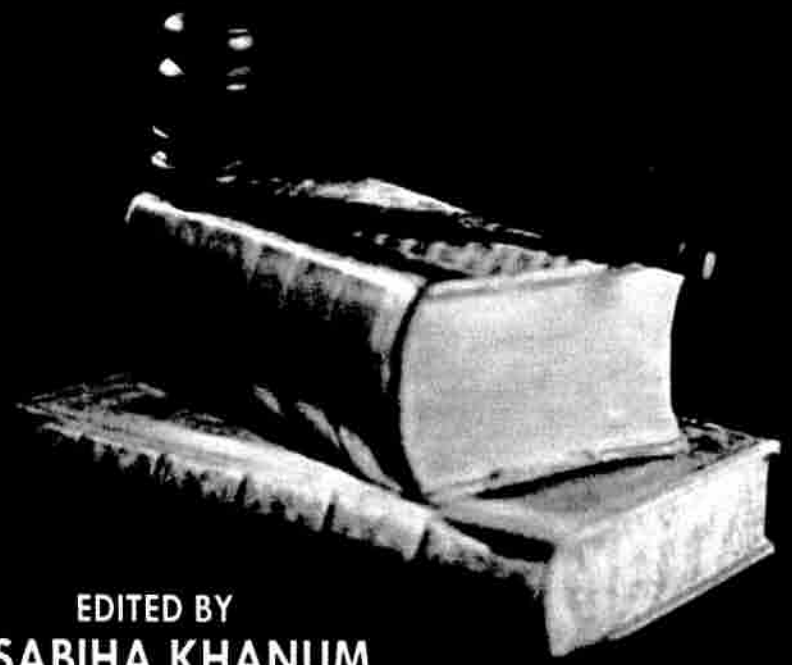
Judicial Independence and Accountability

A DEBATE



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Overview

Judiciary is one of the main constituents of democracy to uphold the rule of law. All the democratic countries acknowledge the judicial independence as it plays a crucial role in democracy. The values such as liberty, equality and freedom can only be secured by a rigorous application of the rule of law, which is the foundation for a democratic society. The rule of law mandates that the courts have jurisdiction to scrutinize all the actions of government and ensure their constitutional validity. Only an impartial and independent judiciary can protect the rights of an individual and provide equitable justice, without fear or favour. Thus it is necessary for the judiciary to perform its functions in an atmosphere of independence and freedom from all kinds of political pressure. In order to achieve impartial and socio-economic justice, all the democratic countries based on rule of law recognize the significance of judicial independence and constitution provides the separation of judiciary from the executive and legislature. This is to prevent any outside influence over the rulings of judges. This sort of independence is necessary to guard the constitution and rights of the individuals.

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When and Why Do "Law" and "Reality" Coincide? De Jure and De Facto Judicial Independence in Chile and Mexico

Andrea Pozas-Loyo and Julio Ríos-Figueroa***

Under what conditions are constitutional laws likely to be observed or ignored? Authors explore this question regarding the constitutional provisions that establish an independent judiciary, which is crucial for the rule of law and horizontal accountability. They argue that whether these constitutional provisions can be considered a good proxy for judicial independence in reality depends on the political conditions that establish the distribution of power among the ruling political groups. Having identified those political conditions, and what Supreme Court judges can expect from them, authors explore what is the likely behavior of these judges regarding decisions on cases where the government violates the rule of law or horizontal accountability. Authors illustrate theoretically informed typology with examples from Mexico and Chile.

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Our aim in this chapter is to determine under what conditions constitutional laws are likely to be observed or ignored. We explore this issue by focusing on the conditions under which the constitutional provisions that establish an independent judiciary are likely to be honored. The observance of these provisions is particularly important given that judicial independence is crucial for the establishment of the rule of law (Raz 1977, 198) and of horizontal accountability (O'Donnell 2003).[1] Recent work on countries as disparate as Argentina (Chavez 2004) and Tanzania (Widner 2001) confirms that not only academics but also politicians, judges, and representatives of civil society agree on the fundamental role that an independent judiciary plays. It follows, then, that observance of these provisions regarding an independent judiciary makes the observance of other constitutional provisions more likely, such as those that establish individual rights and the separation of powers.

In Latin America the distinction between formal and informal rules dominates the debate on this topic. While recent work (such as Helmke and Levitsky 2004) has began to systematize this discussion, there is still a broadly held view that in Latin American "quasi-democratic oligarchies the administration of justice in practice is nearly always worse than the written rule on which it operates" (Groth 1971, 21, cited in Chavez 2004, 23). In other words, the consensus in Latin America seems to be that the level of judicial independence de jure is a lot higher than it is de facto (see, for example, Verner 1984, 463; Rosenn 1987, 2; Larkins 1996, 615; O'Donnell 1996, 40-1; Popkin 2002, 112; Mainwaring 2003, 5; Chavez 2004, 23).

In this chapter, we challenge this consensus and argue that it is based on an oversimplified look at legal texts. Our first task is to capture the level of judicial independence that the constitution grants. To do so we use a theoretically informed, reproducible, and comparable de jure measure of judicial independence that reveals a complex and nuanced picture. Using this measure of de jure independence as a premise, we pin down our initial general question: under what circumstances can we expect the measure of judicial independence de jure to be a good proxy for what we can expect to happen in reality?

We argue that whether this de jure measure can be considered a good proxy or whether we can expect it to overestimate or underestimate judicial independence in

reality depends on the political conditions that establish the distribution of power among the ruling political groups. Having identified those political conditions, and what Supreme Court judges can expect from them, we explore the likely behavior of these judges regarding decisions on cases where the government violates the rule of law or horizontal accountability. Having laid out our theoretical expectations in six different scenarios, we proceed to illustrate them using examples from Mexico and Chile.

The chapter is divided into three parts. In the first, we provide some clear and theoretically grounded conceptual tools. In the second, we lay out our arguments and theoretical expectations, and we contrast these expectations to our case studies. Finally, we conclude.

I. Conceptual Clarifications and Definitions

Independence – To and Independence – From

Research on judicial independence can be separated into two types of studies: the first set focuses on judicial behavior and the second on the institutional framework. In some cases these are perceived as two competing ways of studying judicial independence. In contrast, we will show that they are interdependent and hence better viewed as two complementary forms of judicial independence.

Research on judicial behavior usually approaches the question of independence through the study of actual decisions. These studies consider that judicial independence exists if judges are *independent to* decide, for instance, against the government if there was a violation of the constitution. From this perspective, the question of whether there was judicial independence in a given context becomes whether decisions in the particular context were independently taken. Hence much of the researcher's effort goes to establish criteria to enable him or her to characterize a given decision as independent or not independent. This is what we call *independence-to*.[2] In this chapter we focus on judges' *independence to* take decisions against the government in cases that involve the protection of rights from governmental abuses because these cases are directly linked to the rule of law and horizontal accountability.[3]

Having defined independence-to, we rephrase our question. We seek to answer why and under what conditions the level of independence-to can be expected to coincide with the level of judicial independence de jure and, further, in cases where such coincidence is not likely to occur, whether we can expect that the degree of judicial independence-to will be higher or lower than the level established by our measure of judicial independence de jure.

A second approach to judicial independence is the study of the incentives and limits that judges have vis-à-vis other governmental agents. For this type of study the question is whether there is judicial independence from other governmental agencies.[4] The degree of independence-from in a country can be assessed by looking at the laws that establish the relation between judges and/or the judiciary and other governmental branches. But clearly that is not enough. It is also necessary that those laws are not violated. Therefore, we consider that the degree of judicial independence-from in a given country is, say, high if and only if: (a) there is a high degree of de jure judicial independence, and (b) the politicians act in accordance with the legal provisions that determine such degree. We thus need 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.

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

Judicial Independence De Jure

The degree of independence de jure in a given country can be assessed by looking at its constitution. The study of de jure judicial independence in Latin America has been long overlooked because it is commonly believed that the law is largely ignored and does not play any important role in the region. We challenge this view and argue that it is built on an oversimplified look at legal

texts. True, in all Latin American constitutions there is an article stating that the judiciary is independent and that judges are bound only by law. But there are many other articles in which the particular institutional mechanisms that would make the preceding sentence a reality are specified, and these articles give a much more nuanced and complex picture of the components of judicial independence according to a pure de jure measure.[5]

We establish the level of judicial independence de jure by unpacking the concept into two of its components, measuring each based on a set of observable institutional variables, and coding the constitutions of the countries according to rules consistent with a precise definition of independence.

We define judicial independence de jure as 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 de jure controls "A" retains over "B". In the literature there are two important and clear distinctions. The first is between the individual judge and the institution of the judiciary. The second is between pressures on the judge from within and pressures from outside the judiciary. Using autonomy to refer to the judiciary and independence to refer to individual judges, we unpack the concept into two components: Autonomy, or the relation between the elected branches of government (actor "A") and the judiciary (actor "B"); and External Independence, or the relation between the elected branches of government (A) and Supreme Court judges (B).

Autonomy

An autonomous judiciary decides on its own basic institutional structure, in contrast to a heteronomous judiciary, which would have its structure controlled by the other branches of government. The basic institutional structure of the judiciary is composed primarily of courts, their number, location, jurisdiction, the number of judges sitting in them, and whether the judiciary has or does not have the power of constitutional adjudication with *erga omnes* provisions.[6] We can distinguish between three possible outcomes regarding who controls those variables: one organ (executive or legislative), two organs (executive and legislative), or the judiciary itself. The degree of autonomy would be highest if the judiciary itself controls those variables, lower if two organs control them, and lower still if they are in the hands of only one organ. Then if the constitution[7] of a

country: (a) specifies that the number and jurisdiction of the courts are to be decided by the judiciary itself, (b) establishes the number of Supreme Court judges,[8] (c) provides a fixed percentage of gross domestic product (GDP) for the judiciary, and (d) establishes that effective judicial review lies within the judiciary, the judiciary of that country would have the highest degree of de jure autonomy.[9]

External Independence

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

If the constitution specifies that Supreme Court judges are appointed by the judiciary or by at least two organs of government, we consider that fact as an appointment procedure counting toward de jure external independence. Similarly, if the constitution specifies that Supreme Court judges' tenure is longer than that of their appointing authorities, we count it toward external independence. Impeachment proceedings also relate Supreme Court judges with the elected branches of government. We are interested in the accusation part of the impeachment process, because we want to capture the degree of potential influence over Supreme Court judges. Thus, if the constitution specifies that Supreme Court judges can be impeached by the judiciary or by at least a supermajority of one chamber of Congress, we add that to external independence. Finally, we also add to external independence if the constitution specifies that Supreme Court judges cannot have their salaries reduced while in office.

We can take autonomy and external independence as two distinct components of judicial independence. In our case studies, we measure each component separately and also provide factual information about both. However, for the sake of clarity, in the theoretical arguments that follow we rely on a rather crude distinction between "high" and "low" de jure judicial independence. In particular, when we say that the degree is "high" we mean that the combined score of autonomy and external independence is at least 4 (out of a possible 8).

Accordance between De Jure Independence and the Actions of Politicians

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

The de jure degree of autonomy is determined by who has control over the relevant variables. Suppose we have a country with a very low level of de jure autonomy, meaning that the elected branches have the legal faculty to change the number of courts, their jurisdiction, the number of Supreme Court judges, and to determine the budget of the judiciary. Suppose further that the politicians have not used these legal faculties to alter the structure of the judiciary. Would we say in this case that the politicians' actions were not in accordance with the de jure autonomy? Clearly not; their acts would have been in accordance with the faculties that the constitution grants them, and hence the expected level of independence-from would correspond to the level of de jure independence.[10]

In a nutshell, to violate a legal provision is to act in ways that are explicitly prohibited by it. The executive would violate the provisions that establish autonomy if she did things that she does not has the legal faculty to do (such as to change the number of Supreme Court judges when the constitution gives this power to a judicial council). Therefore, a case where the politicians do not exercise their legal faculties to transform the structure of the judiciary should not be conflated with a case where they do not have those faculties. The former is a case of low de jure autonomy with politicians' actions in accordance with the constitution, while the latter is a case with high de jure autonomy. Cases of low de jure where there are violations of legal provisions are highly unusual. However, it is important to note that, given that a high degree of independence-from requires a high degree of independence de jure, these cases would not amount to a higher level of independence-from than the level of de jure independence.

The same reasoning applies regarding external independence. De jure external independence establishes the controls that the elected branches have over Supreme Court judges. The fact that politicians do not use these faculties to punish judges (if, for example, they do not use their legal faculties of impeachment) is not the same as to make the judges externally independent-from. To have a generous master is not the same as to be free.[11] To see what reasons support our definition of independence-from in this respect, it is useful to note that the sole fact of the possibility to impeach may undercut a Supreme Court judge's independence, just as the possibility of being punished may deter a child from an action that violates the family's norms. Clearly, we would not infer from the lack of instances of punishment that a family's norms do not limit the child's actions; nor can we infer from the lack of impeachment that there is higher external independence.

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

Multilateral and Unilateral Constitutional Settings

A given state has a multilateral constitutional setting if and only if there are at least two different political parties in the legislative and no political group has the capacity to unilaterally amend the constitution given the established requirements.[12] Here it is important to note that "political group" refers not only to political parties, but also to other types of groups with political power, such as a military junta.

A given state has a unilateral constitutional setting if and only if there are not two different political parties in the legislative and/or a single political group has the capacity to unilaterally amend the constitution given the requirements contained in the constitution. For our purposes, it is important to note that if those in power have the capacity to legally transform the provisions that establish the level of judicial independence de jure, we are in a unilateral setting.

Divided and Unified Government

A given state has a unified government if and only if a political party or group has the capacity to enact laws, which in most cases is equivalent to saying that a single party controls the executive and has a majority in the legislative. A given state has a divided government if and only if no political party or group has the capacity to enact laws by itself, which in most cases is equivalent to saying that the political party of the executive does not have a majority in the legislative. Note that this distinction only makes sense in multilateral constitutional settings since all unilateral settings are by definition unified.[13]

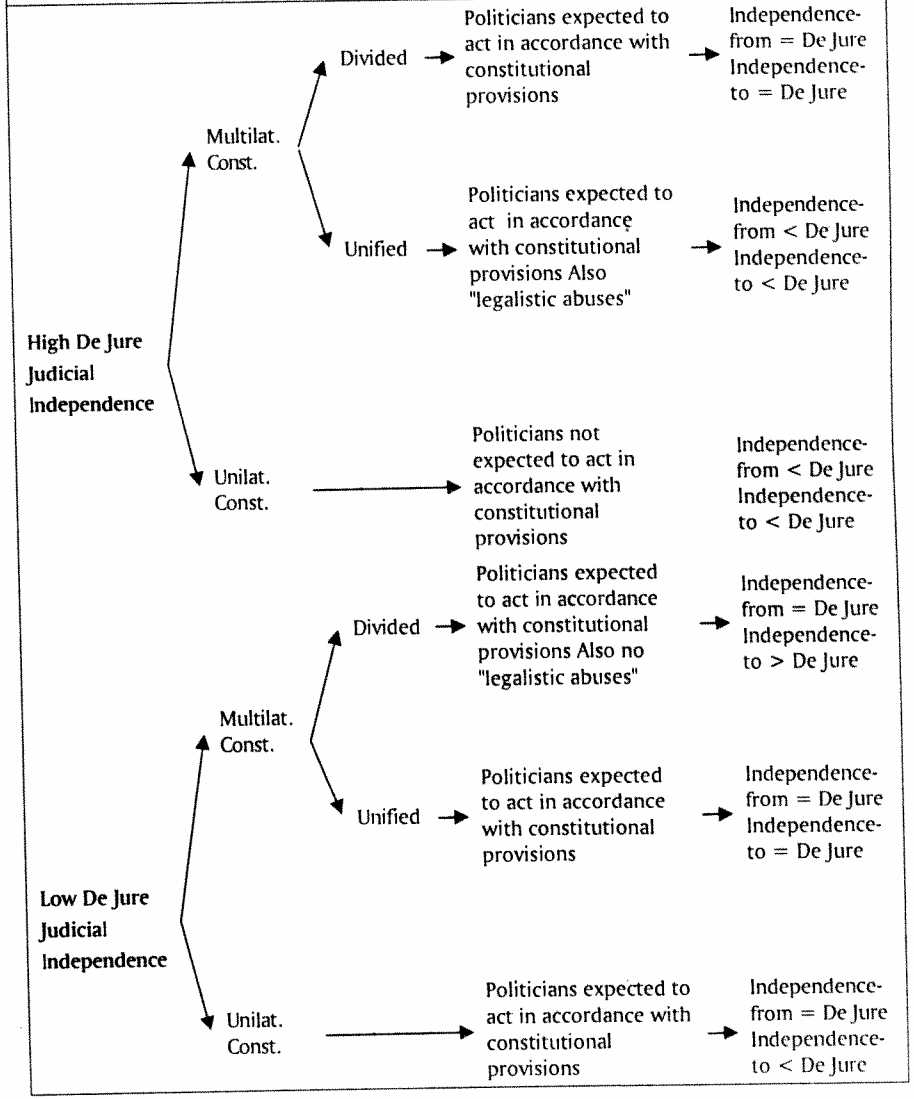
II. When and Why Do Judicial Independence in Law and Reality Coincide?

To answer this question, we first determine whether we can expect members of the executive and legislative branches to act in accordance with the provisions that establish the level of independence de jure. This analysis rests on different combinations of the constitutional setting (multilateral or unilateral) and government characteristics (unified or divided). These conditions, joined with the expected actions of the elected branches, enable us to determine whether we can anticipate coincidence between the levels of independence-to and independence-from and the level of de jure independence, and, if not, to establish whether we expect their levels to be higher or lower than the level of independence de jure. Our theoretically informed typology is summarized in figure 1.

In what follows, we briefly argue what we expect in each of the cases, and we illustrate each case with examples from Mexico and Chile, countries with high and low levels of judicial independence de jure, respectively.[14] Within each case we discuss all the elements of our argument and provide an example. Our measure of judicial independence de jure is taken from Ríos-Figueroa (2006). For actual judicial behavior we rely on a number of secondary sources and other data we have collected. Our discussion of the cases is not intended as a detailed description of the historical circumstances in the two countries, though we suggest references for the interested reader. It is very hard to conclude unambiguously without systematic behavioral data whether the politicians acted in strict accordance with the constitutional provisions, or whether the judges

exercised the expected degree of independence-to. Nonetheless, we believe that with the information at hand we can provide good illustrations of our theoretical expectations.

Figure 1



Case 1: High De Jure Judicial Independence, Multilateral Setting, Divided Government

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

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

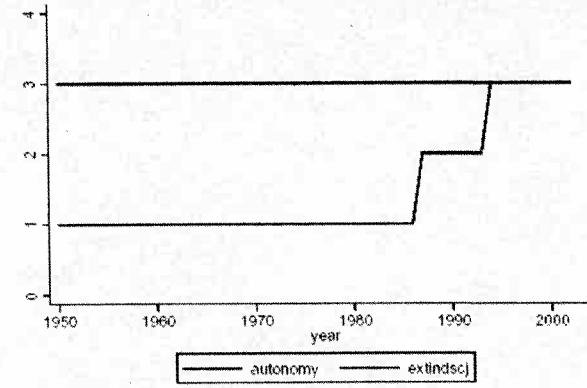
Illustrative Example: Mexico, 1997 – today

High De Jure Judicial Independence

During this period, Mexico has enjoyed a high degree of judicial independence de jure, both in autonomy (with 3 out of 4 points) and in external independence (again 3 out of 4 possible points) (see figure 2). Regarding autonomy, the number and jurisdiction of the courts are currently under the control of the judiciary through the Consejo de la Judicatura (Judicial Council) with judges in the majority (Art. 94). In addition, the number of Supreme Court judges is specified in the Mexican Constitution, meaning that to alter this number is out of the reach of simple majorities because it entails a constitutional amendment.[15] On the contrary, the budget for the judiciary is determined by the executive and legislative. Unlike constitutions of other countries, the Mexican one does not specify a percentage of GDP for the judiciary; and each year the judiciary has to bargain for its budget (this takes away the last possible point). Finally, since the judicial reform of 1994, the Mexican Supreme Court concentrates the power to effectively control the constitutionality of laws and acts of government in the country.

Figure 2

Autonomy and External Independence in Mexico, 1950-2002



NOTE: This figure shows that external independence in Mexico has been constant at 3 since 1950, while autonomy increased from 1 to 2 in 1987, and then to 3 in 1994.

The degree of external independence de jure in Mexico during this period is 3, as has been the case since 1944 (see figure 2). These points correspond to the tenure, salary, and appointment of Mexican Supreme Court justices: (1) their tenure is fifteen years (Art. 94), longer than the six-year tenure of their appointing authorities, the President and the Senate;[16] (2) their salary is protected in the Constitution (Art. 94); and (3) they are appointed by two organs of government (Art. 96). The only variable that makes justices dependent in Mexico is impeachment since a simple majority in the Chamber of Deputies can initiate the impeachment process.[17]

Multilateral Setting

To distinguish the periods under which a single power group was able to amend or change unilaterally the constitutional provisions regarding judicial independence, we look at the constitutional rules for amendment. According to the Mexican Constitution (Art. 135), the amendment procedure requires a supermajority vote of two-thirds in both houses of Congress plus the approval of at least a majority of the state legislatures (via majority vote). From 1929 until 1988, the Institutional Revolutionary Party (PRI) controlled the different organs needed to amend the Constitution, meaning that during those years all amendments (more than 400) were done unilaterally by the PRI.

Following this criterion, we suggest that the Mexican Constitution of 1917 started on the mutilateralization path in 1988 when the PRI lost the monopoly over the constitution-making process when it yielded its supermajority in the Chamber of Deputies (see Pozas-Loyo 2005).[18] After 1988, the opposition parties in Mexico also became constitution-makers and have contributed important amendments. Those undertaken in 1994 are of special importance for our purposes; one is the judicial reform that increased the de jure levels of autonomy.

Divided Government

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

What Do We Observe?

We expect, according to our argument, accordance between de jure independence and the actions of politicians, and that is what we observe in Mexico since 1997. With respect to external independence, two Supreme Court judges have left according to the rules set out in the 1994 judicial reform (Juventino Castro y Castro and Vicente Aguinaco) and one died (Humberto Román Palacios). To fill the vacancies, three new Supreme Court judges (José Ramón Cossío, Margarita Luna Reyes, and Sergio Valls) were appointed as prescribed by the Constitution. In addition, there have been no impeachments. Judges' salaries have not been decreased, and they are now competitive and attractive not only at the Supreme Court level, but also for lower court judgeships (Fix-Fierro 2003, 313). Regarding autonomy, we can say that there has been no meddling with the Court's jurisdiction, and the Supreme Court's role of constitutional guarantor has also been respected.[19]

Given that the level of judicial independence de jure has been high and there has been accordance between the constitutional provisions and the actions of politicians, the expected level of independence-from in this period coincides with the level of de jure independence. Regarding evidence on the level of independence-to, it is interesting to note that it increased precisely in 1997 when the PRI lost the majority in the Chamber of Deputies and the first divided government appeared in Mexico. Evidence of this is that the probability for the Supreme Court to decide against the PRI increased from a mere 0.04 for 1994-1997, to 0.44 after the PRI lost the majority in the Chamber of Deputies in 1997 and to 0.52 after the PRI lost the presidency in 2000 (Ríos-Figueroa n.d.). These facts seem to support our claim that in this scenario the de jure levels of judicial independence are a good proxy for independence-to.

Case 2: High De Jure Judicial Independence, Multilateral Setting, Unified Government

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

However, we can expect that any violation of the constitutional provisions protecting independence by either branch could be capitalized by the minority party in Congress. Admittedly, the capacity of this minority to impose costs on the government will vary depending on context (the "political capital of the government"). However, given that we are in a multilateral setting, we can expect that the minority in Congress would be able to make considerably costly any clear violation of the de jure provisions.[20]

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

Given the above, it follows that the expected level of independence-from will be equal to or lower than the level of judicial independence de jure, depending on the expected costs of committing legalistic abuses. Regarding independence-to, Supreme Court judges would expect politicians to use their legal prerogatives if decisions do not favor them.[21] Also, depending on the context, they could perceive that legalistic abuses are likely to occur. But in a multilateral setting, the costs to Supreme Court judges for not taking action against flagrant governmental abuses are higher than in a unilateral setting, so Supreme Court judges would also expect the minority in Congress to denounce and try to capitalize on these non-decisions if they occur.[22] Arguably, these expectations will ground a level of independence-to lower than the de jure level but not as low as we would expect if we were in a unilateral setting with the same level of independence de jure.

Illustrative Example: Mexico, 1988 – 1997

High De Jure Judicial Independence

During this period the level of autonomy was 2 until 1994, when it increased to 3, and the level of external independence was constant at 3. Regarding autonomy, in addition to having the number of Supreme Court judges specified

in the Constitution, the judicial reform in 1994 increased the level one point by granting the Supreme Court the power of constitutional adjudication and providing effective legal mechanisms to challenge the constitutionality of laws and acts of government (see figure 2).[23]

Unified Government

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

What Do We Observe?

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

Since 1988 the constitutional provisions regarding autonomy and judicial independence have been mostly honored but certainly to a lower degree than after 1997. For instance, regarding judicial appointments and tenure, there is a notable contrast between the administration of Miguel de la Madrid (1982-88), which appointed twenty of the twenty-six Supreme Court judges (80 percent), and the administration of Carlos Salinas de Gortari (1988-94), which appointed eight of twenty-six judges (30 percent) (Magaloni 2003, 288).[24] This seems to conform to what we call "legalistic abuses." Now, as part of the 1994 judicial reform that increased the de jure level of autonomy, President Ernesto Zedillo appointed all the new Supreme Court judges. This meant that the provisions regarding life tenure for sitting Supreme Court judges in 1994 were violated, although we should note that the change of all justices was part of the bargain between the PRI and the National Action Party (PAN) that made the judicial reform possible. For the judges appointed since 1995, provisions regarding tenure, appointment, salary, and impeachment for Supreme Court justices have not been violated.

On autonomy, the constitutional rules that give the judiciary power over the number of courts and judges, as well as their jurisdictions, have been honored. And the judiciary has been granted the necessary means to carry out its projects. If we look at the budget for the judiciary in these years as a share of GDP, we see that it has been steadily increasing, from 0.13 percent in 1990 to 0.39 percent in 1995 (Fix-Fierro 2003, 285), even though there is no constitutional mandate for a minimum fixed amount.

Regarding independence-to, it is interesting to note again (see Case 1) that from 1994 to 1997 decisions against the PRI occurred with a probability of 0.04, lower than we would expect given the level of independence de jure. Although we do not have data regarding decisions before 1994, this fact is consistent with our expectation that independence-to would be equal to or lower than the independence de jure.

Case 3: High De Jure Judicial Independence and Unilateral Setting

Unlike previous cases, here the ruling political group has an extraordinary concentration of power. It is the only political group in the legislative and/or has the capacity to unilaterally amend the constitution given the requirements contained in the constitution. In addition, the ruling group does not face an important minority opposition in the legislative – that is, a minority large enough to stop a constitutional amendment. As we argued in the previous case, this fact would reduce the costs of violating the de jure provisions of judicial independence. Hence in this scenario we expect to observe violations of the constitutional provisions that grant the judiciary a high level of judicial independence. It follows that we expect the level of independence-from to be lower than the level of judicial independence de jure.

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

Illustrative Example: Mexico, 1950-1988

High De Jure Judicial Independence

During most of this period the level of autonomy in Mexico was 1, corresponding to the number of Supreme Court judges that is specified in the Constitution. In 1987 the level of autonomy increased to 2 when Miguel de la Madrid delegated control over the number and jurisdiction of the courts to the Supreme Court (see Fix-Fierro 2003). Regarding external independence, the level was constant at 3 (see Cases 1 and 2 above and figure 2).

Unilateral Setting

The unilateral setting actually goes back to 1929 and the creation of the Revolutionary National Party (PNR), the predecessor of the PRI. During this time, as we said above (see Case 2), the PRI met the requirements to amend the Constitution unilaterally.

What Do We Observe?

We argued that, given the extraordinary concentration of power in this case, we should expect the levels of independence-from and independence-to to be lower than the level of judicial independence de jure, and this is what we observe in Mexico in this period. Despite the high degree of de jure external independence, during this period the constitutional provisions were either violated or ignored. This does not mean that there were constant conflicts between the branches or demonstrations against violations of the law. The Mexican judiciary and Supreme Court judges during this period were politically subordinated. This situation is better understood through the logic of a political system dominated by a single party.

Dominant-party rule secured the complicity of the judicial branch in the construction and consolidation of the Mexican political system under the hegemonic rule of the PRI (Domingo 2000, 726). The Supreme Court was just another stop in a political career, and people coming from an elected office or a bureaucratic post could go to a governorship or a seat in the national Congress after serving on the Supreme Court (see Magaloni 2003, 289-90). Thus, with the judiciary as another building block within the corporatist state structure, it is not

surprising that the Mexican judiciary became immersed in a political system characterized by clientelism, state patronage, and political deference toward the regime (Domingo 2000, 727).[25]

Regarding external independence, even though the Constitution mandated life tenure for Supreme Court judges, every six years the incoming President used to appoint as many as 72 percent of the court judges (Ruiz Cortines, 1952-58) and no less than 36 percent (López Mateos, 1958-64), but on average from 1946 to 1988 they appointed more than half the court (Magaloni 2003, 288). As Magaloni notes, from 1934 to 1994, close to 40 percent of justices lasted less than five years, coming and going according to the presidential term: "The President could thus somehow create vacancies to be filled by justices he appointed or, put in other terms, he could either dismiss justices or induce early retirements or both" (Magaloni 2003, 289).

Regarding independence-to, we do not have much data, but González Casanova (1970) found that among cases involving the President of the Republic decided between 1917 and 1960, claimants won in approximately 34 percent of all disputes. In a similar analysis focusing on labor cases, Schwarz (1977) found that the courts decided around half the time against the government. It is important to note, however, that these findings were based on a small sample of *amparo* cases which, in addition, reduce the political impact of judicial decisions because in these cases the effects are restricted to the parties in the case. Moreover, the government's responses to social movements in this period without doubt violated individual rights, as in the killings of 1968 and 1971, and there was no judicial involvement in punishing those crimes. We can conclude, then, that the decisions made by Supreme Court judges during those years did not challenge the government in any important way, suggesting that their level of independence-to was lower than the level of judicial independence de jure.

Case 4: Low De Jure, Multilateral Setting, and Divided Government

In this scenario political power is highly dispersed. Both constitutional and regular legislative changes require the cooperation of at least two political parties. But it is important to keep in mind that in this scenario the constitution grants to the elected branches important controls over judges and the judiciary. Not to make use of those controls does not constitute a violation of de jure

independence. Also, to act in ways that are not prohibited by the constitution does not amount to a violation of it. In this setting, to violate constitutional provisions would mean proceeding in ways that directly contravene such provisions – for instance, if the President appoints Supreme Court judges when the constitution grants this faculty to the legislative. As we said above, these are very rare cases. Hence in this setting we can expect politicians not to violate de jure independence. Thus the level of independence-from will coincide with the level of independence de jure.

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

It is important to mention that in cases with low de jure judicial independence (Cases 4, 5, and 6) we may also find "behavioral equivalence." For instance, suppose a case with low de jure and with politicians respecting the law – that is, not manipulating judges. This last outcome may be explained either because the law is working or because judges are not challenging politicians. Given that there are three scenarios with low de jure and that we know the scenario of a given country, it is noteworthy that our typology allows us to discern the different reasons underlying the same observed behavior.

Illustrative Example: Chile, 1990-2000

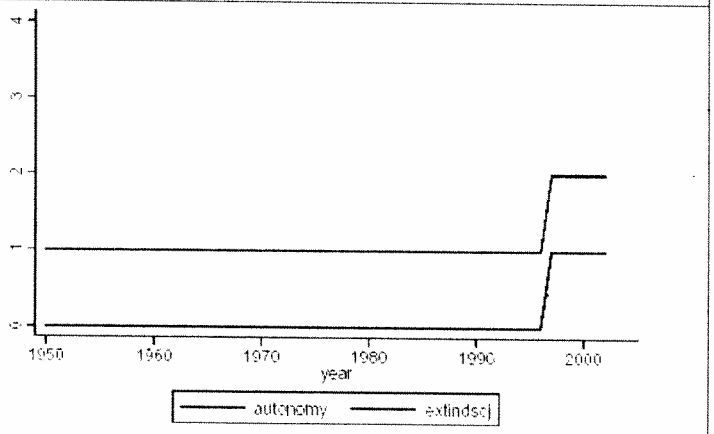
Low De Jure Judicial Independence

The Chilean constitutions included in our analysis are the Constitution of 1925 with the reforms of 1970 and the Constitution of 1980 with reforms until 2001. The degree of autonomy of the Chilean judiciary was zero until 1996 when it increased to 1 (see figure 3). The number and jurisdiction of courts, the number

of judges sitting on the Supreme Court, and the budget for the judiciary were under the control of the executive and legislative organs in Chile until 1997, when only one variable changed: the number of Supreme Court judges was specified in the Constitution. The fourth variable, constitutional adjudication, does not add to the autonomy of the Chilean judiciary. For the power of constitutional adjudication to be politically effective, the constitution itself should specify that the effects of decisions in constitutional cases are to be valid for all *(erga omnes)* and not only for the participants in the case *(inter partes)*.[26] This is the case of Chile until 1970. In that year, however, the Constitutional Court was created, together with legal instruments with *erga omnes* effects. The reason why this power does not add to the autonomy of the Chilean judiciary is that the Constitutional Tribunal is not part of the judiciary (see Correa Sutil 1993).

Figure 3

Autonomy and External Independence in Chile, 1950-2002



NOTE: The figure shows that levels of autonomy and external independence in Chile were constant at a low 0 and 1, respectively, until 1997, when both increased one point.

External independence for Chilean Supreme Court judges has increased slightly over the period of analysis. Until 1996 its level was constant at 1, corresponding to life tenure for Chilean Supreme Court judges established since

the Constitution of 1925. In 1997 a constitutional amendment regarding the appointment of Supreme Court judges increased the level of external independence to 2 (see figure 3). Until then, the President had the power to appoint a judge from a list of five names proposed by the Supreme Court. But since 1997 the President nominates one Supreme Court justice out of five proposed by the Supreme Court, and the Senate approves the nomination via a supermajority (two-thirds) vote. The other two variables do not add to the level of external independence of Chilean Supreme Court judges: their salaries are not protected in the Constitution, and it is quite easy to impeach them. No less than ten and no more than twenty deputies can accuse a magistrate, after which a simple majority of the House determines if he is accused or not. If accused, the Senate adjudicates by simple majority.

Multilateral Setting

To amend the Chilean Constitution of 1925 required that an amendment be proposed and passed by simple majorities in both houses of Congress and then be voted on again without debate after a "cooling down" period of sixty days. Then the projected amendment would be sent to the President to be signed or modified. If modified, the project went back to the Congress, which could approve or not approve the changes. If Congress voted not to approve by a two-thirds majority, the President had the discretion to either promulgate the changes or call a plebiscite within thirty days for ratification. The result of the plebiscite would be final (Arts. 108 to 110).

The Chilean Constitution of 1980 established a similar procedure, but it requires a supermajority vote of three-fifths (or two-thirds, depending on the issue) in both houses for proposing an amendment. After this vote, the "cooling down" period and the consequent requirements of presidential, congressional, or popular approval are similar though they include more procedural details which may be of importance (Arts. 116-119). The important point here is that both before and after 1980, a two-thirds control of both houses of Congress and the presidency was necessary for a single group to be able to amend the Constitution at will. Control of the three branches is essential since the President can call for a plebiscite after two-thirds of both houses have insisted on the amendment.

Based on the previous amending rules, Chile has been living under a multilateral setting both before and after the 1973-1989 interlude when the military junta led by Augusto Pinochet ruled the country. It is interesting to note how the Constitution of 1980, created in a unilateral setting, paved the way to a multilateral setting. Shortly after the coup that toppled Salvador Allende in October 1973, a commission was formed to study constitutional reforms. In October 1978, the commission submitted a draft of the new constitution and sent it to the Council of State. In July 1980, the Council presented the new draft to Pinochet. Then Pinochet sent it to an ad hoc committee which made "85 important changes and 59 fundamental changes" (Navia 2003, 79). The Chilean Constitution as it stood in 1980 created, according to our classification, a unilateral setting in Chile.

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

Divided Government

After sixteen years of military rule, "La Concertación" took the reins of government in 1990 and continues to govern today. Mainly because of the Chilean electoral system, which was drafted by the military regime after losing the plebiscite in 1988, the composition of the two houses of Congress has been roughly equally divided between the coalition of parties on the left and the coalition of parties on the right (see Carey 2002, 225). In addition, the 1980 Constitution included a number of nonelected senators that, when added to those from the center-right coalition, effectively eliminated the possibility that La Concertación would control the two houses of Congress and the presidency.

During this period, La Concertación held a majority in the Chamber of Deputies and among the elected senators as well. However, because of the nonelected senators, the center-right coalition enjoyed a de facto majority in the Senate until 1998. That year, Pinochet was arrested and a senator from the right

was stripped of his immunity, creating a tie between the two coalitions in the Senate until March 2000. Because a tie is virtually the same as a divided government, we consider the entire period as one with a divided government.

What Do We Observe?

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

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

As we would expect, the facts conform to constitutional provisions. Regarding autonomy, using their constitutional prerogatives, politicians have withdrawn jurisdiction from the courts when they do not want judges to resolve cases in areas that politicians deem important. This was the case with labor disputes in the 1920s (Correa Sutil 1993, 94) and also with the creation of a Constitutional Court in 1970, which was situated outside the judiciary in order to take political cases out of the court's ordinary jurisdiction (Clark 1975, 430). During the government of Salvador Allende, special "neighborhood tribunals" – courts outside the formal judicial system and staffed by Socialist Party militants with little or no legal training – were created to rule on issues ranging from petty crimes and neighborhood disputes to squatters' rights and land confiscation (Prillaman 2000, 139).

Other elements of autonomy, such as the budget, also waxed and waned depending on the interests of the political class, which made use of the prerogatives that the Constitution granted to them. From 1947 to 1962, the

budget for the judiciary actually decreased by half, reaching its lowest point in the late 1960s because the political class considered the judiciary more of an obstacle than an ally in their quest for social justice (Correa Sutil 1993, 96; Peña González 1992, 24). In recent years, however, the budget for the judiciary has steadily increased (CEJA 2004). The number of judges in the Supreme Court has also been altered. The last change was an increase from seventeen to twenty-one judges in 1997, which gave the government the opportunity to bring new faces to the Supreme Court (see below). In sum, we observe that politicians have acted in accordance with a constitution that establishes a very low level of judicial independence de jure.[27]

We observe the same regarding the constitutional provisions that establish the level of external independence. These provisions give substantial power over Supreme Court judges to the executive and legislative branches. Until recently, Supreme Court judges had been traditional lawyers who resisted challenging the government, and impeachment procedures against them were seldom necessary. Since the restoration of democracy, five impeachment proceedings have been brought, one of which was successful (Popkin 2002, 118). For the first time in 125 years, a High Court judge was removed for misconduct. In 1997, a constitutional reform took place in the context of corruption scandals in the judiciary. Claiming that it wanted to address the root of the problem, the government seized the moment to propose fundamental structural changes to the Supreme Court. The bill changed the nomination procedure for Supreme Court judges and expanded the number of judges from seventeen to twenty-one. The year 1998 brought eleven new faces to the Supreme Court, including five lawyers from outside the judicial hierarchy, all appointed and nominated according to constitutional provisions (Hilbink 2003, 84-85). In sum, as expected, politicians have acted in accordance with the constitutional provisions that determine the level of de jure judicial independence, and hence it is a good proxy for the level of independence-from.

Regarding independence-to, we expect this to be equal to or higher than the level of de jure independence, and that is what we observe. Because of the high degree of legislative fragmentation from 1970 to 1973, independence-to was arguably much higher than the de jure level: in June and July 1972 the court issued at least ninety orders against the policies of the government (Verner 1984, 483). Similarly, after

the transition to democracy we observe levels of independence-to higher than what the low level of independence de jure would suggest. For instance, during Patricio Aylwin's administration (1990-94), the Supreme Court ruled against the executive in 63.3 percent of decisions in cases specifically challenging presidential authority. During Eduardo Frei's administration (1994-2000), the figure is 62.96 percent (Scribner 2004, 35).

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

Case 5: Low De Jure, Multilateral Setting, Unified Government

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

Given that the government is unified, Supreme Court judges will arguably expect that the elected branches will find it easier to coordinate and pass legislation in ways that contravene their interests (such as stripping jurisdiction). In addition, the justices would expect that their potential rulings against executive abuses will not be particularly welcomed by the majority in Congress. Given that we are in a multilateral setting, we can expect those rulings to be supported by the minority party in Congress. In addition, if the justices decide not to sanction governmental abuses, this minority would likely denounce and try to capitalize on these actions. Arguably, however, the costs that the government is capable of

inflicting on the judiciary are higher than those coming from the minority in Congress. Thus we expect the level of independence-to to be as low as the level of independence de jure.

Illustrative Example: Chile 2000-2002 and 2006

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

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

Case 6: Low Independence De Jure, Unilateral Setting

Finally, in this scenario we expect those in power to act in accordance with the constitutional provisions that not only grant them many controls over judges and the judiciary but that also can be amended by them. Thus the level of independence-from is likely to coincide with the level of independence de jure. In a unilateral setting those in power are legally able to use the mechanisms the constitution grants them without requiring the cooperation of any other political

actor, and it is likely that they need not even face denunciations by a legislative minority. As discussed in the third setting, this will negatively affect the level of independence-to. Therefore, the expected level of independence-to would be equal to or lower than the level of independence de jure.

Illustrative Example: Chile, 1973-1990

Low De Jure Judicial Independence within a Unilateral Setting

After violently taking power in 1973, Pinochet and the military junta clearly violated standing constitutional rules in Chile and arrogated "Supreme Command of the Nation" for themselves, effectively seizing executive, legislative, and constituent power. In the course of 1974, "the manner of exercise of constituent powers and the relationship between the junta and the judiciary were worked out after encounters with the Supreme Court over judicial review of decree-laws and Court supervision of military justice" (Barros 2002, 37). By and large, as Correa Sutil notes, the junta "did not overtly intervene in the Supreme Court when he [Pinochet] came to power; he did not replace the justices, he did not threaten them, nor did he, to my knowledge, use corrupt methods to assure the collaboration of the Supreme Court, at least not in the early years of his dictatorship" (Correa Sutil 1993, 89). This meant, in practical terms, that the judiciary and the Supreme Court judges would roughly be guided by the existing institutional framework, which was actually one with a very low degree of de jure judicial independence: zero autonomy and 1 for external independence (see Case 4). The difference is that this occurred within a unilateral setting characterized by a military government.

What Do We Observe?

We expect the level of independence-from to coincide with the low level of independence de jure and, given the unilateral setting, the level of independence-to to be equal to or lower than the de jure level of independence. During this period, political officials – the junta – acted in accordance with the legal rules. Regarding autonomy, the military regime stripped jurisdiction for national security crimes from ordinary courts and gave it to military courts (Rosenn 1987, 26). As we saw above (see Case 4), politicians in Chile had used their prerogatives to alter the jurisdiction of the courts when they deemed it

convenient for their political purposes. This contributed to make Chilean judges "apolitical" (Correa Sutil 1993 and Hilbink 2003; see also Couso 2003).

Regarding external independence, "because the armed forces needed legitimate collaborators, they did not intervene in the Supreme Court. The military neither removed any Supreme Court Justice nor threatened the Supreme Court in any ways.. .. Nonetheless, the Pinochet regime committed gross and grave human rights violations, and the judiciary had no impact on preventing these violations" (Correa Sutil 1993, 90). Thus there was accordance between the constitutional provisions and the actions of the group in power, and the level of independence-from was as low as that of independence de jure.

This did not mean that Supreme Court judges were free to decide cases. Looking at what we call independence-to between 1973 and 1983, it is noteworthy that the courts rejected all but ten out of 5,400 petitions for habeas corpus filed by the Vicaría de la Solidaridad. In the very beginning of the dictatorship, the Supreme Court managed to send a clear message: those judges who challenge the regime were going to be considered unduly "political" and would face sanctions. "This feeling was particularly strong after the Supreme Court dismissed or forced the retirement of forty judges (15 percent of the total) in 1974, either by giving them poor evaluations for 1973 or by transferring them to geographically isolated posts" (Hilbink 2003, 76). In addition, the percentage of court decisions against presidential authority was 28.63 percent (Scribner 2004, 35). Thus, as expected, the level of independence-to was equal or lower than the de jure level.

III. Conclusion

Our analysis departs from the premise that law and power are theoretically and empirically interdependent (see Maravall and Przeworski 2003; Ferejohn and Pasquino 2003). Law and reality coincide under some political conditions but may diverge under others. While it is common to perceive that in Latin American constitutions the provisions regarding judicial independence insulate judges to a higher degree than what is observed, our thorough and systematic account of such provisions reveals a more complex and nuanced picture. For instance, the Chilean Constitution actually describes a quite heteronomous judiciary and externally dependent Supreme Court judges. The main advantage of departing,

as we do, from a good de jure measure is that it is comparable across countries, comparable across time within the same country, and reproducible by any person that looks at the legal texts and follows the coding rules. But still, how can we know if this measure is a good proxy for what we can expect to happen in reality?

Our theoretically informed typology allowed us to distinguish the political conditions under which constitutional provisions regarding judicial independence are likely to be a good guide to what to expect regarding levels of judges' *independence from* other government branches as well as their *independence to* decide against the government in cases of human rights violations. In particular, we find one scenario where our de jure measure is not a good proxy because it overestimates the de facto level of judicial independence: the combination of a high degree of judicial independence de jure with a unilateral setting (Case 3). In other scenarios, our measure ranges from being quite a good proxy for independence-to (Cases 1, 5, and 4) to being a fair one (Cases 2 and 6), where it may underestimate.

In the six scenarios, we distinguish between strong and weak inequalities regarding expected levels of independence-to. This is important because it introduces an element of dynamism into an otherwise rather static framework. It also enables us to acknowledge that contextual variables, such as the specific power of the minority in a unified government, may play an important role (as in Case 2, for example). Complementary accounts of independence-to, such as Helmke's "strategic defection" (2005), can be used to introduce more dynamism when analyzing judicial behavior within a country that moves across our six scenarios. For instance, we would expect that Supreme Court judges decide more often against a sitting government when elections are close and the opposition is likely to win, especially if a unified government is likely to arise since a unified government will more easily punish "non-loyal" judges.

Our theoretically informed typology is also useful for empirical observation. Knowing which scenario prevails in a country can guide the observer to those areas where attacks to judicial independence are more likely to occur. For instance, in a multilateral setting with unified government, one can expect changes in areas that are covered by organic laws but not in those covered in the

constitution. Take the case of Argentina, where the number of judges in the Supreme Court, which is not specified in the Constitution, has gone up or down in unified governments depending on their interests.

The analysis in this chapter can be expanded by looking at a wider set of countries or at different states within the same federal country. It can also be applied to different kinds of laws, not only to those establishing an independent judiciary. Within Mexico, for example, there is interesting variation in judicial independence across the states; some are working with judicial councils and even constitutional courts, while others have not changed their quite traditional judicial system at all (Caballero Juárez 2005). But there is also interesting institutional variation in other areas that are important for the rule of law, such as the laws regarding access to public information, as Mauricio Merino shows in his chapter. In sum, we hope this chapter encourages more research in the fascinating and transcendent analysis of the political conditions that make the rule of law and horizontal accountability a reality in Mexico and other countries.

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References

Balme, Stephanie, and Pasquale Pasquino. 2005. "Taking Constitution(alism) Seriously? Perspectives on Constitutional Review and Political Changes in China." Paper presented at the conference "Constitutionalism and Judicial Power," China, Sciences Po.

Barros, Robert. 2002. *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution*. New York: Cambridge University Press.

Burbank, Stephen B., and Barry Friedman. 2002. "Reconsidering Judicial Independence." In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Stephen B. Burbank and Barry Friedman. Thousand Oaks, CA: Sage Publications.

Caballero Juárez, José Antonio. 2005. "La independencia de los poderes judiciales a diez años de reforma en México," *Reforma Judicial* 6.

Capelleti, Mauro. 1985. "Who Watches the Watchmen? A Comparative Study on Judicial Responsibility." In *Judicial Independence: The Contemporary Debate*, ed. Shimon Shetreet and Jules Deschenes. The Netherlands: Martinus Nijhoff.

Carey, John. 2002. "Parties, Coalitions, and the Chilean Congress in the 1990s." In *Legislative Politics in Latin America*, ed. Scott Morgenstern and Benito Nacif. New York: Cambridge University Press.

Carothers, Thomas. 2006. *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington, DC: Carnegie Endowment for International Peace.

CEJA. 2004. *Reporte de la Justicia*. Santiago de Chile.

Chavez, Rebecca Bill. 2004. *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina*. Stanford, CA: Stanford University Press.

Clark, Davis S. 1975. "Judicial Protection of the Constitution in Latin America," *Hastings Constitutional Law Quarterly* 2.

Correa Sutil, Jorge. 1993. "The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence during the Transition to Democracy." In *Transition to Democracy in Latin America: The Role of the Judiciary*, ed. Irwin P. Stotzky. Boulder, CO: Westview Press.

Couso, Javier A. 2003. "The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002," *Democratisation* 5: 70-91.

Domingo, Pilar. 2000. "Judicial Independence: The Politics of the Supreme Court in Mexico," *Journal of Latin American Studies* 32.

Ferejohn, John. 1999. "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," *Southern California Law Review* 7.

Ferejohn, John, and Pasquale Pasquino. 2003. "Rule of Democracy and Rule of Law." In *Democracy and the Rule of Law*, ed. José María Maravall and Adam Przeworski. New York: Cambridge University Press.

Finkel, Jodi. 2004. "Judicial Reform as Insurance Policy: Mexico in the 1990s," *Latin American Politics and Society* 46, no. 4: 87-113.

Fiss, Owen M. 2000. "Judicial Independence." In *Encyclopedia of the American Constitution*, ed. Leonard W. Levy and Kenneth L. Karst. New York: Macmillan Reference USA.

Fix-Fierro, Héctor. 2003. "La reforma judicial en México, ¿de dónde viene? ¿a dónde va?" *Reforma Judicial: Revista Mexicana de Justicia* 2 (July-December): 251-324.

González Casanova, Pablo. 1970. *Democracy in Mexico*. New York: Cambridge University Press.

Groth, Alexander J. 1971. *Comparative Politics: A Distributive Approach*. New York: Macmillan.

Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. New York: Cambridge University Press.

Helmke, Gretchen, and Steven Levitsky. 2004. "Informal Institutions and Comparative Politics: A Research Agenda," *Perspectives on Politics* 2, no. 4.

Hilbink, Lisa. 2003. "An Exception to Chilean Exceptionalism? The Historical Role of Chile's Judiciary." In *What Justice? Whose Justice? Fighting for Fairness in Latin America*, ed. Susan E. Eckstein and Timothy Wickham-Crowley. Berkeley, CA: University of California Press.

Inclán, Silvia. 2004. "Judicial Reform and Democratization: Mexico in the 1990s." PhD dissertation, Boston University.

Kenney, Charles D. 2003. "Horizontal Accountability: Concepts and Conflicts." In *Democratic Accountability in Latin America*, ed. Scott Mainwaring and Christopher Welna. New York: Oxford University Press.

Landes, William A., and Richard A. Posner. 1975. "The Independent Judiciary in an Interest-Group Perspective," *Journal of Law and Economics*, pp. 875-99.

Larkins, Christopher. 1996. "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *American Journal of Comparative Law* 44.

Linares, Sebastián. 2004. "La independencia judicial: conceptualización y medición," *Política y Gobierno* 11, no. 1.

Magaloni, Beatriz. 2003. "Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico." In *Democratic Accountability in Latin America*, ed. Scott Mainwaring and Christopher Welna. New York: Oxford University Press.

Mainwaring, Scott. 2003. "Introduction." In *Democratic Accountability in Latin America*, ed. Scott Mainwaring and Christopher Welna. New York: Oxford University Press.

Maravall, José María, and Adam Przeworski. 2003. "Introduction." In *Democracy and the Rule of Law*, ed. José María Maravall and Adam Przeworski. New York: Cambridge University Press.

McNollgast. 2002. "Conditions for Judicial Independence." Paper on file with the authors.

Navia, Patricio. 2003. "You Make the Rules of the Game and you Lose?" PhD dissertation, New York University.

Navia, Patricio, and Julio Ríos-Figueroa. 2005. "The Constitutional Adjudication Mosaic of Latin America," *Comparative Political Studies* 38, no. 2.

O'Donnell, Guillermo. 1996. "Illusions about Consolidation," *Journal of Democracy* 7, no. 2: 34-51.

————.2003. "Horizontal Accountability: The Legal Institutionalization of Mistrust." In *Democratic Accountability in Latin America*, ed. Scott Mainwaring and Christopher Welna. New York: Oxford University Press.

Pasquino, Pasquale. 2003. "Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History," *The Law and Practice of International Courts and Tribunals* 2: 11-25.

Peña González, Carlos. 1992. "Poder judicial y sistema político: las políticas de modernización." In *El poder judicial en la encrucijada: estudios acerca de la política judicial en Chile*, by Carlos Peña et. al., Cuadernos de Análisis Jurídico. Santiago, Chile: Escuela de Derecho, Universidad Diego Portales.

Pettit, Philip. 1999. *Republicanism*. New York: Oxford University Press.

Popkin, Margaret. 2002. "Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective." In *Guidance for Promoting Judicial Independence and Impartiality*. Rev. ed. Washington, DC: USAID.

Pozas-Loyo, Andrea. 2005. "Unilateral and Multilateral Constitutions." Paper presented in the workshop "Constitutions and Constitutionalism," Universidad de San Andrés,

Buenos Aires, Argentina, November 18-19.

Pozas-Loyo, Andrea, and Julio Ríos-Figueroa. 2006. "When and Why 'Law' and 'Reality' Coincide? De Jure and De Facto Judicial Independence in Argentina, Chile, and Mexico." Justice in Mexico Project Working Paper Series, no. 7. San Diego, CA: UCSD Center for US-Mexican Studies and USD Trans-Border Institute, http://www.justiceinmexico.org.

Prillaman, William C. 2000. *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. Westport, CT: Praeger.

Przeworski, Adam. 2002. "Accountability social en América Latina y más allá." In *Controlando la política*, ed. Enrique Peruzzotti and Catalina Smulovitz. Buenos Aires: Grupo Editorial SRL.

Raz, Joseph. 1977. "The Rule of Law and Its Virtue," *Law Quarterly Review* 93.

Ríos-Figueroa, Julio. 2006. "Institutional Models of Judicial Independence in Latin America, 1950-2002." Paper presented at the congress of the Latin American Studies

Association.

————. n.d. "The Emergence of an Effective Judiciary in Mexico, 1994-2002," *Latin American Politics and Society*, forthcoming.

Rosenberg, Gerald N. 1992. "Judicial Independence and the Reality of Political Power," *Review of Politics* 54, no. 3.

Rosenn, Keith. 1987. "The Protection of Judicial Independence in Latin America," *University of Miami Inter-American Law Review* 19, no. 1.

Russell, Peter H. 2001. "Toward a General Theory of Judicial Independence." In *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, ed. Peter H. Russell and David M. O'Brien. Charlottesville, VA: University Press of Virginia.

Schwarz, Carl. 1977. "Rights and Remedies in the Federal District Courts of Mexico and the United States," *Hastings Constitutional Law Quarterly* 4.

Scribner, Druscilla. 2004. "Limiting Presidential Power: Supreme Court-Executive Relations in Argentina and Chile." PhD dissertation, University of California, San Diego.

Shetreet, Shimon. 1985. "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges." *In Judicial Independence: The Contemporary Debate,* ed. Shimon Shetreet and Jules Deschenes. The Netherlands: Martinus Nijhoff.

Verner, Joel G. 1984. "The Independence of Supreme Courts in Latin America: A Review of the Literature," *Journal of Latin American Studies* 16 (November).

Widner, Jennifer A. 2001. *Building the Rule of Law: Francis Nyalali and the Road to* Judicial Independence in Africa. New York: W.W. Norton & Company.

Endnotes

1 These are contested terms (see, for example, Carothers 2006; Kenney 2003), but there seems to be a consensus that judicial independence is a necessary condition for both.

2 While some scholars argue that the sources of judicial preferences lie in the institutional incentives they face, others argue that they are to be found in judges' ideologies, and still others find them in public opinion. For an extensive list on references, see McNollgast 2002. The main problem these studies face is the impossibility of inferring independence-to from decisions against the government, since decisions in favor of the government can be made by judges who are free to decide independently.

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

4 "Independence from what or whom?" is a question that concerns most authors (such as Linares 2004; Pasquino 2003; Burbank and Friedman 2002; Russell 2001; Cappelleti 1985; Shetreet 1985). Some authors make the distinction between independence from political branches and independence from the parties in a case (Cappelleti 1985; Pasquino 2003; Fiss 2000; Larkins 1996). Others argue that it is independence from "undue interferences," without specifying further (Shetreet 1985). And others directly consider only independence from political branches (Landes and Posner 1975; Ferejohn 1999; Rosenberg 1992). Here we focus on external pressures that come from the elected branches of government but acknowledge that a broader notion of independence-from could consider pressures from other external sources such as the media.

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

6 The power of constitutional adjudication can be vested in a special organ outside the judiciary (such as a constitutional court, as is common in Europe) or within the judiciary (in the Supreme Court and all lower federal courts, as in the United States). Latin American countries have created new models with both European and American elements (Navia and Ríos-Figueroa 2005). *Erga omnes* provisions mean that judicial decisions are valid for all, and not only for the parties that are disputing a particular case.

7 Assuming that amending the constitution is harder than changing laws, the degree of de jure autonomy would be highest when the provisions regarding who decides on the basic structure of the judiciary are written down in the constitution, lower if they are regulated by ordinary statues, and lower still if they can be changed by, say, presidential decree.

8 We take "whether the number of Supreme Court judges is specified in the constitution" as a proxy for who decides on the number of judges. We have two reasons for this: establishing a specific number in the constitution intends to protect the political packing or unpacking of the Supreme Court, and the number of lower court judges usually responds more to practical than to political considerations.

9 Further justifications, detailed coding rules for each variable, and another component called internal independence can be found in Ríos-Figueroa 2006.

10 Note that the expected level of independence-to could be higher than the level of de jure judicial independence. In the next section, we will see under what conditions this would be the case. Chile (1990-2005) is an example of low independence-from but where the level of independence-to is higher than the de jure level.

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

12 For the theoretical grounding of these distinctions, see Pozas-Loyo 2005.

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

14 We present one example per theoretical case, using Chile and Mexico as case studies. Examples from Argentina in Case 1 (1983-89) and Case 2 (1989-98) can be found in Pozas-Loyo and Ríos-Figueroa 2006.

15 The number of Supreme Court judges has been established in the Mexican Constitution since 1944.

16 The fifteen-year tenure is a product of the 1994 judicial reform. From 1944 to 1994, the Mexican Constitution granted Supreme Court judges life tenure.

17 Although the Constitution establishes that a two-thirds majority in the Senate adjudicates whether an impeached justice is guilty, our rule is that the power to accuse is sufficiently important to exert pressure on judges so that we add to external independence only when at least a qualified majority has this power.

18 For an account of the notion and different types of "multilateralization" processes, see Pozas- Loyo 2005.

19 It is interesting to note that the budget has been increasing significantly, even though the Constitution does not specify a fixed percentage of GDP for the judiciary. The share rose from 0.56 percent of GDP in 2000 to 0.97 percent in 2001 and to 1 percent in 2002 (Fix-Fierro 2003, 285).

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

21 Note that, as we discussed in the first section, this expectation may be enough to deter certain actions.

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

23 Good accounts of the reform, as well as alternative explanations for why the PRI delegated such power, can be found in Magaloni 2003; Inclán 2004; Finkel 2004; Fix-Fierro 2003.

24 Every president from 1934 to 1988 appointed more than 50 percent of Supreme Court judges during their administrations, with the exception of Miguel Alemán (1946-52), who appointed "only" 48 percent of the members of the Court (Magaloni 2003, 288).

25 An indicator of the low importance of the judicial branch during those years is that its budget from 1970 to 1985 averaged 0.09 percent of GDP (Fix-Fierro 2003, 285).

26 While some form of constitutional adjudication has existed in most Latin American countries since their independence, it was only in the last two decades that *erga omnes* provisions have been adopted (Clark 1975; Navia and Ríos-Figueroa 2005).

27 We disagree with Couso's argument that Chilean judges' "lack of interest in adopting an activist stance continues a long-held preference for maintaining the very autonomy that historically has allowed the Chilean judiciary to play a crucial role in the promotion and maintenance of the legality that characterizes this country" (Couso 2003, 88-89).

List of Cases

Banks v. Dretke, 540 US 668 (2004).

Dimmick v. Republican Party of Minn., No. 05-566, 2006 WL 152093.

Fletcher v. Peck (US Supreme Court, 87–148, Feb. 1810.

Kartar Sigh v. State of Punjab, (1994) 3 SCC 569.

Miller-El v. Cockrell, 537 US 322 (2003).

Miller-El v. Dretke, 545 US 231 (2005).

Pretto and others v. Italy, ECHR 8 December 1983, Series A., vol. 71.

Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005).

Republican Party of Minn. v. White, 536 US 765, 765 (2002).

Sutter v. Switzerland, ECHR 22 February 1984, Series A., no. 74.

United States v. Booker, 543 US 220 (2005).

Z. v. Finland, ECHR 25 February 1997.