

A wooden gavel and a wooden gavel handle resting on a yellow folder. The gavel is positioned diagonally across the upper left, and the handle is positioned vertically in the lower right. The background is a light, neutral color with a subtle shadow effect.

# **Evaluation of Judicial Corruption in Central America and Panama and the Mechanisms to Combat it**

Executive Summary & Regional Comparative Study

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## EXECUTIVE SUMMARY

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In 2006 and 2007, the Due Process of Law Foundation (DPLF) examined the reality of judicial corruption in Central America and the mechanisms currently in place to combat it. This regional comparative report presents the general findings of the study. The reports on the findings in each country are also included.

For the purposes of this study, “acts of judicial corruption” are defined as those in which the conduct of a judicial official or employee violates the principle of impartiality in a judicial proceeding in order to obtain an improper or illegitimate benefit for him or herself or for a third party.

The main conclusions and recommendations drawn from the comparative analysis of the country reports are presented below.

### GENERAL ASPECTS

- (i) Judicial corruption in Central America is a serious problem and must be attacked purposefully and vigorously. Corruption in the judiciary erodes the rule of law, undermines democratic mechanisms, and conspires against adequate economic performance in the countries of the region.
- (ii) Judicial corruption destroys the independence and impartiality of the judiciary. A justice system rife with corruption cannot fulfill its essential constitutional role as the branch of government entrusted with political oversight, upholding the rule of law, and protecting individual rights.
- (iii) The lack of impartiality in the judiciary infringes on one of its essential duties by linking the judge to the interests of one of the parties or to the subject of the proceedings or litigation. Similarly, the lack of judicial independence creates an institutional context in which corruption in the administration of justice finds fertile ground.
- (iv) The judicial appointments system, especially for supreme court justices, creates a link between the justice system and the political system. In practice, this mechanism has impinged upon the independence and impartiality of judges, thereby contributing to the phenomenon of judicial corruption.
- (v) Central American judiciaries have been premised historically on a “bureaucratic” and “corporative” model.<sup>1</sup> It is essential to promote a “democratic” model.

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<sup>1</sup> A bureaucratic model is understood as one featuring a strong hierarchical structure and a judicial career based on seniority and merits. The political authorities are responsible for governing the judicial system (particularly by means of the selection mechanism), and the administration of justice system is ostensibly apolitical and technical in its nature and its role. The corporative model refers to the “self-government” of the judicial system.

- (vi) A new democratic model for the judiciary must reduce the concentration of functions in, and the extra-jurisdictional influence of, the supreme court. A democratic paradigm separates the supreme court's inherent jurisdictional function of cassation from tasks associated with the government and administration of the judiciary. The concentration of powers in the high court undermines internal judicial independence and fosters an institutional environment that is at risk for corruption. Based on this model, the judiciary's traditional disciplinary system must be reshaped in such a way that it adequately ensures the individual independence of judges and contributes to more efficient anti-corruption efforts. In this sense, one alternative to consider is assigning disciplinary control powers to a Council of the Judicature: an external organ responsible for the "autonomous government" of the judicial system.
- (vii) Institutional changes in the judicial branch, such as strengthening independence and improving the disciplinary system, must occur in the framework of comprehensive judicial reforms aimed at deepening the democratic features of the judicial apparatus.

## **Perceptions about corruption**

- (viii) There is widespread public perception of pervasive corruption in the government apparatus throughout Central America. Many of those interviewed reported having been victims of corruption over the previous year and, of particular relevance for this study, this malady is especially evident in the judiciary. An alarming percentage of judges, including supreme court magistrates, acknowledge having been subject to bribery attempts.
- (ix) There is an observable public tolerance of forms of corruption considered minor or low impact. Significant groups of citizens accept corrupt practices in exchange for obtaining other benefits or avoiding harm in other spheres. While individuals condemn moderately serious or serious acts of corruption, they also report that they can live with minor corrupt practices, which they regard as mechanisms to offset social inequalities.

In this sense, society has established a de facto "scale" of corrupt acts complete with specific criteria to evaluate them (motive, rank of the individual, social impact of the conduct, amount of money involved) and establishes a "threshold of tolerance" in which corrupt behaviors perceived to be of minor social impact are considered justified.

## **Political influence and judicial corruption**

- (x) The country reports concur that there is a strong correlation between the judicial appointments system, particularly the selection of supreme court justices, and the state of judicial corruption in Central America.

- (xi) In most Central American countries, appointments of supreme court justices are based on political criteria rather than on the merits and the professional and technical skills of the candidates.

In this way, political and party-driven favoritism penetrates the highest courts of the countries of the region, creating an institutional environment conducive to acts of corruption. This can be seen in cases with high political impact.

- (xii) The comparative report shows that the political component embodied in the judicial recruitment system, particularly at the supreme court level, contributes significantly to the emergence and persistence of corrupt practices in most Central American judiciaries.
- (xiii) The political authorities in Central America also impinge upon the external independence of judges, threatening their impartiality and probity through various means. These include attempts to curtail their essential attributes as judicial organs or direct attacks and accusations of corruption that appear to be motivated by, or part of, short-term political strategies.

This has been observed in particular in cases where judges have been accused of being weak or inefficient in the application of draconian punitive measures authorized by the legislative or executive branches to combat rising common crime or public insecurity.

- (xiv) The predominant and decisive role of the supreme court in the recruitment system for lower-level judges and judicial support staff jeopardizes “internal independence” (that of each judge with respect to the structure of the organization). This readily leads to corrupt practices in the judiciary.
- (xv) The introduction of councils of the judicature in the region has in practice, resulted in the adoption of a watered down model in which the councils appear only as “auxiliary organs” (in the words of the UNDP). The high court usually retains control over the new entity one way or another: it appoints council members, remains operationally superior in the hierarchy, or directly selects judicial officials. The councils have thus been hampered in their efforts to fulfill their essential role of ensuring judicial independence.
- (xvi) Judicial dependence as a result of a politicized recruitment system has a direct impact on the misconduct of some judges in various legal proceedings. Significantly, this includes cases of alleged high impact government corruption.
- (xvii) This study shows that major court decisions in legal proceedings brought against former presidents and other high level officials of certain Central American countries for the alleged commission of crimes of corruption may have been influenced by political patronage networks operating in the judiciary.
- (xviii) Judicial impunity for large-scale political corruption has a tremendously pernicious impact. When the principle of legality—in which everyone is subject to the law, particularly those with official duties—is scoffed at and the judicial system

whitewashes the situation, the independence and impartiality of the courts of law are seriously impaired. This in turn erodes public confidence in the courts and diminishes the full force and effect of the democratic and constitutional rule of law.

- (xix) Certain specific aspects of the politicization of the judiciary in the exercise of its jurisdictional powers are particularly worrisome. In one country, the apparent political control over the supreme court has essentially put an end to the cooperation of banks and financial institutions with the supervisory organs of the State. Such cooperation is an important mechanism for the prevention and punishment of corruption in general. In another country, it is alarming to note that the political control exercised by the government party appears to extend to the Supreme Court of Justice and, through it, to the highest electoral authority.
- (xx) It is likewise alarming to confirm the presence of judicial corruption in proceedings involving drug trafficking. In such cases, various organs of the justice system appear to be acting in criminal complicity by lending a veneer of legitimacy to acts of judicial corruption.

Other judicial corruption networks are operating in ordinary cases. This has implications for other public agencies and sometimes involves illicit ties to individual attorneys or law practices.

## **Inefficiency of the judiciary and judicial corruption**

- (xxi) The judiciary is rife with corrupt practices other than those stemming from political influences. These systematic or structural forms of corruption, which exhibit varying degrees of intensity and severity (usually moderate to minor), frequently are associated with the difficulties Central American judiciaries face in efficiently performing their functions. Obstacles to efficiency include judicial delays, the random case distribution system, issues related to the management or administration of court offices, and the delegation of duties to legal support staff. The public has a tendency to tolerate corrupt acts associated with judicial inefficiency.
- (xxii) The myriad forms of judicial corruption associated with judicial inefficiency include: improper charges for issuing a release order, changing the definition of the offense, or for not releasing an individual; improper charges in exchange for expediting procedures; misplacement of a file; manipulation of service of legal process; document tampering; illicit enrichment; irregular seizures; bribery; influence peddling, and so forth.

## **Mechanisms to combat judicial corruption**

- (xxiii) Central American judiciaries rely on two traditional mechanisms to combat corruption in their ranks: the disciplinary system for judges and auxiliary staff, and

prosecutions initiated by the Public Ministry. Special programs for the prevention, punishment, and eradication of judicial corruption were not documented.

- (xxiv) Central American judiciaries currently apply a disciplinary control model tailored to a “bureaucratic,” top-down model of the judiciary, which features interference from the political power elite and severe constraints on the internal independence of judges.<sup>2</sup> This disciplinary control model also places excessive powers in the hands of the highest court. In doing so, it drastically curtails the internal independence of judges and creates fertile ground for corrupt practices to emerge and spread.
- (xxv) A positive development in the process to consolidate independent and impartial judiciaries is that the laws, and the new judicial career laws in particular, now contain more precise definitions of disciplinary infractions and the respective penalties.

In one country, for instance, the law contains definitions of new offenses intended to combat the various forms of judicial corruption documented in the country reports prepared for this study. This is also a positive development. Nonetheless, overly vague or ambiguous disciplinary infractions remain and can give rise to the arbitrary exercise of disciplinary powers.

- (xxvi) The “inquisitive” nature of disciplinary procedures undercuts the effectiveness of this control mechanism in judicial corruption cases given that these sorts of procedures require the utmost transparency and opportunities for public oversight.
- (xxvii) Other flaws in existing disciplinary procedures include the absence of special witness protection laws, excessively short statutes of limitations for bringing legal actions, and the lack of effective evidentiary proceedings, coupled with the lack of specialized staff and the high turnover of control officials. All of these create obstacles to impartiality and the fight against misguided corporatism.
- (xxviii) The investigations into cases or complaints conducted by the disciplinary organs of several Central American countries routinely display little initiative or attention. Routine investigations are limited to taking statements from the parties directly involved in the case—complainants and accused, court staff—and reviewing the court files. The way investigations are handled makes it virtually impossible to demonstrate the existence of judicial corruption, at least in most cases.

Nonetheless, the organs responsible for internal judicial control occasionally demonstrate greater initiative and dedication in the discharge of their duties. For example, rather than limiting their inquiries to the specific complaint, they broaden it to include other proceedings conducted in the court named in the complaint. This facilitates the detection of potential “patterns” of irregular official conduct.

- (xxix) While the creation and consolidation of Public Ministries may help improve control of judicial corruption in Central America, to date their performance has left much to be desired.

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<sup>2</sup> See footnote 1.



- (xxx) Mechanisms to investigate illicit enrichment among judges and auxiliary staff in cases where irregularities in their assets can be inferred have tremendous potential to improve democratic controls in the struggle against judicial corruption. The income and assets statements of members of the judiciary must be monitored and bank secrecy lifted where necessary.

## **The need for prevention and transparency**

- (xxxi) Prevention and education measures are necessary and should be used appropriately in combination with punitive measures. This study does not document the existence or application of any such mechanisms; to the contrary, it reflects that they are absent and needed.
- (xxxii) Improving transparency in all judicial activities in Central America can be an extremely effective measure to combat judicial corruption. Although the introduction of measures to improve the transparency of proceedings is no guarantee that corruption will be eradicated, contained, or subject to better controls, specific strategies to reduce the opacity of disciplinary proceedings can help improve their punitive effectiveness in judicial corruption cases. This will help ensure that flagrant cases will not be unduly passed over or abandoned due to negligence or lack of political will on the part of the officials involved.
- (xxxiii) The same is true of mechanisms to increase public participation. As with transparency, public oversight, while by no means a foolproof antidote to corruption, will limit the opportunity for those clearly responsible for judicial corruption to enjoy ongoing impunity.
- (xxxiv) The media can contribute to the control of judicial corruption by publicly denouncing such cases and covering judicial proceedings of interest to the public. Their contribution can be further enhanced through systematic coverage of judicial activities, which ideally would include subjects such as judicial transparency and reforms, disciplinary control measures, and so forth.

The judicial authorities must facilitate the work of the media by increasing and improving mechanisms for transparency and by helping to educate journalists assigned to cover legal issues.

## REGIONAL COMPARATIVE STUDY<sup>3</sup>

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### **Improving Democratic Controls to Address Judicial Corruption in Central America and Panama**

**SUMMARY:** Introduction \* **Judicial corruption, impartiality, independence** • Judicial corruption • Judicial impartiality • Judicial independence \* **Justice system models, appointments, discipline** • Justice system models and appointment systems • Disciplinary system \* **Perceptions about government and social corruption** • Perceptions of state corruption, including judicial corruption • Public attitudes and tolerance of corruption • Perception of corruption in the country reports \* **Forms of judicial corruption: the main research findings** • Political corruption and judicial corruption • Inefficiency of the justice system and judicial corruption \* **Mechanisms to fight judicial corruption** • Disciplinary system and efforts to combat judicial corruption • Role of the Public Ministry in fighting judicial corruption and other mechanisms • Need for prevention and transparency.

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<sup>3</sup> This report was written by Abraham Siles Vallejo.

*“Because judicial decisions help determine the distribution of wealth and power, judges can exploit their positions for personal benefit.”*

—Susan Rose-Ackerman\*

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## INTRODUCTION

Combating corruption in the judicial apparatus is an imperative in today’s world. Corruption has topped regional (and international) public agendas for the past two decades. This has led to growing awareness of its myriad pernicious effects and the need for measures to eradicate it.

The justice system clearly plays a vital role in this regard: it is responsible for the detection, prosecution, and punishment of corrupt acts. Efficient and timely action by the justice system, in turn, helps uphold the rule of law and contributes to the effectiveness of democratic mechanisms and satisfactory market performance. Conversely, ineffective action on the part of law enforcement agencies undermines public confidence in government institutions, creates obstacles to good governance, and distorts the economy.

It is therefore easy to grasp the gravity of the situation when the justice system itself is riddled with corruption. Not only is it unable to fulfill its duty to control corrupt deviations in the exercise of power, it is guilty of the same practices it is supposed to punish should they occur in other State institutions.

The panorama is bleaker still when, of all the agencies comprising the justice system, it is the court system that is corrupt, in view of the latter’s prominent role as the branch of government charged with conflict resolution and determining rights and obligations in the framework of the Constitution and the law. The panorama becomes even more critical and disturbing, if that is possible, when judges engage in corrupt practices in the course of legal proceedings to investigate and punish corruption cases, especially in cases involving individuals in positions of significant political, economic, and social power.

Judicial corruption, then, must not be tolerated. It must be confronted purposefully and vigorously. As a political model, the democratic, constitutional rule of law requires the separation and complementarity of the branches of government, a system of checks and balances, and effective reciprocal controls. The judicial branch is vested with the duty to exercise control over political power in order to uphold the rule of law and safeguard fundamental individual rights. For this reason, it must be absolutely independent and impartial.

Corruption destroys the independence and impartiality of the judiciary. Judges who acquiesce to influence peddling or accept bribes cannot make legal decisions free from undue interference in the fair application of the law. Nor can judges demand accountability from abusive and corrupt public officials if they themselves engage in corruption or form part of an illegitimate power structure.

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\* Rose-Ackerman, Susan, *La corrupción y los gobiernos: causas, consecuencias y reforma*, Madrid, Siglo XXI de España, 2001, p. 208.

But how to confront the apparently pervasive phenomenon of judicial corruption? What should be done, for example, about its enduring and complex political ramifications? How to approach its various manifestations, ranging from minor irregularities that allow the parties access to confidential information about a proceeding to demands for, or acceptance of, large bribes in exchange for judgments that flout the law in high profile cases (corruption among high-level government officials and drug trafficking, for example)? What forms does corruption take and, most importantly, what causes them? What factors give rise to corruption in the administration of justice apparatus and what is their nature (personal or structural, episodic or ingrained, ethical or juridical)?

Moreover, what institutional mechanisms have been designed to combat judicial corruption? Are they effective? What are their strengths and weaknesses? What concrete successes and challenges have been observed in their application? What measures, even general ones (such as those pertaining to transparency and access to information) are currently under-utilized and which ones have demonstrated the greatest potential? What are the best practices in this area? What role does civil society, and the media in particular, play in all of this? In sum, what lessons can be drawn from the Central American experience fighting judicial corruption, as observed from a comparative regional standpoint?

These are some of the overarching questions posed by the study presented in this report. As can be gleaned from the preceding discussion, its aims were two-fold: to identify practices of corruption in the judiciary and to evaluate the performance of institutional control mechanisms. All of this without losing sight of the essential dimension of the underlying causes of the problem and their possible solutions.

The aim of this study is to make a contribution at all of these levels (forms and causes of judicial corruption, operational aspects, and improving controls). It should be noted, however, that this is an initial effort to approach a phenomenon that is as murky and elusive as it is complex. For this reason, it is characterized as an exploratory study and is primarily descriptive and qualitative in nature.

In other words, without claiming to be exhaustive, the study documents and highlights core aspects of corruption in Central American judiciaries in an effort to assess the situation and articulate proposals. In this sense, the data provided, while not statistically representative, are valuable indicators of a reality that must be examined in greater depth. Similarly, the corrective measures recommended to more effectively fight judicial corruption still must be put to the test in practice.

The limited scope of this study, however, in no way diminishes the value of its findings. They are valuable in and of themselves (qualitatively speaking) and shed light on various facets of the phenomenon of corruption in the judiciary. In more than one instance, they reveal current trends observed in all or most Central American countries or corroborate the findings of previous studies and analyses.

The study is the fruit of a joint effort between the Due Process of Law Foundation (DPLF) research team and a group of national consultants selected especially for this project. During the first research phase, the DPLF team, in consultation with its advisory committee, designed the comparative study, along with the basic instruments for data collection and report preparation. To this end, team members made exploratory visits to the target countries and conducted interviews

with authorities, experts in the field, and justice system operators. At the same time, they tried to anticipate and surmount potential difficulties in accessing information from official sources.

During the second phase, in addition to more precisely defining the scope of the study and the methodological instruments to be used, the DPLF team selected the national consultants and held a coordination workshop with them to establish the common conceptual bases and methodological guidelines that the researchers would follow in each country. This meeting was held in San Salvador on July 3 – 5, 2006.

Based on the observations gleaned from the San Salvador workshop, the DPLF team prepared a final data collection document for use in each country (see Annex 1). This led to the third phase, which consisted of conducting research in each country. The first step was to conduct a pilot test of the instrument, so as to make further adjustments consistent with local considerations.

After collecting and analyzing the data, the consultants prepared preliminary reports. The DPLF team reviewed the reports and returned them to the authors with comments and suggestions. The latter then prepared their final reports. As a final step, the country reports were used as the basis for the regional comparative report.

From an operational standpoint, given the challenges inherent to the subject matter—judicial corruption, like other forms of corruption, tends to remain hidden and to elude controls and public scrutiny—information for the country reports was drawn from a number of different sources. In addition to the laws in force in each country (beginning, of course, with the Constitution), researchers reviewed disciplinary files on corruption cases involving judges and administrative judicial staff (approximately 30 files in each country).

The researchers conducted in-depth interviews with expert informants having some connection to judicial activities (again, approximately 30 people, including judges, judicial aides, Public Ministry staff, litigators, law professors and students, specialized journalists, political analysts, and so forth). They examined public opinion surveys and polls on the issue of corruption in general or judicial corruption specifically and carried out a systematic review of written press coverage on this subject from 2002 – 2006 (the same time period applied to the review of disciplinary files).

The ability to draw from a combination of sources produces more reliable results, although the findings must always be considered qualitative in nature, as explained earlier. As anticipated, the consultants encountered difficulties in obtaining access to files in more than one country (Guatemala, Nicaragua). In general, however, the research elicited enough valuable information on disciplinary procedures to complement the data gathered from other sources.

Some qualified informants were initially reluctant to provide information. In such cases, assurances of confidentiality and the serious and professional approach taken by the individuals and institutions involved in this study helped to overcome their reluctance.

# JUDICIAL CORRUPTION, IMPARTIALITY AND INDEPENDENCE

## Judicial corruption

The study is framed by the concept of “judicial corruption.” There is intense controversy at the doctrinal level over the difficulty of adopting an unequivocal concept of “corruption” in general, and this is applies *mutatis mutandis* to the definition of “judicial corruption” in particular.

In reference to corruption in general, Joaquín González asserts that “its conceptualization continues to be problematic,” since it occurs as an “elusive protean phenomenon.”<sup>4</sup> Similarly, Michael Johnston observes that “no one has ever devised a universally satisfying “one-line definition” of corruption,” even though “the search for definitions has long been a feature of the conceptual and political debate over corruption.”<sup>5</sup> For his part, Albert Calsamiglia has stressed the relative nature of the concept (which is conditioned by time, place, and culture) and, taking an approach that is particularly germane to this study, has pointed out the importance of developing “a theory of corruption designed to solve practical problems.”<sup>6</sup>

Taking into account the prevailing theoretical ambiguity, as well as the practical nature of this research, we chose a more open-ended and flexible operational definition of judicial corruption. This made it possible to address a wide range of misconduct in the discharge of the judicial functions that Central American political constitutions assign to States.

The Inter-American Convention against Corruption and the United Nations Convention against Corruption (IACC and UNCAC respectively) provided the underpinnings for this definition.<sup>7</sup> These treaties, which are in force throughout the region (Charts 1 and 2), set forth the international standard on this subject and, significantly, both eschew a closed definition of corruption.

**Table 1. Inter-American Convention against Corruption:  
Status of ratification in Central America**

Country	Date of deposit of ratification instrument
Costa Rica	June 3, 1997
El Salvador	March 18, 1999
Guatemala	July 3, 2001
Honduras	June 2, 1998
Nicaragua	May 6, 1999
Panama	October 8, 1998

Source: [www.oas.org/juridico](http://www.oas.org/juridico).

4 González, Joaquín, *Corrupción y justicia democrática*, Madrid, Clamores, 2000, p. 30.

5 Johnston, Michael, *The Search for Definitions: the Vitality of Politics and the Problem of Corruption*, Colgate University, Hamilton, New York, November 1995.

6 Calsamiglia, Albert, «Corrupción y lealtad», in *Cuestiones de lealtad*, Barcelona, Paidós, 2000, p. 20.

7 The first was adopted in Caracas, Venezuela, on March 29, 1996, and entered into force on March 6, 1997, pursuant to its article XXV. The second was adopted in Mérida, México, on October 31, 2003 and has been in force since December 14, 2005, pursuant to its article 68.

**Table 2. United Nations Convention against Corruption:  
Status of ratification in Central America**

Country	Date of deposit of ratification instrument
Costa Rica	March 21, 2007
El Salvador	July 1, 2004
Guatemala	November 3, 2006
Honduras	May 23, 2005
Nicaragua	February 15, 2006
Panama	September 23, 2005

Sources: United Nations document CAC/COSP/2006.4 (October 30, 2006); [www.unodc.org/unodc/en/crime\\_signatures\\_corruption.html](http://www.unodc.org/unodc/en/crime_signatures_corruption.html).

Although the IACC does not offer a finite definition, the catalog of illicit behaviors found in Article VI “Acts of Corruption” is sufficiently comprehensive to encompass the main forms of corruption observed in the judicial branch:

### **Article VI Acts of Corruption**

1. This Convention is applicable to the following acts of corruption:
  - a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;
  - b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;
  - c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party;
  - d. The fraudulent use or concealment of property derived from any of the acts referred to in this article; and
  - e. Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.
2. This Convention shall also be applicable by mutual agreement between or among two or more States Parties with respect to any other act of corruption not described herein.

Section VI.1.c is particularly relevant in that the normative reference contained therein is at once legally rigorous and broad and flexible: according to the IACC, an act or omission in the discharge of his duties by a government official, or by a person who performs public functions, for the purpose of obtaining benefits for himself or a third party constitutes an act of corruption.

Official institutions, academics and analysts across the region regularly employ similar definitions of corruption. For example, Costa Rica's eleventh state of the nation report asserts that "corruption is understood as any activity that deviates from the public function to obtain a private gain."<sup>8</sup>

Vanderbilt University's Latin American Public Opinion Project (LAPOP) has applied a similar concept in its research on the political culture of democracy in Central America: "we understand corruption to be the use of authority or public resources for private, personal, or third party ends, through practices that are sanctioned under national laws or international treaties that the country has signed and ratified."<sup>9</sup>

In sum, people across the region appear to share a similar notion of corruption. The UNDP's "Second Human Development Report for Central America and Panama, which was prepared based on the information obtained from focus groups held in Costa Rica and Honduras, reported that, "in both countries, corruption was defined as an abuse of power to obtain a personal benefit."<sup>10</sup>

In view of the foregoing, the operational definition used in this study identifies "acts of judicial corruption" as any act in which the conduct of a judge or judicial employee violates the principle of impartiality in a legal proceeding, for the purpose of obtaining an undue or unlawful benefit for him or herself or for a third party (see the data collection instrument in Annex 1).<sup>11</sup>

As indicated earlier, rather than a dogmatic imperative, this definition is regarded as a tool for approaching an often veiled reality—one that frequently eludes public scrutiny—in an effort to capture some of its nuances and distinctive features. The definition proposed, then, is intended to be sufficiently broad and adaptable to different situations.

The definition, and ultimately the subject of this study, is confined to the organs or agencies of the judiciary. It does not cover other agencies comprising the administration of justice system as a whole (the police, the Public Ministry, or the penitentiary system for example), since only the judicial organs have jurisdictional authority in litigious proceedings.<sup>12</sup> At the level of individuals, however, the definition includes judges (of all levels and rank) as well as judicial auxiliary staff, since any of these actors may, in the discharge of their official duties, engage in conducts which violate the principle of judicial impartiality in order to obtain an illicit benefit.

8 Programa Estado de la Nación, *XI Informe sobre el Estado de la Nación*, San José, 2005, p. 301.

9 Vargas-Cullell, Jorge, Luis Rosero-Bixby y Mitchell Seligson, *Cultura política de la democracia en Costa Rica: 2006* [LAPOP Report Costa Rica, 2006], San José, Centro Centroamericano de Población, 2006, p. 73 (note 74).

10 UNDP, *Second Report on Human Development in Central America and Panama*, San José, 2003, p. 324 (Hereinafter UNDP Second Report).

11 Transparency International takes a similar position in its latest report, defining corruption as "the abuse of power for personal gain." With respect to the judiciary, it states that "corruption in the judiciary extends to any inappropriate influence on the impartiality of judicial proceedings and judgments by any actor in the court system." See Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems*, United Kingdom, Cambridge University Press, 2007, p. xxii.

12 The UNDP Second Report explicitly addresses this difference when it refers to the "administration of justice system" and the Judiciary. See UNDP, *op. cit.*, p. 286.



## Judicial impartiality

For the purposes of this report, the impartiality of a judicial proceeding is understood to have been impaired if there has been a violation of one of the judge's basic obligations in the exercise of his or her powers to resolve specific jurisdictional conflicts. As Remotti Carbonell points out, judges must have no interests or preconceived notions with regard to the parties or the subject of a particular case. The evaluation of whether these requirements have been met must include the subjective (internal to each judge) and objective dimensions.<sup>13</sup>

From the standpoint of objectivity, Montero Aroca asserts that “inherent to the adjudicatory function is the assumption that the jurisdictional authority cannot, at the same time, be a party to the conflict subject to its judgment.” The subjective dimension, in turn, signifies that “the judgment must be determined solely by the proper execution of the function, that is, through the application of the objective legal standards in a particular case, without allowing any other circumstance outside of this function to influence the judgment.”<sup>14</sup> This is to say that the law must set forth the objective grounds that might give rise to a reasonable belief that a judge is not impartial.

From an objective perspective, then, the judge is impartial if he or she has no connection to the parties to the conflict to be resolved, or to the subject matter under litigation (as the saying goes, “one cannot be judge and plaintiff” in a dispute). And from the subjective standpoint, a court acts with impartiality if its decision is based solely on the objective legal standards that it has been entrusted to interpret and uphold.

The subjective dimension is beyond our grasp (it is impossible to penetrate the mind of the judge). Therefore the law must set forth the objective circumstances (grounds) that might lead one to infer that the judge is not impartial, and therefore may be recused from a case (such as a family relationship or friendship with one of the parties, blatant animosity, and so forth).

In addition to their doctrinal basis, these general criteria are widely accepted in the jurisprudence of international human rights tribunals. In a judgment handed down in the Piersack case (1982), the European Court of Human Rights (ECHR) reaffirmed that the impartiality of a particular judicial organ must be evaluated from objective and subjective standpoints. The Court indicated that for the former “it must be determined whether sufficient guarantees exist to eliminate any legitimate doubt”; for this, organic as well as functional criteria must be applied. The subjective perspective “would consist of determining the judge’s personal views toward a particular circumstance.”<sup>15</sup>

Moreover, in its judgment in the De Cubber case (1984), the ECHR reaffirmed that the personal impartiality of a magistrate is presumed when there is no evidence to indicate the contrary, among other pertinent considerations, and also asserted that “on this subject, even appearances can be important.” Invoking an old adage cited in the precedent set in the Delcourt case (1970), it recalled that “justice must not only be done; it must also be seen to be done.”<sup>16</sup>

13 Remotti Carbonell, José Carlos, *La Corte Interamericana de Derechos Humanos: estructura, funcionamiento y jurisprudencia*, Lima, Idemsa, 2004, p. 356.

14 Montero Aroca, Juan, *Introducción al Derecho Judicial peruano*, Lima, ENMARCE, 1999, pp. 109 y 110.

15 European Court of Human Rights - Case of Piersack v. Belgium (1 October 1982) (*appl. n. 8692/79*)

In the Court's opinion, therefore, the judge should recuse him or herself from any legal proceeding in which there are legitimate reasons to fear a lack of impartiality and this "is derived from the trust that the tribunals in a democratic society must inspire in those subject to judgment."<sup>17</sup> The ECHR also set forth this criterion in its judgment in the Campbell and Fell case (1984).<sup>18</sup>

## Judicial independence

Obviously, impartiality is closely linked to judicial independence and this link is critical to an examination of corruption in the administration of justice. As Andrés Ibáñez and Movilla Álvarez point out, this is true insofar as the degree of independence in the judiciary is not only "its particular form of sovereignty," but also a "prerequisite" for the impartiality of judges.<sup>19</sup>

In other words, courts of justice cannot be impartial unless they are independent. If judges are politically subordinated individually or collectively to the executive or legislative branch, or if the hierarchical structure is such that they are controlled by or subject to improper influences from ranking judicial officials or from their immediate superiors—in short, if external and internal independence is lacking—then there can be no judicial impartiality.<sup>20</sup>

How could there be, if the judge is compelled to resolve the legal dispute independently of constitutional law and the evidence presented in the matter, pursuant to the arbitrary dictates of a political authority or the institutional powers that be? It is clear, then, that judicial dependence constitutes an institutional breeding ground for corruption in the administration of justice.

This is particularly alarming in light of the traditional subordination of the courts to the political authorities in Latin American, including Central American, nations. From an historical perspective, Peña González asserts that the three typical forms of justice in Latin America are "subordinated" justice, "marginalized" justice, and an "emergency" justice." What is required, in response, is the development of a new "emergent" justice.<sup>21</sup>

Referring to the current situation, in its report titled *Democracy in Latin America*, the UNDP states that despite progress in constitutional reforms to strengthen the independence and professionalism of the judiciary, "the executive branch maintains a significant level of interference in the supreme courts of several countries."<sup>22</sup> At the regional level, its *Second Report on Human Development in Central America and Panama* finds that administration of justice systems have a

16 See European Court of Human Rights, De Cubber Case judgment. en Tribunal Europeo de Derechos Humanos, *Jurisprudencia 1984-1987*, Madrid, Cortes Generales, s.f., pp. 257-265.

17 *Ibid.*

18 See, European Court of Human Rights, Case of Campbell and Fell, *op. cit.*, pp. 140-172.

19 Andrés Ibáñez, Perfecto y Claudio Movilla Alvarez, *El Poder Judicial*, Madrid, Tecnos, 1986, p. 29. Margaret Popkin concurs that judicial independence must be understood as "the precondition for impartiality." See Popkin, Margaret, «Fortalecer la independencia judicial», en Pásara, Luis «Lecciones aprendidas o por aprender?», en Pásara, Luis (comp.), *En busca de una justicia distinta: experiencias de reforma en América Latina*, Lima, Consorcio Justicia Viva, 2004, p. 410.

20 For a discussion of the distinction between external and internal independence, see Andrés Ibáñez, Perfecto and Claudio Movilla Alvarez, *op. cit.*, pp. 117-124; Guarnieri, Carlo and Patricia Pederzoli, *Los jueces y la política*, Madrid, Taurus, 1999, p. 46 y ss.

21 Peña González, Carlos, «Presentación», en Correa Sutil, Jorge (ed.), *Situación y políticas judiciales en América Latina*, Santiago, Escuela de Derecho de la Universidad Diego Portales, 1993, p. 8; Peña González, Carlos, «América Latina: ¿una justicia emergente?», en Comisión Andina de Juristas, *Boletín* N° 41, Lima, junio de 1994, p. 9.

22 UNDP, *La Democracia en América Latina*, Buenos Aires, Aguilar, Altea, Taurus, Alfaguara, 2004, p. 27.

“precarious budgetary foundation” and are subject to “assaults by other branches of government and actors in society.” Its main conclusion in this regard is that “in practice, judicial independence is not guaranteed in all countries of the region.”<sup>23</sup>

### ***Independence and judicial appointments***

For the purposes of this study, judicial appointments, and in particular the system to appoint supreme court justices, play a critical role in determining whether a judiciary is independent or suppressed. A judicial appointment system free of undue political control by the executive or legislative branches will contribute significantly to ensuring an independent, impartial and honest justice system.

By contrast, in a politically-driven system for selecting or appointing members of the supreme court (subject to partisan politics, quotas by political groups, or patronage), these superior judicial officials owe their positions and their job tenure to the authorities who appointed them. This accords the latter considerable sway over the high court. Without question, this has a detrimental impact on the administration of justice and is highly conducive to the emergence of corrupt acts.

The United Nations Basic Principles on the Independence of the Judiciary stipulate that “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.” This instrument specifically provides that, “Any method of judicial selection shall safeguard against judicial appointments for improper motives” (principle 10) and that “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary” (principle 1).<sup>24</sup>

Turning to international jurisprudence, the ECHR judgment in the Campbell and Fell case cited earlier confirms that when determining whether a judicial organ can be considered to be independent, it is important to take into account the manner in which its members are appointed and the length of their tenure office, the existence of safeguards against outside pressures, and the question of whether it presents an appearance of independence.<sup>25</sup>

The Inter-American Court of Human Rights also adopted these criteria in its judgment issued in the case of the arbitrary removal of three magistrates from the Constitutional Court of Peru. Significantly, the Court specifically stated that “one of the principal purposes of the separation of public powers is to guarantee the independence of judges and, to this end, the different political systems have conceived strict procedures for both their appointment and removal.”<sup>26</sup>

<sup>23</sup> UNDP, Second Report, pp. 286 - 287.

<sup>24</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan August 26 to September 6, 1985, and endorsed by General Assembly resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985.

<sup>25</sup> European Court of Human Rights, *op. cit.*, p. 154 (78).

<sup>26</sup> Inter-American Court of Human Rights, Constitutional Court Case, Judgment of January 31, 2001, para. 73.

## JUSTICE SYSTEM MODELS, APPOINTMENTS, DISCIPLINE

### Justice system models and appointment systems

The judicial appointments mechanism—particularly at the highest levels, namely the supreme court—reflects a structural link between the justice system and the political system.<sup>27</sup> The specific characteristics of this mechanism have a direct bearing on independence as well as an indirect one on the impartiality of judges. It therefore informs patterns of judicial corruption in terms of both its pervasiveness and its specific manifestations.

In structural terms, the characteristics of the judicial appointments system define, in large part, the type of judiciary in a country. While it is certainly not the only factor—nor perhaps even the most important one, given the relevance of ensuring that individuals with the highest professional and personal qualifications are in charge of imparting justice—it is nonetheless essential and ranks high among the structural elements that shape the judicial apparatus.<sup>28</sup>

From the doctrinal standpoint, therefore, judicial systems have been classified according to the judicial selection system, or based on who exercises governmental powers in the judiciary. And one extremely important element of power is the recruitment of its members.

García Belaunde discusses three models: political, corporative and institutional.<sup>29</sup> In the political model, the executive branch has governing power over the judiciary and is responsible for “selecting, promoting, and sanctioning a magistrate.” While this model operates efficiently in the United States, it has been discredited in Latin America for decades, drawing harsh criticism precisely because it allows for executive interference in the administration of justice.

The corporative model, in contrast, features a sort of judicial “self-governance.” Criticisms of this model point to a presumed lack of democratic legitimacy of judges and the absence of mechanisms for accountability; it too is therefore on the decline. Finally, the institutional model assigns a central role to the council of the judicature (or the magistracy). The council, which is pluralistic and democratic in its composition, is responsible for governing and administering the judiciary, including the task of recruiting judges. According to García Belaunde, this is the most highly regarded model in Latin America.

Here our discussion is centered around “models,” in other words, archetypal theoretical constructs. In the Latin American reality, and specifically in Central America, however, we frequently observe mixed judicial systems that combine elements of one or more of these paradigms.<sup>30</sup> Nonetheless, the “political” model has predominated and historically has been

27 According to Guarnieri and Pederzoli, in the judicial institutions of continental Europe—which provides the model followed in Central America—the involvement of the executive and legislative branches in the recruitment of judges “traditionally was the most important point of institutional intersection between the judiciary and the political system.” See Guarnieri, Carlo and Patricia Pederzoli, *op. cit.*, pp. 50-51.

28 As Pásara recalls, “independence is something inside each individual” and the institutional rules “further, but do not create independence.” This author also contends that “the main problem with the [judicial] reform processes in progress lies not in the lack of financial resources but rather in the quality of the human resources.” See Pásara, Luis, *op. cit.*, pp. 527 and 554.

29 García Belaunde, Domingo, «Gobierno y administración del Poder Judicial», en *Ius et veritas* N° 14, año VIII, Lima, 1997, p. 22 y ss.

30 Héctor Fix-Zamudio—whose traditional approach espouses a binary classification of models for judicial government and administration, one rooted in the Anglo-American tradition and the other in the continental European one—asserts that “both systems have had an

used by governments to control the judiciary. The “appropriation of the judiciary by the executive,” that Montero Aroca discusses in his description of the Spanish situation prior to the 1978 Constitution—which was furthered and upheld by the authority vested in the executive branch to govern or administer the judicial organ—is, in this regard, completely transferable to the Latin American or Central American reality.<sup>31</sup> As the UNDP points out in its Second Report on Human Development in Central America and Panama cited earlier, “the selection of magistrates ‘in tune’ with the executive branch has been part of the political history of the region and one of the mechanisms traditionally employed to dominate the judiciary.”<sup>32</sup>

While it has recently found advocates among Latin American judges—particularly in the context of democratic transitions that permit a larger dose of judicial independence—the corporative model has been rejected on compelling theoretical grounds.<sup>33</sup> Correa Sutil, for example, points out a three-fold risk associated with accepting the so-called “judicial self-government”: the complacency of judges, meaning they are egocentric, removed from the society they are meant to serve, and resistant to criticism; negligence in the exercise of their judicial functions, which constitute their institutional *raison d’être*; and the lack of democratic legitimacy of the judiciary (the “counter-majority argument”).<sup>34</sup>

Luis Mosquera has warned that the principle of “self-government” is conducive to a management-centered approach oriented more toward the interests of the judiciary itself rather than the broader public interest in the proper administration of justice; this is, of course, unacceptable.<sup>35</sup> López Guerra adds that “two corollaries are implicit in the concept of self-government: that the members of the council are all, or mostly judges and those members (or the majority of them) are elected by the same judges,” which, as we know, is not always the case.<sup>36</sup>

But Montero Aroca *et al* offer perhaps the most convincing theoretical argument when they distinguish between the concepts of “self-government” and “autonomous government.” According to these authors, the Constitution does not intend to establish “a system of self-government in the strict sense of the word, in which judges govern themselves—which, by the way, would not appear to be desirable—[but rather] an autonomous system of government separate from the other branches and not conditioned by them, which would be perfectly justifiable.”<sup>37</sup>

It is easy to see, then, why in the contemporary constitutionalism of continental Europe, judicial governance can be conferred upon an organ such as a Council of the Judicature or Magistracy

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influence on the Latin American countries” See Fix-Zamudio, Héctor, “Bodies that Govern and Administer the Judicial Branch of Government in Latin America,” in AA.VV., *Justice and Development in Latin America and the Caribbean*, Washington, IADB, 1993, p. 39.

31 Montero Aroca, Juan, *Independencia y responsabilidad del juez*, Madrid, Civitas, 1990, pp. 24 and 137.

32 UNDP, Second Report, *op. cit.*, p. 288.

33 See, in the Peruvian case, the Technical Secretariat of CERIAJUS, *Los problemas de la justicia en el Perú: hacia un enfoque sistémico*, Lima, Comisión Andina de Juristas, 2004, p. 46.

34 Correa Sutil, Jorge, “Análisis panorámico de la situación y políticas judiciales en América Latina,” in Correa Sutil, Jorge (ed.), *op. cit.*, p. 28. For a discussion of the “counter-majority argument,” see Gargarella, Roberto, *La justicia frente al gobierno: sobre el carácter contramayoritario del Poder Judicial*, Barcelona, Ariel, 1996.

35 Mosquera, Luis, “La posición del Poder Judicial en la Constitución española de 1978,” in Predieri, Alberto and Eduardo García de Enterría (directors), *La Constitución española de 1978*, Madrid, Civitas, 1988, pp. 737-738.

36 López Guerra, Luis, *El Poder Judicial en el Estado constitucional*, Lima, Palestra, 2001, pp. 77-78.

37 Montero Aroca, Juan *et al.*, *et al.*, *Derecho jurisdiccional*, Barcelona, Bosch, segunda edición, 1991, T. I, p. 56.

(or General Council in the Spanish Constitution) since, theoretically, this would not undermine judicial independence. Indeed, it safeguards independence by removing the executive and legislative branches from the judicial sphere and by ensuring that the judicial corporatism fostered by the self-government thesis does not impinge upon internal independence.<sup>38</sup>

Responsibilities associated with the administration of the judicial career or the statute governing judgeships can be constitutionally assigned to the Council (recruitment, promotion, and removal through disciplinary action) along with other tasks related to judicial policy-making and administrative management.

Moreover, the underlying purpose of creating the Councils of the Judicature, in their many variations, is to ensure the highest level of judicial independence and to contribute to the democratization of justice systems.<sup>39</sup> Indeed, throughout the republican history of Latin America, the judiciary, which was molded after continental European law, has been organized under a “bureaucratic” model that features a strong hierarchical structure, a judicial career based on seniority and merit, political authorities assigned judicial government roles (especially judicial appointments), and the presumably apolitical and technical nature of the exercise of the judicial function.<sup>40</sup> In Latin America, however, this organizational model lent itself to the historical control over judges exercised by the executive and legislative branches.<sup>41</sup>

What is proposed instead is a “democratic” model that stresses the relationships between the judiciary and the political system and between the judiciary and civil society. This model preserves the notion of a technical judicial selection process, while involving other sectors of government and society in the process through the establishment of Councils of the Judicature. It also separates the judicial functions of cassation—which inherently fall under the purview of the supreme court—from roles associated with judicial government and administration, since the concentration of these functions in the supreme court compromises internal judicial independence.<sup>42</sup>

Obviously, no single blueprint can be applied effectively in all cases, without regard for the local reality. On the other hand, none of the models can be discarded *a priori*, as some of them might work well in one country, yet prove inefficient or dysfunctional in another. Each country, depending on its needs and particular characteristics, must find the optimal institutional design drawing from diverse theoretical paradigms or models as a reference point. What should always be present, however, is a system of checks and balances that ensures the proper distribution of power and judicial independence.

38 According to Popkin, by transferring certain judicial government functions (appointments of judges and judicial staff, promotions, transfers, discipline) from the political authorities to the judiciary—that is to the Supreme Court and especially its president—in Latin America, what was accomplished on some occasions was “to change the source of pressure on judges” since “instead of feeling the weight of external forces, the judges encountered pressure from their superiors to rule in a particular way.”—, See Popkin, Margaret, *op. cit.*,

39 As Popkin pointed out, “the introduction of the council model in Latin America carried with it the promise that the establishment of this institution would be the ideal mechanism for depoliticizing the judge selection process and ensuring the selection of better qualified judges, thereby enhancing judicial independence.” See Popkin, Margaret, *op. cit.*, p. 429. A similar opinion is expressed in Sagüés, Néstor, «Variables y problemática del Consejo de la Magistratura en el reciente constitucionalismo latinoamericano», en AA.VV., *La Constitución de 1993: análisis y comentarios II*, Lima, Comisión Andina de Juristas, 1995, p. 171.

40 Peña Gonzáles, Carlos, «Sobre la carrera judicial y el sistema de nombramientos», in *Revista de la Academia de la Magistratura* N° 1, Lima, AMAG, January 1998, pp. 11-12.

41 See López Guerra, Luis, *op. cit.*, pp. 131-135.

42 Peña Gonzáles, Carlos, «Sobre la carrera judicial y el sistema de nombramientos», *op. cit.*, p. 13.

## Disciplinary system

This new democratic model—with its focus on reducing the extra-jurisdictional influence of the supreme court—also provides a framework for proposals to restructure the traditional judicial disciplinary system. Indeed, in countries that follow the continental European tradition—Central America included—disciplinary powers have commonly been used as a means of political control over the actions of judges and usually involve supreme court intervention in the final instance.<sup>43</sup>

In the area of judicial disciplinary procedures, then, it is also necessary to move from an authoritarian model marked by interference and politicization, to a democratic one that upholds the individual independence of judges and creates genuine opportunities for decision-making without pressure and interference by external organs or by the institutional hierarchy itself.

Modifying the internal disciplinary system (definition of offenses, penalties, organs, procedures), assigning control powers to the council of the judicature (an external organ, yet part of an autonomous judicial government), or some combination of the two, are alternatives that could contribute to a balanced judicial disciplinary mechanism that incorporates the necessary safeguards. The system must effectively punish judicial misconduct (as opposed to offenses against so-called institutional “prestige” or “honor”) and uphold the fundamental rights of users of the judicial service, without impinging upon the independence of judges.

Clearly the transfer of this important aspect of judicial government to councils of the judicature is an extremely compelling option, in view of the characteristics of these entities discussed earlier. As the UNDP pointed out in its report *Democracy in Latin America*, however, it is important to bear in mind that while these councils certainly have the potential to “enhance the professionalism and independence” of the Judiciary, it has yet to be “fully demonstrated.”<sup>44</sup> And, borrowing a reflection from Popkin on the judicial appointment system, it is more important to determine the criteria and degree of transparency with which the system will operate, than to decide who will be in charge.<sup>45</sup>

The issues of criteria and transparency are crucial to ensuring more efficient control of corrupt practices in the judiciary, since the cultural conditioning and deeply-ingrained attitudes and habits inherited from the previous authoritarian model tend to distort or undo even the most well-intentioned attempts at institutional re-engineering.<sup>46</sup>

Moreover, if changes to the disciplinary system are to be meaningful and have the potential for far-reaching transformation—and this is true of any significant reform to the judiciary—they

43 Andrés Ibáñez and Movilla Álvarez assert that “the disciplinary instrument in the modern judiciary, based on the French tradition, has operated based on hierarchy, with the aim of “policing” and ensuring the internal order of the apparatus,” leaving the judge “frankly defenseless and at the mercy of intracorporatist power centers.” See Andrés Ibáñez, Pefecto and Claudio Movilla Álvarez, *op. cit.*, p. 143.

44 UNDP, *Democracy in Latin America*, *op. cit.*, p. 93.

45 Popkin, Margaret, *op. cit.*, p. 432.

46 Reiterating the central role the “cultural dimension” plays in any judicial reform process, Pásara observes that sometimes “cultural values and guiding principles prevail over legal changes.” For her part, Popkin, concerned that “reforms have not had the desired outcome,” observes that on occasion “the new institutions reproduce the old politicization.” See Pásara, Luis, *op. cit.*, p. 530; Popkin, Margaret, *op. cit.*, p. 415.

must occur in the context of a comprehensive set of reforms.<sup>47</sup> As Eduardo Dargent has pointed out, “the fight against judicial corruption should not be limited to control and preventive measures.” What is required instead is a process of authentic judicial reform using a “broad and comprehensive approach” focused on making the judicial apparatus more democratic.<sup>48</sup>

The point to stress here is that, while changes to disciplinary control systems are inherently valuable and an essential part of any judicial reform process, they will only succeed in their goal of reducing and eradicating judicial corruption in the context of a more far-reaching judicial reform process.

## PERCEPTIONS ABOUT GOVERNMENT AND SOCIAL CORRUPTION

When it comes to justice systems and corruption, the Central American reality today is certainly complex. On the one hand, progress clearly has been made in the framework of democratic transitions and consolidation in the region. Relevant normative and institutional changes include: constitutional reforms; the enactment of judicial career laws; the establishment or strengthening of Public Ministries and ombudsman’s offices; the creation of constitutional courts (within the ordinary court system in all countries, except Guatemala); reforms to criminal codes and procedures (accusatory system); the establishment of judicial reform committees; the gradual (and tentative) introduction of the council of the judicature model; movements toward the adoption of freedom of information and transparency laws (including, in certain cases, the legal concept of *habeas data*); and the ratification of international conventions against corruption.

Nonetheless, various ills and shortcomings continue to afflict good governance and strong institutions in Central America. The region’s judicial apparatus remains particularly fragile (along with other sectors of course). According to the UNDP’s *Second Report* cited earlier, political democratization has yet to be accompanied by “equally significant progress in the establishment of the democratic rule of law.”<sup>49</sup> Judiciaries are plagued by the lack of independence of judges, inefficiency in the administration of justice, and insufficient public access to justice. Experts define these problems as the crucial reform issues for Latin American justice systems today.<sup>50</sup>

Judicial corruption is one of the most serious repercussions of this institutional precariousness. It permeates public administration and is deeply rooted in the societies of the six Central American nations. The present analysis must address this. In other words, corruption is one of the main symptoms of the crisis in the administration of justice and it is intimately linked to the broader and more complex phenomenon of corruption in the State and in society.

47 Edgardo Buscaglia has proposed the concept of “exhaustive judicial reforms,” that encompass all of the hierarchies of the judicial system and include the following areas: administration of justice, judicial independence, alternative dispute resolution mechanisms, legal education, and access to justice. See Buscaglia, Edgardo, “Obstacles to Judicial Reform in Latin America.” in Jarquín, Edmundo y Fernando Carrillo (eds.), *Justice Delayed: Judicial Reform in Latin America*. New York, IADB, 1998 pp. 33-34.

48 Dargent, Eduardo, *Judicial corruption: mecanismos de control y vigilancia ciudadana*, Lima, Comisión Andina de Juristas, 2003, pp. 39 y 38.

49 UNDP, *Second Report*, p. 285.

50 See Pásara, Luis, *op. cit.*, p. 519. See also Jiménez Mayor, Juan *et al.*, *La justicia en Nicaragua: diagnóstico del sistema de justicia*, Managua, 2006, p. 34.



## Perceptions of state corruption, including judicial corruption

In order to examine the problem of corruption in all its breadth and complexity, in order to subsequently hone in on the judiciary, we must first take a moment to examine its ramifications in the State apparatus and in different sectors of society. With regard to the former, a recent study by Vanderbilt University's Latin American Public Opinion Project (LAPOP) titled *Political Culture of Democracy*, reports a high rate of public perception of widespread corruption among public officials in Central America, ranging from 69.0 in El Salvador to 83.5 in Nicaragua, on a scale of 0-100 (Table 3).<sup>51</sup> Evidently, citizens in every country of the region believe that corrupt practices are commonplace and extremely pervasive in the public sphere.

**Table 3. Perception of the Pervasiveness of Corruption among Public Officials in Central America, 2006 (Scale from 0-100)**

Country	Average percentage
Costa Rica	77.0
El Salvador	69.0
Guatemala	81.2
Honduras	79.5
Nicaragua	83.5
Panama	73.7

Source: LAPOP Report, Costa Rica, 2006: p. 85.  
Chart created by author.

But that is not all. The same study provides data on the percentage of the population that reported having been a victim of corruption at least once during the preceding year in Central America. The results are significant, ranging from 11.3% in Panama to 19.3% in the case of Costa Rica (Table 4).<sup>52</sup> It should be noted that relative to the incidence of corruption reported for all of Latin America, Chile has the lowest average percentage of 9.4%, while Haiti has the highest, with 50.1%.<sup>53</sup> This provides a context for the Central American situation which, while certainly not the worst, is nonetheless disturbing.

The available data also indicate the incidence of corruption in particular government sectors, including the judiciary, in different countries of the region. Although lower than the figures for educational services and local government sectors, the percentage of victims of corrupt practices in the courts is significant, particularly taking into account that the situation deteriorated between the 1998-2002 period and 2006. The figures from Nicaragua are particularly alarming:

51 Vargas-Cullell, Jorge, Luis Rosero-Bixby y Mitchell Seligson, *op. cit.*, p. 76. The Costa Rica study is based on the findings of a June 2006 national survey on values, attitudes and opinions with a sample size of 1,500 people. The questionnaire includes core issues applied to all of the countries included in the regional study, as well as issues specific to Costa Rica. The size and design of the study is also similar to those previously conducted in Costa Rica or in other countries, in order to facilitate comparison. See Vargas-Cullell, Jorge, Luis Rosero-Bixby, and Mitchell Seligson, *op. cit.*, p. xviii.

52 *Ibid.*, p. 84.

53 *Ibid.*

the percentage of victims of corruption in the courts was 15.5% during the 1998-2002 period and rose to 22.9% in 2006, based on a question referring specifically to the incidence of bribes in the courts (Tables 5 and 6).

**Table 4. Average percentage of people who were victims of corruption at least once in the last year: Central America, 2006**

Country	Average percentage
Costa Rica	19.3
El Salvador	13.4
Guatemala	18.0
Honduras	16.1
Nicaragua	18.0
Panama	11.3

Source: LAPOP report, Costa Rica, 2006: 93.  
Table created by author.

**Table 5. Victims of corruption by type of service and by country 1998-2002 (percentages)**

Country	Educational system	Local government	Courts
Costa Rica	8.6	5.6	2.7
El Salvador	7.3	5.3	4.0
Guatemala	8.7	8.2	5.0
Honduras	11.3	10.2	6.6
Nicaragua	9.5	12.9	15.5
Panama	6.7	9.3	6.5

Source: XI Informe sobre el Estado de la Nación, 2005: 320.  
Table created by author.

**Table 6. Bribes in the courts, by country 2006 (percentages)**

Country	Percentage
Costa Rica	3.0
Guatemala	6.3
Nicaragua	22.9
Panama	14.1

Source: LAPOP Report, Panama, 2006: 85.  
Table created by author.

These data on the incidence of corruption in the judiciary are consistent with those obtained by a University of Salamanca (Spain) study of judges at different levels, including supreme court justices, in the six Central American countries during the period from 2002 to 2004. In effect, the judges interviewed by the University of Salamanca reported a high rate of “bribery

attempts.” Nicaragua again took first place with a rate of 54.5% (Table 7).<sup>54</sup> As observed, in each country a significant group of members of the judiciary reports having been subject to corruption attempts in the form of offers of bribes.

**Table 7. Attempts to bribe judges in the discharge of their duties: Central America**

Country	%
Costa Rica	19.2
El Salvador	37.7
Guatemala	42.9
Honduras	41.2
Nicaragua	54.5
Panama	43.6

Source: University of Salamanca, 2004: 62.  
Table created by author.

## Public attitudes and tolerance of corruption

Interestingly, more in-depth surveys of public attitudes reveal a certain tolerance toward corrupt acts in public administration. The aforementioned LAPOP study, *Political Culture of Democracy* conducted in Costa Rica, asked respondents about their attitudes toward different acts of corruption. The findings are summarized in Table 8.

As shown, while the vast majority of people (74%) are against acts of corruption in public administration, the intensity of their rejection diminishes in function of the specific circumstances of corruption. Tolerance is shown, for example, toward a mother of several children who pays a small illegal sum (2,500 colones) to a public employee in order to obtain a birth certificate for one of her children without having to spend time waiting: over half of those interviewed (53%) did not consider this an act of corruption or else felt that it was justified. In contrast, harsh criticism is meted out to a congressperson who accepts a \$10,000 bribe from a company, or to an important politician who obtains a government job for his brother-in-law (95% of the responses were negative in both instances). In these cases, the misconduct is clearly of greater public transcendence.

As the authors of the study assert, “there is a greater threshold of tolerance for minor acts of corruption than for serious ones that can cause damage to the greater community.”<sup>55</sup> When the questions referring to tolerance of corruption are grouped into a “simple additive index... the main finding is that only a minority group of people inflexibly condemn concrete acts of corruption in public administration [in all cases the respondent says that the actors are corrupt

<sup>54</sup> University of Salamanca, *La justicia vista por los jueces: diagnóstico del funcionamiento de los sistemas judiciales centroamericanos*, Salamanca (España), Ministerio de Asuntos Exteriores y de Cooperación – AECEI – University of Salamanca, 2004. According to the catalog entry describing the study, interviews were conducted with magistrates of the Supreme Courts of Justice and members of the first and second instance criminal courts of the six Central American countries, using a random sample. The questionnaire was applied from October 2002 to May 2004. See University of Salamanca, *op. cit.*, p. 151.

<sup>55</sup> Vargas-Cullell, Jorge, Luis Rosero-Bixby y Mitchell Seligson, *op. cit.*, p. 86.

**Table 8. Attitudes when faced with situations of corruption  
Costa Rica, 2006 (percentages)**

Topics investigated and responses	Against	For
Congress person accepts a bribe		
Corrupt and should be punished	95	
Not corrupt (is justified / DK-NR)		5
Mother pays a bribe		
Corrupt and should be punished	47	
Not corrupt (is justified / DK-NR)		53
Politician uses influence to get brother-in-law a job		
Corrupt and should be punished	95	
Not corrupt (is justified / DK-NR)		5
Paying bribes is justified		
No	74	
Yes and DK/NR		26
Pay bribes to receive good public services		
No	71	
Yes and DK/NR		29

Source: LAPOP Report, Costa Rica, 2006: 78.

or the bribe is unjustifiable]: a little more than one in four (27%). The rest express at least some degree of acquiescence to corruption depending on the concrete situation.”<sup>56</sup>

Similarly, when faced with the “dilemma of the corrupt politician,” in which rejecting corruption entails paying a tangible price, the population appears to be radically divided between those who believed hospital construction should be halted due to evidence of corruption (49%) and those who felt it should not (51%). Moreover, when asked whether they would prefer an honest, but incapable president, or a capable but dishonest president, and a dishonest president with good ideas or an honest president with bad ideas, the main findings were as follows: 45% of respondents chose honesty over capability or ideas as the main virtue of a politician, which is the largest group numerically, although not a majority of citizens. Many were not sure how to respond to the question, or did not wish to do so. A significant minority group of people (15%) openly preferred dishonest politicians, as long as they were capable or had “good” ideas.<sup>57</sup>

The UNDP’s *Democracy in Latin America* report corroborates these findings. In a survey of 7,424 people in Central America and Mexico, 47.5% strongly agreed or agreed that “it is possible to pay the price of a certain degree of corruption in the government as long as the country’s problems are solved.” The findings for all of Latin America, based on a survey of 18,013 individuals, showed that 41.9% strongly agreed or agreed with the same phrase.<sup>58</sup>

<sup>56</sup> *Ibid.*, p. 86.

<sup>57</sup> *Ibid.*, p. 88-89.

<sup>58</sup> UNDP, *Democracy in Latin America*, *op. cit.*, p. 101 (table 20).

Finally, again citing the UNDPs *Second Report*, the most significant finding elicited from focus groups conducted in Costa Rica y Honduras was that “people make distinctions based on a scale of corruption and express very different levels of tolerance depending on the severity of the act.”<sup>59</sup> In this way, the qualitative study was able to deepen our understanding of three crucial aspects of corruption: the levels of corruption identified, the criteria applied to establish the degree of corruption, and the threshold of tolerance.

Regarding the first aspect, study participants made a distinction between two or three levels of corruption: low and high in once instance, and minor, moderate, and serious in the other. With regard to the second aspect, diverse criteria were identified and can be combined as follows: the motivation behind the act (altruistic or selfish), the rank or category of the person involved (the higher the rank or degree of social responsibility, the more serious the act of corruption), the number of people affected, and the amount of money involved. Lastly, in term of the threshold of tolerance, there was acceptance of minor or low intensity acts of corruption. People are willing to live with such acts and may regard them as mechanisms for “justice” or as a means to offset inequality (reduction of social inequalities), even as they condemn intermediate or serious acts of corruption.<sup>60</sup>

Based on the data presented, we can conclude that there is a generalized public perception of widespread corruption in the government apparatus across Central America. What is more, many people reported having been victims of corruption during the preceding year. And, of particular interest to this study, this malaise is documented in the judicial system and appears to have worsened over time (bribes in the courts). Indeed, an alarming percentage of judges, including supreme court justices, acknowledged having been subject to bribery attempts.

Regarding public attitudes toward corruption, while the first impression is one of general rejection, a more thorough examination reveals tolerance for certain types of corruption considered to be minor or low impact. And that is not all: significant groups of citizens accept corrupt practices in exchange for obtaining other benefits or to avoid problems in other spheres. Lastly, while people condemn moderately serious and serious acts of corruption, they also report being willing to live with minor acts of corruption which they regard as mechanisms to offset social inequalities. In fact, a corruption scale seems to be operating in societies. It draws on specific criteria to evaluate such acts (motivation, rank of the individual, social impact of the conduct, and amount of money involved) and establishes a threshold of tolerance in which certain corrupt behaviors of lesser social impact are regarded as justified.

## Perceptions of corruption in the country reports

It comes as no surprise, then, that the country reports prepared for this study should elicit similar findings. First and foremost, every country save Costa Rica reported an acute perception of widespread government corruption in general, and in the judiciary in particular.

The cases of Guatemala and Honduras are illustrative. In her discussion of Guatemala, Carol Zardetto cites a recent World Bank study indicating that the phenomenon of corruption in

59 UNDP, *Second Report*, *op. cit.*, p. 324.

60 *Ibid.*, pp. 324-325.

that country is “well known” among people of all sectors who “openly admit that they live in a society dominated by corruption at all levels.” Moreover, 85% of those surveyed reported that the justice system is suborned, one in four respondents reports direct knowledge of a case of this nature, and 70% believe that the justice system is manipulated by the government, economic groups and parallel powers.

In his study of Honduras, Rigoberto Ochoa also discusses a World Bank study indicating that corruption and the rule of law are the “principal challenges” facing the country. Significantly, over half of those surveyed “reported a high frequency of bribes in the judicial branch,” while over 80% of the system’s users interviewed asserted that paying bribes is a “precondition for a speedy legal process.”

In the area of perceptions of corruption, however, the Costa Rica country report diverges from the regional trend. On the one hand, Paul Rueda offers abundant empirical data to demonstrate the declining trust in the justice system over the past twenty years. He warns that the courts’ handling of the political corruption scandals that have erupted since 2004 will heavily influence future public evaluations of the judicial system.<sup>61</sup> Nonetheless, he asserts that in his country, “the judiciary is not perceived as an entity rife with systemic corruption; to the contrary, a relevant role is attributed to it in the active struggle against corruption.” This is not to imply, he adds, that the judiciary is free of corruption problems, although they are probably less serious.

The El Salvador report also discusses public tolerance of judicial corruption. As mentioned earlier, this is a compelling issue in that it helps to elucidate, in part, the frequency with which corrupt acts occur, by all available indicators, in the judiciary in this case.

Besides underscoring the links between judicial corruption and political and economic corruption, Henry Campos (who views misconduct in the judiciary as an “inheritance” from the misconduct that occurs in the political and economic spheres) argues that Salvadorans regard such practices as “habitual behaviors that, while frowned upon, are accepted as necessary or justified.” Elsewhere in the report, he notes the public perception that “there is no other way to resolve cases, except by means of favors between cronies within a particular judicial entity.”

The El Salvador report, then, clearly reflects the problem of people’s acquiescence to acts of corruption in the administration of justice, along with the notion that corrupt practices are inevitable (“there is no other way to resolve cases”) or justified (seemingly for the purpose of obtaining individual goals rather than collective ones or the common good). Unfortunately, there is no specific information concerning which types of anomalous judicial acts committed for the purpose of obtaining illicit benefits are tolerated, raising concerns that such tolerance could extend to far-reaching or high impact corruption cases. Future studies could clarify this point and contribute to a more in-depth analysis.

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61 On this point, see the Programa Estado de la Nación, *op. cit.*, pp. 301-322; see also Vargas-Cullell, Jorge, Luis Rosero-Bixby y Mitchell Seligson, *op. cit.*, pp. 9-13.

## FORMS OF JUDICIAL CORRUPTION: THE MAIN RESEARCH FINDINGS

### Political corruption and judicial corruption

#### 1. *Appointments to the Supreme Court*

The area in which the country reports display perhaps the most variety and richness is in the documentation and description of the various forms of judicial corruption. First and foremost, the DPLF consultants were unanimous in pointing to the critical role played by the judicial appointments system, and particularly the selection of supreme court justices, in shaping the problem of judicial corruption in Central America.

Insufficient progress has been made in constitutional and legal reforms intended to strengthen judicial independence, introduce technical and merit-based selection criteria, and build mechanisms for citizen participation and transparency into the judicial appointment process. The legacy of fragility and submissiveness in the judiciary, a throwback to the authoritarian period, persists in the region to this day.

According to the country reports, one of the underlying reasons for this is that the political organs of each country have retained the authority to appoint supreme court justices (Table 9). In the six Central American nations, the Congress of the Republic or the National Assembly makes the final decisions about such appointments. In two countries, the executive branch plays a key role: it is responsible for proposing candidates in Nicaragua, and for making the appointments in Panama (although they are subject to “ratification” by the parliament).

El Salvador’s Council of the Judicature has nominating, but no decision-making, powers. This is also true of the nominating committees in Guatemala [Comisión de Postulación] and in Honduras [Junta Nominadora]. As a result, these three organs— which are pluralistic, feature broadbased public participation, and contribute to greater transparency in the recruitment of these supreme magistrates—lack full powers and are consigned to a limited, albeit important role.

It stands to reason, then, as Rigoberto Ochoa points out in the Honduran case, that although the new method to nominate and appoint Supreme Court magistrates is considered “democratic progress,” public perceptions remain ambiguous. While the opportunities for civilian participation are considered positive, “the National Congress is responsible for the making the selection from the proposed slate *by means of the partisan political vote of its members*; this is further complicated by the influence of economic groups that co-opt and delegitimize the democratic processes promoted by different sectors of Honduran society” (emphasis added). Ochoa also indicates that notwithstanding the recruitment “model” for supreme court justices, “in practice, partisan influence is observed in the make-up of the Supreme Court of Justice and the repercussions of this are evidenced in 8-7 votes by the full Court, for example, in cases such as that of former president Callejas...” which the justices resolved along political party lines.

Similarly, Henry Campos describes how politicized supreme court appointments undermine the independence of these judges and contribute to the emergence of corrupt practices in the

**Table 9. System for selecting supreme court magistrates:  
Central America**

Country	Term	Nomination	Appointment
Costa Rica	8 years, reelection		Legislative Assembly
El Salvador	9 years, staggered	Council of the Judicature*	Congress, two-thirds majority
Guatemala	5 years	Nominating Committee [Comisión de Postulación]**	Congress
Honduras	7 years	Nominating Committee [Junta Nominadora]	Congress, two-thirds majority
Nicaragua	5 years	President and National Assembly ***	National Assembly, 60% majority
Panama	10 years, staggered	Appointed by the Cabinet Council	Ratified by Congress, absolute majority

Source: Popkin, 2004: 446-447.

\* Have of the slate comes from selections by the bar associations.

\*\* Prepares a slate of 26 candidates.

\*\*\* Proposes slates after consultations with civil society.

judiciary. According to Campos, in interviews conducted with Salvadoran experts, “another topic of discussion concerning corruption in the judiciary was its relationship to judicial independence” and significantly, “a high percentage of citizens believes it is necessary to depoliticize the organs of the judiciary from sectors that might have economic and political interests: in other words, to pay more attention to mechanisms for judicial selection and appointment, so as to eliminate opportunities for unethical practices or political favoritism.”

This author stresses the powerful connection between political corruption and judicial corruption: “in reality, the tribunals cannot take all the responsibility for corruption which, based on all indications of how it operates, requires a two-way street and mutual influences. Where political corruption exists, it becomes possible to appoint magistrates, judges and employees who are subject to the orders of public officials devoid of integrity and to manipulate judicial decisions or proceedings according to political or economic interests.”

But Nicaragua offers perhaps the most flagrant example: Sergio Cuarezma and Francisco Enríquez Cabistán have documented blatant government meddling in the administration of justice through the system to recruit supreme court justices. According to these consultants, partisan political control of the magistracy, a notorious problem in that country, has even been associated with recent constitutional amendments.

Cuarezma and Enríquez note that “all of the interviewees concurred that judicial corruption does indeed exist,” and that it is due to “partisan politicization in the extreme” in the judiciary. This judicial corruption “increased in 2000 following the constitutional reforms implemented by the Sandinista Front for National Liberation (FSLN) and the Constitutionalist Liberal



Party (PLC).” According to interviews conducted by the Nicaraguan consultants, the reforms “ended up splitting the Supreme Court of Justice into two camps comprising political adherents of the FSLN and the PLC.”

What is more, according to press reports, Supreme Court president Manuel Martínez acknowledged undue politicization of the highest court when he complained that “in the court there is an 80% to 20% ratio in favor of the FSLN,” and lamented that “his party (the PLC) is being left out.”

Clearly, then, by granting the Congress final decision-making authority and by assigning, in some cases, a significant formal role to the executive branch, Central American systems to appoint supreme court justices have allowed political criteria, rather than the professional and technical merits and qualities of the candidates, to guide appointments to the highest courts of justice. Political favoritism and patronage, if not more blatant forms of political partisanship, have become deeply ingrained and have created an institutional environment conducive to acts of corruption. The ramifications of this have been observed in high profile political cases (such as, for example, those implicating prominent public figures in accusations of political corruption), as discussed in more detail below, in section V.1.d of this report.

One of the main findings of the DPLF study is how this in-built political aspect of the judicial appointment system shapes the problem of corruption in the administration of justice. Contrary to what those who stress the influence of economic factors in judicial corruption might believe, the comparative study shows that the judicial recruitment system—particularly at the level of the supreme court—plays a decisive role in the emergence and persistence of corrupt practices in judicial branches throughout Central America.

## ***2. Other variables affecting independence and accusations of judicial corruption***

But this is not the only way in which the Central American political authorities undermine the external independence of judges, thereby jeopardizing their impartiality and probity. The country reports reveal other circumstances which have led to clashes between the executive or legislative branches (or both) and the judiciary.

Honduras provides a case in point: in 2002 the legislature entered into a tug of war with the judiciary when it attempted to introduce an amendment grant itself exclusive authority to “interpret the Constitution.” This would have severely and unduly curtailed the powers inherent to the independent administration of justice. Fortunately, the national human rights ombudsman [Comisionado Nacional de Derechos Humanos] filed a suit challenging the constitutionality of the proposed constitutional reform, which ultimately was resolved favorably in a judgment handed down by the Constitutional Chamber of the Supreme Court. In this way, the judicial organs defended their constitutional jurisdiction and preserved the appropriate balance among the branches of government by preventing the excessive and illegitimate concentration of functions in the Congress.

But tensions between politics and justice in Central America are not always played out through the appropriate institutional channels. On some occasions, in their pursuit of short-term political strategies, the executive branch and the congress have openly confronted the judicial authorities, even to the extent of accusing them of corruption. The country reports describe such circumstances in El Salvador and Honduras.

Henry Campos points out that in 2006—in the framework of a misguided new “security plan,” in the sense that it focused exclusively on harsher enforcement measures—the Salvadoran government launched a number of attacks against judges featuring public accusations of incompetence and corruption. In Campos’ view, this was a case of a “publicity campaign” to establish a “media interest:” the executive branch “in order to deflect attention from its own responsibility, takes out paid advertisements or issues strong, critical statements in individual cases in which judges have issued rulings releasing the accused. This stirs up the press, which then disseminates biased and hyped up editorials about corruption (in the judicial system), while ignoring the responsibility of other public security actors.”

In Honduras, too, the political authorities attempted to undermine the independence of the courts through public declarations and attacks that were rapidly disseminated by the press. Experts interviewed by Rigoberto Ochoa for this study “affirmed that the executive branch, through the Secretariat of Security, on several occasions criticized the rulings handed down by certain judges and magistrates, who saw this as a political maneuver to cover up its own incompetence and to improve its image at the expense of the judicial branch.” In another episode featuring a government attack on judicial independence, “At a public event with the then president of the National Congress—who was also a presidential candidate—the former secretary of state demanded the removal of the magistrates of the Supreme Court of Justice in a clear case of interference with the independence of the judiciary and a threat to political stability and the rule of law.”

### **3. Propagation of political corruption: recruitment of judges and judicial staff**

The mechanism to appoint of supreme court justices is not the only one that undermines the independence, and by extension the impartiality, of the judiciary, and creates fertile ground for acts of corruption. The system to recruit lower-level judges and judicial support staff is also rife with shortcomings that easily devolve into corrupt practices. The recruitment system for judges and auxiliary staff throughout the region assigns a predominant role, whether direct or indirect, to the supreme court. The difference is that what occurs in this case is not a frontal assault on the “external independence” of the judiciary (the institution’s independence vis-à-vis other branches), but rather on its “internal independence” (that of each judge with respect to the organizational structure).

While councils of the judicature have been introduced in the region, they have essentially been watered down and relegated to the role of “collaborating organs,” to borrow the expression used by the UNDP in its Second Report.<sup>62</sup> One way or another, the highest court usually retains control over this newly established entity: it may be functionally superior to the council, appoint its members, or directly select judicial officials (Table 10).<sup>63</sup>

62 UNDP, Second Report, *op. cit.*, p. 292.

63 See Popkin, Margaret, *op. cit.*, pp. 450-452; Jiménez Mayor, Juan *et al.*, *op. cit.*, p. 39; UNDP, Second Report, *op. cit.*, p. 289.

**Table 10. Councils of the judicature and auxiliary organs of the judicial government and administration in Central America**

Country	Organ
Costa Rica	Council of the Judicature/Superior Council
El Salvador	Council of the Judicature
Guatemala	National Council of the Judicature
Honduras	General Council of the Judicature
Nicaragua	National Council of the Judicial Administration and Career

Sources: Popkin, Margaret, *op. cit.*, pp. 450-452; Jiménez Mayor, Juan et al., *op. cit.*, p. 39; UNDP, Second Report, *op. cit.*, p. 289.  
Table created by author.

Several of the country reports describe how high-ranking members of judiciary use selection mechanisms (among other means) to exert improper influence over lower-level judges. The 2002 constitutional reform in Honduras, for example, created the Council of the Judicature, but its organic law has never been approved. According to Rigoberto Ochoa, this means that most judicial appointments continue to be driven by discretionary criteria and patronage. What is more, a contested decision from the full Court (eight votes in favor and seven against) conferred upon its president “the power to appoint, transfer, and remove judicial staff,” even though this contravenes article 313.8 of the Constitution which grants the Supreme Court the authority to “appoint and remove magistrates and judges subject to the recommendation of the Council of the Judicial Career.”<sup>64</sup>

Nicaragua offers another blatant example of the way in which the judicial appointment system undercuts the internal independence of judges. Cuarezma and Enriquez point out that the judicial career law in that country (often touted as an example of progress in judicial independence and professionalism) has yet to be regulated. This has impeded its application, leaving the Supreme Court responsible for the recruitment of judges.<sup>65</sup> But that is not all. According to the consultants, “the appointments are made according to territorial fiefdoms (the implementing regulations for the Judicial Career Law would put an end to this practice, which is exactly why it has yet to be approved internally). Each magistrate controls a certain geographical area and may remove judges for reasons of political expediency using criteria pertaining to ‘institutional organization’.”

Supreme Court President Manuel Martínez has corroborated this account in statements reported in the written press: “basically the magistrates will not agree to the approval of a set of

64 This authority to “appoint, transfer, and remove judicial staff,” confers a sort of all-embracing power on the head of the Supreme Court. This is extremely undesirable, particularly taking into account the aforementioned Central American (and generally Latin American) tradition of using the appointments system as a way of subordinating judges. The power to order transfers can be used arbitrarily to the extent that there are no adequate parameters and controls in place to prevent it. This conflicts with the principle of guaranteed tenure included in the statute governing judges (principle 12 of the United Nations Basic Principles on the Independence of the Judiciary. In addition, the International Commission of Jurists’ Centre for the Independence of Judges and Lawyers (CIJL) has criticized the excessive powers that the Honduran Supreme Court has conferred upon its president, pointing out that those attributes, “should be exercised by the full Supreme Court, the organ upon which the Constitution confers such functions,” and that “it does not appear to be advisable or appropriate to delegate these functions to the individual occupying the presidency of the Supreme Court.” See CIJL, *Honduras: la administración de justicia, la independencia del Poder Judicial y la profesión legal*, Geveva, CIJL, 2003, p. 34.

65 According to a recent government-supported study, “Nicaragua has made remarkable progress on the path toward greater independence. Despite what has been expressed by users and the constant accusations from the press, important changes have occurred. One of the strengths of the process, in fact, has been the approval of the Judicial Career Law, Law N° 501, which represents a transcendental step for the institutionalization of the Judiciary.” See Jiménez Mayor, Juan et al., *op. cit.*, p. 188.

rules or regulations for the application of that law [on the judicial career], because they do not want to lose their influence over administrative decisions such as the appointment of judges.” He added that, “appointing a judge or secretary is not comparable to issuing a judgment in the constitutional, civil or criminal venue.”

In contrast, the country report prepared for Costa Rica, a country with the most deeply rooted democratic tradition, states that “the intervention [of magistrates] in the matters of lower-level judges, sometimes with the veiled intention of influencing a legal decision,” occurs only sporadically and is a thing of the past. The report attributes the accomplishments made in this regard to the effective implementation of the judicial career mechanism (Council of the Judicature, judicial career law, and the qualifications of the Council members). “In this way,” asserts Paul Rueda, “following the introduction of a merit-based system supported by psychological and social profiles, with the exception of superior judges, the appointment of the rest of the judges no longer was contingent upon the will of the judicial authorities. The full Court, which continues to appoint superior judges, must draw from a slate made up of individuals who have participated in a competitive process.” Therefore, this consultant adds, “Despite some criticism, there is no question that the independence of judges was strengthened by the introduction of the judicial career.”

The reality documented by the country reports prepared for this study corroborates some of the issues raised in previous studies as to how the “political” nature of the judicial selection mechanisms contributes to judicial dependence in different countries in the region, perhaps with the exception of Costa Rica. The aforementioned study by the University of Salamanca (Spain), which surveyed Central American judges about various aspects of their work, shows that judges themselves are aware of the important role that close ties to the executive and legislative branches, as well as to higher-ups in the judiciary, plays in the selection process, as observed in Table 11. The table also contains information on the importance judges attribute to prior experience with the administration of justice in obtaining an appointment. This offers a more detailed idea of the interference of factors related to cooptation and corporatism in the judiciary.

Along these same lines, the University of Salamanca study shows that Central American judges are equally aware that the political powers that be (executive, legislative, political parties), prominent judicial figures (particularly high-ranking members) and the media, have considerable influence over legal decisions (Table 12). As shown below, this is corroborated in great detail, and in all its nuances, in the country reports prepared for this study.

#### **4. High impact government corruption and judicial corruption**

In effect, the judicial dependence created by the politicized recruitment process has a direct impact on improper conduct by judges in all manner of judicial proceedings. Of particular relevance were the high impact cases of alleged government corruption—such as those implicating former presidents in more than one country—discussed in the country reports. These instances of alleged “high corruption” or “large-scale corruption,”<sup>66</sup> arouse considerable

66 “Large-scale” corruption is understood as that involving high-level officials and usually includes international graft and hidden foreign bank accounts. This contrasts with “survival” corruption, which involves acts by public officials who receive low wages and are living on low incomes. For a discussion of this, see Programa Estado de la Nación, *XI Informe sobre el Estado de la Nación, op. cit.*, p. 316 (cuadro 7.7).

**Table 11. Judicial appointments: percentage of judges who believe it is very important or important to have a close relationship with...or to have had a previous judicial posting**

Country	Government or Legislative	Supreme Court or well-known judges	Previous judicial postings
Costa Rica	19.2	41.6	88.5
El Salvador	46.7	65.0	75.0
Guatemala	46.0	49.2	63.5
Honduras	64.7	64.8	43.2
Nicaragua	63.6	79.0	49.1
Panama	25.6	33.3	89.8

Source: University of Salamanca, 2004: 54 and 55.  
Table created by author.

**Table 12. Degree of interference of the authorities in decisions made by judges in Central America: Percentage of judges who believe that there is substantial interference**

Country	Executive	Legislative	Parties	Judicial authorities	Media
Costa Rica	11.5	7.7	6.4	21.8	3.2
El Salvador	26.2	27.9	26.2	24.6	83.6
Guatemala	46.2	42.8	17.5	37.5	60.3
Honduras	41.2	45.1	58.9	29.4	62.8
Nicaragua	40.0	27.3	60.0	43.7	70.9
Panama	23.1	18.4	23.1	28.2	48.7

Source: University of Salamanca, 2004: 38 and 39.  
Created by author.

public interest and demands that the judicial system act efficiently to detect, investigate, prosecute and punish them.

In Honduras, for example, the Supreme Court came under vehement criticism for its lack of impartiality in proceedings against former president Rafael Leonardo Callejas. According to Rigoberto Ochoa, the high court upheld the actions of a judge who took up cases against the former leader even though she lacked jurisdiction in the case. In doing so, she succeeded in dismissing a series of criminal suits involving accusations of abuse of authority and misappropriation of public funds.

In the four cases instituted by the Special Prosecutor against Corruption since 1994—Brazos de Honduras, Comunitas, La Familia, and «Petrolazo»—a judge lacking jurisdiction cleared Callejas of all criminal liability, and these actions ultimately were upheld by the Supreme Court. The scandal was such that in September 2006, seven of the Supreme Court magistrates published a communiqué, clarifying responsibility for the matter: “they asserted that they were compelled to vote in a particular way, as they disagreed with a judge lacking jurisdiction hearing these cases in contravention of article 90 of the Constitution of the Republic.”

Carol Zardetto also observed improper court proceedings in cases involving former Guatemalan president Alfonso Portillo and one of his closest collaborators. In a case concerning the misappropriation of public funds, Portillo benefited from sudden requests for leave by the sitting judge, or controversial rulings such as one suspending a previously issued arrest warrant. Meanwhile, others involved in the same proceeding moved to classify as “State secrets” important Ministry of Defense documents that could corroborate misconduct involving hundreds of millions of quetzals.

Another high profile case in Guatemala involved Judge Posadas Pichillá, who attempted to illegally benefit Francisco Alvarado MacDonald, a financier of the Portillo campaign implicated in the “twin banks” bankruptcy scandal. The collapse occurred after 90% of the loan capital of both banks had been granted to companies lacking a financial base which MacDonald owned. It required an outlay equivalent to \$160 million from the Banco de Reserva. Although Judge Posadas Pichillá ultimately was removed for attempting to illegally authorize Alvarado MacDonald to recover the two banks that had been taken over, he was not subject to any criminal sanction whatsoever and currently works as an attorney for the financier.<sup>67</sup>

Henry Campos reports that in September 2005, former Salvadoran president Francisco Flores Pérez and several of his cabinet officials were found to be involved in financial operations that resulted in suspicious increases in wealth. The Probity Section of the Supreme Court, exercising its normal powers, asked several banks for information. The banks—one of whose executives had been a foreign affairs minister under Flores—decided to ask the Supreme Court whether the aforementioned office had the power to request the bank records of former officials (something the Probity Section had been doing since 1992, in accordance with the law). The Supreme Court, *en banc*, ruled to annul the request by its own oversight division, stating that such powers “are reserved by the Constitution for the Full Court, since otherwise they could cause political damage.”

As a result of this decision by the Salvadoran high court, the Probity Section is no longer able to request the bank records of former civil servants, even though the offense of illicit enrichment is found in article 33 of the Criminal Code. According to Campos, the ruling triggered public objections. He concluded that the episode “demonstrates the difficulties institutions face in acting independently in politically charged cases.”

Turning to Nicaragua, one informant reported irregular court proceedings associated with carrying out the sentence imposed on former president Arnoldo Alemán who, in 2003, was sentenced to 20 years in prison for the crimes of money laundering, fraud, misappropriation of funds, and embezzlement, among others.

Another expert, meanwhile, described blatantly politicized interference from the Constitutional Chamber of the Supreme Court with respect to the Supreme Electoral Council. Cuarezma and Enríquez reported that, according to the expert, the chamber ruled that an *amparo* remedy presented by the president of the Supreme Electoral Council, Dr. Roberto Rivas, “of Sandinista leanings,” was well-founded. In view of the liberal members’ failure to attend the Supreme

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<sup>67</sup> Another Guatemalan case of politicization of the justice system has had a powerful public impact involved the Constitutional Court rather than the ordinary jurisdiction. The Constitutional Court in Guatemala is autonomous, unlike the constitutional system in force in other countries of the region. It was the court of magistrate Guillermo Ruiz Wong, who is accused of having altered the lottery system to appoint the full Constitutional Court that allowed Efraín Ríos Montt, who had come under severe censure for serious human rights violations, to run in the 2003 presidential elections.

Electoral Council, the chamber ordered Rivas to use alternates to create a quorum in the institution. In this way, Rivas was reelected president of the electoral entity, and new presidents of the Departmental Electoral Councils with ties to the official party (FSLN) also were elected, effectively sidelining the opposition party (PLC).

In contrast, Paul Rueda reports that the swift reaction of the Costa Rican Public Ministry to the 2004 corruption scandals implicating former presidents of that country enhanced the credibility of the judicial institution (the Public Ministry is part of the judiciary in Costa Rica). The author added that this has tended to wane over time as the matter has gradually faded from the media. It will therefore be necessary to await the final outcomes of the proceedings in order to better evaluate the courts' response in cases of political megacorruption and the attendant impact on public opinion.

The country reports show that significant decisions handed down by the courts of justice in cases concerning alleged crimes of corruption against former presidents and other high-level officials of different countries of Central America—and certain supreme court rulings in particular—may have been motivated by political patronage networks in the judiciary. By covering up politically corrupt practices, and through its direct involvement in corrupt acts to benefit high-level government officials who commit crimes in the discharge of their duties, the judicial branch has confirmed its complicity in an apparatus of corruption that uses the political system of judicial appointments as one of its main tools.

As a result, “the criminal degradations of politics,” to borrow Perfecto Andrés Ibáñez’s apt phrase, go unpunished.<sup>68</sup> This seems to be due to irregularities in the functioning of a tangled web of state institutions or, as Luigi Ferrajoli refers to them, “clandestine infra-States.”<sup>69</sup> It has a tremendously pernicious effect on society by making a mockery of the legal principle that no one is above the law, particularly civil servants. When the judiciary is complicit in whitewashing this status quo, the independence and impartiality of the courts of justice are seriously impaired. As a result, the confidence the public must have in those tribunals is eroded and the state of constitutionality and the rule of law undermined.

Certain aspects of the politicization of the Central American judicial system in the administration of justice are particularly worrisome. Illegal rulings in favor of certain politicians accused of corruption are not the only problem. In at least one case, apparent political control over the Supreme Court led to the elimination of an important mechanism for the prevention and punishment of corruption in all areas: the collaboration of banking and financial institutions with State oversight organs (Probity Section of the Salvadoran Supreme Court). Moreover, it is of particular concern that the political control exercised by the party in power in Nicaragua appears to extend to the Supreme Court of Justice and, through it, to the Supreme Electoral Tribunal. This is an assault on the very foundations of democracy.

68 Andrés Ibáñez, Perfecto, «Introducción», en Andrés Ibáñez, Perfecto, (ed.), *Corrupción y Estado de derecho: el papel de la jurisdicción*, Madrid, Trotta, 1996, p. 13.

69 Referring to the Italian situation, Ferrajoli points out that: “our State is actually a double State, behind whose legal and representative façade has grown a clandestine infra-State with its own codes and tributes, organized in covert power centers, and devoted to the private appropriate of the public and secretly traversed by recurrent subversive temptations. Therefore, a hidden and parallel double State that contradicts all the principles of political democracy and the rule of law from the principle of legality to those of publicity, visibility, controllability, and the accountability of the public authorities.” See Ferrajoli, Luigi, “El Estado constitucional de derecho hoy: el modelo y su divergencia de la realidad,” in Andrés Ibáñez, Perfecto, (ed.), *Corrupción y Estado de derecho: el papel de la jurisdicción, op. cit.*, p. 16.

## Inefficiency of the justice system and judicial corruption

We have discussed judicial corruption directly linked to political corruption, and to the judicial appointments mechanism in particular (especially supreme court justices). The country reports, however, described many other forms of judicial corruption. In some cases, problems of systematic or structural corruption, of varying intensity or severity (often medium to light) are associated with obstacles to efficiency in the performance of Central American judiciaries. In other words, it would appear that the inefficiency of judiciaries—which, as stated earlier, has been identified as one of the three main issues for judicial reform in Latin America—is at the root of many of these types of corrupt practices which, due to their nature, are frequently tolerated by the population.

According to Juan Enrique Vargas Viancos, the problems associated with corruption in Latin American judiciaries “should not be viewed as isolated events confined to bad officials, but rather for what they really are: widespread problems rooted in the same system in which they operate.” He adds that “the problem lies in aspects central to the structure and functioning of the judicial systems on our continent, which create an environment of negative incentives for the individuals working in those systems.”<sup>70</sup>

Referring generally to the way in which Latin American (including Central American) judicial systems organize and perform their functions, one could argue that they meet the core conditions of Robert Klitgaard’s stylized equation: “corruption = monopoly + discretion – accountability.”<sup>71</sup> Which is to say that the judiciaries of Latin America have absolute control over the exercise of judicial powers and enjoy enormous margins of discretion in the adoption of decisions, while mechanisms for accountability and oversight are weak (including disciplinary measures).<sup>72</sup>

### 1. Inefficiency and forms of corruption found in the country reports

Before presenting some of the more relevant cases of judicial corruption, it is worthwhile to note the types of corruption encountered DPLF consultants in their respective countries. According to Carol Zardetto, for instance, Guatemala’s Commission to Strengthen Justice [Comisión de Fortalecimiento de la Justicia] identified the ten most common corrupt practices in that country as follows:

- (i) The use of the judiciary to issue rulings by judges, magistrates, and other justice system operators intended to exert pressure on the parties to a legal matter.
- (ii) Illegal fees or charges.
- (iii) Acceptance of bribes and monetary incentives to expedite judgments or to adopt other procedural measures, including judgments with a particular outcome.

70 Vargas Viancos, Juan Enrique, «Poder Judicial, políticas judiciales y corrupción» (mimeo) paper presented at the 9th International Anticorruption Conference held in Durban, South Africa/Sudáfrica in October 1999), Santiago de Chile, 1999, pp. 4 and 3.

71 Klitgaard, Robert, *Controlando la corrupción*, La Paz, Bolivia, Fundación Hans Seidel – Editorial Quipus, 1990, p. 83.

72 Other studies on the phenomenon of judicial corruption concur that Klitgaard’s formula is applicable to Latin American judiciaries. See Dargent, Eduardo, *op. cit.*, p. 31; Vargas Viancos, Juan Enrique, *op. cit.*, p. 39.



- (iv) The establishment of fees for granting alternative measures.
- (v) Influence peddling by friends, relatives, political leaders or other powerful individuals.
- (vi) Payments to avoid legal proceedings.
- (vii) Payments in exchange for issuing precautionary measures and proceeding to the seizure of assets.
- (viii) Acceptance of payments for service of legal process or manipulation of such service to the detriment or in favor of one of the parties.
- (ix) Deliberate misplacement of files or petitions.
- (x) Deliberate loss of or tampering with evidence and property seized and in the custody of the state.

Zardetto's research on minor and moderately serious corrupt practices confirms many of the types of corruption described by the Guatemalan commission. She argues, however, that such occurrences constitute "a systematic way of operating by certain judges and auxiliary personnel in the justice system." According to Zardetto, the "most common and recurring cases" she encountered were:

- (i) Improper fees in exchange for issuing a release order.
- (ii) Improper fees in exchange for adjusting the classification of the offenses.
- (iii) Improper fees in exchange for the return of documents such as vehicle licenses, and the like.
- (iv) Improper fees in exchange for not releasing individuals subject to criminal proceedings.
- (v) Improper fees in exchange for expediting judicial procedures.
- (vi) Misappropriation of child support payments or deposits in court.
- (vii) Undue influence to sign documents and accept transactions.
- (viii) Improper return of items connected to an offense.
- (ix) Undue influence by the judge over the police to switch the police parties.

Rigoberto Ochoa identified an extensive list of corrupt practices in Honduras, including: "delay of justice; abuse of authority; failure to discharge duties by public officials; misplacement of files; theft of paper records; manipulation of service of legal process; alteration of paper records; tampering with writs; undue authorization of documents; illegal fees; illegal delegation of functions; illicit enrichment; disobeying a court order; irregular return of assets; irregular seizure; irregular release of seized assets and bank accounts; irregular stays of proceedings; unfounded disqualification of a judge; loss of material evidence; issue of false summons; tampering with documents; refusal to receive statements; false testimonies; noncompliance with deadlines; misplacement of legal documents; loss of securities; larceny; nonrecusal from a legal proceeding;

failure to abide by an appeals court judgment; interference in a trial; creating a situation of lack of a defense; irregular release of the accused; arbitrary revocation of arrest warrants; irregular granting of precautionary measures; refusal to carry out a judgment; bribery; failure to report irregularities in the file; irregular appointment of judges; obstruction of justice; bias in cases; unwarranted annulment of a commitment order; unwarranted suspension of a hearing; theft of legal documents; improper assumption of official functions; payments to process servers to carry out judicial formalities; malfeasance in office.”

Ana Belfon reports the following types of judicial corruption in Panama based on interviews with expert witnesses and information gleaned from press sources: “monetary payments in exchange for information; altering the contents of a report; sale of draft rulings; protection for individuals connected to drug trafficking; granting of alternative measures in exchange for money; lawyers drafting judgments; failure to transmit detention orders by junior personnel; and jail privileges, among others.”

Lastly, in the case of Nicaragua, Sergio Cuarezma and Francisco Enríquez Cabistán, citing a number of sources, asserted that, “there is no disagreement that corruption in the judiciary is a real phenomenon” and underscored the following “factors” as conducive to various types of judicial corruption:

- (i) Political party control over the judiciary.
- (ii) Political operators who override the external and internal independence judges and magistrates.
- (iii) The highest authorities of the Supreme Court of Justice override the internal independence of judges and magistrates.
- (iv) Pressure from powerful economic or religious sectors or certain international actors.
- (v) Influence peddling, bribery by business people and drug traffickers to obtain rulings favorable to their interests.
- (vi) Deterioration or breakdown of most of the structures for the administration of justice. There is also a perception that not all judges are corrupt, but even legally defensible proceedings can come under question because the judiciary is so discredited in general.
- (vii) Shortage of economic and technological resources in the judiciary and inadequate use and distribution of its budget.
- (viii) The influence (and in some cases, imposition) of international aid to approve certain codes or laws, with no accountability in terms of the quality of the laws which, depending on the specific case, may leave a lot to be desired.
- (ix) Failure to attend to the occupational health needs of judicial personnel.

We are talking, then, about an extensive list of corrupt practices and factors conducive to them which, leaving aside those involving politically-driven interference and corruption, primarily revolve around illegal payments. Bribes are at the heart of a considerable number of irregular

acts in the administration of justice. As already noted, structural problems such as judicial inefficiency often create incentives for bribery. It emerges and spreads in an institutional and civic culture that tolerates less serious forms of corruption without regard for its pernicious effects in the bigger picture. At the same time, there also appears to be a proliferation of more serious corrupt practices, such as those associated with drug trafficking.

## **2. Judicial corruption and drug trafficking**

Out of this hodgepodge of irregular judicial practices that undermine the impartiality of judges for the purpose of obtaining some private gain, it is important to spotlight certain particularly serious and pervasive situations. The first is the frequent incidence of drug trafficking as a cause of judicial corruption in several nations of the region. Here it is useful to examine in greater depth a case from Guatemala report, as it illustrates the way in which drug mafias infiltrate Central American judiciaries in their quest for impunity.

In this case from 2001, a first instance criminal court judge routinely ordered the release of groups of drug traffickers, even after they had been surprised with enormous quantities of drugs in their possession. One example is the release several individuals who were apprehended with 380 kilos of cocaine in their possession and were facing accusations of illicit drug trafficking. After a complaint was presented, the disciplinary control agency detected a pattern of official behavior that benefited drug trafficking in general through the use of “guaranteeist” arguments: other entities of the criminal justice system (the police for instance) would fail to adequately perform their duties or commit “irregularities.” The judge, in turn, would then use this as grounds for ordering the release of the accused and close the case.

To its credit, the court supervisory body [Supervisión General de Tribunales] responsible for the investigation pursuant to an order issued by the Judicial Discipline Board [Junta de Disciplina Judicial], decided to extend its inquiry to other cases that had been processed by the same court. In doing so, it discovered an identical pattern of behavior in cases involving contraband offenses. This led to the conclusion that a strategy to commit illegal acts was operating for both categories of offenses (drug trafficking and contraband): officials from various law enforcement agencies would give the appearance of taking the proper actions while actually seeking to benefit the criminals.

More worrisome still, Zardetto affirms that “we were able to confirm the same pattern of behavior in other cases: apprehension agents, prosecutors, and lower-level judges who engage in a series of procedural anomalies that later serve as justification to free the accused.” This consultant added that “in no case did those responsible for these anomalies suffer any consequences for their behavior.”

The Honduras country report documents a similar case from 2004 involving illicit drug trafficking. At the defense attorney’s request, the presiding judge ordered house arrest for the accused in lieu of a pretrial detention order, leading to the escape of several individuals accused of illicit drug trafficking. What is noteworthy in this case is that the modification of the detainees’ legal status was based on certain irregularities (suspicious change in paper records, inadequate identification of residence to justify the substitution) that seemed to point to complicity among the different criminal justice officials involved to illegally benefit members of drug trafficking organizations.

### 3. Other judicial corruption networks

Judicial corruption networks, however, can also operate in cases that tend to draw little public attention; such cases are presumed to be “minor” in the sense that the victims lack political, economic or social power, and the amounts of money involved in illicit payments to judicial officials are relatively moderate or small (even though they may constitute hefty outlays for low-income people). This type of judicial corruption is extremely pernicious, particularly where it has become widespread.<sup>73</sup>

In this regard, it is useful to return to the Guatemala country report, which describes the irregular behavior of a justice of the peace who apparently was colluding with the local police to carry out “raids” on prostitutes. Once the women, who were illegal migrants, had been arrested, they were victims of extortion in the courtroom, where irregular payments were required of them in exchange for their freedom. In this case where the consultant has observed the objectionable behavior of the responsible judicial authorities, it seems clear once again that a mafia network was in place implicating more than one criminal justice agency.

Judicial corruption networks—which often have ramifications for other public entities, notably the police force, attorney general’s office or penitentiary system, and may involve dishonest ties to individual attorney’s or law offices—represent a serious threat to the impartiality and proper functioning of the justice system (and by extension the constitutional rule of law). Such networks may emerge as monopolistic structures, which seems to have been the case of the magistrate’s court [juzgado de paz] in Mazatenango, as reported by Zardetto. Or they may operate as part of a competitive market of extortion and judicial bribes, feeding spirals of corruption.<sup>74</sup> It is easy to see that the involvement of criminal organizations—even when their illicit activities are limited to “small change”—creates an even more serious situation and makes it harder to eradicate such practices. This is further complicated by how deeply rooted such practices are in the judicial apparatus.<sup>75</sup>

Among the many forms and manifestations of judicial corruption documented in the country reports, it is important to mention the role of attorneys as corrupting agents of the judiciary. The role played by legal professionals in judicial misconduct is often understated. Rigoberto Ochoa reports that, according to several people interviewed in Honduras, many litigating attorneys attempt to raise their profits by demanding sums of money from their clients, which ostensibly are to be shared with the judge (or prosecutor). This clearly contributes to the justice system’s negative image. According to this author, unscrupulous attorneys “offer invitations and gifts to judicial officials with the intention of ensuring that, when their cases are heard, they will be resolved according to their wishes.”

73 Susan Rose-Ackerman asserts that “sometimes a complex network develops to sustain corrupt systems.” Commenting on the case of Venezuela, she points out that “there are judicial “tribes” that comprise informal networks of judges, court staff, private attorneys and public officials.” See Rose-Ackerman, Susan, *La corrupción y los gobiernos: causas, consecuencias y reforma*, Madrid, Siglo XXI de España, 2001, p. 216. The phenomenon of “judicial tribes” (or “rings” or “cliques”) in Venezuela has been documented for a long time. For more information, see Pérez Perdomo, Rogelio, «Informe sobre Venezuela», en Correa Sutil, Jorge (ed.), *op. cit.*, pp. 580-581.

74 According to Rose-Ackerman, “when there are multiple payers and receivers of bribes, complex markets can emerge. Frequently, in a competitive environment, bribes lead to more bribes until the system is impregnated by corruption. *Op. cit.*, p. 173.

75 As one might suppose, judicial corruption networks do not always limit themselves to survival or day-to-day corruption, but may also engage in large-scale corruption. Indeed, Rigoberto Ochoa points out that “several of his key informants in Honduras stated that powerful economic or financial groups endeavor to have “pawns” in the various judicial entities who “can influence certain cases so that they do not become part of judicial proceedings or go to trial.” These “pawns” also provide the invaluable service of obstructing adverse trials and expediting beneficial proceedings, according to this author.

#### **4. Risk situations for judicial corruption: judicial mora, case distribution, office management, delegation of duties**

There are a number of other corrupt practices which, by all indicators, are very common in Central American courts and are directly related to inefficiency in the administration of justice. As observed from the lists presented earlier, while there are many different types of corruption, the common thread seems to be that it occurs as a result of structural weaknesses in the organization and functioning of the judicial apparatus.

Undue procedural delays (or judicial mora) is an important cause of practices such as extortion and bribery, especially minor acts of corruption to access information in a file, for instance, or expedite a procedure. The protagonists in such situations usually are auxiliary judicial officials or administrative staff.<sup>76</sup> To give just one example, an expert cited by Cuarezma and Enríquez Cabistán asserted that “corruption is present in every sector [and] begins at the very bottom.... [T]he court clerk accepts bribes to expedite legal procedures or receives gifts from the litigating attorneys in exchange for favorable judgments.” Similarly, another informant asserted that, “corruption begins with little gifts to the secretaries in exchange for expediting judicial procedures.” The president of the Nicaraguan Supreme Court of Justice, Dra. Yadira Centeno in February 2005 statements reported in the press, acknowledged that “there is corruption in the judiciary” and “there are officials who charge fees to expedite cases that are stuck in certain courts.”

Another common form of judicial corruption in Central America involves tampering with the computerized system that randomly distributes cases among the various courts. This was reported in Honduras as follows: “the application of computer technology represents progress in judicial management.... [H]owever, the random case intake system in the court of first instance is not producing the desired outcomes in terms of transparency in case distribution: it can be manipulated based on the various interests at stake to ensure that cases are assigned to previously selected judges.”<sup>77</sup> It is particularly telling that one of the most important features of the judicial modernization process undertaken beginning in the 1990s, namely computer innovation, should be distorted in such a way as to become just one more vehicle for corruption.

The structural problems of judicial organization and management that give rise to acts of corruption are also present in the administration of court offices. The Honduras country report describes an inspection file examined for this study, which revealed that a first instance court in the northeast did not keep the various records and books required by law, including records of material evidence or evidence identification, logs of deposit certificates (without which it is impossible to know their amount, origin, or disposal), and records of drug incineration or destruction. The inspection also determined that the judge had decreed an alternative measure to pre-trial detention for an individual accused of murder, even though an appeals court had rejected on appeal the bond deposited and the precautionary measure.

<sup>76</sup> Rose-Ackerman asserts that “bribes can limit some of the costs and inconveniences of the judicial proceeding [and] serve as a way to expedite decisions where there are excessive delays and bureaucratic procedures.” She adds that “even when the judges are not personally corrupt, the officials responsible for assigning the cases and managing the files may request or accept bribes....[T]he absence of official court costs create incentives for employees and judges to request unauthorized payments for costs.” *Op. cit.*, pp. 212 and 213. On the drawbacks to the lack of fees for judicial services, see also Vargas Viancos, Juan Enrique, *op. cit.*, p. 15.

<sup>77</sup> Dargent’s study on judicial corruption in Peru also detected the problem of electronic manipulation of case allocation. See Dargent, Eduardo, *op. cit.*, pp. 83-87.

These serious anomalies (note that the cases involved drug trafficking and certificates of deposit in court, among other things) with apparent links to acts of corruption, can be explained, at least in part, by the absence of controls or the difficulty of enforcing them, and by the judge's excessive discretion and the lack of transparency and information about his or her judicial and administrative decisions. Such circumstances are known to be conducive to corrupt practices.

The Guatemala country report cites experts who associate the excessive discretion accorded judges—although in this case in the discharge of their judicial rather than administrative functions—with acts of corruption.

According to one expert interviewed by Carol Zardetto, “the problem becomes very complicated since a dishonest judge can maneuver in such a way that it is impossible to detect the presence of corruption.” Another informant in Guatemala confirmed this notion with reference to drug trafficking cases: “another example of how the judges operate is the issue of discretion. One case that comes to my mind involves the justices of the peace. We had to go to the Congress to ask that they not be able to issue rulings—that they not be the ones to determine the category of the offense in cases involving drug-related activities—as they invariably would choose the offense with the lightest sentence.”

The delegation of duties by judges to auxiliary judicial personnel is another area in which pervasive, structural inefficiency in the administration of justice gives rise to corruption in Central American judiciaries.<sup>78</sup> According to Henry Campos, the situation in El Salvador is such that, “in some courts the judges are manipulated by certain employees who in fact control the outcomes of proceedings based on their self-interest” and that those judges “either are unaware of such machinations or, if they are aware of them, turn a blind eye to the problem.”

According to Carol Zardetto, one of her informants corroborated the reality of the phenomenon in Guatemala and made a very interesting point about how the staff recruitment system, which is under the purview of the Supreme Court, plays a key role in limiting the (internal) independence of judges: “junior staff members have a lot of power, especially because they are appointed by Supreme Court magistrates. The judge does not dare to contradict an official who has been appointed by a magistrate and frequently is under his protection.”

## **MECHANISMS TO FIGHT JUDICIAL CORRUPTION**

Central American justice systems rely mainly on traditional mechanisms to control the forms of judicial misconduct documented in all of their diversity and complexity in the country reports. They combat corruption in their ranks through the disciplinary system for judges and auxiliary judicial staff, and the prosecution of cases brought by the Public Ministry. Leaving aside the institutional variations in each particular country, the region's judiciaries generally include internal disciplinary control mechanisms and external controls through criminal proceedings.

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<sup>78</sup> As Juan Enrique Vargas Viancos has observed, “the phenomenon of delegation of duties is another serious cause of corruption in judicial systems. Again, this is due to structural causes and not to any presumed negligence on the part of judges to assume their responsibilities. The delegation of duties is inherent to collapsed judicial systems and those based on written proceedings.” *Op. cit.*, pp. 16-17.

No special programs for the prevention, punishment or eradication of judicial corruption were documented.<sup>79</sup>

## Disciplinary system and efforts to combat judicial corruption

We should begin by noting that the disciplinary system is a traditional, generic mechanism that was not designed specifically to combat corruption in the judicial apparatus, as is occurring at the present time.<sup>80</sup> By way of illustration, it still relies on institutionalized judicial visits or inspections inherited from the Spanish-influenced organic laws of the judiciary dating back to the 19<sup>th</sup> and 20<sup>th</sup> centuries.

Beyond this antiquated mechanism for court oversight and its limited effectiveness in the present day, the core issue seems to be the disciplinary control model itself in force in every country of the region (which employs inspections among other measures). As discussed earlier, the model fits a “bureaucratic,” top-down judicial apparatus marked by interference from the political powers that be and by severe constraints on the internal independence of judges, in contrast to judiciary based on a “democratic” model.<sup>81</sup>

This explains the fundamental role reserved for the supreme court as the highest authority responsible for instituting sanctions for wrongdoing in the discharge of judicial duties. And just as with the judicial appointments system (to join the profession), in the disciplinary control area (removal from the profession) the supreme court plays a key role as the final arbiter in any decision.

This means that, even though many tasks—investigating wrongdoing, holding hearings, conducting evidentiary proceedings, and handing down initial rulings on the merits of the matter being investigated—have been distributed among various entities, usually of a technical nature and operationally autonomous (offices of court supervision or inspection, disciplinary boards, judicial career councils), the supreme court (or an entity under its control in the case in Honduras) is still the highest administrative decision-making body. This is yet another area, then, in which excessive powers are concentrated in the supreme court. This is conducive to the arbitrary use of power and poses a threat to the internal independence of judges, creating a potential risk of judicial corruption.

This set up—combined with substantial supreme court involvement in or control over the system for appointing members of the disciplinary agencies—severely limits the potential for independent action by disciplinary entities. And their subordinate role is further accentuated in practice. As Henry Campos points out in the Salvadoran case, “the performance of the entities [responsible for] ensuring the probity of the judiciary is called into question when

79 For a discussion of special programs to combat corruption, especially widespread corruption in State apparatus, see Rose-Ackerman, Susan, *op. cit.*, pp. 219-223 and Klitgaard, Robert, «Estrategias a nivel nacional e internacional para reducir la corrupción», en *Pena y Estado – Revista Latinoamericana de Política Criminal*, Año 1, N° 1, Buenos Aires, 1995, pp. 249-252.

80 Juan Jiménez *et al.* underscore the need to establish “a special institutional structure to combat corruption (one that is primarily oriented toward combating corruption at all levels of government)” and to foster “a change in perspective from the traditional concepts of institutional or disciplinary control policies in justice system entities so as to empower their work.” *Op. cit.*, p. 196.

81 Montero Aroca asserts that, under the bureaucratic or Napoleonic model, the judiciary was reduced to a “mere administration of justice.” In other words, it became an apparatus similar to that of the public administration. See Montero Aroca, Juan, *Independencia y responsabilidad del juez*, *op. cit.*, pp. 35 y 38.

they are controlled by the judicial authorities.” Campos goes on to ask, “with what degree of independence can these entities expose any sort of irregularity committed by an official and make decisions based on inquiries?”

Therefore, the progress ostensibly achieved in the normative sphere through constitutional amendments and judicial career laws—which are supposed to enhance the independence of the judiciary and the professionalization of its members—is severely curtailed by the wide margin of power and discretion over disciplinary sanctions that remains in the hands of the supreme court.

As can be observed in Table 13, despite sweeping reforms to Central American judiciaries—and to the administration of the judicial career, including the disciplinary control system, in particular—the supreme court remains the final arbiter. This confers enormous power on the high court, which—as one can easily imagine in view of the institutional history of Central America—it exercises at its own discretion, subject to little, if any, oversight (legal, political or citizen). In more than a few cases, therefore, political interference, corporatism, and other harmful practices complicate or preclude accountability on the part of judges or judicial support staff. This creates fertile ground for acts of corruption to occur.

In practice, the high court has usurped the new jurisdictional powers that judicial career laws assign to technical disciplinary organs, assuming functions which in principle should be removed from its purview. As Carol Zardetto affirms, in Guatemala, “the Office of the Presidency of the Judiciary and the Supreme Court of Justice have reserved for themselves powers that parallel those of the [Judicial Disciplinary] Board.... Both of these high-level organs order investigations by the Office of General Court Supervision.” She continues that “in some cases, they have ruled autonomously, without ever sending the case to the Board...in others, they have taken disciplinary measures on their own, even when the case has been presented to the Board.” This author concludes that “a disciplinary regime centered around the superior organs coexists with the disciplinary regime assigned to the Board, which does nothing to help strengthen the latter.”

Supreme court interference, and its still excessive control over disciplinary procedures, undermines the advances found in the laws, frequently rendering them ineffective and distorting their meaning when it comes time to actually apply them.<sup>82</sup> The judiciary’s disciplinary control structures must therefore be reshaped to eliminate the role of its highest authorities or, at the very least, to limit their role and ensure that it is subject to the appropriate safeguards. This is necessary to avoid chipping away at the independence of judges and weakening the struggle against judicial corruption.

In the first place, the appropriate distinction between purely judicial functions on the one hand, and government and administrative functions on the other, argues against the supreme court retaining its responsibility for the latter.<sup>83</sup> The court is unable to concentrate fully on its essential tasks of cassation and of developing the jurisprudence that lends consistency and coherence to court rulings due, in part to its role in disciplinary matters,.

82 Various authors raise concerns about the limitations of legal reforms when they encounter cultural atmospheres adverse to change. Rejecting what he calls “legal fetishism,” Luis Pásara contends that “despite what judges, lawyers, and law professors have believed and maintained to day, justice system reform does not consist principally or primarily of changing laws.” *Op. cit.*, p. 529. Here Rose-Ackerman points out that “many countries have exemplary anti-corruption laws which are irrelevant in the real world.” *Op. cit.*, p. 208.

83 See Universidad de Externado de Colombia, “Administration of Justice in Argentina, Bolivia, Ecuador, Jamaica, Mexico, Panama, Paraguay, and Uruguay,” in AA.VV., *Justice and Development in Latin America and the Caribbean*, Washington, D.C., IADB, 1993, pp. 276-277.



**Table 13. Disciplinary system for judges in Central America:  
Organs and laws**

Country	Organs	Laws
Costa Rica	<ul style="list-style-type: none"> <li>- Judicial Inspection Tribunal [Tribunal de la Inspección Judicial]</li> <li>- Superior Council of the Judiciary [Consejo Superior del Poder Judicial]</li> <li>- Supreme Court</li> </ul>	<ul style="list-style-type: none"> <li>- Organic Law of the Judiciary (1993)</li> <li>- Practical regulations for the exercise of disciplinary authority and the functioning of the Judicial Inspection Tribunal (2001)</li> <li>- Judicial Career Law (1993)</li> <li>- Internal Rules of Procedure of the Judicial Career System (1994)</li> </ul>
El Salvador	<ul style="list-style-type: none"> <li>- Judicial Investigations Department [Departamento de Investigación Judicial]</li> <li>- President of the Supreme Court</li> <li>- Supreme Court</li> </ul>	<ul style="list-style-type: none"> <li>- Judicial Career Law (LCJ) (1990)</li> <li>- Regulation of the LCJ (1991)</li> <li>- Plenary Agreements of the Supreme Court (1995)</li> </ul>
Guatemala	<ul style="list-style-type: none"> <li>- Office of General Court Supervision [Supervisión General de Tribunales]</li> <li>- Judicial Discipline Boards [Juntas de Disciplina Judicial]</li> <li>- Judicial Career Council [Consejo de la Carrera Judicial]</li> <li>- Supreme Court and Congress of the Republic</li> </ul>	<ul style="list-style-type: none"> <li>- Judicial Career Law (LCJ) (1999)</li> <li>- Regulation of the LCJ (2000)</li> <li>- Law of Civil Service in the Judiciary (1999)</li> </ul>
Honduras	<ul style="list-style-type: none"> <li>- Office of the Inspector General of Courts [Inspectoría General de Tribunales]</li> <li>- Office of Administration of the Judicial Career [Dirección de Administración de la Carrera Judicial]</li> <li>- Presidency of the Supreme Court</li> <li>- Judicial Career Council</li> </ul>	<ul style="list-style-type: none"> <li>- Judicial Career Law (LCJ) (1980)</li> <li>- Regulation of the LCJ (1988)</li> <li>- Law of Organization and Attributes of the Courts (1995)</li> </ul>
Nicaragua	<ul style="list-style-type: none"> <li>- Office of the Judicial Disciplinary Inspector [Inspectoría Judicial Disciplinaria]</li> <li>- National Administration and Judicial Career Council [Consejo Nacional de Administración y de Carrera Judicial]</li> <li>- Supreme Court</li> </ul>	<ul style="list-style-type: none"> <li>- Judicial Career Law (LCJ) (2005)</li> <li>- Organic Law of the Judiciary (1998)</li> </ul>
Panama	<ul style="list-style-type: none"> <li>- judicial organs (superior with respect to inferior)</li> <li>- Supreme Court</li> </ul>	<ul style="list-style-type: none"> <li>- Judicial Code (1987)</li> <li>- Rules of Procedure of the Judicial Career (2000)</li> <li>- Jurisprudential interpretation of the Supreme Court</li> </ul>

Sources: country reports and other sources.  
Created by author.

Moreover, in conceptual terms, or from the standpoint of a model for the judiciary (as discussed earlier), the supreme court need not wield disciplinary authority in a contemporary model of the democratic State and the constitutional rule of law. Such powers can perfectly well be assigned to the councils of the judicature as entities entrusted with, not self-government, but rather the autonomous government of the judiciary and, with it, the administration of the judicial career, including its disciplinary component.

Turning now to a positive development on the road toward consolidating independent, impartial, and honest judiciaries that are better able to control internal corruption in Central America, the new legal frameworks, and the new judicial career laws in particular, include more precise definitions of disciplinary offenses and the corresponding sanctions.

For instance, the Guatemala country report states that “one of the greatest improvements from the judges’ standpoint stemming from the enactment of the Judicial Career Law is the definition of the so-called “offenses” that inform the suppositions of fact based on which the Judicial Disciplinary Board acts.... since prior to the law’s enactment, the high-level authorities responsible for disciplinary functions could, at their discretion, accuse the judges of actions they felt would affect the proper discharge of their judicial duties, which obviously created the potential of being judged arbitrarily.”

In addition to this, however, the new definitions of disciplinary offenses found in the law include several provisions intended to combat and punish specific scenarios of judicial corruption. According to article 41 of the Guatemalan Judicial Career Law, the following are “extremely serious offenses” which may give rise to the penalties of suspension or removal:

- a) Perform, simultaneously with judicial functions, remunerated public jobs or duties, or provide any type of professional service related to the judicial function.
- b) Interfere with the discharge of duties of other State organs, or their agents or representatives, or to allow the interference of any organ, institution, or individual against the judiciary.
- c) Conceal any prohibition that might be applicable to him or her with regard to the discharge of the duty or to fail to report any such grounds that should arise.
- d) Fail to appear at work without justification for two or more consecutive days or three days in a single month.
- e) Attempt to influence other judges and magistrates in cases they are processing within their jurisdiction.
- f) Interfere in the position of lower-level judges on jurisdictional grounds, with regard to the interpretation or application of the law, except when the matter is taken up pursuant to the legally established legal remedies.
- g) Commit any coercive act, especially of a sexual or occupational nature.
- h) Solicit or accept favors, loans, royalties, or bribes, in cash or in kind, from the parties or their attorneys in proceedings under his or her purview.
- i) The third serious offense committed within a one year period, when the first two have been punished.

In the case of Guatemala, then, one can observe a legislative initiative to define administrative offenses with greater precision or legal rigor, thereby enhancing internal judicial independence. Moreover, the law also seeks to define new potential infractions intended to combat the types of judicial corruption documented in the country reports.

Carol Zardetto notes the significance of subparagraph “h” cited above (“solicit or accept favors, loans, royalties, or bribes, in cash or in kind, from the parties or their attorneys in proceedings under his or her purview”). Yet possible offenses related to the breakdown of external or internal independence, among others, are also significant. Improved definitions of infractions that give rise to disciplinary sanctions can be observed in other Central American countries such as Costa Rica (article 191, Organic Law of the Judiciary), El Salvador (article 52, Judicial Career Law), and Nicaragua (article 67, Judicial Career Law).

However, while recent definitions of disciplinary offenses certainly represent a step forward, they still contain certain generic or vague categories weighed down by excessively evaluative language apparently intended to preserve a rigid hierarchical structure or to protect attributes such as the “decorum,” or “prestige” of the institution (the “dignity of the Judiciary” or of “justice”). As observed earlier, this is more consistent with the disciplinary control model of the “bureaucratic” judicial system historically beholden to the political power elite. To give an example, article 67 of Nicaragua’s 2005 Judicial Career Law stipulates that the following entail a “very serious disciplinary infraction”:

- (i) The commission of three different serious disciplinary infractions within a one year period.
- (ii) A ruling that contravenes an explicit constitutional or legal norm.
- (iii) Failing to appear at one’s post for more than three days.
- (iv) Absolute negligence in the discharge of his or her duties.
- (v) Interference, by means of orders or pressure, in the discharge of the judicial functions of another judge or magistrate.
- (vi) Abuse of one’s position as judge or magistrate to obtain unjustified favorable treatment from authorities, officials, or professionals.
- (vii) Violation of any of the prohibitions stipulated in this Law.
- (viii) Injurious behavior or slander directed toward other judicial authorities.
- (ix) Blatant and evident acts of corruption or illicit enrichment, without detriment to any resulting criminal action.

Obviously, descriptions such as “absolute negligence in the discharge of his or her duties” or “injurious behavior or slander directed toward other judicial authorities” offer a dangerously wide margin of evaluation that can lead to arbitrary actions against dissident but upright judges. This is particularly true insofar as the supreme court acts as the final review body in the administrative disciplinary process in judiciaries with highly bureaucratic structures and authoritarian cultures. Other countries in the region experience similar problems.

In order to complete the journey toward a judicial disciplinary regime with democratic characteristics, such excessively open-ended regulations must be eliminated, since they lend themselves to arbitrary application and represent a potential threat to independent judges. At the very least, they should be developed and refined through jurisprudence, as an additional

safeguard. It would likely be useful as well to follow the Guatemalan example and incorporate into the disciplinary system legal provisions that criminalize certain specific forms of judicial corruption currently found in Central America. The accent should be placed here.

It also seems clear that the “inquisitive” nature of disciplinary procedures—the legacy or remnants of an outdated disciplinary control system—conspires against the effectiveness of controls in judicial corruption cases. In these sorts of cases, what is required instead is the highest possible degree of transparency and opportunities for public oversight. These are inherent features of a democratic judiciary that is fully coherent with the paradigm of a State governed by the constitutional rule of law, and therefore better situated to ensure due process for judges subject to disciplinary investigations.

With respect to the Honduran situation, Rigoberto Ochoa, affirms that “the disciplinary regime of the judicial career, as it is currently applied, replicates the inquisitive system and disregards due process guarantees.” Therefore, he continues, “reforms are necessary to create a more systemic, less personalized organ, by establishing an oral system and offering better guarantees of administrative due process for the judicial servant.”

The country reports describe a number of other shortcomings in disciplinary procedures. One of these is the absence of norms to ensure special protection for witnesses, which are essential in corruption cases, especially those involving people with considerable political, economic, and social power. Another problem is the extremely short time period in which to bring an action and the lack of effective evidentiary mechanisms. This must be remedied since judicial corruption—just as any other form of corruption—tends to be hidden and not leave traces. A third gap relates to the lack of specialized staff and the high rate of turnover among officials with control responsibilities, with the attendant difficulties for ensuring their impartiality and combating corporatism: judges who carry out control duties for a short time then return to their judicial duties alongside the same colleagues they previously were responsible for investigating.<sup>84</sup>

It is also important to look at the routine investigations, a centerpiece of the work of Central American disciplinary organs. At the present time, investigations consist of taking the statements of those directly involved—the accusers and the accused, and court staff—and reviewing the legal files. As one can easily imagine, if matters are left there, it is virtually impossible to corroborate the presence of judicial corruption, at least in most cases.

As Carol Zardetto notes, for example, it is essential to investigate the links between the judge accused of corruption and individuals outside of the court office who may be involved in the situation. This is so basic that it is astonishing how infrequently it is done. Certain other inquiries, moreover, can contribute significantly to clarifying cases of alleged judicial corruption: one valuable legal tool currently available in every Central American country is the ability to investigate possible discrepancies in the assets of judges or auxiliary staff subject to control in order to verify whether the accused has benefited from illicit enrichment.

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84 In the Guatemalan case, Carol Zardetto comments that the Judicial Discipline Board “came into life with many congenital defects...[T]he organ’s make-up is not ideal insofar as officials exercise their functions for the brief time period of one year, which does not allow them to become specialized in the issue.” The Guatemalan consultant adds that there is a lot of “reasonable” doubt about the “freedom of judgment with which these officials can or cannot rule against their peers, especially from the perspective that, after one year, they will have to return to their post.” In her opinion, this constitutes a “highly vulnerable” situation.

It is important to note that in some cases the institutions responsible for internal judicial control have demonstrated the utmost initiative and dedication in carrying out their duties. Guatemala's Office of General Court Supervision has, in response to certain complaints, undertaken a thorough investigation of the activities of the judicial organ under suspicion. In other words, it has not confined its inquiry to a review of the suspect case file or to the subject of the complaint, but rather has examined other legal proceedings in the same court, together with the books and records the court is required to maintain under law. This proactive approach which should be spotlighted and emulated throughout the region, as it is precisely what enabled the Guatemalan oversight agency to uncover the existence of "patterns" of irregular activities in the performance of official duties.

### **Role of the Public Ministry in combating judicial corruption and other mechanisms**

The country reports prepared for this study point to the difficulties and ineffectiveness of efforts to exercise external control through criminal proceedings. The creation and strengthening of the Public Ministry as the institution generally responsible for criminal prosecutions and for the fight against corruption, including judicial corruption, certainly constitutes a step forward at the institutional level. Nonetheless, its performance, particularly in political corruption cases, has left much to be desired.

Honduras provides perhaps the most notorious example of this. In 2004, the Public Ministry of that country experienced a severe crisis associated with the corruption cases implicating former president Callejas. Unfortunately, as Rigoberto Ochoa reports, the crisis has eroded public confidence in the fledgling institution (founded in 1994), whose organic law assigns it the tasks of collaborating in and promoting the administration of justice and initiating criminal prosecutions to demand accountability from public officials, including judges.

It is revealing to note that the crisis was detonated by an order issued by then Attorney General Dr. Ovidio Navarro to several anticorruption prosecutors to the effect that they put a stop to the investigations against former President Callejas. The prosecutors resisted the order and their unwillingness to comply resulted in their removal or transfer. They were subsequently replaced by other officials, presumably less reluctant to adhere to their superiors' lukewarm approach to corruption.<sup>85</sup>

In sum, the mechanisms that show the greatest potential for improving democratic controls in the struggle against judicial corruption include investigations into illicit enrichment by judges and auxiliary staff, when it is plausible to infer the existence of discrepancies in their assets. It is likewise important to rigorously monitor the assets disclosures submitted by members of the judiciary; this can be supplemented by lifting banking secrecy where appropriate<sup>86</sup> It is also worth reiterating the utility of "risk mapping" and the need to develop "general policies" for combating judicial corruption based on the systematization of the cumulative experiences of the agencies responsible for the internal and external control of acts of judicial corruption, as suggested in the Guatemala report.

<sup>85</sup> The country reports prepared for this research project include details on the creation and strengthening of public ministries and its role in the fight against corruption in different Central American countries.

## The need for prevention and transparency

It is common knowledge that anticorruption efforts cannot rely exclusively or even mainly on punitive measures. Law enforcement must be combined with prevention and education. Unfortunately, there seems to be an enormous gap in this area throughout Central America. The country reports do not reflect that such mechanisms exist or are put into practice and, to the contrary, reflect that they are absent and needed.

In Nicaragua, for example, Cuarezma and Enríquez Cabistán assert in general terms that “there was consensus among all of those consulted: forms of control and prevention of acts of corruption are virtually nonexistent and the few that exist are ineffective.” Referring specifically to the Salvadoran judiciary, Henry Campos reported that “when a citizen tries to find out about prevention mechanisms and how they work, he or she does not find any information available, or any that is accessible or comprehensible.” Campos believes that this has contributed to the negative public image concerning judicial corruption in that country.

Another important issue is the lack of transparency and the pervasive aura of secrecy surrounding the activities of disciplinary agencies. El Salvador provides a relevant example, where the procedure is not only written but is “confidential.” Access to the file is limited to the accuser, the accused, and their agents. What is more, according to Campos, “no certifications can be extended from the proceedings, except for the resolution absolving the official or civil servant of the alleged offense.”

The situation is even worse in Honduras. The report issued by the Office of the Inspector General—the organ responsible for conducting the investigation—cannot be accessed even by the official being prosecuted. The latter, according to Rigoberto Ochoa, is merely notified of the outcome by his or her superior. It is evident that the regulations in force in El Salvador and Honduras, like those of other Central American countries, appear to be geared toward keeping the public from learning about the administrative actions undertaken in certain judicial corruption cases, with the undesirable effect of opacity and self-interest.

It is common knowledge that corruption emerges and prospers in closed, non-transparent environments.<sup>87</sup> While the introduction of mechanisms to democratize procedures (and allow for citizen participation) are, in and of themselves, insufficient to ensure the eradication of corrupt practices, or even improved control or containment,<sup>88</sup> specific strategies to achieve such democratization clearly can help improve the effectiveness of disciplinary efforts in cases of

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86 Here we can cite the Salvadoran case, in which Henry Campos points out: “There is also an impression that certain institutions do not do everything they should or could do. For Example, the Office of the Attorney General of the Republic is an important institution in the struggle against corruption. This office needs to inject greater will, effort, and managerial capacity to investigate corruption. It has the authority to investigate the unjustified accumulation of assets, banking and business operations that judges, prosecutors, police officers, and court staff might have and yet it only conducts investigations, often incomplete, based on complaints. In other words, it could take the initiative and it does not do so.”

87 According to Norberto Bobbio, “one of the areas in which the old and new discourses on democracy intersect is in the affirmation that it entails a government of “visible power,” one that must be imbued with the necessary characteristics of the “visibility, cognoscibility, accessibility, and by extension, controllability of the acts of those in positions of authority at the highest levels.” See Bobbio, Norberto, «La democracia y el poder invisible», in Bobbio, Norberto, *El futuro de la democracia*, México, D.F., FCE, segunda edición, 1997, pp. 94 y 100.

88 Rose-Ackerman asserts that, “clearly, democratic forms do not always succeed in controlling corruption.” She continues, therefore, that “it is germane to ask which features of democratic government help to limit enrichment in the public sector and which contribute to corruption.” *Op. cit.*, p. 156.

judicial corruption.<sup>89</sup> This helps prevent flagrant cases from being passed over or completely abandoned due to negligence or lack of political will on the part of officials charged with prosecuting corruption in the judiciary<sup>90</sup>

Transparency is even more necessary at the conclusion of processes since, by all measures, the information is of public interest and there are no grounds for withholding it (relating to national defense or security, for instance). The situation in Guatemala is especially deserving of criticism in this regard: the country report indicates that “high-impact cases” of investigations into accusations of corruption against judges and magistrates—allegedly for having improperly favored corrupt high-level government officials, particularly during the Alfonso Portillo administration—are not available to the public and therefore it is impossible to discover the contents of the files.

Indeed, all of these cases ended up with a “no action” [*no trámite*] resolution. This means that the disciplinary organs, with their considerable discretion, decided there were insufficient grounds even to open a formal inquiry or investigation. Despite repeated efforts, Carol Zardetto was not allowed to review these records or the “no action” resolutions that shielded the judges suspected of corrupt activities.

In sum, the principle of transparency, if generally practiced in all of the activities of Central American judiciaries, can be a highly effective antidote to judicial corruption where it occurs, and to special risk situations for internal corruption.

When it comes to enhancing transparency and accountability, the media can play an effective role in the control of judicial corruption by informing the public about judicial cases of public interest, as well as cases suspected of involving judicial corruption. Media outlets must be cautious and even-handed in their coverage of these types of cases: it is important to avoid eroding the legitimate foundations of judicial authority, while making sure that this does not inhibit the media’s capacity to exercise oversight of the official activities of judges.

Press coverage of cases, beyond the political or media scandal *du jour*, is an important vehicle for informing the public and raising awareness about the state of affairs in the judiciary, particularly in cases of apparent corruption.

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89 See Dargent, *op. cit.*, p. 181 and on. For a discussion of the irradiation of the conception of “deliberative democracy” in the fight against judicial corruption, see Siles, Abraham, *Corrupción en el Poder Judicial peruano: marco conceptual. Lineamientos de una propuesta de participación ciudadana para su control y erradicación* (documento de trabajo), Lima, Comisión Andina de Juristas, 2002, p. 36 on..

90 The case of El Salvador is relevant in this regard. According to Henry Campos, “different components of the judicial system are making efforts, particularly sectors such as judges, which has been the one that sees itself as having incentives for judicial transparency.”

The **Due Process of Law Foundation (DPLF)** is a non-profit, non-governmental organization based in Washington, D.C., that promotes reform and modernization of national justice systems in the Western Hemisphere. DPLF was founded in 1998 by Professor Thomas Buergenthal, currently a judge on the International Court of Justice, and his colleagues of the United Nations Truth Commission for El Salvador. DPLF's work is divided into three major programs: Equal Access to Justice, Judicial Accountability and Transparency, and International Justice.

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