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Economic growth and judicial independence, a dozen years on: Cross-country evidence using an updated Set of indicators

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ABSTRACT

Over 10 years ago, Feld and Voigt (2003) introduced an indicator for objectively measuring the actual independence of the judiciary and demonstrated its utility in a large cross-section of countries. The indicator has been widely used, but also criticized. Many new indicators for judicial independence have been developed since. Yet, all of them are based on subjective evaluations by experts or confined to measuring the legally prescribed level of independence. This paper presents more recent objective data on de jure and de facto judicial independence (JI) and strongly confirms previous results that de jure JI is not systematically related to economic growth, whereas de facto JI is highly significantly and robustly correlated with growth. In addition, we show that the effect of de facto JI depends on the institutional environment, but not on a country's initial per capita income.

1. Introduction

Thriving market economies depend on strong states that secure private property rights. Yet, a state's strength can be its greatest weakness: if it is strong enough to secure private property rights, it may also be strong enough to violate them. This insight is not new; it was already elegantly described by Hobbes: "For he that hath strength enough to protect all, wants not sufficiency to oppresse all" (Hobbes, 1651, Ch VI, n 3). Sometimes called the "dilemma of the strong state," the issue continues to be of interest, perhaps especially to scholars of political economy (see, e.g., Weingast, 1993). Indeed, the protection of private citizens from the discretionary infringement of their rights by the state might be even more important for long-run economic development than the public enforcement of private contracts (Acemoglu and Johnson, 2005). A simple promise to honor private property rights in the future will not be credible due to the state's time-inconsistent preferences and its ability to choose actions sequentially. The citizens know that after they have invested, the state has no incentive to keep its promise to protect private property rights. In such a setting, having an independent judiciary could make all actors better off: that is, if the judiciary is able to make the state keep its promises, the result will be additional and more productive (physical and human capital) investment, leading to faster economic growth, and eventually to higher tax

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receipts for the state. The judiciary can reduce the time inconsistency of the government's preferences, in areas where it is unfeasible to delegate competences to independent bodies such as central banks.

In light of this seemingly win-win situation, one would expect that rational politicians had long since introduced judicial independence (JI). However, simply promising an independent judiciary is not sufficient to induce additional investment: if potential investors do not believe that the judiciary really is impartial, they will not change their investment behavior. It thus makes sense to distinguish between two kinds of JI: de jure and de facto. In short, de jure JI is what the law says (i.e., the law on the books); de facto JI refers to the independence actually enjoyed by judges. The latter will be the result of their effective term lengths, the degree to which judgments have an impact on government behavior, and so forth. Furthermore, a judiciary that has effectively enjoyed independence has a reputation-enhancing effect on the government, making it even more costly to interfere with the independence of judges in the future. This allows for the simultaneous establishment of different equilibria with high and low levels of independence. Ferejohn (1999) discusses under which conditions such equilibria can be stable, i.e. self-enforcing. Different levels of JI can not only be explained by path dependencies, but might also result from countries' reliance on alternative constitutional commitment mechanisms to JI, for example federalism (Weingast, 1993). Aside from trade-offs at the constitutional stage, the attractiveness of JI might depend on the level of political competition and polarization (Hanssen, 2004).

Feld and Voigt (2003) introduced both a de jure and a de facto indicator of JI a dozen years ago. As the first objective approach to evaluate de facto JI across countries, the indicators were met with great interest, but they also drew criticism (e.g., Rios-Figueroa and Staton, 2012). This paper introduces updates for both indicators and then employs them to answer three questions. (1) Does JI have a significant impact on economic growth? For this purpose, we replicate the results of Feld and Voigt (2003) for a more recent time period and a larger country sample. (2) Are improvements in JI associated with higher growth rates? Here we can employ changes in our indicators between the two waves. (3) Given that the effect of JI also depends on other constitutional traits, can these traits serve as substitutes for or complements to JI?

Based on a sample of as many as 104 countries and analyzing the growth rate of income per capita between 1990 and 2008, we find that (1) de jure JI is virtually uncorrelated with economic growth, whereas de facto JI is highly significantly correlated with growth. The previous results by Feld and Voigt (2003) are thus confirmed. (2) Improvements in de facto JI are indeed significantly correlated with faster growth. (3) The effect of de facto JI on growth is not significantly different for low- and high-income countries. However, the effect of de facto JI is reinforced by a high level of checks and balances and by having a semi-presidential form of government. Although states with a federal system, two chambers of parliament, or greater freedom of the press appear to benefit less from an independent judiciary, these differences are not statistically significant.

The remainder of the paper is organized as follows. Section 2 recaps the central theoretical conjectures on which our empirical analysis builds and then briefly surveys the recent literature on attempts to produce independence measures (not necessarily restricted to the judiciary). In Section 3, we present our two indicators and take a first look at some of their properties. Section 4 discusses possible complementarities of JI with basic constitutional traits such as bicameralism, federalism and the form of government. A number of bivariate correlations between the JI indicators and important aspects of the separation of powers are presented. Section 5 contains our regression model and the regression results. After discussing the empirical relationship between JI and economic growth, we inquire into the complementarity or substitutability between JI and the basic constitutional traits introduced above. Finally, we check the robustness of our empirical results. Section 6 concludes the paper and contains suggestions for future research.

2. Judicial independence: theory and measurement

JI implies that judges can expect their decisions to be implemented regardless of whether they are in the (short-term) interest of other government branches upon which implementation depends. It further implies that judges do not have to fear negative consequences as a result of their decisions, such as being fired, experiencing a cut in pay, or becoming less influential.[1]

There are three archetypical interaction situations in which JI is crucial.

(1) Conflict between citizens. If parties have entered voluntarily into a contract and one of them believes that the other is in violation of the contract, impartial dispute resolution is necessary. As long as both sides expect the judiciary to be impartial, they can save on transaction costs.
(2) Conflict between the government and citizens. The judiciary not only will have to ascertain the constitutionality of newly passed legislation, but will also have to check whether the representatives of the state have followed procedures designed to safeguard the rule of law. If the judiciary is not independent from the executive and the legislature, citizens will not trust in the rule of law.
(3) Conflict between government branches. In the absence of an impartial arbiter, conflicts between government branches are most likely to develop into power games.

Among the functions of government, reduction of uncertainty is of paramount importance. However, the law will reduce uncertainty only if the citizens can expect the letter of the law to be followed. An independent judiciary could be employed as a device for turning promises – for example, the protection of private property rights – into credible commitments (Voigt and Gutmann, 2013). If the judiciary performs this function, there will be more investment in physical and human capital and a higher degree of specialization. Hence, JI should be conducive to economic growth.

[1] Before JI can be defined, a theory of judicial behavior has to be adopted. We refer the reader to Epstein et al. (2013: 89 ff.) for a survey of studies on rational judicial behavior in US, foreign and international courts.