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# The Protection of Judicial Independence in Latin America

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# THE PROTECTION OF JUDICIAL INDEPENDENCE IN LATIN AMERICA\*

KEITH S. ROSENN\*\*

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## I. INTRODUCTION

Latin American judiciaries have been criticized frequently for lacking independence.<sup>1</sup> Seldom, however, have the critics explained the meaning of the talismanic phrase "judicial independence," or the reasoning behind their determinations that a particular judiciary is independent or subservient. Almost never do the critics explain why an independent judiciary is desirable. They apparently regard the proposition as self-evident. As Part II of this essay demonstrates, judicial independence is a concept fraught with ambiguities and unexamined premises. Part III explains the futility of attempts to quantify judicial independence. Part IV explores legal measures that have been utilized in Latin America to attempt to insure judicial independence. Part V reviews the methods by 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 because of certain structural features of Latin American politics and legal institutions. Until there is a much greater commitment by governments and the governed to the principles of

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1. See generally W.R. DUNCAN, *LATIN AMERICAN POLITICS* 152-53 (1976); A. EDELMANN, *LATIN AMERICAN GOVERNMENT AND POLITICS* 477-80 (1969); M. NEEDLER, *LATIN AMERICAN POLITICS IN PERSPECTIVE* 154-55 (1967); A. VON LAZAR, *LATIN AMERICAN POLITICS AND DEVELOPMENT* 66, 89 (H. Wiarda & H. Kline eds. 1979); Moreno, *Justice and Law in Latin America: A Cuban Example*, 12 J. INTER-AM. STUD. & WORLD AFF. 367, 373-78 (1970).

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

Judicial independence is a relative rather than absolute concept. All judiciaries are to some extent independent and to some extent subservient.<sup>2</sup> 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, legislative or judicial branches, or selected by competitive examination, judges are likely to have a belief system that mirrors 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 better resolved by the political processes, obviously do, and should, influence the decisions of independent judiciaries. Moreover, one can even find independent judiciaries in authoritarian regimes. An intriguing study of the Spanish judiciary under Generalissimo Franco revealed that the ordinary courts functioned with a high degree of independence, largely because politically sensitive cases were consistently diverted from the regular courts to special

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2. This point was cogently made by Jerome Cohen, former Professor of Law at Harvard, regarding 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 lies somewhere in between.

Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 HARV. L. REV. 967, 972 (1969).

tribunals.<sup>3</sup>

Judicial independence does not mean that judges are free to decide cases in accordance with their personal predilections. An independent judge need not sit like a kadi under a banana tree, dispensing justice as he or she sees fit. A judge is not expected to act independently of the law or in disregard of ethical considerations or 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 law.<sup>4</sup>

One of the most commonly cited definitions of judicial independence was proposed by Professor Theodore Becker:

Judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values, and conceptions of the 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.<sup>5</sup>

Becker sets out the core concept of judicial independence, but his definition needs further refinement. One problem is that it simplistically amalgamates the principle of independence from political authorities with the complex issue of independence from other judges. Quite different considerations pertain when the issue is the independence of the judiciary as a corporate body rather than the internal independence of an individual judge from his judicial colleagues. Courts in modern legal systems are typically arranged in hierarchical fashion. Lower court judges are expected or required to adhere to the decisions of higher courts for reasons of predictability, uniformity, and sound judicial administration. Even in countries that do not formally adhere to the doctrine of *stare decisis*, courts are almost invariably required to adhere to decisions of higher courts on remand.<sup>6</sup> Moreover, as a practical matter, lower

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3. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 L. & Soc. REV. 475 (1975).

4. Eckhoff, *Impartiality, Separation of Powers, and Judicial Independence*, 9 SCANDINAVIAN STUD. IN L. 9, 17 (1965).

5. T. BECKER, *COMPARATIVE JUDICIAL POLITICS* 144 (1970).

6. One Latin American constitution specifically finds no incompatibility between the

courts generally follow decisions of the higher courts, and all levels of courts generally follow their own decisions.<sup>7</sup> Literally applied, Becker's definition means that the only countries with truly independent judiciaries are those that permit judges to ignore decisions of higher courts. To be sure, one can find an occasional judge who feels that his independence would be compromised if he were obliged to follow decisions of a higher court,<sup>8</sup> but it is difficult to take these claims seriously. Judicial independence hardly requires a system in which lower courts are free to ignore the decisions of the higher courts. Nor is it inconsistent with judiciaries in which decisions regarding the promotion, removal, transfer, and salaries of judges are left to more senior judges, who normally take into account the quality of judicial performance.

Although a higher court can misuse its supervisory powers by disciplining lower court judges for ideological reasons,<sup>9</sup> the potential for such abuse should not require insulation of judges from the

basic principle of *stare decisis* and 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.

CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA, art. 207 (1983).

The classic exception to this principle occurs in France, where decisions of the highest ordinary court, the *Cour de Cassation*, are not binding on the Courts of Appeal until the third *renvoi*. As a practical matter, however, French judges pay careful attention to the decisions of higher courts. R. DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* 43-44 (M. Kindred trans. 1972); P. HERZOG, *CIVIL PROCEDURE IN FRANCE* 158-64 (1967); Yiannopoulos, *Jurisprudence and Doctrine as Sources of Law in Louisiana and in France*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS* 69, 73 (J. Dainow ed. 1974).

7. M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 208-10 (1985).

8. Judge Ruggero J. Aldisert of the United States Court of Appeals for the Third Circuit 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 independence 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 Campbell's decision in *United States v. Wiley*, 184 F. Supp. 679 (N.D. Ill. 1960).

9. A prime example of a tribunal that has misused its supervisory powers for ideological reasons is the Chilean Supreme Court, which has chilled attempts by lower courts to investigate and prosecute human rights violations by the Pinochet regime. Despite thousands of complaints alleging unlawful disappearances, tortures, and murders of opponents of the regime by the police and the military, a recent carefully documented study was unable to find any case where the conviction of a government security agent has been sustained on appeal. Zabel, Orentlicher & Nachman, *Human Rights and the Administration of Justice in Chile*, 42 REC. A.B. CTRY N.Y. 431 (1987) [hereinafter N.Y. City Bar Chile Rep.].

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 the misuse of that power. Judicial accountability can be achieved through a variety of techniques, including supervision by higher courts or judicial councils.<sup>10</sup> If there were no internal judicial accountability, pressure for intervention by the executive or legislative branches would be 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 the 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, 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.<sup>11</sup> Similarly, if political authorities intimidate witnesses and lawyers, the independence of the judiciary will be severely compromised.<sup>12</sup>

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10. See Cappelletti, "Who Watches the Watchmen?" *A Comparative Study on Judicial Responsibility*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 550 (S. Shetreet & J. Deschenes eds. 1985).

11. The Supreme Court of Argentina was totally frustrated by the refusal of military authorities to cooperate with the judiciary by providing facts concerning the whereabouts of thousands of people who mysteriously disappeared in Argentina during the 1970s. The writ of *habeas corpus* ceased to be an effective remedy for the protection of the constitutional rights of life and liberty. Eventually, the 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 1283 (1978) (Argen.). See generally Garro, *The Role of the Argentine Judiciary in Controlling Governmental Action under a State of Siege*, 4 HUM. R.L.J. 311, 332-37 (1983); Snyder, *State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication*, 15 LAW. AM. 503 (1984).

During the early 1980s, the Guatemalan judiciary encountered a similar lack of cooperation from the military government when the courts issued writs of *habeas corpus* for *desaparecidos*. AN AMERICAS WATCH REPORT, GUATEMALA: A NATION OF PRISONERS 21-22 (1984).

A recent examination of the cases involving persons detained by the military in Brazil during the late 1960s and 1970s revealed that in eighty-five percent of the cases, no notification had been given to judicial authorities, and in eleven percent of the cases notification was given to judicial authorities only after the legal time period had elapsed. TORTURE IN BRAZIL 78 (J. Dassin ed. 1986).

Chilean authorities have also been notably uncooperative with judicial investigations of official misconduct under the Pinochet regime. N.Y. Bar City Chile Rep. 454-57, 461-62.

12. There is strong evidence that the Pinochet regime has been intimidating witnesses in the investigation into the murder of Rodrigo Rojas de Negri, a 19 year-old U.S. resident

A third difficulty with Becker's definition is that it ignores the role of private parties in undermining judicial independence through bribery or intimidation. A judge whose vote can be purchased by money, gifts or favors is hardly independent. Neither is a judge whose decision is motivated by fear for his personal safety or that of his family. In Colombia, where fifty-seven judges have been murdered in the past five years, the bribes of drug traffickers, often accompanied by exceptionally credible death threats, have seriously compromised judicial independence.<sup>13</sup>

Becker's definition can be substantially improved by broadening its scope and simplifying its language. I would define judicial independence as the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice, free from the coercion, blandishments, interference, or threats of governmental authorities or private citizens.

Judicial independence is indispensable for the fair and unbiased administration of justice. As Judge Irving Kaufman of the

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who died while visiting Chile in July 1986. He and a teen-age girl were severely beaten, doused with gasoline, set afire, and dumped in the outskirts of Santiago, allegedly by members of the Chilean military. One of the most important witnesses was arrested and held incommunicado. Another was kidnapped and ordered to change any testimony that might have incriminated the military. A third eyewitness was detained and threatened with prosecution. Tolerance of these abuses in the investigation casts considerable doubt on the independence of the Chilean judiciary. See OAS, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1985-1986, 135-39 (1986); see also N.Y. City Bar Chile Rep. 441-48.

The practice of intimidating witnesses and lawyers occurred regularly in Argentina, Brazil and Uruguay in the 1970s during the height of campaigns by military regimes to eliminate subversive elements. See *Plight of Defence Lawyers in Argentina*, 14 REV. INT'L COMM. JURISTS 1-3 (1975); Steiner & Trubek, *Brazil — All Power to the Generals*, 49 FOR. AFF. 464, 472 (1971). Intimidation and harassment of defense lawyers is still going on in Chile. Sagaris, *Chile: Fighting to Abolish Tyranny*, 15 STUD. LAW. 24, 29-30 (1987); see also N.Y. City Bar Chile Rep. 465-79.

13. See Riding, *Cocaine Billionaires: The Men Who Hold Colombia Hostage*, N.Y. Times Magazine, Mar. 8, 1987, Sec. 6 at 27. See also *Deaths Mount as Drug War Rages*, The Miami Herald, Feb. 11, 1987, at 18. 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 Nov. 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. Even Ministers of Justice have been vulnerable to assassins' bullets. Assassins killed Minister of Justice Rodrigo Lara Bonilla on Apr. 30, 1984. Despite being dispatched as ambassador to Hungary for safekeeping, ex-Minister of Justice Enrique Parejo Gonzalez was shot five times and nearly killed in Budapest. If Colombia is unable to protect the lives of those at the top of the judicial hierarchy, how can lower court judges be expected to resist the blandishments and threats of drug traffickers. See also Flanders, *Court Administration in Colombia: An American Visitor's Perspective*, 7 JUDICATURE 36, 37-38 (1987).



United States Court of Appeals for the Second Circuit explained: "Adjudication based upon the noble precept 'equal justice under law' requires impartiality, and impartiality demands freedom from political pressure."<sup>14</sup> Societies in which justice is rarely obtainable tend to be highly unstable. Furthermore, the personal and transactional insecurity arising from the type of justice delivered by a dependent judiciary is likely to retard socio-economic development by deterring investment and productive economic activity.

How much judicial independence is desirable usually depends upon the extent to which one agrees or disagrees with the outcome of judicial decisions, particularly those involving constitutional interpretation. Judicial independence tends to be lauded by liberals and decried by conservatives when the decisions follow a liberal bent; conversely, judicial independence tends to be deplored by the liberals and praised by conservatives when the decisions take a conservative tack. In a universalistic legal system (i.e., where the same rules are meant to apply to all), judicial independence would be desirable if one were seriously committed to the ideal of equal justice under law for all persons. On the other hand, if one were committed to the maintenance of class privileges and the feudal notion of one law for the elites and another for the masses, an independent judiciary would be undesirable.

### III. MEASURING JUDICIAL INDEPENDENCE

Judicial independence is extraordinarily difficult to ascertain or measure. Judicial opinions sometimes display independence, but they almost always attempt to conceal lack of independence. Subservient judges do not write opinions indicating that the result would have been different had they been independent. Instead, they attempt to rationalize their decisions as compelled by law rather than by outside influence. Judges may act independently in certain kinds of cases but not in others. The same judges may also be independent during specific periods but subservient during others. Public perceptions of judicial independence may 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 had openly clashed with the executive, publicly accusing the Allende regime of

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14. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 684 (1979).

violating the Constitution.<sup>15</sup> After Pinochet's overthrow of Allende, however, the Chilean 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 has sympathized with the political goals of the Pinochet regime, public perception of the Court's loss of independence has been somewhat exaggerated.<sup>16</sup>

Perhaps the only people who fully comprehend the degree to which they are actually independent are the judges themselves, and even they may have no clear idea until circumstances arise that test their independence. Some judges may even be unaware that their court's independence has been compromised because one or more of its members has been bribed, intimidated or subjected to other forms of pressure.

Attempts to quantify judicial independence suffer from serious methodological infirmities. Professor Kenneth Johnson 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 of which was judicial independence. Johnson defined judicial independence as "the 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 people and political leaders rely "on judicial processes rather than arbitrary executive or legislative action or military force."<sup>17</sup> His meth-

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15. See Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis: Part II*, 9 LOY. L.A.L. REV. 711, 726-27 (1976); Hudson, *Role of Constitutional Conflict over Nationalization in the Downfall of Salvador Allende*, 31 INTER-AM. ECON. AFF. 63 (Spring 1978).

16. See R. ALEXANDER, *THE TRAGEDY OF CHILE* 349-51 (1978). It should be noted that the Chilean Junta effectively foreclosed judicial review of its decree-laws by declaring that in the event of any incompatibility between the Constitution and any of the Junta's decree-laws, the Junta was implicitly or explicitly exercising its constituent power and the Constitution should be deemed to be modified accordingly. Decreto-Ley No. 788, No. 29.019 DIARIO OFICIAL 4227 (4 de diciembre 1974) (Chile). Moreover, it seems clear that the independence of the Chilean judiciary has been seriously compromised by its overlooking or condoning flagrant human rights violations. N.Y. City Bar Chile Rep. at 436-39; Sagaris, *supra* note 12; *Press Aims Erosion of the System*, Lat. Am. Weekly Rep., Aug. 6, 1987, at 3. At least one U.S. court has expressed substantial doubts about the degree of judicial independence in Chile because of the expressed power of the Junta to amend or rescind constitutional provisions by decree. *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1342-43 (S.D.N.Y. 1982), *aff'd* 727 F.2d 274 (2d Cir. 1984).

17. See Verner, *The Independence of Supreme Courts in Latin America: A Review of*

odology produced numerical scores from which he ranked Latin American judiciaries with respect to independence. Between 1945 and 1975, Costa Rica received the highest scores and Haiti the lowest.<sup>18</sup> Johnson's methodology creates the delusion of mathematical certainty, but it is still only the collective hearsay of eighty-four social scientists, most of whom are historians and political scientists rather than lawyers practicing before the judiciaries being ranked.

A more ambitious attempt at quantification was made by Pablo Gonzalez-Casanova, a sociologist who analyzed 3,700 *amparo*<sup>19</sup> 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 thirty-four percent and denied *amparo* in thirty-four percent of the cases; in twenty-four percent the cases were discontinued or not ruled upon, and in nine percent other types of rulings were entered.<sup>20</sup> The data were further refined by determining the social class to 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.<sup>21</sup>

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the Literature, 16 J. LAT. AM. STUD. 463, 478 (1984).

18. *Id.* at 479.

19. In Mexican law, *amparo* is a complex action that can function as a writ of habeas corpus, injunction, declaratory judgment, or appeal. A leading Mexican jurist has observed that the Mexican *amparo* combines the following five procedural functions: (1) protection of life and liberty, (2) a challenge to the constitutionality of legislation, (3) resolution of conflicts from administrative acts or decisions, (4) appeal of judicial decisions, and (5) protection of peasant rights in agrarian reform. Fix-Zamudio, *El Problema de Lentitud de los Procesos y su Solución en el Ordenamiento Mexicano*, 21 REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO, 85, 116 (1971).

20. P. GONZÁLEZ-CASANOVA, DEMOCRACY IN MEXICO 23-24 (D. Salti trans. 2d ed. 1970).

21. *Id.*

Query whether Gonzalez-Casanova's data really support his conclusions. His data tell us nothing about the importance of the challenged acts or laws to the Executive. Because of typical litigation delays, the act or law challenged in an *amparo* proceeding will often be the product of a prior government. The present regime may have little or no interest in maintaining the disputed measure in force. Moreover, in all constitutional *amparo* actions, the President of Mexico must be named as a party because he signed the law, not because he is necessarily interested in the outcome.<sup>22</sup> Nor does Gonzalez-Casanova's data tell us how many 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 avoid constitutional difficulties. These questions cannot be answered without more sophisticated data. Looking only at the percentage of *amparo* cases decided for or against the claimant may convey a misleading sense of the degree of judicial independence in Mexico.

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 thirty-three-month period.<sup>23</sup> 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 state 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.<sup>24</sup> Moreover, one has to distinguish between pretrial *habeas corpus* or *amparo* cases, which may involve tension between the executive and the judiciary, and post-convic-

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22. See 132 SEMANARIO JUDICIAL DE LA FEDERACIÓN 126 (Sexta Epoca, June 1968 primera parte) and cases cited therein.

23. Schwarz, *Judges under the Shadow: Judicial Independence in the United States and Mexico*, 3 CAL. W. INT'L L.J. 260 (1973). See also Schwarz, *Rights and Remedies in the Federal District Courts of Mexico and the United States*, 4 HASTINGS CONST. L.Q. 67 (1977), comparing U.S. federal district court dispositions of *habeas corpus* and Section 1983 civil rights actions with Mexican federal district court dispositions of indirect *amparos* in penal and administrative cases.

24. Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L.J. 785, 797-98 (1974).

tion *habeas corpus* or *amparo* cases, where the appellate court generally reviews the conduct of the lower court. It is by no means clear that a relatively low percentage of *habeas corpus* or *amparo* cases decided against the government indicates anything about the degree to which judicial independence exists. Judicial independence becomes a critical factor only in those relatively few cases where 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 both too complex and too subtle a concept to be measured by such crude and misleading techniques as calculating the percentage of *habeas corpus* or *amparo* cases decided against the government. 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 *habeas corpus* petitions decided against the government may signify a high degree of compliance with the law and with 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 concerning the whereabouts of persons on whose behalf writs of *habeas corpus* are filed.<sup>25</sup> Actually, in terms of sheer volume of cases, corruption is more likely to pose a greater threat to judicial independence than does 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 perfect information existed regarding the judicial decision-making process and the mental state of each judge in every country, one 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 between these two poles.) Unfortunately, nothing close to perfect information on judicial decision-making is available for any country. Even if it were, it would still have to be interpreted in light of the

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25. See Pérez de Smith y otros, *supra* note 11, where the Supreme Court of Argentina overtly admitted the absence of justice in Argentina. Because the military government refused to acknowledge the whereabouts of thousands of persons secretly and extrajudicially detained by the military, the Argentine courts found it impossible to implement the remedy of *habeas corpus*.

intense doctrinal debates regarding how activist a role the judiciary should play.<sup>26</sup>

#### 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.<sup>27</sup> Others contain 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.

##### A. *Measures to Protect the Integrity of Judicial Decisions*

##### 1. 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. Perhaps the most explicit statement of this form of guaranty is found in Peru's 1980 Constitution:

Art. 233. The following are guarantees of the administration of justice:

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26. Compare A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 127-33 (1962); R. BERGER, *GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977), with M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); Gunther, *The Subtle Vices of the "Passive Virtues"* — *A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

27. CONSTITUCIÓN POLÍTICA DEL ESTADO, art. 117 (Bol. 1967) ("Judges are independent in the administration of justice and are subject only to the Laws."); CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 125 (1976) ("The judges, in their function of administering justice, are independent and owe obedience only to the Law."); CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA, art. 4 (1966) ("These three branches [the legislative, executive, and the judiciary] are independent in the exercise of their respective functions."); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, art. 203 (1985) ("The magistrates and judges are independent in the exercise of their functions and are exclusively subjected to the Constitution of the Republic and the Laws."); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA, art. 165 (1986) ("In their judicial activity, Supreme Court Judges and other Judges are independent and must obey only the Constitution and the Law. . . ."); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA, art. 207 (1983) ("Magistrates and judges are independent in the exercise of their functions and are subject only to the Constitution and the Law."); LA CONSTITUCIÓN PARAGUAYA, art. 199 (1967) ("The independence of the judicial power is guaranteed.").

. . . 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, 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 their presidents or congresses from exercising judicial functions or interfering with judicial decisions.<sup>28</sup>

## 2. Jurisdictional Monopoly

Latin America has a long tradition of creating special tribunals to decide certain classes of cases, particularly those involving labor disputes, military justice, agrarian reform, subversives, administrative law and electoral disputes.<sup>29</sup> Such practice undermines judicial independence when these special tribunals are exempt from any form of control by the regular judiciary.<sup>30</sup> A related technique that also undermines judicial independence is the transfer of jurisdiction normally exercised by the regular courts to specially created *ad hoc* tribunals. Rarely do Latin American constitutions restrict such practices in the interest of safeguarding judicial independence. The Peruvian Constitution of 1980 is an exception, for it 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.<sup>31</sup> More common in Latin American constitutions are provisions specifying that only the judiciary may decide disputes of a litigious nature,<sup>32</sup> or that only tribunals established by law may decide criminal or civil cases.<sup>33</sup>

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28. CONSTITUCIÓN DE LA NACIÓN ARGENTINA, art. 95 (1853); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 73 (1980); LA CONSTITUCIÓN PARAGUAYA, art. 199 (1967).

29. See H. CLAGETT, ADMINISTRATION OF JUSTICE IN LATIN AMERICA 55-6 (1952).

30. See *infra* notes 98-99 and accompanying text.

31. CONSTITUCIÓN POLÍTICA DEL PERU, art. 233(1) (1980).

32. LA CONSTITUCIÓN PARAGUAYA, art. 199 (1967).

33. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 73 (1980); LA CONSTITUTION HAITIENNE, art. 173-1 (1987). The Honduran variation provides that the judging of cases and the enforcement of judgments is the exclusive province of the courts. CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS, art. 314 (1982).

### 3. Requiring a Reasoned Opinion

A third technique to protect the integrity of the decision-making process is requiring judges to write reasoned opinions explaining their decisions.<sup>34</sup> This requirement does not immunize judges from bribes and political pressures. Nevertheless, by exposing judicial decisions to public scrutiny, this requirement makes it more difficult for judges to rationalize "corrupt" rulings. Additionally, a reasoned opinion improves the judicial process by insuring that courts decide in accordance with the law.

### 4. Requiring Public Trials

Publicity can also effectively curb judicial arbitrariness and corruption. It is easier to "fix" cases that are never exposed to public scrutiny. Accordingly, several Latin American countries require that certain cases be decided in open court. For example, Peru requires that all cases in which the defendants are public officials, those involving press crimes and those involving fundamental rights guaranteed by the constitution be tried in open court.<sup>35</sup>

## *B. Measures Protecting Personal Independence*

### 1. Irreducibility of Judicial Salaries

Several Latin American constitutions have followed the example of the United States in attempting to protect a judge's independence by providing that his compensation may not be diminished during his term of office.<sup>36</sup> The underlying policy is to protect judges from financial retribution for rendering decisions that displease the legislature or the executive. Originally, Article 127 of the Mexican Constitution of 1917 went one step further and also prohibited the raising of salaries of Supreme Court members during their term in office. This idea, which originated in the origi-

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34. CONSTITUCIÓN POLÍTICA DEL PERU, art. 233(4) (1980); CÓDIGO DE PROCEDIMIENTOS CIVILES, arts. 81-86 (Costa Rica 1982 ed.). CÓDIGO JUDICIAL DE PANAMA, art. 1034 (1986 rev.).

35. CONSTITUCIÓN POLÍTICA DEL PERU, art. 233(3) (1980). Cf. LA CONSTITUTION HAÏTIENNE, arts. 180-1 and 180 (1987), which require that all political and journalistic offenses be tried in open court, and that all hearings in other cases be open unless public order or morality dictates a closed trial.

36. CONSTITUCIÓN DE LA NACIÓN ARGENTINA, art. 96 (1853); CONSTITUIÇÃO FEDERAL DA REPÚBLICA FEDERATIVA DO BRASIL, art. 113 (III) (1967); CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 160 (1886); CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 94 (1917).



nal 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.<sup>37</sup> In 1982, severe inflation forced Mexico to replace this prohibition against salary increases with a provision calling for adequate compensation to be determined annually in an equitable manner.<sup>38</sup>

An alternative formulation of this aspect of the protection of judicial independence can be found in Peru's Constitution, which guarantees its judges "a compensation that insures for them a life worthy of their mission in the hierarchy."<sup>39</sup> Standing alone this vague provision would appear to provide little protection for judicial compensation. It is more meaningful, however, because it is coupled with a constitutional provision guaranteeing the judiciary a minimum percentage of the country's budget.<sup>40</sup>

Uruguay maintains 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 less than those of Ministers Secretaries of State.<sup>41</sup> Since the Ministers are well paid, this measure has assured adequate judicial compensation in Uruguay.<sup>42</sup> A similar measure has been adopted in Panama.<sup>43</sup>

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

A second technique for assuring financial independence is a constitutional requirement that a fixed percentage of the country's total budget be allocated to the judiciary. The most generous of these provisions is that of Costa Rica, which grants the judiciary

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37. The Framers of the U.S. Constitution rejected the prohibition of judicial salary increases for the protection of judicial independence because increased caseloads and inflation might decrease the real value of judicial compensation, and alterations in the state of society might require more attractive judicial salaries in order to maintain the same calibre of personnel. Rosenn, *The Constitutional Guaranty against Diminution of Judicial Compensation*, 24 UCLA L. REV. 308, 312-18 (1976).

38. Decreto de Reformas y Adiciones al Título Cuatro, D.O. 28 de diciembre 1982.

39. CONSTITUCIÓN POLÍTICA DEL PERU, art. 242(3) (1980).

40. See *infra* note 46 and accompanying text.

41. Acto Institucional No. 12, art. 6, 10 de Noviembre 1981, (Uru.).

42. Vescovi, *Uruguay*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 374, 377 (S. Shetreet & J. Deschenes eds. 1985).

43. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA, art. 210 (1983).

no less than six percent of the nation's ordinary annual receipts.<sup>44</sup> Honduras assures the judiciary an annual appropriation of at least three percent of the nation's annual receipts, excluding loans and grants,<sup>45</sup> while Peru guarantees the judiciary two percent of the current budget of the Central Government.<sup>46</sup> Guatemala and Panama combine the Costa Rican and Peruvian approaches, constitutionally mandating that the judiciary's budget will be at least two percent of the nation's ordinary annual receipts.<sup>47</sup>

Unfortunately, these constitutional guarantees have sometimes been honored in the breach. Moreover, in many countries, substantial percentages of governmental expenditures are not included in the budget. Nonetheless, such guarantees still perform a useful function in providing the judiciary with valuable leverage at budget time. The lack of a similar constitutional guaranty has had drastic consequences for the Argentine and Bolivian judiciaries.<sup>48</sup> Complaints about the inadequacy of judicial salaries in Latin America are widespread.<sup>49</sup>

### 3. Tenure in Office

A third technique to insure personal judicial independence is the constitutional guaranty of tenure in office. Argentina and Mexico follow the model of the U.S. Constitution, assuring federal

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44. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, art. 177 (1949).

45. CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS, art. 306 (1982).

46. CONSTITUCIÓN POLÍTICA DEL PERU, art. 238 (1980). Unfortunately, this guaranty has never been enforced. The judiciary received .34% of the national budget in 1980, .69% in 1981, .70% in 1982, .81% in 1983, .72% in 1984, and .78% in 1985. *Report Condemns Peru's Judiciary*, Lat. Am. Weekly Rep., Feb. 22, 1985, at 6.

47. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, art. 213 (1985); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA, art. 211 (1983).

48. In 1900, Argentina devoted 3.8% of its national budget to the federal judiciary. That figure has fallen steadily, and by the end of 1984, only 0.79% of the federal budget was allocated to the judiciary. Serra, *Poder Judicial: Su Presupuesto*, 1985-C L.L. 1230-31 (1985) (Argen.). Article 119 of the 1967 Bolivian Constitution simply provides that each year the nation's budget will allocate a fixed and sufficient, albeit unspecified, amount to the judiciary. This provision has worked badly, effectively leaving the judiciary with insufficient resources and at the mercy of the other branches of government. See *Exposición de Motivos, Hacia la Reforma Constitucional*, in CORTE SUPREMA DE JUSTICIA DE LA NACIÓN, LABORES JUDICIALES 45-46 (1981).

49. See *infra* notes 111-14 and accompanying text. See also *Explanation of Motives for a Draft Judicial Reform Bill* in I. BURGOA, *EL JUICIO DE AMPARO* 1011 (1981); H. Fernandez-Sandoval, *Bases para una Reforma Integral de la Justicia* 22-23 (1986) (transcript of speech); Ovalle Favela, *La Independencia Judicial en el Derecho Mexicano*, 49 BOL. MEX. DER. COMP. 55, 68-70 (1984).

judges lifetime tenure pending good behavior.<sup>50</sup> The constitutions of several other Latin American countries protect tenure in office pending good behavior until a specified retirement age.<sup>51</sup> Such measures can be nearly as effective as a guaranty of lifetime tenure only if the judicial retirement system is satisfactory. Unfortunately, chronic inflation has wreaked havoc with many retirement programs, thereby undermining these guaranties of judicial independence. It is more common in the majority of Latin American countries to limit the terms of office of members of their Supreme Courts to four to ten years.<sup>52</sup>

Removal of a judge for cause is generally entrusted to other members of the judiciary, often in the form of an appellate court or a council of magistrates.<sup>53</sup> Chile has a review system in which all judges below the level of the Supreme Court are graded annually by the Supreme Court. Those whose performance is deemed substandard for two consecutive years and those graded unacceptable for a single time are automatically dismissed, regardless of their tenure.<sup>54</sup> Argentina and Mexico, follow the U.S. model of impeachment by the legislature.<sup>55</sup> Brazil, Haiti and Paraguay provide for impeachment by the Senate for members of the highest court, while other members of the judiciary are tried before the Supreme Court in Brazil and Paraguay, and before the regular courts in Haiti.<sup>56</sup> At least in theory (although not necessarily in practice), no

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50. CONSTITUCIÓN DE LA NACIÓN ARGENTINA, art. 96 (1853). Mexico's slight variation provides that Supreme Court justices hold office for life pending good behavior, whereas Circuit and District Court judges initially have a four-year term; if re-elected or promoted, they acquire lifetime tenure. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, arts. 94, 97 (1917).

51. CONSTITUIÇÃO FEDERAL DA REPÚBLICA FEDERATIVA DO BRASIL, art. 113 (I) & (III) §2 (1969) (tenure until retirement age of 70); CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 148 (1886) (members of the Supreme Court and the Council of State have tenure until the age of compulsory retirement, fixed by statute at age 75); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 77 (1980) (tenure until retirement age of 75); CONSTITUCIÓN POLÍTICA DEL PERU, art. 242(2) (1980) (tenure until retirement age of 70).

52. See *infra* notes 68-71 and accompanying text.

53. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, art. 165 (1949) (Supreme Court justices can be removed only by the secret vote of two-thirds of the members of the Supreme Court); CONSTITUCIÓN POLÍTICA DEL PERU, art. 248 (1980) (Supreme Court has the investigative responsibility over the official conduct of judges).

54. CÓDIGO ORGÁNICO DE TRIBUNALES, arts. 275-77 (7th ed. 1977) (Chile).

55. CONSTITUCIÓN DE LA NACIÓN ARGENTINA, arts. 45, 51, 52 (1853); CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 110 (1917).

56. CONSTITUIÇÃO FEDERAL DA REPÚBLICA FEDERATIVA DO BRASIL, art. 42(II) (1969); LA CONSTITUTION HAITIENNE, arts. 177, 184-1, 185 (1987); LA CONSTITUCIÓN PARAGUAYA, arts. 151(3), 196 (1968).

Latin American country permits the executive to remove or transfer judges.

#### 4. The Selection and Reappointment Processes

The selection process is critical in assuring an independent judiciary. If entrusted to the executive without constraints on its exercise, the risk of appointment of unqualified candidates or persons selected primarily on the basis of political or personal loyalty becomes exceedingly high. Consequently, most Latin American countries have set forth minimal qualifications for membership on the Supreme Court.<sup>57</sup> Many Latin American countries have created career judiciaries with entry based on competitive examinations and comparison of credentials, evaluated by the judiciary itself.<sup>58</sup> Brazil, which has a career judiciary, nevertheless reserves a certain percentage of lateral appointments on appellate courts for practicing lawyers or state attorneys in order to provide varied legal perspectives on its top courts.<sup>59</sup>

Members of the highest courts in Latin America are generally selected according to 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 judges to engage in political activity.

The presidential selection system (modeled on the U.S. Con-

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57. A typical set of qualifications can be found in Panama's Constitution. To be a member of the Supreme Court, a candidate must: (a) be a native-born Panamanian; (b) be at least 35 years old; (c) be 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. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA, art. 201 (1983).

58. CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 162 (1886) and Estatuto de la Carrera Judicial y del Ministerio Público, Decreto-Ley No. 250 of 1970, Vol. CVI, No. 33023 DIARIO OFICIAL 809 (28 de marzo 1970) (Colom.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE EL SALVADOR, arts. 182(9), 186; CONSTITUIÇÃO FEDERAL DA REPÚBLICA FEDERATIVA DO BRASIL, arts. 113 (III §1), 136 (I) & (II), as amended by Emenda No. 7 de 13 de abril 1977; LEY DE ORGANIZACIÓN JUDICIAL, arts. 207-216 (1972 ed.) (Bol.); Acto Institucional No. 12, art. 1, 10 de noviembre 1981 (Uru.). See also Quintero, *La Independencia Judicial*, 10 ANUÁRIO DE DERECHO 15, 25-27 (1972) (Pan.).

59. Tacito & Barbosa Moreira, *Judicial Conflicts of Interest in Brazilian Law*, 18 AM. J. COMP. L. 689, 690-91 (1970).

stitution) is used in Argentina, where the president appoints all the federal judges with the consent of the Senate.<sup>60</sup> Paraguay has adopted a similar model, albeit 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.<sup>61</sup> Until this year, Haiti was the only country in Latin America that formally granted its President unfettered discretion to appoint the judiciary.<sup>62</sup> Haiti's new Constitution now limits such discretion by requiring the President to choose members for ten year terms to the highest court, the Court of Cassation, from a list of three candidates prepared by the Senate.<sup>63</sup> 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.<sup>64</sup> The Mexican President, with the approval of the Senate, appoints the members of the Supreme Court, which in turn selects the Circuit Court and District Court judges.<sup>65</sup> In Panama, the Cabinet Council (the President and his Cabinet Ministers) appoints members of the Supreme Court for ten-year terms. The Supreme Court appoints the appellate courts, which in turn appoint the judges immediately lower in the hierarchy.<sup>66</sup> The Peruvian President appoints the judges upon the recommendation of the National Council of the Magistracy.<sup>67</sup>

In a majority of Latin American countries members of the highest courts must win legislative approval to continue in office. It is common for the legislature to elect members of the Supreme Court for terms of office that vary between four and ten years.<sup>68</sup> In

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60. CONSTITUCIÓN DE LA NACIÓN ARGENTINA, art. 86(5) (1853).

61. LA CONSTITUCIÓN PARAGUAYA, arts. 180(8), 195 (1968).

62. LA CONSTITUTION HAITIENNE, art. 114 (1983).

63. LA CONSTITUTION HAITIENNE, at arts. 174, 175 (1987). The president appoints lower court judges for seven year terms from a list of three candidates prepared by the relevant Departmental Assembly.

64. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 75 (1980).

65. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, arts. 96, 97 (1917).

66. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA, arts. 200, 206 (1983).

67. CONSTITUCIÓN POLÍTICA DEL PERU, art. 245 (1980).

68. The Supreme Court of Bolivia is elected for ten-year renewable terms by the Chamber of Representatives from lists of three candidates prepared by the Senate. District Court judges have six-year terms, while other judges serve for only four years. CONSTITUCIÓN POLÍTICA DEL ESTADO, arts. 125, 126 (Bol. 1967). Members of Costa Rica's Supreme Court are elected by the legislature for eight-year terms. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, arts. 157, 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

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.<sup>69</sup> A similar system exists in El Salvador, where Supreme Court members automatically remain in office for renewable five-year terms unless the legislature expressly votes them out.<sup>70</sup> In contrast, members of Uruguay's Supreme Court may not be reelected after they have completed a ten-year term until a five-year waiting period has elapsed.<sup>71</sup> Such measures leave judges vulnerable to legislative pressures. Since Latin American legislatures are often themselves dominated by the executive, a legislative approval system may still leave Latin American judges vulnerable to threats or blandishments by the executive.

## 5. Transferability of Judges

Some Latin American constitutions protect judges against involuntary transfers.<sup>72</sup> Others bestow upon the highest court un-

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elected by the National Assembly as co-judges on the Supreme Court, each serving two months per year during a thirty 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. CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA, art. 23 (1966). Supreme Court Justices in Ecuador are appointed by the National House of Representatives for renewable six-year terms. CONSTITUCIÓN DEL ECUADOR, art. 101 (1979). The Supreme Court of Justice of El Salvador is elected by the Legislative Assembly for a five-year term. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE EL SALVADOR, art. 186 (1983). Members of the Supreme Court in Honduras are elected by the legislature for four-year renewable terms. CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS, art. 305 (1982). Guatemala has a six-year term for members of its Supreme Court — four members of the Supreme Court are elected directly by the Congress, and five are selected by the Congress from a list of thirty names submitted by a committee of law school deans, representatives of the bar association, and a representative of the judiciary selected by the Supreme Court. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, art. 215 (1985). The Supreme Court of Justice of Nicaragua is elected for a six-year term by the National Assembly from slates of three candidates submitted by the President of the Republic. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA, art. 163 (1987). The Supreme Court of Uruguay is elected by the Council of the Nation for ten-year terms. CONSTITUCIÓN DE LA REPÚBLICA ORIENTAL DEL URUGUAY, art. 2 *as amended* by Acto Institucional No. 12 art. 2, 10 de noviembre 1981 (Uru.). The Supreme Court of Venezuela is elected by the legislature for nine-year terms. LA CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA, art. 214 (1961).

69. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, art. 158 (1949).

70. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE EL SALVADOR, art. 186 (1983).

71. Acto Institucional Act No. 12, art. 2, 10 de noviembre 1981 (Uru.).

72. CONSTITUIÇÃO FEDERAL DA REPÚBLICA FEDERATIVA DO BRASIL, art. 113 (II) & (III) (1969) (judges transferable only by a secret two-third vote of a higher tribunal); CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 160 (1886) (judges may not be transferred to other employment in a different branch without leaving their positions); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA, art. 208 (1983) (magistrates and judges transferable only for reasons provided by law). See also LEY DE ORGANIZACIÓN JUDICIAL, art. 19 (1972) (Bol.) (a judge not

restricted power to transfer judges.<sup>73</sup> Because an involuntary transfer can be punitive and is often regarded as tantamount to an invitation to resign, the lack of constraints on transference can seriously compromise personal judicial independence.

## 6. Avoidance of Conflicts of Interest

It is common practice in Latin America to prohibit judges from engaging in any other form of economic activity, other than writing or teaching, in order to avoid conflicts of interest.<sup>74</sup> Many countries also prohibit judges from engaging in political activities.<sup>75</sup> Brazil bars judges from participating in commerce or acting as a director or administrator of any business firm,<sup>76</sup> while Chile prohibits judges from owning mining interests within the judge's territorial district.<sup>77</sup>

## 7. Judicial Immunity

Judicial independence can be threatened by vexatious lawsuits by litigants who claim they have been injured by judges who have either maliciously or negligently applied the law. The Anglo-American approach is to accord judicial immunity from such lawsuits; France immunizes its regular judiciary from civil suits, but permits victims of judicial negligence to sue the state. Italy makes its judges personally liable, but also imposes liability on the state.<sup>78</sup> In

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transferable without his express consent).

73. *E.g.*, CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 97 (1917).

74. CONSTITUIÇÃO FEDERAL DA REPÚBLICA FEDERATIVA DO BRASIL, art. 114 (1969) (prohibits judge from engaging in any other professional or political activity except university teaching or serving on the electoral court); CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 160 (1886) (prohibits judges from holding any other paid office or from practicing law, but permits university teaching); LA CONSTITUTION HAÏTIENNE, art. 179 (1987) (prohibits judges from all other salaried employment except teaching); CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS, art. 311 (1982) (prohibits judges from the practice of law and all other governmental employment except teaching or being a diplomat-at-large); CONSTITUCIÓN POLÍTICA DEL PERU, art. 243 (1980) (prohibits judges from engaging in any other professional or political activity except university teaching, and prohibits judges from unionizing or striking).

75. CONSTITUCIÓN DEL ECUADOR, art. 104 (1979); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA, arts. 205, 209 (1983) (prohibition on all political activity and any other employment, with the exception of university teaching).

76. Lei Orgânica da Magistratura Nacional, Lei Complementar No. 35, art. 36 (I)&(II) (14 de março 1979) (Braz.).

77. CÓDIGO ORGÁNICO DE TRIBUNALES, art. 322 (7th ed. 1977) (Chile).

78. See Blom-Cooper, *Independence of the Judiciary*, in COUNCIL OF EUROPE, JUDICIAL POWER AND PUBLIC LIABILITY FOR JUDICIAL ACTS 19, 24 (1986); Morozzo della Rocca, *The*

Latin America, however, one does not generally find a well-developed notion of judicial immunity from such lawsuits. On the contrary, most Latin American countries regard judges as citizens fully exposed to criminal and civil liability for maliciously or negligently applying the law.<sup>79</sup>

## V. FORMS OF INTERFERENCE WITH JUDICIAL INDEPENDENCE

Some countries, such as England and Israel, have managed to achieve independent judiciaries without written constitutions.<sup>80</sup> Although it does not permit the courts to declare laws unconstitutional, France has not only an independent judiciary, but also an independent system of administrative courts that are technically part of the executive.<sup>81</sup> In contrast, 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.

### A. Formal Abrogation of Judicial Independence

Interference with judicial independence takes many forms. The most obvious is the formal abrogation of judicial independence. In 1977, a *de facto* military regime in Uruguay, a country that had previously enjoyed a well-deserved reputation for judicial independence, promulgated an astounding Institutional Act that overtly abolished the independence of the judiciary.<sup>82</sup> The Act dis-

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*Different Forms of Personal Liability of the Judge*, in *id.* at 54, 59, 61-62.

79. Lei Orgânica da Magistratura Nacional, Lei Complementar No. 35, art. 49 (14 de março 1979)(Braz.); CÓDIGO ORGÁNICO DE TRIBUNALES, arts. 324-331 (7th ed. 1977) (Chile). See generally J. BUSTAMANTE ALSINA, *TEORIA GENERAL DE LA RESPONSABILIDAD CIVIL* 383-84 (2d ed. 1973); L. COLOMBO, 2 *CULPA AQUILIANA* 54-55 (1965).

80. This does not mean that England and Israel are without constitutions. Neither country has a single document called the "Constitution," but parts of their so-called "un-written constitutions" can be found in written documents. Thus, one finds the English Constitution in documents such as the Magna Carta, the Petition of Rights, the Bill of Rights, the Habeas Corpus Act, and the Parliament Act. A. GOODHART, *THE BRITISH CONSTITUTION* 1 (1946). The emerging Israeli Constitution is found in five "basic laws." See Sager, *Israel's Dilatory Constitution*, 24 AM. J. COMP. L. 88, 93-99 (1976).

81. R. DAVID, *supra* note 6 at 24-25.

82. Acto Institucional No. 8, 1 de julio 1977 (Uru.). See generally, L. CORTIÑAS- PELÁEZ, *PODER EJECUTIVO Y FUNCIÓN JURISDICCIONAL* (1982). For a detailed analysis of the military's destruction of judicial independence in Uruguay, see THE LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, *URUGUAY: THE END OF A NIGHTMARE?* 43-54 (1984).



carded the theory of a tripartite separation of powers, debunking it as "a thesis incorrectly attributed to Montesquieu," and eliminated the judiciary as a separate branch of government. The Uruguayan courts were placed at the mercy of the Executive, which for four years was granted discretion to dismiss any judge for any reason. All court administrative functions were transferred to the Ministry of Justice, which was granted full authority to set 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 displeasure with the acquittal of forty-five members of Batista's air force on a charge of genocide led to the convening of a special panel to reverse the acquittal (over protests from the bench and bar), and the reliance on "revolutionary courts" for political trials.<sup>83</sup> Judicial independence was formally abolished by the Judicial Organizational Law of 1973, which explicitly subordinated the judiciary to the Council of Ministers.<sup>84</sup> That subservience was confirmed by the 1976 Constitution and the 1977 Judicial Organization Law.<sup>85</sup> 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 responsible for their election, and the judges are subject to recall.<sup>86</sup>

### B. *Bypassing the Ordinary Courts*

A second technique for undermining judicial independence in Latin America is to transfer jurisdiction of the ordinary courts over national security offenses to military or special tribunals. Exceptionally, a courageous court might declare the trial of civilians by military courts unconstitutional, as the Colombian Supreme Court did recently.<sup>87</sup> In many countries, however (particularly those ruled

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83. Salas, *The Judicial System of Postrevolutionary Cuba*, 8 NOVA L.J. 43, 45 (1983).

84. Ley de Organización del Sistema Judicial, Ley No. 1250, art. 3, No. 13 GACETA OFICIAL 57 (23 de junio 1973) (Cuba).

85. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 122 (1976); Ley de Organización del Sistema Judicial, Ley No. 4 de 10 de agosto 1977, art. 4, No. 31 GACETA OFICIAL 299 (12 de agosto 1977) (Cuba).

86. Comment, *Cuba's 1976 Socialist Constitution and the Fidelista Interpretation of Cuban Constitutional History*, 55 TULANE L. REV. 1223, 1275-6 (1981).

87. Decisión de 5 de marzo 1987, (Colom.) Sala Plena in 16 JURISPRUDENCIA Y DOCTRINA 492 (May 1987).

by *de facto* military governments), civilians accused of terrorism or subversion have been tried before special or military tribunals rather than by ordinary courts. Frequently, the ordinary courts have been denied jurisdiction to issue writs of *habeas corpus* or *amparo*, or to review the proceedings on appeal. Brazil began this process in 1965, enacting by military fiat an Institutional Act that permitted military tribunals to try civilians accused of national security crimes.<sup>88</sup> The Brazilian courts were effectively prevented from invalidating the extension of military jurisdiction by a provision (which became boilerplate in all subsequent Institutional Acts) excluding from judicial review all governmental actions based upon the First and Second 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 crimes against the popular economy. Institutional Act No. 6 reduced the Supreme Court's jurisdiction to hear ordinary appeals from cases denying *mandado de segurança* (writ of security) and eliminated ordinary appeals from decisions of military tribunals trying civilians for violations of national security.<sup>89</sup> Recent research into the archives of the Superior Military Tribunal reveals that torture of defendants was commonplace and routinely ignored by the military courts.<sup>90</sup>

In 1982, the military government in Guatemala enacted a decree-law that provided for Tribunals of Special Jurisdiction to deal with people accused of violating the state of siege or participating in other subversive activity. Procedure was summary, with no opportunity for appeal. Judges could be army officers with no formal legal training, and the death penalty was mandated for certain offenses.<sup>91</sup> Similar legislation has been passed in

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88. Ato Institucional No. 2, 27 de outubro 1965 (Braz.).

89. See K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 214-219 (1975). See also Nadorff, *Habeas Corpus and the Protection of Political and Civil Rights in Brazil: 1962-1978*, 14 *LAW. AM.* 297 (1982). Paradoxically, the Superior Military Tribunal appeared to display significantly greater independence in dealing with those accused of subversion than did the packed Supreme Court. "A lei respeitada: O STM e a missão de julgar processos políticos," *Veja*, Dec. 21, 1977, at 20, 22-26.

90. *TORTURE IN BRAZIL*, *supra* note 11; Wechsler, *A Reporter at Large: A Miracle, a Universe*, *The New Yorker*, May 25, 1987, at 69, and June 1, 1987, at 72.

91. Decreto-Ley No. 46-82, Vol. CCXIX, No. 7, *DIARIO DE CENTRO AMÉRICA ANTES EL GUATEMALTECO* 171 (1 de julio 1982) (Guat.). For harsh criticism of the operation of this law, see AMERICAS WATCH REPORT, *HUMAN RIGHTS IN GUATEMALA: NO NEUTRALS ALLOWED* 85-99 (1982); Moyer & Padilla, *Executions in Guatemala as Decreed by the Courts of Special Jurisdiction in 1982-83: A Case Study*, 6 *HUMAN RTS. Q.* 507 (1984).

Argentina,<sup>92</sup> Chile,<sup>93</sup> Colombia,<sup>94</sup> El Salvador<sup>95</sup> and Uruguay.<sup>96</sup>

The Argentine Executive openly performed judicial duties in 1955 after the overthrow of Juan Perón. Judicial functions were exercised by the National Commission of Investigations, which, under the leadership of the Vice President, was set up to deal with the rectification of the irregularities of the Perón regime. Additionally, a National Board for the Recuperation of Patrimony was granted judicial powers, including the power to confiscate property without judicial proceedings.<sup>97</sup>

Two related jurisdictional problems have been the proliferation of special administrative courts and the development of a broad political question doctrine. Many Latin American countries have developed special administrative tribunals outside of the control of the regular judiciary and have delegated a substantial portion of normal judicial jurisdiction to these special tribunals. The most common special courts have been labor courts, and tax and election tribunals. Colombia, Ecuador and Uruguay have gone even further by setting up separate systems of administrative courts following the French model.<sup>98</sup> In situations where administrative judges lack the guarantees of independence of the ordinary judiciary, the transference of jurisdiction diminishes judicial independence.<sup>99</sup>

Many Latin American judiciaries have voluntarily relinquished important aspects of their jurisdictional authority through

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92. Ley No. 21.461, XXXVI-D A.D.L.A. 2895 (19 de noviembre 1976) (Argen.).

93. Decreto Ley No. 5 de 1973, No. 28.657 DIARIO OFICIAL (22 de septiembre 1973) (Chile); Ley No. 18.314 de 15 de mayo 1984, No. 31.873 DIARIO OFICIAL 2354 (17 de mayo 1984) (Chile).

94. Decreto-Legislativo No. 2260 de 1976, Vol. CXIII, No. 34676 DIARIO OFICIAL 481 (17 de noviembre 1976) (Colom.); Decreto-Legislativo No. 1923 de 1978, Vol. CXV, No. 35101 DIARIO OFICIAL 1033 (21 de septiembre 1978) (Colom.). *But see* Decisions of the Sala Plena of the Colombian Supreme Court declaring recent decrees creating Special Tribunals to try certain serious crimes unconstitutional. 16 JURISPRUDENCIA Y DOCTRINA 813, 829 (Aug. 1987).

95. Decreto No. 507, Vol. 269, No. 228 DIARIO OFICIAL 18 (3 de diciembre 1980) (El Sal.).

96. Ley No. 14.493 de 29 de diciembre 1975, Vol. 282, No. 19682 DIARIO OFICIAL 19-A (13 de enero 1976) (Uru.); Acto Institucional No. 8, 1 de julio de 1977 (Uru.); Acto Institucional No. 12, 10 de noviembre 1981 (Uru.).

97. P. RAMELLA, DERECHO CONSTITUCIONAL 781-82 (3d ed. 1986).

98. See Fix Zamudio, *Función del Poder Judicial en los Sistemas Constitucionales Latinoamericanos*, in UNAM, INSTITUTO DE INVESTIGACIONES JURÍDICAS, FUNCIÓN DEL PODER JUDICIAL EN LOS SISTEMAS CONSTITUCIONALES LATINOAMERICANOS 9, 21-25 (1977).

99. For discussion of this phenomenon in the context of Argentina, see J. DROMI, EL PODER JUDICIAL 105-26 (1982).

the development of an exceedingly broad political question doctrine. Many of the issues regarded as political questions are simply political acts of the executive that are treated as nonjusticiable solely because of judicial timidity. While the political question doctrine has been narrowed substantially by the United States Supreme Court in the past twenty-five years,<sup>100</sup> Latin American courts have been generally reluctant to contract their broad view of nonjusticiable political questions.<sup>101</sup>

### C. Wholesale Dismissal of Judges

Perhaps the most devastating attack on judicial independence has been the wholesale purging of courts pursuant to institutional acts issued by *de facto* regimes. Although most courts are left intact after a *golpe*, this general rule has conspicuous exceptions, most notably 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 thirty-one years. In 1946, all but one of the Court's members were removed by a Perón-dominated Congress on trumped up impeachment charges. In 1957, the military regime that had ousted Perón two years earlier summarily dismissed the entire Perón-appointed Supreme Court. In 1966, another military takeover resulted in the replacement of the entire Supreme Court. After the election of a Peronist regime in 1973, all members of the Supreme Court resigned. In 1976, the entire Supreme Court was once again ousted after yet another military takeover.<sup>102</sup> The Junta that assumed power in 1976 suspended the tenure of all federal judges, permanently removing twenty-four of them from office, as well as discharging the judges of the provincial supreme courts. Finally, in 1983, the return of democracy resulted once again in the replacement of the entire Supreme Court.<sup>103</sup>

The Brazilian Supreme Federal Tribunal, whose independence in granting *habeas corpus* was a major irritant to the *de facto* mili-

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100. See *Baker v. Carr*, 369 U.S. 186 (1962); *Powell v. McCormack*, 395 U.S. 486 (1969); *United States v. Nixon*, 418 U.S. 683 (1974).

101. See Fix-Zamudio, *supra* note 98, at 38-39. See also Ovalle Favela, *supra* note 49, at 74; Garro, *supra* note 11, at 326-36; Pérez Guilhou, *La Corte y el Gobierno de Facto Argentino*, in II CONGRESO IBEROAMERICANO DE DERECHO CONSTITUCIONAL, 9 UNAM ANUARIO JURÍDICO, 811 (J. Carpizo ed. 1982).

102. See Rosenn & Katz, *Book Review*, 68 CALIF. L. REV. 565, 573 n. 30 (1980).

103. See Garro, *supra* note 11, at 314-15.

tary regime, has been treated like a suitcase. In 1965, the military government issued an institutional act permitting it to pack the Tribunal by increasing its size from eleven to sixteen judges. Three years later, it was unpacked by the forced retirement of three highly independent judges, the resignation (under protest) of the Chief Justice, and an age-induced retirement. At this time, another institutional act reduced the size of the Court from sixteen to eleven judges.<sup>104</sup>

The military junta that took power in El Salvador in 1979 replaced the entire Supreme Court with appointees sympathetic to the regime.<sup>105</sup> In 1969, Peru's military government dismissed all of the judges of the Supreme Court and replaced them with judges more sympathetic to the aims of the military.<sup>106</sup> The new government also formed a military-dominated National Council of Justice, assigning it the power to appoint all judges.<sup>107</sup> 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 Velasco was unhappy with the outcome of a case. During the course of the Velasco regime, the judicial retirement age was often modified to permit the appointment of new judges or to replace those jurists deemed unacceptable to the military government.<sup>108</sup>

#### *D. Transference or Reassignment of Judges*

Another method of interference with judicial independence has been the transference or reassignment of judges. In some countries, judges who have made politically unpopular decisions have been reassigned to less desirable posts as punishment for their assertions of independence. For example, in El Salvador after Judge

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104. See K. KARST & K. ROSENN, *supra* note 89, at 214-215. .

105. AMERICAS WATCH COMMITTEE & ACLU, REPORT ON HUMAN RIGHTS IN EL SALVADOR 45 (Supp. July 20, 1982). For a chilling depiction of the collapse of the administration of justice in El Salvador, see DeWind & Kass, *Justice in El Salvador: A Report of a Mission of the Association of the Bar of the City of New York*, 38 REC. A.B. CITY N.Y. 112 (1983).

106. Decreto-Ley No. 18060 de 23 de diciembre 1969 (Peru); Decreto-Ley No. 18061 de 23 de diciembre 1969 (Peru).

107. Decreto-Ley No. 18060 de 23 de diciembre 1969, arts. 7-9 (Peru); Decreto-Ley No. 18831 de 13 de abril 1971 (Peru).

108. S. ROSE, *THE PERUVIAN REVOLUTION'S APPROACH: INVESTMENT POLICY AND CLIMATE — 1968-1980*, 321 (1981).

Bernardo Rauda Murcia courageously sentenced five members of the National Guard to long prison terms after a jury found them guilty of the 1980 murders of four American nuns, the Supreme Court reversed the convictions and transferred Judge Rauda to northern Chalatenango Province. This is an area of frequent clashes between leftists guerrillas and army units and requires a four hour round-trip bus ride from the Judge's home in San Salvador, a commute occasionally enlivened by rebel ambushes and army sweeps.<sup>109</sup> Certainly, in some circumstances transfers may be necessary for administrative reasons, but it is important to differentiate between transfers that are in accordance with sound administrative practices and those that are plainly punitive.

### *E. The Illusory Guaranty of Irreducible Salaries*

In most Latin American countries, constitutional guarantees of the irreducibility of judicial salaries have been rendered illusory by chronic inflation. Consequently, the chronically low level of judicial salaries in many Latin American countries often has been cited as a principal source of judicial corruption.<sup>110</sup> In 1985, the average annual inflation rate in Latin America (excluding Cuba) was an astonishing 704.8%. (This rate falls to 91.6% if one excludes Bolivia, whose inflation rate of 11,743% substantially distorts the picture.)<sup>111</sup> At times Argentine inflation so reduced the real economic value of judicial salaries that restaurant waiters in Buenos Aires were earning more than the President of the Supreme Court.<sup>112</sup> Many Argentine judges have resigned for economic reasons. In recent years the Argentine Supreme Court has publicly requested that the Executive and the Legislature substantially increase judicial compensation to keep pace with inflation.<sup>113</sup> In 1985, the Ar-

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109. Le Moyne, *The Case of a Salvadoran Judge: Does Valor Pay?*, N.Y. Times, May 3, 1985, at A2, col. 1-4. The background of this case and the enormous effort required by U.S. representatives to force prosecution are set out in Posner & Greathead, *Justice in El Salvador: A Report of the Lawyers Committee for International Human Rights on the Investigation into the Killing of Four U.S. Churchwomen*, 14 COLUM. HUMAN RTS. L. REV. 191 (1983).

110. Venezuela's President recently urged all sectors of society to unite in a campaign to drive out judges who "enrich themselves in illegal ways" in Venezuela's corrupt, overloaded and underfunded judicial system. *Lusinchi Condemns Corrupt Judges*, Latin Am. Reg. Rep. Andean Group Rep., July 30, 1987, at 2, col. 1.

111. Computed from INTER-AMERICAN DEVELOPMENT BANK, *ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA 1986 REPORT* 22 (1986). Only two Latin American countries, Panama and Honduras, had single digit inflation rates in 1985.

112. De Onis, *Isabelita's Terrible Legacy*, N.Y. Times Magazine, Mar. 21, 1976, at 15.

113. *Acordada* No. 30, 12 de junio 1985, 1985-D L.L. 170 (Argen.); *Acordada* No. 6,

gentine Supreme Court finally decided that the constitutional guaranty against the nondiminution of judicial salaries must be interpreted in real, rather than nominal, terms, thereby affirming a lower court decision requiring monetary correction of judicial salaries in order to compensate for real losses caused by inflation.<sup>114</sup> 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.<sup>115</sup> Only if the constitutional guaranty is interpreted to require the maintenance of the real, as opposed to the nominal, value of judicial salaries can it be a meaningful safeguard of judicial independence in an inflationary economy.<sup>116</sup>

#### *F. Failure to Enforce Judicial Decisions*

Alexander Hamilton elegantly made the point that the judiciary, possessing neither the power of the sword nor of the purse, must ultimately depend upon the executive to enforce court decisions.<sup>117</sup> Refusal of the executive to enforce judicial decisions that it does not agree with seriously undermines the independence of the judiciary. Because the cost of such refusal is generally a breakdown in law and order, most regimes deem the price too high to pay. A conspicuous exception occurred in Chile under the Allende regime, which adopted the policy of ignoring court decisions ordering the return of illegally occupied land and illegally seized factories.<sup>118</sup> In May 1973, the Supreme Court of Chile sent an official letter to Allende, stating:

This Court must protest to you, as it has done innumerable times in the past, about the illegal acts of the administrative authorities who are illicitly interfering with the proper exercise of judicial power, and who are preventing the police force from carrying out criminal sentences duly emanating from the crimi-

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1984-D L.L. 425 (Argen.); Acordada No. 55, 1984-D L.L. 572 (Argen.).

114. *Bonorino Perú v. Estado Nacional*, 116 E.D. 321 (Nov. 15, 1985) (Argen.).

115. See Rosenn, *supra* note 37, at 310.

116. *Id.* at 339-42.

117. THE FEDERALIST No. 78 at 465 (A. Hamilton) (C. Rossiter ed. 1961).

118. Velasco, *supra* note 15, at 723-26; Comment, *Chile under Allende: The Decline of the Judiciary and the Rise of a State of Necessity*, 9 LOY. L.A. INT'L & COMP. L.J. 693, 700-01 (1987).

nal courts . . . . These acts signify a decided obstinacy in rebelling against judicial sentences and a total lack of concern about the alteration that these attitudes and omissions have produced in the juridical order. All of this no longer means a simple crisis of state under the rule of Law, . . . but a peremptory or imminent rupture of the country's legality.<sup>119</sup>

Allende rejected the Supreme Court's charges in a long letter severely critical of the Court for preferring claims of the rich to claims of the poor. He continued to insist upon the right of the executive, "as warrantor of peace and public order," to review every judicial decision and make an independent determination of which should be enforced. A few months later Allende was ousted by the military, which made it plain that one of the primary reasons for its taking power was the reestablishment of the constitutional and juridical order.<sup>120</sup>

#### G. *Executive Domination*

Despite the constitutional configurations providing for three coequal branches of government, historically, Latin American countries have been dominated by the executive. The checks built into the system are far from being equally balanced. Consequently, any judge who attempts to frustrate the will of the executive does so at great peril to his job security. The examples of strong Latin American executives running roughshod over the courts are legion. Trujillo, who ruled the Dominican Republic with an iron fist, reportedly held undated letters of resignation from each member of the Supreme Court and filled in the date whenever he was displeased with any decision.<sup>121</sup> In 1964, Papa Doc Duvalier 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. For many years, Haitian judicial decisions were required to conform strictly to the wishes of the Duvaliers.<sup>122</sup> In Paraguay, the courts still are dominated totally by President Stroessner.<sup>123</sup> For-

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119. Cited in Velasco, *supra* note 15, at 726.

120. Comment, *supra* note 118, at 706-07.

121. H. WIARDA, *DICTATORSHIP AND DEVELOPMENT: THE METHODS OF CONTROL IN TRUJILLO'S DOMINICAN REPUBLIC* 64-65 (1968).

122. Verner, *supra* note 18, at 500-01.

123. Although theoretically the Paraguayan Supreme Court has the power to declare statutes and presidential acts unconstitutional, it has never dared to exercise that power



mer 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.<sup>124</sup>

## VI. CONCLUSIONS

The lack of judicial independence is a chronic problem in Latin America. A recent assessment by two eminent Mexican jurists concluded that Costa Rica is the only Latin American country where the judiciary is truly independent.<sup>125</sup> Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Peru and Venezuela were considered to have independent judiciaries but subject to interference by the executive, while Guatemala, Honduras, Panama, Paraguay and Uruguay were regarded as definitely lacking judicial independence.<sup>126</sup> One can take issue with many of the conclusions in this incomplete impressionistic survey. Nevertheless, the underlying message—that Latin America as a region suffers from a judicial independence deficiency—seems undeniable. Yet this does not mean that Latin American judiciaries are corrupt, incompetent, or poorly trained. Nor does it mean that the majority of cases will not be resolved on the merits in accordance with the judge's proper application of the governing law. As a rule, Latin American judges are dedicated, scrupulous professionals. Indeed, many Latin American jurists deservedly enjoy high international esteem for their scholarship and dedicated work on international legal projects.

Any attempt to explain the reasons for the lack of judicial independence in Latin America must be tentative. One has to take into account the substantial differences between the governmental systems of the twenty countries comprising the region. One must also consider that the degree of judicial independence has differed significantly over time. Nevertheless, certain important structural

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since Stroessner has been president. 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. P. LEWIS, *PARAGUAY UNDER STROESSNER* 110-11 (1980). See also AMERICAS WATCH REPORT, *RULE BY FEAR: PARAGUAY AFTER THIRTY YEARS UNDER STROESSNER* 45 (1985).

124. J. MARTZ, *ECUADOR: CONFLICTING POLITICAL CULTURE AND THE QUEST FOR PROGRESS* 80 (1972).

125. Carpizo & Fix-Zamudio, *La Necesidad y la Legitimidad de la Revisión Judicial en América Latina. Desarrollo Reciente*, 52 *BOL. MEX. DER. COMP.* 31, 50 (1985).

126. *Id.*

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, in which the judge has historically been a weak figure. In no civil law country do judges have the power, prestige, and deference enjoyed by judges in the United States, particularly at the federal level. Unlike his common law counterpart, a civil law judge does not have the power to punish the defiance of his orders by jailing the recalcitrant party for contempt of court. Civilians have tended to regard judges as expert technicians 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 been denied.<sup>127</sup> Yet virtually all Latin American countries have grafted the institution of judicial review on this civil law trunk.<sup>128</sup> Judicial review presupposes a strong judiciary with the independence, prestige, and experience to perform the delicate balancing of individual and societal interests that goes into constitutional adjudication. Most Latin American courts are staffed by career judges with no independent political base or contacts and with relatively narrow experience. Asking them to perform this function (particularly in the context of exercising the power to declare statutes unconstitutional *erga omnes*) is to plunge them into a political role for which they are ill-prepared by both temperament and experience.

Second, the legitimacy of the judiciary, like that of the legal order, stems from the constitution. Unfortunately, Latin American constitutions are notoriously short-lived and often violated. Since gaining their respective 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 maintain a *de jure* institutional authority in a *de facto* regime. Any regime that comes 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 hold-over from the *ancien régime*. Revolutions generally wreak havoc with judicial independence, and revolutions have abounded in Latin America since 1808, when Napoleon initiated Latin America's chronic legitimacy crisis by placing his brother Joseph, a

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127. J. MERRYMAN, *THE CIVIL LAW TRADITION* 36-39 (1st ed. 1969).

128. See Rosenn, *supra* note 24, at 785.

commoner, on the throne of Spain.<sup>129</sup> One ineluctably clear lesson 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 the suspension of many important constitutional guarantees during states of emergency.<sup>130</sup> The most abused of these states of emergency is the state of siege.<sup>131</sup> Although they are supposedly temporary juridical situations reserved for times of great emergency, states of siege have been maintained for years in a number of Latin American countries despite the absence of any external threats. 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 governmental abuse. Consequently, long-term usage of the state of siege or its functional equivalents has substantially hindered judicial independence in many Latin American countries by making the protection of individual constitutional rights impossible.

Fourth, Latin American culture and political tradition are heavily authoritarian. The pattern of executive domination is not accidental. Rather, it reflects the Roman law tradition of granting autocratic powers to the emperors and *paterfamilias*, the corporativism and patrimonialism of colonial rule, and the hierarchical structure of the Catholic church.<sup>132</sup> Despite extensive constitutional rhetoric, the principle that the government should be subject to the rule of law does not come naturally to most of Latin America. The underlying notion that the government is above the law does not bode well for judicial independence.

Fifth, corruption is an endemic problem in many Latin Ameri-

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129. See K. KARST & K. ROSENN, *supra* note 89, at 184-86.

130. See generally INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS (1983).

131. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (OAS), PRELIMINARY STUDY OF THE STATE OF SEIGE AND THE PROTECTION OF HUMAN RIGHTS IN THE AMERICAS 1, 5-8 (1963).

132. Wiarda, *Toward a Framework for the Study of Political Change in the Iberic-Latin Tradition: The Corporate Model*, 25 WORLD POLITICS 206, 210-212 (1973); Wiarda, *Law and Political Development in Latin America*, 19 AM. J. COMP. L. 434, 438-47 (1971). See also ROSENN, *A Comparison of Latin American and North American Legal Traditions*, in MULTINATIONAL CORPORATE INTERACTION WITH HOST GOVERNMENTS (L. Travis ed., forthcoming Notre Dame Univ. Press).

can judicial systems.<sup>133</sup> In some countries, court personnel, particularly the clerks, are so poorly paid that the acceptance of bribes has become a regular practice that badly distorts the decision-making process.<sup>134</sup> Judicial independence ceases to exist when the quality of justice is dependent upon the wealth of the briber.

Sixth, although the formal legal systems of Latin American countries are universalistic and egalitarian, the true commitment to equality under the law is quite superficial. The courts are arenas where elites have been zealously fighting rearguard battles in order to preserve their power and privileges against attacks from groups that would also reject a universalistic legal system and an independent judiciary if they ever were to come to power. Absent a spirit of moderation and a willingness to compromise with conflicting societal groups, establishment of a truly independent judiciary will be difficult.

Overcoming these structural obstacles to judicial independence is not easy, but as the example of Costa Rica indicates, the task is not impossible.<sup>135</sup> On the other hand, Costa Rica not only has a long tradition of effective democratic government without military interference and a long history of respect for the rule of law, but it also has abolished the military. Because these conditions are not readily replicable in most of Latin America, the path to judicial independence is likely to continue to be slow and tortuous.

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133. See generally Helfeld, *Law and Politics in Mexico* in ONE SPARK FROM THE HOLOCAUST: THE CRISIS IN LATIN AMERICA 81, 91 (E. Burnell ed. 1970). See also Cooper, *Law and Medicine in Peru*, 24 CHITTY'S L.J. 56 (1976); Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. INT'L L.J. 1, 36 (1984).

134. See, e.g., Rosenn, *supra* note 133, at 35-37; *Report Condemns Peru's Judiciary*, Lat. Am. Weekly Rep., Feb. 22, 1985, at 6.

135. For a thorough study of the Costa Rican judiciary, see C. GUTIERREZ, *EL FUNCIONAMIENTO DEL SISTEMA JURÍDICO* (1979). For a recent study of judicial review in Costa Rica, see Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 U. MIAMI INTER-AM L. REV. 249 (1986).