



## JUDGES AS INVITED ACTORS IN THE POLITICAL ARENA: THE CASES OF COSTA RICA AND GUATEMALA\*

Elena MARTÍNEZ BARAHONA\*\*

**ABSTRACT.** *The goal of this article is to broaden our knowledge of the high courts in Costa Rica and Guatemala by examining the degree to which these courts are used as “mechanisms of social accountability.” For this purpose, this study assesses changes in the number of judicial claims filed by individuals or social groups before the high courts to control the legality of government actions or to protect their own rights. I analyze whether the emergence of this “judicialization by the people” is a consequence of changes in institutional settings and/or a growing distrust in politicians, scenarios that turn the high courts into viable forums for the achievement of political results.*

**KEY WORDS:** *High courts, supreme courts, judges, societal accountability, judicialization, Costa Rica, Guatemala.*

**RESUMEN.** *Este artículo pretende profundizar en el estudio de las cortes constitucionales en Costa Rica y Guatemala, examinando hasta qué punto son utilizadas como mecanismo de accountability social. Con ese propósito, este estudio evalúa si hay un aumento en el número de recursos interpuestos ante las cortes por los ciudadanos y grupos sociales para controlar la legalidad de las acciones gubernamentales o para proteger sus derechos. A través de este artículo se probará si la emergencia de esta “judicialización por los ciudadanos” es consecuencia tanto de cambios de las reglas institucionales como de la desconfianza hacia los políticos, circunstancias que convierten a dichas cortes en un foro adecuado para obtener resultados políticos.*

**PALABRAS CLAVE:** *Cortes supremas, cortes constitucionales, accountability social, judicialización, Costa Rica, Guatemala.*

---

\* I am indebted to Inés Amezcaga for her excellent copy editing and her careful observations. I would also like to thank the anonymous referees of the *Mexican Law Review* for their extensive and insightful comments on an earlier draft of this article. This article is based on ELENA MARTÍNEZ BARAHONA, *SEEKING THE POLITICAL ROLE OF THE THIRD GOVERNMENT BRANCH: A COMPARATIVE APPROACH TO HIGH COURTS IN CENTRAL AMERICA* (Ph.D. dissertation, European University Institute, published in VDM Verlag Dr. Müller, 2009).

\*\* Professor, Department of Political Science, University of Salamanca, Spain.

## TABLE OF CONTENTS

I. INTRODUCTION . . . . .	4
II. EXPANSION OF THE USE OF JUDICIAL STRATEGIES. . . . .	7
III. PUBLIC RECOURSE TO HIGH COURTS IN COSTA RICA: THE SOCIAL IMPLICATIONS OF LEGAL REFORMS. . . . .	10
1. Legal Reforms . . . . .	12
2. Public Confidence in Sala IV. . . . .	13
IV. PUBLIC RECOURSE TO THE COURTS IN GUATEMALA: A QUEST TO STRENGTHEN THE HIGH COURTS. . . . .	16
1. Judicial Reform after the Peace Accords . . . . .	18
2. Regaining Confidence in the Judiciary . . . . .	20
V. KEY FINDINGS AND CONCLUSIONS. . . . .	23

## I. INTRODUCTION

Analysts of the “Third Wave” of democratization have placed an extraordinary degree of confidence in judges as the guardians of democracy. Furthermore, the current crisis in the system of political representation has led to a reconsideration of the role of the courts, mainly high courts, in public life. On the one hand, this is due to popular discontent with the nature of representative democracy where electoral victory becomes the predominant concern of political actors and accountability is lacking. It is therefore not surprising that countervailing powers that operate under different premises are increasingly welcome. As Dworkin states, “people are attracted to the idea of one forum, at least, where argument matters”.<sup>1</sup> On the other hand, the intervention of high courts can be considered an instrument to break political impasses. In this sense, “courts are not welcome intruders into the democratic process, but invited (and perhaps necessary) release valves for democratic impulses that cannot be addressed through the ordinary legislative route.”<sup>2</sup>

This article contributes to this discussion by showing that judicial institutions in Central America are being used as mechanisms of “social account-

---

<sup>1</sup> “Judges are supposed to do nothing that they cannot justify in principle, and to appeal only to principles that they thereby undertake to respect in other context as well. People yearning for reasoning rather than faith or compromise would naturally turn to the institution that, at least compared to others, processes the former ideal.”

<sup>2</sup> Cornell W. Clayton, *The Supply and Demand Sides of Judicial Policy-Making (or, Why Be so Positive about Judicialization of Politics?)*, 65 LAW & CONTEMP. PROBS. 78 (2002).

ability.”<sup>3</sup> It contributes to the literature which argues that judges have now emerged as active participants in the political process by offering new opportunities to citizens, social movements, interest groups and politicians. This may transform courts into the perfect channel to pursue political objectives. First of all, courts can be used by some groups to achieve political aims that they cannot accomplish through the normal political process. Secondly, the courts can be used as a mechanism that allows a large number of actors to exercise control through legal claims. As a result, this affects the role of judges in contemporary politics.

The goal of this article is to extend the existing research on high courts by examining the degree to which, in a given period, a high court is used as a “mechanism of social accountability.” Following the work of Catalina Smulovitz and Enrique Peruzzotti, this is defined here as a non-electoral, yet vertical, mechanism that allows actors to exercise control by making legal claims through courts.<sup>4</sup> Thus, I will assess whether there is an increase in the number of judicial claims filed by individuals or social groups with high courts to control the legality of governmental actions or to protect their rights.<sup>5</sup>

Based on an adaptation of Smulovitz’s theory, I argue that one of the sources of the judiciary’s new role in politics is democratic institutions’ failure to work efficiently. In fact, the weakness of the prevailing democratic structures has prompted the Courts to intervene in politics. This intervention is fostered precisely by individuals or groups that hope to find in the high courts solutions to problems that political institutions have not been able or willing to provide. The emergence of this “*judicialization by the people*”

---

<sup>3</sup> Catalina Smulovitz & Enrique Peruzzotti, *Societal and Horizontal Controls. Two Cases about a Fruitful Relationship*, Paper presented at the CONFERENCE ON INSTITUTIONS, ACCOUNTABILITY AND DEMOCRATIC GOVERNANCE IN LATIN AMERICA (The Helen Kellogg Institute for International Studies, University of Notre Dame, 2000).

<sup>4</sup> Smulovitz & Peruzzotti, *supra* note 3, at 2. According to these authors, “social accountability” also involves participation in institutional arenas for monitoring and policy-making and the use of non-institutional tools (mainly encompassing social mobilizations and media reports).

<sup>5</sup> It is important to mention the difficulties with making cross-national comparisons of caseloads. As Tom Ginsburg points out, “institutional structure is not always commensurable, and small variations in the institutional configuration can produce large variations in such indicators as strike rates, filings, and other variables.” TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES. CONSTITUTIONAL COURTS IN ASIAN CASES* (Cambridge University Press, 2003). However, this does not mean that comparison is impossible. As the above-mentioned author and this study suggest, the trajectory of each High Court’s caseload over time and the concepts of high-and-low-caseloads can be used to evaluate the performance of the high courts. As Tom Ginsburg states, “essentially, this strategy involves comparing each court with itself at different points in time and then comparing the overall pattern of development with that of other courts. This avoids problems of incommensurable institutional design faced by simply comparing caseloads” (*id.* at 251).

is mainly manifested in the growing distrust in politicians and the acceptance of the new judicial role by citizens and “interest groups.”<sup>6</sup> Where the judiciary has *more* credibility than other government institutions, it is more likely that the media, political parties, interest groups, individuals and weak and marginalized groups will go to the courts to push a specific agenda. Following Neal Tate, this is due to the fact that if these groups view majoritarian institutions as immobilized, self-serving or even corrupt, it is hardly surprising that these groups will allocate policy-making duties to the judiciaries, who have good-standing reputations for their expertise and honesty, and at least as much legitimacy as that of the executive and legislative branches.<sup>7</sup> This tendency should only accelerate if there is a large and important number of “interest groups” using the courts as an additional means to influence policy. This can result in a shift in the balance of power away from the other branches of government toward the judiciary.

This article puts this argument to the test by analyzing the Costa Rican and Guatemalan high courts. The essay is divided into three sections. It begins with an overview of the literature to identify the main theories that explain the public recourse to high courts as a mechanism of “social accountability.” Next, the article analyses the cases of Costa Rica and Guatemala. I first examine statistics concerning each country’s high court caseload over time to depict the evolution in this public recourse. I then study the possible causal factors that explain this evolution, mainly focusing on the institutional changes that have facilitated legal mobilization, which partly depends on the threshold rules to access the courts.<sup>8</sup> I also analyze whether the erosion of citizens’ perception of democratic institutions have an impact on the general expansion of judicial power and whether this legal mobilization from below is enough to guarantee greater judicial activism. This indi-

---

<sup>6</sup> “Judicialization of politics” refers to the growing influence of the courts, in particular on matters that were once considered purely political. Vallinder first introduced this term in 1995 when he made reference to the growth of judicial intervention in politics. Stone Sweet also uses this term in reference to the general process by which legal discourse—norms of behavior and language—penetrates and absorbs political discourse. Alec Stone Sweet, *Judging Socialist Reform: The Politics of Coordinate Construction in France and Germany*, 26 *COMPARATIVE POLITICAL STUDIES* 443-469 (1994). Other and wider definitions can be found in: Pilar Domingo, *Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America*, 11 *DEMOCRATIZATION* 104 (2004); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 *LAW & CONTEMP. PROBS.* 41-66 (2002) or Stella Righettini, *La politicizzazione di un potere neutrale. Magistratura e crisi italiana*, XXV *RIVISTA ITALIANA DI SCIENZA POLITICA* (1995), among others.

<sup>7</sup> Neal Tate, *Why the Expansion of Judicial Power?*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 31 (Neal Tate & Torbjörn Vallinder eds., New York University Press, 1995).

<sup>8</sup> The concept of a threshold rule is developed in Scheppele 1988 and describes the rules that courts use to govern access to legal remedies. Kim Lane Scheppele & Jack L. Walker, *The Litigation Strategies of Interest Groups*, in *MOBILIZING INTEREST GROUPS IN AMERICA* 181 (Jack L. Walker ed., The University of Michigan Press, 1991).

cator will be observed in the public perception of confidence in the high courts compared to confidence in representative institutions, and whether there is an increase in interest groups acting as a response to the immobility of democratic institutions. Finally, the conclusion discusses the implications of the empirical findings by analyzing the repercussions of judges' role in contemporary democracies.

The analysis uses data gathered by the Latin American Public Opinion Project (LAPOP) in 2004, 2006 and 2008 for the countries studied, together with the *Latinobarómetro* database.<sup>9</sup> These surveys contain questions measuring attitudes of confidence in democratic institutions. The study also uses interviews with Supreme Court justices and experts to obtain descriptive information that is difficult to extract from regular questionnaires.<sup>10</sup>

The Central American countries selected for this study share some historical similarities, as well as socio-economic challenges, but they vary considerably in terms of political development. While Costa Rica has long boasted a stable democratic tradition, Guatemala did not undergo a transition to democracy until the 1990s. This variation in political development allows for the examination of the increase in the use of judicial strategies in two distinct national settings. The available information allows for a comparison across and within countries at two different points in time: in Costa Rica before and after the 1989 judicial reform and in Guatemala before and after the signing of the 1996 Peace Accords.

## II. EXPANSION OF THE USE OF JUDICIAL STRATEGIES

Scholars have increasingly departed from a traditional disregard for the influence of the judiciary in mainstream politics. Within a broader compar-

---

<sup>9</sup> *Latin American Public Opinion Project (LAPOP)* is a project funded by the United States Agency for International Development (USAID) and backed by the United Nations Development Programme (UNDP), the Inter-American Development Bank (IADB) and Vanderbilt University. For many years, it was housed at the University of Pittsburgh, but is now hosted by Vanderbilt University. This cross-national set of similar surveys measuring public opinion in Latin America is available at [www.la.popsurveys.org](http://www.la.popsurveys.org). As LAPOP has no data prior to 2004, I also use *Latinobarómetro*. *Latinobarómetro* is an annual public opinion survey carried out in 17 Latin American countries, most of which date back to 1995. The survey has the support of the Swedish International Development Agency (SIDA), the UNDP and the IADB. This survey applies identical questionnaires to representative samples. In the specific cases of Costa Rica and Guatemala, the samples represent 100% of the population. *Latinobarómetro* is available at: [www.latinobarometro.org](http://www.latinobarometro.org).

<sup>10</sup> The in-depth interviews with key informants are part of my doctoral thesis: ELENA MARTÍNEZ BARAHONA, *SEEKING THE POLITICAL ROLE OF THE THIRD GOVERNMENT BRANCH: A COMPARATIVE APPROACH TO HIGH COURTS IN CENTRAL AMERICA* (European University Institute, published in VDM Verlag Dr. Müller, 2009).

ative context, high court activism is a reality along with the new position of these courts in political systems.<sup>11</sup> Thus, this phenomenon of the “judicialization of politics” has increasingly come to be recognized as a feature of political development.<sup>12</sup>

In general, this judicialization of politics indicates judges’ greater involvement in law-making and social control. However, as the judicial system is fundamentally a *reactive* system in the sense that judges do not tend to act of their own accord, their “judicialization” is mainly initiated by the “victims” who approach the judges and bring their legal claims forward. In this sense, legal complaints are mechanisms used by citizens, NGOs or interest groups to turn mobilization into a potential law-enforcing activity, moving the Courts into a more prominent position as actors in the political arena.<sup>13</sup> While some of these groups concentrate on establishing contact with executive agencies, lobbying parliaments, unfolding media campaigns or even staging public protests in the streets, others prefer to pursue their goals through the judiciary as part of a strategy named “the rights revolution.”<sup>14</sup> It is significant that the growth in the number of interest groups, NGOs or parallel “social watchdog” organizations, which initially emerged as a means of using the law as an instrument to hold public institutions accountable, has now extended this role to the advancement of rights protection. In this way, this network (also called “public interest law movement”) has expanded the role of the courts in social and political affairs within the

---

<sup>11</sup> In some Eastern European countries, politicians and legislators frequently resort to constitutional courts. Consequently, these courts supervise policy decisions made by parliament and the executive branch on an almost routine basis. Yoav Dotan & Menachem Hofnung, *Legal Defeats-Political Wins. Why Do Elected Representatives Go to Court?*, 38 COMPARATIVE POLITICAL STUDIES 78 (2005). In this sense, the constitutional courts of Hungary and Poland have been quite influential and the courts in Bulgaria, Slovakia, Slovenia, the Czech Republic, and the Baltic states (but with relative failure in Russia and complete failure of the high courts in Kazakhstan, Belarus, Albania, and Romania) have proven to have been relatively successful in the first few years. We can also find works on the growing judicial intervention of African constitutional courts —the cases of South Africa; Theunis Roux, *Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court*, in DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES (Siri Gloppen *et al.* eds., 2004) or Tanzania and Zambia; E. g., GINSBURG, *supra* note 5.

<sup>12</sup> Pilar Domingo, *Judicialization of Politics: The Changing Political and Social Role of the Judiciary in Mexico*, Paper presented at the CONFERENCE ON JUDICIALIZATION OF POLITICS (ILAS-University of London, 17-19, March, 2004).

<sup>13</sup> In this sense, we can cite the excellent work of Catalina Smulovitz on the Argentinian case: *Petitioning and Creating Rights. Judicialization in Argentina*, Paper presented at the CONFERENCE ON JUDICIALIZATION OF POLITICS IN LATIN AMERICA 3 (ILAS-London, 2004).

<sup>14</sup> CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (Chicago, University of Chicago Press, 1998).

system.<sup>15</sup> The most important channel of influence for interest groups attempting to bring litigation before the courts involves creating a public climate in which judges are forced to respond: “Powerful groups from all points along the ideological spectrum now consider a sympathetic judiciary essential to the development and achievement of important policy goals.”<sup>16</sup>

Such legal strategies often aim at wider *political* and *social* goals. Thus, “social mechanisms” may also *trigger* the use of horizontal mechanisms as they involve increased cost to the reputations of public officials and the threat of their being taken to court. In the words of Smulovitz and Peruzzotti, “societal mechanisms can influence the performance of horizontal ones by adding relatively persistent and newly societal organized guardians to the guardians.”<sup>17</sup>

Why are actors using the courts? Studies have shown that the specific outcomes of judicialization depend on the way laws and courts interact with social and political conditions such as the level of political competition, the social and organizational capacities of the actors or the decision structure of the judiciary.<sup>18</sup> As a result, even though the relevance of judicialization in the region cannot be disregarded, we are lacking assessments of its effects on public policy, requiring analysis of the specific social and institutional context in which laws and courts operate.

The relationship between interest groups and the judiciary is one of the most significant areas of concern in the literature on the judicial process.<sup>19</sup> As the number of publications on interest group litigation has grown, a number of diverse explanations have been developed to explain why some groups use the courts more than others.<sup>20</sup> There are two sets of significantly

---

<sup>15</sup> “If one considers the tremendous expansion of the ‘class actions’ and ‘public interest litigation’ in the United States, of ‘*actions collectives*’ in France, of ‘*Verbandsklagen*’ in Germany, and more generally, of the phenomenon now called ‘diffused interest’ litigation,’ one will recognize that a profound metamorphosis has been taking place not only in the traditional concepts and structures of the judicial process, but also in the very role of the modern judge”. MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 553 (Oxford University Press, 1989).

<sup>16</sup> MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 71 (W. W. Norton, 1994).

<sup>17</sup> Smulovitz & Peruzzotti, *supra* note 3, at 4.

<sup>18</sup> Catalina Smulovitz, *Public Policy by Other Means. Playing the Judicial Arena*, in *COMPARATIVE PUBLIC POLICY IN LATIN AMERICA* (Susan Franceschet & Jordi Diez eds., University of Toronto Press, forthcoming).

<sup>19</sup> Herman Pritchett, *The Development of Judicial Research*, in *FRONTIERS OF JUDICIAL RESEARCH* 33 (Joel Grossman *et al.* eds., 1969).

<sup>20</sup> In their study, Scheppele and Walker use different arguments to describe when groups are likely to use courts: *a*) when they are at a political disadvantage in the electoral process; *b*) when they can frame its interests in terms of rights; *c*) when they have large organizational resources and networks; and finally, interest groups’ use of the courts may depend

powerful variables in an interest group's decision to use the courts. On one hand, a set of *threshold rules* governing when groups can make use of the courts. On the other hand, the structures and strategies of the organizations themselves. For instance, if there is a large and important number of "interest groups" or parallel "social watchdog" organizations using the courts a means of influencing policy, an increase in the political role of high courts is likely to occur since it encourages judicial intervention in politics. This article will only analyze the first variable, studying the changes in the institutional settings to access high courts in the countries in question. Together with this variable, the article examines confidence in courts compared to that in other democratic institutions.

### III. PUBLIC RECOURSE TO HIGH COURTS IN COSTA RICA: THE SOCIAL IMPLICATIONS OF LEGAL REFORMS

"The Sala IV has been a revolution in this country."

Personal Interview with Deputy Federico  
Malavassi, San Jose, Costa Rica,  
September 1, 2005.

Until 1989, politicians and citizens turned to the Costa Rican Supreme Court only on rare occasions and as a last resort. When they decided to seek litigation, the Supreme Court adhered to a narrow concept of judicial review, which did not encourage future litigation. In the 51 years between 1938 (when the Court solidified its power to exercise judicial review) and 1989 (when the Constitutional Chamber of the Supreme Court was created), few cases of unconstitutionality were filed with the Supreme Court.<sup>21</sup> This minimal involvement of the court in Costa Rican political and social debates produced a high level of judicial immobility. However, this situation radically changed when the 1989 judicial reform created the *Sala IV* [the fourth chamber] as a new chamber with constitutional functions within the Supreme Court. Individuals and groups no longer had to depend on the legislative process or mobilize a large number of affected people in collective action suits for the pursuit of rights.

Consequently, citizens began to recognize this new legal opportunity and the number of cases brought to court increased exponentially (see Figure 1).<sup>22</sup>

---

more on the requirements of litigation than on the groups' specific agenda (*supra* note 8, at 160).

<sup>21</sup> Bruce M. Wilson & Juan Carlos Rodríguez Cordero, *Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics*, in *COMPARATIVE POLITICAL STUDIES* 245 (2006).

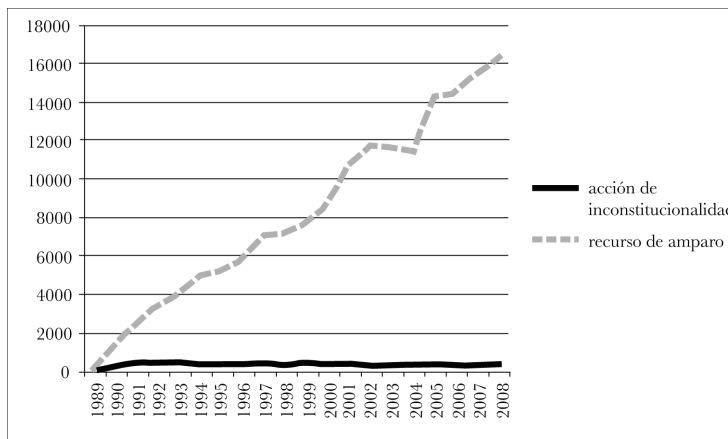
<sup>22</sup> In the 51 years before the creation of the constitutional branch of the Supreme Court,



In the first year after the reform, the total number of cases before the *Sala IV* increased by 529% (663% in *recursos de amparo*). Although the upsurge has been proportionally lower in recent years, it reached 17,966 cases in 2008, for a total caseload of over 195,517 (1989-2008).<sup>23</sup> The most important increase has been in *amparo* suits (*recursos de amparo*), which in 2008 represented 90.9% of the total number of cases brought before the *Sala IV*.<sup>24</sup> Thus, we can observe a growth of the *Sala IV*'s role in politics as a mechanism of "social accountability," which reflects a change in the political calculations of both individuals and interest groups that approach this court instead of using the traditional political paths. As a direct consequence of the low cost of appealing to the *Sala IV*, coupled with confidence in courts, citizens began to make use of this new legal opportunity.

Legal strategy becomes an alternative to orthodox political participation.

FIGURE 1. EVOLUTION OF CONSTITUTIONAL LITIGATION RATES IN COSTA RICA (1989-2008)



only a total of 347 cases of unconstitutionality were filed with the Supreme Court while in the first two and a half years after the creation of the *Sala IV*, 756 cases were filed and 293 were resolved. JAIME MURILLO VIQUEZ, *LA SALA CONSTITUCIONAL: UNA REVOLUCIÓN POLÍTICO-JURÍDICA EN COSTA RICA* 73 (Guayacán, 1994).

<sup>23</sup> One of the most obvious problems is the long-term effectiveness of the Court given its continually escalating caseload. In principle, all cases are formally reviewed, but the Court is now using a panel to sift through cases and identify the most relevant ones. The cases are first reviewed by law clerks (*letrados*) who examine each case and decide on the case's appropriateness. However, this situation can lower the quality of the sentences and undermine the Court's credibility. See Roger Handberg *et al.*, *Comparing Activist National Courts: Hungary and Costa Rica*, Paper presented at the ANNUAL MEETING OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 9 (2001).

<sup>24</sup> *Amparo*, contained in Article 48 of the Constitution, guarantees everyone the right to appeal to the *Sala IV* against public or private actions involving a violation of the individual or social rights established in the Constitution (sections IV and V) and not already included in the *habeas corpus* provisions (the rights of personal integrity and freedom).

In the next section, I study the main factors that have aided in delegating power to Costa Rica's *Sala IV*: the change in institutional settings and the widespread public confidence in the judiciary compared to the rest of representative institutions.

### 1. *Legal Reforms*

The creation of the *Sala IV* in 1989 received widespread support in the legislature, as evidenced by the fact that the constitutional reform was approved in just three and a half months (with a margin of 43-6) when such amendments usually require several years before being passed.<sup>25</sup> This new chamber has the power to implement new directives and enforce existing ones more comprehensively because the *Sala IV* rules on all issues of constitutionality regardless of the actions taken by other branches of government, state-financed agencies or private individuals. The political actors, however, had underestimated this reform. Perhaps because national elites considered judges sufficiently constrained by a civil-law tradition, political actors were unaware of this new institution's real power and viewed it more along the line of symbolic politics rather than substantive in itself. This was, however, a mistaken assumption. In the words of Wilson and Handberg, "what disconcerted those plans was the fact that provisions of easy access to the Court (minimal procedural stops and no requirement for legal counsel) undermined the *status quo* orientation of the reformers."<sup>26</sup> The expansion in the use of judicial strategies in the first years after the creation of the *Sala IV* was made possible mainly by the reduction of the cost to access the court. Any citizen in the country (barring age restrictions) can present a claim directly to the *Sala IV*, which admits cases 24 hours a day, 365 days a year.<sup>27</sup> Claims can even be written in any language with no content restriction and lawyers are not required to submit an *amparo* appeal. These new rules have given interest groups and marginalized groups representation in the political arena, augmenting their political presence and share of power.<sup>28</sup>

---

<sup>25</sup> MURILLO VIQUEZ, *supra* note 22, at 40.

<sup>26</sup> Bruce Wilson & Roger Handberg, *Opening Pandora's Box: The Unanticipated Political Consequences of Costa Rican Legal Reform*, Paper prepared for presentation at the MIDWEST POLITICAL SCIENCE ASSOCIATION 11 (Palmer House Hilton, Chicago, 1998).

<sup>27</sup> For example, there is the case of a 10-year-old boy who filed a *recurso de amparo* concerning the tardiness of private school buses, arguing that this restricted his constitutional right to free education.

<sup>28</sup> Since 1989, the *Sala IV* has ruled extensively and at times controversially on a broad range of issues including trade union matters, the rights of marginalized groups (gays or inmates, for example), environmental rights, taxes, etc., as well as on some cases with potentially important consequences for policy-making and economic decisions. For a full analysis, see MARTÍNEZ BARAHONA, *supra* note 10.

## 2. Public Confidence in Sala IV

The first factor that has aided in delegating power to the courts has been widespread public confidence in these courts compared to the rest of the representative institutions. As seen in Table 1, in the period of 1996-2001, the highest level of confidence Costa Rican citizens placed in institutions was held by the judiciary (44%). This high average has been sustained in the last two surveys (61% in 2004 and 53% in 2006), but increases when citizens express their confidence in the Supreme Court (62% in 2004 and 57% in 2006), rendering the judiciary as the institution with most credibility in the country.<sup>29</sup>

TABLE 1. CONFIDENCE IN COSTA RICAN DEMOCRATIC INSTITUTIONS

<i>Institution</i>	<i>Average Degree of Confidence 1996-2001 (%)</i>	<i>Degree of Confidence 2004</i>	<i>Degree of Confidence 2006</i>
National Government	33	58	53
Supreme Court	—	62	57
Judiciary	44	61	53
Congress	30	53	49

SOURCE: For 1996-2001: Latinobarómetro (average percentage over 1996-2001). Question: “Please, tell me how much confidence you have in each of the following groups, institutions or persons: a lot of, some, a little, or no confidence? (Here, the “a lot of” and “quite a lot of” confidence categories are combined). For 2004 and 2006 (media scale 1-100). The Americas Barometer by the Latin American Public Opinion Project (LAPOP), *www.Lapop Surveys.org*.

This confidence has also been reinforced by the role of interest groups in Costa Rican democracy, which has increased due to the low cost of legal strategy. The impact of the *Sala IV* in a country whose democracy has been called “the democracy of groups” in 1970s has been overwhelming.<sup>30</sup> The

<sup>29</sup> While the percentage over the period of 1996-2001 uses the responses “a lot” and “quite” in the categories regarding confidence, the LAPOP data express grading on a scale of 1-100.

<sup>30</sup> The historical role of “interest groups” can be found in OSCAR ARIAS SÁNCHEZ, GRUPOS DE PRESIÓN EN COSTA RICA 76-78 (San José, 1971). Though their effectiveness has not been systematically studied, Wilson highlights how there is “evidence of cases where deputies have changed their policy positions in response to changes in public opinion or disruptive mass actions.” BRUCE M. WILSON, COSTA RICA: POLITICS, ECONOMICS, AND DEMOCRACY 66 (Boulder, Lynne Rienner, 1998).

court has become a powerful instrument for interest groups that are now using the Court to challenge legislation they failed to change or deter during the policy-making process.<sup>31</sup> Furthermore, as explained above, significant changes in defining access and the expense to gain admittance into the Supreme Court have made petitioning the *Sala IV* a tempting option for politicians and citizens seeking national publicity.

Moreover, as the classic democratic institutions of participation such as referendums or plebiscites did not exist in Costa Rica,<sup>32</sup> constitutional justice has also served as a mechanism of citizen participation, opening an additional channel for controlling public institutions. According to *Sala IV* Judge Ana Virginia Calzada, the judiciary is still a politically “non-contaminated” institution and the *Sala IV* remains as the only institution which can solve problems of ungovernability fast.<sup>33</sup> As Professor Solís Fallas has stated:

...the country is in a situation of ungovernability in which the public institutions, as the Executive or Legislative Assembly, do not work. These institutions are not complying with the obligations and needs of the contemporary times. Thus, the citizens prefer to go to Sala IV because it provides solutions faster than the public institutions.<sup>34</sup>

As a result, the growth of the role of the *Sala IV* in politics as a mechanism of “social accountability” reflects a change in the political calculations of both individuals and interest groups that approach this court instead of using the traditional political paths. The efficiency of the Costa Rican Constitutional Chamber has inspired a new term, the *sala-cuartazo*, which refers to a threat of requesting an injunction. “*Te voy a poner un ‘sala-cuartazo’*” (“to file a Sala IV-case”) is now a common expression in a country where “everything is going to the *Sala IV*.”

However, this “judicialization by the people” has also been reinforced by a change in the attitudes of *Sala IV* judges in terms of how they see themselves in the political system and the role they play in Costa Rican society. After the 1989 reform, *Sala IV* justices have been receptive to increased public expectations and this view has facilitated the court’s more encompassing role in Costa Rican politics in the short term. As Judge Luis Pau-

---

<sup>31</sup> WILSON, *supra* note 30, at 66.

<sup>32</sup> Only with the Law Number 8281 did the Assembly partially reform the Constitution to introduce the referendum (Article 102.9) on May 28, 2002. However, under pressure from the *Sala IV*, the Legislative Assembly is currently regulating the law of the referendum process.

<sup>33</sup> Interview with Virginia Calzada, Magistrate, *Sala IV*, in San Jose, Costa Rica (Sept. 12, 2005). Translated from original Spanish by the author.

<sup>34</sup> Interview with Solís Fallas, Law Professor, in San Jose, Costa Rica (Sept. 14, 2005). Translated from original Spanish by the author.

lino Mora points out: "...now judges have a political activity, not partisan but political. Although the majority of judges are embarrassed to accept it... we used to say that 'politicians have nothing to do with us'... but this is because we have no idea about what 'to be political' means."<sup>35</sup>

*Sala IV* magistrates also accept this new mandate and profit from the wider formal powers national elites have granted them. The *Sala IV* has invested in making people aware of their rights. As Handberg, Wilson *et al.* point out, "the *Sala IV* spent considerable funds educating individuals regarding their rights and actively encouraging and facilitating presenting their cases to the court."<sup>36</sup> The Court embarked on massive publicity campaigns explaining the contents of the Constitution and potential judicial remedies that citizens or anyone else in Costa Rica can take hold of to resolve those problems (one example is the many large posters explaining rights and remedies that were placed in several public buildings). Very soon, this court also proved that it was willing to protect the rights of all citizens, even in instances when it might embarrass the government. To give an example of this, the "Don Trino" case was symbolic.<sup>37</sup> Costa Ricans quickly recognized the *Sala IV* as an efficient and effective arbiter to solve their problems, which shows how far symbolism is often critical in establishing new political contexts for institutions: "The publicity was clearly disproportionate to the practical effect, but it accomplished the purpose of sending a message to the populace and other branches of the government that the *Sala IV* was in business."<sup>38</sup>

These findings confirm Smulovitz's theory arguing that judicialization is not only related to *ex ante* changes in legal culture, but rather to the combined effects of changes in opportunity structures for claim-making and the earlier emergence of a support structure for legal mobilization. In Costa Rica, a change within the judicial institution has triggered a change in the use of constitutional litigation, but the activist attitude in Constitutional Chamber magistrates has also influenced their assuming a more proactive role in politics. This is because Courts always operate "within the bound-

---

<sup>35</sup> Interview with Luis Paulino Mora, Magistrate, *Sala IV*, in San Jose, Costa Rica (Aug., 2003). Translated from original Spanish by the author.

<sup>36</sup> Roger Handberg *et al.*, "Comparing Activist National Courts: Hungary and Costa Rica," Paper presented at the ANNUAL MEETING OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 8 (2001).

<sup>37</sup> Symbolic for its publicity, the case of Trinidad Ortega Fuentes (commonly known as "Don Trino"), a snow cone (*cofios*) vendor who had sold his wares at the street corner of the Legislative Assembly building for 25 years, successfully appealed to the *Sala* to defend his right to sell there despite the security measures implemented for the Summit of the Americas celebrated in San Jose (Resolution N<sup>o</sup> 0075-89).

<sup>38</sup> Handberg *et al.*, *supra* note 36, at 10.

aries of both the law and the social expectations.”<sup>39</sup> All these factors explain the increase in public recourse of the Courts, rendering judges as “new politicians in robes.”

#### IV. PUBLIC RECOURSE TO THE COURTS IN GUATEMALA: A QUEST TO STRENGTHEN THE HIGH COURTS

*“This peace settlement, which brought an end to 36 years of armed conflict, aimed at laying the foundations for a democratic Rule of Law and transform an authoritarian, discriminatory and highly punitive legal tradition.”*<sup>40</sup>

Guatemala is a good case study for testing the expansion of the use of judicial strategies because of the country’s long history of injustice. Despite this, there has been a growth in the mechanism of social accountability. Less than ten years ago, human rights in Guatemala were systematically violated by the State.<sup>41</sup> The callous behavior of the judiciary in the defense of human rights during (and after) the military regime made Guatemala one of the more extreme cases of judicial inactivity in the Latin American region.<sup>42</sup> Guatemala currently has a constitutional government and democratically-elected presidents, yet one of the most formidable obstacles for the consolidation of democracy is the persistent absence of an effective rule of law. Therefore, strengthening the judiciary represents one of the most important struggles in contemporary Guatemala as it entails unavoidable complexities that include problems of racism and discrimination against the majority of the indigenous population, as well as the judiciary’s failure to punish the perpetrators of human rights violations.

However, despite this scenario, the public recourse to high courts has increased in Guatemala after the Peace Accords were signed in 1996. Citizens have begun to see recourse to the courts as part of a general strategy of political action. Specifically, the number of petitions based on the constitu-

---

<sup>39</sup> *Id.*

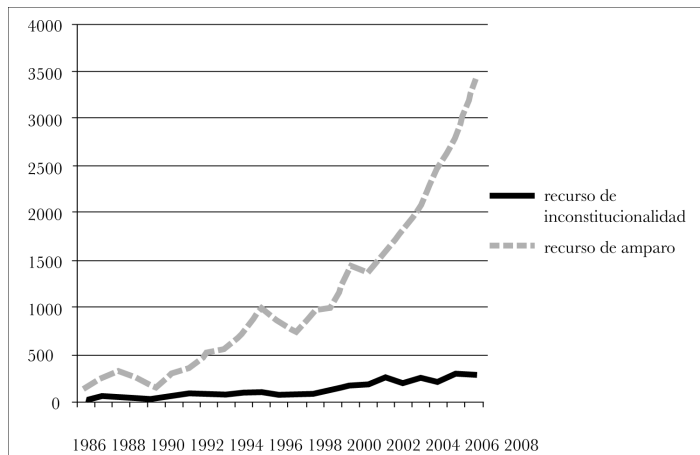
<sup>40</sup> Rachel Sieder, *Renegotiating ‘Law and Order’: Judicial Reform and Citizens Responses in Post-War Guatemala*, in *DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES* 141 (Siri Gloppen *et al.* eds., 2004).

<sup>41</sup> The almost forty years of this regime were characterized by political exclusion, repression and extreme state violence: “the human cost of this model were exceptionally high —over 150,000 people killed, over 50,000 disappeared, a million people displaced and scores of communities destroyed in the counter-insurgency offensive of the early 1980s.” RACHEL SIEDER, *GUATEMALA AFTER THE PEACE ACCORDS* 245 (1998).

<sup>42</sup> KENNETH ANDERSON, *MAXIMIZING DENIABILITY: THE JUSTICE SYSTEM AND HUMAN RIGHTS IN GUATEMALA* 9-10 (International Human Rights Group, 1989).

tional right of the *amparo* suit has risen steadily since 1986, and is now approximately 74.8% of the Constitutional Court’s workload (the figure for 2008, see Figure 2).<sup>43</sup> These data also show the growing trend in the number of cases filed before the Constitutional Court, even against high-level political members through the “*amparo uni-instancial o de única instancia*.”<sup>44</sup> Much in the same way, there is also an increase in the number of times rulings of unconstitutionality have been served.<sup>45</sup>

FIGURE 2. EVOLUTION OF CONSTITUTIONAL LITIGATION IN GUATEMALA (1986-2008)



SOURCE: Statistical Section. Constitutional Court, Guatemala. Data provided by Julio César Córdón Aguilar.

As in the Costa Rican case, we can identify two key causal variables: a change in institutional settings on one hand, and the confidence towards the Supreme Court compared to the rest of democratic institutions on the other.

<sup>43</sup> Individuals are granted the right to file a “constitutional complaint” if they believe one of their fundamental rights has been violated. In the Guatemalan case, there is an extensive procedure to access the *recurso de amparo*, which can be exercised by anyone (*Ley de Amparo*, Article 8).

<sup>44</sup> This particular *amparo* can only be filed against the president or vice-president of Guatemala, the Congress or the Supreme Court of Justice. It is not open to appeal and can only be filed before the Constitutional Court.

<sup>45</sup> The “unconstitutionality action” can be reduced to a specific case (here, it may only be sought by the aggrieved) or against norms that seek an *erga omnes* and *ex nunc* effect (here, the plaintiff can only be the *Junta Directiva del Colegio de Abogados*, *Ministerio Público*, *procurador de Derechos Humanos*, or any person assisted by three lawyers and the *procurador General de la Nación*).

### 1. *Judicial Reform after the Peace Accords*

Since the Peace Accords in Guatemala there has been a propensity to “judicialize” conflicts before the Constitutional Court.<sup>46</sup> More than a decade ago, Mather pointed out the importance of political factors, including “democratization,” on the external environment of courts.<sup>47</sup> Although the impact of “democratization” is difficult to assess in politically unstable countries, it is possible to explore the judicial implications of the political moments that mark the formal transition to democracy.

The Guatemalan case involves analyzing whether there have been changes in constitutional litigation rates after the signing of Peace Accords in 1996. Figure 2 shows how the number of cases filed before the Constitutional Court has increased considerably since then. This result highlights how democratization has a significant positive correlation on constitutional litigation rates. Moreover, if the aim of the Peace Accords was to transform political life and change the actors and rules of the game of power, we should expect increased constitutional litigation because of the strategic use of courts as actors with new power in the political arena. Domestic prosecutions brought before the Guatemalan courts have also been enabled by the new Code of Criminal Procedure (*Código Procesal Penal* or CPP), which includes the provision for civic actors (relatives of victims and NGOs) to assume the role of co-plaintiff (*querellantes adhesivos*) in key human rights cases.<sup>48</sup> It is possible to find many examples: the representation of *Río Negro* massacre survivors by the Human Rights Action Center (*Centro de Acción Legal para los Derechos Humanos*, CALDH) or *Dos Erres* massacre survivors by the Relatives of the Detained-Disappeared organization (FAMDEGUA). These organizations have also had an important role in defending the independence of High Court judges.<sup>49</sup> In 2001, as a result of pressure from the *Movi-*

---

<sup>46</sup> María Inés Bergoglio, *Argentina: The Effects of Democratic Institutionalization*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION (Lawrence Friedman & Rogelio Pérez-Perdomo eds., Stanford University Press, 2003).

<sup>47</sup> Lynn Mather, *Dispute Processing and a Longitudinal Approach to Courts*, 24 LAW & SOC'Y REV. 357-371 (1990).

<sup>48</sup> Human rights organizations, such as the Mack Foundation (*Fundación Myrna Mack*, FMM), the Human Rights Legal Action Center (*Centro de Acción Legal para los Derechos Humanos*, CALDH), the Mutual Support Group (*Centro de Apoyo Mutuo*, GAM), the National Confederation of Widows (*Confederación Nacional de Viudas de Guatemala*, CONAVIGUA) and the Relatives of the Detained-Disappeared in Guatemala (*Familiares de los Detenidos-Desaparecidos de Guatemala*, FAMDEGUA) and elite civic groups like the Families and Friends against Delinquency and Kidnapping (*Familiares y Amigos contra la Delincuencia y el Secuestro*, FADS) and Distressed Mothers (*Madres Angustiadas*), have made technical alliances to lobby these issues (Sieder, *supra* note 40, at 158).

<sup>49</sup> As an example, in 1999 they convinced then UN Special Rapporteur Mr. Coomaraswamy to present a report on the Independence of Judges and Lawyers in the Country (1999/31).



*miento Pro Justicia* for the adoption of a transparent process, the Supreme Court (one of the appointed institutions) established a public selection process to elect Supreme Court magistrates.<sup>50</sup> Furthermore, there are organizations called *fiscalizadoras* [watchdog] —the Relatives of the Detained-Disappeared in Guatemala (*Familiares de los Detenidos-Desaparecidos de Guatemala*, FAMDEGUA); Families and Friends against Delinquency and Kidnapping (*Familiares y Amigos contra la Delincuencia y el Secuestro*, FADS); the Mutual Support Group (*Centro de Apoyo Mutuo*, GAM), among others, that have become pressure groups with strong opinions about the judicial process.<sup>51</sup>

In Guatemala, we should also mention the importance of the international factors driving judicialization. As Pásara has observed, the United Nations (UN) was the principal agent in drawing up detailed proposals for change in Guatemala.<sup>52</sup> In 1997, the UN set up the multi-sector Commission for the Strengthening of Justice, according to the terms of the September 1996 Agreement to augment judicial independence and reduce corruption, professionalize the judiciary, guarantee basic rights, increase access to justice and make it more multicultural. These recommendations were incorporated into the judiciary's five-year Plan for Democratization (*Plan de Modernización del Organismo Judicial*), approved in mid-1997 and supported, among others, by the World Bank.<sup>53</sup> The main advice was:

- a) To ensure access to justice for Guatemala's largely indigenous population ("multiculturalizing" the justice system). However, rejecting the recognition of indigenous peoples' right to use customary law in the constitutional referendum of March 1999 meant that local community conflict resolution procedures are not recognized by courts.
- b) To mandate that budget allocations to the justice sector between 1995 and 2000 double and that it massively extend its institutional coverage throughout the country.<sup>54</sup>

---

<sup>50</sup> LUIS PÁSARA PAZ, *ILUSIÓN Y CAMBIO EN GUATEMALA. EL PROCESO DE PAZ, SUS ACTORES, LOGROS Y LÍMITES* 209 (2003). Some social organizations with objectives related to justice —such as *Madres Angustias*, *Fundación Myrna Mack* (FMM), *Familiares y Amigos contra la Delincuencia y el Secuestro*, *Movimiento Pro Justicia* and the *Instituto de Estudios Comparados de Ciencias Penales de Guatemala*— criticized the process of high courts appointments, and voiced their disapproval of the selection of some of the candidates.

<sup>51</sup> Yolanda Pérez, *Informe sobre la independencia judicial en Guatemala*, Paper presented at the CONFERENCIA INTERNACIONAL: PERSPECTIVA GLOBAL, REGIONAL Y NACIONAL 29-39 (Lima, Peru, November 2001).

<sup>52</sup> Pásara, *supra* note 50.

<sup>53</sup> For a deeper analysis, see Sieder, *supra* note 40, at 143.

<sup>54</sup> Between 1994 and 1999, the total number of judges and magistrates rose from 400 to 753 (Guatemala: Informe de Desarrollo Humano 2000 [Guatemala, PNUD, 2001]). Some 102 new courts were established after 1996, along with 35 positions for legal interpreters. Offices of justices of the peace (*juzgados de paz*), which covered only two thirds of the national territory at the end of the armed conflict, are now present in all 331 of Guate-

- c) To reform the criminal procedures by introducing a framework for criminal justice based on a *garantista* model, to ensure due process and human rights guarantees for those detained.

These changes have implied an important overhaul of the legal culture: rather than simply a means to punish, it was hoped that the courts would come to be seen as means to secure accountability and restitution.

As seen in this section, since the 1996 Peace Accords, there has been an evident increase in the number of cases brought before the courts. The Peace Accords have tried to reinforce the judicial role by means of judicial reforms. Indeed, institutional weakness has also allowed civil organizations and NGOs to “use” the Court as a mechanism of “social accountability,” turning these groups into a potent lobbying force in the courts.

## 2. *Regaining Confidence in the Judiciary*

Guatemala also illustrates, however, how the paradox of increasing judicial claims can and does coexist with low credibility towards the judiciary. This low credibility in the judicial system has deep historical roots in Guatemala due to its historical legacy in addition to politicians’ ability to avoid accountability by securing favorable court rulings. While this negative perception is common towards all Guatemalan institutions during the transition period of the judicial institutions (1996-2001), the judiciary has maintained a higher level of confidence (27%) in comparison with other democratic institutions, such as Congress (24%). This situation has been confirmed in the most recent public opinion surveys (2004, 2006 and 2008): confidence towards the judiciary, the Supreme Court and the Constitutional Court is still higher than that towards Congress (see Table 2).

This slightly higher confidence towards the judiciary in relation to the other democratic institutions could help partially explain the increase in the number of cases brought before the high courts. However, we can find an additional answer, provided in the literature on legal mobilization that reinforces the idea of the high courts as a causal factor of the increase in litigation. This is because legal disputes can also be used to achieve symbolic legitimacy, institutional acknowledgement of the claims, and political and social leverage for the petitioners.<sup>55</sup> As Smulovitz points out, an increase in the rates of litigation can be a sign of a process of legal mobilization, rather

---

mala’s municipalities and each departmental capital now has specialized criminal, civil, family and labor courts.

<sup>55</sup> Michael Mc Cann, *Legal Mobilization and Social Reform Movements: Notes on Theory and its Application*, in *STUDIES IN LAW, POLITICS AND SOCIETY* 11 (1991).

than an indication of the trust in the abilities of the judiciary to solve disputes.<sup>56</sup> This may well be the case of Guatemalan high courts.

TABLE 2. CONFIDENCE IN GUATEMALAN DEMOCRATIC INSTITUTIONS

<i>Institution</i>	<i>Average Degree of Confidence 1996-2001 (%)</i>	<i>Degree of Confidence 2004</i>	<i>Degree of Confidence 2006</i>	<i>Degree of Confidence 2008</i>
National Government	29	49,4	43,9	50,1
Supreme Court	—	43,9	45,4	42,8
Constitutional Court	—	46,5	43,4	41
Judiciary	27	44	46	44,9
Congress	24	38,3	40,6	40,2

SOURCE: For 1996-2001: Latinobarómetro (average percentage over 1996-2001). Question: “Please, tell me how much confidence you have in each of the following groups, institutions or persons: a lot of, some, a little, or no confidence? (Here the “a lot of” and “quite a lot of” confidence categories are combined). For 2004 and 2006 (media scale 1-100) The Americas Barometer by the Latin American Public Opinion Project (LAPOP), *www.Lapop Surveys.org*.

It can be expected, as Smulovitz says of the Argentinean case, that despite the negative perceptions of the performance of the judiciary, in Guatemala “the courts will remain a viable space for engaging in political competition and obtaining political attention.”<sup>57</sup> This means that although the “transition to democracy is in itself an indicator of changes in legal culture”<sup>58</sup> and furthers the wider use of judicial strategies, social conditions and the way institutions have driven these changes will condition the significance of an effective judiciary.

In this sense, Guatemalan high courts are being legitimated through the activism of interest groups, NGOs or parallel “social watchdog” organizations<sup>59</sup> (like the large civilian and humanitarian MINUGUA mis-

<sup>56</sup> Smulovitz, *supra* note 13, at 3.

<sup>57</sup> Catalina Smulovitz, *The Discovery of Law: Political Consequences in the Argentine Case*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION AND IMPORTATION OF A NEW LEGAL ORTHODOXY 267 (Yves Dezalay & Bryant Garth eds., Michigan University Press, 2002).

<sup>58</sup> Bergoglio, *supra* note 46, at 56.

<sup>59</sup> These organizations are formed by institutionalizing certain denouncing movements so as to become more permanent organizations that oversee the behavior of certain public officials in specific policy arenas. The efforts of some of these organizations originally centered on claims of human rights violations. Recently, some new organizations have emerged

sion).<sup>60</sup> Thus, the increase in litigation rates is also the result of empowering these social groups as overseers of the government's implementation of the Peace Agreements. Therefore, interest groups have become an important "accusation apparatus" in a country where political institutions are fragile. As Ginsburg<sup>61</sup> states, "if the court is not seen as an effective forum for advancing political and legal claims, plaintiffs are not likely to bring actions to it."

Thus, findings suggest that Guatemalan public expectation of justice after the Peace Accords and the activism of interest groups have increased the rate of constitutional litigation despite the negative image of the high courts. This implies the re-activation of a judiciary that had in many ways ceased to function, as well as the challenge of changing traditional perception of a judicial system as passive, discriminatory and "ethnicized."

Taking into account the low confidence in representative institutions and the ill-functioning channels of participation, it could be expected that courts will continue to be a viable forum for obtaining political outcomes. Certainly, the constant increase in the caseload may indicate a shift in the country's legal culture.

Guatemala, however, confounds expectations about the effect of institutional strength and contradicts the expectation of an incipient development of a modern legal culture with the judiciary playing an important role in claims of rights violations. A more in-depth analysis reveals complex aspects that influence the effective role of judges as a mechanism of "social accountability."

There is enough evidence of the intimidation, constant harassment and threats against judges in Guatemala that directly undermines their independence.<sup>62</sup> Moreover, formalism in judicial performance (as a part of its

---

and some of the older ones have expanded the scope of their activities to include additional concerns of public interest (Smulovitz & Peruzzotti, *supra* note 3, at 4).

<sup>60</sup> From September 1994 to 2004, the UN General Assembly decided to establish a Human Rights Verification Mission in Guatemala acting on a recommendation by the Secretary-General that such a mission would contribute to putting a stop to a persisting pattern of human rights abuse. While retaining its acronym MINUGUA, this peacekeeping mission's name was changed to *United Nations Verification Mission in Guatemala* on April 1, 1997, to reflect the new mandate: to verify agreement on the definitive cease-fire between the Government of Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca* (URNG), signed at Oslo on December 4, 1996.

<sup>61</sup> Ginsburg, *supra* note 5.

<sup>62</sup> In 2001, the *Association of Judges* indicated that 40 percent of all justice operators had been threatened. That same year, a new office was set up as part of the Public Ministry to deal specifically with threats against justice sector workers (*Fiscalía de Amenazas*) and within two months of its creation, 55 cases had been reported to this office (data from *Fundación Myrna Mack*, 1999). This is largely due to the absence of civilian control over the military, which also determines the role of the high courts in Guatemala. For a more detailed discussion, see Martínez Barahona, *supra* note 10.

reactive and passive legal culture) conditions judges to provide an institutional voice for social groups which may otherwise have limited access to the political process, as happens with indigenous people:

...judges tend to focus on applying the law to the letter, rather than on creative interpretation of existing statutes and constitutional articles. In fact most judges and lawyers are unwilling to accept constitutional principles as law, arguing that implementing or secondary legislation is necessary in order to make them justiciable.<sup>63</sup>

For all these reasons and despite the attempts to reinforce the role of the high courts after the peace process, the pressure placed on judges, the impunity of high officials and a reactive role persist as problems that affect the political role and the performance of these judges as a democratic institution controller. In this sense, Guatemalan judges have become more relevant as political actors, but not significantly more efficient. Judicial overview is being exercised more than before, but it seems to be more of a response to the increased number of claims coming before high courts, rather than an indicator of any sustained pattern of judicial activism as such.

## V. KEY FINDINGS AND CONCLUSIONS

As Alivizatos points out, high courts are often “cast as veto-players institutions designed to protect democracy from the excesses of executive power, majority tyranny, corruption, and a myriad of social and political ills.”<sup>64</sup> Today, in new democracies around the world, some courts have exceeded expectations by being “surprisingly effective in policing the contours of the new regimes.”<sup>65</sup> This “rejuvenation” of national courts experienced in many countries (often as a result of democratization) has also opened up a different type of opportunity structure, namely “legal opportunity.”<sup>66</sup> This is because High Court decisions also provide a convenient outlet that enables citizens to bring issues which were previously ignored or neglected by the political system out into the open.

This article begins to address the fact that high courts today are not only political, but also more active in a country’s social and political life.

---

<sup>63</sup> Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, Draft paper prepared for the workshop entitled COURTS AND THE MARGINALIZED: COMPARATIVE EXPERIENCES (Universidad Diego Portales, Santiago de Chile, 1-2 December, 2005).

<sup>64</sup> Nicos Alivizatos, *Judges as Veto Players*, in PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE (H. Doring ed., St. Martin’s Press, 1995).

<sup>65</sup> James L. Gibson & Gregory Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 JOURNAL OF POLITICS 2 (2003).

<sup>66</sup> Chris Hilson, *New Social Movements: The Role of Legal Opportunity*, 9 JOURNAL OF EUROPEAN PUBLIC POLICY 238-255 (2002).

Throughout the analysis of the evolution of caseload litigation in Costa Rica and Guatemala, this article has examined the factors that influence increased legal litigation. I have found strong evidence that institutional changes may result in the reinforcement of Courts as institutions that can serve as strategies for claiming rights. In Costa Rica, the growing frequency of the use of the Court to pursue rights has led to the creation of the *Sala IV*, a clear mechanism of “social accountability.” In Guatemala, interest group activism illustrates a good example of the use of judges as an instrument of “social accountability.”

My analysis also suggests that the increasing number of high courts decisions, which avoid the deficiencies of party politics in pluralistic democracies, also provides a convenient outlet that enables citizens to bring forth issues that were ignored or neglected by the political system. In this sense, the courts are a viable forum to obtain political outcomes. Within this context, I agree with Koopmans’s argument that the failure of democratic processes to work efficiently has led to a growth in judicial interference.<sup>67</sup>

However, as shown throughout this analysis, the change in the institutional settings, public confidence in the judiciary or the role of interest groups, enhanced by the low cost to access the court, are still not enough to explain judges’ increased activism in the political arena. It is also necessary for judges to be sensitive to social demands and willing to take potentially controversial decisions on political, social or economic issues. Judges have to assume public political stances and enter the political arena autonomously, directly and unconditionally to resolve on instances of political immobility or power stalemate. Without giving judges a proactive role, it is not possible for courts to emerge as active participants in the political process offering new opportunities to citizens, social movements, interest groups or politicians. This is one of the variables that needs to be explored further because, as Taylor and Kapizewski point out, “for the most part, we know little about the backgrounds, ideologies, or preferences of the region’s judges and justices, and have barely begun to explore the politicization of the region’s judiciaries or the implications of that dynamic for those who populate Latin American courts.”<sup>68</sup>

More empirical research is needed on the judicialization by the people. Variations in the use of the Courts as a mechanism of social accountability demand further details on the underlying mechanisms. Nevertheless, as the analysis of the Costa Rican and Guatemalan cases has shown, we are more confident to hypothesize that the failure of democratic institutions to work efficiently is one the main causes of the growth of judicial interference and the new role of judges in contemporary politics.

---

<sup>67</sup> THIJMEN KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS. A COMPARATIVE VIEW* (Cambridge, Cambridge University Press, 2003).

<sup>68</sup> Diana Kapizewski & Matthew M. Taylor, *Doing Courts Justice? Studying Judicial Politics in Latin America*, in *PERSPECTIVES ON POLITICS* 765 (Cambridge University Press, 2008).