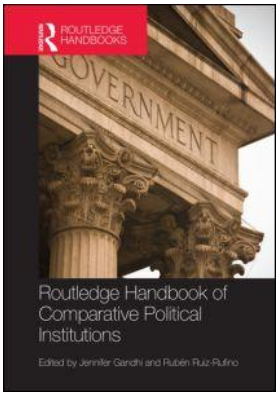

Routledge Handbook of Comparative Political Institutions

Jennifer Gandhi, Rubén Ruiz-Rufino

Judicial institutions

Publication details
https://www.routledgehandbooks.com/doi/10.4324/9781315731377.ch14
Julio Ríos-Figueroa
Published online on: 09 Apr 2015

14
JUDICIAL INSTITUTIONS

Julio Ríos-Figueroa[1]

Judicial institutions arbitrate and adjudicate disputes of various sorts within a political community. The basic social logic of courts and judges is rooted in the triad for conflict resolution: whenever two actors come into a conflict that they cannot themselves solve they call upon a third for assistance (Shapiro 1981: 1). According to this simple but universal view of judicial institutions, the effectiveness and efficiency of the third-party is related to the extent that he or she is neutral to the issue in dispute and independent from the parties in conflict, as well as to the extent to which it applies pre-existing legal norms after adversary proceedings (Shapiro 1981). The immediate role of judicial institutions would then be to resolve specific disputes.

But judicial institutions are also means to achieve other, more general or proximate, normatively appealing goals through the resolution of those specific disputes. According to modern political thinkers, along with the other branches of government judicial institutions partake in creating a moderate or *balanced* system of rule. This is what Montesquieu famously called "the liberty of the constitution" in *The Spirit of the Laws*. Montesquieu argued that judges should be either the "mouthpiece of the law…mere passive beings incapable of moderating either its force or rigor" (VI 6), or political actors that "deliberate, communicate their thoughts, argue […and…] change their minds" (VI 4).[2] There is no contradiction: for Montesquieu the role of judges and of the judicial organ depends on how close a given regime is to the desired moderate government. In republics, where non-arbitrary government is already established by the separation of executive and legislative powers, judges should play a minimum role and the judiciary should be so weak as to become a "null power." But in monarchies, where the executive and legislative powers are concentrated in the king, a permanent judicial organ and deliberative judges are necessary for checking power and preserving the balance of government.[3]

The list of goals that judicial institutions help to achieve has been expanded in recent scholarship. More interestingly, recent research emphasizes the theoretical role played by judicial institutions in achieving such outcomes. Specifically, scholars have made efforts to theorize the role that courts play in bringing about outcomes such as regime stability, human rights protection, corruption control, or investment and economic growth either by enhancing the *credibility* of government *commitments*, by providing focal points that help solve *coordination* problems, or by providing information that reduces the uncertainty that partly causes *cooperation* dilemmas (e.g. Barro 1997; Blomquist and Ostrom 2008; Frye 2004; Gibler *et al*. 2009; Milgrom, North, and Weingast 1990; North and Weingast 1989; Powell and Staton 2009; Reenock, Staton, and

Radean 2012; Ríos-Figueroa 2013; Sutter 1997; Weingast 1997). It is thus not surprising that NGOs, states, international, and supranational organizations have promoted vigorously the introduction of more courts, the construction of judicial independence around the globe, and more broadly, the rule of law (e.g. Carothers 2006).

This chapter is divided into three sections. The first focuses on two central attributes of judicial institutions: independence and power, and introduces a distinction between two different sets of judicial institutions: judges and prosecutors. In the second section, I review recent scholarship that analyzes judicial institutions as means to achieve appealing outcomes by solving commitment, coordination, and cooperation problems.[4] In this section, I also re-state some of the arguments making use of the distinctions introduced in the first part, and on occasion I also extend the reasoning to suggest how judicial institutions would work in authoritarian regimes. In the third section, I discuss some of the most pressing and exciting challenges in this area of research.

"Independence" and "powers" of judges and prosecutors

Any justice system has two key sets of institutions with their corresponding crucial actors: (1) the prosecutorial set, in which prosecutors of different types and levels are in charge of detecting, investigating, and taking cases to court for an eventual trial; and (2) the administration of justice set, in which judges sitting in different types and levels of courts decide over the cases that are brought before them. The bulk of social science research on judicial institutions focuses on courts and judges forgetting the prosecutorial organ and the prosecutors—as if scholars working on these topics had never watched *Law & Order*. Of course, strictly speaking prosecutors are part of the criminal justice system. But their job is the prosecution of *crimes*, i.e. violations of a law in which there is injury not only to the victim but also to the public. And crimes can take place in any area of political or social life—a family dispute, a business transaction, a sports venture, a political campaign, or a government decision. Therefore, the functioning of the criminal justice system affects all other areas of social and political life, which makes the prosecutors and the prosecutorial organ an essential part of any justice system (see e.g. Brinks 2007; Gonzalez Ocantos 2012; Gordon and Huber 2009; Michel-Luviano 2012; Michel-Luviano and Sikkink, 2013; Tonry 2012).[5]

Two features of judicial institutions are particularly relevant to analyze whether, and if so how, they can become effective means to obtain appealing outcomes. The first is their degree of "independence." At the broadest level, "independence" of judicial institutions and actors "expresses the aspiration that judicial decisions should not be influenced in an inappropriate manner by considerations judged to be normatively irrelevant" (Vanberg 2009). In the most basic scheme of courts as third-party dispute settlers (Shapiro 1981) "independence" breeds the neutrality and credibility of judicial decisions and thus is the bedrock for their legitimacy before the parties in the dispute, the political actors, and the public at large (see e.g. Bybee 2010). Independence is also crucial for prosecutors whose legitimacy depends on the perception that they represent the state and the public, and not a particular government or political party.

The second key feature of judicial institutions is related to their capabilities or, more generally, their "powers." The "powers" of judicial institutions and actors are related to both the formal right to decide particular disputes on behalf of particular litigants and the likelihood that those decisions will produce compliance. In general, judges are more powerful the broader the set of parties that can bring their disputes to them, the broader the set of issues they can resolve, and the broader the legal base they have to use to decide on them (see e.g. Ginsburg 2003). In turn, prosecutors are more powerful the broader the set of issues they can pursue, the more

discretion they have to choose which crimes to investigate and how, and the more leverage they have to negotiate with suspects and other parties involved in a crime (see e.g. Tonry 2012).

Notice that the two basic features of judicial institutions, "independence" and "powers," apply to both judges and prosecutors. Moreover, notice also a key difference between prosecutors and judges that can affect the institutional design of the justice system: while the former are "active" the latter are "passive." In other words, judges can only decide the cases that are brought to court by someone else (in the criminal justice system generally by prosecutors). In the famous words of Hamilton, judges do not have "will but merely judgment." In contrast, prosecutors have both will and judgment; they can actually decide whether to go after specific cases in order to investigate crimes that have been committed (and to prevent others that could be committed). Moreover, after they decide which cases to pursue they also have discretion to decide whether or not to take a particular case to court. In essence, prosecutors have the keys that open the courtroom's door in criminal cases.[6]

The institutional design of the justice system involves, then, combining in a specific way the institutional actors—judges and prosecutors—and their institutional features—independence and powers. For instance, arguably a stable and consolidated democracy requires that both sets of actors are independent from the government and also powerful. In an autocratic regime, however, the ruler may prefer to have independent judges with not much power (so that potential decisions against the regime do not cause much damage) and dependent prosecutors that can monitor political opponents and serve as the "legal arm" of the autocrat. Even in democracies, however, we find some courts that enjoy less independence than others (as the non-Article III courts in the United States). As will be argued, theories that explain the particular institutional architecture of a given system focus on different roles that judicial institutions may play.

Conceptual and measurement issues[7]

There is a lot of debate on how to conceptualize and measure key features of judicial institutions such as their "independence" and their "powers." A familiar distinction in the literature involves the difference between *de facto* and *de jure* concepts. The latter deals with formal rules designed to insulate judicial actors from undue pressure, either from outside the judiciary or from within. Institutions like fixed tenure, multilateral appointment procedures, budgetary autonomy, and judicial councils are thought to provide such insulation and thus influence behavior. The concept of *de facto* judicial independence is behavioral and can be further differentiated between two subconcepts. The first demands that judges or prosecutors be the "authors of their own opinions" (Kornhauser 2002: 42–55). On this account, a judge is independent when he or she does not respond to undue pressures to resolve cases in particular ways,[8] in other words, when her decisions reflect her preferences. Judicial independence in this sense reflects *autonomy*. A second concept of *de facto* emphasizes that it makes little sense to call a judge or prosecutor independent if her decisions are routinely ignored or poorly implemented, thus requiring not only that judges resolve cases in ways that reflect their sincere preferences, but also that these decisions are enforced in practice (Cameron 2002). Judicial independence in this sense reflects *influence*.

Diverse research teams have made important efforts to measure the previous concepts. Some teams trying to capture the incentives and rules are likely to induce usually aggregate information via an index of multiple institutions, such as length of tenure and methods of appointment and removal (Camp Keith 2002; Feld and Voigt 2003; La Porta *et al.* 2004). Other teams try to capture independent behavior directly, either through the coding of judicial decisions according to a certain standard of independence (e.g. decisions against the government) or through surveys of experts, users of the courts, and the general public (e.g. Cingranelli and Richards 2010).

Still other teams try to capture independent behavior indirectly through a measure of the behavioral or attitudinal consequences of autonomy or influence, such as higher ratios of non-currency money to total money supply that arguably reflect more confidence in independent judicial institutions and actors that prevent predatory state behavior (e.g. Clague *et al.* 1999).[9]

In addition to conceptual distinctions and measurement strategies, existing research also tells us that institutions in general, and judicial institutions in particular, do not work in a vacuum. It is thus important to analyze the conditions under which, for instance, a sincere evaluation of the judicial record, or compliance with judicial decisions, is more likely. The most relevant conditions for the effectiveness of judicial institutions include the presence of a certain legal culture or ideology (e.g. Gonzalez Ocantos 2012; Hilbink 2012; Ingram 2009), higher levels of political competition or a fragmented political arena (Aydın 2013; Helmke 2002; Popova 2012; Pozas-Loyo and Ríos-Figueroa 2007), strong and sophisticated societal organizations that use the legal system to pursue their interests (Epp 1998; Wilson 2006), and higher levels of public support for the judicial institutions (Gibson, Caldeira, and Baird 1998; Staton 2006; Vanberg 2005).

All in all, each one of the different strategies to conceptualize and measure a given concept of judicial independence has advantages and limitations. Arguably, the most important challenge in this regard is that scholars make sure that their concepts match their theories and that their measures match their concepts. For instance, as will be clearer in the next section, arguments in which independent courts allegedly enforce previously made commitments assume compliance and thus require a specific concept and measure of *de facto* judicial independence, i.e. a concept and measure that reflects influence. In contrast, arguments in which citizens can make use of judicial decisions as signals to help coordinate their responses to a government that has exceeded its constitutional limits, arguably might only require a court issuing decisions that reflect its sincere evaluation of the record.

Three theories on the roles of judicial institutions and actors

Making commitments credible

Governments can get something they want from another actor by committing to do something else in return. But how can the other actor be sure that the government will do tomorrow what it commits to do today? One way the government can make its commitment credible is by increasing the costs of reneging (Shepsle 1991). In this framework, empowering and giving autonomy to a court allowing it to punish deviances from previously made commitments is a device to make such commitments credible (Ferejohn and Sager 2002). In a constitutional democracy, citizens know that politicians cannot easily abuse their decision-making power by changing the rules in their favor, because there is a constitution that is harder to change. But this is not enough. A constitution is not effective if politicians have latitude in interpreting its meaning. Hence, an independent court with some kind of judicial review power is needed. As Sánchez-Cuenca puts it: "representation and constitutions are institutions based on some commitment technology, through delegation or through rules, and judicial review is an essential mechanism to make these commitments credible" (Sánchez-Cuenca 1998: 94).

By making constitutional commitments credible judicial institutions can contribute to obtain desirable outcomes such as promoting investment and economic growth, protecting human rights, democratic survival, and curbing corruption. Independent judiciaries with a sufficient amount of power, which constrain arbitrary executive and legislative power, ensure that state constitutional promises to respect property rights are perceived as credible (e.g. North and Weingast 1989).

In turn, credibility breeds investment, state solvency, growth, and development (e.g. Acemoglu, Johnson, and Robinson 2001; Barro 1997; Frye 2004). The government can also commit to protect the human rights enshrined in constitutions and recent findings suggest an inverse relationship between judicial independence and human rights violations (e.g. Hathaway 2007; Poe, Tate, and Keith 1999; Powell and Staton 2009). Judicial institutions can also facilitate credible commitments and the enforcement of compromises that matter for democratic survival (Reenock, Staton, and Radean 2012). Independent courts and prosecutors are also mechanisms to make credible a government's commitment to punish those who use public funds for private benefit (Van Aaken, Feld, and Voigt 2010; Ríos-Figueroa 2012a).

Notice that arguments in which independent courts allegedly enforce previously made commitments assume compliance. In other words, it makes little sense to argue that a court would make credible the government's commitment if it is routinely ignored or its decisions poorly implemented. Thus, arguments in which the theoretical role of courts is to tie the hands of the government to enhance its credibility imply a specific concept of *de facto* judicial independence, i.e. *influence*.[10] However, it is well known that lacking financial or physical means of coercion, courts depend on the assistance of other political authorities to enforce their decisions, making the likelihood of enforcement of judicial decisions an important element for judges to consider when crafting their decisions. The issue of enforcement of judicial decisions looms large and poses one of the most difficult and exciting research challenges regarding judicial institutions. The literature has pointed to some conditions under which enforcement is more likely because the costs of not complying are higher; perhaps the most important in democracies is public support for the courts (Vanberg 2005).

In authoritarian regimes things are different. Some studies have argued that courts in dictatorships can also make credible the authoritarian government's commitments (Ginsburg and Moustafa 2008; Moustafa 2007). For instance, autocrats may allow independent judicial decisions only in the economic sphere but not in other politically sensitive areas, such as public security (Moustafa 2007).[11] However, enforcement of courts' decisions under autocracies is an even more complicated problem in large part because in those regimes it does not make sense to think of independent institutions of any kind (Schedler 2013; Svolik 2012, 2013). Judicial institutions and actors under authoritarian regimes share the broader goal of wanting the regime and their own benefits to survive: if or when they don't, they would be undermined, sacked, or worse by the dictator (as in Egypt when courts went beyond the purely economic sphere and entered the territory of public security, cf. Moustafa 2007).

This does not mean that judicial institutions cannot contribute to authoritarian power sharing. Most dictators do not directly control enough resources to govern alone and therefore seek the support of notables with whom they promise to share power. This creates, according to Boix and Svolik (2013: 300), "the central dilemma of any dictatorship, which is to establish a mechanism that allows the dictator and his allies to credibly commit to joint rule." Institutions such as autocratic political parties can contribute in solving that dilemma. According to Beatriz Magaloni, "if the dictator delegates control to the access-to-power positions and the state privileges to a parallel political organization, such as a political party, he can more credibly guarantee a share of power and the spoils of office to the groups that support him" (Magaloni 2008: 716). Judicial institutions in authoritarian regimes can play a role analogous to that of political parties.

Specifically, the autocrat can create a special jurisdiction for a group within his ruling coalition in exchange for loyalty. Each special jurisdiction has its own system of courts that are non-independent vis-à-vis the specific group and have powers limited to that domain. Members of this group accept the exchange because having a special jurisdiction means that they will enjoy

autonomy to deal with problems internal to this group. The existence of these special jurisdictions, each with its own system of non-neutral-limited-reach courts, tends to be a clear sign of the regime's intention to respect a significant level of autonomy for the most relevant parts of the ruling coalition to deal with their own issues. The most common special jurisdiction that serves this purpose is the military jurisdiction, but in some dictatorships such as the Franco regime in Spain, there were up to 22 special jurisdictions to cement the power sharing arrangements with important groups of the ruling coalition, including the military, the business elite, and the Catholic Church (Aguilar and Ríos-Figueroa 2014).

Providing focal points for citizens' coordination

A coordination challenge exists when the interests of actors are in agreement but to realize mutual gains the actors have to make mutually consistent decisions. For instance, according to Barry Weingast, the transition to stable democracy "requires the construction of a coordination device that specifies widely accepted and unambiguous limits on the state. By allowing citizens to react to violations in concert, such a device makes limits on political officials self-enforcing" (Weingast 1997: 251). Although Weingast does not explicitly mention judicial institutions, other authors have considered that an independent court with judicial review power can be such a coordination device (Law 2009; Sutter 1997).[12] For instance, David Law argued that by conveying relevant information about government misconduct in a highly public fashion, the courts enable the people to control their government in an informed and coordinated manner (2009: 730).[13] More recently, Gibler and Randazzo (2009) argue that courts and judicial institutions can contribute to prevent democratic backsliding by signaling when rulers overstep their constitutional bounds and facilitating civil society coordinated responses to restrain them. In this connection, then, judicial decisions enable citizens to coordinate to (implicitly) protest against or overthrow the government if it is overstepping its boundaries.

For judicial decisions to effectively provide a focal point for citizen coordination there should be a monitoring system for the government's violations. Citizens themselves can ring the "fire alarm," especially if the legal standing to file cases against the government is very broad. In this line, scholars have argued that court decisions serve as a focal point when they set the agenda that helps mobilize litigants (e.g. Baird 2008; Cichowski 2007; Moustafa 2007). But prosecutors, depending on their degree of independence from the government, can serve also as a "fire alarm" or a "police patrol" mechanism of monitoring (McCubbins and Schwartz 1984). To solve citizens' coordination challenges to keep the government under limits, therefore, both judges and prosecutors can be helpful. In particular, under a constitutional democracy perhaps the best design of the justice system to carry out this function is to give independence and power to both judges and prosecutors.

Arguments such as Weingast's (1997) or Law's (2009), in which citizens can make use of constitutional or judicial signals to help coordinate their responses to a government that has exceeded its constitutional limits, arguably might only require a court issuing decisions that reflect its sincere evaluation of the record. Therefore, these arguments imply a concept of *de facto* judicial independence in the sense of *autonomy*. In contrast to credible-commitment arguments, coordination arguments do not assume that government actors comply with judicial decisions. The reason is, in part, that the coordination arguments reviewed deal precisely with the issue of government compliance either with its constitutional limits. A different but closely related argument is that judicial institutions can also help coordinate citizens to support the court's rulings and act as its enforcement arm if governments refuse to obey. Specifically, judges can "go public" when they need to inform citizens in an effort to rally support for rulings that go against the

government (Staton 2010). In either case, coordination arguments do not assume compliance but rather deal directly with it.

In authoritarian regimes it is hard to believe that an autocrat would allow an independent court that could provide a focal point for citizens to coordinate against him. But the autocrat would surely like to have a good monitoring system, especially of political opponents. Because judges are passive but prosecutors are active, the more important actor in the justice system to play the police-patrol monitoring role under autocracies would be the prosecutor. Moreover, prosecutors are typically non-independent from the head of the executive power in autocracies. This makes them particularly useful to play the monitoring function and deal with the problem of authoritarian control: the threat the dictator faces that emerges from the unsatisfied masses excluded from power and the opposition groups also excluded (Svolik 2012).

Specifically, in authoritarian regimes non-independent prosecutors could investigate opposition groups, get information about their activities, and build "legal leverage" to be used by the regime in negotiations with them. In other words, prosecutors can become the "legal arm" of the dictator. They are a key element in the legal control of the opposition. The more powerful the prosecutors are the more efficient they could be in performing this function.[14] In this story, judges would simply rubber stamp whatever the prosecutors bring before them. The judges, thus, would not be independent but, in contrast with prosecutors, they also would not be powerful. The use that the authoritarian regime of the PRI in Mexico made of the justice system can be an example of this function (see Aguilar and Ríos-Figueroa 2014; Ríos-Figueroa 2012b).

Transmitting information that reduces uncertainty and promotes cooperation

A cooperation dilemma exists when the interaction of two actors pursuing their private interests produces a worst outcome than the one each actor could get if they could act together. Milgrom, North, and Weingast (1990) argue that judicial institutions can solve cooperation dilemmas. Specifically, when actors seek to exchange goods, a judicial institution that serves as a repository of information and as an adjudicator of disputes can reduce transaction costs (e.g. the cost of transmitting information) reinforcing the reputation system as a means of promoting honest trade (1990: 3–11).

Blomquist and Ostrom (2008) also argue that courts applying principles of equity may be able to transform conflictive relations into cooperative ones when actors deal with extractive resources such as water. In particular, these authors highlight the fact that individuals may use particular forms of litigation not only for the purpose of obtaining a judge's decision of their controversy but also for the purpose of conducting their own inquiries about institutional performance, investigating problems, sharing information, and negotiating agreements (Blomquist and Ostrom 2008: 182).[15]

In general, when the cause of conflict between two actors is uncertainty over the right solution to their conflict or over each other's willingness to cooperate, a third-party mediator can facilitate cooperation by providing relevant information (Kydd 2006). Independent constitutional courts that are widely accessible and have ample powers of judicial review can provide that information. Independence is linked to the court's neutrality or impartiality whereas wide access is related to the court's capacity to get information on the issue in dispute. In addition, courts that also have control over docket and sentencing guidelines are more capable of transmitting such information in a more effective way, strategically managing conflict between the actors and avoiding setbacks for its own decisions (Ríos-Figueroa 2013).

When parties have agreed to cooperate but they face informational challenges in knowing whether each actor is complying with the agreement, a third-party mediator such as a court can monitor the parties, transmit information, and enhance their cooperation. For instance, Carrubba (2005) argues that the judiciary can serve as a monitor of cooperative agreements and eliminate costly conflicts by offering strategic declarations on the nature of alleged breaches, declaring a violation only when cooperation would have been mutually beneficial. Interestingly, in dictatorships and transitional democracies third-party mediation by court-like institutions can also contribute to compliance with election results (Svolik and Chernykh 2012). In particular, Svolik and Chernykh argue that electoral courts can improve compliance with the outcomes of elections where the incumbent has an "informational advantage" but this depends on how accessible the courts are to the opposition as well as on the political value of the information revealed by their rulings (2012: 35).

Theoretical and empirical challenges

Despite the recent advances in the study of judicial institutions—recognizing them as means and not ends in themselves and producing theories on judicial institutions' role in producing valuable outcomes—there are still important challenges. First, as discussed throughout the chapter, key features of judicial institutions—such as their independence, powers, and the crucial issue of compliance with judicial decisions—are still under considerable conceptual and measurement debates. Second, as already mentioned, the bulk of the scholarship focuses on the study of courts and judges under democracy without paying much attention to their working under autocracy nor to the other important half of the institutions of the justice system, i.e. prosecutorial organs and prosecutors. Finally, judicial institutions are generally taken as a given so that their effects can be analyzed, but of course actors empower independent judicial institutions based on expected effects. Moreover, what have been identified as effects of such institutions can be as well produced by the determinants of the institutions themselves. In the remainder of this chapter, I focus on the latter challenge.

Causes and effects of judicial institutions

The analysis of institutions has two basic concerns. One is to explain institutions—where they come from, why they take the form they do. The second is to understand their effects for political and social behavior. These are not, of course, really separate. Institutions arise from the choices of individuals, but individuals choose among structures in light of their known or presumed effects (Diermeier and Krehbiel 2003; Moe 1990). It is more common and probably easier to "understand the effects of institutions without having any idea where the institutions come from" (Moe 1990: 215), than to understand why a certain institution exists without knowing "with reasonable confidence … the consequences of the focal institution" (Diermeier and Krehbiel 2003: 133).

Regarding judicial institutions, scholars have asked why self-interested governments would willingly constrain themselves by empowering independent judicial institutions. Political actors may want to sustain judicial institutions that decide against them because they created such institutions not only to adjudicate specific conflicts but also to help them accomplish a more general outcome by playing a specific role (see Vanberg 2009). But notice that if there are conditions under which actors need judicial institutions to solve certain problems (such as making commitments credible, or solving cooperation or coordination problems) then these conditions should at least be some of the factors that "cause" judicial institutions. It is key then to explain

why the actors that create them (e.g. elected officials, politicians, political parties, or autocratic leaders) will not want to, or will not be able to, undermine them.[16]

Recent scholarship has found that the creation of *de jure* independent and powerful judicial institutions is more related to domestic political factors—such as a multilateral constituent body (e.g. Pozas-Loyo and Ríos-Figueroa 2010) or the need to get some insurance in the face of electoral defeat (e.g. Versteeg and Ginsburg 2013)—than to ideational concerns (e.g. Ingram 2009) or diffusion dynamics (e.g. Elkins 2010). These findings are interesting and suggestive but they should be taken with caution because they are based on assumptions about the expected effects of judicial institutions. In part because of the conceptual and measurement issues discussed earlier, and in part because of the identification problems caused by endogeneity, the degree to which we know the effects of judicial institutions "with reasonable confidence" (Diermeier and Krehbiel 2003: 132) still varies considerably across the scholarly literature.

Political actors may not want to undermine judicial institutions, but also they may not be able to do that even if they want to. Thus, scholars have also analyzed the conditions under which political actors may not be able to undermine judicial institutions that decide against them: when they face coordination problems due to political fragmentation (e.g. Cooter and Ginsburg 1996); or when another actor or force–such as public opinion or a free press– imposes high costs for doing so (e.g. Staton 2010; Vanberg 2005). Indeed, while we know some of the factors that lead to the creation of independent and powerful courts as well as some of the factors that lead to their maintenance, these two questions have generally been addressed separately and their joint systematic analysis is still an open question.

Conclusion

Recent scholarship on judicial institutions mostly consists of efforts to theorize the role they play in bringing about appealing outcomes. The traditional account of judicial institutions focused on their capacity to check the government by disabling arbitrary actions. In contrast, to argue that judicial institutions help solve commitment, coordination, and cooperation problems implies that judicial institutions not only disable but also enable. The focus on the theoretical roles of judicial institutions, moreover, allows for a more direct engagement of the question of why they exist not only in democracies but also in autocratic regimes. Incorporating prosecutors, and exploiting the differences between them and judges, is probably a fruitful way to theorize about the roles of these institutions and also to better identify their effects.

The challenges for this type of research on judicial institutions–conceptual, measurement, and endogeneity concerns–are common to the research program of "institutionalism as a methodology" (Diermeier and Krehbiel 2003). This makes the judicial institutions subfield an integral part of this exciting program, in the frontier of comparative politics, constitutional politics, and political economy.

Notes

1 Thanks to Paloma Aguilar, Claudio López-Guerra, Sean Fern, Jennifer Gandhi, Ezequiel Gonzalez Ocantos, Verónica Michel-Luviano, and Rubén Ruiz-Rufino for their careful reading and valuable suggestions.

2 Quotes refer to the book and chapter (e.g. XI, 6) of the English edition of *The Spirit of the Laws* cited in the references section (Montesquieu 1977).

3 The great innovation of Hamilton (2000: 496) in Federalist 78 is to argue for independent and powerful judicial institutions *in a republic*: "In a monarchy it [the judiciary] is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body."

4 The explicit goal of the chapter implies that the review includes mostly studies within the rational institutionalism tradition. Other rich traditions, such as socio-legal or historical institutionalism, are not thoroughly covered.

5 Of course, there are institutional variations depending on the country regarding the links between the prosecutors and the police, and those between the prosecutors and the judges. Because prosecutors are understudied from a social science perspective there are still many open questions, starting from whether or to what extent we can use what we know of courts to study prosecutors.

6 There is a vast and important literature on "judicial activism" that underscores proactive moves by judges, such as making bold interpretations of law, creating judges' associations, or providing guidance to victims' associations (see e.g. Shapiro 2013). Nonetheless, it is accurate to characterize judges as passive in the sense that in general they have to be activated by a party that brings a case before them, whereas prosecutors are *active* because they can go after cases they deem important.

7 This subsection draws from Ríos-Figueroa and Staton (2014).

8 Of course, political authorities always apply some pressure when they are parties to a case or when they file briefs as interested parties (e.g. *amicus curiae* briefs and other similar institutions). The key here is that this pressure is perfectly acceptable within the rules of the legal system.

9 Ríos-Figueroa and Staton (2014) review 13 extant cross-national measures of judicial independence, the concept that each measure tries to capture, the type of sources from which the measures were created, and the coverage of each measure across time and space, and evaluate their validity. In a nutshell, more research teams have attempted to measure *de facto* independence than *de jure* independence; and, within the former category, scholars largely seem to have targeted the influence concept. Evidence suggests the validity of extant *de facto* measures, though their proper use requires attention to correlated patterns of measurement error and missing data. The evidence for the validity of extant *de jure* measures is weaker.

10 Nonetheless, some influential empirical articles making this argument do not use a measure of judicial independence that captures this particular concept. For instance, La Porta *et al.* (2004) use a *de iure* measure of judicial independence as a proxy for *de facto* independent judicial behavior in the sense of influence.

11 In authoritarian regimes it is easier to take over courts when they start making decisions the autocrat dislikes: the Egyptian regime supported the decisions of "independent" courts in the economic sphere, but it did not when the judges made uncomfortable decisions regarding public security (Ginsburg and Moustafa 2008).

12 Interestingly, a court can coordinate not only citizens but also aggregated actors such as states in federal polities where constituent units will be unable to act in the presence of externalities and other kinds of collective action problems (cf. Halberstam 2009).

13 For a court's decision to become an effective focal point there are some other conditions. For instance, the signal should be clear and understandable for the public (Vanberg 2005), which implies that very technical issues, ambiguous writing, or contradictory decisions by different courts weaken the focality of the signal. However, judges sometimes have incentives to write ambiguous decisions to minimize the costs of non-compliance (Staton and Vanberg 2008).

14 The police and the investigative services generally work in coordination with the prosecutors, sometimes under their direct supervision.

15 The transmission of information by the courts and the actors' learning that take place in theories where judicial institutions serve as cooperation enhancing mechanisms differentiate them from theories that posit judicial institutions as mechanisms to make commitments credible.

16 It is worth noting that scholars who study judicial institutions from the perspective of historical institutionalism care about their origins and effects though in a different way. Specifically, when analyzing the origins of judicial institutions historical institutionalism does not place too much emphasis on the actors and their institutional design preferences, but instead it highlights the role of context and specific circumstances, i.e. critical junctures (Gillman 2002), as well as the historic trends in court crafting (Kapiszewski 2012). In turn, when analyzing the effects of judicial institutions historical institutionalism emphasizes the "court character" as shaped by long patterns of jurisprudence, institutional ideology, and interbranch relations (e.g. Lisa Hilbink 2007; Kapiszewski 2012). From this perspective, the connection between origins and consequences of institutions is intertwined with the complex question of institutional change, which in a sense is the very object of study of this scholarship (cf. Pierson 2004; Smith 2009).

References

Van Aaken, A., L. P. Feld, and S. Voigt. 2010. "Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation across Seventy-Eight Countries." *American Law and Economics Review* 12(1): 204–44.

Acemoglu, Daron, Simon Johnson, and James A. Robinson. 2001. "The Colonial Origins of Comparative Development: An Empirical Investigation." *American Economic Review* 91(5): 1369–1401.

Aguilar, Paloma and Julio Ríos-Figueroa. 2014. *Judicial Institutions, Power Sharing, and Control Under Authoritarian Regimes*. Documento de Trabajo, División de Estudios Políticos #267. CIDE: Mexico City.

Aydın, A. 2013. "Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition." *Law & Society Review* 47(1): 105–34.

Baird, Vanessa A. 2008. *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda*. Charlottesville, VA: University of Virginia Press.

Barro, Robert J. 1997. *Determinants of Economic Growth: A Cross-Country Empirical Study*. Cambridge: MIT Press.

Blomquist, William and Elinor Ostrom. 2008. "Deliberation, Learning, and Institutional Change: The Evolution of Institutions in Judicial Settings." *Constitutional Political Economy* 19(3): 180–202.

Boix, Carles and Milan Svolik. 2013. "The Foundations of Limited Authoritarian Government: Institutions, Commitment, and Power-Sharing in Dictatorships." *Journal of Politics* 75(2): 300–316.

Brinks, Daniel M. 2007. *The Judicial Response to Violence in Latin America. Inequality and the Rule of Law*. New York, NY: Cambridge University Press.

Bybee, Keith J. 2010. *All Judges Are Political – Except When They Are Not: Acceptable Hypocrisies and the Rule of Law*. Stanford, CA: Stanford University Press.

Cameron, Charles M. 2002. "Judicial Independence: How Can You Tell it When You See it? And, Who Cares?" In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Steven B. Burbank and Barry Friedman. New York, NY: Sage Publications Inc., pp. 134–147.

Camp Keith, Linda. 2002. "Judicial Independence and Human Rights Protection around the World." *Judicature* 85(1): 195–200.

Carothers, Thomas. 2006. *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington DC: Carnegie Endowment for Intl Peace.

Carrubba, Clifford J. 2005. "Courts and Compliance in International Regulatory Regimes." *Journal of Politics* 67(3): 669–89.

Cichowski, Rachel A. 2007. *The European Court and Civil Society: Litigation, Mobilization and Governance*. New York, NY: Cambridge University Press.

Cingranelli, David L. and David L. Richards. 2010. "The Cingranelli-Richards Human Rights Dataset." Electronic format.

Clague, Christopher, Philip Keefer, Stephen Knack, and Mancur Olson. 1999. "Contract-Intensive Money: Contract Enforcement, Property Rights, and Economic Performance." *Journal of Economic Growth* 4(2): 185–211.

Cooter, Robert D. and Tom Ginsburg. 1996. "Comparative Judicial Discretion: An Empirical Test of Economic Models." *International Review of Law and Economics* 16(1): 295–313.

Diermeier, Daniel and Keith Krehbiel. 2003. "Institutionalism as a Methodology." *Journal of Theoretical Politics* 15(2): 123–44.

Elkins, Z. 2010. "Diffusion and the Constitutionalization of Europe." *Comparative Political Studies* 43(8–9): 969–99.

Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago, IL: University of Chicago Press.

Feld, Lars P. and Stefan Voigt. 2003. "Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators." *European Journal of Political Economy* 19(3): 497–527.

Ferejohn, John and Lawerence Sager. 2002. "Commitment and Constitutionalism." *Texas Law Review* 81(7): 1927–1975.

Frye, Timothy. 2004. "Credible Commitment and Property Rights: Evidence from Russia." *American Political Science Review* 98(3): 453–66.

Gibler Douglas, Kirk Randazzo, and Joseph Walsh. 2009. *The Independent Judiciary and Democratic Backsliding*.

Gibler, Douglas M. and Kirk A. Randazzo. 2011. "Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding." *American Journal of Political Science* 55(3): 696–709.

Gibson, James L., Gregory A. Caldeira, and Vanessa A. Baird. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92: 343–58.

Gillman, Howard. 2002. "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891." *American Political Science Review* 96(3): 511–24.

Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York, NY: Cambridge University Press.

Ginsburg, Tom and Tamir Moustafa. 2008. "Introduction: The Functions of Courts in Authoritarian Regimes." In *Rule by Law. The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa. New York, NY: Cambridge University Press, pp. 1–20.

Gonzalez Ocantos, Ezequiel. 2012. "The Collapse of Impunity Regimes in Latin America: Legal Cultures, Strategic Litigation and Judicial Behavior." Dissertation, University of Notre Dame.

Gordon, Sanford C., and Gregory A. Huber. 2009. "The Political Economy of Prosecution." *Annual Review of Law and Social Science* 5(1): 135–56.

Halberstam, Daniel. 2009. "Comparative Federalism and the Role of the Judiciary." In *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira. New York, NY: Oxford University Press, pp. 142–164.

Hamilton, Alexander. 2000. "Federalist 78." In Alexander Hamilton, John Jay, and James Madison. 2000. *The Federalist. A Commentary on the Constitution of the United States*. New York, NY: Modern Library.

Hathaway, Oona A. 2007. "Why Do Countries Commit to Human Rights Treaties?" *Journal of Conflict Resolution* 51(4): 588–621.

Helmke, Gretchen. 2002. "The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy." *American Political Science Review* 96(2): 291–303.

Hilbink, Lisa. 2007. *Judges Beyond Politics in Autocracy and Democracy: Lessons From Chile*. New York, NY: Cambridge University Press.

Hilbink, L. 2012. "The Origins of Positive Judicial Independence." *World Politics* 64(4): 587–621.

Ingram, Matthew C. 2009. "Crafting Courts in New Democracies: The Politics of Subnational Judicial Reform in Brazil and Mexico." Dissertation, University of New Mexico.

Kapiszewski, Diana. 2012. *High Courts and Economic Governance in Argentina and Brazil*. New York, NY: Cambridge University Press.

Kornhauser, Lewis A. 2002. "Is Judicial Independence a Useful Concept?" In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Steven B. Burbank and Barry Friedman. New York, NY: Sage Publications Inc., pp. 45–55.

Kydd, Andrew H. 2006. "When Can Mediators Build Trust?" *American Political Science Review* 14(3): 319.

Law, David S. 2009. "A Theory of Judicial Power and Judicial Review." *Georgetown Law Journal* 97: 723–801.

McCubbins, Matthew D. and Thomas Schwartz. 1984. "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms." *American Journal of Political Science* 28(1): 165–79.

Magaloni, Beatriz. 2008. "Credible Power-sharing and the Longevity of Authoritarian Rule." *Comparative Political Studies* 41 (4–5): 715–741.

Michel-Luviano, Verónica. 2012. "Access to Justice, Victims' Rights, and Private Prosecution in Latin America: The Cases of Chile, Guatemala, and Mexico." Dissertation, University of Minnesotta.

Michel-Luviano, Verónica and Kathryn Sikkink. 2013. "Human Rights Prosecutions and the Participation Rights of Victims in Latin America." *Law & Society Review* 47(4): 873–907.

Milgrom, Paul, Douglass C. North, and Barry Weingast. 1990. "The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs." *Economics and Politics* 2(1): 1–23.

Moe, Terry. 1990. "Political Institutions: The Neglected Side of the Story." *Journal of Law, Economics, & Organization* 6(2): 213–53.

Montesquieu. 1977. *The Spirit of the Laws (A Compendium of the First English Edition)*. London: University of California Press.

Moustafa, Tamir. 2007. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. New York, NY: Cambridge University Press.

North, Douglass and Barry Weingast. 1989. "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in 17th Century England." *Journal of Economic History* 49(4): 803–32.

Pierson, Paul. 2004. *Politics in Time: History, Institutions, and Social Analysis*. Princeton, NJ: Princeton University Press.

Poe, Steven C., C. Neal Tate, and Linda Camp Keith. 1999. "Repression of the Human Right to Personal Integrity Revisited: A Global, Cross-National Study Covering the Years 1976–1993." *International Studies Quarterly* 43(2): 291–313.

Popova, Maria. 2012. *Politicized Justice in Emerging Democracies: Courts in Russia and Ukraine*. New York, NY: Cambridge University Press.

La Porta, Rafael, Florencio López-de-Silanes, Cristian Pop-Eleches, and Andrei Shleifer. 2004. "Judicial Checks and Balances." *Journal of Political Economy* 112(2): 445–70.

Powell, Emilia J. and Jeffrey K. Staton. 2009. "Domestic Judicial Institutions and Human Rights Treaty Violation." *International Studies Quarterly* 53(1): 149–74.

Pozas-Loyo, Andrea and Julio Ríos-Figueroa. 2007. "When and Why Do Law and Reality Coincide? De Jure and De Facto Judicial Independence in Chile and Mexico." In *Evaluating Accontability and Transparency in Mexico*, ed. Alejandra Ríos Cázares and David Shirk. San Diego, CA: University Of San Diego, pp. 127–64.

—. 2010. "Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America." *Comparative Politics*: 293–311.

Reenock, Christopher, J. K. Staton, and Marius Radean. 2012. "Legal Institutions and Democratic Survival." *Journal of Politics* 75(2): 491–505.

Ríos-Figueroa, Julio. 2012a. "Justice System Institutions and Corruption Control. Evidence From Latin America." *Justice System Journal* 33(2): 195–214.

—. 2012b. "Sociolegal Studies on Mexico." *Annual Review of Law and Social Science* 8: 307–21.

—. 2013. "Generals, Judges, and Democracy in Latin America: Constitutional Courts as Mediators." Instituto Juan March, Madrid, Spain, Working Paper 2013/277.

Ríos-Figueroa, Julio, and Jeffrey K. Staton. 2014. "An Evaluation of Cross-National Measures of Judicial Independence." *Journal of Law, Economics & Organization* 30(1): 104–137.

Sánchez-Cuenca, Ignacio. 1998. "Institutional Commitments and Democracy." *European Journal of Sociology* 39(1): 78–109.

Schedler, Andreas. 2013. *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism*. New York, NY: Oxford University Press.

Shapiro, Martin M. 1981. *Courts: A Comparative and Political Analysis*. Chicago, IL: University of Chicago Press.

—. 2013. "Judicial Independence: New Challenges in Established Nations." *Indiana Journal of Global Legal Studies* 20(1): 253–77.

Shepsle, Kenneth. 1991. "Discretion, Institutions, and the Problem of Government Commitment." In *Social Theory for a Changing Society*, ed. Pierre Bourdieu and James Coleman. Boulder, CO: Westview Press, pp. 245–63.

Smith, Rogers M. 2009. "Historical Institutionalism and the Study of Law." In *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington. New York, NY: Oxford University Press, pp. 46–62.

Staton, Jeffrey K. 2006. "Constitutional Review and the Selective Promotion of Case Results." *American Journal of Political Science* 50(1): 98–112.

—. 2010. *Judicial Power and Strategic Communication in Mexico*. New York, NY: Cambridge University Press.

Staton, Jeffrey K, and Georg Vanberg. 2008. "The Value of Vagueness: Delegation, Defiance, and Judicial Opinions." *American Journal of Political Science* 52(3): 504–19.

Sutter, Daniel. 1997. "Enforcing Constitutional Constraints." *Constitutional Political Economy* 8(1): 139–50.

Svolik, Milan. 2012. *The Politics of Authoritarian Rule*. New York, NY: Cambridge University Press.

—. 2013. "Incentives, Institutions, and The Challenges to Research on Authoritarian Politics." *APSA - CD* 11(2): 1–7.

Svolik, Milan W, and Svitlana Chernykh. 2012. *Third-Party Actors and the Success of Democracy: How Electoral Commissions, Courts, and Observers Shape Incentives for Election Manipulation and Post-Election Protest*, unpublished working paper.

Tonry, Michael. 2012. *Prosecutors and Politics: A Comparative Perspective*. Chicago, IL: The University of Chicago Press.

Vanberg, Georg. 2005. *The Politics of Constitutional Review in Germany*. New York, NY: Cambridge University Press.

—. 2009. "Establishing and Maintaining Judicial Independence." In *Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington. New York, NY: Oxford University Press, pp. 1–29.

Versteeg, Mila and Tom Ginsburg. 2013. "Why Countries Adopt Constitutional Review?" *Journal of Law, Economics, & Organization* 30(3): 587–622.
Weingast, Barry. 1997. "The Political Foundations of Democracy and the Rule of Law." *American Political Science Review* 91(2): 245–63.
Wilson, B. M. 2006. "Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics." *Comparative Political Studies* 39(3): 325–51.