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ARTICLES

THE JUDICIARY IN POLITICAL TRANSITIONS: THE CRITICAL ROLE OF U.S. CONSTITUTIONALISM IN LATIN AMERICA †

*Nuno Garoupa**

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ABSTRACT

This paper proposes a theory that explains how political transitions deal with incumbent judiciaries. We argue that a new political regime compares the benefit of reshaping the judiciary with loyal appointees against the political and economic costs of directly interfering, including the cost of international reputation. There are several forms of interventionism including court packing, court purging, and violence against the judiciary. We discuss political transitions in Europe and Latin American civil law jurisdictions through the lens of our theory. We argue that American constitutional influence plays a critical role. In addition, we provide a detailed analysis of the recent case of Venezuela, a process that began in 1999. The Venezuelan case verifies two conditions identified by our model: weaker forms of formalism and an institution's lack of prestige, and, in particular, the justices of the Supreme Court of Justice. These factors explain the strategic choices of Venezuela's current President, Hugo Chávez.

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I. INTRODUCTION

On January 20, 2009, President elect Barack Obama, in compliance with Article II, Section I of the U.S. Constitution,¹

† We thank Diego Werneck Arguelhes, Carlos Delvasto, Adriana Garcia, Tom Ginsburg, Carlos Gómez Ligüerre, Antonio Hespanha, David Law, Tatiana Maranhão, Rodolfo Noronha, Maria Angela Oliveira, Cesar Santolim, Eduardo Stordeur, the late Luis Schuartz, and FGV seminar participants for their helpful comments. Excellent research assistance was provided by Carlos Bacalao-Fleury, Isabel Freitas Peres, Diego Saul, and Caroline Belloff.

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swore “to the best of [his] ability, *preserve, protect and defend the Constitution of the United States.*” The world witnessed Obama and U.S. Supreme Court Chief Justice John Roberts stumble over each other’s words during the inauguration ceremony. Although a seemingly insignificant error (i.e., the word “faithfully” was put in the wrong place) Chief Justice Roberts re-administered the oath the following day to comply with the exact language of Article II, Section I of the U.S. Constitution.

Democracy presupposes respect for the rule of law and its formalism. It therefore requires a legal and institutional order where law prevails over the will of the rulers and there is judicial review of the constitutionality and legality of the acts of public power.² This statement was acknowledged by the International American States (IAS) when it adopted the Inter-American Democratic Charter in 2001 and stated that the “[e]ssential elements of representative democracy” to include “access to and the exercise of power in accordance with the rule of law” and “the separation of powers and independence of the branches of government.”³

Democracy requires an independent judiciary even if, as is the case in Venezuela, the rule of law is weak.⁴ Indeed, a minimal definition of the rule of law might not mean an actual separation of power or submission to the laws, but simply a respect and guarantee of constitutional rights.⁵

However, as announced by President Chávez, when a new government embodies a political and legal transition from an old

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¹ Each president recites the following oath from the U.S. Constitution, “I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, § 1.

² For a comprehensive discussion, see generally BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (Cambridge Univ. Press 2004). See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Michael Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001).

³ Inter-American Democratic Charter art. 3, Sept. 11, 2011, 40 I.L.M. 1289, available at http://www.oas.org/charter/docs/resolution1_en_p4.htm.

⁴ Rogelio Pérez-Perdomo, *Venezuela 1958-1999: The Legal System in an Impaired Democracy*, in *LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE* 423 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003) [hereinafter *Venezuela 1958-1999*].

⁵ *Id.*

to a new constitutional arrangement, the meaning of the rule of law and the independent judiciary becomes more controversial. The significance of a rule of law and an independent judiciary is particularly contentious in the context of a political transition from a dictatorial regime to a new democratic arrangement. On one hand, the establishment of a rule of law as a separation of powers and submission to the laws necessarily precludes any interference with the judiciary. On the other hand, the judiciary has largely been appointed, influenced, and dominated by the previous political regime, and has therefore been suspected of potentially undermining the foundations of the new democratic regime. The respect for the rule of law and the proper adherence of the judiciary to the new political regime create a conceptual and practical problem.

It may be argued that there is an asymmetric conceptualization of the rule of law.⁶ When a political regime goes from authoritarian to democratic, the replacement of the judiciary appointed by the dictatorship is not inevitably inconsistent with the judiciary's independence. This argument purports that the former judiciary would likely undermine democracy and consequently limit the rule of law itself. The use of impeachment, forced resignation, court packing, or the creation of new courts to undermine the incumbent judiciary is acceptable under the cover of constitutional change that embodies a shift to democracy.⁷ For example, new constitutional courts can be regarded as transitional devices to constrain and undercut the influence of the judges appointed by the previous authoritarian regime.⁸ However, when a political regime transitions from democracy to authoritarianism, or in the case of a consolidated democracy, replacement of the judiciary is inescapably inconsistent and unacceptable under the rule of law. The judiciary cannot be replaced because judges promote rule of law and democratic legal principles. From a legal theory perspective, while such asymmetric conceptualization offers a safe means for political transition, it does not address the practical problems that transitioning governments encounter.

A new political regime cannot easily trust a judiciary selected

⁶ See Owen M. Fiss, *The Right Degree of Independence*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 55 (Irwin P. Stotzky ed., 1993).

⁷ *Id.*

⁸ *Id.*

and influenced by a previous regime that is by and large faithful to a different ideology and embodies a distinct political and legal culture. The extent to which that judiciary will engage in active judicial review to promote a separate political and legal agenda might be a serious concern for the new regime. This behavior might undermine new constitutional and political arrangements and may also question, or even damage, the political and social legitimacy of the new regime.

In the alternative, replacing the judiciary may pose serious problems and burden the new regime with significant costs. Administrative costs are accrued when finding and training a new group of judges to reside on the courts. The more extensive the court repopulation becomes, the higher the administrative costs. To economize on these costs a government could replace judges only on the highest courts. Nevertheless, this solution has the potential to entrust vast areas of the court system in the hands of the younger judges appointed by the previous regime who may then be able to dominate the higher courts in later years as they are promoted or selected. Therefore, while repopulating all of the courts is expensive, it promises to be more effective than only replacing the highest ranking judges.

Yet the administrative costs are not always the most relevant costs. Political costs are also considerable and important. In negotiated transitions from military dictatorships to democracy, such as those in Chile and Argentina in the 1990s, keeping the former judiciary and exercising deference to the higher courts may be a component of the arrangement.⁹ The government that relinquishes power to a new political regime might feel that the new regime's adoption of the old judiciary is a means of protecting the relinquishing regime's interests and could therefore be more willing to peacefully accept transition. Consequently, the new political regime might receive a stable and ordered transition at the expense of accepting the old judiciary.

A second important political cost includes losses in terms of international reputation and foreign economic investment. The replacement of the judiciary may damage the international standing of the new political regime. For example, a new authoritarian regime might want to sustain the fiction of institutional continuity or judicial independence. A new democratic regime may be in a weaker position to shape the

⁹ See *infra* Part IV.

judiciary once constitutional rights and protection have been granted. Foreign investment is also a significant variable; investors might suspect the new political regime will weaken established property rights and therefore reduce the expected return on investment. The replacement of the judiciary can be (correctly or incorrectly) perceived as the first step in that direction. Foreign and national investors usually prefer legal and judicial stability and are usually dissuaded if the new political regime interferes radically and extensively with the old judiciary.

Most of the literature on political transitions and the judiciary tends to concentrate on the treatment of an incumbent judiciary appointed and patronized by a dictatorship in an emerging democracy. This focus is explained by the recent transitions in Europe, Asia, and Latin America, and can also presumably be explained by the adherence of a democracy to the principle rule of law, which makes direct interventionism with an incumbent judiciary a conceptual legal problem. It is generally believed that a new nondemocratic regime would be less concerned with rule of law and would consequently interfere more directly with the incumbent judiciary. However, this observation is historically inaccurate. An authoritarian regime might not be willing to openly interfere with the judiciary for several political reasons.¹⁰

A new authoritarian regime can avoid an open challenge to the judiciary by legitimizing the regime itself, allowing the courts to establish social control and regulation aligned with the interests of the regime, and thus alleviating potential political tensions. In fact, empowering the judiciary to some extent could extend the life of the regime and avoid an abrupt loss of power.¹¹

At the same time, by providing legitimacy and social regulation the courts economize on other more aggressive and expensive sources of power. It also establishes a credible commitment to economic policy, in particular toward foreign and domestic investment. They might even be called to decide on controversial reforms.¹² In addition, it is important for the judiciary to retain some degree of independence to maintain cohesion within the ruling coalition and to mitigate severe

¹⁰ See Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 1-10 (Tom Ginsburg & Tamir Moustafa eds., 2008).

¹¹ *Id.* at 5-7.

¹² *Id.* at 1-10 (discussing Egypt as an example of when a Supreme Constitutional Court was called to review a reformist package of economic liberalization in the 1980s).

fragmentation of the authoritarian ruling elite.¹³

In most jurisdictions, the incumbent judiciary is subject to political and legal concerns that determine its potential replacement or maintenance. The transition from the thirteen British colonies to the United States dealt with British judges appointed by the monarch to serve in the colonies where they held office at pleasure since the 1701 Act of Settlement, which guaranteed the independence of the judiciary would not run.¹⁴ The solution to replacing the British judges that the new American states did not trust is at the heart of many features developed in the United States concerning judicial appointment, selection, and retention at the state level. This also definitely influenced the design of the judiciary at the federal level. Throughout the nineteenth century, as new states that joined the United States were formally under Spanish, French, or Mexican rule, similar problems with incumbent judges had to be addressed. Another important episode was the establishment of a separate court system by the Confederacy in 1861, and how the United States treated the pro-slavery judiciary of the South after its defeat in 1865. Recent evidence may suggest that the way a state chooses to address the nature of judicial independence, as designed by the previous colonial powers, explains substantive differences concerning legal and economic performance across states today.¹⁵

In Europe, the political transitions of the twentieth century also evidence creative ways of addressing the incumbent judiciary. Some examples of such include: Germany and Italy after WWII; Portugal, Spain and Greece at the end of their authoritarian regimes in the late 1970s; and the former communist Central and Eastern European countries in the 1990s.¹⁶ The Argentina and

¹³ *Id.* at 8 (explaining the establishment of the Constitutional Court in Chile in 1981 under Pinochet).

¹⁴ See Jeffrey Goldsworthy, *Abdicating and Limiting Parliament's Sovereignty*, 17 KING'S C. L. J. 255 (2006). See generally CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (Univ. of Michigan Press 2008) (discussing the concerns of the Constitutional Convention about judicial independence and the disposition that judges serve at pleasure of the monarch).

¹⁵ Daniel Berkowitz & Karen Clay, *American Civil Law Origins: Implications for State Constitutions and State Courts*, 7 AM. L. & ECON. REV. 62 (2005); Daniel Berkowitz & Karen Clay, *The Effect of Judicial Independence on Courts: Evidence from American States*, 35 J. LEGAL STUD. 399 (2006).

¹⁶ See discussion *infra* Part IV. The separation of Slovakia from the Czech Republic is another interesting example. When Czechoslovakia split in 1993 the Supreme Court of the Czechoslovak Federal Republic lapsed (this court functioned only for about ten

Chile regime transitions from military to democratic in the early 1990s have more recently become the focus of much debate. Judicial reform in Latin America is constrained by the needs to address the role of the judiciary and their difficult past in terms of democratic legitimacy.¹⁷

Unlike the United States, Europe and Latin America have a common civil law tradition. Although subject to debate, comparative law usually includes the Latin American countries in the French civil law family, because of Portuguese and Spanish colonial influence, whereas the German civil law stands as a separate and distant relative.¹⁸

In this paper we focus on political transitions in Europe and Latin America. Although they share a civil law tradition, we identify different manners of addressing the judiciary during political transitions. We argue that there are substantive explanations as to why Latin American political transitions are, generally speaking, more interventionist than in Europe. These reasons reflect the mix of civil law tradition with American constitutional influence. This mix, which is relatively unknown to Europe, results in a particular judicial institution design that attracts more interventionism by political authorities of a new regime.

At this point in the paper it is important to note that readers should exercise care when evaluating the generalizations we discuss. The characteristics and political transitions of Latin American countries vary historically. Part II provides a general view that clarifies the main distinctions explained by our model and considers important exceptions that should be taken into account when discussing particular cases. Part IV is an overview of Europe and Latin American political transitions that provides more detailed analysis. Our aim is to account for these transitions from the perspective of our generalized theory which necessarily leaves many local particular details without explanation. At the same time our theory does not exhaust the possibility of other

months in 1992) as did the terms of the justices of the federal court. There was no automatic continuing of their duties into the new Czech and Slovakian Supreme Court systems. Of the justices who were nominated for the new Slovak Supreme Court in 1993, none had functioned as a justice in the Czechoslovak Federal Supreme Court. We thank Katka Svatikova for this information.

¹⁷ See discussion *infra* Part III.

¹⁸ See generally K. Zweigert & H. Kötz, *AN INTRODUCTION TO COMPARATIVE LAW* (T. Weir trans., 3d ed. 1998).

contributing local factors that may explain why each transition is unique in certain particular aspects.

Judicial reform and change in Latin America has been explained by essentially three models.¹⁹ One model views judicial reform as an “insurance policy” through which the authorities develop the legal framework for a more independent judiciary when an incumbent government encounters the possibility of losing power. A more independent judiciary will serve as a guarantor of the current *status quo* and prevent the new authorities from dismantling present arrangements, or at least slow down the pace of change.²⁰ This model does not explain why a new political regime, in its early stages when the potential for losing power is in the distant future, should be deterred from interfering with the judiciary imposed by the previous political regime.

A second model views judicial change leading to more independence and autonomy as the inevitable result of party competition in situations where no political group exercises full control of the executive and legislative branches. This model, inspired by the U.S., proposes a divided government as the main explanation for judicial independence.²¹ Our paper analyzes the opposing perspective, specifically how interferences with the judiciary prevail in both autocratic and democratic regimes. The different way autocratic regimes deal with the incumbent judiciary may support the idea that divided government does not fully explain judicial independence.

A third model proposes legitimacy as the main explanation for how Latin American governments deal with the judiciary. Unlike the previous models that require some degree of political competition, this literature sees legitimacy as the outcome of self-imposed restrictions put in place to achieve more credibility. Judicial reforms are therefore instrumental in helping the executive and legislative branches building up leverage for future

¹⁹ See Diana Kapiszewski & Matthew M. Taylor, *Doing Courts Justice? Studying Judicial Politics in Latin America*, 6 *PERSP. IN POL.* 741 (2008).

²⁰ See Jodi Finkel, *Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change*, 39 *LATIN AM. RES. REV.* 56 (2004); Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 47 *LATIN AM. POL. & SOC'Y* 87 (2005).

²¹ See Rebecca Bill Chávez, *The Construction of the Rule of Law in Argentina: A Tale of Two Provinces*, 35 *COMP. POL.* 417 (2003); Rebecca Bill Chávez, *The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System*, 36 *J. LATIN AM. STUD.* 451 (2004).

purposes.²² We recognize legitimacy and credibility as an important part of the problem. However, we provide a detailed account of costs and benefits, where legitimacy is only one of the relevant variables.

Part III details the heart of our theory. We explain why the balance of costs and benefits for a political regime in transition differ within civil law countries. In particular we explain why active interventionism is more likely in Latin American countries than in Europe. Part IV discusses the specific political transitions in Europe and Latin America in light of our generalized model.

In Part V we make a detailed application to the case of Venezuela with a particular focus on the relationship between the current government with President Chávez who has promoted a significant transition in the Venezuelan political regime and the incumbent judiciary. In our view, Venezuela is a striking example of a political transition from a fairly stable democracy to a more authoritarian regime. President Chávez' new government has challenged the Venezuelan judiciary while simultaneously promoting more effective courts and new rules for the purpose of enhancing judicial independence. We argue that our theory explains the policy set by President Chávez since his inauguration in 1999.

Part VI concludes the discussion of our new theory of political transitions in Europe and Latin America based on a comparison of the benefit of reshaping the judiciary, therefore interfering with the incumbent judiciary in different forms, with the costs of undermining rule of law. We argue that this cost-benefit analysis captures the essential differences of political transitions in civil law jurisdictions in Europe and Latin America.²³

²² See, e.g., Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of the New Millennium?* 40 *TEXAS INT'L L.J.* 595 (2005); Alba M. Ruibal, *Self-Restraint in Search of Legitimacy: The Reform of the Argentine Supreme Court*, 51 *LATIN AM. POL. & SOC'Y* 59 (2009).

²³ For an analysis of Asia, see generally TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (Cambridge Univ. Press 2003). For example, in the Philippines after the People Power revolution in 1986, President Corazon Aquino accepted the resignation of all Supreme Court justices and reconstituted it according to the new 1987 Constitution. Given the important American constitutional influence in the Philippines, the observed pattern of judicial transition supports our model. See Stacia Haynie, *Paradise Lost: Politicization of the Philippine Supreme Court in the Post Marcos Era*, 22 *ASIAN STUD. REV.* 459 (1998); Dante Gatmaytan-Magno, *Changing Constitutions: Judicial Review and Redemption in the Philippines*, 25 *UCLA PAC. BASIN L.J.* 1 (2007).

II. INCUMBENT JUDICIARIES IN POLITICAL TRANSITIONS

Any political regime in its transition stage must address the incumbent judiciary. As argued earlier, the degree to which the new ruling elite distrust the judiciary appointed by the former regime will influence their degree of interference. Political interventionism can take different shapes. There are soft approaches that indicate the judiciary's need to adhere to the new regime, or at least to limit confrontation with the political arrangements. There are also hard approaches when the new ruling elite find the incumbent judiciary too unreliable, which therefore justifies a riskier and more direct confrontation. The following is a detailed discussion of these different possibilities.

A. *Take Advantage of Limited Tenure and Other Laws*

When the incumbent judiciary has limited tenure, in particular designed to loosely coincide with changes in the political cycle of government in office or presidential inaugurations, the new regime may secure this advantage by slowly replacing the incumbents. The enormous advantage of this option is that, in principle, there is no constitutional crisis or obvious loss of rule of law. However, an important disadvantage is that it may take a while before the new regime is able to replace a significant part of the judiciary.

Another similar route is to use impeachment or removal procedures already established in the law. This way the new regime might be able to hide political motivations under other technical reasons for impeachment such as financial corruption or gross misbehavior, including failure to comply with judicial duties. When applying legal principles developed by the previous regime rule of law is not lost. The significant disadvantage is that it might not be easy to frame technically and provide strong evidence to justify the impeachment or the removal. There is a fine line between impeachment according to the law and straight court purging.²⁴

This option has been used in Latin American countries when there is no regime transition but a mere change of president or party in office. In addition, this option was utilized in Argentina and Chile during their transitions from military regimes to democracy in the mid 1980s and early 1990s respectively,

²⁴ See GEYH, *supra* note 14, at 113.

presumably to achieve a peaceful process without upsetting the supporters of the old regime.²⁵

A different case, but nevertheless relevant in this context, is that the judiciary abandons the country after the change of political regime. Hence, an incumbent judiciary does not directly face the new regime because it has voluntarily, or in anticipation of reprisals, abandoned the country. This was apparently the situation in Cuba in 1959, after the collapse of the Fulgencio Batista's dictatorship (1952-1959) and the implementation of the new regime under the leadership of Fidel Castro. It is said that many upper-middle class judges preferred to fly abroad to exile rather than wait for the transition. The new Cuban dictator could easily establish a new loyal Supreme Court (*Tribunal Supremo Popular*) in the legal vacuum created by the sudden departure of the previous Justices.²⁶

B. Further Codification and New Laws

Another potential soft way to constrain the incumbent judiciary is by recodification, or the enactment of new laws that actively restrain the judges from interfering with the new regime. Promoting formalism, clarifying ambiguous statutes or openly legislating against incumbent legal doctrines could provide the necessary framework to avoid confrontation with the judiciary.²⁷ For example, the democratic transitions in Italy and Portugal inherited fascist civil codes.²⁸ They neither replaced the judges nor revoked the entire civil code, but rather amended where necessary to indicate to the incumbent judiciary the new interpretation according to the new political regime or where the old civil code directly interfered with new social policies (e.g., family law).

²⁵ See Fiss, *supra* note 6; WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA* (Praeger Paperback 2000).

²⁶ Information gathered by the authors in direct conversation with Cuban legal scholars.

²⁷ In fact, this might have been one of the original goals of codification by Napoleon, an effective and successful technique to constraint the unreliable French judiciary largely suspected of supporting the *Ancien Régime*. See Benito Arruñada & Veneta Andonova, *Judges' Cognition and Market Order*, 4 *REV. L. & ECON.* 665 (2008); Benito Arruñada & Veneta Andonova, *Common Law and Civil Law as Pro-Market Adaptations*, 26 *WASH. U. J.L. & POL'Y* 81 (2008).

²⁸ E.g., Italy (1942) and Portugal (1966).

C. Promote Internal Politicization from the Top

In a highly hierarchical judicial system, where the Supreme Court exerts overwhelming influence in selection, promotion and retention, an available option is to use it to the advantage of the new regime. The Supreme Court will be in a good position to shape the judiciary throughout the political transition by promoting an ideology adherent to the new regime, promoting and favoring loyal judges, and punishing or disciplining disloyal judges. When the design of the Supreme Court's powerful influence is actually inherited from the former political regime, this option avoids the reputation of excessive interventionism.

An alternative framework is to develop a new body that, for the sake of improving the functioning of the judiciary, will in fact mentor the selection and promotion of the judiciary. Taking the form of a judicial council, this new body will have the duty to ensure the incumbent judiciary does not challenge the regime very often. Composed by judges, lawyers and politicians, the judicial council will be in a strong position to regulate the behavior of the incumbent judiciary and develop the necessary professional norms to avoid serious clashes.

This was the solution favored by Portugal, Spain, France and Italy in their political transitions.²⁹ The judicial council was designed to help the independence of the judiciary under a doctrine of self-government (as opposed to the tradition of being dominated by a strong executive). However, the same judicial council was successful in reshaping the judiciary in terms of professional values and diffusing political influence. The case of the Brazilian judicial council established by the military dictatorship after 1964 provides an example where that same institution was used to discipline the judiciary.³⁰

D. Promotion

The fourth soft strategy is to promote disloyal judges, particularly in the highest courts, to high profile jobs and other lucrative positions with less political influence outside of the

²⁹ See Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103 (2009); Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY J. INT'L L. 52 (2009).

³⁰ See discussion *infra* Part IV.

judiciary. This may effectively promote a buy-out for the incumbent judiciary. However, this strategy inevitably requires the incumbent judiciary's cooperation since the acceptance of such promotions results from a passive or active acquiescence of ideological defeat. Apparently President Menem was an enthusiast of this strategy during his term in office as President of Argentina (1989-1999).³¹

E. Court Packing

If unsatisfied with the incumbent judiciary, particularly the highest judicial bodies, another possibility is to institute court packing. The goal is to have a loyal majority in the relevant courts and reduce the influence of the disloyal incumbent judiciary. The disadvantage of court packing is that obvious political goals might negatively affect the independence of the judiciary.

Not unheard of in the United States (e.g., the court packing plan of President Roosevelt in 1937),³² this strategy has been observed in transitions to democracy (e.g., Argentina in the late 1980s), but also in military authoritarian regimes (e.g., Brazil in 1964).³³

F. Creation of New Courts

A common strategy implemented by new regimes is to restructure the court system in to promote the creation of new special or specialized courts. The approach consists of isolating the potential problems caused by incumbent judiciary disloyalty. The political regime identifies the most relevant areas of potential confrontation and assigns them to a new court system packed by loyal judges.

In authoritarian regimes political crimes, human rights violations, police activity regulation, and all acts that potentially threaten the regime may be allocated to a new system of political courts that will smoothly implement the wishes and goals of the regime. Consequently, these political courts are frequently extinguished after the collapse of the authoritarian regime. In this respect, the case of Hitler's Germany is paramount.³⁴

³¹ See Fiss, *supra* note 6.

³² See GEYH, *supra* note 14, at 79.

³³ See discussion *infra* Part IV.

³⁴ See discussion *infra* Part IV.

In a transition to democracy, standard policy is to create a new constitutional court packed by judges, law professors, and lawyers faithful to the new constitutional values. This approach was implemented in Germany, Italy, France, Spain, Portugal and most former communist Central and Eastern European countries. Constitutional review is a fundamental piece of the new political regime and cannot be trusted to the incumbent judiciary.³⁵ The same applies to authoritarian regimes, the Chilean Constitutional Court as the most striking example.³⁶

G. Court Purging

A harder strategy is to dismiss the incumbent judiciary, as observed in some Latin American countries such as Argentina, Peru, and Bolivia. The entire replacement of the Supreme Court or of the constitutional court could effectively secure a loyal judiciary. The judiciary of the lower courts may also be purged to secure a completely faithful court system, if necessary. The main cost of court purging is political in terms of international reputation. If all the previous approaches can be theorized within a rule of law paradigm, a doctrine of court purging consistent with a rule of law has to be extremely creative.

We have exposed the asymmetric conceptualization of a rule of law.³⁷ It is possible that in a transition to democracy court purging could be excused to promote democracy and new constitutional values. Nevertheless, the inevitable political discretion in court purging could be inconsistent with elementary constitutional principles, such as separation of powers. This inconsistency was exemplified in Peru in the mid 1990s.³⁸

H. Sponsoring Violence Against the Judiciary

The most difficult option is to eliminate any threats posed by

³⁵ See John Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 639 (1991); WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* (Springer 2008) (discussing the model of constitutional review in the Baltic republics, Poland, Slovakia, Czech Republic, Hungary, Slovenia, Romania and Bulgaria in search of democratic legitimacy and the increasing conflicts with the government as a result of enhanced judicial activism).

³⁶ See discussion *infra* Part IV.

³⁷ See Fiss, *supra* note 6.

³⁸ See discussion *infra* Part IV.

the incumbent judiciary through state sponsored violence. It is rare that such open and violent challenges to the judiciary occur and this open challenge more often occurs in totalitarian regimes. It may also arise during political transitions in weak states where violence is used to intimidate the judiciary to further certain political interests. An unfortunate example of such is exemplified in Colombia.

III. A THEORY OF INTERVENTIONISM IN POLITICAL TRANSITIONS

Political transitions must overcome the obstacle of an incumbent, potentially disloyal, judiciary that may seek to advance its own ideological goals that undermine the new regime's political and constitutional aims. There are different, but not mutually exclusive, strategies that the new ruling elite can utilize. Harder strategies, rather than softer, are more effective to minimize or eliminate judicial disloyalty. But harder strategies are also more costly in terms of reputation, international ratings, and respect for rule of law. Softer versions can minimize these costs but they are evidently less effective. Depending on local determinants, political context, and even the international geopolitical and economic interests, the balance might favor one type of strategy over another.

One relevant dimension is timing. Political transitions that require quick results might be inclined to pursue harder strategies more frequently. Political transitions that do not face strong external challenges and benefit from more time to accomplish results tend to use softer strategies.

A general overview of political transitions in Europe and Latin America detects a less common use of harder strategies in the former rather than in the latter. This observation holds true both for transitions from authoritarian regimes to democracy as well as from more democratic regimes to authoritarian governments. Given the civil law tradition, such significant differences could be surprising. In this paper we propose two arguments to justify this disparity.

Our first proposal argues that the incumbent judiciary is generally less threatening in European jurisdictions. Our second proposal argues that the political and social costs of openly challenging the incumbent judiciary are significantly lower in Latin America. Both arguments purport the same idea: harder

approaches to the incumbent judiciary are more costly and less needed in Europe than in Latin American from the perspective of the new ruling elite, whether democratic or authoritarian.

*A. Formalism of the Judiciary and the United States'
Influence*

One of the main characteristics of a civil judiciary in terms of lawmaking is its strong adherence to strict formalism.³⁹ There are good legal reasons for this dependence on strict formalism since the civil law system was originally conceived as a reaction to an excessively interventionist judiciary. In addition, there are also important practical reasons. Formalism, as originally imposed by civil law, shields the judiciary from political shifts. It undercuts judicial responsibility for political and social consequences of legal decisions and transfers all the political legitimacy and responsibility for the way the legal system regulates society to the legislator. On one hand, this means the judiciary will enforce absurd and outrageous laws so long as they are the explicit manifestation of legislative will. On the other hand, the judiciary will avoid responsibility for these laws and their unacceptable and sometimes immoral consequences.

A strict uncritical formalism is reinforced by professional norms developed by two mechanisms. One mechanism is bureaucratic in nature and is the process of selection, promotion, and retention that emphasizes internal loyalties rather than by ideology or party line. A second far-reaching mechanism is the existence of a judicial school that favors socialization and judicial education within a pre-defined set of rules that apply to a close group. Both mechanisms create an "esprit de corps" matched only by other state bureaucracies. The legal culture of a bureaucratic judiciary emphasizes collective goals and reputation while deemphasizing individualism and personal ideological goals.⁴⁰

Formalist and bureaucratic judiciaries pose less of a threat to political transitions. Although conservative in nature (pro-status quo) due to the rigidity of professional norms and the "esprit de corps," these judiciaries will rarely undermine the will of the new

³⁹ See generally John Merryman, *How Others do It: The French and the German Judiciaries*, 61 S. CAL. L. REV. 1865 (1988); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225 (1998).

⁴⁰ See generally Nuno Garoupa & Tom Ginsburg, *Judicial Reputation and Audiences: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT'L L. 451 (2009).

legislator for the sake of formalism itself. These types of judiciaries can also be easily manipulated if the interests of the new regime capture the highest levels of the bureaucracy.

The main problem raised by a formalist judiciary is the possible interpretation of the laws enacted by the new regime under the old principles of law that are not formally abrogated or derogated. This could require more legislative activity by the new regime to replace these old general principles of law or doctrines, but it does constitute a major reason for conflict between the judiciary and the new regime. Once the old principles and doctrines are replaced, a formalist judiciary will easily accommodate the preferences of the new regime by faithfully following the new principles and doctrines.

Therefore, highly formalist and bureaucratic judiciaries offer little resistance to the new political regime, independent of its political orientation. Less formalist and less hierarchical judiciaries are more likely to oppose changes that they disagree with on ideological grounds thus undermining the enforcement and application of new laws.

The civil law tradition in Latin America has been developed on the periphery of the nineteenth and twentieth century evolution in Spain and Portugal. The tradition of the Spanish and Portuguese judiciary as a mere interpreter, as opposed to an active lawmaker, has been well established since colonial times. Spanish and Portuguese colonies had limited exposure to any kind of self-government or home rule. Unlike the United States, Latin America was controlled by authoritarian crowns while struggling with liberal revolutions in the early nineteenth century when the colonies gained independence.⁴¹

In the case of Spain, the Council of Indies (*Real y Supremo Consejo de Indias*) was the highest court and located in Madrid. The Council of Indies was simultaneously an administrative and legislative body as well as an appeals court. The local *audiencias* were advisory bodies to the viceroy and performed as high courts in the colonies for civil, criminal, and administrative matters (*Real Audiencia*). They were also executive and judicial authorities. These local *audiencias* reviewed the acts of royal officers to protect royal prerogatives, but they were not an independent review board because their formal role was to support the interests of the

⁴¹ Luz Estella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INT'L & COMP. L. REV. 59 (1995).

Spanish crown.⁴²

The situation in the Portuguese colony was not very different. The administration of justice was a matter for the local governors assisted by a judicial body (*ouvidor-geral da comarca*). Higher courts were established in 1608 (*Tribunal da Relação do Estado do Brasil*, in Bahia) and in 1751 (*Tribunal da Relação do Rio de Janeiro* for the south, whereas the previous high court had jurisdiction over the north). These higher courts were chaired by the governor-general of Brazil to defend the Portuguese crown. The final court of appeal was the king's court in Lisbon (*Casa da Suplicação de Lisboa*). With the transfer of the royal court to Rio in 1808, the highest court of the kingdom was divided in half, the king's court in Lisbon had jurisdiction over Portugal and the king's court in Rio (*Casa da Suplicação do Rio*) had jurisdiction over Brazil. The latter was the embryo of the Brazilian Supreme Court, inaugurated in 1829 after Brazil established independence in 1822.⁴³

The legacy of the colonial rule in Latin American legal systems has favored a centralized control of government with few checks and balances as well as a weak judiciary that is traditionally deferent to the executive branch. In addition, the absence of precedent in the Spanish and Portuguese legal tradition and the embryonic stage of a legal doctrine establishing a separation of powers at the moment of independence are important elements of the Latin American legal culture.⁴⁴

The codification and later developments in civil law arrived after Latin America gained independence. The European influence, while tempered by local needs, still certainly had a significant role in later codifications after the 1850s and 1860s. Civil and commercial codes largely followed the examples of France and Spain but were subject to local adaptations (from well-known legal scholars such as Andrés Bello in Chile, Vélez Sarsfield in Argentina, and Teixeira de Freitas in Brazil).⁴⁵

The initial models for the role of the judiciary were necessarily authoritarian given the Portuguese and Spanish influence. Thus, a weak and subordinated judiciary had a

⁴² *Id.*

⁴³ HISTÓRIA DA EXPANSÃO PORTUGUESA 235 (Francisco Bethencourt & Kirti Chaudhuri eds., 1998) (Port.).

⁴⁴ See generally STEPHEN ZAMORA ET AL., MEXICAN LAW (Oxford Univ. Press 2004).

⁴⁵ See generally ANGEL R. OQUENDO, LATIN AMERICAN LAW (Foundation Press 2006).

tendency to prevail. The evolution from these initial conditions, however, was particular to Latin America.⁴⁶

We argue that European judiciaries, even before the far-reaching reforms after WWII, were traditionally more formalist and bureaucratic than in Latin America. Appointment mechanisms were always more bureaucratic and less ideological in Europe, the "esprit de corps" was stronger, and the influence of judicial schools more powerful.⁴⁷

Obviously the notion of formalism changes over time, even in the most traditional legal systems such as France. The slow introduction of general principles of law as a form to limit legislation changed the behavior of the European judiciary and a new form of activism emerged in Europe at the end of the twentieth century. At most we can discuss some weak convergences across legal systems.

In our view, the influence of American constitutionalism in Latin America is the main reason for the difference between European and Latin American judiciaries. The formalist and bureaucratic tradition of civil law was diminished by the design imported from the U.S. Constitution that naturally induces politicization of the judiciary and, at a later stage, judicial activism. Since the nineteenth century, judicial activism never played the same role in Latin America that it did in the U.S., but the political mechanisms of judicial appointment, coupled with the absence of strict vertical organization, largely undermined the existence of a strong "esprit de corps."⁴⁸ Consequently, the incumbent judiciary in political transitions would potentially be less loyal to the new regime, or more openly loyal to the previous political regime, in Latin America than in Europe. In turn, this characteristic might convince the new political regime of the need to directly interfere with the judiciary or more eagerly challenge the established courts.

The heavy influence of American constitutionalism should also be assessed in perspective.⁴⁹ There was a strong initial

⁴⁶ See Fiss, *supra* note 6.

⁴⁷ On the independence of Supreme Courts, see Joel G. Verner, *The Independence of Supreme Courts in Latin America*, 16 J. LATIN AM. STUD. 463 (1984).

⁴⁸ Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1 (1990) (noting federalism, division of powers between the branches of government, and checks and balances to avoid concentration in the Latin American and U.S. legal systems).

⁴⁹ The impact of American constitutionalism in Latin America has been asymmetric, with Argentina, Brazil, Venezuela and Mexico being the most influenced countries. See, e.g., Mitchell Gordon, *When Executive/Judicial Balances Diverged in Argentina and the*

borrowing in Venezuela or Mexico, with almost literal copies in Argentina (1853) and Brazil (1891).⁵⁰ Many of these countries had constitutions contemplating some form of judicial review, which was alien to their civil law tradition, since by then *Marbury v. Madison*⁵¹ was well enshrined in American constitutional law. The Brazilian Constitution of 1891 offers an excellent example. Despite the civil concept of judiciary influenced by the Portuguese tradition, the new Constitution created a Supreme Court modeled on the American example with very similar powers.⁵²

The Latin American departure from American constitutionalism is a reality of the twentieth century. The 1917 Mexican Constitution expands rights and opens the trend to constitutionalize private law. The lengthy Brazilian Constitution of 1988 consummates this trend in Latin America. Slowly, many Latin American countries also adopted the German model of a specialized constitutional court as part of a package of legal reforms in transitions: Bolivia (1967); Chile (1980); Guatemala (1985); Colombia (1991); Peru (1993); and Ecuador (1998). Others have followed a mitigated model creating a special chamber within the ordinary Supreme Court: Honduras (1982); El Salvador (1983); Nicaragua (1987); Costa Rica (amendment of 1989); Paraguay (1992); and Venezuela (1999).⁵³

Most Latin American countries today have some form of both abstract and concrete review of constitutionality, with a variable degree of open access (*recurso de amparo*, *recurso de tutela*, *mandado de segurança*). These mechanisms are important for separation of powers and judicial independence, but naturally contribute to the politicization of the judiciary.⁵⁴

As compared to the United States, political insularity is still formally greater in Latin America because the judiciary is usually more professionalized and regulated by the Supreme Court (e.g., when selecting lower court judges or new appointments to the Supreme Court) or by some local version of weak judicial

United States, 19 IND. INT'L & COMP. L. REV. 323 (2009).

⁵⁰ See Maria Angela Oliveira, *Reforming the Brazilian Supreme Federal Court: A Comparative Analysis*, 5 WASH. U. GLOBAL STUD. L. REV. 100 (2006) (recognizing the obvious American influence in Brazil, although no *stare decisis* or *writ of certiorari* was introduced).

⁵¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁵² See Oliveira, *supra* note 50.

⁵³ See OQUENDO, *supra* note 45.

⁵⁴ Nuno Garoupa, *The Politicization of the Kelsenian Constitutional Courts: Empirical Evidence*, in *EMPIRICAL JUDICIAL STUDIES* (K.C. Huang ed., 2009).

council.⁵⁵ Furthermore, the existence of authoritarian political regimes in the twentieth century has also contributed to the creation of a distinct judiciary in Latin America. An inoperative and ineffective judiciary was subordinate to the demands of national security and military regimes. For example, in Argentina and Chile where the judiciary was probably stronger, most judges acknowledged that the security of the state was more important than the protection of individual rights. Evidently the threat of deputation in Chile may have convinced those who disagreed, but the strict vertical hierarchical organization of the judiciary, as opposed to the horizontal organization developed by judicial councils in Europe and the loose decentralization of common law jurisdictions, facilitates the life of a new regime by controlling the Supreme Court directly.⁵⁶

In our view the American constitutional influence in Latin America was much stronger in the appointment mechanisms of the judiciary, notably of the Supreme Court justices, and less so in the style of judicial review. This results in a more politicized judiciary, unknown in the civil law tradition, without the ability to develop an independent and strong notion of judicial review similar to that of the U.S. courts.

In summary, strict formalism insulates the judiciary from political responsibility but also effectively constrains judicial activism. Such characteristics reduce the need for an open change against the incumbent judiciary. A pure formalist judiciary will apply the law with full regard for the interpretation and wishes of the new legislator, whether democratic or authoritarian. In this respect, we argue that due to the American constitutional influence mainly in the nineteenth century, the Latin American judiciary falls somewhere between the traditional strictness of the European judiciary and the openly active American judiciary. We recognize that the Latin American judiciary is probably more European than American in this respect. However, the structuring of Supreme Courts (e.g., appointment, judicial review, etc.) that is similar to the U.S. model has introduced an important degree of politicization and has hindered the development of a strong "esprit de corps." Both inevitably undermine the bureaucratic formalism making Latin America different from the path followed in Europe throughout the twentieth century.

⁵⁵ See Fiss, *supra* note 6; Garoupa & Ginsburg, *supra* note 29.

⁵⁶ See Fiss, *supra* note 6.

B. Political and Social Prestige of the Judiciary

Interfering with and replacing a judiciary that has a bad reputation or is openly politicized is less costly for the new ruling elite. The cost of challenging the incumbent judiciary is also lower if they are in a weak position or are less likely to organize strong opposition.

A judiciary perceived to be politically and economically corrupt is an easy target. Judicial corruption can provide the necessary excuse and justification for an intervention. The notorious existence of bribing and political favoritism can help the new ruling elite remove disloyal judges. This practice is utilized much more often in Latin America than in Europe. On the other hand, a more disorganized incumbent judiciary lacking a strong “*esprit de corps*” is less likely to pose strong opposition to change. As discussed earlier, this occurs more often in Latin America than in Europe.

The essence of reputation in the Latin American judiciary has been questionable for a long time.⁵⁷ Unfortunately, the reforms imposed by international organizations at the end of the twentieth century have largely failed to address this problem. The persistent organizational, administrative, and managerial problems of the Latin American judiciary have been described in detail in the literature: financial and political corruption, lack of capacity and resources, poorly organized courts, weak judicial education and training, ineffective delivery of justice, utilizing the judiciary as an arm of the government, and violence against the judiciary.⁵⁸ These traditional problems require a profound reform of the executive and legislative powers that have been largely unaddressed. Also, as expected, the incumbent judiciary is usually hostile to any implementation of new legal policies. A structural change requires

⁵⁷ See Steven L. Taylor, *Democratization in Latin America*, 37 *LATIN AM. RES. REV.* 162 (2002) (discussing the general belief that judiciaries are the weakest pillar of Latin America democracies); Michael Dodson, *Assessing Judicial Reform in Latin America*, 37 *LATIN AM. RES. REV.* 200 (2002) (recognizing that failed judicial reforms may be easily explained by the lack of political culture that demands an independent judiciary).

⁵⁸ See World Bank [WB], *Judicial Reform in Latin America and the Caribbean*, World Bank Technical Paper 280 (August 31, 1995); T. Leigh Anenson, *For Whom the Bell Tolls . . . Judicial Selection By Election in Latin America*, 4 *SW. J. L. & TRADE AM.* 261 (1997); Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 *CA. W. INT’L L.J.* 345 (2000); see also Brian Z. Tamanaha, *The Primacy of Society and the Failure of Law and Development*, in *ST. JOHN’S UNIV. SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER SERIES* 009-0172 (2009).

a new judicial culture that influences new law by adding legislation where there are gaps in the law. However, a new judicial culture is usually unavailable.⁵⁹ Importing U.S. models has not worked for obvious local reasons that are generally ignored by international organizations.⁶⁰

Narrow judicial reforms based on the view that an American-inspired judiciary would consolidate democracy have changed little and, in some cases, have been counter-productive.⁶¹ An unhealthy judicial organization with a serious deficit of prestige has prevailed for most of the twentieth century to the present.⁶²

The low quality of the judiciary in Latin America has caught an immense amount of attention by political scientists. Table 1 summarizes important findings that measure the perceived judicial performance in Latin America in the early 1990s and more recently. Many countries have improved judicial performance probably as a result of more recent extensive reforms, including Uruguay, Mexico, El Salvador, Bolivia, Chile, Paraguay, Peru, Honduras, and Ecuador. Many other countries experienced a loss in quality in recent years, such as Costa Rica, Venezuela, Argentina, Guatemala, and Nicaragua (the worst performance in the sample). Nothing has seemingly changed in Colombia, Panama, or Brazil. The overall performance scores evidence that the judiciaries of Latin American countries do not possess a reputation for quality and independence. The general robustness of these scores further supports our view that the judiciaries of Latin American countries tend to be weak in terms of their credibility and legitimacy.

In summary, we argue that the Latin American judiciary is generally perceived as incompetent, ineffective, politically, and financially corrupt. It lacks prestige and popularity as a whole. The reforms advocated by international organizations in the 1980s and 1990s have largely failed. It is unsurprising that public opinion is not shocked with open challenges to the incumbent judiciary by a new political regime that promises substantive improvements in the court system.

⁵⁹ See Fiss, *supra* note 6; PRILLAMAN, *supra* note 25.

⁶⁰ See Nagle, *supra* note 41; see also Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and Its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77 (1997); Enrique A. Sosa Elizeche, *Restructuring of Justice Administration in Paraguay*, 42 ST. LOUIS U. L.J. 1153 (1998).

⁶¹ See PRILLAMAN, *supra* note 25.

⁶² *Id.*

IV. A GENERAL OVERVIEW OF POLITICAL TRANSITIONS

This section is a general overview of political transitions in Europe and Latin America from the perspective of our thesis. We also discuss the specific case of Venezuela in the following section.

A. Europe

One of the most violent and despicable political regimes that existed in Europe was Nazi Germany. Yet the regime, headed by Adolf Hitler, favored the creation of new courts over court purging or violence exerted against the judiciary. The new Weimar Constitution of 1919 enacted after WWI established a Supreme Court that oversaw the German judiciary. Hitler did not trust the incumbent judiciary when he came to power in 1933. A few judges were removed by the Nazi regime but many remained because the judiciary was perceived as largely irrelevant and insignificant to the political aims of the new regime.⁶³ That same judiciary would later apply the racist laws in a formalist way that supported Hitler's decision to not openly challenge the incumbent judiciary. Formalism was used as a legal justification for the incumbent judiciary to collaborate with the construction of the Third Reich and, after the war, to defend such behavior.⁶⁴

Inevitably there were occasional shocks between the judiciary and Hitler's government. When the final outcome of the Reichstag Fire Trial was determined in 1934, it was disappointing for the Nazis especially with only one conviction and their conspiracy theory not proved according to the court. Rather than purge the regular courts, Hitler decided to create a special court to deal with political crimes. The Third Reich sponsored a specialized court model known as the People's Court (VGH) that was established in 1934. The new court had exclusive control over matters of treason, resistance, and other political crimes against the Reich. Above formal constitutional provisions, this court was neither accountable nor integrated with the regular judiciary. The People's Court was an effective instrument of the Nazi regime and completely subservient to the interests of the Third Reich. It was

⁶³ See Marvin E. Frankel, *Concerning the Role of the Judiciary May Serve in The Proper Functioning of a Democracy*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 23 (Irwin P. Stotzky ed., 1993).

⁶⁴ See Markus Dirk Dubber, *Judicial Positivism and Hitler's Injustice*, 93 *COLUM. L. REV.* 1807 (1993).

dismantled in 1945 in the aftermath of the destruction of the Third Reich. Curiously, none of the almost 600 judges and state lawyers that served in the court from 1934 to 1945, not even the last Judge-President, were convicted of a war crime or made accountable for their actions while serving on this infamous court.⁶⁵

Another example occurred with the Spanish dictatorship under Francisco Franco from 1939-1975. Although Franco won a civil war against the supporters of the former Republic in 1939, the judicial structure was strongly influenced by the defeated regime. The new regime developed a parallel system of two court organizations. One structure included the "regular" court. They were fairly independent from political interference and self-contained to non-political issues. Judicial activism was deterred in areas of political tension or with political implication that affected the stability of the legitimacy of the Franco regime. The other court system was organized with a complex set of special bodies ruling over all matters relevant or important to the political stability of the ruling elite and the survival of the regime. These courts were highly controlled, subservient to the regime, and completely dependent on political aims. In the 1975 transition to democracy these specialized courts were quickly abolished whereas little change was effected on the ordinary courts.⁶⁶

The above mentioned policy of a dual system of court organizations, where one structure is subservient to the dictatorial regime and the other is a mere continuation of the original courts, was also implemented in fascist Italy (1922-1943), collaborationist Vichy France (1940-1944), and authoritarian Portugal (1933-1974).⁶⁷

The transitions from military or authoritarian regimes to democracy in Western Europe generally dealt with the incumbent judiciary in two ways. First, judicial councils were created to promote independence and rule of law, thus removing the

⁶⁵ See generally John B. Mason, *The Judicial System of the Nazi Party*, 38 AM. POL. SCI. REV. 96 (1948); H. W. KOCH, IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER'S GERMANY (I.B. Tauris 1997). The weak denazification of the German courts is widely documented.

⁶⁶ José Juan Toharia, *The Organization, Functioning, and Evolution of the Spanish Judicial System, 1975-2000: A Case Study in Legal Culture*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 377 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003).

⁶⁷ See generally ALAIN BANCAUD, UNE EXCEPTION ORDINAIRE, LA MAGISTRATURE EN FRANCE, 1930-1950 (2002); GUIDO NEPPI MODONA, SCIOPERO, POTERE POLITICO E MAGISTRATURA (1969) (It.).

influence of politicians from selection, promotion, removal, and disciplinary action. Such councils vary in composition and competences but they all favor political insularity at the expense of accountability.⁶⁸ Second, the courts directly involved with political crimes were abolished and new constitutional courts created to promote judicial review of constitutionality in the context of a democracy.⁶⁹ In all cases, including Nazi Germany, the judiciary was almost entirely unchanged and the judges who served in the political courts were never prosecuted for human rights violations.

B. Argentina

Argentina had a sequence of strong military and weak democratic regimes throughout the twentieth century; the Peronism is likely the most famous one (1946-1955). A new military dictatorship, headed by General Videla, took over in 1976, but collapsed in 1983 after the defeat at the Falklands war with Britain. A political transition to democracy was pursued by President Alfonsín (1983-1989), elected by a left-wing coalition, and was followed by President Menem (1989-1999), sponsored by the Peronist Party.

The military junta utilized most of the pre-existing legal institutions and left alone the majority of the lower courts, but appointed a new Supreme Court that was forced to resign in 1983.⁷⁰ In fact, the politicization of Supreme Court appointments and forced resignations dominated Argentina in political transition as well as in party alternations within democracy. President Carlos Menem succeeded in an initiative to remake the appointing and dismissal of judges to serve his own political interests.⁷¹ In particular, while President Raúl Alfonsín had appointed judges to the Supreme Court who were diverse both in political allegiance and professional respect (without changing the number of justices unlike the common practice of all other Presidents), President Menem pushed a court-backing law through Congress in 1990 that expanded the Supreme Court from five to nine members, while managing to fill the new openings with allies that ruled regularly in

⁶⁸ See Garoupa & Ginsburg, *supra* note 29.

⁶⁹ See Garoupa, *supra* note 54.

⁷⁰ See Fiss, *supra* note 6.

⁷¹ GERMÁN BURGOS SILVA, *¿Qué se Entiende hoy por Independencia Judicial? Algunos Elementos Conceptuales*, in 13 INDEPENDENCIA JUDICIAL EN AMERICA LATINA. ¿DE QUIÉN? ¿PARA QUÉ? ¿CÓMO? (Germán Burgos Silva ed., 2003) (Colom.).

his favor.⁷²

Quite differently, President Néstor Kirchner (2003-2007) started a process of Supreme Court reform that included a formal restriction on the executive's ability to determine justice appointments.⁷³ Although the new Supreme Court was more reformist in nature and tried to resolve some of the pending problems (e.g., lack of transparency of internal proceedings and limiting the expansion of the court's jurisdiction), it is debatable as to whether the court was more independent in practice from the President than before.⁷⁴

Within Latin America, Argentina is probably the best example of political transitions purging and manipulating the Supreme Court as needed to serve political interests, specifically by adjusting the number of judges to please the ruling President. The frequency of such episodes has contributed to justices needing to develop adequate strategies to survive impending political transitions.⁷⁵ This has in turn contributed to decreasing the reputation of the judiciary and making purging easier.

Traditionally, the Argentine judiciary is politically marginal whereas the American law judiciary has become the guardian of the democratic process, personal autonomy of the judiciary, and the rule of law. The Argentinean judiciary has had the opposite effect. The Argentinean Supreme Court developed a certain activism, different from the American tradition that is probably more adequate for a civil law system. It is evident that the same Supreme Court model has produced two very different realities in the U.S. and in Argentina.⁷⁶

⁷² *Id.* See Ruibal, *supra* note 22.

⁷³ See Ruibal, *supra* note 22.

⁷⁴ *Id.*

⁷⁵ See Matías Iaryczower et al., *Judicial Independence in Unstable Environments: Argentina, 1935-1998*, 16 AM. J. POL. SCI. 699 (2002); Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Democracy and Dictatorship*, 96 AM. POL. SCI. REV. 291 (2002); Helmke, *Checks and Balances by Other Means: Strategic Defection and Argentina's Supreme Court in the 1990s*, 35 COMP. POL. 213 (2003); HELMKE, *COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA* (2004) [hereinafter *COURTS UNDER CONSTRAINTS*]; REBECCA BILL CHÁVEZ, *THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA* (2004).

⁷⁶ See María Inés Bergoglio, *Argentina: The Effects of Democratic Institutionalization*, in *LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 20* (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003); Carlos S. Nino, *On the Exercise of Judicial Review in Argentina*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA* 309 (Erwin Stotzky ed., 1994).

Judicial review of administrative acts in Argentina has been regularly conducted French-style. Democratic periods have been limited and with weak governments. But in that respect the courts have developed some degree of activism in order to permit expansion of executive powers that naturally affect the balance of power to their own disadvantage.

The low reputation of the Argentine judiciary and the subservient role of the Supreme Court to the ruling political regime have made it easy for a new President to remove the incumbent judiciary. The degree of politicization of the Supreme Court and deference to the President is expected, therefore weakening general concerns that undermine the rule of law by court purging and court packing. More recently, some degree of judicial activism has been observed as a result of a more competitive party system, which might express the desire for a more independent judiciary.⁷⁷

C. Chile

Democracy has prevailed for most of the twentieth century in Chile. Constitutional rule was introduced in 1932 after a military regime. The regime was dominated by a stable party system from 1932 to 1973, although the courts were perceived to be weak.⁷⁸ President Eduardo Frei Montalva was elected in 1964 for the Christian-Democrats with a program of moderate reform. His term in office (1964-1970) did not solve the political tensions emerging in Chile. President Salvador Allende was elected in November 1970 as the head of a left-wing coalition with a program of radical socialist reforms. In 1973 his government was dramatically staged out of the office by a military coup under General Pinochet. A military dictatorship ruled from 1973 to 1990, after passing a new Constitution approved by a plebiscite in 1980. A new plebiscite in 1988 opened the route for democracy, with President Aylwin (1990-1994) and President Eduardo Frei Ruiz-Tagle (1994-2000).

After the 1973 military coup that eliminated the government of Salvador Allende in Chile, Pinochet's new regime chose to

⁷⁷ See, e.g., Rebecca Bill Chávez, *The Appointment and Removal Process for Judges in Argentina: The Role of Judicial Councils and Impeachment Juries in Promoting Judicial Independence*, 49 *LATIN AM POL. & SOC'Y* 33 (2007).

⁷⁸ See Julio Faundez, *Chilean Constitutionalism before Allende: Legality Without Courts*, 29 *BULL. LATIN AM. RES.* (2010).

promote internal loyal politicization from the top. With a Supreme Court that was culturally and socially close to the regime elites, and largely unfavorable to the previous political regime during the days of the Allende's government, the new military regime utilized the Supreme Court to impose their will over the entire judiciary and met minimal disruption. For example, few incumbent judges were actually purged or disciplined. At the same time, because the Constitutional Court could not be equally trusted and was not under direct supervision of the Supreme Court, Pinochet eliminated the court and further empowered the incumbent Supreme Court. Court packing increased the total number of justices from twelve to seventeen.⁷⁹

There were some minor skirmishes with the Supreme Court in the initial years of the military regime mainly due to interpretation of the new rules established by the military under principles and doctrines developed by the previous regime (the legality of administrative acts, the *recursos de amparo*, and the coexistence of the courts with a separate military justice). This eventually convinced General Pinochet that a new Constitution was needed to obliterate previous general principles of law. The goal of the 1980 Constitution was not to start a transition to democracy, but rather to consolidate the military regime, strategically constitutionalizing transitory provisions and assuring supremacy of legal principles dear to the military, thus enshrining the military tutelage. Its main goal was to solve the internal problems of the regime.⁸⁰

The case of the Chilean Constitutional Court created in 1981 is particularly relevant. The military regime began by eliminating the previous Constitutional Court in 1973 because it was too favorable to the previous regime, unlike the Supreme Court Justices who were appointed by the same previous regime but were nevertheless largely sympathetic to Pinochet. Eight years later, the military dictatorship under Pinochet decided to introduce the possibility of constitutional review (*inaplicabilidad por inconstitucionalidad*) by a special court, at the request of the President or a fourth of the members of either house. The regime granted ample powers of review to the court (e.g., draft laws,

⁷⁹ See Fiss, *supra* note 6 (discussing that by 1990 fourteen justices were Pinochet's appointees, two by Allende's, and one was appointed by Eduardo Frei Montalva).

⁸⁰ See ROBERT BARROS, *CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION* (Cambridge Univ. Press 2002).

decrees, constitutional reforms, and international treaties). The new court was expected to be largely loyal to the regime. However, history shows a different record; the court was actually more independent than anticipated and not completely subservient to the military regime. In fact, far reaching decisions in 1985 supported the basic standard for free and clean elections in the 1988 plebiscite and later elections that effectively put an end to the regime itself.⁸¹ However, the court was simultaneously docile to the regime in many other relevant matters.⁸²

The staggering difference between the Chilean Constitutional Court, appointed by Pinochet but not totally subservient, and the Supreme Court, largely appointed by left-wing Presidents (including Allende) before 1973 and yet loyal to Pinochet, deserves some attention. The explanations are political (including the complexities of the Chilean democratic system before 1973 and the absence of party competition after 1973), attitudinal (more class-based than ideological especially with the upper class dominance at the bench), and legally formalistic (conservatism and conformity among the judiciary in the higher courts).⁸³ For example, the introduction of a new judicial council and reforms of the Supreme Court in the early 1990s were met with opposition, not for political reasons, but because the elitist behavior of the judiciary reacted negatively to any outside interference that delegitimized their social prestige.⁸⁴

The general perception during the transition was that the judiciary was fairly independent, especially the Constitutional Court. The 1989 constitutional reforms facilitated the work of the Court by securing a compromise between the military and the transitional elites.⁸⁵ However, the members of the Supreme Court inherited from the military regime, unlike the constitutional judges, were questioned on their merits and one was impeached

⁸¹ See LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007) [hereinafter *JUDGES BEYOND POLITICS*]; Lisa Hilbink, *Agents of Anti-Politics: Courts in Pinochet's Chile*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 102 (Tom Ginsburg & Tamir Moustafa eds., 2008) [hereinafter *Agents of Anti-Politics*].

⁸² See BARROS, *supra* note 80. The explanation seems to be that institutional stability demanded a balance between the direct interests of the ruling elite and some operative concessions to the opposition.

⁸³ *Id.*

⁸⁴ See Fiss, *supra* note 6.

⁸⁵ See Claudia Heiss & Patricio Navia, *You Win Some, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy*, 49 *LATIN AM. POL. SOC'Y* 163 (2007).

for shirking his duties. The Supreme Court was an obstacle to the democratic reforms of Aylwin's government (1990-1994) largely because of the internal legal culture.⁸⁶

The underlying legal culture of the Chilean judiciary has been a priority of all new regimes. The creation of a judicial school by the military regime failed in 1983. A school was created in 1994 to promote a changed legal culture that could support the new innovative democratic regime.⁸⁷

The approach to the Supreme Court was largely influenced by the most traditional formalism in civil law. Rather than opting to change the court, the new democratic regime favored a new legal culture based on a formalist approach. The main argument for favoring a formalist approach was because as long as an incumbent judiciary is highly professional, uncorrupt, and legally skillful, they will not be a major problem for the new regime.⁸⁸ Another dominant notion of judicial independence that allows deference to the government was welcomed by the new democratic political regime.⁸⁹ The irony is that the same reasoning was applied by the previous regime.

D. Peru

A military regime dominated Peru from 1968 to 1980 under generals Juan Velasco and Francisco Morales Bermúdez. The return of democracy, after a new Constitution was promulgated in 1979, did not bring political stability and economic growth. After a term dominated by corruption allegations, the center-left President Alan García (1985-1990) was replaced by a center-right coalition lead by President Alberto Fujimori (1990-2000). The economic and political instability of the early 1990s and the problems caused by terrorism culminated in the 1992 Peruvian constitutional crisis. President Fujimori suspended the separation of powers and extended presidential powers to interfere with the

⁸⁶ See Edmundo Fuenzalida Faivovich, *Law and Legal Culture in Chile, 1974-1999*, in *LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE* 108 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003).

⁸⁷ *Id.*

⁸⁸ Unlike the case of Argentina, the Chilean judiciary does not have a reputation for corruption. See *JUDGES BEYOND POLITICS*, *supra* note 81, at 3.

⁸⁹ Jorge Correa Sutil, *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* 89 (Irwin P. Stotzky ed., 1993).

judiciary (Decree Law 25418). He also inaugurated a more authoritarian style of government and implemented a new Constitution, which was promulgated through referendum in 1993. Corruption and political opposition lead to the collapse of President Fujimori's government by 2000. A new President, Alejandro Toledo, ruled over the transition period (2001-2006) under the 1993 Constitution.

Unlike the transition of the early 1980s, President Fujimori challenged the incumbent judiciary during his own constitutional crisis. He fired the Constitutional Court (*Tribunal de Garantías Constitucionales*), and many of the higher court judges.⁹⁰ President Fujimori undercut the independence of the country's judges through mass firings and the denial of tenure, as well as with the passage of laws that circumvented constitutional provisions aimed at guaranteeing judicial autonomy and restricting executive power.

The President justified his decision by citing the general incompetence of the judiciary, the inefficiency of the courts, corruption, and excessive politicization that occurred as a result of the traditional party system's decadence that utilized the courts to fight some political battles. These arguments were also echoed with the general population.⁹¹ However, even if President Fujimori justified these policies as efforts to combat corruption and inefficiency, his success included relying on his own influence over the courts. The resulting climate of lawlessness facilitated the corruption for which the former President ultimately faced criminal charges in the form of human right violations.

The new court system that emerged from the 1993 Constitution intended to tackle these problems. Different judges were appointed and ratified by the new Constitution for the purpose of promoting more efficient courts and more effective justice. Constitutional review was redesigned and the new Supreme Court was empowered with the competences of the military courts for terrorism with paramilitary characteristics.⁹²

President Fujimori's decision to fire the incumbent judges in 1992 generated so much internal and external criticism that the

⁹⁰ He fired thirteen Supreme Court justices who were members of the Constitutional Court and both the National and District Judicature Councils.

⁹¹ See Fiss, *supra* note 6.

⁹² See Fiss, *supra* note 6; LINN HAMMERGREN, *THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE* (WestView Press 1998).

new regime was forced to effectuate a change. A new court (*Tribunal de Honor de la Magistratura*) was created in 1993 to assess the justifications for serious violations of the rule of law.

E. Brazil

The increasingly leftist leaning of the Brazilian governments of Presidents Juscelino Kubitschek de Oliveira (1956-1961), Jânio Quadros (1961), and João Goulart (1961-1964) resulted in a military dictatorship. The military operated initially under "institutional acts" that provided the constitutional grounds for the political transition. The military did not initially intend to dismantle the previous judicial framework. The First Institutional Act preserved the function of the judiciary, allowing the Brazilian Supreme Court (*Supremo Tribunal Federal*) to still promote principles of the Brazilian Constitution of 1946. However, this was widely distrusted by the new regime because people viewed the justices as closely related to the outgoing ruling elite. The legal principles of the old republic, which were established in the Constitution of 1946, soon became an obstacle to the new political regime.

In the following years, the military dictatorship used court packing and court purging in the Supreme Court. Enacted in 1965, the Second Institutional Act increased the number of justices from eleven to sixteen, which was reduced to eleven in 1969.⁹³ The new Constitution enacted in 1967 abolished all judicial privileges, allowed direct intervention by the military regime into the judiciary, and was profoundly amended in 1969 to favor the new regime. In 1967 only six of the sixteen justices that were part of the Supreme Court composition prior to the military regime were still part of the court. The Fifth Institutional Act was enacted in 1968 and empowered President Arthur Costa E Silva with a variety of powers, namely the power to achieve opposition repression. Under this Act, three justices of the Supreme Court were removed, which initiated the following resignation of two other justices. After 1969 the Supreme Court was solely comprised of justices appointed by the military regime.⁹⁴

⁹³ See OSVALDO TRIGUEIRO VALE, *O STF E A INSTABILIDADE POLITICO-INSTITUCIONAL* (1976) (Braz.).

⁹⁴ It is important to note that the sixth Justice of the Supreme Court, Ribeiro da Costa, died in 1967. There seems to be evidence that the Supreme Court responded to political pressure during the military regime, but other factors may also explain the court decisions.

A sequence of military Presidents, together with large interference of the military regime with Supreme Court decision, followed until 1985. Growing opposition to the military regime was expressed by electoral defeats of the government supporters in Brazil's three major states. However, the Supreme Court continued to be perceived as a strong supporter of the military regime, or at least as a court that would likely act with deference towards the executive branch.⁹⁵

Serious economic problems culminated with the 1985 election of the opposing candidate, President Tancredo Neves. A political transition to democracy started immediately under Presidents José Sarney (1985-1990) and Fernando Collor de Mello (1990-1992). A new Constitution was promulgated in 1988 and essentially maintained the Supreme Court structure. However, the Supreme Court's competence in constitutional matters was amplified with the establishment of the injunction relief and the list of authorities and institutions that could petition for a claim of unconstitutionality. The 1988 Constitution reinforced many of the previous functions of the Supreme Court, while also added some important modifications. The Supreme Court's constitutional role was enhanced when it was assigned to prosecute and judge the petitions for unconstitutionality from the different political bodies. Additionally, other lawsuits were foreseen, such as *habeas corpus*, *mandado de segurança*, and *habeas data*.⁹⁶

The transition to democracy did not directly confront the incumbent judiciary.⁹⁷ The Supreme Court composition was left largely untouched.⁹⁸ A decentralized court system evolved into a

See FABRICIA CRISTINA DE SÁ SANTOS, *DIREITO E AUTORITARISMO: O SUPREMO TRIBUNAL FEDERAL E OS PROCESSOS DE HABEAS-CORPUS ENTRE 1964-1969* (2008) (Braz.), available at http://www.sapientia.pucsp.br/tde_busca/arquivo.php?codArquivo=8180.

⁹⁵ See OSCAR VILHENA VIEIRA, *SUPREMO TRIBUNAL FEDERAL – JURISPRUDENCIA POLITICA* (2006) (Braz.); ALVARO RICARDO DE SOUZA CRUZ, *BREVE HISTORICO DO SUPREMO TRIBUNAL FEDERAL E DO CONTROLE DE CONSTITUCIONALIDADE BRASILEIRO* (2004) (Braz.).

⁹⁶ These are private actions against the President, Congress, and other legislative and executive branches, including the Supreme Court.

⁹⁷ Fabiana Luci de Oliveira, *O Supremo Tribunal Federal no Processo de Transição Democrática: Uma Análise do Conteúdo dos Jornais Folha de S. Paulo e O Estado de S. Paulo*, 22 *REVISTA DE SOCIOLOGIA POLÍTICA* 101 (2004) (Braz.).

⁹⁸ See Oliveira, *supra* note 50. The persistent nepotism might have been an excuse to avoid the more unpopular discussion about empowering the higher courts, since some states such as Rio Grande do Sul already had state constitutional norms to tackle nepotism.

more judicially active framework. The persistent nepotism and the need to harmonize diffused jurisprudence (hence reinforcing the power of the higher courts) eventually led to the creation of the judicial council in 2004.⁹⁹

In Brazil a judicial council was promoted by the military regime as a solution to judiciary oversight. Having inherited a diffused judicial organization and without a trusting relationship with the Supreme Court, the Brazilian dictatorship created a judicial council in 1977 to undermine any conflicts between the new regime and incumbent judges and was composed of seven Supreme Court justices. The council had national jurisdiction and was responsible for receiving complaints against members of other courts as well as taking any necessary remedial measures.¹⁰⁰

The 1988 Brazilian Constitution abolished this council. It was largely eliminated because of its relation with the control system introduced by the dictatorship. In fact, the strategy implemented by the Brazilian military regime explains why the idea of a judicial council that secures independence and better management of the court system was not very popular in democratic Brazil after 1988. The idea that judicial councils serve to promote new political goals, rather than to depoliticize, constrained reforms in Brazil.¹⁰¹ In fact, only in 2004 Brazil inaugurated a new judicial council when most Latin American countries had already established one as a response to their own judicial reform packages promoted by international organizations.¹⁰²

In 2004 the principle of binding decisions (*súmula vinculante*) was established to address the Supreme Court's incapacity to influence lower court decisions because *stare decisis* was absent from the Brazilian legal system.¹⁰³ This principle binds Supreme Court decisions on the lower courts, an *erga omnes* effect. Opponents believe that binding decisions established the "dictatorship of the Supreme Court," which limits the freedom of decision of the judges in the lower courts.¹⁰⁴ Advocates for

⁹⁹ See Garoupa & Ginsburg, *supra* note 29.

¹⁰⁰ BRAZIL CONST. amend. VII.

¹⁰¹ Eliane Botelho Junqueira, *Brazil: The Road of Conflict Bound to Total Justice*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 64 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003)

¹⁰² See Garoupa & Ginsburg, *supra* note 29.

¹⁰³ BRAZIL CONST. amend. XXXV.

¹⁰⁴ It is of particular importance to understand that the (highly politicized) Supreme Court influenced the state courts, which were usually populated by career magistrates (and therefore resembled more civil law courts).

binding Supreme Court decisions on lower courts further affirm that this mechanism establishes uniformity in the application of questions previously answered by other courts, therefore diminishing the possibility of conflicting decisions among them.¹⁰⁵

These developments corresponded to a general increase in power for the Brazilian Supreme Court that resulted from the lengthy 1988 Constitution. However the constitutionalization of welfare rights preventing rights and principles from being altered after new elections has inevitably increased the workload of the court.¹⁰⁶

F. Colombia

The 1886 Colombian Constitution is one of the most stable Constitutions of Latin America, although it has been amended several times with important reforms in 1936 and 1968. Corruption, terrorism, and economic stagnation caused a political crisis that led to the creation of a new Constitution in 1991. There was an important reform of judicial review with the transfer of competences from the traditional Supreme Court to a new constitutional court (*Tribunal Constitucional*).

The reformed competences of the Supreme Court and the new constitutional court inaugurated a new trend of increased interventionism in judicial review.¹⁰⁷ The 1991 Constitution aimed at changing the traditional arrangements.¹⁰⁸ Without *stare decisis*, the court's ability to conduct judicial review and activism was limited.¹⁰⁹

¹⁰⁵ For strong criticism of the former situation, see Augusto Zimmerman, *How Brazilian Judges Undermine the Rule of Law*, 11 INT'L TRADE & BUS. L. REV. 179 (2008).

¹⁰⁶ See Rogério B. Arantes, *Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Rachel Sieder et al. eds., 2005); Mariana Mota Prado, *Rule of Law Reforms: a Paradoxical Path to Progress*, 60 U. TORONTO L.J. 555 (2010). The introduction of new technologies in the court system has helped the Supreme Court achieve supremacy in recent years, thus reinforcing the view that promoting politicization from the top is an effective strategy.

¹⁰⁷ Donald T. Fox & Ann Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT'L. L. 139 (1992); Everaldo Lamprea, *When Accountability Meets Judicial Independence: A Case Study of the Colombian Constitutional Court's Nominations*, 10 GLOBAL JURIST ADVANCES, Article 7 (2010). For an example on commercial law, see Francisco Reyes Villamizar, *Algunas Vicisitudes del Régimen Societario Colombiano Derivadas de la Interpretación Constitucional*, 8 CRITÉRIO JURÍDICO 65 (2008) (Colom.).

¹⁰⁸ See Nagle, *supra* note 41.

¹⁰⁹ *Id.*

As with other Latin American countries, Colombia imported the French doctrine of separation of powers but not the American notion of checks and balances.¹¹⁰ The legal basis for the new constitutional court was likely the *Conseil Constitutionnel* or the Spanish model with limited activism.¹¹¹ The court, however, went further to protect fundamental rights by monitoring political branches and extending constitutional principles. Political conflicts necessarily ensued because of the court's effect on several important areas of public policy, including the war on drugs and gender jurisprudence.¹¹²

G. Mexico

The Partido Revolucionario Institucional (PRI) was the sole political party that dominated Mexico's political life from 1929 until they lost the presidency in 2000. The Mexican Supreme Court was once controlled by the President, and the Senate, which was dominated by the PRI, would confirm the presidential nominations with little control. At the same time, a PRI dominated Supreme Court spent too much time with circuit and district appointments rather than resolving cases.¹¹³ Presidents Miguel de la Madrid (1982-1988) and Carlos Salinas (1988-1994) had little trouble with the Court but the increasing congestion, important economic reforms, and lack of legitimacy convinced President Ernesto Zedillo (1994-2000) that substantive reform was needed.¹¹⁴

President Zedillo introduced far reaching judicial reforms that empowered the Supreme Court and undermined the traditional political dependence. The composition of the Mexican Supreme Court was reduced from twenty-six to eleven justices, the original

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*; Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 MIAMI INTER-AM. L. REV. 253 (1998); Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, 10 DEMOCRATIZATION 46 (2003).

¹¹³ See ZAMORA ET AL., *supra* note 44, at 206.

¹¹⁴ See Michael C. Taylor, *Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N.M. L. REV. 141 (1997); Alicia E. Yamin & Maria P. Noriega Garcia, *The Absence of the Rule of Law in Mexico: Diagnosis for and Implications for a Mexican Transition to Democracy*, 21 LOY. LA. INT'L & COMP. L. REV. 467 (1999); Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. LATIN AMER. STUD. 705 (2000); Manuel Gonzalez Oropeza, *Recent Problems and Developments on the Rule of Law in Mexico*, 40 TEX. INT'L. L.J. 577 (2005).

number contemplated by the 1917 Constitution. The federal judiciary was simultaneously reorganized and a judicial council, known as the Federal Judicial Council, was created to supervise judicial administration and management, thus alleviating the pressure over the Supreme Court.

The present prevailing theory for these changes seems to be that the ruling PRI decided to promote more judicial independence as a form of securing the maintenance of the *status quo* against the loss of power, which took place in 2000 when President Vincent Fox was elected (2000-2006), followed by President Felipe Calderón (since 2006), both from the right-wing PAN.¹¹⁵ The first direct confrontation between the Mexican Supreme Court with the ruling PRI occurred in 1998 on a state electoral law.¹¹⁶ The second major judicial challenge was against President Fox in 2001 on a dispute he had with the PRD mayor (a left-wing party) of the capital city.¹¹⁷ The court unanimously ruled against the President and further rulings against the President began to follow.

Although the 1994 reforms were largely perceived as enhancing judicial independence, President Zedillo effectively forced the retirement of all twenty-one of the old PRI appointed justices and selected eleven new justices to take over in 1995.¹¹⁸ President Zedillo's court packing strategy was not perceived as an attack against the rule of law given the low reputation and lack of credibility of the incumbent judiciary.

At the same time, the PAN Presidents inherited a Supreme Court largely dominated by PRI appointees and they did not have many opportunities to engage in an open strategy to challenge the Mexican Supreme Court. To begin with, after the 1994 reforms the reputation for judicial independence was enhanced therefore raising the costs for any open challenge. Second, PAN's lack of control over the Senate potentially limited their ability to effectively condition the Court.

President Zedillo lost control of the lower house in 1997 and President Fox was unable to regain control over the lower house. Additionally, the PRI and PRD opposition have dominated the Senate. In fact, it is likely that the fragmentation of political

¹¹⁵ See Finkel, *supra* note 20.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See ZAMORA ET AL., *supra* note 44, at 206.

power in Mexico has permitted the development of a more independent federal judiciary, which has in turn undermined the possibility of direct interference during the transition from PRI to PAN presidencies.¹¹⁹ Similar results are observable at the state level.¹²⁰

V. THE SPECIFIC CASE OF VENEZUELA

We now discuss the particular case of Venezuela, which serves as a nearly perfect example of the different forms of political interventionism described thus far. We study the recent removal of judges from the second most important court of the country, the refusal of the Supreme Tribunal of Justice (*Tribunal Supremo de Justicia*) to obey the ruling of the Inter-American Court of Human Rights because of a purported contradiction with the 1999 Venezuelan Constitution,¹²¹ and the latest reform of the judicial system that attempts to diminish the judiciary's independence.

Upon his 1998 election to the formerly known Republic of Venezuela, President Chávez implemented a personal policy to find a loyal judiciary. Our arguments are apparent from our theory. The incumbent Venezuelan judiciary was potentially too disloyal to the ideology of the new political regime. In addition, the reputation of the judges in general, and the justices in particular, was at best questionable. As emphasized later, President Chávez was in a very convenient position to successfully strategize an intervention without expecting too much opposition from the bench.

Some background information is required to best understand the Venezuelan transitional period from the "Fourth Republic" to the "Socialism" of the twenty-first century. From a historical and constitutional perspective, the Venezuelan judiciary never enjoyed as much power as the executive or legislative.¹²² To make matters worse the judiciary was frequently criticized of corruption and the common perception was that the judges did not have an interest in changing the system to enforce justice because they were the main

¹¹⁹ See Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994-2002*, 49 *LATIN AM. POL. & SOC'Y* 31 (2007).

¹²⁰ Caroline C. Beer, *Judicial Performance and the Rule of Law in the Mexican States*, 48 *LATIN AM. POL. & SOC'Y* 33 (2006).

¹²¹ CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA No. 5.453 of Mar. 24, 2000.

¹²² See *Venezuela 1958-1999*, *supra* note 4, at 424.

beneficiaries of the system's corrupt practices.¹²³ Rather than confronting the judiciary directly, President Chávez recommended that the National Constituent Assembly, which was formed to draft a new Constitution, act accordingly. As a result, one of the first acts of the National Constituent Assembly was to declare an emergency concerning judiciary reform.¹²⁴ The Assembly suspended the tenure of all judges and created an emergency commission that was empowered to reorganize the entire judicial system. On October 14, 1999, in an attempt to adhere to the new political regime, the Supreme Court of Justice (*en banc*) justified the original power of the Constituent Assembly with an expansive argument about the constitutionality of a Decree of Emergency and volunteered to "collaborate" during the transitory period. The Chief Justice of the Supreme Court dissented and, as a result, resigned.¹²⁵

Once the Constitution was approved by referendum in December 1999, the organization and management of the judiciary was granted to the new Supreme Tribunal of Justice, which replaced the old Supreme Court of Justice.¹²⁶ Contrary to the original spirit of the Constitution, in 1999 the Commission on the Functioning and Restructuring of the Judicial System (CFRJS) was temporarily formed to oversee judicial discipline. It has been continuously exercising this disciplinary judicial jurisdiction without a legally sound justification.¹²⁷ However, this legal rarity only scratches the surface of the Venezuelan judiciary's lack of independence problem. As discussed next, Venezuela is currently pursuing both a court packing scheme, similar to that of Menem, and an assault on judicial independence, similar in spirit (if not in scope) to that of Fujimori.¹²⁸

¹²³ *Id.* at 451.

¹²⁴ Decree of Reorganization of the Judicial Power, Decree No. 3 of Feb. 2, 1999, *Gaceta Oficial* N° 36.634 of Feb. 2, 1999 (Venez.).

¹²⁵ Right after the decision was published, Former President of the Supreme Court of Venezuela, Cecilia Sosa Gómez, resigned and stated the following in a press conference, "The court simply committed suicide to avoid being assassinated. But the result is the same. It is dead." *Americas Top Venezuelan Judge Resigns*, BBC NEWS, Aug. 25, 1999, available at <http://cdnedge.bbc.co.uk/1/hi/world/americas/429304.stm>.

¹²⁶ Up to that moment, such a power was shared by the Supreme Court of Justice and the Judicial Council. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA art. 217 (1961).

¹²⁷ JESÚS MARÍA CASAL, *LOS DERECHOS HUMANOS Y SU PROTECCIÓN* (2008) (Venez.).

¹²⁸ See discussion *supra* Part IV.

A. Political Transition, Interventionism and Judicial Power

Prior to 1999, Congress appointed the Supreme Court Justices for a nine year period and replaced one third of them every three years.¹²⁹ The appointments were based solely on political considerations and the judiciary was therefore frequently criticized of corruption.¹³⁰ The 1999 Constitution took a great step towards the formal independence of judicial power.¹³¹ Article 264 of the 1999 Constitution sets rules for the judicial selection process, providing some fairness and transparency to the procedure by stating the following:

The justices of the Supreme Tribunal of Justice shall be elected for a single term of 12 years. The election procedure shall be determined by law. In all cases, candidates may be proposed to the Judicial Nominations Committee either on their own initiative or by organizations involved in the field of law. After hearing the opinion of the community, the Committee shall carry out a pre-selection to be submitted to the Citizen Power, which shall carry out a second pre-selection to be submitted to the National Assembly, which shall carry out the final selection. Citizens may file objections to any of the candidates, for cause, with the Judicial Nominations Committee or the National Assembly.

These rules formally guaranteed some degree of fairness and independence in the appointment process and represented an important step forward from previous constitutional arrangements. Notwithstanding the efforts toward judicial independence, we maintain that since 1999 the judicial power has travelled a transitory path producing a great deal of illegalities and political arbitrariness at the expense of contravening the rule of law and independent judicial power.

The court packing process in Venezuela began in 2004 when the National Assembly passed the Organic Law of the Supreme Tribunal of Justice (OLSTJ),¹³² which expanded the court's size from twenty to thirty-two members. Consequently, a majority of the ruling coalition, members and allies of President Chávez' Fifth Republic Movement (*Movimiento V República*, or MVR), named

¹²⁹ Rogelio Pérez-Perdomo, *The Judicialization and Regime Transformation: the Venezuelan Supreme Court*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* 315 (Rachel Sieder et al. eds., 2005) [hereinafter *Regime Transformation*].

¹³⁰ *Venezuela 1958-1999*, *supra* note 4, at 451.

¹³¹ See *Regime Transformation*, *supra* note 129, at 135.

¹³² Decree of May 20, 2004, Gaceta Oficial N° 37.942 of May 20, 2004 (Venez.).

justices to fill the twelve new seats in the Supreme Tribunal. Five more Justices were additionally named later to fill vacancies that opened in recent months, and thirty-two more were named as reserve justices. This resulted in the head of the executive power, by means of his ruling coalition in the legislative branch, effectively securing a loyal majority in the Tribunal.

In terms of purging and court packing, the Inter-American Court of Human Rights stated in its August 5, 2008, ruling that the court packing neither constituted an undue interference of the executive and legislative branch into the autonomy of the judicial power, nor was it ideologically purged.¹³³ We disagree with this statement for two reasons. First, the new OLSTJ is likely to have violated Article 265 of the 1999 Constitution which specifically seeks to guarantee the independence of Supreme Tribunal justices by establishing an impeachment process that requires justice removal with a two-thirds majority vote by Congress and only for “serious offenses.” The OLSTJ granted the governing coalition in the National Assembly the power to remove judges from the Court without the required super majority vote.

Second, the Supreme Tribunal, which has administrative control over the judiciary, has failed to secure tenure for eighty percent of the country’s judges.¹³⁴ We closely examine a notorious case that involved the dismissal of three judges from the First Administrative Court (*Corte Primera de lo Contencioso Administrativo* (CPCA)) in October 2003.

B. The Specific Case of the Inter-American Commission of Human Rights v. Venezuela before the Inter-American Court of Human Rights

The CPCA is the second highest court in Venezuela and has national jurisdiction over the legality of administrative acts of the government (municipal and federal authorities), as well as over claims involving minor charges against the republic, autonomous institutions, and state business.¹³⁵ It was created by the Organic Law of the Supreme Court of Justice of 1976¹³⁶ to decentralize and increase the efficiency of the chamber of the Supreme Court of

¹³³ *Apitz Barbera et al. v. Venezuela*, Case 182, Inter-Am. Ct. H.R., No. 08-1572 (2008).

¹³⁴ CASAL, *supra* note 127.

¹³⁵ *Regime Transformation*, *supra* note 129, at 145.

¹³⁶ *Ley Orgánica de la Corte Suprema de Justicia*. Gaceta Oficial N° 1.893 Extraordinary of July 30, 1976 (Venez).

Justice which specialized in administrative matters (*Sala Politico-Administrativa*).¹³⁷

In the year prior to their dismissal, the CPCA judges granted numerous appeals challenging many policies and programs of the Chávez government. The most notorious challenge¹³⁸ was issued on August 21, 2003, when the majority of the CPCA (three of the five judges) held that hundreds of Cuban doctors sent by the Cuban government to work as volunteers in poor communities could not practice medicine in Venezuela without Venezuelan medical associate certification (Plan Barrio Adentro).¹³⁹ Three days after the Plan Barrio Adentro ruling was issued, President Chávez publicly denounced the CPCA and referred to them as “judges who should not be judges.”¹⁴⁰ He further stated, “I am not telling them what I would like to do because we are in front of the country . . . Do you think the Venezuelan people are going to pay attention to an unconstitutional decision? Well they’re not going to pay attention to it!”¹⁴¹ Other members of government countered the President by inviting the people to disrespect his denunciation and follow the CPCA’s decision (e.g., Minister of Health,¹⁴² Mayor of Liberator Municipality,¹⁴³ and the Mayor of Sucre Municipality in Caracas¹⁴⁴).

In the following days the Inspector General of the judiciary submitted a recommendation to the CRFPJ that the five CPCA judges be dismissed because of an entirely unrelated issue, a Supreme Court determination made the previous May that the CPCA had committed an “inexcusable error” in a 2002 unanimously rendered. After reviewing the charge and the judges’ defenses, the Commission ordered the dismissal of four of the judges.¹⁴⁵ The judges that dissented in the Plan Barrio Adentro

¹³⁷ *Regime Transformation*, *supra* note 129, at 145.

¹³⁸ In total, there are eleven CPCA decisions that would constitute the reason for the Destitution, ten of them issued between August 2002 and August 2003. In those decisions, the CPCA was accused of ruling against the “Revolutionary Process.”

¹³⁹ CPCA, Sentence No. 2727 of August 21, 2003. *Corte Venezuela ordena dejar de ejercer médicos Cuba en Caracas*, REUTERS, August 21, 2003.

¹⁴⁰ Alo Presidente No. 161 of August 24, 2003.

¹⁴¹ *Id.*

¹⁴² *Gobierno desconoce la decisión judicial de reemplazar a los médicos cubanos*, EL NACIONAL, available at <http://www.elnacional.com.do/> (Venez.).

¹⁴³ *Ni en sueños se suspende el plan Barrio Adentro*, EL UNIVERSAL, August 28, 2003 (Venez.).

¹⁴⁴ *Los cuestionamientos de José Vicente y Freddy Bernal*, EL UNIVERSAL (Venez.).

¹⁴⁵ OFFICIAL GAZETTE OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, Nov. 4, 2003. The fifth judge, Judge Marrero, had already retired and was therefore not subject to

case, thus favoring the government's position, were both later appointed to the Supreme Tribunal of Justice.¹⁴⁶

Three of the judges, the majority of the CPCA, appealed the decision to the Supreme Tribunal. However, the Tribunal failed to deliver a decision on the matter after eighteen months and the three judges were forced to plead that the state of Venezuela presumptively violated their rights to the Inter-American Court of Human Rights.

On August 2, 2008, the Inter-American Court of Human Rights unanimously ruled that Venezuela violated the rights of the three CPCA judges to: (1) a fair trial by an independent court;¹⁴⁷ (2) a hearing by an impartial court;¹⁴⁸ (3) a reasonable time period in which to be heard;¹⁴⁹ and (4) simple, prompt, and effective recourse in a competent court for the protection of one's rights.¹⁵⁰ Moreover, the Inter-American Court ordered the three judges to be reinstated within six months from notice of the judgment, if they so desired, to a position in the judiciary with the same salary, related benefits, and equivalent rank as they possessed prior to their removal from office.

The Court also ordered the state of Venezuelan to adopt measures required to pass the Venezuelan Code of Judicial Ethics within one year of its ruling. Despite this decision of the Inter-American Court, on December 18, 2008¹⁵¹ the constitutional chamber of the Supreme Tribunal declared the Inter-American Court's ruling to be "of impossible execution"¹⁵² within Venezuelan territory because of its conflict with provisions Venezuela's 1999 Constitution. The Tribunal further interpreted Article 23 of the 1999 Constitution (previously cited above) to refer exclusively to those provisions that create "rights," not to rulings or resolutions issued by international courts.¹⁵³ Furthermore, the TSJ clearly indicated that these disputed court rulings and resolutions are applicable within Venezuelan territory

sanction.

¹⁴⁶ Justices Marrero and Morales, who was one of the four judges dismissed.

¹⁴⁷ American Convention on Human Rights, art. VIII, ¶ 1, July 18, 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.

¹⁴⁸ *See id.* View in relation to the general obligations set forth in art. I, ¶ 1 & art. 2.

¹⁴⁹ *Id.*

¹⁵⁰ *Compare id.* art. XXV, ¶ 1 with *id.* art. I, ¶ 1.

¹⁵¹ *Apitz Barbera et al. v. Venezuela*, Case 182, Inter-Am. Ct. H.R., No. 08-1572 (2008).

¹⁵² In Spanish the term is "*inejecutable*".

¹⁵³ *Apitz Barbera et al. v. Venezuela*, Case 182, Inter-Am. Ct. H.R., No. 08-1572 (2008) (at the constitutional chamber of the Supreme Tribunal of Justice).

“if and only if they do not contradict the 1999 Constitution, regardless of their nature.”¹⁵⁴

This is not the first time a domestic Supreme Court decided not to follow a ruling of the Inter-American Court. The Venezuelan Supreme Tribunal Court cited the Peruvian case of May 30, 1999, where the Supreme Military Council of Justice declared the Inter-American ruling on the case Castillo Petruzzi and others “of impossible execution.” Similar to the Venezuelan case, the Court reasoned that the inexistence of a “supranational jurisdiction” justified this aim.

The Supreme Tribunal constitutional chamber potentially ruled incorrectly on at least two other issues. First, it called for the executive to denounce the Inter-American Convention. As the dissenting opinion of Justice Rondón Haaz stated, the problem was that the applicability of the Convention was never an issue in this case and the Tribunal therefore exceeded the scope of the controversy. Moreover, this decision constituted an improper interference with executive powers and violated Article 236 of Venezuela’s 1999 Constitution, which states that the President of the Republic has attribution power and the duty “[t]o direct the international relations of the Republic and sign and ratify International treaties, agreements or conventions.”

Second, the Tribunal urged the National Assembly to pass the Judicial Code of Ethics within the term previously ordered by the Decision No. 1048 of May 18, 2006. However, once the time period for compliance with the court elapsed the National Assembly was held in contempt of court. The Court incorrectly issued a new order for the National Assembly to comply with this duty, while the procedure that should have been executed is that for those institutions held in contempt of court.

C. Latest Reforms of the Judiciary

As we stated earlier, another manner of interventionism occurs through enactment of new laws to restrain judges from interfering with the new political regime. Numeral five of the fourth temporary provision of the Venezuelan Constitution mandated the National Assembly to approve legislation relating to the judicial branch within one year upon its installation. After a ten year delay, following the procedure set forth in Article 203 of

¹⁵⁴ *Id.*

the 1999 Venezuelan Constitution¹⁵⁵ for an organic law to be passed, on October 15, 2008 the Project of the Organic Law of the Justice System (OLJS) was approved on first discussion. This law regulates the organization, coordination, and operation of the judicial power.

According to Article 253 of the 1999 Venezuelan Constitution, the judicial branch consists of:

[T]he Supreme Tribunal of Justice, such other courts as may be determined by law, the Office of Public Prosecutions, the Public Defender's Office, criminal investigation organs, judicial assistants and officials, the penitentiary system, alternative means of justice, citizens participating in the administration of justice in accordance with law and attorneys at law admitted to practice.

As established by Article 62 of the 1999 Venezuelan Constitution, the project of law was presented for comments by several institutions of the government. This paper examines the particular comments issued by the office of the Chief Prosecutor, which considers that some provisions in the OLJS unconstitutional. On March 10, 2009, the National Assembly approved seventeen articles of the OLJS. Among these approved articles the most controversial provisions created a National Committee of the Judicial System (Article 9), which also granted authority to plan and coordinate the policies and plans of the entire court system.¹⁵⁶

The committee, comprised of eight members, would be composed of two congresspersons of the National Assembly, two justices of the Supreme Tribunal of Justice (including the Chief Justice), two ministers representing the Executive branch, the *Fiscal General* (Chief Prosecutor), the *Defensor del Pueblo* (Ombudsman), the general public defender, the *Procurador* (Lawyer of the Nation), and a congressperson representing the indigenous communities.

¹⁵⁵ Article 203 reads:

Organic laws are those designated as such by this Constitution, those enacted to organize public powers or developing constitutional rights, and those which serve as a normative framework for other laws. Any bill for the enactment of an organic law, except in the case of those defined as such in the Constitution itself, must first be accepted by the National Assembly, by a two thirds vote of the members present, before the beginning of debate on the bill. This qualifying vote shall also apply to the process of amending organic acts.

CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA art. 203.

¹⁵⁶ CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA art. 9.

Part of the powers of this Commission have already been approved in the second debate so it will be a matter of time before the law is promulgated and executed by the President of Venezuela. The main powers of the Commission include coordination of the policies and plans of the justice system, evaluation of the budgets of the judiciary, and examination of the members of the system. The Commission will be empowered to evaluate judicial performance. The decisions of the Commission will be determined by simple majority. In other words, because the judiciary only has five votes, a decision concerning the judicial system will most likely be determined by representatives of other branches of power.

On November 6, 2008 the Chief Prosecutor sent comments on the OLJS to the legislature proclaiming his belief that it was unconstitutional. It stated that the Commission set forth in the OLJS would be conceived as a superior entity that oversaw the rest of the institutions of the judicial system, "something like a government of the legal system," to direct a great deal of the acts, policies, budgeting, and training of its officers. The report also rejected the fact that seven of the twelve members of the Commission would not be members of the judiciary. It also challenges the power of the Commission to coordinate the budget because, under the respective constitutional provisions, each part of the Venezuelan judicial system is granted with functional, economic, and administrative autonomy. The comments further noted that even though Article 136 of the 1999 Venezuelan Constitution provides that the members of all constitutional branches of power shall collaborate in furtherance of the interest of the country, Article 5 of the project includes concepts such as integration, coordination, and joint responsibility that may be interpreted as an intervention of the judiciary's autonomy and independence. Discussion and approval of the rest of the body of this law is still ongoing.

D. Our Model and the (Difficult) Case of Venezuela

We have detailed how the new political regime created by President Chávez in Venezuela has dealt with the incumbent judiciary. The reasoning behind the strategic choices made by President Chávez is justified within our model. Unlike many

previous cases studied in this field,¹⁵⁷ our specific example of Venezuela describes a transition from democracy to a more authoritarian regime, even if it is considered quasi-democratic in nature. In that sense, our example provides a more ambitious challenge to our model. Therefore, our argument is enhanced by the fact that our model provides a useful framework to understand the decisions of President Chávez.

The Venezuelan judiciary was not traditionally active in the American sense, constituting a weak subordinated branch of government with judges playing a minor role in the institutional arrangements of the country.¹⁵⁸ The appointment of judges and administration of the court system has been on the hands of Venezuelan politicians under the model of the 1961 Venezuelan Constitution. From 1958 to 1998 the judicial apparatus was minimal and overwhelmingly focused on criminal prosecution and litigation of employment law.¹⁵⁹ Nevertheless, there were some tenuous signs that the judiciary was increasingly less passive from 1992 to 1999.¹⁶⁰

To a certain extent Venezuelan politicians were aware of the precarious situation of their judiciary prior to 1999. Under the 1961 Constitution, in order to guarantee an independent Supreme Court, justice terms were set at nine years with an option for reappointment. The Congress renewed the court by thirds every three years. A judicial council was created and a law on the judicial career developed in 1980 to regulate evaluation and judicial sanctions.¹⁶¹ It is argued that these complex arrangements failed to shield the judiciary from corruption and networks of interests patronized by party clienteles that divided judicial appointments.¹⁶²

The 1999 political struggle was initiated by disputes over the control of the court system, specifically the Venezuelan Supreme Court, to advance particular ideological agendas. In anticipation of a potentially more active judiciary, and while also avoiding the capture of the judiciary by the opposition, President Chávez opted for more direct forms of interventionism. The lack of

¹⁵⁷ See *Agents of Anti-Politics*, *supra* note 81; *COURTS UNDER CONSTRAINTS*, *supra* note 75; CHÁVEZ, *supra* note 75.

¹⁵⁸ See *Venezuela 1958-1999*, *supra* note 4; *Regime Transformation*, *supra* note 129.

¹⁵⁹ See *Venezuela 1958-1999*, *supra* note 4.

¹⁶⁰ See *Regime Transformation*, *supra* note 129.

¹⁶¹ See *Venezuela 1958-1999*, *supra* note 3.

¹⁶² *Id.*

independence and potential political subordination to the opposition of the Supreme Court, specifically the constitutional chamber (*Sala Constitucional*), diminished the traditional pure formalism of civil law higher courts. This situation is easily framed within our first argument of our proposed model.

At the same time, as underlined by our second argument, President Chávez faced an incumbent judiciary with weak political and social prestige. The incumbent judiciary was perceived to be prone to political manipulation during the previous regime and therefore the product of a clientelism approach to judicial appointments. They were seen as significantly corrupt, largely ineffective, and unpopular. The incumbent judiciary was not in a position to seriously challenge the will of the new regime.¹⁶³ The powerless judiciary allowed President Chávez to actually interfere and hamper with the incumbent judiciary while simultaneously committing to the principles of an independent judiciary, even while improving the *de jure* legal framework that the Venezuelan judiciary operates under.

According to our model if the incumbent judiciary had been more prestigious or less prone to political favors (i.e., more formalist), President Chávez would not likely have openly and actively engaged in shaping the new judiciary as he did. The two conditions we identified in our model, weak forms of formalism and lack of prestige, are easily verified in the Venezuelan case in 1999. These conditions allowed the strategic choices of President Chávez to flourish with little opposition.

VI. CONCLUSION

Our paper proposed a theory of how political transitions address incumbent judiciaries. We argued that a new political regime inevitably compares the benefit of reshaping the judiciary with loyal appointees against the political and economic costs of directly interfering, including the cost of international reputation. There are several forms of interventionism including soft control, explicit court packing, court purging, and violence against the judiciary. Softer forms of interventionism are cheaper but less effective, while stronger forms are more effective but expensive. Depending on local conditions and significant political constraints, a new political regime may opt for a mix of soft and hard

¹⁶³ See *Regime Transformation*, *supra* note 129.

mechanisms of intervening.

We discussed the political transitions in the civil law jurisdictions of Europe and Latin America from the perspective of our theory. We observed that softer forms of interventionism tend to prevail in Europe while stronger forms more frequently occur in Latin America. We proposed the confluence of two factors: Latin American judiciaries are both less reputable and organized than those in Europe, and, therefore, the nature of Latin American judiciaries reduces the cost of stronger incumbent interference for new political regimes. The influence of American constitutionalism in Latin America has reduced strict formalism and created a judiciary that is still less activist than the U.S. judiciary, but is significantly more politicized than in Europe. This effect makes the need for a direct intervention more acute.

Our theory applies equally to transitions from military dictatorships to democracy and from weak democracies to authoritarian regimes. We discussed several examples in light of our theory and focused on the recent case of Venezuela. We argued that had the incumbent judiciary in Venezuela been more prestigious or less prone to political favors (i.e., more formalistic), President Chávez would not likely have openly and actively engaged in shaping the new judiciary as he did. The two conditions we identified in our model, weaker forms of formalism and lack of prestige, were easily verified in the Venezuelan case in 1999 and explain President Chávez' successful strategic choices of interventionism.

Judicial Performance Scores for Latin America¹⁶⁴

Country	Judicial Performance (2002-2003)	Judicial Performance (1992-1993)
Uruguay	2.73	2.87
Costa Rica	2.90	2.66
Mexico	3.51	4.35
Chile	3.57	3.98
El Salvador	3.71	5.05
Bolivia	3.80	4.65
Venezuela	3.90	3.50
Colombia	4.01	3.98
Argentina	4.04	3.65
Honduras	4.07	4.92
Paraguay	4.10	4.60
Panama	4.24	4.33
Peru	4.29	5.07
Guatemala	4.45	4.04
Ecuador	4.46	4.81
Brazil	4.54	4.62
Nicaragua	4.86	4.48

Range of index: 1 (best) to 6 (worst).

¹⁶⁴ Joseph L. Staats et al., *Measuring Judicial Performance in Latin America*, 47 *Latin Am. Pol. & Soc'y* 77, 90 (2005).