

This article was downloaded by: [Randazzo, Kirk A.]

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Access details: Access Details: [subscription number 908872859]

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Australian Journal of Political Science

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title-content=t713404457>

Institutional Viability and High Courts: A Comparative Analysis of Post-Communist States

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Online Publication Date: 01 March 2009

To cite this Article Bumin, Kirill M., Randazzo, Kirk A. and Walker, Lee D.(2009)'Institutional Viability and High Courts: A Comparative Analysis of Post-Communist States',Australian Journal of Political Science,44:1,127 — 153

To link to this Article: DOI: 10.1080/10361140802657052

URL: <http://dx.doi.org/10.1080/10361140802657052>

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Institutional Viability and High Courts: A Comparative Analysis of Post-Communist States

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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, and 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. Using factor analytic methods, we derive a single score that accurately measures these institutional features in post-communist states.

Introduction

Conventional wisdom acknowledges 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

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A previous version of this paper was delivered at the Interim Meeting of the International Political Science Association's Research Committee for Comparative Judicial Studies in Melbourne, Australia, January 17–18, 2007. The authors thank Brian Galligan, the anonymous reviewers, and the participants of that conference for their insightful comments and suggestions.

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). Although 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 3 years before the Court existed. This is not a random phenomenon, as 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, former Soviet Union and Mongolia. 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 enable the institutions to withstand exogenous influences and/or pressures. Thus, we attempt to determine the point at which institutional mechanisms converge at a sufficiently high level to allow the judiciary to play a role in the performance of the new democratic regime. By focusing on the degree of judicial institutionalization across a number of post-communist states, 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. Although 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' (Larkins 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' (Larkins 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 1959; 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'. Although the acquisition of stability (as Huntington describes) increases over time, it is also possible to instil 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 (2004) measures the underlying concept of judicial institutionalization using indicators that he subsumes under three important qualities of a 'viable' institution: differentiation, durability and autonomy.¹ According to McGuire's operationalization, *differentiation* of the judiciary from the political environment is the principal indicator of an institutionalized political organization (2004, 130). Differentiation is the establishment of clear boundary lines that mark and define the judiciary's unique role (McGuire 2004, 130). Without a clear identity that is distinct from other political organizations, it is difficult for citizens to perceive the judiciary as a viable and/or effective institution. Thus, our first hypothesis states that courts possessing greater levels of differentiation will operate as viable institutions more than courts possessing 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

¹This is not to say that other factors do not influence levels of institutionalization. We recognize that other aspects play an important role as well, such as socio-economic and political circumstances, levels of economic development, and democratic consolidation. This is especially true in post-communist countries where circumstances pertaining to the collapse of the Soviet Union vary across newly independent states.

measure of its integration into the political system. Our second hypothesis, therefore, argues that courts with greater levels of durability will possess higher levels of institutional viability.

Finally, an institutionalized court should be appropriately insulated from the other branches of the national 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'. 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. Our final hypothesis therefore states that courts with greater autonomy will possess higher levels of judicial viability.

McGuire's results – derived from an analysis of the levels of differentiation, durability and autonomy in the US Supreme Court – suggest that institutional arrangements have considerable implications for the historic role of a nation's high court. His principal argument is that step-by-step institutional growth and sophistication of the Court serves as a primary determinant of the justices' political power in the United States (2004, 129). This suggests that judicial institutionalization is most appropriately conceptualized as an ongoing, dynamic process.

We build upon McGuire's work by examining the judicial institutionalization across several newly democratic states. Over time, some transitioning societies may empower their courts; others may continue to look at them with apprehension and distrust. We expect constitutional courts to operate as viable institutions when all three component indicators (i.e. 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.

Following McGuire's framework, we offer our conceptual judicial viability model; based on aspects of differentiation, durability and autonomy. Each of these three aspects should contribute positively to judicial viability. Differentiation is operationalized as *physical location*, *voluntary judicial association* and *qualification requirements*. The initial aspect is a common measure of differentiation (Schwartz 1993, 33). A constitutional court that has its own independent facility provides evidence that the other political actors recognize the unique importance of the court's mission and are consequently committed financially to its success.²

Voluntary judicial association is the second aspect of a court's distinct identity.³ Because judicial associations in many countries have been primarily employee unions – established to lobby for better compensation and other benefits – judicial scholars rarely treat them as agents for judicial reform. Yet, voluntary judicial associations contribute to the institutional identity of

²Alternatives to an independent facility include housing the court with the Ministry of Justice, another court building, or within the Parliament.

³A judges' association is defined broadly to refer to organizations formed by judges to represent their interests, promote their professional training, and protect their judicial independence. Such organizations include judges' unions and professional associations.

constitutional courts by enhancing judicial professionalism, developing and advocating for a code of judicial conduct, and developing judicial leadership.

The final aspect of differentiation involves the *qualification requirements* for positions on the constitutional (high) court. This aspect includes the extent to which court members are recruited from among the legal scholars and judicial experts within a country. Those qualifications provisions that require potential judicial candidates to undergo rigorous legal exams and possess extensive judicial experience should contribute to the perception that the court is part of a unique epistemic community, with clearly delineated entry requirements.

We operationalize judicial durability through four variables: financial commitment to the court, the relative term-length of judges, control over internal procedures, and the court's age. Given the absence of reliable data on the budgets of constitutional courts, we rely on the proxy measures *adequacy of equipment* and *availability of support staff* to serve as surrogate measures for the level of institutional infrastructure, which tap the same underlying concept as a court's budget. The second aspect of durability examines the *relative term* of judges. Those individuals without life tenure and/or with relatively short terms of office will likely be more susceptible to outside influences, and generally more constrained by political pressures than judges with life tenure.⁴ Institutionally, those courts containing judges who do not possess life tenure are less resilient to change and more open to external pressures.

Selznick (1957) identifies another related aspect of an organization's durability: the presence of internally established norms and regularized procedures for decision making. We thus use the variable *rules of procedure* to gauge whether the internal court norms are determined exogenously or endogenously. As a number of courts in civil law countries must submit their rules of procedure for legislative approval – or have their rules directly determined by the legislature or ministry of justice – this aspect measures the extent to which courts are able to adjust to changing legal and political circumstances. The final aspect of institutional durability focuses on the physical age of the court. This aspect reflects the classical institutionalist insight that older institutions are more resistant to environmental shocks than their younger counterparts.

We operationalize autonomy across four aspects: the extent of the court's judicial review powers; budget control and allocations; nominating procedures; and rules of access. Becker (1970) suggests that independence may be highly contingent on a court's *powers of judicial review*. Although Herron and Randazzo (2003) discover no direct connection between the power of judicial review and independence, they note that constitutionally embedded powers of judicial review may indirectly enhance the perception of the judiciary as an independent institution.⁵ Thus, we include a measure that captures the extent of judicial review powers given to the constitutional court.

⁴Several scholars make similar arguments about the importance of life tenure (see Tate and Vallinder 1995; Larkins 1996; Schwartz 2000; Smithey and Ishiyama 2000; 2002; and Helmke 2002).

⁵Furthermore, Rogers and Vanberg (2002) and Vanberg (1998; 2001) note the informational advantage gained by judicial institutions through the possession of abstract and concrete judicial review.

The second aspect of institutional autonomy focuses on the *budget allocation process*. This is a commonly used measure of judicial independence, which examines the extent to which the constitutional court has direct control over its budget allocations. Our third aspect of institutional autonomy examines the *nomination procedure* for judges. Generally, 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 (see Holland 1991; and Smithey and Ishiyama 2000). We therefore include a measure that captures how many institutional actors participate in the nomination process.

The final aspect of autonomy involves the *rules of access* to the judiciary. These rules (often referred to as provisions for standing), affect the jurisdiction courts possess over litigants. More flexible standing provisions, allowing for direct appeals by individuals and minority parties in the legislature, often facilitate decisions that provide for expansions of rights sometimes contrary to governmental positions (Schwartz 2000, 34). We expect courts that possess greater jurisdictional flexibility to be more likely to act in a fashion that promotes their institutional objectives. Simply put, as access increases, the autonomy of the court should also increase.

Research Design

We examine the constitutional courts of 28 states in Eastern Europe and Central Asia;⁶ tracing their institutional development through 2005. These states offer an excellent opportunity to test the emergence of viable judicial institutions for three important reasons. First, there is a clearly marked break with the previous political system – all of the states transitioned to electoral democracies rather abruptly, between 1989 and 1992. Second, owing to their common totalitarian experiences and direct/indirect control by the Soviet Union, these legal systems were considered an instrument of government and, subsequently, the courts were often utilized and perceived as an extension of the Communist Party (Schwartz 2000). Finally, by limiting the sample to post-communist states, we are able to control for the potentially unique combination of elements in the legal culture that are not present in other regions.

Data are compiled from country web sites, the American Bar Association Judicial Reform Index, Amnesty International, Transparency International, the Law Library Resource Xchange, the Conference of European Constitutional Courts, and the EU's Open Society Institute. To ensure we measure the dynamic changes within judicial institutions, we code all of the component variables for each country on an annual basis. Thus, each country was coded during each year after its transition to democracy; the data collected capture

⁶Specifically, we look at the 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.

any changes in the formal provisions or legal rules pertaining to the organization and function of constitutional (high) courts.⁷

Methodology

We argue that a combination of factors contributes to the institutional viability of the judiciary. Accordingly, we employ factor analysis to reduce the 11 variables in our theoretical model to a single statistical measure ‘that is linearly related to the original variables’ in the model (Agresti and Finlay 1997, 630). We label this underlying, unobservable random variable the *judicial viability factor score*. Since this measure is calculated based on annual changes to the courts, we are able to capture the dynamic evolutionary process judicial institutions undergo during democratic transitions.

We rely on the principal factor approach offered by Johnson and Wichern (1998). Although some reservations remain over the appropriateness of factor analysis, both Agresti and Finlay (1997) and Johnson and Wichern (1998) argue that part of these reservations originate from the initial development of the procedure and are not caused by any deficiencies in its application.⁸ This principal factor approach is a modification of principal components analysis. The main difference is that one does not assume that the communalities equal one in the principal factor approach. Instead, we rely on the squared multiple correlations as estimates of the communality to compute factor loading. Therefore, in the model we hypothesize that a single common factor accounts for all of the elements in the sample correlation matrix \mathbf{R}_r . In this view, \mathbf{R}_r is factored as:

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

where $\mathbf{L}_r^* = \{\ell_{ij}^*\}$ are the estimated loadings.

The principal factor approach then uses the estimates:

$$\mathbf{L}_r^* = \left[\sqrt{\hat{\lambda}_1^*} \hat{\mathbf{e}}_1^* \right]$$

$$\Psi_i^* = 1 - \sum_{j=1}^m \ell_{ij}^{*2}$$

where $(\hat{\lambda}_1^* \hat{\mathbf{e}}_1^*)$ 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 (Bartlett 1937). 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 zero.

⁷See Appendix 1 for specific coding rules for each variable.

⁸Additionally, the lack of powerful computing resources slowed the development of factor analysis as a statistical method.

Factor scores are obtained for the j th case by the following computation, using estimates $\hat{\mathbf{L}}$, $\hat{\Psi}$ and $\hat{\boldsymbol{\mu}} = \bar{\mathbf{x}}$ (read as \mathbf{L} -hat, Ψ -hat and $\boldsymbol{\mu}$ -hat = \mathbf{x} -bar) as the true values:

$$\hat{f}_j = \left(\hat{\mathbf{L}}' \hat{\Psi}^{-1} \hat{\mathbf{L}} \right)^{-1} \hat{\mathbf{L}}' \hat{\Psi} (\mathbf{x}_j - \bar{\mathbf{x}})$$

Using this procedure, we produce *judicial viability factor scores* for each of our 428 court-year observations. Since the measure is calculated based on annual changes to the courts, we capture the dynamic evolutionary process that judicial institutions undergo during democratic transitions. The single factor score explains 89% 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 99.8% of the sample variance. We combine the two scores by the proportion of variance they explain individually and create *combined judicial viability scores* for our 428 court-year observations. This variable is formed in the following manner:

Combined judicial viability scores = [(Proportion of 89% sample variance explained by factor 1)(Factor score 1) + (Proportion of 99.8% sample variance explained by factor 2)(Factor score 2)]

Combined judicial viability scores = [(0.892)(Factor score 1) + (0.109)(Factor score 2)]

Results and Discussion

Using the theoretical and methodological framework explained above, we examine annual data related to 28 constitutional courts in post-communist Eastern Europe and Central Asia. Table 1 provides the results from the factor analysis.

Our first hypothesis argues that a principal component of a viable court is its *differentiation* from other political units (i.e. the establishment of clear boundary lines that mark its distinctiveness). Examining the results in Table 1 indicates the three operational measures load heavily onto one communality (i.e. a single factor score).⁹ This single, underlying dimension explains approximately 52% of the variance in the *physical location* of the court, 64% of the variance in *professional qualifications* and also explains approximately 63% of the variance in *judicial association*. These results suggest that the *differentiation* of the court from its institutional environment represents one of the dominant sub-dimensions of judicial viability.

⁹From hereon, we focus on the results obtained from the single factor model and refer our readers to Table 1 for the results of the two factor model. We believe that such focus is appropriate both theoretically (since we argue that judicial viability represents a single underlying dimension of judicial institutional growth) and methodologically (since our single factor model explains almost 90% of the total variance and none of our variables load significantly on the second factor).

Table 1. Factor Loadings for Judicial Viability Models

Variables	One Factor Model		Two Factor Model		
	Factor 1	Uniqueness	Factor 1	Factor 2	Uniqueness
Physical Location	0.521	0.729	0.521	0.024	0.728
Professional Qualifications	0.637	0.595	0.637	0.089	0.587
Voluntary Association	0.629	0.604	0.629	-0.119	0.590
Relative Term	0.808	0.348	0.808	0.186	0.313
Court's Age	0.654	0.572	0.654	-0.341	0.456
Equipment and Staff	0.759	0.425	0.759	-0.429	0.241
Rules of Procedure	0.609	0.630	0.609	0.253	0.566
Judicial Review	0.747	0.442	0.747	0.133	0.425
Nominating Procedures	0.608	0.630	0.608	0.146	0.609
Budget Control	0.705	0.503	0.705	-0.206	0.461
Rules of access (standing)	0.655	0.571	0.655	0.316	0.471
Eigenvalue proportion explained	4.951		4.951	0.603	
	0.890		0.890	0.1083	
Cumulative proportion explained	0.890			0.9983	

The second hypothesis suggests that *durability* is an important component of viability; and is operationalized as a function of the *relative terms* of office for judges, control over their internal *rules of procedure*, the adequacy of their *equipment and staff* (to measure financial support for the court), and the *court's age*. The results of the factor analysis provide support for this hypothesis. The single communality explains a relatively large proportion of the variance for the four aspects: 76% for *equipment and staff*, 65% for *court age*, 61% for *rules of procedure*, and 81% for *relative term*. This indicates that an extensive and adequate administrative framework, with modern equipment and a reasonable ratio of support staff per judge¹⁰ contribute considerably to the institutional viability of the judiciary. Additionally, it should not be surprising that the aspect *court age* weighted heavily on the single factor score, since the oldest post-communist judicial institutions (the Hungarian and Polish courts are each 16 years old) are twice as old as the youngest (the Azeri court 8 years old). This result reinforces the conventional wisdom that institutional viability increases over time.¹¹ Yet, a relatively short lifespan does not automatically hinder the attainment of judicial viability; the Russian and Latvian constitutional courts perform quite well despite their youth (see Figure 1). In sum, the data indicate overall that the viability of judicial institutions is highly contingent (but not entirely dependent) upon their institutional durability.

Our third hypothesis, that the viability of constitutional courts is enhanced by higher degrees of institutional *autonomy*, also receives strong empirical

¹⁰At least two support personnel per judge.

¹¹However, it is important to note that by the end of 2005 the mean age for the post-communist constitutional courts is 12 years, and a vast majority of courts cluster in the 10–14-year old range. We thus caution our readers in interpreting these results and reiterate that the physical age of the institution is a necessary but not a sufficient condition for institutionalization.

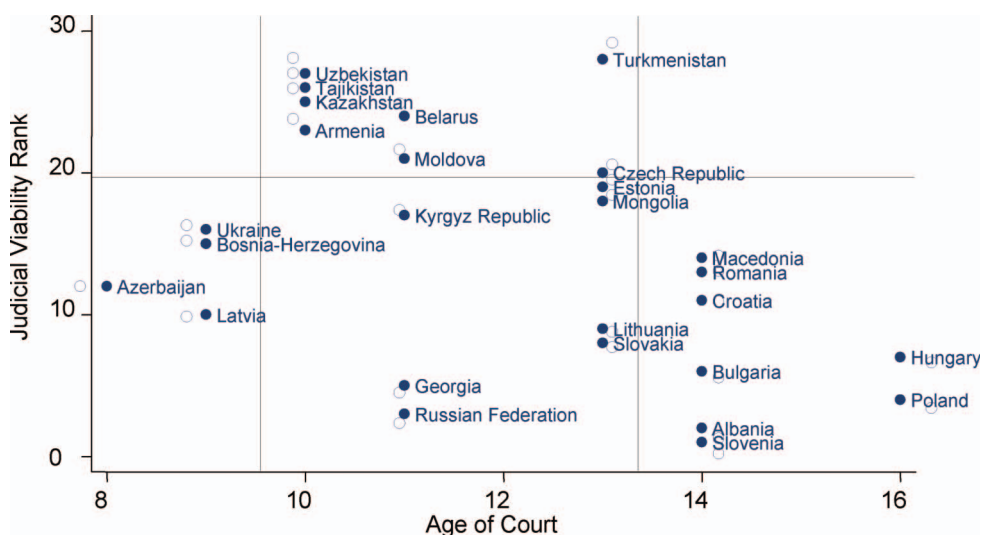


Figure 1. Is Judicial Viability Wholly Contingent on the Court's Chronological Age? *Note:* 2005 data presented. Judicial viability ranks from 1 (high) to 28 (low).

support. The first factor loadings for *judicial review*, *rules of access* (standing), *nominating procedures*, and *budget control* are 0.747, 0.655, 0.608 and 0.705, respectively. Furthermore, these variables all load minimally or negatively on the second factor, indicating that a single factor score captures the essential commonality among the four components of *autonomy*.

It is interesting to note that *relative term* (an aspect of institutional durability) exhibits the largest coefficient in the single factor model (0.808), indicating the importance of stability (or volatility) in the internal composition of the judiciary. Additionally, the impact of *equipment and staff* (also an indicator of durability) is substantial (0.759). This supports Huntington's (1968) argument that organizations that are poorly staffed and equipped cannot manage their workloads efficiently and are consequently unable to perform in the characteristic manner of institutional entities. Similarly, the factor analysis confirms that the breadth of *judicial review* (which loads at 0.747) is one of the most significant contributions to the institutional development of courts. If courts possess extensive jurisdiction over constitutional issues (i.e. abstract and concrete judicial review), the process of institutionalization is greatly facilitated.

Finally, it is worth noting that the measure of *physical location* (an aspect of differentiation) possesses the lowest scoring coefficient in the model (0.521). Although separate judicial buildings provide some degree of differentiation between the courts and other governmental institutions, their relative importance is marginal. Stated another way, the data reveal that a court building is simply a hollow shell unless it houses a capable and professional institution.

To summarize, the 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. According to our analysis of annual court data across several countries, myriad aspects pertaining to these three components represent a single, underlying dimension of viability, which explains 89% of the variance in judicial institutions. These results offer more substantive implications as well; with the identification of a single dimension, it is possible to measure the extent of institutional development within courts through a systematic analysis of formal provisions over time.

Development of Constitutional Courts: An Illustration

Although 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 observe that those countries possessing high judicial viability scores are more institutionally stable (and potentially more functionally independent) than those countries possessing lower scores? The scope of this paper does not allow us to directly test whether judicial viability affects the rate at which courts strike down laws, or the extent to which the public perceives the courts as more ‘trustworthy’. However, we select three individual cases – Albania, Ukraine and Uzbekistan – to illustrate how the process of institutional development unfolds and to demonstrate the utility of our approach for a more systematic analysis of judicial institutionalization and its impact.

To the extent that judicial viability is adequately measured, the levels of institutional development of a constitutional court should correspond favorably with its ability to become a distinctive and respectable force within a fledgling post-communist regime. By this logic, modest levels of judicial viability should constrain the court whereas greater degrees should enhance its impact on the legal and political environment. To illustrate this point, we select one case (Albania) in which the constitutional court attains a significant degree of institutional development by the end of 2005, one in which the court oscillates at modest level of institutional development (Ukraine), and one where the institutional framework remains undeveloped (Uzbekistan) (see Figure 2).¹²

Albania

Following the collapse of communist rule in 1991, Albania operated on the basis of a packet of interim constitutional provisions, passed in sections by a two-thirds vote of the Assembly (Albania’s legislature). The constitutional laws passed in 1991 and 1992, which set up the Constitutional Court, required the issuance of other acts in order to regulate its activity and organization. It took the Assembly almost 6 years to finally adopt the law ‘On the Organization and Functioning of the Constitutional Court of the Republic of Albania’ (nr. 8373; promulgated 15 July 1998), which established a legal base for issues regarding the activity of the Constitutional Court. More important, the 1998 law clarified

¹²Also see Appendix 2 for a full list of judicial viability scores and ranks by country.

provisions concerning the appointment of constitutional judges, the Court's judicial review competencies, and the subjects that may put the Constitutional Court into motion.

It is fair to say that until 1998 the Court operated under a variety of constraints, including Albania's civil unrest of January 1997, which led to a significant destruction of its infrastructure and the closing of the Court for several months (see Carlson 1997).¹³ Since 1998, however, the situation for the Court has improved significantly. The Court became considerably more confident in exercising its authority, rendering one of its most important decisions to date in 1999, in which it declared the death penalty provided by the Criminal Code as incompatible with the Constitution (V-65/99). Figure 3 provides a useful illustration of this dynamic.

Yet, despite the fact that the 1998 law solidified the Court's role in the Albanian political system, it also required the passage of additional legal acts for its implementation. Consequently, in February 2000, the Assembly adopted the law which regulates issues such as the submission of the applications, the preliminary review, and the adjudicating procedures. Although the 2000 law reduced the Court's authority to review certain types of individual constitutional complaints (compared to authorities foreseen by the 1998 provisions), the role of the Court has become more evident to citizens, as indicated by a steadily increasing workload (see Figure 4).

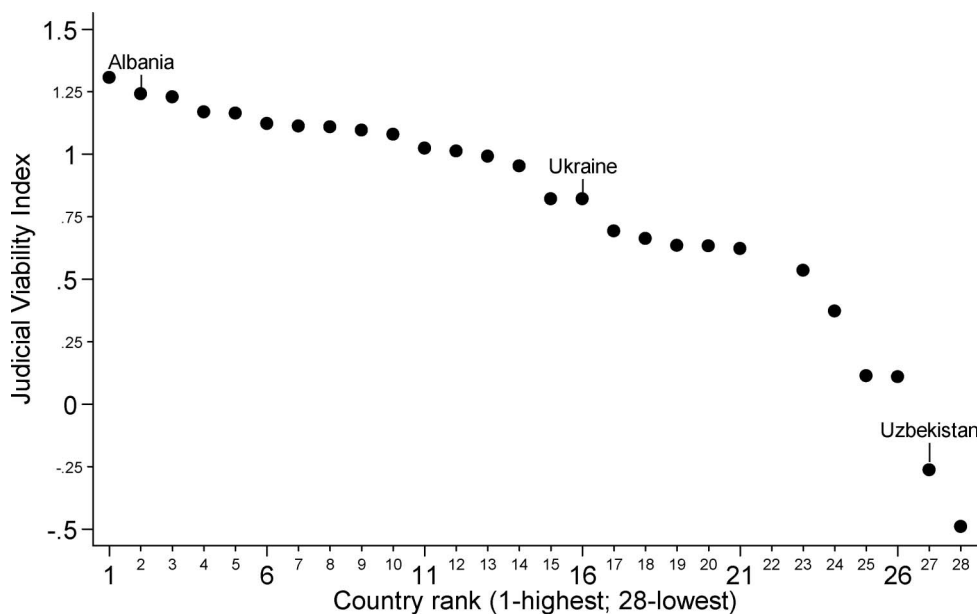


Figure 2. Judicial Viability Scores by Country, 2005.

¹³Since then, the government has renovated the building of the Constitutional Court several times and updated its network capabilities in 2003.

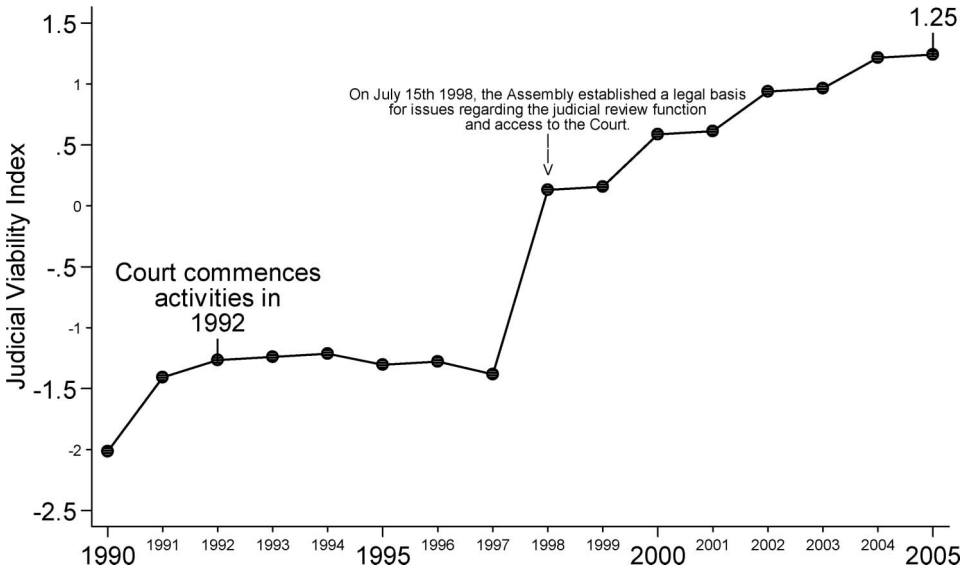


Figure 3. Institutional Development of the Albanian Constitutional Court, 1990–2005.

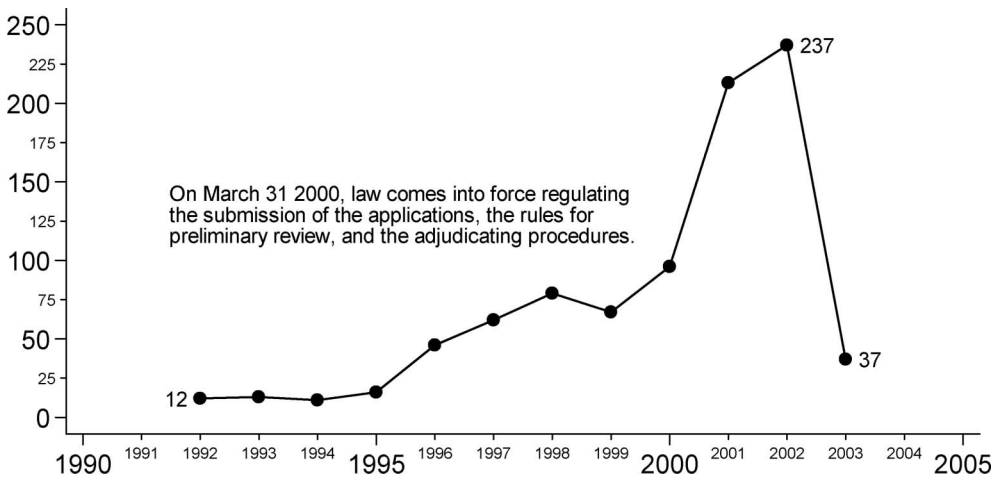


Figure 4. Number of Adjudicated Cases by the Albanian Constitutional Court 1992–2003. Note: Caseload data is not available for 2004–2005 period.

At the end of the observation period (i.e. 2005), it is apparent that the Constitutional Court has attained significant institutional stability and commitment from the lawmakers. Figure 3 shows that the late 1990s and beyond constitute a new era in the Court’s development. It now has vast constitutional jurisdiction over cases, issues, and litigants. The Council of Europe Venice Commission and other monitoring agencies agree that guaranteed terms of office for judges are respected in practice and none of the former Constitutional Court judges were pressured into early retirement. In practice, all appointments to the Constitutional Court, as envisaged by the

original law, are made from among highly qualified professionals (scholars with a degree in ‘higher legal studies’) with at least 15 years of experience in the legal profession.¹⁴ Additionally, the Constitutional Court administers its own budget, although the Assembly can modify the draft budget submitted annually by the Court’s President. Table 2 shows that the level of funding for the Constitutional Court has been stable in recent years.

Most important for the purposes of this illustration is that the constitutional court design and institutional infrastructure outlined by the constitution-drafters were ultimately promulgated by the Assembly, albeit with significant delays in the first years of the Court’s existence and in a piecemeal fashion. The fact that the Court commenced its activities in 1992, but institutionalization did not follow until several years later (from 1997 to 2000, with a more incremental pattern emerging thereafter), reinforces our argument that unless researchers delve deeper, and look beyond specific constitutional provisions to the dates of implementation, our inferences about the development of judicial institutions 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.

Ukraine

The Constitutional Court of Ukraine (CCU) scores in the middle range of our judicial viability index (16th out of 28 countries, with a score of 0.82 on our single factor judicial viability score in 2005). The Court’s institutional development remained at relatively low levels until the late 1990s and its progress since then has been incremental and modest. Notably, it is one of the youngest courts in our sample (9 years of operation), which may, in part, explain its modest levels of institutionalization. Figure 5 highlights the process of institutional development of the CCU. It also illustrates our earlier argument – unless we look beyond constitutional provisions to the dates of their implementation, we would incorrectly conclude that the CCU attained some functional ability as early as 1996, whereas in reality it existed only on paper.

Prior to the adoption of its first post-Soviet constitution on 28 June 1996, Ukraine functioned under a series of interim constitutional provisions. The 1996

Table 2. The Budget of the Constitutional Court of Albania, 2001–04

Year	Amount in Lekë	Amount in USD	Percentage of state budget
2001	68,181,000	649,343	0.04
2003	97,000,000	923,809	0.07
2004	91,030,000	866,952	0.06

Sources: Law on the State Budget for 2001, Law No. 8718, 46 FLET. ZYRT. 2049–53 (2000); Law on the State Budget for 2003, Law No. 8983, 88 FLET. ZYRT. 2597–601 (2002); Law on the State Budget for 2004, Law No. 9165, 108 FLET. ZYRT. 4631–34 (2003).

¹⁴Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania, art. 7.1, Law No. 8577, 4 FLET. ZYRT. 101–22 (2000).

Constitution guarantees basic human rights and mandates the separation of powers into legislative, executive and an independent judiciary.¹⁵ As Figure 5 shows, it is no surprise that the major upswing in the Court’s institutional development corresponds with the implementation of relevant provisions of the 1996 Constitution. The CCU consists of 18 justices (one of the largest courts in our sample), with the President, the Verkhovna Rada of Ukraine (VRU; legislature), and the Congress of Judges¹⁶ each appointing six of them for a single 9-year term.¹⁷ Requirements for the CCU justices include having attained the age of 40, professional experience of no less than 10 years, and residence in Ukraine for the past 20 years. Regional experts, however, voice concerns regarding the qualification requirement of ‘work experience in the sphere of law’, which is apparently not limited to having practiced before the court. No legal definition of what constitutes such experience exists, and it is often interpreted loosely.

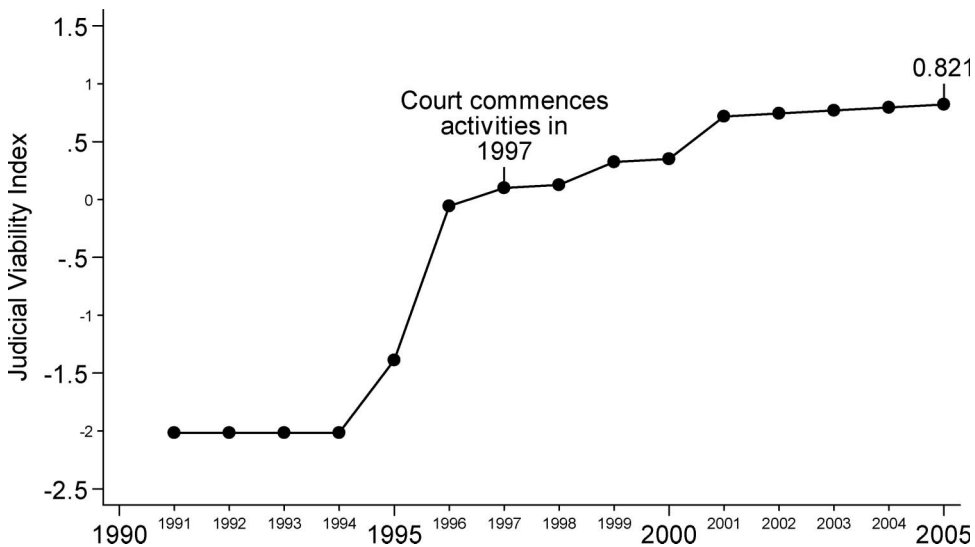


Figure 5. Institutional Development of the Ukrainian Constitutional Court 1991–2005.

¹⁵The Constitution was amended in December 2004 (see BVR, No. 2/2005, art. 44) as part of a compromise with the outgoing government. These amendments do not affect the judiciary, but they attempt to transform Ukraine into a parliamentary form of government, providing for a stronger Verkhovna Rada of Ukraine (which will appoint and dismiss the Prime Minister and most other ministers) while significantly reducing the authority of the President. Owing to their perceived controversial nature and alleged violations of procedural guidelines during their adoption, the President, on a number of occasions, had hinted at a possibility of appealing the constitutionality of these amendments before the Constitutional Court of Ukraine.

¹⁶Ukraine’s judicial administration system is extremely convoluted, with numerous bodies sharing the responsibilities for different aspects of court administration. The highest bodies in this system are the Congress of Judges of Ukraine and the Council of Judges of Ukraine (COJ), its executive arm.

¹⁷Const., art. 148.

The CCU is responsible for drafting its own budget and administering the funds once they are approved by the legislature.¹⁸ Table 3 shows that in practice the budget of the Court has been steadily increasing. It seems that the Ukrainian government is at least financially committed to the creation of a viable constitutional court.

Additionally, each justice of the CCU has a judicial assistant and a research consultant, who must be citizens of Ukraine and have higher legal education.¹⁹ The justices may independently select their assistants and research consultants, who may not be hired or removed without a justice's consent.²⁰ Notably, although these staffing provisions came into force in 1997, they were not fully implemented until late 1998. Furthermore, as of 2001, the CCU appears to be fully equipped with the computers and other necessary equipment, in large part due to the continuing external funding by the American Bar Association and the Council of Europe. These factors contribute to the institutional development of the CCU, but tell only part of the story.

One of the traits of an institutionalized organization is its active participation in the relevant policy-making arenas. The annual changes in the total number of cases adjudicated by the court, therefore, should be outward reflections of its level of institutional development. How has the Ukrainian Constitutional Court fared in this regard and how well does its level of activity correspond to our judicial viability scores? One can readily observe in Figure 6 that the CCU has not emerged as an active, viable policy maker.

We believe that this low level of activity is partly rooted in the fact that although anyone has the right to file a petition with the CCU requesting the official interpretation of the law, only the President, at least 45 VRU members, the Supreme Court, the Ombudsmen, and regional legislatures may file a constitutional appeal regarding the constitutionality of a legal act.²¹ There is also a higher threshold of admissibility for requests for official interpretation of legislation submitted by individuals as opposed to the government entities.

Table 3. The Budget of the Constitutional Court of Ukraine, 2003–06

	2003	2004	2005	2006	2006/2005 % increase
Constitutional Court budget (million UAH)	14.8	19.4	29.6	37.8	27.7
Total judicial system budget (million UAH)	461.4	689.2	1,195.10	1,608.00	34.5
Total judicial system budget (million US\$)	87.7	130.9	239	321.6	–

Sources: Law on the State Budget for 2003, Annex 3 (BVR, No. 10–11/2003, art. 86; *last amended* BVR, No. 16/20054, art. 236); Law on the State Budget for 2004, Annex 3 (BVR, No. 17–18/2004, art. 243; *last amended* BVR, No. 5/2005, art. 122); Law on the State Budget for 2005, Annex 3 (BVR, No. 7–8/2005, art. 162; *last amended* BVR, No. 7/2006, art. 85); Law on the State Budget for 2006, Annex 3 (BVR, No. 9–11/2006, art. 96).

¹⁸LJS articles 41(11), 50(11); LCC art. 31.

¹⁹Const., articles 40.2, 49.2; LCC articles 25., 49.2.

²⁰See CCU Procedural Regulations §74.3. It is interesting to note that no other judge or court in Ukraine is given this level of administrative control.

²¹Constitution, art. 150; Law on the Constitutional Court, art. 40.

Individuals must demonstrate ‘a practical necessity’ in having an official interpretation of a law that may result in violation of their rights.²² This lack of individual standing to petition the CCU directly means that it is not a fully effective mechanism for protecting individual rights. Additionally, many individuals mistakenly believe that the CCU is the highest appellate jurisdiction in the country and have filed 3497 ‘appeals’ against general court judgments with it since 1997 (see Selivon 2005). Thus, it is also possible that the Court has been burdened by a number of ‘frivolous’ petitions, which contributes to its low number of adjudicated cases.

Furthermore, although the CCU is typically perceived as acting fairly and independently when issuing its decisions, it has been criticized sharply in a number of notorious decisions issued in late 2003. These included affirming constitutionality of draft constitutional amendments that were supported by the Presidential Administration but regarded by independent domestic and international experts as a significant step backwards in the establishment of the rule of law; and interpreting the Constitution as allowing then President Leonid Kuchma to run for office for the third time. Finally, although the CCU’s decisions are usually respected in practice, the government has been able to find ways around some decisions on unconstitutionality of certain laws, complying only with those decisions it deems favorable and disregarding the others.²³ Therefore, as a result of these instances of non-compliance by the

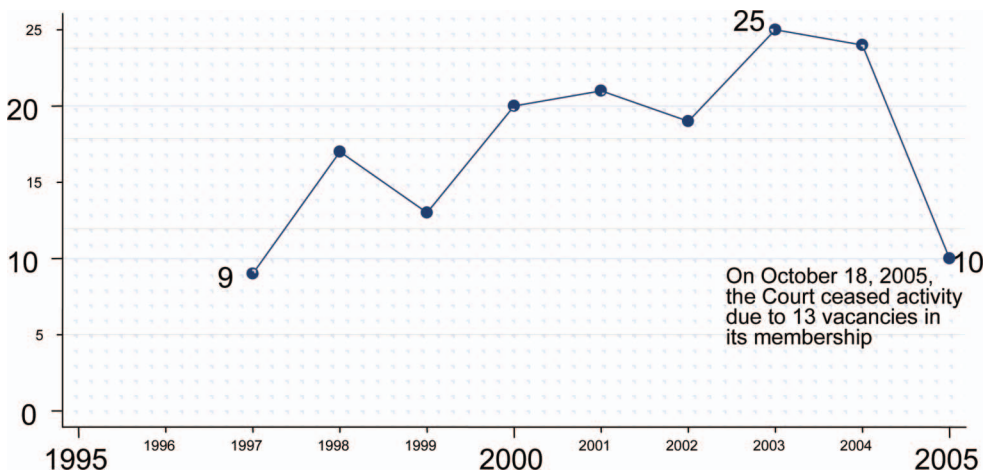


Figure 6. Number of Adjudicated Cases by the Ukrainian Constitutional Court 1997–2005. *Note:* Data is available at the Constitutional Court web site (<http://www.ccu.gov.ua>).

²²Law on the Constitutional Court, articles 93–94.

²³For instance, American Bar Association’s *Ukraine 2006 JRI* report mentions that the CCU has issued a number of essentially repetitive decisions on partial unconstitutionality of annual budget laws, including those related to the judicial budgets. Nevertheless, every subsequent budget law includes the same language as that which was deemed unconstitutional. In another example, the government, in a matter that was pending before the European Court of Human Rights, failed to inform it about a relevant decision by the CCU. Unfortunately, no legally specified mechanisms are available to the CCU to compel the government to comply with its decisions.

government and CCU's own controversial decisions, it is likely that the CCU is not viewed as a fully viable forum for constitutional adjudication. As we have argued earlier, high levels of institutionalization should lend both legitimacy and potency to judicial decisions, whereas low or modest levels of development should indicate limited impact.

The year 2005 was a crucial year for the CCU and Ukraine more generally. The new democratic government that came to power following the 2004 Orange Revolution has been unable and at times unwilling to address the numerous systemic deficiencies in the administration of constitutional justice. For instance, when the constitutionally prescribed tenure of nine justices expired in late 2005 and the CCU was left with only five justices (there were four pre-existing vacancies), the VRU's commitment to the Court was tested and proven to be lacking. The remaining number of justices was insufficient to constitute a quorum for either instituting new proceedings or for adjudicating pending cases (see Table 4). The President and the Congress of Judges promptly appointed nine additional justices, but the Verkhovna Rada, for purely political reasons, has stalled the mandatory swearing-in ceremony for these justices for almost 9 months.²⁴ Thus, the Court was paralyzed and unable to perform its functions from October 2005 until August 2006.²⁵

In sum, we believe that the Court's partial institutional sophistication and continuous institutional volatility corresponds quite favorably to our theoretical predictions. Empirically, it also appears that our judicial viability index for CCU does a good job at approximating its institutional development and impact. To reiterate, we are not ready to claim at this point that a court's institutional development is causally related to its impact on society and its activity levels; we merely note that anecdotal evidence seems to support our assertions and invite further research to address the causality issue.

Uzbekistan

Since its proclamation of independence from the former Soviet Union, Uzbekistan has made little progress towards institutional development of its

Table 4. Vacancies on the Constitutional Court of Ukraine, 2005–06

Vacancies		
Statutory number of judges	2005 (Oct.)	2005 vacancies as a %
18	13	72.2

²⁴Apparently, the VRU was interpreting its right to control swearing in of the justices as a veto power against appointees of the President and the Congress of Judges. Most observers agree that this was constitutionally impermissible. Interestingly, the possibility of such a situation was forewarned as early as 2 months prior to its occurrence (see Bohdan 2005).

²⁵As of 4 August 2006, Verkhovna Rada appointed Holovin, Kolos, Markush and Ovcharenko as Constitutional Court judges. President expects the Court to resume work on 7 August 2006. (Source: Unian News Agency at URL: <<http://www.unian.net/eng/lastnews/>>.)

constitutional court. The 1992 Constitution provides for a presidential system with separation of powers between the executive, legislative and judicial branches but, in practice, President Islam Karimov dominates Uzbek political life. Karimov, the former First Secretary of the Communist Party of Uzbekistan, has held power since he was first elected in December 1991. He has reportedly used a variety of devices, including suppression of the media and of opposing political parties, referenda that were considered neither free nor fair by international observers, and violations of human rights, to retain control. Uzbekistan has received consistently low democracy and rule of law ratings from Freedom House and Polity Project, and the 2005 US Department of State *Country Report on Human Rights Practices* concluded that 'Uzbekistan is an authoritarian state ... with limited civil rights'. The most recent parliamentary elections in 2004 (for the seats in the lower chamber of the parliament), fell significantly short of international standards.

The Constitutional Court (CC) was established in December 1995 pursuant to 'The Law on the Constitutional Court' enacted in April of that year. The Court is self-managing and funded directly by the Ministry of Finance, but does not have its own line-item in the national budget.²⁶ It has 22 staff members, a well-maintained building, and has been sufficiently equipped since 2000. The existing interviews with CC judges seem to point to the fact that the regime has lived up to its financial commitment to the Court.

The Court consists of seven members, one of whom must be from the Karakalpakstan region. The CC judges must either be lawyers or political figures. Historically, however, all judges appointed to the CC have been lawyers. Judges are selected for a 5-year term, subject to re-appointment. Judges are nominated by the President and then 'confirmed' by parliament. In practice, all of the candidates nominated by the President were appointed. Notably, an ex-President becomes a member of the court for life.²⁷ Although this situation has not presented itself, this provision circumvents the appointment process established for the other candidates.

Parliament (and various leaders and subgroups), the President, the chair of the Supreme Court, the chair of the High Economic Court, the procurator general, and three judges of the CC may present cases for consideration to the court, but individual citizens cannot.²⁸ Citizens have reportedly applied to the court for review of decisions by the regional and district level procuracies, but the CC has declined those cases, citing a lack of jurisdiction. The CC representative who met with the *Uzbekistan 2002 JRI* assessment team recognized that the CC has not been a very active organization, rendering only 10–15 decisions per year.²⁹ Unfortunately, official statistics are not readily

²⁶Questions concerning the percentage of the national budget allocated to the court system cannot be addressed because the national budget is not a publicly available document. During his interview with the American Bar Association's Judicial Reform Index (JRI) assessment team in 2002, the CC representative was unwilling to divulge the exact amount of salary, noting that salaries in Uzbekistan are generally quite low, but at least the salaries CC judges are paid are comparable to those paid to other high level government officials.

²⁷Constitution of the Republic of Uzbekistan, 8 December 1992, Art. 97.

²⁸Law on the Constitutional Court, 1995, Art. 19.

²⁹Some experts believed that the CC caseload would increase in 2002 because it was given authority to review decisions and instructions of the Prosecutor General to ensure they comply

available, so it is impossible to trace the changes in the Court's caseload over time as we have done with Albanian and Ukrainian caseloads. Furthermore, although the CC publishes its decisions and guiding opinions in their magazine or newsletters, international experts point out that the opinions are usually brief, superficial, and provide little basis for academic or public scrutiny. Thus, despite financial security and sufficient staff and equipment (variables that loaded highly on our single factor judicial viability score), the Court remains weakly institutionalized, as Figure 7 indicates. This finding reinforces our argument that judicial viability is contingent upon the totality of individual components of autonomy, durability and differentiation (rather than the presence of any one individual aspect).

A Comment on Judicial Viability and Democracy

We are sure that by now the readers are questioning whether judicial institutional development is simply a function of the country's experience with democracy – the more democratic a country, the more likely it is to develop a viable constitutional tribunal. This may occur because extensive political and civil rights (typically associated with liberal democratic regimes) signify support for the idea that the constitutional court has a particular role in enforcing them (Tate and Vallinder 1995; Smithey and Ishiyama 2002; Ginsburg 2003).

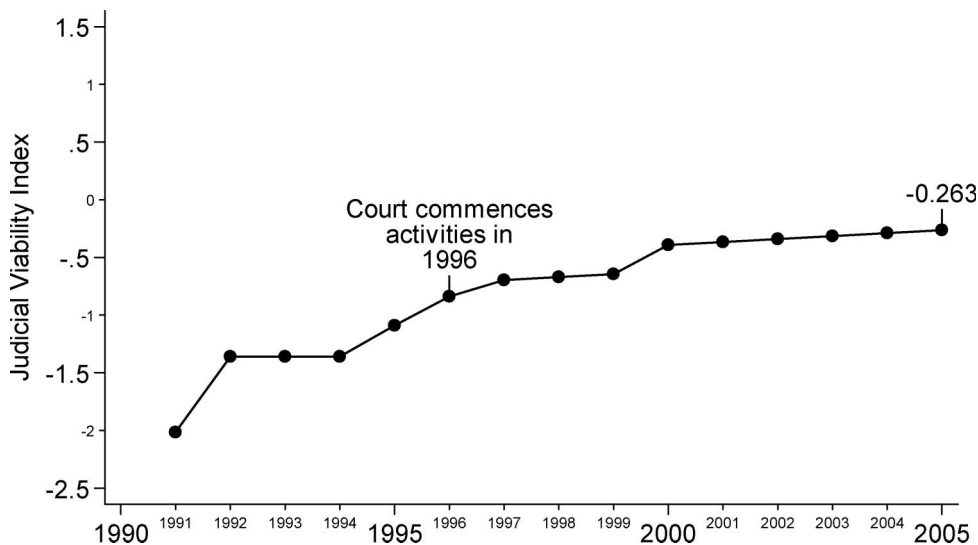


Figure 7. Institutional Development of the Uzbek Constitutional Court 1991–2005.

with the constitution (pursuant to Art. 13 of the new Law on the Procuracy, NO. 257-II, 21 August 2001). Despite this enhanced jurisdiction, however, no cases of this type have made it to the CC. Furthermore, neither lawyers nor lower court judges could cite one key CC decision that had an important influence on civil rights or liberties. Nor could they cite one decision that had arguably been made against the interests of the executive power. Several referred to the CC as a 'dead' organization (see *Uzbekistan 2002 JRI* report, available at <http://www.abanet.org/ceeli/>).

Additionally, a regime’s recognition of extensive political and civil rights may provide greater opportunities for citizens and politicians to bring cases to the court, enhancing and solidifying its role in the country’s political system (e.g. Epp 1998; Tarrow 1998). Thus, it is possible that, as a general rule, viable constitutional courts emerge in an environment characterized by extensive protection of political rights and civil liberties. Fairly high judicial viability scores for Slovenia, Poland, Lithuania, Latvia, and Hungary – all considered consolidated democratic regimes using conventional criteria – seem to support this possibility. In closing, therefore, we briefly address this question.

Figures 8 and 9 provide some answers regarding the democracy–judicial viability relationship. We use Freedom House’s 2005 cross-national data from the *Freedom in the World* dataset, which measures political rights and civil liberties, to proxy the level of democratic freedoms for countries in our sample.³⁰ These figures indicate that, although there is a weak linear trend between judicial institutionalization and democracy, the existence of viable constitutional courts is not limited to countries with consolidated democratic regimes.

The most viable constitutional courts in our sample – courts of Slovenia, Albania, Russian Federation, Poland and Georgia – vary significantly in their

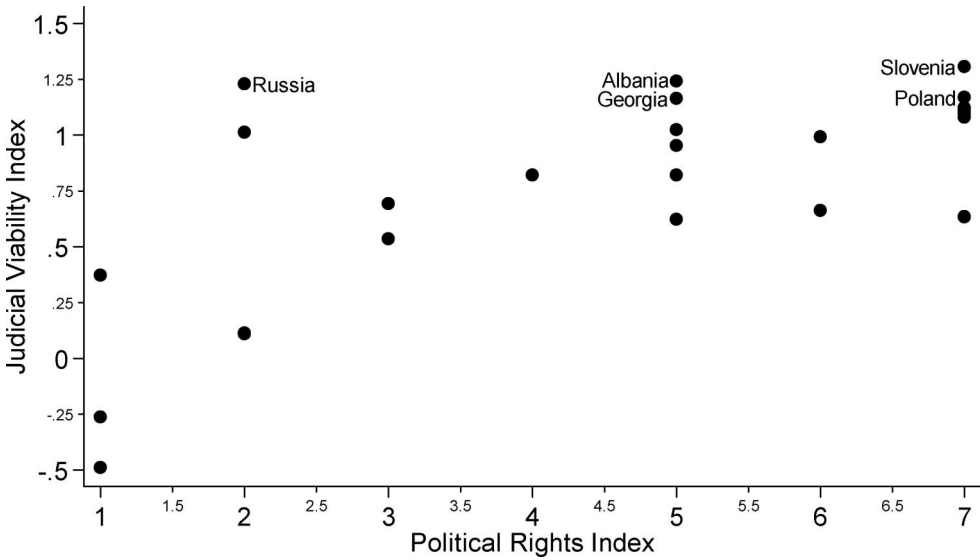


Figure 8. Is Judicial Viability a Function of Extensive Political Rights Protections? *Note:* 2005 data; only the top 5 ranking countries are labelled. FH Political Rights Index is inverted (1-low; 7-high).

³⁰Freedom House measures democratic freedoms according to two broad categories: political rights and civil liberties. These categories contain numerical ratings between 1 and 7 for each country, with 1 representing the most free and 7 the least free. To facilitate interpretation, we invert the scales; using the inverted scale, 1 represents least free and 7 represents most free rating. (FH data and methodology is available at www.freedomhouse.org).

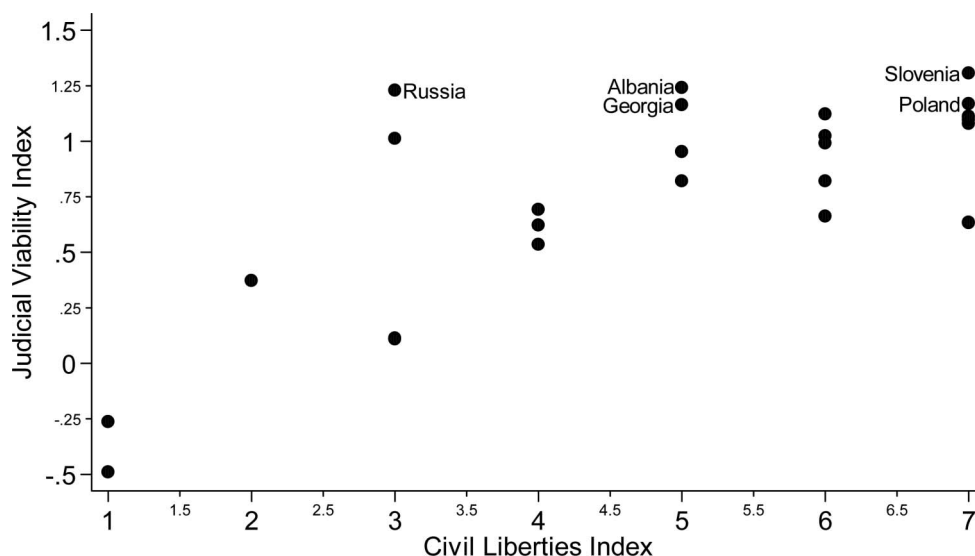


Figure 9. Is Judicial Viability a Function of Extensive Civil Liberties Protections? *Note:* 2005 data; only the top 5 ranking countries are labelled. FH Civil Liberties Index is Inverted (1-low; 7-high).

protection of political rights and civil liberties and, yet, all five exhibit very high relative levels of institutional development. This suggests that the nature of the political regime alone has a very modest role in facilitating the development of viable constitutional tribunals and that other factors must be considered in order to derive a more nuanced understanding of the process of judicial institutionalization.

Conclusions

At the beginning of this examination we asked whether we can confidently claim that the judiciary has emerged as a viable institutional actor in democratic politics. Conventional wisdom acknowledges that an effective judiciary is important to the development and consolidation of democratic governments. Yet scholars have limited methods for discerning when courts have achieved a sufficient level of institutionalization to be effective. Our analysis attempts to fill this gap by examining the institutional development of the judiciary in the post-communist states of Eastern Europe, former Soviet Union and Mongolia. 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 democratising states, they must develop certain levels of organizational sophistication and autonomy that enable the institutions to withstand exogenous influences and/or pressures. Thus, we attempt to determine the point at which institutional mechanisms converge at a sufficiently high level to allow the judiciary to play a role in the performance of the new democratic regime.

Based on our examination, several notable conclusions emerge. First, according to our analysis of annual court data across several countries, myriad aspects pertaining to differentiation, durability and autonomy represent a single, underlying dimension of viability that explains 89% of the variance in judicial institutions. These results offer more substantive implications as well; with the identification of a single dimension, it is possible to measure the extent of institutional development within courts through a systematic analysis of formal provisions over time. Second, to demonstrate the substantive implications of this new measure, we examine three cases studies – Albania, Ukraine and Uzbekistan – to determine the validity of the measure. In each of our case studies, the evidence demonstrates that our measure of judicial viability accurately captures the institutional variations and their substantive implications for judicial efficacy. Finally, we examine whether the measure of judicial viability is simply a function of the country's experience with democracy. Our analysis reveals that the existence of viable constitutional courts is not limited to countries with consolidated democratic regimes.

Although it is simply impossible to address all of the potential uses and limitations of our measure of judicial viability 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 and performance of high courts over time. Additionally, we plan to evaluate a number of factors that could help explain variations in the levels of institutional development that we find here. 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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Appendix 1. Variable Descriptions and Coding Procedure

Differentiation

- **Physical Location** Does the constitutional court have its own building? Coded 0 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.
- **Professional Qualifications** Do specific guidelines for judicial qualification to the constitutional court exist? Coded 0 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.
- **Voluntary Association** Does a national judicial association exist, the sole aim of which is to protect and promote the interests of the judiciary? This variable is coded based on the information collected by the American Bar Association's *Judicial Reform Index* (JRI) Database: 0 for lack of a representative association; 0.5 for state-regulated association OR one that requires mandatory membership for all judges; and 1 for an independent, voluntary judicial association.

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.
- **Equipment and Staff** Does the Constitutional or High Court operate with a sufficient number of computers, equipment and staff to enable it to handle its caseload in a reasonably efficient manner? 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. We code 0 to represent lack of equipment and staff; 0.5 for presence of only one of the two components; and 1 for observations where judges of the Constitutional or High Court are staffed (with two or more support staff per judge) and have adequate computers.
- **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.
- **Court Age** Coded as a continuous measure of the raw number of years the court remains in existence.

Autonomy

- **Judicial Review Doctrine** The scope of constitutional review powers formally assigned to the court. Coded 0 for lack of final constitutional review authority; 0.5 for abstract review only; 1 for dual/mixed review powers (concrete review and abstract review).
- **Standing** provisions for access to the constitutional courts. Coded 0 for no laws to specify standing; 0.33 limited range of litigants (i.e. national-level institutions only); 0.67 for states that provided access to both national and local institutions; and 1 if individuals also allowed to petition the court directly.
- **Budget Control** 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); 0.5 was assigned where judiciary had partial control in the budgetary process; 1 for those courts that allocated their own budget.
- **Nominating Procedure** Number of nominating actors. Coded based on the raw number of nominating actors (0 was assigned for years after transition but prior to establishing the procedure). The variable was then recoded from 0 to 1 based on the following conditions: 0.25 = 1 actor; 0.5 = 2 actors; 0.75 = 3 actors; and 1 = 4 or more actors.

Appendix 2. Judicial Viability Factor Scores by Country (2005)

Country	Court's age (years)	Judicial viability Single factor score	Country rank
Albania	14	1.241618	2
Armenia	10	0.5352716	23
Azerbaijan	8	1.012508	12
Belarus	11	0.3722482	24
Bosnia-Herzegovina	9	0.8210006	15
Bulgaria*	14	1.122196	6
Croatia	14	1.023971	11
Czech Republic**	13	0.6329863	20
Estonia**	13	0.6347734	19
Georgia	11	1.163984	5
Hungary**	16	1.112321	7
Kazakhstan	10	0.1132943	25
Kyrgyz Republic	11	0.6924847	17
Latvia**	9	1.07954	10
Lithuania**	13	1.096318	9
Macedonia	14	0.9529772	14
Moldova	11	0.6223841	21
Mongolia	13	0.6623628	18
Poland**	16	1.169066	4
Romania*	14	0.9916757	13
Russian Federation	11	1.229261	3
Slovakia**	13	1.109212	8

(continued)

Appendix 2. *(Continued)*

Country	Court's age (years)	Judicial viability Single factor score	Country rank
Slovenia**	14	1.306895	1
Tajikistan	10	0.1092363	26
Turkmenistan	13	-0.4898041	28
Ukraine	9	0.8210006	16
Uzbekistan	10	-0.2631566	27
Serbia-Montenegro	11	0.57873398	22

*EU candidate; **EU member; †2003 data were used.
Country ranks range from 1 (highest) to 28 (lowest).