Judicial Corruption in the Peruvian Judicial System: Ways to resolve the problem by applying the Economic Analysis of Law

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws
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Abstract

Judicial Corruption has been one the most serious problems in Latin America and particularly, within the Peruvian state for a long period of time. Accordingly, many judicial reforms were attempted by different governments –democratic and non democratic- in order to definitively resolve the problem. However, none of such attempts succeed and judicial corruption is now chronic in the Peruvian society. Taking into account this scenario, the following investigation proposes the application of the Economic Analysis of Law in order to find concrete ways to fight and end judicial corruption. For that purpose we will mainly apply the economic concepts of incentives and human behavior in order to detect the causes of judicial corruption, the obstacles to achieve a real reform, and principally, to propose concrete measures aimed to address the problem.
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Chapter 1
Introductory Chapter

Corruption in a judicial system distorts the proper role of the judge, which is to protect the civil liberties and rights of the citizens, and to ensure a fair trial by a competent and impartial court\(^1\). Indeed, in corrupt judiciaries, citizens are not afforded their democratic right of equal access to the courts, nor are they treated equally by the courts. The merits of the case and applicable law are not paramount in corrupt judiciaries, but rather the status of the parties and the benefit of the judges and court officials derive from their decisions.

According to the *Global Corruption Report 2007: Corruption in Judicial Systems*, issued by Transparency International (an international anti-corruption nongovernmental organization), despite the international efforts, different forms of judicial corruption continue to afflict many parts of the world. Indeed, in this report we can see that Africa and Latin America are the regions with the bleakest perceptions of judicial corruption. Trailing the table are Bolivia, Cameroon, Mexico, Paraguay and Peru, where 80 percent or more of respondents described their judicial systems as corrupt\(^2\).

Although judicial corruption is a problem that affects the whole Latin American region, this thesis will focus only on the judicial problem in Peru that as we have mentioned before, could be considered one of the countries with the most corrupted judiciary in the world.

Accordingly, thorough this study we will analyze the different attempts of reform that have taken place in Peru in order to address judicial corruption and the reasons why such attempts have failed. As a result of this analysis, we will understand the main obstacles to achieve a real reform against corruption in the Peruvian judiciary and we will isolate the causes and effects of judicial corruption by applying the economic analysis of corruption. This work will be done in order to propose concrete measures to overcome corruption within the Peruvian judiciary. In


\(^2\) *Ibid* at 12.
other words, we will propose a reform based on an economical approach, focused on the application of incentives (costs and benefits) to promote honest and efficient conducts; likewise we will propose the implementation of strict means of control to guarantee accountability in the Judiciary.
Chapter 2
Theoretical Framework

2.1 Judicial Corruption

2.1.1 Notion of corruption and judicial corruption

The etymology of the word corruption is related to the Latin *corruptus*. Past participle of *corrumpere*, which means to abuse or destroy.

Corruption can be defined in general terms as the lack of integrity or honesty (especially susceptibility to bribery); the use of a position of trust for dishonest gain. Corruption is also understood as the act of corrupting or of impairing integrity, virtue, or moral principle; the state of being corrupted or debased; loss of purity or integrity; depravity; wickedness; impurity; bribery.

Therefore, corruption is the use of public office for private benefit. Corruption can be found in different areas of society: within the private and public sector. However, for the purposes of this research, we will focus the analysis on the public sector; specifically, on the Judiciary. In order to analyze judicial corruption, we need to understand as premise that this is a kind of systemic corruption.

Systemic corruption refers to the use of public office for private benefit but within an organization or institution that will not function without its presence. Accordingly, Edgardo Buscaglia describes systemic corruption in the following terms: “the systematic use of public office for private benefit, resulting in a reduction in the quality or availability of government-provided goods and services. Corruption is systemic when a government agency only supplies a good or service if an unwilling and uncompensated transfer of wealth takes place between the market and the public sector (e.g., bribery, extortion, fraud, or embezzlement)”\(^3\).

Having as framework the concepts of corruption and systemic corruption mentioned above, we can say that systemic corruption within the justice system refers to “the use of public authority

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for personal gain that results in an improper delivery of judicial services and legal protection for citizens. The justice system can be broadly defined to include judges, prosecutors, police, public defenders, private bar, court personnel, and court decision enforcement agencies, such as penal institutions. Judicial corruption can take the form of “bribery, political pressure, and personal influence at different levels.”

2.1.2 Types of judicial corruption

Judicial corruption can take many forms. However, in order to analyze them in a systematic manner, we will follow the approach of Buscaglia. Hence, we will classify the forms of judicial corruption into two types. Within the following two corruption types we can include many well known corrupt practices:

2.1.2.1 Administrative

This type of corruption takes place when “court administrative employees violate formal or informal administrative procedures for their private benefit.” For instance, this administrative corruption includes cases where court users pay bribes to administrative employees of the courts (secretaries, clerks, archivists, etc.) in order to alter the legally-determined treatment of files and documents, or in order to accelerate or delay a case by illegally altering the order in which the case is to be attended by the judge. These cases of corruption include procedural and administrative irregularities.

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2.1.2.2 Operational

Operational corruption involves cases that are usually “part of grand corruption schemes where political and/or considerable economic interests are at stake”\textsuperscript{7}. This second type of judicial corruption is particularly related to the judges who pretend to obtain economical benefit and career-wise as a result of their corrupt act. This kind of corruption involves politically-motivated court rulings, undue changes of venue and other substantive irregularities that affect the judicial decision making process.

\textsuperscript{7} \textit{Ibid} at 235.
3.1 Judicial Corruption in Latin America

In order to contextualize the problem of corruption within the Peruvian judiciary, we need to make a brief reference to the judicial scenario in Latin America. Accordingly, the judiciary in Latin America is faced with many problems, ranging from lack of public confidence and access to justice to long delays and the perception and reality of corruption. Indeed, “the majority of the people in Latin America lack confidence in the judicial system for many reasons. Surveys conducted in Argentina, Brazil, Ecuador, and Peru show that between 55 percent and 75 percent of the public manifest a very low opinion of the judicial sector”.

The reason for this crisis is that the efficiency of the courts has declined noticeably, driving litigants to make every effort to avoid using the courts at all. This lack of confidence in the judiciary is most pronounced among law-income families and small economic units.

The circumstances described above gives us the background to understand judicial corruption in Peru. Like the other countries in the region, Peru faces serious problems related to judicial corruption, which is widespread in all the levels of the judiciary (Supreme Court judges to court employees at the lowest levels of the organization). This chronic situation of corruption within the Peruvian judiciary impacts not only the administration of justice itself, but the economy and development of the country.

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3.2. Judicial Corruption in Peru

3.2.1 Historical Introduction

If we review the history of the Peruvian judicial system, it is possible to observe that “the judiciary in Peru has historically been the weakest branch of government, by design and by abandon”⁹.

Peru’s earliest constitutions established judiciary as an independent branch of government; however as it states De Belaunde with respect to the Peruvian judiciary; “one enters the judiciary, fundamentally due to political favors”¹⁰. Indeed, the judiciary in Peru has always been tied to political power. Hence, what we have always had in the real sphere is not a healthy and independent relation of the judiciary with respect to the government. On the contrary, the judiciary has always had a negative relation of dependence, which can be considered as one of the main roots of judicial corruption in Peru.

Accordingly, Peru’s 1979 constitution, written in a multiparty constitutional convention as part of the return to civilian rule, attempted to address the traditional weakness of the Peruvian judicial branch. First, the 1979 constitution created a national magistrates council (called a national judicial council in most other Latin American countries) to propose candidates to fill judicial posts. However, the main problem of this council was that the Peruvian president was not bound to appoint an individual from the council’s list of nominees.

Therefore, the National Magistrates Council was unable to foster real independence within the judiciary. Indeed, politicization of the judiciary became even more pronounced after the return to democracy in 1979 than it had been in the past.

A second innovation of Peru’s 1979 constitution was the establishment of a constitutional court with the power of judicial review. However, this Constitutional Court remained ineffectual.

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⁹ Jodi S. Finkel, Judicial Reform as Political Insurance, Argentina, Peru and Mexico in the 1990’s (Indiana: University of Notre Dame Press, 2008).

during the 1980’s because its naming process had left it tied to the presidency in the period immediately following the return to democratic rule.

Hence, institutional flaws, such as executive influence and the degree of politicization in the judiciary, contributed to the low status of the judicial branch. At the same time this situation generated a rampant corruption and poor quality service with the judiciary.

In 1990 Alberto Fujimori became president of Peru and from the beginning of his regime he attacked the judiciary. Indeed, during his first two years as president, Fujimori publicly denigrated the judiciary branch. Many saw this as an astute public relations maneuver that was well received by the general public. Others consider that Fujimori’s early criticism to the judiciary was “part of a larger campaign to excoriate all of Peru’s traditional political institutions, thereby setting the stage for his 1992 ‘self-coup’”11.

In March 1992, Fujimori attempted to impeach several members of the Supreme Court, but the ploy became moot when all of Peru’s Supreme Court justices were fired in his auto-golpe the following month.

In fact, on April 5, 1992, Fujimori’s executive-led auto-golpe suspended the entire government apparatus, fired all the judges in the country, and declared the country to be in a period of national reorganization. Peru’s citizenry, convinced that Peru’s traditional political institutions impeded the resolution of the country’s economic and social ills, overwhelmingly supported the golpe. The international community, however, “strongly criticized Fujimori’s actions. In a press statement on April 6, the Organization of American States (OAS) demanded an immediate return to democratic rule. Both the United States and the European Community suspended all funds to Peru (except humanitarian aid), and the Inter-American Development Bank suspended over $200 million in loans and grants”12.

As a consequence of this, and in order to renew the access to international funding, Fujimori announced Peru’s impending return to democratic government following the convocation of a national assembly to rewrite the country’s constitution.

11 Finkel, supra note 9 at 66.
12 Ibid at 67, 68.
Such assembly wrote the constitution of 1993, which is the current constitutional document in Peru. However, the fact that we had a new constitution, more open to the market and oriented to the respect of the rule of law did not change the reality of judicial corruption. Indeed, during Fujimori’s regime, judicial corruption became chronic. The president Alberto Fujimori and Vladimiro Montesinos (former chief of the Intelligence Department) controlled the whole judicial branch and were able to direct and control the outcome of the cases in order to benefit their own interests.

This situation of macro corruption within the judiciary has been documented in numerous video tapes that Vladimiro Montesinos kept on his power in order to extort the judges and court users who participate in these corrupt practices. Previous to Fujimori’s defeat such video tapes were found and showed to the public. This fact disclosed the huge net of judicial corruption initiated and enhanced by Fujimori and Montesinos and at the same time caused the end of Fujimori’s regime.

After Fujimori, there were many attempts to eradicate judicial corruption. Such attempts have not been fully successful; however the level of judicial corruption these days is definitive lower than the one we used to have during Fujimori’s government.

3.2.2 Main symptoms of corruption within the Peruvian judiciary

3.2.2.1 Judges performance

Judges are key pieces of the corruption scheme within the Judiciary. Indeed, judges not only accept bribes for selling decisions, but also collude with either the police or the prosecutors in order to benefit their own interests. Therefore, the Peruvian judiciary has become an institution where frauds, extortion and bribery are seen as day to day matters.

Certainly, according to a national poll performed in 2010 by “IPSOS APOYO”, 70% of the Peruvian population considers the judiciary as “corrupt or extremely corrupt”\textsuperscript{13}.

Moreover, in the same year -2010- the Council of Judicial Defense of the State - *Consejo de Defensa Judicial del Estado* - pressed charges against 166 judges involved in cases of corruption\(^\text{14}\) . It is important to remember that this number just represents the publicly known cases of corruption within the judiciary in 2010. However, in the day to day reality there are numerous cases of judicial corruption that remain hidden and without investigation and subsequent sanction.

Additionally, in order to give a clearer spectrum of the seriousness of this problem, we will mention just two of the most scandalous cases of judicial corruption among Peruvian judges that took place in the last few years:

- **Case *Family Sanchez Paredes* (2010):** Without any juridical basis, the Forth Criminal Court of Lima benefitted the *Sanchez Paredes* family by granting a *Habeas Corpus* petition in order to avoid any investigation for drug trafficking and money laundering. Such controversial decision was overturned by the Peruvian Constitution Court which ordered the re-opening of the investigation\(^\text{15}\).

  In addition, charges for prevarication and abuse of authority were pressed against the three judges of the Forth Criminal Court, who in an illegal way tried to benefit the *Sanchez Paredes* family.

- **Case *Used Cars Importation***: The Civil Court of Tacna issued decisions granting legal protection to companies that in an illicit way imported used cars that did not fulfill the minimum legal requirements. Similar decisions on this matter were issued by around 30

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\(^1\) Zarella Sierra, “Identifican a 166 jueces implicados en casos de corrupcion”, *Peru 21* (25 August 2010), online: http://peru21.pe/noticia/628678/identifican-166-jueces-implicados-corrupcion.

judges in the country. Like in the case mentioned above, such decisions were overturned by the Peruvian Constitutional Court.

The judges that issued the illegal decisions mentioned above have been under investigation.

In addition to this, another important evidence of corruption is the notorious illicit enrichment of the judges. Indeed, within the Peruvian judiciary we can see judges that own properties and other assets which value exceeds in large amount what they normally could get with their regular salaries.

All of these elements make clear that in corrupted judicial systems, like the Peruvian one, judges are not concerned on justice or rule of law. They do not respect the ethics and principles of law. On the contrary, judges are more interested on taking advantage of the court users, in order to obtain an economical benefit. Hence, the law for most of the Peruvian judges is secondary and they just want to obtain the maximum benefit from a case.

As we will see after, this is not a matter of law salaries, since judges’ salaries were substantially increased within the last years, and the problem has not been resolved. Thus, this is clearly a problem of ethics, absence of adequate preparation and training, and efficient systems of appointment and control.

3.2.2.2 Status and operation of the legal profession

When we examine the status of the legal profession in Peru, which includes, judges from all the levels, prosecutors and private attorneys, it is evident the discredit of such professions. The reason behind this is precisely the problem described above: the frauds, extortion and bribery among the legal profession.

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Accordingly, standard Peruvian citizens know for a fact that most of the judges and prosecutors in the Peruvian judiciary, not only are not well trained\textsuperscript{18}, but also are corrupt. Hence, attorneys who want to litigate already know that such activity will involve corruption and they accept such corruption as something normal and necessary in order to obtain the requested results.

Corruption among the legal profession is not something isolated; on the contrary, it is a generalized problem, where the exception is honesty in the tribunals. This scenario is perceived by the general Peruvian society as well as by the international community. Particularly, the general perception of the population is that those who participate in the judiciary (judges and prosecutors) as well as lawyers who litigate are corrupt and eager to obtain private benefit by applying illegal mechanisms. Therefore, there is an absolute absence of trust and respect for the judicial system in general.

3.2.2.3 Access to justice

Access to justice is another important sign of corruption. Accordingly, low income people who wish to utilize the judicial system run head-on into the problem of access. This difficulty can be measured in a number of ways: the simple opportunity to get through the door, the time it takes to get a case heard and adjudicated, the direct and indirect costs of litigation, the person’s ability to understand and follow the procedural steps during the life of a case. However, the main difficulty to access justice in Peru for low income people is the cost of justice.

Because of the widespread corruption the access to justice and concretely, the final outcome of a case is determined by the economical power of the parties. Indeed, the party who is in a better position to spend money paying bribes or other illegal incentives will definitively win the case; whereas, the party with limited economical resources will be affected by a corrupted decision.

\textsuperscript{18} According to the study developed by Luis Pásara: "La Enseñanza del Derecho en el Perú: Su Impacto sobre la Administración de Justicia" (Lima: Junio 2004) ("Law Education in Peru: Its impact on the Administration of Justice"), the big majority of Peruvian judges do not come from the most prestigious law schools in the country [on the contrary, the best professionals graduated from such prestigious universities are more interested in working for big law firms and not for the judiciary]. In addition, the same study revealed that among 356 judges within the Peruvian judiciary, just 24 of them had obtained a master in law and none of them had obtained an SJD. Online: http://www.justiciaviva.org.pe/nuevos/2004/informefinal.pdf.
This scenario often “causes people who believe they have grounds for legal action to avoid taking their case to court”19.

Moreover, the situation described above is a clear transgression of the right to access to justice that every citizen has. And at the same time, this is one of the main symptoms of judicial corruption within the Peruvian society.

3.2.2.4 Lack of efficiency

The lack of efficiency is one of the most serious problems within the Peruvian judiciary. According to the Global Competitiveness ranking elaborated by the World Economic Forum, Peru has as one of its weakest aspects, the lack of efficiency to resolve judicial cases. Indeed, from 139 countries, Peru holds the position 108 with respect to this matter.20

Such lack of efficiency involves two main angles described below:

- Delay on the resolution of judicial cases. With respect to this matter the Ombudsman -Defensoría del Pueblo- has expressed their concern. Indeed, according to a formal report developed by this institution 54.22% of the complaints received against the Judicial System are related to the delay in the procedures and just 1/3 of such complaints have been dismissed21.

- Poor quality of judicial decisions. This issue can be easily appreciated in the lack of an adequate and coherent justification of the sentences.

Having said this, we are going to proceed with the analysis of the reasons that explain this lack of efficiency in the Peruvian judiciary. Accordingly, we consider that this is a matter of structural, but also external factors that negatively impact on the way the judicial system operates.

19 Buscaglia, supra note 8 at 7, 8.
The structural factors are linked to the level of knowledge and training of the judges (already explained in the previous section b). Moreover, many of the delays in the resolution of the cases can be attributed to procedural defects and vagueness in the application of the law by the judges, which cause excessive litigiousness.

However, the main cause of the chronic inefficiency within the Peruvian judiciary relies on external factors; particularly, the backlog of cases. According to a study elaborated by the organization “Justicia Viva” the backlog of cases in the Peruvian courts is not the result of the amount of cases that the judiciary receives every year. Such backlog is originated by the accumulation of not resolved cases from previous years. For instance, in 2005 the amount of new cases received by the Peruvian judiciary was 1’146.280 (which is a normal average, compared to the situation of other countries); however, the amount of pending cases (accumulated from the previous years) was already 1’022.324.

Hence, we can see how the backlog of cases in the Peruvian judiciary is principally caused, by the accumulation of no resolved cases from previous years, which at the same time delays the resolution of the new cases.

In addition, this backlog of cases generates negative consequences which are directly connected to the lack of efficiency. Such consequences are the following ones:

- The Peruvian judges and clerks do not have enough time to spend on their training and education. Consequently, they cannot take additional courses or get higher certifications that could contribute to improve their juridical knowledge and practice. If they try to do this, then they will necessary have to overlook their duties at the court.

- The judges do not review each case in detail and in a carefully manner. Hence, most of the time their decisions are not coherent and well motivated. Moreover, in many

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situations they do not analyze the essential aspects of the case. On the contrary, they just provide a superficial analysis that leads on erroneous conclusions.

- This situation also contributes to the generation of corruption within the judiciary. Accordingly, the inefficiency of our judicial system and the uncertainty with respect of the results of the process, are used by the certain parties to try to corrupt the judges and achieve their objectives.

- The generalized lack of reliability in the Judiciary makes this power of the state weak with respect to the other ones. Therefore, we can see a strong interference of the other powers (executive and legislative) in the development and results of the processes.

The scenario described above reveals an inefficient judiciary where judges can manage the cases on their own way, based on their personal interests or under the pressure of third parties, without any respect to the rule of law. As it is obvious, this situation damages the judicial system itself and its public reputation.
Chapter 4
Attempts of Judicial Reform in Peru

4.1 Attempts to Reform: Why they did not success?

Judicial reform is the complete or partial reform of a country’s judiciary. Santos Pastor indicates that the aim of judicial reform is: “to achieve an independent, competent and efficient judiciary branch, independent of the other branches of government, of pressure groups and of all personal influence. Independence in performing its functions; however this does not mean lack of accountability. It must be competent, which requires training appropriate to the endeavors to be carried out in each sphere and level of decision making. And it must be efficient, which means eliminating the waste of resources” 24.

As we can see judicial reforms are aimed to address a variety of problems within the judiciary; however, this thesis will focus only on reforms to address corruption which at the same time is linked to independence and accountability.

In the Peruvian case the judiciary had been subject to a myriad of reforms throughout the twentieth and twenty first century, however, none of these had enabled the courts to act in an independent and accountable manner. Below we will describe some of such failed attempts.

4.1.1 Judicial Reform initiated in 1990: President Fujimori measures

After twelve years of military rule, Peru returned to democracy in 1980 with free and fair elections. For the next ten years, the country was governed by the two traditional parties but neither proved capable of solving the main problems of the country such as the high level of corruption within the judiciary.

Alberto Fujimori came to power in 1990. Two years later, on April 5, 1992, he closed the Congress, fired the country’s Supreme Court and Constitutional Court justices, and centralized...
all power in the executive’s hands. In 1993 Fujimori called to a national assembly to rewrite Peruvian’s constitution. This new constitution introduced institutional changes that appeared to empower the country’s judicial branch, including the creation of a powerful judicial council and a better and stronger constitutional court. However, all of these changes were not implemented.

Furthermore, judicial inefficiency and corruption increased. Indeed, public corruption was one of the main problems during Fujimori’s regime. And the judiciary, particularly, was one of the more affected branches. Hence, Fujimori’s measures to address judicial corruption not only failed, but also judicial corruption became critical during this period of time.

4.1.2 Recent attempts of judicial reform

After the collapse of Fujimori’s regime, the reform process received greater attention. Indeed, in 2003 we had the creation of the Special Commission for the Integral Reform of Administration of Justice (CERIAJUS in Spanish) by means of congressional legislation.

“Representatives of government and civil society working under the umbrella of CERIAJUS produced a National Plan with originally more than 170 specific projects, few of which were carried out or translated into law. This said, there have been some important improvements in the delivery of legal services, including the creation of anticorruption courts to investigate crimes against public administration that occurred during the Fujimori regime and to monitor government ethics, the establishment of seven commercial courts in Lima to resolve disputes, more effective use of the Constitutional Tribunal in interpreting the constitutionality of legislation, and more extensive use of judges of peace for low-level dispute settlement. Notwithstanding these improvements, the reform process in Peru has failed to improve public confidence in the system and to overcome widespread corruption among judicial branch employees and users.

Moreover, under President Alejandro Toledo judicial salaries improved substantially, since there were “dramatic” increases in budgets for the judicial sector. However, the results of the reform efforts were disappointing. Only a small percentage of the proposals made by

\[25\] Finkel, supra note 9 at 63.
CERIAJUS were implemented, and some of the new tribunals, such as the anticorruption courts, produced poor results.

4.2 Problems of the Attempts to Reform in Peru: Obstacles to Reform

4.2.1 Political Instability

The obstacles to judicial reform are deeply linked to the political, social and economic environment in which the legal systems developed. For instance, political instability has been a recurring problem for Latin American countries, where the collapse of regimes, authoritarianism and repeated violations of basic principles of liberal democracy, have contributed to the institutional instability of the judiciary and the justice system.

In the Peruvian case, for example, military and authoritarianism regimes impaired the judicial branch “by undermining its independence; by destabilizing the terms of appointments and tenure of judges and by perverting the notion of the rule of law through overtly illegal activities. Abuse of human rights is the worst case of the illegal activities. (…) Failure to abide by the law and lack of transparency in economic management are also problematic under a military regime, in many cases creating mounting friction within the upper levels of the judiciary”. 26

The last examples of authoritarian governments that contributed to Peruvian political instability are the Velasco Alvarado regime –military regime- (1968-1975) and Alberto Fujimori regime (1990-2000). Both presidents broke the democratic principles by performing military coups, deposing the democratically-elected administration.

The political instability created by these governments weakened not only democratic institutions, such as the judiciary; but also the democratic principles of the society. Hence, with this kind of framework, the mission of performing an efficient and real judicial reform becomes extremely complex.

26 Buscaglia, supra note 5 at 21.
4.2.2 Corruption

Corruption reflects the inability of the public sector to establish an authoritative legal order. Corruption expands where "clientelist relations prevail in the state institutions, in the various interest groups, and among private persons. In this context, corruption is transmitted through the organizational structures and reinforced by the external effects of their networks".27

As we have been stated, corruption is a consequence of the lack of mechanisms to ensure accountability and judicial scrutiny. And at the same time, it presents a powerful obstacle to implement serious legal reforms "capable of threatening a network of mutually beneficial relations".28

4.2.3 Vested Interests within the judiciary

The main obstacles to an effective judicial reform in Peru are the vested interests within the justice system itself. Such interests are threatened by any initiative to generate a profound change in the current judicial system. Therefore, in most of the cases, success in implementing reforms depends on those who are responsible for effective law enforcement.

In other words, it is clear that there will be resistance to judicial reforms at many levels within the judicial hierarchy. The reasons or vested interests behind such resistance could be threatened by measures like the following ones: i) loss of discretionary powers; ii) increase in the control measures, iii) greater responsibility at any level of the judiciary; iv) changes in the system of compensation based on professional merit; etc.

The measures described above are seen in a negative way by the current judicial personnel (including the Supreme Court judges). This is because they are benefited by a more political and clientelist administration and compensation system. Hence, it is clear that these people are going to oppose and even try to sabotage any attempt of serious judicial reform.

27 Ibid at 23.
28 Ibid at 23.
Moreover, if the judicial sector and other members of the government use the courts for own profit – as it actually happens within the Peruvian judiciary –, then we should not be surprised to find members of the court and their assistants blocking the judicial reforms aimed to eradicate corruption and to achieve real inefficiency within the judiciary.
Chapter 5
Application of the Economic Analysis of Law in order to achieve a real and effective Judicial Reform able to address Corruption within Peruvian Judiciary

5.1 Why Law and Economics?

The central goal of Law and Economics is to analyze the individuals' and firms' maximizing behavior within a system of rules in order to identify the effects of laws. In this sense, law and economics follows a methodology compatible with a legal realism and within an elaborate framework of analysis provided by microeconomic theory. Thus, an understanding of how to enhance a more efficient social order through legal reform can be attained through an empirical study of human behavior.

The economic analysis of law can be applied in order to understand and find efficient solutions to address legal problems. Indeed, economic analysis of law is a way to enhance economic efficiency and improve equity in the different areas of law\(^\text{29}\).

Since corruption within the judiciary is a main legal problem for the Peruvian society, and there were already many attempts to resolve it, without success; we consider the economic analysis of law an interesting alternative in order to understand and find a real and effective solution to address corruption within the Peruvian judiciary.

5.2. Economic Analysis of Corruption

5.2.1. Incentives

According to the economic analysis of law, corruption is considered to be behavioral phenomena, occurring between the state and the market domains. Indeed, people and firms respond to incentives by taking into account the probability of apprehension and conviction and

the severity of punishment. Hence, the economic analysis of corruption highlights the fact that people respond to incentives in order to decide to perform an illicit activity or not.

In consequence, the economic concept of “incentives” plays an important role in order to understand and address judicial corruption. Accordingly, Gary Becker explains how reasonable man will decide to perform an offense whenever the expected benefits minus the costs of apprehension and conviction, are the same or higher than the costs of performing such offense\(^30\).

In other words, the criminal or offender –the judge, politician or litigant- will react to different stimuli in a rational and predictable way. This is because they will take into account the returns and costs of their behavior (punishment).

Hence, by following Becker’s approach we do not see criminality, and particularly, judicial corruption, as an irrational behavior associated with the specific psychological and social status of an offender. We analyze the criminal/corrupted conduct as a rational behavior under uncertainty. Indeed, potential criminals respond to both the probability of detection and the severity of punishment if detected and convicted. Consequently, deterrence may be enhanced by raising the penalty, increasing monitoring activities to raise the likelihood that the offender will be caught, and changing legal rules to increase the probability of conviction.

Becker’s model ultimately leads to an “efficient” level of crime, whereby the marginal cost of enforcement is equated to the marginal social benefit of crime reduction.

In the same line of thought, Alvin Klevorick describes the nature of crime and sanction in economical terms. Indeed, he affirms that sanction is the reaction of the society against the crime, which is necessary to enforce the correct behavior. In other words, sanction could be understood as an incentive in order to deter crime.

Specifically, Klevorick states the following: “An act is a crime because the actor behaves in a way that is contrary to what I call the transaction structure that society has established. This

structure sets out the terms or conditions under which particular transactions or exchanges are to take place under different circumstances. Under this economical explanation, the criminal sanction is employed to enforce the transaction structure that society has chosen as well as to charge the offending actor for the harm that his action imposes on individuals within the society. (...) The sanction imposes a penalty on the criminal for his effort to secure an unfair advantage by seeking to avoid complying with transaction structure (...) to which the other members of society conform their conduct”\(^{31}\).

Therefore, by following Becker’s and Klevorick’s approaches, we can say that the implementation of adequate incentives to the judicial actors (judges, litigants and politicians), could lead on a more competent and ethical judiciary. The application of incentives to the judicial actors will be explained in a more practical manner in section 5.5.2 below.

5.2.2. Systemic corruption

In addition to the incentives, another important point we would like to highlight is the concept of system corruption. Indeed, “a legal and economic analysis of corruption should be able to detect why the use of public office for private benefit becomes the norm. In theory, most developing countries possess a criminal code punishing corrupt practices and external auditing systems within the courts for monitoring case and cash flows. Even if they function properly, those two mechanisms would not be enough to counter the presence of systemic corruption in the application of the law”\(^{32}\).

As we have stated above, systemic corruption –like the one we have in the Peruvian judiciary- is the use of public office for private benefit, within an institution that will not function without its presence. Taking into account this, the probability of detecting corruption decreases as the corruption becomes increasingly systemic, and, therefore, the traditional methods of detection and enforcement become less effective.


Then, what would be the best via to address and respond to systemic corruption within the Peruvian judiciary?

We consider that the answer is the economic analysis of law; particularly, the economic analysis of corruption. Indeed, the economic analysis of corruption and the law and economics of development, focus on the effects that well-functioning legal and judicial systems have on economic efficiency and development.

Adam Smith stated in his *Lectures on Jurisprudence* that a factor that “greatly retarded commerce was the imperfection of the law and the uncertainty in its application.” Moreover, deep-rooted corrupt practices within the judicial branch hamper the clear definition and enforcement of laws, and, therefore, as Smith would say, commerce is impeded.

Furthermore, we can say that widespread corruption is a symptom that the state is functioning poorly. Accordingly, the presence of perceived corruption retards economic growth, lowers investment, decreases private savings, and hampers political stability. This is because the existence of judicial corruption “distorts market operations by introducing uncertainty in social and economic interactions.”

Accordingly, systemic corruption within the judiciary can definitely affect the behavior of private investment. This due to the fact that, the “legal principles supporting the prevailing economic systems in many developing countries are usually nominally based on the exercise of individual property rights and the enforcement of contractual obligations. But legislation is meaningless without an effective judicial system to interpret and apply it. Consistent interpretation and application of the laws provides a stable institutional environment in which the long-term consequences of economic decisions can be assessed by business and the public.”

Having said this let’s focus now on the Peruvian case. Peru has been facing a continuous process of economic reform since 1990. Therefore, the need for a well functioning judiciary

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33 Buscaglia, *supra* note 3 at 87.
34 *Ibid* at 88.
35 *Ibid* at 57.
became more obvious day after day. Indeed, “democratization, growing urbanization, and the adoption of market reforms have all created additional demands for court services”.  

Moreover, “the shift of most economic transactions toward the market and away from the public administrative sphere of the state has created an unprecedented increase in private sector demand for an improved definition of rights and obligations”.  

Therefore the Peruvian judiciary became a key element of economic development. This is completely reasonable, since “the judicial system includes all the mechanisms needed to interpret the laws and regulations. The productive role of the judicial sector within the economic system consists of resolving conflicts by providing the substantive and procedural structure to facilitate the exchange of rights to physical and intangible assets”.  

However, in the reality the Peruvian judicial system was not well prepared to respond to the challenges of the economic development. Unfortunately, the Peruvian judiciary suffers from increasing backlogs, delay, and mainly generalized corruption, being the latter the most critical problem within this branch of the state. Therefore, this chaotic scenario generates complete distrust of the system by the private sector and by the public in general.  

Indeed, “an ideal judicial system is composed of institutions capable and interpreting laws equitably and efficiently”. Nevertheless, within the Peruvian judiciary laws are not subject to predictable interpretation.  

However, having this discouraging framework should not be a curb to achieve the objective of having a better, more efficient and free of corruption judiciary. On the contrary, we should continue with the analysis of corruption under economic terms in order to find the correct path to eradicate corruption within the judicial system.  

Accordingly, the economic analysis of judicial corruption is important because it goes beyond the account of general situations that enhance corrupt practices. Indeed, it helps us to find

37 Ibid at 223.
38 Ibid at 223.
concrete strategies in order to isolate the specific causes and effects of judicial corruption. Therefore, it allows us to fight against judicial corruption in a more effective and efficient manner.

5.3 Causes of judicial corruption within the Peruvian judiciary

Many factors can be mentioned as the originators of corruption within the Judiciary. Indeed, it has been stated by Buscaglia that “low salaries, bad working conditions, greed, and fear, among other things, provide many justice officials incentives for corruption, while the frustration of backlogs and certain court procedures, as well as litigants’ desire to get their cases heard and won, provide the opportunities for the courts to extract rents”\(^39\).

As we can see there are numerous causes that contribute to generate and spread corruption within the Judiciary. However, analyzing all of such causes could result endless and will not help to properly address the problem. Hence we will focus on the analysis of eight factors that have been identified and isolated as the more critical causes of corruption within the Peruvian judiciary:

5.3.1 Absence of judicial independence reflected on the political influence by the legislative and executive branches on the judiciary

The effects of judicial independence within the state can be reflected on outcomes such as judicial corruption. With respect to this matter, Julio Ríos-Figueroa states that “[a] necessary step to analyze the effects of judicial independence on outcomes such as corruption is to clearly define and measure judicial independence”\(^40\).

Accordingly, in the Peruvian case, despite constitutional guarantees of equality between the three governmental branches (the legislature, which makes the laws; the executive, which administers the laws and manages the business of government; and the judiciary, which resolves disputes and applies the law), the executive and legislature branches have significant

\(^39\) Buscaglia, supra note 8 at 10.

control over the judiciary. Hence, weak judges are deferential to politically connected individuals in the executive and legislative spheres of power.

### 5.3.2 Absence of respect for the rule of law

The rule of law is a main factor in the development and adequate performance of a judicial system. According to Michael J. Trebilcock\(^{41}\) approach, rule of law should be understood as a procedurally oriented conception. Accordingly, we should take into account the following characteristics: a) Transparency in law making and adjudicative functions; b) Predictability; c) Stability; and d) Enforceability.

Peruvian authorities and officers do not respect the rule of law in the aspects mentioned above. Therefore, the rule of law is deteriorated and almost inexistent, which at the same time, generates a negative impact on the administration of justice.

### 5.3.3 Selection, appointment and ratification of judges

One of the main factors of corruption is directly connected to the judges. To understand this, we should analyze the appointment, selection and ratification process within the judiciary.

#### 5.3.3.1 Process of appointment of the judges and duration of their terms

According to section 150 of the Peruvian Constitution, judges are appointed through a selection process supervised by the *Consejo Nacional de la Magistratura* (CNM) – National Council of Magistracy. This council was created as an independent entity that it is ruled by its own statute: Law No. 26397.

The CNM has as its main duties to select, appoint, ratify and dismiss judges and public prosecutors from all the levels, except for the judges appointed by popular election: *Jueces de Paz* – Judges of Peace\(^{42}\).


\(^{42}\) The Judges of Peace belong to the lowest level in the Peruvian judiciary and they take care of minimum matters. According to Section 152 of the Peruvian Constitution they are appointed by popular elections and not by the CNM.
The candidates to become judges should be Peruvian citizens (born in Peru). They also should have obtained a law degree and have completed the training and education courses provided by the Academia Nacional de la Magistratura - National Academy of Magistracy.

In order to select the judges the CNM organizes a public merit competition, which also includes a personal evaluation\(^{43}\).

The process of selection is initiated with an official announcement published in the Peruvian official newspaper. The main stages of this process are the following:

- **The pre-selection stage**: The applicants should fill a form with their personal information and approve a written examination. Only the candidates that approve the written examination should submit a personal file with specific documentation in order to prove their personal data and professional qualifications, such as: birth certificate, marriage certificate, law degree, certificate of admission in the Bar that demonstrates that the candidate is entitled to practice law in Peru, curriculum vitae and additional documents in order to prove the information contained in the curriculum vitae\(^{44}\).

  The candidates that do not submit the mentioned file are automatically excluded from the process of selection.

- **The selection process**: The phases of the selection process are the following\(^{45}\):
  
  - **Written examination**: The written examination will be different for each position to be applied (specialized, superior or supreme judge). The written examination is aimed to assess the legal education, knowledge and capabilities of the candidates.

  Only the candidates that approve the written examination will pass to the next stage of the selection process.

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\(^{44}\) Ibid, Section 7.

\(^{45}\) Ibid, Section 23.
Assessment of documented curriculum vitae: At this stage, the CNM evaluates the following aspects: academic degrees in Law (Doctor, Master), professional degree in Law (Bachelor), other certifications, articles or books published, professional experience, special merits.

Psychological evaluation: The candidates are subject of psychological evaluation. This evaluation is aimed to assess the capabilities and psychological conditions of the applicants in order to perform the judicial functions.

Personal interview: This is the last stage of the selection process and has as objective to evaluate the ethics, values and principles of the candidate, particularly related to the legal career (juridical principles and rule of law)

The evaluation on each stage is based on a total maximum score of 100 points.

After this, the candidates that obtain the higher grades should be confirmed by the CNM through vote. The candidates are ratified with a minimum of 2/3 of votes of the members of the council.

With the approval of the council, the candidates are appointed as judges or public prosecutors. The appointment is performed through an official resolution issued by the CNM.

With respect of the duration of their terms, section 146.2 of the Peruvian Constitution states that the judges cannot be removed from their positions without their consent. However, there is a limit of age in order to perform as a judge. Accordingly, section 107 of the Judicial Career Statute (Ley de la Carrera Judicial) states that the judicial career should conclude once the judge is 70 years old.

5.3.3.2 Process of ratification and promotion of the judges

Judges in all the levels of the Peruvian judiciary are evaluated every 7 years by the CNM. This evaluation is aimed to ratify the judges on their positions. The CNM evaluates the following

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46 Ley de la Carrera Judicial, Ley Nº 29277, Presidencia de la Republica 2008.

aspects: conduct, quality of their decisions, management of the processes, quality of their publications, professional development. The ratification process also includes a physiological evaluation and a personal interview

After the personal interview, the members of the CNM should vote in order to decide the ratification of each judge.

Both processes mentioned above (appointment and ratification of judges) are clear and even well elaborated. However, the problem goes beyond them. Indeed, the problem of judicial corruption relies basically in the connections between the CNM (entity that selects, appoints and ratifies the Peruvian judges) and the other branches of the state and private groups of power.

Therefore, the selection of the judges in most of the cases is not an objective process where professional and ethical qualities of the judges are evaluated. Indeed, in most of the cases we are in front of an arbitrary compliance, where the connections with the power are the main factors to be appointed as a judge.

Moreover, once these judges are appointed, they feel compelled to respond positively to the demands of the powerful in order to maintain their own status. Rather than act as a check on government in protecting civil liberties and human rights, judges often promote state interests over the rights of the individual.

5.3.4 Insufficient funding and poor budgeting: Low Salaries.

To guarantee an adequate and well distributed budget for the judiciary is a key factor not only to stimulate a better and more efficient performance; but also to prevent and deter corruption. Accordingly, Edgardo Buscaglia stated that “inadequate budgets perpetuate the dependency of the judiciary, generate corruption among the court personnel, and impede the judiciary from attracting well-trained judges and support staff”

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48 Ibid at c IV, s 30, 33.
49 Buscaglia, supra note 8 at 24.
Judicial salaries that are too low to attract qualified legal personnel or retain them, and that do not enable judges and court staff to support their families in a secure environment, prompt judges and court staff to supplement their incomes with bribes. Although judges’ salaries are not as attractive as those of legal professionals in the private sector, the security of the judicial position and the respect afforded to the profession should compensate for loss of earnings.

The salaries within the Peruvian judiciary are directly linked to the hierarchy of the judge. See Table No. 1 below:\textsuperscript{50}:

<table>
<thead>
<tr>
<th>Position</th>
<th>Monthly Salary (S/. Nuevos Soles)</th>
<th>Monthly Salary ($ Dollars)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court Judges</td>
<td>S/. 15,600</td>
<td>$ 5,672</td>
</tr>
<tr>
<td>Superior Court Judges</td>
<td>S/. 12,000</td>
<td>$ 4,363</td>
</tr>
<tr>
<td>Specialized Judges</td>
<td>S/. 9,000</td>
<td>$ 3,272</td>
</tr>
<tr>
<td>Learned Judge of Peace</td>
<td>S/. 6,000</td>
<td>$2,181</td>
</tr>
</tbody>
</table>

\textsuperscript{50} Fija ingresos del Presidente de la Corte Suprema, Presidente de la Sala Suprema y Vocales Supremos, los Magistrados del Tribunal Constitucional, Consejeros del Consejo Nacional de la Magistratura, Fiscal de la Nacion y Fiscales Supremos, Magistrados del Jurado Nacional de Elecciones y el Defensor del Pueblo, Decreto de Urgencia No 034-2006, Presidencia de la Republica, 2006, s 2.
In addition, the range of salaries of the court personnel (legal assistants, clerks, etc.) is really low. Their salaries go between S/. 700 ($254) and S/. 1,700 ($618).

On the other hand, we have the salaries in the private sector; particularly, in the largest law firms of the country. According to a study elaborated by AB INAC Executive Search in 2010, the main partners of a large law firm in Peru can make around $150,000 per year ($12,500 monthly). Meanwhile a junior associate, just graduated from the law school, begins with a monthly salary of around $1500. However, this is just for the first year, since their salaries are increased almost every year, depending on their performance and also on their capability to attract clients to the law firm.

As we can see there is an important difference between the salaries paid in the judiciary and the salaries paid in a prestigious law firm. Hence, it is understandable that many of the good students of the best universities are more interested in working for a large law firm than for the judicial sector.

Although, this is a significant factor to explain the low quality and corruption within our judiciary, we cannot consider it as decisive. Indeed, in the Peruvian case there has already been a significantly increase in the judicial salaries in recent years in a bid to reduce the incentives for corruption. However, the rate of corruption has not decreased. On the contrary, we can say that it has increased during the last years.

5.3.5 Poor training

This problem is deeply linked with the one mentioned in the previous section. Certainly, many well prepared and prestigious lawyers do not want to become judges, and the outcome is that lawyers with no solid legal education and training can easily become part of the judiciary. This situation can be proved by examining the quality of the judgments issued by them.

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Moreover, judges with limited training are more susceptible to corrupting influences. Hence, they create an environment in which the rule of law cannot be guaranteed, as we have stated in section 5.3.2 above.

In order to reverse such scenario we need to create incentives to attract the best professionals to the judiciary. In order to do that, it is not enough to increase the salaries and redesign the selection process and the faculties of the CNM, but also it is particularly important to provide additional and specialized training to the judges focused on judicial as well as on ethical matters.

5.3.6 Lack of mechanisms of control to ensure accountability and judicial scrutiny

The lack of adequate mechanisms of control within the judiciary enables the judges and special interest groups engaged in corrupt practices to function with confidence that their illicit acts will go unpunished, if exposed. Hence, we need to promote the existence of strong mechanisms of control for the judges and the judicial activity in general; otherwise the achievement of a non-corrupted judicial system will not be possible.

In the Peruvian case, the institution in charge of control of the judges’ performance is named: OCMA – Oficina de Control de la Magistratura. This entity has a control and disciplinary function with respect to the judges and judicial auxiliaries. The exercise of its functions can be preventive, concurrent or subsequent to the corrupted or illicit act performed by any member of the judiciary. Among the main objectives of this institution we have the following: i) to implement prevention policies against judicial corruption; ii) to implement mechanisms of control to guarantee a transparent exercise of the judicial function; and iii) the identification and eradication of the corrupted practices within the judiciary.

The OCMA can suspend judges and give other kind of sanctions to the members of the judiciary. However, in case the OCMA concludes after an investigation, that the separation or destitution of a judge is required, then this request should be sent to the CNM.

Unfortunately, the OCMA is not performing its duties in an appropriate manner and the objectives mentioned above have not been accomplished. On the contrary, this institution has
been always weak, and instead of controlling the judicial activity, it tolerates the corrupted behavior of the judges.

The reason to explain this problem within the OCMA is basically related to its nature and composition. Accordingly, the OCMA is an institution directly attached to the judicial system. Indeed, it is part of the Judiciary and it is governed by the Organic Statute of the Judicial System –Ley Organica del Poder Judicial.\(^{52}\) In addition to this, its president is a Supreme Court judge, and the sub-areas or offices within the OCMA are also composed by Superior Court judges. Hence, this is clearly a not independent institution.

In other words, the institution in charge of the control, investigation and sanction of the judiciary, is also composed by members of that same judiciary. Therefore, independence and authentic control cannot be expected.

\textbf{5.3.7 Complexity of procedural steps and lack of transparency}

Edgardo Buscaglia explains how corrupt practices within the judiciary are enhanced, among other factors, “by the added number and complexity of the procedural steps coupled with a lack of procedural transparency followed within the courts”\(^{53}\).

This factor is particularly true in the Peruvian case, where judicial procedures are confused because of their numerous and ‘complex’ steps. Moreover, judges do not contribute to simply such procedures. On the contrary, they take advantage of that complexity in order to avoid transparency on their decisions, and consequently to be able to engage corrupted practices without being exposed to any kind of control or supervision.

\textbf{5.3.8 Poor management skills and inadequately monitored administrative court procedures}

The lack of adequate and efficient organization within the judicial system creates the perfect atmosphere for corruption. Moreover, this disorganization –and absence of control- promotes

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\textsuperscript{52} Texto Único Ordenado de la Ley Organica del Poder Judicial, Decreto Supremo N° 017-93-JUS, Presidencia de la Republica, 1993.

\end{flushleft}
corrupted practices among personnel beginning at the lower levels of the organization, such as secretaries, clerks and judicial auxiliaries.

Accordingly, where procedural codes are ambiguous, perplexing or frequently amended, as in transitional countries, judges and court staff can exploit the confusion. In addition, without modern office systems and computerized case processing, detection of the inappropriate use of case documents and files is difficult. Poorly trained and low paid court staff, are enticed to use their discretionary powers to engage in administrative corruption since there is little accountability for their decisions.

The scenario described above clearly illustrates the Peruvian experience, where the absence of an adequate administration within the Judiciary, enhances corruption not only in the judges and officers who hold positions of high responsibility, but also in the personnel at lower levels of the institution.

5.4 Effects of judicial corruption in economic terms

Before a judicial crisis strikes, corruption within the judiciary runs uncontrolled. This is because corruption generates immediate positive results for the individual court-user who is willing and able to pay the bribe. However, this initial situation cannot remain for a long term due to the fact that the widespread effects of corruption on the overall social system are extremely pernicious. Indeed, “court users that are unable or not willing to give illicit incentives will be excluded from the provision of a supposedly “public good” (i.e. court services) that in reality corruption transforms into a private good subject to an uncertain price”54.

In addition to this, the existence of official corruption distorts market operations by introducing uncertainty in social and economic interactions. A Peruvian study emphasizes that “(…) poor administration of justice implies that one cannot demand the performance of contractual terms, which leads to greater risk. It is precisely this greater risk that led the World Bank to include judicial reform among the conditionalities to its loans”55.

54 Buscaglia, supra note 36 at 234.
Moreover, corruption within the judiciary is a main incentive to promote the growth of organized criminal groups “(…) with the capacity to pose a significant international security threat through illicit traffic in narcotics, nuclear, chemical and biological materials, as well as international smuggling and money laundering”56.

Furthermore, such judicial corruption as paying a bribe to win a case can have a profound impact on the average citizen’s perception of social equity and on economic efficiency57.

As we can see judicial corruption has deep and serious consequences within the state, not only in the judicial sphere, but also in the economical, political and social spheres, affecting also the citizens as individuals on their relationship with the state.

5.5. Anticorruption reforms

If judiciaries are to serve the interests of nations and not just privileged individuals, basic reforms are necessary. In order to be desirable and successful such reforms should take into account an analysis of the present and future cost and benefits to society, but also to the court members and personnel.

To develop this idea, we should use the economic theory of humans as rational maximizers of self-interest that respond to incentives (cost and benefits).

5.5.1 Humans as rational maximizers

Jeffrey L. Harrison and Jules Theeuwes state that “one of the more fascinating challenges associated with applying economics to the law stems from the assumption that people are rational maximizers of self-interest”58.

56 Buscaglia, supra note 53 at 88.
Such assumption is particularly important when economics is applied to behavior and decisions of individuals when these have legal consequences, such as committing a crime or engaging in corrupt activities.

Individuals make consistent and rational choices to maximize their benefit or self-interest. Accordingly, human beings are rational enough to make calculated decisions about the costs and benefits of engaging in specific activities, like corrupted practices for example. In other words, individuals are rational and respond to incentives (based on such rationality). Therefore, incentives are important in order to enhance or deter specific conducts or behaviors. For instance, when penalties for an action increase, people will undertake less of that action.

Having said this, let’s focus on the analysis of the incentives (cost and benefits) that should be taken into account to achieve a judicial reform aimed to address corruption within the Peruvian judiciary.

Accordingly, “we will examine the costs and benefits of judicial reform as seen not only by those who have the most to gain from the reform but in particular, because this is usually ignored and is critically important, by those who think they have the most to lose from the changes”59.

5.5.2 Which incentives can help to achieve a reform? Analysis of the costs and benefits of the corrupt behavior within the judiciary

5.5.2.1 Relevant incentives to politicians

Any attempt to reform the Peruvian judiciary should take into account “the predatory role of the public sector, namely, the rent-seeking activities conducted by different groups within the public sector. In these rent-seeking, or predatory, roles the public sector is seen (...) as the main source of institutional inertia blocking judicial reform”60.

Hence, to achieve a true judicial reform, “the reformers must appeal to their ‘friends’ of the moment within and beyond the predatory sectors of the state and convince them that they will

59 Buscaglia, supra note 8 at 15.
60 Ibid at 16.
gain more than they will lose by helping to bring about the reform then at the top agenda. At the next stage, the reformers’ friends may have changed somewhat depending on who are the main ‘enemies’, those primary sources of institutional inertia who at the time must be divided and conquered. (…) Consequently, for reform to be successful, many rent seekers within the government must understand that the returns associated with judicial reform are greater than the diminishing returns from rent seeking”

5.5.2.2 Relevant incentives to judges and other judicial actors

The judiciary is a branch of government that is very sensitive regarding its functional independence. However, the fact that it has an essential and sensitive role in the development of the society and the individuals in the political, social and economic spheres, it requires evaluation systems.

Indeed, the most complex systems are required to evaluate the performance of judges who should enjoy full independence in carrying out their tasks. By keeping this objective in mind, a set of incentives and sanctions should be adopted to strengthen the performance of judges.

It is important to take into account that a judicial reform in Peru will be complicated due to the fact that “many people within the judiciary do not see the reforms as serving their private interests. In fact, the main opposition to reform has come and will continue to come from judicial and some other government employees who conclude they will lose power or money or both if true reforms are implemented”

However, we can find incentives to achieve the help of the court members. For instance, if deliberately as the program of judicial reform moves toward its planned long-term benefits, in the short-term, it will renew demands for court services and thus a revival in some degree of the court rent-seeking opportunities, a prospect the judges will no doubt weigh carefully when making their decisions as to whether to cooperate or not. This enhanced capacity in turn

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61 Ibid at 19.
63 Buscaglia, supra note 8 at 17.
represents an incentive for the courts to undertake additional judicial reform that should have long-term benefits"64.

5.5.2.3 Relevant incentives to litigants

Litigants are an important factor in the chain of judicial corruption. Indeed, the implementation of anti-corruption reforms that achieve good results in the judges and court personnel does not mean that the situation with the litigants is going to automatically change. Accordingly, although “judges and court personnel become less willing to bribes, litigants and their lawyers may not be less willing to offer them to get to the head of the queue”65. In order to avoid this scenario, we will need to apply adequate incentives to the litigants as well.

Hence, a complete reform should consider ways to impose the costs of judicial corruption on the litigants. Strategies to reduce corruption require that one isolate the benefits and costs to bribe payers and recipients. The first issue is whether to treat the payment and receipt of bribes as crimes or as civil offences. The choice depends on the range of punishments available, the alternative procedural forms required and the additional deterrent effect of labelling an action a crime.

Since corruption is a two-sided offence, the law must specify the status of both those who make payments and those who receive them. Consequently, in order to deter bribes payers, we should make both giver and receiver subject to criminal penalties. We should always remember that corruption is distinctive because of its two-sided nature. If just one of the parties can be deterred, the deal will not go through.

Hence, for effective deterrence each side of the corrupt transaction must face penalties that reflect the gains from bribery. Officials’ penalties should be tied to the size of the payoffs they receive, and bribers’ to the value they receive from making a payoff—not to the size of the payoff.

64 Ibid at 20.
65 Susan Rose-Ackerman, Corruption and Government: Causes, Consequences and Reform (Cambridge: Cambridge University Press, 1999) 155-156.
Convicted public officials should pay a multiple of the bribes received, and convicted bribers should sacrifice a multiple of their gains from bribery. To have a marginal effect, the debarment penalty should be tied to the seriousness of the corruption uncovered. Therefore, if penalties on bribe payers are deterrent, the demand for corrupt services and the level of bribes will fall66.

5.5.3 Design of Anticorruption Policies: Concrete Measures

Having analyzed the main causes of corruption, as well as the main incentives, (costs and benefits) to achieve a judicial reform to address corruption within the Peruvian judiciary, in this section we will provide concrete mechanisms to achieve such reform. It is important to mention that these measures are aimed to ensure judicial accountability and independence as the ways to address corruption within the Peruvian judicial system.

5.5.3.1 Transparent selection and ratification systems: Promoting a real independent judicial council to oversee the selection and ratification of judges

It is necessary to guarantee a transparent and merit-based appointment process. The basic principles require that candidates be individuals of integrity and ability with appropriate training and qualifications in law. In addition, any kind of discrimination on grounds of race, color or sex should be forbidden.

For this purpose, the creation of judicial councils can contribute to strengthening the independence of the judiciary. The United Nations Basic Principles on the Independence of the Judiciary do not explicitly refer to the judicial councils, but emphasizes that the selection and career development processes for judges must be independent of the executive and the legislature67.

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Accordingly, “judicial councils can advance the independence of the judiciary by assuming responsibility for selecting and promoting judges”\textsuperscript{68}. Indeed, judicial councils can enhance the integrity of the judicial appointment process, as long as they are composed of well prepared and ethical law professionals, rather than of any kind of individuals based just on their relationships with other branches of government. Consequently, by having an adequate, knowledgeable and ethical council, we can contribute in great extent to the transparency of the merit-base appointment procedures, which will be based on criteria that are not compromised by political considerations.

Accordingly, by returning to the Peruvian scenario, if we analyze the selection and appointment process for judges (Resolución N° 270-2011-CNM - Reglamento de Concurso para el Acceso Abierto en la Selección de Jueces y Fiscales.), we can clearly see that this is a well elaborated process that assess the merits, experience, professional capabilities and ethics of the candidates to become judges. Therefore, the problem is not in the process itself. The problem is related to the council in charge of the selection and appointment of judges. This is because such council does not strictly apply what the rules for the selection require.

As we have already seen, the Peruvian system has a specialized council to select and ratify judges: the CNM. This council is composed by 7 members. Each member is appointed by a different institution through an internal election: 1 member is elected by the Supreme Court judges, 1 member by the Supreme Public Prosecutors, 1 member by the Chancellors of the Public universities, 1 member by the Chancellors of the Private universities, 1 member by the Bar association, and 2 members by the rest of Professional associations.

Although the mechanism to select the members of the CNM was thought to guarantee the independence of the counsellors, the problem is that not always the members of the council are the most adequate individuals for such position. Hence, they are easy to be influenced by the other branches of the state and even by other groups of power.

This happens because there is not a previous filter for the candidates to counsellor of the CNM. They are just part of an internal election within their own institutions; and their professional capabilities, ethics and values are not evaluated at all. Hence, we do not have real guarantee that they are the most appropriate persons to select, appoint and ratify our judges.

Therefore, what we need is a previous and rigorous assessment of the qualities of each candidate to the CNM. Indeed, only the ones who fulfill the professional and ethical qualities required to be counsellor should be allowed to nominate in the internal elections. By doing this, we will ensure a higher quality (moral and professional) of counsellors at the CNM. This at the same time will give us guarantees of a better, fair and more transparent selection and ratification process of judges.

The implementation of this filter is a feasible measure, since what we need to do, is to organize independent commissions at every institution where the chancellors are elected. These commissions should receive the applications of the candidates and evaluate their professional capabilities, experience and ethics. Just the candidates that fulfill the requirements for the position should be allowed to participate in the internal election to become chancellor of the CNM.

The implementation of this measure does not involve a negative economical impact for the judiciary, since these commissions will be part of each institution and they will be composed by the senior and most prestigious members of each institution. Normally, this kind of commissions already exists to make high level decisions within each institution. Hence, we can add the previous assessment of CNM candidates as part of their duties.

**5.5.3.2 Security of Tenure**

Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge. Indeed, “judges’ terms should be sufficiently long to reassure them that ignoring external influence will not impede their professional advancement”\(^{69}\).

\(^{69}\) *Ibid* at 8.
Accordingly, this measure is aimed to shield the judge from external influence and to reduce the opportunity and need to succumb to political pressure and favoritism. The term of office for judges should be lengthy to increase job security and stability, and to enhance the personal will to avoid governmental pressure.

On the other hand, if there were a system of life-time appointments, there must be substantial and visible accountability mechanisms that ensure judges do not take advantage of their positions.

5.5.3.3 Adequate training to the judges

In order to guarantee a better level of our judiciary is necessary to implement training programmes for new judges and continuing education for sitting judges.

An effective weapon against corruption is an accurate understanding of the law. Often magistrates succumb to pressure because their knowledge of the law and its application is faulty and unsound. A government-sponsored system for the education and training of magistrates on substantive and procedural legal matters prior to assuming their roles, and a comprehensive curriculum which enables magistrates to be continually educated and trained during their term in office is essential to enhance judicial accountability.

It is true that this measure will involve additional costs to the state. However, the costs of providing adequate training to our judges and magistrates, will be definitively less than the costs of widespread judicial corruption we already have (lost of international investments due to uncertainty in the judicial decisions, extended processes -10 year processes-, increase of delinquency and drug trafficking, judicial decisions that contradict law principles and the rule of law).

5.5.3.4 Ensuring adequate financing of the judiciary: Adequate remuneration, conditions of service, and pensions, shall be adequately secured by law

Salaries should be commensurate with the responsibilities of judges and court personnel and the country’s cost of living. In addition, salaries should be published to allow the public to monitor the lifestyle of judicial employee, and thus guarantee transparency.
Accordingly, judges who live lifestyles in notable contrast to the size of their salaries generate perceptions of a corrupt judiciary.

On the other hand, we should not forget that it is very difficult to combat corruption within the justice system when magistrates and police are paid considerably lower wages than individuals in comparable governmental offices and in the private sector. Increasing the income of magistrates and police will aid in eliminating the necessity to supplement their paltry income with bribes.

In addition, “enhancing the working conditions of magistrates, particularly judges, so that their environment is conducive to thoughtful deliberation is essential to ensuring that judicial decisions are well-reasoned. Many judges within corrupt judiciaries share offices, often four judges to a small room, with malfunctioning office equipment and little support staff. Improving their working conditions will not only assist in improving the quality of their decision making, but also increase their professional prestige.”

5.5.3.5 Simplification of court procedures

To reduce opportunities for corruption in administrative processes, court procedures must be simplified and made comprehensible to the court user. They must be precise in order to minimise court staff discretion, and must clearly delineate responsibilities to enhance the accountability of each staff member. Developing a hierarchical structure, headed by a court administrator, and professionalising court staff will improve the quality of judicial service. They also reduce the administrative responsibilities of judges, allowing them to focus on their decisions.

In addition, “a case-management system that allows for transparent tracking of case files enhances the effectiveness of court proceedings and ensures that cases are heard in a reasonably efficient manner. Computerised case-management systems with tamper-proof software allow attorneys and litigants to track cases, trace files and monitor the time requirements.”

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70 Pepys, supra note 4 at 13, 14.
71 Pepys, supra note 68 at 9.
The computerised case-management system is a measure that can be implemented in a progressive way. We can begin with the Supreme Courts and monitor for a period of 6 months to 1 year. After this we can continue with the Superior and Specialized Courts. This will allow us to analyze the benefits and challenges of this measure and at the same time it will reduce its economical impact for the Judiciary and the state budget.

5.5.3.6 Creation of a prosecutorial organ outside the judicial system to investigate and prosecute cases of corruption within the judiciary

As we have previously mentioned the Peruvian system does not have a real independent entity in charge of the control of the judiciary. What we have is the OCMA which is attached to the judiciary and composed by the same judges. Consequently, this institution has not been accomplishing the objectives of control, investigation and sanction of corrupted practices.

Therefore, we need a change on this area. We require a real autonomous office in charge of the control of the judiciary. For that purpose, we propose the replacement of the OCMA along with its sub-areas, and the implementation of an autonomous office with the strict role of control. This role of control should be assigned to a public prosecutor office.

The public prosecutor office must be an independent organism, not attached to the Judiciary or to any other branch of the state. This prosecutor office should be created with the specific objectives of fighting corruption and misconduct within the judiciary. Consequently, it must be strengthened in order to effectively investigate governmental officials, including judges, and well-known businessmen.

Additionally, the criminal code must allow for prosecution and conviction not only with direct evidence of bribery, but also with circumstantial evidence, such as possessing wealth that is unexplained by employment and other lawful activities.

This creation of an independent prosecutor office will involve legislative changes. However, this is a feasible measure, because we are just going to replace the current OCMA –directly attached to the Judiciary- by an independent office in charge of the control of the judiciary. In addition, there will not be a negative economic impact, since the same budget currently assigned to the OCMA can be assigned to this new office. Therefore, the only but main
difference is that the new prosecutor office will be an independent entity not attached or subordinated to the Judiciary.

### 5.5.3.7 Increase Transparency and Accountability of the Administrative Process

Due to the complexities of administrative procedures, there is a significant level of administrative discretion given to court personnel. This intricate environment entices not only court staff to seek illegal payment for services, but also a willingness on the part of the court user to pay them. Court administrative procedures must be streamlined and easily understood by all so that arbitrary decision-making by court staff is reduced. Uniformity and transparency in the administrative process significantly diminish court personnel’s capacity to obtain illicit payments.

The institutional accountability of the justice system must ensure that public resources are allocated and used efficiently and for their intended purposes. The personal accountability of court staff requires them to perform their roles and responsibilities in compliance with all applicable rules and regulations and standards of ethical conduct. Performance standards for all court personnel must require that salaries and promotion be based on clearly enunciated performance standards.
Chapter 6
Conclusions

6.1 Judiciary is a key factor for the development of the society; being one of the most sensitive aspects, the economical development. Indeed, a corrupted and inefficient judiciary deters private investors to risk their capital in a country where there is no certainty in the application of the law, and where judiciary members can take the path they want, regardless the rule of law. This with the only objective to benefit their own interests.

6.2 As statistics demonstrate, Peruvian Judiciary is one of the most corrupted judiciaries around the world. Many reforms were attempted in order to address this problem; however none of them was successful. Hence, we propose a reform based on the perspective of the economic analysis of law, which will allow us to find efficient and concrete results against judicial corruption.

6.3 When we analyze judicial corruption in Peru, the economic analysis of law allow us to isolate the causes and effects that result relevant in order to implement an efficient and real reform. As well, we can determine the incentives that motivate the reformers, the judicial members and the litigants to accept or reject the reform.

6.4 By analyzing the conduct of human beings as maximizers of their self-interest, it is possible to understand and evaluate the importance of the “cost and benefits” that are taken into account before performing any conduct, such as corrupt practices, for example. By knowing this we can elaborate measures to deter these negative practices and to the contrary, we can motivate a more efficient and independent judiciary.

6.5 The concrete measures proposed in this document have as main objective to eradicate judicial corruption, by promoting independence and accountability, but at the same time by implementing strict mechanisms of control to guarantee that judges and court personnel in general are performing their roles according to the rule of law.
LEGISLATION


Ley de la Carrera Judicial, Ley N° 29277, Presidencia de la Republica 2008.


JURISPRUDENCE


SECONDARY MATERIALS: BOOKS


Finkel, Jodi S. *Judicial Reform as Political Insurance, Argentina, Peru and Mexico in the 1990’s* (Indiana: University of Notre Dame Press, 2008).


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OTHER MATERIALS


