Chapter 17

Politicization of the Latin American Judiciary via Informal Connections

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Are courts mere “mouthpieces of the law” in the traditional Civil Law formulation of the separation of powers, or are they powerful agents “making law” following the Common Law view (and “agents” of whom or what)? How shall we confront this basic ambiguity for purposes of Rule of Law (ROL) work? While judicial reform as institutional reform lies at the heart of much ROL work, particularly in Latin America, surprisingly little attention is paid to the practical results of an “empowered” judiciary. Perhaps in Latin America the hidden issue may be the assumption that courts merely apply “norms” almost mechanically (a modern doctrinal version of those selfsame Civil Law views), without examining the “agents of whom” question from anything approaching a public choice or instrumentalism position. The problem seems to lie in institutional ROL approaches of improving the judiciary by adopting a “build it and they will come” attitude, which may or may not work in practice. The difference is already visible in our book in the contrast between the Buscaglia and Trochev chapters.

Much Latin American ROL work has concentrated on judicial reform, so it is well-suited to addressing the question of how “reformed” and “empowered” judiciaries behave in practice. Latin America has formally experienced an expansion of the courts’ policymaking role. This expansion has included instances in which courts openly decide salient issues against important political actors, both governmental and non-governmental. Arguably, the most important political player to be controlled is the government itself, especially in a region with a strong authoritarian past, relatively unfettered executive rule and weak enforcement of fundamental rights. Courts have been empowered precisely with this purpose (Prillaman 2000). The core
argument is that institutionally powerful courts, endowed with formal guarantees for judicial independence, enough resources, and a supportive environment, will be able to contain unruly political actors and help consolidate democracy. The apparent surge of judicial power is often portrayed in an unreservedly positive light. However, in practice, there is cause for concern across the region. Most importantly, the empowerment of courts and the politicization of the judiciary are not mutually exclusive phenomena (Domingo 2004). We observe instances in which courts become apparently strong, only to discover that they are actually carrying out an exogenous agenda pushed by the executive or other powerful player, through judicial means. And this kind of departure from the traditional ROL script may not be an isolated phenomenon (Hammergren 2003).

This chapter commences with a brief review of examples of problematic judicial behavior, followed by a review of the judiciary’s role in Latin America, paying special attention to past research focused on how and why judges hold governments accountable, and addressing issues of judicial independence and judicial power. Thereafter, I lay out the theoretical foundations of a judicial loyalties approach analyzing courts in Latin America, a discussion that includes defining and operationalizing this concept to connect it to related notions. I then address the implications of the loyalties thesis of judicial decision-making for our understanding of the role of courts in weakly institutionalized political systems, especially with respect to judicial decision-making and performance. This represents an additional side of the problem Alexei Trochev’s chapter addresses, calling into question simple “build it and they will come” ROL approaches to institutional development of any judiciary.

Parallel to ensuring the courts’ independence, the last two decades have witnessed a significant number of Latin American judicial reform programs targeted at improving the courts’
quality in terms of accessibility, efficiency, efficacy, fairness, professionalism, and transparency (Hammergren 2007). There are compelling reasons to argue that persistent judicial loyalties negatively influence judicial quality in the broadest sense of the term, however, and is perhaps one of the key reasons why certain reform initiatives have failed.

**Examples in Practice**

How do such examples of an “exogenous agenda” appear in practice? Recent events in Honduras, where the Supreme Court became a key tool of the coup against President Zelaya come to mind (see Ruhl 2010). For these purposes, it matters little that President Zelaya was also, in turn, breaching the Constitution by carrying out a clearly unconstitutional referendum on the modification of the no-reelection rule. Meanwhile, plans to improve the judiciary’s administrative capacity do not necessarily imply greater judicial independence or the systematic display of judicial assertiveness vis-à-vis the government. For instance, the World Bank considers reforms implemented by the Venezuelan Supreme Court a successful project, especially in terms of the improvements made to the Court’s technological platform. Yet, in the hands of the Chavez regime, the Supreme Court became a key tool for political domination and control of the opposition and was (and is) subject to political interference coming from other branches of government (Perez Perdomo 2005; Sanchez Urribarri 2010). Efficiency does not necessarily translate into effectiveness, and is not *per se* related to a stronger (independent) judiciary either. When evaluating these and other aspects of judicial reform, every one of these elements should be assessed separately (Hammergren 2007). So it may go too far to categorize all such work as “ROL”-based simply because it touches on the judiciary.

The true puzzle, however, is why the judiciary remains in control of the political class in some countries and not in others, sometimes in spite of similar institutional reforms or agendas
and notwithstanding the apparent commitment of governments and external audiences to effective judicial reform. What is the root of this chronic domination of the courts? I argue that one key to understanding persistent patterns of judicial politicization in Latin America, and its pernicious effect on judicial power, lies in the existence of informal *quid-pro-quo* linkages between judges and political actors. They condition judges’ willingness to exercise their prerogatives effectively against other political players. These links are not only based on the coincidences of ideological views between judges and politicians, of the kind witnessed in established programmatic democracies (for example, why American political groups argue incessantly about the “judicial philosophy” of Supreme Court nominees).

These links are rooted in particularistic connections that are part of the general informal political dynamics present throughout the political system of several countries in the region and beyond. These connections do not go so far as determining how courts function in *all or most* circumstances, and how judges make decisions in *all or most* cases, as they coexist with other sources of judicial behavior. However, judicial loyalties are critical to explain their decisions in those situations in which their intervention is most necessary – especially in cases that involve the control of key political institutions. Understanding *why* these *quid pro quo* political connections exist, and *how* they affect judicial behavior, may illuminate important issues. These include why judges fail to control political authority in certain contexts, in spite of being ideologically opposed to the government and enjoying several conditions that would favor their confrontation with the regime; or why judicial reform programs fail to enhance the judiciary’s capacity to protect fundamental rights and adjudicate conflicts efficiently.

The effect of political connections on judicial decision-making becomes most evident in highly salient political cases, in which justices side with the political actors linked with them,
often setting aside other reasons that would usually shape their decisions – such as ideological, strategic or legal considerations. Consider, for example, the decision issued by the Venezuelan Supreme Court finding grounds to authorize a criminal trial against President Perez in 1993, and the subsequent proceedings culminating in President Perez being found guilty of misappropriation of funds (Martin 1996). Pre-trial decisions of this kind can be particularly telling concerning the political arrangement in a higher court. Judging whether there is sufficient evidence to move forward with an investigation against a sitting President not only involves solving the strictly legal question of whether such evidence is valid and relevant, but also the political question of whether it is convenient to separate the President from his or her post (see Perez-Linan 2007). In this type of decision, the judges’ political loyalties can become particularly visible.

Thus, from outside, the May 20, 1993 decision against President Perez was an assertive decision against an embattled President, made with the purpose of restoring the political system’s popularity in a time of political turmoil vis-à-vis an extremely disappointed Venezuelan electorate and a restless military (taking also into account that Hugo Chavez’s coup attempt against Perez and a follow-up attempt by other rebels had taken place in February and November 1992). However, after taking a look at who voted for impeachment and the dissents, six of the fifteen members of the Plenary Chamber dissented and sided with President Perez. This group was mainly formed by justices who were appointed during past governments of Democratic Action (Perez’s ruling party). Conversely, the justices who challenged Perez and opened the gate for his eventual departure from power were all justices publicly identified with the opposition, plus a small group of three justices who had just been appointed by opposition forces and were not considered politically aligned with any specific force (Sanchez Urribarri 2010).
Theory of the Politicization of the Judiciary through Loyalty Links

Courts are supposed to play key political roles in democratic and non-democratic societies (O'Donnell 1999, 2000). Judicial institutions can appeal to rulers across different regimes for several reasons. In addition to performing their typical inter-party conflict resolution prerogatives, they may offer a useful venue for a variety of goals, such as chastising political opponents, controlling crime, curbing corruption, or simply gaining legitimacy vis-à-vis international or domestic audiences (Moustafa and Ginsburg 2008; Shapiro 1981).

Although these matters have been extensively discussed in the context of Western democracies, they are also critical issues in the context of developing countries. The empowerment of courts can be critical to ensure the viability of new democratic regimes and provide a legitimate solution to a variety of issues that plague these governments and impair their performance – including issues of transitional justice, restoring social order, stabilizing the economy and fostering growth. This has led governments around the world to expand the realm of court action in the political arena, endowing judges with new prerogatives (especially judicial review), and theoretically ensuring that they enjoy the necessary conditions to fulfill their duties, among other institutional reforms.

In connection with this trend towards increasing the formal powers of the judiciary, a “judicialization of politics” has taken place in numerous countries (Tate 1995). Studies show that, even in authoritarian societies, judges have been able to challenge the regime in a variety of scenarios and influence political outcomes. As examples, consider the South African Apartheid regime (Haynie 2003); constitutional politics in Mubarak’s Egypt (Moustafa 2003, 2007); judicial institutions in “crisis regimes” in Asia (Tate 1993); and functions of courts in Marcos’ authoritarian regime in the Philippines (Tate and Haynie 1993).
Latin America has become a fertile ground for judicial politics analyses. Several countries in Latin America have experienced such a judicialization of politics (see essays in Gloppen et al 2004; Sieder et al 2005). This trend followed the 1980s democratization wave and the implementation of broad judicial reform agendas in these countries. Thus, a wave of works emerged, explaining the role of courts in Latin American democracies. Some assess the conditions and determinants of the courts’ successful exercise of their governmental accountability functions, particularly in countries with a longstanding tradition of hyper-presidentialism, such as Argentina (Dix 2004; Finkel 2008; Helmke 2002, 2005; Kapiszewski 2007; Scribner 2004), or Mexico (Magaloni 2003; Rios-Figueroa 2007b; Staton 2006). Others focus on how and to what extent in a transitional justice mode courts make political officers accountable for past misdeeds in authoritarian polities, most prominently Argentina, Brazil (Pereira 2005), and Chile (Hilbink 2007; Huneeus 2006). Some of these works have looked explicitly at the court’s influence in policy-making in a variety of areas, including Argentina (Iaryczower et al 2002), democratic Costa Rica (Wilson 2005), and Brazil (Taylor 2008). The number of works grows as further demonstrations of judicial assertiveness take place, scholarly attention and debate increases, and more data becomes available (Kapiszewski and Taylor 2008).

In Latin America, the critical concern for analysts has been assessing judicial independence in general, vis-à-vis overzealous executives and other important actors. One aspect of the phenomenon deals explicitly with institutions. Judges need a series of formal conditions in place to be independent, especially regarding appointment rules, tenure security, and mechanisms to ensure compliance with judicial rulings. However, as the experience in Latin America suggests, the most ideal institutional design on paper does not necessarily lead to independent judges in practice (Hammergren 1997, 2007; Prillaman 2000). Several non-
institutional factors are also relevant for this analysis. Take, for example, the political context: An environment with numerous political forces espousing different policy preferences makes it difficult for political actors to agree on staging a backlash against judicial authority (see Magaloni 2003; Rios Figueroa 2007a). On the other hand, judges need to be willing to challenge the regime, and assume confronting the government as one of their goals. Otherwise, courts might fail to stand against political actors – as shown in the Chilean case alluded to in Lydia Tiede’s chapter, in which a mixture of ideological conservatism and institutional isolation arguably prevented the judiciary from denouncing human rights violations under the Pinochet regime (Hilbink 2007).

Thus, even if judges are formally independent, this does not guarantee that they will rule against the rulers or uphold fundamental rights against abuses by political actors. Other circumstances that often escape the judges’ control can also influence their ability to assert their authority. Formal institutions regulating inter-branch relations involving the judiciary may be poor predictors of actual behavior in (developing) countries where the gap between formal and informal politics is prominent. In countries where there is a clear coincidence between programmatic commitments and actual political behavior, in addition to taking into account their professional credentials, judges may be appointed with the purpose of reproducing the views of their appointers from the bench, on the basis of their honest ideological affinity with them (Dahl 1957; Epstein and Segal 2005; Keck 2007; Whittington 2005). However, in political systems where ideology is less important to structure political preferences, and to translate such preferences into actual political outcomes, politicians might not appoint judges solely on the basis of their ideological proclivities. This might be particularly the case in those environments where particularistic or personal relations-based politics prevail and individual benefits are more
common. In such circumstances, a judicial designation, just as any other positive entitlement or sanction, might be allocated as a direct, individualized and excludable benefit involving a *giver* (the person or actor responsible for making the decision that favors the individual or judge in question) and a *recipient* (the person or actor receiving the benefit). If this is the case, then it is also possible that judges may fail to rule against politicians and hold them accountable as a function of their *mutually dependent* (*quid pro quo*) relationship vis-à-vis their appointers, those politicians who play a role in appointing them, or other political actors able to offer them stable and long-term individualized advantages.

The basic notion that judges may follow individualized links should not be strange to those familiar with the broader literature on particularistic politics and personal relationships in the developing world. Students of politics have long noticed patterns of political behavior that follow individualized incentives or preferences, as opposed to following the collective good. Phenomena as varied as clientelism, patronage, and corruption schemes involving tacit or express agreements between two or more people have been thoroughly researched for decades (see Roniger and Gunes Ayata 1994; Schmidt 1977). Latin America, in particular, is well known for the divorce between the formal commitments of political players, and the actual processes and outcomes that take place in the political arena (see essays in Helmke and Levitsky 2006). Claims about political behavior that cannot be consistently explained on the basis of ideological preferences are numerous. For example, Lyne (2008) and Zucco Jr (2009) have studied Latin American legislatures and find compelling evidence for the thesis that “something else” other than ideological commitments or purely strategic, electoral considerations to achieve such goals explains legislative behavior. This new research is theoretically and methodologically sophisticated, and has been able to shed new light on longstanding issues.
On the other hand, claims about individualized linkages between judges and political elites, and their consequence on judicial decision-making, are not new. Journalistic accounts, often lacking scientific rigor, have delved into this politicization, sometimes credibly (see, for example, Verbitsky 1993), and sometimes in a less scrupulous way (Ojeda 1995). However, the effects of these political connections on judicial behavior and other phenomena of interest for judicial scholarship are often left unattended. Yet, they can provide an important avenue of inquiry to understand a variety of judicial decision-making phenomena. The most important may be the judges’ variable commitment, across countries and over time, to uphold the rule of law when deciding cases where such political actors have utmost interest. This may follow from the politicians’ effort to ensure the presence of political allies in the courts at expense of the independence, professionalism, and stability of judicial institutions.

The latter issue is particularly troublesome in the region, especially following changes of political direction through democratic means. Similar issues are visible within ongoing changes to the rules of the game that characterized the changes of regime that have operated in some countries where the arrival in power of previously excluded left-wing groups has taken place. For example, in Bolivia, the top echelon of the judiciary politically aligned with the previous ruling elite, with a strong esprit de corps that resulted from years of little involvement in political affairs, was at odds with the Morales government practically since it came to power in 2006. A stand-off between the government and the opposition led to a lack of timely replacement for justices. In a way, this lack of agreement was not new – it was part of a trend that had already taken place in the past, precisely because political forces would strive to field as many politically-aligned judges as possible, often dragging on unresolved judicial replacements for years (see Perez-Linan and Castagnola 2009). Unsurprisingly, the most recent development was
the clean-slate replacement of the court system after the passing of the new Constitution in 2009 through referendum.\textsuperscript{1}

Such a lack of judicial stability can be blamed mainly on overt political intervention of the courts. On the other hand, in Paraguay, the brisk replacement of justices of the much criticized Paraguayan Supreme Court, who theoretically enjoyed life tenure at the beginning of Nicanor Duarte’s term, was portrayed to the public and the international community as an effort to clean up the judiciary (Popkin 2004). However, a stronger clue to understand the need for replacement was probably the President’s need to field candidates directly connected to him and/or his faction of the Colorado Party, in order to prevent the use of the courts to hinder his political agenda and to seize the opportunity to extend his own political domain. This explanation might also help to understand the emphasis President Lugo placed on “reforming” and packing, once again, the courts after his arrival in power in 2008 – a proposition that involved a serious stand-off with a Court still dominated by the outgoing Colorado Party (an event widely reported by prominent Paraguayan newspapers). The delay in replacing judges, the discussions of appointments centered on political linkages, and the lack of respect for tenure rules should be seen, to a great extent, as by-products of dynamics of political intervention in the courts based on judicial loyalties.

In any case, high courts in Latin America typically decide thousands of cases per year. Even in the most politicized systems, it is unreasonable to think that political commitments explain \textit{all} or even \textit{most} of their decisions. It may well be the case that judges decide a vast

\textsuperscript{1} For example, see http://www.bbc.co.uk/mundo/america_latina/2010/02/100218_2043_bolivia_justicia_jueces_evo_morales_irm.shtml
majority of the court’s proceedings following their ideological preferences, their strategic calculations or legal principles (for a summary of the attitudinal, strategic and legal models, see Baum 1997; Segal 2008). However, such explanations fall short in a series of cases dealing with salient political issues, that is, cases in which the crux of what is at stake are prominent political advantages for a political actor or group.

Judicial politicization – the systematic control that politicians exercise over courts and their staff, and their use by the same politicians of these courts for political gain – can take place prior to the arrival of judges in the bench; or after their nomination, that is, after judges are carrying out their duties (Brinks 2009). The first modality usually refers to the politicians’ efforts to ensure that judges represent the policy preferences of their appointers, especially in the context of programmatic democracies (such as ideologically motivated examination of Supreme Court nominees in the American process). For instance, according to this view conservative politicians, other things equal, will try to appoint conservative judges inasmuch as the designation process allows for a discretionary appointment in this respect. In some countries, this may permit politicians to influence outcomes long after they leave power.

The second, post-hoc modality refers to politicians’ attempts to constrain or entice judicial behavior in a way that best favors their policy-driven or personal political interests after judges are on the bench. This includes institutional modifications to jurisdictional rules (withholding jurisdiction), the size of the court (court packing), the creation of new mechanisms to hold justices accountable for their behavior, or other gross attempts against judicial independence, such as salary reduction or withholding of resources for the courts in exchange for political support. Both strategies attempt to hold governments accountable to their appointers.
The greater the political importance of the cases decided by a given court, the greater the institutional accountability mechanisms that will be implemented to keep judicial rulings in agreement with the preferences of the ruling political elites. Of particular interest for this analysis is the first modality, *i.e.* controlling the courts with likeminded judicial actors. Theories of judicial partisanship, which have always been controversial in studies of judicial behavior, have been explored as an instance of the influence of reference groups in judicial behavior in the U.S. (Lloyd 1995; Songer and Davis 1990). In fact, the role of judges as part of a political establishment, and their connections with a governing political coalition, has troubled scholars for a long time, especially those ascribed to the new-institutionalist tradition (*see* generally essays in Gillman and Clayton, 1999; *see* also Keck 2007; Whittington 2005). The literature on courts and “political regimes” is abundant. For instance, consider Dahl’s (1957) renowned essay exploring the “counter-majoritarian difficulty,” and the connection between changes in the political establishment and the U.S. Supreme Court’s proclivity to exercise judicial review. Preliminary empirical evidence allowed Dahl to infer that judges seldom decide against ruling elites, and that this pro-governmental stance resulted from the government’s influence on the court by appointing ideologically sympathetic judges. The weak link in theorizing about the judiciary in ROL literature is formalism, which seemingly ignores these effects even in developed countries (meanwhile, they might be expected *a fortiori* in developing countries).

A major problem with the analyses mentioned above is that they do not explicitly address contexts outside of the United States, an established democracy with an independent judiciary and where the rule of law is generally upheld. In these contexts, judges are not expected to have significant ties with political elites which might systematically influence their decision-making in a way distinct from ideology. Since political processes and outcomes are structured along
distinct ideological lines, the struggle for dominating the courts centers on the disagreements among political elites of certain core issues in the social, economic and strictly-political realms. Though courts will often get to decide cases where the ideological component is less relevant, especially at the Supreme Court level, the institutional conditions enjoyed by these courts and the importance of their roles (especially judicial review), will mean that ideologically-charged cases will tend to arrive at the bench (usually selected by the justices themselves thanks to their control of the docket) and be decided accordingly. Moreover, following this approach, any advantages enjoyed by specific actors, such as the Solicitor General or specific interest groups, are often analyzed in terms of their ideological agreement with political elites.²

Developing countries targeted for ROL work are different. The need to achieve and secure particularistic goals in weakly institutionalized democracies pervades political relations, including judges. These linkages thus have a distinct effect on the way judges behave (at the micro level) and how courts perform (at the macro level). Since these connections have been underestimated by judicial scholarship, there is a theoretical need to conceptualize these political loyalty links, to operationalize them in a way that is amenable for cross-national research, and to

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² In addition to the ideological connection, recent analyses have explored the possibility that judges take into consideration politicians, their peers and other audiences due to a psychological need for approval. Thus, in *Judges and their Audiences* (2006), Baum discusses judicial decision-making from the standpoint of the judges’ need to please certain individuals or groups for their own satisfaction, including other judges, interest groups, law professors or public opinion. Baum does not go as far as asserting that this could be the main determinant of judicial behavior in the U.S., but that it still is a critical perspective to appropriately understand how and why judges act as they do. In certain instances, this need to please their audiences would drive judges to set aside other considerations and decide purely on the basis of these psychological bonds.
explore their influence on the judges’ ability to hold the government accountable in spite of the pressure to favor political allies. Within the Latin American context, my argument is not far from studies about the role of elites, and how they attain and manage political power. For example, Paige (1997) argues that revolution and governmental structure in Central America are deeply rooted in the histories of the coffee elite. Like other well-documented institutions based on informal dynamics, the existence of political ties in the judiciary adheres, in part, to cultural norms followed by political actors. Weak institutions, low levels of trust, and a culture that has traditionally assigned a longstanding importance to personal links for appointing political agents, delegating power and hold them accountable are all well known features of Latin America’s political systems.

Assessing the Effect of Loyalties on Judicial Decision-Making

I define loyalty links as commitments made by judges to individual (or collective) political players to benefit or, at least, take into consideration their interests once they ascend the bench, in cases that are politically relevant to such political players. Thus, a loyalty link is a conscious allegiance with a political actor to whom “fidelity is due.”3 This political actor can be a chief

3 The use of the term “loyalty” is controversial. The common usage of the word loyalty refers to “the quality or state or an instance of being loyal.” (Merriam Webster’s). The adjective “loyal” has several meanings. According to the cited dictionary, it can mean “1: Unswerving in allegiance as: a: faithful in allegiance to one’s lawful sovereign or government b: faithful to a private person to whom fidelity is due c: faithful to a cause, ideal, custom, institution, or product.” Additionally, it can also mean “2: showing loyalty.” So it is important to separate the notions of loyalties (the existence of the commitment to a person or group, as referred to in 1b) from ‘behaving loyally,’ which would be the result of acting on the basis of the actor’s loyalties. What I explain here, then, is the effect of commitments on “deciding loyally.”
executive, a political party, a faction, an individual, or even a prominent corporation or interest group – as long as the said actor plays an essential role in the nation’s political life.

In Latin America, judges can potentially have many relevant loyalties. With respect to the executive, judges could have connections with the President prior to his or her arrival in power, with other officers who hold important cabinet position, or, for instance, with the military. With regards to the legislature, judges could have affiliations with political parties, factions, or even with powerful politicians. Within the judiciary, judges could develop loyalty ties with other judges, in the same judicial entity or in other bodies, at the same or at a different hierarchical level. Beyond the regime’s structure, judges may develop loyalty ties with other relevant political actors, such as interest groups – like workers’ unions or associations for the protection of human rights- political parties, factions or politicians with no participation in government; or even with powerful businesses. In Latin America’s political systems, the president has a vast influence in the political arena, and parties often function as political machines without much concern for ideology. Thus, two loyalty ties may have great importance among the many existing links: loyalty towards the President; and loyalties towards political parties or factions.4

These political connections could have different sources: family ties, educational background (for example, attending similar military academies or law school), professional links,

4 I am aware this conceptualization may create problems, especially because the traditional separation-of-powers approach already assesses inter-branch relations from an institutional/strategic framework. Notice my approach is different in the sense that I believe that exploring personal connections between the actors is worth analyzing coupled with other approaches to have a compete panorama of judicial decision-making, especially with respect to the judge’s capacity to prevent power-holders from breaching the law.
common membership in an interest group, or common affiliation to a political party, including specific factions. Other times they evolve from ongoing work and cooperation between judges and political elites, allowing them to develop reciprocal trust bonds where none existed before. Signs of those loyalty links are common around the region, and are not concealed from the public. Newspapers commonly report the specific actors that have prominent connections with the judges with what groups or political parties they are affiliated, and even comment or speculate about the influence such links have on the judges’ behavior.

Judges’ loyalties vis-à-vis other actors can have a distinctive influence on judicial behavior that is often independent from political ideology, especially in societies with pervasive non-programmatic or personal relations-based politics, common in Latin America. The influence of loyalties is based on common interests between judges and political actors in attaining, keeping and making the most of political power. In less institutionalized contexts, where the politics of nomination can be at odds with formal institutions, judges depend on other people to be appointed to the bench—not any people, but usually their people, typically those with whom they have previously established prominent social connections. On the other hand, without loyal judges – judges who are conscious of the importance of the connections with politicians, and willing to act on behalf of their appointers, protectors or patrones – politicians lose in several ways: They cannot rely on the (legal and illegal) advantages that judges can deliver in terms of judicial decisions in political cases, cannot benefit from judicial favoritism to

5 These are not the same kind of loyalties addressed above, since they emerge after the judicial designation, but they can be equally important, and also signify an allegiance towards a political actor that is based on the fulfillment of mutual commitments.
law firms or specific litigants, and cannot obtain judicial posts and other appointments under their control.

In fact, personal connections are crucial to understand how the legal profession is structured in Latin America. Like in many other contexts, from the moment future lawyers and judges attend Law School, they not only understand and accumulate legal knowledge, but also develop common expectations about their future professional roles in different positions in the legal and judicial system. This generates important friendships and acquaintances that provide the foundations of their professional relations in the immediate future and beyond. The formation and renovation of legal elite networks begins at this stage, and evolves even further throughout the lawyer’s professional life. Potential judges and lower court magistrates, in addition to proving their professional competence, need to foster and cultivate connections with other political actors in order to be appointed and/or subsequently promoted or remain in office.

Why and under what conditions do political connections influence judicial decision-making in Latin America, especially the judge’s proclivity to support the government? How do these connections influence judicial decision-making? First of all, political connections influence decision-making in salient cases involving overt contestation for political domain. Some salient cases will deal with important policy-making issues, such as matters of economic policy, so important in Latin America during the 1990s and 2000s (see Kapiszewski 2007). Others may entail social policy issues, which have also become paramount in the region, especially in countries where Courts have become very influential in the political arena and thus have the power to decide unpopular issues without fearing reprisal, such as the Colombian Constitutional Court, or the Costa Rican Constitutional Chamber (Sala Cuarta). In such cases, the key will be to separate purely political influence from ideological or principled decision-
making. Yet, in other occasions, the analysis might focus on cases of no defined ideological content, in which political forces are seeking specific advantages from the court in the struggle for political competition. This is characteristic of contexts of regime transition or in the midst of political turmoil.

From this viewpoint, the consolidation over time of a regime-friendly judiciary requires the presence of enough judges in the court to form friendly majority coalitions that rule in favor of the government and exercise their powers in favor of the regime—along with raising the costs for opposition-minded judges of ruling against the regime. In this respect, a variety of strategies may be employed to craft a supportive court. For instance, over time, increasing dominance of the political space can allow the government to employ additional opportunity windows to replace unfriendly judges with partisan supporters. Conversely, if the judiciary is dominated by political opponents as soon as the government starts bending the contestation arenas, the opposition will be tempted to use the courts to seek the support of their allies in the fight against the ruling coalition, sometimes with the genuine expectation of defeating the coalition at the bench.

We find a good example of a case in which judicial loyalties seemingly play an important role among the most prominent decisions issued by the Venezuelan Supreme Court during the consolidation of Hugo Chavez’s government (early 2000s). The Constitutional Chamber of the Venezuelan Supreme Court, created to concentrate key powers of judicial review according to the 1999 Constitution, played an essential role in paving the way for the recall referendum against Hugo Chavez in August 2004. This included several critical decisions, such as filling the void of the Legislature’s failure to designate the members of the National Electoral Council in 2003 (appointing their interim members, including the Council’s President), to rule on the
constitutionality of different decisions made by the Electoral Authority, most of which were perceived as pro-government by the opposition. Most of these cases showed a Supreme Court divided between Chavista and anti-Chavista loyalists, with little or no regard to considerations of principle (see Brewer Carias 2004 for a summary of these controversial cases, and Sanchez Urribarri 2010 for a more extensive analysis). The effects of these political connections on judicial behavior and other phenomena of interest for judicial scholarship are often left unattended, because they do not “fit” comfortably any formalistic narrative of judicial independence, yet at the same time are hard to characterize as corruption.

Distinguishing the Effect of Loyalties from other Covariates of Judicial Behavior

Despite the importance of judicial loyalties in some political contexts, it is incorrect to generalize from the onset that judges do not take heed of other considerations in most cases. On one hand, the discussion in the preceding section applies to a specific category of cases: “salient” proceedings, that is to say, cases that are especially meaningful for politicians, in which judicial loyalties might have a systematic effect on behalf of political actors and forces. In non-salient cases, the effect of political connections might not be systematic, but sporadic and contingent on specific demands by political groups or actors, and hard to distinguish in courts with broad jurisdiction like most Latin American courts. On the other hand, it is also possible that judges systematically pay attention to other kinds of loyalties, in other kinds of proceedings, especially in judicial corruption schemes. For example, a judge may alter his or her decision or the time it takes to decide, in cases that involve a certain lawyer or business firm, as a result of their collusion or gratitude with these actors or due to their connection with the political actor in question. This might, or might not, involve bribing through giving a monetary sum. Other kinds
of rewards might suffice, such as a job for a relative or a professional opportunity after leaving office.

Although the effect of political loyalties can be quite clear in certain cases, it is usually not so evident. Depending on the nature of the case, judges might also take into account their personal preferences (as the attitudinal model of judicial behavior suggests, see Segal and Spaeth 1993, 2002), the costs and benefits associated with ruling against the wish of the government and other political actors or public opinion (as the strategic perspective on judicial decision-making proposes, see for example Epstein and Knight 1998), and legal interpretations or precedents. With regards to ideology, as mentioned above, it is important to bear in mind the potential overlap or differences between judges’ policy preferences and loyalties. If both ideology and the loyalty tie point in the same direction, it would be hard to tell which effect is truly driving the outcome.

The impact of loyalty links on judicial decisions could also be conditioned by strategic considerations, important in the context of change in government (compare Jensen 2003, 342). The first considerations are the popularity of the actor in question, and the ability of this actor to punish or reward the judge for her complacent behavior. This is because the *quid-pro-quo* linkage between a judge and his or her political ally is contingent on the politician’s ability to deliver the promised particularistic goods. If a politician no longer carries the clout necessary to fulfill her end of the loyalty link, or if there is a serious risk of future loss, the judge might feel an incentive to seek another ally or, more importantly, rule independently and without regard for the politician’s preferences. This premise is connected to Helmke’s strategic defection theory (2002, 2005) which argues that judicial support for a government varies as a function of the decaying popularity of the ruling regime. The *loyalties* perspective may supplement Helmke’s
strategic defection theory. Judges potentially reflect the preferences of their original allies and take into consideration their links when deciding whether to defect against the government or remain loyal, especially if the government’s ruling coalition is breaking down. Thus, it can shed light on the phenomenon of why some judges fail to defect and continue supporting a governmental coalition, in spite of the risk of losing or abandoning office, while other judges quickly defect as soon as the government loses political strength (a decision that might be tied to their political allies’ decision to depart the coalition).

The loyalties approach can also explain why some governments decide to get rid of judges rather than keep them once they come in office, notwithstanding the judges’ prior defection in prominent cases, and notwithstanding their seeming lack of commitment to any political cause. Examples abound after a change of regime or change of administration in Latin America. A loyalty perspective on judicial appointments suggests that the main reason why these processes happen in weakly institutionalized contexts concerns the surging political elites’ need to appoint new officers – including judges – not only to ensure their political loyalty, but also to seek as much personal profit as possible from the bench during and after the transition. In fact, in systems with blatant dynamics of judicial loyalties and poor institutionalization, judges will lack tenure protection and their appointments will be “temporary,” both because this helps to prevent judges from ruling against the governmental coalition and because this allows for easy replacement after the composition of the ruling coalition changes (see Hammergren 2007). Tenure instability in spite of formal tenure protection is a logical by-product of a politicized judiciary.

Additionally, legislation, legal doctrine, case-law and other legal sources are capable of affecting the influence of loyalties on judicial decision-making. In this respect, it is important to
make a distinction between “easy” cases and difficult, “hard” cases. “Easy” cases are those in which there is a clear, unchallenged legal interpretation generally accepted as the correct solution. The latter are cases involving a harder, more contested interpretation. Deciding in a politicized manner – i.e., in favor of political allies – is easier when this is consistent with authoritative legal interpretations, or within the boundaries of fair legal discourse. Conversely, if the case is located in a grey zone or, even worse, in the event that deciding politically would be clearly at odds with prevailing doctrine, judges should be less prone to following their judicial proclivities. Judicial loyalties are presumed to have an effect on the margin.

Finally, when comparing and contrasting the influence of political connections or loyalties on judicial decision-making across Latin American nations, it is necessary to address the connection between loyalties and the characteristics of the regime. Loyalties can be consequential in democratic and non-democratic regimes. In Latin America, the consolidation of democratic institutions does not necessarily rule out the existence of clientelist political dynamics in the judiciary. The coexistence of particularistic and programmatic politics in Latin American democracies is possible, as it was the case in the United States and other consolidated democracies, and still is the case in countries such as Brazil or India, with well-embedded democratic institutions.

In democratic regimes, increasing fragmentation of the political arena, accommodating different political actors, can allow courts to enjoy greater independence. The more plural and fragmented the ruling coalition, the greater the number of important loyalties that tends to emerge. This, in turn, reduces the relative impact of a single loyalty on judicial decision-making. The opposite phenomenon occurs in authoritarian polities, where the nexus with a President or smaller ruling elite can trump other factors. This picture would coincide with accounts that
provide a larger role for judges in polities where power is more diffuse, an explanation that has also been applied in the Latin American context (Rios-Figueroa 2007b). On the other hand, the notion of judicial loyalties also helps to explain dynamics of apparent judicial empowerment in a system transitioning towards authoritarianism. As courts are employed by the opposition to further political agendas against rulers, the governing elite becomes concerned with ensuring they have political agents on the court in the first place who understand the importance of ensuring their success for political survival.
References


