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2009**

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**A LONG HISTORY OF THE POLITICAL MANIPULATION OF THE SUPREME COURTS  
IN CENTRAL AMERICA AND THE CARIBBEAN, 1900-2009\***

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One of the most fundamental principles in democratic countries is the guarantee of the independence of the judiciary. The essence of judicial independence is that judges have to be free of the influence or control of the government when deciding on a case (Fiss 1993). When judges are granted this political insularity, the judiciary can act as a countervailing force within the political system, thus ensuring a necessary system of checks and balances between the legislative and executive branches. However, the political manipulation of the judiciary is a deep-rooted problem in nascent democracies like those in Latin America, since executives often alter the composition of Supreme Courts so as to craft a supportive judiciary. What factors account for the instability of justices on the bench? The objective of this research is to understand the logic of the political manipulation of the judiciary by analyzing the stability of the justices in office in 8 Central American and Caribbean countries (Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Panama, and Puerto Rico) between 1900 and 2009. Even though there is an increasing body of research on the judiciary of Latin American countries, the judiciaries of Central America and the Caribbean are among the most understudied in the region as well as the most unstable ones; consequently, they deserve special attention.

In industrialized democracies like the U.S., Supreme Court justices serve in office for an average of 16.8 years, while in developing democracies the average number of years justices remain in office varies from 3.6 years in El Salvador to 5.4 years in Honduras.<sup>1</sup> Why do justices remain in office for such a short time? Based on preliminary analysis, it seems that executives have employed multiple tactics to induce justices to retire from the bench, including impeachment or threat of impeachment, forcing unfriendly justices to resign, or packing the court with friends. During recent decades, many Latin American Supreme Courts like those of Argentina (under the Menem administration), Ecuador (under Lucio Gutiérrez), and Bolivia (under current President Evo Morales) have experienced these different formal and informal tactics by which incoming presidents were able practically to purge the courts, thus

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<sup>1</sup> See Table 1.

jeopardizing judicial independence. Similar patterns have marked the Central American and Caribbean countries, but with lower levels of media visibility. Montesquieu (1752) and Alexander Hamilton (1787-1788) would argue that attacks on the judiciary happen because the judiciary is the weakest of the three branches of government. Therefore, studying the timing of judicial turnover in high courts should make it possible to identify whether justices voluntarily step off the bench or leave as the result of political manipulation by the incoming executive. This close examination of the instability of justices in the region aims to shed light on the debates about the foundations of judicial independence in developing democracies.

This analysis is structured as follows. The first section aims to describe the way Supreme Courts in Central America and the Caribbean have been politically manipulated by either the local executives or the legislatures. Using qualitative evidence, the section presents different examples that denote the executive-court relationship. The second section summarizes the main contributions of the existing literature and derives a set of testable hypotheses to account for judicial turnover. The third and fourth sections present quantitative data that examine variations in judicial instability across countries and years, along with econometric models that test the hypotheses. The final section presents the conclusions.

### **1. The political manipulation of the Supreme Courts in Central America and the Caribbean**

Since 1900 supreme courts in these countries have witnessed the constant manipulation of their composition by incoming executives or winning coalitions in Congress. In Haiti in 2004, for example, following the coup d'état removing President Jean-Bertrand Aristide, the Chief Justice of the Supreme Court, Boniface Alexander, next in the presidential line of succession, assumed the presidency of the country. One of the first actions of the new president was to remove all the other five justices of the Supreme Court, allegedly to allow a better working relationship between the executive and the judicial

branches; in fact it occurred one day after the court had unanimously ruled for the second time that Dumarsais Mécène Siméus, a Haitian-born U.S. millionaire, could run for president. Justices in the region have been removed from the bench through both institutional and non-institutional mechanisms, resulting in high judicial turnover. Even though the Supreme Court of Costa Rica is considered the most stable and independent institution of its kind in Latin America, during the first decades there were several episodes indicating a lack of independence. The following paragraphs highlight several examples of how supreme courts have been manipulated in some of these countries.

Since the beginning of 1900, executives and congresses were able to craft a supportive court using such institutional mechanisms of vacancy creation as removing a justice by executive decree or congressional resolution, or synchronizing the tenure of justices with the term of the executive, among others. In 1985 the Honduran Congress decided to purge the Supreme Court because of its denunciations of corruption and wrongdoing. President Roberto Suazo Córdova reacted by stating that the purge was clearly a congressional coup d'état against his government (ABC 31/3/1985). This confrontation produced a unique situation in the country, namely, two ruling supreme courts at the same time: one court supported by the president, and the other by Congress.<sup>2</sup> As soon as Chief Justice Ramón Vallardes, appointed by the Congress, swore in the Court, President Suazo imprisoned him for treason (ABC 1/4/1985). This awkward situation, which lasted a couple of weeks, was finally resolved only when a political agreement was reached and a new Supreme Court was elected.

Another occasion of unconstitutional removals in the Supreme Court took place in Guatemala. In 1982 General Ríos Montt suspended all the justices of the Supreme Court, replacing them with the

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<sup>2</sup> A similar situation took place in El Salvador in 1854 when, after an earthquake, the Court was relocated in Cojutepeque. Half of the members of the Supreme Court remained in Nueva San Salvador, which was interpreted as a challenge to the decision of the executive. The country thus had two courts, one in Nueva San Salvador and the other in Cojutepeque. The situation was resolved when the Congress removed from office those justices who had not relocated to the new capital (Aguilar Avilés 2000).

deans of private universities (Sieder and Costello 1996). Then, in 1993, the administration of Jorge Serrano Elías had to confront simultaneously a breakdown of the government coalition in Congress, a deadlock in peace negotiations, and strong criticism of the president's abuse of power and corruption (Córdova Macías 1996). As a result of this impasse, in May 1993 the president decided to dissolve the Congress, the Supreme Court, and the Constitutional Court. The *autogolpe* was the result of President Serrano's inability to devise a democratic solution to the increasing protests and political deadlock in the country (Córdova Macías 1996). However, the Constitutional Court issued a resolution stating that the actions taken by the president were clearly unconstitutional and therefore invalid. Soon afterwards the army forced Serrano to step down, leaving the Constitutional Court responsible for overseeing the return of democracy.

A more recent example of manipulation of the courts took place in Nicaragua in early 2010, when President Daniel Ortega, via decree, extended the terms of 25 judges that were about to expire. Three of them were from the Supreme Court (Diario Judicial 23/4/2010).<sup>3</sup> The official justification was that, by extending the term of these judges, Ortega was preventing a judicial impasse, since the legislature was not able to appoint substitutes. The opposition strongly condemned the decision and tried to annul the decree, but supporters of President Ortega from the Frente Sandinista de Liberación Nacional (FSLN) forced the congressmen to leave the building and continue the session in a hotel nearby.

Politicians have also triggered informal mechanisms of vacancy creation like forcing the retirement of justices from the bench or threatening an impeachment trial. In 1944, when General Andres Ignacio Menéndez from El Salvador assumed the presidency of the country, the Supreme Court

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<sup>3</sup> The justices on the Supreme Court belong to the core group of Ortega's supporters that in October 2009 lifted the constitutional ban on reelection, thus allowing President Ortega to run for a second term in the 2011 elections. The Constitutional Chamber of the Court was responsible for the decision, which was condemned by the opposition as illegal, since only members of Ortega's Sandinista party were involved in the ruling.

justices resigned en masse, fearing their involuntary removal. The new Supreme Court appointed by Menéndez, even though it had popular support, did not last long. When, a couple of months later, the military forced the resignation of General Menéndez, and General Osmín Aguirre y Salinas seized power, the court declared the removal of Menéndez unconstitutional. The military formally accused the justices on the court of sedition and removed them from the bench; soon afterwards they were exiled to Guatemala as a way to prevent further retaliation. In Honduras in 1986, when President José Simón Azcona Hoyos (from the Liberal Party) assumed the presidency, he agreed with the National Party, the largest party in Congress, to reassign the seats on the Supreme Court: the National Party would appoint the Chief Justice plus five additional justices, while the Liberal Party would appoint the remaining three justices (Ramos Sotos). A similar situation took place in 1990, when Rafael Leonardo Callejas Romero from the National Party won the national elections; in that case, the Chief Justice (José Oswald Ramos Sotos) and the General Attorney (Leonardo Matute Murillo) were removed from the bench for political reasons (Ramos Sotos). Ramos Sotos had been appointed to the Supreme Court in the first place as a way to limit his political ambition to run for the presidency (Sieder and Costello 1996).

## **2. Judicial instability in nascent democracies: The existing explanations and an alternative framework**

The political manipulation of the judiciary is a deep-rooted problem in Central American and Caribbean countries. In recent years there have been numerous examples that revealed the importance of this branch in accounting for the political stability of the countries in the region. In the most recent one, in Honduras in August 2009, the Supreme Court ordered the military arrest and expulsion of President Zelaya and threatened him with a trial if he re-entered the country. The court also rejected a Costa Rica-brokered deal to restore the ousted president to power. As previously noted, the Supreme Court of Costa Rica, and especially its Constitutional Chamber, is considered to be one of the most stable

and independent branches not only of the region but also of the world. This considerable contrast among the judiciaries in Central America and the Caribbean deserves greater attention. What factors affect the stability of the justices in office? Why do executives manipulate the composition of the court in some countries and not in others? How can we explain these differences among the countries?

Courts are central players in Latin American politics, since they have the capacity to influence the policies designed by presidents and legislators. It is for this reason that the judiciary has emerged as one of the most important institutions in post-transition Latin American politics. The first two subsections below discuss the existing literature, from both North American and Latin American scholars, by highlighting their main contributions and limitations, while the third subsection presents an alternative framework for the analysis of judicial turnover.

### ***The strategic retirement theory***

American scholars have long been studying the factors that explain variations in the composition of supreme courts of justice. The literature about the stability of justices in office can be divided into two approaches. On the one hand, there is a group that explains the factors that may account for vacancies in the high court; on the other, there are those who have emphasized presidential motivations for selecting justices. Due to the fact that vacancies on the U.S. Supreme Court are rare, the literature on this topic is not very well developed. Even though the research about vacancies provides interesting hypotheses to account for the stability of justices in office, these are based on assumptions that hold perfectly for the American case but much less so for nascent democratic countries like those in Central America and the Caribbean. The following paragraphs describe the main contributions and limitations of these analyses.

Studying the dynamic of vacancies in the Supreme Court is important, because judicial nominations are a key political resource for presidents to enhance their control over the judiciary. If nominations take place only when someone voluntarily steps off the bench, then the main research

question of these studies is to determine how to predict when a vacancy will occur.<sup>4</sup> The limited literature about judicial vacancies is mainly of two types: qualitative studies that are essentially chronological and bibliographical accounts of the justices who serve on the court (Atkinson 1999; Ward 2003), and quantitative analyses of the factors that affect the departure of justices. The second type of research provides a provocative theoretical framework for thinking systematically about the causes of a justice's instability in office. This group of studies identifies a long list of possible factors that can affect a justice's tenure; these can be grouped into two categories: political and non-political (Spriggs and Wahlbeck 1995; Hagle 1993; Squire 1988; Barrow and Zuk 1990; Nixon and Haskin 2000; King 1987; Hall 2001; Epstein and Segal 2005; Zorn and Van Winkle 2000).<sup>5</sup>

The non-political factors, also often used by scholars as control variables, suggest that justices retire from office for such personal reasons as the age of the justice, salary or retirement benefits, caseload, and job satisfaction. The argument goes as follows: First, it is more likely that older justices with long tenure on the court will retire from the bench. Age is used as a proxy for health matters, again suggesting that older justices may retire because of health problems. Second, justices are more likely to step off the bench when their salaries are lower or when they can obtain financial benefits from retirement packages. Third, the caseload is important, since its expansion can motivate justices to retire early. Finally, the more dissatisfied the justices are with their own jobs, the greater the probability of their resigning or retiring from office.

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<sup>4</sup> Here it is important to point out that, in nascent democracies, vacancies occur not only when a justice steps off the bench but also when presidents increase the number of sitting justices on the court. Due to the natural evolution of the U.S. Supreme Court, the American literature does not take into account this type of vacancy.

<sup>5</sup> Even though some of these works account for vacancies in the Supreme Court and others deal only with the lower federal courts, all use the same hypotheses to account for judicial retirements. The only exception is the literature on state supreme courts, where scholars pay special attention to the role of judicial elections and institutional variables in explaining the retirements of their justices (Hall 2001).

The other set of explanations is related to the political factors that may affect a justice's decision to leave the bench, namely: political party, presidential status, and critical nominations. This set of explanations is more interesting than the previous one, since they consider the effect of the political context as well as other political actors on a justice's decision. The first explanation, political party, suggests that justices are more likely to retire from office when they belong to the same party as the president and the majority in the Senate. If all of them are from the same political party, then it is more likely that a justice will retire from office, in the expectation that the president will appoint a justice with the same political preferences as the outgoing justice (Zorn and Van Winkle 2000). In this case, justices are being strategic (a pattern also referred to as "strategic retirement"), since they will be willing to relinquish their seats only to other like-minded justices and not to someone with different political preferences (Zorn and Van Winkle 2000; Spriggs and Wahlbeck 1995). Consequently, if the political party of the president and the senate majority is not the same as the political party of the justice, then it is likely that the justice will "hold off" on retiring until a more favorable political scenario occurs. These authors argue that, in the end, judicial retirements from the bench are not a random event but rather reflect strategic decisions by the justices. The second explanation, presidential status, is that justices will not retire from office during the last years of a presidential term if the president is of the opposite political party (as a strategy to wait and see who will be next) (Spriggs and Wahlbeck 1995; Hagle 1993; Zorn and Van Winkle 2000). However, the opposite is true during the first years of the term, especially the second term, since justices may not want to wait till the end to step off the bench. Finally, the last explanation, critical nominations, suggests that justices who have created a close partisan balance in the court will be less likely to retire from office, since no subsequent nomination will have the same ideal configuration as the existing one (Zorn and Van Winkle 2000).

In sum, these explanations reveal an interesting relationship between the preferences of the justices and the political context that can account for the stability of justices in office. Contrary to the

above, within the literature there is some controversy regarding whether or not political factors matter at all, since some studies find that they do (Zorn and Van Winkle 2000; Hagle 1993; Barrow and Zuk 1990), while others have determined that they do not (Squire 1988; Yoon 2003, 2006).

The main underlying assumption of both political and non-political explanations is that it is the justice's own decision that will determine when a vacancy will occur. As Ward argues, "... what is significant about departure [in the U.S. Supreme Court] is the power of the justices themselves to influence who their successor will be by the timing of that departure ..." (2003: 6). The main problem in extending this assumption to the situation in nascent democracies, like those in Central America and the Caribbean, is that there it is the motivation of the president rather than the justices that determines when a vacancy will occur. In other words, in nascent democracies the stability of justices is often affected by a presidential decision to remove them from office, whereas in the North American literature the stability of justices in office is affected solely by their own decision. As Epstein and Segal point out, "... ideology and partisanship have not figured prominently in most judicial *removals* in the United States ..." (2005: 32). Because Puerto Rico, which is in this sample of countries, has a strong legacy of American institutions and practices affecting its own institutions, it would be interesting to uncover whether or not this country follows the North American pattern of strategic retirement or the Latin American one of presidential initiative.

### ***Strategic decision making***

Even though in the early eighties scholars began to focus on the political aspect of the judiciaries in Latin America,<sup>6</sup> it was not until the last decade that an increased interest arose among political scientists in studying judicial politics in developing countries (Russell and O'Brien 2001; Malleson and Russell 2006; Sieder et al. 2005; Ginsburg and Moustafa 2008; Smulovitz 1995; Ginsburg 2003; Schwartz 2000; Gauri and Brinks 2008). Most of the research about Latin American judiciaries is country-specific

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<sup>6</sup> See, for example, Verner (1984).

(Argentina, Brazil, Chile, and Mexico are the most studied judiciaries, with Central American countries the least studied), but during recent years comparative studies have started to appear more frequently (Pérez-Liñán and Castagnola 2009; Scribner 2004; Finkel 2008; Ríos-Figueroa 2006; Staats et al. 2005; Navia and Ríos-Figueroa 2005; Ansolabehere 2007).<sup>7</sup>

These studies have often assumed that life tenure for Latin American justices is not respected (especially in the Argentine case). The main argument relies on the assumption of strategic decision making by the justices, suggesting that they would rule in favor of the preferences of the executive when the executive has partisan power in congress, while the opposite is true when the executive does not have a strong partisan majority in congress. In the end, these studies assume that the way the justices vote is relevant to their stability on the bench, since justices would circumvent possible reprisals by powerful executives by ruling in favor of their interests. However, one of the main limitations of these studies is that they do not test their assumptions. The only exception to this trend is the research carried out by Pérez Liñán and Castagnola (2009b, 2009a) and Castagnola (2006, 2010), which empirically demonstrates that political realignments of the executive can affect the rhythm and flow of judicial turnover in Latin America and, specifically, in Argentina. The next section presents an alternative framework to study judicial turnover in nascent democracies that builds on the work of Castagnola and Pérez Liñán.

### ***An alternative framework to study judicial turnover in nascent democracies***

The starting point of the theoretical framework of this research is that presidents and governors, while in power, want to have a supportive court as a way to maximize their political influence on the decisions of the judiciary. The chief guiding hypothesis is that judicial turnover is mainly the result of changes in the political configuration in the executive. The executive can craft a supportive court not

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<sup>7</sup> For an extensive list of works about judicial politics in Argentina and other Latin American countries, please refer to Kapiszewski and Taylor (2008).

only by appointing friendly justices, as the North American literature has long recognized, but more interestingly by influencing when a vacancy will occur either by removing unfriendly justices<sup>8</sup> or by packing the court with loyal justices.

The underlying assumption of this study is that the proportion of justices who depart from the bench in a given year is not a randomly occurring event but rather a function of certain political variables. Politics matters when explaining judicial turnover, since executives want to have a supportive court to maximize their political influence not only on the judiciary but also on policy-making. It is for this reason that executives would prefer to deal with justices nominated by themselves rather than by the previous administration, or at least with justices nominated by their own party rather than by the opposition. The closer the preferences of the justice to those of the current executive, the smaller the probability of the justice departing from the bench.

Also, executives prefer to have a supportive court earlier in their term so as to have control over the judiciary during the whole term. A supportive court is one in which the majority of the justices share the same political preferences as the executive (i.e., like-minded justices), and the opposite is true for an unfriendly court. When executives do not have a friendly court, then it is likely that they will try to remove those justices perceived as unfriendly because they do not trust them.

The ability to craft a supportive court depends not only on the political context but also on the institutional set-up of the countries. When a country's constitution does not clearly establish the number of sitting justices on the court, then presidents and the congressmen can pack the court with friendly justices instead of having to remove unfriendly ones. Supreme courts in Central America and the Caribbean have constantly changed the total number of sitting justices, with Nicaragua and the Dominican Republic among the countries with the greater number of changes, always increasing the

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<sup>8</sup> "Unfriendly justices" refers to justices appointed by an executive with political preferences different from those of the current executive.

total number of justices. The tenure system is another institutional feature often employed by politicians to manipulate the composition of the court. When justices are appointed for a fixed term and the term is shorter than or corresponds with the term of the appointing authority (as happened, for example, in El Salvador and Honduras), then there is a potential for political manipulation (Ríos-Figueroa 2006). Politicians have often benefited from this institutional set-up to craft a supporting court.

### **3. Exploring variations in the stability of justices on the bench**

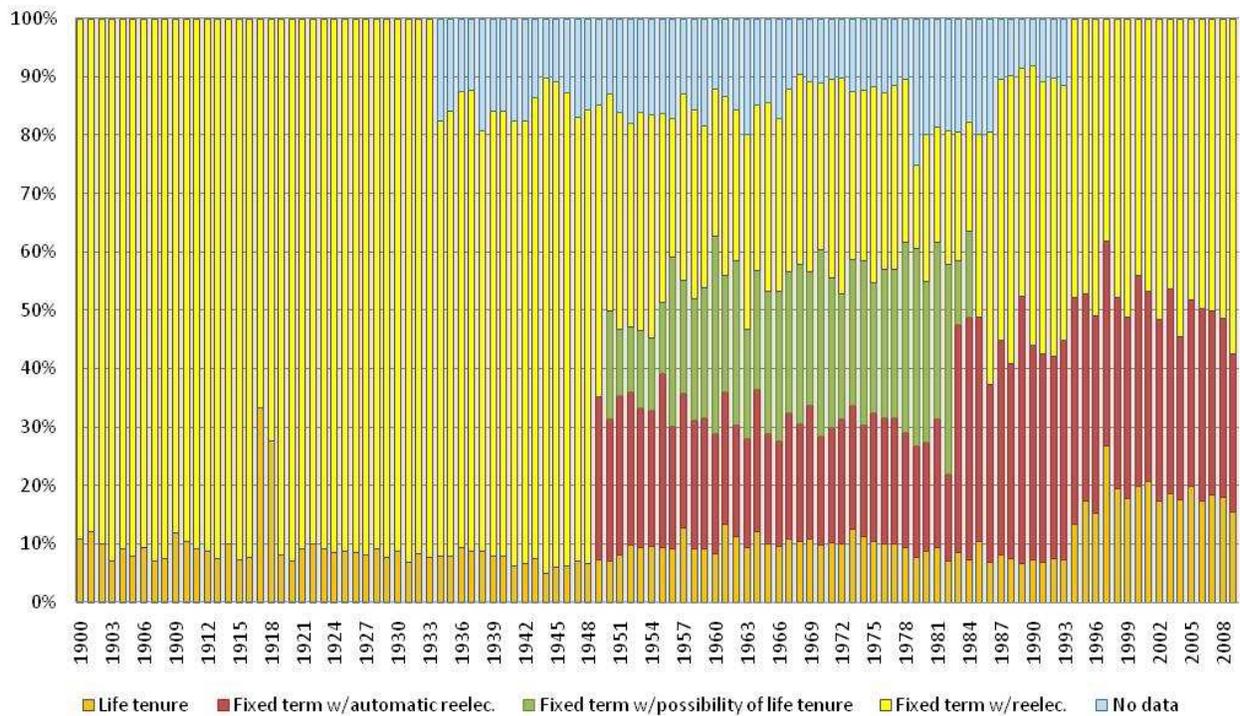
In order to empirically assess the factors that affect the stability of the justices on the bench, a dataset was created that contains information about the tenure of justices in eight Central American and Caribbean countries (Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Panama, and Puerto Rico) between 1900 and 2009. In the case of Guatemala, also taken into account was the tenure of the judges on the Constitutional Court.<sup>9</sup> This section presents descriptive statistics in order to explore the variations in the tenure of the justices as well as in the institutional set-ups of the various countries.

Two indicators can be used to assess the stability of the justices in office: the average tenure and the reshuffles of the supreme courts. Table 1 displays the average tenure of the justices in the region, while Graph 1 shows the institutional evolution in the tenure system in the supreme courts of Central America and the Caribbean from 1900 to 2009. Because most countries changed their tenure systems during these more than one hundred years, the average tenure should be interpreted in relation to the institutional design. Regarding the second indicator, Graph 2 displays the number of times that supreme courts have been reshuffled in a given year.

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<sup>9</sup> Costa Rica, El Salvador, and Nicaragua have a constitutional chamber within their supreme courts that rules on cases regarding the constitutionality of a case, but not a special court. The Dominican Republic has recently created a Constitutional Tribunal in the constitutional reform of 2010, but it is not yet functioning.

Graph 1: Evolution of the tenure system of the Supreme Court justices in Central America and the Caribbean, 1900-2009



One of the most striking pieces of evidence in Graph 1 is that politicians in general have not adopted life tenure but rather fixed terms with the possibility of reelection. Moreover, since the 1950s, new constitutions have incorporated fixed terms with automatic reelection (as in Costa Rica since 1949 and El Salvador since 1983), or fixed terms with the possibility of becoming tenured for life after a number of consecutive reelections (as in El Salvador between 1950 and 1983, and Guatemala in 1956 and 1984). These two innovations in constitutional design could have had, in theory, important implications for the stability of the justices, since, conceptually, their effect could be similar to that of a life tenure system; however, in practice, these innovations did not have the expected consequences (see Table 1). Even though life tenure was not the most popular system adopted by the Central American countries, it was among the Caribbean ones, since Puerto Rico and the Dominican Republic both adopted it. Finally, it was in only a small number of countries that the constitution did not clearly

establish a tenure system, as in the Dominican Republic during the Trujillo and Balaguer administrations and Nicaragua during the Junta de Gobierno de Reconstrucción Nacional.

Table 1: Average tenure for justices in Central America and the Caribbean, 1900-2009

<i>Country</i>	<i>Mean 1900-2009</i>	<i>Mean according to the tenure system</i>
Costa Rica	9.6	4 year tenure w/reelection (1900-1948)*: 6.5 8 year tenure w/automatic reelection (1949-2009): 13.2
Dominican Republic	4.2	4 year tenure w/reelection (1900-1933): 3.8 Don't know (1934-1993): 3.8 Life tenure (1994-2009): 8.9
El Salvador	3.6	2 year tenure w/reelection (1900-1938): 2.7 3 year tenure w/reelection (1939-1944): 3.1 2 year tenure w/reelection (1945-1949): 1.1 3 year tenure w/reelection & poss. life tenure (1950-1982): 3.4 3 year tenure w/automatic reelection (1983-1990): 4.3 9 year tenure w/automatic reelection (1991-2009): 7.1
Guatemala (SC)	5.0	4 year term w/ reelection (1900-1955): 7.6 4 year term w/ reelection & poss. life tenure (1956-1984): 4.0 6 year term w/ reelection (1985-1992): 4.4 5 year term w/ reelection (1993-2009): 4.4
Guatemala (CT)	4.5	Don't know (1966-1984): N/A 5 year term w/reelection (1985-2009): 4.5
Honduras	5.4	4 year term w/reelection (1900-1905): 11.6 6 year term w/reelection (1906-1907): 5.6 4 year term w/reelection (1908-1935): 5.1 6 year term w/reelection (1936-1981): 6.1 4 year term w/reelection (1982-2000): 3.7 7 year term w/reelection (2001-2009): 5.1
Nicaragua	5.8	4 year term w/reelection (1900-1904): 6 year term w/reelection (1905-1978): 5.9 Don't know (1979-1986): 5.9 6 year term w/reelection (1987-1992): 6.1 7 year term w/reelection (1993-1999): 5.3 5 year term w/reelection (2000-2009): 5.6
Panama	5.1	4 year term w/reelection (1904-1940): 4.1 10 year term w/reelection (1941-2009): 5.3
Puerto Rico	12.6	Life tenure (1900-1951): 12.6
<b>Total (SC)</b>	<b>5.6</b>	

Note: \*Costa Rica established life tenure between 1917 and 1918; N/A means no data are available about the justices in those years.

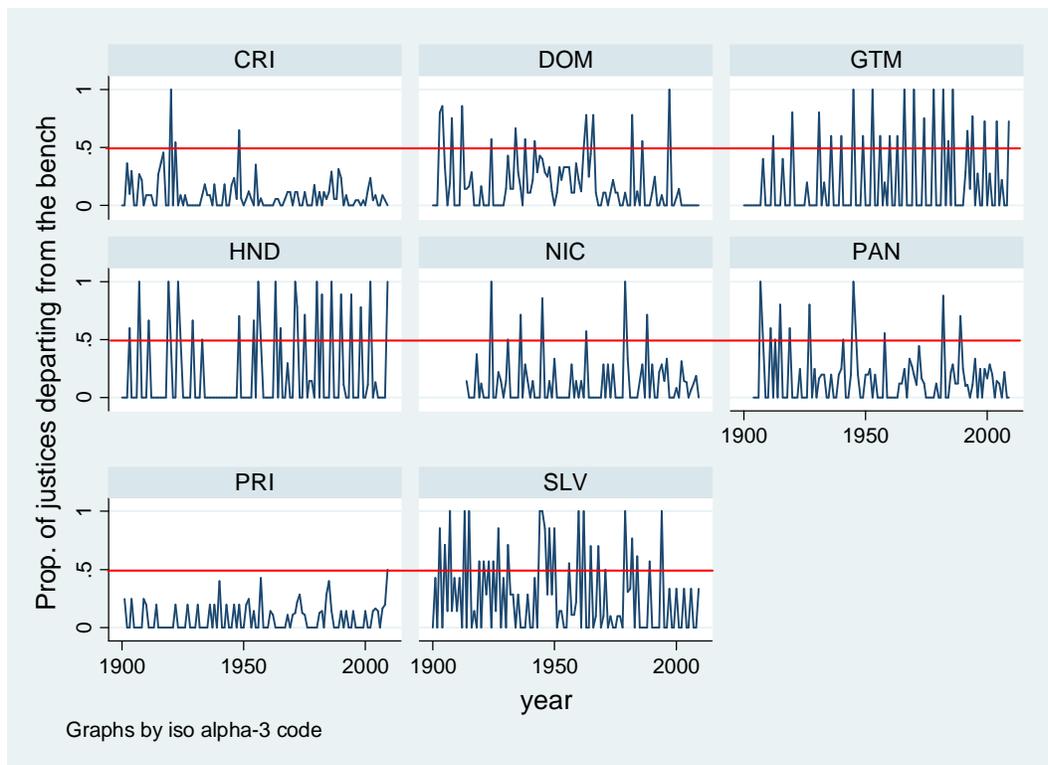
Based on the average tenure display in Table 1, justices within a life tenure system generally enjoyed more stable judiciaries than those with fixed terms. When the Dominican Republic adopted the life tenure system in 1994, the mean tenure more than doubled – from 3.8 years to 8.9 years. Also, the data suggest that long fixed terms, rather than short ones, have also had a satisfactory effect on the stability of justices. When Costa Rica increased the fixed term from 4 years to 8, the mean average increased from 6.5 years to 13.2; similarly, when El Salvador increased the fixed term from 3 years to 9, the mean average increased from 4.3 years to 7.1. Panama represents an exception to this rule, since, even when the constitutional reform of 1941 increased the fixed term from 4 years to 10, justices did not significantly improve their mean average time in office.

One striking piece of evidence from Table 1 is that most of the countries had adopted short fixed terms, generally ranging from 2 years to 5, where it is likely that the tenure of the appointing authority overlaps the tenure of the justices. This situation not only encourages political manipulation of the composition of the judiciaries, but also generates justices who are highly dependable in carrying out the desires of their appointing authorities. Even though the last constitutional reforms in most of these countries aimed to increase the number of years of the justice's terms, Guatemala and Nicaragua moved in the opposite direction. Overall, Table 1 reveals that justices have been very unstable (an average of 5.6 years in office), but some countries have been more unstable than others (El Salvador being the most unstable, with an average of 3.6 years, and Panama the most stable, with 12.6 years); meanwhile, Graph 1 indicates that most of the countries had adopted fixed-term systems with the possibility of reelection.

The other indicator that can be used to assess judicial turnover is the number of times that the high courts were reshuffled; this occurs when more than half of the members of the court depart from the bench in a given year. If judicial turnover is a random event, then justices would be likely to depart in any given year; however, Graph 2 shows a different story. Puerto Rico is the only country that did not

have any reshuffling during these years while Costa Rica had only 3. The supreme courts that experienced the largest number of reshuffles were in El Salvador (26), Guatemala (23), and Honduras (22). It is not surprising that these three countries had the most unstable judiciaries, since the appointment of justices often corresponded with the presidential term in office. The informal rule appeared to be that every incoming president appointed a friendly court at the beginning of the administration. Even though in 1991 in El Salvador the constitutional reform established that the term of the justices would be staggered, so that one-third of the justices came up for renewal every five years, three years after that reform the court was reshuffled again.

Graph 2: Reshuffles in the supreme courts of Central America and the Caribbean, 1900-2009



Note: Total number of reshuffles in the supreme courts: El Salvador 26, Guatemala 23, Honduras 22, the Dominican Republic 13, Panama 9, Nicaragua 6, and Costa Rica 3. Puerto Rico did not have a reshuffle during this term.

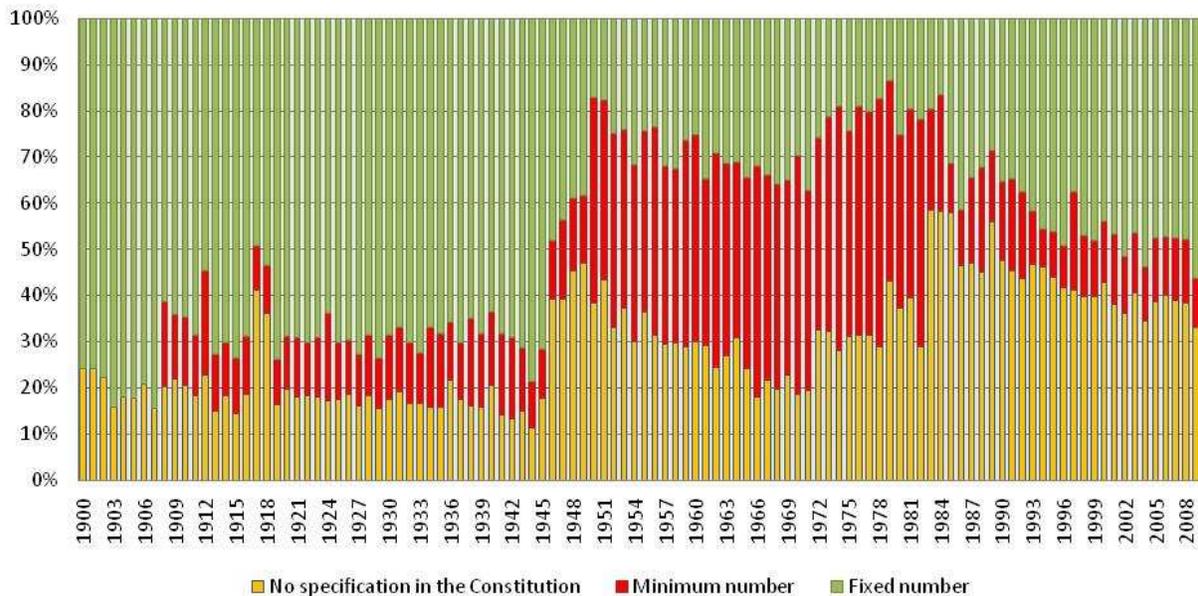
Puerto Rico is the only country that did not experience a single reshuffle during these years, similar to the situation of the Supreme Court of the United States (Pérez Liñán and Castagnola 2009b). Bearing in mind that Puerto Rico is a free associated state of the United States and that, until 1951, the Supreme Court of the island was controlled by the White House (justices being appointed by the US President with the approval of the U.S. Senate), then the absence of reshuffles in the court is not surprising, at least during the first fifty years of the 20th century. Nevertheless, what is in fact surprising is that, since the establishment of self-government on the island, the Supreme Court of Puerto Rico has still not experienced any abrupt change in a given year in the conformation of the court as has happened in the rest of the region.

A closer look at the historical evolution of the justices of the Supreme Court on the island reveals that, in fact, the relationship between presidents and justices has been similar to the United States model – that is, the strategic retirement theory, rather than the Latin American model. From 1900 to 1951, a total of 17 justices departed from the bench, 12 of them leaving when they belonged to the same political party as the ruling president, while the other 5 left when they found that they did not share the same political ideology as the current president (Riviera 2007). From 1952 until the present time, the scenario is more mixed, since 13 of the departures from the bench followed the strategic retirement model, while the other 9 did not (Riviera 2007). This may be suggesting that, since the establishment of self-government, politicians have started to move closer to the logic of vacancy creation according to the Latin American model. Future research should closely disentangle executive-court relations in Puerto Rico.

Finally, Graph 3 presents the evolution of the institutional set-up of the court-packing capacity of executives in the region. Because presidents can craft a supportive court not only by removing unfriendly justices but also by packing the court with their friends, it is important to analyze how this institutional rule has evolved during these years. Graph 3 reveals three different stages in the evolution

of the norm. Until 1945, Constitutions often clearly established the total number of sitting justices on the court, while only a few either did not establish a specific number or specified only a minimum number. From 1945 to the '80s, the trend changed; constitutions moved from an explicit ruling towards a vaguer norm. Finally, from the '80s to the present time, constitutions have less often refrained from clearly stating the total number of justices or specifying only a minimum. As previously stated, the more imprecise the rule, the greater the potential for political manipulation of the composition of the courts.

Graph 3: Institutional evolution regarding the court-packing capacity of executives in the supreme courts of Central America and the Caribbean, 1900-2009



#### 4. Understanding judicial turnover in Central America and the Caribbean

In order to test the hypotheses and follow the literature, a survival model for discrete data was used (Box-Steffensmeier and Jones 2004; Nixon and Haskin 2000; Squire 1988; Zorn and Van Winkle 2000). Temporal dependence variables ( $t$ ,  $t^2$ , and  $t^3$ ) were included, because each individual case has multiple data points that may exhibit such dependence (Carter and Signorino 2007). The dependent

variable is a dummy that indicates with a 1 the year the justice departs from the bench (the event) and a 0 otherwise. The units of analysis are justice-years.

Table 2 presents the statistical results for the analysis of judicial turnover in the eight countries from 1900 to 2009. The independent variables seek to capture the political and institutional conditions that may affect the stability of justices in office. The first two variables capture whether or not the justice is aligned with the current president or ruling party. In the first case, the dummy variable indicates with a 1 if the justice in office was appointed by the current president, and a 0 otherwise; the second dummy variable captures with a 1 if the sitting justice was appointed under a president of the same party, and a 0 otherwise. The expectation is that justices appointed by the current president or by the ruling party will be less likely to depart from the bench, since they will share the same political interests as the ruling administration.

Along with the ideological proximity variables, the model also includes the timing hypotheses. The main argument is that presidents would prefer to craft a supportive court during the first years of their administration so as to leverage their political influence. Two dummy variables were used to capture this effect: a change in the administration and a change in the ruling party. In the first case, a 1 indicates when there is a change in the administration, and a 0 otherwise, while in the second case a 1 indicates when there is a change in the ruling party in office, and a 0 otherwise.

The following variables aim to account for the effect of the institutional design of the countries. As previously mentioned, countries have changed the rules regarding the court-packing capacity of the executives as well as the tenure of the justices; therefore, it is important to examine whether or not changes in these institutional set-ups had affected judicial turnover. The court-packing predictor seeks to capture whether or not justices are more unstable on the bench when the constitutions of their countries clearly establish the total number of sitting justices. A dummy variable was used to measure this effect, a 1 indicating when the constitution clearly establishes the total number of justices on the

bench, and a 0 otherwise. The life tenure variable aims to account for the effect of the tenure system. The expectation is that justices who are appointed for life would have a lower probability of departing from the bench than those justices who are appointed for a fixed term. As in the previous case, a dummy variable measures this effect, a 1 indicating when the constitution establishes that justices are appointed for life, and a 0 when justices are appointed for a fixed term.<sup>10</sup> Because most of the time justices were appointed for fixed terms, an additional variable was included in the model to capture if the justice finished the term on the bench (either the first term or consecutive terms, if the justice was reelected). The “finish term” variable would then account for expected departures of justices rather than induced ones.

Finally, two control variables are included in the model: a military regime and the size of the court. Under military regimes justices should be more unstable on the bench than during democratic times, since institutions and rules appear to be generally not respected by the military. The size of the court is also an important predictor for the model, since it accounts for expected departures when there is a change in the total number of justices on the court.

Model 2.1 from Table 2 presents the results of the discrete survival model, using a logit estimator with robust standard errors. The results indicate that the political proximity of the justices to the president matters in accounting for judicial turnover. Being aligned with the president reduces the probability of justices departing from office, and that risk decreases further when justices are aligned with the ruling party. The arrival of a new administration increases the probability of a justice departing from the bench, while no effect was found with a change in the ruling administration. This result may indicate that elections *per se* represent critical moments for the reconfiguration of courts. The arrival of a new administration in office often changes the partisan power of executives in Congress as well as the

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<sup>10</sup> Even though constitutions did not clearly establish the type of tenure system for the justices in the Dominican Republic between 1934 and 1993, and in Nicaragua between 1979 and 1986, based on the average tenure of the justices in those years it seems that they were appointed for fixed terms.

congressional coalitions. It is precisely these realignments of executives and congress that increase the probability of justices departing from the bench.

Table 2: Explaining judicial instability in Central America and the Caribbean supreme courts, 1900-2009

	<b>2.1 Survival</b>	<b>2.2 Rare event</b>	<b>2.3 Fixed effect</b>
Justices aligned with the current president	-0.504*** (0.123)	-0.505*** (0.121)	-0.450*** (0.126)
Justices aligned with the current ruling party	-0.359*** (0.101)	-0.357*** (0.108)	-0.280*** (0.104)
New administration	0.655*** (0.098)	0.654*** (0.106)	0.037 (0.196)
New ruling party	0.024 (0.097)	0.024 (0.098)	0.115 (0.103)
Court-packing capacity	-0.049 (0.071)	-0.049 (0.079)	0.185** (0.085)
Life tenure	-0.740*** (0.143)	-0.733*** (0.133)	-0.945*** (0.272)
Finishing the term	1.303*** (0.086)	1.301*** (0.085)	1.272*** (0.089)
Military regime	1.107*** (0.103)	1.106*** (0.115)	1.088*** (0.117)
Size of the court	-0.067*** (0.008)	-0.066*** (0.009)	-0.026** (0.011)
t	0.136*** (0.039)	0.135*** (0.037)	0.194*** (0.041)
t2	-0.014*** (0.003)	-0.014*** (0.003)	-0.016*** (0.003)
t3	0.000*** (0.000)	0.000*** (0.000)	0.000*** (0.000)
Intercept	-1.630*** (0.189)	-1.627*** (0.206)	-2.773*** (0.301)
Number of observations	8,856	8,856	8,856

Note: \*\*\* p<0.01, \*\* p<0.05, \* p<0.1. Country intercepts and interaction terms were omitted due to space limitation.

Regarding the institutional variables, justices with life tenure would have a lower probability of departing from the bench than those under a fixed term system, while no effect was found for the court-packing capacity of the executive. Justices who finished their term in office would be more likely to depart from the bench than those who did not. This result corroborates that of Table 1, indicating that justices with fixed term have generally finished their terms in office. Taking into account that the terms of the justices in Central America and the Caribbean have been, in most cases, extremely short and often overlapping with the tenure of the appointing authorities, this result is not a surprise.

The control variables turned out to be statistically significant and in the expected direction – that is, during military regimes justices are more unstable on the bench than during democratic years, and increasing the number of sitting justices reduces the probability of a particular justice departing from the bench. Finally, the temporal dependence variables also showed significant results, revealing the existence of a temporal dependence on justices' tenure or a non-linear evolution over time.

As a way to corroborate the results of Model 2.1, a survival model was computed with random effect as well as a rare event logit, since 14% of the cases are 1's. Because similar results were obtained, Table 2 displays only those of the rare event model (Model 2.2). Predicted probabilities were computed from Model 2.2 so as to provide a substantive interpretation of the results. Let us consider the case of a justice who, after 5 years in office, belongs to a court of 10 members with fixed terms and serves under an executive who has the capacity of court packing. If the justice is aligned with the president and the ruling party, there is no change of government, and the justice has not finished the term, then the probability of departing from the bench is 5%. But if that same justice finishes the term, there is a change in the civilian administration, and the justice is no longer aligned with the new president and ruling party, then the probability of departing from the bench increases to 50%. Furthermore, the risk of departing from the bench increases to 75% if a military regime seizes power. Evidently, judicial turnover is very sensitive to changes in the political context as well as to political realignments.

The previous models have assumed that the likelihood of justices departing from the bench is similar across countries. However, the analysis to-date has shown that there is a lot of variation in judicial turnover in different countries. If this is the case, in which countries are presidents more likely to craft a supportive court? As a way to address this question, an interaction term between country dummies and a change in administration was included. Model 2.3 presents the results of this approach. Even though the results of this model corroborate the results of Models 2.1 and 2.2, the variable for court packing had statistically significant results and in the expected direction. Justices are more unstable when the constitution clearly establishes the total number of sitting justices. In such cases, when presidents confront an unfriendly court and cannot pack the court with their friends, their only recourse would be to remove from the bench those justices considered unfriendly.

The conditional coefficients reflecting the effect of a government change by country are displayed in Table 3. Costa Rica was selected as the baseline category for comparison because it is considered to have the most stable and independent court in the region. The interpretation of the coefficients is relative to the baseline category; therefore, insignificant coefficients mean that the country's effect is indistinguishable from that of Costa Rica, the baseline category, not that the effect is indistinguishable from zero.

Table 3: Conditional coefficients for changes in administration

	Conditional coefficient
Costa Rica (baseline category)	0.037 (0.196)
Dominican Republic	0.556** (0.205)
El Salvador	0.911*** (0.167)
Guatemala	0.874*** (0.201)
Honduras	1.911*** (0.239)
Nicaragua	0.618** (0.235)
Panama	-0.061 (0.237)
Puerto Rico	-0.203 (0.324)

Note: \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

The results suggest that there are consistent differences across countries in this region. The Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua have a positive statistically significant coefficient, which suggests that justices are more unstable in these countries after a change in administration, relative to Costa Rica. The coefficients for Panama and Puerto Rico are statistically insignificant, revealing that the country effect of a change in an administration is indistinguishable from that of Costa Rica. This result may be indicating that Costa Rica, Panama, and Puerto Rico have a different type of executive-court relationship relative to that of the other countries. The case of Puerto Rico can be explained mainly because of the legacy of North American executive-court relations on the Supreme Court of the island. However, as mentioned above in section 3, it seems that since the 1950s

the executive-court relationship in Puerto Rico has started to look more like the Latin American one. The case of Panama deserves greater attention, and future research should disentangle this result.

## **5. Conclusion**

Courts are powerful actors in politics, although until recent decades this institution was often neglected in the discipline. Overall, research has revealed that there has been a long legacy of political manipulation of the supreme courts in Central America and the Caribbean since the early 20th century that corresponds with the story of other Latin American countries (Pérez Liñán and Castagnola 2009a). However, research has also illustrated that Costa Rica, Panama, and Puerto Rico seem to be experiencing a different pattern from the rest of the countries in the region. The following section outlines the main findings of recent research, taking the existing literature in perspective.

Historical analysis of the evolution of the institutional set-up (the tenure system and the court packing capacity) suggests that politicians have often manipulated the constitutional design so as to further their political ambitions. The fact that most of these countries, during most of the 20th century, have adopted short fixed terms that often coincide with the tenure of the appointing authorities reveals that there is an informal practice among the political elites of controlling their supreme courts. Moreover, the statistical models have consistently revealed that justices with life tenure are more stable in office than those with fixed terms, and that justices are also more unstable on the bench when the presidents do not have the capacity to pack the court. Therefore, even though the constitution and other legislation have originally been conceived as structural protections against potential abuses of power committed by political authorities, this research discloses that politicians have often managed to manipulate those rules so as to leverage their political power. As Douglass North (1990) wisely asserts, whenever politicians have the capacity to restructure political institutions, they will do it in such a way that their goals are more likely to be achieved. Overall, the consistent findings of this work suggest that

the study of the evolution of institutional arrangements can provide significant evidence for understanding how politicians have been able to manipulate the composition of their high courts.

Politics matters to account for judicial instability on the bench. The research disclosed that there is an overlap between the electoral cycle and the tenure of the justices. More precisely, realignments in the political scenario will likely correspond with realignments in the composition of the Supreme Court. What this result may be indicating is that the seats in the Supreme Court become a visible target of bargaining among the winning and losing parties, as was illustrated with the example of President José Simón Azcona Hoyos in Honduras in 1986. It is precisely for this reason that the political ideology or proximity of the justices to the incoming executive matters for the stability in the court. Incoming executives would generally not trust justices appointed by a different party, and would prefer justices appointed by themselves or, at least, by their own party. This result may be indicating that executives do not buy the strategic voting behavior supported by scholars like Helmke (2005) and Iaryczower, Spiller and Tommasi (2002), among others, but rather the attitudinal model of behavior outlined by Segal and Spaeth (2002).

Finally, one of the most gratifying results of this analysis is that the judiciary in Costa Rica seems no longer to be the only exception in the region. Panama and Puerto Rico are also different from the rest of the countries. However, it is not yet clear whether or not these countries share in common the same pattern of executive-court relations or if there is something different going on. Future research should disentangle this result so as to provide a better understanding of judicial independence in the region.

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