

Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs

Judicial independence is widely considered to be a foundation for the rule of law (Council of Europe 1998; United Nations 1985), and establishing judicial independence in developing and transition economies has become a major goal of donor-supported legal and judicial reform programs. This topic brief will address three questions related to judicial independence. First, what exactly does "judicial independence" mean and how can it be measured? Second, what is the relationship between judicial independence and economic development? Third, and perhaps most important for policymakers and reformers, under what conditions will those with political power act to preserve, rather than undermine, judicial independence? Stated differently, how can an independent judiciary be achieved?

Defining Judicial Independence

The independence of the judiciary can be defined in many ways. Some scholars have produced long lists of criteria the judiciary must meet; others focus on more narrow aspects of judicial institutions (Landes and Posner 1975; Shetreet 1985; Larkins 1996). But most agree that a truly independent judiciary has three characteristics. First, it is impartial. Judicial decisions are not influenced by the judge's personal interest in the outcome of the case. Some analysts incorporate into "impartiality" the idea that judges are not selected primarily because of their political views but on merit.

Second, judicial decisions, once rendered, are respected. Either the parties to the case must comply voluntarily with the decision, or those with the power to coerce compliance must be willing to use this power if compliance is not forthcoming. (While this aspect is not inherent in judicial "independence" per se, it is often assumed implicitly.) The third characteristic of judicial independence is that the judiciary is free from interference. Parties to a case, or others with an interest in its outcome, cannot influence the judge's decision. In practice, protecting judges from private persons with an interest in the case means preventing judicial corruption and coercion.

Insulating judges from officials of other branches of government is often taken to be the most important aspect of judicial independence. Government poses perhaps the most serious threat to judicial independence for two reasons: it has a potential interest in the outcome of myriad cases, and it has so much potential power over judges.

Measuring Judicial Independence

Although many attempts have been made to assess how "independent" the judiciary is in different countries, most have not been terribly successful. Part of this failure is due to the difficulties of gathering comparative data on this topic. But there are inherent problems with measuring the concept as well. Not only is judicial independence a continuous ("more-or-less") rather than a dichotomous ("yes-or-no") variable, but assessing a country's "judicial independence" requires combining different elements into a composite index. Yet the constituent elements of judicial independence do not necessarily all move together. Nor is it clear how to weight them. How would a country with highly politicized judicial appointments but minimal

post-appointment interference compare with a country that selects judges on merit but promotes them on the basis of the political ramifications of their decisions? The degree of judicial independence within a single country may also vary depending on the type of case. One author contends that during the Franco era Spain's general civil courts were quite independent, while politically-sensitive cases were always handled by special, non-independent tribunals (Toharia 1975).

Although most attempts to measure judicial independence focus on formal or technical provisions – issues like the judicial budget, the selection process, tenure, and the like – this approach is often inadequate. Formal provisions and institutional structure are important, but they do not in and of themselves ensure true independence. In many countries, formal guarantees of independence are routinely ignored or manipulated (Vyas 1992; Domingo 1999). In other countries politicians actually refrain from using controls that they could legally employ to discipline judges (Salzberger 1993). Hence formal protections are not sufficient to evaluate the true independence of the judiciary.

An analysis of judicial independence in Japan was able to obtain detailed records on the promotions and postings of all judges hired between 1961 and 1965 to test a series of hypotheses about the impact on a judge's career of issuing rulings unfavorable to the ruling party (Ramseyer and Rasmusen 1997). But in developing countries this type of data is rarely available. To measure judicial independence in common-law Africa, one researcher resorted to lawyer surveys: asking attorneys in each nation whether, in their judgment, the judiciary was more or less independent than it was five years ago (Widner 1999). Although this approach overcomes both the problem with weighting and that of missing data, it does not permit cross-country comparisons.

Accounting for the Link with Economic Growth

Measurement problems notwithstanding, judicial independence is thought to be important for developing and transition economies not only because of its inherent contribution to human rights and justice, but because it may facilitate economic progress. This argument turns on the idea that a major impediment to economic development is the inability of the government to credibly commit itself to appropriate economic policies. It runs as follows: for growth to occur, potentially productive workers and investors must be confident that they will be able to retain a substantial portion of the wealth they create. But though governments may have a long-term interest in national economic growth, they always face short-term political incentives to redistribute newly-created wealth to themselves or their supporters. Therefore, unless the government can make its promise not to engage in such redistribution credible, the potentially productive agents have no incentive to produce, and therefore won't.

An independent judiciary can help the government make its commitments more credible, as long as it is difficult or costly to change the law. If the judiciary is not independent, the government can change its policy without changing the law, simply by engaging in illegal redistribution and manipulating (or ignoring) the courts. If the judiciary is independent, however, the government can only change its policy by changing the law. If this is difficult to do – which is often the case, especially at the constitutional level – the government will not be able to deviate from its existing policy. Thus, when a government does enact a law – say, one that protects property

rights – private actors can be more confident that the law will remain in effect even when the government finds itself faced with political pressure to break that law. If the previous argument that economic growth depends on credible commitments to sound economic policies is correct, and if it is also correct that an independent judiciary makes policy commitments (that is, law) more credible, then it follows that an independent judiciary enhances economic growth.

Of course, since the mechanism by which judicial independence enhances growth in this formulation is the reduction of government discretion, there can be cases when it can impede growth. An independent judiciary may also make it harder for the government to respond quickly and flexibly to changing circumstances or national crises. Most observers consider this to be a less important problem in developing countries (World Bank 1997; Henisz 2000). Two reasons are cited. First, many argue that the greatest impediment to growth in developing countries is persistent inability to commit to not redistributing wealth to the politically powerful, rather than inability to respond to changing circumstances. Second, while an independent judiciary does make changing policy more difficult, it does not make it impossible. Policy can change, but only when the costs of the status quo exceed the costs of enacting a new law. Thus, in times of crisis, change would still be possible. Nonetheless, it is important to bear in mind that an independent judiciary's ability to block policy change can be a double-edged sword. There are numerous examples of judiciaries that block the attempts of executives to institute economic reform – from the U.S. Supreme Court blocking President Roosevelt's New Deal legislation to the efforts of some of the recently-created Eastern European constitutional courts to block the adoption of IMF-sponsored stabilization packages.

Yet, even if one accepts that, in general, an independent judiciary facilitates economic growth by enhancing the credibility of government commitments, the logic of this argument faces a serious difficulty. If the government faces political pressures to change policy, why don't these same pressures lead it to undermine judicial independence? After all, judicial independence is something created by the government, and there's no obvious reason the government couldn't simply remove it when it becomes politically inconvenient – which, by assumption in the preceding argument, it does. No amount of formal protection solves this problem – what the politically powerful grant, they can just as easily take away.

Explaining Judicial Independence

The political foundation of judicial independence thus remains a puzzle in the literature. A number of solutions have been offered, and while all are plausible in some respects, none are completely satisfactory. First, there is the straightforward explanation that violations of judicial independence would be too costly. The most popular variant of this basic notion is that encroachments would not be tolerated by the general public, and any attempt by the government to illegally interfere with the judiciary would meet with overwhelming political opposition. While superficially plausible and supported by a number of anecdotes, this argument has several difficulties. Most importantly, the source of this public attitude – and, more importantly, why some countries exhibit it – is unexplained. Besides, the public has strong interests in policy, especially policy with distributive implications. Is it believable that public concern with abstract principles will trump people's interest in material well-being? Also, since public political opposition generally requires an obvious and flagrant violation of the rules, it should be possible for the government

to slowly erode judicial independence over time, through incremental encroachments on judicial territory.

There are other variants of this theme. Some scholars assert that in some countries, the political power of the bar, which has a vested interest in an independent judiciary, makes violating judicial independence too costly (Shapiro 1981). But this explanation is problematic as well. Lawyers have a vested interest in preserving the system in which their expertise is valuable. This may be the independent judiciary, but it could just as well be the opposite. Moreover, it seems implausible that lawyers alone are politically potent enough to keep the executive in line.

A second explanation holds that an independent judiciary allows politicians to shift the blame for unpopular decisions from themselves to the judges (Salzberger 1993). Therefore, they want to establish, and publicize as much as possible, the independence of the judiciary from their control. Then, when faced with a problem described above – e.g. where the long-term interest of the country is served by protecting property rights, but the government is under pressure from its supporters to redistribute – the government can claim the judiciary is responsible for the restrictions on policy change. But, of course, for this explanation to work, the government's supporters must either be ignorant of the fact that the government could manipulate the judiciary if it chose to, or must be politically unable to demand that the government violate judicial independence in pursuit of policy goals. The former condition seems implausible, and the latter begs the question.

Another explanation offered is that an independent judiciary is politically attractive because an independent judiciary, by making policy harder to change, makes legislative bargains between politicians and interest groups more durable and hence more valuable to politicians (Landes and Posner 1975). Because legislation is worth more when the judiciary is independent, interest groups are willing to pay politicians more for desired legislation. The amount that interest groups are willing to pay to enact durable legislation is presumed to be larger than the amount other interest groups would be willing to pay to undo previous legislation, and therefore preserving an independent judiciary is in the interests of politicians. The biggest problem with this argument, however, is that it doesn't really deal with the basic time-inconsistency problem that causes commitments to be non-credible in the first place. All politicians might prefer a system in which legislation, once passed, is enforced by an independent judiciary. But any given politician can potentially gain more by deviating from this strategy – this is a classic "free-rider" problem. If all future legislatures will protect judicial independence, the current legislature is better off if it interferes with judicial independence. Similarly, if no other legislature is expected to respect judicial independence, the current legislature is certainly better off violating judicial independence. In this model, judicial independence can only be sustained under what seem like implausible enforcement conditions (Boudreaux and Pritchard 1994). In addition, this explanation requires not only an independent judiciary, but one committed to a jurisprudence of "original legislative intent". But there is no necessary connection between a particular jurisprudence and judicial independence per se.

Finally, it has been suggested that judicial independence arises from the desire of politicians to avoid the risks inherent in sustained political competition (Ramseyer 1994). Governments that expect to be in power indefinitely, that don't care much about the future, or that don't expect to ever compete for power again once they

lose office, have little incentive to preserve judicial independence. On the other hand, forward-looking political actors that anticipate alternating in power over a sustained period of time have a different perspective. Though judicial independence reduces the benefits a party can accrue while in power, it also reduces the costs of being out of power, since its opponents are also constrained. This perspective is similar, in some respects, to the third explanation, but has a much more plausible enforcement mechanism, since parties continue to "play" the political game even when they're not in power, and since they have the opportunity to punish violators of judicial independence once they return to power. However, though judicial independence is both possible and plausible in this set-up, it is not the only possibility. How political competitors can achieve mutual respect for judicial independence, rather than getting stuck with mutual violation of judicial independence, is an unanswered question.

All four of these explanations have their weaknesses. All require making strong, perhaps overly strong and simplistic, assumptions about motivations. All also explain judicial independence solely in terms of the forces at work within a country, ignoring the impact of such external factors as trade, the worldwide spread of ideas, and the actions of international and non-national actors.

Though each explanation suggests only a part of the story, each also carries with it some implicit policy options for fostering judicial independence. If, for example, the most important safeguard of judicial independence is public opinion, resources ought to be devoted to education, consciousness-raising, cultivating watchdog groups, etc. Alternatively, if the judicial independence is due to the durability it adds to interest-group bargains, then it is important to inculcate a jurisprudence deferential to original legislative intent, and to facilitate the access of organized groups to the legislative process. If the basis for judicial independence is believed to be political competition, then efforts to institute judicial independence without first (or simultaneously) establishing sustained political competition between repeat-players will be for naught. If one takes this view, resources should be concentrated on establishing strong, sustainable political parties, genuine electoral competition, and so forth.

The sources of judicial independence are complex and do not conform to any single simple model. Nonetheless, it should be clear that developing an effective strategy to foster judicial independence requires a careful and critical examination of the incentives of politicians to support judicial independence. Unless these incentives are in place, no policy can hope to be successful.

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