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## When and Why “Law” and “Reality” Coincide? *De Jure* and *De Facto* Judicial Independence in Mexico, Argentina, and Chile

Andrea Pozas-Loyo and Julio Ríos-Figueroa\*

The rule of law, as Joseph Raz argues, requires the law to be prospective, open, clear, and relatively stable. That the passing of laws be governed by open, permanent, clear, and general rules. And, that the independence of courts is guaranteed.<sup>1</sup> Horizontal accountability, according to Guillermo O'Donnell (2003), requires state agencies with the autonomy, the authority, and the will to act as controls on other government agencies. An independent judiciary is one of these agencies. Actually, even though the “rule of law” and “horizontal accountability” are contested terms (e.g. Carothers 2006; Kenney 2003), there seems to be a consensus that judicial independence is a necessary condition for both.

Recent work on countries as disparate as Argentina (Bill Chavez 2004) and Tanzania (Widner 2001) confirms that the above view is held not only by academics but also politicians, judges, and representatives of the civil society at large. Moreover, the existence of an independent judiciary has also become a kind of mantra for international institutions such as the World Bank that have invested millions promoting judicial reforms based on the belief that an independent judiciary, through its link to the rule of law and accountability (i.e. protecting property rights and enforcing laws against criminal behavior), provides many benefits such as economic growth and low corruption levels, just to mention two.

However, despite the broad recognition of the importance of judicial independence, evidence for its effects are not conclusive in part because of measurement and conceptual problems (e.g. Feld and Voigt 2003; La Porta et al 2004). It is still far from clear what judicial independence is, how to measure it, and under which conditions a *de jure* independent judiciary effectively contributes to the rule of law and horizontal accountability. In Latin America the distinction between formal and informal rules dominates the debate on this topic and while recent work has begun to systematize this discussion (e.g. Helmke and Levitsky 2004), there is still a broadly held view according to which in Latin American “quasi-democratic

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<sup>1</sup> Raz also requires that the principles of natural justice have to be observed, the courts have to watch over the observance of these principles, and the discretionary powers of crime-prevention authorities must not obstruct the law (Raz 1977, 198).

oligarchies the administration of justice in practice is nearly always worse than the written rule on which it operates” (Groth 1971, 21 cited in Bill Chavez 2004, 23). In other words, the consensus in Latin America seems to be that the level of judicial independence *de jure* is a lot higher than it is *de facto* (e.g. Verner 1984, 463; Rosenn 1987, 2; Larkins 1996, 615; O’Donnell 1996, 40-1; Popkin 2002, 112; Mainwaring 2003, 5; Bill Chavez 2004, 23).

In this paper, we challenge the consensus that in Latin America the level of judicial independence *de jure* is always higher than it is *de facto* and argue that it is based on an oversimplified look at legal texts. We show how a theoretically informed, reproducible, and comparable *de jure* measure of judicial independence captures a more complex and nuanced picture.

The central question our paper aims to address is: Under what circumstances can we expect such measure of judicial independence *de jure* to be a good proxy for what we can expect to happen in reality? We argue that whether this *de jure* measure can be considered a good proxy or whether we can expect it to overestimate or underestimate judicial independence in reality depends on the distribution of power among the ruling political groups. Having identified those political conditions, and what Supreme Court judges can expect from them, we explore what is the likely behavior of these judges regarding decisions on cases where the government violates the rule of law or horizontal accountability. Having laid out our theoretical expectations in six different scenarios, we proceed to illustrate them using examples from Mexico, Argentina, and Chile.

This paper is divided into four parts. In the first, we provide some clear and theoretically grounded conceptual tools. In the second, we lay out our arguments and theoretical expectations. In the third, we contrast these expectations with our case studies. Finally, we conclude.

## I.- Conceptual Clarifications and Definitions

### *Independence-to and Independence-from*

Research on judicial independence has usually been separated into two different types of studies: the first focus on judicial behavior and the second on the institutional framework. These are often perceived as two competing ways of how judicial independence should be studied. In contrast, we will argue that they are better viewed as two complementary forms of judicial independence.

Research on judicial behavior usually approaches the question of independence through the study of actual decisions. These studies consider that there is judicial independence if judges are *independent to* decide, for instance, against the government if there was a violation to the constitution. From this

perspective the question of whether or not there was judicial independence in a given context becomes whether or not decisions in such context were independently taken. Hence, much of the researcher's effort is to establish criteria to enable her to characterize a given decision as independent or not. This is what we call *independence-to*.<sup>2</sup> In this paper we focus on judges' *independence to* take decisions against the government in cases that involve the protection of rights from governmental abuses.<sup>3</sup>

Rephrasing our questions, we seek to answer why and under what conditions can we expect that the level of *independence-to* will coincide with the level of judicial independence *de jure*? In the cases where we can not expect such coincidence, can we expect that the degree of judicial *independence-to* will be higher or lower than the level established by our measure of judicial independence *de jure*?

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

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<sup>2</sup> For instance, Gretchen Helmke analyzed the conditions under which Argentinean judges are likely to decide against the current government (2005). While some scholars argue that the sources of judicial preferences lie in the institutional incentives they face, others argue that they are to be found in judge's ideologies, and still others in public opinion. For a good list on references see McNollgast 2005.

<sup>3</sup> As we will see, the fact that judges do not have *independence-to* make this type of decisions does not imply that they do not have *independence-to* make other kind of decisions. In this connection it is important to note that the judiciary can play different roles, and calls into question the image that in all authoritarian regimes the judiciary plays no role and the law is of no importance. For the more on the roles constitutional law plays in authoritarian regimes see Pozas-Loyo 2005. For interesting examples see Barros' account of Chile during the Junta's Dictatorship (Barros 2002), and Balme and Pasquino's on the increasing importance of the judiciary and the roles it plays in China (Balme and Pasquino 2005).

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

of the other branches act in accordance with the provisions that determine the degree of judicial independence *de jure*.

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

### *Judicial Independence de Jure*

The degree of independence *de jure* in a given country can be assessed by looking at its constitution. The study of *de jure* judicial independence in Latin America has been for a long time overlooked since it is commonly believed that the law is greatly ignored and does not play any important role in the region. We challenge this view and argue that it is built on an oversimplified look at legal texts. The level of judicial independence *de jure* is here established by unpacking the concept into two of its components, measuring each component based on a set of observable institutional variables, and coding the constitutions of the countries according to rules consistent with a precise definition of independence.

We define judicial independence *de jure* as relation between an actor A that delegates authority to an actor B, where the latter is more or less independent of the former depending on how many *de jure* controls A retains over B. In the literature there are two important and clear distinctions. The first one is between the individual judge and the institution of the judiciary. The second one is between pressures on the judge from within and those from outside the judiciary. Using autonomy to refer to the judiciary and independence to refer to individual judges, we unpack the concept of *de jure* judicial independence into two components: Autonomy, or the relation between the elected branches of government (A) and the judiciary (B); and, External Independence, or the relation between the elected branches of government (A) and Supreme Court judges (B).<sup>5</sup>

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<sup>5</sup> The relation between Supreme Court and lower court judges, what can be called internal independence, is also important but we do not consider it here (see Rios-Figueroa 2006).

## Autonomy

An autonomous judiciary decides on its own basic institutional structure, contrary to a heteronomous judiciary that would have its structure controlled by the other branches of government. The basic institutional structure of the judiciary is composed primarily of courts, their number, location, jurisdiction, the number of judges sitting in them and whether it has or not the power of constitutional adjudication with *erga omnes* provisions.<sup>6</sup> We can distinguish three possible answers to who controls those variables: one organ (executive or legislative), two organs (the executive with the legislative), or the judiciary itself. The degree of autonomy would be highest if the judiciary itself controls those variables, lower if two organs control them, and still lower if they are in the hands of only one organ. Then, if the constitution<sup>7</sup> of a country: (a) specifies that the number and jurisdiction of the courts is to be decided by the judiciary itself, (b) establishes the number of Supreme Court judges<sup>8</sup>, (c) provides a fixed percentage of the GDP for the judiciary, and (d) establishes that effective judicial review lies within the judiciary, then the judiciary of that country would have the highest degree of *de jure* autonomy.<sup>9</sup>

## External Independence

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

If the constitution specifies that Supreme Court judges are appointed by the judiciary or by at least two organs of government, we consider that as an appointment procedure counting towards *de jure* external independence. Similarly, if

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<sup>6</sup> *Erga omnes* provisions mean that judicial decisions are valid for all and not only for the parties that are disputing a particular case.

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

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

<sup>9</sup> Further justifications and detailed coding rules for each variable for autonomy and external independence can be found in Rios-Figueroa 2006.

the constitution specifies that Supreme Court judges' tenure is longer than that of their appointing authorities, we count it towards external independence. Impeachment proceedings also relate Supreme Court judges with the elected branches of government. We are interested in the accusation part of the impeachment process because we want to capture the degree of potential influence over Supreme Court judges. Thus, if the constitution specifies that Supreme Court judges can be impeached by the judiciary or by at least a supermajority of one chamber of congress, we add that to external independence. Finally, we also add to external independence if the constitution specifies that Supreme Court judges can not have their salaries reduced while in office.

We can take autonomy and external independence as two distinct components of judicial independence. In our case studies we measure each component separately and also provide factual information about both. For the theoretical arguments that follow, however, when we say that the degree of *de jure* judicial independence is "high" we mean that the combined score of autonomy and external independence is at least four (out of eight possible).

#### *Accordance between de jure independence and the actions of the politicians*

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

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

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<sup>10</sup> We should note here that the expected level of *independence-to* could be higher than the level of *de jure* judicial independence. In the next section we will see under what conditions this would be the case. As we will see, Chile (1990-2005) is a case with low *independence-from* but where the level of *independence-to* is higher than the *de jure* level.



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

Regarding external independence the same reasoning applies. *De jure* external independence establishes the controls that the elected branches have over Supreme Court judges, and the fact that politicians do not use these faculties to punish judges (e.g. if they do not use their legal faculties of impeachment) is not the same as to make the judges externally independent-*from*. To have a generous master does not amount to be free.<sup>11</sup> To see what are the reasons that support our definition of independence-*from* in this respect it is useful to note that the sole fact of the possibility to impeach may undercut the SC judge's independence, as the possibility of being punished may deter a child from an action that violates the family's norms. Clearly, from the lack of instances of punishment we would not infer that the family's norms do not limit the child actions, as from the lack of impeachment we can not infer higher external independence.

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

### *Multilateral and Unilateral Constitutional Settings*

A given state has a Multilateral Constitutional setting if and only if there is at least two different political parties in the legislative and no political group has the capacity to unilaterally amend the constitution given the requirements established in

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<sup>11</sup> For a nice theoretical discussion on the related contrast between freedom as no interference and freedom as no domination see Pettit 1999

the constitution.<sup>12</sup> Here it is important to note that “political group” not only refers to political parties but also other types of groups with political power as a military junta.

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

#### *Divided and Unified Government*

A given state has a unified government if and only if a political party has the capacity to enact laws, which in most of the cases is equivalent to say that a single party controls the executive and has a majority in the legislative. A given state has a divided government if and only if no political party has the capacity to enact laws by itself, which in most of the cases is equivalent to say that the political party of the executive does not have a majority in the legislative. Note that this distinction only makes sense in Multilateral Constitutional settings since all Unilateral settings are by definition unified.

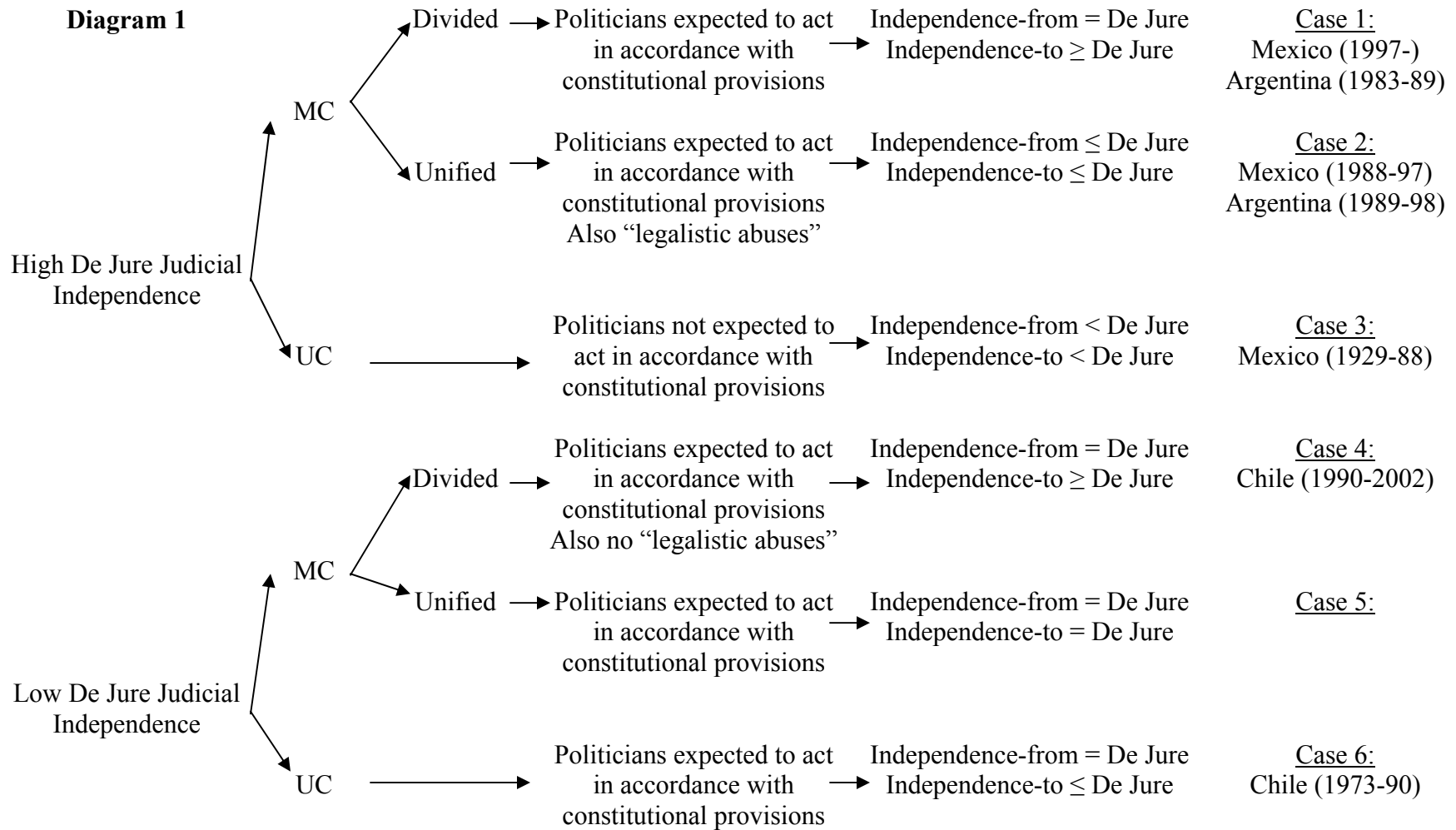
## **II.- When and Why Judicial Independence in Law and in Reality Coincide?**

We first determine whether we can expect the members of the executive and legislative branches to act in accordance with the provisions that establish the level of independence *de jure*. This analysis rests on different combinations of the constitutional setting (multilateral or unilateral) and government characteristics (unified or divided). These conditions, combined with the expected actions of the elected branches, will enable us to determine whether we can expect coincidence between the levels of independence-to and independence-from with the level of *de jure* independence; and, if not, to establish whether we expect their levels to be higher or lower than the level of independence *de jure*. Our account is summarized in Diagram 1. In what follows we briefly argue what we expect in each one of the cases. In the next part we illustrate each case with examples from Mexico, Argentina, and Chile.

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<sup>12</sup> For the theoretical ground of these distinctions see Pozas-Loyo 2005

**Diagram 1**



*Case 1: High de jure judicial independence, multilateral setting, divided government*

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

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

*Case 2: High de jure judicial independence, multilateral setting, unified government*

In this scenario, although the opposition has veto power over the constitutional amendments, the political group of the President has the capacity to make the regular legislative changes. Unlike the previous case, a unified government makes the coincidence of interests between the executive and the legislative more likely. In addition, abuses of either branch will hardly be capitalized by the other. However, we can expect that any violation of the constitutional provisions protecting independence by either branch could be capitalized by the minority party in

Congress. Admittedly, the capacity of this minority to impinge costs on the government will vary depending on context (the “political capital of the government”). However, given that we are in a multilateral setting, we can expect the minority in Congress would be able to make considerably costly any clear violation of the *de jure* provisions.<sup>13</sup> In addition, since a multilateral setting implies that the group in power cannot by itself amend the constitution, if there are attempts to undercut judicial independence we expect them to come in those areas that the unified government can change simply by enacting laws. So we do not expect to see gross violations of constitutional provisions. But we do expect legal changes that, if overtly partisan, would constitute what we call “legalistic abuses” in the way the provisions that are not specified in the constitution are exercised.

Given the above it follows that the expected level of independence-from will be equal or lower than the level of judicial independence *de jure*, depending on the expected costs of making legalistic abuses. Regarding independence-to, the Supreme Courts judges would expect the politicians to use their legal prerogatives if decisions do not favor them.<sup>14</sup> Also, depending on the context, they could also perceive that legalistic abuses are likely to occur. But in a multilateral setting the costs to Supreme Court judges for not taking action against fragrant governmental abuses is higher than in a unilateral setting, so Supreme Court judges would also expect the minority in Congress to denounce and try to capitalize these non-decisions if they occur.<sup>15</sup> Arguably, these expectations will ground a level of independence-to lower than the *de jure* level but not as low as we would expect if we were in a unilateral setting with the same level of independence *de jure*.

### *Case 3: High de jure judicial independence and unilateral setting*

Unlike previous cases, here the ruling political group has an extraordinary concentration of power. It is the only political group in the legislative and/or has the capacity to unilaterally amend the constitution given the requirements contained in the constitution. In addition, the ruling group does not face the presence of an important minority opposition in the legislative, i.e. a minority not large enough to stop a constitutional amendment. As we argued in the previous case, this fact would

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<sup>13</sup> To appreciate this point, contrast this setting with a unilateral one where the opposition has no access to the legislative or the ruling group has power enough to unilaterally change the constitution.

<sup>14</sup> Note that, as we discussed in the first section, this expectation may be enough to deter certain actions.

<sup>15</sup> In this connection the capacity of the Supreme Court judges to determine what cases to take, for instance the writ of certiorari, may be important.

reduce the costs of violating the *de jure* provisions of judicial independence. Hence, in this scenario we expect to observe violations of the constitutional provisions that grant the judiciary a high level of judicial independence. It follows that we expect the level of independence-from to be lower than the level of judicial independence *de jure*.

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

#### *Case 4: Low de jure, Multilateral Setting, and Divided Government*

In this scenario political power is highly dispersed. Both constitutional and regular legislative changes require the cooperation of at least two political parties. But it is important to keep in mind that in this scenario the constitution grants to the elected branches important controls over the judges and judiciary. Not to make use of those controls does not constitute a violation of *de jure* independence. Also, to act in ways that are not prohibited by the constitution does not amount to violate it. In this setting, to violate the constitutional provisions would amount to proceed in ways that directly contravene such provisions, for instance if the President appoints Supreme Court judges when the constitution grants this faculty to the Legislative. As we have said, these are very rare cases. Hence in this setting we can expect the politicians not to violate the *de jure* independence. Thus, the level of independence-from will coincide with the level of independence *de jure*.

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

#### *Case 5: Low de jure, multilateral setting, unified government*

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

Given that the government is unified, Supreme Court judges will arguably expect that the elected branches will have it easier to coordinate and pass legislation in ways that contravene their interests (e.g. stripping jurisdiction). In addition, the Justices would expect that their potential rulings against executive abuses will not be particularly welcome by the majority in Congress. Given that we are in multilateral setting we can expect those rulings to be supported by the minority party in Congress. In addition, if the Justices decide not to sanction governmental abuses, this minority would likely denounce and try to capitalize from these actions. However, arguably the costs that the government is capable of impinging on the judiciary are higher than those coming from the minority in Congress. Thus, we expect the level of independence-to to be as low as the level of independence de jure.

#### *Case 6: Low independence de jure, unilateral setting*

Finally, in this scenario we expect those in power to act in accordance with the constitutional provisions that not only grant them many controls over judges and the judiciary but that can also be amended by them. Thus the level of independence *from* is likely to coincide with the level of independence de jure. In a unilateral setting those in power are legally able to use the mechanisms that the constitution grants them without requiring the cooperation any other political actor, and it is likely that they not even need to face denunciations by a legislative minority. As discussed in the third setting, this will negatively affect the level of independence *to*. Therefore, the expected level independence-to would be equal or lower than the level of independence de jure.

### **III. Judicial Independence in Mexico, Argentina, and Chile**

In this part we illustrate each scenario with cases from Mexico, Chile, and Argentina. Within each case we discuss all the elements of our argument, one

country at a time. Our measure of judicial independence de jure is original and taken from Rios-Figueroa (2006). For actual judicial behavior we rely on a number of secondary sources and other data that we have collected. Our discussion of the cases is not intended as a detailed description of the historical circumstances and critical junctures in our three countries, but we suggest references for the interested reader. It is very hard to conclude unambiguously without systematic behavioral data whether the politicians acted in strict accordance with the constitutional provisions, or whether the judges exercised the expected degree of independence-to. Nonetheless, we think that the following provide good illustrations of our expectations in each case.

## **Case 1: High de jure judicial independence, multilateral setting, divided government**

### **(A) Mexico: 1997-today**

#### *High de jure judicial independence*

During this period, Mexico has enjoyed a high degree of judicial independence de jure, both in autonomy of the judiciary (with three out of four points) and in external independence of Supreme Court judges (again three out of four possible points) (see Graph 1). Regarding autonomy, the number and jurisdiction of the courts are currently under the control of the judiciary, since decisions on these matters are taken by the *Consejo de la Judicatura* (Judicial Council) according to the Mexican Constitution (Article 94). In addition, the number of Supreme Court judges is specified in the Mexican Constitution, meaning that to alter this number is out of the reach of simple majorities because it entails a constitutional amendment.<sup>16</sup> On the contrary, the budget for the judiciary is controlled by the executive and legislative. Unlike constitutions of other countries, the Mexican one does not specify a percentage of GDP for the judiciary. And each year the judiciary has to bargain for its budget (this takes away the third possible point). Finally, since the judicial reform of 1994 the Mexican Supreme Court concentrates the power to effectively control the constitutionality of laws and acts of government in the country.

The degree of external independence de jure in Mexico during this period is three, as has been the case since 1944 (Graph 1). These correspond to the tenure, salary, and appointment of Mexican Supreme Court Justices: (1) their tenure is fifteen years (Article 94), that is longer than the tenure of their appointing authorities, the President and the Senate, that is of six years<sup>17</sup>; (2) they also have their salary

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<sup>16</sup> The number of Supreme Court Judges has been established in the Mexican Constitution since 1944.

<sup>17</sup> The fifteen-year tenure is a product of the 1994 Judicial Reform. From 1944 until that year the Mexican Constitution granted Supreme Court judges life tenure.



protected in the constitution (Article 94); and (3) they are appointed by two organs of government (Article 96). The only variable that makes Justices dependent in Mexico is impeachment since a simple majority in the Chamber of Deputies can initiate the impeachment process. Although the constitution establishes that a 2/3 majority in the Senate adjudicates whether the impeached justice is guilty, our rule is that the power to accuse is sufficiently important to exert pressure on judges so that we add to external independence only when at least a qualified majority has this power.

### *Multilateral setting*

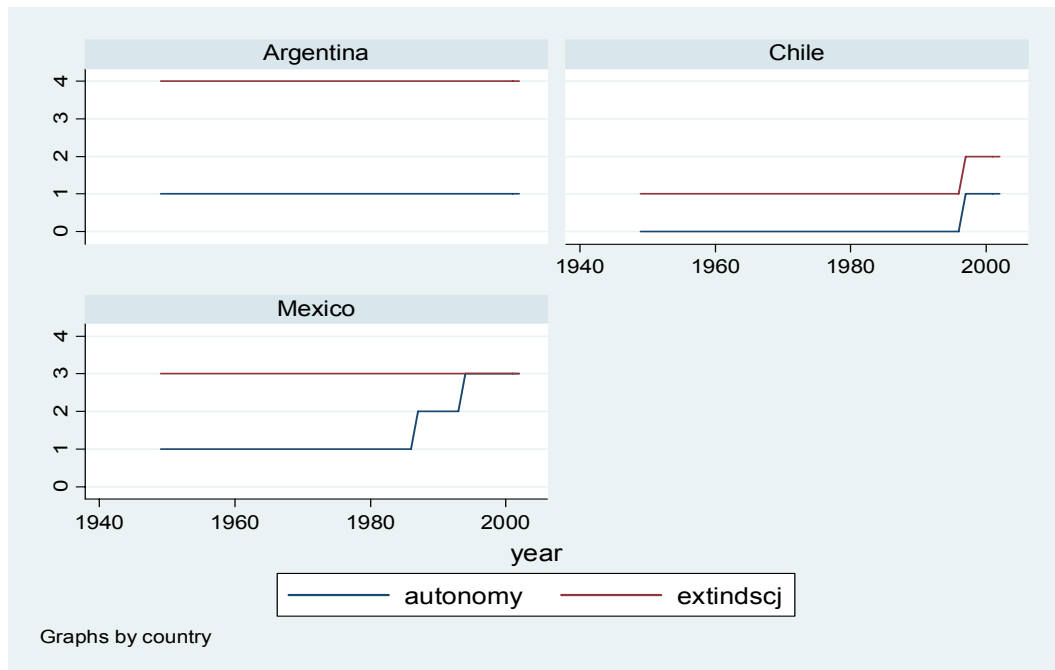
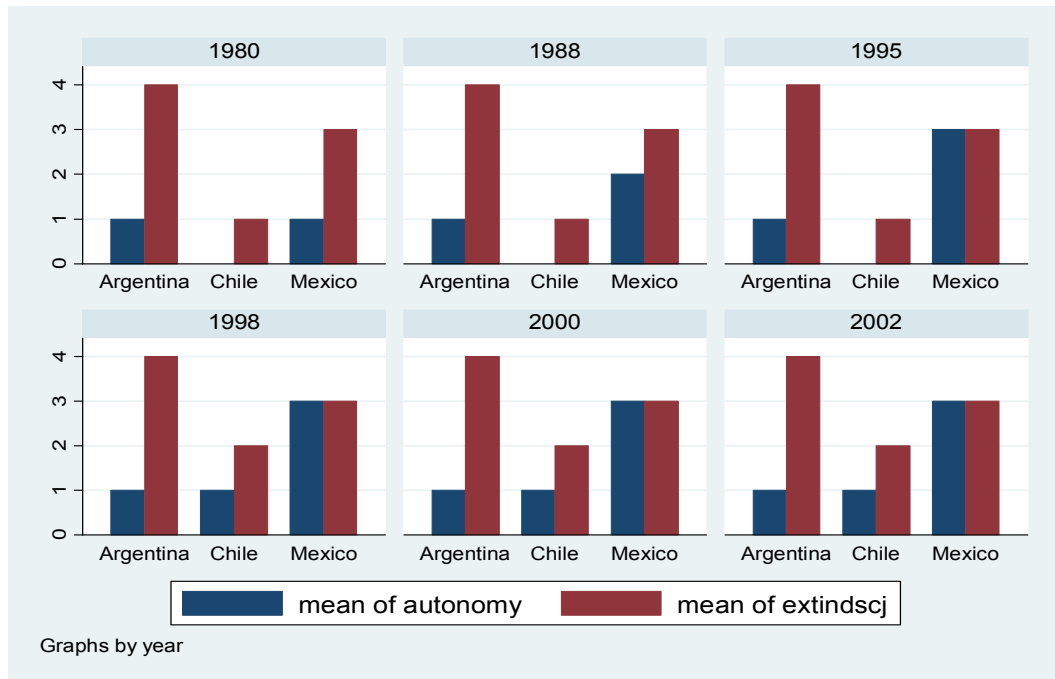
To distinguish the periods under which a single power group was able to amend or change unilaterally the constitutional provisions regarding judicial independence we look at the constitutional rules for amendment. According to the Mexican Constitution (Article 135) the amendment procedure requires a supermajority vote of 2/3 in both Houses of Congress plus the approval of at least a majority of the state legislatures (via majority vote). From 1929 until 1988 the PRI controlled the different organs needed to amend the Constitution, meaning that during those years all amendments (more than 400) were done unilaterally by the PRI. Following this criterion, we would have that the Mexican Constitution of 1917 started the multilateralization path in 1988 when the PRI lost the monopoly of the constitution-making process by losing the supermajority in the House of Deputies (see Pozas-Loyo 2005).<sup>18</sup> After 1988 the opposition parties in Mexico also became constitution-makers and had contributed with important amendments. Among these, those undertaken in 1994 are of special importance for our purposes. One is the judicial reform that increased the *de jure* levels of autonomy.<sup>19</sup>

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<sup>18</sup> For an account of the notion and different types of “multilateralization” processes see Pozas-Loyo 2005.

<sup>19</sup> The electoral reform that leveled the field for political competition and created an autonomous electoral organ is also important. Perhaps more than others, these reforms carried out in 1994 played an essential role in the Mexican transition to democracy, and clearly signaled the end of the PRI's unilateral control over the constitution-making processes that had started six year earlier.

**Graph 1. De Jure Judicial Independence in Mexico, Argentina, and Chile 1950-2002**



NOTE that both graphs show the constant levels of autonomy and external independence in Argentina (at 4 and 1, respectively). In Chile, autonomy and external independence were constant at a low 0 and 1, respectively, until 1997 when both increased one point. In Mexico, external independence has been constant at 3, and autonomy increased from 1 to 2 in 1987, and to 3 in 1994.

### *Divided government*

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

#### *What do we observe?*

We expect, according to our argument, accordance between *de jure* independence and the actions of the politicians and that is what we observe in Mexico since 1997. With respect to external independence, two Supreme Court judges have left according to the rules set out in the 1994 judicial reform (Juventino Castro y Castro and Vicente Aguinaco) and one more died (Humberto Roman Palacios). To fill the vacancies, the appointment of the three new Supreme Court judges (José Ramón Cossío, Margarita Luna Reyes, and Sergio Valls) has proceeded as the Constitution prescribes. In addition, there have been no impeachments. Salary of judges has not been decreased and they are now actually competitive and attractive not only at the Supreme Court level but also for lower court judgeships (Fix-Fierro 2003, 313). Regarding autonomy, we can say that there has been no meddling with the Court's jurisdiction, and the Supreme Court's role of constitutional guarantor has also been respected.<sup>20</sup>

Given that the level of judicial independence *de jure* has been high and there has been accordance between the constitutional provisions and the actions of the politicians, the expected level of independence-from in this period coincides with the level of *de jure* independence. Regarding evidence of the level independence-to it is interesting to note that it increased precisely in 1997 when the PRI lost the majority in the House of Deputies and the first divided government appeared in Mexico. Evidence of this is that the probability for the Supreme Court to decide against the PRI increased from a mere .04 from 1994 to 1997, to .44 to .52 as the PRI lost the majority in the Chamber of Deputies in 1997 and the Presidency in 2000 (see Rios-Figueroa forthcoming). If we say that if Mexican Supreme Court judges who feel independent-to decide against the PRI, and that neutral judges decide in average half

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<sup>20</sup> It is interesting to note that the budget has been increasing in an important way, even though the Constitution does not specify a fixed percentage of GDP for the judiciary, from .56% in 2000 to .97 in 2001 and to 1% in 2002 (Fix-Fierro 2003, 285).

of the time against any particular party, the fact that the Court during those years decided against the PRI with a probability of .5 seems to support our claim that in this scenario the de jure levels of judicial independence are a good proxy for independence-to.

## **(B) Argentina: 1983-89**

### *High de jure level of judicial independence*

According to the Argentinean constitutions included in our analysis (the Constitution of 1853 with reforms until 1972 and the Constitution of 1994), the de jure measures for the two components of judicial independence have not changed for the whole period covered in our database (1949 to 2002). While the degree of autonomy has been constant at a low one, the degree of external independence has been constant at its highest level, four, for the whole period (see Graph 1). Regarding autonomy, the only variable that contributes to it in Argentina is that the power of judicial review lies within the judiciary, actually with the whole judiciary since Argentina adopted a diffuse model of judicial review where any federal judge has the power to interpret the constitution (see Navia and Rios-Figueroa 2004). The Executive and Legislative branches, via the regular law-making process, control the other three variables relevant for autonomy: number and jurisdiction of courts, the number of judges sitting in the Supreme Court, and budget for the judiciary.

On the other hand, external independence in Argentina has been constant at its highest level, four, for the whole period. Supreme Court judges are appointed for life by the President with Senate approval (2/3 vote), have their salary protected in the Constitution, and can be impeached by at least a supermajority of two thirds in the House of Deputies (to be later judged by the Senate which adjudicates also via a supermajority vote).

### *Multilateral setting*

Argentina has had a complex political history, especially in the second half of the XX Century. Since we need to identify those periods under which the constituent power was in the hands of at least two political groups we focus on the rules for amending the Argentinean Constitution. According to the Constitution of 1853 (Articles 30 and 51) only the Senate could initiate reforms to the Constitution. Then, both Houses of Congress by a 2/3 vote would call for a Constitutional Convention to evaluate the proposed changes. The Constitution of 1994 establishes the same procedure but without giving the Senate the monopoly on initiating reforms. Both

Argentinean constitutions, however, do not specify how the Constitutional Convention works. But if we take this procedure at face value, it would mean that control of two thirds of both Houses of Congress is necessary to amend the Constitution. Since the return to democracy in 1983 no single political party in Argentina has enjoyed such super majority to amend the constitution unilaterally (see Molinelli et al 1999, 277).

### *Divided Government in Argentina*

However, there have been periods of unified and divided government. The period we are analyzing now is that of President Raúl Alfonsín, during which his Unión Cívica Radical (UCR) faced a divided government. The UCR from 1983 to 1989 had 39% of Senate seats, and no more than 50% of House seats. It is noteworthy that the government had less support in the Senate than is the most important house of Congress regarding appointment of Supreme Court judges.

#### *What do we observe?*

During this period the constitutional provisions regarding autonomy were honored, although remember that the Argentinean judiciary is largely heteronomous: control over its structure, budget, and number of Supreme Court judges lies with the political branches of government. It seems that the budget has not been manipulated, or at least not drastically reduced.<sup>21</sup> It is interesting to note that Alfonsín tried to increase the number of Supreme Court judges but he couldn't largely because he faced a divided government (Bill Chavez 2004, 41).<sup>22</sup> Finally, the power granted to every Argentinean federal judge to interpret the constitution and to decide accordingly was not altered. Regarding autonomy, then, the constitutional provisions were not violated.

The constitutional rules regarding external independence also were mostly followed. Alfonsín appointed five Justices to the Supreme Court in 1983 complying with the constitutional rules and during Alfonsín's government their tenure was respected,<sup>23</sup> and there were no impeachments.

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<sup>21</sup> The percentage of GDP that goes to this branch of government increased slightly from 9 percent in 1983 to 13 percent in 1989 (Molinelli et al 1999, 663).

<sup>22</sup> As we will see below, Menem succeeded in his attempt arguably because he had a unified government.

<sup>23</sup> One judge resigned after three years. As we will see in our account of the second case, two more judges resigned as a form of protesting the Court's expansion carried out by President Menem in 1990 (who had a unified government). The rest of the judges stayed in the Court for at least fifteen years, as we would expect from the life tenure granted to them by the Constitution (see Molinelli et al 1999, 684).

However, soon after assuming office Alfonsín announced that he was planning to dismiss by decree the dictatorship's illegally appointed judges. Upon learning of Alfonsín's plan the five Justices resigned (Bill Chavez 2004, 39). This case raised the question of whether Alfonsín's government should have honored the life tenure for judges illegally appointed by the military regime, and whether Alfonsín honored the formal process of impeachment by announcing his intention to dismiss the Court (see Fiss 1993). If one takes the position that Alfonsín violated the impeachment procedure by announcing his plans, then the level of independence-from would be lower since there would be an instance of a violation of one of the eight variables. However, we believe this argument is ungrounded given the illegal appointment of the judges by the dictatorship (see Fiss 1993). In addition, we think that this particular instance respond to the conditions specific to transitions and should not be expected in multilateral/divided settings in general.

While the level of independence-from depends on the position one takes in the previous debate, our expectations regarding independence-to are fulfilled. We argued that with divided government independence-to should be at least as high as the level independence de jure, and this is what we observe in Argentina in this period. Supreme Court judges in Argentina witnessed Alfonsín's failed attempt to increase the size of the court. In addition as Bill Chavez argues divided government made the judges more willing to take decisions against Alfonsín's government (2004, 45. See also Helmke 2004; and Iaryczower et al 2002).

## **Case 2: High de jure judicial independence, multilateral setting, unified government**

### **(A) Mexico, 1988-1997**

#### *High de jure judicial independence*

During this period the level of autonomy was one until 1994 when it increased one point, and the level of external independence was constant at three (see Graph 1). Regarding autonomy, in addition to having the number of Supreme Court judges specified in the Constitution, the judicial reform in 1994 increased the level one point by granting the Supreme Court the power of constitutional adjudication and providing effective legal mechanisms to challenge the constitutionality of laws and acts of government.<sup>24</sup>

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<sup>24</sup> Good accounts of the reform, as well as alternative explanations of why the PRI delegated such power, can be found in Magaloni 2003, Inclan 2004, Finkel 2004, and Fix-Fierro 2003.

### *Unified government*

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

### *What do we observe in Mexico?*

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

Since 1988 the constitutional provisions regarding autonomy and judicial independence have been mostly honored but certainly in a degree lower than after 1997. For instance, regarding judicial appointments and tenure it is noteworthy the contrast between the administration of Miguel de la Madrid (1982-88) that appointed twenty out of the twenty-six Supreme Court judges (80%), and the administration of Carlos Salinas de Gortari (1988-94) that appointed eight of twenty-six judges (30%) (Magaloni 2003, 288).<sup>25</sup> This seems to conform to what we call “legalistic abuses”. Now, as part of the 1994 judicial reform that increased the *de jure* level of autonomy, President Ernesto Zedillo appointed all the new Supreme Court judges. This meant that the provisions regarding life tenure for sitting Supreme Court judges in 1994 were violated, although we should note that the change of all Justices was part of the bargain that permitted the constitutional amendment since it required the consent of the PAN. In addition, for the judges appointed since 1995 provisions regarding tenure, appointment, salary, and impeachment for Supreme Court Justices have not been violated.

On autonomy, the constitutional rules that give the judiciary power over the number of courts and judges as well as their jurisdictions have been honored. And the judiciary has been granted the necessary means to carry out its projects. If we look at the budget for the judiciary in these years as a percentage of the GDP we see that it has been steadily increasing from .13% in 1990 to .39% in 1995 (Fix-Fierro

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<sup>25</sup> Every president since 1934 until 1988 appointed more than 50% of Supreme Court judges during their administrations, except Miguel Alemán (1946-52) who appointed “only” 48% of the members of the Court (Magaloni 2003, 288)

2003, 285) even though there is no constitutional mandate for a minimum fixed amount.

Regarding independence-to, it is interesting to note again (see Case 1) that from 1994 to 1997 decisions against the PRI occurred with a probability of .04 that is lower than we would expect given the level of independence de jure. Although we don't have data regarding decisions before 1994, this fact is consistent with our expectation that independence-to would be equal of lower than the independence de jure.

## **(B) Argentina, 1989-1998**

The de jure measures on judicial independence are the same as in Case 1. But what is different during this period is that President Carlos Menem enjoyed a unified government during his administration. From 1989 to 1998 Menem's Partido Justicialista (PJ) had no less than 52% of seats in the Senate, a critical governmental branch regarding judicial appointments. In addition, even though the PJ had an average of 47% of seats in the House of Deputies during the same period, an alliance with the Union del Centro Democratico (UCeDe) allowed Menem to control the lower House as well (Bill Chavez 2004, 62).

### *What do we observe in Argentina?*

President Menem made use of both his majority in Congress and the legal prerogatives that allow him to exert power over judges and the judiciary by passing ordinary legislation. The number of Supreme Court judges was famously altered by Menem and his party in 1990 but since this number is not specified in the constitution we can not say that there was a constitutional violation. However, it clearly was a 'legalistic abuse'. Also regarding autonomy, although we do not have systematic information about manipulation of the number and jurisdiction of the courts, Rebecca Bill Chavez notes that "in a move similar to his SC expansion, in 1992 Menem doubled the number of first instance criminal court judges from 6 to 12 and filled them with pliant judges" (2004, 41). Again, the constitution leaves these decisions to the executive and the legislative branches, so although there is no constitutional violation it is certainly abusive to create courts and then pack them with political cronies.

Regarding external independence, the expansion of the Court allowed Menem to appoint six justices early in his term and the appointment process is also accurately described as a "legalistic abuse" since, according to Bill Chavez, "Menem embraced an opaque appointment process as a means to enhance executive



dominance over the courts. The majority of Menem's Supreme Court appointees had weak qualifications and had demonstrated loyalty to the PJ before joining the Court." (2004, 33).<sup>26</sup> An arguably clearer constitutional violation is the fact that of four of the judges appointed by Menem in 1990 resigned within 5 years suggesting that life tenure was not respected.

Regarding independence-to, Bill Chavez argues that unified government made the Supreme Court more unwilling to decide against Menem's government (2004, 46). This would be in agreement with our expectation since independence-to is lower than the level suggested by de jure independence.

### **Case 3: High de jure judicial independence and unilateral setting**

#### **(A) Mexico: 1950-1988**

##### *High de jure judicial independence in Mexico*

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

##### *Unilateral setting in Mexico*

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

##### *What do we observe?*

We have argued that given the extraordinary concentration of power, in this case we should expect the levels of independence-from and independence-to to be lower than the level of judicial independence de jure, and this is what we observe in Mexico in this period. Despite the high degree of de jure external independence,

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<sup>26</sup> Bill Chavez offers a vivid example of such procedures: "Only one day after announcing the expansion, Menem submitted his list of nominees to the PJ-controlled Senate. The two UCR representatives on the Senate Appointment Committee were absent from the hearing during which the PJ Committee members unanimously approved Menem's candidates. When the Committee's approval reached the floor, the Senate approved the list in a secret session only seven minutes long with no UCR senators in attendance. The new justices took their seat only eight days after Menem had nominated them" (2004, 34)

during this period the constitutional provisions were either violated or not complied with. This does not mean that there were constant conflicts between the branches or demonstrations against violating the law. The Mexican Judiciary and Supreme Court judges during this period were politically subordinated. This situation is better understood through the logic of a political system dominated by a single party.

Studies that focus on the relations between the executive and the legislative under the PRI regime in Mexico have shown that institutional incentives, such as no-consecutive reelection, and the pork-barrel distribution of offices by the PRI leadership, promoted discipline among members of the party while satisfying career ambitions of individual politicians (Nacif 2002; Casar 2002). Relations between the executive and the judiciary followed a similar pattern.

Dominant-party rule secured the complicity of the judicial branch in the construction and consolidation of the Mexican political system under the hegemonic rule of the PRI (Domingo 2000, 726). The Supreme Court was just another stop in a political career, since people coming from an elected office or a bureaucratic post could go to a governorship or a seat in the national Congress after serving in the Supreme Court (see Magaloni 2003, 289-290). Thus, with the judiciary as another building block within the corporatist state structure, it is unsurprising that the Mexican judiciary became immersed in a political system characterized by clientelism, state patronage, and political deference towards the regime (Domingo 2000, 727).<sup>27</sup>

Regarding external independence, even though the Constitution mandated life tenure for Supreme Court judges, every six years the incoming President used to appoint as many as 72% of the Court (Ruiz Cortinez, 1952-58) and no less than 36% (Lopez Mateos, 1958-64) but in average from 1946 to 1988 they appointed more than half the Court (Magaloni 2003, 288). As Magaloni notes, from 1934 to 1994, close to 40% of justices lasted less than 5 years coming and going according to the presidential term: "The president could thus somehow create vacancies to be filled by justices he appointed or, put in other terms; he could either dismiss justices or induce early retirements of both" (Magaloni 2003, 289).

Regarding independence-to we don't have much data but Gonzalez Casanova (1970) found that among cases involving the President of the Republic decided between 1917 and 1960, claimants won in approximately 34 percent of all disputes. In a similar analysis focusing on labor cases, Schwarz (1977) found that the courts

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<sup>27</sup> An indicator of the low importance that the judicial branch had during those years is that its budget from 1970 to 1985 averaged .09% (Fix-Fierro 2003, 285).

decided around half the time against the government. It is important to note, however, that these findings were based on a small sample of amparo cases which, in addition, reduce the political impact of judicial decisions because in these cases effects are restricted to the parties in the case. We can conclude that the decisions made by Supreme Court judges during those years did not challenge the government in an important way, suggesting that their level of independence-to was lower than de level of judicial independence de jure.

#### **Case 4: Low de jure, multilateral setting, and Divided Government**

##### **(A) Chile: 1990-2005**

###### *Low de jure judicial independence*

The Chilean Constitutions included in our analysis are the Constitution of 1925 with reforms of 1970 and the Constitution of 1980 with reforms until 2001. The degree of autonomy of the Chilean judiciary was zero until 1996 when it increased to one (see Graph 1). The number and jurisdiction of courts, the number of judges sitting in the Supreme Court, and the budget for the judiciary, were under the control of the executive and legislative organs in Chile until 1997 when only one variable changed: the number of Supreme Court judges was specified in the Constitution. The fourth variable, constitutional adjudication, does not add for the autonomy of the Chilean judiciary for two noteworthy reasons. First, for the power of constitutional adjudication to be politically effective the constitution itself should specify that the effects of decisions in constitutional cases are to be valid for all (*erga omnes*) and not only for the participants in the case (*inter partes*).<sup>28</sup> This is the case of Chile until 1970. In that year, however, the Constitutional Court was created together with legal instruments with *erga omnes* effects. The reason why this power does not add to the autonomy of the Chilean judiciary is that the Constitutional Tribunal is not part of the Judiciary (see Correa Sutil 1993).

External independence for Chilean Supreme Court judges has slightly increased during the period of analysis. Until 1996 its level was constant at one, correspondent to life tenure for Chilean Supreme Court judges established since the Constitution of 1925. In 1997 a constitutional amendment regarding the appointment of Supreme Court judges increased the level of external independence

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<sup>28</sup> In Latin America while some form of constitutional adjudication has existed in most countries since their independence, it was not until the last two decades that *erga omnes* provisions have been adopted (Clark 1975; Navia and Rios-Figueroa 2005).

to two (see Graph 1). Until then, the President used to have the power to appoint the judge out of a list of 5 proposed by the Supreme Court. But since 1997 the President nominates one Supreme Court Justice out of five proposed by the Supreme Court, and the Senate approves the nomination with a 2/3 vote. The other two variables do not add to the level of external independence of Chilean Supreme Court judges: they do not have their salary protected in the Constitution; and, it is quite easy to impeach them since no less than 10 and no more than 20 deputies can accuse one magistrate, then by simple majority the whole House determines if he is accused or not. If accused, the Senate adjudicates by simple majority.

### *Multilateral setting*

In order to amend the Chilean Constitution of 1825 it was required that an amendment proposed and passed by simple majorities at both Houses of Congress was voted again without debate after a 'cooling down' period of exactly 60 days. Then the project would be sent to the President to be signed or modified. If modified, the project went back to Congress that could approve or disapprove the changes. If Congress disapproved by a 2/3 majority then the President had the discretion to either promulgate the changes or to call a plebiscite within 30 days for ratification. The result of the plebiscite would be final (Articles 108 to 110).

The Chilean Constitution of 1980 established a similar procedure but it requires a supermajority vote of 3/5 (or 2/3 depending on the issue) in both Houses for proposing an amendment. After this vote, the 'cooling down' period and the consequent requirements of Presidential, Congressional, or popular approval are also similar albeit include more procedural details which may be of importance (Articles 116-119). The important point here is that both before and after 1980 a 2/3 control of both Houses of Congress and the Presidency was necessary for a single group to be able to amend the Constitution at will. Control of the three organs is essential since the President can at the end call for a plebiscite after 2/3 of both Houses have insisted on the amendment.

Based on the previous amending rules, Chile has been living under a multilateral setting both before and after the military interlude (1973 to 1989) when the Military Junta led by Augusto Pinochet ruled the country. It is interesting to see how the Constitution of 1980 in a unilateral setting paved the way to a multilateral setting. Little after the coup that deposed Allende's presidency in Chile, in October 25<sup>th</sup> 1973 the Ortúzar commission was formed to study constitutional reforms. In October 1978 the commission submitted a draft of the new constitution, and sent it to the Council of State. In July 8<sup>th</sup>, 1980 the council presented the new draft to Pinochet. Then, Pinochet sent it to an *ad hoc* committee which made "85 important

changes and 59 fundamental changes” (Navia 2003, 79). The Chilean Constitution as it stood in 1980 created, according with our classification, a unilateral setting in Chile.

However, the relative power of Pinochet vis-à-vis the opposition changed through time. Of particular importance were the economic crisis of 1982, the 1988 plebiscite’s results, and of course the results of 1989 elections. Such transformation in the perceptions of the relative power both of Pinochet and of the opposition crystallized, in constitutional terms, in the series constitutional reforms that the constitution has gone through. Without doubt the power bargain of *La Concertación* increased in each of these reforms, and it acquired a *de facto* veto in determining what clauses would be amended. Hence, we can conclude that the 1980 Chilean constitution suffered a process of Multilateralization through constitutional reforms, and after 1990 Chile faces a multilateral setting (see Pozas-Loyo 2005)

### *Divided government*

After sixteen years of military rule, from 1990 onwards, *La Concertación* has governed Chile until today. Mainly because of the Chilean electoral system, drafted by the military regime after losing the plebiscite in 1988, the composition of the two houses of Congress has been roughly equally divided between the coalition of parties in the left and the coalition of parties in the right (see Carey 2002, 225). In addition, the 1980 included a number of non-elected senators that, added to those from the center-right coalition, effectively eliminated the possibility that the Concertación controlled the two houses of Congress and the Presidency. Hence, we consider it a divided government.

### *What do we observe?*

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

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

As we would expect facts conform to constitutional provisions. Regarding autonomy, using their constitutional prerogatives, politicians have retired the jurisdiction from the courts when they do not want judges to resolve cases in areas that the politicians deem important. This was the case with labor disputes in the 1920s (Correa Sutil 1993, 94), and also with the creation of a Constitutional Court in 1970 that was situated outside the judiciary in order to take political cases out of the Court's ordinary jurisdiction (Clark 1975, 430). During the government of Salvador Allende special 'neighborhood tribunals' were created –courts outside the formal judicial system and staffed by Socialist Party militants with little or not legal training –to rule on issues ranging from petty crimes and neighborhood disputes to squatters' rights and land confiscation (Prillaman 2000, 139).

Other elements of autonomy such as budget also waxed and waned depending on the interests of the political class which made use of the prerogatives that the constitution granted them. From 1947 to 1962 the budget for the judiciary actually decreased in half, reaching its lowest point in the late sixties because the political class considered the judiciary more as an obstacle than as a support in their quest for social justice (Correa Sutil 1993, 96; Peña 1992, 24). In recent years, however, the budget for the judiciary has steadily increased (CEJA, Reporte de Justicia). The number of judges in the Supreme Court has also been altered. The last change was an increase from 17 to 21 judges in 1997, which gave the government the opportunity to bring new faces to the Supreme Court (see below). In sum, we observe that the politicians have acted in accordance with a constitution that establishes a very low level of judicial independence *de jure*.<sup>29</sup>

We observe the same regarding the constitutional provisions that establish the level of external independence. These provisions give much power to the executive and legislative branches over Supreme Court judges. Until recently, Supreme Court judges have been traditional lawyers who resisted challenging the government and impeachment procedures against them were seldom necessary. Since the restoration of democracy, five impeachment proceedings have been brought, one of which was successful (Popkin 2002, 118). For the first time in 125 years a High Court judge had been removed for misconduct. In 1997, a constitutional reform took place in the context of corruption scandals in the judiciary. Claiming that it wanted to address the root of the problem, the government seized the moment to

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<sup>29</sup> We then disagree with the argument according to which for Chilean judges "the lack of interest in adopting an activist stance continues a long-held preference for maintaining the very autonomy that historically has allowed the Chilean judiciary to play a crucial role in the promotion and maintenance of the legality that characterizes this country." (Couso 2003, 88-9)

propose fundamental structural changes to the Supreme Court. The bill changed the nomination procedure for SC judges and expanded its number from 17 to 21. The year 1998 brought eleven new faces to the Supreme Court, including five lawyers from outside the judicial hierarchy (Hilbink 2003, 84-5). In sum, as expected, the politicians have acted in accordance with the constitutional provisions that determine the level of *de jure* judicial independence and hence it is a good proxy to the level of independence-from.

Regarding independence-to, we expect it to be equal or higher than the level of *de jure* independence and that is what we observe. Because of the high degree of legislative fragmentation from 1970 to 1973, independence-to was arguably a lot higher than the *de jure* level: in June and July 1972 the court issued at least ninety orders against the policies of the government (Verner 1984, 483). In a similar way, after the transition to democracy we observe levels of independence-to higher than what the low level of independence *de jure* would suggest. For instance, during Aylwin's administration (1990-94), the Supreme Court ruled against the executive in 63.3% of decisions in cases specifically challenging presidential authority. During Frei's administration (1994-2000) the figure is 62.96% (Scribner 2002, 35).

#### **Case 5: Low *de jure*, multilateral setting, unified government**

In the three countries that we are studying in this paper there is no instance of Case 5. According to our database on *de jure* judicial independence, countries that have a low *de jure* level and that have lived under multilateral settings include Costa Rica, Uruguay, and the Central American republics of Guatemala and El Salvador since their transition to democracy. Further research is needed to see if these countries fall within Case 5.

#### **Case 6: Low independence *de jure*, unilateral setting**

##### **(A) Chile: 1973-1990**

##### *Low *de jure* judicial independence within a unilateral setting*

After violently taking power in 1973, Pinochet and the military junta clearly violated standing Constitutional rules in Chile, and arrogated themselves the "Supreme Command of the Nation" effectively seizing executive, legislative and constituent power. In the course of 1974, "the manner of exercise of constituent powers and the relationship between the junta and the judiciary were worked out after encounters with the Supreme Court over judicial review of decree-laws and

Court supervision of military justice” (Barros 2002, 37). By and large, as Correa Sutil notes, the Junta “did not overtly intervene in the Supreme Court when he came to power; he did not replace the justices, he did not threaten them, nor did he, to my knowledge, use corrupt methods to assure the collaboration of the Supreme Court, at least not in the early years of his dictatorship” (Correa Sutil 1993, 89). This meant, in practical terms, that the judiciary and the Supreme Court judges would roughly be guided by the existing institutional framework which was actually one very low degree of *de jure* judicial independence: zero autonomy and one for external independence (see Case 4). The difference is that this occurred within a unilateral setting characterized by a military government.

*What do we observe?*

We expect the level of independence *from* to coincide with the low level of independence *de jure* and, given the unilateral setting, the level of independence-to to be equal or lower than the *de jure* level of independence. During this period, political officials, the Junta, acted in accordance to the legal rules. Regarding autonomy, the military regime stripped jurisdiction regarding crimes to national security from ordinary courts and gave it to military courts (Rosenn 1987, 26). As we saw above (see Case 4), politicians in Chile had used their prerogatives to alter the jurisdiction of the Courts when they deemed that convenient for their political purposes. This contributed to make Chilean judges ‘a-political’ (Correa Sutil 1993; Hilbink 2003. See also Couso 2003).

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

This did not mean that Supreme Court judges were free to decide cases. Looking at what we call independence-to between 1973 and 1983, it is noteworthy that the courts rejected all but ten of fifty-four hundred petitions for habeas corpus filed by the Vicaria de la Solidaridad. In the very beginning of the dictatorship the SC managed to send a clear message: those judges who challenge the regime were going to be considered unduly ‘political’ and would be face sanctions. “This feeling was particularly strong after the SC dismissed or forced the retirement of forty judges (15 percent of the total) in 1974, either by giving them poor evaluations for 1973 or



by transferring them to geographically isolated posts” (Hilbink 2003, 76). In addition, the percentage of court’s decisions against presidential authority was 28.63% (Scribner 2004, 35). Thus, as expected the level of independence-to was equal or lower than the de jure level.

## Conclusion

Our analysis departs from the premise that law and power are theoretically and empirically interdependent. We argued that a theoretically grounded and systematic measure of de jure judicial independence helps challenging the consensus that in Latin America the law is better than the reality regarding this topic. Actually, a careful look at constitutions provides a much more nuanced and complex picture. The main advantage of a good de jure measure is that it is comparable across countries, comparable across time within the same country, and reproducible by any person that looks at the legal texts and follows our coding rules. But still, how can we know if a good de jure measure of judicial independence is a good proxy for what we can expect to happen in reality?

In this paper, we used our measure of judicial independence de jure as a standard against which we compared the expected levels of what we call *judicial independence to* i.e. the Justices’ independence to take decision against governmental abuses of rights. We have argued that under certain political conditions, mainly regarding the distribution of political power in the elected branches of government, we can expect our de jure measure to be a good guide as to what to expect regarding levels of independence-to and independence-from. In particular, we argued there is one particular scenario when our de jure measure is not a good proxy since it overestimates the de facto level of judicial independence: the combination of a high degree of judicial independence de jure with a unilateral setting (Case 3). In other scenarios, our measure ranges from being quite a good proxy for independence-to (i.e. Cases 1 and 4) to being a fair one (i.e. Case 2, Case 6) where it may underestimate it.

Even though a systematic analysis across a wider set of countries is still pending, we believe that our case studies in Mexico, Argentina, and Chile provide support for our arguments. We hope this paper encourages more research in the fascinating and transcendent analysis of the conditions that encourage the rule of law and accountability in emerging democracies.

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