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JULIO RÍOS FIGUEROA

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Fax: 5727•9800 ext. 6314
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Abstract

This paper is an inquiry into whether certain judicial institutions are better for controlling corruption. It argues that (i) in a system of checks and balances the relation between judicial independence and corruption is U-shaped, (ii) a prosecutorial organ located outside the executive power tends to decrease corruption, and (iii) higher levels of internal independence tends to increase corruption. These hypotheses are explored statistically in 18 Latin American countries. There is empirical support for the hypotheses related to the prosecutorial organ and to internal independence. Nested case studies on Chile and Mexico explore causal mechanisms and potentially omitted variables.

Resumen

En este trabajo se analiza sistemáticamente si existe algún diseño de las instituciones del sistema de justicia que sea mejor para controlar la corrupción. El argumento general es que en un sistema de frenos y contrapesos la relación entre independencia judicial tiene forma de U, es decir, un nivel intermedio de independencia es óptimo en el control de la corrupción. En particular, se argumenta también que un mayor nivel de independencia judicial interna tiende a aumentar la corrupción y que una menor influencia del ejecutivo en el ministerio público tiende a reducirla. Estas hipótesis son evaluadas empíricamente en 18 países de América Latina, y se encuentra evidencia que apoya los dos argumentos mencionados anteriormente. Con el fin de explorar los mecanismos causales y potenciales variables omitidas, el análisis empírico se complementa con casos de estudio en Chile y México que están "anidados" en el análisis estadístico que involucra a toda la región.

Introduction

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.¹ A more precise question is, then, under what conditions independent judges have an incentive to also be honest.²

Several studies on judicial independence emphasize that there is a trade-off between judicial independence and accountability.³ Building on this insight, this paper argues that in a system of checks and balances the relation between judicial independence and 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, an intermediate level of judicial independence is optimal for corruption control since it avoids unchecked checkers and minimizes the incentives of elected and unelected government officials to misuse public funds for private gain.

But what does a “medium degree of judicial independence” actually mean? As Susan Rose-Ackerman says we do not know the precise institutional shape of a judiciary correctly designed for controlling corruption, if there is any.⁴ This paper inquires whether certain judicial institutions are better for controlling corruption. It is divided into three parts. The first one explores the theoretical relationship between judicial institutions and corruption in three

¹ Susan Rose-Ackerman, *Corruption and Government... Causes, Consequences and Reform* (New York: Cambridge University Press, 1999) p. 143. Daniel Treisman, ‘The Causes of Corruption: A Cross-National Study’; *Journal of Public Economics*, 76 (2000), 399-457, p. 425. Jakob Svensson, ‘Eight Questions about Corruption’; *Journal of Economic Perspectives*, 19 (2005), 19-42, p. 35. See also Andrei Schleifer and Robert W. Vishny, ‘Corruption’; *The Quarterly Journal of Economics*, (1993), p. 605. Adam Przeworski, ‘The Last Instance: Are Institutions the Primary Cause of Economic Development?’; *European Journal of Sociology*, (XLV, 2004), 165-188, p. 167.

² 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, see Rose-Ackerman, *Corruption and Government*, p. 157. I do not consider this possibility in the paper.

³ Mauro Cappelletti, ‘Who Watches the Watchmen? A Comparative Study on Judicial Responsibility’, in Shimon Shetreet and Jules Deschenes, eds., *Judicial Independence: The Contemporary Debate* (Netherlands: Martinus Nijhoff, 1985). John Ferejohn, ‘Independent Judges, Dependent Judiciary: Explaining Judicial Independence’; *Southern California Law Review*, 72 (1999), 353-384. Carlo Guarneri, ‘Courts as an Instrument of Horizontal Accountability. The case of Latin Europe’, in Jose Maria Maravall and Adam Przeworski, eds., *Democracy and the Rule of Law* (New York: Cambridge University Press, 2003). Peter Russell, ‘Toward a General Theory of Judicial Independence’, in Peter H. Russell and David M. O’Brien, eds., *Judicial Independence in the Age of Democracy. Critical Perspectives from Around the World* (Charlottesville: University Press of Virginia, 2001).

⁴ Susan Rose-Ackerman, ‘Judicial Independence and Corruption’, in Transparency International, *Global Corruption Report 2007. Corruption in Judicial Systems*, (New York: Cambridge University Press, 2007).

steps -detection, prosecution and adjudication. In addition to the general U-shape hypothesis stated earlier, two more hypotheses are derived: (i) a prosecutorial organ located outside the executive power tends to decrease corruption, and (ii) higher levels of internal independence –relations between lower court judges with their hierarchical superiors– tend increase corruption.

In the second section, I pursue a multi-method strategy of empirical analysis. First, an econometric analysis on a sample of 18 Latin American countries from 1996 to 2002 is used to test the hypotheses stated above. Results from this analysis support the hypotheses related to the prosecutorial organ and to internal independence, and shed interesting light on the U-shaped hypothesis. Given the elusiveness of the corruption phenomenon and the scarcity of systematic analysis on the relation between judicial institutions and corruption, I then take advantage of the nested analysis technique⁵ to carry out case studies on Chile and Mexico to pin down the causal mechanisms that connect variables of interest and to consider potentially omitted variables. The last section concludes.

1. Judicial Institutions and Corruption

I use a common definition of 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.⁶ When a legal standard is violated someone may prosecute the offence (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.⁷ In general, corruption in the judiciary can be distinguished between administrative and operational.⁸ The first one occurs when court administrative employees violate formal or informal administrative

⁵ Evan S. Lieberman, 'Nested Analysis as a Mixed-Method Strategy for Cross-National Research', *American Political Science Review*, 99 (2005), 435-452.

⁶ Svensson, 'Eight Questions', p. 20.

⁷ Jennifer Widner, *Building the Rule of Law* (New York: W.W. Norton, 2001) p. 276.

⁸ Edgardo Buscaglia, 'An Analysis of Judicial Corruption and its Causes: An Objective Governing-Based Approach', *International Review of Law and Economics*, 21 (2001b), 233-249, p. 235. Edgardo Buscaglia, 'Judicial Corruption in Developing Countries: Its Causes and Economic Consequences', In *Global Programme Against Corruption* (New York: UNODCCP).

procedures for their private benefit. For instance, court users may pay bribes to administrative employees to alter the legally-determined treatment of files, lose evidence, or accelerate or delay a case by illegally altering the order of their hearing. In Tanzania, law clerks were sometimes the main source of trouble. One common 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.⁹

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, there was a well known case of two circuit court magistrates who had accepted money in exchange of liberating a murderer.¹⁰ Operational corruption may be facilitated by a large number of laws, their vagueness, and their contradictions, since judges would not know what law to apply and vagueness contributes to substantive or procedural abuse of judicial discretion.¹¹

Government officials, elected and unelected (including judges), engage in corrupt acts if they want or if they can. Whether they want to 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.¹² 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.¹³ Thus, detection, prosecution, and

⁹ Widner, 'Building the Rule of law', p. 276.

¹⁰ Héctor Fix-Fierro, 'La reforma judicial en México, ¿de dónde viene? ¿a dónde va?', *Reforma Judicial. Revista Mexicana de Justicia* 2 (2003), 251-324, p. 262 fn. 26. 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", Donatella Della Porta, 'A Judges' Revolution? Political Corruption and the Judiciary in Italy', *European Journal of Political Research*, 39 (2001), 1-21, p. 9.

¹¹ Rose-Ackerman, *Corruption and Government*, p. 152-3.

¹² 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, 'The Causes of Corruption', p. 425. In this paper, I go one step further exploring the conditions under which an independent judiciary reduces corruption.

¹³ Matthew M. Taylor and Vinicious Buranelli, 'Ending-up in Pizza: Accountability as a Problem of Institutional Arrangement in Brazil', *Latin American Politics & Society*, 49 (2007), 59-87. Arguably, simply detecting and publicizing the corrupt act would create costs for the official even if such act is not prosecuted and punished, what Taylor and Buranelli call "reputational sanctions". For instance, Kunicova and Rose-Ackerman argue that a corrupt

adjudication are the three minimum steps involved in controlling corruption. It is the argument of this paper that the institutional design of the justice system in each step impacts the probability that the corrupt act does not go unpunished, thus affecting the official's calculus on whether she can misuse her position for private gain.

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, and indeed all along the three steps as scholars have shown.¹⁴ Once noticed, it should be first investigated and then challenged in court by a prosecutor.¹⁵ 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 presents 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, and in some countries controls, the examining phase, *i.e.* the decision of whether there are enough elements to go to trial and what charges are pressed on the defendant.¹⁶ 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. In a word, in criminal offences prosecutors are the gatekeepers for the judiciary.

In the presence of a corrupt act, the prosecutor can (a) not investigate at all,¹⁷ (b) carry out the investigation but decide that there are no grounds for charging the suspect, or (c) conduct the investigation and charge the suspect with a crime.¹⁸ In all cases the prosecutor himself may be corrupt and, for instance, charge an innocent or dismiss a case against a corrupt official. Institutional incentives influence the prosecutor's behaviour who can be

politician, if exposed, will be punished by voters in the next poll. In this paper, 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, Jana Kunicova and Susan Rose-Ackerman, 'Electoral Rules and Constitutional Structures as Constraints on Corruption', *British Journal of Political Science*, 35 (2005), 573-606. p. 577.

¹⁴ This, however, may vary depending on the characteristics of libel laws. If those laws are stricter they may deter journalists to publish corrupt stories. See Piero Stanig, 'Chilled Journalists, Domesticated Publishers: Do Defamation Law and the Preferences of Publishers affect how newspapers cover Corruption in Mexico?', unpublished manuscript (2007).

¹⁵ I concentrate in criminal offences and the role of the public prosecutor. On the prosecutorial organ see Nicholas Cowdery AM QC, 'Judicial corruption from the prosecution's perspective', in Transparency International, *Global Corruption Report 2007. Corruption in Judicial Systems*, (New York: Cambridge University Press, 2007).

¹⁶ John H. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America* (California: Stanford University Press, 1985) p. 29.

¹⁷ In Mexico, for instance, the prosecutor had until recently the monopoly of the investigative and charging steps in prosecuting the crime, which meant that there was no legal resource for challenging a prosecutor's failure to investigate or charge a suspect even in the presence of strong evidence.

¹⁸ At this stage, as well as in the sentencing phase, the statutes regulating corrupt behaviours are crucial. In some countries these statutes can be so strict that many kinds of behaviours can be construed as corrupt.

pressured by her hierarchical superior, the defendant, or the judge (more on the relation between prosecution and judge below). The hierarchical organization in the prosecutorial office is important since superiors may exert influence through transfers, promotions, or by removing specific cases from individual prosecutors. The prosecutor can also be influenced by a powerful defendant. In this case the prosecutor needs incentives so that it is in her interest to resist temptations. Her institutional prerogatives and career prospects can be the source of independent behaviour, but her hierarchical superior may also exert undue pressure. The superior, thus, should himself be subject to control. Because of the strategic role of the prosecution in combating corruption its institutional location is of primary importance since this location provides a clue for whether the chief prosecutor is controlled, and by whom.

The prosecutorial organ can be part of the executive branch (as in the United States or Mexico), the judicial branch (as in Italy or Colombia), or it can be an autonomous organ (as in Brazil or Chile). 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 judge.¹⁹ Also, traditionally, when the prosecutors are subordinated to the executive, the latter exerts pressure on the whole judicial system through the former.²⁰ Finally, the public ministry may be an autonomous investigative organ, which would nonetheless still depend to a certain extent on the judiciary and the executive to conduct a lawful investigation.

If the prosecutorial organ lies within the executive—that is if the chief of all prosecutors serve at the discretion of the president—then prosecutors will have an incentive to serve the interests of their political boss.²¹ A prosecutorial organ that lies within the judiciary can diminish corruption since prosecutors will enjoy the same degree of independence from the government as that of judges.²² An autonomous prosecutorial organ may reduce the possibility of collusion between the judge and the prosecutor but it may also create unnecessary administrative and organizational burdens. What is clear, then, is that taking the prosecutorial organ outside the executive branch

¹⁹ 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. For an example on the problems of combining these two roles into one career see Stanton H. Burnett and Luca Mantovani, *The Italian Guillotine. Operation Clean Hands and the Overthrow of Italy's First Republic* (Maryland: Rowman & Littlefield, 1998) p. 17.

²⁰ Carlo Guarnieri and Patrizia Pederzoli, *Los jueces y la política. Poder judicial y democracia*, (Madrid: Taurus, 1999) p. 95.

²¹ The degree of influence of the chief prosecutor on their subordinates may vary across countries depending on appointing, promotion and other mechanisms, but it is usually considerable.

²² Della Porta, 'A Judges' Revolution?', p. 13.

would tend to reduce corruption. A prosecutor independent from the executive would increase the probability of lawful investigatory and accusatory phases (at all levels, reducing the likelihood of undue pressures from hierarchical superiors), so that the cost of misusing one's position for private gain would increase and corruption would decrease.

The judge potentially hearing the case (usually a judge in the same jurisdictional level of the prosecutor) may also exert some pressure on the prosecutor (*e.g.* denying search warrants). In many countries the judge who hears the case is assigned randomly to minimize the possibility that the prosecutor and the judge collude. Of course, in systems where prosecutors belong to the judicial branch this risk increases. Also, the appeals system in the judiciary may reassure a prosecutor who can appeal a decision considered inadequate (whether this corrective is more or less important depends on how much the judge values her rate of reversal). 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 crimes²³ are fully investigated and only 1.6% of those reach the courts.²⁴ 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 dollars for a construction project (the "Lalau" case), ten years passed from the time the case was first noticed until it reached a judge and thirteen years until it was decided.²⁵

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. On the other hand, 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 have participated

²³ In Mexico only 25% of crimes committed are reported to the police, Guillermo Zepeda Lecuona, *Crimen sin castigo*. Procuración de Justicia Penal y Ministerio Público en México (México DF: F.C.E.-CIDAC, 2004) p. 398. See also, on the Brazilian case, Maria Tereza Sadek and Rosangela Batista Cavalcanti, 'The New Brazilian Public Prosecution: An Agent of Accountability?', in Scott Mainwaring and Christopher Welna, eds., *Democratic Accountability in Latin America* (New York: Oxford University Press, 2003).

²⁴ 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, *Corruption and Government*, p. 153.

²⁵ Taylor and Buranelli, 'Ending-up in Pizza?', p. 71-72.

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 or the prosecutor. 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. 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. Thus, a medium level of judicial independence from the other branches of government is optimal in the combat of corruption.²⁶ A way of gauging this “medium level” is by looking at the institutional variables that relate judges and the judiciary with the political branches of government, such as the appointment, tenure, and impeachment mechanisms for judges and the budget, jurisdiction and constitutional adjudication powers of the judiciary. These variables can be controlled in a greater or lesser degree by politicians or by judges themselves, and perhaps some combinations constitute a better mix of independence and accountability than others.

The institutional structure of the judiciary may also increase or decrease opportunities for corruption within itself. 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 on bindingness. The ideal extreme of binding precedent would be found in common law systems, where the doctrine of *stare decisis* binds all future judges in the same and lower court levels to make 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 which 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

²⁶ Analyzing the United States, 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, James E. Alt and David Dreyer Lassen, ‘The Role of Checks and Balances in Curbing Corruption: Evidence from American State Governments’, unpublished manuscript (2004), p. 2.

in a country that already has an effective system of enforcement and a strong tradition of procedural justice.²⁷

However, countries within the same legal tradition and arguably similar degrees of bindingness 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 institutional levels of internal independence are also higher.²⁸ This would be true especially in civil law countries where controls over lower court judges depend basically on career incentives.²⁹ More internal independence is a good thing for corruption because too many, decentralized, not closely monitored³⁰ and unconstrained lower courts may increase the incentives for lower court judges to accept bribes. As Gerring and Thacker argue,³¹ 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.³²

In sum, in the complex relation between judicial institution and corruption we focus on three testable hypotheses: (1) A prosecutorial organ located outside the executive power 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 paper evaluates these general hypotheses in Latin America and then explores

²⁷ Treisman, 'The Causes of Corruption', p. 425

²⁸ 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, Borja Díaz Rivillas, and Leticia Ruiz-Rodríguez, 'Percepciones sobre independencia judicial en Nicaragua', paper presented at the *Latin American Studies Association Congress*, (2003), p. 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, *Building the Rule of Law*, p. 276.

²⁹ Recent work on Bolivia and Chile based on a survey to judges analyze the legal and political factors that affect lower court judges in their relation with their superiors, see Aníbal Pérez-Liñán, Barry Ames and Mitchell Selligson, 'Strategy, Careers and Judicial Decisions: Lessons from the Bolivian Courts', *Journal of Politics*, (2006). And Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship. Lessons from Chile*, (New York: Cambridge University Press, 2007).

³⁰ "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 according to Widner, *Building the Rule of Law*, p. 282.

³¹ John Gerring and Strom C. Thacker, 'Political Institutions and Corruption: The Role of Unitarism and Parliamentarism', *British Journal of Political Science*, 34 (2004), 295-330, p. 325. See also Schelifer and Vishny, 'Corruption'.

³² 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, 'A Judges' Revolution?', p. 10.

mechanisms and model specification through a nested analysis on Chile and Mexico.

2. Justice Institutions and Corruption Control in Latin America

The Latin American region provides a promising arena for assessing the hypotheses of this paper. The countries share a common heritage, political culture, civil legal system and presidential regime. At the same time, however, they retain important variations in judicial and other political institutions as well as on corruption perception levels. This makes for a good laboratory for assessing the impact of institutions on economic and political outcomes. The analysis in this paper 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 paper.³³

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.³⁴ 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. 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.³⁵ Hence, whether judicial institutions during the wave of democratization have an effect on corruption is an empirical question to which I now turn.

³³ Adam Przeworski, Michael A. Alvarez, Jose Antonio Cheibub, and Fernando Limongi, *Democracy and Development. Political Institutions and Well-Being in the World, 1950-1990*, (New York: Cambridge University Press, 2000). 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 Jennifer Gandhi, 'Political Institutions Under Dictatorship', PhD Dissertation, New York University (2004). According to other classifications, all countries in my sample during the period of analysis are at least "semi-democracies", see Scott Mainwaring, Daniel Brinks, and Aníbal Pérez-Liñán, 'Classifying Political Regimes in Latin America, 1945-1999', *Studies in Comparative International Development*, 36 (2001), 37-65.

³⁴ Kurt Weyland, 'The Politics of Corruption in Latin America', *Journal of Democracy*, 9 (1998), 108-121, p. 108. See also Schleifer and Vishny, 'Corruption', p. 610).

³⁵ Weyland, 'The Politics of Corruption', p. 113. Laurence Whitehead had pointed out the relevance of the judicial institutions for the effect of economic and political transitions on high level corruption in Latin America. Laurence Whitehead, 'High-Level Political Corruption in Latin America: A "Transitional" Phenomenon?', in Joseph S. Tulchin and Ralph H. Espach, eds., *Combating Corruption in Latin America*, (Baltimore: Johns Hopkins University Press, 2000) pp. 107-129.

2.1. Dependent Variable

The dependent variable is CORRUPTION. As a proxy I use the Corruption Perception Index (CPI) by Transparency International. 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 CPI, as well as its brother index the Control of Corruption Index (CORRWB), compiled by the World Bank,³⁶ has been criticized on a number of grounds,³⁷ but still remains as a good proxy for perception of corruption in cross national research. I use the CPI because it covers more country-years in my sample. The correlation of both indices in my sample is .93. The CPI goes from 0 (least corrupt) to 10 (most corrupt).³⁸

2.2. Independent Variables

In order to test the three main hypotheses of this paper, I constructed the following independent variables to capture judicial institutions as expressed in the constitution of each country. JUDICIAL INDEPENDENCE is a measure that takes values from 0 to 8 and captures the degree of control that the executive and legislative organs have over the following eight institutional features: the number, appointment, tenure, impeachment and salary of Supreme Court judges, as well as the budget, jurisdiction and constitutional adjudication powers of the judiciary.³⁹ INTERNAL INDEPENDENCE takes values from 0 to 4 and refers to lower court judges for whom I coded to what extent their appointment, tenure, promotion and punishment mechanisms are controlled by their hierarchical superiors. Finally, PROSECUTOR'S OFFICE OUTSIDE THE EXECUTIVE (PO OUT EXE) is coded 1 if the prosecutorial organ is located outside the executive branch and 0 otherwise, *i.e.*, within the judiciary or as an autonomous organ.

I capture the degree of independence by relying on two basic coding rules: (i) if the institutional feature is specified in the constitution I consider this a higher degree of independence because such feature would be harder to change than if it is left to be regulated by statute (*e.g.* a fixed percentage of

³⁶ Daniel Kaufman, Aart Kraay, and Massimo Mastruzzi, 'Governance Matters IV: Governance Indicators for 1996-2004', World Bank (2005)

³⁷For instance, Pranab Bardhan, 'Corruption and Development: A Review of Issues', *Journal of Economic Literature*, 35 (1997), 1320-1346, p. 1328. Svensson, 'Eight Questions', p. 23.

³⁸ To facilitate interpretation, the CPI index was rescaled so 0 is least corrupt and 10 most corrupt.

³⁹ I considered whether there is a constitutional adjudication organ within the judiciary with capacity to make decisions valid for all (*erga omnes*). A country may create a constitutional tribunal outside the judiciary, or empower Supreme Court judges with constitutional adjudication. In the latter case (not uncommon in Latin America, see Patricio Navia and Julio Ríos-Figueroa, 'The Constitutional Adjudication Mosaic of Latin America', *Comparative Political Studies*, 38 (2005)) it is more likely that judges would interpret the constitution in their favor whenever a judicial independence issue arises. For instance, in Argentina the Supreme Court decided that judges should not pay taxes because this undermines their independence.

GDP for the judiciary, or a specific number of Supreme Court judges);⁴⁰ (ii) I also consider that there is more judicial independence if an institutional feature is designed in such a way that either it is controlled by the judiciary itself, by at least two organs of government (executive and legislative), or by a supermajority of the legislature in some cases. In the case of lower court judges, these rules are adapted to capture whether their appointment and career incentives are controlled by their superiors in the judicial hierarchy.⁴¹

The main advantage of this measure is that it is comparable across countries, comparable across time within the same country and reproducible by any person that looks at the constitutions and follows the coding rules.⁴² But still, scholars who use the legal framework to analyze judicial independence face the criticism that their *de jure* assessments may not accurately reflect political reality.⁴³ But a *de jure* measure of judicial independence can be highly informative. Whether it can be considered a good, fair, or bad proxy for expected judicial behaviour depends on the distribution of power among the ruling political groups. In particular, if there is not a single political group capable of amending the constitution unilaterally, the level of judicial independence is high, and there is divided government⁴⁴ then we can expect the *de jure* measure of judicial independence to be a good proxy for de facto judicial independence.⁴⁵ For the sample of ninety five observations used in the statistical analysis there is no

⁴⁰ All the Latin American constitutions considered here are “rigid” in the sense that their amendment procedures imply at least supermajorities in the legislative organ.

⁴¹ For all the variables, whenever a judicial council participated in the decision I considered whether the council is actually composed by a majority of judges and if those judges are members of the Supreme Court or come from all ranks in the judicial hierarchy.

⁴² Scholars carrying out single-country studies have used decisions against the government as a proxy for judicial independence, for instance Matias Iaryczower, Pablo Spiller, and Mariano Tomassi, ‘Judicial Decision-Making in Unstable Environments’, *American Journal of Political Science*, 46 (2002). Yet independent courts can decide in favour of the government and binary measures may oversimplify judicial decisions. In depth analysis of judicial independence based on individual and historical circumstances (such as Rebecca Bill Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Stanford: Stanford University Press, 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. Lars P. Feld and Stefan Voigt 2003, ‘Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators’, *European Journal of Political Economy*, 19 (2004), 497-527.

⁴³ See Christopher Larkins, ‘Judicial Independence and Democratization: A Theoretical and Conceptual Analysis’, *American Journal of Comparative Law*, 44 (1996).

⁴⁴ “High” is at least four in my measure. Divided government is coded from Gabriel L. Negretto, ‘Minority Presidents and Democratic Performance in Latin America’, *Latin American Politics & Society* 48 (2006), 63-92. For the cases not included in this source I looked at the partisan composition of the legislature in Dieter Nohlen, ed., *Elections in the Americas. A Data Handbook* (New York: Oxford University Press, 2005).

⁴⁵ The same is true if judicial independence de jure is low and no political party can amend the constitution unilaterally but there is a unified government. When some of these conditions vary the quality of the measure as a proxy also varies. The argument in detail for all possible combinations of conditions can be found in Andrea Pozas-Loyo and Julio Ríos-Figueroa, ‘When and Why ‘Law’ and ‘Reality’ Coincide? De Jure and De Facto Judicial Independence in Chile and Mexico’, in Alejandra Ríos-Cazares and David A. Shirk, eds., *Evaluating Transparency and Accountability in Mexico: National, Local, and Comparative Perspectives* (San Diego, CA: University of San Diego Press, 2007).

observation for which the measure is a gross overestimation, all can be considered either good or fair proxies.⁴⁶

2.3. Control Variables

Several additional variables have been related to perception of corruption. Analyzing Latin America allows us to control implicitly for some variables that have been related to higher corruption, such as civil law tradition,⁴⁷ a presidential system of government,⁴⁸ and lack of a protestant majority.⁴⁹ These variables would suggest that Latin America is a particularly corrupt region. However, cross-national analysis across different continents that control for the level of economic development and the longevity of democracy has not found evidence that Latin America is a particularly corrupt region.⁵⁰

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.⁵¹ Ades and Di Tella find that increases in market competition that promote an OPEN ECONOMY, here measured as the ratio of exports plus imports to the GDP, dampens corruption (Ades and Di Tella, 1997, cited in Montinola and Jackman, 2002, p. 153).⁵² Privatization has also been theoretically connected to higher corruption since the sale of public enterprises gives bureaucrats and politicians discretion over the relocation of vast resources, widening their scope for personal gain.⁵³ 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% of total proceeds from 1,300 transactions. Argentina, Mexico and Brazil accounted for 80% of proceeds in the region

⁴⁶ There are 47 out of 95 (49%) that can be considered good proxies, and out of the rest forty eight observations 36 (75%) are fair proxies that may actually underestimate judicial independence de facto and only twelve that may overestimate it.

⁴⁷ Treisman, 'The Causes of Corruption', p. 402; Simeon Djanko, Rafael La Porta, Florencio López-de-Silanes, and Andrei Schleifer, 'Courts', *The Quarterly Journal of Economics*, (2003), 453-517, p. 453.

⁴⁸ Gerring and Thacker, 'Political Institutions', p. 295; Kunicova and Rose-Ackerman, 'Electoral Rules', p. 597.

⁴⁹ Treisman, 'The Causes of Corruption', p. 402.

⁵⁰ Treisman, 'The Causes of Corruption', p. 436-7. See also Gabriella Montinola and Robert W. Jackman, 'Sources of Corruption: A Cross-Country Study', *British Journal of Political Science*, 32 (2002), 147-170.

⁵¹ For instance Paulo Mauro, 'Corruption and Growth', *The Quarterly Journal of Economics*, (1995) p. 683.

⁵² OPEN ECONOMY is taken from Alan Heston, Robert Summers and Bettina Aten, *Penn World Table Version 6.2*, Center for International Comparisons of Production, Income and Prices at the University of Pennsylvania, (2006). GDP per capita is taken from Angus Maddison, *The World Economy. Historical Statistics* (Paris: OECD, Development Center Studies, 2003), pp. 145-49. Ades and Di Tella also find that judicial autonomy, measured by surveys by BI, also decrease corruption. See Alberto Ades and Rafael Di Tella, 'The New Economics of Corruption: A Survey And Some New Results', *Political Studies*, 45 (1997), 496-515.

⁵³ Weyland, 'The Politics of Corruption', p. 111.

during the 1990s mainly from telecommunications, electricity and energy privatizations.⁵⁴

Among the political variables, Treisman found that DEMOCRACY, in particular countries that have been democracies (using the classification of Przeworski and his co-authors) continuously since 1950 tend to be perceived as less corrupt.⁵⁵ FEDERALISM has also been positively related to perception of corruption;⁵⁶ this variable that takes a value of 1 if the country has a federal form of government (Argentina, Brazil, Mexico and Venezuela) or if the intermediate level of government (that between the national and the local levels, *i.e.*, the equivalent of the state level often called *departamento* or *region* in non-federal Latin American countries) is popularly elected (Colombia, Ecuador and Paraguay).⁵⁷ PLURALITY electoral rules to select legislators have been related to lower levels of perception of corruption because they increase clarity of responsibility.⁵⁸ Finally, social variables, such as a higher degree of ETHNIC FRACTIONALIZATION⁵⁹ and greater income inequality have also been related to more corruption.⁶⁰

An ordinary least squares regression with CORRUPTION as the dependent variable and all the independent and control variables detailed above⁶¹ shows that two of the three hypotheses of this paper find empirical support at conventional levels of statistical significance. As internal independence goes from its minimum to its maximum level the perception of corruption goes from 6.09 (5.55, 6.64) to 7.25 (6.39, 8.11), and the CPI value goes from 6.304 (5.93, 6.68) to 7.16 (6.52, 7.80) when the prosecutorial organ changes from being outside to being within the executive (95% confidence intervals in

⁵⁴ Sunita Kikeri and Aishetu Fatima Kolo, 'Privatization: Trends and Recent Developments', *World Bank Policy Research Working Paper 3765*, (2005), p. 8. There is now a World Bank Privatization Database, but unfortunately the missing data on this variable for our sample does not allow controlling for this variable in the statistical analysis.

⁵⁵ Treisman, 'The Causes of Corruption', p. 433. In the following analysis I code this variable as the number of continuous years a country has been a democracy since its last transition, see Przeworski, *Democracy and Development*.

⁵⁶ Gerring and Thacker, 'Political Institutions', p. 295. Treisman, 'The Causes of Corruption', p. 402.

⁵⁷ Nicaragua elects intermediate level bodies in only two autonomous regions but in the rest of the 15 departments the authorities are designed by the President of the Republic. The source of this variable is the *Political Database of the Americas* (PDBA) at Georgetown University, available at <http://pdba.georgetown.edu/>.

⁵⁸ Kunicova and Rose-Ackerman, 'Electoral Rules', p. 597. Data on this variable comes from *World Development Indicators*, World Bank, CD ROM. See also Margit Tavits, 'Clarity of Responsibility and Corruption', *American Journal of Political Science*, 51 (2007), 218-229. Although not included in this paper, variations in proportional representation systems (open versus closed lists) interacting with district magnitude have also been shown to have an effect on corruption, see Eric C. C. Chang and Miriam A. Golden, 'Electoral Systems, District Magnitude and Corruption', *British Journal of Political Science*, 37 (2006), 115-137.

⁵⁹ For instance, Mauro, 'Corruption and Growth'.

⁶⁰ Jong-Sung You, and Sanjeev Khagram, 'A Comparative Study of Inequality and Corruption', *American Sociological Review*, 70 (2005), 136-157.

⁶¹ Standard errors are country-clustered taking into account that observations are independent across countries but not necessarily within each country across time. See Nathaniel Beck, Jonathan N. Katz, and Richard Tucker, 'Taking Time Seriously in Binary Time-Series Cross-Section Analysis', *American Journal of Political Science*, 42 (1995), 1260-1288. All analyses were done in STATA9.

parenthesis) (see Table 1 and Figure 1).⁶² That is, too much internal independence generates more perception of corruption and a prosecutorial organ outside the executive reduces it. The relationship between JUDICIAL INDEPENDENCE (and its squared value) and corruption is not statistically significant and, contrary to theoretical expectation, it appears to have the form of an inverted-U. Figure 2 shows, however, that while there is more certainty that low levels of JUDICIAL INDEPENDENCE are associated with high levels of corruption, increments of this variable are accompanied with much uncertainty about its effects on corruption. The analysis confirms the negative relation between GDP PER CAPITA and corruption and also that FEDERALISM is associated with greater perception of corruption. The remaining variables are not statistically significant.⁶³

⁶² Figures 1 and 2 are built based on simulations using CLARIFY (Software for interpreting and presenting statistical results, by Michael Tomz, Jason Wittenberg, and Gary King, version 2.1, available at: <http://gking.harvard.edu>) as the variable of interest changes and all other variables are set at their mean value.

⁶³ Because the number of data points is low and the number of panels is larger than the number of data points, I also estimated the model using a population-averaged panel-data model, or a Generalized Estimating Equation (GEE). Internal Independence and Judicial Independence remain unaltered, but the variable capturing the institutional location of the prosecutorial organ outside the executive decreases in statistical significance. The rest of the variables remain unaltered except Open Economy which becomes statistically significant. However, GEE produces a random-effects model that assumes that the unobserved effects affecting judicial independence and institutions (e.g., the quality and professionalism of judges or a culture of judicial restraint such as the political question doctrine) are random draws from a large population. See Jeffrey Wooldridge, *Introductory Econometrics: A Modern Approach* (U.S.: South Western College Publication, 2002) p. 473. I don't have a random sample which makes very likely that the unobserved effects are correlated with my independent variables. For these reasons, I use the regression analysis with country-clustered standard errors.

TABLE 1. OLS ESTIMATES OF DETERMINANTS OF PERCEPTION OF CORRUPTION

	DEPENDENT VARIABLE CORRUPTION
INTERNAL INDEPENDENCE	.288* (.162)
PO OUT EXE	-.860** (.430)
JUDICIAL INDEPENDENCE	.803 (.667)
JUDICIAL INDEPENDENCE ²	-.112 (.096)
GDP PER CAPITA	-.0003*** (.00008)
OPEN ECONOMY	.012 (.011)
FEDERALISM	1.396*** (.277)
DEMOCRACY	.00009 (.011)
PLURALITY	-.461 (.433)
ETHNIC FRAGMENTATION	-.292 (1.088)
NUMBER OF OBSERVATIONS	95
R ²	0.7086
ROOT MSE	.77254

Numbers in parenthesis are clustered standard errors (cluster=country). Levels of significance are denoted as *p<.10, **p<.05, ***p<.01

FIGURE 1. EFFECT OF INTERNAL INDEPENDENCE ON PERCEPTION OF CORRUPTION

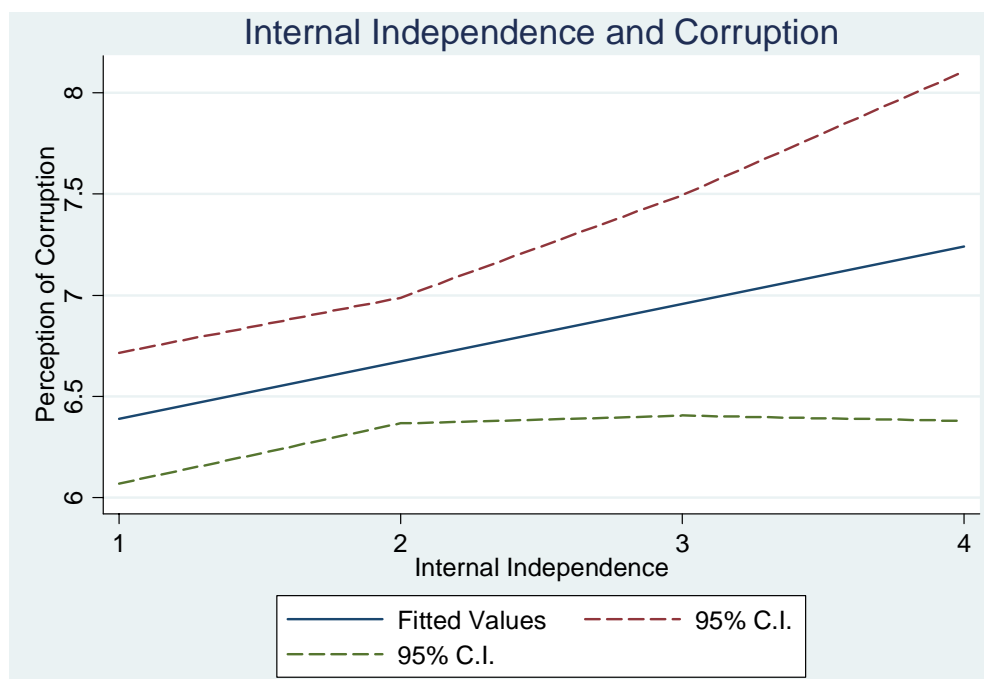
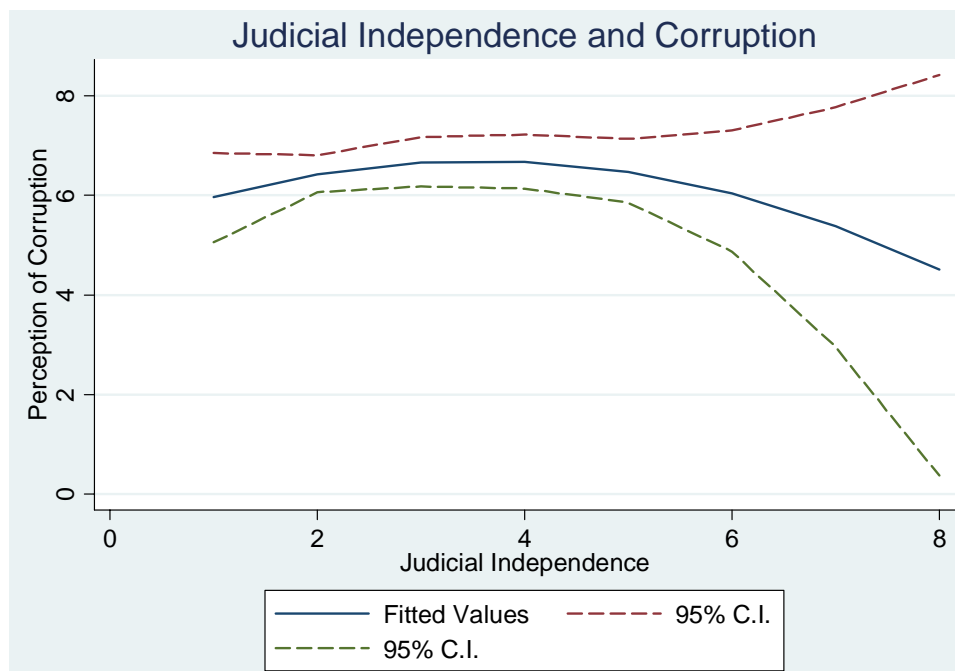


FIGURE 2. EFFECT OF JUDICIAL INDEPENDENCE ON PERCEPTION OF CORRUPTION



The results of the analysis would not suffer from the effects of endogeneity if the decision to design judicial institutions and the decision to combat corruption are independently taken.⁶⁴ I argue that this is true for the present analysis. The design of judicial institutions at the constitutional level is shaped by the bargains between self-interested political groups during constitution-making processes that aim to create institutions that help them to combat increasing returns of power and to protect minorities. Reforms specifically aimed to control corruption are usually made at a statutory level and they typically involve attempts to improve the organization, administration and efficiency of the courts but not the institutional structure of the judiciary. Thus, it is not unreasonable to assume that controlling corruption is not a primary motivation at the level of constitutional design of adjudicatory institutions and that the decisions for creating judicial institutions at that level and the decisions to control corruption are made independently.

⁶⁴ See Christopher Achen, *The Statistical Analysis of Quasi-Experiments*, (Berkeley: University of California Press, 1986).

3. *Nested Case Studies on Chile and Mexico*

The elusiveness of the corruption phenomenon and the scarcity of systematic analysis on the relation between judicial institutions and corruption motivate the need for a multi-method empirical strategy that takes advantage of the statistical analysis made above while simultaneously allowing the search for mechanisms that connect judicial institutions and corruption control and to investigate the potential omission of relevant variables. The nested analysis technique allows this combination, and following this method I selected the cases of Chile and Mexico for a more detail and deeper analysis (see Figure 3).⁶⁵

Chile is a good candidate for detailed analysis because it has a mix of both typical and atypical observations, is the case with most extreme values in the dependent variable, and it also has two observations among the most influential.⁶⁶ Mexico is a good candidate for in depth study because it has both typical and influential observations.⁶⁷ Chile and Mexico also exemplify the full range of variation in the three independent variables: the prosecutorial organ is within the Executive in Mexico and outside it in Chile, internal independence varies from maximum to minimum in Mexico and is constantly low in Chile, and judicial independence is high in Mexico and goes from low to medium in Chile (see Table 2). Together Chile and Mexico allow us to explore in greater detail the causal mechanisms that connect the variables of interest (mainly Mexico but also Chile), to assess problems of conceptualization and measurement (Chile and Mexico), and to search for alternative explanations and potential omitted variables (mainly Chile). That is, in Lieberman's words, these cases present opportunities for model building and model testing.⁶⁸

⁶⁵ Lieberman, 'Nested Analysis as a Mixed-Method Strategy for Cross-National Research'. For advices to select nested case studies I follow John Gerring, *Case Study Research: Principles and Practices* (Cambridge: Cambridge University Press, 2007) and Matthew Ingram, 'Judicial Politics in the Mexican States: Theoretical and Methodological Foundations', *CIDE Working Paper*, Mexico City (2007).

⁶⁶ Chilean country-years appear three times among the thirteen most atypical observations (2000, 2001, and 2002), once among the thirteen most typical (1996), twice among the thirteen most influential based on Cook's distance (2001, 2002), and all of them have extreme values greater than 2 (1996-2002).

⁶⁷ Mexican country-years appear twice among the fourteen most typical observations (2001 and 2002), and twice among the ten most influential observations based on Cook's distance (1996, 1998).

⁶⁸ Lieberman, 'Nested Analysis'. Argentina and Costa Rica are also good candidates for in-depth study according to the criteria suggested by Gerring and Seawright, 'Case Selection Techniques'.

FIGURE 3. ACTUAL VS PREDICTED CORRUPTION VALUES

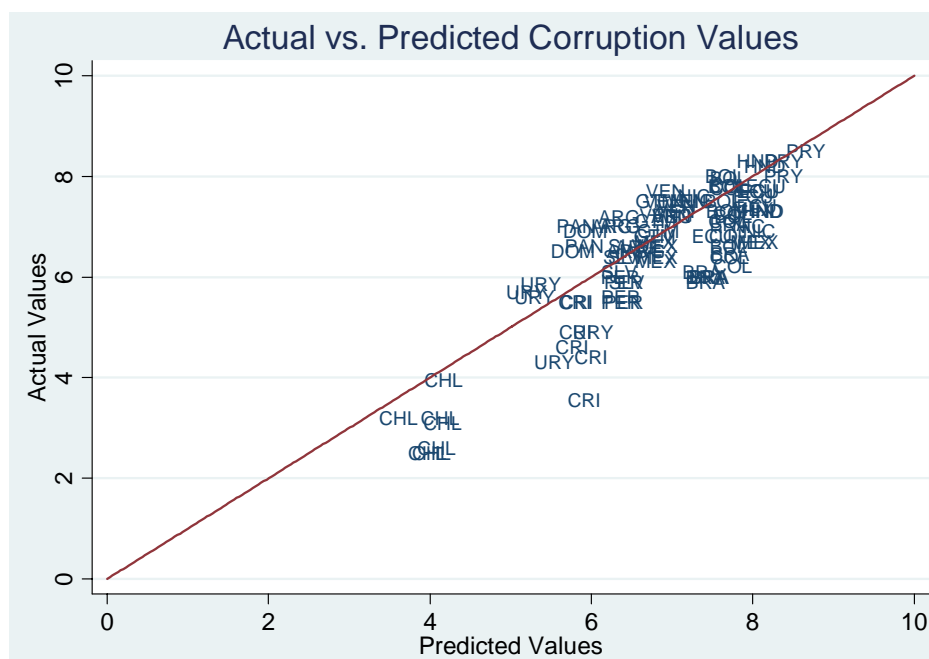


TABLE 2. VALUES OF DEPENDENT AND INDEPENDENT VARIABLES IN CHILE AND MEXICO

YEAR	CORRUPTION		INTERNAL INDEPENDENCE		PROSECUTORIAL ORGAN		JUDICIAL INDEPENDENCE	
	CHILE	MEXICO	CHILE	MEXICO	CHILE*	MEXICO	CHILE	MEXICO
1996	3.2	6.7	0	4	JUD	EXE	1	6
1997	3.95	7.34	0	4	JUD	EXE	3	6
1998	3.2	6.7	0	4	JUD	EXE	3	6
1999	3.1	6.6	0	0	JUD	EXE	3	6
2000	2.6	6.7	0	0	JUD	EXE	3	6
2001	2.5	6.3	0	0	JUD	EXE	3	6
2002	2.5	6.4	0	0	JUD	EXE	3	6

JUD = judiciary, EXE = executive.

*A 1997 constitutional reform established the Chilean public prosecutor's office as an autonomous agency. This reform entered into form on December 2000, and that was also the start date of a gradual implementation process that ended with entry into force in the Santiago Metropolitan region on June 2005.

3.1. Chile: An Early Start and Piecemeal but Overall Reform

From 1996 to 2002 Chile has three observations (2000-2002) in which the predicted value on corruption is higher than the actual value and one observation (1996) in which the predicted and the actual value are in agreement. Chile also is the least corrupt country in Latin America, with values on corruption that are much lower than those of the rest of the countries. It is thus important to look for variables that are not included in the model and that may explain why Chile is not as corrupt as the model predicts. I argue that Chile's early start in administrative reform and slimming of the state, relative to the rest of the countries in the region, help explain its low corruption levels. These two processes started during the authoritarian regime of Augusto Pinochet and continued after the transition to democracy in 1980, in a very gradual way as a product of the even balance of left and right political forces and the difficult bargaining between them.

Let us first take a closer look at the explanatory variables of the model and how they play out in the Chilean case. From 1996 to 2002 Chile had a very low level of internal independence and the prosecutorial organ was located outside the executive. The tight control of Chilean lower court judges by their hierarchical superiors has been documented by Lisa Hilbink who argues that this institutional design also helps explain reactionary judicial behaviour in, for instance, cases of human rights abuses.⁶⁹ In addition, before 1997 when the Chilean prosecutorial organ was made autonomous it was located within the judiciary,⁷⁰ so it has always been located outside the executive organ. As argued above, these two institutional features are related to low corruption levels. On the other hand, the measure of judicial independence in Chile increases from a low one in 1996 (Supreme Court judges enjoyed life tenure) to a value of three in the reform of 1997 that specified the number of Supreme Court judges in the constitution, rendering it less subject to abuse by regular majorities, and also required the approval of two-thirds of the Senators for appointing Justices. This increment from a low to a close to middle value was accompanied by a decrease in the perception of corruption (after an increment in 1997), which is also consistent with the theoretical prediction of a U-shaped relationship (see Table 3). But the model still predicts higher corruption in Chile, so we need to find what else may explain lower corruption in this country.⁷¹

⁶⁹ Hilbink, *Judges Beyond Politics*.

⁷⁰ A 1997 constitutional reform established the Chilean public prosecutor's office as an autonomous agency. This reform entered into form on December 2000, and that was also the start date of a gradual implementation process that ended with entry into force in the Santiago Metropolitan region on June 2005

⁷¹ It is worth mentioning that Chile also has the "correct" values in the other variables that have been mentioned to reduce corruption and that are significant in the model: it is centralized and has enjoyed a growing per capita GDP. Chile also has all the characteristics mentioned in the literature that reduce corruption, although they were not significant in the model, namely plurality elections for congress, a low degree of ethnic fragmentation, and high openness to trade.

It is interesting to look at the judicial reform that took place in 1997. 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 a bargain over judicial empowerment. The new democratic government wanted to transform the judiciary because of its poor 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. As said, 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 difficult because other institutional issues negotiated in the transition protected both the military and the right-of-centre coalition of political forces in the legislative branch, especially the Senate.⁷² Increments in judicial independence and the particular design of institutional mechanisms thus reflect bitter political bargaining. The timing of the reforms, however, is better explained by particular political circumstances.

One of the main issues at stake in the aftermath of the transition was the present and future control of the Supreme Court and the judiciary. Early attempts to create a judicial council were boycotted by the right and by the Supreme Court 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 favour 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 two-thirds approval vote in the senate that practically gave them a veto over the selection of future Supreme Court judges. That was the deal and the context in which the amendments of 1997 took place.

The same piecemeal, negotiated approach to reform that changed the judiciary also took place in the public administration reform in general.⁷³ During the dictatorship, Pinochet reduced the bureaucracy first and then provided employment stability for administrative officials, a kind of career

⁷² 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 centre-right coalition, effectively eliminated the possibility that the centre-left government of La Concertación controlled the two houses of Congress and the Presidency. See John Carey, 'Parties, Coalitions, and the Chilean Congress in the 1990s', in Scott Morgenstern and Benito Nacif, eds., *Legislative Politics in Latin America*, New York: Cambridge University Press, 2002) p. 225.

⁷³ Guillermo Cejudo, 'Democratic Governance and Public Sector Reform: The Experiences of Mexico and Chile', paper presented at the APSA Meeting (2006).

civil service. These were unusual decisions given the common practice in authoritarian regimes of using bureaucratic positions as “pork” to be distributed among political clienteles, as was the case during the PRI-regime in Mexico. In the negotiated Chilean transition to democracy, the military made sure that the bureaucracy could not be removed. As Cejudo argues, taking this as a given the democratic governments since 1990 aimed their reform efforts at improving the performance of the inherited administrative agencies. Better performance in terms of efficacy and professionalism and employment stability are factors that contribute to the control of corruption within administrative agencies. The incremental but overall approach to reform in Chile is explained by the strength of the right and of the military forces at the time and in the aftermath of the transition that forced hard and step-by-step negotiations with the forces grouped in the *Concertación*. This approach seems to have been a factor in reducing corruption in the Chilean public sector.

The Pinochet regime also reduced government in a more general sense, privatizing many of the state-controlled businesses, and Chile has since being able to claim the smallest government in Latin America. It has been argued that privatization increases opportunities for corruption. But privatization processes began earlier in Chile than in the rest of Latin America, so by the time of the first observation in this paper (1996) the Chilean state was already considerably leaner than the other states in the region.⁷⁴ In the case of Mexico, by contrast, massive privatizations began in 1986 under Miguel de la Madrid and were deepened during the administrations of Carlos Salinas de Gortari (1988 to 1994) and Ernesto Zedillo (1994-2000). Thus, if privatizations increase corruption (and arguably perception of corruption) the time gap in starting dates of privatization processes in Chile and Mexico could help explain the initial 1996 lower corruption level in Chile compared to higher level in Mexico and the rest of the countries in the region.

It is also worth mentioning that Chile had also an early start, relative to the rest of the countries in the region, in creating specialized and efficient institutions in charge of supervising the country’s fiscal matters and general issues of state property, such as the *Contraloría General de la República* created in 1972. According to Siavelis, the combination of the *Contraloría* with the highly institutionalized party system in Chile provided a system for controlling corruption and favouring legality in pre-authoritarian Chile. However, these oversight mechanisms were severely weakened during the dictatorship.⁷⁵

⁷⁴ Leaner government, however, is not necessarily cleaner government as argued in Susan Rose-Ackerman, ‘Is Leaner Government Necessarily Cleaner Government?’, in Tulchin and Espach, *Combating Corruption*, pp. 87-104.

⁷⁵ Peter M. Siavelis, ‘Disconnected Fire-Alarms and Ineffective Police Patrols: Legislative Oversight in Post-Authoritarian Chile’, *Journal of Interamerican Studies and World Affairs*, 42 (2000), 71-98.

In sum, Chile's early start in administrative reform and slimming of the State relative to the rest of the countries in the region help explain its low corruption levels. Since these variables are case-specific they can not be generalized to the rest of the countries of the region, *i.e.*, not good candidates for incorporating them into the model and explored again in the whole sample.

3.2. Mexico: The Perils of a Politicized Prosecutorial Organ

From 1996 to 2002 Mexico has two of the better predicted observations in the model (2001, 2002) and two of the most influential observations (1996, 1998). Mexico is a case that confirms the theory and it can help specify the mechanisms that connect judicial institutions with corruption control. In what follows, after briefly discussing in greater detail internal and judicial independence in Mexico and their relation to corruption, I focus on the country's prosecutorial organ. The *ministerio público* is located within the executive branch and, I argue, is perhaps the main factor explaining the relatively high corruption levels in Mexico. The performance of the prosecutorial organ has been recently pointed out as the very "heart of the immunity problem" that characterizes the Mexican criminal justice system.⁷⁶

Internal independence in Mexico during the period of analysis changes from the highest value of four (1996-1998) to the lowest value of zero since 1998, and this change is accompanied by a very slight reduction in corruption. The Mexican judicial council controls appointments and promotions as well as disciplinary matters for all federal lower court judges, permitting the kind of top-down control by senior judges seen in Chile. Although life tenure may ensure a little more internal independence among judges than in Chile, the Mexican council fills lower court judgeships. Life tenure is also granted only to those judges who have served a six-year term and then been ratified by the council. From 1994 until 1998 the council was filled by judges selected randomly from different levels of the judiciary, which guaranteed the highest level of internal independence. However, after strong lobbying from the Mexican Supreme Court judges, a 1998 constitutional reform established Supreme Court control of the council which implied also the loss of internal independence.⁷⁷

On the other hand, the measure of judicial independence in Mexico, from 1996 to 2002, is a six (in a scale of 1-8): (1) the constitution specifies the

⁷⁶ Zepeda Lecuona, *Crimen sin castigo*, chapter III, pp. 155-232.

⁷⁷ See Fix-Fierro, 'La reforma judicial en México'. In addition to institutional factors there are other legal ones that affect internal independence such as the degree of "bindingness" of decisions or the possibility for higher courts to attract a case from a lower court (this is called *poder de atracción* in Mexico). Taking into account these two legal factors, Mexico would have higher levels of internal independence than Chile even in the period when both countries score a zero in the institutional factors. For a discussion on these factors see Julio Rios-Figueroa and Matthew M. Taylor, 'Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico', *Journal of Latin American Studies*, 38 (2006), 739-766.

number of Supreme Court judges, (2) their salary can not be reduced while in office, (3) their appointment is made by the president and the senate, (4) they enjoy a fifteen year tenure, (5) the judiciary itself has power over the jurisdiction of the courts, and (6) the judiciary also controls constitutional adjudication. Is this level too high? So that according to the theory this institutional design would be related to more corruption? Or is it a “medium level” of judicial independence? The two institutional features that do not add points to the measure of judicial independence in Mexico are: (1) impeachment of Supreme Court judges can be made by a simple majority of the House of Deputies, and (2) the judiciary’s budget does not correspond to a fixed percentage of the GDP guaranteed in the constitution. Are these two features enough to check the checkers? Arguably, the power of the purse is important enough so that this institutional design may be closer to the theorized mid-level and thus we should see lower corruption in Mexico. But perhaps the rest of the features make Supreme Court judges independent enough so that they do not feel constrained by the political branches of government. Evidence on judicial behaviour of Mexican highest court judges provides some indication that they do feel constrained by political majorities in the executive and the legislative.⁷⁸ But the question on the “right” level of judicial independence for combating corruption remains open.

Let us look at the institutional location of the prosecutorial organ and its relation to controlling corruption in the case of Mexico. The Mexican president freely appoints and removes the *Procurador General de la República* (the equivalent to the attorney general in the United States) and the *Procurador*, in turn, freely appoints and removes all the *procuradores* at lower levels. There are internal mechanisms of control, such as periodic visits and revisions, that allow higher levels to monitor lower levels, but at the end everybody reports to the *Procurador General*. At the same time, the office of the Mexican attorney general is legally very powerful, in the sense that it enjoys much discretion in the three steps that characterize the prosecutorial process: investigating, charging, and sentencing. This combination of political subordination with strong legal power has been characterized as “strong institution with weak officials”.⁷⁹

The Mexican executive has traditionally chosen the political use of the prosecutorial power to exert pressure on both friends and enemies alike. The saying *para mis amigos todo, para mis enemigos la ley* (“everything for my friends, the law for my enemies”) is particularly true regarding the Mexican *Ministerio Público*. A recent famous case involved the attempt to legally disqualify former Mexico City mayor, Andrés López Obrador, as presidential candidate for the 2006 election. But there are also cases related to

⁷⁸ See Julio Ríos-Figueroa, ‘Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994-2002’, *Latin American Politics & Society*, 49 (2007), pp. 31-57.

⁷⁹ Zepeda Lecuona, *Crimen sin castigo*, p. 339.

corruption, the typical plot being a special investigation that concludes that there is not sufficient evidence to charge a former government official (elected or not) that got incredibly rich during their tenure in office.

While the Mexican prosecutorial organ is relatively efficient at getting things done for the political bosses in selected cases, it is extremely inefficient for prosecuting the vast majority of criminal offences that affect common citizens. One of the problems is the relation between the prosecutors and the police. While in many countries the investigatory police usually act as a filter that deals with most of the minor offences and other common cases that do not merit prosecutorial revision, in Mexico the prosecutors deal with every single case even the minor offences and cases that turn out to be not criminal but, for instance, administrative offences.⁸⁰ The consequence, of course, is that prosecutors have an immense caseload and delays, lost files and poor attention to the citizens are a constant. This inefficiency, in turn, creates opportunities for prosecutors demanding “speed money” and citizens that are willing to pay the bribe in order to move their case (or frustrated citizens that simply do not bother to either report crimes or collaborate with investigations).

In sum, Mexico is a case that confirms the theory and shows how when the prosecutorial organ is located within the executive power, the latter can use the law to protect its friends and attack their foes.⁸¹ This is easier when there are no limits to the executive appointment and removal procedures for prosecutors and when this political subordination is coupled with strong legal prerogatives and wide discretion regarding the investigation of a crime and the charging of a suspect (*e.g.* manipulating accusations and possible sentences). The relation of the prosecutors with the investigatory police is also important. When the police do not act as a filter that lets go through only the cases that merit revision by a prosecutor, this office gets an immense number of cases that promote inefficiency. Inefficiency, in turn, is an incentive for administrative corruption in the form of, for instance, “speed money”.

⁸⁰ Zepeda Lecuona, *Crimen sin castigo*, p. 212.

⁸¹ As recent scandals in the U.S. show, no country is immune to this potential flaw in institutional design. See the *New York Times* editorials during April 2007.

Conclusions

While studies that assess the impact of political institutions on corruption (e.g. electoral systems, federalism, presidentialism or parliamentarism) acknowledge the importance of an independent judiciary as an intervening variable, there is usually little beyond such acknowledgement. Other studies that consider the impact of judicial independence on corruption more directly do not, however, distinguish between different types and ranks of courts and judges or different judicial institutions. This paper aims to contribute to the advances made in the study of corruption by analyzing theoretically and empirically in a systematic way the relation between different judicial institutions and corruption control.

Based on the doctrine of checks and balances, this paper argued that the relationship between judicial independence and corruption is U-shaped. When lower court judges are more independent from their hierarchical superiors, hence not closely monitored and checked, they will have more incentives to accept bribes and corruption will tend to increase. Similarly, if the prosecutorial organ is located within the executive branch prosecutors will have more incentives to serve their political boss rather than the public. The multi-method empirical analysis carried out in this paper showed that there is empirical support for these propositions. Econometric results show that the perception of corruption tends to increase with higher levels of internal independence and with prosecutorial organs subordinated to the president. The more general U-shaped relationship between judicial independence and corruption could not be confirmed or disconfirmed. For the countries and years in the sample, at low levels of judicial independence the level of corruption perception tends to be higher, but there is much uncertainty about what happens at higher levels of judicial independence.

The case study on Mexico shows how the institutional location of the prosecutorial organ connects to higher incentives for corruption via not only the appointment procedures of the prosecutors but also the extent of their legal discretion in investigating and charging suspects. The case study on Chile reveals, among other things, that the existence of institutions explicitly created to oversee irregularities in the management of public funds or alleged malfeasance of government officials, such as the strong pre-dictatorship *Contraloría*, is an interesting avenue for systematic research. Of course, this specialized agency needs to have certain characteristics such as independence, good funding and good legal teeth, in order to function effectively.

The results of this paper have relevant implications. Perhaps the main one is that there is both theoretically founded reasons and some empirical evidence that certain judicial institutions help control corruption perception.

The search for a “correct” mix of independence and accountability for non-elected politicians such as judges and prosecutors seems to demand more research and careful analysis for both academics and politicians. Institutions such as judicial councils, which usually administer the judiciaries and the careers of lower court judges (*i.e.*, internal independence) deserve more attention also by academics and practitioners alike.

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