

TransJus Working Papers Publications

ISSN 2462-263X

Working Paper N.4/2017



This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/)

JUDICIAL INDEPENDENCE AND BUREAUCRATIC JUDICIARY. PERSPECTIVES FROM SOUTH AMERICA

MILTON VELÁSQUEZ DÍAZ

Ph.D. Candidate at Universitat Pompeu Fabra

SUMMARY: 1. Introduction; 2. What does the judicial branch need?; 3. Judges: authorities or public servants?; 4. Welcome to the South: South American judges and the judiciary; 5. Critical issues and emerging challenges; 6. Conclusion

ABSTRACT: South America has a lack of confidence in almost all its public institutions, and judiciaries are not the exception. This article starts with general aspects of judicial independence, impartiality and accountability, and then shows an overview of regional judicial reforms in the last decades. Based on a widely accepted conception of bureaucratic judiciary, this article aims to analyze how its elements work on South American democracies; which will be useful to identify critical issues and emerging challenges on Judicial Councils, recruitment process of judges and magistrates, technical qualification, and disciplinary liability.

KEYWORDS: South America; Bureaucracy; Bureaucratic Judiciary; Judicial independence; Liability; Judicial Councils.

RESUMEN: En Sudamérica existe una desconfianza en casi todas sus instituciones públicas, y sus judicaturas no son la excepción. Este artículo comienza con aspectos generales sobre independencia judicial, imparcialidad y responsabilidad, para luego mostrar un panorama general de las reformas judiciales hechas en la Región las últimas décadas. A base de una concepción ampliamente aceptada de magistratura burocrática, este artículo procura analizar cómo sus elementos funcionan en las democracias sudamericanas; lo que será de utilidad para identificar aspectos críticos y retos emergentes relacionados a los Consejos de la Magistratura, procesos de selección de jueces y magistrados, formación especializada y responsabilidad disciplinaria.

PALABRAS CLAVE: Sudamérica; Burocracia; Magistratura Burocrática; Independencia Judicial; Responsabilidad; Consejos de la Magistratura.

RESUM: A Sud-amèrica existeix una desconfiança en gairebé totes les seves institucions públiques i les seves judicatures no són l'excepció. Aquest article comença amb aspectes generals sobre independència judicial, imparcialitat i responsabilitat, per després mostrar un panorama general de les reformes judicials realitzades a la Regió les últimes dècades. A força d'una concepció àmpliament acceptada de magistratura burocràtica, aquest article procura analitzar com els seus elements funcionen en les democràcies sud-americanes; que serà d'utilitat per identificar aspectes crítics i reptes emergents relacionats als Consells de la Magistratura, processos de selecció de jutges i magistrats, formació especialitzada i responsabilitat disciplinària.

PARAULES CLAU: Sud-amèrica; Burocràcia; Magistratura Burocràtica; Independència Judicial; Responsabilitat; Consells de la Magistratura.

1. INTRODUCTION

According to the current *Latinobarómetro* Report, Latin America has a serious lack of confidence in almost all its political institutions and public organizations, except for the military and police forces. For instance, confidence on the judiciary decreased from 30% to 26 % in comparison with the 2015 report (Corporación Latinobarómetro, 2016).

On judicial independence rankings, South America is divided into two groups. On the one hand, most South American countries present low scores. Venezuela is a paradigmatic example, so it is classified on the bottom of chart. On the other hand, there are better placed countries, e.g. Uruguay and Chile.¹ Those results are similar to wider reports about the quality of civil and criminal justice.²

Unfortunately, most of the region has weak and discredited courts and tribunals. The length of cases, inefficient enforcement mechanisms, inadequate resources, poor judicial decisions and inadequate selection/training of judges are common concerns regarding South American judicial systems (Agrast, Botero & Ponce, 2015). Another typical concern is corruption, which constitutes an important factor in influencing people's decision not to go to court to resolve a dispute; this is the case especially in Venezuela, Ecuador, Bolivia and Peru.³

Addressing these issues is a difficult task that requires an analysis from different perspectives. The aims of this article are, first able, to study the origins, nature and current status of South American bureaucratic judiciary; and then, to identify critical issues and emerging challenges they face today.

¹ By comparing 140 countries, Global Competiveness Report 2015-2016 reveals important data about the region. The judicial independence indicator includes this question "In your country, how independent is the judicial system from influences of the government, individuals, or companies? [1 = not independent at all; 7 = entirely independent]". From lower to higher we find Venezuela (#140), Paraguay (#137), Ecuador (#133), Argentina (#129), Bolivia (#126), Colombia (#114), Perú (#112) and Brazil (#92); all of them in the lower part of the chart. Fortunately, Chile (#31) and Uruguay (#20) are on the upper side (Schwab, 2016).

² The World Justice Project's Rule of law index 2016 analyses 130 countries, including South American countries, except for Paraguay. This index is composed by 9 factors; two of them are about justice. The Civil Justice Factor ranks as follows: Venezuela (#112), Bolivia (#108), Peru (#90), Ecuador (#89), Colombia (#70), Brazil (#58), Argentina (#48), Chile (#32) and Uruguay (#17). The Criminal Justice Factor, in turn, ranks Venezuela (#113) last in the region, followed by Bolivia (#112), Colombia (#91), Peru (#90), Ecuador (#86), Brazil (#78), Argentina (#67), Chile (#37) and Uruguay (#34) (Botero, Agrast & Ponce, 2016).

³ But it is less important in countries like Uruguay and Chile. On that scale, Brazil, Argentina and Colombia are placed in the middle (Agrast, Botero & Ponce, 2015).

2. WHAT DOES THE JUDICIAL BRANCH NEED?

Judicial independence is a transcendental value of contemporary democracies (Shetreet, 2011). It is, nevertheless, an unclear and complex concept due to its relationship to given social, historical and functional contexts. In terms of the functional context, when judges adjudicate, they are not bound or influenced by any political branch, public or private organization or economic powers. So, judicial independence – *prima facie* – is a negative concept.⁴

The core of the concept of judicial independence encompasses the different ways to keep judges away from those influences and pressures, while they are adjudicating. Therefore, this concept is relational (Salzberger, 2012) and depends on the relationship between judges, parties, government and economic power.⁵ Nevertheless, not all external influence, pressure, inducement or interference is forbidden, but only those that are improper or incompatible with adjudication.⁶ The main objective of the rule in question is to prevent unnecessary or useless information from having a bearing on decision-taking process, so judges are able to focus exclusively on relevant legal information (Macdonald & Kong, 2012).

This principle is conceived as relative. Independence for judges and magistrates is not absolute on historical, institutional or even functional perspectives. And, for sure, it is not a privilege for judicial authorities (Villaescusa, 2016), but a fundamental right part of the due process of law, a right recognized by national constitutions and human rights treaties (Chamorro, 2007).

Finally, another characteristic of judicial independence is instrumentality. Most scholars agree that judicial independence is not a goal in itself but a means to obtain something more

⁴ In spite of that, there is also a positive angle on judicial independence. Certain scholars do not accept the term “judicial independence”, so they prefer others like ‘supremacy’ (Friedman, 2004) or ‘neutrality’ (Linares, 2003).

⁵ The idea of *relational* principle is also accepted in political science, and corresponds to the notion that judges have autonomy from other authorities, institutions and the public in general (Russell, 2001). To make it simpler, LINARES, S. (2003) prefers to use the phrase “absence of pressures”.

⁶ Adjectives like ‘improper’, ‘inappropriate’ or ‘unwarranted’ are included on articles 2 and 4 of the UN Basic Principles on the independence of the Judiciary, article 2 of the Universal Charter of the judge and articles 1.1 and 1.3 of the Bangalore Principles of Judicial Conduct. Forbidden interferences are, for instance, those from political powers or public authorities that generate *de iure* or *de facto* obstacles to the adjudication process (Zeitune & Andreu-Guzmán, 2007; Gonzales Mantilla, 2009). The problem is thus how to recognize an acceptable interference. Obviously, higher court case law is accepted as proper influence on judicial decisions (Russell, 2001). Other appropriate influences are interpretative statute law, valid evidence and parties’ arguments in a case (Linares, 2003). MARTINEZ ALARCÓN, M.L. (2004) mentioned examples like parliamentary debates or Supreme Court President speeches.

valuable. But what it is exactly aimed at? Impartiality is the most common answer⁷, but there are alternative perspectives on this matter.⁸

Impartiality, for instance, is an important notion for understanding other concepts like justice, equality before the law and reasonability; even the idea of corruption has no sense without it (Kelly, 2004). The legitimacy of judges - or any other public authority - depends on impartiality; therefore, a fair adjudication is only possible if it is done by someone who is alien to the legal conflict (Pérez-Cruz, 2015). This is also a negative concept: judges shall perform their duties without bias or prejudices, and that is a previous condition of a fair judicial decision (Nieto, 2004) (Jiménez Asensio, 2012). However, an absolute “absence of preconceptions” is impossible for any individual, considering the human mind is no blank piece of paper (Frank, 1930). It is impossible to go inside a judge's brain and verify if he is biased on certain subjects. Because of that, scholarship and case law consider impartiality through two aspects. The first one, a subjective approach to impartiality, focuses on the personal interests of a judge on certain cases; something extremely difficult to demonstrate. The second, an objective approach, does not prioritize judges’ thoughts, but social perceptions about his role. The principal goal on that approach is to avoid any reasonable doubts on judicial neutrality, case by case. For that purpose, an objective test is an important tool to identify preconceptions, using as criteria “the sight of a reasonable observer”.⁹ Charts of judges and procedural codes have various mechanisms to prevent partiality in general or in specific cases. The most common are recusal tools, disqualifications and bans on extrajudicial activities.

Furthermore, the positive perspective of judicial independence is focused on mandatory bounds that judges have to follow. Generally, the principal boundary of judicial activity is the law (especially statute law on civil law countries). Regarding democracy, judges have to respect and enforce statute law produced by Parliaments. This is another way of legitimizing

⁷ This is a general opinion of Latin European scholars, for instance, CAPPELLETTI, M. (1990), RICO, J.M & SALAS, L. (1990), GONZALEZ GRANDA, P. (1993) and DELGADO DEL RINCÓN, L. (2002).

⁸ SEIBERT-FOHR, A. (2012) and QUINTANA CARRETERO, J.P (2008) consider that achieving the due process of law is the most transcendental goal. Similarly, according to European Council, the fair trial is an overwhelmingly important objective to achieve (Bustos, 2016).

⁹ The ‘reasonable observer’ criterion is frequently used in common law countries. For instance, 28 U.S. Code § 455 says: “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned” (Taruffo, 2009). That criterion is also on international instruments about judicial independence: Universal declaration on the independence of Justice of Montreal (1983), “Singhvi” Declaration (1989), Bangalore principles on judicial conduct (2002) or Ibero-American Model Code of Judicial Ethics.

their role (Linares, 2003).

Finally, judicial independence is not enough for an efficient and democratic justice service. The other side of the coin is judicial accountability (Blakenburg, 2004; Seibert-Fohr, 2012), generally defined as an obligation or willingness to accept responsibility for one's actions (Knaul, 2014). At this point, the most important goal is to maintain a balance between these two principles. Irresponsibility must not be the price that citizens pay for an independent justice system (Cappelletti, 1990); at the same time, a judge placed under extreme control becomes a dependent servant easy to manipulate (Delgado, 2002). In order to prevent abuses of power or improper influence, clear control standards must be established (Knaul, 2014).

Accountability is a polysemous concept that involves several control mechanisms over judicial behavior. Basically, it has three levels: explanatory accountability, amendment accountability and “sacrificial” accountability. The last one refers to resign or dismissal from office. Related to that, there are three important dimensions: the obligation of answering to control organisms (*answerable to*), to explain about decisions taken (*account for*) and the acceptance of the risk of being sanctioned or dismissed in case of wrongful behavior (*answerable for, censurable for*) (Hernández, 2016).

Judicial accountability is vertical when it is owed to the people or society, and horizontal when it is addressed to other public branches or institutions (Hernández, 2016). In addition, it is not only referred to an individual justice operator, since all of the judiciary is involved. To sum up, it could be individual or institutional, depending on who is accountable (Knaul, 2014).

On this context, an independent body in charge of protecting independence and controlling administration personnel must be established. It has to be composed by members of the judiciary and other important sectors, e.g. scholars, legal bars, etc. To find a balance between independence and accountability is a difficult task. Nowadays, priority has been given to strengthening judicial independence, so a lack of regulation on accountability mechanisms is a common issue (Knaul, 2014).

3. JUDGES: AUTHORITIES OR PUBLIC SERVANTS?

There are many differences between common law and civil law countries, but one on that scholars pay plenty of attention regards the recruitment and discipline mechanisms of judges. The differences between the two judicial systems refer to professional judiciaries (in Common

Law systems) and bureaucratic judiciaries.

Those differences are graphically represented with a continuous line whose two extremes are the professional judiciary, on one side, and the bureaucratic judiciary on the other. The former is closely connected to bars and professional associations, and its principal criteria for the appointment of judges and magistrates are prestige and experience. The bureaucratic judiciary, in turn, is related to hierarchical structures, whose most valuable criteria for selection is formal education in law. Those are ideal models and national judicial systems around the world can be placed at various points between those extremes. It is often said that England and France are the most important examples for each model (Guarnieri & Pederzoli, 1999).

The professional judiciary is based on a close relationship between judicial authorities and legal practitioners. Usually, selection methods are horizontal, which means that judges are selected from the universe of lawyers, taking into account experience, prestige and respect from colleagues. In addition, recruitment authorities are part of other political branches, such as Parliament or the Executive. In the eyes of certain commentators, they possess a great deal of independence.¹⁰

On the other hand, the bureaucratic judiciary considers a judge as a public servant with special characteristics. That is the reason why judicial selection and dismissal are, in general, similar to civil service procedures. From the standpoint of sociology, bureaucrat judges are seen as employees with the same status as other public servants, powerless in public and political affairs, and without creative freedom on the adjudication process (Toharia, 1975).

Frequently, selection methods include public competitions and judicial schools. Recruitment systems are designed to look for technicians, experts on law with no political attachments, rather than prestigious attorneys. The required profile is simple: young lawyers with an important academic background and not enough experience are greatly preferred; so they can easily afford long-term education on a judicial school. Meritocracy is an important tool not only to fulfill offices with talented lawyers, but also to avoid influences from politicians and their lobbies (Guarnieri & Pederzoli, 1999).

To sum up all those elements, several scholars agree with GIUSEPPE DI FEDERICO'S (1978) four characteristics of the bureaucratic judiciary: selection through public competition,

¹⁰ For further details, see GUARNIERI, C. (2002), TARR, G.A. (2010), SCHAFFNER, B.F. & DIASCRO, J.S (2011), MALLESON, K. (2011) and TURENNE, S. (2012).

hierarchical organization, internal socialization and generalist recruitment.

According to a pessimist perspective, however, bureaucrat judges suffer from what could be considered a state of schizophrenia. Being at the same time dependent servants and guards of an independent branch of the state is clearly a difficult – or impossible – task to accomplish (Aparicio, 1996). Yet, a bureaucratic judiciary can overcome this state, if we consider judges as servants of society rather than of a hierarchical organization (Xiol Ríos, 2009).

4. WELCOME TO THE SOUTH: SOUTH AMERICAN JUDGES AND THE JUDICIARY

To understand how the bureaucratic judiciary model is implemented in Latin America, it is necessary to mention a few details about government systems in the region. After the independence revolutions, Latin American states were built over cultural conflicts dating from colonial times that local elites were unable to solve. Those unresolved conflicts have, in turn, brought political instability. This is the principal way to explain several class and political struggles in the region (Bradford, 1990).

In addition, South American democracies have faced in recent history an array of important obstacles for their development, such as regional, class or even ethnical conflicts, autocratic leadership, the weakness of political parties, instability of control systems and, finally, *coups d'état* and dictatorships (Antón & Soria, 2014).

Political actors frequently failed to build strong constitutional norms, and historical experience demonstrates a tendency to implement constitutional reforms after changes in the balance of power. Power struggles between the Legislative and the Executive are therefore very common (Negretto & Ungar, 1996). A consequence of that is the evident weakness of South American presidential systems, where presidents are in a permanent state of oscillation between lack of power and abuse (Sartori, 1994).

This is obviously not the ideal environment to implement an independent and strong judiciary. Historically, Judicial administration was in charge of Higher Courts, strongly influenced by the Executive and political parties in government (Negretto & Ungar, 1996). Nowadays, judicial systems have a discreet profile and a less relevant role in South American democracies (Pásara, 2009).

In terms of the roots of the South American judiciary, European colonization had an obvious

influence on pre and post- independence judicial structures. Under Spanish colonization, judicial functions were executed by local authorities (City mayors and *Corregidores*), which would lead to confusion between adjudication and general public administration. Even under the *Ancien Regime*, Spanish judges and their colleagues in American colonies were considered as simple public servants. After the independence revolutions, this condition did not change (Toharia, 1975).

Later, European and South American bureaucratic judiciaries followed different paths, specially due to the influence of the United States. One of those differences pertains to the administration of the courts, which was attributed to the Supreme Courts instead of the Ministry of Justice, as was common in continental Europe (Fix-Zamudio, 1977).

With this context in mind, how does one describe an average bureaucrat judge? EUGENIO RAÚL ZAFFARONI (2009) classifies magistrates in three models: empirical-primitive, technical-bureaucratic and legal-democratic model. His opinion is that Latin American judges are part of the empirical- primitive model, whose principal characteristics are a lack of minimum legal-technical level and the arbitrariness of their selection process.¹¹

This perspective also applies to the ordinary bureaucracy in the region. JOAN PRATS I CATALÀ (2005) defines it as an imperfect and not reasonable bureaucracy, with high degrees of arbitrariness, patronage networks, bribery, favoring acts and corruption. If these faults are found in the ordinary bureaucracy, it is very likely that the regional judiciary could share at least a few of them.

After World War II, Europe implemented important changes on their judicial structures. Two of those changes were followed in Latin America: public competition as a selection method and the formation of judicial councils (Salamanca, 2014; Pérez-Cruz, 2015).

In the late 20th century, judicial reform was at the core of the Latin American political agenda. The first attempts, performed in the 80s, were circumstantial, disorganized, and limited to legislative reforms without any previous study. The results were clearly unfruitful. Since the 90s, however, a second round of judicial reforms has been started with its central strategies consisting in the development of access to justice, judicial independence and institutional efficacy (Pásara, 2009).

¹¹ According to this author, a technical-bureaucratic model has a selection process capable of recruiting well-prepared judges, for being members of a strong judicial hierarchy. The legal-democratic model is a superior level. At this level, court administration is attributed to a judicial council, an independent body not part of the legislative or executive branches

An important goal of this new wave of judicial reforms pertained to the administration of courts. As we said previously, Ministries of Justice did not have the same strength in Latin America as they had in Europe in this regard. Instead, Supreme Courts took on classical administrative functions. Later, another problem arrived: those functions took too much time to perform, considering their adjudicative tasks (Gómez Marinero, 2011).

To solve this persistent problem in our region, judicial councils provide an interesting alternative. Basically, there are three important arguments for the creation of those organisms: the development of creative adjudication, beyond the enforcement of law; a strong increase in judicial cases and the creation of more court rooms; and, the specialization of law fields and, consequently, of judges and tribunals (Fix-Zamudio, 1977).

Peru and Brazil created the first judicial councils in the region, and that trend was followed by almost all other countries.¹² Nevertheless, there is no unique model of judicial council in South America (Pásara, 2011). The differences are pertain to council members – only judges or external members –, functions – judicial career, governance and discipline – and hierarchical relationships – part of the higher courts, below them, autonomous.¹³

5. CRITICAL ISSUES AND EMERGING CHALLENGES

There are several emerging challenges for South American judiciaries in terms of their organizational, functional, managerial and economic dimensions, besides the matter of its interaction with other political branches. This article aims to analyze those challenges that closely relate to the bureaucrat judge and the judicial career. I believe there are four critical issues our bureaucratic judiciaries face: a. Judicial Council members; b. Education and technical qualification; c. Appointments; d. Accountability and liability, especially in terms of discipline.

Judicial Councils were created as a guarantee of judicial independence, to protect the judiciary and individual judges from inappropriate influences from other political branches. What is the weak point of those organizations? There is a reasonable fear in our region that

¹² Peru did it in 1969, during a military dictatorship. Brazil included a *Conselho de Justica Federal* on its 1988 Constitution. Nowadays, after reforms on 2005, it is called *Conselho Nacional de Justica Brasileiro*. They were followed by Colombia (1991), Paraguay (1992), Bolivia (1994), Argentina (1994) and Ecuador (1996 and 1998).

¹³ For instance, in Chile and Costa Rica, the Judicial Council is part of the Supreme Court. In Brazil and Mexico, it is below the Highest Court. In Argentina, the Judicial Council is above the whole of the federal judiciary, except for the Supreme Court Justices. In Peru, El Salvador and Ecuador, on the other hand, the Judicial Council can discipline any judge and justice, even from Supreme Courts (Pérez-Cruz, 2015).

those councils could be potentially “kidnapped” by political parties and other powerful groups.

Experiences in the Region show us that Judicial Councils are subject to similar ways of pressure and manipulation as the structures they replaced, and can become truly weak. There is an evident lack of mechanisms to avoid attempts of capture by the Legislative or the Executive (Negretto & Ungar, 1996). The UN Special Rapporteurs on the independence of judges and lawyers observed that the participation of judges as a majority group on Judicial Councils’ composition is required for an independent Judiciary. Lower participation of judges or inclusion of political members (e.g. officials from other branches of the State) is not recommended (Despouy, 2009; Knaul, 2013).

Recent experiences demonstrate how political leaders with high popularity use their electoral power to change rules for Judicial Councils’ composition. In Ecuador, the Constitution of 2008 established the *Consejo de la Judicatura* as head of Judicial Administration and discipline. According to the original constitutional design, the *Consejo* had to be composed by nine members: six lawyers and three professionals in management fields, selected through public competition and organized by a neutral authority. In 2011, former President Rafael Correa started a campaign against the original composition of the *Consejo*, whose slogan was “*meter la mano en la Justicia*” (we will put our hands on Justice). Correa’s popularity was transcendental to change the Council’s membership through a constitutional amendment referendum. Five members integrate the current Council, two of them are officials from the Executive and Legislative branches, a model totally opposite to the UN Special Rapporteur’s recommendations (Pásara, 2014).

Another recent example occurred in Argentina three years ago. The Argentinian *Consejo de la Magistratura*’s composition includes attorneys and law professors, selected by their peers. The Argentinian Congress – with a pro-government majority – and President Cristina Fernández de Kirchner enacted a new selection method for those members: partisan elections without participation of bar associations or universities. This method, far-away from our legal traditions, tried to take advantage of the ruling party’s great popularity. It started a debate in the academic and social realms about democratization of justice and the corporatism of legal profession. Finally, however, the statute law and decrees enacted for the purpose of the reform were overruled by Supreme Court in a case called “Rizzo” (Pérez-Cruz, 2015).

A second critical issue pertains to the technical qualification of judges. Education and training for judges is not only a right for them, it is also a duty of the judiciary in order to give an

efficient and well-qualified judicial service. Each training program, adapted to national circumstances, is useful to fill academic blanks on candidates or young judges and as a social binding mechanism inside judicial career (González Pascual, 2016).

But, what is the knowledge level of an average lawyer running for judge? Legal education in our region suffered important transformations in the twentieth century. In the past, access to college education was elitist, a privilege enjoyed by the upper classes in Latin American society. Currently, our universities have a wider social composition thanks to several factors. For starters, the number of universities increased, even in regions away from bigger cities. In addition, there are more students that come from economic and ethnical minorities as well as a greater access of women to higher education. Consequently, access to university has increased in its geographical basis and diversity. In spite of that, discrimination is an enduring problem (Pérez Perdomo, 2007; Bergoglio, 2007).

Although wider access sounds very positive *prima facie*, it brings troubles if educational structure is not fully prepared. Wider access can affect the quality of college education, and not only because of the higher quantity of students. Higher education's new social composition has brought with it the region's deficiencies in elementary education, so the increase in equity of access has produced, at the same time, inequity in quality (Bergoglio, 2007).

Prestige is part of the selection criteria for the professional judiciary model, but does not play a role in the bureaucratic model. In it, judicial applicants are not the best students from Law school, because the latter do not consider a judicial career as an option for success. This fact, transplanted to our reality, brings another problem: judicial candidates reflect deficiencies from law schools and elementary schools. In our region, schools for judges make enormous efforts to reinforce law and elementary knowledge. Successful judicial school models have been implemented by Chile, Brazil and Colombia, in a similar form to Spanish training programs (Pásara, 2009). Finally, UN Special Rapporteur on independence of judges and lawyers observed that Central American law faculties are of low quality and recommended the involvement of universities on judicial training programs as well (Knaul, 2013).

The third issue is related to the recruitment process. There is a trend towards patronage, ideology or party affiliation as the real motivation behind selection processes (Negretto & Ungar, 1996). Public competitions could be a useful tool to solve this particular problem, provided that political authorities have honest intentions to free judges of pressures (Salamanca, 2014). The UN Human Rights Committee have emphasized that the notion of an

independent tribunal does not tolerate a system where the functions of the judiciary and executive are not distinguishable, or where the latter is able to control or direct the former (Despouy, 2009). In our region, higher politicization and lack of clear criteria are two capital problems of recruitment.

Recent notable cases of political influence on selection have occurred in Ecuador, Argentina and Venezuela. In Ecuador, in 2005, Congress dismissed all Supreme Court members and appointed new Justices; although the Constitution foresaw a corporative method of selection, which only Supreme justices could partake in. Immediately, the new Supreme Court, known as *Pichi Corte*, annulled criminal cases that involved former Presidents and Vice-presidents. The dismissed magistrates then started a lawsuit in the Inter-American Human Rights System.¹⁴ Finally, the *Pichi Corte* was dismissed after the overthrow of President Lucio Gutierrez. Years later, the Inter-American Court of Human Rights delivered the judgment called the "Supreme Court of Justice (Quintana Coello et al.) v. Ecuador" (I/A Court H. R., 2013).

On December 2015, five days after rising to power, Argentinian right-wing President Mauricio Macri appointed two Federal Supreme Court justices while Congress was in recess. The constitutional appointment method consists in the nomination by the president with approval of the Senate. Even if the new justices were prestigious law professionals, criticism from the press and universities were so strong that President Macri was forced to take a step back ("El decreto de Macri", 2015; "Constitucionalistas y opositores", 2015).

Finally, the Venezuelan judiciary presents relevant empirical data to analyze. In that country, judicial independence has suffered continuous attacks from the last administrations. For instance, the current power struggle between Legislative and Supreme Tribunal. After losing parliamentary elections in 2015, the government majority in Congress took advantage of their last days in office to reorganize the Supreme Tribunal and appoint justices politically close to them. When the new majority in Congress arrived, it overruled those appointments, but that decision was annulled by the Supreme Tribunal. Nowadays, this vicious cycle continues with no hope for a solution in the near future.¹⁵

The UN Special Rapporteurs on this field have also raised concerns about appointment of provisional judges. The use (or abuse) of this figure for long and undefined terms could be a

¹⁴ For more information, see RESTREPO, R. (2014) and PAREDES, F. (2016).

¹⁵ For more information about this case, and Venezuela's judicial crisis: see BREWER-CARÍAS, A. (2016).

way to avoid tenure and ordinary dismissal procedures.¹⁶ It can also implicate independence of judiciary if it is used to assign sensitive cases to particular courts or judges.¹⁷

On bureaucratic judiciaries, judicial liability and discipline is a special concern because it is a critical point of balance between the independence and the accountability of judges. Usually, judicial discipline is attributed to Judicial Councils with one important boundary: errors in judicial decisions or decisions overturned on appeal or reviewed by a higher judicial body must not be reasons for dismissal or other sanctions (Despouy, 2009). This limit is particularly relevant on legal systems where Judicial Councils are administrative authorities instead of special courts or tribunals.

Inappropriate use of disciplinary procedures against judges is a common threat to judicial independence (Villaescusa, 2016). To stop these practices, the UN Special Rapporteurs on this field recommends: creation of an independent organism for running those procedures –e.g. Judicial Councils–; statute law’s clear guidance and objective criteria for disciplinary infractions; disciplinary decisions’ review by superior authorities –preferably from the judiciary– and restricted use of this accountability mechanism (Despouy, 2009; Knaul, 2014).

In this context, is an administrative review over judicial decisions conceivable? The answer must be negative. Even if disciplinary authorities cannot overrule adjudications, there is the chance of intimidating judges with administrative punishment because of their adjudicatory tasks. On a recent report about the Central American judiciary, the UN Special rapporteur expressed her worries about Costa Rican judicial discipline, since judges can be sanctioned for their opinions in court (Knaul, 2013).

South American judiciaries also present unfortunate experiences on this field. In Venezuela, for instance, there is no respect for judicial opinions, so the whole content of court rulings can be analyzed by disciplinary authorities.¹⁸ Ecuadorian judicial discipline presents similar troubles. A recent report criticizes the analyses of judicial reasoning – a “re-interpretation” of statute law – made on discipline rulings and the legitimacy of the *Consejo de la Judicatura* as a disciplinary authority (Pásara, 2014).

¹⁶ Special Rapporteur GABRIELA KNAUL remarked the case of Costa Rica, which judicial body has a high percentage of provisional judges (Knaul, 2013).

¹⁷ A famous criminal case involved the President Rafael Correa against the *Diario El Universo* –one of the most important journals in Ecuador– and its editors; Judicial Council appointed provisional judges, that were constantly changed (“Caso El Universo, nuevamente sin jueces”, 2012).

¹⁸ On case “Cedeno v. Venezuela” (2010), UN Human Rights Committee observed that Venezuelan judicial discipline had unclear procedures and subjective criteria for dismissal (Knaul, 2014). For more details about Venezuelan experience on this field, see Dobarro Ochoa (2006).

In both cases, unclear criteria to punish judicial behavior is the key. Broadly defined disciplinary infractions, such as “lack of grounds”, “inappropriate grounds” or “inexcusable error”, give the opportunity for judicial authorities to influence future adjudications not only of disciplined judges, but other bureaucrat-judges who do not want to jeopardize their tenure in office.

In Hispanic comparative law, there are a few alternatives to solve this. The first alternative is to convert Judicial Councils into high courts, e.g. the Colombian *Consejo Superior de la Judicatura*. Another option could be to leave judicial errors to criminal law¹⁹, but UN Human Rights Committee considers that alternative as going against judicial immunity.²⁰ Finally, the Spanish Judicial Power Act requires a higher judicial ruling before a disciplinary procedure for a lower judge on account of his opinion in court.

6. CONCLUSION

Bureaucracy implies the idea of hierarchical networks. The principal challenge of the bureaucratic judiciary model is precisely to avoid this association in order to guarantee autonomy and individual independence for judges. This general problem becomes an even more complicated issue in South America, a region where political instability and power struggles are very common.

Since the 1980s, South American governments have been implementing legal and structural reforms to their judicial branches, but those changes have proven ineffective in the absence of political will. Political forces – especially those in power – have to realize that they are not eternal and that an independent judiciary is the best arbitrator in case they become a minority (Negretto & Ungar, 1996).

Appointment and dismissal procedures designed in our region are usually appropriate to achieve judicial independence and accountability. Nevertheless, the experiences mentioned above demonstrate that it is not difficult for political powers to avoid usual procedures and achieve influence over judges and tribunals.

To sum up, static rules are not enough. Confidence on the judiciary will decrease much more if political interferences on judicial tasks continue. The paradox lies therein: if an independent

¹⁹ CASTAÑEDA OTSU is in favor of this solution (Castañeda, 2012).

²⁰ Special attention on the case CCPR/CO/72/PRK, para. 8; A/56/44 (Supp.), paras. 37 and 39. (Despouy, 2009).

judicial body does not exist and there is no political will to build one, how interferences in judicial affairs can be prevented?

REFERENCES

- AGRAST, M., BOTERO, J., & PONCE, A. (2015). WJP Rule of Law Index.
- ANTÓN, J. & SORIA, N. (2014) Los poderes del Estado ecuatoriano en pugna. In RESTREPO, R. (Ed.). *Pugna de poderes, crisis orgánica e independencia judicial*. (pp. 21-60). Quito: IAEN.
- APARICIO, M. A. (1996, March 21th). El llamado gobierno del Poder Judicial. El País. [accessed on December 29th, 2016]. Retrieved from http://elpais.com/diario/1996/03/21/opinion/827362809_850215.html
- BERGOGLIO, M. I. (2007). Cambios en la profesión jurídica en América Latina. *Academia: Revista para la Enseñanza del Derecho*, 5(10), 9-34.
- BLAKENBURG, E. (2006). Independence and accountability of the Judiciary - Two sides of a Coin: Some observations on the Rule of Law in Central Europe. In SAJO, A. (Ed.), *Judicial Integrity*. (pp. 207-224). Lieden: Martinus Nijhoff Publishers.
- BOTERO, J., AGRAST, M. & PONCE, A. (2016). WJP Rule of Law Index.
- BREWER-CARÍAS, A. (2016). *Dictadura judicial y perversión del Estado de Derecho*. Caracas: Editorial Jurídica Venezolana Internacional.
- BUSTOS, R. (2016). La independencia judicial en Europa. In GONZÁLEZ PASCUAL, M. & SOLANES, J. (Dir.). *Independencia judicial y Estado constitucional. El Estatuto de los Jueces* (pp. 39-60). Valencia: Tirant Lo Blanch.
- CAPPELLETTI, M. (1990). *Le pouvoir des juges*. Paris: Economica.
- CASTAÑEDA, S. (2012) *Responsabilidad disciplinaria de los jueces*. Lima: Jurista.
- CHAMORRO, J. M. (2007). El modelo de juez. In VALLS GOMBAU, J. F. (Ed.). *Políticas de Selección de Jueces*. (pp. 23-37). Madrid: Consejo General del Poder Judicial.
- CORPORACIÓN LATINOBARÓMETRO [on-line]. "Latinobarómetro Informe 2016". [accessed on December 14th, 2016]. Retrieved from <http://www.latinobarometro.org/latNewsShow.jsp>
- DELGADO DEL RINCÓN, L. (2002). *Constitución, Poder Judicial y Responsabilidad*. Madrid: Centro de Estudios Políticos y Constitucionales.
- DESPOUY, L. (2009). *Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/11/41*. UN.
- DIARIO EL COMERCIO. Caso El Universo, nuevamente sin jueces. (2012, January 10th). [accessed on December 29th, 2016]. Retrieved from <http://www.elcomercio.com/actualidad/politica/caso-universo-nuevamente-jueces.html>

DIARIO LA NACIÓN. El decreto de Macri para completar la Corte: "Resulta constitucionalmente válida la designación de jueces en comisión". (2015, December 15th). [accessed on December 29th, 2016]. Retrieved from <http://www.lanacion.com.ar/1854357-el-decreto-de-mauricio-macri-que-designa-a-los-dos-nuevos-jueces-de-la-corte>.

DI FEDERICO, G. (1978). La professione giudiziaria in Italia e il suo contesto burocratico. *Rivista trimestrale di diritto e procedura civile*, 32(2), 798-813.

DOBARRO, S. (2006). *Del régimen disciplinario aplicable al juez venezolano en función jurisdiccional y los principios de autonomía e independencia judicial*. (Thesis). Universidad Católica Andrés Bello de Venezuela, Caracas.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (Venice Commission) (2010). *Report CDL-AD (2010)004 on the independence of the judicial system Part I: the independence of judges*.

FIX-ZAMUDIO, H. (1977). Función del poder judicial en los sistemas constitucionales latinoamericanos (Vol. 12). UNAM, Instituto de Investigaciones Jurídicas.

FRANK, J. (1930). *Law and the modern mind*. Transaction Publishers.

FRIEDMAN, B. (2004). History, Politics and Judicial Independence. In Sajo, A. (Ed.) *Judicial Integrity*. (pp. 99- 125). Lieden: Martinus Nijhoff Publishers

GÓMEZ MARINERO, C. M. (2011). Algunas reflexiones en torno al Consejo de la Judicatura Federal en México. *Revista legislativa de estudios sociales y de opinión pública*, 4(8), 175-206.

GÓMEZ MARTÍNEZ, C. (2007). El modelo constitucional del Juez. In VALLS GOMBAU, J. F. (Ed.). *Políticas de Selección de Jueces*. (pp. 37-84). Madrid: Consejo General del Poder Judicial.

GONZALES MANTILLA, G. (2009). *Los Jueces. Carrera judicial y cultura jurídica*. Lima: Palestra.

GONZÁLEZ GRANDA, P. (1993) *Independencia del Juez y control de su actividad*. Valencia: Tirant lo Blanch.

GONZÁLEZ PASCUAL, M. (2016). La formación continua de los jueces en España: El juez del siglo XXI. In GONZÁLEZ PASCUAL, M. & SOLANES, J. (Dir.). *Independencia judicial y Estado constitucional. El Estatuto de los Jueces* (pp. 131-148). Valencia: Tirant Lo Blanch.

GUARNIERI, C. & PEDERZOLI, P. (1999) *Los Jueces y la Política. Poder Judicial y democracia*. Madrid: Santillana.

GUARNIERI, C. (2002). El acceso a la magistratura: problemas teóricos y análisis comparado. In JIMÉNEZ, R. (Coord.). *El acceso a la función judicial. Estudio comparado*. (pp. 20-40). Madrid: Consejo General del Poder Judicial.

HERNÁNDEZ, M. (2016). El Cambio de paradigma en el control del Poder Judicial como institución en España. De la responsabilidad judicial a la judicial accountability. In SOLANES, J. (Dir.). *Independencia judicial y Estado constitucional. El Estatuto de los Jueces* (pp. 149-182). Valencia: Tirant Lo Blanch.

INFOBAE. *Constitutionalistas y opositores criticaron a Mauricio Macri por nombrar jueces para la Corte por decreto*. (2015, December 15h). [accessed on December 29th, 2016]. Retrieved from <http://www.infobae.com/2015/12/15/1776603-constitucionalistas-y-opositores-criticaron-mauricio-macri-nombrar-jueces-la-corte-decreto/>

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. (2013). *Guarantees for the independence of justice operator. Towards strengthening access to justice and the rule of law in the Americas*. Washington: Inter-American Commission on Human Rights.

I/A COURT H. R. (2013). *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Judgment of August 23, 2013*. [accessed on December 14th, 2016]. Retrieved from http://www.corteidh.or.cr/docs/casos/articulos/seriec_266_ing.pdf

JIMÉNEZ, R. (2012) Imparcialidad Judicial: su proyección sobre los deberes (Código de Conducta) y derechos fundamentales del juez. In SAIZ, A. (Dir.). *Los derechos fundamentales de los jueces* (pp. 27-44). Madrid: Marcial Pons. Generalitat de Catalunya. Centre d'Estudis Jurídics i Formació Especialitzada.

KELLY, P. J. (2006). Impartiality: A philosophical perspective. In Sajo, A. (Ed.), *Judicial Integrity*. (pp. 17-42). Lieden: Martinus Nijhoff Publishers.

KNAUL, G. (2014). *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/26/32*. UN.

KNAUL, G. (2013). *Informe de la Relatora Especial sobre la independencia de los magistrados y abogados, Gabriela Knaul. Adición. Consulta subregional sobre la independencia del Poder Judicial en América Central, A/HRC/23/43/Add.4*. UN.

LINARES, S. (2004). La independencia judicial: conceptualización y medición. *Política y gobierno*, 11(1), 73-126. LOUSADA, J. F. & RON, R.P. (2015). *La Independencia Judicial*. Madrid: Dykinson.

MACDONALD, R. A. & KONG, K. L. (2012). Chapter 39: Judicial independence as a constitutional virtue. In ROSENFELD, M. & SAJÓ, A. *The Oxford Handbook of Comparative Constitutional Law*. (pp. 831-857). Oxford: Oxford University Press.

MALLESON, K. (2011) Appointment, discipline and removal of judges: fundamental reforms in the United Kingdom. In LEE, H.P. (Ed.), *Judiciaries in a comparative perspective* (pp. 117-133). Cambridge: Cambridge University Press.

MARTÍNEZ ALARCÓN, M. L. (2004). *La independencia judicial*. Madrid: Centro de Estudios Políticos y Constitucionales.

MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS DE ECUADOR. *La Transformación de la Justicia*. (pp. 109-154). Quito: Ministerio de Justicia y Derechos Humanos.

- M. & SOLANES, J. (Dir.). *Independencia judicial y Estado constitucional. El Estatuto de los Jueces* (pp. 61-80). Valencia: Tirant Lo Blanch.
- NEGRETTO, G., & UNGAR, M. (1996). Judicial Independence, Rule of Law, and Democratization in Latin America. *Trabajo presentado en el Seminario " Historia, Política y Sociedad"*. Universidad Torcuato Di Tella. Buenos Aires.[Links].
- NIETO, A. (2004). *El Desgobierno Judicial*. Madrid: Trotta.
- PAREDES, F. (2016). La independencia e imparcialidad judicial en el sistema interamericano. In González Pascual,
- PÁSARA, L. (2009). Desafíos de la transformación de la justicia en América Latina. In ANDRADE, S. & ÁVILA, L.F. (Ed.). *La Transformación de la Justicia*. (pp. 85-108). Quito: Ministerio de Justicia y Derechos Humanos.
- PÁSARA, L. (2011) La Experiencia comparada de los Consejos. *Reforma judicial Revista Mexicana de Justicia*, 18, 107-135.
- PÁSARA, L. (2014) *Independencia judicial en la reforma de la justicia ecuatoriana*. Washington: Fundación para el debido proceso.
- PÉREZ PERDOMO, R. P. (2007). Educación jurídica, abogados y globalización en América Latina. *Reforma Judicial: Revista Mexicana de Justicia*, (9), 255-275.
- PÉREZ-CRUZ, A. (2015). La jurisdicción. Especial consideración de independencia como característica esencial de la Jurisdicción. In PÉREZ-CRUZ, J. & SUÁREZ, J. M. (Ed.). *Independencia judicial y Consejos de la Judicatura y Magistratura. Europa, EE.UU. e Iberoamérica* (pp. 27-90) Barcelona: Atelier.
- PRATS I CATALÀ, J. (2005). *De la burocracia al management. Del management a la gobernanza*. Madrid: Instituto Nacional de Administración Pública.
- QUINTANA CARRETERO, J. P. (2008). Poder Judicial y Responsabilidad: La responsabilidad judicial. In QUINTANA CARRETERO, J. P. (Coord.). *Responsabilidad personal del juez*. (pp. 19-49). Cizur Menor: Aranzadi.
- REQUEJO PAGÉS, J. L. (1989). *Jurisdicción e independencia judicial*. Madrid: Centro de Estudios Constitucionales.
- RESTREPO, R. (2014). Independencia judicial y democracia en Ecuador. In Restrepo, R. (Ed.). *Pugna de poderes, crisis orgánica e independencia judicial*. (pp. 121-148). Quito: IAEN.
- RICO, J. M. & SALAS L. (1990). *Independencia judicial en América Latina: replanteamiento de un tema tradicional*. San José: Centro para la Administración de Justicia.
- RUSSELL, P. H. (2001). Towards a General Theory of Judicial Independence. In RUSSELL, P. H. & O'BRIEN, D. M. (Ed.), *Judicial independence in the age of democracy. Critical perspectives from around the world*. (pp. 2-22). Charlottesville: University Press of Virginia.

- SALAMANCA, A. (2014) El Sistema de selección de jueces en Europa (Alemania, España, Italia y Portugal). Algunas recepciones críticas en América Latina. IN RESTREPO, R. (Ed.). *Pugna de poderes, crisis orgánica e independencia judicial*. (pp. 87-120). Quito: IAEN.
- SALZBERGER, E. M. (2004). The independence of the Judiciary: An economic analysis of law perspective. In SAJO, A. (Ed.), *Judicial Integrity*. (pp. 69-98). Lieden: Martinus Nijhoff Publishers.
- SARTORI, G. (1994). *Ingeniería constitucional comparada: una investigación de estructuras, incentiva y resultada*. México DF: Fondo de Cultura Económica.
- SCHAFFNER, B. F. & DIASCRO, J. S. (2011) Judicial elections in the news. In STRED, M. J. (Ed.). *Running for judge* (pp. 115-139). New York: New York University Press.
- SCHWAB, K. (2016). The Global Competitiveness Report 2015-2016.
- SEIBERT-FOHR, A. (2012). Judicial Independence. The normativity of an evolving transnational principle”, in SEIBERT-FOHR, A. (Ed.), *Judicial Independence in Transition*. (p. 1279-1362). Heidelberg: Springer.
- SHETREET, S. (2011). Judicial independence and accountability: core values in liberal democracies. In LEE, H.P. (Ed.), *Judiciaries in a comparative perspective* (pp. 3-24). Cambridge: Cambridge University Press.
- SOLOMON JR., P. H. (2004) Courts in Russia: Independence, Power and Accountability. In SAJO, A. (Ed.), *Judicial Integrity*. (pp. 225-252). Lieden: Martinus Nijhoff Publishers
- TARR, G. A. (2010). *Judicial process & judicial policymaking*. Boston: Wadsworth.
- TARUFFO, M. (2009) La cultura de la imparcialidad en los países del common law y del derecho continental. In GÓMEZ MARTÍNEZ, C. (Dir.). *La Imparcialidad Judicial* (pp. 95-120). Madrid: Consejo General del Poder Judicial. Toharia, J. (1975). *El juez español. Un análisis sociológico*. Madrid: Tecnos.
- TURENNE, S. (2012). Judicial independence. In SEIBERT-FOHR, A. (Ed.), *Judicial Independence in Transition*. (p. 147-184). Heidelberg: Springer.
- VILLAESCUSA, R. (2016) Independencia e imparcialidad. Transparencia y Responsabilidad". In PASTOR, S. *Análisis económico de la justicia y reforma judicial*. (pp. 395-430). Valencia: Tirant Lo Blanch.
- XIOL RÍOS, J. A. (2009) Constitución, Ley, Ciudadanos, Juez. In GUTIÉRREZ-ALVIZ, F. & MARTÍNEZ, J. (Dir.). *El juez y la cultura jurídica contemporánea Tomo III: La función y los poderes del juez en una sociedad democrática*. (pp. 17-62). Madrid: Consejo General del Poder Judicial.
- ZAFFARONI, E.R. (2009). Dimensión política de un poder judicial democrático. In ANDRADE, S. & ÁVILA, L.F. (Ed.).
- ZEITUNE, J. & ANDREU-GUZMÁN, F. (2007). *International principles on the independence and accountability of judges, lawyers and prosecutors*. Geneva: International Commission of Jurists.