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Abstract

The rule of law and the enforcement of these laws are at the core of the fight against corruption. Therefore, a diligent judiciary is crucial to provide equality for all citizens. If this is not the case, more influential and richer citizens can manipulate the justice system for their personal interests. This is especially fatal when these individuals act within the executive, because then corruption spills over into every sphere of society. A region where this is claimed to be the case is South America. However, Chile is an exemption with low corruption levels. This raises the question of why this particular country's situation is better than the one of other states in the region. The case of Chile is compared with Argentina to examine the influence political forces are holding on the respective judicial systems. The four main fields within which this takes place are the appointment procedures for judges, transparency, accountability mechanisms and historical factors. A comparative politics analysis aims at identifying the main differences. Therefore, the existing literature is complemented with interviews with experts from the two countries. A crucial difference between Chile and Argentina is the strong political interference in the judiciary that takes place in Argentina in a system that does not hold the executive accountable. A main institution that provides for this situation is the Judicial Council. In Chile, on the other hand, the separation of powers works fairly well, because it has strong institutions which developed over time and a civil society highly sensitivity towards corruption. This causes the implementation of a constantly improving set of anti-corruption laws and entities. Argentina thus needs a stronger separation of powers and rigorous accountability mechanisms in order to lower its corruption levels.

Kurzfassung

Um Korruption wirksam bekämpfen zu können, braucht es eine starke Justiz, die die Gleichbehandlung aller Bürgerinnen und Bürger vor dem Gesetz garantiert. Ist dies nicht der Fall, können einflussreiche Individuen die Justiz gemäß ihrer persönlichen Interessen manipulieren. Dies ist besonders schlimm, wenn diese Individuen Teil der Exekutive sind, denn dann ist es nur eine Frage der Zeit bis Korruption alle Sphären der Gesellschaft durchdringt. Südamerika ist eine Region, der besonders oft vorgeworfen wird korrupt zu sein. Allerdings ist Chile dabei eine Ausnahme. Das Land hat sehr niedrige Korruptionswerte, was die Frage aufwirft, warum die Situation im Vergleich zu den Nachbarländern besser ist. Im Rahmen dieser Masterarbeit wird der Fall Chiles mit dem Argentinien verglichen, um das Ausmaß des Einflusses der politischen Kräfte auf die jeweiligen Justizsysteme zu analysieren. Dies geschieht in erster Linie auf den Ebenen der Ernennung von Richtern, der Transparenz, der Rechenschaftspflicht und den historischen Faktoren. Unter Anwendung einer Analyse der Vergleichenden Politikwissenschaft werden die vorrangigen Mechanismen identifiziert, die die Situationen in den beiden Ländern bedingen. Dafür wird die Analyse der Fachliteratur mit Interviews mit Experten und einer Expertin aus den jeweiligen Ländern ergänzt. Ein wesentlicher Unterschied zwischen Argentinien und Chile ist das starke Eingreifen der Politik in die Justiz in Argentinien, ohne dass die Verantwortlichen zur Rechenschaft gezogen werden. Der starke Einfluss in Argentinien wird vor allem durch den Justizrat begünstigt, der von politischen Kräften kontrolliert wird. In Chile funktioniert die Gewaltentrennung gut, was hauptsächlich auf den stabilen, historisch gewachsenen Institutionen beruht. Außerdem gibt es eine starke Zivilgesellschaft, die die Implementierung von sich ständig verbessernden Antikorruptionsgesetzen und -einheiten fordert. In Argentinien braucht es deshalb einen stärkeren Fokus auf Gewaltentrennung und Rechenschaftspflicht, um das Ausmaß der Korruption langfristig eindämmen zu können.

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1. Introduction

Bribery, nepotism, kickbacks – corruption is a phenomenon common to public institutions and private businesses all over the world. The forms and extent of corruption, however, differ vastly across countries (Transparency International 2007). When government officials engage in corrupt acts, the scope and effect on society of these negative actions increase tremendously. The state will unfairly allocate public funds and services within the society. Large scale corruption can cause entire governments to flounder and it is the root cause of most development problems (Chayes 2015). The effects are especially harmful in cases where the corrupt officials are positioned within the judiciary.

A state's judicial system is responsible for the enforcement of the national and international anti-corruption legislation. If judicial officials engage in corrupt behaviour, a country finds itself in a situation in which a system of bribes and personal gain override the rule of law (Voigt and Gutmann 2015). If somebody engages in criminal acts, it is the judiciary's task to charge and prosecute the illicit behaviour, but if judges and public prosecutors themselves are prone to illicit influence by the other state branches or private actors, the likelihood of being investigated for criminal offenses is very low as long as one is willing to bribe their way out (Voigt and Gutmann 2015). A corrupt judiciary does not protect the law, civil liberties or human rights. Citizens and government officials have little option, because there is no impartial authority to provide fair trials if judicial decisions are made upon personal interests. This leads to a situation in which citizens are not equal in front of the law, but one in which the more influential and richer citizens can manipulate the justice system for their personal interests. So, sooner or later, the effects will spill over into every other sphere of society (Pepys 2007).

In South America, the region is generally perceived as one in which corruption is a dominant factor (Warf and Stewart 2016). South American countries in general, and its court systems in particular, are often times viewed as being fundamentally corrupt (Tresiman 2000; Buscaglia and Ulen 1997). According to Transparency International's Corruption Perceptions Index (CPI) of 2016, these countries, on average, have higher levels of corruption. Chile is an exemption. Currently Chile is ranked 24th out of a total of 176 considered countries. Chile has fairly low corruption levels, not only when

compared with most of the countries within the region, but also worldwide. Its position within the CPI lies right after France and before Spain or Israel. In South America, Chile and Uruguay are the only two countries that have historically had low corruption levels. Chile was recently declared second-least corrupt after Uruguay. In comparison, neighbouring Argentina is ranked 95th.

A central theme of this thesis is to examine why Chile has such low corruption levels, in a region that is perceived as corrupt. To study this issue in great depth, this thesis will conduct a comparative analysis between Chile and Argentina. These two states were selected because they share a lot of similarities. Together Chile and Argentina form the “Cono Sur”, the southern extreme part of the South American continent, which means that they do share a fairly similar geography, climate and exposition (Warf and Stewart 2016). Both countries’ common cultural heritage dates back to the Spanish colonial rule, of which they inherited the civil legal system (Skaar 2003). Furthermore, their political development throughout the 19th and 20th century was often similar. When looking at more recent political developments, the second half of the 20th century saw strong socialist movements rise in both countries. In contrast to other Latin American countries such as Bolivia or Venezuela, the socialist tendencies in both countries were strongly oppressed by military coups and the eventual establishment of military dictatorships.

In terms of economic politics, Argentina and Chile both resorted to neoliberalism during the second half of the 20th century. This economic policy has been demonized by most of the other countries in South America, especially those in which socialism has flourished (Rios-Figueroa 2012). Although Argentina and Chile do share more similarities with each other, than compared to their other neighbours in the region, they are very different when it comes to corruption levels.

A considerable amount of research has been conducted on the phenomenon of political corruption. However, the methods in which political forces have influenced the setup of judicial institutions and thus the behaviour of judges and public prosecutors has only received some attention so far (Bedner 2002; Rios-Figueroa 2012; Voigt and Gutmann 2015). The rule of law and the enforcement of these laws are at the core of the fight against corruption, which is why this research will focus on the aspect of how

political influence has shaped the judiciary. Based on these considerations, this thesis raises the following research question: **How have the political forces influenced the levels of corruption in the judicial systems of Argentina and Chile?**

This thesis will outline the political-historic circumstances of the development of their respective judicial institutions. It will also take the potential causes for their different levels of judicial corruption and use these causes as indicators for their respective overall corruption levels. This study focuses on a comparative politics analysis in order to be able to better understand the phenomenon of judicial corruption and to deduct indicators for the weak points of the judicial systems. Thus, the focus lies on the institutional structures that enable the executive to intervene in the judiciary.

The analysis is guided by the claim that there are four principal fields of interference by the executive which are the main contributors to establish judicial. This thesis will argue that the stronger the influence is which the executive holds over the judiciary, the higher the overall corruption levels of a state. The four main fields this thesis will examine are the appointment procedures for judges, transparency, accountability mechanisms and historical factors. Within these four fields, the hypotheses are developed.

Hypothesis 1: The more leverage the executive holds in the appointment process of judges, the higher the corruption levels of a country.

Hypothesis 2: The less transparent judicial procedures are, the easier it is for the executive to intervene in the judiciary.

Hypothesis 3: The lower accountability levels towards judges, the higher the corruption levels of a country.

Hypothesis 4: Chile is less corrupt than Argentina because historically its judiciary has been more independent from political interference by the executive.

First, this thesis will outline the general concept of corruption. This section aims at giving a better theoretical understanding of the concept of “corruption” as well as of its causes and consequences. The next chapter deals with corruption in the judiciary and refers to the main institutional levels that have to be addressed when analysing this matter. The core indicators for the level of corruption such as appointment, transparency and accountability procedures are identified in this chapter. Subsequently, a brief overview on the situation of corruption in the judiciary in South America will situate the case studies in the larger scope. This is followed by an in-depth analysis of Argentina and Chile in the context of political history and the political setting. Furthermore, the institutional setup of the respective judiciaries will be explained. This will establish a more comprehensive overview of both countries’ political climate. Finally, the comparative analysis of these two states will highlight the individual institutional particularities that Argentina and Chile are facing within their judiciaries, and draw the connection to each country’s corruption levels. For a better understanding of the countries’ situations, expert interviews have been conducted. The results of these interviews are included in the comparative analysis.

2. Methodology

The disciplines within which this thesis revolves around are Political Science, Law and History. It follows a case study based comparative politics approach and employs causal analysis. The research question and the hypotheses indicate an analysis following a causal mode (Kesselman, Krieger and Joseph 2014). The comparative politics approach aims at identifying patterns through similarities and differences among states in order to assess theoretical models of explanation for the phenomenon or the institution in question, i.e. corruption in judicial systems (Pennington 2009). This comparative politics analysis aims at identifying the main differences in the setup of the judicial institutions, within the context of the respective executives of Argentina and Chile.

Investigating Corruption

The problem with corruption is that it lacks a general definition and thus is difficult to measure, see Chapter 3. To determine the level of corruption, this thesis consults the results of Transparency International's Corruption Perception's Index 2016 (CPI). Transparency International is a Berlin, Germany based Non-Governmental Organisation (NGO) which was founded in 1993 and has national chapters in more than 100 countries worldwide. It is one of the most internationally renowned organisations in the field of anti-corruption work. The CPI has been chosen as the standard reference for corruption levels in this thesis. Due to the fact that the present research looks at corruption in the judiciary and political field, the CPI is adequate because it focuses exclusively on public sector corruption. The CPI captures and standardizes 13 different data sources from 12 different institutions that ask business people and country experts about their perception of corruption levels in their countries' public sectors. A list of all sources which are included in the CPI 2016 can be found in the Annex.

Although there do exist several other sources on country corruption levels such as the Global Competitive Report from the World Economic Forum, or data provided by the World Bank or Latinobarómetro, the CPI fits this thesis' approach very well because it provides a worldwide standard comparison and is one of the most renowned amongst scholars and experts (Treisman 2000, Rose-Ackerman 1999). Certainly, corruption is

a very complex concept which cannot be exclusively investigated by solely examining the judiciary. However, the aim of this study is to constitute a partial contribution to the subject matter for a better understanding of the broad phenomenon of corruption.

Case Selection

As previously stated, the aim of this thesis is to compare the influence of the executive on the respective judiciaries in Argentina and Chile, and determine whether this relationship provides an explanation of their individual corruption levels. The two countries have been chosen as a set of most-similar cases (Gerring 2008). This means that they are very similar in many ways, but show very different outcomes in a specific field of interest, which in this case is the corruption level. The study of these cases intends to reveal the factors that cause these differences (Gerring 2008). Case studies are generally used for process-tracing through the examination of documents, interview transcripts and other primary and secondary sources to see whether a theory or a hypothesis is in fact observable. They are also used to determine if there are any intervening variables.

The biggest problems with a small set of cases, like in the present study, are non-representativeness and sample bias. To some extent the researchers always unwillingly add their subjective interpretation in case selection and analysis (Gerring 2008). Naturally, a small-n study i.e. an analysis of two countries is not enough to make general claims. However, important conclusions can be drawn from the indicators examined and lead to a better understanding of judicial corruption in similar cases. These results could be used for further research and anti-corruption policies (Lancaster and Montinola 1997).

The first step of this thesis is to establish a theoretical framework on the basis of a literature review of the existing academic research on corruption. Based on this, crucial indicators for levels of judicial corruption will be identified. Due to the reason that the judiciary is an enormous bureaucracy, it is not possible to cover every institutional level that is included. The focus of this thesis lies on the judges and the public prosecutor's office, because these are the most influential levels in the judiciary. Judges, especially on the Supreme Court, are the highest instance within the judiciary. Public prosecutors,

especially when they form an autonomous body, are the main institution in investigations.

The Sources

For the analysis of the two case studies, primary and secondary literature sources are consulted to identify key transitional moments in their political developments. These sources include academic literature, research papers, international treaties, national legal documents such as the constitutions and other legal norms, the states' official websites of judicial institutions, anti-corruption organisations' websites and newspaper articles. Except for the case of academic literature, it is often in the sources' nature that they do not fulfil the requirements of academic texts and are thus to be consulted with caution. Institutions' websites and newspaper articles are important sources for identifying the political climate in the countries. In this way, the current judicial setups can be described from a historical perspective. Linking the judicial development to the political situation of its time is important in order to understand where decision makers might have wanted to influence courts and judges and why this was important to them. The most current political events have not entered into scholarly literature so far. Therefore, it is necessary to rely on the non-scholarly sources. These sources have to be consulted with caution, because they lack academic vigour. The potential risks associated with consulting too many non-scholarly sources shall be mitigated through the consultation of a plurality of sources

Interviews

When it comes to corruption, especially in the judiciary, possible weak points within the systems can be evaluated in an analysis of the institutional setup, i.e. the *de jure* situation. However, these officially established norms do not always equal the *de facto* situation. Especially when it comes to corruption, a lot of processes happen in non-public spaces. This can range from individual actors who incidentally take bribes up to entirely corrupt parallel structures. These informal processes, especially those which resemble current practices, are often not depicted in the literature and, thus, are not visible for observers from the outside. Therefore, semi-structured interviews with experts in key positions from Argentina and Chile ought to shed further light on the realities and practices in the countries and set the analytical balance between the norms and the practice.

Interviewing allows the researcher to explore information that secondary sources do not contain. One can directly ask for the motivations behind corruption and for unofficial structures that enable actors to engage in corrupt practices (Rathbun 2008). The interviewed experts were chosen for their particular expertise in dealing with corruption and anti-corruption work in their respective countries and professional fields. In the end, this only constitutes a small and subjective insight in the situations in the two countries. Not everybody who is affected or knowledgeable about judicial corruption can be consulted. Especially those who engage themselves in corrupt acts are not willing to publicly declare their deeds or share their expertise for research. Nevertheless, consulting more interview partners or doing a large-scale survey could lead to results with higher validity. The final interview partners who were consulted for this thesis are as follows:

- Argentina:
- Eugenio Curia: Lawyer and Ambassador of Argentina
 - Roberto Saba: Professor of constitutional law and human rights, Universidad de Palermo, Buenos Aires
 - Pablo Secchi: Executive director of the Argentinean chapter of Transparency International
- Chile:
- Marta Herrera: Director of the Special Anti-Corruption Unit of the public prosecutor's office in Chile
 - Alberto Precht: Executive director of the Chilean chapter of Transparency International
 - A lawyer who wants to remain anonymous.

Although interviews reflect the subjective perception of the interviewees, their professional opinions are highly valuable and provide an important insight into the practice of corrupt behaviour and anti-corruption strategies in Argentina and Chile. A semi-structured set of questions was used in each interview which was slightly adapted to the professional position of the specific interviewees and the country. The interviews were all conducted via Skype and in Spanish. Corruption is a very sensitive topic. People from within the judicial branches are hesitant to speak about corruption, particularly when it concerns their colleagues or superiors, because it could affect their future careers. The fact that the interviews were being recorded might have caused

the interviewees to speak less freely as they might have without being recorded, but it allows the interviewer to focus fully on the conversation at hand. Recording the interviewees also guarantees that the information provided is fully available at a later point in time and can be repeatedly consulted. Under consideration of the valuable advantages that interviewing has for this thesis, it has also drawbacks such as subjectivity, which is why one must be careful in separating fact from opinion. (Rathbun 2008).

Finally, this thesis will link the interviews to the case study analysis, and test the validity of the hypotheses. Specifically within the comparative analysis of Argentina and Chile, the differences between the two states, the development of their judicial institutions, all within the larger context of their political developments, will be determined as far as possible.

3. The Scope of Corruption

In order to be able to tackle judicial corruption, it is first necessary to identify its position within the larger scope and meaning of the general phenomenon of corruption. Thus, this chapter outlines a definition for corruption in general terms and elaborates on its causes and consequences. The aim is to provide a better theoretical understanding of the concept of “corruption”. Corruption takes place on many levels and takes many forms such as money laundering, embezzlement, bribery or nepotism. These practices might slightly vary from illegal, socially unacceptable or immoral. However, the analysis within this thesis focuses on the way the executive might interfere in the judiciary. The focus lies on institutional structures that enable actors to engage in corrupt practices. Therefore, this chapter will clarify the dynamics that lead to the emergence of corruption in the public sector. It will also address the issue of defining, detecting and measuring corruption.

3.1. Defining Corruption

A lot has been written on the definition of corruption. The phenomenon has been addressed from the perspectives of several disciplines. It is a pressing topic for political scientists, economists, sociologists and lawyers. Theoretical approaches are manifold. This fact alone is symptomatic for one of the core difficulties of the issue: the problem to find a clear-cut delimitation of which acts are actually considered corrupt. In the most general and most frequently used definition, corruption is described as “the abuse of entrusted power for private gain” (Transparency International 2016). In this context, private gain can mean monetary enrichment as well as non-monetary personal or political gains such as prestige or votes. It is what Rose-Ackerman (1999) calls “self-interest”, the strive for one’s own well-being through corrupt behaviour, including the well-being of family members and peer groups. Of course, this definition does not specify which acts in fact constitute an “abuse” as such.

Usually, corruption has been included into domestic legislations at least to some extent. This typically contains prohibitions of acts such as bribery, extortion and money laundering, especially in the ambit of private businesses. Besides these more or less easily measurable deeds, conflicts of interest, nepotism and various forms of

patronage are not even necessarily illegal, although these practices may be considered intrinsically corrupt and problematic by the public. Corrupt deeds sometimes only violate social norms, but not legal ones. The common problem with public opinions and social standards is that they also vary within a state or society, some acts are not perceived reprehensible by every citizen. Legislation is thus not always capable of covering every single act that could be considered corrupt in the variety of specific contexts (Lancaster and Montinola 1997). Thus, von Alemann (2005) claims that corruption, more than anything else, is a matter of perception. It is a matter of an individual's and a community's moral understanding.

An important aspect when talking about corruption is the different scopes of it. There is a difference between high-level and low-level corruption. Transparency International (2016) sums up this differentiation in three types of corruption: Grand Corruption, Political Corruption and Petty Corruption. Grand and Political Corruption are high-level corruption, although a distinction between these two concepts is not always clear, which is also why the terms are often used synonymously.

The term Grand Corruption refers to corrupt behaviour committed by the top level of government officials. This means those who develop general policies and rules for a state. Corruption in this sphere has negative effects on the society as a whole because the government officials do not act in the public's best interest. In contrast, the concept of political corruption refers to political decision makers on all levels who abuse their position to alter institutional structures, policies and rules of procedures in order to serve their own interests in terms of power, status and wealth (Transparency International 2016). Political corruption refers for example to the misallocation of resources or the very common practice of the abuse of procurement contracts. In these cases, government officials allocate contracts to private companies for a share of the value of the tender (kickbacks). By taking bribes they undercut the competition process, which should usually provide for the best offer to win and thus makes it virtually impossible for non-corrupt companies to compete (Rose-Ackerman 1999).

Petty corruption, on the other hand, refers to corrupt acts on a smaller scale. This low-level corruption includes usually one-on-one pay-offs and bribes by citizens to facilitate services and goods when interacting with officials in hospitals, police departments,

border control and other public institutions (Transparency International 2016). Uslaner points out that corruption takes place when people are excluded from acts and decisions that affect them. However, he recognizes that there is a difference in perceptions of different kinds of corruption. While acts of petty corruption are often accepted and considered necessary in some societies, there is usually no tolerance towards grand corruption. The small pay-offs petty corruption usually involves are accepted as a matter of substituting a defective state system. "While people don't see petty corruption as moral, they 'adapt' to it because they see no way out" (Uslaner 2008, 11). Grand corruption is different. It is perceived as a strategy to enrich a few usually already wealthy individuals. At the scope of grand corruption, people feel betrayed (Uslaner 2008).

3.2. The Roots of Corruption

Scholars have developed different approaches for explaining and analysing corruption. Economists usually perceive corruption as a result of market forces. Within this scope of interaction between the state and the market, Buscaglia advocates for a rational choice approach to economic self-interest, when he says that "[...] changes in corruption activities occur if the marginal returns from crime exceed the marginal returns from legal occupation by more than the expected value of the penalty" (Buscaglia 2001, 234). He is convinced that in the end, corruption always links up with pure economic thinking of the individual. People would tend to choose the way which promises the highest individual outcome. This is actually a very common perception. Also Treisman (2000) supports the notion that in balancing the utilities and negative consequences of corrupt actions, factors such as the likelihood of being caught, prosecuted and punished as well as psychological and social consequences count and determine whether or not individuals resort to corrupt behaviour.

Another claim that scholars frequently make upon investigating corruption is that individuals who engage in bribery and nepotism stop to separate their private roles from their official tasks. Officials who do not focus on their professional duties but on their gains as a private person accept a bribe in their official professional role but dedicate it to private gain (Bedner 2002). Bedner argues that in some countries public

and personal relations are strongly intertwined, which makes it even more difficult to separate the two spheres of interest.

These economic assumptions do not assist in explaining the roots of corruption, because it is not only the individual that is responsible for corruption to occur, but also the institutional setting plays a crucial role in the likelihood of corrupt practices to occur. In general, systems with high levels of complexity are likely to be non-transparent and have therefore a higher propensity to be corrupt (Voigt and Gutmann 2015). Some scholars such as Greenhill perceive corruption within the public sector as a symptom of dysfunctional governance often involving (transnational) organized crime. Thus, corrupt practices are often a coping mechanism when dealing with deficient state systems (Greenhill 2009). People resort to alternative shadow systems for employment, security and other services to counterbalance the flaws of a state that is not capable of providing them. When people for example do not receive a public service they would need, or if there are long backlogs when dealing with authorities, they will turn to illicit means in order to facilitate that specific service.

Dysfunctional systems also facilitate practices such as illicit payments either because more powerful actors enforce pay-offs on the less powerful, or because people try to achieve special treatment through illicit incentives (Rose-Ackerman 1999). In some cases, over time, alternative judicial systems emerge, which are community-based non-state justice systems, as it did for example happen in Peru (Rose-Ackerman 1999). In this context Lancaster and Montinola (1997) also mention the fact that some forms of corruption might actually be more in the public's interest and are thus perceived as more legitimate by the population than the policies of dysfunctional states. This phenomenon is called "honest graft".

In other state systems, bribes are a general prerequisite to facilitate any kind of public service. These are systems that only work for those who have enough money to pay the bribes. Those who do not pay are excluded from certain public services (Buscaglia 2001). If a state's system is dominated by corrupt practices, those who have enough resources to engage in these practices have an advantage. This can lead to state systems in which the rich and powerful can pay their way out of crimes, and the prisons are full with poor people who were not able to pay the adequate payoff to get free

(Uslaner 2008). Nevertheless, a country grows generally poorer with increasing levels of corruption. Corruption leads to more corruption and legitimate business becomes unprofitable (Rose-Ackerman 1999).

3.3. Is Corruption a Cultural Problem?

Another important aspect is the cultural notion of corruption in societies. An act considered corrupt or even illegally corrupt in one country, might be a normal procedure in another (Underkuffler 2009). Corruption takes place in every country. Especially when it comes to social ties, it might as well be the case that familial codes determine special conducts (Rose-Ackerman 1999). In some countries, paying a bribe to get a judicial service is considered a normal additional fee that one simply has to pay. In this context, a judge might even be considered less honourable if he or she does not accept a bribe (Pepys 2007).

It is undeniable that different state systems are influenced by the different cultures of the nations that they govern. Corruption “[...] has different meanings in different societies. One person’s bribe is another person’s gift. [However, culture] and history are explanations, not excuses” (Rose-Ackerman 1999, 5). Chodosh (2012) claims that corrupt practices are mistakenly considered as cultural attributes. When it comes to corrupt states, the motivations lie far beyond mere cultural particularities. The main driving force for the individual who engages in corrupt behaviour is self-interest for one’s own well-being and the well-being of family and close friends. “Critics call it greed. Economists call it utility maximization” (Rose-Ackerman 1999, 2). It constitutes an attitude within human nature that goes far beyond cultural differences and therefore constitutes a universal problem.

This is important to highlighting, because one has to be careful with the generalizations that some societies have a culture of being inclined to corruption. This leads to the promotion of stereotypes which ignores the more profound reasons that cause high levels of corruption. Corruption is neither an intrinsic cultural phenomenon nor is a corrupt state a coincidental agglomeration of corrupt individuals. Both theories fail “[...] to recognize that there is an economic and social foundation underlying corruption [...]” (Uslaner 2008, 6). Many societies with high corruption levels are caught up in high

inequality rates (Uslaner 2008). Corruption is a structural problem, a social phenomenon that develops over time (Bedner 2002).

3.4. Corruption and State Systems

The state system itself can, under certain circumstances, either have aggravating or mitigating effects on national corruption levels. The general assumption amongst scholars is that democracies provide for high levels of public accountability due to checks and balances. These institutions are a result of democratic institutions such as free elections or an independent media. Holding public officials accountable is one of the most important aspects to deter public officials from engaging in corrupt behaviour (Rose-Ackerman 1999). Checks and balances in a democracy such as civil-society organisations and freedom of expression usually provide for transparency and accountability (Transparency International 2007). In this context, the design of the institutional set-up is crucial.

The main principle is the separation of powers, i.e. the non-interference of the executive, the legislative and the judiciary amongst each other. The branches of the state system have to be able to act independently but do also have to be equipped with strong monitoring mechanisms towards each other to maintain a system of diligence and transparency (Rose-Ackerman 1999). This also means to limit the power of individual politicians and political positions such as for example the president's. The state and the responsibility towards its citizens have to be of higher value than individual desires (Rose-Ackerman 1999).

3.5. Consequences of corruption

In the public sector, state officials hold power over the public financial assets and allocate it accordingly to its various fields of action. Public officials such as politicians, but also judges do control these processes and therefore have access to public assets and finances (Rose-Ackerman 1999). If these officials abuse their power and secretly siphon off resources, the distributional system of the state becomes distorted. Citizens find their tax money being misused and themselves increasingly bereft of public services (Mühlenbrock 1997). In severe cases, people have to pay bribes in order to receive a basic service that actually should be “freely” provided by the state. These

bribes are often normalized to an extent that they are perceived as an additional tax or price to use this public service. Yet, the payoffs distort government and private sector activities, because they are not prices which have developed in a system of supply and demand with the customer being free to choose whether or not to spend it, but are basically charged twice, once through taxes and again through bribes (Rose-Ackerman 1999).

The judiciary is the estate that is responsible for maintaining and enforcing the law and thus punishing criminal corruption. The probability of being detected in committing a corrupt act and the likelihood of being prosecuted and punished have hampering effects on potential corrupt behaviour (Rios-Figueroa 2012). If the judicial system is corrupt in itself, potential consequences for criminal behaviour are basically non-existent (Voigt and Gutmann 2015). Criminals will buy their way out of an accusation. This is also the reason why organized crime can flourish in countries with high levels of corruption. Moreover, parallel structures with their own rules develop (Mühlenbrock 1997). The rule of law, civil liberties and human rights can no longer be guaranteed (Pepys 2007). In order to provide for a proper impartial dispute settlement system and liable enforcement structures, a diligent judiciary is necessary (Bedner 2002). A judicial system that is in itself corrupt cannot be trusted to conduct correct and effective judgments according to the rule of law. This leads to a setup that disadvantages the honest and creates incentives to engage in further corrupt behaviour (Chodosh 2012). Honest citizens and diligent government officials have nowhere to turn to, because there is no impartial authority to provide fair trials. This provides for a situation in which citizens are not equal in front of the law, but one in which the more influential, richer individual can influence the judicial ruling towards their personal gain (Pepys 2007).

Buscaglia (2001) describes an additional problem that emerges for countries with corrupt officials. An overall high level of corruption reduces the levels of investment, especially foreign direct investment, in a country. The reputation of being corrupt decreases investment levels, even if it is just the common perception, which does not necessarily resemble the real corruption level. If foreign investors are aware of the fact that a country is highly corrupt, the propensity to put their money in that specific market is low, because pay-offs and distortion make investments unproductive (Bedner 2002). Thus, corruption ratings do predict economic performance as well as domestic and

foreign investment. So, the publication of corruption levels influences the economic development of a country by predicting its economic performance (Treisman 2000). If government officials are mainly concerned about their own profits and thus do not care about the overall development of the state, they will be inclined to inefficient courses of action which decreases investments (Rose-Ackerman 1999). Especially if the judiciary is corrupt, foreign investors will stay away. They demand a certain level of reliability in the fulfilment of contracts which is mainly granted by the judiciary and the enforcement of the law (Bedner 2002). The absence of the rule of law and the presence of a judicial body which is guided by self-interest and controlled by political interest leads to arbitrary rulings and breaches of contracts which will eventually result in a loss of funds (Buscaglia 2001).

3.6. Detecting and Measuring Corruption

One of the major debates in the literature is how corruption can best be measured. As already indicated before, and as Heller (2009) points out, the big problem in wanting to quantify corruption is that it is often not clear what it actually is that should or could be measured. Given that scholars or practitioners could clearly define all corrupt acts, it is also virtually impossible to directly measure corruption i.e. the corrupt deeds themselves such as for example the amount of bribes in a specific branch of administration within a specific amount of time. This is particularly difficult because corrupt acts, like any criminal acts, are deliberately hidden by those who engage in them. Thus, there are strong limitations especially on corruption measurements (Treisman 2000). Uslaner puts it the following way: "If corruption is not transparent, then it cannot be observed. If you can't see it, you can't measure it" (2008, 11). This is also the reason why cases of corruption only become known to the public if they are prosecuted, but the prosecuted cases are also not directly related to the sum of overt and hidden corruption cases. If one would only regard the corrupt acts that are being prosecuted, it would not provide a full picture of the scope of corruption within a state. Moreover, it might also be possible that the country with the most absolute number of corruption scandals is in fact the least corrupt, due to strong prosecution bodies and vivid public debate (Balán 2011).

Hence, in practice, there are usually three kinds of measuring techniques applied to gain an understanding of the scope of corruption (Kaufmann, Kraay and Mastruzzi 2007). The most common is to gather information about individual perceptions by asking relevant stakeholders such as public officials, country experts, NGOs, companies, investment rating agencies, etc. This technique allows the conduct of large-scale cross-country surveys. Transparency International's CPI uses this approach as well. The second approach is to track countries' institutional features, such as procurement procedures or budgets to deduct indicators for the likelihood of corruption to occur. Another way of measuring corruption levels is to accurately audit individual projects towards a precise analysis of their financial input and output. Although this provides very specific, non-generalizable data, it can be very informative to have this kind of results at hand for the evaluation of specific projects (Kaufmann, Kraay and Mastruzzi 2007). Of course, all these measurements, can never fully grasp the real extent of corruption. Although the results of surveys of levels of corruption are not particularly robust, they provide important indicators. A striking feature of perception indices is their consistency over time. All disadvantages set aside they do provide reasonably stable results when being compared amongst other institutions' (Treisman 2000). So, although perception indices do not provide a perfect measuring technique, it is the most reliable that is currently available and is thus also referred to in this present thesis.

Scholars have also investigated the reliability of secondary or proxy indicators for corruption levels. In this sense, Treisman (2000) claims that corruption levels are generally lower in democracies and that the longer a country has been ruled by democracy, the lower the levels of corruption perception indices. Further secondary indicators for low corruption levels are openness to foreign trade and economic development, legal culture or colonial history. Bedner (2002) examines for example that the former British colonies and their descendent common law systems have lower corruption levels than the Latin-French civil law system does (Bedner 2002). Nevertheless, these indicators do only provide low levels of reliability whilst claiming more exemptions than actual rules (Treisman 2000).

3.7. Conclusion of the Chapter

Corruption is a unique phenomenon. It is present in every society of the world and has virtually uncountable facets. The term corruption itself is highly contested amongst the academic literature. The definition which most experts currently agree upon is “the abuse of entrusted power for private gain” (Transparency International 2016). Although this definition implies a person’s drive for personal interest, the roots that enable corruption to flourish on high levels are mostly structural. Corrupt practices are often coping mechanisms when dealing with deficient state systems. So, if government officials are corrupt, corruption slowly spreads among all public spheres (Greenhill 2009). Corrupt state systems emerge. In order to properly tackle corruption, states need to establish systems of checks and balances that hold individual actors accountable and provide for transparent institutional settings. When it comes to the task of detecting and measuring the extent of corruption, this is only possible on a level of approximations. The most common procedures are perception indices. Scholars have also tried to detect factors that favour corrupt practices. They found that authoritarian states and dysfunctional states are more likely to be corrupt.

4. Corruption in the Judiciary

The previous chapter has clarified some of the basic concepts of corruption. This thesis' focus, however, is on corruption within the judicial sector and the implications that political influence has on it. Thus, the institutional setup of the judiciary and the separation of powers within the state system are crucial aspects. In a first step, this chapter addresses the phenomenon of judicial corruption and tries to determine a definition for the term. Then, the concept of separation of powers and the role of the judiciary within a state are elaborated upon. When it comes to the justice system, the main institutions are the courts and the public prosecutor's office (PPO). By consulting the existing literature, the most vulnerable points for political interference such as appointment mechanisms and sanctions will be addressed. In a last step, this chapter focuses on the litigation and the legal tools the judiciary has at hand to fight corruption.

4.1. Definition of Judicial Corruption

If corruption is defined as “the abuse of entrusted power for private gain”, then corruption in the judiciary means that members of the judicial branch, i.e. judges or clerks abuse their power to enrich themselves or conclude decisions which are not based on the rule of law but on individuals' interests (Voigt and Gutmann 2015). Hence, we are facing the same problem as with a general definition on corruption. The possible deeds included in this definition are manifold. As does the overall concept of corruption, a corrupt judiciary comes in many forms and facets (Cárdenas and Chayer 2007). When investigating judicial corruption, scholars have often circumvented this problem by applying very narrow concepts of corruption which clearly do not capture all dimensions.

When Bedner (2002) investigated judicial corruption, he only looked at the issue of bribing judges, i.e. when judges took money in exchange for a favourable ruling in a specific case. Yet, bribery is not the only corrupt act which officials of the judiciary might engage in. Judicial corruption can also include deeds such as manipulation of court funds, nepotism in hiring court personnel or the cover-up of a criminal act by a public prosecutor in exchange for a promotion. Transparency International tried to find a more inclusive definition with stating that: “Judicial corruption includes any

inappropriate influence on the impartiality of the judicial process by any actor within the court system” (Transparency International 2007) In doing so, the organisation distinguishes two types of corruption in the judiciary: Political interference in judicial processes on the one hand and bribery of judicial officials on the other hand (Transparency International 2007). This is also the categorization Buscaglia (2001) uses.

Political interference in this context means that forces from the executive influence judicial decisions through acts such as cronyism, embezzlement, threats, intimidation or applying pressure of another kind in order to cause judicial officials to decide in a specific way. Furthermore, structural procedures such as appointments of judicial officials who are favourable to a government or transfers of inconvenient judges to posts in unimportant or distant locations are common. An illustrative example of a former president who frequently resorted to the latter was Alberto Fujimori in Peru. Similar to Bedner’s approach, the second type of judicial corruption applies when referring to individuals within the judiciary who are prone to taking bribes for favourable ruling. Buscaglia (2001) calls this “administrative corruption”. These bribes might also come from ordinary citizens and are usually not as structural in their pattern as political influence is (Transparency International 2007). This thesis is primarily concerned with the structural dimension of political interference on judicial institutions.

4.2. Separation of Powers – The Interplay of Independence and Accountability

The separation of powers aims to limit interferences between the judiciary, the legislative and the executive branches. In a state system the separation of powers establishes that the judicial system applies and interprets the laws that the legislative power creates (Robertson 2009). The judiciary ought to protect the rights of the citizens in fair and equal trials. Thus, the judges’ main task is to decide upon the lawfulness of deeds of the other actors and branches within the state and to provide a system of dispute settlement (Barak 2006). In their decision making processes, judges have to be free from influences from anybody within or from outside the judiciary. Their rulings have to be solely based on legal grounds (Robertson 2009). To some extent, however, political influence on the other estates is normal or even desirable, because in a

democracy, the executive represents the will of the people. However, this causes the problem of blurred lines between illegal corrupt acts and interference that is still acceptable.

In some state systems, politically motivated entities (e.g. presidents, ministries of justice) have the power to influence the judiciary for example by appointing and promoting judges without transparent and objective selection mechanisms and thus can install the personnel they know who will work in their favour (Pepys 2007). In these systems, judicial officials themselves might also be prone to corruption because they either want to enrich themselves or are in fear of retribution by politicians, powerful individuals, the public, the media or other judicial officials (Pepys 2007). “Judicial and political corruption are mutually reinforcing” (Transparency International 2007, xxiii). Thus, Chavez (2004) points out that a multi-polar government is more likely to maintain democratic values and restrict corruption to a low level, as competing parties control each other’s behaviour. Plurality of strong interests leads to a situation of balance.

Authoritarian regimes, on the other hand, have more incentives to control the judiciary as there is no balancing power. Chodosh, however, has a different opinion. He claims that democracy is not a necessary prerequisite for a diligent judiciary. Even authoritarian regimes need a minimum level of a trustworthy judiciary to attract foreign investment and trade. Thus, courts in authoritarian regimes are often used to legitimize their government (Chodosh 2012). Nevertheless, what Chodosh does not count in, is the lack of democratic control mechanisms. Judges need to be able to act independently to avoid interference into their decisions, either from the other two estates or from private actors. This can hardly be guaranteed in an authoritarian system. Real judicial independence means that courts do not have to fear retaliation by other actors within the state. Once executive powers have privileges in influencing the judiciary, it is difficult to make them give up on them (Pepys 2007). Thus, it is crucial that the judiciary holds independence over its own administration and can also decide upon the allocation of its budget (Pepys 2007).

However, there is not only the necessity for external independence from these kinds of political and economic interferences. A judiciary which is to be free of corruption needs to be held accountable as well. This means that the judiciary as an entity but

also the individual actors within it, the personnel, need to be held accountable for their actions (Rose-Ackerman 2007). Rios-Figueroa (2012) gives particular importance to this aspect. He supports the idea that in contrast to external independence, a high level of internal independence provides for higher levels of corruption.

Internal independence means that actors are not subject to checks and balances within the judiciary, that there is no control mechanism within the institution. Internal corruption means, for example, that judges collude amongst each other or with the PPO for personal profit. Also, conflicts of interest do frequently constitute a problem (Rose-Ackerman 2014). As Bedner points out, it is often difficult to identify rulings that have been the result of corruption, because the absence of a clear legal situation is habitually the reason why a trial in court is necessary in the first place. Judges are the public officials that need to be held most to the standards of probity. Their legitimacy and professional integrity depend on maintaining impartiality (Bedner 2002). An arbitrary case-assignment system and asset disclosure rules can for example help to avoid collusion between the judges and the prosecutors and provide for impartiality (Buscaglia 2001). The judiciary is the institution in charge of monitoring other actors which in turn cannot be left unchecked. Corruption levels deteriorate when judicial officials are held accountable to their decisions (Voigt and Gutmann 2015; Chodosh 2012).

4.3. The Court Structure

The organisation of judicial systems varies among countries. Robertson (2009) refers to two main types of judiciaries. On the one hand, there are judicial systems designed according to the institutional structure that the Austrian legal thinker Hans Kelsen developed in the 1920s. The main feature of the Kelsen system is the existence of a constitutional court. Constitutional courts act independently from the regular hierarchical court system in a country. Their main task is the judicial review, i.e. to decide whether or not a law, rule or other government decision is in conformity with the constitution (Rose-Ackerman 2007). If this conformity is not given, the constitutional court can invalidate the specific legislation in question (Robertson 2009). Alternatively to the Kelsen system, other states entrust ordinary courts with decisions upon the constitutionality of legislation.

In typical court systems, the highest instance is the Supreme Court, which supervises all judges of a state. Rios-Figuera (2012) claims that it is particularly important that Supreme Court judges are independent from other branches of the government because through the hierarchy in the judiciary, corruption in the Supreme Court might easily pervade the whole judiciary. Every country has a particular institutional setting of its own court system, usually having the first instance structured according to a federal administration with the superior appeal courts as second instance (Robertson 2009). Appeal courts are an important means of redress in the case of faulty verdicts, but this requires a court system that is not pervaded by corruption and collusion (Transparency International 2007). Research has shown that in order for courts to provide efficient services, it is beneficial if administrative procedures are as uniform as possible to provide efficient and transparent case management. The use of up-to-date technology and the size of plaintiff-firms are further indicators for an efficient court system (Buscaglia and Ulen 1997).

Appointment and Sanctioning Procedures of Judges

The main goal in transparent appointment procedures is to avoid a judiciary merely composed of officials who are endorsed by the executive. Still, some countries' appointments are highly political, with a judge's career depending on his or her political ties. In some states, judges are often directly subordinated to the president, the ministry of justice or other officials from the executive.

Generally, different procedures apply according to the rank of the designated judge. Appointment procedures of the high ranks usually include the president's approval or do include approval by all three state's powers. To guarantee external independence, some countries have established a peer-selection procedure that involves at least two estates (Pepys 2007). When it comes to internal independence, appointment procedures of lower court judges are crucial indicators. If the Supreme Court controls all judicial ranks via exclusively being responsible for appointment, promotion and removal procedures, it is more likely that pressure on their hierarchical subordinates is applied. Some scholars suggest that the best way to secure unbiased personnel decisions is to establish a Judicial Council (Rios-Figueroa 2012).

Sanctioning of judges usually comprises two categories: disciplinary measures on the one hand, which includes fines, suspensions as well as admonitions and measures of removal on the other hand, which apply in serious cases of misconduct such as corruption. Appealing a judge's decision in court does not constitute a case of sanctioning or disciplining (Cárdenas and Chayer 2007). In order to avoid an abuse of these mechanisms, one has to make sure that judges can only be removed from their positions in the case of serious misconduct or incapacity to carry out their functions (Pepys 2007). Thus, it is crucial to clarify how judges can be removed from office and who is capable of initiating such a process.

Judicial Councils

The strive for appointment and sanctioning procedures that keep judicial ranks free from political influence and as impartial as possible has so far not delivered a perfect system. Judges should only be chosen on the basis of their merits in order to avoid corruptible appointees (Transparency International 2007). Scholars primarily agree upon the necessity of a transparent way of selecting and promoting judges on the basis of clear standards to increase their level of independence (Pepys 2007; Bedner 2002). The idea of Judicial Councils is to establish a system of selection by peers and not by other branches of the government. Therefore, some states have implemented Judicial Councils composed of peers such as judges and lawyers (Pepys 2007). In other states, like Argentina, the council comprises representatives from all three estates. However, handpicked councils provide a lot of leeway for corrupt interference, thus a system of rotating members might prevent corruption from becoming a habit, but might also be more difficult to administer and to evaluate (Bedner 2002).

Tenure

Another crucial aspect of anti-corruption policies is the tenure of judges. Commonly, it is considered that long terms of office decrease the likelihood of being exposed to political pressure. Most scholars agree upon the fact that it has to be longer than the appointers' terms, i.e. for life as long as they maintain good behaviour. Long tenure is considered to alleviate officials within the judiciary from potential influences by politicians, because they do not have to fear consequences for their future careers (Rios-Figueroa 2012). As Pepys (2007) claims, the sole possibility of removing a judge from office should be a case of serious misconduct or incapacity.

Salaries

Scholars and practitioners usually agree upon the fact that judges need to be financially independent in order to not be susceptible for corruption. If judges work under worse conditions than their colleagues in the private businesses or if they are generally underpaid, they are more likely to accept bribes for favourable rulings (Rose-Ackerman 1999; Transparency International 2007). If the gains from a bribe or any other form of corruption outweigh the regular income and the risk of being caught, the likelihood for corrupt behaviour increases (Rios-Figueroa 2012). This is what Buscaglia (2001) calls the “temptation threshold”. It is an economic approach which claims that “[...] changes in corrupt activities occur if the marginal returns from crime exceed the marginal returns from legal occupation by more than the expected due of the penalty” (Buscaglia 2001, 234). The results of a survey conducted by Voigt and Gutmann (2015) provide evidence for this claim. In general, they found that high income level countries are less prone to corruption, although they also admit that previous studies by other scholars found that there is no significant correlation between higher wages and lesser corruption. However, the question of the impact of sufficient remuneration is a difficult one. It can hardly be proved that an increase in the salary also increases the judges’ diligence (Pepys 2007). High salaries cannot grant a corruption free judiciary. Other scholars claim that it is by far not sufficient to point at policy implications such as wages for civil servants. The roots of corruption are much more profound (Treisman 2000).

4.4. The Public Prosecutor’s Office

Prosecutors are often called the gatekeepers of the judiciary. In some judicial systems only public prosecutors can initiate proceedings i.e. bring cases to the courts. Thus, the PPO is usually the authority entrusted with gathering information on the behaviour of criminal suspects or to instruct the police forces with gathering information. On the basis of this information, the PPO has the competence to indict a suspect. During a trial, the PPO represents the interests of the public (van Aaken, Feld and Voigt 2010). The PPO has to detect, investigate and prosecute criminal acts, thus it is crucial that there is no external influence on its work. In order to avoid corruption, the institutional location of the PPO is important (Rios-Figueroa 2012).

Different state's judicial systems have situated the PPO in different institutional locations. Some, as for example the United States or Uruguay, made it part of the executive branch. The office is therefore directly connected to the politicians. It is very common that the PPO is situated within the judiciary (e.g. in Italy). In these cases, there might still be influences coming from inside the judiciary, mostly from judges, or it might even facilitate collusion between judges and prosecutors. Other countries, such as Chile and Brazil, established the PPO as autonomous bodies. This decreases the probability of political interference and might provide for independence and a counterbalance to the monopoly of the judiciary which in sum causes lower levels of corruption. Yet, often it is considered an unnecessary administrative and organizational burden (Voigt and Gutmann 2015). Although scholars such as Rios-Figueroa (2012) do not give a definite recommendation as to where the PPO should be located, they explicitly advise against subordination to the executive. As part of the government, it is very likely that politicians apply pressure on the prosecutors and interfere in their work.

Usually in their respective constitutions it outlines the formal independence of the PPO, but more importantly is the fact whether it enjoys factual independence of government officials. Sometimes, even though the legal norm does not allow any intervention at all, the informal practice is very different. When investigating corruption levels in a state's judiciary, it is therefore important to find out, how the *de facto* situation is. This is especially crucial when it comes to government officials who have engaged in crimes.

If the PPO is highly influenced by the executive, it is very unlikely that such cases of criminal politicians will be properly investigated, but that they will apply pressure on the investigators. If the judicial personnel are actually dependent on the executive, they are likely to rule in its favour. Of course, the same applies to the influence of criminal or corrupt individuals amongst the judicial officials themselves (van Aaken, Feld and Voigt 2010).

4.5. Litigation

For the combat against corruption it is crucial to have clear legal norms on what is considered corrupt behaviour. It is important that the legislation identifies and recognizes central acts of corruption and to declare them illegal and as criminal

offences. If the laws are not clear in this regard, or even contradict themselves, the judiciary has only deficient grounds on which it can prosecute potential crimes. Judges and prosecutors need the laws as their tools in order to be able to hold leverage over corrupt deeds (Rose-Ackerman 1999). Furthermore, specific laws on transparency and public information can make the procedures more transparent and hold the involved parties accountable by publishing the procedures and results of investigations and rulings.

Whistleblower protection is also an important legal tool. Whistle blowing is the act of providing information about the “neglect or abuses within the activities of an organisation, government body or company [...] that threaten public interest [...]” (Transparency International 2016). These laws are often the cause for strong public disputes. Whilst transparency laws are often accused of violating privacy norms, whistle blowing is discouraged for example with charging the whistleblowers for treason when testifying against government officials. State systems that do have high levels of corruption commonly do not provide whistleblower protection, like it is often the case in Central American countries. The prevalence of organised crime and violence means that the security risks that come with whistle blowing are particularly high (Kennedy 2012). Nevertheless, a clear legal framework of anti-corruption laws alone is not sufficient in the combat against corruption either. A state can have the most sophisticated set of diligent anti-corruption laws at its disposal but might still suffer from high levels of corruption. Corruption levels are lower when judicial diligence is monitored by the civil society and the media, which they can do, if the laws provide for it (Transparency International 2007).

In sum, the question of the legal framework against corruption has to be addressed from two sides. The laws need to provide tools to the judiciary in order to fight corruption within the society, but they also have to help avoiding corruption amongst judicial officials. When it comes to corruption within the judiciary, which is the main concern of this thesis, the time frame of decision making processes is a potential accumulation point of corruption. Judges but also lower rank administrative bureaucrats might intentionally cause backlogs in trials before a decision in a ruling is declared. In these cases, only if litigants pay a bribe, their cases are forwarded or dealt with (Transparency International 2007).

In contrast, especially in situations where the case load exceeds the courts capacities and backlogs are caused by a lack of resources or other institutional circumstances, some litigants might try to bribe judges or clerks in order to get favourable treatment and to accelerate one's own case (Transparency International 2007). When it comes to decision making itself, bribes, extortion and political influence can also cause favourable ruling. Those who have the means can avoid prosecution and punishment (Mühlenbrock 1997). If judges are corrupt and this becomes a general problem throughout the whole judiciary, fair trials are not possible anymore. Honest individuals will not have any leeway in such a system. Once a judicial system is completely up for sale, honest individuals will not stand a chance within it. If the incentives to comply with the law are lowered, people will favour corrupt practices (Chodosh 2012). Reporting corrupt acts will be silenced by threats and the fear of retaliation. Therefore, it is crucial that honest judges supervise the justice system through transparent proceedings (Mühlenbrock 1997).

It is important to reduce the likelihood of judges to take bribes on the one hand, but it is equally important to decrease incentives for people to pay bribes on the other hand. The expectations for bribes to accomplish any goals need to be eliminated (Rose-Ackerman 1999). The research has shown, that standard operating procedures are important to increase the efficiency of the judiciary from within. Streamlining makes monitoring procedures simpler, more transparent and reliable (Rose-Ackerman 1999). This includes the allocation of cases. If cases are directly assigned by the court's chairman the potential of possible interference is higher than in a system of random case assignment (Bedner 2002).

Researchers have also extensively investigated the question of whether different law traditions themselves are prone to different levels of corruption (Treisman 2000). In the civil law tradition, the judgments are merely based on the rules the law provides for. Previous legal decisions themselves do not have formal value as precedent like in the common law system (Rose-Ackerman 2007). However, most scholars agree upon the conclusion that in terms of corruption neither legal tradition is intrinsically more prone to corruption than the other. Both provide different incentives for corruption, but individual circumstances of the particular state in question are more decisive (Rose-Ackerman 2007). For this present thesis, the answer to this question does not

constitute an issue because the investigated cases of Argentina and Chile are both countries of the civil law tradition. Therefore, the matter shall not be discussed in depth here.

4.6. Conclusion of the Chapter

When it comes to judicial corruption, the main concern is to keep the judiciary free from interference of the other state branches. Separation of powers is crucial to maintain independent courts, but at the same time, checks and balances that hold judicial officials accountable are necessary to keep corruption levels low (Chavez 2004). In analysing the judiciary, this thesis examines on the court structure and the PPO, because these are the two entities that constitute the highest authorities in the judiciary and in the lead of investigations. How can one make sure that judicial officials are held accountable and the administration transparent in order to avoid interference? Especially the appointment and sanctioning mechanisms as well as the removal of judges need to constitute transparent procedures in order to avoid politically motivated decisions. Furthermore, it is important to avoid potential for corruption through an efficient court administration, i.e. avoid long backlogs and provide standardised proceedings. The decisive point is to find the optimum balance between independence and accountability which is a difficult task and requires a sophisticated set of institutional control mechanisms (Chodosh 2012).

5. The Cases Studies

The following part elaborates on the two case studies of Argentina and Chile. At first, this chapter will shed light on the regional setting of corruption in South America. This aims at orienting the specific cases within the wider scope of regional dynamics. When it comes to structuring both case studies, the recent political past of the mid 20th century will first be addressed to show the main driving forces within the executive and to provide insight on how it made use of the judiciary at specific points in time. Within the scope of this thesis it is not possible to include every historical detail or corruption scandal that has occurred. The aim is in fact to provide an overview that enables to grasp the main political climate in terms of judicial corruption and how they have affected the establishment of the judicial structures of the respective country. Based on these results, the main structural differences between the two systems shall be detected as the basis for the comparative analysis which will be tackled in the subsequent chapter.

5.1. The Setting: Corruption in South America

Argentina and Chile form the southern extreme of South American, a continent that many perceive as one that is deeply entrenched in corruption (Buscaglia and Ulen 1997). This general assumption often obscures the fact that, although corruption levels are high on average, the individual countries' situations differ strongly amongst each other. Many scholars locate the roots of today's corruption levels in the time of Spanish colonialism in the Americas (Warf and Stewart 2016).

The Spanish Crown established colonies in Latin America since the end of the 15th century to feed their financial needs in Europe, mainly by dispossessing indigenous people and exploiting the natural resources. A small settler elite created strongly marked class societies across the region. Over time, the system provided economic and political rights to those who would showed loyalty towards the high levels within society. The special kind of clientelism that developed was a system that provided a fertile ground for rent-seeking practices (Warf and Stewart 2016). Clientelism in this context is usually defined as “[...] the *individualized contingent exchange of goods and services for political support or votes*” (Weitz-Shapiro 2014, 3). Although the colonial

regime might have established some prerequisites for corruption, the developments after the individual countries gained independence in the 19th century, were crucial as well, maybe even more so (Warf and Stewart 2016).

Chile was a fairly poor and therefore unpopular territory of colonial Spain as it was difficult to reach through the Andes. Spanish officials usually did not favour to go to Chilean territories as it was not a place to boost one's career (Pollack and Matear 1997). As some scholars claim, Chile has been a country of rather low levels of corruption and high standards of political probity since it gained independence from the colonial rule in 1818 (Silva 2016). Others state that corrupt practices were not uncommon, or refer to a "Chilean-style of corruption" which was mainly about nepotism and abusing social ties (Pollack and Matear 1997). What can certainly be said is that, in contrast to many other South American countries, when Chile gained independence it managed to build a fairly stable institutional system.

Hellinger (2011) identifies three main political tendencies common to most of the countries in post-colonialist Latin America: a trend towards personalism in leadership, high inequality rates in societies and concern about external intervention. Other countries did not do as well as Chile. Weak state building practices lead to states of anarchy. These caused especially fertile grounds for personalist tendencies. In the Latin American context, the idea of strong charismatic leaders is called *caudilloism*. *Caudillos* (the literal translation means "men on horseback") show strong leadership skills and gain support in times of conflict and fighting (Hellinger 2011). In some countries, like in Argentina, this led to autocratic political regimes with low levels of accountability and transparency.

The personalist tendency also paved the way for strong populism in the region. In the first half of the 20th century, these kind of strong populist leaders emerged for example in Argentina, Brazil and Venezuela. Political-economic movements in South America fluctuate between the populist right combined with the establishment of neoliberalism and the populist left, with a particular kind of authoritarianism such as Húgo Chavez' in Venezuela. Both extremes are known for their engagement in corrupt practices. In some cases it went as far as repressive state systems and kleptocracies (Warf and Stewart 2016).

Over time, people in some South American countries developed an attitude of fatigue towards corruption. The omnipresence of the phenomenon became accepted as an inevitable part of social life. In Argentina, for example, the frequency of scandals led to the fact that if a corruption case is not exceptionally outrageous, there are not even public outcries anymore (Warf and Stewart 2016).

When it comes to judicial systems in Latin America, Buscaglia and Ulen (1997) assert that one of the main weaknesses of Latin American judiciaries is a lack of efficiency. With the exception of Chile, which according to the authors has established a mostly efficient system, backlogs and litigation delays cause frustration and distrust among the population towards the judiciaries. They recommend the state to improve the systems and manage the case load in a better way to increase the courts' productivity.

Argentina

The political landscape of Argentina has been profoundly shaped by the right-wing socialist legacy of Colonel Juan Domingo Perón Sosa. The ideology Perón created, the *Peronismo*, has been a driving force in Argentina's political arena since its emergence in the 1940s. It is important to understand the particularity of the Peronist movement in order to understand Argentina as it is today. Strong majorities often have provided them with virtually no political opposition of leverage, whilst a legal system of low checks and balances has enabled them to amend the judiciary in ways that it pleased their political goals.

5.2. The Argentinean Recent Political History

Perón gained popularity in a time of strong industrial growth which caused a rise of the popularity of socialist ideas in vast parts of Latin America. The *Grupo de Oficiales Unidos* (United Officers' Group), of which Colonel Perón was a member, perceived this as a setting for emerging communism and thus as a potential threat for Argentina's political field. For this reason, they seized power through a military coup in 1943. Although the new government did not support the labour movement, Perón himself

increasingly did. He became head of the National Labour Department and his ideas started to gain public support from the working class through the implementation of policies which were demanded by the labour unions. He established minimum wages as well as a maximum of working hours and provided a social security system (McGuire 1997). Besides the support for social justice, the Peronist movement represented an ideology of economic independence and national sovereignty which was carried out through the nationalisation of big corporations such as the railways and protectionism of domestic markets from foreign imports (Manzetti 2009). This was a decisive fact in the presidential elections of 1946 in which Perón was elected Argentina's president (McGuire 1997).

At the time of the elections, Perón was a member of the Partido Laborista (Labour Party) which he later replaced with the creation of the Partido Peronista (Peronist Party). However, Perón actually never really enjoyed the idea of strong party politics. In fact, this was something that Perón specifically did not want. McGuire claims that Perón became an outspoken sceptic towards party politics during the decade leading up to 1943's coup when he had witnessed party-line driven practices of backroom deals and electoral fraud. Thus, his aim was to establish Peronism as a movement, not a party. He wanted a society devoid of party politics. This is the reason why the Peronist movement has never been properly institutionalized as a single political party. In the 1940s, the main supporters were agrarians and workers from the industrial sector who were primarily mobilized through syndicates and unions. It was a movement of protests and strikes, of veto-politics (McGuire 1997). Furthermore, the political leverage of *Peronism* also strongly depended on the charismatic personality of Perón himself and his second wife María Eva Duarte de Perón, called Evita, who died at age 33 in 1952. She was the leader of the Eva Perón Social Welfare Foundation and was president of the women's branch of the Partido Peronista (McGuire 1997).

Although workers became increasingly unsatisfied again in the 1950s, Perón was re-elected in 1952 for a second term in office. His presidency ended early in 1955 due to a coup d'état by the armed forces which resulted in Perón fleeing into Paraguayan exile and an anti-Peronist military dictatorship being established in Argentina. The rebels accused Perón of being highly engaged in political corruption as well as of oppressing any kind of political opposition. Perón had often arrested political

opponents and controlled the media in a way that the political opposition was not given any chance to voice their opinions or criticism towards Perón. Furthermore, the executive increasingly took over legislative tasks, overriding democratic institutions (McGuire 1997). Perón had personally appointed almost every single supreme court judge during his administration. In 1947, he had impeached four out of five supreme court justices because he accused them of being politically influenced in their rulings. He appointed judges who had close ties to himself and his political party whilst not necessarily being qualified for their positions (Chavez 2004).

Perón returned from exile and had another brief presidency from 1973-1974. After he died in 1974, the Peronist movement struggled even more. Eventually, the lack of party institutionalisation and disputes among the Peronists led up to the development of various new strands and parties within the movement (McGuire 1997). The military used this moment of uncertainty and seized power through yet another coup. State terrorism, *Guerra Sucia*, dominated Argentina from 1976 until 1983 in which tens of thousands of people were killed or abducted and the officials were accused of severe human rights violations (Chavez 2004). Besides the casualties amongst the population, the time of state terrorism had also severe consequences for the economy (Manzetti 2009).

Argentina became a democracy again in 1983 with President Raúl Ricardo Alfonsín (1983-1989) from the Unión Cívica Radical (Radical Civic Union, UCR), who made an effort to strengthen the weak democratic institutions. Today, the UCR is Argentina's second biggest political party besides the Partido Justicialista (Justicialist Party, PJ), which is a party in the Peronist tradition. The UCR's political orientation is conservative pro-market and anti-Peronist. The economic decline which Argentina suffered since the military regime had caused high unemployment rates and bad living conditions for vast parts of the population. Alfonsín was not capable of fixing these conditions (Manzetti 2009). In 1989, hyperinflation reached a peak. This eventually led to new social movements in the 1990s with the population resorting to public revolts and neighbourhood assemblies. People rallied the streets to protest the authority's course of action. At this point in time, people would also protest labour unions, political parties and public officials for alleged involvement in corruption. The low-income class demanded more jobs, better working conditions and social welfare policies (Villalón

2007). President Alfonsín's successor was Carlos Saúl Menem, probably the second most disputed president of Argentina after Perón himself.

The Menemism

Although Menem was a president loyal to the JP and the Peronist movement, his neoliberal reforms went against the Peronist socialist traditions. In the beginning, the free-market economic measures brought positive effects for the domestic economy with inflation subsiding. State-owned organisations and firms were privatised, the welfare-system reformed and the tax-system altered towards fiscal restraint. The domestic market was opened for foreign investors and state-related employment reduced. Menem also initiated close ties with the US administration which brought vast amounts of foreign financial assistance (Manzetti 2009).

At the same time, judicial authority was declining (Chavez 2004) and also the economic growth stopped eventually, which brought back high unemployment rates and social hardship. As it turned out, privatisation contracts were mainly allocated through highly corrupt deals based on embezzlement of public funds. The implementation of the neoliberalist standards constituted a case of lack of democracy combined with grand and political corruption (Manzetti 2014). Menem would issue pardons for military officers who were convicted of human rights violations in the time of the *Guerra Sucia* and would attack journalists who would critically comment his administration. In the early 1990s, during Menem's first term in office, corruption was perceived as one of the most pressing problems in Argentina. Menem was primarily accused of fostering administrative corruption. His family and friends as well as his political appointees were frequently accused of being involved in corruption cases, such as his sister-in-law Amira Yoma who was charged but acquitted in a case of money laundering in 1994 (McGuire 1997). All this led up to an increasing opposition towards Menem's administration.

Nevertheless, the population was in part still confident about Menem's policies. He had initiated reforms which strengthened the quality of democracy in terms of resilience and fairness, such as a new electoral system for senators, a quota system to guarantee women's participation in political parties and a court of auditors to supervise the conduct of public administration (McGuire 1997). In the realm of the judiciary, Menem

is remembered for amending and maintaining the Supreme Court in a way that he ended up having a like-minded majority in it. He changed the court's composition, increasing it from five to nine justices which gave him the possibility to personally appoint six out of the total nine judges (Llanos and Figueroa Schibber 2008). In the end, he "[...] had a supreme court that critics accused of abdicating its responsibilities" (McGuire 1997, 257). He had it under his control.

During Menem's presidency, in 1994, a reform of the constitution and the penal code was initiated. The constitutional reform brought many changes for the judiciary. Prior to this reform, Argentina had a decentralized judicial administration and no real general supervision procedure. Time standards for maximum lengths of judicial proceedings did not exist and a system of high levels of informality provided for a lack in monitoring. This made the judiciary very susceptible for corruption. Thus, the public demanded a reform (Buscaglia and Ulen 1997). The reform brought a more centralized management, changes in the civil code, legal procedures were streamlined and oral-based trials introduced. Furthermore, the reform included a renewal of appointment and control mechanisms through the institution of the Judicial Council (Buscaglia 2001). Nevertheless, Menem delayed the final establishment of the new rules until the end of his presidency. Finally, under his successor Fernando de la Rúa, the reform came into force (Llanos and Figueroa Schibber 2008).

In Argentina, presidents have a tool at hand which allows them to implement a law without the necessity to consult with the congress. They can do so by issuing a Decree of Necessity and Urgency (DNU), which is established by the Constitution in chapter four, article 100/13 (Manzetti 2014). Only afterwards will the congress determine whether the decree's content is in accord with the Constitution and can remain in force. The general purpose of these decrees is to give the president the possibility to quickly respond to a state of emergency or other extraordinary situations that require quick decision-making (McGuire 1997). "By December 1993, Menem had enacted 308 such decrees, compared to about 30 in the preceding 140 years combined" (McGuire 1997, 255). He justified his pattern of action with the slow pace of legislative decisions in Argentina. Amongst others, Menem used the decrees to appoint and remove judges and public prosecutors (Llanos and Figueroa Schibber 2008).

The Kirchners

Manzetti (2014) argues that despite different approaches when it comes to their economic policies, Menem and the more recent presidents the Kirchners governed the country in similar ways. Néstor Kirchner and his wife Cristina Fernández de Kirchner are also Peronists, but in contrast to the traditional party alignment, they are considered a small conservative left-wing faction which resembles a more populist position. Their economic model was to return to state-led economic nationalism (Manzetti 2014). All three presidents wilfully ignored the principles of a limited government and of accountability whereby they drastically weakened the state's institutions of checks and balances (Manzetti 2014). When Néstor Kirchner ran in the presidential elections with his political party the Frente para la Victoria (Front for Victory, FPV) in 2003, he declared the fight against corruption as one of his main undertakings. He won the elections and became president until 2007. When Néstor left the office in 2007, 80% of the population supported him, which was the highest outcome any democratic president had achieved in the history of Argentina (Manzetti 2014).

This was strongly connected with the fact that during his term in office, Argentina had a period of economic growth, which caused the unemployment rate and poverty to decrease. Manzetti (2014) examines that this was due to the East-Asian interest in Argentine agricultural products, and not because of any political actions of Kirchner. However, the president took credit for it, but the strong support towards him does not only stem from economic development but also from popular political decisions. For example, Néstor Kirchner pushed an initiative through Congress to repeal amnesty laws against those who committed human rights violations in times of the military regime of 1976-1983 (Manzetti 2014).

However, seven years after his death and almost two years after the end of the second presidential term of his widow Cristina Fernández de Kirchner, not much progress has been made on fighting corruption. Currently, the Kirchner family is heavily accused for economic and political corruption (Manzetti 2014). Most recently, the Kirchners' involvement in the Brazilian corruption scandal, the so-called "Car Wash Case" or "Lava Jato" became known to the public. The Argentinean part of the scandal consists in favouring the Brazilian construction company Odebrecht in public tenders in

Argentina under both administrations of Néstor and Cristina Kirchner. In total, contracts of 10.7 Mio USD were conferred to Odebrecht (Fernández Blanco 2017).

Argentina Today

Concerning its political ideology, today's Argentina is considered to occupy an intermediate position between the populist left, like in Venezuela, and the moderate left as can be found for example in Chile. Presidents are elected for a term of four years and the legislative power, the bicameral Congress consists of a Senate (Upper House) and a Chamber of Deputies (Lower House). The federal democratic republic of Argentina has signed and ratified several international agreements against corruption: the OAS Convention against Corruption, the OECD Anti-Bribery Convention and the United Nations Convention against Corruption (UNCAC). The Global Competitiveness Index 2016-2017 of the World Economic Forum identifies corruption as the fourth biggest concern entrepreneurs have when doing business with Argentina, whilst inflation is the main concern, followed by tax rates and access to financing. The report further claims that Argentina has very weak institutions, within which it rates the judicial independence as low as rank 121 out of 138 countries observed. Nevertheless, the report also states that improvements have been achieved through measures initiated by the administration of current president Mauricio Macri (Schwab 2016). Today, basically three agencies monitor the court administration in Argentina: the Judicial Council, the legislature's judicial subcommittees, and the executive's anticorruption office.

5.3. Argentina's Judicial System

The establishment of the rule of law in Argentina has not been a linear development. Although the Argentinian Constitution clearly provides for the separation of powers, the country has deficits in effectively administering these provisions (Chavez 2004). Especially the executive has strongly influenced the legislative and the judiciary, even after democracy was re-established in 1983 (Manzetti 2014). Argentina's political regimes have frequently intervened in the setup of the judiciary. Strong public support and an inferior opposition provided mostly the Peronists with the power to do so. They hold the majority in congress too, which is why the legislative would not veto decisions from the presidents (Manzetti 2014).

However, politicians from other strands did also try to subordinate the state's institutions in order to support their own agenda. Juan Domingo Perón did so as well as UCR-president Arturo Frondizi (1985-1962) or Carlos Menem (1989-1999) (Chavez 2004). The main tactics to influence the judiciary is the restructuring of courts in a way that they end up being filled with supporters for the current administration. This can include measures such as amending the number of judges in the Supreme Court, secretive and politicised appointment procedures or violation of the tenure protection to get rid of inconvenient judges (Chavez 2004).

Especially the Supreme Court has frequently been targeted in Argentina through amendments in its size and composition so that it allowed government associates to influence the court's majorities and rulings (Chavez 2004). Llanos and Fiugeroa Schibber (2008) analysed the cases of appointment and impeachment of judges in Argentina from 1983 until 2006 in order to determine the intervening behaviour of the administrations at each point in time. They claim a strong correlation between the changes of governments and court compositions, even when excluding the obvious rough changes in cases of military coups and processes of re-democratisation.

Also, most of the democratic presidents replaced supreme court judges with political allies if it served their aims. For Menem in the 1990s and the Kirchners in the 2000s, this was a common procedure (Manzetti 2014). When Néstor Kirchner became president in 2003, he forced six supreme court justices to resign after they met decisions that went counter the government's agenda. The whole matter concluded with the practice that the Kirchners approved the rulings of the Supreme Court before they went into force.

The Courts

Argentina's court system is, on the level of first instance, organised in a two-way system. The national judiciary or federal competence applies to the whole nation and deals with issues mentioned in the Constitution under article 116, issues that concern the whole nation or an entity bigger than one province are dealt with by the federal court. On the other hand, Argentina has the ordinary judiciary which deals with issues on the level of one of the 24 provinces.

Argentina's Supreme Court has five members, which is presided over by a president who is selected amongst the members for a period of three years (Corte Suprema de Justicia de la Nación Argentina 2017). Law no. 222/2003 regulates the appointment procedure of supreme court judges. In a public competition, candidates take part in a process of public scrutiny. The civil society gets the chance to comment on the candidates in a period of 15 days. Based on this, a pre-selection of the candidates is carried out. The President of the Argentine Nation then chooses one person from this list of pre-selected candidates who becomes a member of the Supreme Court with the approval of two thirds of the Senate. The justices maintain this post until the age of 75 (Corte Suprema de Justicia de la Nación Argentina 2017).

The Judicial Council (Consejo de la Magistratura)

In the course of the reform of 1994, a Judicial Council (Consejo de la Magistratura) was created. President Menem delayed the establishment of the Judicial Council until the very end of his term, so it was finally established in 1998 (Manzetti 2014). The main purpose of the Judicial Council is to improve the selection process of judges, with the exemption of supreme court judges, by making it more transparent and technical. If there is a vacancy for a court position, the Judicial Council proposes a list of three nominees based on public competition. Argentina's president chooses one person of the list who will be appointed with the approval of a two-thirds majority of the present Senate (Consejo de la Magistratura de la Nación 2009). The Argentinean Constitution provides no foreseen termination of the judges' tenure in article 110, as long as they maintain good conduct.

Although these procedures initially had the intention to provide for a more transparent and fair appointment of judges, it does not fulfil this task in practice. As stated in Article 114 of the Constitution, the Judicial Council comprises representatives from the legislature, the courts, the legal profession, and academia, but leaves the concrete composition to more specific laws. This left leeway for what Cárdenas and Chayer (2007) call a "gradual politicisation" of the Judicial Council. Nestór Kirchner altered the composition of the council in 2006 by reducing the number of councillors from 20 to 13, thus political representatives then held 7 of 13 seats compared to former 9 out of 20 seats (Consejo de la Magistratura de la Nación 2009). As already mentioned, Peronist parties usually hold a majority in congress and do not veto decisions of

presidents of the same political persuasion. In 2013, Cristina Kirchner initiated a highly controversial reform of the justice system under the slogan “democratization of the judiciary”. Her main argument was that the judiciary was not a democratically elected institution. Thus, she wanted to increase the number of members to 19, of which three should be judges, three lawyers, six academics, six legislators and one representative of the executive. The changes should also involve changes of the appointment of the judges, lawyers and academics in the council. It should not be a decision by their peers anymore, but the representatives should be determined in general public elections. The reform passed congress and law no. 816/1999 was amended. Critics still stress that this did not democratize the judiciary but that it gave the executive even more power over it, because now, the candidates for the Judicial Council have to align with political parties in order to stand a chance in the elections (Rebossio 2013). This provides the government representatives in the council with even more power (OECD 2017).

A current additional problem Argentina’s judiciary is facing, is a systematic shortfall of judges. Roughly 25% of judges’ positions in both national and federal courts all over the country are vacant (OECD 2017). This causes delays in court proceedings and a lack of proper case investigation, which is particularly dangerous in severe criminal offences. In addition, the courts resort to surrogate judges, who are usually lawyers, court secretaries or retired judges without proper training, who then fill in the vacant positions. There is no standardized selection procedure for surrogate judges that would guarantee for a standard of qualification and independence. Furthermore, due to the strong dependence of their positions on politicians’ goodwill, these people are often more vulnerable to influences by the executive (OECD 2017). This situation was in part the result of the practice of president Néstor Kirchner who often slowed down the appointment procedures on purpose by refusing to look at the nominees for a long time (Chavez 2004).

Sanctioning of Judges

The second main task of the Judicial Council is the sanctioning of judges in cases of misconduct. A Commission for Discipline and Accusation is responsible for these disciplinary proceedings. Lower court judges can be sanctioned with receiving a warning or a penalty. In cases of severe misconduct, the process of removal or

suspension can be initiated (Consejo de la Magistratura de la Nación 2009). A dedicated impeachment jury (Jurado de Enjuiciamiento) has to investigate these cases. Initially, the Jury consisted of three legislators, three judges and three lawyers. Judges and lawyers were appointed by their peers. A two-thirds majority within the Jury was needed in order to remove a judge (Chavez 2004). Néstor Kirchner also politicised the Impeachment Jury. He changed the composition from nine to seven members, of which four are legislators, two from the Senate and two are parliamentarians, two are judges and one is federal lawyer. In this setting, the four political representatives hold the majority. A majority of four votes has to be given in order to remove a judge (Chavez 2004). If a supreme court judge is ought to be removed, the procedure is quite different. The Chamber of Deputies has to accuse the judge in front of the Senate. Then, the Senate has to decide upon a two-thirds majority of the present members.

The common practice to deal with inconvenient judges in Argentina has been to pressure them into compliance by threatening them with disciplinary measures or to resort to remove and replace them (OECD 2017). This is possible because the executive holds particular influence over the Judicial Council. The OECD refers to such cases in its latest report on the implementation of the Anti-Bribery Convention in Argentina. One example is the case of a judge who initiated investigations against a company in which a government official was a shareholder. The judge was brought before the Judicial Council and charged for unreasonable delay in two unrelated cases with sanctioning in the form of a 30% cut of his salary (OECD 2017).

The Public Prosecutor's Office (Fiscalía, Ministerio Público)

In the course of the reform of 1994, article 120 of the constitution and law no. 24.946 were adopted, which established the public prosecutor's office (Fiscalía or Ministerio Público) as an independent organ. The PPO enjoys functional autonomy and financial autarchy with a dual structure consisting of the public prosecutor's office (Ministerio Público Fiscal) and the public defence lawyer's office (Ministerio Público de la Defensa). The public prosecutor manages and initiates investigations. The public defence lawyer provides legal assistance to the poor and those not present (Ministerio de Justicia y Derechos Humanos).

The appointment of the public prosecutor general of the nation and the public defence lawyer general are designated by the executive and have to be approved by two thirds of the Senate. They, on the other hand, provide a list to suggest lower rank public prosecutors and defence lawyers based on which the president decides. These appointments only need a simple majority approval in the Senate. Sanctioning and removal processes are conducted by an Impeachment Court (Tribunal de Enjuiciamiento) consisting of a former supreme court judge, a former public prosecutor and a former public defence lawyer, as well as a member of the executive, a member of the Senate and a member of the Supreme Court.

The PPO in Argentina has been treated in a similar way as the courts and judges have. In 2004, for example, Nestór Kirchner appointed his long-time loyal political supporter and legal defendant Estean Righi as prosecutor general. Thereafter, the federal prosecutors basically stopped to prosecute party members in corruption cases (Manzetti 2014).

Chile

Chile is famous for being one of Latin America's least corrupt countries. However, no country in the world is completely free of corruption or corrupt individuals. Also Chile has experienced corruption scandals. Especially in times of the military dictatorship of General Pinochet, the judiciary was highly influenced by the executive. The focus of this case study lies on the judicial reforms of the democratic transition and how the country has managed to develop a fairly diligent judiciary within a few decades after the military dictatorship had stopped. Similar to the case study of Argentina, this part will elaborate on the historical climate and the current institutional structure and situation of the judiciary.

5.4. The Chilean Recent Political History

Chile's current institutional setting has been profoundly shaped since the 1970s. At that time, a strong socialist movement emerged, especially under the democratically

elected president Salvador Allende Gossens. Amongst him and the Supreme Court of that time, an ideological fight emerged. Allende disregarded judicial decisions and accused the court of perpetuating social cleavages. The Supreme Court, on the other hand, felt threatened in its independence and authority (Amunátegui Echeverría 2011; Smith and Jorgensen Farrales 2010). Not only from the side of the judiciary emerged a strong opposition towards the socialist movement. Even the US joined to support the opposition, in fear of emerging communism (Childress 2009). After the armed forces carried out a military coup against Allende in 1973, General Augusto Pinochet Ugarte brought the country under authoritarian rule. This came as a surprise to many, because the Chilean democracy was perceived as a stable one (Childress 2009). The Supreme Court supported the dictatorship due to its controversies with the Allende administration. This is also the reason why, in contrast to other state's institutions, there was no need to dissolve or restructure the Supreme Court after the military coup. On the contrary, with the Supreme Court on his side, Pinochet created the image of a leader who honoured democratic institutions (Skaar 2003).

Pinochet's Reforms

Pinochet was eager to restructure the state economically. With the support of a group of economists, the so called Chicago Boys, a neoliberalist economic system was established. A crucial part of this reform was a free market system and measures to slim down the state as well as to privatize state led firms and organisations (Rios-Figueroa 2012). In the course of these restructuring measures, the separation of powers became virtually invalidated (Mühlenbrock 1997). Monitoring institutions such as the Court of Auditors were incapacitated (Silva 2016). Corrupt practices in the states' institutions became normal, for example the payment of extra bonuses to top officials in public service to attract senior managers from the private sector (Silva 2016).

At first, the Supreme Court cooperated with the regime insofar as it did not intervene when human rights violations were committed. It even played a decisive part in omitting them. The court tolerated, for example, that tens of thousands of Chilean citizens were detained, tortured and abducted due to allegedly belonging to the political opposition (Skaar 2003; Childress 2009). Over time, the Supreme Court itself also became a place of increased corrupt behaviour. One particularity was Chile's very strong

hierarchic structure of the judiciary. This means that the Supreme Court dictated the lower courts via a rigorous sanctioning and promotion system that did not allow rulings that their superiors would disapprove of (Mühlenbrock 1997). In other words, the judiciary had a high level of internal dependence. This became Pinochet's trump card in influencing the judiciary.

Holding power over the Supreme Court meant holding power over the judiciary as a whole. Judges provided the regime, the armed forces and the police with impunity which fostered an ideal environment for an increase in corrupt activities. Moreover, the judges themselves were often involved in those cases whilst enjoying life tenure and high salaries (Mühlenbrock 1997). A particular detail is that Pinochet never violated the principle of lifetime tenure of the judges but tried to get rid of inconvenient judges by offering them payments for withdrawing from their position (Skaar 2003). Yet, although Pinochet enjoyed the general support of the judiciary, he slowly started to bring the Supreme Court under his direct control. During his 17 year's in power, Pinochet directly appointed 14 of the 17 supreme court judges that entered office (Skaar 2003).

The End of Pinochet

The end of Pinochet's rule began when he gravely misjudged the extent of support amongst the population. In 1980, he adopted a new Constitution which included a timetable that lead up to a plebiscite in 1988. The referendum should constitute democratic proof of a profound approval of the Chilean citizens towards the regime. The public could choose between another eight-year term of presidency for Pinochet or democratic presidential and congressional elections in 1989. To Pinochet's surprise, the people voted against him (Childress 2009). Before the transition was set in motion, Pinochet made sure that the legacy of his regime could not be dismantled easily. He maintained his influence also even after the democratic transition was completed and thus ensured himself and the military officials a life free of prosecution, which particularly meant the area of human rights (Skaar 2003). Furthermore, Pinochet remained Commander in Chief of the Army for another ten years and became senator until his death in 2006 (Childress 2009).

Most of the corruption allegations against Pinochet only became known to the public after 1990. The allegations evolve around illegal enrichment through which Pinochet

had accumulated a fortune of an estimated amount of 18 to 28 Mio USD. The money was hidden in several foreign countries, for example in the US in the bank Riggs and was supposedly aggregated through real estate deals and arms deals including bribes (Ramírez 2016).

“A long list of illegal banking activities within the army, murders of persons involved in shadowy dealings with connections to the drug trafficking and the intelligence services, the budget of government agencies depleted by questionable contracts, and unsecured loans granted by the State Bank before the Aylwin inauguration were indicative of the levels of illegal gain during the regime. Property from those persecuted or in exile and Indian land had been taken without legal cause or compensation” (Mühlenbrock 1997, 338).

Furthermore, the accusations included family members and their business activities. For example, the irregular financial transactions conducted by one of his sons in the 1980s that involved the army and other state institutions (Silva 2016).

The newly elected government of 1990 had to re-establish the separation of powers, which was not an easy task. It was difficult to change the constitution or even single laws because negotiated agreements of the democratic transition protected both the military and the center-right coalition of political parties which supported Pinochet in 1988 (Ríos-Figueroa 2012). In the course of the plebiscite, two main coalitions emerged which dominate the Chilean political arena until today. On the one hand, there is the center-right coalition initially called *La Alianza*, which now operates under the name *Chile Vamos*. On the other hand, there is the coalition of the center-left parties, the *Nueva Mayoría* (former *Concertación*), which formed the pro-democratic opposition in the plebiscite (Silva 2016). All the democratic presidents since 1990 have so far been from the center-left coalition, with the exemption of Sebastián Piñera (2010-2014).

The Judicial Reform of the Democratic Transition

After the democratic transition, the newly elected government saw the need for a reform of the judiciary in light of its strong politicisation under the dictatorship. Several attempts were undertaken by the first president Patricio Aylwin Azócar (1990-1994). Aylwin designed two major reform packages, one under the name “Leyes Cumplidos” which was followed shortly afterwards by “Leyes Aylwin”. Both were rejected by the

Supreme Court and the conservative opposition under the pretext of wanting to maintain the court's independence (Harasic 2007). Scholars usually see the main reason for the strong disapproval towards the reforms in the fact that the supreme court judges were still Pinochet supporters who would not allow any restrictions on their privileges (Skaar 2003).

Things finally changed when president Eduardo Frei Ruiz-Tagle entered office in 1994. He changed the strategy. Frei and his Minister of Justice, Soledad Alvear Valenzuela, slowly started to alter the setup of the judiciary. In the beginning they only tackled the least invasive reforms. Then, in 1997, the time for a profound change had finally come. A major corruption scandal, involving a supreme court judge, destroyed the leverage the opposition held against the reform and brought popular support. In the end, the judicial reform had two main fields of action. It tackled the constitution, which basically aimed towards restructuring the Supreme Court and the renewal of the penal code (Skaar 2003). Frei also legally established that state agencies have to publish procedures and documents which lead to decisions in public administration, giving the citizens the right to access information (Silva 2016).

Before the reform, a criminal court judge was in charge of every aspect of a trial, from initiating pre-trial investigations to the conduct of the trial and the ruling on the case in first instance (Forner Ortega 2009). Neither the trials themselves nor the verdict and sentence were oral or public (Mühlenbrock 1997). The reform introduced an adversarial system, the autonomous PPO and oral procedures in courts. Further modifications were a restriction of the use of pre-trial detention, the introduction of three-judge panels for major criminal cases and modernised administrative procedures and new anti-corruption laws (Harasic 2007). The implementation of the reform was carried out in a gradual process. It started in the year 2000 and was completed in 2005, when the last regional PPO was established.

Chile Today

Today, Chile is a democratic republic. The main state institutions are the President of the Republic, the Congress, the judiciary and the Constitutional Court (*Tribunal Constitucional*). The presidents of the republic are elected for a period of four years and are allowed to present themselves to re-elections, but not in two consecutive

periods. Similar to Argentina, the legislative power, the bicameral Congress consists of a Senate (Upper House) and a Chamber of Deputies (Lower House) which are also elected for a period of four years. Chile's legal system is based on the Civil Law tradition.

The state consists of 15 administrative regions. Each region's leader, the so called *intendente*, is appointed by the president. The regions are divided into provinces with governors who are also elected by the president and the provinces in turn are divided into municipalities with mayors, who are elected by the citizens. Although the constitution of 1980 has been amended multiple times, it never has been completely renewed. Center-left President Michelle Bachelet Jeria is tackling this endeavour at the moment without a concrete outcome so far.

Chile has signed and ratified several international agreements against corruption: the OAS Convention against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention against Corruption (UNCAC). The Global Competitiveness Report 2016-2017 evaluates Chile as a country with relatively strong institutions and judicial independence. Corruption is only a minor issue for foreign companies in doing business with Chile, whilst inefficient government bureaucracy constitutes the main problem (Schwab 2016).

Corruption in Chile Today

In its legislation, Chile has established several norms that aim at mitigating corruption, as for example the Whistleblower-protection of 2007. An important bribery scandal emerged during the presidential term of Ricardo Lagos Escobar (2000-2006). It was called "MOP-GATE" or "caso coimas" and involved several members of the government, especially within the Ministry of Public Works. The involved officials misappropriated tax money for overpriced construction contracts and overpaid employees (El Ciudadano 2014). In 2015, under President Michelle Bachelet, a corruption case, the so called "Caso Caval", became public. It included Bachelet's son Sebastián Dávalos and his wife Natalia Compagnon. Caval is a company owned by Compagnon who received a loan from the Bank of Chile just when Bachelet was

beginning her second presidency. The money was used to buy properties and resell them for profit (Silva 2016).

Another scandal of that time was the PENTA case. PENTA is a powerful business conglomerate which was accused of illegally financing political parties. One consequence of these and other corruption scandals was the adoption of the several anti-corruption laws such as one limiting private donations to political parties and candidates as well as a law which guarantees citizens access to information from within the sphere of public administration. Furthermore, an online data bank has been established for public institutions to publish all purchases by the state (Silva 2016).

As a consequence, Bachelet also founded the so called Engel Commission (official title: “Consejo Asesor Presidencial contra los Conflictos de Interés, el Tráfico de Influencias y la Corrupcion”) headed by the economist Eduardo Engel. The commission was assigned with the task of drafting laws and giving policy advice on how to fight corruption within Chile. Furthermore, a new Probity Law (Ley de Probidad) was implemented in 2016 to increase transparency levels in public institutions.

5.5. Chile’s Judicial System

Chapter VI of the Chilean Constitution defines the basic structure of the judiciary. Article 76 clearly states that the judicial power lies exclusively in the hands of the courts, with no exception. It further states that neither the president of the republic nor the congress is allowed to bring cases to court, to retrial or enact any other judicial functions. This provides for a *de jure* complete separation of powers.

Rios-Figueroa (2012) states that through the judicial reform that was initiated in 1997, Chile today has achieved a high level of external independence amongst the institutions, although he claims that there are still high dependence levels within the judiciary. Chile’s first instance is organized according to 17 regional entities, followed by appeal courts and the Supreme Court as highest instance. Before the constitutional reform, the Supreme Court was controlled by General Pinochet, which is a fact that did not immediately change through the democratic transition.

Appointment Processes

So, even after democracy was re-established, high levels of interference by the executive were common. One goal of the reform process was to change this situation. The new norms mainly targeted the appointment process and sanctioning mechanisms that enabled the supreme court judges to shape careers of lower ranked judges (Harasic 2007). Article 78 of the Constitution defines the appointment procedures of judges. The Supreme Court consists of 21 members, who are mostly judges but five have to be lawyers from outside of the judicial administration. If a new court member is to be elected, the Supreme Court sets up a list of five nominees which is then passed on to the President of the Republic. This is a secret and not a publicized procedure. The President then selects one of the five nominees. For positive approval, two-thirds of the Senate have to be in favour of the decision. This appointment procedure provides for an inclusion of all three of the state's branches.

Judges to the courts of appeal are appointed by the president from a list of three also suggested by the Supreme Court. All other lower rank judges and public legal officials such as public prosecutors or public notaries are nominated by the corresponding court of appeals after an advertised competitive process and appointed by the president. As stated in article 80 of the Constitution, the judges' tenures lasts until they turn 75.

Sanctioning of Judges

Sanctioning of Judges is regulated in Article 80 of the constitution. Before a lower court judge can be sanctioned, the person in question must be informed as well as the respective courts of appeal. It takes an absolute majority of the Supreme Court to decide a misconduct case concerning a judge. Furthermore, the Supreme Court can also decide on relocation concerning anyone from the judicial personnel. Sanctioning of the Supreme Court has to be initiated by the President of the Republic.

Public Prosecutor (Fiscalía, Ministerio Público)

The reform of 1997 incorporated the PPO as a new and autonomous institution which acts independently from the judiciary. Before the reform, the tasks of investigating and prosecution of alleged criminals were performed by the judges (Forner Ortega 2009). Chapter VII of the Constitution deals with the PPO. It is hierarchically organized with one national prosecutor on top, who is elected for a term of eight years. In Chile, public

prosecutors are obliged to open investigations if they happen to receive a report of suspicion, on their own initiative or upon a complaint by a victim (Forner Ortega 2009).

The appointment of this position involves all three estates of the state. Similar to the procedure of the appointment of supreme court judges, the Supreme Court drafts a list of five names of which the President of the Republic then nominates one person. The appointment of this nominee only is approved after a two-thirds majority in the Senate has voted for him or her. The subsequent level to the national prosecutor are the 18 regional prosecutor's offices throughout the country, of which four are designated for the region of the capital Santiago. They are nominated by their respective courts of appeal and are appointed by the national prosecutor for a term of eight years.

In 2003, a specialized anti-corruption unit was established within the PPO. An additional unit is in charge of economic crime, money laundering and organized crime. There are also specialized prosecutors, police and investigators. The specialized police forces focus on economic and corruption crimes. Their task is conduct investigations under the responsibility of the PPO (Forner Ortega 2009).

5.6. Conclusion of the Case Studies

The case studies of Argentina and Chile aimed at identifying the political climate and the regional setting within which the respective judiciaries of the countries have developed. The focus has been set on more recent political developments of the 20th century. Whilst in Argentina, the executive has strongly intervened in judicial institutions also during its times of democracy, Chile could maintain a fairly independent judiciary with the exemption under the Pinochet regime. A particularity of Chile is that it managed to establish a clear separation of powers within a few decades after the dictatorship ended. Argentina has a judiciary which is influenced by the executive, whereas Chile still has the issue of strong hierarchies and dependencies within the judiciary.

The main difference within the judiciaries of the two countries is that Argentina has a Judicial Council which is responsible for appointing and sanctioning of judges, whilst Chile has specific processes which include all three of the state's branches. Although

the Judicial Council of Argentina ought to provide for more transparency and impartiality, it has increasingly been captured by political forces. The PPO have been established as independent institutions in both countries. However, the general practice of influencing the justice system also applies to the PPO in Argentina.

6. Judicial Corruption in Argentina and Chile – The Comparative Perspective

At first, the previous chapters gave an overview on theoretic approaches of how corruption in the judiciary emerges and then approached the specific settings in Argentina and Chile. The aim was to identify the particularities of the judicial systems which have developed in the context of the political settings of the recent past. This present chapter now looks at the matter from a comparative perspective to answer the initial question of how the political forces have influenced the levels of corruption in the judicial systems in the two countries. Therefore, results of the previous chapters are complemented by the results from interviews with country experts. The aim is to identify the institutional structures that enable the executive to intervene in the judiciary. The comparative analysis is conducted on the four levels of appointment procedures, transparency, accountability mechanisms and historic factors.

- Argentina:
- Eugenio Curia
 - Roberto Saba
 - Pablo Secchi

- Chile:
- Marta Herrera
 - Alberto Precht
 - A lawyer who wants to remain anonymous.

6.1. Hypothesis 1: Appointment Process

The more leverage the executive holds in the appointment processes of judges, the higher the corruption levels of a country.

Both, the literature as well as all consulted experts stressed the importance of appointment procedures when it comes to the leverage the executive holds over the judiciary. As Alberto Precht points out, to date, there does not exist a perfect appointment process that could guarantee for no potential interference by personal and political interests in the selection of judges. In Argentina, especially the Supreme

Court has frequently been targeted through amendments in its size and composition by the administrations in power (Chavez 2004; Llanos and Figueroa Schibber 2008). The main difference in the appointment procedures of Argentina and Chile is that Argentina implemented a Judicial Council in the course of the constitutional reform of 1994.

The council is primarily in charge for appointing and sanctioning of lower court judges. The intention behind the creation of this council was to create an impartial body that would meet its decisions merely on the grounds of judges' professional merits. Before the reform, presidents like Menem appointed justices as they pleased. The Supreme Court especially was packed with supporters of his. The presidents virtually enjoyed complete discretion and authority over the decisions, especially when holding a majority in the legislative. The implementation of the Judicial Council aimed to change this.

Nevertheless, as Precht points out, the Judicial Council has been co-opted by political interests. President Néstor Kirchner amended its composition in a way that it gives the strongest political faction the power to override dissenting opinions by providing the representatives of the executive and the legislator with a majority of votes. Eugenio Curia stresses the fact that in the end, it is always the executive that holds the decisive power in the appointment of justices. He describes that in the last 35 years, every president has intervened in the composition of the Supreme Court, the lower courts and the PPO. Also, Roberto Saba confirms that judges are often selected on the basis of their political ties and not on their merits. The implementation of the Judicial Council did not change this.

When it comes to the Supreme Court, a different appointment procedure applies. It is not affected by decisions of the council. Only in 2003, the civil society achieved the implementation of a new appointment system for supreme court judges which includes a time frame of 15 days within which the public can comment on the candidate brought forward by the president, before the nomination is approved and is passed on to the senate for approval. Also the senate's decision making process is public. Saba refers to this appointment process as being transparent and stresses that a similar approach should be found for lower court judges too. He is convinced that the amendments of

the procedure for the Supreme Court were a step in the right direction. Thus, he suggests a revision of the council and a stronger involvement of the civil society.

One of the main reasons for why Argentina gives the executive so much leeway over the judiciary is because its Constitution only provides loose guidelines for its structural powers. It refers to more concrete laws for defining the procedures of appointment and evaluation of judges and the institutional setup of the Judicial Council. These laws can be amended more easily than the Constitution could be. Argentinean presidents have the tool of Decrees of Necessity and Urgency at hand with which they can establish laws by circumventing potential vetoes by the other state's powers. This gave presidents like Menem or the Kirchners the legal leeway to amend the compositions of the Supreme Court and the Judicial Council and to pack the high ranks of the judiciary with political supporters (OECD 2017).

In Chile, the Constitution provides for a concrete procedure of appointment of judges. This procedure includes all three branches of the state and is ought to guarantee mutual control. However, the country experts are not completely convinced of the process either. All three experts claim that the problem in Chile is the strong hierarchy within the judiciary. When someone wants to advance their career, personal and political contacts and influence become important. The lawyer mentions the concept of the "besamanos" (kiss on the hand) which metaphorically refers to the strong hierarchy in Chile's judiciary. In order to advance in one's career, it is important to have political ties to people of influence. According to the lawyer, the influence of regional senators is especially important when it comes to appointments. He says that he witnessed this in his own career: "A senator sends a 'WhatsApp'-message to a judge, saying: 'I'll help you. So, just relax.'"¹

In order to avoid these acts of nepotism, the lawyer recommends reforms within the appointment process. He recommends the establishment of an impartial Judicial Council which in his opinion would provide for more independence within the judiciary. Although some scholars such as for example Bedner (2002) or Rios-Figueroa (2012) also claim that a Judicial Council provides for more transparent appointments, Precht

¹ "Algún senador le envía un 'WhatsApp' a algún juez, diciéndole: 'Yo te voy a apoyar. Así que quédate tranquilo.'"

points out that this would not necessarily lead to improvements. He is convinced that it could easily complicate the judicial administration without providing for more transparency. Precht refers to examples within South America such as Argentina and the strong influence that the executive holds over the council.

In sum, there is no perfect appointment process that guarantees perfect independence within the judiciary and towards the executive. However, in Chile the system provides for a situation of low interference of the executive. Based on these facts, the first hypothesis is valid for the two case studies examined in this thesis.

6.2. Hypothesis 2: Transparency

The less transparent judicial procedures are, the easier it is for the executive to intervene in the judiciary.

The country experts Curia and Saba describe Argentina's judiciary as a very non-transparent one. Although the Judicial Council should actually aim at making decisions more transparent, it plays a crucial role in obscuring the interference of the executive in judicial processes. Nevertheless, the executive's influence does not stop with the council. According to Saba, there is also a lack in transparency when it comes to rulings of judges themselves. Judges use secrecy to influence proceedings in a way that some cases are speeded up, or others are not prosecuted at all. If it fits political demands, corruption cases can take up until eleven or twelve years until a case is closed. Thus, he claims that there is a need for a better monitoring system, especially of the federal penal system. He also points out that, in part, this is an effect of insufficient legal tools.

Corruption is mainly addressed to by criminal law. The criminal code, however, does not necessarily always apply. "When corruption is an isolated case, the criminal code is appropriate. But in Argentina", he says, "it is a structural problem. Corruption is a part of political processes and includes many of the institutions within the state, from private companies to government officials, the police and the military. In this situation,

the criminal law does not suffice.”² A different approach is needed, but attempts from the civil society, or from the bar association to implement structural checks and balances have been turned down. Pablo Secchi states that Argentina would need an investigative entity specialised in corruption cases.

In both countries, court proceedings have different transparency levels, when it comes to comparing the penal system with the civil system. Saba claims that the federal penal system in Argentina is highly prone to corruption. In Chile, the reform of the penal code from 1997 brought improvements, says Precht. Currently, the system is public and oral. In contrast, the civil system still has weaknesses, especially due to norms of discretion which cannot only be called upon by judges but also by other court officials.

In order to tackle corruption, Argentina passed a transparency law (Ley de Acceso a la Información Pública) only in 2016, although the civil society had been demanding it since 2000. Chile’s transparency laws, on the other hand, were often implemented after corruption scandals became public. The Transparency Law (Ley sobre Acceso a la Información Pública) from 2008, was established after a big corruption scandal called the “MOP-GATE” case became public during the presidency of Lagos. Furthermore, in the aftermath of corruption cases under president Bachelet, the Probity Law (Ley de Probidad) and a special commission designated to find better ways in combating corruption, the Engel Commission, were established. These remedies to increase public information and public awareness are considered crucial because they are important tools in increasing transparency and thus have also increased the levels of accountability.

When it comes to the PPO, both countries established it as an autonomous body, which gives them at least formal independence. This is important, so Curia, because otherwise they would never open investigations against corrupt officials. However, in Argentina, also public prosecutors have been influenced in similar ways by the executive as judges did (Manzetti 2014). When it comes to the PPO in Chile, Herrera and Precht claim that in general, the institution works in an impartial and diligent way.

² “Cuando en un país la corrupción es excepcional, el derecho penal te puede servir, pero en Argentina, la corrupción es estructural. Está metida en muchísimos procesos de decisión política y allí involucra a muchísima gente en distintos niveles desde empresas privadas hasta financieros de gobierno, policía, ejército. Es una situación de corrupción tan extendida que probablemente las herramientas del derecho penal no te sean suficientes.”

Especially in the last few years it has demonstrated its impartiality and also its internal independence.

To measure the independent variable of transparency, this thesis has mainly looked at court procedures and transparency laws. Chile, for a longer time now, has a stronger tradition of making court procedures more transparent and available for the public. Thus, hypothesis 2 is valid for the scope of this thesis and the two countries observed.

6.3. Hypothesis 3: Accountability mechanisms

The lower accountability levels towards judges, the higher the corruption levels of a country.

Holding judicial officials accountable is an important tool in the fight against corruption (Rose-Ackerman 1999). Nevertheless, accountability is a difficult concept, because the judiciary has to be independent in order to be able to work properly. It is the controlling institution, but to some extent, the controlling institution also has to be controlled too. Secchi points out that the judiciary is hardly a powerless victim of the executive, it gains from cooperating with the executive too and has also the tools to threaten and influence the executive. The judiciary is not a victim, it has enough tools at hand to defy the executive's threats and influence. It is a complex situation in which the judiciary is also prone to be captured by political influence.

The tools available are things such as sanctioning mechanisms in cases of misconduct or removal of corrupt judges in severe cases. In Argentina, the Judicial Council applies sanctions to lower court judges and a special impeachment jury is in charge for cases of serious misconduct. This jury decides whether or not judges should be removed from their positions or not. The same concerns that were raised for the appointment procedures under Hypothesis 1 apply when it comes to sanctioning mechanisms. If a political party holds majorities within the legislative, it holds the majority of votes in the council as well. Thus, it is unlikely that like-minded judges are held accountable by the administration. Moreover, those who do not comply with certain political aspirations might be removed.

Curia claims that the judicial system in Argentina is corrupt, because there is virtually no sanctioning for corrupt behaviour. They are not held accountable. In unambiguous cases, the accused usually renounce, before sanctions can be applied. So, even though not every individual is corrupt, it is a system that does not hold misbehaviour accountable. Saba refers to the sanction and removal procedures in Argentina as arbitrary. He advocates for a stronger inclusion of the civil society when it comes to monitoring of justices.

Secchi stresses that the change of administration in 2015 brought the opening of new investigations towards the previous government. This is a new development. In the past, the government and the judiciary have hardly been held accountable for collusion between them. Now, the judiciary demonstrates that it holds power in investigating. Another problem which has to be mentioned here is the fact that the courts are understaffed when it comes to judges, which is why a considerable number of surrogate judges fulfil their tasks in Argentina (OECD 2017). These judges are not part of the procedures that usually apply to judges. Therefore, they cannot be properly held accountable in transparent procedures.

The literature stresses the importance of tenure. In both countries, judges enjoy life tenure, i.e. until age 75, in the case of good conduct. However, although the tenure argument aims at the protection of the judges, it might constitute an obstacle for removing judges without due reason, but if, as the Argentinean case shows, the executive wants to remove them, it will find a way to do so.

In Chile on the other hand, the country experts say that judges are mostly dependent on their superiors. The strong hierarchy within the judiciary provides for a situation in which the judicial career is not perfectly competitive. Especially in more rural provinces, personal ties within the judiciary are important when wanting to be promoted. These high levels of internal dependence can cause corrupt practices to emerge as well.

When it comes to investigations of corruption cases, the authorities are usually confronted with high levels of complexity. Marta Herrera claims that ideally there would be a specialized PPO which should work on the basis of a multidisciplinary approach. It would need specialists in finance, economics, psychology and sociology to be able

to properly investigate corruption cases. Since corruption cases usually do not have clear evidence and victims, it is often very difficult to build a case.

Furthermore, she says that the penalties for crimes in the area of corruption are relatively low. Individuals who engage in corruption know that the punishment is low. Thus, she claims that it is important to raise minimum penalties, in order for it to have a deterrent function. As it stands now, there are hardly any convictions. However, the Chilean population is very sensitive towards corruption. Chile's corruption scandals occur mainly within the executive and usually cause public outcry and political consequences immediately follow, such as resignations by those responsible and an adaption of legal norms.

The topic of accountability is strongly related with transparency. Thus, this hypothesis in itself can hardly be answered within the scope of this thesis. What can be claimed for Argentina and Chile is that the Chilean society holds corrupt officials more accountable. The Chileans are not tolerant towards corruption whereas in Argentina there is a certain resignation towards public officials engaging in corruption.

6.4. Hypothesis 4: Political History

Chile is less corrupt than Argentina because historically its judiciary has been more independent from political interference by the executive.

As Curia points out, the reasons for different corruption levels lie within the history, sociology and politics of the individual states in question. This is also the perspective that many scholars share when it comes to aspects which are decisive in respective corruption levels (Silva 2016). The judiciary is per se an ambit that is more prone to corruption than other spheres, says Precht, because it involves highly complex cases and strong interests from the litigants. In Argentina, the political forces have been strongly shaping the judiciary according to their political needs (Chavez 2004). This is also claimed by Secchi. He says that Argentina's executive has been trying to influence the judiciary and has had a lot of success in doing so. Supreme court judges under Menem were strongly affiliated with his administration. When Néstor Kirchner entered

office, he initiated a reform of the Supreme Court, which the country experts consider necessary, because it restricted excessive powers of the court. On the downside, Kirchner pressured federal judges by accusing them of misconduct when they did not comply with the executive's demands.

Nevertheless, Secchi points out that there have been small improvements. When president Macri was elected president in 2015, his administration initiated investigations into corruption cases involving the previous government. This was something new for Argentina. Curia also refers to the current corruption scandal which involves the former presidential couple Néstor and Cristina Kirchner in the Brazilian corruption scandal "Lava Jato". He is convinced that the current investigations have the potential to bring about a change in the public's perception of the executive and its involvement in corruption. The conduct of the judiciary in this case will be crucial.

What the country experts stress, is that corruption in Argentina is not a question of individuals' misbehaviour. "It is a corrupt system per se", says Secchi, "[...] It is a logic which is pretty complex in our country [...]. One can only solve the issue by changing the system."³ This is the most pressing problem in the realm of the judiciary. In Argentina, corruption has reached a level that it has caused fatigue within the public. Corruption is perceived as an intrinsic and omnipresent fact with low leverage for changing it. Corrupt officials only undergo low consequences. Within this setting, the judiciary only constitutes a small part of the bigger problem of corruption.

Precht perceives the matter in a similar way, when he says that it is not useful to look at individual behaviour. Corruption is a system, but the two countries' developed very differently. In Chile, the historical dimension is different. Since the de-colonisation in the 19th century, Chile has been a country of lower levels of corruption and higher levels of probity than the other countries of South America. Chile has never experienced anarchy and the *caudillosim* like Argentina did. Its strong institutions and the separation of powers already emerged back then. Emblematic is also the example of the Supreme Court during the Allende regime, which could vehemently oppose political decisions in public. The main issue however, the strong internal hierarchy

³ "Es un sistema corrupto en si, [...] es una lógica bastante compleja en nuestro país [...]. Se soluciona con cambiar el Sistema."

within the Chile's judiciary also became a crucial tool for Pinochet. His regime, constitutes the only exception when the executive captured the judiciary (Silva 2016). This task was fairly easy, because once he controlled the Supreme Court, he could quickly bring the whole judiciary under his control. However, the strong internal dependence has maintained until now and is claimed to be one of the main problems within the judicial system of Chile by the country experts and by scholars (Rios-Figueroa 2012).

Precht and Herrera say that in the last decades, the separation of powers works fairly well in Chile and the courts, the PPO and lawyers are of good quality and work diligently. Furthermore, the judicial reforms of the past decades are perceived as having been very efficient (Skaar 2003). As a contributing factor, Precht mentions that Chile has a fairly small internal market and does not have major problems with organized crime. These factors usually contribute to higher corruption levels, so for example in Argentina, where the internal market is considerably bigger and the problem of trade in illicit goods is a problem.

The hypothesis of the importance of the historical roots of Chile's relatively low corruption levels in comparison to Argentina is favoured by country experts such as Precht and Curia. It is valid in the sense that Chile has had an early start in developing strong independent institutions which provide for a lower corruption level. However, this is not a claim that is per se generalizable. In other examples the historic development might not be as emblematic.

6.5. Conclusion of the Chapter

This chapter aimed at answering the four hypotheses to the initial research question of this thesis. A comparative analysis has been conducted according to these four levels of appointment procedures, transparency, accountability mechanisms and historic factors to identify the institutional structures that enable the executive to intervene in the judiciary. A crucial aspect is that corruption has been identified as a structural problem with a lot of contributing factors which add up to an overall corruption level of a country. The justice system is only one component within the large state system. However, the judiciary is certainly an important one, because it constitutes the

controlling institution for the rest of the state. Whilst in Argentina there has always been a strong interference by the executive, the Chilean judiciary is independent towards the executive, but has high levels of dependence within its internal hierarchy. When it comes to interference of the executive on the judiciary, all interviewed country experts also claim the importance of appointment processes of judges. In Argentina, the appointment process provides for a strong level of interference by the executive.

In Chile, the separation of powers works fairly well, which is also due to a civil society which is very sensitive on the topic of corruption. Thus, the Chilean state's usual response to corruption scandals is the tightening or establishing of anti-corruption legislation and accountability mechanisms. Argentina, on the other hand, demonstrates a public belief of corruption being an intrinsic part of the state with a certain fatigue by the public. Country experts such as Saba recommend an increase in the involvement of the civil society to provide public scrutiny for government acts in the realm of interactions with the judiciary and for judicial decisions themselves. The judiciary needs stronger monitoring. Country experts of both states also recommend the establishment of prosecuting entities specialised in corruption-investigations.

7. Conclusion

Corruption is a manifold phenomenon, which has its roots in a complex combination of historical, sociological and political factors. Within this setting, the scope of this present thesis was to detect ways in which political forces have influenced the judicial systems of Argentina and Chile and thus contributed to their overall levels of corruption, being aware of the fact that this at best constitutes a small contribution to the analysis of a topic as large as corruption. This thesis argued that the stronger the influence is which the executive holds over the judiciary, the higher are the overall corruption levels of a state. The four main fields this was examined were the appointment procedures for judges, transparency, accountability mechanisms and historical factors.

South American countries are on average considered particularly corrupt (Buscaglia and Ulen 1997). Chile has low levels of corruption, which makes the country a special case within the regional setting. Thus, Chile was analysed in comparison with neighbouring Argentina, which has fairly high corruption levels. The aim was to detect potential explanations within the two judicial settings for the countries' corruption levels. As Rios-Figueroa (2012) claims, it is not possible to derive general rules by investigating correlations between judicial institutions and corruption in a limited number of case studies. Still, it might indicate circumstances which favour specific kinds of corruption to emerge (Rios-Figueroa 2012).

Institutions in Argentina and Chile have developed in different ways since both countries gained independence from colonial Spain in the early 19th century. Argentina was ruled by anarchic systems for a while, whereas Chile almost immediately established a functioning state system. Later on, in the 20th century, Argentina's political history was drastically shaped by the political movement of Peronism and the dictatorial regimes in times of the so called State Terrorism. Chile was also governed by a military dictatorship for almost two decades in the 20th century. Prior and after the dictatorial Pinochet regime, Chile had functioning democracies.

When it comes to judicial corruption, the main concern is to keep the judiciary free from interference of the other state branches. Separation of powers is crucial to maintain independent courts, but at the same time, checks and balances have to be established to hold judicial officials accountable (Chavez 2004). In analysing the judiciary, this

thesis focused on judges within the court structure and the public prosecutor's office, because these are the two entities that constitute the highest authorities in the judiciary and in the lead of investigations. In general, judicial systems are responsible for enforcing the national and international anti-corruption legislation. If judicial officials engage in corrupt behaviour, a state is not governed by the rule of law but by personal interests (Voigt and Gutmann 2015). It is the judiciary's task to charge and prosecute unlawful behaviour in fair trials, but if judges and public prosecutors themselves are prone to illicit influence, corruption will flourish. In their decision making processes, judges have to be free from influences from anybody within or from outside the judiciary. Their rulings have to be solely based on legal grounds (Robertson 2009).

For a diligent judiciary, the appointment and sanctioning mechanisms as well as the removal of judges need to include transparent procedures in order to avoid politically motivated decisions. In Argentina, on the one hand, these procedures are established in the Constitution, but it only predefines a loose regulation on how the courts and the Judicial Council shall be structured. This provides the executive with the opportunity to meddle in these institutions. Although the Judicial Council was founded with the intention to make appointment and sanctioning mechanisms within the judiciary more transparent, the fact that it has been captured by the executive provides for a completely different outcome as actually intended.

When it comes to Chile, the consulted country experts are not completely in favour of their current appointment and sanctioning mechanisms either, but these at least involve all three state branches in fairly transparent processes. Chile is considered a country with a high level of judicial diligence and low interference by the executive. However, the judiciary also has to be held accountable when it comes to manipulation from within its own peers. This is the main issue in Chile. The country has a strong hierarchy within the judiciary which leads to high dependence levels towards one's superiors.

A crucial difference between the two investigated case studies is also that the Chilean public is very sensitive to corruption scandals among their government officials. Roberto Saba claims that some corruption scandals from Chile are so small in their scopes that they would not even be brought up in the news in Argentina. The

Argentinean society is so used to enormous corruption scandals being part of government activities that it has developed a certain fatigue towards it. This resembles also the fact that in Chile, major corruption cases are often followed by the establishment of new legislative and political measures to avoid future corruption. Although these measures are aimed mainly at preventing further corruption cases, in Argentina, on the other hand, corruption results have hardly any consequences at all, as Eugenio Curia observes.

In sum, an independent judiciary is important, but it cannot combat corruption on its own (Rose-Ackerman 1999). As the results of this thesis have shown, and as the country experts have pointed out, corruption is more of a structural problem than related to specific individuals. The justice system is only one component within the large state system. A lot of factors contribute to the overall corruption level. However, the judiciary is an important one, because it represents the controlling institution for the rest of the institutions and administers the law. Whilst in Argentina there is strong interference by the executive, the Chilean judiciary is independent towards it.

The results of this thesis are only a small contribution to the detection of overall reasons for corruption levels of Argentina and Chile. The judiciary as well as the executive's influence on it are a part of a states' setup and thus can only contain partial explanation for the states' corruption levels. In order to properly tackle corruption, states need to establish systems of checks and balances that punish criminal actors. Therefore, officials need to be held accountable and the existing law must be strictly enforced. This does not mean that existing laws cannot or should not be amended. Quite the contrary is true, but in Argentina this is mostly done for binding the law to personal interests and not to establish judicial independence. The establishment of judicial independence would be necessary on the constitutional level by including an impartial appointment and sanctioning process and would hamper interference by current administrations. A transparent institutional setting is crucial as well as an inclusion of the civil society in order to hold state officials accountable.

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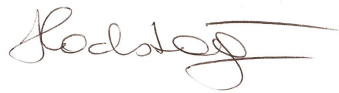
9. Appendix

Corruption Perceptions Index 2016 by Transparency International, Full Source Description:

13 data sources were used to construct the Corruption Perceptions Index 2016:

1. African Development Bank Governance Ratings 2015
2. Bertelsmann Foundation Sustainable Governance Indicators 2016
3. Bertelsmann Foundation Transformation Index 2016
4. Economist Intelligence Unit Country Risk Ratings 2016
5. Freedom House Nations in Transit 2016
6. Global Insight Country Risk Ratings 2015
7. IMD World Competitiveness Yearbook 2016
8. Political and Economic Risk Consultancy Asian Intelligence 2016
9. Political Risk Services International Country Risk Guide 2016
10. World Bank - Country Policy and Institutional Assessment 2015
11. World Economic Forum Executive Opinion Survey (EOS) 2016
12. World Justice Project Rule of Law Index 2016
13. Varieties of Democracy (VDEM) Project 2016

“On my honour as a student of the Diplomatic Academy of Vienna, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it.”

A handwritten signature in dark ink, appearing to read 'Hochstätter', with a stylized flourish extending to the right.

(Sandra Hochstätter)