V Congreso Latinoamericano de Ciencia Política. Asociación Latinoamericana de Ciencia Política, Buenos Aires, 2010.

Presidential Control of Judicial Selection Mechanisms in Latin America: Unraveling the effects on Ideology and Professionalism.

martínez barahona elena y Linares Sebastián.

Draft paper

Searching for the Balance between Democratic Accountability and Judicial Independence: the Selection of High Justices in Latin America

Sebastián Linares
Universidad de Salamanca
slinares@usal.es

Elena Martínez Barahona
embarahona@usal.es

Abstract: This paper addresses the trade-off between two ideals regarding the political selection of High Justices: the ideal of judicial independence and the ideal of democratic accountability. We argue that the ideal of independence requires judges of a non-dominated status, and in order to achieve that status we need to create political selection mechanisms that foster cooperation between political parties. Under those mechanisms, the appointed judge is unlikely to feel a strong partisan tie with his/her selectors. We also argue that these effects are likely to occur when the Legislature controls the final selection and the system combines qualified majorities with lifetime tenure offices. Under this scheme, we make space for democratic accountability (since our representatives will have a voice in deciding what kind of judges we want), and we also promote judicial independence, since appointed judges are not likely to be loyal partisans. We test these arguments by referring to the selection mechanisms of High Courts in Latin America.

Searching for the Balance between Democratic Accountability and Judicial Independence: the Selection of High Justices in Latin America.

I. Judicial Accountability and Independence: a Republican Perspective

In contemporary political literature, there is widespread acknowledgment about which normative principles should guide the selection of judges. On the one hand, scholars point out the importance of judicial independence: we are told that judges should make their decisions on the sole basis of law and in the absence of any kind of coercion[1]. Therefore, it is argued that our selection procedures should be deliberatively designed to get *independent* judges. There are many definitions of judicial independence (see Linares, 2004; Ríos Figueroa, 2006; Pozas Loyos y Ríos Figueroa, 2006), but for the sake of clarity I am going to adopt the following. Judicial independence is not only a question of non-interference on judicial behaviour, but also a status of *non-domination*[2] that is needed to grant judicial decisions with an epistemic value. More directly: we want judges to make their decisions in light of the best (legal) argument, or the best (legal) reason, and not under the influence of threats or bribes or as a result of their status of *domination*. It is crucial to keep in mind the latter, because this is the point I want to bring to light. Domination, here, refers to the *power* or *capacity* someone has to interfere on an arbitrary basis in certain choices that the other (the dominated party) is in a position to make. This means that there is a power-bearer (a principal) who has the capacity to interfere arbitrarily in the other choices, *even if the principal is never going to do so*. It is possible then to have domination without actual interference, and actual interference without domination. A judge may be dominated by someone else –for example, the leaders of a political party- without actually being interfered or actually being threatened. It may just happen that the leaders are of a kindly, non-interfering disposition. Or it may just happen that the judge is fawning enough to ingratiate with

the leaders. Judicial independence, then (at least from a republican perspective), stresses the need to avoid not only actual interference in the judicial function, but also to avoid *domination*.

On the other hand, we are told that democratic judges should be accountable to the public. Judges can be accountable to the public in two different senses: as a collective body, and as individuals. The first sense connects with the concept of judicial *policies*, meaning that the organization of the judiciary as a whole (how many courts and judges we want to create, where are we supposed to place them, how much money we want to assign to them, and so on) is an important and general issue that affects each and every citizen. Thus, from a democratic point of view, we as citizens want to have a voice in the making of those decisions. This means that the question of how to organize the judiciary should not be set aside from democratic politics. Therefore, at least we want the Parliament or the Congress taking the most important decisions on that topic.

The second sense of judicial accountability is related to the concept of judicial adjudication. Judges sometimes exercise power in general way, implying that their decisions affect not only the interests of the parties involved in the litigation case, but the interests of many other people. They affect those interests by means of the doctrines they set forth in their sentences, which are later applied in similar cases, or by means of the exercise of *judicial review*, which consists on the power some judges have to annul statutes or norms (by declaring that those statutes or norms contravene the constitution). Judges, we are told, *legislate*, whether we believe it or not. They may do this in a positive way, by crafting a general rule that didn't exist before, or in a negative way, by declaring that a pre-existent rule is void. These are descriptive statements rarely contested in legal analytical philosophy nowadays, though the recognition that judges sometimes create and enforce *general rules* poses serious normative questions to

democratic theory, especially if judges are not elected and if the issues their decisions endorse are overtly *contested* in society. Why are we to obey a rule we don't support which is made by a person who has no representative ties with the public? Why don't we try, then, to interfere in judicial behaviour more intensely? Why don't we design mechanisms to encourage judges to remain sensitive to public preferences?

At this point, there seems to be a trade-off between democratic accountability and judicial independence. Indeed, many prominent scholars are quite sure that there is (Burbank and Friedman, 2002; Cappelleti, 1985; Ferejohn, 1999; Russell, 2001; Ríos Figueroa, 2007). That trade-off appears clearly when we try to gauge the relationship between courts and elected officials (see Fiss, 1997). On the one hand, elected officials are supposed to *represent* the public views in a contested issue. The question that immediately arises is: Why shouldn't they interfere in judicial behaviour to get what they want, if what they want is supposed to be representative of public preferences? One the other hand, we stress the need to achieve judicial independence, which means taking judicial decisions on the sole basis of law and in absence of any kind of coercion. Thus: Why shouldn't we forbid politicians to interfere in judicial decisions, if we want to avoid *any kind* of interference? Why shouldn't we protect judges from any kind of coercion, even that which comes from elected politicians?

From a republican point of view, this trade off or dilemma stands at the centre of debate, but requires further clarification. The challenge lies in the concept of *interference*, which in this context is a kind of *catch-all* concept. The republican perspective, instead of treating all political interference equally, distinguishes interference on an arbitrary basis from interference without an arbitrary basis. An act of interference *on an arbitrary basis* is one that is perpetrated at the «master's» pleasure, without taking account of the interests or the opinions of those affected by the decision.

For example, illegitimate interference exists when a political leader secretly orders or prescribes a judge how he/she should come to a decision, either by bribing or threatening him/her with a future reward/punishment, or by influence of a certain level of loyalty between them. In this case, it is clear that the principal is interfering in judicial behaviour without tracking publicly the interests or ideas of those affected by the decision. Therefore, it should be considered an illegitimate interference.

In contrast, an act of interference is non-arbitrary when it takes into consideration the interests and ideas of persons affected by the decision. For example, the majority of deputies can interfere in judicial behaviour by means of passing and implementing a legal statute which limits the budget assigned to the judiciary, or changes some legal procedures. In other cases, the majority of deputies can pass a legal statute aiming to overturn certain jurisprudence that is considered wrong (vg. regulating abortion in a different way). These acts of interference should be not considered, as a matter of principle, arbitrary interferences over judicial behaviour, because public officials are meant to debate and justify their decisions in public, and their decisions are supposed to consider the interests and ideas of the public. Moreover, those decisions are open to challenge from every corner of society, and if they turn to be wrong, then appropriate remedies can be taken (vg. public officials can be dismissed from office in the next election, or policies can be overturned).

In some instances, the nature of interference by elected politicians remains unclear. These are *hard cases*, cases in which it is dubious whether elected politicians have taken an arbitrary act or the opposite. For example, elected officials may conceal their intentions (vg. to punish some decisions already taken by the Supreme Court) and decide to limit the judiciary's budget on the pretext that there are other social priorities to be fulfilled. Similarly, elected officials may increase the number of offices in a

certain collegial court on the alleged argument that there is a need to counter an increasing backlog (when the real reason was to control the court with loyal people[3]). In other cases, elected officials can publicly instantiate a process of political impeachment against judges based on an allegation that they don't carry out their tasks efficiently or in a democratic manner. Is the exercise of that power, at the hands of politicians, an arbitrary interference? Or is it an expression of democratic accountability? If the process of impeachment is carried out within a comprehensive debate, the final decision is not controlled by a single political party, and the people impeached have clear and adequate opportunities to defend themselves, then the process is to be considered an expression of democratic accountability[4]. In the absence of these conditions, it should be considered an expression of arbitrary interference.

Although many important issues concerning interference remain to be explored, I wish to further discuss a certain aspect of judicial independence: one that arises from *domination without interference*. I believe that this concept is useful to clear up the trade-off between democratic accountability and judicial independence in the evaluation of the selection of judges.

The Political Selection of High Justices: ¿Democratic Accountability or Political Domination?

The claim that we need to think about domination without interference in our assessment of judicial independence comes from the fact that, in many countries, judges are politically dominated *without being interfered or coerced*. This is publicly recognized in some countries (and even confessed by judges themselves): some judges know *in advance* how they will decide a case, not by referring to the law, but by

influence of their loyalty to some politician. In other words, judges may have a *politically dominated* status, even if politicians never interfere in their decisions. They just live and perform their duties in the shadow of elected officials, striving to get their support or avoid their annoyance. Judges such as these keep an eye on representatives, anticipating what could be expected of their decisions and trying to please them as long as they remain under their influence[5].

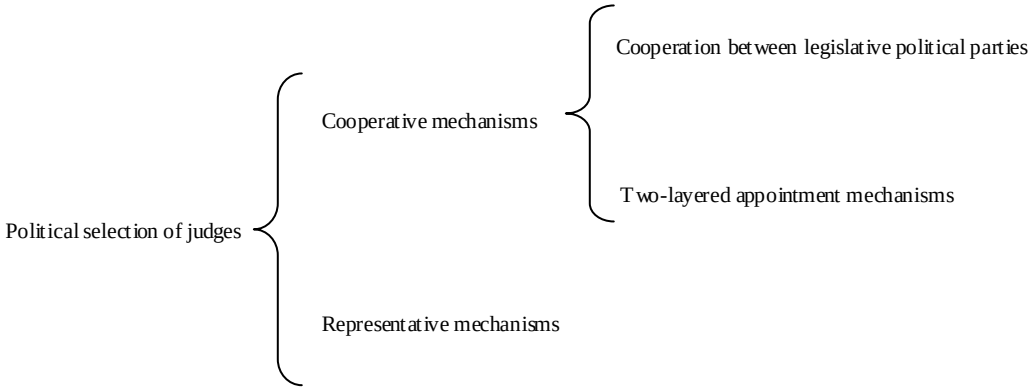
This statement may appear surprising, because in some cases judges are better identified as *sources* of domination instead of victims of domination. Indeed, many significant works in the field convincingly argue and reveal that the status of the entire judiciary is of that kind (see, for example, Galanter, 1974; Rosenberg, 1991; Gargarella, 1996; Kramer, 2004). Judges, we read, are appointed for long periods of time, they cannot be dismissed from office without a costly process of political impeachment, their wages are high and cannot be reduced, and they are given the power to control the validity of all enacted norms (at least in most democracies[6]). Considering these factors, it is hard to consider them as politically dominated. I am in agreement with this perspective and I have no aim to say that this view have to be abandoned. I argue, however, that domination is an empirical question that must be assessed in context, and that domination forms a kind of web in which those who are dominated in some areas may be dominators in others. For example, High Supreme Court Justices can be dominated by a political party and also be dominators of inferior judges. Indeed, I believe this is the actual situation of the judiciary in many Latin American countries. Furthermore, the interference of which the dominator is *capable* can be more or less arbitrary, the cost and difficulty of interfering can be more or less great, and the dominator may be able to interfere in the affairs of the dominated across a wider or narrower range of activities, and in more or less important areas. Political domination,

then, is a question of degree assessed within context, by how much power do the elected branches have over the judiciary, in which areas or activities, and how arbitrarily those powers are or can be used.

As can be imagined, there are many instances where we should assess the extent of political domination over a given judge or group of judges[7], but I believe two are of most importance: the way judges are selected, and the way they are dismissed from office. In how these procedures are configured lies the trade off between political domination and democratic accountability. The central question, then, is: When can we say that the *political selection* of judges is prone to produce *politically dominated* judges? When is it prone to bring about judges of a *non-dominated* status and hence be considered an expression of democratic accountability? In other words: is the political selection of judges an example of democratic accountability or a source of political domination?

The answer isn't simple. I will differentiate, firstly, between two main mechanisms of political selection of judges: 1) Cooperative mechanisms and 2) Representative mechanisms. Secondly, within the realm of cooperative mechanisms, we will distinguish 1.a) Cooperative mechanisms between *legislative* political parties from 1.b) Two-layered appointment mechanisms. I shall also illustrate these by referring to the selection systems of High Supreme Court Justices in Latin America. By doing so, I hope to fill the gap in contemporary literature on judicial politics, both by discerning the logic behind these procedures and by exhibiting new data in comparative perspective.

Figure 1: Types of political selection mechanisms



Cooperative mechanisms

Cooperative mechanisms attempt to introduce the idea of dialogue and cooperation in the selection of judges. The purpose of these mechanisms is twofold: on the one hand, they try to foster dialogue and cooperation between political parties or political authorities; on the other hand, they try to remove the influence of partisan loyalties in the process of selection. The argument says: when the process is not controlled by a single political party, or a single political body, and the consent of some other party or institution is required, the process is more likely to bring about judges of a non-dominated status, because those judges finally appointed will probably feel a weaker «duty of gratitude»[8] towards their selectors. When many people and instances get involved in the process, then the judge is prone to feel that he/she has been selected by reference to his/her virtues, skills or knowledge. This is the ideal behind all these mechanisms. It is important though to make some specifications. Within the realm of this category we have to distinguish two kinds of mechanisms: a) cooperative mechanisms between legislative political parties, and b) the so-called «two-layered appointment mechanisms».

Cooperative mechanisms between legislative political parties Under this kind of mechanism the Parliament, Congress or Legislature has the entire responsibility of selecting High Justices. To evaluate the extent to which this mechanism is an example of democratic accountability or a source of political domination we have to address, first of all, the sort of majority that is required. Suppose that an absolute majority is required (a minimum of 50%+1). If judges are selected by an absolute majority, then we have to explore the *effective distribution of parties* in the legislature in order to know whether the process is genuinely cooperative or not. For if one single party controls the majority of seats, the process should not be considered cooperative: the party in control of the Legislature can impose his will without getting the consent of some other parties. Furthermore, under these circumstances the party doesn't face strong incentives to justify its candidate in public, for it can take the decision anyway by means of the number of votes it controls. Therefore, it weakens democratic accountability, so far as there are no incentives for justification and public deliberation. I believe that this context also undermines judicial independence, so far as the selected judge is able to identify one single person for his/her appointment: the leader (or group of leaders) of a political party. Under these circumstances judges will probably feel a strong «duty of gratitude», an attitude of loyalty which can turn into a dominated status. And that feeling could be even stronger, of course, if one single party in the Legislature controls the process of impeachment.

These considerations merit particular emphasis here, because they help us to differentiate between two contexts under a rule of absolute majority (50%+1), two contexts that, at first sight, promote different outcomes in the process of selecting High Justices. In the context of *fragmented* Legislatures[9], the rule of the absolute majority is prone to bring about judges of a non-dominated status and is prone to promote dialogue

between political parties. In the context of a single-ruling legislative party (normally associated with *unified* governments) the rule of the absolute majority is prone to bring about the appointment of judges with a dominated status, and thus to undermining deliberation in the Legislature.

Mechanisms that require a qualified majority (for instance, 2/3 of the legislative members) have almost the same effects of fragmented Legislatures under an absolute majority rule. Under a qualified majority rule, political parties are forced to cooperate in order to reach a consensus, even in Legislatures where a single party controls an absolute majority of seats. Candidates thereby need to be acceptable for more than one political party if they want to come out ahead. Thus, it promotes deliberation and the selection of «moderate» judges. Moreover, the judge finally selected won't be able to identify a single «principal» responsible for his/her appointment. The appointed judge will tend to feel that he/she deserves that office as result of his/her merits. Certainly, the candidate –in order to be appointed- can make promises of fidelity to the parties involved in his/her nomination, but those promises are less likely to be reliable because he/she will not be able to maintain them all. Political parties may disagree in the future on some judicial issue and the judge will have to decide whether he/she supports one or the other side, or may be no one of them. This method, consequently, enhances judicial independence and democratic accountability, insofar as it promotes the appointment of judges of a non-dominated status and makes possible democratic deliberation.

Fragmented Legislatures (under strict majority rule) or qualified majorities seem to be the best conditions or devices for getting good judges, at least from a republican perspective. However, there are some shortcomings to be considered in both cases. The main drawback comes when political parties tackle the selection of a *group* of judges (at least more than one at the same time). It is important to acknowledge that the

simultaneous selection of *several* judges is usually associated with fixed-term offices, yet it can exceptionally arise with lifetime tenure offices (for instance, it may occur that two or more lifetime judges die, or resign, and have to be replaced at the same time). When we combine fragmented Legislatures or qualified majorities with the simultaneous selection of a group of magistrates, then legislative parties face perverse incentives: *they may find it easier to reach an agreement on the number of judges that are to be selected by each party, than an agreement on each and every individual judge*. In other words: the parties involved in the selection may reach an agreement on a proportional *quota* of magistrates, and not an agreement on each individual magistrate. For instance, it may happen that, under the context of a qualified-majority selection mechanism (2/3 of votes), one political party controls 50% of the seats and a second party controls 40%. Suppose that the Legislature has to select five magistrates. In these conditions both parties face strong incentives to distribute proportional shares of offices than to agree on each designation. For example, it is very likely that the major party will designate three magistrates and the minor party the other two. Instead of reaching an agreement on each designation, they find it easier to negotiate a proportional quota[10]. Judges selected under these circumstances will *appear* to be supported by both parties, yet actually each judge will perform as a loyal «agent» of one single party. Thus, the selection of a group of magistrates under fragmented legislatures or qualified majorities is expected to produce divided and partisan dominated Courts, and is prone to hinder democratic deliberation: judges are expected to be selected without discussion and by reference to their partisan ties and not by reference to their merits. Obviously, these effects would be pernicious from a republican perspective.

If these considerations are correct, then we can hold the conclusion that the best method is the one that combines qualified majorities with lifetime tenure offices. This is

because lifetime tenure judges tend to abandon their offices in an unpredictable manner (by resignation, impeachment or death) and the vacancies usually appear for a single candidacy. Therefore, lifetime tenure offices tend to avoid «quota-agreements» between parties. They may clearly produce other pernicious side-effects, like deadlocks or delays across the process of selection, but from a republican point of view those side-effects are lesser evils, compared to a partisan-dominated Court[11].

Table 1- Cooperative mechanisms between legislative parties.

Country	Composition	Terms of office	Legislative selection	Effects
Bolivia	*Tribunal Constitucional* 5 members	10 years. Reelection permitted 10 after the end of the first mandate.	Ministry of Justice, Law Faculties (public and private) and Bureau of Lawyers can present candidates (Ley 1836). Congress designs by 2/3 of its present members. Congress can select someone who has not been proposed.	Normally no one party controls a 2/3 majority. However, the fixed terms (associated with the renewal of a *group* of judges) promote quota-agreements between parties. Thus, it is likely to weaken deliberation and judicial independence.
Costa Rica (1989)	*Sala IV o Sala Constitucional* 7 members (22 members has the entire Court)	8 years. Automatically re-selected at the end of the period except the Congress opposes by a 2/3 majority of its total members.	Selected by National Assembly by 2/3 of its total members.	Requires cooperation between political parties, and there is no space for quota-agreements. Thus, it promotes deliberation and judicial independence. .
Ecuador	*Corte Suprema* 31 members	Lifetime tenure	Selected by National Assembly (art. 202 CP) Absolute majority	
Nicaragua	*Corte Suprema* 16 members	5 years. Re-election permitted	Executive and National Assembly identify candidates. National Assembly selects by 6/10 of the votes.	Normally no one party controls a 6/10 majority. However, the fixed terms (associated with the renewal of a *group* of judges) promote quota-agreements between parties. Thus, it is likely to weaken deliberation and judicial independence.
Perú (1996)	*Tribunal Constitucional* 7 members	5 years. Re-election permitted 5 years after the end of the first mandate.	Congress selects by 2/3 of its total members.	Normally no one party controls a 2/3 majority. However, the fixed terms (associated with the renewal of a *group* of judges) promote quota-agreements between parties. Thus, it is likely to weaken deliberation and judicial independence.
Perú	*Corte Suprema* 32 members	7 years. Re-election permitted	Selected by Judicial Council (7 members: 1 representante de la CSJ; 1 representante del Ministerio Público; 1 abogado; 1 profesor de derecho de la universidad nacional y 1 de las universidades privadas, 2 representantes de otras asociaciones profesionales)	
Uruguay	*Corte Suprema*. 5 members.	10 years. Reelection permitted 5 years after the end of the first mandate (retirement at the age of 75)	Plenary of the Congress identifies candidates. Both chambers separately selects by 2/3 of its total members.	Normally no one party controls a 2/3 majority. However, the fixed terms (associated with the renewal of a *group* of judges) promote quota-agreements between parties. Thus, it is likely to weaken deliberation and judicial independence.

Two-layered appointment mechanisms Two-layered appointment mechanisms divide the selection of judges in two instances, performed by different political bodies at different times: 1º) nomination (that is, the selection of a candidate or a list of candidates) and 2º) designation or final appointment. More often than not, they are

presented as the best methods for enhancing judicial independence on the argument that they call for broad consensus and dialogue between different institutions. However, I hasten to say that this argument is extremely abstract, fuzzy and confusing. I believe instead that there are many nuances within the boundaries of these methods that deserve much more attention. In order to get to the political logic that lurks behind these mechanisms, it is useful to resort to some rules of inference (see Schedler, 2004). Rules of inferences are particularly important here, because they are the only devices we have to assess the incentives working behind the scenes. Rules of inferences let us discern, in many respects, if the process breeds the selection of judges of a non-dominated status or the opposite.

To evaluate two-layered appointment procedures we first have to explore the *partisan belonging* of the two political authorities in charge of each instance (nomination or final designation), and if it happens that one of those political institutions is of a collegial kind (vg. Legislatures), then we have to gauge the *effective distribution of seats* between political parties within that authority. For if both authorities are controlled by a single party, then the process is not likely to promote democratic deliberation, neither is it likely to select judges of a non-dominated status. For instance, suppose that the Executive is responsible of the nomination of one single candidate (or a list of candidates) and the Legislature is responsible of the final appointment by a strict majority rule (50%+1). Suppose then that the same political party controls the Executive and the Legislature (a state of affairs that characterizes *unified* governments). Under these circumstances, as we can imagine, it is very hard to expect the selection of judges of a non-dominated status. Also improbable is the appearance of democratic deliberation between parties: as long as one party controls the

entire process, it has no incentives to justify their candidates in public neither to request the consent of other parties.

In case there is no single party controlling both authorities (*divided* government), then the assessment of the political logic at the back of the process will require some rules of inferences[12]. If we observe that different political parties are in control of the two authorities, then we need to investigate *what happens if the authority in charge of the final selection doesn't want to approve the candidate already nominated (or rejects the entire list of candidates nominated).* In other words, we have to examine the consequences of the rejection of the nominated candidates (see Schedler, 2004). There are four basic possibilities:

a) The nominating authority (X from now on) proposes a list of candidates. By law, the selecting authority (Y from now on) must appoint one judge from the list. Rejection is not a valid option.

b) *X* proposes a list of candidates. *Y* is able to reject the entire list. By law, judges are appointed by lottery from the proposed list.

c) *X* proposes a list of candidates (or a single candidate). By law, if *Y* rejects the entire list or the Legislature doesn't reach the majority required for selecting one from the list (or for ratifying the single candidate), *X* finally selects one judge from the proposed list (or finally appoints a single judge without the approval of the Legislature).

d) *X* proposes a list of candidates or one single candidate. *Y* may reject the entire list or the single candidate indefinitely. X is forced to present a new list or a new candidate, until one fits with Y preferences.

The first three possibilities give all the power to the nominating authority (*X*), and clearly bound up the negotiating position of the selecting authority (*Y*). In option a), the

selecting authority is completely powerless; it has to decide within the parameters already set forth by the nominating authority. In option b) the selecting authority is also defenceless, for if it refuses to pick one candidate, the judge will be selected by lottery from the candidates already nominated. Option c) also limits the power of the selecting authority, because in case both authorities disagree, the nominating authority will end up imposing its will.

Options d), instead, vest power in the hands of the selecting authority. In d), the nominating authority and the selecting authority are forced to reach a consensus, unless they prefer to hold an endless battle. In the long run, the selecting authority will have a stronger negotiating position. In d), the selecting authority is in a position to force the nominating authority to present new candidates until one satisfies its preferences. Under this scheme, so, the selecting authority (Y) has always the final word.

These possibilities merit special attention because they help us to discern a «*predominant agent*» of the whole process. They allow us to identify which authority *controls* the selection. Options a), b) and c) make the nominating authority the predominant agent; options d) and e) make the selecting authority the controlling agent.

Once we have identified a «predominant agent», we are in a position to find out whether the mechanism promotes the selection of judges of a *non-dominated* status, or if instead induces the selection of *politically-dominated* magistrates. The line of reasoning is this: if, in the light of the rules of inference already exhibited, the predominant authority turns to be controlled by a single political party, then we are able to conclude that the process hampers judicial independence and democratic accountability, for the judge finally selected is likely to have a strong «duty of gratitude» with the partisan leaders and the party that controls the entire procedure doesn't face incentives to justify the quality of its candidate, neither to require the

consent of other parties. These effects are likely to occur when the predominant agent turns to be the Executive, or when the predominant agent is the Legislature *and* this body is actually controlled by a single political party.

And it also seems reasonable to hold, in the light of the same rules of inference, that if the predominant agent turns to be the Legislature (or a Judicial Council) and the decision rule is not controlled by a single political party (vg. fragmented Legislatures or qualified majorities), then the process enhances judicial independence and democratic accountability, for the parties will need to deliberate in public and reach a consensus. We also believe that judges selected in that way are not likely to be *loyal partisans* and thus are going to exhibit a non-dominated status. But remember: if it happens that the Legislature under these conditions attempts to select a *group* of judges at almost the same time, then the process is likely to be undermined by «quota-agreements» between political parties.

Table 2- *Two-layered appointment mechanisms*

País	Composition and terms of office	Nominating Authority	Selecting Authority	Consequences of the rejection of the nominated candidate	Predominant agent	Effects
Argentina	*Corte Suprema* 7 members Lifetime tenure judges (retirement at the age of 75)	Executive (President)	Senate by 2/3 in public session	Constitution doesn't say anything. Thus, the President should present another candidate.	Senate	Como en condiciones normales ningún partido logra los 2/3, se requiere del consenso entre partidos. Dado que los magistrados se seleccionan individualmente a medida que se producen las vacantes, no hay margen para el acuerdo de cuotas.
Bolivia	*CSJ: 12 members, 10 años* con reelección tras período de 10 años	Judicial Council (5 members: 4 by 2/3 Congress; Pte CSJ –duran 10 años) presents lists	Congress selects by 2/3 of its members	Constitution doesn't say anything. Thus, Judicial Council should present another candidate		
Brasil	*T. Supremo Federal* 11 members. Lifetime tenure judges (retirement at the age of 70)	Executive (President)	Senate by absolute majority of its members	Constitution doesn't say anything. Thus, the President should present another candidate.	Senate	Dado el sistema de partidos fragmentado que tiene Brasil, es difícil que un partido controle el Senado. Por ello, se requiere del consenso entre partidos. Dado que los magistrados se seleccionan individualmente a medida que se producen las vacantes, no hay margen para el acuerdo de cuotas.
Chile	*Corte Suprema* 21 members Lifetime tenure offices (retirement at the age of 75)	Supreme Court presents five candidates for each vacancy. President should pick one candidate from the list. Rejection is not a valid option.	Senate should ratify the candidate selected by 2/3 of its members.	Supreme Court should include another candidate in the first list of five and President should pick one again.	Senate	En principio, el sistema no da margen para los acuerdos de cuotas porque las vacantes van apareciendo individualmente.
Colombia	*Corte Constitucional* 9 members 8 years. Reelection forbidden.	-President proposes three lists of 3 candidates for each of the 3 vacancies. -Supreme Court proposes three lists of 3 candidates for each of the 3 vacancies. -*Consejo de Estado* proposes 3 lists of 3 candidates for each of 3 vacancies.	Senate picks one from each list, by absolute majority.	Constitution doesn't say anything. Thus, each nominating authority should present another list.	Senate	El sistema electoral colombiano tiende a generar efectos mayoritarios y gobiernos unificados (es decir, el partido de gobierno suele controlar la mayoría en Diputados y en el Senado). El reemplazo total de los jueces también da pie para el acuerdo de cuotas.
	CSJ: 23 members *8 years. Reelection forbidden*	Judicial Council (7 members de su Sala administrativa: 2 por CSJ; 1 por Corte Constitucional, y 3 por Consejo de Estado) presenta lista	CSJ		CSJ	
Ecuador	*Tribunal Constitucional* 9 members 4 years. Reelection forbidden.	-President proposes 2 lists of three candidates for 2 vacancies. -Supreme Court proposes 2 lists of three candidates for 2 vacancies. -*Alcaldes* and *Prefectos Provinciales* propose 1 list of three candidates for 1 vacancy. -Labour Unions and Indigenous and Rural Organizations propose 1 list of three candidates for 1 vacancy. -*Cámaras de producción* proposes 1 list of three candidates.	Congress selects two directly and picks one from each proposed list.	Constitution doesn't say anything. Thus, each nominating authority should present another list.	Congress	El sistema electoral normalmente produce Congresos con sistemas de partidos fragmentados. Ello significa que se requiere de un consenso entre fuerzas políticas para alcanzar la mayoría. Sin embargo, el reemplazo total de los jueces da pie para el acuerdo de cuotas.
El Salvador	*Sala Constitucional* 5 members (The entire Court has 15 members). 9 years. Re-	*Consejo Nacional de la Judicatura* (without political members) and Associations of Lawyers, present a list of 30 candidates (½ of the list selected	Congress selects from the list by 2/3 of votes.	Constitution doesn't say anything.	Congress	Se requiere del consenso entre partidos. Los incentivos para celebrar arreglos de cuotas se reducen por el reemplazo escalonado de los magistrados. Sin embargo, dado que son tres los magistrados que se

País	Composition and terms of office	Nominating Authority	Selecting Authority	Consequences of the rejection of the nominated candidate	Predominant agent	Effects
	election permitted. 1/3 of judges are renewed after a period of 3 years.	by the *Consejo*, and ½ selected by Associations)				renuevan cada vez, existe la posibilidad de los dos partidos mas importantes se repartan magistrados (dos y uno respectivamente).
Guatemala	*Corte Suprema* *13 members* *5 years. Reelection permitted*	1º CSJ: Comisión de postulación prepara con 2/3 de los votos una lista de 26 candidatos. (Integración Comisión: representantes de los rectores de las universidades del país, presidido por los decanos de las facultades de leyes, un número igual de miembros elegidos por la Asamblea General de la Asociación de Abogados y Notarios y un número igual elegido por los magistrados de Titulares de Corte de Apelaciones)	Contress selects by absolute majority			
Honduras	*Corte Suprema* 9 members 4 years. Re-election permitted.	*Junta Nominadora* proposes a list of 45 candidates (*Junta* formed by representatives of CSJ; Bureau of Lawyers; Commissioned of Human Rights; School of Law of UNAH; Council of Private Business; Labour Unions and Civil Society).	Congress selects from the list by 2/3 of its members.	Constitution doesn't say anything.	Congress	Se requiere del consenso entre partidos. Sin embargo, el reemplazo total de los jueces da pie para el acuerdo de cuotas.
México	Corte Suprema 11 members 15 years. Re-election forbidden.	President presents a list of 3 candidates for each vacancy.	Senate picks one from each list by 2/3 of the present members.	If the Senate doesn't reach the 2/3 majority in 30 days, the President makes the final selection alone. If the Senate rejects the total list, the President should present another list; but if the Senate rejects this second list again, the President makes the final selection (art.96 C.P).	President	El presidente domina el proceso. El juez designado puede identificar el responsable último de su designación. Los partidos del Senado estarán obligados a alinearse a la propuesta del presidente.
Panamá	*Corte Suprema* 9 members 10 years. Alter each period of two years, 2 members are replaced. Re-election permitted.	President proposes candidates with the approval of its ministers.	Congress ratifies by absolute majority.	Congress can reject the candidate and the President should present another again. .	Congreso	El sistema electoral panameño es de corte mayoritario, y por lo tanto tiende a generar gobiernos unificados. En condiciones normales, por lo tanto, es el partido del presidente el que elige a los jueces de la Corte. En situaciones excepcionales el presidente no controla el Congreso y debe pactar con otros partidos. De todos modos, la renovación grupal (aunque escalonada) siempre da margen para el acuerdo de cuotas.
Paraguay	*Sala Constitucional*: 3 members (the entire Court has 9). 5 years. Reelection implies lifetime tenure. (Retirement at the age of 75)	*Consejo de la Magistratura* (formed by 1 CSJ; 1 PE; 1 Senate, 1 Deputy, 2 Lawyers, 2 from Law Universities) proposes 1 list of 3 candidates for each vacancy.	Senate picks one from each list by absolute majority. The selected candidates should be ratified by the President.	President can reject the candidates selected by the Senate. If that happens the Senate should select other candidates from the lists presented by the *Consejo*.	President	El sistema electoral es de corte proporcional, y tiende por ello a generar gobiernos divididos. Sin embargo, la integración política del Consejo asegura que al menos un candidato por cada terna esté alineado con el partido del Presidente. Eventualmente el partido del presidente puede llegar a un consenso con el partido opositor.

País	Composition and terms of office	Nominating Authority	Selecting Authority	Consequences of the rejection of the nominated candidate	Predominant agent	Effects
Venezuela	*Tribunal Supremo de Justicia* 32 members (since 2005) 12 years. Reelection forbidden (art. 263 Ley orgánica poder judicial)	*Comisión Nacional de Postulaciones* (CNP) presents a list. CNP should be formed by representatives of civil society, but in december 2000 the government formed the CNP exclusively with deputies. *Poder Ciudadano* (formed by Min. Público, Contraloría, and Defensor del Pueblo), makes a second preselection from the list.	Congress selects from the list (TSJ in the past said that a 2/3 majority is required, but a new legal statute says that if that majority is not reached after 3 attempts, then an absolute majority is required).	Constitution doesn't say anything	Congress	La integración exclusivamente política (y sin participación de la oposición) de la Comisión de Postulaciones aseguró la presentación de candidatos leales al Presidente. Por su parte, el sistema electoral es mixto y tiende a generar efectos mayoritarios. Así, el partido del presidente Chávez (MVR) tuvo en el año 2000 el 44% de los escaños legislativos, y debido a la existencia de partidos menores afines con la política de gobierno pudo lograr la mayoría absoluta para seleccionar a los magistrados.

Fuente: elaboración propia

Representative mechanisms

As the adjective tells us, these mechanisms tend to *represent* different political authorities or political forces in the composition of the Court. Normally they attempt to secure an equal representation of the Legislature, the Judiciary and the Executive, but in some countries other political authorities or institutions have also a seat in the Court. The background idea is quite simple: since Supreme or Constitutional Courts are supposed to stand as neutral authorities between branches of government; since they are supposed to resolve conflicts between those branches, they need to exhibit an equilibrated integration. There shouldn't be asymmetries of power: no one branch should be stronger than the other if we expect to install a system of reciprocal control. In some countries, the system allows for the representation of other institutions or social forces: usually local states, the Attorney General, universities, the bureau of lawyers, or even labour unions. Some of these institutions have a reserved seat in the Court by reference to their legal skills or knowledge (Universities, Bureau of Lawyers), some by reference to their position in the legal system (Attorney General), by reference to the special political status they have within a federal state (local states) and some by reference to the their social ascendancy (trade or labour unions).

To my knowledge, the arguments held in support of representative systems are ingenious. From a republican perspective, it should be obvious that representative systems don't promote the selection of judges of a non-dominated status. The reason is straightforward: in these mechanisms, the appointed judge is likely to behave as a *loyal agent* of its principal, namely, the leaders of the selecting authority. The appointed judge is likely to feel a strong personal bond with his/her selector. We think that that bond, in the long run, can turn into a dominated status, and thus undermine the epistemic neutral position that is needed to take a correct decision (whatever this word

may mean). And, since each institution or selecting authority is likely to appoint a loyal agent, we should expect as a result extremely divided and partisan Courts. To be sure, these methods tend to avoid deadlock and delays in the selection of judges, but again, these are lesser evils compared to a divided partisan court[13].

Table 3- Representative mechanisms

Countries	Composition	Terms of office	Selection	Effects
Chile (1980) Reform 2005	*Tribunal Constitucional* 10 members	9 years. Partial renewals after a period of 3 years. Re-election forbidden.	3 by the President; 3 by CSJ 4 by Senate (2 directly and 2 proposed by the Chamber of Deputies, in both cases by 2/3 of its members)	En los hechos, una de las dos alianzas partidarias (la Concertación) ha venido controlando el Ejecutivo y el Senado, pero dado que éste último requiere de 2/3 para nombrar a sus 4 miembros, la concertación debe pactar con la oposición. De manera que en el legislativo puede haber reparto de cuotas. Asimismo, dado que el sistema de partidos es muy fragmentado, se debe lograr un acuerdo «dentro» de la alianza que gobierna (PS, PDC, PPD, PRSD).
Guatemala (1986)	*Corte Constitucional* 5 members	5 years. Reelection permitted	1 by CSJ 1 by the Congress 1 by the President 1 by Superior Council of the University of San Carlos 1 by Assembly of Bureau of Lawyers.	En condiciones normales, y debido al carácter mayoritario del sistema electoral guatemalteco, un solo partido llega a controlar el ejecutivo y el Congreso, de manera que nombra dos jueces (de cinco). Es cierto que en el Congreso se requiere de 2/3 de los votos, pero dado que elige dos (un titular y un suplente), es de esperar que el partido de gobierno nombre al titular y la oposición al suplente. El balance de fuerzas depende de si los demás agentes de selección (CSJ, Colegio de Abogados, UNSC) están o no cooptados por el partido de gobierno.
República Dominicana (1994)	CSJ: 16 members	Lifetime tenure (Retirement at the age of 70)	*Consejo Nacional de la Judicatura* identifies candidates and selects by absolute majority (Consejo formed by President, President of Senate, 1 senator from the opposition; President of Chamber of Deputies; 1 deputy from the opposition; President of CSJ; 1 member of CSJ selected by CSJ)	Dada la integración del CNJ, lo normal es que el partido del presidente controle 3 miembros del Consejo. Como los magistrados se designan individualmente a medida que van apareciendo las vacantes, el sistema da espacio para el acuerdo entre partidos.

Fuente: Elaboración propia

Conclusions

This paper argues that a genuinely concept of judicial independence is not only a question of non-interference on judges behaviour, but also a question of *non-domination*, for it can be domination without actual interference. Judges may be dominated by powerful partisan leaders, or powerful economic elites, without being interfered or threatened at all. Republicanism sustains the ideal of non-domination as a

general goal; we also believe that this same ideal is useful to evaluate judicial behaviour. The reason is simple: the status of non-domination is a necessary condition for securing a neutral epistemic position at the time of taking a judicial decision.

Once we acknowledge this, we are in a position to clear up the kernel of the trade-off between judicial independence and democratic accountability. This trade-off appears when we recognize that judges *legislate*, positively or negatively, and for that reason should be accountable to the public. The dilemma is this: if judges legislate, why shouldn't elected officials control the selection process and also interfere in their decisions, given that elected officials are supposed to represent citizen's views in contested issues? On the other hand: if judges are supposed to be independent, why shouldn't we avoid any kind of interference, even the one that comes from elected officials?

This paper argues that this trade-off stands at the centre of the debate regarding the selection of High Justices, yet there are ways to overcome it. Once we concede that non-domination is an important value to be attained, we are able to visualize that there can be political selection mechanisms that require consensus or cooperation between political parties. Under those mechanisms, the appointed judge is unlikely to feel a strong partisan tie with his/her selectors. We argue that these effects are likely to occur when the Legislature controls the final selection and the system combines qualified majorities with lifetime tenure offices. Under this scheme, we make space for democratic accountability (since our representatives will have a voice in deciding what kind of judges we want), and we also promote judicial independence, since appointed judges are not likely to be loyal partisans.

To be sure, there are many respects that this paper has not addressed, many features that merit more attention in the light of a genuinely republican view. Needless to say, one of

those central features is the role reserved to the civil society in the process of selection. We hope to investigate these issues in the upcoming future.

Notes

[1] It is worth noting that the statement «*in the absence of any kind of coercion*» deserves further exploration. There are two main meanings of this statement: judges may take their decisions in the absence of 1) «actual» interference; that is, in the absence of actual *threats* or personal *rewards*; or in the absence of 2) a «*non-dominated* status». Let us analyse this second possibility. Domination is a basic concept ingrained in the work of republican philosophers (see Pettit, 1997). It is exemplified by the relationship of a master to slave or master to servant. Such a relationship means that the dominating party *can* interfere, at will, with impunity, and on an arbitrary basis, with the choices of the dominated. A little reflection should make clear that actual interference and domination are intuitively different things. I may be dominated by another –for example, to go to the extreme case, be the slave of another- without actually being interfered or being actually threatened. I suffer domination to the extent that I have a master; I enjoy non-interference to the extent that the master fails to threaten me. I hasten to say that the bulk of the literature of judicial politics is about «political domination», that is, about the *powers* that the elected branches have over judges, and not about actual political interference (see for example Epstein y Knight, 1988; Ferejohn, 1999, 2002; Ferejohn and Shipan, 1990; Gely and Spiller, 1990; 1992; Segal, 1997; Helmke, 2002).

[2] This concept is taken from the work of Pettit (1997). See the note above.

[3] It is worth remembering the court-packing measure taken by Carlos Menem in Argentina in 1991 (Ley 23.774) against the Supreme Court, and the one taken by Hugo Chavez in Venezuela (2005) against the *Tribunal Supremo*. In both cases, the president's political party got control of the Court by increasing the number of offices.

[4] We dare say that the processes of impeachment carried out in Argentina against two Supreme Court Justices in 2003 and 2005 (E. Moline O' Connor and A. Boggiano respectively) were not arbitrary and hence fall down on the democratic-accountability side. We have many procedural reasons in support of this thesis: the process was not controlled by a single party (it required a 2/3 majority and hence the

consent of other political parties in the opposition), the accused had effective opportunities to defend himself and expose their opinions in public, and there was a clear misbalance between how the accused had been appointed as Supreme Justices (in the context of a court-packing plan, by simple majority and without deliberation) and how they were dismissed (by a 2/3 majority).

[5] In some respects, this status may correspond to the observed behaviour of «strategic defection» (see Helmke, 2002), because one characteristic of being dominated is, precisely, that the dominated party has a strategic deference with their principals (see Pettit, 1997; p. 86-87). If we conceptualize freedom as non-domination, as republicans do, then the need for strategy is minimized.

[6] The exceptions in the developed democracies are United Kingdom, Australia, New Zealand, and Netherlands.

[7] On the institutional variables that regulate the relationship between elected branches and judges, see the work of Ríos Figueroa (2006).

[8] We have taken this expression from the work of Favoreu (1997).

[9] According to this, we would expect that electoral systems of a proportional kind (for selecting legislative offices) and multi-party systems will promote the achievement of non-dominated judges under a rule of absolute majority.

[10] These agreements can be labelled as «quota-agreements» (in Spanish: «*acuerdo de cuotas*»). It is worth noting that this political phenomenon is widely observed. For example, some authors have denounced the pervasiveness of quota-agreements in the selection of Justices for the Spanish «*Tribunal Constitucional*» (See Alzaga Villamil; 2003).

[11] We dare say that the selection procedure of High Supreme Court Justices in Costa Rica, from my point of view, is the best method for appointing magistrates in Latin America (and may be elsewhere). This country combines a selection by a qualified majority in the Legislature (2/3 of members) with almost lifetime tenure judges (offices have a fixed term of 8 years, but are automatically renewed if a 2/3 majority in the Legislature doesn't oppose). In this country, individual vacancies usually appear in an unpredictable pattern. However, it is also true that delays and deadlocks are a common state of affairs (see Hess Araya, 2003).

[12] We have taken these rules from the instructive work of Schedler (2004), yet we have made some minor amendments to them.

[13] There are some caveats to be made though. Under these mechanisms, some appointed judges can be more loyal than others. For instance, if the judge is representing the Legislature, or a Judicial Council, and it happens that no single party controls his/her appointment, then the judge finally selected will tend to exhibit a more independent status than the other judges. To evaluate the extent to which representative mechanisms foster more or less dominated courts, we have to assess each concrete mechanism in context, identifying the selecting authorities, the rule of decision, and the effective distribution of parties within those authorities.

References

Favoreu, Louis (1997). Los Tribunales Constitucionales. En García Belaúnde y Fernández Segado (1997). *La jurisdicción constitucional en Iberoamérica*. Dykinson, Madrid, 1997; pp. 99-115.

Fiss, Owen (1997) El grado adecuado de independencia. En Burgos (ed.) Independencia Judicial en América Latina, ¿De quién? ¿Para qué? ¿Cómo?. Publicaciones ILSA; Bogotá, Colombia.

Galanter, Marc (1974). Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change. En *Law & Society Review*, Vol. 9, pp. 95-160.

Gargarella, Roberto (1996). *La justicia frente al gobierno. Sobre el carácter contramayoritario del poder judicial*. Editorial Ariel, Barcelona, 1996.

Hammergren, Linn (2001). Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals. En: G*uidance For Promoting Judicial Independence and Impartiality*. November. Technical Publications Series. U. S. Agency for International Development. Washington, D. C. Páginas 147-155

Helmke, Gretchen. 2002. "The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Democracy and Dictatorship", *American Political Science Review*, vol. 96, no.2, June.

Hess Araya (2004). *Elección de magistrado constitucional: cómo romper el impasse*. Disponible en Internet: www.hess-cr.com/secciones/dere-estado/dd-0410magistrado.shtml.

Hirschl, Ran (2004) *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press, 2004.

Kramer, Larry D (2004). *The People Themselves Popular Constitutionalism and Judicial Review*. New York: Oxford University Press, 2004.

Linares, Sebastián (2004). Independencia judicial: conceptualización y medición. Revista *Política y Gobierno*, México, DF, 2do Semestre 2004.

Pettit, Philip (1997) *Republicanism: A Theory of Freedom and Government*. Clarendon Press, Oxford; 1997.

Pozas Loyo, Andrea and Ríos Figueroa, Julio (2006) When and Why "Law" and "Reality" Coincide? *De Jure* and *De Facto* Judicial Independence in Mexico, Argentina, and Chile. Working Paper Series, Issue Number 7. Justice in Mexico Project. San Diego: UCSD Center for US-Mexican Studies and USD Trans-Border Institute.

Ríos Figueroa, J. (2006). Institutional Models of Judicial Independence in Latin America. Prepared for delivery at the 2006 Meeting Latin American Studies Association, San Juan, Puerto Rico, March 15-18 2006.

Rosenberg, Gerald (1991), *The Hollow Hope: Can Courts Bring about Social Change?* Chicago. The University of Chicago Press, 1991.

Schedler, Andreas (2003). *Judging the Judge. The Logics of Judicial Accountability*. Paper presentado en el XXIV Congreso de la Asociación de Estudios Latinoamericanos (LASA), celebrado en Dallas, Texas, el 27-29 de Marzo.

— (2004). Measuring the Formal Independence of Electoral Governance. Documento de Trabajo Nº 164. C.I.D.E. División de Estudios Políticos. México, D.F; febrero 2004.

— (2005). Argumentos y observaciones: de críticas externas e internas a la imparcialidad judicial. Revista Isonomía Nº 22, Abril 2005; pp. 65-95.