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ScienceDirect

International Journal of Law, Crime and Justice
42 (2014) 130–145

International Journal of Law, Crime and Justice

www.elsevier.com/locate/ijlcj

Some determinants of internal judicial independence: A comparative study of the courts in Chile, Peru and Ecuador

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Abstract

This article explores the primary determinants of internal judicial independence in three Latin American countries. Considering the relative absence of research focused on this dimension of judicial life, this article is innovative in demonstrating how it is affected by two variables: the quality of judges' training and respect for their judicial careers as criteria for promotions or transfers. While these variables explain why some countries enjoy greater internal judicial independence than others, this article also shows – contrary to popular wisdom – that judicial activism does not have a strong influence on internal judicial independence. Conducting a comparison of the courts in Chile, Peru, and Ecuador using surveys and semi-structured interviews, this study also shows that judges' autonomy from politicians does not necessarily follow the same path as the lower-court judges' independence from their hierarchical superiors.
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Keywords: Internal judicial independence; Judicial autonomy; Judges; Peru; Chile; Ecuador

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http://dx.doi.org/10.1016/j.ijlcj.2014.01.010

1. Introduction

Within the subfield of judicial politics, judicial independence is one of the issues that have attracted the most academic attention. Understood as the level of any type of influence over judges' decision-making, judicial independence may be considered from three specific dimensions. The first, known as external independence, refers to any type of interference with judicial rulings generated from the political sphere. The second dimension, called independence of a court from the parties to a case -judicial impartiality – has to do with the influence that the litigant, lawyers or other parties in the proceedings may have over the judges' decisions, through some type of illegitimate payment (Couso, 2005; Domingo, 2000). The third aspect of judicial independence is the influence that may be exerted by the higher-court judges over their colleagues in the lower courts, within the hierarchy of a judicial system (Kapiszewski and Taylor, 2008). This dimension is known as internal judicial independence (hereafter IJI).

In spite of the fact that studies of each of these three dimensions of judicial independence is equally important for fully understanding the performance of the courts, treatment of the subject in Latin America has been markedly asymmetrical. The vast majority of studies have concentrated on external judicial independence; considerably fewer studies have focused on judicial impartiality, and IJI has been given only minimal attention. Although it is important to analyze the interactions that take place between judges and political actors, as well as those between judges and the users and operators of the judicial service, studying the variables affecting the lower-court judges' autonomy from their superiors when making decisions about their cases is also important, for at least three essential reasons.

First, studying various levels of IJI helps to understand how institutional design affects the entire set of selective incentives that drive the internal dynamic of the courts. Second, by analyzing variations in IJI it is possible to identify the social factors that influence the behavior of some judges toward others. Third, studying the causes of IJI provides a panorama of the bureaucratic logistics that drive judicial activity. In short, exploring the autonomy of judges who are more removed from political influence because they enter the judicial system at a young age offers a clearer vision of how judicial decisions are made in areas that are more closely related to the daily needs of the citizen, and less of the politicians (Guarnieri and Perdezoli, 1999; Damaska Mirjan, 1986; Merryman, 1985).

The first part of this article provides an overview of the main contributions regarding IJI found in the existing research in judicial politics. The second part describes a theoretical framework that identifies variables within a socio-political context, as well as some that are endogenous to the courts, providing a possible explanation for why some countries have more IJI than others. Specifically, this article proposes analyzing variables related to: (i) the political and social context in which the courts function, and (ii) the logic of action observed between judges. This exercise, added to the institutional variables mentioned in previous studies, will provide a broader panorama of the motivations that explain differences in IJI among Latin American countries. The third part tests the hypotheses arising from theoretical proposal through a comparative design of the courts of Chile, Peru and Ecuador. The results show that the quality of judges' training and respect for their judicial careers explain why some countries enjoy greater IJI than others. Furthermore, the empirical analysis shows that judicial activism does not have a strong influence on IJI. The final section presents conclusions and issues to be evaluated in future research agenda.

2. Reviewing the research on internal judicial independence in Latin America

In contrast to external judicial independence, the concept's internal dimension has received scant empirical attention in Latin America. As a consequence, the few studies that do exist are valuable in providing some understanding of court interactions, as well as factors that influence variation in the autonomy of inferior or intermediate courts from that of high courts. Among the seminal studies of IJI in Latin America is that of Julio Ríos-Figueroa (2006). This research analyzes the degree of autonomy lower-court judges have from their hierarchical superiors as a function of six institutional variables: the way judges are selected; their length of time in the position; formal mechanisms for promotions, transfers, or applying penalties; and autonomy regarding salaries. In essence, Ríos-Figueroa assumes that if the supreme court or appellate courts control the judicial selection process or application of any type of selective incentives -by institutional means- then it is more likely those judges exert influence over the decisions of their colleagues in the lower courts. Gamarra (1991) offers a similar explanation in his study of IJI in Bolivia.

Regarding the selection process, Ríos-Figueroa argues that if the institutional design gives the supreme court or the appellate courts the power to appoint lower – or intermediate – court judges, there will be a lesser degree of IJI. The same reasoning applies with regards to the length of time judges occupy their positions. If the supreme courts or appellate courts define the length of time the lower-court judges in office, as a function of an evaluation processes, IJI will also decrease (Ríos-Figueroa, 2006, 33). Likewise, if selective incentives related to promotions, transfers or administrative sanctions of the lower-court judges – and which are also related to the importance placed upon the judicial career – depend directly on the wishes of the intermediate courts or the Supreme Court, IJI will also be diminished (Popkin, 2002, 115). Finally, if judges' salaries are guaranteed in the constitution, this indicates a greater degree of IJI.

Following this logic, Ríos-Figueroa analyzes IJI in eighteen Latin American countries, using an index from 0 to 6, and assigning dichotomous values depending on the presence or absence of the aforementioned institutional restrictions.[2] On the scale, a "6" corresponds to a country which has an institutional design that fully guarantees IJI, while a "0" indicates a country lacking in any institutional safeguards defending IJI. As seen in Appendix 1, in the year 2002 – the last period measured in the cited work – the results show that nine of the eighteen countries are completely deficient in that regard: Chile, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panama and Venezuela, all ranking (0). Only Argentina received the maximum score of (6), followed by Bolivia (4), Colombia (3), Brazil (3), Guatemala (2), Peru (2), Mexico (1), Paraguay (1) and Uruguay (1) listed from the highest to lowest degree of IJI.

Those results are significant because there are countries, such as Costa Rica, Chile, and Uruguay, with high external judicial independence according to other scholars (Wilson, Bruce, Juan Carlos, Rodríguez, and Roger Handberg, 2004, Druscilla, 2004; Brinks, 2003), yet which have extremely low scores in IJI. Given that Ríos-Figueroa focuses only on institutional design to measure IJI but does not consider an empirical measurement of this variable, it is not possible to establish a value for the distances between the formal and the empirical measurements of IJI. Although Ríos-Figueroa himself performs such an analysis, the attention is focused only on external judicial independence and "autonomy" -understood as the relationships between the executive and legislative branches with the judiciary (Ríos-Figueroa, 2006, 84).

[2]The index specified considers constitutional mandates in the 18 countries between 1950 and 2002.

Likewise, in a study of Bolivia, Pérez-Liñán et al. (2006) surmise that the likelihood of lower-court judges submitting to the higher courts increases if: a) there is similarity of criteria among some of the judges regarding interpretation of the law, b) the lower-court judges expect if they issue verdicts based on their own criteria they may be removed from their position by the superior court judges, or c) the lower-court judges are afraid of political manipulation of their professional careers. While the theoretical insight is formally derived from a principal-agent model, the argument fundamentally item c) maintains coherency with Ríos-Figueroa's theory. In other words, it is based on the notion that, if the higher-court judges have institutional power to remove or transfer their colleagues in the lower levels of the hierarchy, IJI will be compromised.

Nonetheless, Pérez-Liñán et al.'s paper ignores the influence the judicial system's ability to sanction could have on IJI -specifically, those sanctions that may be applied to higher-court judges if they attempt to influence the lower-court decisions. By keeping that factor constant, a variable essential to the study of one dimension of IJI is lost, and that dimension can only be examined using variables endogenous to the courts. Nonetheless, unlike Ríos-Figueroa, Pérez-Liñán et al. empirically verify previous described theoretical conjectures, using surveys of judges at various hierarchical levels in the judicial system in Bolivia.

Despite the great contribution of the previously mentioned studies, there is still a noticeable void in the literature regarding empirical measurement of IJI, as well as the factors that could explain variations from one country to the next. This article proposes to fill that void by analyzing variables related to: (i) the political and social context in which the courts function, and (ii) the logic of action observed between the judges. This exercise, added to the consideration of institutional variables mentioned in previous studies, will provide a broader panorama of the various motivations that might explain varying levels of IJI among Latin American countries.

3. A theoretic approximation of internal judicial independence

I argue that differences in IJI are due to the quality of the judges' professional training, the importance given to the judicial career, and the degree of judicial activism. Analyses of external judicial independence assume the threat of being removed from office constitutes an effective means for politicians to obtain judicial decisions in their favor (Helmke, 2005, 2002 Iaryczower et al., 2002). However, this is less effective in explaining IJI. Given that countries with a Roman-Germanic legal tradition, such as those in Latin America, build their judicial systems on a pyramidal bureaucratic structure in which it is common to begin at a relatively young age and have some assurance of employment stability, the probability of lower – or intermediate – court judges being abruptly removed from their positions is low. In that regard, the lower layers of the judicial system follow the standards of longevity and stability seen in the bureaucracy in general (Peters, 1999, 371).

Consequently, when intermediate or higher court judges try to influence the decisions of their colleagues at the lower levels of institutional hierarchy, they have to use different strategies. In this case, the persuasive ability that some judges have over others would come from their greater judicial skills, or from the weight of the knowledge they have accumulated over time. Factors such as age and professional experience required to get to such positions would counteract any asymmetry in the higher-court judges' training compared to that of their lower-level colleagues. In other words, the greater capital and symbolic resources acquired by intermediate and higher court judges constitute the main persuasive tools for influencing judicial decision-making.

Of course, it is not realistic to assume that higher-level court judges automatically enjoy a higher degree of academic and professional training. In fact, there could be primary-level judges who have equal or greater judicial knowledge and education than second – or third – level judges. In short, the security a judge gains from being perceived as gifted with skills to resolve cases well is one of the main tools for minimizing the effect of argumentative persuasion coming from their hierarchical superiors. Essentially: *the quality of lower-court judges' training increases the level of IJI*.

A second factor that influences IJI is the importance placed on judicial careers as a criterion for promoting judges to higher-level courts or for transfers to courts of the same level in a different location. While it is true that the lower and intermediate court judges have less concern about the risk of being removed, they can still be manipulated by the policies their superiors use for granting promotions or transfers. Therefore, if a judge's bureaucratic career within the judicial system is given only minimal value when it comes to filling vacancies, whether in a higher court or in a more desirable location, the likelihood increases that those judges will be accommodating to their superiors.

In effect, if the judge's achievements over the course of his professional experience are not included in the guidelines used for promotions, or if personal criteria take precedence in defining the future of his professional career, those factors may be incentives for the higher-court judges to establish practices and opportunities for influence among their lower-court colleagues. The relationship between one judge and another can be seen as a principal-agent game through which the higher-court judges reward the lower-court judges with promotions or more desirable transfers in exchange for deciding cases according to their wishes (Pérez-Liñán et al., 2006, 285). Given the repeated nature of this game, the lower-court judges can accumulate a good enough reputation that their superiors eventually reward them with promotions, transfers, or some other type of selective incentive.

On the other hand, when the bureaucratic policy of incentives and promotions within the courts is characterized by prioritizing those judges who have the most outstanding careers, the higher-court players have fewer resources with which to influence the decisions of their lower-hierarchy colleagues. This causal relationship should not be seen as binding because, even though the constitution or other legal norms tend to clearly state the guarantee being granted to the judges – that their judicial careers are a determining parameter in policies of promotion or transfer – in many countries in the region this regulatory declaration tends to be ignored.

From political economy perspective, the work of Feld and Voigt (2003) provides additional empirical evidence. They show that in 57 countries, including a good number of Latin American countries, there is a considerable distance between what constitutes *de jure* and *de facto* judicial independence. There are also cases in which, although there is no constitutional declaration guaranteeing a lengthy judicial career, the courts tacitly consider it as essential in order to provide greater IJI. In short, *IJI will increase as the importance given to the judicial career as a criterion for promotion of the judges increases*.

A third factor that influences IJI is related to the degree of judicial activism of the lower-court judges. Judicial activism is a philosophy that claims the process is constitutionally guaranteed and that the judge must act as director of that process, moving it forward even when the parties do not ask for it, and making an effort to gather evidence in order to discover the material truth and issue rulings that seek justice rather than simply applying the law (Gozaini, 2008, 32). Therefore, judicial activism allows judges to enjoy more autonomy in enforcing constitutional guarantees to individuals, seeking to discover in their rulings the material truth and allowing it to prevail over procedural truth.

As a part of this autonomy, judges are liberated from the influence that intermediate or supreme court judges could exert through the application of the principle of *stare decisis et non quieta movere* (hereafter *stare decisis*).[3] This aphorism states that judges have the legal obligation to make their decisions according to decisions taken on similar issues in the past by themselves or higher-level courts. In other words, while judicial activism invokes the judge as an active party in deciding cases, *stare decisis* limits judicial action to reproducing judicial opinions that have been established over time by the appellate and supreme courts. Then, if the judges are identified with the principles of judicial activism, the higher courts judges have less incentives to intend affecting the IJI using the principle of *stare decisis* as a persuasion tool. Therefore, *as judicial activism increases, IJI will increase*.

In sum, I contend that quality of the judges' professional training, the importance given to the judicial career as criteria for promotions and transfers, and the degree of judicial activism existing among the judges constitute the main variables that explain varying degrees of IJI in the courts of Latin America.

4. Measuring internal judicial independence in Chile, Peru and Ecuador

To test these hypotheses, I perform a comparative analysis of the courts of Chile, Peru and Ecuador. The judiciary branches in those countries are useful for comparison because, in spite of the fact that they have similar judiciary and legal traditions, they reveal different degrees of IJI. Not only does this selection guarantee the existence of variation in the dependent variable, but it also diminishes the truncated variable bias that could arise when using units of analysis with extreme values in the dependent variable. Given that Chile has traditionally been considered a country with a highly autonomous judicial system, Ecuador as low autonomy, and Peru as intermediate, the possible effects of overestimation or underestimation originating from the presence of truncated variables would be controlled.

I select three historical periods for each of the judicial systems. In Chile, the first period runs from March 11, 1990 to March 11, 1994. This period marks the country's return to democracy, and a time when the influence of dictatorial enclaves could still be observed in the relationships between judges at different levels. The second period runs from March 11, 1994 to December 31, 1997. This period corresponds to the establishment of the democratic regime, which should have brought with it greater independence from the other political branches and greater autonomy in the courts. The third period runs from January 1, 1998 to June 30, 2011. The adoption of an aggressive judicial reform process at the beginning of 1998, which encompassed not only procedural issues but also issues regarding judge recruitment, identifies this stage as the time Chile's judicial system took off in terms of greater internal autonomy for the lower courts and their judges (Harasic, 2007).

In Peru, the first period runs from July 28, 1985 to April 5, 1992. This was a period of political domination by the party *Alianza Popular Revolucionaria Americana* (APRA). For the courts, and fundamentally for IJI, this would be a period of open political interference in the nomination of superior and supreme court judges, and therefore, of apparent decline in the autonomy of the lower court judges. The second period extends from April 5, 1992 to November 22, 2000. This period starts with the "self-coup" of President Fujimori and ends with his departure from office. This was a time when the effectiveness of the minimal rules of the

[3]Stand by prior decisions and not move from that position.

democratic regime is clearly in doubt. In the case of IJI, the political stage appears to be one in which appellate and Supreme Court judges had sufficient resources to decimate the capacity of the inferior judges to decide independently. The third period runs from November 22, 2000 to June 30, 2011. Due to the return of democracy and effective judicial reform of institutional structures as well as strategies for training judges, IJI should improve in comparison to the preceding period.

In Ecuador, the first period runs from October 1997 to December 2004, a time when Supreme Court judges were appointed for life. Given that level of stability in the Supreme Court, there should be greater respect for IJI. The following period, from December 2005 to December 2008, coincides with the reinstallation both of the Supreme Court and the Constitutional Tribunal, after a period of having no leader, in both judiciary bodies, as a consequence of the premature departure of President Gutierrez (Basabe-Serrano, 2012). It would be expected, consequently, that IJI would retain a certain harmony with the level of independence that had been seen in the previous period. The final period goes from December 2008 to June 30, 2011. This time corresponds to the establishment of a new constitutional design and above all, the emergence of a political process having hegemonic features (Basabe-Serrano et al., 2010). In this scenario, judicial independence in general and IJI in particular should be lower.[4]

For the purposes of giving more heterogeneity to the time periods observed, I initially attempted assessments of IJI for each year. However, the first surveys showed that the informants could not distinguish changes in the dependent variable if they were asked to do an annual evaluation. On the contrary, informants were almost unanimously able to identify changes resulting between the historic periods. In addition, trying to perform annual measurements meant that the surveys would have required more time than our elite informants would be willing to dedicate to answering questionnaires of this type. For these reasons, the structure of the questions was changed, and I proceeded to take new surveys that did not take the previous informants into consideration.[5] In total, 150 surveys were conducted (50 in Santiago, 50 in Lima, and 50 in Quito), using recognized, prestigious lawyers in various fields of law.[6]

Thought the surveys were designed with the intention of providing gender equality and ideological diversity, the possibility of recording bias still exists given the absence of systematic measurements of that subject.[7] However, the fact that the participants were individuals who

[4]The time periods selected for each country do not coincide. Nonetheless, a reasonable point of comparison comes from the fact that each of those periods corresponds to a significant time in the institutional life of the respective judicial systems. As indicated in the framework, changes in IJI are not directly related to political factors. For that reason, variations in that field only serve to identify different periods in the life of the judicial system in each country analyzed.

[5]Even if a specific question was designed for each historical period analyzed, the central question was similar, asking: "If internal judicial independence is understood as a lack of interference by superior court judges over the content or direction of the decisions made by lower − or intermediate − court judges, how would you rate the following periods in your country? Use a scale of 1−10, where the number 1 corresponds to a total absence of internal independence for the lower − and intermediate − court judges, and the number 10 corresponds to a total presence of internal independence for the lower − and intermediate − court judges."

[6]The surveys were conducted between the months of April and June 2011.

[7]Regarding that point, the survey included a question related to ideological self-identification of the informant. Specifically, the participants were asked to qualify their own ideological tendencies on a scale of 1−10, where "1" indicates a person who considers himself to the extreme left, and "10" indicates a person who considers himself to the extreme right. The results showed an average score on that question of 5.22/10 for Chile, 4.95/10 for Peru, and 4.92/10 for Ecuador. These values indicate that the participants, in general, considered their own ideology to be moderate, which reduces biases attributable to the participants.

Table 1
Perception of Internal judicial independence in Chile, Peru and Ecuador.

Country	Period 1	Period 2	Period 3
Chile	5.18	5.80	6.80
Peru	3.46	2.29	5.45
Ecuador	6.26	6.00	3.84

Source: surveys of expert opinion.

have extensive experience in the topics they were asked about tends to minimize measurement errors arising from that methodological problem. The results are shown in Table 1 below.

As predicted, the perception of IJI in Chile experienced a process of improvement after the departure of General Pinochet from the government. During the first period analyzed (1990−1994), the indicator still shows deficiencies inherent in the transition to democracy (5.18/10) and the authoritarian enclaves that undoubtedly arrived to the judicial system. Although the justice system in Chile has traditionally been considered conservative this period is the one presenting the poorest results in terms of IJI (Hilbink, 2007). The second period analyzed (1994−1997) shows some improvement in lower court judges' autonomy from their higher-court colleagues, although not outstanding (5.80/10). The third period, (1998−2011) shows a significant improvement in that variable, although it still does not reach the levels seen in other aspects of judicial independence in the Chilean system (6.80/10).

In Peru, the indicators of the perception of IJI prior to the year 2000 are not satisfactory. During the first period (1985−1992), corresponding to the government of President Garcia and the first two years of President Fujimori, judges' autonomy from their superiors was very low (3.46/10). This deficiency becomes even more pronounced during the second period (1992−2000), when Peru was experiencing a time of constant widespread disregard for the basic rules of democracy (Dargent, 2009). In fact, during that time, the perception of IJI reached the lowest level observed in that country since 1985, which is also the lowest level seen in any of the three countries in the analysis (2.29/10). The third period (2000−2011) shows evidence of an aggressive improvement in the perception of IJI. Although still not reaching an optimal level, there is a significant improvement of more than three points on the scale developed for this study (5.45/10).

Ecuador's statistics demonstrate unusual behavior in regard to its perception of IJI. In the first period (1997−2004) and second period (2005−2008) there is no significant change in that variable (6.26/10 and 6.0/10 respectively). However, in the last period there is a dramatic drop in the perception of IJI (3.84/10). Beyond this significant downward tendency in the third period (2008−2011), it is interesting that the first measurements of Ecuador's situation show values similar to those observed in Chile -a country that, in this article as well as in the general literature about judicial politics, is considered to have a judicial system with good institutional performance (Scribner Druscilla, 2004). For the current period, Ecuador's measurement of the perception of IJI (3.84/10) has dropped so much that it is now comparable to that of Peru during the first term of President Garcia and the early years of President Fujimori (3.46/10).

Despite the differences in the time periods used for each country, and the bias that could emerge given that the values for three different times of the dependent variable in each country was obtained between April and June of 2011, one aspect that can be compared in temporal terms is the situation at the present. While Chile maintains a greater level of IJI (6.8/10) than Peru (5.45/10), and significantly greater than Ecuador (3.84/10), this is not to say that the values achieved by that country are satisfactory. Although there are no measurements of IJI for the other Latin American countries − which would allow a more extensive evaluation − the coding

Table 2
Summary of Perception of Internal Judicial Independence and its Main Explicative Variables in Chile, Peru and Ecuador.

Country	*n*	Period	IJI	Judges' training	Judicial career	Judicial Activism
Chile	50	1990–1994	5.18	5.33	5.63	5.08
		1994–1998	5.80	5.75	6.26	5.60
		1998–	6.80	6.62	7.22	8.42
Peru	50	1985–1992	3.46	3.21	3.14	2.31
		1992–2000	2.29	2.89	2.28	2.35
		2000–	5.45	4.79	5.48	4.55
Ecuador	50	1997–2004	6.26	5.98	5.58	4.46
		2005–2008	6.00	5.28	5.18	4.34
		2008–	3.84	3.98	3.78	4.34

Source: surveys of experts in Santiago, Lima and Quito.

used in this research indicates, at least intuitively, that the performance of the courts in Chile in the aspect of IJI is not within the upper levels of the 1 to 10 scale. The situation in Peru is even more worrisome; but obviously Ecuador's situation is the one that should generate the most concern, among policymakers of judicial politics as well as the participants in the judicial system in the country.

5. Judges' training, judicial careers, and judicial activism as determinants of internal judicial independence

To assess any link that might exist between the results showed and the behavior of the variables that this article proposes as the explanation of the IJI, the survey included questions intended to gather empirical evidence about the level of judges' training, the importance placed on the judicial career as criterion for promotion, and level of judicial activism existing among the judges. Although the measurement used must accept the values assigned to the perceptions of experts as proxy for the variables being observed, this constitutes the most viable way of gathering this type of information. Nevertheless, it is necessary to add two caveats regarding the measurement strategy. First, the perceptions of the informants about the dependent variable could affect their perceptions about the independent variables, which would generate bias in the measurement. Second, the informants in Chile, Peru and Ecuador could have different perceptions about judges' training, judicial career, and judicial activism, potentially causing equivalency bias.

In order to improve the quality of the empirical evidence and reduce the possible bias, I triangulate the survey information with semi-structured interviews conducted with experts, the majority of whom had not been considered for the surveys. In total, 85 interviews were conducted (26 in Santiago, 29 in Lima and 32 in Quito), all of which were conducted in person between the months of April and July 2011.[8] Table 2 summarizes the empirical evidence gathered from the surveys conducted in this research.

[8]Due to the nature of the study, and given that many of the interviewed are frequently involved in litigation in the courts, they were guaranteed that their identities would remain confidential. The same as with the surveys, I sought to maintain gender equality and varied ideological positions. The latter was achieved by selecting experts whose professional practice focused on different areas of the law.

5.1. Training of judges

Regarding this variable, the survey conducted in the three countries asked: "If the quality of judges' training is understood to mean the academic and analytical capacities of the judges for issuing rulings, how would you rate that aspect during the following periods in your country? Use a scale of 1–10, where '1' indicates a deficiency of academic and analytical quality among the judges, and '10' indicates excellent academic and analytical quality among the judges." The mean values obtained for each country-period were: Chile (5.33/10; 5.75/10; 6.62/10), and Peru (3.21; 2.89/10; 4.79), showing a progressive improvement in education and training of judges. On the contrary, Ecuador shows backsliding over time (5.98/10; 5.28/10; 3.98/10). Overall, the changes in level of judges' training should be linked to changes in IJI, which supports the first hypothesis set forth in this article.

According to the interview, one of the decisive elements for improving the quality of judges was consolidation of specialized training centers, generally known as judicial academies or magistrate schools (*Escuelas de la Magistratura*). In Chile, where judges currently rank the highest in that dimension in comparison to their counterparts in Peru or Ecuador, going through the Judicial Academy is an absolute requirement for getting a position as a judge. The academic training process begins with careful selection of candidates who dedicate themselves exclusively for at least nine months, with salary.[9] Created in 1994, but consolidated at the end of that decade, the *Academia Judicial*, or Judicial Academy of Chile, bases a good portion of its success on the absence of a permanent staff of tutors who direct the training programs. The Directive Council of the Judicial Academy (*Consejo Directivo*) holds competitions with multidisciplinary teams of professionals coming from private practice, the magistrature, and university professors in order to select the tutors for their students. This not only guarantees diversity and pluralism but also avoids the possibility of cooptation between students and a permanent staff of the Judicial Academy.

The Academy of the Magistrature of Peru (*Academia de la Magistratura*) was legally born with the Constitution of 1993, although it really began to exercise its functions in 1995. Nonetheless, due to the control of all political branches by the president during the "fujimorista" period, this institution was part of the process of governmental cooptation that only minimally complied with the objective of training and improvement in the education of judges. For that reason, it was only in 2000, with the return of democracy and encouragement of judicial independence coming from various social sectors, including the transitional government of Valentin Paniagua, that the Academy of the Magistrature has begun to produce significant results. For the majority of the interview participants, the work carried out by this institution since 2000 – along with the elimination of temporary judges – has been one of the key points in the training of judges in Peru. Nonetheless, because it concerns a process initiated only a relatively short time ago, the best results are yet to be seen.

In Ecuador, the organic law of the National Council of the Judiciary (*Ley Orgánica del Consejo Nacional de la Judicatura*) issued in March of 1998 established the creation of a

[9] During one of the last selection processes, which usually occur 3 times per year, around 400 candidates were present, of which only 24 approached the Judicial Academy. Admission requires an exam of academic aptitudes and one of psychological character. Currently, a student at the Judicial Academy receives a monthly income of 830,000 Chilean pesos, which is approximately 1700 USD. If the student is already part of the judicial system he retains that income during the time he is in the academy.

judicial training system that is the responsibility of that council. Nonetheless, it was only in 2003 that a regulation was issued that gave life to the Judicial School of Ecuador (*Escuela Judicial*), although it has never managed to become fully functional. Later, the Organic Code of the Judiciary Branch (*Código Orgánico de la Función Judicial*) enacted in March of 2009 mandated the creation of the School of the Judiciary Branch. However, as in the previous case, the judicial training center is not yet operational. Independent of that, and despite the absence of an organic structure and absence of budget and infrastructures from the end of the 1990s until the enactment of the new constitution in 2008, there was some interest in training judges through activities such as workshops and seminars designed for that purpose. Since then, as a result the long transition period in which the Judiciary Council of Ecuador and the judicial system in general find themselves, even these minimal attempts have begun to disappear.

5.2. Importance placed on the judicial career as a criterion for promotion

Regarding the importance placed on the judicial career as a criterion for promotions or transfers in the analyzed countries, the survey asked this: "If the judicial career is understood to mean the years of work experience and training received by the lower – and intermediate – court judges, how would you rate the importance placed on this criterion for the promotion of lower-court judges toward higher courts in your country? Use a scale of 1–10, where '1' indicates an absolute absence of importance placed on judicial career when promoting lower-court judges to superior courts, and '10' indicates a very high level of importance placed on judicial career when promoting lower-court judges to superior courts." The values obtained from the surveys showed an upward tendency, toward greater respect for the judicial career in Chile (5.63/10; 6.26/10; 7.22/10); a significant upturn in the variable in Peru (3.14/10; 2.28/10; 5.48/10); and a decrease in importance in Ecuador (5.58/10; 5.18/10; 3.78/10). The same as with the analysis of judges' training, in analyzing the importance placed on judicial career, it is evident that there is a direct relationship between that variable and IJI. This empirically verifies the second hypothesis of this article.

However, given that the institutional designs of Chile, Peru and Ecuador all contain specific references to the importance of the judicial career in evaluating a judge's merits for promotions and administrative or geographic transfers, those institutional variables would not have produced the variations in IJI observed between the countries. This result does not support the results obtained with the indicator designed by Ríos-Figueroa (2006, 67). In that study, Chile and Ecuador have scores of 0/7 and Peru has 2/7 in the aspect of IJI. That measurement only observed the existence or non-existence of certain basic constitutional guarantees, while this article additionally considers the organic laws and other regulations and norms related to the functioning of the judicial system.[10] Therefore, while institutional design is important for granting greater autonomy to lower-court judges from their hierarchical superiors, the empirical evidence appears to demonstrate that those regulatory agreements are not enough.

According to experts' opinions in Santiago, Lima, and Quito, it is policy decision made by the parties involved that allows past judicial performance to be used as a referential parameter

[10]The review includes not only the organic laws of the judicial system of each country but also the institutional arrangements related to the Councils of the Magistrature, judicial career, and other related legislation.

for promotions and transfers within the courts. In effect, the existence of an agreement oriented toward acknowledging judicial career is a more important deciding factor than regulations in increasing the internal independence of the courts, and is a critical point to consider. Such agreements have been in place in Chile since the return of democracy, and in Peru they are in the process of consolidation. In Ecuador, on the other hand, they have been getting weaker over time.

5.3. Judicial activism

Regarding judicial activism affecting the judges in their rulings, the question presented to the participants was this: "If judicial activism is understood as the willingness of the judges to interpret, create meaning, and fill in gaps in the law, how would you rate the degree of judicial activism among the lower- and intermediate-court judges in your country? Use a scale of 1–10, where '1' indicates a judge who is completely unwilling to participate in judicial activism, and '10' indicates a judge who is completely involved in judicial activism." The results obtained from measuring this variable indicate several peculiarities in relation to the behavior observed in the previously discussed explanatory factors. In Chile, judicial activism changed only slightly between the first two periods analyzed. However, the growth observed from 1998 to June 2011 is quite accelerated, demonstrating a radical change in the reasoning judges were using when issuing their decisions (5.08/10; 5.60/10; 8.42/10). Beyond the fact that there is a marked improvement in judicial activism among the judges in Chile, this empirical finding is opposed to two essential issues. First, with the work of Hilbink (2007) says that the judges in Chile are usually conservative in their approach to justice, and essentially follow the judicial aphorism of *stare decisis* (that is, a limited exercise of judicial activism). In addition, and even more significant, the measurement of 8.42/10 in judicial activism in Chile is not proportional to the level of IJI, which this study measures at 6.80/10 for the same period. In other words, the rate of increase in judicial activism has been much more intense than the rate of increase in IJI.

The relative absence of agreement between the measurements of judicial activism and IJI in Chile could be attributed to two possible causes, one theoretical and one methodological. From a theoretical perspective, the findings could show that there is no causal relationship between the two. Methodologically, this could be an indication of the existence of a measurement bias. In other words, there could be a strong difference between the theoretical concept and the empirical reference used as *proxy* in the surveys that were conducted. However, given that the people surveyed were experts with a high level of knowledge about the performance of the courts, it is not likely that a bias would manifest itself in this way.

In Peru, judicial activism is minimal during the first two periods analyzed, showing an improvement after the return of democracy (2.31/10; 2.35/10; 4.55/10). However, IJI in the final period (5.45/10) has improved much more than the level of judicial activism. After that, and contrary to what happened in Chile, the increase in judicial activism in Peru was less intense than the increase in IJI. Finally, in Ecuador, there is a peculiar phenomenon where judicial activism remains relatively low during all three periods (4.46/10; 4.34/10; 4.34/10). In other words, the drop in IJI in that country during the last period analyzed (3.84/10) apparently has no relation to the degree of judicial activism, because it has remained constant.

Independently of the data presented so far, the participants who were interviewed in the three countries indicate that creating associations among the judges is a key factor for increasing judicial activism. Nonetheless, the type of organization this refers to is not the traditional

judges' union, to which membership is usually obligatory, and which basically exists for the purpose of protecting the judges. On the contrary, the types of associations that influence judges' activism are those with voluntary affiliation and whose objective is for judges to discuss various opinions and criteria among themselves or with similar organizations in other countries. This way, the interchange resulting from this type of organization provides an opportunity for innovative ideas, such as the ideas surrounding judicial activism, to be reflected in judicial rulings.

In Chile, one of the organizations that best represents this is the National Association of Judicial System Magistrates (*Asociación Nacional de Magistrados del Poder Judicial*). Their activities are oriented toward developing critical thinking and providing the motivation for emblematic judges such as Judge Francisca Zapata. Its activities have served as a basis for improving activism among lower-court judges toward their hierarchically superior colleagues. In Peru, the Association of Judges for Justice and Democracy (*Asociación de Jueces para la Justicia y Democracia*, *JUSDEM*) is the country's most representative organization in issues of defending judicial independence as well as motivating judges toward greater activism. Created in the 1990s as a response to the abuses of the Fujimori government, JUSDEM includes Judge Antonia Saquicuray Sanchez as one of its strongest supporters and promoters of greater lower court autonomy. In Ecuador, this type of organization is practically nonexistent, limited to the an association of judges of the National Federation of Judges of Ecuador (*Federación Nacional de Asociaciones Judiciales del Ecuador*, *FENAJE*), whose objectives are essentially labor union type activities, such as exerting pressure on various authorities, not only in the justice system but also the political arena.

As listed in Table 2, the quality of judges' training and the importance placed on judicial career as determining factor in promotions and transfers constitute the variables that best explain changes in IJI in Chile, Peru and Ecuador. As has been shown, judicial activism has not been systematic enough to be identified as a factor influencing the dependent variable measured in this analysis. The historical and cross-national comparison provides evidence that two of the three hypotheses proposed here have empirical support. Finally, the presence of legal guarantees of IJI in Chile, Peru, and Ecuador show also that, in itself, institutional design is not enough to guarantee that the lower-court judges enjoy autonomy from their superiors when making decisions.

6. Conclusions

This article identifies some of the main variables that explain the varying degrees of IJI. In spite of the significance of IJI in the institutional life of the courts – not only for the parties involved in legal proceedings, but also for the perceptions generated in society as a whole regarding the performance of the judicial system – studies of this dimension in Latin America have been minimal. Among the reasons for this marked lack of attention has been, primarily, the difficulty in measuring it in any reliable way. This research, however, follows one of the central ideas proposed in the innovative work of Pérez-Liñán et al. (2006), which highlights the value of surveys for tackling problems of this nature. This article uses that methodological tool to collect information from judicial experts in Chile, Peru, and Ecuador.

This article empirically demonstrates that the variations in IJI in the three countries analyzed can be explained by variations in their judges' level of professional training, and the importance placed on the merits of their judicial career as essential criteria for promotions or administrative transfers. Although the analysis also considers the degree of judicial activism, its behavior was

not systematic enough to conclude that there is a causal relationship between that variable and IJI. Furthermore, the existence of legal guarantees of IJI allowed controls of the possible effects of such institutional variables on the variations observed in the behavior of lower court judges toward their colleagues in the higher level of the hierarchy. Additionally, by considering the courts of Chile, Peru and Ecuador as units of analysis, it was possible to obtain a significant variance both in the internal comparisons within each judicial system and the controlled comparison between countries that was done afterward.

Although Chile shows the best results in IJI in comparison to Peru and Ecuador, its performance is still unsatisfactory. Although it has increased in value over time, it only scored 6.8/10 in the last period of analysis, indicating further room for growth. In addition, the analysis of the empirical evidence presented in this article in comparison with the existing data about external judicial independence in Chile demonstrates a noticeable asymmetry. So, while the Global Competitiveness Report 2010 from the World Economic Forum places Chile in twenty-fifth place among 139 countries in IJI, the degree of decision-making independence that the lower-court judges in Chile have from their hierarchical superiors is less convincing. This finding reflects that the various dimensions of judicial independence do not necessarily develop at the same pace. For that reason, it is essential that the studies be done in a way that analytically captures each of the facets of judicial life.

The imbalance between the two levels of judicial independence observed in Chile can be verified by making a similar comparison in Peru. In fact, while IJI Peru presents a considerable improvement after the year 2000, the measurement of external judicial independence issued in the Global Competitiveness Report 2010 places this country 119 out of a possible 139 countries analyzed (Schwab, 2010). In Ecuador, while the dissonance between the two dimensions of judicial independence is less pronounced, the performance of its courts is truly alarming. As this article shows, Ecuador not only shows performance deficiencies with regards to IJI, but also in measurements of its external judicial independence performed by the previously cited source, placing it 135 of the 139 countries observed. This indicates a chronic absence of autonomy among the judges at all levels in the country.

Better professional training of judges, in specialized academies, and generating agreements about respect for the judicial career are critical factors necessary for proper functioning of the bureaucratic life of the courts. These constitute the essential elements to guarantee greater levels of independence within the judicial systems of Latin America. Although autonomy of judges from politicians is a key dimension for the functioning of a democratic regime, independence of the lower-court judges from their hierarchical superiors facilitates the administration of day-to-day justice, which is of the most interest to citizens, and generates confidence in the judicial system.

Acknowledgments

This article was written with the support of the Academic Development Fund (FDA) of the Facultad Latinoamericana de Ciencias Sociales, FLACSO Ecuador. A preliminary version was presented to the 30th Congress of the Latin American Studies Association (LASA, May 23–26, 2012, San Francisco, California). The author is grateful for the comments and suggestions of Daniel Brinks, John Polga-Hecimovich and Tomas Mandl. Also, the author would like to acknowledge Sergio García Rendón (Ecuador), Jorge Morel Salman (Peru), and Jorge Jocelín Almendras (Chile) for their assistance in collecting and processing the information for this article.

Appendix 1

Internal judicial Independence in Latin America (2002)

Country	Internal judicial independence
Argentina	6
Bolivia	4
Colombia and Brazil	3
Guatemala and Peru	2
Mexico, Paraguay and Uruguay	1
Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panama, and Venezuela	0

Source: Ríos-Figueroa (2006)

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