Judicial Independence: Definition, Measurement, and Its Effects on Corruption.

An Analysis of Latin America

By

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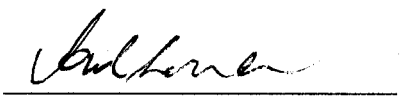

Adam Przeworski

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For Andrea

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ABSTRACT

The general objective of this dissertation can be stated in four steps: (1) To provide a precise definition of judicial independence; (2) to create a measure of judicial independence *de jure* theoretically consistent with the definition and capable to be compared across space and time; (3) to identify the conditions under which such measure can be a good proxy for judicial *independence from* the other governmental organs and for judge's *independence to* decide on cases in which the interests of those organs are affected ; finally, (4) to explore the relationship between judicial independence and corruption. The theoretical propositions advanced in the chapters of this dissertation regarding the four outlined steps are complimented with empirical analyses of Latin American countries.

Based on an original dataset that covers eighteen Latin American countries from 1950 to 2002, I offer a systematic and comparable measurement of four components of judicial independence in the region: (1) Autonomy, or the relation between the executive and legislative with the judiciary as an institution; (2) External independence of Supreme Court judges, or the relation between them as individuals and the elected branches of government; (3) Internal independence of lower court judges, or the relation between them and their superiors in the judicial hierarchy;

and, (4) the institutional location of the Public Prosecutor's Office. I find that, contrary to common wisdom the level of *de jure* judicial independence in Latin America is rather low.

The last chapter uses the measure of the components of judicial independence to examine their relationship with corruption. I argue that in a system of checks and balances the optimal degree of judicial independence is an intermediate one that can be attained by different combinations of the components of independence. I also argue that more internal independence leads to more corruption, and that this is also the case when the prosecutorial organ that lies within the executive power. I explore these hypotheses in the context of Latin American countries from 1996 to 2002 and find preliminary evidence that autonomy and the institutional location of the prosecutorial organ are associated with less corruption.

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INTRODUCTION

The existence of an independent judiciary has become a mantra for international institutions and governments throughout the world. It is widely believed that an independent judiciary provides benefits such as low corruption and protection for human rights, just to mention two. By the same token, when we observe countries with high levels of corruption and poor human rights protection, a common suspect to explain those shortcomings is the lack of an independent judicial system.

When I began my doctoral research on judicial independence, I was struck by the diversity of definitions, inconsistency of the measures, and the consequent gulf I found between the strength of the belief about the benefits of having an independent judiciary and the lack of conclusive evidence (see Appendix A). I soon realized that an important part of the problem was that valuable insights on judicial independence remained dissipated in the legal, economic, political science, and other literatures and that a general framework incorporating those insights was sorely needed. Thus, I saw my research on judicial independence in Latin America as providing an exciting opportunity to bring together heretofore separate fields of knowledge and I decided to embark on the project of trying to

understand what judicial independence is, in order to be able to tell it when we see it, and to analyze what difference it makes.

Judicial independence is a slippery concept, difficult to define let alone to measure, that lies at the crossroads of different perspectives (Burbank and Friedman 2002). For the sake of clarity, I separate research on judicial independence into two different types of studies. The first focuses on judicial behavior, what I call *independence to*, and the second on the institutional framework or what I call *independence from*. In some cases these are perceived as two competing ways of how judicial independence should be studied, but I start from the premise that they are interdependent and hence better viewed as two complementary forms of judicial independence.

Research on judicial behavior usually approaches the question of independence through the study of actual decisions. These studies consider that there is judicial independence if judges are *independent to* decide, for instance, against the government if there was a violation of the constitution. From this perspective the question of whether or not there was judicial independence in a given context becomes whether or not decisions in such context were independently taken. Hence, much of the researcher's effort is

to establish criteria to enable her to characterize a given decision as independent or not.[1]

A second approach to judicial independence is the study of the incentives and limits that the judges have vis-à-vis other governmental agents. For this type of studies the question is whether or not there is judicial *independence from* other governmental agencies.[2] The degree of independence-from in a country can be assessed by looking at the laws that establish the relation between judges and/or the judiciary with the other governmental branches. But clearly that is not enough. It is also necessary that those laws are not violated. Therefore, the degree of independence

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[1] While some scholars argue that the sources of judicial preferences lie in the institutional incentives they face, others argue that they are to be found in judge's ideologies, and still others in public opinion. The literature on independence-to is very rich and nuanced, especially for the case of the United States; for an extensive list of references see McNollgast 2005. The main problem these studies face is the impossibility to infer independence-to from decisions against the government, since decisions in favor of the government can be made judges who are independent to decide. Recent studies are looking for ways to go around this problem (e.g. Harvey and Friedman 2006; Carrubba and Gabel 2006) and to expand the notion of binary judicial decisions into a broader rule-making judicial framework (e.g. Lax and Cameron 2005), and decision strategies to deal with potential non-compliance (e.g. Staton and Vanberg 2005).

[2] As further explained in Chapter 1, independence from what or who is a question that concerns most authors. The main concern in this dissertation is independence from other branches of government. Other important sources of influence such as public opinion or the media are not considered.

from depends on two things: a) the legal provisions that establish the relation between judges and the other branches, and b) whether the politicians act in accordance with those legal provisions. One thus needs to establish why and under what conditions it can be expected that the members of the other branches act in accordance with the provisions that determine the degree of judicial independence de jure.

The general objective of this dissertation can be stated in four steps: (1) To provide a precise definition of judicial independence; (2) to create a measure of judicial independence *de jure* theoretically consistent with the definition and capable to be compared across space and time; (3) to identify the conditions under which such measure can be a good proxy for *independence from* and *independence to*; and, finally, (4) to systematically explore the relationship between judicial independence and corruption. The theoretical propositions advanced in the chapters of this dissertation regarding these four steps are complimented with empirical analyses across eighteen Latin American countries.

While in Latin America there are now good single country studies of independence-to, such as Helmke's (2005) analysis of judicial behavior in Argentina, there are simply no systematic and valid cross-country measures available for gauging different levels of independence-from. A

few scattered attempts to code constitutions (e.g. Clark 1975) were quickly dismissed on the grounds that in Latin America the legal rules are generally at odds with the real political world. But if we are ultimately interested in how institutions shape behavior and affect outcomes, the place to start is the incentives set up by the institutional system (Cameron 2002). How can we evaluate the effect of institutions on outcomes if we lack a clear idea of what the legal institutional framework is?

But *de jure* alone is not enough. To have a clear idea of the institutional framework is a necessary but not a sufficient condition. It is false that behavior has nothing to do with rules, but it is equally false that rules determine behavior. The question then is not whether there is a gap between rules and practice, but under what political conditions rules matter. One view considers that this depends on the balance of forces, strategic calculations, and strategic miscalculations (Maravall and Przeworski 2003). In other words, in order to make inferences about the effects of institutions we need to distinguish between conditions, institutions, and outcomes, and to use every available tool from history to thought experiments to econometrics to make our inferences as reliable as possible (Przeworski 2004).

With this theoretical perspective in mind, the first step in my dissertation was to identify a notion of independence that was simultaneously precise and capable to capture some degree of complexity of the judicial systems, complexity usually acknowledged but also neglected in studies that use a plain index of judicial independence based on surveys or personal classifications. I found such notion in the logic of delegation that lies in the historical origins of judicial independence (Holmes 2003). According to this logic, we can understand judicial independence as a relationship between those who delegate, in contemporary democracies the politicians that populate the elected branches of government, and the delegates or the judges in this case. In addition, I also consider the relationship between judges on the top of the judicial hierarchy with their subordinates and the relationship between the elected branches and the Public Prosecutor's Office.

Thus, building on the literature, in Chapter 1 I unpack the concept of judicial independence into four of its components: (1) Autonomy, or the relation between the executive and legislative with the judiciary as an institution; (2) External independence of Supreme Court judges, or the relation between them as individuals and the elected branches of government; (3) Internal independence of lower court judges, or the

relation between them and their superiors in the judicial hierarchy; and, (4) the institutional location of the Public Prosecutor's Office. Based on these distinctions, I identify six models of judicial independence that reflect how a country combines the first three components. I label these combinations "Institutional Models of Judicial Independence". In order to measure each component and to classify countries according to their model, I propose a set of observable institutional variables and coding rules consistent with the notion of independence.[3]

In Chapter 2, based on an original dataset that covers eighteen Latin American countries from 1950 to 2002, I offer a systematic and comparable measurement of the components of judicial independence in the region. I find that, contrary to the common wisdom according to which the level of judicial independence *de jure* is remarkably high while the level *de facto* remarkably low, the level of *de jure* judicial independence in Latin America is rather low. I argue that current assessments of judicial independence in the region are either based on an oversimplified look at legal texts or on unwarranted generalizations of one or two cases. True, in all Latin American constitutions there is an article saying that the judiciary is

[3] The word "model" is used here in reference to something that attempts to accurately resemble or represent something else, in a simple way or small scale, and not to imply a "formal model" in a game theoretic sense.

independent and that judges are only bound by law. But there are also several other articles where the institutional mechanisms linking judges and the judiciary with the other branches are specified and where we find a more complex and nuanced picture.

Chapter 3 addresses the question of under what conditions laws, the constitutional provisions that establish an independent judiciary in this case, are likely to be observed or ignored. The argument is that whether these constitutional provisions can be considered a good proxy for *independence to* and *independence from* depends on the distribution of power among the ruling political groups. Having identified those political conditions, and what Supreme Court judges can expect from them, I explore what is the likely behavior of these judges regarding decisions on cases where the government violates the rule of law or horizontal accountability. The result is a six-fold theoretically informed typology of the circumstances where, and the reasons why, the *de jure* measure is a good, fair, or bad proxy. The typology is also useful for empirical observation since identifying in which scenario a given country is guides the observer's eye to those areas where attacks to judicial independence are more likely to occur.

Finally, Chapter 4 uses the measure of independence developed in the previous chapters to examine the relationship between judicial independence and corruption. Despite the recent burst of analysis on the causes of corruption, there are relatively few that systematically test for the effects of different political institutions in curbing corruption (e.g. Kunicová and Rose-Ackerman 2005) and none yet, to my knowledge, on the potential effects that the different components of an independent judiciary may have on it. In this Chapter I argue that in a system of checks and balances the optimal degree of judicial independence is an intermediate one that can be attained by different combinations of the components of independence. I also argue that more internal independence leads to more corruption, and that this is also the case when the prosecutorial organ lies within the executive power. I explore these hypotheses in the context of Latin American countries from 1996 to 2002 and find preliminary evidence that an intermediate degree of autonomy and the institutional location of the prosecutorial organ outside the executive are associated with less corruption.

Judicial independence has also been pointed out as a promoter of other benefits such as the protection of human rights, investment and economic growth, and the consolidation of democracy. What is the relation

between the components of judicial independence and these desired goals? Under what conditions judicial independence makes a difference? Moreover, judicial independence is only a part of the extensive justice reforms carried out in Latin America, and indeed in many others countries around the world as well. What is its relation with access to justice, efficiency in the administration of justice, and reforms of the criminal justice system? What is the relation between judicial independence and the so-called judicialization of politics? What are the determinants of the different components of judicial independence, what explains the wide institutional variation in judicial systems across countries?

This dissertation hopes to move the debate on judicial independence from the widely held assumptions about its benefits to the previous set of, to my mind, much more interesting theoretical and empirical puzzles. A precise definition of judicial independence, analytical distinctions of its different components, and a theoretically informed, systematic, and comparable measure hopefully contribute to that end.

This dissertation also aims to contribute to the incorporation of courts and judicial politics into the broader fields of comparative politics, comparative legal studies, and institutional analysis. The literature on executives and legislatures, especially on Latin America, has been growing

and generating new insights (e.g. Shugart and Carey 1992; Mainwaring and Shugart 1997; Morgenstern and Nacif 2002) but courts and judges are still generally considered only marginally in these analyses. As Shugart and Carey have shown (1992) not all presidential systems are alike and the institutional differences in, for instance, presidential vetoes may be consequential (see Alemán and Schwartz 2006). Similarly, this dissertation shows that there are interesting variations in the institutional structure of Latin American justice systems, all of which share the civil law tradition. The comparative framework proposed in this dissertation, which directly considers the relation between courts and judges with the other organs of government, is intended to be a first step towards integration of the three branches of government in comparative institutional and legal analysis.

CHAPTER 1

INSTITUTIONAL MODELS OF JUDICIAL INDEPENDENCE

Notwithstanding valuable insights that research on judicial independence has generated, efforts to analyze and measure it still face important challenges. Scholars who use the legal framework to analyze judicial independence (e.g. Clark 1975) face the criticism that their *de jure* assessments may not accurately reflect political reality (Larkins 1996). To avoid this problem, scholars carrying out single-country studies have used decisions against the government as a proxy for judicial independence (e.g. Helmke 2002; Iaryczower et al 2002; Ramseyer and Rasmunsen 2003). Yet independent courts can decide in favor of the government and binary measures may oversimplify judicial decisions. In depth analysis of judicial independence based on individual and historical circumstances (e.g. Widner 2001; Bill Chavez 2004), however, still face the problem of generalizing results from single country studies. That said, measures of independence are rougher in multi-country studies which use expert surveys, personal classifications, or indices that frequently overlook the relations between branches of government, or fail to differentiate between different types of courts or levels of judges (e.g. Feld and Voigt 2003; La Porta et al 2004; Weder 1995).

Looking at comparative assessments of judicial independence in Latin America, for instance, one can only conclude that we don't know what the level across countries is. Some early attempts to measure and compare judicial independence differ in their conceptualization, measurement, and ranking of countries in the region. David S. Clark (1975) constructed a measure of structural guarantees of judicial independence including recruitment, tenure, salary protections, and effectiveness of judicial review. Kenneth Johnson (1976a; 1976b), surveyed academics and journalists every five years from 1945 to 1975 and ranked individual countries in Latin America with respect to several criteria including judicial independence. Finally, Joel Verner (1984) classified Latin American courts in a six fold mold based on subjective assessments: independent-activist; attenuated-activist; stable-reactive; reactive-compliant; minimalist; and, personalist. The consistencies between Clark, Johnson, and Verner basically reduce to have Costa Rica at the top (although Costa Rica is second for Clark who placed Brazil tied with Colombia in first place), and the Dominican Republic and Paraguay at the bottom of the rank.

More recent efforts are also inconsistent. Table 1.1 reproduces the measures for eighteen Latin American countries in 2002 of some of the most cited large-N analysis (see Table 1.1). There is little consensus across

different measures for each country. Take the case of Mexico. According to Feld & Voigt (2003)[4] the level of judicial independence in 2002 both de jure and de facto was quite high at .80 and .70, respectively. The contrast with Henisz's (2000) binary measure[5] could not be starker since Henisz gives Mexico a 0. David Yamanashi's measure[6] (2002) is also a rather low .25. In sum, these measures not only define judicial independence different ways but also do not tell us much about the level of judicial independence in, say, Mexico in 2002 (see Appendix A for a sample of different measures of judicial independence).[7]

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[4] Their measure of judicial independence is based on a survey of experts. For details see Feld and Voigt 2003.

[5] Henisz measures judicial independence by combining the variable "Constraints on the Executive" by POLITIIV and the variable "Law and Order" by International Country Risk Guide (ICRG). For details see Henisz 2000.

[6] Yamanashi's measure is based on his own evaluation, corroborated by two colleagues, of the number of human rights violations that were adjudicated by an independent organ. For details see Yamanashi 2002.

[7] I don't include another recent measurement by Moreno, Crisp, and Shugart (2003, 105) on eleven Latin American countries because, since they are dealing with the broader issue of accountability, it combines independence of high courts with other superintendence agencies.

Table 1.1 Comparison of Measures of Judicial Independence in Latin America

Country	Feld & Voigt de jure 2002	Feld & Voigt de facto 2002	La Porta et al 2002	Henisz 2001	Yamanashi 1996
Argentina	.665	.333	NA	1.0	.75
Bolivia	NA	NA	NA	0	.75
Brazil	.907	.494	.67	0	0
Chile	.778	.575	.67	1.0	.5
Colombia	.939	.571	.33	0	0
Costa Rica	.685	.92	1.0	1.0	1.0
Dominican Republic	NA	NA	NA	1.0	.25
Ecuador	.835	.4	1.0	1.0	.5
El Salvador	NA	NA	NA	0	.5
Guatemala	.499	.55	NA	0	0
Honduras	NA	NA	.33	0	.5
Mexico	.804	.707	NA	0	.25
Nicaragua	NA	NA	NA	1.0	.5
Panama	NA	NA	NA	0	.75
Paraguay	.781	.6	NA	1.0	.25
Peru	NA	NA	NA	0	0
Uruguay	NA	NA	NA	0	1.0
Venezuela	.65	.4	NA	0	.25

Note: Year in parenthesis is year of measure. All measures are normalized to one, and one corresponds to the highest degree of independence/performance.
Sources: Feld & Voigt (2003); La Porta et al. (2004); Yamanashi (2002); Henisz (2000)

So, what is and how can we measure judicial independence? In what follows, I first define judicial independence and distinguish between four of its components, in order to propose a way to measure each component and

establish a framework for comparison. In the next chapter, I show the results of this systematic and theoretically grounded measure of the components of judicial independence in the case of eighteen Latin American countries from 1950 to 2002.

1.1 Unpacking Judicial Independence

The lineages of judicial independence, according to Stephen Holmes, are to be found in the benefits that people with power, politicians, derive from tying their hands and obeying judges, people without power (2003, 25-28).[8] My analysis on judicial independence starts from this act of delegation in which politicians get some benefit out of their self-limitation, such as having a neutral arbiter to resolve disputes between them.[9]

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[8] The idea that judicial independence is not an end in itself, but a means to an end, is present in authors that have gone beyond the normative conception of judicial independence (e.g. Burbank and Friedman 2002; Russell 2001; Cappelleti 1985; Shetreet 1985). On the other hand, "interest-based theories" of judicial independence make the point in cost-benefit terms and emphasize politician's self-limitation (Landes and Posner 1975; Holmes 2003; Ramseyer and Rasmusen 2003).

[9] Politicians may exchange judicial independence for diverse benefits. The classic one is to have a neutral arbiter to resolve disputes between them (see Madison and Hamilton 2000; Pasquino 2003; Fiss 2000). Holmes (2003) emphasizes that by making judges independent people in power would get information about political opponents while simultaneously transferring the cost of punishing (see also Rogers 2001; Salzberger 1993). Talking about partisan politics in Congress, Landes and Posner (1975) argue that legislators would be able to get higher rents if judges are independent and enforce deals and contracts. McCubbins and Schwartz (1984) argue that

However, delegating power to judges creates a dilemma: while politicians can grant independence they cannot guarantee its expected benefits. For instance, independent judges can be non-neutral and systematically rule against one group or party, at least in principle.[10] In other words, in granting independence politicians are certain of the risks that it involves but uncertain about getting the benefits that motivate them to make judges independent in the first place.

The previous dilemma explains why when politicians make judges independent they also retain some control mechanisms over them and/or the judiciary. It also highlights the concept of independence used throughout this dissertation: a relation between an actor "A" that delegates authority to an actor "B", where the latter is more or less independent of the former depending on how many controls A retains over B. As we will see in the second chapter, throughout Latin America there are interesting variations across space and time in how politicians delegate power to

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independent judges serve as a mechanism for accountability because they monitor the bureaucracy (see also Shipan 2000). Other authors concerned with electoral politics, have argued that independent judges would tie the winner's hands lowering the stakes of loosing and winning (see Ramseyer and Rasmusen 2003; Stephenson 2003; Finkel 1999).

[10] Landes and Posner 1975, 883. See also Ferejohn 1999; Ramseyer and Rasmusen 2003; Maravall 2003.

judges and/or the judiciary, i.e. how different control mechanisms are established.

From the starting point, it follows that we should consider independence from the "people with power" who delegate authority in the first place.[11] In contemporary democracies these are the politicians that populate the political branches of government, executive and legislative, who have the prerogatives and capacities to maintain or eventually alter such delegation. In addition, I also take into account the independence of judges from other judges in the judicial hierarchy who, following political motivations, may want to exert their influence. In order to clarify these dimensions let us make some analytical distinctions and conceptual clarifications.

In the literature on judicial independence there are two important and clear distinctions. The first one is between the individual judge and the institution of the judiciary. The second one is between pressures on the

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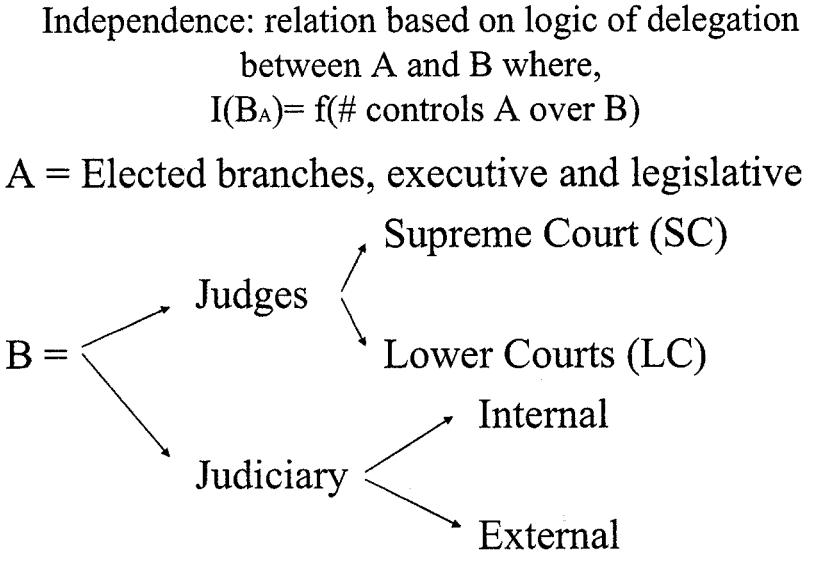
[11] "Independence from what or whom?" is a question that concerns most authors (e.g. Linares 2004; Pasquino 2003; Burbank and Friedman 2002; Russell 2001; Cappelleti 1985; Shetreet 1985). Some authors make the distinction between independence from political branches and independence from the parties in a case (Cappelleti 1985; Pasquino 2003; Fiss 2000; Larkins 1996). Some others argue that is independence from "undue interferences" without further specifying (Shetreet 1985). And there are others who directly consider only independence from political branches (Landes and Posner 1975; Ferejohn 1999; Rosenberg 1992).

judge from within and those from outside the judiciary (see Graph 1.1).[12] Notice that while it makes sense to distinguish between internal and external independence of judges, it is useless to make the same distinction for the judiciary given that its autonomy is always relative to the other branches. Notice also that, regarding internal independence, it makes sense to talk about pressures of Supreme Court judges on lower court judges, but not the other way around. Therefore, it does not make sense to talk about the internal independence of the judiciary or the internal independence of Supreme Court judges.

[12] Following the definition of independence, I focus on external pressures that come from the elected branches of government and do not consider pressures from other external sources such as the media.

Graph 1.1 Definition and Components of Judicial Independence



For the sake of clarity, let us use autonomy when we refer to the institution of the judiciary, and independence when we talk about individual judges. Based on the previous distinctions, I propose to unpack the concept of judicial independence into three components: a) autonomy, or the relation between the judiciary and the elected branches of government, b) external independence, or the relation between Supreme Court judges and the elected branches of government, and c) internal independence, or the relation between lower court and supreme, or

superior, court judges. I also consider a fourth component, the institutional location of the public prosecutor's office that I will address separately.

Notice that I do not consider the external independence of lower court judges. As comparative legal scholars have argued, there tends to be a trade off between external and internal independence of lower court judges that broadly maps into the civil law/common law distinction (Guarnieri and Pederzoli 1999, 40, 64; see also Damaska 1986; Merryman 1985). On the one hand, in civil law systems lower court judges enter relatively young to the judicial career and their climbing up the ladder depends mainly on incentives administered by those at the top of the hierarchy, having no direct contact with the political organs. This is to say that lower court judges in civil law countries tend to be externally independent and internally dependent.[13]

[13] As shown in Chapter 2, however, there are variations in the degree of internal independence across Latin American countries, all of which share the civil law tradition. But these differences are explained by institutional variations in the control of lower court judges by their superiors rather than by the direct control of lower court judges by the political branches. For instance, some countries created judicial councils that are in charge of administering the career of lower court judges, and in these cases the composition of the council becomes crucial to determine the degree of internal independence. If the council combines judges from all ranks in similar proportions (sometimes even selected by lot) then the superiors can not actually control lower court judges.

On the other hand, in common law systems lower court judges are usually appointed by political organs at an older age, regularly for life, and with salary protection and other guarantees that limit their relation with the political organs beyond appointment. In addition, in common law systems the prospect of promotion to a higher court is not nearly so potent a device for instilling hierarchical discipline as it is in civil law systems because even the lowest rung in more horizontal systems is already a prestigious occupation (Damaska 1986, 45). This is to say that lower court judges in common law countries tend to be externally dependent (at least at the moment of appointment with the obvious caveat that variations in length of tenure would impact the degree of dependence) and internally independent.[14]

1.2 Measuring Judicial Independence

Building on what Becker (1970) and Tate (1987) suggested to create a measure of judicial independence, in this section I propose a de jure measurement that enhances previous efforts such as Clark's (1975), for Latin America, or Smithey and Ishiyama's (2000), for Post-Communist countries, by identifying a unique set of observable institutional variables

[14] Empirical extensions to common law countries of the analysis carried out in this dissertation would indicate to what extent and under what conditions this statement holds.

to measure each one of the components of the unpacked notion of judicial independence developed in the first part of this chapter. I also offer coding rules derived from and consistent with the delegative concept of independence explained above. This makes my index reproducible and suitable for comparisons across space and time (see the Codebook in Appendix C).

Autonomy

Let us define an autonomous judiciary as one that decides on its own basic institutional structure, contrary to a heteronomous judiciary that would have its structure controlled by the other branches of government. The basic institutional structure of the judiciary is composed primarily of courts: their number, location, jurisdiction, and the number of judges sitting in them. Since we want to know how autonomous a given judiciary is, we should ask who decides how many courts with how many judges there are in a country, and what should the jurisdiction of each court, or set of courts, be. Given that autonomy refers to the relation between the judiciary and the elected branches of government, I distinguish four possible answers to who decides over those variables: the executive, the legislative, the executive with the legislative, or the judiciary itself.

The degree of autonomy would be highest where the basic structure of the judiciary is controlled by the judiciary itself, lower where two organs of government (executive and legislative) control it, and still lower where it is in the hands of only one organ (executive or legislative). In addition, where do we find the previous information? Assuming that constitutional amendments are harder to pass than ordinary statutes, the degree of autonomy would be highest when the provisions regarding who decides on the basic structure of the judiciary are written down in the constitution, lower if they are regulated by ordinary statues, and still lower if they can be changed by, say, presidential decrees. When the constitution does not specify that the judiciary decides on its structure, it is usually the case that this matter is to be decided by Congress and the Executive by the regular legislative process.[15]

In addition, autonomy of the judiciary also depends on whether it has the capacity to regulate and control the arbitrary exercise of power by state and societal actors and the capacity to strike down unconstitutional

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[15] Many constitutions establish that the judiciary has to be "consulted" before congress legislates on variables that affect judiciary's autonomy. However, I consider that such provisions would only add to autonomy when a specific institutional mechanism backing them is also detailed in the constitution. For instance, the Costa Rican constitution establishes that, after consultation, if the judiciary disagrees with proposed changes on its structure then a 2/3 vote is needed to pass them as law.

laws. Constitutional adjudication is inherently political in the sense that a constitutional court must deliberate and choose from alternative rules for regulating social and political conduct.[16] Among these rules are those related to the distribution of power for the different political organs, including the judiciary. When the power of constitutional adjudication lies within the judiciary the judges could decide cases in a way that increases their own power as well as that of their institutional organ. For the power of constitutional adjudication to be politically effective, however, the constitution itself should specify that the effects of decisions in constitutional cases are to be valid for all (*erga omnes*) and not only for the participants in a particular case (*inter partes*).[17] Thus, if the constitution specifies that the power of constitutional adjudication with erga omnes provisions lies within the judiciary (for instance, in the Supreme Court)[18], I say that the judiciary is more autonomous than if such power lies outside

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[16] Precisely for this reason, Kelsen argued that the constitutional court should be located outside the judiciary and as an autonomous organ (see Ferejohn and Pasquino 2003, 251).

[17] In Latin America, for instance, while some form of constitutional adjudication has existed in most countries since their independence, it was not until the last two decades that erga omnes provisions have been adopted (Clark 1975; Navia and Rios-Figueroa 2005).

[18] It should not be the whole Supreme Court but at least one of its chambers, like Costa Rica's "Sala Cuarta" (see Wilson et al 2004).

the judiciary (for instance, in a constitutional tribunal).[19] Finally, although the power of the purse generally lies within the legislative branch of government, there are countries in which the judiciary receives a constitutionally mandated percentage of the national budget. Since this model attempts to protect the judicial budget from political intervention, in those countries the judiciary would be more autonomous from the elected organs of government.[20]

In sum, in order to measure autonomy, I propose to look at the following institutional variables: number and jurisdiction of the courts, number of judges sitting in those courts[21], constitutional adjudication, and

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[19] The power of constitutional adjudication can be vested in a special organ outside the judiciary, i.e. a constitutional court as is common in Europe, or within the judiciary, i.e. in the Supreme Court and all lower federal courts as in the United States. Latin American countries have created new models with elements of both the European and the America style (Navia and Ríos-Figueroa 2004).

[20] Clearly, however, a fixed percentage in the constitution is not a panacea. Some countries don't comply with the fixed percentage. A minimum easily becomes a maximum. And fixed percentages can actually undermine transparency, efficiency, and consultative process with lower courts because the judiciary no longer needs to justify to the legislature what it does or how it spends its funds (USAID 2002, 26).

[21] I take whether the number of Supreme Court judges is specified in the constitution as a proxy for who decides on the number of judges. I have two reasons: Establishing a specific number in the constitution intends to protect the political packing or unpacking of the Supreme Court; and, the number of lower court judges usually responds more to practical than

budget, and to add the number of variables that lie in the hands of the judiciary instead of on the elected organs of government (see Appendix C for coding details). For instance, if the constitution of a country: (a) specifies that the number and jurisdiction of the courts is to be decided by the judiciary itself, (b) establishes the number of supreme court judges, (c) provides a fixed percentage of the GDP for the judiciary, and (d) establishes that effective judicial review lies within the judiciary, then the judiciary would be fully autonomous.

My index of autonomy, thus, goes from zero to four. Take for example the Peruvian judiciary according to the 1993 Constitution. Article 143 specifies that the judicial power is vested in a Supreme Court and other lower tribunals to be determined by law. This is to say that the Peruvian Congress decides on the general structure of the judiciary, i.e. the number of courts, their jurisdiction, and the number of judges serving in courts (STRUCTURE=0). In addition, the constitution does not specify the number of judges of the Supreme Court (SC JUDGES=0) nor a fixed percentage of GDP for the judiciary (BUDGET=0). Finally, the constitution (Art. 201) specifies that a constitutional tribunal that is outside the judiciary exercises

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political considerations. For details on the coding of each variable see Appendix C.

constitutional adjudication (CONST COURT=0). In conclusion, adding up our variables for autonomy, we can say that in the 1993 Constitution the Peruvian judiciary is heteronomous (AUTONOMY=0).[22]

Before discussing external independence of Supreme Court judges, it is important to mention two issues that are difficult to measure but that have a close relation with autonomy of the judiciary, especially in civil law systems: (1) the distinction between ordinary and extraordinary jurisdictions, and (2) the existence of special courts. Ordinary jurisdiction in civil law systems is generally fragmented, i.e. there are courts that deal with family matters, others with criminal matters, others with civil matters, etcetera. This is important because, as Guarnieri and Pederzoli argue, the higher the degree of fragmentation in jurisdictional competencies, the lower the political weight of a particular court. Alternatively, the larger the sphere

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[22] The Peruvian Constitution of 1993 introduced a Judicial Council. However, only one of the members of the Judicial Council belongs to the judiciary (Art. 155), and while the Council participates in the appointment process and disciplinary proceedings of both Supreme Court and lower court judges (Art. 150, and Art. 154), it does not participate in the decisions regarding the structure of the judiciary, that is controlled by Congress. Therefore, according to the variables, the introduction of the Judicial Council in the Constitution of 1993 was not enough for the Peruvian judiciary to become autonomous. See the section on judicial councils below.

of decision of a judge, the higher the potential impact he can have in politics (1999, 75).[23]

But perhaps more important for autonomy is the existence of special courts, or what can be called extraordinary jurisdiction. Special tribunals are generally outside the judiciary, and are usually set up to consider politically relevant matters. If the executive or legislative can create special tribunals at will, this would imply less autonomy (Guarnieri and Pederzoli 1999, 74-75).[24] In the database, I include a variable that counts the number of special tribunals specified in the constitution. However, I do not include this variable in the measurement of autonomy because this number does not necessarily reflects less autonomy and the prerogatives for creating

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[23] A related question is whether the people perceive the judiciary, as an institution, to be clearly separated from the other branches. Walker (2006) argues that this perception would increase judicial legitimacy.

[24] As Tocqueville argued for the case of France " [...] since the king [...] controlled the judges neither through ambition nor fear, he soon felt troubled by their independence. This led him, more than anywhere else, to limit their jurisdiction over matters which directly affected his power, and to create alongside the ordinary courts, for his own special use, a more dependent kind of tribunal, which gave his subjects the appearance of justice without making him fear its reality" (Tocqueville 1998, 132). I thank Andrea Pozas-Loyo for pointing out to me this quote.

special tribunals are usually not clearly established in constitutions (see Appendix C for details).[25]

External independence

Whether Supreme Court judges are more or less externally independent can be determined by looking at the institutional variables that regulate the relation between them and the elected organs of government: appointment, tenure, impeachment, and salary. Again, to determine the degree of external independence one should answer who controls each variable and where do we find this information. Let us look closer at each variable.

Supreme Court judges can be appointed by the judiciary, perhaps through a judicial council (more on this below), the executive, the legislative, or the executive and the legislative (usually the Senate where it exists). If the constitution specifies that Supreme Court judges are appointed by the judiciary or by at least two organs of government, I

[25] I should also note that I am not considering administrative courts which in the classic French model constitute an entirely separate court system with the Council of State at the top (see Merryman 1985). In Latin America, Colombia is the only country to use the French model of administrative courts. In other countries, administrative tribunals look more like the US system -court-like bodies attached to executive agencies. Collectively, they did not constitute a single system (Hammergren 2002, 13, fn. 22). In addition, in federal countries I only consider the federal judiciary.

consider that as an appointment procedure counting towards external independence. Closely related to appointment is the length of tenure. In order to increase external independence, terms must be long enough to reduce the vulnerability of Supreme Court judges. Tenure need not be for life, but if it coincides with that of appointing authorities then there is the potential for abuse. Hence, my rule is that if the constitution specifies that Supreme Court judges' tenure is longer than that of their appointing authorities, then I count it towards external independence.

Impeachment proceedings also relate Supreme Court judges with the elected branches of government. I am interested in the accusation part of the impeachment process, not on the final outcome (usually, but not always, decided by a different organ from the one that accuses) because I want to capture the degree of potential influence over Supreme Court judges. Thus, if the constitution specifies that Supreme Court judges can be impeached by the judiciary or by at least a supermajority of one chamber of congress, I add to external independence.[26] Finally, I also add to external

[26] Notice that the distinctions made so far are useful for analytical purposes but must be critically evaluated in empirical observation. For instance, as Barry Friedman pointed out, is impeachment a threat to external independence or institutional autonomy? I would say that since the measure is obviously directed towards judges it is a threat to external independence. However, it is important to notice that usually the political

independence if the constitution specifies that Supreme Court judges can not have their salaries reduced while in office.

My index of external independence, therefore, goes from zero to four. For instance, the 1988 Brazilian Constitution (with amendments until 1998) specifies that Supreme Court judges are appointed by the President with Senate approval (Art. 104; SC APP=1), enjoy life tenure (Art. 95; SC TENURE=1), their salary can not be reduced while in office (Art. 95; SC SALARY=1), and can be impeached by the Supreme Court itself (Art. 93; SC IMPE=1). Therefore, Brazilian Supreme Court judges are externally independent (EXT IND SCJ=4).[27] On the contrary, in Honduras the Constitution of 1982 (with amendments until 1999) specifies that Supreme Court judges are appointed by a simple majority in the unicameral congress (Art. 303; SC APP=0), have the same four-year tenure that their appointing authorities (Art. 303; SC TENURE=0), can be impeached by a simple majority in Congress (Art. 205; SC IMPE=0), and says nothing about Justice's salary protection while in office (SC SALARY=0). Thus, Honduran Supreme Court judges are externally dependent (EXT IND SCJ=0).

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branches would proceed against one judge in order to send a signal to the rest of the judges that populate the judiciary.

[27] This refers to the Supreme Justice Tribunal. For its relation with the Supreme Federal Tribunal see Taylor (2004, ch. 6).

Internal independence

Finally, internal independence of lower court judges can be determined by looking at the institutional variables that relate these judges with supreme, or superior, court judges namely: appointment, tenure, promotions, transfers, sanctions, and salary. Again, I take into account who controls each variable, and where one finds this information. Let us look closer at these variables.

In countries where the constitution specifies that supreme, or superior, court judges appoint lower court judges, the latter would be less internally independent than in countries where hierarchical authorities do not participate in the appointment process. Closely related to the appointment process is tenure, since if lower court judgeships have to be renewed periodically by their superiors then internal independence would still be less. Moreover, in the so-called career judiciaries of civil law countries promotion incentives are crucial for internal independence, and it will be hampered if those in the top can promote, transfer, or sanction judges below them. As Margaret Popkin remarks, disciplinary systems have frequently been used for political reasons or to punish judges who issue decisions contrary to the views of their superiors in the judicial hierarchy. Involuntary transfers, often to remote parts of the country, or

even promotions without consent, can be forms of discipline and maintaining hierarchical control (Popkin 2002, 115).[28]

My index of internal independence of lower court judges goes from zero to six. For instance, the Argentine 1994 Constitution specifies that lower court judges are appointed by the President with the approval of the Senate and based on a proposal of three names made by the Judicial Council (Art. 99, and Art. 114; LC APP=1); they enjoy life tenure and salary protection while in office (Art. 110; LC TENURE=1 and LC SALARY=1); and they cannot be transferred, punished, or promoted by their judicial superiors (Art. 114, and Art. 115; LC TRANS=1, LC PUNISH=1, and LC PROM=1 respectively).[29] Thus, Argentinean lower court judges are internally independent (INT IND LCJ=6). On the other hand, we find that Dominican Republic's Constitution of 2002 specifies not only that the Supreme Court appoints lower court judges (LC APP=0) but also that it

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[28] An example of the latter can be found in Argentina, as Catalina Smulovitz pointed out, where Carlos Menem promoted judges in order to control them. This works because judges do not complain (they are being promoted) but at the same time collegiality in upper courts diminishes the individual judge's power.

[29] It is interesting to note that, currently, the Judicial Council decides on the beginning of the disciplinary procedure for lower court judges (Article 114). But before the creation of the Council, while lower court judges were investigated by the Chamber of Deputies and judged by the Senate, only the executive could initiate the disciplinary process.

controls their incentives through promotions, sanctions, and transfers (Art. 67; LC PROM=0, LC PUNISH=0, and LC TRANS=0 respectively). In addition, lower court judges in the Dominican Republic have a renewable "no more than 4 years" tenure (LC TENURE=0), and their salary is not protected by the constitution (LC SALARY=0). Thus, Dominican judges under the Constitution of 2002 are internally dependent (INT IND LCJ=0).

It is worth mentioning two legal factors that are difficult to measure but relevant for the internal independence of lower court judges: (1) rules of "bindingness", and (2) the "power of attraction". The expectation or requirement that lower court judges follow the decisions of higher courts for reasons of predictability, uniformity, and sound judicial administration is important for the internal independence of lower court judges. Keith Rosenn argues that even in countries that do no not formally adhere to the doctrine of *stare decisis*, "courts are almost invariably required to adhere to decisions of higher courts on remand [...] As a practical matter lower courts generally follow decisions of the higher courts" (Rosenn 1987, 5). However, Latin American countries differ in the rules for setting precedent, and the degree of internal independence of lower court judges may be altered by

these rules.[30] In addition, in some countries Supreme Court judges have the prerogative to take a case that is being heard in a lower court in order to decide it themselves. This prerogative, known as *facultad de atracción* in Mexico and *per saltum* in Argentina, clearly diminishes the internal independence of lower court judges.[31]

The previous discussion regarding autonomy, external, and internal independence is summarized in Table 1.2 (see the Codebook in Appendix C for details on the variables).

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[30] For instance, Diana Kapiszewski argues that the changing jurisprudence of Argentinean Supreme Court judges undermines the independence of lower court judges (2005, 21). Ríos-Figueroa and Taylor (2006) provide an assessment of the consequences of the interaction between internal independence and the degree of bindingness for the judicialization of policy in Brazil and Mexico.

[31] I thank Jaime Couso for pointing out this variable.

Table 1.2 Expected Degrees of Autonomy, External, and Internal Independence

Institutional Variables	Who Controls It?	Where do we find it?
Autonomy: # of courts, # of judges, budget, constitutional adjudication	Judiciary> Two organs of government > One Organ	Constitution > Statute > Presidential Decree
External Independence of SCJ: appointment, tenure, impeachment, salary	Judiciary> Two organs of government > One Organ	Constitution > Statute > Presidential Decree
Internal Independence of LCJ: appointment, tenure, promotions, transfers, sanctions, salary.	Judiciary> Two organs of government > One Organ	Constitution > Statute > Presidential Decree

SCJ = Supreme Court Judges; LCJ = Lower Court Judges

Judicial councils

In some countries, control over many of the institutional variables listed above has been delegated to a judicial council. The functions of judicial councils, however, do vary across countries and within the same country over time. For instance, in Europe councils were adopted as a means to increase external and internal independence by taking away from the Executive (usually the Ministry of Justice) the power to appoint Supreme Court judges, and from the Supreme Courts the power to supervise the judicial career of their subordinates, delegating both functions to the Council. In some Latin American countries, in addition,

councils have also been delegated powers over the autonomy of the judiciary such as control over the number and jurisdiction of the courts (Hammergren 2002, 2. See also Fix Zamudio and Fix Fierro 1996).

Composition of judicial councils also varies across time and space. This is crucial for our purposes, since the existence of a Judicial Council per se not necessarily implies judiciary's control over an institutional variable. It is necessary to compare both composition and functions of judicial councils in order to determine whether the judiciary is in control of a given institutional variable or not. In particular, the ratio between judicial and lay members and the ways these groups are chosen is relevant: "The level of judicial independence tends to be higher where judges are granted the majority of the seats on the councils and are directly elected by their colleagues" (Guarnieri 2001, 118; Cappelletti 1985, 569). Therefore, when the constitution of a country specifies that an institutional variable is controlled by the Judicial Council I count that in favor of autonomy, external or internal independence, only if the ratio of judicial to lay members is greater than one.

Control over the Judicial Council has proved a sensitive political issue in Latin America. In those countries where the Supreme Court has the administrative control of the judiciary, it has either blocked the creation of

the council that would take away this control (i.e. Argentina) or it has fought to control a majority of seats in the council (i.e. Mexico). In other countries, where control over the judiciary's structure has been in the hands of the elected branches of government, the creation of a judicial council has been a mere formality since it is controlled by a majority of politicians (i.e. Bolivia). Still in other countries such as Peru in 1969, the Judicial Council was created by the military government in order to manage the appointments of judges; since then the Peruvian council has changed in functions and composition as a reflection of the politics of the time (Hammergen 2002, 3-4).

Public Prosecutor's Office

The public prosecutor's office is an important component of the justice system. There are important differences in origin, organization, and procedures of the office between adversarial (common law) and inquisitorial (civil law) systems. However, in both systems the prosecutor plays a crucial role in the three stages of resolving a criminal matter - investigating, charging, and sentencing (Szott 2004). This is particularly important in civil law countries where the public prosecutor, also a civil servant, acts as prosecutor in criminal actions, preparing and presenting the state's cases against the accused before a court. In this sense, the public

prosecutor is like a district attorney in a typical American state. As Merryman explains, before the trial the prosecutor directs the investigation of a case and participates in, in some countries controls, the examining phase, i.e. the decision of whether there are enough elements to go to trial (1985, 29). The importance of the prosecutor in the adjudication function of the judiciary is evident. Moreover, there are countries where the prosecutor has the monopoly over the investigative part of any case where the state is involved; therefore in these cases the prosecutors become highly critical as the gatekeepers for the judiciary.[32] Accordingly, I consider the relation between the public prosecution office and the elected organs of government as a fourth component of judicial independence.

For the purposes of this dissertation, I propose to focus on the institutional location of the public ministry: within the judiciary, the executive, or as an autonomous organ. As Guarnieri and Pederzoli have argued, if both judges and prosecutors belong to the judiciary, they would be, in principle, more powerful and clearly more independent of the political organs of government. However, in this case there may be concerns on the lack of independence of the prosecutor relative to the

[32] Thanks to Bernard Manin for highlighting this point.

judge.[33] Also, traditionally, when the prosecutors are subordinated to the Executive he exerts pressure on the whole judicial system through them (Guarnieri and Pederzoli 1999, 95). Finally, the public ministry may be an autonomous organ, which is the institutional location favored by the recent reforms in the criminal system of many countries. Based on the definition of independence used in this dissertation, it follows that if the prosecutorial organ is located within the executive the degree of independence is the lowest, and that it increases when it is located within the judiciary and as an autonomous organ.

1.3 Institutional Models of Judicial Independence

Some previous efforts to measure judicial independence rely on a list of institutional variables coded from constitutions that are related to judges such as tenure and appointment (e.g. Clark 1975; Smithey and Ishiyama

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[33] This is the case in countries such as Spain, Italy, and France. In Italy, for instance, the corps of magistrates provides the judges as well as the prosecutors. The same magistrates do not play both roles on the same case, but they are both on the same career track. It may be difficult to see the significance of this combining of two roles into one career, but an example cited by Burnett and Mantovani make it clearer: "in 1992-1993 a current prosecutor in the Clean Hands Pool, Paolo Ielo, was a judge on the court to which people who have been arrested can go to ask for their freedom. In this role, Ielo passed judgment on many cases presented by suspects in Operation Clean Hands. Such instances arose so frequently that the Constitutional Court, in a recent decision, has ruled that magistrates who were involved in the investigation of a suspect may not be included in the tribunal that judges him" (1998, 17).

2000). I argued that it makes theoretical sense to distinguish between components of judicial independence and that it is possible to measure them separately identifying a unique set of variables for each component. But if it makes sense to unpack judicial independence into components it follows that looking at one component separately from the others constitutes a partial view. It may be argued that to have a complete view one may simply add all the variables together in a single measure of judicial independence. However, adding all the variables would imply losing the theoretical appeal of the components of judicial independence. Hence, a framework that incorporates the components beyond simply add them together is necessary. Arguably, such a framework would allow us to compare the institutional structure of judicial independence across countries recognizing that such a structure may be more than the sum of its parts. In other words, the components of judicial independence can be combined in different ways and these combinations would constitute a framework capable of conveying information of the relation between the political organs and judges and the judiciary in a given country that may not be obtained by looking at the components separately.

What I labeled Institutional Models of Judicial Independence constitute a proposal of such framework. I shown that the judiciary can be

autonomous or heteronomous; Supreme Court judges can be externally independent or dependent; and lower court judges can be internally independent or dependent. Each one of these three components can thus take two extreme values. Taking these values there are eight possible combinations, i.e. eight possible "pure" ways, or models, in which politicians may delegate power to judges and/or the judiciary. For instance, politicians in one country can keep control of the judiciary, making it heteronomous, while simultaneously making Supreme Court judges externally independent and lower court judges internally independent.[34] In another country, politicians may choose to make the judiciary autonomous and Supreme Court judges externally independent while, simultaneously, choose to make lower court judges internally dependent.

But notice that not all eight possible combinations are equally sound theoretically. In particular, when Supreme Court judges are externally independent, whether lower court judges are internally dependent or independent can make a real difference. But when Supreme Court judges are externally dependent the constitutional status of lower court judges actually does not make much of a difference. The reason is that if lower

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[34] This argument builds on Ferejohn's (1999) description of judicial independence in the United States.

court judges are internally independent they would actually be externally dependent just as their hierarchical superiors; while if they are internally dependent they would also ultimately be controlled by the elected branches via their externally dependent superiors. Hence, I consider not eight but six combinations of the three components of judicial independence, i.e. six institutional models of judicial independence (see Table 1.3).[35]

The Models are ranked according to their level of overall independence from the highest level (Model 1) to the lowest (Model 6). While ranking the extremes is straightforward, the ranking of the intermediate Models is based on the assumption that is more important to have independent individual judges (externally and/or internally) than having an autonomous judiciary. This explains why, for instance, Model 2 -where both Supreme Court and lower court judges are independent but the judiciary is heteronomous- is ranked higher than Model 3 -where only Supreme Court judges are independent and the judiciary is autonomous.

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[35] The interesting question of what makes a country select one or another delegation scheme (i.e. institutional model of judicial independence) is part of the larger project in which this dissertation is involved. For an analysis of the determinants of the degree of judicial independence in the American states, see Hanssen 2004.

Table 1.3 Institutional Models of Judicial Independence

Judiciary/ Judges	**SCJ Externally Independent & LCJ Internally Independent**	**SCJ Externally Independent & LCJ Internally Dependent**	**SCJ Externally Dependent & LCJ Internally Dependent**
Autonomous	Model 1	Model 3	Model 5
Heteronomous	Model 2	Model 4	Model 6

SCJ = Supreme Court Judges; LCJ= Lower Court Judges

One can get lost in the diversity of legal institutions that relate judges or the judiciary with the other branches of government. A thorough knowledge of the institutional structure is necessary but it should be complemented with a simple framework that captures the essential features to be compared. Heading in that direction, I sorted out the institutional variables that relate the political organs with judges and the judiciary into three 'components' and six 'institutional models' of judicial independence. These are an attempt to capture the differences and similarities of the institutional structure of judicial independence as a whole within the "civil law" tradition.

As I will show in the next chapter, it turns out that there are interesting variations in institutional structures of justice systems within Latin American countries that share the civil law tradition. Ideally the framework would be able to incorporate common law countries as well, so

that the institutional structure of justice systems can be compared across and within legal traditions.[36]

1.4 Conclusion

I identified a precise notion of judicial independence, unpacked this concept into four components, and proposed to measure each component based on a set of observable institutional variables and coding rules consistent with the notion of independence. I have argued that the resulting measures allow us to analyze each component's variation across countries and across time within the same country, and also eventually to tests for their effects on issues like the perception of corruption. In addition, these measures enable us to classify countries according to the institutional model of judicial independence and to use this framework to analyze, for instance, whether judicial reforms in a given country actually implied a change of model of judicial independence and in what direction. In the next chapter, I show the results of measuring the four components for 18 Latin American countries from 1950 to 2002.

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[36] An adapted framework and a larger database that include both common law and civil law countries may show that some civil law countries are closer to common law countries in certain institutional aspects. Consider that detailed analyses of the institutional structure of presidential and parliamentary regimes have shown that some presidential regimes are actually more similar to parliamentary ones than to other presidential regimes regarding specific features (see Shugart and Carey 1992; Aleman and Schwartz 2006).

CHAPTER 2

JUDICIAL INDEPENDENCE IN LATIN AMERICA, 1950-2002

The study of de jure judicial independence in Latin America has been for a long time overlooked since it is commonly believed that the law is greatly ignored and does not play any important role in the region. Hence, much of the debate on judicial independence focuses on the distinction between formal and informal rules. While recent work has began to systematize this distinction (Helmke and Levitsky 2004; Brinks 2003), there is still a broadly held view according to which in Latin American "quasi-democratic oligarchies the administration of justice in practice is nearly always worse than the written rule on which it operates" (Groth 1971, 21 cited in Bill Chavez 2004, 23). In other words, the consensus seems to be that in Latin America the level of judicial independence *de jure* is a lot higher than it is *de facto* (e.g. Verner 1984, 463; Rosenn 1987, 2; Larkins 1996, 615; O'Donnell 1996, 40-1; Popkin 2002, 112; Mainwaring 2003, 5; Bill Chavez 2004, 23).

In this chapter, I challenge this consensus and show that it is based on an oversimplified looked at legal texts and/or unwarranted

generalizations of one or two cases to the whole region.[37] True, in all Latin American constitutions there is an article saying that the judiciary is independent and that judges are only bound by law. But there are also several other articles where the institutional mechanisms linking judges and the judiciary with the other branches are specified and where we find a more complex and nuanced picture. More than twenty years ago, Joel Verner argued that the lack of rigorous knowledge in this area was in part a consequence of "the absence of 'hard data' and systematic analysis, the varying criteria used in making assessments of the independent role of courts in Latin America, the time-periods during which the assessments are made, and the value-biases of the scholars themselves" (Verner 1984, 468). In this chapter, based on an original dataset that measures judicial independence in eighteen Latin American countries from 1950 to 2002, I offer a systematic and comparable measurement of the components of judicial independence and find that, contrary to common wisdom, the level of *de jure* judicial independence in Latin America is rather low.

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[37] This seems to be part of a larger set of inaccurate perceptions about institutions in Latin American countries. Another instance is that, as Adam Przeworski noted, contrary to common perception executives in Latin American countries are subject to more horizontal controls that the executives in OECD countries (Przeworski 2002).

The database includes the eighteen largest Latin American countries except Cuba.[38] I coded the institutional variables referred to in the first chapter of this dissertation for each constitution enacted in these countries from 1950 to 2002: a total a 49 different constitutions plus amendments (see Appendix B).[39] The coding was done based on the concept of independence detailed in Chapter 1, and on rules consistent with this concept (see Appendix C).

In what follows, I first explain in some detail the measurement of the three components in two countries with contrasting levels, Mexico and Chile.[40] These examples can guide the reader while looking, in the second part of the chapter, at the graphs and summary statistics of the components for all the eighteen countries in the database and the results of classifying countries into their corresponding Models of Judicial Independence. The last section concludes.

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[38] These are the same countries for which Navia and Rios-Figueroa (2005) analyzed their constitutional adjudication system.

[39] The constitutions are coded according to the year in which they were enacted. It is important to take into account for empirical analysis that in some cases the year of effective implementation may be different, especially for those provisions that need to be regulated by an organic law.

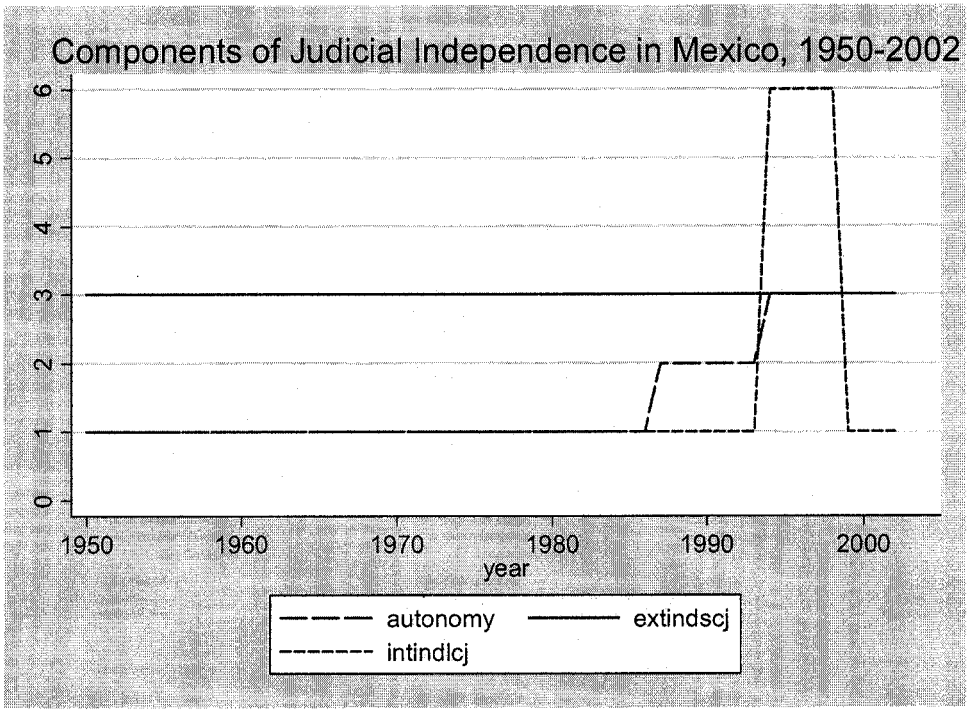
[40] These two countries are used in Chapter 3 as case studies.

2.1 Components of Judicial Independence in Mexico and Chile

The degree of autonomy has been increasing in Mexico (see Graph 2.1). Since 1944 the number of judges in the Supreme Court has been established in the constitution (1 point). In 1987, the administration of Miguel de la Madrid delegated to the Supreme Court control over the number and jurisdiction of the courts, so the degree of autonomy increased to 2 points.[41] In addition, the judicial reform in 1994 concentrated the power of constitutional adjudication in the Supreme Court which increased the autonomy of the judiciary to its current level of 3 points. Mexico does not score four in autonomy because, unlike other countries, the Mexican Constitution does not specify a percentage of GDP for the judiciary.

[41] In 1994, a judicial reform transferred this power to the *Consejo de la Judicatura* (Judicial Council) conformed by a majority of judges so the level of autonomy was not altered.

Graph 2.1 Components of Judicial Independence in Mexico, 1950-2002



Note: The graph shows that, in Mexico, external independence has been constant at 3 since 1950, while autonomy increased from 1 to 2 in 1987 and to 3 in 1994. Internal independence was constant at 1 until 1994 when it jumped to 6 for five years and then back to 1 in 1999.

Unlike autonomy, the degree of external independence in Mexico has been constant at 3. These three points correspond to the tenure, salary, and appointment of Mexican Supreme Court Justices: (1) their tenure is longer than that of the appointing organs; (2) their salary is protected in the constitution; and (3) they are appointed by two organs of government, Executive and Legislative (Senate). The only variable that makes Justices

dependent in Mexico is impeachment since a simple majority in the Chamber of Deputies can initiate the process.[42]

Finally, internal independence of Mexican lower court judges is the flat line at a low 1 (salary protection in the constitution) for the whole period except from 1994 to 1996 where it jumps to the highest level 6 (Graph 2.1). In 1994 the Judicial Council was composed by judges from all levels of the judiciary selected by lot. This mechanism effectively took the control over lower court judges away from the Supreme Court. However, the Supreme Court lobbied to change things (see Fix-Fierro 2003), and in 1999 a constitutional amendment gave to the Supreme Court the control over the majority of the seats in the Council which automatically gave it

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[42] Notice that to get the measure for each component I simply add the variables that are part of it. This imposes a relation among variables that may not be appropriate for all cases since the weight of one variable may be greater. For instance, measuring external independence of Supreme Court judges I add one point for appointment and one point for tenure. But it may be argued that the degree of external independence is higher for Justices that are appointed by only one organ but for life, than for Justices appointed by two organs but whose tenure coincides with that of the appointing authorities. While acknowledging this possibility I kept the linearity assumption for three reasons: (1) Life tenure is relatively infrequent, (2) My measure for tenure is rather conservative since I don't require life tenure but only that tenure of judges is longer than that of the appointing authorities, and (3) The relation between variables is not always as clear as that between appointment and tenure of judges so I chose to minimize the number of subjective decisions in weighting the variables.

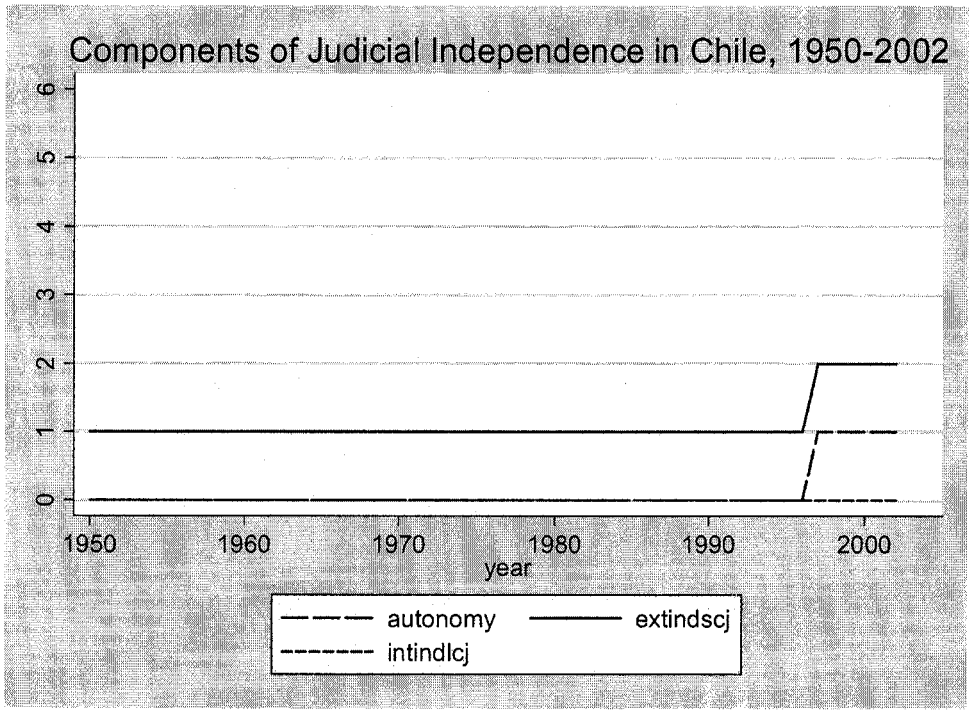
back the control over the careers of lower court judges. My de jure measure nicely captures this political change.[43]

Let us now turn to the Chilean case. The degree of autonomy of the Chilean judiciary was zero until 1996 when it increased to one (see Graph 2.2). The number and jurisdiction of courts, the number of judges sitting in the Supreme Court, and the budget for the judiciary, were under the control of the Executive and Legislative organs in Chile until 1997 when only one variable changed: that year the number of Supreme Court judges was specified in the Constitution. The fourth variable, constitutional adjudication, does not add for the autonomy of the Chilean judiciary for two noteworthy reasons discussed in Chapter 1. First, for the power of constitutional adjudication to be politically effective the constitution itself should specify that the effects of decisions in constitutional cases are to be valid for all (*erga omnes*) and not only for the participants in the case (*inter partes*). The latter is the case of Chile until 1970. In that year, however, the Constitutional Tribunal and legal instruments with erga omnes effects were created. The reason why this power does not add to the autonomy of the Chilean judiciary is that the Constitutional Tribunal is not part of the

[43] Good accounts of the reform, as well as alternative explanations of why the PRI delegated such power, can be found in Magaloni 2003, Inclán 2004, Finkel 2004, and Fix-Fierro 2003. See also Staton 2002; 2005.

Judiciary. Interestingly, as Correa Sutil notes, the Constitutional Tribunal was created outside the judiciary as a sign that ordinary courts should keep their hands off the political process (1993, 94). This supports the idea that a constitutional tribunal located outside the judiciary does not add to the autonomy of the institution.

Graph 2.2 Components of Judicial Independence in Chile, 1950-2002



NOTE: The graph shows that levels of autonomy and internal independence in Chile were constant at 0 until 1997 when autonomy increased one point. External independence was constant at 1 also until 1997 when it increased one point.

External independence for Chilean Supreme Court judges has slightly increased during the period of analysis. Until 1996 its level was constant at one, correspondent to life tenure for Chilean Supreme Court judges established since the Constitution of 1925. In 1997 a constitutional amendment regarding the appointment of Supreme Court judges increased the level of external independence to two (see Graph 2.2). Until then, the

President used to have the power to fill a vacant in the Supreme Court appointing one judge out of a list of five proposed by the Court itself. But since 1997 the President nominates one Justice out of five proposed by the Supreme Court, and the Senate approves the nomination via a supermajority vote (2/3). The other two variables do not add to the level of external independence of Chilean Supreme Court judges because (1) they do not have their salary protected in the Constitution; and (2) it is quite easy to impeach them given that no less than 10 and no more than 20 deputies can accuse one magistrate, then by simple majority the House of Deputies determines if he is formally accused or not. If accused, the Senate adjudicates by simple majority.

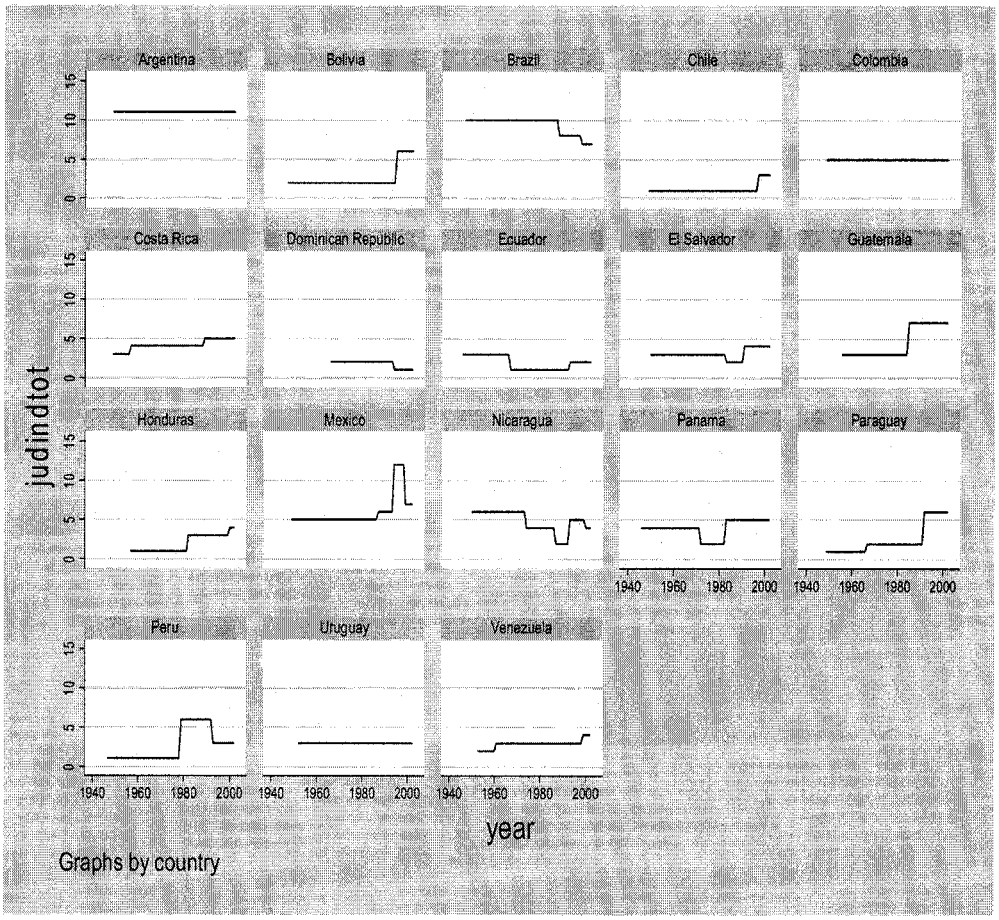
Finally, the degree of internal independence of Chilean lower court judges has been constant at zero for the whole period under analysis. Not only the constitution does not protect their salaries nor gives them a long enough tenure, but also all the variables that set their career incentives - appointment, promotions, transfers, and disciplinary measures- are controlled by their superiors in the judicial hierarchy.

2.2 Components of Judicial Independence in Latin America

Let us first look at the fourteen institutional variables added together in a single measure of judicial independence. Graph 2.3 shows how this

index varies in time and space. Some countries, like Argentina, have had constant levels in this index but others, like Nicaragua, have experienced variations in different directions. As I argued in the last chapter, however, adding all the variables together in a single index may obscure differences across different components of judicial independence. For instance, it may be the case that in Nicaragua much of the variation is limited to external independence while internal independence may have been stable at a constant level. Measuring the components separately, thus, helps us clarify the relation between the political branches and judges or the judiciary while simultaneously suggesting questions as to why politicians may change some constitutional provisions but not others.

Graph 2.3 Index of Judicial Independence, Adding all Variables, in Latin American Countries 1950-2002

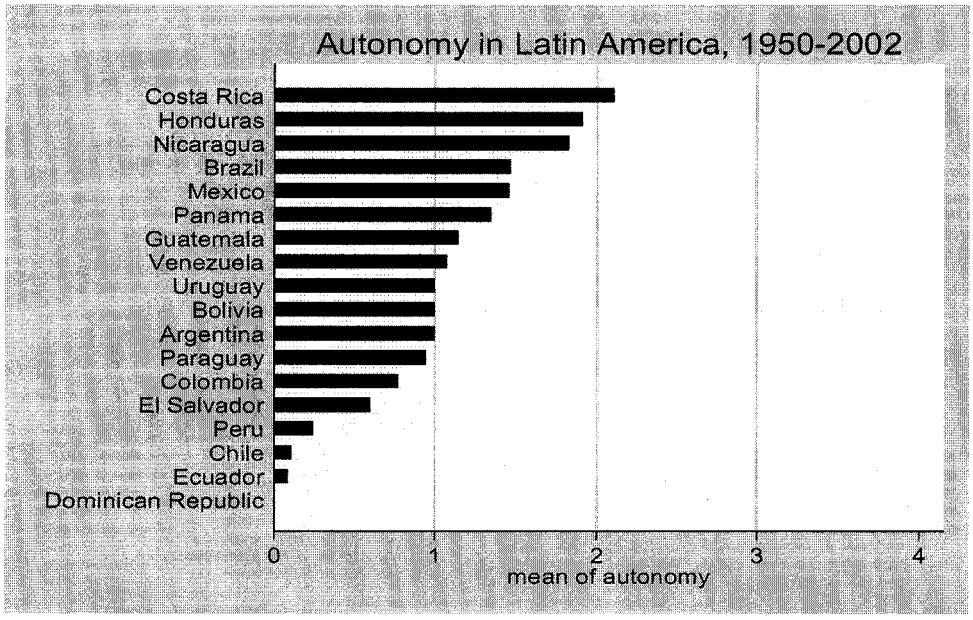


Unpacking judicial independence in three of its components provides a more nuanced yet simple approach to gauging the de jure levels in the region. Remember that the maximum value for both autonomy and external independence is four, while that for internal independence is six.

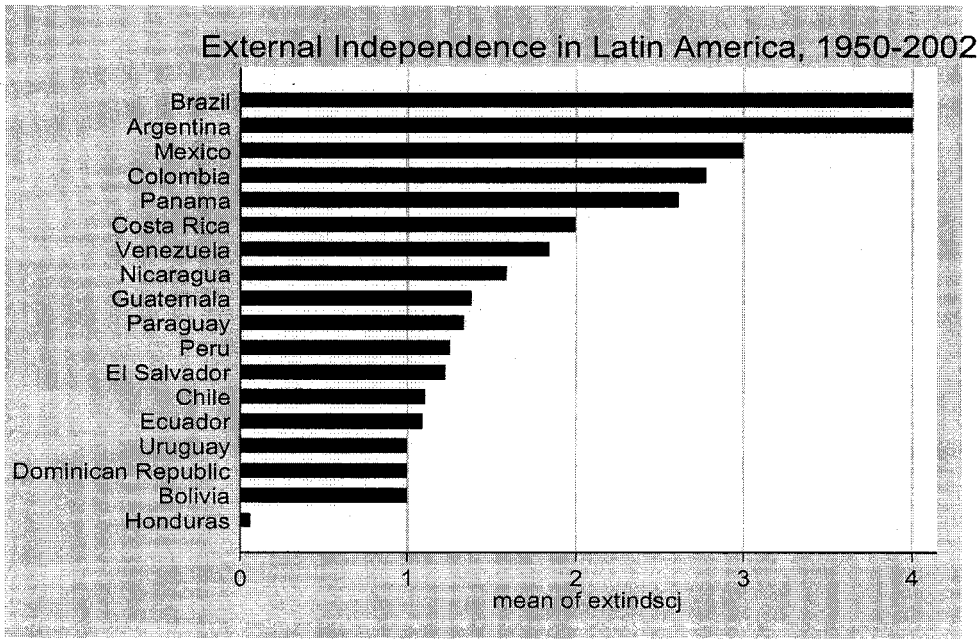
The average value of each component for the whole region, from 1950 to 2002, is 1.01 in autonomy, 1.83 in external independence, and 1.23 for internal independence. The average level in each component is below the middle point.

This, of course, obscures differences across countries. The following graphs show the average levels of each component per country. Costa Rica has the highest average in autonomy but it is slightly beyond two, while Dominican Republic's average is cero (see Graph 2.4). There is more variation in external independence: Argentina and Brazil have the highest level, Honduras the lowest, and most of the countries have averages of two or less (see Graph 2.5). Finally, it is remarkable the low average in internal independence per country; only Argentina has the highest score (six) but Guatemala with the third highest score has two, and five countries have an average of cero (see Graph 2.6).

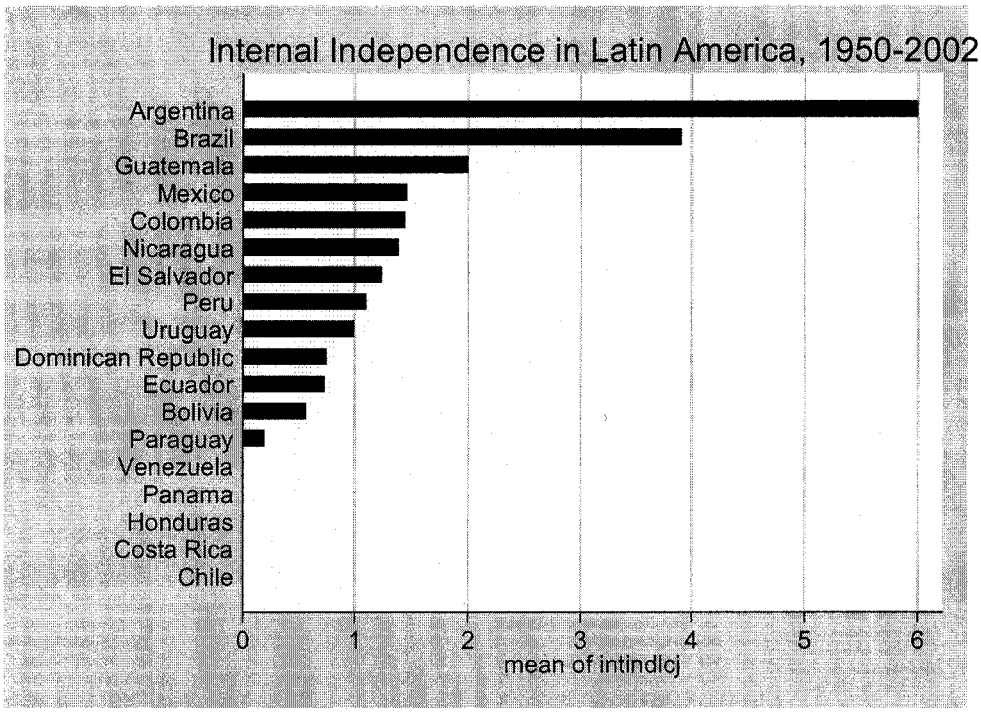
Graph 2.4 Average Autonomy in Latin America, 1950-2002



Graph 2.5 Average External Independence in Latin America, 1950-2002



Graph 2.6 Average Internal Independence in Latin America, 1950-2002

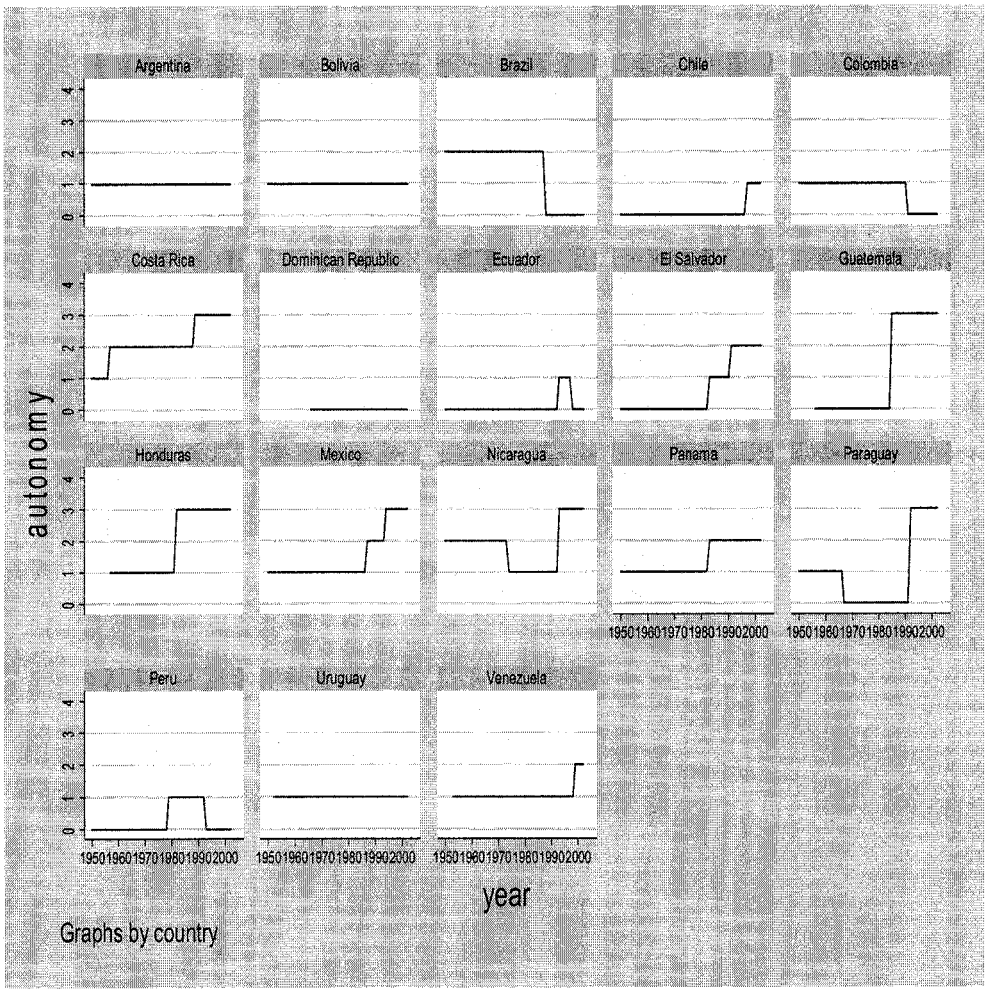


The averages per country, however, don't allow us to see changes through time which is important because the measures of each component of judicial independence do vary within countries across time as they do across countries. The level of autonomy has been constant in some countries, as in Argentina, while it has changed in a linear way in others such as Costa Rica and El Salvador, and in non-linear ways in others such

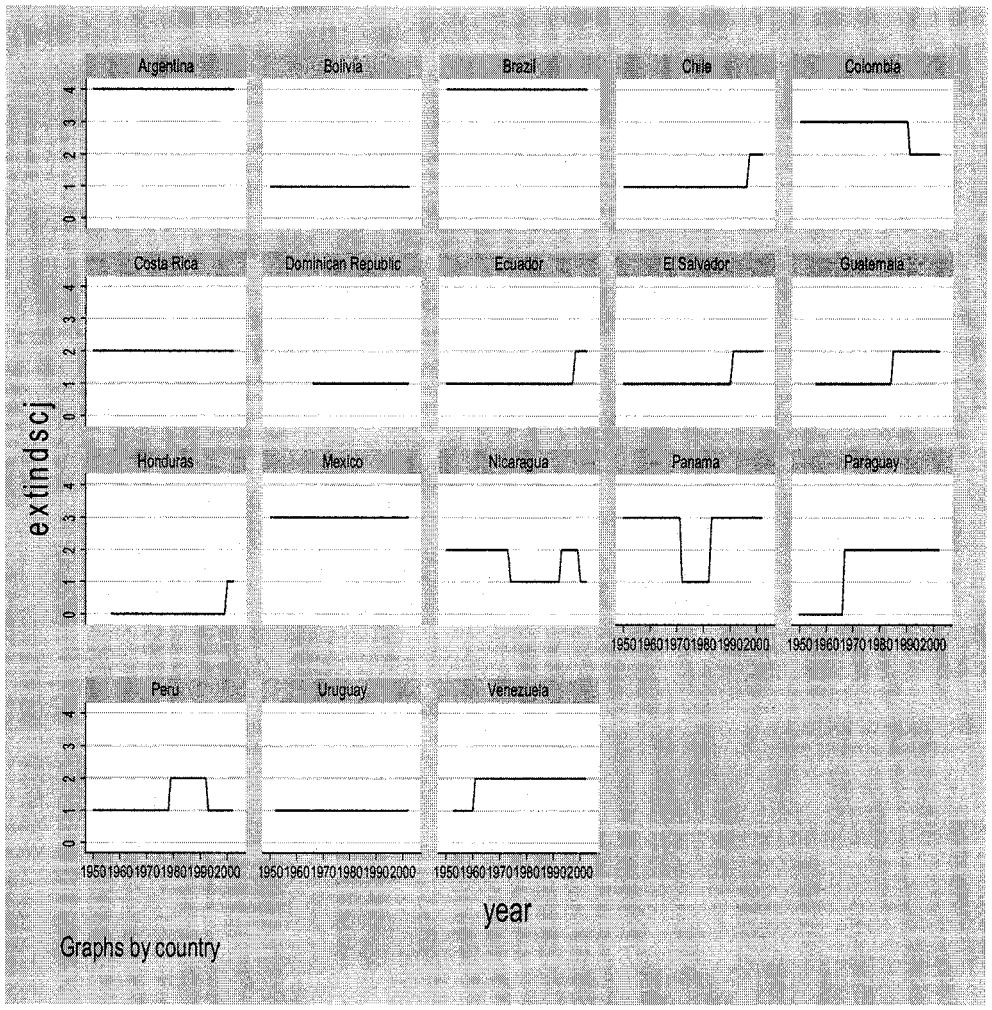
as Paraguay and Peru (see Graph 2.7). The same is true for external and internal independence (see Graph 2.8 and Graph 2.9).[44]

[44] In Colombia, the score in external independence goes from 3 to 2 in 1991. This decrease may be misleading given perception of the independent performance of Colombian judges since 1991. The variable that changes is salary for Supreme Court judges. The constitution of 1886 included a statement according to which the salary of judges can not be reduced while in office, but the constitution of 1991 does not include it (it leaves this issue to the judicial council in which judges do not have a majority). Thanks to Rodrigo M. Nunes for this clarification.

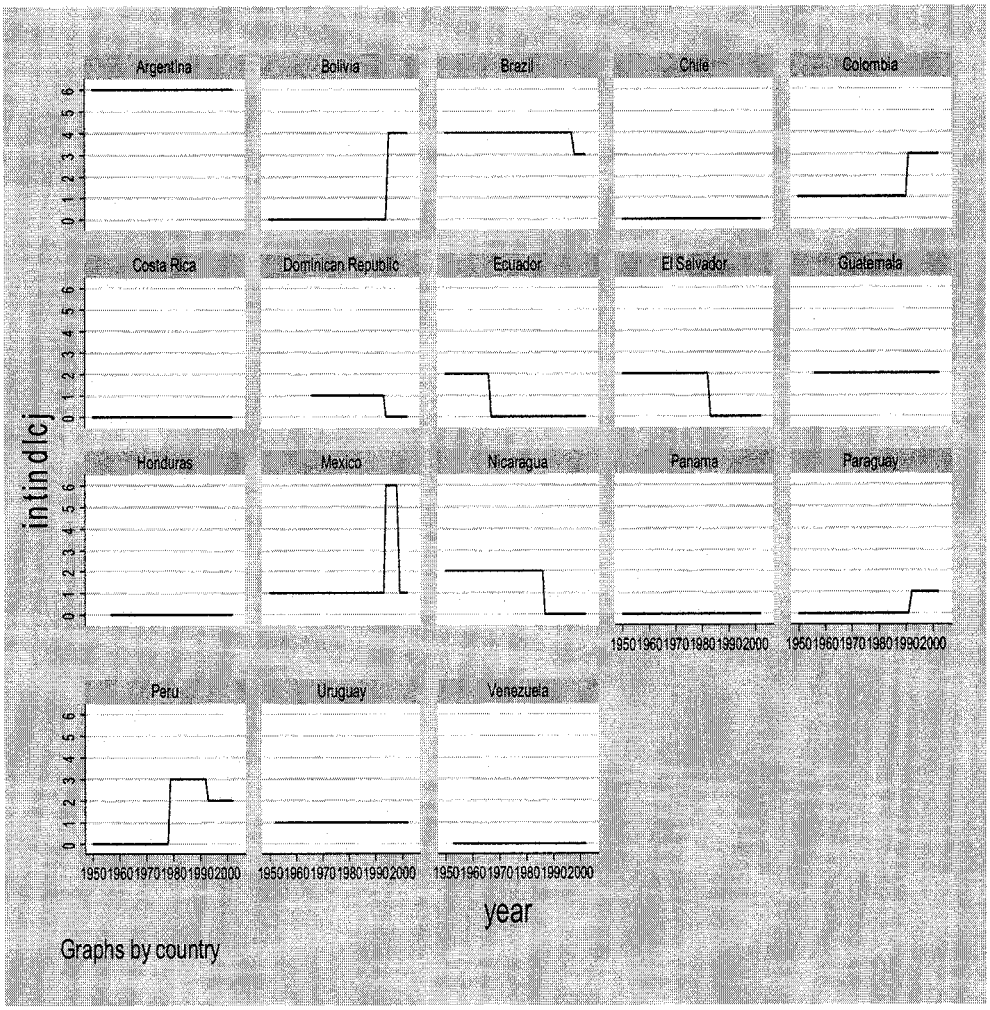
Graph 2.7 Autonomy in Latin America, 1950-2002



Graph 2.8 External Independence in Latin America, 1950-2002



Graph 2.9 Internal Independence in Latin American Countries, 1950-2002



We can also take the raw scores on each component of judicial independence and compare them across countries. Let us take the last year in our sample, 2002. Table 2.1 shows our eighteen countries ranked according to their score on each component of judicial independence. Among other things, Table 2.1 shows that Argentina, a poster child for the

lack of judicial independence, has a constitutional design that while making the judiciary heteronomous (score of 1), has also the highest scores on external and internal independence for judges (scores of 4 and 6, respectively). The Table also shows that Chile and Costa Rica, two of the countries with better reputation about judicial independence, actually have a constitutional design that make lower court judges internally dependent (score of 0 for both), Supreme Court judges not quite externally independent (score of 2 for both), and do differ in their degree of autonomy delegated to the judiciary (3 in Costa Rica, 1 in Chile).

Table 2.1 Latin American countries ranked by raw score (in parenthesis) on each component of judicial independence in 2002

Autonomy (0-4)	Ext. Ind. SCJ (0-4)	Int. Ind. LCJ (0-6)
Costa Rica (3)	Argentina (4)	Argentina (6)
Guatemala (3)	Brazil (4)	Bolivia (4)
Honduras (3)	Mexico (3)	Colombia (3)
Mexico (3)	Panama (3)	Brazil (3)
Nicaragua (3)	Chile (2)	Guatemala (2)
Paraguay (3)	Colombia (2)	Peru (2)
El Salvador (2)	Costa Rica (2)	Mexico (1)
Panama (2)	Ecuador (2)	Paraguay (1)
Venezuela (2)	El Salvador (2)	Uruguay (1)
Argentina (1)	Guatemala (2)	Chile (0)
Bolivia (1)	Paraguay (2)	Costa Rica (0)
Chile (1)	Venezuela (2)	Dominican Republic (0)
Uruguay (1)	Bolivia (1)	Ecuador (0)
Brazil (0)	Dominican Republic (1)	El Salvador (0)
Colombia (0)	Honduras (1)	Honduras (0)
Dominican Republic (0)	Nicaragua (1)	Nicaragua (0)
Ecuador (0)	Peru (1)	Panama (0)
Peru (0)	Uruguay (1)	Venezuela (0)

SCJ = Supreme Court Judges; LCJ= Lower Court Judges

What about the fourth component of judicial independence, i.e. the institutional location of the prosecutorial organ? The area of criminal justice, and in particular the institutional design and functions of the Public Prosector's Office (PPO), has been the focus of reform in the last years. Table 2.2 shows the institutional location of the PPO, or *ministerio público*, in 2002. Several countries used to have the public prosecutor's office located within the executive branch (Bolivia, Guatemala, Ecuador, El Salvador,

Nicaragua, Paraguay, Peru)[45] but have relocated it as an autonomous organ within the last two decades, with the exception of Paraguay that relocated it in the judiciary. Colombia and Costa Rica have retained the PPO within the judiciary and Chile moved it out of the judiciary to create an autonomous organ. Finally, only three countries still place the PPO within the executive: the Dominican Republic, Mexico, and Uruguay.

It is worth noting that institutional change in the PPO has been accompanied by financial support in most countries. For instance, Ecuador increased the budget for the office in 158% from 2001 to 2002; in Guatemala the budget has increased five fold in ten years from 1995 to 2005; and El Salvador has doubled the budget for the office in the years between 1997 and 2004. In other countries the budget has increased more moderately (Colombia, Costa Rica, Panama, and Peru) and, with the exception of Argentina where the budget decreased by about forty percent, in other countries (Bolivia and Mexico) the budget has only slightly decreased over the last five years (CEJA 2006, 6-7).

[45] Brazil had the public ministry controlled by the executive during the military dictatorship, 1964 to 1985.

Table 2.2 Institutional Location of Prosecutorial Organ in 2002

Country	Executive	Judiciary	Autonomous	Notes
Argentina			X	Since 1994
Bolivia			X	Since 1995; under the executive before
Brazil			X	Since 1988. From 1964 to 1985 under the executive. Before 1964 under the judiciary.
Chile			X	Since 1997; under the judiciary before
Colombia		X		Since 1991
Costa Rica		X		Since 1973
Dominican Republic	X			Since 1966
Ecuador			X	Since 1995; under executive and judiciary before
El Salvador			X	Since 1983; under the executive from 1962 to 1983
Guatemala			X	Since 1993; under executive before
Honduras			X	Since 1993
Mexico	X			Since 1917
Nicaragua			X	Since 2000; under executive before
Panama			X	Since 1994
Paraguay		X		Since 1992; under executive before
Peru			X	Since 1993; under executive before
Uruguay	X			Since 1967
Venezuela			X	Since 1961

Sources: CEJA, *Reporte de Justicia de las Américas* 2004-5. For Brazil: Sadek and Batista (2003, 203-6); Ecuador: http://www.fiscalia.gov.ec/min_publ/historia2.html

The institutional location is an important consideration regarding the PPO, especially when thinking about the relation of this component of the justice system with the elected branches of government. But it is only a first step. A closer analysis at the specific discretionary powers of the PPO is of similar importance. In this regard, many Latin American countries are currently going through important changes that involve, in some cases, a transformation of the inquisitorial system into an adversarial system in criminal proceedings. As I said in the previous chapter, in criminal matters it is crucial which powers are delegated to prosecutors regarding the investigating, charging, and sentencing stages. For instance, while in Chile prosecutors have been granted discretion over what cases to pursue in Ecuador the prosecutors still have to investigate all cases filed (CEJA 2006, 6). Also important is the relation of the prosecutorial organ with the judges, other prosecutors, and the investigative police, as well as the development of alternative settlement mechanisms (including guilty pleas). More comparative research in these currently changing and interesting areas is needed, taking into account that both the extensive powers delegated to prosecutors in the United State's adversarial system as well as the traditional inquisitorial system are under scrutiny (e.g. Szott 2004; Della Porta 2001).

2.3 Classifying Countries According to the Models of Judicial Independence

The measure of the components of judicial independence, then, allows us to compare levels both across countries in a particular year or a period of time, and also within the same country across time. It may be argued that by taking the different components separately we may be loosing the 'big picture' of the judicial system as a whole. What I have called the Institutional Models constitutes an effort to take this into account. But, once we have a measure for each component, how can we classify countries according to their Model of Judicial Independence? In order to minimize subjectivity in the classification, I used principal factor analysis to create a factor score for each component of judicial independence per country and year (see e.g. Kim and Mueller 1978a, 1978b).

A factor analysis on all the fourteen institutional variables identified in the first chapter (four each for autonomy and external independence plus six for internal independence) shows that there is some empirical support for the analytical distinction of the three components of judicial independence. There are four factors with eigen values greater than 1. The first three, however, account for 75 percent of the variance; the first, second, and third factors account for forty three, seventeen, and fourteen percent of

the variance respectively. The fourth factor accounts for only twelve percent. Factor loadings are the correlations of each particular variable with the broader factor or dimension. Out of ten variables with positive correlations (greater than .3) with the first factor, six have factor loadings greater than .5 and those six are the variables that I considered part of internal independence. It thus seems that there is a clear dimension of internal independence underlying the data. The six variables of internal independence are in turn negatively correlated (five of them with values between .30 and .50) with the second factor, and three variables (appointment, salary, and impeachment of Supreme Court judges) are correlated with the second factor, which may then be considered a dimension of "external independence".[46]

Finally, two variables that I associated with "autonomy" (budget and structure) are positively correlated with the third factor. However, there are also other three variables correlated with this factor (impeachment of Supreme Court judges, and appointment and salary of lower court judges). The fourth factor, interestingly, also has two variables of "autonomy" positively related to it (budget and constitutional court within

[46] It should be noted that unlike appointment and salary the impeachment variable is negatively correlated with this factor, which may be interesting in light of the potential trade off between appointing and sanctioning mechanisms (see Ramseyer and Rasmusen 2003)

the judiciary) and only one (appointment of lower court judges) negatively correlated to it. This seems to indicate that the third component, autonomy, is in fact an important dimension.

Factor analysis also produces factor scores which are standardized variables that take into account the factor loadings of each variable. I ran a factor analysis for each component of judicial independence separately retaining only one factor.[47] Given that the factor score is a standardized variable, I took zero as the cut off point and classified countries accordingly, i.e. negative values correspond to heteronomy, external and internal dependence, and positive values correspond to their opposites.

As with the components of judicial independence, albeit in a lesser degree, there is interesting variation in time and space regarding institutional models. Remember that Model 1 has the highest degree of overall independence (autonomous judiciary with external and internal

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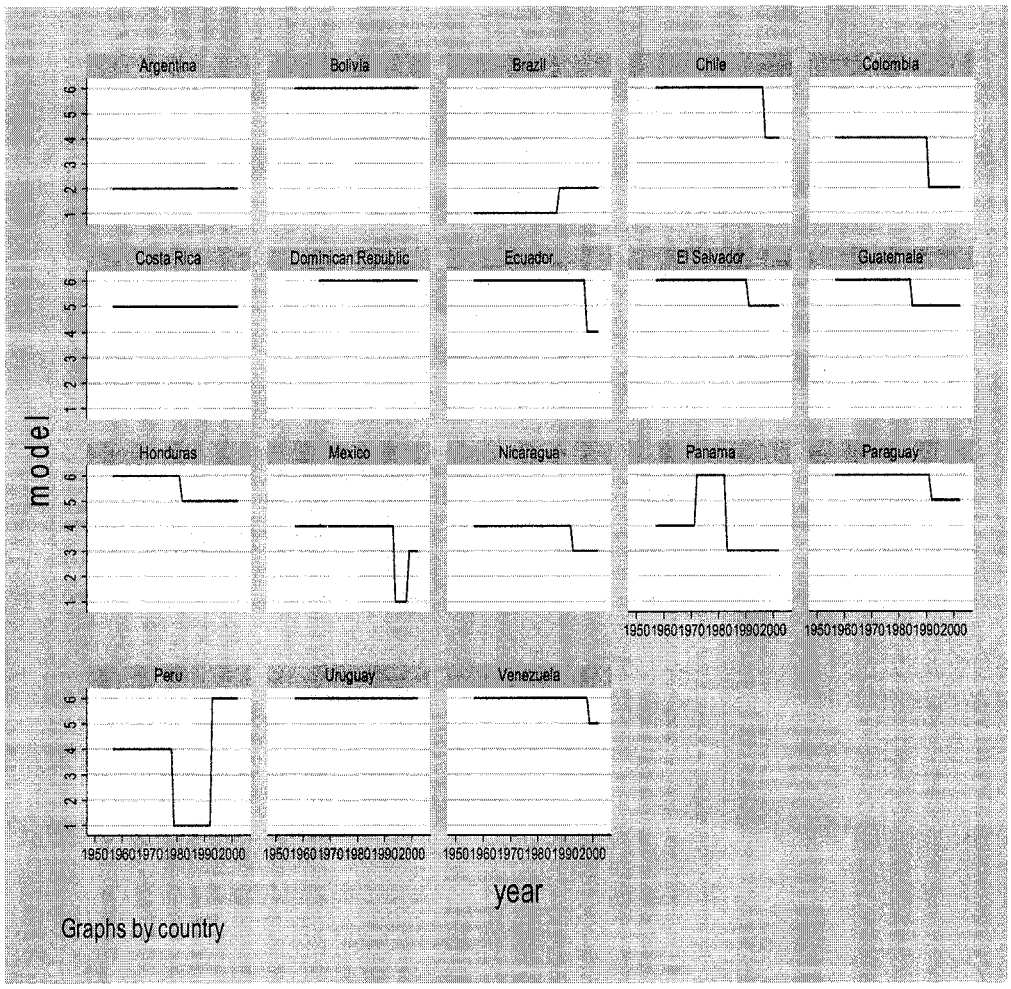
[47] The analysis was done using STATA9. There were, however, few years for which there were two factors with eigenvalues higher than one. This was more frequent in the case of internal independence than in the case of autonomy and external independence. Since the purpose of the analysis is to classify countries and not, for instance, estimate the impact of one component on something else, I retained only one factor in all cases to apply a uniform criterion. In addition, there were only two years for autonomy (1972, 1973) in which factor analysis produced boundary solutions (called Heywood cases) in which at a formal level the test cannot be justified.

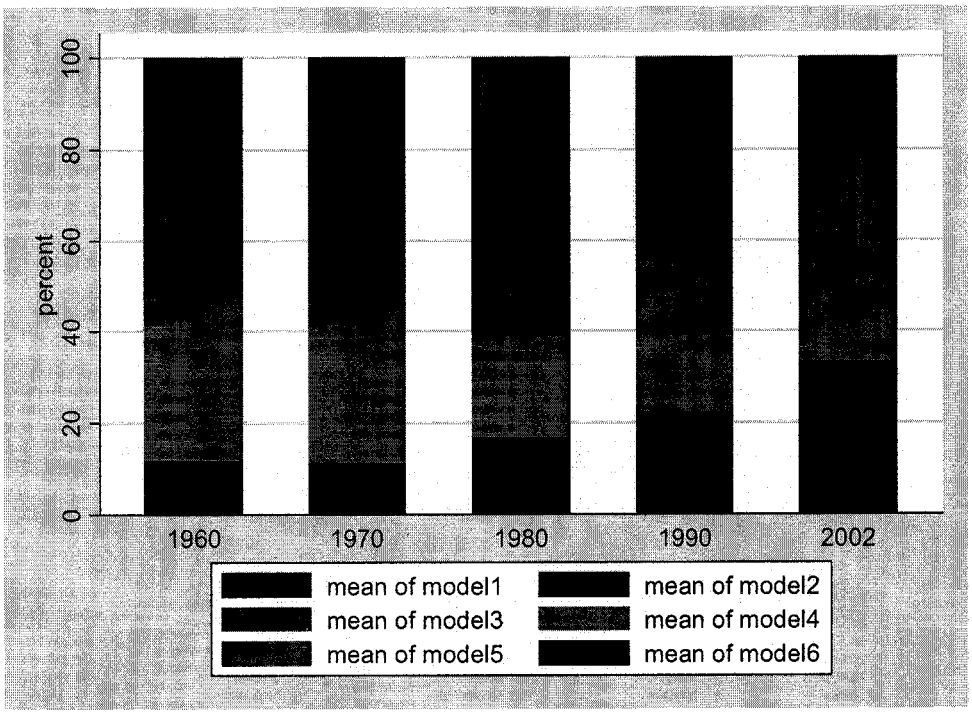
independence), and Model 6 has the lowest (heteronomy with external and internal dependence). While some countries have not changed model since 1950, like Argentina and Costa Rica, there are some that have moved to Models with more overall independence, like Colombia and Ecuador, and others that have moved to Models with less overall independence, like Peru (see Graph 2.10).

If we look at the percent of countries having a particular Model every ten years since 1960 (Graph 2.11), it is noteworthy that Model 6 (lowest degree of overall independence) is the most frequent until 1990. In fact, more than half of Latin American countries have either Model 5 or 6 at any of these years. In turn, less than 20% of countries have one of the two models with highest level of overall independence taken together, Model 1 or 2, at any given year. It is interesting to note, for comparative purposes, that the United States, according to my variables, has Model 2. This classification is consistent with the analysis of Ferejohn (1999).

Graph 2.10 Institutional Models of Judicial Independence in Latin American Countries, 1950-2002



Graph 2.11 Institutional Models of Judicial Independence in Latin America



2. 4 Conclusion

While it is common to perceive that in Latin American constitutions the provisions regarding judicial independence insulate judges to a higher degree than what is observed, a thorough and systematic account of such provisions reveal a more complex and nuanced picture. Actually, there is interesting variation in the degree of judicial independence (components and models) and, if anything, I would say that in general the de jure level of judicial independence in the region is rather low. The much mentioned gap

between formal and informal rules regarding judicial independence is based on an oversimplified look at legal texts and unwarranted generalizations.

For instance, a recent study on judicial independence in Latin America says the following: "In Honduras, despite having a judicial career law in effect, judicial appointments and transfers have routinely depended on arbitrary, political factors. The former president of the Supreme Court, who was delegated by the entire court, named, transferred, and dismissed judges, taking into account the political affiliation of the judge and the proportion of power acquired by the different political parties in the presidential elections" (Popkin 2002, 112). However, despite the implied gap between law and practice in the previous quote, there is no such gap in the Honduras case, where politicians made the judiciary autonomous but kept political control over Supreme Court judges and gave them control over lower court judges (Model 6). In a nutshell, the behavior described does not violate the Honduras Constitution. That such actions in the Honduras case are legal does not mean that they are not abusive; they actually constitute a kind of "legalistic abuse", a topic that is discussed in the next Chapter.

The measurement of the components of judicial independence, hence the different models, rely on de jure institutional variables to be found in constitutions. This has the advantage that any person that looks at the constitution of a country, observes the institutional variables that determine each component, and follows the coding rules, will arrive at exactly the same measurement. However, one obvious objection is that there may be a gap between what we find in the constitution and what actually happens. Does this mean that the de jure measurement and classification is useless? Why to care about de jure at all?

I note first that if we are ultimately interested in how institutions shape behavior and affect outcomes, the place to start is the incentives set up by the institutional system. How can we evaluate the effect of institutions on outcomes if we lack a clear idea of what the institutional framework is? If we only look at what happens we wouldn't understand how the system works, we wouldn't understand what the system deterred (or tried to deter). There are some laws that are never implemented. Does that mean that they are ineffective, or that they effectively deterred some conducts that otherwise would have occurred? If institutions matter they would induce some behaviors and prevent others; rules may also debilitate

threats that are not explicitly allowed. One should then analyze the legal institutional system if the goal is to see whether it matters.

So it is not useless to measure de jure institutional variables. But de jure alone does not work; to have a clear idea of the institutional framework is a necessary but not a sufficient condition. It is false that behavior has nothing to do with rules, but it is equally false that rules determine behavior. The question then is not whether there is a gap between rules and practice, but under what political conditions rules matter. This depends on the balance of forces, strategic calculations, and strategic miscalculations (Przeworski 2003). For instance, recent studies on judicial politics have shown that courts are more effective as a result of strategic decisions by judges (e.g. Helmke 2002; Vanberg 2001) and when there is political fragmentation (e.g. Cooter and Ginsburg, 1996; Tsebelis 2002; Rios-Figueroa Forthcoming). In the next chapter, I develop a framework that combines the legal institutional framework with political conditions to see when we can expect legal rules to be honored.

CHAPTER 3

DE JURE AND DE FACTO JUDICIAL INDEPENDENCE[48]

Under what conditions constitutional are laws likely to be observed or ignored? I explore this question by focusing on the constitutional provisions that establish an independent judiciary. The observance of these provisions is particularly important since judicial independence is a necessary condition for the rule of law (Raz 1977, 198) and horizontal accountability (O'Donnell 2003).[49] Recent work on countries as disparate as Argentina (Bill Chavez 2004) and Tanzania (Widner 2001) confirms that not only academics, but also politicians, judges, and representatives of the civil society agree on the fundamental role that an independent judiciary plays. Then, the observance of these provisions makes more likely the observance of other constitutional provisions such as those that establish individual rights and the separation of powers. This is a cornerstone of the arguments that relate judicial independence with low corruption levels (through the separation of powers s and horizontal accountability) and economic growth (through the protection property rights).

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[48] This chapter is based on Pozas-Loyo and Rios-Figueroa (2006).

[49] These are contested terms (e.g. Carothers 2006; Kenney 2003) but there seems to be a consensus that judicial independence is a necessary condition for both.

Using the measure of de jure independence developed in the previous two chapters as a premise, this chapter seeks to answer under what circumstances we can expect such measure to be a good proxy for what we can expect to happen in reality. I argue that whether this *de jure* measure can be considered a good proxy or whether we can expect it to overestimate or underestimate judicial independence in reality depends on the political conditions that establish the distribution of power among the ruling political groups. Having identified those political conditions, and what Supreme Court judges can expect from them, I explore what is the likely behavior of these judges regarding decisions on cases where the government violates the rule of law or horizontal accountability. Having laid out the theoretical expectations in six different scenarios, I proceed to illustrate them using examples from Mexico and Chile.

The chapter is divided into four parts. In the first, some clear and theoretically grounded conceptual tools are provided. In the second, I lay out the arguments and theoretical expectations in six different scenarios. The third section illustrates these expectations using examples from Mexico and Chile. The last section concludes.

3.1 Conceptual Clarifications and Definitions

Independence-to and Independence-from

In the Introduction to this dissertation, I made the distinction between independence-to and independence-from. In this chapter, I focus on judges' *independence to* take decisions against the government in cases that involve the protection of rights from governmental abuses because these cases are directly linked to the rule of law and horizontal accountability.[50] I seek to answer why and under what conditions the level of *independence-to* can be expected to coincide with the level of judicial independence *de jure*. And in the cases where such coincidence is not likely to occur, whether we can expect that the degree of judicial *independence-to* will be higher or lower than the level established by my measure of judicial independence *de jure*.

The de jure measure of judicial independence presented in the previous chapters, a measure that captures the incentives and limits that the

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[50] The fact that judges do not have *independence-to* make this type of decisions does not imply that they do not have *independence-to* make other kind of decisions. In this connection, it is important to note that the judiciary can play different roles, and to call into question the image that in authoritarian regimes the judiciary plays no role and the law is of no importance. For more on the roles that constitutional law play in authoritarian regimes see Pozas-Loyo 2005, Barros' (2002) account of Chile during the Junta's Dictatorship, and Balme and Pasquino's (2005) on the increasing importance of the judiciary and the roles it plays in China.

judges have vis-à-vis other governmental agents, is a measure of judicial independence *from* other governmental agencies. As shown, the degree of independence-from in a country can be assessed by looking at the laws that establish the relation between judges and/or the judiciary with other governmental branches. But clearly that is not enough. It is also necessary that those laws are not violated. Therefore, let us consider that the degree of judicial independence-from in a given country is, say, high if and only if: a) there is a high degree of de jure judicial independence and, b) the politicians act in accordance with the legal provisions that determine such degree. I thus need to establish why and under what conditions it can be expected that the members of the other branches will act in accordance with the provisions that determine the degree of judicial independence de jure.

Therefore, I use the measure of judicial independence de jure as a standard against which I compare the expected levels of independence-to and independence-from. One advantage of this way of proceeding is that the whole analysis rests on a de jure measure that is comparable across countries, comparable across time within the same country, and reproducible by any person that looks at the legal texts and follows the coding rules.

While I have unpacked the concept of judicial independence intro four components, throughout this chapter I limit the discussion to the first two: autonomy and external independence. In addition, for the sake of clarity, while the measurement of each component goes from zero to four, the theoretical arguments that follow rely in a rather crude but easier to handle distinction between "high" and "low" de jure judicial independence. In particular, for the case studies on Mexico and Chile, when I say that the degree is "high" I mean that the combined score of autonomy plus external independence is at least four (out of eight possible).

Accordance between de jure independence and the actions of the politicians

The degree of judicial *independence-from* in a given country is high if and only if a) there is a high degree of de jure judicial independence and b) politicians do not violate these provisions. It is important to note that the expected level of judicial *independence-from* cannot be higher than the level of judicial independence *de jure,* although it can clearly be lower. To see why let us give a more detailed account of what low levels of accordance between the actions of politicians and the de jure judicial independence would amount to.

The de jure degree of autonomy is determined by who has control over the relevant variables. Suppose we have a country with a very low

level of de jure autonomy, meaning that the elected branches have the legal faculty of changing the number of courts, their jurisdiction, the number of Supreme Court judges, and to determine the budget of the judiciary. Suppose further that the politicians have not used these legal faculties to alter the structure of the judiciary. Would we say in this case that the politicians' actions were not in accordance with the de jure autonomy? Clearly not, their acts would have been in accordance with the faculties that the constitution grants them, and hence the expected level of independence-*from* would correspond to the level of *de jure independence*.[51]

In a nutshell, to violate a legal provision is to act in ways that are explicitly prohibited by it. The executive would violate the provisions that establish autonomy if she did things that does not has the legal faculty to do (e.g. to change the number of Supreme Court judges when the constitution gives this power to a judicial council). Therefore, a case where politicians do not exercise their legal faculties to transform the structure of the judiciary should not be conflated with a case where they do not have those faculties. The former is a case of low de jure autonomy with

[51] Notice that the expected level of independence-to could be higher than the level of de jure judicial independence. In the third section, I show under what conditions this would be the case. Chile (1990-2005) is an example of low *independence-from* but where the level of *independence-to* is higher than the de jure level.

politician's actions in accordance with the constitution, while the latter is a case of high de jure autonomy. Cases of low de jure where there are violation of legal provisions are highly unusual. However, it is important to note that given that a high degree of *independence-from* requires a high degree of independence *de jure*, these cases would not amount to a higher level of independence *from* than the level of de jure independence.

Regarding external independence the same reasoning applies. De jure external independence establishes the controls that the elected branches have over Supreme Court judges, and the fact that politicians do not use these faculties to punish judges (e.g. if they do not use their legal faculties of impeachment) is not the same as to make the judges externally independent-*from*. To have a generous master does not amount to be free.[52] To see what are the reasons that support the definition of independence-from in this respect it is useful to note that the sole fact of the possibility to impeach may undercut the Supreme Court judge's independence, as the possibility of being punished may deter a child from an action that violates the family's norms. Clearly, from the lack of instances of punishment we would not infer that the family's norms do not limit the child's actions, as

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[52] For a nice theoretical discussion on the related contrast between freedom as no interference and freedom as no domination see Pettit 1999.

from the lack of impeachment we can not infer higher external independence.

In this connection, as I argue in the next section, certain political conditions can have an important effect on the likelihood that the elected branches will be able to act in a coordinated way granting Supreme Court judges independence *to* make important and controversial decisions they would not otherwise make given that their independence *from* the elected branches is low. Under these conditions the expected level of independence-to will be higher than the level of independence de jure.

Multilateral and Unilateral Constitutional Settings

A given state has a Multilateral Constitutional setting if and only if there are at least two different political parties in the legislative and no political group has the capacity to unilaterally amend the constitution given the requirements established it.[53] Here it is important to note that "political group" not only refers to political parties but also other types of groups with political power such as a military junta.

A given state has a Unilateral Constitutional setting if and only if there are not two different political parties in the legislative and/or a political group has the capacity to unilaterally amend the constitution given

[53] For the theoretical grounding of these distinctions see Pozas-Loyo 2005

the requirements contained in the constitution. For the purposes of this Chapter it is important to note that if those in power have the capacity to legally transform the provisions that establish the level of judicial independence de jure then that is a unilateral setting

Divided and Unified Government

A given state has a unified government if and only if a political party or group has the capacity to enact laws, which in most of the cases is equivalent to say that a single party controls the executive and has a majority in the legislative. A given state has a divided government if and only if no political party or group has the capacity to enact laws by itself, which in most of the cases is equivalent to say that the political party of the executive does not have a majority in the legislative. Note that this distinction only makes sense in Multilateral Constitutional settings since all Unilateral settings are by definition unified.[54]

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[54] Notice that this distinction directly applies to presidential systems but not to parliamentary regimes. In the latter further distinctions between "minority governments" (as those in Scandinavian countries), "grosse koalitionen" (as in Germany), and "technical governments" (as the Italian ones) would be necessary. Thanks to Pasquale Pasquino for this clarification.

3.2 When and Why Judicial Independence in Law and in Reality Coincide?

To answer this question, I first determine whether one can expect members of the executive and legislative branches to act in accordance with the provisions that establish the level of independence de jure. This analysis rests on different combinations of the constitutional setting (multilateral or unilateral) and government characteristics (unified or divided). These conditions, combined with the expected actions of the elected branches and those of the Supreme Court judges, enable me to determine whether we can expect coincidence between the levels of independence-to and independence-from with the level of *de jure* independence; and, if not, to establish whether we expect their levels to be higher or lower than the level of independence de jure.[55] In the next part I illustrate each case with examples from Mexico and Chile. The theoretically informed typology is summarized in Graph 3.1.

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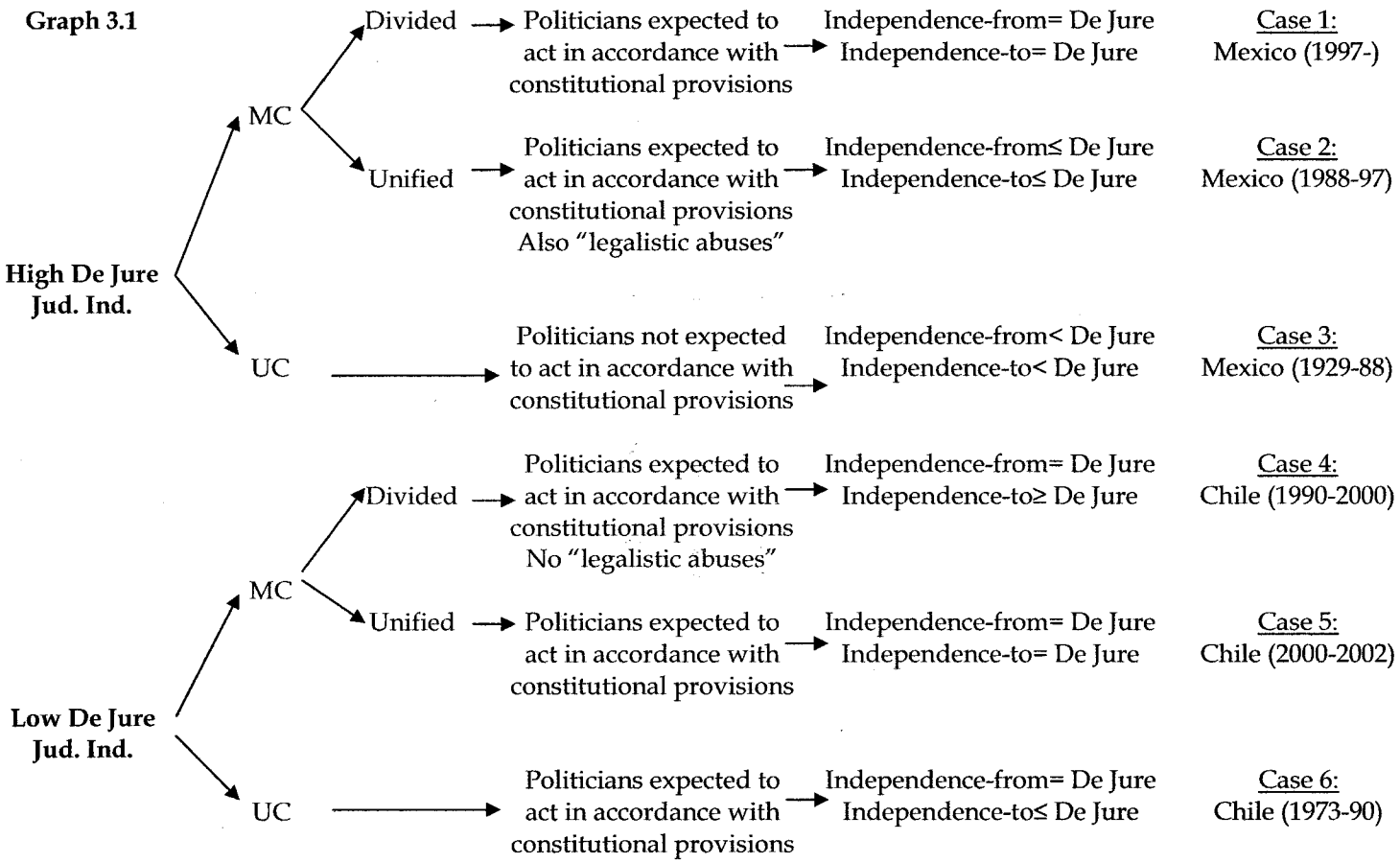
[55] In the legislative branch of government, the greater the degree of party discipline the more party leadership can influence outcomes in a predictable way (Cooter and Ginsburg 1996, 296). Discipline is in turn influenced by nomination and election procedures. In the arguments that follow I assume a high degree of party discipline, but this assumption should be adapted to differences in electoral systems and nomination procedures.


Graph 3.1
High De Jure Jud. Ind.
Low De Jure Jud. Ind.
MC
UC
Divided
Unified
Politicians expected to act in accordance with constitutional provisions
Politicians expected to act in accordance with constitutional provisions Also "legalistic abuses"
Politicians not expected to act in accordance with constitutional provisions
Politicians expected to act in accordance with constitutional provisions No "legalistic abuses"
Independence-from= De Jure Independence-to= De Jure
Independence-from≤ De Jure Independence-to≤ De Jure
Independence-from< De Jure Independence-to< De Jure
Independence-from= De Jure Independence-to≥ De Jure
Case 1: Mexico (1997-)
Case 2: Mexico (1988-97)
Case 3: Mexico (1929-88)
Case 4: Chile (1990-2000)
Case 5: Chile (2000-2002)
Case 6: Chile (1973-90)

Case 1: High de jure judicial independence, multilateral setting, divided government

In this scenario, politicians are expected to act in accordance with the constitutional provisions that determine de jure independence. Political power is highly dispersed. At least two political groups have veto power not only over any constitutional change but also over the regular legislative changes. The presence of divided government makes very likely that the interests of the executive and the majority in the legislative will differ on issues such as the role of the judiciary in horizontal accountability, rule of law, and protection of citizens' rights. This is the case because judicial rulings against executive abuses are likely to be politically capitalized by the party of the majority in the legislative, and vice versa. In addition, since interests between the elected branches differ, a violation of the constitutional provisions for judicial independence by either branch could be capitalized by the other branch which would probably ally with the judiciary to impinge political costs on the transgressor.

Now, given that in this scenario the level of judicial independence is high and politicians are expected to act in accordance with the constitution, it follows that the expected level of independence-from will coincide with the level of judicial independence *de jure,* that is high. Regarding

independence-to, Supreme Court judges are likely to expect the politicians not to violate the independence de jure, and to perceive the fact of divided government as additional protection for those components of judicial independence that are not protected in the constitution but subject to change via the regular legislative process. The reason is that divided government implies difficulties to coordinate for the legislative and the executive, and it constitutes an obstacle for the enactment of laws and policies that could undermine judicial independence. These expectations will arguably ground a high level of independence-to, since Supreme Court judges would more freely decide against the government in cases that involve, for instance, the protection of rights from governmental abuses. So I expect the level of independence-to to be high, as the level of judicial independence de jure.

Case 2: High de jure judicial independence, multilateral setting, unified government

In this scenario, although the opposition has veto power over constitutional amendments, the political group of the President has the capacity to make regular legislative changes. Unlike the previous case, a unified government makes the coincidence of interests between the executive and the legislative more likely. In addition, abuses of either

branch will hardly be capitalized by the other. However, it can be expected that any violation of the constitutional provisions protecting independence by either branch could be capitalized by the minority party in Congress. Admittedly, the capacity of this minority to impinge costs on the government will vary depending on context (the "political capital of the government"). However, given that we are in a multilateral setting, it can be expected that the minority in Congress would be able to make considerably costly any clear violation of the de jure provisions.[56]

In addition, it is important to note that since a multilateral setting implies that the group in power cannot by itself amend the constitution, if there are attempts to undercut judicial independence these are more likely to come in those areas that the unified government can change simply by enacting or amending laws. So I do not expect to see gross violations of constitutional provisions, but I do expect changes in, for instance, organic laws. If these changes are overtly partisan they would constitute what I call "legalistic abuses".

Given the above, it follows that the expected the level of independence-from will be equal or lower than the level of judicial

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[56] To appreciate this point, contrast this setting with a unilateral one where the opposition has no access to the legislative or the ruling group has power enough to unilaterally change the constitution.

independence *de jure*, depending on the expected costs of making legalistic abuses. Regarding independence-to, Supreme Courts judges would expect politicians to use their legal prerogatives if decisions do not favor them.[57] Also, depending on the context, they could perceive that legalistic abuses are likely to occur. But in a multilateral setting the costs to Supreme Court judges for not to taking action against fragrant governmental abuses is higher than in a unilateral setting, so Supreme Court judges would also expect the minority in Congress to denounce and try to capitalize these non-decisions if they occur.[58] Arguably, these expectations will ground a level of independence-to lower than the de jure level but not as low as we would expect if we were in a unilateral setting with the same level of independence de jure.

Case 3: High de jure judicial independence and unilateral setting

Unlike previous cases, here the ruling political group has an extraordinary concentration of power. It is the only political group in the legislative and/or it has the capacity to unilaterally amend the constitution

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[57] Note that, as discussed in the first section of this Chapter, this expectation may be enough to deter certain actions.

[58] In this connection the capacity of the Supreme Court judges to determine what cases to take, for instance the *writ of certiotari* in the United States, may be of crucial importance.

according to the requirements contained in the constitution itself. In addition, the ruling group does not face the presence of an important minority opposition in the legislative, i.e. a minority large enough to stop a constitutional amendment. As I argued in the previous case, this fact would reduce the costs of violating the de jure provisions of judicial independence. Hence, in this scenario I expect to observe violations of the constitutional provisions that grant the judiciary a high level of judicial independence. It follows that the expected level of independence-from is lower than the level of judicial independence de jure.

Now, in this scenario Supreme Court judges would arguably have the following expectations: first, they will expect politicians to violate the high level of independence established in the constitution; and, second, in the unilateral setting the cost for the Supreme Court judges of not taking action against fragrant governmental abuses will not only be lower than in the multilateral setting, but it would also arguably be lower than the costs of taking those decisions. I then expect the level of independence-to to be *strictly lower* than the level of de jure independence.

Case 4: Low de jure, Multilateral Setting, and Divided Government

In this scenario political power is highly dispersed. Both constitutional and regular legislative changes require the cooperation of at

least two political parties. But it is important to keep in mind that in this scenario the constitution grants to the elected branches important controls over judges and the judiciary. Not to make use of those controls does not constitute a violation of de jure independence. Also, to act in ways that are not prohibited by the constitution does not amount to violate it. In this setting, to violate the constitutional provisions would amount to proceed in ways that directly contravene such provisions, for instance if the President appoints Supreme Court judges when the constitution grants this faculty to the Legislative. As I said, these are very rare cases. Hence in this setting we can expect the politicians not to violate the de jure independence. Thus, the level of independence-from will coincide with the level of independence *de jure.*

Supreme Court judges are likely to expect that the politicians will not violate the de jure independence. Given the difficulties that divided government imposes on coordination of the elected branches to sanction the judiciary, Supreme Court judges are also likely to expect that politicians will find difficulties in using the components of judicial independence that are subject to change via the regular legislative process. These expectations may arguably ground a level of independence *to* take decisions that involve protection of rights from governmental abuses higher than the (low) level

of judicial independence de jure. The expectation is then that the level of independence-to to be equal or higher than the level of judicial independence *de jure*.

Case 5: Low de jure, multilateral setting, unified government

In this setting, as in the previous one, the fact that the level of judicial independence is low makes the elected branches very unlikely to violate the de jure provisions. However, it is important to note that unlike the previous case, in this setting the effective use of the many constitutional controls would not be obstructed by problems of coordination between the elected braches. I thus expect the politicians to act in accordance with the de jure provisions, and therefore the level of independence-from will coincide with the level of de jure independence.

Given that the government is unified, Supreme Court judges will arguably expect that the elected branches will have it easier to coordinate and pass legislation in ways that contravene their interests (e.g. stripping jurisdiction). In addition, the Justices would expect that their potential rulings against executive abuses will not be particularly welcome by the majority in Congress. Given that it is a multilateral setting we can expect those rulings to be supported by the minority party in Congress. In addition, if the Supreme Court judges decide not to sanction governmental

abuses, this minority would likely denounce and try to capitalize from these actions. However, arguably the costs that the government is capable of impinging on the judiciary are higher than those coming from the minority in Congress. Thus, the expectation is that the level of independence-*to* should be as low as the level of independence de jure.

Case 6: Low independence de jure, unilateral setting

Finally, in this scenario I expect those in power to act in accordance with the constitutional provisions that not only grant them many controls over judges and the judiciary but that can also be amended by them. Thus the level of independence *from* is likely to coincide with the level of independence de jure. In an unilateral setting those in power are legally able to use the mechanisms that the constitution grants them without requiring the cooperation of any other political actor, and it is likely that they not even need to face denunciations by a legislative minority. As discussed in the third setting (see above), this will negatively affect the level of independence *to*. Therefore, the expected level independence-to would be equal or lower than the level of independence de jure.

3.3 De Jure and De Facto Judicial Independence in Mexico and Chile

In what follows I illustrate each one of the six cases described above with examples from Mexico and Chile, countries with high and low levels

of judicial independence de jure respectively.[59] For actual judicial behavior I rely on a number of secondary sources and other data that I have collected. The discussion of the cases is not intended as a detailed description of the historical circumstances in the two countries, but references are suggested for the interested reader. It is very hard to conclude unambiguously without systematic behavioral data whether the politicians acted in strict accordance with the constitutional provisions, or whether the judges exercised the expected degree of independence-to. Even with systematic data inferring motivations of behavior from judicial decisions faces the problem of observational-equivalence.[60] Nonetheless, I believe that with the information at hand I can provide good illustrations of the theoretical expectations.

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[59] Examples from Argentina in Case 1 (1983-89) and Case 2 (1989-98) can be found in Pozas-Loyo and Rios-Figueroa 2006.

[60] For instance, an observed judicial decision may be consistent simultaneously with the hypothesis that the decision was motivated by political constraints or by a sincere ideological preference of a given judge. The same problem is present when one tries to infer the effects of a law from observed behavior. For instance, in cases with low de jure judicial independence (Cases 4, 5, and 6) suppose that we observe politicians respecting the law, i.e. not manipulating judges. This last outcome may be explained either because the law is working or because judges are not challenging politicians. Given that there are three scenarios with low de jure, and that we know in which scenario a given country is, it is noteworthy that the typology developed here allows us to distinguish different reasons underlying the same observed behavior.

3.3.1 High de Jure Judicial Independence: Mexico

As shown in the previous chapter, Mexico's level of external independence has been constant at 3 since 1950, while autonomy increased from 1 to 2 in 1987, and to 3 in 1994. Hence, during the whole period under analysis for the purposes of this chapter the de jure level of independence has been high: four from 1950 until 1987, five from 1987 until 1994, and six since then. But the political conditions have changed in Mexico throughout this time and with them the relation between "law" and "reality".

Case 1. Multilateral Setting, Divided Government: Mexico- 1997-2006

Multilateral setting

To distinguish the periods under which a single power group was able to amend or change unilaterally the constitutional provisions regarding judicial independence I looked at the constitutional rules for amendment. According to the Mexican Constitution (Article 135) the amendment procedure requires a supermajority vote of 2/3 in both Houses of Congress plus the approval of at least a majority of the state legislatures (via majority vote). From 1929 until 1988 the PRI controlled the different organs needed to amend the Constitution, meaning that during those years all amendments (more than 400) were done unilaterally by the PRI. In 1988 the PRI lost the monopoly of the constitution-making process by losing the

supermajority in the House of Deputies and started a process of multilateralization (see Pozas-Loyo 2005).

Divided government

It is important to distinguish two periods within the multilateral setting that exists in Mexico since 1988. From this year until 1997 the PRI controlled not only the Presidency but also at least a majority in both houses of Congress, thus creating a situation of unified government. However, in the mid-term election of 1997 the PRI lost the majority in the House of Deputies and in 2000 the PRI lost the presidency; hence, from 1997 to date Mexico has been characterized by a period divided government.

What do we observe?

I expect, according to the argument, accordance between de jure independence and the actions of the politicians and that is what we observe in Mexico since 1997. With respect to external independence, two Supreme Court judges have left according to the rules set out in the 1994 judicial reform and one more died. To fill the vacancies, the appointment of the three new Supreme Court judges has proceeded as the Constitution prescribes. In addition, there have been no impeachments. Salary of judges has not been decreased and they are now actually competitive and

attractive not only at the Supreme Court level but also for lower court judgeships (Fix-Fierro 2003, 313). Regarding autonomy, it can be argued that there has been no meddling with the Court's jurisdiction, and the Supreme Court's role of constitutional guarantor has also been respected.[61]

Given that the level of judicial independence de jure has been high and there has been accordance between the constitutional provisions and the actions of the politicians, the expected level of independence-from in this period coincides with the level of de jure independence. Regarding evidence of the level of independence-to it is interesting to note that it increased precisely in 1997 when the PRI lost the majority in the House of Deputies and the first divided government appeared in Mexico. Evidence of this is that the probability for the Supreme Court to decide against the PRI increased from a mere .04 from 1994 to 1997, to .44 to .52 as the PRI lost the majority in the Chamber of Deputies in 1997 and the Presidency in 2000 (Rios-Figueroa forthcoming). These facts seem to support the claim that in this scenario the de jure levels of judicial independence are a good proxy for independence-to.

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[61] It is interesting to note that the budget has been increasing in an important way, even though the Constitution does not specify a fixed percentage of GDP for the judiciary, from .56% in 2000 to .97 in 2001 and to 1% in 2002 (Fix-Fierro 2003, 285).

Case 2. Multilateral Setting, Unified Government: Mexico, 1988-1997

Unified government

From 1988 to 1997 the PRI controlled the Presidency and it also had the majority in the two houses of Congress. Although at the local level the PRI had been losing ground (by 1994 the PRI had already lost the governorship of three states and many municipalities) at the national level there was a unified government.

What do we observe?

I argued that in this case the expected levels of independence-from and independence-to should be equal or lower than the level of judicial independence *de jure,* depending on the expected costs of making legalistic abuses. In addition, I argued that in this scenario I expect that if challenges to judicial independence occur they are likely to come in the form of questionable stretches on the legal provisions granted to the elected branches. This is precisely what I observe in Mexico from 1988 to 1997.

Since 1988 the constitutional provisions regarding autonomy and judicial independence have been mostly honored but certainly in a lower degree than after 1997. For instance, regarding judicial appointments and tenure it is noteworthy the contrast between the administration of Miguel de la Madrid (1982-88) that appointed twenty out of the twenty-six

Supreme Court judges (80%), and the administration of Carlos Salinas de Gortari (1988-94) that appointed eight of twenty-six judges (30%) (Magaloni 2003, 288).[62] This seems to conform to what I call "legalistic abuses". Now, as part of the 1994 judicial reform that increased the de jure level of autonomy, President Ernesto Zedillo appointed all the new Supreme Court judges. This meant that the provisions regarding life tenure for sitting Supreme Court judges in 1994 were violated, although we should note that the change of all Justices was part of the bargain between PRI and PAN that made the judicial reform possible. For the judges appointed since 1995 provisions regarding tenure, appointment, salary, and impeachment for Supreme Court Justices have not been violated.

On autonomy, the constitutional rules that give the judiciary power over the number of courts and judges as well as their jurisdictions have been honored. And the judiciary has been granted the necessary means to carry out its projects. If we look at the budget for the judiciary in these years as a percentage of the GDP we see that it has been steadily increasing

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[62] Every president since 1934 until 1988 appointed more than 50% of Supreme Court judges during their administrations, except Miguel Aleman (1946-52) who appointed "only" 48% of the members of the Court (Magaloni 2003, 288)

from .13% in 1990 to .39% in 1995 (Fix-Fierro 2003, 285) even though there is no constitutional mandate for a minimum fixed amount.

Regarding independence-to, it is interesting to note again (see Case 1) that from 1994 to 1997 decisions against the PRI occurred with a probability of .04 that is lower than we would expect given the level of independence de jure. Although we don't have data regarding decisions before 1994, this fact is consistent with our expectation that independence-to would be equal or lower than the independence de jure.

Case 3. Unilateral Setting: Mexico, 1950-1988

Unilateral setting

The unilateral setting in Mexico actually goes back to 1929, the creation of PNR the antecessor of the PRI. During this time, as I said above (see Case 1) the PRI met the requirements to amend the Constitution unilaterally.

What do we observe?

I argued that given the extraordinary concentration of power, in this case we should expect the levels of independence-from and independence-to to be lower than the level of judicial independence de jure, and this is what one observes in Mexico in this period. Despite the high degree of de jure external independence, during this period the constitutional provisions

were either violated or ignored. This does not mean that there were constant conflicts between the branches or demonstrations against violating the law. The Mexican Judiciary and Supreme Court judges during this period were politically subordinated. This situation is better understood through the logic of a political system dominated by a single party.

Dominant-party rule secured the complicity of the judicial branch in the construction and consolidation of the Mexican political system under the hegemonic rule of the PRI (Domingo 2000, 726). The Supreme Court was just another stop in a political career, since people coming from an elected office or a bureaucratic post could go to a governorship or a seat in the national Congress after serving in the Supreme Court (see Magaloni 2003, 289-290). Thus, with the judiciary as another building block within the corporatist state structure, it is unsurprising that the Mexican judiciary became immersed in a political system characterized by clientelism, state patronage, and political deference towards the regime (Domingo 2000, 727).[63]

Regarding external independence, even though the Constitution mandated life tenure for Supreme Court judges, every six years the

[63] An indicator of the low importance that the judicial branch had during those years is that its budget from 1970 to 1985 averaged .09% (Fix-Fierro 2003, 285).

incoming President used to appoint as many as 72% of the Court (Ruiz Cortinez, 1952-58) and no less than 36% (Lopez Mateos, 1958-64) but in average from 1946 to 1988 they appointed more than half the Court (Magaloni 2003, 288). As Magaloni notes, from 1934 to 1994, close to 40% of justices lasted less than 5 years coming and going according to the presidential term: "The president could thus somehow create vacancies to be filled by justices he appointed or, put in other terms; he could either dismiss justices or induce early retirements of both" (Magaloni 2003, 289).

Regarding independence-to there is not much data but Gonzalez Casanova (1970) found that among cases involving the President of the Republic decided between 1917 and 1960, claimants won in approximately 34 percent of all disputes. In a similar analysis focusing on labor cases, Schwarz (1977) found that the courts decided around half the time against the government. It is important to note, however, that these findings were based on a small and not representative sample of amparo cases which, in addition, reduce the political impact of judicial decisions because in these cases effects are restricted to the parties in the case. Moreover, the government's responses to social movements in this period without doubt violated individual rights, as in the killings of 1968 and 1971, and there was no judicial involvement in punishing those crimes. I can conclude then that

the decisions made by Supreme Court judges during those years did not challenge the government in an important way, suggesting that their level of independence-to was lower than de level of judicial independence de jure.

3.3.2 Low de Jure Judicial Independence: Chile

As shown in the previous chapter, levels of autonomy and external independence in Chile were constant at zero and one, respectively, until 1997 when both increased one point. Hence, during the whole period under analysis for the purposes of this chapter the de jure level of independence has been low: one from 1950 until 1997, and two since then. But the political conditions have changed in Chile throughout this time and with them the relation between "law" and "reality".

Case 4. Multilateral Setting, Divided Government: Chile, 1990-2000

Multilateral setting

In order to amend the Chilean Constitution of 1825 it was required that an amendment proposed and passed by simple majorities at both Houses of Congress was voted again without debate after a 'cooling down' period of exactly 60 days. Then the project would be sent to the President to be signed or modified. If modified, the project went back to Congress that could approve or disapprove the changes. If Congress disapproved by a

2/3 majority then the President had the discretion to either promulgate the changes or to call a plebiscite within 30 days for ratification. The result of the plebiscite would be final (Articles 108 to 110).

The Chilean Constitution of 1980 established a similar procedure but it requires a supermajority vote of 3/5 (or 2/3 depending on the issue) in both Houses for proposing an amendment. After this vote, the 'cooling down' period and the consequent requirements of Presidential, Congressional, or popular approval are also similar albeit include more procedural details which may be of importance (Articles 116-119). The important point here is that both before and after 1980 a 2/3 control of both Houses of Congress and the Presidency was necessary for a single group to be able to amend the Constitution at will. Control of the three organs is essential since the President can at the end call for a plebiscite after 2/3 of both Houses have insisted on the amendment.

Based on the previous amending rules, Chile has been living under a multilateral setting both before and after the military interlude (1973 to 1989) when the Military Junta led by Augusto Pinochet ruled the country. It is interesting to briefly see how the Constitution of 1980, created in a unilateral setting, paved the way to a multilateral setting. Little after the coup that deposed Allende's presidency in Chile, in October 1973, the

Ortúzar commission was formed to study constitutional reforms. In October 1978 the commission submitted a draft of the new constitution, and sent it to the Council of State. In July 1980 the council presented the new draft to Pinochet. Then, Pinochet sent it to an *ad hoc* committee which made "85 important changes and 59 fundamental changes" (Navia 2003, 79). The Chilean Constitution as it stood in 1980 created a unilateral setting in Chile.

However, the relative power of Pinochet vis-à-vis the opposition changed through time. Of particular importance were the economic crisis of 1982, the 1988 plebiscite's results, and of course the results of the elections of 1989, which created in Chile a multilateral setting. It is interesting to note that such transformation in the relative power both of Pinochet and of the opposition crystallized, in constitutional terms, in the series constitutional reforms that the constitution has gone through (see Pozas-Loyo 2005).

Divided government

After sixteen years of military rule, from 1990 onwards, the center left coalition of parties known as *La Concertación,* has governed Chile until today. Mainly because of the Chilean electoral system, drafted by the military regime after losing the plebiscite in 1988, the composition of the two houses of Congress has been roughly equally divided between the coalition of parties in the left and the coalition of parties in the right (see

Carey 2002, 225). In addition, the 1980 Constitution included a number of non-elected senators that, added to those from the center-right coalition, effectively eliminated the possibility that the *Concertación* controlled the two houses of Congress and the Presidency.

During this period, *La Concertación* had a majority in the Chamber of Deputies and among the elected Senators as well. However, because of the non-elected senators, the center-right coalition had in fact enjoyed a majority in the Senate until 1998. That year Pinochet was arrested, and a senator from the right was stripped of his immunity, creating a tie between the two coalitions in the Chilean Senate until March 2000. A tie implies re-negotiating the law in Chile, so it is practically the same as a divided government situation. Hence, I consider the whole period as one with a divided government.

What do we observe?

In this scenario political power is highly dispersed and the constitution grants to the elected branches important controls over the judges and judiciary. I argued that the expected level of independence-from will coincide with the low level of independence *de jure* and the level of independence-to will be higher or equal than the level of judicial impendence *de jure*. In Chile the expectations are fulfilled.

I identified two periods of multilateral settings in Chilean politics, before and after the military regime that ruled this country from 1973 to 1990. Even though the focus is in the period after 1990, it is interesting to briefly comment on both. During these two periods, the constitutional provisions regarding the two components of judicial independence were not violated; hence politicians have acted in accordance with the de jure level of judicial independence. But remember that the de jure level of judicial independence in Chile is very low.

As expected, facts conform to constitutional provisions. Regarding autonomy, using their constitutional prerogatives, politicians have retired the jurisdiction from the courts when they do not want judges to resolve cases in areas that the politicians deem important. This was the case with labor disputes in the1920s (Correa Sutil 1993, 94) and also with the creation of a Constitutional Court in 1970 that was situated outside the judiciary in order to take political cases out of the Court's ordinary jurisdiction (Clark 1975, 430). During the government of Salvador Allende special 'neighborhood tribunals' were created -courts outside the formal judicial system and staffed by Socialist Party militants with little or not legal training -to rule on issues ranging from petty crimes and neighborhood disputes to squatters' rights and land confiscation (Prillaman 2000, 139).

Other elements of autonomy such as budget also waxed and waned depending on the interests of the political class which made use of the prerogatives that the constitution grated them. From 1947 to 1962 the budget for the judiciary actually decreased in half, reaching its lowest point in the late sixties because the political class considered the judiciary more as an obstacle than as a support in their quest for social justice (Correa Sutil 1993, 96; Peña 1992, 24). In recent years, however, the budget for the judiciary has steadily increased (CEJA 2004). The number of judges in the Supreme Court has also been altered. The last change was an increase from 17 to 21 judges in 1997, which gave the government the opportunity to bring new faces to the Supreme Court (see below). In sum, the politicians have acted in accordance with a constitution that establishes a very low level of judicial independence de jure.[64]

The same is true regarding the constitutional provisions that establish the level of external independence. These provisions give much power to the executive and legislative branches over Supreme Court

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[64] This conclusion is in disagreement with the argument according to which for Chilean judges "the lack of interest in adopting an activist stance continues a long-held preference for maintaining the very autonomy that historically has allowed the Chilean judiciary to play a crucial role in the promotion and maintenance of the legality that characterizes this country" (Couso 2003, 88-9).

judges. Until recently, Supreme Court judges have been traditional lawyers who resisted challenging the government and impeachment procedures against them were seldom necessary. Since the restoration of democracy, five impeachment proceedings have been brought, one of which was successful (Popkin 2002, 118). For the first time in 125 years a High Court judge was removed for misconduct. In 1997, a constitutional reform took place in the context of corruption scandals in the judiciary. Claiming that it wanted to address the root of the problem, the government seized the moment to propose fundamental structural changes to the Supreme Court. The bill changed the nomination procedure for Supreme Court judges and expanded its number from seventeen to twenty one. The year 1998 brought eleven new faces to the Supreme Court, including five lawyers from outside the judicial hierarchy, all appointed and nominated according to the constitutional provisions (Hilbink 2003, 84-5). In sum, as expected, the politicians have acted in accordance with the constitutional provisions that determine the level of *de jure* judicial independence and hence it is a good proxy to the level of independence-from.

Regarding independence-to, the expectation is that it should be equal or higher than the level of de jure independence and that is what we observe. Because of the high degree of legislative fragmentation from 1970

to 1973, independence-to was arguably a lot higher than the de jure level: in June and July 1972 the court issued at least ninety orders against the policies of the government (Verner 1984, 483). In a similar way, after the transition to democracy one observes levels of independence-to higher than what the low level of independence de jure would suggest. For instance, during Aylwin's administration (1990-94), the Supreme Court ruled against the executive in 63.3% of decisions in cases specifically challenging presidential authority. During Frei's administration (1994-2000) the figure is 62.96% (Scribner 2002, 35).

Judicial decisions regarding violations of human rights during the dictatorship experienced a jump in 1998, when Pinochet was detained in London. The timing is explained, in part, because in order to have Pinochet extradited and judged in Chile the jurisprudence on human rights had to be changed. So the Chilean Supreme Court started making these decisions. Also important was the broad alliance, for different reasons, that cut across left and right in Chile on this issue. Some backed those judicial decisions because they were pro human rights, while others because they wanted Pinochet extradited and judged in Chile.

Case 5. Multilateral Setting, Unified Government: Chile 2000-2002, and 2006-2009

In 2000 former President Eduardo Frei joined the Senate as a lifetime member, giving the *Concertación* an advantage of 1 senator for two years until March 2002, when the Senate became tied again and this was the situation until March 2006. During this brief two-year period, the levels of judicial independence de jure as well as independence from remained exactly as what we described in Case 4. What about independence-to? We do not have data relative to this specific period to see if our expectations, i.e. a slight lower level of independence-to than in Case 4, are supported by the facts. However, Druscilla Scribner found that in the periods of unified government in Chile from 1933 to 2000 the percentage of court rulings in favor of presidential power for standard decree authority was a rather high 79%, while the figure in times of divided government was 51% (Scribner 2004, 300). One would expect, then, decisions against the government to go down again from March 2000 to March 2002; and to go up since this last date until March 2006, when the *Concertacion* was able to make a unified government and this time it will last until 2009. This seems an interesting avenue for future research.

Other Latin-American countries that have a relatively low de jure level and that have lived under multilateral settings and unified governments are Costa Rica from 1982 to 1994, and Guatemala from 1996 to 2003. Further research is needed to see if the expectations regarding independence from and independence to are met in these cases.

Case 6. Unilateral Setting: Chile, 1973-1990

Unilateral setting

After violently taking power in 1973, Pinochet and the military junta clearly violated standing Constitutional rules in Chile, and arrogated themselves the "Supreme Command of the Nation" effectively seizing executive, legislative and constituent power. In the course of 1974, "the manner of exercise of constituent powers and the relationship between the junta and the judiciary were worked out after encounters with the Supreme Court over judicial review of decree-laws and Court supervision of military justice" (Barros 2002, 37). By and large, as Correa Sutil notes, the Junta and Pinochet "did not overtly intervene in the Supreme Court when he came to power; he did not replace the justices, he did not threaten them, nor did he, to my knowledge, use corrupt methods to assure the collaboration of the Supreme Court, at least not in the early years of his dictatorship" (Correa Sutil 1993, 89). This meant, in practical terms, that the judiciary and the

Supreme Court judges would roughly be guided by the existing institutional framework which was actually one very low degree of de jure judicial independence: zero autonomy and one for external independence. The difference is that this occurred within a unilateral setting characterized by a military government.

What do we observe?

I expect the level of independence *from* to coincide with the low level of independence de jure and, given the unilateral setting, the level of independence-to to be equal or lower than the de jure level of independence. During this period, political officials, the Junta, acted in accordance to the legal rules. Regarding autonomy, the military regime stripped jurisdiction regarding crimes to national security from ordinary courts and gave it to military courts (Rosenn 1987, 26). As said above (see Case 4), politicians in Chile had used their prerogatives to alter the jurisdiction of the Courts when they deemed that convenient for their political purposes. This contributed to make Chilean judges 'a-political' (Correa Sutil 1993; Hilbink 2003. See also Couso 2003).

Regarding external independence, "because the armed forces needed legitimate collaborators, they did not intervene in the Supreme Court. The military neither removed any Supreme Court Justice nor threatened the

Supreme Court in any ways...Nonetheless, the Pinochet regime committed gross and grave human rights violations, and the judiciary had no impact on preventing these violations" (Correa Sutil 1993, 90). Thus, there was accordance between the constitutional provisions and the actions of the group in power and then the level of independence-from was as low as that of independence de jure.

This did not mean that Supreme Court judges were free to decide cases. Looking at what we call independence-to between 1973 and 1983, it is noteworthy that the courts rejected all but ten out of fifty-four hundred petitions for *habeas corpus* filed by the Vicaría de la Solidaridad. In the very beginning of the dictatorship the Supreme Court managed to send a clear message: those judges who challenged the regime were going to be considered unduly 'political' and would be face sanctions. "This feeling was particularly strong after the Supreme Court dismissed or forced the retirement of forty judges (15 percent of the total) in 1974, either by giving them poor evaluations for 1973 or by transferring them to geographically isolated posts" (Hilbink 2003, 76). In addition, the percentage of court's decisions against presidential authority was 28.63% (Scribner 2004, 35). Thus, as expected, the level of independence-to was equal or lower than the de jure level.

3.4 Conclusion

The analysis in this chapter departs from the premise that law and power are theoretically and empirically interdependent (see Maravall and Przeworski 2004; Ferejohn and Pasquino 2004). Law and reality coincide under some political conditions but may diverge under others. The theoretically informed typology developed in this chapter, allows us to distinguish the political conditions under which the constitutional provisions regarding judicial independence are likely to be a good guide as to what to expect regarding levels of judge's *independence-from* other government branches as well as their *independence to,* for instance, decide against the government in cases of human rights violations. In particular, there is one particular scenario when the de jure measure is not a good proxy because it overestimates the de facto level of judicial independence: the combination of a high degree of judicial independence de jure with a unilateral setting (Case 3). In other scenarios, the measure ranges from being quite a good proxy for independence-to (i.e. Cases 1, 4, and 5) to being a fair one (i.e. Case 2, Case 6) where it may be underestimated.

In the six scenarios, there are distinctions between strong and weak inequalities regarding expected levels of independence-to. This is important because it introduces an element of dynamism into an otherwise rather

static framework. It also enables to acknowledge that contextual variables, such as the specific power of the minority in a unified government, may play an important role (e.g. Case 2). Complementary accounts of independence-to, such as Helmke's "strategic defection" (2005), can be used to introduce more dynamism when analyzing judicial behavior within a country that moves across our six scenarios. For instance, one would expect that Supreme Court Judges decide more often against a sitting government when elections are close and the opposition is likely to win especially if a unified government is likely to come, since a unified government will more easily punish "non-loyal" judges.

The theoretically informed typology is also useful for empirical observation. Knowing in which scenario a country is can guide the observer's eye to those areas where attacks to judicial independence are more likely to occur. For instance, in a multilateral setting with unified government one can expect changes in areas that are covered by organic laws, and not those covered in the constitution. Take the case of Argentina as an example where the number of judges in the Supreme Court, not specified in the Constitution, has gone up or down in unified governments depending on their interests.

The next chapter uses the concept and measure of judicial

independence developed in chapters 1 and 2, and the typology of when such measure works well as a proxy for what we can actually expect to happen, to explore the relation between judicial independence and corruption.

CHAPTER 4

JUDICIAL INDEPENDENCE AND CORRUPTION

What is the effect of judicial independence on corruption? An independent judiciary acting as a check on the executive and legislative branches can limit the power of political leaders and reduce opportunities for corruption. But an independent judiciary can also increase corruption if sources of prosecutorial and judicial power are corrupt themselves (e.g. Rose-Ackerman 1999, 143; Treisman 2000, 425; Svensson 2005, 35. See also Schleifer and Vishny 1993, 605; Przeworski 2004, 167; Priks 2005). A more precise question is, then, under what conditions independent judges have an incentive to also be honest.[65]

Studies on judicial independence emphasize that there is a trade-off between judicial independence and accountability (e.g. Burbank and Friedman 2002; Cappelleti 1985; Ferejohn 1999; Guarnieri 2003; Russell 2001). Building on this idea, in this chapter I argue that in a system of checks and balances the relation between judicial independence and

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[65] Under certain conditions corruption may increase in the presence of an independent and honest judiciary. Suppose that private individuals and firms engage in secret corrupt deals with public officials. Private actors are willing to make payoffs because they are confident that the procurement contracts, concessions, and privatization deals they obtain will be upheld by the honest, impartial judicial system (Rose-Ackerman 1999, 157). I do not consider this possibility in the chapter.

corruption is U-shaped: a dependent judiciary facilitates corruption because the elected branches would be unchecked, but totally independent judges constitute additional bribe demanders and increase corruption. Hence, in a system of checks and balances an intermediate level of judicial independence is optimal for the control of corruption since it avoids unchecked checkers and minimizes the incentives of elected and unelected government officials to misuse public funds for private gain.

The chapter is divided into three parts. In the first, building on the conceptualization and measurement of judicial independence elaborated in the previous chapters of this dissertation, I discuss in more detail the relationship between judicial independence and corruption. In addition to the U-shape hypothesis, I argue that more internal independence leads to more corruption and that this is also the case when the prosecutorial organ is located within the Executive power. In the second part I explore these hypotheses in the case of eighteen Latin American countries from 1994 to 2003. The last part concludes.

4.1 Corruption and the Judiciary

I use a common definition of public corruption as the misuse of public office for private gain. As Svensson notes, misuse typically involves applying a legal standard. Corruption defined this way would capture, for

instance, the sale of government property by government officials, kickbacks in public procurement, bribery and embezzlement of government goods (Svensson 2005, p. 20). When a legal standard is violated someone may prosecute the offense (a private citizen or a public prosecutor) and challenge the action in a court of law. A judge, then, adjudicates the case based on the standard.

But the judge herself may be part of the corruption scheme. Judges may not only accept bribes for selling decisions but they could also collude with either the police or the prosecutor. In Tanzania, for example, an investigation in the mid-1990s found cases where the police would falsely arrest a person and receive a kickback from the magistrate when the man or woman paid to win release (Widner 2001, 276). In general, corruption in the judiciary can be distinguished between administrative and operational (Buscaglia 2001b, 235). The first one occurs when court administrative employees violate formal or informal administrative procedures for their private benefit; for instance, court users paying bribes to administrative employees to alter the legally-determined treatment of files, loosing evidence, or to accelerate or delay a case by illegally alter the order of their hearing. In Tanzania some times law clerks were the main source of trouble. One common and quite ingenious ploy was for the clerk to see a decision in

advance of its announcement, then to 'sell' the judgment to the winning party, claiming that the judge or magistrate was still undecided (Widner 2001, 276).

Operational corruption, on the other hand, occurs when political and/or considerable economic interests are at stake. It involves politically-motivated court rulings, buying or selling decisions, plain extortion, and/or undue changes of venue where judges stand to gain economically and career-wise as a result of their corrupt act.

Typical cases of corruption involve a payment to buy a judicial decision. For instance, in Mexico, before the 1994 judicial reform there was a well known case of two circuit court magistrates who had accepted money in exchange of liberating an assassin (Fix-Fierro 2003, 262 fn. 26).[66] Operational corruption may be facilitated by a large number of laws, their vagueness, and their contradictions, since judges wouldn't know what law to apply and vagueness contributes to substantive or procedural abuse of judicial discretion (Rose-Ackerman 1999, 152-3)

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[66] There are other subtler, indirect ways of buying a judge. In Italy, one such indirect benefit which made judges more sensitive to external pressure was "the availability of highly remunerative payments for the extra-judicial arbitrations that were used to settle conflicts between businesses or between business and public bodies -a mechanism that often replaced the slow and inefficient system of the civil courts" (Della Porta 2001, 9)

Government officials, elected and unelected (including judges), engage in corrupt acts if they want or if they can. Whether they want depends on personal characteristics, but here I assume a typical official who does want to increase his welfare even if this involves the misuse of his position. Whether this official can engage in corruption depends on the incentives he faces: he would balance the expected costs of a corrupt act against the expected benefit.[67] The most obvious cost is the risk of getting caught and punished that depends on the corrupt act being (1) detected, (2) prosecuted, and (3) punished in a court of law (Taylor and Buranelli forthcoming).[68]

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[67] Treisman argues that the probability of getting caught depends in part on the effectiveness of the legal system, captured by distinguishing civil law versus common law legal systems. However, as Treisman recognizes, legal systems by themselves do not promote more or less corruption, we need mechanisms. In particular, he argues that an independent judiciary is necessary condition no matter what legal system (Treisman 2000, 425). In this chapter, I go one step further exploring the conditions under which an independent judiciary reduces corruption.

[68] Arguably, simply detecting and publicizing the corrupt act would create costs for the official even if such act is not prosecuted and punished. For instance, Kunicova and Rose-Ackerman argue that a corrupt politician, if exposed, will be punished by voters in the next poll (2005, 577). In this chapter, however, I am concerned with the role of judges and the judiciary in the combat of corruption. The same politician, perhaps before the next election, could be punished by a judge if exposed and prosecuted.

Graph 4.1 Steps in the Control of Corruption

CORRUPT ACT → DETECTED → PROSECUTED → ADJUDICATED

Graph 4.1 displays the minimum steps involved in the control of corruption. If there is a corrupt act by a government official, the first step is that such act does not go unnoticed. A free and independent press may be crucial in this step. Once noticed, it should be first investigated and then challenged in court by a prosecutor.[69] The relation between the public prosecution office and the elected organs of government is noteworthy, particularly in civil law countries where the public prosecutor, also a civil servant, prepares and presenting the state's cases against the accused before a court in criminal actions. In this sense, the public prosecutor is like a district attorney in a typical American state. As Merryman explains, before the trial the prosecutor directs the investigation of a case and participates in, in some countries controls, the examining phase, i.e. the decision of whether there are enough elements to go to trial (1985, 29). The importance

[69] In some countries cases may be brought by private citizens. Here, however, I concentrate in the role of the public prosecutor. Remember, from chapter 1, that the prosecution itself can be divided in three stages - investigating, charging, and sentencing (Szott 2004) - and that difference in powers and capacities of prosecutors may be crucial. I thank Bernard Manin for making me sensitive to the importance of the public prosecution.

of the prosecutor in the adjudication function of the judiciary is evident. Moreover, there are countries where the prosecutor has the monopoly over the investigative part of any case where the state is involved; therefore in these cases the prosecutors become highly critical as the gatekeepers for the judiciary.

In the presence of a corrupt act, the prosecutor can (a) not investigate at all, (b) carry out the investigation but decide that there are no grounds for charging the suspect, or (c) make the investigation and charge the suspect with a crime. In all cases the prosecutor himself may be corrupt and, for instance, charge an innocent or dismiss a case against a corrupt official. Because of the strategic role of the prosecution in the combat of corruption its institutional location is of primary importance. The prosecutorial organ can be part of the executive branch (as in the United States and Mexico), it can be part of the judicial branch (as in Italy and Chile before the 2005 reform), or it can be an autonomous organ (as in Brazil and Chile after the 2005 reform). As Guarnieri and Pederzoli have argued, if both judges and prosecutors belong to the judiciary, they would be, in principle, more powerful and clearly more independent of the political organs of government. However, in this case there are concerns on the lack

of independence of the prosecutor relative to the judge.[70] Also, traditionally, when the prosecutors are subordinated to the executive he exerts pressure on the whole judicial system through them (Guarnieri and Pederzoli 1999, 95). Finally, the public ministry may be an autonomous investigative organ, which would nonetheless still depend to a certain extent on the judiciary and executive to conduct a lawful investigation.

If the prosecutorial organ lies within the executive prosecutors will have an incentive to serve the interests of their political bosses. A prosecutorial organ that lies within the judiciary can diminish corruption since they will enjoy the same degree of independence from the government than that of judges (see Della Porta 2001, 13). Of course, in this case the judge and the prosecutor may collude and this option is not

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[70] This is clear in countries such as Spain, Italy, and France where an important part of the debate on judicial independence is focused on the relation between the prosecutor and the judge. In Italy, for instance, the corps of magistrates provides the judges as well as the prosecutors. The same magistrates do not play both roles on the same case, but they are both on the same career track. It may be difficult to see the significance of this combining of two roles into one career, but an example cited by Burnett and Mantovani make it clearer: "in 1992-1993 a current prosecutor in the Clean Hands Pool, Paolo Ielo, was a judge on the court to which people who have been arrested can go to ask for their freedom. In this role, Ielo passed judgment on many cases presented by suspects in Operation Clean Hands. Such instances arose so frequently that the Constitutional Court, in a recent decision, has ruled that magistrates who were involved in the investigation of a suspect may not be included in the tribunal that judges him" (1998, 17).

available if the prosecutorial organ is autonomous. Therefore, I argue that for controlling corruption taking the prosecutorial organ outside the executive branch reduces corruption, while having an autonomous prosecutor would be the most efficient option. An independent press would increase the risk of detection, an independent prosecutor would increase the probability of being investigated, prosecuted, and sued in court, increasing the cost of corruption and hence decreasing corruption.

For the probability of prosecution to be credible, however, at least in those salient cases that reach the higher courts corrupt defendants should be found guilty. An independent prosecutor who never puts a corrupt official in jail will soon lose his leverage. The connection between prosecutors and judges is interesting and, in many countries, most of the action lies in this step. Notice, for instance, that only when the prosecutor opens the gates of the judiciary a case reaches the court, and many cases never reach the courts. This is the case in Mexico where only 4.5% of reported crimes[71] are fully investigated and only 1.6% of those reach the courts (Zepeda Lecuona 2004, 398. See also Sadek and Batista 2003 on the

[71] In Mexico only 25% of crimes committed are reported to the police (Zepeda Lecuona 2004, 398).

Brazilian case).[72] In addition, it may take years for a corruption case to reach a judge: in a huge scandal in Brazil involving a Senator, a judge, and more than a hundred million USD for a construction project (the "Lalau" case), ten years passed from the case being noticed until it reached a judge, and thirteen until it was decided (Taylor and Buranelli forthcoming).

Once a case finally reaches the court, the judge could punish the corrupt official or collude with him. Because judicial decisions help determine the distribution of wealth and power, judges can exploit their positions for private gain. A corrupt judiciary can facilitate high-level corruption, undermine reforms, and override legal norms. A completely dependent judge would decide in the best interest of the elected officials of whom he is an agent. For instance, the judge could acquit the defendant or dismiss the case since his own career depends on the political officials who may have participated in the corruption scheme. A completely independent judge could collude with the defendant for a price since the judge's decision would not carry consequences from the political officials who may

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[72] Rose-Ackerman argues that if the law on the books does not mean much and the judicial system operates poorly, people will avoid bringing disputes before the courts unless they are certain to be the high bribers. Otherwise, they will find ways to circumvent the court system by hiring private arbitrators and using other methods, such as the protection provided by organized crime (Rose-Ackerman 1999, 153).

have participated in the corruption scheme. Only a judge that fears some punishment that exceeds the benefit of colluding with the corrupt official but who also has certain protection in his salary and position will find the defendant guilty. In other words, when deciding the case the judge would weigh the costs and benefits of colluding with the defendant. In this story, these depend on how independent the judge is from the political branches.

A completely independent judiciary, one that is not accountable, could increase corruption because it would add an additional unchecked veto point that would have an incentive to engage in corruption. Similarly, a very dependent judiciary would increase corruption because in this case it is elected politicians that would be unchecked.[73] Given that elected and unelected government officials would be corrupt if they can, in a system of checks and balances the unchecked checkers would have incentives to be corrupt. [74] Thus, a medium level of judicial independence from the other branches of government is optimal in the combat of corruption (Graph 4.2).

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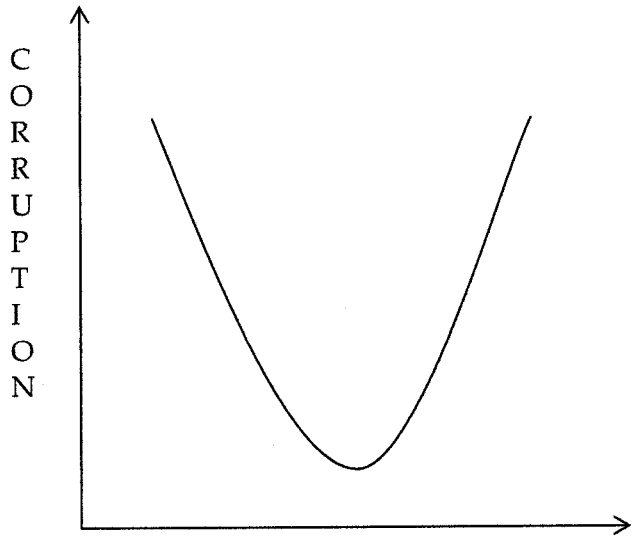
[73] Analyzing the U.S., Alt and Lassen argue that an elected judiciary should be more concerned about curbing corruption, which is disliked by all voters, than an appointed judiciary because judges are held accountable by voters (Alt and Lassen 2004, 2)

[74] This account is consistent with the development of "institutional trust" necessary for political accountability; see Cleary and Stokes (2006).

Graph 4.2. Judicial Independence and Corruption



The institutional structure may also increase or decrease opportunities for corruption within the judiciary. In particular, given that judiciaries are hierarchical institutions, the relationship between Supreme Court and Lower Court judges is of primary importance. I call this dimension "internal independence" that refers to the extent to which lower court judges can make decisions without taking into account the preferences of their hierarchical superiors. Internal independence is determined by the extent and location of administrative controls and the extent to which judges' decisions are constrained by legal rules regarding bindingness. The ideal extreme of binding precedent is found in common law systems, where the doctrine of *stare decisis* binds all future judges in the

same or lower court to the same decision in similar cases; at the other ideal extreme are civil law systems in which the judge applies the written law ("the will" of the legislator) in each case before him without taking into account previous decisions (that are considered "judge-made" law). Real legal systems lie between those two extremes but, as Treisman argues, a legal system that relies on judicial precedent rather than precise codes may reduce corruption in a country that already has an effective system of enforcement and a strong tradition of procedural justice (Treisman 2000, 425).

However, countries within the same legal tradition and arguably similar degrees of bindigness do differ in the extent of administrative controls that higher court judges have over those in lower courts. Controlling for type of legal system, thus, corruption within the judiciary would be higher where purely institutional levels of internal independence are also higher.[75] This would be true especially in civil law countries where

[75] Studies in individual countries seem to support this idea. In Nicaragua, the percentage of judges who say have been offered bribes increases as one descends in the judicial hierarchy, and the bulk of the offers come not from judicial superiors but from parties in the case (Diaz Rivillas and Ruiz Rodgiuez s.d., 39). Widner reports similar results in her study on African countries where the upper levels of the courts were perceived as less prone to corruption (Widner 2001, 276).

controls over lower court judges depend basically on career incentives.[76] More internal independence is a good thing for corruption because too many, decentralized, not closely monitored[77] and unconstrained lower courts, may increase the incentives for lower court judges to accept bribes. As Gerring and Thacker argue, decentralized power structures introduce co-ordination problems among political units whenever the actors are (a) multiple, (b) organizationally independent, (c) instilled with different perspectives and different organizational missions, and (d) empowered with an effective policy veto (Gerring and Thacker 2004, 325. See also Schelifer and Vishny 1993).[78]

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[76] Recent work on Bolivia based on a survey to judges analyze the legal and political factors that affect lower court judges in their relation with their superiors (see Pérez-Liñán et al 2006)

[77] "Supervision is our great weakness. We have had inadequate resources to supervise magistrates. So they are small emperors without fear that someone from above will come down on them", said a judge in Tanzania (Widner 2001, 282).

[78] It must be noted that low internal independence, however, may also promote corruption if the hierarchy is corrupt and pressures lower court judges. Donatella Della Porta shows an instance where a low degree of internal independence actually increases corruption: "Corrupt politicians often used their informal contacts in the senior ranks of the judiciary to intimidate those magistrates who pierced the circle of political illegality through pressure from superiors who were more sensitive to 'political needs', by isolating them or arranging for them to be moved to another position" (Della Porta 2001, 10).

In sum, I have three hypothesis on the relation between the judiciary and corruption: (1) An independent prosecutor would increase the probability of being prosecuted, the cost of corruption would increase and hence corruption would decrease; (2) A medium level of judicial independence from the other branches of government is optimal in the combat of corruption; and (3) Corruption within the judiciary would be higher where the institutional levels of internal independence are also higher. The next part of the chapter looks at these hypotheses in Latin American countries from 1996 to 2002.

4.2 Judicial Independence and Corruption in Latin America

The Latin American region provides a promising arena for assessing the hypothesis of this chapter because countries share a common heritage, political culture, civil legal system, and presidential regime. At the same time, however, countries retain important variations in judicial and other political institutions. This makes for a good laboratory for assessing the impact of institutions on economic and political outcomes. The analysis in this chapter includes the eighteen largest Latin American countries, except Cuba. The time frame, for reasons of data availability, is restricted to the period from 1996 to 2002. During this period most countries in the sample

classify as democracies according to the conceptualization employed in this chapter (Przeworski et al 2000).[79]

It has been argued that as regards increased incentives for corruption, a prime suspect is the wave of democratization that has swept across Latin America over the last 25 years. By dispersing power and requiring the consent of several institutions in decision making, the return of democracy has extended the range of actors who can demand bribes (Weyland 1998, 108; Schleifer and Vishny 1993, 610). However, as Weyland argues, the relation of democratization and corruption is not at all clear since a regime transition entails a whole host of changes, many of which have contradictory effects on corruption levels. Judicial reforms carried out through out the region may be one of the anti-corruption changes. Democratization extends the range of actors who have the power to demand bribes, but it may also enhance overall accountability and thus prevent newly empowered actors -as well as old power holders—from misusing their clout for illicit enrichment (Weyland 1998, 113). Hence,

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[79] The exceptions are: Mexico from 1996 to 1999, Ecuador from 2000 to 2002, Paraguay from 1996 to 2002, and Peru from 1996 to 2000. These countries are classified as civilian dictatorships in those years according to Gandhi (2004). According to other classifications all countries in my sample during the period of analysis are at least "semi-democracies" (Mainwaring et al 2001; Smith 2005).

whether judicial reforms as part as a wave of democratization have an effect on corruption is an empirical question to which I now turn.

Dependent Variable

The dependent variable is corruption. As a proxy I use the Control of Corruption Index (CORRWB) compiled by the World Bank (Kaufman et al 2004). The index aggregates surveys of perceived corruption across countries. The surveys are based on the views of business people, risk analysts, investigative journalists and the general public. The focus is on kickbacks in public procurement, the embezzlement of public funds and the bribery of public officials. The CORRWB, as well as its brother index the Corruption Perception Index (CPI) by Transparency International, has been criticized on a number of grounds (see Bardhan 1997, 1328; Svensson 2005, 23) but still remains as a good proxy for perception of corruption in cross national research. The CPI is another common measure but I use the CORRWB because it covers more country-years in my sample than the CPI. In addition, the correlation of both indices in my sample is .93.[80] The CORRWB goes from -2.5 (least corrupt) to 2.5 (most corrupt).[81]

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[80] To facilitate interpretation, the CPI index was rescaled so 0 is least corrupt and 10 most corrupt. In addition, since CPI is bounded 0-10, the variable was logistically transformed $Z=\ln[(Y-a)/(b-a)]$. Where Y is the original (bounded) dependent variable which exists in the inverval (a,b]. This transformation assumes that a country can never achieve a score of 0.

Independent Variable

The independent variable is judicial independence. As argued in the first chapter of this dissertation, I distinguish between four components: (1) Autonomy, or the relation between the judiciary as an institution and the elected branches of government, (2) External Independence, or the relation between Supreme Court judges and the Executive and Legislative, (3) Internal Independence, or the relation between Supreme Court and Lower Court Judges, and (4) The institutional location of the prosecutorial organ depending on whether it is part of the Executive, the Judiciary, or an autonomous organ. These components are measured as described in Chapter 1 and Chapter 2. I also include the possible combinations of the first three components, what I labeled the Institutional Models of Judicial Independence.

The main advantage of a good de jure measure is that it is comparable across countries, comparable across time within the same country, and reproducible by any person that looks at the legal texts and follows our coding rules. But still, how can we know if a good de jure measure of judicial independence is a good proxy for what we can expect to

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This assumption is plausible given that no country has been labeled 'perfectly incorrupt' (See Taylor 2005).

[81] The original was multiplied by -1 to facilitate interpretation.

happen in reality? As argued in Chapter 3, whether the de jure measure can be considered a good proxy for, to overestimate or to underestimate, judicial independence in reality depends on the distribution of power among the ruling political groups. In particular, whenever there is not a single political group capable of amending the constitution unilaterally, and whenever there is divided government, we can expect the de jure measure of judicial independence to be a good proxy for judicial independence de facto.

Based on the arguments made in Chapter 3, it is possible to know for which observations in the database the measure of de jure judicial independence defended in this dissertation is a good, fair, or bad proxy for independence-from and independence-to. For the seventy two country-years covered in this chapter, which result from our sample of eighteen countries in the four years (1996, 1998, 2000, and 2002) for which there exists a measure of corruption (CORRWB), I looked at whether the sum of autonomy plus external independence is at least four, whether the country had a divided or unified government in a particular year[82], and whether it

[82] This variable is taken from Negretto (forthcoming), and from the Election Results Archive available at http://cdp.binghamton.edu/era/index.html. A divided government implies a multilateral setting. A unified government exists in a multilateral setting when the political group that controls

was in a multilateral or unilateral setting. I then identified to which one of the six theoretical cases a country-year observation corresponds and whether I can expect the de jure measure of judicial independence to be a good, fair, or bad proxy for independence-to and independence-from.

With the data at hand, out of seventy two observations (eighteen countries times four years) there is not a single observation in which the de jure measure can be expected to be a gross overestimation (Case 3); there are seventeen observations for which the measure is a fair proxy (Case 2 and Case 6); fifty three observations for which it is a good proxy (Case 1, Case 4, and Case 5); and two missing observations.[83]

Control Variables

Several additional variables have been related to perception of corruption. Analyzing Latin America allows us to control implicitly for

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congress and the executive have less than the required seats to amend the constitution. See Chapter 3 for details.

[83] Good-proxy observations (Cases 1, 4, and 5) are: Argentina 1998, 2000; Bolivia 1996-2002; Brazil 1996-2002; Chile 1996-2002; Colombia 1996-2002; Costa Rica 1996-2002; Dominican Republic 1996-2002; Ecuador 1996-2000; El Salvador 1996-2002; Honduras 1996, 1998; Mexico 1998-2002; Nicaragua 1998, 2000; Panama 1996-2002; Paraguay 1996; Peru 2002; Uruguay 1996-2002; Venezuela 1996-2000.
Fair-proxy observations (Cases 2 and 6) are: Argentina 1996; Guatemala 1996-2002; Honduras 2000, 2002; Mexico 1996; Nicaragua 1996, 2002; Paraguay 1998-2002; Peru 1996-2000; Venezuela 2002.
Missing observations are: Argentina 2002; Ecuador 2002.

some variables that have been related to higher corruption, such as civil law tradition (Treisman 2000, 402; Djankov et al 2003, 453), a presidential system of government (Gerring and Thacker 2004, 295; Kunicova and Rose-Ackerman 2005, 597), and lack of a Protestant majority (Treisman 2000, 402). These variables would suggest that Latin America is a particularly corrupt region. However, cross national analysis that cover countries across continents have not found evidence of this once controlling for economic development and uninterrupted democracy (Treisman 2000, 436-7. See also Montinola and Jackman 2002).

Other variables have been related to corruption. Among the economic variables, economic development, measured by GDP per capita, has been consistently related to lower levels of corruption (e.g. Mauro 1995, 683). Privatization has been theoretically related higher corruption since the sale of public enterprises gives burocrats and politicians discretion over the relocation of vast resources, widening their scope for personal gain (Weyland 1998, 111). Moreover, during the period from 1990 to 2003 Latin America was the biggest contributor to developing country proceeds from privatization transactions, raising $195 billion or 47 percent of total proceeds from 1,300 transactions. Argentina, Mexico, and Brazil accounted for 80% of proceeds in the region during the 1990s mainly from telecoms,

electricity, and energy privatizations (Kikeri and Kolo 2005, 8).[84] Ades and Di Tella find that increases in market competition, measured in terms of openness to foreign trade using trade imports as a percentage of GDP, dampens corruption (Ades and Di Tella 1997, cited in Montinola and Jackman 2002, 153).[85]

Among the political variables, Treisman found that countries that have been democracies (using the classification of Przeworski et al 2000) continuously since 1950 tended to be perceived as less corrupt (2000, 433).[86] Federalism has also been positively related to perception of corruption (Gerring and Thacker 2004, 295; Treisman 2000, 402), although in my sample only Argentina, Brazil, Mexico, and Venezuela have federal systems of government.[87] Proportional representation electoral systems have been

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[84] The recently available World Bank Privatization Database now allows controlling for this variable.

[85] Ades and Di Tella (1997) also find that judicial autonomy, measured by surveys by BI, also decrease corruption.

[86] In the following analysis I include a related measure: the number of continuous years a country has been a democracy since 1950 (see Przeworski et al 2000).

[87] Venezuela has been federal country according to its Constitutions. However, the degree of centralization of power has fluctuated historically and while I code it as a federal republic it is important to mention that the current Constitution of 1999 limits the power of the states and the even abolished the Senate although it retained the characterization of Venezuela

related to higher levels of perception of corruption (Kunicova and Rose-Ackerman 2005, 597). Finally, social variables, such as the degree of ethnic fractionalization, political rights and liberties (as measured by Freedom House), income inequality (You, Jong-Sung and Khagram 2005), and stability (Taylor 2005) have also been related to corruption.

Descriptive Statistics and Basic Exploratory Analysis[88]

Table 4.1 presents a summary of the data. Note that for most variables the number of observations is seventy two. For some variables (GDP per capita and Openness to trade), however, the number of observations is fifty four because their values for 2002 are missing. Finally, the number of observations decreases to thirty for the privatization variable. It is important to note that while there is good variation in all the variables, unfortunately this variation is largely across and not within countries. For instance, from 1996 to 2002 the degree of autonomy changed in three countries (Chile, Ecuador, and Venezuela), external independence changed in four (Chile, Ecuador, Honduras, and Nicaragua), internal independence in two (Brazil and Mexico), and four countries changed

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as a federal republic (Art. 4). I thank Raúl Sánchez Urribarri for these precisions.

[88] The analysis that follows includes variables that come from Przeworski et al 2000, except otherwise indicated.

model of judicial independence (Chile, Ecuador, Mexico, and Venezuela).[89]

The dependent variable (CORRWB) is also unreliable across time. Each year, the World Bank uses what sources are willing to supply so the indices in one year are not completely based on the same underlying data sets as in other years.[90]

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[89] As shown in Chapter 2, measures of judicial independence show much greater variation within and across countries in the full data set that covers the years from 1950 to 2000.

[90] I thank Susan Rose-Ackerman for pointing out this feature of the dependent variable.

Table 4.1 Descriptive Statistics

Variable	Obs	Mean	Std. Dev.	Min	Max
CORRWB	72	-.2727778	.6372061	-1.2	1.56
Autonomy	72	1.527778	1.221546	0	3
Ext. Indep.	72	1.972222	.9925387	0	4
Int. Indep.	72	1.430556	1.890125	0	6
Inst. Model	72	4.305556	1.553178	1	6
PM Non Exe	72	.666	.47471	0	1
GDP/Pop	54	5642.634	2595.688	1723.26	11638.99
Openness	54	62.92852	30.5306	16.3	153.7
Privatization	30	2144.1	6126.635	4	32427
Agedem	72	18.61	14.5423	0	54
Federalism	72	.1666667	.3752933	0	1

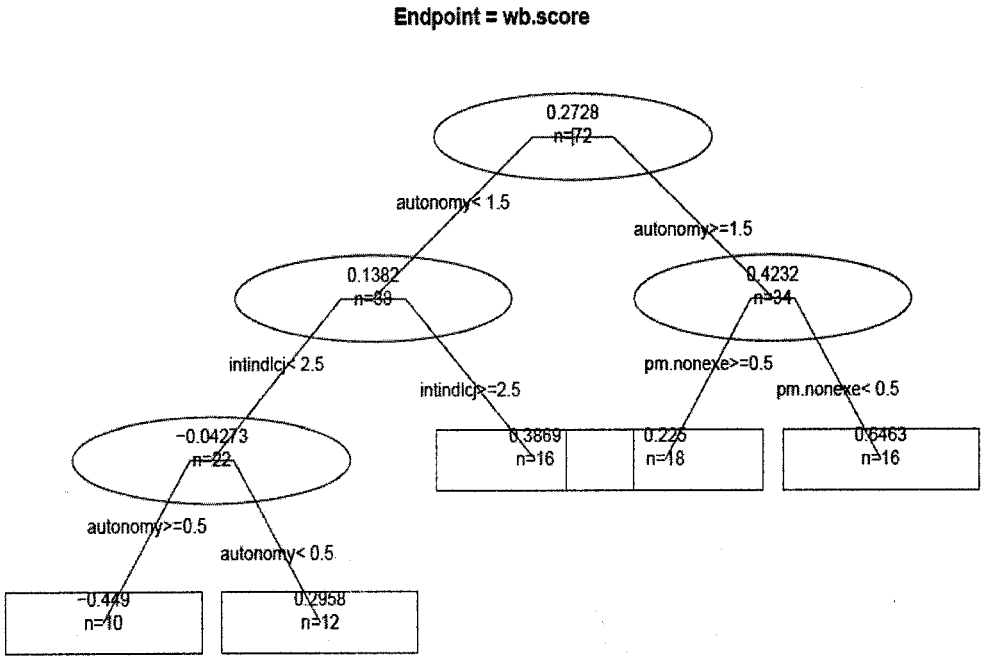
Because of the characteristics of the data currently at hand, instead of relying on a multivariate statistical analysis such as fixed effects or OLS regression with panel corrected standard errors, in what follows I present the results of an exploratory analysis based on regression trees.[91] Regression trees are a descriptive tool in which using recursive partitioning a sample is repeatedly subdivided on the basis of predictor variables into groups that are as internally homogenous as possible, in terms of the outcome. For a continuous outcome such as the measure of corruption, this means minimizing the within group variance, while maximizing the differences between groups. The partitioning is recursive because the two groups formed by the first split are themselves potentially split into two

[91] I thank Adam Przeworski for suggesting the use of regression trees for describing the data.

groups each, then the resulting four groups potentially split, and so on until the resulting groups meet criteria for homogeneity or minimum size. Each split is based on an exhaustive search for the partition based on a single predictor that gives the greatest increase in homogeneity. When a tree has been fully grown, cross validation is used to prune it back in such a way as to minimize prediction error.[92]

[92] The following analysis was done in R 2.3.1 using the package rpart. The package produces a three built by using the largest value of the complexity parameter (a measure of within group homogeneity) with the cross validation relative error within one standard deviation of the minimum. If the tree is too large or complex it is possible to 'prune' it by changing the complexity parameter. I show the trees without 'pruning' them because they are simple. A detailed account can be found in Breiman et al (1994). Classification and regression trees (CART) are mainly used in biostatistics; for applications in economics see Minier (2003), and Durlauf and Johnson (1995).

Graph 4.3 Regression Tree (Corruption regressed on Autonomy, External Independence, Internal Independence, and Prosecutorial Organ Outside the Executive)



I first examine whether and how the independent variables are related to corruption. Graph 4.3 shows the resulting regression tree with corruption as the dependent variable and autonomy, external independence, internal independence, and prosecutorial organ outside the executive as independent variables. The root of the three shows the average corruption (.2728) for all the observations in the sample (n=72). The first variable that splits the data is autonomy. Country-years with more than 1.5

in autonomy are in average more corrupt (.4232, n=34)[93] than those that score less than 1.5 (.1382, n=38).[94] Within countries with autonomy higher than 1.5, however, those with the prosecutorial organ outside the executive are in average less corrupt (.225, n=18)[95] than those with the prosecutorial organ within the executive (.6438, n=16).[96]

Looking at the left branch, among those countries with autonomy lower than 1.5, those with internal independence below 2.5 are less corrupt (-.04273, n=22)[97] than those with internal independence above 2.5 (.3869, n=16).[98] Finally, for those countries with internal independence below a score of 2.5, countries with autonomy higher than .5 are the less corrupt in

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[93] These are: Guatemala from 1996 to 2002; Mexico 96-02; Nicaragua 96-98; Paraguay 96-02; Venezuela 00-02; Costa Rica 96-02; El Salvador 96-02; Honduras 96-02; Nicaragua 00-02; and, Panama 96-02.

[94] Dominican Republic 96-02; Chile 96-02; Ecuador 96-02; Peru 96-02; Uruguay 96-02; Venezuela 96-98; Argentina 96-02; Bolivia 96-02; Brazil 96-02; Colombia 96-02.

[95] Costa Rica 96-02; El Salvador 96-02; Honduras 96-02; Nicaragua 00-02; Panama 96-02.

[96] Guatemala 96-02; Mexico 96-02; Nicaragua 96-98; Paraguay 96-02; Venezuela 00-02.

[97] Dominican Republic 96-02; Chile 96-02; Ecuador 96-02; Peru 96-02; Uruguay 96-02; Venezuela 96-98.

[98] Argentina 96-02; Bolivia 96-02; Brazil 96-02; Colombia 96-02.

average (-.449, n=10)[99], than those with autonomy above .5 (.2958, n=12).[100] It is noteworthy that external independence does not figure out as a variable that splits the data into homogenous groups. According to this tree, countries with an intermediate level of autonomy (above .5 but below 1.5), combined with a low score in internal independence (below 2.5) are among those with less corruption in average.

In order to analyze in particular what institutional variables are related to corruption, I ran regression trees with the variables that are part of autonomy, external, and internal independence separately. Graph 4.4 shows the regression tree with the variables that compose autonomy. If the constitutional court is within the judiciary, then average corruption is higher (.4095, n=37)[101], than if it is outside the judiciary (.1283, n=35).[102] For those countries that have the constitutional court outside the judiciary, if the number of Supreme Court judges is in the constitution then average

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[99] Chile 98-02; Ecuador 96; Uruguay 96-02; Venezuela 96-98.

[100] Dominican Republic 96-02; Chile 96; Ecuador 98-02; Peru 96-02. In this and the previous case it is interesting to note that Chile and Ecuador enacted reforms that altered the degree of autonomy.

[101] El Salvador 96-02; Panama 96-02; Argentina 96-02; Ecuador 96; Venezuela 96-02; Honduras 96-02; Nicaragua 96-02; Paraguay 96-02; Costa Rica 96-02; Mexico 96-02.

[102] Dominican Republic 96-02; Brazil 96-02; Chile 96-02; Colombia 96-02; Ecuador 98-02; Peru 96-02; Guatemala 96-02; Bolivia 96-02; Uruguay 96-02.

corruption is less (-.069, n=15)[103] than if it is not (.2765, n=20).[104] For countries with the constitutional court within the judiciary, if the judiciary itself controls its institutional structure corruption is less (-.27, n=8)[105] than if this is not the case (.5969, n=29).[106] Finally, for the countries in this last category it makes a difference if the number of Supreme Court judges is in the constitution (average corruption .7533, n=12)[107] or not (average .48, n=17).[108] It thus seems that a combination or a middle level of autonomy variables, some controlled by the judiciary others by the political branches, is associated with less corruption.

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[103] Guatemala 96-02; Bolivia 96-02; Chile 98-02; Uruguay 96-02.

[104] Dominican Republic 96-02; Brazil 96-02; Chile 96; Colombia 96-02; Ecuador 98-02; Peru 96-02.

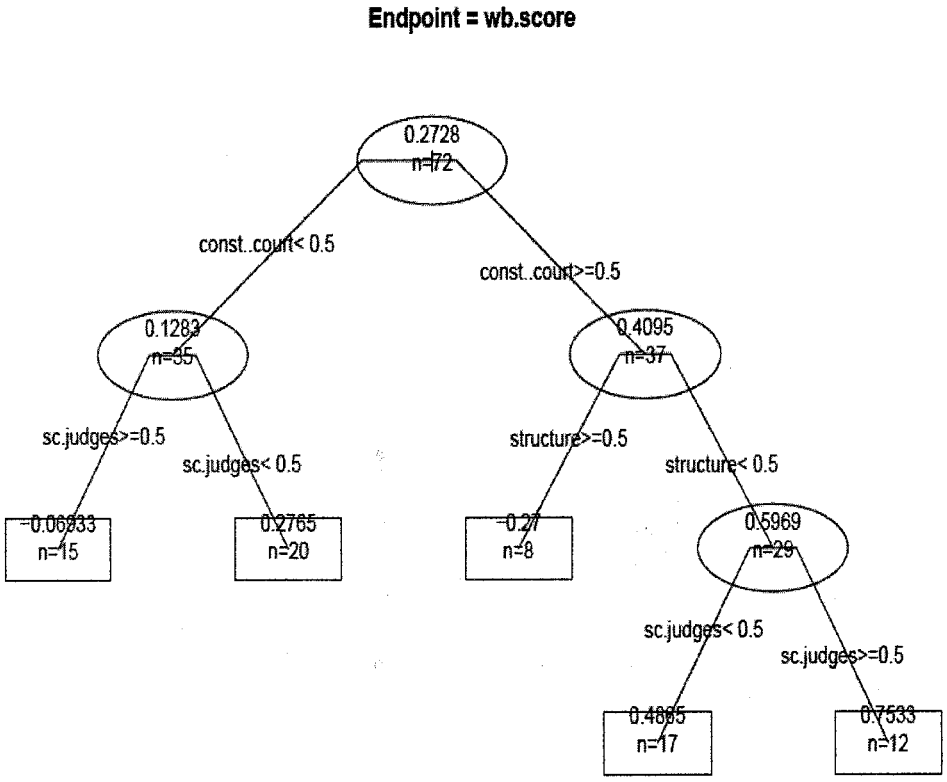
[105] Costa Rica 96-02; Mexico 96-02.

[106] El Salvador 96-02; Panama 96-02; Argentina 96-02; Ecuador 96; Venezuela 96-02; Honduras 96-02; Nicaragua 96-02; Paraguay 96-02.

[107] Honduras 96-02; Nicaragua 96-02; Paraguay 96-02.

[108] El Salvador 96-02; Panama 96-02; Argentina 96-02; Ecuador 96; Venezuela 96-02.

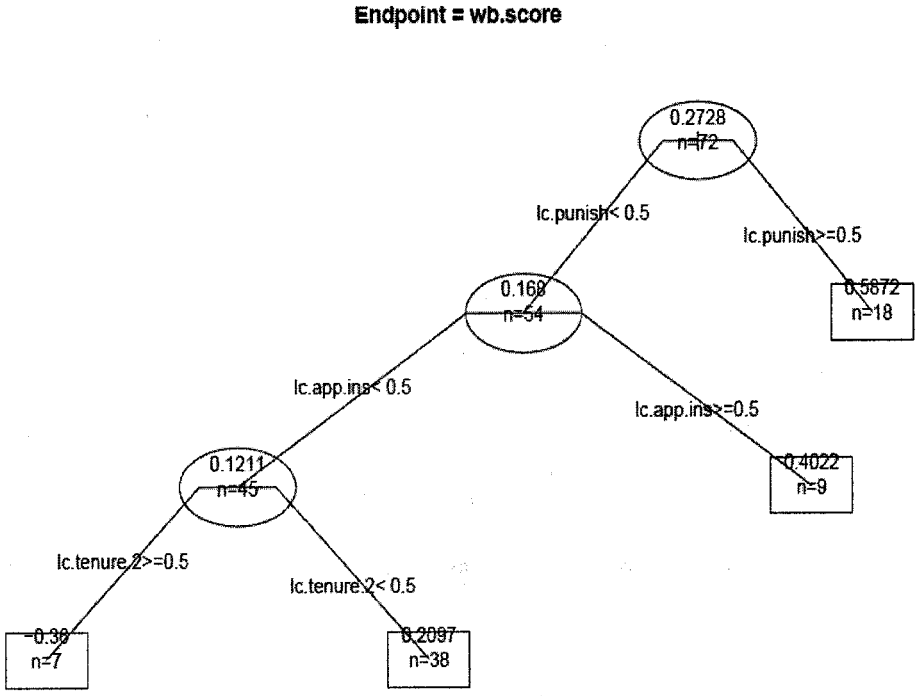
Graph 4.4 Regression Tree (Corruption regressed on the variables that compose autonomy)



Repeating the analysis this time with the variables that are part of external independence (regression tree not shown), it turns out that the single most important discriminatory variable in the dataset is whether the tenure of Supreme Court judges is longer than that of their appointers. If it is, the average corruption is .189 (n=60), while if it is not the average corruption is .6917 (n=12). The other variables that are part of external

independence (appointment and impeachment procedures, and salary protected in the constitution) do not separate the data clearly into groups.

Graph 4.5 Regression Tree (Corruption regressed on the variables that compose internal independence)



Regarding internal independence the first split is whether the lower court judges can be punished by their superiors or not (Graph 4.5). If they can't (i.e., if internal independence is higher) average corruption is higher (.5872, n=18)[109] than if they can (.169, n=54).[110] For those lower court judges

[109] Mexico 96-98; Argentina 96-02; Bolivia 96-02; Colombia 96-02; Paraguay 96-02.

that can be punished by their superiors, if the superiors also appoint them then corruption is lower (.1211, n=45)[111] than if the appointment process is not controlled by the superiors (.4022, n=9).[112] This is consistent with the hypothesis that more internal independence leads to more corruption. Finally, for those lower court judges that can be punished by their superiors and are appointed by them, if their tenure is lower than that of their superiors corruption is higher (.2097, n=38)[113] than if it is not (-.39, n=7).[114] Thus, in the sample low internal independence but with career perspectives, a longer tenure, is associated with less corruption.

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[110] Costa Rica 96-02; Dominican Republic 96-02; El Salvador 96-02; Honduras 96-02; Mexico 00-02; Nicaragua 96-02; Panama 96-02; Chile 96-02; Ecuador 96-02; Venezuela 96-02; Brazil 96-02; Uruguay 96-02; Guatemala 96-02; Peru 96-02.

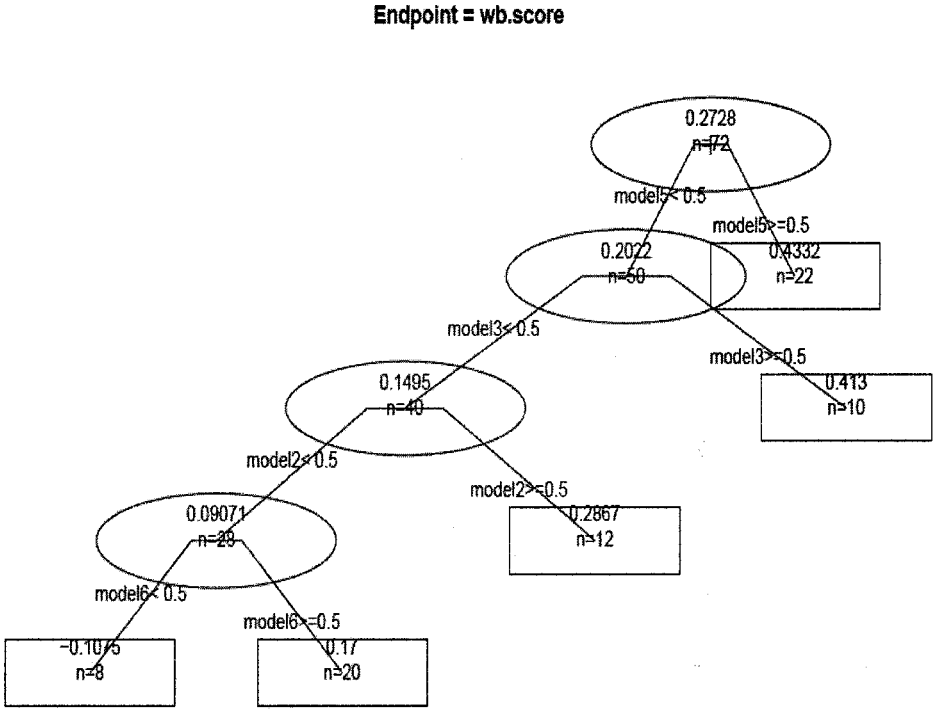
[111] Costa Rica 96-02; Dominican Republic 96-02; El Salvador 96-02; Honduras 96-02; Mexico 00-02; Nicaragua 96-02; Panama 96-02; Chile 96-02; Ecuador 96-02; Venezuela 96-02; Brazil 98-02; Uruguay 96-02.

[112] Guatemala 96-02; Brazil 96; Peru 96-02.

[113] Costa Rica 96-02; Dominican Republic 96-02; El Salvador 96-02; Honduras 96-02; Mexico 00-02; Nicaragua 96-02; Panama 96-02; Chile 96-02; Ecuador 96-02; Venezuela 96-02.

[114] Brazil 98-02; Uruguay 96-02.

Graph 4.6 Regression Tree (Corruption regressed on Institutional Models of Judicial Independence)



Having looked at the components of judicial independence, let us explore the data regarding the combinations of such components, i.e. the Institutional Models of Judicial Independence. Remember that the models are ranked from Model 1 that is the one with the highest degree of overall independence to Model 6, i.e. the one with the lowest degree. Graph 4.6 shows that for countries with Model 5 average corruption is .4332 (n=22).[115]

[115] Costa Rica 96-02; El Salvador 96-02; Guatemala 96-02; Honduras 96-02; Paraguay 96-02; Venezuela 00-02.

Countries that do not have Model 5 (n=50) are then split between those that have Model 3 (average corruption .413, n=10)[116] and those that don't (n=40, average corruption .149). The next split in the data is whether a country has Model 2 (average corruption .2867, n=12)[117], and the last one whether a country has Model 6 (average corruption .17, n=20).[118] It is difficult to see if extreme models are associated to more corruption. While the intermediate Models 2 and 3 have lower average corruption that a more extreme Model 5, countries with the most extreme Model 6 have lower corruption in average than those with Models 2 or 3.

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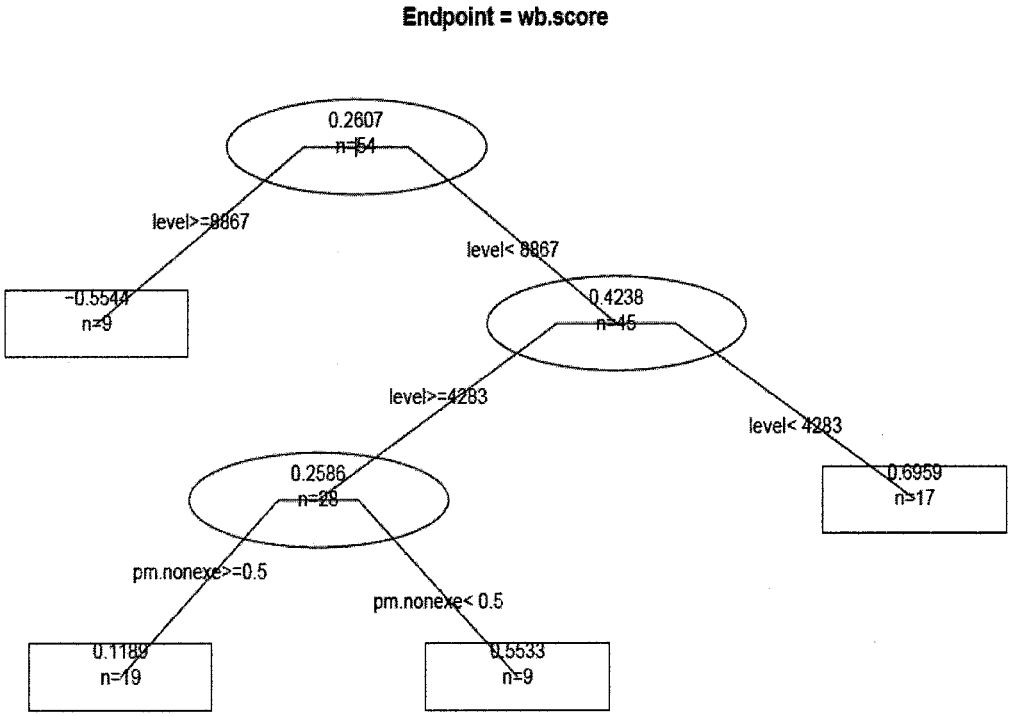
[116] Mexico 00-02; Nicaragua 96-02; Panama 96-02.

[117] Argentina 96-02; Brazil 96-02; Colombia 96-02.

[118] Dominican Republic 96-02; Bolivia 96-02; Chile 96; Ecuador 96; Peru 96-02; Uruguay 96-02; Venezuela 00-02. The rest of the countries, those in the last node (average corruption -.1075, n=8) are Mexico 96-98; Chile 98-02; and Ecuador 98-02.

Graph 4.7 Regression Tree (Corruption regressed on Autonomy, External Independence, Internal Independence, Prosecutorial Organ Outside the Executive, GDP/capita, Open Economy, Years of being democracy, and Federalism)



Let us now look at a regression tree including independent and control variables. As I said, analyzing Latin America allows us to control for some variables that have been related to corruption, such as civil law heritage and presidential systems of government. Graph 4.7 shows a regression tree that includes the independent variables as well as most control variables discussed earlier (GDP per capita, open economy, years of being democratic, and federalism). Notice that at the root node now the

number of observations is less (n=54) because of the availability of data on GDP per capita and that among them average corruption is .2607. It turns out that the two main predictors for corruption are GDP per capita and the institutional location of the prosecutorial organ. If the country is rich (GDP/capita above $ 8867) the average level of corruption is low (-.5544; but notice that there are only 9 observations in this category)[119], while for countries with an income per capita below that level the average for corruption is .4238 (n=45).[120] The next split is again GDP/capita since for those countries with less than $8867 but more than $ 4238, the location of the prosecutorial organ becomes important: for those where it is outside the executive average corruption is .1189 (n=19)[121] while for those where it is within the executive the average is .5533 (n=9).[122] Average corruption for

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[119] Argentina 96-00; Chile 96-00; Uruguay 96-00.

[120] Dominican Republic 96-00; Mexico 96-00; Paraguay 96-00; Costa Rica 96-00; El Salvador 96-00; Panama 96-00; Brazil 96-00; Colombia 96-00; Peru 96-00; Venezuela 96-00; Guatemala 96-00; Honduras 96-00; Nicaragua 96-00; Bolivia 96-00; Ecuador 96-00.

[121] Costa Rica 96-00; El Salvador 98-00; Panama 96-00; Brazil 96-00; Colombia 96-00; Peru 96-00; Venezuela 96-98.

[122] Dominican Republic 98-00; Mexico 96-00; Paraguay 96-00; Venezuela 00.

countries with less than $ 4238 GDP per capita is the highest: .6959 (n=17).[123]

Notice that the rest of the variables were not used in creating the tree. The reason is that no other variable can split the sample, or a sub sample, of the data into two homogenous groups. But this does not mean that the variable is not related to corruption. Regression trees are a good descriptive tool, simple and useful to identify potential predictors. However, they do not provide good answers to why a variable was not included, and they are sensitive to changes in the sample. To fully assess the hypothesis developed in this chapter a statistical multivariate analysis is necessary. It will be possible with a larger database, either in space or time with more variation in the dependent and independent variables.[124]

A multivariate analysis could be complemented with several case studies in order to throw some light on interesting puzzles that spring from contrasting my analysis of judicial independence and corruption with other

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[123] Dominican Republic 96; El Salvador 96; Guatemala 96-00; Honduras 96-00; Nicaragua 96-00; Bolivia 96-00; Ecuador 96-00.

[124] Even then, however, potential problems such as endogeneity and the selection of a good instrumental variable would need to be addressed. Also important are the possible unobserved effects in judicial independence, i.e. professionalism and quality of judges, prevalence of a culture of restrain or a political question doctrine, and whether these unobserved effects are parameters to be estimated or random draws from a large population.

measures of judicial independence.[125] For instance, from Chapter 1 (see Table 1.1) we know that previous measures of judicial independence consistently give Chile a rather high score. However, according to my measure of judicial independence, Chile has among the lowest scores in the components of judicial independence but is the country with the best average score in corruption (Table 4.3). Perhaps part of the answer is that, as we saw in Chapter 3, my measures of judicial independence underestimate *independence-to* enjoyed by Chilean judges because of the political context in which they work. In any case, a theoretically driven case study would help us understand what is happening here.

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[125] Thanks to Susan Rose-Ackerman for this suggestion.

Table 4.2 Average Values of Components of Judicial Independence and Corruption for 1996, 1998, 2000, and 2002

Country	Autonomy	Ext. Ind.	Int. Ind.	PPO	Corruption
Chile	0.1	1.1	0.0	Judiciary*	-1.4
Costa Rica	2.1	2.0	0.0	Judiciary	-.84
Uruguay	1.0	1.0	1.0	Executive	-.59
Brazil	1.5	4.0	3.9	Autonomous	.04
Peru	0.2	1.2	1.1	Autonomous	.18
Panama	1.3	2.6	0.0	Autonomous	.28
Mexico	1.5	3.0	1.5	Executive	.31
Argentina	1.0	4.0	6.0	Autonomous	.38
Dom. Rep.	0.0	1.0	0.8	Executive	.41
El Salvador	0.6	1.2	1.2	Autonomous	.41
Colombia	0.8	2.8	1.4	Judiciary	.42
Nicaragua	1.8	1.6	1.4	Executive*	.52
Bolivia	1.0	1.0	0.6	Autonomous	.71
Guatemala	1.1	1.4	2.0	Autonomous	.74
Honduras	1.9	0.1	0.0	Autonomous	.77
Venezuela	1.1	1.8	0.0	Autonomous	.78
Ecuador	0.1	1.1	0.7	Autonomous	.84
Paraguay	0.9	1.3	0.2	Judiciary	.93

*Chile moved the Public Prosecutor's Office (PPO) to an autonomous organ in 1997. Nicaragua did the same in 2000.

Case studies can also shed light on what particular institutional variable is related to control of corruption and under what conditions. In this regard, the variables that are part of internal independence have not received the attention that they perhaps deserve. This is also true for the Public Prosecutor's Office (PPO). *Ministerios Públicos* vary considerably across Latin America not only in their institutional location but also in their budget, capacities, and perhaps more importantly with respect to the powers they have in the three stages of the prosecution: investigating,

charging, and sentencing. Figures such as Baltasar Garzón, from Spain, or Antonio Di Pietro, from Italy, are now being emulated by some of their counterparts in Latin America. The figure of the public prosecutors has become important in countries like Brazil; and in countries such as Mexico reform of the PPO is considered a matter of urgent importance.

4.3 Conclusion

Based on the concept of judicial independence elaborated in this dissertation, I kept track of the relation between corruption and the judiciary in three steps: detection, prosecution, and adjudication. I argued that (1) an independent prosecutor would increase the cost of corruption, (2) that in a system of checks and balances a dependent judiciary facilitates corruption because the elected branches would be unchecked but totally independent judges would constitute additional bribe demanders and increase corruption, and (3) that corruption within the judiciary would be higher where the institutional levels of internal independence are also higher.

The third part of the chapter provided a first glance at the relationship between judicial independence and corruption in eighteen Latin American countries from 1996 to 2002. Using regression trees analysis to explore the data, I found some empirical support for the hypotheses of

this chapter. An intermediate level of autonomy is related to lower corruption, as are lower levels of internal independence, and a prosecutorial organ located outside the executive branch. Interestingly, however, when including control variables in the regression trees analysis, only the institutional location of the prosecutorial organ is important enough to split the whole sample into different corruption levels. Reforms of the criminal justice system, including, but by no means limited to, the location of the prosecutorial organ, are ongoing throughout Latin America and constitute an interesting research area. These preliminary results suggest that extending in time and space the database built for this dissertation in order to perform a multivariate analysis, as well as theoretically driven case studies are a worthwhile enterprise.

CONCLUSION

The general objectives of this dissertation were stated in the introduction: (1) To provide a precise definition of judicial independence; (2) to create a measure of judicial independence *de jure* theoretically consistent with the definition and capable to be compared across space and time; (3) to identify the conditions under which such measure can be a good proxy for *independence from* and *independence to*; and, finally, (4) to systematically explore the relationship between judicial independence and corruption. Each objective was addressed in one chapter with theoretical propositions complimented with empirical analyses across eighteen Latin American countries.

The main findings are the following. In Chapter 1 I identified a precise notion of judicial independence as delegation of power from the politicians that populate the elected branches of government to judges and/or the judiciary. I unpacked this concept into four components in order to capture some degree of the complexity of judicial systems: (1) Autonomy, (2) External Independence, (3) Internal Independence, and (4) the institutional location of the Public Prosecutor's Office (PPO). I then proposed to measure each component based on a unique set of observable institutional variables and coding rules consistent with the notion of

independence. The resulting measures improve on existing indexes based on surveys to experts, personal classifications, or unqualified checklists of legal variables related to judicial independence and allow us to analyze each component's variation across countries and across time and space. In addition, I propose a framework for comparison that takes into account the possible combinations of the components, what I call the Institutional Models of Judicial Independence.

In Chapter 2 I presented the results of measuring the four components of judicial independence in eighteen Latin American countries from 1950 to 2002. The measurement is based on coding the institutional variables identified in the first chapter from the constitutional texts in each country. It is, thus, a *de jure* measure. The main finding is that across Latin America there is interesting variation in the components of judicial independence as established in the constitutions and, if anything, the *de jure* level is rather low. This finding contradicts the common wisdom according to which the level of judicial independence *de jure* in the region is remarkably high while the level *de facto* is remarkably low.

In Chapter 3 I dealt with the relation between judicial independence *de jure* and *de facto*. I argued that law and reality coincide under some political conditions but diverge under others. Based on

combinations of constitutional setting (multilateral or unilateral) and government characteristics (unified or divided) and what Supreme Court judges can expect from them, the contribution in this chapter is a theoretically informed typology of the circumstances where, and the reasons why, the de jure measure is a good, fair, or bad proxy for *independence to* and *independence from*. The typology is also useful for empirical observation since identifying in which scenario a given country is guides the observer's eye to those areas where attacks to judicial independence are more likely to occur.

In Chapter 4 I kept track of the relation between corruption and the judiciary in three steps: detection, prosecution, and adjudication. I argued that (1) an independent prosecutor would increase the cost of corruption, (2) that in a system of checks and balances a dependent judiciary facilitates corruption because the elected branches would be unchecked but totally independent judges would constitute additional bribe demanders and increase corruption, and (3) that corruption within the judiciary would be higher where the institutional levels of internal independence are also higher. Based on an exploratory analysis of the data using regression trees there are some reasons to believe that a prosecutorial organ located outside the executive branch as well as intermediate levels of autonomy would

contribute to control corruption. Additionally, higher internal independence may be related to more corruption. The preliminary results of this chapter suggest that a multivariate analysis when more data is available, as well as detailed case studies, are a worthwhile enterprise.

Several interesting questions for future research spring from this dissertation. One avenue is to take judicial independence as an independent variable and study its potential impact on other dependent variables besides corruption, such as protection of human rights, investment, and economic growth. Another one is to take judicial independence as the dependent variable and study the determinants of the interesting institutional variation in justice systems. These two avenues may be pursued not only across Latin America, actually they may be better addressed with an extended database that reaches beyond the region. [126]

Still another avenue is to select individual cases based on a theoretical question and study in detail issues that are important and interesting but difficult to measure in cross-country comparisons. Some of these issues were mentioned in Chapter 1. For instance, it is important to

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[126] On the relation between judicial independence and human rights see, for instance, Cross 1999. A related work measuring the impact of constitutional provisions human rights is Keith 2002. Skaar (2002) analyzes the determinants of constitutional reforms increasing judicial independence in Latin America.

study the relation between judicial independence and the characteristics of jurisprudence, such as the degree of "bindigness" of decisions and the capacity of some higher courts to attract cases that are being heard in lower courts. Another important area is that related to special jurisdictions, in particular military jurisdictions, which in countries like Chile and Peru have widened and narrowed in scope depending on the political context. Another interesting question is the relation between the variables that are part of the components of judicial independence, for instance the relation between tenure and appointment of judges, or that between appointment and sanctioning mechanisms of judges.

The relation between different institutional variables and constitutional adjudication is also relevant given the diversity of constitutional adjudication systems in Latin American countries. For instance, what are the consequences of having constitutional court within judiciary or the consequences of providing wide access to the constitutional court? Finally, another area that is currently changing in Latin America is the criminal justice system. In this regard, analyzing the variations, causes and consequences, in the powers of the Public Prosecutor's Office for investigating, charging, and sentencing criminals is notoriously interesting and important.

APPENDIX A

A SAMPLE OF DEFINITIONS AND MEASUREMENTS OF JUDICIAL INDEPENDENCE

Measure	Source	Period/Country	Components of Index
"Judicial Independence": 4 point scale (Cross 1999)	Based on World Human Rights Guide by Humana (1992)	Cross section of 50 nations (no justification of why those 50 nations)	Humana does not have a measure of judicial independence, but Cross rates countries in a 1 to 4 according to "brief comments made by Humana about each country" (Cross 1999, 92 fn. 25).
"Political predictability" and "Judiciary arbitrariness": 6 point scale from lowest to highest perceived predictability and arbitrariness (Weder 1995)	Survey sent by author to private entrepreneurs	Cross section of 28 nations (no justification of why those 28 nations)	Two questions on unexpected changes on laws and policies measure "political predictability". Other two questions on expected neutrality in judicial decisions measure "judiciary arbitrariness".
"Judicial Reform": Dummy equal to 1 for every year after reforms on the judiciary were approved by respective	Classification by authors from reading of constitutions	Longitudinal cross section for 29 Latin American countries from 1973 to 2001.	Judicial Reform equals 1 if at least one of the following was approved by Congress: creation of judicial council; creation of judicial review; reform on appointment

Congresses (Inclan and Inclan 2003).			procedures and length of tenure.
"De jure judicial independence": 12 point scale from lower to higher degree of judicial independence* (Feld and Voigt 2003)	Survey sent by authors to experts (Supreme Court judges, lawyers, law professors)	Cross section of 75 countries. (no justification of why those 75 nations)	1) Whether the highest court is anchored in the constitution; 2) how difficult is to amend the constitution; 3) independent procedure for judicial appointments (by other judges or lawyers instead of by politicians); 4) Life tenure; 5) renewability of judges; 6) security in employment; 7) salary protections; 8) quality of salary; 9) accessibility to the court; 10) discretion of chief justice to allocate cases among court members; 11) judicial review; 12) publication of decisions and dissenting opinions.
"De facto judicial independence": 8 point scale from lower to higher degree of judicial independence* (Feld and Voigt	Survey sent by authors to experts (Supreme Court judges, lawyers, law professors)	Cross section of 66 countries (no justification of why those 66 nations)	1-3) Effective average length of tenure; 4) Number of judges in highest court; 5-6) Real salary; 7) Changes in the basis of the legal foundations of the highest court; 8)

2003)			Degree of compliance on Court by the other branches of government
"Judicial Efficiency": 5 point scale on degree of judicial protection of property rights from lower to higher protection (Laeven and Majnoni 2003; La Porta et. al. 1997, 2003**)	Index of Economic Freedom by the Heritage Foundation (based on surveys)	Longitudinal cross section for 161 countries, from 1996 (Laeven and Majnoni use only cross section data for year 2000. La Porta el. al. use a cross section for the countries in their database on the respective year)	The index captures: freedom from government influence over judicial system; commercial code defining contracts; sanctioning of foreign arbitration of legal disputes; corruption within the judiciary; delay in judicial decisions; legally granted and protected private property; government expropriation of property
"Judicial Efficiency": 6 point scale on the degree of rule of law in the country from less to more rule of law (Laeven and Majnoni 2003; La Porta et. al. 1997, 2003**)	International Country Risk Guide (ICRG) (ranked by staff of the company)	Longitudinal cross section for 135 countries, from 1982 (Laeven and Majnoni use only cross section average for the monthly index of year 2000; La Porta et. al. use a cross section for the countries in their database on the respective year)	Index of the degree of rule of law as ranked by the staff of the company.

"Judicial Independence": "high" or "partial" judicial independence (Howard and Carey 2003)	Author's coding according to US State Department annual human rights report for each nation in the author's sample (these reports are subjective evaluations of the writers of such reports)	Longitudinal cross section for 153 nations, from 1992 to 1999	High judicial independence: "a judiciary that functioned in practice independent of the executive and the legislature, was relatively free from corruption and bribery, and afforded basic criminal due process protections to criminal defendants". Partial judicial independence: "a judiciary that was either in practice independent of the executive and the legislature and relatively free from corruption and bribery, or afforded basic criminal due process protections, or had some aspects of each" (Howard and Carey 2003, 12).
"Judicial Independence": average of authors' measures on 3 variables normalized from 0 to 1 from lowest to	Classification by authors from reading of constitutions	Cross section of 71 countries (no justification of why those 71 nations)	Index includes 3 variables: the tenure for supreme court judges, tenure for administrative courts judges, and case law (whether judges can make law)

highest degree of independence (La Porta et. al. 2003)			
"Judicial Independence": 5 point scale from lowest to highest degree of independence (Yamanishi 2002)	Author's coding according to author's definition of judicial independence on human rights cases. (Two other coders check the results)	Longitudinal cross section for 23 Latin American countries, from 1979 to 2000	Index is based on "percentage of significant human rights violations that are adjudicated by an effectively independent body". So, for instance, a country where with 95% receives a 5, while a country with less than 5% receives a 1.
"Judicial Efficiency": average percentage changes in the median times-to-disposition of cases (Buscaglia and Ullen 1997)	Data obtained by the authors based on the "Expected Duration of the Marginal Case Filed" approach developed by Cappelletti.	Authors have data for 12 Latin American countries, during two periods 1973-1982, and 1983-1993	Index determined by the annual number of cases filed, pending, and disposed or withdrawn). The index is calculating by dividing the number of pending cases for each court at the end of the year by the number of cases disposed of during the same year.
"Judicial Performance": 0 to 1 scale from lower to higher degree of judicial performance	ICRG, Polity IV project, World Bank's Buisiness Environment Survey	Cross section of 16 Latin American countries.	The index is a compound of measures for the independence, accountability, efficiency, effectiveness, and

(Staats 2003)			accessibility of Latin American judiciaries, taken from International Country Risk Guide ICRG, Polity IV project, and World Bank's Business Environment Survey
"Judicial performance": ordinal scales for particular countries, from lower to higher performance (Cristini, Moya, and Powell 2001; Castelar and Cabral 2001; Jappelli, Pagano, and Bianco 2002)	Survey sent by authors to bank officials and/or entrepreneurs in each country.	Cristini et. al. (2001) cross section of 24 Argentinean provinces; Castelar and Cabral (2001) cross section of Brazilian states; Jappelli et. al. (2002) cross section of Italian regions.	Indexes based on questions that measure time of settlement of , number of procedures, perception of performance, number of defaults, and so on.
"Judicial Independence": 5 point rating of constitutional reforms (Skaar 2002)	Classification by author based on based on the reading of constitutions	18 Latin American countries. The rating is based on most recent constitution but takes into account previous amendments	The five points correspond to five factors associated to judicial independence: appointment procedures, length of tenure, judicial councils, judicial review powers, and financial independence (Skaar 2002, 81)

Notes on Appendix A:

*Since data for the 12 variables is not available for all the countries in the sample, the authors divided the sum of the coded variables by the number of variables for which data was available.

**Berkowitz et. al. (2001) measure "legality" as taken from La Porta et. al. (1997), that is a combination of measures of "judicial efficiency".

APPENDIX B

CODED CONSTITUTIONS

Argentina: Constitution of 1853 with reforms until 1957 and until 1972; Constitution of 1949; Constitution of 1994.

Bolivia: Constitution of 1947; Constitution of 1967; Constitution of 1995.

Brazil: Constitution of 1946; Constitution of 1967; Constitution of 1988; Constitution of 1988 with reforms of 1998.

Chile: Constitution of 1925 with reforms of 1970; Constitution of 1980; Constitution of 1980 with reforms of 1989; Constitution of 1980 with reforms of 1997 and 2001.

Colombia: Constitution of 1886 with reforms until 1986; Constitution of 1991, with reforms of 1997 and 2001.

Costa Rica: Constitution of 1949; Constitution of 1949 with reforms of 1957, 1973, 1989, 1993, and 2001.

Dominican Republic: Constitution of 1966; Constitution of 1994; Constitution of 2002.

Ecuador: Constitution of 1946; Constitution of 1967; Constitution of 1978; Constitution of 1978 with reforms of 1984, 1993, and 1996; Constitution of 1998.

El Salvador: Constitution of 1950; Constitution of 1962; Constitution of 1982; Constitution of 1983 with reforms of 1991, and 2000.

Guatemala: Constitution of 1956; Constitution of 1985; Constitution of 1985 with reforms of 1993.

Honduras: Constitution of 1957; Constitution of 1965; Constitution of 1982; Constitution of 1982 with reforms of 1999, and 2000.

Mexico: Constitution of 1917 with reforms of 1944, 1951, 1967, 1977, 1982, 1987, 1994, and 1999.

Nicaragua: Constitution of 1950; Constitution of 1974; Constitution of 1987; Constitution of 1987 with reforms of 1993, 1995, and 2000.

Panama: Constitution of 1946; Constitution of 1972; Constitution of 1972 with reforms of 1978, 1983, and 1994.

Paraguay: Constitution of 1940; Constitution of 1967; Constitution of 1992.

Peru: Constitution of 1933; Constitution of 1979; Constitution of 1993.

Uruguay: Constitution of 1952; Constitution of 1967; Constitution of 1967 with reforms of 1989, 1994, and 1996.

Venezuela: Constitution of 1953; Constitution of 1961; Constitution of 1999.

APPENDIX C

CODEBOOK

I.- Identification variables

NAME: Name of country

NUMBER: Number of country in WORLD02 Database (Przeworski et al 2000)

YEAR: Year of constitutional text used to get the information. If the constitution was adopted in 1988 but it was amended in 2002, then Year is 2002.

II.- Autonomy

SC JUDGES: 1 if the number of Supreme Court judges is specified in the constitution, 0 otherwise

CC JUDGES: 1 if the number of Constitutional Court judges is specified in the constitution, 0 otherwise

STRUCTURE: 1 if the constitution specifies that the structure of the judiciary (number of courts, number of judges sitting in courts, and jurisdiction) is decided by the judiciary itself, 0 otherwise. If the structure of the judiciary is decided by a judicial council, then I coded this variable 1 only if **JC RATIO** (see below) is also 1.

JC RATIO: Ratio of Judicial/Lay members in the Judicial Council. 1 if the ratio is greater than or equal to one, 0 otherwise

BUDGET: 1 if there is a fixed percentage of GDP for the judiciary specified in the Constitution, 0 otherwise.

SP JURIS: Number of special jurisdiction courts recognized in the constitution (i.e. Labor, Administrative, Agrarian, Electoral, Military...)

CONST ADJ: 1 if there is constitutional adjudication (judicial review) with erga omnes provisions specified in the constitution, 0 otherwise

CONST COURT: 1 if the Constitutional Court is part of the judiciary (usually the Supreme Court or one of its chambers), 0 otherwise

PM EXE: 1 if the constitution specifies that the Public Ministery belongs to the executive, 0 otherwise

PM AUTO: 1 if the constitution specifies that the Public Ministery is autonomous, 0 otherwise

PM JUD: 1 if the constitution specifies that the Public Ministery belongs to the judiciary, 0 otherwise

AUTONOMY: Sum of **SC JUDGES** + **STRUCTURE** + **BUDGET** + **CONST COURT** (range is 0 to 4)

FAUTONOMY: Factor score for **AUTONOMY** (standardized variable mean zero variance 1)

BAUTONOMY: 1 if **FAUTONOMY** > 0; 0 if **FAUTONOMY** < 0

III. External Independence

III.1.- External Independence of Supreme Court Judges

SC APP JUD: 1 if the constitution specifies that the Judiciary participates in the appointment of Supreme Court judges, 0 otherwise. If a judicial council participates in the process, then I coded this variable 1 only if **JC RATIO** (see above) is also 1.

SC APP PRES: 1 if the constitution specifies that the President participates in the appointment of Supreme Court judges, 0 otherwise.

SC APP CON: 1 if the constitution specifies that Congress participates in the appointment of Supreme Court judges, 0 otherwise.

SC APP: 1 if **SC APP JUD** is 1 and **SC APP PRES** + **SC APP CON** = 0; or if **SC APP PRES** + **SC APP CON** = 2, 0 otherwise.

SC TENURE1: 1 if the constitution specifies that Supreme Court judges enjoy either life tenure or tenure twice as long as that of their appointing authorities, 0 otherwise.

SC TENURE2: 1 if the constitution specifies that Supreme Court judges enjoy either life tenure or tenure longer than that of their appointing authorities, 0 otherwise.

SC IMPE: 1 if the constitution specifies that Supreme Court judges can be impeached by either the Judiciary or by at least a supermajority of one chamber of Congress, 0 otherwise. If Supreme Court judges can be impeached by a judicial council, then I coded this variable 1 only if **JC RATIO** (see above) is also 1.

SC SALARY: 1 if the constitution specifies that Supreme Court judges can not have their salaries reduced while in office, 0 otherwise.

EXTINDSCJ: Sum of **SCAPP + SC TENURE2 + SC IMPE + SC SALARY** (range is 0 to 4)

FEXTINDSCJ: Factor score for **EXTINDSCJ** (standardized variable mean zero variance 1)

BEXTINDSCJ: 1 if **FEXTINDSCJ** > 0; 0 if **FEXTINDSCJ** < 0.

III.2.- External Independence of Constitutional Court Judges

CC APP JUD: 1 if the constitution specifies that the judiciary participates in the appointment of Constitutional Court judges, 0 otherwise. If a judicial council participates in the process, then I coded this variable 1 only if **JC RATIO** (see above) is also 1.

CC APP PRES: 1 if the constitution specifies that the President participates in the appointment of Constitutional Court judges, 0 otherwise.

CC APP CON: 1 if the constitution specifies that Congress participates in the appointment of Constitutional Court judges, 0 otherwise.

CC APP: 1 if **CC APP JUD** is 1 or if **CC APP PRES + CC APP CON** = 2, 0 otherwise.

CC TENURE 1: 1 if the constitution specifies that Constitutional Court judges enjoy either life tenure or tenure twice as long as that of their appointing authorities, 0 otherwise.

CC TENURE 2: 1 if the constitution specifies that Supreme Court judges enjoy either life tenure or tenure longer than that of their appointing authorities, 0 otherwise.

CC IMPE: 1 if the constitution specifies that Constitutional Court judges can be impeached by either the Judiciary or by at least a supermajority of one chamber of Congress, 0 otherwise. If Constitutional Court judges can be impeached by a judicial council, then I coded this variable 1 only if **JC RATIO** (see above) is also 1.

CC SALARY: 1 if the constitution specifies that Constitutional Court judges can not have their salaries reduced while in office, 0 otherwise.

III.- Internal Independence

JC MEMBER: 1 if the ratio of members of the Judicial Council appointed by Supreme Court/other members is greater than or equal to 1, 0 otherwise

LC APP JUD: 1 if the constitution specifies that judicial superior participates in the appointment of Lower Court judges, 0 otherwise. If a judicial council participates in the process I coded this variable 1 only if **JC MEMBER** (see above) is also 1.

LC APP PRES: 1 if the constitution specifies that the President participates in the appointment of Lower Court judges, 0 otherwise.

LC APP CON: 1 if the constitution specifies that Congress participates in the appointment of Lower Court judges, 0 otherwise.

LC APP INS: 1 if **LC APP JUD** is 0, 0 otherwise.

LC TENURE 1: 1 if the constitution specifies that Lower Court judges enjoy either life tenure or tenure twice as long as that of their appointing authorities, 0 otherwise.

LC TENURE 2: 1 if the constitution specifies that Lower Court judges enjoy either life tenure, or tenure longer than that of their appointing authorities, 0 otherwise

LC IMPE: 1 if the constitution specifies that Lower Court judges can NOT be impeached by their judicial superiors or can be by at least a supermajority of one chamber of Congress, 0 otherwise. If Lower Court judges can be impeached by a judicial council, then I coded this variable 1 only if **JC MEMBER** (see above) is 0.

LC SALARY: 1 if the constitution specifies that Lower Court judges can not have their salaries reduced while in office, 0 otherwise.

LC PROM: 1 if the constitution specifies that promotion of Lower Court judges depend on their superiors in the judicial hierarchy, 0 otherwise. If Lower Court judges are promoted by a Judicial Council and/or their superiors then I coded this variable 1 only if **JC MEMBER** (see above) is 1.

LC TRANS: 1 if the constitution specifies that transfers of Lower Court judges depend on their superiors in the judicial hierarchy, 0 otherwise. If Lower Court judges can be transferred by a Judicial Council and/or their superiors then I coded this variable 1 only if **JC MEMBER** (see above) is 1.

LC PUNISH: 1 if the constitution specifies that punishments of Lower Court judges depend on their superiors in the judicial hierarchy, 0 otherwise. If Lower Court judges are punished by a Judicial Council and/or their superiors then I coded this variable 1 only if **JC MEMBER** (see above) is 1.

ATTRACT: 1 if Supreme Court can attract from lower courts cases it deems important, 0 otherwise (not yet coded)

INTINDLCJ: Sum of **LCAPPINS + LC TENURE2 + LC SALARY + LC PROM + LC TRANS + LC PUNISH**

FINTINDLCJ: Factor score for **INTINDLCJ** (standardized variable mean zero variance 1)

BINTINDLCJ: 1 if **FINTINDLCJ** > 0; 0 if **FINTINDLCJ** < 0.

IV. Institutional Models of Judicial Independence

MODEL: Variable that takes the values 1 to 6 depending on the Institutional Model of Judicial Independence. This variable is built based on **BAUTONOMY, BEXTINDSCJ**, and **BINTINDLCJ**.

MODEL1: 1 if Model=1, 0 otherwise.

MODEL2: 1 if Model=2, 0 otherwise.

MODEL3: 1 if Model=3, 0 otherwise.

MODEL4: 1 if Model=4, 0 otherwise.

MODEL5: 1 if Model=5, 0 otherwise.

MODEL6: 1 if Model=6, 0 otherwise.

V. Corruption

LEVEL: Real GDP per capita, 1985 international prices, chain index. Compiled by first taking RGDPCH from PWT5.6a and where missing, filling with per capita income from World Bank (1999).

PRIVAT: Proceeds in US$ (millions) from privatization transactions in different sectors: primary, infrastructure, energy, manufacturing and services, financial, and other. Source: World Bank Privatization Database.

OPENK: Openness to trade (Exports + Imports to GDP) in constant prices, from PWT6.1

REG: Classification of political regimes as democracies and dictatorships. Transition years are coded as the regime that emerges.

0 Democracy
1 Dictatorship

AGER: Age in years of current regime as classified by REG. The year in which the regime comes into existence is coded as 1. No left censoring

AGEDEM: Years of being democracy counted based on AGER if REG=0. The variable is 0 if REG=1.

FEDERAL: 1 if the country has a federal structure, 0 otherwise

UNIFIEDGOV: 1 if government is unified, 0 otherwise. According to the classification of Negretto (forthcoming)

DIVIDEDGOV: 1 if government is divided, 0 otherwise. This variable includes what Negretto (forthcoming) calls Divided (**DIVGOV**), Congressional (**CONGGOV**), and Median governments (**DIVGOV**).

CASE: Takes values 1 to 6 according to theoretical Case in which the country is based on political conditions: High/Low De Jure Judicial Independence; Unilateral/Multilateral Setting; Divided/Unified Government. See Chapter 3.

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