



Justice Studies Center of the Americas

INDEPENDENCE OF JUSTICE OPERATORS IN THE AMERICAS

REGIONAL OVERVIEW AND CHALLENGES FOR THE DEFENSE OF DEMOCRACY

OR SIT AMET, CONSECTETUR

JUECES Y FISCALES SON AMENAZADOS DE MUERTE

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JUSTICE STUDIES CENTER OF THE AMERICAS 2023

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*Independence of Justice Operators in the Americas Regional Overview and Challenges
for the Defense of Democracy*
Intellectual Property: 2023-A-6701
ISBN: 978-956-8491-98-7

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Foreword

The Justice Studies Center of the Americas (JSCA) is a specialized international agency that focuses on justice systems in the Americas. It has a strong and longstanding commitment to human rights, the rule of law and democracy. To meet its institutional mandate, JSCA maintains ongoing dialogue with judicial institutions and their operators. In that context, in 2022, our institution organized a broad regional participatory process to formulate the 2022- 2026 Institutional Strategic Plan.¹ During the discussions held for that purpose, JSCA received information from various sources about concerning situations involving risks, threats and events that directly or indirectly impact judicial independence in the Americas.

The Justice Studies Center of the Americas (JSCA) presents this publication, which contains a current overview of the state of the independence of justice operators in the Americas. The study seeks to address two main questions: What is the status of judicial independence from a broad regional perspective? What impacts and risks does the region currently face? In addition to answering these questions, this report proposes a new roadmap for work in this field by justice institutions, civil society and international agencies.

The analysis of judicial independence presented in this study covers the situation of judges, prosecutors, and public defenders. This broad and comprehensive perspective on judicial independence constitutes an initial innovative contribution given that such analyses have tended to focus on judiciaries. For JSCA, it has been important to explore the independence of prosecutors, as it is crucial for them to carry out their work without interference so that they can address crime, violence and corruption in the region.

1 <https://cejamericas.org/plan-estrategico-2022/>

This study also addresses the situation of public defenders, who need mechanisms to guarantee that they can work independently to protect due process and access to justice for at-risk individuals.

This study also provides an empirical or *de facto* perspective on judicial independence. While the report offers a detailed review of concepts, theoretical categorizations and international standards in this field, its main value is the review of the risks, threats and violations documented by reliable sources. Although each country has its own unique features and, as this report indicates, there are sub-realities even within countries, this study offers a regional overview that inspires critical reflection and calls on us to take preventative action to defend the independence of justice operators in democratic systems.

Another contribution of this research is its focus on the situation of personal or individual independence of justice operators, as the traditional perspective focuses solely on institutional independence. Based on this, the authors signal that in addition to the risks, threats and violations that come from agents external to institutions, there are critical situations within the organizational structures of justice and even contexts that combine the interests of internal and external agents. This judicial independence perspective, which focuses on the situation of justice operators without failing to recognize the importance of institutional independence, has been developed by JSCA since its work began in 2002, as we note in this research.

The detailed review of international standards on judicial independence is another important contribution of this research. In this regard, the study highlights the absence of and need to design specific international standards to guarantee the independence of prosecutors. It also reflects the urgent need to develop content to operationalize existing standards and update them based on the problems that justice operators face on a daily level at the practical level as outlined in this report.

The topics and subtopics explored in this study offer a wide range of opportunities to strengthen the prevention of risks and impacts on the independence of justice operators, including measures to ensure their protection and security. The professional pathways of justice operators are a key aspect of the study, and its authors pay special attention to their appointment, selection, confirmation and promotion processes. JSCA notes that there is a need to increase institutional developments and monitoring by civil society to ensure that the aforementioned professional pathway aligns with impartial, technical and merit-based criteria and procedures. The structural discrimination that impacts female judges when it comes to holding positions of power in judicial structures is also part of this challenge.

In this study, JSCA describes the critical situation of judicial independence in the Latin American context and its serious impact on the rule of law and democracy in the countries of the Americas. The Center calls on the international community, States, civil society, and justice institutions themselves to strengthen the mechanisms proposed in this report to guarantee the independence of justice operators. This report ends with a proposed roadmap for the work of justice entities, civil society, and international agencies in an effort to contribute to that process.

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Introduction²

Judicial independence is a key element of the configuration of the rule of law and democratic strengthening (IACHR: 2013, paragraph 30; Inter-American Court of Human Rights, 2022, p. 2; JSCA: Vargas, 2002, p. 34). In that context, judicial independence is a guarantee that allows all people to access due process, a substantial element of the rule of law and modern democratic systems.³

Judicial independence -which has various nuances and differences that are addressed in this study- is an essential requirement for judges' work. Today, independence is also a fundamental need for prosecutors' work. These professionals play a key role in protecting rights, criminal prosecution and due process.⁴ Independence is also necessary for public defenders. Their work directly impacts access to justice for vulnerable members of society.

The evidence shows that after a period of progress in the early years of democratic transition processes, Latin America

2 This JSCA study is based on a working paper written by Mauricio Duce, one of the institution's expert consultants and a Full Professor at the Universidad Diego Portales Law School in Chile.

3 Cecilia Medina has argued that due process is a cornerstone of the human rights system, the guarantee of all human rights, and a *sine qua non* requirement for the existence of the rule of law (Medina: 2018, p. 338, our translation).

4 For the purposes of this work, the term justice operators will be used in the sense developed by the Inter-American Commission on Human Rights. This means that it includes all government officials who intervene in justice systems and perform functions essential for the respect for and guarantee of the rights of protection and due process. We will focus on three categories: judges, prosecutors and public defenders. (IACHR: 2013, paragraph 15). The Justice Studies Center of the Americas believes that judicial system improvement processes must adopt a systematic approach that includes the various stakeholders who participate in them and those who depend on their results. This goes well beyond mere judicial organization. For reasons of viability, this document focuses on judges, prosecutors and public defenders.

face a complex and concerning situation related to democratic strengthening and the independence of justice operators, particularly judges and prosecutors. Various types of evidence analyzed in this publication show that, despite the heterogeneous nature of the reality of each country, there is a clear tendency towards stagnation and setbacks in various indicators of the quality of democracy in the region. This is clearly reflected in the independence of justice operators.

The weakening of democracy and infringements on the independence of justice operators have serious consequences. In regard to the former, the weakening of democratic systems translates into various types of populism, the reemergence of authoritarian-leaning projects and even attempted coups and the open breakdown of democratic institutions. In regard to the independence of justice operators as such, the risks to and impacts on it permeate democracies and weaken justice institutions. These entities must face complex phenomena like corruption and crime, turning them into structures exposed to the interests of powerful economic and political groups or the criminal networks that operate in the region. This in turn leads to increased impunity and limited access to justice for those at risk, and seriously impacts levels of trust in and the legitimacy of the institutional structure and democracy.

In 2022, the Justice Studies Center of the Americas (henceforth JSCA) developed a broad process of listening and dialogue with over 700 key stakeholders of justice systems, civil society and international entities that specialize in justice in Latin America and the Caribbean⁵ in the context of the participatory formulation of its new 2022-2026 Strategic Plan. During those conversations, JSCA heard stakeholders express concern about the growing deterioration of the independence of justice operators in the region.⁶ This led the institution to formulate this

5 www.cejamericas.org

6 It is important to note that JSCA's concern in these areas has been clear since it was created in early 2000. For example, Volume 4, Year 2 of *Judicial Systems Journal*, which was published by the institution in 2002, focused on judicial independence and responsibility. Volume 11, Year 6 (2006) focused partly on the issue of justice and corruption. Both can be accessed through the institution's virtual library. <https://biblioteca.cejamericas.org/>

report, which includes a proposal for a new roadmap that will support the improvement of current levels of justice operator independence in the Americas and, as such, also contributes to improving the rule of law and democracy in the region.

The purpose of this report is to provide a current and precise assessment of the situation in the region in regard to justice system operators' independence and to suggest elements that could be used to build a new roadmap for work in this area. The analysis developed in the following sections shows that available evidence demonstrates that, far from having resolved traditional issues or from having made the necessary changes, justice system operators in the region are in a situation of fragility and are subject to undue influence of different kinds on their daily work. The risks come from problems that have existed for decades as well as new threats that have emerged only recently. As such, despite the enormous concern that has existed in regard to this area over the past few decades, it would seem even more necessary now than before to seek out formulae and alternatives for strengthening justice operators' independence.

This document contains four chapters in addition to this introduction. Chapter I reviews key conceptual matters to outline the scope of the notion of independence for the various justice system operators. Chapter II provides a general assessment of the topic in Latin America based on the systematization of a set of studies and indicators developed at the international level that provide information on the scope and setbacks in democratic systems and the independence of judiciaries. Chapter III complements this analysis by identifying concrete practices in the region that have been subject to challenges, questions or undue influence related to justice operators' independence based on various national and international reports that have been published over the past few years. Finally, Chapter IV offers conclusions and key areas that should be addressed in a new roadmap in order to address the problems that impact the independence of justice operators in the region.

CHAPTER I

CONCEPTUAL ASPECTS RELATED TO THE INDEPENDENCE OF JUSTICE OPERATORS

This chapter presents conceptual aspects related to judicial independence and its application to judges and other justice system operators. These clarifications are useful for focusing the assessment contained in this report and grounding the recommendations of the areas that should be part of the new roadmap that JSCA is proposing for this area. As such, this chapter has three sections that address each type of system operator included in this study: judges, prosecutors and public defenders.

1. Judicial Independence

There are various approaches to and definitions of what judicial independence is and what it represents. Overall, there is a fairly clear and widespread idea of what judicial independence constitutes (Linzer and Straton: 2015, p. 225). Judicial independence tends to be understood as an attribute that requires judges to rule on cases that they hear without undue influence from any stakeholder, whether external or internal to the judiciary. Said ruling should be based on what the judge believes to be the correct application of the law to that specific case.⁷ As such, this attribute is meant to ensure

7 With subtle differences in some cases, the definitions of judicial independence that tend to be developed cover the elements mentioned in the main text. The differences involve the number of elements included. For example, some

that each judge is free from pressure or influence that may prevent them from ruling on the matter before them for reasons other than what they believe to be the correct application of the law. That pressure or influence may come from external stakeholders such as the government or internal stakeholders such as other judges or higher courts. They also may involve undue interference prior to the ruling or threats of negative consequences in cases in which the decision does not align with the interests of the person trying to exercise undue influence, among many other possibilities.⁸

2. Aspects of Judicial Independence

It is possible to identify different levels or aspects of judicial independence that can be useful for arriving at a better understanding of the issue. The first and possibly the most frequently used distinguishes between internal and external independence of judges. This distinction emphasizes the identification of the influences or pressure that judges face from external stakeholders such as the Executive Branch and members of civil society or from the

of them emphasize external undue influence, particularly from other branches of government, especially the Executive Branch (Medina: 2018, p. 366). Taylor states that one way that independence tends to be understood is the freedom of the courts to act in ways that diverge from the preferences of other government agencies and, if necessary, that may even restrict those agencies based on their own interpretation of current constitutional and legal rules (2014, p. 232). Other definitions include non-governmental external stakeholders. For example, Shankar states that judicial independence allows courts to act in manners that have not been issued by political or administrative government agencies or by powerful non-governmental stakeholders (2022, p. 857). The most comprehensive definitions also include influences internal to the system itself (Council of Europe: 2014, p. 16; Taylor: 2022, p. 401). Finally, some notions do not specifically mention the sources of the interference, remaining more generic. For example, the Institutional Commission of Jurists defines judicial independence as the autonomy of a judge or court to issue a ruling in a case by applying the law to the facts (CIJ: 2007, p. 21).

8 Some authors add the idea of autonomy as an aspect of independence, defining it as the judicial system's ability to govern itself, including making decisions about its own structure, promotions and budgetary allocations (Taylor: 2022, p. 401). In other cases, autonomy as seen as an aspect of independence that is meant to ensure compliance with judicial decisions by other branches of government in response to potential conflicts such as a president's refusal to comply with a decision issued by a court.

judicial organization (i.e. hierarchical superiors). This is an important difference because influential studies published in the region tend to emphasize a gaze from the external dimension, leaving aside or creating blind spots with regard to problems deriving from pressure generated at the internal level (Besabé-Serrano: 2013, pp. 240- 242; JSCA: Vargas, 2002, p. 35).

Due to the historical design of judiciaries, including strong hierarchical components in Latin America, the internal dimension has been and continues to be a significant source of impacts on judges' independence that loses visibility when the focus is placed solely on the external dimension of the problem. As discussed later in this publication, external and internal undue influence tends to exist more on a continuum in practice and not as two clearly identifiable poles. Given this, a new roadmap for working in Latin America should pay careful attention to the internal dimension or understand that external interference will lead to issues of internal interference sooner or later. This is particularly important given that the internal dimensions represents risks and threats to the works of prosecutors today in addition to that of judges. The historical institutional hierarchy persists in many public prosecutor's offices, reflecting the traditional structures of judiciaries even though the criminal procedure reforms undertaken in the region at the beginning of the millennium sought to redefine them based on their role in the criminal prosecution of offenses.⁹

A second area of analysis distinguishes between *de iure* and *de facto* interdependence, which focuses on differentiating the regulatory aspects that favor judicial independence (*de iure*) from problems or issues that come from the specific practice and operation of the system (*de facto*). This is an important distinction because it allows one to differentiate between the ideal regulated in the constitutions and laws of various countries and what happens in reality or daily practice. The deeper sense of judicial independence

9 JSCA has developed various in-depth studies and training activities on criminal procedure reforms in Latin America with a focus on various substantive and operational aspects.

aspires to ensure that judges make decisions free of undue influence regardless of whether the regulatory program appears to protect them. The problem in the region is that there is an important gap between the two worlds and a tendency, particularly in the legal world, to focus excessively on analysis and work on the *de iure* aspects of the system, losing the focus on independence, which should lead to concrete behaviors by judges.¹⁰

Based on its established institutional experience focused on practices, JSCA proposes that the new roadmap on judicial independence in the region focus on the *de facto* dimension. This means generating more knowledge and empirical evidence on the problems that emerge on that level and on daily practices related to protection and defense as well as impacts on justice operators' independence in the various countries.

A third useful dimension for analysis distinguishes institutional independence from personal or individual independence. This distinction emphasizes the need to differentiate aspects unique to the overall institutional design -such as judiciaries and public prosecutor's offices- as facilitators of or obstacles to the independence of justices or prosecutors. This comes in contrast to elements

10 A recent indicator developed to measure corruption in Latin America which was applied as a pilot program in three countries -Chile, Colombia and Mexico- in 2022 exemplifies the differences that exist between the *de iure* and *de facto* levels. In the rule of law item, which includes judicial independence, scores of 100%, 100% and 33% were awarded for the *de iure* level, and scores of 75%, 46% and 46% were awarded for the *de facto* level. There is a negative gap in the cases of Chile and Colombia. In the latter case, the gap is so extreme that the situation in reality (*de facto*) does not even reach half the compliance as the score assigned for the abstract regulation level. The situation of Mexico stands in contrast to this. There, the *de facto* level was higher than its regulation, although in both cases there were low levels of compliance (ReAL: 2022, p. 22). This indicator reinforces the need to focus more than we had in the past on the elements that are produced in the *de facto* dimension.

linked to the statute and specific work conditions meant to ensure individual exercise of the same in the context of each operator's work. One example of institutional elements has to do with the regulation of aspects such as the budgetary autonomy of judiciaries or public prosecutor's offices, or rules prohibiting political officials from reviewing judicial rulings. At the personal level, there are elements such as regulations or practices linked to the job safety of each judge or prosecutor, their compensation, transfers and disciplinary procedures.

It is clear that both aspects are important. However, the idea of independence ultimately involves judges' practical ability to make decisions free of undue influence. As such, the level of personal independence is the most important and delicate (JSCA: Vargas, 2002, p. 35). In this regard, elements of institutional independence would be justified as necessary aspects for achieving personal or individual independence. Again, current discussions that focus on institutional design seem to lose focus on this level. The strong corporate and hierarchical structure of most judiciaries in the region may explain the greater focus on the institutional aspect of the study and analysis of judicial independence in the region. The debate over independence is driven by institutions, and these entities tend to privilege a more corporatist approach to the problems that exist than focusing on issues that affect members' individual work.

JSCA proposes that the new roadmap on judicial independence in the region pay special attention to how independence works at the level of the decisions that judges and prosecutors make on a daily basis beyond general institutional arrangements, though the latter must be included as part of or at the service of that goal.

A final aspect of judicial independence that deserves attention could be categorized as psychological or attitude-based. This perspective emphasizes independence as a behavioral attribute of judges, a psychological skill and adherence to certain values that favor individual independence behavior rather than simply viewing it as a consequence derived solely from institutional and legal design elements. This analytical perspective seems to be missing from research and discussions in the region even though it is an increasingly important concern in comparative literature (Shankar: 2022, p. 857; UN Rapporteur: June 2019, paragraph 70; Binder: 2015, p. 25, paragraph 7). Little or nothing is known about which attitude-based factors make judges or prosecutors more susceptible to feeling pressured or exhibiting greater deference to what they perceive to be an expectation of an internal or external authority. On the other hand, scholars have yet to clearly identify the elements that allow them to resist more and exhibit autonomy in the face of potential pressure.

JSCA proposes a new roadmap on judicial independence that considers the psychological or attitude-based dimension as a space in which important progress could be made towards strengthening justice operators' independence. This in turn involves the need to focus on understanding and documenting this analytical perspective.

3. Elements of the Description of Judicial Independence

Beyond the distinctions made above, which help us to understand the various facets of justice operators' independence, it is important to consider some general characteristics or elements of this notion, especially in the construction of a new work agenda with actions oriented towards strengthening it.

One important matter is that the level of judicial independence of a given country is not only the result of institutional or legal designs or attitude-based elements in judicial branches or prosecutor's offices or among judges or prosecutors. Rather, it depends to a great extent on the level of development of other elements that are part of the rule of law and democracy in the respective country. For example, the tangible levels of separation of government branches, respect for democratic processes, institutional strength and access to public information, the capacities of civil society, and existing democratic culture are among the key aspects that can impact the level of independence in justice administration in a country. As such, working to strengthen justice operators' independence also depends on strengthening other components of the rule of law and democracy.¹¹

A second matter to consider is, as Taylor notes, the fact that judicial Independence can be an ideal to be achieved rather than a state of things that can be reached in reality (Taylor: 2022, p. 405). It is most likely that it would be difficult to fully and completely achieve it, even in countries in which a great deal of progress has been made. Far from weakening the concept, this shows that one of its main functions is to establish a parameter to guide the behavior of judges, prosecutors and other justice system stakeholders.

¹¹ For an institution like JSCA, whose natural work space is the justice sector, this imposes certain limits on the scope of its actions that must be considered. On the other hand, it also means that its contributions to this area are not limited to it.

One final idea that is worth highlighting and is related to the ideas presented above is that independence is a dynamic concept. This means that it undergoes changes and variations over time because it does not solely depend on legal regulations, which tend to be stable. Instead, it involves complex balances of power and practices that unfold in a given society (Taylor: 2022, p. 409; Taylor: 2014, p. 232). In this area, it is even possible to find vary different levels of judicial independence within a single country and moment. For example, there may be variations in how some cases are tried (i.e. those that affect officials or other people in positions of power) compared to other cases (i.e. everyday cases with low social significance). Serious issues of independence can be identified in the former and high levels of achievement are found in the latter.

4. The Independence of Prosecutors

The conceptual development of and international standards regarding the independence or autonomy of prosecutors are precarious in the region. While the situation of prosecutors has garnered more attention over the past decade, the evidence shows that there has been an international trend to extend the work done on judges' independence to prosecutors without designing international standards specific to these operators. As Chapter II of this publication demonstrates, there are no international standards in this area regarding prosecutors.

The deficient construction of international concepts and standards specific to prosecutors may be due to the limited role that these stakeholders played in criminal procedures when inquisitory systems were used in Latin America. However, it is important to note that this has changed radically over the past 25 years following the introduction of adversarial systems in nearly every country in the region (JSCA: Duce and Riego

2005, pp. 13-14).¹² In this new model, public prosecutor's offices have taken on a central role in the criminal prosecution of crimes. As such, deeper reflection must be undertaken in this area. Due to this new role, the independence of criminal prosecution should be a fundamental element of justice administration (ONUDC, 2014, p. 8).

In contrast to judges, who have institutional protection principles, prosecutors have no such level of protection, or at least those that do exist do not have the same ability to protect prosecutors' institutional independence. As such, attention has been focused on the personal aspect of prosecutors, which is understood as a key element for ensuring that they do their work properly.¹³

There may be different reasons for the differences between the treatment of prosecutors' independence and that of judges. The first is related to the role that judges plays, which is different from that of prosecutors (Chong: 2022). This difference does not have to do with their importance for the system. It is also related to the fact that the scope of prosecutors' work is more limited.¹⁴

Furthermore, there are many legitimate forms of organization of prosecutor's offices at the international level and within the region, which makes it difficult to develop a more precise concept (CIJ: 2007, p. 75). There seems to exist an idea that both the

12 JSCA has produced a wide range of studies on reform processes involving criminal justice in the region. This includes the production of several volumes with national reports on the topic published in the context of a broad regional research project titled "Monitoring Criminal Procedure Reforms in Latin America." More recently, JSCA has published new research evaluating the current state of these reform processes in various countries. This material can also be reviewed through the institution's virtual library.

13 International principles emphasize ensuring that prosecutors' investigations are independence and objective. This naturally has implications for the organization of prosecutors, and there are requirements at that level. This poses a difference in the international treatment of judges and prosecutors in which institutional matters tend to play a more impactful role. Chapter II of this study contains more detailed information.

14 Normally limited to the criminal field and not to other matters, as is the case for judges.

design of institutional aspects of public prosecutor's offices and the individual aspects of prosecutors, there are various models in comparative law that are considered to be adequate and reasonable in this regard (OECD: 2020, p. 36). For example, in some countries, public prosecutor's offices are part of the Executive Branch. This would be impossible for judicial matters because of the requirement that the judicial system be independent (ONUDC: 2014, p. 10). The same can be observed with respect to the hierarchical configuration of public prosecutor's offices. Prosecutors can receive criminal prosecution policies and even orders from higher levels for the adoption of criminal prosecution decisions. As such, it cannot be compared to the situation of judges (ONUDC: 2014, pp. 9- 10).

Despite this diversity in organizational models, the trend at the comparative level is to advance systems that elevate the structural autonomy of public prosecutor's offices with respect to other branches of government (OECD: 2020, p. 27). In this regard, the comparative reports and analyses reinforce the importance of recognizing independence as a fundamental principle of the proper functioning of prosecutor's offices. The same diversity of models and particularly tense relationships between prosecutor's offices and executive branches reinforces the need for independence as a substantial principle for prosecutors' work.

In this context, the purpose of the independence of prosecutors would be to ensure that their decisions are impartial, based on evidence and free of pressure, interference or interests other than those of the legitimate exercise of criminal prosecution. This independence would also mean that there are operational arrangements at the institutional level that allow for and protect it (ONUDC, 2014, p. 9). As such, independence would ensure that prosecutors can do their work without interference.¹⁵

15 The UN Special Rapporteur on Independence also has underscored the connection between judicial independence and that of prosecutors, arguing that the latter is key to protecting the former (2019, paragraph 8).

This description is similar to judicial independence. The differences are based on the level of autonomy that can be demanded. The UN Organization understands that prosecutors' independence should not be understood as absolute autonomy, but in relation to their work with other branches or institutions. For example, it is important to consider the fact that the government could control or influence decisions about criminal prosecution (ONUDC, 2014, p. 8).¹⁶ Without minimizing the importance of the independence necessary to ensure that prosecutor's offices can hold public officials responsible for their actions in order to ensure robust and transparent criminal prosecution with strong ethics and integrity as required by the rule of law (Ibid).

To put a finer point on it, when specifying its scope, a recent comparative report notes that the need for prosecutors to be independent should not be as strong and intense as the independence of judges, who play a key role in the rule of law (OECD: 2020, p. 27). The aforementioned report does not expand on this point and the notion is not clearly developed.

When we examine the way that prosecutorial independence has been treated in the inter-American system, there is a qualitative difference compared to the treatment of judicial independence. The Inter-American Human Rights Commission and Court address the topic mainly from the perspective of the need to ensure independence in the investigation and prosecution of crimes against human rights. This perspective is clearly different from what seems to be a much more limited issue for the work of public prosecutors, which involves prosecutors' specific actions during the investigations of these specific cases. The Court has emphasized the need to guarantee that investigations are independent and objective (*de iure* and *de facto*), not only in hierarchical and institutional terms, but in reality (Inter-American Court, 2022, p. 37). The Court has clarified that that

16 For its part, the Inter-American Commission on Human Rights uses the notion of "reinforced guarantees" in areas such as the stability of judges (2013, p. 11).

does not involve a specific model or institutional arrangement at the constitutional or legal level (2022, p. 39). The Commission has found that a lack of independence among prosecutors can undermine the credibility of criminal prosecution and public trust in it. As such, there is a need to ensure that this institution is independent from other branches of government, with recognition of this at the constitutional level (IACHR: 2013, p. 21, paragraph 44).

The need for prosecutorial independence seems to be gaining ground in the international and comparative contexts. Overall, given the differences in functions, roles and models of organization of prosecutorial agencies compared to those of judges, there are qualitative differences and different intensities with blurred borders, at least conceptually. One pending challenge is thus to offer more content and better establish what prosecutorial independence is and does. Special attention must be paid to the fact that prosecutors acquired a very important role in Latin America through criminal procedure reforms compared to the roles that they have historically had. Given the type of organization and roles that public prosecutor's offices provide, relationships are generated on a daily basis with executive branches that generate challenges and tensions that are different from those involved with the work of judges.

JSCA recognizes that prosecutors play a key role in the proper and effective functioning of criminal justice systems, particularly with regard to organized crime in the region. This points to the need to strengthen their independence.

5. The Independence of Public Defenders

Access to effective legal defense is a fundamental guarantee in all contexts characterized by the rule of law and presence of a democratic system. Trusted defense attorneys allow people to exercise their rights, particularly the right to the presumption of innocence. In this context, independent work free of pressure of any kind is key for defense attorneys given the role that they play in guaranteeing access to impartial justice that is respectful of due process.

The independence of defense attorneys in general and public defenders in particular has not been fully developed conceptually with respect to the scope of said independence and what it entails and with respect to its situation in the region in terms of possible impacts or problems. One example that points to this lower level of treatment is the fact that public defenders' independence has not been addressed in the case law of the Inter-American Court for 2022. It does, by contrast, have sections focused on prosecutors and judges (IACHR, 2022).

While there are tools that address the importance of independence in the exercise of legal defense at the international level, they do little to address the role of this attribute in the case of public defenders. For example, the UN Principles regulate access to legal services provided by independent defense attorneys but do not justify the purposes of said access (CIJ: 2007, p. 68). When the basis for this is analyzed, aspects such as the need to avoid illicit interference in the work of defense attorneys and to avoid threats or attacks that threaten their safety are identified. This would not seem to be clearly linked to independence, which has been understood for other justice system operators. Rather, it points to ensuring independence in the exercise of the legal profession, which is clearly a different issue. On other occasions, they are also mentioned as elements for justifying defense attorneys' independence, aspects meant to guarantee that the defense attorney has access to information, and confidentiality in the relationship with their client. Again,

these seem to be meant to protect other guarantees associated with the right to defense contained, for example, in international legislation.

In any case, all of these justifications emphasize protecting defense attorneys' independence in order to ensure the exercise of people's right to defense and not necessarily the institutional structure that supports that work. In comparative studies, this is due to the fact that public defense services models include various forms of organization. Some have centralized institutional structures like public prosecutor's offices, and others rely on the work of attorneys who are assigned to certain cases in that role and regulated by public rules.

The Inter-American system has encouraged an important discussion of the institutional independence of public defender's offices.¹⁷ The Inter-American Commission has addressed the topic explicitly. It uses much more forceful language than that used to address judicial independence, signaling that these responsibilities should not be assigned to other justice agencies or branches of government (IACHR: 2013, paragraph 47). The Commission has also encouraged countries to create safeguards to ensure the functional autonomy of public defender's offices in the countries in which that arrangement exists (2013, paragraph 48). While the Commission has argued that institutionally independent defense services must exist, it does admit that governments must take measures to ensure functional independence and management of its own budget in their absence. The latter suggests that public defender's office independence is qualitatively different from that of judiciaries.

The Inter-American Association of Public Defender's Offices (AIDEF),¹⁸ an organization that represents public defense entities in

17 In this context, JSCA also has made efforts to help define the scope of and justification for the notion of the autonomy of public defender's offices. We recommend the 2021 publication "Autonomía de la defensoría penal pública," which is available at [https://biblioteca.cejamericas.org/bitstream/handle/2015/5677/PUB_Autonom%
c3%adadelaDefensoriaPenalP%
c3%bablica.pdf?sequence=1&isAllowed=y](https://biblioteca.cejamericas.org/bitstream/handle/2015/5677/PUB_Autonom%c3%adadelaDefensoriaPenalP%c3%bablica.pdf?sequence=1&isAllowed=y).

18 AIDEF was created in 2003 and is now comprised of public defender's offices from 18 countries in the region. For more information, see <https://aidef.org>.

the region, it has developed interesting work focused on identifying the nature of the independence that institutions require. Some have argued that public defender's offices should have functional, financial, budgetary and administrative autonomy (Martínez: 2022). AIDEF also has argued in favor of those levels of independence. In this sense, the entity notes that this independence is due to aspects such as the role (against the majority) that the criminal defense plays in the region today; the need to avoid identifying the public defense service with other state agencies; and the more active role that public defender's offices should play in public policy discussions of safety or crime (Manhke: 2022).

In closing, it is not very clear that independence in the exercise of legal defense, which includes the work done by all sorts of defense attorneys, is not necessarily developed in a specific institutional model for the provision of defense services. In any case, their scope seems to be much more specific than the more expansive notion that governs judges and even the more limited idea of prosecutors. In this context, international standards are focused on ensuring that the defense attorney in a case is an appropriate vehicle for ensuring that people have access to defense services.¹⁹ This could, of course, have institutional implications when the organizational model aligns with what has been described as centralized public institutional structure. However, those implications seem to be somewhat different from those of other justice system operators.

JSCA argues that it is necessary to continue to develop definitions that generate clearer and more relevant definitions and content regarding the notion of independence applied to public defenders and legal defense in general as part of a new roadmap for justice operator independence.

19

See Chapter II on international standards.

CHAPTER II

INTERNATIONAL STANDARDS ON THE INDEPENDENCE OF JUSTICE OPERATORS

This chapter analyzes international standards in the area of justice operator independence. Due to the breadth and variety of standards related to judicial independence, this document does not offer a full analysis of each of them. This would not make sense given the numerous documents that contain them and other texts that explain them. (See, for example, CIJ: 2007; IACHR: 2013.) This chapter explains the general scope of existing standards on the most relevant matters for the purposes of this document. It consists of three sections, each of which offers a description of the situation of one type of justice system operator.

1. International Standards on Judicial Independence

These standards are broadly regulated at the international level and are articulated in various instruments with different perspectives.

In the first, judicial independence is regulated explicitly in all international agreements as a central guarantee or right that is part of due process, requiring all sentences that resolve disputes to come from an independent court.²⁰ The regulation of this guarantee has been broadly developed in the case law and standards of international entities

20 Articles 8.1 of the American Convention on Human Rights (henceforth the American Convention), 14.1 of the International Compact on Civil and Political Rights (henceforth the Compact) and 6.1 of the European Convention on Human Rights. This is replicated in other declarative instruments such as Article 10 of the Universal Declaration of Human Rights.

such as the Inter-American Court, European Court and Committee of the Compact on Human Rights.²¹

Other instruments offer perspectives on judicial independence that go beyond the nature of law for persons awaiting trial, for example, as a key element that protects judicial integrity. The main texts are the United Nations Basic Principles on the Independence of the Judiciary of 1985²² and the Bangalore Principles on Judicial Conduct of 2006 (especially Value 1).²³ In addition, there are the reports of the United Nations Special Rapporteur on the Independence of Judges and Lawyers²⁴ and other regional documents.²⁵

There are clearly robust regulations. In order to lay out their main components, one could say that they include principles or recommendations that point to the regulation of institutional aspects of the justice system or others that are more functional or solely address the individual exercise of judicial activity.

At the institutional level, international standards emphasize the need for the judicial system (judicial branches) to have sufficient independence from other branches of government such that

21 The literature on these developments is abundant. One text is recommended for each area. In the case of the Inter-American Court, an updated version of its case law can be reviewed in its publication on judicial independence from 2022 (pp. 4-36). The European Court has a guide to Article 6 of the European Convention (Council of Europe: 2014, pp. 16-17). In the case of the Compact Human Rights Committee, I recommend the summary offered in General Observation No. 32 of 2007 of the Compact, paragraphs 18-20.

22 <https://www.ohchr.org/es/instruments-mechanisms/instruments/basic-principles-independence-judiciary> . A document was developed after these principles (1989) that establishes procedures for effectively applying them (Resolution 1989/60, United Nations Economic and Social Council).

23 https://www.unodc.org/documents/jji/training/19-03891_S_ebook.pdf. They also have a complementary document of measures for their effective application developed in 2012: https://www.unodc.org/res/jji/import/international_standards/measures_implementation/measures_implementation_spanish.pdf. I recommend reading the text that explains the principles that have been developed by the United Nations (UNODC: 2013, 162 pp.).

24 Over 50 documents have been generated since 1995. All of them can be viewed at: <https://www.ohchr.org/es/special-procedures/sr-independence-of-judges-and-lawyers/annual-thematic-reports-special-rapporteur-independence-judges-and-lawyers>

25 The 2019 UN Special Rapporteur report identifies the various sources (2019, paragraphs 13-55).

that are not subject to or the object of undue intervention by them. In this area, concern is focused on constitutional and legal regulation establishing a clear and effective separation of powers that protects justice systems' independence despite the need for collaboration and cooperation.²⁶ Another area of concern is the budget. It is important to prevent funding from becoming a path to undue influence. Judicial branches must have adequate resources to carry out their work.²⁷ There is also concern about hiring and appointment processes for different types or ranks of judges.²⁸

At the functional level, concern is focused on ensuring that each judge can make decisions without interference.²⁹ Standards have been developed in this area that cover a wide range of matters, including procedures and qualifications for the appointment of judges; guarantees linked to job safety (permanence and immovability);³⁰ conditions governing promotions and transfers;³¹ principles regulating suspension, termination and disciplinary actions;³² the need for systems

26 Principles 1, 2 and 5 of the UN Basic Principles of 1985 point to the same, as do other texts. For example, Principle 1 states: "1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."

27 Principle 7 of the UN Basic Principles addresses this matter, stating that: "7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions."

28 Principle 10 of the UN Basic Principles addresses this matter, stating that: "10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives."

29 The Bangalore Principles seem to emphasize this functional aspect. For example, in Rule 1 on the 1.1 application of value, it states: "1.1. A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason."

30 The UN Basic Principles regulate these aspects in numerals 11 (permanence in the position for established terms) and 12 (immovability).

31 The UN Basic Principles regulate promotions (numeral 13), establishing the fact that they are based on objective factors, especially professional capacity, integrity and experience as a central aspect.

32 Examples are provided in UN Basic Principles 17 through 20.

to ensure judges' safety and protection (UN Rapporteur: 2019, paragraph 67); and others.

A review of the international instruments outlined above shows that the basic principles that ensure judicial independence are well-established and do not seem to be the subject of questioning or discussion. There are various nuances in how they are formulated, but no major discrepancies. Instead, they contribute to and complement each other based on the more specific target of each instrument.

These principles have been developed in international case law and the statements made by various international agencies and officials, which provides a complete framework of analysis. This is key in the inter-American system for the review of texts developed by various agencies in the system in order to provide more details on the scope of judicial independence.³³

However, beyond the progress that the aforementioned developments represent, as we have already stated, the formulation of the principles presents a general or abstract level (as is usual for international standards) and require more precise development so that they can be implemented and monitored. For example, in the case of judicial selection and appointment systems, international standards promote processes that establish equality of conditions and non-discrimination; establish that these processes must be based on applicants' merit and abilities; and require that they be public and transparent.³⁴ While the case law has determined that

33 In regard to this point, we recommend reviewing the aforementioned Inter-American Commission report from 2013 and the case law of the Inter-American court outlined in its 2022 publication .

34 In this regard, it is important to note that there is a growing concern in the international system with ensuring that judicial appointment systems guarantee that women and representatives of various minorities have equal access to positions so that judiciaries are diverse and egalitarian. While these standards were not designed with independence in mind, they do have an important connection to this area. For example, the Inter-American Commission has ruled on this, following the UN Rapporteur, based on the development of ideas of equal conditions and non-discrimination, and includes all justice operators in this scope (IACHR: 2013, paragraph 65.)

in these specific cases, the scope of each of these characteristics, they continue to allow for diverse practices.

JSCA identifies progress on mechanisms related to the appointment of judges and other judicial operators. It also calls attention to the need to develop strategies for ensuring that said appointments are based on eligibility, gender equality and, mainly, objective criteria as well as other technical elements.

A second issue is that international standards, as the UN Rapporteur has stated (2019, paragraph 4), must be updated on an ongoing basis in order to address new problems or impacts on judicial independence that were not anticipated when they were developed. The Rapporteur reported being particularly concerned about increased corruption in judicial systems and risks that stem from the growing expansion and influence of organized crime.

2. International Standards on the Independence of Prosecutors

In contrast to that of judges, prosecutors' work is not directly regulated in international human rights agreements, and their independence is not explicitly mentioned in international legislation. The need to establish standards for prosecutors' work was not addressed until 1980, when it was included in the 6th United Nations Congress on the Prevention of Crime and the Treatment of Offenders. In 1985, more progress was made at the seventh conference, as participants highlighted the importance of the impartial criminal prosecution and recommended that member states ensure the objectiveness of criminal prosecution services

(UNODC: 2014.) This process culminated in the adoption of the Guidelines on the Role of Prosecutors (henceforth the UN Guidelines) at the eighth conference, which was held in Havana in 1990 (UN Rapporteur: 2019, paragraphs 33-34).³⁵

The International Association of Prosecutors (IAP) was created in 1995. One of its goals is to promote and strengthen the UN standards for ensuring prosecutorial independence.³⁶ In 1999, the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (henceforth IAP Standards) were issued and identified as complementary to the 2008 UN Guidelines (Resolution 17/2, 2008, Commission for the Prevention of Crime and Criminal Justice).³⁷

As is the case with judicial independence, various principles have been developed in declarations, working papers and case issued by various international organizations. For example, the Inter-American Commission includes prosecutors in its analysis of independence (IACHR: 2013), and the Inter-American Court does so in its 2022 publication on independence (pp. 36-57). Its inclusion in various documents developed by the United States Special Rapporteur on Independence is noteworthy at the international level. At the regional level, the work of the Ibero-American Association of Public Prosecutor's Offices (AIAMP) is worthy of note.³⁸ In 2018, it produced a declaration reaffirming the autonomy of prosecutors and reinforcing the UN guidelines.³⁹

A common purpose of these regulations is to ensure that prosecutors are not subject to interference, pressure or intimidation.

35 <https://www.ohchr.org/es/instruments-mechanisms/instruments/basic-principles-role-lawyers>

36 The IAP currently has 183 member institutions from 177 countries. More information about its history and goals is available at: <https://www.iap-association.org/Spanish/Acerca-de-la-IAP>

37 The UN resolution can be downloaded from: <https://www.iap-association.org/Spanish/Documentacion-de-la-IAP/IAP-Standards/UN-Resolution>.

38 The organization was created in 1954 and currently has 22 Ibero-American prosecutor's offices as members. For more information, see: <https://www.aiamp.info/index.php/la-asociacion/quienes-somos>

39 The declaration was issued in Mexico City in September 2018 and has three points. The full text can be viewed at: <file:///C:/Users/18575/Downloads/declaracin-conjunta-de-mxico.pdf>

including civil or criminal responsibility and performance of their duties.⁴⁰ To safeguard this, the aforementioned rules include standards designed to ensure adequate compensation, generate job safety, create merit-based systems for promoting staff, and establish equitable and impartial procedures.⁴¹

The international standards also allow us to appreciate differences in how criminal prosecution work is treated in the context of judicial roles. Concern in this area focuses on ensuring that prosecutors make decisions free of political interference (Standard 2.1, IAP Standards) based on the rules or guidelines adopted based on equity, coherence and protection of prosecutorial independence (Standard 17, UN Guidelines and 2.3, IAP Standards). These must be transparent and compatible with current legislation as well (Standard 2.2, IAP Standards).

In regard to investigations of serious cases of human rights violations, the inter-American system has stated that prosecutors must conduct independent, prompt and exhaustive investigations.⁴² This complements the previous rules, adding the independence of investigations conducted by prosecutors.

Finally, in regard to international standards and prosecutors, two additional observations are offered. First, as is also the case with judges, the standards that apply to prosecutors contain general principles that allow for various interpretations and implementation mechanisms for States. This allows for discretion regarding the specific way in which those principles should be safeguarded. The above is consistent with the multiple ways that prosecution services are organized in the region and in the comparative experience.

40 Standard 4 of the UN Guidelines establishes that, “States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.” These types of elements are also mentioned in Rule 6 of the IAP Standards.

41 These elements are addressed in UN Guidelines Standards 6 and 7 and Rule 6 of the IAP Standards.

42 For example, the *Digna Ochoa and family v Mexico* sentence from of November 25, 2021.

However, there is an open and necessary space for building adjustments to the aforementioned standards.

A second issue is that prosecutorial independence seems to be closely linked to prosecutors' roles, specifically decision-making, particularly in areas in which they have discretion. By contrast, institutional aspects seem less important. This again aligns with the logic of recognizing that institutional designs in this area vary.

JSCA proposes that beyond the level of consolidation of international standards on judicial independence, there are opportunities to make them more specific, operational and current based on new problems that are being faced at the practical and daily level. Special attention should be paid to prosecutorial independence.

3. International Standards on the Independence of Public Defenders

As we have said, international tools protect the right to engage the services of a defense attorney or, if one is not available, a public defender provided by the State.⁴³ However, rules or requirements regarding the institutional structure that would support such practices have yet to be established. In this regard, the development of this guarantee in the international context is explained with a clear focus on ensuring that public defenders have the conditions necessary to do their work.⁴⁴

At the universal level, a specific development of public defenders' independence is identified in the Basic Principles of the Role,

43 Art. 8 letters d and e of the American Convention and Art. 14.3 letter d of the International Compact.

44 The previously cited JSCA document from 2021 on the autonomy of criminal public defender's offices provides a detailed discussion of several of these standards (JSCA: 2021, pp. 13-20).

of Attorneys of the United Nations of 1990 (henceforth the UN Basic Principles)⁴⁵ and in the document United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems of 2012 (henceforth the UN Principles and Guidelines).⁴⁶ Both instruments establish governments' duty to protect the independence and protection of legal aid providers,⁴⁷ establishing requirements to ensure that defense attorneys carry out their work free of intimidation, harassment or undue influence. They also state that they should not be the objects of any sanctions based on measures taken in the context of their work. These clauses are similar to those reviewed in the discussion of prosecutors. This means that they focus on ensuring that they are independent and do not speak to the supporting institutional structure.

In the inter-American system, public defenders have been included in a generic notion of "justice operators." As we have stated, this is understood to include all government officials that intervene in the justice system and perform duties essential to respect and the guarantee of due process.⁴⁸ While they are recognized as having roles that differ from those of other operators, their main role is to ensure that due process extends, according to the Commission, to certain requirements developed for the configuration of other system institutions.⁴⁹

The Commission states that the independence of public defender's offices would involve avoiding assigning said entities to other justice agencies or branches of government.⁵⁰ It recognizes the importance of creating safeguards to ensure their functional autonomy in countries where said assignment exists.⁵¹ While the Commission argues that there is a need to have institutionally independent public defender's offices, as we have said, the Commission recognizes that until this is achieved, States should adopt

45 <https://www.ohchr.org/es/instruments-mechanisms/instruments/basic-principles-role-lawyers>

46 https://www.unodc.org/documents/justice-and-prison-reform/GA_67.187_Spanish.pdf

47 Principles 16

48 IACHR: 2013, paragraph 15, p. 6.

49 IACHR: 2013, paragraph 20, p. 8.

50 IACHR: 2013, paragraph 47, p. 23.

51 IACHR: 2013, paragraph 48, pp. 23-24.

measures to ensure the functional independence and budgetary management of public defender's offices.

The more specific development of standards in the inter-American sphere has come from a set of declarations advanced by the Inter-American Association of Public Defenders (AIDEF) before the General Assembly of the Organization of American States (OAS) since 2011. In 2016, the AIDEF approved the document "Principles and Guidelines on Public Defense in the Americas," which organizes said information.⁵² As we have explained, the most relevant of the principles is No. 6, which states that, the diversity of the systems that exist in the region notwithstanding, the functional, financial and/or budgetary autonomy of public defense is paramount. Principle No. 7 complements the previous one and states that governments must ensure absolute respect for public defenders and that their work can be performed without undue interference or control by other branches of government that impact their functional autonomy as it relates to the interests of their client. The latter is already contained in UN instruments. As such, the main innovation consists of reinforcing the need for public defense services to be independent.

It is possible to conclude that the conceptual development of public defenders' independence aligns with limited regulation through dispositions of lower regulatory weight than this independence presents in international instruments.

JSCA believes that it is necessary to develop more content and precise information on the scope of public defenders' independence given that their roles differ substantially from those of judges and prosecutors.

52 <https://www.mpd.gov.ar/index.php/aidef-en-la-oea/395-principios-y-directrices-sobre-defensa-publica-en-las-americas/5531-principios-y-directrices-sobre-defensa-publica-en-las-americas>

TABLE 1
Areas Addressed in International Standards on the Independence of Justice Operators

Independence of Justice Operators	Areas Addressed in the International Standards
Independence of Judges	Institutional level
	Independence from other branches of government
	Constitutional and legal regulation
	Independence reflected in the budget
	Attention to selection and appointment processes
	Functional Level
	Assurance that decisions can be made without interference
	Procedures and qualifications for the appointment of judges
	Job security
	Conditions that govern promotions and transfers
Removal from role and disciplinary actions	
Judges' security and protection	
Independence of Prosecutors	Objectiveness in criminal prosecution
	Ability of prosecutors to work free of interference, pressure or intimidation
	Ability of prosecutors to make decisions without political interference
	Adequate compensation and job safety conditions
	System of promotions based on merit and equitable and impartial procedures
	International regulations that align with international frameworks
	In cases involving serious human rights violations: independent, prompt and exhaustive investigations
Independence of Public Defenders	States' duty to ensure independence and protection
	Freedom from intimidation, harassment or improper intervention
	They should not be punished for actions taken in the context of their work.
	Public defender's offices should not be attached to other justice agencies or branches of government.
	They must be able to perform their work without improper intervention or control by other branches of government.
	Public defender's offices should enjoy functional, financial and/or budgetary autonomy.

Source: Developed by the authors based on a review of international instruments.

CHAPTER III

THE STATUS OF DEMOCRACY AND INDEPENDENCE OF JUSTICE OPERATORS IN THE AMERICAS

This chapter presents an analysis of the challenges to democracy and the independence of justice operators in the region. It is based on a review of comparative evidence that reveals trends in this area. We focus on analyzing various international indicators and studies.

1. The Deterioration of Democracy in Latin America

As we have said, the independence of justice operators is not a characteristic that is isolated in the functioning of a specific country. It is closely linked to the quality of the democracy in which said operators work. Various international indicators have shown that democracy is deteriorating at the regional and global levels.

The Economist's Democracy Index⁵³ has shown a sustained decrease over a six-year period in the area of democratic progress at the global level. The global average for this indicator in 2015 was 5.55 (on a scale of 0 to 10). In 2021, after a gradual decrease, that average was 5.28 (*The Economist*: 2023, p. 20). In 2022, there was a very small increase globally (5.29), which led the report to describe the situation as “stagnation” (*The Economist*: 2023, pp. 3-4).

53 This measurement has been taken since 2006 and includes 165 independent states and two territories. Its purpose is to offer a vision of the state of democracy in those countries and regions. Further information is available at: <https://www.eiu.com/n/campaigns/democracy-index-2022/>

The situation of Latin America in this index is dramatic. It is the region that has presented the largest setback in the indicator's two-decade history. The regional average has dropped from a high of 6.43 in 2008 to 5.79 in 2022 (0.64 points). This far exceeds the global average and is the largest setback of any region in the world. Furthermore, Latin America has declined even more in recent years, dropping from 6.09 in 2020 to 5.79 in 2022 (*The Economist*: 2023, p. 31). In other words, this process has lasted seven years (*The Economist*: 2023, p. 41).

It is important to note that the aforementioned index presents significant differences across countries and involves up to four categories. Chile, Costa Rica and Uruguay are in the “full democracies” category; Brazil, Panama, Argentina, Colombia and others are in the “flawed democracies” category; Paraguay, Ecuador, Bolivia, and other countries are described as “hybrid regimes”; and countries like Nicaragua, Cuba and Venezuela have “authoritarian regimes.”

Other indexes present similar results, including the IDEA International index. The Global State of Democracy Index 2022⁵⁴ warns that democracy is declining and stalling around the world (IDEA: 2022, p. vii). The World Justice Project (henceforth WJP) Rule of Law Index reaches the same conclusion.⁵⁵ In 2022, the index showed that there were setbacks in the quality of compliance in the various indicators that comprise the rule of law in 61% of the countries analyzed (WJP: 2022, p. 8). Both instruments show that the situation of Latin America is heterogeneous and comprises a complex context.

54 This index has measured democratic performance in 173 countries since 2017 in an effort to help the various stakeholders to assess and compare the quality of democracy in various countries.

For more information, see <https://www.idea.int/data-tools/tools/global-state-democracy-indices>.

55 The index has evaluated the quality of the rule of law in 140 countries since 2015. For more information, see <https://worldjusticeproject.org/about-us/overview/what-rule-law>.

2. Democracy and Justice in Specialized Indexes and Studies

This section presents and analyzes reliable evidence on the specific situation of the independence of justice operators. The analysis begins with an in-depth review of the indexes identified in the previous section.

First, the Democracy Index gave the area of civil liberties in Latin America a score of 6.61 in 2022. This includes the measurement of the level of judicial independence from government influence. This indicator presents a downward trend. The score was 6.79 in 2020 and 6.64 in 2021 (*The Economist*: 2023, p. 41). In any case, the indicator is higher than the global average for 2022 of 5.43. However, it includes various additional items and as such does not only influence judicial independence.

Second, the Global State of Democracy index developed by IDEA Internacional contains a specific indicator on judicial independence. It yielded a level of stability for South America beginning in 1992 (0.55 out of 1) after significant and sustained improvement between 1975 (0.41) and 1992 (0.55). The indicator remained stable between 1992 and 2021, which suggests stagnation.

Significant deterioration was observed in Central America in regard to this indicator, particularly after 2017. The indicator started at 0.43 in 1975 and steadily rose to 0.5 in 2003. It remained at that level (0.49) until 2017, after which it dropped significantly, reaching its lowest rate since 1975 of 0.4 in 2021. It is important to consider that the global average for the judicial independence indicator in 2021 was 0.5 and that the starting point in 1975 was 0.44.⁵⁶ As such, the trend in the two subregions of Latin America has been opposite the global average's evolution.

56 The Annex contains Figures 1 and 1.1, which reflect the evolution of this indicator for the two subregions and the global average obtained using the tools on the index website.

For its part, the WJP Rule of Law Index reveals a decrease at the global level between 2016 and 2021 and includes two subfactors that measure aspects of judicial independence. Subfactor 7.4 explores the existence of undue influence in civil justice government, and Subfactor 8.6 explores the same with regard to criminal justice. In both cases, notable differences are observed across countries. The regional average is compared to the global situation.

On one end of the Rule of Law Index, we find countries with very low levels of judicial independence such as Nicaragua (with scores of 0.07 and 0.01 out of 1, respectively), Venezuela (0.04 and 0.02) and Bolivia (0.19 and 0.09). These fall on the lower end of the global rankings. Meanwhile, countries like Uruguay (0.79 and 0.75), Chile (0.69 and 0.75) and Costa Rica (0.7 and 0.69) are on the high end (though they present a marked difference from the countries that lead the ranking, such as Denmark, which has scores of 0.92 and 0.93, respectively).

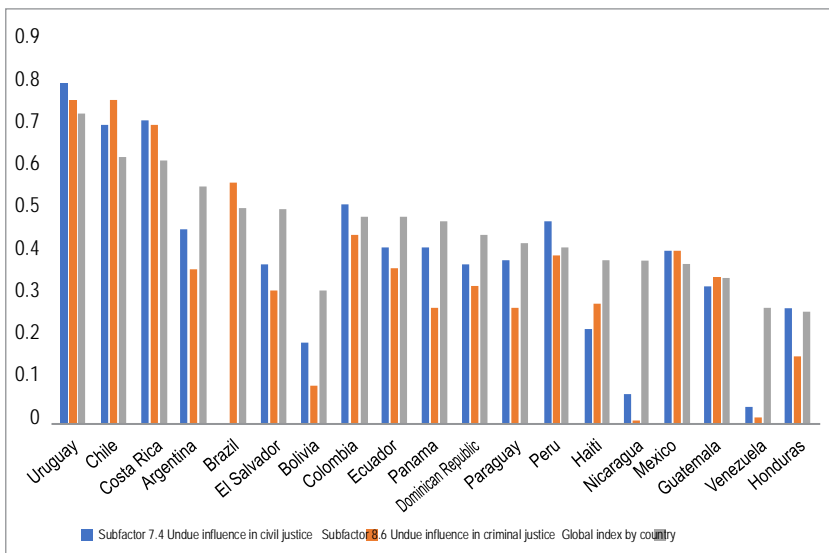
Table 1 describes the situation of countries in the Americas as reflected in the data for both indicators and adds a point of comparison: the global score of each country in the 2022 report. There is significant variation at the subregional level. Furthermore, civil justice and criminal justice present very different results in terms of level of independence, even within a single country. It is concerning that only three countries (Brazil, Chile and Uruguay) present civil and criminal justice independence scores that are higher than the global score obtained for rule of law.

TABLE 2
Subfactors that Measure Judicial Independence in Countries in Latin America

Cou ntry	Subfactor 7.4 Undue Influence in Civil Justice	Subfactor 8.6 Undue Influence in criminal justice	Overall index (for each country)
Uruguay	0.79	0.75	0.72
Chile	0.69	0.75	0.62
Costa Rica	0.7	0.69	0.61
Argentina	0.45	0.36	0.55
Brazil	0.51	0.56	0.5
El Salvador	0.37	0.31	0.5
Bolivia	0.19	0.09	0.31
Colombia	0.51	0.44	0.48
Ecuador	0.41	0.36	0.48
Panama	0.41	0.27	0.47
Dominican Republic	0.37	0.32	0.44
Paraguay	0.38	0.27	0.42
Peru	0.47	0.39	0.41
Haiti	0.22	0.28	0.38
Nicaragua	0.07	0.01	0.38
Mexico	0.4	0.4	0.37
Guatemala	0.32	0.34	0.34
Venezuela	0.04	0.02	0.27
Honduras	0.27	0.16	0.26

Source: Developed by the authors using Rule of Law Index 2022 data.

FIGURE 1:
Judicial Independence in Latin American Countries



Source: Developed by the authors using Rule of Law Index 2022 data.

With the exception of Costa Rica and Mexico, the countries analyzed in the rule of law index present more critical independence indicators than their own averages for the rule of law. The data suggest that the independence of justice in Latin America is a major weakness when it comes to meeting rule of law standards. Furthermore, as explained in Chapter I of this report, judicial independence is variable and dynamic at the regional level and even within a single country.

In conclusion, in regard to the index analyzed, we find that judicial independence indicators in Latin America are at the mid-range based on the global averages. There are significant differences between South America and Central America, and there is notable heterogeneity within each subregion. As such, a strategy oriented towards strengthening judicial independence in the region requires deploying a differentiated perspective on the issues in each reality and proposing differentiated solutions.

The review of the indexes described above leads us to conclude that there are no indicators that provide information on actual and potential issues of independence of prosecutors and public defenders. While the Rule of Law Index measures the autonomy of criminal justice,⁵⁷ it does not differentiate between the various stakeholders involved.

There are also specific studies that measure levels of judicial independence in the world and in the region. We analyze these below.

The study conducted by Linzer and Staton in 2015 uses various studies that measure the evolution of judicial independence.⁵⁸ The study builds a scale that reveals enormous heterogeneity in the region. This includes countries located in the lower third of the measurement, that is, those with the most significant issues regarding independence (i.e. Cuba, Haiti and Venezuela) as well as those with the strongest results (i.e. Costa Rica, Chile and Uruguay) (Linzer and Staton: 2015, p. 237). The measurement also allows us to consider how countries have evolved over time, revealing changes in the long term in the quality of judicial independence (i.e. Argentina and Chile) as well as countries that have experienced significant drops in quality (i.e. Cuba and Venezuela). The full timeline presents improvements and setbacks in specific periods (Linzer and Staton: 2015, p. 239). This shows that the state of judicial independence in various countries is far from being balanced and actually presents critical variations.

Helmke's judicial manipulation indicator also constitutes an effort to measure judicial independence. It analyzes the situation of the countries of the region between 1985 and 2008 (Helmke: 2022). This indicator is designed to measure deliberate efforts by electeds to mold the composition of the Supreme Court beyond the natural process of replacement or appointments that occurs over time (Helmke: 2022, p. 417). It reveals serious problems of judicial independence even though it covers a single specific aspect.

57 Factor 8.6 measures whether the criminal justice system is free of improper influence from the government.

58 These studies covered 200 countries and were conducted between 1948 and 2012.

The study proposes that: (1) attempts at judicial manipulation in the region are not less frequent in recent years than they were at the beginning of the transitions to democracy; (2) there are substantial differences between the countries in the region in which more or less frequent attempts to manipulate exist; and (3) supreme courts are more vulnerable when new governments come into power, particularly during the first two years of their term (Helmke: 2022, p. 428). Another important finding of this study is that public confidence in the judicial system and support from the public would protect courts from any attempts by the Executive Branch to manipulate the judiciary. Finally, the study suggests that attempts at judicial manipulation are not less frequent in democratic regimes in the region, which used to be the case. This points to weaknesses in the democratic strengthening process experienced since the transitions of the 1980s and 1990s. This aligns with the results of the general indexes analyzed above.

Studies in this field thus suggest that judicial independence is facing serious problems in the region. Furthermore, these problems seem to have increased in the past few years, generating a setback compared to the progress achieved a few decades ago in the context of the democratic transitions experienced in the region. This is not an isolated perception. In the inter-American context, it is part of the supposition under which various documents have been developed by the Inter-American Commission on Human Rights (2013) and the Inter-American court (2022) in this area.

On the other hand, at the level of specific analyses of countries, several recent reports by international and civil society organizations describe these problems with a great deal of context. Examples include the reports issued by the United Nations Special Rapporteur on the Independence of Judges and Attorneys (Cases of Bolivia 2022; Honduras 2020) and Misión Internacional regarding the independent determination of facts in Venezuela (2021). There are also reports from private entities (such as Espacio Público, with reports on Argentina, Brazil, Chile and Guatemala that identify problems related to

the independence of investigations of cases of corruption); reports by judicial officials' organizations (in the case of Guatemala, FLAM/UIM: 2022); reports by NGOs (in the case of Mexico, for example, DPLF: 2022) and a set of academic studies that we have cited. Though it is not complete, the evidence consistently shows that the lack of judicial independence that the region faces are not a problem of the past, but a current one that must urgently be addressed given the existence of significant signs of gradual decline over the past few years.

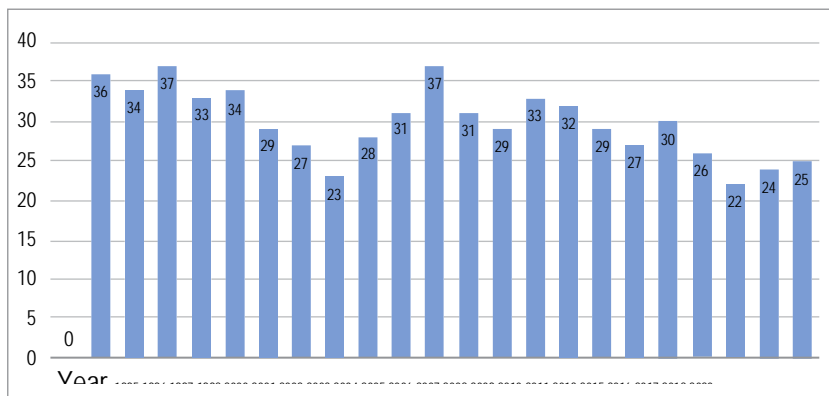
Some reports focus on key relationships. For example, in regard to the relationship between citizen confidence and judicial independence, Helmke suggests that high levels of confidence in justice systems are a positive indicator of judicial independence while lower levels of confidence are a factor that speaks to the seriousness of the situations.

Latinobarómetro has developed a measurement based on several years of data. Its 2021 report contains a summary of the data produced between 1995 and 2020 (2022). The results show that the regional average (which is based on 18 countries in the Americas) presents a high of 37% in 2006 and a low of 22% in 2017 in regard to confidence. That number was 25% in 2020, which places it within the lowest range in 25 years of measurements (Latinobarómetro: 2022, pp. 68- 69). It is important to note that this represents a slight increase over the previous years, particularly 2017. Overall, confidence levels decreased during the period as compared to the initial level.

With regard to citizen confidence in justice systems, important differences were observed at the regional level. Some countries had a reasonably high confidence level (such as Uruguay, with 56%) while others had lower ones (such as Paraguay, with 13%). Even considering those differences, the situation of most countries is concerning. For example, 50% (9) of the 18 countries have confidence levels of 20% or less and 72% (13) had levels lower than 25%. It is important to note that these are higher than the confidence levels reported for congresses or parliaments (20%)

and political parties (13%) but lower than the levels reported for the government (27%), president (32%) and other public and private institutions (Latinobarómetro: 2022, p. 72).⁵⁹

FIGURE 2:
Confidence in the Judiciary, Latin America, 1995-2020



Developed by the authors using Latinobarometro data.

In conclusion, this section analyzes various studies on judges’ independence. This is due to the fact that more evidence is available for judges than prosecutors and public defenders. In regard to the former, several international reports include them -as is the case in Venezuela-, as do general reports that reflect concern regarding this topic (OECD: 2020). Some case studies for countries in the region also include analyses of public prosecutor’s offices.

59 Though it is not completely comparable because the measurement is different, Gallup has developed the Law and Order Index, which covers the opinions of citizens of 122 studies. It allows us to evaluate the meager results of Latinobarómetro in regard to trust in the justice system. One of the key elements of the measurement is determining how much trust people have in local police agencies. Latin America has a lower level of confidence than the global level. It was 51% in 2021 (49% in 2019 and 2020), and the global average was over 70% (Gallup: 2022, p. 11). This piece of information is important because it considers a stakeholder linked to the criminal justice system. Although the confidence level is lower than the global level, the result is much higher than the Latinobarómetro data on the justice system.

(See Espacio Público.) The World Justice Project’s Rule of Law Index includes a specific indicator that measures the independence of criminal justice by quantifying the degree to which there is no undue influence on the part of the government. This should include as an important component, though it is not the only one, the work of prosecutors. Thirteen of the 19 countries in the region studied in 2022 scored lower than the global average on the quality of the rule of law,⁶⁰ and one country (Guatemala) scored the same as the average. This suggests that it is an area that is lacking in most of the region.⁶¹ However, it is not possible to make much progress in this regard due to the lack of specific studies that address this stakeholder.

The evidence on public defenders is much more limited. Elements of their work are included in country reports and inter-American system instruments, but they do not paint a picture similar to the one produced based on information on judges. The region’s public defender’s offices play a more active role in this regard through AIDEF (JSCA: 2022).

60 Argentina, Bolivia, Colombia, Dominican Republic Ecuador, El Salvador, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru and Venezuela.

61 It was higher in just five countries: Brazil, Chile, Costa Rica, Mexico and Uruguay.

Chapter IV

RISKS AND IMPACTS ON THE INDEPENDENCE OF JUSTICE OPERATORS IN THE AMERICAS

This chapter presents an overview of the main problems that justice operators in the region face in terms of their independence. It is based on a review of the evidence available in regional reports and data developed to analyze the situation of specific countries in recent years. The authors identify problems that are common to various locations and provide specific examples of them. The purpose of this chapter is not to provide a detailed discussion of the situation of each individual country or to present a single typology of the problems or regional reality due to the enormous differences that exist from one country to the next.

1. Risks and Impacts on the Independence of Judges

The situation of judges' independence varies in the region and even within individual countries. For example, the 2022 Rule of Law Index indicator shows that levels of improper government intervention in civil justice vary within countries compared to criminal justice. As such, the evidence shows that the risks and impacts on judges' independence can vary by matter, subsystem or case.

1.1. Prior Questions: Problems Beyond the External/Internal Dichotomy

One problem of this blind spot is that the risks and external impacts may quickly lead to the capture of a judicial system, which quickly leads to issues of

internal independence due to the full control that political or other interests take on over the regular operation of the judicial system or its leadership. As such, the external/internal typology seems to correspond more to airtight compartments than aspects that reflect fluid relationships and connections that develop in practice beyond the conceptual differences.⁶² One way to overcome the problem generated by this approach is to expand upon the *de iure* and *de facto* aspects.

The distinction between external and internal judicial independence is insufficient to identify precise and invisible problems on a binary. Serious risks that are left outside of that categorization have been identified by the UN Special Rapporteur for Judicial Independence,⁶³ who has identified three obstacles or threats at the global level: (a) the reinforcement of authoritarian currents in the exercise of public power; (b) the development and strengthening of international organized crime networks; and (c) corruption of justice operators (UN Special Rapporteur: 2022, p. 4).

In regard to the relationship between authoritarianism and judicial independence, the UN Rapporteur reminds us of the importance of the separation of government branches and identifies a lack of compliance with legal dispositions in various countries. This includes, for example, emergency situations that allow executive or legislative branches to enter spheres of action that belong to judicial systems (UN Rapporteur: 2022, p. 13). This aligns with the indicators analyzed earlier in this study that speak to setbacks in the consolidation of democracy and the rule of law in the region.

In regard to organized crime, the UN Rapporteur states that globalization and technology have facilitated transnational crime and highlights its close connection to corruption at different levels of government, including judicial systems.⁶⁴ In their

62 One example of this is observed in Venezuela, where judges are subjected to frequent external interference in the form of instructions issued by officials in politically significant cases. Overall, the progressive removal of judges over time has caused it to be increasingly less necessary to proceed in this way given that judges know the “correct” answer expected by officials (Misión Internacional: 2021, paragraph 130).

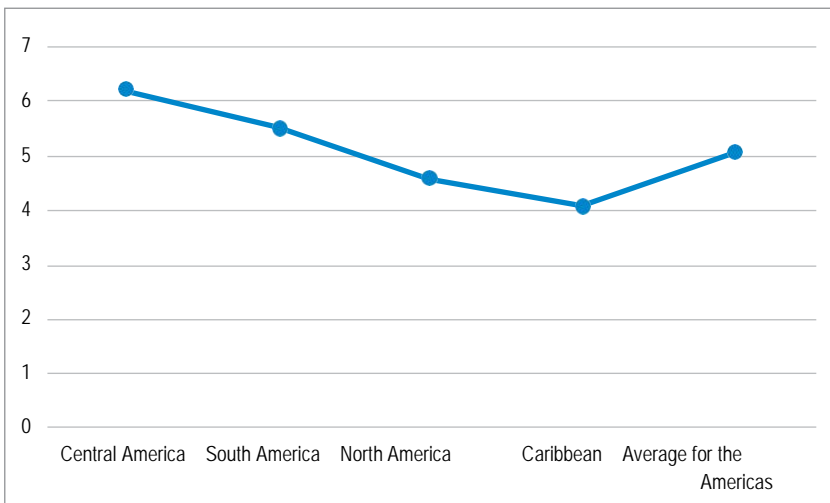
63 Reports from 2019 (July 16), 2020 (July 3) and especially 2022 (July 13).

64 UN Rapporteur: 2019, p. 12.

national reports, the Rapporteur identifies specific impacts on judicial independence due to the influence of organized crime. For example, they expressed concern about this issue in the 2020 Honduras report (UN Rapporteur: 2020, paragraph 73-82).

The perception described above aligns with international indicators that point to an increase in the influence of organized crime in Latin America. The Global Initiative's 2021 Global Organized Crime Index⁶⁵ shows important levels of influence of organized crime in the region. The global average for the indicator of criminality -which looks at its level of influence- is 4.87 (on a scale of 1 to 10). South America has a score of 5.51 and Central America has a score of 6.16 (Global Initiative: 2021, p. 73). According to this report, three of the 10 countries that are most exposed in the world are located in Latin America: Colombia with 7.66, Mexico with 7.56 and Honduras with 6.98. All of them are on the line between considerable and profound influence.

FIGURE 3:
2021 Criminality Indicator



Developed by the authors using Global Initiative data.

65 The index was developed for the first time in 2021 and covers the situation of 193 countries for the year 2020. For more information, see <https://globalinitiative.net/analysis/ocindex-2021/>.

In the indicator on resilience in the Global Organized Crime Index, which measures the capacity to resist organized crime, Latin America sits below the global average. Its lowest scores are in the area of the work of justice, specifically criminal justice. The average for the Americas is: judicial system and detention (4.31) and support for victims and witnesses (4.3). When the information is disaggregated by subregion, Central America scores 3.44 and 3.56 and South America 4.42 and 4.38, respectively.

In regard to infiltration by corruption networks and the performance of justice operators, documentation from specialized agencies speaks to serious cases with public impact in the region. These include the “Caso Audios” involving Peru’s National Magistrates Council, the “Comisiones Paralelas” in Guatemala and the Cartel de la Toga in Colombia. Misión Internacional reports that corrupt practices are common among judicial officials, who demand payments that are not allowed by law (2021, paragraph 157). In Bolivia, justice operators charge people to streamline cases or issue judicial orders (UN Rapporteur: 2022, paragraph 38).

Beyond the evidence on specific countries or cases, the Rule of Law Index also speaks to the existence of this problem in the region. The influence of corruption is measured using three subcriteria: (i) the absence of corruption in judiciaries (Criterion 2.2); (ii) the existence or absence of bribes or undue influence by other private interests in civil justice (Criterion 7.3); and (iii) criminal justice agencies (police, prosecutors and judges) who charge or do not charge bribes or the undue influence of criminal organizations (Criterion 8.5).

Analyzing these three subcriteria together shows that a significant percentage of countries in the region present weak results, which means that they are highly exposed to corruption. Reviewing them one by one again reveals a wide range of situations. For example, in regard to subindicator 2.2, some countries place very low on the scale. These include Venezuela (0.16), Bolivia (0.18), Nicaragua (0.27) and Mexico (0.31). Meanwhile, other countries score very high at the global level, including Uruguay (0.91), Chile (0.84) and Costa Rica (0.78). The same is true for indicators 7.3 and 8.5. Tables 3 and 3.1 offer a more complete vision of the regional situation.

TABLE 3
Subfactors that Measure Justice System Corruption in South America

Country	Subfactor 2.2: Corruption in the judiciary	Subfactor 7.3: Corruption in civil justice	Subfactor 8.5: Corruption in criminal justice
Argentina	0.63	0.53	0.45
Brazil	0.69	0.65	0.53
Bolivia	0.18	0.19	0.20
Colombia	0.54	0.49	0.40
Chile	0.84	0.65	0.68
Ecuador	0.41	0.40	0.42
Paraguay	0.41	0.33	0.28
Peru	0.45	0.38	0.35
Venezuela	0.16	0.17	0.25
Uruguay	0.91	0.81	0.77

Source: Developed by the authors using Rule of Law Index 2022 data.

In addition to presenting significant levels of heterogeneity across countries, the table above shows cases in which said situation occurs based on different indicators within a single country. For example, there is an enormous difference between the general subfactor and the situation of civil and criminal justice in Argentina. A comparison of subfactors 2.2 and 8.5 reveals similar results for Brazil, Chile and Uruguay.

TABLE 3.1
Subfactors that Measure Justice System Corruption in Central America

Country	Subfactor 2.2: Corruption in the judiciary	Subfactor 7.3: Corruption in civil justice	Subfactor 8.5: Corruption in criminal justice
Costa Rica	0.78	0.72	0.66
El Salvador	0.50	0.48	0.39
Guatemala	0.41	0.42	0.43
Haiti	0.37	0.38	0.27
Honduras	0.37	0.37	0.40
Mexico	0.31	0.31	0.30
Nicaragua	0.27	0.33	0.39
Dominican Republic	0.48	0.45	0.45
Panama	0.47	0.46	0.47

Source: Developed by the authors using Rule of Law Index 2022 data.

As the table above shows, with the exception of Costa Rica, the situation of the rest of the countries in Central America is precarious in terms of the level of penetration of corruption in the judicial system. This opens up the possibility of intervention and influence in justice operators' independence.

It is important to consider that judicial system corruption is not only analyzed as a risk to judicial independence on its own. In various cases, political or legislative officials also use it to justify proposing and implementing reforms that affect or could affect said independence. One example is the justice reform project proposed in Mexico in 2021 (DPLF: 2022). Another is the proposals developed in El Salvador to reform the judicial career and the Organic Law of the Prosecutor General's Office (IDHUCA: 2022, p. 27). As such, corruption does not only

threaten judicial Independence in the region. It is also used improperly as a justification for impacting the same or promoting higher levels of intervention on the part of political authority under the pretext of correcting the situation.

Corruption is related to the deep weaknesses in accountability presented by judicial systems in Latin America. As the UN Special Rapporteur noted in their report on the topic, accountability is an important element of independent justice systems (2014, paragraphs 18-96). In this context, a lack of adequate accountability mechanisms favors corruption by making the system more opaque, limiting external oversight -especially by civil society- and favoring impunity. As such, paying attention to corruption is part of the new roadmap that JSCA is proposing and is something that the Center has called for attention to be paid to since its inception (JSCA: Vargas: 2002).

The role of professional organizations that represent judges, prosecutors and defense attorneys in the strengthening of institutions' independence is another key element in the regional context. Latin America presents growing associationism. One of the expectations about the work of these entities is that they will strengthen justice operators' autonomy from internal and external pressure (JSCA: 2002, pp. 62- 63). As the next sections show, there is evidence that these institutions have played this role in various countries and situations and have supported operators and reported serious improper interference. There is still a lack of information about their role, particularly given that, along with a positive role, these organizations run the risk of being co-opted by interests, as has been described in the comparative literature on the topic. A new roadmap for increasing justice operators' independence in the region should consider this point.

1.2.Risks and Impacts on Judicial Independence in the External Dimension:

There exists a wide variety of risks and obstacles to judicial independence in this area. Some could be catalogued as classic obstacles, such as i) improper intervention in judges' selection and appointment systems; ii) intervention in their work; and iii) judges' removal. We explore these three areas further in the sections that follow.

1.2.1. External Risks and Impacts:

This category includes the behavior of other branches of government or external stakeholders that constitutes an effort to decrease the independence of judicial systems or judges. In several countries of the region, these have clear, longstanding impacts on independence.

As the analysis of the judicial manipulation indicator shows, the return to democracy in the region in the 1990s has not led to a reduction in risks of improper influence and control over high courts, for example, by staffing them with individuals who are deferential to the executive and legislative branches. Civil society has determined that judges' removal from their positions in El Salvador in May 2021 led to the appointment of 10 of the 15 Supreme Court justices even though only five were to be replaced at that time (DPLF: 2022, pp. 27- 30). Another example is the serious risk observed in Mexico because of the bill submitted in 2021 that sought to create a new Supreme Court chamber, creating a strong majority of members appointed by the current administration (DPLF: 2021).

A second type of impact on the independence of justice operators refers to the existence of direct pressure applied by political actors in regard to "sensitive" cases. For example, according to *Misión Internacional*, a common practice in political cases designated as "emblematic" in Venezuela is pressuring or instructing judges to rule in a certain way through direct calls issued by

political actors or indirect messages from officials on television (Misión Internacional: 2021, paragraph 138). The Supreme Court also has been subject to such pressure through similar channels. In addition, there are specific people who are designated intermediaries in the Executive and Supreme Court, and they met with justices in the Court or at the presidential palace (Misión Internacional: 2021, paragraph 133).

Another external impact on independence is the use and manipulation of criminal law to punish judges who try to rule independently, especially in cases that could involve or pose problems for those in power. For example, according to the FLAM, this conduct is a problematic practice in Guatemala that involves filing false and malicious accusations against judges, using detention and pretrial detention against them improperly, and engaging in other actions. All of this is occurring in a context in which the independence of the prosecutors responsible for said cases is being questioned (FLAM: 2022, pp. 5- 10).

According to Misión Internacional, criminal action is used in Venezuela to threaten or extort judges. The unique aspect of this is that those criminal actions are based on supposed cases of corruption that the official had “prepared” in case they needed it (Misión Internacional: 2021, paragraphs 166 and 167). The UN Rapporteur has stated that Bolivia has seen the use of threats and allegations of ambiguous criminal activities (sedition, terrorism and failure to perform their duties) (2022, paragraphs 84 and 85).

One way that political officials can pressure judges is the use of political trials or pre-trial hearings against them in an effort to secure their removal.⁶⁶ This has been documented in several countries of the region and, as such, has been the subject of various rulings of the Inter-American Court against countries such as Argentina, Paraguay and Peru (Inter-American Court: 2022, pp. 27- 34). The Court has established

66 There are cases at the regional level in which political trials are a combination of internal and external attacks on independence because there must be some prior level of support for the accusations by high-ranking judiciary officials, as is the case in Guatemala, for example.

the need for the control exercised in those cases to be more than opportunity or political convenience. It should instead be based on legal criteria related to evidence or lack of evidence of alleged behaviors with full respect for due process. This includes the presence of an independent and impartial judicial entity.

The region has seen serious cases of political removal of judges that have failed to respect procedures for trials or pre-trial hearings. The DPLF has argued that the removal of Supreme Court Constitutional Chamber justices in El Salvador on May 1, 2021 by the Legislative Assembly was orchestrated by those in power without the necessary prior discussion and without giving the justices an opportunity to mount a defense (DPLF: 2022, p. 25; IDHUCA: 2022, pp. 9- 10). The FLAM has reported that this tool has been used to undermine judicial independence in Guatemala as well (FLAM: 2022, pp. 11- 12).

There is also evidence of serious threats, intimidation and even murder of judges and prosecutors in Latin America. This is a problem that has been observed in countries like Argentina (Zunilda Niremperger, 2023), Bolivia (UN Rapporteur: 2022), Guatemala (FLAM: 2022, p. 7), Honduras (UN Rapporteur: 2020, paragraphs 67-71) and Venezuela (Misión Intemacional: 2021, paragraphs 160-163). The situation is so serious that the AIAMP has published as many as seven public statements in the past few years in response to threats against and murders of prosecutors in the Americas due to their investigative work against national and transnational organized crime.

In addition to the aforementioned threats, FLAM reports that there have been campaigns to discredit judges in Guatemala who participated in high-impact cases in various media outlets and social media platforms. FLAM alleges that the public prosecutor's office has failed to investigate and punish the threats against and attacks on justice operators (FLAM, 2022, p. 13-14).

The Inter-American Commission on Human Rights has expressed its concern about threats and violence against and the deaths of judges in the region. The organization has argued that there is a lack of adequate investigation and punishment in these cases (IACHR: 2013, paragraph 149).

1.2.2. Selection and Appointment Systems for Judges⁶⁷

International standards highlight the need for selection and appointment processes for judges that guarantee equal access to recognition of merit. (See, for example, recommendations 6-9 of the Inter-American Convention, IACHR: 2013, pp. 108- 109). In some cases in the region, those processes have been impacted by efforts to privilege the interests or political goals of those in power. We present evidence of this in the paragraphs that follow.

First, there are critical cases in which there is a failure to apply the rules of the system used to select and appoint judges. Misión Internacional has found that Venezuela failed to comply with existing rules for Supreme Court justice selection designed to limit political interference in appointments (2021, paragraphs 91-97). This is a very important process because of the control that the Court has over the rest of the system of judges⁶⁸ (Misión Internacional: 2021, paragraphs 98-99).

According to a report by the International Criminal Court, Venezuela’s National Assembly reelected 12 Supreme Court justices in April 2022, ignoring the fact that this is not allowed under the Constitution. As such, of the 20 members of the Court, 12 have political connections to the party in power because they have, for example, held high-ranking political positions within it (Office of the Prosecutor of the International Criminal Court: 2022, paragraphs 148-149).

Honduras is another example. The UN Rapporteur has argued that there is a practice in the country

67 This could create issues of external and internal independence when appointments are handled solely by the judiciary. For now, it is addressed only in this section.

68 This was reflected in a 2003 Supreme Court decision to suspend the application of a highly competitive procedure developed in 2000. Since then, no processes have been held to select judges. They have been appointed temporarily by the Supreme Court through a procedure conducted by the Judicial Commission that involves levels of discretion (Misión Internacional: 2021, paragraphs 100-104).

of moving away from the rules that governed the judicial appointments system and prevented undue political interference. The Supreme Court's Constitutional Chamber declared the Judicial Council and Judicial Career Law unconstitutional in March 2016. This created a legal vacuum in the judicial appointment system and gave the Chief Justice the power to make judicial appointments. It also concentrated a set of additional functions that the law that was declared unconstitutional transferred to the Judicial Council (UN Rapporteur: 2020, paragraphs 30-34).

Another impact on the selection and appointment processes for judges is found in changes to the competencies and roles of courts or institutional agencies in said processes in order to assign them to ad hoc technical or political entities. The UN Rapporteur's 2022 report regarding the participation of bar association representatives in these mechanisms signals that it is important for this to be done in a manner that avoids corporatism and politicization (2022, paragraph 29).

Espacio Público has found that the creation of Application Commissions in Guatemala (Articles 215 and 217 of the Constitution) comprised of representatives of law schools, bar associations and magistrates introduced a technical filter for the selection of judges. This generated a perverse incentive to create new law schools with the sole purpose of intervening in judicial application processes, policy coopting and advancing various types of interests of representatives of bar associations and judges' groups (Espacio Público: 2020, pp. 60- 71). These problems became public when the "parallel commission" cases were revealed in 2014 and 2020 and demonstrated the instrumentalization of appointments to members of the Supreme Court and appeals courts in both periods (FLAM: 2022, p. 4).

A less visible but just as concerning situation developed in Argentina, where political interests permeated Magistrates' Council processes. This included, for example, incorporating

members with more party affiliations than technical preparation (for example, to positions assigned to academics (Espacio Público: 2020, pp. 55- 56). This meant that appointments were the object of various types of political negotiations in practice (Binder: 2022, p. 3).

As a result, the procedures and criteria used to select judges constitute a sensitive and high-impact area for judicial independence. The Inter-American Commission has noted that several countries do not specify which objective criteria are used to select judges (2013, paragraph 107).

There are several examples of this in the literature. In Argentina, one of the selection stages that involves the most discretion and that is as such a source of arbitrariness is the evaluation of applicants' individual interviews (Espacio Público: 2020, pp. 55- 56). A comprehensive reform of regulations for the selection of judges for the Magistrates' Council was undertaken there in July 2022. The reform addressed issues such as the interview process and awarding of a score for it as part of the selection process (Molea, Tolosa and Vásquez: 2022, pp. 1- 2).

In Costa Rica, a lack of clarity regarding objective requirements and the high value placed on the interview opened up spaces of discretion and a lack of transparency in the selection process for judges (Orocú: 2022, p. 10). In Guatemala, the process lacked clarity regarding the position profile and evaluation of background information, which led to arbitrary decisions (Espacio Público: 2020, p. 67). Interviews of candidates by El Salvador's Legislative Assembly have been used as a mechanism for confirming candidates' political preferences rather than focusing on their technical qualification. This was observed in the 2021 Supreme Court justice selection process (IDHUCA: 2022, pp. 24- 25).

In some cases, those responsible for appointing judges have changed the composition of the entities responsible for the appointments. In Venezuela, for

example, a 2022 law reformed the composition of the Judicial Nominations Committee, which was responsible for applicant pre-screening. This law reduced civil society's role in the process and increased the presence of members of the National Assembly, increasing political participation in the appointment of judges (International Criminal Court Prosecutor's Office: 2022, paragraph 147).

As this brief review demonstrates, the impact of improper interference on judicial independence in the selection and appointment of judges is an important, widespread problem in the region that presents in different ways in local realities.

1.2.3. Service and Removal::

This section presents a set of problems related to judicial independence that develop once judges are appointed and are actively working. They are related to the creation of conditions of stability, proper performance and independence. We also analyze problems related to judges' removal.

One key condition for the adequate exercise of the judicial function is the stability of judicial appointments over time. The UN Special Rapporteur and the Inter-American Commission have noted that short-term appointments may impact judges' independence and professional development (IACHR, 2013, paragraph 84).

One widespread problem in the region is the existence of temporary judges, that is, individuals appointed for an unspecified term who have no guarantee of stability or regular status (IACHR: 2013, paragraph 89-96). While temporary appointments are not necessarily prohibited by international standards, experts do recommend that they be used only exceptionally (Bingham Centre: 2016, paragraph 48). Recent statistics suggest that the region is far from meeting that standard and that the existence of temporary judges is a widespread problem. For example, 85.3% of Venezuela's judges were temporary judges in 2019 (Misión Internacional: 2021, paragraphs 100-104). In Bolivia, 47% of judges had temporary appointments in 2022

(UN Rapporteur: 2022, paragraph 21). Experts estimate that 30% of regular judges in Colombia were temporary in 2019, and around 30% of Peru's judges were temporary in 2020 (Villadiego: 2021).

Some permanent appointments of judges last for brief periods of time and subject judges to confirmation processes. This is also the subject of international concern (IACHR: 2013, paragraph 97 and Bingham Centre: 2016, paragraph 49).

One subtle form of this phenomenon has been observed in Chile in regard to attorneys who are members of the appeals courts and Supreme Court. These are professionals external to the judiciary who are appointed for brief periods of time (one year in appeals courts and three year in the case of the Supreme Court) to serve in the entities' chambers and handle roles that are equivalent to those of the courts' permanent justices even though they are not exclusively assigned to that work. They are appointed by the Executive Branch using candidate lists submitted by the courts themselves. Once their term ends, they can be reappointed if they are again included on candidate lists and selected by the Executive. Another formula is the length of interim and acting roles due to delays in the permanent appointment processes. This has been found to occur frequently in Argentina (Binder: 2022, p. 2; Marull: 2022, p. 12).

A final point in this regard that could also be included in the section on issues of internal independence involves the use of promotions and transfers of judges as a tool to limit their independence. These have been identified as problematic by the Inter-American Commission, which has highlighted the need for such processes to be public and announced in advance and based on objective criteria that avoid excessive discretion and arbitrary decisions (2013, paragraphs 120-127 and Recommendations 12 and 13).

There is evidence that both promotions and transfers are used to "punish" judges who make decisions that go against the interests or judicial criteria of a judicial system official. The Inter-American Commission has documented the issue as it presents in the case of transfers

(2013, paragraphs 126). Information from El Salvador suggests that the use of transfers that have the practical effect of demoting judges is a recent practice. In some cases, judges that rule in the way that officials wish them to are transferred as a reward (DPLF: 2022, p. 38). Mexico’s Executive Branch submitted a bill to expand opportunities to transfer judges in 2021, and it has been interpreted as a threat to their independence (DPLF: 2022, p. 19). Binder describes the tortuous situation of judges who wish to be promoted and come up against processes marked by political negotiations (Binder: 2022, p. 2).

We have left the use of procedures for removing or disciplining judges as mechanisms that go against their independence (guarantee of immovability) for the end of this section. In this area, the distinction between external and internal independence is also unclear because they can be used as tools by external stakeholders or judicial officials and bodies in order to “discipline” their members. One example of a threat that comes from outside of the judiciary is the excessive use of political trials or preliminary trials, as discussed above. Another is disciplinary measures imposed by Magistrates’ Councils comprised of individuals external to the judiciary or those who have been co-opted by external forces. In many countries, removal mechanisms involve judicial officials directly or require some sort of intervention by them (through councils, for example). The same occurs -and more intensely- in disciplinary systems.

The improper use of removal and disciplinary measures may impact judges’ tenure, a condition that international standards consider essential for ensuring judicial independence. Permanence and the existence of guarantees of stability are a basic condition for the exercise of the judicial function (IACHR: 2013, paragraph 184). To avoid this, a set of standards linked to these processes has been developed. They include, among other things,

the requirement that the basis for removal and punishment be described with a certain level of precision, that the punishment be proportional to the seriousness of the actions, respect for due process (including impartiality of the judge and the right to a defense), the duty to establish the motivations for the decisions and the right to have them reviewed (IACHR: 2013, paragraph 192-329). Various problematic practices in this area were identified and are reviewed below.

As we have stated, one common mechanism for removing judges, particularly in the region's superior courts, is political trial, that is, removal of judges by political entities, normally within the legislature. The Inter-American Commission has found that at least nine countries in the region have this sort of system (Argentina, Bolivia, Chile, Colombia, Mexico, Panama, Paraguay, Peru and Uruguay) and identified clear risks to judicial independence. This is based on the fact that it found broad and vague reasons for removal in several of them that allow for political trial to be used and the regulation of procedures that do not meet the requirements of due process (IACHR: 2013, paragraph 203, UN Rapporteur: 2020, paragraph 43 with the example of Honduras).

One example of these risks was the removal of judges from the constitutional chamber of Honduras' Supreme Court on December 12, 2012 using a ruling based on allegations of unconstitutional practices that were considered to go against the interests of the State (UN Rapporteur: 2020, paragraph 49). Cases of removal of Bolivian constitutional court judges in 2014 were also documented (UN Rapporteur: 2022, paragraph 83). More recently, Argentina's government initiated a political trial of several members of the Supreme Court. Human Rights Watch and other institutions consider this an attack on the country's judicial independence and other analysts have described it as an abusive use of the tool.⁶⁹

69 Tamara Tariciuk Broner, the Director of Human Rights Watch Americas, argues that the announcement of a political trial of all Court members and the initial statements suggesting that a ruling from the highest court would not be followed constitute a serious attack on the separation of powers (La Nación, January 12, 2023. <https://www.lanacion.com.ar/politica/human-rights-watch-alerto-por-los-ataques-del-gobierno-a-la-justicia-y-la-corrupcion-nid12012023/>).

These same problems came up in regard to disciplinary procedures. For example, disciplinary trials have been used against judges who have issued rulings against officials or their relatives (UN Rapporteur: 2022, paragraph 85). A recent case of legislative attempts to move in a problematic direction in this area is the reform proposed in Mexico in 2021, which has already been mentioned (DPLF: 2021, p. 19).

Even more serious situations continue to emerge in the region in the area of the removal of judges. For example, threats of removal and pressure to resign have been used in Venezuela against judges along with removal for reasons other than those established in the law and outside of the procedure regulated by it (Misión Internacional: 2021, paragraph 142). El Salvador's Legislative Assembly removed members of the Constitutional Chamber of the Supreme Court with no clear explanation of the act in 2021 (DPLF: 2022, p. 5).

We must also consider the situation of temporary judges. Officials with temporary appointments do not benefit from the protections enjoyed by permanent judges and can be removed without regard for general rules, as has been documented in Venezuela (Misión Internacional: 2021, paragraph 111 and International Criminal Court Prosecutor's Office, 2022, paragraph 144).

1.3. Risks and Impacts on Judicial Independence in the Internal Dimension

1.3.1. The Blind Spot in the Field

As we have already stated, several of the impacts identified as issues of external independence also pertain to the question of internal independence. This goes beyond removal and disciplinary processes to include the operation of selection mechanisms, use of transfers, etc.

As we have also suggested, there seems to be a blind spot in the international literature with respect of internal independence

In discussions of such matters. For example, in its review of the impartiality and independence of those who take disciplinary measures against judges, the Inter-American Commission Report identifies the potential risks that their use poses for judges' internal independence (2013, paragraphs 192-205). The Commission has, however, issued a statement, following the Venice Commission and suggestions of the UN Special Rapporteur in regard to its recommendation on the configuration of government agencies and justice system administration. The entity has argued in favor of the establishment of an entity other than the Supreme Court and the other courts that is independent and separate from the Executive and Legislative Branches. It would be responsible for selection, appointment, and discipline as well as other system government and administration functions (IACHR: 2013, paragraph 241).

When addressing the integration of these agencies, again following the recommendations of the UN Special Rapporteur, plural integration is proposed with representatives of different areas (legislators, academics, etc.). Special care must be taken to ensure that political representatives do not constitute a majority, which again reflects concern for protecting external independence. This leads to a proposal that the majority should come from the judiciary and should be chosen by the judges themselves (IACHR: 2013, paragraphs 244-245). No reflections are offered on potential risks to internal independence in this regard. Some of this is linked to the last recommendation formulated to prevent the leadership from coinciding with the presidency of the Supreme Court in order to avoid concentration of functions (IACHR: 2013, paragraph 246). This is made more explicit in Recommendation 10, which states that the purpose of this separation of roles is to strengthen the internal independence of the judiciary.

The Venice Commission seems to have less clarity regarding this problem. Its recommendations also include the idea that bodies cannot be exclusively comprised of members of the judiciary because this creates a risk of corporatism that leads to appointments solely based on the interests of the professional association or a very limited profile of those who should be selected (Brigham Center: 2016, paragraph 64.). There does not seem to be concern regarding the risks that this sort of entity

could be the subject of captures of different types of interests (economic, criminal, political, etc.) which, as we have seen, are among the contemporary concerns at the global level and of which there are several complex examples in the region. Once they enter, the internal/external independence distinction ceases to be important because decisions with technical justifications introduce spurious interests designed to avoid both areas. For example, in 2020, a series of public complaints was issued in Bolivia due to the appointment of 140 judges through the “sale” of judicial positions (UN Rapporteur: 2022, paragraph 90).

1.3.2. Specific Problems Identified:

A serious problem of internal independence has been identified in countries that do not differentiate between jurisdictional functions and judicial system governance. One example of this is found in Chile (JSCA: 2018, p. 345), where there is a vertical and concentrated configuration of superior court roles. This is particularly notable in the Supreme Court. Since the return to democracy, this has caused a lack of internal independence of judges from their superiors, which has been identified as the country’s most serious problem in this area. A similar phenomenon developed in Honduras in 2016, when the decree that regulated appointment, removal and supervision functions was declared unconstitutional, concentrating a high level of power in the Chief Justice of the Supreme Court (UN Rapporteur: 2020, paragraph 33).

There are various matters related to concrete tools that pose risks to internal independence. One is linked to the use of disciplinary procedures, which again offer only vague definitions of conducts and procedures that fail to adequately safeguard due process. These cases are unique in that they are resolved by judicial system officials who are also responsible for applying the law through jurisdictional oversight. One example of this is found in Chile. The Inter-American Commission has recommended transferring these roles to an independent government and administration agency (IACHR: 2013 , Recommendation 26).

Another tool used is case assignment systems as a way of influencing the direction of investigations that may be politically sensitive so that they are handled by judges who are more sensitive to this aspect. This has occurred in Venezuela, for example (Misión Internacional: 2021, paragraph 141). The Inter-American Commission has recommended the installment of case assignment systems based on objective criteria that must be public and precise enough to avoid manipulation (for example, through a lottery or automatic distribution system) (IACHR: 2013 , Recommendation 11).

Finally, there is evidence of the use of direct internal intervention mechanisms such as judicial system officials contacting judges to tell them how to handle politically sensitive cases. Misión Internacional found examples of this in Venezuela (2021, paragraph 139).

In conclusion, although the focus in the region has not been on aspects of internal independence, there is evidence of serious problems at this level that must be addressed more clearly in the context of a new roadmap for work in the region. It is necessary to consider the fact that the problems addressed in the section on external impacts also manifest as internal issues, such as calls to judges handling sensitive cases and the use of appointment and promotion systems.

2. Specific Problems Related to the Independence of Other Justice System Operators:

This section describes the main problems identified in regard to protecting the independence of prosecutors and public defenders. There are two issues to keep in mind. The first is that there is more evidence regarding judges related to this point. There is little data on public defenders in particular. The second is that many of the phenomena described with regard to

judges apply to other justice operators, particularly to prosecutors. As such, this section is naturally much shorter because we will not repeat the analysis that we have presented in regard to judges.

2.1. Risks and Impacts on the Independence of Prosecutors

As we have noted, due to the diversity of institutional arrangements used for public prosecutor's offices at the comparative level, the scope of prosecutors' independence is not precisely equivalent to that of judges. Its main objective is to ensure that prosecutors' decisions are impartial, evidence-based and free of external pressure or interference. At the institutional level, the independence of public prosecutor's offices includes operational arrangements that allow prosecutors to exercise independence. Institutional independence should ensure that prosecutors are able to do their work without interference from the political sphere, particularly the Executive Branch.

Despite the nuances, sensitive areas linked to external independence of prosecutors align quite a bit with those of judges (for example, UN Rapporteur: 2020, paragraphs 48-59). The evidence presented for judges tends to apply to prosecutors as well. Problems have been documented in regard to the appointment (i.e. Guatemala, Honduras) and removal (i.e. El Salvador) of judges; high percentages of temporary appointments (i.e. Venezuela); improper use of transfers (as rewards for or punishment for the behavior expected by internal or external officials); improper use of disciplinary investigations and threats of criminal prosecution; various types of intimidation; and other practices.

Some of these problems present even more intensely in the case of judges. For example, it has been stated that nearly all prosecutors are appointed on the basis of a provisional system in Venezuela, even more so than judges. This is due to the September 2018 reform of the statute for public prosecutor's office staff, which made some prosecutors "personnel of confidence" (International Criminal Court Prosecutor's Office: 2022, paragraph 152). Subsequent reforms have not improved this scenario

(International Criminal Court Prosecutor's Office: 2022, paragraph 154.) In addition, data suggest that only 30% of Bolivian prosecutors have completed the training program for prosecutors (UN Rapporteur, 2022, paragraph 58.)

The level of internal independence of prosecutors presents a different challenge. This is due to the fact that certain public prosecutor's offices in the region are structured as hierarchical organizations in which higher ranking prosecutors can issue instructions to lower-ranking colleagues. This is not accepted in the judicial sphere. Rather, it is considered a possible model for the organization of public prosecutor's offices in certain contexts. The major challenge to independence in those organizational models is ensuring that instructions are transparent, compatible with current legislation and subject to guidelines designed to protect prosecutorial independence and its perception in the community, as mentioned in the section on international standards.

Problems have been identified in this area in the region. Venezuela may again be the most delicate case. Prosecutors in Venezuela have reported that they have received instructions from their superiors regarding how to proceed in politically sensitive cases. The same has been reported for judges. (Misión Internacional, 2021, paragraph 144; International Criminal Court Prosecutor's Office: 2022, paragraph 155.) Another case that has presented issues of internal prosecutorial independence is that of Mexico, specifically the disappearance of 43 young people known as the Ayotzinapa case.⁷⁰

70 In August 2022, the prosecutor responsible for the case obtained judicial arrest warrants for 83 people who were involved in the events. A few days later, a different prosecutorial unit had dismissed at least 21 of those charges with no justification and without the knowledge or consent of the investigator in charge, apparently following internal instructions from superiors and possibly instructions from political officials. This led the prosecutor to resign along with two members of the Interdisciplinary Group of Independent Experts (GIEI in Spanish) because the independence of the investigation and prosecution had been compromised. The incident was the subject of multiple articles in the national and international press and direct criticism of the GIEI. These include: <https://www.washingtonpost.com/es/post-opinion/2022/10/10/giei-ayotzinapa-filtracion-renuncia-fiscal/> (October 10, 2022); <https://la-lista.com/mexico/2022/09/29/ejercito-caso-ayotzinapa-normalistas-giei> (September 29, 2022); <https://laverdadnoticias.com/mexico/Caso-Ayotzinapa-La-FGR-cancela-21-ordenes-de-aprehension-20220925-0204.html> (September 25, 2022). <https://www.youtube.com/watch?v=wF3y6zuYGis> (September 30, 2022).

Another technique used to improperly interfere is the use of case assignment systems to ensure that the most sensitive cases are handled by prosecutors who are more susceptible to pressure or that follow orders based on interests other than those strictly linked to criminal prosecution (Misión Internacional, 2021, paragraph 145.)

As the examples show, the problems of independence that prosecutors face do present nuances with respect to judicial issues and reveal serious impacts on the work of autonomous investigation expected in a democratic society. They also point to an urgent need to address this matter with its specific characteristics regarding these operators' independence.

2.2. Risks and Impacts on the Independence of Public Defenders

As we have stated, the evidence related to this topic is fairly limited in the region. As such, we will present less information in this section. The limited data on this topic available is likely due to various factors including the lack of conceptual clarity regarding the reach of independence in this area and the more limited attention paid to the work of public defenders in the region.

In this context, and as we have already stated, public defenders' independence in Latin America has mainly been studied by public defender's offices and their regional organization (AIDEF). This is the prevailing system of the organization of public defense in the region. We know little about the problems that private defense attorneys may face.

This forces us to analyze existing information on the reality of public defender's offices in Latin America. An initial issue is that these entities are quite diverse in the region. In some cases, they are recognized constitutionally (i.e. Argentina,

Brazil, Colombia and Ecuador). In others, they are only recognized at the legal level (i.e. Bolivia, Chile, Costa Rica and Mexico). In some models, public defense services are generally provided in criminal and other matters (i.e. Argentina, Brazil and Paraguay). In others, it is limited to criminal cases (i.e. Chile). Finally, in some cases, they are not independent -in Chile, they are part of the Executive Branch and in Costa Rica they are part of the judiciary. In others, they are autonomous (IACHR: 2013, paragraph 45.) Regardless of the regulations in place, there seem to be significant levels of functional autonomy and various nuances in terms of financial, budgetary and administrative autonomy across the board (Martínez: 2022).⁷¹

These differences in models do not seem to correlate to quality of service, particularly the link between independence or constitutional autonomy and the quality of the work performed. This makes it difficult to determine when potential impacts on autonomy and independence are truly an obstacle to the right to defense or access to justice and when said problems could impact a corporate vision of how public institutional structure should be organized in this area.

One area impacted by a lack of independence and autonomy is budgetary restrictions and limitations on resources that can be used to provide services. This is a common problem of other justice system operators and is not necessarily linked only to issues of autonomy. The Inter-American Commission has manifested its concern in this regard, including all justice operators in it (2013, paragraphs 49-55).

In the sphere of public defense, however, there seem to be cases in which budgetary issues have impacted autonomy. For example, public defense services are separate from the judiciary in the Dominican Republic. Researchers found that when the institution came to strongly depend on

71 An analysis of various examples of regulation of autonomy of public defender's offices in the region is presented in JSCA's recent publication on this topic (2021, pp. 56-159).

its management by the Public Administration Ministry, which is part of the Executive Branch. This led to various disputes and tension around budgetary matters. This conflict ended in 2020 as a result of a Constitutional Court decision in that country that recognized the constitutional rank of the institution, thus facilitating budgetary allocations that aligned with its needs (Santos: 2022).

One case of an extreme lack of resources in the region is that of Bolivia. Public defense services reach just 99 of the 339 municipalities in the country, and there are just 51 public defenders for a population of just under 12 million (UN Rapporteur: 2022, paragraph 24).

To address this type of budgetary issue, the Inter-American Commission has recommended the allocation of sufficient financial, human and technical resources to ensure that the services are provided (2013, Recommendation 5). This has been extended generally to all justice operators.

In other cases, the lack of autonomy in constitutional or legal regulation of public defender's offices limits the work of defense, preventing services from extending to areas in which it should be more natural and logical. For example, public defender's offices in Chile could not bring cases before the inter-American human rights system.

Another problematic aspect identified in the available literature is that, as is the case with other justice operators, there are documented cases of undue intervention by officials in appointment and removal processes. For example, Paraguay improved the appointment system for the highest-ranking institutional official beginning in 2019 (Segovia: 2022.) Along these lines, many of the vices that have been described for other operators apply here, so it is not necessary to reiterate them.

Public defenders and attorneys in general have also been subjected to threats, intimidation and attacks on their integrity, as have other justice system operators (IACHR: 2013, paragraphs 146- 167; UN Rapporteur: 2020, paragraphs 66-72).

Experts also describe a set of obstacles and barriers to the adequate performance of their duties, such as access to evidentiary material or a lack of resources for producing evidence independently. It is not at all clear whether these issues are linked to the lack of autonomy or independence of public defense in a strict sense. As we have suggested in other sections, these problems are linked to the conditions that exist in our justice systems in terms of ensuring adequate exercise of the right to defense regardless of how such work is organized and whether defense systems are autonomous from political or judicial power. It is not our role to minimize the importance of these problems. Rather, we seek to adequately situate them as a result of more structural matters that do not seem to be directly related to public defenders' institutional independence or autonomy. They are instead linked to significant weaknesses in due process in the region, which are the result of a diverse set of causes.

Two final topics are mentioned as potential aspects to be explored more fully due to the fact that evidence is scant. The first is limitations on the ability of defense attorneys in private practice to partner with and provide independent, quality defense services in the region. Countries seem to lack clear regulations in this area and in regard to the tension that may develop between public and private defense services. All of this undermines the work of legal defense.

A second matter that deserves careful attention is the connections between justice operators in the system, particularly those who provide defense services, as they tend to have a much weaker position than the others. This may be due to the strength of the public institution to which they belong or because they provide services privately without an institutional umbrella. These connections generate several potential issues for the independence of defense attorneys. First, in many countries, allegations against defense attorneys are investigated by prosecutors. This creates a risk of undue use of those powers to encourage more docile or deferential behavior by defense attorneys. In addition,

the staff of public prosecution and public defense institutions are trained together. This could encourage defense attorneys to refrain from “fighting with” their colleagues on the prosecution side, which again undermines the independent exercise of the profession and their role in the defense.

Beyond these issues, it is clear that there is an enormous need for more evidence about the work of defense attorneys that would allow researchers to more specifically address a set of issues that could impact their independence in the region.

CHAPTER V

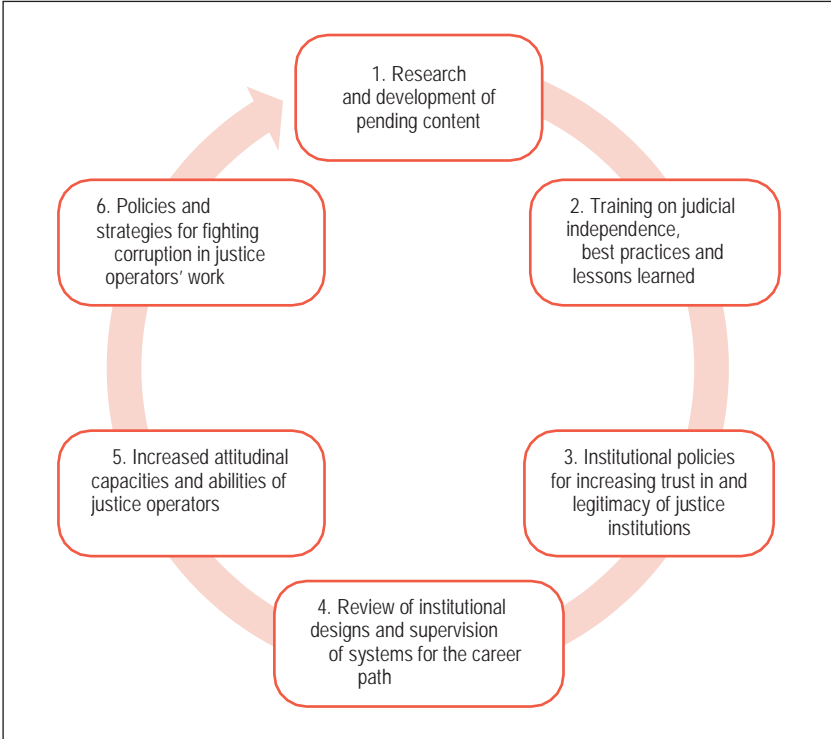
PROPOSAL FOR A NEW ROADMAP TO STRENGTHEN THE INDEPENDENCE OF JUSTICE OPERATORS IN LATIN AMERICA

This section presents JSCA's proposal for building a new roadmap in order to strengthen justice operators' independence in the countries of the Americas. It is based on the needs and opportunities identified in the previous chapters of this study.

This roadmap is directed at stakeholders and institutions that are both internal and external to justice systems as well as international agencies and cooperation agencies and justice operators themselves. JSCA is willing to work with all of them to build partnerships in order to implement all or some of the actions outlined below.

This new roadmap covers work in six areas, as explained in the figure below.

FIGURE 4:
Roadmap to Strengthen the Independence of Justice Operators in Americas



Source: Developed by the authors.

1. Research and Development of Pending Content

- National studies that expand on the points addressed in this report in order to generate comparable information oriented towards facilitating ongoing national and regional monitoring processes.
- Design of operational guides to strengthen the judicial Independence of judges, prosecutors and public defenders based on the issues and sub-issues, differences and particularities of each role addressed in this study.
- Development of orientation guides, protocols and organization of best practices to guarantee the safety and protection of justice operators, particularly judges and prosecutors.
- Design of guides to operationalize international principles and standards on judicial independence in order to promote their implementation and practical changes.
- Formulation of a set of quantitative and qualitative technical indicators to measure and compare progress and setbacks in the independence of judges, prosecutors and public defenders in the various countries in the region.
- Study of best practices in the region that have a positive impact on improving levels of independence of judges, prosecutors and public defenders in a differentiated manner.
- Studies on the impact of the lack of judicial independence on at-risk individuals and groups.
- Research on the role and contribution of justice operator associations in the protection of judicial independence.

2. Training on Judicial Independence, Best Practices and Lessons Learned

Development and execution of specific training programs focused on overcoming the problems identified in attitudinal competencies, human resources management capacities and the application of more sophisticated processes for appointing operators. These programs should contain the following key elements:

- ❖ Making operators aware of the most critical problems as well as the most subtle issues that impact their independence.
- ❖ Implementation of a gender approach given that impacts on independence do not impact everyone the same way. For example, appointment processes should consider the structural disadvantages that women face in regard to accessing positions of power.
- ❖ Development of competencies that allow them to identify situations that go against independence so that they can prevent them.
- ❖ Provision of tools for avoiding or resisting undue influence in the exercise of their roles.
- ❖ Criteria for engaging in critical self-assessment of their performance.

3. Institutional Policies and Mechanisms for Increasing Public Confidence and Legitimacy

Policies and mechanisms in judiciaries, public prosecutor's offices and public defender's offices designed to:

- Increase transparency and accountability with a focus on access to information on rules, criteria and procedures followed in admission, appointment and confirmation processes, promotions and disciplinary processes involving justice operators.
- Communications strategies for increasing public understanding of institutional roles and their results,

highlighting, for example, timely resolution of disputes, judicial production, compliance with deadlines and management of procedural delays, and initiatives for improving access to justice for at-risk people. All of this should be implemented using clear language and a pluricultural approach.

- Strategies for increasing mechanisms for dialogue in justice institutions with civil society organizations and the community, including mechanisms for promoting citizen oversight opportunities and public hearings.
- The design of indicators and measurable short-, medium- and long-term goals regarding the aforementioned policies.

4. Review of Institutional Design and Supervision of Systems for the Career Path

- Review of the design of magistrates' councils or entities with similar roles in order to reinforce objectivity, impartiality, meritocracy and non-politicization of decision-making regarding the professional programs completed by justice operators. In this context, some of the alternatives to be studied and assessed are:
 - ❖ Deconcentration and separation of administrative functions, which should fall to various entities.
 - ❖ Separation of appointment powers from disciplinary powers, which should fall to different entities.
 - ❖ Diversification of selection and appointment systems in order to decrease the risk produced when all of these are part of the same system.
 - ❖ Improvement of mechanisms to ensure that selection processes are more transparent to the public and allow for the participation of civil society (Recommendation 6, Inter-American Commission, 2013).

- ❖ Strengthening of autonomy and procedures for structuring internal investigation systems in the face of criminal or disciplinary violations in order to avoid their possible abuse as a mechanism for exercising undue influence over justice operators.
- Design and implementation of strategies to eliminate or at least reduce temporary appointments of justice operators. We propose the following:
 - ❖ A comparative study of experiences (in the judicial sphere and other areas of state or private action) in which similar progress has been attempted.
 - ❖ Strengthening human resource management capacities in order to ensure that the technical leadership responsible for this work is in place.
 - ❖ Design of a transition plan that addresses the conditions and sets realistic timelines based on the different realities.
 - ❖ Identification and oversight of mechanisms that increase temporary appointments (i.e. short-term appointments with ongoing confirmation, etc.).
- Improvement of the design of justice operator appointment processes in order to improve the quality of appointments from the perspective of the independence of those elected. Special attention must be paid to reducing spaces of discretion that may impact them. This involves potential actions such as:
 - ❖ The design of clearer profiles for the various positions that incorporate independence as an important factor.
 - ❖ Specific regulation of the form, role and weight of interviews in hiring processes which the evidence shows to be one of the most problematic spaces.

- ❖ The incorporation of procedures that allow for adequate control of appointments by civil society, contributing to public participation in various stages of their development.
- Review of disciplinary procedures and sanctions in order to:
 - ❖ Precisely define the conduct that is subject to disciplinary action and particularly those that may lead to removal, including for the highest-ranking officials.
 - ❖ Establish an independent and impartial agency that hears such procedures, avoiding improper external interventions or actions that weaken internal independence.
 - ❖ Design efficient procedures that promote decision-making based on quality information that is also respectful of due process and the procedural guarantees of the individuals investigated.
 - ❖ Review of lists of sanctions to ensure that they are proportional to the seriousness of punishable offenses.
 - ❖ Construction of a clear and accessible registry of disciplinary procedures and sanctions applied in order to ensure that these powers are used within the frameworks authorized by law.
- Improved regulation of the removal of high-ranking officials completed through political procedures or any procedure other than disciplinary ones. The purpose must be to limit excesses or arbitrariness in these procedures due to their impact on justice operators' independence. There is a fundamental need to eliminate vague and open grounds (i.e. unworthy conduct, moral or ethical incapacity, etc.) and protect due process. Given how difficult it can be, there is also a need to design formulae to

restrict the discretion of the decision-making entity by following technical criteria rather than political criteria.

- Improvement of information production systems in order to generate timely and public statistical evidence. In this context, we must make progress on the following:
 - ❖ Identification of minimum common denominators of basic information for the evaluation of justice operators' performance and to prevent potential risks of interference or corruption in the institutions.
 - ❖ Promotion of the use of the production of information in formats that facilitate work with the data that allows third parties, including civil society, to analyze it.
 - ❖ Ensuring that information is produced in a timely manner.
- Increasing justice sector institution accountability. Some potential areas of work on this topic are:
 - ❖ Development of a research agenda that allows scholars to identify successful experiences with institutional accountability.
 - ❖ Promotion of periodic reporting systems for justice sector institutions in a manner that is understandable and public and directed at other government agencies responsible for supervising the respective sector.
 - ❖ Development of an accountability strategy at the local level in coordination with civil society organizations.
- We propose the following specifically for public prosecutor's offices:
 - ❖ Review of institutional design in order to ensure balance between institutional autonomy and

adequate oversight of the system that guarantees that criminal prosecution is exercised within the parameters of democratic society. In this context, the designs must ensure that the institution can become a tool for the prosecution of “political enemies.”

- ❖ Review of institutional designs to guarantee balance between hierarchical organizational models and recognition of spaces for prosecutors’ autonomy or individual independence. This is based on the idea that a non-hierarchical branch with no limitations can lead to abuses, particularly in regard to institutional leadership having an impact throughout the institution with no counterweight. There is also a concern that excessive prosecutorial independence can stand as an obstacle to equal application of a criminal prosecution policy and to the achievement of shared institutional goals.
 - ❖ Detailed regulations (guides, rules, protocols, etc.) on the use of discretionary powers by prosecutors given that they involve levels of discretion in decisions related to various stages of prosecution as well as the review of internal systems for monitoring said decisions.
- We propose the following specifically for the work of public defender’s offices:
 - ❖ Mechanisms geared towards ensuring independence among public defenders above and beyond the existence of a public defense institution.
 - ❖ Precise definition of selection, continuation and removal procedures for public defenders.
 - ❖ Communications strategies designed to disseminate the value and contributions of public defenders to justice systems.

- ❖ Regulations of potential conflicts between the individual work of defense and institutional instructions issued by public defense officials.

5. Increased attitudinal capacities and abilities of justice operators

- Improvement of admission or selection profiles of candidates that apply to join justice institutions, which involves identifying adequate attitudinal capacities for strengthening their independence.
- Design of selection processes and candidate assessments that take up these elements are key components for the selection of those who intend to serve as justice system operators.
- Design of initial training programs, a system for evaluating their results and specific modules focused on developing attitudinal capacities that contribute to independent work and decision-making. This should be complemented by ongoing training programs for those who already work as justice system operators.
- Design of training assessment methods for operators in order to identify performance gaps related to these attitudinal capacities.
- Inclusions of the attitudinal aspect as a component of performance evaluation systems and in the development of institutional goals and incentives.
- Identification of problems generated in work dynamics in collegiate decision-making entities in which operators who are subject to influence may be subject to such pressure.
- Development of skills related to reaching agreements and consensus in collegiate bodies.

6. Anti-corruption policies and strategies related to justice operators' work

- Policies and strategies for minimizing, identifying and countering corruption in the work of justice operators. We propose the following:
 - ❖ Development of assessments that expand on the relationship between corruption and justice operators' independence.
 - ❖ Identification of the consequences of corruption for especially vulnerable groups or those that have historically faced discrimination with an intersectional approach.
 - ❖ Strengthening of internal oversight systems for preventing inadequate practices.
 - ❖ Implementation of systems that allow for monitoring the traceability of justice operators' instructions and decisions, which help to prevent improper interference.
 - ❖ Development of protocols for reacting to and acting in response to various types of problems.
 - ❖ Development of guides and protocols that help identify potential ethical conflicts and conflicts of interest.
 - ❖ Design of training programs that provide effective tools and best practices for prevention and oversight of corruption in justice institutions.

- We propose the following items specifically for the work of civil society in this area:
 - ❖ Strengthening civil society organizations' technical capacities related to monitoring and documenting cases of corruption and related problems involving justice operators.
 - ❖ Development of open, public platforms where civil society can access

documentation and records related to cases at the regional level.

- ❖ Promotion of a regional network and cooperation among civil society institutions that work on corruption.

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