the power of an appellate court to review the decisions of a trial judge, or by one judge deferring to the precedents established by other judges. Instead, the individual autonomy of a judge can be violated by

“the exercise of power by one or more judges over another judge to mandate a decision that, in the estimation of the subordinate judge, is not required by precedent or by a reasonable interpretation of substantive or procedural laws.” (Jackson 1999:9)

A fourth component of judicial independence; and one that Fiss considers “the most difficult to understand” is what he calls “political insularity”. This refers to the judiciary as part of the state as a whole and the autonomy that the judicial power must have with respect to other government entities. Political insularity requires that the judiciary be independent of political institutions and the public in general, or as Larkins explains: “...the notion that the judges should not be used as tools to further political aims and that they should not be punished for preventing their realization.” (1996:609). While the courts, as governmental institutions, are supposed to be free of influence or control, some kinds of influences may be quite appropriate. In the case of the United States, for example, nobody denies the propriety of the briefs and arguments presented by the Solicitor General of the United States (the government’s advocate before the Supreme Court), which certainly have an influence on the members of the Supreme Court. Political insularity, thus, means that judges should be free only of improper or illegitimate sources of influences.

The requirement of political insularity overlaps with the aforementioned requisite of party detachment whenever one of the litigants before the court is one of the other branches of the State. If the government as a whole, or a governmental institution or

official, receives favored treatment in court, both party detachment and political insularity are violated. However, Fiss claims, political insularity is a requirement that must be present even when a case is only between private parties so it should be seen as a separate component of independence. A high degree of judicial independence, then, can be achieved by judges who are neutral and detached from parties before them, who have sufficient individual autonomy to make their own decisions based on the law and facts of the case, and who are insulated from any form of illegitimate influence or control from a third party, be it governmental or particular. It is not a judge's obligation to choose the best public policy or the most popular course of action, but to be fair and act according to what is mandated by the law.

### Separate Dimensions of Judicial Independence

#### *Autonomy*

To better understand judicial independence, it is not enough just to look at the nature of the term. In order to provide a coherent definition of judicial independence, one must look at the different elements that should be present in an independent judiciary. It is clear that the term judicial independence does not only apply to the judiciary itself, but also to the judges that serve in it. The first differentiation, then, must be done between the independence of the judiciary as a body and the independence of individual judges (Prillaman 2000). The independence of the judiciary as an institution from the executive and the legislative has also been termed autonomy (Rios-Figueroa 2006). An

autonomous judiciary is one with enough power to make, uphold and execute their own decisions without external interference from the other branches of government. This does not mean that the judicial power is free to do what it wants without regard for the public or fear of consequences. In a democratic setting, there should always be a system of checks and balances that holds the judiciary and its members accountable for their decisions. It is here where the concept of accountability, which will be discussed a bit later, comes into the picture.

### *External Independence*

When it comes to the independence of individual judges, the categorization is a bit more complex. Rios-Figueroa calls external independence to the relationship between Supreme Court judges and the other branches of government. External independence covers the rules for establishing judges' salaries, terms of appointment, methods for removal and punishment, etc. Simon Shetreet (1985) takes this classification a step further. He claims that there are at least two essential elements to the independence of individual judges. The first is what he calls substantive independence; this means that in the making of judicial decisions and in the exercise of other official duties, individual judges are subject to no other authority than the law. Substantive independence is to individual judges what autonomy is for the judiciary in general. Still, it must be noted that substantive independence does not grant individual judges unlimited rights and protections. Like I mentioned above, judicial independence is meant to protect the judges only against illegitimate or inappropriate influence. In a democratic setting, with a

system of checks and balances, the judges must be accountable when acting outside their realm of authority.

The second element is personal independence; which means that the judicial terms of office and tenure must be adequately secured. Personal independence is secure by clear terms of judicial appointment and by the safeguarding of judicial salary. To ensure personal independence, executive controls over appointment, tenure, salary and sanctions must be prevented. Ideally, it should be the job of the judiciary to handle all of this, but if this is not possible, there has to be at least one institution that is not exclusively under executive control to take care of these issues. Judicial appointment is one of the key factors for personal independence. If the executive is exclusively in charge of appointing Supreme Court Justices, even the appearance of independence will be lost. In the United States, for example, Supreme Court Justices are nominated by the President, but subject to approval by the Senate. The obvious question that comes to mind is, if the party of the President has a majority in the Senate, is there not a major violation to the principles of judicial independence? The answer to this question brings me to the second major element in personal independence; tenure. The term of service of a Supreme Court judge must be longer than the one of those who appointed him in order to safeguard independence. Supreme Court Justices in the United States are appointed for life. After a few years, however, the President who nominated a confirmed Justice is gone and the balance of power in the Senate may have shifted. This effectively eliminates some of the threats for direct interference and maintaining a relatively high level of judicial independence. Finally, the issue of salaries is an important determinant for personal independence. There are two distinct factors that matter here. First, that the

judges have a salary in accordance with the relevance of their position. Second is that the remuneration they receive must be secured and not subject to sudden changes by entities outside of the judicial branch.

### *Internal Independence*

There is one other element of judicial independence, however, that has not attracted much attention. While the majority of scholars focus their studies of judicial independence in the relationship between the high courts, their members, and the executive and legislative bodies, few remember to look the interactions between lower court judges and their superiors. In an independent judiciary, it is key that lower court judges be independent from directives or pressures from their fellow judges regarding their adjudicative functions. This final element is known as internal independence. Judicial adjudication has three main components, administrative, procedural and substantive. The first means that judges have an administrative responsibility for managing their case load, setting dates for hearings and expediting resolutions. Judges also have procedural functions that allow them to conduct the resolution of trials according to the rules of evidence and procedure. Finally, judges have to resolve the case, which involves the determination of the findings and the application of the appropriate legal norms dictated by the facts and the evidence. Internal independence exists when lower court judges are able to exercise these functions without fear of interference or influence from colleagues in higher courts. Finally, it is important to remember that the requisites for the independence of Supreme Court judges, such as protection of tenure and salary, also apply to their lower courts counterparts.

## Judicial Independence vs. Accountability

One of the most controversial features of judicial independence is the delicate balance between independence and accountability. The tradeoff between independence and accountability has been the subject of heated discussions between legal scholars as well as political scientists. No institution can operate without being answerable to society; this means that the judiciary must be accountable. Judicial independence cannot be maintained without judicial accountability (Cappelletti 1985, Fiss 1993). While there is no direct connection between the common citizen and the judiciary, given that judges are not elected but appointed, there are several legal mechanisms to enforce judicial responsibility.

According to Toharia (1999), an exaggerated emphasis on judicial independence has been distorted to a point where it is no longer conceived that the judicial power needs to be controlled and where it is not compatible to have a simultaneously independent but responsible judiciary. However, the notion that independence and accountability are two analytically discrete concepts is wrong. In fact, when appropriately conceived and executed, accountability poses little or no threat to judicial independence (Griffen 1998, Lubet 1998). Stephen Burbank (1999) claims that independence and accountability are not opposites, but two sides of the same coin. If independence is conceived as the possibility of a judge to rule according to the norms of the state without influence from a third party and accountability is the obligation of this judge to adhere to his functions, with the possibility of a penalty for failing to do so, there should be no room for incompatibility. As Hambergren claims,

“The two developments are not contradictory; at least in the current environment, more independence seems to require more accountability, and accountability in some instances can be seen as enhancing independence (Hammergren 2001:155)

Accountability as a concept can be defined by two attributes (Schedler 1999). First, answerability, or the obligation of public officials to inform the public about their activities and decisions and to provide explanations that justify those decisions in a responsible manner. The second attribute is enforcement, which consists of the possibility of sanctions for those who ignore the law or choose not to abide by it. According to Ramos Rollon (Ramos Rollon, et al. 2003), accountability is a concept that is democratic in its origin. Democracy demands that the exercise of power by the state be mandated by the people and can be traced back to it. This means that there is no title or position in which the exercise of power can be released from the demand of democratic legitimacy.

In a democratic setting, accountability has to exist in two dimensions. Vertical accountability is the obligation that democratic institutions have to answer to the people that elected them (Kenney 2003, O'Donnell 1999, O'Donnell 2003). This dimension of accountability exists in almost every democracy with free and fair elections, where citizens can decide to keep or replace a public servant according to his performance in office. Horizontal accountability, however, is much harder to obtain. According to Guillermo O'Donnell,

“Horizontal accountability is the existence of state agencies that are legally enabled and empowered, and factually willing and able to take actions that span from routine oversight to criminal sanctions or impeachment in relations to actions or omissions by other agents or agencies of the state that may be qualified as unlawful.” (1999:38)

This definition is vital in the context of judicial independence, because in Latin America there is no vertical accountability between the judiciary and the electorate, given that there is no instance in which judges are elected by popular vote. So, how does the state achieve horizontal accountability? For this kind of accountability to be effective there must be agencies that are authorized and willing to oversee, control and even sanction illegal actions of other state agencies. Things however are not that simple. For horizontal accountability to exist there are at least two necessary conditions. First, these agencies of control and oversight must be autonomous enough to act swiftly and without interference. Second, there has to be a well endowed judiciary, with a budget that is independent from the executive and legislative and highly autonomous in its decisions so that it can enforce the rulings of these oversight agencies. If the judiciary becomes an enforcing agent of horizontal accountability, and provided the great deal of autonomy required, who does it answer to?

A great example of the tension between independence and accountability is provided by Kommers (2001), who describes the Deckert trial of 1994 in Germany. Gunter Deckert was an anti-Semite who publicly vilified Germany's Jews for their claim about the Holocaust. A criminal court found Deckert guilty of fomenting racial hatred, but let him off with a light sentence, because, in the court's view he had been an upstanding citizen and a good family man. The judge who wrote the opinion, Rainer Orlet, had been impressed by Deckert's political activity and the fact that he sincerely, although wrongly, believed in his anti-Jewish campaign, which was prompted by the defendant's understandable –according to the judge- irritation with continued Jewish demands for compensation fifty years after World War II.



The decision frustrated the public and the media, who began a relentless campaign to discredit judge Orlet. There was also dissent among the judiciary, which opposed Deckert and deplored his actions. Also outraged, the Parliament passed the “Auschwitz Lie”, a statute that explicitly bans the denial of the Holocaust. The media agreed that the new statute was a justifiable rebuke to the judiciary for its lack of democratic accountability. However, the principle had been severely violated, according to the view of some observers. Representatives in the Parliament of Baden-Wurtemberg threatened to impeach Judge Orlet if the judiciary didn’t internally discipline him, even though his behavior could not be regarded as impeachable offense under the state’s constitution. In the prevailing view of these observers, judicial independence would have been flagrantly violated if an otherwise able judge could be dismissed for imprudent remarks in the course of an otherwise competent judicial work product, especially in response to outside political pressure.

In the end, over the objection of two of Judge Orlet’s colleagues, the full court issued an apologetic press release disassociating itself from any far right or anti-Jewish views that might have been conveyed by the judicial opinion. Nevertheless, the court also deplored all attacks on the principle of judicial independence. In the end, however, Orlet was reassigned to another panel of the trial court and would later take an early retirement.

## Measurements of Judicial Independence

Measurements of judicial independence are as diverse as the attempts to define it. Scholars have designed several measures of JI to serve a wide variety of purposes. Some have used independence as a component of a larger dependent variable, such as judicial review or the power that policy makers give to the judiciary (Clark 1975, Ishiyama and Ishiyama 2000). Others have used judicial independence as an independent variable in an attempt to find its effects on human rights protection, economic growth or even democratization (Cross 1999, Feld and Voight 2003, Howard and Carey 2004). If one wants to categorize existing measures of judicial independence, however, the best way to do it would be to divide among those which measure judicial independence *de iure* and those which measure it *de facto*. The former look at formal provisions established in the Constitutions and laws of every country. The latter, on the other hand, focus on the reality of these countries and the practical application of independence in the judiciary. In the next paragraphs I will illustrate this distinction by providing a brief review of some of the previous efforts to measure judicial independence.

As mentioned above, one way of measuring judicial independence is to look at the formal provisions established in the Constitutions and laws of the countries one wants to study. These measures are known as *de iure* indicators. One of the first formal measurements of judicial independence was formulated by David S. Clark (1975). Clark was interested in judicial review in Latin American countries and he devised several possible indicators to measure it. One of these included what he called *structural determinants of effective judicial review*. Among these determinants were judicial

independence, restrictions in making constitutional complaints against the government and the effects of constitutional ruling. To measure judicial independence, Clark analyzed the Constitutions of Latin American countries and coded them according to three criteria. First, the appointment of the Supreme Court Justices. Second, the tenure of these Justices and, third, the salary of the aforementioned judges. According to Clark, a more independent judiciary would appoint its own Supreme Court Justices, who would have lifetime tenure and would earn an equal or greater amount than an executive minister. Clark would then go on to claim that independent judicial review had a positive and significant relationship with economic growth.

A measure of judicial power created in order to analyze court designing in post-communist politics helps to illustrate another formal indicator of judicial independence. John and Shannon Ishiyama (2000) looked at the power that policy makers choose to give to the judiciary. They claim that the power of a judiciary can be measured by adding up two components: the extent to which the constitutional courts possess judicial review powers and the extent to which the constitution extends independence of action to the constitutional or Supreme Court from other institutional actors. To develop an indicator, the authors ask six questions and then code the answers as variables that are then added up to obtain a number for judicial power. These questions look at: 1) The possibility that the decisions taken by the judicial body for determining constitutionality are overturned. 2) The provisions for judicial review, is it a priori or incidental. 3) Tenure of Supreme Court Justices. 4) Number of actors involved in the nomination and confirmation process of constitutional and Supreme Court judges. 5) Who has the control of judicial procedure; and 6) the degree of difficulty in removing judges from office.

Formal measures of judicial independence have often been criticized for not matching reality and for failing to capture the real mechanisms that determine judicial independence (Larkins 1996, Verner 1984). In an effort to better capture the essence of independence, scholars have devised many measures of judicial independence *de facto*. One of these efforts was carried out by Gonzales Casanova (1970), who looked at nearly 4,000 decisions by the Mexican Supreme Court between 1917 and 1960 and discovered that in cases involving the executive, the Supreme Court ruled against the executive less than 40% of the time. This led him to the conclusion that the Mexican Judiciary was relatively independent. While this was a valuable effort, authors like Rossen or Larkins have pointed out that the percentage of rulings against the government is not that important if one does not know the political relevance of those cases.

Other attempts to come up with an adequate measure of judicial independence have relied mainly on scholarly and technical reviews of the matter over the past few decades. Joel Verner (1984), for example, constructed a typology of independence based mostly on theoretical and single country studies. Verner argued that courts can be classified in six different categories. The first category is independent-activist courts. These are courts which have consistently and successfully resisted encroachments upon its independent authority and have been able to say no to other governmental agencies and “make it stick”. The second category includes attenuated-activist courts. Countries were considered to be in this category if their courts have had a long tradition of independent and vigorous activism that was severely attenuated by military coups that took place in the 70s. Then came what he called stable-reactive judiciaries. These are courts that have not experienced direct assaults on their integrity and have a semi

independent status. They are reactive and not activist because they mostly set general limits to the other branches of government but do not attempt to change public policy. The fourth type is reactive-compliant courts. These exhibit uneven and disjointed histories mirroring the political environments in which they are located and tend to become compliant especially during time of instability or military leadership. The last two categories include minimalist and personalist courts. The former are characterized for their lack of popular support and the minimal policy functions they perform vis-a-vis other governmental agencies. The latter, on the other hand, are completely dependent and usually serve a strong unitary government.

Like the majority of de facto measurements of judicial independence, Verner's typology is based on a subjective interpretation of observable evidence. Other scholars have also relied on subjective evaluations to construct indexes of judicial independence. Witold Henisz (2000) for example, constructed a dichotomous measure of judicial independence based on data from the ICRG (International Country Risk Guide) and the Polity dataset. Henisz was looking to uncover the institutional settings that would facilitate economic growth and believed an independent judiciary was one of them. In order to construct a measure of judicial independence that would cover his wide sample size, he decided to use one of the components for the political risk indicator in the ICRG. Henisz then selected the cases that had a high score in the rule of law variable of the political risk component. Since the rule of law can be kept in place by way of democratic actions but also by way of threats and repression of an authoritarian government, Henisz then turned to the Polity dataset. He selected those cases in which the database indicated at least "slight to moderate limitations to executive authority." Based on this coding

scheme, countries with high scores in the rule of law variable in the ICRG data and some limitations to the executive were determined to have independent judiciaries. While this is a creative and coherent way to operationalize judicial independence, lots of variation within the sample is lost by considering independence to be a dichotomous variable.

A more widely *de facto* measure of independence stems from the US State Department Human Rights Reports. These reports rely not only on constitutional provisions but also on assessments of the independence of the judiciary in practice. As evidence of independence, the authors usually rely on freedom from pressure from other branches of government, particularly executive control, and freedom from acts of bribery and corruption. These reports have been subjectively coded by different authors to construct indexes of judicial independence (Howard and Carey 2004, Stephenson 2003). The ratings given by these reports are based on a number of sources that include Amnesty International reports, United Nations reports, the World Human Rights Guide (Humana 1992), and major periodicals like the New York Times and The Economist.

Finally, another way to measure *de facto* judicial independence has been survey research. Staats et al. (2005) conducted a survey of Latin American legal scholars and practitioners in seventeen countries in order to ascertain the efficiency with which judiciaries in these countries worked. Feld and Voight (2003) conducted a survey of experts in over seventy countries worldwide in order to obtain a measurement for judicial independence *de iure* and *de facto*, using two separate questionnaires to capture each scope of judicial independence. A similar undertaking was carried out by Kenneth Johnson (1976), who in another survey of experts in Latin American politics designed to assess the state of democracy in that continent, asked about judicial independence as one

of the measurements of political and democratic consolidation. Keith Rossen stated that “perhaps the only people who comprehend the degree to which they really are actually independent are the judges themselves” (1987:9). A survey study of trial courts in Bolivia (Perez-Linan, et al. 2006) attempted to tap precisely that resource. Their work presented evidence of when and under what circumstances inferior courts judges defer to other judges from higher courts in order to further their career goals. This study found that lower court judges in Bolivia issue their sentences depending on the underlying political environment, fearing reversal of their sentences by higher ranked judges and manipulation of their judicial careers. This same phenomenon, called “strategic defection” was also uncovered in a study of the Argentinean Supreme Court (Helmke 2005, Helmke 2002).

After reviewing various ways in which judicial independence has been measured during the years, in the next section I will replicate four separate measures of judicial independence that have been used for Latin American countries. These measures were not mentioned in the previous discussion, but they will be described in detail in the following pages. I chose them because of the accessibility of the data and the variation among them. Two of the measures are formal indicators or *de iure* and the remaining two are practical, or *de facto*. The indicators measure judicial independence in Latin American and Caribbean countries for the year 2006.

## Judicial Independence in Latin America

### *Formal or De Jure Measures of Independence*

#### *Rios-Figueroa*

The first measurement to be replicated in this section was conducted by Julio Rios Figueroa (2006). He argues that there is more than one type of independence. The first one he addresses is autonomy, or the relationship between the judiciary as an institution and the other branches of government. An autonomous judiciary would then be one in which the constitution did four things: a) Specify that the number and jurisdiction of the courts is to be decided by the judiciary itself, b) establish the number of Supreme Court Justices, c) provide a fixed percentage of the GDP for the judiciary; and d) establish that effective judicial review lies within the judiciary. When a given country's constitution contains all of these provisions it scores a 4 and its judiciary is considered autonomous. Conversely, countries without any of these provisions have a score of zero, which means that their judiciaries are heteronomous.

The second dimension of judicial independence studied by Rios-Figueroa is what he calls external independence, or the relationship between the judges themselves and the other branches of government. According to his criteria, complete external independence is achieved when the Constitution of a country specifies that a) Supreme Court judges are appointed by the judiciary or by at least two organs of government, b) their tenure is longer of that of their appointing authorities, c) they can only be impeached by the



judiciary or a supermajority of congress and d) that their salary will not be reduced while in office. Again, he created a scale going from zero to four to establish a measurement for external independence.

Finally, the third dimension of independence measured by the author is internal independence, which looks at the relationship between lower court judges and their higher court counterparts. To measure internal independence, Rios-Figueroa repeats the utilization of variables such as tenure, salary and appointment, but also adds promotions, transfers and sanctions. In a scale going from zero to six, countries would then obtain a higher score for internal independence if their Constitutions prevent hierarchical authorities from participating in appointment processes, tenure or salary setting, promoting or sanctioning lower court judges and transferring them without their consent.<sup>4</sup>

Table II-1 summarizes the results of the coding for autonomy, external independence and internal independence. The table indicates that countries like Costa Rica, Guatemala and Honduras are the closest to having a completely autonomous judiciary, with three of the four provisions in their current constitutions. At the other end are countries like Ecuador, Peru and Colombia, whose constitutions lack every provision of autonomy specified by Rios-Figueroa. It is important to note that, according to the data, no country has a completely autonomous judiciary, since the six countries that had a score of three were lacking at least one provision. When it comes to external judicial

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<sup>4</sup> Rios-Figueroa also looks at the institutional location of the Public Prosecutor's Office, claiming that countries where the Public Prosecutor lays within the executive branch have less independent judiciaries than countries where this office is part of the judicial branch or altogether autonomous. However, he does consider this variable when creating his models of institutional independence, and so I have also excluded it from this analysis.

independence, only one country's constitution –Brazil- explicitly establishes the four protections prescribed by the author. It stands out that Brazil had been at the bottom of the list when it came to having an autonomous judiciary, now shows up as the country with the best constitutional provisions for external independence. Finally, the table illustrates the levels of internal independence, or the autonomy of lower court judges from his hierarchically superior colleagues. According to Rios-Figueroa, Bolivia is the country with the most constitutional provisions to guarantee internal independence. At the other stand almost half the countries in the sample, which do not provide any guarantees for internal independence.

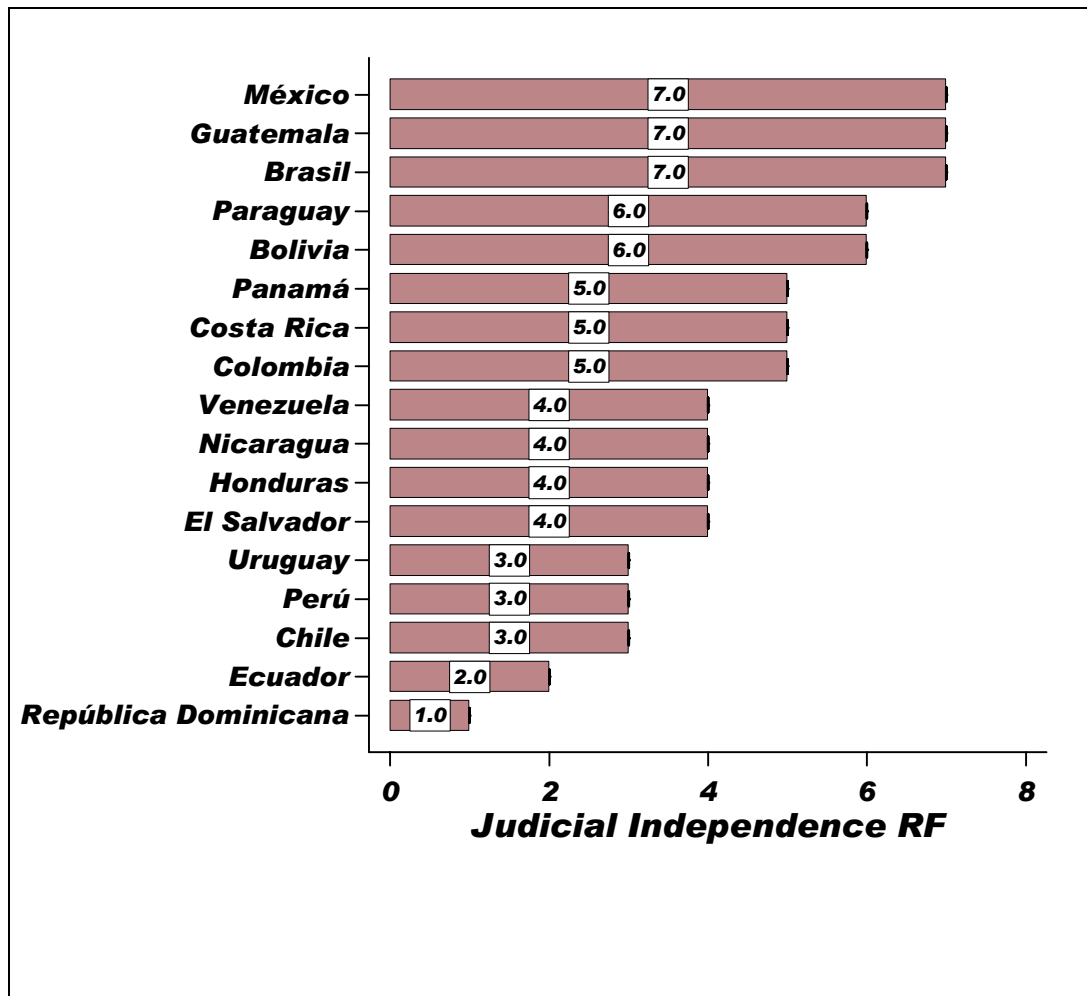
**Table II-1. Latin American countries ranked by score on each component of judicial independence.<sup>5</sup>**

| <b>Autonomy (0-4)</b>  | <b>External independence<br/>(0-4)</b> | <b>Internal Independence<br/>(0-6)</b> |
|------------------------|--|--|
| Costa Rica (3)         | Brazil (4)                             | Bolivia (4)                            |
| Guatemala(3)           | Mexico (3)                             | Colombia (3)                           |
| Honduras (3)           | Panama (3)                             | Brazil (2)                             |
| Mexico (3)             | Chile (2)                              | Guatemala (2)                          |
| Nicaragua (3)          | Colombia (2)                           | Peru (2)                               |
| Paraguay (3)           | Costa Rica (2)                         | Mexico (1)                             |
| El Salvador (2)        | Ecuador (2)                            | Paraguay (1)                           |
| Panama (2)             | El Salvador (2)                        | Uruguay (1)                            |
| Venezuela (2)          | Guatemala (2)                          | Chile (0)                              |
| Bolivia (1)            | Paraguay (2)                           | Costa Rica (0)                         |
| Chile (1)              | Venezuela (2)                          | Dominican Republic (0)                 |
| Uruguay (1)            | Bolivia (1)                            | Ecuador (0)                            |
| Brazil (0)             | Dominican Republic (1)                 | El Salvador (0)                        |
| Colombia (0)           | Honduras (1)                           | Honduras (0)                           |
| Dominican Republic (0) | Nicaragua (1)                          | Nicaragua (0)                          |
| Ecuador (0)            | Peru (1)                               | Panama (0)                             |
| Peru (0)               | Uruguay (1)                            | Venezuela (0)                          |
| Guyana (NA)            | Guyana (NA)                            | Guyana (NA)                            |
| Haiti (NA)             | Haiti (NA)                             | Haiti (NA)                             |
| Jamaica (NA)           | Jamaica (NA)                           | Jamaica (NA)                           |

<sup>5</sup> This table is similar to the one reported by Julio Rios-Figueroa in his dissertation, page 67. Also, the table does not reflect the most recent constitutions for Ecuador and Bolivia, but included the ones that correspond to the time period of the analysis ahead.

While Table II-1 shows the countries ranking on the individual categories of independence, Figure II-1 illustrates how these Latin American countries are ranked after aggregating all of the individual components and calculating an individual measurement of judicial independence for each country. The graph shows that on a scale from zero to fourteen, no constitution in Latin America has gone beyond specifically prescribing more than seven provisions to safeguard judicial independence in the three different dimensions. However, every country has at least one provision out of the fourteen described above. According to this measurement, Mexico, Guatemala and Brazil have the region's most independent judiciaries, while the Dominican Republic has the least independent judicial system in Latin America and the Caribbean, closely followed by Ecuador, Chile and Uruguay.

Figure II-1. Judicial Independence *de iure* in Latin America.



*Keith, Tate and Poe*

A second institutional measurement of judicial independence stems from Keith, Tate and Poe's work on human rights protection (2006). In an institutional analysis of human rights protections, they created and analyzed 22 formal indicators of the existence of constitutional provisions relevant to the promotion and protection of fundamental human rights for a worldwide set of countries. These indicators are divided into personal rights and liberties, limits on the declaration and exercise of the state of emergency rule and elements of judicial independence. The authors constructed their index of judicial

independence primarily based on provisions established by the United Nations and a Special Rapporteur for the United Nations High Commissioner for Human Rights (Cumaraswamy 1995, OUN 1985)<sup>6</sup>, which produced a basic criteria for an independent judiciary. These criteria established that; a) terms of office and remuneration should be constitutionally guaranteed, b) the decisions of judges must not be subject to any revision outside procedures dictated by law, c) courts should have exclusive authority to decide their own competence as defined by law, d) courts have jurisdiction over all matters of a judicial nature, e) they should be adequately funded, f) the executive and legislative powers should ensure that judges are independent and g) the selection of judges should be based on certain qualifications.

On top of these considerations, however, the authors added two rather controversial elements they consider to be necessary to achieve an independent judiciary. The first one is the exercise of judicial review. This is a controversial element because there is no agreement on whether judicial review contributes to an independent judiciary (Blasi and Cingranelli 1996) or if independence is a necessary component for the real exercise of judicial review (Clark 1975, Rosenthal 1990).

The second contested element has to do with establishing a hierarchical system in which the judiciary is structured in multiple layers with the highest level court exercising final control over lower court decisions. The argument behind this provision is that compared to higher court counterparts, lower court judges tend to be more numerous, less qualified in terms of experience, less socialized towards judicial norms and less well

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<sup>6</sup> For complete text of these documents please see appendixes.

paid, making them more susceptible to bribes. Therefore it is important that high court judges, less susceptible to external influences, have the authority to review some decisions that could have been made considering elements that go beyond the extension of the law. Although this element seems to be in complete opposition to internal independence (Guarnieri and Pederzoli 1999, Ramseyer and Rasmusen 2000), it is not without its supporters, who claim that a hierarchical structure within the judiciary is not necessarily inconsistent with the principles of independence (Blasi and Cingranelli 1996, Rossen 1987).

Based on all the considerations above mentioned, the index for judicial independence is constructed by coding constitutional provisions using a three point scale. Coders were instructed to give a zero when there was no constitutional provision regarding a given element, a one in where there was a qualified or incomplete provision, and a two for explicit and full provisions regarding the following nine elements of judicial independence.<sup>7</sup>

**Guaranteed Terms:** The constitution guarantees terms of office, regardless of whether appointed or elected and restricts removal of judges.

**Finality of Decisions:** The decisions of a judge are not subject to any revision outside any appeals procedures as provided by law.

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<sup>7</sup> The authors consider three additional provisions which they do not use in the index. These are the right to a fair trial, the right to a public trial and the right to habeas corpus. They believe that these provisions are somewhat linked to the judge's behavior and the concept of judicial independence, particularly to its principle of impartiality

**Exclusive Authority:** The courts have exclusive authority to decide on their own competence, as defined by law. Their decisions are made without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

**Ban against Exceptional or Military Courts:** The courts have jurisdiction over all issues of a judicial nature. Civilians cannot be tried by military or exceptional courts.<sup>8</sup>

**Fiscal Autonomy:** The courts are fiscally autonomous. Their salaries and/or budgets are protected from reduction by the other branches.

**Separation of Powers:** The courts are housed in a separate branch from the executive and legislative powers.

**Enumerated Qualifications:** The selection and career of judges are based on merit: qualifications, integrity, ability and efficiency.

**Judicial Review:** Courts exercise judicial or constitutional review of legislative and executive branches.<sup>9</sup>

**Hierarchical System:** Courts are structured in multiple layers with the highest level court exercising final control over lower court decisions.

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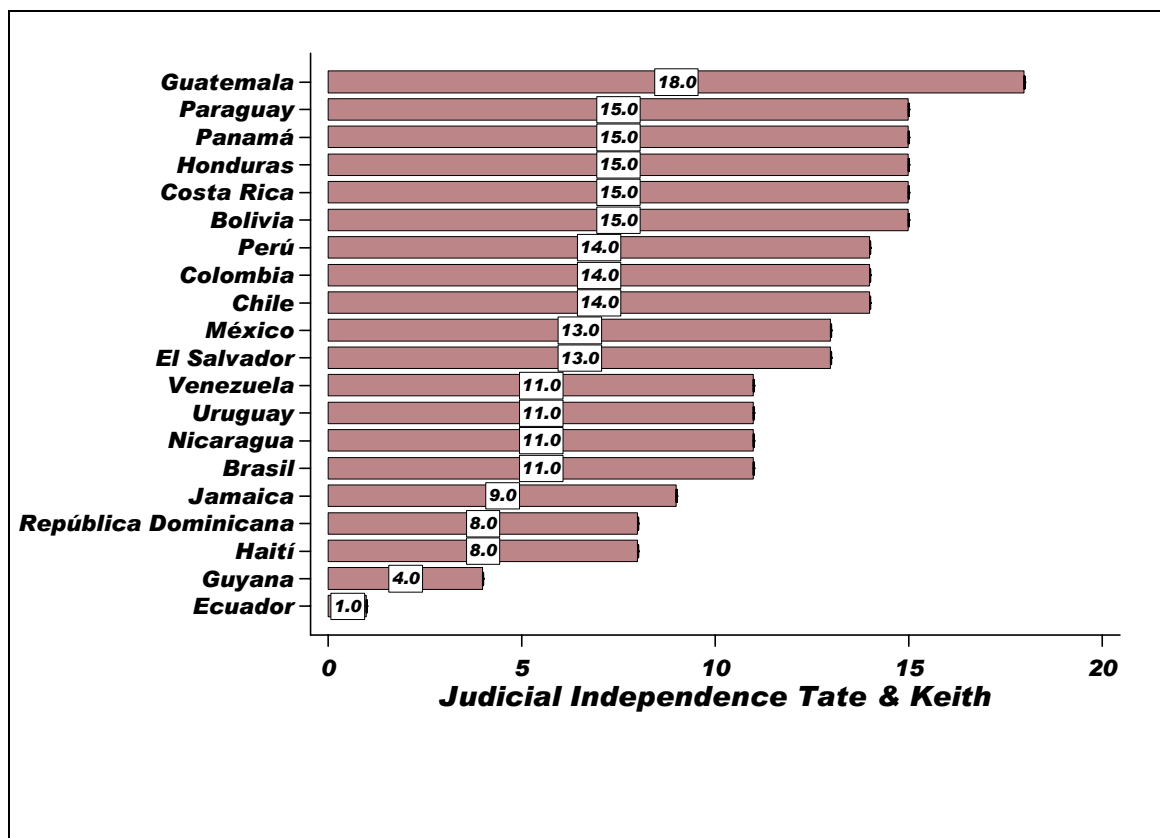
<sup>8</sup> This measure has an additional score beyond 0, 1 and 2. A score of -1 is given to any constitution that explicitly condones trying civilians in military or exceptional courts.

<sup>9</sup> A score of -1 is given to constitutions that explicitly forbid courts from exercising judicial review.



Figure II-2 shows how the countries in the sample are ranked according to this formal measure of judicial independence. Of the twenty countries in the sample, Guatemala was the one that had a full and explicit constitutional provision guaranteeing terms of office, finality of decisions, exclusive authority of the courts, banning exceptional or military tribunals for civil parties, granting fiscal autonomy and separation of powers, enumerating judge qualifications, granting judicial review and establishing a hierarchical system. On the other end, Ecuador is ranked as only having one qualified or incomplete provision for the nine variables portrayed ahead.

**Figure II-2. Formal Provisions for Judicial Independence in Latin America**



A comparison between the two formal measures of independence presented in this chapter does not reveal much consistency between them. Although Guatemala is regarded

as a highly independent country on both measures, and with Ecuador and the Dominican Republic are portrayed as nations struggling to consolidate the autonomy of their judiciaries. At the other end there are some substantial differences between one measure and the other. Brazil, for example, is regarded as having a highly independent judiciary according to one formal measure of judicial independence and a weak judiciary according to the other. The same happens with Mexico, ranked as the country with the highest level of formal judicial independence according to one measure and located in the middle of the sample according to the other.

#### *Practical or De Facto Measures of Independence*

##### *U.S. State Department World Human Rights Reports*

While there have been multiple efforts to measure judicial independence for a large set of countries by going beyond formal provisions, these evaluations have been hard to replicate (La Porta, et al. 2004, Landes and Posner 1975). As I mentioned above, the State Department's reports on human rights across the world are a tool that academics trying to measure judicial independence have found very useful. These reports, which began in the 1970's, are published annually and their goal is to describe the efforts that every country makes to put in practice their commitment to protect the human rights of its citizens. Each country report is individual and contains a detailed description of human rights violations that were reported by affected individuals or by national or international media outlets. These violations are then analyzed in different contexts, one

of which is due process. Within this analysis, the reports evaluate the strength of each country's judicial system and the main problems that they face. Although these chronicles are subject to the criteria of their authors, this is one of the few systematic sources of information about judiciaries in Latin America. Various academic studies written about the judicial system in the region ratify the validity of these reports (Cross 1999, Dakolias 1994, Howard and Carey 2004, Yamanashi 2002).

Since these reports only give a descriptive narration of the strengths and weaknesses of the judicial system in each country, it was necessary to devise a coding scheme in order to systematize the information. Based on previous work by Howard and Carey (2004), Keith, Tate and Poe (2006) and Cingranelli and Richard's CIRI Project, I have created a trichotomous measure that qualifies the level of judicial independence in Latin American countries based on the text of each individual report. The scoring was assigned as follows:

**0.- Low:** The judiciary is not autonomous or independent. The interference from the executive is constant and judges can be removed without warning. There are high levels of corruption and other outside influences.

**1.- Medium:** The judiciary is described as partially independent. Executive interference is less notorious but judges do not enjoy full protections. Occasional reports of corruption and other outside influences.

**2.- High:** The judiciary is generally independent. The courts can rule against the executive without fear of repercussions and judges enjoy full constitutional protections. There are no mentions of corruption or other outside influences.

The classification I assigned to each country based on the criteria described above is depicted on Table II-2. There one can see that according to the US State Department Human Rights Reports, only three countries in the region, Chile, Costa Rica and Uruguay have generally independent courts that can rule against the government without fear of prosecution and exhibit low levels of judicial corruption. On the other hand, countries like Ecuador and Haiti are consistently classified as struggling to obtain judicial independence. Perhaps the most notorious fact, however, is that Guatemala, a country ranked at the top by both measures of formal independence, received a score of zero for *de facto* independence.

**Table II-2. *De Facto* Judicial Independence in the Americas according to the US State Department Human Right Reports**

|               |   |
|---------------|---|
| <b>HIGH</b>   | Chile<br>Costa Rica<br>Uruguay  |
| <b>MEDIUM</b> | Brazil<br>Colombia<br>Dominican Republic<br>Guyana<br>Jamaica<br>Mexico<br>Panama<br>Peru                         |
| <b>LOW</b>    | Bolivia      Nicaragua<br>Ecuador      Paraguay<br>El Salvador      Venezuela<br>Guatemala      Haiti<br>Honduras |

*World Economic Forum*

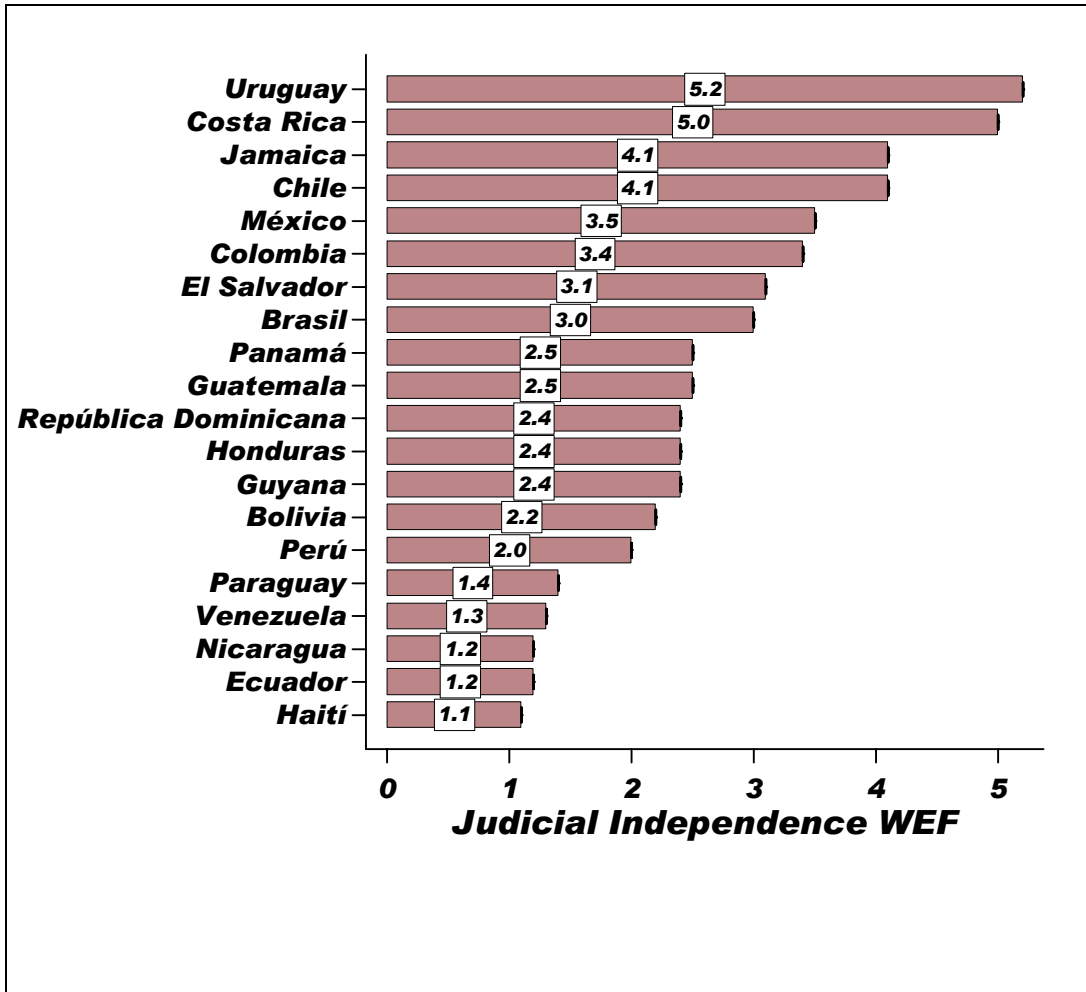
The fourth and final measure of judicial independence to be replicated in this dissertation comes from the World Economic Forum’s Executive Opinion Survey (WEF 2006). This is a yearly survey conducted in every country in the region to help establish a measure for economic competitiveness. An average of 94 Chief Executive Officers or top level managers are polled in each country from a sample of companies including domestic firms that sell in foreign markets, units of foreign firms that operate in the

domestic market and enterprises with significant government ownership. The question is stated beneath:

|  |   |   |   |                              |   |   |
|--|---|---|---|------------------------------|---|---|
| <i>The judiciary in your country is independent from political influences of members of government, citizens or firms.</i> |   |   |   |                              |   |   |
| 1  | 2 | 3 | 4 | 5                            | 6 | 7 |
| 1= No, heavily influenced  |   |   |   | 7= Yes, entirely independent |   |   |

Although this is a measure based on the perception of the elites, which do not necessarily reflect the opinion of the broader population, this is a global, replicable evaluation of judicial independence. The executives who responded to this survey often represent their companies and have dealings with the judiciaries of their host countries. Figure II-3 shows how the countries in the sample are ranked according to the World Economic Forum. Consistent with the State Department reports, Costa Rica and Uruguay stand at the top of the ranking followed closely by Chile. Also consistent is the presence of Ecuador and Haiti at the bottom of the rankings, depicting them as countries that have the weakest and most dependent judiciaries in the region.

Figure II-3. Judicial Independence in Latin America according to the World Economic Forum



In reviewing at all four measurements of judicial independence it is difficult to find consistency among them. The starkest differences occur between the formal and the practical measures of independence. Countries like Uruguay and Costa Rica, which are considered to have weak institutional provisions to safeguard judicial independence, are also regarded by practical measures as the nations with the strongest and most independent judiciaries. The contrasting results are a testament to the amplitude of judicial independence as a concept in political science. Table II-3 depicts a comparison of

the four measurements of independence in Latin America described in the previous pages. In order to better represent the differences between one measure and another, all scores have been normalized to one, which corresponds to the highest degree of independence.



**Table II-3. Comparison Between Measures of Independence in Latin America**

| <b>Country</b>     | <b>Rios-Figueroa</b> | <b>Tate and Keith</b> | <b>Cingranelli &amp; Richards</b> | <b>World Economic Forum</b> |
|--------------------|----------------------|-----------------------|-----------------------------------|-----------------------------|
| Mexico             | .462                 | .706                  | .500                              | .417                        |
| Guatemala          | .462                 | 1.0                   | .000                              | .250                        |
| El Salvador        | .231                 | .706                  | .000                              | .350                        |
| Honduras           | .231                 | .824                  | .000                              | .233                        |
| Nicaragua          | .231                 | .588                  | .000                              | .033                        |
| Costa Rica         | .308                 | .824                  | 1.0                               | .667                        |
| Panama             | .308                 | .824                  | .500                              | .250                        |
| Colombia           | .308                 | .765                  | .500                              | .400                        |
| Ecuador            | .077                 | .000                  | .000                              | .033                        |
| Bolivia            | .385                 | .824                  | .000                              | .200                        |
| Peru               | .154                 | .765                  | .500                              | .167                        |
| Paraguay           | .385                 | .824                  | .000                              | .067                        |
| Chile              | .154                 | .765                  | 1.0                               | .517                        |
| Uruguay            | .154                 | .588                  | 1.0                               | .700                        |
| Brazil             | .462                 | .588                  | .500                              | .333                        |
| Venezuela          | .231                 | .588                  | .000                              | .050                        |
| Dominican Republic | .009                 | .412                  | .500                              | .233                        |
| Haiti              | NA                   | .412                  | .000                              | .017                        |
| Jamaica            | NA                   | .471                  | .500                              | .517                        |
| Guyana             | NA                   | .176                  | .500                              | .233                        |

To further illustrate the different dimensions of independence captured by each of the measurements of judicial independence explained above, Table II-4 show the correlation matrix of these four measures. The coefficients show a high level of correlation between the two formal methods to measure judicial independence, as well as the two practical ones. On the other hand, the correlation between *de iure* and *de facto* measures of independence is substantially lower. What stands out from the matrix, however, is the negative correlation between Rios-Figueroa’s institutional way of measuring independence and Cingranelli and Richards’s *de facto* measure based on the US State Department Human Rights Reports.

**Table II-4. Correlation Matrix Between Measures of Judicial Independence**

|                                   | <b>Cingranelli &amp; Richards</b> | <b>World Economic Forum</b> | <b>Rios-Figueroa</b> | <b>Tate &amp; Keith</b> |
|-----------------------------------|-----------------------------------|-----------------------------|----------------------|-------------------------|
| <b>Cingranelli &amp; Richards</b> | 1.000                             |                             |                      |                         |
| <b>World Economic Forum</b>       | .7521                             | 1.000                       |                      |                         |
| <b>Rios-Figueroa</b>              | -.0515                            | .1236                       | 1.000                |                         |
| <b>Tate &amp; Keith</b>           | .1624                             | .3470                       | .7053                | 1.000                   |

The disparities between formal and practical measures of independence speak to the real differences that exist between the written law and the common political practices in Latin America. On the other hand, in countries like Ecuador, an extreme case which will be further discussed in the next few pages, it is clear that sometimes the lack of formal provisions for the protection of judicial independence do translate into weak

judiciaries, incapable to stand up to a strong executive or even to a weak legislative power. The following chapters of this dissertation will explore how these differences in measurements affect the impact that independence has on corruption victimization and trust in the institutions of the rule of law.

### Judicial independence: The Case of Ecuador

Creating and maintaining an independent judiciary is not an easy task. Throughout this chapter I have been looking at the many conditions, formal and practical, that have to take place in order to obtain a judicial branch that is strong and autonomous. Ecuador has been struggling with this problem since its beginning as an independent republic. Earlier I talked about the importance of institutional stability in creating an autonomous judiciary. Many scholars and experts agree that judicial independence begins with the constitution and the provisions it must contain. Since its independence 1830, Ecuador has had nineteen different constitutions, with each constitution lasting approximately eight years, on average (Salgado 2005). The one that stood the shortest amount of time was the Constitution of 1851, Ecuador's fifth constitution. It lasted one year. The 1978 Constitution marked the return of democracy to Ecuador after almost 15 years of uninterrupted military dictatorships. It was the longest lasting constitution in the country's republican history, lasting 20 years. It was replaced by the one drafted in 1998

by the Asamblea Nacional Constituyente.<sup>10</sup> As the reader can plainly see, it is impossible to conceive of having an independent judiciary when the rules of the game keep changing so abruptly.<sup>11</sup> As stated by a current Supreme Court Justice put it “Constitutional dispositions reflect the hopes of the people. Those have not changed, however, our constitutions keep changing. The principle of judicial independence has been painfully broken many times in Ecuador”<sup>12</sup>

The Constitution of 1978, drafted with the intention of creating a judiciary that was to be autonomous from the military power, gave birth to a judicial branch that was instead subject to the constant manipulation and interference by political parties. This constitution established that the members of the Supreme Court were to be elected by Congress, according to the proportion of representation that each party held in the legislative camera. This made the Supreme Court an extension of the political parties. Its rulings became subject to the ever changing balance of power in Congress, as judges could be and were removed merely by political will. In 1997, President Abdala Bucaram was impeached by Congress and replaced by then president of the legislative branch, Fabian Alarcon. Alarcon assumed a temporary presidency, during which its most significant event was a call to elections for a National Assembly to draft a new constitution.

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<sup>10</sup> The Constitution of 1998 is still in place, but in November of 2007 Ecuador elected a new Constitutional Assembly, which is drafting what will be the 20<sup>th</sup> Constitution in the history of Ecuador. It is expected to be ready by the end of July 2008 and then it will be submitted to referendum for its approval.

<sup>11</sup> There were also several authoritarian and military regimes during that lapse, which also hindered what little autonomy the judicial power could have had in those days.

<sup>12</sup> Interview conducted by author in Quito, on November 13<sup>th</sup> 2007.

In terms of the safeguard of an independent judiciary, the 1998 constitution has been the most advanced in Ecuador's history. It was the first constitution to guarantee the judicial career, offer job protection and stability and establish a mechanism called "cooptacion", by which the Supreme Court could elect its own members. These advances, however, could not protect the sitting Supreme Court judges from the continuing political pressures by the ever changing majorities in congress.

*Judicial Crisis and new Supreme Court.*<sup>13</sup>

In early December 2004, the party of then President Lucio Gutierrez worked out a majority in congress and drafted a resolution ousting all thirty one members of the Supreme Court. The argument was that the court had been for years under the control of Gutierrez's political adversary and former President, Leon Febres-Cordero. The new court was appointed in its entirety by the new majority in congress and was known as the "Pichicorte" because of the name of President Guillermo Castro Dager, nicknamed "Pichi" by his friends.

The "Pichicorte" was viewed negatively by the majority of the population. There were constant manifestations outside of the building where the Supreme Court functioned. During its short three month tenure, the "Pichicorte" annulled several criminal proceedings that were pending against former elected and appointed officials that had fled the country during the midle and late nineties. The straw that broke the

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<sup>13</sup> The following description of the events occurred between 2004 and 2006 are based on the report by the United Nation's Special Rapporteur Leandro Despouy and the testimony of current and former Supreme Court Justices, some of whom were members of the court that was dissolved by congress on December 2004 "Informe De Seguimiento Presentado Por Leandro Despouy, Relator Especial Sobre La Independencia De Magistrados Y Abogados. Mision De Seguimiento Al Ecuador," (Naciones Unidas, 2006).

camel's back, however, was the nullity declared in a high profile embezzlement case against former President Abdala Bucaram, who was impeached in 1997 and was also a close friend of Castro Dager. These actions resulted in the return of Bucaram, who had been exiled in Panama since his ousting nearly eight years before. The results were catastrophic for both the "Pichicorte" and for President Gutierrez. After Bucaram's return, rioting began to break out in Quito and in neighboring cities of the highlands. In a desperate attempt to bring the situation under control, Gutierrez signed a presidential decree dissolving the Supreme Court. Despite the last minute maneuver, Gutierrez's fate was sealed the moment Bucaram arrived in Ecuador. In April of 2005 Gutierrez fled the presidential palace and sought refuge in the Brazilian embassy in Quito. What followed was an eight month period in which Ecuador had no Supreme Court.

In May of 2005, in order to expedite the selection of new members for the Supreme Court, the new Organic Law for the Judicial Branch established the creation of an independent selection committee. This ad hoc mechanism was designed to compensate for the vacuum that existed in the judicial branch, since the constitution mandated that the Supreme Court itself was the institution responsible for the selection of new members through "cooptacion". Among other things, the new law signaled the necessity of national and international observers for the process.

The selection committee functioned from early June to late November 2005 and was integrated by four members. One member named by the country's law schools, one by the Superior Courts and Tribunals, another by humans rights organizations, and a final person was named by civil organizations, specifically women's rights groups. According to the mandate of the law, the committee approved a statute that detailed the process of

application, grading, and appeals for the candidates of the new Supreme Court. Of the 310 applications received, 181 passed all of the formal requisites and advanced to the selection stage. The criterion for the selection of applicants was based on a careful analysis of applicants' experience, academic degrees and publications. Finally, exams were administered to all applicants by hired consulting firms. The final results were made public on November 22<sup>nd</sup> 2005.

Originally, the organic law mandated that the new members of the Supreme Court were to come from three sources in almost equal proportion. Eleven were to be selected from applicants in the judicial career, ten from university professors and the last 10 from professionals in private law. However, drastic differences in scores from members of all three pools caused the committee to amend the law and select the thirty one applicants with the higher scores, regardless of where they came from. In the end, the Supreme Court was comprised of eighteen former university professors, eight applicants from private practice and only five from the judicial career. The new justices assumed their offices on November 30<sup>th</sup> in a ceremony attended by representatives of the United Nations, the Organization of American States and various Supreme Court Presidents from Latin America and Europe.

The new Supreme Court started to work under high scrutiny from the general population and the media. However, the advances made in the 1998 Constitution regarding judicial protections and the attempts to permeate judges from political influence seem to have worked. The Supreme Court has shown its ability to purge itself when the probity of some of its members has been in doubt. This was the case of a Judge dismissed when evidence was found that he requested money to a known politician in

return for a favorable ruling by him and two other colleagues. The members of the court took no chances and also dismissed his two chamber partners even though they denied their involvement in any wrongdoing.<sup>14</sup> Other incidents have occurred, but the court has swiftly dismissed the offenders and replaced them through “cooptacion” in an effort to maintain their image of an independent and uncorrupted institution. During my interviews, a long time judge and member of several Supreme Courts, including the current one told me “This is the first independent Supreme Court Ecuador has had since the return of democracy. There are no political links in this court”.<sup>15</sup> This new found autonomy has allowed the current Supreme Court to become more efficient. In the first two years of its tenure, the court issued more than 11,000 sentences, substantially above the historical average of the country’s highest court. In 2007, the Supreme Court also spearheaded an aggressive restructuring process that attempted to eliminate much of the unnecessary bureaucracy in the justice sector, maximizing efficiency and reducing corruption in the lower courts. Although the Supreme Court has the authority to do all of these things, the process has ironically been delayed by legal maneuvers utilized by members of the Justice Servants Union.

*Obstacles to independence:*

To some legal experts and members of the judiciary, constitutional provisions and autonomy in the selection process are not enough. According to a renowned attorney and law professor, the constitutional protections awarded to the judicial branch are almost

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<sup>14</sup> The Ecuadorian Supreme Court is comprised of 10 chambers of three judges each. These chambers are specialized, meaning that the judges that comprise them will only deal with either civil, criminal, labor or administrative cases.

<sup>15</sup> Interview conducted by author in Quito, on November 15<sup>th</sup> 2007.



fictitious because the constitution is never applied in real life<sup>16</sup>. As an example he cites the ad hoc selection process utilized for the conformation of the new Ecuadorian Supreme Court, which was not even contemplated in the mother law. This is just one of many infringements. He claims that the constitution fails to secure adequate pay to those who work in the judicial sector. While lower court judges are started at a decent salary, it does not improve as the judge gains seniority and does not adjust to inflation and other economic considerations. Furthermore, the salaries of over 5,000 workers in the judicial sector have not been adjusted in over five years.

Another obstacle lies in the vulnerability of judges, especially those in the lower courts, who are not only subject to interference from colleagues in the higher courts but also from civilians. The Ecuadorian constitution guarantees the internal independence of lower court judges and forbids the influence of interference of high court judges in any ruling issued by first instance magistrates (Constitucion Politica De La Republica Del Ecuador 1998). It was reported to me by a Superior Court judge, however, that this is hardly the case<sup>17</sup>. He claims that it is not uncommon for Supreme Court Justices to place calls to lower court colleagues and attempt to interfere in their rulings, especially in high profile cases. Moreover, the law also fails to protect judicial independence by granting citizens the possibility to sue lower court judges if they are not satisfied with the outcome of their trial. According to a constitutional law expert and member of the constitutional assembly, these interferences could be avoided by eliminating the hierarchies from the

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<sup>16</sup> Interview conducted by author in Quito, on November 8 2007.

<sup>17</sup> Interview conducted by author in Guayaquil, on November 12 2007.

judicial system<sup>18</sup>. This can be achieved in two ways. First, renaming the courts so that their names do not reflect a hierarchical order. Second, by granting the National Judicature Council –CNJ-<sup>19</sup> the right to appoint judges for ordinary and appeal courts. Constitutional law experts coincide in the belief that these steps are as important as the selection process for the Supreme Court and the only way to guarantee internal independence. They also agree that there is no need to specify those processes in the constitution as long as those attributes are clearly assigned to the CNJ in its text.

Reviewed above are some of the legal obstacles that Ecuador faces in creating an independent judiciary. All of them are contemplated in the measurements of independence presented in the first part of this chapter and can be overcome via better institutional design. However, there are other factors that come into play that are not easy to quantify or even measure (Brady 2004). Some of these variables have been considered in theories of judicial independence, but are hard to operationalize. In the following paragraphs I will discuss these barriers to judicial independence as described and exemplified to me by experts in judicial politics, lawyers, legislators and even Supreme Court Justices.

*A Judge's character and personality:*

In the previous sections I have talked about the importance of the selection process of a Supreme Court to judicial independence. An autonomous Supreme Court must be comprised of judges without a history of political linkage. That is why it is

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<sup>18</sup> Interview conducted by author over the phone, on November 13 2007.

<sup>19</sup> The National Judicature Council (Consejo Nacional de la Judicatura) is an institution designed to oversee the judicial power and sanction judges if necessary. In the current constitution, however, the CNJ is headed by the President of the Supreme Court, which takes away from its ability to enforce any accountability.

imperative that the selection process is conducted with the participation of the other two branches of government or left to the judiciary itself. However, an appropriate selection process cannot guarantee independence if the judges appointed to the Supreme Court lack the power to stand up to the executive and fend off interference from third parties. Such is the case of the Ecuadorian Supreme Court, according to several experts.

While the controversial selection process that took place in 2005 was closely scrutinized by national and international organizations, its outcome was accepted by all since the 31 jurists with the highest scores went on to be appointed as the new members of the Supreme Court. However, Ecuador's highest court has been far from independent, according to outside members of the judiciary and other experts, and a part of the problem has to do with the personality of some of the judges. A former Supreme Court justice told me "In the end, what matters is how much power the Supreme Court has. In other places, like the United States, the Supreme Court is very powerful, while here in Ecuador, the President raises his voice and the justices' legs begin to shake".<sup>20</sup>

Two examples mentioned to me by several experts illustrate how the lack of a strong personality in a Supreme Court judge can undermine judicial independence. The first one was the result of the dismissal of 57 legislators by the Electoral Tribunal in 2007. President Rafael Correa drafted a decree that called a general election to vote on whether or not to convene a Constituent Assembly that would be in charge of drafting a new constitution, which had been his main electoral promise and the basis for his campaign. A majority in Congress disagreed with some parts of the document and

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<sup>20</sup> Interview conducted by author in Guayaquil, on November 12 2007.

delayed its approval until some changes were made. After a couple of days, the Electoral Tribunal, under immense pressure from the executive, made use of an obscure constitutional interpretation and dismissed 57 of the 100 legislators in Congress<sup>21</sup>. In the following days many of the dismissed legislators filed what is known as a constitutional “amparo”, a petition to a judge to declare that the action executed against them violated their constitutional rights. Many of the 57 legislators were granted “amparos” by first instance judges. This caused an outrage of the executive, who had massive popular support. The pressures of public opinion and the executive proved to be too much for the Supreme Court, which overturned all of the “amparos” and upheld the decision made by the Electoral Tribunal, despite the fact that they had legal backing for the “amparos” granted. Furthermore, the President of the National Judicature Council, who also serves as President of the Supreme Court, dismissed the judges who had granted those “amparos” and threatened to do the same to others who interfered with the call for elections. Although the Supreme Court interpreted that the Electoral Tribunal had been right to uphold the dismissal of the legislators, it is clear that the high court buckled under the pressure from the President and public opinion. As a law professor whom I spoke to stated; “It is true that some judges have used “amparos” to profit illicitly, but you cannot have the executive ordering the Supreme Court not to grant any more of them. Where does that leave judicial independence? Every judge that has granted an “amparo”, right or wrong against the government, has been removed by the National Judicature Council”.

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<sup>21</sup> The Constitution states that during electoral periods the Electoral Tribunal is the country’s maximum authority and has the right to dismiss any public official who interferes with an election process. The problems were that legislators are not public officials but elected ones and that since Congress had not approved the President’s call to elections yet, Ecuador was not in an electoral period.

While a powerful executive can sometimes intimidate Supreme Court Justices and undercut the autonomy of a judiciary, sometimes it is the lack of temerity of the judges themselves which hinders judicial independence. The struggle of the Ecuadorian Supreme Court against its manipulation from the National Constituent Assembly illustrates another way in which the character and personality of a judge can have a direct effect on independence.

Even before the National Constituent Assembly started, some of its elected members spoke about the necessity to restructure the judiciary in general and the Supreme Court specifically. These steps, some politicians claimed, were necessary because of the inability of the Supreme Court to efficiently and swiftly prosecute former banking executives identified as being responsible for the collapse of Ecuador's banking system in 1999. The ruling party, which had won a majority of seats in the Assembly, accused the Supreme Court of delaying necessary extradition documents required for the repatriation of suspects who had been caught in foreign countries. They suggested that in some cases these delays were due to linkages between the suspects and some members of the Supreme Court.

The reaction of the high court to the threat to its autonomy was immediate. A majority of judges claimed that while the Constituent Assembly had the power to modify the judiciary through the new Constitution, pending its approval by referendum, it had no business interfering with the Supreme Court or the structure of the judicial system directly, as the assembly was not conceived to be a legislative organ. However, not every judge was willing to stand up to the assembly. As I found out through conversations with court insiders and a Supreme Court Magistrate, several members of the court were

indifferent to the interference of the assembly in the judiciary and some even welcomed it, claiming that they could finally go back to private practice, where they had been making more money. According to this magistrate, some members had taken part in the selection process simply for the prestige of being named Supreme Court Justice, but were not committed to the court. I learned that some judges complained about the long work hours and sometimes delegated the vital task of writing sentences to their private secretaries. Other judges, who lived outside of Quito, where the Supreme Court is located, did not agree with five day work weeks and returned to their cities on Thursdays to tend to their private practices and businesses, even though the law strictly forbids Supreme Court Justices to pursue other professional activities other than teaching while in office. These judges had gotten to the Supreme Court by demonstrating their knowledge of the law in the selection process, they had been able to purge the court when its incorruptibility was in doubt and the majority of them profoundly disagreed with the intentions of the assembly to meddle in the affairs of the judiciary. However, their reticence to forego of certain personal privileges and their lack of willingness to take on the National Constituent Assembly definitely affected the Supreme Court's ability to effectively assert its independence.<sup>22</sup>

*Judicial Independence and the Media:*

The pressures from the executive and legislative branches, as well as those from interest groups and individuals are not the only strain that judges have to face in their

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<sup>22</sup> In the end, the National Constituent Assembly decided, via decree, to restructure the Supreme Court after the referendum to approve the new constitution, in what the assembly called the "transition regime". The number of Supreme Court Justices was downsized to 21 and ten of the current magistrates will be dismissed at random in a raffle system.

struggle to maintain their autonomy and secure the impartiality of their decisions. The media also plays a key role, especially when it considers that a judicial decision might jeopardize the public interest. In a survey administered to judges in Central America in 2005, the majority of judges identified the media as the most important external obstacle to judicial independence (Diaz Rivillas and Linares Lejarraga).

The relationship between judicial independence and the media is not one that has been overlooked by scholars (Bright 1997, Paletz 2002, Perry 1999). However, it is not easy to quantify the effect that media coverage on one issue or another has on the level of judicial independence in any given country, and that is why it is complicated to incorporate a component of media influence in measures of judicial independence.

The media and the judiciary often clash when it comes to their opinions and interpretations of the law (Bybee 2007, Wood and Rudd 2004). In the opinion of one judicial expert, the media often has a negative impact in the independence of the judiciary, especially because of its advocacy for what is popular instead of what is legal. He believes that “The media can be a powerful deterrent for judicial independence. Reporters are constantly passing judgment on the judiciary’s decisions without completely understanding their scope or the spirit of the law applied in such decision”.<sup>23</sup> Instances where media pressure interferes with judicial independence usually occurs with high profile cases or particularly sensitive issues, like the Deckert case in Germany, described earlier in this chapter.<sup>24</sup>

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<sup>23</sup> Interview conducted by author in Quito, on October 18 2007.

<sup>24</sup> See section on judicial independence and accountability.

The influence of media is especially palpable in countries with a shaky history of judicial independence. As an elected member of the Ecuadorian Constitutional Assembly reported to me during an interview “Of the de facto threats to judicial independence, the one of the media is the most dangerous one.” A case in point is the controversial subject of “detencion en firme” in Ecuador. In 2003, Congress passed a law allowing a suspect to be indefinitely detained while their case made its way through the legal system. The reasoning behind this decision was that many criminals use dilatory tactics in order to hold up their sentencing (“Registro Oficial” 2003). Although controversial, this law was upheld by the Constitutional Tribunal and applied until October of 2006, when it was again reviewed by the same tribunal and deemed unconstitutional (“Registro Oficial” 2006). The practical consequence of this ruling was the imminent release of thousands of jailed men and women who had been held without sentencing for a year.

Public opinion opposed this measure and the sentiment was echoed by the media, which intensified its coverage of criminal acts in the big cities and questioned what would happen to citizens’ personal safety upon the release of hundreds of “criminals”. According to one expert, the media focused exclusively on the issue of public safety and completely ignored the human rights aspect of the controversy, turning public opinion against the judges who declared the law of “detención en firme” unconstitutional, placing immense pressure on the legislature to draft a new law. Ultimately, Congress drafted, debated and passed a law which upheld “detención en firme” in less than a week. The bill was ready one day before the Constitutional Tribunal’s ruling was to go into effect and the prisoners scheduled to be released a day later remained in jail without a judicial sentence against them.



“Judicial independence is not about right and wrong. There certainly was a normative debate on the legitimacy of the ruling by the Constitutional Tribunal. However, that is not the issue. The fact is that a ruling by the ultimate authority in constitutional law cannot be ignored just because a fraction or even a majority of the media considers it wrong” concluded this expert.

## Conclusions

The focus of this chapter has been judicial independence as a concept and the attempts that have been made at measuring it. It is clear that there is little to no consensus as to exactly what is judicial independence. Some scholars define independence solely by looking at the relationship between the Supreme Court and the executive, while others unpack several dimensions of independence and explore various ties between the judiciary, the other branches of the State and external sources of possible influence. The measures of independence presented in this chapter, two formal and two practical, reflect the lack of consensus in the field of judicial politics when it comes to analyzing and assessing judicial independence in Latin America.

The presentation of the Ecuadorian case and the struggle of its judiciary to fend off outside influences also lead me to a couple of conclusions. First, the situation of the Ecuadorian judiciary is better understood by looking at it through practical measures of judicial independence. Formal provisions of independence do not contemplate the political dynamics of democratic countries, especially ones struggling to consolidate. The

sacking of two Supreme Courts in three months cannot be reflected by formal measures of judicial independence. On the other hand, practical assessments of judicial independence are based precisely on these events, and therefore do a better job in transmitting the real state of the judiciary in a country. Second, formal measures of judicial independence are still important. The events in Ecuador were the result of various political maneuvers and could not have been avoided by having better constitutional provisions of independence. Nevertheless, the institutional weakness of the judicial system in Ecuador does result from weak institutional design and a history of instability. Even though the 1998 Constitution made great advances in the protection of judicial independence, the judiciary in Ecuador has been historically weak, in great part because it was never protected institutionally by the laws of the land. Throughout the years, weak formal provisions of independence translated into weak institutions that have proven incapable to fight of political attempts to control it.

In the next chapters, I will be assessing the effect that context can have on personal attitudes and experiences. Using the four measurements of judicial independence described earlier in this chapter, I will evaluate the influence that the presence or absence of an autonomous judiciary can have on personal experiences with corruption, as well as the attitudes of trust towards institutions of the rule of law in Latin America. I believe that countries with higher levels of judicial independence will have citizens that trust more in the institutions of the rule of law. Also, I hypothesize that corruption victimization will be lower in countries where judicial independence is high.

## CHAPTER III

### JUDICIAL INDEPENDENCE AND CORRUPTION IN LATIN AMERICA

In the previous chapter I argued strongly that judicial independence itself should not be considered as an end but as a means to an end. This chapter will test whether or not independence is useful in the reduction of corruption in Latin America. Corruption is considered by Latin American citizens as a major threat to democracy in their countries. According to Rose-Ackerman (1997), widespread corruption is a clear symptom that the state is not functioning properly, a claim that the Americas Barometer survey corroborates in the Latin America and Caribbean regions. In fact, data show that along with crime victimization, high levels of corruption are one of two reasons that would prompt large proportions, even majorities of citizens, to support a military coup (Cruz 2007). Surveys find that acts of corruption are present in every strata of society. Moreover, in the last decade, several elected and appointed officials, including Constitutional Presidents, as in the cases of Mexico, Costa Rica, Peru and Ecuador, have faced criminal charges for acts of corruption committed during the exercise of their public mandate.

The judiciary is often said to be the last defense for citizens and the State in the fight against corruption. When the internal control system between politicians and bureaucrats does not work to prevent corruption, it is up to the judicial system to intervene in order to find administrative illegalities and repress them. Often, however, the

discovery of widespread illegality in the public brings about criticism of the judicial system as having been inadequate in the fight against corruption (Della Porta and Vannucci 1999). Other times, the judiciary itself becomes involved in acts of corruption.

Transparency International defines judicial corruption as “the abuse of entrusted power for private gain” (“Global Corruption Report” 2007:11). This definition, however, is not limited to material or financial profits, since it also includes non-material gains such as the furtherance of political ambitions, and non-material favors from sexual to agreements to lower the sentences of the guilty or even exonerate them. Judicial corruption also includes any inappropriate influence by a third party or any noncompliance by a judge regarding court dates and deadlines (Dakolias 2003). TI divides judicial corruption into two types. One source of judicial corruption is political interference in judicial processes. Despite several efforts for institutional reform in Latin America and elsewhere, judiciaries continue to face pressure to rule in favor of powerful political and economic elites.<sup>25</sup> Political interference also comes about by the manipulation of judicial appointments, salaries and conditions of service. A former legislator in the Ecuadorian Congress reported to me that several appointments of lower court judges took place after legislators acted as “padrinos” to them and use their influence to get them appointed by the National Judiciary Council.<sup>26</sup> The second type of judicial corruption has to do with bribery. In Latin America, bribery in the judicial system

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<sup>25</sup> One example is provided by a controversial ruling by a Menem appointed judge in Argentina on 2006. The judge ruled that excess campaign expenditures had not violated financing laws because parties were not responsible for financing of which “they were unaware”. See “Global Corruption Report” 2007, By Transparency International.

<sup>26</sup> Interview conducted by author on October 19<sup>th</sup> 2007 in Quito, Ecuador

is one of the most common forms of corruption victimization. (Donoso 2007, Zephyr 2007). Bribery can take place during any phase of the judicial process. Judicial employees may solicit bribes to speed up the citation processes, lawyers can request kickbacks to influence a decision and judges can also ask for a sweetener to guarantee a favorable ruling.

The existing literature identifies several causes for judicial corruption. A judiciary may become corrupt, for example due to undue influence by the executive and legislative branches. Even though constitutional guarantees exist to protect the judiciary from these influences, in countries with a history of weak institutions and a frail rule of law, the executive and the legislature often control the judicial branch. Judges in weak judiciaries are often deferential to politically connected individuals in the executive or legislature (Di Tella 2007, Pepys 2007). Fear of retribution by political leaders can also compel a judge to make politically acceptable decisions that may not be based strictly on the law.<sup>27</sup>

Another source of judicial corruption is the social tolerance that countries with weak institutions develop for corrupt acts (Shleifer and Vishny 1993). Citizens in countries where the bureaucracy is highly inefficient come to regard corruption as an everyday occurrence and as a necessary means to get things done (World Bank 2000). These attitudes transform corruption into a useful tool and even a positive trait in an inefficient system (Heidenheimer, et al. 1989). The idea that corruption helps “grease the wheels” of progress in developing countries was famously summed up by Huntington,

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<sup>27</sup> Di Tella et al. (2007) note that political influence in the real world can go beyond bribes and lobbying and into threats and punishment, as was the case with the Colombian judges who often received messages saying their option was to take “plata o plomo” which meant to take the bribe or take a bullet.

who claimed that “the only thing worse than a society with a rigid, over-centralized, dishonest bureaucracy is one with a rigid, over-centralized, honest bureaucracy” (1968:69).

Finally, there are sources of corruption that come as a consequence of poor institutional design, such as low judicial and court staff salaries, poor training, especially to lower court judges, and inadequately monitored accountability and administrative procedures (Voigt 2007). Although high salaries cannot completely eliminate the risk of corruption, low and uncompetitive salaries in the judicial sector definitely act as an incentive for corrupt acts.<sup>28</sup> Poor training of low level judges enhances corruption by producing low quality decisions in the judiciary. These decisions are usually appealed in higher level courts, where bribes and kickbacks are paid to accelerate the process and guarantee outcomes. Lastly, inadequate processes for accountability and administrative control protect those corrupt agents from getting caught and punished for their illegal acts. Judges who are poorly paid, have received little or no training and are not accountable to their superiors or the society in general feel as though their acts of corruption are justified by their low income. These judges lack the ethical behavior to change their ways because of their insufficient training and feel immune to any punishment because of the inadequate processes of control.

The relationship between judicial corruption and judicial independence is easy to identify but not easy to assess. Independence is directly correlated with the majority of

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<sup>28</sup> In the last few years, Ecuador has significantly raised judicial salaries in an attempt to control corruption in the sector. However, this measure has not yet had the desired effect, since the perception of corruption among the citizenship is high and bribery in the judicial system is one of the forms of corruption victimization in this country.

the factors that cause judicial corruption. Autonomy is supposed to protect the Supreme Court from undue influences from members of the executive and legislative branches by regulating methods of appointment, tenure and impeachment and protecting the jobs of judges who refuse to submit to pressures of parties outside the litigation. External and internal independence secure an appropriate level of income, which decrease the incentives for corruption; and protect lower level judges from possible threats and punishments from their hierarchical superiors. However, the effect of independence on judicial corruption is not easy to determine. While on one hand, independence in the methods of appointment can prevent the manipulation of judges by other political entities, on the other hand an excessive level of internal independence [the autonomy of lower court judges from their superiors], combined with inadequate processes of administrative control, can encourage judicial corruption because of the lack of accountability (Rios-Figueroa 2006, Rose-Ackerman 2001)

The problem of using independence as a tool to fight judicial corruption is that the direction of the relationship is not completely clear. In some cases, independence has been identified as one of the potential sources for judicial corruption. The literature speaks to the effects that improved methods for selection and appointment as well as better salaries for judges and employees could have in decreasing judicial corruption. However, judicial corruption can also affect the level of judicial independence. Previous studies of judicial reform in Latin America have identified corruption as one of the main causes for institutional inertia in the region (Buscaglia and Dakolias 1996, Buscaglia 2001, Buscaglia, et al. 2000). The studies look at institutional reform in Latin American judiciaries and the inertia that stems from the long term benefits of the reforms, such as

job stability and judicial independence, in contrast with the short term costs of these reforms. In other words reforms promoting independence, uniformity, transparency and accountability, which would benefit most segments of society in the medium to long term, are often blocked or delayed because the enforcement of these reforms would diminish the court personnel's capacity to seek extra income through bribes.

Corruption in the judicial branch has also been used as a component for measures of judicial independence. Howard and Carey (2004), for example, created a measure of *de facto* judicial independence by coding the paragraphs on the judiciary included in the US State Department Human Rights Reports. In the description of the content of these reports, the authors stated that “As evidence for independence, the authors usually rely on freedom from pressure from other branches of government, particularly executive control, and freedom from such acts as bribery and corruption” (287). Just like Howard and Carey, other authors have included judicial corruption in their coding of judicial independence when using the US State Department Reports (Donoso 2007, Tate and Keith 2006)<sup>29</sup>

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<sup>29</sup> In fact, judicial corruption is considered as a component in my measure of judicial independence that codes the US State Department Human Rights Reports.



## Corruption in Latin America

While I have, thus far, focused exclusively on the judiciary, corruption is a much broader problem. Recent studies claim that democracy in the region is threatened by the expansion of corruption that started precisely after Latin American countries made their transition from authoritarian to democratic regimes (Weyland 1998). Corruption, defined as the misuse of private office for public gain, reflects a failure of the political institutions within a society (Jain 2001). However, corrupt acts can be the outcome of beneficial rules as well as harmful policies. For example, one can pay a bribe to avoid the penalty for a committed infraction; but corruption can also be stimulated by inefficient institutions and individuals attempting to get around them (Svensson 2005).

Countries with high levels of corruption share similar characteristics. According to Svensson, the majority of countries suffering high levels of corruption are developing countries or countries in transition. They are also nations currently or recently governed by socialist leaders and have low levels of income. Many countries in Latin America fit that profile. The majority of countries in the region suffer from low income levels. Also, many Latin American nations are still considered to be transitioning democracies. Corruption has also been associated with a presidential system of government (Rose-Ackerman 2001), high levels of state centralization (Weyland 1998), federalism and civil law traditions. In the specific case of Latin America, however, Treisman (2000) concludes that once controls are introduced for low levels of income and unstable democracies, countries in this regions are not significantly more corrupt that countries on Western Europe and North America.

### *Measuring corruption in the region*

Corruption is a concept that is easy to define but difficult to measure. In a sense, corruption is like democracy, we know it when we see it, but the concept remains essentially contested. The secretive nature of corruption only makes it that much harder to measure. We know that corruption exists, but direct witnesses are few and those with direct knowledge of corrupt acts usually have an interest in keeping them secret. Difficulties in measuring concepts of this nature often end in reification, or thinking about operational measures as though they were the concept itself (Babbie 1995:116).

However, in order to effectively fight corruption one must first be able to measure it. Kaufmann et al (2007:318-23) address several issues of corruption measurement in the Global Corruption Report produced by Transparency International. In a brief paper, the authors identify various myths that are often cited about measuring corruption and compare them with reality.

- *Myth: Corruption cannot be measured*
  - Reality: There are several ways to measure corruption. Be it by gathering the informed views of relevant stakeholders, tracking countries' institutional features or by careful audits of specific projects.
- *Myth: Subjective data reflect vague and generic perceptions of corruption rather than specific objective realities.*
  - Reality: Because of the nature of corruption, perceptions based on experiences are sometimes the only and best information available. Also,

survey based questions of corruption have become increasingly specific, focused and quantitative.

- *Myth: Subjective data are too unreliable for use in measuring corruption.*
  - Reality: All efforts to measure corruption are susceptible to some kind of uncertainty and error, no measure is ever 100% reliable.
  
- *Myth: We need hard objective measures of corruption in order to progress in the fight against corruption.*
  - Reality: Because of the clandestine nature of corruption, it is virtually impossible to come up with a precise objective measure of it.
  
- *Myth: Subjective measures of corruption are not actionable and so cannot guide policymakers in the fight against corruption.*
  - Reality: Several surveys of firms and individuals ask detailed and disaggregated questions about corruption. While these questions may not always point to specific reforms needed, they do help in identifying priority areas for action.
  
- *Myth: Many countries with high corruption also had fast growth.*
  - Reality: While there have been countries, such as Bangladesh, that scored poorly on corruption measures yet grew impressively over the last decade, one must not confuse these exceptions with the stronger empirical

evidence suggesting that corruption adversely affects growth in the long run.

While the authors make a solid case in favor of measures of corruption, there are two omissions that I would like to address. First, besides the informed views of stakeholders, the tracking of institutional features and the auditing of specific projects, corruption can be measured by looking at the experiences of the victims themselves. By omitting the experiences of the common citizens with corruption, researchers make the assumption that much of corruption arises primarily within the context of business deals. When analyzing the Corruption Perception Index by Transparency International, Seligson points out,

“The great strength of these data sources is also a weakness. They tap into the perceptions of individuals engaged in international business and thus are good at evaluating business transactions, but they are weak at tapping into the whole range of activities pursued by the citizens of the countries being evaluated” (2006:384-85)

The second omission is related to the first, and it refers to the assertion by the authors that perceptions based on experiences are sometimes the only and best information available. While the nature of corruption is indeed clandestine, it is more so for witnesses and offenders than for victims of corruption. By ignoring the victims of corruption, measures of corruption are losing vital information about the nature of corruption and its consequences on democratic countries. In the next few pages I will talk more about measures of corruption utilized in Latin America. I will introduce the measure of victimization that will be used to test the relationship between judicial independence and corruption in the region.

### *Corruption Perception Index*

One of the most commonly used measures on corruption worldwide is the Corruption Perception Index [CPI] by Transparency International. Starting fourteen years ago, the CPI is a composite index that makes use of surveys of business people and assessments by country analysts. In 2006, the CPI ranked 163 countries based on 12 different polls and surveys from nine independent institutions, including Freedom House, the World Economic Forum and the United Nations, among others (Graf 2007). The index assigns a score to each country based on the information compiled from all of the gathered sources. The scores range from a 10, which means “highly clean” to a 0, for countries that are considered to be “highly corrupt”. Table III-1 illustrates how the countries pertinent to this dissertation fared on the Corruption Perception Index.

**Table III.1 Corruption Perception Index 2006**

| Country            | Surveys Used | 2006 CPI Score |
|--------------------|--------------|----------------|
| Chile              | 7            | 7.3            |
| Uruguay            | 5            | 6.4            |
| Costa Rica         | 5            | 4.1            |
| El Salvador        | 5            | 4.0            |
| Colombia           | 7            | 3.9            |
| Brasil             | 7            | 3.3            |
| Mexico             | 7            | 3.3            |
| Peru               | 5            | 3.3            |
| Panama             | 4            | 3.1            |
| Dominican Republic | 5            | 2.8            |
| Bolivia            | 6            | 2.7            |
| Guatemala          | 5            | 2.6            |
| Nicaragua          | 6            | 2.6            |
| Paraguay           | 5            | 2.6            |
| Guyana             | 5            | 2.5            |
| Honduras           | 6            | 2.5            |
| Ecuador            | 5            | 2.3            |
| Venezuela          | 7            | 2.3            |
| Haiti              | 3            | 1.8            |

Of the 163 countries that were included in the 2006 CPI rankings, the Latin American country with the lowest level of corruption was Chile, ranking in the 20<sup>th</sup> place. Haiti, on the other hand, was at the bottom of the list, in 163<sup>rd</sup> place. It is interesting that only two countries in the region, Chile and Uruguay, scored better than a five, meaning

that the rest of the countries in Latin America are perceived to be more corrupt than clean. Also, the difference between Costa Rica, the third place in the ranking, and Venezuela, the second to last, is fewer than two points, which does not show a drastic difference between one country and the other. Another point of interest is that while Transparency International used up to twelve different sources to grade each country, in the case of Latin American countries no more than seven sources were ever used to evaluate a country and in the case of Haiti there were only three available data sources. Finally, as Seligson (2006) pointed out, the results of the CPI may be strongly influenced by factors other than direct observation by participants. Consider the case of Ecuador. In 2006, Ecuador scored a 2.3 on the 0-10 scale by TI. The score reflected a high rate of corruption victimization, which at the time was over 30% in the country. In 2008, Ecuador's score on the CPI was 2.0, even though corruption victimization had decreased to 25% (Cordova 2008). The disparity between the two indexes may be due to the fact that the CPI is based on perceptions by the business elites, who are openly opposed to the incumbent President of that nation, and so the fall in the CPI may not have been reflecting an increase in corruption, but an increasing discontent of the business elites with a left wing government.

#### *Global Corruption Barometer*

Another effort by Transparency International, the Global Corruption Barometer seeks to understand how and in what ways corruption affects ordinary people's lives, providing an indication of the form and extent of corruption from the view of citizens around the world (Lavers 2007). In 2006, the Barometer consisted of public opinion

surveys carried out in 62 low, middle and high income countries. In total, over 59,000 respondents were interviewed in this effort.

The Barometer explores incidences of petty bribery, presenting information on the institutions and public services most affected by bribery, the frequency of bribery, and how much people have to pay. Also, the Global Corruption Barometer looks at perceptions about the governments' efforts to fight corruption in these countries. For the purpose of analysis, individual countries are grouped into regions.

A brief overview of the results tells us that Latin America is a region highly affected by corruption. According to the Barometer, over 30% of Latin American citizens reported paying a bribe in the year prior to the survey. This percentage almost doubles the sample's mean which is 17% and is only surpassed by Africa, where 55% of the respondents were victimized by corruption in the 12 months that preceded the survey. But perhaps the more telling results stem from the citizens' perceptions of their government's performance in the fight against corruption. When asked how they would assess their government's actions against corruption, only 7% of Latin American respondents believed it was very effective. Conversely, 29% stated it was not effective, 19% said their governments do not fight corruption at all and 23% of Latin American citizens responded that their governments actually encourage corruption in their countries.

The results presented by the Global Corruption Barometer represent a step forward in the efforts by Transparency International to measure corruption in the world and are certainly useful in the design of public policies against corruption. However, the Barometer is not without problems. For the 2006 round, only ten countries, fewer than



half of the countries in the region, were analyzed in what was called the Latin America regional grouping. Notably absent from the grouping was Brazil, the region's largest country. Also, there was only one Central American country, Panama, and only one country from the Caribbean, the Dominican Republic.

But perhaps the biggest problem with the Global Corruption Barometer has to do with sampling. In six out of the ten Latin American countries surveyed for the study, the data were gathered exclusively from urban areas. Furthermore, in the Dominican Republic, surveys were only carried out in two cities, Santiago and Santo Domingo. Only Argentina, Mexico and Peru had nationally representative samples. Also, in countries like Colombia and Panama, where only residents of urban areas were interviewed; the surveys were conducted via telephone (Hodess and Lavers 2006). These sampling decisions present two problems. One is the automatic exclusion of every low income family in urban areas without a phone line and another is the over-representation of women, who are usually the ones at home during work hours. All of these shortcomings conspire against a truly representative sample of the region in the Global Corruption Barometer.

#### *AmericasBarometer's Corruption Perception Measure*

The Latin American Public Opinion Project's [LAPOP] AmericasBarometer is the most comprehensive series of surveys about democratic values and attitudes in the region. The 2006-2007 round, which I am using for the purpose of this study, includes public opinion surveys conducted in 22 countries in the continent, including Latin

America, the Caribbean, Canada and the United States.<sup>30</sup> In all, over 28,000 respondents were included in nationally representative samples over the course of one year.

In order to get at the perception of corruption that citizens have, the AmericasBarometer asks the following question:

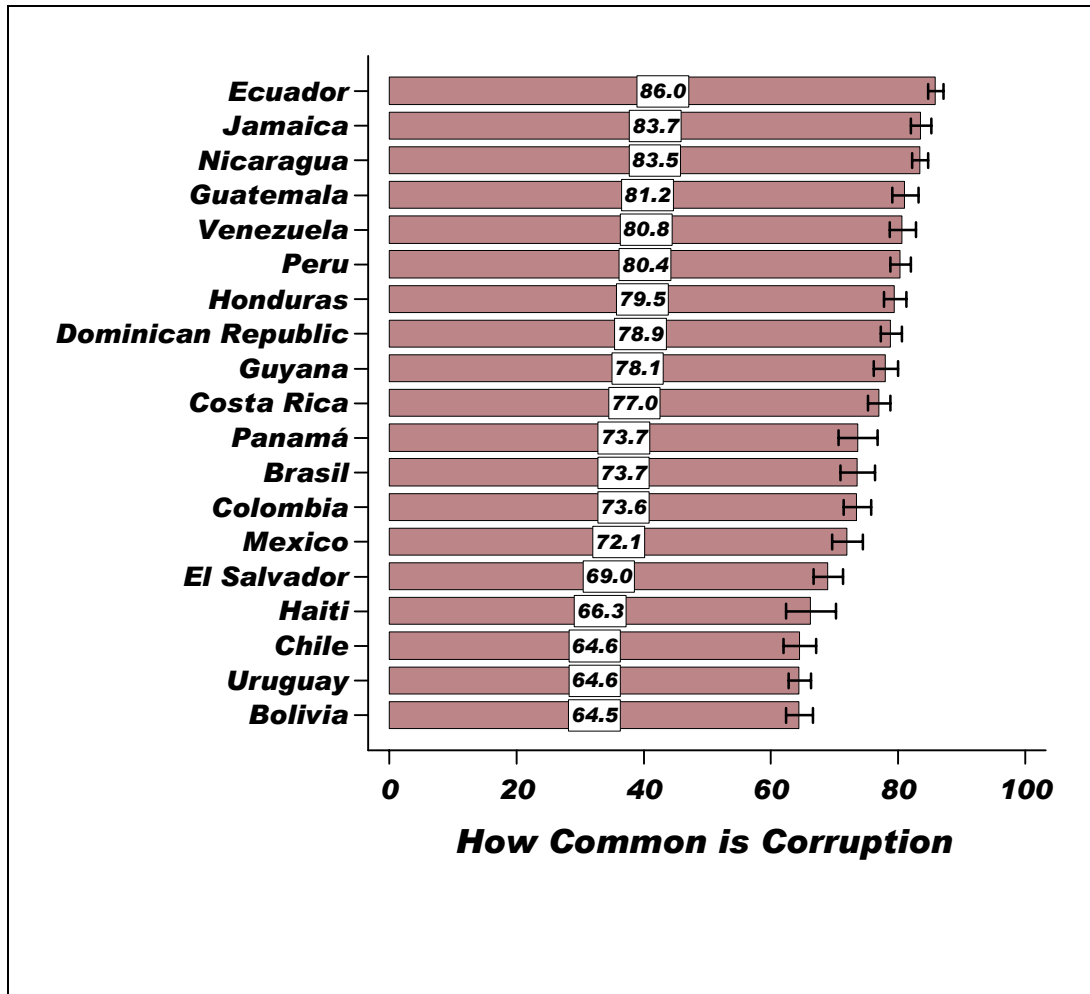
**Considering your experience and what you have heard, corruption among public officials is: (1) Generalized (2) Somewhat generalized (3) Not to extensive (4) Not extensive at all.**

Figure III-1 shows a country ranking based on the individual answers of respondents to this question. For the purpose of the graph, the answers were recoded to a scale from 0 to 100, where 100 is the highest level of perceived corruption and zero the lowest.

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<sup>30</sup> Although Canada and the United States are included in the 2006 round of the AmericasBarometer, I will not include them in the quantitative analysis that follows. The main reason is a disparity in the questionnaires, since the surveys in the United States and Canada were conducted over the phone and the questionnaires had to be much shorter.

Figure III-1. Perceptions of Corruption in Latin America



A first glance at the results shows that the distribution of the countries is relatively similar to the CPI. Chile and Uruguay are at the bottom of the graph, which means that their citizens perceive their public officials to be less corrupt. At the very top of the list is Ecuador, a country that has one of the lowest scores on the Corruption Perception Index. However, there are also some drastic differences between the two measures. Countries like Bolivia and Haiti, which ranked at the bottom of the list according to TI, are depicted in this graph as having citizens that perceive only moderate levels of corruption of their

public officials. Several studies conducted on these data (Donoso 2005, Seligson 2006, Zephyr 2007), however, show that sometimes these perceptions have little to do with the actual levels of corruption in their countries and more to do with other factors. Perceptions of corruption are sometimes influenced by how citizens perceive the efficacy of their government, their personal economic situations and even how they relate to others. Also, perceptions of corruption are swayed by the citizens' own experiences. Respondents who have been victimized by corruption usually tend to perceive higher levels of public official corruption than those who have not personally experienced corruption. In any case, Figure III-1 illustrates the tendency of citizens in Central and South America to believe that the public officials who serve them are dishonest and corrupt.

#### *AmericasBarometer's Corruption Victimization Index*

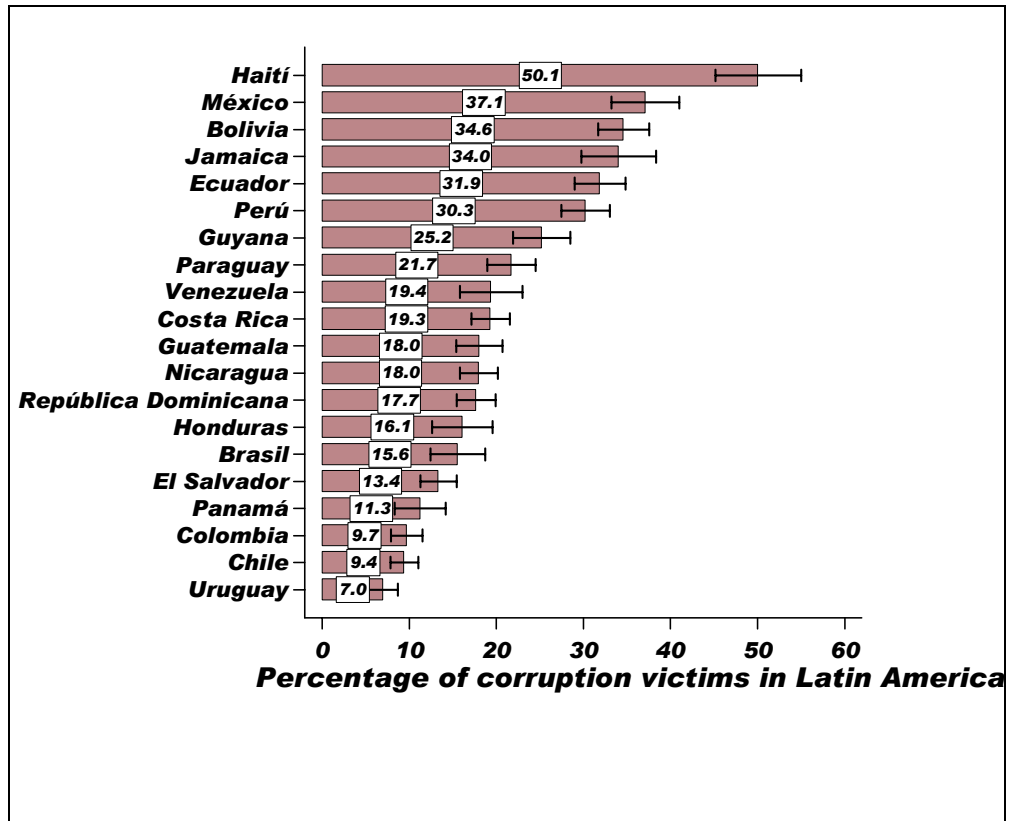
Inspired by crime victimization surveys, originally created by criminologists to deal with the problem of manipulation of official data regarding criminal violence, LAPOP created an index that focuses on actual citizen experience with public sector corruption. To that effect, a module of questions on corruption experience was developed. In this approach, citizens are asked about their personal experience with corruption over the year immediately prior to the survey. Although a study of longer time frames can be attempted, it is not advisable, since the memory of respondents tends to become less reliable with time (Tourangeau, et al. 2000). In order to create the corruption victimization index, the following questions were asked:

1. Has a police officer requested a bribe from you in the last year?

2. Has a public official asked you for a bribe in the last year?
3. Have you had any dealings with your city hall in the last year? If so, were you required to pay any additional fees other than those required by law?
4. Do you work? If so, have you been asked for an inappropriate payment at work in the last year?
5. Have you had any dealings with the courts in the last year? If so, were you ever asked to pay a bribe in the courts?
6. Did you use the public health services in the last year? If so, did you have to pay a bribe to be seen by a doctor?
7. Have you had a child in school in the last year? If so, were you asked to pay a bribe in your child's school?

The AmericasBarometer index of corruption victimization compiles the number of ways in which citizens experienced corruption during the year prior to the survey. Figure III-2 shows the percentage of citizens who were victimized by corruption at least once in the 12 months before the surveys were administered.

**Figure III-2. Corruption Victimization in Latin America**



The first thing that is striking about these findings is the disparity between the perception of corruption and actual corruption victimization in Bolivia and Haiti. In Figure III-1, Haiti and Bolivia were described as two of the countries in the region with the lowest levels of corruption perception. In reality, however, one out of every two Haitians had to pay a bribe at least once in the year prior to the survey, and almost 35% of Bolivians had the same experience. As mentioned earlier, this disparity is mainly due to external factors that affect a respondent’s perception of corruption but are not necessarily related to it. I will explore this further than the line when I analyze the effect of judicial independence on individual perceptions of corruption. On the other hand,

Uruguay and Chile have consistently shown to be the countries with the lowest levels of corruption in the region, both in perceptions and in actual citizen experience.

While measuring corruption victimization opens new avenues for research on corruption and contributes to the identification of the sources of corrupt behavior, identifying areas of priority for policy makers, there are two limitations that accompany these types of measurements. One is that questions on bribery do not always allow the researcher to isolate the respondent as the victim of corruption. In some instances, the respondents are willing participants who deliberately seek to circumvent the norms in order to advance their own objectives (Seligson 2006:389). Another limitation is that these types of measurements fail to tap into high level corruption. Though this is a valid criticism, one must not assume that low level and high level corruption are not related. Usually corruption at the street level is the consequence of corrupt behavior trickling down from the higher spheres of government (Becker 1999).

### Judicial Independence and Corruption

The focus of this section is to explore the relationship between judicial independence and corruption in Latin America. While it has been established that there is a connection between independence and corruption within the judiciary, it is not clear whether the connection is maintained when corruption is measured at the street level. In an attempt to answer this question, I interviewed several judicial experts, legislators and decision makers, in order to find out what, if anything, makes judicial independence

important in the fight against corruption<sup>31</sup>. The answers I received were as diverse as the experts who gave them. Some spoke of a strong relationship between independence and corruption. A lawyer and member of the constitutional assembly told me that “there is a clear relationship between independence and corruption and I would say so without any data backing me up”. A member of the Supreme Court also believes that the two are clearly related “Corruption is fueled by impunity. An independent judge doesn’t answer to anybody but himself and the law. Therefore, there will be less impunity and in turn less corruption”, he said. On the other hand, another Supreme Court Justice thinks believes the association is more complex than that. He reports that “the relationship between corruption and judicial independence is one that must be looked at carefully. At the highest levels of a political sphere, this is an easy relationship to weed out; however at the lower level the connection is not so clear or direct, because the common citizen is too far from high political spheres”. In the end, I found that although a majority believes that there is a relationship between judicial independence and corruption, there is no clear consensus among the experts on this subject.

After listening carefully to the opinions and experiences of experts, I have identified two ways in which judicial independence affects corruption at the ground level. One is by making the citizens resort to corruption as an alternative solution and the other one is by forcing citizens to pay bribes in order to obtain a public service. The judiciary is conceived as a mechanism for conflict resolution between parties, be them public or private. If this mechanism is not working properly, it fails to accomplish its goals and

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<sup>31</sup> All the interviews were conducted by the author in Quito and Guayaquil during the months of October and November of 2007.



citizens are left with the option of seeking alternative methods to resolve their problems. Corruption is one of the more common alternative solutions. In order to function the way it is supposed to, a judiciary must be accessible, efficient and independent. When one of these requisites is missing, the judiciary cannot supply the citizens with timely justice and citizens are left to look for other ways to obtain it. It is easier to imagine corruption as the result of lack of access or efficiency than as a result of a dependent judicial power, but one has to understand that efficiency, access and independence are not mutually exclusive concepts. The problems of access or efficiency are more often than not directly related to the lack of judicial independence. For example, the lack of fiscal independence of the judiciary in any given country is going to affect this judiciary's capacity to maintain a physical presence in remote areas of the country, thus affecting access to justice. Also, the lack of qualifications of a Supreme Court judge, a vital requisite for judicial independence, will undoubtedly affect his performance and efficiency when it comes to the timely and appropriate emission of rulings.

An illustration of how the lack of independence forces the common citizen to resort to corruption was given to me by an experienced lawyer. He gave me the example of a traffic accident between two uninsured private parties. Under a working judiciary, both parties would be subject to the decision of a judge, based on a police report describing the accident. However, usually parties involved in a traffic accident will automatically assume that the judge is not independent, meaning that his decision will not only be influenced by the law and the facts, but can also be swayed by the intervention of a third party. The result is that both parties agree to pay the police officer a bribe to leave

the scene without filling a report on the accident. That way a private solution can be reached between drivers, avoiding lengthy litigious procedures.

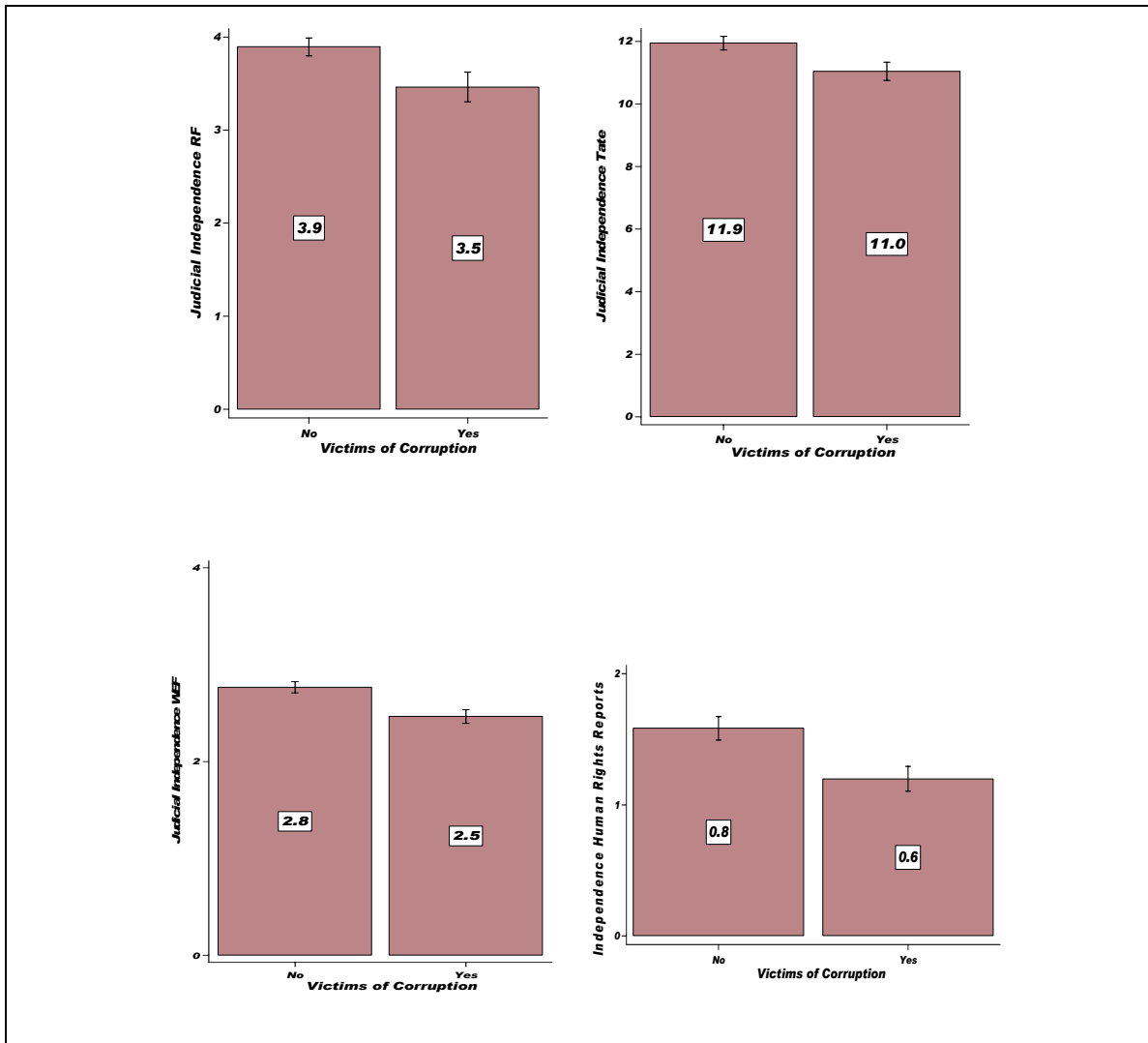
Another way in which independence affects corruption is by forcing citizens to pay for services for which they are not meant to pay. The most common example given to me was the one of the *citador*, or process server. This is the person in charge of delivering the citations and subpoenas to the parties involved in a lawsuit. When party A sues party B, the *citador* must deliver the citation to party B's pre-determined judicial locker. However, because of the lack of internal independence, lower courts cannot assign any resources to cover the expenses of these clerks. The result is that party A becomes responsible for the transportation of the clerk as well as for compensating him for his services. If party A refuses, he will simply be unable to carry out the lawsuit.

However, is there a direct empirical connection between the independence of a judiciary and corruption? In the pages that follow, I argue that in countries with strong and independent judiciaries, experiences with corruption are less frequent than in countries where the judiciary is weak and heavily influenced by other sources. Figure III-3 shows the bivariate relationships between the four measures of judicial independence used in this study and corruption victimization in Latin America. According to the graphic, all four measures of judicial independence are negatively related to corruption victimization in the region. The bars show that on average, citizens that were not victimized by corruption in the year prior to the survey live in countries with higher levels of judicial independence than respondents who had to pay some sort of bribe. The results are consistent across all four measures of independence, showing higher average

values of independence for citizens who were not forced to pay bribes in public or private instances.

Over the following pages, I will use individual multilevel models to test the multivariate relationships between judicial independence and corruption and discuss the consequences that the different ways of measuring independence have on this variable's effect on corruption victimization in Latin America.

**Figure III-3. Judicial Independence and Corruption**



*Dependent Variable:*

The dependent variable is corruption victimization, measured based on the experiences of citizens with corruption in several public and private settings. An index of corruption victimization was built based on the seven questions I enumerated earlier. These questions look at bribery with the police, public employees, within the court system, in schools, hospitals and at work. Of the 30,000 respondents in the 2006 round of the Americas Barometer, 22% were victimized by corruption at least once in the year prior to the survey. However, very few people reported being a victim of corruption two or more times. Using the index of corruption victimization would decrease the precision of the coefficients, due mainly to the decreasing number of observations in the categories that measure multiple experiences with corruption. That is why I have decided to use a dichotomous variable of corruption victimization as the dependent variable. This means that a value of zero will be assigned to the respondents who did not experience corruption in the year prior to the survey, and a value of one will be assigned to those who were forced to pay a bribe.

*Independent Variable:*

The independent variable is judicial independence. I use four different measures of independence, two *de iure* and two *de facto*. The first formal, or *de iure* measure of independence from Rios-Figueroa. As I described earlier, this measure is based in several formal constitutional provisions grouped into three categories. Autonomy, measured as the institutional level independence of the Supreme Court regarding the other branches of government. External independence, which refers to the individual autonomy of Supreme Court Justices, their appointment, removal and tenure and internal independence, looking

at the relationships between lower court judges and their hierarchical superiors. The second formal measure of judicial independence comes from Tate, Poe and Keith and it also looks at constitutional provisions that are supposed to guarantee independence. This measure focuses on nine specific stipulations. Guaranteed terms for Supreme Court Justices, exclusive authority of judges to decide on their competence, finality of the decisions of the Supreme Court, fiscal autonomy for the judicial branch, a constitutional guarantee for separation of powers, enumerated qualifications for Supreme Court Justices a ban on exceptional and military courts, the power of judicial review and finally the existence of a hierarchical system within the judiciary.

Two measures of practical judicial independence are also used in this section. The first measure is the result of analyzing the 2005 State Department's Human Rights Reports for every country in the region. Their analyses of these reports contain several paragraphs that address the judicial branches of these countries and an assessment of their independence. The autonomy of the judiciary is measured on a three point scale that goes from low to high based on the descriptions given in the reports. Finally, a second de facto measure of judicial independence is based on a survey of Chief Executive Officers and top economic managers conducted by the World Economic Forum. The survey asks a question about the independence of the judiciary. The measure is based on a seven point scale that goes from heavily influenced to totally independent.

*Control Variables:*

I have introduced several socio-demographic factors as control variables, given that corruption, especially in the form of bribery, does not discriminate based on political

or ideological preferences. Based on prior studies of corruption victimization (Seligson 06, Zephyr 07) I have introduced the following control variables.

- Education measured by number of years. Education tends to be positively correlated with corruption, meaning that those who are more educated have a larger probability of being victims of corruption than those who are less educated. At first glance this assertion may sound counterintuitive, since one would expect more educated people to be less susceptible to bribery. However, the difference may be due to an underreporting on the part of less educated people, who tend to justify corruption and view it as normal.
- Age measured in different groupings. LAPOP's data shows that adults between 26 and 35 are in the age group with the highest probability of being victimized by corruption. This is not surprising, since adults in that age group make up the majority of the economically active population in Latin America and because of that they are more exposed to corruption. As age increases, the probability of being victimized by corruption decreases.
- Gender. Because of traditional gender roles in Latin America, males are usually more exposed to corruption than females, especially in the work place, in the court system and in instances involving public officials. The only instance where women are more susceptible to corruption according to LAPOP's data is in their children's schools.
- Size of the town. Usually people living in large cities have a larger probability of being victimized than people living in small towns or rural areas. There is usually

little to no presence of the state in small and rural towns, which drastically reduces the probability of corruption victimization.

- Wealth measured by the ownership of material goods. A variable closely associated with education, wealth is also positively correlated with corruption victimization, meaning that as wealth increases so does the probability of being victimized by corruption.
- Number of children. As one would imagine, a larger number of children increases the probability of corruption victimization, especially in public hospitals and schools.

#### *Results and Analysis:*

The nature of my data requires that I combine information at the level of the respondents but also at a country level. This means that my data has a multilevel structure where one unit of analysis [individuals] is nested within the other [countries] (Bryk and Raudenbush 1992). To estimate my models, I rely on a statistical technique developed specifically for modeling multilevel data structures (Anderson and Tverdova 2003, Steenbergen and Jones 2002). In multilevel models, the dependent variable [corruption victimization] varies at the lowest level, taking on different values for different level-1 units [individual respondents] within the same level-2 cluster [countries]. However, explanatory variables can either vary at level 1 or at level 2. For instance, while education can change from one individual to the next, judicial independence is constant between individuals of the same country (Rabe-Hesketh and Skrondal 2005).

Prior to the regression analysis, a test of variance was conducted. The goal of the test was to find out if variation in the dependent variable occurs only at the individual level or if there is any variation at the country level. The results indicated that approximately 7% of the variation in the dependent variable happens at the country level, and that this percentage is statistically significant. This means that multilevel analysis can be conducted with these data. Table III-2 shows the result of the logistic multilevel models that regressed corruption victimization on judicial independence in Latin America. All four models are consistent in respect to the effect that the individual level control variables have on the dependent variable. As I explained earlier, education and wealth have a positive and significant relationship with corruption victimization. This means that citizens that are more educated or own more material goods have a higher probability of being victimized by corruption than their favored counterparts. Conversely, age and the size of the city where the respondents live have a negative and statistically significant relationship with corruption victimization. Older citizens and citizens living in small size towns are less susceptible to corruption victimization than younger citizens and respondents living in large cities. Finally, females have a smaller probability than males of being demanded a bribe in private or public instances.



**Table III-2. Corruption Victimization Regressed on Judicial Independence, Age, Education, Wealth, Urban/Rural, Size of Town and Number of Children (Multilevel Model)**

| Corruption Regressed on Judicial Independence and Control Variables |         |            |              |          |            |              |              |             |                      |              |             |                      |
|---|---------|------------|--------------|----------|------------|--------------|--------------|-------------|----------------------|--------------|-------------|----------------------|
| Variables   | Model I |            |              | Model II |            |              | Model III    |             |                      | Model IV     |             |                      |
|   | Coef.   | Std. error | P> z         | Coef.    | Std. error | P> z         | Coef.        | Std. error  | P> z                 | Coef.        | Std. error  | P> z                 |
| Age   | -.100   | .012       | .000<br>.000 | -.100    | .013       | .000<br>.000 | -.099        | .013        | .000<br>.000         | -.099        | .013        | .000<br>.000         |
| Education   | .037    | .004       | .000<br>.000 | .037     | .004       | .000<br>.000 | .037         | .004        | .000<br>.000         | .037         | .004        | .000<br>.000         |
| Wealth  | .081    | .009       | .000<br>.000 | .081     | .009       | .000<br>.000 | .081         | .009        | .000<br>.000         | .081         | .009        | .000<br>.000         |
| Urban/rural   | .100    | .056       | .076<br>.037 | .100     | .056       | .075<br>.037 | .100         | .056        | .075<br>.037         | .101         | .056        | .074<br>.037         |
| Size of town  | -.083   | .016       | .000<br>.000 | -.084    | .016       | .000<br>.000 | -.083        | .016        | .000<br>.000         | -.083        | .016        | .000<br>.000         |
| Number of children  | .054    | .008       | .000<br>.000 | .054     | .008       | .000<br>.000 | .054         | .008        | .000<br>.000         | .054         | .008        | .000<br>.000         |
| Female  | -.486   | .030       | .000<br>.000 | -.486    | .030       | .000<br>.000 | .485         | .030        | .000<br>.000         | -.485        | .030        | .000<br>.000         |
| Indep. RF   | -.101   | .070       | .150<br>.075 |          |            |              |              |             |                      |              |             |                      |
| Indep. Tate   |         |            |              | -.063    | .035       | .074<br>.037 |              |             |                      |              |             |                      |
| Indep. HRR  |         |            |              |          |            |              |              |             |                      | <b>-.409</b> | <b>.182</b> | <b>.025<br/>.012</b> |
| Indep. WEF  |         |            |              |          |            |              | <b>-.265</b> | <b>.113</b> | <b>.019<br/>.009</b> |              |             |                      |
| Const.  | -1.20   | .304       | .000         | -.819    | .449       | .069         | .845         | .347        | .015                 | -1.24        | .218        | .000                 |
| N   | 28422   |            |              | 28422    |            |              | 28422        |             |                      | 28422        |             |                      |

Table III-2 shows mixed results when it comes to the effect of judicial independence on corruption victimization. The columns showing the P values have two numbers after each coefficient. The first number indicates the P value obtained after conducting a two-tailed test of significance, the number below indicates the results of a one-tailed test. The latter is a slightly less robust test of statistical significance that is conducted when the researcher has a concrete hypothesis regarding the direction of the

relationship between the dependent and independent variables. The results indicate that the two *de iure* measures have a negative impact on corruption victimization, but they are not statistically significant when the two-tailed test of probability is applied. However, the one-tailed test of probability shows slightly different results. While the effect of judicial independence on corruption victimization continues to be negative, one of the measures, the one formulated by Tate and Keith, becomes statistically significant. Since both measures are the result of several components, I also regressed corruption victimization on each of the components that make up the measurements, with almost no variation in the results. Rios Figueroa's formal measure of judicial independence was formed by three separate dimensions of independence, autonomy, external independence and internal independence. I analyzed each one separately. Autonomy and external independence are negatively related to corruption victimization, but their impact is not statistically significant. On the other hand, the regression coefficient of internal independence was positive, meaning that more internal independence, which is the autonomy of lower court judges regarding their hierarchical superiors, increases the probabilities of corruption victimization. However, this coefficient was not statistically significant either.

The second formal measure of judicial independence also contained several components. The statistical analysis on each of these components showed that only one constitutional provision of judicial independence, enumerated qualifications, had a significant effect on corruption victimization. The enumerated qualifications provision requires the constitution to establish that the selection and career of judges are based on merit, qualifications, integrity, ability and efficiency. In other words, good judges that

base their decision exclusively on the law and show themselves to be independent and free from outside influences have an impact on the reduction of corruption in the region.

Other dimensions of formal judicial independence, such as the explicit statement in a constitution about the separation of powers, and the fiscal autonomy of the Supreme Court had a negative impact on corruption victimization that was statistically significant at the .1 level and became statistically significant at the .05 level when a one tailed test was conducted. On the other hand, qualifications such as judicial review and the establishment of a hierarchical system within the judiciary were positively related with corruption victimization. Overall, formal measures of judicial independence proved to be an ineffective predictor for corruption victimization. This means that constitutional provisions do not translate into an effective reduction of corruption victimization in Latin America. This is a significant finding, considering the importance that Latin American countries have placed in their constitutional texts lately, so much so that in the last five years, three countries in South America, Ecuador, Bolivia and Venezuela drafted new constitutions that included among their many objectives a drastic reduction of corruption in their territories.

While formal measures of independence did not have the expected impact on corruption victimization, both *de facto* measures of independence did. The multilevel logistical regression results show that beyond the individual characteristics that make a person more or less susceptible to corruption victimization, context also matters. A young educated male in Uruguay, for example, has a smaller probability of being victimized by corruption than a person with the same characteristics in Ecuador, a country with very low levels of judicial independence. Figure III-4 illustrates the effect of judicial

independence on corruption victimization. The dots to the right of the zero line represent a positive and statistically significant relationship with the dependent variable while the dots to the left of the line represent a negative and statistically significant relationship. The graph shows that except for the urban/rural variable, all of the other individual level factors significantly affect a respondent's probabilities of being victimized by corruption. The confidence interval around the judicial independence dot is larger than the others because independence is a level two measure, and so the number of observations is reduced from 30,000 individuals to 20 countries.

**Figure III-4. Corruption Victimization Regressed on Number of Children, Wealth, Education, Age, Size of Town, Urban/Rural, Sex and Judicial Independence**

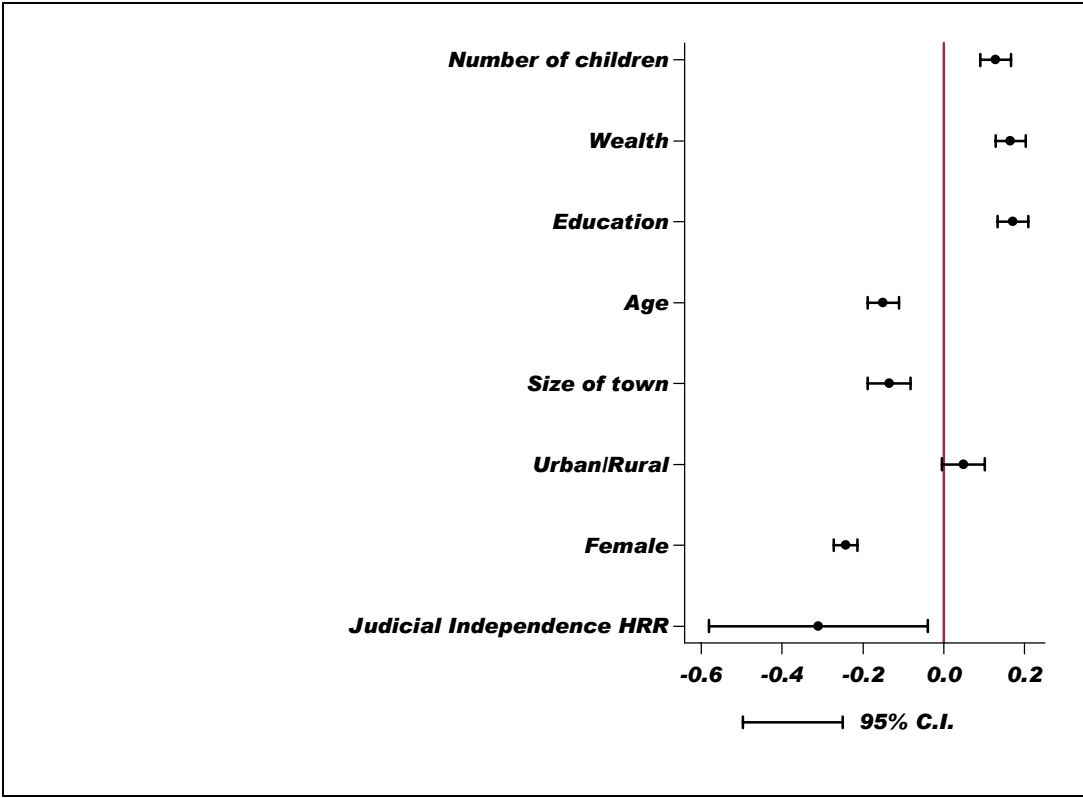
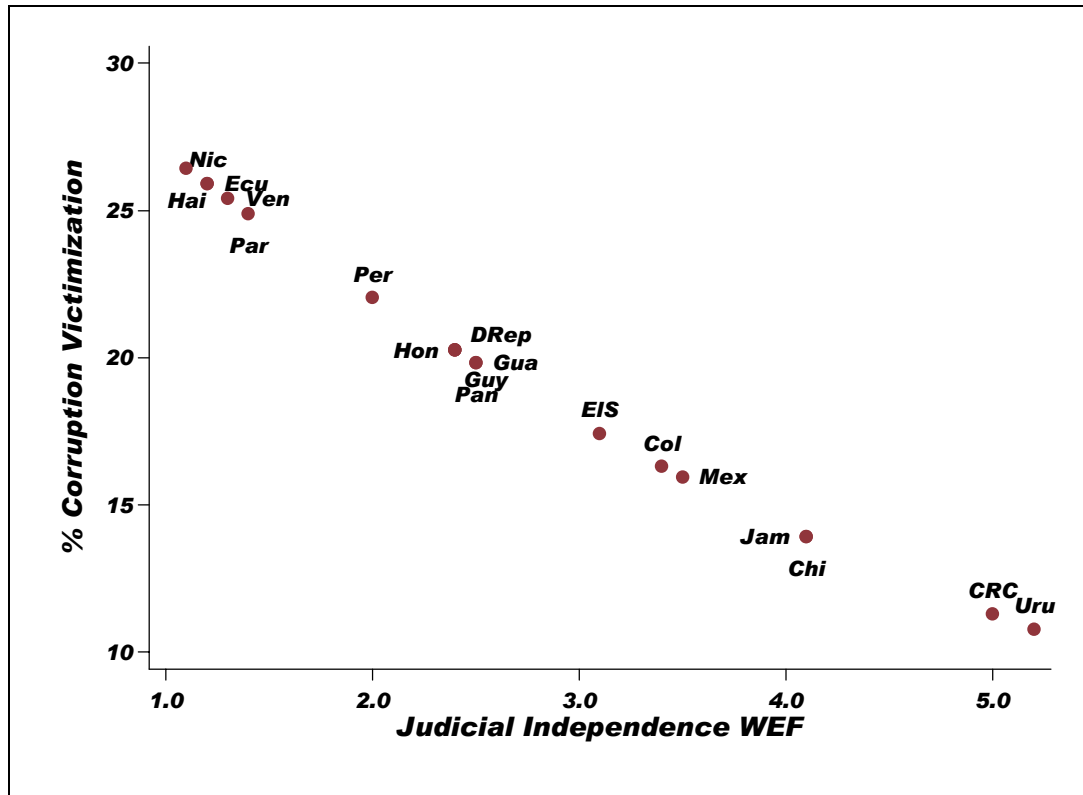


Figure III-5 shows the effect of judicial independence at the country level, measured by the World Economic Forum, on corruption victimization controlling for all other individual level variables. Uruguay and Costa Rica, the countries with the highest level of judicial independence according to this measure, are also the countries with the lowest levels of corruption victimization. At the other end of the spectrum are countries like Haiti, Venezuela and Ecuador, countries with weak and politicized judicial systems and significantly higher levels of corruption victimization in the region.

**Figure III-5. Judicial Independence and Corruption Victimization in Latin America**



The statistical analyses, as well as the insights given to us by several experts in the judicial field, provide empirical support to the idea that context matters. The data has shown that in countries where judicial independence is not only written into the constitution but can actually be observed by the country's citizens and international observers, incentives for corruption decrease and individual citizens are better protected against bribery in public and private sphere. On the other hand, while formal provisions for judicial independence fail to produce a direct effect in corruption victimization in Latin America, their importance should not be diminished. Beyond the empirical evidence linking the importance of designating qualified and efficient judges and a reduction of corruption victimization, formal guarantees for judicial independence protect

judges from external influences and help set the ground rules for a more efficient judiciary that can effectively assist in the fight against corruption in the region.

## Conclusions

This chapter of the dissertation has attempted to expand on the knowledge of the connection between judicial independence and corruption. The first section of this chapter looked exclusively inside the judiciary and concluded that widespread tolerance for corruption in modern societies; mediocre institutional design and constant influence by the other two branches of government are among the main sources for judicial corruption. In the next section I went beyond the scope of the judiciary and looked at corruption in general in Latin America. I also presented some of the most common measures of corruption in the region, including Transparency International's Corruption Perception Index and their newer effort, the Global Corruption Barometer.

The chapter next turned to the development of an innovation in the way judicial independence is linked to corruption, by attempting to uncover the effects of independence on corruption victimization in 20 Latin American countries. The results showed that independence only has a direct effect on corruption victimization when it is measured *de facto*. Countries where judicial independence is an observable phenomenon have greater success in the fight against corruption than countries where the judiciary is constantly subject to external influences. The encouraging preliminary results suggest that extending the dataset in time would be a worthwhile enterprise, given that while

formal measures of judicial independence show little variance over time, practical measures, which produce an observable effect on corruption victimization, do vary in shorter time spans give their susceptibility to political events, especially in a turbulent region like Latin America.



## CHAPTER IV

### JUDICIAL INDEPENDENCE AND THE RULE OF LAW

The efficacy of the rule of law is based on the ability of the State to enforce and comply with the laws of the land in an appropriate, efficient and timely manner. A functioning judiciary is a crucial element in the maintenance of the rule of law, since it is the enforcer of the norms and the principal vehicle used to resolve conflicts between the State and its citizens. Judicial reform and the consolidation of the autonomy of the justice system have been top priorities in Latin America when it came time to design new public policies. These reforms have been aimed to strengthen the judicial power with respect to the Executive and the Legislature, but also to improve the way the case load is managed, the competence of the judges and the overall mechanisms of conflict resolution. The relevance of justice reform, however, may seem diminished when the system overall lacks legitimacy among the population. This chapter explores the effects that judicial independence has on the personal attitudes of citizens. It explores the consequences of those attitudes on the consolidation of liberal democracy in the continent. The first section of this chapter will look at the rule of law, its definition and its importance in a democratic system. The second section will deal with the effect that justice reforms in Latin America have had on the rule of law. Finally, I will explore the empirical relationship between judicial independence and individual citizen support for the institutions that enforce the rule of law in Latin America.

## What is the Rule of Law?

Democracy cannot exist without the rule of law. A constitution is useless without a judiciary that supports it. A law is ineffective without officials to uphold it and an election is empty if the winners do not respect the rights of all citizens. The ability of a nation to create a rule of law helps determine a democracy's character and future prospects. The rule of law makes constitutional rights a reality, and adopting measures to create it is therefore one of the biggest steps towards democratic consolidation (Ungar 2002). Without rule of law, the undemocratic patterns rooted in the history of Latin American countries will flourish under the cover of democratic institutions eventually undercutting them.

One question that arises from the above paragraph is "What does it take to construct the rule of law?" The first element most commonly identified by the existing literature is an accountable, law abiding state whose agencies cooperate with judicial procedures, carry out court rulings and follow constitutional norms in good faith (Dorsen and Gifford 2001, Maravall and Przeworski 2003). But, why would governments, with ready access to multiple means of repression, be induced to make their behavior predictable and cooperate with other agencies? To answer this question one might have to look back all the way to Machiavelli. His thesis, essentially, is that governments are driven to make their own behavior for the sake of cooperation (1985). Governments tend to behave as if they were bound by law, rather than using the law unpredictably as a means to discipline subject populations. They do this less because they fear rebellion than because they have specific goals that require a degree of voluntary cooperation from

specific social groups possessing various skills and assets. Assuming that a political ruler is internally coherent, acts upon rational calculations and is in full control of the means of repression, the only reason to submit to regularized constraint is the perception of the benefits of doing so. This position, first stated by Machiavelli, was later defended by Tocqueville, who stated that “if remote advantages could prevail over the passions and needs of the moment, there would have been no tyrannical sovereigns or exclusive tyrannies” (1969:210). In order to maintain a self-sustaining system, however, some constitutional rules restraining rulers must be created, always allocating power to individuals with a strong incentive to keep the system in place.

The Machiavellian analysis, while, suggestive, remains incomplete, because a political authority that submits to constitutional restraints to obtain voluntary social cooperation has no incentive to treat all groups equally, since it needs the cooperation of some groups more than the cooperation of others (Holmes 2003). The second part of the answer of why the rulers subject to the rules is provided by Rousseau. He claimed that if we define the rule of law in such a way as to exclude disproportionate influence of organized interests on the making, interpreting and applying of the law, we have identified a system that has never existed and will never exist. This does not mean, however, that we should dismiss the concept as useless for descriptive purposes. If we identify the rule of law as a point of ideal justice, says Rousseau, then we must admit that the rule of law can never be achieved, but it can be approximated. The circle of those able to protect their interests can be expanded. According to Rousseau, the rule of law can be approximated in those societies where various roughly equal groups making up a large

proportion of the population all gain some leverage over the government and its privileged social partners (Rousseau 1969).

The second element in the constriction of the rule of law is a functioning judiciary. This judiciary must first be accessible, meaning that impartial mechanisms of conflict and grievance resolution, primarily but not exclusively in the judiciary, must be available to all individuals. The judiciary must also be an autonomous one, where judges and officials make binding decisions on cases and interpretations of the law, with necessary logistical and material support and without undue interference from governmental or private interests (Abraham 2001, Ungar 2002). Weakness in this element has grave consequences. When judiciaries are biased, corrupt and excessively bureaucratized, they are prevented from meeting their own procedural standards and constitutional obligations. Even if they are efficient, those judiciaries may be inaccessible to the vast majority of citizens, discriminatory against certain social sectors, or lacking rudimentary channels, such as the notification of defendants' families. Going back to the Machiavellian argument, it is also in the ruler's convenience to grant full autonomy to its judiciary, and take no credit or blame for its actions, thus giving the ruling party the option of deniability.

The following pages will further explore the importance of judicial independence not only as an element of the rule of law, but also as a core ingredient of its definition. Judicial independence is a necessary component for the subsistence of the rule of law in Latin America, a region that in the recent years has started to build a history of strong, dominant executives and judiciaries struggling to ascertain themselves as a valid counterweight to executive power.

*Defining the Rule of Law:*

A question preliminary to any attempt to define a concept in the social sciences is why we seek to define it in the first place. In the case of the rule of law, there are two reasons. The first reason is that one obviously wants to be clear about what is meant by the phrase, rule of law. The second reason is that it is necessary to spell out the ingredients of the rule of law in order to demonstrate that it is a genuine and living principle and not just merely a vague political aspiration (Walker 1988:7). There are many ways to define the rule of law. One could do it in terms of the values that it is supposed to serve, such as human dignity or individual fulfillment through the development of one's capacities. The rule of law can also be defined in term of the principles whereby the institutions that enforce it need to be safeguarded, such as the rule that a legal basis must be shown for every government action interfering with the rights of the citizens; or in terms of the procedures which those institutions use to serve their purpose, such as public hearings, trials, habeas corpus, etc (Dietze 1973).

In this chapter, I base my definition of the rule of law on the institutions responsible for safeguarding those standards and principles that the rule of law values, as well as for executing the procedures that enforce it. By examining a country and seeking to identify the institutions that serve to maintain its rule of law, we can make an assessment on whether or not the rule of law prevails in that country. The point of view taken here is that the rule of law does prevail to a greater or lesser degree in countries with the appropriate institutional settings.

The institutional description of the rule of law I am about to present is a summarized version of the definition formulated by Geoffrey Walker (1988:24-42). This is one of the most comprehensive definitions of the rule of law and it encompasses the institutions and procedures necessary for its safeguarding. The definition begins by accepting a preliminary proposition made before by Joseph Raz (1977), who claimed that most of the content of the rule of law can be summed up in two points. One is that people [including the government] should be ruled by the law and obey it. The second point is that the law should be such that people will be willing and able to be guided by it. From these two basic propositions, Walker deduces twelve requirements which I list and explain below. These points have been repeatedly stressed as essential by scholars, such as Rawls (1973) and Jowell (1985) practitioners and judges.

- Laws against private coercion: There must be substantive laws prohibiting private violence and coercion and of such character as to give the citizen protection against general lawlessness and anarchy.
- Government under law: The government must be bound by substantive law, not only by the constitution, but also as far as possible by the same laws as those that tie individuals. This includes criminal laws, which, for example, by penalizing homicides committed by government authority, protects citizens from any form of state terrorism.
- Certainty, generality and equality: The substantive law must be guided by the principle of normativism. Certainty means that all laws should be prospective, open and clear, and that they should be relatively stable. This principle condemns

the enactment of excessively vague laws that delegate to administrators and judges the power to deal arbitrarily with citizens. Generality requires that while laws should be specific about what they prohibit, they should also not particularize the subjects to whom they apply. Unless the law is specific in terms and general in application, and remains so over time, it ceases to be a system of norms and gives the government scope to become arbitrary in its behavior. Finally, the equality principle is in a sense a corollary to the idea of generality. It is the main basis for protecting the general interest against influence by pressure groups and other special interests. It restrains a legislature from enacting bills which unilaterally benefit or injure particular individuals or groups. However, one must remember that certainty, generality and equality are relative concepts in the legal context. Certainty, for example, must be weighed against the need for flexibility, otherwise there will be a danger that the law will move too far out of line with public opinion and will become a barrier to progress.

- General congruence of law with social values: There must be some mechanism for ensuring that the law is, and remains, reasonably in accordance with public opinion. Otherwise, there may be widespread disrespect for the law and pressures for violent change may build up and find expression in arbitrary acts of hostility. This mechanism could take a variety of forms. Where the law consists of recognized custom, what is needed is a willingness in the part of the courts to give due recognition to new customs as they become established and displace old ones. Where the statute is an important source of law, some other form of consultation

with the people may be required, in the form of direct or representative democracy.

- Enforcement of laws against private coercion: The fundamental requirement here is for institutions and procedures that are capable of speedily enforcing the substantive laws mentioned above, those which prohibit private violence, coercion and anarchy. The rule of law depends on the existence of an effective government capable to maintaining law and order.
- Enforcement of government under law principle: There must be effective procedures and institutions, such as the judicial review of executive action, to ensure that the government action is also in accordance with law. Without this enforceable reciprocity, law cannot operate as a restraint power.
- Independence of the judiciary: An independent judiciary is an indispensable requirement of the rule of law, indeed of all known methods of controlling power. It implies freedom from interference by the executive whether by way of threats or by way of bribery, such as the offering of the prospect of a successful career (Tsang 2001). Nor should there be any interference by the legislature with the exercise of the judicial function. Perhaps the usefulness of judicial independence is best described by the following quote by political scientist Ralf Dahrendorf:

“The power of the law, and of the judiciary, is in its independence. There are excellent reasons why notions like respect and dignity should be associated with the law above all. There are equally good reasons why the appointment of judges and their tenure of position, should be arranged in such a way as to emphasize that they are not dependent on any other branch of public authority, at least once they have been appointed. The power of the law and those who administer it is in the very fact that they are not competing with the more partisan powers of the



executive and even the legislature. Such independence of the judicial department may indeed be regarded as the very definition of the rule of law: it is certainly an important part of it. If the law and the judiciary come under government control, they cease to be necessary as such; if courts become a part of political struggles, they merely simulate parliament and parties and lose their function. Either way the partisan administration of law is in fact the perversion of law, and the denial of the rule of law” (Dahrendorf 1977:9)

It is in the dispute with the executive or the legislature that judicial independence matters the most. Impairing independence undermines confidence in the courts as dispute-settling mechanisms. This can threaten the stability, and eventually the existence of the social order. While the rule of law requires that judges be independent, they must also be bound by law, their function being to interpret the law and the fundamental principles and assumptions that underlie it (Wesley-Smith 2001). If there are no limits to the power of judges to make law we would be under the mercy of what Walker calls a judicial oligarchy.

- Independent legal profession: Some system of legal representation is required. This should take the form of an organized and independent legal profession. In criminal cases it is particularly important that the accused should have the opportunity to be represented. Even when the independence of the courts has been compromised by government pressure, an independent bar can remind the judges of their duty and generally keep the rule of law ideals alive.
- Natural justice; impartial tribunals: The principles of natural justice, as the term is understood in law, must be observed in all trials. Whether truly natural or not, these principles are certainly very old. The rules of natural justice are defined today as including the requirement of an unbiased tribunal, the hearing of both sides of the case and open courts with the possibility of press reporting. In

criminal cases, there should be a presumption of innocence and denial of a charge must not be held against a party in a criminal matter or any other case. The principles of natural justice are closely associated with the requirement for an independent court. Their function is to legitimate the court as a dispute-settling mechanism by requiring rational procedures that demonstrate a concern for an individual and his problems.

- **Accessibility of courts:** The courts should be accessible, so that a person's ability to vindicate legal rights is not vanished by long delays or excessive costs. The cost of litigation has been a deficiency of judicial systems in a large part of the region and that must be overcome, at least in part, by legal aid and by the creation of alternative sources of conflict resolution such as mediation and arbitration centers. Along with the costs of litigation, the physical absence of the courts in remote areas of several Latin American countries is another grave problem that must be solved in order to grant all citizens equal access to justice.
- **Impartial and honest enforcement:** The discretion of law enforcement agencies or of other government officials or of political office holders should not be allowed to pervert the law. Nor should perjury by police officers, a particularly serious problem in regimes with strong executives that demonstrate authoritarian tendencies.
- **An attitude of legality:** While the other eleven items embody the main requirements of the rule of law in terms of substantive law, procedures, practices and institutions, this one element is difficult to articulate with precision. It is there

to remind us that the health and strength of the rule of law does not ultimately depend on the efforts of lawyers, judges or police, but on the attitudes of the people. What this requirement of spirit means, therefore, is that having defined the concept explicitly, we are still left with an important residue of meaning that cannot be translated into words. The rule of law has a dimension of spirit that does not fit into the framework of constitutional and legal concepts. But since emotion is the spring to human action, this dimension is what gives the previously mentioned concepts their practical force. When the rule of law is defined this way, its fundamental importance becomes clear. It is plainly the essential precondition of the whole legal, constitutional and perhaps social order. For unless the law can command obedience, there is no legal system, unless those in power abide by the rules of law laid down for the exercise of power, there is no constitution, and unless all parties accept the results of political processes undergone in accordance with the law, there is no democracy. The rule of law is not a complete formula for the good society, but there can be no good society without it.

In its concluding section, this chapter will take a closer look at the attitudes of citizens in Latin America with regards to the rule of law. While the attitudes and beliefs of citizens with respect to the institutions that make up the rule of law might be its most important component, it is important to realize that they are also influenced by the performance of these procedures, practices and institutions. With the empirical analysis conducted in this section, I will explore the effect that the independence of the judiciary, an indispensable ingredient for the rule of law, has on individual support for the

institutions that represent it in Latin America. The next section of the present chapter, however, deals with the impact that the judicial reforms conducted in several countries throughout the region during the last two decades had on the state of the rule of law and ultimately in the consolidation of liberal democracies Latin America.

### Judicial Reforms and the Rule of Law in the Americas

When writing about the United States, Alexis de Tocqueville commented on the role of the judiciary system in the construction of the rule of law. When referring to the U.S. Supreme Court, he stated that “a more imposing judicial power was never constructed by any people” (Tocqueville cited in O'Donnell 2000). Tocqueville was impressed by the fact that judges were obeyed even when they contradicted the preferences and policies of public officials. In the absence of a regular security force, the courts' decision for a reason that he found very difficult and at the same time very simple to explain: Most people just felt that the courts decisions had to be obeyed, and there rests one of the strongest pillars of democracy in the United States.

Many years after Tocqueville would write about democracy in the United States, the nations of Latin America reversed a tendency of authoritarian and military governments and started a complicated transition towards liberal democracy. A transition that, in several countries, is still going on and although usually obscured by more prominent actors, the judiciaries of some of these Latin American countries have played a crucial role, especially in the beginning of these transitions. In Argentina, for example,

by asserting itself as an independent body, the judiciary was the first branch of the new government that took decisive steps to extirpate the image, deeply rooted in Argentine society that the citizens had no protections against the State and that important public officials were above and beyond the reach of the law. This was achieved mainly by what has come to be known as the “Trial of the Military Juntas”, which concluded with several convictions, thus starting the vindication of human rights in that country (Alfonsín 1993). Although the extent of the convictions for the members of the military juntas was not the one hoped by the majority of the population, given the power that the military still had even after the transition, the convictions served to show that a democratic regime had been put into place and that its judicial system would protect its citizens against unruly force by the State.

Another judicial institution that played a relevant role in transition periods was the office of the prosecutor (Orentlicher 1993). This was true especially in countries where the rights of its citizens had been openly violated by the authorities, which was the case of many South American and Central American countries, where the government had been at war with its own people (Dodson and Jackson 1997, Dodson and Jackson 2003). In Chile, for example, the office of the prosecutor faced an uphill battle against a Supreme Court that, although independent throughout the dictatorship (Correa Sutil 1993), had been politically insulated, socially isolated, and had not been accountable to the Chilean people.

The role of the judiciary in transitional processes was in fact so important that some of these processes failed when the judicial system could not adequately perform its duties. Such was the case of Haiti, where after finally democratically electing a president

in February 1991, the judiciary failed to prosecute cases of corruption, failed to bring State terrorists to justice and even failed to establish itself as a functioning branch of the State. The weakness of the judiciary and the power of the military gave way to the coup that overthrew Aristide and reinstated authoritarian rule in that nation (Aristide 1993).

The crucial role of the judiciary in the transition from authoritarian governments to democratic regimes would reprise itself years later, with Latin American democracies struggling to consolidate, eroding the rule of law so eroded that some even wondered if liberal democracy could be achieved at all (Lagos 2003). When Guillermo O'Donnell (1996) evaluated the state of the democracies emerging from the third wave of democratization (Huntington 1991), he observed what he called several "illusions" about the prospects of democratic consolidation in the region. For one, he claimed that the idea of reaching Dahl's classic polyarchy (Dahl 1971) was not within reach given the institutional setting of many Latin American democracies. According to O'Donnell, the polyarchies in the region had not yet reached a sufficient degree of institutionalization. O'Donnell cites as lack of horizontal accountability within Latin American democracies.<sup>32</sup> In these regimes, the executives often succeed in their efforts to weaken, discredit and delegitimize the institutions that enforced horizontal accountability, particularly the judiciaries.

In the last few years, however, the majority of these democracies started aggressive judicial reforms with the hopes of establishing strong and independent judiciaries that could serve either as counterweights to strong executives or as stabilizing

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<sup>32</sup> More on horizontal accountability can be found in Chapter II, in the section dealing with judicial independence and accountability.

forces in countries with volatile political environments. One of the major challenges for the rule of law in new democracies is to establish credible mechanisms of accountability. The judiciary is a key institution in the task of horizontal accountability and constitutional control, and so the role of courts is vital to democratic consolidation. It is the judiciary that underpins the establishment of the rule of law and legal accountability to constitutional norms. The judiciary is also crucial in the process of building regime legitimacy, which increasingly in Latin America is dependent on the capacity of these regimes to create credible mechanisms of accountability, public responsibility and the effective advancement of citizen rights (Domingo 1995). This is why optimizing judicial independence has become a main objective of the legal reforms throughout Latin America.

Judicial independence is critical for courts to have the capacity to fulfill their functions of constitutional control, legal accountability and justice administration. Autonomy of the courts is necessary to achieve impartiality in the task of adjudication and to ensure advancement of the rule of law. However, there are several obstacles that must be overcome to achieve the desired level of independence, especially in countries with strong executives. When looking at the case of Argentina, for example, Rebecca Bill Chavez (2004:23-27) identified several indicators of executive subordination of the judiciary. These indicators are related to common political practices used not only in Argentina but in other Latin American countries and are useful to understand why constitutional provisions just are not enough to ensure an independent judiciary.

- The executive uses an opaque process to appoint pliant judges: This often results on unqualified appointees or appointees with strong ties to the political party that controls the executive branch or with personal ties to the administration.
- The executive violates judges' tenure protection: This practice creates obscure, political removal processes and noncompliance with formal and constitutional impeachment rules.
- The executive violates judges' salary protection: The result is usually a reduction in judges' real salary.
- The executive packs the Supreme Court: The result is an unstable and politicized Supreme Court created as a result of frequent changes in the number of Supreme Court Justices.
- Judges are unwilling to endure the costs of ruling against executive interests: The consequences of this unwillingness are rulings that uphold government acts of dubious constitutionality and rulings in favor of executive officials suspected of committing acts of corruption during their tenure.

Besides these political obstacles, judicial reforms also face institutional, infrastructural and organizational obstacles along the way. There are serious structural problems regarding court administration, resulting of high levels of inefficiency. In many countries, administrative tasks are concentrated in the high courts. Courts are also facing the consequences of fiscal dependency. Budget allocations often fall short of what is



needed to run a fully autonomous judiciary and low resources usually result in inefficient practices, corruption and inaccessibility for the general population.

Given the nature and the sources of the challenges faced by judicial reformers in Latin America, mixed results are to be expected. In the case of Argentina, for example, although the Peronist party was induced to initiate constitutional revisions to strengthen the judiciary, the party then proved unable to accept the costs of an independent judiciary and failed to implement these changes, via a legislative enactment. Only once the Peronists believed they were unlikely to maintain power did they implement the constitutional revisions initiated by themselves year before (Finkel 2004). The results of the implementation have also been mixed. Looking at two provinces of Argentina, San Luis and Mendoza, Bill Chavez (2004) found that judicial reforms did break some patterns of executive dominance in Mendoza, but failed to do so in the province of San Luis. The survival of those patterns, however, should not always be blamed on the reformers, but also on the members of the judiciary themselves. One of the perils of independent judiciaries is that they are free to side with whom they want, and that means that they are free to side with the executive as well. According to Gargarella (2004), Supreme Court Judges are usually from the same background. They are members of the elite, educated at the same schools and belonging to the same social circles. So, they may be independent, but they can still sympathize with the executive.

Another relatively failed experiment is the case of Ecuador. According to several legal and constitutional experts, as well as current and former members of the Supreme Court, the 1998 Ecuadorian constitution enacted several positive reforms that strengthened the independence of the judiciary. However, it did not stop the Supreme

Court from making unpopular and controversial decisions, nor could it even stop a relatively fragile executive from disbanding the Supreme Court and creating a new one with pliant judges. As Gargarella claims “Politically independent, well-educated and well equipped judges could still write many questionable decisions, particularly, but not only, in legally and politically unstable communities” (2004:195).

New judicial reforms were introduced on 2008, when a new constitution, written by an assembly with a majority that demonstrated clear affinity with the executive, was approved. These reforms attempted to create a separate institution for constitutional review and ratified the independence of the judiciary. However, the same legislators who drafted the constitution attempted to disobey it only a few weeks later when the members of the new Supreme Court [the one created by the 2008 constitution] rejected the constitutional reforms and decided to resign from their posts. The new Congress, in an attempt to avoid a vacuum in the judicial branch, offered to reinstate the old Supreme Court [which had the same members, but different attributes], in clear violation of the constitutional reforms they initiated. In the end, the members of the high court declined and the result of the latest judicial reforms in Ecuador was the dismantling of the judiciary.

Although judicial independence needs to be the main focus of judicial reforms, the scope of the reform must go beyond it to obtain observable results. Changes must include internal procedures, codes of ethics and administrative systems and penal reforms that modernize the prison system (Binder 1991, Hammergren 1998). Only a structural change will produce the changes necessary for the participation of a functioning judicial branch in a state where citizens’ regime commitment is high and the rule of law works equally

for both the privileged and the underprivileged (Holston and Caldeira 1998, O'Donnell 1999). It is in that environment an independent judiciary will thrive and fulfill its role as a vital element in the consolidation of democracy.

### Judicial Independence and Support for the Institutions of the Rule of Law

Judicial independence has been identified as a pillar of the rule of law (McNollgast 1995, Mendez, et al. 1999, Russell 2001, Schwartz 1999). In order for the State to be able to apply the law of the land effectively it is necessary to have an autonomous judicial body to enforce the law. When the government is strong a self reliant judiciary is also necessary to keep it in check and make it accountable to its citizens. So far this chapter has focused on the rule of law as a complex social science concept and on the effect that strengthening the judiciary might have on the ability of the state to maintain the rule of law within a country. The recent political history of Latin America suggests that although constitutional reforms definitely have their merit and are the foundation for judicial independence, in practice, political actors step over those reforms all the time to achieve their personal objectives. However, do political reforms or do actual observable independent behavior by the judiciary have an effect on citizens' attitudes towards the institutions that represent the rule of law in any given country? This question is the basis for the current section. In the following pages, I will present a measure of support for the institutions of the rule of law based on data obtained in the 2006 round of the Americas Barometer by the Latin American Public Opinion Project. Using that same survey data, as well as the four country level measures of judicial independence introduced in Chapter

II, I will attempt to uncover the relationship between the independence of the judiciary and individual level attitudes towards the institutions that are in charge of safeguarding the rule of law in Latin America.

*Measuring support for the rule of law:*

The study of the stability of democratic regimes has generated a substantial amount of theory and empirical evidence whose center of attention is the importance of support for the political system. The dynamics of this support depend in part on the relationships between the State and the citizens of a country. The fundamental assumption of this relationship is that citizens have certain expectations regarding the State's performance and that said performance is judged by the citizens individually. Positive or negative evaluations result in feelings of satisfaction or dissatisfaction with the performance of the State's institutions, which in turn lead to the willingness of the individual to support those institutions. Based on this reasoning, scholars have found that support for the political system is an important element in a democracy, not only owing its relevance to the stability of a democratic regime but also because it is a vital element for the political process. A democratic political system cannot survive for long without the support of the majority of its citizens (Miller 1971).

Low levels of support for political institutions are considered a threat against the stability of democracy and the rule of law because the consequences of long term dissatisfaction with public institutions can generate the feeling of a power vacuum and of the absence of regulations (Anderson and Guillory 1997). Dissatisfaction with the State's performance transforms into low levels of system support, which can later be channeled

through actions that are detrimental to the stability of a democratic regime (Bastian and Luckham 2003, Weatherford 1992).

In speaking about the erosion of system support, Dalton (2004) claimed that among several factors that generate changes in support for the system, trust is one of the most relevant individual characteristics. Trust in the institutions of the political system is crucial to generate satisfaction with the performance of a democratic regime. Multiple studies show compelling evidence that political trust is a fundamental part of system support. The fact that citizens consider their institutions and the people in them trustworthy has an influence on, among other things, levels of individual participation in politics as well as electoral preferences, levels of social cooperation and individual support for specific government politics (Easton 1975, Easton 1976, Hetherington 1998, Levi and Stoker 2000).

I base my measurement index of support for the institutions of the rule of law on trust. The questions used to create the index were designed to measure trust in the institutions that represent the rule of law in Latin America. The items I chose are based on the principles of the rule of law described earlier in this chapter. The index was built upon these five questions from the 2006 questionnaire from the Americas Barometer.<sup>33</sup>

1. On a scale from one to seven, where 1 means “not at all” and seven means “a lot”, how much do you trust that the courts in your country will guarantee a fair trial?
2. How much do you trust your country’s justice system?

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<sup>33</sup> All answers were measured on a scale from 1 to 7, where 1 meant “not at all” and 7 meant “a lot”. The answers were then recoded to a 0 to 100 scale.

3. How much do you trust the Office of the Public Prosecutor?
4. How much do you trust your National Police?
5. How much do you trust your Supreme Court?

The above five items were chosen for theoretical reasons. I argue that these five questions include the identified principles that the rule of law is supposed to uphold, as well as the institutions that represent it inside a country. The first question measures confidence in the ability of the State's tribunals to guarantee a fair trial. The principles of accessibility to the courts as well as the ones of certainty, generality equality and the impartiality of justice tribunals are tapped by this question. The second question is a more general one, measuring overall trust in the justice system. This question taps the principles of government under law and the congruence of law with the social values that citizens treasure. The third question looks at trust towards the Office of the Prosecutor. Public prosecutors have a crucial role in the rule of law, because they are the ones who initiate the processes that bring charges against people who committed criminal actions. By criminal actions, I mean actions legally punishable by the penal codes in most countries with civil law tradition. Prosecutors are most effective when their office is not linked to the executive office, since it is sometimes the role of the prosecutor to initiate cases against government abuses, especially human rights violations (D'Alessio 1993, Rios-Figueroa 2006). The fourth question measures citizen trust in the police. This institution is society's first defense against attacks on the rule of law, and public confidence in it is crucial. Achieving public confidence in the police, however, has been a difficult task, especially in countries with a history of abuses by this institution, such as

Mexico, Brazil and Argentina (Chevigny 1999). The final question looks at the legitimacy of the quintessential institution of the rule of law, the Supreme Court. This is the agent of horizontal accountability. Without a strong, independent Supreme Court to adjudicate justice and maintain the constitutional order, there are no limits to what an authoritarian government or even a democratic one with a fairly strong executive can do. Together, the five questions have a Cronbach's alpha reliability index of .821 for the pooled 2006 Americas Barometer survey, which means that the item is a good theoretical fit. Removing any of the individual questions that compose the index would not have increased its reliability.

**Figure IV-1. Support for the Institutions of the Rule of Law in Latin America**

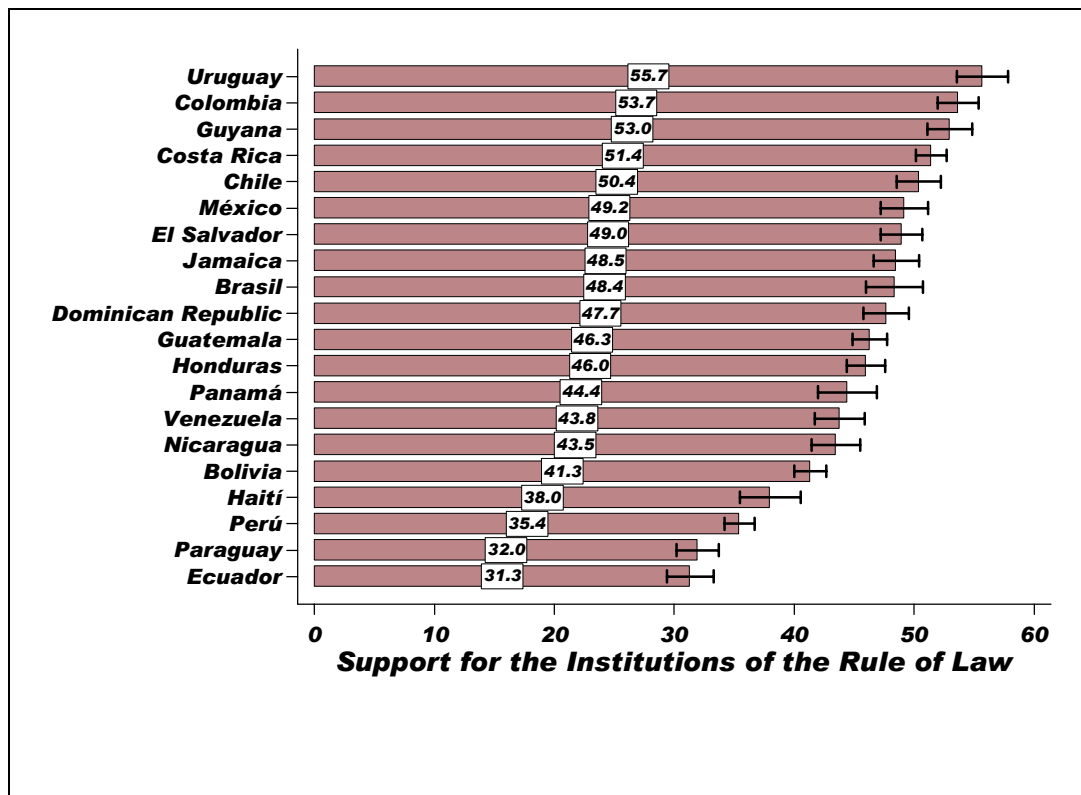


Figure IV-1 shows the country averages for the index of support for the institutions of the rule of law. While the questions were originally measured on a scale from 1 to 7, I have recoded them to fit a scale that goes from 0 to 100, making it easier to look at when presenting graphs. It is not a surprise to see some of the usual suspects both at the top and at the bottom of the graph. Countries like Uruguay and Costa Rica, with long traditions of steady democracy, very little history of State repression and a stable, independent judiciary are at the top of the graph. At the other end of the graph are countries with political instability, constant external interferences in the work of the judiciaries, like the case of Ecuador, and some of them with a history of State repression, such as Haiti and Paraguay. What is somewhat worrisome, however, is that in only five countries the average citizen support for the institutions of the rule of law attains over the half point of the scale. This means that in average, citizen evaluation of the institutions and processes that stand for the rule of law in the region are more negative than positive.

*Predictors of support for the institutions of the rule of law:*

This section will consider the analysis of the individual and contextual predictors of support for the institutions of the rule of law. First, I will see if judicial independence measured in four different ways, has any effect on individual attitudes towards the institutions of the rule of law. This will be done while comparing various socio-demographic variables, such as age, years of education, wealth measured by the ownership of capital goods, size of the city where respondents live, urban or rural areas, gender and number of children. The second part of the analysis will include multi level regression models that assess the effect of judicial independence on support for the institutions of the rule of law while controlling for other attitudes and experiences of



respondents at the individual level that might also have a direct effect on their evaluation of these institutions.

Prior to the regression analysis, I conducted a test of variance to see if the variation in the dependent variable [support for the institutions of the rule of law] occurs only at the individual level or if it also occurs between countries. The test of variance revealed that approximately 8.5% of the variation of the dependent variable is explained by country level factors, and that the percentage is statistically significant. Table IV-1 shows the results of the four different models regressing support for the institutions of the rule of law on socio-demographic variables and the four separate measures of judicial independence.

**Table IV-1. Support for the Institutions of the Rule of Law Regressed on Judicial Independence, Age, Education, Wealth, Urban/Rural, Size of Town and Number of Children (Multilevel model)**

| Support for the Rule of Law Regressed on Judicial Independence and Control Variables |         |            |      |          |            |      |              |              |             |             |             |             |
|--|---------|------------|------|----------|------------|------|--------------|--------------|-------------|-------------|-------------|-------------|
| Variables  | Model I |            |      | Model II |            |      | Model III    |              |             | Model IV    |             |             |
|  | Coef.   | Std. error | P> z | Coef.    | Std. error | P> z | Coef.        | Std. error   | P> z        | Coef.       | Std. error  | P> z        |
| Age  | .122    | .111       | .272 | .122     | .111       | .271 | .119         | .111         | .285        | .117        | .111        | .294        |
| Education  | -.096   | .036       | .008 | -.096    | .036       | .008 | -.097        | .036         | .008        | -.096       | .036        | .008        |
| Wealth   | -.144   | .082       | .082 | -.143    | .082       | .082 | -.145        | .082         | .079        | -.150       | .082        | .068        |
| Urban/rural  | -.282   | .491       | .565 | -.282    | .491       | .566 | -.282        | .491         | .566        | -.276       | .0491       | .574        |
| Size of town   | 1.094   | .146       | .000 | 1.094    | .146       | .000 | 1.094        | .146         | .000        | 1.090       | .146        | .000        |
| Number of children   | .051    | .072       | .478 | .051     | .072       | .478 | .051         | .072         | .474        | .052        | .072        | .466        |
| Female   | .207    | .265       | .434 | .207     | .265       | .434 | .206         | .265         | .437        | .204        | .265        | .441        |
| Indep. RF  | .090    | .805       | .911 |          |            |      |              |              |             |             |             |             |
| Indep. Tate  |         |            |      | .303     | .411       | .461 |              |              |             |             |             |             |
| Indep. HRR   |         |            |      |          |            |      | <b>5.156</b> | <b>1.810</b> | <b>.004</b> |             |             |             |
| Indep. WEF   |         |            |      |          |            |      |              |              |             | <b>4.34</b> | <b>.872</b> | <b>.000</b> |
| Const.   | 43.00   | 3.40       | .000 | 39.79    | 5.141      | .000 | 39.33        | 2.131        | .000        | 31.58       | 2.70        | .000        |
| N  | 28422   |            |      | 28422    |            |      | 28422        |              |             | 28422       |             |             |

There are two important socio-demographic predictors of support for the institutions of the rule of law, according to the regression results. The first one is education. Although at the aggregate level countries with better education indicators are usually those with a longer tradition of respect for the rule of law and democracy, at the

individual level, the relationship between education and institutional legitimacy is different. The data show that those individuals with higher levels of education trust the institutions that represent the rule of law less than their lesser educated counterparts. Another important predictor is the size of the city of the respondent. The regression analysis suggests that respondents in smaller cities are more trusting of the institutions of the rule of law than respondents in large cities and country capitals.<sup>34</sup>

When it comes to judicial independence, the results of regression analysis are similar to the one obtained in Chapter III, when I looked at the effect of independence on corruption victimization. The two formal measures of judicial independence prove to be statistically insignificant, meaning that the autonomy of the judiciary measured according to formal and constitutional provisions does not have an effect on individual attitudes towards the institutions of the rule of law, when introducing socio-demographic controls. On the other hand, the two practical measures of independence do have a positive and statistically significant effect, meaning that citizens living in countries with independent judiciaries, not only on paper but in practice, are on average more trusting of the institutions that represent the rule of law than respondents in countries where judiciaries are weak.

However, is the effect of judicial independence strong enough to hold when controlling for other individual level attitudes or experiences that have a more tangible and direct impact on system support? For the second part of the analysis, I have introduced several control variables that have been shown to have a powerful impact on

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<sup>34</sup> The sign of the relationship is positive because the variable “size of town” is coded from 1 being “big city” to four being “small town”.

institutional legitimacy from the citizens' perspective. These variables have been included in several studies that have used the Americas Barometer data to predict institutional support in Latin America (Corral 2008, Schwarz Blum 2007, Seligson 2004).

- **Corruption Victimization:** My assumption is that citizens that have been victims of corruption will show lower levels of trust in the institutions of the rule of law. This is the same dichotomous variable that I used as my dependent variable for the analysis in Chapter III.
- **Crime Victimization:** Like it is in the case of corruption, crime victimization is also expected to erode the legitimacy of the institutions of the rule of law. Victimization by crime is also measured dichotomously.
- **Tolerance:** At the beginning of this chapter I briefly described several elements that comprise the rule of law. According to Walker, one of the most important elements was what he called “attitude of legality”, a sort of dimension of feeling. I believe tolerance for the political rights of the minorities is a big part of the attitude of legality that the citizenry must hold in order for the rule of law to stay in place. For this particular case, tolerance is measured in an index that taps the respondents approval of minorities to exercise basic political rights, such as their right to give a speech, protest publicly and peacefully, and to elect and be elected for public office.
- **Presidential approval:** The executive has always been a powerful figure in Latin American politics, especially in the last decade or so. For example, a recent study conducted in Ecuador using data from the Americas Barometer showed that

approval of the President's job is the most powerful predictor of support for the institutions of the rule of law in that country (Donoso 2008). However, in a context of political instability, a strong and excessively popular executive could be a double edge sword. This is especially true when it comes to the rights of minorities in the opposition, since the arbitrariness of the majority may lead to hasty decisions that produce institutional outcomes incapable of establishing controls over the will of that majority, therefore creating a breakdown in the rule of law (Gargarella 2003).

- Perception of the government's economic performance: I hypothesize that a positive perception of the government's economic performance will boost individual confidence in the institutions of the rule of law. This variable is measured as an index that combines the citizens' evaluation of the government's effectiveness in combating poverty and unemployment.
- Perception of individual economic situation: It has been said many times that as long as the government does not mess with people's pockets, they will put up with a lot. Previous public opinion studies have shown that is the case. Citizens that have a positive perspective of their economic situation tend to have feelings of trust for the institutions that represent and protect them. Conversely, those who perceive their personal economic situation as being problematic will tend to blame the State for its shortcomings, which will be reflected on low levels of confidence for the institutions of the rule of law.

- Preference for democracy: While delivering his famous Iron Curtain speech, Winston Churchill proclaimed that “democracy is the worst form of government, except for all the other ones that have been attempted by some”. This variable attempts to tap that Churchillian sentiment among the citizens of Latin America. Those who prefer democracy over any other form of government, will exhibit higher levels of trust in the institutions that make up the rule of law in their countries.

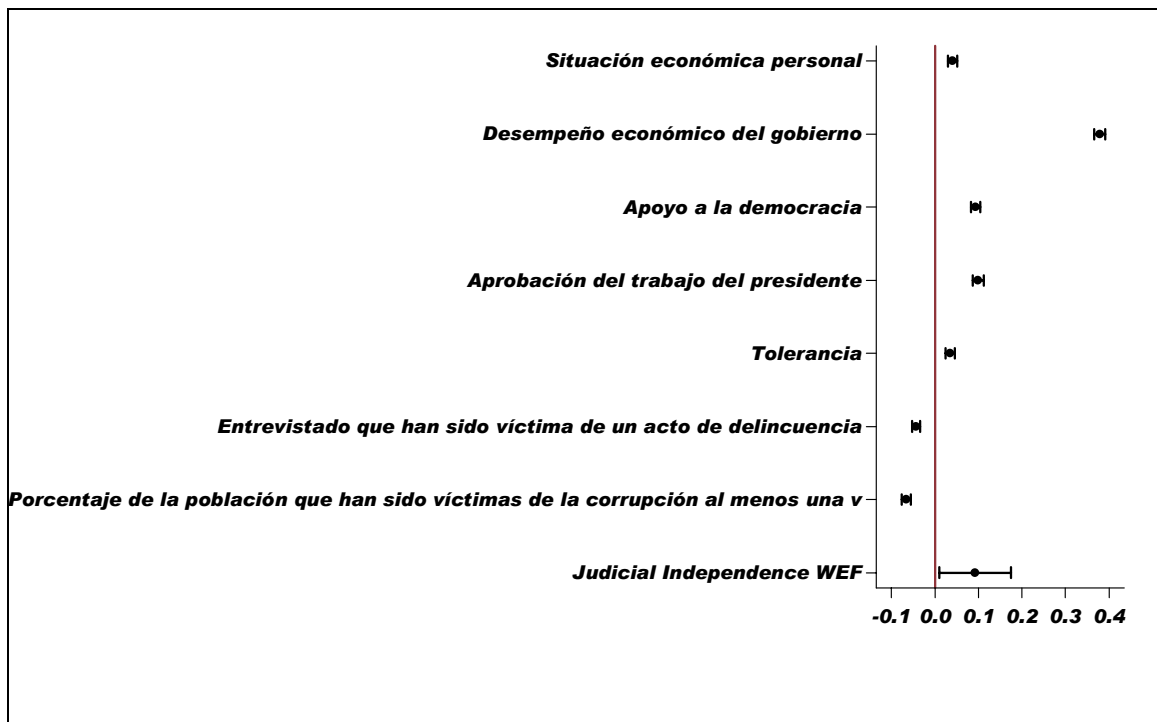
Table IV-2 displays the results of the multilevel regression models used to assess the effect of judicial independence on individual level support for the institutions of the rule of law. Not surprisingly, every control variable ended up having a statistically significant relationship with the dependent variable and the hypothesized direction of those relationships were confirmed. The table shows that those respondents who were victimized by crime or who had to pay a bribe in the year prior to answering the survey have a significantly lower trust for the institutions that make up the rule of law than those respondents who were not forced to pay bribes in public or private settings of those who were subject to crimes against their property or physical integrity. Regarding the effect of tolerance, analysis suggests that the intangible requisite he called “attitude of legality” does indeed affect support for the rule of law. Those who are respectful of the rights of others to express themselves politically are also more trusting of the institutions and principles of the rule of law in their country.

**Table IV-2. Support for the Institutions of the Rule of Law Regressed on Judicial Independence, crime, corruption, tolerance, perception of government's economic performance, presidential approval, perception of own economic situation and preference for democracy (Multilevel model)**

| Support for the Rule of Law Regressed on Judicial Independence and Control Variables |         |            |      |          |            |      |           |            |      |             |             |             |
|--|---------|------------|------|----------|------------|------|-----------|------------|------|-------------|-------------|-------------|
| Variables  | Model I |            |      | Model II |            |      | Model III |            |      | Model IV    |             |             |
|  | Coef.   | Std. error | P> z | Coef.    | Std. error | P> z | Coef.     | Std. error | P> z | Coef.       | Std. error  | P> z        |
| Crime Vic.   | -.036   | .002       | .000 | -.036    | .002       | .000 | -.036     | .002       | .000 | -.036       | .002        | .000        |
| Corruption Vic   | -.026   | .003       | .000 | -.026    | .003       | .000 | -.026     | .003       | .000 | -.026       | .003        | .000        |
| Tolerance  | .029    | .004       | .000 | .029     | .004       | .000 | .029      | .004       | .000 | .029        | .004        | .000        |
| Presidential Approval  | .097    | .006       | .000 | .097     | .006       | .000 | .097      | .006       | .000 | .097        | .006        | .000        |
| Preference for Democracy   | .074    | .004       | .000 | .074     | .004       | .000 | .074      | .004       | .000 | .074        | .004        | .000        |
| Gov. Economic Evaluation   | .307    | .005       | .000 | .307     | .005       | .000 | .307      | .005       | .000 | .306        | .005        | .000        |
| Personal Economic Evaluation   | .046    | .006       | .000 | .046     | .006       | .000 | .046      | .006       | .000 | .046        | .006        | .000        |
| Indep. RF  | -.089   | .497       | .857 |          |            |      |           |            |      |             |             |             |
| Indep. Tate  |         |            |      | .077     | .275       | .779 |           |            |      |             |             |             |
| Indep. HRR   |         |            |      |          |            |      | 1.47      | 1.41       | .297 |             |             |             |
| Indep. WEF   |         |            |      |          |            |      |           |            |      | <b>1.82</b> | <b>.830</b> | <b>.028</b> |
| Const.   | 22.5    | 2.20       | .000 | 21.2     | 3.41       | .000 | 21.03     | 1.63       | .000 | 17.15       | 2.54        | .000        |
| N  | 27667   |            |      | 27667    |            |      | 27667     |            |      | 27667       |             |             |

Personal evaluations of the economy are also important in shaping individual attitudes towards the rule of law in Latin America. The regression results indicate that citizens with a positive evaluation of the government’s performance in the economic area and citizens with a positive outlook on their own economic situation show higher levels of confidence in the institutions of the rule of law than their counterparts. Figure IV-2 shows the magnitude of the impact that the evaluation of the government’s economic performance has on personal attitudes towards the institutions of the rule of law.

**Figure IV-2. Predictors of Individual support for the institutions of the rule of law**



Finally, the approval rate of the incumbent president has a direct and positive effect on the legitimacy of the institutions of the rule of law. A higher approval rating



will mean increasing levels of confidence in institutions like the police and the Supreme Court. Conversely, lower approval ratings will result in a decrease in confidence in these key institutions.

*The impact of judicial independence:*

The multilevel regression analysis revealed that judicial independence can have an effect on individual attitudes towards the institutions of the rule of law, but it depends on how it is measured. Once again, formal measures of independence proved to be insignificant when trying to predict individual attitudes. There were two formal indicators of independence used in the regression models, one created by Rios-Figueroa and the other created by Tate et al. The first one unpacked the concept of independence into three separate dimensions, institutional autonomy, external independence, meaning personal independence of Supreme Court Justices and internal independence, which looks at the relationship between lower court judges and their superiors. I regressed each of these dimensions separately and none of them had a statistically significant effect on the dependent variable; neither did the full indicator, which actually turned out to have a negative coefficient in the regression. This indicates that more judicial independence would actually hurt confidence in the institutions of the rule of law. The magnitude of the coefficient, however, tells us that that we should have no confidence on the sign either, since there is really no substantive influence of this indicator on the dependent variable. I also looked at every component of the second formal measure of independence individually, with the same results every time. None of the nine constitutional provisions analyzed [guaranteed terms, finality of decisions, exclusive authority, ban of military courts, judicial review, judicial qualifications, fiscal autonomy, separation of powers and

a hierarchical system] had a substantive statistical effect on individual confidence in the institutions of the rule of law.

Two practical measures of independence were included in the regression models. The first one was obtained by coding the US State Department's Human Rights Reports and assigning each country a level of judicial independence based on a three point scale. When inserted into the regression equation, this variable, which had been a significant predictor of the probability of an individual being victimized by corruption, had a positive but statistically insignificant effect on the trust in the institutions of the rule of law. The second practical measure of independence, provided by the World Economic Forum, was based on the subjective evaluation of elites that have had to deal with the judiciary in Latin American countries, usually as the representatives of the corporations for which they serve. The regression analysis showed that this measure of independence, in contrast with the other three, did have a positive and statistically significant effect on the dependent variable. This means that in countries where the judiciary is not only independent on paper but behaves independently, citizens pick up on that fact. This creates feelings of trust in these institutions, and a more favorable environment for the subsistence of the rule of law. The conclusion that one can obtain from these results is that when judicial independence is tangible and observable, it becomes a positive agent for the creation of democratic attitudes and behaviors in Latin America. On the other hand, when independence is just a complex legal construct, left only to rest on the pages of laws and proclamations, and does not go beyond them, it remains only an important principle of the rule of law. Its influence is not felt by those who would reap the benefits of a strong and autonomous judiciary that enforces horizontal accountability, or that

suffer the consequences of having a judiciary that can be stepped on by the executive, the legislature or other private interest holders.

## Conclusions

The rule of law is a fundamental pillar of liberal democracy. I cannot conceive that a political regime that does not apply the law of the land equally, appropriately and effectively across a territory can be considered a democratic one. However, it is impossible to construct the rule of law if the institutions that represent it are not considered legitimate by the people that those institutions are supposed to serve. This chapter looked at judicial independence as a possible contextual predictor for individual citizen support for the institutions that represent the rule of law in Latin America.

At the beginning of this chapter, I looked at independence only in combination with socio-demographic variables and their effect of confidence for the rule of law. The analysis presented in the chapter shows that *de facto* measures of judicial independence have an observable effect on support for the institutions of the rule of law, while formal provisions of independence are not related to individual attitudes. The second part of the analysis introduced theoretical variables that have been shown to have an effect on the support for the institutions of the rule of law by several previous studies conducted using the data obtained by the Americas Barometer. The results, although similar, did vary slightly. Formal constitutional provisions for judicial independence once again were ineffective in the creation of positive or negative attitudes towards the institutions of the

rule of law in Latin America. Neither combinations of these provisions nor them individually produced any observable statistical influence in the dependent variable.

On the other hand, the analysis of practical measures of judicial independence showed that one of the two indexes of independence did have a substantive effect on individual trust in the institutions of the rule of law. This index was a subjective evaluation of the independence of the judiciary made by citizens that had interacted with the judicial sector and had a sense of what possible public or private sources had an influence in it. The multilevel regression models used to assess the effect of a contextual variable like independence on individual level attitudes showed that context indeed matters and countries with observable independent judiciaries produce citizens who trust their institutions more than countries with weak judiciaries that answer to external interests.

## CHAPTER V

### CONCLUSION

This dissertation had two general objectives. The first was to advance the discussion on what judicial independence is and how scholars understand and measure it. The second objective was to show that the importance of independence goes beyond the scope of the judicial function. I attempted to show that independence is not necessarily an end, but that it can also be the means to an end. In this case, that independence can contribute to a reduction in corruption and the creation of favorable attitudes towards the institutions that represent the rule of law in Latin America. Each objective was addressed by a chapter with theoretical propositions, and in the case of the second objective, with empirical analyses on 20 countries across Latin America.

In Chapter II, I looked at judicial independence as a social science concept. Judicial independence is the essence of justice; it is the principle that proclaims the impartiality and political insularity of a judge. I discussed the several ways in which independence has been defined and measured. I focused on four indexes of judicial independence, two formal or *de iure* and two practical or *de facto*. The formal measures looked at various constitutional provisions that are supposed to ensure judicial independence within a country. The first measure, by Rios-Figueroa (2006), creates separate indexes for three separate dimensions of independence; the autonomy of the Supreme Court as an institution with respect to the other branches of the State, the

independence of the individual judges with respect to external pressures from public and private sources, and the internal independence of lower court judges with regards to their hierarchically superior counterparts. The second formal measure of independence, created by Tate et al (2006) also groups several constitutional provisions that are designed to enhance the independence of a judiciary. Those provisions include guarantees for the finality of the decisions of the Supreme Court, enumerated qualifications for Supreme Court Justices, constitutional guarantees for the separation of powers and the fiscal autonomy of the judiciary and the ban of military court procedures for civilians. The practical measures of judicial independence were comprised of subjective evaluations of the autonomy of the Supreme Court and the judiciary in general, made separately by the US State Department and by CEO's working in these Latin American countries. The chapter also looks at the similarities and differences between these four measurements and how the 20 Latin American countries rank according to each one of them.

Chapter II also describes the recent history of the judiciary in Ecuador, a politically unstable country with a judiciary that has been notoriously manipulated by State and private sources over the last few years. Through interviews with several Supreme Court judges, lower court judges, legislators and judicial experts, I assess the "real world" validity of the measurements of judicial independence that I use in the empirical analysis contained in the following chapters. I also looked at several other factors that influence the independence of the judiciary and that were not contemplated in any of the measures used in this dissertation.

In Chapter III, I dealt with the relationship between judicial independence and corruption in Latin America. After discussing several ways corruption is measured in the region. I presented a corruption victimization measure that is based on personal experiences of citizens with corruption in both public and private instances. I then created a multilevel regression model to assess the effects of context on the probability of citizens being victimized by corruption in their countries. Along with individual level variables, such as sex, education, age and wealth, the analysis demonstrated that judicial independence has a direct effect on corruption victimization when it is measured *de facto*, while its effect is not statistically significant when it is measured using formal constitutional provisions.

Finally, in Chapter IV, I looked at the effect of those same four measures of judicial independence on individual support for the institutions of the rule of law in Latin America. I devised an index of support for the institutions of the rule of law that included confidence on institutions like the Supreme Court, the National Police and the Office of the Prosecutor, as well as confidence in the justice system in general, and on its capacity to provide a fair trial to its citizens. Like on the previous chapter, the empirical analysis showed that judicial independence had no effect on individual feelings of trust when it was measured using constitutional provisions. On the other hand, one of the two practical measures of independence proved to be positively related to institutional trust, meaning that in countries with higher levels of observable judicial independence, citizens trust the institutions that represent the rule of law more than in countries where the judiciary is weak and influenced by other political interest holders.

The results yielded by the empirical analyses conducted throughout this dissertation led me to two separate conclusions. First, judicial independence matters. Scholars and policy makers in Latin America need to start looking at independence as a valuable tool to achieve other political and social objectives, and ultimately as a necessary requisite for the consolidation of liberal democracy in the region. Second, judicial independence is a dynamic concept. Formal measures of judicial independence are not enough when scholars want to use independence as an independent variable. There is a need for a more comprehensive measure of judicial independence. The discrepancies between formal and practical measures of independence, as well as the tangible effect of independence on corruption reduction and institutional trust in Latin America, lead me to believe that a broader measure of independence would help social scientists to better understand the consequences of an independent judiciary in consolidating democratic regimes.

*Judicial Independence Matters:*

At the beginning of this dissertation I wrote that judicial independence should not be considered as an end in of itself but a means to an end. The previous chapters have presented empirical evidence that supports that statement. However, one should not underestimate the importance of independence by itself. A Supreme Court Justice I met with during the process of writing this dissertation once told me that independence is to justice what elections are to democracy, it is not sufficient, but one cannot exist without the other. Judicial independence is a fundamental principle of justice. It is based on the idea that two parties, be them of public or private nature, can resolve their conflicts through the intervention of a third party that is completely impartial and insulated from



their interests and preferences. An efficient adjudication of justice would not be possible without the element of judicial independence.

The evidence gathered during the course of this study, along with the information gathered regarding the Ecuadorian case, however, has also led me to the conclusion that independence is important to the consolidation of liberal democracy in Latin America. It would be impossible for the State to guarantee and safeguard the civil liberties of its citizens without an independent judiciary capable of enforcing those rights, and the ability to hold the government accountable when it attempts to abuse its authority.

In chapters III and IV, I have shown that there is an empirical relationship between judicial independence and the reduction of corruption victimization, as well as the individual support for the institutions of the rule of law in Latin America. These findings alone demonstrate the importance of independence on democracy. However, the conversations I had with judges, legislators and legal experts about the situation of the judiciary in Ecuador helped me in painting a realistic picture of what can happen to a democracy when judicial independence does not exist. Ecuador has had eleven Presidents in twelve years. Ever since Abdala Bucaram was overthrown illegally by Congress on February of 1997, no elected President has been able to finish the four year period established in the Constitution as the presidential mandate. The Supreme Court and the Constitutional Tribunal should have played a vital role on those days. A former Supreme Court Justice, who claimed to be opposed to be Bucaram regime told me: “An independent Constitutional Tribunal, one mandated only by the letter of the law would have declared the unconstitutionality of the decision taken by Congress, which declared

President Bucaram mentally unstable and therefore unfit to fulfill his duties”.<sup>35</sup> In the years to come, the judiciary had to stand by helplessly while the Constitution was interpreted freely by the legislature any time that public opinion turned against the incumbent.

The eleven month absence of a Supreme Court caused by the illegal sacking of all its judges by the legislature and later by executive decree also had extremely damaging effects for democracy in Ecuador. Without the high court, the legal rights of millions of citizens were unprotected for almost a year. Hundreds of processes prescribed, leaving crimes unpunished and citizens without a chance to appeal lower court sentences that could have been overturned by the Supreme Court. This meant that the rule of law did not exist in the country during that period of time.

A little over a year has passed since I had those conversations with judicial experts in Ecuador. In those days Ecuador had a Supreme Court composed of the 31 most qualified judges in the country, selected after a public and transparent examination process which was overseen by international observers. Since then, Ecuador once again underwent a process of constitutional reform. The new constitution took away much of the power from the Supreme Court and gave it to a Constitutional Court, whose members were selected by the Constitutional Assembly, where the ruling party has an absolute majority. After being stripped of their independence once again, every judge of the Supreme Court except for one resigned. A new high court, now called National Court of Justice was quickly put together by using the one judge who did not resign and adding

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<sup>35</sup> Quote from an interview conducted by the author in Quito, on November 13<sup>th</sup> 2007.

twenty of the thirty alternates from the old court. As a result, Ecuador once again, has a judicial power that is subservient to the executive. Although this does not guarantee that the State will use this advantage to abuse its power, the damage to the consolidation of democracy in the country has already been done, as the mechanisms of horizontal accountability have been broken.

### Towards a Comprehensive Measure of Judicial Independence

Judicial independence matters, as this dissertation has shown. However, its effects are better observed when it is measured dynamically rather than statically. The reason for the success of practical measures of judicial independence as predictors of other dependent variables, however, is not only the conception of the measures but the nature of the concept. Independence is not static. It is affected not only by formal provisions, but by political actors and actions. Let's take the case of Ecuador once again. Even though it ranked very low in formal measures of judicial independence, judicial experts told me that the Constitution of 1998, used for the purpose of this study, had made significant advancements in the protection of judicial independence in the country. Although it did not contain all of the provisions established in the measures I used chapters III and IV, the Constitution explicitly proclaimed the independence of the judiciary and the protection of the judicial career. Those significant legal changes, however, could not stop Congress from sacking all 31 Supreme Court Justices in late 2004, nor could they stop President Gutierrez from sacking the new magistrates again only a few months later.

Finally, the significant constitutional advancements in judicial independence were rendered insignificant when Ecuador spent eleven months without a Supreme Court because of the political manipulation of the judiciary by the hands of the other branches of the State. A year later, however, a new court was created under a transparent process monitored closely by international observers. This new court operated under the same constitutional rules as its predecessors, but it was able to stand on its own feet and fend off political influence, as well as depurating itself when accusations of corruption were made against its members. Therefore, if a researcher had to assess the independence of the judiciary in Ecuador over the last few years, would it be logical to claim that 2005 and 2007 were the same? The answer is no. Even though the same constitutional rules operated in the country during those two years, the Supreme Court was much more independent in 2007 than it was two years before. Formal measures of judicial independence fail to capture the political changes in a country and the effect that those changes have on the administration of justice. Furthermore, if one wants to measure judicial independence over time, formal measures are inefficient, since they assume that independence is only affected by constitutional changes, which are unusual in the most countries. By recognizing independence as a dynamic concept, one gains not only a broader understanding of it but also analytical leverage on it.

The existing practical measures of judicial independence are not without their flaws. Although better equipped to deal with changes in the political environment and the effect that such changes have on the independence of the judiciary, these measures fail to acknowledge the importance of constitutional norms as a starting point for independence. Also, the subjective nature of these measurements can have a negative impact on the

resulting assessment. Take, for example, the practical measure of judicial independence based the US State Department's Human Rights Reports used on this dissertation. This measure, although widely used, is based on a single paragraph containing an assessment of the judiciary by a single officer in the State Department. Even though these evaluations are generally fair, they can also fail to account for political changes that affect judicial independence. In the 2007 report, for example, the description of the situation of the judiciary in Ecuador was similar to the one on 2005. That small paragraph failed to account for the favorable changes that had taken place during that year; so had I coded independence in Ecuador for 2007 based on that report, I would have had to code it as low. Something similar happens with the other practical measure used in this dissertation, based on elite evaluations of the independence of the judiciary obtained by the World Economic Forum. Although these evaluations were made by people who had dealings with the judicial system in 2006, it is hard to ignore that the people interviewed represent large corporations in these countries and undoubtedly have a marked political ideology. Therefore, it is possible that these evaluations were based not only in the experiences of these people with the judicial system of their own countries, but also on their perception of the incumbent regimes. In conclusion, practical indexes of judicial independence recognize it as a dynamic concept and are better equipped to measure it, but their subjective nature impacts the way independence is evaluated and can have a negative impact on the results of the measurements.

*Measuring judicial independence:*

The second overarching objective of this dissertation was to assess the importance of judicial independence for the consolidating democracies of Latin America. The empirical analysis conducted in the previous chapters as well as the opinions of judicial experts, show that independence is indeed a key ingredient for the reduction of corruption in the region, as well as for the legitimacy of the institutions of the rule of law. However, I believe that a more precise measure of independence, one that combines elements from formal and practical indexes, would not only enhance the theoretical understanding of judicial independence, but also become a more valuable tool for empirical analysis in the field of comparative politics.

1. Formal provisions of independence: Although these provisions are not a guarantee of judicial independence in practice, it is impossible to construct an independent judiciary without a solid constitutional base that serves a starting point. The problem with some of the existing formal measures is that they include too many provisions, which are not always included in the constitution of a country, but can be found in other secondary laws regarding to the judicial sector. A comprehensive measure of independence should consider only those constitutional provisions that are essential to the safeguarding of judicial autonomy; the protection of the Supreme Court as an institution and the protection of judges from outside influence. The most important are; a) An explicit proclamation of the principle of judicial independence. b) Protection of the judicial career. c) Specific methods of appointment and removal for Supreme

Court Justices. d) Tenure of Supreme Court Justices. e) Fiscal autonomy of the judiciary; and f) Enumerated qualifications for Supreme Court Justices.

2. Violation of formal provisions of independence: If one considers formal requisites important for independence, then explicit violations of these requisites should also be included in a measure of judicial independence. Events such as the unconstitutional appointment of a Supreme Court judge due to lack of qualifications or an illegal procedure, as well as the early termination of a judge for reasons not included in the constitution, should be coded as elements against the consolidation of an independent judiciary in a country.
3. Apparent interference from external parties on judicial decisions: Attempts to influence a Supreme Court decision are usually covert. However, there are cases in which the outside pressure on the high court is evident. The most obvious ones are bribery attempts made public. There are also cases in which the media and public opinion show a clear preference for a determined outcome. Also, there are occasions in which the executive makes public his expectations about a judicial decision. These public statements can be considered threats to independence, especially with powerful and popular executives. If the decision made by the Supreme Court in these cases goes against the clear preference of public opinion or against the State, one can assume the independence of that court. On the other hand, there is the possibility that the Supreme Court may rule in favor of the State, or in accordance with what the media and public opinion expect. When these decisions, favorable to the State or in accordance with public opinion,

violate a legal or constitutional norm, or go against prior legal precedents, one can assume that the independence of the judiciary has been violated.

The measure proposed in this section will generate some problems of operationalization at the beginning, especially with respect to its third component. On the other hand, apparent attempts to interfere with the independence of the judiciary are usually easy to identify, since they come from public sources and capture national attention. In the end, however, I believe that this comprehensive measure of judicial independence will help researchers in two fundamental ways. First, by capturing the dynamic essence of the concept of independence; and second, by providing a reliable and replicable assessment of judicial independence that will be better suited for understanding its usefulness and its importance in a democratic regime.



## APENDIX A

### US STATE DEPARTMENT HUMAN RIGHTS REPORTS FOR THE YEAR 2005<sup>36</sup>

#### MEXICO

Although the law provides for an independent judiciary, government authorities occasionally influenced court decisions, particularly at the state and local level. Corruption, inefficiency, and lack of transparency continued to be major problems in the justice system.

The federal court system consists of the Supreme Court, 91 circuit courts of appeal, 49 courts of appeal, and 185 district courts.

#### GUATEMALA

While the law provides for an independent judiciary, the judicial system often failed to provide fair or timely trials due to inefficiency, corruption, insufficient personnel and funds, and intimidation of judges, prosecutors, and witnesses. The majority of serious crimes were not investigated or punished. Many high-profile criminal cases remained pending in the courts for long periods as defense attorneys employed successive appeals and motions.

During the year there were numerous reports of corruption and manipulation of the judiciary. Judges, prosecutors, plaintiffs, and witnesses also continued to report threats, intimidation, and surveillance. The special prosecutor for crimes against justice sector workers received 79 cases of threats or aggression against judges, compared with 61 in 2004. During the year eight judicial sector workers were killed by unknown assailants. For example, on March 21, Justice of the Peace Jose Antonio Cruz Hernandez was killed in San Pedro Ayampuc. On April 25, High Impact Court Judge Jose Victor Bautista Orozco was killed in San Marcos in front of his house. At year's end each of these cases was under investigation. There were credible reports of killings of witnesses. Less than 3 percent of reported crimes were prosecuted, and significantly fewer received convictions.

There were no significant developments regarding the July 2004 killing of Jesus Mendoza, cousin of Bamaca case witness Otoniel de la Roca Mendoza.

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<sup>36</sup> Only the paragraphs dealing exclusively with the independence of the judiciaries are included.

The Supreme Court of Justice continued to seek the suspension of judges and to conduct criminal investigations for improprieties or irregularities in cases under its jurisdiction. During the year the Judicial Discipline Unit investigated and held hearings for 147 of 597 complaints of wrongdoing, with the result that 60 claims were found to be baseless, 45 magistrates received written or verbal warnings including suspensions, 7 judges were fired, and the remaining cases were still under investigation at year's end.

Prosecutors remained susceptible to intimidation and corruption. The law's failure to delineate between the PNC and the Public Ministry in taking responsibility for investigating crimes led to organizational rivalries and the duplication of investigative efforts. An estimated 3 percent of approximately 250 thousand complaints filed with the Public Ministry during the year were prosecuted.

The judiciary consisted of the Supreme Court of Justice, appellate courts, trial courts, and probable-cause judges [with a function similar to that of a grand jury], as well as courts of special jurisdiction, including labor courts and family courts. More than 350 justices of the peace were located throughout the country. Some of the justices specialized in administering traditional and indigenous law in community courts, which were under the jurisdiction of the Supreme Court of Justice. The Constitutional Court, which reviews legislation and court decisions for compatibility with the constitution, is independent of the rest of the judiciary.

Between January and August, the Public Ministry had approximately 50 persons in its witness protection program.

## **EL SALVADOR**

Although the law provides for an independent judiciary, the judiciary suffered from inefficiency and corruption. Corruption in the judicial system contributed to impunity from the country's civil and criminal laws. Impunity remained a significant problem, undermining respect for the judiciary and the rule of law. A September CID-Gallup poll revealed citizens' belief that judicial system inefficiencies allowed criminals to escape from justice. Many judges allowed unjustified trial delays, but few were ever sanctioned for this practice. NGOs such as the Foundation for Studies in Legal Application [FESPAD], the Salvadoran Foundation for Economic and Social Development, and the Human Rights Institute of the University of Central America [IDHUCA] claimed that the Supreme Court did not respond adequately to public criticism and did not make a comprehensive effort to remove unqualified and corrupt judges.

The PNC, prosecutors, public defenders, and the courts continued to have problems with criminal investigations. Inadequate government funding of the PNC and intimidation of victims and witnesses made it difficult to identify, arrest, and prosecute criminals, thus diminishing public confidence in the justice system.

During the year the attorney general's office received 117 complaints of prosecutorial irregularities, including bribery, negligence, and failure to attend legal proceedings.

In August the Criminal Chamber of the Supreme Court affirmed an October 2004 court decision dismissing charges of child pornography against Nelson Garcia, former president of the Salvadoran Bar Association and former candidate for the Supreme Court.

There were no new developments regarding the criminal court's October 2004 releasing from police custody and dismissing of charges against criminal court legal clerk Graciela Roque, in connection with the 2004 flight from justice of Raul Garcia Prieto.

There were no developments regarding an appellate court's August 2004 decision to uphold a lower court ruling to transfer defendant Fernando Palacios Luna, convicted of kidnapping and organized crime, from a maximum-security to a medium-security prison. At year's end Palacios Luna, who was given a sentence of 40 years, remained in maximum security at the Zacatecaluca prison.

The court system has four levels: justices of the peace, trial courts, appellate courts, and the Supreme Court. The Supreme Court oversees the budget and administration of the court system, and selects justices of the peace, trial judges, and appellate judges from a list of nominees proposed by the National Judicial Council [CNJ], an independent body that nominates, trains, and evaluates justices. There are separate court systems for family matters and juvenile offenders. The law requires that minors from 12 to 17 years of age be tried in juvenile courts.

Although juries were used for specific charges, including environmental pollution, and certain misdemeanors, judges decided most cases. By law juries hear only cases that the law does not assign to sentencing courts. After the jury's determination of innocence or guilt, a tribunal decides the sentence.

Defendants have the right to be present in court and to question witnesses and present witnesses and evidence. Although the law further provides for the presumption of innocence, protection from self-incrimination, the right to legal counsel, freedom from coercion, and government-provided legal counsel for the indigent, these legal rights and protections were not always respected in practice. Although a jury's verdict is final, a judge's verdict can be appealed. Trials are public.

## **HONDURAS**

Although the law provides for an independent judiciary, the judicial system was poorly funded and staffed, inadequately equipped, often ineffective, and subject to patronage, corruption, and political influence.

Low wages and lack of internal controls rendered judicial officials susceptible to bribery, and powerful special interests still exercised influence in the outcomes of court proceedings.

During the year 74 percent of approximately 221,000 cases pending under court procedures organized in 2004 were purged. The law requires backlogged cases to be resolved by 2006.

There are 12 appeals courts, 77 courts of first instance with general jurisdiction, and 330 justice of the peace courts with limited jurisdiction. The Supreme Court of Justice names all lower court judges. The media and various civil society groups expressed concern that the 8-7 split between the National and Liberal parties on the court resulted in politicized rulings by the Supreme Court of Justice.

## **NICARAGUA**

Although the law provides for an independent judiciary, the judicial system was susceptible to corruption and political influence. Judges' political sympathies or acceptance of bribes or influence from political leaders often influenced judicial actions and findings. While civil and criminal courts continued to expedite the judicial process for those in prison awaiting a final verdict, human rights and lawyers' groups continued to complain about judicial inaction and delay. The PLC and FSLN manipulated the judiciary for political purposes. The FSLN utilized its political control of the judiciary to impede the resolution of property claims. Both lower courts and the Supreme Court rendered controversial judgments dismissing evidence and convictions against international drug traffickers.

On March 3, FSLN leader Daniel Ortega used personal connections with judicial officials to obtain a court order permitting him to hold a rally in Masaya on March 6 to block a campaign rally by a rival for the 2006 FSLN presidential candidacy, former Managua mayor Herty Lewites. The media and human rights organizations, including the pro-Sandinista Nicaraguan Center for Human Rights [CENIDH], criticized the action as a politically motivated threat to the freedoms of expression and assembly.

In March the Supreme Court named Oscar Loza, formerly of the state security directorate and a documented human rights abuser during the 1980s Sandinista regime, as a Managua appeals court judge. In March and April the court system continued to erase all corruption charges and convictions against Byron Jerez, former director of taxation during the government of Arnoldo Aleman.

In April the National Assembly elected four magistrates to the Supreme Court, ensuring that the institution remained evenly divided between PLC and FSLN caucuses with political loyalties either to Arnoldo Aleman or Daniel Ortega. Despite promises that FSLN leader Daniel Ortega had made to President Bolanos that independent candidates

would be given fair consideration, the National Assembly ignored lists of experienced and politically neutral candidates proffered by civil society and the Bolanos administration.

In July PLC-affiliated Judge Roxana Zapata granted to former President Aleman what the government and media described as an illegal medical parole that freed him from house arrest following 2003 convictions for money laundering, fraud, and corruption. According to the media and the government, the arrangement was part of a political deal between Aleman and Daniel Ortega. Although the attorney general's office appealed Aleman's release to an appeals court, sending Aleman back to house arrest for several weeks, on August 30, the Supreme Court, controlled by Aleman and Ortega supporters, approved the "medical parole" and ordered the government to release Aleman. The government released Aleman on September 22. Although Aleman's convictions technically remained in effect, press reports indicated that he and Ortega continued to negotiate a deal to erase the convictions.

The Supreme Court took partisan positions on legal issues in the institutional conflict between the Bolanos government and its FSLN and PLC opponents in the National Assembly. The court ignored the constitutional principle of separation of powers and ruled in favor of the assembly in every constitutional dispute that arose out of the assembly's reforms intended to strip powers from the presidency (see section 3). The Supreme Court's proposal during the year to create a body of judicial police that would follow its orders alone was dropped when the government and National Assembly reached a settlement.

The judicial system comprises both civil and military courts. The 16-member Supreme Court is the system's highest court, and it administers the judicial system and nominates all appellate and lower court judges. The Supreme Court is divided into specialized chambers on administrative, criminal, constitutional, and civil matters. The law requires that the attorney general investigate crimes committed by and against juveniles. The military code requires that the civilian court system try members of the military charged with common crimes.

There were no new developments in the case of Henry Ruiz and other members of the Augusto Cesar Sandino Foundation charged in 2003 with document fraud and illicit association to commit a crime. Observers noted that the charges were politically motivated.

## **COSTA RICA**

The law provides for an independent judiciary, and the government generally respected this provision in practice. The legal system faced many challenges, including significant delays in the adjudication of civil disputes and a still growing workload.

The judicial branch of government includes the upper and lower courts, the Judicial Investigative Police, the Office of the Prosecutor, the Office of the Public Defender, forensic laboratories, and the morgue. The lower courts include the courts of first instance and the circuit courts. The Supreme Court is the highest court, with 22 justices known as magistrates. The Legislative Assembly elects those magistrates for eight-year terms, which are renewed automatically unless two-thirds of the assembly opposes such renewal.

## **PANAMA**

Although the law provides for an independent judiciary, the judicial system was susceptible to corruption and outside influence, including manipulation by other branches of government. The president appoints 9 supreme court of justice magistrates to 10-year terms, subject to national assembly ratification. Supreme court magistrates appoint appellate [superior tribunal] judges, who appoint circuit and municipal court judges in their respective jurisdictions. Although judicial appointments were supposed to be made under a merit-based system, the system was undermined by political influence and interference by higher-level judges.

At the local level, mayors appoint administrative judges [*corregidores*], who exercise jurisdiction over minor civil cases and who hold wide powers to arrest and impose fines or jail sentences of up to one year. Outside of Panama City, this system had serious shortcomings. Defendants lacked adequate procedural safeguards. Administrative judges usually were not attorneys, had not completed secondary education and in some cases, were corrupt. In practice, appeal procedures were nonexistent. Affluent defendants often paid fines while poorer defendants went to jail, contributing to prison overcrowding.

## **COLOMBIA**

While the law provides for an independent judiciary, the judicial system was overburdened, inefficient, and hindered by the suborning and intimidation of judges, prosecutors, and witnesses. Impunity remained a serious problem. According to the Supreme Council of the Judiciary, a perpetrator was punished in less than 1 percent of crimes. The administrative chamber of the Supreme Council of the Judiciary [CSJ] reported that the civilian judiciary suffered from a backlog of cases to be processed. These backlogs led to large numbers of pretrial detainees.

Judicial authorities frequently were subjected to threats and acts of violence. According to the National Association of Judicial Branch Employees and the Corporation Fund of Solidarity with Colombian Judges, 14 judicial branch employees were killed and 53 received threats against their lives. One employee was kidnapped, one was "disappeared," and four left the country in self-imposed exile because of death threats. Some judges and

prosecutors assigned to small towns worked out of departmental capitals because of security concerns. Witnesses were even more vulnerable to intimidation and many refused to testify.

There were reports that judicial workers were killed during the year. For example during a March investigation into the February San Jose de Apartado massacre, a commission of investigators from the offices of the prosecutor general, the human rights ombudsman, and the inspector general were attacked with mortar shells and machine gun fire, killing the police escort accompanying the commission.

In April suspected paramilitaries killed a police captain and prosecutor general's office investigator Susana Castro. The pair was conducting an investigation in La Hormiga, Putumayo Department.

In September five members of a judicial commission conducting an investigation in Tumaco, Narino Department disappeared after members of the FARC attacked and sunk their river transport boat. The bodies of a prosecutor and a technical investigator on the commission were found three days later.

There were no new developments in the investigations of two cases from 2004 involving judicial workers: the August killing by unknown assailants of former superior court judge and La Guajira Department magistrate Ronaldo David Redondo and the November killing of state attorney Mario Canal.

The civilian justice system is composed of four functional jurisdictions: civil, administrative, constitutional, and special. The civil jurisdiction is the largest and handles all criminal, civil, labor, agrarian, and domestic cases involving nonmilitary personnel. The Supreme Court of Justice is the highest court within the civil jurisdiction and serves as its final court of appeal.

The administrative jurisdiction handles administrative actions such as decrees and resolutions, which may be challenged in the administrative jurisdiction on constitutional or other grounds. The Council of State is the highest court in the administrative jurisdiction and serves as the final court of appeal for complaints arising from administrative acts.

The Constitutional Court is the sole judicial authority on the constitutionality of laws, presidential decrees, and constitutional reforms. The Constitutional Court also may issue advisory opinions on the constitutionality of bills not yet signed into law and acts within its discretion to review the decisions of lower courts on *tutelas*, or writs of protection of fundamental rights, which can be filed before any judge of any court at any stage of the judicial process.

The special jurisdiction of the civilian justice system consists of the Justices of the Peace program and the indigenous jurisdiction. The CSJ is responsible for the administration and discipline of the civilian justice system.

The Supreme Court, the Council of State, the Constitutional Court, and the CSJ are coequal supreme judicial bodies that sometimes issued conflicting rulings and frequently disagreed about jurisdictional responsibilities.

The Office of the Prosecutor General is responsible for investigations and prosecutions of criminal offenses. Its Human Rights Unit, which included 15 satellite offices in 7 regional capitals, specialized in investigating human rights crimes. The unit's 48 prosecutors were handling 2,320 cases at year's end.

An internal affairs unit was created in the prosecutor general's office. The prosecutor general's office fired 31 employees for corruption based on the work of this unit.

The office of the inspector general, also known as the public ministry, investigates allegations of misconduct by public employees, including members of the state security forces. The inspector general's office referred all cases of human rights violations received during the year to the human rights unit of the prosecutor general's office.

Through August the office of the inspector general charged 22 members of the armed forces with human rights offenses, which were referred to the prosecutor general for criminal investigation. According to the Ministry of Defense, during the year authorities sentenced several members of the army who were found to be guilty of the 1994 murder of Elcias Munoz and 6 other people in Neiva, Huila Department, to prison terms ranging from between 16 and 40 years. In addition authorities found 7 other members of the army guilty of murders, massacres, and kidnappings and sentenced them to prison terms ranging between 20 and 38 years. For example Lieutenant Sandro Quintero Carreno was found guilty for his role in the 1998 La Cabuya massacre and sentenced to 38 years in prison.

## **ECUADOR**

While the law provides for an independent judiciary, in practice, the judiciary was susceptible to outside pressure and corruption.

The judiciary is composed of the Supreme Court, superior circuit courts, other courts and tribunals that hear cases in accordance with the constitution and other laws, and the Judicature Council, which is charged with administering the court system and disciplining judges. There also are military and police tribunals that have the same status as circuit courts, as well as criminal, provincial, and cantonal [county] courts. The Supreme Court supervised the selection by open competition of all appellate judges.

In February the Inter-American Commission on Human Rights held a general hearing on the appeal brought by 27 justices of the Supreme Court who were replaced by Congress in December 2004. The commission did not reach a decision on the petition's admissibility, and there were no further developments by year's end. President Gutierrez



dissolved the court days before his ouster in April following the court's decision to drop corruption charges against two former vice presidents and former President Abdala Bucaram. In May Congress passed legislation to select a commission to designate a new court and in November the commission named a new Supreme Court in a process widely viewed as transparent. The Constitutional Tribunal has been dissolved since December 2004.

## **BOLIVIA**

The law provides for an independent judiciary, and the government generally respected this provision in practice; however, corruption and inefficiency in the judicial system remained major problems. Poor pay and working conditions made judges and prosecutors susceptible to bribes.

The judicial system has three levels of courts: trial court, superior court, and the Supreme Court. The Supreme Court hears appeals in general, while the constitutional tribunal has original and appellate jurisdiction on constitutional matters.

The CCP provides for a system of transparent oral trials in criminal cases; requires that no pretrial detention exceed 18 months; provides for a maximum period of detention of 24 months in cases in which a sentence is being appealed; and mandates a 3-year maximum duration for a trial.

The law provides that the prosecutor is in charge of the investigative stage of a case. The prosecutor instructs the police regarding witness statements and evidence necessary to prosecute. Counternarcotics prosecutors lead the investigation of narcotics cases. The prosecutor pursues misdemeanor cases [with possible sentences of less than four years] before a judge of instruction and felony cases [with possible sentences of more than four years] before sentencing courts, both of which features a five-member panel that includes three citizen members and two professional judges. During the year the Forensic Medical Institute opened, although the attorney general's office did not have the proper chemicals to begin conducting investigations.

Superior court review is restricted to a review of the application of the law. Supreme Court review is restricted to cases involving exceptional circumstances. During the superior court and Supreme Court reviews, the courts may confirm, reduce, increase, or annul sentences or provide alternatives not contemplated by lower courts.

## **PERU**

The law provides for an independent judiciary, and the government generally respected this provision in practice.

The three-tier court structure consists of lower and superior courts, and a Supreme Court of Justice of 30 judges. A constitutional tribunal of seven members operates independently of the judicial branch. The independent National Judicial Council [CNM] appointed, disciplined, and evaluated all judges and prosecutors who have served in their position for seven years or more. Failure to be certified by the CNM disqualified a judge or prosecutor from working in that capacity again.

In May the government presented a report recognizing that the CNM's procedures violated the due process criteria of the Inter-American Commission of Human Rights [IACHR]. Consequently, the government agreed to the following remedial measures: an indemnity of \$5 thousand [17,200 soles], the establishment of a new evaluation procedure that would take place within five months of settlement of the dispute, and the reincorporation of formerly disqualified justices into their former positions or those of a similar level.

Judicial reform remained a government priority, but implementation was irregular. During the year some of CERIAJUS' recommendations were put into practice. Congress approved 13 of 52 legal proposals put forward by CERIAJUS, among these a proposal to create a special commission dedicated to following up on the proposed reforms. The judiciary created the first seven judgeships for a special commercial court and continued to post an estimated nine thousand Supreme Court of Justice decisions on its Web site. Superior court justices and their administrators also received special training in public administration.

In addition the CNM approved new regulations [including suggestions from civil society] for the selection of judges and prosecutors.

Witness protection remained a significant weakness of the justice system. The National Coordinator for Human Rights, an umbrella Human Rights NGO, documented 45 cases of attacks on witnesses during the year. In February a witness in the case of accused narcotics trafficker Fernando Zevallos was attacked, and on June 1, for the third time in 15 months, unknown assailants attempted to kill Luis Alberto Ramirez, the key witness in the trial of General Luiz Perez.

## **PARAGUAY**

While the law provides for an independent judiciary, courts remained inefficient and subject to corruption and political influence. Politicians and other interested parties blocked or delayed investigations and often pressured judges, although the judiciary was not allied with any political group.

The nine-member Supreme Court appoints lower court judges and magistrates, based upon recommendations by the magistrate's council. There are five types of appellate tribunals: civil and commercial, criminal, labor, administrative, and juvenile. Minor

courts and justices of the peace come within four functional areas: civil and commercial, criminal, labor, and juvenile. The military has its own judicial system, which is subordinate to the civilian justice system.

## **CHILE**

The law provides for an independent judiciary, and the government generally respected this provision in practice.

The judiciary has civil, criminal, juvenile, family, and labor courts of first instance throughout the country. There are 16 courts of appeal. The 21-member Supreme Court is the court of final appeal. A constitutional tribunal decides whether laws or treaties present conflicts with the constitution. There are also military courts martial.

## **URUGUAY**

The constitution provides for an independent judiciary, and the government generally respected this provision in practice.

The Supreme Court heads the judiciary system and supervises the work of the lower courts. Criminal trials are held in a court of first instance. Aggrieved parties have a right of appeal to the appellate court but not to the Supreme Court. A parallel military court system operates under a military justice code. Two military justices sit on the Supreme Court but participate only in cases involving the military. Military justice applies to civilians only during a state of war or insurrection.

## **BRASIL**

The law provides for an independent judiciary, and the government generally respected this provision in practice; however, the judiciary was underfunded, inefficient, and often subject to intimidation and political and economic influences, particularly at the state level, a situation that occasioned vigilante action. A number of senior judges remained under investigation nationwide on a variety of charges.

Although the law requires that trials be held within a set period of time from the date of the crime, the nationwide backlog in state and federal cases frequently led courts to dismiss old cases unheard. This practice reportedly encouraged corrupt judges to delay certain cases so that they eventually could be dismissed, although there were no reports of this during the year.

The judicial system ranges from courts of first instance and appeals to the Federal Supreme Court. States organize their own judicial systems within the federal system and must adhere to the basic principles of the constitution. There are specialized courts for police, military, labor, election, juvenile, and family matters.

## **VENEZUELA**

While the law provides for an independent judiciary, it was increasingly less so. The judiciary also was highly inefficient, sometimes corrupt, and subject to political influence, particularly from the attorney general's office, which in turn was pressured by the executive branch.

The judicial sector consists of the Supreme Tribunal of Justice and lower courts, the attorney general's office, and the Ministry of Interior and Justice. The Supreme Tribunal of Justice is the country's highest court and directly administers the lower courts through the Executive Directorate of the Judiciary.

According to government statistics, provisional and temporary judges constituted an estimated 50 percent of the approximately 1,900 judges. The Supreme Tribunal of Justice's Judicial Committee may hire and fire temporary judges without cause and without explanation, and it did so. Provisional judges legally have the same rights as permanent judges. In May the Supreme Tribunal of Justice's Judicial Committee removed approximately 50 judges [some tenured and some provisional] in several states and Caracas, accusing them of complicity with drug traffickers and other irregularities. In May the Supreme Tribunal of Justice began administering competitive exams to provisional judges as a basis for granting tenure. As of December approximately 480 judges had been granted tenure.

The law provides that the Moral Council [attorney general, human rights ombudsman, and comptroller general] may suspend judges and allows the National Assembly to revoke the appointment of supreme tribunal of justice judges by a simple majority vote. Human Rights Watch [HRW] noted that the law threatens the independence of the judiciary by subjecting it to political control.

Lower court judges oversee pretrial motions, including prosecution and defense motions, prior to criminal cases going to trial judges. Executive judges oversee the application of sentences. Appeals courts, consisting of three-judge panels, review lower court decisions. The attorney general oversees the prosecutors who investigate crimes and bring charges against criminal suspects.

Corruption and susceptibility to political pressure were widespread, particularly from the attorney general's office, which in turn was responding to pressure from the executive branch. In February the Supreme Tribunal of Justice suspended three judges for lifting travel restrictions prohibiting persons investigated for involvement in the attempted

removal of President Chavez in 2002. The magistrates who assumed the duties of the suspended judges subsequently reversed the decision to lift the ban. In March the Constitutional Chamber of the Supreme Tribunal of Justice annulled a 2002 supreme tribunal of justice ruling that the events of April 2002 constituted a power vacuum and not a coup. The 2002 ruling had previously prevented the prosecution of four high-ranking military officers accused of military rebellion.

Human rights NGOs and judicial observers criticized the attorney general's office for corruption and the politicization of prosecutors. In June judicial NGO Foro Penal reported that a small group of prosecutors was given the lead on nearly all high-profile prosecutions. In July the Andean Commission of Jurists criticized the attorney general's use of his office to investigate and prosecute opposition figures on political grounds.

On April 14, the Penal Chamber of the Supreme Tribunal of Justice revoked the October 2004 ruling throwing out all criminal charges against National Guard General Carlos Alfonzo Martinez and ordered the case reheard. On July 12, an appeals court upheld the original August 2004 conviction of General Martinez to five years probation for violating security zones. The court found Martinez not guilty of instigating rebellion or abandoning his command.

In May the Penal Chamber of the Supreme Tribunal of Justice revoked the October 2004 appeals court ruling dismissing the case against Baruta mayor Henrique Capriles Radonski on charges relating to a violent demonstration in front of the Cuban Embassy in 2002 and ordered the case reheard

In November the attorney general's office issued arrest warrants for four alleged "intellectual authors" of the November 2004 killing of prosecutor Danilo Anderson. Businessman Nelson Mezerhane and 2 others were held for 46 days in DISIP custody for allegedly masterminding the killing based on the testimony of an alleged former Colombian paramilitary member whose credibility was questioned by various press reports. In December a Caracas judge convicted three former police officers as the material authors of the killing.

In May a judge ruled that General Felipe Rodriguez must stand trial on charges of rebellion and conspiracy for his alleged role in the 2003 bombings of the Spanish and Colombian consulates in Caracas and for his role in a military protest at Altamira.

On March 14, prosecutors accused former Miranda State governor and Democratic Coordinating Committee leader Enrique Mendoza of conspiracy and rebellion for his alleged involvement in the closure of a television station in 2002. Mendoza was not subject to any court-ordered restrictions, and the court had yet to rule whether he would stand trial by year's end.

In April prosecutors opened an investigation into Carlos Ayala Corao, President of the Andean Commission of Jurists and former president of the Inter-American Commission on Human Rights, for conspiracy related to his alleged participation in the 2002 coup.

Human rights groups criticized the charge as an example of political prosecution without legal foundation. In October the prosecution did not cite Ayala as one of those formally charged in the case, thereby discontinuing the investigation.

In November the controller general suspended from political activity Leopoldo Lopez, an opposition party mayor of a Caracas municipality, for a period of six years after he leaves office in 2008. The controller alleged that Lopez mishandled municipal funds in 2002. Lopez claimed the move was unconstitutional and part of a strategy by the Chavez government to eliminate the political opposition.

## **DOMINICAN REPUBLIC**

Although the law provides for an independent judiciary, public and private entities continued to undermine judicial independence. The judiciary received training in the Criminal Procedures Code to help create and maintain professional standards, but undue influence remained a problem.

The judiciary includes a 16-member Supreme Court, appeals courts, courts of first instance, and justices of the peace. There are specialized courts that handle tax, labor, land, and juvenile matters. The Supreme Court is responsible for naming all lower court judges according to criteria defined by law. The government established 17 of the 25 tribunals provided for by law and 5 courts of appeals for children and adolescents. The Code for Minors outlines the judicial system for criminal cases involving juveniles and family disputes.

## **HAITI**

Although the law provides for an independent judiciary, in practice the judiciary was subject to significant influence by the executive and legislative branches. Years of extensive corruption and governmental neglect left the poorly organized judicial system largely moribund. Judges assigned to politically sensitive cases complained about interference from the executive branch. Then Minister of Justice Bernard Gousse made minimal efforts at reforming the justice system, such as relieving corrupt judges of their caseloads. In May the IGOH replaced Gousse with Justice Minister Henri Dorleans, who enacted tough judicial reform measures, particularly on pretrial detention. The new minister introduced system-wide changes aimed at strengthening the system's capacity. Although some immediate improvements were made, such as special judicial sessions to adjudicate the cases of detainees held in prolonged pretrial detention, the system remained weak and had limited capacity at year's end.

Systemic problems--including underfunding and a shortage of adequately trained and qualified justices of the peace, judges, and prosecutors--created a huge backlog of

criminal cases, with many detainees waiting months or in pretrial detention for a court date. For persons acquitted or who had charges dismissed, there was no legal redress for their prolonged pretrial detention.

In December the IGOH issued a presidential decree involuntarily retiring five judges from the Supreme Court. The action resulted from the interim government's outrage over two Supreme Court decisions affirming Haitian-American Dumas Simeus' right to appear on the presidential ballot.

In most regions judges lacked the basic resources and professional competence. The qualifying year-long course at the magistrates' school requires no previous legal training. Judges increasingly conducted legal proceedings exclusively in Creole rather than French, but language remained a significant barrier to full access to the judicial system. The UN Development Program [UNDP], supported by the government, provided additional training for many segments of the judicial system, including new judges and attorneys.

On April 25, former Port-au-Prince police chief Jackson Joanis appealed his conviction for his role in the murder of Father Jean-Marie Vincent in 1994. On June 10, the appeals court overturned Joanis' conviction for lack of sufficient evidence against him and set him free.

Former paramilitary leader Louis-Jodel Chamblain was released from prison on August 11. Chamblain appealed his 2000 conviction in absentia for the 1994 Raboteau massacre, and the appeals court overturned it in late May, citing irregularities within the original trial. Although he remained in prison to face additional charges related to a 1993 incident in Cite Soleil, on June 7, his lawyers filed a writ of habeas corpus asserting that he was being held without due process, and the court ordered his release on July 26.

The release of Chamblain and Joanis, despite their alleged roles in other human rights violations, called into question the IGOH's commitment to respect the rule of law and to strengthen democratic institutions in the country.

At the lowest level of the justice system, justices of the peace issue warrants, adjudicate minor infractions, mediate cases, take depositions, and refer cases to prosecutors or higher judicial officials. Investigating magistrates and public prosecutors cooperate in the development of more serious cases, which are tried by the judges of the first instance courts. Thirty appeals court judges hear cases referred from the first instance courts, and the 11-member Court of Cassation, the country's highest court, addresses questions of procedure and constitutionality.

## **JAMAICA**

The law provides for an independent judiciary, and the government generally respected this provision in practice. However, the judicial system was overburdened and operated with inadequate resources.

The judiciary's lack of sufficient staff and resources hindered due process, and the BSI also had a large backlog. Trials in many cases were delayed for years, and other cases were dismissed because files could not be located or had been destroyed. A night court had some success in reducing the backlog of cases. The Supreme Court used mediation through the Dispute Resolution Foundation as an alternative to traditional trials, which alleviated some of the backlog in that court. The resident magistrate's courts also used alternative dispute resolution in limited cases.

There was a general lack of confidence in the police's witness protection program, which led to the dismissal of a number of cases involving killings. In a culture where it was widely believed that "informers will die," some criminal trials were dismissed because witnesses failed to come forward as a result of threats and intimidation. Some of those who came forward qualified for the witness protection program, but many either refused protection or violated the conditions of the program.

The court system consists of justices of the peace at the lower end. Resident magistrate's courts handle civil and criminal cases, while the Supreme Court has unlimited jurisdiction in civil and criminal matters. Defendants have the right to appeal a conviction in any of the three trial courts to the court of appeal, which is the highest court in the country. The Privy Council in the United Kingdom is the final court of appeal.

## **GUYANA**

Although the law provides for an independent judiciary and the government generally respected this provision in practice, some law enforcement officials, prominent lawyers, and others accused the government of occasional judicial intervention. The general perception was that the judiciary was influenced by the executive, and that corruption existed at the magistrate level.

Delays and inefficiencies in the judicial process undermined due process. Delays in judicial proceeding were caused by shortages of trained court personnel and magistrates, inadequate resources, postponements at the request of the defense or prosecution, occasional allegations of bribery, poor tracking of cases, and the slowness of police in preparing cases for trial. The delays resulted in a backlog of more than 10 thousand cases, some dating back 10 years.

The court system is composed of magistrate's courts, the High Court, and the Court of Appeals. There is also the right of final appeal to the new Caribbean Court of Justice. The



magistrate's courts deal with both criminal and civil matters. Specially trained police officers serve as prosecutors in lower magistrate's courts. The DPP is statutorily independent, may file legal charges against offenders, and handles all criminal cases.

The Judicial Services Commission [JSC] has the authority to appoint judges, determine tenure, and appoint the DPP and his deputy. The president, on the advice of the JSC, may temporarily appoint judges to sit in magistrate's courts and on the High Court.

## APPENDIX B

### BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

**Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985**

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

### ***Independence of the judiciary***

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

### ***Freedom of expression and association***

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

### ***Qualifications, selection and training***

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

### ***Conditions of service and tenure***

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

### ***Discipline, suspension and removal***

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

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