Independent Judiciary

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George Tridimas

University of Ulster, Ulster Business School

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Abstract

After describing the closely related concepts of judicial independence and independent judicial review of policy, the essay offers an overview of four issues. (1)Reasons for establishing an independent judiciary, including its ability to resolve problems of information asymmetry between citizens – principals and public officials – agents, transform constitutional declarations to credible commitments and provide a mechanism of political insurance. (2) Mechanisms for appointing judges and the jurisdiction of courts. (3) Modelling the role of the judiciary as an additional veto player in games of collective decision making and policy implementation. (4) The judiciary an explanatory variable and its effect on economic variables of interest like economic growth and the size of government.

1 Definition

Judicial independence means that courts enforce the law and resolve disputes without regard to the power and preferences of the parties appearing before them (La Porta et al, 2004). Its theoretical antecedents are traced to the Enlightenment and its application in practice dates to the US Constitution. Judicial independence is an indispensable part of the rule of law. The rule of law requires that laws apply equally to both ordinary citizens and public officials, and that they protect the rights of individuals against the power of the state in both the political and economic spheres. In this respect the rule of law and judicial independence are inextricably linked with liberal democracy. The literature on the topic is enormous and cuts across different disciplines including law, economics, politics and sociology. It is not possible to do justice to this scholarship in the confines of the present essay; rather its aim is to present a summary of the main issues. First, it considers the rationale of judicial independence and the closely related judicial review. Second, it looks at the institutional arrangements for judicial independence. Third, it considers how independent courts are modelled in the collective choice framework. Fourth, it discusses some evidence on the effects of judicial independence on economic variables of interest. These issues are analytically treated as separate but are best understood in relation to each other.

2 Rationale for judicial independence

A Judicial independence and related concepts

An independent judicial authority is necessary to resolve disputes and maintain the rule of law which are prerequisites for the functioning of a market economy and a free society. In general, two parties in dispute may resolve their differences by fighting violently against each other or by asking a third party to arbitrate. Realizing that fighting may result in serious inefficiency (destruction of life and property), they may ask a third party to adjudicate and agree to abide by its ruling. They will only do so, however, if they are reasonably confident that the adjudicating party is a neutral and unbiased referee. Disputes may emerge between private entities (citizens, companies or other organizations); between private entities and the state which among other cases is always a litigant in cases of economic regulation and criminal acts; and between different state organizations (central government, local authorities, nationalized industries, and other public law bodies). Judges with the power to issue binding rulings must then be shielded from the threat of corruption and intimidation by both private litigants and the arms of the state.

However, the very act of referring a dispute to a mediator generates a new conflict: When the dispute resolver declares a winner and a loser, his legitimacy may be undermined leading to the collapse of the adjudication process and its benefits. The reason is that a ruling which obliges parties to behave in a particular way (take specific actions, pay damages, fines, sentence to prison) creates a two–against–one situation (winner and judge against the loser), which is resented by the loser. In order to overcome such problems arbitrators base their rulings on generally accepted principles of justice and conduct as expressed in formal laws and informal norms, and adopt rhetoric of normative justification. The two–against–one problem is even more pronounced in cases where the state is one of the disputants. A delicate balancing act then must be performed between the need to resolve disputes, protecting the independence of the judge and ensuring that he is perceived as serving only notions of justice.

Closely related to judicial independence, is the function of judicial review of policy, where courts may examine and subsequently ratify or annul laws and policy measures, passed by the legislature and enacted by the executive branch of government, for their compatibility with the constitution or other relevant statutes (like declarations of basic rights), and have been enacted according to the stipulated procedures (Stone Sweet 2002). Similarly to ruling in disputes between private parties, judicial review of policy is meaningless unless the reviewing judge is independent of the government. Two further related concepts are those of judicial activism and judicial discretion. Judicial activism is the propensity of courts to query the decisions of elected officials and range from "nullifying acts of the legislature, to abandoning neutral principles, to deciding cases in a politically 'liberal' or 'conservative' fashion" (Hanssen 2000 p. 538). Judicial discretion is understood as the degree to which the judiciary can implement rulings without being overruled by one of the other branches of government (Voigt 2008).

The interdisciplinary literature analyzing judicial independence can be divided into two strands. The first includes scholarship that treats a politically independent judiciary as an endogenous variable and examines the reasons for its establishment and the characteristics and degree of its political independence. The second strand considers courts as an explanatory variable and seeks to understand how it affects other political and economic variables of interest, mainly but not exclusively economic growth.

B Reasons for judicial delegation

A number of in truth complementary explanations of an independent judiciary and its review powers have been proposed in the literature. For a review complementary to the issues taken

up in the present section, the interested reader is referred to Harnay (2005). In all cases the starting point is the constitution. Constitutions, written or unwritten and other fundamental charters specify the rules by which collective decisions are made and the constraints set upon the government and the citizens. They contain declarations of general principles, procedures, organisational forms and rights and obligations, which in the absence of complete information and perfect foresight about future changes in tastes and technology, are rendered as incomplete contracts riddled with problems of interpretation and enforcement. The judiciary is the arm that interprets and enforces the constitution, all ordinary laws and policy measures, and for this reason judicial independence and judicial review are often analyzed jointly.

Modern scholarship uses the insights of the economic analysis of institutions and game theory to examine the benefits of delegation to courts, see Law (2009) and Tiede (2006). Delegation of decision making by uninformed principals, like the citizens or their political representatives, to the judiciary, a specialised agent, offers several benefits. (a) It resolves problems of information asymmetry as courts develop the relevant expertise in resolving disputes and interpreting and enforcing the law, which subsequently allows specialisation of labour and increases welfare. (b)By taking resolution of constitutional disputes away from partisan politics and handing it to "politically disinterested" judges, judicial independence promotes the long-run interests of citizens. Politicians are better informed than ordinary citizens and exercise discretionary actions which opens up the opportunity for abuse of power to pursue their own interests at the expense of the rest of the society. Citizens may be protected from such abuses by subjecting politicians to elections, which allows voters to confirm or reject politicians, and by setting up checks and balances, where decision making is divided between different arms of government and each arm can block the actions of the rest. An independent judiciary is part of the latter mechanism. As it does not need to pander to short term shifts in public opinion it may be trusted to look after the long–run interests of citizens and control politicians. Thus, judicial independence is a mechanism that transforms constitutional declarations to credible commitments. Specifically, citizens wish to protect certain individual rights when the cost suffered by someone who is denied that right is very large relative to the gain obtained by others when the right is denied, and when those who grant the right, are uncertain whether they will be protected or harmed by that right (Mueller 1991). For example, pronouncements of individual freedoms, property rights, protection of minorities, non–discriminatory taxation and the like can be trusted by the citizens, who safe in this knowledge will develop a longer time horizons increasing investment, growth and welfare (Maskin and Tirole 2004). Note that in the credibility rationale of judicial delegation the independent judiciary protects the interests of citizens against a mighty government, and political competition and judicial review are substitutes. This is based on an underlying conflict between on the one hand politicians (who irrespective of partisan ideologies pursue their personal interests against those of the citizens) and on the other hand all the citizens.

(c) Contrary to the credibility view, the political insurance view of an independent judiciary considers the conflict between political groups competing for office and focuses on independent courts as a mechanism of political insurance. This approach builds on the famous thesis of Landes and Posner (1975) that a judiciary independent of the current legislature adds permanence to the distributive gains secured by the original winning political coalition. In essence the argument runs as follows (Stephenson (2003), Hansen 2004a and 2004b; and Tridimas 2004 and 2010). Constitutional judicial review implies that courts may prevent the election winner to implement his favoured policy measures if found to violate the constitutional arrangements and the rights of citizens. However, in exchange for this constraint, when the same party is out of office its opponent may also be prevented from implementing his favoured policy. Hence, the losers of the political contest can use the review

process as a mechanism to minimize the losses inflicted to them from the measures taken by the electoral winner. When political groups anticipate that they will not win every election and therefore they will be out of power, constitutional judicial review is a useful mechanism to restrain those in control of the government. Constitutional review by an independent judiciary lowers the risks associated with the uncertain outcomes of collective choice. On the above reasoning, one expects judicial review to be more pronounced in polities where political competition is strong and parties alternate in office. In the political insurance framework given the probability to win an election and the differences in the preferences of competing political groups, each political group is better off when an agent decides policy, but prefers to delegate policy making to an "ally", that is an agent which has preferences similar to its own. See Cooter and Ginsburg (1996) and Hayo and Voigt (2007) for an empirical investigation of the determinants of judicial independence see.

Note that delegating thorny issues to the judiciary may offer short run benefits to politicians who this way shift blame for unpopular decisions to independent agents to escape electoral punishment (Fiorina 1986). However, such delegation to the courts decreases the ability to claim credit for policies with a favourable impact. When the expected gains from shifting the blame exceed the expected losses from forgoing credit, the politician will choose to refer policy making to the judiciary. Shifting of responsibility is easier if the judiciary is perceived by the electorate as independent of the other branches of government. However, the latter view loses its explanatory power when voters cannot be fooled and recognise the politicians' play.

2 Institutional arrangements for judicial independence

Judicial review of the acts of government is the most politicised aspect of the behaviour of courts. Judicial involvement in the political process and collective choice raises a fundamental question: decision making by an independent but unelected judiciary may go against deep-seated notions of majority decision making and electoral accountability. As soon as discretionary powers are granted to the judiciary a new principal – agent problem arises: A judiciary which is strong enough to block the legislative majority is also strong enough to pronounce rulings to pursue its preferences. What guarantees are there that the independent judiciary will not pursue its own interests at the expense of the citizens that it is supposed to protect? This is the well-known problem of "who will guard the guards?" going back to the ancient Greek philosopher Plato and the Roman poet Juvenal. Note the reverse dilemma too: accountability of the judiciary to give reasons and explain their actions is hardly controversial. But accountability by holding judges responsible for their decisions may infringe their independence. For it cannot be precluded that measures which aim to strengthen the accountability of an agent may be abused and weaken its independence. The solution of this dilemma depends on the arrangements that in practice balance the demands for judicial independence and accountability of the judiciary; see also Cappelletti (1983) and Shapiro (2002) for the tension between democracy and judicial independence. We divide the arrangements for judicial independence under two broad categories, structure and jurisdiction.

A Structure

The political independence of judges increases with the following. (a) The smaller the involvement of the government in the process of their appointment and the larger the legislative majorities needed for their confirmation; independence is even higher when judges are nominated by the judiciary itself. (b) The longer their term of service; independence is also higher when judges serve for a single term only or do not seek reappointment. (c) The greater

their financial autonomy which implies that salaries and budgets cannot be reduced by discretionary acts of the executive. (d) Transparency, the obligation to explain and justify rulings, enhances the independence of judges as it increases publicly available information, influences future courses of action, obliges non-elected judges to fully justify their decisions and discourages politicians or other interested parties to intervene in judicial outcomes. However, there is no consensus regarding the optimal degree of transparency. For example, although full disclosure has a certain intuitive appeal, keeping secret the voting record of judges may also have some advantages in the specific circumstances of supranational judicial bodies like the European Court of the EU. The Court does not disclose how individual judges have voted and, contrary to the USA Supreme Court, dissenting opinions are not published. This secrecy protects judges against possible retribution from governments which lost their cases at the Court. (e) The more difficult is to discipline and dismiss judges. (f) The more difficult it is for the government to overturn judicial rulings it does not like. Rulings can be overturned by introducing new legislation or changing the status and power of courts. The latter is less likely when courts are bound to follow legal precedent and when their independence is declared in the constitution which, contrary to ordinary legislation, requires super-majorities to revise.

B Jurisdiction

A range of issues are examined here – see Ginsburg (2002) for a detailed discussion of the structure and organisation of the judiciary. (a) Whether ordinary courts can exercise judicial review of laws, as in the decentralised US system, or only specialized constitutional courts have such rights, as in the centralized system of the European countries following the model of the Austrian legal theorist H. Kelsen. (b) Whether judicial review is concrete, or abstract. Under concrete the constitutionality of a law is checked in a case which is actually litigated in front of a court, while under abstract a law may be examined without litigation. Related to this issue is whether review is carried out before or after the promulgation of a law. USA courts practice concrete ex post review, while the French Constitutional Court offers an example of abstract a priori review. Abstract and a priori review is not based on a real case but on a hypothetical conflict and is conducted with less information about "facts" and as such is more limited, but has the advantage that it can eliminate unconstitutional legislation before it actually does any harm. (c) In general, the power of the judiciary as an independent arm rises when individuals are granted more open access to the courts, and ceteris paribus when courts are allowed to review more legislation, since under these circumstances the hold of the executive on policy making is weaker. Note however that easy access may encourage trivial applications for annulments frustrating the exercise of the will of the majority but also increasing the judicial workload and therefore the cost of the system. (d) The ability of court rulings to "make law". Although judiciaries do not make laws in the sense that legislatures do, insofar as they interpret legislation their rulings become a source of law and bind future rulings, their independence is greater than otherwise. Similarly, by annulling those acts and measures that they find incompatible with the constitution and fundamental charters, courts have a form of negative law making power.

3 Modelling the behaviour of an independent judiciary

The behaviour of the judiciary in collective decision making is studied by applying spatial decision models and game theory to the process of policy making. The judiciary is modelled as a rational agent pursuing an objective function defined over one or more policy variables and is pitted against the executive arm and the legislature in a sequential game; see Ferejohn and Weingast (1992), Hanssen (2000) Vanberg (2001), Rogers (2001), Tsebelis (2002) and

Stephenson (2004). Introducing the judiciary in the collective choice game typically adds the highest court as a veto player, which affects the set of feasible alternatives against the status-quo. In this policy game the executive and legislative branches are not only interested in the outcomes of their own decisions, but also on whether their decisions will trigger the judiciary to move and reverse such decisions.

The literature makes two key assumptions about the preferences of the judges. First, their preferences are based on 'deeply internalised'notions of justice, the rule of law, and respect for legal reasoning. Second, judges would like to see their rulings implemented. However, in modelling the utility function of judges, normative objectives are not specified. To a large extent this comes from the generality of the rule of law that eludes more specific normative specification. Application of the rule of law does not necessarily imply that a "good" law is applied. The law may privilege the interests of whomever the lawmakers wish to favour. As Shapiro (2002) put it "The rule of law requires that the state's preferences be achieved by general rules rather than by discretionary-arbitrary-treatment of individuals" (p.166). For example, courts of the apartheid era in South Africa were upholding the law of the land, but to the black population they could hardly appear as neutral and independent arbiters between the interests of different races.

4 Empirical studies of the economic effects of judicial independence

Application of the rule of law promotes a just society, protects individual rights and defends citizens against predatory governments, advancing in turn economic goals. Major research breakthroughs were made with the construction of indicators of the independence and the power of the judiciary as represented by supreme courts. Empirical research has found that countries with higher degrees of judicial independence enjoy higher economic performance (Henisz, 2000), greater economic and political freedom (La Porta et al. 2004) and a lower share of taxes (Tridimas, 2005). Most interestingly, Feld and Voigt (2003) distinguish between *de jure* independence, as described in legal texts setting up the supreme court of a country, and *de facto* independence which is independence of the supreme court of a country as it is actually implemented in practice, and find that only *de facto* judicial independence is conducive to growth.

Regarding the effect of the method of selecting judges, appointment or election, on judicial outcomes, the literature notes a selection effect (the ideological preferences of judges who are elected may differ from the preferences of judges who are appointed) and an incentive effect (judges seeking re-election are more sensitive to the preferences of the electorate). It is found that appointed judges are more independent than elected ones, since elected judges are more sensitive to electoral considerations and may attach greater weight to the interests of litigants from groups who are presumed to have large electoral power; see Hanssen (1999).

Informative as these findings may be, several open questions remain. In the first instance, there is the perennial problem of reverse causality, that is, richer countries can afford good judicial institutions rather than good judicial institutions leading to higher income. Second, the judiciary is approximated by the highest constitutional court and the latter is treated as a single decision taker. This ignores that in reality the judiciary comprises a hierarchy of lower and higher courts. In addition, even though the constitutional court itself is a collective body comprising several justices, subject to the well-known problems of reaching a collective decision, these problems are assumed away and the court is treated as a single decision taker. Finally, from the viewpoint of policy advice, the creation of legal institutions conducive to economic success requires long gestation periods, which may be of little comfort to a

government facing pressing short-run demands for growth-promoting policies. Significantly, the results from reforming the courts of developing economies to be politically independent and introducing statutes incorporating principles and procedures of codes found in advanced western countries have been underwhelming (Carothers 2006). It appears that the same deep–lying factors of institutional failure were left intact and prevented the legal reforms to function as intended.

Cross–References in this volume:

Constitutional Political Economy, Incomplete Contracts, Incomplete Information, Game Theory, Credibility, Institutional Economics, Judge Made Law, Political Economy, Principal–Agent

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