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Judicial Corruption

The Constitutional Court of Ecuador in Comparative Perspective

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INTRODUCTION

Corruption is a decisive factor in preventing both the full realization of citizens' rights as well as the emergence of sustainable and vigorous economies.[1] In fact, a simple correlation analysis shows that there are no consolidated democratic regimes in which levels of corruption are worrying. Nor are there cases of economically developed countries that also present serious problems of corruption. It is therefore a public policy priority to understand the conditions that favour the emergence of corrupt practices.

One of the most interesting and understudied forms of corruption is that which unfolds inside judicial institutions. Studying judicial corruption is key not only because its presence weakens the mechanisms that serve to control political power, but also because it inhibits the protection and expansion of citizens' rights. This chapter contributes to one of the themes that guide this edited collection by illuminating the contrast between the high expectations generated by the construction of strong courts via ambitious reform efforts, and the reality of pervasive corruption within those same judicial institutions, especially where political power is concentrated. It does so by looking at the case of Ecuador, where a Constitutional Court with very broad formal powers granted by the 2008 Constitution was at one point in its history the site of corrupt exchanges between judges, lawyers and politicians. Crucially, such exchanges thrived when political power was concentrated: politicians

[1] Translated from Spanish by Ezequiel Gonzalez-Ocantos and Samuel Ritholtz.

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demanded favourable decisions on specific issues and in exchange offered protection for judges seeking to engage in corrupt dealings with high-flying private litigants. Together with Rios-Figueroa's chapter on Mexico (Chapter 8), my analysis of the Ecuadorian Constitutional Court thus shows that in the absence of other conditions, the formal empowerment of judges does not automatically yield more transparent or public-spirited justice systems.

Studying corruption in the courts opens up space for a research agenda with repercussions beyond the academy. Unfortunately, progress in this direction is rather limited in the fields of political science and economics, which focus on the formal selective incentives that impact the behaviour of key actors, and therefore tend to ignore both the mechanisms through which judicial corruption occurs and the informal institutions that facilitate it. The same can be said for the bulk of legal scholarship on the topic, which is usually restricted to a prescriptive discussion of the role of the judge and the design of legal structures that more precisely define the actors and interactions that should be considered criminal.

In light of these shortcomings, this chapter contributes to the literature in two ways. First, I propose a definition of judicial corruption that is sufficiently parsimonious but at the same time capable of capturing different facets of the phenomenon in a broad universe of cases. In so doing, I distinguish between micro-, meso- and macro-level judicial corruption, identify the different interactions, negotiations, and payments that characterize the three types, and discuss the variables that best explain the presence of judicial corruption at each level. In the case of high courts, I argue that the concentration of political power fuels judicial corruption because it facilitates the formation of protection pacts between justices and politicians. Second, I rely on unprecedented access to judicial actors in Ecuador to unearth evidence of the informal interactions that constitute judicial corruption. In particular, I take as a case study the scandalous acts of judicial corruption that occurred in the Constitutional Court in the period 2009–2019.

JUDICIAL CORRUPTION: A DEFINITION

In order to study judicial corruption, it is important to first come up with a definition that is broad enough to include the large variety of illegal exchanges while avoiding laxity and platitudes (Hilbink and Ingram, 2019; Power and Taylor, 2011; Morris and Blake, 2010). With this in mind, I propose that judicial corruption involves any act carried out by a

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judge, prosecutor or judicial official who, by action or omission, alters the impartial direction or content of a decision or ruling in exchange for money or any other type of material or symbolic benefit, delivered by a person or corporate entity with a direct or indirect interest in the judicial process. In other words, judicial corruption exists only when damage to the administration of justice through an altered decision has actually been caused, and such action or omission occurs as a consequence of the delivery of resources of any kind. Both the attempt to alter the normal course of a judicial process and the mere promise of future payments do not in and of themselves constitute judicial corruption.

Two groups of actors engage in the actions necessary for judicial corruption to occur. The first group includes those who belong to the judicial field and whose participation is essential for an act of corruption to occur. In what follows, I discuss the concept as it applies to judges and officials (clerks) of first-level courts, courts of appeal or second instance courts, and supreme courts or courts of cassation. Included in this definition are also constitutional judges and constitutional court officials, as well as those in electoral courts and courts specialized in the resolution of agrarian conflicts or the implementation of transitional justice policies, which in some countries are not strictly speaking part of the judiciary. Included also are prosecutors and their assistants even if in some countries, such as Ecuador, the Public Prosecutor's Office is not part of the Judicial Branch. Independent of the decision-making arena, for the concept of judicial corruption to be applicable to a specific case, the participation of any of these actors is required.[2] Excluded from the concept of judicial corruption are those who, because of their expertise, are called upon to collaborate with their opinion during the proceedings: specifically, experts, judicial police personnel or those who contribute to the resolution of conflicts between individuals or between individuals and the state. Although the malicious handling of a professional expert's report or a police report may be criminal and would be part of a generic concept of corruption, the fact that these actors do not have a permanent link to the judicial branch removes them from the concept. Including these types of acts within the definition of judicial corruption could lead to conceptual stretching (see Gloppen, 2014).

The second group of actors involved in judicial corruption includes all those persons, natural or legal, who in interaction with any of the

[2] With regard to the differences between judicial and prosecutorial corruption, see Idowu and Ibidapo (2014); Ugochukwu (2011); Badel (2008).

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aforementioned officials contribute to the exchange. This category includes lawyers, users of the judicial system and, in certain contexts, public officials as well as people who serve as intermediaries or who lobby between interested parties and judicial personnel. The range of actors in this category is therefore much broader and harder to specify. In short, while one of the subjects who interact to give rise to acts of judicial corruption must be part of the structure of the courts, the other can be any person whose intention it is to steer a judicial decision in one direction or another, in line with their interests.

What kinds of transactions between these two groups of actors constitute judicial corruption? I argue that for an act to be considered an instance of judicial corruption, it must consist of two phases. The first phase involves the delivery of money or any kind of benefit – material or symbolic – to the judge, prosecutor or clerk by a person interested in the outcome of a case.[3] In this sense, it is worth noting that the nepotistic networks described in Rios-Figueroa's chapter on Mexico (Chapter 8) are not necessarily instances of judicial corruption, because while highly deleterious for the correct functioning of the system, offers of employment in the judicial branch are not necessarily made conditional on future behaviour. The second phase of the transaction is related to the action or omission on the part of the judge, prosecutor or administrative official, through which the alteration of the judicial decision is materialized, in either its direction or content. Given the diversity of actors, interactions and types of payment covered by the concept of judicial corruption, the judicial decisions I refer to are not only those that end a legal process. They can also be resolutions on relevant aspects of a dispute, such as interlocutory appeals or other procedural resolutions that could have an impact on the course of the judicial process.

This characterization of the transactions that constitute judicial corruption has four important implications. The first is that if there is no delivery of money or goods (material or symbolic), an act does not constitute judicial corruption. For instance, when the judicial decision is altered under pressure from political or other actors, one can speak of a reduction in external judicial independence, but not of an act of judicial corruption. Similarly, the mere expectation of a future payment is not enough for an act to be considered part of the concept of judicial corruption. The second implication relates to the need for the judge, prosecutor

[3] For Gloppen (2014) "delivery" includes any form of inappropriate influence.

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or clerk to actually change the direction or content of the judicial decision as a result of the delivery of money or other material or symbolic payments. If the judicial official does not comply, the attempt or act could be considered criminal but not a case of judicial corruption. A third implication relates to the actors involved – specifically those that offer money or other benefits in exchange for a modified court decision. Although this category of actors is broad, it does not include judges, prosecutors or court officials. If the exchange is between people who belong to the bureaucratic structure of the judiciary, it therefore does not fall within the concept of judicial corruption. In most cases where both parties are judicial officials, the exchange takes the form not of monetary benefits but of favours. Such behaviour is related to what is known in the literature as diminished internal judicial independence (Kapiszewski and Taylor, 2008). Finally, the concept does not specify which actor must initiate the exchange. Depending on whether it is the judge/prosecutor/judicial official who proposes the exchange or whether the initiative comes from the service user or some other intermediary, the criminal definition of the act may vary (Ayres, 1997). But while this may be a relevant distinction for criminal law purposes, it is irrelevant when it comes to constructing a concept of judicial corruption that is both parsimonious and empirically useful.

TYPES OF JUDICIAL CORRUPTION

Although the concept of judicial corruption applies to any decision-making space that involves the allocation of material or other resources in exchange for favourable judicial decisions, the modes through which this phenomenon occurs vary depending on the location of the court within the pyramid of the judicial branch. One way to differentiate the ways in which judicial corruption operates is therefore through a classification system based on the judicial hierarchy. We can distinguish between micro-level judicial corruption, which occurs within courts of first instance; meso-level judicial corruption, which corresponds to intermediate or appellate courts; and macro-level judicial corruption, which takes place in high courts, including supreme and constitutional courts or courts of cassation. The differences between the three types of judicial corruption include: (i) the type of actors involved in the interaction between the operators of justice and interested parties, (ii) the complexity of the negotiation, and (iii) the level of payments required to obtain a favourable decision.

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In the case of micro-level judicial corruption, the interaction between the parties is direct (i.e., no mediators are usually required) and occurs on a daily basis. Unlike macro-level corruption, in these spaces corruption primarily involves clerks and other support staff, who are usually the ones in charge of altering the direction or content of judicial decisions. Moreover, the negotiation process between the parties tends to be less complex. In general, minor "favours" are requested during the judicial process and for this there are established fees (Mujica, 2011). Since decisions originating in this type of court are susceptible – in the vast majority of cases – to appeal, the possibility of reversing the decision in the next judicial instance reduces the costs incurred by those demanding fraudulent action from the judge, prosecutor or clerk. In other words, there are few guarantees that the investment will "pay off," so prices are lower.

Meso-level judicial corruption occurs in intermediate or appellate courts. In this type of judicial corruption there is greater intermediation between the judge, prosecutor or judicial officials and the interested party. Lawyers play a more relevant role as brokers between their clients and those in charge of altering the direction or content of the judicial decision. In addition, the terms of the negotiation tend to be more complex since in many cases this is the instance in which the final decision is made. This is both a function of the structure of the appeals process, which often limits the kind of decisions that can be litigated further, and also of the costs of pursuing a case beyond this instance. As a consequence of these dynamics, the monetary or symbolic value of the payments required tends to be higher.

Finally, macro-level judicial corruption occurs in higher courts, both those that act as courts of third instance and those that limit their action to resolving extraordinary appeals in cassation. By extension, this category also includes constitutional courts that are autonomous from the structure of the judicial branch and those courts of last instance for specific issues, such as the Bolivian Agri-Environmental Court. Because of the political nature of these courts, which arise from the type of mechanisms used for selecting and appointing judges, the interaction between the parties involved in judicial corruption is usually more sophisticated. The individual efforts of lawyers to gain access to judges or prosecutors are usually not enough; interested parties require more powerful connections, including links to political and economic actors. Sometimes, the links between those who alter the judicial decision and the final beneficiary are large and influential law firms, which combine legal expertise with

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proximity to the networks of political power and sociability in which judges and prosecutors are directly or indirectly involved. The terms of the negotiation are also more complex than in the other two types of judicial corruption, simply because of the material and jurisprudential implications, both direct and indirect, of altering the course of the judicial process. Moreover, since these are decision-making arenas where the dispute usually ends, the value of the payment required to alter the decision are much higher. As a result, only a very limited pool of interested parties can afford to engage in macro-level judicial corruption.

Having identified the different types of judicial corruption, in the next section I discuss the variables that scholars often cite to explain why the phenomenon is more or less pervasive at different levels of the judiciary. I complement this literature with a discussion of the role of power concentration in fuelling macro-level judicial corruption. I argue that when power is concentrated, judges can rely on politicians for protection, which in turn makes it safer and easier to engage in judicial corruption.

JUDICIAL CORRUPTION AND ITS CAUSES

So far, I have shown that the type of interactions, complexity of the negotiation processes and magnitude of the payments made to encourage judicial corruption vary depending on the location of the courts within the judicial branch. In this section, I argue that the variables which explain the pervasiveness of judicial corruption also depend on the type of court. Although judicial corruption is obviously a multi-causal phenomenon, some variables are likely to play a more important role at different levels of the judicial system. For analytical purposes, I present a taxonomy of possible explanations for judicial corruption, including those that emphasize economic, institutional, social and political factors.

Economic variables feature prominently in accounts of judicial corruption. This body of literature finds that judges with low salaries have a higher probability of being involved in corruption scandals (Badel, 2008; Barrett, 2005; Buscaglia and Dakolias, 1999; Rose-Ackerman, 2006; Wang, 2013). Along similar lines, research finds that the level of openness of the economy as well as GDP per capita also affect the degree of corruption that takes place inside the courts (Rose-Ackerman, 2006). However, there are also empirical findings that challenge this view and show the absence of a causal relationship between salaries and judicial corruption (Yang and Ehrichs, 2007). Similarly, Voigt (2007) reports that

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in the case of Singapore, an increase in salaries led to an increase in cases of judicial corruption.[4]

From an institutional perspective, one of the main explanations for judicial corruption has to do with the transaction costs – essentially time – generated by the number and complexity of the legal procedures required to obtain a (favourable) judicial decision (Buscaglia, 1997; North, 1993; Pepys, 2007; Rose-Ackerman, 2006; Voigt, 2007). In the face of a complex and cumbersome institutional design, there are greater incentives to seek prompt and efficient solutions through illegitimate payments or other forms of judicial corruption. An implication of this research is that the implementation of a more expeditious procedure should curb judicial corruption. This is precisely what scholars argue happened in Chile after a reform that streamlined the country's criminal procedure (Carbonell, 2008, 2007; Harasic, 2007). Other relevant institutional variables are the presence/absence of judicial organs of control, as well as overlap of jurisdictional and administrative prerogatives in the same organization, usually the Supreme Court (Buscaglia, 1997; Gloppen, 2014; Salazar and Ramos, 2007). Finally, the absence of selective incentives for honest judges, the presence of single-member courts or the permissiveness of judges and prosecutors regarding activities outside the administration of justice such as teaching are other possible institutional explanations for higher levels of judicial corruption (Pepys, 2007; Rose-Ackerman, 2007; Salazar and Ramos, 2007). However, the literature that emphasizes the importance of institutional design is yet to produce robust empirical evidence in support of the various hypotheses, or carefully theorize the causal mechanisms leading to corruption.

As for more sociological factors, a common argument in the literature is that the context in which judges, prosecutors or judicial officials work affects their propensity to engage in acts of judicial corruption. In this sense, scholars have indicated that citizen tolerance for this type of behaviour, also known as a culture of illegality, allows judicial corruption to thrive (Badel, 2008; Gloppen, 2014; Pepys, 2007). Furthermore, the presence of armed groups or other organized illegal actors favours the systematic presence of judicial corruption (Buscaglia and Dakolias, 1999). In both cases, however, it is difficult to establish whether there is indeed a causal link or whether it is in fact a circular relationship.

[4] Additionally, Voigt's (2007) work shows that the interaction of per capita GDP and the country's market openness explains only 46 per cent of judicial corruption in the sixty-three countries he studied.

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Finally, among the variables of a political nature, the extent to which political power is concentrated or fragmented is a key factor favouring or discouraging judicial corruption. As the concentration of political power increases, the probability of judicial corruption increases. By contrast, a greater distribution of political power benefits good governance, promotes balance and internal checks in the courts, and thus reduces the occurrence of judicial corruption (Begovic et al., 2004; Montinola and Jackman, 2002; Ríos-Figueroa, 2012). Indeed, research on Latin America suggests that judicial corruption tends to be higher under dictatorship than under democracy (Basabe-Serrano, 2015a; Hammergren, 2007; Melgar Peña, 2007).[5]

As stated at the beginning of this section, the importance of different sets of explanatory factors likely varies across the judicial hierarchy. Following the same logic used to differentiate the mechanisms through which judicial corruption operates, I propose that the factors that affect judicial corruption are also micro-, meso- and macro-level in nature.

Due to the nature of recruitment in courts of first and second instance, these judicial bodies tend to be infused with a strong bureaucratic mindset, much like public employees in the executive branch. The variables that likely best explain judicial corruption are therefore those related to the incentives generated by often rigid and formalistic bureaucratic structures (Baum, 1997). For example, a fixed and uncompetitive salary could be one of the reasons why these officials engage in judicial corruption. At the institutional level, the weak sanctioning capacity of the administrative bodies designed to control the proper functioning of the judiciary, or the excessive burden of the highly formalistic procedures that must be followed prior to reaching a decision, could also be variables that favour the presence of judicial corruption in these courts (Basabe-Serrano, 2013).

In the case of supreme/constitutional courts and high-level prosecutors, the dynamics, interactions and actors involved in the recruitment process are usually political in nature. The variables that best explain judicial corruption are therefore also most likely related to political factors. In fact, while salaries or the complexity of existing procedures could determine the occurrence of judicial corruption at this level, they are not as decisive as in the case of lower courts. Supreme or constitutional judges are often among the best paid in the public administration, and have

[5] However, in an analysis of sixty-three countries, Voigt (2007) does not find a statistically significant relationship between judicial corruption and the fragmentation of political power, measured by the number of players with institutional veto power.

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access to a broad range of perks and benefits which should in principle discourage corruption. With this in mind, I contend that judicial corruption in the highest courts is primarily related to the degree to which political power among the actors who participate in selecting and appointing judges and prosecutors is concentrated or fragmented. As the concentration of political power increases, the likelihood of judicial corruption in the highest courts of justice increases. Although acts of judicial corruption exist under conditions of power concentration and fragmentation, in cases of greater political power concentration the phenomenon is more likely to become endemic.

The link I propose between the concentration of political power and judicial corruption in high courts is as follows. Once a political actor has succeeded in accumulating a good deal of power, one of their first objectives is usually to try to control or influence supreme and/or constitutional courts. Their privileged position makes it easier for them not only to co-opt the arenas and actors that participate in the selection and appointment of judges and prosecutors but also to appoint judicial officials who are personally or ideologically close to their preferences. As a result, a relationship is established in which, out of fear, gratitude or political loyalty, judges and prosecutors respond favourably to requests by political actors in cases where their interests are at stake. Note that, given this level of acquiescence, there is usually no need for the political actor to provide additional economic incentives. This implies that while such dynamics trump judicial independence, they do not necessarily fall within my definition of judicial corruption. But the fact that judges adapt to the preferences of politicians buys them the ability to engage in judicial corruption vis-à-vis other actors without fear of punishment. This is because politicians compensate judicial docility by affording judges ample freedom to rule as they see fit in cases in which the political patron does not have specific interests. It is in these cases that judges practise judicial corruption, especially when disputes involve rich plaintiffs who can afford to pay handsome bribes. In short, I propose that the concentration of political power not only affects judicial independence, as others have noted in the literature on judicial politics, but also fosters an environment of impunity via the creation of tacit protection pacts in which judges and prosecutors are given carte blanche for the perpetration of corrupt acts.

Put differently, I argue that it is not the diminished independence of supreme and/or constitutional judges per se that facilitates acts of judicial corruption but rather the impunity that results from the concentration of political power. In analytical terms, what I propose is that, in scenarios of

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greater concentration of political power, supreme/constitutional judges are appointed by those who hold political power. In exchange for these positions, judges resolve cases in ways that favour those in power. Finally, and most importantly, this submissive attitude is rewarded by allowing, tolerating and overlooking acts of judicial corruption that occur in cases in which politicians do not have a direct interest. And, of course, by protecting the judges or prosecutors should the press or the opposition cry foul.

In Latin America there are several examples that illustrate the connection between the concentration of political power and judicial corruption. Some of the most striking include the Supreme Court of Paraguay after the return of democratic rule, as well as courts in Bolivia under Morales and Venezuela under Chavez and Maduro (Basabe-Serrano, 2015a; Gloppen, 2014; Sánchez-Uribarri, 2011). In the remainder of this chapter, I present yet another example in which the concentration of political power allowed macro-level judicial corruption to thrive: the case of the Constitutional Court of Ecuador under President Rafael Correa.

ECUADOR'S CONSTITUTIONAL COURT: AN EMBLEMATIC CASE OF JUDICIAL CORRUPTION

The Constitutional Court of Ecuador (CCE) is a good case study to illustrate my argument about the protection pacts that emerge when political power is concentrated, and their impact on macro-level judicial corruption. I rely on twenty in-depth interviews I conducted between February and July 2019 with constitutional lawyers and former officials of the CCE. I have at my disposal more than thirty hours of testimonies of people who were privy to the most egregious acts of judicial corruption that occurred during the administration of President Correa. Because of the nature of judicial corruption, interview data of this kind is extremely hard to collect. At the same time, it is usually only with this data that researchers can trace the processes that give rise to, and the transactions that characterize, judicial corruption. In fact, few studies of judicial corruption are based on such direct and reliable empirical evidence as that presented here. In order to elicit candid accounts of judicial corruption, I reassured my informants that their testimonies would remain strictly anonymous. In addition to the interviews, I also use information collected from the CCE's own archives, media reports and other relevant public documents related to the assets and professional and academic backgrounds of the judges of the CCE.

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I concentrate on the period between 2008, when the CCE was created, and the dismissal of its penultimate cohort in August 2018. The CCE, which enjoys administrative and financial autonomy and is not part of the judiciary, consists of nine judges, elected for nine years and with partial renewals of three judges every three years. Nominations are made by the executive branch, the legislative branch and transparency and social control institutions.[6] Appointments, in turn, are the prerogative of a commission composed of two representatives from each of the aforementioned branches of government. In short, despite the fact that the constitution mandates a competitive public recruitment process with civil society oversight, those who nominate candidates are also those who choose the constitutional judges.

During the period analysed here, nineteen tenured judges distributed in three cohorts passed through the CCE. The first cohort was made up of judges who had been appointed to the Constitutional Court established under the 1998 Constitution, and who called themselves the "CCE for the transitional period" once the 2008 Constitution came into force. On 6 November 2012, the second cohort took office with six new judges and three who remained from the transitional court (Ruth Seni, Manuel Viteri and Patricio Pazmiño). In 2015 the first partial renewal took place (María del Carmen Maldonado, Antonio Gagliardo and Marcelo Jaramillo left the court), resulting in a third cohort.

In terms of accountability mechanisms, the 2008 Constitution included a number of provisions that make any kind of political and even judicial control over the CCE virtually impossible. Indeed, members of the CCE cannot be subject to impeachment or removal proceedings by the appointing authority. Criminal actions against CCE judges must be brought before the plenary of the National Court, and a vote of two-thirds of its twenty-one judges is required to declare CEE judges criminally liable. It is worth noting that this super-majority is required only in the case of CCE judges. By contrast, other public officials, such as the president or national legislators, are tried by a specialized criminal chamber of the National Court composed of only three judges. In other words, while the criminal responsibility of the executive or the legislature can be declared

[6] The 2008 Constitution created the Función de Transparencia y Control Social as a separate branch of government. It consists of the Council of Citizen Participation and Social Control, the Comptroller's Office, the Ombudsman's Office and the superintendencies for banks, companies, popular and solidarity economy, telecommunications, market power control, territorial ordering and the use and management of the land. Until recently, there was also a superintendency for information and communication.

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with two votes (in the case of a split decision), for members of the CCE a minimum of fourteen votes is required. Both the impossibility of political prosecution and the need for a super-majority vote in the national court to declare the criminal responsibility of a member of the CCE were ratified through an interpretative resolution of Article 431 of the constitution in 2011.[7] Additionally, in the same resolution the CCE established that its members cannot be subject to pre-trial or trial actions in criminal matters due to the content of their opinions, resolutions or rulings. Finally, Ecuador's constitutional design establishes that in order for the removal of judges from the CCE to proceed (in the cases and circumstances established by law), a vote of two-thirds of its members is also required. In other words, in order for a CCE judge to be removed from the court, a vote of six members from that very organization is required.

If the absence of control mechanisms is one of the key institutional features of the CCE, another is its broad powers to prosecute and defend citizen rights and to limit and control political actors. In fact, along with its Colombian counterpart, the CCE is considered one of the most powerful in the region (Sotomayor, 2019; Brinks and Blass, 2018). The CCE not only has the capacity for *erga omnes* judicial review, but also the power to control states of emergency, sanction non-compliance of decisions, declare administrative acts unconstitutional and overturn decisions of courts of last resort for violations of constitutional rights, among others. In addition, the CCE may issue binding judgments with respect to writs of *habeas corpus* and *habeas data*.[8]

The broad powers of the CCE make it an attractive space for manipulation and control by political actors. In certain scenarios, when political power is distributed among several actors, one way this is done is through the famous "quota" system. Negotiations between political actors lead to a sort of tacit balance within the courts that favours mutual checks and balances between judges not only in terms of the direction of rulings but also in terms of corruption. By contrast, when a single actor enjoys sufficient political power to capture the CCE, the political dependence of judges increases, as do the spaces for corruption during judges' interactions with other users of the service.

[7] Constitutional Court Resolution No. 3, published in Official Registry No. 372 of 27 January 2011

[8] Article 436 of the Constitution of Ecuador describes the powers of the Constitutional Court.

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In the case of Ecuador, the arrival of Rafael Correa to power in 2007 brought with it a new constitution in 2008 that dramatically increased the powers of the presidency. Additionally, in the 2009 presidential elections Correa won in the first round and his political party, Alianza País, obtained 47.58 per cent of the seats in the legislature. In the 2013 elections, Correa won again without the need for a run-off, and the size of his electoral base grew to 72.99 per cent. Such circumstances added to the popular support for the head of state, which fluctuated between 50 and 60 per cent, and an unprecedented economic bonanza anchored in high international oil prices laid the foundations for what could be called a case of imperial presidentialism (Basabe-Serrano, 2017).

In addition, the accumulation of political power in the hands of a single political actor inexorably led to the appointment of docile loyalists to the CCE. These were usually justices with no academic or professional training of note, and who, in the vast majority of cases, had previously held positions in the executive branch. A review of the judges' résumés reveals that prior to their arrival in the CCE, none of them had been lawyers with experience in constitutional matters, professors in areas related to that subject or part of the judicial branch. Although, in the previous Constitutional Court, judges with high professional and academic profiles were not in the majority, a group of them did meet minimum requirements that allowed them to guarantee high-quality decisions and high levels of independence.

The lack of professional or academic credentials not only made these judges grateful for having accessed positions of authority they would never have reached following a meticulous selection process, but also triggered absolute submission to the wishes of the executive in politically salient cases. In this respect, the legal secretary of the president, Alexis Mera, used to dictate the weekly schedule of decisions of the CCE, thus making sure the docket was aligned with the president's priorities or with the directives that every Saturday emerged from the so-called citizen contacts that President Correa organized around the country. As one of the interviewees points out:

> I can attest that Alexis Mera used to visit the Constitutional Court every week. He had a specific hour and a specific day. In fact, if you went at that time, that day, you would find Alexis Mera entering the office of Patricio Pazmiño, the president of the CCE. He had his list of cases. He would say "this case [should be decided] like this, this case like that". [Alexis Mera] didn't sign anything when he entered the building, unlike me and others who had to sign in. If you ask for the ledger, you're going to find everyone's signature but not his. He would go up with his security guards.

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One former official also mentioned the direct interference of the national government in the decisions of the CCE:

> Alexis Mera used to go to the CCE. At least in the beginning he went practically every week. He would come in and say: "This case, this case, I want it like this." He would go straight to the president of the CCE and then to the office of the five judges who made up the majority. He would come in and say: "You have to solve such cases in this way." They said they were cases that came directly from the orders of Rafael Correa.

The cases in the hands of the CCE that were relevant for the government were thus decided by President Correa and communicated to the judges by Alexis Mera. In this type of exchange, there was no provision of resources by the executive. Instead, a decision in favour of the government was expected as a sign of subordination or gratitude to the person who had facilitated access to the court. One can therefore speak of interference in the independence of judges to decide free from pressure but not of judicial corruption. However, the submission of the CCE in cases in which the executive had an interest implicitly carried with it the guarantee of impunity when the judges decided to exchange favourable rulings for economic resources in other cases. As a result, in a context where the institutional design practically eliminated all forms of judicial and political control over the judges, and where the president's political power was almost absolute, judicial corruption was rampant.

Of the various prerogatives of the CCE, the one used frequently for the perpetration of acts of judicial corruption was the so-called extraordinary protection action (EPA). Through this prerogative, the CCE can annul or modify a ruling or final order in which the rights enshrined in the constitution have been violated by action or omission. The rules stipulating the conditions under which EPAs may be invoked are vague, minimally mandating that all prior ordinary and extraordinary remedies must be exhausted. While there are some additional criteria in the law, in general terms, accessing the CCE through an EPA is relatively straightforward. Since even cassation judgments issued by the chambers of the National Court can be overturned through an EPA, trial lawyers often refer to this writ as a "fourth instance". In fact, of the total number of writs presented to the CCE during the period under analysis, 75 per cent were EPAs.

In institutional terms, once an EPA is proposed, the first filter is the CCE's admissions chamber. There, three judges decide on the legal feasibility of the proposed action. If the application is accepted, the case is randomly assigned to one of the nine judges, who will be responsible for

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preparing a draft ruling that will finally be heard by the plenary of the CCE for a final decision. If, by contrast, the admissions chamber rejects the EPA, the possibility of appearing before the CCE ends. Consequently, the decision of the admissions chamber is key, and therein lies the first space for judicial corruption. In fact, it was in the admissions chamber that the first exchange of money would take place for a ruling that accepted or denied the EPA. On this subject, one of the informants explains:

> The famous admissions chamber became a kind of marketplace where everyone first negotiated whether to admit or not to admit cases, according to convenience. For example, if you have a tax issue and the amount you have to pay to the Internal Revenue Service is, say, $5 million, then in order to get that case admitted they would first make sure that you paid for the whole process; that is, up to the judgment. But the real proof of love was the admission. If you are saving $5 million in taxes then you have to pay $1 million or 20 per cent. So, to admit the case you had to give $200,000 first. By depositing that amount you were guaranteeing admission and also special treatment in the rest of the process. What was the special treatment? The special treatment was that the ruling could be drafted jointly with your lawyers.

Because of the hierarchy of the CCE, the negotiations were not carried out directly with the judges but through diverse and sophisticated channels of intermediation and negotiation. These channels included the judges' own advisors as well as legal firms created by former CCE officials. In general, the intermediaries took the initiative to contact litigants by telephone in order to offer their services both to obtain admission and for the subsequent stages until the final decision was reached. In this regard, another interviewee made the following point:

> The interaction or overlap [between litigants and CCE officials] is so important that some appointments were made from the inside out and then from the outside in. If one year you worked as a clerk in the court, the next year you were a legal assistant in a law firm. The revolving door was always like this [...] Then the judge's advisor could tell you to go to this law firm [...] "we are on good terms with that law firm" [...] Then you had to leave your lawyer and you had to change law firms [...] Judge XXXX, played a very important role because he had his own law firm, although all the charges were made in the name of his son.

When the interests at stake were more numerous, large law firms, especially in Quito and Guayaquil, were in charge of leading the negotiation between the judges of the CCE and the users of the service. In general, these firms not only had among their staff prestigious professionals, with expertise in constitutional matters, but also possessed privileged

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information about movements within the CCE. And officials of the CCE were at their service. A former official of the CCE explained:

> Large law firms have the following mechanism. They pay a person from the general secretariat every month to inform them about the process. They don't even to talk with the judge. That person has an extra salary because it is one thing to be the secretary general and have your salary and another thing to have another salary in addition to that. I knew of the case of a company that wanted to hire me to help them get information. They told me that a person from the general secretariat was charging them $3,000 a month and that was too much. They were willing to pay me $1,000 a month because they knew I had connections in there [at the CCE] and could get the same information at a lower cost. How about that?

While one way to obtain a decision from the CCE was to agree on the economic conditions for the whole process to be favourable, another option was to establish partial agreements: an amount to obtain admission; another to obtain a favourable draft sentence; and a third payment for the final decision by the plenary of the CCE. In this case, the total values could be higher since the intermediaries to the admission chamber were not necessarily those representing the presiding judge. This form of negotiation implied an additional agreement with the general secretariat, since that body, together with the presidency of the CCE, controlled which cases reached the agenda of the plenary. On the gatekeeping role of the general secretariat and the presidency of the CCE, one of the interviewees stated:

> The second filter was whether [the case] got to the court's daily schedule. This was totally controlled by the presidency as the rules of procedure indicated that the schedule of cases had to be drawn up by the president of the court, in theory, in chronological order. But the president of the court used to say: "This is a political case, we are not going to touch it. This is a private case, let's deal with it." How the schedule of cases was decided is a mystery because it was done by the president with the secretary who came with his checklist. The list included information on whether or not the disbursements had actually been made for each case.

Corruption in the CCE gradually became common practice.[9] Among seasoned lawyers it was common knowledge that corruption was especially rampant when it came to EPAs. For example, they knew that if money was not delivered, not only was a favourable decision unlikely, but the case could be shelved, either waiting for it to be placed on the agenda of the CC or for a ruling from the admissions chamber on whether or not

[9] Some interviewees pointed out that there were two or three judges of the "transitional court" who were not part of these acts of corruption. None of them was reappointed.

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the action was admissible. The naturalization of corruption in the CCE reached such a point that if "help" was not accepted when a court intermediary communicated by telephone with a lawyer or client, the response was to automatically shelve the case. A lawyer explains:

> This is *vox populi*, everyone knows that to get a case admitted you used to have to pay. It only happened to me once. I had a very important case. Actually, I still have the case because since I didn't comply, it was never processed. I received a call from a person who identified himself with a name and surname that I did not know and who said he was extremely close to the president of the court. He told me: "I was in the judge's office on this case and I think you are right. I would like to be able to help you get it processed." So I asked him what the conditions were. He told me: "We would have to meet at the Marriot Hotel, I would tell you the room where we would meet. You'd have to go to your clients and obviously we'd discuss the terms there." So I said: "I don't do this kind of thing, but what I do in these cases is to communicate the offer to the clients so that if they wish they can get in touch with you." I talked to the clients, they refused, and I told the intermediary. He told me: "What a shame, then your case will not be processed." In fact, it's a case that hasn't been assigned to a judge in four or five years.

The large sums of money received by the judges of the CCE as a result of corruption not only bought them a standard of living inconsistent with their salaries, but also led to types of completely shameless behaviour, even in front of other CEE officials. Levels of impunity were such that it had an impact on every aspect of the life of the court. This impunity in turn guaranteed that they would be submissive to the government, which held almost absolute political power. One interviewee, who still has links to the CCE, explained:

> They were paid in cash. And you would see Judge XXXX with wads of cash, but I'm not talking about the judge having a hundred dollars in his pocket. No: you'd see him pulling a lot of bills out of the breast pocket of the suit. In every pocket he had wads of bills.

Another former CCE official recounted the following event:

> One day I was talking to the judge I was working with and the view from his office was towards El Arbolito Park. Suddenly, I tell the judge, "Look at that man." He was one of the secretaries of the court. This was about eleven o'clock in the morning. Together with him were two girls who worked here and they were carrying some bags. Then we see him reach into one of the bags and pull out a wad of bills. All the bags were full of bills and with those bills they went into the CCE.

Among the many cases of judicial corruption in the CCE that were subsequently revealed, one of the most emblematic involved a suit against the Cervecería Nacional (National Brewery) by a group of employees who

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claimed not to have received payment of their share of the profits for sixteen years. After several years of litigation, and while the case was being heard in the ordinary justice system in the city of Guayaquil, the CCE assumed jurisdiction over the legal process. This prerogative is similar to the *per saltum* in Argentina, and had never been used before in Ecuador. Given that more than $90 million in compensation for workers was at stake, observers became suspicious about this move. Later on, the plenary ruled to deny workers their right to compensation. But before the parties to the proceedings were notified of the ruling, Congressman Galo Lara claimed that one of the lawyers of the National Brewery had received $1 million.[10] What raised suspicions was that the lawyer had acquired his professional title only a few months before this happened. It was strange that a company of that size would not hire a more experienced professional.[11] Furthermore, the lawyer had been an advisor to the president of the CCE, Patricio Pazmiño, and was the brother of the secretary general of the court. Rumours therefore began to spread in various media outlets that the million dollars was intended as payment for a ruling in favour of the company.

The scandal that ensued was so great that immediately after the complaint was circulated, the plenary of the CEE decided to leave the ruling "without effect".[12] The implausible argument offered by the court was that, since the decision had not been formally notified to the plaintiffs, it had no legal value. Also in an effort to address the public outcry, the vice-president of the CCE immediately requested an investigation from the attorney general, while constitutional judge Alfonso Luz Yúnes publicly declared that he "requested that the plenary of the CCE proceed with the dismissal of the secretary of the court, Arturo Larrea Jijón", who was implicated in the scandal.[13] In spite of the societal pressure to investigate those involved, the attorney general, who had previously been a minister and the personal lawyer of President Correa, decided after a few months to close the investigation into the president of the CCE, citing lack of evidence.[14] Although the secretary general of the CCE did leave his post, the legal mechanism used was removal, which, unlike dismissal, allows

[10] "Cheque de Cervecería causa acusación a la Corte", *El Universo*, 5 February 2011.
[11] " Los Larrea tuvieron nexos con A. País", *El Comercio*, 20 February 2011.
[12] "La Corte deja sin efecto fallo de la Cervecería", *El Comercio*, 12 February 2011.
[13] "Caso de Cervecería regresó a los juzgados", *La Hora*, 12 February 2011 and " Corte Constitucional remueve a su secretario y asoma otro escándalo", *La Hora*, 4 March 2011.
[14] "Él no se mete con los alfiles del Presidente", *El Comercio*, 25 February 2012.

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him to hold public office in the future.[15] The protection pact was on full display. The events following the scandal made it clear that the CCE relied on its political patrons for impunity.[16]

One of the first decisions of President Moreno, who succeeded Correa in May 2017 and quickly broke ranks with his predecessor, was to launch an ambitious institutional reform agenda.[17] This put an end to the protection pact. Moreno called a popular consultation, which initiated a process to review various bodies, among them the CCE. Specifically, a Transitional Citizen Participation Council proposed a thorough review of both the professional skills of CCE judges and their assets. In this context, corruption scandals were such a particular focus of attention that the Comptroller General's Office indicated there was mounting evidence against several CCE judges. One of my sources described the turmoil inside the court caused by the investigation:

> When the Transitional Participation Council came in at the end of 2018 to review the assets of the judges, they [members of the court] got scared and started bringing money to the office and ask for it to be deposited $5,000 at a time in different accounts. One of the court drivers told us this because it fell to him every day to go to the bank to make a deposit. He told us that the bills were as if they had just left the bank, and still had the wrapping with the delivery date. They were bills from 2013, 2015, 2016.

Once the members of Correa's CCE were dismissed, a merit-based competition was launched, led by a commission of experts. As a result of this recruitment process, on 5 February 2019 the National Assembly appointed nine new constitutional judges. The CCE now includes prestigious university professors and some practising lawyers. The new president, Hernán Salgado Pesántes, former president of the Inter-American Court of Human Rights and one of the most renowned jurists in the

[15] "Él no se mete con los alfiles del Presidente", *El Comercio*, 25 February 2012.

[16] The Cervecería Nacional case subsequently returned to the court of origin. A few months later, on 4 March 2011, the Provincial Court of Guayaquil ratified the decision of the first instance court, which sided with the workers. Cervecería Nacional reacted by requesting an EPA on 5 April of the same year. Unfortunately for the company, the case was delayed and could not be decided before the infamous "brewery court" was dismissed in August 2018 (see later). In fact, it was not until 2019 that a new CCE heard the case and issued a ruling favourable to the interests of the workers.

[17] A few months after his inauguration, President Moreno distanced himself from his predecessor. For example, Moreno turned against Vice-President Jorge Glas when the latter was criminally prosecuted and subsequently sentenced to six years in prison. Jorge Glas had previously served as vice-president under Correa and was a key player in preventing corruption scandals from escalating or leading to sanctions.

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country, has initiated a restructuring plan that so far has managed to speed up the proceedings and restore public confidence in the CCE.

In sum, the case of Ecuador's CCE shows that in contexts where political power is concentrated, not only does judicial independence suffer, but also the spaces for judicial corruption tend to increase. The interview data presented here shows that as long as the government was satisfied with the resolution of politically salient cases, politicians were ready to provide protection for judges willing to pursue corruption in other cases involving wealthy private actors. Judicial corruption in the highest instance of constitutional justice in the country thus reached historic levels, with most decisions requiring the prior exchange of bribes.

CONCLUSION

This chapter proposed a definition of judicial corruption that is both parsimonious and heuristically productive. An act can be considered an instance of judicial corruption if there is a delivery of material or symbolic resources from a third party to a judge, prosecutor or judicial official in exchange for altering the direction or content of a judicial decision. This clearly defines the subjects that must be part of the interaction, the objective of the exchange and the actions necessary for judicial corruption to occur. Importantly, in an effort to distinguish judicial corruption from external and internal judicial independence, the definition excludes the conduct of judges, prosecutors or judicial officials that results from pressure exerted by political actors and judicial leaders. Although in all of these instances we observe changes to the natural course of the decision-making process, there are fundamental differences in the reasons that justice operators have for adapting their decisions to cater to the preferences of others. Finally, I argued that judicial corruption likely operates differently depending on the type of court under analysis. The actors and mechanisms of interaction, the complexity of the negotiations and the amount of resources that service users transfer in exchange for a decision vary depending on whether it is a court of first, second or third instance. For this reason, I distinguished between micro-, meso- and macro-level judicial corruption. The hierarchy of the court under study also determines which factors best explain the incidence of judicial corruption.

In this chapter I focused on the kind of judicial corruption that affects high courts, and pointed out that the key variable explaining whether corruption is merely episodic or endemic is the extent to which political power is concentrated or fragmented. When power is concentrated in a

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few hands, this not only limits judicial independence but also leads to an environment of impunity in which judges and prosecutors have the necessary protection for committing acts of judicial corruption. The Constitutional Court of Ecuador served as a case study to probe the dynamics of these protection pacts. Based on unique interview data, I presented an account of a court in which the exchange of money for decisions was practically the only way for users to access a favourable outcome.

The case of the CCE under Correa is striking because its corrupt behaviour differs markedly from that of prior constitutional courts in Ecuador. As I have shown elsewhere, the court created in 1998 was characterized by judges who guarded their professional prestige, and behaved with a high degree of independence and transparency in order to strengthen their legal careers after they left the court (Basabe-Serrano, 2011, 2012). These career or professional incentives, coupled with a high level of judicial instability and power dispersion, meant that the judges were less likely to engage in systematic corruption or benefit from protection pacts with politicians. By contrast, the judges of the "brewery court", as the corrupt CCE came to be known, were practically without exception lawyers with no expertise or credentials. They therefore had no reason to expect to embark on successful academic or professional careers after leaving the bench (in fact, none of them did). In this context, the cost of being known as corrupt was low in comparison to what they could gain economically from exorbitant bribes.

The discussion in this chapter sets the stage for a research agenda in the field of judicial corruption. On the one hand, it is essential to increase the number of comparative case studies because we still know perilously little about how judicial corruption works. Indeed, studies of the ways in which judicial corruption operates are still few and far between, and tend to focus on high courts (Llanos et al., 2016). In addition, research on the factors that encourage or discourage acts of judicial corruption is still in its infancy. Given that judicial corruption is not as pervasive in industrialized democracies, scholars should probably focus on developing democracies and authoritarian regimes to further develop and test theoretical propositions. Latin America offers excellent opportunities in this regard. While it is true that the harmful effects of judicial corruption on the consolidation of political institutions, economic growth, poverty reduction and levels of foreign investment are known (Gupta et al., 2002; Robertson and Watson, 2002; Selligson, 2002), studies in which corruption is the dependent variable are less common in the region. If the factors

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that affect the presence of judicial corruption or the dynamics that characterize these illegal exchanges are not well understood, it will be difficult to design public policies to curb the incidence of corruption in the courts. Perhaps this explains why the various waves of judicial reform in Latin America, at least in the area of corruption, have been unsuccessful and have not generated major positive results (Basabe-Serrano, 2015b; Hammergren, 2007; Inclán and Inclán, 2005; Oyanedel, 2019; Pásara, 2019; Sieder, 2003). Finally, we should also look into the ways in which judicial corruption restricts the capacity of the courts to control political power and also how its presence affects the protection and expansion of citizen rights. In this sense, while this chapter describes the presence of serious judicial pathologies, it has less to say about exactly how such "broken promises" undermine democracy.

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