

The Politicisation of High Courts in Latin America's Hybrid Regimes:

Comparing Bolivia, Ecuador, and Venezuela

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In this paper, I introduce a comparative research project developed to explore the politicisation of High Courts in Bolivia, Ecuador and Venezuela, with an emphasis on the Venezuelan case under *Chavismo*. The project's **central aim** is to develop a systematic account of how hybrid regimes – *i.e.* political systems where democratic institutions coexist with authoritarian practices – employ the judiciary to stifle dissent and enact policy. It focuses on the politicisation of courts of last resort (*i.e.* high courts) in three Latin American democracies with authoritarian traits in recent years: Bolivia, Ecuador and Venezuela. The project will explore three key aspects of the politicisation of courts, namely:

- The mechanisms employed by governments to craft a politicised judicial system, with an emphasis on high courts. Building on prior research (Sanchez Urribarri 2012, 2013), this part of the projects looks at the ***control*** dimension of the politicisation of courts as the key variable of interest.
- The ways in which different government actors employ the judiciary to enable the regime's manipulation of the political arena. Building on prior research (Sanchez Urribarri 2011), this part assesses the ***proactive role*** of courts in hybrid regimes. This includes two key aspects: a) Pro-government litigation at the high court level in areas considered essential to preserve power and manage opposition dissent, including criminal litigation, freedom of expression, freedom of assembly, elections, and others typically observed in legal contestation in hybrid regimes; b) Cases brought to the court by government allies to create, modify or implement regime policies, including those related to economic governance, eminent domain and tax issues.
- The extent to which courts favour the regime in the face of challenges against government policy brought by opposition actors (***reactive role*** of high courts). This part of the project analyses opposition litigation in hybrid regimes, and looks into how government actors react against these efforts to defend regime interests.

From the Judicialisation of Politics to the Politicisation of Courts – A Look at the Literature

The optimism that followed the formal transition to democracy experienced in several countries at the end of the 20th Century, most notably in the post-communist world and Latin America, has now declined. A growing number of countries have either stopped evolving towards democratic rule or, worse, have regressed to authoritarianism experiencing what some scholars call ‘democratic rollback’ (Merkel 2010, *see* POLITY IV project of the Center for Systemic Peace 2014, Freedom House 2016). Countries as varied as Belarus, Kenya, Russia, the Ukraine and Venezuela have democratic constitutions, and a nominal commitment to separation of powers, judicial independence and the rule of law. Yet, elections are not consistently considered free and fair, freedom of expression and assembly are under threat, the military plays an overwhelming role in political life and major social, economic and political decisions are made unilaterally and often by breaching the law. Scholars have called these regimes in multiple ways, including hybrid regimes (Karl 1997, Diamond 2002); competitive authoritarianism (Levitsky and Way 2002, 2010; Schedler 2013), and different kinds of ‘democracies with adjectives’ (Collier and Levitsky 1997).

Over time, scholars noted that the persistence of authoritarian practices in some countries was not an anomaly (Geddes 1999; Gandhi 2008). Rather, the survival and governance of these regimes were contingent on such practices and their institutionalization (Gerschewski 2013) – this is, on the rulers’ capacity to successfully manipulate the ‘political contestation arena’ (Levitsky and Way 2010). Scholars have focused mainly on the manipulation of electoral processes (Schedler 2013; Gandhi and Lust-Okar 2009), and government attempts to constrain the ability of social movements and political protestors (Robertson 2011, Lyall 2006). Managing dissent potentially includes any institution located at the juncture between

state and society that allows for contesting policy, and this is why courts are relevant (Solomon 2007).

Across different types of regimes, courts adjudicate conflicts on behalf of the state and, as such, are political actors (Shapiro 1981). This is even more the case with courts of last resort (i.e. high courts), particularly if they have the prerogative to strike down acts of other branches of power via judicial review (Jacob 1996; Tate and Vallinder 1997).

The political role of courts and the rise of judicial power have been central themes in the democratization agenda. Courts are meant to uphold the rule of law in democratic regimes by holding elected leaders and other state actors accountable for unruly actions, and protecting the fundamental rights of the citizens (O'Donnell 1998, 2003; Holmes 2003). This perspective inspired serious efforts to engage in extensive judicial reform during the 1990s, pushing for independent and assertive courts free from political interference (Hammergren 1998). In turn, these attempts led to a wide variety of experiences in terms of the relative relevance of courts for political life; their level of judicial autonomy vis-à-vis political and business elites; and, most importantly, their capacity to protect citizens' rights against abuses of power (Prillaman 2000). In some countries, judicial institutions, especially high courts, became major political actors and policy-makers (Tate and Vallinder 1997), including countries in the post-communist world (Herron and Randazzo 2003), Africa (Ellett 2013), South East Asia (Ginsburg 2003, Dressel 2014), and most notably Latin America (Helmke and Rios Figueroa 2011).

In this region, countries like Brazil (Taylor 2008), Colombia and Costa Rica (Wilson 2009) experienced significant judicialisation of politics (Kapiszewski and Taylor 2008); whilst in

other countries courts would be less consistent, such as Argentina (Helmke 2002, 2005), Chile (Hilbink 2007; Hilbink and Couso 2011), Mexico (Magaloni 2003; Finkel 2008; Staton 2013), or Venezuela's previous regime (Sanchez Urribarri 2011). Most of the attention has focused on the judicial politics of countries like Argentina, Brazil, and Chile, which, despite challenges, are uncontestedly democratic (Kapiszewski and Taylor 2008; Helmke and Rios Figueroa 2011). Less attention has been given to countries like Bolivia, Ecuador, Guatemala, Honduras, Paraguay, Nicaragua or Venezuela, where democracy is either seriously at risk or has suffered major setbacks in recent years (see Pérez-Liñán, and Mainwaring 2013). In these countries, rule of law institutions appear to be severely compromised and the lack of judicial independence is a serious concern (World Justice Project 2015). For instance, this is the case in Ecuador (Basabe Serrano 2012), Paraguay (Basabe Serrano 2015) or Venezuela (Sanchez Urribarri 2012, 2013).

Yet, the relationship between type of regime and judicial performance is not linear. For instance, courts can also play meaningful roles in non-democracies (Ginsburg and Moustafa 2008; Moustafa 2014) – such as Brazil under military rule (Pereira 2005), China (Stern 2015), and Egypt during Mubarak (Moustafa 2003, 2007), to name a few. Some analyses have focused on hybrid regimes, where governments are often caught between the need to enhance their democratic legitimacy by adopting nominally independent and powerful courts, whilst still needing to ensure that they conform to the regime's interests. This has been the dilemma in contexts as dissimilar as Thailand (Dressel 2012), the Philippines (Tate and Haynie 1994), Ukraine (Popova 2012), Russia (Trochev 2008) or Turkey (Shambayati and Sütçü. 2012). However, the efforts employed by ruling elites to control courts can vary, as can the dynamics of judicial power across different levels of the courts and the extent to

which the opposition and individual citizens are willing and able to use these venues to contest policies or their implementation.

The discussion needs to be developed in cross-national perspective, as recent successful examples of analyses of the politicisation of courts in other regions have shown – such as Popova’s study of Russia and the Ukraine (2012), or Ellett’s study in Africa (2013). This comparative research project will help to fill this gap, by looking at the High Courts of three understudied Latin American countries that are considered hybrid regimes: Bolivia, Ecuador, and Venezuela.

Theorising Dynamics of Politicisation of Courts in Hybrid Regimes

Why do rulers in hybrid regimes seek to control courts and to what ends? Why do pro-government and opposition actors use the courts in these environments? How do courts react to those petitions and why? This project explores the specific benefits that courts can provide to ruling elites in hybrid regimes, especially in terms of **political control** and **governance**, with an emphasis on high courts. The project analyses government actions to craft a supportive judiciary (*ex ante* or *post hoc*, Brinks 2011); the specific instances in which government and opposition actors resort to the courts (i.e. demand for rights protection), and the courts’ reaction to such requests (a question of judicial behaviour). The project focuses on three defining dynamics of a hybrid regime tied to regime survival (Bueno de Mesquita et al 2003) – legitimacy, co-optation and repression (Levitsky and Way 2010; Gerschewski 2013).

Controlling the Judiciary: Rulers in hybrid regimes are typically less constrained by the institutional framework that governs the relationship between political leaders and the judicial branch (Sanchez Urribarri 2011). *Ceteris paribus*, the government enjoys more

flexibility to change the rules that define the conditions for courts to exercise their power, the judiciary's configuration and its performance. Yet, the cost may not be negligible either. Just like in the case of other contestation arenas (especially elections), the government is restricted in its ability to politicise the judiciary, use it for its gain and control the opposition through judicial means. That is, there is a point which the prospective gains obtained by controlling the judiciary – especially the legitimacy the regime accrues from having an apparently neutral arbiter in cases or types of cases (Moustafa 2008) – are offset by costs concerning the relative functions of courts, especially courts of last resort. On the other hand, closing the courts or openly politicizing them could be too costly in certain circumstances. For instance, governments could face a significant loss of legitimacy, both domestic and internationally, by virtue of being exposed rulers who do not respect institutional rules. This preliminary discussion thus leads to a basic comparative hypothesis which serves as a guiding hypothesis for this regime: Holding other factors constant, rulers will tend to control courts in those instances where the relative gains obtained by politicizing the judiciary offset the perceived costs.

An investigation in comparative perspective, then, should aim to identify these institutional and informal factors, and map them across countries during the time-period under analysis. Following Brinks (2011) and Popova (2012), this project will look into both *how* this politicisation is accomplished at the high court level – especially by looking at four essential aspects of a regime's process of crafting a politicised court: Political appointments (mechanisms of appointments and an assessment of the ideological, social and political profiles of the justices); the key terms of inter-branch relation between the high court and the executive and legislative branch (to empirically assess the judiciary's independence vis-à-vis the regime); the High Court's administrative responsibilities with respect to the judiciary, and

essential details about the institutional origin and history of the high court and its role in the political system (Hilbink 2007).

Judicial Governance: Broadly defined, governance “describes how authority is exercised in a polity through economic, political and social institutions, that is, the processes through which decisions are made and implemented” (Dressel 2014, 3). Against this backdrop, courts can perform or actively assist in implementing policy-making functions for the regime (**proactive function**) or secure the implementation of policy decisions by siding with the regime in the event of challenges against the government’s decisions (**reactive function**). With respect to the *proactive function*, courts can play supportive roles for policy creation, and for confronting opposition at the courts. This is particularly the case in the context of broad transformative political agendas. Thus, it is possible to imagine different governmental actors using litigation as an active tool to secure advantages for the regime – most importantly the executive branch by way of the attorney or solicitor general or its equivalent, but also through other actors, and even politicians themselves.

Hence, other things equal, if the courts are more politicized, such actors might feel more motivated to actively resort to litigation and expect to win. Conversely, if courts were seen as less politicized, they would be less used or avoided altogether and resort, instead, to other venues. In other words, the politicization of courts, *ceteris paribus*, raises the prospects of both pro-government litigation *and* favourable judicial behaviour from the bench – especially pro-government rulings.

On the other hand, with respect to *the reactive function*, the opposition in hybrid regimes could attempt to rely on the law against the government, or question regime policies on

constitutional grounds. Even if the government is most likely to win in these cases, evidence from disparate hybrid regimes show that the opposition may still win in some cases (especially in non-salient cases) or simply secure other advantages from the bench, such as raise the political awareness of certain issues, or block or impair the implementation phase of certain policies (Moustafa 2007, 2014). Yet, this is certainly more challenging in the view of a highly politicised judiciary. The politicisation of courts, *ceteris paribus*, decreases the prospects of both pro-opposition litigation *and* favourable judicial behaviour from the bench – especially pro-opposition rulings.

Assessing Politicisation of Courts Comparatively – Data and Methods

An autonomous, principled and influential judiciary that is respected by political elites is key to building the rule of law and enhancing the legitimacy of the state. This is a particularly pressing need in societies where democratic institutions are weak or in non-democratic regimes that allow for legal contestation of state policies. As we have seen in examples across the democratising world, a powerful independent judiciary creates an additional mechanism to contest abuses of power by political officials and, more importantly, influence policy on the basis of legal and constitutional premises. Moreover, it is often the case that the politicisation of courts also affects the quality of the justice system. This, in turn, has multiple negative effects for human security, especially affecting the judiciary's ability to punish crime (which is critical in Latin America), and for socio-economic development.

Doing a cross-country analysis within Latin America would allow us to control for several important factors that can potentially affect the nature of the political regime and the role of high courts in the political system, including type of legal system (the region follows the

continental European Civil Law system and shares significant similarities in terms of constitutional tradition); type of political regime (as presidentialism is the norm in the region); and colonial past. Moreover, the study focuses on three countries in the region – Bolivia, Ecuador, and Venezuela – with regimes that combine democratic features with authoritarian traits, particularly after the arrival in power of three strong charismatic leaders: Evo Morales in Bolivia (2006), Rafael Correa in Ecuador (2007) and, more importantly, Hugo Chavez in Venezuela (1998-2013). In all three cases these elected leaders enjoyed comfortable political majorities, via elections, and were followed by significant political transformations by way of major constitutional reforms. The government style of all three leaders was quite similar, with populist discourses framed around the protection of political majorities, but accompanied by significant tensions between the government and the opposition.

Finally, all three countries have courts of last resort with broad judicial review powers, created or strengthened in the context of the said constitutional reforms, which are part of judicial systems that allegedly lack judicial independence and autonomy. At the same time, there are major *differences* across the three countries and over time with respect to key variables of interest. Most notably, it is well known that Venezuela ranks as the most authoritarian regime of the three, and has the most politicised judicial system of the group. Although the nature of the social, political, and economic changes pushed by these regimes has similar tenets, their actual policies vary significantly in scope and transformative character. Moreover, the High Courts of the three countries vary in terms of composition, number of justices, rules of access, appointment rules and institutional tradition – all factors relevant to account for institutional strength according to prior scholarship. The variation in type of regime context, the configuration of the high courts and their institutional strength

should account for major differences in the way regimes control the high courts and the extent to which they are supportive of the regime.

The project will rest on two main research strategies. On one hand, it will develop a *quantitative* dataset of judicial review decisions of the High Courts of Bolivia, Ecuador, and Venezuela. Special attention will be paid to cases tied to the key areas of dissent and the policy modifications proposed by the government, including: human rights cases (criminal cases against opposition leaders and cases involving basic civil liberties identified as essential for a liberal democracy, such as freedom of speech, freedom of assembly, and political protests); economic policy cases (including nationalisation cases, eminent domain, and business disputes involving state or government-owned entities); and other cases of major significance in which vital political questions are contested (mega political cases, Hirschl 2008). This dataset will be based in prior data collection efforts conducted in other large-n cross-national datasets, such as the High Courts Judicial Database (Haynie et al 2007), and my own Venezuelan Constitutional Review database developed since the doctoral dissertation.

However, this data collection is distinct in three important ways: it includes Bolivia and Ecuador, where this topic of politicisation of courts has not been explicitly assessed and where quantitative analyses of judicial data are scarce; it will cover cases of judicial review and *cassation* that address the aforementioned issue areas identified above; and it will extend to other important features of the case that are relevant to understand *how* courts support the regime, including the time taken to decide the different stages of the process, interim decisions, the participation of several actors in the process and features of the type of legislation contested. Suitable statistical techniques will be employed to analyse trends and

outcomes of interest in the cases, including regression analysis (especially logistic regression), time-series analyses, and other tools as applicable. Although the definitive number of cases to be assessed will only be determined after a thorough preliminary exercise, the project caps the maximum number per chamber/court (as applicable) to 30 cases per year (to be selected randomly if necessary), between 2000 and 2015. The data will be coded directly from information provided in the websites of the high courts of Bolivia, Ecuador, and Venezuela, respectively (e.g. www.tsj.gov.ve). This data will be made available to the wider research community and deployed through a web site designed with basic tools for analysis, with the assistance to these ends of La Trobe staff.

Additionally, the project will include a systematic *qualitative* effort to document and analyse both the regime's control of the judiciary (especially the high courts), the political use of high court litigation from the point of view of different actors involved in the judicial process and a smaller selection of cases tried and decided at the level of the courts of appeals and lower courts to explore variation across different judicial institutions within the same system. The first part, related to assess the level of politicisation of the judiciary across different levels (with an emphasis on courts of last resort) over the period under analysis (2000-2015), will be carried mostly through a comprehensive assessment of historical records at key institutions but especially the judiciary, analyses of newspaper data –searching for relevant news about the influence of political actors in the court systems – and semi-structured interviews with a range of actors with specialised knowledge of the phenomena under analysis. Although it is not essential for the success of the research, the project aims to interview pro-government and pro-opposition actors, including legal professionals, academics with relevant knowledge and politicians. This part provides the much necessary context to understand the nature, extent, and dynamics of political control that surround the

rulings under analysis. Finally, the research will delve into a selection of cases that are politically salient, to discuss different legal interpretations and identify and evaluate the political relevance of the case in the trial and outcome. This will allow for discussions that incorporate legal and political factors.

Concluding Remarks

This project will be based on an original conceptual framework to discuss the politicisation of courts across regime types, with an emphasis on hybrid regimes in Latin America. Whilst the project is connected to previous scholarship, it follows a theoretical that builds on original work (Sanchez Urribarri 2011, 2012, and 2013). The framework addresses the politicisation of courts from multiple perspectives: efforts by ruling elites to influence judicial systems (including informal factors); judiciary responses to the attempts of a variety of government actors to use the courts; and how opposition use high courts and their response. Moreover, the research design seeks to offer a strong empirical foundation, based on quantitative and qualitative data on judicial decisions and the political environment in three countries in Latin America that have enjoyed less attention in judicial politics scholarship.

More importantly, the project will contribute to related debates in comparative perspective, including the politicisation of courts, judicial behaviour and judicial reform. This will be achieved by way of an original research strategy that will result in data available for the analyses purported in this project and other future studies. This database will be accessible via an online tool that will allow access to researchers and the public as a whole for other projects. Finally, the analyses conducted will lead to a range of outputs that will benefit a variety of actors with an interest in the performance of courts in emerging democracies.

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