

ARGENTINE FEDERAL REFORMS OF THE JUDICIARY AND THE JUDICIAL
DELAY OF CORRUPTION CASES: FROM THE 35TH ACCORD OF 2003 TO THE
REPENTANCE LAW OF 2016

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By

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Many thanks, Alexander Uzarowicz

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Chapter 1: Hypotheses

The researcher will focus the paper to answer the following research question: Why is the Argentine judiciary unable to resolve federal corruption cases? This paper will consider the following hypotheses:

1. A high level of political competition in the Argentine electoral system provokes judicial delay in corruption cases. Contrary to conventional belief that electoral competition helps solidify an independent judiciary, Argentina's competitive elections paired with a super presidentialist system, politicize the judiciary and make it the political ring where most major political battles become settled.
2. The judicial culture prevents a speedy judicial process. Referencing Beers' works from Romania and Ukraine, Argentine judicial officials have a similar particular cultural issue that impedes the judiciary from settling corruption cases. This culture is insular making it hard to accept any kind of reforms, loyalty-centered abiding by the system rather than the law, and driven by nepotism making one of the most exclusive branches of government. This last point explains the intense quid pro quo negotiations that take place between judicial officials and the Magistrate Council that define their confirmation process.
3. The Argentine government lacks the institutional protocols to address judicial delay. From the institutionalist theoretical approach, the judiciary contains many different loopholes that allow the indicted to appeal any kind of sentence. The judiciary also suffers from a poor mixture of inquisitorial and adversarial systems that confuse the roles of judicial officials blurring the lines between the prosecution and the judges. The system is also known for judges' bad time

management skills and for having very little initiative to attend academic coursework for latest legal knowledge.

4. Corruption cases are only resolved when the crime is easily visualized. Public scrutiny theorists point out that when there is ample press coverage and information about the effects of corruption, the public mobilizes and demands quick action. The Argentine judiciary has an emblematic train incident that helped deliver the swiftest corruption case sentence in history.

The researcher will utilize previously established theories on corruption to add more context to these hypotheses.

Chapter 2: Introduction

Argentina's trust in the judiciary is in shambles. About 70 percent of those polled in October 2017 in the City of Buenos Aires, the most populous city in Argentina; believe that the judiciary is corrupt.¹ This percentage correlates with a 2007 report from Transparency International where 70 percent of Argentines at-large found the judiciary to be corrupt.² The vast majority of those polled believe that judges are complicit in corruption cases involving public officials and major business leaders. The perception comes from the fact that most accused of corruption end up free. Testimonies are not heard, evidence is not presented and cases become unresolved. The numbers say it all:

- Over 90 percent of corruption cases end unresolved.
- The judicial process for corruption cases lasts an average of 14 years.
- About 6 percent of these cases go to trial.
- Only about 3 percent of the cases receive an actual sentence.³

To this day, there are only three executive public officials who served and are currently serving a sentence. The list of convicted individuals includes the late Maria Julia Alsogaray, President Menem's former cabinet secretary, currently Vice President Cristina Kirchner's own Vice President, Amado Boudou, and Kirchner's Minister of Transportation, Ricardo Jaime. The fact that the list includes only three high ranking public officials makes the public feel disenfranchised and ignored.

¹ Eduardo Paladini, "Llamativa Encuesta Sobre Corrupción: Para El 48% Es "inevitable"." Clarín – Últimas Noticias De Argentina Y El Mundo En Clarín.com, Accessed July 22, 2018. https://www.clarin.com/politica/llamativa-encuesta-corrupcion-48-inevitable_0_Syh_vgY3-.html.

² Transparency International E.V., "Corruption Perceptions Index 2018," www.transparency.org, accessed July 21, 2019, <https://www.transparency.org/cpi2018>. Pg. 13.

³ Ezequiel Nino, Luis Villanueva, Camila Blanco, Renzo Lavin, and Lucas Luna, "LA PARÁLISIS DE LA JUSTICIA FRENTE A LOS CASOS DE CORRUPCIÓN." Asociación Civil Por La Igualdad Y La Justicia: pg. 22. http://acij.org.ar/wpcontent/uploads/La_paralisis_de_la_Justicia_frente_a_los_casos_de_corrupcion.pdf.

There is ample distrust in public institutions that only discredits the democratic system overall. For instance, the current Vice President and Former President Cristina Kirchner is indicted for 10 different corruption charges, the vast majority of which involve illicit enrichment. The fact that the judicial process is long and tedious, feeds into the idea that either the corrupt are free and continue to govern or that political elites utilize the judiciary to persecute their rivals endlessly for political benefits. One side of the political class accuse Kirchner and her bona fides of escaping justice, Kirchner counters with lawfare, that the judiciary is intentionally persecuting her colleagues. The real issue is that the judiciary is unable to define matters one way or the other and it feeds this stalemate situation. The truth becomes an anomaly and public distrust in politics only deepens.

Judicial delay also poses economic concerns. Stolen funds end up unrecovered by the criminal justice system. The non-profit Centro de Investigación y Prevencion sobre la Criminalidad Economica (CIPCE) estimates that the Argentine government lost around 10 billion dollars between 1980 and 2006 due to corruption.⁴ Unfortunately there are no recent estimates. This is clearly an urgent topic that needs to be addressed.

There are some obvious issues with the judiciary. As the previously mentioned statistics show, the judicial process of corruption cases is long and tedious. Firstly, a 14 year judicial process prevents cases from getting a firm sentence because of well-intentioned legal safeguards that protect the accused from going through a never-ending process. Secondly, there is an ambiguity with the law as to how long the judicial process ought to be. This permits judges, the prosecution and the defense teams to devise

⁴ Mariano Fernández Valle, and Soledad Pujó, "DERECHOS Y JUSTICIA: Para Vos, Para Mí Y Para Tod@s," CIPPEC. <https://www.cippec.org/wp-content/uploads/2017/03/2020.pdf>. pg. 37

loopholes and evade a sentence. Thirdly, the vast majority of these corruption cases end without any firm sentence which only deepens the trust deficit that Argentines have with the judiciary. This last point leads public opinion to believe that judicial officials are complicit with the accused to avoid any kind of punishment. There is a critical research question that takes all of these different issues into consideration: Why is the judiciary unable to resolve these cases?

Academic studies have long encountered this question. Scholars familiar with the subject matter would point to the lack of sentences delivered against allegedly corrupt politicians. They will point to many different examples of public officials that almost always end up free from any kind of legal reprimands. Surely enough, the statistics back these claims. It is also apparent from a wide array of studies that the judiciary is a highly politicized branch of government and works in cahoots with those accused of corruption. What is not so apparent from previous studies is the institutional fabric that allows for this behavior and the underlying causes that make the judiciary a broken branch of government.

This study will collect data through a series of in-depth interviews. The Asociación Civil por la Igualdad y Justicia (ACIJ), a non-profit that promotes transparency within the judiciary, wrote several reputable studies about corruption in the judiciary. These studies pursued high-profile judicial experts and judicial scholars as well as politicians, NGO leaders, and journalists to describe the state of the judiciary. This researcher used those studies as a guide to interview those same individuals and try to find any similar or differing views from their original findings published in 2007.

The research involves 19 subjects. The vast majority of these subjects were

originally interviewed by the ACIJ, however, through a snowball sample, the author acquired access to additional relevant sources. They were interviewed from October 2019 to February 2020. All of these subjects participated voluntarily and provided many different answers to the research question revealing the causes of judicial delay.

The researcher found three major causes for judicial inefficiency. Some of these include institutional obstacles. For instance, there is no agreement as to how long should the judicial process be. This only allows for further loopholes and a plethora of legal disagreements. Another institutional roadblock is the structure of the judicial system. A regular corruption case involves two different prosecutorial lawyers, one for the instruction and a different one for the oral phase of the case. The same applies for judges who are different in both phases. Furthermore, there are political reasons for the judiciary's poor performances. The nomination process of prosecutors and especially federal judges is a highly politicized ordeal. Candidates go through many litmus tests that often involve quid pro quo negotiations. Additionally, the judiciary suffers from a culture of nepotism and bureaucracy that embraces all kinds of red-tape that make it highly improbable for any kind of well-intentioned judicial official from performing his or her duty. The system is highly exclusive and only the well-connected gain access. This paper will include judicial studies that show how favoritism trumps meritocracy and draw parallels with different countries. Last, but not least, the researcher found that the more public scrutiny there is in judicial proceedings, the speedier the process. However, the public only mobilizes when it is aware of the judiciary's inefficiencies be it nepotism, political interference, and or institutional shortcomings.

Definition of key terms

In order to evaluate the state of the judiciary branch, one has to take many concepts into consideration. Firstly, the research needs to define corruption, judicial delay, judicial reforms, independent judiciary, and judicial culture.

Corruption

Many legal and political scholars attempt to define corruption. One of them is Susan Rose-Ackerman, a renowned Yale scholar that spent much of her career researching corruption. Rose-Ackerman defines corruption as the “misuse of public office for private gain.”⁵ She explains how public officials use their authority to profit individuals. Several consolidated democracies like Australia embraced this definition as well, believing that corruption affects the honest and impartial performance of public officials’ responsibilities.⁶ The Australian government approaches corruption through the same lens as Rose-Ackerman, contending that officials abuse their public office. In other words, corruption is the abuse of power or authority subverting the interests of the public for private gain. Other political scientists like Rasma Karklins go even further on this point asserting that corruption involves “‘the self-serving misuse of official authority’ by persons entrusted to serve the public good; and...that corruption entails a violation of official rules and/or ‘a breach of public trust.’”⁷ Corruption does not only involve the private gain of the public official but a violation of the trust or social contract established

⁵ Susan Rose-Ackerman and Nancy Zucker Bowell, "Corruption and Democracy," Proceeding of the Annual Meeting, 1996, 83, accessed July 21, 2019, JSTOR.

⁶ Angela Gorta, "Research: A Tool for Building Corruption Resistance," Corruption and Anti-Corruption, 2013. doi:10.22459/cac.03.2013.02. pg. 13.

⁷ Daniel Beers, "BUILDING DEMOCRATIC COURTS FROM THE INSIDE OUT: JUDICIAL CULTURE AND THE RULE OF LAW IN POSTCOMMUNIST EASTERN EUROPE," Indiana University, October 2011, 118.

between the citizenry and the government. Karklins' definition is similar to Rose-Ackerman's only that it includes the social contract component. Scholars like Robert Klitgaard and Samuel Huntington disregard the trust component and devised a more mathematical approach to define corruption: $\text{monopoly} + \text{discretion} - \text{accountability} = \text{corruption}$. They present this definition pointing to empirical examples of countries where accountability is scarce in monitoring and evaluating public policy, and this, in effect, propels corruption.⁸ Other specialists define corruption with more ample terms. They define corruption as "the abuse of entrusted power for private gain." The definition is broader in order to include corrupt behavior from the private sector specifically from "senior executives of private corporations."⁹ Interpol prefers this definition in order to prosecute those in the public and private realms.

Since the scope of the paper is the Argentine judiciary, the researcher will utilize Rose-Ackerman's and Karklins' definitions. Both of these definitions establish a general idea that corruption occurs when there is a private gain in the hands of officials who hold a monopoly of power and violate their public functions and responsibilities. It is simple to apply this definition to the judiciary. One could see how judges engage in corruption by gaining monetary and political benefits. A judge could engage in corrupt behavior by opting not to prosecute a public official, by delaying the judicial process of a case, or "selling" of court decisions through bribery and extortion."¹⁰ These examples will be explained in more detail later in the paper.

⁸ Robert Klitgaard, "International Cooperation Against Corruption," Finance and Development, March 1998, 4, <https://pdfs.semanticscholar.org/b6cf/ccb56a32cf9124be07c07b3494b79e841f58.pdf>

⁹ Leslie Holmes, Corruption: A Very Short Introduction (Oxford, United Kingdom: Oxford University Press, 2015), 57.

¹⁰ Ibid 7, 118.

Judicial delay

Argentine legal academia does not have a unanimous opinion over the legal definition of delay. However, several scholars cite the “Ley de Siete Partidas, y el Código Procesal de la Provincia de Buenos Aires,” article 141, which determines that the span for a judicial process cannot exceed two years.¹¹ The delay in the judicial system is nothing new to Argentina. In fact, judicial delay became a hot-button issue in 1996 when a Sierra Chica prison of the Province of Buenos Aires, broke into a complete violent riot due to the fact that 66 percent of inmates from Sierra Chica’s prison were detained “either waiting for the trial or for a response of their appeal against their conviction.”¹² Argentina violated the American Convention on Human Rights back in 1996 and continues to do so by delaying the process by up to 14 years before obtaining a firm sentence. The ACHR does not specify what the proper time period is, but it explicitly states that “any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings.”¹³ The ACHR has ruled in several cases however, that “reasonable time” between arrest and trial can go up to 18 months but cannot exceed two years.¹⁴ Argentina’s Supreme Court defined in 2005 in the Losicer case that 18 years of judicial proceedings is unconstitutional since it violates the “reasonable time” clause spelled out in the Argentina Constitution under

¹¹ Hernán Diego Asensio Fernández, "Plazo De Juzgamiento Razonable," *Garantías Constitucionales*: 77-80. http://www.casi.com.ar/sites/default/files/139_PDF_Ideología_y_Justicia_77_a_80.pdf.

¹² Pablo Ciochini, "Campaigning to Eradicate Court Delay: Power Shifts and New Governance in Criminal Justice in Argentina," 64, doi:10.1007/s10611-013-9475-5.

¹³ *Ibid* 12, 70.

¹⁴ United Nations Human Rights, 269, accessed July 21, 2019, <https://www.ohchr.org/Documents/Publications/training9chapter7en.pdf>.

section 1 article 8.¹⁵ The ruling, however, makes no mention of what constitutes reasonable. So while there is no specific definition of “reasonable time” for judicial proceedings, this paper will utilize an 18-month to two-year criteria as a mid-point between the international commission and article 141 of the “Ley de Siete Partidas, y el Código Procesal de la Provincia de Buenos Aires.” Anything exceeding this criterion qualifies as judicial delay.

Judicial reforms

The international community considers corruption a critical issue. There are many recipes for combating it, depending what experts identify as its main causes. Some propose institutional remedies, others informal changes that affect the toxic culture that provokes corruption and a different group of scholars believe in political reforms to campaign finance, for example, to improve transparency in the electoral process.

Popova and Beers explain what constitutes reform. They define judicial reform as a “process of transformation.”¹⁶ They point out that the reform is not a destination but a continuing process. Both also point out that reforms are characterized by their scopes and modes.

For instance, reforms can have a limited scope - defined as focused on “only a single issue” - or ample in scope, addressing the whole judicial system, for example.¹⁷

Reforms can have a limited scope changing a specific issue or ample in scope addressing

¹⁵ "La Corte Dejó Sin Efecto Una Multa Impuesta Por El Banco Central," Abogados.com.ar, accessed July 21, 2019, <https://www.abogados.com.ar/la-corte-dejo-sin-efecto-una-multa-impuesta-por-el-banco-central/10482>.

¹⁶ Maria Popova and Daniel Beers, "Judicial Reform after the Euromaidan: Ukraine's Rule-of-Law Breakthrough That Wasn't," *Demokratizatsya*: 2.

¹⁷ *Ibid* 16, 4.

the judicial system as a whole, for example. Many individuals are mistaken into thinking that the larger the scope, the more consequential the reform. In fact, a minor change such as altering the retirement age of Supreme Court justices can actually have a deeper impact on the court's independence than a general reform to a judicial system.

As for the mode of a reform, it can be normative, institutional or legislative. Most judicial reforms are enacted through the legislative branch.¹⁸ Legislative reforms focus on changing the jurisdiction of the courts and the different legal codes that courts work with on a daily basis. Whereas institutional reforms implicate creating new courts, eliminating existing courts, establishing legal institutions outside the judiciary etc. Lastly, judicial reforms concerned with normative changes addresses informal rules within the judiciary. This is the slowest and most tedious of reforms since it involves changing the culture and behavior of judges, prosecutors, defense attorneys, and administrative staff.

All of these reforms are judged by their impact or "the degree of change in the functioning of the judiciary." Both Beers and Popova point to judicial independence, judicial behavior and judicial turnover as some of the most important impacts.¹⁹ These help scholars measure the effects of judicial reforms.

This paper will identify reforms pertaining to the Argentine judiciary. Most of them involve institutional reforms such as the 35th Accord of 2003 which was the first reform that promoted transparency in the judiciary by publishing the judicial process of all case files.²⁰ The research will identify the scope and, most importantly, the impact that these reforms had on the judicial process of corruption cases.

¹⁸ Ibid 17, 4-5

¹⁹ Ibid 17, 5

²⁰ Álvaro Herrero, Sebastián Schwartzman, Juan González Bertomeu, and Mariela Aisenstein, "Reformas Institucionales En La Corte Suprema De Justicia De Argentina," *Corte Supremas*: pg. 50.

Judicial culture

Many scholars stress the importance of the judicial culture in corruption cases. As indicated above, the informal norms and behaviors of judges are a lot more pivotal in their impact than the reforms focused on changing institutional structures. The culture is what drives a clean judiciary or what invites corruption. This paper will analyze the judicial culture of Argentine judges and judicial officials.

Academics attribute judicial culture to two different factors. They define judicial culture to the judges' interpretations of the law and of their individual role.²¹ For instance, judges may adopt an activist role trying to influence the legislative process or a restrictive view limiting the scope of the judiciary. Another example of judicial culture could be seen by examining the decision-making behind judges' interpretations on what "reasonable time" may mean, as previously stated in the judicial delay section above. These are all part of the judicial culture. Beers defines it as the "attitudes, beliefs, norms, and customs shared by participants in a given judicial system, which prescribe how individuals are expected to behave within the confines of that institutional setting." Beers cites the definition from scholars Deal and Kennedy who describe it as "the way we do things around here."²²

Some take a more nuanced view. They differentiate judicial culture between internal and external. Academic Lawrence Friedman began theorizing this distinction in the 1970s explaining that "the legal culture literature clearly acknowledges the role of informal rules and norms—within specific legal institutions ('internal' legal culture) and

<http://www.sistemasjudiciales.org/content/jud/archivos/notaarchivo/349.pdf>.

²¹ Stephen Daniels, "A Tangled Tale: Studying State Supreme Courts," *Law & Society Review* 22, no. 5 (1988): 838, doi:10.2307/3053636.

²² *Ibid* 7, 25.

in the broader society ('external' legal culture)—in explaining the development of formal legal mechanisms and institutions."²³ This paper will research the internal judicial culture of the Argentine judiciary and will utilize Beer's definition cited above.

Independent judiciary

Corruption is strongly tied to the Argentine judiciary. Judges, attorneys and judicial staff are the ones involved in preventing and remedying cases involving corruption. In fact, many scholars correlate how corrupt a country is with its judicial independence, a founding principle of a liberal democratic system. It is what distinguishes consolidated from unconsolidated democracies: those guided by the rule of law and those by law.²⁴ The question is how a country establishes this independence.

Trust is the founding principle of an independent judiciary. In the 2007 Transparency International report, the organization wrote that "the perceived integrity of the institution is of particular importance, since it underpins trust in the institution."²⁵ The report cites two examples that present a conflict of trust between the citizenry and the judiciary. One example is from a judge in the United Kingdom who also served as the speaker of the upper house of parliament and at the same time in the executive branch. This judge's impartiality is in question since the magistrate is tied to many political interests. Another example comes from the fact that local judges in the United States are elected and can accept donations from corporations and individuals alike. These donations pose a clear conflict of interest. Consider a judge having to deliver a sentence

²³ Daniel J. Beers, "A Tale of Two Transitions," *Demokratizatsiya: The Journal of Post-Soviet Democratization* 18, no. 1 (2010): 31, doi:10.3200/demo.18.1.28-55.

²⁴ *Ibid* 2, 38.

²⁵ *Ibid* 2, XXIII

against a corporation that donated to his or her campaign. In order for there to be an independent judiciary, the general populace needs to be able to trust the judiciary's fairness and impartiality. If there is no trust, litigants will resort to "bribing court officials, lawyers and judges to achieve their ends."²⁶ To this point, Transparency International reported in 2007 that of the 20 percent of Latin Americans who interacted with their judiciary, 18 percent of them paid a bribe.²⁷ There is a clear trust deficit in the region. An independent judiciary depends on the public's confidence.

The appointment process of judges is also imperative to building that trust. The citizenry needs to know how judges are selected and confirmed. Were they nominated for political favors or because of their merits? Was the judge nominated for his or her favored jurisprudence or because of his or her impartiality? Transparency International prescribes judges to be selected solely on their merits so that they present a "record of competence and integrity." The organization also advocates for public hearings of the confirmation process. People are more likely to trust their judges if they know them and if they can participate in open forums during the process.²⁸

An independent judiciary also depends on its political and economic freedom. Susan Rose-Ackerman identifies several factors that contribute to an independent judicial system. Rose-Ackerman writes that the legislative may skew the courts in their favor by "keeping overall budgets low so that salaries and working conditions are poor." These conditions would serve to exert the legislative's influence in the judicial process and hold them hostage to their agenda. A court's budget needs to be approved on an automatic

²⁶ Ibid 2, XXIV

²⁷ Ibid 2, 11

²⁸ Ibid 2, XXV

yearly basis rather than by a legislature's approval or disapproval of its legal decisions. This takes out the economic factor out of the equation. The scholar also makes it clear that the judiciary needs protection from intimidation. Judges in countries like Argentina are intimidated to decide one way or another and cannot reject this exerted influence because of fear for their safety and their relatives, fear of losing their jobs or of being demoted to less important judicial districts. If a judiciary is insulated from political pressures, judges will decide in a more just and fair manner.

Furthermore, the trust component also applies to judges themselves. Judges need to be able to believe in themselves and in the judicial system in order to act autonomously. Legal scholar Theodore Becker defined judicial independence in the following way:

(a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values, and conceptions of judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court

Becker adds a perception component to the definition of judicial independence.²⁹ It is not only how the citizenry view the judiciary, but how judges practice their public responsibilities and whether they trust each other to uphold the rule of law.

This paper will address the matter of judicial independence. Argentina has an issue with judicial independence and this issue will be described in more detail through data gathered in in-depth interviews.

²⁹ Christopher M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *The American Journal of Comparative Law* 44, no. 4 (1996): 609, 605-626. <https://www-jstor-org.proxy.library.georgetown.edu/stable/pdf/840623.pdf?refreqid=excelsior%3A2ce148c56c1b1a9acb51c5888a10f871>

Background information about the Argentine judicial system

Argentina has a civil law system. Countries in the post-colonial era decided to adopt either a common law or a civil law system. This distinction is important. For example, judges in common law systems like the one in the United States and the United Kingdom, have a mere arbitral function. They listen to the plaintiff and the prosecutor, and decide the case. On the other hand, civil law or continental law judges like Argentina's have several responsibilities and most of their jobs are spent in the instructive role or the investigative phase of a criminal case. For instance, Dutch judges are "fact finders and decision makers,"³⁰ the same roles apply to Argentine judges. They gather evidence that is later used by the prosecutor and the defense attorney.

Civil law systems also adhere to a set of codes. These codes are derived from laws ratified by the legislative branch. The law creates general principles and later "develops a set of rules derived from or at least closely related to the generalities... divided into general parts and specific parts."³¹ The judges' role is applying these codes whereas common law judges derive their decision from precedent or from past legal decisions. Civil law judges use precedents for persuasion, but consider these as non-binding. Judges also play an inquisitorial role in the system. They accept written documents as evidence, they question witnesses, and end up playing less of the role of an arbiter.

Some legal scholars question the civil law system. Argentine scholars like Enzo Finocchiaro make a strong case against the system. Finocchiaro believes that the inquisitorial role of the judge infringes on his or her impartiality necessary to hear a case

³⁰ J. F. Nijboer, "Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective," *The American Journal of Comparative Law* 41, no. 2 (1993): 302, doi:10.2307/840719.

³¹ *Ibid* 11, 300

in a fair and objective manner.³² Others point against the system's transparency indicating that it is "partly because the role of the general public-which can act as a control on potentially corruptible judges-is reduced, given the rarity of trial by jury."³³ Judicial systems like Argentina's do not decide cases by jury giving highly perceived corrupt judges discretion to decide however they see fit. The fact that these judges also take a more intense investigative role not only affects their impartiality, it also obligates a judge to meet non-adjudicative tasks; these include instructing and investigative criminal cases.

The Argentine judiciary is overwhelmingly criticized for the lack of efficiency. One recent study found that Argentine judges spend more than 70 percent of their time in investigative non-adjudicative tasks.³⁴ Academics believe that the institutional structure of the judiciary and especially the role of the judge not only affect the impartiality of corruption cases but also postpones the process. For example, Argentine legal scholars found that over 90 percent of corruption cases expire in the process. An NGO, Fundacion Poder Ciudadano, analyzed corruption cases and concluded that over 80 percent of these cases end in the instructive phase or in the investigative phase. Poder Ciudadano cites several studies from the Centro de Investigación y Prevención de la Criminalidad Económica (CIPCE), a different organization involved in researching corruption cases, also concluded that corruption cases last on average 14 years.³⁵ Both organizations came

³² Enzo Finocchiaro, "La Investigación Penal Preparatoria Y La Etapa De Control En El Sistema Acusatorio," *Pensamiento Penal*: pg. 4.
<http://www.pensamientopenal.com.ar/system/files/2015/09/doctrina42114.pdf>.

³³ *Ibid* 9, 64

³⁴ Kenneth W Dam, "The Law-growth Nexus: The Rule of Law and Economic Development," Washington: Brookings Institution Press, 2007. pg. 103.

³⁵ Ezequiel Brodschi, Eduardo Fracchia, and Martín López Amorós, "La Corrupción En La Argentina: Un

to the realization that these corruption cases were postponed due to a lack of independence of the judiciary branch from other branches of government and due to the civil law system. There is also a lack of transparency from the judiciary branch and many judges have given immunity to public officials. These two facts helped CIPPEC and other organizations to conclude that judges are influenced by the political ruling class.³⁶ The Asociación Civil por la Igualdad y la Justicia believes that judges ultimately cede to political pressure and delay corruption cases. As attorney Ricardo Monner Sans said, judges do this “be it because of fear from consequences, or directly because judges are complicit with the accused politicians.”³⁷

However, the Argentine judiciary was not always a corrupt driving force. Argentina’s first president, Bartolome Mitre, was emphatic about the impartiality of the courts. Mitre stated in 1862 that “ [I]n order to increase citizen’s faith in the Court’s ability to protect their rights, I sought impartial justices from opposition parties who would be independent of the political branches of government.”³⁸ Mitre put the judiciary’s interests over his party’s. Some could take that quote and easily tribute it to modern day liberal democracies. The radical change really began after 1930, Argentina’s first of many coup d’états. According to Elisa “Lilita” Carrió, founder of the Cambiemos Coalition that helped elect Mauricio Macri to the presidency and leader of the anti-corruption movement in Argentina, 1930 proved a shift of that liberal judicial system and

Diagnóstico De La Actual Situación," *América Economía*, 2008.

<https://mba.americaeconomia.com/sites/mba.americaeconomia.com/files/corrupcion-en-argentina.pdf>.

³⁶ *Ibid* 35.

³⁷ *Ibid* 3, 9.

³⁸ Rebecca Bill Chávez, John A. Ferejohn, and Barry R. Weingast, "A Theory of the Politically Independent Judiciary," *Courts in Latin America*: 23, doi:10.1017/cbo9780511976520.009.

began the crippling of the judiciary at the hands of the executive branch.³⁹ It was during 1930 and 1983, Argentina's return to democratic rule, where the judiciary was "tainted with pathological breaks of the constitutional order, overt and covert unfulfillment of the law, official authoritarianism, pervasive economic decline, and endemic stagflation."⁴⁰ This weakening of judicial autonomy only deepened in 1946. It was in 1946 when Juan Domingo Peron assumed the presidency. The executive began implementing "informal practices such as court-packing, opaque judicial appointments, and violations of judges' tenure." The most problematic of these was court-packing, a practice repeated in 1946, 1955, 1966, 1973, 1983 and 1990.⁴¹ The courts became the political arm of the president allowing the executive to govern without any judicial review or obstruction. President Menem repeated this practice in the 1990s after his predecessors' party leaders accused the judiciary of blocking President Alfonsín's agenda.

Menem took no risks. The Supreme Court changed again in 1990. Menem increased the number of justices in the Supreme Court from 5 to 9. The Menem Administration initiated this reform to obtain political approval for his policies.⁴² This Supreme Court reform gave President Menem discretion, and allowed him to validate illegal profits acquired by the hydro electrical company, Yacypetá.⁴³ Carrió points out that Menem also bribed federal judges to comply with his politics.⁴⁴ There is ample judicial

³⁹ Elisa Carrió, personal communication, February 6, 2020.

⁴⁰ Alberto Garay, "Federalism, the Judiciary, and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitutional Model," *The University of Miami Inter-American Law Review* 22, no. 2/3, 193, accessed July 21, 2019, JSTOR.

⁴¹ *Ibid* 38, 26

⁴² "Ministros De La Corte Suprema De La Nación Argentina," *Oficina De La Mujer*, Accessed July 22, 2018. <https://www.csjn.gov.ar/institucional/historia-de-la-corte-suprema/los-jueces-de-la-corte>.

⁴³ Relea Francesc, "Reportaje | El Rastro De Corrupción De La 'década Menem'," *EL PAÍS*. October 19, 1999, Accessed July 22, 2018. https://elpais.com/diario/1999/10/20/internacional/940370418_850215.html.

⁴⁴ *Ibid* 39.

encroachment from the executive branch. As author Leslie Holmes writes in his book, “corruption thrives in a situation where old laws have been discarded, and replacement laws have either not yet been adopted or else are brand new and contain numerous loopholes.”⁴⁵ To change the constitution and get a seal of approval for his reelection bid, Menem initiated a strong reform with his opposition called *Pacto de Olivos*. In 1994, Menem replaced the ultimate authority from the Supreme Court to the Consejo de la Magistratura. This special judiciary council selects and evaluates judges according to their performance, injecting oversight over the judicial system.⁴⁶ The *consejo* is comparable to the Ukrainian and Romanian commissions previously stated in the paper.

However, the council lacked transparency until 2003 when a series of reforms were put in place to audit their legal processes. These reforms intended to make the judiciary more transparent through public congressional hearings of judicial nominees. The 2001 financial crisis gave impetus to these transparency-centered reforms. President Nestor Kirchner signed the Executive Order 222 in 2003 that required Supreme Court nominees to have “legal knowledge,” and to resemble the gender demographics of the country. Kirchner also put into place a process of congressional hearings where people can attend and listen, and also obligated the executive branch to publish the background checks of all nominees. Kirchner believed that Menem’s corruption was due to the lack of transparency and professionalism from the courts. It was during this same period that Kirchner signed another judiciary reform that published all case files of corruption cases

⁴⁵ Ibid 9, 64

⁴⁶ Eugenio Ganduglia, “Las nulidades en el proceso penal,” Monografias.com, 2012, <https://www.monografias.com/trabajos96/descripcion-reforma-constitucional-del-94/descripcion-reforma-constitucional-del-94.shtml>.

and their standing in the legal process.⁴⁷ This is the most important reform for it impacted all case files.

Argentina's executive continued proposing new reforms to the courts. The country had no proposed judiciary reforms from 2003 until 2013 when President Cristina Kirchner, wife of the late President Nestor Kirchner, tried to push an electoral reform for the selection of judges taking power away from the *Consejo de la Magistratura*. The Supreme Court deemed this "democratization" unconstitutional in 2013.⁴⁸ Another important reform came in 2016 with the Repentance Law, a law pushed by then President Mauricio Macri. This law allowed those accused of crimes to cooperate with authorities and confess their wrongdoing, providing additional evidence involving other individuals that partook in the crime, and thus lessening or forgiving their sentence.⁴⁹ This allows the prosecution to gather new evidence and move along in the trial streamlining the investigative phase of each criminal case. In addition to these reforms, the Supreme Court of Argentina proposed reforms of its own pushing for legislative action. The former Chief Justice, Ricardo Lorenzetti, said recently that the Supreme Court needs to overcome the judicial delay problem of corruption cases being that the "tardiness of the process is our principal worry."⁵⁰ In the same vein, Lorenzetti said in a recent interview that these reforms would act as a remedy to the immunity problem of corrupt officials. He sees the digitalization of case files as a way of shortening the judicial process. The Court

⁴⁷ Álvaro Herrero, "Poder Judicial, Transparencia Y Participación Ciudadana: Reformas Recientes En Argentina," *Iberoamericana*: 175-79. <https://www-jstor-org.proxy.library.georgetown.edu/stable/pdf/41676653.pdf?refreqid=search:2fd397daf0043638fa451c630b501b32>.

⁴⁸ LPO, "La Corte Le Puso Un L." *La Política Online*, Accessed July 22, 2018. <http://www.lapoliticaonline.com/nota/70503/>.

⁴⁹ Michael Roa, "Argentina: ¿qué es la ley del arrepentido?" *CNN.com* <https://cnnespanol.cnn.com/video/que-es-la-ley-del-arrepentido-pkg-roa/>

⁵⁰ Entrevista Longobardi y Lorenzetti. *CNN*. 2018.

presented these reforms in March, 2018, and has yet to be taken into consideration by the legislative branch.⁵¹

In conclusion, this thesis project must analyze all recent judiciary reforms and spell out the effects that they have had on the delay of corruption cases. The paper will include testimonies of legal experts, journalists, judicial activists and politicians to understand the impact of the reforms.

⁵¹ Bàrbara Defoix, Redactora, and Seguí, "Lorenzetti Propuso Hacer Reformas Y Pidió "una Autocrítica"," Perfil.com, Accessed July 22, 2018. <http://www.perfil.com/noticias/politica/la-corte-suprema-presenta-el-nuevo-ano-judicial.phtml>.

Chapter 3: Theoretical framework

Political

Many academics attribute corruption to highly competitive electoral systems. They point to the political instability of the country as the main reason for leaders engaging in corruption. It is the volatile political environment that provokes competitive elections and ultimately corrupt behavior.

Ukraine is a perfect example. Popova analyzes the Ukrainian judiciary's treatment of pro-government and opposition candidates to establish a correlation between strong political competition and weak judicial independence. The focus of the study pertains to the correlation involving electoral democracies or countries that hold open elections but lack most of the institutions and guarantees for full and fair participation to all its citizens. Popova looks specifically at lawsuits filed by these candidates appealing their barring from a ballot, others involving candidates seeking the electoral authority to register them as a candidate, and finally cases filed against candidates who in the litigant's view should be banned from the ballot because of a violation of election law. Popova investigated cases involving 135 single-member districts (SMD) or seats in parliament. The results were startling. Pro-government candidates enjoyed a 25 percent advantage over opposition candidates in winning their legal disputes.⁵² This was all due to the fact that there is a highly competitive political environment. Popova believes that the high political competition "(a) increases the benefits to incumbents of dependent courts, (b) fails to increase the costs of exerting pressure on the courts, and (c) increases

⁵² Maria Popova, "Political Competition as an Obstacle to Judicial Independence: Evidence from Russia to Ukraine," *Comparative Political Studies*, May 2010, 221, accessed July 21, 2019.

the number of court cases whose outcomes matter to incumbents.”⁵³ Popova defined this as the strategic theory pressure where pro-government candidates get favorable treatment over the opposition because “the cost of pressuring the courts are lower but the benefits of pressure are higher.”⁵⁴ The argument holds that unconsolidated democracies like Ukraine do not have the necessary public institutions to invest in long-term policies. One of these long-term approaches is fomenting an independent judiciary. Popova utilizes this long-term criterion since in electoral democracies politicians only care about the immediate political gains and do not expect to stay in politics for the long haul.⁵⁵ As a result, Ukraine fits perfectly in this tension between political competition and corruption in the judiciary.

Argentina has a similar situation. The South American country is far from a liberal democracy. Argentina is an electoral democracy that practices open and fair elections, but lacks important institutions such as a vibrant separation of powers between all branches of government, an independent judiciary, protection of private property etc. The high political competition in Argentina also propels corruption. To put matters into perspective, the Latin American country is similar to that of Ukraine, in the sense that public institutions are not yet developed to its fullest potential to allow for full and fair participation of all its citizens. Argentina like Ukraine are young democracies and both came out of an authoritarian past, one directed by a fascist military coup, and the latter by the Soviet communist bloc. Once they embraced a democratic system, they adopted a semi-presidential system but their leaders later opted for a super-presidential system.

⁵³ Ibid 52, 203

⁵⁴ Ibid 52, 207

⁵⁵ Ibid 52, 209

Both countries also had a public crisis with rampant privatization in the 1990s, which led to crony capitalism and hyperinflation. Ukraine and Argentina are extremely alike. Hence, it is relevant to draw parallels between them and analyze Argentine political competition and the state of the judiciary.

Balán identifies high political competition stemming from members of pro-government coalition and opposition. Balán paints two different scenarios, one being the fact that political officials compete within their own coalition to gain power and influence, and the other scenario involves politicians leaving a governing coalition by leaking information detrimental to the coalition and joining a new political party. With this in mind, Balán discovered that corruption cases arose when “insiders have high incentives to leak information, which shows that high internal competition led to a prevalence of corruption scandals during certain periods.”⁵⁶ He pointed to the intense competition between President Nestor Kirchner’s 2005-2007 period, where two competing factions, *Albertistas* (led by Alberto Fernandez, President Kirchner’s Chief of Staff, and current president of Argentina) and *Pingüinos* (Julio De Vido’s faction, a Santa Cruz businessman currently a candidate for congress as well as being tried for corruption in malfeasance of public funds).⁵⁷ It was during these two years where many scandals were leaked to the press. When it comes to intense competition between the party in power and the opposition, President De la Rúa’s 1999-2001 term stands as a clear example of high political competition and high levels of corruption. De la Rúa’s party controlled the lower house and the opposition controlled the senate. His tenure is known

⁵⁶ Manuel Balán, "Competition by Denunciation: The Political Dynamics of Corruption Scandals in Argentina and Chile," *Comparative Politics* 43, no. 4 (2011): 470, doi:10.5129/001041511796301597.

⁵⁷ Clarín.com, "Habilitaron La Candidatura Provincial De Santiago Cúneo Y Julio De Vido," Clarín, July 12, 2019, , accessed July 21, 2019, https://www.clarin.com/politica/habilitaron-candidatura-provincial-santiago-cuneo-julio-vido_0_kGDz51_6c.html.

as one of the most corrupt periods due to the notorious scandal implicating the Vice President, “Chacho” Alvarez, who pushed for a senate bribery scheme.⁵⁸ These two examples tie to Popova’s thesis that high levels of political competition only invite more corruption.

The political theory on corruption has its share of valid points. Both Ukraine and Argentina are perfect representations of countries with strong correlations between high political competition and corruption. The question remains, what should these countries do in order to prevent corruption? Their political systems are very competitive, but since they are electoral democracies, should they aspire to be less competitive? Should these electoral democracies adopt institutional reforms to establish an independent judiciary? It is clear that the political theory may help explain the phenomena, but it only tells part of the story and needs other theories to understand the big picture.

As a result, political theorists have a hard task at hand. They need to be able to show the negative consequences of corruption and they need to educate society that corruption cannot be part of the norm, that these unfair and often illegal actions carry deep consequences to the detriment of democratic and liberal values. That is why their theory falls short. They do not take into consideration cultural implications that are critical in understanding the causes of corruption. They would answer the research question pointing to electoral and lack of liberal values as a cause for an inefficient judiciary. There needs to be a more holistic approach.

⁵⁸ Ibid 56, 468

Institutionalist

Another theory that attempts at explaining corruption is the institutionalist approach. Institutionalists believe that corruption occurs in the absence of protocols and procedures that aim at limiting a strong centralized power or, on the other hand, at reinforcing all branches of government. When it comes to the judiciary, the institutionalist theory is caught between two arguments: the judiciary's lack of authority at abolishing immunity and the complete opposite where the judiciary has overwhelming authority and independence from other branches which gives it the status to ignore the laws of the land. Susan Rose-Ackerman is an institutionalist and wrote several published works linking corruption to the lack of authority from the judicial branch. Rose-Ackerman writes that unconsolidated democracies have weak judicial branches and are more prone to corruption because of a weak system of checks and balances and separation of powers. For example, Rose-Ackerman proposes "campaign finance reform, laws requiring asset disclosure and policies to assure the independence of the judiciary and the prosecutors." She also proposes an independent anti-corruption institution to be solely in charge of prosecuting these crimes without the involvement of the executive, judiciary or legislative branches; an institution similar to that of Botswana, Singapore and Hong Kong.⁵⁹ ⁶⁰ Again all remedies to corruption come from establishing laws and protocols to ensure a fair and independent judiciary.

Institutionalists applaud Ukraine's reforms. Ukraine enacted many changes to the judiciary after the 2014 political crisis. One of them includes the selection of judges being delegated to an independent body called the High Qualification Commission of

⁵⁹ Ibid 5, 88.

⁶⁰ Ibid 3, 302.

Judges (HQCJ). This commission's goal is to depoliticize the judiciary (taking the legislative out of the equation) and creating an independent judiciary branch. Institutionalists champion the oversight applied to the judiciary by the HQCJ and how the commission recommended firing 62 percent of all judges for not meeting qualification assessments.⁶¹ Another reform transferred the selection of chiefs of the courts from the executive to judges themselves. The idea comes from the fact that judges are the ones who know who is qualified or not to lead the courts rather than the executive branch. These are all strong institutional reforms.

The same could be said for Romania. This Eastern European country followed similar footsteps to that of Ukraine's. Romania employed a judicial reform broad in scope, instituting additional checks and balances that act as safeguards for the judiciary. Some examples include the implementation of the Superior Council of Magistracy taking power away from the Ministry of Justice and the executive branch, the adoption of a "binding 'deontological code of judicial conduct and a system of mandatory wealth and interest declarations for judges," among many others.⁶² Romania acknowledged its shortcomings on the corruption front and devised institutional reforms to improve its judiciary.

The institutionalist theory has a fair share of pros and cons. These scholars evaluate formal structures involved in the judicial system. They help identify all laws pertaining to corruption and evaluate their impact. However, institutionalists are blind-sided by the fact that countries like Ukraine and Romania still function with high levels of corruption even after implementing such rigorous reforms. In fact, scholars point to the

⁶¹ Kateryna Pryshchepa, "Will the Long-awaited Justice Prevail in Ukraine?" Jan Nowak-Jezioranski College of Eastern Europe, 2017, 99-102.

⁶² Ibid 7, 85-87.

Czech Republic, a country that applied very few reforms to its judiciary and yet is considered one of the most transparent in the post-Communist bloc and Eastern and Central Europe.⁶³ Following the institutionalists approach, Czech Republic should be the most corrupt out of the three countries for applying the least amount of reforms.

Even with its shortcomings, the Argentine case sample benefits from the institutionalist approach. Institutionalists would answer the research question tying the judicial delay of corruption cases to the lack of institutional safeguards. They would point out that Argentina hasn't had an actual judicial reform of the judicial process since the 35th Accord of 2003, which was not a legislative proposal rather an administrative reform from the Supreme Court.⁶⁴ They would also argue that the delay could in fact be solved through the legislative process perhaps by circumventing the judges' role in the process and adding a jury to solve these cases. They could also propose an anti-corruption institution like the ones cited earlier using Singapore or Hong Kong as a model. The institutionalist theory is positive for identifying all judicial reforms but fails to acknowledge cultural and political implications. This single theory would only point to institutional shortcoming as a cause to judicial delay and corruption. There are more issues that need to be considered.

⁶³ Ibid 7, 6

⁶⁴ "Acordada Judicial," La Guía De Derecho, accessed July 21, 2019, <https://derecho.laguia2000.com/derecho-procesal/acordada-judicial>.

Cultural

Theorists utilize different explanations for corruption. Some political scientists and sociologists believe that culture drives wrongdoing. They would point to the culture that permeates offices, courtrooms, and conversations between judges. The issue that culture presents is that while institutional and legislative reforms may look good on paper, if judges do not put the reforms in practice as expected due to cultural norms, then the reform's goals are void.

The theory came about from the reforms' shortcomings. Many academics believe that an independent judiciary could be designed and implemented by legislative means. Ukraine and Romania are examples of countries where legislative action leads to an independent judiciary. Both applied strict "by the book" reforms to insert judicial independence: taking power away from the executive and giving it to the judiciary for the selection and nomination of judges, and creating independent commissions to oversee judges' performances, and applying European Union's standards for judicial reform. However, the results were not promising. Academics hit a roadblock, and especially when they discovered Czech Republic's judicial reforms. This country threw institutionalists overboard.

The Czech Republic has one of the most reputable judiciaries. Rather than applying a broad scope to reform like Romania, the Czechs decided to be very limited in their reforms. From their independence from the Soviet bloc, the Czech Republic adopted a new constitution in 1993 establishing local and regional courts and a Supreme Administrative Court in charge of overseeing the whole judicial process. Czechs adopted lustration laws firing close to 30 percent of the judicial corps, ridding itself from the

highly politicized communist judicial staff and allowing for new leadership.⁶⁵ The Czech Republic applied judicial reforms necessary for joining the European Union such as the Act on Courts and Judges of 2002 which streamlined judicial processes and legal codes. But it was the strong lustration of the 1990's and the Czech Union of Judges that promulgated pivotal informal changes to the judiciary. The latter organized judges to push for a more transparent judiciary proposing a "judicial code of conduct for its members...lobbied for the creation of a constitutionally mandated independent council of judges, which would decrease the influence of the Ministry of Justice in judicial careers and establish a politically independent mechanism for judicial self- governance."⁶⁶ This judicial union also pushes for constant training programs for judges evinced by the creation of their Education Commission. These helped instill deeper trust within the judiciary. It is no wonder that 70 percent of judges trust in the Czech Union of Judges and feel represented by it, contrasting it to 40 percent of Romanian judges saying the same of their own association. An important characteristic of the Czech reforms is that they came from judges themselves rather than being imposed by the executive or legislative branches. This guarantees that the reforms will be put into practice. The Czech judiciary fares much better with the public than their Romania counterpart. 40 percent of Czechs polled in 2009, said that they "tend to trust" the judiciary, exceeding the Central Eastern European 31 percent average and 25 percent in Romania.⁶⁷ Culture theorists' measure of trust allowed for a more nuanced explanation of a successful judicial system. These

⁶⁵ Ibid 7, 90.

⁶⁶ Ibid 7, 93

⁶⁷ Ibid 7, 98

theorists' findings help the academic community to see beyond the traditional outlook of judicial reform being implemented through institutional and legislative means.

Culture theorists come to these conclusions by measuring perception. As previously stated in the definitions section, the perception of the judiciary is paramount. These theorists analyze public opinions of judges' and judges' own opinions of themselves and of their colleagues. Does the public feel that it can trust judges? Does the public believe that they are being impartial? Do judges feel at ease when delivering a sentence or do they feel pressured by the executive or a political actor? Are they threatened through salary cuts?

All in all, culturalists' perspective is essential. They would point to the personal relationships of judges and judicial officials as a key factor for judicial corruption and judicial delay. Also, culturalists will be keen to point out those reforms and institutional safeguards can be futile if they are not accepted by

However, cultural theorists have their shortcomings. As previously stated, institutional and political factors are also key to understanding the causes of judicial corruption and its inefficiency. Culturalists miss the fact that institutions are important deterrents of corruption and that liberal democracy' tenets of separation of powers and an independent judiciary prove essential for a clean judicial system.

Public scrutiny

Corruption thrives when undetected. A bribe is easy to visualize as an act of corruption. For instance, an oil company bribes a government official and gains access to drill in areas where prohibited. A quid pro quo scenario is too familiar in the subject of

corruption. What happens when corruption's effects are hard to visualize? Some theorists devote their academic careers to make it easier to pinpoint corruption, not only examples like the permit for drilling oil, but also examples like coercive relationships between special interests and different branches of government. Theorists like Dimant and Tosato embrace the public scrutiny theory which emphasizes democratic participation as an antidote for corruption.⁶⁸

Civil participation is key for countering corruption. This participation manifests into social mobilization like voting, participating in rallies, but most importantly in a free press. Journalists play a pivotal part in informing people and injecting transparency into government. In fact, Dimant and Tosato pointed out studies from Bhattacharyya and Hodler which evaluated the importance of a free press analyzing 126 countries from 1980 to 2007 and finding that democratization and a free press played an essential role in deterring corruption. Due to findings like these, many NGOs push for more transparency in governance and vibrant journalism to promote social participation in democratic societies for honest governance. The more visible the effects of corruption, the easier it is for the public to mobilize and demand quick action. The international community engaged this idea in the mid-1990s and continues to do so to visualize the detrimental effects of corruption.⁶⁹

For instance, there are many NGOs that aim at countering corruption by pushing for collective-action. Corruption Watch is an NGO that emphasizes the big-picture of

⁶⁸ Eugene Dimant and Guglielmo Tosato, "CAUSES AND EFFECTS OF CORRUPTION: WHAT HAS PAST DECADE'S EMPIRICAL RESEARCH TAUGHT US? A SURVEY," *Journal of Economics Surveys* 0, no. 0 (2017): 1, https://www.researchgate.net/publication/312642624_Causes_and_Effects_of_Corruption_What_has_Past_Decade%27s_Empirical_Research-Taught_us_A_Survey

⁶⁹ *Ibid* 9, xiii.

corruption. They believe corruption “affects us all...threatens sustainable economic development, ethical values and justice; it destabilizes our society and endangers the rule of law. It undermines the institutions and values of our democracy.”⁷⁰ Since it affects all members of society, all such members are entitled to take legal action against institutions involved in corruption.

Argentina had a corruption scandal that galvanized the public. In 2012, a train had a brake malfunction and crashed into a train station, killing 51 people and injuring 789 others.⁷¹ The crash received extensive news coverage showing clips of the actual crash and footage of emergency personnel rescuing people from the train. The tragedy mobilized the relatives of those killed and injured to such an extent that they showed up in federal tribunals and in congress demanding that both bodies act to reprimand the Minister of Transportation, Ricardo Jaime, and the owners of the train company. There is still a pending sentence for the Minister of Infrastructure, Julio De Vido, who worked hand in hand with Mr. Jaime particularly on train contracts. However, Mr. Jaime’s sentence is one of the swiftest sentences in Argentine judicial history. Mr. Jaime was found guilty on charges of illicit enrichment; his case began in 2016 and ended in 2018. Jaime is guilty of fraud and negligent derailment. The judicial system holds him accountable for the inadequate funding of the rails and trains. The case itself lasted 5 to 6 years including the instruction and trial phase. This pales in comparison with the usual 14 year process. Many experts point out that the speediness of the trial was due to the fact that the families of the victims inserted pressure over judges, politicians and prosecutors.

⁷⁰ “Corruption affects us all,” Corruption Watch, <https://www.corruptionwatch.org.za/learn-about-corruption/what-is-corruption/we-are-all-affected/>

⁷¹ “Las imágenes más conmovedoras de la Tragedia de Once,” Perfil.com <https://www.perfil.com/noticias/sociedad/tragedia-de-once-se-cumplen-seis-anos-del-accidente-que-conmociono-al-pais.phtml>

A train accident with so many deaths and injuries makes it hard for society to turn a blind eye and makes it easier to act swiftly and properly.

Of course, academics like Dimant and Tosato found part of the explanation. Corruption is a vast subject that requires all different schools of thought. These public scrutiny theorists would miss the fact that there are many consolidated democracies like the United States which still has corruption and yet contains a vibrant politically involved electorate. Institutions, culture and politics play an important role as well in explaining corruption.

Chapter 4: Methodology

The researcher chose qualitative methods to analyze the hypotheses. This strategy allowed the researcher to uncover deep-seated beliefs from the subjects on sensitive issues involving the judiciary's inefficiency in corruption cases. There were few studies conducted on the topic of judicial processes of corruption cases. Only one mentioned in prior sections of the paper from the ACIJ in 2007, gaged experts' opinion on the matter and the researcher used this study as a starting point and interviewed several subjects from the study. However, as the study developed, some of these subjects recommended different sources which ultimately led to a snowball sample method.

When using qualitative methods, researchers need to cross-reference data. Hence, the list of subjects includes at least two people from each category to corroborate facts and information provided during the interviews. The researcher analyzed the data and found common patterns and opinions that ended up validating the hypotheses.

The nature of the interviews is important. The interviews themselves were consented by the subjects, conducted in their offices from where they work, homes and public places such as coffee shops, and almost all of them were recorded with a cell phone except for one individual who opposed the recording but allowed the researcher to take notes.

Interviews

Prosecutors:

-Carlos Rívolo- Federal prosecutor in charge of several corruption cases

-Franco Eduardo Picardi- Federal prosecutor in charge of several corruption cases

Judicial employees:

-Alfredo Popritkin- Former accountant for the Federal Court District involved in investigating corruption crimes

Politicians:

-Elisa Carrió- founding leader of the Cambiemos Coalition

-Fernando Sánchez- Secretary of Institution Building under President Macri

-Germán Garavano- Minister of Justice under President Macri

Judges:

-Daniel Rafecas- federal judge placed by President Nestor Kirchner

-Mariano Borinsky- judge leading the 2014 procedural penal code reform

-Sebastián Casanello- federal judge who's heard several corruption cases involving the current Vice President, Cristina Kirchner

Journalists:

-Maia Jastreblansky- Journalist from La Nación specializes in corruption crime

-Pablo Mendeleovich- Journalist from La Nación writing many columns about corruption

NGOs:

-Agustín Carrara- Research fellow of the Centro de Investigación y Prevención de la Criminalidad Económica (CIPCE)

-Marcelo Giullitti- Law and research fellow of Asociacion Civil por la Igualdad y la Justicia

-Alberto Binder- Researcher for the Instituto de Estudios Comparados en Ciencias Penales y Sociales

-Claudio Castelli- Researcher for the CIPCE

-Germán Emanuele- Researcher for Poder Ciudadano in charge of fomenting transparency in the judicial system

Academics:

-Sebastián Pereyra- Sociologist expert in corruption in culture and electoral systems

-Catalina Smulovitz- Professor at Universidad Di Tella expert in corruption cases

-Alba Ruibal- Professor from CONICET who researched judicial reforms

Chapter 5: Institutional roadblocks

The bureaucratic structure of the judicial system plays a key part in the judicial delay of corruption cases. There are several reasons why the criminal justice system lacks the speed to deliver firm sentences. On one hand there are issues with the workflow of judicial officials and their respective roles. On the other hand, the judicial process contains a vast amount of loopholes that are used to postpone the process.

Workflow

The judiciary's structure proves problematic. The fact that the branch operates from a mixed inquisitorial and adversarial system prevents a smooth and quick process. Secondly, the prosecution lacks the independence and structural resources to guarantee a speedy judicial process. Thirdly, there are only 12 federal judges that are in charge of solving corruption, human rights, drug trafficking, and kidnapping cases. The difficulty lies in the quantity of cases being dealt in the most important federal district court, Comodoro Py. Fourthly, judges are not required to attend or participate in any academic courses meant to deepen their knowledge on more complex 21st century crimes like they are in other countries. These are all workflow issues related to the structure of the judiciary.

Argentina's structure of the judicial system is a non-starter. The judicial process follows a mixed system. On one hand, the investigative part of the case is done on a written basis, while the trial is done orally. Judges play an important role in bringing key evidence to the case while also arbitrating between the prosecution and the defense. Judges can also delegate the investigative part of the case to the prosecution; however, prosecutors cannot bring cases to trial. In fact, the line is so blurry between judges and

prosecutors that it is hard to determine who does what. German Emanuele is a Director at Citizen's Power (Poder Ciudadano) which is a non-profit that pushes for transparency and anti-corruption measures. Emanuele mentioned that the system is convoluted that "you never really know who is directing the investigative phase of a case, whether it's the prosecutor, judge, a case can go through many judicial bureaucrats, because you have judges of instruction, then you have a tribunal that is in charge of hearing the trial, then you have an appeal's court, Court of Cassation..." For Emanuele it is a confusing and never ending process.⁷² The roles assigned to judges and prosecutors are unclear. What is clear is that judges determine whether there is sufficient proof to bring a case to trial. As Marcelo Giullitti of the Civil Association for Equality and Justice put it, "it's a horrible mixture of both systems [inquisitorial and adversarial], it's the worst from both judicial systems that makes it hard to make anyone accountable for their actions. In an adversarial system, prosecutors have to answer for their actions since they are elected by popular vote."⁷³ Giullitti is a research fellow at a nonprofit that pushes for more transparency in the judicial system and for additional reforms that are meant to improve the efficiency in the judicial process. Giullitti mentioned that, at least, in an adversarial system, state attorneys are elected which has its own set of issues; politicizing the criminal justice system. However, in a mixed system like Argentina's, neither prosecutors nor judges have any kind of accountability. How does this relate to judicial delay? Having no accountability means that judges and prosecutors can do as they see fit. They have no pressure from any non-partisan body to act in a professional manner. This mixed judicial system creates an inefficient and complex structure.

⁷² German Emanuele, personal communication, October 15, 2019.

⁷³ Marcelo Giullitti, personal communication, October 8, 2019.

Furthermore, judges have their own set of issues. Judicial experts often criticize the time management skills of federal judges. Alfredo Popritkin worked as a judicial accountant conducting financial investigations in cases involving corruption like that of former President Menem, came to the conclusion that “judges are horrible time administrators, they have zero knowledge of organization skills...or maybe they don’t want to have that knowledge or are really not interested because the judicial delay gives them some kind of benefit.”⁷⁴ Popritkin is under the impression that judges thrive in judicial delay since they are in the judicial system to deliver special favors to their political cronies. This politicization of the judicial system will be addressed in more detail in the following section. What remains relevant from Popritkin’s experience is that judges are not equipped with the organizational methods to deliver in all cases that pass through their bench. It is also important to emphasize that even though judges lack time-management skills, there are thousands of criminal cases that pass through Comodoro Py, the main Federal District Court located in the City of Buenos Aires. These same judges that handle corruption cases also handle cases involving drug trafficking, kidnapping, human rights etc. And these judges lead the investigative phase in all cases as well as the arbitration which Federal Prosecutor Picardi believes that the evidence is already contaminated by the judge, losing impartiality. Catalina Smulovitz, a sociologist from the Di Tella University said that it would be impossible for judges to meet their own responsibilities. It is approximated that judges handle 400 cases each.⁷⁵ Dr. Smulovitz believes that the system is set to fail for this very reason.⁷⁶ Legal experts also criticize

⁷⁴ Alfredo Popritkin, personal communication, October 29, 2019.

⁷⁵ Franco Picardi, personal communication, January 15, 2020.

⁷⁶ Catalina Smulovitz, personal communication, December 18, 2019.

judges for their lack of knowledge in financial crimes. Emanuele mentioned that academic conventions and courses are not required for judges to attend.⁷⁷ They are also not required to go through any periodic evaluation in order to assess their legal knowledge. This is a problem for judges who have served the bench before computers became a common tool of work. It is a generational issue. Some judges and prosecutors resist making all casework digital for this very reason. However, when asked if judges have enough knowledge to solve different cases, Federal Judge Sebastian Casanello from Comodoro Py, mentioned that those who take their roles seriously do their due diligence in keeping up to date with all different kinds of modern crime. According to Judge Casanello, it is a mere personal choice to opt out of keeping with the times.⁷⁸ Thus, judges in the Argentine judicial system play a key part in its inefficiency.

The prosecution also has their own set of issues. Prosecutors frequently complain that they do not have enough resources or faculties to effectively carry out a case. Their main responsibility is to collect evidence and accuse the person of a crime. The caveat is that judges also carry out the investigation making a prosecutor's role confusing and at times limited in scope. In fact, there are judges that have not even once delegated the investigation to a prosecutor.⁷⁹ Federal prosecutor Delgado recently opined on the difficulties that prosecutors face on a daily basis. First of all, prosecutors depend on the Federal Police Force from the Executive Power to inquire about a crime. The Ministry of Public Prosecutors does not have a police force of their own to pursue suspects. Delgado points out that sometimes prosecutors need to investigate the police and they depend on

⁷⁷ Ibid 72.

⁷⁸ Sebastian Casanello, personal communication, November 21, 2019.

⁷⁹ Ibid 76.

that same police to collect any evidence.⁸⁰ This causes important conflict of interest on behalf of the police, but more importantly, slows down the investigative phase by depending on a completely different branch of government. Another significant challenge for the prosecutors is their dependence on different authorities. Federal prosecutor Rívolo believes that the cases are time-consuming because they are monitored on a daily basis by judges, the Council of Magistrates and the Commission for Monitoring the Public Ministry both from the lower house of congress. Judges may object to some of the evidence gathered by the prosecution or may demand additional evidence in order to elevate the case to trial. On the other hand, both bodies from the legislature are highly politicized shortening or elongating the period of individual cases. Rívolo said that it is “a completely politicized system, they put pressure on you when they want the lawsuit to move forward and they put the brakes on you when they don’t want the case to get resolved...they never ask us what we think about the case, what is happening with the case, they always politicize the process.” While this politicization of the judiciary will be touched in more detail in the coming section of the paper, it is critical to point out that the prosecutor’s performance depends on individuals other than themselves. Finally, each case requires to be handled by two different prosecutors. There is one prosecutor who is in charge of the investigative phase, and then there is a different one who handles the prosecution during the trial. Rívolo mentioned that once he’s done collecting all evidence, he types a memo called “elevating to trial.” This memo is meant to inform the trial prosecutor of all different findings and complexities of the case. Rívolo points out that this structural procedure slows down the judicial process: “the judicial system is

⁸⁰ Federico Delgado, “Un fiscal relata cómo es trabajar en Comodoro Py,” Perfil.com, <https://www.perfil.com/noticias/elobservador/un-fiscal-relata-como-es-trabajar-en-comodoro-py.phtml>

meant to be slow and tedious.”⁸¹ As a result, the prosecution lacks a certain independence from different bodies of government to progress in the judicial process, and the judicial structure creates an impediment for a speedy process by requiring two different prosecutors and several judges, some for the investigative portion of the case and others for the trial.

These all prove to be essential institutional impediments. The judiciary is unable to resolve corruption cases because it is flawed in its very structure and perpetuates a never ending judicial process.

Institutional loopholes

The judiciary also offers an important number of resources available for the convicted to appeal a sentence. This only extends the judicial process. For instance, there is no law or accepted jurisprudence that establishes an official time period to solve corruption cases. Federal Prosecutor Rívolo believes that there are federal crimes that do not need any kind of time restraints. For example, human rights violations that took place during the several dictatorships should not have time specifications, “we will never set a ‘reasonable time clause,’ because we need to find out what happens generationally to all the disappeared children.” Rívolo references the many children that were abducted by the military governments from alleged terrorists who conspired against the state. However, corruption cases need a reasonable time clause especially since they last over 14 years, as previously stated in the paper. Rívolo believes that it depends on a case by case basis. He referenced the 1995 Río Tercero explosion of a military factory where personnel

⁸¹ Carlos Rívolo, personal communication, December 9, 2019.

manufactured arms involved in the illegal contraband of weapons implicating then President Carlos Menem. 7 people died in the explosion. The federal tribunal of Cordoba decided unanimously in 2014 that the explosion was no isolated incident, in fact, it was meant to cover up the contraband.⁸² Rívolo believes that the reasonable time clause should not apply to complicated cases like this one because some cases do require more time to collect evidence.⁸³ The issue lies in the ambiguity of the reasonable time clause. Federal Judge Mariano Borinsky said that “in our European continental system there are many grey areas such as defining reasonable time clauses, defining what constitutes a corruption crime, defining asset recovery; the lack of definitions end up giving a lot of importance to Supreme Court decisions making these more relevant than legislative norms.” Borinsky defines the reasonable time clause as a period where the judicial system determines the complexity of the crime while also guaranteeing the constitutional safeguards of the accused. However, he made no mention as to what the specific time period should be.⁸⁴ Borinsky is not the only one. Federal Judge Daniel Rafecas opines the same. Rafecas said “jurisprudence here in Argentina and the perspective of the Court has always been very impervious at defining a reasonable time clause which ends up absolving many because usually most cases violate that arbitrary clause.”⁸⁵ There is no Supreme Court decision or law that defines the reasonable time clause. Like Rafecas said, this allows judges, prosecutors, and defense attorneys to find loopholes around this definition and claim for more time to kick the can down the road and avoid any sentence.

Former Minister of Justice German Garavano who served under President Mauricio

⁸² Irina Hauser, “El caso de la explosión en Río Tercero, sin culpables,” Página 12, <https://www.pagina12.com.ar/diario/elpais/1-77305-2006-12-06.html>

⁸³ Ibid 81.

⁸⁴ Mariano Borinsky, personal communication, November 21, 2019.

⁸⁵ Daniel Rafecas, personal communication, December 5, 2019.

Macri believes that this issue needs to be resolved. Garavano points to conflicting opinions within the Court of Cassation which respected the reasonable time clause and in others where it did not. Garavano believes that it is imperative for the Court to define this clause in order to ensure the constitutional safeguards of the accused and to receive firm sentences.⁸⁶ Borinsky also mentioned that one of the main causes for these loopholes is the “obsolete codes” that the judicial system utilizes. Borinsky said that “it is up in the air how many times a convicted individual can appeal a case, challenge a sentence...these 50 different appeals mean an extension of the judicial process.” Borinsky led the discussion in putting in place a new procedural penal code that has gone into effect in 2019 in the Provinces of Salta and Jujuy.⁸⁷ This code intends to prevent the multitude of appeals. Borinsky and Rafecas are on the same page. Judge Rafecas mentioned the ample appeals tool as a key issue in the judicial process due to the obsolete penal code. Rafecas states that the accused can appeal the whole process continuously, objecting to any kind of minutia and he believes the new reform will help.⁸⁸ Since everything is done on a written basis in the preliminary phase, these appeal tools make it a really long process. Hence, the Argentine judicial system has serious defects on this reasonable time clause allowing for loopholes in the sentencing process proving difficult to reach a sentence.

The judiciary is backtracked by many institutional roadblocks. The ambiguity of the law allows for endless appeals from defendants feeding a never ending judicial process. It is one of several reasons why the judiciary is unable to resolve these corruption cases.

⁸⁶ German Garavano, personal communication, December 4, 2019.

⁸⁷ Ibid 84.

⁸⁸ Ibid 85.

Chapter 6: A pro-cyclical process and an overwhelming political influence

The judiciary is overwhelmingly politicized. The elites use it for their own political bidding. The judiciary becomes the ring for all political battles taking advantage of the fact that Argentina like many other unconsolidated democracies have weak institutions and experience volatile economic and political scenarios. Argentina is after all only 37 years old; it regained its democratic rule in 1983 after a series of coup d'états. These adverse scenarios only fume young institutions' critical conditions and allow for an over-politicization of the judicial process in a continuous pro-cyclical approach. When presidents begin their term, they prosecute their predecessors for alleged corruption charges instigating a smear campaign against their opponents. The elites' thinking goes as follows: "once I'm in power, I control everything and I will do everything possible to conserve my authority even when I'm gone." The judiciary is constantly steered to investigate past administrations rather than current crimes.

Outside political forces

The overwhelming electoral competition in Argentina foments a highly politicized process of selection of public officials, especially those involved in the judiciary. In order to understand this strong politicization of the judiciary, one must begin by addressing the selection process of judges, campaign finance, the unusual role of the intelligence services, the media's pressure on judges, and the excessive authority from the executive branch.

The Magistrate Council selects and evaluates federal judges. The 1994 Constitutional Reform institutionalized the diverse Magistrate Council in order to create a more transparent selection process of judges including the following stakeholders: three

judges, two national senators representing the majority party and one representing the minority, two national deputies from the majority party and one from the minority, two federal lawyers, and a member of academia.⁸⁹ All of these evaluate and select judges. The issue with the selection and evaluation process is the overwhelming political influence. Federal Judge Casanello stated that “one gets into the judiciary thanks to interpersonal relationships.” According to Casanello, these interpersonal relationships carry a big political influence. Casanello believes that most federal judges from Comodoro Py operate to do their political bidding.⁹⁰ This proves problematic since judges are meant to conserve their impartiality. In fact, several judicial experts point to the partiality of judges by showing that the judiciary always investigates and prosecutes those who are out of power. Investigative journalist Jastreblansky explains that the selection process, while there is an exam where candidates acquire points, the final phase of the selection process involves an in-depth interview and that is where some who may not have scored the best in the evaluation, may actually get picked.⁹¹ Casanello said that it is the interpersonal relationship that defines who gets the job or not. Popritkin who worked closely with many judges can attest to that fact. He believes that this politicization of the judiciary starts in the Magistrate Council, “I would go even further. I believe this process begins before a candidate is considered by the Magistrate Council. The laws and norms that regulate the Council, the people who participate in the Council, members of political parties, some legislators, and others from the executive.” Popritkin believes that these highly politicized members of the Council do not intend to appoint independent or the

⁸⁹“Ley 24.937,” Ministerio de Justicia y Derechos Humanos Presidencia de la Nación, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/48231/norma.htm>

⁹⁰ Ibid 78.

⁹¹ Maia Jastreblansky, personal communication, November 7, 2019.

highest qualified judges. According to Popritikin, the Council only recommends candidates who political parties can trust will do their bidding.⁹² As Federal Prosecutor Franco Picardi said, the interview portion of the selection process of judges is very arbitrary and invites irregularities.⁹³ While these are the technical difficulties in the selection process, there are some experts who go even deeper in their analysis and point to the money influence as part of the problem. While the Magistrate Council is key, the real question is who funds each political party.

South America has been hit recently with several political scandals. Odebrecht is the main one. The company financed political parties in order to gain influence within several Latin American governments, winning contracts with governments and maximizing their profits. Odebrecht has not been prosecuted in Argentina, however, even though it is guilty in several different countries.⁹⁴ CIPCE is an Argentine nonprofit that focuses solely on investigating cases like Odebrecht. Director of CIPCE Alberto Binder believes that the root of these corruption cases and the political influence within the judiciary comes from campaign contributions. Binder said that the real “phenomenon at the root of it all is the big CEOs who don’t want to compete in a free market system and create a system to distribute who does which public works project and in return finances the political campaign...they end up creating an economic structure that funnels funds back to those companies.”⁹⁵ Fernando Sánchez, Former Secretary of Institution-Building under President Macri, agrees wholeheartedly with Binder’s perspective. Sánchez believes that “part of the corruption begins with campaign finance and that’s followed by

⁹² Ibid 74.

⁹³ Ibid 75.

⁹⁴ Sebastian Pereyra, personal communication, October 9, 2019.

⁹⁵ Alberto Binder, personal communication, November 7, 2019.

the degradation of the judicial system in the Compromise Commission of the Senate.”⁹⁶

The commission mentioned by Sánchez is the same commission that coordinates with the Magistrate Council in the selection of judges. How does this really influence the judiciary? Company A finances political party B. Political Party B selects judge C. Judge C delivers sentences favorable to Company A. Federal Judge Rafecas arbitrates many of these cases. Rafecas believes that there is a substantial number of cases that come from illegal campaign finance. Rafecas said that there are cases involving “illegal requirements for companies, bribes, asset laundering...part of the game that ends up financing campaigns.”⁹⁷ Rafecas presided over a particular case in 2000 where he found then President De la Rúa’s administration bribing senators from the opposition party to approve a labor reform law. Money in politics and corruption go hand in hand. Politicians raise funds illicitly, get elected and put their own network in many branches of government like the judiciary.

The intelligence services’ and media’s extortion

The judiciary becomes a political tool thanks in great part to the intelligence services and the media. Argentina like many other countries has intelligence services that rather than investigating foreign subjects, they investigate domestic individuals be it journalists, politicians, judges, prosecutors etc. These intelligence services work in cahoots with judges and prosecutors to collect evidence from the accused as well as the media to give airtime to their agenda. They also coordinate with the executive branch. In fact, in the last 10 to 15 years, presidents used the intelligence services to go after their

⁹⁶ Fernando Sánchez, personal communication, December 6, 2019.

⁹⁷ Ibid 85.

opposition, weakening their leaders in order to conserve their power and ultimately get reelected. Binder from CIPCE points to the fact that even the Supreme Court authorizes this kind of illegal system granting agents the permission to wiretap conversations.⁹⁸

Intelligence services serve as a tool for extortion. Once they gather alleged evidence about someone, they can blackmail that individual before the court, accusing that individual of corruption, malfeasance of funds etc. The intelligence services utilize “judicial operators” (*operadores judiciales*) to file these lawsuits that are oftentimes fictitious.⁹⁹ These judicial operators push lawsuits that the political class wants to get addressed in the judiciary. Here again, the judiciary becomes strongly politicized. Rather than being an impartial branch, it becomes a political tool, a political ring. Judge Rafecas can attest to the fact that these judicial operators exist and that all presidents used the intelligence services for their benefit.¹⁰⁰ Federal Prosecutor Picardi mentioned the Nisman case as a strong example of intelligence services working within the judiciary. Picardi referenced the newly launched Netflix documentary series about the disputed death of Federal Prosecutor Alberto Nisman. The documentary shows how Nisman worked hand in hand with Antonio Stiuso, a former head of Argentine intelligence services, to try to uncover the mastermind behind the AMIA building (Argentine Israeli Mutual Association) bombing of 1994.¹⁰¹ Picardi mentioned his own personal use of intelligence services. Picardi said that he used the intelligence services only once for an exceptional case trying to keep a tab on an Argentine suspect who was located outside the country. However, he knows that many in Comodoro Py tend to use these services more

⁹⁸ Ibid 95.

⁹⁹ Omar Lavieri, “Nuevos operadores judiciales en los Tribunales de Comodoro Py,” Infobae.com, <https://www.infobae.com/2013/08/23/1503729-nuevos-operadores-judiciales-los-tribunales-comodoro-py/>

¹⁰⁰ Ibid 85.

¹⁰¹ Justin Webster, *Nisman: El Fiscal, la presidenta, y el espía*, (Argentina, Netflix, 2020).

frequently than him.¹⁰² In fact, some in the judiciary even get paid by the intelligence services for undisclosed reasons. Alfredo Popritkin mentioned that the late Supreme Court Judge Fayt accused federal judge, Canicoba Corral, of getting a monthly salary of U\$14.500 a month from intelligence services.¹⁰³ These services have a significant impact over the judiciary.

The intelligence services' interference in the judiciary has gotten recent attention from the newly inaugurated president. The current President Alberto Fernández recently declared a reform that would circumvent the use of these intelligence services in the judiciary, stating that his government will put an end to the judicial operators and to these opaque investigative procedures. In fact, he characterizes the intelligence services as being part of “democracy’s basement.”¹⁰⁴ Nongovernmental organizations like the ACIJ and Poder Ciudadano pushed this type of reform for many years. It is a step in the right direction. However, intelligence services are not the only ones that partake in collecting information and extorting individuals. The judiciary suffers from an unhealthy media influence.

The sensationalist media plays a key role in the politicization of the judiciary. Many point to political judicial operators that push fake news and lawsuits. However, Federal Prosecutor Picardi believes that there are also media judicial operators that push their agenda in the judiciary and usually they do not get the same kind of blame from the public.¹⁰⁵ Picardi believes that these operators push their media outlet’s interests. Federal

¹⁰² Ibid 75.

¹⁰³ Ibid 74.

¹⁰⁴ Rosario Ayerdi, “Limitan la participación de la AFI en investigaciones judiciales,” Perfil.com <https://www.perfil.com/noticias/politica/limitan-la-participacion-de-la-afi-en-investigaciones-judiciales.phtml>

¹⁰⁵ Ibid 75.

Judge Casanello mentioned how media outlets have extorted him on many different occasions. Casanello said, “Journalists call me and ask me for details about specific cases. I tell them that I cannot provide them with that information since the case is under trial. Then they tell me that if I don’t give them that kind of information they will publish stories against me saying that I’m sleeping on that case.”¹⁰⁶ In fact, the media baptized Judge Casanello as *Tortuga Casanello* comparing him to a tortoise for his alleged slow handling of corruption cases.¹⁰⁷ Judge Casanello rebuts by saying that the system itself is very bureaucratic and makes it difficult for any judge to solve a case in a timely manner. The media also criticized Casanello for being too close to Former President Macri, for the very reason that Casanello indicted many former Kirchner ministers. In fact, Prosecutor Picardi mentioned that the media was instrumental in promoting fake news reporting that Judge Casanello was seen leaving President Macri’s residence in Olivos.¹⁰⁸ Casanello sued those individuals acting as witnesses in the news story, contending that he never went to President Macri’s residence.¹⁰⁹ Minister Garavano mentioned this example as part of that media influence on the judiciary. Garavano said that President Macri’s Administration defended Casanello against media criticism and the criticism from members of Macri’s own governing coalition. They wanted Garavano and Macri to get rid of Casanello.¹¹⁰ As mentioned in several instances in this paper, the judicial process is slow and tedious and makes the judge’s role very difficult regardless of how Casanello

¹⁰⁶ Ibid 78.

¹⁰⁷ “Ocaña denunció a ‘tortuga’ Casanello ante la Magistratura,” Urgente24.com, <https://archivo.urgente24.com/253220-ocana-denuncio-a-tortuga-casanello-ante-la-magistratura>

¹⁰⁸ Lucía Salinas, “Casanello no hizo nada en tres años y ahora quiere presionar,” Clarín.com, https://www.clarin.com/politica/casanello-anos-ahora-quiere-presionar_0_rJ1GY118.html

¹⁰⁹ Cecilia Devanna, “Avanza la investigación contra quienes acusar al Juez Casanello,” Perfil.com, <https://www.perfil.com/noticias/politica/avanza-la-investigacion-contra-quienes-acusaron-al-juez-casanello.phtml>

¹¹⁰ Ibid 86.

works as a judge. However, Casanello is not the only judge who spoke ill of the media outlets. Federal Judge Rafecas also considers the media outlets as too powerful of a stakeholder in the judicial process. Rafecas said that “like it or not, the media participates in the state’s criminal politics, they direct the agenda, they generate pressure not only on the judiciary, but also on the police forces, executive power, legislative power, they are another stakeholder and they are getting stronger and stronger by the day.”¹¹¹ Federal Prosecutor Rivolo concedes with Picardi, Casanello and Rafecas. Rivolo said that the media “exerts a very powerful pressure on those who work in the judiciary, they interfere on an individual basis with the judge, the prosecutor, and sometimes reporting without the merits and the facts of the case.”¹¹² Rivolo categorized the media with a certain activism absolving or condoning those who are accused of an alleged crime and make it extremely hard for there to be an impartial judicial process. Secretary of Institution Building Fernando Sanchez would point to this pressure coming from the media as a healthy democratic tool for accountability. While Sanchez condones the use of fake news and lawsuits, he is one of many judicial experts that believe that the judiciary is isolated from society and lacks any kind of checks and balances. Sanchez sees this pressure applied onto judges from society and the media alike as a good way of making the branch accountable and being laser-focused on these corruption cases.¹¹³ Moderation is key. While fomenting accountability in government is always a good goal, media outlets can be a coercive force in that same judicial process that they are trying to improve.

¹¹¹ Ibid 85.

¹¹² Ibid 81.

¹¹³ Ibid 96.

All in all, there are societal pressures that put in jeopardy the impartiality of the judiciary. The media manipulates the judiciary process, blackmailing judges who preside cases and prosecutors who gather evidence, and define the political agenda. The media plays a key part in politicizing the judiciary.

A pro-cyclical process

The judiciary in Argentina suffers a strong political influence. This political pressure comes from the intelligence services, a sensationalist media, a quid-pro-quo campaign finance, and from a partisan Magistrate Council that evaluates and selects judges. All of these contribute to a “change of wind,” as journalist Pablo Mendeleovich said. As one president loses his or her reelection bid, Comodoro Py changes the way it operates: who they investigate, who they set free on bail, and who gets a guilty or innocent sentence.¹¹⁴ Mendeleovich’s colleague, Jastreblansky said that “the judiciary in Argentina tends to be pro-cyclical, prosecutes hardly anyone in power...in fact most corruption cases are filed once a president’s term is up. This occurred during Menem’s presidency, De la Rúa’s, and we see it with Kirchnerism. It is Comodoro Py’s handbook.”¹¹⁵

The 2019 election is a perfect example. When President Macri lost in total votes to Alberto Fernandez, Cristina Kirchner’s running mate, during the national primaries in August 2019, seven of Kirchner’s former ministers and CEOs that worked hand in hand with then President Cristina Kirchner, ended up free and their lawsuits were dropped. When Macri lost the general election in December, 2019, close to 70 other Kirchner

¹¹⁴ Pablo Mendeleovich, personal communication, October 23, 2019.

¹¹⁵ Ibid 91.

affiliates were liberated as well.¹¹⁶ Former President and current Vice President Cristina Kirchner is indicted with 10 different corruption charges, but due to her immunity, she will not be detained in the instruction phase even though the late Federal Judge Bonadio has asked congress three times to do that. The fact that a federal judge needs to ask congress to detain an indicted felon shows how politicized the process is and how weak the judiciary is. Kirchner countered against Bonadio with “lawfare” arguing that she is a victim of a political prosecution conducted by the judiciary. Kirchner argued that the indictments against her and her affiliates are for mere political reasons.¹¹⁷ It is after Kirchner’s 2019 political victory when judges from Comodoro Py decided not to advance with these lawsuits. It is that change of wind that Mendeleovich referred to. As President Alberto Fernandez began his term, already several of Macri’s former ministers and affiliates were sued on corruption charges and irregularities: one of them is Macri’s head of the Anticorruption Agency and the other Jose Aranguren, Minister of Energy. Many legal experts indicated that Comodoro Py never investigates cases of corruption when that individual is in power.

The pro-cyclical process is only possible through a strong executive branch. The president sets the judicial tone. As mentioned before, Argentina’s elections carry disproportionate consequences when compared to liberal democracies. Whoever wins the presidency, they win vast amounts of power all thanks to the super presidentialist system. Some like Argentine legal expert Abelardo Levaggi compared the Argentine to the U.S. system citing one of Argentina’s founding fathers, Juan Bautista Alberdi. This prominent

¹¹⁶ Lucía Salinas, “Consecuencias del discurso K sobre las prisiones preventivas ‘abusivas,’” Clarin.com, https://www.clarin.com/politica/cambio-gobierno-74-ex-funcionarios-k-empresarios-detenidos-solo-quedaron-presos-8_0_VzinRPO9.html

¹¹⁷ “Juicio por Corrupción,” Clarin.com, https://www.clarin.com/politica/lawfare-termino-uso-cristina-kirchner-descalificar-acusaciones_0_Eopyaq6Y.html

founder said, “the Argentine executive branch...is completely different from the executive branch of the United States. Placing one next to the other and counting their powers will suffice to show that they are as similar as an egg and a chestnut.” Alberdi mentioned that the Argentina executive branch modeled itself after the governor and viceroy system from the Spanish colonial period.¹¹⁸ This system allowed a deeply centralized authority having no checks and balances and no branches that could limit the executive’s authority. While the Argentine system has evolved from the Spanish colonial period, and currently contains a judiciary and legislative branch with their own respective authorities, the executive has historically claimed the ultimate authority. As mentioned before, the executive has packed the national Supreme Court in several instances, presidents govern in large part through executive decrees bypassing congress, and the judiciary gets pressured from whoever is in power to prosecute or lay off from different political actors. The executive decrees are the most important of all of these. In fact, the two recent Supreme Court Justices were installed by President Macri through executive decree. This just goes to show how pervasive the executive influence is over the judiciary.¹¹⁹ Macri is no anomaly. Many Argentine presidents took advantage of dire economic situations and expanded their power through the Economic Emergency Law and State Reform Law approved in the 1980s. The former has been used 18 times in the last 20 years to govern by decree.¹²⁰ The Argentine modern day presidency functions through these emergency laws. Since there are very few checks and balances imposed on

¹¹⁸ Abelardo Levaggi, “Three Matters Concerning Argentine Constitutional History,” <http://www.derecho.uba.ar/investigacion/investigadores/publicaciones/levaggi-three-matters-concerning-argentine-constitutional-history.pdf>

¹¹⁹ Ibid 76.

¹²⁰ José del Río, “La ley de emergencia económica dejó de tener vigencia después de 16 años,” *La Nación*, <https://www.lanacion.com.ar/politica/la-ley-de-emergencia-economica-dejo-de-tener-vigencia-despues-de-16-anos-nid2098510>

these presidents, elections gain a relevance unmatched to other countries. In fact, institutional scholars point out that Argentina has one of the strongest presidential systems in the region, only comparable to that of Brazil and Colombia.¹²¹ As a result, a strong executive branch makes presidential elections extremely significant and controls who will get prosecuted by the Courts.

The executive will do everything possible to keep power. The super presidentialist system foments a volatile and fragile political and economic climate. Even though the previously mentioned economic emergency laws were meant to stabilize the economy, these very same laws create an unstable situation. Those who are in power do everything they can to conserve them, and those who win elections do anything to eliminate any kind of obstacles or checks and balances they may get to their mandate, keeping the economic emergency laws in place and continue governing by decree. That is why presidential elections carry gargantuan significance.

Currency devaluation is a perfect example of the ample executive authority. For instance, Argentines keep track of the value of the peso to the U.S. Dollar on a daily basis because of the high inflation rates. Prior to the 2019 Presidential Primaries on August 13, 1 U.S. dollar had a value of \$48.31 Argentine pesos. When the results started pouring in, they showed that President Macri lost by a landslide to Alberto Fernandez and Cristina Kirchner's party. After the election results, the peso devalued to \$57.23 per U.S. dollar. The currency devalued 20 percent in one day just because of the election results.¹²² The same can be said of the country's risk factor rate. Prior to the primaries the country's risk

¹²¹ Jeff Bowen and Susan Rose-Ackerman, "Partisan Politics and Executive Accountability: Argentina in Comparative Perspective", *The University of Chicago Press*, Vol. 10, 2003, 169

¹²² "COTIZACION DOLAR HISTORICO AÑO 2019 - Cotizaciones históricas del dólar en Argentina," Cotización Dólar, <https://www.cotizacion-dolar.com.ar/dolar-historico-2019.php>

factor stood at 861 and jumped to 1,658 after the election.¹²³ This risk factor rate is important since Argentina is a highly indebted country and depends on international financial institutions like the International Monetary Fund to avoid defaulting on their debt. These institutions watch closely the country's risk factor rate in order to decide whether they will lend financial help to the Argentine government. The rapid currency devaluation and economic volatility is all due to the presidential election result. Liberal or consolidated democracies do not experience this kind of volatility after presidential elections. There is a continuity and respect for institutions that is unseen in Argentina.

Since presidential elections mean everything, they are oftentimes dirty. Candidates and incumbents especially do everything in their power to win them. After all, they define who goes to jail. Former Secretary of Institution Building, Fernando Sánchez, believes that it all depends on how elections are won. Sanchez said, "the real question is if you want to win an election with any kind of tool or if you are going to comply with the rule of law, when you have a degradation of democratic institutions, you want to win in whichever way possible, and that's when campaign finance comes into play, murky opposition research, and the use of the judiciary." Sanchez is of the opinion that candidates from all sides of the aisle engage in these poor tactics, but it is thanks to public institutions that allow this type of conduct.¹²⁴ The super presidentialist system ends up feeding the pro-cyclical judicial process used to take political components out of the picture, investigating political rivals to avoid any kind of electoral loss.

¹²³ "RIESGO PAIS JPMorgan EMBI+," RavaBursátil, https://www.rava.com/empresas/perfil.php?e=RIESGO%20PAIS&gclid=EAIaIQobChMIfqJi_iU5wIViZ OzCh3A8Ao_EAAYAiAAEgINY_D_BwE

¹²⁴ Ibid 96.

The high electoral competition contributes to this reality. As Popova would point out, the more competitive an election, the more tainted the judiciary becomes. There is a strong competitive streak in the last three presidential elections between major political parties usually composed on one end by Peronist oriented parties, and on the other represented by anti-Peronist factions. For instance, Cristina Kirchner received 45,28% of the vote in the 2007 presidential election, while the rest of the non-Peronist parties received 45,52%.¹²⁵ The 2019 election had a similar outcome. Alberto Fernandez and Cristina Kirchner's formula received 48,10%, followed by then President Macri who received a 40,38%, while three other candidates, Roberto Lavagna, Jose Luis Espert and Gomez Centurion, who all repudiated the Kirchnerism ideology, they received a total 9,36%. In other words, if Macri would have made an alliance with these three other candidates, he would have gotten 49,74% of the vote.¹²⁶ The same can be said of the 2003 election where the two major parties gathered 24,45% of the vote with President Menem as the presidential candidate and 22,25% of the vote with Nestor Kirchner as Menem's counterpart. It is important to mention that there are anomalies to this theory such as the 2011 election where Cristina Kirchner received 54,11% of the vote. However, it is the second presidential election since the return to democracy in 1983, that a candidate received more than 50% of the vote, seconded only by President Alfonsín victory in 1983.¹²⁷ That is two out of nine presidential elections since 1983. Overall, there is an overwhelming electoral competition and the way the Argentine government is structured makes for a problematic combo. Marcelo Giullitti of the ACIJ believes that

¹²⁵ Direccion Nacional Electoral, "Recorriendo las Elecciones de 1983 a 2013," Ministerio del Interior, Obras Públicas y Vivienda, <https://recorriendo.elecciones.gob.ar/presidente2007.html#/3/1>

¹²⁶ "Mapa de resultados de las elecciones 2019," Infobae <https://www.infobae.com/mapa-resultados-elecciones-2019-pais-provincias/>

¹²⁷ "TOTAL PAÍS: 2003," <https://recorriendo.elecciones.gob.ar/presidente2003.html#/3/1>

“there is the fact that the loser after the election remains in a desert, in Saharan politics, that creates the problem... politicians need to absolutely win the following elections and that’s why they judicialize politics to prevent their opponent from defeating them again.”¹²⁸ It’s a vicious pro-cyclical process.

In conclusion, the judiciary has two important political issues. The branch is unable to resolve corruption cases because of a super presidentialist system that captures the judiciary into their personal lackey: who goes to jail and who avoids it. The primary source of this influence comes from the overwhelming electoral competition. The executive branch uses the judiciary branch to prosecute opposition leaders for alleged wrongdoing. The politicization of the judiciary propels a pro-cyclical process investigating past administrations rather than current wrongdoing.

¹²⁸ Ibid 73.

Chapter 7: A culture of loyalty, nepotism and insularity

Many Argentine legal experts criticize the judiciary. While they may disagree on how to improve the judiciary, they all share the same criticism: the judiciary is too slow, overwhelmingly bureaucratic and too familial. These legal experts include judges, prosecutors, academics, journalists and politicians. They point to a certain judicial culture that poses an obstacle to the efficiency of the judiciary branch delaying the legal process and thus finding it close to impossible to deliver sentences. This judicial culture is rooted in a loyalty to the system, nepotism and inflexibility to any kinds of reforms.

Nepotism

The Argentine judiciary is an exclusive boys and girls club. Very few individuals get to work in the judiciary from merit alone. Federal Judge Casanello encountered this reality when he first entered the Comodoro Py Federal District Court in 2007. For instance, Casanello realized that his secretary had his wife working right across from his cubicle, and that an important part of his 40 person staff was either related or had a friend in the judiciary that helped him or her get the job. Casanello tried implementing a merit-based evaluation when he first started in 2007; however the judiciary worker's union objected repeatedly and at times violently. Casanello mentioned several instances where leaders of the union threatened him prohibiting him from implementing the evaluation process. Casanello implemented this system finally in 2019.¹²⁹ It took him 12 years. Casanello called this union resistance, the unconscious resistance. It is part of the judicial employees' DNA to preserve the status quo. It is clear that the union objected to this

¹²⁹ “Un tribunal oral Penal Económico recibió la certificación IRAM,” Infobae.com, <https://www.infobae.com/politica/2019/11/06/un-tribunal-oral-penal-economico-recibio-la-certificacion-iram/>

reform because of the strong favoritism or cronyism that permeates the judicial system. Casanello went further on this point handing this researcher an academic paper titled “La construcción de la trama política del Poder Judicial,” or “The construction of the political plot behind the judiciary.” The paper outlines in detail how one gets in the judiciary in the first place and how one later gets a promotion. The person who facilitates these processes is called the “godfather.” The academics involved in the cited academic paper interviewed many individuals who work in the judiciary. One of these employees told the researchers that “in order to get your judicial career started you need to count with ‘someone who is willing to help,’ referred to this person on several occasions as the ‘godfather.’”¹³⁰ This individual is the gatekeeper to the judiciary. Without such an individual, it becomes close to impossible to gain access. The researchers also mentioned that there is some kind of hazing that goes on for whoever enters the judiciary. New employees must comply with three different tests. The first being yelled at profusely by a judicial authority be it a judge or prosecutor, for example. Second of all, new employees must pay his or her dues doing any kind of chore or task that more established employees are unwilling to do. And thirdly, they must go through some kind of homecoming joke. Judicial employees mentioned that they become “baptized” when judicial authorities and employees work together to play a joke on the new staff. For instance, an employee mentioned that he was sent around the different floors in Comodoro Py to get a signature for an important document. The judges, staff, prosecutors, and public defenders were all in on the joke. Long story short, the document was made up. This is part of that judicial culture. Not only does one need a gatekeeper but also needs to go through a hazing

¹³⁰ Mariano Hernán Gutiérrez, María Valeria Alvarez, and Ezequiel Kolker, “La construcción de la trama política del Poder Judicial,” Instituto de Investigaciones Gino Germani UBA, February 4, 2013, 6.

process. Casanello also handed this researcher another critical paper of the judiciary: “La justicia penal y los universos coexistentes. Reglas universales y relaciones personales,” basically the interpersonal and informal norms in the judiciary. One of the judicial employees cited in this paper said that ““I entered the judiciary] thanks to a guy I knew at that moment, a guy I went out with and he worked in the Supreme Court. He spoke with ‘his’ judge and succeeded at giving me a job with the prosecution...Once you’re in you need your godfather to defend your job.””¹³¹ This is another example of the “godfather” concept, but it goes to show that that gatekeeper is necessary for getting into the judiciary and for keeping the job itself. The paper also mentions how most of the resumes from aspiring judicial workers come with the business card from public officials or these so called godfathers; pointing to the fact that merits go unnoticed.¹³² Casanello handed these academic papers to this researcher to stress the point that the judiciary is an exclusive organization accessing it via one’s network and that the judiciary works through an informal culture. Both these papers also mention that new judicial employees, called *meritorios*, who get a promotion only through their godfather. Again, these get a promotion not because they deserve it, but because they have the contacts and do plenty of favors with their boss to get that position. However, these same experts explain that there is nothing surprising from this favoritism centered approach since judges get their job through a quid pro quo relationship established through the Magistrate Council. These same judges continue this quid pro quo mindset once they are in the judiciary to satisfy the Council members that placed them there in the first place. It is a never ending

¹³¹ María José Sarrabayrouse Oliveira, “La justicia penal y los universos coexistentes. Reglas universales y relaciones personales,” *Revista de Sociología e Política*, no. 13, 1991, 207

¹³² *Ibid* 131, 209.

cycle where favors trump merit. And this is not even mentioning the strong familial bonds in the judiciary.

Nepotism is a clear characteristic within the Argentine judiciary. Many legal experts opine that judges, prosecutors, public defenders and judicial bureaucrats employ their relatives. Journalist Pablo Mendelovich singled out Federal Judge Maria Servini de Cubria as the most grotesque example. Judge Servini de Cubria's sons, Juan Carlos Cubria, works as a general administrator for the Magistrate's Council and Eduardo Cubria works as a federal prosecutor in her mother's district court. Former Chief Justice of the Supreme Court, Ricardo Lorenzetti engaged in the same kind of behavior, accommodating his relatives like his son with a high-paying position. The same occurred for Supreme Court Justices Horacio Rosatti and Elena Heighton de Nolasco.¹³³

Mendelovich went on to say that judges go at many lengths to provide employment for their relatives: "many times, Judge Servini de Cubria negotiated to put her son, her nephew, and she ended up filling many positions with her own family." One has to wonder what involves this negotiating process.

Federal Prosecutor Rivolo acknowledged this culture. Rivolo believes that nepotism is deeply rooted not only in the judiciary but also within the political class. He points to the Kirchner family as a perfect example. Nestor Kirchner became president in 2003 and later in 2007, his wife, Cristina Kirchner became president. Cristina Kirchner just became elected Vice President in 2019 and her son, Maximo Kirchner, is the majority whip leader. Rivolo points out that this is a systemic issue with the governing class, including all three branches but also non-public institutions like labor unions where

¹³³ "Quiénes son los jueces que pusieron a sus parientes en el Estado," Noticias, November 12, 2016, <https://noticias.perfil.com/noticias/general/2016-11-12-quienes-son-los-jueces-que-pusieron-a-sus-parientes-en-el-estado.phtml>

the children of train employees get priority into getting a job at the railroad company, for example. It is a deep seated cultural component.¹³⁴ These are just the rules of the game. Carrió agrees saying that there is nepotism in all major unions, congress, the judiciary, all due to the fact that Argentina has a “corporative society” rather a republican one.¹³⁵ Members of institutions unite to defend their own interests. The judiciary is a cooperative body. As previously stated, one gets in the judiciary by knowing the right person and who is better at doing that than a relative. The merits of the individual and their test scores or work experience become insignificant when compared to the person’s last name or relation to a judicial gatekeeper. Mendelevich’s colleague, Maia Jastreblansky agrees. Jastreblansky sees this kind of nepotism as a key characteristic within the judiciary which transcends political ideologies, parties and jurisprudential differences. The nepotism in the system serves as an impediment to the judicial process pushing judicial officials to protect their buddies, those who got them the job in the first place, and keeps qualified individuals out of the system. Those qualified candidates could very well be the antidote against these corruption cases having a sophisticated understanding of white-collar crime necessary to the gathering of crucial evidence. A system driven by nepotism leads to mediocrity leaving the qualified out of the equation.

Loyalty

There is a strong quid pro quo component in the judiciary. Some experts point to the fact that once someone gains access to the judiciary, that individual is indebted to his or her gatekeeper and must employ their staff people close to the gatekeeper be it a

¹³⁴ Ibid 81.

¹³⁵ Ibid 39.

Senator that voted in favor of that judge or the Magistrate's Council. It is pivotal to point out that employment in the judiciary is driven through these intense quid pro quo negotiations placing one's relatives.¹³⁶ Mendeleovich believes that this judicial family ends up creating a certain culture, a kind of corporatist attitude where judges, prosecutors, and all judicial bureaucrats alike look out for each other since all of them benefit from the system.¹³⁷ It is a loyalty first culture; loyalty to the system.

Loyalty is based on the premise for self-preservation. As investigative journalist Jastreblansky said, "there is a habit in the judiciary, about helping each other out, getting each other's back because they know that someday the chips will fall on one of them, and that forces them to protect one another." Jastreblansky referred to the fact that some judges may lose their position being persecuted politically and, as a result, they defend each other.¹³⁸ Claudio Castelli, a lawyer that works for an NGO that investigates backroom deals made between the private sector and the government, sees this corporatist judicial culture as a major problem in the Argentine judiciary. Just like Jastreblansky and Mendeleovich, Castelli categorizes the judiciary as a corporatist body, "a judicial corporation, basically a lobby of judges in Comodoro Py, federal judges as well, which materializes as a magistrate's association, and bureaucrats, a lobby of federal prosecutors, all of them united to conserve the status quo and so that no one reforms the judiciary."¹³⁹ All of these are scratching each other's backs determined to keep the system alive.

The loyalty based culture serves as an obstacle against judicial efficiency. One of

¹³⁶ Ibid 131, 209.

¹³⁷ Ibid 114.

¹³⁸ Ibid 91.

¹³⁹ Claudio Castelli, personal communication, October 24, 2019

the reasons why the judiciary is unable to solve corruption cases is because the system is loyal to itself and no one else, not the Constitution or legal procedures. Loyalty to the system means not carrying out an investigation against their judicial colleagues, their gatekeepers, and those who are potentially guilty of corruption.

Insularity

The judiciary's concern is defending the status quo. Judicial officials are laser-focused on defending the establishment. A perfect example of this united corporatist judiciary and of the status quo acting to benefit itself is the judicial employees' opposition to pay income taxes. Judges and judicial bureaucrats are exempt from paying the income tax. The idea is that by not paying the income tax, they maintain an impartial outlook of the law. In November 2018, Argentine congressional leaders proposed a bill that would force judicial employees to pay income taxes. The "judicial lobby" opposed this bill pressuring President Macri into backing away from the proposal.¹⁴⁰ It just goes to show that the judiciary has not only a nepotism problem but an isolation problem. Many legal experts refer to the judicial culture as a "bulletproof" culture; a branch of government that isolates itself from the rest and does not allow others to interfere with it. Marcelo Giullitti mentioned this as being a key component into the judiciary's lack of accountability, "I believe there is a culture that says 'we are working just fine, leave us alone.' Do not interfere. We need to work and you should not interfere.' It is the very classic judicial culture, 'that we need to work in peace. Those who audit our work, you

¹⁴⁰ Daniela Mozetic, "Por el fuerte lobby judicial, empleados y jueces seguirían sin pagar Ganancias," *Editorial Perfil*, November 3, 2018, <https://www.perfil.com/noticias/politica/por-el-fuerte-lobby-judicial-empleados-y-jueces-seguirian-sin-pagar-ganancias.phtml>

are making matters worse.”¹⁴¹ Any kind of accountability is viewed as a detrimental force. Secretary Sanchez had a very similar take. Sanchez believes that the judiciary is too distanced from society. It operates through an overwhelmingly technical language in the courts, hard for any common folk to understand. This is part of that lack of accountability. The less society comprehends what judicial bureaucrats do, the easier it is for them to do whatever they want.¹⁴² As previously mentioned, the judiciary’s standing with the Argentine society is wanton. Most have this perturbed view that the judiciary is broken and works to benefit itself. All in all, this judicial culture rooted in nepotism, camaraderie and alienation act as a wrench in the efficiency of the legal processes. It all comes down to favors being played among judicial bureaucrats, politicians etc.

In addition, many legal experts point to Max Weber's theory to explain the judicial culture. Nepotism and cronyism may be part of the root of the problem, but it all comes down to the bureaucratic culture, an insular culture. While Max Weber became the first academic to utilize the term bureaucracy, he used this concept in positive terms proving that bureaucracies are effective channels of government fomenting specializations, delegating tasks to different individuals, and creating hierarchical systems. Argentine legal experts tend to focus on its negative effects. Federal Judge Rafecas stated that “all bureaucratic dealings become routine, dealing with forms, with clichés, with mundane tasks, compiling statistics...and the bureaucratic structure ends up dodging or avoiding the most important responsibilities.”¹⁴³ Rafecas mentioned these as a deterrent for a speedy trial. The structure of the judicial bureaucracy tends to create slow

¹⁴¹ Ibid 73.

¹⁴² Ibid 96.

¹⁴³ Ibid 85.

and unnecessarily complex processes. One key factor to this tardiness is the fact that the vast majority of the legal proceedings are implemented on a written basis. Alberto Binder's associate from the non-profit, Agustin Carrara, believes that the judiciary would be a lot less bureaucratic if documents were digital and if they were done on an oral basis. This written mode makes matters tedious but also secretive behind closed door hearings attaching anything presented to the case file, and accessed only by the parties involved.¹⁴⁴ Alfredo Popritkin who worked at Comodoro Py agrees with Judge Rafecas and Agustin Carrara. Popritkin sees that the main issue in the judiciary is that it spends time on "dumb tasks, formalities, or gathering evidence that they will never utilize." Popritkin believes that this wastes the judiciary's resources. A major example of this waste is the actual file for each case. Popritkin mentioned that these files usually contain more than 200 pages, and that only 10 percent of the content actually matters. The rest are pointless procedural records, maybe transfers from one entity to the other, from a judge to a prosecutor.¹⁴⁵ And it is worth mentioning that there are too many individuals involved in each file, several prosecutors, judges, and legal bureaucrats. Other legal experts like Federal Prosecutor Rivolo include the lack of actual definitions as part of the problematic bureaucratic culture, defining the period that each case needs to meet in order to receive an actual sentence.¹⁴⁶ How much time should an actual judge have in order to deliver a sentence? How much time is a case supposed to be in an appellate court? These are all bureaucratic functions that the judiciary avoids defining. Federal Judge Borinsky agrees with Rivolo in that the culture depends on how each prosecutor, judge and bureaucrat

¹⁴⁴ Agustin Carrara, personal communication, October 16, 2019.

¹⁴⁵ Ibid 74.

¹⁴⁶ Ibid 81.

operates, but if you add a flawed system to that complexion, you come up with a broken judicial culture. President Macri appointed Borinsky with the hard task of implementing the adversarial judicial system reforming the federal procedural code which defines key issues like time limits imposed on legal cases be it in the sentencing process of the appellate process.¹⁴⁷ As a result, the bureaucracy within the judiciary makes legal proceedings harder.

All in all, the Argentine judiciary has a problematic culture. This culture is deeply rooted nepotism, a loyalty to the broken system that benefits the status quo, and an insularity issue that avoids any kind of reforms. All of these make for a flawed bureaucratic structure that makes legal processes difficult and only perpetuates a never-ending legal process leaving so many cases unresolved. These are all important factors that prove detrimental to the judicial process.

¹⁴⁷ Ibid 84.

Chapter 8: The more visible corruption is, the speedier the trial

International legal experts are recently focusing on the impacts of corruption. Experts like Holmes and United Nations legalese are pushing for more transparency in governance and tying corruption to a human rights violation. They believe that corruption is a reduction in aid to impoverished sectors of society; it widens distrust in public institutions, and ultimately provokes higher income inequality. Thus, they focus on corruption's negative impacts to enact preventive measures. The bottom line is that the more visible the impact of corruption, the more likely society is to understand it and the more bound it is to prevent it and to act upon it. In regards to the Argentine judiciary case study, the more visualized the effect of corruption, the speedier the trial. The issue is visualizing the effects of corruption.

Corruption is a relatively new concept in academia. The conservative school of thought tackled the issue of corruption as a sinful action and a struggle between good and evil. Corruption was a moral issue. More modern schools of thought embraced a nuanced approach paying close attention to cultural implications among other causes, for example. The international community began to focus on corruption in the 1990s since the fall of the Soviet Union due to the deeply entrenched corruption of Soviet governments. In fact, one of the major reasons why the Soviet Union collapsed is due in no small part to corruption. One Soviet criminologist accounted that roughly 25 percent of all Soviet crime came from private gain corruption such as embezzlement and bribery.¹⁴⁸ That's one of the reasons why their last President Mikhail Gorbachev applied reforms like

¹⁴⁸ John M. Cramer, "Political Corruption in the U.S.S.R.," *The Western Political Quarterly*, 30 no. 2, June 1977, https://www-jstor-org.proxy.library.georgetown.edu/stable/pdf/447406.pdf?ab_segments=0%2Fbasic_SYC-4946%2Fcontrol&refreqid=search%3A5909fc31b1f65fa385c8b0d595cbd952 pg. 214.

perestroika and *glasnost* to reform the core structure of the Soviet Union. However, those reforms did not suffice. With the fall of the Berlin Wall, many countries gained independence and social science scholars engaged in deep studies to assist them with easier transitions into democratic systems. International experts like anthropologists, political scientists, economists, criminologists, and many others, found a key tactic in combating this Soviet corruption by raising awareness of the effects of corruption. They viewed this strategy as a guarantor for mobilizing society.¹⁴⁹ One easy way to engage society is conveying the message that a dollar stolen from the budget is a dollar less invested in roads, bridges, schools, hospitals etc. That kind of message can work, however, the issue is when corruption does not involve bribery or fraud. As mentioned before in this paper, the private sector influences politicians by paying for the elected official's children's school tuition or getting paid in services such as mailings for their campaign elections. A recent example in Argentina involved a train company getting paid to replace the trains' brakes. The company got paid, kept the funds, and avoided changing the brakes causing a tragedy like Once. It is tragedies like Once that propel the final hypothesis of this paper: the more visual the effects of corruption, the stronger the pressure from society and ultimately the speedier the judicial process. This assertion is backed by scholars like Dimand and Tosato with their public scrutiny theory that focuses on pinpointing the effects of corruption, visualizing them to promote civic participation.

The Once Tragedy sparked the swiftest corruption case in Argentine judicial history. The case lasted approximately 5 years total and the courts delivered a firm sentence against several public officials such as the Former Secretary of Transportation,

¹⁴⁹ Ibid 11, 99.

Ricardo Jaime, who received an 8 year sentence for accepting bribes and giveaways from the train company.¹⁵⁰ The more astonishing fact of the case is that the investigative portion lasted a year and the trial itself another. The remaining three years were spent in appellate and procedural courts where sentences become confirmed or revoked. As mentioned before, most corruption cases take an average of 54 months to go through the instruction or investigative phase.¹⁵¹ Most cases end in this preliminary phase because it violates the “reasonable time” clause as mentioned in previous sections. Defense attorneys take advantage of this clause to prevent any kind of sentencing. With that in mind, the Once Tragedy took only a year to collect all evidence: 12 rather than 54 months. Alfredo Popritkin worked in the Once case and felt an intense pressure from the presiding judge, Claudio Bonadio. Popritkin mentioned that “we investigators felt the judges breathing down our neck” to finish the investigation in a timely manner.¹⁵² However, where did this pressure come from? What motivated the judge? As Marcelo Giullitti from the ACIJ mentioned, the case lasted such short amount of time because there were “extrajudicial incentives, like public opinion playing a strong role in the case, there was a clear visibility of negative impact of corruption, and that is also one of the important factors” in determining the amount of time it takes for a lawsuit.¹⁵³ Giullitti believes that the media coverage and the dire pictures coming out of the tragedy moved the public into action. Catalina Smulovitz believes that it was easy for the public to

¹⁵⁰ Ibid 71.

¹⁵¹ “Los procesos judiciales en materia de corrupcion,” Oficina de Coordinacion y Seguimiento en materia de Delitos Contra la Administracion Pública, Asociacion Civil por la Igualdad y la Justicia, Centro de Investigación y Prevencion de la Crriminalidad Economica, 2014, http://www.oas.org/juridico/pdfs/mesicic4_arg_proc.pdf pg. 5

¹⁵² Ibid 74.

¹⁵³ Ibid 73.

“materialize” the harm done by corruption, “you can count the dead bodies.”¹⁵⁴ Unlike many other cases where hearings are desolate and only attended by lawyers and judges, Giullitti also emphasized the fact that the families of the victims that died in the train incident as well as the relatives of the hundreds that were injured went to every hearing concerning the case, adding extra pressure on the judiciary. These same individuals marched on several instances demanding the government to act. Some experts referred to these individuals as part of a movement, a movement that pushed for justice against those involved in the tragedy. The movement received broad support. The University of Buenos Aires published a poll that showed ample support with a 94% approval with the movement’s demands.¹⁵⁵ The judges felt observed by the public and knew they had to act. Even one of the representatives from the victims’ Once movement said that “the judiciary kept an open mind, very rare in its trajectory in our country, and decided to look back and deliver an ample investigation indicting 29 people, among them high level officials from the Executive branch.” This individual is not alone. It is extremely rare for the Argentine judiciary to have taken such swift action. The argument coming from the victims’ played an important role. Agustin Carrara from CIPCE addressed the Once Tragedy like modern theorists. Carrara believes that corruption cases like Once involve an infringement on human rights. Carrara mentioned that his NGO presented a memo to the Inter-American Commission on Human Rights pointing out that any kind of corruption crime involved “omission of any type of control which ends up in tragedies

¹⁵⁴ Ibid 76.

¹⁵⁵ Candela Hernández, “LA CORRUPCIÓN MATA”. LOS FAMILIARES DE VÍCTIMAS DE LA TRAGEDIA DE ONCE Y SUS ACCIONES COLECTIVAS EN LA CONSTRUCCIÓN DEL PROBLEMA,” Instituto de Investigaciones Gino Germani, FERROVIARIOfile:///C:/Users/usuario/Downloads/Dialnet-LaCorrucionMataLosFamiliaresDeVictimasDeLaTragedi-6164735.pdf, September 29, 2017, pg. 156

[like Once], or cases involving tax evasion which empties the states' budget and it impedes it from applying proactive public policies...deep down, any type of corruption case affects human rights.”¹⁵⁶ The Once Tragedy embodies a human rights violation caused by corruption. As the United Nations mentioned in one of their documents against corruption, “Depending on the level, pervasiveness and form of corruption, corruption can have devastating impacts on the availability, quality and accessibility – on the basis of equality – of human rights-related goods and services... [Disadvantaged people] are often more reliant on public goods and services and have limited means to look for alternative private services.”¹⁵⁷ The victims of Once did not have the luxury to take private transport for their commute to work, they had to use public transport. Corruption affects those in the lower social strata who depend on public goods and services. This conglomerate of intense and persuasive arguments pressured the Argentine judiciary to act and indeed delivered the fastest sentence in history.

Corruption can be a convoluted concept. Many social scientists devote their careers to help society visualize the negative effects and impacts of corruption. This awareness helps society understand the perils of corruption and propels it to advocate for reforms. The Once Tragedy is a perfect example. The Argentine public mobilized after seeing pictures and footage of the train victims and pressured the judiciary to sentence public and train company officials to several years of jail. The easier it is to visualize the effects of corruption, the more likely that society will act.

¹⁵⁶ Ibid 144.

¹⁵⁷ “Corruption and Human Rights”, United Nations Human Rights Office of the High Commissioner <https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx>

Chapter 9: Can it be fixed?

The Argentine Judiciary has many obstacles to overcome. Many legal experts interviewed for this research paper believe that the judiciary can apply a set of reforms to help streamline the legal process especially for complex cases like ones involving corruption. However, there is no silver bullet; there is a package of reforms. The judiciary needs to change its structure from an inquisitorial to an adversarial system, implement a new judicial police to spearhead all investigative efforts independent from others police forces, depoliticize the Magistrate's Council, apply a merit-based approach for the selection of judicial officials and obligating them to frequent knowledge-based exams, digitalize all judicial documents, and exclude intelligence service agencies from all judicial activities. These reforms will guarantee a fairer justice system.

The evidence is essential in all criminal cases. However, a key factor in collecting evidence is the police force. Many legal experts in Argentina fear the fact that if all investigations depend on the Federal Police of Argentina, all evidence will have some kind of bias, and especially if the investigation requires approval from the Federal Courts. Marcelo Giullitti is one of many experts who endorse the idea of an independent judicial police. Giullitti points to the fact that the current system requires previous authorization from the Federal Courts to wiretap suspects. If someone were to accuse a federal judge of corruption, a federal judge would have to authorize investigating their colleague which in his view makes it highly improbable. As previously stated, judges cover each other no matter what. Giullitti believes that an independent judicial police would avoid this kind of conflict of interest.¹⁵⁸ Former congressional leader Elisa Carrio proposes a judicial police force for a different reason. Carrio believes that prosecutors need an independent judicial

¹⁵⁸ Ibid 73.

police due to a shortage of staff. Carrio points out that prosecutors usually have a group of three individuals that assist the prosecution to gather evidence. As a result, federal prosecutors usually receive all evidence from the Federal Police and do not have the manpower to go through it all and cross check it with their own investigation. Carrio believes that there are very few prosecutors who are diligent and studious with evidence. Those who are meticulous are usually fired from their position for these very exact reasons.¹⁵⁹ A judicial police guarantees fair and independent evidence.

The judiciary needs to implement an oral based structure. Legal experts criticize the Argentine system for having the worst from both the inquisitorial and adversarial systems. As previously stated, criminal cases go through an investigative process that is both secretive and extremely overwhelming. On top of that, the process is carried out on an only written basis. Most criminal cases end in the instruction phase without any firm sentence because of the tardy process; because skilled defense lawyers use the convoluted system to their client's advantage obfuscating the law. If the process were completely oral, many experts believe that the instruction will last a maximum of a year, even some opining that it might be carried out in a matter of days. The system needs to apply an oral process as well as keeping the same key players throughout the process: the same prosecutor, judge, and defense attorney for the duration of the case. For instance, the Argentine system is set up to have different prosecutors in the investigative process and the trial phase. This will also help streamline the process by avoiding playing catch up on behalf of the prosecutor, judge etc. This will also allow for all judicial officials to stay for the totality of the case rather than delegating their tasks to different individuals. An oral

¹⁵⁹ Ibid 39.

based system and keeping the same key players for the duration of the case will make the process much shorter and transparent.

Digitalizing judicial documents will also foment efficiency and transparency. Today's judicial documents are all on paper. This researcher was taken aback by the large quantities of paper that were dollied from one courtroom to the other at the Federal District Court in Comodoro Py. In fact, there are judicial employees whose sole responsibility is to do just that. Boxes jam-packed with papers and all of these with restricted access only for judges and lawyers involved in the case. Digitalizing case files will allow several judicial officials to read the file at the same time rather than having to ask each other for the original copy. This will also allow the public and nonprofits alike to evaluate corruption cases holding judicial officials accountable for their actions.

The judiciary needs to also veer away from politics. The selection of prosecutors and especially judges is based on a quid pro quo basis often through political lenses. One positive aspect of the Argentine judicial system is that aspiring federal prosecutors go through an intense merit-based evaluation. This is unlike judges who go through a partial interviewing process which based on the interview the Council designates the order in which candidates become listed on the nomination process. This is a critical aspect of the nomination process and it needs urgent reform. The Magistrate's Council needs to change dramatically and push political party leaders aside and involve only academics, members of the judiciary, leaders from important non-profits etc. Depoliticizing the judiciary will make the branch far more independent from all other branches of government. This ties into a merit-based approach. Judges and prosecutors need to go through a continuous evaluation process for their career's trajectory. Once these individuals are confirmed by

the legislative and executive branches, they remain in their position for the rest of their lives. Theoretically speaking, this conserves the independence of the judiciary branch; however, most legal experts argue that these individuals usually get too comfortable in their position and make no efforts whatsoever in keeping up with the most recent legal knowledge. All judicial officials need to comply with a yearly academic process to keep up with all the latest legalese. This will take the politics away from the judiciary.

Last, but not least, intelligence services must be prohibited from intervening in the judiciary. As previously stated, these services have a powerful grip on the judiciary, blackmailing judicial officials to act often for their own agenda. Intelligence services need to focus only on foreign subjects. There will be no need for more investigative forces since the new judicial police will handle all investigations and crime solving tasks.

Argentina's judiciary can and must be reformed. There are no easy solutions, but there are several policies that will improve the judicial process of corruption cases. A new independent judicial police will guarantee credible and fair investigations, a merit-based selection of judicial officials will take the politics out of the justice system, an adversarial system will make judicial proceedings more transparent and more efficient, digitalizing judicial documents will make legal processes easier and more accessible, taking intelligence services out from the judiciary will prevent sidestepping the judiciary in their goals, and obligating judicial officials to frequent knowledge-based exams will keep their legalese up to date. All of these are no easy solutions, but they are critical in transforming the judiciary. The real question is their feasibility.

These reforms will be hard to implement. For instance, the current President Fernandez appointed a council of nine experts to advise him on coming up with a reform

to the judiciary, one of these experts includes Vice President Cristina Kirchner's personal lawyer who is defending her against corruption charges.¹⁶⁰ The fact that this individual is involved in the council discredits the move for reform and has been repudiated by wide-ranging protests. Any kind of proposal will face opposition coming from the judicial establishment, Kirchneristas and anti-Kirchneristas alike as to who will be prosecuted and set free, and special interests groups who benefit from the status quo. The key lies in the public's hands demanding action for a comprehensive package. This was the case for Chile where Hilbink pointed out that the vast human-rights violations and an important corruption scandal in the Supreme Court built up enough demand for swift and radical judicial reforms.¹⁶¹ Argentina needs a public scandal in the judiciary to build enough consensus for reform.

¹⁶⁰ "El abogado de Cristina Fernández de Kirchner y otros ocho juristas integrarán el Consejo Asesor de la Reforma Judicial, *Infobae*, " <https://www.infobae.com/politica/2020/07/24/el-abogado-de-cristina-fernandez-de-kirchner-y-otros-ocho-juristas-integraran-el-consejo-asesor-de-la-reforma-judicial/>, July 24, 2020.

¹⁶¹ Lisa Hilbink, "An Exception to Chilean Exceptionalism? The Historical Role of Chile's Judiciary, *What Justice? Whose Justice?*, University of California Press, 2003, https://www.jstor-org.proxy.library.georgetown.edu/stable/pdf/10.1525/j.ctt1pn9c2.7.pdf?ab_segments=0%252Fbasic_SYC-5187%252Fcontrol&refreqid=excelsior%3A60b1c2aae5f02a6b7ed19cd82df73393

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