

MULTIDIMENSIONAL JUDICIAL INDEPENDENCE:  
ASSESSING VARIATION IN SUBJECT MATTER JUDICIAL INDEPENDENCE

by

KAREN BODNARUK

(Under the Direction of Ryan Bakker)

ABSTRACT

Why do courts appear to be independent in some legal areas and not others? How should scholars assess judicial independence for courts of special jurisdiction, including administrative courts, economic courts, and military courts? An independent judiciary plays a critical role in autocracies and democracies; however, identifying independence has proven notoriously challenging. In this project I seek an explanation for the ambiguity by challenging existing measurement strategies empirically, and supplementing the conclusions with fieldwork conducted in Argentina. Unlike the dominant strategies for operationalization that rely on the assumption that judicial independence is unidimensional, I suggest a new approach, which may be characterized as disaggregated and multidimensional. If we are to identify judicial independence we must consider that independence may not occur across all legal issue areas simultaneously. My theoretical framework and empirical analyses push beyond the conceptualization and operationalization of unidimensional judicial independence in the extant literature in several ways. The framework disaggregates judicial independence rather than treating it as a unified phenomenon. I break apart the thick conceptualization -

which demands insularity, impartiality, and empowerment of the court across all legal issue areas - to consider judicial independence in three dimensions: social *de facto* independence, economic *de facto* independence, and political *de facto* independence. I use a Bayesian latent variable technique to estimate continuous measures of independence across 191 countries from 1980-2013. I then use the multidimensional measure in a replication study and I address a novel research question. In a cross-national analysis I test the efficacy of judicial nominating institutions on each dimension of judicial independence. This large-N study is supplemented with fieldwork conducted in Argentina. The qualitative component, elite interviews, provides data to process trace the causal mechanism. Both theoretically and methodologically, this project contributes to the burgeoning literature on judicial politics and institutions in comparative politics scholarship.

INDEX WORDS:     Judicial independence, Bayesian latent variable model,  
                          Measurement model, Judicial nominating councils, Argentina

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## DEDICATION

In memory of my sister Kelly Anne Elizabeth Bodnaruk.

You left fingerprints of grace on our lives. You are not forgotten.

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## CHAPTER 1

### INTRODUCTION

*“The courts of justice are the only possible medium between the central power and the administrative bodies; they alone can compel the elected functionary to obey, without violating the rights of the elector. The extension of judicial power in the political world ought therefore to be in the exact ratio of the extension of elective offices: if these two institutions do not go hand in hand, the State must fall into anarchy or into subjection.”*

Alexis de Tocqueville *Democracy in America* (1835)

Since its establishment the United States Supreme Court has been revered for its independence and scope of power. Early philosophers and constitutional designers admired the role of the court for guarding the Constitution from the encroachment of legislative and executive branches, defending against tyranny of the majority, and providing “stability against the fickleness of the democracy” (Alexis de Tocqueville). Others, such as Alexander Hamilton, had a more pragmatic view of the court. The judiciary “has neither force nor will but merely judgment. Because of this the judiciary is the weakest of the three departments of government” yet it must remain truly distinct from them so as not to endanger the general liberty of the people (Hamilton, 1788). Despite the normative dialog on the scope of the court’s power, both perspectives agreed that an independent court was a critical component for protecting the fundamental institutions at the heart of a stable democracy.

American courts continue to receive a considerable amount of attention for their role in preserving democratic ideals, yet we know little about judicial independence in the United States and cross-nationally. Only in the last four decades, since the third wave of democracy, have policymakers, scholars, and international organizations seriously considered the significance of an independent court to support democracy. Scholars of American judicial politics have developed an active research agenda on judicial independence across the hierarchy of American courts using a variety of research methods. Studies of American courts focus on questions of judicial independence at both the high court and lower courts, including conditions that affect judicial independence (Epstein, Ho, King, & Segal, 2005; Westerland, Segal, Epstein, Cameron, & Comparato, 2010), judge preferences (Songer, Segal, & Cameron, 1994; Westerland et al., 2010), and judicial deference related to specific topics (Epstein et al., 2005; Schorpp, Songer, & Massie, n.d.). Meanwhile, a growing number of comparative scholars have developed an interest in judicial independence cross-nationally. These scholars conduct empirically rich qualitative single-country studies (Barros, 2003; Finkel, 2005, 2008; Helmke, 2005; Peerenboom, 2008; Pereira, 2008; Popova, 2010, 2012; Staton, 2004; Toharia, 1975; Widner & Scher, 2008).

The two subfields are notable for their distance. They pursue different levels of analysis, ask different questions, and use different methodological techniques. This divergence is largely due to the relatively underdeveloped theory guiding comparative judicial politics and the comparativists' preference for region specific scholarship. These preferences are not misguided. There are considerable challenges in studying judicial independence cross-nationally. First, it is difficult to develop sound, generalizable



theories of judicial independence across a variety of regime types. Second, developing accurate measures of judicial independence has proven challenging. Nonetheless, while studying judicial independence cross-nationally is complicated, it is hardly impossible. Indeed, scholars are conducting large-N studies to assess the effect of judicial independence on a variety of dependent variables (Gibler & Randazzo, 2011; La Porta, Lopez-de-Silanes, Shleifer, & Vishny, 1997; Randazzo, Gibler, & Reid, n.d.; Reenock, Staton, & Radean, 2013). While other scholars explore new forms of measurement (Linzer & Staton, 2015; Rios-Figueroa & Staton, 2014).

This research offers a good first cut for understanding judicial independence, yet each of these quantitative studies rely on an assumption that contradicts findings from a growing body of qualitative research. As it stands now, scholars of judicial politics are largely treating *de facto* judicial independence (behavioral independence) as a unidimensional concept. In other words, existing conceptualizations and measures assume that a court is equally independent across all legal issue areas simultaneously. However, emerging research suggests that the *de facto* independence of the court waxes-and-wanes across different legal issues (Cameron, 2002; Finkel, 2005, 2008; Ginsburg & Moustafa, 2008; Peerenboom, 2008; Popova, 2010; Silverstein, 2008; Toharia, 1975). Ignoring this variation has the potential to mislead research assessing the role of an independent court, by masking nuances in judicial independence and producing misleading null results.

In this dissertation I develop a new conceptualization and operationalization of *de facto* judicial independence that takes into account variation in judicial independence across different legal issues. The approach can be characterized as disaggregated and

multidimensional. In Chapter 2, *Judicial Independence in Comparative Politics: A New Analytical Framework for Addressing Variation in Judicial Independence Across Issue Area*, I lay the groundwork for the multidimensional approach. In this chapter, I develop a new framework for studying variation in judicial independence and integrating this framework into cross-national analysis. Drawing from existing research, I develop a three-part categorization of judicial independence related to social issues, economic issues, and political issues. I then explore a primary issue largely ignored in quantitative analysis on this topic: our measures of judicial independence rely on the assumption that judicial independence is uniform despite qualitative analysis that speaks to the contrary. Finally, I suggest a new conceptualization of judicial independence that accounts for variation across issue area, and I consider two measurement strategies that accommodate variation in judicial independence.

In Chapter 3, *Towards a Multidimensional Measure of Judicial Independence*, I develop a measure of judicial independence that accounts for variation in independence across issue area. In this research, I propose a new multidimensional operationalization for analyzing judicial independence. I formulate a theoretical concept whereby *de facto* judicial independence is measured in three dimensions: social, economic, and political. I then estimate a Bayesian latent variable model to construct individual measures of each dimension of judicial independence. The resulting measures, available from 1980-2013 across 191 countries, provide a robust and comprehensive analysis of variation in judicial independence within each country. This multidimensional approach uncovers patterns of where and how judicial independence begins, how it adjusts to changes in the political environment, and when it is associated with democracy. These measures provide a new

tool to test existing theories, including relationships between economic independence and investor confidence, political independence and insurance theory, and social independence and human rights.

Finally, in Chapter 4, *Looks Can Be Deceiving: Judicial Councils and Judicial Independence*, I apply the multidimensional measure to an investigation of the effect of judicial nominating institutions on judicial independence. In theory, judicial councils intervene in the appointment, discipline, and administration of judges in order to reduce executive influence, thereby encouraging independence of the court. However, in some countries it appears that judicial councils have a negative effect on judicial independence. In this article, I explore under what conditions judicial councils affect judicial independence. The primary hypothesis is that judicial councils do not increase judicial independence because the procedural features of the judicial council such as membership composition are open to political manipulation. I use two unique latent variable measures of *de facto* judicial independence in a global cross-national analysis of state-years from 1980–2013 to find that judicial councils are not associated with an increase in judicial independence. Furthermore, drawing from research that finds variation in judicial independence across different legal issue areas, I explore the possibility that judicial councils affect only specific types of courts and therefore specific dimensions of judicial independence reflect the council's influence. To test the second hypothesis I use the multidimensional measure of *de facto* judicial independence developed in chapter 3. Findings suggest that judicial councils do not affect social, economic, and political *de facto* judicial independence. Last, I support the large-N results with a case study of Argentina's *Consejo de la Magistratura*. A series of elite interviews, conducted in 2014,

included members of the *consejo*, judges, politicians, educators, non-governmental organizations supporting rule-of-law, and members of the Buenos Aires bar associations.

## **CHAPTER 2**

### **JUDICIAL INDEPENDENCE IN COMPARATIVE POLITICS: A NEW ANALYTICAL FRAMEWORK FOR ADDRESSING VARIATION IN JUDICIAL INDEPENDENCE ACROSS ISSUE AREA**

Scholars of American judicial politics have developed an active research agenda on judicial independence across the hierarchy of American courts. Meanwhile, a growing number of comparative scholars have developed an interest in judicial independence cross-nationally. Yet the two subfields are notable for their distance. Studies of American courts focus on questions of judicial independence at both the high court and lower courts, including conditions that affect judicial independence (Epstein et al., 2005; Westerland et al., 2010), judge preferences (Songer et al., 1994; Westerland et al., 2010), and judicial deference related to specific topics (Epstein et al., 2005; Schorpp, Songer, et al., n.d.). Answers are sought through quantitative and qualitative analysis. On the other hand, scholars of comparative courts focus on different research questions, methods, and level of analysis. Most studies of judicial independence pertain to the high court and most often in a single country qualitative analysis (Barros, 2003; Finkel, 2005, 2008; Peerenboom, 2008; Pereira, 2008; Popova, 2010, 2012; Staton, 2004; Toharia, 1975). This divergence in methods between the two subfields is largely due to the complexity of generating accurate measures of judicial independence cross-nationally. Scholars of American courts have a wealth of data at all levels of the judicial hierarchy, whereas scholars of comparative courts face a number of data challenges, including language,

opaque legal decisions, and limited access to legal archives. In non-democracies regime control inhibits access to legal decisions and the court's actions are often veiled in secrecy. These complications reinforce region specific scholarship. Expertise in a single country or region mitigates the language barrier and increases understanding of country specific history and social norms. In sum, these challenges help explain why scholars of comparative courts often study the same phenomenon as Americanists but with dramatically different approaches.

Nevertheless, there are large and growing intersections between the two subfields. For example, both are concerned with how judicial selection methods affect judicial independence (Bill Chavez, 2007; Bonneau & Hall, 2009; Driscoll & Nelson, 2012; Glick, 1978) and variables that counteract judicial independence (Bill Chavez, 2004; Epstein et al., 2005; Helmke, 2002; Popova, 2010; Ramseyer & Rasmusen, 2001; Schorpp, Songer, et al., n.d.). Research in comparative judicial politics is becoming richer through the awareness of how judicial institutions function, and scholars are gaining from sophisticated qualitative research that is uncovering tremendous variation in judicial independence across countries and regime types.

The goal of this essay is not to offer a survey of what comparative judicial scholars have learned about judicial independence and their measurement tools. In 2009, Helmke and Rosenbluth summarized the state of the field, and, in 2014, Rios-Figueroa and Staton reviewed a variety of measurement tools. My aim is to offer a roadmap to researchers that might not yet be apparent and suggest an area of research that is especially productive. Scholars conducting qualitative research have uncovered variation in juridical independence across issue area (Epstein, Knight, & Shvetsova, 2001;

Ginsburg & Moustafa, 2008; Moustafa, 2008; Peerenboom, 2010; Popova, 2010; Silverstein, 2008; Solomon, 2002; Toharia, 1975); however, large-N studies of this variation do not exist. Scholars are starting to ask questions about this variation, but our studies are limited simply because we lack the measurement tools to do so. At this time, our existing measures of judicial independence and ensuing quantitative analyses rest on the assumption that judicial independence is uniform. In other words, judicial independence is assumed to be equal across all legal issues. In this essay, I suggest a new approach that takes into account variation in judicial independence. To support this argument, I specifically concentrate on research that is most relevant for observing this variation. I focus therefore on three areas: (1) the rationale for political elites to design legal institutions capable of checking their own power; (2) the implication of these strategies that results in variation in judicial independence across legal issues; (3) the evolution of measurement that operationalizes three overarching categories: social topics, electoral politics, and economics.

The judiciary has neither the sword or the purse, and its independence is largely contingent on the greater political environment. Thus, the foundation for studying judicial independence rests on the political process. In section one I assess the building blocks that are the foundation for most research on judicial independence. The first building block is distinguishing between *de jure* and *de facto* independence. This distinction is fundamental because recent scholarship shows little correlation between formal guarantees of independence (*de jure* independence) and the behavioral independence (*de facto* independence) of the court. Second, I assess the subcomponents of *de facto*

independence. These include impartiality, insularity, and influence. In the third building block I review how political scientists measure judicial independence.

In section two I focus on why political leaders establish institutions capable of checking their own power. Much of this research has concentrated on how political elites use independent courts to lower transaction costs and coordinate behavior (North & Weingast, 1989; Staton & Reenock, 2010). Then, I explore how judicial independence manifests in specific issues. Strategic elites tolerate the constraints of an independent court, but they limit the parameters of the court's jurisdiction to only affect legal areas where the payoff is greater than the costs of constraint. In other words, leaders selectively allow judicial independence in narrow parameters. In sum, these processes highlight that an independent court offers a myriad of benefits; however, a court need not be independent across a broad range of topics.

A body of research has emerged that explores judicial independence related to specific issues, including administrative law, civil rights and liberties, corruption, the electoral domain, and property rights. In this section, I argue that these seemingly unrelated subject areas fall into three categories of judicial independence. Those are issues affecting social issues, civil liberties, rights, and social norms; cases managing electoral politics; and last, cases affecting economic issues. Each category identifies the narrower parameters of independence that exist particularly in autocracies and partial democracies. Taken in sum, these categories form a court with broad jurisdiction which we would hope to find in consolidated democracies.

In section three I point out the inconsistency between variation in judicial independence, highlighted in section two, and all existing measures that assume the



independence of the court is applied equally across all issue areas. These measures rely on a false assumption about judicial independence that is leading, perhaps, to erroneous results in large-N research.

In section four I suggest strategies to resolve measurement challenges. The first step introduces a conceptualization of judicial independence that accounts for variation across the three categories. The second step is to develop a multidimensional measure that accounts for this variation. We can utilize two techniques. The first is to conduct in-depth research on the outcome of legal decisions related to each dimension and then code the outcome of the decision as pro-plaintiff or pro-defendant. While labor intensive, this technique is the traditional method in studies of American courts. The second technique treats *de facto* independence as a latent concept; it is unobservable. In this strategy, we identify observable indicators related to each dimension of judicial independence and then estimate a latent variable model for each dimension of judicial independence. Finally, I offer recommendations for future research.

## **2.1 Building Blocks**

### **2.1.1 What is *De Facto* Judicial Independence?**

Despite a universal acceptance that an independent judiciary is fundamental for democracy (Larkins, 1996; Rosenn, 1987), democratic stability (Gibler & Randazzo, 2011; Reenock et al., 2013), economic growth (Acemoglu, Johnson, & Robinson, 2001; Feld & Voigt, 2003; Frye, 2004; La Porta, Lopez-de-Silanes, Shleifer, & Vishny, 1999; North & Weingast, 1989; Staton & Reenock, 2010), and human rights (Hafner-Burton & Tsutsui, 2005; E. Powell & Staton, 2009) there is not a widely agreed upon definition of *de facto* independence (behavioral independence). Scholars have developed and molded a

variety of unique conceptualizations, yet they are united around three fundamental subcomponents: impartiality, insularity, and influence.

Before turning to a complete discussion on *de facto* independence, I start with distinguishing between *de jure* and *de facto* independence. *De jure* independence entails institutional guarantees of tenure, salary, and appointment mechanisms. Arguably, these rules create strong incentives for independent behavior. Until recently many scholars, policymakers, and constitutional designers assumed a causal relationship between *de jure* and *de facto* independence. But why would political regimes abide by parchment barriers? Ferejohn (1998) suggests two reasons: Courts can overturn attempts to reduce institutional protections, and the constitution provides checks-and-balances against political intrusion. But constitutional protections afforded to judges remain dependent on congressional willingness, interest groups, public opinion, norms, and regime stability (Ferejohn, 1998).

The assumed causal relationship between *de jure* and *de facto* independence is not without critics. James Madison expressed trepidation on the lack of checks-and-balances, namely that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective” leads to the very definition of tyranny (Madison, 1788). In fact, recent scholarship suggests that while *de jure* independence may be engrained in the constitution it has little correlation with *de facto* independence (Epstein, Knight, & Shvestova, 2001; Larkins, 1996; Melton & Ginsburg, 2013; Rios-Figueroa & Staton, 2014; Smithey & Ishiyama, 2000). Political regimes can guarantee tenure, salary, and appointment; however, a myriad of factors can affect independent decision-making,

including limited jurisdiction of the court, political pressure, and pressure from fellow judges. In Bahrain, for example, the constitution incorporates subcomponents of *de jure* independence, including judicial review power and an assurance of independence. In reality, the *de facto* independence of the court is low. The Amir of the State controls judicial selection.<sup>1</sup> Centralized appointment systems are a major detriment to judicial independence (Driscoll & Nelson, forthcoming).

While *de jure* independence occupies a central position for scholars and policymakers a recent wave of research focuses specifically on *de facto* independence, behavioral independence (Helmke & Rosenbluth, 2009). With *de facto* independence moving to the forefront it is important to develop a clear and concise conceptualization. Here I focus on developing the core subcomponents that compose the whole of *de facto* judicial independence: (1) impartiality, (2) insularity, and (3) influence. These subcomponents may occur separately or concurrently. For example, judges may have a high degree of insularity and impartiality, but their influence is limited if their legal decisions are not applied into law. I explore each subcomponent in turn.

*Impartiality:* Impartiality is fundamental to how most political scientists understand the court. In the liberal democratic concept, an independent judiciary should serve as a check-and-balance against the political branches of government. In order to fulfill this role it must act as a “neutral third.” Judges must use objective principles and not let bias interfere with decision-making. They must be impartial toward the parties of a dispute in order to be impartial arbiters of the law (Larkins, 1996, 611). Judges must be

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<sup>1</sup> The Bahraini high court is appointed by the Amir of the State following nomination by the Supreme Council of the Judiciary. The Amir is the chair of the six member Supreme Council of the Judiciary and he appoints the council.

impartial and able to function so that binding law applies to the state and citizens represented (Ungar, 2002, 119). Impartiality requires that judges base their decision on law and facts not predilection toward one of the litigants (Fiss, 1993a; Shapiro, 1981). Impartiality is difficult to identify (Larkins 1996); however, impartial decision-making can be encouraged by insulating judges from coercion.

*Insularity:* Judges must be insulated from undue pressure so that the legal decision reflects “their own opinions” (Kornhauser, 2002, 42-55) in accordance with their own “determination of the law, evidence, free from coercion, blandishments, interference, or threats of government authorities or private citizens” (Rosenn, 1987, 7). Of course judges are not cloistered from political and public demands, as evidence from *amicus curie* briefs, but this outside opinion should not threaten the impartiality and preferences of the judge. Ferejohn, Rosenbluth, and Shipan (2004) state that judicial independence means “autonomy from other actors...to the extent the court is able to make decisions free from influence from other political actors, and to pursue its goals without having to worry about the consequences from other institutions, it is independent” (2004, 3). Thus, judges should not be “political tools to further political aims nor punished for preventing their realization” (D. Clark, 1975; Fiss, 1993a; Larkins, 1996, 609; Rosenn, 1987).

In addition to insulation from political actors, an independent judge should be insulated from endogenous pressures. The judicial institution regulates the behavior of its judges through the appeals process and internal promotion procedures. Songer et al. (1994, 691) and Westerland et al. (2010) find that courts of appeals are quite responsive to Supreme Court policy, and judges “appear to be faithful agents of the Supreme Court.”

In civil law countries, recruitment and promotion within the ranks of the judicial profession creates pressure for judges to decide cases in accordance with the ideology of their superiors (Fiss, 1993b; Garoupa & Ginsburg, 2008; Hilbink, 2008). In Chile, the internal hierarchy of the court allows superior judges to handpick protégés who align with their ideological preferences. Junior judges adapt their decision-making to the ideological preferences of the senior judges (Hilbink, 2008).

*Influence:* Impartiality and insularity are critical subcomponents; however, this is not sufficient for an independent court. The court must be influential so that the decision is applied into practice (Cameron, 2002). The court must be an influential institution such that society and the political system view the court as a “legitimate body for the determination of right and wrong, legal and illegal” (Larkins, 1996). Political actors, the police, and public must implement the court’s decisions (Ungar, 2002, 17 and 19).

### **2.1.2 Measurement**

Reflecting on these three subcomponents, it is imperative to keep in mind that *de facto* independence is not directly observable (Rios-Figueroa & Staton, 2014, 108). It is possible to measure the influence of the court by whether or not decisions are applied into law. It is much more challenging to determine to what extent a court is independent of influence. How do we know a judge is insulated from higher or lower judges, politicians, the media, or public? We can conduct cross-national surveys of judges hoping they answer honestly. We can also look at legal decisions. Perhaps, a decision against the government means political insulation but this does not address influence from other actors. Because of this latency scholars “depend critically on theories, beliefs at least, about how the concept is likely to manifest” (Rios-Figueroa & Staton, 2014, 117).

As it stands now, most measures are constructed through observation of when *de facto* independence ought to manifest. These measures rely on theoretical arguments connecting observable behaviors to the latent concept. To do this scholars depend on information from a variety of sources that should imply *de facto* independence. At present, there are ten widely available measures for time-series-cross-sectional studies. In this section, I briefly review each measure. See Rios-Figueroa and Staton (2014) for a complete analysis on content and construct validity and concerns of nonrandom missing data.

In general, there are four methods for identifying *de facto* independence: proxy variables, expert surveys, third party reports, and a latent variable measure. First, political scientists commonly use proxy variables when a direct measure of the concept is not available. Contract intensive money (CIM) is often used as a proxy variable for judicial independence (Carrubba, 2009; Clague, Keefer, Knack, & Olson, 1999; Staton, 2010).<sup>2</sup> Theoretically, higher levels of CIM reflect public confidence in private property rights and bank security. A second method uses surveys to gauge an expert assessment on judicial independence. Three datasets rely on expert surveys: Bertelsmann Stiftung's Transformation Index (BTI) (Bertelsmann-Stiftung, 2014, 20), Feld and Voigt (2003, 498), and Political Risk Services (PRS).<sup>3</sup> The third method relies on information from third party reports. Howard and Carey (2004), Tate and Keith (2004), and Cingranelli, Richards, and Clay (CIRI) use the United States State Department reports as primary

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<sup>2</sup> CIM is the ratio of non-currency money to total money supply (Clague, Keefer, Knack, & Olson 1999).

<sup>3</sup> Sources relying on expert surveys introduce bias and measurement problems as well as nonrandom missingness. Feld and Voigt (2003, 505) acknowledge that respondents may answer the questionnaire to pursue their own agenda and have the tendency to give 'socially desirable' answers. Respondents may also not answer questions if they feel the question does not apply to their country.

sources to evaluate judicial independence. POLITY IV's executive constraints variable (XCONST) uses data from historical and social science works which is compiled into a basic political chronology (Marshall & Jaggers, 2010, codebook 5).<sup>4</sup> Henisz (2000) creates a dichotomous measure of *de facto* independence by combining information from XCONST and the PRS law and order measure. The Fraser index (GCI), developed by the World Economic Forum, uses a combination of reports, including expert interviews, surveys, and case studies (Fraser Institute, 2014).

Rios-Figueroa and Staton (2014) determine that these measures seem to capture what they purport. However, developing accurate measures of judicial independence across a spectrum of regime types is challenging. First, most measures suffer from nonrandom missing data and this is not being dealt with in the field (Rios-Figueroa & Staton, 2014, 124). Some measures purposefully exclude specific regions. BTI, for example, excludes OECD countries. More problematic is the lack of transparency and access to data in partial democracies and autocracies. A second and more fundamental problem is that scholars are attempting to quantify a concept that is not directly observable. *De facto* independence is a latent concept and the correct measurement strategy requires inference (Treier & Jackman, 2008) and by implication measures of uncertainty (Rios-Figueroa & Staton, 2014). Linzer and Staton (2015) offer an alternative measure that takes into account this latency and a solution for missingness. Using a Bayesian latent variable approach they aggregate eight existing measures of judicial independence, five of which are precisely designed to measure *de facto* independence, to

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<sup>4</sup> POLITY IV identifies restraints upon the chief executive imposed by legislatures, an independent judiciary, and in non-democracies the coalitions of elites, or in other words the checks-and-balances between various parts of government.

develop a continuous measure of *de facto* judicial independence for each country in their dataset (LJI). Table 2.1 displays the data and degree of missingness across ten datasets.

Table 2.1: *De Facto* Measures of Judicial Independence<sup>5</sup>

Variable	Measurement level	Years available	Number of countries	Percent missing	Source
Linzer-Staton	Continuous (0-1)	1960-2009	200	0	Linzer (2015)
Feld-Voigt <sup>6</sup>	Continuous (0-1)	-	80	-	Feld (2003)
PRS (ICRG)	Continuous (0-6)	1984-2011	142	3.64	PRS (2014) <sup>7</sup>
GCI (Fraser)	Ordinal; 7	2006-2014	148	9.37	Fraser (2014)
Henisz	Interval; 0-1	1800-2012	237	53.73	Henisz (2012)
CIRI	Ordinal; 3	1960-2012 1981-2011	202	14.39 12.01	Cingranelli (2012)
Howard-Carey	Ordinal; 3	1992-1999	177	10.22	Howard (2004)
Tate-Keith	Ordinal; 3	1980-2010	200	1.87	Tate (2009)
XCONST	Ordinal; 7	1800-2013 1960-2013	194	4.51 4.25	Marshall (2010)
BTI	Ordinal; 10	Bi-annual 2006-2014	128	-	Bertelsmann (2008)

These measures have different conceptualizations and methods for operationalizing *de facto* independence, yet they are united in their expectation that the concept they seek to observe is unidimensional. In other words, they assume equal independence across a broad spectrum of legal issues.

<sup>5</sup> Percent missing is calculated from the sample provided in the dataset not from all countries existing in the international system. The percent missing would be much higher if all countries were included.

<sup>6</sup> Data are available from the authors. They have not responded to requests for replication materials.

<sup>7</sup> PRS (ICRG) data were obtained from POLCON database. PRS (ICRG) missingness is mainly from former Soviet satellite states.



## **2.2. Variation in Judicial Independence Across Issue Area**

Having discussed the building blocks that are the foundation for studying judicial independence, I now turn to the particular findings of this research. To date, large-N studies of judicial independence have uncovered important implications of judicial independence. Several prominent examples of this research find that judicial independence is no more likely in democracies and autocracies, yet an older independent court is more able to thwart a democratic backslide (Gibler & Randazzo, 2011). Judicial independence positively affects democratic regime survival particularly in economically advanced countries (Reenock et al., 2013), solves commitment problems (Staton & Reenock, 2010), increases the probability of state compliance with international human rights treaties (E. Powell & Staton, 2009), and offers legal protections of property rights which increases economic development (Reenock et al., 2013). These studies highlight the role of judicial independence for increasing democratic ideals. However, the role of judicial independence extends far beyond enforcing democratic norms (Helmke & Rosenbluth, 2009, 348). Leaders structure institutions for a myriad of reasons and as a result judicial independence may occur in a piecemeal approach. Thus, although our methods of conceptualizing and operationalizing judicial independence assume that judicial independence exists equally across all legal issues it should be treated as a disaggregated concept.

In this section, I focus on research that identifies variation in judicial independence. First, I explore why leaders implement institutions capable of checking their power. Then, I assess independence related to specific issue areas. In principle, it is intuitive to expect variation in independence across issue areas particularly for courts in

autocracies and unstable democracies. In practice, however, this research is quite disparate and a cohesive analysis to understand why, when, and how this variation occurs has not been fully realized. In the final component of this section, I categorize the myriad of research into three subject areas. This categorization creates an opportunity for scholars to develop methods for unpacking unidimensional measures of judicial independence into a multidimensional operationalization.

### **2.2.1 Why Establish an Institution That Constrains Your Power?**

Understanding why leaders implement institutions that constrain their power is fundamental to how most political scientists study judicial independence. Scholars have identified five distinct theories to explain the benefits of an independent court: insurance, commitment, monitoring, information, and delegation. I briefly discuss each theory in turn.

*Insurance:* The first theory, insurance theory posits that courts guarantee protection for vulnerable leaders who fear political retaliation following a loss of power (Finkel, 2005, 2008; Ginsburg, 2003; Landes & Posner, 1975). Rulers prefer political control over a deferential judiciary, but in the event of a threat from an opposition movement the ruling party with an “uncertain political future may decide to grant the court independence to serve as a hedge against possible downturns in the party’s future political position” (Finkel, 2005, 102).

Recent scholarship suggests a different story. Rebolledo and Rosenbluth (2009, 4) find a nonmonotonic relationship, between political competition and judicial independence, with judicial independence reaching a peak at median levels of political competition. In the Ukraine and Russia, Popova (2010) finds that intense electoral

competition undermined judicial independence by turning the court into a “spoils of political war” (Randazzo et al., n.d., 5). The deferential court ruled on electoral issues that fundamentally damaged the viability of opposition political parties. Finally, entrenched autocrats are more likely to expand judicial independence to extend the life of their regime (Ginsburg & Moustafa, 2008, 12).

*Credible commitments:* The enforceability of promises is key to every political, social, and economic agreement (Staton & Reenock, 2010). Vulnerable parties enter into a contract with the hope that each complies with the established rules. Noncompliance or even concerns of noncompliance increase transaction costs. In the absence of complete trust between parties, judicial institutions, in particular, form a critical component for detecting noncompliance and ensuring that promises and agreements are enforced. Independent judicial institutions control arbitrary and confiscatory abuse of power (Frye, 2004; North & Weingast, 1989; Staton & Reenock, 2010). Consequently, transaction costs decrease, economic growth ensues, and social order is encouraged (Frye, 2004; North, Summerhill, & Weingast, 2000; Staton & Reenock, 2010). Landes and Posner (1975) suggest that an independent judiciary prevents legislatures from undermining the laws passed by the previous legislatures providing stability or continuity necessary for interest groups to operate in the political arena. If courts ensure that legislation is durable and enforced it follows that an independent judiciary facilitates contractual agreements. The advantages from guaranteeing credible commitments are apparent in economic activity.

These guarantees encourage a domestic population to invest without fear of confiscation (Clague, Keefer, Knack, & Olson, 1999), and multinational firms,

particularly those with infrastructure intensive immobile assets, are more interested in investing if they are confident their investment will not be expropriated (Jensen et al., 2012, 73; Williamson, 1985). Lee Kuan Yew (Singapore), Deng Xiaoping and Hu Jintao (China), Mikael Gorbachev (Russia), Anwar Sadat and Hosni Mubarak (Egypt) are examples of leaders who structured independent judicial institutions to guarantee credible commitments. These leaders acquiesced political control and allowed an independent court specifically to establish a credible commitment to private property. As a result, the state benefited from economic growth. Yet, in each of these regimes, the court's independence was exclusive to cases that facilitated credible commitment.

*Monitoring:* All leaders face the constant threat of fractured loyalty among followers: the domestic population and the political elite. Courts can have a fundamental role in monitoring actors at all levels of the political hierarchy. First, I address the role of the court in monitoring principal-agent problems. Then I turn to the role of the court in maintaining elite cohesion.

All governments must delegate certain tasks to agents who have the skills and expertise to accomplish the task. The agents then have an informational advantage over the principal which they can choose to share with the principal or retain for personal benefit. This principal-agent problem results in substantial costs unless there are mechanisms in place to monitor the agent's compliance. The scope of loss is contingent on a leader's capabilities to manage the principal-agent problem.<sup>8</sup> Administrative law,

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<sup>8</sup> Several factors affect the scale of the principal-agent problem. First, larger bureaucracies increase the possibility for agent misbehavior. Second, principal-agent problems are more problematic in autocratic regimes. Autocracies have fewer independent "watch-dogs," including media and civil society who can alert the public to abuse. Third, hierarchical management structures help reduce costs, senior agents discipline juniors (Weber 1964). Fourth, domestic allegiance to the regime's ideology reduces monitoring costs. Ginsburg (2008, 60) explicitly points out that strong ideological attachment to the leader keeps agents in line, e.g. China under Mao Zedong or the Soviet Union under Vladimir Lenin.

rules controlling government action, can resolve “coordination problems among government actors” (Ginsburg 2008, 59). Leaders can monitor agents by expanding the scope of the court’s independence to include administrative law. This is not a costless approach; the independent court must also monitor the leader. But leaders allow independence in administrative law when other forms of monitoring become too costly (Ginsburg & Moustafa, 2008).

The court can have a similar role in maintaining elite cohesion. We know that a leader’s political stability relies on a coalition of elite support (Bueno de Mesquita, Smith, Siverson, & Morrow, 2004), and maintaining elite cohesion is a constant challenge for any ruler. Elite level “cleavages require careful management to prevent one faction from dominating others” (Ginsburg 2008, 8). Independent courts monitor elite cleavages by identifying rule breakers. In China, for example, when Bo Xilai, a member of the Central Committee, was prosecuted for corruption some scholars suggested fissures in elite cohesion (Li, 2012). Alternatively, courts can pacify cleavages by formalizing agreements between competing parties. In Chile, for example, during the drafting of the 1980 Chilean constitution the court played a fundamental role in arbitrating differences and consolidating elites among four branches of military (Barros, 2003).

*Information:* Independent courts provide informational benefits to other political branches. Because courts have better information about particular policies and the actual effect of the policy on outcomes, purely policy-oriented legislatures often tolerate independent courts even when there is some probability that the court’s preferences diverge from those of the legislature (Rogers, 2001). In autocratic regimes, courts are

particularly valuable for resolving issues between opposition groups and assessing the strength of opposition parties. Gandhi (2008) explains the importance of nominally democratic legislative institutions as a conduit for information to the regime and as an institutionalized method for resolving conflict. An independent court can provide the same benefits. An independent court can emerge as a key point of access for both rights groups and opposition political parties.<sup>9</sup> Opposition groups use the court to resolve grievances and at the same time the regime gains information on the strength of the movement and policy demands.

However, this strategy can backfire on the leader. By creating an outlet for power leaders “provide an opportunity for legal mobilization so that groups, including the opposition, may use the courts for purposes not desired by the regime. As a result, the courts may end up protecting or even nourishing civil society” (Solomon, 2007, 132). In 1999, Hosni Mubarak empowered committees of judges to float between polling stations during the next election for the People’s Assembly.<sup>10</sup> A relatively independent Supreme Court declared that judges were to stay and monitor election sites, and as a result prevented the ruling party from tampering with voter turnout or rigging the election. Unanticipated high levels of public participation resulted in an overwhelming surge of support for independent parties and embarrassing losses for the ruling regime (Brownlee, 2002).

*Delegation:* Judicial independence can emerge when “majoritarian institutions decide that there are certain issues that they do not wish to be burdened with deciding” (Tate & Vallinder, 1995, 32). Politicians steer politically controversial issues to courts

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<sup>9</sup> For information on the Egyptian courts see Moustafa (2007).

<sup>10</sup> The next election was scheduled for 2000.

when the elected bodies approve of the issue “but cannot champion it publically”(Grabber, 1993, 43). In turn, the court makes the controversial decision alleviating political elites from potential backlash. In the United States, decisions on certain policy areas, including abortion, prison reform, education reform and funding, and healthcare were steered to the courts by a legislative unwillingness to assume political risk (Tate & Vallinder, 1995, 33).

Authoritarian leaders also delegate decision-making authority in order to absolve themselves of potential backlash. Political decisions that risk creating fissures in public support or fracturing elite cohesion are funneled to an independent court. The ensuing legal decision protects the autocrat and the losing group respects the decision of an insulated, impartial court. For example, Anwar Sadat’s initiatives to overturn Gamal Nasser’s socialist oriented policies risked alienating social groups dependent on socialist policies and those opposed to economic liberalization. The Egyptian Supreme Court’s management of these cases buffered Sadat from public backlash. He was able to claim that he was simply respecting the rule-of-law (Ginsburg & Moustafa 2008, 10; Moustafa 2007).

### **2.2.2 Determining Independent Issue Areas of the Court**

The above elements are tied to political choices. Elites determine the scope of judicial independence in order to absolve themselves of controversial decisions, safeguard political viability, monitor social actors, guarantee credibility, and gain information. But an independent court requires a tradeoff: The broader the scope of the court’s independence the greater the constraints on political elites. Leaders accept these constraints when the costs of alternative resolutions are too high. Nevertheless, a rational

leader need not fully constrain him/herself by allowing a court independence across a broad spectrum of legal issues. For example, if a leader needs to attract international investment he/she can increase judicial independence specifically to issues involving private property. This way the leader constrains himself/herself to abiding by the court's rulings protecting private property, yet he/she has not constrained himself/herself with an independent court that intervenes in electoral or social issues. Strategic elites maintain the legitimacy of the court by allowing independence pertaining to specific issues while selectively restraining the court in issues that are dangerous for regime stability or are simply not necessary for political benefit. As a result, some courts can have broad jurisdiction encompassing a wide range of issues while others have a smaller number of cases across a narrower range of subjects (Smithey & Ishiyama, 2002, 720).

Recent studies suggest a complex picture wherein judicial independence varies across different types of legal issues. Topics range from campaign law in Russia and the Ukraine (Popova, 2010) to administrative law in Egypt (Moustafa, 2007) and economic law in Singapore (Silverstein, 2008). Although, these topics appear disparate looking across the body of research there is a discernable pattern. The research falls into three categories: social issues (Camp Keith, 2002; Knight, 1998), economics (Gabel, Carrubba, Ainsley, & Beaudette, 2012; La Porta, Lopez-de-Silanes, Pop-Eleches, & Shleifer, 2004; North & Weingast, 1989), and electoral politics (Brownlee, 2002; Epstein, Knight, & Shvetsova, 2001; Finkel, 2005; Ginsburg, 2003; Popova, 2010). To understand this variation I develop a three dimensional typology based on these three categories. This categorization is consistent with Smithey and Ishiyama's (2002, 723) analysis of judicial activism in post-communist countries relating to economics and property rights, civil



liberties, and structure and process of government.<sup>11</sup> In the three dimensional typology, the first dimension is the degree to which courts have independence to affect social issues, civil liberties and rights, and social norms; the second dimension reflects the independence of the court in economic issues, private property rights, and financial concerns; and the third dimension relates to an independent court's ability to affect a legitimate electoral system.

*The first dimension of independence: Economic issues.* The first dimension relates to judicial independence in issues affecting economics. An extensive body of research recognizes the importance of judicial independence as an institutional constraint on the discretionary power of government to encourage economic growth (Brunetti, Kisunko, & Weder, 1998; La Porta et al., 1997; La Porta et al., 1999), enforce property rights and contracts (Haggard & Tiede, 2011), and for monitoring and enforcing market liberalization rules (Gabel et al., 2012, 1125). A few prominent examples of judicial independence in economic and administrative issues include Silverstein's (2008) analysis of Singapore and Moustafa's (2008) extensive research on the Egyptian courts post-Nasser. In both countries, political elites encouraged judicial independence in economic and administrative issues specifically to guarantee a credible commitment to private property rights in order to increase international investment. At the same time, this high level of independence did not extend to cases involving electoral politics or social issues.

*The second dimension of independence: Social issues.* The second dimension of judicial independence relates to an independent court's scope to affect social issues. A central insight from research that focuses on the expansion of judicial independence to

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<sup>11</sup> Cameron (2002) also offers guidance on this categorization.

social issues is that an independent court should “counter incursions upon individual rights by other branches of government” (Camp Keith 2002, 195). Alternatively, under different political conditions, courts can have limited jurisdiction in social issues.

Autocratic regimes often rely on the use of special courts or military tribunals to decide cases on civil liberties and civil rights as well as those affecting social control (Pereira, 2008; Toharia, 1975). Moreover, during military crisis judges have deferred to political elites and limited protections for civil liberties and rights (Epstein et al., 2005; Helmke & Rios-Figueroa, 2011; Helmke & Rosenbluth, 2009; Scheppele, 2012; Schorpp, Reid, & Songer, n.d.).

A second insight is that legal decisions regarding civil liberties and rights in turn affect social norms. Applying the rule-of-law the same way to everyone such that it does not advantage specific segments of the population will affect general welfare and social cooperation. Changes in law bring about changes in society (Kahan, 2002).

*The third dimension of independence: Political issues.* The third dimension of judicial independence relates to an independent court’s ability to affect electoral politics.

Electoral politics is, perhaps, the most contentious jurisdiction for the court. Electoral politics is a high stakes game. Politicians seek to win elections and a court’s decision on election law, including campaign fundraising and voter participation can affect the viability of a political party. The strategic importance of the electoral domain has been explored in a wealth of literature that links judicial independence to insurance theory and the electoral market (Finkel, 2004, 2005, 2008; Ginsburg, 2003; Landes & Posner, 1975; Ramseyer, 1994; Stephenson, 2003). A court with independence in the electoral domain

is insulated from majoritarian interests and this ensures equitable access to politics by opposition groups, the dominant political party, and the public.

On the other hand, courts may have no jurisdiction in electoral politics or make partial decisions. In Mexico, for example, the autocratic government purposefully gave the courts no jurisdiction over political conflicts (Magaloni, 2008, 181). In a 1994 judicial reform law, Mexican President Ernesto Zedillo increased the independence and judicial review powers of the court; however, the court was explicitly prohibited from using its new power to determine the constitutionality of laws with respect to electoral matters (Finkel, 2005, 94). The independence of the court increased across many other issues but specifically excluded electoral politics.

Taken together, these three dimensions suggest that judicial independence cannot be classified in simple unidimensional terms. Ignoring such variation can lead to erroneous conclusions about the utility of an independent court. It remains an open question whether accommodating this knowledge into large-N studies is possible. The following sections lay a foundation for addressing this question.

### **2.3 The Problem of Unidimensionality**

This literature suggests that a number of observable and unobservable factors affect judicial independence and as a result judicial independence manifests in different ways at different times and in specific legal issues. Our existing methods for conceptualizing and operationalizing judicial independence do not account for this variation, and as a result all large-N studies accept the erroneous assumption that judicial independence is uniform.

A simple comparison between qualitative analysis and quantitative measures of judicial independence in three countries highlights this divide. Figure 2.1, below, plots judicial independence over time for China, Singapore, and Russia, using LJI. I compare the overtime plot to qualitative assessments identifying variation in independence across issue area. First, in China, according to field research, since the early 1990s the government increasingly allowed the courts greater independence and authority in a wide range of controversial cases. But the range of cases waxed-and-waned over time (Peerenboom, 2010, 15). In contrast to Peerenboom's assessment, the quantitative data suggest that since 1990 judicial independence moved in a downward trend. Second, in Singapore, the regime strictly limits any attempts by the court to assert independence to protect civil liberties and rights; however, since the 1960s the court has established a credible commitment to guaranteeing private property rights (Peerenboom, 2010, 91; Silverstein, 2008). Investors and the World Bank consider Singapore's judiciary as one of the best in the world. In contrast to this qualitative research, the quantitative data suggest that judicial independence increased through the 1990s peaking in 2000 and then steadily declining. Last, in Russia, qualitative studies of Russia's *arbitrazh* courts (courts of special jurisdiction designed to resolve all economic disputes) describe a considerable degree of independence related to economic issues (Halverson, 1996, 60 & 67; Hendley, 1998, 95), and the Russian government has adopted procedural rules reflecting a desire to increase the independence of the *arbitrazh* courts.<sup>12</sup>

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<sup>12</sup> See Economic Court Act 1995. Also see Halverson (1996, 75) and Solomon (2004).

### De Facto Judicial Independence Over Time Linzer & Staton (2015) Measure of Independence

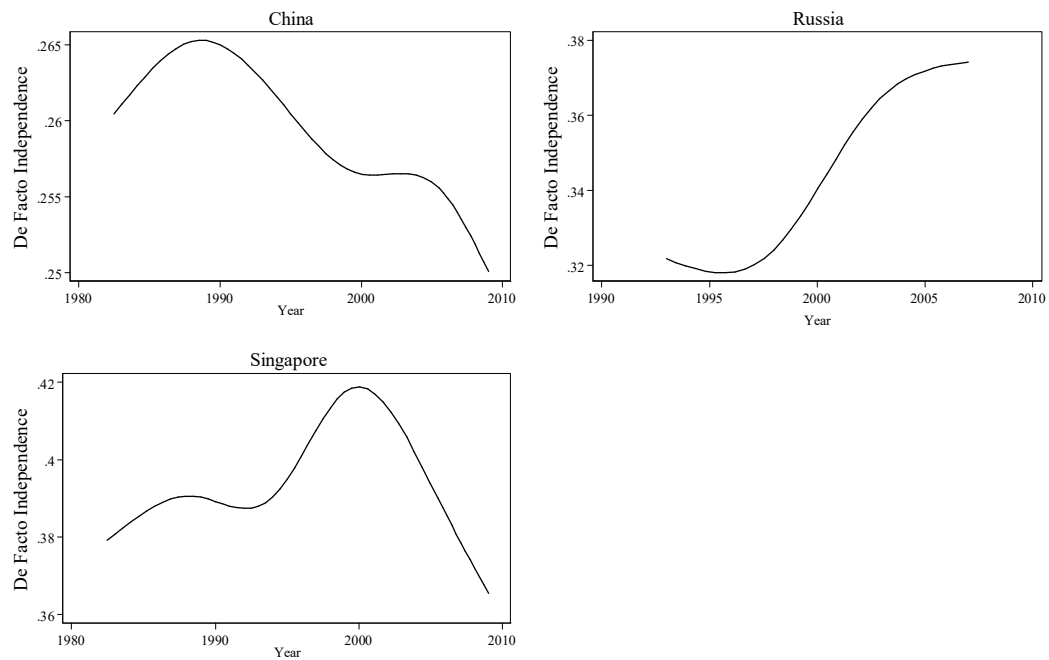


Figure 2.1: Unidimensional Measure of Judicial Independence in Three Countries

In contrast to the independence of the *arbitrazh* courts, the first Russian Constitutional Court was suspended by Yeltsin in 1993 and the second court chose its dimensions of independence based on tolerance levels of political actors (Epstein, Knight, & Shvetsova, 2001). In contrast, the quantitative measure steadily increases into the late 2000s despite the suspension of the court in 1993. These examples highlight the inability of unidimensional measures to identify variation in judicial independence across different issue areas.

Some critics might suggest that this variation appears in partial democracies and autocracies, and democracies with “institutionalized” courts are better suited for unidimensional measures. This may be true in some cases but scholars have identified

variation in judicial independence in consolidated democracies with “institutionalized” courts. Most of this research pertains to judicial deference of social issues during military crisis (Epstein et al., 2005; Schorpp, Reid, et al., n.d.). The United States Supreme Court judges are significantly more likely to restrain rights and liberties during times of war and other international threats (Epstein et al. 2005). Epstein, Ho, King and Segal (2005, 4-6), state that the “belief that the Court acts to suppress rights and liberties under conditions of threat is so widely accepted... since the World War I period that observers no longer debate whether the Court, in fact, behaves in this way.” Chief Justice William H. Rehnquist (1998, 222-225) states,

In wartime, reason and history both suggest that this balance [between freedom and order] shifts to some degree in favor of order – in favor of the government’s ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority that the former should prevail.

It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government’s claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.

However, when looking at existing measures of judicial independence during war times there may be a different story. Polity IV’s XCONST does not change from 1941-1950, the years around World War II. Table 2.2, below, contains judicial independence scores from five commonly used datasets for the United States post-9/11 (2000-2010).<sup>13</sup>

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<sup>13</sup> These measures are commonly used in large-N studies of judicial independence. There are additional measures of *de facto* independence, but they do not have this time series.

Table 2.2: United States *De Facto* Judicial Independence: Post-9/11

Year	POLITY IV – Executive Constraints	Henisz	Linzer and Staton (2015) <sup>a</sup>	Tate and Keith	Cingranelli, Richards, and Clay
2000	7	1	0.9684	2	2
2001	7	1	0.9677	2	2
2002	7	1	0.9672	2	2
2003	7	1	0.9663	2	2
2004	7	1	0.9660	2	2
2005	7	1	0.9655	2	2
2006	7	1	0.9649	2	2
2007	7	1	0.9645	2	2
2008	7	1	0.9643	2	2
2009	7	1	0.9641	2	2
2010	7	1	-	2	2

<sup>a</sup>There is not a statistically significant difference in judicial independence post-9/11.

Across all measures, there is no statistically significant change in judicial independence during military crisis. From this we can draw one of two conclusions. Either the United States Supreme Court did not defer its independence for protecting civil rights and liberties during World War II and post-9/11 or the measures are not equipped to identify judicial deference in social issues. To agree with the former disregards Supreme Court decisions *Korematsu v. U.S.* and *Hirabayashi v. U.S.* (WWII) and debates surrounding the Patriot Act and the military tribunals post-9/11, as well as scholarly research that suggest it is no longer a question that courts defer protections for civil rights and liberties during military conflict (Cole, 2004; Epstein et al., 2005).

This discussion serves two purposes. First, in all countries the independence of the court varies by issue area. This variation pertains to a specific court or issue area and does not encompass an overarching change in the entire judicial system. In the United States, for example, judicial deference during conflict appears to affect only civil rights and liberties. Second, in Russia, variation occurs across different levels of the judicial hierarchy.

The bottom line is that judicial independence varies across the type of legal issue, and by definition unidimensional measures cannot capture this variation. Continued use of unidimensional measures is particularly problematic for questions exploring the effect of judicial independence on narrow parameters of topics and across a large sample of regime types.

## **2.4 The Future Looks to Multiple Dimensions**

Given this large productive research we know that judicial independence is not uniform, and continued reliance on unidimensional measures of judicial independence may result in flawed analysis. This is particularly relevant in studies including autocracies and partial democracies where, to date, most of this variation has been observed. Perhaps, unidimensional measures are better suited in studies of consolidated western democracies where social norms, informal institutions, a lack of congressional willingness to strip the court's powers, and institutionalization of the court guarantees independence across a wide swath of topics, exclusive of extraordinary circumstances. If this assumption is correct and unidimensional measures are most applicable for western democracies then our studies will be limited to a small subsection of countries.

Bringing multidimensional judicial independence into mainstream comparative judicial politics poses a new set of research challenges. Conceptualizing multidimensional judicial independence is relatively straightforward. Operationalizing multidimensional judicial independence is much more challenging.

In this section, I suggest a new conceptualization of judicial independence that takes into account the multidimensional approach. Then, I explore two methods for developing measures that account for this variation.



### **2.4.1 Conceptualizing Multidimensional *De Facto* Judicial Independence**

A concise definition of multidimensional judicial independence rests on the subcomponents, discussed in section one, but these subcomponents are exclusive to the specific dimension. In the multidimensional framework, I use a definition that incorporates two subcomponents of judicial independence: insulation and influence. Multidimensional judicial independence exists when a judge is free to express his/her preferences without influence in a specific issue area and within this issue area the court's decisions are applied into law.

### **2.4.2 Operationalizing Multidimensional *De Facto* Judicial Independence**

The second step operationalizes multidimensional judicial independence. I propose a multidimensional measure that relates to the three categories identified in section two. The economic dimension relates to cases that affect economic growth and investment; the social dimension relates to the court's ability to protect civil rights and liberties, and social norms; and last, the political dimension encompasses cases involving electoral politics.

There are different approaches to measurement that can accommodate the multidimensional framework. One way of identifying multidimensional judicial independence is to study judicial decision-making on cases related to each dimension of judicial independence and code the outcome accordingly. This strategy is commonly employed by American judicial scholars (Epstein et al., 2005; Schorpp, 2012; Songer et al., 1994) and comparativists studying a single country (Epstein, Knight, & Shvetsova, 2001; Helmke, 2005; Ramseyer & Rasmusen, 2001; Vanberg, 2005). The research design starts with gathering data on the universe of cases then categorizing these cases into the

appropriate dimension. The scholar then randomly draws a subsection of cases from each dimension and codes the outcome of the case pro-plaintiff or pro-defendant. The independence of the court is assessed by how the court rules on the decision.

This simplistic coding scheme has several fundamental problems that must be addressed before proceeding. First, it must be established that a pro-government decision means the court is dependent. Second, non-democracies are unlikely to allow open access to legal decisions. At the end of the day this strategy suffers from the same nonrandom missingness that is a serious detriment to existing unidimensional studies (Rios-Figueroa & Staton, 2014). Last, it is important to consider the practical side of this endeavor. Simply put, the data collection effort is a deterrent to this type of research on a large scale.

An alternative strategy is to treat *de facto* independence as a latent variable, and look for observable indicators that produce outcomes that ought to be associated with judicial independence. In this latent variable approach I suggest we look for observable indicators that relate to each dimension of judicial independence. Each observable indicator will adjust based on the perception of judicial independence related to specific legal issue. On their own each of these observable indicators are noisy predictors of judicial independence. Taken together these dimensions should provide a comprehensive overview of *de facto* independence.<sup>14</sup>

There is no agreement regarding how one should aggregate the observable indicators into a specific dimension (Treier & Jackman, 2008, 202). Indicators should be

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<sup>14</sup> See Treier and Jackman (2008) and Linzer and Staton (2015) for examples of latent variable measures. It is possible that some observable indicators straddle the line between two dimensions. In cases such as this, scholars should look to existing theory as a guide for placing the indicator into the respective dimension.

selected carefully, using theory as a guide, to place the indicator into the respective dimension. For example, CIM is commonly used as a proxy variable for judicial independence. Foreign direct investment is another observable indicator of judicial independence. Both of these observable indicators relate to the economic dimension of judicial independence. Whereas, freedom of speech and the press, civil society, and human rights causes are observable indicators that relate to the social dimension of judicial independence. Finally, the political dimension may be reflected in the composition of political parties, existence of viable opposition parties, and the treatment of political opposition and minorities.

Second, regression analysis should support the causal relationship between the observable indicator and judicial independence. Exploratory factor analysis also confirms the placement of the indicator in the respective dimension. Last, the observable indicators should be time-series-cross-sectional with minimal missing data.

## **2.5 Conclusion**

Policymakers, constitutional designers, academics, and international organizations believe in the critical role of an independent court for checking the arbitrary abuse of power and ordering relations within and between states (Mitchell & Powell, 2009). Democratization efforts have dedicated hundreds of millions of dollars toward judicial reform efforts to strength the independence of the court, and some international organizations require judicial reform from new member states, the EU. In this article, I have provided an overview of research on judicial independence to outline how an independent court plays a variety of roles, including guaranteeing commitments, monitoring social actors, providing political insurance and information, and handling

controversial decisions. My approach is to emphasize that leaders implement independent judiciaries for a myriad of reasons, and depending on the motivation independence manifests in different ways at different times and under different conditions. As a result, judicial independence develops and evolves in a piecemeal approach. This perspective helps to explain why courts, especially those in autocracies and partial democracies, have independence narrowly tailored to specific issues. I have developed a coherent strategy for studying this variation, and then suggested a multidimensional conceptualization of judicial independence that encapsulates three categories of legal issues: economic, social, and political.

The next step is to operationalize a multidimensional measure of judicial independence. A successful measure will require a clear and concise theory and creativity on the part of the scholar. Data collection efforts will be a challenge, but this should not deter efforts to advance our knowledge of judicial independence. Considering the challenges of data collection, scholars should push beyond the traditional method of coding the outcome of individual cases. The latent variable approach is superior in that it treats *de facto* independence as what it is, unobservable. Furthermore, the multidimensional latent variable approach is the only technique that provides a solution for the nonrandom missingness that occurs in non-democratic regimes. There will be many critics of this approach; however, this should not deter scientists from pushing forward. The result may change the state of the field.

I have sought to broaden and extend our knowledge of judicial independence by introducing a framework for incorporating multidimensional judicial independence into large-N studies. Far from rejecting existing conceptualizations and measures, I seek to

broaden and extend them, with the goal of refining, and ultimately strengthening our knowledge on judicial independence. I see several areas for future research. First, we must explore insurance theory directly, and test hypotheses about how a leader under political duress expands judicial independence in the political dimension. Second, we need to vigorously test the relationship between judicial independence and economic growth. For example, we need to explain why countries with low scores of unidimensional judicial independence attract international investment. The answer seems obvious now that we understand multidimensional judicial independence; the regime guarantees private property rights. Third, we need to better understand judicial independence in new democracies and autocracies. We know very little about how these courts evolve in a transition to democracy, but conventional wisdom suggests that when a country democratizes it is not realistic to expect the judiciary to immediately attain *de facto* independence across all legal issue areas. Therefore, it is important to determine how a nascent democratic court tests the waters of its newfound independence. Could pre-existing judicial independence in one dimension affect the newly democratic court's ability to assert independence? Are autocratic courts with limited independence better equipped to expand the scope of independence once the country transitions to a democracy? On the other hand, if a court has no history of independence how will judicial independence emerge? Finally, we should seek to understand how courts respond to restrictions on independence. If a court loses independence in one dimension, to an auxiliary court or special tribunal, does the court compensate by asserting independence in other dimensions? The latter question may be particularly valuable in assessing the role of the court in countries on the precipice of a democratic backslide.

### CHAPTER 3

## TOWARDS A MULTIDIMENSIONAL MEASURE OF *DE FACTO* JUDICIAL INDEPENDENCE

Judicial independence is often regarded as the bulwark of democracy. It aids in economic development, protects individual liberty, and increases democratic stability (Burbank & Friedman, 2002, 9). However, democracy is not a prerequisite for judicial independence. A burgeoning literature highlights authoritarian regimes that grant substantial independence to judicial institutions (Finkel, 2005; Ginsburg, 2003; Ginsburg & Moustafa, 2008; Moustafa, 2007; Peerenboom, 2008, 2010; Toharia, 1975). Despite the general consensus that courts play an essential role in governance, there is a debate on how to define judicial independence (Kornhauser, 2002, 46) and how to operationalize it when we see it. This elusiveness is particularly troublesome for generating accurate measures of judicial independence.

Existing measures require the strong assumption that judicial independence is equal across all legal issues simultaneously. In other words, judicial independence is operationalized unidimensionally. However, scholars conducting qualitative research have uncovered variation in judicial independence across three predominant categories: social issues (Camp Keith, 2002; Knight, 1998), electoral politics (Epstein, Knight, & Shvetsova, 2001; Ginsburg, 2003; Popova, 2010), and economics (Gabel et al., 2012; La

Porta et al., 2004; Silverstein, 2008).<sup>15</sup> Unfortunately, large-N studies of this variation do not exist. It is not because scholars have not asked the question. It is because scholars have not had the tools to do so.

In this research, I suggest a multidimensional conceptualization and operationalization that takes into account variation in judicial independence across three categories of legal issues: an economic dimension relating to the court's ability to affect economic issues; a social dimension identifying the court's ability to affect human rights and liberties, and social norms; and a political dimension relating to electoral politics. In the multidimensional conceptualization a court may not be independent across a broad spectrum of issues; however, a court may be independent in a narrow space.

Although each dimension of *de facto* judicial independence (behavioral independence) is unobservable, it is latent; it is possible to detect through observable indicators.<sup>16</sup> Using existing theory and research as a guide, I identify observable indicators related to each dimension of judicial independence in a Bayesian latent variable model to produce a continuous measure for each country-year for social *de facto* independence, economic *de facto* independence, and political *de facto* independence. The resulting measures are available for 191 countries from 1980–2013. In the final section of this paper, I apply the multidimensional measure to a replication study of Gibler and Randazzo's (2011) test of the effect of independent judiciaries on democratic backsliding. Whereas unidimensional measures do not show a statistically significant relationship between democracies and judicial independence, my multidimensional measure uncovers

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<sup>15</sup> Variation between issue areas depends on characteristics of the regime, regime stability, international influence, and domestic stability (Cole, 2004; Epstein, Knight, & Shvetsova, 2001; Finkel, 2005; Helmke & Rosenbluth, 2009; Peerenboom, 2010; Popova, 2010; Silverstein, 2008).

<sup>16</sup> This is commonly done using a single proxy variable.

that only more democratic countries have courts with independence to affect cases involving electoral politics.

This multidimensional approach has the potential to unmask intriguing, intricate details about the behavior of the court. For example, these measures open the door to analysis of partial democracies, new democracies, and authoritarian regimes where judicial independence is often restricted to specific narrow issues. The utility of a multidimensional measure extends far beyond this proposed research agenda: More empirical analysis is needed in a myriad of areas where theories are abundant but empirical testing lags behind.

### **3.1 *De Facto* Judicial Independence**

A remarkable amount of time and effort has been dedicated to conceptualizing and measuring judicial independence. In the last four decades, judicial scholars have debated the normative importance of *de jure* independence, constitutional guarantees of independence, and *de facto* independence, the behavioral independence of the court. A growing consensus suggests that *de facto* independence is what matters. A country can enshrine subcomponents of *de jure* independence, yet the court may still lack *de facto* independence.

With *de facto* independence at the forefront of scholarly interest it is critical to have a concise, explicit conceptualization (Rios-Figueroa & Staton, 2014). This is not an easy task. Scholars abide by a variety of conceptualizations; however, there are two widely agreed upon subcomponents. First, judges must reach decisions independent of “inappropriate” influence (Kornhauser, 2002, 49). In other words, the judge is insulated from outside influence and the decision does not reflect pressure from politicians, the



media, and the public as well as higher and lower courts (Fiss, 1993b; Rosenn, 1987; Russell, 2001). In this sense, the decision reflects the sincere preference of the judge. Second, the court must be influential so that political actors apply and abide by the rules (Hayo & Voigt, 2007; Stephenson, 2003). Put together, a comprehensive definition of judicial independence requires both subcomponents. The court must be free from influence and decisions must be applied into law (Rios-Figueroa & Staton, 2014).

### **3.1.1 Variation in Judicial Independence Across Issue Area**

Judicial independence resides on evolving assumptions about which authorities or institutions pose the greatest threat to the political independence of high courts and judges (Driscoll & Nelson, forthcoming, 2). The court is part of a larger political system and even in established democracies the judiciary is influenced by a combination of domestic and international political forces (Mitchell & Powell, 2009, 2011). In democracies, judicial independence is affected by the power configuration of the political branches (Bill Chavez, Ferejohn, & Weingast, 2003; Epstein & Knight, 1998; Ferejohn & Shipan, 1990; Schorpp, 2012; Staton & Vanberg, 2008), the extent of party fragmentation (Helmke, 2005; Iaryczower, Spiller, & Tomassi, 2002), and public support for the court (Carrubba, 2009; T. Clark, 2011; Gibson, Caldeira, & Baird, 1998; Vanberg, 2005; Walker, 2009). In autocracies, the role of the court is restricted, and the court's scope of independence resides on the whims of the regime (Ginsburg & Moustafa, 2008)

Yet it is false to assume that the sole role of an independent court is to enforce democratic norms (Helmke & Rosenbluth, 2009, 348). Leaders structure institutions for a myriad of reasons, and as a result judicial independence may emerge merely to benefit the regime and in a piecemeal approach. Elites expand the scope of independence to

delegate controversial decisions (Ginsburg & Moustafa, 2008; Moustafa, 2007; Tate & Vallinder, 1995), safeguard political viability (Finkel, 2005, 2008; Ginsburg, 2003), monitor social actors (Ginsburg & Moustafa, 2008), guarantee credibility (La Porta et al., 2004; Landes & Posner, 1975; Staton & Reenock, 2010), and gain information (Rogers, 2001). But an independent court requires a tradeoff: the broader the scope of the court's independence the greater the constraints on political elites. Leaders accept these constraints when the costs of alternative resolutions are too high.

Nevertheless, a rational leader need not fully constrain him/herself by allowing a court independence across a broad spectrum of issues. Strategic elites maintain the legitimacy of the court by allowing independence pertaining to specific issue areas while selectively restraining the court in issues that are dangerous for regime stability or are simply not necessary for political benefit. As a result, an independent court can have broad jurisdiction encompassing a wide range of issues while others have a smaller number of cases across a narrower range of subjects (Smithey & Ishiyama, 2002, 720). If the leader does not like the results they may take back the jurisdiction already given (Shapiro, 1981).

Perhaps because of this strategic behavior judicial emergence does not emerge uniformly across a broad range of legal issue areas. In fact, recent case studies suggest a complex picture in which judicial independence varies across different issues. Topics range from electoral politics in Mexico (Finkel, 2005) to campaign law in Russia and the Ukraine (Popova, 2010) and administrative and economic law in Egypt and Singapore (Moustafa, 2007; Silverstein, 2008). In China, for example, the court has a "high degree of judicial independence in economic issues combined with at times excessive

restrictions in politically sensitive cases, as true for South Korea, Taiwan, prior to democratization” (Peerenboom, 2010, 91).<sup>17</sup> The government increasingly allowed the courts greater independence and authority in a wide range of controversial cases but the range of cases waxed-and-waned over time (Peerenboom, 2010, 15). In Singapore, the judiciary is generally ranked as being one of the best in the world, by investors and the World Bank, but the regime strictly limits any attempts by the court to assert independence to protect civil liberties and rights (Peerenboom, 2010, 91; Silverstein, 2008).

Russia’s *arbitrazh* courts are an example of variation in independence across different levels of the judicial hierarchy. These economic courts are politically independent institutions whose formal role is to protect the legal rights and interests of citizens (Halverson, 1996, 60, 67, & 71; Hendley, 1998, 95), and the Russian government has adopted procedural rules reflecting a desire to increase their independence.<sup>18</sup> In contrast to the independence of the *arbitrazh* courts, the first Russian Constitutional Court was suspended by Yeltsin in 1993 and the second court chose its dimensions of independence based on the tolerance levels of political actors (Epstein, Knight, & Shvetsova, 2001).

Although, these topics appear disparate looking across the body of research there is a discernable pattern. The research largely falls into three categories: social issues (Camp Keith, 2002; Knight, 1998), electoral politics (Epstein, Knight, & Shvetsova,

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<sup>17</sup> In China, political cases which directly challenge the authority of the ruling regime almost always result in some direct interference in the judicial decision (Yulin & Peerenboom, 2010, 108). The government and court have taken steps to ensure that legal cases do not undermine social stability. Whereas, in economic cases the government’s role is diminished (Yulin & Peerenboom, 2010, 119).

<sup>18</sup> See Economic Court Act 1995. Also see Halverson (1996, 75) and Solomon (2004).

2001; Ginsburg, 2003; Popova, 2010), and economics (Gabel et al., 2012; La Porta et al., 2004).

### **3.2 Existing Measures**

This literature suggests that observable and unobservable factors affect judicial independence, and as a result judicial independence manifests in different ways at different times and in specific issue areas. However, our existing conceptualizations and measures rest on the assumption that judicial independence is uniform. These measures mask nuances in judicial independence and may lead researchers to accept misleading results.

As it stands now, scholars construct measures using information from a variety of sources that should imply *de facto* independence: expert surveys, United States State Department Reports, reports from NGOs, proxy variables, and latent variable models. Fortunately, there is not a shortage of quality measures. Rios-Figueroa and Staton (2014) explore the validity of thirteen *de facto* measures of independence and detail deficiencies in the current methods. The good news is that each measure seems to be capturing what they purport, and these measures perform important functions well particularly for monitoring large changes in judicial independence and covering both space and time (Linzer & Staton, 2015). The benefits of unidimensional measures are not disputed; but each of these scholars assume that the concept they seek to observe is applied equally across all legal issue areas.

### **3.3 Conceptualizing the Multidimensional Approach: Judicial Independence in Specific Issue Areas**

Drawing from this discussion, I make a significant departure from conventional measurement schemes to suggest that *de facto* judicial independence should be treated as a multidimensional concept. The first step in the multidimensional approach requires a concise, straightforward conceptualization that takes into account variation in judicial independence across issue area. In this framework, I use a definition that incorporates two subcomponents of judicial independence: insulation and influence. Multidimensional judicial independence exists when a judge is free to express his/her preferences without influence in a specific issue area and within this issue area the court's decisions are applied into law.

The second step, constructing a multidimensional measure of *de facto* judicial independence, is complicated, as are constructing all measures of *de facto* independence. This is largely because *de facto* independence is unobservable: It is latent (Kornhauser, 2002; Rios-Figueroa & Staton, 2014). It is possible to measure the influence of the court by whether or not decisions are applied into law. It is much more challenging to determine to what extent a court is independent of influence. How do we know if a judge is insulated from higher or lower judges, politicians, the media, or public? We can conduct cross-national surveys of judges in hopes they answer honestly. We can also look at legal decisions. Perhaps, a decision against the government means political insulation but this does not address influence from other actors.

One way of identifying multidimensional judicial independence is to study judicial decision-making on cases related to each dimension of judicial independence and

code the outcome accordingly. However, given the potential for unobservable, nefarious interference in the decision-making process a simplistic coding scheme requires strong assumptions about the insulation and motivations of the court. Furthermore, restrictions to data, particularly in non-democracies, will result in nonrandom missingness (Rios-Figueroa & Staton, 2014).

Considering these challenges, I opt for an alternative approach which is to treat *de facto* independence as a latent variable. Since *de facto* independence is unobservable, I look for observable indicators related to each of the three categories of judicial independence: economic, social, and political.<sup>19</sup> These observable indicators, which I identify below, adjust based on the perception of judicial independence related to the affiliated categorization.<sup>20</sup> On their own each of these observable indicators are noisy predictors of judicial independence. Within each dimension the observable indicators should provide a picture of this narrow scope of judicial independence. Taken together these dimensions should provide a comprehensive overview of *de facto* judicial independence.<sup>21</sup>

To preview the next section, the **Economic** dimension relates to an independent court's effect on economic growth and investment; the **Social** dimension relates to the court's ability to protect civil rights and liberties, and influence social norms; and last, the **Political** dimension encompasses the role of the court in electoral politics. These dimensions encapsulate a court's independence in specific types of cases, by issue area,

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<sup>19</sup> This categorization is similar to Cameron (2002, 140-142) and Smithey and Ishiyama's (2002) discussion on the relationship between judicial independence and economic growth, human rights and liberties, and stability of democracy.

<sup>20</sup> Existing theory, empirical analysis, and analysis within this research supports the causal relationship between judicial independence and the observable indicators.

<sup>21</sup> See Treier and Jackman (2008) and Linzer and Staton (2015) for examples of latent variable measures.

which in turn affects observable indicators related to economics, social issues, and electoral politics. For example, an independent court's decision regarding private property will result in a corresponding change in specific observable indicators related to economics, CIM or FDI (Clague et al., 1999; La Porta et al., 1997).

Identifying the dimensions is the first step for understanding a multidimensional measure of *de facto* independence. The second step identifies observable indicators that operationalize different dimensions. There is no agreement regarding how one should aggregate the observable indicators into a specific dimension (Treier & Jackman, 2008, 202). I selected indicators carefully for several reasons. First, I look to existing research, using theory as a guide, to place the indicator into the respective dimension. It is possible that some observable indicators straddle the line between two dimensions. For example, freedom of expression fits in the **Social** dimension but it could also relate to political campaign speech and belong in the **Political** dimension. In cases such as this I use existing theory to support the placement of the indicator into the respective dimension. Second, I assess the causal relationship between the observable indicator and judicial independence with regression analysis.<sup>22</sup> The results suggest that all observable indicators are significantly affected by judicial independence at the 95% confidence level. Third, a parsimonious model is useful in future research. There may be justification for additional indicators in each dimension, but the more indicators used reduces the utility of the measure for future research. Last, the observable indicators should be time-series-cross-sectional with minimal missing data. Missing data is a challenge in a cross-national study

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<sup>22</sup> Regression analyses use LJI as the independent variable causing the observable indicator. The models used lagged variables for the independent variables and country fixed effects. See table A.4 and A.5 in the appendix.

of this magnitude, but care must be taken as missingness increases uncertainty in the Bayesian credible interval.

### **3.3.1 The Social Dimension**

In the liberal democratic concept, independent courts are fundamental for protecting god given rights and liberties, social order and behavior. An independent court should “counter incursions upon individual rights by other branches of government” (Camp Keith, 2002, 195). In turn, legal decisions regarding civil rights and liberties affect social norms. Courts establish rules and conditions for compliance that nurtures the development of informal mechanisms of cooperation among members of society (Knight, 1998, 762). As Kahan (2002) suggests, applying the rule-of-law the same way to everyone such that it does not advantage specific segments of the population will in turn affect general welfare and social cooperation. Changes in law bring about changes in society.

Under different conditions courts defer protections for civil liberties and rights (Epstein et al., 2005; Helmke & Rios-Figueroa, 2011; Helmke & Rosenbluth, 2009; Scheppele, 2012; Schorpp, Reid, et al., n.d.), or courts simply do not have jurisdiction to affect social issues (Toharia, 1975). The relationship between judicial independence and social issues is observable through measures of expression, civil society movements (Handler, 1978), and social behavior (Knight, 1998).

#### ***Observable indicators, Social dimension***

##### ***Freedom of Expression***

There are few human rights as profoundly important as the freedom of expression. Free speech is fundamental to human flourishing, and independent courts have a long



history of protecting the free exchange and evaluation of ideas; thus, aiding as a bulwark against tyranny. Of course, free speech has limits: fraud, libel, “crying fire in a crowded theatre” but these exceptions are strictly delineated and justified by independent courts. Restrictions on expression are a key mechanism by which executives have maintained dominance and control (Scribner, 2014, 254), and attacks on judicial independence “imperil ... our fundamental rights and freedoms ... especially free speech” (Peretti, 2002, 120).

#### *Non-Governmental Human Rights Organizations*

NGOs form a central link in civil society’s push for human rights (Hafner-Burton & Tsutsui, 2005), and these organizations flourish when supported by an independent court. According to Epperly & Taedong (2015, 8), “for an NGO sector to be sustainable, the legal and regulatory environment should support the needs of NGOs.” The United States Agency for International Development (USAID) is particularly interested in judicial independence focusing on legal matters explicitly affecting NGOs (Epperly & Lee, 2015, 8). Certainly, NGOs exist in countries without independent courts and many organizations bring their case to the court despite a preferential outcome, but actions by courts and other legal institutions sometimes lend legitimacy to the claims advanced by the social movement (Coglianese, 2001) leading these organizations to proliferate in environments conducive for advancing their cause.

#### *Social Norm of Corruption*

An independent court will influence social norms. Knight’s (1998) institutional approach for understanding social norms highlights the role of courts for establishing concrete processes that foster formal social cooperation. Corruption can be an indicator

of social cooperation. While corruption is commonly associated with economic issues, a social norm of corruption is an ingrained behavior. According to Tavits (2010), on the individual level, people are willing to engage in illegal or immoral behavior when they do not define corruption as wrong and when they perceive that corrupt behavior is widespread among their peers.

An independent court influences corruption in several ways. First, the court can determine the legality of issues and deter future behavior via punishment. Second, the public can rely on the court to sanction politicians and bureaucrats. Courts can expose and denounce wrong doings (Peruzzotti & Smulovitz, 2006, 16). For example, in Brazil, increased oversight and transparency over local officials has made them aware that a disregard for public issues may be costly and result in termination of their term in office (Peruzzotti & Smulovitz, 2006, 44). Last, courts can improve institutional efficiency which is associated with a decrease in corruption (Buscaglia & Dakolias, 1999, 112). An independent court creates stable, predictable, and efficient institutions which citizens depend upon. In turn, stability mitigates the need to engage in corruptive practices.

### **3.3.2 The Economic Dimension**

The **Economic** dimension encapsulates legal issues that provide a guarantee of private property rights and credible economic commitments. An extensive body of research recognizes the importance of judicial independence as an institutional constraint on the discretionary power of government to encourage economic growth (Brunetti et al., 1998; La Porta et al., 1997; La Porta et al., 1999), enforcement of property rights and contracts (Haggard & Tiede, 2011), and for monitoring and enforcing market liberalization rules (Gabel et al., 2012, 1125). Based on evidence that courts substantiate

a leader's credibility international organizations have dedicated hundreds of millions of dollars toward judicial reform programs, including enhancing judicial independence, as part of larger efforts to strengthen newly emerging markets around the world (Messick, 1999). These judicial reform programs focus specifically on economic performance (Legal Department of the World Bank, 1995).

***Observable indicators, Economic dimension***

*Contract Intensive Money (CIM) and Foreign Direct Investment (FDI)*

Independent judicial institutions control arbitrary and confiscatory abuse of power (Frye, 2004; North & Weingast, 1989; Staton & Reenock, 2010) which stimulates long-term and capital intensive investment. Contract intensive money (CIM) theoretically reflects public confidence in private property rights and bank security, and it is often used in studies as a proxy for judicial independence (Clague et al., 1999; Rios-Figueroa & Staton, 2014). Judicial influence and adherence to the rule-of-law directly affects FDI (Jensen et al., 2012, 73). Corporate managers are more likely to invest at higher rates when courts protect their interests in disputes with the state (Frye, 2004, 26).<sup>23</sup> Foreign investors are risk averse, particularly in industries that require high initial outlays of capital. An independent court provides a credible commitment that the government will not expropriate private property, in turn, lowering transaction costs associated with capital investment (Williamson, 1985).

*Perception of Institutional Effectiveness*

An independent court enhances the predictability and viability of institutional effectiveness. These courts monitor bureaucracy and increase administrative efficiency.

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<sup>23</sup> Only when revenue gains and political benefits from enforcing property rights exceed the costs will state officials make property rights secure (Frye, 2004, 29).

This is particularly important for investors for whom “the better the bureaucracy the quicker decisions are made and the more easily they can go about their business” (World Bank, 2014). Institutional effectiveness resides on perceptions of the quality of public services, the quality of policy and implementation of policy, and the credibility of the government’s commitment to these policies (World Bank, 2014).

### **3.3.3 The Political Dimension**

The **Political** dimension relates to an independent court’s ability to affect electoral politics. These issues are a critical ingredient for democracy, and the strategic importance of this dimension has been explored in a wealth of literature that links judicial independence to the electoral market (Finkel, 2004, 2005, 2008; Ginsburg, 2003; Landes & Posner, 1975; Ramseyer, 1994; Stephenson, 2003). A **Politically** independent court is insulated from majoritarian interests, and this ensures equitable access to politics by political opposition and the public. A court’s decisions on cases, including voter registration, party participation thresholds, campaign requirements, and campaign fundraising can determine the viability of a competitive electoral system. Whether a political party is falling from grace or an opposition party is on the rise the court’s decisions can fundamentally affect either parties’ survival.

On the other hand, courts may have no jurisdiction in electoral politics or make partial decisions. As Magaloni (2008, 181) explains in a case study of Mexico, the autocratic government purposefully gave the courts no jurisdiction over political conflicts. In a 1994 judicial reform bill, Mexican President Ernesto Zedillo increased the independence and judicial review powers of the court; however, the court was explicitly prohibited from using its new power to determine the constitutionality of laws with

respect to electoral matters (Finkel, 2005, 94). The independence of the court increased across many issue areas but specifically excluded electoral politics.

In many autocratic countries security courts or special courts handle the most sensitive political matters (Pereira, 2008; Toharia, 1975). Autocratic regimes might be interested in empowering the courts in the political arena if they fear a loss of power (Ginsburg, 2003) or, in the case of a military regime, after they return to the barracks (Shambayati, 2008).

Electoral politics is, perhaps, the most contentious jurisdiction for the court. Electoral politics is a high stakes game. Politicians seek to win elections and the court plays a fundamental role in success or failure. Independent judges do not want a politicization of justice, but at some point they must engage in law that has important ramifications on the electoral system.

### ***Observable Indicators, Political Dimension***

#### ***Voter Participation***

Legal rules are strongly and significantly associated with voter participation (Norris, 2003, 12). Courts can affect voter turnout by determining the legal voting age and enfranchising segregated populations (Norris, 2003, 8). Additionally, a politically independent court can increase efficiency and transparency of elections giving the appearance of a legitimate and trustworthy process. People are more likely to vote if they feel like the system is fair. Conversely, a non-independent court erodes the public's confidence in the election process and can have a direct effect on citizens' belief that elections as instruments are not worth their time and effort (Birch, 2010; G. B. Powell, 2000).

### *Ethnic Participation in Government*

Independent courts are fundamental in protecting and enhancing political access of underrepresented groups. Courts determine the constitutionality of gender quota laws (Baldez, 2004, 234) as well as correct the under-representation of ethnic minorities (Bird, 2003, 3). An independent court's rulings on candidate selection, anti-discrimination laws, redistricting, quotas, and other laws affecting representation can have a decisive effect on the ability of ethnic minorities to participate in government institutions. In Canada, for example, one explanation for high ethnic minority political representation is that the candidate selection process allows participation of non-resident citizens. It has become "increasingly common for Canadian parties to recruit ethnic minorities as party members to facilitate its constituency in areas of high ethnic concentration" (Bird, 2003, 11).

### *Participation of Minority Parties*

Judicial decisions have a tremendous impact on the viability of minority parties. Majority political parties have an advantageous position of stronger name recognition, larger grassroots organizations, and greater fundraising capabilities (Cox & Magar, 1999). An independent court can increase the viability of minority parties by ruling on electoral laws, the naming of state electoral tribunals, and illicit campaign financing (Finkel, 2005, 97). On the other hand, subservient courts may be used as instruments by ruling parties to maximize reelection odds (Popova 2010). These courts grant favorable rulings to the executive in politically important decisions regarding election law, campaign finance, redistricting, and polling organization (Popova, 2010, 1205). A few court decisions can inflict tremendous damage on an unconsolidated political party (Popova 2010, 1208).

### *Political Prisoners*

Independent courts protect the rights of political opposition. A **Politically** independent judiciary provides due process to political prisoners, exonerates them, and provides material compensation to victims and their families. Independent courts also reduce inefficiencies and obstacles in criminal proceedings. On the other hand, subservient courts participate in the regime's prerogatives to order arrests of political activists. The government can obstruct **Political** independence by stripping the court of its jurisdiction and use security courts to bypass constitutional protections for political activists (Pereira, 2008).

### 3.4 Observable Indicators and Data Sources

Table 3.1, lists the observable indicators, data sources, and expected effect.

Table 3.1: Indicators of Measurement Model

Dimension of Judicial Independence	Data Source	Data Range	Expected Effect <sup>a</sup>	Reference
<b>Social</b>				
Freedom of expression	CIRI Human Rights Data Project	1-3	+	Scribner (2011)
NGOs	Transnational Social Movement	0-182	+	Widner & Scher (2008);
HROs	Organization & Murdie (2009)	0-1		Epperly & Lee (2015)
Social norm of corruption	World Bank Transparency Intl.	-2.5 to 2.5	+	Laporte (2004); Knight (1998)
<b>Economic</b>				
FDI	World Bank	0-100%	+	Jensen et al. (2012)
CIM	Clague et al. (1999)	0-100%	+	Clague et al. (1999)
Perception of institutional effectiveness	World Bank	-2.45 to 2.43	+	World Bank (2014)
<b>Political</b>				
Participation of minority political parties	Polyarchy	0-70%	+	Popova (2010)
Ethnic participation in government	Ethnic Power Relations	0-98%	-	Popova (2010); Enloe (1981)
Political prisoners	CIRI Human Rights Data Project	1-3	+	Ginsburg & Moustafa (2008)
Voter participation	Polyarchy	0-100%	+	Birch (2010)

<sup>a</sup> Theoretically derived expectation for the relationship between indicator and the estimated measure. + positive relationship and a –negative relationship. Higher levels of the indicator suggest the expected sign.

### 3.5 Model Specification

After identifying the theoretical relationships between the observable indicators and their respective dimension, I use exploratory factor analysis to test if the data fit the proposed model. If my expectation is false, an indicator is not significantly related to fellow observable indicators in that dimension of *de facto* independence, I exclude that



indicator or reconsider a strategy on how to use them. Figure 3.1, is the path diagram for the latent variable model.<sup>24</sup>

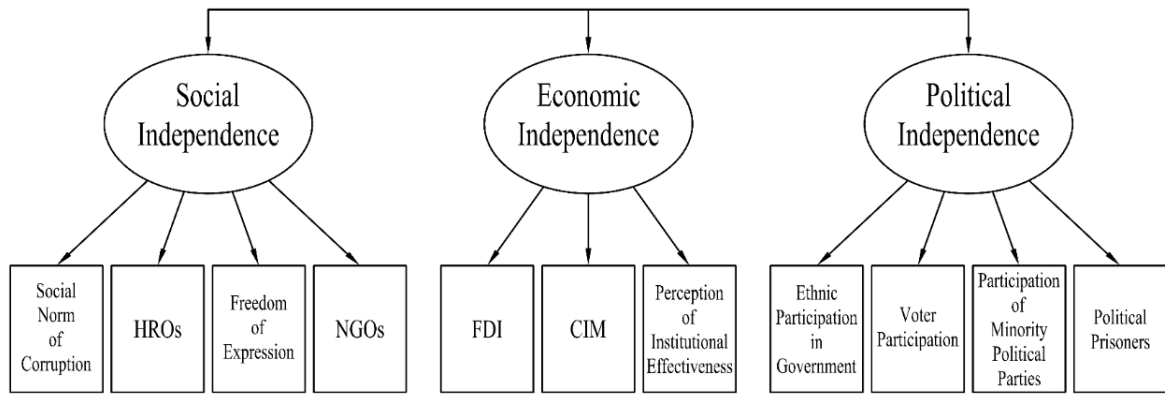


Figure 3.1: Path Diagram for the Latent Variable Model

### 3.5.1 Bayesian Latent Variable Approach

To estimate the dimensions of *de facto* independence I use a Bayesian latent variable model. In this approach, the Bayesian latent concept is the lone explanatory variable and the observable indicators of judicial independence are the outcome variables. These various indicators have degrees of missingness which the Bayesian approach helps overcome. The Bayesian model treats missing values of the dependent variable as a parameter to be estimated and imputes conditioning on observed data (Gill, 2008).

<sup>24</sup> In the appendix, I provide a formal discussion on the model, observable indicators, and analysis on the differences between unidimensional measures of judicial independence and my multidimensional approach.

Formally, the model is expressed as:

$$\begin{aligned}y_{ij} &\sim N(\mu_{ij}, \sigma_j^2) \\ \mu_{ijk} &= \beta_{jk} \eta_{ik} \\ \eta_{ijk} &\sim N(0, 1) \\ \sigma_{jk}^2 &\sim G(1, .1) \\ \beta_{jk} &\sim N(0, 1)\end{aligned}$$

In this model,  $i$  indicates country-year,  $j$  indexes observed indicator, and  $k$  indicates dimension.  $\eta$  indicates the latent measure of judicial independence and  $y$ 's are the observed indicators. I estimate a Bayesian model using WinBUGS software package.<sup>25</sup>

### 3.6 Measurement Results, Validity, and Replication

The model estimated levels of judicial independence for every country-year in the multidimensional measure from 1980-2013. To explore the face validity of my results I plot the estimates and credible intervals of the latent concept on every country, in the measure, for the year 2000.

[Figures A.1-A.6 see appendix pages 129-134]

In figures A.1 and A.2, representing the **Economic** dimension, the ordering places countries such as Finland, Singapore, Netherlands, Iceland, and Denmark in the upper range and places countries such as Afghanistan, Somalia, North Korea, and Iraq in the lower end. In figures A.3 and A.4, representing the **Social** dimension, the ordering predictably places countries such as the United States, United Kingdom, France, and Netherlands at the top and Afghanistan, North Korea, and Myanmar at the lower end of

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<sup>25</sup> I use a Bayesian latent variable model due to the missingness in the data. A full description of the model is available in appendix. I assess convergence by visual inspection of the series of two chains for adequate mixing and values of the Gelman-Rubin statistic of one. I also implemented a Multiple Indicators Multiple Causes model to include *de jure* measures of judicial independence and a unidimensional measure containing all eleven observable indicators. See appendix for discussion on other model specifications.

judicial independence. Figures A.5 and A.6 represent the **Political** dimension and place Italy, Belgium, Denmark, and Netherlands at the top of the dimension and Afghanistan, China, and Myanmar at the bottom. It is important to note the changes in rank from one dimension to the next. For example, in the **Political** dimension Singapore is in the lower level of independence; however, in the **Economic** dimension Singapore has among the highest scores of judicial independence. Although this country is an authoritarian regime it is well known that Lee Kuan Yew established a commitment to private property rights and strict adherence to rule-of-law in order to encourage foreign investment and increase economic growth (Silverstein, 2008). This suggests that the multidimensional approach is able to isolate different dimensions of judicial independence.

To further assess face validity of the measures I conduct independent t-tests using variables that are commonly associated with judicial independence: military conflict, regime type, and legal origin. There is a significant difference in the **Social**, **Economic**, and **Political** measures of judicial independence in countries experiencing military conflict and countries not experiencing military conflict. In sum, these results suggest that conflict has a negative effect on all dimensions of judicial independence. There are also significant differences in judicial independence between democracies and non-democracies. As expected democratic countries have substantially higher levels of **Social**, **Economic**, and **Political** dimensions of judicial independence than non-democracies.<sup>26</sup> Last, countries with a British common law legal heritage have significantly higher levels of judicial independence than countries with other legal origins.

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<sup>26</sup> These data were obtained from the Democracy and Dictatorship dataset and UCDP PRIO Armed Conflict dataset.

Table 3.2: Independent t-test Latent Measures of *De Facto* Judicial Independence

Dimension	Military Conflict	Regime Type	Legal Origin British
Social	No conflict = 0.10 Conflict = -0.22 Difference = 0.35*	Democracy= 0.43 Other= -0.30 Difference = -0.72*	UK= 0.14 Other= -0.0005 Difference= -0.14*
Economic	No conflict= 0.06 Conflict = -0.28 Difference = 0.34*	Democracy = 0.28 Other= -0.27 Difference = -0.55*	UK= 0.16 Other= -0.08 Difference= -0.25*
Political	No conflict = 0.22 Conflict = -0.33 Difference = 0.55*	Democracy= 0.71 Other = -0.41 Difference = -1.12*	UK = 0.17 Other= 0.10 Difference= -0.07*

\*Difference \*p<0.001

### 3.6.1 Judicial Independence Over Time

The greatest advantage of my method is identifying variation in judicial independence that is masked in existing unidimensional measures. In China, for example, Staton and Linzer's (2015) (LJI) unidimensional measure remains stationary from 1980-2009 with scores ranging from 0.2494-0.2689. On the other hand, the multidimensional measure is able to capture Peerenboom's (2008; 2010) observations of increasing judicial independence as well as variation in government influence on political cases (see figure 3.2). In addition, the continuous scale identifies small changes in judicial independence. Existing measures with a coarser approach would only identify large changes in judicial independence. The figures below show trends in judicial independence in eight countries using my **Social**, **Economic**, and **Political** measures, and LJI.<sup>27</sup> Venezuela and Zimbabwe show consistent patterns across all measures, whereas the remaining countries reflect significant differences between LJI and the multidimensional measure. In

<sup>27</sup> These data are standardized and plotted using cubic splines to smooth the data. Over time graphs of all countries are available in the appendix.

Venezuela, declining measures of judicial independence reflects Hugo Chavez’s repeated purging and court packing (Taylor, 2009). In Zimbabwe, declining judicial independence since the early nineties reflects “friction between judicial decisions and government aspirations which has recurred with nauseating regularity” (Raftopoulos & Savage, 2004, 101). Tension between the court and “government has often been precipitated, and sometimes exacerbated, by constitutional changes initiated by government” (Raftopoulos & Savage, 2004, 101 & 103).

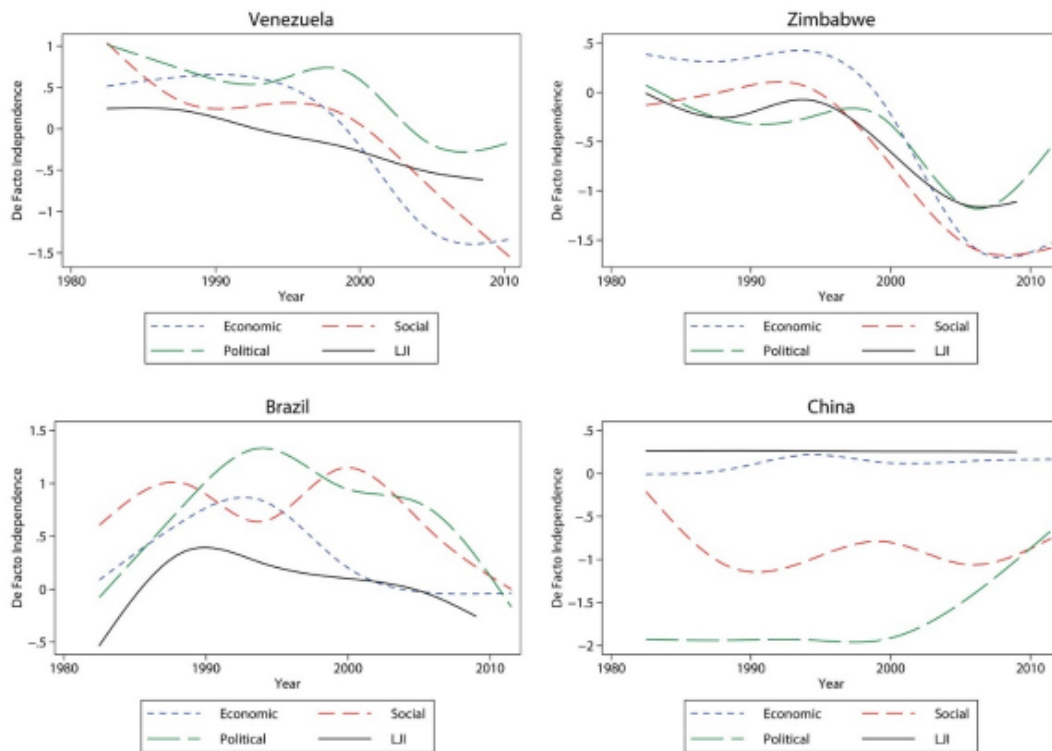


Figure 3.2: Judicial Independence Over Time-Venezuela, Zimbabwe, Brazil, China

In Brazil, the courts asserted increased independence into the 1990s. In subsequent years declining judicial independence reflects sparring between the Court and President Luiz Inacio Lula da Silva and judicial reforms instituted in 2004.<sup>28</sup> Since da Silva took office in 2003, members of the Supreme Court and the President sparred in public over the independence of the judiciary, economic policy, and cuts in pensions for public servants, including judges. Lula has called the judiciary a “black box” and promised to prise it open (The Economist, 2004).

In China, measures of judicial independence are expected given the Chinese Communist Party’s (CCP) control of the judicial system. The variation between **Social**, **Economic**, and **Political** dimensions should not be surprising. According to Peerenboom (2008, 15), the CCP only rarely intervenes in the handling of specific cases unless they threaten socio-political stability and its right to rule. It is “incorrect to conclude or assume that the Chinese judiciary is unable to decide any cases independently, especially commercial, routine civil, administrative or routine criminal cases” (Peerenboom, 2008, 21). Increases in the **Political** dimension in the early 2000s could reflect revisions to the Organic Law and regular elections at the provincial level. The decline in the Social dimension in 1989 coincides with the Tiananmen Square massacre and continued deference of the court relating to civil liberties and rights.

In Thailand, figure 3.3, the increase in the **Social** and **Political** dimensions in the late 1990s coincides with amendments to the Thai constitution that increased transparency and added reforms (Institute for Developing Economies, 2001). Both the **Social** and **Political** dimensions decline in the early-2000s with both dimensions

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<sup>28</sup> See Brinks (2005).

dropping to their lowest points in 2006, which coincides with the military coup. The decline in the **Economic** dimension in the late 1990s is, perhaps, influenced by the near collapse of the financial system. However, if the latent measure were identifying something other than judicial independence I would expect this measure to plummet during the Asian financial crisis.

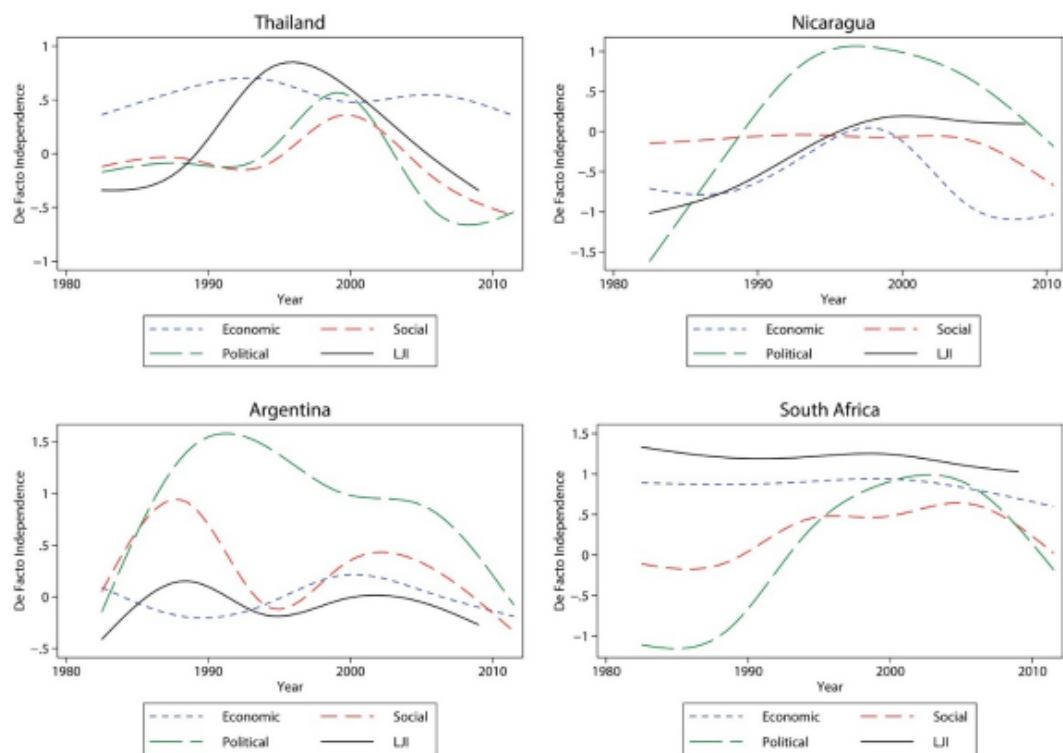


Figure 3.3: Judicial Independence Over Time-Thailand, Nicaragua, Argentina, South Africa

Nicaragua and Argentina have different trends across all measures. In Nicaragua there is a precipitous rise and decline of multidimensional judicial independence. In the early 2000s all measures decline except LJI. These declines coincide with Jensen et al.'s

(2012, 73) assessment of the Sandinista's control of the court system, and President Ortega's complete control of the judiciary in 2010.

In Argentina there is a dramatic divergence in the **Social**, **Economic**, and **Political** dimensions in the 1990s. The **Social** and **Political** dimensions initially move upward reflecting changes as the country transitioned to democracy in 1983. Declines may reflect attempts of court packing by the Menem government and ramifications of the *Olivos Pact* in 1994. In recent years the court has come under attack from an inefficient Judicial Council and President Christina Kirchner. The measure of Argentina's **Economic** independence steadily increases starting in the early 1990s with a decline in the mid-2000s. Executive branch attacks on the court during the 2001 debt default are apparent in the declining measure of **Economic de facto** independence. The Supreme Court faced a crisis of legitimacy after bowing to the demands of the Menem government. However, in "*San Luis, Provincia de c/Estado Nacional s/Acción de amparo*" (S.173.XXXVIII *originario*), the court ruled against the government in its attempt to forcibly convert billions of U.S. dollar-denominated bank deposits into pesos, i.e. '*pesification*'.<sup>29</sup> This ruling, upheld the nation's constitution, and the court exercised its independence (Jacobs, 2003, 395).<sup>30</sup> This exercise of "judicial independence appears to have bolstered the public's confidence in the court as an institution. The ruling drew hundreds of Argentineans to the courthouse steps to cheer the court..." (Jacobs, 2003, 396). This assertion of independence may be reflected in the slight stabilization of the

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<sup>29</sup> Decree No. 214/02 February 3, 2002.

<sup>30</sup>Also see Associated Press, 2002 and N.Y. Times October 12, 2002.



**Economic** measure in the early-2000s. In 2004, during the presidency of Nestor Kirchner, the court reversed its ruling and bowed to political pressure.<sup>31</sup>

Last, in South Africa the gradual erosion of judicial independence across all three dimensions in the mid-2000s reflecting a growing consensus that independence of the South African judiciary is under threat.

Studying these temporal trends provides evidence that the multidimensional measure is capturing judicial independence and not something else. For example, judicial independence in the economic dimension does not decline during financial crises: the Asian financial crisis 1997, Argentina's debt default in 2001, and the dot-com tech bubble and housing recession in the United States 2001 and 2008, respectively. If the economic dimension was identifying something other than judicial independence, including investor confidence, central bank behavior, global economic circumstances, then these measures should decline to reflect bleak economic circumstances.

### **3.6.2 Replication**

To demonstrate the validity and usefulness of the multidimensional measure of judicial independence I replicate Gibler and Randazzo's (2011) "Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding." This research determined that established independent judiciaries are able to thwart regime changes toward authoritarianism.<sup>32</sup> In Table 3.3, below, I replicate the first analysis in Gibler and Randazzo (2011). The original study sought to determine whether changes in democracy

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<sup>31</sup> It is important to note that the composition of justices changed upon the presidency of Nestor Kirchner.

<sup>32</sup> I chose this replication study for several reasons. First, the overlapping time frame. Second, the original study does not use any variables that I include as observable indicators in each dimension of judicial independence. Therefore, no changes to the data were made except for a subset of time and accounting for differences in observations of the dependent variable.

(changes in the Polity IV scale) relate to the formation of independent judiciaries.<sup>33</sup> The original study used the Henisz (2012) measure of judicial independence (dichotomous measure) and all independent variables are lagged one year from the observed state-year.

Results for model one confirm expectations from the original study, specifically that judicial independence is a concept distinct from democracy. Regime shifts are not correlated with the presence of an independent judiciary. Other independent variables are consistent with the original manuscript except for territorial rivalry. Statistically significant predictors of an independent judiciary are the logged value of GDP, count variable for the age of democracy, the presence of a territorial rivalry, and the level of militarization of neighboring states.

Table 3.3: Predictors of Independent Judiciaries, 1980-2000  
(All States in the International System)

Dependent Variable:	(1) Original Study	(2) LJI	(3) Social Independence	(4) Political Independence	(5) Economic Independence
Presence of Regime Change	0.05 (0.06)	0.0009 (0.003)	0.01 (0.01)	0.04*** (0.01)	-0.0005 (0.01)
Wealth (log GDP)	1.34*** (0.10)	0.16*** (0.01)	0.21*** (0.01)	0.50*** (0.02)	0.42*** (0.01)
Age of Democracy (log)	0.04*** (0.004)	0.002*** (0.0002)	0.01*** (0.0004)	0.003*** (0.0005)	0.001*** (0.0004)
Democratic Reversions	0.18 (0.15)	-0.01 (0.01)	0.08*** (0.03)	-0.06* (0.03)	0.01*** (0.02)
Economic Crisis	0.07 (0.14)	-0.06*** (0.01)	-0.06** (0.03)	-0.03 (0.03)	-0.10*** (0.02)
Territorial Rivalry	-0.44** (0.18)	-0.01 (0.01)	-0.04 (0.03)	-0.13*** (0.04)	0.02 (0.03)
Militarized Neighbor	-0.62*** (0.14)	-0.03*** (0.01)	0.03 (0.02)	-0.20*** (0.03)	-0.05** (0.02)
Constant	-14.95*** (1.08)	-1.00*** (0.06)	-1.55*** (0.17)	-4.62*** (0.20)	-3.69*** (0.16)
Observations	1,789	1,789	1,789	1,789	1,789
R-squared	-	0.72	0.52	0.55	0.55
Log Likelihood	-732.00	-	-	-	-

Standard errors in parentheses. Model 1, Logistic regression model with robust standard errors. Model 2, Ordinary least squares regression model with robust standard errors. Column 3-5, Seemingly unrelated regression (SUR).

\*\*\* p<0.01, \*\* p<0.05, \* p<0.1

<sup>33</sup> Replication data were obtained from Gibler and Randazzo (2011).

Columns two-to-five replicate the study using LJI and my multidimensional measure of judicial independence. Results from column two, LJI, are consistent with the original study. Namely, that judicial independence is not associated with changes in regime type. Turning to my multidimensional measure of judicial independence, for **Social** and **Economic** independence, third and fifth columns, I find that the only predictors of these dimensions of judicial independence are wealth of a nation, age of democracy, historical reversions from democracy, and economic crises (3% decrease in GDP). Consistent with column one, I also find that regime shifts are not correlated with the presence of increased judicial independence. Results from column four suggest different influences on judicial independence. Most importantly, I find that positive changes toward democracy are related to increases in **Political** judicial independence. I also find that wealth and age of democracy increases political independence. Territorial rivalry, militarized neighbors, and past democratic reversions decrease independence. There are other interesting differences between the control variables and different dimensions of judicial independence. In an effort for a parsimonious discussion I leave an analysis of control variables to future research.

Perhaps, the most important finding is the relationship between political independence and democracy (column four). These results do not corroborate existing research, which suggests that judicial independence is a concept distinct from democracy. Gibler and Randazzo (2011, 704) suggest that while some democratic regimes may choose to institutionalize judicial independence. Some do not. This might be true when using unidimensional measures abiding by thick definitions of judicial independence;

however, my results suggest that only more democratic regimes allow judicial independence in the political dimension. A court empowered with social and economic independence may not pose a threat to political actors. On the other hand, a court with political independence is able to affect electoral constraints on political actors. The political risk associated with a politically independent court may only be a risk democracies are willing to take. In less democratic regimes political independence is not tolerated as it constitutes a direct challenge to the political status quo.<sup>34</sup> This finding exemplifies the importance of multiple dimensions.

### **3.7 Conclusion**

Judicial independence is complex and multifaceted. An independent court is vital for democratic stability; however, judicial independence takes time to develop. The United States Supreme Court, considered one of the most independent courts in the world, established its legitimacy, judicial review, and independence over many years. Even in established democracies judicial independence waxes-and-wanes across issue areas depending on the political environment. Simply put, judicial independence may manifest in different legal issues at different times and under different conditions. Scholars have identified these processes in single country studies and formal models; however, cross-national analyses are underdeveloped simply because unidimensional measures of judicial independence are not able to capture these nuanced processes.

The intent of this research is not to suggest we do away with existing unidimensional measures: It is to advocate the multidimensional approach to capture the

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<sup>34</sup> I do not believe this significant result is a reflection of the observable indicators used in the multidimensional measure. A correlation between measures and democracy and the political dimension is positive at 0.80. But this should be expected given the theoretical argument. The correlation does not reflect that I am creating a measure of democracy.

refined and multifaceted aspects of judicial independence. Ignoring this variation has the potential to mislead research assessing the role of an independent court, by masking nuances in judicial independence, and producing deceptive, null results.

My analysis draws from existing research to identify three dimensions of *de facto* judicial independence: **Social**, **Economic**, and **Political**. These dimensions encapsulate a court's independence in specific issue areas. The multidimensional measure passes a variety of face validity tests which support the multidimensional conceptualization. Results from the replication analysis, although intuitive, are novel in that they parse out under what conditions judicial independence is likely to be found. These results provide a nuanced picture of the relationship between judicial independence and democracies; and the results are only possible using a multidimensional measure.

I encourage scholars to consider using the multidimensional measure in cross-national analyses of complex relationships theorized for a variety of regime types. In democracies, we believe that courts acquiesce independence in social issues and human rights during military conflict. Do these theories remain valid over time cross-nationally? In autocratic regimes, vulnerable leaders who fear political retaliation following a loss of power increase judicial independence in the electoral domain (Finkel, 2004; Ginsburg, 2003). Future research could explore this theory directly by applying the political dimension to a test of insurance theory. Another avenue of research can explore how courts assert independence. Based on educated speculation it is not realistic to expect a court in a new democracy to assert independence across all issue areas simultaneously. Therefore, it is important to ask which dimension emerges first, and how do the remaining dimensions proceed? Alternatively, if a court loses independence in one

specific dimension is it able to compensate by gaining independence in other dimensions?

The latter observation may be particularly valuable in assessing the roles of the court in countries on the precipice of a democratic backslide. There is practically no research on how courts respond to restrictions on independence; these measures will make this new avenue of research possible. Exploring these questions will provide valuable insight for political scientists, policymakers, and institutional designers.

## CHAPTER 4

### LOOKS CAN BE DECEIVING: JUDICIAL COUNCILS AND JUDICIAL INDEPENDENCE

In the last four decades, judicial reform efforts, worldwide, have sought a magical solution for encouraging judicial independence with judicial selection procedures occupying a central position. We know the foundation for judicial independence starts with guaranteeing a system that selects competent judges, and ensuring those judges are independent once they attain office (Haynes, 1944). In an effort to increase judicial independence some countries have experimented with the direct election of judges (Bonneau & Hall, 2009; Driscoll & Nelson, 2012, forthcoming) and others have incorporated a judicial council to aid in judicial selection. The judicial council, in particular, has proliferated globally. In theory, judicial councils intervene in the appointment, discipline, and administration of judges in order to reduce executive influence, thereby encouraging independence of the court. Yet, despite the normative importance of a judicial selection process that aids an independent judiciary, scholars are only starting to explore the effect of these institutions on judicial independence.<sup>35</sup>

A majority of countries have a judicial council; however, we know very little about the efficacy of these councils in promoting judicial independence. In some

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<sup>35</sup> There is a wealth of literature on judicial elections in the United States, see Bonneau & Hall (2009). For literature on judicial selection in comparative courts, see Driscoll and Nelson (2012, 2013, & forthcoming), Bill Chavez (2007), Bobek and Kosar (2013), and Piana (2009). See Glick (1978) for an analysis of the Missouri Plan in the United States.

countries the judicial council appears to do little to facilitate judicial independence, and public confidence in the judicial council is waning. For example, in Argentina the media and public criticize the council for its many inefficiencies and inability to select judge candidates. On the other hand, international organizations (IOs) vehemently promote judicial councils. The International Monetary Fund (IMF), World Bank (WB), and Inter-American Development Bank (IDB), among many other institutions, have dedicated hundreds of millions of dollars to promoting judicial councils as an “international best practice” to encourage judicial independence. Taken together there appears to be a divide between the rich theoretical underpinnings for why judicial councils should increase judicial independence and the growing evidence that suggests judicial councils do not affect judicial independence. The purpose of this article is to provide some clarity by assessing whether judicial independence increases in the presence of a judicial council.

Political elites implement a judicial council as a policy concession to satisfy internationally sponsored judicial reform efforts or to pacify domestic opposition. But judicial selection and administration is a high stakes game. Maintaining influence over the judiciary is integral for political elites to guarantee their policy prerogatives. Thus, I claim, left to their own devices political elites instrumentally construct a judicial council that does not supersede their influence.

To test this argument, I proceed as follows. First, I briefly discuss the motivation for a judicial council and under what conditions political elites adopt them. Since there is little guidance on what an effective council looks like and there are no incentives for governments to keep checks-and-balances in place, leaders construct a version of a judicial council that does not threaten their influence. Consequently, the new judicial council



reflects the vested interests of the greater political environment. Rather than being nonpartisan and independent, members of the judicial council do the bidding of the political elite, and as a result the independence of the court remains at the status quo. Second, I assess the relationship between judicial councils and judicial independence using two latent variable measures of *de facto* judicial independence (behavioral independence) in a global cross-national analysis of country-years from 1980-2013. The results suggest that judicial independence does not increase in the presence of a judicial council. Then I consider a nuanced analysis of judicial independence. A growing body of research suggests that judicial independence waxes-and-wanes across specific legal issue areas (Bodnaruk, n.d.; Epstein, Knight, & Shvetsova, 2001; Ginsburg & Moustafa, 2008; La Porta et al., 1997; Moustafa, 2007; Root & May, 2008; Silverstein, 2008). Drawing from this research, I explore the possibility that judicial councils affect only specific types of courts; therefore, specific dimensions of judicial independence reflect the council's influence. To test this argument, I use a new multidimensional measure that identifies judicial independence related to three categories: social issues, economics, and political issues (Bodnaruk, n.d.). Last, I support this argument with fieldwork, conducted in Argentina, to process trace the causal mechanism. A series of elite interviews, conducted in 2014, included members of Argentina's *Consejo de la Magistratura* (the judicial council - or the *consejo*), judges, politicians, educators, non-governmental organizations supporting the rule-of-law, and members of the Buenos Aires bar associations.

I conclude with an argument that judicial councils are at best "window dressing": Because they are formally implemented to pacify an international audience yet instrumentally designed to reflect the preferences of political elites.

#### **4.1 *De Facto* Judicial Independence and Judicial Councils**

A general assumption across the world is that judges should be independent from political actors, the media, and the public as well as higher and lower courts (D. Clark, 1975; Fiss, 1993b; Rosenn, 1987; Russell, 2001). A key component affecting independence is the specific method of judicial selection. Highly centralized selection processes concentrate judicial appointment in the hands of a single authority, the executive or a unicameral legislature. This method of selection is advantageous for political elites to maintain control over the judiciary. Politicians prefer to select ideologically compatible judges who decide cases in ways consistent with the party (Glick, 1978, 511). Furthermore, judgeships are prestigious positions used for patronage.

Over the last four decades, around the world, judicial reform experts have encouraged decentralizing judicial selection (Garoupa & Ginsburg, 2008). The premise of removing politicians from judicial selection and administration should insulate the court from political actors and increase judicial independence. The two most common practices are the direct election of judges and judicial councils (Driscoll & Nelson, forthcoming). Still, these institutions are not foolproof. Scholars debate whether judicial elections shift judicial accountability from elected politicians to the public and financial donors (Bonneau & Hall, 2009; Driscoll & Nelson, 2012; Pozen, 2008). The jury is still out on judicial councils, but as my research describes judicial councils are not the depoliticized institutions advocated by its proponents.

In theory, judicial councils play a fundamental role in regulating the influence of political actors in judicial selection and administration. A judicial council is conceived of as an independent institution positioned between the executive and judiciary to act as an

intercessor in decisions involving judicial nominations, management of judicial personnel, and decisions on tenure, promotion, removal, salaries, and other administrative tasks (Garoupa & Ginsburg, 2008; Hammergren, 2002). The intent of the council is to act as an “independent intermediary” (Bobek & Kosar, 2013, 10), to increase the impartiality of judges, and insulate judicial personnel from external pressure including the partisan political process (Garoupa & Ginsburg, 2008; Hammergren, 2002).

Broadly, judicial councils perform three functions: discipline and promotion of judges, selection of judicial candidates, and management of the court’s budget and administrative efficiency. Responsibilities differ from country-to-country and change over time.

#### **4.1.1 What We Know About Judicial Councils**

The first judicial councils originated in France, in 1946, and Italy, in 1958.<sup>36</sup> In the 1970s, post-dictatorship Spain and Portugal followed suit.<sup>37</sup> The judicial council model diffused to Latin America during the 1980s to help stabilize the judiciary in these new democracies (Finkel, 2004, 2008; Hammergren, 2002).<sup>38</sup> These states historically suffer from weak, subservient judiciaries and the judicial council was intended to remedy the threat of executive overreach (Finkel, 2004, 2008). After the breakup of the Soviet Union, some Eastern and Central European countries adopted the judicial council while others were required to do so as members of the European Union (EU). The EU and Council of Europe exercise heavy pressure on candidate states to implement a judicial

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<sup>36</sup> France’s council had a limited role tasked with managing judicial personnel while Italy’s had expansive powers, including fully insulating the entire judiciary from political control.

<sup>37</sup> These councils have decision-making authority on promotion, tenure, discipline, removal, and judicial salaries.

<sup>38</sup> These include Argentina, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Mexico, Panama, Paraguay, and Guatemala, and Venezuela adopted the judicial council. Venezuela’s was dissolved in 2000.

council as part of pre-accession conditionality (Piana, 2009) Judicial councils are also in many African and Asian countries. In 2013, 65% of countries and independent territories had a judicial council. Figure 4.1, shows the worldwide proliferation of judicial councils.

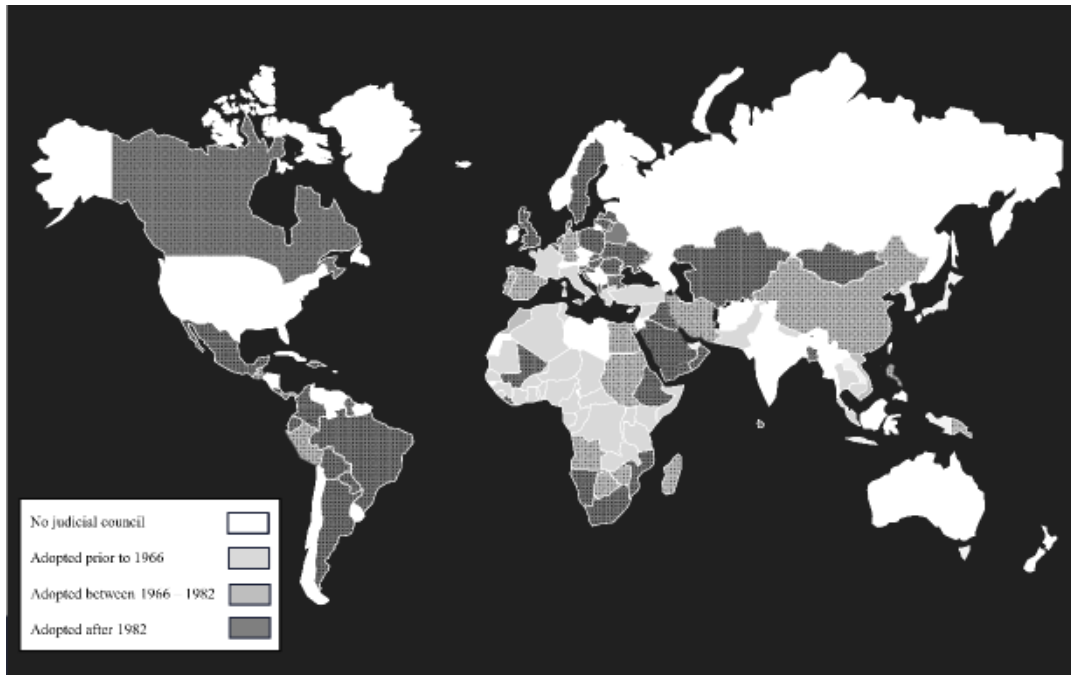


Figure 4.1: Judicial Councils Worldwide

International organizations (IOs) are the foremost promoters of the judicial council. The World Bank, International Monetary Fund, and Inter-American Development Bank have made judicial councils part of a standard package of institutions associated with judicial reform.<sup>39</sup> For example, in Argentina, civil society groups and the IMF demanded judicial reform as a condition for foreign aid. The IMF released a loan to Argentina ten days after President Carlos Menem formally integrated the council into law (Bill Chavez, 2007). IOs also promote judicial independence through judicial training workshops, led by national and foreign lawyers, business administration specialists, and

<sup>39</sup> For example, the Argentine Sector Reform Loan (1989) and the Judicial Infrastructure Loan in Venezuela (1994).

judicial experts (Dakolis, 1996, 61). According to Bobek and Kosar (2013, 12), in Central and Eastern Europe, the European Commission used “pre-accession conditionality to exercise significant pressure on former Communist States and enticed them to adopt the judicial council.” In some countries this has been a struggle. The fact that the Council of Europe had to exercise significant pressure on Estonia, Latvia, and Slovakia to adopt the judicial council suggests leaders were hesitant to incorporate the institution (Bobek & Kosar, 2013).

By the early 2000s scholars began to doubt the efficacy of the council. Hammergren (2002, 7) states, “the success and relevance of councils in Latin America may be vastly exaggerated.” The formal role of Latin American councils was ambiguous and as a result obstructed the institutions’ ability to increase judicial independence (Hammergren, 2002, 15). Hammergren (2002) and Bill Chavez (2007) suggest a tempering of expectations for judicial councils but remain optimistic as to their overall effect. Even the “worst of councils have short-circuited some of the most egregious examples of external interference by eliminating practices like the party quotas of judicial appointments and the internal patronage mafias” (Hammergren 2002, 19).

In Europe, councils have not delivered on the goods promised: Judicial councils have failed to deliver on the promise of judicial independence, and the institution has had outright “disastrous consequences” for judicial independence (Bobek & Kosar, 2013). Even councils composed of a majority of judges are not able to counter-act political influence of the court (Piana, 2009, 820-822). To date, there is little cross-national support for the claim that a judicial council enhances judicial independence (Garoupa & Ginsburg, 2008).

## **4.2 A Theory for Institutional Failure: Why Judicial Councils Fail to Promote Judicial Independence**

### **4.2.1 Instrumental Institutional Design**

IOs and civil society organizations are vanguards for motivating states to adopt the judicial council. Political elites implement the council and, in return, they receive a payoff: financial assistance or pacify domestic opposition. Under the microscope of international attention political elites concede to what is appropriate (Hall & Taylor, 1996). They meet the minimum criteria and enshrine the judicial council into law.

At the same time, there are few guidelines and very little oversight post-implementation to ensure an effective judicial council (effective in the sense of being depoliticized and able to promote judicial independence). EU member states receive some guidance on the effective structuring of the judicial council and its theoretical role from the European Network for Councils of the Judiciary (ENCJ) and European Commission. However, best practices are vague. The European Council “does not dispose of any binding provision to force states to adopt a particular model of judicial governance, and beyond the principles of judicial capacity and judicial independence, the actual implementation has been left to the initiatives of experts involved in the reform projects” (Piana, 2009, 825 & 828). The ENCJ suggests that the membership composition and role of the judicial council depend on the political reasons that motivated its creation, with the most successful models incorporating a broad based membership.

Councilmembers should include a combination of elected and appointed legal experts (European Network of Councils for the Judiciary (ENCJ), 2011, section 2.1). Even with this guidance many EU states have not seen an increase in judicial independence and

their judicial councils are rife with nepotism, patronage, and politicization (Bobek & Kosar, 2013).<sup>40</sup> Puzzling enough there were no normative underpinnings of what the council should look like (Bobek & Kosar, 2013). We have a general idea of the theoretical concept of what a judicial council should achieve but there is very little guidance on how to get there.

Ultimately, the political elite in each country determine the precise role and membership composition of the judicial council. Therefore, the same political leaders agreeing to acquiesce influence and power over the judiciary also determine the structure of the judicial council.<sup>41</sup> Political elites determine the outcome of important questions such as: Who sits on the judicial council? How many councilmembers? What professions do they represent? What is the selection process? Single term limits versus renewable terms? The answers to these questions influence a councilmember's accountability and insulation from outside influence.

Judicial selection and administration is a high stakes game. Judgeships are an integral mechanism for political elites to guarantee policy preferences. Controlling the selection of ideologically allied judges, partial and/or pliant judges ensures a preferred outcome on legal decisions. Thus, why would political elites voluntarily cede influence and power over judicial selection and management, particularly if there are no guidelines on what an "effective" judicial council looks like? Simply put, they do not. As Piana (2009, 835) states, they design a system "taking into account the payoffs of the reform,

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<sup>40</sup> The ENCJ is an independent body supported by the European Commission with a mission to actively promote uniformity across the EU. The ENCJ suggests initial parameters on the composition of the judicial council and conducts research on best practices.

<sup>41</sup> The composition, jurisdiction, and insulation of the council varies from country-to-country, the political context at its creation, and the regime's respect of its formal powers.

because they expect that any change of the judicial organization might eventually entail a change in the distribution of power.” Left to their own devices political elites instrumentally construct a judicial council that does not supersede their influence (Pierson, 2000). Since most advocates of the judicial council have no long-term incentives to encourage further reform, there is no incentive for political elites to keep good governance in place.<sup>42</sup> Even in a case where institutional designers have the best motives, adopting the judicial council in this ad hoc manner results in unanticipated consequences (Pierson, 2000, 483). Over time unscrupulous actors can exploit loopholes in poor institutional design and co-opt the theoretical role of the council. These initial conditions create judicial councils open to politicization and co-optation.

#### **4.2.2 Co-opting Councilmembers**

A key mechanism for political elites to retain influence of the judiciary and judicial council is in the selection of judicial councilmembers. Political elites select the stakeholders granted access (the professions represented in the council) and influence the negotiation of judicial selection and administration. In general, councilmembers consist of other elite political stakeholders: judges, academics, lawyers, and government officials. Placing fellow politicians on the judicial council is the most advantageous method for political elites to guarantee influence. Eighty-five percent of judicial councils, worldwide, contain politicians and a representative(s) from the executive branch. Political appointees have considerable power. These councilmembers are not selected at random: They are individuals who are loyal to the party, active in party politics, and support the

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<sup>42</sup> This argument is similar to the wealth of literature that explores the effect of foreign aid on democratization. See Djankov, Montalvo, and Reynal-Querol (2005); Moss, Pettersson, and van de Wall (2006); Riddell (1999).



leadership's preferences. Frequently they are open to information from and persuasion by leadership (Glick, 1978, 521).

The remaining stakeholders, academics, lawyers, judges, and military, are not immune from partisanship politics.<sup>43</sup> They are expected to be influenced by the other members and their stakeholder groups (Glick, 1978, 512).<sup>44</sup> There are several ways the independent preferences of these councilmembers are co-opted. First, stakeholders select a representative(s) to the council who is loyal to the group's preferences. Second, it is unlikely that councilmembers insulate themselves from their stakeholder groups during their tenure on the judicial council. Councilmembers continue to work in their profession and their stakeholder groups will use continued access to convey precise political goals. Third, the councilmember's appointment is term limited. Councilmembers have a professional career in addition to their tenure on the judicial council, and councilmembers will continue in their vocation after completing their work on the council. A councilmember cognizant of his/her future will have an ear open to the stakeholder's preferences. To depart from the stakeholder group risks the viability of their current and future career. With this foresight the councilmember makes decisions that reflect elite interests (Tsebelis, 2002).

Because councilmembers are accountable to outside stakeholders, outside influence prejudices the independent execution of judicial selection and administration. Ultimately, politicization permeates the judicial council. Instead of acting as an

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<sup>43</sup> The judges are part of the partisan process. He/she understands the rules of the game and political expectations. Having intimate knowledge of the judiciary, fellow members may defer to his/her preferences (Glick 1978).

<sup>44</sup> I will show this in the case study of Argentina where councilmembers are threatened, bribed and co-opted. Garoupa and Ginsburg (2008) find little empirical evidence to support the assumption that judge representatives increase judicial independence. Only fifteen percent of judicial councils are composed entirely of judges, e.g. Iraq, Lithuania, and Scotland.

independent, depoliticized institution, the judicial council is a conduit for the political elite to influence the judiciary. This affects the governance of the council and the judiciary. Decisions regarding appointment, promotion, discipline, and administration are motivated by politics rather than merit.

In sum, my argument is as follows. Political elites instrumentally adopt judicial councils to satisfy international organizations or domestic opposition. However, these same elites create a judicial council that will not threaten their influence over the judiciary. They select the stakeholders granted access and infiltrate the councilmember's autonomy by lobbying, pressuring, and co-opting individual preferences on judicial selection and administration. Political elites still determine judicial selection and management of the court but they use the judicial council as a conduit. Thus, the foundations of judicial independence, the selection of judge candidates and the management of the judiciary, will resemble systems without a judicial council. This reasoning is summarized in hypothesis one where I do not expect higher judicial independence to be associated with judicial councils.

*H1: There is not a significant difference in de facto judicial independence in countries with a judicial council.*

*H1a: Higher levels of de facto judicial independence are associated with the presence of a judicial council.*

In hypothesis one, I suggest political elites instrumentally design judicial councils to avoid ceding influence over the judiciary. As a result, judicial independence does not increase in the presence of a judicial council. However, we know that political elites have strategic motivations for increasing judicial independence. Elites increase the scope of a

court's independence to absolve themselves of controversial decisions (Ginsburg & Moustafa, 2008; Moustafa, 2007; Tate & Vallinder, 1995), safeguard political viability (Finkel, 2005, 2008; Ginsburg, 2003), monitor social actors (Ginsburg & Moustafa, 2008), guarantee credibility (Frye, 2004; Landes & Posner, 1975; North et al., 2000; Staton & Reenock, 2010), and provide information (Rogers, 2001). But an independent court requires a tradeoff: The broader the scope of the court's independence the greater the constraints on political elites. Leaders accept these constraints when the costs of alternative resolutions are too high. Nevertheless, a rational leader need not fully constrain him/herself by allowing a judicial independence across a broad spectrum of issues. Strategic elites maintain the legitimacy of the court by tolerating independence pertaining to specific legal issues while at the same time selectively restraining the court in issue areas that are dangerous for regime stability or are not necessary for political benefit. As a result, courts can have a considerable degree of independence; however, their scope of independence may wax-and-wane over time and may only consist of a small fraction of legal cases related to specific issues (Bodnaruk, n.d.; Ginsburg & Moustafa, 2008; Peerenboom, 2010; Toharia, 1975). For example, the enforceability of contracts is central to economic growth. A leader can resolve commitment problems by increasing judicial independence pertaining to administrative law, economic issues, and private property rights (Frye, 2004; Silverstein, 2008; Staton & Reenock, 2010). In this way, the leader constrains himself/herself to abiding by the court's rulings on contract law, yet he/she does not constrain herself/himself with a court that intervenes in other issues: separation of powers, electoral law, or social matters.

Turning back to the role of the judicial council. Political elites may use the judicial council to influence judicial selection and administration related to courts or judges affecting specific issue areas.<sup>45</sup> It could be the case that the politicized judicial council considers the preferences of the political elite; however, outside influence waxes-and-wanes depending on the strategic importance of the specific court. Thus, the judicial council has the flexibility to promote judicial independence for courts relegated to specific legal issues. At other times the council defers to outside influence and makes decisions on judicial selection and administration that reflects elite interests. As a result judicial independence may vary across different legal issues. Following this line of reasoning, I suggest that judicial independence related to specific issues will increase in the presence of a judicial council.

*H2: There is a significant difference in de facto judicial independence across different legal issue areas in countries with a judicial council.*

*H2a: There is not a significant difference in de facto judicial independence across different legal issue areas in countries with a judicial council.*

To examine the validity of the hypotheses outlined above I first subject the argument to an analysis encompassing 191 countries. This is followed with a case study of Argentina's *Consejo de la Magistratura*.

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<sup>45</sup> For example, courts of special jurisdiction, the Russian *arbitrazh* courts have special jurisdiction over economic issues, or military tribunals.

## 4.3 Research Design

### 4.3.1 The Data

The unit of analysis for the quantitative study on the effect of judicial councils on judicial independence is country-year. The sample covers 191 countries from 1980-2013. I compiled data on the existence of a judicial council through a combination of sources, including existing research documenting start and end year, analysis of constitutions to determine formal adoption, media accounts to determine actual integration of the council, and accounts from international and non-governmental organizations. I measure judicial council dichotomously: 0 if a judicial council does not exist and 1 if a judicial council was implemented in that year. The year of implementation refers to the actual year the council began its duties. Although, the dichotomous indicator obscures some interesting variation in the different roles of the judicial council it offers a good first cut for cross-national hypothesis testing.

I measure judicial independence as follows. First, I use a unidimensional measure of *de facto* judicial independence (Linzer & Staton, 2015) (LJI).<sup>46</sup> However, in this study, using this measure is problematic for two reasons. First, LJI combines eight existing measures of judicial independence; most of which pertain to the high court. But in some countries judicial councils do not affect management or judicial selection of the high court. Thus, using this measure to evaluate the relationship between judicial councils and lower courts combines two different levels of analysis. Second, this measure includes components of *de jure* independence which may be endogenous to the independent variable (judicial council). Judicial councils are a component of *de jure* independence. If

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<sup>46</sup> This measure aggregates judicial independence across many different legal areas to form a single measure of high court independence.

the coding scheme for the original measures accounted for a judicial council then the measure of independence is endogenous to the judicial council. Endogeneity potentially biases the results.

In order to identify the effect of judicial councils on lower court judicial independence I must use a measure that takes into account high and low court independence as well as a measure that does not include components of *de jure* independence. Unfortunately, there is not a measure that takes into account the *de facto* independence of lower courts. To tackle this problem, I create a latent variable measure using country-year level indicators that should reflect judicial independence of both higher and lower courts. In this strategy, I use data from eleven observable indicators in a Bayesian latent variable model to create a continuous measure of *de facto* judicial independence (hereafter KB). These indicators include: contract intensive money, foreign direct investment, government policy effectiveness, counts of human rights organizations and human rights headquarters in a country, freedom of speech, social norm of corruption, existence of political prisoners, voting participation, existence of minority political parties, and percentage of the ethnic population with representation in government. Each of these indicators are believed to be caused by judicial independence (Bodnaruk, n.d.).<sup>47</sup> On their own each is a poor proxy of judicial independence, but taken together they form a comprehensive measure of judicial independence.

To test hypothesis two I must use a measure of judicial independence that identifies independence associated with specific legal issue areas. Again I use the latent

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<sup>47</sup> See La Porta et al. (2004), Silverstein (2008), and Clague et al. (1999) for economic indicators: see Popova (2010) and Finkel (2005) for electoral indicators: see Camp Keith (2002), Epperly & Lee (2015), and Moustafa and Ginsburg (2008) for social indicators. See appendix for model specification.

variable approach; however, I categorize the eleven observable indicators into three dimensions: social, economic, and political. Each dimension reflects the court's independence pertaining to social, economic, and political issues. The social dimension identifies the court's independence related to legal issues concerning civil rights and liberties, and legal decisions that affect social norms. The economic dimension identifies independence related to economic issues. Last, the political dimension identifies the court's independence to affect electoral politics. I then use the observable indicators in a Bayesian latent variable model to create a continuous measure of social *de facto* independence, economic *de facto* independence, and political *de facto* independence. The resulting measures are available for 191 countries from 1980-2013.<sup>48</sup> Table 4.1, below, provides descriptive statistics on the judicial council and measures of judicial independence.

Table 4.1: Descriptive Statistics

Variable	Observations	Mean	Standard deviation	Variance	Minimum	Maximum
Judicial councils	6,422	0.589	0.492	0.242	0	1
LJI	5,340	0.481	0.307	0.094	0.019	0.989
KB	6,422	0.159	0.925	0.855	-1.556	2.607
Economic dimension	6,422	0.000	0.728	0.530	-1.948	2.297
Social dimension	6,422	0.046	0.691	0.478	-1.183	4.036
Political dimension	6,422	0.125	0.755	0.571	-1.418	1.804

<sup>48</sup> In Bodnaruk (chapter 3, n.d.) I identify three dimensions of judicial independence: Social – social behavior, civil rights and liberties; Economic – commitment to economic policy; and Political – electoral politics. In the multidimensional conceptualization a court may not be independent across a broad range of legal issue areas; however, a court may be independent in a specific issues. See appendix for information on the multidimensional measure.

### 4.3.2 The Model

In order to determine whether judicial independence increases in the presence of a judicial council I use a difference in means test. While the frequentist t-test is the standard approach in such settings, because the dependent variable (judicial independence) is a Bayesian latent variable I am able to compare the probability of the data under both the null and alternative hypotheses. That is, the Bayesian approach allows one to directly assess the probability that the mean level of independence is higher or lower, conditional on the presence of a judicial council. I also test the difference in means using a frequentist t-test for comparison.

### 4.4 The Results

Table 4.2 summarizes the results of a frequentist difference in means test. The results are mixed, conditional on the method of measuring judicial independence. In LJI there is a statistically significant difference in mean values of judicial independence. Judicial independence is higher in the presence of a judicial council. However, in KB there is not a difference in judicial independence between countries with or without a judicial council.

Table 4.2: Difference in Means, Judicial Councils and Judicial Independence

LJI	KB
No council = 0.468 (0.007)	No council = 0.160 (0.020)
Council = 0.490 (0.005)	Council = 0.159 (0.014)
Difference = 0.022* (0.004)	Difference = 0.001 (0.012)
N, No judicial council= 2,196	N, No judicial council= 2,635
N, Judicial council= 3,144	N, Judicial council = 3,787

Standard errors are in parentheses.



The results from table 4.2 provide some evidence that there are statistically significant differences on the effect of the judicial council on judicial independence. However, the data generating process for the judicial independence scores may not be suited to the frequentist approach for two reasons. First, the trivially small effects can be found with very large sample sizes. Second, and more importantly, the t-tests cannot take into account the uncertainty in the measures of the dependent variable.<sup>49</sup>

In order to incorporate the uncertainty, the credible interval, for each measure of judicial independence I use a Bayesian technique to plot the difference in means and credible intervals. The Bayesian approach of hypothesis testing is comparative in nature. Meaning that the probability of the data is considered under both the null hypothesis (judicial independence does not increase in the presence of a judicial council) and the alternative hypothesis (judicial independence increases in the presence of a judicial council). The Bayesian approach “is not just a measure of how unlikely the null hypothesis is, but rather, a comparison of how likely the null is compared to the alternative” (Jarosz & Wiley, 2014, 7).

My central hypothesis expects judicial councils to have no effect on judicial independence (null hypothesis). To test this hypothesis I plot the difference in mean values of judicial independence between countries with a judicial council and ones without using LJI and KB. Figure 4.2, below, plots the difference in judicial independence between countries with a judicial council and those without using LJI. The results suggest that there is a 64.6% probability of higher judicial independence in countries with a judicial council compared to countries without a judicial council. In

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<sup>49</sup> See Wagenmakers (2007) for critiques of the frequentist approach to interpreting p-values.

other words, the alternative hypothesis is slightly more likely than the null hypothesis. While this result shows a greater probability of higher judicial independence in the presence of a judicial council, the odds of increased judicial independence are not much better than 50-50.<sup>50</sup> Using LJI in the Bayesian context does not resolve endogeneity and potential for biased results discussed earlier.

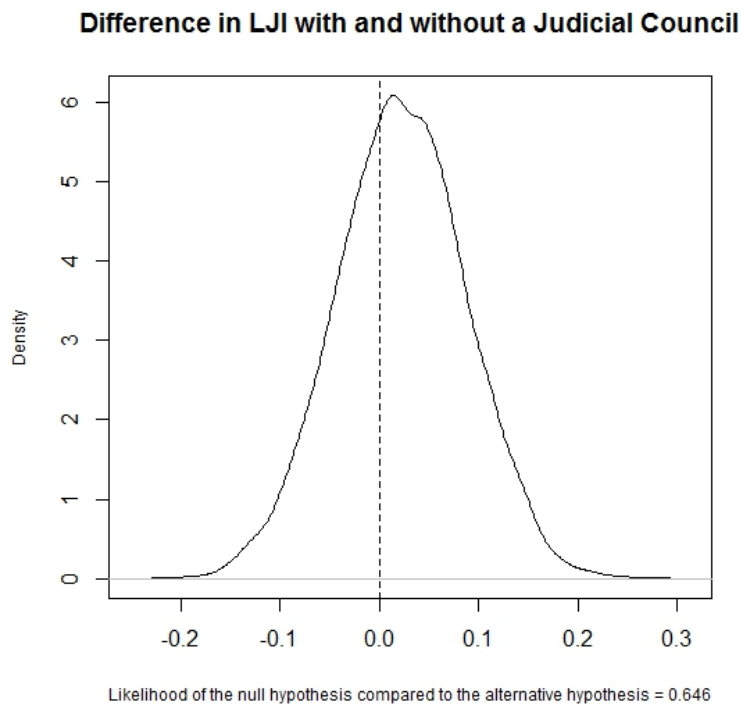


Figure 4.2: LJI Unidimensional Measure

Figure 4.3, below, uses KB to plot the difference in mean scores of judicial independence between countries with a judicial council and countries without a judicial council. This result suggests a 49.8% chance of increased judicial independence in a country with a judicial council compared to a country without a judicial council. In a country with a

<sup>50</sup> Estimated as a frequentist p-value the results would not be significant with a p-value = 0.33.

judicial council the odds are 50-50 that judicial independence will increase. In other words, the null hypothesis is almost equal to the alternative hypothesis.

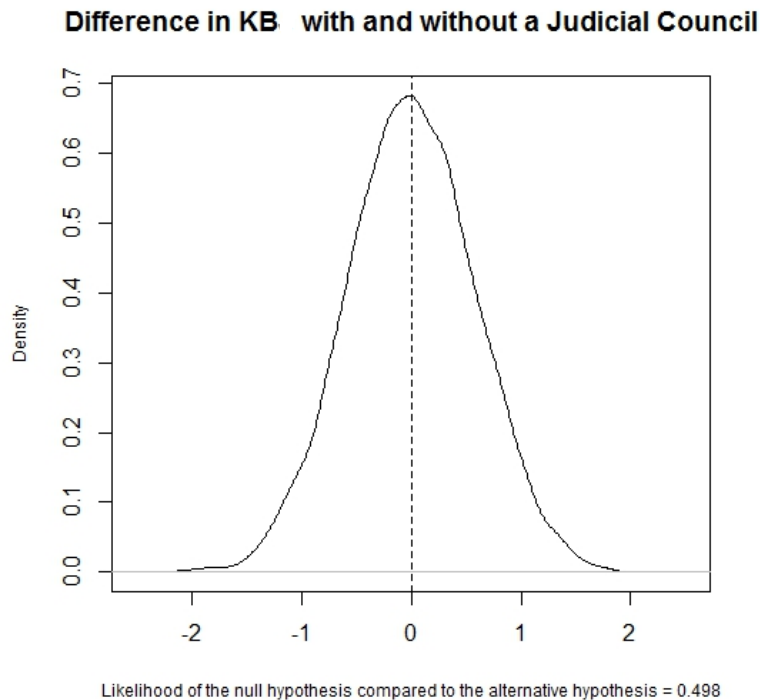


Figure 4.3: KB Unidimensional Measure

#### 4.4.1 Judicial Councils and Multidimensional Judicial Independence

While my central hypothesis does not expect higher judicial independence in the presence of a judicial council, in hypothesis two I expect judicial councils to affect different dimensions of judicial independence. To test this hypothesis I conduct difference in means tests using the multidimensional measure of judicial independence. Contrary to expectations, I find very few differences between the dimensions of judicial independence. Figures 4.4-4.6, plot the difference in means of each dimension of the multidimensional measure of judicial independence between countries with a judicial council and without a judicial council. To summarize, across all three dimensions, higher levels of judicial independence are not associated with the presence of a judicial council.

More specifically, in the economic dimension of judicial independence, figure 4.4, the probability of higher judicial independence in presence of a judicial council is 44.9%. In other words, there is a 55.1% chance that economic *de facto* independence will decrease in the presence of a judicial council. I find similar results for the social dimension of judicial independence, figure 4.5. It is more likely social *de facto* independence will decrease in the presence of a judicial council. Although the difference is not significant, the probability of a lower measure of judicial independence is greater than half at 51.7%. I find a slightly different result for the political dimension. There is an incremental but not significant increase in political independence in countries with a judicial council. As shown in figure 4.6, there is a 53.4% chance that the political dimension of *de facto* judicial independence will increase in countries with a judicial council.

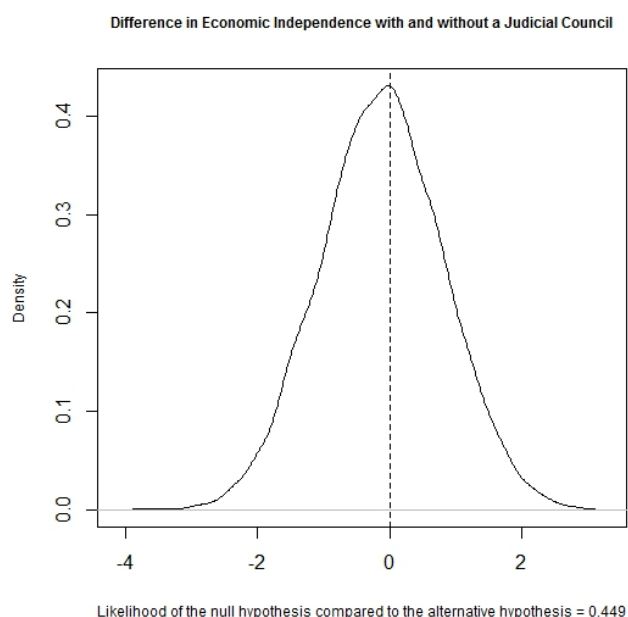


Figure 4.4: Economic Independence

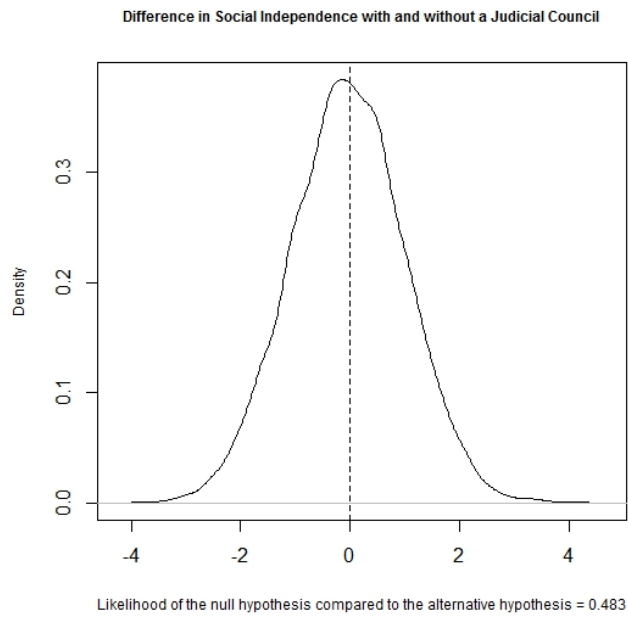


Figure 4.5: Social Independence

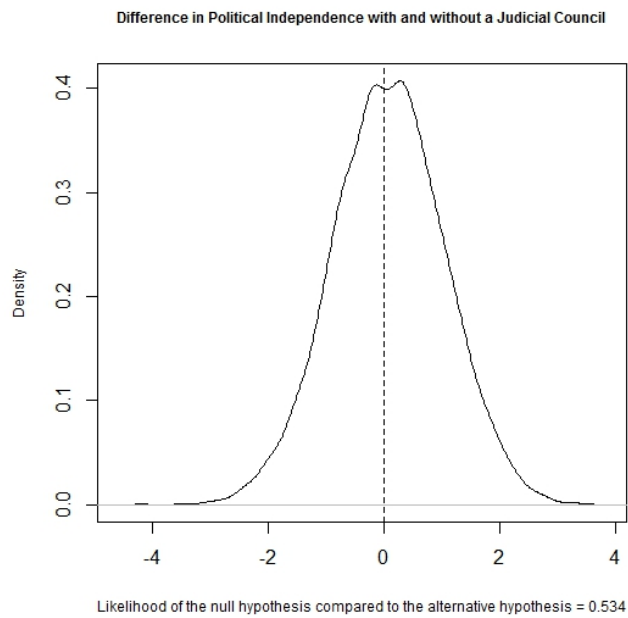


Figure 4.6: Political Independence

In sum, these findings confirm my expectations for hypothesis one; namely, that judicial independence does not increase in the presence of a judicial council. Contrary to expectations, I do not find evidence to suggest that the judicial council affects only specific types of courts and therefore specific dimensions of judicial independence reflect the council's influence.

#### 4.4.2 By Regime Type

Some readers may be interested to see if judicial independence increases in the presence of a judicial council in specific regime types: democracies, autocracies, and partial democracies. I assess differences by regime type using Polity IV (Marshall & Jaggers, 2010), LJI, and KB.<sup>51</sup> Table 4.3 contains descriptive statistics on judicial councils by regime type.

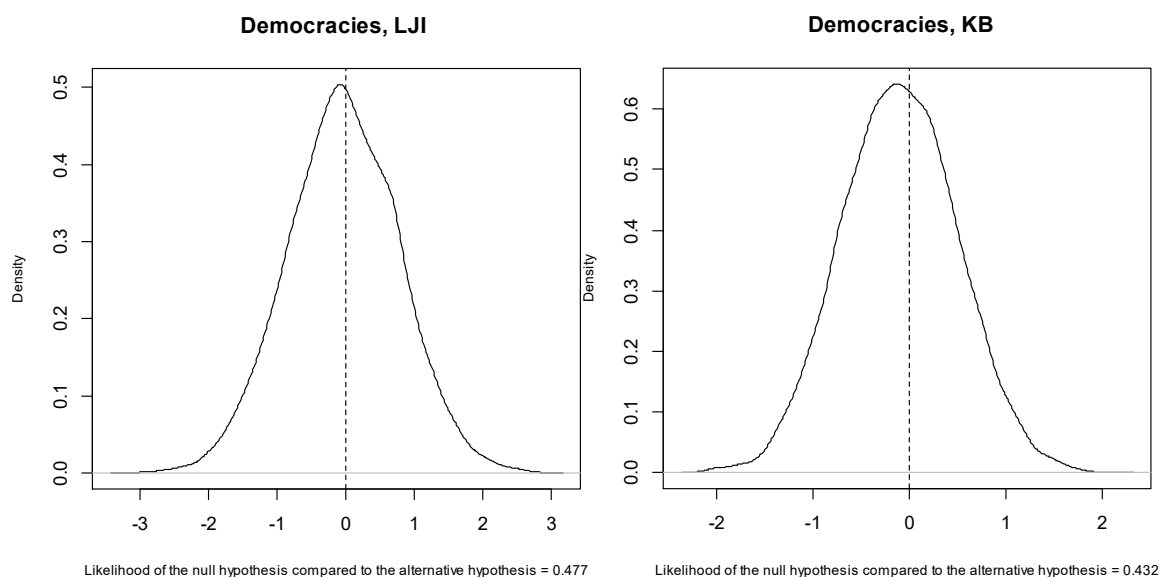
Table 4.3: Descriptive Statistics, Judicial Councils by Regime Type

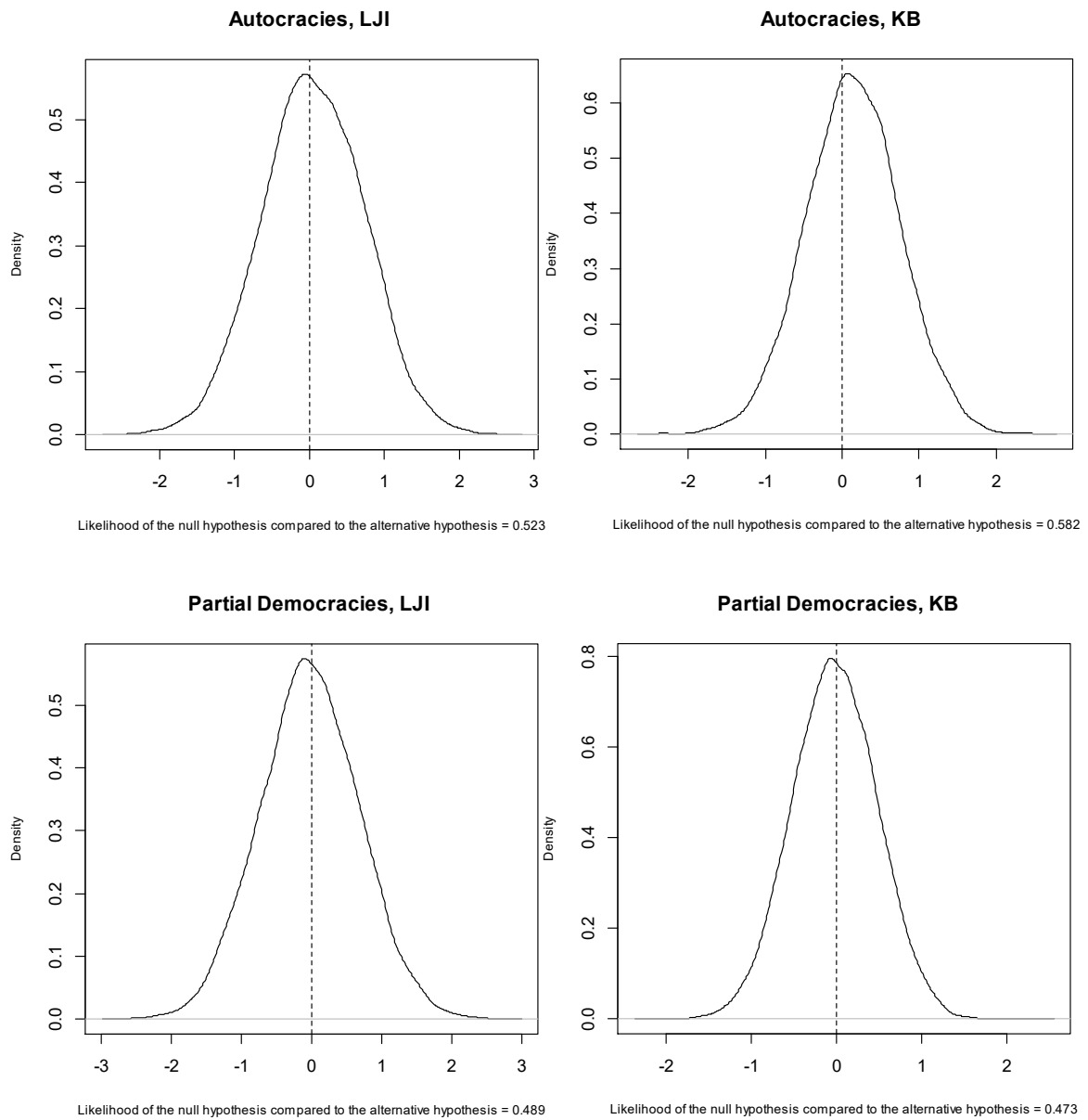
Judicial Council by Regime Type	Observations	Mean	Standard deviation	Variance	Minimum	Maximum
Democracy	2,315	0.635	0.482	0.232	0	1
Partial Democracy	1,654	0.704	0.456	0.208	0	1
Autocracy	1,142	0.429	0.495	0.245	0	1

In general, by regime type, figures 4.7-4.12, there are not significant differences in judicial independence in the presence of a judicial council. In democracies judicial independence incrementally decreases in the presence of a judicial council. The probability of increased judicial independence in the presence of a judicial council is only 47.7% and 43.2%, LJI and KB respectively. In autocracies the probability of increased

<sup>51</sup> Since judicial independence and a judicial council are constraints on the executive, I rescale Polity IV to omit the executive constraints variable. Normally the combined score ranges from -10 to 10 the rescaled Polity IV ranges from -7 to 6.

judicial independence in the presence of a judicial council is 52.3% and 58.2%, LJI and KB respectively. And in partial democracies the probability of increased judicial independence in the presence of a judicial council is 48.9% and 47.3%, LJI and KB respectively. These results are not entirely surprising. Even in consolidated democracies judicial councils are plagued with problems. For example, the Italian *Consiglio Superiore della Magistratura* is riddled with corporatism, a lack of judicial accountability, and suboptimal efficiency (Volcansek, 2006).





Figures 4.7-4.12: Difference in Judicial Independence by Regime Type

I also assess differences in multidimensional judicial independence by regime type: democracies, autocracies, and partial democracies. For each regime type the odds are almost even, or 50-50, that the economic, social, and political dimensions of *de facto*



judicial independence increase in the presence of a judicial council.<sup>52</sup> In other words, this nuanced analysis does not reveal any interesting differences in the effect of the judicial council on multidimensional judicial independence by regime type.

#### **4.5 Argentina's *Consejo de la Magistratura***

The quantitative results confirmed my central hypothesis, but the results have limited application. First, the relationship between judicial councils could be spurious since many factors affect judicial independence. Second, the measure of the key concept, a dichotomous indicator of the judicial council, is blunt. A case study can check the result's robustness through process tracing. I chose Argentina, a country that was well predicted by the results. This analysis uses primary and secondary accounts, news articles, and fifteen key interviews. The interviews corroborate media sources and establish what local elites thought. I identified the names of significant political entrepreneurs through research and assistance from non-governmental agencies engaged in judicial independence. I then gathered a larger sample via snowball methods. I ensured complete anonymity to many participants due to the volatile political environment. Furthermore, Argentina has a small number of councilmembers at the federal level making it easy to identify participants.<sup>53</sup>

Argentina has a tumultuous history of judicial independence. Beginning with Juan Peron's administration, in 1946, courts were purged and packed with regularity.<sup>54</sup> Even

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<sup>52</sup> Regime type by multidimensional judicial independence. The numeric value is the probability of increased judicial independence per the specific configuration of regime type and dimension: autocracy, economic dimension = 0.477; autocracy, social dimension= 0.555; autocracy, political dimension= 0.523; partial democracy, economic dimension= 0.459; partial democracy, social dimension= 0.474; partial democracy, political dimension= 0.489; democracy, economic dimension= 0.441; democracy, social dimension= 0.443; democracy, political dimension= 0.511

<sup>53</sup> There are 13 councilmembers holding four-year terms. See appendix for data and methods.

<sup>54</sup> The first court was purged in 1947.

with democratization, in 1983, the status of Argentina's judiciary remained precarious. Carlos Menem, Argentina's second president, packed the Supreme Court to create a pro-government majority: known in Argentina as the *mayoria automatic amenesta*, the automatic Menem majority (1988-1989). In an effort to restrict executive overreach in judicial affairs, civil society organizations and multilateral donor agencies, specifically the IMF, advocated implementation of a federal judicial council, and the "World Bank, IMF, and the international community imposed the judicial council following the European model" (author's interview subject X, December 2014).<sup>55</sup> The judicial council was formally adopted in 1994 as part of a negotiation, the *Olivos Pact*, between President Carlos Menem (the *Partido Justicia* or PJ) and the minority party *Union Civica Radical* (UCR). The *Consejo de la Magistratura* (*consejo*) assumed its role in 1998.<sup>56</sup>

Today, almost twenty years later, the *consejo* is failing in its role as a guarantor of judicial independence. Minority political parties, non-governmental organizations (NGOs), the legal community, media, and the public complain of a lack of transparency in the judicial nomination process, gridlock, and coercion. According to the leader of a civic organization, "the *Consejo de la Magistratura* in Argentina is performing very badly" (author's interview subject A, June 2014; subject X, December 2014). Negative perceptions of the *consejo* correspond with negative perceptions of the judiciary. According to the 2011 LatinoBarometer question asking, "how much confidence you have in the judiciary" only 3.2% of respondents have a lot of confidence, 47.5% have little confidence, and 18.4% have no confidence at all (Latinobarometro Corporation, 2011).

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<sup>55</sup> These civil society groups included *Justicia Democratica* and *Encuentro de Jueces*.

<sup>56</sup> See Bill Chavez (2007) and Zayat (2009) on a discussion of the timing of implementation.

My theory predicts that political elites design and politicize judicial councils so they can maintain influence over judicial section and administration. Judicial councils are a tool of the regime and, as a result higher levels of judicial independence are not associated with the presence of a judicial council. I look at evidence of three observable implications from the theory. First, do political elites design a politicized judicial council? Second, does a politicized judicial council affect judicial selection and administration? Third, does judicial selection affect judicial independence? I examine each question in turn.

#### **4.5.1 Politicizing the Argentine Judicial Council**

First, political elites designed a judicial council dominated by politicians and other political stakeholders. In 1994, Menem's grand bargain put the *Consejo de la Magistratura* into effect. At its creation, the *consejo* was a novelty. It was a separate power from the Executive, Congress, and Judiciary and it was intended to act as a fourth power (author's interview subject S, December 2014). Proponents of the *consejo* believed it would create balance and ensure the selection of educated professional competent judges. The selection process assumed that judges would not "owe appointment to a political process" (author's interview subject Q, December 2014). The formal rules for the selection of judge candidates focused on increasing the professionalization of judges with the belief that "professionalization would act as a check against government" (author's interview subject J, December 2014).

Congress was tasked with determining how the *consejo* should function. However, there were "very few formal procedures as to how members of the judicial council were to act. What was the composition? It was a checks-and-balances nightmare

and became a system made for the President to do whatever he wanted to do” (author’s interview subject J, December 2014).<sup>57</sup> Because of these broad outlines the *consejo*’s membership was open to interpretation by the dominant political parties. The role of the *consejo* shifted from one envisioned as a balance between branches of government to an extension of the dominant political party. In law 24,937 (1998) Congress established that the *consejo* would consist of twenty members drawn from a variety of professional backgrounds: politicians, judges, academics, a representative from the executive branch, and lawyers.<sup>58</sup> The dominant political party, the PJ, had five councilmembers: four politicians and a representative from the executive branch. The minority party in Congress had four councilmembers, all politicians. Judges, lawyers, and academics occupied the remaining seats.

Civil society groups never intended for a large proportion of the *consejo* to consist of politicians (author’s interview subject S, December 2014). “They got it wrong” (author’s interview subject L, December 2014). Law 24,937 created a system that introduced partisan politics. This membership composition politicized the judicial council; however, at that time the proportion of politicians to the remaining stakeholders provided some balance against single party domination. During *consejo* activities councilmembers formed coalitions based on profession, for example, the “judge’s block.” Councilmember Humberto Quiroga Lavie reported that six factions checked one another (Bill Chavez 2007). According to a former legal representative to a councilmember, “depending on the issues under consideration, administration or salary or impeachment,

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<sup>57</sup> Debate over these issues delayed congressional approval for the *consejo* until December 1997. The *consejo* initiated proceedings in December 1998.

<sup>58</sup> Also see law 24,939 on the number of councilmembers.

the divisions between blocks maybe more ideological” (author’s interview subject G, November 2014). For example, if a candidate for a vacant seat was a judge, perhaps in another jurisdiction from the vacancy, the judge representatives in the *consejo* voted in favor of the candidate (author’s interview subject G, November 2014). In general, “judges voted in block whenever they want to pass a resolution regarding something budgetary they voted in block” (author’s interview subject G, November 2014). In essence, judges voted for the interests of fellow judges. These factions functioned as a system of checks and this allowed some balance of political ideologies.

From 1998-2006 the *consejo* struggled with inefficiencies, and there were delays in the judicial selection process (Bill Chavez 2007). Senator Christina Kirchner, President of Argentina from 2007-2015, “blamed the poor functioning of the *consejo* to the excessive power granted to the judges and attorneys” (Rodriguez, 2009, 7). In response, in 2006, Argentina’s President Nestor Kirchner, with consent from Congress, reduced the number of councilmembers and increased the proportion of politicians (law 26,080). The new composition of the *consejo* “allowed for it to be composed of a majority of pro-government senators and representatives” (Colegio de Abogados de la Ciudad de Buenos Aires, 2013).

Table 4.4 reflects changes in membership composition from law 24,937 and law 26,080.

Table 4.4: Changes to the Judicial Council Membership

	Law 24,937	Law 26,080
Justices	1 <sup>b</sup>	-
Judges	4 <sup>b</sup>	3 <sup>b</sup>
Lawyers	4 <sup>b</sup>	2 <sup>b</sup>
House	4 <sup>a</sup>	3 <sup>c</sup>
Senators	4 <sup>a</sup>	3 <sup>c</sup>
Professors	2 <sup>b</sup>	1 <sup>b</sup>
Executive	1	1
Total	20	13

<sup>a</sup> only four of eight could be from the majority party

<sup>b</sup> selected by colleagues.

<sup>c</sup> two from the majority party and 1 from the largest minority

Nestor Kirchner’s modification to the *consejo* altered the system of checks-and-balances. He reduced the size of the council, removed the Supreme Court representative, and allocated a majority of seats to politicians. The factions dissolved into disparate groups with differing interests (author’s interview subject H, December 2014). The new composition divided the *consejo*’s membership into two coalitions: pro-ruling party and the opposition. Thus, in 2006, the balance of power shifted in favor of the political branches of government, and the dominant political party in government gained a tremendous advantage in vote share. These changes guaranteed that five-of-thirteen councilmembers represented the dominant party’s political interests. The “council cannot solve the problem of presidential dominance if the majority of the council is composed by presidential supporters” (author’s interview subject C, July 2014).

A series of elite interviews revealed that councilmembers are accountable to their stakeholder groups. The political representatives are chosen for their party loyalty.<sup>59</sup> Internal “debate among party leaders show tremendous consideration of the councilmember’s dedication to the parties’ prerogatives” (author’s interview subject O, December 2014). In an interview, I was told “a potential candidate for the council was annulled due to concerns that the person was not a 100% guarantee to do as the party wished” (author’s interview subject O, December 2014).

The six remaining councilmembers represent “nonpartisan” stakeholder groups. In theory, these councilmembers should reflect independent preferences (ENCJ). However, according to a member of the *consejo*, “politicians simply do not limit their lobbying of preferred judicial nominees within the confines of their fellow legislators. They influence the lawyers and academia. Lawyers representing the political parties are reaching out to these stakeholder groups to encourage decisions” (author’s interview subject G, November 2014). For example, political parties engage with the bar associations to lobby for and “support candidates to the *consejo*” (author’s interview subject B, December 2014).<sup>60</sup> Political parties see the lawyer representative as an opportunity to infiltrate and they publically lobby and support the bar association (author’s interview subject B, December 2014). The ensuing lawyer councilmembers are “not formally consulted by political parties regarding their decisions on judges. It is all political negotiation” (author’s interview subject G, November 2014; and subject B,

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<sup>59</sup> A closed list electoral system helps ensure party discipline (Mainwaring, 1991).

<sup>60</sup> The legal community chooses two members for the *consejo*; one represents the Buenos Aires bar association and one represents the interior of the country. Members of the bar, fellow lawyers, form parties and these parties lobby for their preferred candidate. The nominee who wins a majority of bar votes represents the association for a four-year term (author’s interview Subject D, December 2014). In some cases, competing candidates will agree to rotate their candidates splitting the four-year term in half (This occurred in 2010 and 2014).

December 2014). Councilmembers attempting to remain independent and at times opposed the government's demands have been "bribed, physically threatened, and private property destroyed" (author's interview subject D, December 2014).

Politicization is also prevalent in the judges. Until the late 2000s judges formed a politically independent faction in the *consejo* and voted to protect fellow judges.<sup>61</sup> From the late 2000s-to-2013, the ideological preferences of the judges became more apparent. By 2014 judge representatives to the *consejo* were taking an obvious partisan stance, "and their political ideologies were becoming more apparent through judicial selection" (author's interview subject H, December 2014; subject J, December 2014). According to a legal professional, "now we have judicial members of the *consejo* splitting off the old alliance with judges and entering an alliance with the government" (author's interview subject H, December 2014). This ideological shift coincides with the growing influence of the political party *Justicia Legítima* (Legitimate Justice).<sup>62</sup> Legitimate Justice is a pro-government organization aligned with the PJ party.<sup>63</sup> Members of the *consejo* are publically involved with Legitimate Justice, and their decisions in the *consejo* align closely with the government in power, the PJ. The *consejo*'s new president, Judge Gabriela Vázquez, is widely believed to be a member of Legitimate Justice. The appointment of Vasquez has resulted in a 7<sup>th</sup> vote for the PJ, and she has, so far, voted 100% with the government (author's interview subject F, December 2014). Vasquez's appointment shifted the balance of power in the *consejo* into the hands of the PJ party.

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<sup>61</sup> Judges on the *consejo* are chosen by peers within the judicial system via a nomination and electoral process.

<sup>62</sup> Legitimate Justice released its first publication titled "*Una Justicia Legítima*" in December 2012.

<sup>63</sup> Legitimate Justice holds public rallies to support the Kirchner administration. According to the group's president, Judge María Laura Garrigós, approximately 30% of the nation's prosecutors, and 10-15% of judges are sympathetic the group (Turner & Johnson, 2015).



Finally, the motivations of the academic representative are circumspect.<sup>64</sup> The “academic representative comes from a public university and in the last ten years many universities have been founded or funded by the Executive” (author’s interview subject S, December 2014). This “lobbying on behalf of the Executive results in a quid-pro-quo whereby the academic appointee, to the *consejo*, becomes another political pawn” (author’s interview subject B, December 2014). “The academic representative votes 100% of the time for the government way” (author’s interview subject D, December 2014).

In sum, two simultaneous processes politicize the judicial council: one in which politicians have a disproportionally high number of seats on the *consejo*, and a parallel process that consists of co-opting the councilmembers’ independent preferences. As a result, the composition of the *Consejo de la Magistratura* is becoming exclusively controlled by the Executive (Colegio de Abogados de la Ciudad de Buenos Aires, 2013). Some officials stated, “the government has significant control of the *consejo* and members of the *consejo* do what the executive wants” (author’s interview subject E, June 2014). By 2008, the *consejo*’s activities became more circumspect “as the appointment process of councilmembers became less transparent and the selection of judge candidates became less transparent. The entire process takes place behind closed doors. The *consejo* is closed so judge candidates just need to be close to political associations” (author’s interview subject A, June 2014).

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<sup>64</sup> Public universities select one representative for a four-year term on the *consejo*.

#### 4.5.2 The Effect of Politicization on Judicial Selection and Administration

Second, the politicized judicial council negatively affects judicial selection and administration. The PJ party dominates the *consejo* with the simple majority necessary to control decisions related to judicial administration and discipline. Unjust, punitive measures are used against judges pursuing cases against the government. For example, “impeachment proceedings can be targeted against judges if the judge prosecutes politicians” (author’s interview subject C, July 2014). In 2014, the *consejo* investigated three federal judges following a series of highly charged political cases that resulted in decisions against the Kirchner administration (Farella, March 30, 2014). These judges were highly skilled, reputable, and considered by most legal professionals to be competent. The *consejo* also manages the administration of the Supreme Court, and judges fear a check on their independence through a loss of budgetary control (author’s interview subject N, December 2014).

More problematic are the effects of politicization on judicial selection. Rather than selecting judge candidates based on quantifiable professional qualifications, councilmembers are selecting judge candidates for political expediency. The result is an ideological battle between the pro-PJ councilmembers and the opposition. The PJ dominates the *consejo*, but falls short of the 2/3’s majority vote required for the selection of judges. To make decisions on judge candidates the pro-government councilmembers must co-opt the remaining stakeholders’ preferences. This is a lengthy process and many times the *consejo* cannot negotiate the 2/3’s decision necessary to determine judge candidates (author’s interview subject X, December 2014). As a result, the judicial council moves through the judicial nomination process very slowly (author’s interview

subject X, December 2014). According to a former member of the *consejo*, “an inefficient gridlocked judicial council becomes increasingly overwhelmed with work and cannot select judge candidates” (author’s interview subject D, December 2014).

The politicized judicial council is contributing to a vast backlog of vacant positions. Over the last ten years between 15%-33% of federal seats are vacant.<sup>65</sup> Vacancies are filled with temporary judges (*subrogantes*). In Argentina, this is problematic for two reasons. First, politicians have direct control over the appointment of *subrogantes* (discussed in detail below). Second, high vacancy rates increase inefficiency in the judicial system. There are simply not enough judges to handle the caseload. “Jails are full of indicted people waiting for trial sometimes two or three years, and if they are innocent there is problem” (authors interview subject G, November 2014).

In Argentina, appointing and removing *subrogantes* is a complicated and discretionary process. Prior to 1994 temporary judges were usually fellow judges (Garrido, 2010b). In 2004, the *consejo* allowed retired judges, lawyers, or court clerks to act as temporary judges. In 2007, the Argentine Supreme Court (in *Rosza, Carlos Alberto*) determined that court clerks and other non-trained judges acting as *subrogantes* seriously mitigated the guarantee of access to an independent judge (Garrido, 2010a).<sup>66</sup> In essence, the populace has a right to a natural judge.<sup>67</sup> In response to *Rosza*, Congress issued law 26,376 (in 2008) which designated a process for appointing *subrogantes* at the

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<sup>65</sup> There is not a national database recording vacancy rates. Information gathered from interviews estimated a vacancy rate between 15-33%. According to the *Colegio de Abogados de la Ciudad de Buenos Aires*, in a 2013 publication approximately 25% of total positions remain vacant (208 vacant positions at the federal level). According to former Judicial Council woman Marcela V. Rodriguez (ARI-Coalicion Civica) there were approximately 210 federal vacancies, 20%, in 2009 (Rodriguez 2009).

<sup>66</sup> See *Rosza* (2007) <http://www.profprocesalpenal.com.ar/archivos/a05e9cfc-Fallo-Rosza-Carlos-Alberto-de-23-mayo-07-Validez-jueces-subrogantes.PDF>

<sup>67</sup> In *Rosza* (2007), although the Supreme Court determined that *subrogantes* are not constitutional, they also decided that they would not review all appeals coming from surrogate courts pre-2008.

federal level. Once a vacancy occurs, the legal process allows fellow judges to select a *subrogante* of equal status. If judges cannot find a replacement then the power resides in the hands of the *consejo* and President. The *consejo* selects a *subrogante* from a list of names provided by the President and previously approved by a simple majority of the Senate (Garrido, 2010a).

Unfortunately, for judicial independence, politicians have delayed full implementation of procedures to resolve judicial vacancies. Court clerks and secretaries continue to act as *subrogantes*. For example, in December 2014, the Judicial Council of La Plata appointed a secretary as a judge in the Criminal Court (Herrero, 2014). According to one interview, nothing changed after *Rosza* “because with so many positions filled by law clerks and such there were not any ideas on who else should fill these positions” (author’s interview subject Q, December 2014). The President is also complicit in disregard for the rule-of-law. Kirchner did not complete her approved list of *subrogantes* until 2014. Why the delay in compliance? It is simply because it is not in the political best interest to do so. Reliance on the “informal institution of the *subrogante*” is a mechanism to control the judiciary (author’s interview subject E, June 2014). The ability of the President to handpick pliant judges for the “list” along with partisan control of the *consejo* makes “it is easier to appoint friendly judges and easier to pressure them” (author’s interview subject E, June 2014).

#### **4.5.3 Declining Judicial Independence**

Third, due to the inefficient judicial council judicial independence is declining. The large percentage of temporary judges is a serious impediment to judicial independence. At “some point *subrogantes* cannot exercise true independence” (author’s

interview subject G, November 2014; subject O, December 2014). In Argentina, “many times temporary judges are faced with these job responsibilities that can extend for years” (author’s interview subject B, December 2014). The uncertainty of a future career constrains the judge in his/her ability to render impartial decisions. For example, the temporary judge may seek a permanent position, and with this foresight he/she is incentivized to make decisions preferable to the appointing bodies: the *consejo*, President, and Senate. A “*subrogante* would love to be confirmed to a permanent position; therefore, they are pliant to the demands of the politicians” (author’s interview subject G, November 2014). You can have a *subrogante* “that wants a good career in the judiciary, but finds himself with the dilemma of being if I don’t vote according to the wishes of the political party my career is ruined” (author’s interview subject G, November 2014). Therefore, rather than expressing independent preferences, the *subrogante* makes decisions that appeal to the preferences of the *consejo* and President. As a politician and former head of the Anticorruption Office stated, “temporary judges in this situation generate significant obstacles for judicial independence” (Garrido, 2010a, 4 & author's interview subject O, December 2014).<sup>68</sup>

Such political control over the appointment of temporary judges reduces the incentive for the government to “fix” the politicized judicial council. The government has significant control of the *consejo* and prevents permanent appointments because they are more reliant on informal institution of the *subrogante*” (author’s interview subject E, July 2014). Dr. Alejandra Garcia, a candidate for the *consejo* on behalf of the lawyers for the

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<sup>68</sup> Moreover, if a judge has a permanent position in another jurisdiction the judge can work overtime as a *subrogante* and receive “overtime” pay. Judges who routinely accept dual appointments are incentivized to favor high vacancy rates (author’s interview subject Q, December 2014).

city of Buenos Aires 2014, refers to paralysis currently facing the *consejo*, “it is a national government policy, because they do not have two-thirds majority, they want to paralyze the judicial council” (Buenos Aires Herald, August 27, 2014 & author's interview subject E, July 2014).

#### **4.6 Conclusion**

My intention is not to suggest that judicial reform efforts are futile. It is to highlight the perplexing phenomenon of why we do not see increased judicial independence in the presence of a judicial council. Blinded by the normative idea that even the slightest bit of judicial reform is better than nothing, we do not give enough attention to the unforeseen consequences of poor institutional design. The reader may wonder if I advocate uniform guidelines for the role and composition of the judicial council. A one-size-fits-all approach is not the answer. Countries have unique histories and political systems that require a custom approach. However, policymakers should carefully consider the ramifications of hodge-podge adoption of reform programs. As we see, in Argentina, a foreign aid package required the judicial council; however, once Menem signed on the dotted line there was little support or oversight to ensure a properly functioning judicial council. The ramifications of a politicized judicial council have fundamentally hindered not only the independence of the court but also citizen access to fair adjudication.

In this article, I have argued that judicial councils do not affect judicial independence principally because the political elite do not want to cede power and influence over the judiciary to an independent institution; thus, they create dependent

judicial councils. A politicized judicial council becomes an extension of the political branches of government: It is a conduit for the political elite to influence the court.

Further research could proceed along several lines. First, data collection that includes explicit attention to the exact composition and role of the council could yield interesting results. Second, future research might probe more deeply into the role of the council in discipline and administration. Most research focuses on judicial selection, but discipline and punitive management also affect judicial independence.

These findings are significant for several literatures. First, it adds to the growing attention on judicial independence cross-nationally. At this time, most studies of judicial independence focus primarily on a specific country or region. This article presents a generalizable theory, data, and results. Second, using new measures of judicial independence I am able to conduct a nuanced assessment of judicial independence. We believe that judicial independence is a multidimensional, and the independence of the court waxes-and-wanes across issue areas. In this research, I have found that judicial councils do not significantly affect social, economic, and political dimensions of *de facto* judicial independence. Last, this research provides insight into judicial reform efforts. The politics of judicial reform is a high stakes game that involves a great deal of compromise between political elites. International actors are interested in institutions that aid democratization and strengthen the rule-of-law. It is not obvious, however, whether these institutions live up to expectations. The findings in this article call into question the feasibility of these efforts.

## CHAPTER 5

### CONCLUSION

This dissertation introduces a new conceptualization and operationalization of judicial independence related to three categories of legal issues. In Chapter 2, I assess the building blocks of judicial independence and the tools available to measure it. I then review a wealth of research to explain why leaders constrain themselves with an independent court, and because of these motivations judicial independence manifests in narrow issue areas. As a result, judicial independence is not uniform across a broad range of topics; it waxes-and-wanes across legal issues. Next, I outline how existing measures treat the concept as uniform and as a result mask the effect of judicial independence for a subset of research questions causing null results. Last, I suggest a new conceptualization and two measurement strategies that account for variation in multidimensional judicial independence.

In Chapter 3, I propose a new multidimensional operationalization for analyzing judicial independence. I formulate a theoretical concept whereby *de facto* judicial independence is measured in three dimensions: social, economic, and political. I then estimate a Bayesian latent variable model to construct individual measures of each dimension of judicial independence. The resulting measures provide a robust and comprehensive analysis of variation in judicial independence within each country.

Finally, in chapter 4, I apply the multidimensional measure to an analysis testing the efficacy of judicial nominating councils on judicial independence. I explore under



what conditions judicial councils affect judicial independence. My results suggest that judicial councils are not associated with an overall increase in judicial independence. Furthermore, using the multidimensional measure of *de facto* judicial, my findings suggest that judicial councils are not associated with changes in social, economic, and political *de facto* judicial independence. Last, my fieldwork in Argentina reveals that nefarious activities within the *Consejo de la Magistratura* have resulted in profound negative implications for the independence of the court.

Viewed together these chapters reveal that *de facto* judicial independence should be treated as a multidimensional concept. In order to advance our understanding of this variation we must push forward to develop measures that address these nuances in judicial independence. While this work goes a long way to assessing variation in judicial independence, it is also clear that there is much more to be revealed in future studies.

I encourage scholars to consider using the multidimensional measure in cross-national analyses of complex relationships theorized for a variety of regime types. Leaders may increase judicial independence to gain political insurance or to encourage economic investment. Future research could explore these theories directly by applying the political dimension to a test of insurance theory and the economic dimension to an analysis of trade relationships. Another fruitful research agenda could pay particular focus to judicial independence in new democracies and autocracies. We know very little about how these courts evolve in a transition to democracy, but conventional wisdom seems to suggest that when a country democratizes it is not realistic to expect the judiciary to immediately attain *de facto* independence across all issues. A myriad of factors could affect the emergence of multidimensional judicial independence, including

the conditions causing the transition (conflict, economic crisis, elite fracture), the type of transitional leader (military junta, single party, or personalistic regime), or international influence. Each of these scenarios can be explored using the multidimensional measure. Another avenue of future research should look specifically to pre-existing conditions. Could pre-existing judicial independence in one dimension affect the newly democratic court's ability to assert independence? Are autocratic courts with limited independence better equipped to expand the scope of independence once the country transitions to democracy? If these countries transition to democracy do the courts have an advantage in motivating a wave of independence in other legal issues? On the other hand, if a court has no history of independence how will judicial independence emerge? Finally, we should seek to understand how courts respond to restrictions on independence. If a court loses independence in one dimension, to an auxiliary court or special tribunal, does the court compensate by asserting independence in other dimensions? The latter question may be particularly valuable in assessing the role of the court in countries on the precipice of a democratic backslide.

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**APPENDIX A**

**TOWARDS A MULTIDIMENSIONAL MEASURE OF *DE FACTO* JUDICIAL  
INDEPENDENCE**

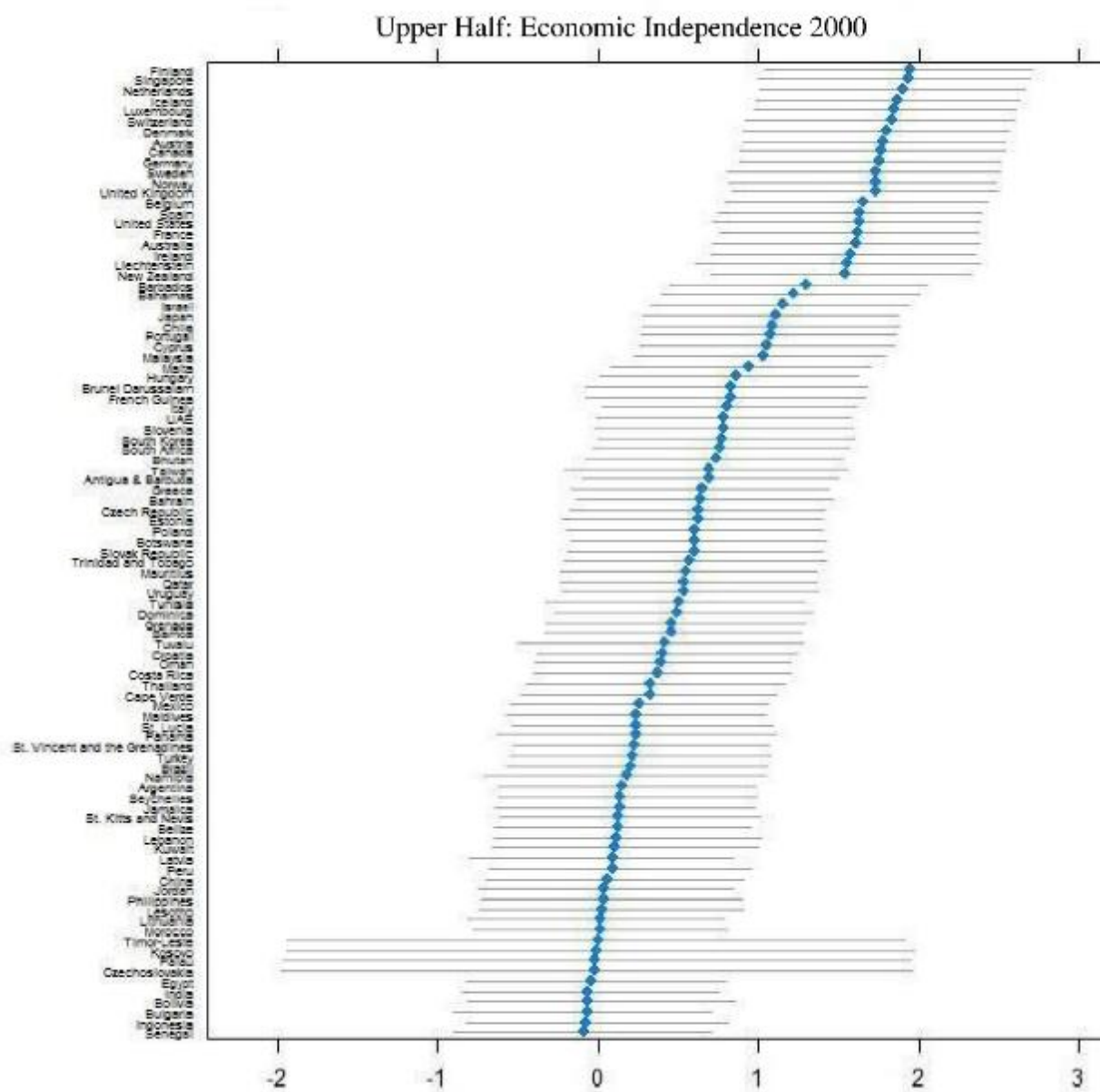


Figure A.1





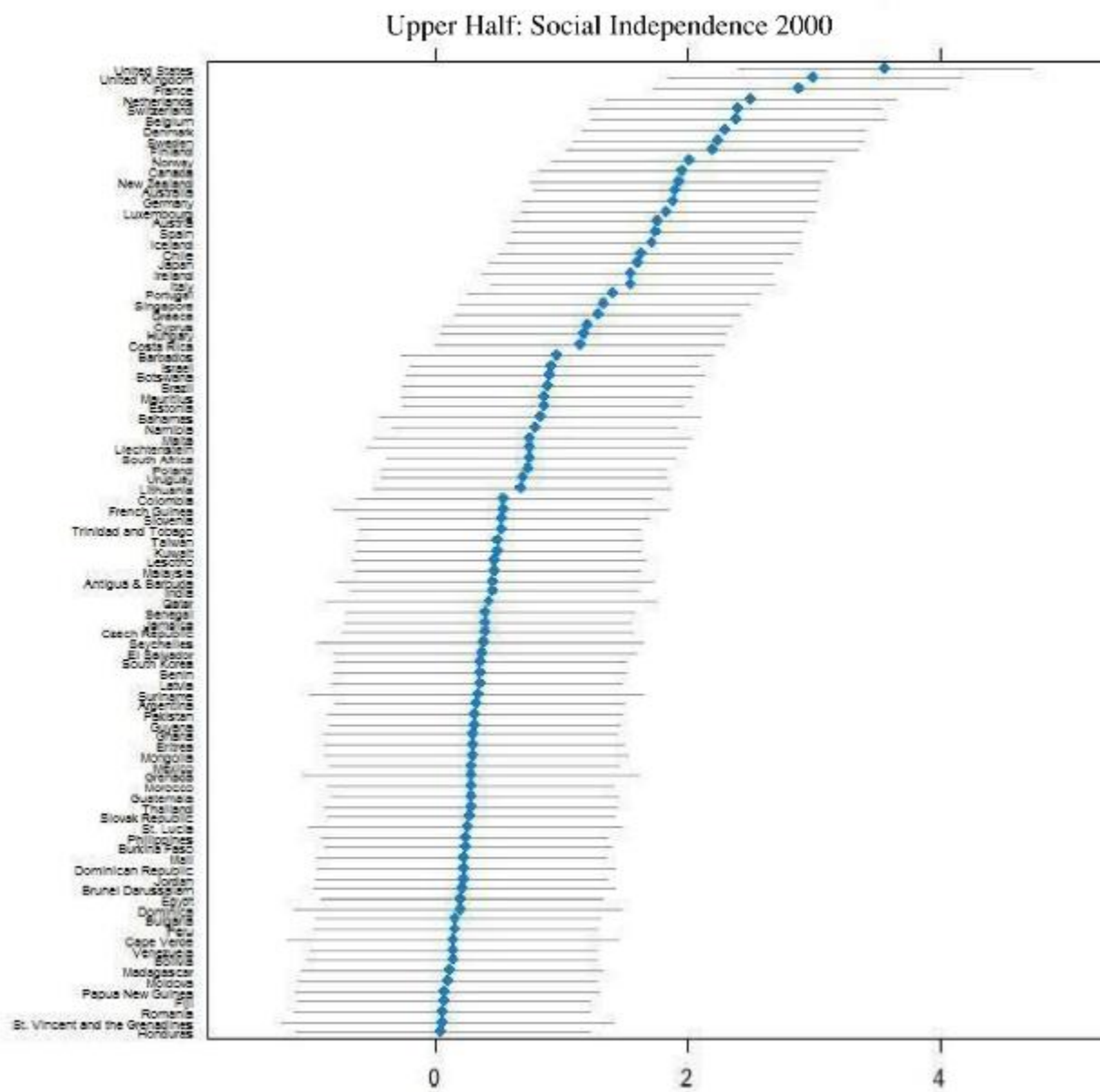


Figure A.3

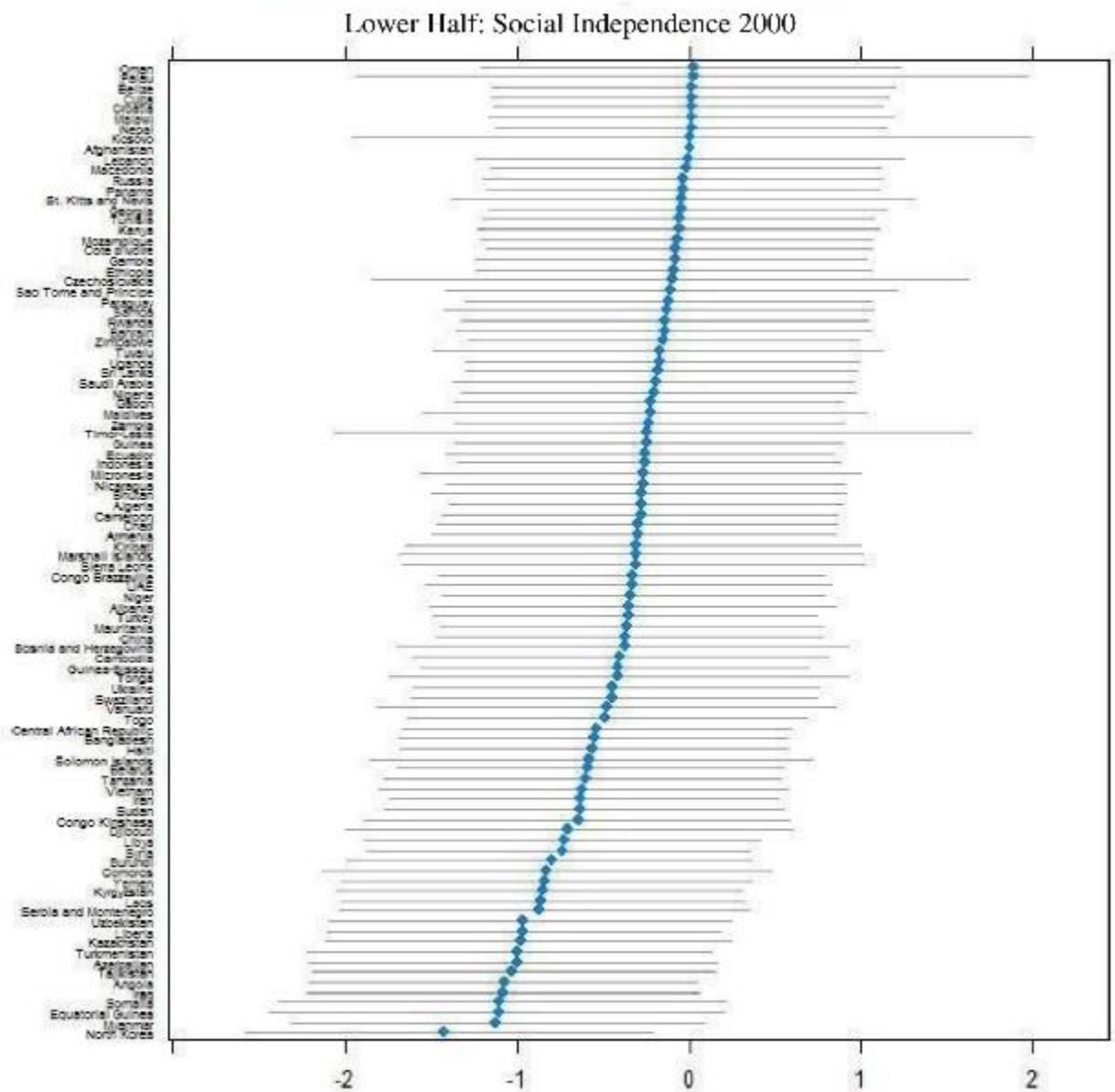


Figure A.4

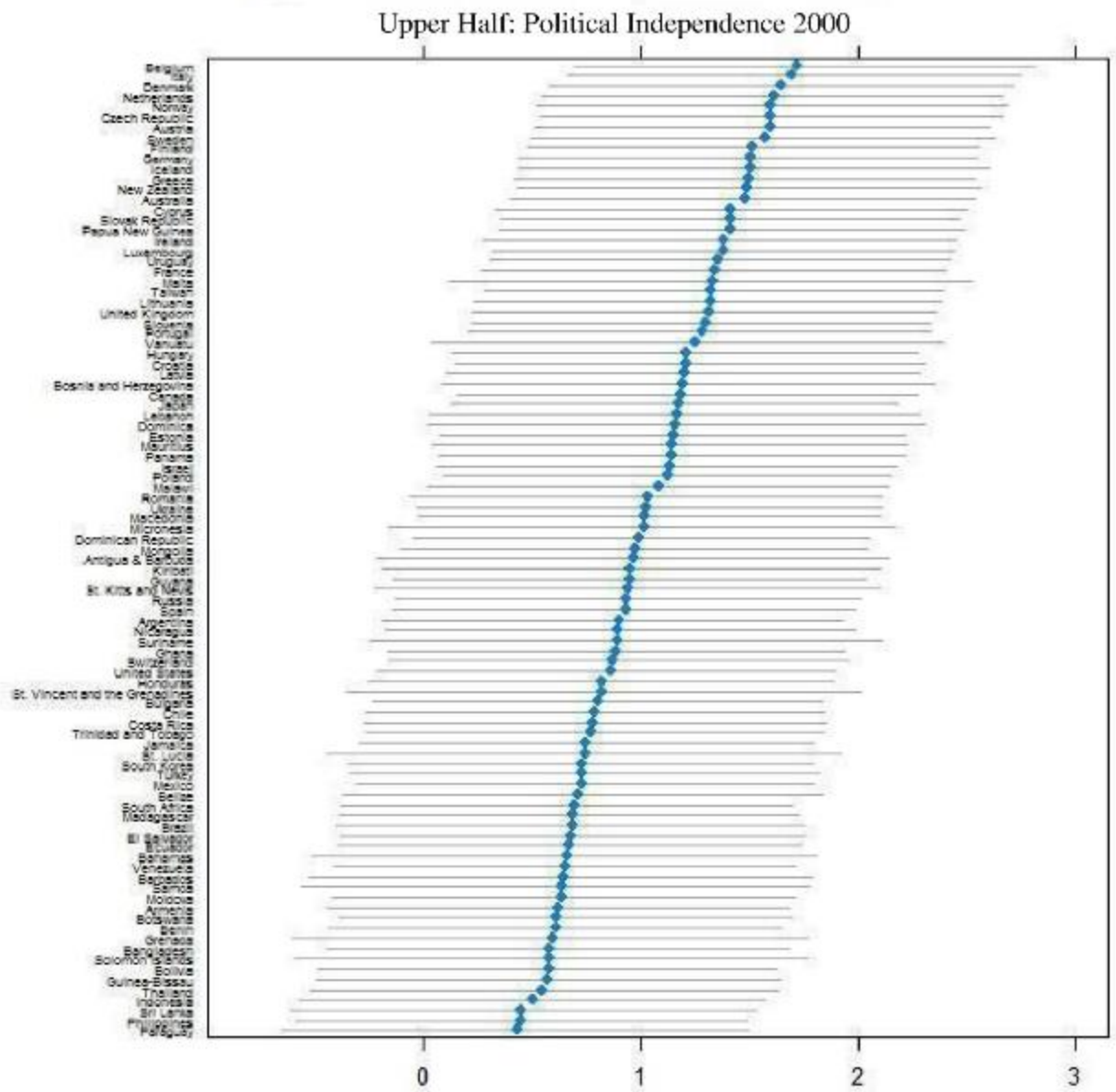


Figure A.5

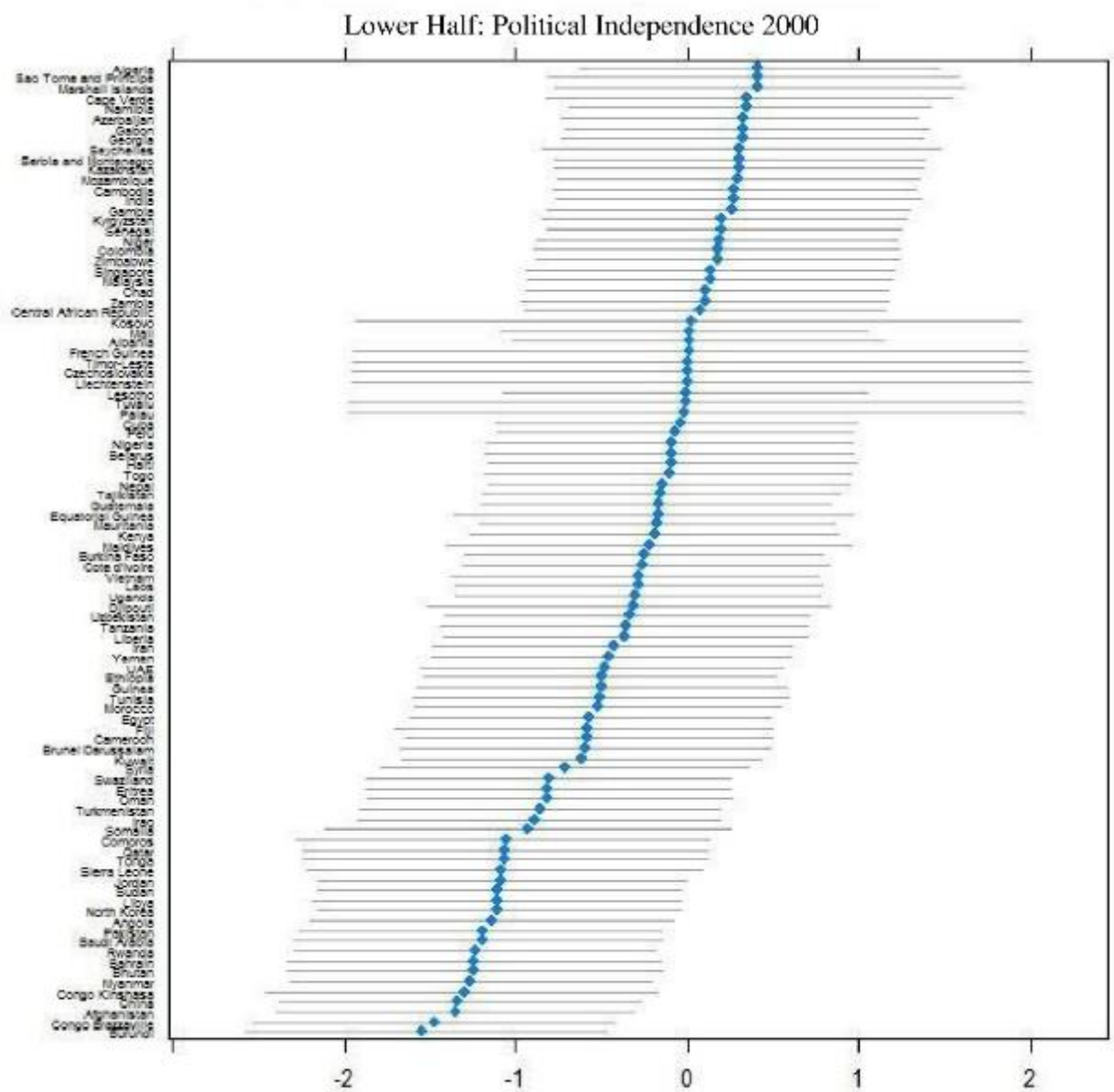


Figure A.6

## Operationalizing Multidimensional Judicial Independence

In this section I discuss the data used to obtain the estimates for the three dimensions of judicial independence: economic, social, and political. The method used is a fully Bayesian latent variable model. In an effort for parsimony I use as a few observable indicators as possible within each dimension. This allows flexibility in the use of these measures for future research.

Table A.1: Economic Independence

	Data source	Years	Obs.	Mean	SD	Min	Max
Foreign direct investment	World Bank	1980-2013	6014	3506.09	15267.33	-31689	314007
Contract intensive money	Clague	1980-1999	3098	0.794	0.151	0.015	0.999
Government effectiveness	World Bank	1996-2013	2827	-0.07	0.9919	-2.45	2.43

Table A.2: Social Independence

	Data source	Years	Obs.	Mean	SD	Min	Max
Count of human rights NGOs in that country	Transnational Social Movement	1981-2003	2188	34.52	30.68	0	182
Count of NGO headquarters	Murdie	1980-2008	3609	2.46	7.64	0	71
Freedom of speech	CIRI	1981-2011	4906	1.98	0.73	1	3
Social norm of corruption	World Bank	1996-2013	2803	-0.65	0.996	-2.06	2.59

Table A.3: Political Independence

	Data source	Years	Obs.	Mean	SD	Min	Max
Political competition (% smaller parties in government.)	Polyarchy	1980-2000	3605	29.76	25.72	0	70
% of minority participation in government	Ethnic power relations	1980-2010	4333	0.153	0.213	0	.98
Existence of political prisoners	CIRI	1981-2011	4897	2.12	0.844	1	3
% of the adult population voting	Polyarchy	1980-2000	3605	30.39	21.43	0	74.59

### Regression Models

In the manuscript, I provided a brief theoretical justification for the effect of judicial independence on each observable indicator. For several indicators there are existing statistical analyses that support this relationship. These include FDI, CIM, and freedom of speech and press. For eight indicators there is evidence in case studies and court decisions to support the relationship. To my knowledge there are no cross-national statistical analyses. In table A.4 and A.5, below, I test the relationship between each observed indicator and judicial independence on a cross-national sample from 1980-2013. The main independent variable is Linzer and Staton's (2015) (LJI) continuous measure of *de facto* judicial independence lagged by one year. The dependent variables are each of the 11 indicators used in the measurement model. I account for within country

variation using fixed effects. In every model judicial independence is a statistically significant predictor of the observed indicator at the 95% confidence level.

Table A.4: The Effect of Judicial Independence (LJI) on Observable Indicators

Dependent Variables	(1) FDI(log)	(2) CIM	(3) Perception of Institutional Effectiveness	(4) Social Norm of Corruption	(5) Ethnic Participation in Government	(6) Participation of Minority Parties	(7) Voter Participation
Judicial Independence (lagged)	9.094*** (0.417)	0.272*** (0.013)	0.595*** (0.108)	1.010*** (0.123)	0.079*** (0.021)	96.680*** (2.323)	26.680*** (2.290)
Constant	0.399* (0.208)	0.663*** (0.006)	-0.365*** (0.055)	-0.574*** (0.062)	0.813*** (0.009)	-14.570*** (1.091)	18.300*** (1.075)
Observations	4,697	2,961	2,223	2,226	4,165	3,401	3,401
R-squared	0.096	0.145	0.015	0.032	0.004	0.350	0.041
Number of countries	188	169	189	189	154	190	190

Ordinary least squares regression models. Lagged independent variable with country fixed effects. Standard errors in parentheses. \*\*\*p<0.01, \*\*p<0.05, \*p<0.1

Table A.5: The Effect of Judicial Independence (LJI) on Observable Indicators

Dependent Variables	(8) NGOs	(9) HROs	(10) Freedom of Expression	(11) Political Prisoners
Judicial Independence (lagged)	2.464*** (0.0496)	2.355*** (0.217)	7.767*** (0.456)	7.717*** (0.458)
Constant	2.091*** (0.0941)	-0.861*** (0.229)	- -	- -
Observations	2,068	3,388	4,682	4,673
Number of countries	190	131	192	192

Models 8 and 9, poisson models with country fixed effects. Models 10 and 11, ordered logistic regression models with country fixed effects. Lagged independent variable. Standard errors in parentheses  
\*\*\* p<0.01, \*\* p<0.05, \* p<0.1

## Formal Model Discussion

Figure A.7 presents the hypothesized relationship between the latent variables of judicial independence. The diagram conforms to path analysis convention, where ellipses represent latent variables, and boxes represent observed variables, disturbances (errors) are not enclosed. A straight arrow is the influence of a variable at the base of the arrow

on the variable at its head. Two-headed arrows represent unanalyzed relationships between the variables that are connected.

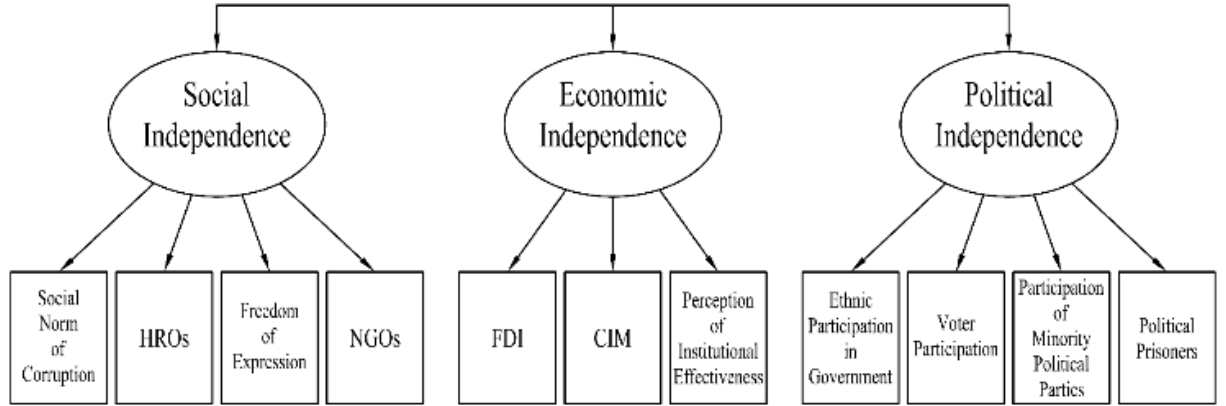


Figure A.7: Path Diagram

The empirical model consists of a measurement model relating to the observed indicators of social, economic, and political independence. I estimate the model simultaneously in the Bayesian framework. Here, let  $\eta$  refer to  $N \times k$  matrix of observed variables (11 observed variables in total distributed between the three respective dimensions, for example in the political dimension, 4 variables).

The underlying measurement model, then:

$$\eta = f(\text{latent})$$

The observed variables are treated as a linear function of the latent variable.

$$Y_i = b_0 + b_1 \text{latent}_i + e_i$$

The latent variables all have the same structure. In the first period (i.e. first year the independent state appears in the data set), the country's latent variable score ( $X_{ijk}$ ) is drawn from a normal distribution with a mean zero and precision of one, where  $i$  indexes country-year,  $j$  indexes observed indicator, and  $k$  refers to the latent variables;  $k =$



(social, economic, and political). The precisions are given Gamma (1, 0.1) priors. The coefficients relating the latent variable to the observed variables (i.e.  $y$ 's) are given normal priors with a mean and unit variance and are constrained to be positive for identification purposes.

$$y_{ij} \sim N(\mu_{ij}, \sigma_j^2)$$

$$\mu_{ijk} = \beta_{jk} X_{ik}$$

$$\eta_{ijk} \sim N(0, 1)$$

$$\sigma_{jk}^2 \sim G(1, .1)$$

$$\beta_{jk} \sim N(0, 1)$$

### Comparison of Unidimensional Latent Measures and the Multidimensional Latent Measure

I also estimated a unidimensional measurement model resulting in one latent variable measure of *de facto* independence using all 11 observable indicators for use in chapter 4 and to compare model fit. Figure A.8 presents the hypothesized relationship between the latent variables of judicial independence.

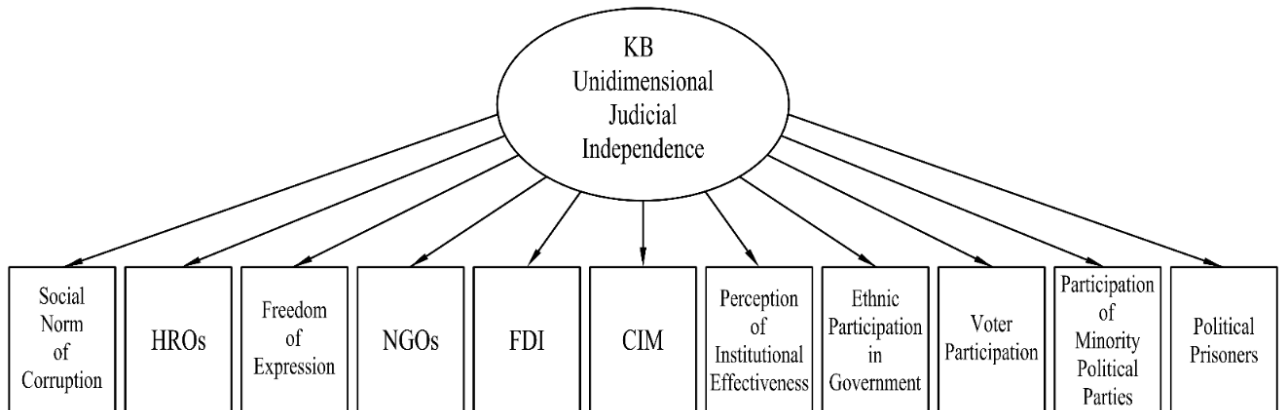


Figure A.8: Path Diagram

The formal model is expressed with the same notation as discussed above:

$$y_{ij} \sim N(u_{ij}, \sigma_j^2)$$

$$u_{ij} = \beta_j X_{ij}$$

$$X_{ij} \sim N(0, 1)$$

$$\sigma_j^2 \sim G(1, .1)$$

$$\beta_j \sim N(0, 1)$$

The correlation between the posterior means of the multidimensional measures, unidimensional measure, and LJI unidimensional measure are in the table A.6.

Table A.6

	KB Unidimensional latent variable	Social independence	Political independence	Economic independence	LJI
Unidimensional latent variable	1				
Social	0.81	1			
Political	0.80	0.55	1		
Economic	0.76	0.64	0.42	1	
LJI	0.80	0.66	0.71	0.65	1

The posterior means of the multidimensional measures have a positive correlation with the KB unidimensional measure. Not at all perfectly related. The highest correlation between the social dimension and the unidimensional measure is correlated at 0.81. The KB unidimensional latent measure correlates with LJI at 0.80. The multidimensional measure correlates with LJI; at 0.66 in the **Social** dimension, 0.71 in the **Political**

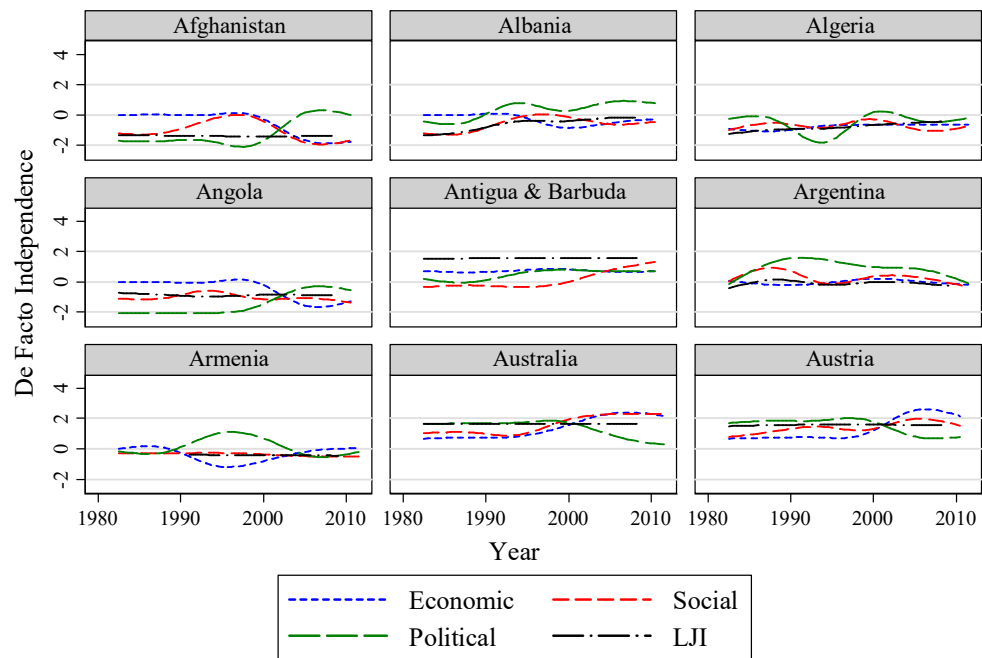
dimension, and 0.65 in the **Economic** dimension. I also implemented a multiple indicator multiple causes model (MIMIC) to include measures of *de jure* independence. Inclusion of the *de jure* indicators increased uncertainty. This may reflect what Rios-Figueroa and Staton (2012) suggest that *de jure* independence may not correlate with *de facto* independence. Therefore, injecting *de jure* indicators may infect the *de facto* measures.

### Summary Statistics for the Multidimensional Measure

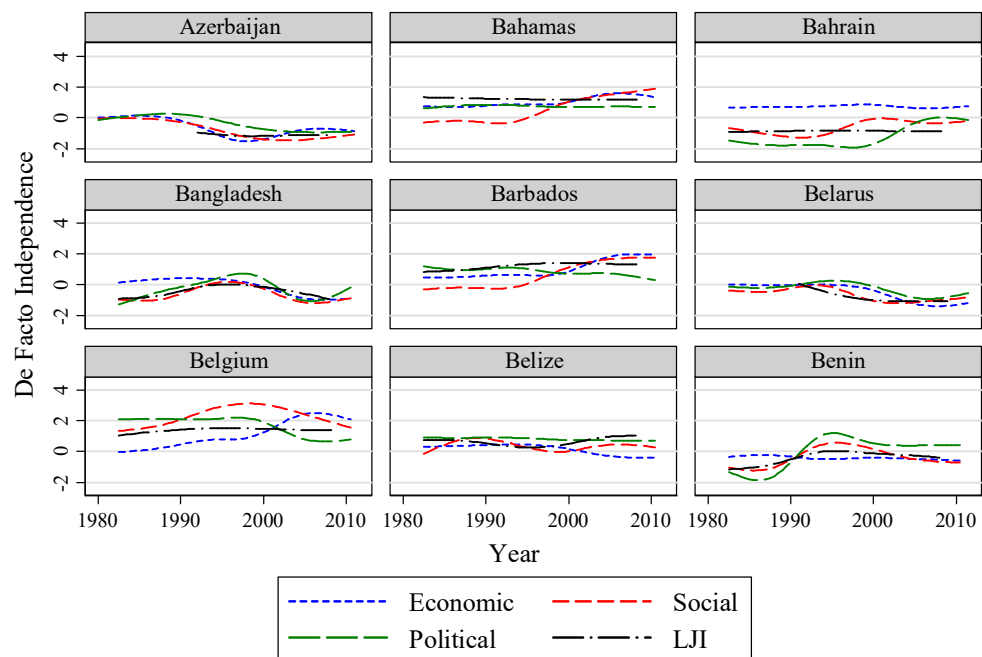
Table A.7

Latent Measure	N	Mean	Standard deviation	Min	Max
Social independence	6,422	0.046	0.691	-1.460	4.036
Political independence	6,422	0.125	0.755	-1.564	1.804
Economic independence	6,422	0.0005	0.728	-3.321	2.297

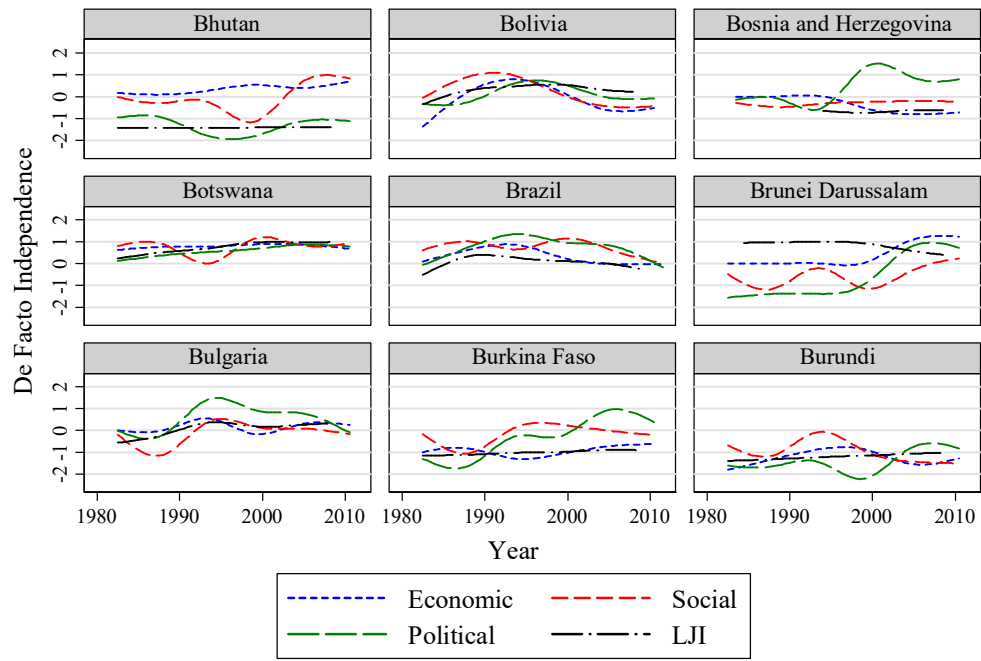
## Judicial Independence Over Time by Country



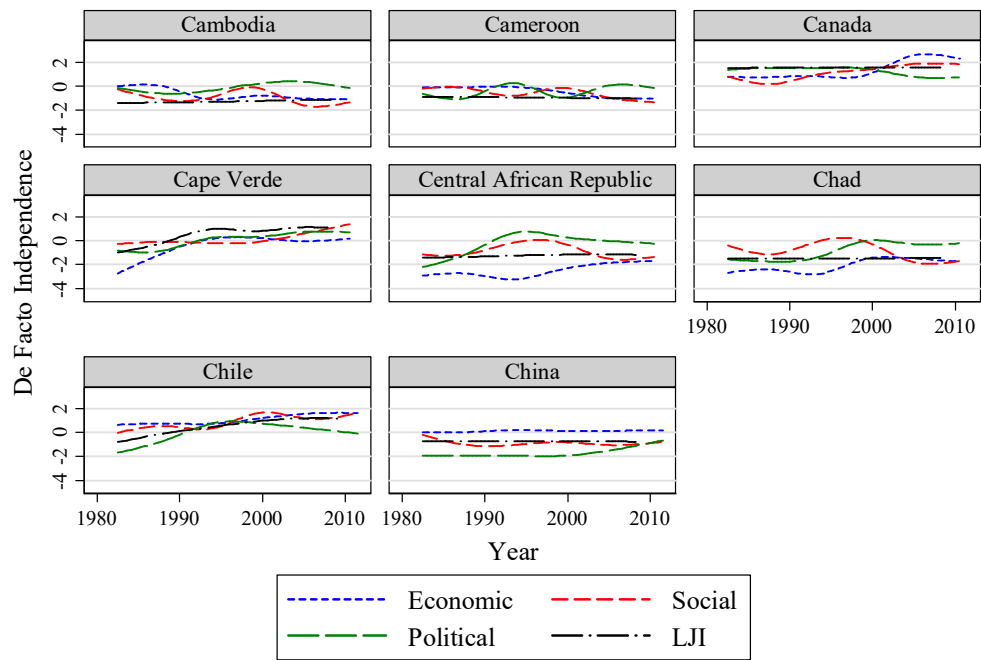
Graphs by Country



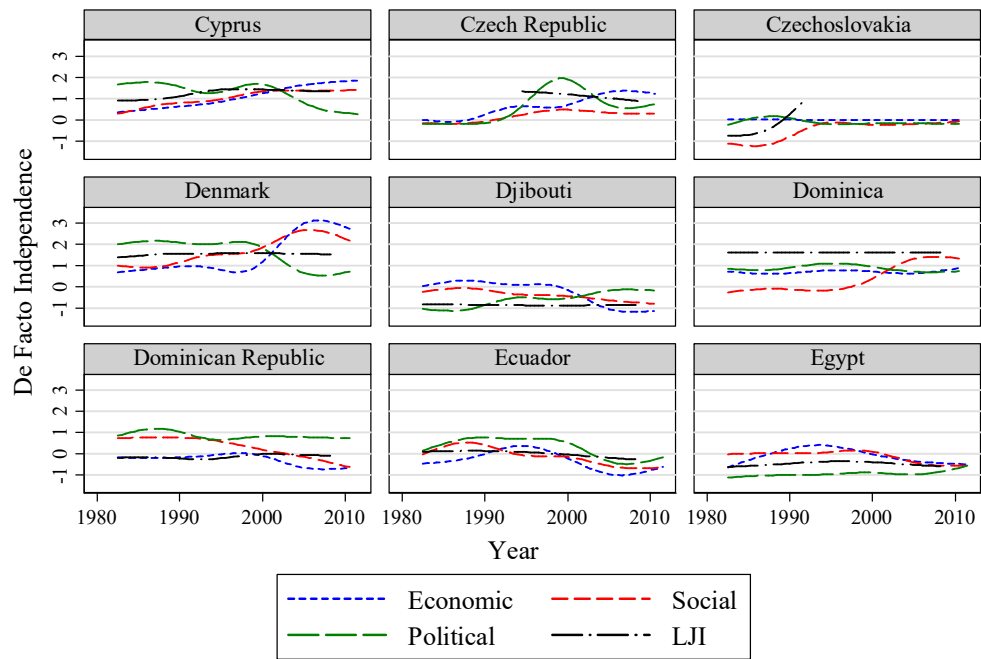
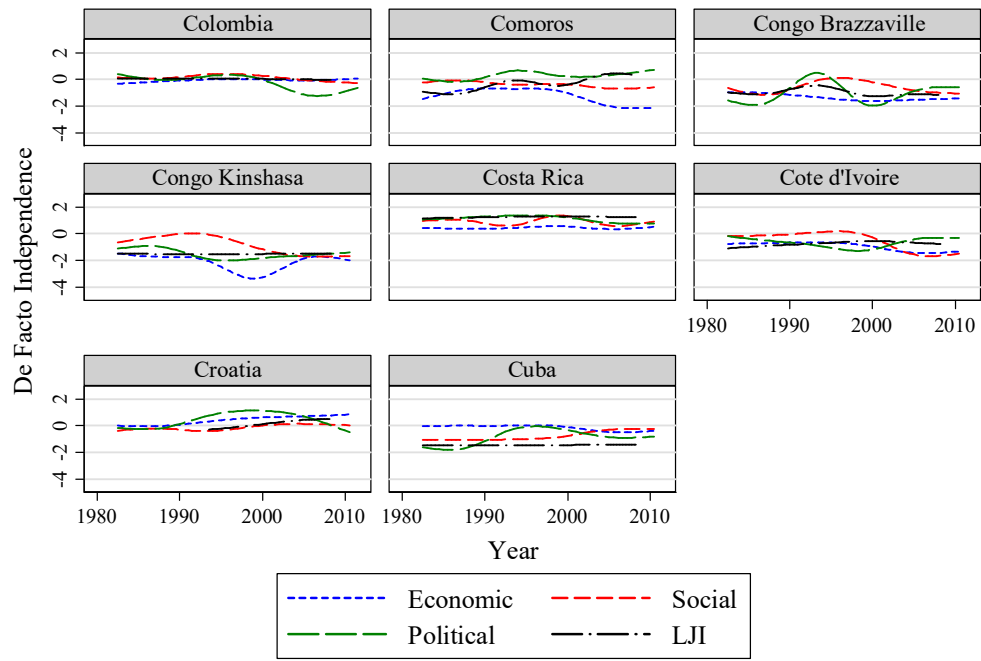
Graphs by Country

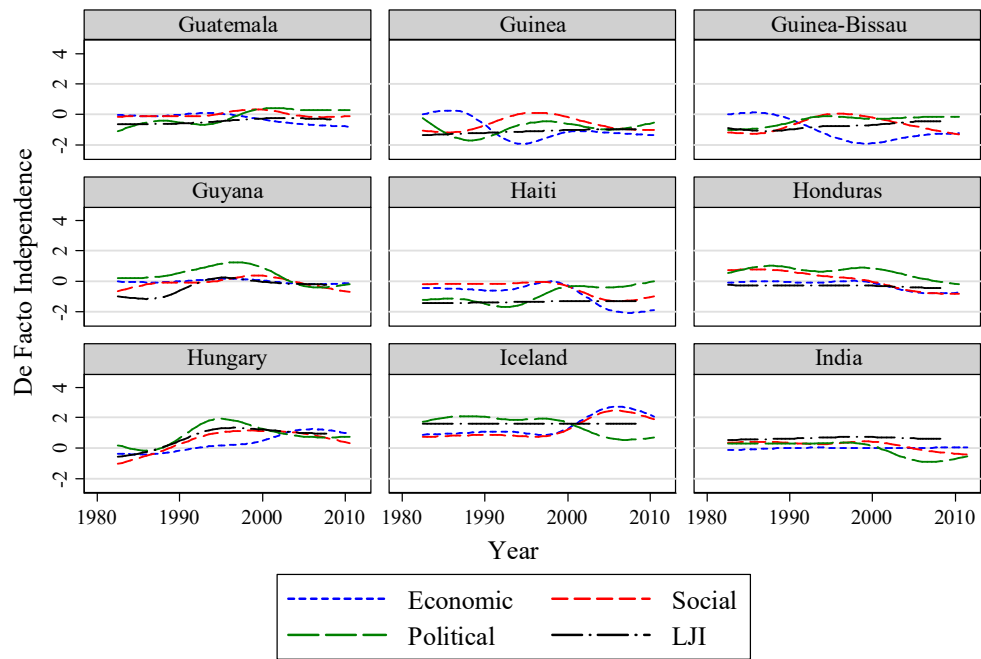
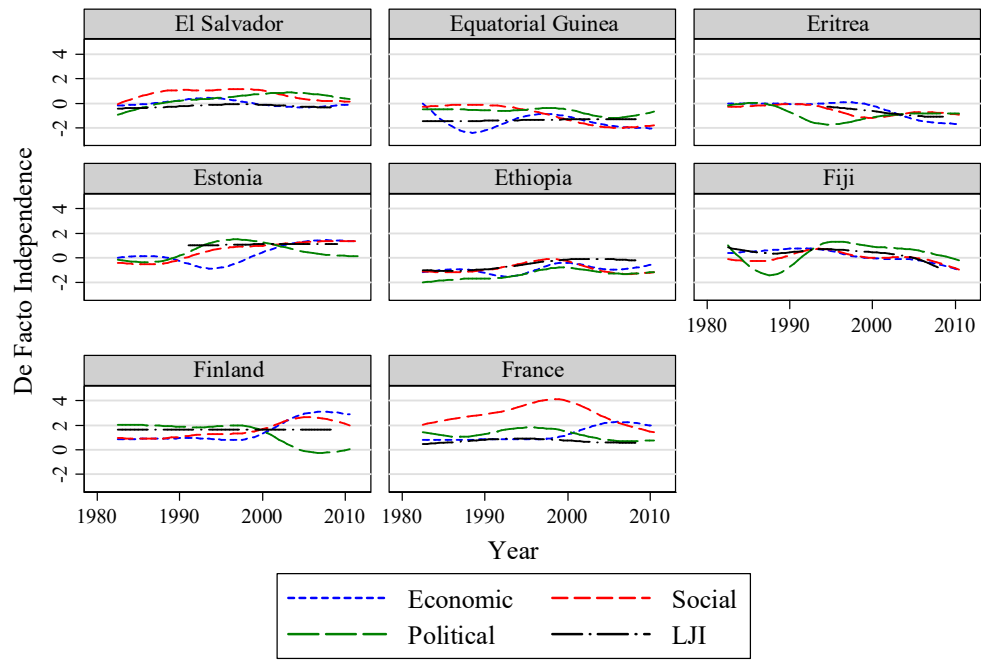


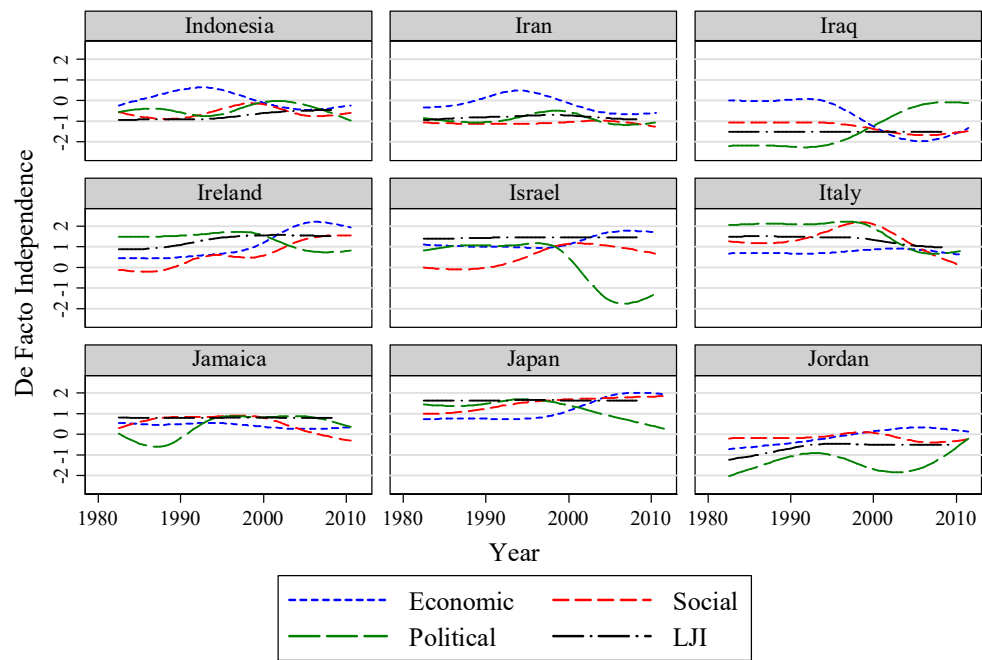
Graphs by Country



Graphs by Country

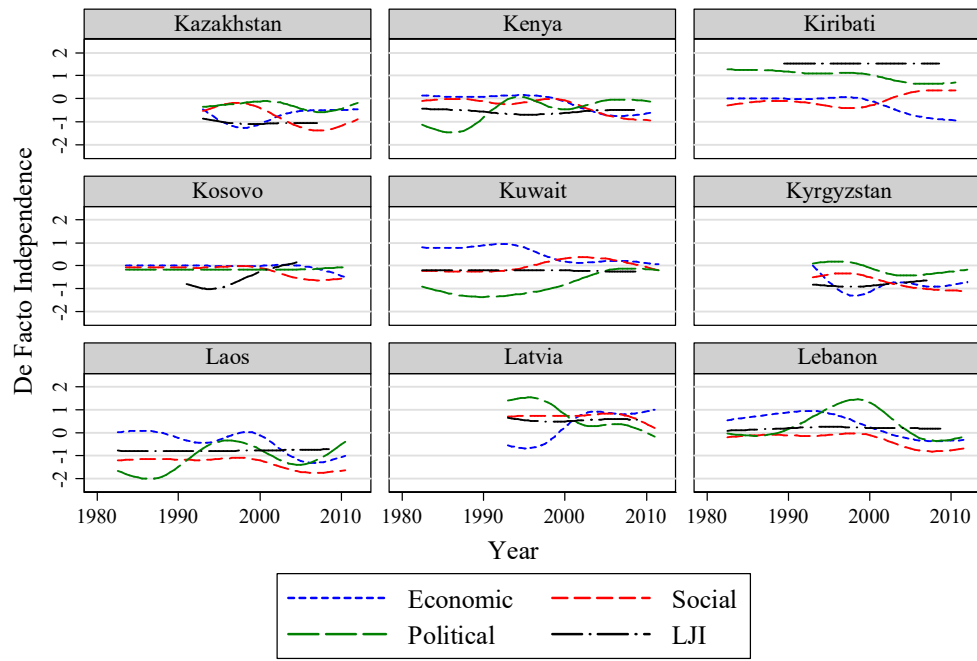




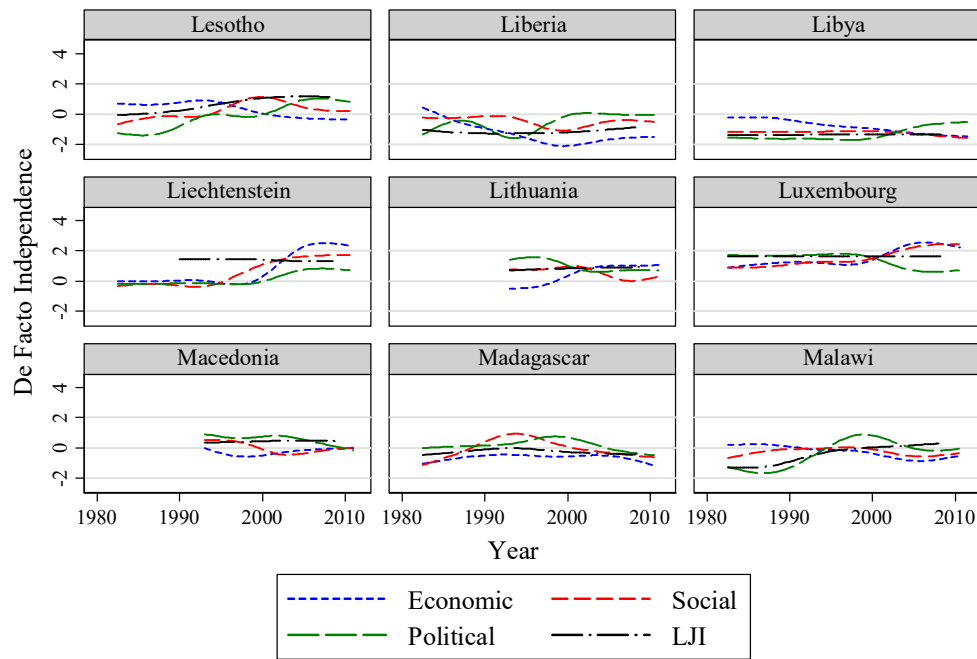


Graphs by Country

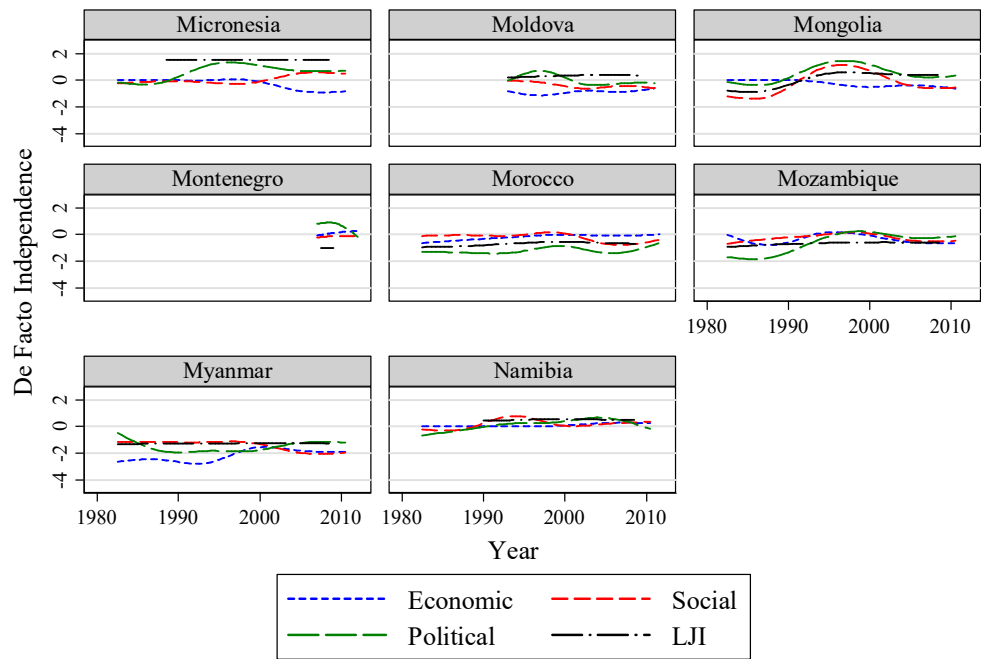
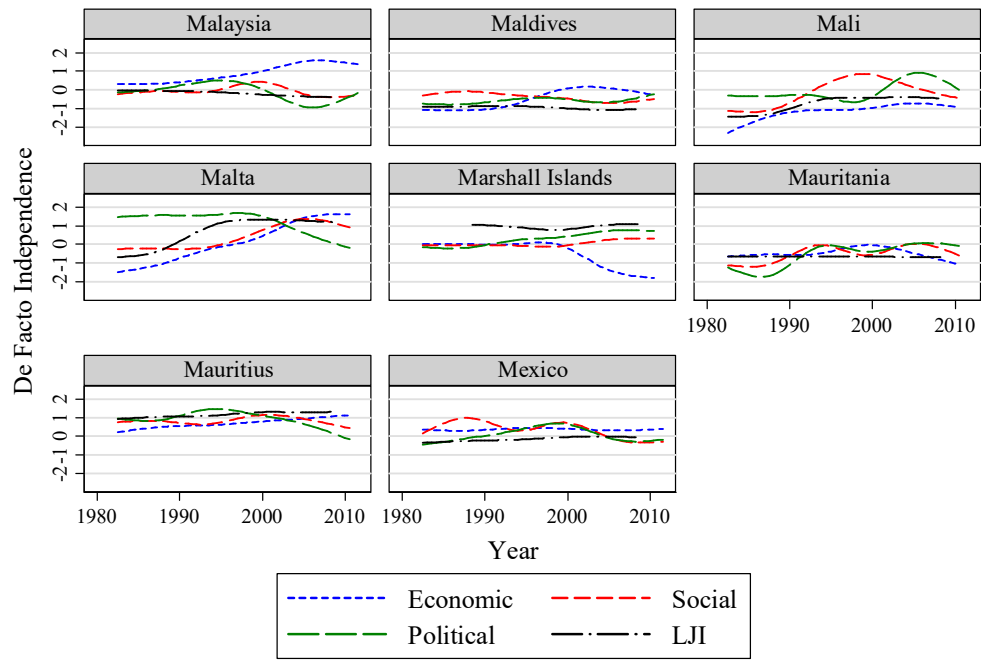


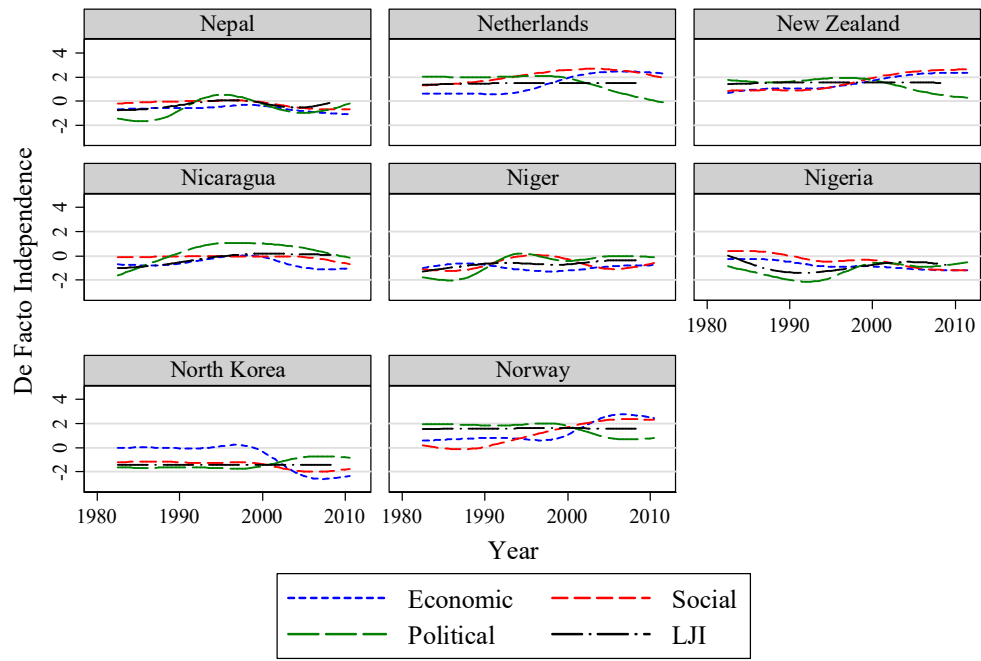


Graphs by Country

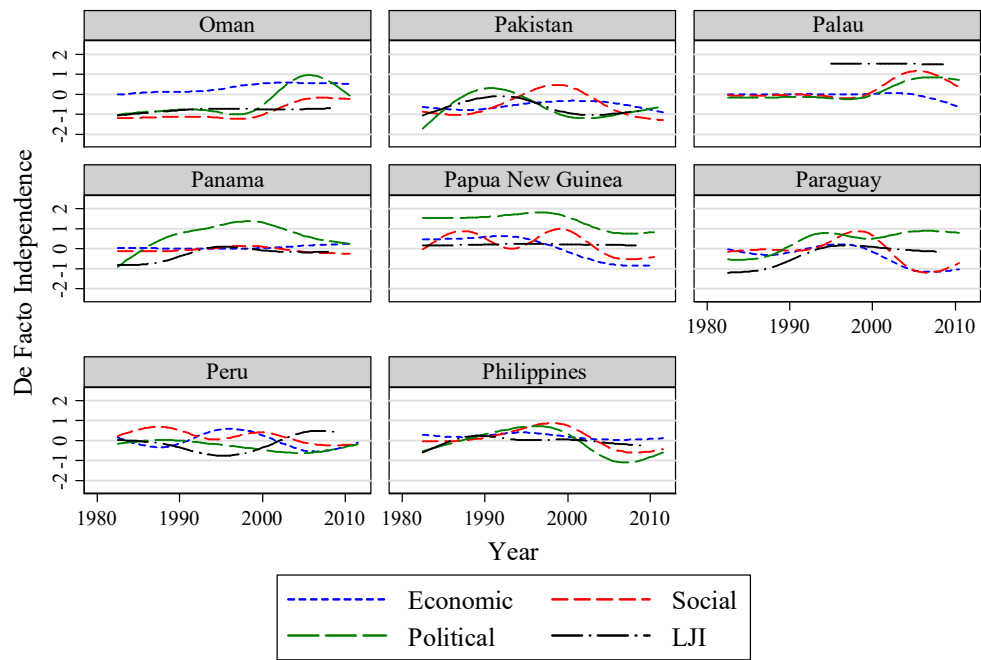


Graphs by Country

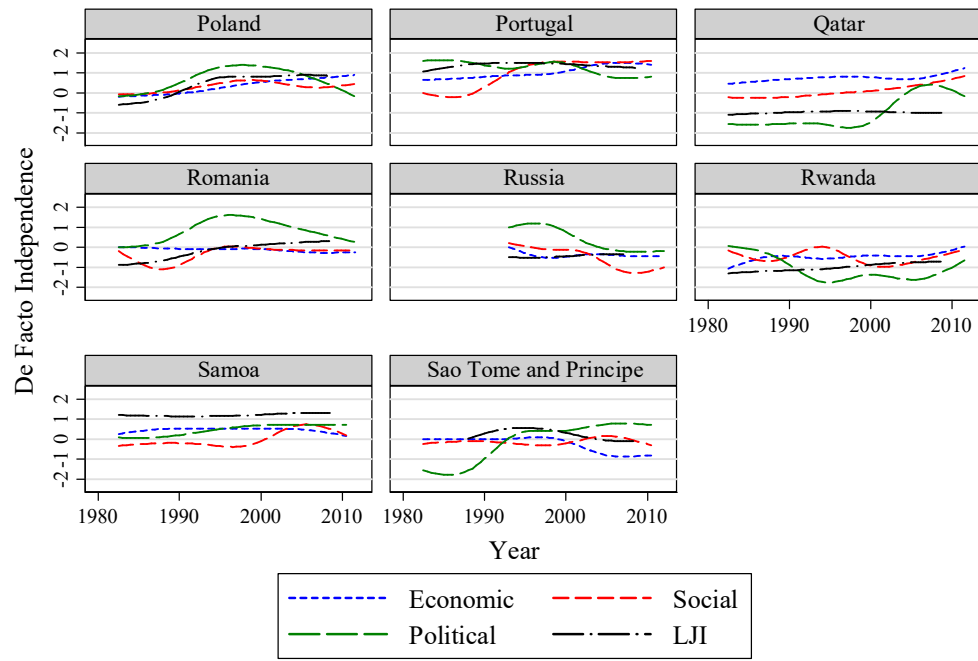




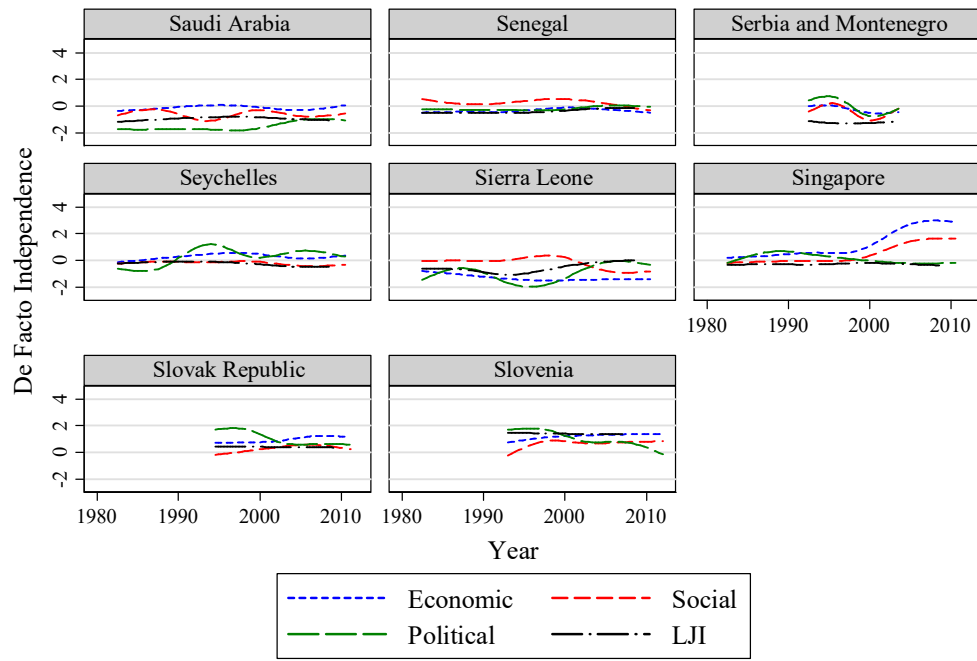
Graphs by Country



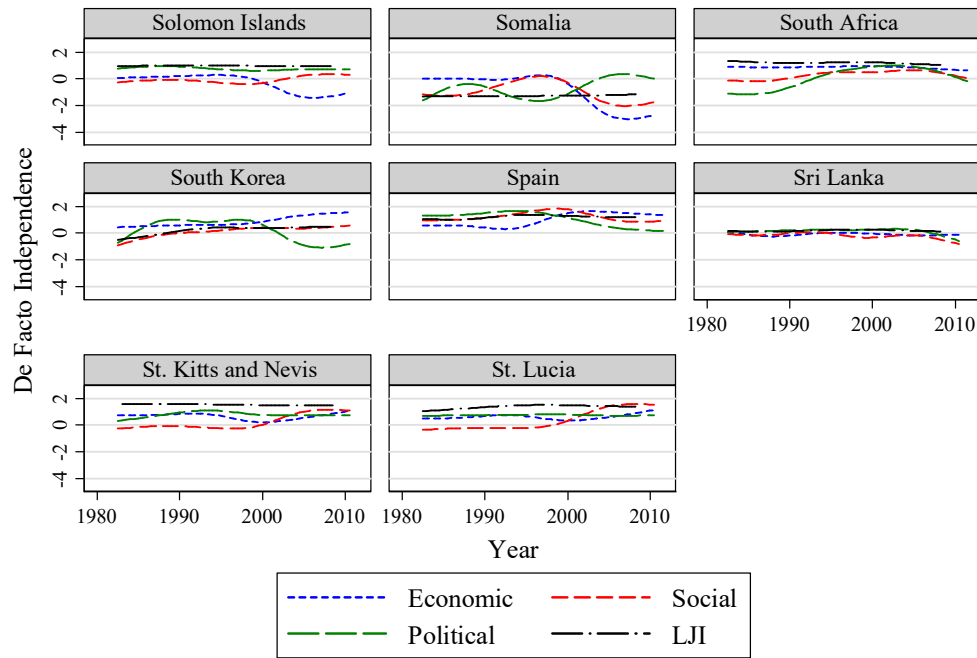
Graphs by Country



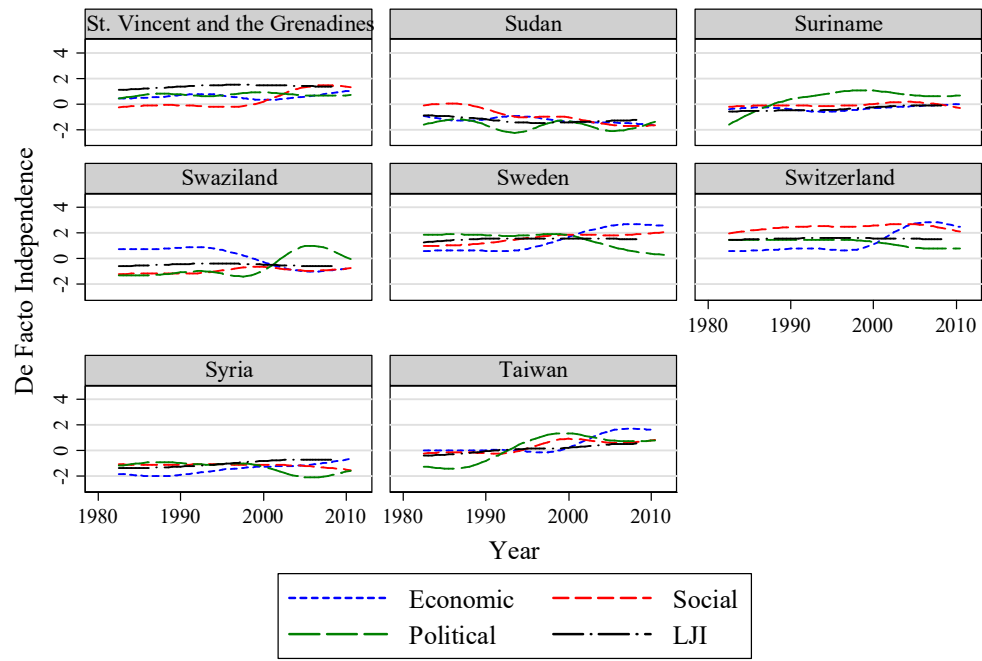
Graphs by Country



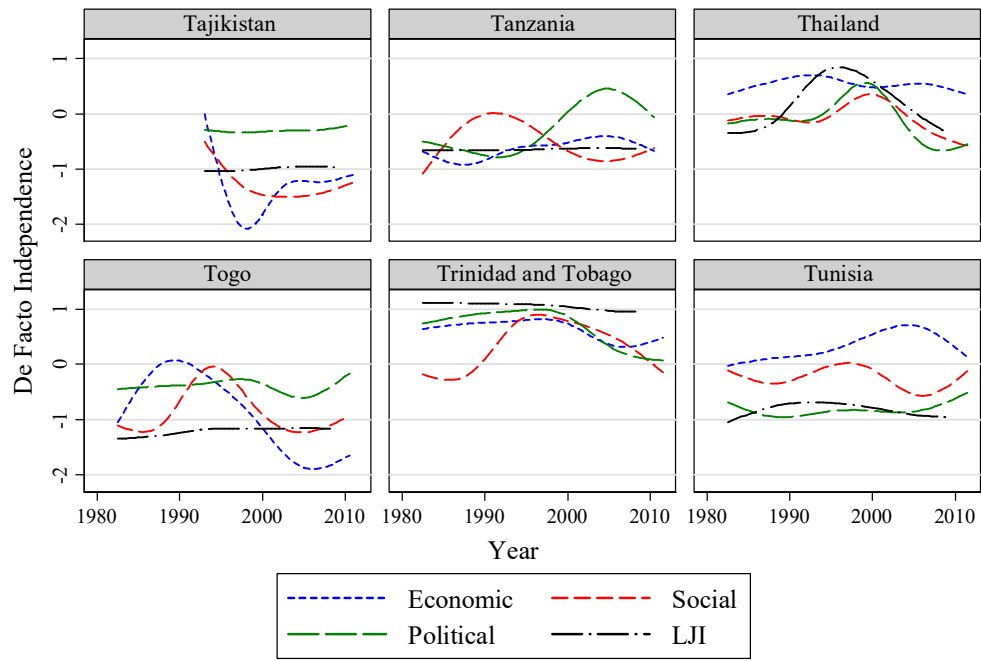
Graphs by Country



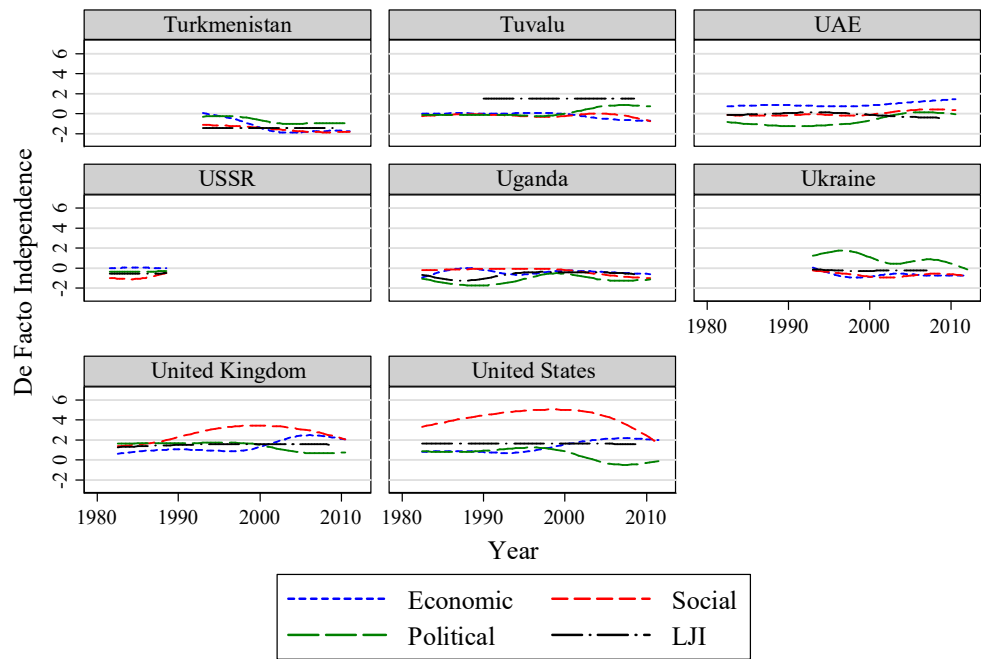
Graphs by Country



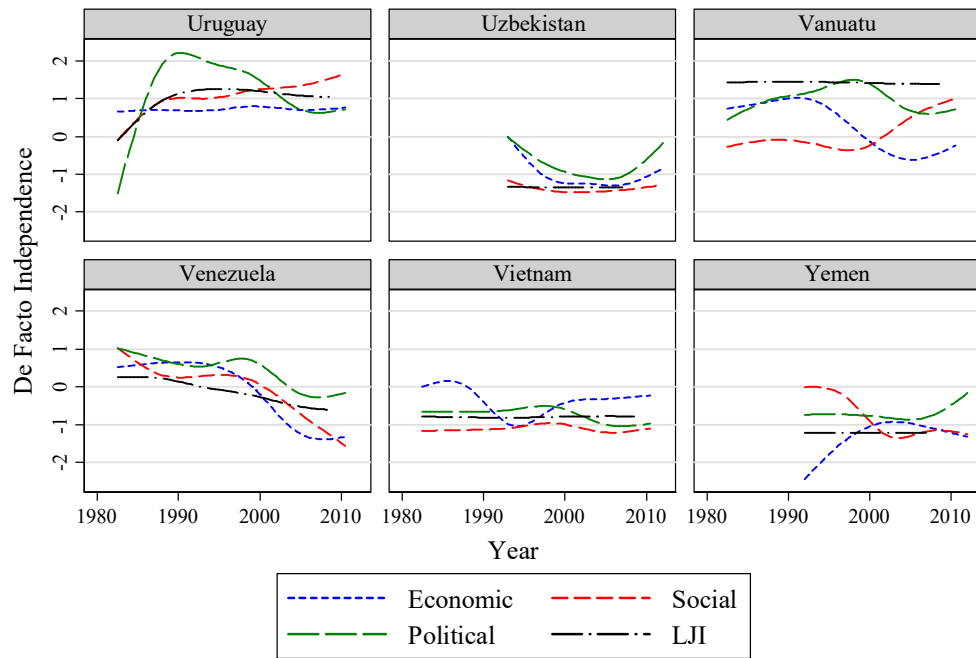
Graphs by Country



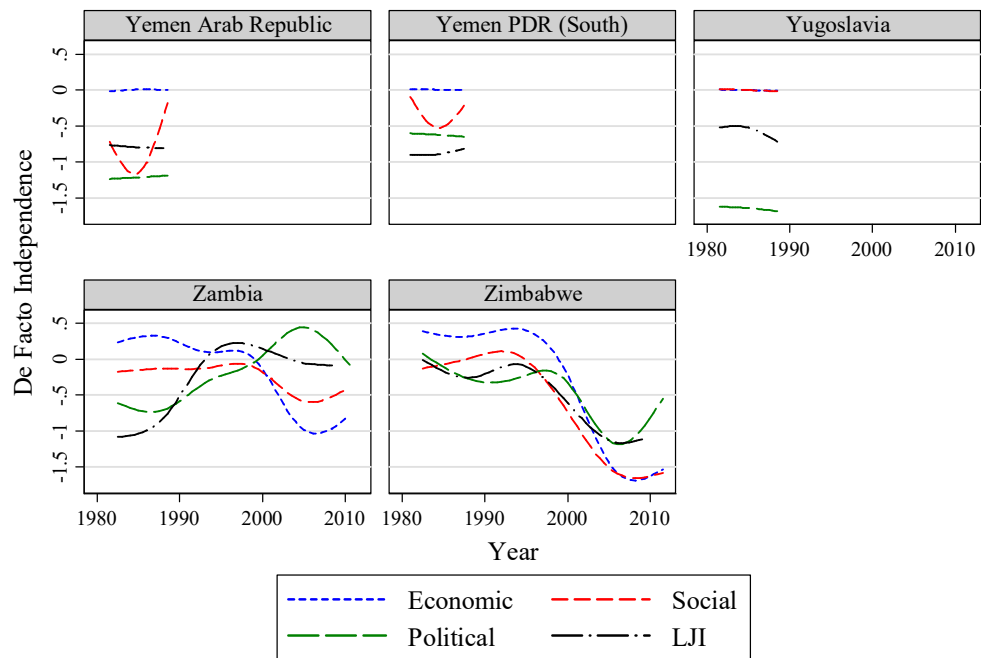
Graphs by Country



Graphs by Country



Graphs by Country



Graphs by Country



## **APPENDIX B**

### **LOOKS CAN BE DECEIVING: JUDICIAL COUNCILS AND JUDICIAL INDEPENDENCE**

The qualitative component of this manuscript is primarily based on data collected in fieldwork investigations in Buenos Aires, Argentina June-July and December of 2014. I chose Argentina to conduct fieldwork for several reasons. First, the country fits the results of the large-N study. Second, Argentina is open and accessible for academic research. Third, I have rudimentary Spanish language skills, which facilitated communication. In some cases I was assisted by a translator to ensure accurate data. Fieldwork was conducted in Buenos Aires due to its location as the capital city and seat of government, home to the national judicial council, large proportion of appointed judges, proximity of the national bar association, location of NGO headquarters, and location of the Supreme Court.

The dynamics of judicial appointment and the judicial council were examined by interviews with councilmembers, politicians, officials of administrative agencies, and members of the legal NGO community. I also conducted interviews via skype with former judicial council employees residing outside of Argentina. In total, twenty federal officials were interviewed and fifteen are directly quoted in this article. Each interview lasted a half-an-hour to four hours. Most interviews were conducted in the offices of the interviewee. Some interviews were recorded and notes were taken during the interviews and compiled immediately thereafter.

Due to the sensitive nature of the topic and small number of federal council judicial members, thirteen, I do not identify interview participants by status unless given expressed permission to do so. In the manuscript, I identify interviews with random assignment of alphabetical values followed by the date of the interview. For example, (author's interview subject A, December 2014).

These interviews are complemented with a close reading of internal documents, including judge nominee evaluations and policy reports. I was granted access of these internal documents by two interviewees. These documents listed the placement of judge nominees at different points in the judicial council's assessment process: test scores, professional qualifications, and interview. I assessed archival data via Argentina's electronic [database](#). This material is referenced in the manuscript and is available via a url.

I initially identified interviews by referencing existing literature and reviewing the acknowledgement section of books and articles. For example, I reviewed the acknowledgements section and works cited of Gretchen Helmke's *Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy* (2002). I found contact information and emailed interviewees who had participated in existing academic research. I also contacted academic scholars studying Argentine courts and asked for their help in initial points of contact. At this stage, I developed a list of potential contacts working within the non-governmental organization (NGO) and academic community. In the spring of 2014 I began emailing these contacts asking if they would be interested in meeting with me for an initial round of fieldwork to initiate in July 2014. A sample email is below:

*Good morning X,  
I hope this finds you well. X gave me your email address and suggested I contact you. I am X student at the X and my dissertation research is on judicial politics. I will be traveling to Argentina in July and I am writing to ask if you would consider meeting with me?  
To tell you a little about my research. I am interested in learning more about the Consejo de la Magistratura: appointment of council members, decision making on judicial nominees, relationships among council members, and relationship with justices and politicians (I can provide you more detailed information if needed). Your professional background and experience in the Consejo would be so helpful. Please let me know if you can carve out a little time in your busy schedule to meet. It would be very much appreciated.  
Thank you for your time and consideration.*

During my first round of fieldwork I met with the five references from academia and NGOs. Considering the topic under study these contacts provided contact information for politicians, legal experts, other NGOs, and academics familiar with the topic. During this round of fieldwork, I familiarized myself with archival materials. In preparation for a second round of fieldwork, December 2014, I contacted the second-generation references via email in October 2014. I explained the content of my research and asked for a meeting in person or via skype. A sample email is below:

*Good morning X,  
I hope this finds you well. X gave me your email address and suggested I contact you. I am X student at the X and my dissertation research is on comparative judicial politics. I will be traveling to Argentina in December and I am writing to ask if you would consider meeting with me? And if so can we set a date and time? I have been in touch with X and I hope to be able to meet with him as well. If you have any other recommendations for people to meet who are familiar with this topic please keep me in mind (academics, politicians, council members, staff, etc....). I hope to be able to meet with you in December!*

*Specific research interests:*

*I am interested in the Consejo de la Magistratura and its relationship with judicial independence. I have researched quite a bit on judicial councils cross-nationally and read policy papers from CIPPEC, and other NGOs, as well as followed the local media.*

- *I am curious to explore the evolving role of the Consejo (theoretical role versus actual performance) and composition of membership within the Consejo (connections between council members and politicians or judges, and connections to judicial nominees).*
- *I would like to learn more about the role of the Consejo in the increasing backlog of judicial vacancies. I am interested in exploring the implication of these vacancies.*
- *I am curious about the appointment and removal process of subrogantes. How long subrogantes remain in the position and how are they removed? Are subrogantes replaced by the council if they are not performing? How do subrogantes affect the independence of the court?*

I conducted one interview via skype in October/November 2014 with a former legal council to a member of the federal judicial council. This person also provided contacts within the NGO community, a former attorney general, and anti-corruption prosecutors. In December 2014 I returned for a second round of field for a total of fifteen interviews. These interviews consisted of members from both the pro-Kirchner and anti-Kirchner political parties. Some interviewees were familiar with the council at its origination others solely observed/participated in the council during the Kirchner presidencies.

### **Sample interview questions:**

#### **Composition of the *Consejo de la Magistratura***

1. The *consejo* consists of members coming from different backgrounds. Do factions exist because of this? If so, do they form alliances to nominate candidates to the *terna*? What is this process?
2. Whom do you communicate with while making decisions on nominees? Do political party representatives make decisions differently from other members of the *consejo*? In other words, are there pressures from party discipline to choose certain judicial nominees?

3. What are considerations of the bar and the universities when making their appointments to the *consejo*? How do they choose a representative?
4. Are there any types of negotiations with the judges, or politicians, or the executive branch when making choosing their member of the *consejo*? Are these organizations lobbied by the political parties regarding their nominee to the *consejo*? If so how do they lobby?
5. Are members of the *consejo* lobbied by outside pressures (political or private interests) when deciding on a *terna*?
6. Has the *consejo* functioned differently post implementation of Law 26,080? (I am interested to see if there are differences in *consejo* performance with less judges and no Supreme Court representation).
7. In general, what is your perception of the *consejo*?
8. How has the *consejo* increased professionalization of the judicial system?
9. How has the *consejo* affected judicial independence?

#### **Nominations to the *consejo/ternas***

1. When *consejo* ranks candidates what are the considerations in the C.V. (resume)?  
In other words, a CV can display professional associations, memberships, does this influence the *consejo*'s ranking of the candidate?
2. How important is the interview in the process?
3. What qualifications do you look for when a judicial candidate?
4. Do certain qualifications or memberships in associations have more importance than other qualifications?
5. Do you communicate your preferences with other members of the *consejo*?

6. Once you decide on particular candidates what is next in the process of creating the *terna*? (I am trying to differentiate between how this functions in theory versus reality)  
  
Does this process every change?
7. How important is it for the *consejo* to recommend judges to fill a vacancy outside of their ‘home’ jurisdiction? (Idea is to eliminate political ties and guarantee impartiality).
8. What would you do to change the nomination process? Are *consejeros* concerned with the lack of transparency of the ‘contest’ for nominations?
9. *Ternas* are legally binding. Is the executive branch able to avoid adhering to binding *ternas* during the nomination process? Are you aware of other loopholes in this process exploited by the political process?

#### **Temporary Judges (*subrogantes*)**

1. Can we talk about *subrogantes*? What is your impression of the use of *subrogantes*? Are there any problems or benefits?
2. Are *subrogantes* more prevalent in certain jurisdictions?
3. If the executive assembles a list of ‘approved’ judge alternates, how is this different than choosing an appointment directly?
4. The executive has delayed providing lists of judge alternates. What has been the outcome of the delay?
5. Does the *consejo* have a role in this process?
6. Are *subrogantes* more prevalent in certain jurisdictions? And/or do some jurisdictions have *subrogantes* for a longer period of time?

7. What happens if the *subrogante* is not ‘performing’ to expectations? Who has influence on his/her removal? Are *subrogantes* replaced by a different *subrogantes*?
8. What are the pressures on *subrogantes*, i.e. is it hard for them to work, are they perceived as legitimate, knowledgeable, etc...?
9. Are judges in other courts able to act as a *subrogante*? How does the extra workload affect their performance? Judges are allowed to act as surrogates on other courts, does this increase their salary?
10. How does the political/public community feel about *subrogantes*? Is it a favorable institution, i.e. reduces the judicial backlog or workload?
11. Do vacancies cause an increased backlog in cases? Has the efficacy of the court been impacted by the backlog?

### **Independently behaving judges**

1. How is the treatment of more ‘independent’ judges? Are they placed in less important jurisdictions? Are *consejo* nomination lists created keeping this in mind?
2. Are there an inordinate amount of complaints against independent judges?