

Llanos, Mariana; Tibi Weber, Cordula; Heyl, Charlotte; Stroh, Alexander

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Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases

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Mariana Llanos, Cordula Tibi Weber, Charlotte Heyl,
Alexander Stroh

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GIGA German Institute of Global and Area Studies
Leibniz-Institut für Globale und Regionale Studien
Neuer Jungfernstieg 21
20354 Hamburg
Germany
E-mail: <info@giga-hamburg.de>
Website: <www.giga-hamburg.de>

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Abstract

This paper assesses the extent to which elected power holders informally intervene in the judiciaries of new democracies, an acknowledged but under-researched topic in studies of judicial politics. The paper first develops an empirical strategy for the study of informal interference based on perceptions recorded in interviews, then applies the strategy to six third-wave democracies, three in Africa (Benin, Madagascar and Senegal) and three in Latin America (Argentina, Chile and Paraguay). It also examines how three conditioning factors affect the level of informal judicial interference: formal rules, previous democratic experience, and socioeconomic development. Our results show that countries with better performance in all these conditioning factors exhibit less informal interference than countries with poorer or mixed performance. The results stress the importance of systematically including informal politics in the study of judicial politics.

Keywords: judicial politics, constitutional court, supreme court, Latin America, Francophone Africa, democratization, separation of powers, informal politics

Dr. Mariana Llanos

is a political scientist, a senior research fellow at the GIGA Institute of Latin American Studies, and the coordinator of the SAW project “Judicial (In)dependence in New Democracies”.

Contact: <mariana.llanos@giga-hamburg.de>

Website: <www.giga-hamburg.de/en/team/llanos>

Cordula Tibi Weber

is a political scientist, and a research fellow at the GIGA Institute of Latin American Studies.

Contact: <cordula.tibi_weber@giga-hamburg.de>

Website: <www.giga-hamburg.de/en/team/tibi-weber>

Charlotte Heyl

is a political scientist, and a research fellow at the GIGA Institute of African Affairs.

Contact: <charlotte.heyl@giga-hamburg.de>

Website: <www.giga-hamburg.de/en/team/heyhl>

Dr. Alexander Stroh

is a political scientist, and a research fellow at the GIGA Institute of African Affairs.

Contact: <alexander.stroh@giga-hamburg.de>

Website: <www.giga-hamburg.de/en/team/stroh>

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Mariana Llanos, Cordula Tibi Weber, Charlotte Heyl, Alexander Stroh

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- 3 The Cases
- 4 Using Interviews to Assess Informal Interference
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1 Introduction¹

Since the late twentieth century, high courts worldwide have frequently been asked to settle important policymaking issues. The empowerment of courts – regarded as “arguably one of the most significant phenomena” of the late twentieth and early twenty-first centuries (Hirschl, 2008) – has constrained the authority of elected power holders and often led to an increased political interest in controlling the judiciary. Political actors willing to do so can pursue judicial intervention at different moments and in many different ways, depending on the peculiar circumstances of the regime they are a part of (VonDoepp, 2005, p. 149). Broadly

¹ This GIGA Working Paper is an outcome of the SAW project “Judicial (In)dependence in New Democracies.” Earlier versions of this paper were presented at the ECPR Joint Sessions in Mainz, on 12 March 2013; at the ECPR 7th General Conference in Bordeaux, on 6 September 2013; and at the ALACIP 7th Latin American Congress of Political Science in Bogotá, on 27 September 2013.

speaking, they can act prior to or after the arrival of the judges on the bench (Brinks, 2011). The first stage is the process of judicial appointment, through which the actors involved decide who presides over the courts. Constitutions allow for different degrees of involvement of the elected branches in the appointment of judges. The second stage is when judges are already on the bench and political actors interfere *ex post*. In younger and less consolidated democracies, the latter political reactions can take the form of retaliation. Helmke (2010), for instance, analyzed the range of mechanisms that an attacking branch of government uses to threaten the survival of another branch in Latin America (impeachments, forced resignations, packing schemes, or the dissolution of the entire institution), and showed that courts are often a target of attacking political branches. However, in younger democracies power holders display a wider range of actions than this “heavy-handed behavior” (Helmke and Rosenbluth, 2009, p. 347).

This paper focuses on a particular form of *ex post* political intervention in the judiciary: the efforts of power holders – at the executive or the legislative level – to influence or curb court activity informally or extra-legally. Several authors acknowledge that many mechanisms for judicial intervention are not foreseen in formal constitutional rules (see Russell, 2001; VonDoepp, 2005). Kapiszewski and Taylor (2008, p. 750) argue that the elected branches may respond to certain rulings by the courts with perfectly legal and constitutional acts based on the legal provisions that regulate their relations with the judges, or they may adopt extralegal and retaliatory actions. For Sanchez Urribarri (2012), in consolidating democracies it is difficult to analyze judicial intervention only through the lens of formal constitutional rules because pervasive informal linkages between judges and political actors often distort the effect of formal rules for court insulation.

Despite the acknowledged importance of informal practices of political intervention in the judiciary, the empirical study of them remains fragmented. The most obvious reason for this is the researcher’s general dilemma with informal politics: the latter is difficult to observe precisely because of its informal character. In the following pages we study these practices through the perceptions of experts and participants, collected in original interviews. We adopt a small-N cross-regional research design that includes six countries that have been part of the third wave of democratization, three in Africa (Benin, Madagascar, Senegal) and three in Latin America (Argentina, Chile, Paraguay). The small number of cases has allowed us to undertake intensive fieldwork, the most adequate research method for the study of informal institutions (Helmke and Levitsky, 2004, p. 733). By utilizing the cross-regional perspective, we enlarge the variance of the cases and also contribute original data on under-researched countries.

The goal of this study is thus twofold. First, we wish to assess the extent to which elected power holders intervene informally in the judiciary in the six selected cases. To do so, we develop and operationalize the concept of judicial interference, on which we have systematically collected information through the interviews. There are two types of such interference –

direct and subtle. Since the extent of both types varies in different cases, they provide us with a useful comparative tool. Second, we seek to explain under what conditions power holders are more prone to resort to these informal means. To do so, we focus on three factors highlighted by the literature on both judicial and informal politics. First, we pay attention to the formal institutional design. In democratic regimes, political actors operate in a particular institutional environment where constitutional rules matter: they define the power of courts as well as how much leeway the elected branches formally have to influence them. Second, we consider the previous experience a country has had with democracy. Informal interference is incompatible with formal democratic rules, and hence its use is likely to vary according to the extent of previous democratic experience. Third, lower levels of socioeconomic development are often seen as being correlated with informal practices that undermine formal rules. Thus, higher socioeconomic standards should come hand in hand with less informal interference.

The paper is organized as follows. Section 2 presents the concept of informal interference and the factors identified as influencing the strength with which it appears in different contexts. Section 3 explains our case selection and outlines the basic characteristics of our cases with respect to the conditioning factors. Section 4 presents the results of our interviews. Section 5 interprets the resulting rankings for the perceived level of informal interference through the lens of the conditioning factors described in Section 3. Section 6 concludes with some thoughts on the study of informal politics and the path of future research.

2 Informal Interference and Its Conditioning Factors

We define informal interference as threats, punishments, or rewards carried out or granted by elected power holders in a covert or public way without any legal action.² The informal interference that constitutes our object of analysis is exercised *a posteriori* – that is, once judges are on the bench and in response to court activity. These actions can be grouped into two major *types* – direct and subtle – according to whether they take place openly or covertly with respect to the public.³ These two types of interference consist of different *modes*. Modes of direct informal interference are, typically, rhetorical attacks, threats of violence, and phys-

² See also VonDoepp (2005), who refers to “paths of interference” that take place through formal or informal mechanisms, and Ramseyer (1994), for whom these actions can be exercised either through punishment after a court’s decision or through (anticipated) reward. Russell (2001, pp. 20–11) also refers to “direct approaches,” or modes of threat, punishment or reward mainly targeting individuals. Trochev and Ellett (2014) describe a broad range of informal interference in the judiciary worldwide.

³ VonDoepp and Ellett (2011) use the expressions “direct” and “subtle,” but they do not systematize the mechanisms of interference included within these categories. See Russell (2001, p. 21) for the distinction between open and covert actions.

ical assaults, while modes of subtle informal interference consist of unofficial communication between judges and power holders, personal connections due to social linkages, and bribes.

Informal interference in the judiciary coexists with formal democratic institutions. With Radnitz (2011, p. 354), we regard informal interference as “informal politics,” including both institutions and practices. In fact, informal institutions are “behavioral regularities that must respond to an established rule or guideline, the violation of which generates some kind of external sanction,” while the term “informal practices” refers to occasional behavior that is “neither externally sanctioned nor rooted in shared expectations” (Helmke and Levitsky, 2006, p. 7). By interfering informally, actors maximize their chances of access to needed goods and services (Lauth, 2012, p. 48). Although not all informal politics is at odds with democracy and the public good, informal interference is generally “competing” or incompatible with the formal rules of democracy, in the sense that by following these practices actors violate formal rules (Helmke and Levitsky, 2004, p. 729; see also Lauth, 2000, p. 25). However, there are different levels of competition or mismatch between formal institutions and informal interference. On the one hand, formal rules vary regarding the level of control or intrusion they allow from the political actors, as we explain below. On the other hand, informal interference also varies; thus the different forms it takes and the intensity with which it occurs do not contradict democratic principles in the same way. For instance, subtle interference requires secrecy and privileged access as a channel of influence. It therefore increases the lack of transparency of political processes and violates the principle of equality and fairness in the consideration of all interests (Lauth, 2000, pp. 35–36). Direct interference involving violence openly violates democratic principles, yet the (more frequent) use of threats of violence limits actors’ capacity to make decisions freely because it may lead to (self-censored) restrictions on what decisions are being reached (*ibid.*: 37).

If informal politics is difficult to investigate and measure *per se*, these fine distinctions between types and modes of informal interference are even harder to grasp. Section 4 explains the empirical strategy we have adopted for this study. First, however, we consider the factors likely to explain the strength with which informal interference takes place. Following the specialized literature, we analyze, first, what the impact of different designs of formal rules may be on the use of informal interference by power holders. Second, we discuss the fact that this interference usually has long-standing roots that go beyond the current political regime, thus making it necessary to connect it to past political and economic experiences.

The Interplay between Formal Rules and Informal Practices

In democratic regimes, informal practices unfold within the framework provided by constitutional rules, even in weakly institutionalized settings. Constitutions vary considerably in terms of the rules for judicial insulation, most of which revolve around the ideas of protecting the judiciary from the unilateral action of a single actor and avoiding the alteration of clauses by single ordinary majorities (Brinks and Blass, 2011; Feld and Voigt, 2003; Ginsburg,

2003; Ríos-Figueroa, 2011). A court is barely insulated, for instance, if just one organ (such as the president of the republic) has the prerogative to appoint its judges; in this case, the president is formally allowed to interfere with the composition of the court. In general, the more actors involved in the processes of judicial appointment and removal, the more insulation; similarly, insulation is achieved if removal decisions are left to the judiciary itself (Ríos-Figueroa, 2011, among others). Constitutions also establish the formal power of courts. They detail the number of instruments for constitutional adjudication, who has access to them, and the effects of judges' decisions (Ríos-Figueroa, 2011). But as Brinks and Blass (2011) have pointed out, the formal power of courts is not straightforward: Constitutions may establish trade-offs among the different formal instruments shaping the autonomy, accountability, and authority of the courts. A constitution may grant important review functions to the Supreme Court, but the system of appointments and term length may politically constrain its use of such review functions. We thus need to look at formal rules in an aggregated manner.

It seems that the more power a court has to decide on issues of political importance, the greater the power holders' interest in controlling it or interfering with its decisions (Helmke and Staton, 2011, pp. 325–26; VonDoepp and Ellett, 2011, p. 163). In general terms, we can assume that power holders will react against challenging courts, and that they will do so using formal mechanisms if the constitutional rules allow this. However, the extent to which formal rules predict observed behaviors is difficult to determine (Helmke and Levitsky, 2004; Helmke and Rosenbluth, 2009; Levitsky and Murillo, 2013; O'Donnell, 2006, p. 287) because such rules are not equally effective in the way they constrain or enable political actors. Similar formal rules can produce different outcomes, and we cannot argue with certainty that a constitutional design that provides room for formal political intervention will make the use of informal interference less relevant. For this reason, the impact of formal rules on informal behavior is a question that should be disentangled empirically.

Depth of Experience with Democracy

The prevailing formal rules for judicial insulation and court power are probably insufficient to explain the extent of informal interference. Sometimes politicians have incentives to change formal rules when they become inconvenient; sometimes the rules and procedures that exist on paper are not enforced and complied with in practice (Helmke and Levitsky, 2004; Helmke and Rosenbluth, 2009, p. 350; Levitsky and Murillo, 2013). In addition, informal practices and institutions are sticky and difficult to change, and new norms of interaction will be modeled on preexisting ones (Lauth, 2012, p. 48; Reh, 2012, p. 69). When informal practices openly contradict the formal rules of democracy, their persistence under democratic rule can be seen as a legacy of the past (Helmke and Levitsky, 2004, p. 729). New democracies that have gone through a transition from a colonial, authoritarian, or communist regime may have brought the experience with informal practices based on secrecy, privileges, or threats from the previous regime or from the insecure environment of the transition (Lauth,

2000, p. 44). However, new democracies also differ in the extent of their previous experience with democracy and the rule of law. We could expect that these informal practices do not appear as strongly in those cases with longer democratic spells in the past.

Socioeconomic Development

A further factor that may explain the extent to which power holders informally approach the judiciary is the level of socioeconomic development. The connection between informal politics and development has been addressed extensively by the economic, political science, and sociological literature. We have learned that different degrees of informal politics may exist at different levels of socioeconomic development, and that not all of them are harmful to development (Radnitz, 2011; Williamson, 2009). Indeed, it seems that the spontaneity and immediacy of informal interaction is an important element of social life and therefore constitutes an effective tool to solve problems of social organization (Böröcz, 2000, p. 358; Radnitz, 2011, p. 352; Reh, 2012). Generally, however, the forms of informal politics that exploit the state for particularistic interests exist to a greater degree in less developed countries.

The two most prominent examples of this type of informal politics are clientelism and corruption. Although clientelism “often adapts and endures” and actually exists at very diverse levels of development, it is more probable in poorer countries (Hicken, 2011). Similarly, the link between development and corruption is clear for the least developed and the most developed countries (the former have very high corruption indicators, the latter have the lowest), while for the large group of middle income countries a direct relationship is more difficult to establish (Blackburn, Bose and Haque, 2010, p. 6). All in all, we can generally expect a negative relationship: the higher the level of socioeconomic development, the lower the incidence of harmful informal politics. We include some modes of informal interference in the judiciary, particularly the subtle ones, within this expectation.

Before exploring whether and how these three factors influence the extent of elected power holders’ informal interference in the judiciary, we use the next section to describe how the selected cases vary.

3 The Cases

As Helmke and Levitsky (2004, p. 773) have stated, there is probably no substitute for intensive fieldwork in informal institutional analysis. Informal politics is often observable only by inference, much like the shadows in Plato’s cave (Radnitz, 2011), and some fieldwork-intensive techniques, such as participant observation and interviewing, are the most commonly used to obtain relevant data. We have also relied on interviews to research informal interference in the judiciary, and we have opted for a small-N research design to be able to carry them out. Small-N comparisons are sensitive to context, allow in-depth fieldwork, and, at the same time, help identify some patterns of behavior. We determined that a cross-

regional small-N comparative research design (Basedau and Köllner, 2007; Sil, 2009) was the most appropriate for the identification and measurement of these informal practices as well as for testing the factors influencing the extent to which they are being used. Such a design has allowed us to enhance the variation among the cases and, thus, the scope of our propositions (Sil, 2009).

In particular, our research includes six countries – three in Africa (Benin, Madagascar and Senegal) and three in Latin America (Argentina, Chile and Paraguay) – that have experienced third-wave democratization processes. In the six cases, regime stability has only been questioned with a coup once, in Madagascar in 2009, this case being the weakest regime in the sample. However, the countries differ considerably in terms of their previous experience with democracy. Chile and Argentina are the only two with a tradition of some elements of democratic institutionalization that dates back to their independence at the beginning of the nineteenth century. In the Polity2 score of the Polity IV-Index (Marshall and Gurr, 2013a), Chile has 88 years with values over 0, Argentina 59 years, Paraguay and Benin 3, and the other two countries 0.⁴ Even in other indexes critical of Polity IV, such as Cheibub, Gandhi and Vreeland (2010), Argentina and Chile are distant from the other cases under study in terms of democratic experience, even though these two countries themselves differ considerably concerning democratic stability (Argentina has experienced several democratic breakdowns since 1930) and the depth of democratization (Chile only adopted universal suffrage in the 1960s, several decades after Argentina).

The two Latin American countries also have a longer tradition of constitutional review. Argentina introduced review powers in the late nineteenth century, and Chile in the 1920s. (Paraguay did it in the 1960s, but it did not practice judicial review before the democratic transition in 1992.) In contrast, the African cases have had a much shorter lifespan as independent countries. Madagascar and Senegal introduced constitutional review mechanisms in their first postindependence constitutions (in 1959 and 1963, respectively), but constitutional review was rarely exercised in these countries before democratization. In Senegal access to the Supreme Court in constitutional review questions was limited to the president of the republic until 1978. In Madagascar constitutional review was rarely applied despite a separate High Constitutional Court created in 1975. Benin's Supreme Court had a dysfunctional constitutional chamber until the 1990 democratic constitution came into being.

However, the selected cases are positioned rather differently when we analyze the ruling formal judicial institutions. Four of the countries have a constitutional court (Benin, Chile,

⁴ The Polity2 score combines the indices for institutionalized democracy (DEMOC) and autocracy (AUTO) from the POLITY IV by subtracting the AUTO score from the DEMOC score. It ranges from +10 (strongly democratic) to -10 (strongly autocratic) (Marshall, Gurr, and Jaggers, 2013b, p. 17). Although Polity IV defines a "real" democracy as having a score of 6–10, we are using a lower specification, counting as "democratic experience" every coding above 0; that is, the years that, according to the indicator, have been more democratic than autocratic.

Madagascar, and Senegal), while in Argentina it is the Supreme Court and in Paraguay a three-member chamber of the Supreme Court that deal with constitutional matters.⁵ The constitutional rules regulating court authority in our six cases indicate the presence of courts with potential power, but with variations. To weight their *de jure* strength, we rely on the scores obtained using an aggregated index of judicial independence that clusters 28 indicators in five dimensions (accessibility of the court, competencies of the court, appointment rules, judges' tenure and removal, the reach of court decisions) (Stroh and Heyl, forthcoming 2014). This index systematically aggregates formal features related to court power and independence; it starts at zero and scores at a theoretical maximum of two. The strongest courts constitutionally speaking are Chile and Benin; the weakest are Argentina and Senegal.⁶

Finally, the selected cases demonstrate great variation in terms of their socioeconomic status. According to the Human Development Index (UNDP, 2013), Chile and Argentina classify as countries with very high human development, Paraguay as medium, and the three African countries, with small variations among them, as low.⁷ The cross-regional comparison of these six new democracies increases the variation in terms of development because even the worst-performing countries in Latin America are then positioned at a medium level of development. The relative positioning of the selected countries has remained the same since the beginning of the Human Development Index measurement in 1980, with the exception of Argentina and Chile. The two countries have always been close together, but Chile overtook the lead in the 1990s.

If we consider these factors together, we see, for instance, how two countries with formally strong constitutional courts (Benin and Madagascar) are low on the list in terms of development and democratic experience. In other words, we see how formal institutions that empower and insulate courts coexist with contextual specificities that suggest there could be difficulty putting these institutions' prescriptions into practice. At the same time, we see that a country like Argentina ranks low in *de jure* strength but ranks higher in terms of its past democratic experience and level of socioeconomic development. This raises questions with respect to the behavior of elected officials in relation to the courts. The next section presents our findings regarding power holders' use of informal interference.

⁵ Among our cases, Benin, Chile, Madagascar, and Senegal have centralized constitutional review; Argentina has decentralized review; and the Paraguayan constitution allows for both (decentralized review to be used in the cases of *amparo* and *habeas corpus*). Our comparative analysis focuses on the highest court of each country.

⁶ Countries score as follows: Chile (1.00), Benin (0.72), Madagascar (0.53), Paraguay (0.31), Argentina (0.26), Senegal (0.24).

⁷ The Human Development Index includes three dimensions that are important for development: "a long and healthy life" as measured by life expectancy, "access to knowledge" as measured by expected and mean years of schooling, and "standard of living" as measured by GNI per capita (UNDP, 2013). The country values for 2012 were as follows: Chile (0.819), Argentina (0.811), Paraguay (0.669), Madagascar (0.483), Senegal (0.470), Benin (0.436).

4 Using Interviews to Assess Informal Interference

This assessment of informal interference is based on the perceptions of participants and informed experts. The “participants” interviewed included current and former judges⁸ of the constitutional courts – or highest courts – and representatives of the appointing institutions (presidency, congress, judicial councils, supreme courts);⁹ the “experts” included judges of lower courts, lawyers, academics, journalists, NGO representatives, and development advisors. The results presented in this paper are based on a total of 117 interviews in six countries, 45 of which were carried out with supreme court or constitutional court judges. We conducted semistructured interviews with the same questionnaire, which included a special section on informal interference. Our aim was to have the interviewees explicitly address the three specific modes of interference we had identified for each major type, direct and subtle, as described in Section 2. They often did this while talking about broader topics, but if they did not, we asked them directly about the occurrence of each of the six modes.¹⁰

With the goal of assessing to what extent political interference in the judiciary is present in a given country, we analyzed the interviews in three steps. First, we recorded individual answers at the level of the modes of interference. Second, we evaluated the perceived existence of the two types of interference, subtle and direct, respectively, per individual interview. Third, we aggregated individual perceptions into a country-level assessment.¹¹

As previously explained, we allocated three basic modes to each of the two types of interference. Therefore, the first step consisted of coding individual interviews with regard to the six different modes of interference. We assessed whether the interviewees had indicated (a) the existence of a given mode or (b) its absence, or (c) if the answer was missing. In a second step, given that semistructured interviews across countries (and continents) always involve uncertainty and inconsistencies, we coded one individual interviewee as affirming the existence of one type of interference if she indicated the existence of at least two of the three modes subsumed under this type. This means that there were two observations per interview – one for subtle interference and one for direct interference. Each observation records if

⁸ In order to protect the anonymity of the interviewees, we refer to current constitutional or supreme court judges and ex-judges as “judges” in general. Constitutional court judges are abbreviated as “CC judge,” supreme court judges as “SC judge.”

⁹ Cited as “appointer” in subsequent quotations.

¹⁰ The specific question was as follows: What have been the mechanisms and the means that have been used to pressure the court or individual judges? We are not asking you for specific cases or names; we are only interested in your general assessment. However, if you want to cite specific examples, go ahead. [If not already part of the spontaneous answer:] How about (a) rhetorical attacks? (b) physical attacks? (c) personal threats of violence against judges? (d) informal communications such as phone calls? (e) bribes? (f) the use of personal obligation due to social linkages?

¹¹ We also conducted checks of the results against potential errors and alternative criteria. These checks included the choice of different benchmarks and the calculation of error margins based on answers that could not be collected for various reasons. All in all, the findings proved to be robust.

(a) the respective type of interference has existed, or (b) if it has been absent, or (c) if the interview could not be categorized due to missing answers.

In a third step we assessed the existence of subtle and direct interference at the country level. We did this by considering the chance of randomly picking two interviewees from our expert sample who agreed on the existence of either type; the greater the chance of drawing two “yes” answers, the more the country was perceived to be exposed to a particular type of interference.¹² This resulted in the country-level assessment of a country’s “exposure” to each of the two broad types of interference. The black rhombuses in Figure 1 represent the levels of exposure. We can see that they provide an interesting comparison. Generally speaking, the African judiciaries seem more likely to experience informal interference by power holders, since both types of interference – direct and subtle – are perceived to be pervasive in the three countries. Meanwhile, subtle interference can be regarded as a more global phenomenon. Chile is a special case, with a very low perceived use of interference of any type.¹³

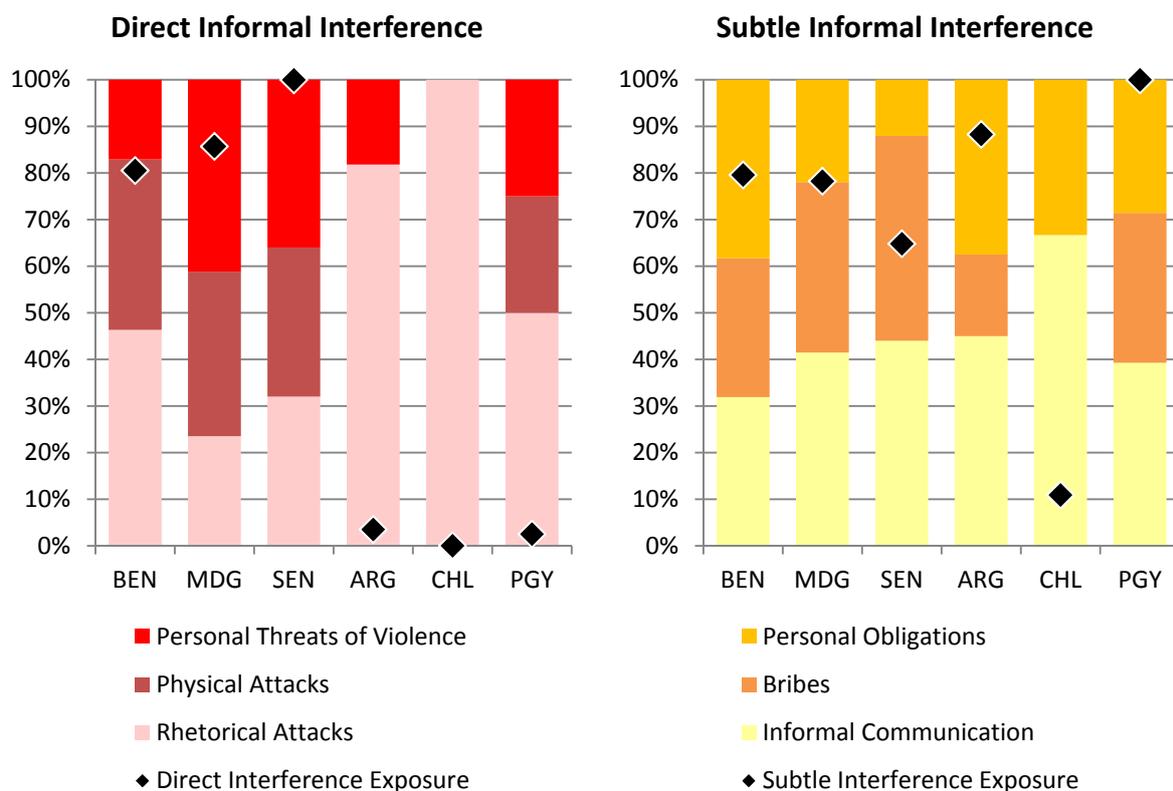
In order to refine the country-level assessment, we returned to the six modes of interference. We considered the ratio of each mode to all perceived incidences of interference of one type. We assumed that “rhetorical attacks” and “informal communications” are the mildest modes of interference. Figure 1 has two bars per country, one for each type of interference, and each bar shows the cumulative ratio of frequency for the respective interference modes. We can see, for instance, the contrast between direct interference in Chile, with only rhetorical attacks, and in Senegal, where all three modes are almost equally acknowledged. If we combine the level of exposure (as shown by the rhombuses) and the distribution of modes per country, we have a better comparative measure with which to order the countries according to the intensity of judicial interference. As mentioned, Chile is by far a best performer. Then we have the cases of Argentina and Paraguay, both with judiciaries perceived as experiencing considerable subtle interference but not as much direct interference. These cases differ, though, because only the milder forms of interference are acknowledged in Argentina, while the distribution of the reported modes is more balanced in Paraguay. This characteristic makes this latter case resemble the African cases. In effect, the detailed analysis outlined in the following subsections has encouraged us to pull the Paraguayan and Beninese cases closer together. The modes of interference in the judiciaries of these two countries, as identi-

¹² The check for a binary agreement has certain advantages against checking for simple frequencies. First, the reported numbers are less exciting, but they represent a more careful interpretation of this quantified interview data. They help us compare the cases, although they should not be mistaken for mathematical rigor. Second, a binary agreement imposes a penalty for very small numbers of interviews. Due to national specifics, the interview count varied across cases. Given that we aimed to assess the confidence level about the existence of political interference, the quantified result should critically penalize low numbers of interviews. Equally importantly, extreme rates of agreement must be screened for unwanted biases.

¹³ Similarly, we repeated the agreement calculation for the absence of the two respective types. Unsurprisingly, we found much higher levels of confidence in the absence of a type when confidence in its presence was very low. This is true for all direct interference in Latin America and for subtle interference in Chile.

fied from the content of the interviews, indicate a sort of grey cross-regional area, instead of the clear-cut difference initially observed between the two regions. Finally, Senegal and Madagascar remain the weakest performers in the sample. These are the only cases where direct interference was reported more often than subtle interference – even though the latter is also present at a significant level – and where the modes of direct interference used are the most severe.

Figure 1. Exposure to Types of Interference and Ratio of Modes of Interference



Source: Figures based on interview data collected by the authors.

The Best Performer: Chile

According to our Chilean interviewees, there is not much informal pressure or – as some stated – any kind of pressure on the Constitutional Court in Chile. Particularly the judges interviewed perceive themselves and the institution they represent as being autonomous and independent. In those cases where interference was mentioned, only the mildest modes were recognized. Direct interference was considered to be virtually absent. Only a few interviewees stated that rhetorical attacks had occurred during the Piñera administration (2010–2014), when power holders publicly claimed that the judiciary was responsible for high crime rates because it was too soft in sentencing criminals.

Positive answers regarding subtle interference were also remarkably rare, and most of them referred to the mildest mode, informal communications, with interviewees pointing out that the system of judicial appointments means that “constitutional judges have more flexibility to have contact with political actors than other judges” (interview with CC judge, December 2012). In effect, Chile has a ten-judge Constitutional Court, with three judges appointed by the president, four by Congress, and three by the Supreme Court. The judges have nine-year mandates and cannot be reelected. The five judges interviewed who acknowledged the existence of informal communications with power holders had been political appointees. They mentioned the existence of informal connections to their old contacts within the political and social elite, but they regarded such communication less as pressure than as a means to learn the opinion of the ministers, particularly when topics sensitive to the government are at stake. In contrast, ministers with a judicial origin declared that relations between the Constitutional Court and the political realm are purely ceremonial.

It is striking how differently judges of different origin assessed the situation. This confirms previous assessments that the Chilean judiciary has traditionally been characterized by its “institutionalized apoliticism” (Hilbink, 2007, p. 224), a feature that has only recently begun to change due to an ideational shift in the judicial community as well as the effects of constitutional reforms on the Constitutional Court (Couso and Hilbink, 2011). It also confirms that power holders do not obtain much from interfering informally: they can only reach a small number of the total judges (those politically close to them), and the benefits of doing so are uncertain because “no one votes automatically for the party that selected you” (interview with CC judge, December 2012). Just one feature seems to weaken judicial insulation according to the interviewees: the reelection chances of judges appointed as substitutes (the only ones whose tenure is in principle open for reelection) can be affected by their votes on crucial topics.¹⁴

Argentina

Argentina differs considerably from Chile in that it has a much higher perceived level of subtle interference. This feature actually makes Argentina resemble Paraguay, but only at first sight; in Argentina the milder modes of subtle interference were reported more frequently. There was far less mention of corruption linked to the Argentine Supreme Court, and when there was it almost exclusively referred to one particular composition of the court (President

¹⁴ The only case in which the reelection of constitutional judges in Chile is possible is when a member of the court is appointed as a substitute for another judge who has left the court before ending her mandate. The substituting member completes the predecessor’s mandate, and if this occurs in less than four and a half years, she can be a candidate for a subsequent full mandate. A couple of interviewees mentioned that in the so-called “Trans-Santiago Case” (in which the Constitutional Court rejected the financing plan for an important and politically crucial infrastructure project proposed by Michelle Bachelet’s government (2006–2010), a substitute member’s vote against the government’s interest negatively affected his reelection chances.

Carlos Menem's, 1989–1999). Typical of Argentina, instead, is the high level of informal communication with judges and the use of personal and social linkages as a means to influence court decisions. Seventy-eight percent of the interviewees agreed that judges and political actors communicate informally: "Sometimes the lawyers have this habit: because I know you I come to say hello and drink a coffee and, by the way, I tell you that a friend of mine has a case..." (interview with SC judge, May 2013). Indeed, several interviewees also emphasized that informal contacts are used beyond the Supreme Court and its relations with politicians; they are part of a more general practice of how the parties in a case relate to the judge. There are also no established institutional or social sanctions obliging the parties to avoid the judge with whom they have a case, a reason why "this way of relating to each other generates opportunities that in other social models do not exist" (interview with academic, May 2013).

With the partial exception of Chile, informal communications between judges and power holders were acknowledged in all the cases studied, and should thus be regarded as a global informal phenomenon. From a positive angle, they can be seen as "dialogue, cooperation, inter-dependence ... after all, the judicial power is the weakest in effective power, and it loses if confrontation replaces dialogue" (interview with academic, May 2013). On the other hand, subtle communication is a type of mild pressure, which nonetheless cannot be regarded as harmless. Such communication normally takes place secretly, and there are certain groups with privileged access to this mechanism, those well connected due to their sociopolitical networks. In extreme cases, secret communications can involve corruption, a more dangerous way to influence court decisions, which brings us to our analysis of the next cases.

Benin, Paraguay, and Some Cross-Regional Similarities

What distinguishes Argentina from Paraguay and, we argue, places the latter near Benin, is the greater perceived use of more severe modes of interference, both direct and subtle. Unlike the case in Argentina, after democratization the Paraguayan Supreme Court faced violent threats and attacks, higher levels of (reported) corruption, and greater informal personal obligations due to clientelist links. All these forms of informal interference were cited in the interviewees' accounts, together with the – sometimes twisted – use of formal rules to render the court accountable. In effect, the mode of "threat" Paraguayan interviewees regarded as the most serious for the judiciary is the threat of impeachment. Impeachments of upper-level officials, including Supreme Court judges – trials that can end in the incumbent's removal following evidence of professional misconduct – are written into the constitution. In practice, the threat of impeachment works as intimidation because judges understand that their decisions have consequences for the stability of their position. In Paraguay, "the impeachment is the Damocles sword that the chamber of representatives has imposed on the judges" (inter-

view with SC judge, October 2012).¹⁵ Similarly, every five years judges fear that they will not be confirmed in their positions, despite constitutional life-long tenures, due to the practical interpretation that the Senate (Congress's upper house) has been applying to this constitutional clause since 1999.¹⁶ As long as impeachment exists as a threat, we can regard it as a powerful informal means of exerting pressure or interference. It is curious that although Argentina has a long history of judicial instability (Helmke, 2005), our interviews did not show job insecurity to be a threat in that country, as it clearly appeared to be in Paraguay. This is an additional factor that distinguishes the two cases.

Job insecurity is thus perceived as a vivid threat in contemporary Paraguay, and this is probably why our interviewees reported more on this kind of threat than the death threats that our question was trying to capture. The finding is thus that there is a very low level of direct informal interference in this country. However, the physical attacks and threats mentioned by interviewees in Benin were also mentioned in Paraguay, a fact that makes these two countries similar. In both cases physical attacks were isolated events that occurred in the 1990s. In Paraguay, interviewees remembered the insecurities judges had to live with when deciding on the Oviedo case in 1998.¹⁷ These judges received phone calls threatening violence, and one judge's house was attacked with a machine gun when the family was on holiday. In Benin, interviewees mentioned two events in 1996 in particular that were connected to that year's presidential elections: a demonstration close to the Constitutional Court building and a violent attack on Judge Glèlè's home.

Two other features reported in the interviews show Benin to be a milder case than the other two African cases. First, there is little politicization through appointments, despite the fact that the formal system of appointments and tenure makes the Beninese court compara-

¹⁵ In 2003, the threat of impeachment made to six members of the constitutional court ended in four resignations and two completed removal processes. With these removals, President Nicanor Duarte Frutos (2003–2008) "fulfilled" his electoral promise to ensure the "pulverization of the Supreme Court" (CEJ, 2013).

¹⁶ The Constitution of Paraguay refers to the length of judges' terms in two passages. Article 261 declares that Supreme Court judges may only be removed through impeachment and that their mandatory retirement age is 75. However, Article 252 (in the chapter concerning the judicial branch in general) declares that judges are appointed for five-year terms and that "any judge confirmed for two terms following the term of his appointment will be irremovable from his post until he reaches the mandatory retirement age set for justices of the Supreme Court of Justice." The practice means the Supreme Court judges have been treated the same way as justices from the ordinary judiciary; this is not without controversy as the Supreme Court has rendered this treatment unconstitutional.

¹⁷ Former colonel Lino Oviedo was imprisoned for planning a coup in 1996. Shortly after assuming office, President Raúl Cubas (1998–1999), a close ally of Oviedo, declared the sentence against Oviedo void and set him free. The Supreme Court, in turn, declared the presidential decree unconstitutional and ordered the imprisonment of Oviedo, a decision that was publicly rejected by President Cubas (Brítez and Numan Caballero, 2010). Writing on the death of Oviedo in a helicopter accident in February 2013, newspapers once more reminded readers of the death threats that some politicians and Supreme Court judges had received from Oviedo and his people (Colmán Gutiérrez, 2013).

tively more accountable to the political sphere (interview with appointer, and interview with a journalist and political analyst, September 2012).¹⁸ What explains this behavior is a strong self-conception of independence among the judges: “*Vous m’avez nommé, je ne vous connais plus.*” (You appointed me; I don’t know you anymore.)¹⁹ Second, interviewee statements on corruption at the Constitutional Court were more general in Benin than in the other African cases, and even in Paraguay, where interviewees often illustrated their point with detailed examples.²⁰

To summarize, Paraguay and Benin are two cases in which the judiciary’s level of “exposure” to political interference resembles that of the other cases in their own region. However, in terms of the modes of interference used, both countries perform in a rather similar way: Paraguay is the weakest case in Latin America, for interviews revealed that the most serious modes of interference are being used there, while Benin is the strongest case in Africa, for the modes of interference are milder in comparison to the other cases in the same region.

The Weakest Performers: Senegal and Madagascar

Although the judiciaries of all three African countries are exposed to all the modes of informal interference identified in this paper, such interference is more pronounced in Senegal and Madagascar. Interviewees not only mentioned more direct interference than subtle interference in these countries, but they also referred more frequently to the most severe modes. The level of agreement among interviewees concerning the existence of the two toughest modes of direct interference was very high (greater than 70 percent). Although physical assaults were generally recalled as isolated events in the interviews across all countries, in these two countries they were seen as particularly severe, and in both cases they were connected to the courts’ role in overseeing elections.

The most serious case reported to us was the assassination of the vice president of the Constitutional Council of Senegal, Babacar Sèye, during this court’s first year of activity (1993). This event, together with the resignation of the highly respected president of the council, Kéba Mbaye, which occurred in the same year, was connected to the 1993 elections.

¹⁸ Benin’s Constitutional Court is composed of seven judges, three of whom are appointed by the president alone and four by the Board of the National Assembly. Appointments are made simultaneously, and judges serve five years with the possibility of being reappointed for another term.

¹⁹ According to one of the judges interviewed, this phrase goes back to Mgr. de Souza’s speech at the inauguration day of the Constitutional Court (interview with CC judge, September 2012).

²⁰ An important center of corruption related to the Paraguayan Supreme Court seems to be the Oficina de Admisibilidad (Office of Admissibility), the administrative body that decides whether or not a lawsuit will be heard by the Supreme Court. According to several interviewees, in order to get a case heard by the Supreme Court, a bribe often has to be paid: “It is an office of revenue, of charge in the route of trial. The only thing it guarantees is that a case will be discussed; it does not guarantee the result, which has another cost” (interview with appointer, November 2012).

These were the first elections to fulfill procedural democratic standards, and they were celebrated under a new electoral code, over which the constitutional court was to preside.

In Madagascar, a series of violent attacks occurred around an electoral crisis that took place after the presidential elections in December 2001. The opposition, in particular Marc Ravalomanana, alleged that there had been irregularities in the vote counting and questioned the credibility of the High Constitutional Court, the responsible electoral body, as the judges had only been appointed three weeks before the election. When the High Constitutional Court decided that a run-off between incumbent president Didier Ratsiraka and Ravalomanana needed to be held, Ravalomanana (with the support of public protests and large parts of the opposition) disobeyed the court decision and declared himself president. Madagascar thus had two parallel governments, and both political camps attacked the houses of members of the other camp, including those of members of the constitutional court.

In addition to these serious physical assaults, interviewees in Madagascar and Senegal often mentioned personal threats of violence and rhetorical attacks. These countries also evinced the most serious modes of subtle interference. The interviews in Senegal focused heavily on the Constitutional Council's controversial decision to allow President Wade (2000–2012) to run for a third presidential period. The lack of independence demonstrated by the Constitutional Council in this case was interpreted in terms of "the unlimited respect it [the court] has had for the boss" (interview with academic, September 2012), reminding us that the limited independence this court has been given in the formal rules has translated into a loyal personnel. The court decision was also accompanied by a timely increase in the salaries of the presidents of the highest judicial bodies (Supreme Court, Constitutional Council, Court of Audit) as well as by the distribution of automobiles to the members of these courts. In Madagascar, a quite different case with a well-insulated court enshrined in the constitution,²¹ corruption was also often acknowledged. It seems to have taken similar forms to the corruption in Senegal, occurring "indirectly through certain privileges like official cars" (interview with academic, April 2013).

5 Discussion

Now that we have analyzed the perceptions of the extent to which elected power holders resort to informal means to influence judicial behavior, we can assess the cross-country variations through the lens of the explanatory factors pointed out in sections 3 and 4. Table 1 illustrates the combined results. In the first three columns, the countries studied are ordered from

²¹ Whereas in Senegal all five constitutional judges are appointed by the president of the republic for a non-renewable term of six years, the Malagasy constitution stipulates that the nine constitutional judges are appointed by the president of the republic (3), the National Assembly (2), the Senate (2) and the High Judicial Council (2) for a seven-year mandate. The 1992 constitution clearly stated the nonrenewability of the judge's mandates, but the revised 1998 constitution is less clear about this question. In any case, the judges cannot formally be removed through an impeachment procedure.

best to worst (high to low) according to their scores for the indicators for formal strength of courts, previous democratic experience, and economic development. The last column reverses the order – low to high – as our expectation was to find lower levels of informal interference when countries scored high for the mentioned indicators. Three findings stand out. The first concerns the two cases of Chile and Senegal – located at the top and bottom of the table, respectively – where we can see a correspondence between the strength of political informal interference and what the formal rules, the depth of democratic experience, and socioeconomic development prescribe. The predictive capacity of the formal rules enforced after democratization in these two cases lies in the fact that they reflect the past legacies and the broader institutional framework, creating a virtuous circle in the case of Chile and a vicious one in that of Senegal. Senegal has enforced a constitution where the executive is granted much more power to meddle with the constitutional court than in the other cases. In turn, the informal behavior of political actors matches the past legacies incorporated into the formal rules, but in a kind of vicious circle in which a harmful informality and permissive formal rules mutually reinforce one another.

Table 1: Informal Interference and Conditioning Factors

	IFI Index	Democratic Experience	Socioeconomic Development	Informal Interference	
HIGH	Chile Benin Madagascar Paraguay Argentina	Chile Argentina	Chile / Argentina Paraguay	Chile Argentina	LOW
LOW	Senegal	Paraguay/Benin Madagascar/Senegal	Madagascar Senegal Benin	Paraguay/Benin Madagascar/Senegal	HIGH

Source: Authors' own compilation.

The second finding calls attention to the imperfect correspondence of the in-between cases in terms of their score in formal rules and the use of informal interference in the judiciary. The cases of Benin and Madagascar are placed below Chile as their constitutions provide similarly for strong courts, though to a lesser extent in each case. However, these two cases have not inherited favorable conditions for corresponding democratic behavior, as can be seen in the two other columns. It therefore comes as no surprise that they have been more exposed to informal interference. Still, there is a difference between the two cases, since our interviews in Benin described a more moderate situation. This difference emphasizes the importance of formal rules, in particular their implementation and the commitment of relevant political actors to them (Helmke and Levitsky, 2004).

Douglas North has aptly explained that “how the game is actually played [is] a consequence of the formal structure, the informal institutional constraints, and the enforcement characteristics” (North, 2005, p. 52). On the one hand, Benin’s constitution of 1990 established relatively effective democratic institutions after a period of leftist military dictatorship and a

politically very instable first postcolonial decade. As a consequence, constitutional stability has been given high priority since the democratic transition: The constitution is difficult to amend and has not in fact been revised so far. It is guarded by a highly respected Constitutional Court, frequently and honorifically described as the “fetish” that warrants stability to the democratic system (e.g., interviews with a CC judge and with an appointer, September 2012). Accordingly, recent plans for constitutional revision resulted in heated political debates. Madagascar, on the other hand, is the weakest case in the sample in terms of the effectiveness of democratic institutions. The judicial architecture negotiated during the National Forum of 1992 and confirmed in the constitutional referendum was never implemented.²² National experts explained to us that the political class mistrusts judges, who they perceive as corrupt (several interviews, e.g., with an appointer and the representative of an association of legal professionals, April 2013, and with a lawyer, May 2013), and that they fear “government by judges” (interview with former minister of justice, April 2013) if the latter were granted too much independence. In practice, formal rules have never become rooted and have often been reinterpreted and changed.

The third finding concerns the performance of the remaining two countries – Argentina and Paraguay – located in the lowest half of the table in terms of the formal strength of their courts but differing in past democratic experience and level of development. Both countries have experienced considerable political manipulation of the formal rules since democratization, with elected power holders taking advantage of loopholes in constitutional texts and at the same time contradicting the principle of judicial stability also recognized in the constitutions. In Argentina, this pattern was inherited from the past, as the removal of judges with changes of government or regime had recurred since the 1940s. Interestingly, though, after thirty years of democracy Argentina has managed to move away from these more severe (formal) forms of judicial intervention to the comparatively less harmful modes of subtle political interference in the judiciary. In contrast, Paraguay has not shown progress in the principles of judicial stability and independence. This country came to democracy after 35 years of General Stroessner’s dictatorial rule, while Argentina’s past institutional instability did not obscure the longer democratic experience of a richer and more active civil society.

6 Conclusion

Informal practices and institutions are difficult to grasp empirically. They exist simply in the beliefs and attitudes of individuals; they are not formally codified and they cannot be traced in official documents. Their study is time-consuming and demands intensive fieldwork, elements that conspire against systematic scrutiny of them in a social science world that tends

²² The constitution of 1992 introduced a judicial power (*pouvoir judiciaire*) and stipulated a Constitutional, Administrative and Financial Court that included a constitutional court.

to reward the testing of context-free theories and the use of prepackaged data (Luna, Murillo, and Schrank, 2014, p. 5f). In these pages we have proposed a technique for collecting information on informal interference in the judiciary based on the perceptions of country experts and relevant participants. Using this technique, we have provided new empirical data on the under-researched topic of informal interference for six countries, many of which are also severely under-researched in the general judicial politics literature (namely, the three African cases and Paraguay). The small-N cross-regional research design has obliged us to keep the scope of the propositions large, but the research has maintained context sensitivity.

With this research strategy, we have shown how the relationship between judges and political actors in a heterogeneous group of new democracies is embedded in informal behaviors. The informal interference that we have investigated here is a behavior that competes, to different degrees, with democratic practices. Our research has stressed how often informal practices and formal rules pursue divergent, sometimes contradictory, ends. While formal institutions can be changed by an act of state authorities, changing informal institutions and practices is a lengthy process as they are internalized by the participating actors and reproduce themselves by shaping future behavioral expectations (Lauth, 2012, p. 48). It is therefore difficult to assess the performance of new democracies only through the lens of the recently established or reestablished formal institutions. For instance, a study that looks solely at formal aspects lacks relevance for the understanding of judicial independence in these countries, and even a more advanced approach showing how formal rules are being disregarded or poorly implemented in practice has its limits: it keeps the codified norms at the center of the analysis, ignoring the informal patterns of behavior that sometimes replace such norms or render them meaningless.

We have presented a scheme that disaggregates different types and modes of informal interference, and differentiates the degree with which they impact individual judges or the court as an institution. In addition, we have shown the added value of investigating countries in two regions: This approach enhanced the variety of conditioning factors as well as the variety of mechanisms of informal interference we gathered through the interviews. This in turn made it possible for us to examine unexpected combinations of factors, as in the case of Benin, where a different “spirit” of constitutionality compensates in part for the lack of democratic experience and the low level of development and means that the country’s level of informal interference is close to more developed Paraguay. Certainly, there is still a long way to go, but we hope to have demonstrated the importance of keeping informal politics in mind when studying judicial independence and that this study has had opened the door for further research along these lines in future.

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