

1

Societally Penetrated Judiciaries and the Democratic Rule of Law

In 2015, Guatemala City was rocked by popular protests. Sparked by an investigation into a customs scandal known as “La Linea,” the protests ultimately brought down the Guatemalan president. The “La Linea” investigation was only possible because of an international anti-impunity commission that had been working to strengthen Guatemala’s justice sector since 2007. While the “Guatemalan Spring” represents a sea change in institutionalization in Guatemala’s justice sector that has also allowed for recent trials for massive human rights violations, it has yet to eliminate corruption and threats affecting police, prosecutors, and judges in an environment of continued criminal violence. Contrast this to the relative comfort with which judges operated in Costa Rica: threats are rare and are usually confined to the drug trafficking affected zones in the Caribbean coast and the border with Panama. Meanwhile, Honduras continues to be affected by the judicial legitimization of a coup against President Zelaya in 2009. To the south, the Nicaraguan Supreme Court has become subject to intensifying partisan influences including stepping into the political debate on reelection to open the door to another term for President Ortega in 2009. Violent crime in El Salvador in 2015 reached levels of violence not seen since the civil war of the 1980s and 1990s. The judiciary there has become increasingly independent – and has also increasingly butted heads with the Legislative Assembly. Clearly, serious threats to the independence of judges exist in Central America. These threats come from above (elected politicians) and below (violent criminals) and, indeed, from nearly every quarter. This kaleidoscope of threat poses substantial challenges to those who would try to improve the quality of justice and strengthen the rule of law in this region.

In this book, I argue that a democracy can function well only when its judges are autonomous from societal forces in addition to political actors. Most scholarship on judicial politics has emphasized the political independence of courts while shortchanging their societal autonomy. Judges who are

insulated from societal pressures can better control crime, including organized crime, than can judges who are dependent on or threatened by societal actors such as economic elites or criminal actors. I demonstrate the significance of societal pressures by comparing the levels of judicial political independence and judicial societal autonomy across five countries in Central America since 1980, using a conceptual tool I call the “judicial regime type” to examine the interactions of political independence and societal autonomy. Judicial regimes emerge as a result of the impact of dominant decision rules, or “currencies,” of politico-legal conflict resolution – be they official violence, unofficial violence, legislation, or constitutions. Judges in Central America today are threatened by criminals and economic corruption at least as often as they are by governmental actors and political pressure. Conversely, those countries where judges are insulated from societal actors enjoy a more complete rule of law, even where the judiciary is not politically independent. We must understand all of these sources of pressure if we are to understand judicial politics and build better governments.

The judicial regime type approach is novel within the comparative study of judicial politics and can help reformers to craft better reform programs throughout the developing world. The persistent focus on political independence is a legacy of the “third wave of democracy” in which the current wave of judicial reform was born, an era in which military and other dictatorships that had either ignored or manipulated their judiciaries were giving way to democracy. Some three decades on, the problems facing judiciaries have changed. The dominant type of violence in Latin America is now criminal in nature rather than being part of an official (if covert) government policy, although the two are sometimes linked. Governments, including democratic governments, have been largely unable to confront this wave of unofficial violence. Thus, I argue that one reason for the persistent shortcomings of nation-building projects around the world has been the inability or unwillingness to confront societal actors. Societal actors in weak states may be able to capture aspects of the state apparatus, including the judiciary. Even without actual state penetration, a weak state will be unable to give its laws practical effect if the judiciary cannot enforce them because of threats from violent societal actors and enticements from their wealthy counterparts.

Nearly three decades after the dirty wars and civil wars of the 1970s and 1980s ended and democracy was reinstated in Central America, weak states and weak democracies have become the norm in the isthmus, with the exception of Costa Rica. Drug and gang-related violence and organized crime predominate in Guatemala, Honduras, and El Salvador; traffickers have also infiltrated parts of Nicaragua and Costa Rica. Guatemala’s political system significantly

overlaps the organized criminal sector; former military men present the major opposition to those groups while sometimes also backing their own illegal organizations. Heavy-handed, militaristic tactics are routinely employed against criminals in the region, raising renewed concerns about human rights. In the late 2000s, both Honduras and Nicaragua experienced significant backsliding in their democratic governance, with a coup in the former and the constitutionally questionable reelection of President Daniel Ortega in the latter. The once-powerful political parties of Costa Rica have decayed and are being pursued by upstarts and recent congresses have been paralyzed by the apparent reluctance of congressmen to appear for votes. Nowhere can politicians be counted on to have the ability – or perhaps even the inclination – to address the changes needed to allow a democratic rule of law to function. Even recent progress in Guatemala, as incomplete as it is, has only been possible because of the involvement of an international anti-impunity commission (Comisión Internacional Contra la Impunidad en Guatemala, CICIG), whose mandate renewals are consistently resisted by the national government.

With the rise of democracy in Latin America in the 1980s and 1990s, attention turned to building strong state institutions, including politically independent judiciaries. Despite extensive international aid to further this goal, four of the five Central American countries have failed to build the kinds of judiciaries usually associated with a liberal democracy. In Guatemala, impunity reigns as drug-trafficking gangs are able to infiltrate politics and threaten judges. In Nicaragua and Honduras, the judiciary is highly partisan and responsive to the interests of elected politicians. El Salvador suffers from a mixture of both of these problems. Costa Rica stands alone as a judiciary that is largely free of political and societal threats. Despite these concerns, it remains encouraging that none of these judiciaries is under the direct control of the government as was typical during authoritarian periods.

More than two decades of judicial reform in the region have not substantially improved the rule of law in these countries. Even the dramatic successes of Guatemala's CICIG have primarily affected only a small number of high-profile cases. Reform efforts, while serving lofty goals including building the rule of law by enhancing access to the legal system for all citizens, protecting judicial independence, and increasing the efficiency of the justice sector, have produced gains in some areas and have stalled or even regressed in others. Part of the problem is in the nature of reforms that have tended to focus – and necessarily so – on discrete projects that dealt with only one small part of the problem. More problematic, however, was the tendency to layer reforms onto old institutions, frequently leaving in place the officeholders and giving them the chance to reproduce their power and thus subvert reforms.

Additionally, while incremental improvements were often made in certain justice sector problems, crime and social disorganization exploded in these countries and the demand for justice quickly outpaced these reforms. Where this criminal behavior has been the worst – in Guatemala, El Salvador, and Honduras – security has had to become a top priority, though governments and international reformers have often reacted slowly and inadequately. The frightening levels of criminality that accompanies the often pathological resolutions of politico-juridical conflicts are at the heart of these problems.

THE RULE OF LAW IN CENTRAL AMERICA

At the center of the relationship between legal politics and democratic politics is the democratic rule of law, an important but often poorly conceptualized notion. Academic work on democratic consolidation nearly always includes building the rule of law among its important issues. The rule of law is a crucial component of a consolidated democracy.¹ The democratic rule of law can probably be most intuitively understood as the enforcement of the “rules of the game” of democracy.² Scholars writing in the Law and Society tradition have focused on the relative gap between the law as written and the law as lived,³ alongside a skeptical account of the ways in which law and legality are used for social control.⁴ O’Donnell has provided a definition of the rule of law that includes the republican ideas of sacrificing private preferences to public interests and the liberal idea that certain rights should be protected.⁵ I define the “democratic rule of law” as a system in which power is exercised through formal laws that have been passed by democratic institutions, is checked by horizontal accountability institutions (including courts), and respects liberal political rights necessary for democratic participation; furthermore, to the extent that social rights are provided in national laws, citizens are able to enjoy

¹ Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge*; Linz and Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*; Diamond, *Developing Democracy: Toward Consolidation*.

² Przeworski, “Some Problems in the Study of Transitions to Democracy”; Przeworski, “The Games of Transition.”

³ This view is also reflected in Paulo Sergio Pinheiro’s introduction to *The (Un)Rule of Law*, in which he suggests that a fundamental weakness of citizenship in the weak democracies of Latin America allows traditional elites to manipulate state institutions, and produces (or at least tolerates) lawless violence, discrimination, and lack of access to justice. Méndez, O’Donnell, and Pinheiro, *The (Un)Rule of Law & the Underprivileged in Latin America*.

⁴ Rose, O’Malley, and Valverde, “Governmentality.”

⁵ O’Donnell, “Ployarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion.”

them equitably.⁶ The rule of law is perniciously difficult to measure, as is democracy itself.⁷ Measures of judicial independence, commonly linked to the democratic rule of law, do not fare much better; one study of the various measures and indices of judicial independence found that they were all flawed in one manner or another and, furthermore, did not correlate with each other.⁸ These measures have been criticized as constituting international norms in their own right, imbuing them with the power to regulate developing country governments.⁹

Nonetheless, even imperfect indicators can help to provide a picture of the state of the democratic rule of law in the region. The World Justice Program Rule of Law Index is composed of 47 sub-factors grouped into eight primary indicators, scored from 0 to 1, with 1 representing strongest rule of law. A selection of these sub-factor scores is presented in Table 1.1. Not surprisingly, Costa Rica scores the highest overall, but the differences between the other four are striking. Honduras and Nicaragua score especially poorly on the measures of government influence on both civil and criminal justice as well as “government powers are effectively limited by the judiciary,” although Nicaragua scores highest for timely and effective criminal adjudication. Guatemala scores especially low for access to civil justice. Additionally, all but Costa Rica score quite poorly on the sub-factor “government officials are sanctioned for misconduct,” suggesting that official impunity is high. Guatemala, Honduras, and El Salvador also all fared very poorly in the World Economic Forum’s 2013–2014 ratings for the business costs of crime and violence, efficacy of the courts, and organized crime.¹⁰ Meanwhile, legitimacy of the justice system had gone down and approval of vigilantism had increased, according to one 2011 World Bank report.¹¹ Despite the presence of formal democracy, it appears that the rule of law was weak in the region.

Crime statistics can provide a partial picture of changes in the rule of law over time. Figure 1.1 provides the Homicide rates per 100,000 residents from 2000 to 2014, according to the United Nations Office on Drugs and Crime. As is evident, there is considerable variation and volatility in homicide rates. Honduras had in the early 2000s the unfortunate distinction of being the most dangerous country in the world. By contrast, Nicaragua and Costa Rica closely

⁶ Møller and Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes*, 25.

⁷ Møller and Skaaning, *The Rule of Law*.

⁸ Ríos Figueroa and Staton, “Unpacking the Rule of Law: A Review of Judicial Independence Measures.”

⁹ Urueña, “Indicators and the Law: A Case Study of the Rule of Law Index.”

¹⁰ World Economic Forum, “Global Competitiveness Report 2013–2014.”

¹¹ The World Bank, “Crime and Violence in Central America: A Development Challenge,” 10.

TABLE 1.1 *Selected World Justice Program Indicators, 2015*

	Costa Rica	El Salvador	Guatemala	Honduras	Nicaragua
Overall score	0.68	0.51	0.44	0.42	0.43
Government powers are effectively limited by the judiciary	0.70	0.45	0.42	0.31	0.29
Government officials in the judicial branch do not use public office for private gain	0.77	0.43	0.36	0.37	0.27
People have access to affordable civil justice	0.69	0.56	0.35	0.52	0.40
Civil justice is free of corruption	0.74	0.42	0.44	0.42	0.34
Civil justice is free of improper government influence	0.77	0.39	0.35	0.26	0.17
Civil justice is not subject to unreasonable delays	0.31	0.46	0.19	0.36	0.31
Criminal investigation system is effective	0.47	0.24	0.24	0.14	0.36
Criminal adjudication system is timely and effective	0.43	0.26	0.24	0.19	0.52
Criminal system is free of corruption	0.68	0.45	0.34	0.34	0.43
Criminal system is free of improper government influence	0.79	0.45	0.31	0.13	0.08
Due process of law and rights of the accused	0.74	0.42	0.47	0.28	0.35
Government officials are sanctioned for misconduct	0.63	0.30	0.31	0.39	0.26
Crime is effectively controlled	0.69	0.58	0.45	0.41	0.67

Source: World Justice Project.¹²

track each other with homicide rates close to 10 per 100,000. Surveys conducted by Vanderbilt University's Latin American Public Opinion Project between

¹² World Justice Project, "WJP Rule of Law Index[®] 2015."

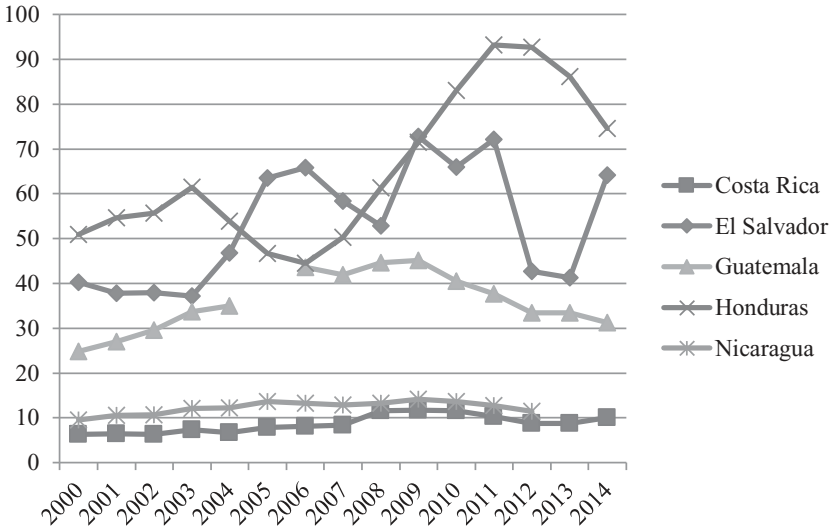


FIGURE 1.1 Homicide Rates per 100,000 (2000–2014).
 Source: United Nations Office on Drugs and Crime.¹³

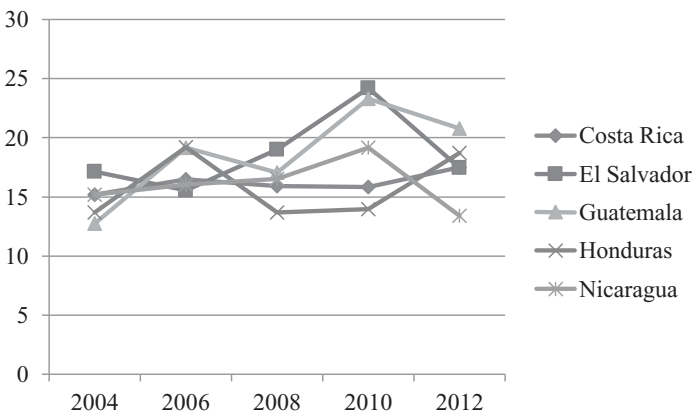


FIGURE 1.2 Crime Victimization in Central America (2004–2012).
 Source: The AmericasBarometer by the Latin American Public Opinion Project (LAPOP), www.LapopSurveys.org.

2004 and 2012 suggest that self-reported criminal victimization was somewhat less volatile, as depicted in Figure 1.2. Guatemala saw the lowest figure

¹³ United Nations Office on Drugs and Crime, “UNODC Statistics Online – Homicide Counts and Rates (2000–2014).”

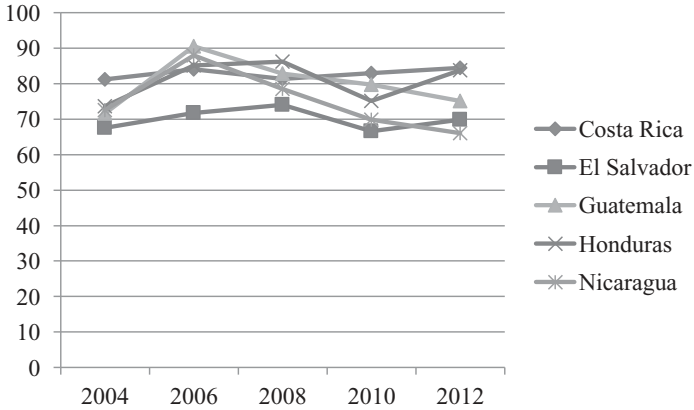


FIGURE 1.3 Percent of Respondents Viewing Corruption as “Somewhat or Very Generalized” (2004–2012).

Source: The AmericasBarometer by the Latin American Public Opinion Project (LAPOP), www.LapopSurveys.org.

(12.76 percent) in 2004 but then had the highest rate (20.78 percent) in 2012. More surprising, perhaps, is the similarly high rates of criminal victimization in Costa Rica (between 15.2 percent in 2004 and 17.49 percent in 2012) and Nicaragua (15.19 percent in 2004, peaking at 19.17 percent in 2010 and then dropping to 13.41 in 2012), given their low homicide rates. The World Bank further reported in 2011 that their own surveys suggested that crime was among the top five impediments to development everywhere in Central America except for Costa Rica.¹⁴

An additional helpful measure of the democratic rule of law is corruption. Corruption is notoriously difficult to measure and most indicators are based on either expert opinion or public opinion. Transparency International scores and ranks most of the world’s countries from least corrupt to most corrupt. Central America sees considerable variation, although only Costa Rica, ranked at 40 in the world, has a relatively controlled corruption problem. El Salvador is in the middle of the rankings in place 72, with Honduras (112), Guatemala (123), and Nicaragua (130) all being scored quite poorly.¹⁵ Notably, these scores have been quite stable, suggesting that little progress is really being made. LAPOP data also includes a question about how generalized respondents believe public corruption to be. Figure 1.3 tracks the percentage of people responding that corruption is somewhat or very generalized. Surprisingly, all countries have

¹⁴ The World Bank, “Crime and Violence in Central America,” 8.

¹⁵ Transparency International, “Corruption Perceptions Index 2015.”

very high scores on this measure, with El Salvador being the lowest until 2012, Costa Rica tying with Honduras for highest in 2012, and Nicaragua showing the most improvement. Although perceptions of corruption can be sticky, with people continuing to view a government as highly corrupt even after efforts are underway to combat that corruption, these indicators suggest that corruption remains a significant problem throughout the region.

This weakness of the rule of law persists despite decades of judicial reforms. Judicial reform created additional changes in both the opportunities available to activists and the role-orientations of judges. As a part of democratic consolidation, Latin American countries undertook a large number of judicial reform programs, sponsored by international aid and development agencies.¹⁶ Central America was no exception to this trend. Indeed, international penetration of the justice sectors of these countries has been quite high.¹⁷ These reform efforts have focused on building the rule of law by increasing access to justice for citizens, efficiency of the judicial system, and independence of the judiciary.¹⁸ In justifying these projects, scholars tend to focus on the “rule of law” as the important contribution of the judiciary to democracy.¹⁹ The rule of law has provided an important theoretical concept and goal, which changes the way judges perceive their roles in the constitutional order. As judges are exposed to international norms of independence and impartiality, international training programs, and new ways of doing justice, they may become more likely to shed traditional civil law deference and adopt activist approaches.

Changing norms and role-orientations can have a variety of effects on judicial politics. The experiences of a variety of countries indicate that judiciaries do not simply become more independent or activist in a linear fashion. In Eastern Europe, some Constitutional Courts were initially very activist, but have since become relatively deferential in the wake of significant incursions on their independence.²⁰ The Nigerian Supreme Court has had periods

¹⁶ Dakolias, “A Strategy for Judicial Reform: The Experience in Latin America.”

¹⁷ Bowen, “International Imposition and Transmission of Democracy and the Rule of Law: Lessons from Central America.”

¹⁸ Carothers, *Promoting the Rule of Law Abroad*; Carothers, “The Rule of Law Revival”; Domingo and Sieder, *Rule of Law in Latin America: The International Promotion of Judicial Reform*; Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America*; Hammergren, *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective*; Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America*.

¹⁹ Carothers, “The End of the Transition Paradigm.”

²⁰ Epstein, Knight, and Shvetsova, “The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government”; Scheppele, “Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe”; Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006*.

of extreme independence, including trying to hold a military government accountable to the constitution, but has seen its fortunes rise and fall with different regimes.²¹ The Taiwanese Supreme Court was riding a wave of support and activism in the years after democratization, but saw more restraintist judges appointed after the Court began to deal with sensitive issues of identity politics.²² Even the well-insulated Israeli High Court of Justice saw its prestige drop once its judicial review role was publicly institutionalized.²³ Moments of activism – or even lengthy periods – at one time do not imply widespread or growing activism in the future. Activism or restraint are always the outcome of contestation between different groups trying to influence judicial outcomes. That contestation may be peaceful or it may include violence directed at judges themselves. The specific characteristics of particular groups and the institutional features often understood collectively as “judicial independence” will facilitate or inhibit this contestation by elites of the judicial role.

This book is primarily concerned with the question of how weak democracies can build courts and other justice sector institutions that can exercise autonomous power and contribute to building the rule of law. This question becomes especially important in environments in which some aspects of the rule of law is severely lacking, either because of prevalent partisan favoritism or because of pervasive social violence that persists in impunity. Comparative judicial politics scholarship has delved extensively into the dynamics of overcoming partisanship, but has reflected much less on the influence of criminality on justice sector institutions. I argue that the question of how to build strong, independent institutions can only be understood if we understand political influence in a broad fashion, extending not only to partisan politicians but also to criminals, businessmen, and other social actors who have an eye toward disrupting public policy and governance.

WHY WOULD POLITICIANS BUILD INDEPENDENT INSTITUTIONS?

The larger question of institution building implies another question: how does the judiciary get empowered by politicians in the first place, given that politicians are giving up some of their own power by doing so? The late twentieth century witnessed the rise of judiciaries as political actors in much of the globe, usually – but not exclusively – in the context of democratization or democratic constitutional reform. This judicialization of politics

²¹ Okere, “Judicial Activism or Passivity in Interpreting the Nigerian Constitution.”

²² Chu, “Global Constitutionalism and Judicial Activism in Taiwan.”

²³ Hofnung, “The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel.”