Institutional Viability and High Courts: A Comparative Analysis

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Abstract

Theory: The development of judicial viability involves a process by which constitutional courts attain institutional stability and value as an end in itself. Institutional stability denotes the courts' capacity to withstand environmental shocks, while value involves entities acquiring a distinctive mission and identity in the newly-democratized governmental system. More precisely, we argue that constitutional courts attain functional (substantive) viability when they attain high levels of three features: differentiation (unique character and mission), autonomy (functional insularity), and durability (institutional resilience and adaptability). The emergence of judicial viability, therefore, lies in the interplay of these features over time.

Hypotheses: Courts with greater degrees of differentiation, autonomy, and durability will possess higher levels of viability.

Methods: We choose several measurable indicators of the component features of viability and then employ factor analysis to reduce the ten variables of our judicial viability model to their underlying dimensions. To produce the judicial viability score, we use the Bartlett weighted least squares method to produce factor scores. Additionally, we follow the same procedure and create two uncorrelated variables using the first two eigenvalue and eigenvector pairs that are linearly related to the original judicial viability models.

Results: Factor analyzing the ten indicators of judicial differentiation, autonomy, and durability presents mixed support for the stated hypotheses. The data provide support for the autonomy and durability hypotheses, but lack definitive answers as they relate to the impact of differentiation on constitutional court viability over time. The single factor judicial viability score explains 77.3 percent of the sample variance within the data. A set of two factor scores (i.e., the combined judicial viability factor) explains 97.8 percent of the sample variance. Furthermore, our analysis suggests that the component measures of institutional durability and autonomy represent one dominant underlying dimension of judicial viability—the stability of the court as an organizational entity.

Many scholars acknowledge that an effective judiciary is important to the development and consolidation of democratic governments. This is due, in part, to the judiciary's institutional responsibility to ensure the rule of law and establish a check on the political branches of government. Yet, as Gibson, Caldeira and Baird (1998) recognize, since courts do not possess the power of the 'purse' or the 'sword' they are dependent on the goodwill of other actors for support and compliance. This dependence begs the question of how observers can determine when the judiciary becomes a distinct force within governments. Stated another way, when can we confidently claim that the judiciary has emerged as a viable institutional actor in democratic politics?

Many scholars have approached similar questions by examining the guarantees of judicial independence located within constitutions (Smithey and Ishiyama 2000; Epstein, Knight and Shvetsova 2001). Additionally, other scholars have relied on single case studies to address questions of judicial behavior (Tate and Haynie 1993; Haynie 1994; Sabalinus 1996; Iaryczower, Spiller, and Tommasi, 2002). While these analyses provide rich and detailed information, they are limited in their ability to generate explanations based on temporal changes. Consequently, important factors are neglected by cross-sectional designs. For example, in Slovenia the post-communist government adopted a constitution in 1991, which included provisions that defined the power of the Constitutional Court. However, the Court itself was not established until 1994, with the passage of the Constitutional Court Act. Thus, scholars relying on commonly used indicators of judicial power (based on constitutional guarantees) would conclude incorrectly that the Slovene Constitutional Court possessed some functional ability to affect policy almost three years before the Court existed. This is not a random phenomenon, since a large proportion of states establish a 'political space' for constitutional courts within their constitutions, and then enact laws at a later point in time to create the court itself. Unless researchers delve deeper, and look beyond specific constitutional provisions to the dates of implementation, our inferences about the nature of judicial power will remain incomplete. Stated another way, if we wish to understand the variation across courts in terms of their authority, we must examine how they develop over time.

Our paper attempts to fill this gap by examining the institutional development of the judiciary in the post-communist states of Eastern Europe and in various Latin American countries. Specifically, we examine the viability of judicial institutions by focusing on temporal differences between the establishment and implementation of the judicial infrastructure. We argue that in order for judiciaries to play a significant role in democratizing states, they must develop certain levels of organizational sophistication and autonomy that enables the institution to withstand exogenous influences and/or pressures. Thus, we attempt to determine the point in time when a constitutional court attains enough stature within the policy-making arena that allows it to contribute to the democratic process. By focusing on the degree of judicial institutionalization across a number of Latin American and Eastern European cases, our paper attempts to discern the favorable conditions under which viable judiciaries emerge.

A FRAMEWORK FOR JUDICIAL INSTITUTIONALIZATION

Despite an almost universal consensus regarding the importance of judicial independence, no single definition of this concept exists. Larkins (1996) argues that judicial independence is contingent on three factors: impartiality, political insularity and institutional stability. Though the first two components pertain to individual judges, the final aspect places an emphasis on the courts' functional relationship with other political actors within the system. Thus, "significant levels of independence [are] contingent on the degree to which the judicial institution has a distinct and discrete role… to regulate the legality of state acts, enact justice, and determine general constitutional and legal values" (1996: 611). Courts, if they are legitimate and viable institutions, must be able to operate freely, uninhibited from other branches of government. As an example, he examines the Costa Rican Supreme Court whose judges display some features of impartiality and insularity. Yet, the additional trait that has contributed to the Court's substantial political power is its considerable institutional structure, "which is respected by other actors as a separate, autonomous entity whose rightful and legitimate purpose in the determination of what is legally acceptable" (1996: 610). This suggests the importance of institutionalization as a significant factor in determining judicial effectiveness.

A majority of research focuses on the development of an institution over a considerable period of time (Schmidhauser 1973; McGuire 2004). This makes intuitive sense because the greater an organization's age, the more likely it develops distinguishing structures and capabilities that allow it to exercise substantive political influence. Yet, the physical age of an institution does not capture completely its viability. As Huntington (1968: 12) acknowledges, institutionalization is a process by which an organization "acquires stability and value as an end in itself." Though the acquisition of stability (as Huntington describes) increases over time, it is also possible to instill stability within more recent institutions; and several governments in recently transitioning democracies encounter choices over the viability of the judiciary. It is therefore necessary for scholars to develop a theoretical framework to examine this phenomenon.

McGuire's recently published article provides a useful framework for operationalizing and measuring judicial institutionalization. Relying on contributions from previous scholars (Huntington 1968, Ragsdale and Theis 1997, Keohane 1969), he examines the U.S. Supreme Court's process of institutional growth and tests the linkages to the justices' policy outputs. He measures the underlying concept of judicial institutionalization using indicators that he subsumes under three important qualities of a “viable” institution: differentiation, durability, and autonomy.

According to McGuire’s operationalization, *differentiation* of the judiciary from its environment is the principal indicator of an institutionalized political organization—it establishes clear boundary lines that mark its distinctiveness and define its unique role (2004: 130). This component is necessary to develop the identity of the institution. Without a clear identity, distinct from other political organizations, it is difficult for citizens to perceive the judiciary as a viable and/or effective institution. Therefore, our first hypothesis focuses on this component.

> H_1*: Courts possessing greater levels of differentiation will operate as viable institutions more than courts with low levels of differentiation.*

Institutional growth and sophistication can also be expressed in terms of *durability*—an ability to persist and to adapt to change (Gurr 1974). Resilience and flexibility, therefore, are marks of a stable policy maker. If the judiciary can maintain its role in the ebb and flow of democratization, this serves as a measure of its integration into the political system. Put differently, a durable organization would be able to pursue its goals when confronted with environmental changes (Huntington 1968). Selznick (1957) identifies another related link to an organization’s durability: the presence of internal norms and regularized procedures for decision-making. Thus, institutionalization can also be gauged by a dependence upon established guidelines and the ability to establish these procedures without outside interference.

> H_2*: Courts with greater degrees of durability will possess higher levels of viability.*

Finally, an institutionalized court should be appropriately insulated from the other branches of the federal government. McGuire (2004: 132) argues that *autonomy* is operationally indicated by the "presence of procedures protecting independence of the institution vis-à-vis other political actors and institutions," or in Polsby's (1968: 145) words, its "well-boundedness." Calibrating judicial capacity and institutional objectives thus hinges on some measure of the court's ability to chart its own policy course independent of the legislature or the executive.

H_3: Courts with greater autonomy will enjoy higher levels of viability.

McGuire's results suggest that institutional arrangements derived from the analysis of the Supreme Court's differentiation, durability, and autonomy indicators (and more specifically, longitudinal changes in those arrangements), have considerable implications for the historic role of the U.S. Supreme Court. McGuire's principle argument is that step-by-step institutional growth and sophistication of the Court's role in American social life serves as principal determinants of justices' political power (2004: 129). Similarly, Larkins (1996: 621) argues that,

> "…a more institutionalized judiciary is by default more independent. This is not only because one of its defining characteristics is autonomy, but also because an institutionalized judicial system implies one which has a broad range of authority within the political system. An institutionalized judiciary, in other words, exhibits the traits of functional [substantive] independence."

This suggests that judicial institutionalization is most appropriately conceptualized as an ongoing, dynamic process. Over time, some transitioning societies may empower their courts; others may continue to look at them with apprehension and distrust. Furthermore, the literature suggests that institutionalization – as a rule – translates into political power (Stinchcombe 1968; Huntington 1968; Epstein and Knight 1996; Ragsdale and Theis 1997; McGuire 2004). Seen in the broader context, therefore, institutionalization of the judiciary should reflect the more general rise of confidence in the role of democratic institutions in the transitioning society (Larkins

1996). This brings us to the core concern of this study: given that democratization is generally defined as a dynamic change over time, what explains the emergence of functional democratic institutions? And specifically, what explains the emergence of functionally-independent and institutionally-secure high courts? What combination of factors marks the critical threshold, the major turning point, which tells us that judiciary is sufficiently developed to function in accordance to its prescribed role in new democracies?

Unfortunately, a key issue emerges in "defining the time frame for the shift from organization to institution (Ragsdale and Theis 1997: 1384). It is unsatisfactory to simply state that the constitutional court is more institutionalized at the end of a period than it was at the beginning. To some extent, a court is never fully "institutionalized"; there is a continual attempt to differentiate the institution from the other organizations, as it constantly revises, updates, and expands its jurisdiction and rules of procedure. Since institutionalization refers to an ongoing development process, rather than a specific critical moment (e.g. emergence of a viable institution), we must sharpen our conceptual propositions if we are to determine how fast, and under what conditions, the judiciary will begin to play a role in national politics after a marked break with the authoritarian rule.

Generally speaking, though, we expect constitutional courts to operate as viable institutions when all three component indicators (differentiation, durability, and autonomy) are attained at meaningful levels. Larkins (1996) and Garro (1993) argue that this is likely to happen only if other state actors recognize that the legal bounds of the system cannot be transgressed for the achievement of partisan political gains and if they willingly empower the high court to monitor the submission of the state to constitutional law. Thus, we also expect that the greater consistency and speed with which transitioning democracies endow their constitutional courts with these indicators contribute to the emergence of viable judiciaries. The explicit task of this analysis, therefore, is to determine *which* political developments are favorable to the establishment and maintenance of judicial viability and *when* this is most likely to happen during the democratic transition process.[1]

RESEARCH DESIGN

We examine the constitutional courts of thirty nine states in two regions: Latin America and post-communist states of Eastern Europe and Central Asia.[2] Broadly speaking, our analysis is confined to the "third wave" of democratization. This period represents the latest large-scale, substantial attempt by these states to democratize. However, since it is of particular interest to us to understand how long (on average and in specific cases) it takes for constitutional courts to develop substantive independence after the break with an authoritarian or totalitarian past, the selection of the year of initial observation ($t=0$) was made on case-by-case basis.

From a methodological point of view, the post-communist states present an excellent opportunity to test for the emergence of viable courts. First, and most importantly, there is a clearly-marked break with the previous political system—all of the twenty-eight states transitioned to electoral democracies rather abruptly between 1989 and 1992. This gives us a logical, easily-identifiable starting point for the analysis. Second, these transitions happened at roughly the same time, give or take a year. Thus, we can compare how successful these states have been in institutionalizing their courts, given roughly an equal amount of time to do so.

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[1] It is important to note that we are not testing how institutionalization of the judiciary affects substantive political influence or power. While this is important – we would expect higher levels of viability to produce greater substantive outcomes – the question is beyond the scope of this paper. Before we can assess the impact of judicial institutionalization, we must first determine what relevant components of institutionalization (and what combination of its indicators) should be outward reflections of the court's assimilation into the system of national policy-making.

[2] Specifically, we look at following post-communist states: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Poland, Romania, Russia, Serbia and Montenegro, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. In Latin America, we examine Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, and Venezuela.

Latin American transitions, however, present some difficulties: most of the states considered in our study are in fact undergoing a re-democratization. Some of the high courts enjoy significant independence prior to and throughout the autocratic retrenchment period; and in some cases, it is difficult to determine exactly when the transition to democracy began. Finally, the pervasive sense of legal nihilism found in post-communist societies is often absent. Costa Rica, however, stands out as a clear exception in our sample—it is the oldest Latin American democracy that began its transition during the "second wave" of democratic transitions. Therefore, to minimize our own selection bias in determining the initial year of transition, we relied on the commonly-accepted dates from Statistical Abstract of Latin America[3] and based our decisions on the most recent date of military relinquishing the presidency to a civilian rule.

We chose these regions for both practical and substantive reasons. Most of the constitutional courts in Latin America and post-communist states now provide information online, permitting us to code a large number of cases and variables. Furthermore, many international and regional organizations (e.g., American Bar Association, Inter-American Development Bank, Amnesty International, Transparency International, Justice Studies Center of the Americas, EU's Open Society Institute) have monitoring missions that provide in-depth reports on various aspects of judicial organization. Additionally, while the progress toward democratic consolidation varies widely across these states, they all have made formal commitments to democracy and the rule of law (most prominently, in crafting anew or bringing back previous constitutions). This study allows us to examine systematically the variation in these formal commitments over time. Finally, despite the presence of some common elements, these transitions exhibit a large degree of variability in the variables of interest. Given that our sample is based on the entire population of post-communist transitions and a fairly representative sample of Latin America, our ability to generalize beyond the current set of cases is certainly enhanced.

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[3] SALA Vol. 30, Part 1: 274.

Measurement

Since we wish to test the impact of the component variables of institutionalization over a historical period, the basic observational unit must be time-based, and we selected the year since regime transition or significant liberalization as the time unit. Our unit of analysis is court-year. We code all of the component variables on an annual basis for changes in formal provisions and legal rules as they affect the organization and function of the constitutional (high) courts. Every country was coded individually for each subsequent year after its initial transition to capture the relative changes over time.[4] The last year coded for observations is 2003.

To minimize coder bias, we attempted to rely exclusively on provisions codified in constitutions, presidential decrees, annual budgets and legislation, and other legal documents. In some instances, we also rely on published interviews with constitutional court judges and their staff, as well as subjective evaluations of monitoring agencies such as American Bar Association's *Judicial Reform Index Database*. Our conceptual variables are differentiation, durability, and autonomy, which we operationalize comparably to those found in the previous institutionalization research. Component indicators of these variables are measured on a scale from zero (absence of phenomenon of interest) to one (presence). Some of the indicators are dummy variables, while other allow for a greater degree of variation (three or four possible values). Detailed overview of coding and measurement procedures can be found in Appendix I.

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[4] See Appendix I for specific coding rules for each variable.

Differentiation

According to McGuire, differentiation of the judiciary from its environment is the principal indicator of an institutionalized political organization—it establishes clear boundary lines that mark its distinctiveness and define its unique role (2004: 130). One common measure of differentiation is the *qualification requirements* for the position on the constitutional (high) court or, the extent to which the court's members are recruited from among the legal scholars and judicial experts that share a unique and common understanding about the innerworkings of the institution and its relation to other political actors.

Schwartz (1993: 33) argues that another concrete measure of the court's distinctive character and role is its *physical location*. Hence, a constitutional court that has its own independent facilities[5] provides evidence that the other political actors recognize the unique importance of the court's mission and are financially committed. Also, while ordinary individuals may never step foot in the chambers of the high court, having to walk by the court's building every day to work, will certainly raise the general awareness that the court exists.[6]

Durability

Institutional growth and sophistication are expressed as an ability to persist and to adapt to change (Gurr 1974). The financial commitment to the constitutional court is a particularly pertinent measure of durability because in addition to capturing the institutional support, it also reveals the size and scope of the court's internal operations. Unfortunately, data on the constitutional courts' budgets are not widely available, especially prior to the year 2000. McGuire's analysis, however, suggests that the level of financial commitment can also be assessed by the availability of support staff and basic equipment for the court to carry out its tasks. In general, these measures provide a reliable proxy for the level of institutional infrastructure and tap the same underlying concept as the court's budget. Therefore, to account for the financial commitment to the court, we create a measure composed of two factors: the *availability of support staff* to help judges carry out their duties, and *adequacy of the equipment* for judges to carry out those duties efficiently.

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[5] Rather than being housed in the Ministry of Justice, another court's building, or the Parliament building.

[6] Gibson, Caldeira, and Baird (1998: 356) suggest that generally speaking, "to be aware of a court is to be [more] supportive of it."

Selznick (1957) identifies another related link to an organization's durability: the presence of *internal norms and regularized procedures* for decision-making. Herron and Randazzo (2003) also point out that judges without life tenure and/or with relatively short *terms of office* in comparison to other political branches will likely be more susceptible to outside influences and generally more constrained by political pressures than judges with life tenure.[7] If judges have a shorter tenure than the President or the members of the Parliament[8], then it is possible for the most powerful branch to completely change the composition of the court within his/her/their own term. Such courts are less resilient to change and more open to parochial pressures.

Finally, in order to account for the classical institutionalist insight that older organizations are more resistant to environmental shocks than their younger counterparts, we also create a variable "*transition*" which represents an annul measure of the longevity of the transition to democracy (i.e., cumulative count of raw number of years from t=0 through 2003). In our dataset, the longevity of transitions ranges from Haiti (lowest; 11 years of observations) to Costa Rica (highest; 32 years).

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[7] Other scholars make a similar argument (e.g., Smithey and Ishiyama 2000, 2002; Schwartz 2000; Tate and Vallinder 1995; Helmke 2002, Larkins 1996). However, a few scholars suggest that short, non-renewable terms of office in fact foster judicial independence rather than undermine it (e.g., Stone Sweet 2000).

[8] If legislature is bicameral, the terms of office for lower house are considered (see Nolan 2004 for justification).

Autonomy

McGuire (2004: 132) argues that autonomy is operationally indicated by the "presence of procedures protecting independence of the institution vis-à-vis other political actors and institutions," or in Polsby's (1968: 145) words, institutional "well-boundedness." Becker (1970) suggests that the Court's independence may be highly contingent on its *powers of judicial review*.[9] Though Herron and Randazzo (2003) discover no direct connection between the power of judicial and independence, they note that constitutionally-embedded powers of judicial may indirectly enhance the perception of the judiciary as an independent institution.[10] Thus, we include an annual measure of judicial review which captures the extent of judicial review powers given to the constitutional court. Specifically, this study considers the presence of both the broad and specific *a priori* review powers (i.e., abstract judicial review) and concrete review powers.

The literature suggests that another commonly used measure of judicial independence relates to the *budget allocation process*. The state's budgeting procedures illustrate that the issue is not only in the political and legal culture of the society, but also in legal and institutional limits to effective representation of the judiciary's interest. Thus, constitutional courts (or their chairmen) that determine their own annual budgets and decide how money is allocated, are more independent than the courts that play a lesser role in determining their own institutional needs. To account for this possibility, we create a measure that captures the level of the court's involvement in the budgetary process.

Furthermore, many scholars argue that judicial insularity is contingent on the *nomination and appointment procedures*. Holland (1991) and Smithey and Ishiyama (2000) argue that if a country's laws stipulate the nomination of judges as the work of one institution, then those judges will be more inclined to render decisions in accordance with that institution's preferences.[11] Generally, the countries that allow multiple actors to participate in the nomination and/or appointment process increase their constitutional court's independence relative to those countries that provide limited opportunities for political contestation of judicial nominees. We therefore include a measure that captures how many actors participate in the nomination process.

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[9] Several other scholars have commented on the importance of judicial review as well (Smithey and Ishiyama 2000, 2002; Lane 1985).

[10] Furthermore, an ability of the constitutional court to review the laws after their enactment and after their substantive impact can be assessed (i.e., the power of posterior/concrete review), provides the court with an informational advantage (see Rogers and Vanberg 2002; Vanberg 1998, 2001) and gives the court an opportunity to counteract an ineffective or harmful laws in the face of other political actors' inaction (Smithey and Ishiyama 2000).

Finally, drawing on Schwartz's (2000) elaborate account of the Yeltsin-Zorkin[12] tensions, we ask whether the judges of the constitutional court are compensated beyond their formal salaries. For instance, do they receive state-provided transportation, dachas, or additional "allowance" for personal spending? It is possible that additional financial incentives beholden the judges to the actors that provide those "perks." Therefore, we code for presence or absence of formal provisions for *non-pecuniary benefits* (*perks*).

METHODOLOGY

We have argued that a combination of factors contributes to judicial institutional viability. Accordingly, we employ factor analysis to reduce the ten variables of our judicial viability model to a single statistical variable, "that [is] linearly related to the original variables" of our model (Agresti and Finlay 1997: 630). We call this unobservable random variable the *judicial viability factor score*. Johnson and Wichern (1998: 514) argue "the essential purpose of factor analysis is to describe, if possible, the covariance [and or correlation] relationships among many variables in terms of a few underlying, but unobservable, random quantities." The primary function of the analysis is to determine whether "the data are consistent with a prescribed structure" (1998: 515).

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[11] Songer and Haire (1992) and McGuire (2004) point out that the federal judges in the United States, by the virtue of being nominated by the President only, tend to render decisions that further the president's agenda (see Segal and Spaeth 2002 for counter-argument).

[12] Chairman of the "first" (1993-1995) Constitutional Court of Russian Federation.

We are well aware of the reservations that remain concerning the factor analysis procedure; that is, the inherent difficult of interpreting the factors. However, both Agresti and Finlay (1997) and Johnson and Wichern (1998) argue that part of the reservations associated with the use of this procedure originate from the origin rather than actual deficiencies in the application of the procedure.[13] Moreover, Agresti and Finlay (1997: 634) argue that the procedure is now used in more of a confirmatory rather than an exploratory mode, which forces the investigator "to think more carefully about reasonable factor structure before performing the analysis."

We use the principal factor approach of estimation offered by Johnson and Wichern. This approach is a modification of the principal components approach. The major difference is that we do not assume that the communalities equal 1 in the principal factor approach. We use the squared multiple correlations as estimates of the communality to compute factor loading. In this model, we hypothesize that one common factor accounts for all of the elements of the sample correlation matrix $\mathbf{R}_r$. In this view, $\mathbf{R}_r$ is factored as

$$\mathbf{R}_r = \mathbf{L}_r*$$

Where $\mathbf{L}_r* = \{l\ ^*_{ij}\}$ are the estimated loadings.

The principal factor approach then uses the estimates

$$\mathbf{L}_r^* = [\ v?_1^*\text{-hat}\ ?_1^*\ ]$$

$$?_i^* = 1 - \overset{m}{\underset{j=1}{?}} l^{*2}_{ij}$$

where $(?_1^*\text{-hat}, ?_1^*)$, are the eigenvalue-eigenvector pairs for $\mathbf{R}_r$.

To produce our judicial viability score variable, we use the Bartlett weighted least squares method to produce factor scores. This procedure produces a new variable based on the eigenvalues. In other words, the scores are a linear transformation of the original variables that are centered at 0. Factor scores are obtained for the *j*th case by the following computation using estimates **L**-hat, **?** -hat, and ***μ***-hat = **x**-bar as the true values:

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[13] Pearson and Spearman employed the approach to define and measure intelligence. Additionally, the lack of powerful computing facilities slowed the development of factor analysis as a statistical method.

$$\mathbf{f}_j\text{-hat} = (\mathbf{L}'\text{-hat } \mathbf{?}^{-1}\text{-hat } \mathbf{L}\text{-hat})^{-1}\, \mathbf{L}'\text{-hat } \mathbf{?}\text{ -hat } (\mathbf{x}_j - \mathbf{x}\text{-bar})$$

Using this procedure, we produce *judicial viability factor scores* for each of our 627 observations. This single factor score explains 77.3 percent of the sample variance. Additionally, we follow the same procedure and create two uncorrelated variables using the first two eigenvalue and eigenvector pairs that are linearly related to our original judicial viability models. This results in a set of two factor scores that explain 97.8 percent of the sample variance. We combine the two scores by the proportion of variance they explain individually and create *combined judicial viability score*s for our 627 observations. This variable is formed in the following manner:

*combined judicial viability score*s = [(proportion of 97.8% sample variance explained by factor 1)(factor score1) + (proportion of 97.8% sample variance explained factor2)(factor score2)]

*combined judicial viability score*s = [(.79)(factor score1) + (.21)(factor score2)]

RESULTS

We now apply the theoretical and methodological framework outlined above to the thirty nine constitutional (high) courts in Latin America and post-Communist Eastern Europe and Central Asia. Table I provides a convenient summary of the results of our factor-analytic models.

— Insert Table I here —

Our first hypothesis suggests that a principal component of a viable court is its *differentiation* from other political units (i.e., an establishment of clear boundary lines that mark its distinctiveness). The factor scores for the two principal indicators hypothesized to work within this dimension, however, do not provide a solid footing to our initial expectations. Our

judicial viability score variable, based on one communality (i.e., the first factor) and produced with the Bartlett weighted least squares method, only explains a relatively small proportion of variance in *physical location* of the court (0.338). Yet, our first factor communality represents almost fifty percent of the variance in *professional qualifications* variable (coefficient of 0.499). While the second factor loading shows additional communality in *professional qualifications* variance, the proportion of variance explained remains small (0.279 coefficient on second factor loading). Put differently, our results suggest that *differentiation* of the court as a whole from its environment does not represent the dominant underlying dimension of judicial viability. That is not to say that differentiation of the court from its environment is irrelevant; rather, we simply point out that an interpretation of factor loadings coefficients for differentiation indicators should be conducted with some reservation. Selznick's (1957: 17) argument that "to institutionalize" is to infuse with value beyond technical and financial requirements of the task at hand is, therefore, not fully supported by the factor-analytic approach. Given that *physical location* variable does not gain any communality in second factor variance at all (-0.008 coefficient), but the two factor cumulative loading on *professional qualifications* explains a large proportion of its variance (0.499+0.279=0.778), better specification of dimensions may be necessary. With these results, McGuire's (2004: 130) argument that differentiation is a major factor of substantive judicial independence—because it marks clear boundary lines between the high court and other political actors—is not supported by our comparative temporal data.

We also hypothesize that institutional viability can be expressed in terms of *durability*, the ability to persist and to adapt to change (Ragsdale and Theis 1997). More concretely, we suggest that durability is a function of the *relative terms* of office for constitutional court judges, adequacy of their *equipment and staff* (i.e., financial commitment to the court), and the longevity of the ongoing *transition*. The results of our factor-analytic models provide strong support for this expectation. Our first factor of communality explains a relatively large proportion of variance in the component indicators of *durability.* The large factor loading for *equipment and staff* variable (0.665) supports Hibbing (1988) and McGuire's (2004) findings in the American context and carries them over into a comparative setting. An extensive and adequate administrative framework, with modern equipment and a reasonable ratio[14] of support staff per judge, seems to play an important role in our **judicial viability (**first) **factor score**.

Similarly, the first factor loadings on the *transition* and *relative term* variables show that the judicial viability communality factor explains a large proportion of their variances (0.620 and 0.524 respectively). The large proportion of variance explained in the longevity of the ongoing *transition* by our **judicial viability factor score** seems to imply that the institutional development of high courts is directly connected to their historical role—as the classical institutionalist analyses consistently suggest. The first factor loading coefficient points out that over time, given necessary financial resources, opportunities, and independence, the high courts should be able to convert institutional stability into genuine political capital. Put differently, as the judicial organization becomes viable, it exhibits continuity and importance in spite of changes in individual and environmental exogenous constraints.

While the proportion of variance in the *relative term* variable explained by our **judicial viability (**first) **factor score** is somewhat lower (0.524), the explained communality is still significant for the support for the durability hypothesis, especially that the variable loads exclusively on the first factor (second factor loading is -0.121). The two factor model produced similar findings for the *equipment and staff* variable—its second factor coefficient is -0.163. These results provide strong support for our second hypothesis—that is, the viability of high courts is highly contingent on their institutional adaptability, flexibility, and working capacity (i.e., *durability*).

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[14] At least two support personnel per one judge.

Our third hypothesis—that constitutional court viability is enhanced by higher degrees of institutional *autonomy*—also receives strong empirical support. The first factor loadings for *budget control* and *judicial review* variables are 0.673 and 0.647 respectively. The *rules of procedure* variable (i.e., whether the internal court norms are determined exogenously or endogenously), however, has a relatively low loading (0.380) on the first factor of communality. Nonetheless, a negative coefficient for the *rules of procedure* in the two factor model (-0.266) seems to imply that our **judicial viability** (first) **factor score** at least partly accounts for its contribution to the court's institutional development over time.

We also find some support that the first dimension of communality represents the underlying logic behind the *nominating procedure* variable. Our measure of the openness and contestation of the nomination process for constitutional court judgeship loads 0.451 on the first underlying factor of judicial viability and -0.359 on the second factor. Interestingly, our variable that represents formal provisions for financial assistance beyond codified salary levels (i.e., *non-pecuniary benefits* or *perks*) exhibits a relatively low proportion of explained variance by the first factor loading (0.363), but the factor loading for the second dimension of viability increases dramatically (0.544). This suggests that it is possible—as Ragsdale and Theis (1997) argue—that autonomy is operationally represented by two sub-dimensions: internal and external. Put differently, it may be the case that the *nominating procedures* for the high court (as a part of *autonomy* dimension of viable institutions) do not affect the insularity of the court from other political branches per se, but do play an important role on the individual-level considerations within the court—which in turn—have direct consequences for the deliberative outcomes at the institutional level (i.e. internal sub-dimension).

To summarize, our factor analysis of various indicators of judicial differentiation, autonomy, and durability presents support for the hypotheses stated earlier in this paper. We hypothesize that constitutional courts operate as viable institutions when all three component indicators (differentiation, durability, and autonomy) are attained at meaningful levels. To a large degree, especially once we take into account the sizable factor loading on the *professional qualifications* variable, this expectation is borne out. Our single factor judicial viability score explains 77.3 percent of the sample variance and accounts for all three component dimensions. Once we consider a set of two factor scores (i.e., combined judicial viability factor), the model explains 97.8 percent of the sample variance. Thus, our data provides strong support for the *autonomy* and *durability* hypotheses, but lacks in clear-cut answers as it relates to the impact of *differentiation* on constitutional court viability over time. And, this extremely high proportion of explained variance in the individual measures implies that only one or two dimensions (when carefully operationalized and measured) explain the emergence of institutionally-viable high courts, while drastically reducing the number of parameters.

Furthermore, the communality factors carry a concrete conceptual and substantive meaning. The first dimension of judicial viability (i.e., first factor of communality) appears to represent both the *durability* and *autonomy* of the constitutional court. As Huntington (1968) argues, institutionalization broadly refers to a process by which an organization attains value and stability. Institutional stability denotes that the court is capable of surviving various exogenous and internal challenges. Larkins (1996) similarly shows that administrative capacity, complexity, and adaptability are marks of stable, well-endowed political institutions. The longer the court exists, the more likely it develops distinguishing capabilities and jurisdiction; "it achieves self-maintenance—it exists in the future because it has existed in the past" (Ragsdale and Theis 1997: 1282). Our component measures of institutional *durability* and *autonomy*, therefore, represent one underlying dimension of judicial viability—*the stability of the court as an organizational entity.*

However, the indicators typically denoted as representative of the institutional "value" (i.e., our *differentiation* dimension; such factors as distinctive location or unique qualifications for judgeship), do not seem to figure prominently into judicial viability as we previously thought. Thus, unlike McGuire (2004), we find that the differentiation of the high court from other political institutions is perhaps not as important as durability and autonomy in our judicial viability model. It is also possible that the differentiation dimension is underspecified by the indicators used here. We suspect that the strong findings for differentiation reported by McGuire may be confined to western judiciaries, particularly those of advanced industrialized democracies like the United States, Great Britain, or Germany. However, since our data does not allow us to generalize onto consolidated western democracies, this possibility will have to be explicitly confirmed in future statistical analyses.

SUBSTANTIVE MEANING OF JUDICIAL VIABILITY

While the findings reported above are interesting in themselves, an important question remains: how well does the substantive interpretation of the judicial viability score fit the empirical data? In other words, do we, on average, see that those countries that score high on our composite judicial viability score are in fact more functionally-independent and institutionally-stable than their counterparts that score lower? Are judicial institutionalization and viability simply a function of time? The scope of this paper unfortunately does not allow us to directly test whether judicial viability affects substantive political outcomes. However, we can compare how well our viability scores hold up against the evidence amassed by other judicial scholars. We can also infer whether time alone accounts for institutionally-stable high courts. In order to do so, we select a few examples to illustrate the fit between our data and what we actually know about the institutional independence of specific high courts.

As it can be seen in Figure 1, the combined judicial viability factor score for Costa Rica, places it at the very top of our sample in terms of functional levels of judicial autonomy and durability.[15]

— Insert Figure 1 here —

This interpretation is consistent with the existing literature.[16] Costa Rica is a well-established, consolidated democratic system. The rule of law and the authority of the Constitutional Chamber of the Supreme Court to rule on unconstitutionality of political acts are widely accepted and supported both at the elite- and mass-levels. In 2001, the institution was assigned 6.4% of this budget—by far the greatest amount among the states within our Latin American sample.[17] Figure 2, which allows one to trace the historical development of the courts, once again points to the fact that the emergence and maintenance of judicial viability is a dynamic process and in large part a function of time.

— Insert Figure 2 here —

Similarly, Mexico (the second highest factor score), Guatemala (third highest), Czech Republic (fourth), and Hungary (fifth) score very high on our underlying institutional stability composite measure. This ranking makes intuitive sense—the states listed above have undergone significant structural (constitutional) reforms in the late 1980s and throughout the 1990s. For instance, it is generally agreed that Hungarian Constitutional Court is a powerful, independent, and active actor in the democratic politics. The general provisions securing the independence and financial commitment to the court's needs were outlined in the Constitution of 1989. However, the commitment to judicial viability was continuously strengthened throughout the observed period. Act LXVII on the Legal Status and Remuneration of Judges (1997), for example, strengthened the judicial control over the budgetary process.[18]

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[15] Also see Appendix II for judicial viability scores by country.

[16] Kimberly Shaw (2003), however, tests judicial institutional design in Latin America using Smithey and Ishiyama's (2000) matrix of institutional design. She finds that Costa Rica and Uruguay conform least to the design criteria that Smithey and Ishiyama advance as enhancing the independence of the judiciary. Our findings for Costa Rica directly contradict this.

[17] However, this sum also includes specific allocations for the Ministerio Público and the Defensa Pública (public defender's office) as auxiliary bodies of the judicial branch. The budget assigned to the courts represented 5.16% of the 2001 fiscal budget, or 0.69% of that year's GDP. See http://www.cejamericas.org/reporte/muestra_pais.php?idioma=ingles&tipreport=REPORTE0&seccion=0

Macedonia, on the other hand, has continuously struggled with sufficiently insulating its constitutional court from external influences and has been only partly successful in securing financial commitment to the court's needs.[19] On a similar note, Uzbekistan has enacted a Law on Courts which recites that judicial independence shall be guaranteed by, among other things, "providing judges at the government expense with financial and social support appropriate for their high status."[20] The existing interviews with Constitutional Court judges seem to point to the fact that the regime has lived up to its commitment to the court.[21]

Bosnia and Herzegovina, scoring the lowest in the sample, is also plagued with severe problems as it relates to the judicial sector. This finding is not particularly surprising, given the civil wars of the early 1990s and the overly-complex structure of the courts that has to reflect the country's complex political framework. The Federation of BiH Constitutional Court judges are underpaid, cannot review the legality of certain governmental acts, and have to continuously struggle to define their constitutional mandate.[22] The longevity of Bosnian transition to democracy is also one of the lowest.

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[18] This information can be found at: http://www.eumap.org/reports/2002/judicial/national/hungary/2002_judicial_hungary.zip

[19] In 2003, Macedonia became the first country in the region to adopt an independent court budget law. See LAW ON THE COURT BUDGET O.G.R.M. 21/03. This law establishes a nine person Court Budget Council (CBC), consisting of a president, who is the president of the Supreme Court, and eight other members. Under the new Law on the Court Budget, the judiciary is responsible for preparing a budget for the courts, subject to the approval of the minister of finance, as well as supervising implementation after the court budget has been approved by the Assembly.

[20] See LAW ON COURTS, supra at 6, Art. 67. Can be found at: http://www.ceelijri.org/Country%20Detail.asp?Country=Uzbekistan&Factor=11

[21] The chair of the CC is paid the same as the deputy chair of parliament, the deputy chair of the CC is paid the same as a chair of a parliamentary committee, and the other members are paid the same as deputy chairs of parliamentary committees. Ibid.

It is also interesting to note that the longevity of the democratic transition does not explain the emergence of institutionally-viable high court by default. Figure 3 illustrates this point extremely well. Ecuador, despite its 25-year experience with democratic institutions, failed to achieve substantive levels of judicial viability by the year 2003. Romania, on the other hand, despite continuing difficulties in the implementation of judicial reforms, managed to secure higher levels of institutional autonomy and durability for its Constitutional Court within twelve years after its break with the communist past. The Chilean Constitutional Tribunal also managed to secure high levels of institutional stability and a significant degree of financial independence despite the fact that key constitutional rights of the judicial branch were not enacted till November 9, 1991.[23]

— Insert Figure 3 here —

While it is simply impossible to do justice to the analysis of these cases in such a short overview, it is clear that—at least on the surface—the judicial viability factor score can provide a useful tool to judicial researchers in identifying the underlying dimension of judicial institutionalization. In future analyses, we plan to use the judicial viability scores to directly test the extent to which formal provisions of autonomy and durability affect the institutional stability of high courts over time. Given the potential benefits of comparative cross-sectional and temporal data illustrated here, our approach should help explain lingering questions on the precise nature of judicial independence and behavior.

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[22] Bosnia and Herzegovina is separated into federal units, each with its own constitutional court. Given this situation, it is extremely difficult for the Federation Court to play its assigned role. This situation is only further complicated by the extensive jurisdiction given to the International Court of Human Rights and European Court of Justice.

[23] Our findings tend to corroborate Larkins' (1996, 613) argument that the Chilean judiciary was surprisingly autonomous during the Pinochet Regime (1973-1990).

TABLE I. Factor Loadings for Judicial Viability Models

	One Factor Model		*Two Factor Model*		
Variables	Factor 1	Uniqueness	Factor1	Factor2	Uniqueness
Physical Location	0.338	0.886	0.338	-0.008	0.886
Professional Qualifications	0.499	0.751	0.499	0.279	0.673
Relative Term	0.524	0.726	0.524	-0.121	0.711
Transition	0.620	0.615	0.620	0.317	0.515
Equipment and Staff	0.665	0.558	0.665	-0.163	0.532
Judicial Review	0.647	0.581	0.647	0.037	0.579
Non-pecuniary Benefits	0.363	0.868	0.363	0.544	0.572
Rules of Procedures	0.380	0.856	0.380	-0.266	0.785
Nominating Procedures	0.451	0.796	0.451	-0.359	0.667
Budget Control	0.673	0.547	0.673	-0.178	0.515
Eigenvalue	2.816		2.816	0.749	
Proportion explained	0.773		0.773	0.205	
Cumulative Proportion Explained	0.773			0.978	

FIGURE I

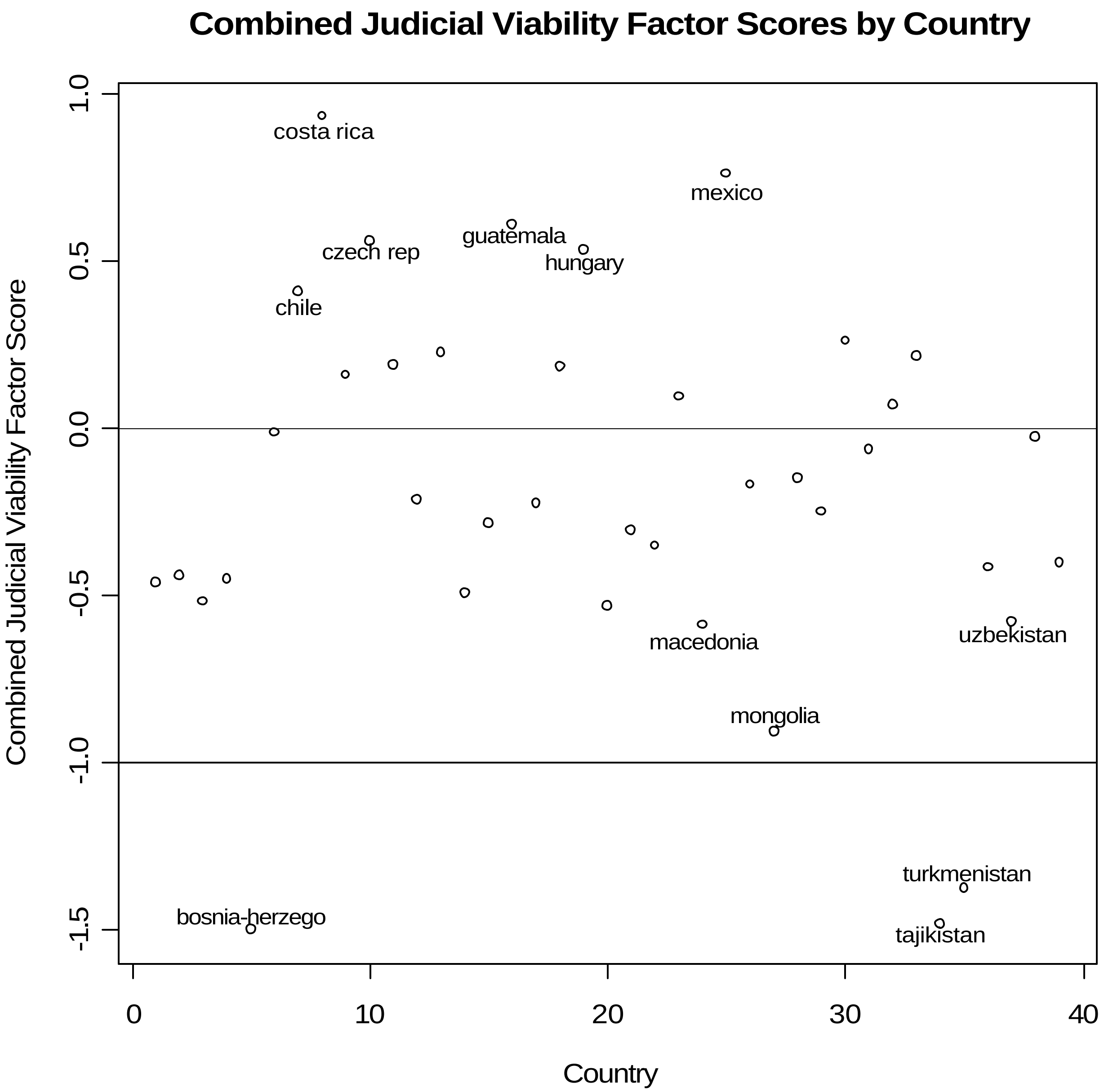

Combined Judicial Viability Factor Scores by Country
Combined Judicial Viability Factor Score
1.0
0.5
0.0
-0.5
-1.0
-1.5
costa rica
mexico
guatemala
czech rep
hungary
chile
macedonia
uzbekistan
mongolia
turkmenistan
bosnia-herzego
tajikistan
0
10
20
30
40
Country

FIGURE II

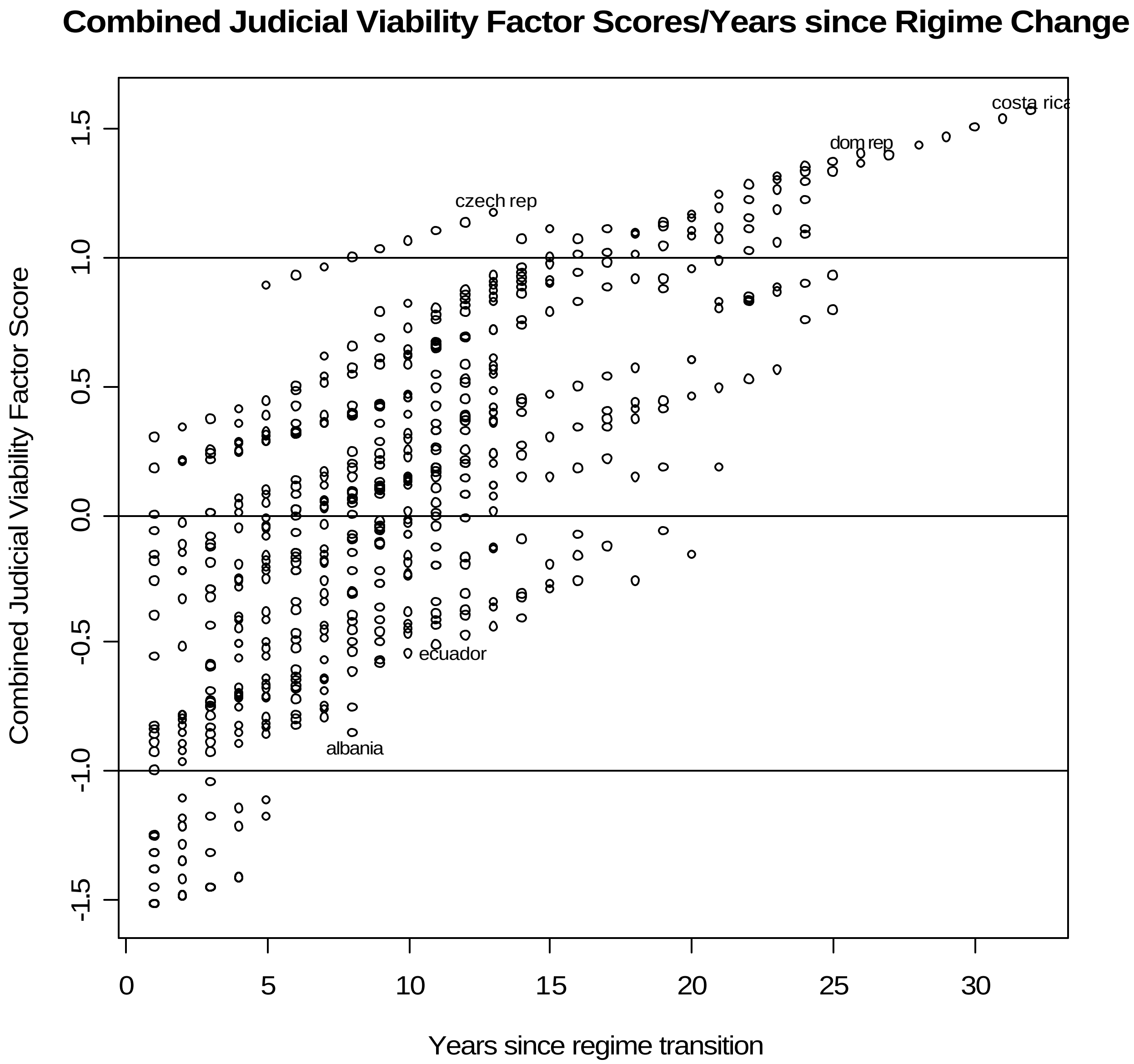
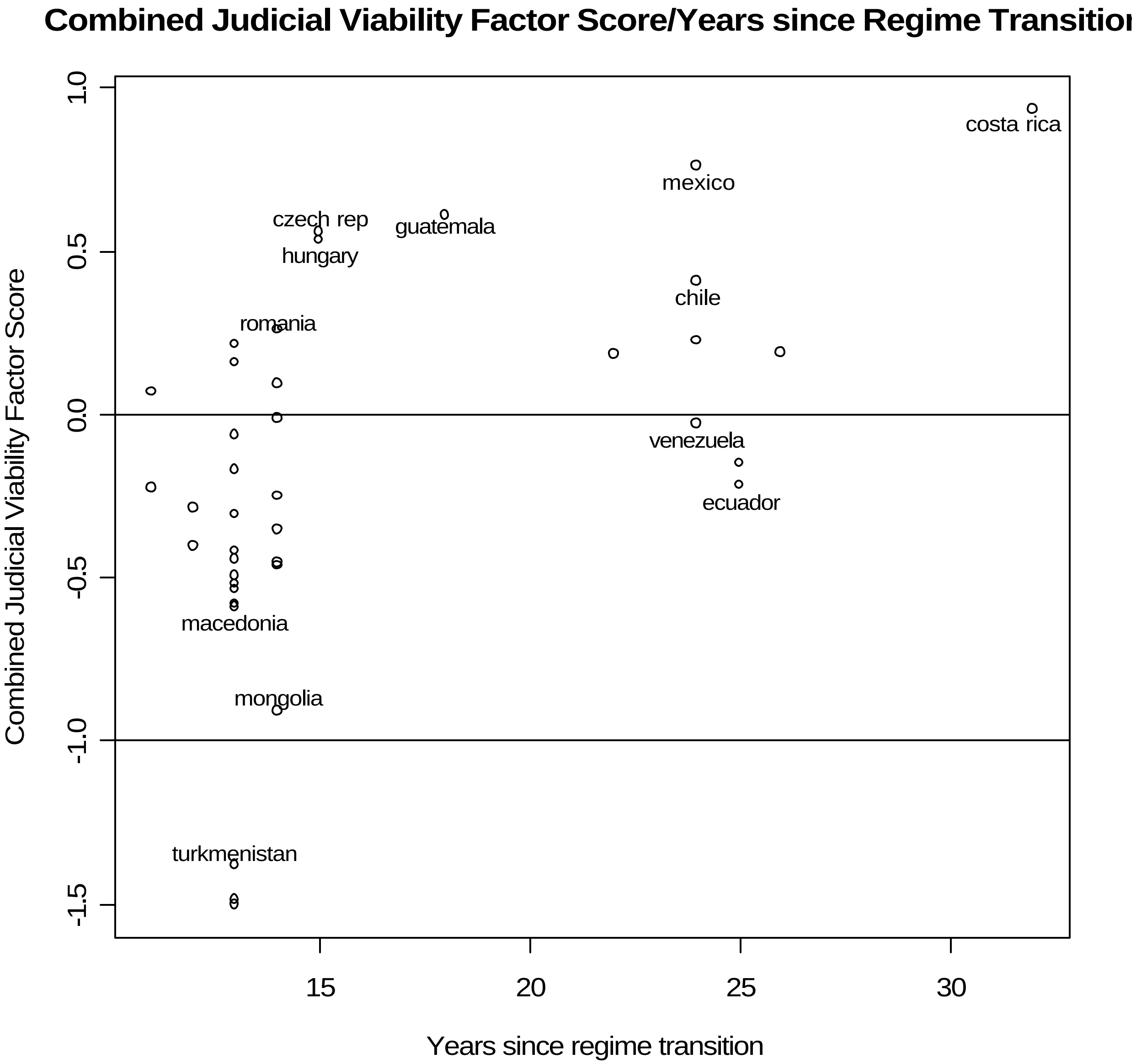

Combined Judicial Viability Factor Scores/Years since Rigime Change
Combined Judicial Viability Factor Score
Years since regime transition
1.5
1.0
0.5
0.0
-0.5
-1.0
-1.5
0
5
10
15
20
25
30
costa rica
dom rep
czech rep
ecuador
albania

FIGURE III



Combined Judicial Viability Factor Score/Years since Regime Transitio
Combined Judicial Viability Factor Score
Years since regime transition
1.0
0.5
0.0
-0.5
-1.0
-1.5
15
20
25
30
costa rica
mexico
czech rep
guatemala
hungary
chile
romania
venezuela
ecuador
macedonia
mongolia
turkmenistan

APPENDIX I: Variable Descriptions and Coding Procedure

DIFFERENTIATION

- ***Physical Location*** Does the constitutional court have its own building? Coded zero for years in which the constitutional court resided in Ministry of Justice (or simply cease to exist for a period of time; e.g. Russian court), Supreme Court, or had to share a building with another organizational entity; coded 1 for years in which the court resides in a structure that is allocated exclusively to that court and no other organizational entity. Zero was assigned if the constitutional chamber of a Supreme Court does not have its own facilities separate from the rest of the court.
- ***Professional Qualifications*** Do specific guidelines for judicial qualification to the constitutional court exist? Coded zero for lack of specific provisions that detail judicial qualifications; 0.5 for vague provisions that refer only to "formal legal training" and age requirements; 1 for detailed and highly selective guidelines (i.e. provisions specify the type of legal training necessary, the number of years in prior legal service, a professional legal examination dealing with substantively relevant areas of the law).

DURABILITY

- ***Relative Term*** The extent of formal judicial insularity, as codified in the constitution and/or subsequent amendments. Coded 0.25 when the term of the constitutional court judge was less than or equal to one term of the actor with the longest constitutional term; 0.5 when it was less than or equal to two parliamentary sessions; 0.75 when it was more than two parliamentary sessions, but had a constitutionally specified limit on the number of terms and/or compulsory retirement based on age; and 1 when the term was life tenure or until voluntary retirement. Coded zero for subsequent years after t=0 but before the judges are selected and court begins to function. See Smithey and Ishiyama (2000) for similar coding procedure.
- ***Equipment and Staff*** Does the Constitutional or High Court operate with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner? And, does each judge have the basic human resource support necessary to do his or her job (e.g., adequate support staff to handle documentation and legal research)? This variable is coded based on the same methodology as used by the American Bar Association's *Judicial Reform Index* (JRI) Database for post-communist states. *JRI* codes equipment and staff as two separate measures and the measure represents only whether the correlation is positive or negative (i.e. sufficient vs. insufficient equipment and staff). Our measure, however, requires less subjective evaluation. We simply code zero to represent lack of both components (i.e. judges of the Constitutional Court or High Court lack in support staff and equipment to carry out regular tasks; observations were also given a 0 for equipment if Courts' computers are more than five years old, used exclusively for word processing and/or if courts do not have legal libraries, local area networks and/or Internet access); 0.5 was assigned for presence of only one of the two components; and 1 for observations were judges of the Constitutional or High Court are staffed (with two or more support staff per judge) and have adequate computers, LAN, computerized databases, libraries, and other office equipment.
- ***Transition*** Annually coded for the number of years since the transition from military or communist rule. It represents a cumulative count of raw number of years from t=0. Thus, second year after the transition begins is coded 2, the third—3, and so on. The last year of observation is 2003. For Latin American states, to determine the year when the military relinquishes presidency (i.e. initial year of transition), we consult Statistical Abstract of Latin America (SALA; Vol. 30, Part 1: 274).

AUTONOMY

- ***Judicial Review Doctrine*** The scope of constitutional review powers formally assigned to the court. Coded zero for lack of final constitutional review authority; 0.5 for abstract review only; 1 for dual/mixed review powers (concrete review and abstract review).
- ***Non-pecuniary benefits (perks)*** Are judges compensated beyond their formal salaries? Specifically, is the state required to provide/subsidize housing for the judges? Do judges receive state-provided transportation, dachas, or additional "allowance" for personal spending? The logic is simple: compensation beyond specified and adequate salaries contributes to parochial pressures on the judges and to corruption. Since the absence of perks represents the value of interest, the variable is coded zero for compensation beyond formal salaries and 1 for salary-based compensation only.
- ***Rules of procedure*** Does the Court define its own procedures? Coded 0 if procedures were established outside of the court and 1 if procedures were established by the court itself.
- ***Budget*** Who determines the constitutional court's budget and supervises its allocation? Coded 0 for national assembly, president, Ministry of Justice/Finance, Supreme Court, High Judicial Council of Courts (i.e., lack of allocation of budget power); 1 for those courts that allocated their own budget. A special condition 0.5 was assigned where judiciary had partial control in the budgetary process. This condition was assigned based on three specific criteria: 1) court lacks direct input at the level of the Assembly; 2) once allocated, funds are directly controlled by the court; 3) court must expend funds in accordance with budget line-items.
- ***Nominating Procedure*** Number of nominating actors (e.g., President, National Assembly, other courts, High Judicial Council, etc.). Coded based on the raw number of nominating actors (zero was assigned for years after transition but prior to establishing the procedure). The variable was than recoded from zero to one based on the following conditions: 0.25= 1 actor; 0.5= 2 actors; 0.75 = 3 actors; and 1= 4 or more actors.

APPENDIX II: Judicial Viability Factor Scores by Country

Country Number	Country	Years since Regime Transition	Judicial Viability Factor Score	Combined Judicial Viability Factor Score
1	Albania	14	-.532	-.461
2	Armenia	13	-.357	-.442
3	Azerbaijan	13	-.652	-.522
4	Belarus	14	-.528	-.454
5	Bosnia-Herzego	13	-1.913	-1.504
6	Bulgaria	14	.110	-.010
7	Chile	24	.668	.407
8	Costa Rica	32	.894	.937
9	Croatia	13	.092	.159
10	Czech Republic	15	.594	.558
11	Dominican Rep.	26	-.067	.189
12	Ecuador	25	-.450	-.216
13	El Salvador	24	.281	.225
14	Estonia	13	-.494	-.492
15	Georgia	12	-.238	-.287
16	Guatemala	18	.851	.613
17	Haiti	11	-.476	-.226
18	Honduras	22	-.042	.187
19	Hungary	15	.594	.534
20	Kazakhstan	13	-.500	-.535
21	Kyrgyz Republi	13	-.370	-.305
22	Latvia	14	-.195	-.353
23	Lithuania	14	.371	.096
24	Macedonia	13	-.471	-.590
25	Mexico	24	.828	.760
26	Moldova	13	.013	-.167
27	Mongolia	14	-1.040	-.912
28	Nicaragua	25	-.284	-.151
29	Poland	14	-.268	-.248
30	Romania	14	.574	.259
31	Russia	13	.079	-.064
32	Slovakia	11	.165	.067
33	Slovenia	13	.335	.214
34	Tajikistan	13	-1.897	-1.487
35	Turkmenistan	13	-1.762	-1.382
36	Ukraine	13	-.412	-.420
37	Uzbekistan	13	-.609	-.578
38	Venezuela	24	-.227	-.028
39	Yugoslavia	12	-.358	-.403

Note: *combined judicial viability factor score* =[(proportion of 97.8% sample variance explained by factor1)(factor score1) + (proportion of 97.8% sample variance explained by factor 2)(factor score2)]

combined judicial viability factor score =[(.79)(factor score1) + (.21)(factor score2)]

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