Budgeting in the Era of Judicial Independence

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Introduction

In this paper judicial independence is viewed from the angle of economics. Economic historians have identified judicial independence as a key element in explaining why some nations have had a more successful economic development than others. Empirically it is shown that perceived judicial independence correlates with economic growth. I argue that the crucial importance of judicial independence and how it is perceived poses a challenge with regard to judicial budgeting, and that this true with regard to both basic models of judicial budgeting presently found in Europe: the traditional model which grants the authority to manage and allocate the judicial budget to the Ministry of Justice, and the more "modern" approach which grants this authority to an independent judicial council. However as illustrated with practical examples, in both cases the use of carefully designed and transparent statistical performance indicators may help authorities to deal more properly with the challenge posed by judicial independence.

Judicial independence is a key value of modern judicial systems. In this paper, I argue that we should support judicial independence not only out of principle, but also because it helps generate economic growth. I then go on to argue that the concern for judicial independence poses a severe challenge with regard to budgeting for courts, implying that there is a need to consider carefully the organizational and institutional tools applied for handling judicial budgets. In addition however, I argue that the use of carefully designed and transparent statistical performance indicators may help authorities to deal more properly with the challenge posed by judicial independence, and that this is true with regard to both basic models of judicial budgeting presently found in Europe: the traditional model which grants the authority to manage and allocate the judicial budget to the Ministry of Justice, and the more "modern" approach which grants this authority to an independent judicial council .

The outline is as follows: First, I will briefly introduce the specific understanding of judicial independence from the perspective of economics. The economic angle is especially relevant because economists have had a major role in the development of the current and widespread consensus about the crucial importance of judicial independence. Second, I will present empirical evidence that perceived judicial independence impacts economic growth. Third, I will explain why the concern for judicial independence poses a challenge for both basic models of judicial budgeting, and how the use of well designed statistical indicators as the primary tool for making budgetary decisions may help alleviate this. The handling of judicial budgeting in Denmark will serve as an example to illustrate this point.

The economic approach to judicial independence

When law scholars talk about judicial independence they sometimes (but not always, though) tend to treat the concept as an entirely positive and abstract ideal, implying that it is always better for society to grant more independence to judges. It is clear, however, that only in the very abstract can judicial independence be conceived as entirely positive. Whenever we consider real-world institutional solutions, established to bring about such independence, there is a negative as well as a positive impact to consider.

This is one reason why it may be refreshing to turn to the "dismal" science of economics. If economists support the idea of institutionalising judicial independence they do so only because they see it as a means to an end, and this "end" is of course about money. Judicial independence will receive support from economists if it is logically and empirically shown to contribute to societal prosperity.

Modern thinking about the impact from judicial institutions on economic performance is to a large extend inspired by the work of economic historians who have identified relative judicial independence as one of the key factors which may explain the power and prosperity gained by England over its continental rivals. For instance, Glaeser and Shleifer (2002) argue that the main point of deviation regarding the legal and political history of the English and French courts is to be found in the twelfth and thirteenth centuries. At that time French feudal lords were so powerful that they were more afraid of each other than of the king, and as a consequence made sense for them to delegate the power of dispute resolution to the sovereign, even if he had his own stake in the matter. People demand a dictatorship when they fear a dictator less than they fear each other.

In contrast, feudal lords in England were less powerful, and more afraid of the king than of their neighbors. As a consequence, they were willing to pay the king to allow them to resolve disputes locally. This could occur because in

England, but not in France, the royal power was sufficient to protect local law enforcers. From this perspective, the Magna Carta in 1215 essentially represented a bargain between English King John and the nobility, the latter receiving cash and peace for agreeing to accept the rule of law. Most importantly, substantial control over judicial decisions was surrendered to juries consisting of local notables. In France, the then-existing juries were instead abolished, and Philip Augustus and Louis IX took advantage of the rediscovery of the Justinian law. The modernization of this law provided by scholars from Bologna, inspired the installment of a system with judges directly beholden to the king, who would question witnesses privately and separately, prepare written records, and themselves determine the outcome of the case. French kings had considerable influence over these judges via appointments, reappointments and bribes.

Economic historians have argued that such differences in judicial systems have had a crucial impact on economic development. The basic reasoning relates to the traditional Hobbesian telling of the state as contractual liberation from a chaotic state of nature. The state has the opportunity to provide the fundamental conditions for transactions by securing the rights to life and property and establishing and enforcing the basic rules for exchange, competition and cooperation (North, 1981: 21ff). Given an economic perspective, however, those who possess state powers must also be expected to act with rational intent and selfish concerns. This establishment of a strong state to protect rights thus confronts us with another dilemma which has been baptized “the fundamental political dilemma” (North and Weingast, 1989; North, 1990; Weingast, 1993): The government that is strong enough to protect property rights will also be strong enough to confiscate the wealth of its citizens. If citizens anticipate this, they will be less likely to generate wealth in the first place, since it is likely to be confiscated anyway.

It is not necessary to know much about human history to know that the fundamental dilemma is not merely a theoretical curiosity. Even if it had somehow dawned on governments that the arbitrary confiscation of property and wealth may reduce incentives to engage in economic activity and thus lower the future opportunities for wealth generation (and confiscation), history is full of evidence that absolutist governments have given in to the temptation to do so, especially when faced with an acute financial crisis (North, 1981: 143-57).

From this point of view, the “Glorious Revolution” in England in 1688 represents another crucial moment time. By the end of the 16th century, there were two powerful political groupings in England – the Whigs and the Tories – with considerably different perceptions of the ideal role of the king. The Whigs were predominantly merchants and in favour of secure and untouchable property rights, low taxes on economic activity, and the active protection of England’s trade interests. The Tories were mainly landowners. They preferred a low international profile and low taxes on land property. They were strong supporters of the church and were against explicit restrictions on royal power.

The last Stuart kings tended to transgress the rights of the Whigs and gain support from the Tories. The almost permanent financial crisis of the time forced the Stuarts to invent new ways to get money, including forced loans (that were almost never paid back) and in some instances outright confiscations of private fortunes. The state also made money by selling monopoly rights and selling the right to be exempted from specific legal rules. When James II got into a conflict with the Tories in the 1680s, the Whigs and Tories united to rebel against the King, who had to flee. In addition to a coup d’état, this resulted in significant constitutional change. The Whigs and Tories now agreed upon a set of fixed restrictions on royal power with an explicit and formal “Bill of Rights” supported by a consensual agreement to enforce these rights. The king was no longer considered to be above the law; his ability to collect taxes was severely restricted; and royal expenses were more clearly restricted in order to avoid exceeding a specified tax income.

According to Barry Weingast, the combined effect of explicit constitutional restrictions on royal power and a fundamental consensus to enforce these institutions made the difference:

> *…the appropriate set of political institutions is important for maintaining boundaries of state behavior. But they alone are incapable of producing a government that adheres to them. Because rules can be disobeyed or ignored, something must be added to police deviations. Our approach assumes that the foundation for institutional restriction fundamentally rests on the attitudes of the citizens…* (Weingast, 1993: 305)

The period after the Glorious Revolution in England was characterized by very rapid economic development. North and Weingast (1989) argue that this was exactly because of the effective restrictions on the powers of the state. It created the necessary incentives for the establishment of a well-functioning loans market, meaning that an unprecedented level of funds was made available to private citizens and the king alike. It also increased entrepreneurial activities as entrepreneurs were now less afraid of having their fortunes confiscated. All in all, the constitutional changes following the Glorious Revolution may have been instrumental not only in achieving economic growth, but also in achieving world dominance. England could not have beaten France without its financial revolution (North, 1990: 139).

North (1990: 113ff) explains the 17th century decline of Spain from its peak as a leading western power as mainly being the result of the failure of the Spaniards to reach a similar solution to the fundamental dilemma. While the English lost power, Queen Isabella of Spain succeeded in gaining control over the Spanish church as well as the unruly warlike barons, but Spain's large centralized state bureaucracy combated against the constant threat of bankruptcy using a mix of regulations, confiscations and increased taxation. Profitable careers could be found in the army, the church and the bureaucracy, but certainly not in entrepreneurial enterprise.

Notice the crucial role played by "informal institutions" or the "mental models" of the actors in this account. The constitutional constraints on government only work if they are backed by expectations of severe consequences if the rules are violated. While in the 19th century, American Supreme Court Justice Joseph Bradley could state with conviction that "a violation of the constitution will result in a revolution within one hour" (Weingast, 1993: 303), the countries of Latin America that have attempted to copy the constitution of the United States have not had this informal constraint; consequently, they have not had success (North, 1990: 96)

Economic historians have in this way pointed to judicial independence as crucial for economic development, but there appears to be no reason that the logic should not also apply to modern times. Modern governments will also need to address the fundamental dilemma and find ways to credible commit to promises. Most governments will want to attract investments by promising to enforce property rights. Once invested, however, government is subject to a short-term temptation to attenuate (in some way or another) the investor's property rights, and knowing about this temptation the investor may not want to invest in the first place. Then again, if a neutral third party (the judiciary) has the competence to ascertain whether any of the conflicting players has reneged on its promises, incentives to honour one's promises are substantially increased. In this way, an independent judiciary may help sustain economic growth in a modern economy (Hayo & Voigt, 2007).

Empirical evidence

To investigate the impact on economic growth from perceived judicial independence I have used a measure based upon the annual Executive Opinion Survey carried out by the World Economic Forum organization (I use the results from the 2006-survey)[1]. This survey polls over 11,000 business executives worldwide, who are selected in order to reflect the structure of each country's economy. Among other things, the respondents are asked whether they consider the judiciary in their country to be independent from the political influence of the members of government, citizens and firms, this influenced rated from 1 (heavily influenced) to 7 (entirely independent).

A common approach to assessing variables which might influence economic growth is estimating a growth equation of the following general form (Levine and Renelt, 1992; de Haan and Sturm, 2000; 2005):

$$\mathbf{Y} = \beta_i \mathbf{I} + \beta_m M + \beta_z \mathbf{Z} + \alpha + \varepsilon$$

where Y is a vector of rates of economic growth[2] in a cross-section of countries for a given period of time; M is our variable of interest; I is a vector of a small number of standard economic explanatory variables, which previous empirical studies have shown to be robustly linked with economic growth and which are normally always used in such regressions; and finally, Z is a vector of additional explanatory variables that are used to test the robustness of the impact of I.
In Wittrup (2008) I provide much more detailed discussion of this model and a comprehensive test of the impact from perceived judicial independence. In this context, it suffices to present some basic results shown in table 1 below which models economic growth[3] for 95 countries (for which relevant data are available) in the period from 1980 to 2003.

The first column (1) shows that three basic economic (M-vector) variables - 1) initial GDP per capita; 2) the rate of secondary school enrolment[4]; and 3) the average annual population growth rate[5] - correlate significantly with economic

[1] Source: Porter et al. (2006)

[2] Economic growth can be measured in several different ways, all of which have their pros and cons. The standard approach, which is the approach I will adopt here, is to take the average of the annual growth rates of GDP for the period concerned. I apply data from the Penn World Table version 6.2 (Heston et al, 2006), which provides annual growth rates for a large number of countries for the period from 1960 to 2003.

[3] I apply data from the Penn World Table version 6.2 (Heston et al, 2006), which provides annual growth rates for a large number of countries for the period from 1960 to 2003.

[4] The data for the secondary school enrolment is taken from the Barro and Lee (2001) dataset

[5] The data for population growth and initial GDP is taken from PWT6.2 (Heston et al, 2006).

growth. A low initial GDP per capita, a high level of secondary school enrolment and low population growth all appear to be conducive to higher average growth rates. Together, these variables explain about 25 percent of the variance in economic growth for the 95 countries which are included in the study.

Table 1: OLS regression of economic growth (1980-2003) on judicial outcomes and controls[6]

Economic growth	(1)	(2)
Perceived judicial independence	-	0.562*** (5.98)
Log of real GDP per capita in 1980	-0.688** (2.54)	-1.032*** (4.10)
Log of secondary school attainment rate in 1980 (in %)	0.724** (2.09)	0.698** (2.15)
Average annual population growth (in %)	-0.669*** (4.17)	-0.509*** (3.38)
Dummy for transition countries	-1.572*** (3.09)	-0.817* (1.91)
Constant	6.086***	6.261***
R^2	0.267	0.411
F	7.44	16.56
Observations	95	95

When we then add (see column 2 of table 1) the measure of perceived judicial independence to the model, this variable also turns out to be highly significant, and notably the overall explanatory power of the model increases to roughly 40 percent. A very strong result indicating that perceived judicial independence may very well have a huge impact on economic growth. In Wittrup (2008) I show that this result holds for different time periods, and also when we add different controlling variables to the model.

I hasten to point out that the above analysis does not by itself prove beyond any doubt that perceived judicial independence explains economic growth. An alternative interpretation could be that the causal relationship may be reverse, i.e. economic growth determines perceived judicial independence; given the particular specification of the model above, which relates the measure of judicial independence to a later point in time than the time period for which growth is measured, that possibility obviously cannot be ruled out. Nevertheless, when we pair the empirical results with the theoretical arguments mentioned above, we do seem to have a promising case: Perceived judicial independence is a serious candidate when we want to explain why some countries have a higher economic growth than others.

While perceived judicial independence appears to have a substantial impact on economic growth, formal characteristics of judicial systems do not. Feld & Voigt (2003, 2006) construct a de iure index of formal legal foundations of judicial independence (e.g. related to constitutional safeguards of judicial independence and formal procedures for appointing or

[6] The numbers in brackets are t-values based upon White's heteroscedasticity-corrected standard errors. ***, **, and * show that the estimated parameter is significantly different from zero on the 1, 5, or 10% level, respectively. Models 1 and 3 cover only those countries that have a non-missing value for perceived judicial independence. The reported R^2 is not adjusted. VIF is consistently below 3 for all variables.

removing judges) and show that it has no impact on economic growth. This result is confirmed by Wittrup (2008) using a wider set of data. As discussed above, merely copying formal institutions of judicial independence – as this has been experienced in some South American countries – appears to be a poor strategy – independence has to be for real if it is going to have a positive economic impact.

What we should care about then is the perception of judicial independence. Governments should be very much aware how their actions towards the judiciary are perceived. I adopt this perspective in the following discussion of how judicial independence poses a challenge to judicial budgeting.

The European Models of Judicial Budgeting

To simplify things, let us consider just two basic models of judicial budgeting: One model which grants the authority to manage and allocate the judicial budget to the Ministry of Justice, and another model which grants this authority to an independent judicial council. The table below depicts the model of judicial budgeting for a number of European countries (as the situation was in 2006). As a second dimension I consider in this table also the amount of influence judges have on electing or appointing members to the judicial council. I consider this influence to be strong if the majority of the council members are elected by the judges by popular vote and the chairman or president of the council is not appointed by the executive power. I consider the influence to be weak if judges are a minority within the council, or if there are no formal requirements for the government to ask the judiciary for nominating members of the judicial council[7].

It is evident that the majority of European countries still stick with the traditional Moj-model for judicial budgeting. It is worth noticing, however, that by the mid-90'es only Sweden had granted its judicial council (or Courts Administration) authority to manage the judicial budget. We have thus seen a dramatic shift towards the council model in recent years.

I t also appears that among countries where judges have only a weak or moderate influence on the composition of the judicial council, there is a higher tendency to grant the council authority over handling the budget. The most obvious exception to this rule is Hungary, but it should be noted in Hungary the judicial council has no say over the budget of the Supreme Court.

Table 2: European Models of Judicial Budgeting

		Judge´s influence on the composition of the judicial council (1=low; 4=high)			
		Weak	**Moderate**	**Semi-strong**	**Strong**
Model for judicial budgeting	**Council Model**	Ireland, Netherlands, Norway, Sweden	Cyprus, Denmark	(Albania), Bulgaria, Georgia, Iceland	Hungary
	Moj Model	England	Croatia, Estonia, Finland, Greece, Serbia, Spain, Turkey	Belgium, France, Malta, Portugal, Slovakia	Bosnia, Italy, Latvia, (Lithuania), Macedonia, Moldova, Poland, Romania, Slovenia
Countries without a national judicial council		Austria, Czech Republic, Germany, Luxembourg, Switzerland			

Finally, it is worth noticing that among countries normally classified as having a French legal origin it is very rare to have the judicial budget managed by the judicial council. Albania appears to be the only exception to this pattern.

The Challenge for the "Ministry of Justice" – model

According to economic theory, as well as the empirical evidence discussed above, governments should not only care about maintaining an actual high level of judicial independence, but they should also care very much about how their actions toward the judiciary, however well-intentioned these may be, are perceived by others. This poses an obvious challenge to the traditional model of judicial budgeting which grants the authority to manage the judicial budget to the

[7] See Wittrup(2008) for a more detailed discussion of the power of European judicial councils.

Ministry of Justice. Rumors may easily arise that the government tries to use the budget to punish or reward the judiciary for its actions.
In Denmark, for example, there was a consistent rumor that the government's demand for reductions of the total judicial budget in the beginning of the new millennium was a kind of punishment for a famous Supreme Court verdict (in the so-called Tvind case) which had declared unconstitutional a law passed by parliament banning schools run by a certain "sectarian" movement (Tvind) from receiving public funds. If a government stand on the total judicial budget is enough to raise concerns over possible violations of judicial independence, this becomes of course even more critical when the government does also have the power to allocate the judicial budget among courts, because it can then in theory direct funds to those courts and those judges it likes, and away from those it does not like.

On the other hand, there is also a risk that the government becomes so afraid of causing such rumors that it refrains from altering the judicial budget at all. This is clearly an inefficient solution since judicial activity is rarely constant. If the judicial budget is going to be used efficiently, it is necessary to continuously adjust budget allocations to ensure that the more busy courts receive more funds, while less busy courts may do with fewer resources.

The answer to the dilemma on how the Ministry of Justice may efficiently manage the judicial budget without causing accusations for violating judicial independence lies then in the development of a transparent system of valid and "objective" indicators for court workload and court performance. Such indicators will allow the Ministry to justify rational adjustments to budget allocation and may also provide important information to consider when negotiating the overall judicial budget.

Indeed, more and more countries have in recent years embarked upon the development of systems of indicators guiding budgetary decisions. Among countries with a Moj-model, for instance Germany and Finland have developed sophisticated models for assessing the workload of courts, which are then used as important inputs to budgetary decision-making.

The Challenge for the "Judicial Council" – model

Another option if one is concerned that management of the judicial budget by the Ministry of Justice may be perceived as problematic with regard to judicial independence, is to grant the authority to manage and allocate the judicial budget to a more or less independent body, a judicial council or a Courts Administration. As argued above, the recent trend in Europe has been exactly this solution.

It is important to realize, however, that transferring the authority over the judicial budget to another institution may not entirely eliminate concerns that the budget may be used in attempts to unduly influence courts. Furthermore, removing the budgetary authority away from government raises the question of how the "independent" institution should be held accountable for its economic management. With regard to both these concerns the example from the establishment of the independent Courts Administration in Denmark, which took responsibility for managing the judicial budget in 1999, may serve to illustrate some important points.

When the Courts Administration took over the management of the judicial budget it was obvious that there was a need out of concern for efficiency to consider budgetary reallocations, since the Ministry of Justice had for many years allocated the budget (maybe out of fear from being accused of violating judicial independence) based upon historic traditions rather than upon assessments of the workload and performance of the different courts. It was, however, also obvious that the new management of the Courts Administration, even though it was independent from the government, needed to legitimate and justify changes in the budgetary allocation by developing a transparent and "objective" model for assessing the workload and performance of each court. Lacking such a model, it is likely that the Courts Administration would have been met with severe resistance and accusations of favoritism from those courts that would have to face a reduction in their budgets and staff.

It is worth noticing that judges sometimes appear to consider other judges, and not the government, to be major threat to their independence[8]. In the light of this the judges occupying leading positions in the management of the new independent Courts Administration faced exactly the same dilemma as did the Ministry of Justice: Only by basing budgetary decisions upon a transparent and objective model of court workload could the Court Administration avoid accusations of having abused its budgetary power.

[8] See e.g. Malleson (1997), and also Transparency Internationals report on "Magistrate's Perceptions of Judicial Independence", published on the website of Transparency International Romania: www.transparency.org.ro .

In addition, the transfer of budgetary authority to the Courts Administration raised concern for how the public and the parliament was to hold this independent institution accountable for its economic management. When the law of the Courts Administration was put forward in Parliament, it was stated that the General Public Auditor should have the same competence in regard to the Courts Administration as in regard to any other public agency. This implies that the General Public Auditor can demand from the Courts Administration any information he may consider of importance to fulfilling his duties as auditor, and he can at any time make inspections of the council and the courts. The discussion of the law in parliament, however, focused on what to do, if the Courts Administration and its independent board of governors did not react appropriately to critique from the General Public Auditor?

Because of this concern, it was finally agreed that that the Minister of Justice can, if the General Public Auditor has issued severe criticism of the financial management, instruct the Courts Administration to take the measures the minister and the public auditor can agree upon. If the Court Administration and its board of governors do not comply with these instructions the minister can dismiss the entire board.

As this example illustrates the concern for judicial independence and the concern for judicial accountability may go hand in hand[9]. If one increases judicial independence by granting the authority over the judicial body to an independent body this naturally creates a demand for a mechanism to hold the independent body accountable for its economic management. Again, performance indicators and indicators used for allocating the budget efficiently play a crucial role in this regard. The Courts Administration in Denmark has vehemently developed and used such indicators to show that it does indeed deliver "value for money". Similar developments are seen in other countries which have recently established judicial councils to administer the judicial budget, e.g. in Norway and the Netherlands.

Conclusion

We are living in an era of judicial independence in the sense that the international consensus about the importance of the independence of judges and courts has probably never been as intense and wide-spread as it is now. As shown in this paper, the value of judicial independence appears to be very concrete since it may be measured in the amount of economic growth it helps to generate. For this reason, every government should take very seriously how its actions toward the judiciary are perceived.

As I have argued in this paper, the concern for judicial independence poses a challenge for both basic models of judicial budgeting found in Europe: The "Ministry of Justice"-model and the "judicial Council"-model. In both cases, however, the best way to deal with this challenge appears to be investing in the development of valid and objective indicators of court workload and court performance.

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[9] In the judicial reform debate accountability and judicial independence are values that are often considered to be in tension. See Contini & Mohr (2007) for a more thorough discussion on how accountability and independence may be seen as part of the very same effort of protecting and improving key values on which our judicial systems are based.

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