THE PROTECTION OF JUDICIAL INDEPENDENCE IN LATIN AMERICA

Keith S. Rosenn *

SUMMARY: I. *Introduction.* II. *Defining Judicial Independence.* III. *Measuring Judicial Independence.* IV. *Legal Measures Guaranteeing Judicial Independence.* 1. *Measures to Protect the Integrity of Judicial Decisions.* 2. *Measures Protecting Personal Independence.* V. *Forms of Interference with Judicial Independence.* 1. *Formal Abrogation of Judicial Independence.* 2. *Deprivation of Jurisdiction.* 3. *Wholesale Dismissal of Judges.* 4. *Transference of Reassignment of Judges.* 5. *The Illusory Guaranty of Irreducible Salaries.* 6. *Executive Domination.* VI. *Conclusions.*

I. INTRODUCTION

Latin American judiciaries have been frequently criticized for lacking independence.[1] Seldom, however, have the critics explained the meaning of the talismanic phrase "judicial independence", or how they know that a particular judiciary is independent or subservient. Even rarer is an explanation of why an independent judiciary is desirable. The proposition is regarded as self-evident. As Part I of this essay demonstrates, judicial independence is a concept fraught with ambiguities and unexamined premises. Part II explains the essential futility of attempts to quantify judicial independence. Part III explores the legal measures that have been utilized in Latin America to attempt to insure judicial independence. Part IV reviews the ways in which the independence of Latin American courts has been undermined. The essay concludes that formal constitutional guarantees of judicial independence have been largely ineffective in much of Latin America

*Professor of Law and Director of Graduate Foreign Law Program, University of Miami.

[1] *E.g.*, Duncan R., *Latin American Politics*, 152-3 (1976); Edelman, A., *Latin American Government and Politics*, 477-80 (Rev. Ed. 1969); Wiarda T. & M. Kline (eds.), *Latin American Politics and Development* 66, 89 (1979); Needler, M., *Latin American Politics in Perspective* 155 (1965); Lazar, A. Von, *Latin American Politics* 41 (1971); Moreno, *Justice and Law in Latin america: A Cuban Example*, 12 *J. Inter-Am. Stud. & World AFF*, 367, 373-78 (1970).

because of certain structural features of Latin American politics and legal institutions. Until there is a much greater commitment on the part of both governments and the governed to constitutionalism and the rule of law, lack of judicial independence will continue to plague Latin America.

II. Defining judicial independence

What does judicial independence mean? Independent from whom and independent of what? Why does it mater whether a judiciary is independent? Is an independent judiciary always better than a non-independent judiciary? Is judicial independence critical to insuring observance of constitutional guarantees? To what extent is judicial independence a function of a court's ability to avoid deciding highly controversial cases?

Judicial independence is a relaitive rather than an absolute concept. All judiciaries are to some extent independent and to some extent subservient.[2] Courts simply do not come packed like tennis balls, hermetically sealed from their environment. Regardless of whether they are popularly elected, appointed by some combination of the executive, legislature or the judiciary itself, or selected buy competitive examination, judges are likely to have a belief system in tune with the dominant political culture.

Surely, judicial independence does not require that judges remain oblivious to all political considerations when deciding cases. Political factors, such as whether a nation is at war, whether granting a requested remedy will indicate disrespect for a coordinate branch of government, or whether a problem is likely to be satisfactorily resolved by the political processes, obviously do and should influence decisions of independent judiciaries. Moreover, one can even find independent judiciaries in authoritarian regimes. Toharia's intriguing study of the Spanish judiciary under Generalisimo Franco reveals that the ordinary

[2] This point was made cogently by Jerome Cohen, former Professor of Law at Harvard, in the context of the judiciary in Communist China:

> "Judicial independence' is not something that simply exists or does not exist. Each country's political-judicial accommodation must be located along a spectrum that only in theory ranges from a completely unfettered judiciary to one that is completely subservient. The actual situation in all countries les somewhere in between.

Cohen, "The Chinese Communist Party and 'Judicial Independence': 1949-1959", 82 *Harv. L. Rev.* 867, 972 (1969).

courts functioned with a high degree of independence, largely because politically sensitive cases were consistently diverted from the regular courts into special tribunals.[3]

Nor does judicial independence signify that judges must be free to decide cases in accordance with their personal predilections. An independent judge need not sit like a kadi under a banana thee, dispensing justice as he or she sees fit that day. A judge is not expected to act independently of the law or in disregard of ethical considerations and the positions taken by counsel in the case at bar. An independent judiciary does not signify an irresponsible judiciary; judges have a responsibility to decide cases in accordance with preestablished rules of procedural and substantive lew.[4]

One of the most commonly cited definitions of judicial independence is that of Professor Theodore Becker:

> Judicial independence is *a)* the degree to which judge believe they can decide and do decide consistent with their own personal attitudes, values, and conceptions of judicial role (in their interpretation of the law), *b)* in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and *c)* particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.[5]

While setting out the core concept of judicial independence, Becker's definition needs further refinement. One problem is that it simplistically amalgamates independence from political authorities with the complex issue of independence from other judges. Quite different considerations pertain where the issue is the independence of the judiciary as a corporate body from where the issue is the internal independence of the individual judge from his judicial colleagues. Modern legal systems typically arrange courts in hierarchical fashion. Lower court judges are expected or required to adhere to decisions of higher for reasons of predictability, uniformity, and soud judicial administration. Even in countries that do not formally adhere to the doctrine of *stare*

[3] Toharia, "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain", 9 *Law & Soc. Rev.* 475 (1975).

[4] Eckhoff, "Impartiality, Separation of Powers, and Judicial Independence, 9 *Scandinavian Stud. in Law*, 9, 17 (1965).

[5] Becker, T., *Comparative Judicial Politics*, 144, (1970).

decisis, courts are not only theoretically required to adhere to decisions of higher courts on remand,[6] bult in practice they generally follow decisions of the higher courts as well as their own decisions.[7] If one applied Becker's definition literally, the only countries with truly independent judiciaries would be those that permitted judges to ignore decisions of higher courts. One can, of course, find judges who feel their independence would be compromised if they were obliged to follow decisions of higher courts.[8] Nevertheless, judicial independence surely does not require a system in which lower courts are free to ignore decisions of the higher courts. Nor does it prevent use of a system in which promotion, removal, transfer, and salaries of judges are left to more senior judges, who normally take into account the quality of judicial performance. On the other hand, a higher court can misuse its supervisory powers to discipline the independence of lower court judges for ideological reasons. Yet this possibility should not require insulation of judges from the influence of other judges as a condition of judicial independence. Judicial independence does not imply judicial irresponsibility. On the contrary, an independent judiciary wields substantial power and must be held accountable for misuse of that power. Judicial accountability can be achieved through a variety

[6] Panama has made clear in Article 207 of its 1983 Constitution that this basic principle does not violate judicial independence.

> Magistrates and Judges are independent in the exercise of their functions and are submitted only to the Constitution and the Law; but lower court judges are obliged to obey and carry out decisions of their hierarchical supervisors revoking or reforming, by virtue of legal appeals, their decisions.

The classic exception is France, where decisions of the highest ordinary court, the *Cour de Cassation,* are technically not binding on the Courts of Appeal, even in the particular case on appeal, until the third *renvoi.* David, R., *French Law: its Structure, Sources, and Methodology,* 43-44 (M. Kindred trans., 1972); Herzog, P., *Civil Procedure in France,* 158-64 (1967); Yiannopoulos, "Jurisprudence and Doctrine as Sources of Law in Lousiana and in France", in *The Role of Judicial Decisions and Doctrine in Civil Law and Mixed Jurisdictions,* 69, 73 (J. Dainow ed. 1974). As a practical matter, however, French judges pay careful attention to decisions of higher courts.

[7] Glendon, M., M. Gordon, & C. Osakwe, *Comparative Legal Traditions,* 208-10 (1985).

[8] Judge Aldisert tells of an Italian trial judge, who upon hearing a lecture explaining common law notions of precedent, leaped to his feet and passionately declared: "My independences as a judge would be completely undermined if I had to follow the decisions of the court of appeals." "Rambling through Continental Legal Systems", 43 *U. Pitt. L. Rev.* 935 (1982). For an unusual decision by a U.S. judge expressing his philosophical adherence to his Italian counterpart, see Judge Cambell's decision in *United States v. Wiley,* 184 F. 679 (N. D., Ill., 1960).

of techniques, including supervision by higher courts or judicial councils.[9] If there is no internal judicial accountability, pressure for intervention by the executive or legislative branches is impossible to resist. Historically, the threat to judicial independence from outside interference has been far greater than from in house interference.

A second problem with Becker's definition is that it ignores the crucial role of courts in finding and interpreting the facts as well as the law. If judges or juries are induced to determine the facts in a skewed manner, judicial interpretation of the law may not matter. More importantly, failure of the political authorities to cooperate with the courts in finding the facts may wholly frustrate efforts by the judiciary to operate effectively and independently.[10] Similarly, if the political authorities intimidate witnesses and lawyers, the independence of the judiciary will be severely compromised.[11]

A third problem with the definition is that it ignores private parties' undermining judicial independence by bribery or intimidation. A judge whose vote can be purchased by money, gifts or favors is

[9] See, Cappelletti, "'Who Watches the Watchmen?' A Comparative Study on Judicial Responsability", in *Judicial Independence: The Contemporary Debate*, 550 (S. Shetreet & J. Deschenes, eds. (1985).

[10] The Supreme Court of Argentina was totally frustrated by the military authorities' refusal to cooperate in providing any facts about the whereabouts of thousands who mysteriously disappeared in Argentina during the 1970s. Consequently, the writ of habeas corpus ceased to be an effective remedy for protection of the constitutional rights of life and liberty. The Argentine Supreme Court was reduced to admitting openly that the country was suffering from an "absence of justice" because the "judges are being deprived of those necessary conditions to enable them to exercise their jurisdictional powers... ." *Pérez de Smith y otros*, 300 Fallos 1282, 1283 (1978), 1979-A La Ley 429. *See generally* Garro, *The Role of the Argentine Judiciary in Controlling Governmental Action under a State of Siege*, 4 Human Rights L. J. 311, 332-37 (1983); Snyder, "State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication", 15 *U. Miami Inter-Am. J. Int'L L.* 503 (1984). During the early 1980s, the Guatemalan judiciary encountered similar lack of cooperation from the military government when issuing writs of *habeas corpus* for *desaparecidos*. *Americas Watch, Guatemala: A Nation of Prisioners*, 21-22 (1984).

[11] There is evidence that this phenomenon has been happening this year in Chile in connection with the investigation into the murder of Rodrigo Rojas De Negri, a 19 year old U.S. resident who died in Chile in July 1986, after he and a teenage girl were doused with gasoline and set afire, allegedly by members of the Chilean military. The investigation also casts considerable doubt about the independence of the Chilean judiciary. See OAS, *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, 135-139 (1986). The practice of intimidating witnesses and lawyers occurred regularly in Argentina, Brazil, and Uruguay during the 1970s during the height of campaigns by military regimes to eliminate subversive elements.

hardly independent. Nor is a judge independent if his decision is motivated by fear for his personal safety or that of his family. In a country like Colombia, where fifty-seven judges have been murdered in the past five years, the bribes of drug traffickers, often accompanied by all to real death threats, have seriously compromised judicial independence.[12]

Therefore, I would define judicial independence simply as the degree to which judges actually decide cases in accordance with their own conceptions of the evidence, law and justice, free from the coercion, blandishments, interference, or threats of governmental authorities or private citizens. Judicial independence is indispensable for the administration of justice and the protection of individual rights from arbitrary deprivations. As Judge Kaufman has explained: "Adjudication based upon the noble precept 'equal justice under law' requires impartiality, and impartiality demands freedom from political pressure." [13] Societies characterized by an absence of justice are highly unstable. Moreover, the personal and transactional insecurity stemming from the type of justice delivered by a dependent judiciary is likely to retard socio-economic development.

The desirability of judicial independence often depends upon whether one agrees or disagrees with the outcome of judicial decisions, particularly those involving constitutional interpretation. Judicial independence to be lauded by liberals and decried by the conservatives when the decisions follow a liberal bent; conversely, judicial independence tends to be deplored by the liberals and lauded by the conservatives when the decisions take a conservative tack. If the formal legal system is universalistic (*i.e.*, the same rules apply to everyone), judicial independence is desirable only if one is seriously committed to the ideal

[12] See Riding, "Cocaine Billionaires: The Men Who Hold Colombia Hostage", *New York Times*, Mar. 8, 1987, Sec. 6, at 27, 28-32; "Deaths Mount as Drug War Rages", *Miami Herald*, Feb. 11, 1987, at 1, 8. The violence has claimed not only lives of 36 lower court judges, but of a dozen members of the Supreme Court as well. Eleven members of Colombia's Supreme Court were killed on November 5, 1985, when the army stormed the Palace of Justice after its seizure by leftist guerrillas. Another Supreme Court Justice, Hernando Baquero Borda, was assassinated on July 30, 1986. Not even Ministers of Justice can be protected from asassins bullets. Rodrigo Lara Bonilla, then Minister of Justice, was killed by motorcycle assassins on April 30, 1984. Former Colombian Minister of Justice, Enrique Parejo Gonzalez, was made ambassador to Hungary for safekeeping. Yet even in Budapest, he was shot five times by an assassin who barely missed killing him. If the country is unable to protect the lives at the top of the judicial hierarchy, how can one expect trial judges to resist the blandishments and threats of drug traffickers?

[13] Kaufman, "Chilling Judicial Independence", 88 *Yale L. J.*, 681, 684 (1979).

of equal justice under law for all persons. On the other hand, if one is committed to maintenance of class privileges and the feudal notion of one law for the elite and another for the masses, an independent judiciary is undesirable.

III. Measuring judicial independence

Not only is judicial independence a question of degree, but it is also something extraordinarily difficult to ascertain or measure. Judicial opinions can sometimes be helpful in revealing independence, but they seldom reveal lack of independence. Subservient judges ar unlikely to write opinions indicating that the result would have been different had they been independent. Instead, the opinion will attempt to rationalize the result reached as one compelled by law rather than by outside influence. Judges may be independent in certain kinds of cases but not in others. Judges may also be independent during certain periods but subservient in others. The perception of Judicial independence can easily change even though a court may regard itself as possessing the same degree of independence. For example, the Chilean Supreme Court was widely regarded as very independent because it openly clashed with the Allende regime, which it accused publicly of violating the Constitution. After Pinochet's overthrow of Allende, the Chilen Supreme Court was widely regarded as subservient because it failed to stand up to the military and defend individual constitutional rights. Because the Chilean Supreme Court, openly sympathized with the Pinochet regime, the Court's perceived loss of independence was more apparent than real.[14]

Perhaps the only people who really know the degree to which they are independent are the judges themselves, and even they may have no clear idea until circumstances arise that test their independence. On a multijudge tribunal, some judges may be unaware that the independence of one or more of its members has been compromised by bribery, threats, or other forms of pressure.

Attempts to quantify judicial independence suffer from serious methodological infirmities. Professor Kenneth Johnson has attempted to gauge political democracy in Latin America by asking a select group of social scientists specializing in Latin America to fill out questionnaires rating the twenty republics with respect to fifteen factors, one

[14] See Alexander, R., *The Tragedy of Chile*, 349-51 (1978).

of which is judicial independence.[15] Johnson defines judicial independence in terms of "extent of respect for the court's decisions, the extent to which the court has the courage of its convictions" and "is free from executive domination", whether "decisions are dignified and founded on law", and the extent to which the people and political leaders rely "on judicial processes rather than arbitrary executive or legislative action or military force." His methodology produces a rank ordering of judiciaries with respect to independence, with Costa Rica at the top and Haiti at the bottom.[16] Nevertheless, it is essentially only the quantification of the collective impressions of eighty-four social scientists, most of whom are historians and political scientist rather than lawyers. Indeed, it is doubtful that any of these responses are based upon an actual examination of court decisions.

A more ambitious attempt at quantification was made by Pablo Gonzalez Casanova, a sociologist who analyzed 3 700 *amparo* decisions rendered by the Supreme Court of Mexico between 1917 and 1960 in which the President of the Republic was named as the defending authority. Gonzalez Casanova found that the claimants were granted *amparo* in 34 percent and denied *amparo* in 34 percent of the cases; in 24 percent the cases were discontinued or not ruled upon, and in 9 percent other types of rulings were entered. This data was then further refined by determining the social class tho which the *amparo* claimant belonged. Ultimately, Gonzalez Casanova concluded that:

> ...[T]he Supreme Court of Justice operates with a certain degree of independence with respect to the executive power, sometimes exercising a controlling action over the President or his assistants. The Court subjects to judgment certain acts coming from the Executive. Its main political function is to provide hope for those groups and individuals who are able to utilize this recourse to protect their interests or rights...
>
> There is no doubt that the Supreme Court of Justice is endowed with power, yet it does generally follow the policy of the Executive, and in fact it serves to make the Executive more stable.[17]

[15] "Scholarly Images of Latin American Political Democracy in 1975", 11 *Lat. Am. Res. Rev.* 129, 136 (núm. 2, 1976). *See also* Johnson, "Measuring the Scholary Image of Latin American Democracy", 17 *Statistical Abstract of Latin America* 347-66- (J. Wilkie ed. 1978).

[16] See Appendix I, *infra*.

[17] *Democracy in Mexico*, 21-24 (Salti translation, 1970).

Query wheter Gonzalez Casanova's data really supports his conclusions? His data tell us nothing about the importance of the challenged acts or laws to the Executive. Indeed, in constitutionality *amparo* actions, the President must be named as a party because he signed the law, not because he is interested in the outcome. Nor do they tell us how many of the cases involved the same act or law, how many challenges were avoided on procedural grounds, how many patently unconstitutional governmental actions were sustained, or how many statutes were reinterpreted to make them constitutional?

These questions cannot be answered without much more sophisticated data. Looking only at the percentage of *amparo* cases decided for against the claimant does not give one much feel for judicial independence in Mexico. Moreover, it can be quite misleading. Mexican presidents, as signers of laws, are routinely included in all constitutionality *amparo* actions. Just because the president has been named as a defendant does not mean that he has any real interest in the outcome.

A more ambitious attempt at massaging the Mexican data was made by Professor Carl Schwarz, who compared the percentage of *amparo* actions decided in favor of the nongovernmental party in penal cases before the Mexican Supreme Court with the percentage of *habeas corpus* cases decided in favor of the nongovernmental party in the United States Supreme Court in a 33 month period.[18] Unfortunately, the comparisons are misleading because the jurisdictional requirements for the two kinds of cases are very different. Since every claim of misapplication of state law by the courts can be converted into a federal constitutional issue under Article 14 of the Mexican Constitution, *amparo* often serves as the functional equivalent of a direct appeal from the state courts to the federal courts.[19] Moreover, one has to distinguish between pretrial *habeas corpus* or *amparo* cases, which may involve tension between the executive and the judiciary and post-conviction *habeas corpus or amparo* cases, where the appelate court is generally reviewing the conduct of the lower court. It is by no means clear that a relatively low percentage of *habeas* or *amparo* cases decided against the government indicates anything about the degree to which judicial independence exists. Judicial independence

[18] Schwarz, "Judges under the Shadow: Judicial Independence in the United States and Mexico", 3 *Cal. West. Int'l L. J.* 260 (1973).

[19] Rosenn, "Judicial Review in Latin America", 35 *Ohio St. L. J.* 785, 797-98 (1974).

becomes a critical factor only in those relatively few cases in which the political authorities are deeply concerned that a particular result obtain and that result differs from the one the judges would reach if left to their own devices.

Judicial independence is too complex and too subtle a concept to be measured by such crude techniques as calculating the percentage of *habeas corpus* or *amparo* cases decided against the government. The volume of cases decided one way or another is likely to be a misleading indicator. If a country scrupulously observes the law and the constitution in the administration of criminal justice, *habeas corpus* should never be granted. Indeed, a low percentage of *haber corpus* petitions decided against the government may signify a high degree of compliance with the law and constitutional guarantees. On the other hand, it might also signify judicial impotence in the face of a regime that makes people disappear without any legal process and which refuses to acknowledge any information about the whereabouts of persons on whose behalf writs of *habeas corpus* are filed.[20] In terms of sheer volume of cases, corruption is more likely to pose a greater threat to judicial independence than political influence. The incentive to bribe is present in virtually every case, while the incentive for political authorities to apply pressure is present only when one of the parties is politically well-connected or the case is deemed to have some important political implication.

If we had perfect information about the judicial decision-making process and the mental state of each judge in every country, we could plot the positions of judiciaries on a spectrum between the poles of total subordination and total independence. Each country's judiciary would undoubtedly fall somewhere in between these two poles. Unfortunately, nothing close to perfect information on judicial decision-making is available for any country. Even if it were, we would still have to interpret it in light of the intense doctrinal debates that frequently rage about how activist a role the judiciary should play in exercising its powers.[21]

[20] See *Pérez de Smith, Ana M. et al., supra* note 10, where the Supreme Court of Argentina called to the attention of the Executive the absence of justice in Argentina resulting from the inability of the courts effectively to exercise their habeas corpus jurisdiction because the military government refused to acknowledge that it had secretly detained numerous persons.

[21] Compare Bickel, A., *The Least Dangerous Branch*, 127-33 (1962) *with* Gunther, "The Subtle Vices of the 'Passive Virtues' — A Comment on Principle and Expediency in Judicial Review", 64 *Colum. L. Rev.* 1 (1964).

IV. Legal measures guaranteeing judicial independence

The constitutions of all Latin American countries provide for independent judiciaries. Some do so in formalistic fashion, simply declaring that the judiciary shall be independent.[22] Others have inserted into their constitutions a panoply of measures designed to insure the independence of the judiciary. Analytically, these prophylactic measures can be divided into two broad overlapping categories: (1) protection of the integrity of the judicial decision-making process from outside pressures, and (2) protection of the personal independence of the judge.

1. *Measures to Protect the Integrity of Judicial Decisions*

A. Guaranty of Noninterference with Judicial Proceedings

One of the most common measures to insure the integrity of the judicial process is a constitutional prohibition against any interference by other branches of government with judicial proceedings. One of the most explicit statements of this form of guaranty is found in Peru's 1980 Constitution:

> Art. 233. The following are guarantees of the administration of justice:
>
> . . . 2. Independence in its exercise. No authority may assume jurisdiction in cases pending before the judiciary or interfere in the exercise of its functions. Neither can court cases that are *res judicata* be unenforced, ongoing court proceedings be cut off,

[22] *E.g.*, Bolivian Const., art. 117 (1967) ("Judges are independent in the administration of justice and are subject only to the laws."); Cuban Const., art. 125 (1976) ("Judges, in their funstion of dispensing justice, are independent and should obey only the law."); Dominican Const., art. 4 (1966) ("These three branches [the legislative, evecutive, and the judiciary] are independent in the exercise of their respective functions."); Guatemala Const., art. 203 (1985) ("Magistrates and judges are independent in the performance of their functions and subject only to the Constitution of the Republic and the law."); Haitian Const., art 136 (1983) ("The President of the Republic Const., art. 136 (1983) ("The President of the Republic guarantees the independence of the Judiciary."); Nicaraguan Const., art. 165 (1986) ("In their judicial activity, Supreme Court Judges and other Judges are independent and must obey only the Constitution and the law..."); Panamanian Const., art. 170 (1946) ("Magistrates and Judges are independent in the exercise of their functions and are subject only to the Constitution and the law."); Paraguayan Const., art. 199 (1967) ("The independence of the judicial power is guaranteed.").

judgments modified, nor their execution delayed. This provision does not affect the right to a pardon.

The Constitutions of Argentina, Chile, and Paraguay contain similar guaranties preventing the President or Congress from exercising judicial functions or interfering with judicial decisions.[23]

B. Jurisdictional Monopoly

Latin America has had a long tradition of creating special tribunals to decide certain classes of cases, particularly those involving labor law, military justice, administrative law, and electoral disputes.[24] This practice has undermined judicial independence where these special tribunals have been exempt from any form of control by the regular judiciary. A related technique for undermining judicial independence has been transference of jurisdiction normally exercised by the regular courts to specially created *ad hoc* tribunals. Only rarely do Latin American constitutions restrict such practices in the interest of safeguarding of judicial independence. An exception is the Peruvian Constitution of 1980, which provides for the unity and exclusivity of the judiciary's jurisdiction and denies the other branches the power to establish any other independent jurisdiction except for military and arbitral tribunals.[25] More typical are provisions merely stating that only the judiciary may decide contentious disputes[26] or that only tribunals established by law may decide criminal and civil cases.[27]

C. Requiring a Reasoned Opinion

A third technique for protecting the integrity of the decision-making process is to require judges to write reasoned opinions explaining their decisions.[28] Obviously, this requirement does not immunize judges from bribes and political pressures, but it does have the virtues of making

[23] Argentine Const., art. 95 (1853); Chilean Const., art. 73 (1980); Paraguayan Const., art. 199 (1967).

[24] Clagett, H., *Administration of Justice in Latin America*, 55-56 (1952).

[25] Peruvian Const., art. 233 (1) (1980).

[26] Paraguayan Const., art. 199 (1967).

[27] *E.g.*, Chilean Const., art. 73 (1980). The Honduran variation is that the judging of cases and enforcement of judgements is the exclusive province of the courts, Honduran Const., art. 314 (1982).

[28] *E.g.*, Peruvian Const., art. 233 (4) (1980); Costa Rican Code of Civil Procedure, arts. 81-86 (1982 ed.).

it more difficult to rationalize the result in such cases and exposing the decision to public scrutiny. Moreover, the requirement of the reasoned opinion improves the judicial process even when no undue pressures have been brought to bear by helping to insure that courts decide in accordance with the law.

D. Requiring Public Trials

Publicity can be an effective curb on judicial arbitrariness and corruption. It is easier to fix cases that are never exposed to public scrutiny. Therefore, several Latin American countries require that certain kinds of cases be decided in open court. For example, Peru requires that most criminal cases, and all cases of the responsibility of public officials, delicts involving the press, and constitutionally protected fundamental rights be tried in open court.[29]

2. *Measures Protecting Personal Independence*

A. Irreducibility of Judicial Salaries

Many Latin American constitutions have followed the example of the United States in protecting judicial independence by providing that a judge's compensation may not be diminished during his term of office.[30] The policy underlying such a provision is to protect judges from financial retribution for rendering decisions that displease the legislature or the executive. Article 127 of the Mexican Constitution used to go one step further and also prohibit raising the salaries of Supreme Court members during their term in office. This idea, which originated in the original draft of the Compensation Clause of the U. S. Constitution, was designed to promote judicial independence by insulating judges from the blandishment of salary increases.[31] Severe

[29] Peruvian Const., art. 233 (3), (1980), *Compare* Haitian Const., art. 141 (1983, requiring all political and journalistic offenses to be tried in open court, and providing for open hearings in all other cases unless public order or morality dictate a closed trial.

[30] Argentine Const., art. 96 (1853); Brazilian Const., art. 113 (III) (1969); Colombian Const., art. 160 (1886, as amened); Mexican Const., art. 94 (1917).

[31] The Framers of the U. S. Constitution rejected this form of protection of judicial independence on the grounds that increased caseloads and inflation might decrease judicial compensation, and that alterations in the state of society migth require more attractive judicial salaries to maintain the same calibre of personnel. Rosenn, "The Constitutional Guaranty against Diminution of Judicial Compensation", 24 *U.C.L.A L. Rev.* 308, 312-18 (1976).

inflation forced Mexico to replace this prohibition against salary increases with a privision calling for adequate compensation that shall be increased annually in an equitable manner.[32]

An alternative formulation or this aspect of protection of judicial independence is contained in Peru's 1980 Constitution, which guarantees its judges "a remuneration that assures them a standard of living in accord with the dignity of their mission and hierarchy".[33] In isolation this vague standard would appear to provide little protection for judicial compensation; it is, however, more meaningful because it is coupled with a constitutional provision guaranteeing the judiciary a minimum percentage of the country's budget.[34]

Uruguay has one of the most effective guaranties of judicial salaries in a chronically inflationary environment. Since 1981, the salaries of the members of the Supreme Court, which in practice determine the salaries of the rest of the judiciary, cannot be inferior to Ministers Secretaries of State.[35] Since the Ministers are well paid, this measure has assured adequate judicial compensation in Uruguay.[36] A similar measure has been adopted in Panama.[37]

B. Guaranteeing the Judiciary a Fixed Percentage of the Government's Budget

A second technique for guaranteeing financial independence is a constitutional requirement that a fixed percentage of the country's total budget be allocated to the judiciary. The most generous (arguably overly so) of these provisions is Costa Rica's which grants the judiciary at least two percent of the nation's ordinary annual receipts.[38] Honduras assures the judiciary an annual appropiation of at least 3 percent of the nation's annual receipts, excluding loons and grants.[39] Peru's Constitution guarantees the judiciary of least two percent of current expenditures of the Central Government.[40] Guatemala and Panama combine the Costa Rican and Peruvian approaches, constitutio-

[32] Mexican Const., art 127 (1917, as amended Dec. 28, 1982).
[33] Art. 242 (3).
[34] See note 40 *infra*, and accompanying text.
[35] Institutional Act Nº 12 of Nov. 10, 1981, art. 6.
[36] Vescovi, "Uruguay", in *Judicial Independence: The Contemporary Debate* 374, 377 (S. Shetreet & J. Deschenes eds. 1985).
[37] Panamanian Const., art. 210 (1983).
[38] Costa Rican Const., art. 177 (1949).
[39] Honduras Const., art. 306 (1982).
[40] Peruvian Const., art. 238 (1980).

nally mandating that the judiciary's budget will be at least two percent of the nation's ordinary annual receipts.[41] The Bolivian Constitution simply provides that each year the nation's budget will allocate a sufficient, albeit unspecified amount, to the judiciary.[42]

Unfortunately, these constitutional guarantees have sometimes been honored in the breach. Still they perform a useful function in providing the judiciary with useful leverage at budget time. The lack of a similar constitutional guaranty has had dire consequences for the Argentine judiciary. In 1900, Argentina devoted 3.8 percent of the federal budget to the judiciary. That figure has fallen steadily, so that by the end of 1984, only 0.79 percent of the federal budget went to the judiciary.[43] Complaints about the inadequacy of judicial salaries in Latin America are widespread.[44]

C. Tenure in Office

A third technique for insuring personal judicial independence is the constitutional guaranty of tenure in office. Argentina and Mexico follow the model of the U. S. Constitution, assuring federal judges lifetime tenure pending good behavior.[45] The constitutions of several other Latin American countries protect tenure in office pending good behavior only until a specified retirement age.[46] This should be nearly as effective a guaranty as lifetime tenure, provided that the judicial retirement system is satisfactory. Unfortunately, chronic inflation has wreaked havoc with many retirement programs, thereby undermining the guaranty of judicial independence. As will be seen in the next

[41] Guatemalan Const., art. 213 (1985) y Panamian Const., art. 211.

[42] Bolivian Const., art. 119 (1967).

[43] Mercedes Serra, "Poder Judicial: Su presupuesto", 1985-C *La Ley* 1230, 1231.

[44] See notes 89 and 90 *infra*, and accompanying text; Explanation of Motives for a Draft Judicial Reform Bill, in Burgoa, I., *El juicio de amparo*, 1011 (17th ed. 1981); Fernandez Sandoval, H., *Bases para una reforma integral de la justicia*, 22-23 (1986); Ovalle Favela, "La independencia judicial en el derecho mexicano", 49 *Bol. Mex. Der. Comp.* 55, 68-69 (1984).

[45] Argentine Const., art. 96 (1953). Mexico has a slight variation. The Supreme Court justices hold office for life pending good behavior, but the Circuit and District Court judges originally have a four-year term. If re-elected or promoted, they acquire litetime tenure, Mexican Const., art. 97 (1917, as amended Dec. 28. 1982).

[46] Brazilian Const., art. 113 (I) and para. 2 (up to retirement age of 70); Colombian Const., art. 149 (1886) (members of the Supreme Court and the Council of State have tenure until compulsory retirement, fixed by statute at age 75); Chilean Const., art. 77 (1980) (up to retirement age of 75); Peruvian Const., art. 242 (2) (up to retirement age of 70).

section, the majority of Latin American countries limit the terms of office members of their Supreme Courts to four to ten years.[47]

Removal of a judge for cause is generally entrusted to other members of the judiciary, either in the form of an appellate court or a council of magistrates.[48] There are, however, important exceptions, such as Argentina and Mexico, which follow the U. S. model of impeachment by the legislature.[49] Brazil and Paraguay provide for impeachment by the Senate only for members of the Supreme Court; other members of the judiciary are tried before the Supreme Court.[50] At least in theory, although certainly not in practice, no Latin American country permits the executive to remove or transfer judges.

D. The Selection and Reappointment Process

The selection process can be critical to assuring an independent judiciary. If the selection process is entrusted to the executive without constraints on its exercise, the risk of appointment of unqualified candidates or persons selected principally on the basis of political or personal loyalty becomes exceedingly high. Consequently, most Latin American countries have attempted to set out minimal qualifications for membership on the Supreme Court.[51] Below the Supreme Court level, many Latin American countries have career judiciaries with entry by competitive examinations and comparison of credentials administered by the judiciary itsel.[52] Even in countries with a career judiciary, such

[47] See notes 61-64 *infra*, and the accompanying text.

[48] Costa Rican Const., art. 165 (1949) (Supreme Court Justices can be removed only by secret vote of two-thirds of the members of the Supreme Court); Peruvian Const., art. 248 (1980) (granting the Supreme Court disciplinary and removal, power over all judges, including its own members).

[49] Argentine Const., arts. 45, 51, and 52 (1853, as amended); Mexican Const., arts. 97 and 110 (1917, as amended).

[50] Brazilian Const., art. 42(II) (1969); Paraguay Const., arts. 151(3) and 196 (1967).

[51] A typical set of qualifications is contained in Article 201 of Panama's 1983 Constitution. To be a member of the Supreme Court, a candidate must be (a) a native born Panamanian, (b) at least 35 years old, (c) in full enjoyment of his political and civil rights, (d) possess a duly registered law degree, and (e) have at least ten years experience as a practicing lawyer, judge, or law professor.

[52] *E.g.*, Colombian Const., art. 162 (1886, as amended) and Decree-Law 250 of 1970: El Salvadorean Const., arts. 182(9) and 186 (1983); Brazilian Const., art. 113(I) and (III), para. 1, and art. 136 (I) and (II) (1969, as amended by Amendment No. 7 of Abril 13, 1977); Bolivian Law of Judicial Organization, arts. 207-216 (1972 ed.); Uruguayan Institutional Act No. 12 of Nov. 10, 1981, art. 1. See also Quintero, "La independencia judicial", 10 Anuario de Derecho 15, 25-27 (1972).

as Brazil, there my be a certain percentage of lateral appointments on appellate courts are reserved for practicing lawyers or state attorneys to provide a different perspective.[53]

Members of the Supreme Court are selected in accordance with one of the following four models: (1) free executive selection with some form of legislative or judicial approval as a check (2) free executive selection. (3) executive selection from a list of prescreened candidates prepared by the judiciary or the legislature, or (4) legislative selection. Curiously, popular election of judges is eschewed on the ground that such a measure would compromise judicial independence by forcing a judge to engage in political activity.

The presidential selection model has been borrowed from the U.S. Constitution by Argentina, where the president appoints all the federal judges with the consent of the Senate.[54] Paraguay has adopted a similar model with an important variation: the President, with the consent of the Senate, appoints the Supreme Court, but only for a five-year term. The President also appoints the other judges, with the consent of the Supreme Court.[55] Haiti has been the only country that formally gave its President unfettered discretion to appoint the judiciary,[56] but the Haitian 1983 Constitution is about to be replaced by a new one. Chile has adopted a presidential selection model in which the president fills vacancies on the Supreme Court and the Courts of Appeals from a list of names proposed by the Supreme Court itself.[57] The Mexican President, with the approval of the Senate, appoints the members of the Supreme Court, wich in turn selects the Circuit Court and District Court judges.[58] In Panama, members of the Supreme Court are appointed for ten-year terms by the Cabinet Council (the President and his Cabinet Minister). The Supreme Court appoints the appellate courts, which in turn appoint the judges immediately below in the hierarchy.[59] The Peruvian President appoints the judges upon the recommendation of the National Council of the Magistracy.[60]

A majority of Latin American countries make members of their

[53] Tacito and Barbosa Moreira, "Judicial Conflicts of Interest in Brazilian Law", 18 *Am. J. Comp. L.* 689, 690-91 (1970).

[54] Argentine Const., art. 86(5) (1853, as amended).

[55] Paraguayan Const., arts. 180(8), 195, and 196 (1967).

[56] Supreme Court judges are appointed for ten-year terms, while appellate court judges have seven-year terms. Haitian Const., art. 114 (1983).

[57] Chilean Const., art. 75 (1980).

[58] Mexican Const., arts. 96 and 97 (1917, as amended).

[59] Panamanian Const., arts. 200 and 206 (1983).

[60] Peruvian Const., art. 245 (1980).

highest courts dependent upon legislative pleasure for continuance in office. A common pattern is for the Supreme Court to be elected by the legislature for terms of office that vary between four and ten years.[61] In Costa Rica, a justice is automatically reelected to an additional eight-year term unless at least two-thirds of the legislature vote affirmatively for removal.[62] A similar system is used in El Salvador, where Supreme Court members automatically continue to hold office for renewable five-year terms unless expressly voted out by the legislature.[63] On the other hand, once they have completed a ten-year term, members of Uruguay's Supreme Court may not be reelected until a five-year waiting period has elapsed.[64] Such measures leave judges vulnerable to legislative pressures. Since Latin American legislatures are often themselves dominated by the executive, Latin American judges are also vulnerable to threats or blandishments by the executive.

[61] The Supreme Court of Bolivia is elected for ten-year renewable terms by the Chamber of Representatives from a list prepared by the Senate. District Court judges have six-year terms, while other judges have only four-year terms. Bolivian Const., arts. 125 and 126 (1967). Members of Costa Rica's Supreme Court are elected by the legislature for staggered eight-year terms. Costa Rican Const., arts. 157 and 158 (1949). Cuba's Supreme Court consists of 26 professional judges elected by the National Assembly for five-year terms. There are also 156 lay judges elected by the National Assembly as co-judges on the Supreme Court, each serving two months per year during a 30 month term. Berman & Whiting, "Impressions of Cuban Law", 28 *Am. J. Comp. L.* 475, 479 (1980). The Dominican Supreme Court and all lower court judges are elected by the Senate for four-year terms. Dominican Const., art. 23 (1966). Ecuadoran Supreme Court Justice are elected by the House of Representatives for renewable six-year terms. Ecuadoran Const., art. 101 (1979). The Supreme Court of El Salvador is elected by the legislature for a five-year term. El Salvadorean Const., art. 186 (1983). Members of the Supreme Court in Honduras are elected by the legislature for four-year renewable terms. Honduran Const., art. 305 (1982). Guatemala has a six-year term for members of its Supreme Court; five members of the Supreme Court are elected directly by the Congress, and five are selected by the Congress from a list of 30 names submitted by a Commission of law school deans, representatives of the bar association, and a representative of the judiciary selected by the Supreme Court. Guatemalan Const., art. 215 (1985). The Supreme Court of Nicaragua is elected for a six-year term by the National Assembly from slates of three candidates submitted by the President. Nicaraguan Const., art. 163 (1986). The Supreme Court of Uruguay is elected by the Council of the Nation for ten-year terms. Uruguayan Const., Sec. XV, art. 2 (1967), as amended by Institutional Act No. 12 of Nov. 10, 1981, art. 2. The Supreme Court of Venezuela is elected by the legislature for nine-year terms. Venezuelan Const., art. 214 (1961).

[62] Costa Rican Const., art. 158 (1949).

[63] El Salvadorean Const., art. 186 (1983).

[64] Institutional Act No. 12 of Nov. 10, 1981, art. 2.

E. Transferability of Judges

A few Latin American constitutions protect judges against being transferred involuntarily.[65] Others give the nations highest court the unrestricted power to transfer judges.[66] Since an involuntary transfer can be punitive and is often regarded as tantamount to an invitation to resign, the lack of any constraints on transference can seriously compromise personal judicial independence.

F. Avoidance of Conflicts of Interest

It is also common to prohibit judges from engaging in any other form of economic activity, other than writing or teaching, in order to avoid conflicts of interest.[67] Many countries also prohibit judges from engaging in any political activities.[68] Brazil bars judges from participating in any commerce or being a or a director or administrator of any firm,[69] while Chile prohibits judges from owning any mining interests within the judge's territorial district.[70]

G. Judicial Immunity

Judicial independence can be threatened by vexatious lawsuits by litigants who claim they have been injured by judges who have either

[65] *E.g.*, Brazilian Const., art. 133(III) para. 3 (1969) (Judges can be transferred only by a secret two-thirds vote of a higher tribunal); Colombian Const., art. 160 (1886, as amended) (Judges may not be transferred to other employment of a different branch without leaving their positions); Panamanian Const., art. 208 (1983) (Magistrates and judges may be transferred only for reasons provided for by law). *See also* Bolivian Law of Judicial Organization, art. 19 (1972) (Neither can a judge be transferred without his express consent.)

[66] *E.g.*, Mexican Const., art. 97 (1917, as amended).

[67] *E.g.*, Brazilian Const., art. 114 (1969) (prohibits judges from engaging in any other professional or political activity except teaching at the university level or serving on the electoral court); Colombian Const., art. 160 (1886) (prohibits judges from holding any other paid office or practicing law; university teaching is the sole exception); Honduran Const., art. 311 (1982) (prohibits judges from the practice of law and all other governmental employment except teaching or diplomat at large); Peruvian Const., art. 243 (1979) (prohibits judges from engaging in any other professional or political activity except university teaching, and prohibits judges from unionizing or striking).

[68] Ecuadorean Const., art. 104 (1979); Panamanian Const., arts. 205 and 209 (1983) (prohibition on all political activity and any other employment, with the exception of university teaching).

[69] Lei Complementar No. 35 of Mar. 14, 1979, art. 36 (I) and (II).

[70] Código Orgánico de Tribunales, art. 322 (1977).

maliciously or negligently applied the laffl. Curiously, one does not generally find in Latin America a well developed notion of judicial immunity from such lawsuits. On the contrary, most Latin American countries regard judges as fully exposed to criminal and civil liability for maliciously or negligently applying the law.[71]

V. Forms of Interference with Judicial Independence

Some countries, such as England and Israel, have managed to achieve independent judiciaries without a written constitution. Even though it does not permit judicial review after a law has been enacted, France not only has an independent judiciary, but it also has an independent system of administrative courts that are technically part of the executive. On the other hand, a number of Latin American countries with elaborate constitutional guarantees of judicial independence have subservient judiciaries. The sad reality is that the citadel of judicial independence has been perennially besieged in Latin America. On occasion, the citadel has been seized, and the judges sacked.

1. *Formal Abrogation of Judicial Independence*

Interference with judicial independence has taken many forms. The most obvious is the formal abrogation of judicial independence. In 1977, a *de facto* military regime in Uruguay, wich used to enjoy a well-deserved reputation for judicial independence, promulgated an astrounding Institutional Act that overtly abolished the independence of the judiciary.[72] This Act discarded the theory of a tripartite separation of powers, which it debunked as "a thesis incorrectly attributed to Montesquieu", and eliminated the judiciary as a separate branch of government. The Act placed the Uruguayan courts under the Executive, which for four years was granted unrestricted power to dismiss any judge for any reason.All court administrative functions were transferred to the Minitry of Justics, which was granted full power to set

[71] See, *e.g.*, Bustamante Alsina, J., *Teoría general de la responsabilidad civil,* 383-84 (2d ed. 1973); Lei Organica da Magistratura Nacional, art. 49 (Brazilian Lei Complementar No. 35 of Mar. 14, 1979; Código Orgánico de Tribunales, arts. 324-331 (Chilean Law No. 7.321 of June 15, 1943).

[72] Institutional Act No. 8 of July 1, 1977. See generally, Cortinas Peláez L., *Poder Ejecutivo y función jurisdiccional* (1982), and *Lawyers Committee for International Human Rights, Uruguay: The end of a Nightmare?* (1984) for a detailed analysis of the military's destruction of judicial independence in Uruguay.

judicial salaries. Not only did the Act drastically diminish the powers of the Supreme Court of Justice; it even removed "Supreme" from the court's name.

Since the Castro takeover, Cuba has also formally abrogated judicial independence. Castro's unhappiness with an acquittal of 45 members of Batista's air force on a charge of genocide led to the convening of a special pane ito reverse the acquittal over protests from the bench and bar, and the reliance on "revolutionary courts" for political trials.[73] Judicial independence was formally abolished by the 1973 Judicial Organizational Law, which explicitly subordinated the judiciary to the Council of Ministers.[74] This subservience was confirmed by the 1976 Constitution and the 1977 Judicial Organization Law, both of which explicitly subordinate the judiciary to the National Assembly and the Council of State.[75] The National Assembly elects the Supreme Court, and People's Assemblies elect their respective local courts. Judges must give accounts of their work to the bodies that elected them, and the judges are subject to recall.[76]

2. *Deprivation of Jurisdiction*

A second way in which judicial independence has been undermined in Latin America has been the reduction of the jurisdiction of the regular courts. The most dramatic and serious interference with the jurisdiction of the courts has been the transference of offenses against national security to military tribunals. Occasionally, a courageous court declares the trial of civilians by military courts unconstitutional, as the Colombian Supreme Court did earlier this year. In many countries, however, particularly those ruled by *de facto* military governments, civilians accused of terrorism or subversión have been tried before special or military tribunals rather than the ordinary courts. Moreover, the ordinary courts have been denied jurisdiction to intervene by issuing *habeas corpus* or *amparo*, or to review the proceedings on appeal. This was done in Brazil in by Institutional Act No. 2 of 1965, which permitted extension of the military tribunals to civilians accused

[73] Salas, "The Judicial System of Postrevolutionary Cuba", 8 *Nova L.* J. 43, 45 (1983).

[74] Ley de Organización del Sistema Judicial, G. O., June 23, 1973, art. 3.

[75] Cuban Const. of 1976, art. 122; Ley de Organización del Sistema Judicial, Law No. 4, Aug. 10, 1977, G.O., Aug. 12, 1977, art. 3.

[76] Comment, "Cuba's 1976 Socialist Constitution and the Fidelista Interpretation of Cuban Constituional History", 55 *Tulane L. Rev.* 1223, 1275-76 (1981).

of national security crimes. The Institutional Act also included a provision excluding from judicial review all governmental actions based upon the First and Second Institutional Acts, a provision that became standard in subsequent institutional acts. Institutional Act No. 5 of 1968 made *habeas corpus* inapplicable to cases where detention was ordered pursuant to charges based upon the National Security Law, crimes against the social and economic order, or against the popular economy. Institutional Act No. 6 cut back on the Supreme Court's jurisdiction to hear ordinary appeals from cases denying *mandado de seguranca* (writ of security) and eliminated ordinary appeals from decisions of military tribunals trying civilians for violations of national security.[77]

The military government in Guatemala in 1982 enacted a decree-law setting up Tribunals of Special Jurisdiction to deal with persons accused of violating the state of siege or other subversive activity. Procedure was summary, no appeal was permitted, judges could be army officers with no formal legal training, and the death penalty was mandated for certain offenses.[78] Similiar legislation was been passed in Argentina,[79] Chile,[80] Colombia,[81] El Salvador,[82] and Uruguay.[83]

Two related problems have been the proliferation of special administrative courts and the development of a broad political question doctrine. Many Latin American countries have set up special administrative tribunals, outside the control of the regular judiciary, to which a substantial portion of normal judicial jurisdiction has been delegated. The most common special courts have been labor courts, tax tribunals, and election tribunals. A few countries, such as Colombia, Ecuador, and Uruguay, have gone forther and set up separate systems of administrative courts following the French Model.[84] Where administrative

[77] See Karst K., & K. Rosenn, *Law and Development in Latin America*, 214-219 (1975); Nadorff, "Habeas Corpus and the Protection of Political and Civil Rights in Brazil: 1962-1978", 14 *Law Am.* 279 (1982).

[78] Decree-Law No. 46 of July 1, 1982. For harsh criticism of the operation of this law, *see Americas Watch Report, Human Rights in Guatemala: No Neutrals Allowed*, 85-99 (1982).

[79] Law No. 21.461 of No. 19, 1976.

[80] Decree-Law No. 5 of Sept. 22, 1973; Law No. 18.314 of May 15, 1984.

[81] Decree No. 2260 of 1976; Legis. Decree 1923 of 1978.

[82] Decree No. 507 of Dec. 3, 1980.

[83] Law No. 14.493 of Dec. 29, 1975; Institutional Act No. 8 of July 1, 1977; Institutional Act No. 12 of Nov. 10, 1981.

[84] See Fix-Zamudio, "Función del Poder Judicial en los sistemas constitucionales latinoamericanos", in UNAM, Instituto de Investigaciones Jurídicas (ed), *Función del Poder Judicial en los sistemas constitucionales latinoamericanos*, 9, 21-25 (1977).

judges lack the guarantees of independence of the ordinary judiciary, the transference of jurisdiction has the effect of diminishing judicial independence.[85]

Many of the Latin American judiciaries have voluntarily relinquished important components of their jurisdiction by developing an exceedingly broad political question doctrine. Many of the issues that are regarded as political questions are simply political acts of the executive with no particular reason other than judicial timidity for treating them as nonjusticiable. While the doctrine of political questions has been substantially narrowed by the United States Supreme Court in the past 25 years,[86] Latin American courts have generally remained timid about contracting their broad concept of nonjusticiable political questions.[87]

3. *Wholesale Dismissal of Judges*

Probably the most devastating attack on judicial independence has been the wholesale purging of courts pursuant to institutional acts issued *de facto* regimen. Often the courts are left intact after a *golpe*, but this general rule has conspicuous exceptions. Most conspicuous have been Argentina, Brazil, El Salvador, and Peru. Despite a constitutional guaranty of lifetime tenure, the Argentine Supreme Court has been replaced *en masse* six times in the past 31 years. In 1946, all but one of the Court's membership were impeached by a Perón-dominated Congress on trumped charges. In 1957, the military regime that ousted Perón two years earlier summarily ousted the entire Perón-appointed Supreme Court. The entire Court was again ousted in 1966 in the wake of another military takeover. The entire Supreme Court resigned in 1973 after election of a Peronist regime. The entire Supreme Court was once again ousted in 1976 after another military takeover.[88] In addition, the Junta that assumed power in 1976 suspended the

[85] For discussion of this point in the context of Argentina, See Dromi, J., *El Poder Judicial*, 105-26 (1982).

[86] *E.g.*, Baker v. Carr, 369 U.S. 186 (1962); Powel v. McCormack, 395 U.S. 486 (1969); United States v. Nixon, 418 U.S. 683 (1974).

[87] Fix-Zamudio, *supra* note 84, at 38-39; Ovalle Favela, "La independencia judicial en el derecho mexicano", 49 *Bol. Mex. Der. Comp.* 55, 74 (1984); Garro, "The Role of the Argentine Judiciary in Controlling Governmental Action under a State of Siege", 4 *Human Rts.* L. J. 311, 326-336 (1983); Pérez Guilhou, "La Corte y el gobierno de facto argentino", in J. Carpizo (ed.), II Congreso Iberoamericano de Derecho Constitucional 811 *(Anuario Jurídico* IX 1982).

[88] *See* Rosenn & Katz, "Book Review", 68 *Calif. L. Rev.* 565, 573 n. 30 (1980).

tenure of all federal judges and permanently removed 24 of them from office, along with the judges of the supreme courts of the provinces. The return of democracy in 1983 resulted once again in the replacement of the entire Supreme Court.[89]

The Brazilian Supreme Court, whose independence in granting *habeas corpus* was a major irritant to the *de facto* military regime, was treated like a suitcase. In 1965, the military issued aninstitutional act permitting it to pack the Court by increasing its size from 11 to 16 judges. Three years later, it was unpacked by the forced retirement of three highly independent judges, the protest resignation of the Chief Justice, and a retirement because of age. At this point, another institutional act reduced the Court's size from 16 to 11 judges.[90]

The military junta that took over El Salvador in 1979 replaced the entire Supreme Court with appointees sympathetic to the regime.[91] In 1969, the military government that took over Peru the prior year formed a National Council of Justice with power to appoint all judges. The same statute that created the Council also dismissed the entire Supreme Court, permitting the military-dominated Council to appoint judges more congenial to the government. In 1973, at the instigation of President Velasco, the Council dismissed the entire criminal division of the Supreme Court because the President was unhappy about the outcome of a case. Several times during the course of the Velasco regime, the judicial retirement age was modified to permit appointment of new judges or replace those deemed unacceptable to the military government.[92]

4. *Transference or Reassignment of Judges*

Another way of interfering with judicial independence has been the transference or reassigment of judges. Judges who have made politically unpopular decisions in certain countries have been reassigned to less desirable posts as punishment for assertion of their independence. This happened in El Salvador with respect to Judge Bernardo Rauda Murcia, who sentenced five members of the National Guard to long prison terms after a jury found them guilty of the 1980 murders of four Amer-

[89] Garro, *supra* note 87, at 314-15.
[90] Karst, K. & K. Rosenn, *supra* note 77, at 214-215.
[91] Americas Watch Committe & Aclu, *Report on Human Rights in El Salvador* 45 (Supp., 1982).
[92] Rose, S., *The Peruvian Revolution's Approach: Investment Policy and Climate 1968-1980,* 321 (1981).

ican nuns. In apparent retaliation for his courageous behavior, the Supreme Court of El Salvador transferred Judge Rauda to northern Chalatenango Province, an area of frequent clashes between leftists guerrillas and army units and a four hour bus ride from his home.[93] Of course, in certain circumstances transference may be necessary for administrative reasons, but one must be careful to differentiate between transfers that are in accordance with sound administrative practices and those which are plainly punitive.

5. *The Illusory Guaranty of Irreducible Salaries*

In most Latin American countries, constitutional guarantees of irreducibility of judicial salaries have been rendered illusory by chronic inflation. The average annual inflation rate in 1985 for Latin America (excluding Cuba) was a whopping 704.8 percent. (This rate falls to 91.6 percent if one excludes Bolivia, whose inflation rate of 11,743 percent substantially distorts the picture.)[94] Argentine inflation so reduced the real economic value of judicial salaries that waiters in restaurants in Buenos Aires were earning more than the President of the Supreme Court.[95] Many Argentine judges have been forced to resign for economic reasons. In recent years the Argentine Supreme Court has made several public pronouncements calling attention to the problem and requesting that the Executive and the Legislature remedy the problem by substantially increasing judicial compensation to keep pace with inflation.[96] Even in the United States, where inflation has been far less chronic and severe than in most countries of Latin America, the value of judicial salaries has declined sharply in real terms, resulting in a substantial number of judicial resignations as well as lawsuits by judges challenging the constitutionality of Congressional failure to raise salaries.[97] Only if this constitutional guaranty is interpreted to require maintenance of the real, as opposed to the nominal,

[93] LeMoyne, "The Case of a Judge Who Imprisoned Salvador Soldiers: Does Valor Pay?", *N. Y. Times,* May 3, 1985, p. 10, cols. 1-6.

[94] Computed from Inter-American Development Bank, *Economyc and Social Progress in Latin America Report* 22 (1986). Only two countries, Panama and Honduras, had single digit inflation rates in 1985. *Id.*

[95] De Onis, "Isabelita's Terrible Legacy", *N. Y. Times, Magazine,* Mar. 21, 1976, at 15, 54.

[96] Acordada No. 30 of June 12, 1985, 1985-D La Ley 170; Acordada No. 6 of 1984, 1984-D La Ley 425; Acordada No. 55 of 1984, 1984-D La Ley 572.

[97] See Rosenn, *supra* note 31, at 310.

value of judicial salaries is it a meaningful protector of judicial independence in an inflationary economy.[98]

6. *Executive Domination*

Despite the constitutional form of three coequal branches of government, the historical experience of Latin America has been that governments are dominated by the executive. The checks built into the system are far from being equally balanced. Consequently, any judge who attempts to frustrate the wishes of the executive on an issue the executive feels strongly about does so at great peril to his position. The instances in which strong executives have simply run roughshod over the courts are legion. Trujillo, who ruled the Dominican Republic with an iron fist, reportedly held undated letters of resignation from each person he nominated to the Supreme Court. In the event he was displeased with any decision, he exercised those letters of resignation.[99] In 1964, Duvalier (Papa Doc) summarily dismissed Douyon, the Chief Justice of the Supreme Court and chastised the remaining justices because the Supreme Court had been too slow to praise the President-for-Life. Under the rule of both Duvaliers (Papa Doc and Baby Doc), judicial decisions strictly adhered to the wishes of the Duvaliers.[100] In Paraguay, the courts are totally dominated by President Stroessner.[101] Former Ecuadorean President Velasco Ibarra's response to the Supreme Court's invalidating several controversial executive decrees was to abrogate the 1967 Constitution, reform the Supreme Court, and seize dictatorial powers.[102]

[98] *Id.* at 339-42.

[99] Wiarda, H., *Dictatorship and Development: The Methods of Control in Trujillo's Dominican Republic*, 64-65 (1968).

[100] Verner, "The Independence of the Supreme Courts in Latin America: A Review of the Literature", 16 *J. Lat. Am. Stud.* 463, 500-501 (1984).

[101] Although the Supreme Court theoretically has the power to declare statutes and presidential acts unconstitutional, it has never dared to exercise the power since Stroessner has been in power. Judges are appointed for terms of only five years, and renewal depends upon currying presidential favor. Moreover, no constitutional provision prevents the Stroessner-dominated Congress from reducing their salaries during their term in office or from impeaching them. Lewis, P., *Paraguay under Stroessner*, 110-11 (1980), Americas Watch Report, *Rule by Fear: Paraguay After Thirty Years Under Stroessner*, 44-45 (1985).

[102] Martz, J., *Ecuador: Conflicting Political Culture and the Quest for Progress*, 80 (1972).

V. Conclusions

Lack of judicial independence is chronic problem in Latin America. The most recent assessment of the situation by two eminent and knowledgeable commentators on Latin American law, writing in 1985, singled out Costa Rica as the only Latin American country in which the judiciary is truly independent. Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Peru, and Venezuela weer considerad to have independent judiciaries but subject to interference by the executive. Guatemala, Honduras, Panama, Paraguay, and Uruguay were regarded as definitely lacking judicial independence.[103] One may, of course, take issue with certain of the assessments in this incomplete impressionistic survey. Nevertheless, the undelying message —that Latin America as a region suffers from a judicial independence deficiency— seems undeniable.

On the other hand, this does not mean that Latin American judiciaries are corrupt, incompetent, or poorly trained. As a rule, Latin American judges are dedicated, scrupulous professionals. Indeed, many Latin American jurists deservedly enjoy considerable international repute for their scholarship and dedicated work on international legal projects. Nor does it mean that the great bulk of cases will not be resolved on the merits in accordance with what the judge honestly believes to be the governing law.

Any assessment of judicial independence must take into account that Latin America comprises twenty countries that differ substantially. Moreover, the degree of judicial independence has differed substantially over time. Nevertheless, certain important structural aspects of Latin American legal culture and political experience seem to be critical for the region as a whole.

First, Latin America is heir to the civil law tradition. This a tradition in which the judge has historically been weak. In no civil law country does the judge have the power, prestige, and deference enjoyed by the judge in the United States, particularly at the federal level. Unlike his common law counterpart, a civil law judge does have the power to punish disregard of his orders by jailing the recalcitrant party for contempt of court. Civilians have historically regarded judges as expert clerks whose sole function is to apply the law to the facts. An independent, creative role for the judge in the civil law tradition has long

[103] Carpizo & Fix-Zamudio, "La necesidad y la legitimidad de la revisión judicial en América Latina. Desarrollo reciente", 51 *Bol. Mex. Der. Comp.* 31, 50 (1985).

been denied.[104] Yet virtually all Latin American countries have grafted the institution of judicial review on this civil law trunk.[105] Judicial review pressupposes a strong judiciary with the independence, prestige, and experience to perform the delicate balancing of individual and societal interests that inevitably goes into constitutional adjudication. This is particularly true when courts are given the power to declare statutes unconstitutional *erga omnes*. Asking Latin American judges to perform this function is to plunge them into a political role for which they are illprepared by both temperament and experience. Most are career judges, with no independent political base or contacts and with relatively narrow experience.

Second, the legitimacy of the judiciary, like that of the legal order, stems from the constitution. But Latin American constitutions are notoriously short-lived and violated. Since independence, the twenty Latin American republics have promulgated 267 constitutions, an average of 13.4 per country. Each *golpe* ruptures the preexisting constitutional order, leaving the judiciary in the unenviable position of trying to be a *de jure* institution in a *de facto* regime. A regime that has come to power by extraconstitutional means is unlikely to brook any active interference with the exercise of the extraordinary powers it has assumed, and even less so from a holdover from the *ancien regime*. Revolutions generally play havoc with judicial independence, and revolutions have been in conspicuously abundant supply in Latin America ever since 1808, when Napoleon began Latin America's chronic legitimacy crisis by placing his brother Joseph, a commoner, on the throne of Spain.[106] One lesson that is ineluctably clear from the Latin American experience is that constitutional guarantees of judicial independence do not by themselves produce an independent judiciary.

Third, Latin American constitutions provide for suspension of a number of important constitutional guarantees during states of emergency.[107] The most abused of these states of emergency is the state of siege.[108] Although supposedly a temporary juridical situation reserved for great emergencies, states of siege have been maintained for

[104] Merryman, J., *The Civil Law Tradition* 36-39 (lst ed. 1969).
[105] Rosenn, *supra* note 19, at 785.
[106] Karst, K., & K. Rosenn, *supra* note 77, at 184-86.
[107] See generally, International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1983).
[108] Inter-American Commission on Human Rights (OAS), *Preliminary Study of the State of Siege and the Protection of Human Rights in the Americas* 1 (1963).

years in a number of Latin American countries despite the absence of any external threat to the nation. Declaration of a state of siege does not necessarily prevent a judiciary from functioning independently, but its practical effect is to reduce considerably the judiciary's sphere of action in protecting constitutional rights from executive abuse. Consequently, long-term usage of the state of siege or its functional equivalents have substantially reduced judicial independence in many Latin American countries by making protection of individual constitutional rights impossible.

Fourth, the political tradition of Latin America is heavily authoritarian. The pattern of executive domination is not accidental. Rather it reflects corporativism and patrimonialism of colonial rule, and the hierarchical structure of the Catholic church. The notion that the government should be subject to the rule of law does not come naturally to most of Latin America, despite constitutional rhetoric. The underlying notion that the government is above the law bodes ill for judicial independence.

Fifth, corruption is an endemic problem in many Latin American judicial systems.[109] In some countries, court personnel, particularly the clerks, are so poorly paid that acceptance of bribes is a regular practice. This badly skews the decision-making process. Judicial independence ceases to exist where the quality of justice depends upon the wealth of the briber.

Sixth, the formal legal system of Latin American countries are universalistic and egalitarian. But the commitment of the elites that dominate much of Latin America to equality under the law is skin deep. The judicial system is an area where elites have been zealously fighting a rearguard battle to preserve their power and privileges, oftentimes from attacks by subversive groups who, if and when they come to power, would also reject a universalistic legal system with an independent judiciary. Without a spirit of moderation and a willingness to compromise with conflicting societal groups, it is difficult for a judiciary to be truly independent.

Overcoming these structural obstacles to judicial independence is an enormously difficult task. As the experience of Costa Rica indicates, the task is not impossible.[110] But Costa Rica has a long tradition of

[109] See *e.g.*, Helfeld, "Law and Politics in Mexico", in *One Spark from Holocaust: The Crisis in Latin America*, 81, 91 (E. Burnell ed. 1972); Cooper, "Law and Medicine in Peru", 24 *Chitty's L. J.* 5, 6 (1976); Rosenn, "Brazil's Legal Culture: The Jeito Revisited", 1 *Fla. Int'l L. J.* 1, 36 (1984).

[110] For a recent study illustrating the delicate balance in Costa Rica, see Barker,

effective democratic government without military interference and a long history of respect for the rule of law. Because these conditions are not readily replicable in many parts of Latin America, the path to judicial independence is likely to continue to be slow and tortuous.

APPENDIX I

Ratings of Judicial Autonomy of Latin American Countries 1945-1975

Country	*1945*	*1950*	*1955*	*1960*	*1965*	*1970*	*1975*	*Total*
Argentina	40	25	19	42	40	30	35	231
Bolivia	17	23	19	23	23	25	20	150
Brazil	30	38	40	40	36	25	21	230
Chile	41	44	44	44	45	40	19	277
Colombia	42	37	32	40	40	37	37	265
Costa Rica	44	45	44	44	46	40	43	306
Cuba	31	39	29	18	13	14	18	162
Dominican Republic	15	16	14	12	25	26	24	132
Ecuador	21	23	28	34	29	28	24	197
El Salvador	24	24	26	29	29	29	26	187
Guatemala	25	27	23	29	26	27	23	180
Haiti	19	18	23	18	12	13	12	115
Honduras	17	21	25	26	25	26	21	161
Mexico	30	31	36	38	38	34	33	240
Nicaragua	18	18	15	20	23	24	18	136
Panama	36	28	19	30	31	24	24	192
Paraguay	18	17	16	16	18	21	16	122
Peru	30	26	21	34	34	29	24	198
Uruguay	45	47	48	45	45	39	19	288
Venezuela	31	27	20	35	37	36	39	225

Verner, Joel G., "The Independence of Supreme Court in Latin America: A Review of the Literature", 16 *J. Lat. Amer. Stud.* 463, 479 (1984).

"Constitutional Adjudication in Costa Rica: A Latin American Model", 17 *U. Miami Inter-Am. L. Rev.* 249 (1986).