Justice System Institutions and Corruption Control. Evidence from Latin America

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This essay explores whether the design of justice system institutions helps control corruption. Applying the basic logic of checks and balances to intrabranch institutional design, the main argument is that any justice system where judges and prosecutors, of different ranks and levels, are unchecked actors generates incentives for them to abuse their positions. In other words, while generally judges and prosecutors are considered organs that oversee other branches of government, they may also constitute sources of corruption if left unchecked. The essay offers preliminary evidence on the specific hypotheses derived from the general argument from samples of eighteen Latin American countries and two case studies on Chile and Mexico.

One of the central tenets of theoretical and practical approaches to the rule of law is that by eliminating unchecked actors, a well-designed system of checks and balances can minimize government arbitrariness and abuse of power. But designing an institutional framework to meet this simple specification is a monumental task and may lead to unintended consequences. Consider, for example, the design of the justice system. While an honest independent judiciary acting as a check on the executive and legislative branches can limit the power of political leaders and reduce opportunities for corruption, a completely independent judiciary can also increase corruption if sources of prosecutorial and judicial power are corrupt themselves (cfr. Schleifer and Vishny, 1993; Rose-Ackerman, 1999; Svensson, 2005). In other words, without accountability, judicial independence can actually hinder the rule of law (Capelleti, 1985; Ferejohn, 1999; Russell, 2001; Guarnieri, 2003; Maravall and Przeworski, 2003).

Although the basic logic of checks and balances is usually applied to interbranch relations, it can also guide our understanding of intrabranch institutional design and its potential effects. To illustrate this more general point, this essay analyzes the relationship between the institutional architecture of the justice system and corruption. It argues that any justice system that leaves judges and prosecutors “unchecked” generates incentives for them to abuse their positions. In particular, it proposes three hypotheses: 1) A prosecutorial organ located outside the executive raises the probability that denunciations of corrupt acts are duly investigated and that corrupt officials are prosecuted and charged; 2) extremely high or low levels of independence reduce...
the incentives of supreme court judges to punish corruption in the executive or legislative branch; and 3) corruption within the judiciary is higher where institutional levels of internal independence are higher.

The essay is divided into three parts. The first analyzes the relation between corruption and the institutional architecture of the justice system, and derives the three stated hypotheses from the main argument. The second section is devoted to the empirical analysis of the three hypotheses in a sample of eighteen Latin American countries and case studies of Chile and Mexico. The third section discusses conclusions.

INSTITUTIONAL ARCHITECTURE OF THE JUSTICE SYSTEM AND CORRUPTION

Corruption in the Judiciary: Who Guards the Guardians? In the common definition of corruption as the misuse of public office for private gain, “misuse” implies applying a legal standard to a concrete action (Svensson, 2005). Corruption defined this way would capture, for instance, the illegal sale of government property by government officials, kickbacks in public procurement, bribery, and embezzlement of government goods. If a legal standard is violated, someone can prosecute the offense and challenge it in a court of law.¹ A judge, then, adjudicates the case based on the legal standard. In this simple example, prosecutors and judges are the guardians that keep other government officials’ actions within legal limits.

But what if the prosecutor or the judge is part of the corruption scheme? Judges may not only accept bribes for selling decisions, they may also collude with the police or the prosecutor. In general, it is possible to distinguish between two types of corruption in the justice system: “administrative” and “operational” (Buscaglia, 2001). Administrative corruption refers to judicial employees violating formal or informal procedures for their private benefit in everyday cases. For instance, court users may pay bribes to administrative employees to alter the legally determined treatment of files, lose evidence, or accelerate or delay a case by illegally altering the order of their hearing. In contrast, operational corruption refers to situations where considerable political or economic interests are at stake, including politically biased prosecutorial investigations, politically motivated court rulings, buying or selling of decisions, plain and simple extortion, and/or undue changes of venue where judges stand to gain economically as a result of their corrupt act.²

¹ Note that the statutes regulating corrupt behaviors can be crucial. In some countries, these statutes can be so strict that many kinds of behaviors can be construed as corruption. In others, they can be too thin and general, giving prosecutors and judges more discretion to decide what constitutes a corrupt act.

² Real-life examples of both types of corruption within the justice system abound. In Tanzania, police in the mid-1990s would make false arrests and receive a kickback from the magistrate when the prisoner paid to gain release. Tanzanian law clerks reported on another common ploy: to see a decision in advance of its announcement, then to “sell” the judgment to the winning party, claiming that the judge or magistrate was still undecided (Widner, 2001:276). In Mexico, two circuit court magistrates accepted money in exchange for freeing a murderer (Fix-Fierro, 2003). In Italy, judges who agreed to arbitrate cases extra-judicially received highly remunerative payments, which would make them “more sensitive” to suggestions from those parties in actual judicial cases (Della Porta, 2001:12). In general, Susan Rose-Ackerman argues, corruption in the justice system is facilitated by a large
Distinguishing the basic types of corruption in the judiciary is important to designing a justice system capable of deterring government officials, legislators, prosecutors, and judges from engaging in corrupt acts. Because administrative corruption is more frequent at lower levels of the judiciary and the prosecutorial body, the intrabranch design of the hierarchical organizations of both institutions is relevant to preventing it. Similarly, because operational corruption typically involves deals at the highest levels of the three branches of government, the interbranch design of checks and balances is directly related to its control. To have a deterrent effect, justice system institutions must increase the probability of getting caught and being punished, which depends on the corrupt act being 1) detected, 2) prosecuted, and 3) punished in a court of law.³

I focus on three elements of the institutional architecture of the justice system that enhance the detection, prosecution, and punishment of corruption: the institutional location of the public prosecutor’s office, the independence of supreme court judges from other branches of government, and the independence of lower-court judges from their hierarchical superiors.

Public Prosecutor’s Office (PPO). A corrupt act by a government official must first be detected to be investigated and challenged in court by a public prosecutor (Cowdery, 2007). Then a prosecutor investigates the case and decides whether there are enough elements to take it to trial and what charges should be pressed against the defendant. In the face of a corrupt act, the prosecutor can choose a) not to investigate, b) to carry out the investigation but decide that there are no grounds for charging the suspect, or c) to conduct the investigation and charge the suspect with a crime. Thus, in criminal offenses, prosecutors are considered the gatekeepers of the judiciary.⁴

A prosecutor’s decisions at each step can be influenced by his or her superiors, the defendant, other branches of government, or the judge. The hierarchical organization of the PPO is important since superiors may exert influence through transfers, promotions, or by removal of specific cases from individual prosecutors. The prosecutor can also be influenced by a powerful defendant. When the defendant is part of another branch of government, say a cabinet member or legislator involved in a corruption case, the prosecutor must have strong incentives to resist undue pressures or invitations for collusion. In this case, the prosecutor’s institutional prerogatives and career prospects can set the incentives for autonomous behavior. However, institutional prerogatives and career prospects can also be manipulated by hierarchical superiors interested in exerting undue pressure to favor a powerful defendant. The prosecutor general, therefore, should be subject to control (Brinks, 2008).

³ Arguably, simply detecting and publicizing a corrupt act could cost officials electorally (Kunicova and Rose-Ackerman, 2005) or reputationally (Taylor and Buranelli, 2007), but still those costs depend on previously successful prosecutions and judicial punishments.

⁴ The degree of control over the investigation stage enjoyed by prosecutors varies from country to country. In Mexico, for instance, the prosecutor had until recently the monopoly over this stage, which meant that there was no legal resource for challenging a prosecutor’s failure to investigate or charge a suspect even in the presence of strong evidence.
Because of the strategic role of the PPO in combating corruption, its institutional location is of primary importance to the questions of whether the chief prosecutor can be controlled, and by whom. The PPO can be part of the executive branch (as in the United States, Uruguay, or Mexico), the judicial branch (as in Italy or until recently in Colombia), or it can be an autonomous organ (as in Brazil or Chile). When the prosecutors are subordinated to the executive, the latter exerts pressure on the whole judicial system through the former (Guarnieri and Pederzoli, 1999). The degree of influence chief prosecutors wield over their subordinates is usually considerable but varies from country to country depending on appointment, promotion, and other mechanisms. If the PPO resides in the executive—specifically if the chief prosecutor serves at the president’s discretion—prosecutors will have incentives to serve the interests of their political boss. In this design, the prosecutor will have little incentive to investigate corruption scandals that originate in the executive branch or those of officials who belong to the same political party of the president.

On the other hand, a prosecutorial organ that lies within the judiciary can diminish corruption since prosecutors will enjoy the same degree of independence from the government as judges do (Della Porta, 2001). However, in such cases there may be concerns over the lack of independence of the prosecutor relative to judges: collusion between judges and prosecutors makes for incentives to overlook some corrupt acts or to act arbitrarily in certain cases.\(^5\)

Finally, the public ministry may be an autonomous investigative organ, which would nonetheless still depend to a certain extent on the judiciary and the executive to conduct a lawful investigation. An autonomous prosecutorial organ may reduce the possibility of collusion between the judge and the prosecutor but it may also create unnecessary administrative and organizational burdens.

In sum, although the optimal institutional location of the PPO for the control of corruption is not clear, it is relatively uncontroversial that placing the prosecutorial organ outside the executive branch reduces incentives for corruption. A prosecutor independent of the executive would increase the probability of lawful investigatory and accusatory phases (at all levels, reducing the likelihood of undue pressures from hierarchical superiors, especially when there are clear standards for career advancement and the administration of the organ is not run by hierarchical superiors), so that the cost of misusing one’s position for private gain would increase and corruption would decrease (cfr. Van Aaken, Feld, and Voigt 2009). The institutional location of the prosecutorial organ may affect the probability that the prosecutor opens the gates of the courts of law to judge and eventually sentence the corrupt official.\(^6\)

\(^5\) This is clear in countries such as Spain, Italy, and France where an important part of the debate on judicial independence is focused on the relation between the prosecutor and the judge. In Italy, for instance, the corps of magistrates provides the judges, as well as the prosecutors. The same magistrates do not play both roles on the same case, but they are both on the same career track (Burnett and Mantovani, 1998).

\(^6\) The emphasis of this section is on incentives and possibilities of corruption and how they affect prosecutors’ choices to prosecute certain crimes. But, of course, it is important to underscore that there are other sources of
**Judges.** Once a case finally reaches the court, the judge could punish the corrupt official or collude with him. The judge slated to hear the case, usually a judge in the same jurisdictional level as the prosecutor, may also exert some pressure on the prosecutor (e.g., denying search warrants). In many countries the judge who hears the case is assigned randomly to minimize the possibility that the prosecutor and the judge collude. As mentioned before, this risk increases in systems where prosecutors belong to the judicial branch. The judge may also be subjected to undue pressures on behalf of a powerful defendant. In this case, the judge can be deterred from accepting pressure in favor of the defendant by the prosecutor’s threat to appeal the judge’s decision. Of course, whether this corrective is more or less effective depends on how likely it is that the appeal succeeds and how much the judge values his or her rate of reversal. In sum , the connection between prosecutors and judges is interesting and, in many countries, most of the action lies in this step.7

Because judicial decisions help determine the distribution of wealth and power, judges can exploit their positions for private gain. A corrupt judiciary can facilitate high-level corruption, undermine reforms, and override legal norms. A completely dependent judge would decide in the best interests of the elected officials of whom he is an agent. For instance, the judge could acquit the defendant or dismiss the case since his or her own career depends on the political officials who may have participated in the corruption scheme. On the other hand, a completely independent judge could collude with the defendant for a price since the judge’s decision would not carry consequences from the political officials who may have participated in the corruption scheme. In this framework, only a judge who fears some punishment that exceeds the benefit of colluding with the corrupt official but who also has certain protection in his salary and position will find the defendant guilty. In other words, when deciding the case the judge would weigh the costs and benefits of colluding with the defendant or the prosecutor. In the logic of this essay, these costs and benefits depend on the independence of the judge.8

Because the hypotheses of this essay concern the institutional architecture of the justice system, I use a *de jure* concept of judicial independence, e.g., the formal institutional rules designed to insulate judges from undue political pressure (e.g.,}

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7 Notice that, for instance, only when the prosecutor opens the gates of the judiciary does a case reach the court. In Mexico only 25 percent of crimes committed are reported to the police; of those, only 4.5 percent of reported crimes are fully investigated by prosecutors and only 1.6 percent of those reach the courts (Zepeda Lecuona, 2004). In addition, it may take years for a corruption case to reach a judge: in a huge scandal in Brazil involving a senator, a judge, and more than a hundred million dollars for a construction project (the “Lalau” case), ten years passed from the time the case was first noticed until it reached a judge and thirteen years until it was decided (Taylor and Buranelli, 2007).

8 Analyzing the United States, Alt and Lassen argue that an elected judiciary should be more concerned with curbing corruption, which is disliked by all voters, than an appointed judiciary because judges are held accountable by voters (Alt and Lassen, 2004).
In particular, I focus on 1) the independence of supreme court judges from the other branches of government, or “external” independence, and on 2) the independence of lower-court judges from their hierarchical superiors, or “internal” independence. Notice that there is a more direct, though not exclusive, connection between internal independence and administrative corruption and between external independence and operational corruption.

The institutional variables that determine the degree of external independence (e.g., appointment, tenure, and impeachment mechanisms) can be controlled, to a greater or lesser degree, by politicians or by judges themselves, and some combinations constitute a better mix of independence and accountability than others. For instance, an appointment procedure that gives more weight to the political branches can be balanced with a sufficiently long tenure. I argue that the relationship between external independence and corruption is U-shaped: dependent supreme court judges facilitate corruption because the elected branches would be unchecked, but totally independent and unaccountable judges may more easily become additional actors that need to be bribed to get something done, thus also increasing corruption. An intermediate level of judicial independence would be optimal for corruption control since it avoids unchecked checkers and minimizes the incentives for elected and unelected government officials to misuse public funds for private gain.

The institutional variables that determine the level of internal independence (e.g., the extent and location of administrative controls and the extent to which judges’ decisions are constrained by legal rules on bindingness) can give more or less power to supreme court judges over lower-court judges. For instance, in countries under civil law, supreme courts are granted a lot of leverage in appointments, promotions, and punishments during the careers of lower-court judges. I argue that corruption within the judiciary is higher where institutional levels of internal independence are also higher. More internal independence is positively related to corruption because too many, decentralized, poorly monitored, and unconstrained lower courts may increase the incentives for lower-court judges to accept bribes. As Gerring and Thacker argue (2004:325), decentralized power structures—such as judiciaries with higher levels of internal independence—introduce coordination problems among political units whenever the actors are multiple, organizationally independent, instilled with different perspectives and different organizational missions, and empowered with an effective policy veto.

For a discussion on the concept and measures of independence, see Ríos-Figueroa and Staton, forthcoming. Of course, the impact of rules on behavior may not be direct but rather mediated by the social, political, economic, or ideological context.

“Supervision is our great weakness. We have had inadequate resources to supervise magistrates. So they are small emperors without fear that someone from above will come down on them,” said a judge in Tanzania (Widner, 2001).

However, Donatella Della Porta describes an instance where a low degree of internal independence actually increases corruption: “Corrupt politicians often used their informal contacts in the senior ranks of the judiciary to intimidate those magistrates who pierced the circle of political illegality through pressure from superiors who...
In sum, this essay presents three testable hypotheses where elements of the architecture of the justice system are related to three steps in the combat of corruption (detection, prosecution, punishment): 1) A prosecutorial organ located outside the executive raises the probability that denunciations of corrupt acts are duly investigated and that corrupt officials are prosecuted and charged; 2) extremely high or low levels of external independence reduce the incentives of supreme court judges to punish corrupt acts in the executive or legislative branches; and 3) higher levels of internal independence create incentives for corruption within the judiciary. The remainder of the essay evaluates these hypotheses in the context of the Latin American region.

**Justice System Institutions and Perception of Corruption in Latin America**

Whereas Latin American countries share a common heritage, political culture, civil legal system, and presidential regime, they retain important variations in judicial and other political institutions as well as in corruption perception levels, which makes them a good laboratory for in exploring the impact of institutions on economic and political outcomes. The third wave of democracy that swept the region, by dispersing power and requiring the consent of several institutions in decision making, has extended the range of actors who can demand bribes. However, a regime transition entails a whole host of changes, many of which have contradictory effects on corruption levels. While it is true that democratization extends the range of actors who have the power to demand bribes, it may also enhance overall accountability and, thus, prevent newly empowered actors—as well as old power holders—from misusing their clout for illicit enrichment (Weyland, 1998). Institutions of the justice system have been among the most reform institutions in the region. Of particular importance to this essay, since the 1980s, these transformations included changes in levels of both external and internal independence and in the institutional location of the public prosecutor’s office. Have these institutional transformations influenced corruption levels across the region?

Let us explore the relation between justice system institutions and corruption throughout the region. To gauge corruption levels, I use the Corruption Perception Index (CPI) made by Transparency International, which goes from 0 (least corrupt) to 10 (most corrupt). The index aggregates surveys of business people, risk analysts, investigative journalists and the general public on their perceptions of the frequency of kickbacks in public procurement, the embezzlement of public funds, and the bribery of public officials. Transparency International has been reporting the CPI annually since 2001, and there are values for most Latin American countries for all these years.

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

13 The CPI, as well as the Control of Corruption Index (CORRWB) compiled by the World Bank (Kaufman, Kraay, and Mastruzzi, 2005), has been criticized on a number of grounds (see Bardhan, 1997) but is still the most widely used proxy for corruption in cross-national research.
To assess levels of external and internal independence, I use two de jure indexes based on coding the constitution of each country. The index of external independence takes on values from 0 to 8 and considers five elements: 1) whether the appointment procedure is made by judges themselves or by at least two different organs of government; 2) whether the length of tenure is longer than the appointer’s tenure; 3) the relationship between appointment procedure and length of tenure; 4) whether the process to remove judges involves at least two thirds of the legislature; and finally, 5) whether the number of supreme court judges is specified in the constitution. The index of internal independence takes values from 0 to 4 into account: 1) whether lower-court judges are appointed by supreme court judges or by a judicial council dominated by them; 2) whether the length of tenure is longer than the appointer’s tenure; and 3) whether promotion, transfer, and punishment mechanisms are controlled by supreme court judges or by a judicial council dominated by them.\(^\text{14}\)

To measure the institutional location of the prosecutorial organ, I created a dummy variable coded 1 if the chief prosecutor serves at the pleasure of the president, which is tantamount to the PPO being located inside the executive branch, and 0 otherwise, i.e., when the public prosecutor’s office is within the judiciary or is an autonomous organ. This dummy variable captures the most basic set of incentives that the prosecutor general faces and proxies for the pressure that the prosecutor general and other hierarchical superiors may exert over lower-level prosecutors. However, it is important to note that more complete measures of external and internal prosecutorial independence can and should be created (a task beyond the limits of this essay). Such measures could capture the appointment and removal rules for both the general and lower-level prosecutors, their tenure, the hierarchical structure within the prosecutor’s office, and who controls the prosecutor’s budget (i.e., congress or the executive). Moreover, professional requirements for prosecutors exhibit higher cross-country variance than those for judges (e.g., to have a law degree, to have served as a public defendant, to pass an exam before becoming a prosecutor; see Aguiar, 2010). These professional requirements may also be included in de jure measures of prosecutorial independence, given that prosecutors with higher professional qualifications would arguably be more independent because of having a more accessible “exit option.”

Figure 1 shows Latin American countries according to their levels of de jure internal (vertical axis) and external (horizontal axis) independence. Argentina and Bolivia, for instance, are countries with high levels on both indexes, while Chile and Mexico have a high degree of external independence; but Chile has zero internal independence, and Mexico has a middle value in that index. In turn, Ecuador and the

\(^{14}\) For details on the coding rules and explanations on each of the components of the indexes, as well as on the list of constitutions and amendments covered, see (Ríos-Figueroa, 2011, 2006). There are other extra-institutional factors that affect external and internal independence and that are not considered in the indexes. For instance, regarding the latter, there are legal factors such as the degree of “bindingness” of decisions and the culture of respect for hierarchy. Ríos-Figueroa and Taylor (2006) discuss in greater detail some of these extra-institutional factors.
Dominican Republic have low levels on both indexes. The size of the circle around each country in Figure 1 corresponds to its value in the Corruption Perception Index. For instance, Chile, the least corrupt country in the region, has a very small circle around it, while Ecuador, which is among the most corrupt, has a considerably larger circle around it. If more internal independence is related to more corruption, we would see larger circles as we go from the bottom up on the vertical axis, and there is some evidence that this is the case (the correlation coefficient is 0.175, statistically significant at 95 percent levels). On the other hand, if extreme values of external independence are related to more corruption, we would see larger circles on the extreme right and left of Figure 1. While there certainly are some countries in the extremes with large circles, e.g., Ecuador and Guatemala, there are also several countries in the middle with quite large circles (Pearson’s r is -0.073). In sum, there is some evidence in favor of the hypothesis on internal independence and no evidence regarding the hypothesis on external independence.

Table 1 lists countries from the least to most corrupt and reports the values of all variables in Figure 1. It also indicates whether the public prosecutor’s office (PPO) resides within the executive branch. As is clear, in all but three countries (Dominican Republic, Mexico, and Uruguay), the PPO has been taken out of the executive branch. Indeed, the reform of the criminal process, including the institution in charge of the investigation, has been one of the primary aims of the judicial reforms that swept the region (Hammergren, 2007). In fact, judicial reforms aimed at making the PPOs
autonomous were in part aimed at eliminating the perverse incentives that arise when prosecutors are subordinate to the executive. Of the countries with the PPO within the executive, only Uruguay has low levels of perception of corruption and this may be explained, at least in part, by a strong public opposition to corrupt behaviors (cfr. Brinks, 2008). The hypothesis on the location of the prosecutorial organ, thus, also has some evidence in its favor (Pearson’s $r = 0.166$, statistically significant at the 95 percent level).

This evidence is only suggestive, of course. In this essay, to further analyze the relation between justice system institutions and corruption levels, I analyze the cases

<table>
<thead>
<tr>
<th>Country</th>
<th>Perception of Corruption</th>
<th>External Independence</th>
<th>Internal Independence</th>
<th>Prosecutor Organ Outside the Executive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chile</td>
<td>2.9</td>
<td>.83</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Uruguay</td>
<td>4.8</td>
<td>.66</td>
<td>.25</td>
<td>0</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>5</td>
<td>.5</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Peru</td>
<td>5.9</td>
<td>.16</td>
<td>.5</td>
<td>1</td>
</tr>
<tr>
<td>El Salvador</td>
<td>6.2</td>
<td>.66</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Brazil</td>
<td>6.2</td>
<td>.5</td>
<td>.57</td>
<td>1</td>
</tr>
<tr>
<td>Mexico</td>
<td>6.6</td>
<td>.83</td>
<td>.43</td>
<td>0</td>
</tr>
<tr>
<td>Panama</td>
<td>6.6</td>
<td>.5</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Dom. Republic</td>
<td>6.8</td>
<td>.33</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Colombia</td>
<td>6.8</td>
<td>.66</td>
<td>.5</td>
<td>1</td>
</tr>
<tr>
<td>Argentina</td>
<td>7</td>
<td>.83</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Guatemala</td>
<td>7.3</td>
<td>1</td>
<td>.5</td>
<td>1</td>
</tr>
<tr>
<td>Bolivia</td>
<td>7.5</td>
<td>.83</td>
<td>.75</td>
<td>1</td>
</tr>
<tr>
<td>Ecuador</td>
<td>7.5</td>
<td>.16</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Venezuela</td>
<td>7.5</td>
<td>.61</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Honduras</td>
<td>7.7</td>
<td>.58</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Paraguay</td>
<td>8.2</td>
<td>.66</td>
<td>.25</td>
<td>1</td>
</tr>
</tbody>
</table>

Note: Values are averages of each variable for the years 1996 to 2005, except for the variable in the last column, which considers the location of the PPO as coded by CEJA (2006).

A systematic analysis has to take into account that, as mentioned above, institutions do not work in a vacuum. Other economic, political, and cultural variables that have been linked to corruption must also be considered. Among the economic variables, the literature emphasizes the GDP per capita (Mauro, 1995), the degree of openness of the economy (Ades and Di Tella, 1997, cited in Montinola and Jackman, 2002:153), privatization (Weyland, 1998), and economic inequality (You and Khagram, 2005). Among the political variables, a presidential system of government (Gerring and Thacker, 2004; Kunicova and Rose-Ackerman, 2005), years of being...
of Chile and Mexico in greater detail. While it is not possible to establish causal inference between judicial institutions and corruption control with case studies, they allow us to assess the effects of time and specific historical circumstances on corruption perception levels. Moreover, Chile and Mexico display variations in the independent variables, allowing us to better explore the causal mechanisms that connect the variables of interest. Judicial reforms altered the architecture of the justice system differently in Chile and Mexico. In 1997 Chile made reforms to the appointment procedure of supreme court judges, effectively increasing their external independence, while Mexico’s justices have long enjoyed consistently high levels of external independence. On the other hand, while the subordination of Chilean lower-court judges to their hierarchical superiors has been a constant, in Mexico there was an increase in the level of internal independence in the reform of 1994, but five years later supreme court judges regained control of lower-court judges’ career incentives. Finally, Chile reformed its prosecutorial organ to make it autonomous, while Mexico has kept it within the executive branch.

**Chile: An Early Start and Piecemeal but Overall Reform.** Chile is perceived as the least corrupt country in Latin America. One variable that is beyond the institutional architecture of the justice system, but crucial to understanding the architecture of Chile’s justice system, is its relatively early start in administrative reform and slimming of the state, compared to the rest of the region. These two processes began during the authoritarian regime of Augusto Pinochet and continued after the transition to democracy in 1990. These gradual processes were by-products of the even balance of leftist and rightist political forces and the bargaining between them.

Let us first take a closer look at the justice system variables over time in the Chilean case. From 1996 to 2005, Chile had a very low level of internal independence, and the prosecutorial organ was located outside the executive. The tight control of Chilean lower-court judges by their hierarchical superiors has been documented by Hilbink (2007), who argues that this institutional design also helps explain reactionary judicial behavior in, for instance, cases of human-rights abuses. In addition, before 1997 the Chilean prosecutorial organ was located within the judiciary, as is still the case in Spain and Italy. In 1997, however, a constitutional reform established the Chilean public prosecutor’s office as an autonomous agency. This reform entered into effect in December 2000, and the gradual implementation process concluded with the transformation of the office and criminal process in the Santiago Metropolitan region in June 2005.

democratic (Treisman 2000), federalism (Gerring and Thacker 2004), and the type of electoral system (Kunicova and Rose-Ackerman, 2005; Tavits, 2007; Chang and Golden, 2007) have been related to corruption. Among the social variables the most common are a tradition of civil law, the lack of a protestant majority (Treisman, 2000), and the degree of ethnic fragmentation (Mauro, 1995).

16 In 2005 there was a constitutional reform that modestly increased internal independence, see Couso and Hilbink (2011).
For the purposes of this essay, it is noteworthy that the Chilean PPO has always been located outside the executive. As hypothesized, low levels of internal independence and the PPO outside the executive branch are two institutional features that should be related to lower corruption levels. On the other hand, external independence in Chile was low until 1997 when a constitutional reform specified the number of supreme court judges, making it more difficult for regular majorities to pack the court, and also required the approval of two-thirds of the senate for appointing justices (justices already enjoyed life tenure). This increase from low to medium levels of external independence is also in line with the hypothesis that relates extreme values of external independence to greater corruption.17

Chile is much less corrupt than the rest of Latin America. Part of the reason is that Chile has the most commonly cited correlates of low corruption, namely, a centralized political system, growing per capita GDP plurality elections for congress, a low degree of ethnic fragmentation, and high openness to trade. But Chile’s case also presents other institutional variables closely related to the justice system that are important to take into account. In this regard, it may be worthwhile to examine the 1997 judicial reform in greater detail.

Pinochet and the military regime in Chile famously lost a 1988 plebiscite regarding their continuation in power. The negotiated transition to democracy that followed included a bargain over judicial empowerment. The new democratic government wanted to transform the judiciary not only because of its poor performance during the dictatorship regarding human-rights violations but also because of its clear Pinochet-friendly profile. During his eighteen-year rule, Pinochet appointed fourteen out of seventeen supreme court judges, and twelve of these appointments took place between 1985 and 1989. Because of the low degree of internal independence, control of the supreme court meant control over lower-court judges as well. However, it was difficult for the new democratic government to change the constitution or even the laws because other institutional issues negotiated in the transition protected both the military and the right-of-center coalition of political forces in the legislative branch, especially the Senate.18 Enhancements in judicial independence, such as those that took place in 1997, and modifications to the design of institutional mechanisms thus reflect bitter political bargaining.

The timing of the 1997 reforms, however, is further explained by particular political circumstances. One of the main issues at stake in the aftermath of the transition was the present and future control of the supreme court and the judiciary. Early

17 Chile, in contrast to Mexico, has a constitutional tribunal outside the judiciary, which under certain circumstances may also reduce corruption by providing an additional check on the supreme court judges.
18 The Chilean electoral system, drafted by the military regime after losing the plebiscite in 1988, ensures that the composition of the two houses of Congress is roughly equally divided between the coalition of parties of the left and the coalition of parties of the right. In addition, the 1980 Constitution included a number of nonelected senators who, added to those from the center-right coalition, effectively eliminated the possibility that the center-left government of the Concertación could control the two houses of Congress and the presidency (Carey, 2002:225).
attempts to create a judicial council were boycotted by the right and by the supreme court itself because power would be taken away from it. A reform of the appointment procedure finally passed in 1997 in the context of a corruption scandal that involved a supreme court judge. That fact mitigated the court's opposition to the reform and motivated the right's acceptance to negotiate because that particular judge would be removed, and he was in favor of judging past violations of human rights. The leftist democratic government then demanded the imposition of a retirement age of 75 years old, which implied getting rid of Pinochet-friendly judges in the near future. The right accepted on the condition that the appointment procedure include a two-thirds approval vote in the senate that practically gave them a veto over the selection of future supreme court judges. That was the deal and the context in which the amendments of 1997 took place.

The same piecemeal, negotiated approach to reform that changed the judiciary also took place in public administration reform in general (Cejudo, 2006). During the dictatorship, Pinochet first reduced the bureaucracy and then provided employment stability for administrative officials, a kind of career civil service. These were unusual decisions given the common practice in authoritarian regimes of using bureaucratic positions as “pork” to be distributed among political clienteles, as was the case during the PRI regime in Mexico. In Chile's negotiated transition to democracy, the military ensured that the bureaucracy could not be removed. As Cejudo argues, taking this as a given, the democratic governments since 1990 aimed their reform efforts at improving the performance of the inherited administrative agencies in terms of efficacy, professionalism, and employment stability. In turn, these factors contributed to the control of corruption within administrative agencies. The incremental but overall approach to reform in Chile is explained by the strength of the right and of the military forces during and after the transition that forced hard, step-by-step negotiations with the forces grouped in the Concertación. This approach seems to have helped curb corruption in the Chilean public sector.

The Pinochet regime also reduced the size of the government in a more general sense, privatizing many of the state-controlled businesses. Indeed, Chile has since claimed to have the smallest government in Latin America. It has been argued that privatization increases opportunities for corruption. But the privatization process began earlier in Chile than in the rest of Latin America, so by the time of the first observation in this essay (1996) the Chilean state was already considerably leaner than the other states in the region (but see Rose-Ackerman 2000). In the case of Mexico, by contrast, massive privatizations began in 1986 under Miguel de la Madrid and were increased during the administrations of Carlos Salinas de Gortari (1988-94) and Ernesto Zedillo (1994-2000). Thus, if privatization increases corruption (and arguably the perception of corruption), the time gap in starting dates of privatization processes in Chile and Mexico could help explain the initially lower corruption levels in Chile compared to Mexico and the rest of the region.
It is also worth mentioning that Chile also had an early start, relative to the rest of the countries in the region, in creating specialized and efficient institutions in charge of supervising the country's fiscal matters and general issues of state property, such as the **Contraloría General de la República**. According to Siavelis (2000), the combination of the **Contraloría**, created in 1972, and the highly institutionalized party system in Chile provided a system for controlling corruption and favoring legality in pre-authoritarian Chile. However, these overseeing mechanisms were severely weakened during the dictatorship. In sum, Chile’s head starts in administrative reform and slimming of the state help explain its low corruption levels relative to the rest of Latin America.

**Mexico: The Perils of Politicized Justice System Institutions.** Mexico has all the values in the justice system's institutional variables associated with high corruption levels, particularly the location of the PPO. The ministerio público is located within the executive branch and, arguably, is perhaps the main factor explaining the relatively high corruption levels in Mexico. The performance of the prosecutorial organ has been recently pointed out as the very “heart of the impunity problem” that characterizes the Mexican criminal justice system (Zepeda Lecuona, 2000). Thus, I briefly discuss internal and external independence in Mexico and their relation to corruption before turning greater attention to the prosecutorial organ.

Internal independence in Mexico was practically nonexistent until the judicial reform of 1994. By creating a judicial council, this reform raised internal independence to the highest value of my scale (4). However, another constitutional reform, which changed the composition of the council in 1999, brought internal independence down to its traditionally low levels. The Mexican judicial council controls appointments and promotions, as well as disciplinary matters, for all lower-court federal judges, permitting the kind of top-down control by senior judges seen in Chile. Although life tenure may ensure a little more internal independence among judges than in Chile, the Mexican council fills lower-court judgeships and controls the judicial career of all lower federal judges. Life tenure is also granted only to those judges who have been ratified by the council after a six-year trial term. From 1994 until 1998 the council was composed of judges selected by lot from different levels of the judiciary, which effectively meant that supreme court judges had no power over the composition of the council and thus over the career incentives of lower-court judges. But after strong lobbying from the supreme court judges, a 1999 constitutional reform established supreme court control of the council, which also implied a loss of internal independence (Fix-Fierro, 2003; Pozas-Loyo and Ríos-Figueroa, 2011).

On the other hand, external independence for Mexican supreme court judges has been constantly high, since they enjoy most of the constitutional guarantees of independence discussed in the first section of the essay. However, the hegemonic control of the **Partido Revolucionario Institucional** (PRI) during most of the twentieth century meant these guarantees were not put into practice: in a nutshell, supreme court judges were part of the corporatist structure of the PRI-controlled state. As
fragmentation of political power increased, especially since 1997, supreme court judges have gained the space necessary to face the executive and legislative branches, and the constitutional guarantees of independence became effective (Ríos-Figueroa, 2007).19

Now let us look at the institutional location of the prosecutorial organ and its relation to controlling corruption in the case of Mexico. The Mexican president freely appoints and removes the Procurador General de la República (the equivalent to the attorney general in the United States), and the Procurador, in turn, freely appoints and removes all the procuradores at lower levels.20 There are internal mechanisms of control, such as periodic visits and reviews, that allow higher levels to monitor lower levels, but ultimately all procuradores report to the Procurador General. At the same time, the office of the Mexican attorney general is legally very powerful, in the sense that it enjoys much discretion in the three steps that characterize the prosecutorial process: investigating, charging, and sentencing. This combination of political subordination with strong legal power has been characterized as “strong institution with weak officials” (Zepeda Lecuona, 2000:339).

The Mexican executive has traditionally chosen the political use of the prosecutorial power to exert pressure on friends and enemies alike. Even the first non-PRI president, Vicente Fox from the Partido Acción Nacional (PAN), under a working democratic regime tried to use his power over the prosecution to try to get rid of the main opposition leader, former Mexico City mayor Andrés López Obrador from the leftist Partido de la Revolución Democrática (PRD). But the politically motivated use of the prosecution is also found in cases related to corruption, the typical plot being a special prosecutor selected to investigate a high-level official who concludes that there is not sufficient evidence to charge him even if he became ridiculously rich during his tenure in public office.

While the Mexican prosecutorial organ is relatively efficient at getting things done for the political bosses in selected cases, it is extremely inefficient at prosecuting the vast majority of criminal offenses that affect common citizens. One of the problems is the relation between the prosecutors and the police. While in many countries the investigatory police usually act as a filter for minor offenses and other common cases that do not merit prosecutorial revision, in Mexico the prosecutors deal with every single case, even the minor offenses and cases that turn out to be not criminal but, for instance, administrative offenses (Zepeda Lecuona, 2000:212). The consequence, of course, is that prosecutors have an immense caseload, which results in delays. Lost files and poor attention to citizens are the norm. This inefficiency, in turn, creates opportunities for prosecutors demanding “speed money” and for citizens who are willing to pay the bribe to expedite their case (or to frustrated citizens who simply do not bother to either report crimes or collaborate with investigations).

19 Across Mexican states both levels of external independence and of perception of corruption show interesting variations. A recent analysis shows results in some aspects consistent with the hypothesis of this essay, see Romano (2010).

20 Since 1994 the executive choice of Procurador General has had to be approved by the Senate, but the president still freely removes that person.
In sum, Mexico is a poster child for the perverse incentives of the political subordination of justice system institutions and, in particular, prosecutors. The result is pervasive corruption, as politicians use the law to protect their friends and attack their foes. The situation is exacerbated by the executive’s powers to appoint and remove prosecutors and strong legal prerogatives and wide discretion regarding the investigation of a crime and the charging of a suspect (e.g., manipulating accusations and possible sentences). Relationships between prosecutors and the investigatory police are also important. When the police do not filter all but the cases that merit revision by a prosecutor, the office’s mounting caseload promotes inefficiency. Inefficiency, in turn, is an additional incentive for administrative corruption in the form of “speed money” and other such bribes.

CONCLUSION

Many studies that assess the impact of political institutions on corruption (e.g., electoral systems, federalism, presidentialism, parliamentarism) acknowledge the importance of an independent judiciary as an intervening variable. However, these studies usually do not go beyond such acknowledgment. Moreover, studies that examine the impact of judicial independence on corruption more directly usually do not distinguish between different types and ranks of courts and judges or different institutions within the justice system. This essay aims to contribute to the advances made in the study of corruption by theoretically and empirically analyzing the relationship between justice system institutions and corruption control.

This essay takes a central idea of the system of checks and balances—that unchecked checkers face incentives to engage in corrupt behavior—and applies it to both inter- and intrabranch institutional design. Just as scholars of democracy speak of democratizing other institutions (e.g., the internal procedures of political parties, primary elections, decentralization, etc.), this essay argues that scholars of rule of law could scale the model of checks and balances down to the intrabranch level. In particular, while judges and prosecutors are generally considered checkers of other branches of government, they may also constitute sources of corruption if left unchecked. The institutional design of the judicial branch, therefore, should also be modeled so as to prevent the presence of “unchecked checkers.” Based on available data on the perception of corruption and on original data on judicial institutions in Latin America, preliminary results show that the perception of corruption is higher with higher levels of internal independence and with prosecutorial organs subordinated to the executive branch.

21 As relatively recent scandals in the United States show, no country is immune to this potential flaw in institutional design. See New York Times editorials during April 2007.

22 The criminal process in Mexico is being transformed from inquisitorial to adversarial. A 2008 constitutional reform provided for an eight-year period to complete the transformation. As of today, the reform has been fully implemented in only a handful of states, and it is considerably delayed at the federal level. The institutional location of the public prosecutor’s office, however, was not reformed, and, thus, it is still located under the executive branch. For details on the reform see Shirk (2011).
branch. However, there is no evidence that extreme values of external independence are related to higher perceptions of corruption.

The case studies in Chile and Mexico illustrate how unchecked checkers in the judiciary are detrimental to the war on corruption. At the same time, they exemplify how the mechanisms by which the intrabranch checks and balances help or hinder the combat of corruption can vary based on the particular design of a given justice system, the presence of particular institutions (such as the Contraloría in Chile), the socio-political context, and the important legacy, both institutionally and politically, of antecedent authoritarian regimes.

This essay also has relevant implications. Perhaps the main one is that there are both theoretically founded reasons and some empirical evidence that certain judicial institutions help control the perception of corruption. The search for a “correct” mix of independence and accountability for nonelected politicians such as judges and prosecutors seems to demand more research and careful analysis by both academics and politicians. Institutions such as judicial councils, which usually administer the judiciaries and the careers of lower-court judges (i.e., internal independence), also deserve more attention by academics and practitioners alike. 

REFERENCES


