

Explaining Human Rights Outcomes in Latin America:  
What Judicial Independence Leaves Out

Rachel E. Bowen, J.D., Ph.D.

Assistant Professor

Political Science

The Ohio State University, Mansfield Campus

[Bowen.208@osu.edu](mailto:Bowen.208@osu.edu)

Prepared for presentation at the Meeting of the Western Political Science Association

March 28-30, 2013, Hollywood, CA

The patterns of human rights violations in Central America have changed and the patterns of enforcement have changed as well, often for the worse. In the past two decades, the amount of state-sponsored human rights violations has declined dramatically in the region, with the military withdrawing substantially (although not totally) in Guatemala, Honduras, and El Salvador, and with the Nicaraguan Contra War coming to a close alongside the end of Sandinista rule. However, a variety of new encroachers have arisen in what are now highly complex settings. Violent criminality, including both street gangs (*maras*) and international drug traffickers, has become prominent in the region, while the state has become weaker and abdicated much of its enforcement power to private security forces. I argue that the differences in the ability and willingness of the judiciary to enforce human rights violations varies based less on how independent judges are from politicians and more according to how autonomous they are from social or unofficial actors. As such, the highly penetrated judiciaries of El Salvador, Guatemala, and Honduras perform less well than the politically dominated but socially autonomous Nicaraguan judiciary.

## **I. Judicial Independence and Autonomy**

The rule of law, defined as a system in which “legal rules are applied fairly, consistently, and predictably across equivalent cases, irrespective of the class, status, or power of the subject of the rules,”<sup>1</sup> has been a central part of democracy-promotion efforts (as “rule of law reform”) as well as efforts to understand democratic development since the so-called “third wave” of democratization in the 1980s.<sup>2</sup> The rule of law was considered necessary for governments to

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<sup>1</sup> Larry Diamond, *Developing Democracy: Toward Consolidation* (Baltimore, MD: The Johns Hopkins University Press, 1999) at 11.

<sup>2</sup> Thomas Carothers, “The Rule of Law Revival,” *Foreign Affairs* 77 (1998): 95–106; Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006); Pilar Domingo and Rachel Sieder, *Rule of Law in Latin America: The International Promotion of Judicial*

make “credible commitments” to citizens, political rivals, and investors alike.<sup>3</sup> The rule of law, which defies measurement or even uniformly accepted conceptualization, remains a powerful concept for democracy promoters and activists. Even if we continue to know the rule of law primarily intuitively, it still animates any discussions around human rights and democracy. It seems clear, at least, that a well-functioning independent judiciary is an important contributor to the rule of law – even if judicial independence also defies measurement and uniformly accepted conceptualization.<sup>4</sup>

Much of the early literature on the rule of law expected that independent judiciaries would protect human rights, especially when pushed by activist nongovernmental organizations and the international community.<sup>5</sup> This aspirational focus has not, however, taken into account a newer line of research on the surprising benefits of “rule by law” with judicial independence or

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*Reform* (London: Institute of Latin American Studies, 2001); Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: Johns Hopkins University Press, 1996); Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Julian J. Rothbaum Distinguished Lecture Series (Norman, OK: University of Oklahoma Press, 1993); Margaret Popkin, *Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador* (University Park, Pa.: Pennsylvania State University Press, 2000).

<sup>3</sup> Douglass North, John Joseph Wallis, and Barry R. Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (Cambridge, UK: Cambridge University Press, 2009); D. C. North and B. R. Weingast, “Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-century England,” *The Journal of Economic History* 49, no. 04 (1989): 803–832.

<sup>4</sup> Julio Ríos Figueroa and Jeffrey K. Staton, *Unpacking the Rule of Law: A Review of Judicial Independence Measures*, Political Concepts (Committee on Concepts and Methods, International Political Science Association, September 2008).

<sup>5</sup> Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998); Peter Vondoepp, “Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zimbabwe,” *Political Research Quarterly* 59, no. 3 (2006): 389–399; Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Transnational Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998); Ellen Lutz and Kathryn Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,” *Chicago Journal of International Law* 2 (2001): 1–33; Guillermo O’Donnell, “Ployarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion,” in *The (Un)Rule of Law and the Underprivileged in Latin America*, ed. Juan Méndez, Guillermo O’Donnell, and Paulo Sérgio Pinheiro (Notre Dame, IN: University of Notre Dame Press, 1999); William Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Santa Barbara, CA: Praeger, 2000).

semi-dependence in authoritarian and hybrid regimes.<sup>6</sup> These studies, which focus primarily on hybrid regimes outside of Latin America, have highlighted that both independent and dependent judiciaries may be quite functional for governments for a long time. With the pressures to grant independence to judiciaries, especially in the area of constitutional law, governments may create the appearance of an independent constitutional arbiter without actually allowing that body to effectively check the government on the important issues by such means as withholding certain areas from its jurisdiction.<sup>7</sup> Unfortunately, many such studies focus primarily on the highest courts and constitutional arbiters, which may not be the most significant actors in the protection of human rights.<sup>8</sup> Thus, while it is widely believed that an independent judiciary is necessary to protect human rights, few studies have established adequately that it is a sufficient condition. I argue that the root of this problem lies in our current conceptualization of judicial independence.

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<sup>6</sup> Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008); Tamir Moustafa, "Law Versus the State: The Judicialization of Politics in Egypt," *Law and Social Inquiry* 28 (2003): 883–928; Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge, UK: Cambridge University Press, 1997).

<sup>7</sup> This phenomenon is common in Latin America as well and was especially true during periods of authoritarian rule and transition, although it continues in a number of weak democracies and semi-democracies. Daniel M. Brinks, "Faithful Servants of the Regime": The Brazilian Constitutional Court's Role Under the 1988 Constitution," in *Courts in Latin America*, ed. Gretchen Helmke and Julio Ríos Figueroa (Cambridge, UK: Cambridge University Press, 2011), 128–153; Anthony W. Pereira, *Political (in)justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina*, Pitt Latin American Series (Pittsburgh, Pa.: University of Pittsburgh Press, 2005). In contrast to arguments from Israel and Taiwan, among other polities, the creation of such bodies need not allow these bodies to take on a life of their own. Juo-Juo Chu, "Global Constitutionalism and Judicial Activism in Taiwan," *Journal of Contemporary Asia* 38, no. 4 (2008): 515–534; Yoav Dotan and M. Hofnung, "Legal Defeats - Political Wins. Why Do Elected Representatives Go to Court?," *Comparative Political Studies* 38, no. 1 (2005): 75–103; Menachem Hofnung, "The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel," *American Journal of Comparative Law* 44 (1996): 585–604; Gary J. Jacobsohn, "Judicial Activism in Israel," in *Judicial Activism in Comparative Perspective*, ed. Kenneth M. Holland (New York: St. Martin's Press, 1991), 90–116.

<sup>8</sup> Elena Martínez Barahona, *Seeking the Political Role of the Third Government Branch: A Comparative Approach to High Courts in Central America* (Saarbrücken: VDM Verlag, 2009); Diana Kapiszewski, "Power Broker, Policy Maker, or Rights Protector? The Brazilian Supreme Tribunal Federal in Transition," in *Courts in Latin America*, ed. Gretchen Helmke and Julio Ríos Figueroa (Cambridge, UK: Cambridge University Press, 2011), 154–186; Matthew M. Taylor, *Judging Policy: Courts and Policy Reform in Democratic Brazil* (Stanford, CA: Stanford University Press, 2008); Jodi Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s* (Notre Dame, IN: University of Notre Dame Press, 2008); Silvia Inclán Oseguera, "Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?," *Political Research Quarterly* 62, no. 4 (2009): 753–766.

*Judicial independence* is generally defined as the ability of judges to rule without interference from the political branches of government. It is typically demonstrated by guaranteed (sufficient) budgets, clear appointment processes, and the absence of court-packing or “court-sacking” (politicized removal) schemes. It is not clear, however, that elected (or unelected) politicians are the most significant threat to human rights in the region today. In the wake of coincident democratization and decay of state strength in many countries, other societal actors – firms, elites, and especially criminals – may pose greater threats to citizens than do politicians. What I call *judicial autonomy* better captures the position of judges and litigants vis-à-vis these threats. Judicial autonomy has not been widely discussed in the literature.<sup>9</sup> I define judicial autonomy as the ability of judges to rule without interference from societal actors. It can be seen primarily through signs of its absence: threats against judges, bribery and other forms of judicial corruption, abuses of disciplinary processes, and short, nonrenewable judicial tenures. Where a lack of judicial autonomy is paired with a thriving criminal sector, the consequences for judges, litigants, and criminal defendants can be disastrous.

Judicial autonomy and judicial independence of course do not exist independently of one another. It is necessary to understand how the two relate to create a judicial regime. In the same fashion as a political regime, a judicial regime is best understood as the formal and informal “rules of the game” that drive a potential litigant’s choices about how to handle a legal dispute, when to legalize a social dispute, when to politicize a legal dispute, and when to judicialize a

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<sup>9</sup> There are some exceptions, however autonomy is neither fully developed nor given prominence in these works. Javier A. Couso, “The Politics of Judicial Review in Chile in an Era of Democratic Transition, 1990-2002,” in *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, ed. Gloppen, Siri, Roberto Gargarella and Elin Skaar (London: Frank Cass, 2004), 70–91; Pilar Domingo, “Judicialization of Politics: The Changing Political Role of the Judiciary in Mexico,” in *The Judicialization of Politics in Latin America*, ed. Rachel Sieder, Line Schjolden, and Alan Angell (New York: Palgrave MacMillan, 2005), 21–46; Daniel M. Brinks, *The Judicial Response to Police Killings in Latin America: Inequality and the Rule of Law* (Cambridge, UK: Cambridge University Press, 2008); Brinks, “‘Faithful Servants of the Regime’: The Brazilian Constitutional Court’s Role Under the 1988 Constitution.”

political dispute. These decisions are driven largely by a calculus of what is like to be most successful, which is in turn informed by what has worked for prior actors. These choices can be understood in terms of the “currencies” that are likely to determine the winners of these disputes. Legal actors (litigants, judges, and lawyers) may appeal to the constitutional currency, the statutory currency, the currency of violence, or monetary currency. Constitutional democracy typically demands that the constitutional currency predominate, even when statutory law decides most cases in practice. The dominance of statutory law, which is inherently political law, without regard to the constitution creates a very different environment for human rights, one in which political leaders, whether elected or not, can violate the constitution and the basic rights it contains. Where official force drives legal decision-making, it is nearly impossible to enforce human rights against official actors, although it may be possible to punish private actors. Where private force is able to penetrate the legal system to a significant extent, the judiciary is substantially weakened and widespread impunity is the likely result.

## **II. Human Rights Violations and the Judiciary**

If the conventional wisdom is correct, judicial independence should be more important than judicial autonomy. I argue that judicial independence and judicial autonomy differ in their importance for protecting human rights depending on the nature of the human rights violation. While the most emblematic human rights violations are done by state actors, human dignity may be no less compromised by actions of non-state actors, especially when the state fails to enforce human rights protections or even encourages violations. International human rights law focuses primarily on the actions and obligations of state actors. This emphasis can be seen most clearly in the Convention Against Torture and the Convention Relating to the Status of Refugees, which define torture and persecution in part based on the state nature of the violation. However, states’

general duty to “respect, protect, and fulfill” human rights guarantees has been argued to include a duty to take reasonable steps to prevent or respond to an abuse.<sup>10</sup> Adequate legal processes are at the center of this duty.

Certainly, state actors have been and continue to be responsible for a large number of human rights violations in Central America. These state-sponsored violations were at their peak in the civil conflicts of the 1980s. The region has seen considerable change since that time, however, with fundamentally democratic governments now the norm and at least nominal or formal protections of human rights a matter of course. Widespread violations of fundamental human rights are no longer a major part of overt government policy. Large scale covert operations have largely fallen out of fashion as well. In contemporary Central America, human rights violations by state actors are most often done independently by lower-level state actors who may operate under the blind eyes of superiors and enjoy impunity in the justice sector.

In addition to abuses by lower-level officials such as police officers, prison guards, and school officials, the human rights of citizens are also frequently violated through the actions of private actors. Most notorious of these violations are those stemming from the actions of private security guards or security forces. Human rights activists have also criticized the human rights impacts of neo-liberalism on the rights of workers, women, peasants and other small landholders, and other vulnerable populations. While the state is not typically directly responsible for these violations, it should be obliged to provide a forum to hold accountable those who are responsible; failure to do so amounts to constructively allowing these abuses to continue.

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<sup>10</sup>Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) accessed 3/21/2013.

At the root of this myopic focus on state actors is a problematic understanding of the state. Facing the reality of weak states, we need to better understand the phenomenon of societal penetration of the state. Scholars have focused for some time that a healthy civil society can be salubrious for democracy, suggesting that an organized and engaged citizenry can provide an important check on state actors by activating the media, evoking the condemnation of international watchdog and donor groups, and informing voters.<sup>11</sup> This often rosy scholarship generally ignores the negative aspects of some sectors of society on democratic governance. Specifically, an uncivil criminal society may have a cancerous effect, especially when that criminality is highly organized and capable of colonizing state agencies with relative ease. When such colonization happens – and especially when it involves the justice sector – re-establishing official hegemony may prove a very difficult problem, requiring extensive human and financial resources.<sup>12</sup> These very concerns have driven the militarization of justice in many Latin American countries, where *maras* (street gangs) and *narcos* (drug trafficking organizations) have waged war against the state. Criminal society is thus able to constrain the state just as effectively – and perhaps more so – than does civil society. State agencies must resist this criminal colonization if they are to protect civil society and democracy. Doing so will not be possible without a commitment to building democracy and the state from the grassroots up.

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<sup>11</sup> Robert Putnam, *Making Democracy Work : Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1993); Robert Putnam, *Bowling Alone : the Collapse and Revival of American Community* (New York: Simon & Schuster, 2000); Peruzzoti, Enrique and Catalina Smulovitz, *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies* (Pittsburgh, PA: University of Pittsburgh Press, 2006); Keck and Sikkink, *Activists Beyond Borders: Transnational Advocacy Networks in International Politics*; Thomas Risse and Kathryn Sikkink, “The Socialization of International Human Rights Norms in Domestic Practices: Introduction,” in *The Power of Human Rights: International Norms and Domestic Change*, ed. Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (Cambridge: Cambridge University Press, 1999), 1–38.

<sup>12</sup> Vadim Volkov, *Violent Entrepreneurs: The Use of Force in the Making of Russian Capitalism* (Ithaca, NY: Cornell University Press, 2002); Diego Gambetta, *The Silician Mafia: The Business of Private Protection* (Cambridge, MA: Harvard University Press, 1996).



There are thus a variety of ways that a government can relate to human rights violations. From the standpoint of state actors, a government may be an active abuser of human rights or may try to hold past (or current) violators accountable for abuses. In considering abuses by private actors, a government may either passively allow violations to occur or may actively police violators. The relationship between accountability for state actors and policing of private violators is not necessarily clear. There is often the assumption that holding state actors accountable for prior human rights violations will lead to a greater likelihood of holding current human rights violators accountable for their actions. Patterns of human rights enforcement develop in response to both the stimulus of perceived interests of the infringers and enforcers as well as the expectations and constraints established by previous decisions made about watershed cases. In the area of human rights, transitional justice questions are the watershed cases of primary concern. Transitional justice refers to the question of how to deal with those people who violated human rights or other laws during a pre-transition regime. Because of the nature of transitional moments, such decisions are often made in the context of the surrounding power struggles and may be based on relative power of the negotiating parties rather than questions of justice. Past violations may be prosecuted, amnestied, or ignored. Initially, these decisions were considered necessary compromises that were not to be abrogated. However, the arrest and attempt to try Chile's General Pinochet as well as a variety of lower-level offenders made it more possible for those transitional bargains to be broken.<sup>13</sup> The decisions made, the actors that influence them, and the means of influence set the patterns for future treatment of human rights. However, changing circumstances, such as diminishing size and budget of the military or drug-trafficking activity that becomes a threat to social peace or even the state itself, will open

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<sup>13</sup> Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park, PA: The Pennsylvania State University Press, 2010).

opportunities for these patterns to be adjusted. Even where adjustment is possible, the available options for change are limited by the power that remains with those actors who participated in these negotiations or who were excluded.

The judiciary is an important component of a human rights enforcement system and we need to understand what kinds of judicial qualities will allow for or even require accountability mechanisms against human rights violators. Specifically, the levels and interactions of both judicial independence and autonomy matter. A lack of inter-branch judicial independence is likely to permit official human rights violations to persist. Indeed, highly dependent courts that are complicit in human rights abuses are commonly found in oppressive governments that are active human rights violators. However, a dependent judiciary may nonetheless be able to hold past state actors accountable if the past violations were carried out by a prior government whose political enemies are currently incumbent. In other words, current office-holders may gladly prosecute the human rights violations of past office-holders even while continuing to violate human rights themselves. Furthermore, when human rights enforcement is occurring as an act of political vengeance or primarily in order to satisfy international pressure, there is no reason to believe that it will be extended against private actors and some circumstances in which that is quite unlikely.

When the relevant human rights violators are private non-state actors, judicial autonomy may be a more important consideration than inter-branch judicial independence. A judiciary must be autonomous from powerful societal actors in order to be able to hold them accountable for their actions. A judiciary that is subject to influence from the wealthy elite is unlikely to hold major landholders, large corporations, or their agents accountable for human rights violations. Similarly, judges who are subject to threats and bribes from criminal actors are also unlikely to

enforce human rights law – or any laws – against them. Indeed, the failure to enforce the law in general and the proliferation of impunity represents a dire situation for human rights and the enjoyment of human dignity. In the absence of judicial autonomy, the human dignity of many citizens and even their most fundamental human rights may go unprotected even if the government itself refrains from any state-sponsored violations.

### **III. Tracing Human Rights Enforcement: Methodology**

This study takes a mid-level approach, comparing four countries within the region of Central America in a systematic fashion. Studying this region allows for considerable variation in judicial independence and autonomy and in human rights outcomes while also holding constant many potentially significant variables such as culture, religion, economic strength, and international vulnerability. In each country case, I trace the influence of judicial autonomy and independence on human rights outcomes from the 1980s to today. I argue that human rights enforcement is a product of the strength of the judiciary today as well as the patterns of violation and enforcement that were laid down in the past, with special attention to transitional justice efforts.

The independent variable is judicial regime, which is defined as the interaction of judicial independence and judicial autonomy. As discussed above, judicial independence refers to inter-branch independence. It can be seen in exercises of judicial power against sitting politicians, including constitutional cases or corruption cases. Its absence is revealed through attacks on the judiciary *as an institution* and in highly politicized appointment processes. Judicial autonomy is defined as the ability of judges to rule independently from society. A judiciary that is functionally autonomous is one that applies the law with relative uniformity and impartiality.

The absence of autonomy can be seen in the frequency of bribery and threats against judges, especially in criminal cases or economic cases that affect powerful interests such as traditional elites, industry, or organized crime. While there is room for overlap between the two concepts, such as influences from politicians acting outside of their official capacities, Table 1 lays out the primary distinctions. The concept of judicial regime requires us to examine these aspects separately as well as in relation to each other.

**Table 1: Judicial Independence vs. Judicial Autonomy**

Judicial Independence	Judicial Autonomy
Inter-branch relations	Individual judges
Attacks on the judiciary <i>qua</i> institution	Attacks on judges as individuals
Appointment processes	Disciplinary processes
Budget	Bribery
	Threats

The dependent variable is human rights enforcement, which needs to be parsed out in detail as well. I examine three kinds of human rights: physical integrity, political liberties, and freedom from discrimination. Within each type, I consider as distinct violations by public actors and private actors, leading to the following classification, summarized in Table 2: Physical Integrity may be violated by public actors through extra-judicial killings, political imprisonment, massacres (genocidal or not), and excessive pre-trial detention. Private actors may violate the right to physical integrity primarily by engaging in murder, kidnapping, and assault. Political Liberties are a very broad category of rights, but I focus on the absence of democratic rule, restrictions on democratic participation such as the banning of certain parties, and official censorship as violations by public actors and corruption and employer’s limitations on union membership or other democratic participation as the primary private violations. Discrimination may be on the basis of race, ethnicity, language, cultural identity, nationality, sex, gender

expression, sexual orientation, or disability. Discrimination by any public official, whether or not it is punished, is treated as public actor discrimination; discrimination by private individuals primarily occurs in employment and private education, but may also occur in ways that are difficult to track, such as discrimination involving public accommodations.

**Table 2: Public vs. Private Human Rights Violations**

	<b>Physical Integrity</b>	<b>Political Liberties</b>	<b>Discrimination</b>
<b>Public Actors</b>	Extra-judicial killing, massacre, political imprisonment, excessive pre-trial detention	Authoritarianism, limitations on participation, censorship	Lack of equal treatment by official actors
<b>Private Actors</b>	Murder, assault, kidnapping	Corruption, Employer limitations on exercise of political rights	Lack of equal treatment by private actors, especially in employment and public accommodations.

Human rights enforcement is seen, in short, when a court or another government agency holds the violator accountable. Human rights enforcement is examined in light of these six types of violations in two time periods. Past violations begin in 1980 and continue through the end of civil wars, the return of democracy, and the end of military dictatorships; these processes are essentially completed at the most basic level by approximately 1996. Enforcement of these violations is examined both in the period when the violations occurred and in a transitional period that follows. The contemporary period is somewhat arbitrarily defined as the past five full years, including 2007-2012.

#### **IV. Judicial Politics and Human Rights in Central America: Case Studies**

In the following sections, I trace and analyze the judicial regimes of Central America and their impact on human rights in these countries from the 1980s to today. These countries follow

a similar pattern of some degree of repression in the context of civil wars and other forms of government-sponsored violence during the 1980s, followed by a transition to democratic governance during the years approximately 1985-1996 and then a period of simultaneously liberalizing economies, decaying state strength, and growing criminality. Decisions about transitional justice questions appear to fade in significance when compared with the impact of growing criminality, especially *narco*-related organized crime. In these countries, the rise of organized crime has raised new questions about state strength, state capacity, and the desired prioritization of human rights, economic growth, and social stability. Table 3 provides an overview of the general conditions in each country.

**Table 3: Overview of Conditions**

	El Salvador	Guatemala	Honduras	Nicaragua
Pre-transition HRV	1979-1992: 75,000 killed, high intensity	1960-1996: 200,000 killed/ disappeared, high intensity	"Dirty War" 1970s-1980s: moderate intensity; 2009 coup	<i>Contra</i> war 1979-1990: low-intensity
Transitional Justice	Minimal, 1993 Amnesty Law	1996 Amnesty law, 2 truth commissions	2004 report on disappearances; 2009 truth commission	None
Post-Transitional Justice	None	<i>Dos Erres</i> trial, Rios Montt trial (2012-)	Eclipsed by 2009 coup	None
Freedom House 2013	Free	Partly Free	Partly Free	Partly Free
Control of Corruption (percentile)	51	35	21	23
Official Impunity	Politicized	Corrupt	Politicized	Politicized
Homicide rate	69	39	92	13
Criminal Impunity	High	Extreme	High	Low

Sources: Transparency International, Human Rights Watch, United Nations Office on Drugs and Crime, Truth Commissions from each country, as well as the author's own judgment.

## *Guatemala: From Government Control to Clandestine Control*

Guatemala today represents a judicial regime under control by clandestine forces, which exists in the context of a violent society and a political system rated “Partly Free.” Guatemala’s democratic 1986 constitution reiterated a commitment to judicial independence and created a constitutional court to provide a check on the actions of the government. Following these changes, Guatemala became host to a variety of efforts to improve the functioning and independence of the judiciary. Institutionally and formally, Guatemalan judges and magistrates are relatively independent from politicians, but not necessarily from society. Appointment measures are relatively insulated from legislative or presidential influence, but give non-governmental actors direct access to the appointment commissions for magistrates of the Supreme Court and the Constitutional Court.<sup>14</sup> However, magistrates at all levels are limited in their autonomy by the brevity of their five-year tenures, after which most of them will need to seek non-judicial employment from people whom they have either pleased or harmed with their rulings. More troubling is the influence of the threats, attacks, and bribes from criminal sector.

Guatemala was subject to repressive military rule from 1954 to 1986 and a civil war that lasted from 1960 until its formal conclusion in 1996, during which 200,000 people were either killed or “disappeared” and many more fled into exile. Approximately half of those deaths occurred in the period 1979-1983. During the civil war years, the judiciary was tightly controlled through the judicial hierarchy. One retired judge recalled that, in those years, a superior judge would review each of her cases to ensure conformity with the law and with judicial practice. There could be little room for a rogue judge to rule against the regime without

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<sup>14</sup> The Constitutional Court in Guatemala is an independent governmental power, outside of the judiciary and the legislature. The Constitutional Court is hierarchically above the Supreme Court inasmuch as it can hear complaints against the Supreme Court, but there are other areas where the Supreme Court has the final say, including in the governance of the lower courts.

the support of the judicial hierarchy. Indeed, the judiciary did not provide a significant check on the military governments of the civil war period, which relied primarily on extra-legal and extra-judicial actions. Surprisingly, the judiciary may have been *more* autonomous during the war years than it has been since, but nonetheless personal influence represented the only cracks in the wall of repression that faced opponents of the regime.

Authoritarian legacies have persisted since the 1986 transition to democracy and even the 1996 peace accords at the same time that the state has lost strength and capacity and seen organized crime grow. Unfortunately for Guatemalans, the gradual and partial removal of the military from politics has coincided with skyrocketing crime. Most problematic has been organized crime, from the kidnapping rings of Guatemala City to the drug traffickers of the rural areas. Worse, these organized criminal elements have deeply penetrated the political and justice systems of Guatemala. One report alleges that many of these gangs have their origins in rings of current and former military officers who were involved in smuggling and other illicit activities during the war years.<sup>15</sup> These “hidden powers” were “partially revealed,” in the words of one Guatemalan scholar, by the inscription of former dictator General Ríos Montt as a candidate for president in 2003 following a constitutional crisis involving a standoff between the Supreme Court and the Constitutional Court and angry mobs of *campesinos* bused in by Ríos Montt and his supporters to surround the Courts and several other “unfriendly” government offices including the Human Rights Ombudsman.<sup>16</sup> Together, there is the implication of clandestine control over the legal sector as a whole.

The human rights situation in Guatemala has grown more complex since the end of the civil war. There are now more players and their identities are less clear. Where once a military

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<sup>15</sup> Susan C. Peacock and Adriana Beltrán, *Hidden Powers in Post-Conflict Guatemala: Illegal Armed Groups and the Forces Behind Them* (Washington Office on Latin America, December 4, 2006).

<sup>16</sup> Juan Hernandez Pico, “La Revelación Parcial De Los Poderes Ocultos,” *Política y Sociedad* no. 41 (2003): 9–24.



unit might enter a village and kill some of the men for suspected participation in the civil war, now a drug trafficking gang might enter a village to reward its peons while killing or threatening its enemies. Depending on the village, the gang, and the particular soldiers and officers involved, the military may try to protect the village or may cooperate with the criminals, as may the police. Guatemala has officially taken a “mano dura” (hard hand) approach to fighting crime, but corruption runs rampant among the security forces. Meanwhile, there is a widespread practice of killing street kids who are viewed as a threat to security by the police, although it is not a stated policy. Police engage in brutality, courts are rife with corruption and delays, and the prisons are overcrowded and often left to be run by gangs. In general, the government no longer has a clear policy of violating human rights, but they also have not made a commitment to respecting and enforcing the human rights of their citizens.

There have been very few trials for pre-transition human rights offenses, all in very high-profile cases where there has been strong pressure from the international community. The Guatemalan government acknowledged in 2004 that anthropologist Myrna Mack had been killed by a military death squad fourteen years earlier only after her family brought the case to the Interamerican Court of Human Rights. Two military officers were convicted of the murder of Monsignor Juan Gerardi, founder of the Archbishop’s Office on Human Rights (ODHA), only after more than twenty judges had left the case (and sometimes the country) under threat. Indeed, staff members at ODHA mentioned that they refuse to use official protection from the police because of fear that their bodyguards would kill them. The most significant case of the past few years has been the attempt to try former military dictator and longtime civilian member of Congress General Efraín Ríos Montt, who was finally arrested and put on trial in 2012 after resigning from the Congress. He is charged with genocide for ordering massacres and other

atrocities as president. That verdict, when it comes, is likely to be appealed; like Pinochet, the now elderly Ríos Montt may die before he can be finally sentenced. In all three of these cases, the driving force for prosecution has not been the government, but rather non-governmental organizations.

The prevalence of crime in Guatemala has produced significant problems for the autonomy of individual judges, especially at the lower levels of the judiciary. 2010 Constitutional Court President Roberto Molina Barreto opined that organized crime wants impunity and tries to “co-opt” all of the institutions of the state from the ordinary courts to the prosecutors and the constitutional court. The clearest form of intimidation is direct threats against judges. Judges who work in high impact criminal cases are given bodyguards, as are Supreme Court and Constitutional Court magistrates as a matter of course, although not all judges or magistrates choose to take advantage of this protection. One criminal judge reported that she felt very secure as a result, although one civil court judge indicated that she did not feel well protected by the judiciary. The general climate of violent criminality in Guatemala leads to a vague, general sense of intimidation. For example, a judge was murdered in Guatemala City in 2009. There was immediate speculation in the press that her murder was related to her work as a judge, although it turned out that she had been murdered by her maid because of a financial dispute. The ease with which a person can be murdered contributes to the influence of threats when they are made. One appellate magistrate described this “terrorism” as a very grave threat to judicial autonomy.

This lack of judicial autonomy also depresses the likelihood that a citizen whose rights have been violated by a private actor might find justice. Too often, justice goes to the highest bidder or the most brutal thug. The prevailing “currency” is money and force instead of laws and

the constitution. A poor defendant might find himself in pre-trial detention for years – sometimes longer than the ultimate sentence – while a wealthy defendant may be released to house arrest or may be able to buy the pace of trial he prefers and a sufficiently violent defendant (with sufficiently violent friends) may be able to threaten the prosecutor or judge off the case altogether. If convicted, the criminally connected may find that they are able to continue operating from within Guatemala’s overcrowded and often lawless prisons. True culprits may go free while innocent people go to jail. Meanwhile, certain kinds of victims are unlikely to ever see justice. The thousands of women killed – often after being raped and tortured – and dumped on Guatemala City’s streets are unlikely to have their murders investigated by police who dismiss them as domestic violence, as gang-related (if the victim has tattoos), or as worth ignoring for the right price. Special courts introduced to deal with violence against women appear to have had no effect.

The human rights situation in Guatemala is not rosy, but the government and the society are playing different roles in the violation and enforcement of human rights than they did several decades ago. Amnesty International reports that Guatemalans, especially human rights activists, are still at risk of being threatened or tortured – but that the culprit is more likely to be the drug trafficking gangs.<sup>17</sup> Human Rights Watch reports, “Guatemala’s weak and corrupt law enforcement institutions have proved incapable of containing the powerful organized crime groups and criminal gangs that contribute to one of the highest violent crime rates in the Americas. Illegal armed groups are believed to be responsible for ongoing threats and targeted attacks against civil society actors and justice officials.”<sup>18</sup> Even if Guatemala’s politicians were

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<sup>17</sup> Amnesty International, “Annual Report 2012: Guatemala,” accessed December 29, 2012, <http://www.amnesty.org/en/region/guatemala/report-2012>.

<sup>18</sup> Human Rights Watch, “World Report 2012: Guatemala,” accessed December 29, 2012, <http://www.hrw.org/world-report-2012/guatemala>.

angels, the state apparatus remains too weak to combat the violence of street gangs and drug traffickers.

*El Salvador: Extensive Judicial Reform Under Seige*

El Salvador today has a judiciary that is controlled both by political parties and by clandestine forces. Political parties in El Salvador are much stronger than in either Guatemala or Costa Rica in that they persist over many elections with stable leadership that is able to make credible commitments (and credible threats) to other political actors. El Salvador has experienced extremely intensive judicial reform efforts in the context of the internationally-supported implementation of its peace process<sup>19</sup>, a benefit that neither Honduras nor Nicaragua enjoyed despite their own histories of violent conflict in the same period. Although imperfect, these reforms did produce a more independent judiciary, at least formally, through the creation of a judicial council to oversee appointments of inferior judges. The judicial council also has primary responsibility for discipline of judges, although the final decision sits with the Supreme Court. Discipline of Supreme Court magistrates is initiated by the Supreme Court itself and then voted on by the legislature, as in Costa Rica. Unfortunately, successive Supreme Courts have been increasingly politicized through the appointment process after a relatively professionalized set of magistrates following the initial reforms in the 1990s.

In the war years, El Salvador experienced a government-controlled judicial regime not unlike Guatemala's, typified in part by the use of the authoritarian currency of violence to achieve state goals. Violence was pervasive and often not submitted to legal process. In these civil war environments, state violence may have been at times clandestine and may have been done by unofficial or quasi-official actors such as paramilitaries, but it was nonetheless raw and brutal violence. Political opponents were targeted for torture, disappearance, or killing through

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<sup>19</sup> Popkin, *Peace Without Justice : Obstacles to Building the Rule of Law in El Salvador*.

extra-judicial and frequently secret processes, but the results were often quite public: in both countries, tortured corpses were often disposed of in public places to send a message. Where the justice sector is bypassed in this way, it is almost meaningless to discuss their independence or autonomy except inasmuch as they are unable or unwilling to hold the government to account for those actions. Again, as in Guatemala, corruption provided the opportunity for a respite from repression for the fortunate. Margaret Popkin reported witnessing several different interactions between lawyers and judges, including military judges, in San Salvador that resulted in the release of prisoners with no actual legal argument being invoked.

El Salvador transitioned from a closed, authoritarian regime to a hybrid regime with the relatively fair March 1984 elections. However, the guerilla war and accompanying extensive state violence continued until the signing of a peace accord in 1992. The move to semi-free elections (the FMLN was not permitted to participate) and many subsequent reforms were influenced by thinking within the United States Department of State that creating democracy in El Salvador would help to reduce the attractiveness of armed struggle for those who had previously been left out of Salvadoran politics. Nonetheless, the United States continued to support the repression of the FMLN through much of the 1980s, balking only when the Salvadoran military and death squads seemed to attack people who were, in the eyes of the United States, outside of the conflict, such as the six UCA Jesuits.

The murders of the six Jesuits, their cook, and her daughter in El Salvador in 1989 attracted substantial pressure from the United States. In response, the Salvadorans put on what amounted to a show trial, convicting only one colonel and his lieutenant but not the confessed triggerman. This trial was plagued by military obstructionism, but was hailed by many as a breakthrough because members of the military were actually convicted of human rights abuses.

Such laudatory reactions are perhaps overly optimistic. As with many similar cases in the region, lower-level officers may be convicted but the “intellectual authors” may never face trial. In fact, frequently, these governments resist reopening the trial to try the people who ordered the abuses on the grounds that the case has already been concluded. An additional problem with such show trials is that they only affect the tiny fraction of the cases of human rights abuses that secure the sustained interest of powerful international actors. A 1993 amnesty law has prevented further trials for past human rights violations and remains in force despite numerous orders, Collins suggests that judicial reforms have actually made it more difficult to seek redress in domestic courts.<sup>20</sup>

The human rights situation in El Salvador today poses similar problems as Guatemala’s in its complexity. The number of actors has increased, their interests have diversified, and the connections between them have become more obscure. Salvadorans live in a very violent society, with 69 murders per 100,000 inhabitants nationwide. The capital, San Salvador, is routinely ranked among the world’s most dangerous cities. As put by the United States Department of State, “The principal human rights problems were widespread corruption, particularly in the judicial system; weaknesses in the judiciary and the security forces that led to a high level of impunity; and violence and discrimination against women.”<sup>21</sup> They go on to cite isolated unlawful killings as well as poor conditions in prisons and pre-trial detention. They also recognize that these problems are made considerably worse by the impunity enjoyed by those

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<sup>20</sup> Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador*. At 195.

<sup>21</sup> Bureau of Democracy, Human Rights, and Labor, United States Department of State, “Country Reports on Human Rights Practices for 2011: El Salvador,” n.d., <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186513>.

within the security forces that do violate human rights. The problem of official impunity is considerably deepened by the takeover of 11 prisons by the military.<sup>22</sup>

Unofficial impunity remains a problem as well. The Salvadoran government continues to violate the human rights of its citizens, albeit typically in isolated events, refuses to hold either politicians or military officers accountable for past violations of human rights, and also fails to enforce the human rights and human dignity of citizens against private actors. El Salvador has very powerful *maras* or street gangs. With corruption rampant in the judiciary and among groups such as prison guards, the *maras* are frequently able to operate with impunity. Judicial corruption is so common and so poorly dealt with by the Supreme Court, which has disciplinary authority, that it has harmed public opinion of the judiciary. If this trend continues, the judiciary is likely to become less prestigious and consequently less powerful over time.

#### *Honduras: Subject to Parties and Cartels*

Like Guatemala and El Salvador, Honduras faces a daunting level of violent criminality. Murder rates are at 92 per 100,000 inhabitants and brutal *maras* are active in the cities. Meanwhile, drug traffickers make use of the Caribbean coast as a trans-shipment point. Honduras has adopted a *mano dura* approach to try to control the gangs. The judiciary is weak, corrupt, and subject to influence from both politicians and criminal elements. Of major continuing concern is the lack of accountability for the 2009 coup d'etat against President Manuel Zelaya. Although the level of violence and threats against judges, journalists, and activists has diminished since the months immediately following the coup, there continue to be problems with both official and unofficial actors violating human rights.

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<sup>22</sup> Amnesty International, "Annual Report 2012: El Salvador," accessed December 29, 2012, <http://www.amnesty.org/en/region/el-salvador/report-2012>.

Honduras experienced outright military government in the 1970s, including the populist regime of General Oswaldo López Arellano (1972-1975) that included a land reform, which proved to be a successful means of coopting peasant support. The following two conservative military presidents monopolized power but nonetheless allowed for some civil rights. Honduras then transitioned to a hybrid regime with the election of civilian president Roberto Suazo Córdova (1982-1986). The democratic gains of the early 1980s were matched by reversals on human rights as the military continued to dominate society from behind the scenes. Inspired by anti-communism, influenced by authoritarian Argentina, and lavishly funded by the United States, the Honduran military embarked on a “dirty war” in the early 1980s that included torture, assassination, and forced disappearance. Although Honduras had only minimal local communist guerilla movements, the military broadly targeted student groups, labor unions, and suspicious peasant organizations. At the same time, Honduran soil was being used with the enthusiastic blessing of the Honduran military as a staging ground for the Contra rebels fighting the Sandinista government in Nicaragua.<sup>23</sup>

In Honduras under the hybrid regime, the ordinary courts had little independence. Trial judges were appointed by the Supreme Court, which was in turn appointed by the Congress with the often overwhelming influence of the military. A human rights report described the situation as follows in 1984: “The lack of life tenure and the political nature of the appointments process have had a profound and debilitating effect on the independence of the Honduran judiciary. The courts have been largely ineffectual as a check on the other branches of government, particularly

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<sup>23</sup> Ruhl, J. Mark. 2000. "Honduras: Militarism and Democratization in Troubled Waters." Pp. 47-66 in *Repression, Resistance, and Democratic Transition in Central America*, edited by Thomas W. Walker, and Ariel G. Armony. Wilmington, DE: SR Books, Schulz, Donald E., and Deborah Sundloff Schulz. 1994. *The United States, Honduras, and the crisis in Central America*. Boulder: Westview Press.



in cases where the armed forces are accused of violating human rights.”<sup>24</sup> Clearly, the institutional rules in Honduras, as in the other countries, made independent judging unlikely, if not impossible. The consequence of this lack of independence was especially pronounced for the victims of human rights violations. For example, the Inter-American Court ruled against Honduras in 1988 for its failure to effectively investigate and prosecute a case of forced disappearance; the next year the court ordered the government of Honduras to pay compensation to the surviving family.<sup>25</sup>

In practice, the appointment process has developed into a highly political, highly partisan one. Following the 1985 election, there was a “pactito” (little pact) between the winner, President José Azcona del Hoyo of the Liberal Party and the actual recipient of the most votes, leader of the National Party Rafael Callejas. Among other things, this pact gave the National Party members of Congress the “control of the Supreme Court and half of the other judicial appointments.”<sup>26</sup> Pact-making has often been held up as a great benefit to democratization because of its ability to bring about peaceful compromise in the Southern Cone of South America, but Honduras and Nicaragua may demonstrate for us the problems inherent in relying on pacts that are semi-democratic and semi-constitutional at best. In both countries, these friendly arrangements between political elites have allowed for incursions on democracy, as with the use of the Honduran Supreme Court to legitimize a coup in 2009 or the ongoing politicization of the Nicaraguan courts.

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<sup>24</sup> Quoted in Schulz, Donald E., and Deborah Sundloff Schulz. 1994. *The United States, Honduras, and the crisis in Central America*. Boulder: Westview Press. At 18.

<sup>25</sup> Velasquez Rodriguez Case, No. 4 Inter-Am.Ct.H.R. (Ser. C) (Inter-American Court of Human Rights 1988).

<sup>26</sup> Schulz and Sundloff Schulz at 132.

In 2003, two-thirds of Honduran judges identified membership in a political party as a paramount qualification for becoming a judge.<sup>27</sup> Partisan control of the judiciary appears to have contributed significantly to the June 2009 coup against President Manuel Zelaya. The magistrates of the Supreme Court who authorized the military to remove Zelaya had only recently been appointed by Roberto Micheletti as president of the Congress; that they then approved Micheletti's assumption of the presidency is thus unsurprising. As the coup's denouement dragged on through the installation of newly-elected President Porfirio Lobo in January 2010, the Supreme Court was the loudest and most insistent proponent of the coup, even invalidating a Congressionally approved power-sharing agreement that would have partially reinstated Zelaya and restored Honduras' international standing. In the year following the coup, members of the judiciary who had opposed the ouster found themselves subjected to forced transfers to less desirable posts and disciplinary processes, some of which resulted in the removal of judges and even one magistrate from their positions.<sup>28</sup> Only one of those who petitioned for reinstatement was successful.<sup>29</sup>

The problem of impunity for past human rights violations during and immediately following the 2009 coup had eclipsed the question of violations during the 1980s. A Truth and Reconciliation Commission was established after the election of President Porfirio Lobo in late 2009. While this commission has identified a number of abuses, the government has been reluctant to actually hold anyone accountable for them. Meanwhile, impunity reigns for a variety of other official and unofficial violations of human rights. Police officers and prison guards

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<sup>27</sup> Borja Díaz Rivillas and Sebastián Linares Lejarraga, "Fortalecimiento De La Independencia Judicial En Centroamérica: Un Balance Tras Veinte Años De Reformas," *América Latina Hoy* 39 (2005): 47–96.

<sup>28</sup> Amnesty International, "Document - Honduras: Independence of the Judicial System Is Seriously Undermined as the Dismissal of Justice Officials Is Confirmed | Amnesty International," June 2, 2010, <http://www.amnesty.org/en/library/asset/AMR37/010/2010/en/239278fd-5ce0-473a-8190-dca89f2f19a6/amr370102010en.html>.

<sup>29</sup> Human Rights Watch, "World Report 2012: Honduras," accessed December 30, 2012, <http://www.hrw.org/world-report-2012/world-report-chapter-honduras>.

routinely use excessive force and engage in arbitrary detention; it is rare for these state actors to be charged with any offenses. Private security guards and gang members are also routinely allowed to continue violating the human rights of the population in general. In response, much of the population has become supportive of the *mano dura* approach that itself tends toward more official violations of the human rights of criminal suspects and prisoners. In short, Honduras, having established a politically partisan judiciary, has also not developed a socially autonomous judiciary. As a consequence, the state continues to be a violator of human rights, to be reluctant to hold officials accountable for those violations, and to also be unable to protect the human rights of citizens against private actors.

#### *Nicaragua: A Judiciary Under Partisan Control*

Nicaragua has a highly partisan judicial regime, but enjoys relative social peace and citizen security. Gangs have not overrun its cities and drug trafficking has remained primarily on the more sparsely populated Caribbean Coast. However, as a result of a series of political pacts, the two main political parties, the Liberal Party and the Frente Sandinista Liberación Nacional (FSLN), have divvied up the political appointments throughout government, including the judicial appointments. In the context of the second presidency of Sandinista leader Daniel Ortega (2007 – ), the judiciary has become increasingly dependent and unwilling to check corruption and other abuses by the government or by prominent Sandinistas. However, human rights violations in general remain at a much lower level than in Nicaragua's northern neighbors. While democracy has faltered in the years since the 1990 election of Violeta Chamorro, basic human dignity continues to be generally respected.

The FSLN in Nicaragua during the 1980s took advantage of a number of means of controlling its judiciary. Immediately following the revolution, they purged the judiciary of any

Somocista judges that had not already fled the country. They created a number of specialized tribunals. Even with the adoption of a democratic constitution in 1987, which explicitly guaranteed judicial independence, infringements continued. The appointment method in practice gave President Ortega the ability to appoint whomever he chose to the Judiciary. While officially the National Assembly made the final decision, they typically acted as a rubber stamp to Ortega's choices. Once appointed to the bench, they did not enjoy judicial career protections. Judges may have been particularly easily manipulated because of their inadequate training. In the years following the revolution, many professionals, included lawyers, left the country. Consequently, a large number of people without legal training were appointed to District and Local Courts. To be appointed in this way, a person had to be "knowledgeable of the law," which could be accomplished through a training course offered by the judiciary. Consequently, Solis and Wilson report that at the end of the Sandinista era, only forty percent of District Judges and five percent of local judges held law degrees.<sup>30</sup> These judges had no institutional protections for independent actions from the FSLN and likely would have been expected to be loyal to their patrons.

The Supreme Court was somewhat more difficult to dominate because all had independent legal training and the FSLN had chosen to appoint three opposition members to the court. When the Supreme Court acted against the wishes of the FSLN, however, they were simply ignored, as in the case of "La Verona" under the land reform. After this property had been taken and redistributed, the Special Agrarian Tribunal reversed the expropriation. Soon after, the executive seized the land again and the original landowner filed an amparo with the Supreme Court. The Supreme Court ruled in favor of the landowner and ordered the land be

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<sup>30</sup> Solis, Luis G., and Richard Wilson. 1991. *Political Transition and the Administration of Justice in Nicaragua*. San Jose, Costa Rica: CAJ. At 56.

returned. Jaime Wheelock, the Agrarian Minister and a key figure in the revolution, then went before the court to announce his ministry's refusal to comply with the amparo. In response, the three opposition magistrates resigned in protest, signing an open letter explaining the situation. Rather than accept the protest, the FSLN asked that the other magistrates step down as well, replacing them all with FSLN loyalists.<sup>31</sup>

The moment of democratic transition in Nicaragua is controversial. While many international observers declared the 1984 election the freest in Nicaragua's history, the boycott by many opposition parties led the United States to condemn it. The new Congress then spent two years writing the 1987 constitution still in force. Finally, under pressure from the United States, the Sandinista agreed to move up the 1990 election by several months and the unified opposition won, creating an obvious, if not complete, transitional moment. Chamorro began a massive retreat from the social policies of the Sandinistas, including reversing the land reform program. Chamorro governed in part with the benefit of a pact between herself and outgoing FSLN president Daniel Ortega, which made it easier to re-incorporate the contras and reduce the military but also laid the foundation for the corrupt power-sharing pacts between Ortega and Liberal President and party leader Arnaldo Alemán that is very important to the argument in chapter three.<sup>32</sup> Democracy cannot be said to have been consolidated in Nicaragua as of this writing. Alemán also began the process of returning the government, including the judiciary, to a spoils system. Problems in the area of the rule of law and judicial independence are especially acute in Nicaragua, with the second presidency of Sandinista leader Daniel Ortega involving

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<sup>31</sup> Ibid. At 18. Close, David. 1999. *Nicaragua : the Chamorro years*. Boulder, Colo.: Lynne Rienner Publishers.

<sup>32</sup> Close, David. 1999. *Nicaragua : the Chamorro years*. Boulder, Colo.: Lynne Rienner Publishers, Close, David, and Kalowatie Deonandan. 2004. *Undoing democracy : the politics of electoral caudillismo*. Lanham, Md.: Lexington Books, Walker, Thomas W. 2003. *Nicaragua : living in the shadow of the eagle*. Boulder, Colo.: Westview Press.

extensive manipulation of the courts in order to extend his control over more of Nicaraguan politics.

With the predominance of pact-making in Nicaragua came an unwillingness either to conduct a systematic lustration process or to otherwise put a legal *punto final* on the events of the Sandinista years. Instead, the dismissal, retention, and selection of government officials has been driven substantially by partisan political concerns. This tendency is reflected in the choices to hold accountable for corruption and other abuses primarily those official actors who are out of favor with the current government, most notably former president Alemán.<sup>33</sup> Nicaragua has little “horizontal accountability”<sup>34</sup> as a result of this tendency, but they nonetheless operate fairly effectively with regard to ordinary cases. Because of Nicaragua’s relatively low crime rates and the isolation of drug trafficking networks primarily in the Atlantic Coast, the judiciary has not been substantially criminally penetrated. The continuing influence of the politically opposed Sandinista and Liberal elites has also meant that, even if some judges may be heavily influenced by connections to traditional elites or by revolutionary commitments, the judiciary as a whole may be somewhat balanced. The pairing of political dependence and social autonomy creates an environment where ordinary citizens’ rights are more likely to be respected than is the case in Nicaragua’s Northern neighbors.

## **V. Conclusion**

These four case studies from Central America demonstrate the various patterns of judicial response to human rights violations. I argue that these patterns cannot be understood without parsing the different elements of judicial independence and autonomy. It is less useful to

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<sup>33</sup> Indeed, this logic seems to hold true even in relatively transparent Costa Rica.

<sup>34</sup> Guillermo O’Donnell, “Horizontal Accountability: The Legal Institutionalization of Mistrust,” in *Democratic Accountability in Latin America*, ed. Scott Mainwaring and Christopher Welna (Oxford: Oxford University Press, 2003), 34–54.

conceptualize the perfectly independent judiciary that also has taken unto itself a commitment to enforce human rights. Judges may or may not feel impelled to enforce human rights; some judges will fall on their swords in order to protect the powerless, but most are likely to prioritize at the least their own safety first. In settings of complex insecurity, then, we need to consider when judges are free to rule according to the law – and part of that question is against whom they are ruling. If judges are asked to rule against past human rights violators who are part of the current government, they need to be independent, but they may be able to rule against human rights violators who are now the enemies of the incumbents even if they are not. Indeed, for reasons of international image, they may be encouraged to go after past violators who are now enemies of the regime. Judges most likely need to be politically independent to be able to hold current state actors accountable for human rights violations, but even independent judges may be paralyzed against powerful criminals or other social actors if they do not enjoy social autonomy.

All of these patterns can be seen in Central America. Moderately independent but not socially autonomous Guatemalan judges have begun to be able to bring a select number of past human rights violators to trial, but have been able to halt the assault on the human dignity of Guatemalans presented by criminals and corrupt officials. El Salvador, also experiencing weak social autonomy and moderate political dependence within a stronger party system, has stuck to its choice to amnesty past human rights violations and has been largely unable to hold current violators accountable. In Honduras, a politically dependent judiciary was complicit in a coup d'état and declined to hold officials accountable for human rights violations in the period immediately following. At the same time, Honduran courts have not had sufficient strength or autonomy to withstand the onslaught by *maras* and *narcos*. Nicaragua has the good fortune of a relatively low level of violent criminality, but they have governed so consistently through

partisan pacts that it is unlikely that judges would ever have the desire to hold either past or current official violators of human rights accountable, nor unofficial violators who had the right political friends.

While justice is highly politicized in Nicaragua, it is not generally able to be bought or bullied in the way that it can be in Guatemala. Unlike Nicaragua, however, Guatemala, Honduras and El Salvador have seen the rise of *maras* or youth gangs. Honduras has the highest levels of membership in these gangs in the region and El Salvador has these problems as well. In all three countries, these gangs are involved in a variety of semi-organized violent criminality, including kidnapping, extortion, and murder for hire. All three governments have relied primarily on “*mano dura*” (“hard hand”) approaches to control these gangs; the difference is the widespread complicity of Guatemalan police officers in violent crime.<sup>35</sup> These *mano dura* approaches produce additional new violations of human rights in that they relax protections against arbitrary arrest and detention, against torture or other brutality, and for basic procedural protections for criminal defendants. Furthermore, these approaches signal to security forces that human rights violations are acceptable when deployed against “criminals.” Indeed, it is in the context of *mano dura* approaches and violent organized crime that United States has launched the Central America Regional Security Initiative.<sup>36</sup> Whether this new attempt to build the rule of law in Central America will adequately address judicial autonomy remains to be seen.

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<sup>35</sup> Pierre Frühling, *Maras and Youth Gangs, Community and Police in Central America* (Swedish International Development Agency, 2008), [www.Sida.se/publications](http://www.Sida.se/publications).

<sup>36</sup> United States Department of State, “The Central America Regional Security Initiative: A Shared Partnership,” accessed December 31, 2012, <http://www.state.gov/p/wha/rls/fs/2012/183455.htm>.