The Economics of Judicial Councils[*]

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Abstract

In recent decades, many countries around the world have institutionalized judicial councils of some sort. These institutions are designed to maintain an appropriate balance between judicial independence and accountability. However, they differ in attributes and competences across the world. Our paper has two aims. First, we provide an economic theory of the formation of judicial councils and identify some of the dimensions along which they differ. Second, we test the extent to which different designs of judicial council affect judicial quality. We find that there is little relationship between councils and quality. We also offer a positive explanation for why judicial councils nevertheless remain attractive institutions. Finally, we discuss several experiences from the perspective of our theory.

I. Introduction

Most legal systems strive for judicial quality in terms of timely, well-formulated judicial decisions by qualified judges. The way in which democracies pursue this goal vary across legal traditions and countries, but one universal is the inevitable tension between judicial independence and judicial accountability. On the one hand judicial

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quality can only be assured by an independent judiciary.[1] On the other hand, judges are agents who may exploit slack if granted too much independence, so some form of external accountability is required to make sure that judicial decision-making is not affected by personal or other interests of judges. The adequate calibration between independence and accountability is the key goal of institutional design of judicial systems.

In recent years, there has been a proliferation of institutions known as judicial councils to help ensure judicial independence and external accountability, and to achieve the important balance between the two. This paper describes these institutions and provides an economic theory of their formation and features. We also provide some evidence as the whether different designs of judicial council affect judicial quality. Although we find that there is little relationship between councils and quality, the paper argues that the eternal struggle for a balance between independence and accountability ensures that Councils will continue to be a locus of institutional reform. We thus have an institution adopted more for its role as an arena for contestation than for the substantive outputs that it produces.

II. The Tension Between Accountability and Independence

[1] There is a large body of literature on judicial independence and quality. See, for example, Richard Epstein, The Independence of Judges: The Uses and Limitations of Public Choice, Brigham Young University Law Review 827, 1990; Paul Fenn and Eli Salzberger, Judicial Independence: Some Evidence from the English Court of Appeal, Journal of Law and Economics 42, 831, 1999; John Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, Southern California Law Review 72, 353, 1999; F. Andrew Hanssen, Is There a Politically Optimal Level of Judicial Independence? American Economic Review 94, 712, 2004; Irving Kaufman, The Essence of Judicial Independence, Columbia Law Review 80, 671, 1980; Daniel Klerman and Paul Mahoney, The Value of Judicial Independence: Evidence from 18th Century England, American Law and Economics Review 7, 1, 2005; William Landes and Richard Posner, The Independent Judiciary in an Interest-Group Perspective, Journal of Law and Economics 18, 875, 1975¸ J. Mark Ramseyer, The Puzzling (In)dependence of Courts, Journal of Legal Studies 23, 721, 1994; J. Mark Ramseyer and Eric Rasmusen, Judicial Independence in Civil Law Regimes: Econometrics from Japan, Journal of Law, Economics, and Organization 13, 259, 1997.

A long and established literature argues that the ideal of judicial independence is a crucial quality of legal systems, and indeed inherent in the notion of judging.[2] Naturally, the ideal is not always met, for it remains the case that in every legal system judges are appointed and employed by the state. It would be unusual indeed if judges did *not* have a role in implementing social policy, broadly conceived.[3] Typically, then, in democracies, the degree of judicial independence actually granted reflects broad choices of the regime: it may make sense, for example, to have judicial independence so as to maintain credible commitments in the economic sphere or to enable liberal politics to be maintained.

The delegation of power to judges implies some need for judicial accountability. While judicial independence is widely studies, accountability has been the subject of much less inquiry. It implies that the judiciary as a whole maintain some level of responsiveness to society, and ensure a high level of professionalism and quality on the part of its members.

Judicial councils are devices designed to address the need for both accountability and independence. They fall somewhere in between the polar extremes of letting judges appoint their own successors and maintain internal responsibility for judicial discipline, and the alternative of complete political control of appointments, discipline and promotion. The first model errs on the side of independence, while the latter may make judges too accountable in the sense that they will think about politicians preferences in the course of deciding specific cases. As an intermediate body between politicians and judges, the judicial council provides a potential device to enhance both accountability and independence. There are a wide variety of models of council, in which the composition and competences reflect the concern about the judiciary in a specific context.

France established the first High Council (*Conseil Superieur de la Magistrature)* in 1946. It was in charge of managing judicial personnel, but only a minority of members

[2] See the recent volume JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank and Barry Friedman eds., 2003)
[3] MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

were themselves magistrates elected directly by fellow judges.[4] Italy was the first country to create a judicial council (the *Consiglio Superiore della Magistratura*) in 1958 designed to completely remove the entire judiciary from political control, a model that served subsequently for other judiciaries.[5] Spain[6] and Portugal[7] have slightly different models introduced after the fall of the dictatorships in the mid 70s, in which judges are a majority of the members. These councils have final decision-making in all cases of promotion, tenure and removal. Judicial salaries are also technically within their authority but usually tempered by the department in charge of the budget (typically the Ministry of Finance). The power of high-ranking magistrates has been dramatically reduced in most of these countries (as a consequence of junior-ranking judges being appointed to the judicial council) and strong unions or judicial associations have emerged.[8]

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[4] In the Fifth Republic, the President of the Republic took over the appointments of all the members and reinstated most of the traditional powers of the Minister of Justice and higher-ranking judges. The cohabitation period in the 1980s eventually led to another reform (*Loi Constitutionnelle* of July 1993 and *Loi Organique* of February 1994). The Council has two committees, one for judges and another one for prosecutors. The Council has a total of sixteen members. Each committee has .one administrative judge chosen by the administrative judges (*Conseil d'État*), and three individuals chosen by the President, the Senate, and the National Assembly each. For the judicial committee, it has also five judges elected by the fellow judges and one prosecutor chosen by the fellow prosecutors; for the prosecutorial committee, it has one judge elected by the fellow judges and five prosecutors for the prosecutorial formation. The President and the Minister of Justice sit *ex officio*. See Cheryl Thomas, 1997, Judicial Appointments in Continental Europe, Lord Chancellor's Department, Research Series 6/97. Further discussion in section V.D.

[5] The Italian Council was made up of thirty-three members, twenty magistrates elected directly by the judges, ten lawyers or law professors nominated by the Parliament, and the President, the Chief-Justice and the Chief-Prosecutor all *ex officio*. It has been reformed recently. See Thomas, *supra* 2. Further discussion in section V.E.

[6] The Spanish Council (the *Consejo General del Poder Judicial*) has twenty members, twelve judges and eight lawyers all appointed by the Parliament, and the Chief-Justice *ex officio*. For prosecutors, there is a council made up of twelve prosecutors (the *Consejo Fiscal*).

[7] There are three councils in Portugal, one for judicial courts (the *Conselho Superior da Magistratura*), one for administrative courts (the *Conselho Superior dos Tribunais Administrativos e Fiscais*), and one for prosecutors (the *Conselho Superior do Ministério Público*).

[8] A good summary can be found in Thierry-Serge Renoux, 2000, Les Conseils Supérieurs de la Magistrature en Europe, Documentation Française (Coll. Perspectives sur la justice). About the unionization of the judiciary, see Willem de Haan, Jos Silvis and Philip A. Thomas, 1989,

The French-Italian model has been exported to Latin America and other developing countries.[9] Indeed, the World Bank and other multilateral donor agencies have made judicial councils part of the standard package of institutions associated with judicial reform and rule of law programming.[10] Efforts to produce model "best practices" are proceeding. For example, the Association of European Magistrates for Democracy and Freedom (MEDEL) produced a Draft Additional Protocol to the European Convention on Human Rights , called the Elements of European Statute on the Judiciary (known as the "Palermo Declaration"). This model statute states that there shall be a supreme council of magistracy, at least half of whom are judges, and that shall also include appointees of the parliament.[11] In their conception, the supreme council will produce a budget for the courts, manage the administration, recruitment, assignment[12] and discipline, [13] thus guaranteeing judicial independence. The Council of Europe made a similar recommendation in its 1994.[14] Other international organizations have followed suit. [15]

Radical French Judges: Syndicat de la Magistrature, Journal of Law and Society 16, 477-482 (explaining the role of the union of judges). See also discussions of Sections V.D. and V.E.

[9] Some refer to a distinction between a "Northern European Model" more focused on management concerns and a "Southern European Model" that is constitutionalized and focusing on structural independence. Wim Voermans and Pim Albers, *Councils for the Judiciary in EU Countries*, European Council for the Efficiency of Justice, CEPEJ, 2003. We reject this distinction as unhelpful, but rather develop an index of powers and competences discussed below, section IV.

[10] See Hammergren, *infra* 39. See also Pedro C. Magalhaes, 1999, The Politics of Judicial Reform in Eastern Europe, Comparative Politics 32, 43-62 (discussing the judicial institutional design in Bulgaria, Hungary and Poland and how it relates to the bargaining process between the different political actors) and Peter H. Solomon, 2002, Putin's Judicial Reform: Making Judges Accountable as well as Independent, East European Constitutional Review 11, 117-123 (discussing the reforms to the Judicial Qualification Commission).

[11] Article 3.2

[12] Article 3.1

[13] Subject to review by the Supreme Court. Article 3.4

[14] **Recommendation No.R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (1994) (Council of Europe Recommendation), art.I.2.c**

[15] Violane Autheman and Sandra Elena, *Global Best Practices-Judicial Councils: Lessons Learned from Europe and Latin America* (IFES, 2004) (arguing that judicial councils should be composed of a majority of judges elected by their peers, and should be tasked with selection, promotion, discipline and training) .

In most civil law countries that have adopted the French-Italian model, the main initial concern was independence of the judiciary after periods of undemocratic governments (therefore most of these countries have constitutionalized judicial councils). Independence, however, is a complex and multifaceted phenomenon. Even though judges may be independent from political control, they may become dependent on other forces, such as senior judges in a judicial hierarchy—with just as much potential to distort individual decision-making as political influence.[16] In civil law countries, a large proportion of judges are recruited directly from law school using some form of public examination and with only minimal requirements of previous professional experience. Therefore, socialization takes place within the ranks of the profession. Capture by strong professional interests is a matter of time. Seniority becomes more important than merit. Therefore, external accountability has emerged at some point as a second concern.

Other civil law countries, such as Germany, Austria and the Netherlands, have judicial councils with fewer competences than in the French-Italian model.[17] They are limited to playing a role in selection (rather than promotion or discipline) or are heavily influenced by regional and federal governments. The political impact of these councils on the judiciary has been less clear than in the other four countries.[18]

The councils in civil law jurisdictions vary in their relationship with the Supreme Court. In some countries, such as Brazil, Costa Rica and Austria, the Judicial Council is a subordinate organ of the Supreme Court tasked with judicial management. In other countries, Judicial Councils are independent bodies with constitutional status. Further, in

[16] For example, the Brazilian Council (*Conselho da Justiça Federal*) has ten judges from federal superior courts, including the Chief-Justice and the Deputy Chief-Justice *ex officio*. See Section V.A.

[17] See Section V.F on the Netherlands and recent reforms.

[18] See Thomas, *supra* 2.

some countries they govern the entire judiciary while in others only govern lower courts.[19]

In the common law world, too, there is a wide range of experiences. Recruitment of the judiciary in common law countries has been traditionally been wider in terms of previous experience and socialization than in civil law.[20] Therefore, external accountability was a major factor in shaping appointments. The lack of public accountability in the selection process, the merits of the appointees, and the socially unrepresentative profile of the judiciary has dominated the policy concerns in the US as in the UK.[21]

In many American states, concern over traditional methods of judicial selection (either appointment by politicians or direct election by the public) led to the adoption of "Merit Commissions" to remove politics from the appointment and base selection on merit. Because in common law systems, the judiciary is not a "career judiciary" in the civil law sense, there is less interest in having these commissions handle discipline, promotions and reassignments. Compared to the civil law judiciaries, common law judges have relatively few opportunities for advancement, and hence there is less capacity for political authorities to use the promise of higher office to influence judicial decision-making.[22]

[19] Voermans and Albers, *supra* 9, provide the examples of Guatemala and Argentina.

[20] Nicholas L. Georgakopoulos, *Discretion in the Career and Recognition Judiciary*, 7 CHICAGO LAW SCHOOL ROUNDTABLE 205 (2000).

[21] See, for example, Kate Malleson, 2004, Selecting Judges in the Era of Devolution and Human Rights, in Building the UK's New Supreme Court, National and Comparative Perspectives (edited by Andrew Le Sueur), Oxford University Press.

[22] Cf J. Mark Ramseyer and Eric Rasmusen, MEASURING JUDICIAL INDEPENDENCE (2004) (documenting political manipulation of judicial career structures in Japan.).

Sometimes called the "Missouri Plan" (although it was first adopted in California) or "Merit Plan", this system features a non-partisan judicial selection commission composed of judges, lawyers and political appointees.[23] This institution originated in a famous 1906 speech by Roscoe Pound, and can be seen as consistent with early twentieth century view in the value of technocracy and administrative insulation from politics. The Merit Commission is responsible for nominating judges, in some cases exclusively and in other cases sending a set of candidates from which the Governor chooses appointees. Merit Plan judges are typically subject to uncontested retention elections, but judges rarely lose these elections.[24] As of 1990, 23 states used Merit Plan for initial appointment. Most states adopted these institutions in the 1960s and 1970s.[25]

Epstein et. al. (2002) predict that Merit Plan systems will expand independence.[26] Hanssen (2004: 721) tests the effect of partisan division on appointment and retention systems, assuming that Merit Plan correlates with independence.[27] He finds that, broadly speaking, states using merit plans tend to correlate with higher levels of political competition (and hence presumed demand for judicial independence) than those using partisan elections.[28] Hanssen also finds that states switch to merit plans when they have increased party competition and policy differences between parties. Nevertheless, we

[23] In Missouri, the Commission has seven members: the Chief Justice, three lawyers elected by the bar from different appellate districts, and three laypersons appointed by the Governor. For an analysis, see F. Andrew Hanssen, *supra* 1.

[24] P. Webster, 1995, Selection and Retention of Judges: Is There one Best Method?, Florida State University Law Review

[25] F. Andrew Hanssen, 2004, Learning About Judicial Independence: Institutional Change in State Courts, 33 Journal of Legal Studies 33: 431-62.

[26] Lee Epstein, Jack Knight and Olga Shvestova 2002. Selecting Selection Systems, in Judicial Independence at the Crossroads: An Interdisciplinary Approach. Stephen B. Burbank and Barry Friedman, eds. American Academy of Political and Social Science/Sage Publications. pp. 191-226.

[27] F. Andrew Hanssen, *supra* 1.

[28] For at least one indicator, both these methods have less political competition on some indicators than the residual category of "other" appointment methods (such as legislative or gubernatorial appointment. Id at 720 ("In 95 percent of partisan election states the same party controlled both houses of the legislature, versus in 87 percent of merit plan states and 81 percent of other states.")

know of no study that has demonstrated an actual improvement in judicial independence or quality after adoption of the Merit Plan, and the actual impact on quality is debatable.[29]

The Canadian experience of provincial and federal advisory committees has been appraised as a good model to promote women and minorities within the judiciary.[30] In the UK, the Constitutional Reform Act 2005 has created the Judicial Appointments Commission responsible for appointments based solely on merit.[31] There is nevertheless a good deal of discussion as to how much the merit principle should be made compatible with other functionalist goals such as affirmative action or promoting certain diversity of attributes across the judiciary.[32] The advantages of a Judicial Appointment Commission have also been at heart of the debate in New Zealand and in Australia, where judicial appointments are still in the competence of the Attorney-General. Currently, judicial appointment protocols have been developed to enhance independence and external accountability (by including mandatory consultation with several office holders).[33]

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[29] P. Webster, 1995, Selection and Retention of Judges: Is There one Best Method?, Florida State University Law Review; H. Glick, 1978, The Promise and Performance of the Missouri Plan: Judicial Selection in the Fifty States, University of Miami Law Review 32.

[30] There are wide different models in Canada, but usually judges are not a majority in the council. The federal committee has seven members, three laymen, three lawyers and one judge. See Kate Malleson, 1997, The Use of Judicial Appointment Commissions: A Review of the US and Canadian Models, Lord Chancellor's Department, Research Series 6/97.

[31] The composition of the JAC is fifteen, seven are judges and magistrates, two lawyers (one barrister and one solicitor), and six are laymen (including the chairman). It has started selecting judges in April 2006. Kate Malleson, 2005, The Legal System, Oxford University Press, 2nd edition, chapter 17.40, argues that the JAC is effectively dominated by the judiciary. The fact that the council is chaired by a non-lawyer does not seem to counter a strong judicial membership. The traditional role of the Lord Chancellor in judicial appointments has been the object of study by Anthony Bradney, 1989, The Judicial Activity of the Lord Chancellor 1946-1987: A Pellet, Journal of Law and Society 16, 360-372.

[32] For a discussion on the extent to which merit selection is consistent with affirmative action in the judiciary, see Kate Malleson, 2006, Rethinking the Merit Principle in Judicial Selection, Journal of Law and Society 33, 126-140.

[33] Empirical analysis is provided by Mita Bhattacharya and Russell Smyth, 2001, The Determinants of Judicial Prestige and Influence: Some Empirical Evidence from the High Court of Australia, Journal of Legal Studies 30, 223-252 and Pushkar Maitra and Russell Smyth, 2004, Judicial Independence, Judicial Promotion and the Enforcement of Legislative Wealth Transfers -

Within the common law world, the case of Singapore is also an interesting one. There is a Legal Service Commission but with a limited role.[34] The president appoints judges of the Supreme Court on the recommendation of the prime minister after consultation with the Chief Justice. The Legal Service Commission supervises and assigns the placement of the subordinate court judges and magistrates who have the status of civil servants; however, the president appoints subordinate courts judges on the recommendation of the Chief Justice.[35] The Chief Justice in Singapore is probably the most well-paid judge in the world, with a salary of over one million U.S. dollars, and the judiciary is widely praised for its quality and independence. Nevertheless, it is also known for its docility in cases of great importance to the government. One might characterize this situation as being one in which the bribes are legalized in the form of salaries, and in which the person of the Chief Justice operates to ensure that lower judges do not stray from the formula of independence in commercial cases but docility in political ones.

This brief survey illustrate that it is clearly impossible to eliminate political pressure on the judiciary, but adequate institutions might minimize the problems of a politicized judiciary and enhance judicial independence. However, increasing powers and

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An Empirical Study of the New Zealand High Court, European Journal of Law and Economics 17,

[34] See Kim Teck Kim Seah, 1990, The Origins and Present Constitutional Position of Singapore's Legal Service Commission, Singapore Academy of Law Journal 2.

[35] The judicial branch of the Legal Service Commission is headed by the Registrar of the Supreme Court, but the ultimate responsibility for managing lies with the Chief Justice.

[38] Stephen Burbank, Judicial Independence, Judicial Accountability and Interbranch Relations, University of Pennsylvania Law School, Working Paper 102 (2006), available at http://lsr.nellco.org/upenn/wps/papers/102 (arguing that judicial independence in the United States is at a tipping point because of a characterization of judicial politics as ordinary politics.)

independence enjoyed by judges risks creating the opposite problem, that of judicializing public policy, since judicial decisions have an important impact on politics and government.[38] It is our view that the periodic reforms of judicial appointments and management that we observe within and across countries reflect a dialectic tension between the need to de-politicize the judiciary and the trend toward judicializing politics. Independence is needed to provide the benefits of judicial decisionmaking; independent judges are useful for resolving a wider range of more important disputes; but as more and more tasks are given to the judiciary, there is pressure for greater accountability because the judiciary takes over more functions from democratic processes.

Figure 1 presents a stylized summary of the recurrent calibration between independence and external accountability, synthesizing the different experiences discussed above. Begin in the upper right corner, a judiciary that has little independence or influence. When judges carry little weight over public policy and politics, concerns over independence tend to dominate and a move from politically dependent weak judiciary to a strong self-regulated judiciary may be the goal of reformers (e.g. the French-Italian model). This gives rise to a judiciary that has some control over its own affairs. Frequently, though not inevitably, judges use this independence to increase their influence over public policy. However, once politics is judicialized in a significant way, accountability becomes an issue; pressures arise for a politically accountable though strong judiciary (the common law countries). As accountability becomes directed only to a small group of principals and assaults on judicial independence are too successful, we may in some circumstances observe a move from politically accountable strong judiciary back to politically dependent weak judiciary, as in a rising authoritarian regime. This framework provides a tool for understanding the various institutional adjustments observed in various countries.

FIGURE 1 HERE

This paper has two aims. First, we provide an economic theory of judicial councils. Second, we undertake some preliminary tests of the extent to which different designs of judicial council affect judicial quality. We thus seek to fill a major gap in the empirical and theoretical literature by calling attention to this important set of institutions.

II. What do Councils Do?

Academic work on judicial councils has been so far quite limited. There are very few empirical studies[39] and there has been no economic analysis to date that we know of. We have observed that judicial councils operate in very different legal environments, and therefore we need to understand the particularities before we can compare the role and the powers of judicial councils across countries.

Broadly speaking, judicial councils have three important competences:

(i) Housekeeping functions (managing budget, material resources, operations);

(ii) Appointment of judges; and

(iii) Performance evaluation (promotion, discipline, removal and retention of judges, and judicial salaries).

[39] But see Linn Hammergren, Do Judicial Councils Further Judicial Reform? Lessons from Latin America, Working-Paper Series Democracy and Rule of Law Project 28, 2002.

For all of these functions, the key factor is effective calibration between judicial independence and external accountability (as reflected, for example, by the composition or membership of the council, by the appointment mechanism or by sharing certain functions with other branches of the government or other bodies, even the electorate in the case of elected judges). We do not assert that there is a universally optimal balance between independence and accountability, but understand that there is a limit to how far one can move in either direction within democracies.[40] Moving too far in either direction may trigger pressures for a shift as idealized in Figure 1. These shifts rely on the institutional setup and social preferences that are in place.

Whereas the first competence, housekeeping, is purely managerial, the second and third competences are related to career incentives and more directly contribute to judicial quality. Housekeeping functions deal with practical questions concerning the organization and the running of the judiciary. There, the primary rationale to be considered in assigning the task to a Council is economies of scale and specialization with respect to alternative managers, such as the Ministry of Justice (arguably better able to do things like purchasing supplies etc) or the Supreme Court (a body that typically has little time or expertise for management).

Housekeeping factors, of course, can potentially affect judicial independence—for example if material incentives are used to reward certain types of judges. Obviously managerial competences are also important for efficiency of courts, and in that respect shape the quality of the legal system. Nevertheless, the other two competences (appointment and performance evaluation) are the ones directly related to judicial career incentives. If institutions matter for judicial quality, they matter because of their impact on judicial incentives. Also, the political impact of the broader relationship between the

[40] Hanssen, *supra* 1.

judiciary and other political actors is deeply shaped by the way judicial councils exercise their powers.

In order to understand the role of judicial councils, we first need to understand the preferences of the judges and the reasons for a misalignment between judicial decisions and socially optimal decisions. If there were no misalignment, there would be no need for a judicial council with more competences than pure housekeeping functions. The section below thus focuses on the sources of agency problems and the institutional devices to correct them.

III. Theory

We use a principal-agent model to approach judicial councils. The judicial council is an intermediate body analogous to regulatory agencies in the regulatory literature[41] and boards of director in the corporate literature.[42] The judges are the agents and society is the principal. The Council becomes an intermediary-trustee whose role is to both to exercise expert oversight and also to filter out political influence (notice that the intermediate body is paid by the principal, the taxpayers, as in the usual economic model). The standard problem that arises in principal agent models is produced by information asymmetry: as the agent's expertise increases, her potential effectiveness increases as well, but her accountability decreases. Therefore, just as shareholders utilize a board as a representative intermediate governance system, the public may wish to set up (and pay for) a judicial council to manage judicial agents. Like a board, the council might have a representative appointment system, where different stakeholders have agents that then negotiate governance in order to minimize possible rents created by asymmetric information.

[41] Jean-Jacques Laffont and Jean Tirole, 1993, A Theory of Incentives in Procurement and Regulation, MIT Press.

[42] Stephen M. Bainbridge, 2002, Corporation Law and Economics, Foundation Press.

Generally speaking there are two types of stockholders within the principal, a majority (the general population) that is vastly uninformed and uninterested since the opportunity costs to information acquisition are high, and a very well informed minority with leverage to influence agents (the lobbies and all those who would like a favorable decision by courts at a certain moment in time). The principle of judicial independence aims at avoiding possible capture by the minority and also aims at aligning the interests of the judges with those of the majority, the common good. However, given the asymmetry of information between the vast majority on one hand and the minority and the judge-agents on the other hand, an intermediate body might be necessary to limit opportunism and minimize agency costs.

The judicial council is a body to limit agency costs and reduce the likelihood that an informed minority will use the court system to their advantage against the vast majority of the population. However, asymmetry of information and specialization may create a new problem, namely the capture of the judicial council by the judiciary itself or by an external body that wishes to manipulate the judiciary. Therefore, periodic reforms emerge to correct learning mistakes in one or the other direction (as shown in Figure 1). We imagine that judicial governance requires learning by doing to some extent, and that as new agency problems materialize, there may be shifts among governance structures to try to rectify them.[43]

An important point to take into account is the interaction between preferences, incentives and politicization. When appointed judges are subject to any form of political scrutiny, we should expect some alignment between the preferences of the judicial power and the political power (even if lagged due to political cycles). In this case, we observe *ex ante* politicization. Alternatively, we can have *ex post* politicization by pressure or corruption. Our conjecture is that a judicial council aims at controlling both.

[43] Hanssen, *supra* 25.

A. Judicial Incentives

Judges have their preferences and their career structure that generates certain type of incentives. With respect to preferences, we should assume that judges have the same set of preferences that everybody else, as Richard Posner has argued.[44] Obviously they care about their income. They may be more risk-averse (that is why they are judges rather than lawyers or prosecutors) and care more about non-monetary than monetary payoffs (otherwise they would be practicing law) than the average individual. Therefore, we expect judges to be quite sensitive to changes in prestige or social influence (judicial independence is very important here) and to shifts in risk (for example in promotion or evaluation of performance).

Before we go further into the need for an intermediate body we should understand why the standard market-oriented alternatives do not work to constrain judges. Judges operate in a highly-subsidized monopoly (the court system), so there is no market discipline (obviously individuals can opt-out of the state provided system and use alternative resolution mechanisms, but it does not have a significant effect on the welfare of the judiciary). There are some important regulations and legal constraints operating within the judiciary (how to become a judge, procedural law, etc.), but external enforcement is weak (we have the usual problem of verifiability) and expensive (furthermore, due to the asymmetries of information it might raise questions concerning the problem of judicial independence and separation of powers). External enforcement potentially reduces independence and therefore is typically made quite difficult. Summing up, we cannot rely on external or market-oriented mechanisms to limit opportunism in the judicial system.

[44] Richard Posner, What Do Judges and Justices Maximize? (The Same Thing as Everybody Else), Supreme Court Economic Review 3, 1 (1993); Richard Posner, Judicial Behavior and Performance: An Economic Approach, Florida State University Law Review 32, 1259 (2005).

Judicial careers are structured differently in different parts of the world. In civil law countries, judges tend to operate in bureaucratic hierarchies and spend their entire career in the judiciary. Whoever controls advancement in this career hierarchy is thus very important. For example, in Japan, the Secretariat of the Supreme Court plays a very important role in assigning judges to different posts, and thus has a good deal of influence on performance.[45] For "recognition" judges, such as those in common law systems or those appointed to constitutional courts in civil law countries, prestige among the public or with other branches of government is very important, but once selected into the judiciary, there are relatively few opportunities for advancement. They may be less sensitive to external pressures and performance evaluation from any source, including judicial councils. [46] We expect that judicial councils in common law countries will focus on appointments rather than promotions, which are relatively rare.

B. Judicial Councils as Monitoring Devices

We believe that judicial councils should be viewed as devices to reduce agency costs in the judiciary, although we do not assert that they are necessary or sufficient bodies to accomplish this task. In this section, we describe the membership and extent to which powers are shared with other branches of government and Supreme Court.

The Council is composed of three possible agents, (i) members of the majority (laymen), (ii) members of the minority (lawyers, politicians, and eventually law professors) and (iii)

[45] J. Mark Ramseyer and Eric B. Rasmusen, Measuring Judicial Independence (University of Chicago Press, 2003).

[46] Measuring the performance of judges has been the object of some work but is still quite underdeveloped. Whereas quantitative (workload measures) and qualitative measures (reversal rates in appeal courts) are by now largely developed, complexity is still a problem (even the use of citations is still the object of discussion). See Stephen Choi and Mitu Gulati, A Tournament of Judges?, California Law Review 92, 299, 2004; Stephen Choi and Mitu Gulati, Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance, Southern California Law Review 78, 23, 2004; FSU Symposium on Judicial Performance, 2005.

judges (analogous to inside directors). It is of importance to note that in most situations it is impossible to clearly distinguish between laymen and politicians since they are all usually appointed by other branches of government.[47] As to judges and lawyers, usually they are appointed by the Supreme Court or by other courts (in some cases, judges are chosen by the Parliament), and the law society/bar association respectively, or else serve *ex officio* by virtue of the constitution or governing law. The council is accountable to the selectorate (the controllers of the controllers whoever the selectorate might be); different accountability rules will make the council more or less likely to be captured by the judiciary (which might promote professional interests) and or minority stockholders (which might promotes lobby or minority interests).

Council members are also appointed and this is important for understanding their effectiveness as monitors. In some cases, all members of the Council are appointed by the same body (for example, the Parliament); in other cases, different bodies of government intervene in the appointment process. A more heterogeneous membership is expected when different bodies intervene, either by a sequential process of nomination and confirmation (members of the council must appeal to different constituencies) or by a quota system where different bodies of government appoint a pre-defined number of members.

We expect that the mechanism of appointment of judicial members in the Council will matter for outcomes. If they are Supreme Court judges (senior judiciary), there should be a tendency to focus on the power struggle between government and Supreme Court and on maintaining a vertical hierarchy within the judiciary. However, if they are not Supreme Court judges (junior judges), we should expect the decrease of the role of the Supreme Court (which might be welcomed by the government). We have observed an

[47] In fact, laymen in many councils are lawyers, law professors or legally educated individuals, hardly the standard example of independent laymen.

increasing role of judicial associations (unions) which are motivated by the need to coordinate the interests of the junior judges to undermine the traditional vertical hierarchy.

The size, appointment and type of composition of judicial councils are therefore important. However, even when the judges are not a numerical majority in the council, they might have a dominant or preponderant role. To start with, most members of a judicial council must rely on information provided by the judgment of the judiciary itself. On top of that, a judicial council does not exert control over judiciary (which would hurt the independence of judiciary), but struggles with a configured mix between authority and accountability. Such configuration is usually complex and full of uncertainties that usually call for expertise by judges. Furthermore, between judicial and non-judicial members of the council, asset specificity is asymmetric (since the judges will go back to their professional careers inside the judiciary with bonding and socialization ties whereas the non-judges will go back to their careers outside of the judiciary).

We are also interested in whether composition correlates with powers. One hypothesis is that judges will resist external regulation and control. Therefore if non-judges are the majority on the council, we might see less substantive powers given to the council. A competing hypothesis is that judicial councils (a relatively late historical development) have been set up to control judges and ensure some accountability. If this were the case, we should see the percent of judges on the council *negatively* correlated with the extent of powers. On the other hand the politics of setting up the councils may vary greatly depending on local circumstances, in particular the historical balance of power between government and Supreme Court. For example, the extent to which the chief justice and justices in general are easily captured by the government will result in different models of judicial council.

We can frame this as the question of whether judicial councils are set up to ensure independence of judges *from* the principals or accountability *to* the principals (see Figure one). If judges are a majority on the Council, the assumption is that judges utilize the Council to exercise self-government and maintain independence. If judges are a minority on the Council, the assumption is that the Council is a device to constrain the judges and render them more accountable. These two types of Councils reflect quite different goals.

A second question is how much party politics undermines the powers of the council. Judicial councils are presumably more powerful when there is no dominant party (the judiciary should be immune to the frequent changes in power) or when an incumbent dominant party loses power (since Supreme Court justices will not be trusted by the new government). Hanssen's data from the United States suggests that the *timing* of the adoption of council-type mechanisms reflects these motivations. Hence a judicial council might be used to assure independence of judiciary (when majorities in government change frequently) or to undermine independence of judiciary (when a new government suspects the judicial power has been captured by a long-ruling party).

Therefore, we can summarize the main relevant variables of a judicial council:

(i) Functions that are relevant for career incentives;
(ii) Calibration between independence and accountability, in particular size and composition of the council, relationship with the Supreme Court and party politics.

Interacting competences with composition, we can imagine different configurations. We view extensive competence of a judicial council as enhancing judicial accountability. We

view judicial majorities or judicial dominance on the judicial council as promoting independence (notice that dominance does not necessarily mean formal majority since the existing asymmetries of information might empower a judicial minority with disproportional influence). Interacting these two, we can see that there are several possible configurations (see Figure 2). Extensive competences create strong councils whereas limited housekeeping functions are associated with very weak councils. When judges are not dominant, we usually have politicized councils. However, when judges are dominant, we have influential councils. Nevertheless, the shape of the council will depend on whether or not the judges in the council behave as a homogeneous body. That is easily achieved when judges come from superior courts since judicial hierarchy will prevail. If the judges come from various different courts, there are strong incentives to empower judicial associations or unions that provide a solution to the coordination externality and solve these collective action problems.

FIGURE 2 HERE

C. Institutional Setup

The role and importance of the judicial council depends very much on the institutional setup in place. Depending on the preferences and empowerment of the judiciary, the monitoring activity of the council can be more or less significant. Take performance measurement for example. Apart from the technicalities of devising an adequate metric to evaluate judicial performance, judges might have different reactions to measuring performance depending on how much that interacts with their career structure and their risk attitudes but also on their social influence and role in the community. Second, performance measures could reduce the influence and power of senior judges by limiting their ability and discretion to shape the judiciary for the next generation. It could also create an imbalance in the power of the different actors within the council. Finally, the relevance of measuring performance might be understood in different levels by the other

branches of government and the population in general. Therefore, transplanting particular roles of a judicial council ignoring local determinants might generate unexpected results. Furthermore, certain complex functions such as performance evaluation might have very different understandings or interpretations depending on the institutional setup.

At the same time, the urge for a judicial council is intrinsically related to the importance and functioning of the legal system in a certain institutional setup. The importance of the quality of judiciary is related to their own powers within a given legal system. The more extensive powers that judges have, the more important it is to assess any potential conflict between the common good and judicial incentives (since there will be judicialization of public policy as shown in Figure one). The conjunction of judicial attributes, politics and peer-pressure becomes more important as the institutional setup is more prone to change with judicial review.[48] The less important the judiciary is in a given institutional setup, the less need for achieving the appropriate balance between independence and accountability. Thus we predict that judicial councils will have greater competences but fewer judges when judges have a good deal of power, for example the power of judicial review of legislation.

IV. Empirical Analysis

[48] Among others, see Timothy Besley and Abigail Payne, Judicial Accountability and Economic Policy Outcomes: Evidence from Employment Discrimination Charges, Working-Paper W03/11 Institute for Fiscal Studies, 2003; Barry Friedman, The Politics of Judicial Review, Texas Law Review 84, 256, 2005; Tracey E. George and Lee Epstein, On the Nature of Supreme Court Decision Making, American Political Science Review 86, 323, 1992; Thomas Ginsburg, Economic Analysis and Design of Constitutional Courts, Theoretical Inquiries in Law, 3, 2002; Jonathan Macey, Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model, Columbia Law Review 86, 223, 1986; Jonathan Macey, Competing Economic Views of the Constitution, George Washington Law Review 56, 50, 1987; James R. Rogers, Roy B. Flemming, and Jon R. Bond (editors), Institutional Games and the U.S. Supreme Court, University of Virginia Press, 2006; Alexander Tabarrok and Eric Helland, Court Politics: The Political Economy of Tort Awards, Journal of Law and Economics 42, 157, 1999.

To test these provisions, we have developed a small database on Judicial Councils. (See Appendix). The sample consists of the councils in 121 different nation-states. Data was gathered for the most recent iteration of the judicial council available. For 93 countries, the Judicial Council is mentioned and described in the country's constitution, so we gathered our information from there.[49] For 28 other countries, the Council is not mentioned in the Constitution, or it provides no detail on the composition and powers of the Council. In these countries, the Council is left to ordinary law. We gathered data on these countries from an array of sources, including Hammergren (2002)[50] and a number of country-specific sources.

Note that the issue of whether or not a Council is constitutionalized is itself interesting. If the composition and powers of the Council are left to ordinary law, they are subject to enhanced manipulation by the government and other actors and hence less of a guarantee of independence. We have a dummy variable to capture this information. Presumably those Councils lean more toward the accountability pole than the independence pole. We predict systematically lower independence scores for these countries.[51]

First, we developed a simple ordinal index of powers/competences ("Power Index"). Each judicial council was rated depending on the extent of its competences. A Council that had purely administrative functions council was rated a 1; a Council with a role in appointment, transfer, and discipline of judges was rated a 3. The intermediate rating of 2 was given to Councils who had a limited role either because they could appoint but not discipline judges, or their role was limited in performance-relevant variables. For example, a Council that only had a role in recommending judges for appointment or minimal role in discipline would be rated a 2.

[49] This data is from the Comparative Constitutions Project at the University of Illinois; seenetfiles.uiuc.edu/zelkins/constitutions.html

[50] *Supra* 39.

[51] Judicial independence on every measure is lower for these countries.

Our first prediction was that competences would vary systematically depending on the institutional problem that is faced. Extensive competences correlate with stronger councils. Stronger councils, however, can reflect demands for strong political control and accountability—OR judicial self-regulation effectuated by capture of the council. Sorting out which motivation exists in particular contexts is difficult. To evaluate this, we make the assumption that a majority of judges on the council indicates a greater degree of judicial self-regulation.

A. Power of judges and institutional structure: When judges have extensive powers, there is likely to be a judicialization of public policy. In such environments the judicial council is likely to reflect demands for control and accountability. We expect this will be more likely in common law countries as well as any country in which ordinary judges can engage in the power of judicial review. By contrast where judicial review is limited to a specially designated court, we do not expect to see as extensive demands for accountability of the ordinary judiciary.

Oddly, neither of these predictions appear to bear out in the descriptive data. Where judicial review is conducted by ordinary courts, competences are less likely to be extensive.

FIGURE THREE

Power index	judicial review by ordinary courts	
	0	1
1	3 (8%)	3 (9%)

2	13 (35%)	15 (44%)
3	21 (58%)	16 (47%)

On the other hand, judicial review is associated with fewer judges on the court, indicating some desire for external control of judges.

FIGURE 4

Majority judges on council?	judicial review by ordinary courts	
	0	1
No	13 (46%)	18 (60%)
Yes	15 (54%)	12(40%)
Total	28	30

In general, common law judicial councils are *more* likely to have extensive powers, not less. But they are less likely to have a majority of judges.

FIGURE 5

Pow	Civil law	Common law

er index		
1	5 (7%)	2 (8%)
2	33 (43%	9 (34%)
3	38 (50%)	15(58%)

Total 76 26

FIGURE 6

Majority judges on council?	Civil law	Common law
No	32 (53%)	15 (58%)
Yes	29 (47%)	11(42%)

Total 61 26

In light of our theory laid out above, we next need to understand how and whether competence is correlated with composition. We divide our sample into three groups by competences according to the power index. We then examine whether power is associated with a higher percentage of judges on the Council. Our results exclude cases for which all information is not available, so there are only 74 cases at this point. In addition, we can ignore the small number of Councils with purely managerial functions at this point. Councils with the full array of powers have, at the mean, a (bare) majority of judges; Councils with reduced powers have a minority of judges. A difference of means

test gives a t-stat of -1.48 (85% confidence level), indicating close to statistical significance. Using the median rather than mean levels illustrates the difference more starkly: the median council with the full array of powers has 60% judges; the median council with reduced powers has 29% judges.

FIGURE 7

Percentage of Judges, by Power Index

power index	Mean	N	Std. Deviation
1	.7520	5	.28208
2	.3945	31	.31791
3	.5032	38	.29032
Total	.4745	74	.31150

In short, powers and composition go together, but in two different configurations. When councils are very weak (power index 1) judicial involvement is extensive. When powers are extensive (power index 3), judicial involvement is also relatively high. In the intermediate situation., judicial involvement is lower. We interpret this finding as reflecting the upper right and lower quadrants of Figure 1. Judicial involvement can be extensive when it does not matter much; but it can also reflect a very powerful and independent judiciary that is extensively involved in politics.

B. Regime type: It is possible that regime type can play some role in sorting out the various configurations we observe. We predict that autocracies will feature councils with weak competences (ineffectual council) or strong competences/fewer judges (for greater

political control).[52] For democracies, we predict greater variety, depending on other elements of the institutional configuration. To explore this, we divide constitutions containing provisions on judicial councils into three categories: those that are written in autocracies, those written in established democracies and those written in transitions between autocracy and democracy.[53] We use data available from Carles Boix, a political scientist at the University of Chicago, who uses other generally available data to make binary characterizations of countries as autocracies or democracies in a large time-series.[54]

Our data shows that the percentage of judges tends to be lower in autocracies rather than democracies, though our results hold only at the 85% comfidence level..

FIGURE 8

Coefficients(a)

Model		Unstandardized Coefficients	Standardized Coefficients	T	Sig.

[52] Logit regression confirms the direction of this relationship, although not at statistically significant levels.

[53] There are no cases in our sample of democracies transitioning to autocracies.

54. Carles Boix, DEMOCRACY AND REDISTRIBUTION (2000); Boix, Constitutions and Democratic Breakdowns (paper presented at Comparative Law and Economics Forum, Chicago, October 2005). For each constitution, the country's autocracy/democracy status was considered for the five years preceding the constitution and immediately afterwards. If the country was rated a democracy in the year of or immediately following the promulgation of the constitution, and had been an autocracy at any time in the five preceding years, without an intervening constitution, it was considered to have undergone a transition from autocracy to democracy.

		B	Std. Error	Beta		
1	(Constant)	.482	.043		11.202	.000
	dummy for autocratic constitutions in autocracies	-.104	.072	-.159	-1.439	.154

a Dependent Variable: percent of judges on council.

Looking at democratic constitutions in democracies, the percentage of judges tends to be higher. This suggests that countries with autocratic histories (either in continuing autocracies or new democracies) tend to distrust the judges and are using councils to assert greater political control.

FIGURE 9

Coefficients(a)

Model		Unstandardized Coefficients		Standardized Coefficients		
		B	Std. Error	Beta	T	Sig.
1	(Constant)	.427	.043		9.955	.000
	dummy for democratic constitutions in democracies	.046	.072	.071	.646	.520

a Dependent Variable: percent of judges

In short our data shows some correlation between regime type and Council configuration, although the relationships are not strong.

C. **Councils and Independence**

Finally, we wish to examine whether the variables of composition and competence correlate with external dependent variables like judicial quality and independence. This is an important question given that judicial councils are offered as a "best practice" to promote judicial independence. As an initial step, we use the Judicial Independence scores produced by Howard and Carey (2004).[55] They analyzed the U.S. Department of State's Annual Human Rights Reports for a series of years in the 1990s to produce dummy variables for individual, collective, and overall judicial independence. We used the last year available (typically 1999) and focus on the individual independence factor. The indicator has much more variance.

FIGURE 10

Judicial Independence (Howard-Carey "individual), by Power Index

power index	Mean	N	Std. Deviation
1	.57	7	.535
2	.55	40	.504
3	.67	51	.476
Total	.61	98	.490

[55] Reference.

Here again we see a trend toward more independence with greater competence. This suggests that perhaps there is an effect on independence. There is a potential problem, however: any index that draws on formal structures for the definition of judicial independence raises endogeneity problems. It is possible for example that the State Department's definition is itself produced by a judgment as to whether or not a country has a judicial council. To overcome this problem, we need to examine judicial independence as exists on the ground, rather than relying on formal or structural independence. Voigt (Feld and Voigt 2003; Hayo and Voigt 2004)[56] distinguishes de facto and de jure independence and develops separate indices for each. Voigt's de facto index is composed of a number of variables that are likely to impact actual levels of independence, such as the number of times provisions for appointment or court structure have changed, whether judicial budgets and income have remained constant, whether judges have been removed from office and non-implementation of judicial decisions. Using this more refined index, it does not appear obvious that judicial independence scores increase with the level of powers.

FIGURE 11

Judicial independence de facto (Voigt), by Power Index

power index	Mean	N	Std. Deviation
1	.5600	5	.23801
2	.5053	15	.24617
3	.5065	26	.22978
Total	.5120	46	.23132

[56] Feld, L. and S. V[illegible]lence: Cross-Country Evidence using a new[illegible]*my:* 19(3):497-527.

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We also can consider the effect of various features of judicial councils on metrics of judicial independence. The table below presents six models, using 3 dependent variables measuring different aspects of judicial independence. Interestingly, when common law dummies are introduced they dominate other effects. It appears that effects of increased powers of the council on independence are quite unstable.

FIGURE 12

	1	2	3	4	5	6
DEPENDENT VARIABLE	**Rule of Law**		**de facto judicial independence**		**judicial independence** (Howard/Carey 2004)	
(Source)	(World Bank 2005)		(Voigt 2003)			
constant	-0.56	-0.56	0.39	0.47	0.77	0.59
percent of judges	-0.43	-0.43	0.12	0.12	0.07	0.06
number of members	0.03	0.03	0.01(*)	0.01	-0.01	0.01
strong powers of council	.21*	0.21	-0.07	-0.1	-0.12	0.06
common law dummy		.36*		-0.06		.19*

A final bit of evidence comes from preliminary analysis of World Bank Rule of Law data on those countries which appear to have adopted a judicial council after 1996. This data shows that more countries suffered a *decline* in quality of rule of law than an increase. 39 countries suffered a decline in Rule of Law rating between adoption and 2005, whereas only 27 countries showed an increase.[57] It seems that the emergence of judicial councils as an international "best practice" for promoting judicial independence and quality may be unjustified.

V. Case Studies

The above results suggest the need to focus on a more dynamic model of Council Structure. Clearly the effects are not linear. Rather there is a complex relationship between council structure and political incentives of the various actors at the time. This section describes the operation of judicial councils in a number of different countries to see whether our argument withstands scrutiny.

A. Brazil

Brazil's first judicial council was the National Council of the Magistracy (*Conselho Nacional da Justiça*), created through constitutional amendment in 1977, and established in 1979.[58] Brazil at the time was under a military dictatorship, and the Council was likely

[57] Data on file.

[58] This section relies on Lenz, C. E. T. F. (2005). O Conselho Nacional da Justiça e a Administração do Poder Judiciário. Revista de Doutrina da 4ª Região - Publicação da Escola da Magistratura do TRF da 4ª Região - EMAGIS. We thank Antonio Porto for research help on this section.

created to assert greater control over the Council, though it gave some formal powers to judges. This situation corresponds to the upper right box of Figure 1. The judiciary was politically dependent and weak. The shift toward the National Council of the Magistracy meant that judges had some formal control over their affairs, but in practice this was quite limited. In addition, in the dictatorship, judges had little scope for maneuver in terms of the scope of activity. But then, in 1985, the dictatorship fell. The judges moved toward a more independent stance, as external controls were removed. Indeed, with the passage of the Brazilian Constitution of 1988, the National Council was removed, leaving judges self governing and subject to virtually no oversight, shifting to the upper left quadrant of Figure 1. Constitutional guarantees of independence became real. In addition, the complexity of the 1988 Constitution delegated many types of controversies to the judiciary. While judges had formally enjoyed the power of constitutional review even under the 1964 constitution, the actual exercise of the power was highly constrained. The 1988 constitution, by constitutionalizing many aspects of public life and maintaining constitutional review, provided an opportunity structure for a major increase in judicial power.

Judges utilized these new opportunities. In time, the combination of little oversight and expanded scope of activity led to increasingly judicialized politics, shifting toward the lower left quadrant of Figure 1. [59] This naturally led to demands for greater accountability. Many academics and even judges criticized the politicization of the judiciary in Brazil.[60] There was, however, great controversy over the type of mechanism that should be used to ensure accountability. Some associated the judicial council with the dictatorship; indeed this was likely the reason for its abolition in 1988.

[59] Rogerio Arantes, *Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Rachel Sieder, et al, eds. 2005).

[60] Torquato, G. (2005). "A politização do Judiciário." Paran@shop - Política Nacion

Nevertheless, in 2004, Brazil passed a constitutional amendment to introduce a new judicial council.[61] The politics of the adoption are telling. It was proposed, initially, by a member of the opposition Liberal Party in the year 2000. The proposal did not see the light of day, however, until the election of Lula de Silva as President in 2003. Incoming politicians may feel the need to impose greater discipline on the judiciary, particularly if it is seen as being aligned with their opponents; more generally, changes in power can lead to efforts to institutionalize judicial independence so as to provide insurance for those who are likely to lose in future rounds.[62] One can interpret the creation of the judicial council from either perspective. The new left coalition may have believed that the unconstrained judiciary was more likely to support their political opponents, and used the council to discipline the judiciary; or the coalition may have wanted to institutionalize an *accountable* independent judiciary to make it more viable for the long term, since the system of alternating parties seems to be coming in place. Either way, the 2004 reforms clearly sought to shift the judiciary to the lower left quadrant of Figure 1.

The Brazilian story illustrates that there is no *necessary* connection between judicial councils and judicial independence. Though formally designed to provide the appearance of independence, the 1977 version of the judicial council did little to constrain military interference with the courts. Indeed, judicial independence was in one sense greatest between 1988 and 2004, when judges enjoyed a vastly expanded domain of governance but had little oversight. Only with the recent reforms is there a promise of a strong but politically accountable judiciary. It remains, of course, to be seen whether this materializes.

[61] Emenda Constitucional N. 45 (article 103B) (2004).

[62] Tom Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003); J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts*, 23 J. Leg Stud. 721 (1994).

B. Bolivia

[J council in Bolivia created in 1994 for first time. Motive was part of larger judicial reform. Note role of IADB.]

C. Bosnia

Another interesting example of an innovation in judicial councils is that of Bosnia. The Dayton Peace Accords, signed by Serbia, Croatia, and Bosnia and Herzegovina in 1995, ended the war/ethnic cleansing of 1992-5 and reconstructed the Bosnian state along ethnic lines – allotting 51% of Bosnian territory to the Muslim-Croat federation and 49% to Republika Srspka.[63] The Accords were never meant to be permanent, but instead to act as a framework for rebuilding the war-torn nation. External parties, including the U.S., U.K., France, Germany, and Russia, formed a "Contact Group" with the task of overseeing the implementation of the Accords.[64]

Along with other state-building tasks, the judiciary was the target of external intervention. The multi-ethnic nature of the Bosnian state requires careful negotiation of all institutional structures to ensure an ethnic balance. In 2004, the High Judicial and

[63] Jane M.O. Sharp, *Dayton Report Card*, International Security, Vol. 22, No 3., 101-37, 113 (Winter 1997-98). Available at: http://links.jstor.org/sici?sici=0162-2889%28199724%2F199824%2922%3A3%3C101%3ADRC%3E2.0.CO%3B2-6. Although the matter of control of the Brcko District was sent to binding arbitration, where it was established as an autonomous district held by the Federation and RS in "condominium" but with a separate legal structure. Michael G. Karnavas, *Current Developments: Creating the Legal Framework of he Brcko District of Bosnia and Herzegovina: a Model for the Region and Other Postconflict Countries*, 97 Am. J. Int'l L. 111- 131, 111 (2003).

[64] Jane M.O. Sharp, *Dayton Report Card*, International Security, Vol. 22, No 3., 101-37, 111 (Winter 1997-98). Available at: http://links.jstor.org/sici?sici=0162-2889%28199724%2F199824%2922%3A3%3C101%3ADRC%3E2.0.CO%3B2-6 .

Prosecutorial Council of Bosnia and Herzegovina (HJPC of BiH) was created.[65] The Council appoints and disciplines judges (and prosecutors) in an effort to enhance the rule of law, as well as handles budgetary and administrative matters and training.

The HJPC has consisted of 15 national members and 2 international members since January 31, 2006 (one Norwegian lawyer and one Irish lawyer). The national members are selected through provisions laid out in Article 4 of the Law on HJPC of BiH, and ethnic balance is paramount. International membership appears to fluctuate, with at least between one and two members[66] Like other institutions in Bosnia, the international members play a role of providing international reference points, while also monitoring institutional development.

The Bosnian situation illustrates a Council that is designed to ensure both independence from domination by any particular ethnic group, as well as accountability to the broader international community that bankrolls and guarantees the Bosnian state. It again shows that independence per se is not the only goal of the system.

D. France

The French approach to the organization of judicial councils has been identified by many as a row model as we have discussed before.[67] The French judicial council, *Conseil Superieur de la Magistrature*, was created after Second World War II, in 1946, when the

[65]According to the HJPC's official website, the Council "replaced three previously established councils." http://www.hjpc.ba/intro/?cid=1648,1,1 HJPC Fact Sheet. Available at http://www.hjpc.ba/intro/?cid=246,1,1 (last visited 2/15/07.)
[66] HJPC Fact Sheet. Available at http://www.hjpc.ba/intro/?cid=246,1,1 (last visited 2/15/07.)
[67] We thank Sofia Garcia for help in this section and the next two.

Fourth Constitution established a council headed by the President of the Republic and having the Minister of Justice as the Vice – President[68]. The French Fourth Republic was quite unstable: there were twenty-one prime ministers (*Président du Conseil des Ministres*) in approximately twelve years. In 1958, there was a political crisis in France due to the military and civilian revolt in Algeria that led to the creation of the Fifth Republic[69]. The Fifth Constitution, voted by referendum, led to some reforms in the judicial council, namely in terms of the composition of its members, although the President of the Republic and Ministry of Justice are still the president and vice-president of the council, respectively, and nine members were to be appointed by the President[70]. Until the 1990's, the powers of the council were quite limited, taking into account that they were basically related to the proposal of nomination of high level magistrates, and the council was influenced by the President of the Republic.

The Constitutional Reform (*Loi Constitutionelle*) in 1993 and Constitutional Amendment (*Loi Organique*) in 1994 brought changes in terms of membership, method of appointment, powers and operating procedures of the council. To sum up, the main changes were: magistrates members of the council were to be elected; creation of two "formations" or committees, one with jurisdiction over the judges (*siège*)[71] and the other over public prosecutors (*parquet*); four members who are common to both formations are appointed by the "high authorities" of the State[72]; the other twelve members (six of each formation) are elected by the judiciary, and new competences related to the nomination of Presidents of the *Tribunaux de Grande Instance.* Although the French Constitution refers

[68] There were six members elected by the National Assembly, four magistrates elected by their peers and two members appointed from the judiciary by the President of the Republic.
[69] This is the fifth and current republican constitution, which replaced a parliamentary government by a semi-presidential system.
[70] These members could be appointed directly (two qualified prominent figures), by nomination of the officers of the *Cour de Cassation,* the French Supreme Court for civil and criminal cases (six members) and the General Assembly of the *Conseil d´État*, the French Supreme Court for administrative justice (a *Conseiller* appointed by the *Conseil d'État*).
[71] The French Constitution grants the judges a status that guarantees their independence and security of tenure.
[72] These are the President of the Republic, the Presidents of the two Parliamentary Chambers (the Senate and the National Assembly) and the General Assembly of the *Conseil d'Etat*.

the existence of a judicial council and its composition, this body is covered mainly by ordinary legislation[73].

The reforms in the 90s were clearly driven by political events as well as political scandals that have empowered the judiciary. France was ruled by right-wing administrations for more than 20 years. François Mitterrand became the first socialist elected President of France by universal suffrage, in 1981, but with the loss of the PS majority in the French National Assembly in 1986 he had to live in *cohabitation* with the conservative government of Jacques Chirac. In the legislative elections of 1993, due to economic recession, consecutive scandals[74] and divisions on the left, Edouard Balladur becomes Prime-Minister, giving rise to the second *cohabitation* of the Mitterrand's presidency. Jacques Chirac becomes President in 1995, replacing Balladur with Alain Juppé. The third *cohabitation* started in 1997, when the President dissolves the Assembly[75] and Lionel Jospin[76] becomes Prime-Minister, constraining Chirac's political influence.

On the other hand, several political scandals have given the judiciary an important influence over politics. For these investigations it was crucial the emergence of judges that were motivated and willing to investigate corruption scandals and to confront political pressures. These judges were designed by "sheriffs" in France, and have included Thierry Jean Pierre, from the URBA affair in the 1980's, Eva Joly, from the Dumas/ELF scandal, and Halphen.[77]

[73] According to the French Constitution, there must be ordinary legislation regulating the functioning of the Council (*Loi Organique* nº 94-100, 5th February 1994 – consolidated version 25th June 2001; Decision nº93-337 DC 27th January 1994; Decree nº 94-199; 9th March 1994).

[74] These include contaminated blood, illicit financing, and the suicide of the ex-Prime Minister Pierre Bérégovoy, suspected of receiving a loan from a controversial businessman.
[75] The Assembly was dissolved despite the large right-wind majority.
[76] This was a surprising victory of the Socialist, in coalition with the Communists and Greens.
[77] See Arnault Miguet, "Political Corruption and Party Funding in Western Europe – an overview", London School of Economics, April 2004 (mimeograph).

Cheryl Thomas[78] refers to the *cohabitations* in France as weakening the executive, with the powers of the Minister of Justice being reduced in relation to the judiciary and the Council's powers have increased. According to Pujas and Rhodes[79], comparing to Spain and Italy, France is the country where political power remains quite influential over the judiciary. The authors refer the episodes from different Ministers of Justice and the conflict with the judiciary "when they have tried to hush up 'affairs' linked to their respective parties". This is consistent with our story on the upper part of our Figure 1. As the political system becomes more competitive in the 80s and early 90s, there is a pressure for judicial reforms that assure more independence. Nevertheless, the involvement of high profile politicians in scandals and the more active judicial review (for example Cheryl Thomas[80] observes that "the increasing political significance of the judiciary can be seen in the exercise of judicial review by the *Conseil Constitutionnel* in recent years and the involvement of French magistrates (both prosecutors and judges) in investigating prominent businessmen and politicians in relation to corruption scandals"), has introduced a debate about the lack of external accountability of the judiciary which is consistent with the bottom of Figure 1. According to Valéry Turcey[81], a member of the CSM, if during a long time the existence of the CSM was unknown for a major part of the population, the increasing role of the judiciary in the French society was made through large debates about the CSM. The same report refers that the designation of "*autogovernment*" of the judicature is not well accepted in France, due to the historical tradition hostile to the recognition of a true judicial power.[82]

[78] Supra 4.
[79] Véronique Pujas and Martin Rhodes, "Party Finance and Political Scandals in Italy, Spain and France", West European Politics, Vol. 22, Nº 3 July 99, pp. 41-63.

[80] Supra 4.
[81] Valéry Turcey, 2005, Le Conseil Superieur de la Magistrature Français: Bilan et Perspectives, Paris.
[82] Also consistent with our theory as summarized in figure 2 is the existence of two strong unions for judges and magistrates that are considered to be influential. One is the *Syndicat de la Magistrature*, a union for the French magistrates that counts with around 30% of the French magistrates. It was created in 1968, it is politically considered as left, and two of its members have a sit at the CSM actual composition (one at the parquet formation and the other at the siege). This union is a member of the MEDEL association (*Magistrats Européens pour la Démocratie et les Libertés*). The other is the *Union Syndicale des Magistrats* (USM), a union for the judicial magistrates opened to every member of the judicial body. Politically, it is considered

E. Italy

The *Consiglio Superiore della Magistratura* was instituted in 1958[83], although its creation had been envisaged by the Italian democratic Constitution of 1948[84], approved after the WWII and built in opposition to the previous fascist regime. The Italian Constitution has been amended more than ten times until today[85]. Italians rejected by referendum[86] in 2006 a major reform bill that aimed revising Part II of the Constitution (Organisation of the Republic). It defines the existence, composition and tasks of the CSM but it also statues that rules governing the judiciary and the judges are laid out by ordinary law[87]. The Council can issue quasi-statutory measures related to its activity only.

The Council is in charge of the employment, assignment, transfer, promotion and taking of disciplinary measures for judges, according to the Italian Constitution[88]. The Constitution pays especial attention to the autonomy and independence[89] of the judiciary, since previously the judicial power was subjected to the executive power. Cheryl

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as center. There is also another judicial association, the *Association Profissionnelle des Magistrats* (APM), on the right and close to the RPR (*gaulliste*).

[83] Law of 24th March 1958, nº 195.

[84] The Italian Constitution came into force in January 1948.

[85] Constitutions of Europe – Texts collected by the Council of Europe Venice Commission, Council of Europe, Martinus Nijhoff Publishers.

[86] Article 138 of the Italian Constitution refers that amendments to the Constitution or other constitutional laws shall be adopted by each House and can be subject to popular referendum when, within three months of their publication, such request is made (in this case it must be a request made by one fifth of the members of a House, five hundred thousand electors or five region councils. A majority of valid votes is needed).

[87] Law nº 195, 24th March 1958, reformed by Law no. 44 of 28 March 2002, sets the composition and functioning of the CSM

[88] Since administrative jurisdiction is assigned to bodies separated from the ordinary courts, there is also a council for administrative judges, the *Consiglio di Presidenza della Magistratura Administrativa*.

[89] Voermans and Albers, supra 9, refer that Italy adheres to the greatest possible independence due to the country's struggle against organized crime, terrorism and corruption in the executive.

Thomas[90] refers that the Italian judicial system is notable for its extreme independence, in which the CSM controls virtually all aspects of judicial appointment and the conditions of the judicial career in the ordinary judiciary. The author defends that the balance of power on the CSM is clearly in the hands of the judiciary, and that the internal hierarchy have been dismantled: all decisions on the status of magistrates are taken by the CSM

Several scandals investigations related to businessmen, politicians and bureaucrats marked the period from 1992 to 1997 which as raised questions about accountability of judicial powers as expected by our model. Political scandals in Italy, Spain and France have all, according to Cheryl Thomas[91], touched the judiciary in some way. It could be by elevating the public role for investigating magistrates (and thus increasing the political significance of the judiciary), or by implicating the judiciary in the corruption scandals themselves. Public debates centred in the type of appointment of judges and the organization of the judiciary.

The composition[92] of the Council was altered by Law nº 44 of 28th March 2002. Previously there were a total of 33 members. Now they are 2/3 of ordinary judges and prosecutors belonging to the various ranks (sixteen members appointed by the judges and the prosecutors) and 1/3 of university law professors and lawyers with fifteen years experience in the legal profession (eight members appointed by the Parliament).[93]

[90] See supra 4.
[91] See Thomas *supra* 4.
[92] Voermans and Albers, supra 9, refer that the Italian respondents emphasized that "the fairly large size of the CSM impedes the decision-making process and makes it susceptible to politicization. The CSM is a parliament on its own." These answers from the respondents were before the change in the composition took place.
[93] If we refer to the role of the judicial associations, there are four that are crucial in elections to the CSM and since 1990 no judicial representatives to the CSM have been elected without the backing of one of the following groups (from left to right on the political spectrum): Magistratura democratica; Movimento per la giustizia; Unita per la Constitutzione; Magistratura indipendente. There is also another association, Articolo 3-I Ghibellini, but with less influence. All these five associations join the Associazione Nazionale Magistrati (ANM).

The Italian case, as the French case, fit well on our dynamic model of addressing excessive politicization first by grating extensive independence to the judicial power, and raising serious accountability issues once judicialization of party politics becomes notable (in both cases mostly due to political scandals).

F. The Netherlands

The Netherlands has not followed the French-Italian model. Important reforms were introduced recently pushed by the need for more transparency and accountability, and not due to high profile political scandals.

In 2002 the judicial system in the Netherlands was subject to substantial reform by law, reinforcing the constitutional judiciary's position towards an effective protection of independence of the judicial system. One of the changes held was the institution of the Council for the Judiciary [94](*Raad voor de Rechtspraak*), created in January 2002 with the main responsibility in terms of organization and financing the Dutch Judiciary - with the exception of the Dutch Supreme Court (*Hoge Raad*) and the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*). The Council took part of the powers previously in the hands of the Ministry of Justice, what should reinforce the independence of the judiciary authority with respect to the legislature, the Parliament, and the Government.[95]

[94] The creation of the Council for the Judiciary followed the Leemhuis Commission's advice to the Minister of Justice by the report "Updating the Administration of Justice", in 1998

[95] "*The State of our Democracy 2006*", Ministry of the Interior and Kingdom Relations, October 2006.

The Council for the Judiciary is part of the judicial system but it does not administer justice itself. The main tasks that it has and that has taken away from the Minister of Justice are related to operational tasks, including the allocation of budgets, supervision of financial management, personnel policy, and accommodation. The Council only has five members[96] but it has an office to assist it in its activities, employing around 135 people. The acts of the Council are not subject to any control.

The Minister of Justice keeps its competences for general policy related to the system of administration of justice, to issuing financial resources to the council and to employment conditions and personnel policy of the judicial authority. The Council is accountable to the Minister of Justice for the appropriate use of those resources and is responsible for the elaboration of a general annual plan and an annual report for the Dutch judiciary system. The selection of judges in the Netherlands combines the appointment system in common and civil law: half of the judges are young university graduates and the other half experienced members of the legal profession[97]. The Ministry of Justice shares the power of selecting the members for the judicial selection boards with the judiciary and legislature.[98]

The Dutch case is a good example of where concerns for excessive politicization of the judiciary have never been serious, and yet reforms operate in accordance to the bottom of Figure 1 as a need for more accountability and better allocation of resources becomes socially relevant.

[96] Three members came from the judiciary and two held senior positions at a government department.
[97] Supra 4.
[98] Also note that the existence of the Dutch Association of the Judiciary, *Nederlandse Vereniging voor Rechtspraak*. It defines itself as "the independent trade association and union of judges and public prosecutors". The NVvR advises the Ministry of Justice, participates in international organizations and counted in the end of 2004 with 3244 members.

VI. Conclusions

This paper is a first examination of a new important institution for judicial independence, namely judicial councils. We start by providing a comprehensive view of common-law judicial appointment commissions (the Merit Plans in the US as well as the Canadian and the British experiences) and civil-law high judicial councils (the French-Italian model). We have argued that the different designs aim at achieving the appropriate balance between independence and accountability in face of two recurrent phenomena, the politicization of the judiciary and the judicialization of politics, that are combined in different degrees across the world. We provide a typology of judicial councils by looking at two crucial elements, composition and competences.

Our economic model of judicial councils is based on the principal-agent model. The judicial council is an intermediate body that aims to reduce agency costs due to the misalignment of interests between society and the judiciary and the possible capture by a minority that has better information (e.g., the politicians). The exact shape of this body depends on judicial incentives (including payment for performance and social influence due to reputation) and the judicial role (e.g., the extension of judicial review) as well as on the more general institutional setup. Our empirical observation of patterns of institutional design show that competence and composition interact in complex ways to respond to particular institutional problems. We also found little evidence in favor of the widespread assumption that councils increase quality in the aggregate. Therefore, we emphasize the complexity of the role of a judicial council and reject the simplistic view that importing or transplanting certain types of judicial council has a determinant role on the quality of the judiciary. We thus reject the view of international organizations that

assert that judges should always and everywhere form the majority of members on the Council.[99]

Our framework explains why it is that councils persist as institutions. Because they involve actors from multiple different arenas, the council itself promises that no one institution can easily dominate the judiciary. The councils, once created, provide an arena for competition and the eternal struggle to calibrate independence and accountability. We thus predict that councils themselves will frequently become the targets of institutional reform, as our case studies from Brazil and elsewhere demonstrated.[100]

Finally, we introduce the notion of a politically accountable but strong judiciary. In many ways, this ideal type is more desirable than the conventional view that judicial independence is an unqualified good. Those who emphasize judicial independence too often do not articulate the need for accountability, which provides the crucial other side of the proverbial coin.

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[99] Violane Autheman and Sandra Elena, *Global Best Practices-Judicial Councils: Lessons Learned from Europe and Latin America* (IFES, 2004).

[100] Autheman and Elena provide a very interesting report of survey data from five Central American countries. Respondents in those countries that had a judicial council reported that the Council had had a negative impact on judicial independence. Respondents in those countries that did *not* have a judicial council felt that adopting a judicial council would increase judicial independence. Id. at 4. These two results are not contradictory from our point of view. First, the two sets of countries have different starting places, and are likely to vary systematically. Second, the countries that have adopted judicial councils may have done so to enhance accountability rather than independence, in which case, respondents are observing a successful institution.

FIGURE 2

COMPETENCE AND COMPOSITION: TYPOLOGY OF JUDICIAL COUNCILS

COMPOSITION COMPETENCES	JUDGES FROM SUPREME COURT DOMINATE	JUDGES FROM DIFFERENT COURTS DOMINATE	NON-JUDGES DOMINATE
EXTENSIVE	STRONG RIGID HIERARCHICAL JUDICIAL COUNCIL (JAPAN, MEXICO, THAILAND)	STRONG NON-HIERARCHICAL JUDICIAL COUNCIL (FRENCH-ITALIAN MODEL)	POLITICIZED JUDICIAL COUNCIL (ECUADOR, BARBADOS, SINGAPORE)
INTERMEDIATE (APPOINTMENTS)	RIGID SELFREGULATED JUDICIAL APPOINTMENTS COMMISSION (BANGLADESH)	SELFREGULATED JUDICIAL APPOINTMENTS COMMISSION (UK, BELGIUM)	JUDICIAL APPOINTMENTS COMMISSION (USA, CANADA, NETHERLANDS, GERMANY)
MINIMAL (HOUSEKEEPING FUNCTIONS)	WEAK JUDICIAL COUNCIL (BRAZIL, PANAMA)	WEAK JUDICIAL COUNCIL (HUNGARY)	WEAK JUDICIAL COUNCIL (PARAGUAY)

FIGURE 1

CONTROLLING THE JUDICIARY