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Presidential Power and the Judicialization of Politics as Determinants of Institutional Change in the Judiciary: The Supreme Court of Ecuador (1979-2009)

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What explains institutional instability in national judicial institutions? Much extant research focuses on de facto *institutional instability, emphasizing political motivations behind irregular changes to high court composition. In contrast, I consider the causes for* de jure *changes made to the Ecuadorian Supreme Court from 1979 to the present, drawing on qualitative and quantitative analyses. I contend that the judicialization of politics and presidential interest in stacking the courts are central explanatory factors, and that changes to the Supreme Court's institutional framework reflect implicit compromises and political arrangements negotiated by strategic political actors. As such, institutional reforms to national judicial institutions may be adopted to ameliorate conflict in the larger political sphere.*

Keywords: Ecuador, Judicialization of Politics, Judicial Stability, Institutional Change, Supreme Court, Judicial Politics in Ecuador, Ecuadorian Political Institutions.

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¿Qué factores explican la inestabilidad institucional en los Poderes Judiciales nacionales? Al respecto, la mayoría de investigaciones focalizan en la inestabilidad institucional de facto, enfatizando en las motivaciones políticas que llevan a cambios en la composición de las cortes. En contraste, y recurriendo a un análisis cualitativo y cuantitativo, este artículo analiza las causas de los cambios de jure realizados en la Corte Suprema de Justicia del Ecuador desde 1979 hasta la fecha. El artículo propone que la judicialización de la política y el interés de los presidentes por controlar las cortes son los factores clave que explican tales cambios institucionales y que dichas variaciones en la Corte Suprema reflejan compromisos implícitos y acuerdos negociados por actores políticos estratégicos. Por tanto, las reformas institucionales a las cortes se adoptan a fin de aminorar el conflicto político suscitado en una esfera política más amplia.

Among studies of the judicial branch in Latin America, one of the areas that has received the greatest academic attention is related to factors explaining the early and unconstitutional removal of high court judges (Pérez-Liñán and Castagnola 2009, 92). Although the impeachment and removal of judges accounts for the prevailing judicial instability in most countries in the region, another source of institutional instability that has received less attention by scholars concerns institutional changes that affect the functioning of these courts. The present analysis complements studies that focus on *de facto* institutional changes that only pertain to changes in court composition by considering explanations for alternative *de jure* modifications and what accounts for their variation.

It is worth mentioning right at the beginning that institutional change of high courts does not necessarily imply judicial instability understood in the terms mentioned above. While in certain cases reform of office terms is a mechanism through which political actors seek to alter court composition, they can also propose changes to court competency, judge selection mechanisms, and the way of filling vacancies on the bench that do not produce early dismissal of judges but are, nevertheless, politically consequential. In other words, the terms "judicial stability" and "institutional change" with regard to courts have different but related meanings. This article concentrates on the second of these concepts.

The objective of this article is to identify the factors explaining the changes to the institutional design of Ecuador's Supreme Court. The first section reviews the literature of judicial institutions and institutional change in Latin America. Next, I

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propose an approach that weds logic from political and legal spheres to explicate institutional change. Then, I test the empirically observable consequences of my theoretical claims, using data on institutional changes to the Ecuadorian Supreme Court. Finally, I offer a few key conclusions and suggest opportunities for future research agendas.

Institutional Changes in Latin America's Courts

In his early study of judicial politics in Latin America, Verner (1984, 464) indicated that the institutional stability of many high courts in the region is compromised by the divergence between constitutional guarantees and what happens in reality. Similarly, although all Latin American countries are tripartite separation of powers systems, many authors have found that where presidents or legislators accrue sufficient political power, they exploit this power to change the composition of the courts (Chávez 2004, 452-3; Helmke 2005, 28; Iaryczower, Spiller, and Tommasi 2002, 703; Ríos-Figueroa 2007, 33; Scribner 2004, 23-6). This behavior by political actors concerns the need to have judges who support their political projects.[1]

In one of the first cross-national analyses of compositional instability of courts throughout the region, Pérez-Liñán and Castagnola (2009, 107) found that in eleven countries of the region—Argentina, Brazil, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama, and Uruguay—there is no systematic relationship between the arrival of a new government and the irregular replacement of high court judges. The early departures of judges occur regardless of whether or not an election is near. These authors also demonstrate that the reorganization of courts occurs independent of regime type: judges face the possibility of impeachment in democracies and dictatorships alike. In sum, in these works, the desire of political actors to have courts that support their political projects is the strongest predictor of judicial instability, as can be observed in the early dismissal of judges.

Although such studies consider the irregular replacement of high court judges, few focus on institutional reforms more generally, including those that may not imply early dismissal of judges.[2] In contrast to irregular replacement of high court officials, such as judge impeachment or court packing schemes, *de jure* changes to institutional structures of courts may reflect a more general effort to reconfigure the political system or reallocate power among political actors. This article considers the second objective: politicians may seek to alter the institutional

[1] A more detailed description of studies on judicial independence and, in general, on judicial politics in Latin America can be found in Kapiszewski and Taylor (2008).

[2] One noted exception to this trend is the work of Pozas-Loyo and Ríos-Figueroa (2010, 294-300), who take a similar approach to the one adopted in this article. In it, the authors explore the conditions under which certain constitution drafting processes generate to institutional designs that provide citizens with greater legal certainty.

design of courts to reduce political conflict and redistribute power across political actors. The following section elaborates a theoretical framework that I use to explain both changes in the institutional design of the judiciaries, and the subsequent effects in the larger political arena. Then I use the case of Supreme Court of Ecuador to test the main hypotheses developed in my theoretical discussion.

The Judicial Arena as a Space for Resolving Political Conflicts

With the third wave of democratization, social and political conflicts have increased considerably in most Latin American countries. Democratization of the political systems and expansions of basic civil and political rights are two of the explanations behind these social and political transformations. Although political parties were first built as a link between the demands of citizens and their representatives, over time, this link eroded and weakened, reaching the point of collapse of the political party system in various countries in the region. Peru, Venezuela, Bolivia, and Ecuador are a few prime examples.[3]

The collapse of the traditional party systems occurred most dramatically in countries where the president lacked a legislative majority to support his political agenda (Mainwaring and Shugart 1997, 6). As a result, while the number of actors seeking political influence and representation increased, the amount of public resources for distribution—and in some cases for patronage and pork barrel—remained constant. As such, political agreements became fragile, political confrontation increased, and the mechanisms to enforce these agreements gradually became diluted, to that point that in countries, such as Ecuador, government coalitions became known as "mobile majorities," alluding to their temporary and sporadic existence (Basabe-Serrano, Pachano, and Mejía Acosta 2010, 69-70; Mejía Acosta 2009, 125-6).

Given the relative lack of dispute resolution mechanisms, politicians increasingly turned to the courts to settle many disputes. Over time, the judicial branch was converted from the neutral "third impartial power," into a tool for political pressure, manipulation, and blackmail. Although many studies characterize the *judicialization of politics* as simply the transfer of political decisions into the hands of the judges (Cepeda 2005, 69-73; Domingo 2004, 110-1), the present article advances a different and more nuanced interpretation of this concept.[4] Judges are limited to issuing warnings when certain agreements are broken with regard to the improper distribution of political patronage, or

[3] For the case of Peru, see Tanaka (2002) or Arce (1996). Studies on Venezuela's political system include Maingón (2004) and Rivas Leone (2002). For Bolivia, there are the studies by Mayorga (2004) and Calderón and Gamarra (2003). Finally, the Ecuadorian case is covered in the research of Freidenberg (2008) and Pachano (2007).

[4] For an extensive analysis of the judicialization of politics in different countries, see all articles published in *International Political Science Review* 15 (2).

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simply the presence of personal conflicts between party leaders. I argue, therefore, that the courts are not the end of political disputes but rather a means through which these conflicts take a different course.

In more analytical terms, following a conflict in the political arena, the actor who feels attacked may take the confrontation to the judicial arena and threaten the aggressor for this breach or to bring about a "reckoning." With this, the aggressor either modifies his behavior or also responds via the courts with a similar threat. In any case, although the dispute is resolved in the political arena itself, the intervention in the judiciary serves as a catalyst, and raises the stakes of the political conflict. Subsequently, as agreements become more fragile and political actions increasingly confrontational, use of the courts intensifies to the point where all the actors agree to a temporary nonaggression pact. This agreement is materialized in the form of institutional reform of the judicial branch and reconfiguration of the political power within the courts. This article defines the judicialization of politics as the transfer of confrontations from the political arena into the judicial arena; meanwhile, institutional change events are defined as institutional changes to high courts that are meant to alter the balance of political power within them.

These court institutional reforms do not necessarily imply the abrupt exit of judges. There are other means. Seemingly small changes in the internal structure of the courts nevertheless change the balance of power within courts in politically consequential ways (see Ríos-Figueroa 2010, 51-67). Some examples of these types of reform include the relocation of judges via the creation or abolition of special chambers, the reorientation of the internal dynamics of the court through changes in jurisdiction or the modification of the judge selection process, and are advanced by political actors when the judicialization of politics has reached a critical point (Helmke and Ríos-Figueroa 2010, 29-34). For example, recent research on Mexico explores ways where judge selection procedures privilege some actors in the legislative arena (Mayer-Serra and Magaloni 2010, 36-40). Thus it can be argued that *as the process of the judicialization of politics intensifies, the probability increases of having institutional changes in the courts*.

An alternate explanation, which does not altogether contradict the argument of this article, indicates that instances of institutional change in the courts are the result of the arrival of a new government and its subsequent desire to influence the judicial branch. This is the alternative explanation mentioned by Helmke (2002, 293) in her work on the Argentine Supreme Court, and is also addressed by Pérez-Liñán and Castagnola (2009, 93-4) in their comparative historical review of courts across the region. Institutional change could, in certain cases, be explained by politicians' attempts to diminish autonomy of courts (Kapiszewski and Taylor 2008, 749).[5] Therefore, I hypothesize that *as the political power of the president increases, the probability of institutional changes in the courts also increases*.

[5] To other authors, the concept of autonomy from other branches of government is understood as "political autonomy" (Couso 2005), "autonomy" (Ríos-Figueroa and Taylor 2006), or "political independence" (Domingo 2000).

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Data and Methodology

To test these hypotheses, this article examines the case of the Supreme Court of Ecuador (Corte Suprema de Justicia [CSJ]), one of the supreme courts of the region that has changed the most with regard to the institutional framework. I consider the institutional framework of this Court between 1979 and 2009, a period that provides a broad spectrum of political and legal variations. The institutional changes are related not only to the number of members of the CSJ, but also include alterations in the Court's jurisdictional powers, nomination requirements, and appointment procedures. Descriptively, this article provides a historical narrative that is based on 16 semi-structured interviews of various judicial actors, such as former judges and presidents of the CSJ, lawyers, political actors, and employees of the judicial branch. Additional information regarding institutional change was compiled from the *Official Register* and coverage of the Supreme Court in the national Ecuadorian press.[6]

The judicialization of politics was measured using the number of criminal trials where the litigants involved were political actors. To gather this information, I used the files of the CSJ presidency until 2006, and then the files of the Criminal Chambers of the CSJ from 2007 to 2009. Given that presidents, legislators, mayors, prefects, and political authorities are judged exclusively by the head of the CSJ or by the Criminal Chambers of the CSJ since 2006, according to the files of the Supreme Court, the information obtained reflects the judicialization concept. Figure 1 presents the trials related with judicialization of politics in the period analyzed.

As one can see, at the end of the 1980s was the first time that the CSJ was called upon to resolve a substantial number of political cases (17 cases in 1988, 13 in 1989). This period corresponds to the transition in governance from President Febres-Cordero to President Borja. It is also precisely the time which some of the actors interviewed identified as the moment when political actors began to use the CSJ as a space to reduce conflict and division.[7] In addition, this uptick in the judicialization of politics coincides with a change in the alignment of political power. Similarly, the next period of heavy use of the courts by politicians was seen in 1993 and 1994, the years that coincided with the exit of President Borja and the entrance of President Durán-Ballén.

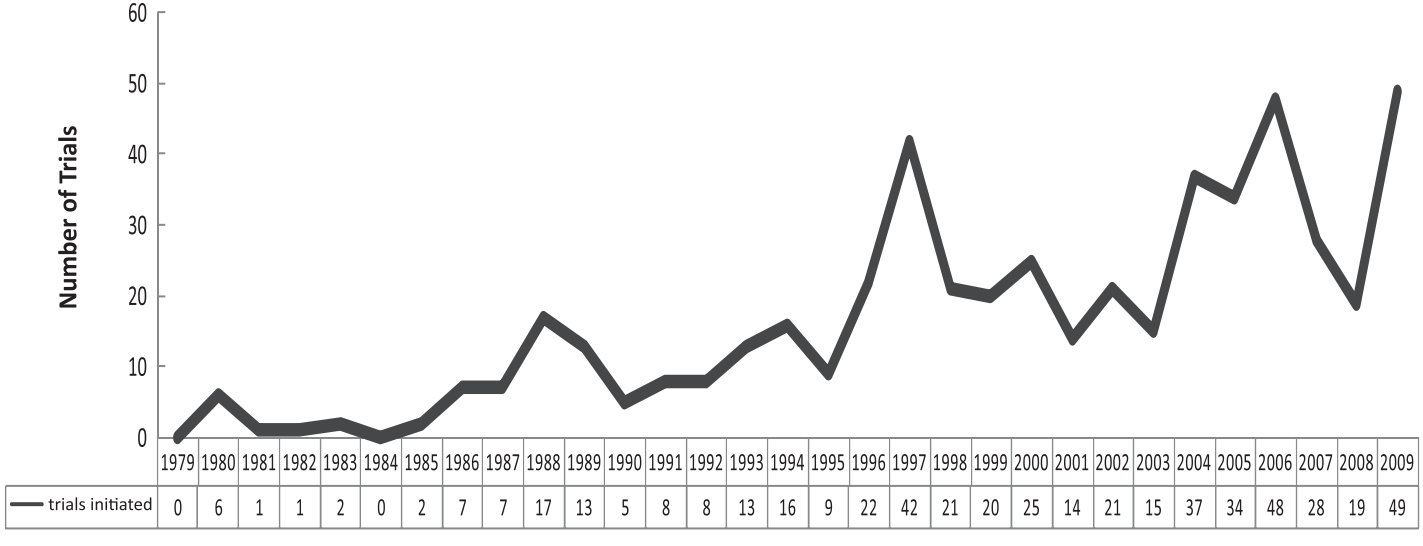
Although in the following years the number of cases remained relatively high, a few, in particular, stand out. Specifically, 1997 (42 trials), 2006 (48 trials), and 2009 (49 trials) are the years with the greatest amount of political

[6] In total, 16 interviews were performed in the city of Quito, between the months of June and August of 2010. The questions asked respondents to contextualize the political situation of each institutional reform and also to evaluate the effects within the CSJ during each one of these events.

[7] During this period, the famous "Ran Gazit" case took place against ex-President Febres-Cordero. Basically, the former president was accused of paying for the professional services of security expert Ran Gazit with public resources (see El Universo 2009). In the end, the CSJ issued an acquittal, *nolle prosequi-sobreseimiento definitivo*.

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Figure 1.
Number of Trials against Political Actors—*Judicialization of Politics*—in the Supreme Court of Justice (1979-2009)



	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
trials initiated	0	6	1	1	2	0	2	7	7	17	13	5	8	8	13	16	9	22	42	21	20	25	14	21	15	37	34	48	28	19	49

Source: Files of Ecuadorian Supreme Court.

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judicialization. Similar to the cases cited earlier, these coincide with periods of change in the alignment of political forces, fundamentally due to the end of a presidential term. Indeed, 1997 was the year of the fall of President Bucaram and the rise to office of Fabián Alarcón. In 2006, Palacio's term ended, and in 2009, President Correa began his presidency with a new constitution and a distribution of political power that was quite different from that seen in Ecuador since the return of democracy in 1979 (Basabe-Serrano 2009a, 387-90). Next, a sequence of historical narratives is presented describing the main institutional changes that have occurred in the CSJ.

October 1984: Tanks Surround the Palace of Justice

A little more than four years after the promulgation of the constitution and the transition to democracy in Ecuador, the first modification of the rules of the CSJ occurred. Basically, the judicial term of office was reduced from six to four years, and the period of accountability before the National Congress (CN) was increased to up to one year after leaving office. The first reform aimed to reduce the term of office of the national president, which was also reduced from five to four years, equal to that of the judges. The second reform increased the mechanisms for horizontal accountability. These changes to institutional oversight became the focal point of the subsequent dispute between President León Febres-Cordero and the CN, which designated a new CSJ in October of 1984.

Just two months after León Febres-Cordero became president, the legislative majority led by the opposition party, the Democratic Left (Izquierda Democrática [ID]) attempted to completely impeach the CSJ, arguing that the terms for which those judges were appointed were now defunct under the constitutional reforms. In response, the executive ordered tanks to surround the CSJ building, thus preventing the entrance of the judges recently appointed by the legislature. The government's justification, based on the same constitutional reform, was that the previous judges still remained in office, and thus the new appointments were spurious. In the end, an agreement between the Social Christian Party and the ID ended the conflict; a new supreme court was formed to replace the two in dispute.[8]

More Judges and a Change of Legal Faculties: Reforms during Durán-Ballén's Administration

At the end of 1992, the CSJ experienced a new package of constitutional reforms, which were patently more extensive and which affected the organic

[8] In a personal interview with the author, Blasco Peñaherrera Padilla (2010), vice president to President Febres-Cordero, claimed that the president argued that his fundamental obligation was to "enforce the constitution," and that for this reason, he did not allow the CSJ to be led by Gustavo Medina López, an active militant of the ID. After more than a month where Ecuador had two supreme courts, the conflict ended with a new court (see El Universo 2002).

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structure of the maximum court authority of Ecuador. In effect, the six-year term of office established in the 1979 Constitution was restored, and every two years, a third of the bench would be changed. Whereas previously the power to nominate judges was in the hands of the CN alone, the new constitutional reform also granted this to the president. Both offices could present the same number of candidates. The existing possibility of reelection became indefinite with this reform. The duty of constitutional control held by CSJ was modified to be handled by the Constitutional Chamber of the Supreme Court, which was also established in the reform.

As perhaps the most critical aspect of this constitutional reform, the number of Supreme Court judges went from 16 to 31, and a third-instance trial became a cassation.[9] As a result, an internal bureaucratic reorganization occurred in the court. Going from five chambers with no specialization made up of three judges each, a configuration emerged where there were six specialized chambers made up of five Supreme Court justices each. However, the figure of the president of the CSJ was preserved as a special judge who did not belong to any of the chambers but rather served to judge crimes committed by high state officials, such as the president, the legislators, and the high command of the armed forces. Finally, this reform led to the creation of the National Judicial Council (CNJ), which would oversee the financial and administrative aspects of the national court system, as these activities were considered to be beyond the jurisdiction of the CSJ. Given that this new institution was charged with assigning judges to the intermediate and lower courts of the entire country, this institutional change belies the clearly political motivations behind it.

The Creation of the Constitutional Court and the Referendum in 1997

Three years following these institutional changes, in the middle of January 1996, a third constitutional reform occurred which affected the CSJ. On one hand, the ability of the CSJ to monitor constitutionality was eliminated with the creation of the Constitutional Tribunal (TC). On the other hand, the internal structure of the CSJ was once again changed, as the CSJ was given ten specialized chambers with three judges each. It is worth noting that a side effect of this reform was the creation of a second chamber with jurisdiction in criminal matters, which led to realignment of judges and of power structures within the CSJ. As a result of the creation of the TC, a new player with veto power was incorporated into the country's decision-making process (Basabe-Serrano 2009b, 124).

[9] Specifically, the cassation prevents Supreme Court judges from evaluating evidence taken during a process. Their role, therefore, was reduced to correct errors of pure law committed by lower court judges when issuing a sentence. Legal theory states that, strictly speaking, the cassation is not a resource but rather an action directed against the judge who has violated the norms expressed in substance, *in judicando*, or as an adjective, *in procedendo* (Albán Gómez 1994; Tolosa Villabona 2005).

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Subsequently, as a way to translate the popular will expressed in the referendum of May 25, 1997, the fourth constitutional reform occurred, which directly affected the CSJ on July 31 of this same year.[10] Among the changes, the most important was the declaration of life tenure periods for CSJ's judges. This institutional reform, inspired by the arguments of the *Federalist Papers* in favor of one independent judicial branch, amounted to an innovation in the institutional life of the CSJ. This reform was a major step toward granting judges more autonomy. Similarly, the selection filters were made more restrictive, increasing the years of experience necessary from 15 to 20, with professional practice or a degree in law as a basic requirement to apply for a bench with the CSJ. At the same time, the reform incorporated co-optation as an institutional mechanism to fill vacancies in the CSJ, thus excluding the CN from making appointments. In this way, a court that would be capable of self-regulation and autonomous supervision was sought.

The 1998 Constitution and the New Institutional Changes in the Supreme Court

In the 1998 Constitution, the changes in the institutional design of the CSJ were related to small modifications with regard to what was established in the fourth amendment to 1979 Constitution. In line with this, it became explicitly impossible to impeach the members of the CSJ before the CN, except under certain circumstances. However, the number of years of experience necessary to hold a position in the CSJ was once again reformed, returning to 15 years. With regard to the effective membership of the CSJ, which included life tenure, the CN designated the members "one last time" (Vela 2010). For nomination of these candidates, a specialized commission was created, which had expressly been designated by the fourth constitutional reform. This commission was charged with selecting the best candidates in an open contest.

According to most of the interviewees, with regard to the quality of the verdicts and the academic background of the judges, this was the best CSJ cohort since the return to democratic regime. Additionally, an article that compares the degree of judicial independence of Chile, Peru, and Ecuador beginning in the 1990s establishes that of the different CSJ cohorts under consideration, the one that served in Ecuador from 1998 to the end of 2004 had the greatest amount of autonomy in terms of political power (see El Universo 2011).

The Gutiérrez–Bucaram Alliance, the "Pichi Court," and the New Institutional Variations

This CSJ operated until December of 2004, when a legislative coalition formed by the Patriotic Society Party of President Lucio Gutiérrez and a set of

[10] The referendum was called for by then interim President Fabián Alarcón. The main objective of this move was to legitimize his government, which had been constitutionally called into question. Question number 11 of the referendum referred to the need to have a CSJ with life tenure.

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smaller political groups headed by the Ecuadorian Roldosist Party (Partido Roldosista Ecuatoriano) dismissed the court's justices in an openly unconstitutional manner (Basabe-Serrano 2011, 81). The legislative resolution that dismissed the CSJ judges was dictated on December 8, 2004. With the same act, the judges of the so-called Pichi court—an allusion to the CSJ's new president, Guillermo "Pichi" Castro, a personal friend of ex-President Abdalá Bucaram—was formed. In fact, a few days after taking office, the new president of the CSJ nullified all criminal trials against the ex-president, who at the time was a fugitive in Panama (Basabe-Serrano 2012, 139).

With the abrupt end of the Gutiérrez administration, the CSJ appointed by him was also dissolved. Thus, after a limbo of almost a year without judges in this body, in addition to the lack of members of the Constitutional Court (CC), on May 26, 2005, the Organic Law of the Judiciary (LOFJ) was reformed, producing new changes in the internal structure of the CSJ. First of all, along with a series of openly unconstitutional restrictions, the age of 65 was established as the maximum age for a Supreme Court judge.[11] In addition, a qualification commission was established to select the new members of the CSJ, which were nominated by the general population.

Less than a year after this institutional reform, on March 28, 2006, the rules governing the CSJ were again modified. This time, the power to hear criminal cases against high officers of the state was transferred from the president of the CSJ to chambers specializing in criminal matters. Although the formal motivation of this reform was to make the trial process swifter, at heart, it implied a considerable shift in the political power within the CSJ. Research has demonstrated that the resolution of matters with political connotations by a single judge clearly runs against the logic of exchange and negotiation that prevails in the context of collegiate chambers (Epstein and Knight 1998, 112-35; Maltzman, Spriggs, and Wahlbeck 2000, 128-30).

The 2008 Constitution and the National Court of Justice

Finally, the 2008 Constitution led to yet another fundamental restructuring of the Ecuadorian system of justice. The changes range from the name of the highest body itself, which would now be called the National Court of Justice (CNJ), to matters of profound political consequence to the structure of this court. One such example is related to the possibility that the newly created CC would be able to review verdicts decided by the CNJ under particular, constitutionally established, conditions—*acción extraordinaria de protección*. The term limit for judges was restricted to nine years, with partial changes of a third of the bench every three years. Furthermore, the number of CNJ members

[11] Among the institutional filters for selection, it was established that a candidate should not have actively participated in politics or defended cases of narco trafficking which have ended in convictions. Also, those who had been representatives of companies or legal studies with pending litigations with the state were prohibited from selection.

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was decreased from 31 to 21. Justices were prohibited from reelection, and the requirements to join this court were relaxed. The only requirement is that judges have at least ten years of teaching, professional, or judicial experience. In other words, there is no minimum age to become a member of the CNJ.

With regard to the selection mechanisms, the judiciary council was declared as the body to make selections; any citizen could become a candidate.[12] In contrast to all previous cases of institutional reform, the CNJ currently does not have the formal power to propose constitutional reform. The new CNJ also has eight specialized chambers consisting of three judges each. What is striking in the current institutional design is that each judge should choose at least two specializations. Thus there is a random selection of judges assigned to each case that reaches the CNJ among the judges who are part of the respective specialization to obtain the three judges who will issue a sentence.[13]

Since the return to democratic regime in 1979, the Ecuadorian judicial system has undergone a series of institutional reforms that, one way or another, altered the autonomy of the judges in the judicial decision-making process. On average, these changes occurred every 3.75 years, which accounts for the large amount of variations found in the dependent variable of institutional change. The inconsistent justification of these modifications is clearly observable in the permanent efforts to reform the institutional design to return to provisions that were in force before. The changes related to the term of office for judges or to the requirements to sit on the CSJ bench are empirical reflections of this argument. Table 1 details the cases of institutional change seen in the CSJ during the period I just described.

A Model to Explain Institutional Change in the Supreme Court of Ecuador, 1979-2009

Following this descriptive analysis, this section proposes a logistic model to evaluate the role played by the judicialization of politics and the political power of the present court with regard to these institutional variations. As I mentioned earlier, this article interprets the judicialization of politics as *the process of transferring conflicts from the political to the judicial arena*. With regard to the power of the president, it is assumed that the executive wields more political power when beginning a term in office, and this power decreases as time goes

[12] The judiciary council is elected by the Council for Citizen Participation and Social Control, which directly represents the country's citizens. However, with the Popular Referendum of May 7, 2011, the membership of this organism was drastically changed. The new members of the judiciary council shall be one representative of the CNJ, who will preside over it, the attorney general, the public defender, a representative of the executive, and one from the National Assembly.

[13] The mechanisms for structuring the specialized courts and its duties are legislated in the Organic Code of the Judiciary, published as a Supplement to the *Registro Oficial* of March 9, 2009 (Derecho Ecuador 2011).

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Table 1. Changes in the Institutional Design of the Ecuadorian Supreme Court (1979-2009)

Institutional Design/Issues	1979 Constitution	First Constitutional Amendment	Second Constitutional Amendment	Third Constitutional Amendment	Fourth Constitutional Amendment
Date of promulgation in *Registro Oficial*	March 27, 1979[a]	September 1, 1983	December 23, 1992 (s)	January 16, 1996	July 31, 1997
Judges term	6 years	4 years	6 years with partial renovation of 3 judges each 2 years	6 years with partial renovation of 3 judges each 2 years	Life tenure
Number of judges	16	16	31	31	31
Requirement to selection process	40 years and 15 of experience[b]	40 years and 15 of experience[b]	45 years and 15 of experience[b]	45 years and 15 of experience[b]	45 years and 15 of experience[c]
Institution that choose the judges	CN	CN	CN	CN	CSJ
Institutions that nominate candidates to judges	CN	CN	President, CN, and CSJ, all in equal number of candidates	President, CN, and CSJ, all in equal number of candidates	CSJ
Mechanism to fill benches	CSJ temporarily until CN selecting permanent judges	CSJ temporarily until CN selecting permanent judges	CSJ temporarily until CN selecting permanent judges	CSJ temporarily until CN selecting permanent judges	Co-option
Reelection	Yes	Yes	Yes, undefined	Yes, undefined	Life tenure
Judicial review	Yes, concentrated and diffuse	Yes, concentrated and diffuse	Yes, concentrated and with report of CSJ's Constitutional Chamber	Eliminated with the creation of TC	Eliminated with the creation of TC in 1996
Impeachment	Yes, when the judges are in office	Yes, until 1 year after to leave the office through CN	Yes, until 1 year after to leave the office through CN	Yes, until 1 year after to leave the office through CN	Yes, until 1 year after to leave the office through CN
Constitution amendments	Yes	Yes	Yes	Yes	Yes
Chambers composition	Without specialization. 5 chambers of 3 judges each	Without specialization. 5 chambers of 3 judges each	With specialization. 6 chambers of 5 judges each	With specialization. 10 chambers of 3 judges each	With specialization. 10 chambers of 3 judges each
Competencies	Third instance trial	Third instance trial	Cassation	Cassation	Cassation
Competent judge to persecute the higher government staff	CSJ's president	CSJ's president	CSJ's president	CSJ's president	CSJ's president

Continued.

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Table 1. (continued)

Institutional Design/Issues	1998 Constitution	Reform of the Organic Law of the Judiciary	Reform of the Organic Law of the Judiciary	2008 Constitution
Date of promulgation in *Registro Oficial*	August 10, 1998	May 26, 2005	March 28, 2006	October 20, 2008
Judges term	Life tenure	Life tenure	Life tenure	9 years with partial renovation of 3 judges each three years
Number of judges	31	31	31	21
Requirement to selection process	45 years and 15 of experience[c]	45 years, no more than 65 years, and 15 years of experience[d]	45 years, no more than 65 years, and 15 years of experience[d]	10 years of experience[e]
Institution that choose the judges	CN "on last time"	CN "on last time"	Rating committee "for this occasion"	CJ
Institutions that nominate candidates to judges	CSJ	Citizenship	Citizenship	Citizenship
Mechanism to fill benches	Co-option	Co-option	Co-option	CJ
Reelection	Life tenure	Life tenure	Life tenure	No
Judicial review	Eliminated with the creation of TC	Eliminated with the creation of TC	Eliminated with the creation of TC	No, CC is created
Impeachment	No	No	No	No
Constitution amendments	Yes	Yes	Yes	No
Chambers composition	With specialization. 10 chambers of 3 judges each	With specialization. 10 chambers of 3 judges each	With specialization. 10 chambers of 3 judges each	With specialization. 8 chambers of 3 judges each. Each judge is at least 2 chambers[f]
Competencies	Cassation	Cassation	Cassation	Cassation
Competent judge to persecute the higher government staff	CSJ's president	CSJ's president	Criminal Chambers of CSJ	Criminal Chambers of CSJ

Notes: Shaded areas indicate institutional changes.

[a] Effective from August 10, 1979.

[b] Teaching, professional practice, or judicial activity.

[c] Judicial Council CJ is created.

[d] It includes other requirements.

[e] A minimum age is not required.

[f] The structure of chambers is detailed in Organic Code of Judiciary.

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Table 2. A Logistic Model to Explain Institutional Changes in the Ecuadorian Supreme Court (1979-2009)

Variable	Statistics	Model
Judicialization of politics	Coefficient	0.09023*
	Standard error	0.04778
	e^b	1.0944
	e^bStdX	1.2382
	Marginal effects	0.0154
Political power of president	Coefficient	0.87601**
	Standard error	0.2602
	e^b	2.4013
	e^bStdX	1.5492
	Marginal effects	0.1495
Constant	Coefficient	5.136***
	Standard error	0.29

Notes: *** p < .001; ** p < .01; * p < .05.
e^b = EXP(b) = change in the log-odds for a unit increase in X. e^bStdX = exp(b*|SD of X) = change in the log-odds for a standard deviation change in X.

on. Although this assumption has not been seen in cases such as Presidents Bachellet, Lula, or Correa, the decrease in the political influence of the president as his administration wears on is the general rule of thumb for the region.

To measure the degree of institutional change, a dichotomous variable that captures this information on a monthly basis was designed. Thus a month when an institutional reform occurred was designated a "1," and the months when no changes occurred were designated as "0." Using this method, 365 observations (n = 365) were obtained. In addition, the variable of the judicialization of politics was also measured monthly, using as a proxy the number of criminal trials where the litigants involved were political actors. Information on these types of political trials was collected from the archives of the CSJ presidency, along with the archives from the Criminal Chambers of the CSJ and of the CNJ. Given that presidents, legislators, mayors, prefects, and other political authorities are judged exclusively by the head of the CSJ, these archival collections were the appropriate location to measure the variable in question.

Finally, to account for the political power of the president, a dichotomous variable was designed as a function of the electoral calendar. Thus a value of "1" corresponds to the twelve months following the arrival of a new president, while a value of "0" is used otherwise. Interim presidents and those who assumed power after the departure of a president were considered as new presidents. This is the case of Fabián Alarcón, Gustavo Noboa, and Alfredo Palacio. Table 2 presents the results of this model.

According to the sign of the coefficients, the two variables considered in the analysis exert a positive effect over the changes in the institutional design of the CSJ and are statistically significant. In other words, an increase in trials

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involving political actors constitutes a good predictor of a subsequent process of institutional change. Similarly, the first months of a new presidential administration, which entail greater political power, led to greater opportunities for changes in the institutional design of the courts. Based on this, and to evaluate which of the chosen variables most affects judicial instability, the standard deviation of each variable was used as a unit of change. Thus it was shown that, even though there is no ostensible difference, the judicialization of politics has a smaller effect (1.23) than the arrival of a new president in office (1.54).

Based on the analysis of the marginal effects and keeping the variable of the political power of the president constant, it seems plausible to argue that during a month where there were no trials put before the CSJ, which coincides with the lowest value for the variable of the judicialization of politics, there is a .19 probability that there will be an institutional change in the CSJ. Similarly, during a month where 22 trials were brought before the CSJ, the highest value for the judicialization variable, there is a probability of .64 that there is an event of institutional change that affects the CSJ. Nevertheless, keeping the average value of the judicialization of politics variable constant, it can be shown that during the first twelve months of a new government, there is a .30 probability of a change in the institutional design of the CSJ, while during other periods, the probability decreases to .15. While the marginal effect of the judicialization of politics variable is .015, that of the variable referring to the political power of the president is .149.

In more intuitive terms, in the case of Ecuador, the arrival of a new president exerts a specific influence over institutional change. In this regard, the lack of legislative majorities that support the governing administration serves as an incentive for the executive to seek support for his political agenda by maintaining politically friendly courts (Basabe-Serrano, Pachano, and Mejía Acosta 2010, 71). From another point of view, the logic of action described is a way to affect judicial autonomy in terms of the interference of the other branches of government on the independence of the courts. Another possible explanation is that, as presidents are weak in terms of parliamentary support, the alternative is to seek governing coalitions where reforms of the judicial branch and a resulting redistribution of power in this arena are part of the exchanges to achieve legislative majorities. This explanation is coherent with the formation of informal government coalitions, as planted by Mejía Acosta (2009, 13-4).

Yet the influence of the arrival of a new president over the institutional changes that affect the CSJ could also be related to the greater popular acceptance of the president's administration during the first months of government. In reality, including the variable of citizen approval of the president would be the best way to test this conjecture. Unfortunately, this information is only available in monthly form beginning at the end of 1988, which precludes systematic analysis. In spite of this, however, it should be noted that the arrival of a new president and his approval by citizens may be highly correlated with one another, which would produce a problem of collinearity in the statistical analysis.

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With regard to the judicialization of politics, the empirical evidence indicates increased involvement of the judicial branch in political disputes and is associated with a greater probability of institutional change. The saturation of unfulfilled political compromises, benefits that are never fully granted, and the flaring of *caudillista* confrontations, all addressed in the form of criminal cases before the CSJ, are solid predictors of oncoming institutional reforms of the judicial branch. According to the theoretical claims advanced here, institutional change is produced when the caseload before the CSJ is so large that all political actors feel the need to reform the structure of the CSJ. Thus by obtaining positions for ideologically aligned judges, modifying the makeup of Criminal Chambers, changing the judicial decision-making structure, or reconfiguring the necessary majority to appoint the president of this court, the political actors can maintain control over the judicial branch and its performance.

As has been indicated, in the game of political aggressors and victims, the judicial arena plays the role of sounding the alert on disagreements that have arisen, which can distort its function of independently administering justice. In fact, the cases with political connotations that ended up receiving a sentence or a firm judicial decision are extremely rare and are seen when an additional component is present, which is not discussed here. In the end, the role of the CSJ is instrumental and serves as a means to moderate political conflict or as a pressure mechanism for political actors seeking alternatives to the crisis in governability and the lack of agreements.

Institutional change in the CSJ can, therefore, be understood as the mechanisms through which conflicts are resolved among political actors. Specifically, institutional change endows greater room for influence within the judicial system to those who are involved in a scene of political tension. According to this logic, an increase in the number of CSJ judges may be understood as a way of sharing power structures among the actors involved in this tension. The changes in the makeup of the specialized courts, above all related to criminal matters, follow the same logic. A similar relationship is found as a consequence of change in the requirements and mechanisms for the selection of judges.

Certainly, institutional changes that affect the CSJ are more likely when the president is beginning his term in office, and also when the levels of political conflict are so high that institutional changes in the CSJ are necessary to allow for a new distribution of power within these courts. Thus sharing perks and positions of power within the CSJ is the means by which the effervescence of political conflict may resume its normal channel.

Conclusions

Within the discussion on the factors that affect judicial stability and democracy in Latin America, this article has indicated that the need to have judges who support the political agenda of the president is the main reason for

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which judges are removed at the highest level. Although this pattern of behavior is atypical among certain countries, such as Chile, Costa Rica, and Uruguay, the reality of the region appears to be guided by this description. The present article has helped expand existing empirical findings by analyzing a less explored angle—institutional changes that affect the supreme courts—and could implicate a threat to judicial autonomy of the courts in relation to the other branches of government. For this, the determinants of institutional change in Ecuador's CSJ were analyzed, as it is one of the least stable courts of justice in Latin America, yet has paradoxically received little attention in extant literature.

Among the main findings of this article is that the desire of the executive to obtain positions of power in the courts is a variable that explains robustly the variation in the institutional design that governs Ecuador's Supreme Court of Justice. I have shown that the first months of governance are crucial to predict the advent of reforms in the institutional structure of this national high court. The main contribution of this article demonstrates that these institutional changes to the Ecuadorian Supreme Court came about to alleviate tensions and political conflict between political actors and coalitions. Many types of institutional changes, such as the redistribution of positions and institutions in the CSJ, alteration to selection procedures, expansion to the number of judges or alteration of the criminal jurisdiction, arose as a compromise among political actors to mitigate political conflict.

However, the empirical findings presented here require a rigorous testing process, and subsequent research is needed to extend this analysis to include additional courts or countries. In this regard, this article should be viewed as a starting place, from which additional analyses may consider institutional reforms of supreme courts in a more holistic manner. Finally, the court's role as mediator of social and political conflict, by generating opportunities for political contributions that may be assumed by the supreme courts, constitutes a piece of evidence that warrants further research to better understand the relationship between politics and justice in Latin America.

About the Author

Santiago Basabe-Serrano holds a PhD in Political Science from *Universidad Nacional de San Martín*, Buenos Aires-Argentina. He is currently an associate professor at the Facultad Latinoamericana de Ciencias Sociales, FLACSO-Ecuador. His research interests include the performance of supreme courts in Latin America, and the interaction between judges and politics. His most recent publications are "Judges without Robes: Exploring Judicial Voting in Contexts of Institutional Instability. The Case of Ecuador's Constitutional Court (1999-2007)," *Journal of Latin American Studies* 44 (1), and *Jueces sin toga: políticas judiciales y toma de decisiones en el Tribunal Constitucional del Ecuador, 1999-2007.*

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