
INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE (IBAHRI)
**THEMATIC PAPER No 5**

**APRIL 2016**

# A Double-Edged Sword: Judicial Independence and Accountability in Latin America

**By Jessica Walsh**


the global voice of
the legal profession®

# A Double-Edged Sword: Judicial Independence and Accountability in Latin America

# Contents

# About the Author

Jessica Walsh is a Solicitor of the Senior Courts of England and Wales, who has worked at both Davies Arnold Cooper (now DAC Beachcroft) in London and Balaguer, Morera & Asociados (now Balaguer, Morera & García del Río) in Barcelona. In practice, she specialises in international commercial dispute resolution, with a focus on arbitration proceedings. In 2012, she was awarded a doctoral studentship at the University of Surrey to conduct research on judicial disciplinary procedures in Argentina. Her research has involved in-depth interviews with various stakeholders in Argentina, including judges who had been accused of corruption; members of judicial councils, impeachment tribunals, and legislative impeachment committees; and lawyers and members of NGOs who had filed complaints against judges. Jessica also lectures in law at the University of Surrey. She holds an LLB in European Law from Warwick University and a Certificat Européen d'Études Juridiques Intégrées awarded jointly by Warwick University, the Universität des Saarlandes, and the Université de Lille II.

# Acknowledgements

Thanks are due to Alex Wilks of the International Bar Association's Human Rights Institute and Cecilia Barral Diego for her extensive and dedicated research for this paper. Dayan Picon also provided valuable research assistance on specific issues.

Further thanks are also due to the following for reviewing a draft of this paper and providing invaluable comments and suggestions: Judge Maria Cristina Crespo, President of the International Association of Judges (IAJ), and Judge José Igreja Matos,Vice-President of the IAJ; Dr Jan van Zyl Smit of the Bingham Centre for the Rule of Law, part of the British Institute of International and Comparative Law (BIICL); and Jane Ellis and Rocio Paniagua of the Legal Policy and Research Unit at the IBA, which is currently working on the IBA Judicial Integrity Initiative. Thanks also to IBAHRI Council Member Professor Carlos Ayala Corao of the Andrés Bello Catholic University; Rafael Silva Niño de Zepeda of the Supreme Court of Chile; Dr Daniele Canestri, Vice-President at JP Morgan Chase; and Pablo Lloveras, lawyer and Argentinean Diplomat, for their support and suggestions.

# 1. The Lack of Trust in Accountability Procedures

Governments that threaten judicial independence in Latin America by unduly sanctioning, removing and intimidating judges are becoming an ongoing concern for all involved in the region. In Ecuador, for example, a judicial reform programme initiated in 2011 has since led to the removal of hundreds of judges.[1] In Honduras, the Council of the Judicature, whose members were controversially elected by the National Assembly in 2013,[2] has been conducting questionable assessments of 'trustworthiness' on judges and judicial candidates, including lie detector tests and assessments of personal finances.[3] In Venezuela, the emblematic trial of Judge María Lourdes Afiuni has dragged on for six years after her arrest for granting bail to a political prisoner.[4] Judge Afiuni has alleged that she was tortured and raped during her imprisonment in a maximum security facility and her case has sent shock waves through the Venezuelan judiciary, creating an atmosphere of fear. These and many other stories paint a picture of judges as victims of government attacks that threaten the constitutional order of countries across the region.

Conversely, various reports and indices suggest that judges in the region are widely perceived by the public as corrupt. In the *Latinobarómetro* of 2015,[5] in almost all countries in the region, the majority of participants had 'little' or 'no' confidence in the judiciaries of their countries. The only exception, by a small margin, was Uruguay.[6] Transparency International's Global Corruption Barometer 2013 tells a similar story, with the majority of participants deeming the judiciary to be 'corrupt or extremely corrupt' in all countries in the region surveyed, including an alarming 85 per cent of respondents in Peru deeming the judiciary corrupt.[7] According to the World Justice Project (WJP) Rule of Law Index,[8] the Latin American and Caribbean region scores an average of 0.48 for the absence of corruption in the judiciary[9] on a scale of zero to one, with one being the highest possible score. The range, however, is quite large, from 0.83 for Uruguay to 0.21 for Venezuela and Bolivia, and some countries, such as Paraguay, are not included.

It is important to emphasise that all these indices rate perceived corruption as a proxy for actual corruption. In addition, most of these indices do not tell us *why* participants deem judges to be corrupt: some may perceive the judiciary to be corrupted by subservience to the executive, whereas

---

1 In 2012, the Transitional Council of the Judiciary also elected all 21 members of the National Court of Justice in a procedure that allegedly lacked transparency and credibility. See Freedom House, *Freedom in the World 2013*, available at https://freedomhouse.org/report/freedom-world/2013/ecuador (last accessed 29 March 2016).

2 *Ley vs Realidad: Independencia y transparencia de la justicia en Centroamérica y Panamá. Informe de Honduras* (Due Process of Law Foundation 2013).

3 See Decree No 291-2013 reforming the Law of the Judicial Council and Judicial Career (Decree 219-2011, of 16 November 2011). While the law specifies that failing a polygraph will not be sufficient reason to remove a judge from office, opponents claim that the tests will serve to remove judges who may not be politically aligned with the government, or to prevent them from entering the judiciary. More generally, there are tens of writs of *amparo* waiting to be heard in the country's constitutional courts about judges that have been removed or suspended under suspicious circumstances.

4 See IBAHRI Report, *The Execution of Justice: The Criminal Trial of Judge Maria Lourdes Afiuni* (2014).

5 Corporación Latinobarómetro, *Latinobarómetro Análisis de datos*, see www.latinobarometro.org/latOnline.jsp (last accessed 31 March 2016).

6 In the 2013 *Latinobarómetro,* both Uruguay and Costa Rica were exceptions to this trend.

7 Transparency International, *Global Corruption Barometer: Peru* (2013). See www.transparency.org/gcb2013/country/?country=peru (last accessed 31 March 2016).

8 World Justice Project, *Rule of Law Index 201.* See http://data.worldjusticeproject.org/ (last accessed 31 March 2016).

9 These WJP ratings on perceived judicial corruption reflect the answers given by local experts and the general population to 12 questions relating to both bribes paid to the members of the judiciary and improper influence on judges by litigants, government and private parties.

others may believe that the judiciary acts in a self-interested way, that is, for personal gain, or with an institutional bias against certain parts of society.[10] Similarly, there may be several reasons for the public's lack of trust in the judiciary, with possible roots in governmental discourse or the memory of a judiciary that was deemed by many to be subservient to the interests of previous undemocratic regimes. A lack of trust in the judiciary, however, whether or not well founded, is problematic in itself, not least because it makes the judiciary vulnerable to attacks from the government.

Indeed, several governments across the continent have latched onto popular concerns, speaking out against judges that they claim are out of touch with ordinary citizens. While perceptions of judicial corruption may relate, at least to some extent, to a belief that the judiciary is subservient to the government, many governments ignore this possibility and instead chose to portray judges as biased and self-interested corporations that hold political power without being held democratically accountable for their decisions. By publicly discrediting the judiciary, governments attempt to justify further attacks on judicial independence, both formal (ie, through legal reform) and informal (ie, by forcing judges to resign).

Given the continent's authoritarian past, the knee-jerk reaction from a judiciary wary of the government's motives is often to resist change and calls for accountability, fearing reforms that they feel are designed to undermine their independence. In essence, at the heart of the debate on judicial independence and judicial accountability is an unhelpful mistrust of motives that stifles any real political debate regarding the way forward. Governments accuse judges of using calls for independence as a way to protect their power and avoid accountability, and judges accuse governments of using rhetoric about accountability as a way to gain power over the judiciary. A related problem, aggravated by this mistrust of motives, is that there is also a genuine lack of agreement between the government and judges, and between different political ideologies, regarding the desirable nature and extent of judicial independence and accountability.

It is unlikely, however, that a defensive response from the judiciary will neutralise the power struggle. Instead, it is likely to fuel further criticism that the judiciary is insular and unresponsive. A more productive response from the judiciary to attacks from the government would be to promote its own integrity and take the lead in demonstrating a willingness to be held accountable for the proper exercise of its function in terms of both transparency and access to information, in addition to adherence to a well-functioning disciplinary procedure that roots out judicial corruption of any type. Such a bona fide willingness to embrace judicial accountability will make it more difficult for governments to criticise the judiciary. This, of course, may be difficult in extreme circumstances where there is a flagrant disrespect for the rule of law. In such circumstances, the struggle is on political and ideological levels. However, in countries that maintain a veneer of legality, such an approach can essentially call on a government to make good its stated intentions.

10 The WJP Rule of Law Index provides an insight into what type of corruption the public believes affects judges. It has a separate rating for whether the civil and criminal justice systems are deemed to be free from improper government influence. It is interesting to note that, on average, the region scores worse for a lack of improper government influence in the justice system (0.43 for civil justice and 0.39 for criminal justice) than for lack of corruption in the judiciary (0.48), with Venezuela scoring zero and Nicaragua scoring 0.08 for lack of political interference in the criminal justice system. The problem with comparing these two indicators, however, is that the former rates the justice system as a whole, including perceptions about prosecutors and police, whereas the latter only relates to the judiciary and includes perceptions of government influence on the judiciary. What we can take away from this, however, is that improper government influence is deemed to be a problem, even if it is not the only type of corruption affecting the judiciary.

For this to be productive, however, there needs to be a move away from disciplinary procedures plagued by political interference and partisanship. There is a need for judicial disciplinary procedures to be transparent, unbiased and, most importantly, trusted by all. To implement this change, it is necessary to have a better understanding of how and when these processes are or can be abused, protecting either judicial or governmental interests. This calls for a systematic analysis of the ways in which judges are currently being held 'accountable' and 'disciplined' in the region, *de jure* and de facto. Detailed information about the politicisation and abuse of disciplinary procedures in practice would help both in terms of making a case for reform and in identifying the changes that need to be made.

In addition to collecting detailed information about the ways in which disciplinary procedures work, it is also important to understand the context of tension between the executive and judiciary, and between different political ideologies in the region. It is therefore instructive to note that behind these tensions there lurk ongoing debates about the ideal distribution of constitutional power,[11] about individualism versus collectivism and mistrust of the unbiased execution of power. Although coloured by every country's *sui generis* experience of democracy and abuse of power, these debates are part of a wider global discussion about the powers held by the judiciary, and how and to what extent judges should be held accountable. Concerns about the politicisation of 'unaccountable' judiciaries and accompanying attempts by governments to exert control over them can be witnessed around the globe, both in countries with long-standing democratic traditions and those that have transitioned to democracy more recently. It is clear, however, that debates about institutional arrangements and how power can be kept in check are critical for the formation of democratic constitutional entities throughout Latin America and in other post-dictatorship constitutional democracies around the world.

In this paper, we seek to provide an overview of some of the ways in which judicial accountability and disciplinary processes appear to be abused currently in Latin America, and to make some recommendations regarding the way forward, including identifying where further information needs to be gathered.[12] In the following section, we present the international and regional norms on judicial independence and accountability, discussing some of the differences between national legal systems across the region. In section three, we consider some ways in which accountability and disciplinary procedures appear to have been subverted for political or personal reasons. In section four, we conclude with recommendations for both the preservation of judicial independence and increased accountability. In this paper, we maintain that accountability should be a well-defined, transparent and impartial system, which, when properly implemented, is a double-edged sword that can root out and sanction any undue governmental influence on the judiciary in addition to nepotistic and corrupt judges. Accountability should not be a threat to judicial independence and integrity but rather a tool to strengthen it.

---

11 Indeed, in *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas*, the IACHR observed that the constitutions of some states in the region have provisions stating that the three branches of government shall mutually collaborate or cooperate. See Art 12 of the Constitution of Bolivia, Art 4 of the Constitution of Honduras and Art 136 of the Constitution of Venezuela. See also Art 121 of the Constitution of Cuba, which provides that 'the courts are a system of state bodies, structured so as to be functionally independent of any other organ and hierarchically subordinate to the National Assembly of the People's Power and to the Council of State'. OEA/Ser L/V/II, Doc 44, 4 December 2013.

12 This is merely a consideration of trends across the region as a whole and some countries, such as Mexico, have been entirely excluded from the scope of this paper.

# 2. The Legal Framework

## International norms

The principle of judicial independence has been recognised as 'international custom and a general principle of law recognised by the international community'[13] and has been established in several international treaties, having developed as a necessary prerequisite for the enforcement of various international human rights treaties. The United Nations Human Rights Council has, on many occasions, stated that 'an independent judiciary… is essential to the full and non-discriminatory realisation of human rights instruments and indispensable to the processes of democracy'.[14] The principle of judicial independence has correspondingly been recognised in universal human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR)[15] (Article 14) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[16] (Article 13). The vast majority of states in Latin America have ratified both treaties and are therefore bound to protect judicial independence.[17]

At a regional level, the American Convention on Human Rights (ACHR)[18] states in Article 8(1) that 'every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law'. The Inter-American Court of Human Rights[19] (IACtHR) confirmed in its case law that the principle of judicial independence is 'one of the basic pillars of the guarantees of the due process… [and] results necessary for the protection of fundamental rights'.[20] It also stated that 'the independence of the judiciary shall be guaranteed by the State and… it is the duty of all governmental or other institutions to respect and observe the independence of the judiciary'.[21]

The Inter-American Commission on Human Rights (IACHR) confirmed that for the judiciary to operate independently, courts must be 'free of all influence, threats, [and] interference'.[22] In this regard, in its case law, the IACtHR found that the removal of judges from office for decisions taken in exercise of their judicial functions violates Article 8(1) of the ACHR.[23] The court explained in *Reveron Trujillo*[24] that without the irremovability of judges, 'States could remove judges and therefore

13 UN General Assembly Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers,* Leandro Despouy, A/HRC/11/41, 24 March 2009, para 14.

14 Preamble, Human Rights Council Resolution 15/3, 30 September 2010. See also Resolution 12/3, 1 October 2009, A/HRC/RES/12/3; Commission on Human Rights Resolution 2004/33, 19 April 2004, E/CN.4/RES/2004/33; and Commission on Human Rights Resolution 2003/43, 23 April 2003, E/CN.4/RES/2003/43.

15 International Convention on Civil and Political Rights, New York, 16 December 1966. Entered into force on 23 March 1976, 999 UNTS 171.

16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984. Entered into force on 26 June 1987, 1465 UNTS 85.

17 The only exceptions are Cuba, St Lucia, Antigua and Barbuda, and Saint Kitts and Nevis that have not ratified the ICCPR, and Haiti, Trinidad and Tobago, the Bahamas, Suriname, Barbados, Jamaica, Saint Lucia, Grenada, Dominica, and St Kitts and Nevis that have not ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.

18 Signed in San José, Costa Rica, on the 22 November 1978. Entered into force on 19 July 1978. Note that Cuba is not a participating member of the Organization of American States (OAS). Venezuela and Trinidad and Tobago ratified the convention, but later denounced it.

19 All parties to the ACHR have submitted themselves to the jurisdiction of the IACtHR, with the exception of Barbados, Dominica, Grenada and Jamaica.

20 IACtHR, *María Reverón Trujillo v Venezuela*, judgment of 30 June 2009, para 68.

21 *Constitutional Court v Peru, Merits, Reparations and Costs*, 31 January 2001, para 73, IACtHR Series C No71.

22 IACHR, *Report on Terrorism and Human Rights* (22 October 2002) para 229.

23 See Apitz-Barbera et al, *First Court of Administrative Disputes v Venezuela*, IACtHR Series C No 182, and *Constitutional Court v Peru*, IACtHR Series C No 71.

24 IACtHR, *María Reverón Trujillo v Venezuela*, judgment of 30 June 2009.

intervene in the Judicial Power without greater costs or control. In addition, this could generate a fear in the other judges, who observe that their colleagues are dismissed and then not reinstated even when the dismissal has been arbitrary. Said fear could also affect judicial independence, since it would promote that the judges follow instructions or abstain from contesting both the nominating and punishing entity.'[25]

These principles and standards, however, do not preclude that judges are held accountable for the proper exercise of their function. Accountability here is understood to be a combination of both explanatory accountability whereby the judiciary, its finances and all processes should be public and transparent, and judges should provide clear explanations of their decisions, and sacrificial accountability, whereby complaints can be lodged against judges. Indeed, it is important for the very protection of the independence of the judicial branch, and the appearance of the independence of the judicial branch, that judges who do not uphold standards of judicial conduct in their functions are sanctioned or removed from office.[26] International norms do not therefore prohibit judicial accountability, but rather set out standards for the sanctioning or removal of judges in order to ensure that processes are not abused.

The UN Basic Principles on the Independence of the Judiciary (the 'UN Basic Principles'),[27] which sets out the ways in which states are required to guarantee judicial independence, provides further guidance regarding the standards to be followed in procedures for the suspension or removal of a judge. Principle 17 states that 'a charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing.' These principles were complemented in 2003 by the Bangalore Principles of Judicial Conduct.[28]

The UN Human Rights Committee has also set out the requirement that the removal of judges must be the object of an impartial procedure in general comment 32: 'judges may be dismissed only… in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law'.[29] Where procedures for the removal of a judge are unduly influenced by political actors or considerations, the procedure transforms from one that is meant to safeguard judicial independence to one that threatens it. In the case of *Chocrón Chocrón*, the IACtHR agreed, stating that 'the authority in charge of the procedure of removing a judge must act independently and impartially in the procedure established for that purpose and permit the exercise of the right of defence. This is so because the free removal of judges raises the objective doubt of the observer regarding the real possibility of judges deciding specific disputes without fear of reprisals.' [30]

The IACtHR also stated that disciplinary oversight of the judiciary 'requires an autonomous reason warranting a finding that a disciplinary offence has been committed'.[31] Principle 18 of the UN

25 *Ibid*, para 83.

26 See also Geoffrey Robertson QC, *Judicial Independence: Some Recent Problems (*IBAHRI 2014).

27 Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, UN Doc A/CONF 121/22/Rev 1 at 59 (1985).

28 Resolution 2003/43 of the UN Commission on Human Rights, 23 April 2003.

29 General comment 32, Art 14: Right to Equality before Courts and Tribunal and to a Fair Trial, 23 August 2007, CCPR/C/GC/32.

30 IACtHR, *Chocrón Chocrón v Venezuela*, Series C No 227, para 99.

31 Apitz-Barbera et al, *First Court of Administrative Disputes v Venezuela*, IACtHR Series C No 182, para 86.

Basic Principles further specifies that 'judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties'. Principle 19 adds that whether or not judges have displayed behaviour that renders them unfit to discharge their duties shall be determined 'in accordance with established standards of judicial conduct'. However, these standards of judicial conduct are more controversial and subject to regional variations, as shall be seen below. It is clear, however, that judges cannot be removed for their impartial judgment. These principles are applied in some constitutions of the democratic world by affording judges life tenure or a mandated retirement age. However, in states where judges are elected, it is interpreted to mean that judges shall not be unduly suspended or removed during their period in office.[32] Such provisions, however, need to be combined with adequate safeguards in practice and a fair procedure for sanctions and removals where necessary.

## National normative frameworks for oversight of the judiciary

### *Structural framework and procedural issues*

Following the reinstatement of democracy throughout Latin America in the 1980s and 1990s, various new constitutions and reforms of the judiciary have resulted in a plethora of national norms for the protection of judicial independence and a variety of procedures for the discipline and removal of judges. Although expressed in different ways, the majority of constitutions in the region recognise the principle of judicial independence. The constitutions of Bolivia, Paraguay, Peru and Venezuela explicitly state that the judicial branch is independent, whereas the constitutions of Argentina, Chile and Uruguay introduce the principle of judicial independence by expressly allocating judicial powers exclusively to the judiciary. Such provisions are critical because they clearly imply that other institutions cannot revise the legal basis or content of judicial decisions and the judiciary should not be reprimanded for the independent and impartial exercise of its function. The ways in which judicial independence is thereafter guaranteed in law and practice, however, diverges more markedly between countries.

#### Security of tenure

As suggested in Principle 12 of the UN Basic Principles, many countries afford guaranteed tenure to judges until a mandatory retirement age or expiry of their term in office as a way of protecting judicial independence. The Brazilian constitution, which provides a detailed list of guarantees designed to safeguard judicial independence, explicitly specifies the life tenure of judges, whereas the constitutions of Argentina, Chile,[33] Peru and Uruguay specify that judges shall stay in office while their good conduct lasts. In Paraguay, judges hold office for an initial period of five years. During those five years, the constitution guarantees their immobility and they acquire life tenure once they have been confirmed for two periods following their initial selection.[34] Conversely, the

32 That interpretation, while in line with the UN Basic Principles, is subject to substantial controversy, which may be because of both lack of consensus on the desirable extent of judicial independence, as shall be discussed further below, and the argument that whether the election of judges affects their independence depends only on the integrity of the actors involved and perhaps the political and social climate.

33 In Chile, only Court of Appeal and Supreme Court judges are afforded life tenure. Lower court judges hold office for the number of years specified by the law. However, the law specifies that all judges, including interim and substitute judges, are guaranteed immobility for the fixed period of time that they hold office under the law. See Art 247 of the Organic Court of Tribunals and Art 80 of the national constitution.

34 Art 252 of the Constitution of Paraguay. Supreme Court justices are designated by the Senate with the approval of the Executive Branch from a list of three candidates vetted and proposed by the judicial council.

constitutions of Bolivia and Venezuela opt for non-renewable fixed terms for judges without any reference to immobility.

The importance of tenure and guarantees of immobility in terms of protecting judicial independence are to ensure that judges do not fear removal or transfer from their posts as a result of them exercising their function independently and impartially. It is also important to avoid judges becoming biased in their decision-making with a view to re-election.[35] However, as shall become apparent below, while it is crucial to have constitutional guarantees of immobility in place, there is the danger of these guarantees being violated in practice either through dubious removal proceedings or forced resignations.

### Procedures for the appointment of judges

It is clear that where judges are hand-picked for their loyalty to the government, judicial independence is undermined. While an evaluation of the appointments procedure does not fall within the scope of this paper about judicial accountability,[36] irregularities in appointment procedures may still be a sign of possible anomalies in accountability and disciplinary procedures. Government influence over judicial appointments clearly demonstrates a desire by the executive to control the judiciary, and suggests that it is also likely to attempt to control the accountability and discipline of judges. This may particularly be the case where the same body is responsible for both the appointment and removal of judges. If the government can influence – formally or informally – one of these procedures, it is also likely to be able to influence the others.

The mechanisms for appointing judges vary greatly throughout the continent. In countries where the judiciary exerted significant influence over the process of drafting the constitution, such as Brazil, Chile and Uruguay, the judiciary maintains substantial power over the appointments procedure. In other countries, such as Peru, Argentina and Paraguay, judicial councils are, to varying degrees, in charge of appointments. The judicial councils in Peru and Paraguay are autonomous institutions,[37] whereas the National Judicial Council in Argentina is a permanent body of the judicial branch.[38] Brazil and Bolivia both operate mixed systems. In Brazil, each lower court is responsible for the appointment of its own judges in accordance with the limits set by the National Judicial Council, which is also part of the judicial branch.[39] The Supreme and Superior Court justices are, however, appointed by the executive and approved by the Senate. In Bolivia, the Council of the Magistracy is responsible for the appointment of lower court judges, but judges of the higher courts and members of the Council of the Magistracy themselves are elected by popular vote from a list compiled by the Legislative Assembly.

Criticisms of appointment procedures vary, with judiciaries being accused of corporatism and nepotism in countries where they hold power over appointments, and governments accused of trying to control processes where judicial councils or the legislature make appointments. In Bolivia, for example, there has been widespread concern that the complex procedure for making appointments,

35 A distinction needs to be drawn between external bias, where a judge takes into account the external popularity of a decision, which is to be avoided, and internal bias, where a judge's personal bias affects his or her independent judgement. Views on the latter case are varied.

36 See IBAHRI, *Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals* (October 2011).

37 For Peru, see Art 1 of the Organic Law of the National Council of the Magistracy, Law No 26397 (published 7 December 1994). For Paraguay, see Art 1 of the Law No 296/94 that organises the functioning of the Council of the Magistracy.

38 Art 1 of the Law of the Council of the Magistracy, Law 24.937 (to 1999) as amended by Art 1 of Law 26.855.

39 Art 92 of the Brazilian Constitution.

involving a popular vote, leaves the process vulnerable to political intervention. The 2011 election of the judges of the highest courts of Bolivia were controversial because the candidates were preselected by a two-thirds vote in the legislature. This meant that the governing party was able to influence the list of candidates put forward for election. The resulting constitutional court later ruled in favour of President Evo Morales being able to run for a third term as president, giving further weight to fears that the election of judges had been politically manipulated.

In Venezuela and Argentina, substantial judicial reforms aimed at 'democratising' the judiciary have been enacted and have been criticised for leading to increased partisanship in judicial councils and the appointment of judges. In Argentina, the most controversial provisions of a six-bill judicial reform package that purported to politicise the election of members of the judicial council were declared unconstitutional by the Supreme Court in 2013.[40] In Venezuela, a host of judicial reforms and reforms to the Criminal Code continue to raise fears over increased levels of politicisation of judicial appointments. Indeed, the UN Committee on Economic, Social and Cultural Rights recently expressed concern at the level of informality and politicisation of the judicial appointments procedure in Venezuela, calling for increased transparency in the procedure.[41]

### Procedures for the removal of judges

All constitutions in the region have provisions regulating the removal of judges. Who is in charge of the removals process and how it is managed, however, differ greatly. The process for removing judges of the highest courts is also usually different from the procedure for removing any lower court judges, and in federal states, procedures in the provinces may differ significantly to those at the federal level.

The divergence in legal provisions can once again be explained largely by the balance of power at the time constitutions came into force, with countries and provinces with strong judiciaries generally managing to maintain disciplinary procedures internal to the judiciary. This was the case, for example, in Brazil, where the executive was very weak during the years leading up to 1988 when the new constitution came into force. The Brazilian judiciary at the time used this to influence the drafting of the constitution, as well as the fact that the drafters of the constitution wanted to ensure judicial independence after Brazil's experience of military dictatorship. The result is a constitution that provides the judiciary with a great deal of autonomy with very little external oversight.[42] In the case of Brazil, this imbalance has now been corrected with the newly formed National Judicial Council holding the power to discipline judges. This National Judicial Council is composed of representatives of judges, prosecutors, lawyers and civil society, and has centralised and coordinated the administration of federal justice in Brazil. This change, however, did not come about without strong resistance from parts of the judiciary, and only after several judicial corruption scandals had been brought to the public's attention.[43]

---

40 Case No 3034/13, Rizzo, Jorge Gabriel (apoderado Lista 3 Gente de Derecho) s/ acción de amparo c/ Poder Ejecutivo Nacional, ley 26.855, medida cautelar (Corte Suprema de Justicia de la Nación, 18 June 2013). For a summary and a copy of the decision, see www.cij.gov.ar/nota-11694-La-Corte-declaro-inconstitucional-cambios-en-el-Consejo-de-la-Magistratura.html (last accessed 29 March 2016).

41 UN Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of the Bolivarian Republic of Venezuela, Approved by the Committee on its 50th meeting, (19 June 2015), E/C.12/VEN/CO/3.

42 See IBAHRI, *One in Five: The Crisis in Brazil's Prisons and Criminal Justice System* (February 2010), 41. The report quotes Fiona Macaulay, who has argued that the Brazilian judiciary's influence over the drafting of the 1988 Constitution represents a clear case of 'producer capture'. See Fiona Macaulay, 'Democratisation and the judiciary', in Maria DiAlva Kinzo and James Dunkerley, *Brazil since 1985: Economy, Polity and Society* (Institute of Latin American Studies, 2003), 86.

43 IBAHRI, *One in Five: The Crisis in Brazil's Prisons and Criminal Justice System* (February 2010), 34.

Regardless of the balance of power that was established in the post-dictatorship constitutions, we shall, however, see that all accountability and disciplinary procedures have their challenges. In countries where the judiciary managed to protect its power, the Supreme Court typically holds the power to remove lower court judges, which is the case, for example, in Chile and Uruguay. This appears to be a way to secure institutional independence by not giving other branches of government any power over removals. Whether this translates into actual institutional and individual judicial independence in practice depends on the level of actual independence of the Supreme Court itself.

The system that places the Supreme Court in charge of oversight of the judiciary is also vulnerable to accusations of lack of impartiality. While the Supreme Court may have a vested interest in maintaining the impartiality and integrity of the judiciary, and may also, because of experience, be well placed to judge the actions of judges, any institutional bias that may exist in the judiciary could go unscrutinised in an internal procedure. There are also concerns raised over judicial corporatism, whereby the judiciary is accused of protecting its members. This, however, should not be interpreted as a problem of the judiciary being 'too independent'; what is problematic is when the judiciary is unaccountable for the independent and impartial exercise of its function.

The same fears are voiced over systems where each court has some control over the discipline of its own judges, as was the case in Brazil with its previous system of *corregedorias*, the internal disciplinary committees of each tribunal. *Corregedorias* still exist in Brazil, but as alluded to above, because of many judicial corruption scandals, the y now share their disciplinary faculties with the National Judicial Council. The birth of the National Judicial Council in Brazil has led to a similar tension between the executive and judiciary, as in many other countries across the continent, because each one fights to protect its sphere of influence in the judicial council.

The model placing the discipline of judges in the hands of a free-standing judicial council and/or impeachment jury is inspired by the Franco–Italian experience. While this system is in place in Argentina, Brazil, Peru and Paraguay, there are wide variations between how this system works in each country. In Argentina, the National Judicial Council receives and investigates complaints against federal judges and then decides whether to accuse the judge in question before the national impeachment jury, which takes the final decision regarding removal. In Paraguay, anyone is entitled to bring an accusation directly before the impeachment jury that decides on the removal.[44] In Peru, the Office for Supervision of Judges is in charge of investigating any lower court judges, and where it finds cause for removal, the Supreme Court requests that the judicial council investigates and removes the judge where necessary. If the judicial council does not find cause for a removal hearing, it remits the file to the Supreme Court, which is in charge of deciding whether any other sanctions may apply. In Venezuela, the Code of Judicial Ethics sets out that a judicial disciplinary tribunal shall hear and apply disciplinary procedures with the possibility of appeal to a judicial disciplinary court. However, due to a severe delay in creating these tribunals, disciplinary powers were granted to the Commission for Operating, and Restructuring the Judicial System, and the Inspectorate General of Courts.

44 See Art 16 of Paraguayan law 1084/1997.

All these judicial councils are relatively new and there has been much controversy about their composition and what powers they should hold. This controversy has been fuelled by doubts about whether such bodies can ever be independent[45] and impartial, and concerns about who will be able to influence these bodies in practice. The composition, in some countries, is precisely outlined in the national constitution, as is the case in Paraguay.[46] In other countries, the constitution only outlines that the council – or impeachment jury – should include representatives from various sectors, leaving the exact composition to be regulated by law. This is the case in Argentina, for example, and has resulted in frequent and controversial changes to the law and composition of the council.

Most constitutions recognise that in the interest of maintaining institutional judicial independence, the executive should not hold a controlling interest in the judicial council or impeachment jury. However, composition varies widely. In Paraguay, the impeachment jury is composed of eight members: two members of the Supreme Court; two members of the judicial council, which could include a member of the executive because one of the members of the judicial council is a member of the executive; two senators; and two deputies. This opens up the possibility of a majority being from the executive and legislative branches of government.

By contrast, in Peru, there is no executive or legislative representation on the council. The Peruvian judicial council is composed of seven councillors: one from the Supreme Court; one prosecutor from the higher courts; one from the Lawyers' Association; two from other professional associations; one from a national university; and one from a private university. In Brazil, there also appears to be little opportunity for legislative and executive interference with only two out of 15 councillors of the National Judicial Council being chosen by the legislature: one by the Chamber of Deputies and one by the Senate. Nine out of the 15 members are representatives of the judiciary, although these members are appointed by the president and approved by the Senate.

In some jurisdictions, there have been initiatives to involve civil society in the decisions to remove judges, as is the case in some Argentine provinces where civil society is directly represented in the provincial judicial council.[47] In Bolivia, civil society is involved in a variety of ways, which depend on the seniority of the judge subject to disciplinary procedures. In the case of elected judges – higher court judges – civil society can vote on the continuity in office of a judge where a popular complaint questioning the judge has been filed. In the case of lower court judges, disciplinary judges are in charge of imposing sanctions, and in serious cases, form a disciplinary tribunal composed of citizen judges and disciplinary judges, which can decide on the removal of judges. The judicial council acts as a court of appeal in such cases. Although, theoretically, the involvement of civil society may serve to increase transparency and reduce politicisation, in practice, there are concerns about the impartiality of the members of civil society involved.[48] Members of the judicial

45 Indeed, there has been much debate about whether these councils should be 'internal' to the judiciary or 'external' autonomous bodies that are separate from the three branches of government.

46 See Art 253 and 262 of the 1992 Constitution of Paraguay.

47 See, for example, the judicial council of the Argentine province of Chubut. Five out of 14 councillors are civil society representatives elected by popular vote. For more information, see www.conmagchubut.gov.ar.

48 See IBAHRI, *Challenges to the Independence of the Judiciary: A Case Study of the Removal of Three Judges in Iowa* (December 2013).

council in Bolivia are elected by popular vote, but only once the candidates for election have been preselected by the legislature in a process that has been criticised for its discretionary nature.[49]

Indeed, although the institutional and compositional design of judicial councils and other disciplinary bodies are important, there are additional concerns about the potential abuse of these structures. In practice, it may be less important how many members of a judicial council or impeachment jury are judges, lawyers, senators or members of civil society, and more important whether they are truly impartial or whether they represent other interests, and if so, to which political party they are aligned or what particularistic arrangements they have in place. In this light, the true nature of the controversy surrounding the composition of judicial councils and impeachment juries becomes clear. Politicisation and fear of abuse of disciplinary powers are the main source of contention.

Judicial councils were created to provide independent oversight of the judiciary; however, there are fears that these bodies will be captured by political or judicial interests. Whose interests judicial councils serve in practice may have less to do with the formal composition of councils and more with whose interests each councillor may or may not serve. There exists, therefore, a need to conduct further research on the extent of this problem and its causes. Both the extent and causes may differ significantly from one judicial council to another. Some judicial councils may lack transparency and accountability, whereas others may benefit from a more precisely defined mandate and responsibilities. In any case, such problems are symptomatic of wider problems related to partisan politics and the rule of law, and as such, a holistic and context-sensitive approach should be adopted.

## Standards of judicial conduct

It is important that the criteria for removing a judge, specifically what constitutes conduct that justifies removal, is clearly defined. This, at the very least, would make it easier for judges claiming that they were unfairly dismissed to appeal those decisions. Indeed, Article 19 of the UN Basic Principles sets out that 'all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct'. In the region, however, there remains considerable uncertainty regarding the standards of conduct to which judges shall be held in disciplinary proceedings.

Where the legal provisions for the removal of judges are vague, setting out, for example, that judges can be removed in the case of 'serious misconduct' or 'manifest lack of impartiality', there needs to be clearer guidance regarding the meaning of those terms. A recent study of disciplinary decisions by the Peruvian judicial council concluded that a lack of clarity in this regard resulted in the inconsistent application of norms. This was aggravated by the fact that the judicial council cited norms without explaining their understanding of the norms and sufficiently substantiating their decisions.[50] Similar concerns have been voiced in Honduras, Costa Rica and Nicaragua. In Honduras, the failing of the aforementioned lie detector test is, by law, insufficient to remove a judge, but as it is not clear exactly what is sufficient to remove a judge, there are concerns that the results of these questionable polygraphs will be used to justify removals.

---

49 Luis Pásara, *Judicial Elections in Bolivia: An Unprecedented Event*, Executive Summary (Due Process of Law Foundation and Fundación Construir).

50 Luis Pásara, *Procesos Disciplinarios de Magistrados en el Consejo Nacional de la Magistratura, Perú 2009–2013,* Fundación para el Debido Proceso.

There are two crucial instances of confusion that may arise with respect to the standards of judicial conduct to which judges should be held for the purposes of disciplinary action. The first is whether judges can be disciplined on the basis of their ruling in a case. It is in the nature of judicial independence that the judiciary needs to reach decisions independently based on the facts and laws before them without external influence. In addition, as stated clearly in Principle 4 of the UN Basic Principles, judicial decisions by courts shall not be subject to revision. Therefore, it is clear that governments cannot opine on judicial decisions and much less discipline judges where they disagree with their decisions.[51] This has, however, been a problem in several cases where governments have opined on judicial decisions and judges have been threatened, removed or intimidated because of decisions made in the proper exercise of their function.

The second confusion is between standards of judicial conduct warranting disciplinary action and codes of judicial ethics. Whereas codes of judicial ethics are highly valuable instruments for the guidance of judges and for promoting public trust in the judiciary, not every breach of an ethical code would warrant disciplinary action. Many codes of ethics are non-binding in nature or clearly set out which breaches warrant disciplinary actions and which do not. It is only fairly recently that some Latin American countries have instituted codes of judicial conduct: Paraguay and Peru in 2005, Brazil in 2008 and Venezuela in 2009/2010. Fifteen countries across the region have codes of judicial ethics in place. Many of these codes, however, have not been implemented in practice. Other countries, such as Argentina, Bolivia, Chile and Uruguay, do not have national codes in place exclusively for the judiciary.[52]

There have been encouraging advances at the regional level to provide guidelines through the Ibero-American Code of Judicial Ethics (2006)[53] and previously, the Statute of the Ibero-American Judges (2001)[54] and the Charter of the Rights of Person in the Justice System in the Ibero-American Judicial Area (2002).[55] However, the challenge remains in the national application of judicial ethics, and critically, clearly setting out to what extent, if any, they should inform decisions on the types of misconduct that justify the removal of a judge.

## The relationship between the criminal courts and disciplinary systems

Judges can be removed for misconduct, which clearly includes judicial corruption. Recently, however, there have also been increasing moves to criminalise corruption, including judicial corruption. Therefore, judges facing charges of corruption face two proceedings: a disciplinary proceeding for removal and a criminal trial. There are questions to be raised about whether the standards for a finding of corruption are the same in disciplinary proceedings as they are in criminal proceedings and consequently, whether such a finding is properly the jurisdiction of a disciplinary body.

---

51 See Art 7-2-b3 of the Declaration of Minimal Principles about Judiciaries and Judges' Independence in Latin America (Campeche Declaration), April 2008. For comparative purposes, see also s 69, Opinion No 1 (2001) Consultative Council of European Judges; Principle VI-1 of Recommendation No R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Rule of Judges (adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies); s 66 of the Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe; and Fundamental Principle No 4 of the Magna Carta of Judges adopted during the 11th plenary meeting of the Consultative Council of European Judges in Strasbourg on the 17–18 November 2010.

52 It should be noted, however, that they are subject to the laws that regulate public officials in general.

53 Approved by the 13th Ibero-American Judicial Summit, Santo Domingo, Dominican Republic 2006.

54 Approved by the 6th Ibero-American Summit of Presidents of Supreme Courts and Tribunals of Justice, Santa Cruz de Tenerife, Canarias, Spain, 2001.

55 Approved by the 7th Ibero-American Summit of Presidents of Supreme Courts and Tribunals of Justice, Cancun, Mexico, 2002.

The division of responsibilities between the criminal courts and disciplinary bodies, such as judicial councils and impeachment juries, needs to be defined more clearly, and collaboration between the two improved. For example, the effect one proceeding has on the other should be clarified; whether judges can be suspended from their positions during criminal trials and whether it is the disciplinary bodies or criminal courts who decide this; and whether both proceedings should run parallel or whether one should await the outcome of the other. The potential sharing of information and whether this is obligatory is also important. This clarity is vital because all methods for suspending or questioning the integrity of judges need to be protected from abuse of process by anyone who may try to undermine the independence of the judiciary.

It is also important that one institution does not overtake the functions of the other. A recent example of overlap in function is the Bolivian legislature's 'judgement' of three constitutional court judges: Gualberto Cusi Mamani, Soraida Rosario Chanez Chire and Ligia Mónica Velásquez Castaños. The Chamber of Deputies brought proceedings before the Senate to demand the *imprisonment* of the judges. This clearly illustrates confusion between disciplinary and criminal proceedings because the Bolivian legislative assembly does not, by law, have the power to hear criminal trials and imprison judges. Such a 'hearing' would have been contrary to Article 8 of the ACHR and Article 1 of the ICCPR, which protect the right to a fair trial in criminal proceedings. Ultimately, however, the Senate chose only to remove Judge Soraida Rosario Chanez Chire, but it did refer the judges for criminal proceedings. Judge Ligia Mónica Velásquez Castaños chose to resign and proceedings were not pursued against Judge Gualberto Cusi Mamani on health grounds. To add to the confusion, the newly created Ministry of Institutional Transparency and Anti-Corruption also has the faculty to investigate judicial corruption. Although there have been some laudable efforts by the various institutions to work together, the roles need to defined more clearly to ensure due process and avoid arbitrary decisions.

It is clear that the vast majority of countries in Latin America are constitutionally bound to protect judicial independence. While judges should be held accountable for misconduct, international norms clearly state that judges can only be removed by impartial procedures in the light of objective and established standards of judicial conduct. To adhere to these standards, countries need to ensure the guaranteed tenure of judges and a fair and impartial system for appointments and removals. There is, however, considerable divergence of opinion on the best way to ensure this. There is a fear that, in practice, whoever is responsible for appointments and removals will abuse his or her power. There has, therefore, been a great deal of controversy surrounding the composition and functioning of judicial councils, and a marked lack of trust in these recently established bodies. Also problematic is the lack of clarity regarding standards of conduct applied in disciplinary proceedings. It is clear, therefore, that the legal and institutional framework for ensuring judicial independence and impartial and objective judicial accountability in the region needs further development. In addition, as shall be seen in the next chapter, further problems arise in practice as existing laws and structures are undermined by partisanship. As has been explained in the UN Secretary-General's message to the High-Level Political Conference for the Purpose of Signing the United Nations Convention on Corruption in Mexico on 9 December 2003, the effective application of the rule of law is essential if corruption is to be removed.[56]

56 See www.legal.un.org/ola/media/info_from_lc/corruption_message.pdf.) See also Hans Corell, 'Appeal to Judges Worldwide', delivered at the same conference. See www.un.org/law/counsel/english/corruption_appeal.pdf (last accessed 29 March 2016).

# 3. Political Interference in the Disciplining of Judges

It is clear from section two that the majority of states in Latin America are bound by their constitutions, national laws and international obligations to uphold the independence of the judiciary. Because of increasing awareness of judicial corruption, there have also been laudable moves to set up independent oversight of the judiciary to ensure that judges are accountable for their function and disciplined for any cases of corruption or misconduct. A range of legal and institutional frameworks have been adopted across Latin America to give effect to this judicial oversight. Having discussed advantages and disadvantages of various legal oversight mechanisms in the previous section, we shall turn our attention in this section to the challenges facing these mechanisms and some of the most emblematic examples of governments putting pressure on the judiciary, interfering in disciplinary procedures, threatening and removing judges, and otherwise informally undermining judicial independence.

## Statements discrediting the judiciary

There are frequent examples across the region of government officials making public statements against individual judges, their judgments and the judiciary as a whole. This may be simply in the form of a government voicing disagreement with a judge's decision. However, there are also examples of stronger statements where a judge's impartiality is questioned, sometimes to the extent that it forces a resignation or removal. More generally, some government rhetoric suggests that the judiciary should be 'accountable' to the government, as the legitimate and democratically elected representatives of the people.

Some emblematic examples of this include the promises by then President Nicanor Duarte Frutos to clean up or, as he expressed it, 'pulverise', the Supreme Court, following which six members of the Paraguayan constitutional court were removed on the grounds of corruption.[57] In the aforementioned Bolivian legislature's judgement of three constitutional court judges, Bolivian Vice-President Álvaro García Lina, who is also President of the Legislative Assembly, made highly prejudicial statements in the media during the proceedings.[58] On a milder level, in Chile, the government publicly made claims that the judiciary was responsible for elevated crime rates due to lenient sentencing.[59] Judicial decisions have been also reported to be treated with contempt by government and local authorities in Colombia, where the government frequently makes public statements criticising judicial decisions. An example is the 2011 case of Judge Juan de Dios Solano, who ordered the release of a member of the Revolutionary Armed Forces of Colombia (FARC) because of the presentation of insufficient evidence for his detention. President Juan Manuel Santos openly criticised Judge Solano's decision and the judge has since faced both criminal and disciplinary proceedings. While these statements do not prove any governmental interference in subsequent

57 This was reported several times in many periodicals across the region. See https://freedomhouse.org/report/countries-crossroads/2005/paraguay (last accessed 29 March 2016).

58 International Commission of Jurists, press release on Bolivia, 'ICJ condemns removal and forced resignation of Constitutional Court judges by Legislative Assembly' (8 January 2015), available at www.icj.org/bolivia-icj-condemns-removal-and-forced-resignation-of-constitutional-court-judges-by-legislative-assembly (last accessed 29 March 2016).

59 See 'Juica: Hay cierta inseguridad pública pero no la han provocado los jueces ni los fiscales', *La Nación*, 11 November 2011, available at www.lanacion.cl/noticias/pais/tribunales/juica-hay-cierta-inseguridad-publica-pero-no-la-han-provocado-los/2011-11-11/164650.html (last accessed 29 March 2016).

disciplinary proceedings, public statements by the government damage both the image of the judiciary and the perception of impartial disciplinary proceedings for the judge in question.

In Argentina, a 2013 judicial reform called for the 'democratisation' of the judiciary, which echoed similar calls in other countries across the region. Proposals included the majority of members of the judicial council to be elected by popular vote as part of partisan elections. While this particular provision was declared unconstitutional by the Supreme Court, the rhetoric and reforms demonstrate clearly that when governments speak of 'accountability' they are not referring to explanatory or sacrificial accountability, which ensures the proper exercise of function. It would appear that they are referring to political accountability, whereby judges would be expected to reflect the political ideology of the ruling party in their decisions. As problematic as that suggestion is, critics doubt the sincerity of the reform, arguing instead that this was just an attempt to gain control over the judicial council, and therefore judicial appointments and removals, by filling it with people who would protect their personal interests.

One of many examples of government statements against the judiciary in Argentina is found in the controversial case of the disappearance and alleged forced prostitution of María de los Ángeles Verón heard by a panel of three judges of the criminal court of the province of Tucumán. In that case, the government had openly supported de los Ángeles Verón's mother, Susana Trimarco, in her dedicated fight against forced prostitution in the country. When the court found that there was not enough evidence for a prosecution of the accused, the government accused the judges of corruption and began impeachment proceedings against them. Two of the judges resigned as a result of the pressure, claiming that the impeachment proceedings did not uphold due process.

It is worth noting that where government officials have sincere concerns about the impartiality of a judge, the proper recourse is to judicial disciplinary bodies. Disciplinary bodies can ensure the confidentiality of investigations during its initial stage, as per Principle 17 of the UN Basic Principles, therefore avoiding any tarnishing of a judge's reputation where concerns are unfounded. This, however, once again demonstrates the need for disciplinary bodies and proceedings that are trusted by both the executive and judiciary.

## Informal interference in disciplinary proceedings

It is difficult to gauge the actual levels of informal interference in processes for the discipline of judges. While in some cases governments make no secret of their involvement, as in the aforementioned case where politicians publicly spoke out against judges, there may also be involvement that takes place behind closed doors. A quick phone call to the right person could ensure, for example, that a certain judge is protected against disciplinary proceedings, perhaps by dismissing a claim against him or her, or investigations against a judge being slowed down and then used as leverage to blackmail the judge or sped up, perhaps in violation of guarantees of due process. In extreme cases, where the government has absolute de facto control of disciplinary processes, it may be able to demand the removal of judges at its will. Such interference is difficult to detect where a veneer of legality is maintained to some degree. Therefore, failing absolute transparency in procedure, interference can be suspected, but difficult to prove.

Despite a lack of evidence for this type of interference, some proceedings certainly give this appearance, which is in itself problematic for the integrity of disciplinary bodies. In Ecuador, since the initiation of the 2011 judicial reform and 'Citizens' Revolution' spearheaded by President Rafael Correa, it is surprising to note that one out of three disciplinary procedures opened in 2013 resulted in the removal of the judge in question, with 57 judges removed in the period 2011–2013 and removals continuing since then. President Correa claimed that the reforms were the only way of tackling corruption and a large backlog of cases in the judiciary. It is problematic, however, that the reforms appear to provide the ruling party with controlling power over judicial removals and appointments, and in this regard, it is also important to note that decisions of the judicial council in Ecuador are not public. Even more telling is the fact that studies demonstrate that a large majority of cases against judges are filed by government officials.[60]

## Lack of due process in disciplinary proceedings

Governments may be able to interfere in disciplinary proceedings in many ways. The scale of influence ranges from merely being able to stop the commencement of disciplinary proceedings against a judge, where they are interested in protecting a judge who has been compliant with their wishes, to simply circumventing disciplinary proceedings altogether and removing judges in a more forcible manner (as described below). Governments may also maintain an appearance of legality by removing – or attempting to remove – judges via disciplinary proceedings, but interfering with those proceedings in such a way that due process guarantees are violated. Such concerns were noted by the International Commission of Jurists in the aforementioned case of the proceedings against the Bolivian constitutional court judges.[61] It noted that there were severe irregularities in the hearing before the Senate, including arbitrarily limiting the rights of the judges to present evidence and witnesses in what was clearly a political trial.

Similar concerns have recently been voiced in Colombia amid the controversy surrounding the accusations of corruption against Judge Jorge Ignacio Pretelt of the Constitutional Court, who was selected eight years ago by the former President of Colombia, Alvaro Uribe, currently an opposition senator. Although Judge Pretelt was initially accused by another member of the Constitutional Court, which Judge Pretelt described as motivated by internal court politics, other political actors called for the resignation of Judge Pretelt before any hearing was held to determine whether he had solicited and received a bribe. In April 2015, Judge Pretelt submitted a letter to the IACHR, stating that he was a victim of a 'systematic smear campaign', and requesting that government officials be asked to respect due process. The general prosecutor concluded that Judge Pretelt was not guilty of the accusations, but the Commission of Inquiry and Accusations of the parliament accused the prosecutor of protecting Judge Pretelt.

Recently, the IACtHR ruled in favour of four former judges from Honduras who had been removed during the 2009 coup d'état: Adán Guillermo López Lone, Luis Alonso Chévez de la Rocha, Ramón Enrique Barrios Maldonado and Tirza del Carmen Flores Lanza. All the judges had been members of the Association of Judges for Democracy, an organisation that had publicly condemned the

60 See Luis Pásara, *Independencia Judicial en la Reforma de la Justicia Ecuatoriana*, Fundación para el Debido Proceso.

61 See n 58.

coup d'état. The IACHR concluded that 'the disciplinary proceedings against the alleged victims were initiated because of their actions in defence of democracy'.[62] The Court found that, among the many violations of the ACHR, there was a lack of due process, independence and impartiality in the disciplinary proceedings to which the judges were subject.

## Intimidation of judges and direct political interference in the judiciary

There are some extreme cases where governments – or other actors – simply circumvent any judicial council or disciplinary body, instead applying influence more directly on the judiciary. There are alarming examples of judges who are removed from their offices or suffer human rights abuses with absolutely no regard to any legal guarantees or procedures. A climate of fear is created among judges where, for example, they suspect that their communications are intercepted, as happened to the Supreme Court justices of Colombia in 2007 following the 'parapolitics' scandal,[63] or by intimidating or pressuring judges or their families with telephone calls, tax inspectors or by way of threats or physical intimidation. In countries where the legislature hold the power to impeach judges, which is often particularly the case for senior court judges, there is often also fear or threats of politically motivated removals.

The seriousness of this issue cannot be understated because many judges in the region have lost their lives in recent years. In addition to human rights abuses suffered, judicial independence suffers, as does public trust in the judiciary. As many as 64 legal professionals, including many judges, lost their lives in Honduras in the period between January 2010 and July 2013.[64] A similar climate of fear is attested to by members of the judiciary in Colombia, where legal professionals frequently face physical threats and intimidation, and in the recent past, several judges have been murdered.[65] While many of these abuses may be linked to organised crime, governments are responsible both for ensuring the safety of judges and of assuring that the perpetrators of such crimes are brought to justice.[66]

The arrests of not only judges, but also other legal practitioners in Venezuela is currently of grave concern and clearly in violation of all legal guarantees. The case that brought these practices in Venezuela into the spotlight in the international community was the arrest and lengthy criminal trial of Judge María Lourdes Afiuni. Such cases directly harm judicial independence because other judges may fear making decisions that are unpopular with the executive. This so-called Afiuni effect allows the government to control the judiciary through fear. Indeed, in Venezuela, it seems that no one is safe. Ironically, Judge Alí Fabricio Paredes, a self-proclaimed 'servant of the revolution', who presided over the Afiuni case and was responsible for many of the due process violations that created the Afiuni effect, was himself arrested for purportedly giving a too lenient decision in a case about drug trafficking and money laundering.

---

62 IACtHR, *López Lone y Otros v Honduras*, Series C No 302, 5 October 2015, para 148, translated from the original Spanish.

63 The IACHR *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas*, OEA/Ser L/V/II, Doc 44, 4 December 2013, para 164.

64 Organization of American States, press release No 55/13, 'IACHR Condemns Murder of Judge in Honduras' (30 July 2013), available at www.oas.org/en/iachr/media_center/PReleases/2013/055.asp (last accessed 6 April 2016).

65 See Colombian Caravana UK Lawyers Group, *Report of the Judge Delegates of the Colombia Caravana Monitoring Visit August 23 to August 31 2014*, available at www.colombiancaravana.org.uk/wp-content/uploads/2015/11/COLOMBIA-CARAVANA-judges-report-2015-FINAL.pdf (last accessed 29 March 2016). See also their 2012 report, *Judges at Risk*, available at www.colombiancaravana.org.uk/reports/2012judgesatrisk.pdf (last accessed 29 March 2016).

66 IACHR, *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas*, OEA/Ser L/V/II, Doc 44, 4 December 2013, paras 146–147.

In Paraguay, judges have faced physical intimidation, such as phone calls threatening violence and guns being fired at a judge's house. The most well-known example is the 1996 case of Lino Oviedo, when the Supreme Court overturned a presidential decree and ordered the imprisonment of Oviedo, a close ally of the president. While such physical threats may be uncommon, the threat of impeachment is of very real concern to judges in the country. In 2003, the impeachment of six members of the constitutional court was threatened. Two judges were removed and the other four then resigned.

## Provisional and temporary judges

Another serious threat to the tenure, and therefore the independence, of judges is the practice of appointing temporary judges. These judges are more susceptible to influence because both the process for selection and removal are not subject to the same rigorous criteria and clear guarantees as those for regular judges. This means in practice that these judges may be selected according to political interests and quickly removed where their decisions are problematic for the ruling political party of the time. Even where these allegations are disputed, the appearance of partiality and subsequent lack of trust is damaging to the judiciary. For these reasons, the IACtHR has ruled that provisional appointments must be the exception and not the rule[67] and the state must offer guarantees derived from the principle of judicial independence also to provisional judges.[68]

Throughout the region, there appears to be an increasing percentage of judges who are temporary, with allegations of political powers purposely slowing down or halting the procedure for the appointment of permanent judges. The UN Human Rights Committee's observations note with concern that only 34 per cent of judges in Venezuela are regular judges; the rest are temporary judges who can be removed with absolute discretion.[69] Indeed, the Supreme Court of Venezuela has confirmed that temporary judges can be removed without the need for an administrative procedure for their removal.[70] In its recent review of Venezuela, the UN Committee for Economic, Social and Cultural Rights also noted concern over the number of temporary judges in place in Venezuela and the lack of transparency over their appointment and removal.[71] The IACHR also expressed its concern about rising numbers of provisional judges in Peru, Bolivia and Nicaragua. In particular, it noted that all judicial positions are temporary in Bolivia under the Judicial Transition Act (Law 212 of December 2011) while the judiciary is in a transitional stage.[72]

67 IACtHR, *Chocrón Chocrón v Venezuela*, Series C No 277, 1 July 2011, para 107.

68 IACtHR, *María Reverón Trujillo v Venezuela*, Series C No 197, 30 June 2009, para 114.

69 Indeed, in 2010 alone, the Judicial Commission annulled 67 appointments of provisional or temporary judges and ordered the precautionary suspension of 40 permanent judges, and the Restructuring and Operation Commission delivered 106 final rulings: 23 reprimands, 13 suspensions, 40 removals, 21 declarations of responsibility and nine acquittals. See IACtHR, *Chocrón Chocrón v Venezuela*, Series C No 277, 1 July 2011, para 70.

70 IACtHR, *Chocrón Chocrón v Venezuela*, Series C No 277, 1 July 2011, para 68.

71 UN Committee on Economic, Social and Cultural Rights, *Observaciones finales sobre el tercer informe periódico de la República Bolivariana de Venezuela, Aprobadas por el Comité en su 55° período de sesiones (1–19 de junio de 2015)*, E/C.12/VEN/CO/3.

72 The IACHR *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas*, OEA/Ser.L/V/II, Doc 44, 4 December 2013, paras 91–92.

A recent report on Argentina highlights that close to 25 per cent of judges currently in office in the country are temporary.[73] This controversy has come to a head in Argentina with the passing of a new law (Law 27,145) that gives the National Judicial Council increased powers to appoint and remove temporary judges. The law, which was controversially used to remove substitute Judge Luis María Cabral from the Federal Criminal Court of Appeal, has been declared partially unconstitutional by the Federal Criminal Court. Judge Cabral was about to rule on the constitutionality of a government deal with Iran when he was removed. Similar concerns have been voiced in other countries, for example, Chile, with concerns that the chances of re-election of substitute judges may be affected by the way in which they lean on issues of political importance.

## Understanding the reasons for political interference

While the actions described above are clearly detrimental to judicial independence, it is instructive to consider the motivations behind governments' actions in such cases. It is important to note that many governments chose to accuse judges of 'corruption' publicly to discredit them and remove them from office. Judge Afiuni in Venezuela, for example, was charged with 'spiritual corruption'. The use of the term 'corruption' by governments in this way is clearly different to the way that the term is generally understood among lawyers: the abuse of power for private gain. However, if we understand corruption more simply as 'not playing by the rules', a different picture emerges. In a political society that is intent on implementing a socialist revolution, the endgame may rather be perceived to be fidelity to the national political project. Judges who do not play the game are accused of 'corruption', that is, of not playing by the rules – of not demonstrating loyalty to the ruling party.

Governmental discourse of this kind is not compatible with the democratic principle and rule of law to which these governments are constitutionally bound. There is a disjunction between the legal framework and their actions. Placing partisan loyalties above the law obviously undermines the rule of law, but it also creates instability and a dangerous precedent because loyalties may shift over time to reflect changes in power structures. One could also question how genuine such governmental policies are, or whether they are simply a way to accrue and maintain power. Even if this was the case, it is unhelpful to reduce the process of democratic debate to a game of discrediting the personal integrity of political opponents, if only because it further harms public trust in the system. It is more effective to use the rule of law against those wishing to undermine it.

Although this is a complex issue, it is important to recognise two aspects: (1) that there are important political and ideological gaps in different political parties' understandings of the purpose and function of judicial accountability; and (2) that inefficiencies and abuses of disciplinary procedures may be symptoms of deeper issues in the consolidation of the rule of law. For these reasons, it is crucial to tackle the issues in a holistic manner.[74]

---

73 *Agenda anotada de la Justicia argentina 2015–2020*, FORES. For a summary, see https://justicia2015.wordpress.com/acerca-de/el-proyecto (last accessed 29 March 2016). See also a 2012 detailed report in Spanish on these concerns at www.oas.org/juridico/pdfs/mesicic4_arg_anex1.pdf (last accessed 6 April 2016).

74 See also *Rule of Law – A Guide for Politicians*, a guide elaborated under the auspices of the Raoul Wallenberg, Institute of Human Rights and Humanitarian Law and the Hague Institute for the Internationalisation of Law, available at http://rwi.lu.se/what-we-do/academic-activities/rule-of-law-a-guide-for-politicians-2 (last accessed 29 March 2016).

# 4. Recommendations

The need to rethink judicial accountability arises both from allegations of political interference in disciplinary proceedings and a crisis of public trust in judiciaries beset with accusations of corruption. Although disciplinary procedures are plagued by politicisation and abuse, judges should not fear accountability per se. They need to demonstrate that they are willing to be held accountable for the independent and impartial exercise of their powers. They should insist, however, on the implementation of clear, transparent and impartial procedures that cannot be abused for personal or political motives.

Criticism of disciplinary processes is based on a lack of trust in the objectivity and impartiality of these processes. The examples in this paper demonstrate that such fears may be well-founded, and party politics and informality are undermining disciplinary processes in the region. However, a knee-jerk rejection of all accountability for fear of its abuse will only make the situation worse. It is important for the consolidation of trust in the judiciary, and the protection of the rule of law, that solutions are found for the proper and impartial application of disciplinary and other accountability measures.

Although disciplinary measures are an important form of accountability, in particular in cases of misconduct or corruption, other forms of accountability, broadly defined as explanatory accountability, can include increased transparency and information about judicial administration, in addition to public hearings and well-reasoned decisions. In this regard, some recent initiatives to make information about the judiciary available online should be welcomed. Such initiatives can help to address the crisis of trust in the judiciary, but also to ensure that any abuse of power by judges is caught and sanctioned. In this way, transparent and explanatory accountability may actually lower the possibility for governmental interference in the judiciary, not heighten it.

A four-pronged approach is recommended to protect the judiciary from political interference and increase public trust in the judiciary.

## Promote personal and institutional judicial integrity

To avoid further attacks on the judiciary and confront the public's lack of trust, the judiciary needs to embrace and demonstrate absolute personal and institutional integrity. However, there also needs to be agreement on a political level, within the executive and between the three branches of government, regarding the ethics and standards that judges are expected to embody. It is equally important for this agreement to be reflected in clearly worded documents because, without such clarity, it becomes too easy to denigrate a judge. The adoption of and adherence to a judicial code of ethical rules can provide focus to this debate. It can also be used to raise awareness more generally in society regarding the proper role of a judge and the importance of the judge's independence and impartiality.

Publishing best practice for the prevention of corruption in the judiciary would also be helpful to ensure a practical implementation of ethical codes. The adoption of a code of judicial ethics has the benefit of simultaneously protecting judicial independence by making independence and impartiality central to the ethical code, and demonstrating a willingness to be held accountable for

keeping this standard. A forthcoming IBA Judicial Integrity Initiative study, analysing the types of corruption occurring between lawyers and judges, and other judicial system officials, should also provide helpful practical guidelines.

## Increase the transparency of the judiciary

The lack of public trust in the judiciary needs to be addressed. Party politics and institutional power struggles should not detract from the need to demonstrate that the judiciary is fulfilling its function. A transparent, independent and impartial judiciary will be better placed to impugn any political attacks on its credibility. In addition to protecting the judiciary by demanding more transparency, objectivity and impartiality in disciplinary proceedings, the judiciary also needs to demonstrate transparency in its own proceedings. This should hopefully serve to assuage fears and suspicions of corruption.

There have been and are currently several moves by judges across the continent to promote transparency, including allowing external audits, publishing decisions online and filming some proceedings. Such reforms, however, have neither been consistent across the region nor across different levels of courts within each country. Encouragingly, some supreme courts in the region have taken the lead in promoting transparency, for example, by uploading their decisions online. However, such reforms now need to continue to be rolled out to the judiciary at all levels.

Given the extent of the lack of trust in judges, an increase in transparency may not be enough to restore trust. A systematic and independent review of the practical workings of courts at different levels would provide a clearer understanding of the types of corruption that risk affecting each type of court and would lead the way for any necessary reforms or changes to court procedures. In this respect, it is important to appreciate the differing contexts in which courts work: lower and geographically more remote courts may be subject to different challenges and pressures than higher courts working in the region's major cities.

## Clarify the rules and procedures for disciplining judges

The laws regulating the grounds on which judges may be sanctioned or removed remain largely underdeveloped and vague. There are three separate issues to be tackled in this regard: (1) making the rules more specific to provide legal certainty to all judges, be they permanent or temporary; (2) ensuring that the disciplinary sanctions and decisions to remove judges are proportional and adequately justified in law; and (3) ensuring that proceedings meet international standards of due process.

With regard to the first issue, clarifying the standards to which judges will be held in disciplinary proceedings will reduce the potential for an arbitrary application of disciplinary norms. This step will, however, require a clear agreement between the branches of government and different political parties regarding the nature and purpose of disciplinary procedures as a form of accountability. The political undertones and underlying disagreements about the nature of accountability should not be ignored. Without a shared vision for change, steps in this regard are unlikely to be successful.

Once the law is clearer with respect to the grounds on which judges can be removed, it will become easier for disciplinary bodies to substantiate their decisions and resist external pressures. Disciplinary bodies may and should, however, also contribute to the creation of legal certainty through transparency of their procedures, publication of their decisions and most importantly, justifying their decisions under the law. Disciplinary bodies should also ensure that their decisions reflect the principle of proportionality, adequately justifying the degree of sanction applied where they are entitled to use discretion. Critically, disciplinary action should not be taken against judges in response to judicial acts. Clarifying the standards to which judges will be held and what constitutes a disciplinary offence should help to prevent judges from being sanctioned for their judgments. Disciplinary rules should also be clearly distinguished from codes of judicial ethics.

In terms of procedure, as soon as a disciplinary procedure has commenced, the judge in question should have the right to obtain the files and materials of the preliminary investigation. The accused judge should also have the right to a full defence, delivering the defence on the facts of which the judge was accused and with the assistance of a lawyer, if he or she so wishes. The defence must be properly considered by an independent disciplinary body at a public hearing and judges need to be guaranteed the right to appeal any disciplinary decisions.

More clarity is also needed on the ways in which disciplinary and criminal proceedings interact in cases of judicial corruption. This will prevent disciplinary bodies from taking over judicial functions and vice versa. All bodies involved in tackling corruption in the judiciary could also benefit from more coordinated activity. Yet again, clarity in this respect will guarantee legal certainty regarding the procedure to be used against judges accused of corruption or misconduct.

There is also a need to strengthen the guarantees for temporary judges. This will help to avoid the current situation where such judges are put in place precisely because they are easy to remove and therefore easy to pressure into complying with the will of the government. Temporary judges should be appointed for a determined period of time, and should enjoy irremovability for this period. They should also be subject to the same disciplinary rules and procedures, and therefore guarantees, as permanent judges.

## Ensure the transparency and impartiality of disciplinary processes

There are several steps that can be taken to increase the transparency and impartiality of disciplinary procedures. Those in charge of accountability procedures should be subject to a duty of explanatory accountability, ensuring that processes are transparent and that their impartiality is protected and perceived. To this end, while complainants should not have a right to initiate or insist on disciplinary action, they must be informed of the final outcome of their complaint.[75] In addition, some guidance on how to handle any conflict of interest that may arise within disciplinary bodies may be useful. It should also be noted that those working in a judicial council are public officials that should be bound by any ethical duties that bind all public officials. All other necessary steps to ensure their impartiality, such as a review of the appointments procedure of disciplinary bodies to ensure their independence, are also important.

75 See Recommendation No 4.9 of the Resource Guide on Strengthening Judicial Integrity and Capacity (Codes of Conduct and Disciplinary Mechanisms), United Nations Office on Drugs and Crime, 2011.

The danger with the implementation of any substantive norms or procedural rules is that they may be simply ignored or circumvented in practice. This leads to processes captured by party politics, which threatens the rule of law. The judiciary, however, cannot exist in a vacuum, and the underlying political battles that are affecting disciplinary processes need to be addressed. In particular, a more clearly defined understanding of the nature and function of judicial accountability and disciplinary proceedings would pave the way for more coherent proceedings. This should be viewed as part of a larger process of consolidation of the rule of law. The importance of the rule of law, access to justice and accountable institutions was recently highlighted at the 2015 UN Sustainable Development Summit. Indeed, the promotion of the rule of law was specifically placed at the heart of the new Sustainable Development Goals and 2030 Agenda.[76] The shadow of informality cannot be ignored.

After decades of allegations of judges being compliant to the wishes of the various political leaders that have come and gone, it is important to acknowledge and address the crisis of trust and restore the integrity of judges across the continent. Properly functioning accountability systems would root out judges who bend to the will of the executive or otherwise abuse their office, while protecting judges who maintain their impartiality. To protect the rule of law and the constitutional order of these countries, there is a need to create such transparent and impartial accountability systems that are not captured by partisan interests. Only then will the judiciary be safeguarded against abuses of power by the executive and democratic consolidation in the region be possible.

# Annex 1: Indicators of Corruption Affecting the Judiciary in Latin America

## World Justice Project's 2015 Rule of Law Index

The index's scores are built from the assessments of local residents (1,000 respondents per country) and local legal experts, ensuring that the findings reflect the conditions experienced by the population, including marginalised sectors of society. The scores are on a scale from 0 to 1, with 1 being the best possible score.

For a list of the variables used to construct the index, please see http://worldjusticeproject.org/sites/default/files/roli_tov.pdf.

| Country | Uruguay | Chile | Costa Rica | Jamaica | Brazil | Panama | Argentina | Colombia | Peru | Dominican Republic |
|---|---|---|---|---|---|---|---|---|---|---|
| Income Group | High Income | High Income | Upper Middle Income | Upper Middle Income | Upper Middle Income | Upper Middle Income | Upper Middle Income | Upper Middle Income | Upper Middle Income | Upper Middle Income |
| WJP Rule of Law Index: Overall Score | 0.71 | 0.68 | 0.68 | 0.56 | 0.54 | 0.53 | 0.52 | 0.50 | 0.50 | 0.48 |
| Factor 1: Constraints on Government Powers | 0.76 | 0.74 | 0.78 | 0.61 | 0.61 | 0.53 | 0.49 | 0.55 | 0.60 | 0.49 |
| 1.2 Government powers are effectively limited by the judiciary | 0.72 | 0.63 | 0.70 | 0.71 | 0.60 | 0.43 | 0.36 | 0.54 | 0.46 | 0.38 |
| Factor 2: Absence of Corruption | 0.78 | 0.72 | 0.68 | 0.53 | 0.46 | 0.49 | 0.48 | 0.43 | 0.34 | 0.36 |
| 2.2 Government officials in the judicial branch do not use public office for private gain | 0.83 | 0.75 | 0.77 | 0.63 | 0.64 | 0.43 | 0.63 | 0.53 | 0.37 | 0.44 |
| Factor 4: Fundamental Rights | 0.79 | 0.74 | 0.78 | 0.66 | 0.61 | 0.62 | 0.66 | 0.55 | 0.60 | 0.61 |
| 4.3 Due process of law and rights of the accused | 0.59 | 0.62 | 0.74 | 0.44 | 0.36 | 0.41 | 0.54 | 0.42 | 0.46 | 0.44 |
| Factor 7: Civil Justice | 0.71 | 0.61 | 0.63 | 0.52 | 0.53 | 0.50 | 0.55 | 0.51 | 0.43 | 0.51 |
| 7.3 Civil justice is free of corruption | 0.81 | 0.65 | 0.74 | 0.68 | 0.61 | 0.52 | 0.59 | 0.52 | 0.35 | 0.40 |
| 7.4 Civil justice is free of improper government influence | 0.72 | 0.74 | 0.77 | 0.70 | 0.59 | 0.31 | 0.35 | 0.55 | 0.44 | 0.40 |
| Factor 8: Criminal Justice | 0.54 | 0.56 | 0.57 | 0.46 | 0.37 | 0.32 | 0.39 | 0.34 | 0.34 | 0.37 |
| 8.5 Criminal system is free of corruption | 0.76 | 0.73 | 0.68 | 0.62 | 0.53 | 0.52 | 0.52 | 0.44 | 0.30 | 0.40 |
| 8.6 Criminal system is free of improper government influence | 0.66 | 0.79 | 0.79 | 0.75 | 0.68 | 0.27 | 0.30 | 0.38 | 0.38 | 0.35 |

| Country | Ecuador | Mexico | Venezuela | El Salvador | Guatemala | Nicaragua | Honduras | Bolivia | LATAM AVERAGE |
|---|---|---|---|---|---|---|---|---|---|
| Income Group | Upper Middle Income | Upper Middle Income | Upper Middle Income | Lower Middle Income | Lower Middle Income | Lower Middle Income | Lower Middle Income | Lower Middle Income | |
| WJP Rule of Law Index: Overall Score | 0.47 | 0.47 | 0.32 | 0.51 | 0.44 | 0.43 | 0.42 | 0.41 | 0.51 |
| Factor 1: Constraints on Government Powers | 0.40 | 0.51 | 0.19 | 0.52 | 0.51 | 0.35 | 0.45 | 0.38 | 0.46 |
| 1.2 Government powers are effectively limited by the judiciary | 0.33 | 0.47 | 0.18 | 0.45 | 0.42 | 0.29 | 0.31 | 0.27 | |
| Factor 2: Absence of Corruption | 0.45 | 0.33 | 0.27 | 0.43 | 0.33 | 0.37 | 0.34 | 0.34 | |
| 2.2 Government officials in the judicial branch do not use public office for private gain | 0.41 | 0.39 | 0.21 | 0.43 | 0.36 | 0.27 | 0.37 | 0.21 | 0.48 |
| Factor 4: Fundamental Rights | 0.53 | 0.56 | 0.39 | 0.62 | 0.56 | 0.46 | 0.45 | 0.53 | |
| 4.3 Due process of law and rights of the accused | 0.51 | 0.36 | 0.22 | 0.42 | 0.47 | 0.35 | 0.28 | 0.43 | 0.45 |
| Factor 7: Civil Justice | 0.41 | 0.44 | 0.35 | 0.51 | 0.36 | 0.36 | 0.45 | 0.37 | |
| 7.3 Civil justice is free of corruption | 0.40 | 0.37 | 0.26 | 0.42 | 0.44 | 0.34 | 0.42 | 0.22 | 0.49 |
| 7.4 Civil justice is free of improper government influence | 0.26 | 0.54 | 0.05 | 0.39 | 0.35 | 0.17 | 0.26 | 0.23 | 0.43 |
| Factor 8: Criminal Justice | 0.35 | 0.31 | 0.16 | 0.34 | 0.30 | 0.33 | 0.21 | 0.25 | |
| 8.5 Criminal system is free of corruption | 0.39 | 0.27 | 0.29 | 0.45 | 0.34 | 0.43 | 0.34 | 0.30 | 0.46 |
| 8.6 Criminal system is free of improper government influence | 0.13 | 0.48 | 0.00 | 0.45 | 0.31 | 0.08 | 0.13 | 0.13 | 0.39 |

Source: http://worldjusticeproject.org/rule-of-law-index

## *Latinobarómetro* 2015

| | Q: How much trust do you have in the judiciary? (percentage of respondents)* | | | | | | |
|---|---|---|---|---|---|---|---|
| | A lot | Some | Little | None | No Response | Don't know | (N) |
| Argentina | 4.1 | 23.6 | 41.2 | 30.1 | 0.2 | 0.7 | 1,200 |
| Bolivia | 5.1 | 22.9 | 40.0 | 25.2 | 1.2 | 55 | 1,200 |
| Brazil | 5.6 | 26.1 | 38.5 | 26.4 | 0.2 | 4.2 | 1,250 |
| Chile | 5.8 | 17.2 | 40.0 | 35.3 | 1.1 | 0.6 | 1,200 |
| Colombia | 5.8 | 18.5 | 38.5 | 35.6 | 0.6 | 2.5 | 1,200 |
| Costa Rica | 16.3 | 27.2 | 26.0 | 27.4 | 0.4 | 2.7 | 1,000 |
| Dominican Republic | 13.2 | 25.7 | 18.3 | 42.2 | - | 0.7 | 1,000 |
| Ecuador | 9.1 | 30.8 | 39.2 | 19.4 | 0.2 | 1.3 | 1,200 |
| El Salvador | 5.8 | 10.0 | 38.3 | 42.5 | 0.8 | 2.7 | 1,000 |
| Guatemala | 8.2 | 14.9 | 41.7 | 28.2 | 1.7 | 6.3 | 1,000 |
| Honduras | 4.9 | 17.6 | 25.7 | 46.7 | 1.0 | 4.2 | 1,000 |
| Mexico | 4.7 | 19.2 | 35.8 | 38.0 | 0.2 | 2.1 | 1,200 |
| Nicaragua | 11.9 | 22.5 | 32.6 | 27.1 | 0.8 | 5.2 | 1,000 |
| Panama | 6.0 | 22.5 | 35.7 | 29.5 | 1.4 | 4.9 | 1,000 |
| Paraguay | 3.2 | 29.6 | 43.9 | 21.7 | 0.1 | 1.6 | 1,200 |
| Peru | 2.5 | 18.1 | 38.4 | 38.5 | 0.7 | 1.8 | 1,200 |
| Uruguay | 12.4 | 38.7 | 30.6 | 14.4 | 0.3 | 3.6 | 1,200 |
| Venezuela | 6.3 | 19.2 | 27.8 | 45.5 | 0.2 | 1.0 | 1,200 |
| Average/Total | 7.0 | 22.6 | 35.4 | 31.6 | 0.6 | 2.8 | 20,250 |

* Translated by the author. Original question in Spanish: '*Por favor, mire esta tarjeta y dígame, para cada uno de los grupos, instituciones o personas de la lista. ¿Cuánta confianza tiene usted en ellas?. Poder judicial.*'

## Transparency International's 2013 Global Corruption Barometer

| Country | Percentage of respondents who felt that the judiciary was corrupt or extremely corrupt | Percentage of respondents who reported that they or someone in their household had paid a bribe to the judiciary in the 12 months leading up to the survey |
|---|---|---|
| Argentina | 65 | 6 |
| Bolivia | 76 | 38 |
| Brazil | 50 | - |
| Chile | 67 | 6 |
| Colombia | 64 | 19 |
| El Salvador | 81 | 6 |
| Jamaica | 47 | 6 |
| Mexico | 80 | 55 |
| Paraguay | 79 | 28 |
| Peru | 85 | 32 |
| Uruguay | 39 | 1 |
| Venezuela | 74 | 37 |

Source: www.transparency.org/gcb2013.

# Annex 2: Overview of legal provisions for the removal of judges

The table below provides a basic overview of the relevant legal provisions and summarises the procedure for disciplinary action resulting in the removal of a judge, in force at the date of publication.

| | Institution Responsible for Judicial Removals | Procedure for Removing a Judge |
|---|---|---|
| Argentina | The National Council of the Magistracy, and the National Impeachment Jury | Investigation by the National Council of the Magistracy (Commission for Discipline and Prosecution). Decision of the Council of the Magistracy as to whether or not to prosecute. Following a public oral hearing, the National Impeachment Jury makes the final decision as to removal.<br><br>The opinion of the Commission for Impeachment of the Chamber of Deputies, followed by a vote in the Chamber of Deputies (requiring a 2/3 majority), and then a vote in the Senate (requiring a 2/3 majority). |
| Bolivia | The Council of the Magistracy | On receipt of a complaint from an affected party, an investigation is carried out by individual regional Disciplinary Judges, appointed by the Council of the Magistracy. The case is then heard and decided by a Disciplinary Tribunal made up of the relevant Disciplinary Judge and two citizen judges (laypersons). Decisions can be appealed to the Disciplinary Chamber of the Council of the Magistracy.<br><br>Judges can also be removed if they fail regular evaluations of their aptitude and efficiency, carried out by the Council of the Magistracy.<br><br>The Congress also has the power to remove judges of the Pluri-national Constitutional Court and the Supreme Court. |
| Brazil | The National Justice Council | The National Judicial Internal Affairs Office, of the National Council of Justice, has the authority to receive complaints, investigate judges, and apply disciplinary sanctions. Individual courts also retain some disciplinary powers.<br><br>The Senate has the power to remove Supreme Court justices. |
| Chile | The Supreme Court | The Supreme Court can remove judges upon considering a report from the Court of Appeal and the accused judge.<br><br>Justices of the Supreme Court can be removed by the National Congress. |
| Colombia | The Council of the Judicature | Disciplinary action against judges is currently taken by the two instances of the Council of the Judicature, however a 2015 constitutional reform planned to replace that institution by a new Disciplinary Commission. The reform, however, is currently being reviewed by the constitutional court following allegations of its unconstitutionality. |

| | Institution Responsible for Judicial Removals | Procedure for Removing a Judge |
|---|---|---|
| Costa Rica | The Supreme Court | The various institutions that are involved in the process of removing a judge are all subordinate to the Supreme Court. Complaints against judges are received by Court of Judicial Oversight which investigates and impose sanctions appealable to the Superior Council of the Judiciary. In cases of serious miscarriages of justice, the cases are referred directly to the Supreme Court.<br><br>Justices of the Supreme Court can be removed by the National Assembly. The National Assembly may also refuse to renew the appointment of a justice of the Supreme Court following an 8 year cycle, by 2/3rds of its members. |
| Paraguay | Impeachment Jury | The National Impeachment Jury can remove lower court judges upon receiving a complaint from an affected party, or the Supreme Court, the Ministry of Justice, the Public Ministry, the Senate, the Chamber of Deputies, the Council of the Magistracy, or by the Impeachment Jury itself.<br><br>Justices of the higher courts can be removed by the National Congress. |
| Peru | National Council of the Magistracy | The Council of the Magistracy is responsible for the removal of both justices of the Supreme Court and judges of the lower courts. In both cases the Council acts upon the request of the Supreme Court, and in the case of the lower courts, following an investigation by the Office for Control of the Judiciary.<br><br>The Council of the Magistracy additionally evaluates judges every 7 years to confirm their appointments. |
| Uruguay | The Supreme Court | The Supreme Court can remove lower court judges by way of a disciplinary hearing before the Court.<br><br>Justices of the higher courts can be removed by the National Congress. |
| Venezuela | Judicial Disciplinary Tribunal and Judicial Disciplinary Court | The Code of Judicial Ethics sets out that a Judicial Disciplinary Tribunal shall hear and apply disciplinary procedures with the possibility of appeal to a Judicial Disciplinary Court.<br><br>Justices of the Supreme Court can be removed by the National Assembly (by 2/3rds of its members). |

# The International Bar Association's Human Rights Institute

The **International Bar Association's Human Rights Institute** (IBAHRI) works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

## What we do

We provide **human rights training** and **technical assistance** for legal practitioners and institutions, building their capacity to effectively promote and protect human rights under a just rule of law.

A leading institution in international **fact-finding**, we produce expert reports with key recommendations, delivering timely and reliable information on human rights and the legal profession.

We support lawyers and judges who are arbitrarily harassed, intimidated or arrested through **advocacy** and **trial monitoring**.

A focus on pertinent human rights issues, including the **abolition of the death penalty, poverty** and **LGBTI rights** forms the basis of targeted capacity-building and advocacy projects.

## Why we are here

Lawyers and judges play a fundamental role in facilitating access to justice, ensuring accountability of the state and upholding the rule of law. When the legal profession is not able to function independently or effectively, this gives rise to human rights violations, impunity and injustice. As part of the world's leading organisation of international legal practitioners, bar associations and law societies, the IBAHRI is uniquely placed to build the capacities of the legal profession to promote and protect human rights and professional independence worldwide.

## History

Established in 1947, the **International Bar Association** (IBA) is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law and shapes the future of the legal profession throughout the world. It has a membership of over 55,000 individual lawyers and 206 bar associations and law societies spanning all continents. Grouped into two divisions – the **Legal Practice Division** (LPD) and the **Public and Professional Interest Division** (PPID) – the IBA covers all practice areas and professional interests, providing members with access to leading experts and up-to-date information.

The IBA established its Human Rights Institute in 1995 under the honorary presidency of Nelson Mandela, to promote and protect human rights and the independence of the legal profession under a just rule of law. The IBAHRI is an independent entity within the Public and Professional Interest Division (PPID) of the IBA. IBAHRI projects are funded by the generous support of its members and funding bodies.


## International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44(0)207842 0091
**www.ibanet.org**


**International Bar Association**
4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
Website: **www.ibanet.org**