

THE HIGHEST CASTE ON THE DEFENDANT'S SEAT:

Comparative institutional analysis of jurisdictional privileges in Latin American countries.

A CASTA MAIS ALTA NO BANCO DOS RÉUS: Análise institucional comparativa dos privilégios jurisdicionais nos países latino-americanos.

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Resumo

Após o fim dos períodos coloniais, muitos países latino-americanos enfrentaram regimes autoritários. A maioria destes países conheceu ondas de autoritarismo seguidas de momentos democráticos durante o último século. Por essa razão, as instituições democráticas foram construídas sob a ameaça iminente de um golpe de Estado. Para garantir que os presidentes não seriam perseguidos por motivos políticos, o Brasil estabeleceu que seu Supremo Tribunal Federal (Supremo Tribunal Federal) seria o único tribunal com poderes para julgar presidentes (exceto casos de impeachment), deputados federais e senadores, entre outras autoridades superiores. Com base no exemplo brasileiro, este trabalho busca compreender se outros países latino-americanos também oferecem a mesma proteção às suas autoridades e por quê. Quais são os fatores que influenciam a existência do privilégio jurisdicional? Além disso, o que influencia a extensão do privilégio concedido a mais ou menos autoridades? Esta pesquisa utilizou uma abordagem multimétodo para apresentar e analisar o fenômeno institucional do privilégio jurisdicional. Primeiramente, foi realizada uma pesquisa comparativa exploratória e descritiva a partir de textos constitucionais latino-americanos para identificar onde estão presentes os privilégios jurisdicionais e seus respectivos montantes. Em seguida, uma análise quantitativa aplicou testes estatísticos às variáveis incluídas na base de dados da pesquisa, para verificar possíveis correlações entre os índices de qualidade institucional e a variação no número de categorias representativas de autoridades políticas beneficiadas pelo privilégio de jurisdição. Por fim, este trabalho realizou uma análise comparativa qualitativa (QCA) para descrever a relação lógica entre as variáveis em termos de condições necessárias e suficientes para a ocorrência do fenômeno em estudo. Palavras-chave: América Latina; análise comparativa institucional; Supremos Tribunais; privilégio jurisdicional; abordagem empírica.

Abstract

After the end of colonial periods, many Latin American countries struggled with authoritarian regimes. Most of these countries experienced waves of authoritarianism followed by democratic moments during the last century. For that reason, democratic institutions were built under the imminent threat of a coup d'état. To ensure that presidents would not be persecuted for political reasons, Brazil has established that its Supreme Court (Supremo Tribunal Federal) would be the only court with powers to judge presidents (except impeachment cases), federal deputies, and senators, amongst other higher authorities. Based on the Brazilian example, this work seeks to understand if other Latin American countries also offer the same protection to their authorities and why. What are the factors that influence the existence of jurisdictional privilege? Furthermore, what does influence the extent of the privilege given to more or fewer authorities? This research used a multi-method approach to present and analyze the institutional phenomenon of jurisdictional privilege. First of all, exploratory and descriptive comparative research was carried out from Latin American constitutional texts to identify where jurisdictional privileges are present and their respective amounts. Then, a quantitative analysis applied statistical tests to the variables included in the research database, to check possible correlations between institutional quality indexes and the variation in the number of representative categories of political authorities benefiting from the privilege of jurisdiction. Finally, this work performed a qualitative comparative analysis (QCA) to describe the logical relationship between the variables in terms of necessary and sufficient conditions for the occurrence of the phenomenon under study. Keywords: Latin America; institutional comparative analysis; Supreme Courts; jurisdictional privilege; empirical approach.

1. Introduction.

We have over-pluralized the hypotheses of jurisdictional privilege and this ends up causing this dysfunctionality of the system that culminates in the perverse effect consisting of impunity - Former Chief Justice Celso de Mello, O Estado de São Paulo, May 31, 2017.

What does influence the existence of jurisdictional privilege for some authorities in Latin American countries? After the end of colonial periods, many Latin American countries struggled with authoritarian regimes. Most of these countries experienced waves of authoritarianism followed by democratic moments during the last century. For that reason, democratic institutions were built under the imminent threat of a coup d'état.

For instance, to ensure that presidents would not be persecuted for political reasons, Brazil has established that its Supreme Court (*Supremo Tribunal Federal*) would be the only court with powers to judge presidents (except impeachment cases), federal deputies, and senators, amongst other higher authorities. This is commonly known as *foro privilegiado*, but the official name should be "jurisdiction for the prerogative of function". For this work, we decided to translate it as "jurisdictional privilege" since it is a right conceded to a few authorities to have one specific court with judicial power to judge them.

In the case of Brazil, the Brazilian Supreme Court tends to use the time and the power of agenda-setting to choose when, who, and even *if* they will judge criminal charges against high authorities. According to Gomes Neto and Carvalho (2021), the original goal of the creation of the jurisdictional privilege was to protect the political activity, given the recent history of authoritarianism in the country, heavily influenced by studies on the re-democratization of the region. However, they found that this institute did not produce the expected effects: it served as a shield for members of the political higher classes from being condemned and punished for illicit acts (crimes).

Based on the Brazilian example, this work seeks to understand if other Latin American countries also offer the same protection to their authorities and why. What are the factors that influence the existence of jurisdictional privilege? Furthermore, what does influence the extent of the privilege given to more or fewer authorities?

This research used a multi-method approach to present and analyze the institutional phenomenon of jurisdictional privilege. First of all, exploratory and descriptive comparative

research was carried out from Latin American constitutional texts to identify where jurisdictional privileges are present and their respective amounts. Then, a quantitative analysis applied statistical tests to the variables included in the research database, to check possible correlations between institutional quality indices and the variation in the number of representative categories of political authorities benefiting from the privilege of jurisdiction. Finally, a qualitative comparative analysis (QCA) was performed to describe the relationship between the variables in terms of necessary and sufficient logical conditions for the occurrence of the phenomenon under study.

Thus, we hope to find research results that contribute to the understanding of the reasons for this constitutional privilege and an understanding of the way it is distributed among Latin American countries. What was once presented as a local and singular institutional feature has actually turned out to be a regional phenomenon, demanding generalized explanations within a broader legal and political context.

This paper is divided into 3 topics. The first topic explains how the transitions in Latin American countries influenced the design of Judicial institutions and created some institutions that only exist in this region. It shows that it is not possible to study countries of the Global South based on theories established upon countries of the North of the Globe. Secondly, we discuss how the institutional quality is affected by an incomplete transition to democracy. Our argument is that one of the (unwelcome) consequences of an incomplete democratic and institutional transition is the arising of institutional privileges, as jurisdictional privileges. The third topic explains our method and, finally, presents our results. This is the first paper of a more extended research project that we hope will help to fill this gap in the comparative studies of Judicial institutions.

2. Institutions in Latin America: what to know before analyzing them.

2.1. Latin American transitions to democracy and their effect on Judicial institutions

Latin American countries have endured many moments of political instability that, eventually, led to constitutional changes. These changes also meant institutional transitions. During the 1980s and 1990s, the region observed a wave of new democratic constitutions that brought with them some mechanisms meant to impede new

authoritarian regimes. The Judiciary, in some cases, has gained more power and liberty to protect constitutions and, one would expect, to safeguard democracy. In other cases, the relationship between branches of power did not change so much.

In Argentina, for instance, even with a democratic transition due to the election of Raúl Alfonsín, the Judiciary was still seen “as a power vulnerable to the Executive” (ENGELMANN; BANDEIRA, 2017, p. 908). After the democratic reopening, the Argentine Court went through three distinct periods. The first one lasted until 1989, during the period of Alfonsín and it showed an image of Judicial stability before the society. The trial of the military dictators and the technical composition of the judges helped to build this image, despite the political appointment of justices.

Under the Menem government, the Argentinian judicial institution lost its credibility: the government changed the Court's composition (court-packing) and judges were again being seen as allies to the government. It was after 2003 when the Argentine Court gained more independence from the Executive due to changes in the way judges were recruited. It was key to avoiding an increase in the protagonism of the institution and its judges in the Argentine political scene (BANDEIRA, 2017).

In Bolivia, it was in 2009 that the government of Evo Morales held a popular consultation to amend the Constitution that brought the project of the “Plurinational State of Bolivia” (BOLIVIA, 2009). The new constitution also gave more powers to the Judiciary, creating the Plurinational Constitutional Court, the Supreme Court of Justice, the Agro-environmental Court, and the *Consejo de la Magistratura*.

According to the constitutional text, the Supreme Court of Justice is the highest court of ordinary jurisdiction, and its magistrates are elected by universal suffrage (BOLIVIA, 2009). Because of greater freedom and greater power, the court was a protagonist in important decisions on indigenous rights. “There are cases, such as Constitutional Sentence 295/03, in which the Constitutional Court of Bolivia has already ruled, recognizing indigenous rights. [...] Thus, it is possible to point to Bolivia as a case of pluralization of law with judicial activism” (AVRITZER, 2016, p. 84).

Chile is a different case. Throughout the rest of the century, and even after the authoritarian regime, the Chilean Court remained apathetic, according to its researchers. One of the explanations is the concern with legality; on the other hand, even with this respect for legality, the Chilean Court allowed and even facilitated authoritarian rule

(HILBINK, 2007). After the democratic reopening and with small reforms that allowed greater freedom, Chile is a case of a self-contained Court, especially when compared to the phenomenon of protagonism observed in other countries (HUNEEUS, 2010). One of Hilbink's (2007) conclusions is that the Chilean Judiciary has a tendency toward conservatism and avoids confrontation with the government, and this is linked to its history of "impartiality" and institutional structure.

As legal change alone is not enough, according to Ríos-Figueroa (2007), for judicial effectiveness, Mexico proves that political instability is also important in the scenario of judicial activism. The Mexican Court did not go against the interests of the Institutional Revolutionary Party (PRI) until it presented weaknesses in 1997 (it lost its majority in Congress) and in the year 2000 (this year the party lost the presidential elections). Finally, under power fragmentation in the Executive and Legislative branches, due to the weakening of the PRI, the Supreme Court imposed defeats on the government.

In Peru, the Judiciary has always been considered a minor power, subordinate to the Executive: judges contributed to Fujimori's authoritarian government by failing to apply international human rights standards and ignoring constitutional guarantees. Even so, human rights protection organizations used international mechanisms, such as the Inter-American Court of Human Rights (IACHR), to denounce government abuses in the 1990s and, after Fujimori's fall, the Peruvian Judiciary started to analyze and judge the cases, leading to a total of 113 individuals to be acquitted, 66 convicted and 12 were absent during the criminal trials that took place between 2005 and 2012 (BERNARDI, 2015).

In the Peruvian case, Bernardi (2015) also says that the IACHR played an important role in the transition, through the activities of non-governmental organizations for the protection of human rights: after the overthrow of Fujimori, these organizations participated in the transitional government. The reconfiguration of the Judiciary included judges that not only did not have a career (magistracy) but were also part of political parties that were hit hard by the Fujimori dictatorship.

Finally, Uruguay proved that the entry of left-wing parties into the game also had a symbolic consequence. Civil society felt more empowered to discuss political issues in the Judiciary. The new party design, according to Trujillo (2013), is one of the seven elements he describes as important for the judicialization of politics in Uruguay. Something only possible after the democratic transition, since the other elements are: judicial independence;

publicizing cases of State irregularities; the appearance on the State's agenda of problems involving violations of human rights and the environment; the ideological homogeneity of political actors; high levels of political competition and emergence of "new social movements" (TRUJILLO, 2013).

These cases are examples. This topic sought to explain that, during re-democratization, Latin American countries built institutions and legal avenues that would help to avoid new authoritarian regimes. It involved strengthening the Judiciary and, in some cases, creating jurisdictional privileges to protect elected officials.

The reason why the countries sought to empower their judiciaries is not the focus of this research, even though there are many theories varying from insurance - when a ruling coalition gives power to courts expecting that they will protect their policies in the future (RAMSEYER 1994; GINSBURG, 2003; FINKEL, 2008); power balance is also a possible explanation since courts could be responsible for balancing forces between Executive and Legislative (CHAVEZ 2004a, 2004b). One that best fits the idea of this text is the legitimization of regimes. Countries that went through transitions of regimes need to show that the new democratic government will be transparent and committed to the rule of law (LANDRY, 2008). Next, we will further look at why institutions matter when explaining this subject.

2.2. Formal and Informal Institutions matter: what to expect when studying Latin American institutions

Before diving deeper into our object of research, the institution of jurisdictional privilege, it is important to define what is an institution. For this purpose, we will use O'Donnell's (1996, p. 6) concept: an institution is "a regularized pattern of interaction that is known, practiced, and accepted (if not necessarily approved) by actors who expect to continue interacting under the rules sanctioned and backed by that pattern". O'Donnell (1996) explains that most scholars when analyzing democracies tend to compare them to

northwestern countries. However, many Latin American countries, albeit polyarchies¹, are also established on informal institutions that he defines as particularism and clientelism².

This has been a challenge for scholars who study Latin America from comparative perspectives for decades now. Informal institutions, as O'Donnell (1996) called them, bring instability and weakness since formal institutions tend not to perform as we would expect them to (BRINKS et al., 2019).

For instance, O'Donnell (1996, p. 5) adds that, on top of the attributes of a polyarchy, countries need to guarantee that "elected (and some appointed) officials should not be arbitrarily terminated before the end of their constitutionally dictated terms". It means that the rule of law must be respected if there is a reason to oust an official (elected or not). Rule of law, free courts, and accountability are some of the requisites that countries have to prove to be part of liberal constitutional democracies.

Nonetheless, if a president is going to be held accountable or not because of her mistakes is another question. One thing is to establish rules and to provoke courts to judge officials, something different is to expect that judges will feel empowered enough to enforce those rules. In Argentina, for example, Helmke (2004) learned that justices tend to vote to favor presidents' interests during the first years of their terms because they fear losing their jobs. When they notice that the sitting president is going to be substituted, they change their line of ruling to vote in support of the next president and/or party agenda.

In Brazil, Gomes and Carvalho (2021) found that when the Supreme Court (STF) has to judge high officials in criminal cases under the jurisdictional privilege, it tends to use different mechanisms to avoid ruling the case. Justices often either dismiss the case under some technicality or send them to another court (lower level). In spite of being democratic countries, these examples from Brazil and Argentina show that legal institutions do not always perform as they should.

It is important to note that not only democracies are subjected to this. Authoritarian countries have also demonstrated the political use of courts in different ways. In their cases, one can expect that they will not perform by the democratic book. Research about

¹ O'Donnell (1996) uses Dahl's definition of polyarch and its seven formal attributes: elected officials; free and fair elections; inclusive suffrage; right to run for office; freedom of expression; alternative information; associational autonomy.

² That is "various sorts of non universalistic relationships, ranging from hierarchical particularistic exchanges, patronage, nepotism, and favors to actions that, under the formal rules of the institutional package of polyarchy, would be considered corrupt (O'DONNELL, 1996, p. 12-13).

authoritarian countries show that “courts are often used to advance the interests of authoritarian regimes, and yet paradoxically, they are also sometimes transformed into important sites of political resistance” (MOUSTAFA; GINSBURG, 2008, p. 2). This information can explain why an authoritarian country would have institutional avenues to try officials.

In summary, we have learned that, in Latin America, “a regularized pattern of interaction that is known, practiced, and accepted (if not necessarily approved) by actors who expect to continue interacting under the rules sanctioned and backed by that pattern” (O’DONNELL, 1996) are not always formal. Most importantly, even when they are formal, such as the jurisdictional privilege rules, researchers may find that they do not perform as they were supposed to. Also, it is important to understand that, authoritarian regimes may also present legal institutions to try officials, but it would be interesting to find if they do really work as they should.

3 EXPLAINING THE JURISDICTIONAL PRIVILEGE (*FORO PRIVILEGIADO*).

*In the Republic, we are all common and we must be treated as common. In Brazil, a system of privileges protects a caste of politicians. It is necessary to 'republicanize' Brazil - Sergio Abranches, **BBC Brasil**, 9 April 2018.*

This is a *sui generis* situation: constitutional rules designate a Supreme Court, a High Court, or another special institutional body to play the role of a single instance for the judgment of alleged practice of common crimes by people in the highest decision-making spheres of the country, while occupying elective term and/or public service. In addition to the exercise of their primary activities - notably those related to judicial review - the members of the respective Court are displaced to conduct and judge criminal proceedings, allegedly committed by high authorities.

The Brazilian legal literature justifies the existence of this privilege as a necessary procedure to preserve the procedural guarantees of the accused high authorities and to safeguard them from possible political pressures on first-degree magistrates, as well as from unwanted persecution by the magistrates themselves (TOURINHO FILHO, 2013; TAVARES FILHO, 2016; TÁVORA and ALENCAR, 2012; MALAN, 2014; AGUIAR and OLIVEIRA, 2018).

Some people hold positions of special relevance in the State, and in consideration of these positions or functions that they exercise in the political-juridical scenario of our Homeland, they enjoy a special jurisdiction, that is, they will not be prosecuted and judged like any of the people, by the common bodies, but by higher bodies, at a higher level (TOURINHO FILHO, 2013, p.179).

In addition, Malan (2014) observes that the specter of political agents with jurisdictional privileges - especially in the Brazilian Supreme Court environment - underwent an expansive and practically uninterrupted process throughout the successive Brazilian constitutional regimes, attributing the existence of the benefit to an ethical-political foundation: the dignity of the public function exercised by the accused. According to the dominant argument in the legal literature, the accused would be tried in a special jurisdiction, precisely to prevent courts from being used as "instruments of political war" (ARANTES, 2007).

Arantes (2007) and Aguiar & Oliveira (2018), however, in the opposite direction, refute legal justifications for the existence and continuity of situations of jurisdictional privilege, arguing that this would be capable of generating a reverse and unwanted effect: the concentration of judgments in the High Courts would reduce the chances of prosecution and punishment of accused politicians, contributing to the feeling of impunity. This position is empirically confirmed by the evidence found in the study by Gomes and Carvalho (2021).

Despite the legal literature description of such privilege, there is a gap in substantive comparative research on the institute among Latin American countries. This is the reason why we took the Brazilian case as a starting point. This research sought to verify from a comparative perspective the existence and causes of the benefit of jurisdictional privilege in Latin American countries and to fill this theoretical gap.

4. Jurisdictional privilege in latin america: research design, results, and discussion.

As mentioned above, we used a multi-method approach to present and analyze the institutional phenomenon of jurisdictional privilege. First of all, exploratory and descriptive comparative research was carried out on Latin American constitutional texts, to identify where jurisdictional privileges are present and their respective amounts.

This research had its starting point in the full reading of 24 Constitutions of Latin American countries³, seeking to identify legal rules that benefit political authorities with jurisdictional privilege, transferring regular criminal judgments to the environment of the Supreme Courts, High Courts, or Parliament bodies.

Figure 1: Jurisdictional privilege and countries' descriptive data

COUNTRY	Jurisdiction		PRESIDENT	VICE		SENATOR	DEPUTY	JUSTICES	DIPLOMATS	PROSECUTORS	MINISTER /			INDICATOR
	Privilege	CONST RULE		PRESIDENT	VICE						SECRETARY	MILITARY	OTHERS	
ARGENTINA	1	ART 116	0	0	0	0	0	0	1	1	0	0	0	2
BOLIVIA	1	ART 184, "4"	1	1	0	0	0	0	0	0	0	0	0	2
BRASIL	1	ART.102, "b", "c"	1	1	1	1	1	1	1	1	1	1	1	10
CHILE	0	-	0	0	0	0	0	0	0	0	0	0	0	0
COLOMBIA	1	ART 235	1	1	1	1	1	1	1	1	1	1	1	11
COSTA RICA	1	ART 121, "9"	1	1	0	0	1	1	1	0	0	0	0	5
DOMINICA	0	-	0	0	0	0	0	0	0	0	0	0	0	0
DOMINICAN REPUBLIC	1	ART 154	1	1	1	1	1	1	1	1	1	0	1	10
ECUADOR	1	ART 431	0	0	0	0	1	0	0	0	0	0	0	1
EL SALVADOR	1	ART 182	1	1	0	1	0	0	0	0	0	0	0	3
GRENADA	0	-	0	0	0	0	0	0	0	0	0	0	0	0
GUATEMALA	0	-	0	0	0	0	0	0	0	0	0	0	0	0
GUYANA	0	-	0	0	0	0	0	0	0	0	0	0	0	0
HAITI	0	-	0	0	0	0	0	0	0	0	0	0	0	0
HONDURAS	1	ART 313	1	1	0	1	0	0	0	0	0	0	0	3
JAMAICA	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MEXICO	1	ART 111	1	1	0	0	0	0	0	0	0	0	0	2
NICARAGUA	1	ART 130	1	1	0	0	0	0	0	0	0	0	0	2
PANAMA	1	ART 142, 155, 161	1	1	0	1	1	1	0	0	0	0	0	4
PARAGUAY	0	-	0	0	0	0	0	0	0	0	0	0	0	0
PERU	1	ART 93, ART 99	1	1	1	1	1	1	0	1	1	0	0	7
SURINAME	1	ART 140	1	1	1	1	1	1	0	0	1	0	1	7
URUGUAY	0	-	0	0	0	0	0	0	0	0	0	0	0	0
VENEZUELA	1	ART 266	1	1	1	1	1	1	1	1	1	1	1	10

Source: Authors' elaboration based on the original database of this research and Constitute Project website.

Thereby, we identified that 15 countries present constitutional rules on jurisdictional privileges, while 9 Latin American countries do not have any constitutional rule in this sense. In countries with active jurisdictional privileges in their constitutional designs, we counted how many categories of political authorities benefited from differentiated judicial treatment⁴.

³ Constitutional texts are available on the Constitute Project website: <https://www.constituteproject.org/countries/Americas?lang=en>

⁴ This research did not measure how many people would benefit (by category of political authority) from the privilege of jurisdiction in each country surveyed.

Figure 2: Spatial distribution of criminal jurisdictional privilege



Among the countries studied in this investigation, 13 (54.17%) protect presidents and vice-presidents, 9 (37.5%) protect deputies and justices, 6 (25%) protect senators, diplomats, prosecutors and ministers/secretaries, 5 (20.84%) protect other categories of political authorities and 3 (12.5%) protect the military.

Colombia (11), Venezuela (10), Brazil (10), and the Dominican Republic (10) are those countries that have jurisdictional privilege spread across a greater number of political authorities. Argentina, Bolivia, Mexico, and Nicaragua have only two categories in their constitutional norms that benefit from the privilege of jurisdiction, representing the lowest intensity of this benefit. However, this does not occur homogeneously: while the constitutions of Mexico, Bolivia, and Nicaragua seek to benefit presidents and vice-presidents, the Constitution of Argentina gives this benefit to two less expressive authorities, specifically diplomats and prosecutors. The nine countries with no constitutional rule on jurisdictional privileges are Chile, Dominica, Grenada, Guatemala, Guyana, Haiti, Jamaica, Paraguay, and Uruguay.

What would be the factors that could help to empirically explain the existence and distribution of jurisdictional privileges in Latin American countries?

We searched for other quantitative and qualitative empirical tools that could provide explanatory evidence of this phenomenon, carrying out an in-depth analysis of possible relationships between the prediction and the intensity of the aforementioned institutional benefit and a set of explanatory variables related to the characteristics of the countries studied.

Then, we used statistical correlation tests (*Pearson "r" and Spearman "rho"*) to verify whether the variation in the number of categories of privileged political authorities in the group of Latin American countries (indicative of the *intensity of the jurisdictional privilege*) - dependent variable (Y) - was related to the variation in institutional quality indexes measured by the WGI scale of the World Bank - independent variables (X) - for the same group of countries. Such tests are adequate to assess the existence (or not) of correlation between such variables of continuous and ordinal nature (LEVIN et al., 2014).

Table 1: Correlation between the intensity of jurisdictional privilege and World Bank's institutional quality indicator (WGI)

Statistical correlation tests: Pearson "r" and Spearman "rho"			Pearson r	Spearman rho
Intensity of jurisdictional privilege	-	Political Stability and Absence of Violence/Terrorism 2021 WGI (WB)	-0.311	-0.271
Intensity of jurisdictional privilege	-	Rule of Law 2021 WGI (WB)	-0.241	-0.148
Intensity of jurisdictional privilege	-	Government Effectiveness 2021 WGI (WB)	-0.175	-0.112
Intensity of jurisdictional privilege	-	Control of Corruption 2021 WGI (WB)	-0.237	-0.185

Note. All tests are one-tailed for the negative correlation. The results for the p-value are irrelevant as the researchers analyzed the entire population of Latin American countries.

Source: Authors' elaboration is based on the World Bank's WGI 2021 indicators and the original database of this research.

The results of the statistical tests show (from a quantitative point of view) that there is a *negative correlation* between institutional quality indexes and the intensity of jurisdictional privilege. Thus, within the inferential limits of the research model in Latin American countries one slight but interesting correlation was found: ***as institutional quality indicators decrease (negative direction), the number of categories of public authorities protected by the aforementioned privilege increases.***

Then, we carried out a qualitative comparative analysis (QCA), a tool suitable for the logical understanding of a reduced set of cases (small-n), such as Latin American countries.

The crisp-set Qualitative Comparative Analysis (csQCA) was the first type of QCA to be developed by Ragin and Drass and is still the most widely used type today. Through the use of Boolean algorithms, Ragin, with the help of Drass, "found an instrument to identify patterns of multiple conjunctural causations and a tool" (RIHOUX; RAGIN, 2009, p. 33-34), to "simplify structured complex data in a logical and holistic way" (RAGIN, 1987, p. viii). Thus, at the heart of the QCA is the "Boolean minimization", which would be binary conditions that would divide the world into a part that presents the condition (1) and another part that does not present the condition (0) (RIHOUX; RAGIN, 2009, p. 35-36).

As Rihoux and Ragin (2009) described the entire analysis process using the QCA technique, the present analysis uses the same logical sequence. In the case of our research, there were three causal conditions:

- 1) It is considered a Free Country by Freedom House⁵ (1) or not (0) / It is considered a Liberal Democracy (1) or not (0) by V-DEM⁶.
- 2) Countries with positive (1) and negative (0) Government Effectiveness⁷.
- 3) Countries with positive (1) and negative (0) Control of Corruption⁸.

The outcome is the presence of jurisdictional privilege for the president, vice-president, deputies, or senators.

Table 2: Dichotomized data (3 conditions) using Freedom House

CASES	FREE COUNTRY (FREEDOM HOUSE)	GOVERNMENT EFFECTIVENESS (WGI)	CONTROL OF CORRUPTION (WGI)	JURISDICTIONAL PRIVILEGE (OUTCOME)
Argentina	1	0	0	0
Bolivia	0	0	0	1
Brazil	1	0	0	1
Chile	1	1	1	0
Colombia	0	1	0	1
Costa Rica	1	1	1	1
Dominica	1	0	1	0
Dominican Republic	0	0	0	1
Ecuador	1	0	0	0
El Salvador	0	0	0	1
Grenada	1	0	1	0
Guatemala	0	0	0	0
Guyana	1	0	0	0
Haiti	0	0	0	0
Honduras	0	0	0	1
Jamaica	1	1	0	0

⁵ Freedom House rates people's access to political rights and civil liberties in 210 countries and territories through its annual Freedom in the World report. Individual freedoms — ranging from the right to vote to freedom of expression and equality before the law — can be affected by state or non-state actors. The Freedom House Score on country liberties is available at: <https://freedomhouse.org/countries/freedom-world/scores>

⁶ Varieties of Democracy (V-DEM) rates the political regimes of the world in four main categories: Liberal Democracy; Electoral Democracy; Electoral Autocracies; Closed Autocracies. Disponível em: https://www.v-dem.net/democracy_reports.html

⁷ The Worldwide Governance Indicators (WGI) project reports aggregate and individual governance indicators for over 200 countries and territories over the period 1996–2020. Available at: <http://info.worldbank.org/governance/wgi/>

⁸ *Idem*.

Mexico	0	0	0	1
Nicaragua	0	0	0	1
Panama	1	1	0	1
Paraguay	0	0	0	0
Peru	1	0	0	1
Suriname	1	0	0	1
Uruguay	1	1	1	0
Venezuela	0	0	0	1

Source: Authors' elaboration based on Freedom House (2022) and World Bank WGI (2020).

Table 3: Dichotomized data (3 conditions) using V-DEM

CASES	LIBERAL DEMOCRACY (V-DEM)	GOVERNMENT EFFECTIVENESS (WGI)	CONTROL OF CORRUPTION (WGI)	JURISDICTIONAL PRIVILEGE (OUTCOME)
Argentina	0	0	0	0
Bolivia	0	0	0	1
Brazil	0	0	0	1
Chile	1	1	1	0
Colombia	0	1	0	1
Costa Rica	1	1	1	1
Dominica	0	0	1	0
Dominican Republic	0	0	0	1
Ecuador	0	0	0	0
El Salvador	0	0	0	1
Grenada	0	0	1	0
Guatemala	0	0	0	0
Guyana	0	0	0	0
Haiti	0	0	0	0
Honduras	0	0	0	1
Jamaica	0	1	0	0
Mexico	0	0	0	1
Nicaragua	0	0	0	1
Panama	0	1	0	1
Paraguay	0	0	0	0
Peru	0	0	0	1
Suriname	0	0	0	1
Uruguay	1	1	1	0
Venezuela	0	0	0	1

Source: Authors' elaboration based on V-DEM (2021) and World Bank WGI(2020).

If Y, then X. Y implies X. The "truth table" is nothing more than a synthesis of the raw data table. In other words, it is a table of settings (RIHOUX; RAGIN, 2009, p. 44). To know the possible number of combinations, it is only necessary to raise the number 2 (presence or absence) to the number of conditions. In the present case, the formula would be 2^3 . That is, there are 8 possible configurations in the present research design:

Table 4: "Truth Table" of Boolean Settings using Freedom House

CASES	FREE COUNTRY (FREEDOM HOUSE)	GOVERNMENT EFFECTIVENESS (WGI)	CONTROL OF CORRUPTION (WGI)
1) Bolivia, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Venezuela	0	0	0
2) Argentina, Brazil, Ecuador, Guyana, Peru, Suriname	1	0	0
3) Jamaica, Panama	1	1	0
4) Chile, Costa Rica, Uruguay	1	1	1
5) Colombia	0	1	0
6) Dominica, Grenada	1	0	1
7) ?	0	1	1
8) ?	0	0	1

Source: Authors' elaboration based on Freedom House (2022) and World BankWGI (2020).

Table 5: "Truth Table" of Boolean Settings using V-DEM

CASES	LIBERAL DEMOCRACY (V-DEM)	GOVERNMENT EFFECTIVENESS (WGI)	CONTROL OF CORRUPTION (WGI)
1) Argentina, Bolivia, Brazil, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Paraguai, Peru, Suriname, Venezuela	0	0	0
2) ?	1	0	0
3) ?	1	1	0
4) Chile, Costa Rica, Uruguay	1	1	1
5) Colombia, Jamaica, Panama	0	1	0
6) ?	1	0	1
7) ?	0	1	1
8) Dominica, Grenada	0	0	1

Source: Authors' elaboration based on V-DEM (2021) and World Bank WGI(2020).

Table 6: Analysis of sufficient configurations using Freedom House

Configuration	X ₁	X ₂	X ₃	Y=0	Y=1	N	N _y	Consistency	X→Y
1	0	0	0	Guatemala, Haiti, Paraguay	Bolivia, Dominican Republic, El Salvador, Honduras, Mexico, Nicaragua, Venezuela	10	7	0,7	T
2	1	0	0	Argentina, Ecuador, Guyana	Brazil, Peru, Suriname	6	3	0,5	F
3	1	1	0	Jamaica	Panama	2	1	0,5	F
4	1	1	1	Chile, Uruguay	Costa Rica	3	1	0,3	F
5	0	1	0		Colombia	1	1	1	T
6	1	0	1	Dominica, Grenada		2	0	0	F
7	0	1	1			0	--	--	[?]
8	0	1	1			0	--	--	[?]

Y = Jurisdictional Privilege / X₁ = Free Country / X₂ = Government Effectiveness / X₃ = Control for Corruption.

Source: Authors' elaboration based on Freedom House (2021) and World Bank (2020).

As a result of QCA, configurations whose consistency is greater than 0.5 can be considered empirically valid (true). Only configurations 1 and 5 could explain the outcome of "jurisdictional privilege". According to configuration 1, not being a free country and having an inefficient and very corrupt government would explain the jurisdictional privilege. It is the case in Bolivia, Dominican Republic, El Salvador, Honduras, Mexico, Nicaragua, and Venezuela. According to configuration 5, not being a free country and having a very corrupt government would explain the jurisdictional privilege in Colombia.

The table above shows two counterfactual cases. We chose to consider these cases as false (not sufficient) since it makes no sense to consider that non-free countries have efficient governments that control corruption.

Table 7: Analysis of sufficient configurations using V-DEM

Configuration	X ₁	X ₂	X ₃	Y=0	Y=1	N	N _y	Consistency	X→Y
1	0	0	0	Argentina, Ecuador, Guatemala, Guyana, Haiti, Paraguay	Bolivia, Brazil, Dominican Republic, El Salvador, Honduras, Mexico, Nicaragua, Peru, Suriname, Venezuela	16	10	0,6	T
2	1	0	0			0	–	–	[?]
3	1	1	0			0	–	–	[?]
4	1	1	1	Chile, Uruguay	Costa Rica	3	1	0,3	F
5	0	1	0	Jamaica	Colombia, Panama	3	2	0,6	T
6	1	0	1			0	–	–	[?]
7	0	1	1			0	–	–	[?]
8	0	1	1	Dominica, Grenada		2	0	0	F

Y = Jurisdictional Privilege / X₁ = Liberal Democracy / X₂ = Government Effectiveness / X₃ = Control for Corruption.

As already explained, configurations whose consistency is greater than 0.5 can be considered empirically valid (true). Again, only configurations 1 and 5 could explain the outcome of "jurisdictional privilege". According to configuration 1, not being a liberal democracy and having an inefficient and very corrupt government would explain the

jurisdictional privilege. Using V-DEM's concept of "liberal democracy", we were able to fit 3 more countries in this first configuration, totaling 10 countries: Bolivia, Brazil, Dominican Republic, El Salvador, Honduras, Mexico, Nicaragua, Peru, Suriname and Venezuela.

When using V-DEM, configuration 5 suggests that not being a liberal democracy and having a very corrupt government would explain the jurisdictional privilege not only in Colombia (as in the Freedom House scenario) but also in Panama.

The table above shows four counterfactual cases. Configurations 2, 3, and 6 were tested when using Freedom House and were considered false. Again, we chose to consider configuration 7 as false (not sufficient) since it makes no sense to consider that non-free countries have efficient governments that control corruption.

Of the true cases whose outcomes were 1, 2 (two) descriptive formulas resulted:

*free country*government effectiveness*control of corruption	*free country*GOVERNMENT EFFECTIVENESS*control of corruption
Bolivia, Dominican Republic, El Salvador, Honduras, Mexico, Nicaragua, Venezuela	Colombia

Outcome → jurisdictional privilege

The first formula (*free country*government*effectiveness*control of corruption) corresponds to Bolivia, Dominican Republic, El Salvador, Honduras, Mexico, Nicaragua, and Venezuela using Freedom House; and to Bolivia, Brazil, Dominican Republic, El Salvador, Honduras, Mexico, Nicaragua, Peru, Suriname, and Venezuela using V-DEM.

The second formula (*free country*GOVERNMENT EFFECTIVENESS*control for corruption) corresponds to Colombia using Freedom House; and to Colombia, and Panama using V-DEM.

The minimum formula allows us to observe that not being a free country and having low control of corruption are the conditions that are present in both configurations. It is possible to rewrite it in a single formula:

*free country*control of corruption → jurisdictional privilege
--

Thus, *not being a free country and having low levels of corruption control are necessary and sufficient conditions for a country to have jurisdictional privilege for presidents,*

vice-presidents, deputies or senators in their constitution. Although it represents a significant qualitative advance in the understanding of the institutional phenomenon object of this research, the qualitative comparative analysis was not able to fully explain why free countries with relative institutional quality (e.g., Costa Rica) have so many situations of jurisdictional privilege.

Perhaps this is another indicator of the need to review some of the criteria for the institutional classification of legal and political regimes, as well as the formal, minimum, and sub-minimum definitions used by international agencies to understand Latin American countries, including regional institutional peculiarities.

5. CONCLUSIONS

The 1980s marked the beginning of re-democratization in several Latin American countries. Now as democratic countries, they had to establish constitutional means to protect officials (elected or appointed) from political pursuit. As a way of avoiding political persecution, countries like Brazil established that only special courts, like the highest court in the country, could judge presidents, deputies, and senators, among several public authorities. This article sought to answer what are the factors that influence the existence of that jurisdictional privilege in Latin American constitutional designs.

Using a multi-method approach to present and analyze the institutional phenomenon of jurisdictional privilege we reached two main findings. First, statistics showed us a *negative correlation* between institutional quality indexes and the intensity of jurisdictional privilege. In other words, as institutional quality indicators decrease (negative direction), the number of categories of public authorities protected by the jurisdiction privilege increases.

Second, using the qualitative method QCA, we found that not being a free country and having low levels of corruption control are necessary and sufficient conditions for a country to have jurisdictional privilege as a constitutional institution. In spite of that, the qualitative comparative analysis was not able to fully explain why free countries with relative institutional quality (e.g., Costa Rica) have so many situations of jurisdictional privilege. It follows O'Donnell's (1996) theory that to study Latin American institutions, scholars must also pay attention to informal institutions of the countries.

This article could be considered a contribution to studies on “political regimes” in Political Science. Based on its findings, we could question the way in which international indexes classify these regimes.

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