To what extent do courts in Latin America protect individual rights and limit governments? This book answers these fundamental questions by bringing together today's leading scholars of judicial politics. Drawing on examples from Argentina, Brazil, Chile, Mexico, Colombia, Costa Rica, and Bolivia, the authors demonstrate that there is widespread variation in the performance of Latin America's constitutional courts. In accounting for this variation, the contributors push forward ongoing debates about what motivates judges; whether institutions, partisan politics, and public support shape interbranch relations; and the importance of judicial attitudes and legal culture. The authors deploy a range of methods, including qualitative case studies, paired country comparisons, statistical analysis, and game theory.

Gretchen Helmke is Associate Professor of Political Science at the University of Rochester. She received her Ph.D. from the University of Chicago in 2000. She has received fellowships from the Weatherhead Center for International and Area Studies at Harvard University, the Kellogg Institute for International Studies at the University of Notre Dame, and the Woodrow Wilson International Center for Scholars in Washington, D.C. She has published two books: *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (2005) and *Informal Institutions and Democracy: Lessons from Latin America* (coedited with Steven Levitsky; 2006). She has also published numerous articles in leading political science journals on comparative political institutions, the rule of law, and Latin American politics.

Julio Ríos-Figueroa is Assistant Professor in the Division of Political Studies at Centro de Investigación y Docencia Económicas in Mexico City. He received his Ph.D. from New York University (NYU) in 2006. He was a Hauser Research Scholar at the NYU School of Law during the academic year 2006–2007. He has published articles on the rule of law, Latin American politics, and the emergence and performance of judicial institutions in journals such as *Comparative Politics, Journal of Latin American Studies, Comparative Political Studies,* and *Latin American Politics and Society.* He is currently working on a book project on the judicial construction of due process rights in Latin America.

CAMBRIDGE
UNIVERSITY PRESS
www.cambridge.org

ISBN 978-1-107-00109-1

Cover artwork: José Clemente Orozco, *La lucha de los trabajadores* (The struggle of the workers). Photograph by Paola Pineda Córdova, Director of Artistic Programs at the Supreme Court of Mexico. Used by permission of the Supreme Court of Mexico.

Cover design: Wendy Bedenbaugh

Helmke / Ríos-Figueroa

COURTS IN LATIN AMERICA

CAMBRIDGE

COURTS IN LATIN AMERICA

Edited by Gretchen Helmke and Julio Ríos-Figueroa

CAMBRIDGE

Courts in Latin America

Edited by

GRETCHEN HELMKE
University of Rochester, Department of Political Science

JULIO RÍOS-FIGUEROA
Centro de Investigación y Docencia Económicas, División de Estudios Políticos

CAMBRIDGE
UNIVERSITY PRESS

Anchen 2011

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9781107001091

First published 2011

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Courts in Latin America / edited by Gretchen Helmke, Julio Ríos-Figueroa.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-107-00109-1 (hardback)
1. Constitutional courts – Latin America. 2. Courts of last resort – Latin America. 3. Judicial process – Latin America. 4. Civil rights – Latin America. I. Helmke, Gretchen, 1967–
II. Ríos Figueroa, Julio.
KG501.C68 2011
347.8'035–dc22 2010038589

ISBN 978-1-107-00109-1 Hardback

Contents

Contributors

Daniel M. Brinks, University of Texas at Austin

Andrea Castagnola, Facultad Latinoamericana de Ciencias Sociales, Mexico City

Rebecca Bill Chávez, U.S. Naval Academy, Annapolis, Maryland

Javier Couso, Universidad Diego Portales, Santiago

John A. Ferejohn, New York University, New York

Gretchen Helmke, University of Rochester, New York

Lisa Hilbink, University of Minnesota, Twin Cities

Diana Kapiszewski, University of California, Irvine

Beatriz Magaloni, Stanford University, Palo Alto, California

Eric Magar, Instituto Tecnológico Autónomo de México, Mexico City

Aníbal Pérez-Liñán, University of Pittsburgh, Pennsylvania

Julio Ríos-Figueroa, Centro de Investigación y Docencia Económicas, Mexico City

Juan Carlos Rodríguez-Raga, Universidad de los Andes, Bogotá

Arianna Sánchez, Curtis, Mallet-Prevost, Colt, and Mosle LLP, New York City

Druscilla Scribner, University of Wisconsin, Oshkosh

Jeffrey K. Staton, Emory University, Atlanta, Georgia

Barry R. Weingast, Stanford University, Palo Alto, California

Bruce M. Wilson, University of Central Florida, Orlando

10

Bolivia

The Rise (and Fall) of Judicial Review

Andrea Castagnola and Aníbal Pérez-Liñán

The Bolivian case illustrates the possibility of creating of an activist judiciary through institutional design, but it also illustrates the political limits of institutional experiments in the late twentieth century. The case is encouraging and humbling, an example of institutional transformation as well as one of historical persistence. In this chapter, we analyze the main institutions of the Bolivian judiciary from a historical perspective, emphasizing the decisive transformations of the last decade.

Although constitutional rules gave the Bolivian Supreme Court a potential role as a mediator in political conflicts and as a protector of individual rights, during the twentieth century, the supreme court failed to develop an activist profile. It was not until 1998, with the creation of the Bolivian Constitutional Tribunal, that a more assertive judiciary emerged. A new range of legal instruments were developed and tested. This experiment, however, did not last. In a growing context of political polarization, the constitutional tribunal was dismantled between 2006 and 2009.

In the first section of the chapter, we discuss the trajectory of the Bolivian Supreme Court, its constitutional powers, and its role in Bolivian affairs. An historical analysis of the court suggests that until 1995, Bolivia was evolving toward a decentralized model of judicial review, but justices had limited incentive to become activists or political arbiters. We document how the instability of judicial tenure became acute as a consequence of political turmoil between 1930 and 1982. The historical evidence also suggests that some of the informal practices observed at the beginning of the

We are indebted to Guadalupe Amusquivar Penaranda, Juan Pablo Ayala, José Luis Baptista Morales, Rosario Canedo, Néstor Castaneda Angarita, Javier Couso, Pilar Domingo, Alvaro Gálvez, Gretchen Helmke, Matthew Ingram, Elizabeth Iñiguez, Jorge Oblitas, Ramiro Orias, Julio Pemintel, Julio Ríos Figueroa, Jose Antonio Rivera Santivañez, Carlos Rocha, Eduardo Rodriguez Veltzé, Silvia Salame Farjat, José Luis Scotto, Jaime Soruco Paniagua, Jeffrey Staton, Matthew M. Taylor, and Neyer Zapata Vásquez for their valuable comments and support for this project. Our research was supported by NSF grant SES 0918886.

twenty-first century (in particular, the delay in filling open vacancies in high courts) were already exercised one hundred years ago.

As we show in the following section, the creation of the constitutional tribunal in 1998 inaugurated a centralized model of judicial review. The constitutional tribunal increasingly asserted its power until 2006, when it disintegrated under the threat of impeachment. Just as in the case of the supreme court, members of the tribunal were, in principle, appointed for ten years, but the average tenure in office in both cases was less than four years. In the third section, we discuss the demise of the brief Bolivian experiment with judicial review. We reconstruct the events that led to the unraveling of the model adopted in 1998. Our conclusions emphasize the theoretical implications of the Bolivian case: we close the chapter with a typology of informal practices used to manipulate the composition of high courts.

THE SUPREME COURT

Until the conformation of the Bolivian Constitutional Tribunal in 1998, the Bolivian Supreme Court formally exercised the power of judicial review. However, the court did not embrace an activist role for the protection of individual rights or an arbitration role for the resolution of intraelite disputes. Political turmoil throughout the twentieth century (marked by the demise of the Liberal era, the 1952 revolution, a period of military rule, and the return to democracy in 1982) created considerable uncertainty in judicial tenure. Judicial turnover undermined the capacity of justices to exercise judicial review as well as the ability of the overall judicial system to protect individual rights.

Judicial Review and the Protection of Rights

The power of judicial review was established for the first time in the 1861 constitution, and it was consolidated by the 1878 charter (Asbun 2003; Fernández Segado 2002; Rivera Santiváñez 1999).[1] The 1878 constitution empowered the supreme court to determine the constitutionality of laws, decrees, and other forms of regulations (Article 111, inc. 2). To some extent, this principle was inspired by the U.S. case, but its implementation presented some important differences. Rulings in Bolivia operated *inter partes* (i.e., affecting only the parties to the process), as in the classic diffuse model of judicial review (Montaño P. 1998). However, the Bolivian Supreme Court was the only body able to declare the unconstitutionality of legislation, as in a centralized model. Bolivian justices, operating in the continental tradition, were not bound to follow established precedent (Asbun 2003; Rivera Santiváñez

[1] Earlier constitutions (Bolivia had a total of ten in the nineteenth century) had established that the supreme court could assess the soundness (*inteligencia*) of the laws and present the case to the executive, who in turn could request congress to revise the legislation (Fernández Segado 2002; Rivera Santiváñez 1999).

1999). Because of these traits, some authors have argued that Bolivia originally adopted an atypical diffuse model of judicial review (Asbun 2003). Institutional design restricted judicial activism to the highest court, and moderated the potential impact of adversarial decisions both across space (through the *inter partes* principle) and over time (because of the absence of binding precedent).

The civil war of 1899 led to the downfall of the Conservative Party (including its supreme court justices) and to the ascent of Liberals to power. As a result of the war, which marked the emergence of the tin economy, the president and congress moved to La Paz, but the supreme court symbolically stayed in the capital city of Sucre (in the district of Chuquisaca). The Liberal era allowed for an expansion of the administrative capacity of the judiciary, including the construction of the judicial palace in La Paz in 1912–1913, the territorial reorganization of lower courts in 1914, and an expansion in the number of courts (Castro Rodríguez 1987).

The Bolivian model of judicial review progressively evolved toward a more decentralized pattern. The lower courts gained a more prominent role as the legal system incorporated the habeas corpus in 1931 and the writ of *amparo* in the 1967 constitution (Fernández Segado 1998, 2002; Rivera Santiváñez 2007).[2] Writs of *amparo* and habeas corpus were presented to the lower courts, but until the creation of the constitutional tribunal in the late 1990s, the supreme court was responsible for reviewing those decisions. Unfortunately, lower courts typically failed to comply with the requirement of holding a public hearing within forty-eight hours in response to writs of *amparo* and therefore failed to issue prompt decisions regarding the protection of individual rights (Loayza Torres 1999). The effectiveness of the writ of *amparo* was also undermined by the fact that by contrast to the habeas corpus, decisions of lower courts were not enforced until they were upheld by the supreme court, unless the petition or the ruling explicitly established that the *amparo* had immediate legal force.[3]

Reviews of habeas corpus and *amparo* decisions were stalled in the supreme court by the absence of a special chamber devoted to such matters. When the writ reached the supreme court, the General Attorney's Office took on average one year to assign the case to one of the chambers (civil or criminal) of the court. The chamber sometimes took an additional year to analyze the case (Loayza Torres 1999). A recent study revealed that between 1991 and 1998, the supreme court took on average one and a half years to review habeas corpus cases and one year and three months to review writs of *amparo* (Rivera Santiváñez 2007). Ironically, the real effect of the writ of *amparo* was opposite to the one intended by the constitution because individual rights were protected (when they were protected at all) not immediately but sometimes after several years.

[2] The 1975 Procedural Civil Code created legal instruments to challenge legislative decisions and taxes, but such writs were introduced directly to the supreme court (Articles 782–786).

[3] Interview with Jaime Soruco Paniagua, September 16, 2009.

By contrast to habeas corpus and *amparos*, writs of annulment and demands of unconstitutionality were presented directly to the supreme court and were analyzed at the plenum (Sala Plena). The supreme court also took several years to decide on such cases, producing a delay in the sentences. Between 1991 and 1998, the supreme court took on average two and a half years to decide on writs of annulment and three and a half years on actions of unconstitutionality (Rivera Santiváñez 2007). Delays were one important factor discouraging citizens from using those instruments, but the nature of the legal system mattered as well. Because supreme court decisions had effects *inter partes* and justices were not bound to follow established precedent, the court could decide differently on similar cases, producing confusion and frustration among citizens (Asbun 2003).

The nature of the judicial review process thus reflected the absence of an activist judiciary and the limits of the supreme court in Bolivia. The weakness of the court also undermined its capacity to arbitrate intraelite conflicts. As in the case of individual rights, the problem was not the absence of legal instruments to mediate elite conflicts but the lack of political leverage and judicial incentive to do so.

Mediation of Conflicts: The Judicial Model of Impeachment

A second institutional power that placed the supreme court as a potential mediator of political conflict was its role in the presidential impeachment process. Since independence, Bolivia had embraced a judicial model of impeachment in which congress issued (or authorized) accusations against the president and the supreme court ruled in the trial (Pérez Liñán 2007). The specifics of the procedure varied in different Bolivian charters, but the basic principle remained in place.[4] The 1967 constitution, for instance, required that congress issue accusations against the president, vice president, or ministers in a joint session by simple majority. A 1994 reform additionally required the vote of two-thirds of all congress to release the accusations, and the 2009 constitution required the vote of two-thirds of the members present at the joint session (Article 184). Irrespective of the details, the supreme court was always the final recipient of the legal case against the chief executive.

This constitutional function potentially gave the supreme court an important role as a mediator of executive-legislative conflicts. However, in a historical context in which powerful presidents were challenged by military interventions and armed civilian revolts rather than impeachments, this function gave the court little real leverage in the political process. Legislators rarely attempted to initiate impeachment charges. Sometimes they introduced accusations against former presidents who had

[4] The procedure for presidential impeachment was eliminated from the 1945, 1947, and 1961 constitutions (i.e., between 1945 and 1967). However, other high officials (including the appointed governors and the presidents of public universities) remained subject to this mechanism of accountability.

already fallen from power, but even in such cases, congress usually dismissed the accusations.[5]

Only two former presidents were subject to supreme court trials in the twentieth century. In 1986, a group of deputies and senators requested the impeachment of former president Luis García Meza under charges of human rights abuses, murder, and other crimes during his military regime (1980–1981). Congress authorized the charges, and the supreme court sentenced García Meza to thirty years in prison after a seven-year trial in April 1993. The former dictator was arrested in Brazil and extradited to Bolivia in 1995.

In November 2003, Deputy Evo Morales introduced a proposal to impeach former president Gonzalo Sánchez de Lozada (1993–1997 and 2002–2003) and fifteen of his ex-ministers. The main accusation involved the killing of at least sixty people in La Paz and El Alto when the military attempted to break popular barricades against the president in October 2003. Congress approved the charges in October 2004, and the case was introduced to the supreme court in February 2005. However, after his resignation in October 2003, Sánchez Lozada and most of his ministers had fled into exile, and the supreme court did not initiate the process (in the midst of political turmoil, the chief justice found himself serving as interim president in 2005). It was not until May 2009, under heavy pressure from the new Morales administration, that the supreme court initiated the hearings for the case. We discuss these pressures and the related dismissal of two chief justices later. The historical inability of congress and the court to impeach presidents (particularly those in office) consistently revealed the difficulties of legislators and judges in controlling the executive branch.

CAREER INCENTIVES FOR SUPREME COURT JUSTICES

The previous sections showed that the formal powers of the supreme court did not translate into an activist judiciary. A series of informal practices limited the incentives of Bolivian justices to develop activist or arbiter roles during the twentieth century. Even though the constitution fixed the size of the supreme court to prevent packing schemes, vacancies were often left unfilled in the absence of partisan agreements. Similarly, although the law provided for extended terms in office, justices stayed on the court for short periods. The court was reshuffled more than twenty times during the twentieth century. Unfilled vacancies, high judicial turnover, and reshuffles undermined the incentives of Bolivian justices to exercise their power autonomously.

[5] No president in office was subject to a supreme court trial during the twentieth century. To our knowledge, the only accusations against a sitting president were introduced against José M. Pando in 1903. Legislators also attempted to initiate accusations against former presidents Ismael Montes in 1917, Bautista Saavedra and Hernando Siles in 1931, Víctor Paz Estenssoro in 1956 and 1966, and Hugo Banzer in 1979. In all instances, congress failed to authorize the charges (Corte Suprema de Justicia 1993).

Court Packing versus Open Seats

Before 2009, Bolivian constitutions specified the number of sitting justices in the supreme court to minimize the risk of packing. During the twentieth century, the number of sitting justices expanded only twice: in 1938, from seven to ten, and in 1967, from ten to twelve.[6] This tradition ended in 2009, when the new constitution established that the number of justices would be determined by law (Article 181). This rule could undermine the independence of the judiciary because presidents with strong partisan powers would be capable of expanding (or contracting) the size of the court, thus altering its composition.

The fixed number of members was partly the result of a distinctive Bolivian tradition: territorial representation in the court. The 1839 constitution established that the court should be integrated with justices from the different departments (Castro Rodríguez 1987, 137). This rule was formally eliminated in 1861, but it remained as one of the unwritten guidelines for the selection of justices well into the late twentieth century.

Even though Bolivian law dictated the size of the supreme court, congress often failed to fill open vacancies. As an extreme case, President Mariano Melgarejo (1864–1871) was notorious for delaying the payment of judicial salaries, achieving in the end the resignation of all supreme court members except for the chief justice – who remained in office as the last standout for judicial independence (Castro Rodríguez 1987). Our analysis indicates that between 1900 and 2009, the court operated with an incomplete membership for about 53 percent of the time.[7] This problem was particularly acute at the beginning of the twentieth century (the court operated with four or five members until 1918) and toward the end of the century (the number of justices fluctuated after 1988).

After the transition to democracy in 1982, the absence of partisan majorities in congress hindered the timely appointment of new justices. Because legislative coalitions were necessary to fill vacancies in the supreme court, parties waited until several vacancies were open to bargain on the distribution of seats. The practice of allocating court seats among members of the legislative coalition was known as *cuoteo* (political quota making). As we discuss later in the chapter, this practice explains some of the problems in the period 2003–2009.

Tenure

In most Latin American countries, justices are appointed for fixed terms rather than for life. Bolivia is no exception. Between 1880 and 2009, justices were appointed for

[6] In December 1955, President Victor Paz created a Social Chamber with five additional members (Decree-Law 4281), but this initiative only lasted one year.

[7] We used secondary sources to reconstruct the composition of the Bolivian Supreme Court from 1900 to 2008 (Castro Rodríguez 1989; Unidad Bibliográfica del Supremo Tribunal de Justicia de Bolivia 2009).

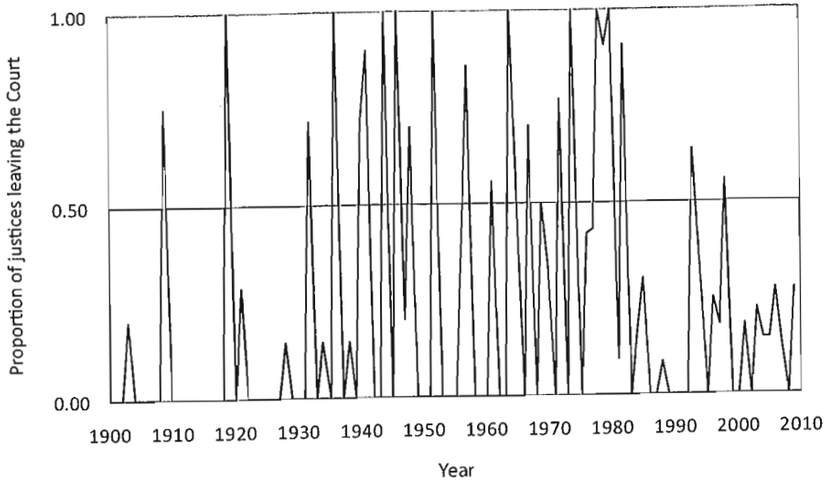

FIGURE 10.1. Reshuffles of the Bolivian Supreme Court, 1900–2009.

ten years, but the 2009 constitution shortened the term to six years. Initially, there were no term limits: between 1880 and 1995, immediate reelection was allowed. The 1994 constitutional reform established that reelection was possible only after ten years out of office. The 2009 charter banned reelection altogether.

Given the length of the constitutional terms before 2009, we would expect the average tenure in the court to last for ten or more years. However, our data tell a very different story. On the basis of historical records from the supreme court between 1900 and 2008, the average justice served in office for 3.6 years, and the median justice completed only 2 years on the bench. In other words, only 8 percent of all justices finished their full terms. The high instability of justices in office reveals that constitutional design was not the main explanation for judicial turnover; other factors drove the timing of replacements. In Bolivia, as in other Latin American countries, judicial tenure was often not respected (Chávez 2004; Helmke 2005; Iaryczower et al. 2002; Magaloni and Sanchez 2006; Pérez-Liñán and Castagnola 2009; Ríos-Figueroa 2007; Scribner 2004).

Figure 10.1 shows the proportion of sitting justices leaving the Bolivian Supreme Court in any given year. Between 1900 and 2009, the supreme court was reshuffled twenty-two times, an average of one reshuffle every five years.[8] The court was revamped in 1909, as a normal consequence of the constitutional design requiring nonstaggered renewal every ten years; in 1919 following the normal schedule, although its composition was partially altered in 1921 as a result of the Republican

[8] Operationally, we define as a reshuffle any situation in which 50% or more of the justices are replaced in the same year.

revolt of 1920; and in 1932 following the constitutional procedure, albeit with some delay because of the military coup in 1930.

The court was reshuffled in 1936, as a result of the coup that brought Colonel David Toro to power (who removed justices by decree); in 1940, following President Busch's suicide (1939); in 1941, after President Peñaranda took office; in 1944, after a coup was followed by a Constitutional Assembly that appointed new justices; in 1946, when mobs killed President Villarroel and a civilian junta selected new members[9]; and in 1948, after the election of President Hertzog marked the return to constitutional government (the new president claimed that court members were acting justices). The Bolivian Revolution ignited a new wave of reshuffles: in 1952, when the Movimiento Nacionalista Revolucionario (MNR) came to power and dismissed the court (Decree 3157); in 1957, when congressional elections in 1956 marked the end of the interim court; in 1961, when congress passed a surprising bill to "reorganize" the judiciary; and in 1964, when General Barrientos overthrew Paz Estenssoro and purged the court (via Decree 6971). During the military era, the court was reshuffled in 1967, after the adoption of the new constitution; in 1969, when General Ovando's coup replaced some justices; in 1972, following Banzer's coup in 1971; in 1974, after Banzer turned to stricter military rule; in 1978, when General Padilla Arancibia declared the need to create a "prestigious" judiciary; in 1979, as congress replaced the "prestigious" interim court; and in 1980, following a new coup by General Luis García Meza. The democratic transition brought reshuffles in 1982, with the return to democracy, and in 1993, when justices elected in 1982 finished their terms – this was followed by the impeachment of Justices Poppe and Oblitas in 1994.[10] Reshuffles were more frequent during 1930–1982, indicating that they were often related to broader patterns of political instability.

Appointment

In Bolivia, as in other Latin American countries, the executive does not formally participate in the appointment of supreme court justices. Between 1878 and 1995, the senate nominated *ternas* (lists of three candidates) for the bench, and the chamber of deputies selected, by an absolute majority of votes, a justice among them.[11] With the 1994 constitutional reform, the mechanism and the actors in the appointment process changed. The judicial council became responsible for nominating a list of candidates, while congress selected – in joint session and by two-thirds of the votes

[9] On November 27, 1947, congress reappointed eight of the ten justices previously appointed by interim president Tomás Monje Gutiérrez. Two justices, Oliva and Paredes, were not reappointed (Poder Judicial de Bolivia 2008).

[10] In 1990, the ruling coalition of Acción Democrática Nacional (ADN) and Movimiento de Izquierda Revolucionaria (MIR) also attempted to dismiss eight of twelve members from the supreme court, but this reshuffle was prevented by a political pact in congress (Rodrígez Veltzé 2001).

[11] Congress adopted rules to appoint justices with two-thirds of the votes after 1991 (Rodrígez Veltzé 2001, 190).

of all members – the new justices. The judicial council was formed by the chief justice and by four other members elected by congress (using the same procedure) for ten-year terms.[12] The constitution of 2009 preserved a central role for congress in the appointment process but adopted a significant innovation. The new charter has established that justices will be popularly elected. Congress is in charge of elaborating a list of candidates from different departments, and candidates are not allowed to campaign before the election (Article 182). In contrast to the procedure adopted in 1994, congress now controls the nomination but not the final selection of justices. No mechanism of direct election had been implemented in Latin America since Nicaragua and Honduras eliminated similar constitutional articles in the early twentieth century.

THE CONSTITUTIONAL TRIBUNAL

The system of diffuse judicial review ended between 1995 and 1998 with the creation of the Bolivian Constitutional Tribunal (TCB). The new concentrated form of judicial review introduced four significant changes. First, the TCB was endowed with strong powers to assess legislation, administrative acts, and interbranch conflicts (Law 1836).[13] Second, the most important decisions of the *magistrados* were not limited to the parties in the process, but they prevailed *erga omnes*. Third, judges were bound to follow precedent (Law 1836, Article 44). Fourth, the TCB had both preventive and corrective powers of judicial review,[14] whereas the supreme court had been previously unable to annul the laws that judges found to be unconstitutional (Asbun 2003).[15]

Even though the TCB was included in the 1995 constitution, it was not until 1998–1999 that it started to work. The design of the new institution was resisted by the supreme court but enthusiastically supported by Bolivian legal experts.[16] The initial proposal located the new tribunal outside the judicial branch (Law 1473,

[12] In the late twentieth century, several Latin American countries created judicial councils with the goal of depoliticizing the appointment of justices. El Salvador was the first Latin American country to incorporate a council as part of the appointment mechanism, but this experience lasted for a short period (from 1940 to 1944). Decades later, several countries adopted this institution as part of the normal procedure for the nomination of justices (Peru in 1979, Guatemala in 1985, Colombia in 1991, Paraguay in 1992, and Venezuela in 1999), and others reserved it for the nomination of lower judges.

[13] For a detailed analysis of the powers of the Bolivian Constitutional Tribunal (TCB), see Rivera Santiváñez (1999) and Fernández Segado (1998, 2002).

[14] In institutional terms, preventive and corrective powers are two forms of reactive powers. Preventive power allows the courts to preclude the approval of a law, decree, or resolution ex ante. Corrective power enables courts to reverse policy outcomes to the previous status quo after the new law, decree, or resolution has been approved.

[15] For a comparative analysis of constitutional adjudication in Latin America, see Navia and Ríos Figueroa (2005).

[16] Arguments against and in favor of the creation of the TCB can be found in the work of Fernández Segado (1998, 2002).

Article 121), but the supreme court strongly opposed the idea of transferring the power of judicial review to an independent body. According to Chief Justice Edgar Oblitas Fernández, judicial review was one of the basic functions of the supreme court, and taking it away would undermine the nature of the institution (Fernández Segado 1998). In a public document, the court asserted that the creation of the TCB would undermine the independence of the judiciary because judicial functions would be divided among two different bodies. According to Fernández Segado (1998, 2002), those reactions reflected the unwillingness of supreme court justices to resign their powers.[17] In the end, the TCB was created as an independent body within the judiciary (Law 1836), a design that some authors considered problematic because the most important feature of this institution presumably was its complete independence from other branches of government (Asbun 2003; Fernández Segado 1998; Rivera Santiváñez 1999).

Judicial Review and the Protection of Individual Rights

The creation of the TCB encouraged a surge of legal activity and a new profile for the judiciary.[18] Nineteen different legal instruments of constitutional adjudication allowed political elites and regular citizens to request the intervention of the TCB in different circumstances. For reasons of space, we do not discuss the specific instruments here (see Rivera Santiváñez 1999), but we classify them in Table 10.1 according to their type, jurisdiction, timing, access, and effects (see Chapter 1). Four of the nineteen instruments were designed to assess the law in abstract terms, whereas the rest addressed concrete cases. The TCB was the only court empowered to use twelve legal instruments, and it was mandated to revise the use of the remaining seven by the lower courts. Three instruments were strictly preventive (a priori), and the rest were corrective (a posteriori). Almost half of the instruments imposed some type of restriction on the claimants, and seven of them generated legal decisions valid for all citizens beyond the parties involved.

Thus, although the TCB had access to the whole range of instruments of constitutional adjudication identified by Ríos-Figueroa in Chapter 1, the distinctive instrument in the tribunal's menu was concrete, centralized, and a posteriori. Yet, given the limitations of access, a vast majority of the cases addressed by the tribunal involved the revision of decisions made by lower courts in a more decentralized way. The last column in Table 10.1 displays the distribution of cases introduced to the TCB. Between January 1999 and May 2009, the TCB received 19,812 cases and

[17] This strong opposition of supreme court justices to the creation of the TCB was also present during the first years of the TCB because there was a strong confrontation between the supreme court and the tribunal.

[18] Domingo (2006) has shown that the emergence of the TCB and the ombudsman strengthened the protection of individual rights, although the TCB did not openly embrace progressive or pro-poor judicial activism.

TABLE 10.1. *Instruments of constitutional adjudication in Bolivia: cases presented to the Bolivian Constitutional Tribunal, 1999–2009*

Instruments	Abstract	Centralized	A priori	Model	Restricted	*Erga omnes*	Percentage
Inquiries on the constitutionality of legislative bills	Yes	Yes	Yes	3	Yes	Yes	0.1
Inquiries on constitutionality for concrete cases	No	Yes	No[a]	1	Yes	No	0.2
Inquiries on the constitutionality of treaties	Yes	Yes	Yes	3	Yes	Yes	0.0
Inquiries on local constitutions (autonomic statutes)	Yes	Yes	Yes	3	Yes	Yes	0.0
Direct demands of unconstitutionality	Yes	Yes	No	4	Yes	Yes	1.3
Indirect demands of unconstitutionality	No	Yes	No	1	Yes[b]	Yes	7.1
Demands against taxes	No	Yes	No	1	No	No	0.5
Procedural demands against constitutional reforms	No	Yes	No	1	Yes	Yes	0.0
Conflicts of competence among powers	No	Yes	No	1	Yes	No	0.1
President's constitutional challenge to other powers	No	Yes	No	1	Yes	Yes	0.0
Writs of annulment	No	Yes	No	1	No	No	6.0
Demands against legislative resolutions	No	Yes	No	1	No	No	0.1
Reviews of habeas corpus	No	No[c]	No	2	No	No	26.0
Reviews of actions of release (since 2009)	No	No[c]	No	2	No	No	0.8
Reviews of *amparo*	No	No[c]	No	2	No	No	57.7
Reviews of habeas data	No	No[c]	No	2	No	No	0.1
Reviews of actions of enforcement	No	No[c]	No	2	No	No	0.0
Reviews of popular actions	No	No[c]	No	2	No	No	0.0
Reviews of actions to protect privacy	No	No[c]	No	2	No	No	0.0
TOTAL (n = 19,812)							100.0

Note: Column labeled "Model" refers to constitutional adjudication models presented in Chapter 1. "Percentage" indicates the percentage of all cases presented to the tribunal (whether accepted or rejected).

[a] Preemptive adjudication takes place after the norm is adopted but before it is applied to the concrete case.

[b] Lower courts inquire about specific cases.

[c] Automatic revision of all decisions made by lower courts.

Source: Data are from http://www.tribunalconstitucional.gov.bo (cases between January 1, 1999, and May 30, 2009) and Baldivieso Cuzmán (2007).

ruled in 15,801 (80%) of them. In spite of the potential ability of the tribunal to serve as a mediator in political conflicts, most of the cases presented to the body were reviews of *amparo* decisions (58%) and of habeas corpus decisions issued by lower courts (27%).[19]

The extended menu of constitutional adjudication undoubtedly encouraged citizens to turn to the TCB to protect their rights and political elites to turn to the TCB to mediate in their conflicts. Figure 10.2 compares the total number of norms (laws, decrees, and other regulations) declared unconstitutional by the supreme court in 1972–1998 and by the TCB in 1999–2009.[20] Until the creation of the TCB, the supreme court had rarely ruled against the executive or the legislature (if the legislature was open). Between 1972 and 1998, the court challenged the constitutionality of 35 norms, an average of 1.3 norms per year.[21] A brief surge in judicial activism took place during the transition to democracy, but judicial restraint prevailed after

[19] The habeas corpus was redefined in the 2009 constitution as an action of release (*acción de libertad*).

[20] Data for the supreme court were gathered from the summary of jurisprudence for the *Sala Plena* published in the annual reports, whereas figures for the TCB were compiled from the tribunal's Web site. Yearly series reported in the figure include norms that were declared totally and partially unconstitutional. If the same ruling declared more than one norm unconstitutional, the norms were counted separately. Therefore the total number of cases in which the judiciary challenged a norm is not necessarily the same as the number of norms declared unconstitutional.

[21] The figure only includes cases of unconstitutionality and not cases of inapplicability. Plaintiffs challenging the applicability of a norm in front of the supreme court did not question the constitutional standing of the rule but rather the applicability of the norm to their particular cases.

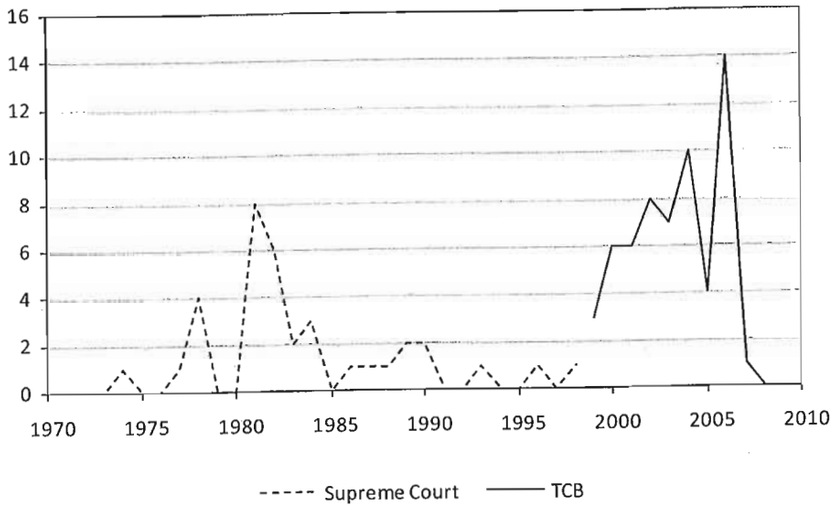

FIGURE 10.2. Total Number of Norms Declared Unconstitutional, 1972–2009. *Source:* Authors' elaboration based on the annual report of *Labores judiciales* (Sucre: Corte Suprema de Justicia) for 1972–1998 and http://www.tribunalconstitucional.gov.bo for 1999–2009.

1984.[22] By contrast, the creation of an independent constitutional tribunal effectively meant the rise of judicial review in Bolivia. Before it was dismantled in 2008, the TCB declared fifty-nine norms unconstitutional, an average of six and a half norms per year.

The evidence reveals that the tepid activism of the supreme court focused on executive decisions (decrees and ministerial resolutions) even after 1982, while the TCB inaugurated the practice of challenging legislative decisions as well. Figure 10.3 reports the types of norms declared unconstitutional by each institution on a yearly basis. The supreme court challenged executive decrees and resolutions in 74 percent of the cases and rarely laws (9%) and other regulations (17%). Most decisions were oriented toward protecting property rights in cases of land expropriation. Most of the TCB's decisions also challenged executive decrees and resolutions (56%) as well as laws (39%). On average, the TCB ruled against three decrees or resolutions and two laws per year.

The judicial assertiveness of the tribunal expanded progressively: in 1999, the tribunal declared three norms unconstitutional (two specific articles in the laws

[22] In 1981, the supreme court declared eight norms unconstitutional right before the fall of the García Meza dictatorship in August; in 1982, the court ruled against six norms before the military left power in October. Although these outcomes may indicate some form of strategic defection against the rulers (Helmke 2005), the evidence is not conclusive. Most decisions during this period involved cases of expropriation in which the court ruled consistently.

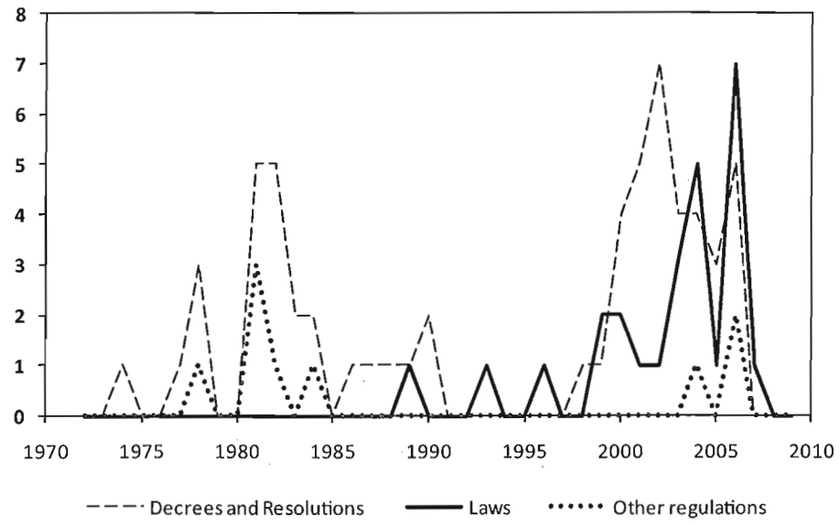

FIGURE 10.3. Types of Norms Declared Unconstitutional, 1972–2009. *Note:* Decree-laws were counted under "Decrees and resolutions." *Source:* Authors' elaboration based on the *Labores judiciales* (Sucre: Corte Suprema de Justicia) for 1972–1998 and http://www.tribunalconstitucional.gov.bo for 1999–2009.

of telecommunications and judicial organization and a resolution issued by the governor of La Paz). In 2006, the tribunal declared unconstitutional segments of seven laws, five executive orders, and two administrative regulations. An analysis of the decisions of the tribunal, until its collapse in 2008, reveals that on many occasions, the tribunal was willing to limit the power of other political actors and guarantee the rule of law. For example, in 2005, the tribunal ruled four times in favor of political rights – regarding the redistribution of seats in congress, the election of governors, national elections, and the suffrage of Bolivians abroad.[23] When addressing the protection of substantive rights (*derechos fundamentales*), the tribunal also ruled in favor of the rights to life, dignity, and work, among others (Tribunal Constitucional de Bolivia 2009).[24] However, a study conducted at the Universidad Mayor de San Simón concluded that in spite of its growing activism, the tribunal tended to upheld the neoliberal policies adopted after 1985.[25]

[23] Decisions SC 0066/2005, SC 0075/2005, SC 0076/2005, and SC 1392/2005-R (Tribunal Constitucional de Bolivia 2005).

[24] Decisions SC 0411/2000-R, SC 0687/2000-R, SC 0026/2003-R (life); SC 0338/2003-R, SC 0923/2002-R, SC 0338/2003-R, SC 0686/2004-R, SC 0511/2003-R, SC 0338/2003-R (dignity); and SC 1132/2000-R, 0203/2005-R, SC 1132/2000-R, 0888/2003-R, SC 0019/2003, 0426/2003-R, SC 0930/2004-R, 0203/2005-R, 013/2005-R, 0465/2001-R (work).

[25] Neyer Zapata Vásquez, personal communication, July 2009.

As noted in Table 10.1, most of the daily activity of the TCB concentrated on mandatory reviews of *amparo* and habeas corpus cases processed by lower courts. The activity of the tribunal increased from 475 decisions (262 of them reviews of *amparos*) in 1999 to 2,357 decisions (1,546 of them *amparos*) in 2004.[26] This surge in workload prompted justices to adopt more restrictive criteria to limit the number of *amparo* cases. For instance, in 2000, the TCB dictated that all *amparos* should be introduced within six months of the event that justified the claim. In 2003, the body offered a stricter interpretation of the conditions under which an *amparo* was acceptable on the grounds that all other administrative and judicial venues to address the grievance had been exhausted. In 2005, the TCB empowered lower courts to dismiss cases in limine on procedural grounds, without assessing the substance of the case, and placed the review of such rulings in the hands of an admissions committee rather than the full tribunal (Zapata Vásquez 2009). As a result of these measures, the number of cases handled by the tribunal declined after 2004. However, the reasons driving the further decline in the number of TCB rulings were not related to a decline in the inflow of new cases but rather to the inability of the tribunal to make any major decisions after 2006. By 2008, the TCB was virtually paralyzed.

Career Incentives

The tribunal created in 1995 had five members (magistrates) selected by two-thirds of the votes of all members present in a joint session of congress. Magistrates were appointed for ten years without the possibility of immediate reelection. However, our historical data reveal that the average tenure in the TCB was just 3.6 years. In fact, no justice completed a full decade in office (the longest-serving justice was Elizabeth Iñiguez de Salinas during 1998–2007). This finding indicates a duration pattern similar to the one observed in the supreme court. As in the case of the court, formal rules cannot explain why justices step off the bench. Evidently, other factors have influenced the timing of exits.

Even though the stability of the magistrates was similar to the stability documented for justices in the supreme court, until 2009, the TCB had a system of *suplentes* (alternate justices) who covered open vacancies and allowed the TCB to maintain its quorum (Law 1836, Article 8, and Law 2087, Article 22).[27] In contrast to the supreme court, which appointed its own surrogates every year, the tribunal's *suplentes* were appointed by congress for ten-year terms. They joined the tribunal (and thus moved to Sucre) as soon as they were appointed, and therefore they were readily available to cover vacancies without much delay. The 2009 constitution unified the rules about alternates for the supreme court and for the new constitutional tribunal, but the consequences of this change for the formation of quorums in the tribunal are hard to anticipate.

[26] Figures for 1999 do not include cases initiated before that year. The TCB decided not to hear previous cases, and cases pending by 1999 were decided by the supreme court.

[27] *Suplentes* were appointed following the same procedure and for the same length of tenure as the principals.

The 2009 constitution modified other features of the tribunal as well. The new plurinational constitutional tribunal will be formed with magistrates recruited from the ordinary ranks of the judiciary (*justicia ordinaria*) and with representatives of the indigenous justice system (*justicia indigena campesina*) (Article 197). The charter does not establish the number of sitting magistrates, and members of the tribunal will be democratically elected for a six-year term without reelection (Articles 197, 198, and 200). Candidates for the post can be nominated by civil society organizations and indigenous movements, but congress is in charge of elaborating a final list of candidates (approved with two-thirds of the votes in a joint session) to be submitted to the electorate. Table 10.2 compares the size, term length, and appointment procedures for the tribunal and the supreme court in different historical periods.

THE DEMISE OF JUDICIAL REVIEW

The inauguration of the constitutional tribunal in 1999 allowed for emergence of a more activist judiciary and for the expansion of legal instruments intended to protect citizen rights. But to what extent were Bolivian citizens confident that the judiciary would protect *them*? Unfortunately, not much. Figure 10.4 compares the average level of public trust in the supreme court and the constitutional tribunal in each judicial district (department), using data from Latin American Public Opinion Project's (LAPOP) 2004 public opinion survey (Ames et al. 2004). The study interviewed 3,073 citizens, who were asked to rank, on a scale from 1 to 7, their level of trust in the two bodies (we rescaled the items to range between 0 and 100). The evidence suggests that five years after the TCB's inauguration, and in spite of the judicial reforms of the 1990s, confidence in the judiciary remained quite limited (Domingo 2006). Support for high courts was not abysmally low, but it lay below the midpoint in the scale in a vast majority of districts. The TCB did not perform substantially better than the supreme court in terms of public image. Moreover, approval was relatively low in the most populated districts (La Paz, Santa Cruz, and Cochabamba).

The lack of public support for the judiciary creates strategic conditions that facilitate political attacks against the high courts (see Chapter 11). In Bolivia, the combination of weak public support for the judiciary, fledgling activism on the part of the constitutional tribunal, and legislative deadlocks preventing the appointment of justices produced an explosive mix that led to the rapid downfall of the new model of judicial review less than a decade after its inauguration. In just five years, the constitutional tribunal lost all its members.

As in the twentieth century, a new cycle of political turmoil was critical to undermining the judiciary. In September 2003, social protests erupted when President

TABLE 10.2. *Constitutional design of the Bolivian High Courts, 1900–2009*

	Supreme Court			Constitutional tribunal		
Constitution	Members	Term	Appointment	Members	Term	Appointment
1878 (1880)	Seven	Ten years, reelection allowed	Nominated by the senate; appointed by deputies			
1938	Ten	Ten years, reelection allowed	Nominated by the senate; appointed by deputies			
1945	Ten	Ten years, reelection allowed	Nominated by the senate; appointed by deputies			
1947	Ten	Ten years, reelection allowed	Nominated by the senate; appointed by deputies			
1961	Ten	Ten years, reelection allowed	Nominated by the senate; appointed by deputies			
1967	Twelve	Ten years, reelection allowed	Nominated by the senate; appointed by deputies			
1995	Twelve	Ten years, reelection allowed after 1 term	Nominated by Judicial Council; appointed by congress (joint session, with 2/3 of all members)	Five	Ten years, reelection allowed after 1 term	Appointed by congress (joint session, with two-thirds of members present)[a]
2009	Determined by law	Six years without reelection	Popular election; candidates selected by congress (two-thirds of members present)	Determined by law	Six years without reelection	Popular election; candidates nominated by civil society, approved by congress (two-thirds of members present)

[a] Law 1836 (1998) established that the Ministry of Justice, the law schools from public and private universities, and the bar associations (*colegios de abogados*) could submit nominations to congress (Article 14). It also required congress to appoint five alternate justices to the constitutional tribunal to replace the principals in case of absence.

FIGURE 10.4. Public Trust in the Supreme Court and the Constitutional Tribunal, by Department (2004). *Note:* Bars indicate 95% confidence intervals for the district mean. *Source:* Latin American Public Opinion Survey.

Gonzalo Sánchez de Lozada announced a plan to export natural gas through Chile. Roadblocks set by demonstrators created food and gasoline shortages in La Paz, and by early October, the press had reported that 82 percent of the population disapproved of the president's policies (Seminario 2003). An attempt by the government to break the roadblocks produced several deaths, accelerating the downfall of the administration. When Vice President Carlos Mesa announced his opposition to the president on national television, chances of a political recovery vanished. Sánchez de Lozada resigned from office on October 17, and Mesa took over. However, President Mesa confronted strong demonstrations demanding the renationalization of the gas industry, and he presented his resignation in June 2005. The ongoing popular mobilization also forced the resignation of the speakers of the house and senate. According to the constitution, the next in the line of succession was the head of the supreme court. On June 6, 2005, Chief Justice Eduardo Rodríguez Veltzé took office as a caretaker.

THE BATTLE FOR THE SUPREME COURT

In December 2005, Evo Morales, the candidate of the Movement toward Socialism (MAS), won the presidential election, becoming the first Aymara president of Bolivia. Morales's inauguration opened an era of great public expectation. It also triggered a struggle for power between the president, who sought to impose a hegemonic project, and the traditional parties and elites, who resisted such transformations. The struggle, initially centered on the adoption of a new constitution (Lehoucq 2008), led to growing polarization, the displacement of moderate politicians, and the radicalization of local opposition leaders in Santa Cruz, Beni, and Pando. In this context, judicial institutions became natural targets of political attacks.

As soon as Morales took office, justices in the supreme court and the constitutional tribunal began to depart. Chief Justice Rodríguez Veltzé was charged with treason because the military had decommissioned thirty-one Chinese surface-to-air missiles without his knowledge and turned them over to the United States in October 2005, while he was interim president. The accusations undermined the chief justice's already difficult position within the court. In November 2005, when Rodríguez Veltzé was about to finish his tenure as interim president, several members of the supreme court questioned his return to the court because the law regulating the organization of the judiciary established (Article 6) that no judge could serve in multiple positions. The justices formally asked the constitutional tribunal about the case, and the TCB ruled in favor of Rodríguez Veltzé (0001/2006). Nevertheless, the dissatisfaction of several justices with the decision of the tribunal affected the functioning of the court, and this contributed to Rodríguez Veltzé's resignation in February 2006.[28] After his departure, congressional accusations against the former chief justice simply stagnated. Three years later, John Carey (2009, 354) noted that "the Bolivian government's attack stalled, but Rodríguez is now sufficiently marginalized that Morales has little to gain by attempting to finish him off."

The following month, in March 2006, Justice Villafuerte left the court, presumably because of the poor health of his wife. In April, Justice Rocha Orozco resigned in response to a reduction of 32 percent in the salaries of justices,[29] and in May, Justice Ruiz Pérez stepped off as a result of health problems. A year later, in May 2007, Justice Gonzalez Osio resigned in response to political harassment, when President Morales declared that the judiciary was the most corrupt branch of government. By then, the supreme court had seven (out of twelve) members. In July, a new congressional coalition appointed four new justices, leaving one vacancy open.

[28] Interviews with Eduardo Rodríguez Veltzé and Carlos Rocha Orozco, September 8–9, 2009.

[29] Early in his term, President Morales issued Decree 28609, by which he reduced his salary and established that no public official's salary could exceed his. The popular measure resulted in a reduction of the salary of justices and *magistrados*.

The appointment of new justices was not enough to secure a fully compliant court. Starting in 2007, the government initiated several impeachment processes against members of the supreme court in retaliation for rulings that were perceived as shielding the opposition in controversial criminal cases. The accusations often lacked substance, but they were effective in curbing judicial independence. In 2007, the government requested the impeachment of Justices Rosario Canedo and Beatriz Sandoval (from the criminal chamber) for wrongdoing in the case of Luis Alberto Valle, governor of La Paz during the Banzer administration. The government sought the preventive arrest of Valle, accused of misconduct during his time in office (1996–98), but the two justices argued that the law did not justify such a measure. In response, the chamber of deputies, controlled by the MAS, approved the impeachment of Justice Canedo – Justice Sandoval was spared because she apologized for her decision during the public hearings. Canedo was suspended from office for three months, until the senate – where MAS was in the minority – declared her not guilty.[30]

In March 2008, Justices Ampuero García, Araya Gutiérrez, and Sandoval Parada finished their terms, leaving the court with a total of four open vacancies. Congress failed to appoint new members in the following months, and the seats remained open because the new constitution approved in 2009 established that justices had to be popularly elected. However, in contrast to the constitutional tribunal, the plenum of the supreme court was able to appoint its own stand-in justices (*conjueces*) for one-year terms (Law of Judicial Organization, Articles 55 and 80).

As institutional venues to challenge the government weakened, moderate politicians lost their ability to bargain with the administration and the opposition radicalized, worsening the political climate. In September 2008, nineteen people were killed when a group of supporters of Evo Morales were ambushed in the northern department of Pando. Charged with being the mastermind of the attack, the governor of Pando, Leopoldo Fernández, was removed from office by the national government and transferred to La Paz to face trial. The district attorney of La Paz filed a criminal case in his district, bypassing an impeachment trial against the governor. The defendant's lawyers complained to the supreme court that this involved a violation of due process and sought to disqualify the criminal court in La Paz. Ruling against the local district attorney, Justices Morales Baptista and Irusta, from the criminal chamber, ordered the court in La Paz to transfer the case to the Bolivian attorney general. The following day, the government requested the impeachment of both justices and their recusation from the case. Irusta accepted his recusation, but Morales Baptista resisted it. In response, the chamber of deputies

[30] According to the 1967 constitution (reformed in 1994), the impeachment of supreme court and Constitutional Tribunal members was initiated by the Chamber of Deputies and decided by the senate with the vote of two-thirds of the members present (Article 66).

initiated proceedings toward his impeachment, and Morales Baptista was excluded from the case. At the time of this writing, the impeachment of the justice was on hold in the lower house, and the former governor remained in jail, waiting for a trial.

In May 2009, the chamber of deputies initiated an impeachment proceeding against Chief Justice Eddy Fernández, charged with delaying the trial of former president Sánchez de Lozada. His suspension from office left the court with only seven principal justices (and therefore with a bare quorum of seven out of twelve). The court initiated the trial against Sánchez de Lozada and his former cabinet within a few days. The judicial council (by then reduced to only one member) decided in August that Justice Fernández was not allowed to receive his salary, adding further pressures for his resignation. When the impeachment reached the senate, Fernández challenged twenty-one (out of the twenty-two) senators because of lack of impartiality. After an impasse and intense debates, the alternate senators took charge, and the trial was reactivated. By the time the administration gained control of the supreme court in February 2010, the impeachment had not been resolved.

A renewed attack on the court occurred in August 2009 as a result of another criminal case. In April, a bomb exploded in the house of the Archbishop of Santa Cruz, and in the following days, five persons were found dead in a nearby hotel. The government concluded that the deaths and the terrorist attack were part of a separatist plot concocted by opposition leaders in Santa Cruz. The district attorney from Santa Cruz initiated an investigation, but national officers requested the district attorney from La Paz to initiate a parallel inquiry on the case. When a court in La Paz asked the supreme court to solve the competence conflict, justices ruled in favor of Santa Cruz because the case had originated in that district. The government condemned the decision and requested the impeachment of seven justices (three principals and four surrogates) in August. In February 2010, the charges were still pending in congress.

After the suspension of Chief Justice Fernández in May 2009, Justice Rosario Canedo became the acting chief justice until November, when she was also suspended as a result of impeachment. Justice Canedo was accused of deliberate neglect of duty in the bankruptcy case of Banco Sur in 1994. (According to her accusers, Canedo had ruled in favor of the bank's shareholders rather than the state and the customers.) In mid-November, the chamber of deputies approved the impeachment process with sixty-six votes out of seventy-seven, and Canedo was suspended. Canedo began a hunger strike against the violation of due process and the lack of judicial independence, hoping to get attention from the international community. Her hunger strike ended dramatically seven days later, when she collapsed in the senate during the public hearings. Meanwhile, and because of her suspension, the supreme court lost its quorum (only six principal justices out of twelve were left), and one of the civil chambers was closed down. As of early 2010, the impeachment trial was still open.

DISMANTLING THE CONSTITUTIONAL TRIBUNAL

In the midst of the political turmoil, the constitutional tribunal also became a target of political pressures, but the presence of stable *suplentes* (alternate justices appointed by congress for ten-year terms) made the TCB distinctive. The design of the constitutional tribunal, established by law in 1998, determined that congress would appoint five alternates to fill open vacancies in the TCB until congress selected the new principals. In this way, the law ensured that the tribunal would always have a reservoir of justices to operate with five members.

Magistrates Baldivieso and Roca Aguilera left the constitutional tribunal for personal reasons in January and April 2005, respectively. In January 2006, Magistrate Rivera Santiváñez also resigned, tired of public criticism of his positions. Congress, however, was reluctant to fill the vacancies. As the MAS sought to reassert its majority and the debates on the constitutional reform came to a standstill, the new minority in congress (represented by the opposition party Podemos and by the remnants of the Nationalist Revolutionary Movement) had little incentive to cooperate in the appointment of new TCB magistrates. The alternates, appointed between 1998 and 2003, represented the preferences of the opposition better than any candidates who could be elected as a result of a negotiation with MAS.

The first major clash with the constitutional tribunal took place in March 2006, two months after President Morales took office. In February, in response to a strike of the national airline Lloyd Aéreo Boliviano, President Morales ordered a public intervention of the company, which had been partially privatized in 1996. When the constitutional tribunal admitted the writ of annulment introduced by the company, President Morales claimed that the magistrates had received bribes. The members of the tribunal condemned the allegations, and Magistrate Salame Farjat threatened to introduce a demand against President Morales at the Inter-American Court of Human Rights. Morales's chief of staff (*ministro de presidencia*) ultimately apologized for the accusations, and the incident was closed. However, Magistrate Durán Ribera resigned in March, and Magistrate Tredinnick Abasto quit the tribunal in November when he was appointed ambassador to Brazil. By the end of 2006, the constitutional tribunal operated with two principals (Iñiguez de Salinas and Rojas Alvarez) and three alternates (Arias Romano, Salame Farjat, and Raña Arana).

New tensions emerged in April 2007, when approximately two thousand workers from the Posokoni Mine demonstrated in front of the tribunal. The workers wanted the TCB to reject a demand of unconstitutionality against a presidential decree that cancelled previous exploitation licenses for the mine in favor of the state-owned company (COMIBOL). To support their case, the demonstrators set off bombs in front of the TCB building.

In the meantime, resignations in the supreme court had accumulated. By December 2006, the court was operating with only eight members, and congress appeared incapable of appointing new justices (an agreement was not reached until July

2007). Taking advantage of the congressional recess, President Morales signed a decree to fill the four vacancies in the court with interim members (Decree 28993). Not surprisingly, legislators challenged the executive order in front of the TCB.[31] The tribunal ruled on the case in May 2007. Four of the five magistrates concluded that the decree was constitutional, even though interim appointments were limited to ninety days (SC 0018/2007). But because the three-month period had already elapsed, the interim justices had to go. Magistrate Salame Farjat voted with the minority, claiming that the decree was just unconstitutional. Within two days, President Morales asked the tribunal to reconsider the strict ninety-day limit for his appointees, but the tribunal dismissed the plea. In response, President Morales asked congress to initiate impeachment proceedings against the magistrates.[32]

The impeachment process against the magistrates extended from May to October 2007. The charge against the TCB divided the professional associations and brought congress back to the forefront of the conflict. Government officials denounced corruption and politicization in the judiciary and requested the resignation of all members of the supreme court and the constitutional tribunal. In October, the senate finally acquitted the magistrates, and they were restored to office, but the government soon issued new accusations. Shortly after, Justices Elizabeth Iñiguez de Salinas and Martha Rojas Alvarez (the last two principals in office) resigned from the tribunal, denouncing political persecution, public defamation, and the lack of independence of the judiciary (Tribunal Constitucional de Bolivia 2008). In December, Justice Wálter Raña Arana resigned after he received physical threats. His departure deprived the TCB of the majority required to make decisions. By the time the tribunal lost its quorum, the Constitutional Assembly was already working on the constitutional reform without an institution that could control the legality of the process.[33]

By the end of 2007, the constitutional tribunal had only two alternate justices in office: Silvia Salame Farjat and Artemio Arias Romano. In March 2008, Arias Romano resigned in response to the manipulation of the judiciary. Alone in the tribunal, Salame Farjat found a way to preserve the institutional role of the TCB. Even though the tribunal was unable to issue rulings because of the lack of a quorum, the magistrate was still able to sign administrative decrees. Salame employed TCB decrees as public reminders of relevant jurisprudence, guiding the decisions of lower judges toward precedent set by the tribunal on similar cases. In her most

[31] A similar attempt by President Carlos Mesa in 2004 (Decree 27650) had been rejected by the TCB because congress was not in full recess at the time.

[32] Initially, Magistrate Salame Farjat was spared because she had not participated in the decision. The government called her to testify against her colleagues, but the magistrate explained that she had not participated in the second ruling because of her dissenting opinion in the case. In her view, Decree 28993 was simply unconstitutional. The following day, she was also accused and subject to an impeachment process.

[33] At the Constitutional Assembly, members of the Movement toward Socialism party then proposed the elimination of the Constitutional Tribunal (Tribunal Constitucional de Bolivia 2008).

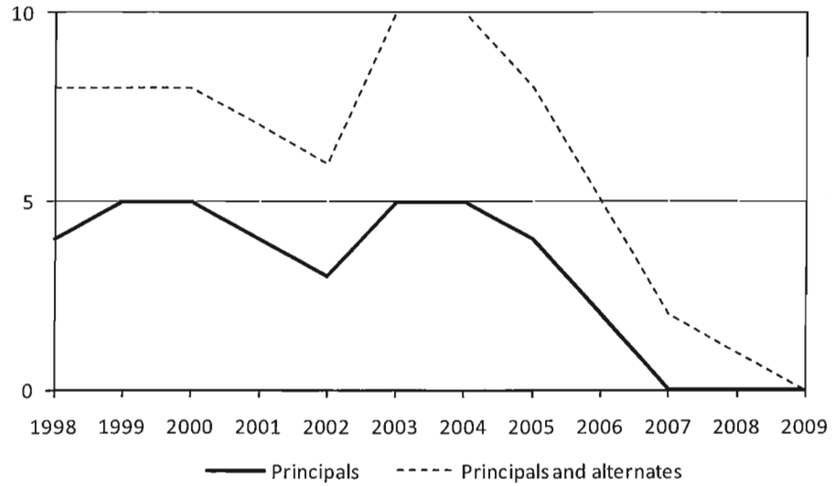

FIGURE 10.5. Number of Justices Serving on the Constitutional Tribunal, 1998–2009.

controversial decree, issued in July 2008, Salame Farjat indicated that the recall election for President Morales and eight governors scheduled for August 10 should be cancelled. The National Electoral Court did not enforce her opinion (Morales was confirmed in office with 67% of the vote), and the government soon initiated impeachment proceedings. Salame Farjat finally resigned in late May 2009, after denouncing an agreement between the government and the judicial council (by then also operating with just one member) to cut the tribunal's budget. She noted at the press conference that more than four thousand cases waited for a decision.

Figure 10.5 displays the number of justices serving on the constitutional tribunal on December 31 of each year during the period 1998–2008. The solid line indicates the number of principals (*titulares*), whereas the broken line includes the alternates (*suplentes*). The figure suggests that the political mechanism employed to deactivate the TCB was very different from the one historically employed to neutralize the supreme court during the twentieth century. The tribunal was never reshuffled – it was simply dismantled. Because the congressional opposition blocked the appointment of new members and because the ruling party wanted to minimize the number of veto players during the process of constitutional change, the government simply induced the exit of incumbent magistrates until the TCB became inoperative.

By early 2010, the constitutional tribunal and the judicial council were paralyzed because of a lack of members. The supreme court operated with a majority of alternate justices, precluding critical decisions. It was clear that the popular election of justices ordered by the 2009 constitution would take several months to be implemented. After his party won the general election in December 2009, capturing 68 percent of the seats in the chamber of deputies and 72 percent in the senate,

President Morales introduced a congressional bill to appoint interim justices. The legal profession questioned the constitutionality of the plan, and for the first time since the transition to democracy, no representative of the executive branch was invited to inaugurate the judicial year in Sucre. On February 12, 2010, congress approved the law, authorizing President Morales to appoint five interim members of the supreme court, ten members of the constitutional tribunal (including the five alternates), and three members of the judicial council. Congress also set the date for the first popular election of high courts for December 2010.

BEYOND PACKING: THREE PATHS TO JUDICIAL SUBMISSION

> "Notwithstanding repeated attempts to change the constitution there still appears to be a lack of genuine will on the part of elected politicians to establish a strong, independent judiciary," wrote one justice presciently already in 2001. "The return to democracy appears to have increased the desire of political parties to control the judiciary, rather than respect its autonomy."
>
> – Rodrígez Veltzé (2001, 179)

The rise and fall of judicial review in Bolivia suggest that building a strong judiciary is a difficult task fraught with complex institutional traps. The constitutional tribunal progressively asserted its authority to mediate conflicts among elites and to protect individual rights, but the diffuse public support that could have protected high courts from political attack was for the most part missing. The combination of institutional strength (its potential to mediate conflicts among elites) and political weakness (the lack of active public support) ultimately sealed the fate of the first constitutional tribunal. When the struggle for political hegemony became critical, the government had both the incentive and the capacity to dismantle the TCB.

The unusual way in which the tribunal was neutralized also indicates that we need a subtler typology to represent the whole range of informal institutional practices that work to alter the composition of supreme courts and constitutional tribunals. At least two variables should be considered to understand the political crafting of high courts: the ability of politicians (in particular, the president) to force the resignation of incumbent justices and the capacity of politicians (president and congress) to appoint new members to the courts. The first variable reflects the informal power of political leaders to induce the exit of justices through moral suasion, political bargaining, collateral payoffs, or mere coercion. The second variable reflects the capacity of political institutions to produce new appointments – which can be delayed or blocked by the lack of political incentive to select candidates from the available pool of jurists or (more often) by the presence of multiple veto players with inconsistent preferences participating in the appointment process. Extraordinary situations, such as coups, revolutions, or strong supermajorities in congress, allow incumbent presidents to enjoy both powers. But in normal contexts, when institutional constraints matter, presidents may be lucky to enjoy any of the two prerogatives over the high courts.

Those conditions create three possible strategies for politicians seeking to reshape the courts:

1. The incidence of the first condition alone (i.e., the ability to induce resignations without appointments) produces the dismantling of the courts. This strategy makes the courts inoperative, even if the distribution of preferences among justices is not altered to reflect the preferences of the government. The dismantling of courts is therefore a reactive and transitional strategy. In contrast to packing or so-called telephone justice, it does not secure judicial decisions to enforce the government's policy preferences in the short run, but it is sufficient to prevent adversarial rulings. It relies on the configuration of veto players in congress to stall new appointments until the administration can gain full control of the nomination process and compounds institutional deadlock by forcing sitting justices to resign. The procedure thus exploits a combination of normal democratic conditions (institutional gridlock) with extraordinary institutional measures (the removal of justices). An accelerated process of dismantling determined the downfall of the TCB over the period 2006–2009.
2. The presence of the second condition alone (appointments without removals) creates the possibility of packing, or the expansion of court size to gain a friendly majority without the need to expel incumbent justices. Packing was prevented in Bolivia by the presence of a fixed number of justices in the constitution, but it has been common in other countries discussed in this volume. In Bolivia, the appointment of new justices was a difficult task, unless extraordinary circumstances allowed for a full reshuffle or a constitutional change.
3. In contrast, the combination of the informal capacities of removal and appointment triggers the reshuffling of the courts. This pattern is characterized by the exit of a majority of justices and their replacement by politically palatable ones.[34] In Bolivia, recurrent regime instability made the supreme court an easy target for reshuffling during the twentieth century. We identified twenty-two instances of reshuffling in the Bolivian Supreme Court between 1900 and 2009. Both the court and the constitutional tribunal were reshuffled again in 2010, after the adoption of a new constitution. Other episodes in Latin America (e.g., the Argentinean impeachment of supreme court justices in 1947) also reflect this pattern (see Chapter 8).

[34] A softer way of reshuffling combines a few retirements with the enlargement of the court (i.e., it is a hybrid of types 1 and 2). In this circumstance, the executive is able to appoint a majority of justices even without removing a majority of them.

The 2009 constitution has introduced a number of substantial reforms intended to curb the countermajoritarian nature of the judiciary and align its preferences with those of the median voter. It is still too early to anticipate the specific behavior of the new high courts, but this institutional design is quite unique for Latin America (and for the rest of the world). Although the constitution of 2009 demands that future members of the supreme court and the constitutional tribunal be nonpartisan (Articles 182 and 198), the adoption of universal suffrage as the selection mechanism for justices and magistrates seems to contradict this principle, immersing high courts in the logic of partisan competition.

REFERENCES

Ames, Barry, Aníbal Pérez-Liñán, Mitchell A. Seligson, and Daniel Moreno Morales. 2004. *Elites, Instituciones y el Público: Una Nueva Mirada a la Democracia Boliviana*. La Paz, Bolivia: Universidad Católica Boliviana.

Asbun, Jorge. 2003. "El Control de Constitucionalidad en Bolivia: Evolucion y Perspectivas." *Anuario Iberoamericano de Justicia Constitucional*, vol. 7: 7–28.

Baldivieso Guzmán, René. 2007. *Ley del Tribunal Constitucional (No 1836, 1 de Abril de 1998). Comentada y Concordada Jurisprudencia*. Sucre, Bolivia: Tribunal Constitucional de Bolivia.

Carey, John M. 2009. "Palace Intrigue: Missiles, Treason, and the Rule of Law in Bolivia." *Perspectives on Politics*, vol. 7, no. 2: 351–356.

Castro Rodríguez, Carlos. 1987. *Historia Judicial de Bolivia*. La Paz and Cochabamba: Los Amigos del Libro.

Castro Rodriguez, Carlos. 1989. *Presidentes de la Corte Suprema de Justicia de Bolivia*. Sucre, Bolivia: Editorial Judicial.

Chávez, Rebecca Bill. 2004. *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina*. Stanford, California: Stanford University Press.

Corte Suprema de Justicia. 1993. *El juicio del siglo: El Poder Judicial de Bolivia ante la historia*. Sucre: Editorial Judicial.

Domingo, Pilar. 2006. "Weak Courts, Rights, and Legal Mobilisation in Bolivia." In R. Gargarella, P. Domingo, and T. Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* Burlington, VT: Ashgate.

Fernández Segado, Francisco. 1998. "La Jurisdicción Constitucional en la Reforma de la Constitución de Bolivia de 1994." *Revista de Estudios Politicos* 101 (Julio-Septiembre): 207–34.

Fernández Segado, Francisco. 2002. *La Jurisdicción Constitucional en Bolivia. La Ley número 1836, del 10. de abril de 1998, del Tribunal Constitucional* Vol. 40. México, D. F.: Universidad Nacional Autónoma de México.

Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. New York: Cambridge University Press.

Iaryczower, Matias, Pablo T. Spiller, and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments, Argentina 1935–1998." *American Journal of Political Science*, vol. 46, no. 4: 699–716.

Lehoucq, Fabrice. 2008. "Bolivia's Constitutional Breakdown." *Journal of Democracy*, vol. 19, no. 4: 110–124.

Loayza Torres, Enrique. 1999. "Revisión de los Recursos de Amparo." *Revista Constitucional Justicia Constitucional para Comenzar el Tercer Milenio*, vol. 3: 73–90.

Magaloni, Beatriz, and Ariana Sanchez. 2006. "An Authoritarian Enclave? The Supreme Court in Mexico's Emerging Democracy." Paper presented at the annual meeting of the American Political Science Association, August 31-September 3, Philadelphia, PA.

Montaño P., Edgar 1998. "Corte Suprema y Tribunal Constitucional." *Ius Et Praxis* 4 (1):121–34.

Navia, Patricio, and Julio Ríos-Figueroa. 2005. "The Constitutional Adjudication Mosaic of Latin America." *Comparative Political Studies*, vol. 38, no. 2: 189–217.

Poder Judicial de Bolivia. 2008. *El Poder Judicial de Bolivia. Memoria Histórica (Homenaje al Bicentenario del 25 de Mayo de 1809)*. Sucre, Bolivia: Poder Judicial de Bolivia.

Pérez-Liñán, Aníbal. 2007. *Presidential Impeachment and the New Political Instability in Latin America*. Cambridge: Cambridge University Press.

Pérez Liñán, Aníbal, and Andrea Castagnola. 2009. "Presidential Control of High Courts in Latin America: A Long Term View (1904–2006)." *Journal of Politics in Latin America*, vol. 1, no. 2: 87–114.

Ríos-Figueroa, Julio. 2007. "Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002." *Latin American Politics and Society*, vol. 49, no. 1: 31–57.

Rivera Santiváñez, José Antonio. 1999. "El Control de Constitucionalidad en Bolivia." *Anuario Iberoamericano de Justicia Constitucional*, vol. 3: 205–237.

Rivera Santiváñez, José Antonio. 2007. *El Tribunal Constitucional Defensor de la Constitución: Reflexiones Sobre la Necesidad de su Consolidación y Fortalecimiento Institucional*. Sucre: IMAG.

Rodrígez Veltzé, Eduardo. 2001. "Legal Security in Bolivia." In John Crabtree and Laurence Whitehead (eds.), *Towards Democratic Viability: The Bolivian Experience*. New York: Palgrave, 179–194.

Scribner, Druscilla. 2004. "Limiting Presidential Power: Supreme Court-Executive Relations in Argentina and Chile." Ph.D. dissertation, University of California, San Diego.

Seminario, Francisco. 2003. "El Gobierno de Sánchez de Lozada, ante un futuro incierto." *La Nación*, October 2.

Tribunal Constitucional de Bolivia. 2005. *El aporte del Tribunal Constitucional al fortalecimiento del Estado de Derecho y la Democracia*. Sucre: Tribunal Constitucional de Bolivia.

Tribunal Constitucional de Bolivia. 2008. *Informe Anual de labores 2007–2008*. Sucre: Tribunal Constitucional de Bolivia.

Tribunal Constitucional de Bolivia. 2009. *Mis Derechos Fundamentales*. Sucre: Tribunal Constitucional de Bolivia.

Unidad Bibliográfica del Supremo Tribunal de Justicia de Bolivia. 2009. *Nómina de Ministros de la Corte Suprema, gestiones 1988 a 2008*. Sucre: Biblioteca del Superior Tribunal de Justicia.

Zapata Vásquez, Neyer. 2009. "El Tribunal Constitucional de Bolivia y la generación/supresión de desigualdades." Paper presented at the XXVIII International Congress Latin American Studies Association, June 11–14, Rio de Janeiro, Brazil.