

**The Determinants of Judicial Independence and Constitutional Adjudication
A Study of Latin America, 1950-2002**

Abstract

Why politicians empower courts and judges? What explains the variation in patterns of politician's delegation of independence and constitutional adjudication power to courts and judges? As I show in the first part of this paper, Latin American countries exhibit interesting variation in these areas both across countries and within the same country across time. In the second part of the paper, I first explore different explanations for such diversity, trying to identify the conditions under which they work and their implications regarding particular institutional designs. In an effort to integrate general motivations with contextual variables and short term considerations, I also provide a more detailed account of the delegation strategies in Mexico and Chile during the last two decades.

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The lineages of judicial independence are found in the benefits that people with power, politicians, derive from tying their hands and obeying judges, people without power (Holmes 2003, 25-28).¹ In contemporary democracies the politicians that delegate power to judges populate the elected branches of government, executive and legislative, and have the prerogatives and capacities to maintain or eventually alter such delegation. The analysis of this paper starts from this act in which politicians seek some benefit out of their self-limitation, such as having a neutral arbiter to resolve disputes between them. 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 (Landes and Posner 1975, 883. See also Ferejohn 1999; Ramseyer and Rasmusen 2003; Maravall 2003). 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.

This dilemma explains why when politicians make judges independent they also retain some control mechanisms over them and/or the judiciary: independence and accountability of judges are two sides of the same coin. The dilemma also highlights the concept of independence used throughout this paper: 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. Let us call this concept

¹ 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 a normative conception of judicial independence (e.g. Burbank and Friedman 2002; Russell 2001; Cappelletti 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 (e.g. Landes and Posner 1975; Ramseyer and Rasmusen 2003; Stephenson 2003).

judicial *independence from* the other organs of government² and distinguish it from judges' *independence to* decide cases based on the law. While the former can be assessed by looking at the laws that establish the relation between courts and judges with the other governmental branches, the latter refers to judicial behavior and is usually assessed through the study of actual decisions.³ *Independence from* and *independence to* are no doubt related but not necessarily in a linear way. For instance a constitution may establish a high degree of *independence from* but if the elected branches are controlled by a single party then judges' *independence to* make decisions that affect the interests of the ruling group is likely to be lower than what one would expect from looking at the constitution.

The objective of this paper is to explore the determinants of *independence from*⁴ as well of those of the institutional design of constitutional adjudication systems, since they do not necessarily coincide. The literature on the subject offers several hypotheses regarding the conditions under which politicians make judges independent and delegate

² "Independence from what or whom?" is a question that concerns most authors (e.g. Linares 2004; Pasquino 2003; Burbank and Friedman 2002; Russell 2001; Cappelletti 1985; Shetreet 1985). Some authors make the distinction between independence from political branches and independence from the parties in a case (Cappelletti 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).

³ From this perspective much of the researcher's effort is to establish criteria to characterize a given decision as independent or not, and a common benchmark is judicial decisions against the government. The main problem these studies face is the impossibility to infer independence-to based on decisions against the government, since independent judges can decide in favor of the government. In addition, as Kornhauser notes, independence-to may also vary according to different theories of adjudication (2002, 46). The literature on *independence to* is rich and nuanced, especially in the case of the United States, and includes recent ingenious efforts to go around the main problem (see McNollgast 2005; Harvey and Friedman 2006; Carrubba and Gabel 2006; Lax and Cameron 2005).

⁴ In particular, as we will see, the determinants of the institutional features that conform *independence from*. Those institutional features can then be evaluated as explanatory variables on issues such as control of corruption or economic well being (see Kornhauser 2002, 53).

the power of judicial review. My intention is to go one step further and explore why those politicians choose a particular institutional design. Hence, I am interested in questions such as what institutional mechanisms politicians use to strike the balance between independence and accountability of judges? Under what conditions delegation of independence to judges goes together with the empowerment of constitutional adjudication?⁵ What explains the selection of an American, a Kelsenian, or a mixed model of constitutional adjudication? Eventually, the broader project in which this paper is immersed aims to link the inquiry about the determinants of different institutional features of *independence from* not only to *independence to* but also to their consequences on, for instance, the control of corruption, the protection of human rights, and the promotion of better economic performance and economic well being.⁶

I explore these questions in the context of the eighteen largest Latin American countries (except Cuba) from 1950 to 2002. The Latin American region makes for a good laboratory for assessing possible explanations for differences in delegation strategies for several reasons. Latin American countries share a similar heritage, political culture, civil legal system, and presidential regime, but at the same time they retain important variations in judicial independence, constitutional adjudication systems, and other variables. As I will show, variations on the institutional design of justice systems are captured quite well in Latin American countries' constitutions that reflect political,

⁵ It is important to note that independent judges can give to themselves the power of judicial review powers through judicial decisions, as in the famous case of *Marbury v. Madison*, or expand their given powers as in the 1971 decision where the French *Conseil Constitutionnelle* considered that the bill of rights was part of the French Constitution. My focus in this paper is in the institutional design of independence from and constitutional adjudication systems, but the larger project involves extensions of given powers through the so called judicialization.

⁶ In my dissertation I explore the effects of judicial independence on corruption (see Rios-Figueroa 2006)

economic, and social changes: in the period under study eighteen countries produced a total of forty nine constitutions plus numerous amendments. The time frame under study also includes periods of democracy, authoritarianism, and transitions in both directions, which would allow us to analyze the impact of regime and of regime transitions in delegation strategies. Finally, the time frame includes periods of judicial independence without constitutional adjudication (generally before the 1970s) and periods of judicial independence with constitutional adjudication, which would allow us to see whether, and under what conditions, the determinants of judicial independence and constitutional adjudication coincide. Hopefully, the empirical inquiry in Latin America will also be useful to refine or modify the existing theories of delegation to courts and judges and to contribute to the understanding of the determinants and the consequences of judicial empowerment in other regions.

The paper is divided into three parts. In the first one I briefly describe the interesting variation in the dependent variable (*independence from* and constitutional adjudication systems) in Latin American countries. In the second part, I explore different arguments that have been advanced to explain the empowerment of courts and judges and I illustrate how general explanations interact with contextual variables in the cases of Mexico and Chile. The last section briefly concludes.⁷

I.- The Mosaic of Judicial Independence and Constitutional Adjudication in Latin America, 1950-2002

Independence from can be assessed, in part, by looking at the institutional mechanisms found in constitutions that relate the executive and the legislative with

⁷ This paper is a work in progress. Ultimately, the idea is to empirically assess the different hypotheses in the larger set of Latin American countries once the relevant data is collected, and then go back to the theoretical accounts based on the results of the empirical research.

Supreme Court judges and the judiciary.⁸ Consider the following seven variables: (1) number and jurisdiction of the courts, (2) budget for the judiciary⁹, (3) number of Supreme Court judges, (4) their appointment procedure, (5) their length of tenure,¹⁰ (6) procedures to impeach them,¹¹ and (7) salary. The degree of *independence from* would be highest when a variable is either controlled by the judiciary itself (as in the case of jurisdiction of the courts and constitutional adjudication), by at least two organs of government, executive and legislative or a supermajority of the legislature (as in the case of appointment and impeachment of Supreme Court judges), or when a variable is specified in the constitution and thus harder to change than if it was left to be regulated by statute (as in the case of budget for the judiciary, judges' salary and number of Supreme Court judges).¹²

⁸ It is also necessary that those laws are not violated. Therefore, the degree of independence 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. These conditions depend on the distribution of power among political parties in the elected branches of government (see Pozas-Loyo and Rios-Figueroa 2006).

⁹ There are countries in which the judiciary receives a constitutionally mandated percentage of the national budget. This idea is not without problems, but since it is intended to insulate the judiciary from monetary pressures I count it towards independence.

¹⁰ 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 independence.

¹¹ 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. 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 independence.

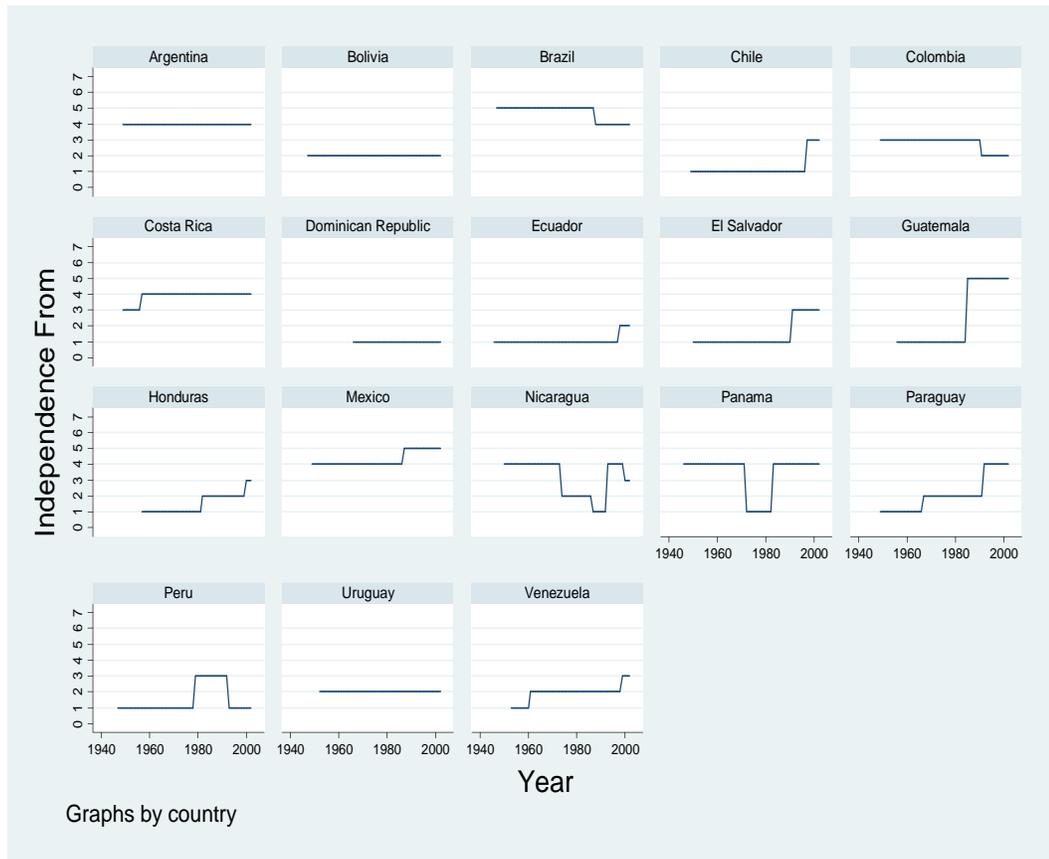
¹² For more details on coding decisions and discussion of the variables listed here, as well as others not listed regarding lower court and constitutional court judges, see Rios-Figueroa (2006).

Graph 1 shows the results of a systematic measure of the previous seven institutional variables that link judges and/or the judiciary with the elected branches of government in eighteen Latin American countries from 1950 to 2002. It is striking the variation across time and space in how politicians delegate power to judges and/or the judiciary, i.e. how different control mechanisms are established. In Argentina, Bolivia, Dominican Republic, and Uruguay the measure of *independence from* remains at a constant four, two, one, and two, respectively. In Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Paraguay, and Venezuela *independence from* has an increasing trend (albeit at different periods and rates). In Brazil and Colombia it decreases in time. And in Nicaragua, Panama, and Peru *independence from* follows a zig zag pattern.

As a way of comparison, the measure of *independence from* in the United States is exactly the same as Argentina's: constant at four throughout the period (the number of Supreme Court judges and budget for the judiciary are not in the Constitution, and jurisdiction of courts is left to Congress and the Executive to decide). It is important to note that changes to independence from in both the United States and Argentina have occurred at the statutory level, and in particular in those areas that the constitution leaves to the elected congress, i.e. the jurisdiction of the courts (see Ferejohn 1999 for the US) or the number of judges of the Supreme Court (see Bill Chavez 2005 for Argentina).¹³

¹³ In parliamentary countries, such as Italy, the Superior Council of the Judiciary (with judges in the majority) controls many of the previously mentioned variables, and the Constitutional Court is outside the judicial power. However, to code parliamentary countries according to the previous measure of independence from other issues such as the participation of the Ministry of Justice has to be taken into account (see Guarnieri and Pederzoli 2002).

Graph 1. Independence From in Latin American Countries, 1950-2002



The institutional design of constitutional adjudication systems also varies considerably across countries.¹⁴ Let us focus on three dimensions: whether there is a specialized organ in charge of constitutional adjudication, whether it is outside or within the judiciary, and rules of standing before the constitutional organ. Some countries like Bolivia, Colombia, Chile, or Guatemala have a Constitutional Tribunal outside the judiciary (*à la Kelsen*), while in others like Argentina, Mexico, or Costa Rica the constitutional court is within the judiciary. However, while in Argentina every federal

¹⁴ I am only considering current systems in which decisions in constitutional cases are valid for all (*erga omnes*) and not only for the participants in a particular case (*inter partes*). This is important because in most Latin American countries some form of constitutional adjudication has existed since their independence, but it was not until around the 1980s that *erga omnes* provisions have been generally adopted (Clark 1975; Navia and Rios-Figueroa 2005)

judge has the power of judicial review (U.S. style), in Mexico constitutional adjudication is centralized in the Supreme Court, and in Costa Rica it is centralized in a chamber of the Supreme Court (the famous *Sala Cuarta*, see Wilson et al 2004). Whether the constitutional organ is within or outside the judiciary is important because 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,¹⁵ and having such organ within the judiciary limits, to mention one thing, the profile of judges to be appointed specially in countries traditionally suspect of “political judges”.

Variation regarding legal standing before the constitutional court is also important, and it ranges from open access to any citizen, as in the United States, to access restricted to a parliamentary minority, as in France. In some countries like Mexico and Chile standing is restricted to public authorities, i.e. a minority fraction of the legislators, branches of government at different levels, and political parties. In other countries like Brazil standing is more open and includes unions and “class entities” with national reach, including industrial and commercial federations.¹⁶ And in countries like Colombia, for instance, any individual has standing before the constitutional court in abstract review of legislation. Finally, in most countries there also are so-called individual complaints, like the Mexican *amparo*, the Brazilian *mandado de segurança*, or the Colombian *acción de*

¹⁵ Precisely for this reason, Kelsen argued that the constitutional court should be located outside the judiciary and as an autonomous organ (Ferejohn and Pasquino 2003, 251).

¹⁶ In most countries individual citizens have access to constitutional justice (e.g. *amparo* in Mexico, *mandado de segurança* in Brazil, *acción de tutela* in Colombia) but usually the effects of these individual instruments are restricted to the parties in the case.

tutela, but decisions in these cases are restricted to the parties in the case, unlike the individual complaints in Germany or Spain (Stone Sweet 2000, 46).¹⁷

In any case, the important point for the purposes of this paper is that there exists considerable and interesting variation in Latin American countries, both across and within countries, regarding the institutional design of *independence from* and constitutional adjudication systems. What explains this variation? Can we make sense of politician's strategies of delegation to courts and judges? Let us turn now to try to answer this question.

II.- Delegation to Judges and the Judiciary

In this section I identify some general motivations that have been pointed out to explain why politicians empower courts and judges. I also provide an account of the delegation strategies in Mexico and Chile in an attempt to integrate general motivations with contextual variables and short term considerations. The aim is to specify the conditions under which and the reasons why politicians delegate power to courts and judges, to identify empirical implications of different hypothesis in order to eventually test them, and to identify some features of the institutional design that would best accomplish the desired goal.

I have identified in the literature six motivations behind politicians' desire to have independent judges with the power of judicial review. These motivations are (1) to have a neutral arbiter to resolve disputes between them, (2) to tie the hands of political opponents, (3) to enhance their or their policies' credibility, (4) to mark a difference with a previous authoritarian regime and to prosecute past abuses, (5) to blame others (i.e.

¹⁷ In addition, unlike Germany or Spain, individual complaints in some Latin American countries are not centralized in the constitutional organ. For instance, in Mexico circuit courts hear *amparos*.

judges) for punishment or unpopular policies, and (6) to improve efficiency in the public administration. It is important to note that I distinguish these motivations for analytical purposes but, as the delegation stories in Mexico and Chile will show, it is usually the case that more than one is behind the decision to empower courts and judges.

Neutral arbiter. Politicians may want independent judges in order to have a neutral arbiter to solve conflicts among them (e.g. Madison and Hamilton 2000; Pasquino 2003; Fiss 2000). It has been pointed out that the need of a neutral arbiter to resolve disputes is specially acute in instances where different polities are coming together into a greater common framework (i.e. federalism) both as a condition to join the union in the first place and as a mechanism to solve the foreseeable high number of conflicts between units and between the union and the member states (e.g. Ackerman 1997; Rakove 1997; Bednar, Eskridge, and Ferejohn 2001; Voigt and Salzberger 2002, 302). Therefore, we should be able to see that either federal countries (or prospective federations such as the European Union) have higher levels of judicial empowerment. As the cases of the European Union and the United States show, however, there seems not to be a particular institutional design that is necessary for this purpose. Notice that the *neutral arbiter* hypothesis can also work when a centralized unit is dismantling into several units that nevertheless want to remain linked somehow. A neutral arbiter in this case would be a condition for a peaceful decentralization that does not take the process further into a full separation.

Bind others. When a ruling party expects to win elections repeatedly, the likelihood of judicial empowerment is low, but when it has a low expectation of remaining in power, it is more likely to support an independent judiciary that would “tie

the hands” of the potential winner (Landes and Posner 1975; Ramseyer 1994; Ramseyer and Rasmusen 1997).¹⁸ In this case, then, we should be able to see judicial independence correlated with the competitiveness of a polity’s party system, and with the ideological distance between competitors (Haanssen 2004, 713). Tom Ginsburg (2003) builds on this idea and argues that that by providing “insurance” to prospective losers, delegating to courts the power of judicial review can facilitate transitions to democracy (see also Przeworski 1990). It is important to note that the *bind others* hypothesis requires that those who delegate believe that they are going to lose elections in the near future (otherwise why delegate now?), and that they act based on that belief. In the transitional setting, the *bind others* hypothesis applies specifically to negotiated transitions since in other types of transitions (e.g. when the autocratic regime collapses by military defeat) the democratizing elite does not have an incentive to bargain with the outgoing regime.

Notice also that the delegator may not be a political party but also a set of “hegemonic groups” that want to “lock in” certain policies by empowering the courts to protect them (Hirschl 2004). Hirschl argues that the transfer of constitutional adjudication power to supreme or constitutional courts is the product of a strategic interplay between political, economic, and judicial elites that see their interests potentially threatened by democratic majorities. This version of the *bind others* hypothesis is also more likely to work under certain conditions, as Hirschl points out: “This type of hegemonic preservation through the constitutionalization of rights or a interest-based judicial empowerment is likely to occur when the judiciary’s own public reputation for professionalism, political impartiality, and rectitude is very high; when judicial

¹⁸ Stephenson (2003) adds that this would promote moderation since independent judicial review is a mechanism to restrain the winner from applying extreme policies that inflict large losses to the opposition.

appointment processes are controlled to a large extent by hegemonic political elites; and when the courts' constitutional jurisprudence predictably mirrors the cultural propensities and policy preferences of these hegemonic elites" (2004, 44).

In the previous two hypotheses (*neutral arbiter* and *bind others*), the degree of fragmentation in the political system is an important moving force for judicial delegation.¹⁹ Fragmentation can be vertical (i.e. federalism), horizontal (i.e. divided or minority governments), and social (i.e. existence of a variety of ethnic, religious, or other kind of interest groups). The empirical implication is that we should see higher levels of judicial empowerment (independence and constitutional adjudication) correlated with higher levels of fragmentation. It also follows that less fragmented political systems, autocracies in the extreme, should exhibit lower degrees of judicial empowerment. Notice, however, that in autocratic regimes judges may have less constitutional adjudication powers but not necessarily less independence if the autocrat wants to use the judges for something else, for instance improving administrative efficiency. A common technique in autocratic regimes is to create dependent special courts for those areas that directly affect them²⁰ or to expand considerably the military or other court's jurisdiction as Toharia (1975) and Barros (2002) have shown for the cases of Spain and Chile,

¹⁹ Political competition or fragmentation in the elected organs of government also enhances judges' *independence* to make decisions because it implies coordination difficulties for the legislative and executive branches to re-act to a judicial decision (e.g. Cooter and Ginsburg 1996; Tsebelis 2002).

²⁰ 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).

respectively. Thus, in autocratic regimes one should be able to observe either more special courts directly dependent on the autocrat, or wider military court's jurisdiction, and highly restrictive constitutional adjudication systems, if at all.

Enhance credibility. Politicians may grant judicial independence and judicial review because they want to enhance their credibility either with international actors (e.g. other states or international organizations²¹), with domestic political actors (e.g. a minority party or the business community), or more generally with public opinion (e.g. to signal the difference with a previous government or regime²²). For instance, as North and Weingast (1989) argue, having an independent judiciary enhances the credibility of a government's commitment to protect property rights and promote investment. Note that political fragmentation is not an enabling circumstance for this motivation to empower judges and courts. In fact, autocrats or single party systems may want to enhance their credibility with international organizations in order to have access to funding and/or to limit sanctions. In this case, politicians may want a scheme of delegation that is not considerably threatening for their capacity to rule unchecked so we may find stronger controls over judges if this is the case (e.g. impeachment requirements easier to meet; strong control over judiciary's budget, delegation of features not related to independence such as access to justice or efficiency). It is also likely that if they delegate the power of constitutional adjudication at all they choose a system in which access is highly restricted

²¹ For instance, in Nicaragua the motivation behind internationally funded judicial reform programs was to create favorable conditions for investment, in the eighties, and from the mid nineties to strengthen and consolidate democratic institutions. (Diaz Rivillas and Ruiz Rodriguez s.d., 4; see also Domingo and Sieder 2002).

²² In Guatemala the motivation was to correct for human rights violations that occurred during the civil war (Diaz Rivillas and Ruiz Rodriguez s.d., 4; see also Domingo and Sieder 2002).

(e.g. standing only for some public authorities) or in which the effects of decisions do not hurt them (i.e. prevalence of inter partes effects).

However, the *enhance credibility* hypothesis also requires that whatever features are delegated to judges they must meet at least the minimum requirements imposed by those whose credibility is sought.²³ For instance, if a regime is looking for World Bank money that comes with increments in judicial independence, the World Bank may specify that life tenure for judges or a particular appointment procedure is a reform recognized by the international community to such independence. A testable implication is that among poorer nations that need funds, enhancing credibility with international donors may have a greater weight in judicial delegation than in richer nations. If this is the case, institutional design in those countries may follow more closely the advice of those donors and deviate more from, for instance, previous institutions in that same country. Different countries that get funds from the same donor may also exhibit similar institutional designs.

Transitional justice. In the aftermath of the transition to democracy politicians may want independent judges that are able to judge the previous regime's abuses and violations of human rights. New democratic governments may also want independent judges to carry out these processes in order to mark their difference with the authoritarian past. However, processes of transitional justice pose difficult problems as to the decision of who and how should judge past crimes since neither competent nor untainted judges

²³ Helmke and McLean (2006) argue that under some conditions local NGOs provide good information to international lenders about the credibility of the national government's commitment to improve judicial institutions.

may be available.²⁴ Even with competent and independent judges, transitional justice processes are plagued with procedural obstacles, the most salient being the non-retroactivity of legislation. Because of these problems, in transitional justice cases one finds different types of justice institutions dealing with past abuses which go from “pure political justice” (i.e. ad hoc tribunals) to “pure legal justice” (i.e. ordinary courts) (see Elster 2004, 2006). Only in the last cases one would be able to see increments in judicial independence and constitutional adjudication related to transitional justice motivations.²⁵

Blame deflection. Politicians may want independent judges in order to transfer the cost of punishing while keeping the right to pardon (Holmes 2003) and independent judicial review to deflect the blame for making hard, and potentially unpopular, decisions on conflictive issues such as abortion (Salzberger 1993. See also Fiorina 1984). Notice that the blame deflection hypothesis is weaker at the stage of institutional design of the justice systems since it is unlikely that politicians delegate authority on the basis of this motive.²⁶ However, the hypothesis is stronger as a strategy that politicians may follow once there is a judiciary in place to transfer to the courts decisions on controversial issues. However, in this last case the hypothesis assumes a public sophisticated enough to observe that courts rather than the government made an important policy decision, but not

²⁴ This was the case in post-communist countries where, Aviezer Tucker (2006) notes, there were neither lawyers nor judges with proper training. In post-1945 Germany, David Cohen (2006) argues, there were competent lawyers and judges, but they were not trustworthy because of their collaboration with the Nazi regime.

²⁵ Elin Skaar (2002) argues that increasing *independence from* is a necessary condition for a change in judicial behavior (*independence to*) regarding human rights violations. She finds that politicians in Argentina, Chile, and Uruguay wanted to empower the judiciary for judging past abuses, among other motivations.

²⁶ Except, perhaps, in authoritarian regimes in which the dictator makes judges independent in order to transfer to them the cost of punishing. However, arguably a sophisticated public would not believe that judges are independent to make decisions in an autocratic regime.

sophisticated enough to realize that the government could manipulate a court by not enforcing its decision (Stephenson 2003, 62).

Improve efficiency. Politicians may want independent judges with the power of judicial review in order to monitor the bureaucracy (McCubbins and Schwartz 1984; Shapiro 2002). Independent judicial review may also be beneficial for politicians because it provides information on the actual consequences of the enacted law, the actual workings of policy implementation, in part because of judge's fact finding abilities (Rogers 2001).²⁷ This hypothesis, as *blame deflection*, works better not at an institutional design level but rather at a statutory level once an independent judiciary is already in place. For instance, the more abstract the language in a statute the greater discretion granted to judges vis-à-vis the bureaucracy, and viceversa (Huber and Shipan 2005). But it is interesting to note that there may be cases where this hypothesis works at the level of institutional design as in autocratic regimes that choose to delegate independence to judges (but not judicial review powers) in order to improve administrative efficiency.

The previous six general motives, of course, play out in particular contexts where short term considerations are crucial. In what follows I provide an account of the delegation strategies in Mexico and Chile that tries to integrate general motivations with context and particular institutional designs as a first step towards a more general framework of the conditions under which, and the reasons why, politicians choose particular institutional mechanisms of delegation of power to courts and judges.

²⁷ There is an abundant and rich literature on delegation to bureaucracies in the United States (see Huber and Shipan 2005), and recent work also considers delegation to judges. In particular, Stephenson (2006) argues that the legislator faces a tradeoff by delegating power to judges, whose decisions tend to be more consistent across time but less consistent across issues, or to bureaucrats, whose decisions tend to have the opposite characteristics (1047-48).

Mexico

For seventy one years (1929-2000) the *Partido Revolucionario Institucional* (PRI) governed Mexico controlling the Presidency, the state's governments, and practically all the seats in Deputies and Senators houses of Congress. 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. From 1934 to 1994, most presidents appointed more than 50 per cent of Supreme Court judges during their terms and almost 40 per cent of the judges lasted less than five years, despite the constitutionally guaranteed life tenure established in 1944, coming and going according to the presidential term (Magaloni 2003, 288-9). 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. 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). As the PRI started to lose power, and the Mexican economy was being liberalized, in 1987 a constitutional amendment delegated to the judiciary control over its administration, budget, and more importantly over the jurisdiction and number of courts. This reform, and others during the PRI era, was carried out mainly seeking a more efficient administration of justice (Fix-Fierro 2003).

But in 1994 another constitutional reform *increased independence* and gave to the Supreme Court the power of constitutional adjudication.²⁸ This meant transferring real

²⁸ Before the 1994 reform, the legal instruments for constitutional control were the *amparo* suit, an individual complaint, and constitutional controversies, available only to public authorities.

political power to the judges. Why did Mexican politicians decide to tie their hands and empower the Supreme Court? Jodi Finkel has argued that PRI politicians, unable to control political outcomes at the state or local levels and unsure if they would continue to dominate the national government in the future, “opted to empower the Mexican Supreme Court as a hedge against the loss of office” (2004, 87). In this account, the 1994 judicial reform is a kind of insurance policy to ensure that “those who may come to power in the future are unable to change arbitrarily the rules of the political game in ways detrimental to the former ruling party’s political position” (Finkel 2004, 101). There are reasons to be skeptical of such accounts of long-term strategic behavior in the case of Mexico. As Silvia Inclán argues, “according to some privileged witnesses of the reform process, in 1994, no one could have foreseen the PRI electoral defeat that occurred in 1997²⁹ or 2000” (2004, 84). Hence, the motivations for the reform are to be found instead in short-term political considerations such as winning the election of 1994, that took place in the context of the assassination of the PRI presidential candidate and an indigenous uprising in the southern state of Chiapas, and in the effort to enhancing credibility in the prospect of a general reform of the state led by the PRI (Inclán 2004, 106).

A complimentary and perhaps more compelling story has to do with delegating power to judges because of the need of an arbiter to solve disputes, both intra-PRI and inter-parties, as the traditional dispute settler role of the Mexican President became more

Although important, decisions in these cases had only *inter partes* effects. The reform of 1994 created a new instrument of abstract review, the action of unconstitutionality, and allowed for general effects on constitutional controversies. The reform reduced the number of Supreme Court judges from 25 to 11, and involved the appointment of all new 11 judges.

²⁹ The PRI lost the majority in the Chamber of Deputies for the first time in the mid-term elections that year.

difficult to implement. Beatriz Magaloni has argued that multiple-party politics created incentives for President Zedillo to delegate power to the judiciary (2003, 267. See also Inclan 2004, ch. 5). As the era of hegemonic *presidencialismo* was fading, politicians of multiple partisan affiliations began to occupy elected offices at the county, state, and federal levels. The divisions within the PRI itself were also growing. In this context, “the president’s leadership was challenged, first by members of different parties, and soon by his own co-partisans. The president thus delegated to the Supreme Court the power to rule on constitutional issues as a means to solve this dilemma” (Magaloni 2003, 268).

I would argue that the particular institutional design chosen by Mexican politicians in 1994 seems to support this hypothesis. Access to constitutional adjudication instruments is restricted to public entities such as one third of legislators or political parties (in actions of unconstitutionality) and to representatives of different levels of government (in constitutional controversies). Individual complaints (*amparo*) remained open to citizens but with restricted, *inter partes*, effects. Abstract review of legislation is further limited by the requisite that an action of unconstitutionality has to be filed within thirty days of the enactment of a law. In addition, constitutional adjudication power was given to the Supreme Court and not to a Constitutional Tribunal, which restricted the profile of judges to be appointed to respected but traditional lawyers. The independence of Supreme Court judges from the other branches was assured with fifteen year tenure and an appointment procedure where the executive and the senate participate. However, the requirement to impeach a judge is a simple majority in the House of Deputies, a requirement easy to meet by the PRI at the moment of the reform. In sum, even though the degree of independence from is high and that Supreme Court judges have the power

of constitutional adjudication, the institutional features still gave the PRI at that time good control over them.³⁰

The fact that in Mexico a cumbersome appointment procedure of Supreme Court judges is accompanied by an easier impeachment procedure may point to a more general strategy to balance independence and accountability of judges. Politicians may find a trade off between *ex ante* and *ex post* mechanisms of control³¹, for instance between appointment and sanctioning mechanisms. In this connection, perhaps the creation of judicial councils in which politicians and not judges have a majority (see Guarnieri and Pederzoli 2002) may be correlated with an increase in certain features of *independence from* (tenure, appointment, salary, etcetera) because those councils may be an *ex post* mechanism for politicians to monitor judges. Several Latin American countries have adopted judicial councils and the composition of them certainly varies. In some countries, the council is by judges (e.g. Mexico) but in other it is controlled by politicians (e.g. Bolivia).

Chile

The degree of *independence from* in Chile has been very low: one (life tenure for Supreme Court judges) from 1950 until 1997, and two since then (appointment procedure reformed to include the consent of the Senate, see Graph 1). During this time Chile has enjoyed a democratic regime except for the period from 1973 to 1990 in which Augusto

³⁰ As I show elsewhere, the probability for the Supreme Court of voting against the PRI increased from a mere .07 (from 1994 to 1997) to .44 (from 1997 to 2000) to .52 (from 2000 to 2002) as the PRI lost the majority in the Chamber of Deputies in 1997 and the Presidency in 2000 (Rios-Figueroa forthcoming).

³¹ This distinction is taken from studies that focus on delegation strategies to the bureaucracy, see Huber and Shipan (2006). See also Ramseyer (1994).

Pinochet led the military junta that ruled the country. The military junta did not remove any Supreme Court judge nor threatened the Supreme Court in any way (Correa Sutil 1993, 90). Part of the explanation is that the Supreme Court had been a strong opponent of the socialist policies of President Salvador Allende from 1970 to 1973. But also the military regime did not overtly intervene in the judiciary because it needed to enhance its credibility and show that it respected a democratic institution, in other words “the armed forces needed legitimate collaborators” (Correa Sutil 1993, 90; Skaar 2002, 133). This did not mean that the Pinochet regime left judges free to decide cases according to law and their conscience: the military committed gross human rights violations and the judiciary had no impact on preventing or punishing these violations.³²

As Barros explains, in the course of 1974 “the relationship between the junta and the judiciary was worked out after encounters with the Supreme Court over judicial review of decree-laws and Court supervision of military justice” (Barros 2002, 37). In particular, the military regime took advantage of the low degree of independence from delineated in the Chilean Constitution and manipulated the promotion procedures of judges in order to “legally” subject them and, perhaps more importantly, manipulated the jurisdiction of the courts. The Junta announced that judges who challenged the regime would be considered unduly ‘political’ and 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).

Chilean politicians have regularly used their constitutional prerogatives of

³² Between 1973 and 1983 the courts rejected all but ten out of fifty-four hundred petitions for *habeas corpus* filed by the *Vicaría de la Solidaridad*.

controlling the jurisdiction of the courts, especially when they do not want judges to resolve cases in certain areas. This was the case with labor disputes in the 1920s (Correa Sutil 1993, 94) and also with the creation of a Constitutional Tribunal in 1970 that was situated outside the judiciary in order to take political cases out of the Court's ordinary jurisdiction (Clark 1975, 430; Correa Sutil 1993, 94). The majority of the constitutional judges were appointed by the President and ratified by the Senate and endowed with a priori review of legislation and highly restricted rules of standing (Barros 2002). During the government of Salvador Allende (1970-73) 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).

The military regime, thus, was no exception when it stripped jurisdiction regarding crimes to national security (broadly defined as to include practically anything) from ordinary courts and gave it to military courts (Rosenn 1987, 26). The military also dissolved the Constitutional Tribunal in 1973. Interestingly, the military resurrected the Tribunal in the Constitution of 1980 with a particular design to serve their interests: the appointment procedure guaranteed a majority of military-friendly judges³³, standing was restricted to public authorities (president and ¼ of deputies or senators), and empowered the Tribunal with the right to determine the constitutionality of particular organizations, movements, political parties, and individuals that threatened the Constitution, the

³³ The Supreme Court was responsible for naming three of the seven members of the Tribunal; two were selected by the National Security Council (on which the armed forces controlled half of the seats), one by the Senate and another by the President. Tenure was eight years (Fuentes 2006)

institutional order, or the national security of the country (Fuentes 2006, 20)³⁴.

Pinochet and the military regime in Chile famously lost a 1988 plebiscite regarding its continuation in power. The negotiated transition to democracy that followed included an interesting bargain over judicial empowerment. The new democratic government wanted to correct the judiciary because of its performance during the dictatorship regarding human rights violations but also because of its clear Pinochet-friendly profile. During his eighteen-year rule Pinochet appointed fourteen out of seventeen Supreme Court judges and twelve of these appointments took place between 1985 and 1989 (Skaar 2002, 134). Because of the hierarchical organization of the Chilean judiciary, control of the Supreme Court meant control over lower court judges as well. But for the new democratic government to change the constitution or even the laws was very difficult because other institutional issues negotiated in the transition protected both the military and the right-of-center coalition of political forces in the legislative branch, especially the Senate.³⁵ Increments in *independence from* and the particular design of institutional mechanisms reflect thus bitter political bargaining. The timing of the reforms, however, is better explained by very particular political circumstances.

The issue at stake in the aftermath of the transition to democracy (1990) was present and future control of the Supreme Court and the judiciary. Early attempts to

³⁴ In 1989, as part of the negotiations in the transition to democracy, this power was removed from the Constitutional Tribunal.

³⁵ The Chilean electoral system, drafted by the military regime after losing the plebiscite in 1988, assures that the composition of the two houses of Congress is roughly equally divided between the coalition of parties in the left and the coalition of parties in the right. 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 center-left government of *La Concertación* controlled the two houses of Congress and the Presidency (see Carey 2002, 225).

create a judicial council were boycotted by the right and the Supreme Court³⁶ because it would take power away from it. A reform of the appointment procedure finally passed in 1997 in the context of a corruption scandal that involved a Supreme Court judge. That fact mitigated the Court's opposition to the reform and motivated the right's acceptance to negotiate because that particular judge would be removed and he was in favor of judging past violations of human rights. The left democratic government then demanded the imposition of a 75 year old retirement age, which implied getting rid of Pinochet-friendly judges in the near future. The right accepted on the condition that the appointment procedure included a 2/3 approval vote in the Senate that practically gave them a veto over the selection of future Supreme Court judges. That was the deal.³⁷

Among other things, the case of Chile highlights the importance of politicians' control over the jurisdiction of the courts. A possible delegation strategy to balance independence and accountability may be, as Ferejohn (1999) argues for the case of the United States, to have independent judges but a dependent judiciary. The Chilean case shows this strategy is used both under democracy and under authoritarianism albeit with somewhat different purposes (see also Toharia 1975). Control of jurisdiction, of course,

³⁶ Control over the Judicial Council has proved a sensitive political issue in Latin America. In 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. Chile and 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).

³⁷ It is interesting to note that in Chile, where the Constitution of 1980 greatly concentrated power on the President and military-friendly institutions (i.e. national security council, constitutional tribunal), more political competition has implied that increasing judicial independence is at the cost not of the current president and congress but of the former regime (see Pozas-Loyo 2006).

need not occur at the constitutional level but rather, as is the case in the United States, at the statutory level. Further research is needed to see how common this strategy is. The case of Chile also shows how in transitional settings some institutional provisions, like tenure or qualifications for Supreme Court judges, can be design specifically to get rid of judges linked to a previous regime.

Conclusion

There is interesting variation across time and space in Latin America regarding the way the elected branches of government have made courts and judges independent and in the way they have been empowered with constitutional adjudication. In this paper I explored different explanations for such diversity, trying to identify the conditions under which they work and their implications regarding particular institutional designs that would allow us testing those explanations empirically in a broader set of cases. These future tests involve gathering relevant data as well as combining general and contextual motivations that politicians have in their judicial delegation strategies. Ideally, we would be able to identify a general framework of strategies of delegation to courts and judges linked to particular institutional designs of independence from and constitutional adjudication.

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