



Courts and the Constitutional
Erosion of Democracy in Latin
America

Azul A. Aguiar-Aguilar

May 2020

Users Working Paper

SERIES 2020:31

THE VARIETIES OF DEMOCRACY INSTITUTE



UNIVERSITY OF GOTHENBURG
DEPT OF POLITICAL SCIENCE

Varieties of Democracy (V-Dem) is a new approach to the conceptualization and measurement of democracy. It is co-hosted by the University of Gothenburg and University of Notre Dame. With a V-Dem Institute at University of Gothenburg that comprises almost ten staff members, and a project team across the world with four Principal Investigators, fifteen Project Managers, 30+ Regional Managers, 170 Country Coordinators, Research Assistants, and 2,500 Country Experts, the V-Dem project is one of the largest-ever social science research-oriented data collection programs.

Please address comments and/or queries for information to:

V-Dem Institute
Department of Political Science
University of Gothenburg
Sprängkullsgatan 19, PO Box 711
SE 40530 Gothenburg
Sweden
E-mail: contact@v-dem.net

V-Dem Working Papers are available in electronic format at www.v-dem.net.

Copyright © 2020 by authors. All rights reserved.

Disclaimer: V-Dem does not do quality control and therefore does not endorse the content of the papers, which is the responsibility of the authors only.

Courts and the Constitutional Erosion of Democracy in Latin America*

Azul A. Aguiar-Aguilar
Professor
Department of Sociopolitical and Legal Studies
ITESO, Jesuit University of Guadalajara

* Please send all comments to azulaguiar@iteso.mx

Abstract

In constitutional democracies, courts are becoming a beloved device of incumbents to make their dream come true: remain unchecked in power. Playing by the rules set in the democratic game, elected anti-democrats use their power to erode democracy by capturing electoral management bodies, extending term limits, harassing journalism or shifting power from the legislative to the executive. What is the role of courts in this tale? Independent and empowered courts are a blockage to elected anti-democrats who seek to control other institutions with a veneer of legality. Thus, instead of unlawfully increasing their share of power, elected anti-democrats choose to capture high courts to pave their way in changing the rules of the game. With the court on their side, the constitutionality of their undemocratic moves is undisputed. Here starts democratic erosion.

1. Introduction

In constitutional democracies, courts have become a beloved device of incumbents to make their dream come true: remain unchecked in power. Several scholars contend that in our days, military coups and blatant political ruptures are a very rare way of obtaining and retaining political power, while nuanced and indiscernible mechanisms are more popular to extend the time executives control the government (Landau 2013; Bermeo 2016; Ginsburg and Huq 2018; Levitsky and Ziblatt 2018; Przeworski 2019). In the past years we have witnessed the emergence of populists, false democrats and would-be autocrats that claim to have the power to make democracy work, bolster economic growth and put an end to corruption and abuses of privileged elites. Using the rules set by the democratic game, they undermine the democratic process by manipulating the mechanisms of direct democracy such as referendums or consultations, capturing electoral commissions or management bodies, extending term limits, modifying electoral laws, harassing journalism or shifting power from the legislative to the executive.

How democratic erosion evolves and what is the role of courts in this tale? Independent and empowered courts are a blockage to populist leaders who seek to control other institutions and extend their time in office. Thus, instead of illegally increasing their share of power, elected anti-democrat leaders choose to capture the constitutional or supreme court to pave their way in changing the rules of the game. With the court on their side, the constitutionality of their undemocratic moves is undisputed. Here starts democratic erosion.

In this paper I argue that elected anti-democrats need the courts to secure the legality and legitimacy of their decisions and the constitutional amendments they are willing to introduce in key features of electoral and liberal democracies, such as executive term limits, the electoral system, free speech, independent media outlets and the party system (freedom of association). I contend that this process unfolds in three interactive steps: elected anti-democrats and their parties a) lead public attacks on the judiciary; b) push judicial purges; and/or c) pack the courts. To illustrate the pathway of this process, I provide examples from Latin America.

This paper organizes as follows. In the second section I frame the discussion of this work on the concepts of democracy and populism. The third part delves the role of courts in the erosion of democracy. Here I unpack the concept of democratic erosion and operationalize the main argument of the paper: how attacks to the judiciary, judicial purges and court-packing evolve. Using the 2020 dataset of Varieties of Democracy and documentary research, in the fourth section I explore my argument in the Latin American region. Finally, I present some tentative conclusions on the judicial erosion of democracy.

2. What Democracy Are We Talking About?

Democracy is the political regime that allows the organization of plurality, that is, of groups with different interests. To talk about the constitutional erosion of democracy implies clarifying what type of democracy is being reversed. Minimal definitions, such as that proposed by Przeworski, are convenient because they allow to easily observe when there is something or when there is nothing left. There are free, regular and competitive elections? Do incumbents leave power after losing elections? We are effectively in a democratic regime when “citizens have the ability to remove the government by elections” (Przeworski 2019, 5). When we do not observe this, democracy a) backslides to electoral authoritarianism (Schedler 2013) where there are regular elections, but they are minimally free, fair, and competitive; or b) breakdown to an authoritarian regime (Linz 2000), where limited pluralism prevails, namely, parties do not run on free, fair, regular and competitive elections.

For the minimal definition to work, however, we need other attributes that belong to the conception of liberal democracy. Dahl argued that democracy in complex societies requires the presence of rights and liberties such as freedom of expression, association and alternative sources of information (1971, p. 4), that is, for the election to be fair, free and competitive, societies need to assure that citizens are able to formulate their preferences, that is, to create political associations, to freely criticize the politics of government, as well as to have access to independent and alternative media sources.

If we are to understand how constitutional democratic backsliding unfolds, it is imperative to take a step back in the classical electoral and liberal definitions of democracy and consider its constitutional basis, namely, take into account the limits established in government power in a democratic constitution, or more concisely, something known in constitutional and democratic theory as the separation of powers.

One aspect that autocrats and false democrats would seek in their quest to remain in power is to dismantle the separation of powers. The foundation of this idea is very well expressed in what the leader of Law and Justice Party in Poland, Jaroslaw Kaczynski, called ‘impossibilism’ or “the notion that it is impossible for a democratically elected government to fulfill the ‘nation’s will’ because of the check and balances imposed on it by the constitution” (Davies 2018, p. 2). Elected anti-democrats wish to govern unchecked specially from the judiciary. Thus, grounded in the majoritarian approach to democracy, they attack the institutional foundations of the courts, particularly, judicial review, arguing that unelected authorities should not decide on the constitutionality of legislation enacted by directly elected representatives. Elected false democrats usually wish to ignore that in most democratic countries, judges are indirectly elected by the people,

since their appointment result from a legislative and executive consensus. Additionally, they forget that second and third wave democracies arose with the strong determination to avoid falling again in the totalitarian and authoritarian experiences they went through. Thus, curbing the power of the legislative and the executive by independent constitutional courts was a necessary device to prevent that sort of political catastrophe (Stone 2000).

Second and third wave democracies are founded on the principle of separation of powers, namely, the idea that in order to avoid political abuses, the authority of the state must be divided into different branches (executive, legislative, judicial) each one of them is responsible for developing independently different tasks. If one wishes to reduce the possibility of governmental tyrannical abuses, then the functions of the state must be separated: the power must stop the power (Montesquieu, 1748, Book XI, Chapter VI). To separate functions means not only to divide the responsibilities of government to improve the organization of society, but especially to introduce barriers to “the encroachments and oppressions of the representative body (and) to secure a steady, upright, and impartial administration of the laws” (Hamilton 1788). Concerning the judicial power, we can think of two important barriers to deter encroachments: judicial independence and judicial empowerment. The first refers to the institutional features that protect the judiciary from being subjected to external influences during adjudication, preventing the use of law as a political weapon to honor friends and punish enemies. An independent judiciary will hand out sincere decisions that do not reflect the interests of incumbents. The second, judicial empowerment, points to the mechanisms that a court has to check and neutralize other powers and protect citizens’ rights. The clearest example of such mechanisms is the judicial review of legislation, namely, the authority of courts to declare laws unconstitutional.

Ginsburg and Huq consider the previous ideas in their account of democracy and sustain that this political regime contains at least three institutional elements: free elections, liberal rights of speech and association and rule of law (2018, 9-14). Rule of law turns a key attribute to maintain the thinnest definition of democracy: unbiased elections. The notion that is at the core of the rule of law is that no one can be placed above the law. Rule of law is “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. (It is concerned with) equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts” (Dicey 1915, 110, 120). In particular, the executive authority must be constrained by the constitution and the rulings of independent courts. Raz contends that we can think of the rule of law as the enforcement and application that courts make of prospective, clear, independent, general, stable and publicly passed laws (Raz 1977, 198-201).

Consequently, considering Ginsburg and Huq definition, the well-functioning of the minimal democracy implies the existence of independent courts because we cannot speak of regular, competitive and free elections where citizens, for example, lack the judicial protection that guarantees their right to appear in the ballot box, to issue a lawsuit claiming unequal campaign resources among party competitors or their right to have an impartial resolution of electoral disputes. If a country is expected to hold well-functioning elections and a democratic government, independent courts are an important touchstone. Constitutional democracy is thus formed by free, clean and competitive elections, freedom of association, freedom of expression and independent and power courts that impose judicial constraints to the authority of the executive.

This version of democracy is currently under siege around the world. Reviewing the publications of the past couple of years on this subject, one can verify that scholars and international organizations are not concerned anymore with democratic quality or new waves of democratization, but with *Democracy in Decline* (Diamond and Plattner 2015), *How Democracies Die* (Levitsky and Zibblat 2018), *How to Save Constitutional Democracy* (Ginsburg and Huq 2018), *Populism and the Crisis of Democracy* (Fitzi, Mackert and Turner 2019), *Crisis of Democracy* (Przeworski 2019), “A Leaderless Struggle for Democracy” (Freedom in World 2020), “Democracy Facing Global Challenges” (V-Dem 2019) or “A Third Wave of Autocratization is Here: What is New About it?” (Lührmann and Lindberg, 2019). The evidence from these readings let us know that new forms of political leaderships have emerged and are questioning, repudiating and eroding liberal democracy. Freedom in the World 2020 report points, for instance, that “many freely elected leaders are dramatically narrowing their concerns to a blinkered interpretation of the national interest. In fact, such leaders are increasingly willing to break down institutional safeguards and disregard the rights of critics and minorities as they pursue their populist agendas” (Repucci 2020, 1).

2.1 The “Zeitgeist” of Populism

Populists, false democrats and elected anti-democrats are on the rise. Telling the story of democratic erosion, via the rise populist political leadership, starts by taking into account its sociological roots: the unfulfilled promises of democracy that lead to citizens’ dissatisfaction with this political regime. As scholars, we have an understanding of democracy that avoids using many attributes and thus conceptual stretching. We agree to define democracy as a competitive electoral process where liberal rights are safeguarded. People, however, tend to associate democracy with a more substantive definition. Consequently, there are expectations that, in the light of an important proportion of citizens, democracy did not meet. This is what tell us the persistent downward on the satisfaction with democracy across Latin America. Democracy seems to be understood as a

regime that produces more than just competitive elections and alternation in power. What citizens demand “is a responsive government, i.e. a government that implements policies that are in line with citizen wishes” (Mudde 2004, p. 558), someone that solve the problems of the common people. People tend to associate democracy with social welfare, security, employment, equality and all promises politicians make during political campaigns. When those promises are repeatedly not fulfilled by any of the existing political parties but, on the contrary, after several political alternations in power a country faces higher levels of insecurity, political corruption, increase in unemployment and poverty, than the incumbents and political parties suffer from distrust and despise, while dissatisfaction with democracy increases. Skeptical and frustrated citizens are eager to vote for a radical change and fervently claim *!Que se vayan todos!* (All of them must go!). This is the appropriate ground for populists to seize power.

The populist *Zeitgeist* (Mudde 2004) is spreading across well-established democracies and returned to several third wave democracies when democratic consolidation and quality was expected. Charismatic and reckless leaders have won elections promising to end the abuses of privileged and corrupted elites and to return the power to the people. Populist leaders use a nationalist and anti-establishment rhetoric to expand and enhance their power and gain public support for their agenda (Barr 2017). Elected anti-democrats from Donald Trump, to Jair Bolsonaro, Andrés Manuel López Obrador or Evo Morales do not feel comfortable with the checks exerted by other institutions on their power. Hence, they claim that to realize the will of the people it is necessary to limit the authority of other institutions.

Populists conceive society divided “into two homogenous and antagonistic groups: the pure people *versus* the corrupt elite” (Mudde 2004, 543). This idea (in the mouth of many populist leaders) breaks one of the central tenets of liberal democracy: pluralism, namely, that society is divided into different groups that compete to make their interests prevail. Hence, considering Mudde’s definition on populism and the one Dahl uses for democracy (1971), it can be argued that there is not such a thing called democratic populism¹. Populism tends, instead, to develop the seeds of democratic erosion.

Populist hold anti-establishment, anti-elite, anti-system and anti-party sentiments and rhetoric. “To hell with your corrupt institutions!” shouted López Obrador after losing the 2006 federal election. Then, he abandoned his party and created his own, calling it *Movimiento Regeneración Nacional* (MORENA) avoiding the use of the despised word ‘party’. This is by no means a political strategy exclusive to Mexico. Other countries such as Bolivia (*Movimiento al Socialismo*), Italy

¹ There is an extensive discussion on both democratic and authoritarian populism, as well as bad and good populisms. See Norris 2017 and Howse 2017.

(*Movimento Cinque Stelle*), Spain (*Podemos*) or Greece (*Syriza*) have also seen in the past decades the upsurge of anti-system-movement-parties from both the right and the left.

Populism sows the seeds of democratic backsliding because it “is inherently hostile to the idea and institutions of liberal democracy or constitutional democracy” (Mudde 2004, 561). Populist leaders do not like the idea of relying on the institutions of democracy to govern because, they claim, they are controlled by the ‘corrupted elite’. Moreover, why to govern with institutions when populists can govern with the people? Referenda and consultations turn into an important mechanism to achieve results, till they do not produce what populists want. Then, they go after the independent Courts.

Today’s populists want to control their opponents without being perceived as undemocratic. Accordingly, the question is how to concentrate power in the executive branch so to remain unchecked and still qualify as democratic? A puzzling paradox indeed. But not for populists. Winning a constitutional majority in elections has proved a valuable condition for populist leaders succeed in their quest to capture other institutions and remain unchecked in power. However, this is insufficient in a political arena where there is also an independent court with constitutional review powers, as is the case of mostly all second and third wave democracies. A powerful and independent court can strike down legislation that changes the nomination procedure in the electoral commission or electoral redistricting that favors the ruling party. Law and Justice Party in Poland learned very well this lesson. In its second term in power the party rapidly went after the judiciary, “capturing the constitutional court, (removing) the ‘old’ judges of ordinary courts by lowering retirement age” (Sadurski, 2019, 4). The result was a lenient judiciary that do not question the constitutionality of legislation that concentrates power in the ruling elite. This is how democratic erosion begins spreading.

3. Democratic Erosion and the Role of Courts

In the past years, scholars and international organizations that study or support democracy around the world had noticed a process of regression, decline, crisis, deconsolidation, backsliding, subversion or erosion of democracy. In short, democratic regimes are losing what they have gained in the past decades. Democratic erosion or backsliding has been defined as “a series of discrete changes in the rules and informal procedures that shape elections, rights, and accountability. These take place over time, separated by months or even years” (Lust and Waldner 2015, 7).

Levitsky and Ziblatt argue that different from past transformations —mainly democratic breakdowns— “democratic backsliding today begins at the ballot box” (2018, 5), that is, with the election of false democrats or leaders whose democratic credentials are dubious. Throughout his

political career, for example, Jair Bolsonaro has expressed clearly authoritarian positions. In an interview in 2016 he claimed that “the dictatorship's mistake was to torture and not kill more” and during his first year in office, he wanted to install commemorations for the 1964 military coup that ushered in 20 years of autocratic rule in Brazil. These authoritarian expressions make democrats and human rights activists feel uncomfortable and vexed, however, they do not undermine the institutional foundations of democracy. According to Bermeo, democratic backsliding “denotes the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy” (2016, 5). We can observe this state-led actions as legislative reforms accomplished by the executive and his party in electoral and judicial institutions, but also in the media. They are all legal measures. Furthermore, they are presented as efforts to fight corruption, enhance transparency, public austerity and improve democracy (Levitsky and Ziblatt 2018; Ginsburg and Huq 2018). What voter would oppose to reduce the number of proportional seats in the Congress for saving money in a context of economic crisis or dismiss justices of the Supreme Court on corruption charges? With democratic erosion, we face the enactment of laws that, at a first glance, do not disrupt the democratic order. To put it otherwise, we observe, for example, the introduction of administrative and judicial procedures to curb corruption, but that are targeted only at political opponents. In most cases, these measures have a hampering effect on the democratic checks placed on the executive, while allowing the expansion of its power. These measures dismantle democracy in a way that is imperceptible to most citizens. Przeworski call it “subversion of democracy by stealth” (2019, p. 15).

The differences between democratic erosion and democratic breakdown are easy to observe. Time is a critical variable to distinguish between democratic breakdown and democratic erosion. The first occurs rapidly through a self-inflicted or military coup, the second occurs, as mentioned above, gradually by elected leaders in a longer period of time. Democratic breakdowns are quite easy to identify because we are faced with the sudden death of democracy. In March 31, 1964, the Armed Forces occupied the streets of several Brazilian cities with tanks and ousted President João Goulart, who some days later was forced to flee into exile to Uruguay. Eleven days after the military putsch General Humberto Castello Branco took the presidency and deployed the prosecution of opposition. Democratic erosion, instead, is a less striking and more subtle process in which several legal changes in a time span undermine democracy.

Even when democratic erosion is a concept difficult to operationalize and observe (Ginsburg and Huq 2019), the attributes outlined in the Table 1 guide us in recognizing episodes that, if prevail, accumulate and extend in time, will lead a country away from democracy.

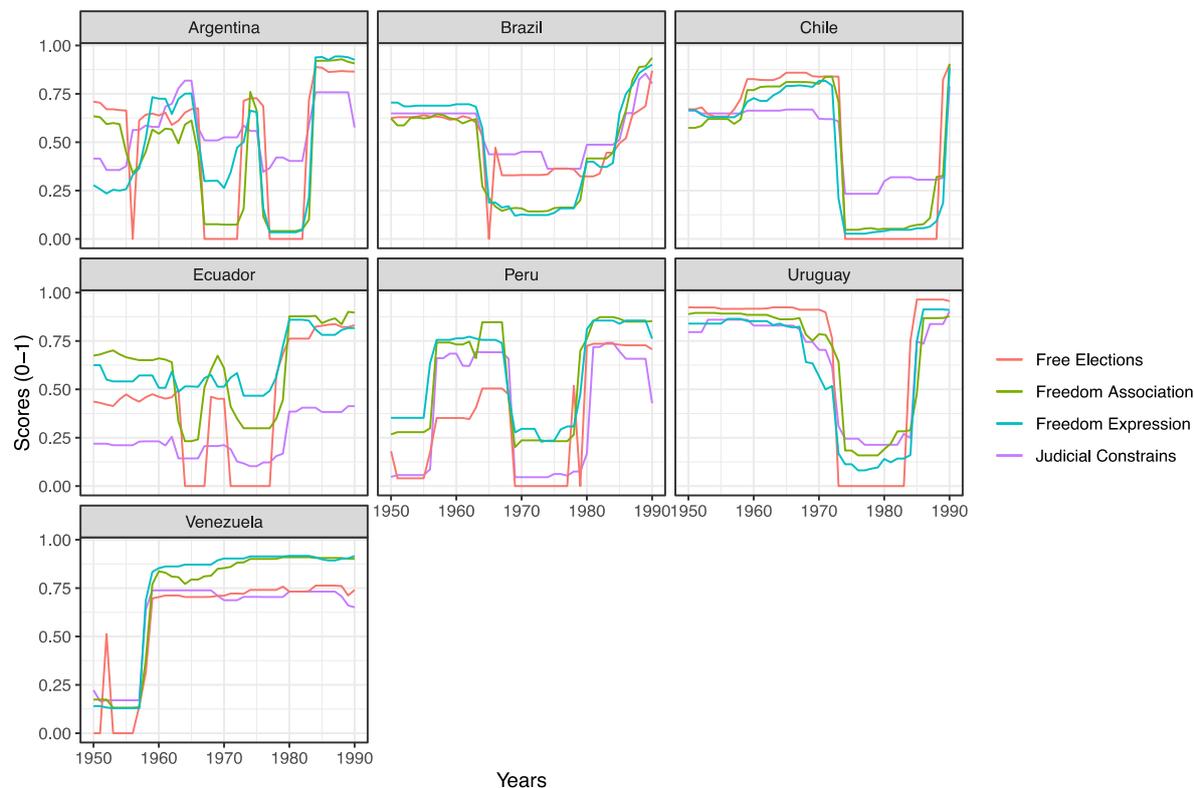
Table 1. Devices of democratic breakdown and backsliding

| Institutions or actors | Democratic breakdown | Democratic backsliding |
|------------------------|-------------------------|------------------------------|
| Executive's authority | Emergency powers | Constitution and referendums |
| Courts | Curtailed and sidelined | Attacked, purged or packed |
| Legislative | Dissolved | Thinned and encroached |
| Constitution | Disregarded | Amended |
| Political parties | Banned and prosecuted | Sidelined |
| Elections | Suspended or fraudulent | Regular and flawed |
| Opposition | Imprisoned/disappeared | Manipulated |
| Media | Stifled | Harassed and coopted |
| Society | Highly polarized | Polarized |

Source: with information from Linz 2000; Hilbink 2012; Bermeo 2016; Ginsburg and Huq 2018; Levitsky and Ziblatt 2018; Przeworski 2019; Sadurski 2019;

Evidence of democratic breakdown across the world had shown that the institutions and actors of democracy suffer radical transformations. On September 11, 1973 the Chilean military assaulted the *La Moneda* and president Salvador Allende was pulled out dead from there. Augusto Pinochet declared state of emergency and Santiago was patrolled by soldiers. Courts remained in place and indifferent to the brutality and human rights violation deployed by the armed forces. Their main functions were performed by military courts (Hilbink 2007). The military junta dissolved the congress. Political parties were banned or suspended, and the opposition was prosecuted, tortured and killed. Sources of information were reduced to two loyal media outlets. Hence, democratic breakdowns are quite easy to identify. Figure 1 shows most important democratic breakdown in Latin America through four key attributes of democracy: free, clean and competitive elections, freedom of association, freedom of expression and judicial constraints on the executive. Democratic breakdowns are illustrated by sharp decreases in each mini graph.

Figure 1. Democratic Breakdowns in Latin America, 1960-1990
Data: V-Dem Institute, 2020



Differences between democratic backsliding and a democracy whose quality is poor are more difficult to identify (Ginsburg and Huq 2019). They still are different phenomena and, as this paper shows, we can identify also democratic erosion in low quality democratic regimes. Usually the weaknesses of poor-quality democracies are clear from the outset: several attributes of full democracy are absent. We know that low quality democratic regimes hold to some extent free, regular and competitive elections, but other aspects might be lacking (a full-working justice system, vertical, horizontal or societal mechanisms of accountability, electoral integrity, or equal political participation for different groups). A country takes the road of democratic backsliding when it begins to lose what it has already gained, when reforms that were introduced during the democratic founding period are partially or fully reverted. If democracy granted independence to the courts, created autonomous electoral management bodies, bolstered free speech, facilitated the upsurge of political parties and political associations and these characteristics are being overturned, then we are before a problem of democratic backsliding.

In our days, however, elected anti-democrats have found subtle methods to expand their power. I highlight here abusive constitutionalism, which “involves the use of the mechanisms of constitutional change -constitutional amendment and constitutional replacement- to undermine

democracy” (Landau 2013, 191). Abusive constitutionalism relies on strong legislative majorities to, on the one hand, reform the constitution in a way that favors the political elite in power, for example, by amending the constitution to allow the executive additional terms in office. This is the case of Álvaro Uribe in Colombia (Landau 2013) but also of Daniel Ortega in Nicaragua. On the other hand, abusive constitutionalism is carried out by constitutional replacement. Again, using their majority in Congress, incumbents push the enactment of a new constitution in which powers of the executive office are increased while checks on the majority are vanished. Here we find the cases of Hugo Chavez in Venezuela, Rafael Correa in Ecuador and Evo Morales in Bolivia (Landau 2013). Capturing the judiciary might occur in both abusive constitutionalism by amendment and by replacement.

Courts can either safeguard democracy or they can contribute to democratic subversion. In the first case, courts actively strike down legislation that seeks to undermine checks and balances. In the second case, courts validate the constitutionality of, for instance, electoral laws that grant an overwhelming advantage to the ruling party. Is the second type of courts that false democrats prefer. In constitutional democracies, however, populists or elected anti-democrats need to engineer how to get the court to stop doing its reviewing job. To govern, they believe, it is important to hamper the limits imposed by courts on their moves.

Contrary to autocrats that blatantly de-activate the courts by curtailing their powers in episodes of democratic breakdown, elected anti-democrats in democratic backsliding follow a gradual pace. The process of capturing the judiciary usually unfolds in three interactive steps: a) public threats or attacks on the judiciary; b) judicial purges; and/or c) packing of the courts. Actions in this process evolve slowly, covered by a democratic mantle and a veneer of legality and they can be interrupted only in the presence of strong democratic institutions and actors.

Elected anti-democrats first use an anti-elite discourse. They accuse the courts and judges of maintaining their privileges and those of economic elites or the opposition. They accuse judges of having high and ostentatious salaries, being corrupted and not protecting the interests of the people. False democrats claim that judges are to blame for the blockage of policies that will benefit the national interest and raise their case to the public by pointing that unelected authorities (judges) are precluding the elected ones from realizing the will of the people. In short, judges are accused by politicians of carrying out a ‘constitutional coup’ when protecting rights, reviewing the constitutionality of law or striking down legislation. This is the case of MORENA, the current ruling party in Mexico, which has publicly accused the judiciary of working against its policies on security matters: “We are very respectful of the Judiciary, but I want to send a message to judges and magistrates: this practice is going to end. (The practice in) which a criminal is arrested and a

few days later he gets out of jail, laughing at authorities because a judge released him always by the same justification, the same excuse, that the investigation was poorly integrated” declared Andrés Manuel López Obrador and announced he was preparing a reform to the judiciary. Public attacks on the judiciary are meant to push judges to self-restrain and dissuade adverse rulings, but also to push unfriendly judges to resign. When attacks do not work, false democrats turn to either to judicial purge or court-packing.

To advance their agenda, false democrats purge the constitutional or supreme court and the judiciary. Arguing efficiency, public austerity or the fight against judicial corruption populists remove judges and/or justices from the bench. Forcing the resignation of incumbent judges comes in different ways. Law and Justice Party in Poland, for instance, reduced the retirement age of judges and many of them were then legally forced to leave (Sadurski 2019). Evo Morales in Bolivia used several strategies that went from launching investigations on charges of treason and corruption against justices, political harassment or reducing justices’ salaries (Castagnola and Pérez-Liñán 2011). These measures resulted in the resignation of mostly all justices in the Supreme Court and Constitutional Court in less than 2 years after Morales’ arrival to power.

To guarantee the legality and legitimacy of their antidemocratic moves and push their expanding power agenda, an additional step for populists is to pack the court. Increasing the size of the court grant populists and their parties the chance to nominate justices loyal to their cause. This translates into favorable judicial votes to reach binding decisions and thus lift any blockage to legislation or policy implementation wished by the incumbent government. It also translates into judicial protection for friendly politicians and a weapon against political enemies. Elected anti-democrats couch their plans of court-packing in terms of governability, court’s heavy workload, judicial reorganization, the need of a specialized court to effectively target corruption or “good-government” reasons (Tushnet, 2019). In 2000, the then president of Nicaragua Arnoldo Alemán (1997-2002) and the leader of the opposition Daniel Ortega crafted a political pact to “achieve governability” by increasing the number of seats in the Supreme Court from 12 to 16 (Díaz Rivillas and Ruiz-Rodríguez 2003). Each political group nominated two justices, resulting in the erosion of checks on both the executive and the legislative. This friendly Supreme Court became a key artifice in the path toward authoritarianism after Ortega’s election in 2007 (see below).

It is worth noting, that the process of capturing the courts is not sequential but interactive. Most of the times public attacks come first, in some cases however, court-packing might be preferred to purging the court, especially in countries where the constitution does not stipulate the maximum number of justices that shall sit at the constitutional court, so its size can be easily increased.

By attacking, purging or packing the Supreme Court and the judiciary, false democrats destroy the foundations of constitutional democracy. Courts might still possess judicial review powers, but if they are captured, judges will not dare to hand out rulings that curtail the power and undemocratic moves of those whom they honor their position. I do not claim here that courts and judges will always save democracy, since in several instances, judges have shown that they are not willing to do so. Courts will play a relevant role against democratic backsliding when besides being independent and empowered, they a) are committed to the liberal rights of democracy; or b) when they want to preserve their interests and powers.

4. The Constitutional Erosion of Democracy in Latin America

When we were expecting Latin American democracies to maintain or improve the quality of their regimes, a subtle “wave of autocratization” hit the region. Populists, false democrats or would-be autocrats won elections in Venezuela (1999), Bolivia (2006), Nicaragua (2007), Ecuador (2007), Mexico (2018) and Brazil (2018) and promised citizens to radically change the way politics were conducted, end privileges and political corruption.

Central tenets of liberal democracy have been eroded by incumbent parties since 2000 and several countries in Latin America have suffered the partial dismantling of freedoms or horizontal accountability mechanisms. Figure 2 tells this story. Venezuela, Nicaragua, Bolivia, Honduras, Haiti, the Dominican Republic experienced constant decreases in democratic attributes such as free and competitive elections (Free Elections), government respect for press and civil society’s manifestations and opinions (Freedom of expression), political parties’ ability to register or freely compete in elections, operation of civil society organizations without political constraints (Freedom of Association), or effective judicial and constitutional checks on the executive actions (Judicial constraints). Ecuador faced consistent decline in these indexes for almost a decade and only began to perform better in the past two years. Argentina, Colombia, El Salvador, Guatemala, Mexico, Panama, Paraguay and Peru show stable patterns and partial increases in all four indexes. The biggest democracy in Latin America, Brazil, has been experiencing backsliding since 2017 but still remains an electoral democracy. Only Chile, Costa Rica and Uruguay show stable and high scores on these attributes of democracy, their lines are mostly flat.

Figure 2. Democratic Erosion in Latin America, 2000-2019
Data: V-Dem Institute, 2020

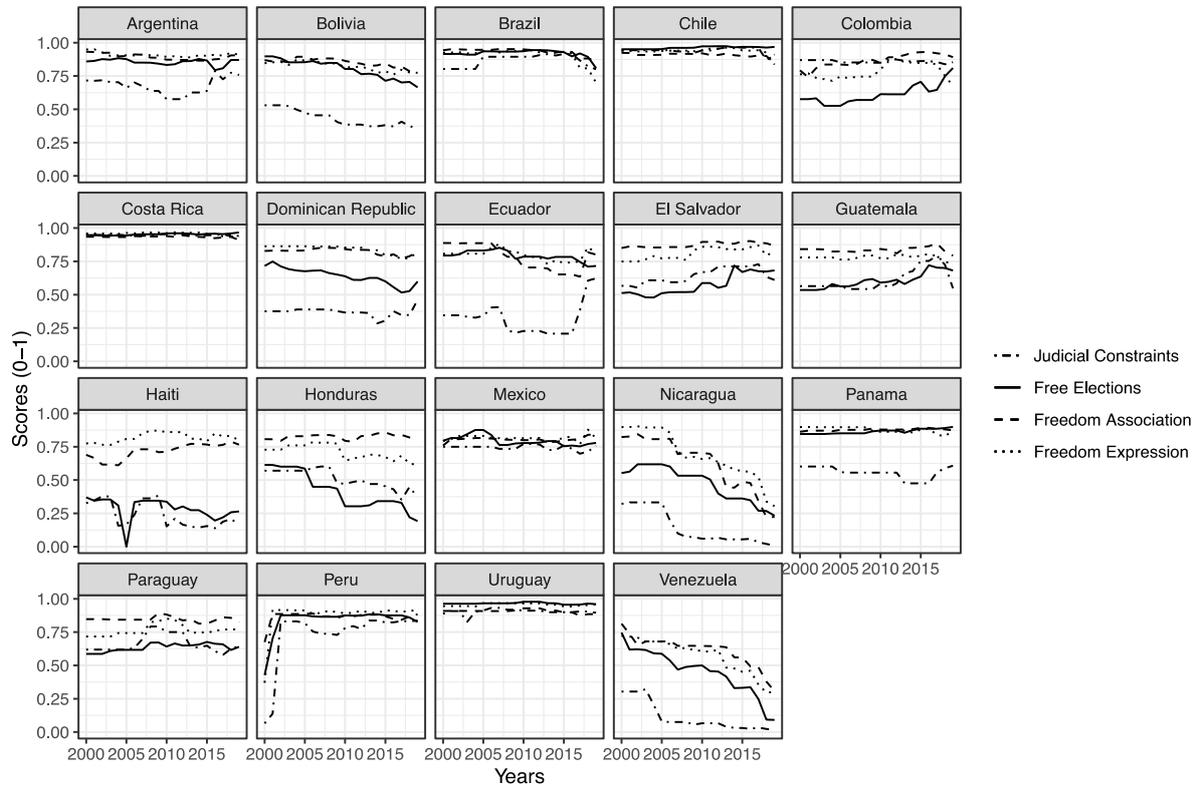
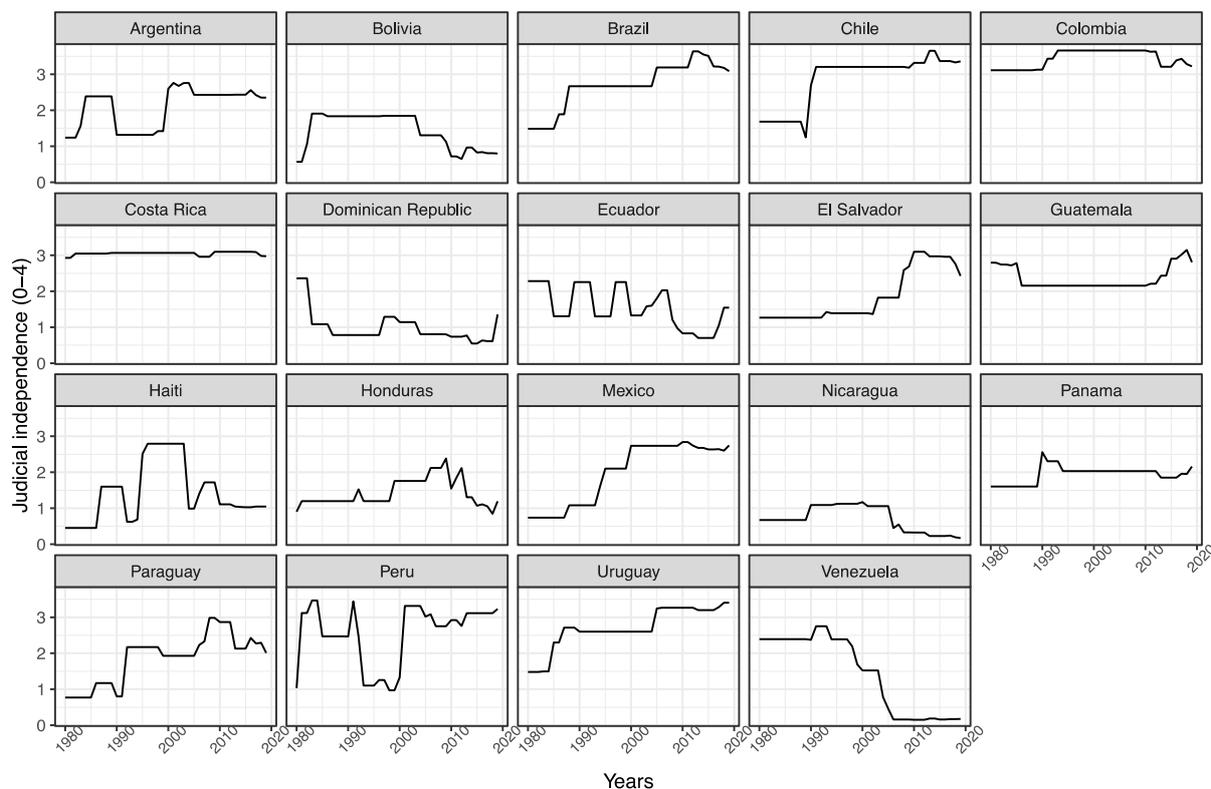


Figure 2 indicates that in Argentina, Bolivia, Dominican Republic, Ecuador, Nicaragua, Panama, Peru, and Venezuela judicial constraints on the executive has been constantly the weakest attribute of their electoral democracies, that is, there, presidents have tended more to disrespect the constitution or not comply with all judicial rulings than to intimidate the opposition, impose restrictions on the formation and activities of civil society organizations or harass the press and the media.

During the first decade of the XX century, several Latin American countries experienced partial or fully assaults on their judiciaries. Threats, attacks, purges or court-packing contributed to constrain the power and independence of courts. As depicted in Figure 3, levels of judicial independence of high courts in Bolivia, Ecuador, Haiti, Honduras, Nicaragua, Panamá, Paraguay, Perú and Venezuela started to decline after year 2000. Some of the most independent judiciaries in the region such as Brazil, Chile, Colombia have followed a similar trend over the past half-decade.

Figure 3. Judicial Independence in Latin America, 1980-2019
Data: V-Dem Institute, 2020



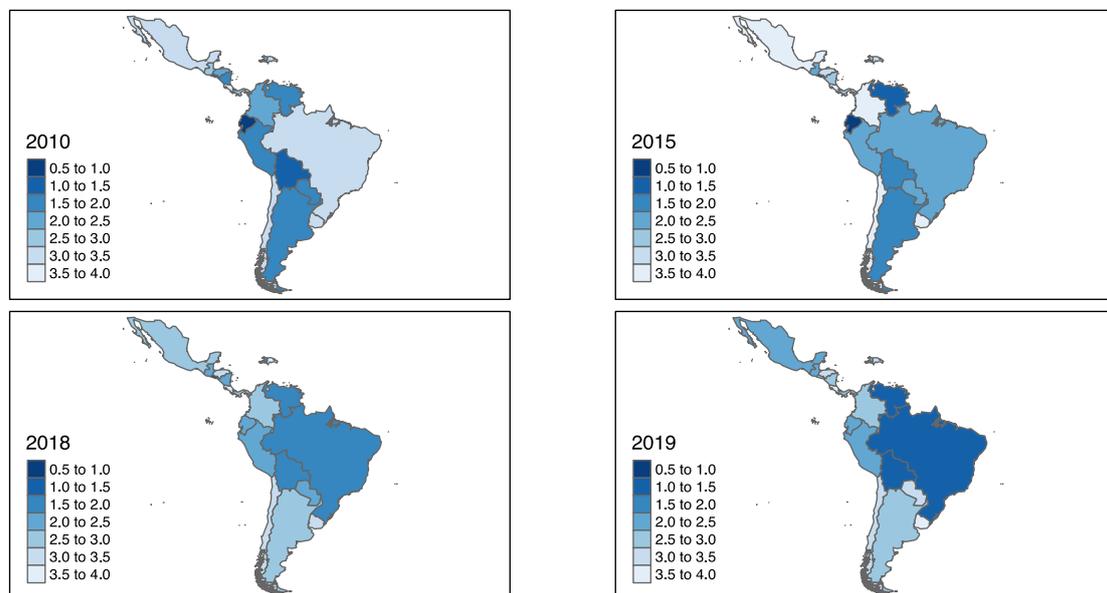
The mini graphs in Figure 3 tell us that justices in several Latin America countries are less eager to vote sincerely and hand out decisions that affect the interests of the government. The more the lines get closer to zero, the more that high court reflects in its rulings the wishes of the government. In general, lowest levels of judicial independence are found in Venezuela, Nicaragua, Bolivia, Dominican Republic, Honduras and Haiti, where justices are strong supporters of the ruling elite. Ecuador mini graph is significant given its perennial instability, its sharp decline in judicial independence in the year 2010 and its partial recovery after Rafael Correa left power. Judiciaries in Argentina, Brazil, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Mexico, Peru and Uruguay show high independence from the government when handing out decisions. This by no means implies that courts are not attacked. The cases of Brazil and Mexico are telling in this respect.

4.1 Public Attacks on the Judiciary: Brazil and Mexico

Government attacks on the judiciary in Latin America have increased in the past decade. As shown by the following comparative maps, from 2010 to 2019 some Latin American presidents increased their attacks on the judiciary by pointedly accusing judges of corrupt, privileged elites, failing to

fulfill their function or ruling against the interest of the nation. On the Map, the light-blue color indicates lesser attacks on the judiciary, thus, in Chile, Costa Rica, Colombia, Paraguay and Uruguay there were few or none “attacks to the judiciary integrity” (V-Dem Codebook 2020). During past 10 years, government attacks on the judiciary (darker blue) were steady or increased in Brazil, Bolivia, Venezuela, while several threats to the judiciary integrity (semi-darkblue) occurred also in Argentina, Mexico, Peru, Ecuador. The mini-maps show that increase in government attacks on the judiciary are particularly telling in the two biggest democracies of Latin America, México and Brazil:

Figure 4. Government Attacks on the Judiciary in Latin America
Data: V-Dem Institute, 2020



Brazilian President Jair Bolsonaro (2019-2022), a far-right populist, has been seeking to govern without horizontal checks since his arrival to power in 2019. In his view, he is unable to deliver the policies he promised (i.e. land rights or public security) to his voters due to the systematic obstruction to his proposals by the traditional “corrupted elites” that occupy the congress and the judiciary.

As depicted in Figure 3, Brazil has one of the most independent judiciaries in the region since 1988, when its Constitution was enacted. As a matter a fact, the judicial power had played a critical role in the judicialization of politics through the effective checks on other powers (Carvalho 2009) and the protection and expansion of citizens’ rights such as health and education (Mori-Madeira 2016). In the past years, for example, the world witnessed the emergence of the Latin American version of “*Mani Pulite*”, better known as *Operação Lava Jato* (Car Wash Operation), the

criminal investigation that uncovered political corruption and led to the indictment of top politicians across all political parties. We also observed a very controversial and pernicious role of judges in the case leading to the imprisonment of ex-president Luiz Inácio Lula da Silva, hampering his political right to participate in an election that the polls showed he could have won. Furthermore, the Supreme Court has also ruled already against Bolsonaro's administration in order to protect freedom of expression in the case of "The Intercept Brazil", the outlet media that exposed the illegal conduct of former Judge Sergio Moro during the investigations that jailed Lula da Silva (Timm 2019). These are the sort of checks Bolsonaro would potentially face from the Judiciary. He is, however, an anti-democrat with close ties to the military, which have returned to power following the October 2018 election.

Since his arrival to power, Bolsonaro has used several times his social media to publicly attack the Judiciary. On the eve of his first year in office, for example, Bolsonaro posted on his Twitter account a video in which a lion is being attacked by hyenas. In the video, which message is "Let's support the president till the end and not attack him! He has already the opposition to do so", he is represented by the lion and hyenas —carrying over their heads the logo of political parties, social movements, media outlets, the *Supremo Tribunal Federal* (STF)— represent the enemies that want to kill him. The judiciary reacted energetically and senior justice, Celso Mello, declared that "this behavior in addition to characterizing an absolute lack of "gravitas" appropriate of presidential stature, also constitutes the odious (and deeply regrettable) expression of those who are unaware of the dogma of the separation of powers" (Turollo 2019). Soon after Mello's statement, Bolsonaro's supporters attacked and mocked justices of the STF with the hashtag #HienasdeToga (#TogedHyenas), which turned a top trending topic on Twitter (with 55.8k tweets). Backers of Bolsonaro accused the Justices of being leftist, defenders of criminals and destroying democracy.

Using one of the classical mechanisms of democracy, civil society demonstrations, Bolsonaro called his supporters to take the streets in large cities across Brazil to protest against the judicial and the legislative branches. In his fight to get approved his preferred policies, Bolsonaro shared a video through Whatsapp that claimed to rescue the country, the power of the people and provide the President with the tools to defeat his enemies: the National Congress and the Judiciary. Demonstrations took place and demanded to shut down both the Supreme Court and the Congress. Justices of the Supreme Court and government officials were vexed and came out to defend democracy. They condemned Bolsonaro's behavior and declared that this was a clear assault to the separation of powers and the constitution, pointing that he was committing a crime of responsibility for which he might be impeached (Carvalho, Chaib and Caram 2020).

Presidential lash out at judiciary is unprecedented in Brazil since its return to democracy. As other populist elected anti-democrats across the region, Bolsonaro's actions endanger democracy, by contributing to discredit its institutions and to spread the idea that political institutions just hinder peoples' well-being. With the judiciary and the Congress as a strong check on his actions, Bolsonaro is using his popularity and riding the wave of citizen frustration with politics to bolster a radical change in the Brazilian political system via constitutional replacement or a military coup (Daly 2019). This is something, however, we can observe clearer in other cases such as Venezuela.

In Mexico, left-wing populist President López Obrador (2018-2024) is less reckless than Bolsonaro but still holds ideas that oppose to liberal democracy. Different to the Brazilian president, López Obrador has full support in the legislature, since his party won a strong majority in the 2018 election. Consequently, instead of a constitutional replacement, we can expect to observe significant constitutional amendments that allows him to develop his program. The judiciary is in his sight.

As mostly all incumbents, López Obrador and his party wish a friendly judiciary that does not intervene with his political mandate. Figure 3 above shows that the judiciary in Mexico is an institution which independence increased in 1994 —when judicial reform was introduced— and consolidated after political alternation in 2000 —when the Justices in the Supreme Court began to rule more frequently against the preferred policies of the president—The Mexican Supreme Court is a strong institution and it has become an effective arbiter in constitutional disputes between powers and political institutions, even if it is less enthusiastic when it comes to the protection and expansion of citizen's rights (Rios-Figueroa 2011). Following his arrival to power, López Obrador and his party have attacked the judiciary with measures disguised, at a first glance, as democratic but which subvert democracy by stealth.

One of the first Laws approved by MORENA caused a cataclysm within the judicial power. As Morales in Bolivia, López Obrador announced the reduction of federal public servants' salaries, among which judges. According to the austerity policies of his government, no one in the federal public administration can receive a higher salary than the president. Justices received a salary at least three times higher than the president, while magistrates and federal judges earn more than what the president established for himself, but not as much as Justices of the Supreme Court. Even if this can be seen as an attack to judicial independence, since article 94 of the constitution states that judges' salaries cannot be reduced, it is worth noting that austerity measures were not directed exclusively to the judicial power, but to all public officials in the federal government.

Using *amparo* suits, the opposition and civil society have found a way to stop and/or delay central policies in the administration of López Obrador. For instance, around 60% of all federal judges and magistrates filed an *amparo* suit to protect their salaries from the reduction approved by the Congress and the Executive. They won a suspension and the new Federal Law of Public Servants Salaries will go into effect until the Supreme Court delivers the final decision regarding the constitutionality of the approved Law. López Obrador escalated the problem and lashed out at judges in his daily-morning address to the press (*Mañanera*), calling them the best paid judicial elite in the world. The National Association of Magistrates and Judges pushed back and issued a public statement pointing that López Obrador actions and declarations were shattering “the system of checks and balances in our democracy and damaging the rule of law” (Excelsior 2019).

Amparos have been further used by civil organizations aiming to stop key political projects of the president during his mandate: the construction of the Santa Lucía Airport and the so-called Maya Train. Reacting to these situations, the parliamentary leader of MORENA in the Senate declared they were preparing a judicial reform that will “shake the judiciary” and how justice is currently delivered. Among his more controversial voiced proposals was to reform the *Amparo* Law in order to avoid the judicial hindrance to the president’s projects which “cause damage to economic and social progress” (Animal político 2019).

In his quest to reduce corruption and increase the effective performance of the judicial branch, López Obrador and his party spoke their intention to create a specialized chamber, within the Supreme Court, to fight corruption. Dismantling political and administrative corruption is a powerful idea nobody in Mexico oppose. According to the initiative that was presented, this new anti-corruption chamber will contribute to overcome the heavy workload in the Supreme Court by expanding its size from 11 to 16 Justices. This would grant the president and his party the opportunity to nominate five friendly Justices to the Supreme Court and consolidate a solid majority also there.

López Obrador has insisted that he will be very respectful of the judiciary and, in an unparalleled move, he adopted a proposal of judicial reform crafted by the President of the Supreme Court and sent it to Congress for its discussion. The proposal contains a steady constitutional reform to eradicate judicial corruption and nepotism, a pervasive problem in the judiciary in Mexico. This first constitutional reform project will be discussed, added and/or changed by the proposals MORENA has in the Congress to “shake up” the judicial power.

What shook the judiciary, however, was the sudden resignation of Supreme Court’s Justice, Eduardo Medina Mora. A government agency, the Financial Intelligence Unit (UIF) of the Treasury Department, revealed they had an open investigation to uncover the origin of non-

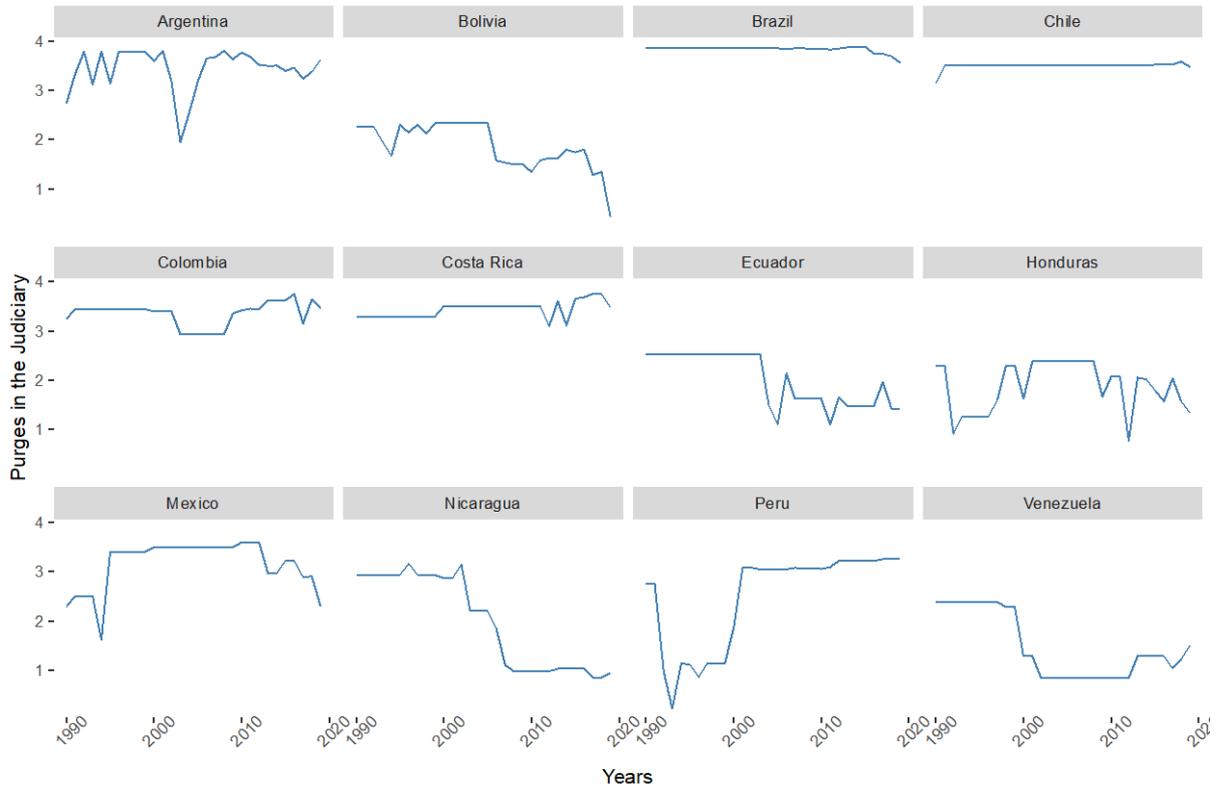
declared properties and millionaire transfers to the Justice's accounts in foreign banks. The UIF freeze Medina Mora bank accounts and his family. Additionally, it informed that a criminal dossier was being handled by the General Public Prosecutor's Office (which is also dependent on the executive). The Justice left his office 11 years before the end of his constitutional mandate. The Justice resignation opened a seat in the Supreme Court that was quickly filled by the president and his party. This is the first time that a Justice of the Supreme Court resigns under political pressures since democratization began. Almost a year later no further investigations had resulted from the initial allegations and the Medina Mora's accounts were unblocked weeks after his removal.

Attacks and sieges to the judiciary have been framed by incumbents as the needed reforms to get rid of corrupted and privileged elites that slow down social, economic and democratic progress. It is difficult to oppose the idea of holding accountable judges, which have illegally enriched themselves. These attacks represent, however, the most significant assault to the judiciary since Mexico transitioned to democracy. Mexico is experiencing the outset of the judicial erosion of its democracy.

4.2 Purges in the judiciary: Bolivia

During the past two decades, judges in Latin America have been arbitrarily or legally removed from their seats in Argentina (2003, due to judicial reform), Bolivia (2006-2008 and again in 2017), Honduras (2012), Ecuador (2004-2005 and again in 2010), Nicaragua (2003) and Venezuela (2000). Brazil, Chile, Colombia and Costa Rica are the countries with less judicial purges in the period 1990-2019, with Mexico and Peru having almost two decades of judicial stability. Figure 5 illustrates only most stable and unstable judiciaries in the region. The solid blue line in the mini graphs depicts the evolution of judicial purges in each country, while the grey lines portray the other 11 countries providing a quick comparative perspective.

Figure 5. Judicial Purges in Latin America, 1990-2019
Data: V-Dem Institute, 2020



The judiciary in Bolivia is among the most unstable in the region (Helmke and Figueroa 2011). The mini-graph of Bolivia in Figure 5 shows that a significant clash with the judiciary began in 2006, at the outset of President Morales political mandate (2006-2019). Unable to achieve a two-third majority in Congress to nominate four Justices to the Supreme Court, Morales issued a presidential decree and single-handedly appointed the four Justices on an interim basis at the end of 2006. Appointees were sworn and the opposition went to the Constitutional Court to appeal the nomination (Latin News 2007a). The Court ruled that the four Justices could hold their seats only for 90 days and new appointments had to be proposed by the president with the approval of Congress as the Constitution states. Morales pushed back and tried, unsuccessfully, to extend the period of his appointees on the bench. He then escalated the problem and filed a suit against justices in the Constitutional Court accusing them of acting not on judicial but political considerations (Latin News 2007b).

During Morales' first two years in power, Justices of the Supreme Court and the Constitutional Court were suspended, impeached or resigned due the executive's political pressures. He publicly accused the Justices of both the Supreme Court and the Constitutional Court to be the most corrupted elite in the country and pointed that the "current composition of

the court was tantamount to an a priori sentence against indigenous people” (Latin News 2007a). The then Chief Justice of the Supreme Court, Eduardo Rodríguez Veltze, was impeached on charges of treason, espionage and submission to foreign domination (Latin News 2006), while other Justices were suspended on charges of corruption, or resigned due to political pressures, health reasons or salary reduction. By mid-2007, the Supreme Court was performing its duties only with 7 out of 12 Justices and in 2009 only with 6 (Castagnola and Perez-Liñan 2011).

Bolivians approved its new Constitution in 2009 and changed radically the selection process of Justices in the high courts. From appointing, the process moved to election by universal suffrage of top authorities in the judicial branch. The National Assembly, however, has the prerogative to craft the (closed) list of candidates to be voted. Since Morales arrival to power, his party, MAS controlled the National Assembly. This resulted in a list of candidates where more than a half had an ideological linkage with MAS (El País 2011). Elections were held in 2011 and vacancies were filled in the Supreme and Constitutional Courts mainly with Morales’ loyalist, avoiding his desired legislation failing to pass constitutional muster.

As illustrated in Figure 5, the last purges in the Bolivian judiciary verified in the period 2017-2019, when Morales dismissed more than 100 judges using the Judicial Council, previously captured by MAS in the 2016 elections. The removal was supported on a Law 003 passed in 2010 which states that all judges nominated before the enactment of the Bolivian Constitution of 2009 hold their posts on a transitory basis and can be removed at any time by the Judicial Council (HRW 2019, DPLF 2018). This has resulted in the erosion of judicial independence and instability of judges on the bench: once a judge delivers a ruling against the government, she is removed from her post, opening the space for loyalist judges.

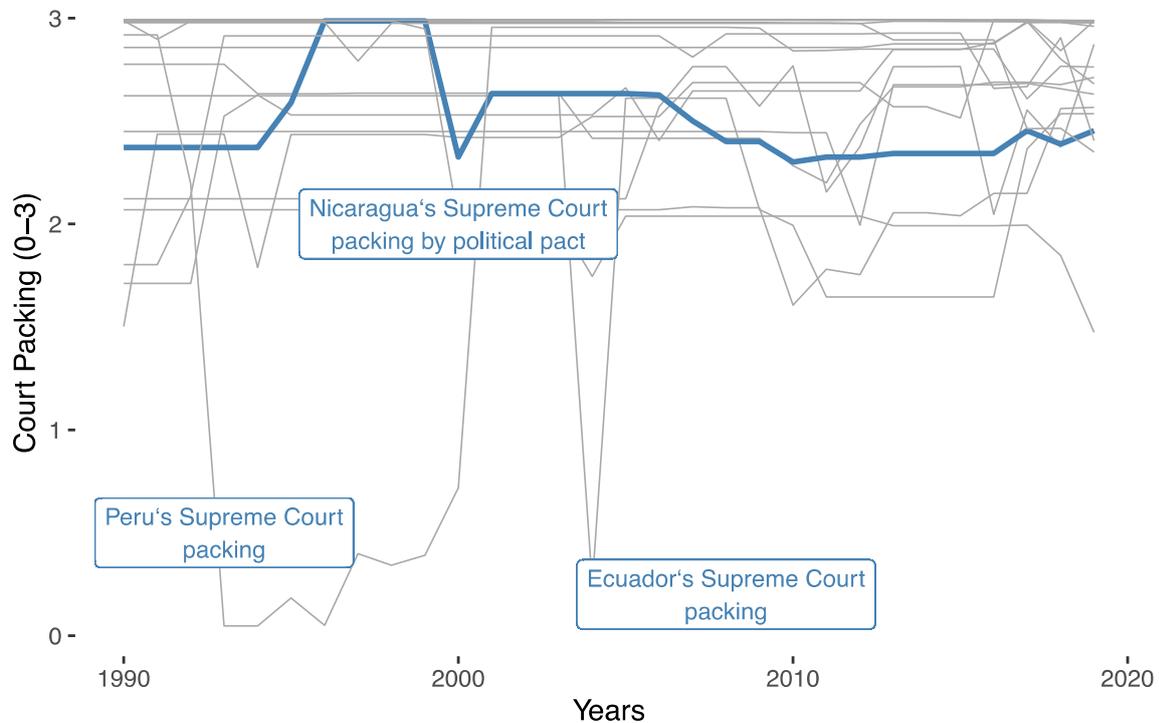
Purging the judiciary granted Morales the opportunity to prepare his future legal assault on democracy. On 2016 MAS asked the Constitutional Court to review the constitutionality of the electoral law that limited presidential reelection to two consecutive terms. The Court ruled in favor of MAS and Morales, clearing his way to run for a fourth term in the 2019 elections.

4.3 Court Packing: Nicaragua

Presidents in Latin America have expanded the size of the Courts for political motivations in fewer occasions than compared with the times they have purged the judiciary. As illustrated in Figure 6, creating more seats in the High Court or in the judiciary is not a favored executive’s strategy to capture judicial referees: only in the cases of Perú (1993) under President Alberto Fujimori and Ecuador (2004) with President Lucio Gutiérrez the court-packing index declined close to zero, meaning that “there was a massive, politically motivated increase in the number of judgeships

across the entire judiciary” (VDem Codebook 2020). In the other countries (indicated with light-gray lines) there was a limited (or no) increase of seats in the judiciary that was politically motivated.

Figure 6. Nicaragua Court’s Packing in Comparative Perspective, 1990-2019
Data: V-Dem Institute, 2020



Court-packing has occurred a couple of times in Nicaragua (blue solid line in Figure 6). Since its transition from authoritarian rule, the Supreme Court and the judiciary has been composed predominantly by Sandinistas allies, triggering other incumbent political parties to seek placing their judges in the Court. During the government of Violeta Chamorro (1990-1997), some seats on the Supreme Court were negotiated to be filled by the incumbent government. She threatened to pack the Court, taking advantage of the constitutional void regarding the maximum number of Justices who may occupy the Supreme Court. Fearing that the number of justices could be doubled from 7 to 14, the opposition and the Court reacted by increasing in two the number of seats and additionally pushing the resignation of two Sandinistas’ Justices. This granted Chamorro and her party four seats in the Supreme Court (Revista Envío 1991; Díaz Rivillas 2009). This new Court became problematic both for the executive and the legislative when Alemán and his party swept to power in 1997 and the Sandinista National Liberation Front (FSLN) continued to control the Congress.

Both the president and the leader of the opposition in the Legislative, Ortega, faced criminal investigations to be adjudicated by an unsympathetic Supreme Court. Alemán was being accused of drug-trafficking and illicit enrichment, while Ortega of sexual abuse (Díaz Rivillas 2009). Despite their political disagreements, they worked together in a political pact which resulted in a constitutional reform that increased the number of seats in the Supreme Court to 16, offering them the opportunity fill vacancies with their allies. The blue line decline in Figure 6 in the year 2000 tells this story. With the Supreme Court on their side, both obtained favorable judicial adjudications.

In 2007 Ortega won the presidency again and since then he has consolidated a stable and strong majority of Sandinistas Justices in the Supreme Court. In 2009 with no majority in the National Assembly to introduce changes to the Constitution, he relied on the Supreme Court to legally authorize his reelection. Justices reviewed the constitution and ruled that “that Article 147 was ‘not applicable’, as it disregarded the principle of equality before the law and was therefore guilty of violating human rights” (Peñalba 2012, 60).

5. Conclusions on the Constitutional Erosion of Democracy

The judiciary became the queen of chess after the transition to democracy: every executive wants to capture it so that it turns easier to win the game. As this work illustrates, elected anti-democrats understood that if they control the judiciary, they can extend legally their term in office and, with a veneer of legality, prosecute, circumvent or subordinate to their control the media, the opposition, the electoral commission and other institutions and actors of democracy. Democratic erosion crystalizes with the capture of the judiciary. With judicial referees in their pockets, false democrats can accomplish their dream: remain long periods unchecked in power.

In this article I highlight the role of courts in democratic erosion emphasizing the sequential pathway followed by elected anti-democrats in their quest to manipulate the courts and hoard democracy for themselves. I analyzed this argument with cases of Latin America. As shown, presidents firstly publicly attack judges on the basis of being corrupt, inefficient or a privileged elite, which decides not on judicial considerations but on class, ethnic, political or economic motivations. When these attacks do not dissuade judicial adverse rulings against the politics of the executive, then false democrats go ahead and weaken the courts through judicial purges or court-packing.

Using an anti-establishment discourse, populists and false democrats have solved the puzzle of concentrating power in the executive and looking fully democratic and legal by governing with the constitution and the courts. In the past decades, we have verified this tale in Hungary,

Poland or Turkey (Levitsky and Ziblatt 2018; Ginsburg and Huq 2018; Przeworski 2019) but also, as shown in this work, in Bolivia, Nicaragua, Ecuador, Venezuela and more recently Brazil and Mexico. From Latin America, we learned that presidents win their game when shattering the judicial power: after this move, they are free to advance legally their steps to erode liberal democracy. Democrats cannot ignore these moves if they are to protect democracy.

References

- Animal político. (2019) “Morena busca que amparos no puedan frenar obras que “beneficien a la comunidad”. Access: March 23 2020. <https://www.animalpolitico.com/2020/01/reforma-amparos-morena-obras-publicas/>
- Barr, R. T. (2017). *The Resurgence of Populism in Latin America*. Colorado: Lynne Rienner
- Bermeo, N. (2016). “On Democratic Backsliding”. *Journal of Democracy*. Volume 27, Number 1
- Carvalho, D., Chaib J. and Caram B. (2020). “Chamado de Bolsonaro para ato do dia 15 gera indignação nas cúpulas de STF e Congresso”. Folha de S.Paulo. Access: March 23 2020 <https://www1.folha.uol.com.br/poder/2020/03/chamado-de-bolsonaro-para-ato-do-dia-15-gera-indignacao-nas-cupulas-de-stf-e-congresso.shtml>
- Carvalho, E. (2009). “Judicialização da política no Brasil: controle de constitucionalidade e racionalidade política”. *Análise Social*. v. 44, p. 315-35
- Castagnola, A. and Pérez-Liñán, A. (2011). “Bolivia: The Rise (and Fall) of Judicial Review”. In Gretchen Helmke und Julio Ríos-Figueroa. *Courts in Latin America*. Cambridge: Cambridge University Press.
- Coppedge, Michael, John Gerring, Carl Henrik Knutsen, Staffan I. Lindberg, Jan Teorell, David Altman, Michael Bernhard, M. Steven Fish, Adam Glynn, Allen Hicken, Anna Luhmann, Kyle L. Marquardt, Kelly McMann, Pamela Paxton, Daniel Pemstein, Brigitte Seim, Rachel Sigman, Svend-Erik Skaaning, Jeffrey Staton, Steven Wilson, Agnes Cornell, Nazifa Alizada, Lisa Gastaldi, Haakon Gjerløw, Garry Hindle, Nina Ilchenko, Laura Maxwell, Valeriya Mechkova, Juraj Medzihorsky, Johannes von Römer, Aksel Sundström, Eitan Tzelgov, Yi-ting Wang, Tore Wig, and Daniel Ziblatt. 2020. ”V-Dem [Country–Year/Country–Date] Dataset v10”. Varieties of Democracy (V-Dem) Project. <https://doi.org/10.23696/vdemds20>.
- Coppedge, Michael, John Gerring, Carl Henrik Knutsen, Staffan I. Lindberg, Jan Teorell, David Altman, Michael Bernhard, M. Steven Fish, Adam Glynn, Allen Hicken, Anna Lührmann, Kyle L. Marquardt, Kelly McMann, Pamela Paxton, Daniel Pemstein, Brigitte Seim, Rachel Sigman, Svend-Erik Skaaning, Jeffrey Staton, Agnes Cornell, Lisa Gastaldi, Haakon Gjerløw, Valeriya Mechkova, Johannes von Römer, Aksel Sundtröm, Eitan Tzelgov, Luca Uberti, Yi-ting Wang, Tore Wig, and Daniel Ziblatt. 2020. "V-Dem Codebook v10" Varieties of Democracy (V-Dem) Project.
- Dahl, R. (1971). *Poliarchy. Participation and Opposition*. New Haven: Yale University Press.
- Daly, T. (2019). “Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro”. Paper prepared for the 14th International Human Rights Researchers’ Workshop: ‘Democratic Backsliding and Human Rights’, organised by the Law and Ethics of

Human Rights (LEHR) journal, 2-3 January 2019. Access: March 21 2020.

SSRN: <https://ssrn.com/abstract=3350098> or <http://dx.doi.org/10.2139/ssrn.3350098>

Davies, C. (2018). "Hostile Takeover: How Law and Justice Captured Poland's Courts". *Freedom House*. Access: February 25 2020 https://freedomhouse.org/sites/default/files/2020-02/poland%20brief%20final_0.pdf

Dicey, A. (1915). *Introduction to the Study of the Law in the Constitution*, Mcmillan.

DPLF. (2018). "Informe sobre el Estado de la Justicia en Bolivia". Access: March 12 2020. http://www.dplf.org/sites/default/files/informe_estado_de_la_justicia_2018_bol.pdf

Fitzzi, G., Mackert J., and Turner, B. S. (2019). *Populism and the Crisis of Democracy. Volume 1: Concepts and Theory*. New York: Routledge.

Excelsior. (2019). "Acusan magistrados y jueces intromisión contra el Poder Judicial". Excelsior. Accessed: March 01 2020 <https://www.excelsior.com.mx/nacional/acusan-magistrados-y-jueces-intromision-contra-el-poder-judicial/1283850>

Ginsburg, T. and Huq, A. (2018). *How To Save A Constitutional Democracy*. Chicago: University of Chicago Press.

Hamilton, A. (1788). "The Federalist No. 78. The Judiciary Department", in *The Federalist Papers*, Accessed: February 19 2020 https://avalon.law.yale.edu/18th_century/fed78.asp

Helmke, G. and Ríos-Figueroa. (2011). "Introduction". In Gretchen Helmke und Julio Ríos-Figueroa. *Courts in Latin America*. Cambridge: Cambridge University Press.

Howse, R. (2017). "Populism and Its Enemies". Workshop on Public Law and the New Populism, Jean Monnet Center, NYU Law School, 15-16 September 2017 3.

HRW. (2019). "Bolivia: Decenas de jueces destituidos de manera arbitraria". Human Rights Watch. Human Rights Watch. Access: March 10 2020 <https://www.hrw.org/es/news/2019/04/29/bolivia-decenas-de-jueces-destituidos-de-manera-arbitraria>

Latin News. (2006). "BOLIVIA: Rodríguez took money from US for missiles". *Weekly Report*. 26 August 2006.

Latin News. (2007a). "BOLIVIA: Morales harangues judiciary". *Weekly Report*. 04 January 2007.

Latin News. (2007b). "BOLIVIA: Morales clashes with judiciary". *Weekly Report*. 24 May 2007.

Landau, D. (2013). "Abusive Constitutionalism". *UC Davis Law Review*. Vol. 47: 189.

Levitsky, S. and Zibblat, D. (2018). *How Democracies Die*. NY: Crown Publishing Group

Linz, J. (2000). *Totalitarian and Authoritarian Regimes*. Colorado: Lynne Rienner Publishers.

Lührmann, A. and Staffan I. L. (2019). "A third wave of autocratization is here: what is new about it?", *Democratization*, 26:7, 1095-1113, DOI: 10.1080/13510347.2019.1582029.

- Lust, El. and David W. (2015). “Unwelcome Change: Understanding, Evaluating, and Extending Theories of Democratic Backsliding”. USAID.
- Montesquieu, C. (1748). *The Spirits of Laws*, Book XI, Chapter VI.
- Mori-Madeira, L. (2016). “Judicialização das políticas sociais”. In Rosa M. Castilhos Fernandes e Aline Hellmann (eds.). *Dicionário Crítico: Políticas de Assistência Social no Brasil*. Publisher: Cegov - Ed. Ufrgs.
- Mudde, C. (2004). “The Populist Zeitgeist”. *Government and Opposition*. Vol. 39. Issue 4. pp. 541-563
- Norris, P. (2017). "Is Western democracy backsliding? Diagnosing the risks". HKS Working Paper No. RWP17-012. pp. 14-15.
- Przeworski, A. (2019). *Crisis of Democracy*. Cambridge: Cambridge University Press.
- Pemstein, Daniel, Kyle L. Marquardt, Eitan Tzelgov, Yi-ting Wang, Juraj Medzihorsky, Joshua Krusell, Farhad Miri, and Johannes von Römer. 2020. “The V-Dem Measurement Model: Latent Variable Analysis for Cross-National and Cross-Temporal Expert-Coded Data”. V-Dem Working Paper No. 21. 5th edition. University of Gothenburg: Varieties of Democracy Institute.
- Raz, J. (1977). “The Rule of Law and its Virtues”. *The Law Quarterly Review*, vol. 93, pp. 195-211.
- Repucci, S. (2020). “A Leaderless Struggle for Democracy”. *Freedom House*. Access: February 25 2020 <https://freedomhouse.org/report/freedom-world/2020/leaderless-struggle-democracy>
- Revista Envío. (1991). “Nicaragua: UNO's Court-Packing Plan”. Access: March 18 2020 <https://www.envio.org.ni/articulo/2940>
- Ríos-Figueroa, J. (2011). “Institutions for Constitutional Justice in Latin America”, in Gretchen Helmke und Julio Ríos-Figueroa. *Courts in Latin America*. Cambridge: Cambridge University Press.
- Sadurski, W. (2019). *Poland's Constitutional Breakdown*. Oxford: Oxford University Press.
- Schedler, A. (2006). *Electoral Authoritarianism: The Dynamics of Unfree Competition*. Colorado: Lynne Rienner Publisher.
- Timm, T. (2019). “Brazil Supreme Court Minister Rules to Protect Press Freedom for Glenn Greenwald and The Intercept”. *The Intercept Brazil*. Access: March 20 2020. <https://theintercept.com/2019/08/08/brazil-supreme-court-glenn-greenwald/?comments=1>
- Turollo, R. (2019). “Atravimento de Bolsonaro não tem limites, diz Celso de Mello sobre vídeo das hienas”. *Fohla de S.Paulo*. Access: March 01 2020. <https://www1.folha.uol.com.br/poder/2019/10/atrevimento-de-bolsonaro-nao-tem-limites-diz-celso-de-mello-sobre-video-das-hienas.shtml>

Tushnet, M. (2019). "Court-Packing on the Table in the United States?". *Verfassungsblog. On Constitutional Matters*. Access: February 25 2020. <https://verfassungsblog.de/court-packing-on-the-table-in-the-united-states/>