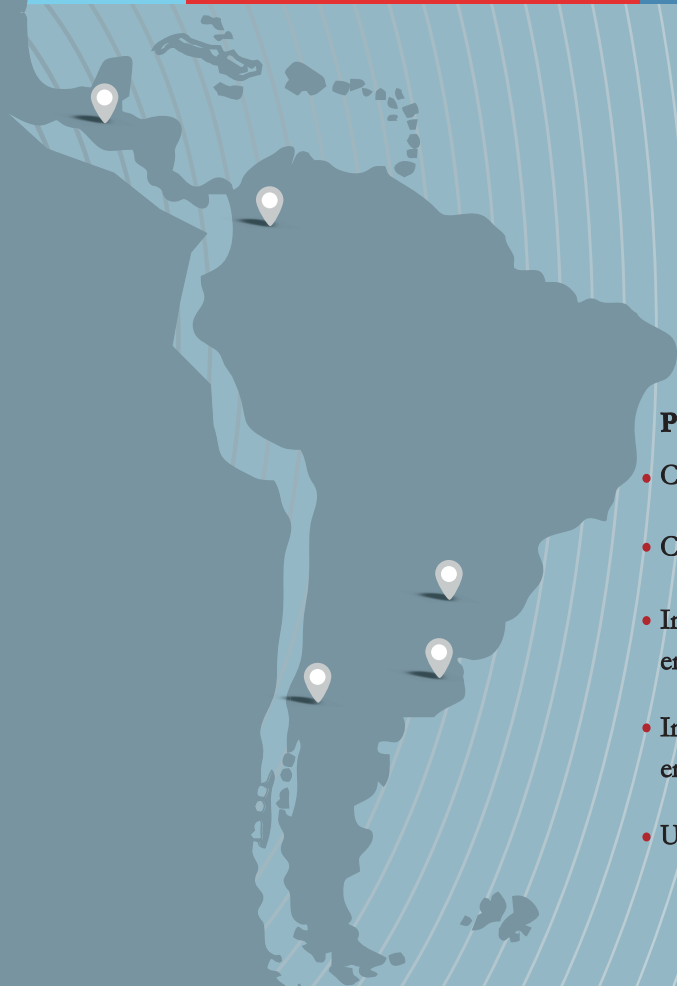


Judicial Government

Independence and Strengthening of the Judiciary in Latin America

Directors: Alberto Binder and Leonel González



Participating institutions:

- Centro de Estudios Judiciales
- Corporación Excelencia en la Justicia
- Instituto de Estudios Comparados en Ciencias Penales y Sociales
- Instituto de Estudios Comparados en Ciencias Penales de Guatemala
- Universidad Diego Portales



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Independence and Strengthening of the Judiciary in Latin America

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Distribución gratuita.

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PROLOGUE¹

Judicial government is an essential issue for consolidating Latin American democracies. Conceptually defining and empirically exploring it and how the Judiciary works in different nations is a fundamental task for guaranteeing both the legitimacy of judges in the performance of their duties and, more importantly, the fair impartation of citizens' rights. The discussion of judicial government should include a political aspect, which addresses the independence of the Judiciary from other public entities and interest groups and should also consider the operational aspect of the organization and actions of judges from the perspective of the strengthening of their functional autonomy, and the transparency and objectivity of the rules regarding the selection, appointment and promotion of judges in the judicial career. The failure to distinguish between political and administrative functions within the Judiciary, mainly those exercised by individuals who hold high-ranking positions, has made it difficult for us to understand and approach the dynamic of justice in our societies. In addition, members of judicial careers have questioned the impartiality and management of the system. For all of these reasons, this book addresses an important social and institutional issue that began to appear on the public agenda in the early 1990s. However, due to developments in each of the countries of the region and the continent as a whole, it has not been positioned as the cornerstone of democratization. The effort made here to revisit and update this discussion, particularly from the perspective of countries that have faced the most difficulty separating governance and jurisdictional functions within Judiciaries or that have been pressured by public opinion, private interests or members of the Executive or Legisla-

1 This document is an abbreviated version of the original, which is available in Spanish at: <http://biblioteca.cejamericas.org/bitstream/handle/2015/5613/gobierno%20judicial.pdf?sequence=1&isAllowed=y>

tive Branches frames the commitment of the Justice Studies Center of the Americas (JSCA) to the comprehensive and systemic view of the improvement of Latin American justice systems. The five case studies presented here (Argentina, Chile, Colombia, Guatemala and Paraguay) and the introduction to the report are a point of departure that invites judges, academics and citizens to focus on the importance of a strong, transparent and efficient Judiciary for the countries of Latin America.

Jaime Arellano Quintana
Executive Director, JSCA



INTRODUCTION AND OBJECTIVES

The Justice Studies Center of the Americas (JSCA) with the financial support of Global Affairs Canada (GAC) has developed a regional study on the situation of judicial government in Latin America. Its main purpose is to generate information in order to contribute to the renovation and deepening of the discussion on the independence of judges in the region.

In order to develop this research, five national realities that have been the subjects of varying levels of discussion and progress in regard to the independence and strengthening of the Judiciary were selected. We have three countries with different profiles and functions of Judicial Councils. In Colombia, the Judicial Council was introduced through the constitutional reform of 1991, absorbing all government and management powers. In the federal justice system in Argentina, the Council was created through the constitutional reform of 1994 and was given three fundamental tasks: budgetary administration, participation in the selection of judges, and disciplinary powers. In Paraguay, the Council was included in its legal organization after the Constitution was reformed in 1992, though with a very limited role: to propose candidate lists for judicial roles and manage the Judicial Academy. We also describe the experience of two countries that do not have this institution. In Chile, the government of the Judiciary is handled exclusively by the Supreme Court and administrative powers are held by a specialized agency that is located within the Judiciary. While the recovery of democracy has offered an opportunity to create a Judicial Council, it has not translated into a concrete change. In Guatemala, the system of government and administration is handled by the Supreme Court and specifically the Chief Justice. Over the past few years, profound changes have taken place in the judicial career, and there has been renewed discussion of the constitutional reform of judicial government.

While this study does not aim to be representative of the entire region, the five national realities that have been considered reflect the main trends and scenarios that have developed in Latin American judiciaries: Supreme Courts with a leading role in the government and administration of the Judiciary (Chile and Guatemala); Judicial Councils that have been in place for over 20 years (Colombia and Argentina); and systems in which responsibilities are divided between the Supreme Court and the Judicial Council (Paraguay).

All of the institutions and experts that took part in the local studies have a great deal of experience in judicial reform processes in their countries and specifically in discussions of the strengthening of judicial independence. These are the Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP) in Argentina; in Colombia, Corporación Excelencia en la Justicia (CEJ); in Paraguay, Centro de Estudios Judiciales (CEJ); in Guatemala, Instituto de Estudios Comparados en Ciencias Penales de Guatemala (ICCPG); and in Chile, Universidad Diego Portales (UDP).²

The first phase of the research involved mapping out the theoretical and empirical-referential area of judicial government (contained in the initial section of this publication). This document was distributed to the local counterpart institutions, with which we engaged in exchanges on the approach that the country reports would adopt. The final version of these reports is included in the second section of this publication. Finally, the third section of this publication presents the main findings from the five countries and the lines that JSCA proposes for a new discussion on judicial government in Latin America.

2 The opinions expressed in the country reports are the exclusive responsibility of the authors.

SECTION 1. JUDICIAL GOVERNMENT. INDEPENDENCE AND STRENGTHENING OF JUDGES

*Alberto M. Binder*³

1. Political and social context: The Judiciary in Latin America

1. From the beginning of the processes that ushered in a new democratic reality in Latin America that began approximately 30 years ago, the weakness and lack of independence of judges was identified as one of the problems that had to be addressed in a structural manner in order to give this new institutional cycle a form of justice administration that could address the main tasks that were required for a democratic republic.

We can therefore say that the weakness of the Judiciary has been –and unfortunately continues to be– one of the major problems of the Latin American political system. This need was perceived of as a political problem because it was thought that the new democratic republics of our region required a new sort of Judiciary. Furthermore, for various reasons, the configuration of the judicial system that most countries had when they began this process was not viewed as being adequate for achieving these goals.

In this study, which we hope will soon extend to other countries, we have not tried to provide a response to these two questions from the purely theoretical perspective, but to explore –for now in a set of countries that are representative of the Latin American reality– the way in which that dialectic is manifested among new expectations and old realities.

3 President of the Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP).

The background of all of the studies is thus the strong burden of political expectations of the Judiciary, which is expressed in our countries' Constitutions. This does not only include the essential function of the judicature, which is to strengthen the validity of common law, but new forms of control of constitutionality –and its enormous capacity to configure the entire legal system- and a diffuse expectation in the sense of control of the excesses of public authority.

Enforcing equal protection under the law –in social and economic systems that are characterized by privilege and inequality-, constitutionalizing the legal system –in countries that have a long tradition of ignoring political constitutions- and overseeing public officials- in countries in which republican government either has not existed or has become a joke or a mere façade- are major political undertakings.

We tend to use the phrase “judicial independence” in many senses, many of them incomprehensible, but in the end we use that concept to refer to judges' capacity to effectively address these three major tasks, which cannot be completed if those judges consolidate privileges instead of the law; allow de facto illegality of the exercise of public service instead of the Constitution; and guarantee the impunity of the powerful instead of oversight of public officials.

It is possible that there is no definitive awareness of the magnitude of these tasks and the burden that they place on judges in constitutional thought in Latin America or political thought in the region. In general, we have sustained a moralistic and superficial vision of judicial independence, as if it were a matter of the vague honesty of judges, a vague expression of judicial ethics or a technical problem when it comes time to build solutions, where procedure law inexorably drives the issue towards a progressive banalization.

On the contrary, we understand that in order to be able to reflect on the various problems that revolve around the idea of “judicial government,” we must overcome that simplistic version.

In short, the issue of judicial government as an expression or mechanism of independence is framed by important social and political expectations. These are sufficiently standardized in the bloc of constitutionality, which is always adding enormous tasks to the Judiciary that involve overcoming specific social processes such

as inequality, privilege, autocracy and illegality. They must also be framed by a set of people who belong to organizations that preserve structural elements of weakness that are the product of historical nuances and that have not even been designed to strengthen judges in the simplest tasks, much less in the major constitutional undertakings that they must address today.

2. The structural conditions of weakness of judicial organizations are broad and old. They come from a long inquisitorial tradition of colonial legislation as well as the strong commitment that the various judicial systems had to the worst period of mass human rights violations, the different forms of dictatorship or fraudulent governments, and state-sponsored terrorism. Whether it is because justice administration had not had enough “moral courage” to stop the abuses or because it directly responded to and executed the orders of dictators and fraudulent presidents, the “judicial apparatus” as “machinery” was built to answer to the Executive Branch or factual powers and to be an active or passive accomplice to dictatorships or fraudulent governments.

As a result of this history, as a new period of democracy began in the great majority of countries, it was clear that justice administration *did not have the attributes of independence necessary to be a stakeholder in democratic systems that would be respectful of the rule of law*. On the other hand, outside of this political dimension, the long tradition of extreme formalism, the nearly absolute prevalence of written justice in the civil realm, the high costs of litigation, lack of adequate infrastructure and territorial coverage, mediocre preparation of judges and attorneys and many other historical factors made the general population –and especially the most vulnerable sectors of society– experience a lack of access to justice and futility in regard to justice administration and the feeling that justice served the interests of those who had a greater capacity to learn about and utilize complicated mechanisms, organizational labyrinths, sensitivity to favoritism or venality. In the sphere of civil or commercial justice, there was also a belief that judicial independence was not one of the main attributes of justice administration and that there were multiple forms of dependence that made it the domain of traps and influences that always favored the most powerful and represented a mortal trap for the weak.

3. All of this fed the traditional difficulties enforcing the law equally in our region. From the origins of the installation of colonial legislation and the suffocation of the entire regulatory system of

indigenous peoples –at least in terms of formal legal recognition, though some countries maintained the daily life of many communities- *selective non-compliance with the law has been a constant.*

But this does not only refer to the feeling of lack of state power to enforce the law, and goes to the deeper legal work executed knowing that it was not being enforced, that is, a fictional legislation oriented towards covering up the subsistence of privileges or lack of social attachment to that law, which was practically unknown to the majority of the population except for the elites. The law was constantly broken as part of commercial, civil or tax practice, as if the law didn't apply to everyone.

This history of weakness *of the law* alongside the *weakness and lack of independence of judges* created the strong tradition that new democratic processes came up against. These new processes proclaimed that republics would be built on the division of the branches of government, judicial independence, rule of law and equal application of the law. This situation is aggravated by the fact that the new constitutional reform movement carried out in the 1980s and 1990s –and much more intensely in the 2000s- is characterized by the increase in recognition of fundamental rights, by the incorporation of International Human Rights Agreements into the bloc of constitutionality, by the strengthening of control of constitutionality and a greater fragmentation of the division of branches of government, creating autonomous institutions with mutual oversight. In other words, the tasks of justice administration quickly became broader, more central and much more demanding. However, the historical conditions of weakness had not changed, which meant that the judicial crisis grew instead of shrinking. This is alongside the promises that are expressed in a happy policy of recognition of rights, exponentially increasing the pressure of interests and expectations on each judge and on all of them as a group.

4. It very quickly became apparent that that task was much larger and more difficult than the studies and projects seemed to suggest. The first answer (though it did not always come first chronologically) involved removing or limiting the authority of judges involved in human rights violations and those who had demonstrated a clear and deep subordination to political power. The key idea from this perspective was that subordination to political power or direct complicity were personal choices made by a set of officials who had been chosen precisely because of that subordination. A second perspective which complemented the first was that if they

had been selected in that manner, there was a need to change the way judges were appointed so that merit-based selection through public processes would allow for independent justice administration to be built. A third perspective, which again, complements the first two, held that in addition to the adequate and transparent selection of candidates, there was a need to modernize the way the Judiciary worked and the way that work was organized in it, so the use of public and oral procedures and adequate management of human and material resources would allow the *institutional and labor environment of the judge to facilitate independence*.

That set of perspectives managed to mobilize a large number of projects and resources for the improvement of justice administration, and it would be an exaggeration to state that they did not produce notable changes in the modes and forms of operation of the region's courts. However, there is a certain level of skepticism regarding whether that modernization generated a greater level of independence of judges. The increase in forms of communication in society, the strong tendency of the media to confuse information about facts with editorial opinions, many of them based on the interests of the owners of those media outlets, and the change in the forms and breadth of criminality and violence or increase in judicial decisions with a strong impact on social rights or countries' economies caused *the work of the Judiciary to be subjected interests and forces that are much more intense than they had been*.

This situation *demonstrated the institutional weakness of this part of the State*, trapped in institutions and organizations with obsolete rules that were not designed for the true independent exercise of judges' power and for the defense of that independence against the resilient interplay of interests that is part of modern democracy. It is thus clear that a single isolated judge could not solve the set of tensions that accumulated in the space of justice, which was designed as an institutional field of rules, stakeholders and specific rationalities, no matter how great his or her professional capacity or exceptional civil commitment.

5. As such, in general, the weakness of the Judiciary or its lack of independence (which are not always the same) do not only continue to be an important problem in Latin America but have also become more serious in a certain sense. One cannot claim that the context of weakness or dependence is the same as it was under dictatorships or fraudulent democracies; many judges began to make uncomfortable decisions for the traditional factors of power,

sometimes making significant personal sacrifices. At the same time, a phenomenon of more active oversight of political power or strong influence in the development of public policies developed, which introduces new sources of tension, even at the level of the Inter-American Court of Human Rights. The judicial sphere became a field of new tensions and forces at play that in some way resignify or generate new challenges to judicial independence. The increase in the rights of citizens and thus the struggle to ensure that they are enforced; the appearance of class actions or cases of public interest supported by true social movements; and the judging of crimes against humanity generate a type of conflict to which judges were not accustomed and around which the idea of independence becomes tense and problematic.

The central question that this research seeks to address is, beyond the personal value of the judge and the meaning of his or her role, is the institutional structure of the Judiciary ready to strengthen and support judicial independence? Does providing political autonomy to the organization of judges, which has been the historical solution of our constitutions, automatically mean that each judge will become independent? Does the government of that autonomy by superior courts help judicial independence or accentuate internal dependence? What variants exist regarding the government of that autonomy in our region? Or do they all follow a single historical pattern, specificities aside?

These questions seek to call attention to the need to think about judges' independence *as a political problem rather than one of judicial ethics*. It is an intense political problem, and one that is to a certain extent new for the institutional structure in Latin America. This generates a new problem: Can a judge resolve these tensions on their own? And if each judge cannot significantly change the political conditions of the exercise of their office, who is responsible for doing so? What does it mean for judges to form a government "branch" or "function"? These are issues that have not been sufficiently explored much less focused on the structural conditions of weakness that we have mentioned.

6. For example, Atria (2006: 9) states that "in the correct sense, *poder judicial* is the power that the judge uses to decide a case. This means that the judiciary does not exist, or is null, absurd. But in the normal use of the expression, it refers to the organization of the courts, and that is the way the expression is used in this text: the Judiciary does not exist as a State power led by the Supreme

Court. If the term is used to refer to the courts, the term can only be understood as an abbreviation for ‘all judges.’” (Our translation.)

Atria’s claim that, in a possible –and perhaps the more correct– sense, each judge embodies the entire Judiciary– is important for advancing the critique of all of the administrative and bureaucratic models of the Judiciary that have suffocated the possibility of judicial independence throughout history (the “curatorial” understanding of jurisdiction based on its expression⁴). As such, Atria rightly insists that “while the rule of law is simply impossible without judges, it is incompatible with the idea that a Judiciary exists. The claim that the Judiciary does not exist does not mean that there are no judges or that they don’t have authority: it merely implies that they do not have that authority as officials within an organization. Each time we speak of the Judiciary, we are using an abbreviation to refer to all judges. Each time we refer to the Judiciary as a government agency, we are incorrectly using language or engaging in a sub-version of the institutions. Insofar as it lacks agency unity, the judiciary is not a collective agent (and thus it makes sense to write it using lowercase letters, and this is why I have been using upper case letters in cursive to refer to the judiciary in the incorrect sense, as a ‘Branch’ of government.” (2006:9, Our translation). Atria’s reflections are essential to understanding the value of independence as a function of the judge, of each judge, and not of a sector of government. If we refer to it as a sector of government, the Judiciary cannot be independent, in a strict sense. Furthermore, that vision prevents any attempt –through the present– that the “Judiciary” has made to suffocate the independence of each judge.

However, there are problems that open up a broader reflection on the idea of judicial government. The point is that that second dimension –of the Judiciary, still in the metaphoric sense of the “group of judges”- presents two other problems. The first is a matter

4 According to Atria (2006:15), “Judicial independence disappears in the curatorial approach. The judge is no longer independent in the same sense that the regional ministerial secretary or minister or head of the service is not independent. Now his or her decisions are decisions that are made ‘at the risk and on the part of the superior,’ who then may issue instructions and review not only the merit of the decisions but their timeliness as well. The judicature ceases to be the power to resolve the case without any instrumental consideration and becomes the resolution of the case in a manner that best advances the purposes of the Judiciary.” (Our translation.) Atria offers these two visions, but it is not clear how they coexist in the dynamic of the judicial system. I consider this problem in a similar manner, but as traditions that intersect and acquire various entities in the historical configuration.

of fact: *judges are immersed in a specific organization that provides support for their work.* It is true that the organization of the “Judiciary” does not produce anything jurisdictional and does not exercise even a hint of the power implicit in the idea of the judicature. In that sense, it is true that it does not have a power of “agency,” but larger consequences are not extracted from it, or at least, it does not modify the perspective of our work.

The determinant aspect of that “structure” or “organization” that we unfittingly call the “Judiciary” is that it does not exist to exercise any power of the State, but to provide support for the “individual power of the judge.”⁵ Its only function is to *give force to the power of the judge*, the only depository of jurisdictional power. This is not only achieved by allowing the judge to concentrate on the case and to be able to address the task with impartiality in the real and sometimes very serious context of the interplay of interests. Failing to manage interests (which is the nucleus of impartiality) in a field of strong interests in conflict requires support and not only freedom of action.

However, the existing structure or organization exists and, in our constitutional models or in the tradition of their interpretation, it is understood that that structure is “autonomous” and thus presents problems in regard to its configuration. Here we reach the central point: the type and model of organization of the structure in which judges exercise jurisdictional power presents problems in our region. This is due to the fact that it may acquire the configuration of a structure that favors the weakness of the judge (the curatorial model) or that it may be a structure that generates strength and protects it. This is the point that we must explore and clarify, particularly in order to determine which role each judge plays in the configuration and maintenance of that structure and specifically

5 Atria offers a similar idea (2006:10), stating that the organization of the Judiciary (in the unique sense, as an abbreviation: the organization of the group of judges) must maximize the judge’s capacity to handle the case. But what institutional characteristics affect the judge’s ability to handle the case? The generic response is that any instrumental consideration of the case that the judge develops prevents him or her from handling the case. Handling the case means trying to understand it on its own terms rather than as an instrument for something. Everything that makes it likely that a judge will begin to look at cases instrumentally is contraindicated. And given that it is necessary to have ends in order to have instruments, the first end of the organization of the courts is to prevent them from developing their own ends (our translation). This is correct, but it is a simplistic vision of the interplay of judicial organization and any organization of subjects that exercise any form of power.

how the political meaning of that organization is influenced by inquisitorial traditions that imagine that group of judges as a machine that manages interests. History and politics blend in traditions that operate on the jurisdictional function which each judge exercises exclusively without belonging to hierarchies or corporations. All of this shows us the complexity of the problem of each judge's independence, the citizen guarantee for strengthening the difficult exercise of impartiality in a minefield of forces that are much greater than each judge and in which the historical selective application of the law and weakness of the culture of legality represent constant traps and easy outs.

7. However, prior to this it is necessary to provide some explanations of terminology so that the purpose and scope of the study are clear. This is particularly important given that the idea that the Judiciary requires some sort of "government" is not common, and it is not clear what that means. The concepts that we have traditionally used are "autonomy" or "self-sufficiency" in relation to other branches of government and "superintendence" to refer to the authority of higher agencies regarding "lower" agencies in the context of highly hierarchical structures that also have been called into question as having no place in a system of judicial independence.
8. This entire conceptual apparatus is old and ineffective when it comes to describing the serious political issues that justice administration must address today, much less to reflect the complex forms of building and accumulating power and legitimacy, which will be what shows the real capacity for "independence." As such, we are interested in starting a dialogue between current leadership structures in this branch of government, institutions that are still moving between old judicial models and new tasks, and a conceptual framework that is nebulous and has not addressed these realities sufficiently. The end goal is to be able to open up new avenues of investigation and discussion of the real conditions of strength of the Judiciary in our region and judicial structures that can help to build and sustain that strength, moving away from the moralist, mechanical, curatorial or merely procedural vision and overcoming a fragmented vision of the problem that assumes that each individual judge can overcome these conditions, at least without a heroism that ends up expelling the most independent and well-prepared judges. If we are clear that the organization does not exercise judicial power and that judges do not express anything collective and that nothing that can be called "Judiciary indepen-

dence” exists, I believe that we can enter this field in a more productive manner.

2. Conceptual theoretical framework: Foundations for understanding the institutional structure of the Judiciary

1. First, when we talk of the Judiciary, we are referring to the autonomous organization of judges. It is a government organization composed of offices, officials, employees, routines and work processes that *have no purpose other than ensuring judges’ independence*. The Judiciary assigns judges based on their area of competency. The *autonomy* of this sector of government is recognized, but it is important to avoid confusing *independence* and *autonomy*. The latter is a characteristic of the organization and as such it may not be led by anyone other than judges. The issue of the judicial career or appointment of judges should not be confused with the management of that organization. Whether or not there is a career and whether or not judges are appointed in the context of a democratic republic are issues that are separate from the operation of the *judicial organization*. The use of the word ‘branch’ or ‘function’ in regard to that organization is incorrect.⁶ The term that we will use is *autonomous judicial organization*.⁷ Judicial power is what every judge or court has when carrying out their constitutional functions. Based on this clarification, we can thus talk about *government of the judicial organization*.
2. The idea of government of the Judiciary is not clear. We generally use the word ‘government’ to refer to the actions that the Executive Branch takes or that which we refer to as ‘administration’ in more general terms. Of course, nothing that the Judiciary does comes under that umbrella in that sense. Judges do not ‘govern’ society in the sense that other branches do even though in some sense we re-

6 However, the terms Judicial Branch (*Poder Judicial*) and Judicial Function (*Función Judicial*) are used frequently along with *Rama Judicial*, though to a lesser extent. The use of a certain name would not be a problem if the meanings were clear, but that is not the case. The question is whether the judges as a group form a body with purposes that go beyond the work of each individual judge, which should be imposed on the individual function, or if the reverse is true. There are two models of judicature in dispute around the names that are used, though this is not always done consciously.

7 This is exclusively applied to the organization that provides support to judges. The organization of the public prosecutor’s office or public defender’s office or any agency that does not exercise jurisdiction is excluded.

fer to “government of judges” when there is a move to make many decisions about public policy within the administration of justice.

But here we are not referring to the functions of judges with respect to society, but to the fact that they form part of a branch of government regarding which *something must be done as a whole outside of the individual function of each judge so that the organization meets its responsibilities and does not stray into other areas*. As such, our goal is to simply refer to “administration” of the “administration of justice,” but that word is also the wrong word because it refers to a number of tasks linked to salary payments, general spending, etc. that have a more distant connection to judicial independence, at least in the context of modern justice administration regardless of the problem of budgetary allocation or management which, as we will see, do have a great amount of influence. For all of these reasons, we believe that it is necessary to offer some conceptual clarification that will allow us to evaluate the data and put it in the perspective of a regional study.

3. It is necessary to clearly understand the main function of “judicial government.” Judges’ independence is the main guarantee that we have built to strengthen impartiality, and that impartiality is the nucleus of the concept of jurisdiction. A judge who is not impartial and no does not act as such or cannot do so loses the core of what the judiciary means. Being impartial, that is, not managing interests in the context of serious interests at play is not –and has not been– a simple task. As such, it has been understood that *judges as a group should have a self-managed, autonomous structure, a sector of government that does not depend on the administrative branch or the legislative branch*. This “independence” (which is actually autonomy) of the state structure that groups together judges **is at the exclusive service of the strengthening of the judicial independence of each judge (independence in the strict sense) as a mode of strengthening the impartiality that is the essential condition of the exercise of the power of judicature**. As such, the only foundation of any idea of “judicial government” –or any other concept that we use to refer to the set of actions that are taken with regard to the management of the autonomous structure of the Judiciary– is **the preservation and defense of the functional independence of each specific judge**.

Any other function is derived from this one, as this is the reason the division of branches exists within our constitutional systems beyond the fact that it actually refers to the power of each judge

or court. However, as we have noted in the preceding paragraphs, that function of “government” of the judicial structure does not take place in a vacuum, but in the context of the interplay of interests of each society and in the context of the historical configuration of judicial institutions and legality. As such, judicial government today should address the existence of vertical organizations, strong hierarchy and bureaucracy, that is, the *mode of functioning of the judicial machinery that was not designed for nor facilitates impartiality or independence*. As such, judicial government cannot be the mere administration of existing structures, which is why there has been a deep connection between this issue and modernization processes.

However, from this one cannot assume that the function of government is to modernize the Judiciary. The function of internal government is exclusively to preserve, defend, strengthen and promote judicial independence as a mechanism for guaranteeing the judge’s impartiality regarding a dispute between interests. This is true despite the fact that one of its main tasks is actually to safeguard the judge from the pressure of the structure of his or her colleagues in the context of vertical and hierarchical judges’ organizations that are not appropriate in a context of judicial independence. This reactive, internal function of the idea of judicial government is central to understanding it in the current context. If judicial government implies strengthening the organization or higher levels in order to pressure or weaken each individual judge, that concept of government is not appropriate for a democratic republic. If the concept of government means that the organization’s resources (the resources of the organization are always greater than those of each individual judge) are placed at the service of the judicial function of each judge, we have taken a step in the meaning of the democratization of the Judiciary. This tension between two concepts of government may be the main problem today, as the practice summarized in the specific studies shows. This also explains why the selection and appointment of judges is mixed into this issue as a central role of the upper levels of the Judiciary.

4. It is therefore necessary to distinguish between *government* actions and those that constitute the *administration of the courts*. The former are related to the defense of judicial independence as the main task and to the planning of the development of the judicial service, general management oversight, budgetary execution supervision, communication with society and relationships with other branches of government as functions derived from the main function, that is,

functions that serve to preserve the main function of the organization or preserve and develop the organization so that it can continue to effectively fulfill its role in preserving judicial independence despite the passage of time or evolution of social circumstances.

On the other hand, like any major administrative body, the Judiciary has a resource administration, budgetary execution, fine and specific income collection, salary payment and contract structure. All of this comprises the *administrative aspect* of the Judiciary, which depends on government agencies but is subject to specific principles and technical rules. That does not mean that there should not be connections between the tasks of “administration” and “government,” particularly when the mode of administering those resources may impact the independent exercise of the judicial function. Obsolete administration of support personnel, lack of infrastructure maintenance, lack of oversight of flows of complaints, lack of technological support, and matters that any judge cannot resolve on their own and that often are imposed by an administration that is out of their control and supervision that often suffer from the arbitrariness of administration rather than seeing it as a source of strength.

5. Given that there is a necessary connection between governing the structure and changing the logic and configuration of that structure (because it was not designed for an independent judge), any work of reconfiguring work processes and offices should be planned out, as these are not short-term tasks. In addition, the judicial service must adapt to changing societal conditions that pose new challenges to impartiality and thus independence. The goals that judicial system institutions set through their governance agencies are very diverse. They include not only organizational changes, but also adaptation to new services, correcting functional problems and the ongoing expansion of coverage.

The judicial system must plan its work and report on that planning. All planning must provide for future scenarios. The strategic planning that we must ask of the judicial system is not only planning for its own work. Rather, it implies an exercise in anticipating future disputes and the rights that will be at play. Currently –and this is a matter of institutional coordination- the judicial system always seems to be “surprised” by new legislation, and legislators do not consider the impact of new laws on the courts. The use of strategic planning tools and participatory forms of engaging in that planning should be encouraged in order to build that vision in the judicial

system. Planning based on the anticipation of future scenarios is one of the actions that can be taken to preserve judicial independence, as impartiality will be threatened by new forms of pressure in those scenarios.

6. A direct result of planning is responsibility for resource allocation, which is directly linked to following the budget. Although progress has been made, the obscurity and disorganization of Judiciary budgets continues to be a problem. This may be because they do not yet follow clear technical criteria or because they are not familiar with budgetary execution –and judges are frequently unaware of the budget upon which their job depends- or because that budget is executed in a disorganized manner. Many budgets are still generic and do not allow for the analysis of expenditures by sector, much less provide opportunities to connect them to the system's productivity. Beyond the payment of salaries, there is little oversight of judicial spending and the use of personal contracts for various levels of officials is expanding, which requires new and more demanding types of audits. It is unthinkable that the work of government, which must always seek to strengthen the structure in which judges carry out their work, has a connection of this type to the allocation of public funds, which is precisely what is asked of those who manage judges to guarantee their independence.
7. The discipline and morality of any organization do not depend on its system of sanctions but on other factors that ensure members' adherence to values, behavioral guidelines and self-restriction. One of the main values –if not *the* main value- is the awareness of the impartial and independent exercise of the judicature by each one of the judges. If each judge voluntarily submits to or works for other interests and manages them, the separation of powers and autonomous structure is useless. But it must be controlled and preserved. The disciplinary system is a corrective tool and should thus be used only when necessary and very precisely. In the case of the Judiciary, which is by definition in the middle of conflicts of interest, extra care must be taken to ensure that its disciplinary tools are not distorted in order to pressure judges. It is thus necessary to demand special transparency in regard to all matters involving disciplinary powers. That control is one of the functions of government. It does not mean in any case that those who govern discipline judges or even manage the disciplinary system. Rather, it means that they protect the level of compliance with standards of professional ethics as a means of protecting social legitimacy that then affects each individual judge.

8. The sustainment of a judicial culture that is tied to guiding values is a task of government connected to the presentation of that independence. It is also necessary to be aware of the precision of, need for and correctness of the use of disciplinary tools. Reestablishing discipline through sanctions already implies a situation of infringement of the culture of adherence that should serve as the basis of judges' conduct. As such, there must be a great deal of clarity in that regard. This area requires responsibility, as we have observed that use of discipline to control judges and produce short-term effects has not always been properly controlled. Inspectors, supervisors and practices of fear that are often justified by positive values or real problems within judicial institutions sometimes hide other purposes or constitute desperate remedies that aggravate the problems. There is a need to encourage strong external oversight of the use of disciplinary systems and control by judges in order to avoid extended processes of subjection to the upper ranks of judicial organizations (internal dependence), which may currently be the biggest problem with judicial independence.
9. We have seen that the clear separation between government actions in the strict sense and court administration actions is necessary. However, that does not mean that there are no strong connections between them. Who is responsible for managing judicial institutions? What is the specific dimension of that administration? What real impact does it have on the provision and quality of the judicial service? How much does poor administration of resources impact judicial independence? Although these questions seem obvious, we would be surprised to discover the level of disorder, obscurity and even primitivism that dominates court management. Even more surprising is the fact that many of those decisions –and not even necessarily the most important ones– are made by “high-ranking” judges. This is greatly detrimental to their jurisdictional work and they have no preparation for such tasks. It is fairly normal for chief justices and even Supreme Court justices to participate in thousands of administrative files on minor issues that they must sign without having any opportunity to control them and without these being decisions that require the participation of such high-ranking levels of government. Judicial institutions must engage in institutional design that clearly separates *jurisdiction, government and administration*. Judicial systems must do this because administrative modernization is not an internal need, but a way of guaranteeing quality service. It is also one of the areas that impacts judicial independence on dai-

ly basis and is caused by judicial institutions themselves, which tend to be blind to these problems.

10. The modes of appointing magistrates and judges is certainly linked to the current “techniques” of government, but in an informal or indirect manner. The appointment of judges responds to another set of problems that are also connected to impartiality and independence. However, they *do not constitute a problem of judicial government in the strict sense*. In fact, in the great majority of cases, the appointment system for judges is connected to methods and agencies that do not have anything to do with those that are used for government. We are not saying that there are no connections. On the contrary, studying the internal dynamic of the Judiciary shows that the informal groups (judicial tribes) influence both the government and appointment process and that would be seen as a continuum between the exercise of power and its reproduction. But for the *strict purposes of outlining the sphere of this research*, we prefer to leave everything related to modes of appointing judges aside. These are already the focus of a large number of research projects and concerns. This does not mean that the real dynamic of concurrence of both problems is left aside, when in practice the administration of the career is a *spurious form of judicial government*.

Similarly, this study does not address the factual dimension of all of the impacts on judicial independence, such as forms of external or internal interference, voluntary submission of judges, dependence of the administrative environment, management or even their support staff, etc. However, and reiterating that this is the center of the concerns of judicial government, the consideration of the general problem of independence will always be present as a horizon of this study, but it is not its main object. As occurs with the problem of the appointment and selection of judges, the phenomenology of dependence is a related issue and finally constitutes a continuum in the social and institutional space of the administration of justice. But there are also many studies on this. In the end, it is a question of the very borders of this research that would allow us to emphasize one of the areas of concern regarding judicial independence that has received the least attention and that opens up a path for institutional reengineering that has not yet been fully explored.

3. Main Conclusions

1. The exercise of jurisdictional functions is conducted through judges or courts which, in the specific field of the cases that are assigned to them (jurisdiction), exercise the entire judicature. This cannot be exercised through a body of officials or magistrates who act together or express themselves collectively. As a constitutional power, jurisdiction is exercised piecemeal by each judge.
2. Each judge must be impartial, that is, **they must not manage** the interests of the parties who litigate before them. However, that position of impartiality must be sustained by other institutional actions given that the judge is the only official in the republic who is asked not to manage interests. In the context of a tradition of dependent judges, this institutional position faces serious conflicts of interest. Many parties are accustomed to enjoying privileges, so this cannot be sustained *by the solitary action of each judge*.
3. In order to *strengthen the position of each judge in the exercise of their impartiality and protect them from pressure (independence), it has been decided that all judges will form a single organization that sustains them and that is autonomous*. The only role of the organization is to preserve each judge's independence directly and indirectly. It has no other purposes and cannot exercise any political function outside of that which each judge exercises in his or her jurisdiction. It is a *support organization*.
4. Direct defense actions are those that imply concrete support in the face of external or internal pressure (that is, from other judges) that seek to impact impartiality and have a judge manage a given interest. Indirect defense actions seek to maintain the collective organization of judges (autonomous judicial organization) in conditions of effective and efficient preservation of the *conditions of the exercise of the jurisdictional function*.
5. In a strict sense, *government of the autonomous judicial organization* means taking all direct actions in defense of judges' independence such that they do not face any interference with their function of exercising the judicature in an impartial manner and all of the indirect actions designed to maintain the organization in its capacity to provide direct defense. We call administration of *the autonomous judicial organization* all daily maintenance actions for the operation of the organization, such that judges can carry out

their daily work and have the material and human resources necessary to do so.

6. As such, the judicature is individual, government is collective and administration is technical and specialized.
7. Maintaining judges' discipline can be seen as a problem of government in that it maintains the organization's legitimacy based on criteria of transparency and oversight. However, it could be an issue that is given to other organizations as long as they guarantee that they will not use disciplinary power as a form of covert interference that impacts independence. The preservation of that sense of disciplinary control (legitimacy that does not affect each judge's independence) is what could form a government action.
8. Admission to the judicature directly or through the judicial career or any other means is not a problem of judicial organization but the appointment of an official in the context of a democratic and constitutional republic. This is particularly complex if there is a desire to avoid direct democratic election.

4. Empirical-referential framework: Quantitative and qualitative variables. A basic research matrix

This section presents the guidelines that were provided for the research and drafting of the country reports.

A. CONSTITUTIONAL AND LEGAL FRAMEWORK

1. Division of branches of government. Autonomy and independence of the Judiciary.
2. System of governance and administration.
3. Government structure. Powers.
4. Presidency of the Judiciary. Powers and election.
5. Administrative branch. Relationships.
6. Disciplinary branch. Powers.
7. Oversight and auditing systems.
8. Relationships with other branches of government.

B. GOVERNMENT MANAGEMENT

1. How are decisions made within the government? Meetings, committees, etc. Recording and documentation of those decisions.
2. Execution of decisions. Formal and informal proceedings.
3. Assessment of the impact of the decisions.
4. Cases of defense of judges' independence.
5. Planning activities. Multi-year strategic plans. Planning methods.
6. General modernization plans.
7. Evaluation of the development and modernization of the Judiciary. Accountability.

C. ADMINISTRATIVE MANAGEMENT

1. The process of making administrative decisions. Supervision, delegation.
2. Administrative management of the courts.
3. Levels and forms of bureaucratization.
4. Management oversight levels and mechanisms. Audits.
5. Administrative management evaluations.

D. BUDGETARY ASPECT

1. Characteristics of the judicial budget. National Treasury Funds and self-generated funds.
2. Design and approval of the budget.
3. Execution of the budget and rules for reallocation of items.
4. Spending oversight. Levels of execution.
5. Managing savings and investment accounts.

E. JUDICIAL GOVERNMENT AND DISCIPLINING OF JUDGES

1. The existence of disciplinary rules linked to judicial independence. Codes of Ethics and their application.
2. Description of supervision systems for jurisdictional work and its relationship to discipline.
3. Main case law and cases of disciplinary impacts connected to impartiality.
4. The disciplinary process. Guarantees for avoiding its abuse.
5. Judges' perceptions of the disciplinary system.

F. JUDICIAL ASSOCIATIONS AND JUDGES' PARTICIPATION IN GOVERNMENT

1. Existence and characteristics of judges' professional associations.
2. Election officials and processes. Officials' powers.
3. Participation of associations in the defense of judicial independence.
4. Participation in administrative activities.
5. Participation in disciplinary matters and judicial ethics.
6. Participation in planning activities.
7. Participation in accountability activities.
8. Informal participation of judicial organizations in the dynamics of government.
9. Informal relationships between the government and appointment of judges and magistrates.

G. SOCIAL DIMENSIONS OF THE STRENGTHENING OF THE JUDICIARY

1. Is there a social concern with the weakness or strength of the Judiciary?
2. Opinions and practices of political leadership.
3. The problem of the media.
4. Surveys and social opinions of the Judiciary.
5. Actions taken by the Judiciary to inform society.
6. Other relationships with judges and society in general.

H. RELATIONSHIPS WITH OTHER POLITICAL POWERS

1. Formal relations with the Executive Branch.
2. Formal relations with the Legislative Branch. Participation in bills. Accountability.
3. Relations with other autonomous entities (Ombudsman's Office, public prosecutor's offices, etc.).
4. The participation of the Judiciary in inter-branch commissions.
5. The formal and informal dynamic of the relationship with other branches of government.

CHAPTER 2. THE REALITY OF LATIN AMERICA. EXAMPLES AND MODELS

1. Argentina

*Javier A. Mokritzky*⁸

1. Introduction

The issue of judicial government has not been the focus of discussions regarding the organization of the Judiciary, but it is one that will arrive on the main stage soon.

Judicial government is the way in which the Judiciary is organized in order to exercise the functions that are meant to guarantee its objectives. It refers to the way in which it controls its own structure and ensures that it fulfills jurisdictional functions in the same way that other branches of government ensure that they fulfill their functions. Of course, in the case of the Judiciary there is an extra component. Due to its nature and the fact that its roles include oversight of the public acts of the entire State, it must take steps to guarantee its independence so that it can do its work free of undue external influence.⁹

We can differentiate between two types of functions. The first is management and administration, and the other is planning and implementation of internal policies.¹⁰

8 With the enormous support of the Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP) and its staff.

9 INECIP, 2001, pp. 14/16.

10 *Ibid.*, p. 47.

These different functions of government complement each other and allow the system as a whole to achieve its most evolved and refined functions.

2. Judicial Government

2.1 The functions of government

When defining which specific functions are included in judicial government, we can refer to many sources.

The division mentioned above regarding acts of government as management and administration on the one hand and the implementation of public policy on the other can be noted clearly in a Supreme Court reading.

Based on Agreement 1/04 of the Supreme Court, which orders acts of government be made public as part of a public policy of transparency, the elements that the Court understands to be acts of government that should be public are revealed.

This agreement includes the following elements as necessary for dissemination and publicity. They are relatively simple and should be accessible to all through the Supreme Court website:

1. The full list of officials and staff, including the office in which they work and their role. This information must be updated at least monthly.
2. The following administrative acts –agreements and rulings- regarding personnel:
 - a. Appointments and promotions;
 - b. Hires;
 - c. Dismissals;
 - d. Special leaves granted;
 - e. Penalties;
 - f. Any other act identified as public.
3. Administrative calls and awards, complaints, the list of bidders, the amounts of their bids and rulings regarding the procedures for:
 - a. Public tenders;
 - b. Private tenders;

- c. Pricing;
 - d. Direct purchases.
4. The annual Supreme Court budget, monthly reports on its execution and the investment account.
5. Bi-annual statistics containing the following data:
 - a. Number of records entered into the Supreme Court by case type;
 - b. Number of records ruled on;
 - c. Majorities, assenting votes, dissenting votes and abstentions by justice.
6. Any other agreement or ruling that is general in scope, any other act involving expenditures and other matters as established by the Court.

In an analysis of the elements of dissemination, points 1, 5 and 6 are published because they are part of the composition and transparency of the state of the Judiciary as a government branch so that the population is aware of them.

While gathering statistics is an act of government (given their immense usefulness for outlining policies and actions by the government), due to their public nature, at least as is established in point 5, this activity is based on the presentation of generic results of the same (very general numbers) and, without the methodologies for gathering being published, is understood as publicity rather than government.

However, points 2, 3 and 4 clearly describe government activities, fulfilling administrative, oversight/discipline, internal organizational and budgetary roles.

2.2 The organization of Argentina's judicial system

Argentina has a republican and federal government.¹¹ This means that each of the individual jurisdictions (provinces) is responsible for justice administration within its territory through the respective provincial judiciaries.

For its part, the federal government performs the judicial function in the federal capital, which is known as national justice administration, and it

¹¹ National Constitution, Articles 1, 3, 5 and 7.

does so in the rest of the country regarding the specific matters that the provinces have delegated to the national government, which is known as federal justice.¹²

This article will focus on the issue of judicial government through the analysis of the national and federal justice system, that is, in regard to the National Judiciary.

As such, the focus will be the various agencies and functions of the federal government, though mention will be made of some provinces.

3. The Judicial Council

The discussion of the composition and functions of the Judicial Council in Argentina has lasted for over 20 years. The institution has inspired a number of parliamentary debates, reforms and changes since it was created in 1994, demonstrating a true interest in it among the various political stakeholders over the years.¹³

As one of the three branches of the national government, the Judiciary manages a large amount of funds, human resources, individual and group interests and, above all else, power.

The consequence of this is that there will obviously be interests, the majority of them legitimate, that seek to maintain a certain level of control over the power that the Judiciary holds.¹⁴

12 The National Constitution establishes that certain issues are to be delegated by the provinces as exclusive attributes of the National Government. These include, for example, issues regarding customs (Art. 5, para. 1), navigating the rivers in the country (Art. 75, para. 10) and disputes among provinces (Art. 117).

13 The most significant development in the parliamentary discussions was the approval of the Law of the Judicial Council, Law 24.937, in 1997.

14 In fact, the constitutional discussion in the early 1990s included a discussion of the way in which this structure of judicial government should be formed. Specifically, the discussion focused on whether an agency external to the Judiciary should be created, or an internal one. If it was to be internal, it was necessary to determine whether it would report to the Judiciary as the only head of it or as a hemisphere (sharing its functions with the Supreme Court). The option that was initially proposed in the 1994 constitutional reform and then set by the Law of the Judicial Council was the single head. For more information, see Baigún, David and Bustos Ramirez, Juan (Directors), "Consejos de la Magistratura" in *Revista Latinoamericana de Política Criminal*, Ediciones del Instituto, Buenos Aires, 2003, pp. 43/44.

Some functions of government that were disputed (budgetary issues, resource administration, designation and removal of magistrates and others) after the creation of the Judicial Council through legal modifications addressed two specific elements: the composition of the Council and its functions.

The discussion of the Council's functions seemed to be a result of the circumstances that the country was facing. However, the discussion of adding or taking power away from this specific agency developed in the same context.

Finally, but no less importantly, the poles of internal power of the Judiciary that almost always represent the role of resistance to changes are present in these discussions, though sometimes in more creative ways. These individuals had control over the functions of judicial government prior to the constitutional reform that established the Council and its main functions.

However, prior to analyzing the legislation regarding the Judicial Council, we should first arrive at a certain level of understanding regarding the constitutional issues that have shaped the form of government and understanding of government in Argentina.

3.1 Constitutional background

Since it was founded, Argentina has had a republican structure of government based on the democratic election of representatives and the division of the branches of government.

The national government and its respective branches are the result of a delegation of powers of the provinces that existed in Argentina when the National Constitution went into effect in 1853. As such, the organization of the government and the functions of each of its branches (Executive, Legislative and Judiciary) were assigned to the provinces, delegating functions that had heretofore belonged to them.¹⁵

This delegation marked the limit of the work of the national government, as it could only carry out the tasks expressly assigned to it in Book II of the National Constitution.

15 National Constitution, Art. 1.

Furthermore, since the passage of the original Constitution, the functions of the national government were to be divided into different branches which would have specific, balanced functions.

This interaction between the three branches of government is not limited to mutual cooperation. Within the functions of each of the branches is the power to act as an oversight mechanism for the others. One of the most common examples is the constitutional oversight exercised by the Judiciary with respect to actions taken by the Legislative and Executive Branches as well as the creation of the National General Auditing Office as part of the functions of the Legislative Branch.¹⁶

This organization was inspired by the US Constitution, which was passed in 1788 and went into effect in 1789.¹⁷

The US federal government, its division of powers and the checks and balances that it established between the branches of government were in place for over 50 years following the approval of the Constitution and the Bill of Rights in 1791 when the constitutional discussion developed in Argentina.

This allowed for the principles and structures that were later incorporated by the constitutionalists in Argentina to be established and corrected until the work of the three branches of government was aligned.

Thus, for example, the constitutional oversight function exercised by the Judiciary with respect to the supremacy of the Constitution when it enters into conflict with a lower ranking rule was not immediately implemented in the US until the Supreme Court ruled in the case of *Marbury v. Madison* in 1803.¹⁸

That precedent established the primacy of the National Constitution and the importance of the Judiciary, elevating it for the first time in the history of that country to a level that was equivalent to the other two branches.

3.2 Argentina's National Constitution

It was in this historical-legal framework that Argentina's National Constitution set a balance between the three branches that would make it the

16 Nino, 2005, p. 555.

17 Alberdi, 2005, pp. 108/112.

18 <https://www.law.cornell.edu/supremecourt/text/5/137>

axis of the functioning of the national government. However, beyond the administrative nature of this decision, the division of the branches of government formed a principle of political legitimacy on which it had been erected.¹⁹

In regard to the autonomy and independence of the various government branches, the National Constitution states that the Supreme Court will have the authority to issue its own regulations and select its own employees.²⁰ The original Constitution of 1853 also provided that the Supreme Court would issue its own economic regulations.²¹

A constitutional reform process was carried out in 1994 that led to the incorporation of a series of institutions that would change the organization of the Judiciary in order to ensure greater independence and self-sufficiency. The reform created the Judicial Council and would remove the public prosecutor's office from the orbit of the Executive Branch.

The prosecutor's office became an agency that was independent of the other branches according to Article 120 of the Constitution. It was to be autonomous and self-sufficient both functionally and financially.

For its part, the Judicial Council was created in Article 114 of the Constitution as the entity responsible for many internal functions of the government of the Judiciary.

The Constitution states that there should be a balance involving representation of political agencies subject to popular elections (the Legislative and Executive Branches) as well as judges, attorneys, academics and scientists.

The importance that the Constitution gives the balanced membership of this agency is due to the fact that it endows it with more important roles for the performance of the Judiciary as an element that is independent from the other branches of government.

As such, Article 114 states that it will have the following functions:

- “1. To hold public competitions to select applicants to lower courts.

19 Alberdi, 2005, pp. 108/112.

20 National Constitution, Art. 113.

21 Originally Article 99 of the National Constitution of 1853.

2. To issue binding candidate lists for the appointment of magistrates of lower tribunals.
3. To manage resources and execute the budget assigned to the administration of justice by law.
4. To exercise disciplinary authority over magistrates.
5. To decide to open removal proceedings for magistrates, order suspension when applicable and formulate charges.
6. To issue regulations related to the judicial organization and all of those necessary to ensure judges' independence and the effective provision of justice services." (Our translation.)

As one can see, its roles include an array of powers regarding the government of the Judiciary, with the power to appoint and oversee the performance of magistrates, administration of the Judiciary's economic, material and human resources, the establishment of internal regulations for the organization and oversight of budget execution.

4. Power struggles regarding the Judicial Council

4.1 Introduction

In this section, we return to two axes that were mentioned above: the roles of the Judicial Council and its composition.

In what we could all a public phase, the entity has focused on praiseworthy or at least necessary aims with the stated intention of improving the system of judicial government and/or solving problems that emerge (in addition to helping the government structures to solve internal problems). On the other hand, one can see a second intention focused on the struggle for power and on maintaining or expanding the control that these forces have within the Judicial Council.

The oversight that each one of the forces may exercise over the Judiciary and the exercise of the jurisdictional forces will never cease to be an important facet of the public life of a country.²²

22 The Judicial Council has been subject to various legal modifications since Law 24.937 went into effect. Specifically, it has been modified by Law 25.669 of 2002, Law 25.876 of 2004, Law 26.080 of 2006 and Law 26.855 of 2013.

In fact, when this paper was being finished (November 2017), a discussion was taking place in the public sphere regarding a proposal by the National Executive Branch to modify the Council. The bill has not yet been submitted to Congress, but various media sources suggest that it includes a new change in the Council's membership in terms of representation. Those sources state that the bill was drafted in collabora-

4.2 Functions of the Council

The functions of the Judicial Council are centered on some characteristic points of the performance of judicial government set out in the law.²³

Those that stand out, leaving aside elements related to the internal functioning of the Council itself, can be summarized as follows:²⁴

- Appointment of new members of the Judiciary and establishing mechanisms for evaluating candidates;
- Guaranteeing ongoing training for members of the Judiciary and organizing training courses for all personnel;
- Establishing the replacement structure and temporary internal restructuring of the Judiciary (substitutes);
- Issuing the rules for administrative and auditing agencies of the Judiciary that are responsible for the budgets (developing the budget and executing it);
- Observing the budgetary planning activities of the Judiciary;
- Regulating and overseeing disciplinary measures for members of the Judiciary.

Furthermore, the entity is responsible for forming commissions staffed by members of the Judicial Council. These are divided into specific areas based on the matters addressed (Administration and Finance, Discipline, etc.) and oversee the offices created by the Council that are responsible for managing government functions such as the budget or administrative matters.

The members and officials of these Council commissions are elected by the full membership of the Council.

One of the moments in which it has been possible to observe the way in which a change was introduced in the Council's functions was in 2002.

At that time, Argentina was trying to recover from a very serious institutional and economic crisis. In that context, the general population found

tion with Federal Capital Bar Association representatives. See: <https://www.urgente24.com/270903-horas-decisivas-para-las-reformas-al-consejo-de-la-magistratura>

23 Law 24.937.

24 Baigún and Bustos, 2003, pp. 49/51.

that the Judiciary and the rest of the State was failing to protect the public interest.²⁵

The point that was taken up for debate that brought about the change in the Judicial Council Law, which had already been in place for three years, was the issue of the large number of vacancies among national magistrates. This logically had an impact on the slow pace that characterized the system.

A reform was proposed in order to decrease the amount of time between the competitive selection of magistrates and the presentation of candidates to the Senate; modify requirements for evaluating background information; allow the commission to propose the appointment of substitute magistrates (those who had already been designated to a position so that they can temporarily hold another that is vacant); and bring this proposal to the commission plenaries.

However, there was a political purpose behind this discussion. This project was promoted by allies of the administration, which was facing resistance from the opposition because the change to the law opened the door to the Judicial Council having more power than it had before.

The functions of judicial government that make it possible to designate its own members (with the approval of the branch of government that is most representative of the population) may be the greatest controversy that has emerged over the years.²⁶

The “easier” it is to appoint more magistrates, the more limited the opportunities that those who do not form part of those represented by the judicial government agency have to participate in that decision. This was not the first time that a struggle over political interests would lead to attempts to modify the way in which magistrates are selected.

In 2015,²⁷ the party that was in power sought to significantly expand the power of the Judicial Council to appoint substitute judges. The changes

25 It is important to mention the context given that the State as a whole was very weak in regard to its political legitimacy at the time. Once the early period of the crisis ended in December 2001, the political leaders who took control of the government had a wide margin in which to act due to the fact that they were acting on the basis of extreme need as well as the need to guarantee the political consensus required to strengthen its weak position.

26 Baigún and Bustos, 2003, pp. 53/54.

27 Law 27.145.

included the direct appointment of substitute judges by the Council based solely on the absolute majority of the members present in the Council commissions plenary.

This obviously gives more power to the political force that manages to form a majority within the Council, allowing for the appointment of temporary magistrates to a Judiciary that, 13 years after the passage of the aforementioned law (and 16 years after the Judicial Council began to conduct its work), continued to suffer from the problem of undesignated vacancies.²⁸

It is at this point that a stakeholder within the Judiciary structure enters the scene: the Supreme Court.

The system for substitutes was expressed in vague and confusing terms in 2017.²⁹ It had been stated that the system for designating substitute judges should be modified by an act of Congress because its existence worked against the constitutional rights of individuals who had been charged with crimes. But despite this “warning,” what had been done up until that point was endorsed.

In 2015,³⁰ by contrast, as a result of the passage of the law that expanded the powers of the Judicial Council (where the influence of the Court was much more limited), the Court declared the law passed by Congress that same year regulating the designation of substitute judges to be unconstitutional.

Furthermore, guidelines were issued for Congress to pass a new law for the appointment of substitutes, and the Judicial Council was told how it should do so until the new law was passed.

This was clearly a show of power by the Supreme Court given that it was an issue that had not been handled by the Judiciary and Judicial Council in a manner that satisfied their interests.

It is important to recall that the Supreme Court is also an important stakeholder in matters of judicial government and always has the “silver bullet,” which is declaring something unconstitutional.

28 Ibid, pp. 70/72.

29 National Supreme Court Ruling on “Rozsa, Carlos Alberto.”

30 National Supreme Court Ruling on “Uriarte, Rodolfo Marcelo.”

4.3 Council membership

According to the Constitution, the council membership³¹ includes representatives of the Judiciary, Legislative Branch, Executive Branch, federally enrolled attorneys and academics in the following proportions: three judges from the Judiciary, six legislators (three from each of the chambers with two from the party that has the majority and one from the first minority), two attorneys elected by the Bar Association, one Executive Branch representative and one professor. This yields a total of 13 members.

An initial analysis reveals the importance of the representation of the Legislative Branch on the council as well as the way in which an attempt is made to respect the political color of the composition of each one of the two legislative bodies. This is followed by the representation of judges, who are chosen by a system that seeks to provide equitable representation.³²

It is very interesting to consider that the integration of the Judicial Council is one of the issues that has been changed the most over the years in the nearly two decades that the agency has been active.³³

The Council's original law established that its integration would be complemented by a greater proportion of legislators (8), judges (4) and attorneys as well as the inclusion of the Supreme Court Chief Justice. Representation among legislators also included one member of the second minority in each chamber rather than just the first.³⁴

There was another change in 2006, and a new law was passed in 2013. This new law expanded the number of council members, diluting the representation of the three branches of government and increasing the proportion of attorneys slightly and that of academics/scientists significantly.³⁵

In addition, the Council members who represented the Judiciary, attorneys and academia would be directly chosen in popular elections, which were

31 Law 24.937. Modified by 26.080.

32 See the "D'Hondt" selection system at <http://chequeado.com/el-explicador/como-funciona-el-sistema-dhont-conoce-como-se-cuentan-los-votos-y-se-reparten-las-bancas-del-congreso-nacional/>.

33 Baigún and Bustos, 2003, p. 52.

34 Law 24.937.

35 Law 26.855.

to be carried out alongside the general elections for the Legislative and Executive Branches based on the duration of each one of the mandates.³⁶

However, that same year the Supreme Court found that the articles of the reform law that set popular elections for the selection of these council members to be unconstitutional, annulling them at the end of the operation of the Judicial Council.³⁷

Here again one can appreciate the way in which the different stakeholders who have been in power have operated.

5. Finance laws

For its part, the Financial Administration Law (No. 24.156), which was passed prior to the law that established the Judicial Council and was later modified, states that the Supreme Court is responsible for ensuring transparent management and efficient use of State resources in external oversight of the Judiciary's financial management.

The Judicial Self-Sufficiency Law (No. 23.853), which was passed both after the creation of the Judicial Council and the constitutional reform of 1994, establishes that the Supreme Court is responsible for managing and safeguarding the Judiciary's budgetary autonomy.

However, this law has subsequently been modified to give the Council a central role in this area, making it clear that any rule that exists within the law regarding the powers of the Supreme Court should not go against the administration of the Judiciary that is in the hands of the Judicial Council.

36 This Judicial Council reform was the result of a bill submitted to Congress by the Executive Branch along with other bills regarding the Judiciary. The various proposed reforms included the Democratic Admission to the Judiciary (approved as Law 26.861), which allows individuals to access the Judiciary through processes based on their background for both magistrates' and other professional positions. The law also established a slot for individuals with disabilities within the justice administration system.

Another bill would make the Judiciary Acts public (Law 26.856), requiring the publication of a list of all of the cases admitted to the Judiciary, which was to be easy to access along with agreements, resolutions and rulings.

Law 26.857 was approved in the same package of bills. It requires magistrates to present sworn statements regarding their assets during regular periods and requires the State to publish this information through the Judiciary. This law was passed in order to ensure transparency through financial information, modifying a law that required such statements of members of the Judiciary and the Executive. Finally, a law was passed that required detailed regulation of the way protective measures against the State would be managed (Law 26.854).

37 Supreme Court ruling "Rizzo, Jorge Gabriel, 18/06/2013.

Even so, it does leave to the Court certain elements that we can consider government functions, such as setting pay for Judiciary employees and restructuring the general budget.

There are two similar figures that are responsible for administration within the Supreme Court and the Judiciary, respectively.

The General Administrative Director of the Supreme Court is responsible for administrative and budgetary matters within the agency. He or she is appointed internally by the Court and there are some limitations on their role due to the fact that they report exclusively to this entity. The role is also comprehensive in regard to the administrative and budgetary matters that remain in the hands of the Court.³⁸

The Judiciary's General Manager is appointed by the Judicial Council and is responsible for drafting the annual budget of the Judiciary and the execution of the budget that has been assigned by the respective Judiciary law. He or she also oversees offices responsible for paying salaries and Judiciary infrastructure, in addition to handling other tasks.³⁹

The latter of the two roles includes more responsibilities because it includes the majority of the budgetary issues involving hiring, inventories and other processes.⁴⁰

6. Discipline

6.1 Introduction

One of the most important roles for the management and administration group is punishing and removing magistrates who have engaged in serious misconduct. This is commonly known as the disciplinary function.⁴¹

38 Agreement 39/07. http://www.cpacf.org.ar/files/acordadas/ac_csjn_3907.pdf

39 <http://www.consejomagistratura.gov.ar/index.php/administracion-general>

40 Baigún and Bustos, 2003, p. 103.

41 It is important to remember that the disciplinary function within the government of the Judiciary does not go against judicial independence in any way. Instead, it reaffirms it. The other side of ensuring judicial independence is the responsibility of creating a judiciary that does not deform that independence. For more information, see INECIP, *Asociacionismo e Independencia Judicial en Centroamérica*, Editorial Serviprensa C.A., Guatemala, 2001, pp. 36/37.

This government function and the appointment of magistrates is probably the one that has attracted the most attention from the various sectors of the Judiciary inside and outside of the Judicial Council since it was created.

6.2 Problematic Axes

The first problem emerges when one tries to elucidate the causes for an accusation against judges.

One of the motives is the commission of a crime in the exercise of their functions.⁴² This motive is replicated for judges with a lower ranking than Supreme Court Justice.

The second motive is “poor performance.”⁴³ How can the poor performance of a magistrate be evaluated?⁴⁴

This is in reality a tricky question that the majority of the stakeholders who influence this process internally or externally see as a curtain for avoiding an honest, in-depth discussion about the truth of the underlying question.

The real question that must be asked and analyze is not the way in which the poor performance of magistrates must be evaluated, but how to evaluate good performance.

Something that seems perfectly logically outside of the judicial sphere is a surprise when an attempt is made to discuss it.

For example, when a person takes a new job, the first question that they ask is not “What do I have to do to get fired?” but instead “What is expected of me in this role?”

6.3 Professional Ethics

It is important to mention that based on the Constitution and the law, the Judiciary should be governed by individuals who represent the various spheres of the legal profession.

42 National Constitution, Articles 53 and 59.

43 Ibid.

44 Baigún and Bustos, 2003, pp. 76/78.

This comes from the composition of the Judicial Council, which is directly or indirectly comprised of Judiciary “parties” and thus has an interest in its form of government. These include members of the three branches of government, academics, scientists and attorneys.

However, this government agency is not expressly mandated by law to issue professional ethics regulations within its sphere of action. It has not shown that there is any intention to carry out such work, leaving these tasks to external agencies.

It is necessary for the performance of the judicial function and in order to magistrates to have specific standards to follow in the case of complaints of poor performance. Otherwise, magistrates are subject to undefined, vague rules until they are accused of some sort of inappropriate conduct.

Current legislation does not include a professional code of ethics for magistrates or attorneys, the latter of which would fall to the various boards of the associations that represent attorneys in the provinces and at the federal level.⁴⁵

6.4 Removal procedure

The Judicial Council has established a procedure for addressing complaints against magistrates.⁴⁶

It is designed to guarantee respect for the constitutional and legal guarantees that are given to defendants in other areas of the Judiciary and to ensure a relatively public and transparent process once the accusation is taken to the respective body to be substantiated.

However, the same cannot be said of the accusation process prior to reaching this level. The accusation charts handled by the Judicial Council Disciplinary Commission are secret and only provide the names of the defendants and accusers and limited information on the status of the case.⁴⁷

This is where there is a conflict of interest with part of the government agency upon issuing its own procedure.

45 http://www.cpacf.org.ar/inst_codigo_etica.php

46 Disciplinary Commission Regulations. https://www.pjn.gov.ar/02_Central/ViewDoc.Asp?Doc=60594&Cl=INDEX100

47 Baigún and Bustos, 2003, p. 91.

On the one hand, it is true that all defendants should have certain rights including safeguarding their dignity and privacy in the face of accusations. However, it is important to keep in mind that this involves public officials who are carrying out a function delegated to them by the public day in and day out. As such, they should be subject to broad oversight of the way in which they carry out the mandate given to them.

The culture of institutional secret of magistrates who are the subject of complaints and the way in which the procedure is carried out prior to holding a jury trial (which is not always certain) subverts the principle of transparency that should govern public acts, particularly those that can result in the removal of a judge.

This situation demonstrates a corporate attitude on the part of the Judiciary of safeguarding the indemnity of its members. It represents an endemic intention to obscure the matters that could lead to the work of establishing parameters for good performance of judicial activity.

6.5 Magistrates' Association

The entity that represents and protects judges at the national and federal levels in Argentina is the National Associations of Magistrates and Justice Officials.⁴⁸

The main roles of this association are to promote initiatives to improve justice through training, publications, research and the dissemination of activities.

Unfortunately, the available information only allows us to conclude that the training courses offered to its members do not show a level of participation with the Judicial Council in regard to its role of providing ongoing training to Judiciary officials.⁴⁹

The Magistrates' Association is not included as part of the process of removing magistrates established by the Judicial Council.⁵⁰ This implies that a magistrate who is subject to a disciplinary process only faces the possibility of undertaking an individual defense without this including

48 <http://www.amfjn.org.ar/>

49 <http://www.amfjn.org.ar/category/capacitacion/>

50 Discipline Commission Regulations. https://www.pjn.gov.ar/02_Central/ViewDoc.Aspx?Doc=60594&CI=INDEX100

the opportunity for participation by an entity that provides cooperative protection.⁵¹

The Magistrates' Association does represent its members in other aspects of the political and social life of the Judiciary. However, it has not been included in processes that are extremely important to magistrates in order to be able to defend them.⁵²

7. Internal policy planning and implementation

7.1 Introduction

Judicial government is an issue that can be studied from two perspectives.

The first is management, which includes the administration of resources, budget, internal organization and internal selection and sanction of judicial system operators.⁵³

The second area of analysis points to the administration, application, planning and evaluation of internal policies by the systems. Its main facets are the establishment of parameters for success and failure of its main function (justice administration) and the sub-functions that depend on it (independence, efficiency, transparency and internal and external participation) and the gathering of information that is important for those purposes.⁵⁴

These two groups should, of course, align and sustain one another so that they function fluidly. A fundamental element for generating this is internal training of judicial operators.⁵⁵

Finally, once a certain level of performance is achieved in these two areas, judicial government will be in a position to implement public policies in response to societal objectives and demands that go beyond maximizing efficiency when it comes time to "administer justice."

51 INECIP, 2001, pp. 71/73.

52 In late 2017, a discussion began regarding Judiciary reforms in the political sphere. The first proposals from the Executive Branch that may affect the way in which judges and other judicial employees work is including the Magistrates' Association in the discussion process.

53 INECIP, 2001, pp. 47/56.

54 Binder, 2014.

55 Vázquez Smerilli, 2000, pp. 60/62.

Of course, each one of the elements that comprise these two groups represents a matter to be addressed. In addition, the evolution of these matters over the years was the subject of discussion and controversy. In the end, it is a struggle for control over the Judiciary.

The issues that were historically related to the sphere of internal management, such as budgeting, the power to appoint judges, the power to sanction and remove them and the administration of human resources, are connected to the issue of judicial independence. This is the case because judges' autonomy could be compromised if an external entity were to control these matters.

For its part, the planning and public policy sphere represents the idea of insecurity for those within the Judiciary. This means that it has always been received with resistance and negativity.

The treatment of the various functions of judicial government has been very uneven in Argentina.

While questions of administrative management have been addressed over and over again on the public agenda with many twists and turns, in various "push and pull" maneuvers by different stakeholders, those that engage in the planning and implementation of public policy seem to be forgotten.

A Judiciary with balanced and representative management (by its operators and other external stakeholders) will reach a level of independence that allows it to work free of external pressure. But if a government that is capable of implementing public policies (both internal and external ones) is installed, this will become a branch of government that is representative of the republican and democratic society to which it belongs.⁵⁶

7.2 The exercise of this function in Argentina

The Supreme Court is the body responsible for creating and implementing plans of action directed at specific issues in order to implement changes.

This has generally been carried out in two ways. The first is the creation of plans for implementation within the Judiciary by the very courts and tribunals that form part of the organization. A clear example of this was the promotion of measures for improving transparency standards by the

⁵⁶ Ibid, pp. 67/68.

Supreme Court. An agreement was reached in 2004 regarding the public nature of government actions, and a Supreme Court website was created and it was established that the information should also be published there.⁵⁷

Years later, in 2013, the Supreme Court issued two related agreements regarding the publication of sentences issued by the courts, ordering them to publish all of the sentences and resolutions that they issue to the Judicial Information Center.⁵⁸ It issued a second agreement creating a protocol for recording sentences.⁵⁹ In 2014, it issued an agreement ordering the submission of magistrates' sworn statements.⁶⁰ Finally, in 2015, the Court ordered the creation of the Secretariat of Communication and Open Government, giving it control over the Judicial Information Center and Judiciary Press Directorate.⁶¹

This form of implementing public policy reveals two important elements for analyzing the way in which this government function is exercised. First, this planning is structured so that it does not necessarily elucidate the action of governing until it can be evaluated retrospectively. Second, these government policies are not implemented on the basis of institutional plans issued by authorities prior to their implementation with clear objectives. Instead, they are built on top of each other like bricks until one can observe the problem with the building that was constructed.

While this government activity is present in the activity of the Supreme Court, it is sporadic and intermittent. There are no clear standards for periodic oversight that can be used to evaluate its effectiveness once it is implemented.

This can be seen in the various plans that the Supreme Court has passed, such as the 2008 initiative that formed part of an Institutional Strengthening plan on management of first instance civil courts.⁶² There has been no ongoing monitoring or expansion of the plan in subsequent years.

57 Agreement 01/04. <http://old.csjn.gov.ar/docus/documentos/verdoc.jsp?ID=117>

58 Agreement 15/13. <http://old.csjn.gov.ar/docus/documentos/verdoc.jsp?ID=75798>

59 Agreement 24/13. <http://old.csjn.gov.ar/docus/documentos/verdoc.jsp?ID=79525>

60 Agreement 09/14. <http://old.csjn.gov.ar/docus/documentos/verdoc.jsp?ID=87025>

61 Agreement 42/15. <http://old.csjn.gov.ar/docus/documentos/verdoc.jsp?ID=96515>

62 <http://old.csjn.gov.ar/data/instructs.pdf>

There is another mode for implementing public policies that is used by the Supreme Court, which is the creation of specific offices with concrete purposes that are given the necessary resources, such as the Domestic Violence Office.⁶³

The fact that there will inevitably be certain almost accidental elements of what we could call the functions of government regarding the creation and implementation of plans does not mean that this effectively constitutes what an adequate judicial government system should carry out. This is why it is important to analyze the functions that should be executed in a measured, reflexive manner with a view to the future and self-improvement.

8. Statistics

Making government decisions of any sort and any level of importance requires that the person or entity that makes that decision do so on the basis of objective data, regardless of whether it is issuing a sanction against a judge, allocating a budget line or creating a specific office.

People who make these decisions must have access to pertinent information so that they can adopt a rational position. If this is not the case, important issues are left to the discretion or luck of the operators and government agencies. Here the gathering of statistics by the Judiciary takes on a key role. The more information that is available on the situation to be addressed and the more detailed and precise this information is, the better the decision that will be made (or at least, it will be more calculated).

8.1 The importance of statistics

Gathering statistical data is not only a tool to be used for decision-making, final evaluation or system transparency. Although these reasons would be more than sufficient to justify the need for this activity and to argue in favor of its in-depth development, data become even more important if one understands that they are useful before, during and after any decision is made by a government entity.⁶⁴ We will analyze each of these elements.

First, government entities must make decisions based on concrete needs (from the large ones that impact the entire system to the most basic ones

63 <http://www.ovd.gov.ar/ovd/>

64 Binder, 2004, p. 273.

such as the purchase of office supplies) with precise purposes in order to provide for those needs.

In this first area, statistics are important for determining the individual causes of these needs. Once this government action is executed, it must be evaluated prior to its conclusion so that its implementation can be adjusted if it is not having the desired effect. In other words, a progress report must be developed. After the activity is completed, the same data collection method that was used to analyze the problem addressed is used to conduct a final assessment to measure the success or failure of the measure taken.

This also leads to another important point for statistical data collection, which is anticipating problems. An efficient resource administration system (of any kind) requires anticipation and management of future problems in order to leave aside reactionary functions and move to a new level of management and government.

Finally, it is important to keep in mind that the Judiciary, like other branches of government, is part of a republican State that represents the people, which means that any sort of decisions made by its institutions must be evaluated by the people that they represent.

The publication of statistics may not have a direct impact on government actions, but is mandatory for the various components of the government, which must publish decisions as well as the way that they were reached.

8.2 Data collection forms

Having established the importance of statistics as a fundamental tool for judicial government entities, we must determine how they can be gathered and processed.

It is important to note that the tasks that are inherent to the judicial function can only be carried out by specific people who have made law their career. However, just as a level of professionalism is required of these people to carry out this work, the other functions focused on areas of knowledge outside of law should be conducted by professionals from those fields. For example, the creation of judicial offices or hearing management offices, which engage in work that focuses on time and space organization for the development of hearings between the parties and judges, administrative and management professionals are employed rather than attorneys. In this context, professionals specializing in collec-

ting and processing statistical data must be hired to carry out that work for the Judiciary.

Of course, one must not ignore the enormous difficulty of gathering statistical data in the Judiciary for various reasons. These include the size of this branch of government in terms of territory and the matters it covers, the various components that comprise it and the multiple facets of managing individuals' interests.

In regard to the size of the Judiciary, it is important to note that national and federal justice cover the entire country (without mentioning the judiciaries of each of Argentina's provinces). This body has an enormous number of employees who are mainly assigned to atomized structures (individual courts and tribunals).⁶⁵

In regard to the management of multiple specific interests, given the nature of the judicial function, unlike the other two branches of government, the Judiciary does not issue general resolutions aimed at groups of people, but instead receives individual complaints that can often end in very diverse outcomes.

To this we add the need for data that can be gathered under common and uniform parameters, which should spread over time and change in a calculated and careful manner. This would seem to present a case for the work being done in a more centralized manner, which would come up against the way in which justice is organized in a certain sense. Beyond the fact that Argentina has a serious problem of the atomized organization of the various Judiciary entities, which act without coming into contact or creating relationships with one another, an organization that is more aware of the judicial function should still be decentralized (which is not the same thing as atomized).⁶⁶

For example, the organization of national and provincial judiciaries within Argentina is divided in regard to the content that they address (criminal, civil, commercial, labor, etc.), as they are grouped into different courts and tribunals with chambers for each one of these areas.

This division is due to the variety of claims and interests that the parties (the country's inhabitants) bring before justice.

65 Binder, 2004, p. 137.

66 Ibid, pp. 236/238.

However, this is a false contradiction because both systems (a uniform statistical data system and a decentralized judicial system) are perfectly compatible.

Just as an entity that exercises government functions within the Judiciary can operate even though it is divided, decentralized statistical data gathering mechanisms with parameters set by a central entity can be implemented. Furthermore, there can be general guides that allow for the collection of uniform basic data and other specific guidelines for each area depending on the subject and specific needs.⁶⁷

To get to the point, this could include the creation of a central office for statistics that reports, for example, to the Judicial Council and provides for the creation of individual sub-offices in the various chambers connected to the central office and to each other.

This sort of organization would also allow sub-offices to gather and process shared information for all sub-offices and develop specific parameters that can be generated by the area of justice in which they operate.

Some matters are common to all areas, such as budgetary execution or human resources, and some are only useful to specific sectors.

8.3 The situation of Argentina

Unfortunately, all of the information provided above regarding the importance and usefulness of gathering and processing statistical data as a fundamental tool for carrying out the Judiciary government functions has not been reflected in any way in our country at the national level.

There is no general initiative through the government agency, the Judicial Council, which seeks to gather statistics on the Judiciary. While Law 24.937 states that the Council's Office of Administration and Finance shall be responsible for, among other things, "maintaining the judicial statistics and information registry," this is another section of a delegation that mainly holds broad budgetary functions.

Specifically, there is no agency within the judicial government structure that focuses exclusively on the gathering and analysis of statistical data through the employment of experts in the field, much less one that covers all of the courts and tribunals in which most of the data to be collected is generated.

⁶⁷ Ibid, pp. 263/267.

Very scant statistical material that exists is included in reports (a word that is used in the most flexible sense) of the National Judiciary Statistics Office that was created by the Supreme Court in 1991.

However, the information that we have obtained suggests that this office either closed or stopped gathering and publishing statistics in 2012, as there are no data from after that date.⁶⁸

Furthermore, the information gathered through that point by the office is of very poor quality given that it only contains data collected by each one of the chambers regarding case filings, how many were being processed and how many had been closed. The information contributed by each of the chambers was uneven because it had not been gathered in a uniform fashion.

It was possible to find an Executive Branch program called the National Judicial Statistics System, which issued a more detailed report in 2012. However, it was focused on Judiciary employees (proportion, placement and relationship to the number of inhabitants).⁶⁹ Only two reports were issued, one in 2012 and one in 2014.⁷⁰

The current situation of the Judiciary in regard to this tool is insufficient. Despite the fact that there is an entity that is responsible for most government functions, the Judicial Council, little or nothing has been done to carry out this role.⁷¹

The other agencies that existed in the past did not carry out government functions either. This also brings to bear the serious lack of contributions to system transparency on the part of the Judiciary, given that it is impossible to understand the work of its representatives in the State without precise information. This lack of knowledge on the part of the public, together with other factors, encourages mistrust of and discontent towards the Judiciary.

This apparent willingness to make decisions without sufficient information when adopting measures and evaluating their success or failure and accepting an inability to anticipate future issues would seem to suggest that the judicial government structure is happy to act blindly or perhaps

68 Judicial Statistics Office. https://www.pjn.gov.ar/07_estadisticas/

69 National Judicial Statistics System (PEN). [http://www.jus.gob.ar/areas-tematicas/estadisticas-de-politica-criminal/sistema-nacional-de-estadisticas-judiciales-\(snej\).aspx](http://www.jus.gob.ar/areas-tematicas/estadisticas-de-politica-criminal/sistema-nacional-de-estadisticas-judiciales-(snej).aspx)

70 SNEJ 2014 Report.

71 Binder, 2004, p. 275.

in pursuit of interests that have little or nothing to do with those of the judicial function.⁷²

9. Performance parameters

The problem becomes even more complicated when, as a next step, we must research, identify, differentiate and establish performance parameters/standards/measures of the judicial system.

This is a problem that subtly emerged when addressing the issue of mechanisms for removing magistrates when we mentioned the difficulty of having no concrete ethics and performance standards. This allows for arbitrary actions on the part of the people who make decisions regarding sanctions and deciding which behaviors and performance are acceptable and which are not.⁷³

The problem is determining which indicators point to problems in the development of the judicial function, either with the specific operators or the system in general.⁷⁴

Of course, this work is impossible if one lacks certain and precise information on the system's functioning.

9.1 The judicial function

It would thus seem that in order to be able to establish performance parameters, we must clearly define the judicial function.

The judicial system was established with broad, noble and idealistic purposes, but its work was always meant to focus on the disputes that individual citizens bring before it so that the system could balance the parties' interests (even if one of these was the State) and provide a response based on the complaint.⁷⁵

It is thus necessary to evaluate the efficiency of the system in handling the disputes and/or interests that the various parties bring to be addressed in regard to their quantitative nature: matters of efficiency, access to justice,

72 Ibid, pp. 270/272.

73 Vázquez Smerilli, 2000, pp. 57/60.

74 Binder, 2004, pp. 279/280.

75 Binder, 2014.

organization of justice and ways to ensure that the judicial function flows as fluidly as possible. In the meantime, one must always consider that these should not be the only parameters that should matter, as a balance must be struck with qualitative issues. This first factor is more related to the system's productivity, and also serves to connect government management and administration functions in regard to the management of resources. On the other hand, qualitative parameters, as the term suggests, refer to those that evaluate the quality of the performance of the judicial function.⁷⁶

This can be executed from the individual perspective, the quality of the rulings issued by judges (or the work completed by other judicial operators), or based on the system itself and the way in which it responds to societal demands.

This sort of evaluation serves to establish performance parameters when considered from the other side.

The individual analysis of quality has often been disguised as unmeasurable, but that is far from the case. In fact, judicial sentences or any other ruling are subject to many conditions and standards that the various sources of law establish. This is how a quality resolution is understood as being one that is based on the terms of the law, case law and doctrine, for example.

Quality parameters of the government functions exercised by the system as a whole may be very diffuse, but they are not unreachable. An initial approach shows that indicators for this are found in the system's response capacity and depend on whether or not there are organized structures that avoid the atomization of the system and allow for problems to be anticipated and joint treatment of disputes.

9.2 Development in Argentina

This study has shown that Argentina's national system presents many deficiencies and that there are no established parameters for measuring the performance of the judicial function individually or globally.

Furthermore, individual assessments of magistrates through the disciplinary functions of the Judicial Council suffer from three major problems in regard to this issue: 1. They are reactionary in nature, meaning that they act when a specific magistrate is reported. This does not help to establish a performance parameter because it only operates when someone has committed a violation that goes beyond the tolerable limits. 2. The

76 Ibid.

discipline commission and trial jury (entities that form part of the disciplinary council) only address specific incidents, addressing complaints rather than evaluating judges' performance on a regular basis in order to be able to correct situations before they require a trial and the possible removal of the magistrate. 3. Periodic evaluations of the system as a whole are not conducted.

In short, this is where judicial government in Argentina is furthest behind. There is not even a conscious discussion of the elements that contribute to the quantitative and qualitative performance of the judicial function.⁷⁷

When analyzing the performance of judicial government in Argentina, we must not only evaluate whether or not performance parameters are established in regard to jurisdictional activity. It is also necessary to evaluate administrative, management and financial functions.

The measures that the judicial government issues should have concrete purposes. Given that they must also be the reasonable result of a situation analysis, they must contain standards for success and failure for management, administrative and financial/budgetary measures.

As long as the Judicial Council lacks certain specific tools for evaluating the achievement of the objective behind the measures, it will be very difficult to evaluate success or failure and even more difficult to be able to evaluate the reasons for the success or failure of those measures.

An analysis of the minutes of the Judicial Council plenary sessions and commission meetings shows that there is a complete lack in this regard.

The plenary sessions that approve budgetary and regulatory measures are generally limited to accepting the requests made by the respective commissions.

For their part, the minutes of the meetings of the individual commissions show that projects have repeatedly been approved based on previously established tender terms such as those of the Commission for Administration and Finance.

These mechanisms do not show a strategic approach that can lead to a cost/benefit or success/failure analysis of the decisions made. Instead,

77 Binder, 2014

they tend to be established as the result of need and are mainly justified by that need.

As such, a higher level of planning for the daily management exercised by the Judicial Council is not required, and as such there is no effort to seek out the result of an analysis regarding the measures taken that could produce improvements in the way that things are done.

10. Public policies

The last element that connects the judicial function to judicial government is the implementation of public policies. This refers to the Judiciary's ability to respond to the needs of the society in which it is immersed in a proactive manner.

This implies the need for the structure and government of the judicial system to be oiled in a way that allows issues of improvement, planning and internal evaluation to function fluidly along with the management and administration system, which allows the system to operate independently from the judicial function.

Once this is achieved, the system will be able to respond to and anticipate societal needs and be able to respond to them within the scope of its jurisdictional functions.⁷⁸

The implementation of effective public policies requires cooperation and coordination among the various branches of government.

Moreover, in an effort to carry out an adequate evaluation of the planning of these public policies, a high level of participation in the Judiciary and in its government will be necessary. This must go beyond the work that the juries currently do and the popular election of members of the Judicial Council.

This does not mean that there have not been several attempts over the years to implement public policies, or good imitations. However, these have been reactions to a complaint on the part of society in general for the entire State. As such, they have been implemented autonomously by the Judiciary without anticipating their usefulness or effectiveness when carrying out these actions.

78 Binder, 2004, pp. 85/88.

It is important to recall that behind these technical, legal and procedural issues, the Judiciary exists because of and for the contact that it has with the people who come to it with problems. Judiciary members⁷⁹ represent the people and manage their interests. The work that is conducted within the walls of the courts is inherently human.⁸⁰

11. Conclusions

Since the return of democracy in Argentina in 1983,⁸¹ there have been discussions of forms of republican government at all levels of the State. However, it would take more than a decade and a constitutional reform to bring this issue to the area of the Judiciary.

The Judicial Council was created to be a government agency that was representative of the various levels of society related to a branch of government that is not elected directly by popular vote.

However, even though 30 years have passed since the return of democracy, over 20 years have passed since the constitutional reform created the Judicial Council, and nearly 20 years have passed since the Council began operating, the evolution of the exercise of the functions of judicial government is clearly stalled.

As we have stated, since 2002 the political and legislative struggles regarding changes aimed at improving the Judicial Council have been focused almost exclusively on two areas.⁸²

The discussion of political stakeholders and judicial operators continues to address the “representation” of the council’s membership, seeking one that allows control over the entity’s work to be maintained or recovered.

The changes that have been made never go beyond the functions of the council that were established at the outset. This again shows that there

79 In this case, the term ‘members’ refers to magistrates and all of the professionals who form part of the judicial system as a whole, such as judges, attorneys, public defenders, prosecutors, operators and assistants.

80 Binder, 2004, pp. 169/172.

81 Argentina’s most recent dictatorship lasted from 1976 to 1983. During that period, the country was governed by a totalitarian military junta that permeated every level of government.

82 The reform bills and laws were introduced in legislative areas between 2002 and 2013 and the discussion was reactivated in 2017 regarding the same areas.

is progress of the political forces that have a certain level of control over the Council (through integration) to expand or limit the existing functions depending on their position.

“Expand or limit” does not mean that more functions are assigned to this entity, but that the fulfillment of existing functions can be facilitated. This means reducing necessary majorities, legislative oversight, etc.

The goal is always for judicial government to more or less align with the interests that are deployed around it.

However, the largest problem is that the Judiciary shows no intention of developing a vision of the future or promoting a capacity (within its structure) to anticipate problems and act accordingly.

At the same time, the justice system has not created an ongoing internal reform system that seeks to identify and address problems related to its performance.

In fact, the projects designed to reform judicial system structures and processes have historically been initiatives promoted by stakeholders and interests outside of the justice system.⁸³

In order to advance a reasonable policy for internal improvements, as the ideal agency that carries out government functions, one must have full knowledge of the operation of the Judiciary and its various gears.

In fact, given that the Judicial Council oversees other Judiciary members and handles budgetary and resource administration as well as regulations, it must have this knowledge even if it weren't necessary to improve the judicial system.

Despite all of this, it is clear that there is no real interest in determining how justice works. The organization of the judicial system is atomized rather than decentralized in an orderly manner. There is no standardized and coherent system for data collection. Furthermore, the little data that are

83 Of course, the majority of these changes –those that were implemented and those that were not- featured the active participation of various judicial operators. However, this does not mean to say that they have been initiatives internal to the judicial system, as we saw in regard to the reforms of the council itself. Furthermore, ideas for changing the justice system are viewed with reticence and tend to be resisted by judicial operators.

collected by individual courts and tribunals are not processed in a uniform manner in order to be able to obtain useful information from them.

At the same time, the false idea that the judicial function cannot be accessible beyond basic, generic and vague directives such as those of “strengthening justice” and “protecting rights” is used as an excuse to avoid a sincere discussion of the performance of individual judicial operators and the judicial system as a whole.

If the government of the Judiciary has not managed to overcome the internal resistance to establishing parameters or standards of performance for the development of the judicial function, both quantitative and qualitative, it will never be able to conduct an adequate evaluation of the functioning of the system.

The management and administration functions do not seek to establish parameters of success and failure for the measures that are taken to solve daily problems.

Finally, the absence of progress in these areas makes it impossible for the Judiciary to engage in elevated government functions that are present in more evolved democratic republics.

In regard to the implementation of public policies, working with other branches of government and citizen participation on the internal functioning of justice will make it possible to address the interests of the population.⁸⁴

In this context, it makes sense to ask whether the function of judicial government can be exercised properly under these conditions. It would be necessary to argue that the existence of the Judicial Council in Argentina shows that government functions are being exercised correctly.

At the same time, the fact that the Judiciary is functioning and has not collapsed does not suggest that the development of the function of government is a success.

Very far from this, an analysis of the functions of government that are actually exercised within the Judiciary show that the measures are taken

84 It is important to note that citizen participation is currently understood at a basic level that is limited to the incorporation of trial by jury and popular elections of members of the Judicial Council.

in a reactionary manner, responding to eminent problems rather than anticipating them.

It is precisely this inability to develop systems and processes that allow for problematic situations to be anticipated and work on structural improvements that impedes the evolution of the exercise of judicial government toward one that is truly democratic and republican.

It is true that nothing is innocent and these lacks are not due to forgetting or innocent ignorance, but are evidence of a system in which no significant changes are pursued and that does not possess a culture of self-improvement.

The work that comes next in the area of judicial government must be concentrated on the creation and improvement of tools and agencies that can be used to gather information on the current functioning of the Judiciary in all of its facets.

At the same time, the discussion must be focused on the creation of performance standards for the judicial function in terms of both quantity and quality in order to pay attention to efficient improvement of the judicial system itself.

These two issues necessarily require a judicial government agency that is trained to and, more importantly, interested in carrying out these changes because they must come from inside of the Judiciary (though not exclusively) in order to develop a commitment to improving the system on the part of judicial operators.

Finally, the effective performance of the function of the Judiciary will ensure that the judicial function is carried out in a qualified manner, which will increase transparency and public trust in the work of the Judiciary. This will in turn allow it to offer opportunities for participation in the decisions made regarding judicial government.

The entity that was an innovative idea for a country that was recovering its democracy 20 years ago was meant to be the initial stage in a virtuous process that would generate justice administration that was committed to the society that it represented through the autonomy and independence of the Judiciary.

Now, nearly two decades later, political stakeholders, judicial operators and those who participate in the judicial system in a broad sense (professionals, academics, etc.) must make significant progress so that Judiciary

government ceases to be a mere administrator and becomes an agency that is appropriate for a modern democracy.

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2. Chile

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1. Introduction

This report presents the main issues and discussions associated with the jurisdictions of judicial government in Chile and how these are exercised on a daily basis. Its main focus is relationships between judicial government and judicial independence, though it also addresses other aspects of the system that the government should implement.

The report begins with a description of the way judicial government is understood in Chile and how it is exercised. I then analyze the main discussions of the issue, particularly the tension between judicial government and the internal independence of judges and the option of creating a Judicial Council. Next, I examine specific issues linked to the administration and financing of the Judiciary, its strategic plan and disciplinary oversight. The report ends with conclusions and ideas for addressing these issues in the future.

The extensive bibliography on the subject was used to generate this report along with news articles and interviews conducted with ten key informants from various levels of the Judiciary, including the Supreme Court (SC); Santiago Court of Appeal; guarantee, family and labor courts in Santiago; the National Magistrates' Association (NMA) and the Judiciary Administrative Corporation (CAPJ).⁸⁶

85 Professor, Universidad Diego Portales de Chile.

86 The key informants who were interviewed are: Dolmestch, Hugo. Supreme Court Chief Justice (26.07.2017); Flores, Álvaro. Labor Court Judge and President of the NMA (01.08.2017); Korporic, Zvonimir. Assistant Director of the CAPJ (16.08.2017); Lara, Mario. Institutional Development Division Director – DDI- CAPJ (16.08.2017); Llanos, Leopoldo. Santiago Court of Appeal judge and former President of the NMA (27.07.2017); Moya, Javier. Santiago Court of Appeal judge (20.07.2017); Muñoz, Sergio. Former Chief Justice of the Supreme Court and current justice (08.08.2017); Negroni, Gloria. Family Court judge (27.07.2017); Olave, Mauricio. Oral Criminal Trial Court judge and NMA Board member (01.08.2017); and Zapata, Francisca. Guarantee Judge (26.07.2017).

2. Description of judicial government in Chile

a. How is the term judicial government understood in Chile?

The term judicial government is used in Chile to refer to the jurisdiction of the Supreme Court (SC) over the institution in contrast to strictly jurisdictional powers.⁸⁷ This authority is fundamentally associated with (i) representing the institution before other branches of government and third parties,⁸⁸ (ii) the judicial career and other officials who comprise the institution from appointment to separation, and (iii) the management of the institution.⁸⁹ In that sense, judicial government is different from judicial policy, which refers to the regulatory framework under which justice system functions are overseen by co-legislator branches, a role that is assumed by the Executive and Legislative Branches in Chile.

The SC's powers in the areas described above emanate directly from the Constitution, which states in Article 82 that this entity shall have "directive, correctional and economic superintendence over all of the country's courts." (Our translation.) In regard to directive powers, the SC leads the institution and represents it. Correctional authority refers to the discipline of judges and officials. Finally, economic superintendence means that it may issue any agreements and instructions that allow for the prompt and improved administration of justice. These powers correspond to the institution and it exercises them through the plenary. The attributes of the Chief Justice are limited to organizing the work of the plenary, representing the Court as part of its protocol and giving an annual inaugural

87 Chile's Judiciary is comprised of the ordinary courts: Supreme Court (21 justices), Appeals Courts (17 throughout the country), oral criminal trial, guarantee and professional courts (civil, family, labor and general). In addition, there is a series of courts that are linked to the Judiciary (in that it is involved with appointment members or reviewing sentences). These include the local police courts, customs and tax courts, environmental courts, free competition defense court, public hiring court and industrial property court. Finally, the use of arbitration for civil and commercial cases is widespread in Chile.

88 The role that the SC plays in international fora, particularly the Ibero-American Judicial Summit, is becoming increasingly important.

89 The SC also has other important functions as part of the nation's institutional structure. While it lost the most important responsibilities that were originally conferred on it by the Constitution of 1980, such as having members serve on the Constitutional Court and being able to appoint senators, it currently has the power to elect three of the ten members of the Constitutional Court (Art. 92.c of the Constitution), four of its justices serve on the Elections Court (Art. 95.a of the Constitution), the Chief Justice serves on the National Security Council (Article 106 of the Constitution), and its justices appoint a representative to the Board of the Chilean Legal Publishing House and various government commissions.

speech at the beginning of the judicial year in which he or she is to offer suggestions for better regulating the sector.

The administration of Judiciary resources was traditionally the responsibility of the Justice Ministry until Law No. 18.969 was passed on March 10, 1990 (the day before democracy was restored in Chile). This law created the Judicial Administrative Corporation (CAPJ),⁹⁰ which is responsible for managing the “financial, technological and material resources allocated for the operation of the Supreme Court, courts of appeal, professional courts, youth courts and labor courts.” (Art. 506 of the Organic Code of the Courts, henceforth OCC, our translation).⁹¹ This entity reports to the SC and is directed by a Superior Council.

However, this definition of judicial government, which is insistently separated from judicial policy, is far from perfect. We had said, for example, that in principle judicial policy corresponds to co-legislator agencies, but the SC intervenes in various ways. The first is through the constitutional obligation of being consulted regarding the bills that impact the courts’ organization and functioning. However, its most important role in the area of judicial policy is exercised energetically through the issuing of rulings, which have extended its sphere to include very substantive questions over the past few years.

On the other hand, various agencies take part in the appointments of officials. When these are not judges, the appointment is handled by the Judiciary. In the case of Appeals Court judges and ministers, there is a co-option system in which the higher court of the vacant position forms a candidate list and the Executive Branch makes an appointment based on it. In the case of SC justices, the system is even more complex because the Court itself must generate a candidate list and the President of the Republic chooses a candidate from that list. The appointment must then be ratified by two-thirds of the Senate (Art. 78 of the Constitution).⁹²

90 “This corporation absorbed and became the main continuation of the Judicial Services Board (created in 1937 to manage infrastructure and court supplies) and the Judiciary Budgets Office (which managed the financial aspects of the system beginning in 1972).” CORREA AND VARGAS (1995), p. 51, OUR TRANSLATION. Furthermore, in the 1980s, the Justice Ministry began to develop a series of studies and to execute modernization plans through its Planning and Budgeting Office. The plans regarding the introduction of computer systems in the courts were particularly important. See HAEUSSLER (1991).

91 Many of the officials who work in the Justice Ministry on judicial administration were transferred to this new body, accentuating the continuity of the process.

92 For a more extensive analysis of the judicial appointments system, see Vargas, 2014.

Responsibility is also shared by the President, Congress and Senate in disciplinary areas. The Constitution also guarantees that judges may not be removed as long as their conduct is good and they are under the age of 75. However, the Constitution also states: "In any case, at the request of an interested party or *de oficio*, at the request of the President of the Republic, the Supreme Court may declare that judges have poor conduct and, following the submission of a report from the accused and the respective Appeals Court, rule that he or she be removed by majority. These agreements will be reported to the President of the Republic to be executed." (Our translation.)

Finally, Chile has a Judicial Academy to handle training of Judiciary employees and judges. It is overseen by a Board of Directors that includes the Supreme Court Chief Justice, which is the Board President, the Minister of Justice, a Supreme Court justice, the SC judicial prosecutor, an appellate judge chosen by second-level officials from within the primary hierarchy of the Judiciary, a member from that same category chosen by the professional association that represents them, a Bar Association representative and two academic appointed by the President and confirmed by the Senate (Art. 2).

This entity is responsible for managing the training programs for applicants to the first level of the Judiciary (judges and court clerks), the program for those who wish to serve as Appeals Court judges and the continuing education program that all Judiciary members must complete in order to be listed on the merit list each year.

b. Government and judicial independence

The powers of the individuals who hold the top positions in the Judiciary reflect the fact that this is an extremely hierarchical institution in which most of the power is held at the apex. This would not be of note in some institutions, but has special connotations in the case of the Judiciary due to the independence that its judges must enjoy. In other words, in principle power is not located at the head in the Judiciary as it is in any other organization, but is distributed among all of the judges, who do not work as delegates but in direct exercise of popular sovereignty.

In any case, the notion of judicial independence should not be seen as an attribute of judges established for their benefit, but as a basic condition for their ability to carry out their work impartially.⁹³

93 This does not go against the decision of the Inter-American Court of Human Rights that

This same idea of diffuse power and judicial independence has led some to question that the Judiciary can be characterized as such, as an organization with that purpose does not exist or at least should not exist, and the very notion of government would lose all meaning in such a case:

... while the rule of law is impossible without judges, it is incompatible with the idea that a Judiciary exist. The observation that the Judiciary does not exist does not mean that there aren't judges or that they have no authority. It simply implies that they do not have that authority as officials of an organization. Each time we discuss the Judiciary, we are using an abbreviation to refer to all judges. Each time we speak of the Judiciary as a government agency, we are misusing language or subverting institutions. (Our translation.)⁹⁴

This thesis has been broadly accepted by judges over the past few years, particularly within the National Magistrates' Association (NMA)⁹⁵ and has been an important driver of the initiatives for change that they have advanced.

Based on this, judges' careers are organized vertically. A career of this type enormously strengthens the power of superiors who depend on the promotion of their subordinates, which they exercise through annual assessments. This is exercised informally through jurisdictional work, and is certainly the most complex for judicial independence. Given that superiors review their subordinates' decisions through procedural remedies, and these are the same superiors who assess their work and make decisions regarding promotions, the risk of contamination between one decision and another is evident.

judges have a subjective right to certain guarantees that make judicial independence possible, specifically in regard to immovability and stability in the position. See the rulings in cases involving the Supreme Court (Quintana Coello et al., parr. 153), Constitutional Court (Camba Campos et al., parr. 188) and López Leone et al. (parrs. 192 and 193).

94 ATRIA (2007), p. 43. Also along these lines, Rodrigo Correa stated, following Montesquieu, that "while the power to judge should exist, the 'judiciary' as a government agency is incompatible with republican freedom." (Our translation.) He later adds that "the term *Judiciary* is merely traditional and dispensable." CORREA, RODRIGO (2005). pp. 119 and 120, our translation.

95 See the article by current NMA President FLORES, ÁLVARO (2005) and the document summarizing the academic work conducted in 2011 in the context of the Judicial Forum organized by this institution in collaboration with the Instituto de Estudios Judiciales. http://www.pazciudadana.cl/wp-content/uploads/2013/07/2011-11-10_Reflexiones-cr%C3%83%C2%ADticas-acerca-de-la-capacitaci%C3%83%C2%B3n-judicial-en-Chile.pdf.

While there have been various attempts to improve the system and make it objective,⁹⁶ the results have been very limited, which has led many to argue that they should be eliminated. This has been the historical position of the NMA.⁹⁷ The option of eliminating qualifications is difficult because it does not seem to benefit a public official to be able to exercise their powers for a long period of time without submitting to any sort of scrutiny or oversight of the quality of their professional performance.⁹⁸

96 The largest reform of the qualifications system was conducted in 1995 (Law No. 19.390). Its objectives were as follows: "In the old system, the Supreme Court retained the power to assess all judicial officials in the final instance, which strongly enhanced its power within the system. One of the principles of the reform was that qualification was to be conducted by the direct hierarchical superior, as he or she was the only one with full knowledge of the official's actions. The qualifications criteria were very vague and general, which led to efforts to make them more precise and objective. In this sense, the creation of a resume for each official that was to list information to be considered for the annual review was an important development. In order to integrate the views of system users, which had not been considered, they were allowed to go before the agency responsible for assessing officials' performance. One of the main problems with the previous system was that it did not achieve its natural objective: to discriminate between the various officials when over 95% of them were always rated as being at the top of the scale. In fact, the system did not reward the best officials, but punished some people through an expedited route that offered fewer guarantees than the disciplinary system. The measures that were adopted to solve this problem included increasing the qualifying lists from 4 to 6 in order to better differentiate and establishing that the maximum list was absolutely exceptional. The rubrics were also subdivided for this same purpose, with the subject receiving a score in each area. The final score was then the average of the grades given by each reviewer -when a collegiate entity managed the process- in each of the rubrics. Prior to the reform, the subject was only informed of the list in which he or she had been included. In order to make the entire process public and ensure that the subject knew what he or she was doing well and what had to be improved, it was established that they should be informed of the scores assigned in each rubric, the basis for those scores and the aspects that the evaluators felt should be corrected or maintained. Finally, given that these are collegiate entities, the way in which each participant voted was to be disclosed. A generic right to appeal was granted, which did not previously exist. In order to make the evaluations more important, a direct connection to promotions was established. As such, an official who has received better evaluations is preferred over other candidates when they submit applications. The contents of the law that created the Judicial Academy were added to this law, as they state that the official must attend at least one training activity per year in order to receive the highest score." VARGAS AND DUCE (2000, our translation).

97 See <http://www.emol.com/noticias/Nacional/2017/03/15/849509/Jueces-recurren-a-la-Comision-Internacional-de-DDHH-en-busca-de-independencia-judicial.html>.

98 It is true that the other officials who exercise sovereignty are not evaluated in this way, but one must recall that they are elected for a limited period of time and must submit to a new election if they wish to continue in their roles in the cases in which this rule applies. From the perspective of the public, it is indefensible that a bad judge who doesn't even meet his or her responsibilities can remain in their position indefinitely unless he or she commits a disciplinary infraction. See RIEGO, CRISTIÁN & VARGAS, JUAN ENRIQUE (2016).

It is thus clear that there is a strong tension between judges' independence and a career and government structure that concentrates excessive power in the SC. Traditionally, the greatest risks and attacks on judges' independence have come from the outside.

Historical experience shows that in order to protect judges' external independence, they must be given a sort of protective institutional shell because isolated judges are less able to resist pressure from the powerful.

Finally, one must consider that no matter how important judges' independence is for the exercise of the jurisdictional function, not all of the system's values are exhausted in it. From the social or aggregate perspective, justice should contribute to generating legal security, that is, its utility is not limited to the specific cases that it resolves. Rather, it has more general effects based on the information that it generates, telling the entire community -and not just the parties- the specific contents of their rights and how to resolve similar disputes that might affect them. This prevents future conflicts, discouraging opportunistic litigation.

The complex aspect of the design of a justice system resides precisely in the evident tension between all of these purposes. Assuming that judicial independence is essential to carrying out their function, judges who only address it may not adequately respond to the need to provide timely justice or maintain stability of the rulings,⁹⁹ and it is difficult to discipline them in order to achieve those objectives precisely due to that independence.¹⁰⁰

c. How does the Chilean SC exercise its governance function?

The SC's judicial government responsibilities are managed by the plenary. As the Judiciary has grown -a phenomenon which has been especially

99 Garoupa and Ginsburg state, "The quality of the judicial system can only be achieved through an independent judiciary. On the other hand, judges are the agents who can abuse the lack of efficiency if a considerable level of independence is guaranteed. It is thus necessary to have some form of external accountability to ensure that judicial decision-making is not affected by judges' personal interests. The adequate balance between independence and accountability is fundamental for the structuring of a judicial system." GAROUPA AND GINSBURG (2007), p. 42, our translation.

100 But this type of conflict or tension is not exclusive to the judiciary. Think, for example, of the importance of freedom in the classroom for teaching. There is no doubt that that independence that teachers must enjoy to do their job must be balanced with institutional guidelines within the school, which determine the pedagogical goals to be met, the class schedule and assessment systems, all of which can and should be aligned without imposing a single form of teaching on the teacher.

intense over the past few years⁻¹⁰¹ and its work has become more complex, the plenary has become an inadequate mechanism for effectively addressing the multitude of issues that come before it, particularly non-judicial matters. This led the Court to establish structures to facilitate the work of the plenary including committees. Act No. 56-2014 modifies the Court committees, focusing them on three strategic areas plus the CAPJ Superior Council: modernization,¹⁰² communications,¹⁰³ and people.¹⁰⁴ A Technical Secretariat also was created. It is coordinated by the SC Research Directorate and is responsible for providing methodological support to committees and to the plenary and for facilitating its work.

Most of the issues that are of concern to the Court are related to appointing personnel, including appointments for officials who play a secondary role within the institution, including designers, fourth officials and infrastructure managers. Finally, the *Autos Acordados* regulate issues such as the distribution of cases and composition of chambers (3), the establishment of management targets and responses to the fulfillment of those targets or lack thereof (5), the creation of SC Committees (1), permission for directors of Associations (1) and setting compensation (1). Only two of the *Actos Acordados* of the period address issues of general importance: one on digital case processing and one on the administrative management of the courts.

The situation of the CAPJ Superior Council is no different, as it must rule on all of the decisions that the body adopts. These range from signing purchase and sale agreements for land to the purchase of computer servers for backing up files or an appeal from an official who was refused the right to access daycare benefits).

101 The Judicial Branch was comprised of 4,300 people in 1995 [VARGAS AND CORREA (1995) p. 75]. That number currently stands at over 11,000.

102 This committee will be “responsible for proposing the lines of action that should guide the development of the Judiciary to the plenary, considering best practices, opportunities for innovation and comparative experiences.” (Our translation.)

103 This committee will be “responsible for proposing to the Plenary the lines of action related to information flows, types of communication, the organizational culture, identity and image and the dissemination of Judiciary activities.” Act No. 60-2015 added that the committee also must serve as “...the editorial committee of the judicial channel and other activities of the Communications Directorate.” Our translation.

104 This committee “shall be responsible for proposing to the Plenary the lines of action related to issues of development, evolution and improvements of the organization’s staff.” Our translation.

The situation of the Judicial Academy is different because experience suggests that the SC, due to its own choices as well as the abandonment of the Ministry of Justice,¹⁰⁵ has gradually taken control of the Academy, acting as if it were its subordinate which implies, for example, directly assigning tasks to its Director through acts.¹⁰⁶

d. Participation in and consultation on judicial government decisions

In a Judiciary this hierarchical with power concentrated at the apex, it should not surprise us that decisions have traditionally been made with low levels of consultation and participation. However, the aforementioned Act No. 56-2014 shows that this has begun to change, opening the SC up to adding representatives to the various levels of the Judiciary in areas linked to judicial government, though they only have the right to speak and not to vote. The same is true of the committees that the SC has replicated in the CAPJ Superior Council.

e. *Autos Acordados* (Acts) as instruments of judicial government

As we stated above, the SC has the authority to issue acts, which is indirectly recognized by the Constitution by establishing that the Constitutional Court is responsible for “resolving matters of the constitutionality of the acts issued by the Supreme Court, Appeals Courts and the Elections Certification Tribunal.” (Art. 93, Constitution, our translation).

In recent years, two circumstances have impacted these rules. The first is that this possible constitutional oversight generated resistance on the part of the SC, which did not accept the idea that another court, in this case the Constitutional Court, would review its rulings. On the other hand, greater activism on the part of the Court led it to extend its intervention through this instrument to a very broad series of matters. This has led to criticism on the part of judges, particularly through the NMA, claiming that the Court is exceeding the scope of its power and is getting involved in matters that should be managed by legislators.

The discussion has focused on two specific issues. The first is the SC’s intervention in the implementation of the new family courts, which were created through Law 19.968 in 2004 and began to hear cases the following year. There were acute issues of congestion and performance,

105 In practice, the Ministry of Justice does not participate in Judicial Academy Council sessions.

106 Act 183-2014 states that the Judicial Academy shall serve as the Technical Secretariat of the Supreme Court.

which led to a series of legal changes through Law 20.286 in 2008. Even with that law, the correct functioning of the courts required very direct and ongoing oversight by the SC. The first step was to create the Center for the Oversight, Evaluation and Resolution of Protective measures, which later became the Center for Protective Measures. It was created so that the courts of Santiago could address these issues in a specialized and effective manner.

The second step, which was the “Management and Administration of the Family Courts,” regulates the scheduling of these trials, establishing different types based on the nature of the cases, which meant that they would have different timelines and procedures.¹⁰⁷ The effort made to implement this act was intense and included various training activities and direct interventions in the coordination of various courts throughout the country.¹⁰⁸

The second area in which the acts have generated resistance involves personnel. Specifically, the NMA contested four acts in regard to qualifications, appointments, judicial government and continuing education. A formal presentation was offered before the SC Plenary on December 18, 2014 in order to request the annulment of these acts. The NMA claimed that the regulations infringed on legal confidentiality and that one of them was unconstitutional because it established requirements in the law to opt for the judicial function.

The main complaint focused on the way in which these regulations were generated, which was very vertical and with no or limited consultation with those impacted by them. They were thus criticized as being authoritarian. This resulted in the distance from them and the recent reaction of attacking them for exceeding the powers of the Court.

However, the option of passively waiting for legislators to address these issues did not solve the problems because there was no interest in doing so and because legislators often lack this power. This is because it is precisely the Judiciary that is best positioned to intervene in such matters due to its proximity to the stakeholders and information. On the other hand, the SC has assumed a sort of legislative initiative beyond the consultative role that is traditionally given to the Ministry of Justice on bills invol-

107 For an analysis of this intervention process, see GARCÍA, PEDRO (2012).

108 The levels of internal resistance to this process are evident in the term “caravan of death,” which is used internally in the courts to refer to the itinerant commission responsible for supervising compliance with this Act.

ving it. This occurred with the last civil justice reform, which established completely digital case processing (Law No. 20.886 of 2015) and was developed by the SC.

A group of SC justices has begun to express opinions that are consistent with the NMA criticisms, stating that matters reserved for legislators are being regulated through these acts, and that this exceeds the jurisdiction of the SC. The minority justices expressed in their dissenting opinion that "...the dispositions of the preceding order go beyond the sphere of economic powers that sit with the Supreme Court and can be exercised in that area, entering into spaces of legal domain and going beyond the functions that belong to the Court of Appeal." (Act No. 44-2015, our translation).¹⁰⁹

The SC has used its powers in this same way to make progress on issues that generate a broad consensus in regard to their desirability within the Judiciary, such as the gender policy that it has developed.¹¹⁰

3. The current vision of judicial government

a. How much does the government system impact judicial independence?

There is a certain level of consensus that the harshest period of direct and irregular interventions by superiors in the jurisdictional decisions that subordinates adopt is now in the past. However, the fact that members of the Judiciary have the authority to make decisions about judges' careers (particularly through assessments, promotions and discipline¹¹¹), whether they review their jurisdictional work, is seen by many interview respondents as significantly compromising that independence, at least indirectly. This is accentuated when those powers are used by superiors to expressly send messages to subordinates who diverge from their own jurisdictional criteria. This tends to happen more at the level of the Court of Appeal than in the SC. In fact, in order to react to these intrusions on judicial independence, the NMA created the figure of professional protection.¹¹²

¹⁰⁹ It is important to note that one of the justices who signed this dissenting opinion is the current SC Chief Justice.

¹¹⁰ See: <http://decs.pjud.cl/index.php/estudios/proyectos/168-avances-del-trabajo-en-materia-de-g%C3%A9nero-al-interior-del-poder-judicial>.

¹¹¹ The latter aspect will be addressed separately.

¹¹² <http://www.magistrados.cl/documentos/reglamento-del-amparo-gremial/>

Several factors explain the improvements. The interview respondents stated that the most important ones are as follows: the replacement of Judiciary members with new ones, particularly at the top; the establishment of meritocratic and competitive systems for appointing new judges thanks to the Judicial Academy, which makes them based on merits and less on clientelism; regulatory changes regarding institutional concerns (for example, the qualifications system), but mainly in regard to procedures (criminal procedure, family and labor reforms), which have strongly empowered first instance judges, valuing their work, which is no longer necessarily based on the decision of a superior; and changes in salary structure and Judiciary positions, making promotions less attractive and less likely; and strengthening professional organizations.¹¹³

b. Governance structure and efficiency of decision-making

Although the collegiate units created for decision-making in the courts are designed to arrive at better and more thoughtful jurisdictional solutions, they are not always the best for managing an institution.

Although it is recognized that power is currently situated in the plenary, it is clear that the personality and agenda of the Chief Justice can have important consequences when it comes time to promote certain lines of action. Over the past few years, the changes that the governance of the institution has experienced each time the Chief Justice is replaced have made this clear. Critics claim that two years is too short a timeframe for the Chief Justice's term because it does not give the new person enough time to acquire experience and deploy an agenda and because the election of a new leader creates excessive tension within the institution.¹¹⁴

In the CAPJ Superior Council, which also has two-year terms for its members, this means that they are constantly initiating new learning processes.

There is extensive recognition that the growing use of technology and increasing complexity of the matters submitted to governance entities exceed the capacity and at times the knowledge of the justices. In order to process them, they must turn to advisory bodies (the Research Director-

113 See Couso and Hilbink (Hilbink, 2014).

114 See the following articles for more information on the election held in December 2017: <http://www.economiaynegocios.cl/noticias/noticias.asp?id=381603>; <http://impresa.elmercurio.com/Pages/NewsDetail.aspx?dt=2017-07-23&PaginaId=13&bodyId=3>; <http://impresa.elmercurio.com/Pages/NewsDetail.aspx?dt=2017-09-03&PaginaId=17&bodyId=3> <http://www.latercera.com/noticia/juego-supremos-los-entretelones-del-nuevo-presidente/> and

te and CAPJ's International Development Department), thus giving them much more power than they are meant to have, which at times can be decisive.

From the perspective of CAPJ technicians, the Superior Council is an important ally for containing the demands of the judges and ensuring that they are rational. If the Council did not exist, it would probably be much more difficult to resolve the tensions that naturally develop between the judicial level and administration technicians.

Another issue that can create noise in decision-making is the eventual overlap between the jurisdictions of the CAPJ Superior Council and the SC Plenary. According to the CAPJ, this has been limited to a certain extent by the creation of a strategic plan for the development of the institution from the moment it sets the innovation projects, infrastructure plans, etc. that the institution will advance, limiting the emergence of initiatives that have not been coordinated.

c. In regard to transparency and public scrutiny

Over the past few years, there has been very significant progress in terms of transparency and accountability, addressing the issue as an important internal strategic decision. The current maxim is that everything that is done within an institution is public unless the law requires that it be confidential. The greatest proof of this is the work of the Judiciary Communications Directorate, the creation of the judicial channel¹¹⁵ and the entire Judiciary website.

Evidence of the good results of this effort is the score that Chile received on the Index of Online Access to Judicial Information developed by JSCA. In 2017, Chile placed first in the region for its Judiciary with a score of 75.87%.

In any case, this process has not been free from difficulties. In fact, some have questioned whether the SC is the unit that should make decisions about what should be communicated to certain audiences and when that information is not the property of the Judiciary given that there are interests within the institution involved in whether or not it is disseminated.¹¹⁶

115 This channel broadcasts news, interviews and live hearings.

116 <http://www.elmostrador.cl/noticias/opinion/2017/04/30/sobre-la-transmision-de-juicios-por-television/>

The decision made by the plenary that the Chief Justice would not be the spokesperson for the SC but would assign that work another member, which reduces his or her power and visibility, also is important with respect to judicial government and, more specifically, for the authority and role of the Chief Justice.

4. The discussion of the Judicial Council in Chile

a. The proposals

When Chile recovered its democracy, and shortly after the first government of “the Concertación” (the Coalition of Parties for Democracy) took power, a series of bills was presented to implement changes to the Judiciary. The most important of these was undoubtedly the bill for constitutional reform, the purpose of which was to outline the creation of a Judicial Council.

The Council was to be comprised of representatives of the three branches of government, although the Judiciary was to have a majority.

The processing of this initiative generated strong controversies. The first institution to express its rejection was the SC itself, which started by objecting to the claim that the Judiciary was in crisis. It then stated that in addition to curtailing its powers, the Council would place judicial independence at risk and impact the hierarchy of the Judiciary, as ministers of the Supreme Court, the Courts of Appeals and first instance judges would all participate on an equal basis.¹¹⁷

It would not be until towards the end of that administration that the discussion on justice would become clarified following a shift towards procedural issues, which meant postponing the most significant institutional changes. In the years that followed, procedural reforms (criminal, family and labor procedures) became the focus of efforts to modernize the justice system, subject to the approval of certain organic changes, but never to the extent implied by the creation of a Justice Council.¹¹⁸ One of the characteristics of these new reforms, which were very different from those

117 MOYANO G. & FUENZALIDA P., pp. 8 and 9

118 The most important changes involved the creation of the Judicial Academy (Law 19,346 of 1994); the specialization of the SC chambers (Law 19,374 of 1995); the modification of the system of judicial qualifications (Law 19,390 of 1995), and the increase in the number of members of the Supreme Court - from 17 to 21, five of whom must be lawyers from outside of the Judiciary - and the intervention of the Senate in their appointment (Law 19,541 of 1997).

initially attempted, was the high degree of political consensus after the changes.

The issue of the judicial governance was to be excluded from the programs of the presidential candidates in the periods that followed¹¹⁹ until the 2013 election in which it was again placed on the discussion table by two of the candidates: Andrés Velasco and Michelle Bachelet. The government program of candidate Bachelet, which included the issue of judicial governance, was the one that eventually won the election.

Taking advantage of this opportunity, the NMA strongly encouraged the idea of transferring the functions of a judicial government to a Council. These proposals, which were further developed during a series of meetings,¹²⁰ shaped the document “Guidelines for the Discussion of Constitutional Reform of the Chilean Judiciary,” which proposed the creation of the following:

“[A] constitutionally autonomous body shall have the superintendence and administration of the judicial service, as a guarantee of the independence of the judges, the functioning and structure of which shall be regulated by an organic constitutional law,” and an integration “that allows the majority to consist of representatives of the judiciary.” (Our translation.)¹²¹ But of course, the creation of this body implied depriving the SC of its non-jurisdictional functions.

Anticipating the likely threat, the SC initiated a series of studies related to the “Analysis of decision-making mechanisms and support for Judicial Governance” (University of Chile), with a view to assess its own situation and ascertain comparative alternatives and have a list of proposals to improve said body. Its main conclusions were contained in the document “Summary report on Judicial Government.”¹²²

In Chile, the administrative role of the Judiciary is exclusively granted to the SC. As such, though the CAPJ plays an important role in this activity, is a contributory body of the SC in the tasks pertinent to it, but lacks both functional and institutional independence.

119 See MOYANO G. & FUENZALIDA P., pp. 37, 57 and 80.

120 In fact, the NMA organized several meetings of its associates within the participatory process that formed part of the framework of the constitutional reform.

121 http://www.magistrados.cl/wp-content/uploads/2016/05/Propuesta-de-Reforma_Constitucional_PJUD.pdf p.23

122 File that is in the possession of this author.

As for the composition, in Chile the requirements for the integration of the judicial government body by a majority of judges and of broad representation of the members that compose it are not met.

The “judicial members” factor also finds no application in the Chilean system, as its main budget is the designation by election of the members.

Lastly, the variable that alludes to “monitoring and reporting” refers to the obligation of accountability that the body of judicial government must have with, in this case, the higher court. Its influence is closely linked to the existence of an independent body, which is why, given that the Chilean system exclusively assigns the administrative functions to the SC, there is no real accountability of the management of the administrative body.

Most of the indicators do not have a suitable normative solution, particularly the peripheral regulations (for example, appointments, careers, discipline), due to the rigidity of the standards in which they have been consecrated.”¹²³

Based on a more detailed analysis, this report concluded by proposing three possible institutional models for the restructuring of judicial governance, which, in all cases, started from the premise that “the jurisdictional function must enjoy independence with respect to the Legislative Branch and, specifically, from the Executive Branch.”¹²⁴ These possible models were as follows:

“The first model is based on the creation of a mixed collegiate body with representatives from all levels, in which must include some external representatives. In regard to their appointment, both the Executive and Legislative branches must be excluded.

This model produces the separation of the tasks of Judicial Governance from those that are jurisdictional.

The second institutional model is also based on the creation of a mixed collegiate body, but by order of the SC. Unlike the previous model, the tasks of judicial and jurisdictional governance are maintained by the SC.

123 Ibid. pp. 12 and 13.

124 Ibid. p. 18.

For its part, the Governing Board would be an intermediate body that would report to the SC.

The third model involves the formation of a Corporate Government on the basis of redistributing tasks in the current organizational system. This model would leave intact the tasks of the plenary, but it would establish a cascading model of organization, where the figures would be the committees.” (Our translation.)¹²⁵

Following these proposals and considering the political discussion that began in the country, the plenary of the SC approved an unprecedented Memorandum No. 186-2014 on judicial government during its day of reflection in October 2014. For the first time, it envisaged that it might cease to be the body in charge of such a function and share it with the various branches of the Judiciary.

The crucial decisions that were made in said act were to separate the jurisdictional functions from those that are not within the SC, leaving that court only with the former and creating an **“internal body pertinent to the Judicial Branch, integrated exclusively by representatives of all the strata that make up said Branch”** (Our translation, emphasis added), in order to take charge of those non-jurisdictional functions, that is to say, of the governance of the Judiciary.

This act was approved by a majority, with 11 judges against seven. Three judges were of the opinion that their integration should be mixed, that is, “both with members of the Judiciary and with members outside of it” while four others thought that “non-jurisdictional functions should be placed within an entity external to the Judiciary, and of mixed composition.” That is to say, at that point, in 2014, there was a broad consensus within the SC for introducing a radical change to the mechanisms of judicial governance.

b. Current state of the discussion

Despite what was stated in its program, during the Bachelet government there was no attempt to discuss the forms of judicial governance and take advantage of the opportunities presented by the aforementioned pronouncement of the SC.¹²⁶ Moreover, it is clear from the opinions gathered

¹²⁵ Ibid. p. 20.

¹²⁶ After drafting this report, and a few days prior to the termination of her government, President Bachelet presented a draft for a new Constitution. However, this did not

in the interviews that the Court's willingness to move forward in these matters had been lost and that, instead, the aim was to review certain steps that had already been taken.

At the time of writing this report, and on the cusp of a new presidential election, a new achievement has been noted with the incorporation of the issue into the program of New Majority candidate Alejandro Guillier -who represents the continuity of the present administration- who has said:

"We propose the creation of a Judicial Council that is a pluralistic body tasked with appointing judges, managing disciplinary matters relating to judges, participating in the procedure of removal of judges and, in general, developing policies related to the judicial career." (Our translation.)¹²⁷

Sectors that are considered to be more progressive have distanced themselves from the idea of a mixed Judicial Council that follows the Italian model as advocated by the NMA, opting instead for an internal body, and following in this sense the model of Judicial Conferences of the United States, which is quite similar to what was proposed by Memorandum 186-2014 of the Supreme Court.

Various factors may also be influencing the Supreme Court to begin pacing the activism it had exhibited on issues related to government. Among them, the following may be mentioned: (i) the change in its presidency, by a judge with a different view on these issues; (ii) the judicial battle that the NMA is undertaking before the Constitutional Court to repudiate the validity of the acts; (iii) the perception that constitutional changes are not as imminent as they were expected at some point to be, and (iv) the level of satisfaction that the current presidency has with the performance of the CAPJ may be acting as a discouragement from it taking innovative steps on the issue. In any case, in the 2015-2020 Strategic Plan, this issue continues to be identified as one of the strategic objectives to contribute to the line of access to justice.¹²⁸

introduce any substantive modification to judicial governance.

127 <file:///C:/Users/VideoConferencias/Downloads/Programa-Gobierno-Alejandro-Guillier-v8.pdf>. P. 205.

128 <http://www.pjud.cl/documents/10179/104862/Planificaci%C3%B3n+Estrat%C3%A9gica+2015-2020+%28Versi%C3%B3n+extendida%29.pdf/15b039c1-97f5-46ce-99ca-3ab2cbef2ee0>. P. 17. In the following is added objective 8 "Transform the current Administrative Corporation of the Judiciary into a help and support service that is agile, common and cross-cutting in all judicial processes and work."

c. Evaluation of the perspectives of institutional change.

Public discussion of this issue is practically nonexistent, and the adoption of an alternative solution to the model of the Judicial Councils is explained, at least in part, by the existing ignorance about comparative experiences with these institutions.

In any case, in both the Latin American¹²⁹ and European experiences, such Councils have not made a contribution to judicial independence. The study conducted by Garoupa and Ginsburg indicates that the information available from countries that have adopted Councils after 1996 shows that the evolution of their Rule of Law index has been negative in 39 cases and positive only in 27, which led them to conclude that “It seems that the emergence of Councils as an international ‘best practice’ to promote judicial independence and quality may be unjustified.”¹³⁰ Pásara noted that “Spain is, perhaps, an example of a non-achieved depoliticization and, consequently, it is frequently in the media for both referring to the members of the General Council of the Judiciary as “the voice of” one or another political party, as well as referring to negotiations and pacts between sectors of the entity, as being defined ideologically or on a partisan basis, to agree appointments.” (Our translation.) And with respect to Latin America, he indicates that they “have not produced the required balance between the necessary judicial independence -with which they must have the judges to impartially serve those awaiting trial- and the still reduced capacity for accountability.” (Our translation.)¹³¹

The problems of the Councils thus stem from an excessive confidence in the ability of institutional design to solve complex problems; the belief that it is possible to transplant solutions without considering context and the objectives for which they were created; and seeking solutions without weighing the risks they entail. In my opinion, this is the most significant, because there is a concrete risk that by seeking higher levels of internal independence of the judiciary, the end result is serious damage to its external independence. Not only does the compared experience foster the fear that what is gained in internal independence with a Council is lost

129 For a more detailed analysis of the problems that have arisen in the region, see VARGAS (2006).

130 GAROUPA AND GINSBURG (2007), p. 66. They later add the following: “... we found little evidence in favor of the widespread and conceived idea that the Councils increase the quality in the aggregate... we emphasize the complexity of the role of a Council and reject the simplistic view that the importation or transplantation of certain types of Councils have a specific role in the quality of the judiciary,” p. 67

131 PÁSARA (2011), p. 110.

in external independence, but also the national debate on the issues of justice, in which in the political sphere, the need to control the work of the judiciary has been raised more than once.

5. Administrative and financial management of the Judiciary

a. Model of judicial administration

According to the model of analysis of the administration of courts prepared by JSCA,¹³² it is best to approach this matter by identifying three levels: (i) the government, which is responsible for the development of strategic definitions that impact the overall design of the system;¹³³ (ii) judicial management, which addresses tactical decisions related to the implementation of government decisions in the general system;¹³⁴ and (iii) the operation of the judicial office, that is, management at the basic level where the judicial service takes place.¹³⁵ As stated above, administrative functions in this area of Chile's Judiciary are shared between the SC and the CAPJ, with the latter taking an increasingly prominent role that also includes management of the system. The management of the judicial offices is decentralized, but with significant differences between

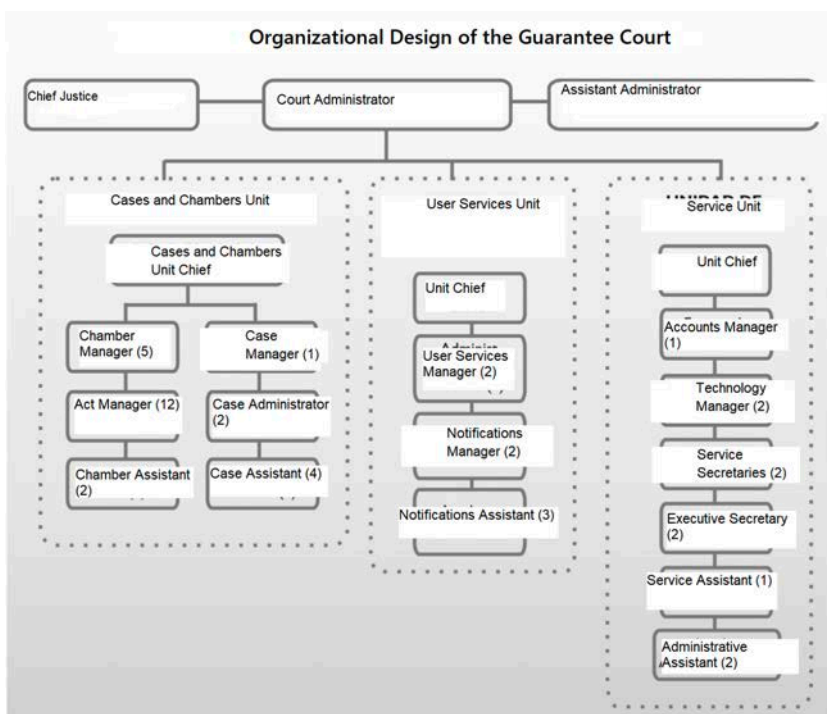
132 Comparative Study on Budgetary Management and Administrative Management of Courts and Tribunals and Statistical Treatment of Information on the Functioning of the Judicial System. http://biblioteca.cejamerica.org/bitstream/handle/2015/306/Estudio-Comparado_gestion.pdf?sequence=1&isAllowed=y

133 "Among these decisions are those of planning and institutional development; those of introducing reforms to the structure, operations and processes and procedures most relevant to the functioning of the courts (number and location of courts, assigned powers, roles of officials, etc.); to define the criteria that will be used for the allocation and expenditure of resources; and decisions regarding the judicial profession, such as appointments, evaluation and disciplinary control of members of the Judiciary. At this level, the political representation of the institutions of the Judicial Branch is also exercised." (Our translation, p. 6.)

134 "Usually the type of decisions made at this level have to do with: making investments and acquisitions; specific allocation of resources, both human, material and financial, to the different units of the organization (courts, administrative offices, etc.); the creation and maintenance of information systems and judicial statistics; the provision of administrative services to the courts (such as building maintenance, payment of remuneration, administration of personnel, etc.); the preparation and execution of the budget, among others. These are decisions that, due to economies of scale, are centralized and not dispersed in each of the units that make up the judicial system." (Our translation, p. 6.)

135 "The management decisions taken at this level are, among others, the distribution of court cases; management of the agenda of the court and the judges; definition of procedures or work routines that will be followed; definition of tasks to be performed by each officer of the court; definition of how attention to the public will be organized; attention to the public itself, among others." (Our translation, p. 6.)

the reformed courts and those where judicial reform is still pending. The first, organized as corporate structures (a set of judges with a common administrative support team), have a professional administrator who has been assigned the tasks of day-to-day management.¹³⁶ At the Courts of Appeals level, professional administrators have also been incorporated. The CAPJ plays an important role in the supervision of the management of the judicial offices,¹³⁷ generating for the administrators a kind of matrix structure in which they report both to this body and to the judge who presides over the Judges Committee.¹³⁸



136 The courts that have not been reformed maintain the traditional structure of a judge, with a secretary and a set of officials assigned to the office. The lack in this case of a professional administrator, but above all the widespread delegation of tasks, makes it impossible to implement modern judicial management methods.

137 There are zonal administrators who are delegates of the CAPJ at the level of Courts of Appeals that perform this task.

138 The Judges Committee is the body that represents the judges in the judicially reformed courts in their relations with the administration. Art. 22 and following of the Court Statutory Code.

The separation between the administrative and jurisdictional tasks which the Chilean model seeks also presents limitations because the SC intervenes in both governance and decisions regarding judicial management, such as why at the level of judicial offices the relationship between judges (represented by a Committee of Judges and a Presiding Judge) and the administrators is in many cases conflictive, with extreme pressure placed on the latter to become completely subordinated to the interests of the former.¹³⁹

There is a perception among judges that the significant progress made in the management of the reformed courts, which have resulted in major increases in productivity, have been achieved by unacceptable subordination of the jurisdictional objectives to the goals¹⁴⁰ and management indicators. But it is not correct to suggest that tension occurs between jurisdiction and administration as if they were in pursuit of competing goals. We must remember that jurisdiction realizes the objective of a due process that, among other factors, integrates the real possibility of accessing justice and obtaining a resolution within a reasonable period of time. Management then is both part and at the service of the jurisdiction, both for the judges to adequately analyze cases and evidence, and for the parties to receive a timely response. Both management and jurisdiction fail if one or the other is not achieved.

The negative reaction of the judges towards management is due to feeling pressured and losing spaces in which they traditionally and autonomously made decisions. Their freedom and power to manage their own time have decreased, among other things. But it is also due to the fact that many of the management decisions are adopted without further consultation, which is why they have been perceived as impositions.

b. Budget: Formulation and execution

In Chile there is no guaranteed minimum budget for the Judiciary, which means that it must be negotiated on an annual basis, first before the Mi-

139 This led to the alteration of the original design, in which the administrators were qualified by the judges of the courts they administered, transferring this power to the Courts of Appeals, with the final aim of providing administrators with greater autonomy over the former.

140 Each year in Chile, the Supreme Court, after a work in which the different levels participate, establishes concrete management goals for the courts, whose accomplishment is associated with a pecuniary management bonus, to which the 90% best qualified of staff are entitled in each of the courts that represent 40% of best compliance with the goals.

nistry of Finance to include their requests within the draft General Budget and then before Parliament for its approval.¹⁴¹ For many years, the demand for budgetary autonomy was a constant in the Judiciary, and was repeated by its presidents in opening speeches of the judicial year¹⁴² and by the Supreme Court plenary itself,¹⁴³ as a requirement for full independence of the judges.

Regardless of how diffuse the link between financial autonomy and judicial independence may be, the truth is that this demand has been tempered over time to the point that none of the interviewees indicated that they adhere to it. The NMA indicates that their demand in this regard is limited to the intangibility of salaries, as recent wage readjustments for the public sector have excluded the members of the judiciary as they are among those who receive the highest remunerations within the State, which is detrimental for them.¹⁴⁴

The following graph shows the evolution of the judicial budget over the last ten years (it includes the budget of the judiciary itself, that of the CAPJ and that of the Judicial Academy),¹⁴⁵ and confirms a sustained increase:

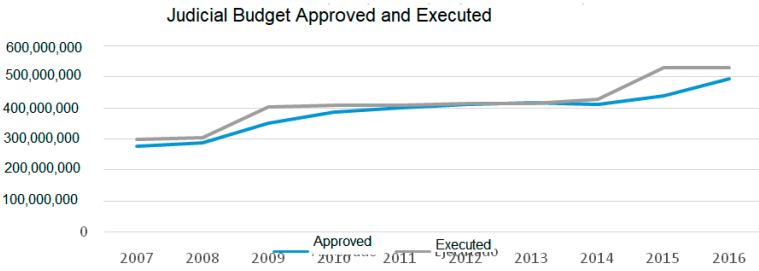
141 In Chile, there are no fees charged for judicial services and the extra budgetary income of the Judicial Branch is not significant, which is why the budgetary discussion is crucial for its functioning.

142 For example, in the opening speech for 2016. <http://www.emol.com/noticias/nacional/2007/03/01/247581/enrique-tapia-serias-falencias-afectaron-al-poder-judicial-en-2006.html>

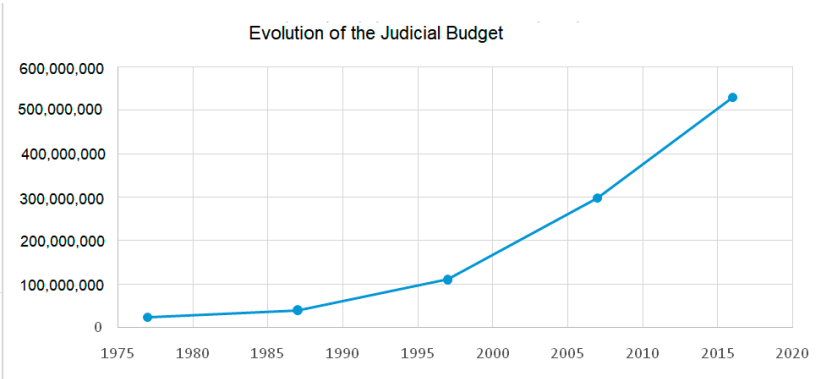
143 For example, in the proposition made in the act of reflection in 2003, where it was requested that the contributions received from the State be gradually doubled, to stand at 2% of the national budget: <http://www.elmostrador.cl/noticias/pais/2003/07/10/exclusivo-poder-judicial-aspira-al-2-del-presupuesto-nacional/>.

144 See the column written by NMA President Álvaro Flores: <http://www.elmostrador.cl/noticias/opinion/2016/11/19/el-salario-de-los-jueces-y-la-independencia-judicial/>. In any case, the risk of impacting judicial independence occurs when judges' salaries can be manipulated up or down in order to influence the content of their decisions. It is difficult to see this in a general policy of readjustments for the public sector, though this includes judges.

145 All figures correspond to the Chilean peso (\$) in 2017.

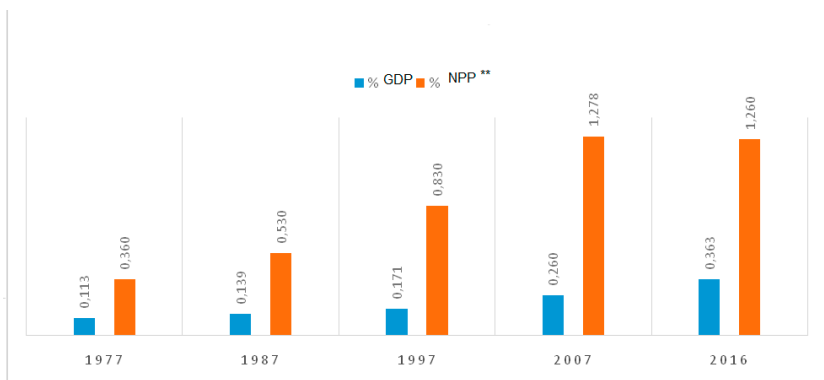


The rise is much more remarkable if one considers the situation in the period prior to the beginning of judicial reforms, which marked the process of a sharp increase in judicial spending. The following graph shows the evolution of the judicial budget over the last 40 years:

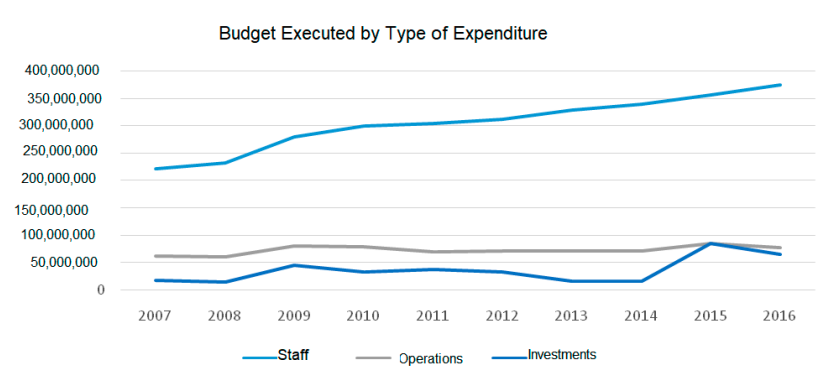


It is clear that this strong growth occurred during a period of widespread economic expansion in the country, but it is significant to note that the sector grew more strongly than others, receiving a percentage of GDP and NPP¹⁴⁶ considerably more significant, as can be seen in the following graph:

146 Net Primary Production.



In regard to the composition of spending, it is not surprising that the majority is earmarked for personnel,¹⁴⁷ but it should be noted that in recent years judicial investments have risen strongly, mainly associated with the construction of new courts, all of them with a standard far superior to their traditional counterparts. This can be seen in the following graph:



The budget of the Judicial Branch is drawn up by the CAPJ¹⁴⁸ in accordance with a methodology agreed upon with the Budget Office of the Ministry of Finance. In general, the budget is inertial (approximately 90%), given the weight of the remuneration item and the stability associated with the majority of operating expenses. Investment initiatives or, in ge-

147 The staffing level of the Judiciary has increased significantly in recent years. In 2000, the total number of officials stood at 5,560 (http://www.dipres.gob.cl/572/articles-70199_doc_pdf.pdf), a figure that that rose to 13,689 in 2016 (http://www.pjud.cl/dotacion-escala-sueldos-portlet/PDF/dotacionEscSueldos/Dotacion_Discurso_20161130.pdf).

148 The Judicial Academy draws up its own draft budget and administers it.

neral terms, new expenditures are at first analyzed as bills, which are then presented to the Council of the CAPJ, which establishes the order of priority. With this information, negotiations with the Treasury are initiated, without there being an amount previously allocated for these purposes (only operational continuity is ensured). It is the Ministry of Finance that ultimately draws up the budget and only when it is issued to the CAPJ is it known which projects were accepted and which rejected.¹⁴⁹

A debate is then held in parliament, where generally the budget of the Judiciary is approved without further questioning.

The financial management of the Judiciary is handled exclusively by the CAPJ.

International Cooperation via donations has not been relevant in Chile for various years. In judicial matters, there have been loan operations in recent years with the IDB that have resulted in two projects: one to strengthen the CAPJ and another to strengthen institutions.

c. Strategic Plan of the Judiciary

The general objective of the IDB Project initiated in 2010 was “... to strengthen the institutional capacity of the Judiciary to develop medium- and long-term judicial policies that favor its institutional development and adequately address the reforms that are being introduced in the Chilean justice sector.” (Our translation.)

It should be noted that this objective combined two key elements of the diagnosis that drove this project: the weaknesses of the internal government of the Judiciary, particularly with regard to its strategic design capabilities and the verification of important deficits in the internal participation that will unite the institution in the pursuit of common objectives. In that sense, strategic planning was important.

However, before this project was initiated, the SC, with the help of experts from Universidad Católica, generated a Strategic Plan for 2011-2015, without following the participatory strategy designed in the project. This was amended in a second plan in force for the 2015-2020 period. In this

¹⁴⁹ We do not have any information on the number of draft budgets presented or the amounts requested, which were ultimately approved by the Treasury, but apparently the resolution coincides with the expectations within the CAPJ.

plan, the following strategic objectives were defined with goals set for the year 2020.¹⁵⁰

STRATEGIC OBJECTIVES	2020 TARGETS
1. INCORPORATE THE SERVICES PROVIDED BY THE COURTS MEDIATION SERVICES AND/OR ADR METHODS	<ul style="list-style-type: none"> • The Judicial Branch must make progress in steadily increasing the cases that are resolved by these mechanisms. By 2020, the internal ADR must resolve at least 15% of its cases, a substantial increase with respect to its 2015 measurement.
2. BE RECOGNIZED AS RELIABLE, CLOSE AND TRANSPARENT (EFFECTIVE JUDICIAL PROTECTION ACHIEVES AUTHENTIC IMPLEMENTATION)	<ul style="list-style-type: none"> • Citizens improve their evaluation of access to the judiciary, initiating an increase, expected to exceed 40 points of positive evaluation. • The perception of trust in the Courts improves steadily given the actions that the institution has undertaken, this is because the user/citizen understands clearly the judicial resolutions, and where understanding of rulings exceeds 50% on the part of the citizens.
3. INCORPORATE ORAL INTERVENTIONS IN ALL MATTERS AND INSTANCES	<ul style="list-style-type: none"> • To be clear about the deadlines for the implementation of the Civil Procedure Reform, along with incorporating oral interventions in all Courts of Appeals and SC in matters already subject to reform. • Coordinated work is being undertaken in the three bodies of the Judiciary.
4. CONTRIBUTE ACTIVELY WITH A MORE INCLUSIVE COUNTRY, INCORPORATING THE ELEMENTS OF RESTORATIVE JUSTICE IN CHILE.	<ul style="list-style-type: none"> • The Judiciary leads the discussion of the State in terms of restorative justice in Chile, opening the field over criminal jurisdiction. • For each one of the competences, the judgments effectively resolve the conflicts, and the Judiciary provides specific examples of its concern to collaborate in preventing conflicts.
5. DEVELOP ONLINE PROCESSES OF ADMINISTRATION AND JUSTICE MANAGEMENT (E-JUSTICE)	<ul style="list-style-type: none"> • That the Judiciary has a new legal and technological framework that allows for the administration and management of justice, from knowledge of the case, the ruling and its implementation.

(Continue on the next page)

¹⁵⁰ Targets have also been set for 2030 for each of the objectives.

(Continued from previous page)

STRATEGIC OBJECTIVES	2020 TARGETS
<p>6. ESTABLISH THE NEW SYSTEM OF IMPROVEMENT, TRAINING AND CAPACITY-BUILDING IN LINE WITH THE NEW JUDICIAL PROFESSION.</p>	<ul style="list-style-type: none"> • Anticipating the design of a New Judicial Academy for the future. • Have a unique statute for judges and non-judges.
<p>7. ADVANCING TOWARDS DECENTRALIZED JUDICIAL ADMINISTRATION WITH ORGANIC AND FINANCIAL AUTONOMY</p>	<ul style="list-style-type: none"> • The new judicial administration begins the decentralization process that the country's justice requires in harmony with the other branches of the State. • The Judiciary leads the discussion of the relevance of having organic and budgetary autonomy for the inclusive development of Chile, 100% of organic autonomy is expected.
<p>8. TRANSFORM THE CURRENT ADMINISTRATIVE CORPORATION OF THE JUDICIARY INTO AN AGILE HELP AND SUPPORT SERVICE, THAT IS SHARED AND CROSS-CUTS ALL JUDICIAL PROCESSES AND WORK.</p>	<ul style="list-style-type: none"> • All the bases of the design of the “new Administrative Corporation of the Judicial Branch” are in place, which will be a cross-cutting help and support service for all the work of the Judiciary, optimizing the function of administration by 2020.

This plan has been intensely disseminated within the Judiciary, and is easy to access through the Judiciary website. However, few are aware of its implementation process and there is a general perception that it does not really reflect the actions of the Judiciary. The latter issue stems from the fact that most of the proposed objectives go beyond the sphere of decisions of the courts, referring to issues of judicial policy that are the responsibility of the other branches of government. Beyond being able to exercise influence in that direction, the attainment of the majority of the objectives is beyond the competence of the judges.

d. Disciplinary oversight

The regulation of the disciplinary responsibility of judges is one of the most complex and deficient issues of our judicial institutions, which means, paradoxically, that neither judges¹⁵¹ nor users of justice are sa-

151 See the following articles from 2016: <http://www.elmostrador.cl/noticias/opinion/2016/08/24/disciplina-de-los-jueces-en-las-antipodas-del-debido-proceso/>;

tified with it.¹⁵² This is due to a deficient typification of the conduct that may be punished, to the multiplicity of ways in which it can be enforced without there being a specialized authority in the investigation of possible infractions, and the fact that the procedure does not adequately ensure due process.

The tension between disciplinary oversight occurs both because of the possibility of attacking the jurisdictional criteria applied by the judge using disciplinary rather than legal recourse, as well as the extreme breadth and vagueness with which such conduct is described.

Regarding the former, we must consider the fact that in Chile the parties can attack the content of a court ruling arguing that the judges committed an infraction or abuse, for which they have the appeal of complaint of Art. 545 of the Court Statutory Code.¹⁵³

This regulation, issued in 1995, represented some progress. However, the change does not resolve the underlying problem, which is the confusion between the jurisdictional and disciplinary levels. The problem arises both because the disciplinary system is used to invalidate sentences, and

<http://www.elmostrador.cl/noticias/opinion/2016/10/18/el-regimen-disciplinario-de-los-jueces-una-reforma-urgente/>; and <http://www.elmostrador.cl/noticias/pais/2016/11/03/poder-judicial-chileno-en-la-mira-por-caso-de-hostigamiento-a-juez-vinculado-al-mundo-de-la-defensa-de-los-derechos-humanos/>

152 See RIEGO AND VARGAS 2016.

153 “Art. 545 of the Court Statutory Code. The sole purpose of the complaint is to correct the faults or serious abuses committed in the dictation of jurisdictional rulings. It will only proceed when the fault or abuse is committed in interlocutory judgement that concludes the trial or makes its continuation or final ruling impossible, and that are not subject to any ordinary or extraordinary appeal, without prejudice to the attribution of the Supreme Court to take a formal intervention in exercise of its disciplinary powers. Exceptions are final judgments issued by arbitrators, in which case the complaint proceeding will proceed, in addition to the appeal. The ruling that contains the complaint will contain the precise considerations that demonstrate the lack or abuse as well as the manifest and serious errors or omissions that constitute them and that exist in the ruling that motivates the appeal, and will determine the measures that will remedy such lack or abuse. In no case may it modify, amend or invalidate judicial rulings in respect of which the law provides for ordinary or extraordinary jurisdictional remedies, except in the case of an appeal filed against a final judgment of the first or only instance issued by arbitrating arbitrators.

In the event that a higher court of justice, making use of its disciplinary powers, invalidates a jurisdictional ruling, it must apply the disciplinary measure(s) it deems pertinent. In this case, the court shall order that the full court be informed of the background information for the purposes of applying the disciplinary measures that may be appropriate, given the nature of the offenses or abuses, which shall not be less than a private reprimand.” (Our translation.)

because it is the same official who hears the procedural remedies is responsible for imposing disciplinary sanctions.

The description of conducts that constitute violations should emanate from a general ethical framework to which the conduct of the judges should be subject. In some way, the first task is assumed by Act 262-2007, establishing in its second chapter the principles of judicial ethics, although in a fairly general and laconic way, far from what should be a true Code of Judicial Ethics. This act contains what is called general principles that every judge should follow.¹⁵⁴

154 "First.- Dignity. Every member of the Judicial Power, must exercise his or her office with dignity, abstaining from any conduct contrary to the seriousness and decorum that it requires. Second.- Probity. Every person that integrates the Judicial Branch must act with rectitude and honesty, trying to provide a service satisfying the general interest of the Judiciary and discarding any profit or personal advantage that can be obtained by themselves or through other people. This obligation requires not demonstrating any interest in matters that are known or may be known by a court, interceding or intervening in any way for or against any person, whatever the nature of the trial or action in question. It also includes competitions, appointments, qualifications, transfers and other matters relating to the staff of the Judiciary.

Third.- Integrity. Every member of the Judicial Branch must be straightforward and faultless conduct, in order to promote the trust of the community in the Judiciary. Consequently, with their conduct they will try not to provoke any criticism or claims on the part of those who resort to the courts or other authorities or the public, in general.

Fourth.- Independence. Both the judges and the other judicial officials must, jointly and individually, ensure the autonomy of the courts and enforce it in all circumstances.

Fifth.- Prudence. Every member of the Judicial Branch must act with diligence, skill and criteria in all matters in which it is appropriate to intervene in reason or on the occasion of their duties, ensuring that the way they exercise said duties inspires confidence within the community.

Sixth.- Dedication. Judges and other judicial officers must have a permanent disposition to perform their positions with diligence, knowledge and efficiency, acting with equity and diligence in all the functions that they must execute.

Seventh.- Sobriety. Judges and other officials of the Judicial Branch must demonstrate temperance and austerity both in the exercise of their positions and in their social life, avoiding any ostentation that may raise doubts about their personal honesty and conduct.

Eighth.- Respect. Judges and other judicial officials must demonstrate respect for the dignity of all persons in the hearings and other actions carried out in connection with the performance of their duties.

Ninth.- Reserve. Judges and other judicial officers must maintain absolute reserve on all matters that require it and of those they deal with, refraining from making known their thoughts, or issuing opinions in public or private, or allowing them to be known by other persons or using the information they possess because of their functions for their own benefit or that of others.

Ninth Bis.- Prohibition to receive pecuniary stimuli. Judges and other judicial officials are prohibited from receiving stimuli of a pecuniary nature, which go beyond the symbolic, for the exercise of their duties, since this, apart from creating a public environment unfavorable to the judicial function in general, seriously affects the independence and impartiality of these officials.

The legal description of improper conduct should also be complemented by the development of case law that provides more detailed information about behaviors that are not permitted for judges. One of the difficulties of the disciplinary system is the many ways that control can be exercised over judges. To this we add the fact that the procedural regulation for applying the disciplinary measures that have been developed by the SC through Acts 129-2007, 168-2007 and 262-2007.

In general, criticism of Chilean disciplinary procedure can be summarized as follows: (i) there is no agency responsible for conducting investigations or adequate separation between those functions and disciplinary functions; (ii) there are many restrictions on the exercise of the right to defense: the charges are generic, information is limited and there is no contradictory space in which to discuss the evidence. In short, written and inquisitorial proceedings seem far removed from the current standards of the country in procedural matters.¹⁵⁵

One could imagine that a system lacking in guarantees in the hands of a small group at the top that is interested in exercising its power could give way to numerous violations. However, the other side of the coin of the system is the low frequency of indictments, something that the magistrates themselves recognize, and how difficult it is for them to result in severe disciplinary measures. Moreover, the SC often ends up lowering the sentences imposed on judges and ordering that they be transferred to a different jurisdiction in some cases.¹⁵⁶

The Judiciary Research Directorate website¹⁵⁷ contains a survey on perceptions of the Judiciary's disciplinary regime.¹⁵⁸ Its main findings were that 17% of respondents have been the object of a disciplinary investi-

Ninth Ter.- In the matters not foreseen in this Chapter, the provisions of the Ibero-American Model Code of Judicial Ethics will be supplementary, which will become part of this agreement." (Our translation.)

155 Furthermore, judges complain that this procedure is not respected fully in certain Courts of Appeal.

156 This measure is especially questionable given that it involves judges whose behavior has been proven inadequate for exercising its function. The application of the measure has generated conflicts within the SC, which have been made public, particularly in the case of judges from Arica who were sanctioned for corruption. See <http://diario.elmercurio.com/detalle/index.asp?id={203c9ed3-8b85-4405-82ca-8f8f364a422e}>.

157 http://decs.pjud.cl/documentos/descargas/R_gimen_disciplinario_-_Resultados_En_cuesta_Percepcci_n.pdf

158 The survey was conducted in October 2016 and was answered by 2,887 officials representing 24% of the institution's staff.

gation (and 12% stated that they had participated as complainants). Of these, 51% faced punishment¹⁵⁹ such as a private reprimand, written warning and suspension. Only 10% of the respondents hired a professional to defend them, 55% believe that the investigators were not clear on the role that they were to play and 60% stated that there is a lack of impartiality on the part of those who carry out the investigations and issue punishments.

The SC itself received a negative evaluation regarding the disciplinary oversight system's function, and it is in the process of modifying acts in order to address the complaints about the procedure that is used. In keeping with their position regarding these decisions, the NMA stated that the solution should consist of a new regulation for the entire disciplinary system that should be issued by the Legislative Branch.

6. Conclusions

The main conclusion of this report is that, regardless of whether the SC does this work well or poorly, with good or erroneous intentions, oversight of government of the Judiciary in Chile has a serious lack of legitimacy. This lack is mainly manifested within the judicial institution itself, as the judges resent the government structure and are the main opposition to its manifestations. The consequences of this are not only very negative for the internal climate, but are also negative for the development of effective government. It is the questioning of the system that impedes, for example, the decided exercise of disciplinary powers when there truly are reasons for this.

This suggests that a problem that could appear to be internal to the Judiciary also affects the institution's external performance and its operations. It is worth noting that during a period in which the Judiciary underwent intense reforms in terms of its functioning, the institutional structure and government bodies remained practically unchanged. Both the criminal procedure reform and the reforms that followed in the areas of family and labor law left these issues aside even though they changed the SC's legal jurisdiction. Even more important is the fact that the civil procedure reform, which the country tried and failed to implement, introduced even more significant changes to the SC's role in hearing appeals.

159 The meager numbers on judges who have been punished seem to be inconsistent with the percentage of officials who stated that they had been the object of a disciplinary investigation (17%) and then disciplined (51%). This would allow one to advance the hypothesis that the disciplinary is more severe in the case of Judiciary officials than it is for judges.

One possible explanation for this is the significant complexity of the policy involved with comprehensive judicial government reform. If there was a desire to remove the main source of the problems at the root, it would be necessary to start by radically changing the way in which the judicial career is understood in our country. As long as it is understood as a life-long option with a more or less certain likelihood of moving up to better positions and higher salaries as one accumulates knowledge and experience, there will inevitably be tension between the independence that must be protected for judges and for the system of government because the people who have the power to elect, evaluate and promote them must have the power to influence the way in which disputes submitted to them are resolved. It will only be possible to isolate government functions at a risk of possibly harming independence (internal or external) if judicial positions are temporary and there were no need or opportunity to assess or promote them. Even in those cases, the power to discipline them when they break the rules could deviate in order to try to influence their verdicts. Of course, this is a major change that is fairly contrary to the way in which officials' careers have traditionally been understood in the country.

If we accept that it is very difficult if not impossible to conceive of a radical change of the Chilean judicial system that implies completely eliminating the judicial career,¹⁶⁰ the changes in institutional design that could be promoted do not seek to eliminate risks to independence. Rather, the idea is to reduce them and to create systems that allow conflicts to be recognized and adequately resolved.

There is no doubt that the public is interested in having an impartial judge resolve their disputes so that the work is done without considerations that are separate from it and the interest of justice, but those same people are interested in effectively having access to justice, in their disputes being resolved within a reasonable period of time and at a reasonable cost, and in their cases being handled in a predictable manner. This requires a system of government that goes beyond judges' professional interests. As a result, it seems that it is not possible to simply think of a judicial system without government as this would severely harm the service of justice to the detriment of the people.

In my opinion, the best route available today to modernize judicial government is to use the door that the SC itself opened in 2014 by creating

¹⁶⁰ In fact, attempts to create an institution without a career in the sector, as was the case of the Public Prosecutor's Office, have not yielded results due to the pressure of professional associations that have taken steps to create one.

an internal unit responsible for these functions and returning the SC to a purely jurisdictional role. As the Court stated at that time, the agency should be composed of representatives of all levels of the Judiciary and should be directed by the Supreme Court Chief Justice.

A judicial government that takes part in the entire institution instead of just the SC as much as it maintains a driving role is the only route that is currently available to align the objectives of legitimacy and efficiency, reducing the risks of internal independence that have been highlighted throughout this report.

Once the institutional configuration of the agency responsible for judicial government is defined, it is necessary to specify the issues that are fundamental to the exercise of the same. These are:

1. The regulatory powers of the entity responsible for judicial government and the form and scope of its impact on judicial public policy in general. The government entity should limit itself to setting the policies, strategies and general regulations without considering executive functions, which should be given to differentiated structures in the areas of financial and staff management and administration.
2. Both financial and staff management and administrative structures (which will take on the responsibilities of what is now the CAPJ) should be professional entities run by a responsible director chosen using the High-Ranking Public Leadership system.
3. The entity responsible for staff will be responsible for managing the appointments, qualifications and promotions system which, in the case of judges, should also follow the High-Ranking Public Leadership system.¹⁶¹ It should also take on the responsibilities that currently fall under the Judicial Academy for initial and ongoing staff training.
4. Depending on the entity, there should be a disciplinary sub-system that should have an internal affairs unit responsible for receiving and investigating complaints. The legal level of the conducts that represent infractions should in any case be adequately determined through a procedure that protects due process. The agencies responsible for hearing procedural remedies against resolutions

¹⁶¹ This proposal is developed more fully in VARGAS 2014.

of individuals who can impose sanctions should be completely separate.

This sort of change opens up a space in which to rethink the role of the SC within the Chilean jurisdictional system, a matter that goes beyond the scope of this report.

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3. Colombia

Ana María Ramos¹⁶²

INTRODUCTION

The creation of the Superior Judicial Council has been an important step forward in the autonomy of the Judiciary. However, the gaps that exist in terms of its impact on judicial independence and the strengthening of the capacities of the justice system have placed the need for reform of this branch of government and management created by the 1991 Constitution on the table, though not yet successfully.

In order to address this topic, this report is divided into three parts. This first outlines the background information and constitutional and legal framework that led to the creation of the Superior Judicial Council. The second describes the main achievements and deficiencies and offers a critical analysis of its structure and dynamics. The third presents proposals for improving the entity.

It is important to note that research conducted by Corporación Excelencia en Justicia (CEJ) over the past few years was revisited and additional bibliography was reviewed that is useful to illustrate the description and proposals presented herein. Furthermore, requests were sent to the Judiciary in order to obtain quantitative and qualitative information as inputs for this assessment. We also conducted a limited amount of field work that included interviewing stakeholders from various areas and positions who have interacted with the Superior Judicial Council¹⁶³ and a panel of experts was held to present the preliminary conclusions and options for adjusting the institutional model.

Finally, although the document will address aspects related to the Superior Judicial Council's Disciplinary Chamber, this assessment focuses on the Administrative Chamber for two reasons. The first is the impact of its work on the operation of the entire justice system and the second is the reform of the Disciplinary Chamber in 2015 that created the Judicial

162 Written by the Corporación Excelencia en la Justicia. The report was coordinated by Ana María Ramos Serrano.

163 One former Supreme Court justice, a former Executive Director of Judicial Administration, a former Superior Judicial Council Administrative Chamber magistrate, two current judges, a researcher from a civil society organization and two magistrates from the Superior Judicial Council Sectional Administrative Chambers.

Discipline Commission. This has not yet been implemented, but it will take over the disciplinary functions that this Chamber currently handles.

A. LEGAL AND CONSTITUTIONAL FRAMEWORK

1. Background on the government and administration of the Judiciary

1.1. The situation prior to the Constitution of 1991

The autonomy of the Judiciary as a basis for judges' independence has been an ongoing struggle that began with constitutional adjustments and legal developments in the context of the Constitution of 1886. As such, this responsibility remained in the hands of the Judiciary and the Supreme Court, which was elected by Congress based on candidate lists submitted by the President, was responsible for selecting the magistrates, who would in turn select judges.¹⁶⁴

In 1970, the Superior Council of the Administration of Justice was created to manage the judicial career,¹⁶⁵ which was mainly composed of representatives of the Judiciary,¹⁶⁶ the Ministry of Justice and National Attorney General. However, the management of resources continued to be handled by the Executive through the Ministry of Justice, which was assigned responsibility for the Judicial Revolving Fund,¹⁶⁷ the purpose of which was to contribute to better Judiciary staffing and operations.

Soon after, in 1979, there was a new attempt to create an autonomous government and administration agency for the Judiciary. A constitutional reform¹⁶⁸ was approved for this purpose, creating the Superior Judi-

164 Giraldo Ángel, Jaime. *Obras Competas*. Tomo III. Universidad de Ibagué. *Reforma Constitucional a la Justicia. La Ética en el Derecho*. P. 95

165 This includes setting the guidelines for the process and the definition and implementation of evaluation systems.

166 The heads of the Supreme Court, State Council and Disciplinary Court, one official and one career employee.

167 Created by Decree 1709 of 1954. "To create and endow with legal identity a special fund called the Judicial Revolving Fund, which will come under the auspices of the Ministry of Justice. Its main responsibility will be to improve the staffing and material operation of the Jurisdictional Branch of the Judiciary, its Auxiliary Body, the Public Prosecutor's Office and the other units that are included in the Ministry of Justice Budget, and to the economic, cultural and housing improvement of the respective officials." (Our translation.)

168 Legislative Act 1 of 1979.

cial Council. However, it was declared unconstitutional by the Supreme Court due to procedural defects in November 1981.

After attempts to implement a constitutional reform were frustrated, subsequent regulations that were lower on the hierarchy were used to create a fragmented model of government and management in which the Executive Branch continued to be present. This was considered to impact the entity's autonomy because it subordinated its needs to the desires of the Executive Branch.¹⁶⁹ As a result, in the late 1980s a move was made to create the Judicial Administration Institute, which was to execute the budget, but the initiative was never implemented.

In summary, some progress has been made in concerning autonomy for Judiciary nominations by the 1980s, while areas such as internal regulations and budgetary management continued to be highly conditions by the Executive and Legislative Branches.

1.2. The Constitution of 1991

The National Constituent Assembly revisited the idea of creating an agency responsible for the government and administration of the Judiciary. Several models were proposed. In the end, the decision was made to create an agency composed of staff focused **exclusively** on this work –rather than Chief Justices- who absorbed all of the government, administration and disciplinary functions for judges that had been in the hands of various institutions,¹⁷⁰ some of them outside of the Judiciary.

169 Regarding this point, the first President of the Superior Judicial Council, Doctor Jaime Giraldo Ángel, stated that this model “creates a contradiction between the body that has the power to decide on the handling of resources and the body that needs them to operate because decisions regarding the needs that should be met and priorities and the timing for providing the elements required tend to differ because they come from different considerations.” (Giraldo Ángel, *op. cit.*, p. 99, our translation.)

170 “The Superior Judicial Council has been conceived as an administrative legal entity that covers the functions, which are currently diverse, that serve as the basis for the effective administration of justice.” “The unit to be created seeks to turn the Council into the institution responsible for the comprehensive administration of justice. As such, it brings together such dissimilar functions as serving as a space for disciplinary matters related to judges and attorneys, updating and overseeing the operation of the administrative career, using it to provide candidates for judicial positions, resolving jurisdictional conflicts and preparing and executing the budget for the entire branch, in stark contrast to the current situation.” (Constitutional Gazette No. 75, our translation).

2. Structure and functions of the Superior Judicial Council in the Constitution of 1991

The constitutional text established:

- i) The main functions, which will be open to others established by law.
- ii) The entity is divided into the Administrative Chamber and the Disciplinary Jurisdictional Chamber without discriminating against the functions of each of them.
- iii) The requirements for and term of Superior Judicial Council members, who are given the category of magistrate so that they can make decisions in the jurisdictional field. For the purposes of administrative functions, the constituent understood that it was the role of a member of a "management board."¹⁷¹
- iv) The possibility that the Disciplinary Jurisdictional Chamber could have Sectional Councils which would later be developed by the Justice Administration Statutory Law.

Based on the above, the Council was configured as follows:

Functions
<p>Electoral: To develop the lists of candidates for the Supreme Court and Council of State.</p> <p>Oversight: To investigate and punish infractions committed by Judiciary officials. To oversee the performance of judicial offices.</p> <p>Jurisdictional conflicts: To resolve conflicts over jurisdiction.</p> <p>Regulatory: To regulate judicial and administrative processes in areas not provided for by the legislature. To submit bills to Congress regarding issues related to justice administration. To establish the division of territory and establish the location and redistribution of judicial offices.</p> <p>Administration: To manage the judicial career; develop a Judiciary budget; create, eliminate and transfer positions, issue regulations and establish the internal functions of justice administration; participate in the drafting of the National Development Plan.</p>

(Continue on the next page)

171 Constitutional Gazette No. 75. In regard to the denomination "magistrate," the constituent stated that, "This is a new concept of the condition of magistrate that distances them from the strict procedural function that currently characterizes them."

(Continued from previous page)

Structure and Composition
<p>Administrative Chamber: 6 magistrates (3 elected by the Council of the State, 2 by the Supreme Court and 1 by the Constitutional Court).</p> <p>Disciplinary Chamber: 7 magistrates elected by Congress using candidate lists sent by the National Government.</p>
Requirements for serving as magistrate (Administrative or Disciplinary Chamber)
<p>Candidates must be Colombians by birth and current citizens over the age of 35 who hold a law degree and have practiced law for 10 years in good standing.</p>

Table 1. Organization and Constitutional Functions of the Superior Judicial Council

The Statutory Justice Administration Law provided more specifics on the agencies and functions of the Superior Council. We describe its characteristics below.

2.1. Government of the Judiciary

The Statutory Law defined the functions of the Administrative and Disciplinary Chambers of the Superior Councils and some of their main internal offices. It also established that there would be a common body, the Plenary Council, responsible for drafting the annual report to Congress, adopting the National Development Plan, issuing regulations for justice administration and adopting bills. In regard to the regional structure, sectional councils were created, which also were divided into administrative and disciplinary chambers.

The Inter-Institutional Commission of the Judiciary was created as the highest-ranking unit for sectorial coordination. It is composed of the heads of the State Council, Supreme Court, Constitutional Court and Superior Judicial Council, the National Public Prosecutor and a representative of Judiciary employees and judges that they elect. The main function of this entity is to issue **non-binding**¹⁷² prior opinions on various matters including the budget and sectorial development plan, creation and transfer of courts, division of the territory and structure of court staffing plans. Furthermore, it develops the list of candidates for the position of Executive Director of Judicial Administration, who is elected by the Administrative Chamber. At the

172 In Sentence C-037 of 1996, the Constitutional Court stated that “this is only an opinion or recommendation and by no means requires or conditions the decisions that the Administrative Chamber of the aforementioned Corporation are to make regarding the aspects set out in the numerals analyzed.” (Our translation.)

territorial level, inter-institutional sectional commissions are to be created. These include the highest-ranking legal and administrative officials of the region’s Judiciary¹⁷³ along with a representative of officials and employees.

2.2. The Superior Judicial Council Administrative Chamber

The Administrative Chamber has a central level composed of six magistrates’ offices and seven units that report to the Chamber. At the regional level, the Statutory Law established that there would be Sectional Judicial Councils at the heads of the judicial districts in which they were considered necessary. To date there are 24 sectional administrative chambers. The chambers are responsible for the following within their district: administration of the judicial career, oversight of performance of judicial offices, the design and implementation of training programs and administrative oversight of offices in order to ensure that justice services and provided efficiently and in a timely manner, and consolidating the assessment of judges, among other matters.

Administrative Chamber Technical Units	Executive Directorship Technical Units
Statistical Development and Analysis Unit	Planning (created by law)
Rodrigo Lara Bonilla Judicial Academy	Budget (created by law)
Judicial Documentation Center- CENDOJ	Technical Services (created by law)
Judicial Career Administrative Unit	Human Resources (created by law)
Office of International Affairs and Legal Advising	Physical Infrastructure
Auditing Unit	Legal Aid
Advisory Office for Judiciary Security	
National Attorney Registry	Administrative Unit

Table 2. Technical Units of the Superior Judicial Council

The **Executive Directorate of Judicial Administration** was created to serve as the operations unit. It is overseen by a Director who is elected for a four-year term. The Directorate has seven technical units. Its functions include executing Judiciary plans and policies, resource administration, signing contracts, developing financial statements, representing the Judiciary in judicial proceedings and providing the technical inputs required by the Administrative Chamber to carry out its work.

173 The heads of the Courts, Sectional Director of Public Prosecutor’s Offices and the President of the Sectional Judicial Council.

2.3. The Superior Judicial Council Disciplinary Chamber

The Superior Judicial Council Disciplinary Chamber has four main functions: i) to examine conduct and punish disciplinary infractions of judicial officials¹⁷⁴ and others who exercise legal functions on a temporary basis. These functions are exercised at the central level and in the disciplinary chambers of the Sectional Judicial Councils. ii) To exercise the disciplinary function over attorneys. iii) To resolve disputes of jurisdiction. When there are disputes between jurisdictions, the Disciplinary Chamber addresses them at the central level. When they involve judges within a single jurisdiction, the disputes are handled by the Sectional Council's disciplinary chamber. iv) To issue decisions regarding protective remedies.

The deficiencies in the performance of this agency led to its elimination through the Branch Equilibrium Legislative Act, which replaced it with the Judicial Disciplinary Commission. The new unit presents the following changes with respect to the model established in the Constitution of 1991: i) Although there are still seven members, the monopoly over candidate lists was eliminated. The President is tasked with developing only three candidate lists, rather than all of them. The remaining four lists are handled by what is now¹⁷⁵ the Superior Judicial Council Administrative Chamber. ii) Responsibility for protective measures and disputes over jurisdiction are transferred to the Constitutional Court. iii) Disciplinary oversight over judicial employees is assigned to each employee's superior. No major changes were made to the regional design, and it is established that only judicial disciplinary sectional commissions may be used.

The reform was approved in July 2015, but the new agency has not yet been formed.

B. THE ROLE OF THE SUPERIOR JUDICIAL COUNCIL IN THE INDEPENDENCE AND STRENGTHENING OF THE JUDICIARY

1. Overview of the results of 25 years of the Superior Judicial Council

Anticipating the conclusion of this study, we can state that the creation of the Superior Judicial Council was a step towards the autonomy of the Judi-

¹⁷⁴ It is worth noting that the Statutory Law distinguishes between "officials" and "employees." The former are judges and magistrates, that is, staff who exercise jurisdictional functions. The latter are the other public servants who work in judicial offices or belong to other administrative areas of the Judicial Branch.

¹⁷⁵ When the Disciplinary Chamber ceases to exist, the Administrative will become the Superior Judicial Council.

ciary and the strengthening of its management. It went from being an entity that experienced a high level of interference from the Executive Branch and fragmented administration to approaching autonomous government –sometimes in isolation from the other branches of government– and more concentrated and specialized administration as well as the strengthening of the career, which has contributed to judicial independence.

1.1. The role of the Superior Judicial Council in the defense of judicial independence against internal and external threats

External threats

In regard to external threats, one cannot ignore the territorial control that armed groups have maintained on the margin of the law in various parts of the country. This limits citizen access to formal justice and judges' ability to apply justice independently. Although this is a situation that was overcome during the current administration, during the second half of the 2000s, there were significant confrontations between then-President Álvaro Uribe Vélez and the Supreme Court. The tension was not limited to the highest levels of justice.

Despite this confrontation, key decisions were made during this period that demonstrated the independence of the courts. The unconstitutionality of the Legislative Act allowed for a second presidential re-election and there were also investigations and convictions of members of Congress with connections to paramilitaries.

Although there is a good level of independence from the Executive Branch today,¹⁷⁶ the pressure on judges has not disappeared. The defense that the Superior Judicial Council has provided against external threats has been precarious. These lacks have meant that judges mount their defense either directly through explanations of their decisions in the media or through unions, judges' groups¹⁷⁷ or the Chief Justices of the High Courts, who

176 Of course, this is not a statement that everyone supports. For some, the interference of the Executive Branch can be more silent, such as through the nomination of people who are very close to the administration for candidate lists for magistrate' positions on the Constitutional Court or by offering positions to magistrates once their terms are complete. The first criticism is difficult to sustain, because it is a natural result of the current constitutional design, particularly because magistrates' set terms allow them to distance themselves from their electorate. One example of this is the ruling that prohibited presidential reelection during the administration of Álvaro Uribe Vélez, who received a positive vote from a magistrate who was nominated by the President.

177 This has occurred, for example, with criminal court judges who work in the Paloquemao judicial complex in Bogotá. They have issued public statements in

offer public statements to reject statements by the media, the Executive Branch and other public powers. In these cases, the Superior Council's role is limited to disseminating the statements on its website.

The main statements in defense of autonomy by the Superior Judicial Council have been framed by the constitutional reforms of justice that the government has tried to implement over the past few years.¹⁷⁸ In these cases, the Council has objected to assigning jurisdictional powers to individuals¹⁷⁹ and to the participation of external stakeholders, particularly the Ministry of Justice, in the new judicial government models that have been proposed. The Council has proposed the budgetary autonomy of the Judiciary in these same contexts of discussion of reforms through the allocation of a set percentage of the national government.

The call for more funds for the Judiciary has been a point of coming together, and perhaps the main such point, between judicial basis, the high courts and the Superior Judicial Council.

Internal threats

There is a perception that internal impacts have increased, especially due to judges' dependence on their functional superiors and the lack of mechanisms for ensuring that they are suitable.¹⁸⁰

defense of judicial independence on more than one occasion stating that it has been undermined by critics of judicial decisions in the media in cases related to the application of protective measures. For example, in 2012 a joint statement was made to call for respect for judicial independence and to reject the "media lynching" of judges who do not hold defendants in pretrial detention (<https://www.ramajudicial.gov.co/documents/2769583/3297596/comunicado1jueces+penales.pdf/7cc2812b-6b37-414d-b260-e5f49e57c7e8?version=1.0>). The same thing happened in 2017 when these same judges issued a statement against the National Prosecutor's claims against a decision not to impose protective measures against people who had been captured after allegedly participating in a terrorist act in Bogotá. (<http://www.elespectador.com/noticias/judicial/jueces-califican-como-una-intimidacion-el-anuncio-de-investigaciones-en-su-contra-articulo-700625>).

178 An attempt was made in 2011 that led to a sui generis presidential objection to prevent it from being implemented. In 2015, the "Balance of Branches" reform was approved as Legislative Act 02 by Congress, which is mentioned in several parts of this report.

179 El Nuevo Siglo. Más peros de Judicatura a reforma judicial. in: <http://www.elnuevosiglo.com.co/articulos/11-2011-mas-peros-de-judicatura-a-reforma-judicial>

180 According to the Basic Principles of the Independence of the Judiciary of the United Nations, individuals selected to hold judicial positions will be people of integrity with adequate legal qualifications (our translation). <http://www.ohchr.org/SP/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

One of the main tasks of the Superior Judicial Council is the implementation of the judicial career, an indispensable prerequisite for judges' independence. While there has been a lot of progress compared to the situation that existed prior to the Constitution of 1991, there is currently an important gap in regard to this objective, as 44% of the 5,728 existing judge positions are temporary, which means that they were appointed by the functional superior without needing to use a merit-based process based on criteria that are neither transparent nor necessarily meritocratic.¹⁸¹ The officials in temporary positions do not have the stability of those who are part of the judicial career and are exempt from the performance evaluation to which the latter are subjected.

This situation is due to delays in the implementation of hiring processes in the Judiciary. It can take over three years from the time they are opened until the list of eligible candidates is ready, and they sometimes conclude after the list of eligible candidates is expired.

In regard to the training required for the judge to have the skills and knowledge required to make decisions based on law and play his or her role as the director of the process, important progress has been made with regard to the situation prior to the Superior Judicial Council, but it has stalled over the past few years. The Judicial Academy¹⁸² does not have the institutional capacity required to guarantee the territorial and thematic coverage and depth that judges need.

The causes of these deficiencies include the lack of a budget and lack of adequate tools for diagnosing training needs. Despite these lacks, the Academy continues to be appreciated by judges, who have repeatedly asked for it to be strengthened.

1.2. The administration of the Judiciary budget

In regard to budgets, the Administrative Chamber is responsible for **planning** (developing the proposed budget for the Judiciary and the investment plan) and **approval** (approving cooperation agreements, investment

181 In the words of the former Superior Judicial Council Administrative Chamber Magistrate, there is a lack of "mechanisms that allow temporary positions to be filled with objectivity and transparency." (Our translation.) He also states that expired or exhausted lists of candidates "contribute to cronyism and corporatism." (Our translation.) Néstor Raúl Correa Henao. Informe Final: Diagnóstico y propuestas para la Rama Judicial. 13 de diciembre de 2016. http://www.cej.org.co/files/2016/131216_IF_NRC.pdf

182 The Judicial Academy was created in 1970 and began to operate in 1987. In 1987, it was connected as a unit of the Superior Judicial Council. <http://ejrlb.net/historia>

projects¹⁸³ and contracts in excess of 100 current minimum monthly salaries). For its part, the Judicial Administration Executive Directorate is responsible for executing the resources.

The Superior Council has faced various challenges in this regard, which manifest in the low execution of the Judiciary investment budget, which implies designing projects and hiring practices that must often go through public tender processes. These activities require significant administrative work within the entities. When it is not done on time, the resources assigned are generally lost. When they are done late, the products and services hired are not satisfactorily provided during the fiscal year as scheduled, and are thus left for the next period. This is an obstacle to oversight of the fulfillment of the terms of the contracts signed.¹⁸⁴

This deficiency in the administration of resources delays the implementation of hearing rooms and information systems that are required for justice to function. It also becomes an argument that can be used by the Executive and Legislative Branches to refuse to provide resources because even when they are necessary, the conditions for efficiently managing them are not in place.

Part of this problem is the delayed release of resources by the Executive Branch and delays in approval of investment projects and contracts that require approval by the Administrative Chamber. Over the past few years, the Judiciary has had a level of execution of Judiciary resources has been much lower than the average of the other government entities.

1.3. Labor conditions and modernization of the justice system

The Superior Judicial Council must guarantee optimal conditions for the operation of the justice system. These include the availability of supplies in order for offices to complete their daily tasks, infrastructure and tech-

183 The budget that is used to build infrastructure and for information systems.

184 In 2016, the National Comptroller General stated that the Superior Judicial Council “continues to be incapable of executing the investment resources granted to the Judicial Branch in a timely manner. This is reflected in cuts to appropriations and the creation of prebudgetary reserves. (...) This situation is due to the lack of timeliness and speed in decisions made by the Superior Judicial Council’s Administrative Chamber in the approval of investment plans. As a result, 79% of the hiring will take place in the last quarter of 2015.” Source: A pesar de que se destinaron \$2.3 billones para 5 años: Continúan pendientes resultados en materia de descongestión judicial. www.contraloriagen.gov.co/web/guest/boletinprensa/-/asset_publisher/YpAcs9FAgeWm/content/a-pegar-de-que-se-destinaron-2-3-billones-para-5-anos-continuan-pendientes-resultados-en-materia-de-descongestion-judicial

nological support to facilitate traceability, management and internal and external interaction of judicial offices.

The current state is undoubtedly better, as the public servants who have been connected to the Judiciary since before the Council was created recognize. However, after a notable improvement during the first few years of the new body, the progress made over the past decade has been painfully slow and incompatible with the needs of the justice system.

For example, there is no information system that facilitates internal management, the production of statistics or interaction with users. Due to these lacks at the central level, some judicial offices have made an effort to incorporate technology on their own through the use of free software or tools developed by their own staff that allow for the introduction of digital case files, virtual hearings and digital notifications.¹⁸⁵

In the area of infrastructure, the majority of judicial offices lack adequate working conditions for their staff and for providing services to system users. The buildings are overcrowded, lack connectivity and adequate space for case file archives, lack sufficient hearing rooms and recording equipment, fail to provide access to people with disabilities and lack waiting areas and spaces for providing services to the public.

1.4. The management of judicial offices

The management of offices has been another area of deficient execution due to the lack of research and regulations along with an inadequate understanding of judicial independence.

Improvisation, lack of monitoring and early adjustments to the initiatives undertaken facilitate the opposition of judges and employees to these models, together with the expectation that they will reach a consensus on the ideal model, has resulted in delays in their implementation. The experiences that have been attempted have not managed to get beyond the pilot program stage. They focus on certain specialties, often unsuccessfully and in other cases in a manner that is not sustainable. Management models for office administration do not include estimates of reasonable

185 This is the case of the court of Puerto Rico Caquetá, which won the award for excellence in justice given by the CEJ for best judicial practices. For more information, see: <http://cej.org.co/index.php/convocatoria-vi-premio>

workloads. This information could also be used to determine the number of officials needed to bring the judicial system up to date.¹⁸⁶

Some of these lacks are due to a lack of institutional capacity and internal relevance of analyses of the justice system with regard to the importance of administrative matters and day-to-day problems. This results in the disappointment of the expectation held by the National Constituent Assembly that the new body would allow the justice system to adapt with greater flexibility to its surroundings.¹⁸⁷

1.5. Judicial Discipline

The Disciplinary Chamber of the Superior Judicial Council may be the most highly questioned judicial institution created by the Constitution of 1991 due to its politicization, the use of its jurisdictional powers and its inadequate exercise of disciplinary power together with recent corruption scandals.

In regard to the first issue, the constitutional design that charged the President with creating lists of candidates and Congress with their election allowed individuals who had been active in political life¹⁸⁸ or who had a clearly defined party-oriented background to join the institution. For its part, in the exercise of jurisdictional functions, the power to address protective measures has served to revoke decisions adopted by the High Courts, which made more acute what has been called the “train wreck” and distrust in the agency given that some of those cases involved decisions in criminal cases involving high-ranking government officials.¹⁸⁹

186 In regard to reasonable workloads, the only source is the study conducted by the World Bank for civil justice, which has not been used to make administrative decisions.

187 “Experience has shown that it is necessary to give the judicial organization more flexibility so that it can adjust each day to society’s changing and demanding needs. As such, in this report we propose endowing the Superior Judicial Council with a series of functions and mechanisms to allow this entity to guarantee the execution of the aforementioned general principles in order to adapt justice administration to the progressive needs that its service requires.” (Constitutional Gazette No. 75, our translation).

188 For example, this includes former members of Congress and former governors.

189 Néstor Julián Ramírez Sierra. Corporación Excelencia en la Justicia. Situación Disciplinaria de la Rama Judicial en Colombia. p 5. Available online at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKewjVouyf4q_WAhXHwiYKHfYOA10QFgglMAA&url=http%3A%2F%2Fwww.cej.org.co%2Fseguimientoreforma%2Findex.php%2Fmesas-reforma%2Fdocumentos%2Fdoc_download%2F305-situacion-de-la-funcion-disciplinaria-de-la-rama-judicial-en-colombia&usq=AFQjCNFIREDNdy8YWRxIS-76f4I-_PRJPA

In regard to disciplining judges, the Chamber has not managed to position itself as an effective tool for guaranteeing these officials’ impartiality, legality and honor. Discipline of judges is perceived to be benevolent both in the cases that are presented and the sanctions imposed on those found to have committed violations of the rules.

Year	Fines	Suspensions	Reprimands	Removals	Total
1992	4				4
1993	34	20		8	62
1994	31	8	1	6	46
1995	82	2	1	8	93
1996	95	2		12	109
1997	19	10	24	5	58
1998	43	10	36		89
1999	33	9	28	1	71
2000	42	3	25	2	72
2001	38	5	26	6	75
2002	56	10	16	5	87
2003	68	11	12	1	92
2004	46	16	7	3	72
2005	73	32	8	4	117
2006	63	46	10	4	123
2007	40	57	26	5	128
2008	24	52	7	9	92
2009	9	89	23	11	132
2010	14	196	25	30	265
2011	11	165	8	17	201
2012	1	89	3	12	105
2013	3	75	1	11	90
2014	7	91	9	23	130
2015	5	73	5	11	94
2016	4	79	3	20	106
2017	3	31	3	9	46
Total	848	1181	307	223	2559
%	33%	46%	12%	9%	100%

Table 5. Penalties issued to officials. Court: July 31, 2017. Source: Superior Judicial Council. Response to the right of request.

Due to these unsatisfactory results, the transformation of the disciplinary agency was one of the few issues that did not generate significant resistance in the passing of the Balanced Branch Legislative Act. It was the only organic change that passed the filter of the Constitutional Court because the Commission on Individuals with Privileges and Judicial Government Council were found to be unconstitutional.

1.6. Transparency and accountability

One of the main problems that the justice system suffers from is lack of accountability due to an erroneous concept of judicial autonomy. Reporting is limited to the submission of an annual report to Congress that contains limited information and does not facilitate the monitoring of goals or sectoral development plans. Although the Statutory Law establishes the ability to invite members of the Superior Judicial Council to review Judiciary performance,¹⁹⁰ this almost never occurs. In contrast to the precarious accountability conducted by the Superior Judicial Council, some Sectional Courts and Councils have decided to implement their own mechanisms. For example, in 2016 the State Council launched a project to improve standards of transparency and accountability.¹⁹¹ At the regional level, Sectional Judicial Councils have developed their own methodologies and annual reports on accountability. Very few of the reports that the sectional units develop are published on the Judiciary website,¹⁹² and the ones that are vary greatly in terms of content, indicators and the level of detail of the information.

Progress has been made over the past decade on the availability and publication of information.¹⁹³ However, it continues to be insufficient. For example, the Colombian Judiciary placed 12 out of the 34 countries evaluated in the Index of Online Access to Judicial Information,¹⁹⁴ which means that it is part of the group with average scores. The Superior Judicial Council and each of the courts currently have their own websites with their own policies. There is no minimum shared standard. The lack of transparency is

190 Law 270 of 1996, Article 80.

191 This project enjoys the technical support of Corporación Excelencia en la Justicia.

192 The reports that are available have been published on the website <https://www.ramajudicial.gov.co/portal/inicio/mapa/consejos-seccionales>.

193 For example, the resumes of candidates to the high court and board are published, though they are not always updated. This information used to require a right of petition request.

194 Justice Studies Center of the Americas. Index of Online Access to Judicial Information (Spanish language document). Available at: http://biblioteca.cejamericas.org/bitstream/handle/2015/5549/IAcc_Decimaversion_2017.pdf?sequence=1&isAllowed=y

linked to technical difficulties related to gathering and organizing statistical data and complete and reliable documents as well as the fact that this task is not a priority within the government agency.

As a result, the Judiciary does not currently report to anyone, which contributes to its isolation and inefficiency and a feeling of distance between the public and the justice system.

1.7. Electoral authority

The Administrative Chamber is responsible for developing candidate lists for the State Council and Supreme Court, which are responsible for final elections. These processes have not been transparent in regard to timing, lists and evaluation criteria. The latter has not been addressed and there is no clarity regarding the criteria used to generate the lists. There is, however, more openness compared to the situation observed a few years ago, which is manifested in the publication of resumes and interviews with the candidates.¹⁹⁵ Some of the best practices were constitutionalized in 2015.

These efforts seek greater openness of the Judiciary, which abstained from electing individuals external to it as magistrates in most cases over the past few years and was presenting a high level of corporativism.¹⁹⁶

The way in which magistrates are currently elected to the High Courts continues to be the subject of intense debate.

1.8. Regulating justice services

The functions that the Superior Judicial Council's Administrative Chamber absorbed include important regulatory tasks. These powers have served to create criteria and rules regarding internal administrative matters (oc-

195 The citizen coalition "Elección Visible," which Corporación Excelencia en la Justicia is part of, has monitored these elections, promoting transparency and the publication of information. Several of its studies have been appropriated by the entities, some of which have been incorporated into the Branch Balance act.

196 According to former Supreme Court justice Arturo Solarte, "In regard to elections in the Civil Chamber, which I served on, there would be a chance in the balance of its composition –which I always appreciated– with the presence of magistrates from different background (academia, litigation and, obviously, the best of the Judicial Branch)." Interview with *Revisa Semana*, 15 September 2017. See: <http://www.semana.com/nacion/articulo/exmagistrado-arturo-solarte-habla-de-su-renuncia-en-la-corte-suprema-de-justicia/540528>. For his part, former Administrative Chamber justice Néstor Raúl Correa states that, "Corporativism sometimes takes precedence over merit for the assignment of high-level positions and the drafting of lists for the high courts." (Correa Henao. *Op.Cit.* p. 4).

cupational health, document retention, etc.) as well as those related to the service of justice (judicial deposits, judicial surveillance, support staff and others), which is a way of materializing the self-government of the Judiciary.

There are at least three cross-cutting deficiencies in the fulfillment of this function: i) the lack of sufficient and reliable quantitative and qualitative data and assessments that can be used to make regulatory decisions. Civil society organizations and the governments have had more studies and data on the functioning of the Judiciary on more than one occasion. ii) The centralist vision, which does not consider the specificities of the country's regions. This stands in the way of the implementation of reforms due to the varied conditions and affects the adaptation of the model of justice to the particular needs of the population. iii) The regulations are too generic, which prevents the normalization of certain minimum levels of functioning of the Judiciary. There are also areas that have not been sufficiently regulated, as is the case of the judicial career. In others, they have not adapted to the changes that justice administration has undergone over the past few years, such as the introduction of judicial office management models. There has not been adequate regulation of transparency and accountability that would allow for some of the minimum standards to be normalized.

The Judiciary is a difficult agency to organize and regulate. This is due to the expansion of the concept of independence to include administrative matters and the presence of what interview respondents call internal "power agents" who lead the opposition to change. This is evident in sensitive areas such as the regulation of officials' evaluations.

Another aspect related to regulation is the limited use of the Superior Judicial Council's constitutional authority to submit bills to Congress in all areas under its purview,¹⁹⁷ particularly over the past few years. Some of the bills have met with success, as is the case of the Disciplinary Code for Attorneys (Law 1123 of 2007) and the law that delayed the introduction of oral procedures in the civil and family specialties (Law 1716 of 2014).

This passive attitude is also materialized in the limited interest and effectiveness of the Superior Council in regard to intervening in the bills submitted.

197 Political Constitution, Article 156.

2. Critical analysis of the design and functioning of the Superior Judicial Council

2.1. Profiles of magistrates and office structure

The lack of qualification for exercising the functions of the role has been identified as one of the factors that has most impacted the functioning of the Superior Judicial Council.

Its members have the title of magistrate and must meet the same requirements set for being a magistrate. There are no requirements related to experience and training in the design of public policies, planning, judicial management, information technologies or areas associated with the tasks that the agency oversees. Nor are candidates required to have a variety of experience and training as members of the agency. Over the 25-year history of the Council, most of its members have come from positions related to the exercise of jurisdictional functions. A small group has held administrative positions in the Superior Judicial Council,¹⁹⁸ while the work history of a minority pertains to activities outside of the Judiciary. In regard to the regional level, the requirements are more focused on the role. The magistrates of the Sectional Administrative Chambers must have experience in the administrative, economic or financial sciences and specific experience of no fewer than five years in those same areas. Finally, the Executive Directorate of Judicial Administration reports that many employees do not have the specialized experience or knowledge required for the exercise of their roles.

2.2. Relationship with higher courts and first instance judges

The experience of the CEJ and field work conducted for this study show the disconnect that judges and magistrates from the high courts feel with respect to the Superior Judicial Council.

This has led the courts to manage their interests on their own in areas such as processing bills, the budget for increasing staff or the defense of their judicial independence.

The Superior Council and courts also have different visions. The former seek to strengthen administrative areas while the latter focus on judicial offices through new judges or more office staff.

198 For example, former magistrate Hernando Torres Corredor, who led some technical initiatives in the Superior Judicial Council, and current magistrate Gloria López, who served as Sectional Administrative Chamber Magistrate for the Antioquia Judiciary.

The situation with judges and employees is no different. In addition to feeling that their interests are not represented, they feel that the Administrative Chamber pays more attention to requests from the high courts than to the needs of lower ranking officials.

Due to this lack of alignment of goals, magistrates, judges and employees have shown interest in implementing a reform that would allow them to participate directly in the government and administration entity. In the words of one of the interview participants, “We want to be part of judicial government because the people who have been there have not understand our needs or known how to represent us.” The most recent justice reforms have been formulated with this in mind.

2.3. The work of the Superior Judicial Council Administrative Chamber

The Superior Judicial Council Administrative Chamber holds sessions.¹⁹⁹ In general, one can say that instead of focusing on general policies in the justice system, the agency invests a significant amount of time in electoral, operational and micro management issues. These include reports on the events that the magistrates attended, the publication of rights of petition that are then sent on to the technical directorate responsible for responding to them, specific responses from the courts, sectionals or groups of judges, permits, etc. The structural and complex issues are posited but it takes time to dispatch them because they are put off or broken up into various sessions in which they share space with many other issues that are included on that day’s agenda.

This dynamic is not only a result of the lack of more efficient work rules and the absence of prioritization criteria and the selection of matters by magistrates. It is also the result of a legal framework that confuses government and management functions.

A second problem has to do with the division of labor. The issues and specialties are distributed among the different magistrates²⁰⁰ in the Adminis-

199 Between 2013 and 2016, the Chamber met an average of 52 times in regular session and 16 times in special sessions. (Source: response to right of petition submitted by the CEJ. Filed. PCSJO17-1660. August 4, 2017).

200 For example, in late 2016 the issues were: ordinary jurisdiction (divided into the sub-issues of sentence execution and security measures, judges for expired ownership, civil, family and agricultural affairs and the implementation of the General Procedure Code), labor jurisdiction, contentious-administrative jurisdiction, constitutional jurisdiction, disciplinary jurisdiction, special and transitional jurisdiction (divided into the sub-issues of land restitution, peace court, justice and peace, indigenous, peace justice and

trative Chamber, either exclusively or in the company of other Chamber members. For example, a magistrate may be the only person responsible for addressing criminal justice issues while two people may manage constitutional or technology issues. This makes it difficult to implement inter-institutional activities. The problem is exacerbated when bills that cut across the different spaces into which the issues have been divided are addressed. And none of this considers the fact that courts or judges may subsequently disagree with the inter-institutional agreements, thus halting the bills' progress.

Furthermore, there is no place for the strategy that every organization must create. The lack of attention to these matters creates a vicious cycle because it keeps justice administration in a permanent state of reaction, limiting it to addressing disturbances in the environment.

Finally, the Judiciary Sectorial Development Plan is a confusing, long and not very strategic document. The plan is developed with no mechanism for citizen participation even though these are the final users of the service, and is not coordinated with the National Government's development plan.

2.4. Regional government and administration

At the regional level, government and administration are exercised by three bodies: Inter-Institutional Sectional Commissions, the Administrative Chambers of Judicial Sectional Councils and Sectional Executive Directorates; in other words, it reproduces the three parts of the system used at the national level.

The Inter-Institutional Sectional Commissions are conceived of as the local integration mechanism.²⁰¹ Despite the importance that they could have for coordinating the justice system, their role has been marginal with very few exceptions. This has contributed to the undertaking of parallel efforts to coordinate units within the Judiciary.

reconsideration), quality management and internal oversight, judicial career (including the sub-issues of hiring judicial employees and officials and evaluation of services and calls), training, human resources administration (divided into security of judicial servers, monitoring salary leveling and the Inter-American Development Bank project), multilateral banking and international cooperation, communications, gender and human rights and monitoring budgetary execution.

201 Law 270 of 1996, Article 102.

The main roles of the Sectional Council Administrative Chambers are to manage the judicial career, consolidate the evaluations of judges and employees, oversee judicial offices and develop investment project proposals. They also can carry out tasks delegated to them by the Superior Judicial Council Administrative Chamber.

As is to be expected, the Sectional Administrative Chambers do not have homogeneous functions or results. These depend on various factors, such as the culture of the region, the profiles of the members of the chamber, the size of the section and the infrastructure and safety conditions.

Although some Sectional Councils have good results, problems remain. There is an inconvenient centralization of some tasks that could be done better and in a timelier manner by these entities. The function of judicial oversight²⁰² creates conflictive positions. For some, this is one of the few mechanisms that the people have to exercise their right, and it should thus be strengthened. For others, it has become a space of interference in judicial management because some magistrates in administrative chambers have intervened excessively in the judicial process. Those who advance this hypothesis add that in addition to impacting independence, the effects of an unfavorable result in the surveillance process are marginal,²⁰³ so they are not useful for discouraging poor performance.

D. GENERAL RECOMMENDATIONS FOR A REFORM OF THE JUDICIAL MANAGEMENT AND ADMINISTRATION AGENCY

While the creation of the Superior Judicial Council has served to strengthen regulatory and administrative autonomy and oversight of the Judiciary and thus strengthened judges' independence, deficiencies in its functioning have been significant.

Worthy of note are the lacks in the administration of resources and regulation. A good number of lacks stem from inadequate distribution of func-

202 Judicial surveillance is meant to be a mechanism for ensuring adequate provision of judicial services. It is administered *ex officio* or at the request of a party to a judicial process in which actions that go against the timely and effective administration of justice are identified that cannot be attributed to congestion or any situation beyond the official. The process is advanced by a reporting judge. The judge who is to be monitored may exercise the right to legal defense, and the final decision is taken in Chamber. Judicial surveillance does involve discipline.

203 The effects of a favorable decision are: the loss of one point in the evaluation of services, ineligibility for receiving awards and bonuses during the period in question and restrictions on the right to request a transfer for reasons other than health or safety.

tions and the profiles of Administrative Chamber members. The isolation of the Judiciary, which leads to the lack of accountability, coordination with other units and precarious attention to the environment and citizens' needs is an obstacle to its government and administration. Another notable lack has to do with the judicial career, though it was one of the areas of success at the beginning of the work of the Council. However, the years in which there was an important number of judges for decongestion and delays in hiring have impacted the basic principles of judicial independence.²⁰⁴

Reasons like these have led the Superior Judicial Council to become one of the main foci of justice reform initiatives over the past few years.

However, it is important to mention that over the past few months some changes have taken place. These include the election of professionals with more appropriate profiles in the Administrative Chamber, greater openness to accountability and transparency practices, a priority that is beginning to strengthen judicial ethics, and investigations are beginning to dismantle networks of corruption in the justice system.

1. Background on the reform of the Superior Judicial Council: A goal full of obstacles

Attempts to change the agency responsible for the government and administration of the Judiciary began based on the political agenda of the 2000s and have become more intense.

During the second term of Juan Manuel Santos, the issue was again addressed, this time in the context of the Balanced Branches reform, which was not limited to a justice reform and addressed various other aspects of the political sphere. In the judicial component, there were three main issues: i) the reform of the Superior Judicial Council in order to create a more efficient, technical structure that represented employees and officials, ii) the reform of the agency used to investigate high court magistrates and the prosecutor general in order to create one that was more operation and specialized than that of Congress' Chamber of Representatives; iii) the requirements for and election of magistrates in order to raise the level of qualifications of officials and lend greater transparency and

204 The basic principles regarding the judiciary adopted by the UN include a promotion system based on objective factors, permanence in the position and the absence of "undue motives" in the selection of judges. <http://www.ohchr.org/SP/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

criteria of merit in the selection of individuals to serve in the higher ranks of the justice system.

The processing of this reform was difficult and contentious because various magistrates opposed it. Legislative Act 02 of 2015 was approved after intense debates and introduced the following changes:

<p>Election of magistrates and requirements</p>	<p>The minimum level of experience for serving as a magistrate on a high court was increased from 10 years to 15. It was established that academic experience should be related to the areas in which the magistrature works.</p> <p>Individuals who had served as prosecutor general or magistrates in the high courts were prohibited from being elected to those same positions in the year immediately following the end of their term.</p> <p>It was established that magistrates' elections must be preceded by a public call regulated by law that guarantees the principles of public information, transparency, participation, gender equity and criteria of merit.</p> <p>Public servants who had participated in the election of the person responsible for their selection or application were prohibited from applying and being elected.²⁰⁵</p>
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205 This was the constitutionalization of the prohibition of what was called "I elect you, you elect me" practice, which the State Council had already prohibited in 2015.

(Continued from previous page)

<p>Superior Judicial Council</p>	<p>Eliminates the Superior Judicial Council and creates two different agencies in the Judiciary to manage its functions:</p> <p>1. The Judicial Government Council: the government and administration agency</p> <p>Composed of nine people²⁰⁶: i) The Chief Justices of the Supreme Court, State Council and Constitutional Court, ii) a representative of judges and magistrates selected by them for a period of four years, iii) a representative of employees elected by them for a period of four years, iv) three permanent members who focus exclusively on this work elected by the five previous members with experience in the design, assessment or monitoring of public policies, management models or public administration, v) the Manager of the Judiciary elected by the eight previous members for a period of four years. The Manager must have 20 years of experience, 10 of them in the administration of businesses or public entities.</p> <p>2. The Judicial Disciplinary Commission: the disciplinary agency for judges and employees</p> <p>Comprised of seven people elected by Congress, three from candidate lists developed by the President and four by the Judicial Government Council.</p> <p>This agency was given the role of exercising disciplinary control over employees, which was responsible for upper hierarchies.</p>
<p>The criminal and disciplinary investigation of high court magistrates and the prosecutor general</p>	<p>The Exempt Commission is the agency responsible for investigating and filing charges against magistrates of the high court and the Prosecutor General. This role was assigned to Congress in the Constitution of 1991.</p> <p>When crimes are involved, the Commission must file charges before the Supreme Court and is not required to exhaust a political pretrial in Congress.</p>

Table 6. Summary of the Balanced Branches reform

For the CEJ, while there may be discussions regarding whether it is advisable for Court Chief Justices and Judiciary officials to participate in the government agency due to possible coopting of the regulatory agency,

206 With the exception of the chief justices and representatives of officials, if a court magistrate were elected, the other members of the Government Council would not acquire the status of magistrates because they belong to the agency, as had been the case for members of the Administrative Chamber.

stating that this model impacts judicial self-government is an exaggeration, particularly if one considers the fact that several countries with self-government have opted for models that include direct representation of judges and magistrates on the Judicial Councils or have left the role to the head of the Supreme Court.

In regard to the implementation of the Judicial Disciplinary Commission, the process has not advanced more successfully. The implementation of the Commission is in limbo. No progress can be made on the election of the Judicial Disciplinary Commission but the vacancies in the Disciplinary Chamber cannot be filled either, forcing the agency to work with interim magistrates and magistrates who have already completed their constitutional term.

1. Recommendations for a reform of the Superior Judicial Council

Conducting a justice reform is no easy task. The difficulty is not limited to resistance to change and inconvenient adjustments that may appear during the legislative process. It also includes the “minefield” of restrictions imposed by the sentence that the Balanced Branch reform examined. Although these obstacles would not exist if a Constituent Assembly were held, given that there would be broader opportunities to modify the institutional architecture, there is the danger that this would be used to introduce changes that have not been subjected to sufficient research and that could weaken the justice system.²⁰⁷

Based on all of this, we present general recommendations for three scenarios below. The first, which is the shortest in scope, only involves internal adjustments to the Superior Judicial Council and the Justice Administration Statutory Law. The second includes specific reforms through a Legislative Act and the third and most in-depth is a Constituent Assembly, which some presidential candidates have already identified as being necessary.

Scenario 1. Adjustments that do not require a constitutional reform.

This scenario may serve to usher in a constitutional reform because it helps more precisely identify the matters that can only be improved through this route and do not require assuming the risk of a larger scale

207 For example, in-depth reforms of protective action or the unification of the high courts so that there is only one closing agency.

institutional redesign. It could also complement the specific constitutional reforms outlined in Scenario 2.

Some of the adjustments that could be implemented in the Superior Council without the need for a constitutional reform are described below:

- **Internal restructuring.** The restructuring of the Administrative Chamber should consider: i) the recomposition of technical units;²⁰⁸ ii) the restructuring of magistrates' offices; iii) increasing the term of the Council President to at least two years; iv) strengthening channels for participation and accountability within the Judiciary; and v) creating thematic committees.²⁰⁹ While the Administrative Chamber distributes the various specialties among its magistrates, there are no work dynamics that allow for progress to be made on projects. In order to correct this, specialized committees should be formed. Depending on the topic, they could include representatives of civil society.
- **Strengthening regional government and administration.** The functions that could be delegated to the Sectional Councils should be identified in order to achieve greater agility or relevance in decisions made regarding the needs of the territory.²¹⁰ The Superior Council should also identify best regional practices and encourage their replication in other areas of the country.
- **Positioning the citizen as a key stakeholder in government and administration.** Despite the fact that they do not have a seat in the Superior Judicial Council, justice service users should play a greater role in judicial government and administration.
- **Codifying and updating the regulations.** In an effort to improve the regulatory activity, we recommend codifying the agreements by topic in order to facilitate consultation with the members of

208 As was noted at the beginning of this report, some technical units report to the Executive Directorate and others to the Superior Council.

209 It is important to note that in several countries there exist in addition to the Plenary Judicial Council specialized decision-making, advisory or consultive committees in certain areas.

210 One simple activity that could be executed immediately is to establish the rules for disseminating information that Sectional Councils must publish on the website created for this purpose in the Judicial Branch, which is practically empty.

public. This exercise also will serve to identify needs in regard to aligning and updating current regulations.

- **Implementing a Justice Administration Statutory Law reform.** One key point to be addressed is the division of the functions of government and administration, which are currently combined in the Statutory Law.²¹¹

Scenario 2. Constitutional reform through a legislative act

Some of the reforms that could be implemented are: i) Expanding the requirements for being a member of the Administrative Chamber to include professionals from disciplines focused on law and consecrating the diversity of profiles in its integration; ii) Consecrating the coordination agency of the first level of the Judiciary, which is currently the Inter-Institutional Commission that created the Statutory Law, as a forum for discussing and setting Judiciary policy; iii) Making explicit the purposes of the Superior Judicial Council because the Constitution currently only makes reference to its functions. The goals should include judicial independence, efficiency and the legitimacy of the justice system.

Scenario 3. Reform through a National Constituent Assembly

Some recommendations and warnings that should be considered in this discussion are presented below. They are based on the lessons that have been learned over the past few years.

- **Defining objectives.** Although this may be the object of discussion, the assessment presented in this study suggests that there are at least four objectives that the reform should seek to achieve: i) improving the administrative efficiency of the Judiciary, ii) strengthening the relationship between magistrates, judges and employees with the government and administration agency, iii) improving accountability and iv) strengthening regional government and administration in a manner that is controlled and coordinated with the central level.
- **Defining the scope of judicial government.** Although there is no one position regarding the functions that comprise the essential

211 Article 85 of the Statutory Law refers in general to the “administrative function” of the Administrative Chamber. However, it includes functions that could be considered to pertain to the government, such as the regulation of the judicial career or judicial and administrative procedures.

nucleus of judicial government, this discussion has not even been addressed with the necessary depth in Colombia.

While some scholars of the issue believe that nominating officials is not an essential axis of self-government,²¹² this has been one of the matters that has been defended most vehemently by members of the Judiciary as part of the principle of autonomy. Any change made in this regard is rejected.²¹³ By contrast, regulatory functions that do consider it as part of self-government have not been as high profile.

Focusing efforts on creating an agency responsible for government and administration without having clarity on these matters can lead to the repetition of the errors in the design of the Superior Judicial Council.

- **Government and administration agencies.** There is still a lack of clarity regarding the classification of the various functions of government and administration. The discussion that has developed around reforms would seem to go along with any decision that implies that an important power must be decided by a collegiate body.

212 For example, Alberto Binder writes, “I would identify three systems that I believe to be separate. One of them –which for me has nothing to do with judicial government- is the system used to appoint judges, which tries to address the issue of the judge as an official of the Republic who is not selected by popular vote and is called on to make decisions that go against the majority. As such, their appointment has to involve a complex system of legitimacy that give way to other systems in which the political branch participates.” (Revista Sistemas Judiciales. No. 10. 2006. See: <http://www.sistemasjudiciales.org/content/jud/archivos/revpdf/36.pdf>.)

213 For example, in one of the presentations on the Balanced Branch reform, a Magistrates’ Directorate was created to manage the judicial career and the Judicial Academy, which was not approved. The Cauca tribunal stated, “In order to appoint a judge in by profession or mandate, an administrative official must be asked to do so. This official is the Director of the Magistrature. Judges are selected based on their competence and honor based on legal tradition in a democratic and participatory manner.

The community in general and international agencies such as the UN committee responsible for the defense of human rights regarding judicial autonomy and independence should understand this attack on the part of other government branches against the Judicial Branch (...).” See: http://www.cej.org.co/seguimientoreforma/index.php/documentos-de-interes-reforma/doc_download/475-comunicado-tribunal-superior-del-distrito-judicial

The discussion of the agencies and levels of government and administration will be another one of the topics to be analyzed. It is closely related to the functions to be allocated. There are many ways to group spaces together. The important thing is that relationships of dependence, members and the amount of time that they dedicate to their work contribute to an operational agency specializing in the tasks to be performed and in which unnecessary bureaucracy is avoided.

- **Adjusting job profiles.** Regulatory, electoral and resource administration roles are not similar to jurisdictional ones. To that end, while the entity responsible for policy can seek direct representation of judges and magistrates, this cannot lead to the exclusion of people who are not necessarily attorneys.
- **Representation and politicization.** The models that include representation of judges and employees generally imply holding internal elections within the Judiciary. While this is not a new idea, as elections are currently held to identify the representative to the Inter-Institutional Commission at the central level and the Sectional Inter-institutional Commissions, the difference lies in that these entities do not have higher decision-making power. This is an issue that must be reviewed carefully, establishing measures that guarantee the equality of aspirations and control politicization. The system could opt to regulate candidate promotion processes, for example, in order to restrict external funding and require that they to go through the channels offered within the Judiciary (website, fora, equitable financing of print material, etc.)
- **There is no single vision in the Judiciary.** Although there has been a constant complaint that the Judiciary is not considered in reform work, it is important to remember that there is no single vision inside of this entity. We recommend that the various proposals that are made through spokespeople and the differences among them be traced.
- **Preventing the discussion from going off course.** It is common for attempts to adjust the Constitution to be accompanied by proposals for staffing increases and budgetary self-sufficiency, which are considered more effective remedies for improving the functioning of the Judiciary. Moving this discussion to this field compromises

the focus of the discussion, which is the reform of the government and administration agency.

- **Opening up spaces for discussion that allow for further exploration of issues.** Any future attempt to change the Constitution should have more effective spaces that allow for the further exploration of issues such as the scope of judicial government, the separation of roles and agencies (decision-making levels, territorial organization), participation of stakeholders external to the Judiciary and others topics that have been included in the main discussions.

4. Guatemala

*Javier Monterroso*²¹⁴

Introduction

This project is part of a collective effort undertaken by various individuals and institutions in several Latin American countries in order to better understand the concept, definition, content and scope of what has been called “judicial government.”

In addition to the regulatory analysis of the structure of the Judiciary contained in the Constitution, the Judiciary Statutes Law and other laws and regulations, special emphasis has been placed on the political-administrative practices that are used for making decisions within the Judiciary. To that end, the author has included interviews with former Judiciary presidents, officials and former officials, and members of judges’ associations who have had the experience of forming part of the government of the Judiciary.

Context

The Judiciary has historically been the weakest of the three classic branches that constitute the Republic, and although the independence of judges and magistrates in the exercise of their duties has been recognized since the earliest Constitutions (those of the Central American Federation of 1824 and the State of Guatemala of 1825), in practice the Judiciary has always depended on the Executive or Legislative Branch for its budget. Furthermore, for many years, the appointment of judges and magistrates was handled by another branch of government, which meant that the independence of the Judiciary was always unattainable, particularly during the country’s numerous dictatorships.²¹⁵

A. Constitutional and Legal Framework

1. Division of powers. Autonomy and independence of the Judiciary

According to the Constitution, the Judiciary is independent (Articles 203 and 205) from the Executive and Legislative Branches and is granted full autonomy for the administration of justice.

²¹⁴ Instituto de Estudios Comparados en Ciencias Penales de Guatemala (ICCPG).

²¹⁵ For example, during the dictatorship of Jorge Ubico Castañeda (1931-1944), judges were appointed by the Supreme Court but were supervised by the Executive Branch.

However, though the constitutional regulations cited above promote the independence of the Judiciary, the Constitution also contains rules that limit that independence. For example, Article 208 states that judges and magistrates are appointed for five-year periods and Article 217 gives Congress the power to appoint magistrates to the appeals courts. In this sense, it is evident that the Constitution does not provide the minimum guarantees for true judicial independence.

2. System of Government and Administration

The government and administration of the Judiciary is the exclusive responsibility of the Supreme Court, which has 13 justices appointed by Congress. This means that there is self-government of the Judiciary and that judging and administration are concentrated in the Supreme Court.

The Constitution grants the Supreme Court the authority to formulate a budget (Article 213), appoint judges and administrative and auxiliary staff (Article 209) and states that the Chief Justice is also the President of the Judiciary (Article 214).

Judiciary Law Decree 2-89 clearly establishes the concentration of administrative and judicial functions in the Supreme Court and specifically in the figure of the Chief Justice and President of the Judiciary (Article 52).

3. Government Agency. Powers

As an independent and autonomous government agency of the Judiciary, the Supreme Court enjoys full autonomy as well as economic independence and independence in regard to hiring its staff. Article 52 of the Judiciary Law Decree states that the Judiciary President is to oversee administrative tasks. Both the Judiciary Decree Law and the Constitution grant administrative government functions to the full Supreme Court.

When Decree 32-2016, the Judicial Career Law, went into effect, the Judicial Career Council assumed all of the functions that the Supreme Court had in the area of the judicial career, including appointments, raises and the disciplinary system for judges and magistrates. There are no Supreme Court Justices on the Council, though it does have a representative that has the same qualities as a Supreme Court justice.

In regard to appointment to the Supreme Court, Guatemala has a *sui generis* system that is divided into two stages. The first is conducted in an Application Commission composed of Appeals Court magistrates, members of the Bar Association and the Deans of the country's Law Schools.

It is presided over by a representative of the rectors of the country's universities. This Commission publicly invites attorneys that meet the requirements to submit their curriculum vitae, pre-selects candidates based on that information and selects 26 finalists who are sent to Congress. The second stage of the selection, which is eminently political, results in the election of the 13 magistrates that sit on the Supreme Court.

The Constitution does not distinguish between or set preferences regarding attorneys external to the judicial career or career judges and magistrates in regard to serving on the Supreme Court.

4. The Presidency of the Judiciary. Powers and Election

The Presidency of the Judiciary, which is held by the Supreme Court Chief Justice, is exercised by a magistrate elected by the full Court who serves for one year and may not be reelected (Article 215 of the Constitution). This makes it difficult to achieve adequate monitoring of institutional plans and programs.

A good part of the government of the Judiciary is concentrated in the figure of the Chief Justice (Article 55, Judiciary Law Decree).

5. Administrative Agency. Relationships

The President of the Judiciary relies on various administrative offices, the most important of which is the Judiciary General Management, which is run by a General Manager who is appointed by the President.

According to Agreement No. 24/998 dated September 24, 1998, the General Management is defined as "the connection between the Judiciary President and the administrative offices. This body manages and is responsible for institutional administrative policy based on the guidelines of the Presidency in an effort to contribute to the fulfillment of the objectives of the Judiciary."

In order to carry out its functions, the General Management has various administrative agencies: Human Resources, Finance, Administrative Affairs, Information and Telecommunications and regional offices.

In addition, various entities have been created that report directly to the Presidency. These are the General Secretariat of the Presidency, the Secretariat of Institutional Planning and Development, the Secretariat of Institutional Strengthening and Cooperation, the Secretariat for Women and the Analysis of Gender, the Secretariat for Social Communications and Protocol, Internal Auditing, Legal Advising, the General Protocol Archive, the Directorate of Court

Management Services, the Directorate of Labor Management, the Directorate of Family Management, the Directorate of Alternative Dispute Resolution Methods, the Institutional Security Directorate, the Center for Information, Development and Judicial Statistics, the Center for Judicial Analysis and Documentation, the Criminal Justice Administration Auxiliary Services Center, the Information center, Judicial Development and Statistics, Public Information Unit, Indigenous Affairs Unit, Childhood and Adolescence Unit, Criminal Background Unit, and Oversight, Monitoring and Assessment of Agencies Specializing in Femicide and Other Forms of Violence Against Women.²¹⁶

6. Disciplinary agency. Powers

All matters related to the judicial career including admission, appointments, promotions, transfers, training, and discipline and removal of judges and magistrates is regulated in a detailed manner in Decree 32-2016 Judicial Career Law and in the case of administrative and auxiliary court personnel in Decree 48-99, the Judiciary Civil Service Law. The Supreme Court does not play a role in the disciplinary process for judges and magistrates. This is the exclusive responsibility of the Judicial Discipline Boards. However, the Court does play a role in disciplining auxiliary workers.

7. Oversight and auditing systems

The Judiciary is subject to the oversight and auditing of other government institutions. This power is concentrated in the Office of the Comptroller General of the Republic. The Comptroller General's Office is an autonomous and independent agency overseen by a Comptroller General who is elected to a four-year term by Congress. All of the entity's auditors have the capacity to impose sanctions or file complaints based on the results of audits. Furthermore, the entity has its own internal audit agency, which serves to engage in preventative work and advises the Presidency.

8. Relationships with Other Branches of Government

The relationships between the Judiciary and other government agencies is based on the absolute independence of powers. No other agencies can interfere in the administrative of justice, though they can maintain a level of interinstitutional coordination.

In regard to budgetary matters, the Judiciary develops a budget proposal that is sent to the Ministry of Public Finance so that it can be incorporated

216 Organismo Judicial de Guatemala, (2016) *Memoria de labores del Organismo Judicial*.

into the proposal for the General Budget. The other branches of government accept or reject the proposal submitted by the Judiciary.

B. GOVERNMENT MANAGEMENT

1. How does this branch of government make decisions? Meetings, etc. Recording and documentation of decisions

The most important decisions regarding the government of the Judiciary are made unilaterally by the Judiciary President through agreements with the President. Other decisions such as the approval or modification of the budget or approval of bills are taken by the full Supreme Court.

2. Decision-making. Formal and informal procedures.

In order to execute decisions by the full Supreme Court, the Chief Justice instructs a clerk, the General Manager of the Judiciary, the Finance Manager, Human Resources Manager or director of the respective entity to take a given action. These instructions are frequently written and are accompanied by minutes when it comes from the full Court or the agreement when it is a decision made by the Chief Justice, and informally through declarations.

3. Evaluation of the impact of decisions

There is no record for evaluating the impact of Judiciary government decisions, nor is there an entity responsible for evaluating institutional policy. Cooperation projects are occasionally evaluated by donor agencies.

4. Planning activities. Multi-year strategic plans. Planning methods

The Judiciary has an Institutional Planning and Development Secretariat that is responsible for designing five-year strategic plans as well as annual operations plans required by the Public Finance Ministry for budgetary disbursements.

Each year, when the Supreme Court Chief Justice changes, an annual plan is drafted based on the five-year plan. However, these plans do not align. Both are submitted to the Finance Ministry at the end of each year in compliance with the General Budget Statutory Law.

5. General modernization plan

Each new Supreme Court introduces its own modernization plans depending on the justices' priorities.

6. Evaluation of the development and modernization of the Judiciary. Accountability

There is no accountability policy for the Judiciary, and it is not mandatory for it to report on its work, as is required for the Public Prosecutor's Office and other institutions.

Accountability for management of the Judiciary budget is very deficient. Although Congress has quarterly reports, not even it conducts audits of the management of Judiciary funds. No Chief Justice, Supreme Court Justice or administrative official has been called to Congress to report on budgetary management.

C. ADMINISTRATIVE MANAGEMENT AREA

1. The process of making administrative decisions. Supervision, delegation

Given that the administrative and judging functions are concentrated at the highest level in the Supreme Court, decision-making is made during plenary sessions depending on the agenda that the Chief Justice brings to hear judicial or administrative issues, or both.

This situation has created the following problems:

- Serious difficulties maintaining efficient administration and design of institutional policies given that it is composed of 13 magistrates with training in legal affairs and not management.
- The emergence of a trend or attitude that supports a culture of verticality and subordination that threatens the independence of judges' criteria.
- Voluminous and bureaucratic administrative work forces the Supreme Court to pay attention on matters that are not related to its jurisdictional work.²¹⁷ "While some administrative functions are delegated to the General Manager and his or her staff, the final decisions in this area continue to be the exclusive responsibility of the Supreme Court." (Our translation.)²¹⁸

217 National Commission for Strengthening Justice report: "Una nueva justicia para la paz" el proceso de implementación 1998-2004; Guatemala 2005, p. 23.

218 Ibid. p. 209.

2. Administrative management of the courts

The internal administrative management of the court is the responsibility of the Court Secretary, who is responsible for managing all judicial decisions and requests for supplies as well as the administrative flow of the court, establishing the workloads of auxiliary staff and supervising their work. However, depending on the court, the judge may be more or less involved in running the judicial office. There is no judicial office manager, which is a position that exists in other countries.

3. Management oversight approaches and mechanisms. Audits

The Comptroller General's Office conducts a general annual audit of the Judiciary. It is mainly focused on the quality of spending, though it does include an analysis of administrative management. The audit report is submitted to the Supreme Court, detailing the findings and any sanctions or measures to be issued. It is then submitted to Congress as part of the annual government audit report. The Comptroller General's Office also conducts specific audits on certain sections. The Judiciary internal auditing office also conducts periodic preventative audits.

4. Administrative management evaluations

No evaluations are conducted of administrative work, even when the Chief Justice changes, although each Chief Justice can make changes in the administrative work of the Judiciary. These changes are not the result of assessments, but depend on the criteria of each staff member.

D. BUDGETARY MATTERS

1. Characteristics of the judicial budget. National Treasury funds and funds collected by the entity

The Judiciary budget is comprised of funds allocated from the national budget and private funds from fines issued by the various branches of justice. The Judiciary also receives donations or loans from international cooperation agencies. The Constitution mandates that the funds from the national budget be no less than 2% of the general budget.

The main source of income for Guatemala's Judiciary is the contribution from the central government, which represented 86% of the budget in 2017. Self-generated funds represented just 12% and cooperation funds 2%.

2. Design and approval of the budget

In practice, the Financial Office is responsible for designing the budget. The proposal is submitted to the Supreme Court and then sent on to the Ministry of Public Finance so that it can be incorporated into the general budget. Finally, it is approved by Congress, which can also make changes. The Executive also makes special funds available to the entity from time to time.

3. Budgetary execution and rules for reassigning line items

The Supreme Court has exclusive responsibility for the execution of the budget through the Finance Office. When a budgetary line item must be reallocated, an agreement is issued by the Supreme Court that must be published in the official gazette.

4. Spending oversight. Levels of execution

The Supreme Court supervises spending through the Judiciary President, who submits reports at its request. According to Judiciary data, 56% of the budget went to the judicial area, 31% to the administrative area and 10% went to cover the costs of basic services.²¹⁹

5. Savings and Investment Account Management

The Judiciary has various savings accounts, which are mainly used to manage the payment of employees' pensions and savings from private funds. They are managed based on the parameters set by the Judiciary President. At the end of each fiscal year, balances and interest in these bank accounts are capitalized and included in the government income and spending budget.

E. JUDICIAL GOVERNMENT AND DISCIPLINE FOR JUDGES

1. The existence of disciplinary rules linked to judicial independence. Codes of ethics and their application

The disciplinary rules to which judges and magistrates are subject are set out in the Judicial Career Law (Decree 32-2016). This law sets out the catalogue of conducts that are considered to be violations, which can be minor, major and very serious. Some specialists and judges have found this catalogue to be very broad and to fail to discern between violations

219 Organismo Judicial de Guatemala, Memoria de labores 2009-2014.

and crimes, which has caused confusion and stood as an obstacle to the application of disciplinary and criminal procedures.

There is also a code of ethics for Judiciary employees called the Judiciary Ethics Standards for the Republic of Guatemala. The code was approved by the Supreme Court through Agreement 7-2001 and does not establish sanctions, instead providing guidelines for them to follow.

2. Description of supervision systems for jurisdictional work and its relationship to discipline

Court Supervision (Decree 32-2016) is an entity that verifies the quality of the services provided by judges and investigates disciplinary issues with judges, magistrates and other Judiciary staff.

3. Main case law and cases of disciplinary impacts linked to impartiality

Although Decree 32-2016, the Judicial Career Law, was approved in July 2016, the implementation of this legislation has been long and tortuous, and has been the subject of strong criticism and even complaints of unconstitutionality. These challenges and legislative amendments delayed the election of the Judicial Career Council, and it is thus not possible to evaluate its implementation. As such, in this section we will refer to the current disciplinary system, which follows the terms set out in the Judicial Career Law (Decree 41-99).

Unfortunately, Guatemala's judicial disciplinary system presents high levels of impunity. Some 2,304 complaints were filed with the judicial discipline boards between 2014 and 2016, of which 1,860 (81%) were dismissed, 314 (13%) are pending and only 130 were resolved. Sixty-five cases were dismissed and only 65 (2.82% of the total) resulted in the application of mild sanctions.²²⁰

4. The disciplinary process. Guarantees for avoiding abuse

The disciplinary process set out in the judicial career law guarantees the rights of judges. It begins with a verbal or written complaint, after which the Court Supervision entity initiates the corresponding investigation. That process is to last no more than ten days, though it may be expanded for up

²²⁰ Observatorio de Independencia Judicial, *Justicia en riesgo: Obstáculos a la independencia judicial en Guatemala*, Guatemala 2017.

to eight days. A report is submitted to the Judicial Discipline Board and a hearing is scheduled in which the judge or magistrate appears along with their defense attorney, the general court supervisor, the individual who filed the complaint and their attorney. The complainant may appear as an interested third party in the process. Once the evidence and arguments are received, the board issues a decision that may be appealed before the Judicial Discipline Appellate Board within three days of the ruling.

5. Judges' perceptions of the disciplinary system

According to Haroldo Vásquez, the President of the Association of Guatemalan Judges for Integrity, the disciplinary system has occasionally been used to pressure independent judges. Although Decree 32-2016 mentions that court supervision is the responsibility of the Judicial Career Council, it continues to be managed by the Supreme Court.

F. JUDICIAL ASSOCIATIONS AND PARTICIPATION OF JUDGES IN GOVERNMENT

1. Existence and characteristics of judges' associations

The Guatemalan Association of Judges for Integrity was created in 2016. It is comprised of peace and first instance judges who are working to strengthen the judicial career system and the independence of the Judiciary. There is also a Magistrates' Institute comprised solely of chamber magistrates. Its purpose is to develop members' capacities through conferences, workshops and training courses. The Judiciary Institute has been active since 2009 and includes judges and attorneys, mainly women. Its goals include promoting justice system modernization and the strengthening of the judicial career system.

2. Participation of associations in the defense of judicial independence

The various associations have different methods and strategies for protecting the judicial independence of their members. The Magistrates and Judges' Association has generated press releases when its members have been threatened and has filed suit against the arbitrary change of judges. It recently took a position in favor of judges questioned for favoring unions in cases of corruption and those with high social impact.²²¹

221 <http://republica.gt/2018/03/12/instituto-de-magistrados-reclama-independencia-judicial-y-presuncion-de-inocencia/>

The Judiciary Institute also has prepared press releases and has participated in panel discussions on legal reforms.

The Magistrates' Institute also speaks to the press and participates in panel discussions of legal and constitutional reforms.

3. Participation in administrative activities

None of the associations participate in administrative activities.

4. Participation in disciplinary matters and judicial ethics

None of the associations participates formally in disciplinary matters and judicial ethics. However, due to the fact that the Judicial Career Council is composed of judges and magistrates from the various categories that should be elected in assembly, the associations encourage their members to join them.

5. Participation in planning activities

None of the associations participate in planning activities.

6. Participation in accountability activities

None of the associations participate in accountability activities.

7. Informal participation of judicial groups in the dynamic of government

Interview respondents stated that none of the judicial associations informally participate in the dynamic of judicial government.

G. SOCIAL DIMENSIONS OF THE JUDICIARY'S STRENGTH

1. Social concern regarding the weakness or strength of the Judiciary

The social importance of the issue of justice has increased. The following key moments can be identified in this process:

1. The approval of the Application Commissions Law in 2010 that allowed the election of appeals court magistrates, Supreme Court justices and the Attorney General to be public.

2. The case against former president Efraín Ríos Montt for the crime of genocide and for crimes against humanity during the Cold War that culminated in 2013 and practically divided public opinion.
3. The election of magistrates to the Courts of Appeal and Supreme Court in 2014, which was highly questioned by various judicial associations.
4. The cases of corruption involving high-ranking officials brought by the International Commission against Impunity and the Public Prosecutor's Office.
5. The constitutional reform proposals for the justice sector that were presented to Congress in 2016.

The public has become increasingly interested in all matters related to the justice system in the wake of these crucial moments.

2. The opinions and practices of political leaders

Congress appoints Supreme Court and Appeal Court justices, which allows for strong political participation in the selection of candidates for these positions.

However, after the cases involving corruption that began in 2015, the Judiciary has increased in importance in relation to other branches of government. The Supreme Court and Appeals Magistrates have allowed the Public Prosecutor's Office to investigate high-ranking Executive and Legislative Branch officials, becoming the true agency of oversight of political power. For the first time in the country's history, the Judiciary has become a first-rate political stakeholder.

3. The problem in the media

Following the emergence of high profile cases of corruption, the media increasingly focused on all matters related to the justice system, including the strengthening of Judiciary independence, which they have understood as key for making progress in the fight against corruption.

4. Surveys and opinion polls about the Judiciary

No recent opinion polls specific to the Judiciary have been conducted, but there are surveys on Guatemalans' level of confidence in various public institutions. The level of confidence that the public has in the Judi-

ciary has improved, though it is still among the institutions that ranks lowest.²²²

5. Actions taken by the Judiciary to report to the community

There is no information policy for the Judiciary (<http://www.oj.gob.gt>) for reporting its achievements, policies or plans to the public. There is a Social Communication Secretariat for the Judiciary that reports to the Supreme Court Chief Justice and manages the entity's social media presence, which includes information on events. No statistics or organizational diagrams were found.

6. Other relationships between judges and society

Peace judges have the closest relationship with the community and social leadership in their towns. First instance judges and magistrates mainly maintain connections to local public officials. Some judges' associations maintain ongoing relationships with social organizations specializing in justice, such as the Instituto de Estudios Comparados en Ciencias Penales, Fundación Myrna Mack and the Comisión Internacional de Juristas para Centroamérica.

H. RELATIONSHIPS WITH OTHER POLITICAL BRANCHES

1. Formal relations with the Executive Branch

Relations between the Judiciary and government branches mainly exist at the level of coordination for cooperation projects.

In regard to operations, first instance judges request support from the police for certain actions, such as evictions. The police provide their services when asked to do so. The law states that sentence execution judges must oversee the situation of the prisons run by the Executive, but this is not done periodically.

2. Formal relations with the Legislative Branch. Participation in bills. Accountability

The Supreme Court has legal initiative, which it has used rarely to present proposed reforms to the Criminal Procedure and Civil and Mercantile Procedure Codes.

²²² <https://nomada.gt/politica/encuesta-pro-mp-cicig-y-democracia-y-no-por-gobierno-cacif-y-ejercito/>.

No Supreme Court justices or Judiciary judges or administrative staff have ever been called to account for administrative or financial management before Congress.

3. Relationships with other autonomous entities (Ombudsman's Office, public prosecutor's offices, etc.)

The relationship with the Human Rights Prosecutor is minimal, as that official is prohibited from intervening in judicial cases and has not used the office's mandate to verify the right to access to justice or due process.

Coordination between the Judiciary and the Public Prosecutor's Office is much greater and includes joint cooperation projects, mainly in the area of training.

There is also a level of coordination with the Criminal Public Defense Institute, which has offices in some Judiciary buildings.

Over the past few years, coordination mechanisms have developed with the Tax Administration Superintendence in the area of taxes and operation of tax courts in Public Finance Ministry locations.

The Judiciary also has signed coordination agreements with universities for staff training.

4. Judiciary participation in inter-branch spaces

The Justice Sector Modernization Unit was created in 1998 as a high-level cooperation mechanism. It has developed cooperation projects and secured loans from international agencies such as the Inter-American Development Bank (IDB) and World Bank for the entire justice sector.

It also has coordinated the introduction of Justice Administration Centers, which contain the offices of justice entities in many districts as a way of providing all of the services to system users.

5. Formal and informal dynamics of the relationship with other branches of government

The formal relationships between the Judiciary and other government institutions are very limited or almost non-existent. However, there are very important relationships based on coordination with international cooperation agencies, embassies and the UN system including CICIG and OACNUDH.

Conclusions

1. Guatemala's Constitution does not guarantee true independence of the Judiciary. While it does provide for formal autonomy and independence of the courts, it sets the term for judges and magistrates at just five years, and there is no guarantee of immovability, thus impacting the principle of independence. The magistrate election system established in the same Constitution that allows Congress to elect magistrates to the appeals courts and Supreme Court in which career judges compete for positions with litigators is a violation of the judicial career system.
2. The Supreme Court imparts justice and manages administration, which leads to deficiencies in the exercise of both functions. While the creation of the Judicial Career Council has allowed the Supreme Court to focus on judicial functions to a greater extent, it still handles various administrative functions, the most important which is the approval of the Judiciary budget.
3. The government and administration of the Judiciary are concentrated in the Supreme Court Chief Justice, who is also the President of the Judiciary. While specialized administrative agencies have been created, the General Management of the Judiciary is the most important. The administrative system is highly centralized in the Chief Justice, and the fact that a new person is elected to that role each year makes it difficult to develop strategic government plans and prevents multi-year planning.
4. There are lacks in the Judiciary accountability system, as well as a lack of transparency in the use of the budget and communication systems. However, high impact cases and the media have caused more attention to be focused on the justice system in general as well as greater social auditing of the election of high-ranking justice officials, including appeals court magistrates and Supreme Court justices.
5. In order to improve the current situation of concentration of functions of the Supreme Court and the problems and limitations of the judicial career system, it is fundamental to discuss and approve Constitutional reforms because Guatemala has a constitutional design issue as it pertains to the justice sector, which cannot be addressed by ordinary legislative reform.

5. Paraguay

*Alberto Manuel Poletti Adorno*²²³

INTRODUCTION

According to Article 27 of the Constitution of Paraguay, the Judiciary is the custodian of the Constitution. It must interpret, comply with and enforce it. Justice administration is managed by the Supreme Court, the tribunals and the courts as outlined in the Constitution and various laws including the Judicial Organization Code, Law 803/1981.

Unfortunately, the vision of the performance of the Judiciary is not the best.^{224 225}

According to information obtained within the 2015-2016 World Economic Forum, Paraguay ranks 137 in Judiciary Independence along with Venezuela.²²⁶ Furthermore, Transparency International ranks it 123 on the Corruption Perception Index.²²⁷

The independence, autonomy, self-sufficiency and effectiveness²²⁸ of its work are analyzed in this document. We also analyze aspects linked to the constitutional standards, laws and work of the Judiciary, government management, budgetary management, agencies of representation and their relationship to with branches of government.

223 Centro de Estudios Judiciales (CEJ)

224 FELIPPO, Eduardo: Discurso pronunciado en la inauguración de la Expo 2017. In: Ley de Ética para legisladores, ABC Color, 15 de julio de 2017. <http://www.abc.com.py/nacionales/piden-ley-de-etica-para-legisladores-1613274.html>.

225 RUIZ DIAZ, Estela: La corrupción judicial no es tema de campaña, Diario Última Hora, 20 de agosto de 2017 <http://www.ultimahora.com/la-corrupcion-judicial-no-es-tema-campana-n1103053.html>.

226 GIORGI, Jerónimo: La independencia del sistema judicial, el termómetro de la corrupción en América Latina. El Observador, 20 de julio de 2017. <http://www.elobservador.com.uy/la-independencia-del-sistema-judicial-el-termometro-la-corrupcion-america-latina-n1099996>.

227 TRANSPARENCIA INTERNACIONAL: Índice de percepción de corrupción 2016 https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table.

228 CASTELLANOS GOUT, Milton Emilio: Gobierno y administración del Poder Judicial a la luz del Derecho Constitucional Comparado: los casos de Italia, España y México. Tesis de doctorado bajo la dirección de Francisco Javier Díaz Revorio, Universidad de Castilla-La Mancha, España, 2016, p. 26. <https://ruidera.uclm.es/xmlui/bitstream/handle/10578/9076/TESIS%20Castellanos%20Gout.pdf?sequence=1&isAllowed=y>.

There may be discrepancies, but the strengthening of the Judiciary is in the national interest and the statements made in this report are offered with this goal in mind.

A. CONSTITUTIONAL AND LEGAL FRAMEWORK

1. Division of powers. Independence, autonomy and self-sufficiency of the Judiciary

Javier García Roca refers to the Judiciary as a ‘diffuse power’ comprised of “very diverse (unipersonal or collegiate) judicial agencies that form the judicial organization of each level. Their diffuse nature stems from being endowed with strong internal independence among the judicial agencies and from the other branches of government. They also enjoy independence from the media, which tend to be one of the main threats to the serenity and distancing that they require for independence in the exercise of the jurisdictional function.” (Our translation.)²²⁹

A) *Independence of the Judiciary*

Selection is currently conducted by the Judicial Council using candidate lists that are submitted to the Supreme Court for the appointment of magistrates. They must reapply five years after they are appointed (Article 252 of the Constitution) and only acquire irremovability after two confirmations.²³⁰

There are frequent discussions in Paraguay as to whether it would be beneficial to grant a judge irremovability after he or she is appointed. This requires a Constitutional reform. Beyond the advantages or disadvantages of the system, it is important to note that it was recently mentioned that the Magistrates’ Trial Court is an agency with very low productivity²³¹ that

229 GARCIA ROCA, Javier: Del principio de la división de poderes, *Revista de Estudios Políticos* (Nueva Época) Núm. 108. Abril-Junio 2000.

230 *Article 252 – On the irremovability of magistrates*
Magistrates may not be removed from their position, location or level during the term for which they were appointed. They cannot be transferred or promoted without their prior express consent. They are appointed for five-year periods starting from their appointment.
Magistrates that have been confirmed for two periods following their election acquire irremovability in their position until the age limit set for Supreme Court Justices. (Our translation.)

231 DIARIO ABC COLOR: JEM: Solo el 1% de los denunciados fue apartado. 24 de marzo de 2017 <http://www.abc.com.py/nacionales/jem-solo-el-1-fue-apartado-1577239.html>.

was involved in a controversy over transparency²³² and that there have been questions regarding why most of its members are affiliated with parliamentary majorities that are supportive of the current administration.²³³

Another factor that generates tension is the fact that representatives are elected from the Senate and Congress within the Judicial Council rather than individuals appointed by those agencies, as occurs in other countries. While there are other members elected by attorneys, university representatives and Executive Branch and Supreme Court designees, the system is considered to be inadequate because it is described as a form of pressuring judges who are seeking confirmation to issue rulings that align with the views of a certain sector.²³⁴ This situation was tempered by Law 5336/2015.

Law 5336/2015 and the new confirmation mechanism

According to Article 1 of Law 5336/2015, “the procedure for confirmation of magistrates is established” for the Accounts Tribunals, Appeal Tribunals, Electoral Tribunals, First Instance Courts, Electoral Courts, Professional Courts and Peace Courts as well as the General Bankruptcy Receiver, Receiver Agents, Assistant Prosecutors, Public Prosecutor’s Office Agents and members of the Public Defender’s Office who seek confirmation. They must formalize a new application for the position that they hold and are subject to meeting constitutional, legal and regulatory dispositions set out for the respective position. The Judicial Council must include the magistrate or official who is seeking confirmation on the candidate list.

As such, the Court must decide to confirm a magistrate or not to do so.

It is important to note that the Executive Branch issued a partial veto of Law 5336 through Decree 2483 dated October 29, 2014, arguing that it violated the constitutional attributes of the Judicial Council.²³⁵ The Senate

232 DIARIO ABC COLOR: Jurado se mantiene renuente y no informa. 5 de agosto de 2017. <http://www.abc.com.py/edicion-impresajudiciales-y-policiales/jurado-se-mantiene-renuente-y-no-informa-sobre-millonarios-contratos-1619627.html>.

233 PRESS READER: Cartes copa CM y JEM. ABC Color, 25 de junio de 2017. <http://www.pressreader.com/paraguay/abc-color/20170625/281517931127379>.

234 DIARIO ABC COLOR: Jueces denuncia presión, 11 de setiembre de 2010. <http://www.abc.com.py/edicion-impresapoliciales/jueces-denuncian-presion-158720.html>

235 Decreto P.E. 2483 del 29 de octubre de 2014 “Por el cual se objeta parcialmente el proyecto Ley N° 5336 ‘Que modifica la Ley N° 1634/00 Que establece el Procedimiento para la confirmación de los magistrados del Poder Judicial. <http://odd.senado.gov.py/archivos/file/Poder%20Ejecutivo%20Nro%20194.pdf>.”

and Congress rejected the veto.²³⁶ However, the Judicial Council presented a finding of unconstitutionality that is pending resolution as of the writing of this report, and the Association of Judicial Magistrates of Paraguay requested its rejection through *Amicus Curiae*.²³⁷

The independence of judges and tribunals

Judges are not given instructions by other branches or superiors per Article 248 of the Constitution. However, there is no information on how to file a complaint if such a situation arises or to review cases involving influence.

B) Autonomy

Autonomy refers to the power to act under the organization's own rules and governing bodies. Under the Constitution, Judiciary agencies work autonomously and under the supervision of the Supreme Court. In reality, judges and tribunals have independence from high-ranking agencies but are subject to the instructions issued by the country's highest court regarding the organization of offices, available resources, scheduling, submitting reports and other matters.

The adoption of Agreements (Art. 258 of the Constitution and Art. 29 para. a of the COJ) is a self-government mechanism for adopting necessary measures for the operation of the Judiciary.

C) Self-sufficiency

"The Judiciary enjoys budgetary autonomy. The National General Budget will allocate an amount that is no lower than three percent of the budget for the Central Administration. The Judiciary budget will be approved by Congress and the Comptroller General's Office will verify all of its expenditures and investments." (Art. 249 of the Constitution, our translation.)

Research conducted by the Centro de Estudios Judiciales mentions that the budget assigned to the Judiciary in 2009 was 6% according to official

236 Diario Última Hora, 30 de abril de 2015: Jueces ya entrarán directo a ternas por sus cargos tras rechazo a veto. <http://www.ultimahora.com/jueces-ya-entraran-directo-ternas-sus-cargos-rechazo-veto-n892291.html>

237 ASOCIACIÓN DE MAGISTRADOS JUDICIALES DEL PARAGUAY: Magistrados piden a la Corte rechazar acción del Consejo, 14 de setiembre de 2015. <http://www.amjp.org.py/noticias/2015-09-14/83/magistrados-piden-a-la-corte-rechazar-accion-del-consejo>.

data.²³⁸ It has not stopped growing since then. In practice, the Judiciary depends on the other branches of government for approval of the budget. In Paraguay, the Ministry of Finance prepares a proposed bill that is submitted by the President to Congress, which analyzes it and develops the law during the last quarter of the year.

Number of employees

It is currently possible to ascertain the number of officials hired and their salaries using information published online based on Law 5189/2014, “which establishes that information on the use of public resources for remunerations and other payments made to public workers in the Republic of Uruguay must be published” and Law 5282/2014 “On Access to public information” (Our translation).²³⁹ In fact, the Supreme Court was the first agency to publish the complete list of its employees and their salaries following the Agreement and Sentence 1306²⁴⁰ issued October 15, 2015.

It is important to note that once the budget is approved, it is not all allocated to the Judiciary at the beginning of the year, but is instead disbursed gradually.

D) Effectiveness

The problem of the celerity of justice is a phenomenon that is not limited to the national level.

In regard to judicial delays, Dr. Juan Carlos Mendonca stated that 428 first instance judges have to process 155,448 trials per year as well as those added for previous years. According to data obtained from the Magistrates’ Trial Court, a judge has never been punished for delays.²⁴¹

238 MINISTERIO DE HACIENDA: Conoce tu presupuesto, Bol 2, Año 2009, p. 3. <http://www.stp.gov.py/cooperacion/giz/wp-content/uploads/2015/05/Boletin2ConoceTuPresupuesto09.pdf>.

239 Public information on Judiciary salaries and list of officials: <http://www.pj.gov.py/contenido/943-nomina-de-magistrados-y-funcionarios/943>.

240 PODER JUDICIAL: Dos años del histórico fallo de acceso a información pública. <http://www.pj.gov.py/notas/11456-dos-anos-de-historico-fallo-sobre-acceso-a-la-informacion-publica>.

241 BENITEZ, Carlos: Ministros de la Corte y jueces pueden ser destituidos por mora, Diario ABC Color, 15 de octubre de 2017. <http://www.abc.com.py/edicion-impresa/judiciales-y-policiales/ministros-de-la-corte-y-jueces-pueden-ser-destituidos-por-mora-1640707.html>.

This is not an isolated opinion. Judge Daniel Ledesma states that it is better for the Court to publish statistical data for various courts from all instances as well as the number of decisions that a judge signs per day, ongoing challenges, the number of hearings suspended and the reasons for said suspensions, the number of hearings a court can handle each day and the percentage as it relates to the number of ongoing trials, and the distribution of cases by court and judicial district.²⁴²

2. Government and administration system

Basically, the powers of the Supreme Court (259 CRP) can be grouped into jurisdictional functions (mainly as the final recursive court) or within the functions of the government and administration of the Judiciary. It is important to note that the Constitution solely mentions the Court of Audit, the Judicial Academy (Art. 265) and the Superior Electoral Court (Art. 273), and not the other courts and tribunals that must be established by law.

Law 609/1995 “The organization of the Supreme Court” refers to the functions of the plenary and, later in the text, the functions of the various chambers.

It is important to note that the high court exercises jurisdiction throughout the republic (unitary country) either as the full Court or as chambers composed of three justices each. The chambers are the *Constitutional Chamber*, *Civil Chamber* and *Criminal Chamber*.

In order to carry out its work, the Supreme Court created a diagram of its structure, which was published on the Judiciary website. The structure was modified by Agreement 941/2014.

As the lead agency of the Judiciary, the Supreme Court is responsible for the management of this branch of government. There is a concern regarding the time allocated to manage the Judiciary to the detriment of its jurisdictional functions. This has been the object of numerous questions, and in late 2015, the Court issued Agreement 865/2013 to create the Judicial Administration Council and tasked it with planning, organizing, directing, coordinating, supervising and overseeing the administrative ac-

242 LEDESMA, Daniel: ¿Quién es el responsable de la mora judicial? Diario ABC Color, Suplemento Judicial, 23 y 30 de octubre de 2017. <http://www.abc.com.py/edicion-impresasuplementos/judicial/quien-es-el-responsable-de-la-mora-judicial-1642952.html> and <http://www.abc.com.py/edicion-impresasuplementos/judicial/quien-es-el-responsable-de-la-mora-judicial-1645032.html>.

tivities of the Judiciary based on the principle of the self-sufficiency of that branch of government.²⁴³

It is important to note that while the process for accessing the magistrature and binding roles (public defenders, prosecutors, trustees) has been established in the law, access to positions via competition (officials) within the Judiciary is decided by the full Supreme Court.

The General Superintendence of Justice

This office reports to the Supreme Court and is led by the Superintendent. It is responsible for executing the orders of the Supreme Court Superintendence Council, supervising and coordinating the work of the disciplinary offices, conducting summary procedures and submitting files with reports on the actions of the summary procedure to the Superintendence Council, which makes the decision.

The functions of this body are set out in Article 21 and following of Law 609/1995 and Agreements 1129, 2158, 2464, 2744, 3534, 464/2006, 476/2007, 709/2011, 716, 726 and 961.

The Administration Council

The Administration Council (Agreement 1043/2016) is the highest authority in the area of budgetary, financial, accounting and equity administration of the Supreme Court. It reports to the plenary of the Supreme Court, the highest decision-making space for administrative actions, and there is no delegation of responsibilities.

The decentralization of administrative work

The Presidents and members of juridical districts were appointed in accordance with Agreement 1116 dated September 20, 2016.²⁴⁴

These members currently have the authority to grant permits, apply minor sanctions, adopt and manage the district budget and purchase supplies at the local level.

243 The Council began its work on January 1, 2016. <http://www.pj.gov.py/notas/11732-corte-designo-a-miembros-del-consejo-de-administracion>

244 PODER JUDICIAL: Designan presidentes para circunscripciones judiciales. 16 de diciembre de 2016. <http://www.pj.gov.py/notas/13384-decisiones-de-la-plenaria-de-la-corte-suprema-de-justicia>

The alternative to Judiciary government in other countries

The current Constitution of 1992 included the Judicial Council in the government structure. Various laws were passed to regulate its functions, including Law 212/1993, Law 240/1993, Law 296/1994, Law 439/1994, Law 763/1995, Law 1376/1998, Law 1634/2000, Law 1662/2000, Law 1983/2002, Law 2349/2003, Law 3332/2007 and Law 5336/2014.

It is possible to note that in the early days of the new Constitution, there was a discussion as to whether this agency would be authorized to govern the Judiciary and the opinion that the Supreme Court was responsible for justice administration prevailed. The High Court is constitutionally responsible for ensuring the independence of the Judiciary and appointing magistrates, prosecutors, public defenders, bankruptcy trustees, judges and Judiciary officials.

Access to public information

There is no doubt that the effort made to publish sentences through offices that report to the Supreme Court should be highlighted. A report on performance would also be useful. Some judges have stated that they are up to date on their office work²⁴⁵ and even publish reports on their work,²⁴⁶ so the practice would not be entirely new in the Judiciary.

3. Government agency. Powers

The roles of Supreme Court officials are set out in Articles 5, 6 and 7 of Law 609/1995. It has been determined that the Court goes beyond the mere judicial function and takes on roles that correspond to other tribunals as well as specialized agencies in other countries. As such:

245 Some examples: Judge Jorge Barboza <http://www.pj.gov.py/notas/12698-magistrado-informo-a-la-corte-que-su-despacho-esta-al-dia>

246 Judge Luis Pereira Ramírez <http://www.pj.gov.py/notas/13621-magistrado-informo-a-la-corte-que-su-despacho-esta-al-dia>

Judge Christian Bernal <http://www.pj.gov.py/notas/13735-magistrado-informo-a-la-corte-que-su-despacho-esta-al-dia>

Judge José Delmás <http://www.judiciales.net/paraguay/126-tribunales/2699-juez-informo-que-esta-al-dia-en-su-despacho>

Judge Tadeo Zarratea also issued a similar statement.

DIARIO ÚLTIMA HORA, 1° de julio de 2012. Los jueces de Asunción tienen 2673 casos que deben resolver.

<http://www.ultimahora.com/los-jueces-asuncion-tienen-2673-casos-pendientes-que-deben-resolver-n541685.html>

⁴⁰ Reports from Minister Bareiro de Mónica. 2011.

- 1) It hears constitutional matters (a role reserved for the Constitutional Courts in Brazil, Chile, Bolivia, France, Guatemala, Spain and other countries).
- 2) It has the final word on contentious-administrative matters (playing the judicial role of the State Council that exists in Colombia, France and Italy), judicial matters (like the majority of the Supreme Courts around the world) and electoral issues (the rulings of the Electoral Court can be brought before the Supreme Court in certain cases).
- 3) It intervenes as a final instance tribunal in civil and commercial matters and rules on cassation requests filed in criminal cases (a judicial role that is assigned to nearly every Supreme Court in the world).
- 4) It appoints magistrates (a role that is assigned to the Judicial Councils in Spain and Argentina) and preventatively suspends them while the process is brought before those magistrates in the Magistrates' Trial Court.
- 5) It appoints and removes Judiciary officials (from assistants to Supreme Court rapporteurs) throughout the country.
- 6) It exercises the role of the Superintendence (work conducted by the Judiciary General Councils in France, Spain and other countries) and maintains a record of justice assistants (role that corresponds to the courts or tribunals of appeal in other systems).
- 7) It also exercises the superintendence in penitentiary roles (a role similar to that of the prison oversight agency imposed on criminal execution courts by virtue of Article 43 of the Criminal Procedure Code since 2000 as well as Article 19 of the Statutes of the Public Prosecutor's Office).
- 9) It intervenes in habeas corpus trials (without compromising the jurisdiction of first instance judges).
- 10) It intervenes in issues linked to nationality (due to the lack of a law that addresses the issue in a comprehensive manner, the majority of the regulations are contained in agreements issued by the court itself).²⁴⁷

247 POLETTI ADORNO, Alberto Manuel: Derecho Constitucional Comparado,

Supreme Court authorities

The Supreme Court shall have a Chief Justice, a First Vice President and a Second Vice President (Art. 5). The Chief Justice shall represent the Judiciary, replace the President, call and preside over regular and special sessions, sign documentation related to the functions of the Court and sign official correspondence as well as other tasks set out in the law (Art. 6).

Superintendence Council

This body is comprised of the Supreme Court Chief Justice and the two Vice Presidents and its composition changes entirely each year. According to Article 23 of Law 609/1995, the Superintendence Council is responsible for the following: disciplinary and supervisory powers per Article 4 of the law; organizing and overseeing the Justice Assistants' Directorate, Human Resources Directorate and Finance Directorate as well as other Judiciary bodies; and understanding and ruling on cassation processes or the annulment of the registration of attorneys and legal representatives; as well as issuing warnings to, suspending or removing public clerks or other justice staff and officials and Judiciary employees.

The complete annual renewal of this body will be the object of review. The plenary has review authority and the nine justices can also analyze the distribution of the superintendence, administration and Judiciary representation tasks through a modification of Law 609/1995.

Actions initiated by the Supreme Court in relation to Law 1600/2000 "On public service"

It is important to note that the High Court has submitted binding actions for laws that impact the Judiciary.

The finding of unconstitutionality was admitted and Articles 1, 36 and 95 of Law 1626/2000 were declared unconstitutional. We will thus focus on outlining aspects related to the Sentence.

Art. 1 and the independence of the Judiciary

"This does not only subordinate the administration of [Judiciary] financial resources to the Executive Branch, but it also covers human resources, including them in the Central Administration, which the Judiciary does

not form part of, given that as one of the branches of government, it has institutional independence under the Supreme Law. This means that it enjoys political independence, that is, the autonomy of the Judiciary, as well as economic independence, which is the budgetary self-sufficiency of the Judiciary.” (Our translation.)²⁴⁸

“In that sense, the Supreme Court has the legal aptitude to validly conduct certain administrative actions such as those by which it appoints officials and employees, assigns them the tasks that they are to carry out and, when necessary, removes them. Although the Judiciary is basically responsible for intervening in and deciding contentious issues, declaring the rights of the parties, it does not break with the principle of the division of branches of government because it engages in such acts because it is authorized to do so by the Constitution, Law 609/95 ‘On the organization of the Supreme Court,’ the Judicial Organization Code and the regulatory agreements.” (Our translation.)²⁴⁹

Art. 36 On the Judiciary budget

The Court found that *“self-sufficiency is another of the elements that is inseparable from the current organization of the States. These considerations are limited to the Paraguayan State per Article 249 of the Supreme Law, which recognizes the self-sufficiency of the Judiciary through the following text: ‘On budgetary self-sufficiency. The Judiciary enjoys budgetary autonomy. The National General Budget will assign an amount of no less than three percent of the budget of the central administration to this body. The Judiciary budget will be approved by Congress and the Comptroller General’s Office will verify its expenditures and investments.’*

This constitutional disposition categorically establishes the Judiciary’s autonomy and self-sufficiency, which implies its institutional independence (as an agency-institution, a power in relation to other powers that exercise various functions of political power) and functional independence (as an agency-individual, understood as magistrates and officials appointed based on the constitutional rules and special laws).” (Our translation.)

Art. 95 On the Advisory Board of the Secretariat of Public Function which provides for the participation of the Judiciary

“By virtue of the complete independence of the judicial function from other entities that hold power, the form in which individuals are appointed to ju-

248 Supreme Court Constitutional Chamber Agreement and Sentence 1534/2013 cited, p. 2

249 Supreme Court Constitutional Chamber Agreement and Sentence 1534/2013 cited, p. 4

ditional roles is important. We must conclude that the creation of the Consultative Board of the Secretariat of Public Function, comprised of representative of the Executive and Legislative Branches and the Judiciary in order to advise the Secretary of Public Function (Art. 95), violates Article 3 of Supreme Law. This is based on the fact that a law that is lower in rank than the Constitution can be used to grant special attributes and powers to an agency that reports to the Executive Branch despite the fact that said powers are solely and exclusively in this particular case are held by the Judiciary, namely the appointment of its officials and employees, in case of removing them, and in the case of the superintendence over the other agencies and people who are under its disciplinary power. These situations are expressly provided for in the Constitution and the special laws and regulatory agreements that govern them. Furthermore, there is a move to provide the Judiciary with a role that is not within its purview under the Constitution, as would be the case of making decisions for the appointment of officials and employees of agencies that report to other branches of government, or which would imply an intromission of other government branches, thus violating Art. 3 of the Carta Magna.” (Our translation.)

This demonstrates that the Judiciary has decided that it cannot or should not participate in any agency outside of its internal scope, particularly when it is linked to the Executive Branch for issues related to justice administration.

Decisions of the Supreme Court plenary

The Supreme Court publishes its most important decisions online and sends them out via email.²⁵⁰ Appointments of magistrates and auxiliary staff, the work of the various judicial bodies, participation in events and other information can be found on the website. Issues related to the administration of the Judiciary are generally not published.

4. Presidency of the Judiciary. Powers and election.

At the beginning of the judicial year, the Supreme Court justice gather to elect the Chief Justice and Vice President for each chamber.

The Role of the Supreme Court Chief Justice

The Chief Justice is the head of the Judiciary and shares responsibility for administration with other justices (mainly with the members of the Super-

²⁵⁰ Judiciary website: <http://www.pj.gov.py/notas/plenaria/>.

intendence Council) and provides assistance for events linked to justice administration or other branches of government.

Primus Inter pares

Decisions in Paraguay are always adopted by uneven numbers (three or nine in the case of the plenary or the removal or recusal of a justice). The Court must be composed of members of the Courts of Appeal.

5. Administrative Body. Relationships

Law 609/1995 contains two mentions of justice administration. There is no other direct reference to it such as the establishment of its internal regulations, agreements, and all of the actions necessary to improve the organization and efficiency of justice administration or initiate and present bills related to the organization and functioning of justice administration and staff members (Art.3). Judiciary administration includes justice administrative management and technical and records management.

Administrative technical area

One of the most frequently discussed points within the Judiciary is the reception of judicial fees. There has been an upward trend in the amounts of money from sectors linked to justice over the past few years.

Of the total collected, 57.94% corresponds to the highest judicial body, which is equivalent to 226,222,824,025 guaraníes; while other related institutions received 164,210,340,350, which is equivalent to 42.06% of the total collected between January and December 2016.²⁵¹

Increasing and distributing revenue

This revenue corresponds to Article 1 of Law “Fifty percent of the resources from fines applied in fulfillment of Book I, Title III, Chapter II, Sections II and III, Chapter VI, Article 66 of Law 1.160/97, Criminal Code, and those from judicial auctions of seized assets under Article 2 shall be deposited in the name of the Supreme Court, Judiciary.”

Article 76 paragraph 4 of Law 4423/2011 “Statutes of the Public Defender’s Office” established the distribution of the fines equally between the Supreme Court, public prosecutor’s office and public defender’s office, modifying Article 3 of Law 1492/1999.

251 <http://www.pj.gov.py/images/noticias/17-01-17-587e15e45f706-1.jpg>

Among the Judiciary agencies, the Administration and Finance Directorate has as its mission the management of the equity and financial resources of the Supreme Court in order to facilitate the execution of the institution's goals.²⁵²

A bill is currently being discussed that addresses the possibility of using all of the funds within the Judiciary.²⁵³

6. Disciplinary agency. Powers

Through the Superintendence Council, the Supreme Court (Art. 4 of Law 609/1995) exercises disciplinary and supervisory power over the tribunals, courts, auxiliary staff, Judiciary officials and employees and offices that report to the Judiciary as well as any other entities established by law.

Law 609/1995 (Art. 23) regulates the duties and powers of the Superintendence Council. These are to exercise disciplinary and supervisory powers based on Article 4 of the current law; to organize and oversee the Auxiliary Staff Office, Human Resources and the Financial Directorate and other Judiciary bodies; and to understand and make decisions on cassation or annulment processes involving the enrollment of attorneys and legal representatives and giving notice to, suspending or removing public clerks, other auxiliary staff members and Judiciary officials and employees.

Auxiliary staff

The Supreme Court issued Agreement 709 on July 18, 2011 in which the disciplinary regime of the Judiciary was approved, invoking laws 879/81 and 609/96.

The rule was modified by Agreement 961 dated April 13, 2015.

As such, Article 4 referring to the mandatory nature of the application of disciplinary sanctions to an assistant is justified when there are acts of violence, threats, insults or mistreatment of the magistrate or officials. However, a statement made by a litigant in bad faith, the abusive exercise

252 The organizational structure <http://www.pj.gov.py/organigrama> refers to the General Administration and Finance Directorate. However, the website only mentions the Administration and Finance Directorate. <http://www.pj.gov.py/contenido/157-direccion-de-administracion-y-finanzas/157>

253 CAMARA DE DIPUTADOS: 6 de julio de 2017. <http://www.diputados.gov.py/ww5/index.php/noticias/estudian-redistribucion-de-recursos-provenientes-de-tasas-judiciales>

of the law or reckless litigation constitute sanctions that should be decreed after having heard from the affected party and mainly after a study of the case. The rule provided for in Article 17 of the CPC provides for that *authority* and the transformation of the same in an *obligation* breaks the balance of law that corresponds to an attorney in a democratic society.

There is unequal treatment, as attorneys face more serious sanctions than contract workers, employees and magistrates. It is clear that the agreement seeks to impose automatic sanctions without granting the right to defense that any individual enjoys and that does not constitute an exception for attorneys.

As such, the reading of Article 24 presents situations that violate the right to defense because the rule, which was drafted in such general terms, does not make it clear what sort of behaviors may be the object of sanctions.

Finally, Article 25 of Agreement 961/2015 states that judges must submit a quarterly report on incidents, recusals and decisions made in the courts. This rule, which was drafted in general terms, does not indicate that there is a need to explain motives for recusals, which is necessary given that an attorney can be sanctioned under Article 24 c of Agreement 961.

The possibility of sanctioning an attorney with a formal admonishment in their file should respect due process and should be implemented by disciplinary agencies focused on this profession, as was noted in a colligation bill that was unfortunately vetoed and should be considered given that the current system used to make decisions regarding sanctions and apply them goes against Article 3 of the Constitution.

Rules for magistrates: Argument on the superimposition of functions

It should be noted that in addition to constitutional oversight provided in the Magistrates' Trial Court, other oversight agencies exist within the powers of the Superintendence of the Supreme Court.

Agreement 709/2011 regulates the regime for Judiciary officials and magistrates.²⁵⁴

254 Office of General Superintendence of Justice. <http://www.pj.gov.py/contenido/165-superintendencia-gral-de-justicia/165>

Agreement 390/2005. The Ethics Tribunal

The Judiciary adopted the Judicial Code of Ethics for magistrates in order to advise them on the exercise of their duties and receive complaints for judging acts that violate moral rules that should be followed by the magistrates.²⁵⁵

There is one ethics tribunal for officials and one for magistrates as well as a consultative council responsible for addressing questions, which may be submitted anonymously and online.²⁵⁶

Agreement 475/2008: The Office of Complaints and Reports

This entity was created to receive, record and analyze complaints and reports received against magistrates, judicial officials, assistants or the public service of justice.

7. Auditing and Oversight Systems

Based on information obtained within the Judiciary,²⁵⁷ the General Auditing Directorate of Judicial Management has been created as an oversight agency reporting to the Supreme Court through the Superintendence Council per Agreement 478/07. It began its work in February 2018.

Its organizational structure includes a directorate and three units: Analysis and Programming, Immediate Response and Scheduled Audits.

Its main role is to determine whether the activity subject to oversight is achieving the desired results, which refer to accessible, inexpensive, timely and complete justice.

However, it is important to note that the current system does not publish the results of oversight of trial processes and the issuing of rulings in the terms of the law.

The Role of the Magistrates' Trial Court

This is a constitutional agency that is responsible for removing poorly performing judges from the bench. It is regulated by Law 3759/2009.

255 Judicial Ethics. <http://www.pj.gov.py/contenido/170-etica-judicial/170>

256 Judicial Ethics Directorate. <http://www.pj.gov.py/contenido/170-etica-judicial/930>

257 General Management Audit Directorate. <http://www.pj.gov.py/contenido/167-direccion-general-de-auditoria-de-gestion-judicial/167>

Ethics Tribunal sanctions

It also has been argued that both the Superintendence Council and Trial Court have the power to issue light sanctions. Based on the causes for judgment set out in Law 3759/2009 and the violations described in the Supreme Court Disciplinary Agreement, identical suppositions are presented as acts that could trigger a judgment and administrative summary. These include “e) Frequent participation in gambling in public spaces focused on that purpose” set out in Agreement 709/11 and “j) frequenting and repeatedly participating in gambling in public places,” which is set out in Article 14 of the Judgment Law. There is thus a question as to whether two processes of the same “administrative” nature would be carried out in order to analyze the magistrate’s responsibility and whether they have the same sort of sanction, which would lead to the need to outline the roles of each agency.²⁵⁸

8. Relationships with other branches of government

A custom has developed in which the Chief Justice and some other justices participate in certain acts with other members of the Executive and Legislative Branches. These include swearing in ceremonies for ministers of the Executive Branch, official acts celebrating Independence Day and unveiling projects. The Judiciary’s participation in government agency summits was discussed and no clear position was suggested because the presence of justices is generally a matter of protocol. In fact, when discussing the possibility that the President might call for a summit and participate in a political trial process, he stated that he rejected this.²⁵⁹

Furthermore, the Judiciary Code of Ethics prohibits justices and judges from participating in social events and meetings that might compromise their investiture. This led to written warnings to justice.²⁶⁰

258 BOGARIN FERNANDEZ, Luz Rosanna: *El rol de la Superintendencia General de Justicia y el Jurado de Enjuiciamiento*, Tesina, Instituto de Altos Estudios Estratégicos, Ministerio de Defensa, 2015.

259 DIARIO ABC COLOR, 16 de marzo de 2016. <http://www.abc.com.py/edicion-impresa/politica/cartes-rechaza-cumbre-de-poderes-para-tratar-los-cambios-en-la-corte-suprema-1462204.html>

260 Caso Blanco: <http://www.abc.com.py/edicion-impresa/suplementos/judicial/leve-sancion-a-ministro-por-falta-etica-426425.html>

Casos Torres Kirmser, Núñez y Rienzi <http://www.abc.com.py/edicion-impresa/politica/tribunal-ratifica-sancion-etica-a-tres-ministros-que-farrearon-con-cale-974664.html>

B. GOVERNMENT MANAGEMENT AREA

In regard to the quality and efficiency of public work, it is important to note that there are strategic management plans. The third plan applied to 2011 through 2015, and the current plan covers 2016 through 2020 and is available on the Judiciary website.²⁶¹

Decisions are made following a discussion for which records are kept in the Judiciary. These are not reported to the general public with the exception of the most important developments.

The decisions that can affect members of the public can be viewed at the Accounts Tribunal. The decisions are executed by the Council of Superintendence, which must act in coordination with all other entities within the Management with Transparency Oversight Area.

Agreement 783/2012 “Code of Good Government of the Judiciary”

After establishing the objectives and mission of the institution in Art. 2 “to guide the actions in order to administer justice, resolve disputes in order to strengthen social peace, interpret the laws and manage its resources independently, effectively and efficiently and with equity and transparency” (our translation), the ethical principles are outlined in Article 3 along with the institutional values (Art. 4), leadership (Art. 6), the commitment to the goals of the State (Art. 7) and management (Art. 8) that include a commitment to “stand out due to its competence, integrity, transparency, sense of commitment, belonging and public responsibility in the exercise of its duties...,” commitment to maintain good relations with oversight entities and provide the required information (Arts. 10 and 11), commitment to integrity (Art. 12), deployment of actions for ethical practices, integrity and transparency (Arts. 13 and 14), prevention of conflicts of interest (Arts. 16 – 20), online government (Art. 25), quality (Art. 26), commitment to the community (Art. 29), accountability (Art. 31), management of complaints and claims and citizen oversight (Arts. 32 and 33) and the evaluation of good government indicators (Art. 38), among others.

According to Judiciary data, the General Directorate of Internal Audits of the Supreme Court currently conducts evaluations as part of Phase 1 of the Standard Internal Oversight Model for Public Entities of Paraguay (MECIP).

261 Plan Estratégico P. Judicial 2016-2020 http://www.pj.gov.py/descargas/ID1-298_libro_plan_estrategico_csj_2016_2020.pdf

Judiciary Government Sessions

The justices (plenary) meet weekly to make decisions. The agenda/topics to be addressed are not published in advance, but the most important decisions are made known. Formal and informal meetings may only be accessed by the justices and members of their staff. There are no minutes. There is no evidence of impact studies of these sessions or evaluations on the magistrates' performance. Some of the planning and strategic decision activities are made public via institutional email and websites along with details of modification plans that are available to the public.

Accountability

Article 249 of Paraguay's Constitution states that the Office of the Comptroller General of the Republic must verify Judiciary expenditures and investments.

Article 281 of Paraguay's Constitution states that the Office of the Comptroller General of the Republic is the agency that oversees State economic and financial activities as per the Constitution and Law 276/1994. This agency enjoys functional and administrative autonomy.

Numerous institutions such as the Supreme Court have filed complaints regarding the unconstitutionality of Law 2248/2003.

It is important to note that the agreements and sentences that uphold actions of unconstitutionality against Articles 1, 2 and 3 of Law 2.248/2003 do not state that the Office of the Comptroller General of the Republic is prohibited from exercising its constitutional function in regard to the highest court and other public institutions. This does not mean that the Judiciary is not controlled by the Comptroller's Office, but that the actions will be resolved in the sphere of the Accounts Tribunal and not another administrative agency.

C. ADMINISTRATIVE MANAGEMENT AREA

It is important to note that the Supreme Court manages personnel, granting leave and designating replacements and interim positions with the assistance of the Human Resources Office. The president of each judicial district manages these tasks in areas outside of the capital.

Art. 186 of the COJ states that the secretaries are office managers and are responsible for a series of tasks related to endorsing judicial decisions.

The secretaries issue simple and authenticated copies of acts and communicate judicial decisions.

Management oversight mechanisms and approaches. Audits.

It is important to provide an example of the audits conducted and publication of the results. In early 2017, after a series of news pieces on the slowness of cases involving child support, the Supreme Court ordered a management audit of the different courts. Some institutions requested reports and asked to collaborate on the Project, but they have not received a response to date.

D. BUDGETARY MATTERS

The Supreme Court publishes information on spending and income on the institution's website.²⁶²

Most of the funds are from state resources, but there are also self-generated resources that are distributed in compliance with Law 1273/1998.

Budgetary execution to date

The Judiciary page lists the levels of execution since 2011. The following data are provided for 2017:

Description	Current Budget	Spent	Balance	% Spent
Personnel services	921,409,466,279	476,197,753,515	445,211,712,764	52%
Non-personnel services	181,334,708,811	98,470,661,395	82,864,047,416	54%
Supplies and consumables	16,566,807,140	9,466,049,603	7,100,757,537	57%
Physical investments	119,650,263,595	34,603,092,059	85,047,171,536	29%
Public debt services	5,158,613,443	1,519,943,915	3,638,669,528	29%
Transfers	6,373,375,000	1,154,205,675	5,219,169,325	18%
Other expenses	3,676,792,468	2,113,778,570	1,563,013,898	57%
Overall total	1,254,170,026,736	623,525,484,732	630,644,542,004	50%

Fuente: http://www.pj.gov.py/images/contenido/presupuesto/2017/xls_Gastos-Por-Objeto-de-Gasto.pdf.

²⁶² Judiciary budget information: <http://www.pj.gov.py/contenido/358-ejecucion-presupuestaria/358>.

E. JUDICIAL GOVERNMENT AND DISCIPLINING JUDGES

In addition to the agencies mentioned above, this disciplinary system includes the Council of the Superintendent of the Supreme Court, the Magistrates' Trial Jury and the Judicial Ethics Office. This office is responsible for implementing Paraguay's Judicial Ethics Code²⁶³ and was created on December 6, 2005 by Resolution No. 577.

The issues to be addressed include:

The existence of disciplinary rules linked to judicial Independence. Codes of Ethics and their application.

Agreement 709/2011 establishes the division of minor and serious infractions for magistrates and officials as well as the levels of punishment in a manner similar to Law 1626/2000, "On the public function."

Description of systems for supervising jurisdictional work and their relationship to disciplinary matters

There is a judicial ethics court for magistrates and one for officials. A call for applicants was published in 2017. The process is private, the complainant is not a part of it, and requests for reports are not generally answered despite the fact that Law 5282/2014 states that judicial ethics court rulings constitute minimal available information within the Judiciary.

Management oversight. Mechanisms for improving the system.

Unfortunately, there are no data on the number of complaints against judges and the rulings issued regarding them. In fact, Law 5282/2016 establishes that Ethics Court rulings must be published. No evidence of such publications has been found.

Judges' perceptions of the disciplinary system

Some judges argue that there are numerous oversight processes. However, litigants state that those processes are inefficient because no results are visible and the administration of justice continues to move slowly.

The Judiciary sporadically reviews how often judges work in their offices. They do not clock in or out. The list of judicial rapporteurs (who have a diffe-

263 Code of Ethics. www.pj.gov.py/descargar/ID2-926_codigo_de_etica_para_magistrados.pdf.

reniated schedule) was recently published and it was established that delays persist in the Supreme Court despite the fact that there are 118 rapporteurs.²⁶⁴

F. JUDICIAL ASSOCIATIONS AND JUDGES' PARTICIPATION IN GOVERNMENT

There are three institutions. The first is the **Paraguayan Judicial Magistrates' Association**,²⁶⁵ which was created by Assembly on February 28, 1958. This is the first-level professional entity that represents Supreme Court justices, members of the Courts of Appeal and Auditors, and all members of ordinary and electoral justice jurisdictions along with first instance judges from all ordinary jurisdictions and electoral courts, professional justice judges or the equivalent and justice of the peace from throughout the country and all levels, the Attorney General, Assistant Attorneys General and prosecutors who form part of the Public Prosecutor's Office, the Public Defender General, Assistant Public Defenders General and public defenders appointed to the exercise of public defense, the general bankruptcy association and association agents.

The **Paraguayan Judges' Association** was formed more recently and is comprised exclusively of judges (from the peace, professional, first instance and appeals courts as well as the Supreme Court).²⁶⁶

There is also an **Association of Peace Judges**.

There have recently been reports of the creation of a judges' association.²⁶⁷ However, some magistrates who have been interviewed were not aware of its existence. The entities are private and elect their officers through secret vote or the presentation of candidate lists in regular meetings, and generally seek to encourage the participation of various sectors.

Participation in judicial Independence defense associations

Both the Magistrates' Association and Paraguayan Judges' Association periodically issue statements regarding situations that impact justice.

264 BENITEZ, Carlos: Corte Suprema tiene 118 relatores, Diario ABC Color, Judiciales, October 16, 2017. <https://www.pressreader.com/paraguay/abc-color/20171016/282355449973234>

265 <http://www.amjp.org.py/>

266 <http://www.ajp.org.py>

267 CENTRO DE DOCUMENTACIÓN Y ESTUDIOS. Informativo Mujer. February/17 <http://www.cde.org.py/mas-de-140-mujeres-forman-una-asociacion-de-magistradas-del-paraguay/>

Participation in activities related to judicial government

No judges' representatives participate in management tasks that are exclusive of the Supreme Court. They do not directly intervene in disciplinary or judicial ethics matters. Some magistrates take part in meetings held within the Legislative Branch involving justice reform.

It is equally important to mention that the Administration Council that was recently created does not include judges.

Informal relations between the government and appointment of judges and magistrates.

These is a discussion beyond the appointment of justices and the Prosecutor General (which are political appointments)²⁶⁸ regarding whether there is a need to turn to the political sector for the designation of judicial positions. Many people argue that they reached those positions on their own merits and that they honor the magistrature. However, others suspect that there are connections to or sponsorships from the political sector.²⁶⁹

G. SOCIAL ASPECTS OF THE STRENGTH OF THE JUDICIARY

The 2016-2020 Strategic Plan identified critical problems (judicial delays, lack of communication, difficulties accessing justice in certain sectors) and laid out plans to implement reforms in order to improve the system.²⁷⁰

Social concern regarding the strengths and weaknesses of the Judiciary

There is no doubt that the slow pace of justice and lack of response to serious reports of corruption or cases of national interest raise doubts about the performance of the Judiciary.

Another serious situation is related to monitoring case law which, although not binding in Paraguay, is important in that it is an essential mechanism for legal security.

268 Diario La Nación, March 8, 2015. <http://www.lanacion.com.py/2015/03/08/la-decision-que-provenga-va-a-ser-una-decision-politica-eso-es-en-todas-partes/>

269 DIARIO ABC COLOR, October 1, 2014. <http://www.abc.com.py/edicion-impresa/judiciales-y-policiales/se-aplazo-14-veces-en-la-facultad-pero-ayer-la-corte-la-nombro-jeza-1291203.html>

270 http://www.pj.gov.py/book/plan_estrategico/2016-2020/pj.html

The concern with celerity in cases before the Judiciary

The first Supreme Court appointed in 1995 focused on quickly resolving emblematic cases. However, delays currently persist. It is important to note that complaints involving emblematic cases are being processed. For example, the Bower case, which involves torture,²⁷¹ has been in the system for 17 years. Many cases of corruption involving senators and members of Congress are stalled at various stages, which contributes to discrediting justice administration.

A concern beyond borders

In 2017, the Inter-American Human Rights Courts held a public hearing to analyze the independence of the Judiciary in Paraguay. A resolution regarding the topic is expected to be issued soon.²⁷²

H. RELATIONSHIPS WITH OTHER BRANCHES OF GOVERNMENT

Beyond protocol-related visits and acts, it is important to highlight the Judiciary's role as an agency that settles disputes. Disputes from the political sphere have significantly increased in recent years, which has led to the jurisdictionalization of numerous decisions including the procedure for the amendment/reform of the Constitution and allowing reelection, the validity of parliamentary sessions, changes to the Board of Directors in the Chambers of Congress and the appointment of representatives to various agencies.

Relationships between judicial agencies and other government agencies

Representatives of the Supreme Court form part of the Judicial Council and Magistrates' Trial Council.

On the other hand, the Judiciary members participate in meetings connected to criminal justice system reform, justice for children and adolescents and the judicial system in general. It is important to mention that according to the report of the Office of the Comptroller General of the

271 DIARIO LA NACIÓN: Corte cajonea caso Bower denuncia Abogado, November 1, 2017. <http://www.lanacion.com.py/judiciales/2017/11/01/corte-cajonea-caso-bower-denuncia-abogado/>

272 CIDH culmina 165 Período ordinario de sesiones en Uruguay. October 27, 2017. <http://www.oas.org/es/cidh/prensa/comunicados/2017/168.asp>

Republic, the entity took part in the 2015 Judicial Expo during Judicial Integrity Week.²⁷³

Judiciary participation in bills

According to data obtained from the Legislative Information Service (SIL-PY), the Supreme Court submits bills to Congress.

Dissemination of recordings. Opening of criminal investigation paths for traffic of influences and illicit enrichment

In November 2017, ABC Color journalist Mabel Renhfeldt disseminated a series of conversations among judges, prosecutors, attorneys and members of the Trial Jury and Chambers of Congress highlighting the existence of a mafia that manipulated files and engaged in trafficking influence. A criminal case was opened and former officials from the Magistrates' Trial Jury were charged. An investigation also was opened to explore the possibility that there had been illicit enrichment when it was found that the assets of some officials did not align with their income.

This also led to a reaction in civil society.

Electronic case files

We cannot end this report without mentioning the Judiciary initiative to implement new technologies in the judicial sphere. The electronic case file allows users and attorneys to have proceedings.

The process began with the presentation of cases and computer sorting for distribution in various jurisdictions, but the civil and commercial areas implemented pilot courts²⁷⁴ and an appeals court that works exclusively in this area.

In February 2018, the decision was made to allow civil and commercial filings to be completed exclusively using electronic media based on Law 4017/2010 and Agreement 1107/2016. Publications have been released to help users and officials understand the new system.²⁷⁵

273 Memoria Anual 2015, Contraloría General de la República, p. 77.

274 DIARIO ABC COLOR: Comienza la implementación del expediente electrónico. October 10, 2016 <http://www.abc.com.py/edicion-impresa/judiciales-y-policiales/comienza-la-implementacion-del-expediente-electronico-1526462.html>

275 Manual sobre utilización del expediente electrónico. <http://www.pj.gov.py/descargas/>

While there are questions and complaints about its implementation, it is important to recognize that progress has been made.

CONCLUSION. RECOMMENDATIONS

Paraguay's judiciary has constitutional and legal regulations that establish its independence from other branches of government.

Progress has been made within the Judiciary, but lacks, criticisms and questions about independence remain, particularly in regard to delays.

The role of the Supreme Court as the head of the Judiciary, custodian of the Constitution and the body responsible for following and enforcing it is frequently linked to the system's failures, and there are periodically discussions about replacing the justices. Four vacancies are anticipated in the upcoming period.

In regard to the possibility of constitutional reform, the system used to appoint magistrates and their tenure should be considered along with the tenure of Supreme Court justices, which was decided by the justices themselves. An important topic that goes beyond potentially increasing the number of members and the organization of the Court is whether or not it should continue to be responsible for judicial management or if another agency will be created or granted jurisdiction over that work.

In order to improve service in the area of justice, we offer the following recommendations:

A. Access to public information

- 1) Report on the observance of Agreement 709/2015, which regulates the period of admission for actions of unconstitutionality.
- 2) Improvement of the judicial management system through the procurement of data on the number of cases managed by judges, the start and end dates of procedures and the date the sentences are issued. This is important in the area of youth justice, where the results of the work must be published based on the audit carried out in 2017.

- 3) Publication of reports on complaints made regarding judges including the date of the complaint, the proceedings and resolution and in both cases the reasons for any delays.

B. Management of judicial government

- 1) Report on the process of appointing Supreme Court Chamber members if members are removed by judges from other chambers or members of the Appeals Courts. This should include the timeline for appointing magistrates and the mechanism used to carry out the selection process.
- 2) Publication of reports submitted by judges in fulfillment of Article 197 of the COJ.
- 3) Improvement of auditing system and ethics court data.
- 4) Equal treatment: how quickly requests submitted by private parties are addressed compared to the speed with which cases that impact Supreme Court justices are resolved.
- 5) Rapid resolution of cases of national importance.

ACKNOWLEDGMENTS

We had the opportunity to interview representatives of various offices over the course of this research project, and we are especially grateful to:

- 1) Marco Antonio Elizeche, Treasury Director of the Finance Ministry
- 2) Dr. Mario Elizeche, Judiciary Auditing
- 3) Dr. Rafael Monzón, Superintendent General of Justice and Dr. Luz Rossana Bogarín, Area Coordinator
- 4) René Ojeda, Department Coordination Office
- 5) Dr. Gabriela Gill Ríos, Director of the Judicial Ethics Office
- 6) Rubén Ayala, Director General of Administration and Finance

We are also grateful to Dr. María Victoria Rivas of Centro de Estudios Judiciales, Dr. Leonel González and Dr. Alberto Binder for their suggestions.

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SECTION 3. COMPARATIVE ANALYSIS AND GUIDELINES

*Leonel González Postigo*²⁷⁶

1. Comparative analysis: Main findings of the country reports

1. A. Government management. Policy and strategic management

1. We define *government management* as the oversight, planning and setting of general Judiciary policies in order to preserve judges' independence. Specifically, we are referring to the structure of government, the way decisions are made, actions taken to defend independence, planning and strategic intervention of the Judiciary and identifying and monitoring objectives.

2. The analysis of the country reports shows that there are various formats. In Chile, government powers are mainly held by the 21 Supreme Court justices, who meet at least once a week to discuss matters related to judicial government. In 2006, a space within the Judiciary was created to facilitate the work of the full Court. It was restructured in 2008, 2009 and 2010. The most recent adjustment was made in 2014, when the Court focused committees' work in three areas: modernization, communications and people. It also established a Technical Secretariat coordinated by the Supreme Court Research Directorate to support the committees and the Court. The main judicial government instrument that the Court has is the authority to issue acts that are generally regulated by the Constitution and Court Statutes Code. Over the past few years, the use of this mechanism has generated resistance in two areas. The first was the Court's intervention in the implementation of family justice and the creation of the Protective Measures Center and the regulation of the management and administration of the family courts. The second involved dispositions on

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personnel and disciplinary matters, which led the National Magistrates' Association to support three associates in claiming that this was unconstitutional before the Constitutional Court in 2016.

3. In regard to the productivity of Chile's Supreme Court in areas related to government, it is necessary to analyze the measures that have recently been issued. Between January and September 2017, 82% of the goals were related to appointments; 6% were condolences and invitations; 2% were not found; and only the remaining 10% dealt with issues related to government. They included "the distribution of cases and use of chambers, the establishment of management measures or sanctions for failure to comply with them, the formation of Court committees, permission granted to the directors of Associations and setting amounts. Only two of the measures taken during the period address issues of general importance: one on digital case processing and one on administrative management of the courts." These data show a weak level of concern for government in the court. However, in 2014, the Supreme Court issued a decision for the first time that opened up the possibility that it might leave aside its judicial government powers. Specifically, two very important decisions were reached. One was that the Court would exclusively exercise jurisdictional functions and the other was that government powers would be assigned to a Judiciary agency composed of representatives of all of its levels. These measures have not yet taken effect even though there is a 2015-2020 Strategic Plan that states that one of the objectives is "to work towards decentralized judicial government with statutory and financial autonomy."

4. In Guatemala, the government of the Judiciary is the exclusive responsibility of the Supreme Court, which has 13 justices. The Organic Law for the Judiciary states that the Chief Justice is responsible for the most important tasks and that minor tasks are managed by the plenary of the Court. The justices are replaced every five years and a new President of the Judiciary is elected annually, which makes it difficult to execute and monitor institutional programs. However, there is no evaluation of the impact of decisions on judicial government and there is no unit responsible for evaluating the institution's policies.

5. In the case of Colombia, the government agency is the Superior Judicial Council, which is composed of people who work exclusively in that role. The agency manages elections, oversight, regulations, administrative tasks and conflicts over jurisdiction. It has two chambers (administrative and disciplinary) and one shared space: the Plenary Council. It also operates an Interinstitutional Commission of the Judiciary as the highest coordinating body among all of the sectors that comprise it. At the regional level,

there are sectional councils that are also divided into administrative and disciplinary chambers. In regard to the function of the Council in defense of judicial Independence vis-a-vis external intrusions, the country report states that "it has been precarious for several reasons, particularly the disconnect between first instance judges and the high courts, who do not see them as representatives of their interests and see their role as lacking importance. This is manifested in the absence of internal studies that would assess the current state of judicial independence and the lack of implementation of measures to defend and protect against this sort of attacks." This has meant that the judges themselves or judicial associations head up the defense of judicial independence through statements or the press. In regard to the reality within the Judiciary, there is a perception that impacts on internal judicial Independence have increased. Proof of this is that 44% of judges' positions are provisional (which means that they have been appointed but have not completed a competition based on merit) because of the delays for hiring processes within the Judiciary. There is also a weak understanding of accountability because it is limited to the presentation of an annual report to Congress. While members of Congress can be invited to learn about the management of the Judiciary, this almost never happens. Finally, in regard to the strategic positioning of the Council, it is important to mention that it rarely uses its constitutional power to submit bills to Congress in areas under its purview, which demonstrates a weak capacity to develop policy with other judicial or executive entities.

6. In 2015, a substantial reform was undertaken in the government and administration of the Judiciary in Colombia because Legislative Act 02 dissolved the Superior Judicial Council and created two different agencies within the Judiciary. One was the Judicial Government Council (comprised of the chief justices of the Supreme Court, State Council and Constitutional Court; a representative of the judges and magistrates elected by them; a representative of employees elected by them; three permanent full-time members elected by the five aforementioned members with experience in design, evaluation or monitoring of public policies, management models or public administration; and the Judiciary manager, who is elected by the eight aforementioned members) for government and administration functions. The other is the Judicial Discipline Commission (composed of seven people elected by Congress, three from candidate lists provided by the President and four by the Judicial Government Council) as the agency responsible for disciplining judges and employees. However, as the country report states, "The Legislative Act stated that the Administrative and Disciplinary Chambers would continue to fulfill their roles until the members of the new agencies had been

elected and installed. In the case of the Judicial Government Council, this never occurred because the Constitutional Court stated that it was unconstitutional before the Judiciary Manager was selected, which meant that the Administrative Chamber was to remain in place.” The implementation of the Judicial Discipline Commission also has been halted because “no progress can be made on elections (which are the responsibility of the Government Council) and the vacancies that have been left in the Disciplinary Chamber cannot be filled because another agency has been forced to use some of the magistrates while others have already fulfilled their constitutional period.”

7. In Argentina’s national justice system, judicial government mainly falls to the Supreme Court. Over the past few years, the Court has implemented programs focused on specific areas. For example, it has promoted measures for improving transparency standards such as requiring the courts to report all resolutions to the Judicial Information Center, issuing a protocol for recoding sentences and creating a Secretariat for Communication and Open Government. In any case, as the country report notes, “these government policies are not implemented on the basis of institutional plans.” The Court also has made judicial government decisions through the creation of specific offices, providing them with human and material resources, as is the case of the Domestic Violence Office.

8. In Paraguay, the management of Judiciary government is exclusive to the Supreme Court, and the main mechanism is the issuing of agreements. Plenary meetings among all of the justices are held weekly. While the agenda does not include the issues to be addressed at each meeting, the decisions that are considered to be most important are published at the end. The country report states that “we are not aware of impact studies on the decisions or assessments of the magistrates’ performance.” Although there is a Judicial Council, its role is limited to proposing lists of candidates for the Court and lower judges. In 2012, the Supreme Court approved a Good Governance Code for the Judiciary that is currently being assessed by the General Internal Audit Directorate of the Supreme Court. The report states that cases of defense of judicial Independence are generally reported through public statements issued by the Association of Magistrates and Judges of Paraguay.

1. B. Administrative oversight. General management policies.

1. We define *administrative oversight* as the work of setting and overseeing general administrative policies that must be carried out by government agencies. Specifically, we are referring to the creation and use of

information systems, judiciary infrastructure, court design and management, and oversight mechanisms.

2. In Chile, the administration of Judiciary resources has been handled by the Administrative Corporation of the Judiciary since 1990. This unit reports to the Supreme Court and is directed by a Superior Council led by the Chief Justice and comprised of four justices. The Corporation also has a Director, Assistant Director, department chiefs, a comptroller and a staff, all of whom are appointed at the discretion of the Court and can be removed whenever it deems necessary. The Corporation has played a key role in the monitoring of judicial office models. In fact, the country report states that the administrators generated “a sort of matrix structure in which they report to the Corporation and the judge who is the President of the Judges’ Committee.” However, “there is a perception among judges that the significant progress made in the management of reformed courts... has been achieved by subordinating jurisdictional goals to management goals and indicators in an unacceptable manner.”

3. The Guatemala report states that Judicial Branch administration mainly falls to the Supreme Court Chief Justice, who relies on various units to perform this work. The most important of these is the General Management of the Judicial Branch, the Manager of which is appointed by the Chief Justice. His or her role is to serve as a link between the unit and administrative offices and to direct institutional administrative policy. In order to carry out this mission, the General Management oversees the Human Resources, Finance, Administrative, Technology and Telecommunications Center and regional coordination offices. In addition, 22 administrative agencies with specific tasks have been created that report directly to the Chief Justice.

4. In Guatemala, the concentration of administrative functions in the Chief Justice has caused various problems. We will mention two of them. First, it has generated “a culture of verticality and subordination that threatens the independence of judges’ criteria.” Also, the high volume of administrative tasks has caused them to be the focus of the Chief Justice’s work, forcing him or her to leave aside measures or decisions regarding the strategic leadership of the Judiciary. Assessments of administrative performance are not conducted, though the Comptroller General’s Office conducts an annual audit that is mainly focused on the quality of spending.

5. In Colombia, the Administrative Chamber of the Superior Judicial Council is responsible for “the administration of the judicial career, oversight of performance and management of judicial offices, the development and promotion of training programs, and administrative oversight of offices in

order to achieve efficiency and timely provision of justice services and strengthen judges' qualifications, among other responsibilities." The main level is composed of six magistrates and seven technical units that report to the Chamber. In regard to operations, there is an Executive Directorate of Judicial Administration whose director must be a professional specializing in the economic, financial or administrative sciences and who holds the position for four years.

6. In regard to the existence of information systems, the local report from Colombia states that "a system that facilitates internal management, statistics production and interaction with users has not been implemented. A strategic technology plan was developed in 2012, but it has not been implemented." This suggests that there are currently various systems that do not talk to each other and lack national coverage. In regard to the Judiciary infrastructure, various Judicial Branch offices are rented, which makes it difficult to invest in improvements. Furthermore, the majority of the offices do not have adequate conditions for employees' work or customer service. On the other hand, the Administrative Chamber's work also has been problematic in regard to management of judicial offices. In this regard, the report states that "There has been shielding against organizational reforms, especially when they involve removing personnel from judicial offices, such as implementing shared administrative support offices." For example, when the Council decided to implement judicial services in the context of the entry into force of the General Procedure Code, a strike was held that ended with the suspension of the measure. In regard to the profile of Administrative Chamber magistrates, the report emphasizes that "it is more similar to a judicial office than to a government and administration agency," given that all of its members must meet the same requirements set for a magistrate on the High Court, that is, a law degree (leaving aside other areas related to public policy). The report author adds, "the individuals who have been selected over the course of the Council's 25 years have mainly come from positions linked to the exercise of jurisdictional functions in the Judicial Branch," which demonstrates that their expertise does not come from the field of administration. Finally, in regard to the daily work load of the Chamber, the report states that "rather than focusing on general policy matters related to the justice system, the agency invests a significant amount of time in electoral, operations and micro-management matters," that is, on day-to-day issues that do not necessarily involve strategic planning.

7. In Argentina, the administrative management of the National Judiciary is the responsibility of the Judicial Council, which has 13 members from diverse backgrounds (judges, legislators –members of Congress and senators-, attorneys, a representative of the National Executive Branch and

a scholar). The composition of the Council has been one of the most broadly discussed areas over the past few years. In fact, in 2013 a law was passed to expand the number of council members (diluting the representation that the three branches of government had had, slightly increasing the proportion of attorneys and significantly increasing the proportion of academics and scientists). The selection process was also changed (council members who are members of the Judiciary, attorneys and academics would be selected through popular elections). However, that same year the Supreme Court declared the law unconstitutional.

8. The main functions of the Argentinean Council are: to appoint the new members of the Judiciary and establish mechanisms for evaluating candidates; to guarantee ongoing training for members of the Judiciary; to establish a system of substitutes; to issue the rules for administrative agencies and audits; to observe budgetary planning; and to regulate the discipline process for members of the Judiciary. The Commission has four areas: administration and finance, discipline, selection of magistrates and judicial academy, and regulations. In regard to its practical work, the Council does not have a concrete initiative for producing statistics on the work of the Judiciary. In its national report, it states that “while it is true that Law 24.937 establishes that the Office of Administration and Finance of the Council will be responsible for recording statistical and informatics data, among many other things, this is a section of a delegation that mainly has broad budgetary functions. There is no agency within the judicial government structure that focuses exclusively on the collection and analysis of statistical data by employing experts in the field.” (Our translation.) In addition, the Statistics Office created by the Supreme Court in 1991 has not published statistics since 2012 (and the data published prior to that date are of very low quality). Finally, in regard to the plenary sessions and Council commissions, there is no evidence of a strategic plan, but only formal and administrative work.

9. In the case of Paraguay, administrative management of the Judiciary is handled by the Supreme Court Administrative Council, which was created in 2015. The Council is responsible for “planning, organizing, directing, coordinating, supervising and overseeing the Judicial Branch’s administrative activities.” It is comprised of the Supreme Court Chief Justice, one Supreme Court justice, one legal advising member, one finance and administration member and one member who is responsible for management auditing and oversight. These functions were decentralized in 2016 when the Presidents and members of judicial districts were appointed, “who have the authority to grant permits, apply minor sanctions, adopt and manage the district budget and purchase supplies at the local level.”

1. C. Budgeting: Design, execution and oversight

1. We define *budgeting* as the process of developing, approving, executing, reassigning items and overseeing the Judiciary budget. Various institutions from the Executive Branch, Parliament and entities external to the Judiciary are involved in this process.

2. The Chile report states that “there is no minimum budget guaranteed by the Judicial Branch, so it must be negotiated annually, first with the Ministry of Finance so that it is included in its requests as part of the General National Budget and then before Parliament for approval.” The budget is developed by the Judiciary Administrative Corporation based on a methodology agreed upon with the Ministry of Finance. Financial management is the responsibility of the Judicial Branch Administrative Corporation. If the full Supreme Court approves a measure that involves budgetary spending, it must be reported to the Corporation’s Superior Council so that it can determine whether or not there are economic resources available to execute it. In regard to the composition of spending, the majority of it goes to staffing, though judicial investment has significantly increased in recent years (associated with new infrastructure for the courts, such as family courts).

3. The Guatemala country report states that “the Judicial Branch develops the budget proposal, which is submitted to the Ministry of Public Finance in May. This entity incorporates it into the proposal for the General Budget of Income and Expenditures, which the Executive Branch submits to Congress.” The Judicial Branch’s budget is mainly composed of contributions from the central government, as a very limited portion comes from the institution itself. Budgetary execution is managed exclusively through the Supreme Court. Accounting for financial management is quite deficient because the supervision provided by the Court through the Chief Justice and Congress does not include an audit of the funds that are sent to the Judiciary. The Comptroller General’s Office supervises the accounts of the Judicial Branch in Guatemala.

4. In Colombia, the Superior Judicial Council’s Administrative Chamber has a dual role in regard to the budget. The development of the bill and investment plan (planning) is the first and the second is approval of cooperation agreements, investment projects and contracts (approval). The Executive Director of Judicial Management is responsible for executing resources. One of the main problems identified is the low level of budgetary execution in the Judiciary due to delayed release of funds by the Executive Branch and delays approving investment projects and contracts

in the Administrative Chamber. This has led to delays in the implementation of hearing rooms and information systems.

5. In Argentina, the Supreme Court has the authority to set pay for Judiciary officials and to restructure the general budget. There are two similar figures in the Court and council for budgetary administration. One is the Supreme Court's Director General of Administration, who is appointed by that body, and one is the Judiciary's General Manager, who is appointed by the Judicial Council. The latter official is responsible for drafting the annual budget for the Judiciary and its execution once it is approved by Congress.

6. In Paraguay, the Judiciary has a limited impact on budgetary management because the Ministry of Finance is responsible for proposing the bill, which is submitted to Congress for final approval during the last quarter of the year. Once approved, the funds are not distributed to the Judicial Branch in full at the beginning of the year. Rather, they are gradually disbursed as the resources become available. However, the country report notes that "there are no delays in regard to salaries, which are paid at the end of each month."

1. D. Discipline, ethics and training for judges: Rules and processes

1. In this section, we address the disciplinary powers of government agencies, rules or ethical principles (and, specifically, judges' independence) and training mechanisms in the judiciary. Specifically, we describe the existing rules and current operation of the five countries under study.

2. In Chile, the Judicial Academy was created in 1994 in order to manage the training of judges and Judiciary employees. The local report states that "upper leadership and management corresponds to a Board comprised of the Supreme Court Chief Justice, who chairs the Board, the Minister of Justice, a Supreme Court justice, the legal representative of the Court, a judge from a Court of Appeal selected by members of the second category of the first tier of the Judicial Branch, a member from that same category elected by the professional organization that represents them, a representative of the bar association and two academics appointed by the President and confirmed by the Senate." However, the Minister of Justice does not currently participate in the sessions of this Board, which means that the Supreme Court holds practical control over the Judicial Academy, as if it were an internal agency. In 2014, the Court ruled that the Academy was to function as a technical secretariat under its purview.

3. The Chilean case presents various issues with disciplinary control. First, the typification of conducts is extremely vague, which allows for the discretionary application of sanctions by the Supreme Court or Courts of Appeal. Second, while an act containing a section on principles of judicial ethics was issued in 2007, these are very abstract and differ a great deal from the Code of Judicial Ethics. Third, there are various paths to supervising judges. Finally, disciplinary procedure is handled in writing and seriously impacts guarantees of due process. The report states that “there is no agency specifically responsible for investigation or adequate separation between those functions and the work of discipline and there are multiple restrictions on the exercise of the right to defense: the charges are generic, the information is limited, and there is no specifically adversarial space for discussing the evidence.” However, between 2015 and 2016, the majority of the sanctions imposed on judges were light (one judge was suspended twice, another was fined and the remaining judges received private reprimands or written censure). Chile’s National Magistrates’ Association created the figure of “professional protection” to react to cases in which superiors (especially in the Courts of Appeal) use their power in a manner that impacts judges’ independence.

4. In Guatemala, the disciplinary system was concentrated in the Supreme Court until 1999, when the Judicial Career Law was passed. It was later reformed in 2016. At this point, disciplinary authority was held by Judicial Discipline Boards, which hear cases (qualified as minor, serious and grave) committed by judges and magistrates. These boards are “permanent collegiate agencies with three full members and three alternate collegiate attorneys with experience in the judiciary elected through a public competition by the Judicial Career Council.” According to the local report, “due to the fact that the great majority of complaints filed with the Judiciary disciplinary system are archived or dismissed (97%), the system has not developed enough cases or case law regarding the use of disciplinary measures as a mechanism for violating judicial Independence.” The Association of Guatemalan Judges for Integrity have stated that “the disciplinary system has sometimes been used as a mechanism for pressuring independent judges. Although the Judicial Career Law states that the supervision of courts is to be handled by the Judicial Career Council, it has not been fully staffed, which means that supervision continues to fall to the Court.” In 2001, a Code of Ethics for Judicial Branch employees was approved, but it only sets out general guidelines.

5. In Colombia, the Superior Judicial Council Disciplinary Chamber has four main functions: to examine, conduct and punish disciplinary infractions by judicial officials and those who temporarily exercise jurisdictional functions; to exercise disciplinary authority over attorneys; to resolve

conflicts of jurisdiction; and to make decisions regarding protective actions. In regard to its practical role, historical statistics show that approximately 50% of the complaints result in acquittal or filing. Only 9% of cases in which a disciplinary infraction was found to have occurred resulted in the judge's removal. According to the local report, "this does not align with the perception of litigants and academics on judges' failure to fulfill their duties, especially in the current context, in which allegations of corruption have come to light involving hundreds of judges and magistrates from different regions of the country."

6. The national report on Colombia has a critical perspective on training of judges, particularly in regard to the performance of the Judicial Academy. The author states that "since the end of the 1990s, the Judicial Academy has been recognized nationally and internationally for its publications, training programs, implementation of virtual media and trainer's networks. However, there is currently no institutional ability to guarantee adequate terrestrial and thematic coverage or the development that judges require, which has led some to seek out the paid or free training that they need in order to stay up to date on their own." One of the possible causes is the lack of budget and tools for assessing training needs or identifying which trainers are Judicial Branch employees.

7. In Argentina, the National Judicial Council Commission on Discipline is responsible for disciplinary oversight, and it presents several problems. First, there is a very general regulation on the causes that merit the removal of a magistrate (for example, "poor performance" of their duties, the abstract nature of which allows for discretionary use of the regulation). Furthermore, there are no specific rules of judicial ethics that guide the work of judges or serve to provide parameters for judicial performance. Third, in the removal proceedings, "the requirements for accusation that the Commission on Discipline has in place are secret, and the only information that is provided to the members are the names of the accused and the complainants and some details on the status of the process." Finally, in regard to the role of judicial associations in the disciplinary process, "the group is not well-represented during the process of submitting an accusation against a specific magistrate."

8. In Paraguay, the Superintendence Council, which reports to the Supreme Court, exercises disciplinary and supervisory powers. It is one of the agencies that comprises a Disciplinary Office and Judicial Ethics Council. In regard to the latter, it is important to note that "the Judicial Branch adopted a Code of Judicial Ethics for magistrates in order to advise them on the exercise of their authority and receive complaints in order to judge acts that go against the moral rules that magistrates must follow."

There are currently two ethics tribunals, one for officials and one for magistrates. The number of complaints that have been filed have not been released even though this information is supposed to be public. Finally, several problems have been identified in the disciplinary regime of the Judiciary, which was issued in 2011 and modified in 2015. In regard to the exercise of the profession, there is a very abstract regulation regarding offenses that attorneys might commit (for example, “including more than three incidents in a single final, including recusal, that have been rejected with costs”), which makes it difficult to clearly identify the conducts that would be subject to sanction.

1. E. Judicial career: Impacts on judges’ independence

1. While we understand that the system of electing judges is not a problem that is unique to the government of the Judiciary, it could be to the degree that the design and functioning of the career impact judicial independence. In this section, we will mention the issue of electing judges in regard to the conflicts that exist in the connection between judicial career and judicial independence.

2. Chile is one of the countries that has the most significant problems with the organization of the judicial career because its structure is highly vertical. According to the local report, the system “enormously strengthens the power of superiors to determine whether their supervisees receive promotions, which are awarded through the annual review and their participation in the development of candidate lists for appointments, which is done without considering the disciplinary authority that they hold over them. They also exercise this authority informally through jurisdictional work, which is certainly the most important issue for judicial Independence.” The main problem is related to judges’ evaluations, which led the National Magistrates’ Association to request that the Inter-American Human Rights Court eliminate them in 2017. The report that was filed states that the evaluations “involve having superiors assign a grade of between 1 and 7 to all judges and officials in their jurisdiction. The most important consequences are that those who receive outstanding grades have the right to opt for promotions before others. Those who receive low grades or ‘conditional’ evaluations for the second consecutive year must be removed from their positions.” This system clearly impacts judges’ work (internal independence) due to the discretionary exercise of power by their superiors through annual evaluations.

3. As we have mentioned, Guatemala undertook a structural reform of its appointment system for judges in 2006 based on the passage of the Judicial Career Law. It established that the Judicial Career Council (composed of judges, a representative of the Court, an expert in human resources, an expert in public administration and an expert in adult education) would be responsible for all of the functions that the Supreme Court had held regarding appointments, raises and discipline of judges and magistrates through the Judicial Studies School and Career system. The judges' associations have stated that this impacted the judicial career because competitions for serving as Appeals Magistrate fail to provide any advantage for judges who are competing against attorneys in private practice.

4. In Paraguay, the Supreme Court has the constitutional authority to appoint appeals court judges, first instance judges, prosecutorial agents, public defenders, bankruptcy receivers, peace judges and all Judiciary officials. In the country report, the author notes that "there is no competitive mechanism for selecting officials (other than magistrates) for merit-based raises. The decisions are made by the Supreme Court judges and we have received information regarding cases in which merit competitions have been held that were not completed."

2. The work plan: Guidelines for a discussion of judicial government

The discussion regarding judicial reform is not new in the region. However, as we have seen, very profound changes have taken place over the past few decades in the structures and dynamics of the operation of judiciaries in Latin America. In view of this, and based on the local experiences that we have addressed, in this final section we present a set of ideas and possible guidelines for expanding the discussion and promoting changes.

- A. Government management.** There is still confusion within the work of Supreme Courts or Judicial Councils in regard to judicial, administrative and government functions. This has resulted in weak planning and strategic intervention of the Judiciary, which is reflected in the marginal role that it has given the work of governance. The cases of Chile (where only 10% of the decisions made by the full Court address issues related to the government of the institution) and Colombia (where the Superior Judicial Council makes limited use of its constitutional authority to submit bills to Congress in areas under its purview) are examples of this. It is thus necessary to clarify that the function of government should be separated from jurisdictional and administrative work and be exercised exclusively and in an effort to protect judges' independence

and establish policies for managing the Judiciary. In regard to the latter, the country reports reveal that government agencies do little to defend independence or promote policies to strengthen it. For example, 44% of judgeships in Colombia are provisional and there is a separation between the high courts and first instance court judges, who do not view the former as representing their interests. On the other hand, the function of government falls mainly to the Supreme Courts. (In some cases, like that of Guatemala, it falls exclusively to the Supreme Court Chief Justice while in others, like that of Chile, it falls to the full Court.) This means that this work is concentrated in a single tier of the Judiciary. The selection of the judge who will preside over the Supreme Court or Judiciary tends to be handled through a voting process among all of the members of the Court. This democratic process could be expanded to include all judges who form part of the Judiciary as both candidates and individuals who can select their representative. This dynamic would recognize the current politicization of the institution and would allow the person elected to hold a great deal of legitimacy among his or her peers with the understanding that their main role would be to protect their independence. Finally, it is interesting to note the limited participation of judges in issues of government and the fact that they do not tend to be formally informed and consulted, with such action only taking place through informal networks. As such, they have become passive subjects of the government and administration. It is thus necessary to rethink the participation and selection of the person who leads the judicial government agency.

- B. The role of the Supreme Courts.** In addition to noting the importance of ensuring that the functions of judicial government are independent and assigning them to an agency or representative who is exclusively dedicated to that work, it is necessary to discuss the role that the Supreme Courts should play. While it has not been the main focus of this study, it is interesting to note that these entities must exclusively undertake jurisdictional functions and must do so under a logic of building criteria that make the demand for legal security operational, which generally has been posed as an abstract mantra lacking content and specific tasks. We are referring to the creation of judicial precedents as occurs in the tradition of Anglo-Saxon countries. While it has been argued that this practice is not consistent with the logic of the legal systems adopted in Latin America, this is currently the way that these systems operate *de facto* because the case law that Superior Courts issue

tends to guide and condition the work of all of the courts. Based on this, we understand that the system of precedents constitutes a tool for professionalizing the work of the Supreme Courts such that they focus on the resolution of a limited number of cases and creation of objective standards that guide jurisdictional action.

- C. Administration of the Judiciary.** The local reports describe three administration models. The first includes a specific agency that reports to the Supreme Court (such as Chile's Judiciary Administrative Corporation and Paraguay's Supreme Court Administrative Council). The second, in which the Court retains exclusive oversight of the administrative function but enjoys the support of specialized agencies, is seen in countries such as Guatemala. In the third model, the Judicial Councils handle this task (such as the Administrative Chamber of Colombia's Superior Judicial Council and the Administrative and Financial Commission of Argentina's Judicial Council, although there is a General Administrative Director in the Supreme Court). In any case, it is important to underscore the importance of releasing the Supreme Courts from any administrative function because it falls outside of their sphere of expertise and purview and also takes up a great deal of their time, as reported in the case of Guatemala. The dimension that involves general planning policies should be consistent with the measures that are adopted by government agencies. Decisions will be made at this level regarding the institution's goals, the courts' organizational structure, the design of judicial offices and investment plans, among other issues. In this case, it would be best to have a small, specialized office that reports directly to the person who directs the government agency. There is also the dimension that involves daily administrative policy, and the main task of this office will be to execute the decisions made at the level. It could work through various specialized offices separated by area and would report to the general administrative body. In both cases, its members should have expertise in the field of administration (in contrast to that which currently occurs in the Administrative Chamber of Colombia's Superior Judicial Council, where the members meet the same requirements set for a magistrate on the High Court, that is, they must be attorneys).
- D. Statistical information and budgetary execution.** In general, the reports identify an absence of regular policies regarding the production of high quality statistical information. One example of this is the cases of Colombia (a strategic plan for technology was developed in 2012 but has not been implemented, so there are

various systems that do not communicate with one another and a lack of national coverage) and Argentina (while the Council's Administration and Finance Commission is responsible for recording judicial statistics and data, there is no unit that can be consulted with for information; for its part, the Supreme Court Statistics Office has not published statistical data since 2012, and the data from before that date is over very low quality). Government and administrative functions both require updated, high quality data in order to make decisions as well as political oversight of their work. At the level of general planning policy, the administrative agency should implement a program for gathering, processing and publishing statistics for the internal use of the judiciary as well as external use. In regard to budgetary execution, various problems have been observed including low execution of the budget due to late releases by the Executive Branch and delays in investment project and contract approvals (Colombia), duplication of roles in administrative management between the Judicial Council and Supreme Court (Argentina) and the gradual disbursement of the Budget as funds become available (Paraguay). In regard to budgetary management, a specialized office should be created that would operate under parameters set by government and administration agencies and subject to their oversight and external audits. The creation of the Budget should be guaranteed and submitted in its totality so that the financial agency can anticipate and execute its work plan.

- E. Disciplinary role.** There are two major discussions regarding this issue. One is related to regulation of the causes that motivate the initiation of a disciplinary process. In Chile, the way in which conducts are typified is very vague, which facilitates the discretionary application of sanctions by the Supreme Court or courts of appeal. Argentina also has generic regulations, the main cause of which is "poor performance" of duties, which also allows for capricious interpretation. The other discussion is related to the way in which the disciplinary process is substantiated. In Chile, the procedure is written, there is no separation between the investigative and disciplinary roles, and there is no adversarial space for substantiating the occurrence of the infraction. For its part, in Argentina the proceedings are held through secret files. While Guatemala undertook a substantial reform of the disciplinary system in 2016, there is not yet enough evidence to provide an analysis. In any case, there is a need to rethink the disciplinary function under certain characteristics. First, there should be a specific autonomous disciplinary agency with a mixed staff in order

to ensure that it is not used as a tool to pressure judges. Second, the procedure should respect the standards of due process, which means holding public hearings with a clear division between the work of investigation and accusation and with an opportunity for the accused to fully exercise his or her right to a defense. Third, there should be concrete, objective conducts that are punishable. To that end, the existing rules on judicial ethics should be oriented towards the specific standards and conducts of judicial performance that guide the daily work of judges and serve to substantiate disciplinary processes instead of broadly summarized causal elements. (In cases like Chile and Guatemala, the generic guidelines that exist should be strengthened. Paraguay and other countries should continue to use the Code of Ethics.)

- F. Judicial career and independence.** It has been determined that the systems used to elect judges have impacted judicial independence in cases like Chile (due to the vertical organization of the judicial career, annual rankings made by superiors and the power to create candidate lists) and Paraguay (where the Supreme Court holds the judicial appointment functions). As we have stated, the main function of judicial government lies in protecting judges' independence. As such, these aspects of the judicial career are related to the role that government agencies should have in the process of selecting judges. It would be best to separate Supreme Courts from the judicial career in order to avoid intrusions. One model that could be considered would involve giving this work to a specific mixed entity (with members from the Judiciary and external experts from, for example, academia) that would handle the call for applications and make decisions through public processes designed to fill vacancies in the Judiciary. In fact, this agency could also assign them disciplinary and performance evaluation roles so that it would be an entity that specializes in appointments and the supervision of judicial work.

This book presents a regional study on the situation of judicial government in Latin America based on the analysis of the realities of Argentina, Chile, Colombia, Guatemala and Paraguay. Each country report was authored by a local expert.

In addition to a proposal for a conceptual discussion of the topic that includes a review of the history of the independence of the Judiciary in Latin America, the methodological guidelines proposed by JSCA for the local studies set out the variables that should frame any research in this area. These are the constitutional and legal frameworks, government management, administrative management, budgetary matters, disciplinary processes that can be applied to judges, the functioning of judicial associations, the participation of judges in judicial governance, the social aspects of the strengthening of the Judiciary and the relationship between the Judiciary and other political powers.

On the basis of all of these elements, the book concludes with a comparative approach that draws on the country reports to highlight the similarities and differences of those realities. More importantly, it identifies the main points that should be addressed by scholars and professionals interested in reaffirming the commitment to democratic, independent and effective jurisdiction.

As this innovative work demonstrates, JSCA's commitment to the reform of Latin American justice systems also involves consolidating the political field of justice, understood in the republican sense of the Judiciary at the service of the people and achieved through respect for the principles of good management and the functional autonomy of judges in order to enforce the law and the constitutions of their respective countries.