



2009

VIALE INSTITUTIONS, JUDICIAL POWER, AND POST-COMMUNIST CONSTITUTIONAL COURTS

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ABSTRACT OF DISSERTATION

Kirill Mikhaylovich Bumin

The Graduate School

University of Kentucky

2009

VIABLE INSTITUTIONS, JUDICIAL POWER, AND POST-COMMUNIST
CONSTITUTIONAL COURTS

ABSTRACT OF DISSERTATION

A dissertation submitted in partial fulfillment of the
requirements for the degree of Doctor of Philosophy in the
College of Arts and Sciences at the University of Kentucky

By
Kirill Mikhaylovich Bumin

Lexington, Kentucky

Co-Directors: Dr. Bradley C. Canon, Professor of Political Science
and Dr. Kirk A. Randazzo, Professor of Political Science

Lexington, Kentucky

2009

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In pursuing their goals, newly-created constitutional courts of Eastern Europe and the former Soviet republics are affected by their institutional setting and capabilities. Yet, previous studies did not explore how constitutional courts develop over time and what noteworthy implications for politics and society result from their institutional growth. To address this gap in the literature, I measured a variety of organizational characteristics and constructed an index of institutional development for the twenty eight constitutional courts in the post-communist countries from the initial year of their transitions through 2005. I argued that high values on this measure (which I labeled the judicial viability score) should enable constitutional court judges to satisfy their policy objectives and improve public and elite perceptions of the judiciary's role in new democratic systems. To demonstrate this empirically, I tested a series of statistical models of judicial influence to show that the level of court's institutional viability has profound implications on its legal, political, and social impact.

My analyses indicated that the level of the constitutional court's institutional viability is, indeed, an important determinant of the constitutional court judges' ability to actively shape public policies and render decisions which are independent of, and in opposition to, the preferences of dominant political actors and government institutions. Additionally, the results demonstrated that the level of constitutional court's viability significantly affects the perceptions of the ordinary citizens and business elites—ordinary citizens and business owners and managers are more likely to express confidence in the national legal system in countries with relatively institutionalized constitutional courts than citizens living in countries with weakly institutionalized constitutional courts. Thus, my research highlights the importance of studying the evolutionary process by which courts acquire institutional viability and, in doing so, contributes to our understanding of the factors shaping the development of democracy, the rule of law, and constitutionalism in the post-communist societies.

KEYWORDS: Post-Communist Constitutional Courts, Institutional Development, Judicial Activism, Public and Elite Trust in Courts, Comparative Judicial Politics

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To my parents

TABLE OF CONTENTS

List of Tables	vi
List of Figures	vii
Chapter One: Introduction	1
Introduction.....	1
Concepts.....	8
Constitutionalism	8
Constitutional Judicial Review	9
Judicial Independence.....	10
Conclusion	12
Chapter Two: Describing the Post-Communist Systems of Constitutional Review.....	15
Introduction.....	15
Organizational Contours of Post-Communist Courts	23
Jurisdiction over Cases: Forms, Timing, Subject Matter, Decision-Writing, and Effect.....	25
Standing: The Right to Appeal to the Constitutional Court.....	31
Mechanisms for Accountability: Political Control and Influence on the Court	33
Conclusion	39
Chapter Three: Theory of Judicial Institutional Development	44
Introduction.....	44
Defining Institutions	45
Definitions Used in This Study.....	50
Explaining the Process of Judicial Institutionalization	52
Differentiation.....	53
Durability	55
Autonomy	58
Institutionalization as a Process and an Impact Variable.....	61
The Impact of Institutional Development on Judicial Decision-Making.....	65
The Impacts of Institutional Development on Public Perceptions.....	67
Conclusion	73
Chapter Four: Constructing a Dynamic Index of Judicial Institutionalization	75
Introduction.....	75
Measuring Judicial Institutionalization.....	77
Differentiation.....	77
Durability	80
Autonomy	82
Constructing a Dynamic Index of Judicial Institutionalization	84
Results and Discussion	87
Judicial Viability and Country Placement	91
Albania	91
Ukraine.....	93

Uzbekistan.....	97
Conclusion	99
Chapter Five: Judicial Institutionalization and Judicial Activism	108
Introduction.....	108
A Note About Judicial Activism and Judicial Independence	109
The Impact of Institutional Development on the Behavior of Constitutional Courts.....	111
Mapping Judicial Activism: The Dependent Variable.....	114
Primary Explanatory Variable: Constitutional Court Viability	123
Control Variables	124
Institutional and Economic Influences.....	125
Litigant Characteristics	132
Issue Characteristics.....	135
Results and Discussion	137
Constitutional Court (CC) Viability.....	138
Institutional and Economic Influences.....	139
Litigant Characteristics	142
Issue Characteristics.....	144
Conclusion	145
Chapter Six: Judicial Institutionalization and Public Confidence	156
Introduction.....	156
The Impact of Constitutional Court Institutionalization on Public Confidence in the Legal System.....	158
Mapping Confidence in the Justice System: The Dependent Variable.....	163
Absolute confidence in the justice system	165
Relative confidence in the justice system	167
Primary Explanatory Variable: Constitutional Court Viability	170
Control Variables	170
Political Culture and Socialization Variables	172
Institutional performance variables.....	175
Methodology	179
Results and Discussion	179
Constitutional Court (CC) Viability.....	180
Political Culture and Socialization Variables	184
Institutional Performance Variables	187
Conclusion	190
Chapter Seven: Judicial Institutionalization and Business Elite Confidence	206
Introduction.....	206
Do Elites and the Masses Evaluate Institutions Differently?.....	208
Mapping Confidence in the Legal System: The Dependent Variable	210
Primary Explanatory Variable: Constitutional Court Viability	215
Controls: Institutional Performance Variables.....	215
Performance Perceptions (Micro-level institutional performance).....	216
Enterprise Characteristics: Ownership and Size	219
National Environment (Macro-level institutional performance)	220

Controls: Civic Culture Variable	221
Methodology	222
Results and Discussion	223
Constitutional Court (CC) Viability.....	224
Performance Perceptions (Micro-level institutional performance).....	227
Enterprise Characteristics: Ownership and Size	230
National Environment (Macro-level institutional performance)	232
Civic Culture Syndrome	233
Conclusion	234
 Chapter Eight: Conclusion.....	243
Introduction.....	243
The Impact of Judicial Institutionalization on Post-Communist Societies.....	249
Constitutional Court Viability, Activism, and Independence.....	250
Constitutional Court Viability and Citizens' Perceptions of the Post-Communist Legal Systems	259
Some Shortcomings and Limitations of This Study	269
Conclusion	274
Future Research Agenda	275
 Appendices.....	278
Appendix A: Descriptive Statistics—WVS data (Chapter 6).....	278
Appendix B: Variable Descriptions—WVS data (Chapter 6)	279
Appendix C: Descriptive Statistics—BEEPS data (Chapter 7)	281
Appendix D: Variable Descriptions—BEEPS data (Chapter 7).....	282
 References.....	284
 Vita.....	303

LIST OF TABLES

Table 2.1, Experimentation with Constitutional Judicial Review during the Communist Era	42
Table 2.2, Subject-Matter Jurisdiction of Post-Communist Constitutional Courts	43
Table 4.1, Factor Loadings for Judicial Viability Model.....	101
Table 4.2, Judicial Viability Scores and Relative Ranking for the Post-Communist Courts, 2005	102
Table 4.3, The Budget of the Constitutional Court of Albania, 2001-2004	103
Table 4.4, The Budget of the Constitutional Court of Ukraine, 2003-2006	103
Table 4.5, Vacancies on the Constitutional Court of Ukraine, 2005-2006.....	103
Table 5.1, Judicial Activism (by Country).....	150
Table 5.2, Descriptive Statistics.....	151
Table 5.3, Institutional and Contextual Influences on CC Activism (Probit Results)	152
Table 6.1, Comparisons of Public Trust in Courts across Post-Communist Societies	194
Table 6.2, Comparisons of Relative Public Trust in Courts across Post-Communist Societies.....	195
Table 6.3, Absolute Public Confidence in the Justice System (Ordered Logit)	196
Table 6.4, Relative Public Confidence in the Justice System (Ordered Logit)	197
Table 6.5, Change in Predicted Probabilities: Absolute Confidence in the Justice System	198
Table 6.6, Change in Predicted Probabilities: Relative Confidence in the Justice System	199
Table 7.1, Business Elite Confidence in the Legal System (Ordered Logit).....	237
Table 7.2, Change in Predicted Probabilities: Business Elite Confidence in the Legal System	238

LIST OF FIGURES

Figure 1.1, Constitutional Review Around the World	14
Figure 3.1, Judicial Institutionalization and Its Components	74
Figure 3.2, Judicial Institutionalization and Its Impacts	74
Figure 4.1, Is Judicial Viability Wholly Contingent on the Court's Chronological Age?	104
Figure 4.2, Judicial Viability and Democratization	104
Figure 4.3, Judicial Viability Scores by Country, 2005	105
Figure 4.4, Institutional Development of the Albanian Constitutional Court, 1990-2005	105
Figure 4.5, Number of Adjudicated Cases by the Albanian Constitutional Court, 1992-2003	106
Figure 4.6, Institutional Development of the Ukrainian Constitutional Court, 1991-2005	106
Figure 4.7, Number of Adjudicated Cases by the Ukrainian Constitutional Court, 1997-2005	107
Figure 4.8, Institutional Development of the Uzbek Constitutional Court, 1991-2005 ..	107
Figure 5.1a, Proportion of Activist Rulings Across the Region by Year, 1991-2006	153
Figure 5.1b, Proportion of Activist Rulings by Court (from the 1st year of operation through 2006)	153
Figure 5.2, Observed Correlations between Judicial Viability and Judicial Activism	154
Figure 5.3a, Predicted Probability of Activist Ruling Over the Observed Period, 1991-2006	154
Figure 5.3b, Predicted Probability of Activist Ruling, Selected Years	155
Figure 5.3c, Predicted Probability of Activist Ruling by Year, 1991-2006	155
Figure 6.1, Public Confidence in the Justice System	200
Figure 6.2, Predicted Probabilities of Individual Outcomes: Absolute Confidence	202
Figure 6.3, Predicted Probabilities of Individual Outcomes, Relative Confidence	204
Figure 7.1, Business Elite Confidence in the Post-Communist Legal Systems	239
Figure 7.2, Predicted Probabilities of Individual Outcomes, 1999-2005	241

CHAPTER ONE

Introduction

INTRODUCTION

The judicial branch plays an important, albeit often underestimated, role in democratic government. In new and consolidated democracies alike, courts frequently issue rulings that significantly affect actions of other branches of government and have far-reaching consequences for the rights of individuals. Moreover, judicial action can sometimes support or undermine the very legitimacy of democracy and its institutions. As the history of US Supreme Court decision-making shows, the overall impact of courts on government and public policy can be profound indeed.

Until recently, however, students of comparative politics paid little attention to judicial politics, law, and courts. As Lee Epstein (1999: 1) points out: “Of the 42 articles published on courts in the *American Political Science Review* and the *American Journal of Political Science* since 1993, only 5 (even nominally) contemplated courts abroad... Of the 727 articles published in [comparative politics] field between 1982 and 1997, less than 1% were on courts.” Since her lament, this trend changed dramatically. In the late 1990s, as scholars examined the recent (third) wave of democratic transitions in Latin America, Asia, and Eastern Europe and the continuing politico-economic integration in Western Europe, they began noting that one of the most significant developments in comparative politics is the growing influence of judicial institutions in national and international politics (see Tate and Vallinder 1995; Ludwikowski 1996; Epp 1998; Schwartz 2000; Stone Sweet 2000; Shapiro and Stone Sweet 2002; Ginsburg 2003; Chavez 2004; Sadurski 2005; Ginsburg and Moustafa 2008).

Despite this resurgence of interest in courts and numerous publications on the subject, we still “know precious little about the judicial and legal systems in countries outside the United States” (see Gibson et al. 1998: 343). At present, we have a very limited understanding of how judicial power is constituted, why some judiciaries are more active than others, how judges make decisions, and how judicial institutions affect the development and consolidation of democratic regimes more generally. This state of affairs is particularly unfortunate given that constitutional democracy and judicial power have always been closely interrelated (Schwartz 2000).¹

Moreover, as Gibson et al. (1998), Larkins (1996), Stone Sweet (2000), and Ginsburg (2003) point out, the work of (democratic and authoritarian) governments is today structured by an ever-expanding web of legal and constitutional constraints. Even dictators, disingenuously or not, often claim that the “laws of the land” are supreme and that citizens are better off when the political system establishes rules for all to follow, rather than subjecting citizens to arbitrary rule. This emphasis on the rule of law creates a uniquely important role for constitutional courts—who are, in view of many scholars, the primary agents of legal and constitutional oversight in modern political systems (e.g., Stone Sweet 2000). As comparative political science finally ‘rediscovered’ the centrality of constitutional courts, many recent studies began to systematically address questions related to the exercise of constitutional judicial review. This dissertation is part of the new trend. Focusing on the post-communist countries of Eastern Europe and Central Asia, it provides a theoretical and empirical account of how constitutional courts develop into viable political actors and traces their impact on politics and society in transitional polities.²

While interest in constitutional courts in post-communist societies is no longer unique, my research differs in focus, scope, and method from other available studies. First, the phenomenon I intend to explain—the dependent variable—is the *impact of*

¹ A familiar theme in the democratization literature is that democratic consolidation is a gradual and delicate process of establishing and institutionalizing democratic procedures during which public officials learn not to exercise any authority that is not granted to them by a legitimately-enacted constitution, regulation, or statute (i.e., abiding by the *rule of law*). The submission of the state and its agents to law thus becomes one of the most important (and perhaps, one of the most difficult) tasks for a new democracy.

² Specifically, this study will look at following post-communist states: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Poland, Romania, Russia, Serbia and Montenegro, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

judicial institutional development on societal perceptions and judicial behavior. Several studies besides the present one (e.g., Ginsburg 2003, Shipan 2000, Gibson et al. 1998) evaluate how constitutional courts develop, how they perform in deciding important cases, and how they are viewed by the public, and my work is not the first to argue that institutional variations matter for the successes and the failures of constitutional courts.

Yet, my argument differs from others in the way it accounts for such successes and failures. My focus here is on explicitly linking the development of organizational infrastructure, and the financial, jurisdictional and personnel conditions of the constitutional courts to the way these courts act and the way they are perceived by the public. Although I consider a number of other factors throughout the study, I am only marginally interested in these alternative explanations. It is undeniable that factors other than institutional development matter—diffusion of political power, the structure of the government, a country’s legal culture, influences of international and regional organizations, just to name a few, all impact what the courts do and how the public views them. But my primary objective, one that distinguishes my study from others, is to learn whether the institutional design of courts and its subsequent development has a distinct, independent, and systematic role in explaining judicial performance and public confidence in courts.

This study also differs from others in its scope. Most studies that consider judicial institutional development rely on a single case study or a very limited set of cases. Carla Thorson’s (2004) article is truly one of the best in the field in showing how the institutional design of the Russian Constitutional Court (and the subsequent changes to its design) largely determined the court’s level of independence.³ In her study, Thorson makes comparisons between stages of the court’s development from the establishment of the USSR Constitutional Oversight Committee (1988-1991), to the establishment of a short-lived “first” Russian Constitutional Court (1991-1993), and then, to the establishment and operations of the current, “second” Russian Constitutional Court to demonstrate that Russian politicians tailored the design at each stage to enhance their democratic credibility and to promote their self-interested political agendas. Moreover,

³ Thorson defines judicial independence as the ability of the court to decide significant cases with minimal interference from the executive and the legislative branches.

she shows that each successive design largely explains the different trends in Russian Court's decision-making behavior.

In this study, I too find that Russian Court's institutional endowment has at times inhibited, and at times enhanced, its ability to exercise independent decision-making behavior. However, unlike Thorson, I rigorously compare and contrast the institutional development of the Russian Court to eighteen other post-communist courts in order to draw broad, generalizable inferences about the institutional development's impact on judicial behavior. As King, Keohane, and Verba (1994) argue, it is simply impossible to account for and to parse out the independent effects of multiple causal factors on the dependent variable within a single case. Thus, although Thorson's study is informative and useful, it cannot help scholars resolve the issue of how much (if at all) the institutional development matters as a *general* explanation of judicial behavior and public trust in courts.⁴

My research, therefore, also differs from others in its method. Most studies concerned with post-communist constitutional courts are qualitative and descriptive in their approach. These works go into great detail in outlining the development of a few constitutional courts but often lack an explicit theoretical framework and do not test any explicit hypotheses. For instance, Schwartz's (2000) seminal study considers post-communist courts in Russia, Bulgaria, Slovakia, Hungary, and Poland. The author lays out prominent features of each court's design, discusses how these courts withstood or buckled under the pressure of successive governments in each of the five countries, the courts' relationship with the regular judiciary and the public, and the content of each court's decisions on important social and political issues (e.g., lustration laws). However, by Schwartz's (2000: 11) own admission, "the study is largely descriptive." He attempts to develop some comparisons and general conclusions in the last chapter, but, in my view, the author fails in this regard. The only definitive conclusions that can be gleaned from his work is that constitutional courts can only succeed in democracies and that the successes of each court are dependent on the "bravery" and "courage" of constitutional

⁴ Similarly, McGuire (2004) provides an engaging analysis of the US Supreme Court institutional development, but his ability to explain the impact of organizational factors on judicial behavior is limited to the United States, and therefore, cannot serve as a framework for explaining constitutional court behavior in general.

court judges (especially, the courts' chairmen) while the failure of some courts to develop into significant political force is due to the "wickedness" and authoritarianism of such leaders as Lukashenka in Belarus, Berisha in Albania, and Ter-Petrosian in Armenia (since he does not look at these countries explicitly, this is an unsupported conjecture at best).

This is not to say that Schwartz's study is not useful or informative—in fact, I borrow from his research extensively throughout this dissertation—but it does not move the scholarship on the constitutional courts any closer to the ultimate questions of interest: what best explains the behavior of judges on such courts and why do publics in some countries regard such institutions with confidence and trust while others continue to express hostility and distrust toward their constitutional courts? The present study thus differs from the previous work by testing hypotheses in the context of a large-N, cross-national and temporal analysis. The wealth of quantitative data on post-communist states that have become available in recent years furnishes fresh opportunities for explaining judicial institutional development in a fairly broad comparative perspective, and I use these data extensively.

The logic of causal inference is relatively straightforward. To test hypotheses that are amenable to quantification, I use simple descriptive statistics, as well as regression analyses in each chapter. In much of the analysis, I examine the hypothesis by analyzing the entire post-communist region (defined as the 28 countries of the former USSR, Eastern Europe, and Mongolia). Sometimes, I also narrow my focus to a few short case studies to address atypical findings or simply interesting cases in a manner that reveals that the primary variable of interest—judicial institutional development—is an important determinant of public trust in these courts and has an important effect on the decision-making behavior of constitutional court judges.

As Durkheim (1982: 155) argues, analyzing a large number of cases using statistical techniques bolsters the possibility of displaying the "series of variations" necessary to demonstrate causation. It also increases the opportunities for exhibiting the full range of variation on the variables under analysis, such that the data units "are correlated with each other in as continuous a gradation as possible" and "cover an adequate range" (Ibid). Since the whole universe of post-communist countries is

reasonably small and quantitative data are available for the vast majority of the 28 cases, one can examine the region in its entirety, and from a number of different angles—something that has not been done to date. This is unfortunate, considering that the post-communist region composes a natural family of cases that definitively constitute “varieties of the same species” (Durkheim 1995: 91). Countries in the region share a common history of Marxist-Leninist political regimes, command economies, civil law legal cultures and systems, and they underwent regime change at virtually the same time (Bunce 1995; 2000). Thus, the opportunity to investigate the entire region clearly obviates the problem of case selection. It enables me to elude the trap of selecting cases to fit the theory, which Durkheim warned against and which is an ever-present hazard in scientific inquiry. Furthermore, the scope of the analysis is confined to a discrete, limited stretch of time, specifically, 1989 through 2005. The claims that arise from the findings are limited to this period. I do not hold that the arguments are necessarily valid for other times, still less for all other countries or regions.

Cross-national statistical approaches, such as the one adopted here have been the subject of criticism in recent decades. Prominent scholars have argued that political regimes are deeply embedded in historical circumstances, that the dynamics of much social interaction are nonlinear, and that regression analysis is not optimal for comparative study (see Pierson and Skocpol 2002, Hall 2003, Pierson 2004). For instance, Peter Hall (2003) argues that scholars know that history unfolds unevenly; some periods of time are clearly more important than others. What is more, Hall and other historical institutionalists have argued that some events may place a system on a distinct path that dramatically narrows the range of possible future outcomes and that causal relationships are very often reciprocal in politics. Thus, the notion that we can distinguish between variables that are “independent” and those that are “dependent” is at odds with what we know to be true about history. These scholars therefore hold that regression analysis (especially, linear regression), which requires that the scholar label some variables as independent and others dependent, is not the best way to grasp cause and effect in large-scale social and political change.

Instead, Hall recommends that the scholars interested in demonstrating causal relationships focus on in-depth tracing of historical processes. While Hall and others

have made important contributions to understanding social and political phenomena, and they have successfully drawn attention to the deficiencies of large-N studies that rely on regression analysis, these critics have not furnished a satisfactory set of alternative methods. They propose carefully examining how history unfolds as the alternative, but while the historical process tracing may be of great value, it is not necessarily superior to regression analysis as a means for testing the empirical validity of theoretical hypotheses. Even the most careful effort at historical process tracing is also vulnerable to making simplifying assumptions about the direction of effects in causal relationships, and it often fails to detect nonlinear relationships and critical moments (which will go undetected or will need to be suppressed for the sake of concision).

In short, if one is concerned with testing hypotheses about causation, working with some simplifying assumptions is unavoidable, and statistical approaches that encompass a large number of observations may provide at least as good a source of leverage for testing hypotheses as historical process tracing does (see Laitin 2000; Weingast 2002; King, Keohane, and Verba 1994). The present study shows that despite its limitations, an analysis that focuses on comparison across a large number of cases provides a good way of gauging the validity of hypotheses in the study of large-scale political change.

Further insight into causal relationships, which I first test statistically, is gained by occasionally zeroing in on a few cases within the post-communist region. Qualitative, in-depth investigation of some cases can be particularly important when the quantitative measures are not readily available for some important variables and/or years covered by this analysis. In these instances, the effects of judicial empowerment and institutionalization on public trust and judicial decision-making must still be assessed in light of the proposed theory. The analysis of a small subset of countries within the post-communist region provides additional purchase on unearthing causal relationships which I argue exist at the regional level. The addition of case studies also obviates some criticisms of historical institutionalist who argue that the best method for comparative inquiry is historical process tracing in a small-N context.

CONCEPTS

Modern scholarship on judicial politics usually references American experience as the benchmark against which other countries' experiences are measured. Yet, some important differences exist between American judiciary and constitutional traditions and those of other political systems. As a result, debates continue amongst the students of judicial politics about how to accurately define concepts such as judicial review, judicial independence, and constitutionalism, and how to properly apply these concepts to the empirical studies of judicial institutions outside the American context. Before delving into the specifics of the judicial institutional development in the post-communist states, it may be helpful to set out how certain concepts such as "constitutionalism," "constitutional review," and "judicial independence" are used in this study.

Constitutionalism

Constitutionalism refers to the idea that the interactions that take place within a society are to be governed by a set of authoritative rules—the constitutional law. A constitution is a body of rules that specifies how all other legal rules are to be produced, applied, and interpreted. These constitutional rules are considered to be of higher order because they constitute a given political community. Such rules establish governmental institutions (e.g., legislatures, courts), distribute political authority across institutions, and link these institutions to society, via elections or some form of selection procedure. As Schwartz (2000: 7) points out, in its original meaning, a constitutional state is governed by the rule of law as long as the constitution is honored, but a state governed by the constitution need not be a democracy. A *constitutional state*, in other words, can be characterized by administrative regularity (the *rechtsstaat*) and such a system is (in theory) fully compatible with the absence of political and human rights typically associated with modern liberal democracies.

In addition to constitutional regulation of administrative authority, the modern conception of constitutionalism—the so-called "new" or "higher law constitutionalism"—has it that a constitution must specify substantive constraints on political power, the most important of which are individual political and civil rights.

Stone Sweet (2000: 37) lays out four specific components of this modern form of constitutionalism which spread around the globe after World War II:

“(1) State institutions are established by, and derive their authority exclusively from, a written constitution; (2) this constitution assigns ultimate power to the people by way of elections; (3) the use of public authority, including legislative authority, is lawful only insofar as it conforms with the constitutional law; (4) that law will include rights and a system of justice to defend those rights. As an overarching political ideology, or theory of the state, the new constitutionalism faces no serious rivals today.”⁵

Constitutional Judicial Review

When a constitution adds a layer of substantive constraints on the uses of public authority, a mechanism for enforcing these constraints must also be established. A *constitutional review* is precisely such a mechanism; it is the authority to invalidate the acts of government (e.g., judicial or administrative decisions and legislative statutes) on the grounds that these acts have violated constitutional rules. While this authority can be assigned to the executive or legislative branches, in the recent years it is becoming increasingly associated with the work of judges and legal experts. Only a handful of modern constitutional regimes empower the executive or the legislature with the authority of constitutional review. The power of constitutional review, if it exists, is typically reserved for the courts because most constitutional scholars and politicians are skeptical about the willingness of elected branches to self-correct and faithfully comply with the constitution (see Ferejohn, Rosenbluth, and Shipan 2004).

As Figure 1.1 shows, 84 percent of the countries around the world empower judicial tribunals to decide constitutional issues and only 3 percent (5 countries) do not use any concrete form of constitutional review.⁶ Although in many countries, constitutional review remains on paper only and repressive authoritarian/dictatorial regimes continue to rule without any effective constitutional oversight, the fact that more and more societies write provisions for constitutional review into their constitutions and

⁵ Similarly, a modern conception of constitutional democracy entails a set of constitutionally established and protected rights that stem from the definition of democracy such as inclusive suffrage, freedoms of press, religion, and expression, and the right to due process under law (see Dahl 1998). The examples of such polities are the United States, Canada, Germany, Costa Rica, Hungary, and many more countries across the globe.

⁶ Out of these five, two countries—the Netherlands and the United Kingdom—are consolidated and stable democratic regimes.

assign judicial tribunals to perform this task is significant on its own right. In Tate and Vallinder's (1995) words, this indicates increasing "constitutionalization" and "judicialization" of politics around the world.

Insert Figure 1.1 here

As will be discussed in the following chapter, judicial review of constitutionality comes in several forms and the American and European models comprise the two major approaches to *constitutional judicial review*.⁷ In the former, the power of constitutional review is diffused—any judge may decide on the constitutionality of laws, decrees, and administrative regulations; in the latter, the constitutional review is concentrated—that is, performed only by judges sitting on special judicial tribunals called constitutional courts. Stone Sweet (2000) argues that European-style constitutional courts perform four essential functions: 1) they operate as a counterweight to majority rule, 2) protect human rights against an invasion or inaction by government, 3) "pacify" politics by refereeing boundary disputes between parts of the government, and 4) legitimize public policy by helping elected officials draft constitutionally-sound legislation. These European-style tribunals are the primary subjects of this study. Their proliferation in the second half of the twentieth century, and especially after the collapse of the communist regimes in Eastern Europe and the former Soviet Union, suggests that an increasingly large number of countries are finding the European model of constitutional review appropriate for their political circumstances (Shapiro and Stone Sweet 2002: 147).

Judicial Independence

Finally, one cannot talk of courts and judicial review without addressing the issue of judicial independence. In this study, I conceptualize *judicial independence* as "(a) the degree to which judges ... decide [cases] consistent with ... their interpretation of the law, b) in opposition to what others, who are perceived to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision averse to the beliefs or desires of those with political or judicial power may bring some retribution

⁷ Throughout the remainder of this study, when I discuss "judicial review" I will be referring to constitutional judicial review, unless otherwise noted.

on the judges personally or on the power of the court” (see Becker 1970: n. 8, at p. 144). In short, to the extent that a panel of judges or an individual judge is able to review the constitutionality of laws and legality of administrative regulations free of influence from other political actors and without having to worry about retaliation from other institutions, they are independent. Most scholars tend to agree with this view, although many disagree about the best way to measure judicial independence empirically.

I recognize that there are many inherent problems with empirical measures of independent behavior of courts and judges. Larkins (1996: 616-617) does a good job of summarizing the major problems inherent in measuring independence in terms of judicial behavior. He points out that:

“Some scholars have utilized methods which look at outcomes of the courts, and have attempted to inductively gauge judicial independence from this. In other words, they have examined the frequency by which courts decide cases against the government. Logically, if the courts did this often, it might be claimed that they were sufficiently independent to challenge the regime when necessary. Conversely, if practically all decisions were in support of state policy, one could surmise that the courts were unwilling (perhaps due to pressure) to critically scrutinize government policy or behavior... Using this method absent more in-depth interpretation would cause one to label a judicial branch as dependent if many cases were decided in favor of the government... [however] infrequent grants of habeas corpus or declarations of unconstitutionality may also indicate that the government is doing a good job of conforming to the law, and that the courts are finding in favor of the state because few violations of the constitution really occur... In the end, mere numbers do not necessarily indicate the degree of a judiciary's independence because all the cases the government lost may have concerned issues that it cared little about and those it won may have involved major exercises of state power.”

Based on this assessment, Larkins suggests that the best way to gauge behavioral independence is to carefully study the content and the language of each judicial decision. While in theory this is a fine idea, in practice, it is impossible to implement in most countries around the world because judicial decisions are terse, short, and do not justify the court's ruling in depth (the so-called French style of opinion writing). Given these difficulties, I propose in Chapters 3 and 5 that the courts that are institutionally-secure and developed are more likely to exercise effective constitutional review and to rule against powerful political actors (when these actors are litigants to the case) because institutionally-developed courts are less fearful of potential retaliation on the court's

jurisdiction, finances, judicial terms of office, and other institutional features. In highly-sensitive cases, where judges may be fearful of potential retaliation for unfavorable decisions, substantial levels of institutional development minimize these constraints and allow judges to issue rulings which are closer to their sincere policy preferences.

Nonetheless, judicial institutionalization by itself cannot guarantee faithful compliance by the losing party because even the most powerful courts cannot physically force others to accept their decisions (other factors, which I discuss and analyze in Chapter 5, matter for such considerations). In other words, if judges care about rendering decisions that are as close as possible to their ideal policy, institutional development provides them with an ability to do so. However, I acknowledge that if judges also care about making efficacious policy—one that is complied with and faithfully enforced by other political institutions—they will still have to be attentive to other strategic constraints on their own behavior as well as on the behavior of the litigants to the case. In sum, by arguing that institutionalization affects the degree of judicial behavioral independence, I do not deny the importance of other considerations that must be taken into account in studying judicial behavior.

CONCLUSION

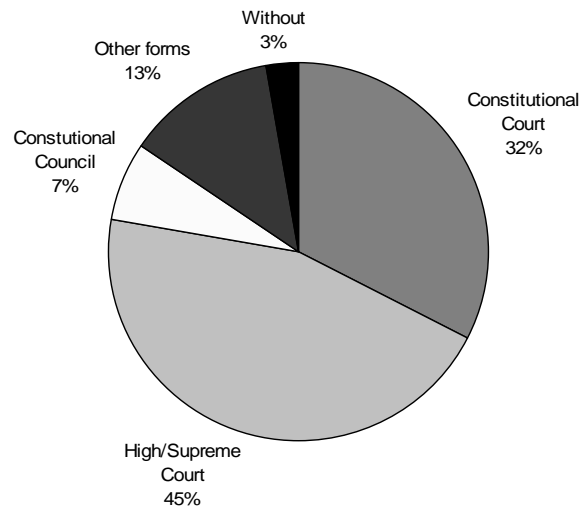
In the following chapter I begin to examine the most recent “global wave” of creation of the constitutional judicial review. In particular, I focus on the creation of constitutional tribunals in twenty-eight states in Eastern Europe and Central Asia and explain the prominent features of their institutional design and organization. This chapter outlines a number of factors related to the structure of the post-communist courts, the issues and litigants these courts deal with, the kinds of rulings they make, and the conditions in which judges operate. It also shows that several communist-era legacies are important to our understanding of the forces behind the creation of constitutional courts and their subsequent performance and development.

In Chapter 3, I outline a general theoretical framework for the study of judicial empowerment and its impacts on society and politics. In Chapter 4, I develop a cross-

national time-series measure of judicial institutional development that will serve as the primary independent variable for the empirical chapters that follow. In Chapters 5, 6, and 7, I trace the development of post-communist constitutional courts over time and empirically assess their impact on societal perceptions of the legal system and on judicial decision-making in transitioning societies. Chapter 8 offers conclusions about the validity of the theory proposed herein and makes some recommendations for future research.

FIGURES

Figure 1.1, Constitutional Review Around the World



Source: Chart constructed based on the information provided in G. Harutyunyan and A. Mavčič. 1999. *The Constitutional Review and Its Development in the Modern World: A Comparative Constitutional Analysis*. Yerevan, Armenia.

CHAPTER TWO

Describing the Post-Communist Systems of Constitutional Review

INTRODUCTION

The breakdown of communist regimes in the Soviet Union, Eastern Europe, and Mongolia between 1989 and 1991 and the subsequent rise of new regimes and new states throughout this region provide scholars with a truly unique opportunity to make a contribution to our understanding of judicial politics and the practice of constitutional judicial review. The post-communist region provides an ideal laboratory for comparison—it contains a large number of cases (28 in all) and exhibits sufficient variation in social, economic, and political outcomes (including the outcomes of judicial and constitutional reforms). At the same time, historical causes are limited, largely because of the homogenizing effects of state socialism and the temporal similarities in when these transitions commenced (Linz and Stepan 1996; Geddes 1995; Laitin 2000; Fish 2005). As Bunce (2000: 725) argues, “communism was a distinctive domestic and international political-economic system—it was recently in place, relatively long lived, unusually invasive, clearly demarcated in spatial terms, and relatively consistent over time and across country in its institutional design.” This combination of variable outcomes and constrained causes is, of course, precisely what comparative scholars value.

In the post-communist region, several historical legacies are important to our understanding of the forces behind the creation of constitutional courts and their subsequent performance and development. Before I describe the specific design and structure of the post-communist courts, therefore, I devote some attention to these issues.

For the purposes of this analysis, four socialist legacies are central—weak commitment to a political culture based on the rule of law, extensive executive interference in the judiciary, pervasive public distrust in the legal system, and prior experience with constitutional judicial review.¹

First legacy of the pre-1989 period common throughout the region is a weak commitment to a political culture based on the rule of law.² All 28 states were ruled by communist single-party regimes for at least forty years. Although the severity of these regimes differed greatly over time and from state to state, in all of them, the civil law system and judiciary were subordinated to the executive and through it to the supra-political authority of the Communist Party.³ In these systems, based on Lenin’s concept of “Unity of State Power,” the subordination of judges to politicians and of law to politics extended from mundane administration to matters at the core of judicial decision-making.⁴ Socialist philosophy considered the law as a tool of the state in capitalist societies that was used to oppress the working class. Thus, Soviet-era politicians similarly viewed socialist law as a tool of the state, to be used to work toward a socialist society. This resulted in a kind of twisted logical circle: Law exists to further the interests of citizens; the state knows better than any individuals what the interests of the citizens are; anything the state does, therefore, must be legal.

In the communist period, judges were generally viewed as functionaries, and few individuals imagined a judge might issue a decision fundamentally at odds with the official political line. The Communist Party dictated important decisions to judges, often through surreptitious telephone calls (hence the oft-used term “telephone justice”). The deference and loyalty of judges was valued over their capacity for responsible decision-

¹ See Tate and Vallinder 1995; Linz and Stepan 1996; Magalhães 1997; Gibson, Caldeira, and Baird 1998; Schwartz 2000; Stone Sweet 2000; Boulanger 2001, 2002; Ginsburg 2003; Thorson 2004; Karklins 2005.

² Even prior to the communist period, the principles of the rule of law and separation of powers were only partly respected throughout most of the region (Schwartz 2000). The countries of Eastern Europe and the FSU had no traditions of legality (i.e., legal culture which stipulates the submission of the state to law)—with the exception of Czech Republic, Hungary, Lithuania, Poland, Slovakia, and Slovenia—and none had the tradition of constitutionalism (i.e., legal culture which stipulates the protection of civil rights and political liberties) before the coming of Communist rule (see Boulanger 2000, 2002).

³ Forms commonly found in some civil law systems—such as combination of judicial and prosecutorial functions, full review, uniformity of decision, and civil service status for judges—were retained in the communist period.

⁴ On the impact of the socialist past on regional judiciaries, see Dietrich, M.K., *Legal and Judicial Reform: Voices from Five Countries*, World Bank, 2000, in particular “The Transition Path: From Party Rule to Rule of Law.” available online (http://www4.worldbank.org/legal/publications/LJR_ECA.pdf).

making. These perceptions persist; many politicians and citizens still assume that judicial processes should or do hew to current political priorities and that judges implement government policy (Gibson, Caldeira, and Baird 1998; Schwartz 2000). These perceptions contribute to another legacy of socialism, popular distrust of judges and lack of confidence in the integrity of the legal system.

The second (and related) legacy of the pre-1989 period, and one of the most prominent threats to the consolidation of fully independent judiciaries in the post-communist countries, is the continuing, pervasive influence of the executive, and especially Ministries of Justice and the Procuracy,⁵ in the administration of the judiciary. The assumption—both in the other branches and among judges—that executive involvement in judicial administration was both necessary (because the judiciary is ill-prepared to administer itself) and desirable continues to hinder the development of a culture based on the rule of law and separation of powers and to contribute to the low levels of public confidence in judges. As Rzeplinski argued in his study of the Communist Polish judiciary,

“An elaborate system of appointments, transfers, promotions, rewards, disciplinary measures, and supervision by chairmen of the courts and the Ministry of Justice functioned rather smoothly and succeeded in maintaining the judiciary in a clearly subservient position. Needless to say, all high-level administrative positions were strictly reserved for trustworthy Party members. Exceedingly unsatisfactory salaries of judges as well as inadequate working conditions contributed to the generally felt malaise, low morale, and the lack of self-esteem.”⁶

Because the Ministry of Justice was the agent of control over the judiciary under the Communists, there has been an immense resistance for releasing the control over the judiciary in the early transitional period and an observable tendency for the executive to try to retain or reclaim its powers in the subsequent years (Hendley 1996; Magalhães

⁵ In the communist legal systems, Procuracy was a government agency concerned with ensuring administrative legality. The constitutions invested the procurator general with the responsibility of supervising the observance of the law by all government ministries and institutions subordinate to them, as well as by individual officials and citizens. The practice originated in the Tsarist Russia, was revived in the Soviet Union, and is still used in many former Soviet republics. East European states followed the suit, adopting this system after World War II.

⁶ Summarized in S. Frankowski, *The Independence of the Judiciary in Poland: Reflections on Andrzej Rzeplinski's Sadownictwo W Polsce Ludowej (The Judiciary in People's Poland 1989)*, *Ariz. J. Int'l and Comp., L.* 33, p. 8.

1997). Moreover, because communist-era judges operated in a culture of deference to the executive, many still cater to its preferences in their decisions. The continuing effects of this history on public and political ideas about the judiciary, and on judges' view of their role, therefore should not be underestimated.

Third, and clearly related to the legacies discussed above, the post-communist region is characterized by a pervasive sense of public distrust in courts and judges. Throughout the communist era, the region's courts were characterized by a steady degradation of the status and reputations of individual judges and judiciaries.⁷ Yet, as it has often been noted, public confidence in courts is essential to the judiciary's legitimacy as a guarantor of rights and freedoms (Gibson and Caldeira 2003). If courts are not seen as independent and impartial, citizens will not turn to them to resolve their problems, but may seek recourse through political or extralegal means. This lack of public and political trust may have serious consequences for the development of post-communist constitutional courts, as it undermines support for needed reforms and can encourage incursions on judicial prerogatives.

Additionally, there is a widespread perception that corruption—another common symptom of a weak legal system during the communist period—is endemic in the judiciary of all 28 post-communist states. Rapid and destabilizing economic changes, the weakness of new political institutions, and the legacy of a system in which the law was not an impartial protector of rights have encouraged corrupt practices in all walks of life, including judicial adjudication and enforcement (Herron and Randazzo 2003; Karklins 2005). Certainly, perceptions of judicial corruption that developed in the socialist era further reduce trust in the courts and reinforce negative stereotypes of judges.

Schwartz (2000: 39) argues that although most communist-era judges were discredited and distrusted it was not a serious problem for the establishment of post-communist constitutional courts: the countries *simply* adopted the European model of constitutional judicial review (my emphasis). I disagree. In my account, this region-wide pervasive sense of public distrust in the judiciary was considered a very serious problem and had two immediate and quite important consequences on the process of establishing

⁷ Some scholars argue that public distrust of the judiciary precedes even the communist period and have been a part of the region's landscape for more than a century (e.g. Schwartz 2000).

the basic structure of post-communist constitutional courts. First, *precisely* because judges were discredited and distrusted, the vast majority of post-communist states adopted a European centralized model of constitutional judicial review. The historical trends and popular perceptions therefore directly influenced the decision to select the European model.⁸

Second, although the publics—due to the socialist-era experience of judicial dependence on, and deference to, the executive—generally supported a centralized constitutional judicial review design, their preferences did not otherwise influence the choices of politicians in designing the constitutional courts. The creation of these courts was not enveloped in intense discussion or great interest at the mass public level, in part because the ordinary citizens (given their prior experiences) were not able to foresee the importance of these tribunals for the consolidation of their newly-established democratic regimes. Put differently, the political actors made choices regarding the specific contours of the constitutional court design with little input from the broader public. This argument is consistent with several studies in the region which find that during the constitution-drafting process the “[p]olitical actors endowed with the power to make institutional choices [were] not captured by interest groups, but ma[d]e choices based on a concern for their individual political power” (Frye 1997: 4).

Insofar, the legacies of the past point to some serious potential impediments for the post-communist judicial reforms more generally and the establishment of constitutional courts more specifically. However, and quite surprisingly, the socialist (and in the Romanian case, pre-socialist) past also provided politicians and legal academics with some experience (or at the least, a minimal familiarity with) in constructing and administering constitutional tribunals. As the Table 2.1 shows, out of the 28 post-communist states, only Romania,⁹ Hungary,¹⁰ Bulgaria, and Mongolia did not

⁸ A number of scholars argue that after World War II and in the 1970s West and South European countries similarly adopted Kelsen’s centralized review design out of a profound distrust of judicial institutions which had failed to meet their constitutional responsibilities (see Stone Sweet 1992, 1998, 2000; Shapiro and Stone Sweet 2002).

⁹ Although Romania experimented with constitutional judicial review before World War II (1923-1937) it was abolished under the communist rule.

¹⁰ Some early attempts at constitutional reforms occurred in 1984 but the constitutional court was not established until late 1989 (see Chapter 1 in G. Harutyunyan and A. Mavčič. 1999. *The Constitutional Review and Its Development in the Modern World: A Comparative Constitutional Analysis*. Yerevan, Armenia (available online at <http://www.concourt.am/Books/harutunyan/monogr3/index.htm>).

experiment with constitutional judicial review during the communist era. In all cases where constitutional courts were established, the communists followed the European tradition, creating a constitutional tribunal which was separate from the regular judiciary. Czechoslovakia (1920-38, in 1969, and then again in 1990-91) and the Soviet Union (1988-91) briefly experimented with constitutional courts at the federal level. And in Poland a severely-limited Constitutional Tribunal came into existence in 1986. However, with the exception of Yugoslavia (discussed below), these communist-era constitutional tribunals remained largely subservient to the Communist Party and played little if any role in maintaining the rule of law.

Insert Table 2.1 here

In Communist Yugoslavia, where constitutional judicial review was established in 1963, the constitutional courts functioned at both federal and republic levels and, according to Fisk (1971: 281), exercised their jurisdiction actively and with the Communist Party's full commitment and support. The Federal Constitutional Court was most active and bold in asserting its review powers. For example, in June 1967 the Court held as unconstitutional major portions of an important federal law, despite the fact that the law was viewed as one of the most politically-charged issues of federation-republic relations at the time (Fisk 1971: 292-293). So it would seem that out of all post-communist states, the former republics of Yugoslavia are the only states that could rely on a somewhat vibrant tradition of constitutional judicial review. Nevertheless, while some former Yugoslav republics were in fact able to capitalize on this tradition fairly early in the transition process, others were less successful in doing so.¹¹

The general point here, however, is that even if we ignore the failures of most communist states to implement meaningful constitutional reforms, these attempts exposed both the mass public and the politicians to a particular set of ideas (European rather than American) about constitutionalism, the rule of law, and constitutional judicial review. And, as Fisk argues, "many of the experiments are like genies, who once let out of the bottle of authoritarian and ideological rule are hard to force back in" (Fisk 1971:

¹¹ Certainly, the outbreak of ethnic violence and secessionist wars in the 1991-1995 period severely affected the prospects of some of Yugoslav republics in this regard.

280). Moreover, communist-era experiments conditioned the views of politicians charged with drafting and implementing the new democratic constitutions in the early 1990s who were able to capitalize on the lessons learned from those earlier attempts.

Thus, given the history outlined above and the successes of constitutional judicial review in the second part of the twentieth century, it is no surprise that by the early 1990s all newly emerging post-communist regimes adopted a judicial tribunal with at least some constitutional review powers. Because most of these countries had the European civil law tradition, publics distrustful of the regular judiciary, history of executive interference in judicial affairs, and little familiarity with the American model of judicial review (but some experience with the European constitutional review model), not one of them delegated the power to review the acts of legislature or the executive to its regular courts.¹² A vast majority of post-communist constitutional courts (26 out of 28) are based directly on Hans Kelsen's constitutional design; only Estonia and Turkmenistan opted for a "mixed model" (constitutional review powers are concentrated in the high/supreme court but placed at the apex of the *regular* judiciary).

The Estonian constitution assigns the constitutional review power to a Constitutional Chamber of its regular High (Supreme) Court but prevents lower courts from deciding constitutional disputes. In some instances, constitutional disputes may also be decided by the court *en banc* (the Court's Rules of Procedure specify instances when this may occur).¹³ The major departure of Estonian design from the original European approach is that the power of constitutional review is ultimately vested in the regular judiciary. On the other hand, the major departure from the American design is that lower (trial) courts are prohibited from hearing cases involving constitutional interpretation and that in most instances the power of constitutional review is delegated to one chamber of the high court.

Turkmenistan settled for a somewhat peculiar post-communist constitutional review design. In fact, because its constitutional system is constructed differently from

¹² In some countries, adoption of federal structure and/or unicameralism provided additional reasons to adopt the European model (see Schwartz 2000: 23). A centralized review design was considered by some as a necessary check on the power of the federal government or the legislative majority in a unicameral legislature.

¹³ Information regarding the competences of the Court is available at the Supreme Court website (<http://www.nc.ee/>)

the rest of the post-communist world, many judicial scholars wrongly argue that Turkmenistan does not have a court with a power of constitutional review. Formally, the Supreme Court is the only Turkmen court with the power of statutory and constitutional review; however, the binding effect of this action depends on the approval by the *Halk Maslakhaty* (People's Council).¹⁴ According to the Turkmen Constitution, this Council is the highest representative organ of the Turkmen government. Its membership is composed of representatives from every branch of government (including the chairman of the Supreme Court) who must be directly appointed by the president.¹⁵ As is the case in Estonia, the Turkmen lower courts are prohibited from engaging in constitutional interpretation. In sum, although the Supreme Court lacks a formal binding authority on the constitutionality of laws and presidential decrees, it may still consider constitutional cases and in most other respects resembles constitutional court structures found elsewhere in the post-communist region.

The remainder of the post-communist region is populated by the European/Kelsenian constitutional courts. While they differ in many important respects, all twenty-six courts also share some important similarities in their basic design: 1) the power of constitutional judicial review is vested in a constitutional court/council which is separated from the regular judicial branch; 2) the jurisdiction of the constitutional court/council is limited to the constitutional questions only; 3) the decisions of the constitutional court/council are virtually final because they can be altered only by a complicated procedure of constitutional amendment, passage of overriding legislation requiring supermajority support, or by a new ruling of the Court; 4) the judges on the constitutional court enjoy constitutional guarantees of immunity to criminal action or removal, and 5) at least some degree of financial and administrative autonomy of the constitutional court/council from the government is guaranteed in a country's constitution. The following section takes these similarities for granted, and proceeds to discuss the ways in which these courts, as well as Estonian and Turkmen courts, systematically differ. The key differences between these courts are considered in the

¹⁴ In this sense, Turkmen Court is not very different from the Polish Constitutional Tribunal which until 1997 constitutional amendments came into force did not have the final authority on the constitutional matters (see Schwartz 2000, Ch. 3).

¹⁵ See translation of Constitution of Turkmenistan at <http://www.uta.edu/cpsees/TURKCON.htm>

context of three broad categories: jurisdiction, standing, and mechanisms for insuring judicial accountability to the elected branches.

ORGANIZATIONAL CONTOURS OF POST-COMMUNIST COURTS

This section is primarily concerned with the institutional choices embodied in post-communist constitutions, organic statutes, and court rules of procedure. It does not seek to provide a theoretical framework to explain the origin of these choices; rather, it simply introduces the reader to the provisions which bear directly on the court's powers, independence, and organizational efficiency. It is important to note that although all post-communist constitutional courts are established by the respective constitutions, in all 28 states the constitution also calls for an enabling law or a set of laws (usually known as the "Law on the Constitutional Court") which establish the necessary details about the functioning of the court and which usually require a supermajority of legislature to pass or change.¹⁶ In some instances, ordinary legislation, passed with simple majority support of the legislators, is also required to ensure the functioning of the court (e.g., annual budget of the courts). Additionally, the post-communist legislatures play a role (to varying degrees) in drafting the rules of procedure which regulate the court's internal operation (e.g., selection of a court president, how ties are broken, whether the court should decide a particular type of cases *en banc* or in panels, whether and when cases should be orally argued, or what should be the role of court rapporteur).

As Schwartz (2000: 46) notes, what provisions go into constitutions, statutes, or internal rules of procedure is important because *the location of a particular provision determines who can change it and how easily it can be changed, which in turn affects the nature of the court and its impact on the society and politics*. The dominant political actors that emerge after the constitution has been ratified and the constitutional court has been created can attempt to change the design of the court to increase its responsiveness to their priorities. Obviously, amending the constitution involves a number of significant

¹⁶ In semi-presidential and presidential regimes, the supermajority requirement often extends to include the executive branch, especially if the president has power to veto legislation.

hurdles (e.g., national referendum) and therefore may be the least unattractive option even for the dominant political actors. Another, less-costly strategy available to these newly dominant actors is to craft enabling legislation that would effectively modify the initial constitutional court design outlined in the founding constitution. Given that passage of such legislation requires fewer hurdles than constitutional amendments, it becomes an attractive venue for post-transition winners.¹⁷ Additionally, these actors can block the passage of enabling legislation necessary to implement the constitutional court design outlined in the founding constitution. By blocking the passage of enabling legislation newly dominant political actors can affect the pace of judicial reforms and hinder the development of a viable constitutional court for years to come.

Generally speaking, the post-communist courts' jurisdiction over cases (subject-matter jurisdiction), the method of appointment to the court, professional qualifications, and the terms of judicial office are found in the constitution or constitutional amendments. In some countries, provisions related to standing (right to petition the court) may also be found in the constitution. Provisions regarding compensation and pecuniary benefits (privileges such as state-provided apartments or cars), court budgets, allocation of computers and other necessary equipment, the size of the secretariat staff, and the internal rules of procedure are usually found in ordinary laws (*enabling legislation*). Notably, although European-style constitutional courts can affect their own structure and powers at the margins through legal rulings, their ability to do so is severely limited; strictly speaking, the elected branches of government *must* pass ordinary and constitutional legislation in order to give the courts a "political space" to exist and function.¹⁸

¹⁷ Of course, even dominant actors may sometimes back the creation of a constitutional court (see Ginsburg 2003; Thorson 2004). For example, powerful politicians may advocate the establishment of a constitutional court with a power to overrule their own decisions in order to signal a future commitment to the rule of law and limited government, and/or to differentiate themselves from other politicians. Such self-commitment may be tailored to appease domestic public or international audiences or both.

¹⁸ At this point, a number of judicial scholars trained in American politics would think of the profound impact of *Marbury* and the blatant self-assertion by the Supreme Court of the power of constitutional judicial review in 1803. To my knowledge, in no other country or time period has any constitutional court been able to assert powers as important as constitutional review. In fact, even in the case of the United States Supreme Court, McGuire (2004: 137) argues that the "[Court's decisions do] not affect its organizational character ... it apparently does not provide [justices] with the strategic capacity to significantly shape the character of the Court ... the developments [in Court's structure and functions] have often been the result of congressional, not judicial, action."

In short, it is important to remember that a constitution is usually an imperfect blueprint—just a starting point—for the creation of constitutional courts and that the subsequent changes to their design and powers may have far-reaching consequences for courts’ role in post-communist countries. As Przeworski (1991: 94) puts it, “the choice of institutions [during the constitution-drafting process]... has been to large extent ... dominated by the understandable desire to terminate the fundamental conflict as quickly as possible ... [and] the new democracies are likely to experience continued conflict over the basic institutions; the political forces that suffer defeat as a result of the interplay of these institutions will repeatedly bring the institutional framework back to the political agenda.” I take Przeworski’s argument seriously and in the subsequent chapters argue that in order to understand the constitutional developments in the post-communist world we must look beyond the initial design of constitutional courts. Thus, the primary empirical focus of this study is to analyze the precise nature of changes in the institutional structure of these courts and then link these changes to the courts’ performance and influence on the society.

Jurisdiction over Cases: Forms, Timing, Subject Matter, Decision-Writing, and Effect

In the most fundamental sense, the nature of post-communist constitutional courts is reflected in the issues they deal with and the kinds of rulings they make. After all, constitutional courts, like all courts, hear and decide cases that are brought before them; their primary function is to render a decision on the merits of the case. Before any presentation of the various powers entrusted to constitutional courts, some preliminary distinctions regarding the *form* in which they intervene and *timing of the review* will provide a general insight into understanding their powers.

Preventive vs. subsequent (repressive) control — Preventive control is exercised before the entry into force of the reviewed law, while subsequent control is exercised once the law has become effective. For example, in France, the *Conseil Constitutionnel* (Constitutional Council) is charged with reviewing the constitutionality of laws passed by parliament before they are implemented (Stone Sweet 1992). Similar situation exists in Belarus. On the other hand, in the United States, the Supreme Court only rules on the constitutionality of laws through litigated cases that emerge through the

federal court system. Some post-communist countries, such as Romania, Poland, Azerbaijan, or Mongolia, have given their constitutional courts the power to exercise both a preventive and a subsequent review of the constitutionality of statutes and/or regulations.

Abstract vs. concrete constitutional control — Abstract judicial control is generally exercised by courts to review the constitutionality of legislation while concrete control is exercised in a specific case based on a constitutional challenge in a litigated case and specific factual situation (Schwartz 2000: 25-26). All preventive controls are necessarily abstract in nature because the law under scrutiny has not yet entered into force and has therefore not been applied. Subsequent (repressive) controls can be either concrete or abstract, depending on the jurisdiction allocated to the court and on whether it can hear cases brought by individual citizens. For example, the United States Supreme Court exercises a concrete control rooted in the application of the alleged unconstitutional law to a given factual situation. On the other hand, in Latvia, Russia and several other post-communist cases, the constitutional court may be called upon to exercise an abstract control of the constitutionality of laws which have already entered into force, through requests for preliminary rulings by the judiciary. Similarly, in countries such as Hungary, the *actio popularis* enables any citizen to seize the Constitutional Court to exercise an abstract control of the constitutionality of promulgated laws. In short, when a court exercises the power of abstract review it must make the ruling on the bare text of the constitutional provision or law, without the benefit of seeing it in the context of its application to a particular factual situation.

With these distinctions in mind, let us now turn to the issues the post-communist constitutional courts deal with (their subject-matter jurisdiction). The core function of constitutional courts is the constitutional review of legal norms (i.e., the assessment of the compatibility of legal norms with the normative principles enshrined in the constitution). It should be noted that in almost all contexts, the constitutional court is not given discretion to refuse to issue a ruling—if the constitutional court should decline to decide the question, no other judicial remedies would be available. In some countries, courts have some flexibility in deciding which cases to decide, but as a general principle (and in keeping with the European practice) a constitutional court must decide every

question *properly* brought before it.¹⁹ Constitutional review powers can be divided into five main categories: (i) interpretative powers; (ii) powers related to the constitutionality of norms; (iii) powers related to the distribution of powers among public authorities; (iv) elections and political parties; and (v) human rights and civil liberties.

Interpretative Powers — A number of constitutional courts have been entrusted with the power to interpret fundamental legal norms and various procedural rules. This power is justified by the need to guarantee the uniformity of interpretation of constitutional provisions and of legal norms. Interpretative functions are generally exercised in a consultative and advisory capacity (most often as *a priori* advisory opinion and sometimes in the context of applying abstract *posteriori* review) and may include:

- Interpretation of the constitution
- Interpretation of international treaties
- Interpretation of statutes and other norms, such as executive decrees and administrative regulations
- Matters related to the conformity with the constitution of the implementation of a law, decree, regulation or any other norm

As Stone Sweet (2000) points out, this authority to “interpret” also offers the court an opportunity to “create” the constitution by developing constitutional doctrine even when there is no concrete dispute.

Control of the Constitutionality of Legal Norms — Many constitutional court activities are related to reviewing the constitutionality of legislative statutes and sometimes decrees (i.e., acts of the executive). These powers enable constitutional courts to serve as a guardian of the constitution and to ensure that the executive and legislative branches respect the legal norms enshrined in the constitution. These powers include:

- Review of constitutional provisions
- Review of international treaties

¹⁹ A number of frivolous and incomplete petitions have been brought before the post-communist constitutional courts. Oftentimes, when the courts reject a large portion of the received petitions it is because the petition failed in some way to follow the established submission procedures, not because they have great agenda-setting powers. Epstein, Knight, and Shvetsova (2001) grossly exaggerate Russian Constitutional Court’s discretion over case selection. They note that between 1994 and 1996, the Court received about 15,000 petitions but considered only 300 and of those, decided 39 cases on the merits. After considering these numbers, the authors argue that Russian Constitutional Court has great agenda-setting powers, rivaling those of the US Supreme Court. This conclusion is quite puzzling given that in the same paragraph, they quote the Secretariat of the Court, which stated that 98% of the received petitions did not meet the “requirements of the [1994] law [on the Constitutional Court] and for that reason were declined” (Epstein, Knight, and Shvetsova 2001: n. 6, at p. 122).

- Conformity of laws and/or parliamentary regulations with the constitution
- Conformity of executive decrees and regulations with the constitution
- Conformity of acts of the Head of State with the constitution
- Conformity of acts of territorial entities and/or rules of national and local administrative units with the constitution
- Conformity of national legal norms with international legal norms or treaties

If a law or act is declared contrary to the constitution, a constitutional court may annul the law or act, in full or, in case the unconstitutional provisions can be severed, in part. In rare instances (e.g., Georgia), the constitutional court is formally prevented from deciding on the conformity of the whole law or other normative act with the constitution if the petitioner or applicant requests the recognition of only a certain provision or provisions of the law or other normative act as unconstitutional. Some constitutional courts also have positive decision-making powers and may declare the law or act conditionally constitutional. Conditional constitutionality means that the law under scrutiny conforms to the constitution only if interpreted or applied in a certain way. Similarly, the constitutional court may decide to declare the law inapplicable only in certain circumstances. If the court has power to exercise concrete constitutional review, it can hear requests for preliminary rulings on constitutional issues referred by the courts of general jurisdiction before which the case has been filed.²⁰

Distribution of Powers among Public Authorities — In some countries, constitutional courts have been given the responsibility for resolving conflicts between public authorities. These conflicts can be (i) horizontal: between two branches of government at national, regional or local level; (ii) vertical: between government entities at two different levels of government; or (iii) negative: failure to act from any branch or entity of government at any level. These attributions may include:

- Distribution of powers among top government bodies
- Distribution of powers between the national government and regional or local administrative authorities
- Distribution of powers among regional or local administrative authorities
- Distribution of powers between the courts and other government bodies
- Omission of regulation and legal gaps (*ex officio* ruling)

²⁰ This ruling is purely legal in nature; the general court then uses the constitutional court's ruling as the legal basis for the resolution of the underlying dispute.

Elections and Political Parties — In many countries following European models of constitutional review, the constitutional court has been entrusted with a variety of powers in relation to electoral and political processes. This is particularly true of constitutional courts which are created in a context of post-communist transitions. Granting powers over electoral and political processes to these newly-created courts is a way to both guarantee a review of these processes in light of constitutional principles and to insulate this control in the hands of an institution that had not been a participant in the previous regime. Some constitutional courts, such as those of Albania, Bulgaria, Czech Republic, Moldova, Russia, and Slovenia, also have powers to regulate and to dissolve political parties. The use of these powers has given rise to a significant number of cases, especially in the first years of transition. Specifically, court powers related to electoral and political processes may include:

- Capacity to hold office (Head of State and/or other representatives)
- Control of the constitutionality of acts and activities of political parties
- Control of the conformity of electoral processes with the constitution (this regards the actual holding of the election, not the election law)
- Control of the conformity of referenda with the constitution
- Confirmation of election results
- Oath of the Head of State
- Authorization/dissolution of political parties
- Impeachment of the Head of State
- Impeachment of other State representatives

Human Rights and Civil Liberties — During the second half of the twentieth century human rights and civil liberties have emerged as universal values guaranteed under international and regional treaties. Many of these rights have been enshrined in constitutions and laws in virtually all constitutional democracies around the world. In many countries, and especially in those with post-World War II European influence, the responsibility for protecting human rights and civil liberties has been largely given to a constitutional court.²¹ Such powers include:

²¹ Some constitutional courts do not have express powers to protect human rights. However, they can indirectly contribute to the protection of human rights, notably by giving constitutional value to certain human right principles which are not explicitly recognized in the constitution and by assessing the constitutionality of laws against these principles as well as the formal constitution. For example, in the

- Hearing direct appeals for preliminary constitutional rulings from proceedings before the courts of general jurisdiction (application of concrete review)
- Hearing constitutional complaints from ordinary citizens (*actio popularis*; application of abstract or concrete review)
- Hearing constitutional complaints related to the protection of individual human rights (application of abstract or concrete review)
- Specific complaint procedures, such as *habeas corpus* or *amparo*²²

Decision-Making and Opinion Writing — The vast majority of the post-communist constitutional courts divide their work between panels for most cases.²³ Usually, the panels consist of three to five members although in Russia the panels are larger (one panel has nine members and the other ten). A typical division of labor is between two or three panels; a panel to examine constitutional complaints in the area of criminal law (the criminal panel), a panel to examine complaints in the area of civil law (the civil panel), and a panel to examine complaints in the area of administrative law (the administrative panel). Plenary sessions are used for the more important cases or where a conflict between panels arises. Most often the plenum deals with politically-charged cases such as the review of the constitutionality of statutes, status of political parties, and impeachments. The court's internal rules of procedure are also usually drafted in a plenary session. Schwartz (2000: 45) notes that in both plenary and panel sessions, the selected judge-rapporteur is regularly assigned the task of preparing the case for the rest of the panel/plenum, making the rapporteur the effective decision-maker.

In terms of the opinion writing, the vast majority of post-communist constitutional courts rely on the so-called French model, which usually does not include a detailed statement of reasons for the decision.²⁴ Additionally, although many courts formally authorize dissenting votes and opinions, they are often not published and only

1970s, the French Constitutional Council took such an active role and expanded the notion of “constitutional norms” far beyond the constitution itself, incorporating scores of international human right principles into the body of “constitutional norms” (see Stone Sweet 1992).

²² Used most prominently in Latin America and Spain, *amparo* is a category of legal protection comparable to a broad form of *habeas corpus* that safeguards individual civil liberties and property rights.

²³ This is despite the fact that of the 28 post-communist courts, only Bulgarian and Armenian courts are required to always meet in plenary sessions.

²⁴ An alternative model of opinion writing, the German/American model, involves a detailed discussion of the arguments and counterarguments and the reasons for the applicability in the majority opinion as well as in the concurring and dissenting opinions. Very few post-communist courts actually follow this model in practice.

the fact of dissent is noted in the majority opinion.²⁵ In some instances, the rules of procedure require support from a supermajority of judges for a decision, but most often, simple majority is sufficient.

Lastly, the effects attached to the decisions of the constitutional court deserve mention. Decisions of unconstitutionality may apply *erga omnes* (general) or *intra partes* (only parties), *ex tunc* (retroactive) or *ex nunc* (only for the present and future). For example, decisions only applicable *intra partes* will not affect the courts of general jurisdiction, except maybe as an element of general interpretative guidance. On the other hand, an annulment *erga omnes* means that all courts must subsequently disregard the annulled law in their decisions. Table 2.2 summarizes the jurisdiction of constitutional courts outlined thus far.

Insert Table 2.2 here

Standing: The Right to Appeal to the Constitutional Court

The European and post-communist approach to standing—that is, the right to file a challenge in the court—is significantly more permissive than the approach used in the United States. Ginsburg (2003: 36-40) argues that open access to the constitutional court makes it more likely that politicians will be challenged in court should they fail to abide by constitutional limitations. And, as Schwartz (2000: 30) points out, “The reason [for a fairly broad access to post-communist constitutional courts] has been stated quite openly and frequently: to protect the minority against the majority.”

Although legal standing before the constitutional court varies from country to country depending on the nature of the claim, one can array access to the court on a spectrum from very restrictive (national-level officials only) to very permissive (regional entities, individuals, and any court of general jurisdiction). For the purposes of presenting legal standing rules, claims before constitutional courts can be divided into three main categories: (i) direct constitutional challenges; (ii) preliminary questions; and (iii) constitutional complaints. Before going into each category in more detail, it is worth pointing out that some countries, like Macedonia and Poland (until 1997), have also

²⁵ Of the 28 post-communist courts, only Armenia, Kazakhstan, Kyrgyzstan, Serbia-Montenegro, Turkmenistan, and Uzbekistan do not formally mandate that dissents be published alongside the official decision.

introduced mechanisms for *ex officio* review, through which the constitutional court may review the constitutionality of legal norms on its own initiative.

Direct constitutional challenges — Challenges to the constitutionality of legal norms are in principle open to political authorities, such as the president, the government, ministers, parliamentary groups or members. Some countries also allow judicial authorities, such as the highest courts in Ukraine and Poland, the Attorney General in Romania, or any court in Croatia, to initiate constitutional review proceedings before the constitutional court. Exceptionally, public officials such the Ombudsman or representatives of local/regional entities (e.g., Russia) are allowed to bring direct constitutional challenges before the constitutional court. In these cases, the claims are limited to the protection of specific interests. Thus, constitutional challenges may be considered in the context of both abstract and concrete review applications. A minority of countries have also introduced the possibility of *actio popularis*, which gives legal standing to individuals and legal persons to challenge the constitutionality of legal norms directly before the constitutional court. In some countries, such as Hungary and Croatia, there are no limitations on the legal standing of individuals; even non-citizens are allowed standing. In others, individuals must demonstrate a specific interest or are only allowed to challenge certain acts (e.g., Georgia).

Preliminary questions — Many countries provide for the possibility of preliminary questions to the constitutional court. Under this procedure, all courts or, in some cases, only the highest courts may suspend judicial proceedings and refer a question to the constitutional court on the conformity to the constitution of a legal norm to be applied in the proceedings. In these cases, the constitutional court exercises its power of concrete review. Two models for the submission of preliminary questions are found in the post-communist region: a mandatory referral and a limited referral. A mandatory referral specifies mandatory suspension of judicial proceedings and referral to the constitutional court whenever any doubt arises as to the constitutionality of a legal norm to be applied in the proceedings (e.g., Romania). In countries with limited referral, a court of general jurisdiction must make a referral to the constitutional court only if the court is fully convinced that the legal norm is unconstitutional or fails to find an interpretation that would make it compatible with the constitution (e.g., Czech Republic).

Constitutional complaints — The notion of constitutional complaints covers a variety of actions created to provide aggrieved citizens (in defense of their rights) or public officials (in defense of their institutions) with a subsidiary legal remedy. Complaints generally arise when a violation of constitutional rights and civil liberties attributable to an act or omission of a State entity is alleged. Legal standing in these instances is usually recognized only after all legal remedies have been exhausted (i.e., the complaint has unsuccessfully gone through the courts and all appeals have been exhausted). In other words, the court applies concrete review. Few countries, like Hungary, Slovakia, and Georgia, also allow direct access to individuals through *actio popularis*.²⁶ Constitutional complaints are restricted to challenges of individual decisions and legal acts of the courts (and other jurisdictional bodies) and of administrative authorities that affect the constitutional rights of the complainant.

Mechanisms for Accountability: Political Control and Influence on the Court

Constitutional court serves important social and political needs in a political regime. For this reason, constitutional court powers need to be complemented with means to ensure that the court comports with society's principles and legitimate interests. In other words, constitutional judges need to be accountable to society and, to some extent, to its elected representatives. Although it is sometimes suggested that judicial accountability and independence are inherently contradictory, there need be no contradiction between them; unless judges are somehow accountable, society will likely view their independence as a danger and seek to curtail it.²⁷ Indeed, as EUMAP's (European Union Monitoring Accession Program) 2001 reports argue, accountability and independence are actually complementary expressions of a society's decision to grant a limited measure of autonomy for particular common purposes, and an independent judiciary must therefore be ultimately accountable for its decisions and operations.²⁸

²⁶ In Georgia, complaints are limited to alleged violations of constitutional rights; in Slovakia, individual access is limited to challenges to the application of law, not to the law itself; Hungary does not impose any such limits and allows for abstract and concrete review of constitutional complaints.

²⁷ This is the very essence of the so-called "countermajoritarian difficulty" which focuses on the propriety of unelected judges to overturn legitimately-enacted laws of assemblies/parliaments (see Ginsburg 2003: 21-22).

²⁸ See EUMAP reports at <http://www.eumap.org/reports/2001/judicial>

For the purposes of this discussion, judicial accountability raises four sets of considerations related to (i) the professional experience required to become a constitutional court judge; (ii) the appointment of constitutional court judges; (iii) judicial terms of office, and (iv) the material and financial conditions within which constitutional court judges exercise their functions.

Professional experience requirements — All post-communist countries require at least some experience in administrative or legal affairs related to the constitutional law (in practice, ranging from five to fifteen years of experience). Due to the importance of their functions, constitutional court judges should be distinguished professionals whose integrity and morality cannot be called into question. In the end, as some scholars argue, it is the quality and integrity of the court's members that will provide the institution with the necessary legitimacy and respect (Epstein and Knight 1998; Boulanger 2001). Given the pervasive sense of public distrust in the judiciary during the communist era, most appointees to the new constitutional courts have been law professors and other legal scholars; only rarely communist-era judges are chosen to serve. Also, as a manner of general practice, former politicians are either barred by the constitution or simply not chosen to serve on these courts.²⁹

In addition to the specific number of years of professional experience, age eligibility requirements are also included. Most often, judges must be at least forty years of age to serve on the court, with a mandatory retirement at sixty-five to seventy years of age. All post-communist countries require citizenship, either by constitution or in the enabling legislation. The brevity and the language of Albanian constitutional provision are typical for the region: "Judges are appointed from among lawyers with a diploma in higher legal studies and at least 15 years of professional experience."³⁰

On a rare occasion, an appointment to the court is contingent upon passing a professional examination in the relevant areas of law. For instance, the Estonian Courts Act passed in 2002, mandates judge's examination in the following manner: "(1) A judge's examination shall consist of an oral and a written part. (2) The oral part of a

²⁹ Czech provision is atypical in this regard as there is no limitation on a person's eligibility to be appointed because she was a member of the government or of parliament prior to her nomination.

³⁰ Article 125 of the Constitution (available online at <http://www.ipls.org/services/kusht/contents.html>)

judge's examination means the assessment of the theoretical knowledge of a candidate for judicial office. (3) The written part of a judge's examination means case analysis."³¹

Appointment Mechanism for the Selection of Constitutional Court Judges — Constitutional court judges should be selected through an objective and transparent process. Ideally, the process should be open to public scrutiny and participation in order to ensure that the candidates selected have the qualifications and professional ethics corresponding to this important function in society. The normative task is to select an appointment mechanism that will maximize the chances that the judge will apply her powers in accordance with the intentions of the constitution writers (Shapiro 1981; Schwartz 2000; Stone Sweet and Shapiro 2002; Ginsburg 2003). Thus, appointment mechanisms are usually designed to insulate judges from short-term political pressures, yet ensure some long-term accountability. Most countries have divided appointment responsibilities among several branches of central government: they either participate together in making appointments or each branch appoints a given set of members.³²

Post-communist appointment procedures can be divided into three broad categories: single-body, cooperative, and representative. One example of a single-body appointment mechanism is the Supreme Court of Turkmenistan, whose members are appointed by the president from a list of nominees prepared by a special committee he picks. Hungary also leaves the appointment entirely to one body, the parliament, but includes a supermajority requirement for judicial selection; each party in the parliament participates in the nomination of judges and a two-thirds vote is necessary for appointment. As Mueller (1996; 1999) argues, a supermajority requirement for judicial selection will tend to produce more moderate, and therefore, more acceptable candidates (also see Ginsburg 2003; Ferejohn, Rosenbluth, and Shipan 2004). Countries that employ either cooperative or representative mechanisms are most successful in combining accountability with some degree of insulation from political interests.

³¹ RTII 2002, 64, 390 (available online at http://www.ensib.ee/toetused/Courts_Act.htm)

³² Based upon a cursory review of appointment procedures around the post-communist world, it appears that the judiciary rarely plays any role in the process of selecting constitutional court judges. However, in a few of countries, the higher courts or the Judicial Council play a role in the nomination and appointment. For instance, in Latvia, five constitutional court judges are elected for 10 years by an absolute majority of the members of the legislature (three are selected by parliament and two by the government) and two by the Supreme Court. In Moldova, parliament, the government, and the Superior Council of Magistracy each appoint two of the six judges to the constitutional court.

In cooperative systems, appointments are made by one branch of government upon nomination or selection of candidates by another. In Czech Republic and Kyrgyzstan, for example, an appointment is made by the president with legislative approval. In Russia, the president nominates candidates and the Federation Council (upper house of the federal assembly) approves them. As Ginsburg (2003: 44) argues, cooperative mechanisms are consistent with supermajoritarian requirement by ensuring fairly broad support for the appointments but are often subject to gridlock because they require the agreement of different institutions to go forward. For example, in July 1993 only twelve of the fifteen members of Czech Constitutional Court were appointed due to legislative gridlock (in January 1994 three remaining members were finally appointed).

Representative appointment procedures also involve multiple appointing authorities but no one institution must agree on an appointment made by another; there is no need for political or inter-branch compromises. Due to this factor, representative systems have been quite popular in the post-communist region. This system has been adopted by many post-communist countries, including Armenia, Georgia, Bulgaria, Kazakhstan, Latvia, Macedonia, Moldova, Mongolia, Romania, and Ukraine. For example, in Romania, the President, Senate, and Chamber of Deputies each appoints three of nine constitutional court judges. In Mongolia, three judges are appointed by the Parliament, three by the President, and the remaining three by the Supreme Court.

Given that no compromises are necessary, it is reasonable to think that each appointing body essentially seeks to appoint candidates most sympathetic to their interests and priorities (i.e., judges are “pure agents” of their respective appointing bodies). Thus, although representative systems ensure smooth appointment process (unlike cooperative systems), Ginsburg (2000: 45) argues that they risk deadlock on the court as the “[o]pinions issued by the court are likely to be internally fragmented and of lower quality than those issued by a more centrist, consensual deliberative body as appointed through cooperative mechanisms.” Nevertheless, because only a portion of the court’s membership is appointed by any one body, each appointing authority can be assured that it will be unable to dictate court’s decisions even if their appointees act as “pure agents.”

Terms of office — While the length of the terms of office varies from country to country, there is a consensus that members of a constitutional court should have security of tenure throughout their judgeship. Nevertheless, unlike ordinary judges who generally have life tenure, the constitutional court judges normally have limited terms. In most countries, constitutional court judges serve single terms with no possibility of reappointment. The term lengths vary from five years (Bosnia and Herzegovina, Turkmenistan, Tajikistan, and Uzbekistan) to fifteen years (Russia and Azerbaijan). Vast majority of post-communist countries use eight- to twelve-year terms. Belarus, Czech Republic, and Slovakia permit indefinite reappointment, while Hungary and Estonia limit reappointment to two terms only. In Armenia, constitutional court judges have life tenure, but are subject to mandatory retirement at the age of seventy. Depending on the age of the appointee at the beginning of her term, the actual time served on the court by lifetime appointees may thus be no longer (and in some cases, shorter) than by the judges who have specific and limited terms with no mandatory retirement age.

Furthermore, Herron and Randazzo (2003) point out that it may be more appropriate to think of judicial terms of office in relative rather than absolute terms. Judges who have relatively short terms of office in comparison to other political actors will likely be more susceptible to outside influences and generally more constrained by political pressures than judges with life tenure or whose terms are longer than those of elected politicians.³³ If judges have a shorter tenure than the president or the members of the parliament, then it is possible for the most powerful branch to change the composition of the court within his/her/their own term. Such courts are probably less resilient to change and more open to political pressures.³⁴

Material and Financial Conditions — Work conditions should reflect the importance of the constitutional court and include access to adequate courtroom facilities, staff, equipment, and finances. At the same time, courts should be accountable and some degree of financial dependence on legislature and/or the executive will ensure that both

³³ Also see Smithey and Ishiyama 2000, 2002; Tate and Vallinder 1995; Helmke 2002; Larkins 1996.

³⁴ However, Stone Sweet (2000) suggests that short, non-renewable terms of office in fact foster judicial independence rather than undermine it. As I will argue in the following chapters, the effect of the term length on judicial behavior is largely contingent on other features of the constitutional court design; it is hard if not impossible to make sense of how term lengths affect judicial decisions in isolation of other components of court design.

normative principles, accountability and independence, are met. In practice, post-communist constitutional courts almost always depend on the financial and administrative support from the elected branches. This, of course, creates a danger that either the executive or the legislature will try to create pressure by cutting off or reducing the body's financial sustenance. The danger of political interference is further exacerbated by the fact that in many countries the provisions related to finances and administrative resources for the courts are found in the ordinary, enabling legislation rather than in the constitution itself (and therefore, potentially subject to more frequent changes than would be the case with the constitutional provisions). In several countries, efforts were actually made to deprive the constitutional court judges of their basic services like transport and living quarters (Russia), elevator service and electricity (Slovakia), and buildings (Bulgaria).

To prevent excessive influence from other branches, some countries allow their constitutional courts to prepare their own budgets which are then subject to approval by the legislature (e.g., Hungary and Poland) or the Ministry of Finance (e.g., Estonia, Macedonia, and Ukraine). In some instances (e.g., Latvia and Belarus prior to 1997), a separate heading in the annual budget provides for the funds required to guarantee the work of the constitutional court, and the court is free to use those funds as it sees fit. Most often, however, the constitutional court does not advocate its needs in the legislature (i.e., lacks direct input in the legislative deliberations on annual budgets), must expend funds in accordance with budget line-items, and/or allowed to shift funds only between specific sub-items determined by the legislature. This may have direct impact on the court's efficiency in dispensing with its caseload.

For instance, a court that has sufficient funds but does not have control over how they are dispersed may be unable to shift funds to buy computers, printers and other materials and equipment which would help the court dispose of its caseload in an efficient, timely manner. Similarly, both the size and the quality of the court's support staff (secretaries, research assistants, and library staff) are largely contingent on sufficient budgetary funds and court's ability to spend those funds without external approval. A lack of funds may prevent the court from hiring a sufficient number of assistants to deal with its growing docket. Moreover, even where the constitution stipulates that each

constitutional court judge is entitled to one or more assistants, court's ability to provide competitive salaries to these employees will have impact on the professional competence and quality of the applicant pool. In practice, the size of the support staff varies considerably from around twenty in Bosnia and Herzegovina and Moldova to more than three hundred in the Secretariat of the Russian Constitutional Court.

The salaries of the constitutional court judges are usually far more secure than their annual budgets. After all, a sufficient salary is a necessary safeguard against the risk that impoverished judges will be compelled to make ends meet; in addition, salary often correlates with prestige, which can help inoculate constitutional court judges against attempts at improper influence, especially from parties to disputes. The language of the Slovene provision is typical for the region: "The president of the Constitutional Court shall have the right to the wages and an allowance for his post to the amount determined for the president of the National Assembly. The salaries for judges shall be determined in proportion to the salaries of the vice-president of the National Assembly. The secretary of the Constitutional Court shall receive a salary proportional to the salary of a judge of the Constitutional Court."³⁵

CONCLUSION

This chapter outlined a number of factors related to the structure of the post-communist courts, the issues and litigants these courts deal with, the kinds of rulings they make, and the conditions in which judges operate. Three general observations emerge from this discussion.

First, in order to understand the choices made by political actors regarding the design and powers of the post-communist courts, we must be attentive to past practices and historical precedents. Particular sets of institutions (e.g., civil law system) and historical circumstances (e.g., communist-era legacies of weak/dependent judiciaries and public distrust) are often mutually reinforcing in constraining institutional design choices

³⁵ Law on Salaries of Constitutional Court Judges (Official Gazette of the Republic of Slovenia, 10/93) and Article 71 of the Constitutional Court Act (Official Gazette of RS, 15/94) available online at <http://www.us-rs.si/en/>

in subsequent time periods (see Pierson and Skocpol 2002). Thus, the adoption of new constitutional courts in the post-communist region has been seriously constrained by norms, attitudes, and structural conditions inherited from the communist era, and in some aspects, from the pre-communist era as well.

Second, it should now be clear that despite the fact that most post-communist countries adopted the European model, the particulars of the institutional design of these constitutional courts potentially determine the level of their independence.³⁶ Constitutional provisions and enabling legislation for these courts outline the institutional safeguards of independence for individual judges and the court as a whole. Provisions such as appointment mechanisms, the specificity of professional qualification requirements, terms of office, procedures for financing, and internal rules of conduct will ultimately determine how accountable the constitutional court judges will be to the short-term interests and priorities of elected politicians.

Third, what provisions go into constitutions, ordinary statutes, or internal rules of procedure will have profound consequences because the location of a particular provision determines who can change it and how easily it can be changed, which in turn affects the nature of the court and its potential impact on the post-transition society and politics. Thus, if we want to make sense of these new courts' performance and influence, we must look beyond their basic design and analyze the precise nature of changes in the courts' institutional structure after their creation. This point cannot be overstated as many scholars of post-communist judicial politics continue to rely on static measures of judicial capacity located in the founding constitutions written more than a decade earlier (e.g., Smithey and Ishiyama 2000, 2002; Ginsburg 2003).

In the next chapter, I outline a general theoretical framework for the study of judicial empowerment, focusing on the structural characteristics of the courts described above. According to my theory, each of these components represents an imperfect replication of a single, unobserved pattern of institutional development. I argue that in order for judiciaries to play a significant role in democratizing states, they must develop certain levels of organizational sophistication and autonomy. In Chapter 4, I develop a

³⁶ As I argued earlier, judicial independence is generally measured by how capable judges are in rendering decisions solely on the basis of their understanding of the law and in the absence of influence from outside forces.

cross-national time-series measure of judicial institutional development that will serve as the primary independent variable for the empirical chapters that follow. In Chapter 5, I empirically link constitutional courts' development to their willingness to overrule, invalidate, or declare unconstitutional laws and executive decrees. I analyze whether the level of institutional development affects the degree to which judges on constitutional courts become actively involved in deciding constitutional disputes and the legality of government policies.

In the post-communist regimes, it is of great importance that citizens acquire confidence in previously repressive institutions, such as the police and courts. Thus, in Chapters 6 and 7, I examine whether perceptions of the mass public (Chapter 6) and business elites (Chapter 7) about their legal systems are contingent on the institutional development of their constitutional courts, the most visible of all domestic courts. The basic hypothesis that I test in both chapters is whether the confidence in judicial institutions is systematically related to their level of development. Chapter 8 summarizes the findings and suggests directions for future research.

TABLES

Table 2.1, Experimentation with Constitutional Judicial Review during the Communist Era

	Years in existence
Yugoslavia (and its republics)	1963-91
Soviet Union (federal-level only)	1988-91
Czechoslovakia (federal-level only)	1920-38; 1969;* 1990-91
Poland	1986-present
Romania	1923-37**

Note:

* Court design was not implemented in practice.

** Although the provision for constitutional judicial review was not removed until the Communists consolidated power in 1947, the Supreme Court stopped exercising its review powers in December 1937 when King Carol II established a personal dictatorship.

Table 2.2, Subject-Matter Jurisdiction of Post-Communist Constitutional Courts

	PREVENTATIVE REVIEW										ABSTRACT REVIEW										Concrete Review	Individual Complaint
	Constitution	International Agreements	Statutes	Regulations	Acts of the President	Acts of Territorial Units	Other General Acts	Constitution	International Agreements	Statutes	Regulations	Acts of the President	Local Government	States	General Acts of Public Power	Other General Acts	National Norms vs. Treaties	Regional Agreements				
Albania																						
Armenia																						
Azerbaijan																						
Belarus																						
Bosnia and Herzegovina																						
Bulgaria																						
Croatia																						
Czech Republic																						
Estonia																						
Georgia																						
Hungary																						
Kazakhstan																						
Kyrgyzstan																						
Latvia																						
Lithuania																						
Macedonia																						
Moldova																						
Mongolia																						
Poland																						
Romania																						
Russia																						
Serbia-Montenegro																						
Slovakia																						
Slovenia																						
Tajikistan																						
Turkmenistan																						
Ukraine																						
Uzbekistan																						

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CHAPTER THREE

Theory of Judicial Institutional Development

“It is men who first make institutions, thereafter institutions form men.”
— Montesquieu, quoted in Huntington (1965: 421)

INTRODUCTION

In Chapter 2, this study argued that there is ample evidence to suggest that historical trends and popular perceptions influenced the decision of post-communist countries to select the European model of constitutional review. During the communist era, the region was characterized by a weak commitment to a political culture based on the rule of law, extensive executive interference in the judiciary, and pervasive public distrust in the legal system. I have argued that these factors, along with mostly unsuccessful attempts to establish constitutional courts during the communist era,¹ created conditions which favored the adoption of European (Kelsenian) model of centralized constitutional judicial review after the collapse of communism. However, the preceding discussion also suggested that despite some common structural-historical trends, the region exhibits a large degree of variability in the specific organizational details included in the designs of post-communist constitutional courts. Moreover, I pointed out that the design of each constitutional court evolves over time (through the enabling legislation), from a formal blueprint in a founding constitution into an organization with a concrete scope of authority, employees, facilities, and budgets.

Of course, a number of questions arise out of those descriptive observations. Two are explored in this study in detail. First, if the institutional framework varies over time and across countries, how do these differences impact what the constitutional courts do?

¹ The communists followed the European tradition, creating constitutional tribunals which were separate from the regular judiciary. Thus, despite the fact that these attempts were unsuccessful and most courts existed on paper only, they exposed the politicians and the public to a particular set of ideas—European, rather than American—about constitutionalism, the rule of law, and constitutional judicial review.

Put differently, does the specific nature of their organizational environment affect how the judges on these courts render decisions? Second, does the specific institutional design affect how the public views these courts, and more broadly, how it views the quality of a country's legal system?

Before I answer these and other questions, it is necessary to integrate several approaches from political science and sociology. It is worth noting that the major advantage of the theoretical framework outlined below is that it can be applied to other regions, legal systems, and time periods. It should apply equally well to newly-established courts and those courts which have operated for a long time. Moreover, the same framework can be applied to the study of other government institutions, such as trial courts, legislatures, executives, bureaucracies, and the armed forces.² In short, my attraction to law and courts comes out of more general theoretical interests, especially in the explanatory status of institutions and institutional change, and the complex relationships between rules, organizations, and public policymaking.

DEFINING INSTITUTIONS

A cursory review of political science literature shows that scholars use such words as “institutions,” “institutional framework,” and “institutionalization” (or some other variation of these terms) quite frequently. Moreover, scholars now generally recognize that “social, political, and economic institutions have become larger, significantly more complex and resourceful, and *prima facie* more important to collective life” (March and Olsen 1984: 734). Yet, as Ragsdale and Theis (1997: 1282) point out, most analysts discuss these terms without explicitly defining what they mean, and in the process, assume that their readers know and agree on the meanings of these concepts. The concept of an institution has in fact been defined in diverse ways, with substantial variation among approaches. Consider the following definitions commonly cited in the literature.

² Of course, until the theory is applied and tested in a number of different contexts and institutions its validity and explanatory power is in question. This dissertation thus aims to spark scholarly interest in this approach and highlight some of its strengths and weaknesses for future research.

“Institutions are stable, valued, recurring patterns of behavior” (Huntington 1968: 12).

“As an organization achieves stability and value, it becomes an institution. Stability denotes that the organization is no longer a mechanistic entity, easily altered or eliminated... [Organization’s] value denotes ... its distinctive importance in society” (Ragsdale and Theis 1997: 1282).

“Institutions are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights). ... They evolve incrementally, connecting the past with the present and the future; history in consequence is largely a story of institutional evolution ...” (North 1991: 97).

“Legal institutions—for example, substantive law, rules of standing and jurisdiction, doctrinal principles, canons of construction, and so on—structure social settings by aligning individual’s expectations and priorities in ways that enable coordination” (Shapiro and Stone Sweet 2002: 115).

A similar level of definitional disagreement exists regarding the concept of institutionalization or, the process of institutional development. The definitions below are indicative of the variation in the existing approaches.

“To institutionalize is to infuse with value beyond the technical requirements of the task at hand” (Selznick 1957: 17).

“The process by which actions become repeated over time and are assigned similar meanings by self and others is defined as institutionalization” (Scott 1987: 495).

“Institutionalization ... will be defined as the process by which ... [an] organization becomes differentiated, durable, and autonomous” (Keohane 1969: 861).

“A political community ... develops routines—standard ways of doing things by organizations endowed with resources and authority. ... In a word, responses to regularly recurring problems are often institutionalized” (Shepsle and Bonchek 1997: 299).

“[A] legislature, an administrative agency, or a court is institutionalized to the extent that it is an integrated part of the government system with an identity or mission seen as uniquely its own” (McGuire 2004: 129).

As these definitions indicate, although there is some underlying similarity in the various approaches, there is little agreement on specifics. Furthermore, some versions are much more carefully defined and explicit, while others are less clear in their conceptualization. In most general terms, however, the definitions above show that we should start by distinguishing between organizations and rules/norms. Given my focus on the constitutional courts—that is, government entities with clear organizational structures—the following discussion focuses entirely on this layer of institutional analysis.³

Institutional theories that deal with *government institutions or political institutions*, or entities with clear organizational forms such as legislatures, bureaucratic agencies, and courts, have enjoyed a considerable prestige among social scientists.⁴ One of the earliest institutional theories to deal with organizations was outlined by Philip Selznick in 1957. Selznick viewed organizational structure as an adaptive vehicle shaped primarily by the influences and constraints from the external environment, as well as the characteristics and commitments of the organization's participants. He recognized the difference between organizations that are “technical instruments, designed as means to definite goals ... judged on the engineering principles; they are expendable” and organizations that may be “partly engineered, but they also have a ‘natural’ dimension ... products of interaction and adaptation ... receptacles of group idealism; they are less readily expendable” (Selznick 1957: 21-22).

Selznick's distinctive brand of institutional theory was applied by him to the study of the Tennessee Valley Authority public corporation. The author's primary emphasis appears to have been on institutionalization as a means of instilling value, supplying intrinsic worth to a structure or process that, before institutionalization, had

³ See Zucker (1987), Berger and Luckmann (1967), Scott (1987a, 1987b), Kritzer (1991), Moe (1984), March and Olsen (1984), DiMaggio (1988), and Meyer and Rowan (1977) for excellent literature reviews on other forms of institutions and institutional development.

⁴ In defining organizations as institutions, traditional sociological approach counters the view in economics and some political science work which defines institutions exclusively as formal rules and informal conventions. In this “new institutionalism” approach, organizations cannot be institutionalized because they are not institutions (e.g., March and Olsen 1984; North 1991; Shepsle and Bonchek 1997). By this logic, institutions are the “rules of the game,” while organizations are a type of players/actors which operate under the constraints of existing rules. Here, I adopt a more permissive sociological approach, which allows institutions to encompass rules, norms, and other social relationships, such as professional and epistemic communities and formal organizations, but also permits scholars to explicitly define the unit of analysis of interest in a discriminating manner.

only instrumental utility (see reviews by Perrow 1986; Scott 1987a, 1987b). For an organization to survive and prosper, according to Selznick, it must move from the vision of the original founders to an ongoing, well-defined set of goals, rules, roles, and rewards. Nevertheless, Selznick's conception remained largely definitional rather than explanatory; he defined and described the process but did not explicitly account for it. As Scott (1987b: 495) points out, Selznick's treatment of institutionalization "informs us *that* values are instilled; not *how* this occurs" (original emphasis).

In terms of explaining the process of institutional development, Samuel Huntington's (1965, 1968), Nelson Polsby's (1968), and Robert Keohane's (1969) work is somewhat more satisfactory. These authors, alongside Selznick, recognized that for an institutional analysis it is necessary to analyze the whole organization; while specific processes and components should still be analyzed, it is the nesting of these processes into the whole that gives them institutional meaning. Unlike Selznick, however, Polsby, Keohane, and Huntington developed models to describe how the specific processes independently and conjointly influence the overall level of organization's institutional development. In doing so, Polsby (1967) suggested that some organizations become increasingly institutionalized over time: the boundaries between an organization and its environment solidify, an organization becomes more complex in its internal operations, and it increasingly relies on well-defined, universalistic operating procedures to govern its day-to-day operation. Keohane (1969) alternatively argued that institutionalization results from an interplay of three qualities of an organization that develop over time: durability, differentiation, and autonomy. For Keohane, differentiation refers to the development of a distinctive identity and role of an organization, whereas durability and autonomy reflect interactions between organizational capabilities and political (external) pressures. Finally, Huntington (1968) argued that the level of institutionalization can be gauged by the growth in adaptability, autonomy, complexity, and coherence of the organization: the more adaptable the organization in the face of environmental challenges, the more independent the organization from the other social groupings in its work, the more purposes the organization serves, and the more unified the organization behind its goals, the more institutionalized it becomes.

In short, then, all three scholars recognized that 1) not all organizations are “true” institutions (i.e., they are not necessarily effective or viable), 2) that institutionalization is a process that occurs over the lifetime of the organization, and 3) that institutionalized organizations are different from their pre-institutional and less-institutionalized counterparts because they develop certain levels of sophistication, stability, and authority beyond the technical requirements at hand. Nevertheless, these approaches remained largely descriptive; they went into great detail in recording how various components of institutions are built up over time, but did not provide a theory that could explicitly account for either the determinants or the outcomes of this institution-building process. Moreover, many aspects of these analyses were essentially tautological (e.g., persistence both defines and empirically indicates what is institutionalized). In sum, by conflating the *process* of development with the *impact* of institutions and by failing to separate the causes of institutionalization from its major consequences, these theories proved to be of modest value to the future development of the organizational institutionalization theory.

In the subsequent years, although social scientists continued to work on organizational institutionalization and a number of excellent descriptive analyses were published, a comprehensive theoretical framework failed to emerge. With a few notable exceptions (e.g., Hibbing 1988; Squire 1992; Ragsdale and Theis 1997; McGuire 2004), political scientists and economists, abandoned the study of organizational institutionalization altogether. As Zucker (1987: 460) pointed out, “In political science and economics there is very little interest in the problems of where institutions [i.e., organizations] come from, the processes that produce institutionalization of one element but not another ... or the internal structure or coherence of institutions. Institutional production and legitimation are left to the sociologists.”

Most of the political science work that have emerged in the recent years studies the constraints that institutions (as rules of the game, not as organizational structures) place on the choices that individuals make, but placed little emphasis on the character or the development of the organizational structures (e.g., North 1986; North and Weingast 1989; North 1991; Tsebelis 1995; Gehlbach and Malesky 2007). The primary thrust of institutional studies in political science and economics remained on institutions as enforcement mechanisms that ensure individual compliance to institutional effects. In the

process, scholars have avoided the construction of indicators of institutionalization by assuming institutional status and then studying presumed institutional properties and outcomes. The problem with such assumptions, however, is that even stable, consolidated regimes vary in levels of institutional development in their organizations. For instance, Hibbing (1988) shows that the British House of Commons lags behind its younger counterpart, the US House of Representatives (assessed by Polsby 1968), in its level of institutional development. Presumably, scholars can treat both legislatures as “institutions” due to their persistence over a prolonged period of time, but the differences in the degree of institutionalization, which have important consequences for what these government bodies do and how the other political and social actors see them, would be entirely missed due to the assumption that the two are equivalent.

Simply put, even where viable institutions can be said to exist, a more relevant question for assessing institutional impacts seems to be the *degree* of institutionalization rather than simply its presence or absence. Organizations, whether institutionalized or not, exist in a dynamic environment full of political, economic, and societal changes. These entities affect and are affected by the contemporary environment. Their authority, personnel, financial endowments, and organizational structures are not static; to suggest otherwise, would be to throw the baby out with the bath water. Clearly, it is incumbent upon scholars to combine insights that have developed in sociology, political science, and economics to derive a more complete, more testable, and significantly more explicit, institutional theory. Such a theory must a) provide clear and specific definitions and avoid the inconsistent and arbitrary use of terms such as “institution,” b) devise a theory that considers institutions both as a process (i.e., the institutional development) and as a property variable (i.e., institutional impact on society and politics), and c) link institutional elements to their origins and their consequences more clearly, so that institutional theory is falsifiable and testable.

Definitions Used in This Study

As I have suggested above, little can be learned about institutions, their impacts, and their causes if the definitions used are not clear, specific, and discriminating.

Therefore, I begin by defining the relevant concepts before outlining my theory of judicial institutional development.

When political actors create a constitutional court (or another government entity), their intent regarding the scope of the court's relative authority, resources, and accountability to its creators is revealed in the institutional design that is adopted. In other words, *institutional design* is a formal blueprint that gives the constitutional court a basic responsibility (i.e., to adjudicate constitutional disputes) and basic tools to fulfill this responsibility (i.e., jurisdiction over cases and litigants, financial resources, and so on). However, as McGuire (2004) points out, simply having formal responsibility is not enough for an organization to be an "institution." In order for a constitutional court to fulfill its role as prescribed by its basic institutional design, and to survive and prosper over time, it must move from the vision of the original founders to an ongoing, well-defined set of goals, rules, roles, and rewards. The *process of judicial institutional development*, therefore, is a temporal process by which a court incrementally acquires characteristics and qualities which its creators sought to instill in its institutional design.⁵

At some point in time, the process of institutional development may transform a court into a *viable institution*. Here, I rely on Huntington's (1968) definition of an institution as modified by Ragsdale and Theis:

"As an organization achieves stability and value, it becomes an institution. Stability denotes that the organization is no longer a mechanistic entity, easily altered or eliminated... it survives various internal and environmental challenges and achieves self-maintenance ... value denotes ... [organization's] distinctive importance in society ... deemed to be important in and of [itself] ... [and] exhibited when individuals in the organization have authoritative control over policy outcomes acceded by those in other organizations" (Ragsdale and Theis 1997: 1282).

Stated differently, a viable constitutional court is "*respected by other actors as a separate, autonomous entity whose rightful and legitimate purpose is the determination of what is legally acceptable*" (Larkins 1996: 610; original emphasis). In simple terms,

⁵ It should be noted that this definition has a distinct functionalist feel but this not need be a problem. Institutionalization as a concept is clearly related to functionalism. Yet, as Keohane (1969: 895-896) argues, institutionalization is an important concept that deserves attention on its own, apart from the functionalist approach. After all, organizations must "acquire types of personnel ... and develop structural arrangements and production processes that *conform to the specifications of that sector*" (Scott and Meyer 1983: 141; emphasis added).

then, a *viable constitutional court* should be able to act as an integral part of the government policy-making apparatus, it should be able to structure the behavior of political and social actors in appropriate circumstances, and it should be perceived as performing a unique and indispensable function in a political regime.

In the following section, I adapt the existing sociological institutionalism approaches for describing and tracing the process by which courts (and other organizations) become viable institutions. In the subsequent sections, I provide a theory for an empirical study of the causes and the consequences of institutional development of the constitutional courts. This framework will be systematically applied throughout the remainder of this study.

EXPLAINING THE PROCESS OF JUDICIAL INSTITUTIONALIZATION

Above, I suggested that the *process of institutional development* is a temporal process by which an organization acquires characteristics and qualities which its creators sought to instill in the organization's institutional design/blueprint. The key concern of this section centers on the following question: What qualities must a constitutional court acquire to have sufficient stability and value to become a viable institution? To address this issue, I rely principally on the insights provided by Robert Keohane (1969), who developed the general theoretical framework, and Kevin McGuire (2004), who applied it to the study of the US Supreme Court.⁶ In short, both scholars argue that *institutional*

⁶ I chose Keohane's framework over Huntington's and Polsby's for a couple of reasons. First, as Keohane (1969: 863) and Ragsdale and Theis (1997:1284) point out, autonomy and durability reflect the organization's stability and value in the environment, while complexity and coherence refer to characteristics internal to the organization (i.e., standard operating procedures and stable relationships among the organization's staff). These internal characteristics should be considered subsidiary factors for institutional development and not as chief concepts that link organization and environment. In reference to Huntington's model, Keohane (1969: 863) writes that "Complexity and coherence may contribute to durability and autonomy and may serve as partial indicators for those concepts. They are not, however, capabilities relative to the environment but merely internal organizational characteristics.... They should not, therefore, be placed at the same level of analysis as autonomy and durability." Second, the notions of complexity and coherence are too closely related to the impact of institutional development and, therefore, should not be conceptualized as the indicators of development process altogether. Both internal dimensions refer to the changes which occur in the behavior and perceptions of the organization's personnel; these changes are not likely to occur unless buttressed and reinforced by the organization's stability and value relative to its environment. Put differently, the "external" institutionalization structures the behavior and

development is a process by which an organization becomes differentiated, durable, and autonomous; by developing these characteristics an organization will acquire stability and value representative of a viable institution. Of the three chief dimensions of institutional development, differentiation refers to the distinctiveness of the organization from its surrounding environment, whereas durability and autonomy reflect interactions between organizational capabilities and political pressures.⁷

Differentiation

According to Keohane, *differentiation* of an organization from its environment is the principal indicator of an institutionalized political organization—it establishes clear boundary lines that mark its distinctiveness and define its unique role (also see McGuire's 2004: 130; Eisenstadt 1964; Schmidhauser 1973). More specifically, Keohane suggested that if the personnel in an organization 1) have developed a unique area of expertise, 2) remain in organizational roles for a long period of time, 3) increasingly share norms and values distinctive from other organizations, and 4) rely on career patterns by which promotion takes place largely within an organization, then we would have strong evidence for the development of differentiated institutional structure.

McGuire (2004) applies this argument to study the institutional development of the United States Supreme Court. He argues that, in regard to the judiciary, the evidence of significant levels of differentiation requires that the Court's members constitute a discrete group with a well-defined role in the political system. For instance, relying on previous work by Schmidhauser (1959), McGuire suggests that the recruitment of experienced federal judges to the Supreme Court (rather than former politicians without judicial experience or legal training) eventually produced a cadre of Supreme Court

interests of organization's staff, which is a classic impact associated with institutions and institutional evolution (see Weingast 2002; Pierson and Skocpol 2002). Polsby's framework—universalistic procedures, internal complexity, and external boundaries—suffers from the same set of limitations. It fails to account for the fact that two of three dimensions refer to the secondary, internal processes, gives insufficient attention to the organizational characteristics relative to the surrounding environment, and conflates the process of development with its impact. Although Keohane's model is not perfect, unlike others, it focuses on discrete features of organizational structure in relation to the organization's environment.

⁷ Since Keohane fails to separate the structural inputs of institutional development from the outputs (impact of institutional development on behavior and perceptions), at this time I limit my discussion only to those factors which are causally prior to what institutions do or how others view them. The latter are discussed in the following sections.

justices with both judicial expertise and national (rather than regional) policy aspirations. He also suggests that the Court's differentiation developed as a result of congressional enactments which limited the circuit-riding duties of the Supreme Court and demarcated its jurisdiction from the responsibilities of other federal courts. Finally, McGuire points out that one concrete indication of the Court's distinctiveness is its location: "Surely the justices' move into their own building in 1935 was evidence of their unique identity and status" (McGuire 2004: 131; also see Gillman 1999; Brigham 1987; Schmidhauser 1973). Whether an organization has its own permanent base of operations or whether it is housed alongside another organization may seem trivial but in practice, it is important for societal perceptions regarding the role of the institution. Decorum and appearance matter (Squire 1992).⁸

Thus, differentiation—as a conceptual dimension of the judicial institutional development process—refers to the development of organizational distinctiveness; that is, the sharpness of boundaries between the constitutional court and the surrounding political environment. Without a clear identity, distinct from other political organizations, it is difficult for citizens to perceive the constitutional judiciary as a viable and effective institution. As the constitutional court develops over time, its institutionalization should therefore be partly reflected in the degree to which the court and its members represent (or at the very least, perceived by others as representing) values and expertise which are unique from other government institutions. The courts possessing greater levels of differentiation will in turn exhibit higher levels of institutional viability than the courts possessing low levels of differentiation.

⁸ For example, in 1929, Chief Justice William Howard Taft argued for the US Supreme Court to have its own headquarters precisely as a way to distance the Court from Congress as an independent branch of government. The Supreme Court booklet (available online at Supreme Court website) points out that: "The building was designed on a scale in keeping with the importance and dignity of the Court and the Judiciary as a coequal, independent branch of the United States Government, and as a symbol of the national ideal of justice in the highest sphere of activity." The entire building is adorned with symbols of law and justice—marble columns representing figures of the greatest law givers such as Justinian publishing the *Corpus Juris* and Lord Coke barring King James from sitting as a judge, as well as marble panels with more symbolic figures such the *Justice*, holding scales and sword. In short, the building itself was designed to both represent and reflect the distinctiveness and importance of the Supreme Court in the national policy-making arena.

Durability

Institutional growth and sophistication can also be expressed in terms of *durability*—“the capability of the organization to adjust to future environmental changes so as to maintain itself” (Keohane 1969: 865; also see Gurr 1974, Huntington 1968; McGuire 2004). Organizational stability, resilience, and adaptability, therefore, are outward reflections of a viable constitutional court. As the court becomes more durable, it can insure its self-preservation in the face of change more successfully than its rigid, less adaptable counterparts. In particular, Keohane (1969: 864-866) identifies three factors pertinent to the development of organizational durability: 1) willingness of government to support the organization financially, which is represented by the actual size of a government’s contribution relative to the organization’s needs, 2) the number and diversity of organization’s functions and internal subunits, and 3) organization’s age.

In applying this framework to the institutional development of the US Supreme Court, McGuire shows that institutional development of the Court followed the pattern predicted by Keohane—rather modest financial commitments to the Court in the nineteenth century eventually gave way to higher levels of support. By the second half of the twentieth century, the amount of money allocated to the Court was finally indicative of its unique function and revealed the true size and scope of the Court’s influence in the US policy-making process. McGuire also argues that the development of a durable institutional structure of the Supreme Court depended on the size of staff and organizational resources allocated to assist the justices in their day-to-day work. In short, he points out that if the constitutional court is to develop into a viable institution, the number of its supporting staff must reflect its changing needs and the volume of cases before the court. To support this argument, McGuire shows that justices enjoyed only marginal institutional durability until, in the 1920s, Congress began to formally provide for these personnel in the Court’s annual budget. Prior to this congressional enactment, justices hired law clerks at their own expense and therefore, the Supreme Court as an institution was less able to successfully adapt to the changing circumstances of the post-Civil War era volume of litigation (Ibid). The author shows that in the subsequent years the Supreme Court developed a large variety of other organizational resources, such as the legal library and its attendants, chief justice’s administrative attendant, and

eventually, computers, printers, and other communications equipment managed by a qualified support staff. In sum, as financial and other organizational resources allocated to the Court grew over time, the Court developed institutional durability representative of its intended role in the political system.

McGuire (2004: 131) adds another related link to an organization's durability: the presence of internal norms and regularized procedures for decision-making (also see Selznick 1957; Scott and Meyer 1983; Scott 1987b; Schmidhauser 1997). According to him, the degree of judicial institutionalization in terms of durability can be gauged by an increasing dependence upon established guidelines, such as detailed rules of procedure for consideration and deliberation of cases, and the ability to establish these procedures without outside interference. McGuire then shows that the Supreme Court's increasing reliance on regularized, formal procedures for the consideration of cases (rather than on informal and ephemeral preferences of each successive Chief Justice) served to frame and advance the Court's institutional role within the federal system (McGuire 2004: 132).⁹ Put differently, durable courts are those that are able to determine their own procedures, given the particular environmental conditions at a particular moment of time; if the rules of the court's procedure are established outside of the court, it is considerably less durable as an institution as the incursions of outside influence are much more likely at one point of time or another. This component of durability therefore reflects the degree of resilience of a developing organization to external interference.

However, McGuire's analysis leaves out one critical element of durability—the age of an organization—a factor which Keohane, Huntington, and other institutionalists suggest is of some importance to the analyses of organizational institutionalization. I speculate that McGuire omission of this indicator of durability reflects his belief that the chronological age of the Supreme Court (i.e., the number of years it has remained in existence) alone does not account for the level of its institutional development. Most scholars would certainly agree with this conclusion but they (as I am) also remain sensitive to an argument that the “taken-for-granted” quality of a viable institution is, in part, a function of a simple passage of time: the longer the institution has survived in the

⁹ Similarly, Smithey and Ishiyama (2002: 730) argue that the question of control of judicial procedure—who sets the rules for the proceedings of the court cases—determines the court's ability to chart its own course and adjust to the environment as it sees fit.

past, the more likely it is to survive in the future. McGuire's omission of an organization's age as a relevant component of institutional durability raises an even more fundamental issue: after all, institutionalization is a process that occurs *over time*. In other words, organization's age is an integral—albeit, not the only—component of its institutional viability in general and its durability more specifically. This makes intuitive sense because the greater an organization's age, the more likely it develops distinguishing structures and capabilities that allow it to exercise substantive political influence indicative of a viable institution. Therefore, it is necessary to explicitly account for an organization's age as one aspect of the development of institutional durability.

There is yet another aspect of durability that McGuire does not consider due to his focus on the United States Supreme Court: the duration of justices' terms of office. Because the federal judges in the United States serve life terms, Keohane's argument that differentiation requires that personnel remain in office for longer periods of time as the institutionalization occurs, does not apply neatly to the US Supreme Court and McGuire presumably excludes this aspect from his analysis for this reason. This raises a similar concern in regard to other constitutional courts. As I pointed out in Chapter 2, in designing constitutional courts, most countries opt for limited, non-renewable terms, although a few select limited, renewable terms or life tenure. Given that provisions for terms of office vary greatly from country to country and given that they usually restrict constitutional court judges to a limited number of years in office, absolute number of years in service (as an aspect of differentiation) has limited application in the studies of constitutional court development.

Although judicial tenure in office as an indicator of differentiation may not be revealing of the process of institutional development, one can assess the impact of the terms of office on the development of institutional durability. As Herron and Randazzo (2003) point out, judges with relatively short terms of office *in comparison* to other political branches will likely be more susceptible to outside influences and generally more constrained by political pressures than judges with life tenure (also see Smithey and Ishiyama 2000, Schwartz 2000; Larkins 1996; Tate and Vallinder 1995). Therefore, it is reasonable to hypothesize that the relative term of constitutional judges' office is a good indicator of how durable the institution is as a whole. If judges have shorter tenure than

the president or the members of the legislature than it is possible for these branches to completely change the composition of the court within their own term.¹⁰ Such courts will be less resilient to change and more open to parochial pressures.

In sum, then, constitutional courts with greater levels of durability should, *ceteris paribus*, possess higher levels of institutional viability. The level of court's durability, in turn, is a function of 1) government's willingness to support the court financially, which is represented by the actual size of a government's contribution relative to the organization's needs, 2) the degree of external control over the internal operations of the court, 3) court's age, and 4) the duration of judicial terms in relation to the terms of office for the elected government officials.

Autonomy

Finally, a viable institution must also be autonomous, having "some degree of independence in making its own decisions without dictation from outside actors" (Keohane 1969: 862). In particular, Keohane argues that the level of institutional autonomy is indicated by two factors: 1) personnel controls existing between an organization and other groups or other government institutions and 2) the degree to which an organization controls its own material resources. Keohane (1969: 868) points out that although personnel controls, as an aspect of autonomy, may partially overlap with some aspects of differentiation,¹¹ one aspect of personnel controls that is not covered by the differentiation dimension is the relationship between an organization and its individual members and the governments to which they are responsible.

This argument applies well to the judiciary; many scholars argue that judicial autonomy is highly contingent on the nominating and appointment procedures for the selection of judges. For instance, Holland (1991) and Smithey and Ishiyama (2000) argue that if a country's constitution stipulates the nomination of judges as the work of one institution, then those judges will be more inclined to render decisions in accordance with

¹⁰ Another relevant issue is whether the terms of office are staggered. If only a part of the court's membership changes at any one particular moment, the court will likely exhibit greater continuity and durability. In the vast majority of countries, especially those following the European model of constitutional review, constitutional court judges' terms are limited, non-renewable, and staggered.

¹¹ This occurs because autonomy depends upon the development of distinctive area of expertise by the members of an institution.

that institution's preferences. Ferejohn, Rosenbluth, and Shipan (2004) take this argument one step further, suggesting that the best single predictor of judicial autonomy is the rules governing court composition and re-composition. Following these insights, I argue that the countries that allow multiple actors to participate in the nomination and/or appointment process increase their constitutional court's autonomy relative to those countries that provide limited opportunities for political contestation of judicial nominees.

Although the degree to which an organization controls its own material resources may also seem to overlap with the concept of institutional durability, it is actually not the case. The willingness of the government to support an organization financially, which is represented by the *actual* financial contribution to fulfill organizational needs (discussed above as an aspect of durability), taps a different dynamic between an organization and its environment than the one proposed for autonomy. Here, an organization's ability to control its own material resources refers to two particular issues: 1) the limits placed on an organization's representation in the budgetary matters and 2) once the funds are received from the government, ability to allocate these funds without strict government limitations on how they must be spent. By this logic, a court that can express its needs to legislators directly during the budget drafting process is more autonomous than a court that depends on the Ministry of Justice, the Judicial Council, the Procuracy or another government agency to lobby for funds on its behalf. Similarly, a court that can spend funds allocated to it without excessive strings attached will be more autonomous in its financial decisions than a court that must spend funds under strict limitations and instructions.

In addition to the financial and personnel control aspects mentioned by Keohane, McGuire (2004: 132) also argues that autonomy is operationally indicated by the "presence of procedures protecting independence of the institution vis-à-vis other political actors and institutions" (also see Polsby 1968; Huntington 1965, 1968; Mishler and Hildreth 1984). In applying the concept of autonomy to the US Supreme Court, he points out that one of the best indications is the Court's ability to construct its agenda without outside interference; that is, the extent to which the Court can independently decide which types of cases to hear. McGuire then shows that until the late 1800s the

Congress gave the Supreme Court little control over its docket. Since then, the Court slowly obtained ever greater control over its agenda, until in 1988, the Congress granted it virtually unlimited control over its caseload (McGuire 2004: 133; also see Perry 1991). Thus, as the legislators ceded greater control to the justices, the Court was increasingly able to chart its policy course independent of congressional prerogatives.

To restate McGuire's observation in more general terms, an autonomous court should have some degree of independence in making its own decisions without dictation from outside actors; its decisions should not merely reflect inputs from the political environment but also bear the values and policy preferences of its members. One way to assess this is to ask whether the constitutional court has the final authority on constitutional interpretation (i.e., whether the court's decisions can be easily rejected or overruled by other political actors). For instance, Ferejohn, Rosenbluth, and Shipan (2004) argue when the court has the "last licks" on constitutional issues, it is often able to ignore the pressures from the politicians and make decisions on the merits of each case as it sees fit.

Another way to get at the issue of procedural autonomy is to assess the breadth of constitutional jurisdiction assigned to the constitutional court. Holding other factors constant, it is reasonable to hypothesize that the courts which have abstract and concrete review powers, with broad jurisdiction over different types of cases, have greater independent capacity than those with limited and circumscribed jurisdiction.¹² At last, a court's jurisdiction over litigants—that is, the rules of access to the constitutional court—is an aspect of institutional autonomy that should not be ignored. The constitutional courts, like all other courts, are not "positive" legislators; their power to decide on the constitutionality of laws or administrative procedures must be activated by a litigant that

¹² Autonomy may also vary from one issue-area to another. Shipan (2000: 272) argues that legislators may give courts jurisdiction to review certain types of cases but write enabling legislation in such a way that it makes it harder for courts to review these cases. Such legislation can deny standing, which effectively limits the ability of some interested parties to seek and obtain constitutional review, and can place strict time limitations on the filling of petitions, which effectively lowers the probability of judicial consideration of the issue by prohibiting review after a certain date. The specificity of the enabling legislation regarding the court's jurisdiction over different issue-areas may therefore have an impact on the effective degree of institutional capacity. This is certainly an interesting possibility that should be addressed by future research in comparative judicial politics. Students of American judiciary are already beginning to address these possibilities (e.g., Randazzo, Waterman, and Fine 2006).

has a legal right to petition the court.¹³ More flexible standing provisions, allowing for direct appeals by private citizens, local officials, and minority parties in the legislature, would then facilitate court's institutional autonomy, allowing it greater flexibility in deciding which cases to decide (and thus to act in a fashion that promotes its institutional objectives). Simply put, as access increases the autonomy of the court should also increase.

Thus, a constitutional court possessing greater levels of procedural, financial, and personnel autonomy should exhibit higher levels of institutional viability than the courts possessing low levels autonomy. The level of court's autonomy, in turn, is a function of 1) the degree of government's control over the nomination and appointment of the court's members, 2) the finality and diversity of court's jurisdiction over cases and litigants, and 3) the extent to which the court's interests and needs must be taken into consideration by the government during the budgetary and allocation processes.

INSTITUTIONALIZATION AS A PROCESS AND AN IMPACT VARIABLE

To summarize the argument so far, I conceptualize judicial institutional development as *a process by which a constitutional court becomes differentiated, durable, and autonomous*; by developing these characteristics over time it will acquire stability and value representative of a viable judicial institution. Of the three chief dimensions of institutional development, differentiation refers to the distinctiveness of the court's identity and mission from its surrounding political environment. Durability depends on the court's capability to adapt to changes in its environment. Autonomy reflects the relationship between judicial capabilities to make independent decisions and external pressures. I argue that incremental increases in a court's autonomy, durability, and differentiation levels are reflected in the rising overall level of judicial institutionalization. Figure 3.1 below represents these arguments.

¹³ Although a few courts (e.g., Hungarian and Macedonian constitutional courts) have the power to *ex officio* review, through which the court may review the constitutionality of legal norms on its own initiative, it is generally true that all constitutional courts function as a "negative legislators," deciding on the constitutionality of issues brought before them by petitioners.

Insert Figure 3.1 here

It should be clear that the development of each dimension is important on its own right because each contributes differently to the development of a viable constitutional court (i.e., they tap into different qualities of a viable institution in ways exclusive to each dimension). Yet, throughout this study I stress that they become meaningful only conjointly; while specific processes and components should still be analyzed, it is the nesting of these processes into the whole that gives them institutional meaning. Although the three aspects of institutionalization do not necessarily develop simultaneously—improvements in court’s differentiation, for example, may not be immediately matched by improvements in durability or, increased durability may in practice be matched by concomitant decreases in judicial autonomy—only when all three reach sufficiently high levels, can one claim that the court has attained the status of a viable institution. High levels of autonomy and durability of a court both depend on the existence of a differentiated organizational purpose and distinctive personnel. Yet, the degree to which the judges on the court are distinctive from other political actors is also contingent on some aspects of autonomy (e.g., nomination and appointment procedures) and durability (e.g., the age of the court). In other words, although conceptually distinguishable, the relative importance of these dimensions for judicial viability is often difficult to parse out empirically.

A major conclusion is that institutionalization is a uniform, monotonic, and homogenizing process *in theory*, even though in practice constitutional courts (and other organizations) may develop in different ways and at different rates. Some courts may develop high levels of autonomy first but develop comparable levels of differentiation only much later in time; others may develop a unique identity but will lack in durability; and yet another set of courts will become durable, but not very autonomous. In some cases, it may take decades or even centuries for autonomy, durability, and differentiation to converge at high levels. It is also likely that some institutions do not attain viability and are eventually discarded or replaced. To quote Hibbing (1988: 708), “the concept of institutionalization ... illustrates a general tendency, but with facets that fall victim to politics at particular moments” (also see Cooper and Brady 1981).

One caveat is in order. A key issue emerges in identifying a point in time when one can confidently claim that a viable institution has emerged. In laying out their institutionalization theory, Ragsdale and Theis (1997: 1384) note that it is unsatisfactory to simply state that an organization is more institutionalized at the end of a period than it was at the beginning. However, in their empirical analysis of institutional development of American presidency, the authors argue that “the time period for institutionalization is approximate and is not the same for any two units”(Ibid). Ragsdale and Theis then suggest that only when all of their institutional development indicators reach “high levels” that it is appropriate to designate an organization as a viable institution. Like the time period for institutionalization, the authors’ judgment of when the institutional development reaches levels sufficiently high of a viable institution is somewhat arbitrary and is not well grounded in theory.¹⁴

The problem of distinguishing a developing organization from a developed (i.e., viable) institution is, of course, not limited to Ragsdale and Theis’s analysis but one that plagues the entire organizational institutionalization approach. In regard to the judiciary, there is presumably a point of optimum balance in which significant judicial durability and autonomy are still matched by some responsiveness to the political and social needs and in which the distinctiveness of the institution does not inhibit its support from other government actors and the public. However, the existing theoretical and empirical research does not provide an answer to where such optimum can be found.¹⁵

¹⁴ To their credit, Ragsdale and Theis at least state their expectations of when the institutional development reaches levels sufficiently high of a viable institution. They (1997: 1284) suggest that “once those high levels [on all indicators of institutionalization] are reached, the elements taper off and become more stable (although not necessarily static).” Presumably, they mean that institutional development follows a general pattern—a period of steady institutional growth followed by a period of institutional stability/oscillation—but the authors do not discuss this aspect any further, leaving the reader to speculate precisely what is meant by their statement. “More stable” is of course a loaded condition and subject to varying interpretations.

¹⁵ Earlier, I argued that a *viable constitutional court* should be able to act as an integral part of the government policy-making apparatus, it should be able to structure the behavior of political and social actors, and it should be perceived as performing a unique and indispensable function in a political regime. At this point, the best we can do is to say that as the court institutionalizes, it will be increasingly capable of fulfilling these criteria. As I discuss below, more empirical research is necessary if we want to have a better grasp of what separates viable and effective institutions from their non-viable and ineffective counterparts. Moreover, this problem is pervasive in other key areas of political science research. Democracies, like institutionalized judiciaries, are subject to continuous changes and incremental improvements. Even where scholars agree on the definition of a consolidated democracy, no one scholar claims that the process of democratic development reaches some ultimate end. By definition, then,

In my opinion, the conceptual problem of distinguishing fully viable institutions from the non-viable, developing organizations provides analysts with a salient reason to focus on the longitudinal relationships between the causes, the patterns, and the consequences of institutionalization. It also prompts scholars to broaden their horizons and compare a number of similar institutions in varying social and political contexts. It is unfortunate that operationalizations of institutionalization have insofar only been applied rigorously to a single constitutional court, the US Supreme Court (McGuire 2004). At this point, there is no way to know the extent to which institutionalization serves as a model of *constitutional court* change and not just Supreme Court change. Moreover, this lack of empirical research leaves us unsure whether institutionalization as an explanatory variable has any independent effect on judicial impact outside of the United States.

The good thing is that these problems and lingering questions are not intractable. By applying a common framework and common measures of institutional development to a number of constitutional courts and collecting longitudinal data on their impacts, one can determine, in relative terms, which developments are favorable to the establishment and maintenance of viable constitutional courts and when this is most likely to happen during the institutionalization process (i.e., the relative levels of autonomy, durability, and differentiation necessary for the emergence of viable judiciaries). In sum, the ongoing debate about what constitutes a viable constitutional court (or any other viable institution) will not be answered unless we find general properties and temporal regularities across a large number of similar institutions. My research certainly contributes to this enterprise, but does not resolve this question definitively.

Moreover, as I argued earlier, whether one can claim that an organization has obtained the status of a viable institution or not, the *level* of institutionalization is still important for the assessments of institutional performance and its consequences. After all, “institutionalization is worth studying primarily because of the importance it may have for an organization’s impact on its environment” (Keohane 1969: 893). No matter whether an institution is young or old, highly developed or underdeveloped, if the changes in the level of institutional development did not produce a corresponding change

institutional development is a process with no definitive endpoint and should be assessed in relative, rather than absolute, terms.

in the institution's impact on its personnel as well as on the surrounding political and social environment, the concept would be worth little study. Below, I introduce two potential impacts associated with judicial institutions and institutional development that will be explored and analyzed in the following chapters. One of these impacts is internal to the organization, referring to the effects of institutionalization on the behavior of constitutional court judges, while the other captures the effects of institutionalization on public perceptions of the courts and thus reflects institutional impact on the surrounding environment. I believe that by linking the levels of institutional development to their respective external and internal impacts across a number of constitutional courts, we will be in a better position to address the theoretical concerns and gaps noted above.

The Impact of Institutional Development on Judicial Decision-Making

In general, scholars suggest that as organizations institutionalize, they may seek legitimization of their activities through active control or shaping of their political environment (see Zucker 1987: 451; also see Dowling and Pfeffer 1975). McGuire similarly argues that “as a rule, institutionalization translates into political power ... [institutionalization,] therefore, should *ceteris paribus* enhance the impact of the Court” (McGuire 2004: 135; also see Stinchcombe 1968; Meyer and Zucker 1986). He shows that substantial increases in Supreme Court's institutionalization by the beginning of the New Deal era allowed the justices to take on Franklin Roosevelt and his economic policies. Further institutional growth under the Warren Court permitted justices to vastly expand civil rights and liberties protections (see McGuire 2004: 134-135). By this logic, modest levels of institutionalization should limit the scope of the constitutional court's policy influence while greater levels of judicial institutionalization should enhance the court's ability to pursue its policy goals uninhibited. In short, judges on constitutional courts with higher levels of viability will be able to act with greater degree of independence than judges on the courts characterized by lower levels of institutional viability (recall the definition of judicial independence provided in Chapter 2).

Keohane (1969: 861) recognized that the supreme test of an institution comes during a crisis, during which external pressures increase dramatically. The response of an institution to a crisis, however, only partly reflects the pressures from outside; the

qualities and characteristics an institution has developed in the pre-crisis period mediate the extent to which external forces influence the institution's response. In regard to the constitutional courts, one example of the "crisis situation" of the sorts discussed by Keohane occurs when constitutional judges are asked to overturn the preferences of legislative majorities, presidents, or powerful economic actors.¹⁶ In these situations, the constitutional court judges may be under significant pressure from dominant political actors to rule in their favor, effectively constraining judges' ability to act independently.¹⁷ This may occur because, as Gibson, Caldeira, and Baird (1998) argue, the judiciary is dependent on other actors' support and on their willingness to comply with judicial policy-making. However, if the court has developed a substantial level of institutional viability, the boundaries which separate the court and its members from the surrounding environment will allow judges considerably greater discretion to follow their own policy views (recall that specific factors that comprise judicial autonomy, durability, and differentiation collectively protect both individual judges and the court as a whole from retaliation for unfavorable decisions).

At this point, a subtle but important detail must be added. While overruling the court or attacking its jurisdiction, finances, or personnel is a costly and time-consuming process which often requires cooperation among several political actors, non-compliance (i.e., ignoring the court's ruling) can be executed quickly and unilaterally (see Carrubba, Gabel, and Hankla 2007). The impact of institutionalization on judicial behavior should thus be greater if judges are concerned with being overruled or with potential attacks on their jurisdiction, members, or financial resources in retaliation for an unfavorable decision, and less significant if judges are concerned with other actors simply ignoring the court's decision.

¹⁶ Although this measure is fraught with several problems (see Larkins 1996; Boulanger 2001; Rogers 2001) which I will discuss in greater detail in Chapter 5, it is commonly used to assess judicial independence and judicial decision-making behavior under political constraints (e.g., Shapiro 2000; Smithey and Ishiyama 2002; Herron and Randazzo 2003; Ferejohn, Rosenbluth, and Shipan 2004; Carrubba, Gabel, and Hankla 2007).

¹⁷ If we assume alongside the proponents of strategic interaction models of judicial behavior that judges actually care about making efficacious decisions which are complied with and properly enforced (e.g., Epstein and Knight 1998; Ferejohn 1998; Epstein, Knight, and Shvetsova 2001; Shipan 2000; Ferejohn, Rosenbluth, and Shipan 2004), they will then have to give disproportionate weight to the desires and preferences of other actors and sometimes disregard their own policy aspirations entirely.

Elected politicians have a variety of tools they can legally use to influence the actions of courts, such as appointing sympathetic judges, passing legislation that overrides court rulings, failing to provide the court with sufficient organizational resources, or even amending the constitution. But politicians are able to do so only to the extent that they are sufficiently coherent as a group to amass the support necessary to attack a court. The level of judicial institutionalization intervenes crucially in this regard. In highly-sensitive cases, where judges may be fearful of potential retaliation on the court's jurisdiction or finances for unfavorable decisions, substantial levels of institutional development minimize these constraints and allow judges to issue rulings which are closer to their sincere policy preferences. But by itself, judicial institutionalization cannot guarantee faithful compliance by the losing party because even the most powerful courts cannot physically force others to accept their decisions (other factors, which I discuss and analyze in Chapter 5, matter for such considerations). In other words, if judges care about rendering decisions that are as close as possible to their ideal policy, institutional development provides them with an ability to do so. On the other hand, if judges also care about making efficacious policy—one that is complied with and enforced by other political institutions—they will still have to be attentive to other strategic constraints.¹⁸ In sum, by arguing that institutionalization systematically affects judicial behavior, I do not deny the importance of other considerations that must be taken into account in studying judicial behavior.

The Impacts of Institutional Development on Public Perceptions

While McGuire's notion of the court's political power refers to the behavioral impact of institutionalization (i.e., how constitutional judges behave in deciding cases,

¹⁸ Therefore, factors such as the degree of legislative fragmentation (the number of parties in the legislature), the extent of power concentration in the executive branch relative to the legislature, the degree of public support for the court and its decisions, external pressures (such as the EU pressure on the governments to comply and respect the court rulings), and the degree of political transparency (such that the non-compliance or attacks on the court will be visible to both domestic publics and international audiences) become important in the assessments of judicial decision-making. As many scholars argue, these factors affect both the capacity and incentives of political branches to retaliate against the court for unfavorable decisions or engage in overt non-compliance (see Epstein and Knight 1998; Ferejohn 1999; Magalhães 1999; Schwartz 2000; Shapiro 1999; Stone Sweet 2000; Shipan 2000; Epstein, Knight, and Shvetsova 2001; Smithey and Ishiyama 2002; Shapiro and Stone Sweet 2002; Herron and Randazzo 2003; Ginsburg 2003; Thorson 2004; Ferejohn, Rosenbluth, and Shipan 2004; Carrubba, Gabel, and Hankla 2007).

especially the landmark cases), another type of impact related to the institutional development is attitudinal. In theory, judicial institutionalization should be reflected in the improvements in the societal perceptions of legitimacy, trustworthiness, and indispensability of the court. “The strength of the political organizations,” argued Huntington (1968: 12), “depends upon the *scope of support* for the organizations and their *level of institutionalization*” (original emphasis).

Thus, viable courts should not only act differently, but also be viewed differently from the courts characterized by low levels of institutional development; their stability and value depends on it.¹⁹ As the court develops, rising levels of institutionalization should be reflected in the rising levels of public confidence in the court, in particular, and the country’s legal system, more generally.²⁰ These “decibel meters” (see Weingast and Moran 1983; McCubbins and Schwartz 1984; Moe 1984), which refer to the feedback institutions receive from the public, indicate the extent to which the court has developed a unique identity and value representative of a viable institution. Moreover, public “decibel meters” provide politicians with a method of monitoring the performance of the court that they can then use to either “reward” or “punish” the court and thus affect the direction and rate of its future development.

At this point, it is important to emphasize that the institutional development of constitutional courts should not only affect the levels of public confidence in the court itself, but also generate more diffuse and positive public perceptions of the country’s legal system as a whole. Put differently, I argue that *the institutionalization of constitutional courts should affect public perceptions about the quality, integrity, and independence of the entire legal system*. There are several reasons why this theoretical

¹⁹ Greater trust is associated with the perception that constitutional judges are different from other political actors, that they rely on law and the constitution, and that they are “impartial” and “objective” (Tyler and Mitchell 1994). Additionally, through the processes of selective perception and framing, those with allegiance to and trust in a court may be more likely to discount objectionable decisions and give excessive credit for favorable decisions (see Gibson, Caldeira, and Baird 1998: 355). Finally, if the court is trusted and well-respected by the public, the legislatures and executives are more likely to comply with unfavorable decisions by the court (Vanberg 1998; 2001).

²⁰ Although emphasizing the causal relationship between institutionalization and trust, I do not reject the importance of early-life cultural influences and socialization stressed by the political culture proponents (e.g., Almond and Verba 1963). In political systems that have been in place for a long period of time and where institutions have persisted and performed consistently, both processes of socialization and performance could very well have similar and reinforcing effects on institutional trust (Mishler and Rose 2001: 31).

proposition should hold. First, constitutional courts are the most visible courts in most if not all countries (see Gibson, Caldeira, and Baird 1998; Schwartz 2000; Stone Sweet 2000; Shapiro and Stone Sweet 2002; Trochev 2005) and therefore the successes and failures of these courts' institutional growth should rub off on all other courts. In making this argument, I do not suggest that the perceptions of individuals about a country's legal system are affected only by the status of the constitutional courts; there are certainly a number of other factors that will affect how much confidence the individuals express in the legal system. However, the visibility and the stature of the constitutional courts cannot be neglected in analyses of public perceptions of their country's legal system.²¹

Moreover, to the extent that a constitutional court is salient and viable policymaker, it probably has made decisions of interest and concern to ordinary people. For instance, between 1992 and 2005, the Russian Constitutional Court (RCC) received over 130,000 petitions from individuals, corporations, regional administrations, other courts, and politicians, and issued more than 1,300 decisions. A significant share of the Court's decisions reversed federal and regional policies in favor of individual political and civil rights, rights of criminal defendants, and rights of private businesses, ethnic minorities, and civil society groups. Although it is unreasonable to think that the public is intricately aware of all of these significant decisions, it is far more likely that an average Russian is more aware of the RCC rulings than she is of the rulings of the local *arbitrazh* courts and would base her confidence in the legal system, at least in part, on her assessments of the salience and viability of RCC as an institution. Thus, the second reason why institutional growth of the constitutional courts should influence the ordinary citizens' confidence in their legal systems is that these high courts make decisions that greatly affect the public at large while the lower courts have far narrower and less significant effects on public life.

²¹ As Gibson, Caldeira, and Baird (1998) show, public awareness of high courts in post-communist societies is fairly high. The authors point out that the awareness of the national high courts in large part indicates their politicization; these courts, especially in the first years of the transition from the communist rule, had to make decisions that were of great significance (e.g., human rights, lustration, economic privatization, government powers) and attracted extensive media attention both at home and abroad (also see Schwartz 2000). However, Gibson et al. note that the Russian Constitutional Court (RCC) is the least visible court in their sample: only 17.6% of respondents were fairly aware of the Court (Gibson, Caldeira, and Baird 1998: 347; on the low visibility of RCC also see Trochev 2005).

Third, constitutional courts—beyond their great visibility and potential importance of their rulings to the general public—are constitutionally charged with protecting the independence, immunity, and status of all other judges and courts. Their institutional development is a necessary (albeit not sufficient) condition for the development of the regular judiciary and for these courts' ability to provide independent and impartial resolution of disputes. In 1994, for example, due to its dominance in the Assembly, the successor of the Bulgarian Communist Party, the Bulgarian Socialist Party (BSP), pushed through the Law on Judicial Power which established new eligibility requirements for the regular judiciary and made them retroactive. Schwartz (2000: 175) points out that the goal of BSP was to purge the judiciary of the newly appointed and fairly independent (although poorly qualified) non-communist judges. In its ruling, the Constitutional Court of Bulgaria upheld the government's new professional competence and eligibility requirements, which mandated three years' judicial experience for trial court judges, but refused to permit their retroactive effect, thus allowing the non-communist incumbents to remain in office. The next year, in 1995, the Court once again stood up to BSP and protected the regular judiciary by striking down a provision of the state's budget as a violation of judicial independence.²² In short, the Court systematically protected the new post-communist judiciary from the BSP's attempt to restore communist-style judicial subservience to political power (see Schwartz 2000, Chapter 6; Ganey 2003).

Of course constitutional courts may not always protect the independence or powers of the lower court judges, but without institutionally viable and developed constitutional courts, no external force will stop the government and the procuracy from interfering in the judicial affairs and subjugating the judiciary to their own needs. In turn, without such protections, ordinary judiciary is likely to be subservient to the political branches and the general public will not express much confidence in such legal system. Institutional development thus enables constitutional courts to protect and promote the power of the ordinary judiciary, which in turn, may have a significant impact on public confidence in the legal system more generally. In sum, I theorize that the

²² The budget law placed the BSP-controlled Ministry of Justice in charge of funding the Supreme Judicial Council, which appoints judges, prosecutors, and investigators (see Melone 1996; Schwartz 2000; Ganey 2003).

institutionalization of the constitutional courts should not only affect the levels of public confidence in the court itself, but will also generate positive public perceptions of the country's legal system as a whole because viable constitutional courts are highly visible, make rulings that affect the general welfare and rights of citizens, and have capacity and the means to protect and promote the independence of the ordinary judiciary.

There is an additional nuance that I wish to add to this argument. The effects of macro-level variables, such as constitutional court institutional development, on individual's trust are indirect and mediated at the micro level by an individual's value-laden perceptions (see Silver 1987; Mishler and Rose 1997; Rose, Mishler, and Haerpfer, 1998). Although individuals are unlikely to overlook country's economic recessions, runaway inflation, judicial subservience, or gross corruption (or, alternatively, strong economic and political performance), they may discount the importance of one in favor of the other depending on their individual circumstances. Some theories thus emphasize that confidence in the political institutions varies both within and between societies as a result of different political socialization experiences linked to differences in education, gender, age, or other social structural influences and/or because people with different political values and interests evaluate political and economic performance differently (Mishler and Rose 2001). This makes it likely that the individuals living in the same society and exposed to the same level of judicial institutionalization will nevertheless manifest very different levels of confidence in the legal system because they differ either in their personal experiences or in the priorities they assign to common experiences. Thus, micro-level influences like age, gender, education, satisfaction with one's own financial situation, individual perceptions of corruption, as well as influences of certain macro level variables (e.g., country's per capita GDP, level of democracy), must be taken into account in any attempts at modeling the relationship between judicial institutionalization and citizens' confidence in the legal system.

One final detail is important. While mass confidence in state and societal organizations is often considered hallmark of democratic governance, elite support for these organizations is less studied. Clearly, elites play an extremely important role in creation and survival of new democracies (see Higley and Burton 1989; Huntington 1991; Bunce 1995, 2000; Linz and Stepan 1996). "Institutions, be they parliament,

ministries or political parties,” argues Steen (2001: 697) “are the arenas for mobilizing and regulating conflicts among the elites.” Yet, the existing studies of public support for new democracies and public confidence in newly created democratic institutions continue to focus disproportionately on the mass citizenry and ignore the question of whether the support for democracy and its institutions is similar among ordinary citizens and social, economic, or political elites. Miller, Hesli, and Reisinger (1995, 1997) therefore believe that while citizen support may be one of the critical factors needed for the successful development and performance of democratic institutions, it may be even more important to know how the elites in the emerging post-communist regimes perceive these new institutions and their performance. Therefore, the legitimacy of post-communist democratic regimes and institutions should be analyzed from both the mass public and elite perspectives.

The crucial question, then, is how different strata of the population react to institutions, and how dependent the organizations are on support from different groups for attainment of institutional viability. In this study, I focus upon the role of the economic elites.²³ I define such elites as persons who normally represent a business enterprise or a financial company (either state-owned or private) for official purposes, that is, the individuals who normally deal with banks or government agencies. Such persons occupy the position of a general director/manager, financial manager, and/or the owner of the business enterprise.

I assume that trust in the judiciary from this group is of special importance for assessing the impact of judicial institutionalization. An independent and powerful judiciary is essential not only to democratic government, but also to a free market economy in which participating suppliers and consumers need to know what the rules are

²³ Steen (1996) suggests that another category of elites—the “social elites”—is important in the post-communist societies. He argues that highly educated individuals may be referred to as “social elites” and assumes that the higher levels of education indicate higher levels of “political competence.” However, Steen does not explicitly define what specific educational standards would qualify one as a “social elite” (Doctoral degree? Master’s degree?). Moreover, his argument that the well educated people are, by definition, better informed about politics is suspect. The notion of social elite may, nevertheless, be worth exploring. For instance, if an individual has attained a graduate degree, falls into the country’s highest income level, and reports high level of interest in politics, he or she may in fact be considered a member of the “social elite.” Presumably such person would have a systematically different response to confidence in the legal system questions than an average citizen. I will explore this possibility in the course of evaluating mass public confidence, but at this point, see no reason to dedicate a separate chapter to this category of respondents.

and that their respective economic rights and obligations will be enforced (Verner 1984; Ferejohn, Rosenbluth, and Shipan 2004). The constitutional rights protections provided by the constitutional courts (e.g., private property guarantees, fair taxation and contract law standards) are of great and immediate importance to the successes and failures of these businesses, and especially to the owners of private enterprises, and their trust in the legal system should be more closely linked to the institutional development of the constitutional courts than that of the mass citizenry.

CONCLUSION

In sum, mass public and elite confidence in the legal system and the behavior of the constitutional judges in rendering decisions should be systematically related to the constitutional court's level of institutional development (see Figure 3.2 below). Conjointly, they will indicate the impact of judicial institutional development and the extent to which the constitutional court has emerged as a viable institution. Although one can select other indicators of institutional impact—for instance, the degree of actual compliance to court's rulings by politicians and bureaucratic agencies responsible for the implementation—I restrict my focus to public and elite confidence and judicial behavior for now. The following chapters apply this theory to the post-communist constitutional courts and test its validity empirically.

Insert Figure 3.2 here

FIGURES

Figure 3.1, Judicial Institutionalization and Its Components

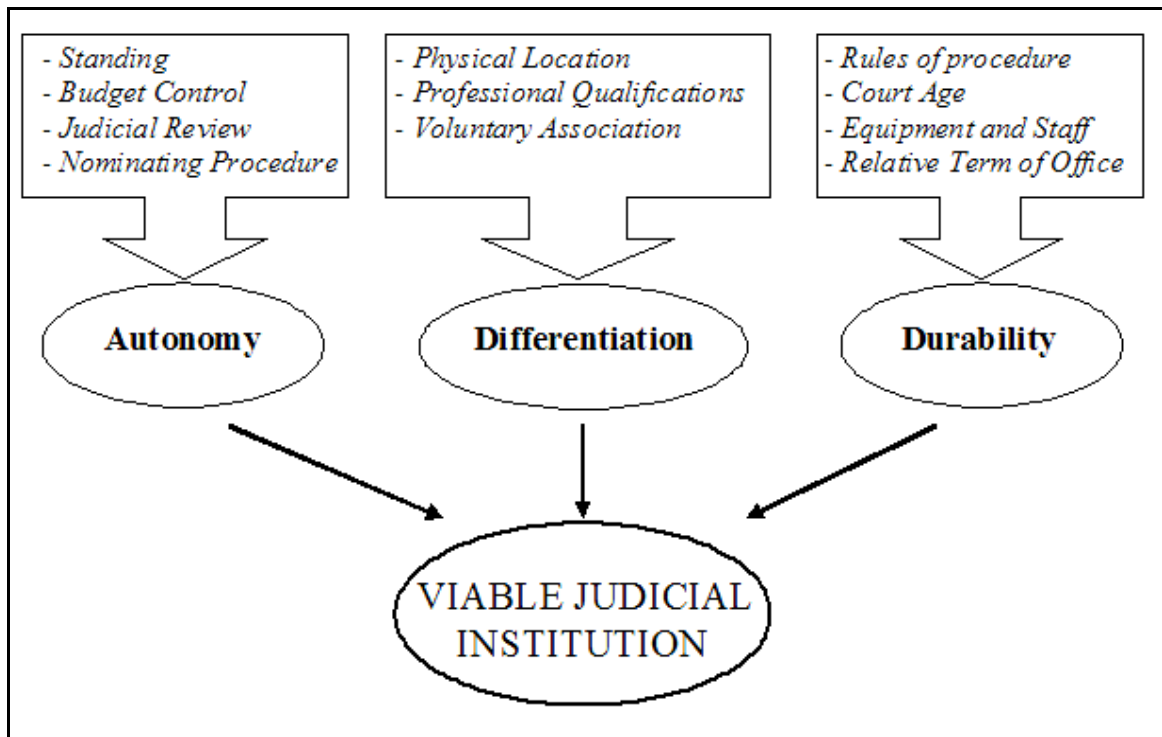
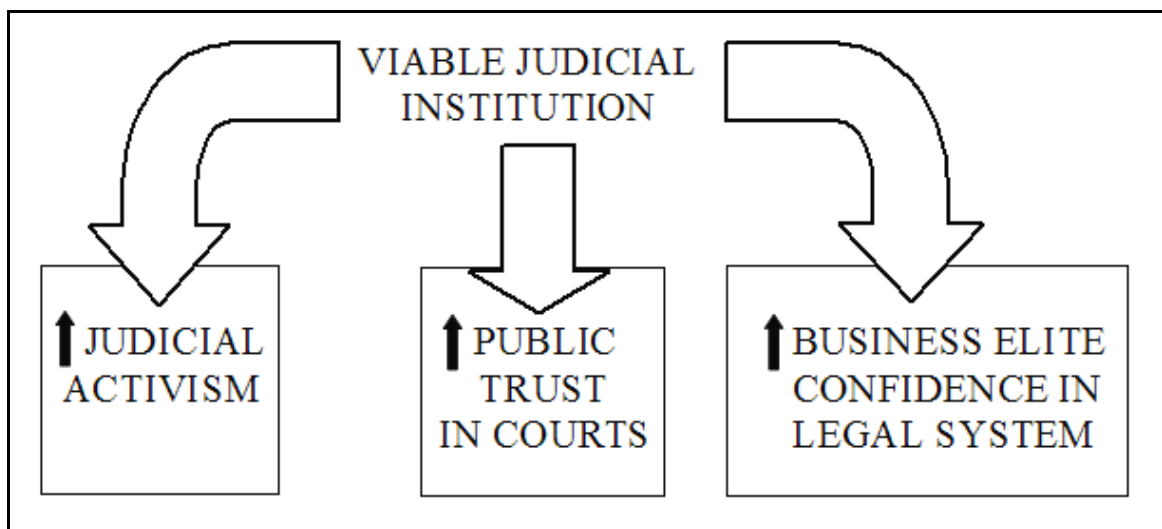


Figure 3.2, Judicial Institutionalization and Its Impacts



CHAPTER FOUR

Constructing a Dynamic Index of Judicial Institutionalization

INTRODUCTION

The very concept of institutionalization refers to organizational characteristics in relation to the organization's environment (Keohane 1969). Yet, before we can identify potential influences on the development of judicial institutions and address their subsequent impacts we must first define and find empirical manifestations of institutionalization. Chapter 3 argued that institutionalization of judicial organizations (i.e., courts) is regarded as *the process by which courts become differentiated, durable, and autonomous*. Of the three chief dimensions, *differentiation* refers to the development of organizational distinctiveness; that is, the "sharpness of boundaries between the organization and its environment" (Polsby 1968; also see Keohane 1969; McGuire 2004). Without a clear identity, distinct from other political organizations, it is difficult for citizens and politicians to perceive the judiciary as a viable and/or effective institution. In practical terms, therefore, differentiation implies that the organization's members should constitute a discrete group with a well-defined role in the political system (see Eisenstadt 1964; also see McGuire 2004).

Institutional growth and sophistication can also be expressed in terms of *durability*—an ability to persist and to adapt to change (Huntington 1968; Gurr 1974). Resilience and flexibility in the face of political and social changes, therefore, are marks of a stable policy maker. If the judiciary can maintain its role in the ebb and flow of politics, this serves as a measure of its integration into the political system. Additionally, given that the courts are dependent on the legislature and the executive for organizational

resources, the durability of judicial institution is captured by the willingness of other branches to support the organization financially (see Polsby 1968; Keohane 1969; Hibbing 1988; Schmidhauser 1989).

Finally, an institutionalized court should be appropriately insulated from the other branches of the national government. McGuire (2004: 132) argues that judicial *autonomy* is operationally indicated by the “presence of procedures protecting independence of the institution vis-à-vis other political actors and institutions” (also see Huntington 1965, 1968). An autonomous court has some degree of independence in making its own decisions without dictation from outside actors; its decisions do not merely reflect inputs from the environment but also bear of the values of its members. Thus, autonomy is enhanced by the process whereby the organization becomes “valued for itself, not as a tool but as an institutional fulfillment [of the society’s goals and aspirations]” (Selznick 1957: 16).

In sum, of the three chief dimensions of institutional development, differentiation refers to the distinctiveness of the organization from its surrounding environment, whereas durability and autonomy reflect interactions between organizational capabilities and environmental pressures. Furthermore, since durability, autonomy, and differentiation do not necessarily develop simultaneously, it is possible to conceive of *levels* of institutional development as well as the *scope of change* (i.e., the direction and the rate of institutional growth). The latter aspect is particularly important given that although the level of institutional development generally increases over time,¹ it is also possible to instill stability and value within more recent institutions; and the post-communist societies encounter real choices over the viability of their governing institutions, including the judiciary. It is therefore necessary for scholars to devise measures of institutional development that capture both cross-sectional and temporal aspects of judicial institutionalization. This chapter constitutes an attempt to devise

¹ This makes intuitive sense because the greater an organization’s age, the more likely it develops distinguishing structures and capabilities that allow it to exercise substantive influence (see Selznick 1957; Eisenstadt 1964; Polsby 1968; Keohane 1969; Schmidhauser 1973; Ragsdale and Theis 1997; McGuire 2004). Yet, as Huntington (1968) recognizes, the physical age of an institution does not capture completely its viability or the rate of its development.

generalizable, yet concrete, indicators of autonomy, durability, and differentiation for the institutionalization of the constitutional courts.²

MEASURING JUDICIAL INSTITUTIONALIZATION

If the foregoing conceptual scheme is to have much value to the scholars of post-communist judiciaries, it must be accompanied by indicators for the dimensions of institutional development it identifies. In this section, I devise quantitative indicators to measure autonomy, durability, and differentiation. In the following section, I summarize the quantitative techniques used to derive an index of judicial development. The subsequent section provides descriptive statistics on judicial institutionalization for the twenty eight post-communist societies. The final section provides five short case studies to illuminate the dynamics of the development process.

In constructing a measure of judicial institutionalization, I build upon McGuire's (2004) work on the institutionalization of the US Supreme Court discussed in detail in Chapter 3. To reiterate, I expect constitutional courts to operate as *viable institutions* only when all three component dimensions (differentiation, durability, and autonomy) are attained at high levels. Each of these three aspects should contribute positively to judicial viability. I also expect that once relatively high levels across all three dimensions are reached, the process of development becomes more stable and incremental (although not necessarily static).

Differentiation

According to McGuire, differentiation of the judiciary from its environment is the principal indicator of an institutionalized political organization—it establishes clear boundary lines that mark its distinctiveness and define its unique role (2004: 130). One common measure of differentiation is the court's *physical location* (Schwartz 1993: 33). A constitutional court that has its own independent facilities provides evidence that the

² Although I operationalize these indicators with the post-communist sample in mind, the same framework has been successfully applied to other regional contexts (see Bumin, Randazzo, Walker 2005 MPSA Conference paper).

other political actors recognize the unique importance of the court's mission and are financially committed.³ For example, Bucharest's Soviet-era courthouse remained in use until the late 1990s; according to American Bar Association's *Judicial Reform Institute (JRI)* reports it was "old, dilapidated, and in general disrepair."⁴ In contrast, the Office of the General Prosecutor had been noted by the *JRI* assessors for its new marble columns. In this type of situation, the state sends a clear message to the citizens regarding its organizational priorities. Similarly, for much of its history, the U.S. Supreme Court lacked a permanent home, contributing to a certain amount of institutional insecurity—"the lack of its own building was evidence that the Court was not regarded as an institution of great importance in the federal system" McGuire (2004: 131). Furthermore, even though ordinary individuals may never step foot in the chambers of the high court, court's permanent residence provide tangible recognition of the unique identity/importance of the courts' mission by other political actors and raise the general awareness that the court exists.⁵ I thus create a dichotomous variable, *physical location*, coded zero for years in which the constitutional court resided in Ministry of Justice, Supreme Court, or had to share a building with another organizational entity, and 1 for years in which the court resides in a structure that is allocated exclusively to that court and no other organizational entity.

Another measure of the courts' distinctive identity can be gauged through the presence and operation of independent, voluntary *judicial associations*.⁶ Because judicial associations in many countries have primarily been employee unions—established to lobby for better compensation and other benefits—judicial scholars have rarely treated them as agents for judicial reform. However, many of the newly formed groups, such as

³ Alternatives to an independent facility include housing the court with the Ministry of Justice, another court building, or within the Parliament.

⁴ Available online at http://www.abanet.org/ceeli/publications/jri/jri_romania.pdf

⁵ Gibson, Caldeira, and Baird (1998: 356) suggest that generally speaking, "to be aware of a court is to be [more] supportive of it."

⁶ For the purposes of this study, the notion of judges association is defined broadly to refer to organizations formed by judges to, *inter alia*, represent their interests, promote their professional training, and protect their judicial independence. Such organizations include judge's unions. It is important to note, however, that the coding for this variable allows us to differentiate between national judicial associations that are truly voluntary and independent, and those that organize judges through mandatory membership or state-regulated apparatuses. Also see *Guidance for Promoting Judicial Independence and Impartiality—Revised Edition* (Document ID# PN-ACM-007; 1/2002)

http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf

the Slovak Judges Association, have a committed membership that has been at the forefront of constitutional reforms and the promulgation of the rule of law. Thus, it is important to elaborate why I believe an independent and voluntary judicial association can contribute to a distinctive identity of constitutional courts.

At their best, judges associations can contribute to the development of judicial viability and capacity in three ways. First, voluntary associations enhance a sense of professionalism, collegiality, and self-esteem among judges, which is particularly important in countries where the profession has been held in low regard. This has direct and immediate application to post-communist states, which share a common hurdle to attainment of judicial viability—a pervasive sense of legal nihilism (see Schwartz 2000). Second, these associations can become persuasive advocates for a code of judicial ethics. For instance, these associations can adopt their own informal codes and other mechanisms of self-regulation, and heighten awareness of ethical and constitutional issues through publications and continuing legal education. Finally, judicial associations help developing judicial leadership and advocating reforms (an area where constitutional court judges' role may be crucial and indicative of the court's unique identity in the political system). In sum, judicial associations can function as advocates for an independent and viable judiciary, especially by educating the public about judicial issues. That is, judicial associations may enhance the public's awareness that the judiciary as whole (and the constitutional court in particular) is different from other branches of government.⁷ I code this variable based on the information collected by American Bar Association's *JRI* and EU's *Open Society Institute* (OSI) databases; variable is coded zero for lack of a representative association, 0.5 for state-regulated association (or one that requires mandatory membership for all judges), and 1 for an independent, voluntary judicial association.

The third measure of differentiation is the *qualification requirements* for the position on the constitutional (high) court or, the extent to which the court's members are recruited from among the legal scholars and judicial experts that share a unique and common understanding about the innerworkings of the institution and its relation to other

⁷ For similar interpretation, see *Monitoring the EU Accession Process: Judicial Independence, 2001*, Open Society Institute (<http://www.eumap.org/reports/2001/judicial>).

political actors. Qualification provisions that require nominated candidates to the constitutional court to undergo rigorous legal exams in relevant areas of law and possess extensive judicial experience should contribute to the perception that the court is a part of a unique epistemic community, with clearly delineated entry requirements (Stone Sweet 2000; Schwartz 2000; Smithey and Ishiyama 2002; Ginsburg 2003; Ferejohn et. al 2004). I therefore ask: Do specific guidelines for judicial qualification to the constitutional court exist? Based on the available information, I code zero for lack of specific provisions that detail judicial qualifications, 0.5 for vague provisions that refer only to "formal legal training" and age requirements, and 1 for detailed and highly selective guidelines to the position on the court.

Durability

I operationalize durability of judicial institutions through four variables: financial commitment to the court, the relative term of judges, external control over internal procedures, and the court's age. The financial commitment to the constitutional court is a particularly pertinent measure of durability because in addition to capturing the institutional support, it also reveals the size and scope of the court's internal operations. Given the absence of reliable data on the constitutional courts' budgets, the level of financial commitment can also be assessed by the availability of support staff and basic equipment for the court to carry out its tasks. In general, these measures provide a reliable proxy for the level of institutional infrastructure and tap the same underlying concept as the court's budget. Therefore, to account for the financial commitment to the court, I create an *equipment and staff* variable, composed of two equally-weighted factors: the availability of support staff to help judges carry out their duties, and adequacy of the equipment for judges to carry out those duties efficiently. On an annual basis, I code *equipment and staff* zero to represent insufficient equipment and staff; 0.5 for presence of only one of the two components; and 1 for observations where judges of the constitutional court are staffed (with two or more support staff per judge) and have adequate computers.⁸

⁸ This variable is coded based on the same methodology as used by the American Bar Association's *JRI* database.

The second aspect of durability examines the *relative term* of judges. In short, those individuals without life tenure and/or with relatively short terms of office will likely be more susceptible to outside influences, and generally more constrained by political pressures than judges with life tenure.⁹ Institutionally, those courts containing judges who do not possess life tenure are less resilient to change and more open to external pressures. To capture this logic, I coded the extent of formal judicial insularity, as codified in the constitution and subsequent amendments. The variable is coded 0.25 when the term of the constitutional court judge was less than or equal to one term of the actor with the longest constitutional term; 0.5 when it was less than or equal to two parliamentary sessions¹⁰; 0.75 when it was more than two parliamentary sessions, but had a constitutionally specified limit on the number of terms and/or compulsory retirement based on age; and 1 when the term was life tenure or until voluntary retirement.

Selznick (1957) identifies another related aspect of an organization's durability: the presence of internally-established norms and regularized procedures for decision-making. This analysis uses the variable *rules of procedure* to gauge whether the internal court norms are determined exogenously or endogenously.¹¹ The variable is coded zero if procedures were established outside of the court and one if procedures were established internally, by the plenum of judges. I argue that courts which are able to establish and revise their rules of conduct in an internal, collegial setting will be more capable to adjust to changing legal and political circumstances. Finally, in order to account for the classical institutionalist insight that older organizations are more resistant to environmental shocks than their younger counterparts, I create a variable *age of court* which is coded on an annual basis as a continuous measure of the raw number of years the court remains in existence (from the initial year of transition from communism and through 2005).

⁹ Several scholars make similar arguments about the importance of life tenure (see Tate and Vallinder 1995; Larkins 19996; Schwartz 2000; Smithey and Ishiyama 2000, 2002; and Helmke 2002).

¹⁰ If legislature is bicameral, the terms of office for lower house are considered (see Nolan 2004 for explanation).

¹¹ While this measure may strike the scholars of American judiciary as odd, the courts in a number of civil law countries (within as well as beyond the post-communist sample) must submit their rules of procedure for legislative approval or await for the legislature or the ministry of justice to hand them down directly.

Autonomy

This study considers autonomy across four aspects: the extent of the court's judicial review powers, budget control and allocations, nominating procedures, and rules of access. Becker (1970) suggests that independence may be highly contingent on a court's formal (i.e., enshrined into constitution) *powers of judicial review*.¹² This power hinges on the constitutional (high) court's ability to examine laws and governmental decrees and either uphold their constitutionality, or invalidate them. Courts with constitutionally-embedded powers of judicial review (unlike the U.S. Supreme Court) are potentially more autonomous because the highest law of the land (i.e. the Constitution) grants them the power to substantially modify the laws preferred by other political actors. Furthermore, an ability of the constitutional court to review the laws after their enactment and after their substantive impact can be assessed (i.e. the power of posterior/concrete review), provides the court with an informational advantage (see Rogers and Vanberg 2002; Vanberg 1998) and gives the court an opportunity to counteract an ineffective or harmful laws in the face of other political actors' inaction (Smithey and Ishiyama 2000). Thus, I include a measure which captures the scope of constitutional review powers formally assigned to the court, coded zero for lack of final constitutional review authority; 0.5 for abstract review only; and 1 for dual/mixed review powers (concrete review and abstract review).

The second aspect of institutional autonomy focuses on the *budget allocation process*. This is a commonly used measure of judicial autonomy, which examines the extent to which the constitutional court has direct control over its budget allocations. Larkins (1996) and Tate and Vallinder (1995) suggest that the inability to meaningfully participate in the budgetary allocation process creates significant strains on the court's ability to act independently. Thus, it is reasonable to expect that the constitutional courts (or their chairmen) that determine their own budgets and decide how the money is to be allocated, are more autonomous than courts that play lesser roles in determining their specific needs. To account for this possibility, I create an ordinal measure that captures the level of court's involvement in the budgetary process. It is coded 0 for external financial control (by the national assembly, president, Ministry of Justice/Finance,

¹² But see Herron and Randazzo (2003).

Supreme Court, or High Judicial Council of Courts); 0.5 was assigned where judiciary had partial control in the budgetary process, and 1 for those courts that participate meaningfully in drafting the court's budget and supervise the allocation of dispersed funds.

The third aspect of institutional autonomy examines the *nomination procedure* for judges. It is a measure that captures how many institutional actors participate in the nomination and appointment process for the constitutional court. Holland (1991) argues that if a country's constitution stipulates the nomination of judges as the work of one institution, then those judges will be more inclined to render decisions in accordance with that institution's preferences. Songer and Haire (1992) and McGuire (2004) similarly point out that the federal judges in the United States, by the virtue of being nominated by the President only, tend to render decisions that further the president's agenda. Generally then, countries that allow multiple actors to participate in the nomination and appointment process increase their constitutional court's independence relative to those countries that provide limited opportunities for political contestation of judicial nominees. *Nomination Procedure* was coded based on the raw number of nominating actors (zero was assigned for years after transition but prior to establishing the procedure). The variable was then recoded from zero to one based on the following conditions: 0.25 for one nominating/appointing actor; 0.5 for two actors; 0.75 for three actors; and 1 if four or more actors participated in the process.

The final aspect of autonomy involves the *rules of access* to the judiciary. These rules (often referred to as provisions for *standing*), affect the jurisdiction courts possess over litigants. More flexible standing provisions, allowing for direct appeals by individuals and minority parties in the legislature, often create decisions which are creative and expansive of rights, contrary to governmental positions (Schwartz 2000: 34; also see Epp 1998). I expect courts which possess greater jurisdictional flexibility to be more likely to act in a fashion that promotes their institutional objectives. Simply put, as access increases the autonomy of the court should also increase. *Rules of access* was therefore coded zero if no laws existed to specify standing; 0.33 for standing provisions that allowed for national-level institutions only; 0.67 for cases where access was

extended to both national and local institutions; and 1 for rules that allowed individuals to petition the court directly.

In sum, these eleven indicators account for the degree to which constitutional courts operate as viable institutions, and comprise my empirical *judicial viability model*. Before proceeding, it is important to mention that to measure the dynamic changes within judicial institutions I code all of these variables on an annual basis. Thus, each country was coded during each year after its transition from communism, and the data collected capture any changes in the formal provisions or legal rules pertaining to the organization and function of constitutional courts.¹³ To minimize coding bias, I rely primarily on provisions codified in constitutions, presidential decrees, annual budgets and legislation, and other legal documents. In some instances, I also rely on published interviews with constitutional court judges and their staff, as well as subjective evaluations of monitoring agencies such as American Bar Association's *Judicial Reform Institute* and the EU's *Open Society Institute*.

CONSTRUCTING A DYNAMIC INDEX OF JUDICIAL INSTITUTIONALIZATION

I have argued that a combination of factors contributes to judicial institutional viability and that it is appropriate to designate a court (or any other organization) as an institution only when all three dimensions reach sufficiently high levels. Each of the variables described above illuminates some aspect of the constitutional court's integration into the system of national policy-making. Thus, at the theoretical level, each indicator represents an imperfect replication of a single, unobserved pattern of institutional growth. McGuire (2004) further suggests that as a matter of measurement, composite measure is likely to be a more reliable indicator of the concept than any one indicator alone (also see Berry and Feldman 1985: 48). In other words, he argues for an aggregation of the component measures into a single index.

¹³ Specifically, I look at following post-communist states: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Poland, Romania, Russia, Serbia and Montenegro, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

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

Some scholars express reservations concerning the factor analysis procedure, in large part due to the inherent difficulty of interpreting the factors. However, both Agresti and Finlay (1997) and Johnson and Wichern (1998) argue that part of the reservations associated with the use of this procedure originate from the origin rather than actual deficiencies in the application of the procedure.¹⁴ Moreover, Agresti and Finlay (1997: 634) argue that the procedure is now used in more of a confirmatory rather than an exploratory mode, which forces the investigator “to think more carefully about reasonable factor structure before performing the analysis.” Given my argument that each indicator represents an imperfect replication of a single, unobserved pattern of institutional growth, I am thus using factor analysis in its confirmatory mode.

I selected the principal factor approach of estimation offered by Johnson and Wichern (1998). This approach is a modification of the principal components approach. The major difference is that it does not assume that the communalities equal 1 as in the principal factor approach. This method use the squared multiple correlations as estimates of the communality to compute factor loading. In this model, I hypothesize that one common factor accounts for all of the elements of the sample correlation matrix \mathbf{R}_r . In this view, \mathbf{R}_r is factored as

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

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

¹⁴ Additionally, the lack of powerful computing facilities slowed the development of factor analysis as a statistical method.

The principal factor approach then uses the estimates

$$\mathbf{L}_r^* = [\sqrt{\lambda_1^*} \hat{\mathbf{e}}_1^*]$$

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

where $(\lambda_1^*, \hat{\mathbf{e}}_1^*)$, are the eigenvalue-eigenvector pairs for \mathbf{R}_r .

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

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

Using these procedures, the model produces *judicial viability* factor scores for each of the 428 court-year observations in the post-communist sample. Since this measure is calculated based on annual changes to the courts, I am able to capture the dynamic evolutionary process judicial institutions undergo during democratic transitions. This single factor score explains 89% of the sample variance. In light of this robust result, it is not necessary to derive a two-factor model or to take the factor analysis to the next stage of factor rotation. Therefore, I discuss the results obtained from the single factor model only. I believe that such focus is appropriate both theoretically (since I argue that the component measures represents a single underlying dimension of institutional growth) and methodologically (since this single factor model explains almost 90% of the total variance and none of the variables load significantly on the second factor). Table 1 on the following page provides a convenient summary of these results.

RESULTS AND DISCUSSION

Earlier, I argued that a principal component of a viable court is its *differentiation* from other political units (i.e. the establishment of clear boundary lines which mark its distinctiveness). The results in Table 4.1 indicate that the three operational measures load significantly onto one communality (i.e. a single factor score). This single, underlying dimension explains approximately 52% of the variance in the *physical location* of the court, 64% of the variance in the *professional qualifications*, and 63% of the variance in *judicial association*. These results suggest that the *differentiation* of the court from its institutional environment represents one of the dominant sub-dimensions of judicial viability.

Insert Table 4.1 here

Durability is another important component of institutionalization and I operationalized it as a function of the *relative terms* of office for judges, control over their internal *rules of procedure*, the adequacy of their *equipment and staff* (to measure financial support for the court), and the *court's age*. The results of the factor analysis provide support for this hypothesis. The single communality explains a relatively large proportion of the variance for the four aspects: 76% for *equipment and staff*, 65% for *court age*, 61% for *rules of procedure*, and 81% for *relative term*. This indicates that an extensive and adequate administrative framework, with modern equipment and a reasonable ratio of support staff per judge¹⁵ contribute considerably to the institutional viability of the judiciary. Additionally, it should not be surprising that the aspect *court age* loaded heavily on the single factor score, since the oldest post-communist judicial institutions (Hungarian and Polish courts are both 16 years old) are twice as old as the youngest one (Azeri court is eight years old); this result supports the conventional wisdom that institutional viability increases over time.¹⁶ Yet, as I argued earlier, a short life span does not spell doom for the attainment of judicial viability in younger courts,

¹⁵ At least two support personnel per judge.

¹⁶ However, it is important to note that by the end of 2005 the mean age for the post-communist constitutional courts is 12 years, and a vast majority of courts cluster in the ten- to fourteen-year-old range. Thus, I caution readers in interpreting these results and reiterate that the physical age of the institution is a necessary but not a sufficient condition for institutionalization.

and the Russian and Latvian constitutional courts perform quite well despite their relative youth (see Figure 4.1 below). In short, the data analysis leads us to believe that the viability of constitutional courts is highly contingent (but not wholly dependent) on their institutional durability.

Insert Figure 4.1 here

Finally, I suggested that constitutional court viability is enhanced by higher degrees of institutional *autonomy*. This expectation also receives strong empirical support. The first factor loadings for *judicial review*, *rules of access (standing)*, *nominating procedures* and *budget control* are 0.747, 0.655, 0.608, and 0.705 respectively. Furthermore, these variables all load minimally or negatively on the second factor, thus indicating that the first factor captures much of the essential commonality of these four indicators of *autonomy*.

It is interesting to note that *relative term* (an aspect of institutional durability) exhibits the largest coefficient in the single factor model (0.808), which points to the importance of stability or volatility in the internal composition of the courts. The impacts of *equipment and staff* (also an indicator of durability) and *judicial review* (an aspect of autonomy) are also quite substantial—0.759 and 0.747 respectively. The loading for the *equipment and staff* variable clearly supports institutionalist and functionalist arguments that organizations that are poorly staffed and equipped cannot manage their workloads efficiently and thus unable to function in a stable, predictable manner characteristic of an institutionalized entity. Similarly, the factor analysis confirms that the breadth of judicial review is one of the most important contributions to the institutional development of courts. If courts enjoy an extensive jurisdiction over cases (i.e., abstract and concrete review jurisdiction), the process of institutionalization is greatly facilitated. It is also worth noting that the *physical location* measure (an aspect of the differentiation dimension) has the lowest scoring coefficient in the model (0.521). I speculate that this result should sit comfortably with most judicial scholars; after all, a constitutional court building is just a hollow shell unless it represents a capable and professional internal structure. While judicial buildings provide some degree of differentiation between the

courts and other government institutions, it seems that their impact is of modest importance, especially in the medium- to long-term development.

To summarize, the factor analysis of various indicators of judicial differentiation, autonomy, and durability presents strong support for the hypotheses stated earlier in this paper. I suggested that constitutional courts operate as viable institutions when all three components are attained at meaningful levels. It seems that this expectation is borne out; the single factor judicial viability score explains 89% of the sample variance and accounts for all three component dimensions. Furthermore, the eleven indicators of my judicial viability model load negatively or fail to reach meaningful levels of communality on the second factor. These results carry a concrete conceptual and substantive meaning—this analysis finds that a single underlying dimension of judicial viability exists and that it is possible to gauge the extent of courts’ institutional development through careful analysis of formal provisions over time.

At this point, some readers may be questioning whether judicial institutional development, as measured here, is simply a function of the country’s experience with democracy—the more democratic a country, the more likely it is to develop a viable constitutional tribunal. This may occur because extensive political and civil rights (typically associated with liberal democratic regimes) signify support for the idea that the constitutional court has a particular role in enforcing them (Smithey and Ishiyama 2002; Tate 1995; Ginsburg 2003). Additionally, the regime’s recognition of extensive political and civil rights may provide greater opportunities for citizens and politicians to bring cases to the court, enhancing and solidifying its role in the country’s political system (e.g., Epp 1998; Tarrow 1999). Thus it is possible that as a general rule, viable constitutional courts emerge in an environment characterized by extensive protection of political rights and civil liberties. Fairly high judicial viability scores seen in Table 4.2 for Slovenia, Poland, Lithuania, Latvia, and Hungary—all considered consolidated democratic regimes using conventional criteria—seem to support this possibility.

Insert Table 4.2 here

Upon closer examination, however, it becomes clear that the relationship between democracy and judicial institutionalization is only modest. To capture the state of

democratization, I use Freedom House's cross-national time series data from the *Freedom in the World* dataset which measure political rights and civil liberties to proxy the level of democracy around the world. Political rights and civil liberties categories contain numerical ratings between 1 and 7 for each country, with 1 representing the most free and 7 the least free. I simply add the two indices together to construct a single variable that represents country's annual *democracy score*. The scores range from 2 (most democratic/free) to 14 (least democratic/free).¹⁷

Figure 4.2 shows the relationship between FH scores and judicial institutionalization. It treats judicial viability scores as the dependent variable, under the assumption that the extent of democratization in 2000 predicts judicial viability in 2005. Yet, as Figure 3.2 illustrates, the correlation is not very strong. In many countries, the viability of constitutional courts is much higher than one would expect it to be if less democratization caused lower levels of judicial institutional development. Furthermore, many of the countries in the sample fall outside the 95% confidence interval, suggesting that the causal connection between democracy and viability is not very robust. Thus, the evidence indicates that although there is a modest linear trend between judicial institutionalization and democracy, the existence of viable constitutional courts is not limited to countries with consolidated democratic regimes. The emergence of viable judicial institutions is not a mere effect of the extent of country's experience with democracy by 2000.

Insert Figure 4.2 here

While the findings reported above are interesting in themselves, an important question remains: How well does the substantive interpretation of the judicial viability score fit the empirical data given that we find only a modest democracy-judicial viability link? In other words, do we, on average, see that those countries that score high on our single factor judicial viability score are in fact more functionally-independent and institutionally-stable than their counterparts that score lower? In the remainder of this chapter, I select three cases—Albania, Ukraine, and Uzbekistan—to illustrate how the

¹⁷ Not a single country in the post-communist sample attained a democracy score of 2 (i.e., 1 on both political rights and civil liberties indices) by 2000.

process of institutional development unfolds. It is my hope that the following section shows that quantitative measures of institutional growth (like the one developed here) to which descriptive material can be related in a systematic manner will facilitate progress toward better understanding of how judicial organizations operate and evolve.

JUDICIAL VIABILITY AND COUNTRY PLACEMENT

To the extent that the judicial viability is adequately measured, the levels of institutional development of the constitutional courts should correspond favorably (or unfavorably) with the courts' ability to become a distinctive and respectable force within the fledgling post-communist regimes. By this logic, modest levels of judicial viability should constrain the courts while greater degrees should enhance the impact of the courts on their legal and political environments. To illustrate this point, I selected one case (Albania) in which the constitutional court attains a significant degree of institutional development by the end of 2005, one in which the court oscillates at modest level of institutional development (Ukraine), and one where institutional framework remains undeveloped (Uzbekistan).¹⁸

Insert Figure 4.3 here

Albania

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

¹⁸ Also see Table 2 for a full list of judicial viability scores and ranks by country.

Court's judicial review competencies, and the subjects that may put the Constitutional Court into motion.

It is fair to say that until 1998 the Court operated under a variety of constraints, including Albania's civil unrest of January 1997 which led to a significant destruction of the court infrastructure and the closing of the court for several months.¹⁹ Since 1998, however, the situation for the Court has improved significantly and consistently. The Court became considerably more confident in exercising its authority, rendering one of its most important decisions to date in 1999, in which it declared the death penalty provided by the Criminal Code as incompatible with the Constitution (V-65/99). Figure 4.4 illustrates this dynamic.

Insert Figure 4.4 here

Yet, despite the fact that the 1998 law solidified the Court's role in the Albanian political system, it also required the passage of additional legal acts for its implementation. Consequently, in February 2000, the Assembly adopted the law which regulates issues such as the submission of the applications, the preliminary review, and the adjudicating procedures. Although the 2000 law reduced the Court's authority to review certain types of individual constitutional complaints (compared to authorities foreseen by the 1998 provisions), the role of the Court has become more evident to citizens as indicated by a steadily increasing workload until 2003 (see Figure 4.5).

Insert Figure 4.5 here

At the end of the observation period (2005), it is clear that the Constitutional Court has attained significant institutional stability and commitment from the lawmakers. Figure 4.5 shows that the late 1990s and beyond constitute a new era in the Court's development. It now has vast constitutional review jurisdiction over cases, issues, and litigants. Council of Europe Venice Commission and other monitoring agencies agree that guaranteed terms of office for judges are respected in practice and none of the former Constitutional Court judges were pressured into early retirement. In practice, all

¹⁹ See Scott Carlson, "A Study of the Judicial System in the Republic of Albania," prepared for the World Bank 21 (1997). Since then, the government has renovated the building of the Constitutional Court several times and updated its network capabilities in 2003.

appointments to the Constitutional Court, as envisaged by the original law, are made from among highly qualified professionals (scholars with a degree in “higher legal studies”) with at least fifteen years of experience in the legal profession.²⁰ Additionally, the Constitutional Court administers its own budget, although the Assembly can modify the draft budget submitted annually by the Court’s President. Table 4.3 shows that the level of funding for the Constitutional Court has been stable in recent years.

Insert Table 4.3 here

Most important for the purposes of this illustration is that the constitutional court design and institutional infrastructure outlined by the constitution-drafters was ultimately promulgated by the Assembly, albeit with significant delays in the first years of Court’s existence and in a piecemeal fashion. The fact that the Court commenced its activities in 1992, yet takeoff institutionalization did not follow until several years later (from 1997 to 2000, with a more incremental pattern emerging thereafter) reinforces the argument that unless researchers delve deeper, and look beyond specific constitutional provisions to the dates of implementation, our inferences about the development of judicial institutions will remain incomplete. Stated another way, if we wish to understand the variation across courts in terms of their authority, we must examine how they develop over time.

Ukraine

The Constitutional Court of Ukraine (CCU) scores in the middle range of judicial viability index (16th out of 28 countries, with a judicial viability score of 0.82 in 2005). The Court’s institutional development remained at relatively low levels until the late 1990s and its progress since then has been incremental and modest. Notably, it is one of the youngest courts in the sample (9 years of operation), which may in part explain its modest levels of institutionalization. Figure 4.6 highlights the process of institutional development of the CCU. It also illustrates my earlier argument—unless we look beyond constitutional provisions to the dates of their implementation, we would incorrectly

²⁰ Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania, art. 7.1, Law No. 8577, 4 FLET. ZYRT. 101-22 (2000)

conclude that the CCU attained some functional ability as early as 1996, while in reality existing only on paper.

Insert Figure 4.6 here

Prior to the adoption of its first post-Soviet constitution on June 28, 1996, Ukraine functioned under a series of interim constitutional provisions. The 1996 Constitution guarantees basic human rights and mandates the separation of powers into legislative, executive, and an independent judiciary.²¹ As Figure 4.6 shows, it is no surprise that the major upswing in the Court's institutional development corresponds with the implementation of relevant provisions of 1996 Constitution. The CCU consists of 18 justices (one of the largest courts in our sample), with the President, the Verkhovna Rada of Ukraine (VRU; legislature), and the Congress of Judges²² each appointing six of them for a single 9-year term.²³ Requirements for the CCU justices include having attained the age of 40, professional experience of no less than 10 years, and residence in Ukraine for the past 20 years. Regional experts, however, voice concerns regarding the qualification requirement of "work experience in the sphere of law," which is apparently not limited to having practiced before the court. No legal definition of what constitutes such experience exists, and it is often interpreted loosely.

The CCU is responsible for drafting its own budget and administering the funds once they are approved by the legislature.²⁴ Table 4.4 shows that in practice the budget of the Court has been steadily increasing. It seems that the Ukrainian government is at least financially committed to the creation of a viable constitutional court.

Insert Table 4.4 here

²¹ The Constitution was amended in December 2004 (see BVR, No. 2/2005, art. 44) as part of a compromise with the outgoing government. These amendments do not affect the judiciary, but they attempt to transform Ukraine into a parliamentary form of government, providing for a stronger Verkhovna Rada of Ukraine (which will appoint and dismiss the Prime Minister and most other ministers) while significantly reducing the authority of the President. Due to their perceived controversial nature and alleged violations of procedural guidelines during their adoption, the President, on a number of occasions, had hinted at a possibility of appealing the constitutionality of these amendments before the Constitutional Court of Ukraine.

²² Ukraine's judicial administration system is extremely convoluted, with numerous bodies sharing the responsibilities for different aspects of court administration. The highest bodies in this system are the Congress of Judges of Ukraine and the Council of Judges of Ukraine (COJ), its executive arm.

²³ Const., art. 148.

²⁴ LJS arts. 41(11), 50(11); LCC art. 31.

Additionally, each justice of the CCU has a judicial assistant and a research consultant, who must be citizens of Ukraine and have higher legal education.²⁵ The justices may independently select their assistants and research consultants, who may not be hired or removed without a justice's consent.²⁶ Notably, while these staffing provisions came into force in 1997, they were not fully implemented until late 1998. Furthermore, as of 2001, the CCU appears to be fully equipped with the computers and other necessary equipment, in large part due to the continuing external funding by the American Bar Association and the Council of Europe. These factors contribute to the institutional development of the CCU, but tell only part of the story.

One of the traits of an institutionalized organization is its active participation in the relevant policy-making arenas. The annual changes in the total number of cases adjudicated by the court, therefore, should be outward reflections of its level of institutional development. How has the Ukrainian Constitutional Court fared in this regard and how well does its level of activity correspond to our judicial viability scores? One can readily observe in Figure 4.7 that the CCU has not emerged as an active, viable policy-maker.

Insert Figure 4.7 here

It seems that this low level of activity is partly rooted in the fact that although anyone has the right to file a petition with the CCU requesting the official interpretation of the law, only the President, at least 45 VRU members, the Supreme Court, the Ombudsmen, and regional legislatures may file a constitutional appeal regarding the constitutionality of a legal act.²⁷ There is also a higher threshold of admissibility for requests for official interpretation of legislation submitted by individuals as opposed to the government entities. Individuals must demonstrate "a practical necessity" in having an official interpretation of a law which may result in violation of their rights.²⁸ This lack of individual standing to petition the CCU directly means that it is not a fully effective mechanism for protecting individual rights. Additionally, many individuals mistakenly

²⁵ Const., arts. 40.2, 49.2; LCC arts. 25., 49.2.

²⁶ See CCU Procedural Regulations § 74.3. It is interesting to note that no other judge or court in Ukraine is given this level of administrative control.

²⁷ Constitution, art. 150; Law on the Constitutional Court, art. 40.

²⁸ Law on the Constitutional Court, arts. 93-94.

believe that the CCU is the highest appellate jurisdiction in the country and have filed 3,497 “appeals” against general court judgments with it since 1997.²⁹ It is thus also possible that the Court has been burdened by a number of “frivolous” petitions, which contributes to its low number of adjudicated cases.

Furthermore, while the CCU is typically perceived as acting fairly and independently when issuing its decisions, it has been criticized sharply in a number of notorious decisions issued in late 2003. These included affirming constitutionality of draft constitutional amendments that were supported by the Presidential Administration but regarded by independent domestic and international experts as a significant step backwards in the establishment of the rule of law; and interpreting the Constitution as allowing then-President Leonid Kuchma to run for office for the third time. Finally, although the CCU’s decisions are usually respected in practice, the government has been able to find ways around some decisions on unconstitutionality of certain laws, complying only with those decisions it deems favorable and disregarding the others.³⁰ As a result of these instances of non-compliance by the government and CCU’s own controversial decisions, therefore, it is likely that the CCU is not viewed as a fully viable forum for constitutional adjudication. As I have argued earlier, high levels of institutionalization should lend both legitimacy and potency to judicial decisions, whereas low or modest levels of development should indicate limited impact.

2005 was a crucial year for the CCU and Ukraine more generally. The new democratic government that came to power following the 2004 Orange Revolution has been unable and at times unwilling to address the numerous systemic deficiencies in the administration of constitutional justice. For instance, when the constitutionally prescribed tenure of nine justices expired in late 2005 and the CCU was left with only 5 justices (there were 4 pre-existing vacancies), the VRU’s commitment to the Court was tested and proven to be lacking. The remaining number of justices was insufficient to constitute

²⁹ See Mykola Selivon (CCU Chairman), *The Constitutional Court of Ukraine: 9th Anniversary*, 4 BULLETIN OF THE CONSTITUTIONAL COURT OF UKRAINE (2005).

³⁰ For instance, American Bar Association’s *Ukraine 2006 JRI* report mentions that the CCU has issued a number of essentially repetitive decisions on partial unconstitutionality of annual budget laws, including those related to the judicial budgets. Nevertheless, every subsequent budget law includes the same language as that which was deemed unconstitutional. In another example, the government, in a matter that was pending before the European Court of Human Rights, failed to inform it about a relevant decision by the CCU. Unfortunately, no legally specified mechanisms are available to the CCU to compel the government to comply with its decisions.

a quorum for either instituting new proceedings or for adjudicating pending cases (see Table 4.5 below). The President and the Congress of Judges promptly appointed nine additional justices, but the Verkhovna Rada, for purely political reasons, has stalled the mandatory swearing-in ceremony for these justices for almost nine months.³¹ The Court was thus paralyzed and unable to perform its functions from October 2005 until August 2006.³²

Insert Table 4.5 here

In sum, I believe that the Court's partial institutional sophistication and continuous institutional volatility corresponds quite favorably to theoretical predictions made in Chapter 3. Empirically, it also appears that judicial viability index for CCU does a good job at approximating its institutional development and impact. To reiterate, it is too early at this point to claim that court's institutional development is causally related to its impact on society and its activity levels; I merely note that anecdotal evidence seems to support this assertion and investigate it in greater detail in the following chapters.

Uzbekistan

Since its proclamation of independence from the former Soviet Union, Uzbekistan has made little progress towards institutional development of its constitutional court. The 1992 Constitution provides for a presidential system with separation of powers between the executive, legislative, and judicial branches, but in practice, president Islam Karimov dominates Uzbek political life. Karimov, the former First Secretary of the Communist Party of Uzbekistan, has held power since he was first elected in December 1991. He has reportedly used a variety of devices, including suppression of the media and of opposing political parties, referenda that were considered neither free nor fair by international observers, and violations of human rights, to retain

³¹ Apparently, the VRU was interpreting its right to control swearing-in of the justices as a veto power against appointees of the President and the Congress of Judges. Most observers agree that this was constitutionally impermissible. Interestingly, the possibility of such a situation was forewarned of as early as two months prior to its occurrence. See Bohdan A. Futey, *Crisis in the Constitutional Court of Ukraine: A Court Without Judges?*, 34 YURYDYCHNY VISNYK UKRAINY (2005).

³² As of August 4, 2006, Verkhovna Rada appointed Holovin, Kolos, Markush, and Ovcharenko as Constitutional Court judges. President expects the Court to resume work on August 7, 2006. (Source: Unian News Agency; <http://www.unian.net/eng/lastnews/>).

control. Uzbekistan has received consistently low democracy and rule of law ratings from Freedom House and Polity Project, and the 2005 U.S. Department of State *Country Report on Human Rights Practices* concluded that, “Uzbekistan is an authoritarian state... with limited civil rights.”³³ The most recent parliamentary elections in 2004 (for the seats in the lower chamber of the parliament), fell significantly short of international standards.

The Constitutional Court (CC) was established in December 1995 pursuant to “The Law on the Constitutional Court” enacted in April of that year. The Court is self-managing and funded directly by the Ministry of Finance, but does not have its own line-item in the national budget.³⁴ It has 22 staff members, a well-maintained building, and has been sufficiently equipped since 2000. The existing interviews with CC judges seem to point to the fact that the regime has lived up to its financial commitment to the Court.

The Court consists of seven members, one of whom must be from Karakalpakstan region. The CC judges must either be lawyers or political figures. Historically, however, all judges appointed to the CC have been lawyers. Judges are selected for a five-year term, subject to re-appointment. Judges are nominated by the President and then “confirmed” by parliament. In practice, all of the candidates nominated by the President were appointed. Notably, an ex-President becomes a member of the court for life.³⁵ While this situation has not yet presented itself, this provision circumvents the appointment process established for the other candidates.

Parliament (and various leaders and subgroups), the President, the chair of the Supreme Court, the chair of the High Economic Court, the procurator general, and three judges of the CC may present cases for consideration to the court, but individual citizens cannot.³⁶ Citizens have reportedly applied to the court for review of decisions by the regional and district level procuracies, but the CC has declined those cases, citing a lack of jurisdiction. The CC representative who met with the *Uzbekistan 2002 JRI* assessment

³³ U.S. Department of State *Country Report on Human Rights Practices 2005 - Uzbekistan* (released by the Bureau of Democracy, Human Rights, and Labor, March 2006). Available at: <http://www.unhcr.org>.

³⁴ Questions concerning the percentage of the national budget allocated to the court system cannot be addressed because the national budget is not a publicly available document. During his interview with the JRI assessment team in 2002, the CC representative was unwilling to divulge the exact amount of salary, noting that salaries in Uzbekistan are generally quite low, but at least the salaries CC judges are paid are comparable to those paid to other high level government officials.

³⁵ Constitution of the Republic of Uzbekistan, 8 December 1992, Art. 97.

³⁶ Law on the Constitutional Court, 1995, Art. 19.

team recognized that the CC has not been a very active organization, rendering only 10-15 decisions per year.³⁷ Unfortunately, official statistics are not readily available so it is impossible to trace the changes in the Court's caseload over time as I have done with Albanian and Ukrainian caseloads. Furthermore, although the CC publishes its decisions and guiding opinions in their magazine or newsletters, international experts point out that the opinions are usually brief, superficial, and provide little basis for academic or public scrutiny. Thus, despite financial security and sufficient staff and equipment (variables that loaded highly the judicial viability factor score), the Court remains weakly institutionalized as Figure 4.8 indicates. This finding reinforces my argument that judicial viability is contingent upon the totality of individual components of autonomy, durability, and differentiation (rather than the presence of any one individual aspect).

Insert Figure 4.8 here

CONCLUSION

At this point, it is clear that—at least on the surface—the judicial viability index can provide a useful tool to judicial researchers in identifying the underlying dimension of judicial institutionalization. The previous discussion also points to the possibility that institutionalization of constitutional courts may be systematically related to the citizen's attitudes toward the judiciary and to the courts' activity levels. In the following chapters, therefore, I consider various effects of judicial institutional development in greater depth. In Chapter 5, I link constitutional courts' development to judicial policy outputs. I argue that judicial viability affects the degree to which judges on constitutional courts become actively involved in deciding constitutional disputes and the legality of government policies—greater levels of institutional development should result in higher rates of

³⁷ Some experts believed that the CC caseload would increase in 2002 because it was given authority to review decisions and instructions of the Prosecutor General to ensure they comply with the constitution (pursuant to Art. 13 of the new Law on the Procuracy, NO. 257-II, 21 August 2001). Despite this enhanced jurisdiction, however, no cases of this type have made it to the CC. Furthermore, neither lawyers nor lower court judges could cite one key CC decision that had an important influence on civil rights or liberties. Nor could they cite one decision that had arguably been made against the interests of the executive power. Several referred to the CC as a “dead” organization (see *Uzbekistan 2002 JRI* report, available at <http://www.abanet.org/ceeli/>)

judicial activism. In Chapters 6 and 7, this study examines whether perceptions of the mass public and economic elites about their legal systems are affected by the institutional development of their constitutional courts. I hypothesize that the confidence in the national legal systems is systematically related to the constitutional court's development.

TABLES

Table 4.1, Factor Loadings for Judicial Viability Model

Variable	Factor 1 Loading	Uniqueness
Physical Location	0.521	0.729
Professional Qualifications	0.637	0.595
Voluntary Association	0.629	0.604
Relative Term	0.808	0.348
Court's Age	0.654	0.572
Equipment and Staff	0.759	0.425
Rules of Procedure	0.609	0.63
Judicial Review	0.747	0.442
Nominating Procedures	0.608	0.63
Budget Control	0.705	0.503
Rules of access (standing)	0.655	0.571
Eigenvalue	4.951	
Proportion explained	0.89	

Table 4.2, Judicial Viability Scores and Relative Ranking for the Post-Communist Courts, 2005

Country	Court's Age	Judicial Viability Score	Country Rank
Albania	14	1.24	2
Armenia	10	0.54	23
Azerbaijan	8	1.01	12
Belarus	11	0.37	24
Bosnia-Herzegovina	9	0.82	15
Bulgaria*	14	1.12	6
Croatia	14	1.02	11
Czech Republic**	13	0.63	20
Estonia**	13	0.63	19
Georgia	11	1.16	5
Hungary**	16	1.11	7
Kazakhstan	10	0.11	25
Kyrgyz Republic	11	0.69	17
Latvia**	9	1.08	10
Lithuania**	13	1.10	9
Macedonia	14	0.95	14
Moldova	11	0.62	21
Mongolia	13	0.66	18
Poland**	16	1.17	4
Romania*	14	0.99	13
Russian Federation	11	1.23	3
Slovakia**	13	1.11	8
Slovenia**	14	1.31	1
Tajikistan	10	0.11	26
Turkmenistan	13	-0.49	28
Ukraine	9	0.82	16
Uzbekistan	10	-0.26	27
Serbia-Montenegro	11	0.58	22

Notes: For Serbia-Montenegro, 2003 data are used

Country ranks range from 1 (highest) to 28 (lowest)

* = EU candidate

** = EU member

Table 4.3, The Budget of the Constitutional Court of Albania, 2001-2004

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

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

Table 4.4, The Budget of the Constitutional Court of Ukraine, 2003-2006

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

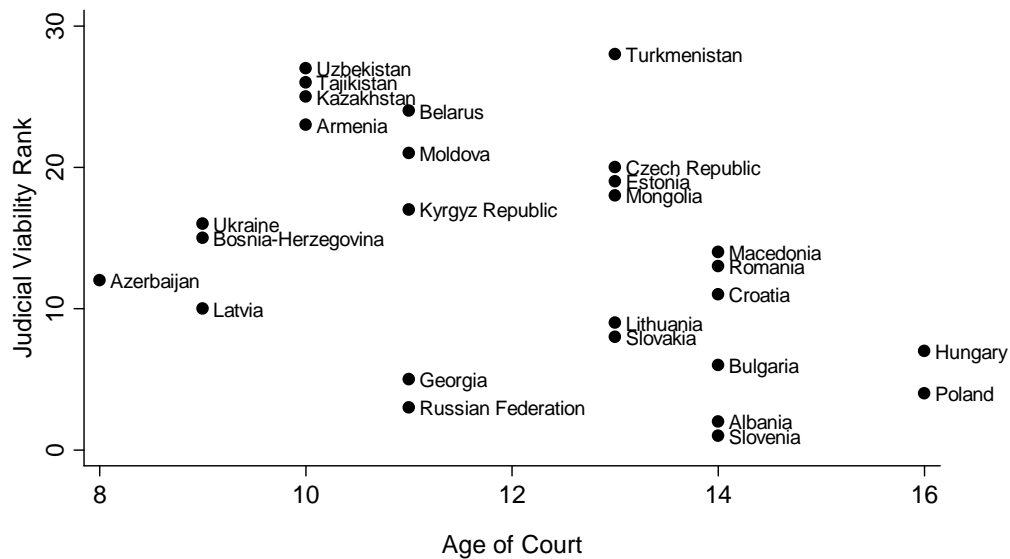
Sources: Law on the State Budget for 2003, Annex 3 (BVR, No. 10-11/2003, art. 86; *last amended* BVR, No. 16/20054, art. 236); Law on the State Budget for 2004, Annex 3 (BVR, No. 17-18/2004, art. 243; *last amended* BVR, No. 5/2005, art. 122); Law on the State Budget for 2005, Annex 3 (BVR, No. 7-8/2005,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

Table 4.5, Vacancies on the Constitutional Court of Ukraine, 2005-2006

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

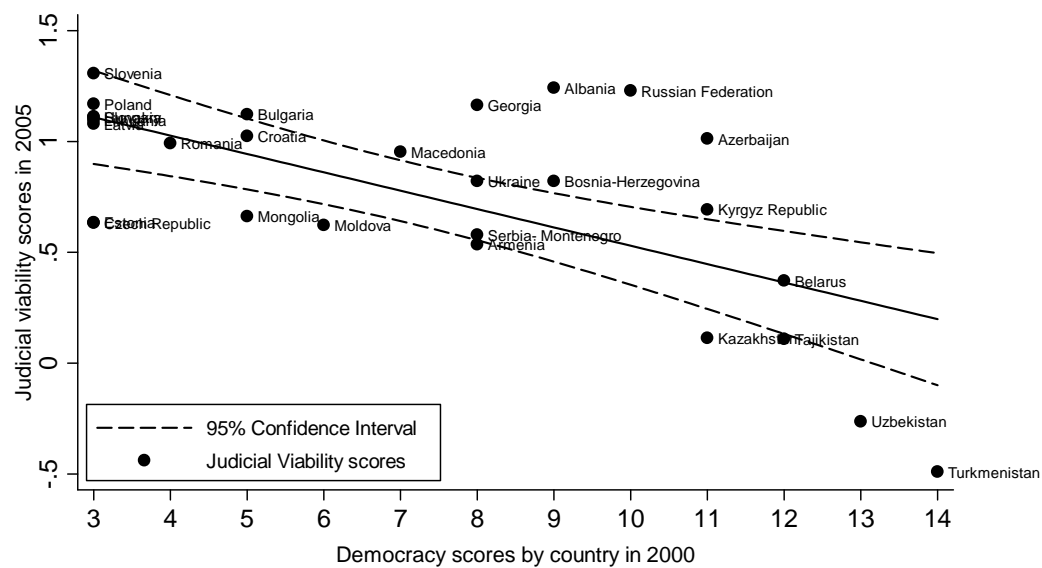
FIGURES

Figure 4.1, Is Judicial Viability Wholly Contingent on the Court's Chronological Age?



Note: 2005 data presented. Judicial viability ranks range from 1 (high) to 28 (low).

Figure 4.2, Judicial Viability and Democratization



Note: Democracy scores are obtained by combining Freedom House's Political Rights and Civil Liberties scales.

Figure 4.3, Judicial Viability Scores by Country, 2005

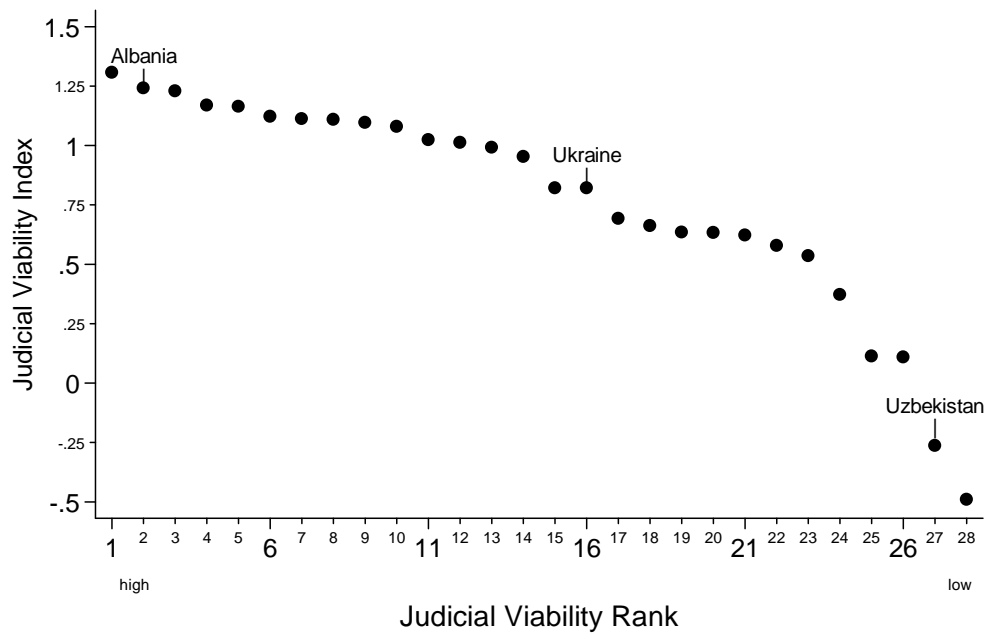


Figure 4.4, Institutional Development of the Albanian Constitutional Court, 1990-2005

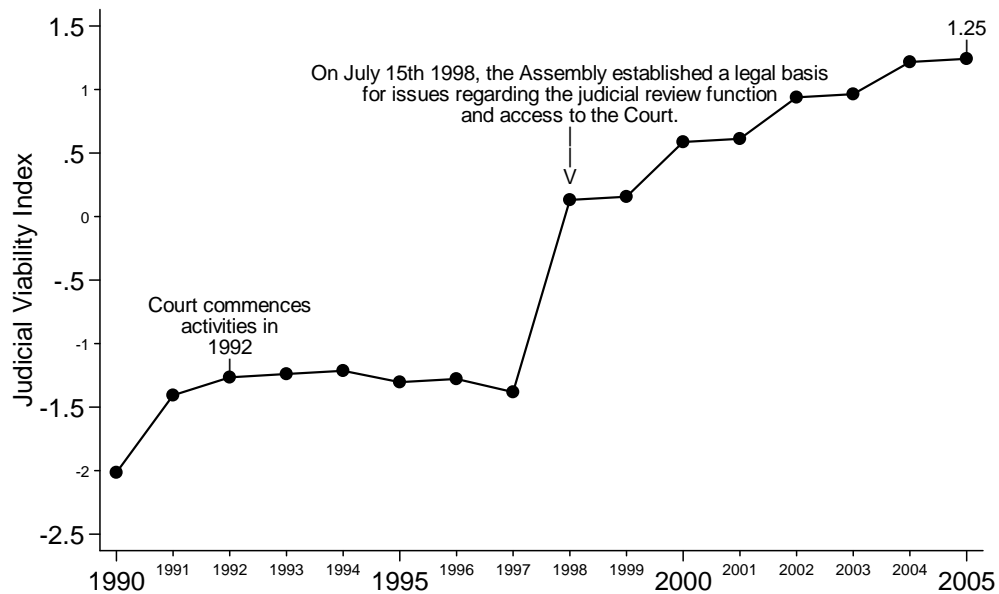
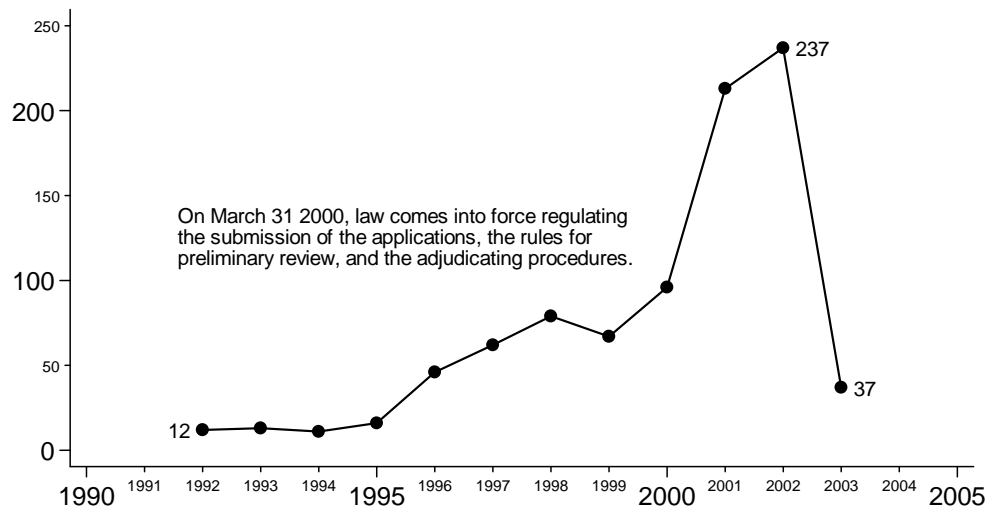


Figure 4.5, Number of Adjudicated Cases by the Albanian Constitutional Court, 1992-2003



Note: Caseload data is not available for 2004-2005 period

Figure 4.6, Institutional Development of the Ukrainian Constitutional Court, 1991-2005

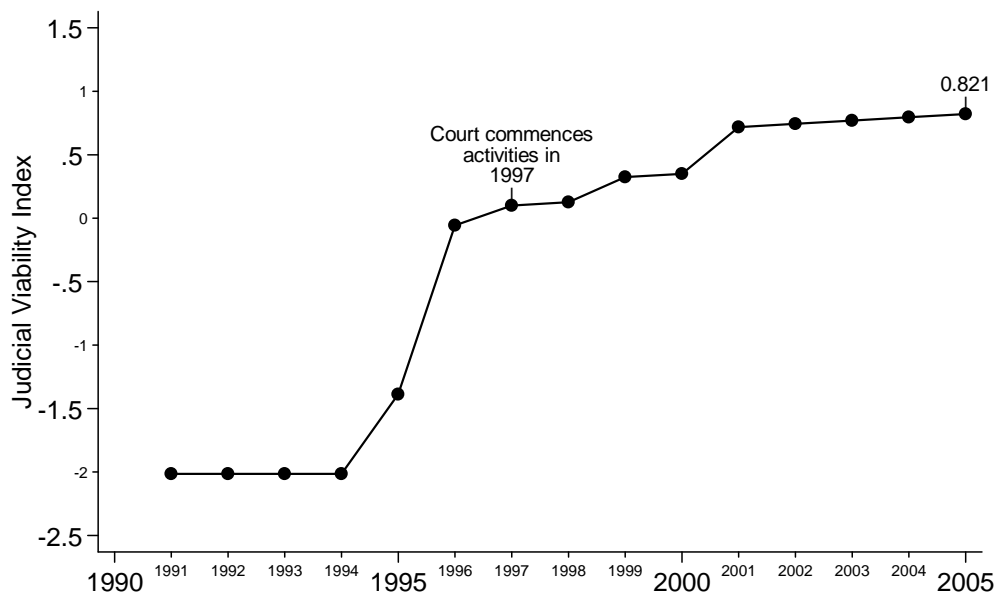
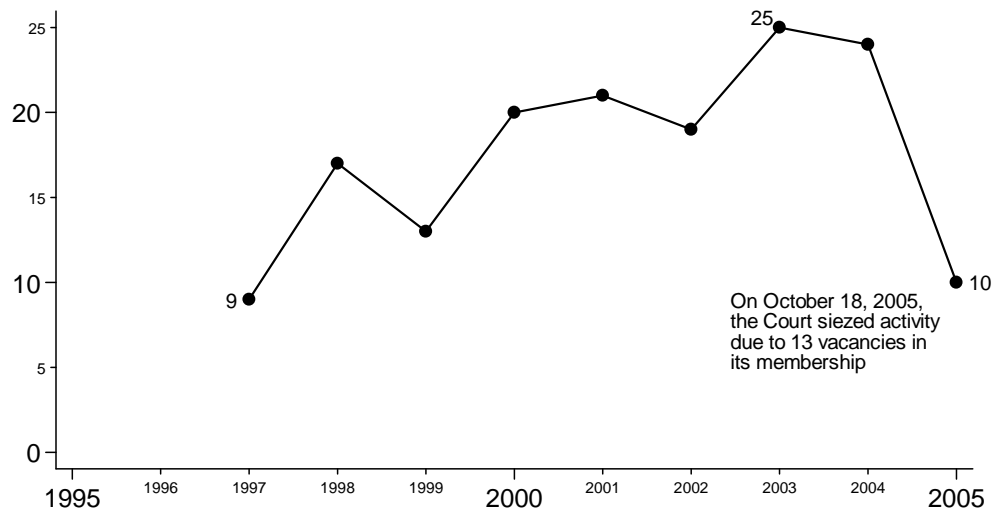
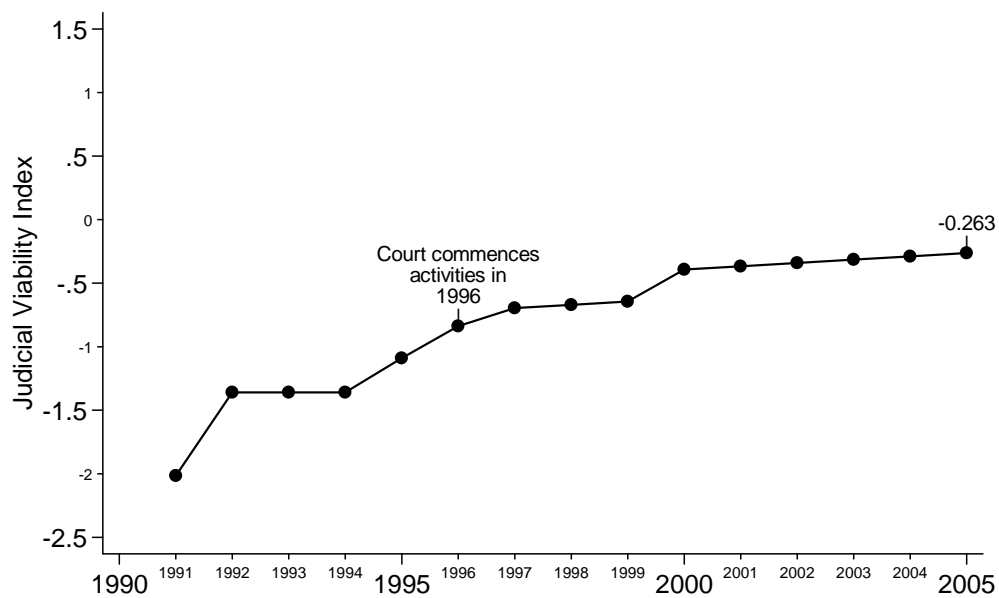


Figure 4.7, Number of Adjudicated Cases by the Ukrainian Constitutional Court, 1997-2005



Note: Data is available at the Constitutional Court website (<http://www.ccu.gov.ua>)

Figure 4.8, Institutional Development of the Uzbek Constitutional Court, 1991-2005



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CHAPTER FIVE

Judicial Institutionalization and Judicial Activism

INTRODUCTION

Constitutional courts play an important, albeit often underestimated, role in democratic societies. In new and consolidated democracies alike, these courts frequently issue rulings that significantly affect actions of other branches of government and have far-reaching consequences for the rights of individuals. Moreover, the actions of constitutional courts can sometimes support or undermine the very legitimacy of a democratic regime. As the history of US Supreme Court decision-making shows, the overall impact of constitutional courts on government actions and public policy can be profound indeed. At present, however, we have a very limited understanding of how judicial power is constituted in new democracies, why some newly-created constitutional courts are more active than others, and how the judges on these courts make decisions. As Herron and Randazzo (2003: 423) argue, “A majority of research has formulated conclusions about judicial behavior based primarily on observations collected from the United States and mostly from studies of the U.S. Supreme Court.”

This state of affairs is particularly unfortunate given that constitutional democracy and judicial power have always been closely intertwined (Schwartz 2000). A familiar theme in the democratization literature is that democratic consolidation is a gradual and delicate process of establishing and institutionalizing democratic procedures during which public officials learn to abide by the rule of law and to refrain from exercising any authority that is not granted to them by a legitimately-enacted constitution, regulation, or statute (e.g., see Larkins 1996; Stone Sweet 2000). The submission of the state and its agents to law thus becomes one of the most important (and perhaps, one of the most difficult) tasks for a new democracy and courts play a vital role in assuring this outcome.

If the judiciary in general, and constitutional courts in particular, are inactive and unable to render impartial decisions, they will be incapable of contributing to the “deepening” of democracy and the rule of law, and the democratic experiment may consequently falter, potentially signaling a return to authoritarianism.

In Chapter 3, I proposed that the institutional viability of a constitutional court (hereafter CC) is an important determinant of its ability to contribute to the process of democratic consolidation in the post-communist societies. I argued that this is precisely the reason why judicial institutionalization deserves scholarly attention; if the changes in the level of institutional development do not produce a corresponding change in the institution’s impact on its personnel as well as on its surrounding political and social environment, the concept would be worth little study. In this chapter, I consider one potential impact associated with judicial institutional development; this impact is internal to the organization, referring to the effects of institutionalization on the collective behavior of constitutional court judges. Specifically, I examine whether the level of CC viability impacts the degree to which post-communist CCs become actively involved in deciding constitutional disputes and the degree to which they invalidate the policy choices of other major political actors. I also explore several contextual and institutional factors that may contribute to such activity. I find that both sets of considerations matter; contextual and institutional influences are important determinants of judicial decision-making, but the level of CC viability also has a distinct and substantial impact on the CC’s exercise of constitutional review. This analysis thus provides the first definitive empirical confirmation of the importance of judicial institutionalization to the policy outputs of the post-communist CCs.

A NOTE ABOUT JUDICIAL ACTIVISM AND JUDICIAL INDEPENDENCE

As Herron and Randazzo (2003: 423) argue, “Understanding the relationship between independence and judicial review is essential to determining the role of courts in states emerging from decades of communist rule.” In the introductory chapter, I followed Becker’s (1970) definition who argued that:

“Judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.” (Becker 1970: n. 8, at p. 144)

In short, to the extent that a panel of judges or an individual judge is able to review the constitutionality of laws and legality of administrative regulations free of influence from other political actors and without having to worry about retaliation from other institutions, they are independent. Most scholars tend to agree with this view of judicial independence, although disagreements persist about the best way to measure independence empirically (Larkins 1996).

In this chapter, I argue that one observable indication that a court behaves independently is that it is willing to overrule the government’s actions. In making this argument, I follow a long line of scholars who examine the rates of judicial activism—the frequency with which courts rule that policies passed by government institutions are illegal or unconstitutional—as a manifestation of independent judicial behavior. Smithey and Ishiyama (2002: 721) point out that “nullification [of policy choices made by other government institutions] is considered to be the highest form of activism by most commentators.” Furthermore, it is useful to consider judicial activism rates because the ability of courts to exercise political power is at the heart of the concept (Galligan 1991: 70; see also Holland 1991).

Some scholars have noted potential downsides to such a measure and I acknowledge the validity of these criticisms.¹ Nevertheless, the rates of judicial activism

¹ First, scholars note that it is possible for even the most independent courts to engage in judicial restraint. Second, infrequent declarations of unconstitutionality may indicate that the government institutions are actually doing a good job of conforming to the law, and that the courts are finding in their favor because few violations of the constitution really occur. Finally, in some countries, the judiciary may be used by the president or legislature as a tool for legitimizing unlawful actions or for advancing short-term partisan agendas. If this occurs, the court may be extremely effective in reviewing and nullifying *certain* legislation, but it by no means indicates that the court is independent of external influence. All three criticisms are valid but should not preclude an empirical analysis of independent behavior. “Restrained” courts will still sometimes engage in ruling against the government; even the politicians that typically play by the constitutional rules, sometimes engage in illegal behavior that will be subject to judicial review. See Chapter 1 for further discussion of the problems associated with measuring behavioral independence by judicial activism rates (see also Herron and Randazzo 2003: 423-425; Larkins 1996: 616-617).

are commonly used to assess judicial independence and judicial decision-making behavior under political constraints around the world in general, and in post-communist countries in particular,² and no alternative cross-national measures of behavioral independence have been proposed to date. Although independent judges will not always choose to “substitute their own policy judgment for that of others, independent judges are in good position to assert themselves in policy-making against or in competition with the legislative and executive branches” (Tate 1995: 32-33). Thus, while judicial independence does not assure judicial activism, it certainly increases the potential for it.

Still, I wholeheartedly agree with Herron and Randazzo (2003) that it is important to treat rates of invalidation reported for some courts with great care, and that it is inappropriate to simply assume that judicial activism is an indication of judicial independence. In order to assess whether activism rates by the post-communist constitutional courts can be treated as an indicator of their independence, we need to systematically consider the influences important to the development of independent CCs and examine these characteristics along with a wide variety of other contextual and institutional influences on the exercise of constitutional review. Thus, as Herron and Randazzo (2003: 425) argue, “when attempting to model potential influences on judicial behavior, it is imperative to include a diverse range of indicators.” In this study, I argue that three types of characteristics influence the activism rates of the post-communist CCs: the level of their institutional viability, the country-specific institutional and economic environment in which these courts operate, and various contextual factors peculiar to the cases decided by these courts.

THE IMPACT OF INSTITUTIONAL DEVELOPMENT ON THE BEHAVIOR OF CONSTITUTIONAL COURTS

In general, scholars suggest that as organizations institutionalize, they seek legitimation of their activities through active control or shaping of their political

² See Shapiro 1999; Smithey and Ishiyama 2002; Herron and Randazzo 2003; Ferejohn, Rosenbluth, and Shipan 2004; Thorson 2004.

environment (Zucker 1987: 451) and that as a rule institutionalization translates into political power (Stinchcombe, MacDill, and Walker 1968). The level of institutional viability acquired by an organization thus represents an underlying set of incentives and resources available to its members to shape the scope of their political influence (McGuire 2004). By this logic, modest levels of institutionalization should limit the scope of the constitutional court's policy influence while greater levels of judicial institutionalization should enhance the court's ability to pursue its policy goals relatively uninhibited.³ In politically-sensitive cases, where judges may be fearful of potential retaliation for unfavorable decisions, substantial levels of institutional development minimize these constraints and allow CC judges to issue rulings which are closer to their sincere policy preferences and goals. The courts will have such flexibility because the specific factors that comprise judicial autonomy, durability, and differentiation collectively protect both the individual judges and the court as a whole from reprisals for unfavorable decisions.⁴

It is important to add that the tools that political actors can use against the courts differ in their severity. All impose some costs on courts, but some impose greater costs than others. Being removed from the court or having the court's jurisdiction reduced, for example, are more costly than being overturned. Courts will then weigh the costs they might face against the potential benefits of reaching policy outcomes that they prefer but other influential actors might oppose. I argue that the ratio of these costs to these benefits is larger in political systems where the courts are weakly institutionalized and smaller in countries where the courts have attained a relatively high level of viability. Significant levels of CCs' institutional growth therefore minimize the severity and the likelihood of reprisals against the court by powerful political actors, allowing the courts to behave

³ I speak of the court as an actor, when of course there is no single court, but rather a set of many judges. The theory of how individual motivations are aggregated into actions of the institution is thus necessary, but such theory is still in its early stages of development (see Baum 1997; Epstein and Knight 1998; Helmke and Sanders 2006). Since a fully-fledged theory is beyond the scope of this study, I make the basic assumption that the level of CC viability has a homogenizing impact on the motivations and strategic considerations of the individual members of the court.

⁴ Constitutional provisions and enabling legislation outline the institutional safeguards for CCs and include a host of factors, such as the nomination/appointment procedures, professional requirements to serve on the courts, judicial term of office, procedures for financing the court, as well as internal rules of procedure for the consideration of cases and the rendering of decisions. I exclude a detailed discussion of these factors here since they were extensively addressed in Chapters 2 and 4.

relatively independently.⁵ Based on the preceding argument, in the empirical portion of this analysis, I hypothesize that the rates of CC activism (and hence, the underlying degree of its independence) should vary across countries in proportion to the level of their CCs' institutionalization.

However, as Keohane (1969: 860) noted, the *actual* impact of an organization on its environment also depends on the behavior of other actors who must respect and, if necessary, enforce its decisions. Judicial institutionalization by itself cannot guarantee faithful compliance by the losing party because even the most powerful courts cannot physically force others to accept their decisions. While overruling the court or attacking its jurisdiction, finances, or personnel is a costly and time-consuming process which often requires cooperation among several political actors, non-compliance (i.e., simply ignoring the court's ruling) can be executed quickly and unilaterally (see Carrubba, Gabel, and Hankla 2007). Thus, if CCs care about making efficacious policy—one that is complied with and faithfully enforced by other political institutions—they will still have to be attentive to other strategic constraints on their own behavior as well as on the behavior of the litigants to the case.⁶ This means that a host of other institutional and contextual factors—such as the degree of legislative fragmentation, the relative power of the executive branch, the degree of public support for the court and its decisions, presence and severity of external/international pressures, and the degree of political transparency—become important to the analyses of judicial decision-making. As many scholars argue, these factors may affect both the capacity and the incentives of political branches to retaliate against the court for unfavorable decisions and/or to engage in overt non-compliance.⁷ In sum, by arguing that institutional viability affects CC behavior and

⁵ Elected branches have a variety of tools they can legally use to retaliate against the actions of courts, such as appointing sympathetic judges, passing legislation that overrides court rulings, failing to provide the court with sufficient organizational resources, or even amending the constitution. But politicians are able to do so only to the extent that they are sufficiently coherent as a group to amass the support necessary to attack the court, and the level of judicial institutionalization intervenes crucially in this regard.

⁶ If we assume alongside the proponents of strategic interaction models of judicial behavior that judges care most about making efficacious decisions which are complied with and properly enforced, then even viable CCs will sometimes give disproportionate weight to the desires and preferences of other actors and, in certain circumstances, may even disregard their own policy aspirations entirely.

⁷ See Epstein and Knight 1998; Ferejohn 1999; Magalhães 1999, Schwartz 2000; Shapiro 1999; Stone Sweet 2000; Shipan 2000; Epstein, Knight, and Shvetsova 2001; Smithey and Ishiyama 2002; Shapiro and Stone Sweet 2002; Herron and Randazzo 2003; Ginsburg 2003; Thorson 2004; Ferejohn, Rosenbluth, and Shipan 2004

policy outputs, I do not deny the importance of other considerations that must be taken into account when modeling judicial behavior.

MAPPING JUDICIAL ACTIVISM: THE DEPENDENT VARIABLE

I assess the degree of judicial activism of the post-communist constitutional courts using an original dataset of CC decisions. I examine case descriptions of post-communist CCs in 19 countries: Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, and Ukraine. These courts made case descriptions readily available online, permitting me to code a large number of cases. This sample includes published decisions⁸ for all of the post-communist CCs that provide online case descriptions in English or one of the languages familiar to this author.⁹ Each CC caseload was coded from the first year for which published decisions were available through 2006 (with the exception of Moldova and Ukraine, which were coded through 2005, the last year for which the case descriptions were available). Unlike the previous studies which excluded less-democratic post-communist states from their analysis (e.g., Smithey and Ishiyama 2002), I explore CC policy outputs and instances of judicial activism in every instance where court decisions were available for analysis.¹⁰

⁸ It is important to note that since my sample contains only published decisions, my inferences and conclusions are generalizable only to these rulings by the courts. While it is impossible to know the precise selection criteria for online publication of rulings by the courts, it is probable that the more politically significant cases receive higher rates of publication (in fact, many CC websites explicitly state that the cases available online were selected because of their “importance”). Nevertheless, I acknowledge a possibility that unpublished cases which are not included in this analysis may fundamentally change any inferences and conclusions drawn.

⁹ Cases were coded in Russian (Armenia, Azerbaijan, Belarus, Latvia, Moldova, Russia, Slovakia, and Ukraine), Belarusian, Ukrainian, and Bulgarian to provide the most comprehensive overview of caseload for each court. I also used English translations provided by the courts to fill any gaps in coverage. For Bosnia-Herzegovina, Croatia, Czech Republic, Estonia, Georgia, Hungary, Lithuania, Moldova, Poland, Romania, and Slovenia, I used English translations of cases only (these translations were made available by the constitutional courts). The coverage for these courts is therefore less complete due to my sole reliance on case information translated by the courts. In some cases, this precluded assessment of a vast number of decisions. For example, Hungarian Constitutional Court provides English translations for only 69 decisions over the 1992-2006 period; however, the website provides case descriptions for over 600 cases in Hungarian.

¹⁰ I argue that by censoring out an investigation of the CC rulings in less-democratic countries, any conclusions drawn about post-communist judicial behavior from the previous studies are questionable. As

I followed two specific selection criteria for inclusion of cases into the dataset. First, only the instances of *posteriori* review were coded.¹¹ As Herron and Randazzo (2003: 429) argue, once a policy decision is promulgated and implemented by government institutions, it becomes more costly and potentially dangerous for courts to nullify it (see also Stone Sweet 2000: 51). On the other hand, if CC applies *a priori* review, it enjoys additional flexibility. In these instances, CCs are only asked to give an advice to policy makers on the constitutionality of their draft law or regulation. The likelihood of retaliation against the court for unfavorable interpretation is thus very low. Indeed, in most cases the court does not even have to consider the interests of contending parties in issuing an advisory opinion (see Schwartz 2000: 27-31).

Second, only decisions on the merits of the case were included. If the case was summarily dismissed, dismissed on procedural grounds, denied standing, or only

Gillman (2002) shows, expansion of judicial power may occur in conditions where political power is highly concentrated in the hands of one dominant actor who uses the courts to advance short-term policy goals. It is therefore possible that the long-term prospects for the expansion of judicial power are no smaller in authoritarian regimes than they are in democratizing regimes. The courts in authoritarian states may not be independent vis-à-vis the autocrat, but may make an important contribution to the national policy-making nevertheless. Furthermore, as Durkheim (1982: 155) argued, analyzing as large number of cases as possible using statistical techniques bolsters the possibility of displaying the “series of variations” necessary to demonstrate causation. It also increases the opportunities for exhibiting the full range of variation on the variables under analysis, such that the data units “are correlated with each other in as continuous a gradation as possible” and “cover an adequate range.” Thus, an opportunity to investigate all countries and court decisions that are available for analysis enables me to elude the trap of selecting cases to fit the theory, which Durkheim warned against and which is an ever-present hazard in scientific inquiry.

¹¹ There seems to be a lot of confusion in the literature about how to classify the caseloads of the post-communist CCs. This confusion is understandable given the highly complex nature of CCs’ jurisdiction over cases and litigants. It is therefore necessary for the reader to carefully consider the information below and review the in-depth discussion presented in Chapter 2. Preventive control (*a priori* review) is exercised before the entry into force of the reviewed law, while subsequent control (*posteriori* review) is exercised once the law or regulation has become effective. All preventive controls are necessarily abstract in nature because the law under scrutiny has not yet entered into force and has therefore not been applied. Because an application of *a priori* review asks the court to issue an advisory opinion on legislation that has yet to be implemented into law, I exclude all such cases from this analysis. Subsequent (repressive) controls can be either concrete or abstract, depending on the jurisdiction allocated to the court. An application of *posteriori* review includes preliminary questions, direct constitutional challenges of legal norms, and constitutional complaints. All three types can be presented in either concrete or abstract form (or both), depending on the specific jurisdiction of the CC. When a CC exercises the power of *posteriori* abstract review it must make the ruling on the bare text of the constitutional provision or law, without the benefit of seeing it in the context of its application to a particular factual situation. A CC exercises the power of *posteriori* concrete review when it reviews cases or controversies where specific rights violations have occurred and where actual damages from such violations can be assessed (most often, such cases originate through litigation in the ordinary courts). Again, the reader is urged to see Chapter 2 for specific information on subject-matter jurisdiction of the post-communist CCs.

concerned a request for clarification of a constitutional provision, it was excluded.¹² This choice has significant ramifications for analysis of some CC caseloads. For instance, between 1992 and 2006, the Russian CC issued more than 1,400 decisions, but only 246 of these decisions were on the case merits. Some post-communist CCs therefore make an explicit distinction between judgments and rulings (or decisions and rulings) to indicate to the reader which case descriptions concern decisions on the merits. Hereafter, any reference to decisions or rulings by the CCs is meant to reflect decisions on case merits only.

The dependent variable for this study is the probability that the CC engaged in constitutional review of a legislative statute, presidential decree, lower court ruling, bureaucratic regulation, or the decision of a Central Electoral Commission (CEC). If the court upheld the policy and affirmed its constitutionality, then the case was coded 0. Cases were coded 1 if the court nullified/invalidated, overruled, or declared unconstitutional one of the above mentioned policy types.¹³ In practice, this measure also includes invalidations of parts of legislative statutes, bureaucratic regulations, or other policy declarations. In many cases, appellants did not challenge a policy in its entirety,

¹² The students of the US Supreme Court would probably object to the exclusion of non-merit cases such as dismissals. In the American context, where the US Supreme Court has virtually complete discretion over its caseload, it could be argued that dismissals are substantively important as they effectively uphold the existing policy (perhaps reflecting the justices' reluctance to challenge legislative or presidential policies). This scenario, however, has little applicability to the post-communist CCs which are given no discretion to refuse to issue a decision on an appeal properly brought before them. The primary reason for this lack of discretionary powers is that under the European system of concentrated review adopted in all post-communist countries if the CC does not decide the question, it is usually the case that no court will be able to (see Chapter 2; see also Stone Sweet 2000; Schwartz 2000). Thus, virtually all dismissals by the post-communist CCs occur because an appeal was improperly filed, a petitioner lacks standing, or the CC lacks jurisdiction (many individuals mistakenly believe that the CC has jurisdiction over statutory issues and is the highest appellate court in the country).

¹³ It is important to note that this measure of judicial activism does not distinguish between "major" and "minor" invalidations (as is a common practice in the studies of the US Supreme Court). Some readers may therefore question whether it is possible that a CC nullifies a large number of relatively unimportant or mundane administrative regulations and thus seems very activist, but poses no real challenge to important government policies. Although I recognize this potential flaw with the activism measure adopted in this analysis, I argue that there are no easy ways to make a distinction between "grand cases" and "trivial" rulings. Such classification would require an intricate knowledge and understanding of all major socioeconomic and political issues in every post-communist country in this analysis. It would also require an ability to trace the impact of these decisions on the society and politics over a prolonged period of time—for example, some invalidations may at first appear quite trivial, but could prove to be highly significant in the long run. Without such intricate knowledge, any distinction between "grand cases" and "trivial" rulings would reflect nothing more than my own subjective perceptions and biases. Moreover, one could argue that *all* CC decisions on the merits are important—if the CC does not invalidate a policy on constitutional grounds, no other court will be able to.

but argued that only a part of the policy was unconstitutional.¹⁴ The descriptive statistics about each court's caseload, including the number of published decisions, proportion of activist rulings, and the time period covered is found in Table 5.1.

Insert Table 5.1 here

The data show that the mean rate of judicial activism across the sample and over the observed period (1991-2006) is relatively high—54.4% of the cases decided by the post-communist CCs resulted in invalidation of a challenged policy.¹⁵ As Figure 5.1a

¹⁴ An earlier version of this analysis also considered partial invalidations as a separate category (i.e., an ordinal dependent variable was used where 2 represented complete invalidation of policy, 1 stood for partial invalidation, and 0 represented the instances where the court upheld the challenged policy). Any anxious readers at this point should be comforted by the fact that employing an ordinal dependent variable in place of a dichotomous one does not qualitatively change any of the statistical inferences or substantive conclusions. The decision to collapse “partial invalidations” into “full invalidation” category presents problems only in one specific instance—where the CC was asked to nullify an entire policy but chose to invalidate only the offending provision (these cases are very rare in my dataset, comprising less than 2% of all decisions). In substance, these types of decisions are difficult to interpret. One possibility is that such decision represents strategic bargaining by the judges on the court (e.g., judges' agreement that the collective policy goals of the court are best served by partial invalidation, or the chief justice's desire to render a unanimous decision and avoid dissents). Another possibility is that the court is behaving strategically vis-à-vis other institutions by taking into account the preferences of other political actors and its own vulnerabilities to a potential retaliation if the policy is invalidated in full. Finally, it is possible that the CC rules of procedure include the principle of ruling on the narrowest grounds possible, allowing the court to limit unconstitutional behavior of political institutions without necessarily declaring the entire policy unconstitutional (similar to the principle adopted by the U.S. Supreme Court). The data available for this analysis are not sufficiently discriminate to tease out these different possibilities. I therefore collapse partial and full invalidations and acknowledge that doing so may entail certain costs.

¹⁵ These invalidation rates present a picture of vigorous judicial activism that goes far beyond what the students of the US Supreme Court are accustomed to. However, it is important to remember that the post-communist CCs are structurally different from the US Supreme Court and function in a fundamentally different environment. First, these courts' very reason for existence is to handle sensitive constitutional problems that are raised in many contexts and ways, and unlike the US Supreme Court, they cannot normally decline to handle these matters. The standing provisions and constitutional subject-matter jurisdiction of the post-communist CCs dwarf those of the US Supreme Court and provide them with many more opportunities to invalidate policy decisions of other government institutions. Second, norms of constitutional observance have been slow to emerge in the post-communist societies and old patterns of behavior did not simply disappear. There are often hundreds of communist-era or transitional laws and regulations on the books that continue to violate the text of the constitution, each awaiting a challenge by private individuals, businesses, or government institutions. Additionally, post-communist government agencies and legislatures are still inexperienced in drafting constitutionally-sound policies; they have over-legislated in many areas, creating contradictory laws or policies that infringe on the rights of citizens and policy-making authority of other government institutions. It is also not uncommon for the bureaucratic agencies, lower courts, local governments, and, to a lesser degree, national legislatures and executives, to remain unaware or deliberately indifferent to the constitution and the existing CC decisions, and the CCs are often forced to issue repetitive rulings on issues that have been previously decided by them. Finally, in federal and presidential/semi-presidential systems, disputes regarding allocation of political authority continue to emerge and are typically brought before the CCs for resolution. In short, the environments in

illustrates, however, there are no discernable longitudinal trends in the rates of judicial activism across the post-communist region. On the other hand, Figure 5.1b shows that there are substantial differences in the frequency of invalidation across countries; some post-communist CCs have been very activist in their rulings while others have been relatively restrained. Belarusian and Azeri CCs exhibit the highest rates of judicial activism in the sample, overturning 77%¹⁶ and 70%¹⁷ of the challenged policies respectively, while Croatian and Ukrainian CCs exhibit the lowest rates, with only 38% and 34% of challenged policies nullified respectively.

Insert Figures 5.1a and 5.1b here

which post-communist CCs operate provide them with numerous opportunities and reasons to overturn policies of other government institutions.

¹⁶ During the 1994-2006 period, the Belarusian CC invalidated numerous policies that infringed upon citizens' constitutionally-guaranteed rights to a "dignified standard of living," employment, housing, healthcare, pension, and education. The Court also found numerous provisions of the Criminal Code to be in violation of the constitutional guarantees to a speedy trial and legal representation in criminal proceedings. A very large proportion of invalidations occurred in cases in which the legislature appeared as a respondent. The vast majority of these cases were appealed to the CC by the president of Belarus (or one of the representatives of the presidential administration), the Supreme Court of Belarus, or were initiated by the CC itself following a request by private parties. The Court has also struck down a large proportion of local ordinances and administrative regulations. The major reason cited by the CC for invalidation of legislative statutes and administrative regulations is that the legislators and bureaucrats fail to understand the content of constitutional provisions and previous CC decisions. Decisions of the CC have also urged the legislators and local officials to pay more attention to the legal omissions and contradictions in the legislation. Additionally, in practically all separation of powers cases which concerned disputes between the central and local/regional governments, the CC has ruled in favor of the central government institutions. In separation of powers cases which concerned the division of power between executive and legislative branches, the CC has consistently ruled in favor of the executive branch and presidential policies.

¹⁷ Similar to the policies struck down by the Belarusian CC, the vast majority of invalidations by the CC of the Republic of Azerbaijan occurred in cases concerning economic rights/disputes (e.g., pension guarantees, tax laws, rights to inheritance of property, private property and debt repayment disputes) and individual political or civil rights (e.g., rights of criminal defendants to a speedy trial and legal representation, freedom of movement and residence, challenges to residency requirements for voting in local or national elections, social welfare guarantees for the elderly and internally displaced persons from the Nagorno-Karabakh region). In most instances, a regulation or a decision by a bureaucratic agency, a legislative statute, or an order of a local government was challenged and overturned. A sizeable majority of these cases were brought before the CC by the Supreme Court of Azerbaijan, the Procuracy, or the lower courts on the behalf of individual citizens, private businesses, civic organizations, or political parties. Interestingly, only 4 out of 45 cases (8.9%) heard by the Court during the 1998-2006 period concerned separation of powers issues. In 3 of these cases, the CC overturned legislative statutes which attempted to expand legislative control over the salaries and pensions of the ordinary judges and were thus deemed to be in violation of the constitutional guarantees of the judiciary's independence. In the remaining separation of powers case, the CC ruled against the parliament (appellant) and in favor of the president of Azerbaijan (respondent), allowing him to unilaterally modify the language of an article of the constitution concerning the initiation and administration of national referenda.

Furthermore, there are some notable differences across the post-communist region in the types of cases that different CCs are willing to invalidate. During the time period analyzed in this study, the CCs in authoritarian and semi-authoritarian regimes which enjoyed wide popular support, such as Belarus, Armenia, Azerbaijan, Moldova, Romania (until 1996), Slovakia (until 1998), Ukraine (until 2003), often reviewed and overturned local/municipal ordinances and regulations of bureaucratic agencies (and to a lesser extent, the decisions of the ordinary courts), but were fairly timid in nullifying policies of the dominant political actors (e.g., presidential orders/decrees, laws passed by the pro-presidential majorities in the legislature, or acts of coalition governments in parliamentary systems).

For example, the analysis of the cases heard by the CC of Moldova and decided on the merits reveals that the CC heard few challenges to the statutes passed by the ruling Party of Communists of the Republic of Moldova (PCRM) and invalidated a very small proportion of them. With PCRM holding the majority of the seats in the legislature (since 2001) and the party's leader, Vladimir Voronin, in the position of the president, only 7 acts of the government and 1 presidential order have been reviewed by the Court, and only 2 government acts have been nullified from 2001 through 2006.¹⁸ In practically all election-related disputes or allegations of violations brought by the opposition parties, the CC sided with the Central Electoral Commission and upheld the challenged results (which predictably favored the candidates of the ruling party); the Court has been equally unwilling to rule against the PCRM-passed statutes on the conduct of elections (although there is one notable exception; see footnote 11). On the other hand, the CC has been relatively active in reviewing local ordinances and agency regulations on the appeals by the Administration of the President and the Prosecutor General and struck them down in 62% of all challenges.

Belarus provides another instructive example. The Belarusian CC was quite independent in the first years of its existence and struck down 17 presidential decrees and

¹⁸ In one of these two instances, the Moldovan CC declared that a decision of the government creating a National Committee for Adoption was unconstitutional (Decision No. 11, June 27, 2006). The CC ruled in favor of the appeal by two members of Parliament who challenged the move on the grounds that only the legislature (rather than the executive branch) has the authority to restructure the administration.

orders in the 1994-1996 period.¹⁹ There were several important decisions on human rights issues, media freedoms, and rights to private property and real estate, in which the CC nullified President Lukashenka's policies. The Court also ruled Lukashenka's dissolution of the parliament and the initiation of a constitutional referendum in 1996 unconstitutional. Since 1997, however, as Lukashenka consolidated power and marginalized the opposition, the CC has been largely subservient. In my dataset on the Court's decisions, I was unable to find a single instance of invalidation of a presidential decree or order from 1997 through 2006 (and only 5 challenges were heard by the Court). Moreover, in 53 out of 64 cases (84%) in which the Court found the policies of the Cabinet of Ministers (controlled by Lukashenka and staffed with his close allies) to be unconstitutional, it did not declare them null and void, as it has typically done with legislative statutes, agency regulations, municipal ordinances, and lower court rulings when it found them unconstitutional. Instead, the CC only made a non-binding recommendation to the Cabinet to bring its policies into conformance with the constitution.²⁰

On the other hand, as long as its rulings were in line with Lukashenka's preferences and did not threaten his authority or policy agenda, the Belarusian CC has been quite willing to rule against the legislature, bureaucratic agencies, and the ordinary judiciary. For example, the Belarusian CC invalidated numerous administrative regulations, local ordinances, ordinary court rulings, and legislative statutes that infringed upon citizens' rights to a "dignified standard of living," employment, housing, healthcare, pension, and education. Since the popular support for Lukashenka hinges on his ability to provide extensive social services and acceptable living standards (see e.g., Kuzio 2001, 2002; Way 2005; Marples 2006), CC's activism in these issue-areas is in line with the president's interests and policy agenda. Indeed, the vast majority of these cases were appealed to the CC by one of the representatives of the presidential

¹⁹ This number of invalidations is particularly remarkable given that over the entire 1994-2006 period, the Court only heard 26 cases in which presidential decrees or presidential orders were directly challenged.

²⁰ Although on the Court's website the CC Chairman notes that the majority of these recommendations have been implemented, I was unable to find independent confirmation in support of these claims. In the remaining 11 cases in which the CC ruled against the Cabinet of Ministers, it actually declared the offending order or policy null and void. In these decisions, the CC's behavior can be interpreted as somewhat independent. However, given that these 11 cases comprise only 4% of the CC's total caseload and most invalidations concern relatively minor procedural issues, it is reasonable to conclude that Belarusian CC's independence has been quite rare.

administration; the remaining cases were appealed by the Supreme Court of Belarus, the Ministry of Justice, or were initiated by the CC itself following an informal request by private parties. It thus seems—at least on the surface—that the activism by the Belarusian CC should be interpreted as a tool used by the authoritarian president to monitor and restrain “undesirable” behavior of other government institutions, and to do so under a veneer of constitutional justice and the rule of law.

A largely similar situation characterizes Armenia, where the CC has functioned since its creation in the political context dominated by a powerful president (at first, Levon Ter-Petrossian, and since 1998, Robert Kocharyan) and president’s allies in the parliament. The Court reviewed the constitutionality of laws in 7 cases and of government acts in 3 cases.²¹ No case thus far has involved the constitutionality of a presidential decree. The Court ruled in favor of the president’s appeals on *all* cases related to the distribution of executive-legislative power (10 of 42 cases coded for this analysis) and on the Kocharyan’s allegations of legislative interference in judicial administration (3 cases). The CC has also been unwilling to actively intervene in election-related disputes and verified challenged election results in all but 3 instances in ten years.²²

In summary, in countries where the political power remained concentrated in the hands of a powerful president and/or a dominant legislative party, the CCs’ caseloads and instances of nullification seemed to follow a more or less predictable pattern. The courts were somewhat less likely to hear cases concerning government competencies, especially

²¹ There is only one instance of the Armenian CC’s nullification of an act of government in my dataset. Two elderly women challenged the government’s refusal to pay pensions and salaries to citizens without the use of identity cards equipped with unique personal identification (PIN) numbers. Since the start of the identity card program in 2002 (named “Social cards”), many people expressed opposition to the need to enter PIN numbers in order to gain access to funds. The court found for the plaintiffs, thereby requiring the State Social Protection Fund to pay 1,317 retirees who were earlier denied their pensions (Decision No. 641, September 13, 2006). It is worth noting that this case marked a major event for the Armenian CC—it represents the first CC case brought by a private citizen (constitutional amendments earlier that year expanded CC’s jurisdiction to rule on petitions brought by ordinary citizens).

²² For example, on April 16, 2003, the Armenian CC issued a ruling (Decision No. 412) on a dispute related to 2003 presidential election. It found a significant number of election-related violations that may have tainted the outcome, but refused to nullify the results. Subsequently, the CC issued a statement that the incumbent president was elected in accordance with the Constitution and the Electoral Code. In its decision, the CC nevertheless suggested that the newly-elected National Assembly and the president, within one year, organize a referendum of confidence as an effective measure to overcome social resistance observed after the election results were announced. However, the CC’s proposal on holding a referendum of confidence was non-compulsory, and as such, fell on deaf ears and was rejected by implication (due to the government’s inaction for at least one year).

those challenging the authority of the dominant actor(s); most likely to focus on adjudicating “safe cases”—cases concerning lower courts’, local governments’, and administrative agencies’ compliance with the central government directives²³; and almost completely unwilling to invalidate the acts of government on conduct of elections or CEC decisions on election-related disputes (since these decisions typically favored candidates of the ruling party or presidential allies). On the other hand, CCs operating in countries with more competitive political environments, such as Bulgaria, Hungary, Czech Republic, Lithuania, Slovenia, Georgia, and Poland, heard cases across a broader spectrum of issues, were more even-handed in the types of cases they invalidated, and seem to have been somewhat less likely to consistently favor one party or the president in their rulings. Predictably, allegations of electoral fraud were also much less common in these countries than in countries with semi-authoritarian or authoritarian regimes.

It is thus important to treat very high and very low rates of invalidation reported for some courts with great care, at least at this point. First, it is possible for even the most institutionally viable courts to engage in judicial restraint.²⁴ Second, infrequent declarations of unconstitutionality may indicate that the government institutions are actually doing a good job of conforming to the law, and that the courts are finding in their favor because few violations of the constitution really occur (see Larkins 1996: 616-617). Third, in some countries—as the examples above show—the judiciary may be used by the president or legislature as a tool for legitimizing unlawful actions or for advancing short-term partisan agendas.²⁵ If this occurs, the court may be extremely effective in reviewing and nullifying *certain* legislation, but it by no means indicates that the court is independent of external influence or institutionally viable. Figure 5.2 illustrates this last

²³ Many of these cases did concern individual economic rights (e.g., pension guarantees, tax laws, rights to inheritance of property, private property and debt repayment disputes) and individual political or civil rights (e.g., rights of criminal defendants to a speedy trial and legal representation, freedom of movement and residence, social welfare guarantees for the elderly), and Belarusian, Moldovan, Ukrainian, Croatian, and Romanian CCs have been quite ready to rule in favor of citizens’ rights in such cases. However, it is worth noting that most of these cases were appealed to the court by the dominant political actors, especially the presidents (or representatives of the administration), the Ministry of Justice, or the Procuracy.

²⁴ Most scholars consider Hungarian CC is one of the most independent and viable constitutional tribunals in the world. Yet, in the past few years, the court’s use of constitutional review has declined considerably (Scheppele 1999, 2001; Boulanger 2002). The US Supreme Court, despite its established independence and substantial history of existence, also uses its power of judicial review quite sparingly (Ferejohn 1999).

²⁵ Schwartz (1998, 2000) and Herron and Randazzo (2003) point out that the presidents of Albania, Azerbaijan, Belarus, Croatia, and Georgia, and the parliament of Moldova have manipulated the courts to overturn statutes that undermine presidential authority.

point nicely. Although overall there is a modest correlation between the aggregate rates of judicial activism and the level of institutional viability attained by the CCs by the end of 2005, Belarusian CC is unquestionably an outlier. Its viability is very low (the lowest among all courts in the sample), yet its rates of activism are the highest in the post-communist region.

Insert Figure 5.2 here

As this observation and cross-national differences in caseloads indicate, in order to assess whether activism rates by the post-communist CCs can be treated as an indicator of their independence, we need to systematically consider the characteristics important to the development of an independent CCs (i.e., the degree of CC institutional development) and examine these characteristics along with additional contextual and institutional influences on the exercise of constitutional review. Thus, as Herron and Randazzo (2003: 425) argue, “when attempting to model potential influences on judicial behavior, it is imperative to include a diverse range of indicators.” In this study, I argue that three types of characteristics influence the activism rates of the post-communist CCs: the level of their institutional viability, the country-specific institutional and economic environment in which these courts operate, and various contextual factors peculiar to the cases decided by the courts.

PRIMARY EXPLANATORY VARIABLE: CONSTITUTIONAL COURT VIABILITY

This study argues that modest levels of institutional viability will limit the scope of the constitutional court’s policy influence while greater levels of viability will enhance the court’s ability to pursue its policy goals relatively uninhibited. Judges on CCs with higher levels of viability will therefore be able to act with greater degree of independence than judges on the courts characterized by lower levels of institutional viability. Put differently, I posit that CC viability will have a homogenizing effect on the strategic calculations by the individual members of the court, allowing judges to express their sincere policy preferences during the adjudication process. Thus, the rates of activism

(and hence, the underlying degree of judicial independence) should vary across countries in proportion to the level of their CCs' institutionalization.

To test this relationship empirically, I hypothesize that courts possessing higher levels of institutional viability will more frequently nullify legislative statutes, presidential decrees, lower court decisions, bureaucratic regulations, and CEC rulings.

***H:** Constitutional courts with higher levels of institutionalization will invalidate legislative statutes, presidential orders and decrees, bureaucratic regulations, electoral commission decisions, and lower court rulings more frequently than courts characterized by lower levels of institutional development.*

I use the measure of viability developed in Chapter 4.²⁶ This measure is available for all of the constitutional courts considered in this analysis and consists of eleven indicators across the three conceptual dimensions of institutional development. I expect to find a positive relationship between CC viability and judicial activism. The mean level of institutional viability for the post-communist sample is 0.669 over the observed period (1991-2006). The CC viability scores range from -2.01 to 1.31 (centered at zero), with higher values representing greater degree of institutional development (see descriptive statistics reported in Table 5.2 below).

Insert Table 5.2 here

CONTROL VARIABLES

Although my primary interest is to explore the impact of the institutional viability on the independence of the constitutional court (proxied by the rate of CC activism) in its exercise of constitutional review, it is necessary to include other influences in this analysis to derive robust statistical inferences about the viability-independence relationship. Furthermore, inclusion of these additional factors will allow me to present a

²⁶ CC viability scores are lagged by one year. Thus, for example, the level of CC viability attained by the end of 2005 is expected to determine the scope of the court's policy influence in 2006.

more comprehensive picture of the determinants of judicial activism and judicial independence in the post-communist countries. I add controls for institutional influences that may undermine or bolster the policy-making authority of the courts. I also control for potential effects caused by litigants and legal issues adjudicated by the courts. These factors are important to consider because judicial behavior may be affected when a certain party appears as the litigant before the court, when specific issues are litigated, or when political and economic environment is not conducive to judicial intervention.

Institutional and Economic Influences

First, this study considers whether legislative fragmentation influences the probability of judicial activism by the constitutional courts. Stone Sweet (2000: 54) contends that when parties form broad coalitions to pass legislation, the promulgated statutes are generally less contentious than those produced by a single dominant party. Carrubba, Gabel, and Hankla (2007) similarly argue that legislative statutes that have been crafted through compromise and coalition-building are less likely to face court challenges because the policies satisfy a broad range of political actors.²⁷ Since a broad coalition supports the promulgated law, the CC's scope of policy influence is limited. If the court invalidates the law, the legislative coalition can potentially overrule the court (if the coalition is sufficiently large). Additionally, the cohesiveness of legislative coalition also increases the legislature's ability to retaliate against the court in case of invalidation of the challenged law by revising CC jurisdiction or limiting the court's budget (see Ferejohn, Rosenbluth, and Shipan 2004).²⁸ Thus, it is reasonable to expect that the likelihood of activist rulings will be lower in countries where the legislature is more fragmented.

On the other hand, some scholars note that political fragmentation in the legislature may in fact provide more latitude to the CC and increase its independence (see

²⁷ Herron and Randazzo (2003) posit a similar argument in their study of judicial activism of the post-communist CCs, but do not find a statistically significant relationship between legislative fragmentation and activism rates.

²⁸ Ferejohn, Rosenbluth, and Shipan (2004: 12) argue that even when multiple parties with distinct constituencies and platforms must join together to form a coalition government, the courts are constrained. The authors point out that the legislative parties in coalition operate according to "treaties" which leave the courts little reason to believe that they can invalidate a statute without being overruled as long as the coalition government is in power.

Tate 1995; Chavez, Ferejohn, and Weingast 2003). Other things being equal, it is more difficult for the fragmented legislatures to affect CC behavior as extraordinary levels of parliamentary coherence are required to punish the court for going against the preferences and policy agenda. Individual legislators cannot act unilaterally and quickly in response to an unfavorable court ruling. High degree of party competition within the legislature may therefore invite more challenges from the CC (i.e., positive relationship between legislative fragmentation and judicial activism may exist).

Both possibilities are reasonable and both must be considered in this analysis. From the perspective of the institutional environment in which the courts operate, I argue that the legislative fragmentation inhibits judicial activism; other things equal, I expect lower probability of invalidation in systems characterized by high degree of legislative fragmentation. However, in the following section which addresses litigant characteristics, I consider an alternative hypothesis: if and when the legislature appears as a respondent in a case adjudicated by the CC, the court will be less deferential and more willing to invalidate the statute. This may occur because the legislature's retaliation against the court in case of a negative ruling entails a costly and time-consuming process which often requires cooperation among several political parties.

To assess the degree of legislative fragmentation for the post-communist countries in the sample, this study uses Wolfram Nordsieck's legislative elections data. The data cover post-communist elections over the 1989-2007 period.²⁹ The effective number of legislative parties (as a proxy measure for legislative fragmentation) was calculated using the following formula from Laakso and Taagepera (1979): $1/\sum s_i^2$ where s_i is the percentage of the seats won by the *ith* party and independents or 'others' are treated as a single party. The scores for legislative fragmentation for the post-communist sample range from 1.14 in Azerbaijan from 1998 through 1999 (least fragmented legislature) to 8.79 in Armenia from 2003 through 2004 (most fragmented).³⁰ The mean level of legislative fragmentation in the sample is 4.381 (see Table 5.2 for descriptive statistics). To reiterate, it is my expectation that as an institutional environment variable, legislative fragmentation will be negatively related to the frequency of CC activism.

²⁹ Elections data available at <http://www.parties-and-elections.de/countries.html>

³⁰ This study imputes values for the years between election cycles as the number of legislative parties does not change until the subsequent election.

Second, this study considers whether the structure of the executive system may impact the CC's ability to exercise constitutional review. Two prominent positions emerge in the literature regarding the effects of parliamentary vs. presidential systems on judicial independence and activism. On the one hand, Ackerman (1997: 789) argues that presidentialism is good for courts by providing them with a role as an arbitrator among law-making powers. Arguably, the reason the presidential and semi-presidential systems support judicial activism is because of the potential for institutional divergences between the executive and the legislative branches. These divergent policy views can be ameliorated by the presence of a capable and active constitutional court (see Ginsburg 2003: 82-86). In addition, division of power between branches can allow the courts to exercise greater independence and discretion in their rulings because *certeris paribus* attacking the court through restrictions on jurisdiction or budget may be more difficult in systems where passage of legislation requires the cooperation between two separate political bodies. Because of the combination of a difficult environment for passing new legislation to retaliate against the CC for unfavorable decisions or for overruling the court, along with high demand from the executive and the legislature for a neutral third party to resolve jurisdictional boundary problems (separation of powers disputes), semi-presidential and presidential systems may indeed favor the development of an activist and independent CC more so than pure parliamentary systems with their focus on the fusion of executive and legislative powers.³¹

On the other hand, some scholars have concluded that concentrated executive power is a significant factor in explaining judicial subservience in the post-communist countries (e.g., see Schwartz 2000; Herron and Randazzo 2003). According to this line of thinking, strong presidents impose substantial constraints on CC independence. Even though presidential systems may build in an additional source of inter-branch conflict, strong presidents are also more easily able to retaliate against the courts for unfavorable decisions or to simply ignore their rulings.³² If CC is a strategic actor, it will attentive to

³¹ In an earlier study, I found that in the post-communist region presidentialism facilitates the process of judicial institutionalization (see MPSA 2007 Conference paper; available at <http://www.mpsa.org>). It is possible that as a system-level variable, presidentialism may have a similar, positive impact on judicial behavior.

³² While legislatures can also attack the courts, the parliamentarians are able to do so only to the extent that they are sufficiently coherent as a group to amass the majorities necessary for retaliation against judicial

the preferences and capabilities of a powerful president and would be less likely to invalidate government policies or executive orders. This perspective thus predicts a negative relationship between presidential power and CC activism.

While this is a valid position, empirical studies of strategic interaction between the courts and strong executives have produced mixed results thus far—the jury is still out, so to speak. In this study, I therefore explore both possibilities. From the perspective of the institutional environment in which the courts operate, I argue that the presidential and semi-presidential systems support judicial activism; other things being equal, I expect greater CC independence and greater probability of judicial activism in the presidential systems. However, in the following section which addresses litigant characteristics, I consider an alternative hypothesis: when a president is a direct litigant to the case adjudicated by the CC, the court will be deferential and more willing to rule in the president’s favor.

To assess the relative power of the executive, this study relies on the presidential powers index (PPI) derived from *Comparative Political Data Set II* by Armingeon and Careja (2007).³³ The authors construct an index of executive-legislative power distribution that is specifically tailored to the capacity of presidents or legislatures to maintain or alter the status quo of policy-making. A significant advantage of this measure is that it incorporates temporal changes in executive powers into PPI coding. This provides for a continuous measure of presidential power from 1989 through 2006 for the post-communist countries in my sample, with pure parliamentarism and strong presidentialism (with a weak, reactive legislature) as endpoints. Theoretically, the full index runs from zero (pure parliamentarism) to 29 (superpresidentialism; regimes with the absolute concentration of power in the presidential office). However, the range of actual scores for executive-legislative powers for the post-communist sample is from 1 (very weak presidency in Bosnia and Herzegovina) to 22.5 (very strong presidency) in Belarus. The mean PPI score in the sample is 9.77, which, in substance, represents semi-presidential regimes with moderately-balanced distribution of power between the

salaries, terms of office, or jurisdiction. Presidents, on the other hand, can exercise certain “attack options” quickly and unilaterally.

³³ In essence, PPI is a revised version of Frye’s (1997) index; see Klaus Armingeon and Romana Careja (2007), *Comparative Data Set for 28 Post-Communist Countries, 1989-2007*, (data available online at: http://www.ipw.unibe.ch/content/team/klaus_armingeon/comparative_political_data_sets/index_ger.html)

president and the legislature. I expect that the likelihood of CC activism will increase in countries with semi-presidential and presidential systems.

The third characteristic potentially influencing judicial activism in the post-communist countries is economic performance. The relevant literature posits that economic performance matters for judicial behavior although it is unclear on the direction of its influence (for a useful discussion, see Herron and Randazzo 2003: 426). Some suggest that in countries where economic conditions worsen over time, probability of judicial intervention decreases; others argue that the courts will actually exert more influence on national policy during periods of poor economic performance. Yet another group of scholars speculate that in many post-communist countries, privatization and economic growth thrust public officials into uncharted waters and in response, administrative agencies and legislatures often enacted contradicting legislation. This facilitates judicial activism, as economic actors interested in avoiding technical violations increasingly rely on the courts to clarify and standardize the law. Based on this possibility, one could expect an increase in the application of judicial review as a function of economic diversification and growth.

Only one empirical study of economic performance-judicial activism relationship in the post-communist region has been undertaken to date. Herron and Randazzo (2003: 434) explore the influence of economic growth on judicial activism in seven post-communist countries and find that “as a country’s economic conditions worsen, the likelihood of judges engaging in judicial review increases.” However, the authors admit that their data do not allow them to provide a sufficient explanation for this finding and that additional analyses are necessary to understand the relationship between the economy and CC activism. Since at this point we can only speculate about the relationship between economic growth and judicial activism, I include a measure of GDP growth, using first year of a country’s transition as the base year, and rely on a two-tailed test of statistical significance to assess the direction of its influence.³⁴

The fourth characteristic potentially influencing activism rates of the post-communist CCs is the state’s respect for political and civil rights. Epp (1998) and Tarrow (1998) argue that regime’s recognition of extensive political and civil rights may provide

³⁴ I assume that higher values for change in GDP growth are associated with more robust economies.

greater opportunities for citizens and politicians to bring cases to the CC, enhancing and solidifying its role in the country's political system. This may occur because extensive political and civil rights (typically associated with liberal democratic regimes) signify support for the idea that the constitutional court has a particular role in enforcing them (Tate and Vallinder 1995; Smithey and Ishiyama 2002; Ginsburg 2003). Thus it is possible that CCs are more active and more willing to invalidate legislative statutes, executive orders, bureaucratic regulations, and other policy decisions in an environment characterized by extensive protection of political rights and civil liberties. To control for this possibility, this study uses Freedom House's cross-national time-series data from the *Freedom in the World* dataset which measure political rights and civil liberties around the world. Political rights and civil liberties indices contain numerical ratings between 1 and 7 for each country, with 1 for the most free and 7 for the least free. This study adds the two indices together to construct a single variable. The country scores can thus range from 2 (most democratic/free) to 14 (least democratic/free).³⁵ I anticipate a negative relationship—courts will exhibit more independent behavior in countries with more extensive protection of political rights and civil liberties.

Finally, some scholars note that the European Union accession process has generated an unprecedented momentum for reforms in the candidate/applicant countries (Schimmelfennig and Sedelmeier 2005: 226). As part of the accession process, the European Commission regularly evaluates candidate countries in a wide range of areas in the framework of its reports on the progress of each country towards fulfillment of the "Copenhagen criteria" (the political and economic criteria, and ability to take on the obligations of membership). Although these criteria do not specifically refer to judicial institutions, the fulfillment of the political criteria of ensuring "stability of institutions guaranteeing ... the rule of law" seems difficult without an institutionalized and active constitutional court.³⁶ This situation can potentially encourage CCs to rule against the

³⁵ Freedom House political rights and civil liberties data are available at <http://www.freedomhouse.org>

³⁶ The available evidence indicates that the Commission indeed places some emphasis on the ability of judiciaries to safeguard citizens' rights, contribute to a favorable business environment, implement EU legislation and norms of human rights protection, and (more recently) on the judiciary's adjudicative and administrative autonomy. For instance, in 2001, the Commission's *Regular Reports* noted (for the first time) the importance of safeguarding judicial independence. In 2002, the Commission launched an Action Plan for each candidate country's judiciary, accompanied by special financial assistance to reinforce its

preferences of dominant political actors and to realize their own institutional goals by making decisions that converge with the EU norms.³⁷ Moreover, by monitoring the countries' commitment to the Copenhagen criteria, the EU accession program may lower the probability of non-compliance with the CC rulings by government institutions (a less-costly strategy than attacking the court, but one that weighs heavily on the minds of judges when they consider how to rule on sensitive political issues). The country's participation in the EU accession process may therefore assure the CC of a greater probability of compliance with its rulings and lower the risk of retaliation against the court by the losing party.

To gauge these influences empirically, this study relies on a dichotomous variable where 1 represents EU applicant status and zero otherwise, taking into the consideration the official dates when each applicant country obtained her status. By the end of 2006, the following post-communist countries have participated in the EU accession program: Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovenia, and Slovakia.³⁸ This study expects a positive relationship between the participation in the EU accession process and CC activism in a candidate country.³⁹

administrative and judicial capacity. See European Commission, *Regular Reports on Progress towards Accession* (available for 1998-2006 at www.eumap.org).

³⁷ Maveety and Grosskopf (2004: 468) specifically argue that the EU-imposed constraints associated with the accession process reinforce the power of national CCs and promote their distinctive contribution to the national policy-making process by allowing the courts to reference or invoke EU legal principles in their rulings and, by doing so, enhance the legitimacy of their rulings (see also Boulanger 2001, 2002; Alter 2001; Nyikos 2001).

³⁸ With the exception of Bulgaria, Romania and Croatia, these countries officially joined the EU in May 2004. Bulgaria and Romania joined the EU as full members in January 2007. Croatia received the candidate status in 2003 but has not yet attained EU membership (see EU Enlargement reports at <http://ec.europa.eu/enlargement>).

³⁹ I recognize that there are at least two other potentially relevant environmental variables that are not included in this analysis. For example, Vanberg (2001) argues that public support for the CC may be an important resource that the court can use to induce compliance with its rulings and to minimize the likelihood of retaliation for unfavorable rulings. The fear of public backlash or censure can be a powerful inducement for elected politicians to respect the rulings and the institutional integrity of a CC (see also Leuchtenburg 1995: 92; Vanberg 2000). Additionally, the author suggests that the ease with which citizens can monitor politicians' actions toward the judiciary takes on great importance. The threat of public censure will only deter politicians' noncompliance or attacks on the court's authority if they are sufficiently likely to be exposed both domestically and internationally for such actions. I agree with Vanberg's arguments wholeheartedly. However, empirical measures for these influences on the court behavior are not available for the vast majority of post-communist CCs and years considered in this sample. Inclusion of a political transparency variable (available only for 1993-2000 period), for example, results in a loss of a large portion of the judicial activism data (approximately two thirds of judicial activism observations are dropped when this variable is included). Moreover, its inclusion does not qualitatively change the substantive conclusions for the CC viability or for other variables included in the model. In regard to

Litigant Characteristics

I add controls for potential effects caused by particular litigants before the constitutional courts. As Herron and Randazzo (2003) point it out, this is necessary because judicial behavior may be affected when certain actors appear as litigants before the court. All cases included in this analysis were thus coded for litigant characteristics (appellant and respondent). Each of the six litigant variables discussed below is dichotomous and coded 1 when the litigant of interest appears and 0 otherwise. Descriptive statistics in Table 5.2 indicate the frequency with which a specific litigant appears before the court in the post-communist sample.

In the previous section, I posited that from the perspective of the institutional environment in which the courts operate, presidential and semi-presidential systems support judicial activism. Here, I consider another possibility: when a president is a direct litigant to the case adjudicated by the CC, the court will be deferential and more willing to rule in the president's favor. Specifically, I measure when the president (or a high-ranking member of the presidential administration) appears as an appellant before the CC and asks the court to invalidate legislative statutes, policy decisions of regional/local authorities, or rulings of the courts of general jurisdiction.⁴⁰ I hypothesize that the CC will be more likely to nullify policy decisions of other actors when asked directly by the president. I expect that CCs will be deferential to the presidential requests because presidents are more easily able to retaliate against the court or to ignore its rulings. As Ginsburg (2003) argues, presidents can act quickly and often unilaterally in response to unfavorable decisions, and this possibility weighs heavily on the minds of CC judges

measures of public support for or public trust in the CCs, no such empirical measures are available. I thus acknowledge the potential importance of these factors and accept that their exclusion may entail certain costs.

⁴⁰ This measure includes petitions by an official representative of the President, the General/State Prosecutor's Office, State Procuracy, Cabinet of Ministers (or an individual member of the Cabinet), Government, or another high ranking member of the presidential administration and the executive branch. These litigants were coded as representatives of the president if and only if their nomination, appointment, and tenure are controlled by the presidential branch. In countries where the Cabinet of Ministers or the Government is subject to legislative appointment and control, appeals by these actors were not coded as presidential/executive branch appeals. In some instances, a clear determination could not be made; in these cases, the *President (litigant)* variable was coded zero, and the appellant was coded in the "Other" category (this litigant category is excluded from this analysis due to my inability to identify precisely whose policy interests the nominal litigant represents).

when they consider the ratio of costs to the benefits of upholding the policy challenged by the president.

Second, I control for those cases where individual citizens, private businesses, and civic organizations appeal the court (direct constitutional challenges and constitutional appeals).⁴¹ All post-communist countries adopted CCs during their transitions away from communism with the express purpose of protecting political, civil, and basic human rights of individual citizens.⁴² I therefore hypothesize that if CC judges view their role as protectors of constitutionally-guaranteed rights and liberties, they may be more likely to engage in judicial review when presented a claim on behalf of these appellants. In short, I expect a higher probability of judicial activism if an individual appears as an appellant before the court.

Third, I consider whether CCs are more willing to invalidate legislative statutes if a minority party in the legislature appeals the court. Stone Sweet (2000) and Ginsburg (2003) argue that constitutional courts are inherently “minoritarian institutions” because they provide opposition parties an alternative forum in which to challenge the policies of political majorities. However, Herron and Randazzo (2003) suggest that CCs are less likely to rule in favor of legislative minorities when the legislative majority is a direct litigant to the case. Since it remains unclear why CCs would systematically favor (disregard) preferences of legislative minority factions, I include the measure but rely on a two-tailed test of statistical significance to assess the direction of its influence on the probability of judicial activism.

Fourth, I control for those cases where legislature appears as a respondent before the court. I hypothesized earlier that the probability of invalidation of legislative statutes will be lower in systems characterized by high degree of legislative fragmentation. Here,

⁴¹ In practice, this measure also includes instances where an Ombudsman (Public Defender of Rights) or a lower court appeals to the CC on the behalf of an individual or private organization. This is necessary because not all post-communist CCs provide direct standing to the individuals and therefore require that an Ombudsman or a judge on the lower court submit an appeal for review of constitutionality. This is just a matter of following proper procedures for filing an appeal before the court and, substantively, the individual (not the lower court or the Ombudsman) is still viewed as an appellant by the CC.

⁴² Although this was not the only reason for the creation of CCs, protection of individual rights figured prominently on the minds of constitution writers—rights protections could not be entrusted to the regular judiciary which had failed to meet its constitutional responsibilities during the communist era (see Chapter 2; see also Mishler and Rose 1997; Schwartz 2000; Shapiro and Stone Sweet 2002; Ferejohn, Rosenbluth, and Shipan 2004; Thorson 2004).

I consider an alternative hypothesis: if and when the legislature appears as a respondent in a case adjudicated by the CC, the court will be less deferential and more willing to invalidate the statute. While legislatures can retaliate against the courts for negative rulings, the parliamentarians are able to do so only to the extent that they are sufficiently coherent as a group to amass the majorities necessary for retaliation against judicial salaries, terms of office, or jurisdiction. Legislative counterattacks are thus relatively costly and time-consuming responses, and the CC judges should have additional flexibility in deciding the case in accordance with their own understanding of the constitutional law or their own policy goals.⁴³

Fifth, I hypothesize that CCs will be particularly active in ruling against the ordinary judiciary when one of the lower courts appears as a respondent to a case. As Schwartz (2000: 236-237) indicates, general courts in many post-communist states are either unaware of, or deliberately indifferent to, both the constitution and CC rulings (on the Russian case, see also Trochev 2005). Incompetence is also widespread; ordinary judges often misinterpret and incorrectly apply statutes and codes, violating citizens' constitutional rights in the process (see Anderson and Gray 2007). Thus, CCs have many opportunities to review and reverse decisions originating in the ordinary judiciary. Moreover, ruling against the lower courts presents no threat to a CC; ordinary judiciary cannot retaliate against unfavorable rulings (although the possibility of non-compliance remains large). In sum, I expect a greater probability of activism in cases where a lower court is a respondent.

Finally, and for reasons similar to those outlined in regard to the ordinary judiciary, I expect that CCs are more likely to rule against bureaucratic agencies (local and national) and electoral commissions when those appear as respondent before the constitutional courts.⁴⁴

⁴³ Additionally, I already posited that when presidents and individuals appear before the courts as appellants, the CCs will be more likely to rule in their favor. In many cases where presidents and individuals appeal, the legislature appears as a respondent. Therefore, this hypothesis naturally flows from my previous arguments.

⁴⁴ By aggregating administrative agencies and electoral commissions into a single *Bureaucratic Agency* litigant variable, I follow the conventional approach in the bureaucratic delegation literature which views the central/national and regional/local electoral commissions as regulatory and administrative agencies (e.g., see Estévez and Rosas 2008; Lopez-Pintor 2000). These agencies register political parties and candidates, verify candidates' residency and other eligibility requirements, distribute state-provided campaign funds, collect and disseminate election results, disseminate information about electoral rules and

Issue Characteristics

The rate of CC activism may also be influenced by the specific issues litigated. CCs may be more inclined to invalidate policies in certain issue-areas, such as those concerning separation of powers and individual political and economic rights. Each of the four issue variables described below is dichotomous and coded 1 when the issue of interest appears and 0 otherwise. Descriptive statistics in Table 5.2 indicate the frequency with which these specific issues appear before CCs in the post-communist sample.

First, I argue that CCs are more likely to invalidate legislative statutes or presidential decrees pertaining to separation of powers issues or issues of governmental authority. These issues may involve disputes over authority between national institutions (“horizontal” separation of power disputes, such as those concerning distribution of executive and legislative powers), or disputes concerning the distribution of political power at the national and subnational levels (“vertical” separation of powers disputes). Although going against the president or the legislature over such sensitive political issues as the allocation of power significantly increase the prospects of a counterattack and/or non-compliance, courts may take a more active role to ensure lawful action of government.⁴⁵ In “horizontal” disputes, the CC always has at least one significant national policy-maker on its side;⁴⁶ this somewhat lowers the threat of retaliation by the losing party for an unfavorable decision. Additionally, as Schwartz (2000: 229) argues, “there is a good deal of pressure on these branches to obey the court’s judgments in allocating power between them.” In the vast majority of cases, the alternative—the dissolution or overthrow of the constitutional order—will leave both parties worse off (see Stone Sweet 2000; Shapiro and Stone Sweet 2002; Ginsburg 2003).

candidates to the voting public, and carry out other typical administrative/regulatory functions. I originally coded electoral commissions as a separate litigant (in the dataset, they always appear as a respondent), but chose not to use a separate litigant variable for electoral commissions in the statistical analysis since the *Electoral Disputes* issue variable subsumes all instances in which electoral commissions appear as litigants to the case. If I would have also included electoral commissions as a separate litigant variable, I would have essentially double counted and overestimated their impact on the CC decision-making.

⁴⁵ After all, in all post-communist states, the task of refereeing conflicts over the division of powers lies solely in the hands of the constitutional courts. Empirical evidence presented by Schwartz (2000: 228) shows that in separation of power disputes, the post-communist CCs “frequently rule against the party in power... and by and large, they have gotten away with it.”

⁴⁶ As I hypothesized earlier, the court should generally favor the president.

Second, I control for instances where the courts decide on matters related to elections (e.g., verification of election results in presidential and parliamentary elections, disputes over election results, cases concerning CEC denial of eligibility for certain candidates, charges of gerrymandering on the grounds that such schemes violate constitutional rights). I argue that it is especially unwise for the CCs to actively intervene in such issues and expect that the courts will be less likely to declare elections invalid or to nullify other election-related policy decisions.

Third, I expect that the CCs may be more active when resolving economic issues. These cases often involve private and public disputes over property rights, complaints about unconstitutional/illegal taxes and customs duties imposed on individual citizens and businesses, and requests for financial reparations for economic losses incurred during the communist era or immediately after the collapse of communism. These issues are highly salient and controversial, and in some instances involve claims against the state for financial damages resulting from ethnic conflicts (e.g., Bosnia and Herzegovina, Georgia), civil wars (e.g., Azerbaijan, Moldova), and ethnic/religious/linguistic discrimination (e.g., Estonia, Russia, Ukraine, Hungary, Bulgaria).

Finally, I hypothesize that the CCs will be more inclined to act in order to preserve and defend individual political rights, civil liberties, and fundamental human rights. In the post-communist countries, such basic necessities as food, clothing, shelter, medical care, and work are seen as a matter of right that people can demand from their governments, and these societies include such rights in their constitutions for enforcement by CCs. Additionally, as Maveety and Grosskopff (2004) argue, since most post-communist countries in my sample have signed the European Convention on Human Rights and are members of the Council of Europe, there is now an additional incentive (and pressure) to enforce these rights. These international agreements reinforce the power of the CCs by allowing them to reference or invoke European legal principles in their rulings and, in doing so, enhance the legitimacy of their rulings (see Boulanger 2001, 2002; Alter 2001; Nyikos 2001).

RESULTS AND DISCUSSION

To explore the factors influencing CC activism in the post-communist countries, I analyze pooled cross-sectional data on judicial decisions. Because the dependent variable is dichotomous, I use multivariate probit estimation.⁴⁷ In order to account for the fact that some constitutional courts publish more decisions than others, I adopt a system of proportional weighing suggested by Herron and Randazzo (2003). This weighing technique measures the proportion of cases from each CC and weighs those cases by the inverse.⁴⁸ This is necessary because the unweighted sample generates distorted results since certain courts will have a disproportionate influence on the statistical analysis.⁴⁹ Table 5.3 displays the results of the multivariate probit model and marginal effects for the explanatory variables.⁵⁰

Insert Table 5.3 here

⁴⁷ See Long and Freese (2003), Hosmer and Lemeshow (2000), Long (1997), and Agresti (1996) for introduction and explanation of ordered logit/probit techniques and other models with categorical dependent variables. However, Wells and Krieckhaus (2006) and Steenbergen and Jones (2002) argue that standard regression techniques yield biased estimates when data are hierarchically organized. According to this line of criticism, binary probit procedure for combining national and individual/case data replicates the national-level variables into hundreds of individual-level observations, and this replication can artificially inflate the statistical significance of national-level variables. Yet, as Snijders and Bosker (1999: 140) note, “a two-level design with 10 groups, i.e., a macro-level sample size of 10, is at least as uncomfortable as a single-level design with a sample size of 10” (see also Kreft 1996; Raudenbush 1998). Thus, a successful application of multi-level models hinges on the availability of sizable numbers of contextual units. Some statisticians contend that the lower limit is 30-50 clusters for robust estimation in a two-level analysis (see Muthén, Khoo, Francis, and Boscardin 2003; Duncan, Duncan, Alpert, Hops, Stoolmiller, and Muthén 1997). This is a steep requirement that is not always met in political science data, and one that I cannot meet here. Therefore, this study uses binary probit estimation and accepts that doing so entails certain costs.

⁴⁸ In other words, if one country contains 1/6 of the total number of cases and another country 1/10 of the cases, the former would have a weight of 6 and the latter a weight of 10. This technique thus ensures comparability across courts in terms of representation within the overall dataset.

⁴⁹ I also ran models including certain fixed effects, such as dichotomous variables to control for specific country and temporal effects. The substantive conclusions for the CC viability, the primary variable of interest, remained consistent across both fixed effects models, although the size of the coefficient was reduced. However, some control variables lost statistical significance in the temporal effects model and their coefficient sizes were diminished, and a few controls were negated by the fixed effects models (i.e., the variable was dropped due to perfect collinearity). Since inclusion of these fixed effects adds 16-19 dummy variables to the model, but contributes little to the conclusions about the impact of CC viability on activism, I chose not to report these models here.

⁵⁰ An examination of the marginal effects allows one to assess how much influence a particular coefficient has on the probability of the dependent variable registering a 1 instead of a 0. This allows one to make judgments of the variable’s impact relative to the baseline probability (calculated holding all variables at their minimum levels) for both categories of the dependent variable. As Herron and Randazzo (2003: 434) point out, the interpretation of marginal effects is similar to OLS regression coefficients.

Constitutional Court (CC) Viability

I hypothesized that the level of institutional viability of a constitutional court (characterized by the slow accretion of various measures of durability, differentiation, and autonomy over time) is positively related to the rate of CC activism. This study finds strong support for the primary hypothesis—post-communist CCs with higher levels of institutional viability are more likely to overturn, invalidate, or reverse policy decisions of other government institutions. The data reveal that the level of CC viability has a statistically significant and positive influence on the rates of judicial activism across the 19 post-communist countries and over time. Additionally, a relatively large absolute difference in BIC' (Bayesian Information Criterion) parameters reported in Table 5.3 reveals that the model that included the CC viability measure was more likely to have generated the observed decision outcomes than the model excluding the measure.⁵¹

According to the marginal effects for CC viability reported in Table 5.3, higher levels of institutional viability increase the likelihood of CC activism by 15.8%. Notably, the impact of CC viability on judicial behavior is larger than the impact of any other variable included in the model. It is easier to make sense of these statistical results by considering Figure 5.3a, which visually illustrates that during the 1991-2006 period relatively institutionalized constitutional courts were substantially more likely to invalidate legislative statutes, executive orders, lower court rulings, and bureaucratic regulations than courts that are weakly institutionalized.

Insert Figure 5.3a here

Similar conclusions can be reached by examining Figures 5.3b and 5.3c, which illustrate the impact of viability on CC behavior in longitudinal terms. Figure 5.3b graphs changes in predicted probabilities for the selected years (1994, 1999, and 2006) under the analysis, while Figure 5.3c indicates the impact of viability on the scope of CC policy influence for each of the sixteen years for which court decisions were coded. Both figures show that institutional viability has a consistent, positive effect on the behavior of CC judges not only across the sampled post-communist countries, but also over time. Figure

⁵¹ An absolute difference in BIC' is used to evaluate the overall fit of the model (see Freese and Long 2003: 94). An absolute difference in BIC' that is greater than 10 indicates very strong support for the inclusion of the CC viability.

5.3c further indicates that relatively small temporal increases in CC viability levels across the post-communist region result in commensurably small temporal changes in the probability of CCs invalidating policy decision of another government institution, while more substantial increases in CC viability from one year to the next lead to a more substantial impact on CC activism. This suggests that the collective behavior of judges on the CC responds to the improvements in the court's institutional capacity with relatively high degree of accuracy. In some respects, this provides an empirical confirmation that judges behave strategically, at the very least taking into account their own vulnerabilities and institutional resources in making politically-consequential decisions.

Insert Figures 5.3b and 5.3c here

At the beginning of this chapter, I argued that in politically-sensitive cases, where judges may be fearful of potential retaliation for unfavorable decisions, substantial levels of institutional development minimize these constraints and allow CC judges to issue rulings which are closer to their sincere policy preferences and policy goals. I explained that the courts have such flexibility because the specific factors that comprise judicial autonomy, durability, and differentiation collectively protect both the individual judges and the court as a whole from retaliation for unfavorable decisions. The empirical results of this analysis support these claims unequivocally. In sum, as Thorson (2004) argues and this study finds, institutionally viable constitutional courts are indeed more independent and assertive in exercising their formal powers of constitutional review than the courts characterized by low levels of institutional development.

Institutional and Economic Influences

Earlier in this study I argued that if judges care about rendering decisions that are as close as possible to their ideal policy, institutional development provides them with an ability to do so. However, I also acknowledged that if judges care about making efficacious policy—one that is complied with and faithfully enforced by other political institutions—they will also have to be attentive to other strategic constraints on their own behavior as well as on the behavior of the litigants to the case. The results discussed

below confirm that institutional and contextual influences affect judicial behavior and that CC judges are attentive to their surrounding environment in deciding cases.

I posited that as an institutional environment variable, legislative fragmentation will be negatively related to the frequency of CC activism. In other words, I expected that as number of viable legislative parties increased, the CCs would be less likely to engage in activism. The empirical data support this claim. An examination of marginal effects indicates that as number of viable parties increases, CCs are 4.8% less likely to invalidate legislative statutes, executive orders, lower court rulings, and bureaucratic regulations. Stated another way, political systems characterized by high degrees of legislative fragmentation are less conducive to judicial activism than systems with relatively low levels of fragmentation. Perhaps, as Stone Sweet (2000) argues, when parties form broad coalitions to pass legislation, the resulting policy outputs are generally less contentious than those produced by a single dominant party and less likely to be challenged by the CCs (i.e., statutes passed by large/broad legislative majorities are less likely to be overturned by a CC than statutes passed by very small/narrow majorities).

I further argued that semi-presidential and presidential systems favor active courts and hypothesized that as the presidential power increases (*vis-à-vis* the legislature), CCs would be more likely to nullify policy decisions of other government institutions. The data reported in Table 5.3 provide support for this claim. As the relative presidential power increases, the CCs are 6.3% to engage in constitutional review and invalidate policies. At this point, it is important to remember that I argued that the presidential power variable proxies the institutional environment in which courts operate and does not reflect the actual influence of a powerful president on judicial behavior in specific cases. The results indeed show that semi-presidential and presidential systems provide an institutional environment which favors the development of an activist and independent CC more so than pure parliamentary systems with their focus on the fusion of executive and legislative powers.

The third environmental characteristic considered in this analysis pertained to the regime's general respect for political rights and civil liberties. I expected that CCs engage in activism more frequently in countries when the political system recognizes and respects the rights of its citizens. The empirical results do not support this claim. Although

the coefficient is negative (indicating that CC activism is more prevalent in countries with extensive protection of rights), the variable is not statistically significant.

Additionally, I expected that economic performance (proxied by GDP growth rate) influences judicial behavior. However, I did not specify direction of its influence. The results presented in Table 5.3 demonstrate that economic performance has a statistically significant and positive influence on CC activism. Furthermore, the impact of economic conditions on judicial activism is substantial. As the country's economic conditions improve, the likelihood of CC invalidating statutes, bureaucratic regulations, and other government actions increases by 10.5%. These results contradict Herron and Randazzo's (2003) finding that judicial activism in the post-communist countries is more prevalent during economic downturns. At this point, I can only speculate that my results indicate that economic growth leads to an increasing demand for more objective dispute resolution mechanisms and better-functioning regulatory and judicial institutions in the post-communist countries, and that CCs respond to this demand by standardizing the law, clarifying public and private property rights, and invalidating contradictory or illegal policies. Clearly, more theoretical and empirical research on the impact of economic conditions on judicial activism is necessary at this point to determine the precise nature of this relationship.

The last environmental factor considered in this analysis concerned a country's participation in the EU accession process. I speculated that the EU accession process may potentially encourage CCs to rule against the preferences of dominant political actors in order to assure that national policies converge with the EU norms. This study expected to find a positive relationship between a country's participation in the EU accession process and CC activism in a candidate country. According to Table 5.3, however, participation in the EU accession process does not exert a statistically significant influence on the likelihood of CC activism. Moreover, the coefficient is negative, indicating that CC is less likely to invalidate government policies in candidate countries. The data seem to indicate that EU influences are not as important for the CC behavior as some scholars have suggested. It is quite likely, however, that the EU accession program does have a positive influence on state institutions' compliance with the domestic constitution and the EU norms. The politicians in the states participating in the EU accession program are

likely to anticipate reprimands by the EU Commission for unconstitutional policies (e.g., refusing to conclude negotiations on the individual chapters of the *acquis communautaire* or postponing the date of accession), and therefore adopt laws and regulations that are less likely to be viewed negatively by the Commission or be challenged on the constitutional grounds before the CCs. In other words, the positive influence associated with the EU accession negotiations may manifest itself earlier in the policy-making process and before the CC has an opportunity to assert its powers. The negative coefficient on the *EU Applicant Status* variable strongly supports this possibility.

Litigant Characteristics

At the beginning of this study, I assumed that the courts care about making efficacious policy and, based on this assumption, hypothesized that CC behavior in reviewing government policies will be affected by the presence of certain litigants before the court. Specifically, I expected that when president appears as an appellant before the court, requesting it to invalidate a legislative statute, a lower court ruling, or a policy decision of a local/regional government, the CC will defer to the presidential request. Put differently, I hypothesized that the CC will be more likely to nullify policy decisions of other actors when asked directly by the president. The empirical results support this claim unequivocally. According to the marginal effects reported in Table 5.3, when a president appears as an appellant, CCs are 13.9% more likely to acquiesce to president's appeal and invalidate the challenged policy. Clearly, the post-communist CCs favor presidents in their rulings. Given that some post-communist regimes concentrate enormous power in the presidential office (e.g. Belarus, Russia, Georgia, Azerbaijan, and to a somewhat lesser extent, Armenia, Croatia, and Ukraine), these results are unsurprising. The CCs realize that unlike the legislatures, the presidents are able to act quickly and unilaterally and can sometimes impose substantial costs on courts if they do not get their way.⁵²

⁵² The most extreme example in the post-communist region is Boris Yeltsin's suspension of the activities of Russian CC in October 1993. The CC became embroiled in separation of powers dispute that pitted Yeltsin against the Duma, chose to side with the parliament, and ultimately paid a price for its actions. Although this is an unlikely scenario in most circumstances, presidents in many post-communist countries can impose less extreme and technically-legal "punishments" on the CCs and their members when their policy objectives are thwarted. In several countries, efforts were made by the presidents to deprive the CC judges of their basic services like transport and living quarters (Russia, Ukraine), elevator service and electricity (Slovakia), and office buildings (Bulgaria). Chapter 2 elaborates on the specific tools available to the post-

I also proposed that when individual citizens, private businesses, and civic organizations appeal the court (direct constitutional challenges and constitutional appeals), the CC judges may be more likely to engage in judicial review and strike down policies challenged by the ordinary citizens. In short, I expected a higher probability of judicial activism if an individual appears as an appellant before the CC. The results show that CCs are in fact attentive to the requests for invalidation made by private actors. According to the marginal effects for the *Individual (Appellant)* variable, CCs are 8.6% more likely to invalidate statutes, executive orders, bureaucratic regulations, or lower court rulings when asked to do so by ordinary citizens. This finding thus supports the argument that CC judges view their role as protectors of individual rights and liberties. And, it is reasonable to interpret CCs' activism on the behalf of citizens is an indication of their independence.⁵³

Third, I considered whether CCs are more willing to invalidate legislative statutes if a minority party in the legislature appeals the court. However, I did not hypothesize the direction of its influence on the probability of judicial activism. The results in Table 5.3 show that CC behavior is not influenced by the appeals made by the legislative minorities. Although the variable fails to achieve statistical significance, the negative sign on the coefficient seems to support Herron and Randazzo's (2003) argument that CCs are less likely to rule in favor of legislative minority appellants when the legislative majority is a respondent to the case.

Fourth, I controlled for those cases where legislature appeared as a respondent before the court. I hypothesized that when the legislature appears as a respondent in a case adjudicated by the CC, the court may be less deferential and more willing to invalidate the statute. I speculated that the pressures on the CC to rule in favor of legislative majorities (i.e., uphold the statute) are minimized by the fact that legislative counterattacks for unfavorable rulings require extraordinary levels parliamentary coherence and significant amount of time to execute. I therefore expected that other

communist presidents to ensure that the CCs take presidential preferences seriously in making decisions (see section titled *Mechanisms for Accountability: Political Control and Influence on the Court*).

⁵³ Private actors cannot impose costs on the courts for unfavorable decisions; on the other hand, many political institutions that are challenged in courts can retaliate against them for unfavorable rulings. The fact that the CCs are more likely to side with the weaker litigant on certain issues thus signifies that courts are willing and able to act on their formal responsibilities as the protectors of individual rights and the rule of law.

things being equal, this may invite more invalidations from the CC. The empirical results support this speculation. The CCs are 5.7% more likely to invalidate a legislative statute if and when the legislature appears a respondent to the case. In light of the findings for *President (Appellant)* and *Individual (Appellant)* variables reported above, a discovery that CCs are more willing to invalidate legislative statutes when the legislature is a respondent make a good deal of sense.⁵⁴

Finally, I hypothesized that CCs will be particularly active in ruling against the ordinary judiciary and bureaucratic agencies. Since ruling against these actors does not pose an immediate threat to CCs, I expected a greater probability of activism in cases where these actors appear as respondents. The empirical results support my claims in regard to the bureaucratic agencies only. The CCs are 8.1% more likely to invalidate agency decisions if an agency is a respondent to the case. However, as Table 5.3 shows, post-communist CCs do not systematically rule against the decisions of the lower courts. The *Ordinary Judiciary (Respondent)* variable is not statistically significant and the sign on the coefficient is in the direction opposite to my hypothesis.

Issue Characteristics

The final set of control variables pertained to the influence of specific issues litigated by the constitutional courts. I hypothesized that judges are more likely to strike down policies which concern allocation of powers (horizontal or vertical), economic/financial issues, and individual rights. Conversely, I expected that CCs will be less likely to intervene in electoral disputes. The empirical data show that the elections-related issues do not exert a significant influence on judicial behavior (although the sign on the coefficient is in the hypothesized direction); CCs are not likely to actively intervene in such issues. On the other hand, my claims regarding the separation of powers, economic issues, and individual rights are confirmed (see Table 5.3).

According to the marginal effects, CCs are 7.7% more likely to invalidate legislative statutes or presidential decrees pertaining to separation of powers issues or to the issues of governmental authority. Moreover, constitutional courts are more active

⁵⁴ In many cases coded for this analysis, the president or a private citizen appealed the CC for invalidation of a legislative statute, asserting that it violated the separation of powers clauses of the constitution or the constitutional rights of the citizens.

when resolving economic issues involving private and public disputes over property rights, constitutional complaints about taxation and customs duties imposed on individual citizens and businesses, and requests for financial reparations for economic losses. Over the observed period, post-communist CCs were 4.7% more likely to strike down legislation in these types of cases. Finally, I hypothesized that the CCs will be more inclined to act in order to preserve and defend individual political rights, civil liberties, and fundamental human rights. The results show that courts were 6.3% more likely to exert their influence on rights-related issues and to nullify challenged government policies. Combined with the results for the *Individual (Appellant)* variable, it is clear that post-communist CCs perceive their role as defenders of rights and actively shape public policy in this area.

CONCLUSION

In this chapter, I analyzed a wide range of influences that affect the behavior of judges on the post-communist CCs. I examined whether the level of CC viability impacts the degree to which post-communist CCs become actively involved in deciding constitutional disputes and the degree to which they invalidate the policy choices of other major political actors. I also explored a number of contextual and institutional factors that undermine or bolster the policy-making authority of the courts. Four important conclusions emerge from my analysis.

First, we are now in a position to conclude that viable courts are relatively independent and active courts, at least in the post-communist region. Ultimately, independence is measured by how capable CC judges are of rendering decisions solely on the basis of their understanding and interpretation of the constitutional law and without taking into consideration the class, status, or power differentials of the participants to the litigated case. To equate institutional viability with independence is of course inappropriate for the reasons outlined earlier in this chapter, but given the results of this analysis, it is undeniable that the institutional design of post-communist constitutional courts greatly influences their levels of independence.

As I have already noted, the tools that political actors can use against the courts differ in their severity. All impose some costs on courts, but some impose greater costs than others. Being removed from the court or having the court's jurisdiction reduced, for example, are more costly than being overturned. Courts will then weigh the costs they might face against the potential benefits of reaching policy outcomes that they prefer but other actors might oppose. The ratio of these costs to these benefits is larger in political systems where the courts are weakly institutionalized and smaller in countries where the courts have attained a relatively high level of viability. Substantial levels of CCs' institutional growth thus minimize the severity and the likelihood of reprisals against the court by powerful political actors, allowing the courts to behave relatively independently.

One important caveat is in order. This conclusion is contingent upon how we measure institutional viability of the courts; reliance on only one feature of CC design or only on the provisions outlined in the founding constitutions is inadequate. We must look beyond the provisions in the founding constitution to the dates of their implementation if we want to accurately capture the actual level of CC viability. When institutional viability is adequately measured, it corresponds favorably with the courts' ability to become a distinctive and respectable force within the post-communist regimes.

Second, as Keohane (1969) notes, the actual impact of an organization depends upon the interactions between its own organizational characteristics and the surrounding environment. Constitutional courts do not exist in a vacuum and my analysis shows that the institutional environment in which CCs operate is an important determinant of their policy influence. Some institutional environments provide CC judges with more opportunities to shape national policies while other institutional settings limit the scope of judicial impact. I find that the separation of powers systems (i.e. presidential and semi-presidential regimes) are conducive to the independence and activism of constitutional courts. Presumably, due to a combination of a difficult environment for passing new legislation to retaliate against the CC for unfavorable decisions, along with high demand from the president and the legislature for a neutral third party to resolve jurisdictional boundary problems, semi-presidential and presidential systems favor the development of activist and independent CCs in the post-communist region. On the other hand, I find that pure parliamentary systems limit CC opportunities to actively shape national policies.

Other things being equal, because the legislative and executive branches remain fused in such systems, constitutional courts have little room for maneuver and court rulings at odds with the legislative majority can be overturned with relative ease.

The results for the legislative fragmentation variable—another proxy for the institutional environment—seem to support the “insurance theory” of judicial power proposed by Ginsburg (2003). The author argues that the demand for an active and independent constitutional court is greatest in the political systems where legislative power is evenly split between two dominant parties.⁵⁵ My findings similarly indicate that the probability of judicial activism is negatively related to the number of viable parties in the legislature. Although I make no strong claims in support of Ginsburg’s theory at this moment, the empirical data hint at a possibility that “insurance theory” can help explain judicial behavior in the post-communist countries.

Taken together, the results for presidentialism and legislative fragmentation perhaps indicate that the most fortuitous environments for active and independent CCs are those where the presidential branch is independent and relatively influential, and the parliamentary power is evenly split between two or three major parties. This constitutional configuration may be ideal for the development of active judicial power. In future analyses, it is necessary to address the interactive effects of these two variables on judicial independence in a more rigorous manner.

Third, I discovered that the impact of economic conditions on judicial activism is positive and substantial. Unfortunately, my data do not provide a satisfactory answer for this phenomenon. At this point, I can only speculate that my results indicate that economic growth leads to an increasing demand for more objective dispute resolution mechanisms and better-functioning regulatory and judicial institutions in the post-communist countries, and that CCs respond to this demand by actively intervening in matters related to national economy. This possibility is further supported by the finding that constitutional courts are more active when deciding economic issues involving private and public disputes over property rights, complaints about unfair taxes and

⁵⁵ In such scenarios, neither party can be confident of winning future elections and would therefore prefer to limit majority rule and value institutional mechanisms that check the power of future electoral winners.

customs duties imposed on individual citizens and businesses, and requests for financial reparations for economic losses.

Finally, it is important to emphasize that while structural/institutional environments shape the range of policy options available to the CC judges they do not dictate specific case outcomes. As the empirical results show, in the real world of CC litigation, parties to the specific case can and do influence the extent to which courts take advantage of the existing structural and institutional opportunities. In separation of power cases, the constitutional court is most clearly serving in its role as dispute resolver rather than policy maker. But these kinds of cases are fraught with danger for the court, especially where there is an asymmetrical distribution of power among the litigants to the case. The losing party may respond with non-compliance and/or retaliation against the court. Thus, if the court sides with the more powerful litigant, its decision becomes largely self-enforcing and the risk of reprisal is substantially lowered. This study shows that in the post-communist region CCs clearly favor the presidents in disputes over governmental authority. When a president appears as an appellant before the court and requests it to invalidate policies of another government body (the legislature and local/regional governments are typically the respondents to such cases), the court is likely to rule in the president's favor. Given that several post-communist regimes concentrate enormous power in the presidential office (e.g. Belarus, Russia, Georgia, Azerbaijan, and to a somewhat lesser extent, Armenia, Croatia, and Ukraine), these results are unsurprising.

However, where constitutional courts side with an individual against government institutions in political, civil, or economic rights cases, the reason cannot be the lower potential for reprisal or the greater possibility of compliance. The power of government institutions to retaliate against the court or to ignore its decisions is always greater than that of individuals. Rather, CCs' activism on the behalf of individual citizens is a clear indication of their relative independence. The CCs in post-communist countries obviously perceive themselves as protectors of individual rights and liberties and, dependant on their levels of viability, are more or less willing to challenge powerful political actors in such cases. It is possible that in deciding in favor of individual rights,

the CCs are striving to legitimize their existence in the eyes of the general public and by doing so to raise the costs of future political attacks or non-compliance.

Though I have amassed one of the largest collections of data ever assembled on constitutional court decisions, my findings are nonetheless limited to the post-communist region and to published decisions only. And my efforts to tease cross-national (and a few longitudinal) inferences out of these data will surely not please everyone. Still, I am convinced of three things: Additional case studies of the constitutional courts can do little to advance our understanding of the general processes by which courts acquire institutional viability and become active policy makers; it is necessary for scholars to carefully formulate their hypotheses and differentiate between the general effects of institutional/structural configurations and the effects of peculiar contexts in which actual judicial choices are made; and, the increasing availability of cross-national and longitudinal quantitative data on courts provides enormous opportunity to test and refine our theories of judicial behavior.

TABLES

Table 5.1, Judicial Activism (by Country)

	Number of Published Decisions on the Merits	Proportion of Activist Rulings	Time Period Coded
Armenia	36	0.56	1996-2006
Azerbaijan	116	0.70	1998-2006
Belarus	269	0.77	1994-2006
Bosnia-Herzegovina	156	0.53	1997-2006
Bulgaria	253	0.68	1991-2006
Croatia	105	0.38	1997-2006
Czech Republic	124	0.44	1992-2006
Estonia	173	0.60	1993-2006
Georgia	46	0.61	1996-2006
Hungary	69	0.61	1992-2006
Latvia	127	0.69	1997-2006
Lithuania	196	0.42	1993-2006
Moldova	315	0.41	1995-2005
Poland	150	0.62	2000-2006
Romania	198	0.57	1992-2006
Russia	246	0.63	1992-2006
Slovakia	698	0.42	1993-2006
Slovenia	469	0.55	1992-2006
Ukraine	129	0.34	1997-2005

Table 5.2, Descriptive Statistics

Variable	Obs.	Min	Max	Mean	Std. Dev.
Activism (<i>dependent variable</i>)	3838	0	1	0.544	0.498
CC Viability	3838	-2.015	1.307	0.669	0.518
Legislative Fragmentation	3838	1.14	8.79	4.381	1.594
Presidential Power	3838	1	22.5	9.767	6.032
GDP Growth	3838	-0.200	0.291	0.041	0.059
EU Applicant Status	3838	0	1	0.584	0.493
FH Liberties and Rights	3838	2	13	5.222	3.047
President (Appellant)	3838	0	1	0.190	0.393
Individual (Appellant)	3838	0	1	0.404	0.500
Legislative Minority (Appellant)	3838	0	1	0.081	0.351
Legislature (Respondent)	3838	0	1	0.342	0.475
Ordinary Judiciary (Respondent)	3838	0	1	0.281	0.449
Bureaucratic Agency (Respondent)	3838	0	1	0.172	0.378
Separation of Powers (issues)	3838	0	1	0.134	0.341
Electoral Disputes (issues)	3838	0	1	0.104	0.305
Economic (issues)	3838	0	1	0.567	0.496
Individual Rights (issues)	3838	0	1	0.682	0.466

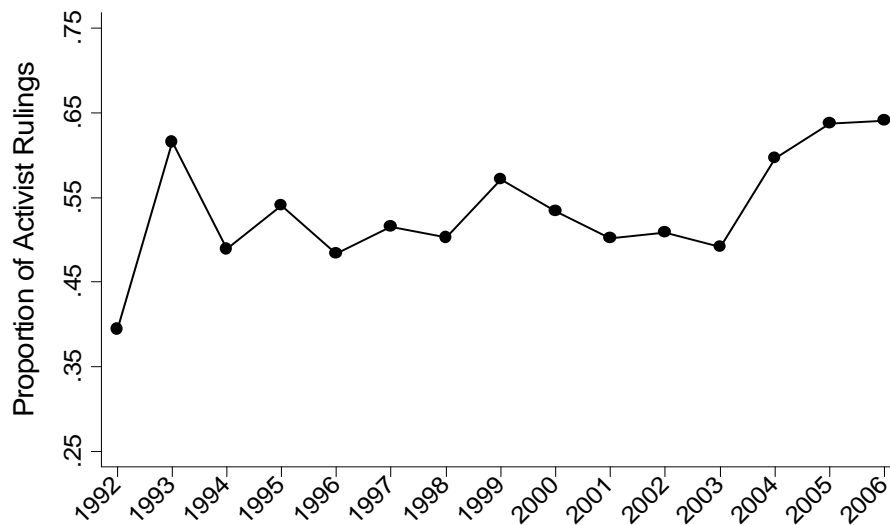
Table 5.3, Institutional and Contextual Influences on CC Activism (Probit Results)

Variable	Coefficients w/Robust Standard Errors	Marginal Effects
INSTITUTIONAL FEATURES		
<i>Constitutional court viability</i>	.325 (.101)***	.158***
CONTEXTUAL INFLUENCES		
<i>Legislative Fragmentation</i>	-.068 (.031)**	-.048**
<i>Presidential Power</i>	.022 (.010)**	.063**
<i>FH Liberties and Rights</i>	-.013 (.033)	-.010
<i>GDP Growth</i>	1.405 (.814)*	.105*
<i>EU Applicant Status</i>	-.063 (.168)	-.014
LITIGANT CHARACTERISTICS		
<i>President (Appellant)</i>	.824 (.261)***	.139***
<i>Individual (Appellant)</i>	.615 (.107)***	.086***
<i>Legislative Minority (Appellant)</i>	-.047 (.108)	-.033
<i>Legislature (Respondent)</i>	.420 (.099)***	.057***
<i>Ordinary Judiciary (Respondent)</i>	-.128 (.105)	-.034
<i>Bureaucratic Agency (Respondent)</i>	.307 (.120)***	.081***
ISSUE CHARACTERISTICS		
<i>Separation of Powers (vertical/horizontal)</i>	.351 (.125)***	.077***
<i>Electoral Disputes</i>	-.172 (.142)	-.028
<i>Economic (financial damages and rights)</i>	.211 (.092)**	.047**
<i>Rights (political, civil, and human)</i>	.402 (.086)***	.063***
Constant	-.869 (.315)***	.124 (baseline probability)
N (observations)	3,838	
N (countries)	19	
Log pseudolikelihood	-2557.166	
Wald X ²	163.53	
Prob > X ²	.000	
McKelvey and Zavoina's R ²	.524	
Pseudo R ²	.069	
Difference of BIC' parameters	12.123	

System of proportional weighing is used to ensure comparability across countries in terms of representation within the overall dataset; robust standard errors are reported in parentheses; all significance tests are two-tailed; a difference of BIC' parameters indicates that model with the judicial viability measure is more likely to have generated the data than the model without the viability measure; McKelvey and Zavoina's R² provides the closest approximation of Adjusted R² statistic found in OLS; * $p > 0.10$; ** $p > 0.05$; *** $p > 0.001$

FIGURES

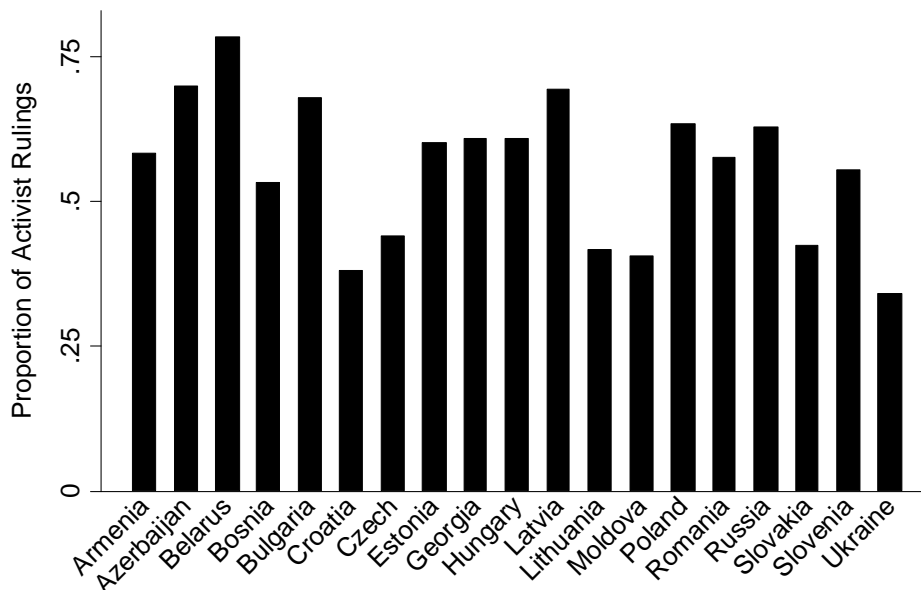
Figure 5.1a, Proportion of Activist Rulings Across the Region by Year, 1991-2006



Notes:

- Figure represents the proportion of laws, presidential decrees, bureaucratic regulations, lower court rulings, or decisions of the CEC nullified by the constitutional courts.
- N=19 post-communist countries

Figure 5.1b, Proportion of Activist Rulings by Court (from the 1st year of operation through 2006)



Notes:

- Bars represent the proportion of laws, presidential decrees, bureaucratic regulations, lower court rulings, or decisions of the CEC nullified by each constitutional court.
- N=19 post-communist countries

Figure 5.2. Observed Correlations between Judicial Viability and Judicial Activism

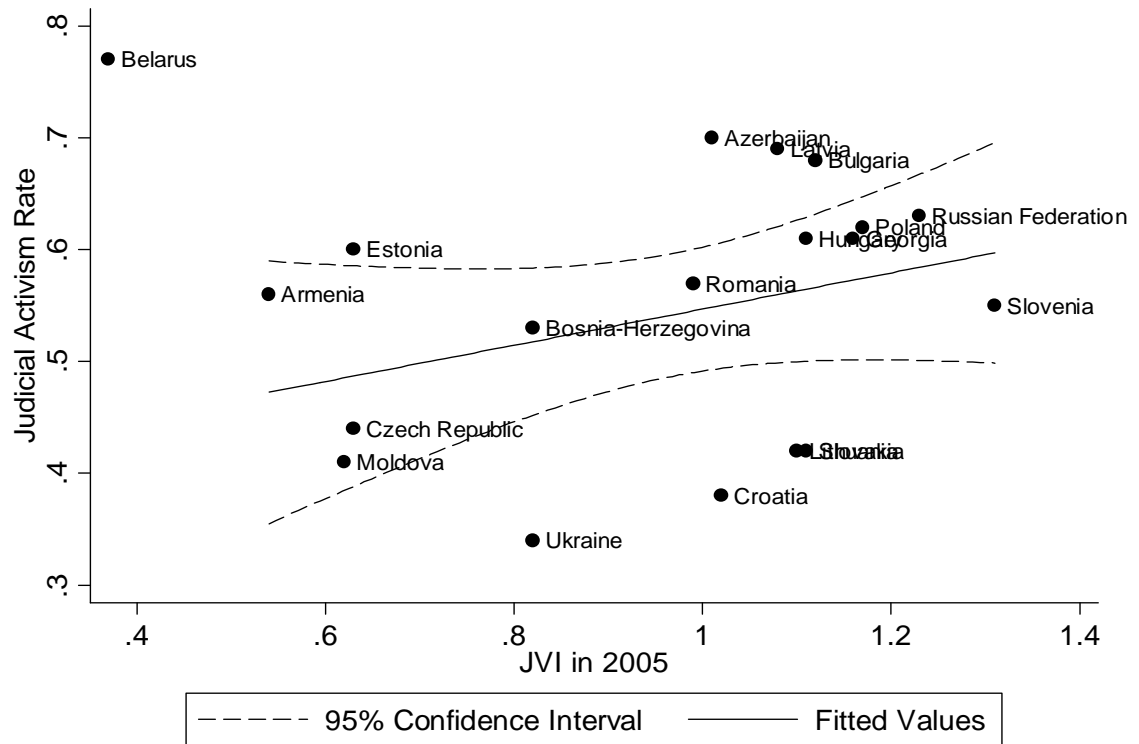
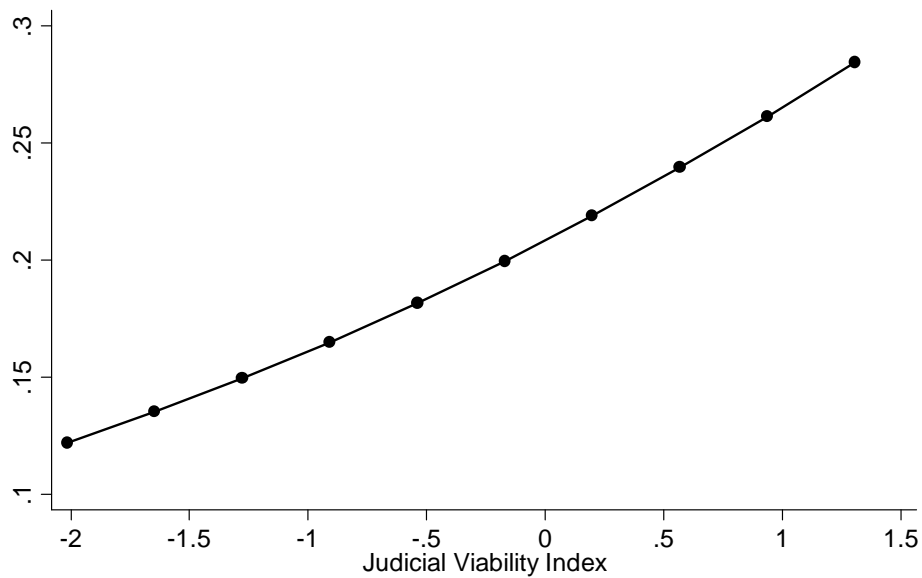


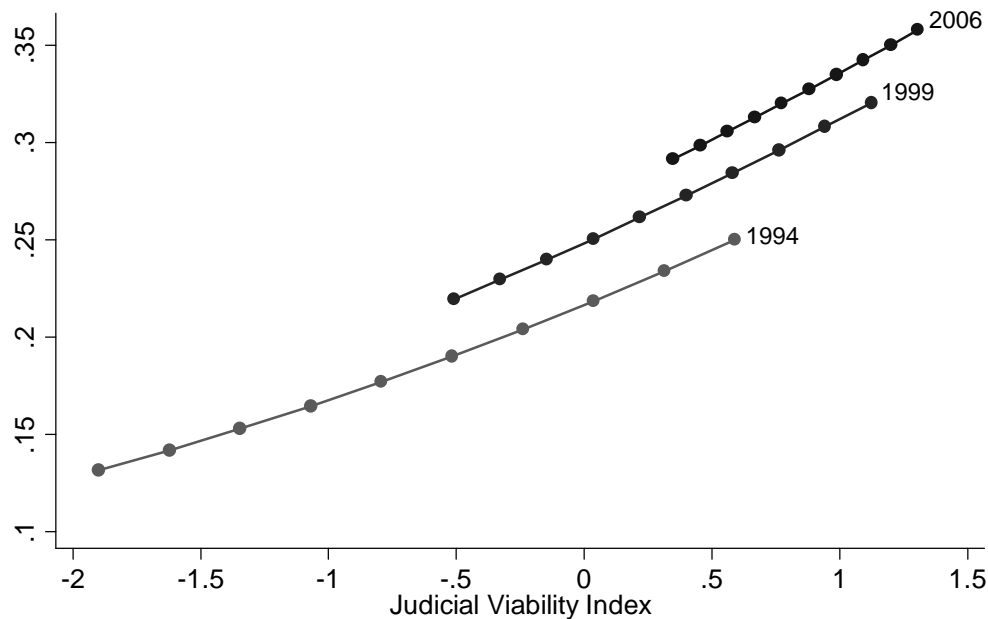
Figure 5.3a. Predicted Probability of Activist Ruling Over the Observed Period, 1991-2006



Notes:

- Graph represents predicted probabilities of the court nullifying a challenged law, presidential decree, bureaucratic regulation, lower court ruling, or decision of the CEC.
- N=19 post-communist countries

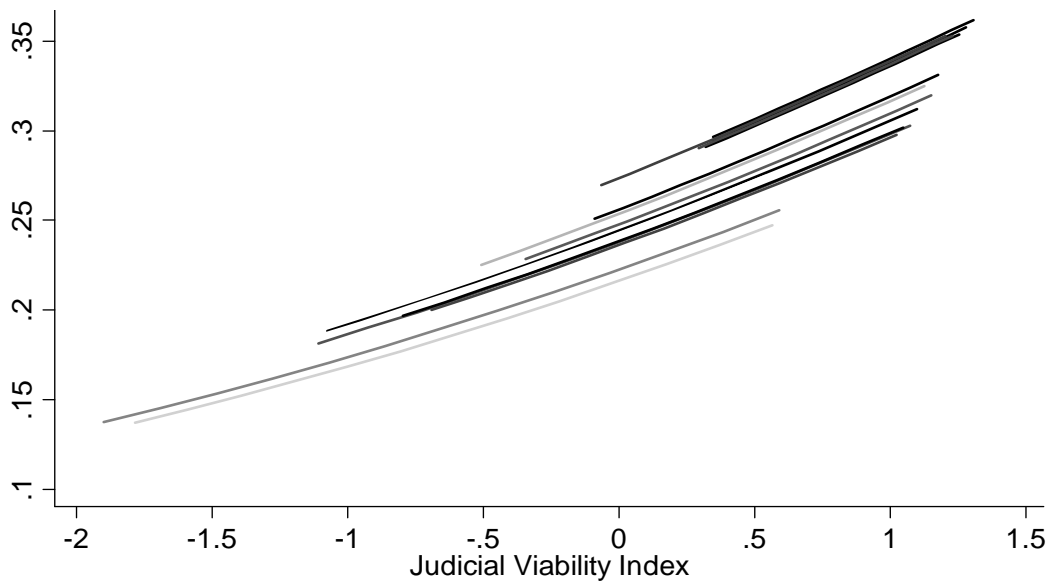
Figure 5.3b, Predicted Probability of Activist Ruling, Selected Years



Notes:

- Graph represents predicted probabilities of the court nullifying a challenged law, presidential decree, bureaucratic regulation, lower court ruling, or decision of the CEC.
- N=19 post-communist countries

Figure 5.3c, Predicted Probability of Activist Ruling by Year, 1991-2006



Notes:

- Graph represents predicted probabilities of the court nullifying a challenged law, presidential decree, bureaucratic regulation, lower court ruling, or decision of the CEC.
- N=19 post-communist countries

CHAPTER SIX

Judicial Institutionalization and Public Confidence

INTRODUCTION

In post-communist regimes, it is of great importance that citizens acquire confidence in what once were repressive institutions, such as the police and courts. In order to acquire institutional loyalty and legitimacy, and to become fully viable institutions, constitutional courts (hereafter, CCs) and ordinary judiciary have to amass a store of popular support and positive evaluations of their general performance by the citizens (see Gibson, Caldeira and Baird 1998; hereafter GCB). In the post-communist context, this is a difficult task, to say the least. As Chapter 2 pointed out, pervasive popular skepticism in courts and the legal system persists in the region. Rampant corruption, economic instability and growing inequality, and poor performance of bureaucratic agencies in the post-communist period, especially during the 1990s, further complicate post-communist judiciaries' ability to attain high levels of public trust. The survey research findings in the post-communist countries point to this alarming trend. Initially, Mishler and Rose (1997) (hereafter MR) argued that a "healthy skepticism" predominates in post-communist region and that this attitude, to a large extent, should facilitate the development of a truly democratic society more so than blind, unequivocal trust. Few years later, however, the authors note that the overall pattern in post-communist countries is one of severe skepticism bordering on outright distrust of current institutions—"Positive trust in any institution is extremely limited; even skepticism is in short supply" (MR 2001: 41).¹ Given these findings, I approach the study of public

¹ The situation has deteriorated even further in the recent years. Life in Transition Surveys (LITS) conducted in 2006 by the European Bank for Reconstruction and Development in 27 post-communist countries shows that the courts are now experiencing a true crisis of confidence. According to the LITS

perceptions in the post-communist judiciary with modest expectations and, in MR's words, with "healthy skepticism."

In Chapter 3, I introduced two potential impacts associated with judicial institutions and institutional development that I explore and analyze throughout this dissertation. I argued that one of these impacts is internal to the organization, referring to the effects of institutionalization on the behavior of CC judges, while the other captures the effects of institutionalization on public perceptions and thus reflects institutional impact on the surrounding environment. In Chapter 5, I addressed the former; below, I explore the latter. My goal here is not to offer a definitive theory that explains all cases, but rather to articulate an important set of factors that have received insufficient attention in the discussion of public perceptions of the judiciary. In short, I hypothesize that as the CCs develop (i.e., acquire institutional viability through positive accretion of different measures of durability, autonomy, and differentiation), their institutionalization will influence public perceptions of a country's legal system as a whole. As a system/macro-level variable, CC viability will have a homogenizing, positive effect on personal attitudes, and confidence in the justice systems will vary across countries in proportion to the degree of their CCs' institutionalization. Existing survey research and case study findings from West European democracies and the United States provide some evidence to support these theoretical expectations (see Gibson and Caldeira 1992, 1995; Caldeira and Gibson 1995; GCB 1998; Schwartz 2000; Shapiro and Stone Sweet 2002), but due to the dearth of longitudinal and cross-national studies of public perceptions in courts, especially in the new democratic regimes, we still know very little about the processes that lead to the accumulation of public support in courts. Accordingly, my goal is to broaden the study of the relationships between CCs and public confidence in the judiciary by examining post-communist public attitudes toward their justice systems.

data, 44.5% of the public actively distrusts courts, another 27% profess indifference, and only 28.4% express "positive" trust in the post-communist courts across the region. Only in Azerbaijan, Belarus, Hungary, Tajikistan, and Uzbekistan, do courts enjoy high levels of public trust (with the exception of Hungary, these high trust levels are suspect). Recent case-study research reports equally troubling and paradoxical findings—public trust in the post-communist courts is declining precipitously despite the fact that these courts are becoming stronger, more independent in their decision-making, and more active in ruling against the government in favor of private citizens' interests (on the Russian case, see Trochev 2005).

Although I consider a number of other important influences on public confidence in this analysis, my interest in these factors is secondary. I do not claim that the institutionalization of CCs is the sole determinant of public trust; nor do I deny the relevance of conventional cultural and institutional explanations of trust. It is undeniable that many factors influence public perceptions, but my primary objective—one that distinguishes my study from others—is to show that the institutional design of the CCs and its subsequent development has a distinct, independent, and systematic role in explaining public confidence in the post-communist courts and legal systems.

THE IMPACT OF CONSTITUTIONAL COURT INSTITUTIONALIZATION ON PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM

A number of studies point out that the choice of institutional designs will have real consequences for government performance and for citizens' confidence in institutions (e.g., Lijphart and Waisman 1996; Stark 1995; Magalhães 1999; Schwartz 2000; McGuire 2004; Thorson 2004; Anderson, Bernstein, and Gray 2005). While the relationship between the structure of institutions and their performance has been confirmed by several empirical studies, especially in the economic performance realm, the latter relationship—between the choice of institutional design and public trust—is largely untested. Anderson and Guillory (1997: 69) correctly note that: “A country's political context has rarely been incorporated explicitly into explanations of system support or satisfaction with democracy and political institutions. In fact, much of the research on the determinants of public support in Western democracies is notably institution-free because it has focused exclusively at the level of individuals.”

There are but a few empirical studies, all conducted within the United States, that confirm that the public is in fact sensitive to the potential effects of institutional designs of courts and views some designs more favorably than others. For example, Benesh (2006) finds that the American public professes greater confidence in the state courts with institutional design features that enhance judicial independence and less confidence in institutional designs that expose judges to external influences and pressures. The

author considers selection systems (appointive vs. elective) used to fill judicial vacancies at the state level. She shows that institutional designs producing “accountable” judges (partisan election) engender less confidence than those that enhance independence (appointment systems as well as retention and nonpartisan election systems).² This relationship has never been tested in the post-communist region and it is therefore important to ask whether the institutional design of the post-communist courts may similarly affect public perceptions of the judiciary.³

As I have argued in Chapter 2, communist-era legacies are important to our understanding of why post-communist CCs were designed to play such an important role on public confidence in the rule of law and the integrity of the post-communist legal systems. In all communist states, the judiciary was subordinated to the executive, and through it, to the supra-political authority of the Communist Party. The subordination of judges to politicians and of law to politics extended from mundane administration to matters at the core of judicial decision-making. The interference of the executive branch in the judicial affairs, especially by the Ministry of Justice and the Procuracy, hindered the development of a culture based on the rule of law and contributed to the low levels of public confidence in judges during the communist era. The pervasive sense of public distrust in the communist judiciary thus had an important effect on the process of establishing the basic structure of post-communist CCs during the region’s transition to democracy. Because the ordinary judiciary was discredited and distrusted, almost all of the post-communist states adopted a European model of constitutional judicial review and created a specialized court whose primary role is to safeguard the constitution and promote the rule of law.⁴ Those politicians who backed the creation of capable and

² Similarly, referring to the states that use elective systems and short terms of office, Webster (1995) argues that the public perception that judges will need to curry favor with those capable of influencing large numbers of voters, together with the concomitant need to raise campaign funds, erodes public respect for the judiciary as an institution.

³ MR (1997) hint at a possibility that in transitional polities the design of institutions could matter for public confidence as much as their policy outputs, and have an even larger impact on public perceptions than in the consolidated Western democracies. In fact, the explicit intent of the original designers of the post-communist constitutional courts was to endow these courts with certain institutional features that would instill public confidence in the rule of law, entrench the constitutional bargain, and provide some assurance to the politicians fearful of future authoritarian reversals or of the ability of future electoral majorities to trample on the rights of political minorities (see Ginsburg 2003; Thorson 2004).

⁴ A number of scholars argue that after World War II and in the 1970s West and South European countries similarly adopted Kelsen’s centralized review design out of a profound distrust of judicial institutions

independent CCs signaled their commitment to the rule of law, strengthened their democratic credentials in the eyes of the public, and thus differentiated themselves from other politicians.

Additionally, since the very process of judicial institutionalization requires an ongoing, long-term commitment by the elected officials, public confidence in the legal system is in part contingent upon their assessment of how committed the elected branches have remained since the initial transition moment to the constitutional principles in general and to the institutional development of CCs in particular.⁵ As MR (1997: 437) argue, “Given the repressive legacy of the past, the role of the [post-communist] government in securing individual liberty may provide an especially important political basis by which citizens evaluate institutions.” Post-communist CCs were written into the post-communist constitutions as part of the wave of anti-authoritarian reforms, but a constitution is an imperfect blueprint for the creation of CCs and the subsequent changes to their design and powers have far-reaching consequences for their role in a society. If the political authorities remain committed to the rule of law over time, the courts will develop into relatively viable institutions and in turn will not only act differently, but also be viewed differently from the courts characterized by low levels of institutional development.⁶ This has a long-run significance because trust in the CCs implies trust in what the courts are doing,⁷ and this can help develop a broader sense

which had failed to meet their constitutional responsibilities (see Stone Sweet 1992, 1998, 2000; Shapiro and Stone Sweet 2002).

⁵ Since the courts do not possess the power of the ‘purse’ or the ‘sword’ they are dependent on the goodwill of other actors for survival, support, and compliance (see GCB 1998, Magalhães 1999; Schwartz 2000; Ginsburg 2003; Ferejohn, Rosenbluth, and Shipan 2004). As I have argued in Chapters 2 and 3, a constitution is an imperfect blueprint for the creation of constitutional courts and the subsequent changes to their design and powers have far-reaching consequences for their role in a society. Although constitutional courts can affect their own development at the margins, their ability to do so is severely limited; strictly speaking, the elected branches of government must pass ordinary and constitutional legislation in order to give these courts ‘political space’ to exist and function (see also McGuire 2004; Thorson 2004; Bumin 2007; Bumin, Randazzo, and Walker 2009).

⁶ Schwartz (2000) notes that the standing of Russian, Bulgarian, Czech, Slovak, and Polish constitutional courts is remarkably high with the general public and that they often rank far above the elected politicians in public opinion polls. While Schwartz attributes positive perceptions of these courts to the “bravery” of their judges in ruling against government policies and to the general public satisfaction with the pace of democratic transition, I argue that the major reason why these five courts enjoy relatively high public approval lies in their substantial institutional growth in the mid- and late-1990s, which, in turn, also allowed constitutional court judges to be “brave” and for the democracy to deepen.

⁷ Greater public trust is associated with the perception that constitutional judges are different from other political actors, that they rely on law and the constitution, and that they are “impartial” and “objective” (Tyler and Mitchell 1994). Additionally, through the processes of selective perception and framing, those

of respect for the constitution and the rule of law (Ginsburg 2003). Therefore, CC institutionalization should not only affect the levels of public confidence in the court itself, but also generate more diffuse and positive public perceptions of the country's legal system at large. These courts, if institutionalized, become the flagships of the rule of law and constitutional faith in the emergent democratic regimes.

There a number of other reasons why the viability of CCs will impact public views of the post-communist justice systems. CCs are the most visible courts in most if not all countries,⁸ and their stature in the constitutional and legal hierarchy will figure prominently into how the public perceives the justice system.⁹ In addition, to the extent that a CC becomes a salient and viable institution, it will make decisions of interest and concern to the citizens. In the post-communist countries, such basic necessities as food, clothing, shelter, medical care, and work are seen as a matter of right that people can demand from their governments, and the post-communist societies include such rights in their constitutions for enforcement by the CCs. CCs are also given jurisdiction over the allocation of power among different branches of the state and the protection of human rights, as well as other sensitive issues that impact public opinion and degree of support for the rule of law and the new democratic regime, such as validating elections and impeachments of the highest officials.

Although it is unreasonable to think that the public will be intricately aware of all (or even most) CC decisions on these issues, it is far more likely that an average citizen will know something about the work of the CC than she will of the rulings of the lower courts, and would base her confidence in the legal system, at least in part, on her assessments of the salience and viability of the CC. Institutional growth of the CCs

with allegiance to and trust in a constitutional court may be more likely to discount objectionable decisions and sometimes even give excessive credit for favorable decisions (see GCB 1998: 355). Finally, if the court is trusted and well-respected by the public, the legislatures and executives are more likely to comply with unfavorable decisions by the court (Vanberg 1998; 2001).

⁸ GCB (1998) empirically confirm that public awareness of supreme and constitutional courts is fairly high in post-communist societies. The authors speculate that the awareness of the post-communist high courts in large part indicates their politicization; these courts, especially in the first ten years of the transition from the communist rule, had to make decisions that were of great significance (e.g., human rights, lustration, economic privatization, government powers) and attracted extensive media attention both at home and abroad (see also Schwartz 2000; Stone Sweet 2000; Shapiro and Stone Sweet 2002; Trochev 2005).

⁹ In making this argument, I do not suggest that the perceptions of individuals about a country's legal system are affected only by the status of the constitutional courts; there are certainly a number of other factors that will affect citizens' confidence.

should therefore influence the ordinary citizens' confidence in their legal systems because these courts make decisions that greatly affect the public at large (or at least have the potential to do so) while the lower courts have far narrower and less significant effects on public life.¹⁰ In sum, CC visibility, stature, and potential significance of their rulings to the political and social life should not be neglected in the analyses of public trust in the emergent post-communist justice systems.¹¹

Beyond these reasons, it is important to remember that the CCs are formally charged with protecting the independence, immunity, and status of all other judges and courts.¹² Their institutional development is a necessary (albeit not sufficient) condition for the development of the regular judiciary and for these lower courts' ability to provide independent and impartial resolution of disputes.¹³ As Schwartz (2000) shows, capable and independent post-communist CCs help develop a respect for constitutionalism among

¹⁰ For instance, between 1992 and 2005, the Russian Constitutional Court (RCC) received over 130,000 petitions from individuals, corporations, regional administrations, other courts, and politicians, and issued more than 1,300 decisions (but only 246 on the merits of the case). A significant share of the Court's decisions reversed federal and regional policies in favor of individual political and civil rights, rights of criminal defendants, and rights of private businesses, ethnic minorities, and civil society groups (Trochev 2005).

¹¹ The quality of judicial rulings and judges' independence and impartiality in rendering decisions may also be important to public perceptions of the legal system. However, I argue that much of this judicial performance is also contingent upon courts' institutional development and, thus, by default, on the extent of commitment to the rule of law and a capable legal system made by the elected branches. Judicial corruption and subservience, for example, are symptoms of poorly-funded judiciary and insufficient structural protections for judicial independence (factors that the elected branches, not the courts, have the responsibility to enact and implement). Furthermore, GCB (1998: 354) point out that "Courts garner legitimacy from pleasing decisions but lose little or nothing from displeasing decisions, since they can transfer responsibility for unpopular decisions to the 'law.' In this sense, courts do not suffer from negativity bias, the common tendency for negative policy outputs to be more readily noticed than positive outputs."

¹² Although constitutional courts may not always protect the independence or powers of the lower court judges, without institutionally viable and developed constitutional courts, the government and the ministry of justice is likely to return to the communist-era practice of interfering in the judicial affairs.

¹³ In 1994, for example, due to its dominance in the Bulgarian Assembly, the successor of the Communist Party, the Bulgarian Socialist Party (BSP), pushed through the Law on Judicial Power which established new eligibility requirements for the regular judiciary and made them retroactive. Schwartz (2000: 175) points out that the goal of BSP was to purge the judiciary of the newly appointed and fairly independent (although poorly qualified) non-communist judges. In its ruling, the Constitutional Court of Bulgaria upheld the government's new professional competence and eligibility requirements, which mandated three years' judicial experience for trial court judges, but refused to permit their retroactive effect, thus allowing the non-communist incumbents to remain in office. The next year, in 1995, the Court once again stood up to BSP and protected the regular judiciary by striking down a provision of the state's budget as a violation of judicial independence. The budget law placed the BSP-controlled Ministry of Justice in charge of funding the Supreme Judicial Council, which appoints judges, prosecutors, and investigators (see Melone 1996). In short, the Court systematically protected the new post-communist judiciary from the BSP's attempt to restore communist-style judicial subservience to political power (see Schwartz 2000, Ch. 6; Ganev 2003).

the judges on the ordinary courts.¹⁴ Viable CCs may thus play an important albeit indirect role on the behavior and rulings of other judges and courts, and in doing so, contribute to public perceptions of integrity and impartiality of the legal system as a whole.

Building on these insights, I theorize that the institutional viability of CCs has far reaching consequences for public confidence in the post-communist legal systems and empirically test this proposition below. Although the reader may disagree with some of the specific arguments outlined above, to deny the impact of post-communist high courts on public perceptions of their justice systems would be equivalent to arguing that the stature and activity of the United States Supreme Court does not impact how Americans view the federal judiciary; few scholars would venture this far.¹⁵

MAPPING CONFIDENCE IN THE JUSTICE SYSTEM: THE DEPENDENT VARIABLE

I test hypotheses regarding public confidence in the post-communist justice systems with World Values Surveys (WVS) data. The WVS series was designed to enable a cross-national, cross-cultural comparison of values and norms on a wide variety of topics and to monitor changes in values and attitudes across the globe. This data collection contains the survey data from the four waves, carried out in 1981-1984, 1989-

¹⁴ The author explains that the ordinary judges in Russia are beginning to embrace their right and obligation to apply the constitution on their own, without deferring to the Russian Constitutional Court (RCC). Schwartz attributes this increasing sensitivity to and respect for constitutionalism among the judges of the general judiciary to the active role of the RCC.

¹⁵ Some critics may argue that the most pertinent and important relationship arising from the theory presented above—the relationship between the institutional development of constitutional courts and the public confidence in these courts in particular—is not addressed by this study. There is no question that the institutionalization of constitutional courts will have far greater influence on the public trust in these courts than on trust in the entire legal system. And, if it were possible, I would test this relationship empirically. However, cross-national data on public perceptions of the constitutional courts is not readily available and the costs of conducting representative surveys across the region on my own are too high to consider seriously. In addition, the relationship between institutionalization of constitutional courts and public confidence in the national legal system is a far more interesting and important one, and one that deserves to be addressed. The very reason for this analysis is to show that constitutional courts have a widespread effect on the public—they are a “vanguard institution” for public confidence in the post-communist legal systems and their stature and visibility have a distinct impact on citizens’ views.

1993, 1995-1998, and 1999-2004.¹⁶ Due to the fact that the first wave (1981-1984) is irrelevant to the study of post-communist attitudes, I consider Wave 2 (1989-1993), Wave 3 (1995-1998), and Wave 4 (1999-2000) only.

In this analysis, I consider two variations on the dependent variable. At first, I look at the respondents' basic attitudes toward the justice system (*absolute confidence measure*). Then, I consider the respondents' confidence in the justice system in comparison to their confidence in the legislature (*relative confidence measure*). It is important to look at both of these measures because the *absolute confidence measure*, although attractive in many respects, may be contaminated by a respondent's view of other institutions. MR (1997, 2001) argue that a majority of ordinary citizens in post-communist societies do not make fine-grained distinctions between institutions with which they have little familiarity or experience. Thus, courts may receive an approval because a respondent is generally satisfied with the political system or, be "guilty by association" and receive a negative rating because a respondent is dissatisfied or upset with the performance of state institutions in general.¹⁷

Yet, even if we agree with MR that a majority of the post-communist mass public does not differentiate between political institutions, differences in the level of trust across institutions may still exist for some citizens. It is therefore interesting and important to know whether the respondents who are capable of making more fine-grained assessments would express higher levels of confidence in the justice system (an "old" institution, carried over from the communist era) than they would in the parliament or another representative institution (the newly-established institutions). And, if the differences in confidence levels are discovered, it is necessary to ask why some citizens would express more confidence in the courts more than in the parliament, and how the institutional viability of CCs is related to one's relative confidence.

¹⁶ Although the official Wave 4 spans 1999 through 2004, WVS drops the question about confidence in the justice system after the year 2000, making 2001-2004 surveys irrelevant to this analysis. Albania (2002), Bosnia-Herzegovina (2001), Kyrgyzstan (2003), Macedonia (2001), Moldova (2002), and Serbia-Montenegro (2001), therefore, are not included in this part of the analysis.

¹⁷ Given the fact that the recent public opinion surveys show a general decline in public trust across all political institutions in the post-communist region, the "guilty by association" effect is most likely to be observed.

Absolute confidence in the justice system

The dependent variable, *absolute confidence in the justice system*, is measured using a WVS question that asks respondents to rate their level of confidence, with choices ranging from one (no confidence at all) to four (a great deal of confidence).¹⁸ The surveys provide data from representative national samples (of approximately 1,000 respondents in each country per survey year)¹⁹ of the publics of 22 post-communist societies (78.6% of the region is thus covered within the 1989-2000 period): Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Russian Federation, Serbia-Montenegro, Slovakia, Slovenia, and Ukraine.

As Table 6.1 and Figure 6.1 show, in 1989-1993 period, the levels absolute public confidence in the justice system were fairly high, with the exception of Belarus, where 22.9% of the public responded with no confidence and 51.1% responded with minimal confidence (i.e., “not very much” responses). The respondents in Estonia, Latvia, Lithuania, and Russia show little confidence, but outright lack of confidence is not very high—less than 18% of the respondents fall into “none at all” category. This subset of countries seems to fit most closely (albeit imperfectly) to the MR’s “skeptical” category.²⁰ In Hungary, Poland, Romania, and Slovenia, on the other hand, more than 50% of those surveyed reported “quite a lot” and “a great deal” of confidence in their post-communist justice systems. In Bulgaria, Czech Republic, and Slovakia, more than 40% also responded with “quite a lot” and “a great deal” of confidence. These data seem to conform well to MR’s (1997: 420) argument, who note “Although memories of the Communist past retain a powerful contemporary influence, the fact is that Communist rule is past... Whatever else the new civic and political institutions may be, at least they are not Communist or Communist controlled. That, by itself, can create a measure of

¹⁸ The WVS question asks respondents, “Could you tell me how much confidence you have in [justice system]?” (1) = a great deal; (2) = quite a lot; (3) = not very much; (4) = none at all. The variable was then recoded so higher numerical values represent greater interest, arriving at the following coding scheme: (1) = none at all; (2) = not very much; (3) = quite a lot; (4) = a great deal. See Appendix B for variable description and coding procedures.

¹⁹ In the statistical analyses, each country was weighted based on the exact number of respondents.

²⁰ There are important limits to comparability between the World Values Surveys (WVS) and New Democracy Barometer (NDB) surveys used by MR. Specifically, WVS ask about public “confidence” in institutions, not trust in courts; and it offers only four rather than seven response categories. A critical limitation according to the MR is that WVS excludes a middle, or skeptical category.

trust or, at least, a tempering of distrust.” Thus, arguably, it makes sense that in the first wave of post-communist opinion surveys (1989-1993), citizens tended to express fairly high levels of trust in the (partially) reformed justice systems.

Insert Table 6.1 and Figure 6.1 here

The 1995-1998 data (Wave 3) show a small decline in public support relative to Wave 2 (see Table 6.1 and Figure 6.1). More than 20% of Armenian, Bulgarian, Czech, Georgian, and Macedonian respondents react with no confidence in their justice systems. Albanian, Bosnian, Croatian, Estonian, Hungarian, Moldovan, and Polish respondents, however, express positive views of their justice systems—more than 50% of them report “quite a lot” and “a great deal” of confidence. Azeris, Czechs, Latvians, Lithuanians, Russians, Slovaks, and Slovenes are highly “skeptical” of their systems (more than 44% report “not very much” confidence in the justice systems). Lithuanians are particularly cautious in their attitudes, with almost 65% of them reporting little confidence. Nevertheless, with the exception of high negative response rate in Armenia (30% report “none at all”), the regional average for “none at all” category increased only by 2.5% relative to the first wave (from 13% to 15.5%) and those reporting “quite a lot” of confidence increased by 2.9% from the 1989-1993 period. It is interesting to note that these variations in confidence levels, at least on the surface, are not systematically tied to the degree to democratization accomplished by the country: Georgia, which scores fairly low on democracy measures for this period, exhibits similarly low confidence levels in the justice system as the more democratic and economically advanced Czech Republic.

Wave 4 (1999-2000) data, however, begin to exhibit some alarming trends, similar to those reported by MR (1997, 2001). Across the 14 post-communist societies surveyed in this period, public reactions to the justice system move further into the “skepticism” (“not very much” confidence) and outright lack of confidence categories (see Table 6.1 and Figure 6.1). More than 44% of the respondents in the 14-country sample report “not very much” confidence in their justice systems and full 20% report complete lack of confidence. At the regional level, only 6.8% of the post-communist public report “a great deal” and 28.8% report “quite a lot” of confidence. Bulgarian

(28.8% report no confidence at all), Lithuanian (24%), Romanian (20.8%), Russian (27.9%), and Ukrainian (28.1%) responses are particularly alarming.

When comparing across the WVS waves, one notices that the regional averages for the “none at all” responses keep climbing, from 13% in Wave 2, to 15.5% in Wave 3, and to 20% in Wave 4, while “quite a lot” and “a great deal” responses systematically decline. Although “not very much” category does not match MR’s “skeptical” category neatly, the substantive interpretation of these WVS Wave 4 responses conform well to the authors’ observation that “skepticism... predominates everywhere; it is the majority attitude” (1997: 424). At least on the surface, these temporal changes in the observed levels of confidence are dismaying. One would expect that as the CCs institutionalize, confidence would also rise, even if marginally. CC viability levels are in fact increasing across the region and over time, but the absolute confidence levels do not seem to follow suit. Nevertheless, given that I expected to discover declining levels of confidence (based on the previous survey findings), it is premature to discount the theory at this moment. Even the most successful of the new post-communist institutions cannot be expected to match the performance of institutions in established democracies. Therefore, whatever the origins of confidence in the new legal institutions, the absolute level of confidence is likely to be problematic.

Relative confidence in the justice system

The second dependent variable, *relative confidence in the justice system*, is measured by subtracting respondent’s answer to the WVS question about his level of confidence in the parliament (measured in the same manner as the confidence in the justice system), from his response to the question about confidence in the justice system (see Smithey and Ishiyama 2002 for a similar coding scheme). The recoded *relative confidence* variable ranges from -2, which represents greatest relative confidence in the parliament, to 2, which represents greatest relative confidence in the justice system.²¹ The interpretation of the “indifferent” category (0) is somewhat unclear as it could stand for equally high levels of confidence in the justice system and the parliament, no confidence in either institution, or any other equivalent rating for the two institutions. However, this

²¹ See Appendices A and B for details on coding this variable.

is not particularly problematic for this analysis; the purpose here is to capture the degree to which a respondent expresses confidence in one institution more so than he/she does in another one. Still, the fact that 48.5% (Wave 1), 49.5% (Wave 2), and 53.1% (Wave 3) of respondents express “indifferent” (equivalent) views toward these institutions seems to support some arguments that a majority of citizens in post-communist societies do not make fine-grained distinctions between institutions with which they have so little familiarity or experience.²²

It is notable that in all three WVS waves a greater proportion of citizens express more confidence in the justice system than in the parliament (see Table 6.2 below). In 4 out of 9 Wave 2 countries, 30.1% of respondents express significant confidence in the justice system relative to the parliament. In Wave 3, 30.4% of respondents in 15 out 22 countries express greater relative confidence in the justice system. Similarly, in Wave 4, over 30.4% of respondents in half of the countries surveyed (7 out of 14) express positive evaluations of the justice system relative to the parliament. Romanian respondents, in particular, stand out: their relative confidence in the justice system has remained consistently high (although it is declining slightly over time). Only Polish (Wave 2) and Azeri (Wave 3) respondents are overwhelmingly trustful of the parliament (more than 40% of respondents) relative to the justice system. Thus, the data show that the respondents who are capable of making more fine-grained assessments express higher levels of confidence in the justice system than they do in the parliament. Since these differences in confidence levels were discovered, it is now necessary to ask why some citizens would express more confidence in the courts more than in the parliament and how the institutional viability of CCs is related to one’s relative confidence.

Insert Table 6.2 here

In sum, across both absolute and relative measures of confidence in the justice system, four trends are worth noting. First, the relatively low levels of “a great deal” of confidence for the justice systems across the three WVS waves are consistent with the conventional wisdom on the origins of public trust in political institutions. Both cultural

²² For example, MR (1994, 2000) argue that both cultural and institutional theories assume the existence of a generalized sense of trust or distrust that holds across the different institutions of the state; their findings support this assumption.

and institutional performance theories, which I discuss in more detail in the following sections, hypothesize that initial confidence in the post-communist justice systems will be low. Cultural/socialization theories base this prediction on the legacy of distrust which developed during the communist era, combined with the weak rule of law (legal) cultures that characterize most countries in the region. Institutional theories similarly predict low levels of “positive” confidence, but base their predictions on the performance deficit that untested justice systems are likely to face as they attempt to confront intractable problems (e.g., sharp rise in crime in the mid-1990s).

Second, although the number of respondents expressing “none at all” absolute confidence in the justice system is increasing over time (from 13% of respondents in Wave 2 to 20% in Wave 4), most citizens in the post-communist societies continue to respond with at least minimal confidence toward the justice system. By the 1999-2000 period, however, “skepticism” clearly becomes the modal category. It is important to also note that skepticism and outright distrust is not limited to the judicial institutions and increasingly characterize other political institutions, including the government and the parliament. Third, as MR (1994) argue and WVS data show, many of the ordinary citizens in post-communist societies do not make fine-grained distinctions between legislative and judicial institutions with which they have little familiarity or experience. Finally, despite the relative “indifference” toward different political institutions expressed by some of the post-communist citizens, 51.5%, 50.1% and 46.9% of respondents were capable of making more fine-grained assessments in Wave 2, Wave 3, and Wave 4 respectively. The vast majority of these respondents were more likely to express confidence in the justice system than in the parliament.

Taking these observations into account, what explains the variations in public confidence in the justice system observed across the post-communist region? Why do respondents in some countries profess substantially higher levels of confidence? Why did a greater proportion of citizens express more confidence in the post-communist justice systems than in the parliaments? And, most importantly, is the level of CC viability related to the public confidence in the legal system, and if so, how? What, if anything, does it contribute to our understanding of public trust in the legal systems and courts?

PRIMARY EXPLANATORY VARIABLE: CONSTITUTIONAL COURT VIABILITY

This study argues that as the CCs develop, their institutionalization will positively impact public perceptions of the post-communist justice systems. I posit that as a system/macro-level variable, CC viability will have a homogenizing, positive effect on personal attitudes, and confidence in the justice systems will vary across countries in proportion to the level of their CCs' institutionalization. To test this relationship, I use the measure of institutional development of the post-communist CCs developed in Chapter 4. This measure is available for all 28 post-communist CCs and consists of eleven indicators across the three conceptual dimensions of institutional development.²³ Higher values on this variable are hypothesized to lead to more positive evaluations of the legal system in the *absolute confidence* model. I also hypothesize that the justice system will be trusted more than the parliament if the CC is relatively institutionalized (i.e., the effect of CC viability will be greater in the *relative confidence* models). To gauge the variable's impact on public confidence in the legal system, I use the CC viability score obtained by the year of the survey (e.g., for the 1995 survey of Russian citizens, I use the viability score obtained by the Russian CC by the year 1995).

H1: *Higher levels of constitutional court institutionalization result in more positive public opinion of the justice system. CC viability will have a homogenizing and positive effect on individual perceptions.*

H2: *In countries where the level of constitutional court institutionalization is relatively high, the public will express more confidence in the justice system than in the parliament.*

CONTROL VARIABLES

Although my primary interest is to explore the influences of the CC viability on public confidence, it is necessary to include other determinants of public trust in this

²³ See Chapter 3 for an in-depth discussion of this measure.

analysis. This will allow me to derive more robust statistical inferences about the viability-confidence relationship and to present a more comprehensive picture of the sources of public confidence in the post-communist justice systems. I include variables from two conventional approaches to the origins of trust—cultural/socialization theories and institutional performance theories. These theories can be distinguished broadly along two dimensions.

First, cultural/socialization theories principally differ from the institutional performance theories in regard to the extent to which confidence is perceived as exogenous or endogenous to political institutions (MR 2001). Cultural theories argue that confidence in political institutions originates outside the political system and reflects one's early-life (pre-political) socialization and embeddedness into the community; political trust is largely exogenous to the political processes (see Almond and Verba 1963; Eckstein 1966; Putnam 1993, 1995; Eckstein, Fleron, Hoffman, and Reisinger 1998, Inglehart 1988; 2003). By contrast, institutional performance theories argue that trust is substantially endogenous to political institutions; it is a consequence of contemporaneous institutional performance. From a performance perspective, trust depends upon citizens' evaluations of the success with which government institutions provide valued social, economic, and political benefits—trust is something that institutions have to earn (see Rogowski 1974; Anderson 1998; MR 1999; Rothstein 2003).

Second, both perspectives draw a further distinction between macro-oriented and micro-oriented theories. Macro theories assume that confidence is a collective or group property broadly shared by all members of a society and therefore emphasize the homogenizing effect of institutional performance or culture on personal evaluations. Micro theories, by contrast, hold that the individuals living in the same society may manifest very different levels of confidence in institutions because of the differences in one's socialization and social background, political and economic experiences, and individual attitudes and evaluations (MR 2001). In controlling for the effects of culture and institutional performance on public confidence in the justice system, I try to account for both macro-level and micro-level influences in this analysis.

Political Culture and Socialization Variables

Cultural theories begin with an assumption that trust is an emergent property linked to basic forms of social relations (see Eckstein 1966; Putnam 1993, 1995; Eckstein, Fleron, Hoffman, and Reisinger 1998, GCB 1998; MR 2001). From early childhood, individuals learn to trust or distrust other people by experiencing how others in the society treat them and, how in return, others react to their behavior. As an individual ages the set of interactions expands from immediate family to include school friends, colleagues, and neighbors. This results in a generalized sense of trust or distrust in other people. According to Almond and Verba (1963) and Putnam (1993, 1995), individuals and national cultures can thus be differentiated according to their levels of trust or distrust of others.²⁴

Although the sources of interpersonal trust lie outside the political system, cultural theorists further assume that people who trust each other are more likely to cooperate with each other in forming both formal and informal institutions such as choirs, bowling leagues, and community associations (Putnam 1993, 1995). Thus, although politically exogenous, interpersonal trust helps make political institutions work because it “spills over,” as Putnam describes it, into cooperation with people in civic associations and then “spills up” to create a nationwide network of institutions necessary for democratic government. In this sense, interpersonal trust is “projected” onto political institutions, creating a civic culture (Almond and Verba 1963; Inglehart 1988, 2003). In applying the culture theory to the post-communist countries, some argue that the existence of untrustworthy institutions in the former Soviet Union and in Eastern Europe (even prior to communism) has resulted in a socialization process in which individuals learn to distrust other people and institutions (Steen 1996; Hedlund 1999; Schwartz 2000, MR 2001). Given these predictions, I therefore control for the potential effects of interpersonal trust in this analysis; greater levels of trust in other people are expected to positively affect one’s confidence in the justice system.

²⁴ It is important to distinguish between *generalized* and *particularized* trust. According to culture theorists, only *generalized* interpersonal trust (i.e., ‘trust most people in country’ rather than ‘trust the people you know’) matters when it comes to public confidence in political institutions (see Uslaner 1999; Putnam 2000; Rothstein 2003).

Inglehart (1988) adds another dimension to the culture theory—life satisfaction. Although not a part of the original conception of political culture outlined by Almond and Verba (1963), Inglehart argues that the citizens of certain societies have much more positive feeling toward the world they live in than do individuals in other societies. He points out (1988: 1205) that “One of the best indicators of this orientation is satisfaction with one’s life as a whole. This is a very diffuse attitude. It is not tied to the current performance of the economy or the authorities currently in office or to any specific aspect of society. Partly because it is so diffuse... [it may] help shape attitudes toward more specific objects, such as the political system.” According to Inglehart, then, life satisfaction will be causally related to an individual’s political trust. I therefore expect that greater satisfaction with one’s life “spills over” into higher levels of confidence in the justice system.

In addition, some scholars find that “to know something about courts is to be favorably oriented toward them” (GCB 1998: 344; see also Casey 1974; Murphy and Tanenhaus 1990; Caldeira 1986; Tyler and Mitchell 1994). The proponents of this approach, especially Gibson and Caldeira (1992; 2003) and GCB (1998), argue that greater awareness of the courts creates a less realistic view of the nature of judging,²⁵ a view that greatly contributes to the support for the courts. These arguments are broadly consistent with the socialization/cultural perspectives. Although I am unable to directly control for the individual’s level of awareness in courts in this analysis, I assume that an individual’s general interest in politics is related to his or her awareness of the justice system. Based on this assumption and GCB (1998) arguments, I expect that greater interest in politics positively affects one’s confidence in the justice system.²⁶

²⁵ GCB (1998: 354) point out that “Courts garner legitimacy from pleasing decisions but lose little or nothing from displeasing decisions, since they can transfer responsibility for unpopular decisions to the ‘law.’ In this sense, courts do not suffer from negativity bias, the common tendency for negative policy outputs to be more readily noticed than positive outputs.”

²⁶ In practice, however, political awareness may result in positive or negative evaluations, depending on the specific content of the political information. *A priori*, I suspect that it is much more likely that greater interest in politics will result in more negative evaluations of the political institutions as greater exposure to political information may erode favorable stereotypes leaving the politically-aware citizen with a picture of courts that, while informed, is less favorable than would be an uninformed vision (see Sarat 1975; Benesh 2006). This is especially likely to hold true in the post-communist societies. However, the purpose of this hypothesis is to test the cultural theory predictions, not my intuitions. Moreover, the educational attainment hypothesis discussed below tests the possibility that awareness and trust in institutions are negatively related.

Age is a central variable in theories of political socialization. Listhaug and Wiberg (1995), Miller (1993), and Steen (1996) find that age has a positive effect on confidence, due to internalization of established values over time. In short, authors predict that older people will have higher trust in the political system than younger citizens. However, MR's (1997) more-nuanced analysis adds an additional dimension to this argument—the effects of age on trust vary across two broad types of post-communist institutions. MR find that the older cohorts are more skeptical of the “new” institutions (e.g., private businesses, political parties) to which elderly people cannot adapt as easily as the younger age cohorts. On the other hand, older people in the post-communist countries were found to have more confidence in “old” institutions which were carried over from the communist era (e.g., ordinary judiciary, bureaucracy, police, education system, and the military). Following MR's analysis, I therefore expect that younger people will be especially critical of the justice system, while the older people will express more positive attitudes toward the justice system.

There is also a possibility that women and men may express systematically different levels of confidence in the justice system. Some scholars point to greater political conservatism of women, their lesser political interest and participation, and their stronger support for and trust in political authorities (see Jennings and Niemi 1981; Jennings 1989; Shapiro and Mahajan 1986; Carnaghan and Bahry 1990; Finifter and Mickiewicz 1992). Following these arguments, I control for the respondent's gender and expect women to be more trustful of the justice system.

In addition to the above-mentioned social background characteristics, Steen (1996: 216-217) points out that if education is taken as an indicator of “political competence” and of one's ability to make sophisticated judgments, then the more educated citizens will express less confidence in political institutions because they are better informed and know their weaknesses. To test this prediction, I consider the individual's level of educational attainment. The well educated are expected to be especially critical of the justice system.²⁷

²⁷ It is notable that the prediction that the well-educated will express less confidence in the judicial system is at odds with the previously-discussed prediction of the cultural theory that greater interest in politics will produce more confidence in political institutions. It is unclear why different strands of cultural/socialization theory provide contradictory hypotheses regarding the influence of political competence on one's

Finally, an indicator of individual's economic circumstances—household income—is also included. Some cultural analyses argue that a respondent's earning ability is strongly related to his or her social background and political socialization, and find substantial within-country differences in political attitudes linked to differences in income (see Dalton 1996; Inglehart, Basañez, and Moreno 1998). Following the literature, I expect that wealthier respondents are more likely to be satisfied with the post-communist system and its institutions, and will therefore express more positive attitudes toward the justice system.²⁸

In sum, cultural/socialization approaches perceive trust in political institutions as an extension of interpersonal trust, general satisfaction with one's life, interest in politics, and social background characteristics reflecting one's position in the society such as age, gender, educational attainment, and income. To derive robust inferences about the impact of CC viability and to provide a more complete picture of the origins of public confidence in the post-communist societies, I therefore include these seven cultural/socialization variables in the statistical model.²⁹ All of these variables are derived from the WVS dataset. The coding for these variables can be found in Appendix B, and the descriptive statistics appear in Appendix A.

Institutional performance variables

In contrast to the cultural approaches, some scholars view political trust as a form of support that is contingent primarily upon assessments of contemporary institutional performance. From a performance perspective, trust and confidence depends upon citizens' evaluations of the success with which government institutions provide valued

confidence or how these hypotheses can be reconciled. My personal expectation is that the interest in politics and the level of educational attainment should be negatively related to one's confidence in the post-communist justice systems (i.e., more educated and politically-aware citizens will be more critical of the justice system).

²⁸ Household income and two measures of institutional performance (satisfaction with the financial situation of the household and per capita GDP income) which I describe in the following section, do not exhibit high levels of collinearity, permitting their inclusion into the statistical model.

²⁹ Since macro-level cultural theories assume that there are significant intercultural differences in life satisfaction and interpersonal trust levels, it is unnecessary to include macro-level measures for these factors; individuals' trust in others and satisfaction with life will be systematically higher in some societies and systematically lower in others. I therefore include micro-level indicators of interpersonal trust and life satisfaction only and assume alongside cultural theorists that intercultural differences on these dimensions will be evident from the individual responses.

social, economic, and political benefits—trust is something that institutions have to earn (see Rogowski 1974; Anderson 1998; MR 1999; Rothstein 2003). In regard to the post-communist states in particular, proponents of this perspective argue that value-related and cultural explanations take on a subordinate role for legitimacy and support, and short-term performance considerations are of primary importance to the post-communist citizens (MR 1997). Thus, if people are dissatisfied with the immediate outputs of the political system, their confidence in political institutions will be low.

As I pointed out earlier, institutional theories draw an additional distinction between macro-oriented and micro-oriented theories. Macro theories emphasize the homogenizing effect of institutional performance on personal evaluations. Micro theories, by contrast, hold that the individuals living in the same society manifest very different levels of confidence in institutions because they differ in their subjective experiences and evaluations of performance (MR 2001). I control for both macro-level (those that emphasize the impact of aggregate economic or political performance on citizens' confidence) and micro-level (those that focus on the individual evaluations of performance) influences in this analysis. I use five institutional performance measures, including the respondent's sense of satisfaction with his/her household finances, individual perceptions of political corruption, the aggregate index of civil liberties and political rights, a measure of per capita GDP income, and the homicide rate.

First, I consider one's satisfaction with the financial situation of his/her household as a primary micro-level measure of economic performance. Individuals who are unemployed or whose personal finances have suffered from what they believe to be poor government policies are less likely to be trusting of political institutions than respondents who experience better or improving economic circumstances (see Caldeira 1986; Silver 1987; MR 1994, 1997). I thus expect that positive evaluations of economic performance (i.e., high degree of satisfaction with household's finances) will generate positive evaluations of the political system in general and of the justice system in particular.

Second, I use the respondents' perceptions of official corruption as a proxy measure for political performance of the post-communist regimes. Numerous scholars argue that corruption systematically undermines democratic principles and performance of political and economic institutions, and, as a result, diminishes people's faith in the

political process.³⁰ Thus, if a citizen perceives that official corruption is not widespread and that public officials rarely engage in bribe taking, he/she will express higher confidence in the justice system. In sum, individuals that perceive the system to work well will exhibit higher levels of confidence. The data for these two micro-level variables are extracted from WVS. The coding procedures are described in Appendix B and the descriptive statistics appear in Appendix A.

Third, some scholars argue that in the post-communist societies macro-economic performance (measured by a country's GDP per capita income) should be highly salient for individual perceptions of political institutions. MR (1997: 426) point out that "Socialization into a state-controlled economy taught citizens to hold government accountable for economic conditions, and the introduction of market reforms has precipitated major economic dislocations." By this logic, poor macro-economic conditions should lead to declining levels of confidence in courts and other government institutions. On the other hand, good macro-economic conditions result in high levels of public confidence in the justice system. To control for this macro-level influence on public confidence, I use the natural log of per capita GDP income, extracted from the data provided by the European Bank for Reconstruction and Development.³¹

Fourth, I also add a control variable for a country's level of democracy/freedom. I expect that citizens are likely to value judicial institutions more in countries that succeed in removing restrictions on individual liberties and in providing increased freedoms (see MR 1997, 2001, 2005; Diamond 1999). Thus, a stronger constitutional and procedural emphasis on individual rights by the political system should improve citizens' perceptions of and satisfaction with their judicial institutions. This study uses Freedom House data on political rights and civil liberties to control for this influence on public perceptions.³²

Finally, I posit that the rate of violent crime, as another aspect of macro-level institutional performance, will have an impact on public confidence in the justice system. As Caldeira (1986: 1216) argues, "crime provides one of the best tests of the efficacy of

³⁰ For example, Anderson and Tverdova (2003) demonstrate that citizens in countries with higher levels of corruption express more negative evaluations of the performance of the political system and exhibit lower levels of trust in civil servants.

³¹ The data are available at <http://www.ebrd.com/country/sector/econo/stats/index.htm>.

³² The data are available at <http://www.freedomhouse.org>.

the legal and political processes.” I expect that high rates of violent crime (proxied by homicide rate per 100,000 inhabitants) will have a negative impact on citizens’ views of their justice system.³³ In sum, these institutional performance control variables are necessary to derive robust statistical inferences about the impact of CC viability and to obtain a relatively complete picture of the sources of public confidence in the post-communist justice systems.

Before proceeding to a brief discussion of methodology, it is worth noting that from the perspective of both cultural and institutional performance theories, there should be no reason for citizens to distinguish among different political institutions (see MR 1994, 2001). If interpersonal trust and diffuse satisfaction with one’s life “spill up” from individuals to institutions, it should do so equally for all institutions. Similarly, individuals should not differentiate between institutions but rather ascribe positive or negative evaluations of institutional performance holistically to both the parliament and the justice system. Thus, I hypothesize that political culture and institutional performance variables discussed above will have a systematic effect in the *absolute confidence* models, but will have marginal and sporadic influence in the *relative confidence* models.

H3: The impact of institutional and cultural variables on public confidence will be more pronounced in the absolute confidence models and less visible in the relative confidence model.

On the other hand, as I hypothesized earlier, I expect that CC viability will have a systematic impact in both *absolute confidence* and *relative confidence* models. Moreover, I expect that the influence of the CC viability variable will have a larger effect on public confidence in the latter model than in the former. Stated differently, the justice system will be trusted more than the parliament if the CC is relatively institutionalized.

³³ The data to for this variable are compiled from numerous official government sources, UN Office on Drugs and Crime (UNODC) Division for Policy Analysis and Public Affairs, UN Surveys of Criminal Trends and Operations of Criminal Justice Systems (UNCJS), INTERPOL, and Economist Intelligence Unit *Global Peace Index*. Appendix A provides the descriptive statistics and Appendix B describes how this variable is measured.

METHODOLOGY

To test the arguments outlined above, I use ordered logit estimation. This method is appropriate because the dependent variable has four possible and ordered realizations.³⁴ Wells and Kriekhaus (2006), however, state that it is imperative to utilize multi-level statistical methodologies when examining the combined effect of national-level and individual-level variables. Steenbergen and Jones (2002) also argue that standard regression techniques yield biased estimates when data are hierarchically organized, with one level (individual respondents) embedded within another level (countries). According to this line of criticism, ordered logit procedure for combining national and individual data replicates the national-level variable into hundreds of individual-level observations, and this replication can artificially inflate the statistical significance of national-level variables.

Yet, as Snijders and Bosker (1999:140) note, “a two-level design with 10 groups, i.e., a macro-level sample size of 10, is at least as uncomfortable as a single-level design with a sample size of 10” (see also Kreft 1996; Kreft and De Leeuw 1998; Raudenbush 1998). Thus, a successful application of multi-level models hinges on the availability of sizable numbers of contextual units. Some statisticians contend that the lower limit is 30-50 clusters for robust estimation in a two-level analysis (see Muthén, Khoo, Francis, and Boscardin 2003; Duncan, Duncan, Alpert, Hops, Stoolmiller, and Muthén 1997). This is a steep requirement that is not always met in political science data, and one that I cannot meet here. Therefore, this study uses ordered logit estimation techniques and accepts that doing so entails certain costs.

RESULTS AND DISCUSSION

This study finds strong support for the three main hypotheses. WVS data reveal that the levels of CC viability have a statistically significant and relatively consistent

³⁴ See Long and Freese (2003), Hosmer and Lemeshow (2000), Long (1997), and Agresti (1996) for introduction and explanation of ordered logit/probit techniques and other models with categorical dependent variables.

effect on public evaluations of the justice system. Furthermore, I discover that the effects of CC viability are greater in the *relative confidence* models as Hypothesis 2 suggested. Hypothesis 3 also receives strong support; the impact of institutional and cultural variables on public confidence is sporadic and less pronounced on the *relative confidence* levels. As I expected, the data show that both the political culture and the performance of the transitional regimes are important determinants of *absolute confidence*. Given the persistent assault on the cultural theory by the proponents of institutional explanations, the results of this analysis will be welcomed by the adherents to the cultural explanations of trust—it is too early to discount the predictions of the cultural theory in favor of institutional performance explanations.

In regard to institutional explanations, this study finds that the micro-level variables play a far more important and consistent role than the macro-level variables. Although this analysis does not provide an unequivocal support for micro-level institutional explanations, future analyses would do well by concentrating primarily on these determinants of institutional trust in favor of the aggregate measures.³⁵ Taken together, the results obtained for the CC viability measure and the control variables provide a relatively complete picture of the origins of public confidence in the post-communist justice systems.

Constitutional Court (CC) Viability

I hypothesized that as the CC develops institutional viability, public will respond with greater confidence in the justice system. I also hypothesized that the justice system will be trusted more than the parliament if the CC is relatively institutionalized (i.e., the effect of CC viability will be greater in the *relative confidence* models). As Tables 6.3 and 6.4 indicate, the results obtained from the analysis of WVS data largely support these expectations. CC viability is positive and statistically significant in every model, with the exception of *absolute confidence* model for Wave 3 (discussed separately in the following paragraphs). Moreover, as I hypothesized, the impact of CC viability is much larger in the *relative confidence* models than in the *absolute confidence* models. A large

³⁵ Since I did not include any cultural macro-level variables, it is impossible to say whether this conclusion applies to cultural theories.

absolute difference in BIC' (Bayesian Information Criterion) parameters reported in Tables 6.3 and 6.4 further indicates that the models with the CC viability measure were more likely to have generated the observed responses than the models excluding the measure.³⁶ In other words, I find very strong support for the inclusion of this explanatory variable into analyses of public confidence.

Insert Tables 6.3 and 6.4 here

An examination of change in predicted probabilities³⁷ reported in Tables 6.5 and 6.6 reveals the average impact of CC viability. In the *absolute confidence* models, as CC viability shifts from its minimum to its maximum value in the sample, the likelihood of respondents expressing “quite a lot” and “a great deal” of confidence (Y=3 and Y=4) increases by a respectable 10.3% in Wave 2 and by 5.5% in Wave 4. The likelihood of a respondent expressing no confidence (Y=1) decreases by an additional 6.3% in Wave 2 and by 4.4% in Wave 4 data. These results are consistent with Hypothesis 1.

In *relative confidence* models, the impact of CC viability is more substantial relative to the *absolute confidence* models and statistically significant across all three Waves—the likelihood of respondents expressing some and great deal of confidence in justice system relative to parliament increases by 17.8% in Wave 2, 13.5% in Wave 3, and 9.5% in Wave 4. Also, as CC viability shifts from its minimum to its maximum value in the sample, the likelihood that respondents express relative confidence in the parliament than in the justice system (Y=-2 and Y=-1 combined) decreases by an additional 20.8% in Wave 2, 11.3% in Wave 3, and 5.1% in Wave 4. CC viability is even able to “turn” some “indifferent” respondents (Y=0) into relative supporters of the justice system. The probability of expressing indifferent/equivalent attitudes decreases by 2.1% in Wave 3 and 4.5% in Wave 4 as the level of CC viability moves from its minimum to its maximum value.

Insert Tables 6.5 and 6.6 here

³⁶ An absolute difference in BIC' is used to evaluate the overall fit of the model (see Long and Freese 2003: 94).

³⁷ These probabilities are calculated by adjusting the variable of interest (in this case, *CC viability*) from its minimum to its maximum value while simultaneously holding the remaining variables at their minimum values. This allows one to make judgments of the variable's impact relative to the baseline probability (calculated holding all variables at their minimum levels) for each category of the dependent variable.

It is easier to make sense of these statistical results by considering Figure 6.2, which visually illustrates that during 1989-1993 and 1999-2000 periods citizens in countries with relatively institutionalized CCs were more likely to express higher levels of *absolute confidence* in their justice systems than the respondents in countries where CCs are weakly institutionalized. The two upward-sloping lines in Wave 2 and 4 graphs indicate that as the CC's viability increases from its lowest to its highest value in the sample, the likelihood of respondents expressing "quite a lot" and "a great deal" of *absolute confidence* in the legal system increases.³⁸ Alternatively, the two downward-sloping lines show that as the CC viability grows, the respondents were less likely to respond with "none at all" and "not very much" responses.

Insert Figure 6.2 here

Similar conclusions can be reached by examining Figure 6.3, which graphs changes in predicted probabilities for the *relative confidence* models. Consistent with Hypothesis 2, the impact of CC viability on one's relative confidence is larger than the impact on one's absolute confidence. Substantively, the results of this analysis show that during the 1989-2000 period approximately 50% of the ordinary citizens in the post-communist societies do make fine-grained distinctions between judicial and parliamentary institutions, that the justice system is their relative favorite, and that the institutional viability of CCs is an important determinant of this choice.

Insert Figure 6.3 here

At this point, I would like to devote some attention to the Wave 3 *absolute confidence* model results. In this model, CC viability variable is statistically significant but its coefficient is negative, counter to the Hypothesis 1. Substantively, this implies that during the 1995-1998 period, countries with relatively institutionalized CCs had publics that were highly skeptical or distrustful of their justice systems.³⁹ Since Wave 3 data

³⁸ Figures 2 and 3 report change in predicted probabilities for CC viability while holding other variables at their mean values. Although, other variables are held at their means rather than at their minimum values, the actual impact of CC viability does not change because of these differences (only the intercepts change as a result).

³⁹ I initially thought that the difference in country samples included in each WVS wave may be driving these disparate results. However, an inclusion of dummy variables into the statistical model to account for

furnish the largest number of country-cases of the three WVS Waves, it is important to examine what might be driving these results. Why would we observe waning trust in the justice system despite substantially stronger CCs?

At the beginning of this study, I hypothesized that CC viability and public confidence are linearly related—as viability grows, confidence rises—but, perhaps, the relationship between institutional development and confidence is more complicated than I originally assumed. To explore this possibility, I disaggregate Wave 3 countries into two samples. These samples differ principally in their CC viability levels—8 countries score below the mean value on the CC viability variable, while 10 other countries score above the mean.⁴⁰ Once the data are disaggregated, and separate analyses are conducted for these two subsets of countries, an interesting picture emerges. In countries that score above the mean on the CC viability variable, institutional development of the CC is statistically significant and positively related to public confidence in the justice system; its effect on public confidence is substantial.⁴¹ In countries that score below the CC viability mean, the relationship is statistically significant and negative.⁴² One possible explanation for these findings is that during the 1995-98 period there is some sort of threshold effect—CC viability has to reach sufficiently high levels in order to exert positive influence on public perceptions. If this is the case, then the relationship between institutional development and confidence is in fact more complicated than I originally assumed. However, there could also be a number of other plausible reasons for this finding which I cannot address here. Since the CC viability variable performs as expected in the *absolute confidence* models for Waves 2 and 4, as well as in all *relative confidence* models, I therefore acknowledge a possibility of an existence of a threshold effect but conclude that it is premature to discount the original theory.

countries that appear in Wave 3 only does not alter these results; the relationship between CC viability and public confidence remains negative.

⁴⁰ The CC viability mean for Wave 3 sample is 0.174. These two sets of countries do not systematically or substantially differ on any of the micro-variables included in the statistical model and differ only marginally on the macro-level variables (principally, homicide rate and FH liberties).

⁴¹ $b=1.415$, $p=0.028$; this subset of countries includes Bulgaria, Czech Republic, Georgia, Hungary, Lithuania, Macedonia, Moldova, Poland, Slovakia, Romania, Russia, and Slovenia.

⁴² $b=-0.336$, $p<0.001$; this subset of countries includes Albania, Armenia, Azerbaijan, Belarus, Bosnia, Croatia, Estonia, Latvia, Serbia-Montenegro, and Ukraine.

Political Culture and Socialization Variables

Most cultural and socialization variables perform surprisingly well in either the *absolute confidence* model or the *relative confidence* model, or in both (see Tables 3 and 4 above). The influence of the primary political culture variables—interpersonal trust and life satisfaction—holds across all three waves in the *absolute confidence* models although it is largely absent in the *relative confidence* part of the analysis. From the perspective of cultural theories there is no reason for citizens to distinguish among different political institutions, projecting interpersonal trust on some more or less than others. If trust and diffuse satisfaction with one's life “spill up” from individuals to institutions, it should do so equally for all institutions. This finding is therefore consistent with Hypothesis 3 and the conventional wisdom. Interpersonal trust and life satisfaction contribute positively to the *absolute* levels of confidence in the justice system, but have a statistically insignificant or sporadic impact in the *relative confidence* models.⁴³ Examination of the changes in predicted probabilities for *absolute confidence* models (see Table 6.5) further reveals that life satisfaction has a much larger impact on respondents' views toward the justice system than interpersonal trust.⁴⁴ In sum, this analysis confirms that life satisfaction and, to lesser extent, interpersonal trust are important determinants of one's trust in political institutions. The proponents of cultural theories will be pleased with these findings.

⁴³ There are two exceptions to this conclusion. In Wave 1, interpersonal trust is statistically significant but negatively related to the relative confidence in the justice system. In substantive terms, the data suggest that trustful citizens during the early post-communist period were more likely to express confidence in the parliament than in the justice system. To some extent, this makes sense: the newly- and democratically-elected parliaments in the early 1990s probably deserved more confidence than relatively unreformed justice systems, still staffed by many communist-era incumbents. The second exception is the statistically significant and positive coefficient for life satisfaction variable in Wave 3. This seems to imply that in the late 1990s the individuals satisfied with their lives were more likely to give greater credit for their life satisfaction to the justice system than the parliament. However, given the predictions of the cultural theories, it remains unclear why they would express such views.

⁴⁴ In Wave 2, as life satisfaction shifts from its minimum to maximum value, the likelihood that a respondent will choose “none at all” or “not very much” confidence responses (Y=1 and Y=2 combined) decreases by 12.9% and the likelihood that a respondent will select “quite a lot” and “a great deal” responses (Y=3 and Y=4 combined) increases by 12.9%. On the other hand, average change in predicted probabilities for the interpersonal trust variable is only 1%. In Wave 3, respondent is 14.2% more likely to respond with high confidence in the justice system (Y=3 and Y=4 combined) if she is satisfied with her life in general, while more trusting respondent is only 4.1% more likely to express high confidence. The impact of life satisfaction increases further in Wave 4 and the impact of interpersonal trust stays relatively the same. As life satisfaction moves from its minimum to maximum value, a chance of respondents' expressing low confidence (Y=2) or no confidence (Y=1) decreases by 17.3% and potential for expressing high confidence (Y=3 and Y=4 combined) increases by the same amount.

Some scholars argue that “to know something about courts is to be favorably oriented toward them” (Gibson, Caldeira, and Baird 1998: 344; see also Casey 1974; Murphy and Tanenhaus 1990; Caldeira 1986; Tyler and Mitchell 1994). These arguments are broadly consistent with the socialization/cultural perspectives, which argue that greater interest in politics should be related to higher confidence in the political institutions. I assumed that one’s general interest in politics is a reasonable proxy for one’s awareness levels. However, I find that greater interest in politics results in negative rather than positive evaluations of the justice system, even though the *interest in politics* variable is statistically significant only in Wave 4 (1999-2000) *absolute confidence* model and the impact of this variable is relatively small (see change in predicted probabilities reported in Table 6.5). The negative coefficient on this variable nonetheless confirms my personal expectations (see footnote 26). Greater interest in politics probably leads to more negative evaluations of the justice system as greater exposure to information about the judiciary may erode favorable stereotypes leaving the politically-aware citizen with a picture of courts that, while informed, is less favorable than would be an uninformed vision (for similar conclusions, see Steen 1996; Benesh 2006).

The results for the *education level* variable further reinforce this view. The well educated are more critical of the post-communist justice systems than the less educated segments of the society. The *education level* produces the most consistent and most astounding effect of all demographic variables in my models. The coefficients are negative and statistically significant for all waves and for both *absolute confidence* and *relative confidence* models (see Tables 6.3 and 6.4). Furthermore, in both relative and absolute terms, the more educated people are becoming more critical of the justice system over time—the size of the coefficients grows substantially from Wave 2 through Wave 4. As Table 6.5 reports, by 1999-2000 the likelihood of respondent expressing a complete lack of confidence in the justice system increases by 10% ($Y=1$) as one shifts from the lowest to the highest educational attainment level. The findings reported here therefore support Stein’s (1996) conclusion that the well educated are better informed than others, and as such, particularly critical of the post-communist institutions.

I also posited that younger people will be especially critical of the justice system while older people will express more positive attitudes. Counter to these expectations, the

results show that *age* is not systematically related to the respondent's absolute level of confidence in the justice system. The change in predicted probabilities reported in Tables 5 and 6 further reveal that the actual impact of this variable is minimal.⁴⁵

Similarly, the results for the *income* variable fail to support the predictions of socialization theories. In 1989-1993 and 1995-1998 periods, wealthier respondents were in fact less likely to express a lot of *absolute confidence* in the justice system (coefficient is negative and statistically significant). The substantive effect, however, is modest. The changes in predicted probabilities show that as one shifts from low income category to high income category, the likelihood of a respondent choosing "quite a lot" and "a great deal" of confidence (Y=3 and Y=4 combined) decreases by 3.8% in Wave 2 and by 3.4% in Wave 3 (see Table 6.5). And, in 1999-2000 *absolute confidence* levels are not significantly affected by the respondent's income. *Relative confidence* models, across all three WVS waves, also show that income is not a significant determinant of relative confidence. A person with low income is just as likely (unlikely) to express greater confidence in the justice system than in parliament as a person with high income.

The final social background/demographic variable considered here is *gender*. Some scholars find that women are more likely to express trust in political authorities (Jennings 1989; Shapiro and Mahajan 1986; Carnaghan and Bahry 1990; Finifter and Mickiewicz 1992). I similarly expected that women will express greater confidence in the justice system than men. WVS data show that gender differences do exist. Women tend to express higher levels of absolute and relative confidence in the justice system than men. These differences are particularly pronounced in 1999-2000 period. In substantive

⁴⁵ However, in 1989-1993 period (Wave 1), *age* is positively related to confidence in the justice system and statistically significant. At least during the initial transition period, then, one can conclude that Mishler and Rose (1997) are correct—older people have greater confidence in the justice system, which remained practically unreformed during 1989-1993 period, than younger cohorts. In subsequent years assessed in this study (1995-1998 and 1999-2000), however, *absolute confidence* in the justice system is not systematically related to the age of the respondent. Coefficients for *age* fail to reach statistical significance and are much smaller than in 1989-1993 period. The results for *relative confidence* models show that the impact of the *age* variable is negative (counter to the hypothesized impact), but attains significance only in Wave 3. In substantive terms, this means that the older respondents are more likely to express greater confidence in the parliament than in the justice system. This is an interesting and somewhat puzzling finding given that the justice system is in large part the "old institution" whereas the parliament is a "new institution," and based on Mishler and Rose's (1997) findings, one would expect the opposite relationship to exist. Stated somewhat differently, in regard to absolute levels of confidence, this analysis finds support for the proposition that older people are marginally more trusting than the younger people; however, in regard to relative confidence levels, this analysis finds the opposite—the younger cohorts are more likely to express positive views toward the justice system (than toward the parliament) than the older respondents.

terms, the likelihood that a woman will respond with “quite a lot” and “a great deal” (Y=3 and Y=4 combined) increases by 5% in *absolute confidence* model and 2% in the *relative confidence* model.

Institutional Performance Variables

I now turn to the results for institutional performance variables. In general, micro-level political and economic performance variables perform fairly well, while macro-level variables receive only modest support. I start with political variables and then discuss the economic ones.

Findings of this analysis are consistent with previous research that cites perceptions of corruption as an important determinant of one’s confidence/trust in political institutions. I expected that those respondents that perceive official corruption to be widespread will have less confidence in the justice system.⁴⁶ I find that individual perceptions of corruption are significant in the *absolute confidence* model. The coefficient is positive (i.e., if one perceives that corruption is almost nonexistent, he will express greater level of confidence in the justice system) and highly significant. Moreover, Table 6.5 reveals that if one perceives the political system practically devoid of official corruption, the likelihood of respondent having no confidence in the justice system (Y=1) decreases by 16.5% and the likelihood of having “not very much” confidence (Y=2) decreases by an additional 18.6%. Perceptions of a very “clean” political system similarly increase the likelihood of respondent having “quite a lot” (Y=3) or “a great deal” (Y=4) of confidence in the justice system by 21.8% and 13.3% respectively. In other words, if one perceives that little or no official corruption exists, he is 35.1% more likely to express substantial confidence in the justice system. However, as predicted by Hypothesis 3, the corruption measure loses its significance in the *relative confidence* model, suggesting that individuals do not differentiate between institutions

⁴⁶ Unfortunately, WVS asked respondents about their perceptions of official corruption during Wave 3 surveys only. Any inferences made about this variable’s impact are therefore limited to the 1995-1999 period. It is important to note that inclusion (exclusion) of the *corruption* variable in Wave 3 models does not substantially change results for any other variable. When *corruption* is excluded, all other variables that were significant remain significant, and their coefficients point in the same direction as in the model that includes *corruption*. Post-estimation tests (difference in BIC’ parameters and comparison of Count R2 statistics) show that model that includes *corruption* fits the data better than the model that excludes *corruption*.

but rather ascribe positive or negative evaluations of institutional performance holistically to both the parliament and the justice system.

The posited relationship between the political regime's respect for citizens rights/liberties and public perceptions of the justice system is not supported in any of the *absolute confidence* models.⁴⁷ This macro-level variable is not significantly related to individual perceptions of confidence in the justice system and achieves statistical significance only in the *relative confidence* Wave 2 model. However, the coefficient is positive. In substantive terms, this implies that citizens in political regimes that show little respect for individual rights and liberties are more likely to express confidence in the justice system than in the parliament.⁴⁸ Excluding this counterintuitive result and consistent with Hypothesis 3, it is clear that the measures for a regime's respect for political rights and civil liberties do not have a systematic, positive influence on the citizens' relative confidence in the justice system.

I also expected that the homicide rate, as another macro-level political performance variable, should be systematically linked to a respondent's perceptions of the justice system. WVS data largely confirm this expectation. The homicide rate is statistically significant and negatively related to the *absolute confidence* in the justice system only in the 1989-1993 and 1995-1998 periods. In both periods, the likelihood of a respondent having "none at all" or "not very much" confidence in the justice system (Y=1 and Y=2 combined) increases by approximately 14% as the number of murders rises. This finding is also statistically significant for *relative confidence* model in the 1989-1993 period. The substantive effect is even more pronounced for the *relative confidence* model—as the homicide rate rose in 1989-1993, a respondent was 40.5% (Y=-2 and Y=-1 combined) more likely to respond positively to the parliament than to the justice system (see Table 6, Wave 1). As Caldeira (1986) argues and this study finds, control of crime is a particularly important indicator of the efficacy of the justice system.

⁴⁷ It is likely that in the real world, the regime's respect for citizens rights does in fact matter, but as many scholars note (e.g., Herron and Randazzo 2003; Inglehart 2003), Freedom House scores are relatively crude instruments and do not reflect the "solidity" of a country's democratic freedoms in any one year very effectively.

⁴⁸ The only explanation for this counterintuitive finding that comes to mind is that during the early 1990s citizens of unreformed political systems, where parliaments were still dominated by the communist-era incumbents, preferred to give their support to the justice system (however, given that the justice systems were probably also unreformed and staffed with communist-era officials, it is hard to make sense of this finding).

In the early and mid-1990s, as the communist regimes lost power and the newly-established political systems were often unable to respond effectively to the rising social problems, homicide rates rose significantly. In these circumstances, public opinion toward the justice system responded as predicted. Given that homicide rates are not statistically significant in Wave 4, it seems that by 1999-2000 the rates of violent crime are sufficiently low and no longer systematically affect public confidence in the justice system.

Regarding the economic performance variables, MR (2001) argue that in post-communist societies, macro-economic performance (proxied by the GDP per capita income) should be highly salient for individual perceptions of the institutions. I similarly hypothesized that poor macro-economic conditions should lead to declining levels of public confidence in the justice system. This analysis, however, finds no statistically significant relationship between GDP per capita income and confidence in the justice system throughout the 1989-2000 period in either *absolute confidence* or *relative confidence* models. These findings may be due to the fact that most countries' economies were showing signs of improvement by 1994 (see Steen 1996). It is more likely, however, that most post-communist citizens focus on their own financial situation rather than on the macro-economic conditions, and once the perceptions of the household's financial situation are taken into account, macro-level effects simply wash out.

The following results support this notion; satisfaction with financial situation of one's household is significant and positive in all three Waves. In the *absolute confidence* models, shifting the satisfaction with finances variable from its minimum to maximum leads to 15.2% increase in Wave 2 and 5.8% in Waves 3 and 4 in the likelihood that a respondent will have "quite a lot" and "a great deal" of confidence in the justice system (see Table 6.5). However, as Hypothesis 3 holds, this relationship is present only in the *absolute confidence* models; the variable is insignificant in the *relative confidence* models. This implies that individuals who are satisfied with their household finances are likely to respond positively to all government institutions and do not assign more credit to either the justice system or parliament for their financial comfort. In sum, this study finds that individual evaluations of current household conditions have relatively strong

and significant effects on absolute confidence, but evaluations of current macroeconomic conditions do not.

CONCLUSION

At the beginning of this chapter, I theorized that the institutional viability of CCs has far reaching consequences for public confidence in the post-communist justice systems. I argued that these courts, if institutionalized, become the flagships of the rule of law and constitutional faith in the emergent democratic regimes and help generate diffuse and positive public perceptions of the country's legal system as a whole. In making this argument, I explained that the communist-era legacies are important to our understanding of why post-communist CCs play such an important role on public confidence. I also posited that because the very process of judicial institutionalization requires an ongoing, long-term commitment by the elected officials, citizens' confidence in the justice systems is in part contingent upon their assessment of how committed the elected branches have remained since the initial transition moment to the constitutional principles in general and to the institutional development of CCs in particular. I outlined several other reasons why the viability of CCs will impact public views of the post-communist justice systems, noting that CC visibility, stature, and potential significance of their rulings to the political and social life should not be neglected in the analyses of public trust in the emergent post-communist justice systems. Finally, I stipulated that viable CCs may play an important albeit indirect role on the behavior and rulings of other judges and courts, and in doing so, contribute to public perceptions of integrity and impartiality of the legal system as a whole.

Several important conclusions emerge from this analysis. First, and most importantly, I statistically confirmed two observable implications of this theory—higher levels of CC viability correlate with positive individual perceptions of the post-communist justice systems and help explain why many post-communist citizens express higher confidence in the justice systems than they do in their representative institutions. The findings show that the positive impact of CC viability measure is statistically

significant and relatively large in all statistical models, with the exception of Wave 3 *absolute confidence* model where I discovered a more complex relationship between CC viability and confidence.⁴⁹ Taken together, these results encourage at least cautious optimism about the potential for nurturing political trust in post-communist legal institutions through the empowerment of CCs.

Second, it is important to note that the overall impact of CC viability on confidence is declining over time. On average, the impact of CC viability is reduced twofold when comparing Wave 2 levels to Wave 4 levels.⁵⁰ In view of this author, this finding hints at a possibility that over time the post-communist respondents become less sensitive to the institutional design considerations and that other considerations begin to figure more prominently into their assessments of the justice systems. This is not necessarily problematic for the theory presented in this chapter. I did not deny the importance of other determinants of public trust nor did I argue that the impact of CC viability will increase over time relative to other potential influences. Nevertheless, this is an interesting discovery and I plan to address it in future analyses.

Third, it is reasonable to conclude that the conventional explanations of the origins of mass public trust in political institutions apply relatively well to the analyses of post-communist attitudes toward justice systems. This is an important but largely anticipated finding. Specifically, the results of this study strongly support micro-institutional and micro-cultural explanations of trust. Although this analysis does not provide an unequivocal support for micro-level explanations, future analyses would do

⁴⁹ One may also question whether a less complex variable, say, the age of the constitutional court, would have a similar influence on public perceptions—if Country A constitutional court is 10 years old and Country B court is 3 years old, one might suspect that there would be systematic differences in confidence levels. In other words, was it necessary to use a complex, multi-faceted, annualized index of constitutional court viability to show that the relationship between constitutional courts and public elite confidence in the justice system exist? The answer is yes. In models which I do not report here, I re-estimated the models sequentially using only one of the eleven component indicators included in the CC viability measure. Neither the age of the court, nor its judicial review powers, nor the length of judicial terms of office, nor did any other individual indicator reveal statistically significant results. Furthermore, when I re-estimated the models using only those provisions related to the constitutional courts that were located in the founding constitutions, the data revealed no relationship between constitutional court initial design and public confidence in the justice system. In short, and similar to my earlier arguments, reliance on only one feature of constitutional court institutionalization or only on the constitutional court design provisions outlined in the founding constitutions is inadequate.

⁵⁰ For example, I discovered that the likelihood of respondents expressing some and great deal of confidence in the justice system relative to parliament increases by 17.8% in Wave 2, 13.5% in Wave 3, but only 9.5% in Wave 4.

well by concentrating primarily on these determinants of institutional trust in favor of the aggregate measures.

Fourth, the data clearly show that the individual's political culture and social background matters for his/her confidence in the judiciary. Despite salient criticisms of culture approaches, the results of this analysis are clear—it is too early to discount the cultural theory in favor of institutional performance explanations. The average impact of cultural and social background variables on public confidence in the judiciary is similar in magnitude to the observed impact for the performance variables. The results are thus consistent with Uslaner's (2002: 112) argument that generalized (i.e., interpersonal) trust is largely independent of experience and is akin to a basic personality trait that reflects “a basic sense of optimism and control” (see also Delhey and Newton 2003). My findings are also consistent with Inglehart's (1988) argument that life satisfaction predisposes satisfied individuals to trust the state institutions more than those who are less satisfied with their lives. Of course, this analysis did not address the directionality of causation—it remains possible that interpersonal trust and life satisfaction are the effects of the institutional performance and therefore the independent effect of these variables on public trust is overestimated. However, *a priori*, it is just as possible that institutional performance evaluations are mediated by the societal levels of interpersonal trust and generalized sense of satisfaction with life. Since it was not one of the aims of this analysis to address this question, I leave it to others to address the issue of direct and indirect causality.

Finally, important differences were discovered between the determinants of absolute confidence and relative confidence in the justice systems. This study confirms Hypothesis 3 and shows that standard institutional performance measures (both macro and micro) and political culture (micro-level) variables play a systematic role in the absolute confidence models but have lesser explanatory power in the relative confidence models where their influence lacks consistency. As MR (1994, 2001) argue, it is true that many post-communist citizens do not distinguish greatly between different political institutions when they assign credit/blame for the system's contemporaneous economic and political performance. However, it is also true that many citizens (approximately 50% of the post-communist mass public) hold more refined opinions about different

institutions. When we compare the levels of one's confidence in the justice system relative to one's confidence in the parliament, it becomes apparent that the former are trusted more than the latter. Given the general decline in public trust across all political institutions in the post-communist region, I asked why the citizens would trust the justice system more than the parliament. My analysis provides a partial explanation of why this is the case—in part, confidence “spills over” from the institutionalization of the CCs onto the legal system as a whole.

Additionally, the differences across models show that how one defines and measures confidence has profound consequences for analyses of public attitudes toward the judiciary. The absolute confidence measure, although attractive in many respects, is clearly contaminated by a respondent's view of other institutions. Thus, courts may receive an approval because a respondent is generally satisfied with the political system or, be “guilty by association” and receive a negative rating because a respondent is dissatisfied or upset with the performance of state institutions in general. Given the findings of this analysis, I am tempted to conclude that the relative trust/confidence measures are probably more useful in the studies of public opinion in the post-communist states, and potentially just as useful in other transitioning countries which exhibit relatively low levels of public trust across most or all political institutions.

TABLES

Table 6.1, Comparisons of Public Trust in Courts across Post-Communist Societies

Wave 2 (1989-1993)

Confidence	Belarus	Bulgaria	Czech Rep.	Estonia	Hungary	Latvia	Lithuania	Poland	Romania	Russia	Slovakia	Slovenia	Average
None at all	22.9	15.3	9.0	14.5	7.9	16.3	7.1	11.2	12.6	17.3	9.9	11.7	13.0
Not very much	51.1	39.3	46.4	52.8	32.5	47.5	54.3	38.3	39.8	44.5	47.6	37.5	44.3
Quite a lot	18.2	32.5	33.9	28.0	45.9	29.2	35.5	34.6	32.6	27.3	33.3	37.3	32.4
A great deal	7.8	13.0	10.7	4.7	13.7	7.0	3.2	15.9	15.1	10.9	9.2	13.5	10.4
Total confidence	77.2	84.8	91.0	85.5	92.1	83.7	93.0	88.8	87.4	82.7	90.1	88.3	87.0

Wave 3 (1995-1998)

Confidence	Albania	Armenia	Azerbaijan	Belarus	Bosnia	Bulgaria	Croatia	Czech Rep.	Estonia	Georgia	Hungary	Average
None at all	7.4	30.0	8.7	14.7	4.8	25.2	6.7	21.4	8.3	22.2	11.1	15.3
not very much	34.1	38.7	44.7	36.5	24.6	36.2	41.9	49.5	30.1	32.3	37.0	40.4
quite a lot	44.6	24.5	41.5	37.5	50.1	29.4	41.8	27.7	53.5	37.6	41.7	35.5
a great deal	13.9	6.8	5.1	11.3	20.4	9.2	9.6	1.3	8.2	8.0	10.3	8.8
Total confidence	92.6	70.0	91.3	85.3	95.2	74.8	93.3	78.6	91.8	77.8	89.0	84.7

Confidence	Latvia	Lithuania	Macedonia	Moldova	Poland	Romania	Russia	Slovakia	Slovenia	Ukraine	Serbia	Average
None at all	17.6	13.3	27.1	13.5	10.7	13.6	19.2	13.0	16.3	17.4	14.9	15.3
not very much	44.1	64.6	48.5	36.6	36.7	41.8	41.6	45.0	47.8	38.7	38.3	40.4
quite a lot	35.5	20.6	13.3	41.0	40.7	31.8	30.6	38.9	28.4	36.3	33.7	35.5
a great deal	2.8	1.6	11.1	9.0	11.9	12.7	8.6	3.1	7.5	7.6	13.1	8.8
Total confidence	82.4	86.7	72.9	86.5	89.3	86.4	80.8	87.0	83.7	82.6	85.1	84.7

Wave 4 (1999-2000)

Confidence	Belarus	Bulgaria	Croatia	Czech Rep.	Estonia	Hungary	Latvia	Lithuania	Average
None at all	11.8	28.8	19.1	19.7	16.8	18.0	15.1	24.0	20.0
not very much	41.8	44.3	50.4	57.3	50.6	37.8	37.8	59.3	44.4
quite a lot	37.4	18.3	27.0	17.2	28.0	37.7	39.2	16.5	28.8
a great deal	9.1	8.6	3.6	5.8	4.6	6.5	8.0	0.2	6.8
Total confidence	88.2	71.2	80.9	80.3	83.2	82.0	85.0	76.0	80.0

Confidence	Poland	Romania	Russia	Slovakia	Slovenia	Ukraine	Average
None at all	16.6	20.8	27.9	19.1	14.1	28.1	20.0
not very much	40.4	39.2	35.5	45.5	42.2	39.2	44.4
quite a lot	30.6	29.4	29.6	32.4	33.2	27.4	28.8
a great deal	12.5	10.7	7.1	3.0	10.5	5.3	6.8
Total confidence	83.5	79.2	72.1	81.0	85.9	71.9	80.0

Table 6.2, Comparisons of Relative Public Trust in Courts across Post-Communist Societies

Wave 2 (1989-1993)

Confidence	Belarus	Bulgaria	Czech Rep.	Hungary	Poland	Romania	Russia	Slovakia	Slovenia	Average
greatest in parliament	3.6	5.9	2.5	1.5	11.8	0.8	5.6	1.8	2.3	4.0
some in parliament	22.3	20.8	18.2	11.1	29.2	5.3	24.4	13.5	12.2	17.4
Total parliament	25.9	26.7	20.7	12.6	41.0	6.1	29.9	15.3	14.5	21.4
indifference	54.6	50.3	51.5	47.2	43.6	43.1	47.4	48.4	50.9	48.5
some in justice system	16.8	18.3	23.3	30.2	12.5	35.7	17.3	29.5	27.0	23.4
greatest in justice system	2.7	4.8	4.5	10.1	2.9	15.2	5.4	6.7	7.7	6.7
Total justice system	19.5	23.1	27.9	40.3	15.4	50.9	22.7	36.3	34.6	30.1

Wave 3 (1995-1998)

Confidence	Albania	Armenia	Azerbaijan	Belarus	Bosnia	Bulgaria	Croatia	Czech Rep.	Estonia	Georgia	Hungary	Average
greatest in parliament	4.3	3.8	13.7	2.6	1.3	8.0	1.3	1.7	2.3	4.8	2.5	3.0
some in parliament	15.3	15.5	34.9	14.3	10.2	21.3	15.3	14.8	11.6	15.0	15.5	14.7
Total parliament	19.6	19.3	48.5	16.9	11.5	29.3	16.6	16.6	13.9	19.7	18.0	17.7
indifference	56.0	52.5	39.0	39.7	55.0	49.5	55.4	51.6	47.1	51.3	45.6	49.9
some in justice system	20.0	20.3	10.8	29.9	28.2	16.9	23.2	28.2	31.5	20.3	28.6	25.2
greatest in justice system	4.4	8.0	1.7	13.5	5.3	4.3	4.8	3.7	7.5	8.7	7.8	7.2
Total justice system	24.4	28.2	12.5	43.4	33.5	21.1	28.0	31.9	39.0	29.0	36.4	32.4

Confidence	Latvia	Lithuania	Macedonia	Moldova	Poland	Romania	Russia	Slovakia	Slovenia	Ukraine	Serbia	Average
greatest in parliament	2.1	1.4	1.0	2.0	1.2	1.2	2.1	1.7	1.6	3.0	1.6	3.0
some in parliament	14.4	21.1	7.0	12.4	9.9	9.9	12.0	15.4	13.3	15.6	9.9	14.7
Total parliament	16.5	22.5	8.0	14.4	11.0	11.0	14.1	17.1	14.9	18.5	11.5	17.7
indifference	47.8	61.7	61.2	45.6	42.1	42.1	45.6	49.7	53.0	50.9	55.6	49.9
some in justice system	29.1	13.8	23.0	31.2	32.8	32.8	30.8	27.3	25.9	24.6	26.4	25.2
greatest in justice system	6.7	2.0	7.8	8.8	14.1	14.1	9.6	6.0	6.2	6.0	6.5	7.2
Total justice system	35.8	15.8	30.8	40.0	46.9	46.9	40.3	33.3	32.1	30.6	32.9	32.4

Wave 4 (1999-2000)

Confidence	Belarus	Bulgaria	Croatia	Czech Rep.	Estonia	Hungary	Latvia	Lithuania	Average
greatest in parliament	1.6	4.1	1.9	0.8	2.0	2.2	1.5	0.1	2.2
some in parliament	14.0	20.4	13.0	12.6	16.6	13.3	10.1	11.4	14.4
Total parliament	15.5	24.5	14.9	13.5	18.6	15.5	11.7	11.5	16.6
indifference	51.7	55.1	56.5	54.8	56.1	54.0	50.1	66.7	53.1
some in justice system	26.6	16.0	23.8	26.4	21.2	24.6	29.7	20.0	23.7
greatest in justice system	6.1	4.3	4.9	5.3	4.1	5.9	8.6	1.7	6.6
Total justice system	32.7	20.3	28.7	31.7	25.3	30.5	38.3	21.7	30.4

Confidence	Poland	Romania	Russia	Slovakia	Slovenia	Ukraine	Average
greatest in parliament	3.7	1.3	2.7	3.6	1.6	3.4	2.2
some in parliament	15.6	9.1	11.6	24.7	13.2	16.2	14.4
Total parliament	19.2	10.5	14.2	28.2	14.8	19.6	16.6
indifference	49.2	48.1	47.9	51.8	48.5	52.3	53.1
some in justice system	23.1	27.5	27.8	16.6	26.5	22.6	23.7
greatest in justice system	8.5	14.0	10.1	3.4	10.2	5.5	6.6
Total justice system	31.6	41.5	37.9	20.0	36.7	28.1	30.4

Table 6.3, Absolute Public Confidence in the Justice System (Ordered Logit)

Variable	Wave 2 1989-1993	Wave 3 1995-1998	Wave 4 1999-2000
INSTITUTIONAL FEATURES			
<i>Constitutional court viability</i>	.168 (.046)*	-.267 (.124)*	.165 (.049)**
POLITICAL CULTURE			
<i>Life satisfaction</i>	.089 (.008)***	.067 (.007)***	.075 (.010)***
<i>Interpersonal trust</i>	.101 (.041)*	.185 (.071)**	.235 (.053)***
<i>Interest in politics</i>	-.014 (.027)	-.019 (.016)	-.054 (.020)**
SYSTEM PERFORMANCE			
<i>Satisfied with household's finances</i>	.074 (.008)***	.029 (.008)***	.059 (.006)***
<i>Extent of political corruption</i>	—	.489 (.073)***	—
<i>FH rights and liberties</i>	-.032 (.018)	.018 (.030)	.004 (.043)
<i>Per capita GDP income (natural log)</i>	-.006 (.148)	-.017 (.144)	-.113 (.298)
<i>Homicide rate (per 100,000 residents)</i>	-.052 (.007)***	-.029 (.011)**	.003 (.012)
DEMOGRAPHICS			
<i>Age</i>	.141 (.029)***	.045 (.038)	-.040 (.045)
<i>Gender</i>	.062 (.040)	.046 (.033)	.201 (.033)***
<i>Education</i>	-.006 (.022)	-.246 (.045)***	-.267 (.042)***
<i>Income</i>	-.094 (.045)*	-.080 (.025)**	-.055 (.039)
/cut1	-1.906 (1.385)	-.477 (1.269)	-2.333 (2.830)
/cut2	.413 (1.389)	1.495 (1.275)	-.3645 (2.790)
/cut3	2.334 (1.394)	3.709 (1.264)	1.671 (2.814)
N (observations)	12,815	20,918	14,010
N (countries)	12	18	14
Log pseudolikelihood	-14264.452	-22505.506	-17066.171
Wald chi2	1698.37	2566.26	287.26
Prob > chi2	0.000	0.000	0.000
Count R2	44.7	43.6	44.1
Difference of BIC' parameters	91.398	66.468	19.403

Data clustered by country and weighted by number of country-year observations; robust standard errors are reported in parentheses; all significance tests are two-tailed; a large difference of BIC' indicates that model with the judicial viability measure is more likely to have generated the data than the model without the viability measure (i.e., very strong support for the inclusion of judicial viability measure into the model); Count R2 statistic reflects the proportion of responses correctly predicted by the model; * p<0.05; ** p<0.01; *** p<0.001.

Table 6.4, Relative Public Confidence in the Justice System (Ordered Logit)

Variable	Wave 2 1989-1993	Wave 3 1995-1998	Wave 4 1999-2000
INSTITUTIONAL FEATURES			
<i>Constitutional court viability</i>	.408 (.106)***	.325 (.032)***	.281 (.126)*
POLITICAL CULTURE			
<i>Life satisfaction</i>	.007 (.015)	.003 (.006)	.018 (.005)***
<i>Interpersonal trust</i>	-.205 (.046)***	.020 (.045)	.013 (.058)
<i>Interest in politics</i>	-.040 (.035)	-.029 (.015)	-.028 (.018)
SYSTEM PERFORMANCE			
<i>Satisfied with household's finances</i>	.012 (.009)	-.014 (.013)	-.014 (.013)
<i>Extent of political corruption</i>	—	-.001 (.038)	—
<i>FH rights and liberties</i>	.309 (.090)**	.022 (.053)	.004 (.029)
<i>Per capita GDP income (natural log)</i>	.757 (.445)	.144 (.132)	-.117 (.337)
<i>Homicide rate (per 100,000 residents)</i>	-.137 (.027)***	.011 (.013)	.013 (.012)
DEMOGRAPHICS			
<i>Age</i>	-.066 (.042)	-.033 (.035)	-.150 (.030)***
<i>Gender</i>	.067 (.048)	.053 (.026)*	.092 (.034)**
<i>Education</i>	-.047 (.029)	-.082 (.036)*	-.162 (.030)***
<i>Income</i>	.050 (.035)	-.047 (.029)	-.051 (.032)
/cut1	3.899 (4.414)	-2.251 (1.289)	-5.163 (3.155)
/cut2	5.866 (4.315)	-.355 (1.312)	-2.988 (3.150)
/cut3	8.122 (4.290)	1.844 (1.303)	-.565 (3.157)
/cut4	9.991 (4.304)	3.639 (1.278)	1.268 (3.193)
N (observations)	10,023	17,949	13,467
N (countries)	9	18	14
Log pseudolikelihood	-12697.502	-23172.575	-16493.864
Wald chi2	71.19	87.12	949.86
Prob > chi2	0.000	0.000	0.000
Count R2	48.4	48.2	52.2
Difference of BIC' parameters	340.943	94.962	25.162

Confidence in the justice system is measured relative to confidence in the parliament; data clustered by country and weighted by number of country-year observations; robust standard errors are reported in parentheses; all significance tests are two-tailed; a large difference of BIC' indicates that model with the judicial viability measure is more likely to have generated the data than the model without the viability measure (i.e., very strong support for the inclusion of judicial viability measure into the model); Count R2 statistic reflects the proportion of responses correctly predicted by the model; * p<0.05; ** p<0.01; *** p<0.001.

Table 6.5. Change in Predicted Probabilities: Absolute Confidence in the Justice System

	None at all	Not very much	Quite a lot	A great deal
Wave 2 (1990-1993)	Pr (Y=1)	Pr (Y=2)	Pr (Y=3)	Pr (Y=4)
Baseline probability	0.197	0.510	0.234	0.059
CC viability	-0.063	-0.040	0.072	0.031
Life satisfaction	-0.075	-0.054	0.089	0.040
Interpersonal trust	-0.016	-0.006	0.016	0.006
Interest in politics	0.002	0.001	-0.002	-0.001
Satisfied w/finances	-0.085	-0.068	0.103	0.049
FH rights and liberties	0.021	0.005	-0.019	-0.007
Per capita GDP	0.001	0.000	-0.001	0.000
Homicide rate	0.130	-0.010	-0.092	-0.028
Age	-0.033	-0.015	0.035	0.014
Gender	-0.011	-0.004	0.011	0.004
Education level	-0.005	-0.002	0.005	0.002
Income level	0.032	0.006	-0.028	-0.010

Wave 3 (1995-1998)	Pr (Y=1)	Pr (Y=2)	Pr (Y=3)	Pr (Y=4)
Baseline probability	0.229	0.452	0.270	0.049
CC viability	0.109	-0.004	-0.085	-0.020
Life satisfaction	-0.089	-0.053	0.105	0.037
Interpersonal trust	-0.031	-0.010	0.032	0.009
Interest in politics	0.010	0.002	-0.010	-0.003
Satisfied w/finances	-0.043	-0.016	0.045	0.013
Perceived corruption	-0.165	-0.186	0.218	0.133
FH rights and liberties	-0.027	-0.009	0.028	0.008
Per capita GDP	0.007	0.001	-0.007	-0.002
Homicide rate	0.090	0.054	-0.107	-0.038
Age	-0.016	-0.004	0.016	0.004
Gender	-0.008	-0.002	0.008	0.002
Education level	0.098	-0.002	-0.078	-0.018
Income level	0.029	0.004	-0.027	-0.007

Wave 4 (1999-2000)	Pr (Y=1)	Pr (Y=2)	Pr (Y=3)	Pr (Y=4)
Baseline probability	0.257	0.438	0.252	0.053
CC viability	-0.044	-0.010	0.041	0.014
Life satisfaction	-0.115	-0.058	0.122	0.051
Interpersonal trust	-0.039	-0.009	0.036	0.012
Interest in politics	0.034	0.001	-0.027	-0.008
Satisfied w/finances	-0.043	-0.016	0.045	0.013
FH rights and liberties	0.054	-0.001	-0.042	-0.012
Per capita GDP	0.027	0.001	-0.022	-0.007
Homicide rate	-0.012	-0.002	0.010	0.003
Age	0.008	0.001	-0.007	-0.002
Gender	-0.041	-0.009	0.037	0.013
Education level	0.100	-0.010	-0.071	-0.019
Income level	0.024	0.001	-0.019	-0.006

Note: changes in predicted probabilities are calculated by moving the variable of interest from its minimum to its maximum value, while simultaneously holding the other variables constant (at their minimum levels).

Table 6.6. Change in Predicted Probabilities: Relative Confidence in the Justice System

	Greatest in parliament	Some in parliament	Indifference	Some in justice system	Greatest in Justice system
Wave 2 (1990-1993)	Pr (Y=-2)	Pr (Y=-1)	Pr (y=0)	Pr (Y=1)	Pr (Y=2)
Baseline probability	0.082	0.309	0.469	0.116	0.025
CC viability	-0.052	-0.156	0.030	0.135	0.043
Life satisfaction	-0.005	-0.010	0.007	0.006	0.002
Interpersonal trust	0.017	0.033	-0.027	-0.019	-0.004
Interest in politics	0.010	0.020	-0.015	-0.011	-0.003
Satisfied w/finances	-0.008	-0.017	0.012	0.011	0.003
FH rights and liberties	-0.057	-0.177	0.014	0.164	0.055
Per capita GDP	-0.041	-0.113	0.042	0.087	0.025
Homicide rate	0.271	0.134	-0.291	-0.094	-0.020
Age	0.011	0.021	-0.017	-0.012	-0.003
Gender	-0.005	-0.011	0.008	0.007	0.002
Education level	0.007	0.015	-0.012	-0.009	-0.002
Income level	-0.007	-0.016	0.011	0.010	0.003

Wave 3 (1995-1998)	Pr (Y=-2)	Pr (Y=-1)	Pr (y=0)	Pr (Y=1)	Pr (Y=2)
Baseline probability	0.055	0.225	0.498	0.176	0.045
CC viability	-0.026	-0.087	-0.021	0.096	0.039
Life satisfaction	-0.001	-0.003	0.001	0.003	0.001
Interpersonal trust	-0.001	-0.003	0.001	0.003	0.001
Interest in politics	0.005	0.013	-0.003	-0.011	-0.004
Satisfied w/finances	0.007	0.019	-0.005	-0.016	-0.005
Perceived corruption	0.000	0.001	0.000	0.000	0.000
FH rights and liberties	-0.010	-0.029	0.002	0.027	0.009
Per capita GDP	-0.015	-0.047	0.000	0.045	0.017
Homicide rate	-0.011	-0.033	0.002	0.031	0.011
Age	0.004	0.010	-0.002	-0.008	-0.003
Gender	-0.003	-0.008	0.001	0.007	0.002
Education level	0.009	0.025	-0.007	-0.020	-0.007
Income level	0.005	0.014	-0.004	-0.012	-0.004

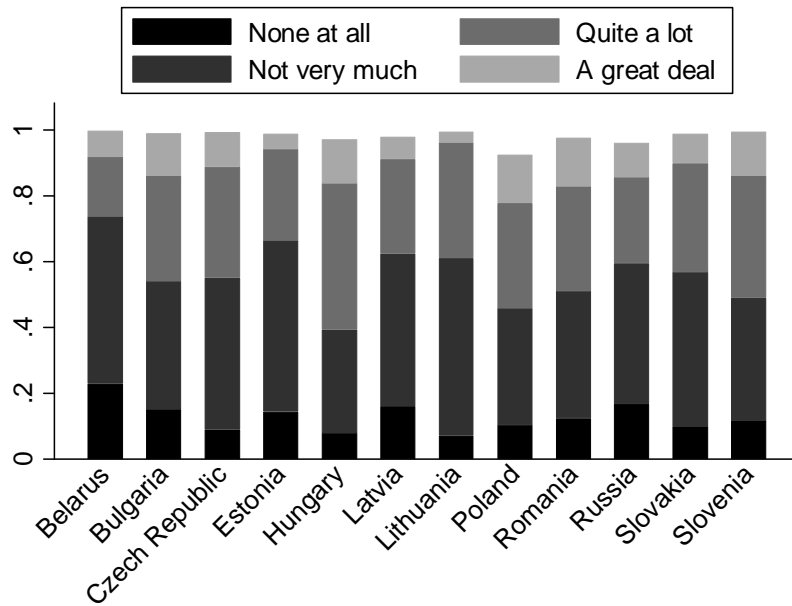
Wave 4 (1999-2000)	Pr (Y=-2)	Pr (Y=-1)	Pr (y=0)	Pr (Y=1)	Pr (Y=2)
Baseline probability	0.022	0.145	0.527	0.240	0.066
CC viability	-0.008	-0.043	-0.045	0.064	0.031
Life satisfaction	-0.003	-0.018	-0.014	0.025	0.011
Interpersonal trust	0.000	-0.001	-0.001	0.002	0.001
Interest in politics	0.002	0.010	0.006	-0.013	-0.005
Satisfied w/finances	0.007	0.019	-0.005	-0.016	-0.005
FH rights and liberties	-0.001	-0.005	-0.003	0.006	0.002
Per capita GDP	0.004	0.020	0.010	-0.025	-0.010
Homicide rate	-0.005	-0.026	-0.022	0.037	0.016
Age	0.008	0.038	0.014	-0.044	-0.016
Gender	-0.002	-0.010	-0.007	0.014	0.006
Education level	0.008	0.042	0.014	-0.047	-0.017
Income level	0.002	0.012	0.007	-0.015	-0.006

Note: changes in predicted probabilities are calculated by moving the variable of interest from its minimum to its maximum value, while simultaneously holding the other variables constant (at their minimum levels).

FIGURES

Figure 6.1, Public Confidence in the Justice System

Wave 2 (1989-1993)



Wave 3 (1995-1998)

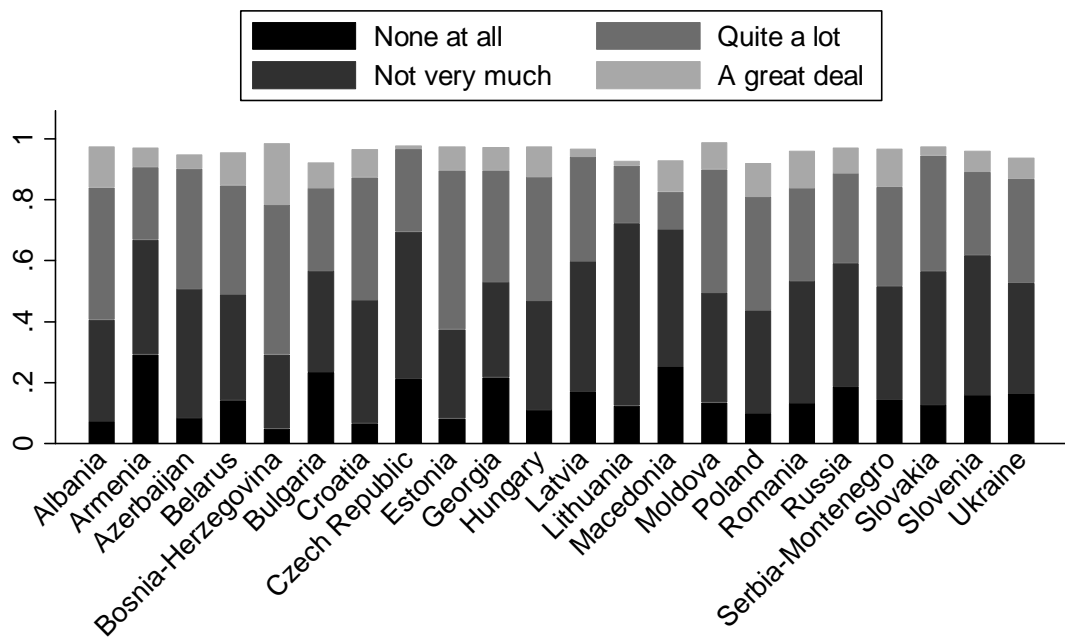


Figure 6.1, Public Confidence in the Justice System (continued)

Wave 4 (1999-2000)

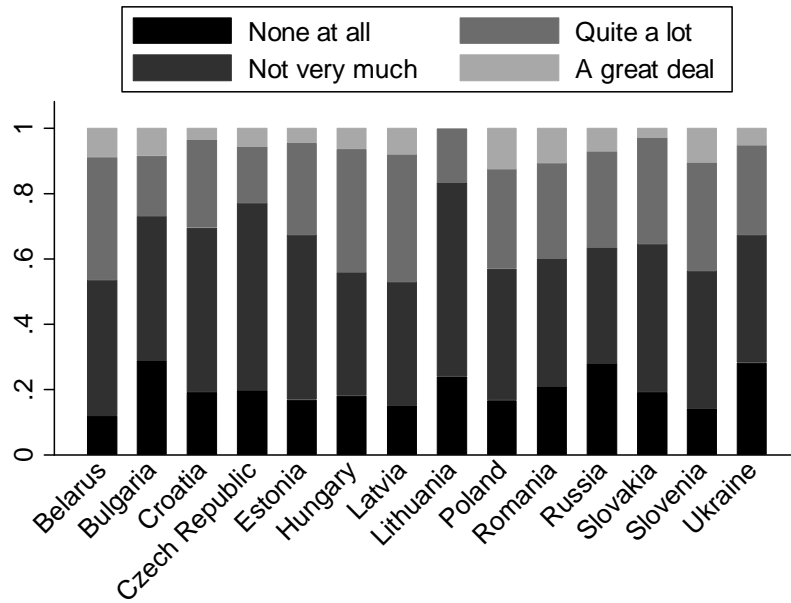
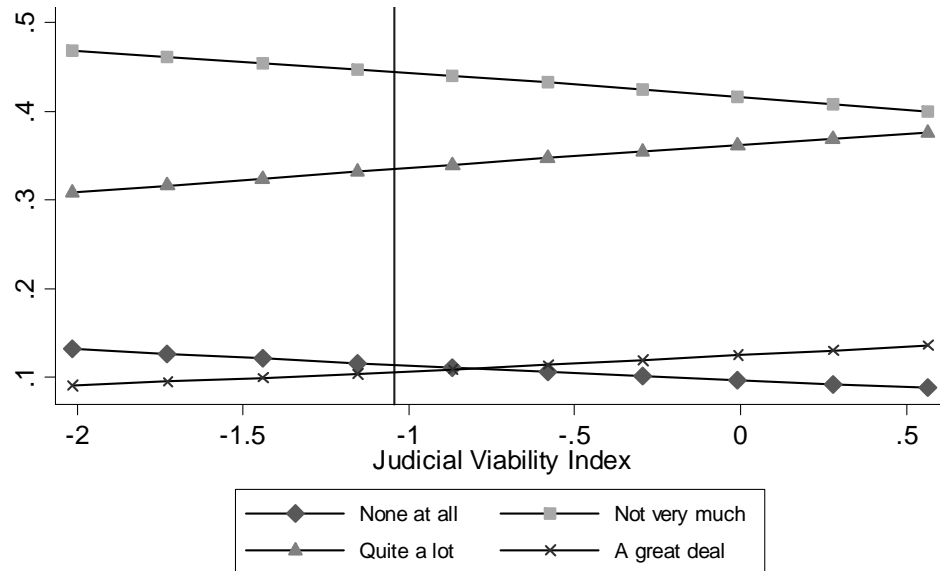


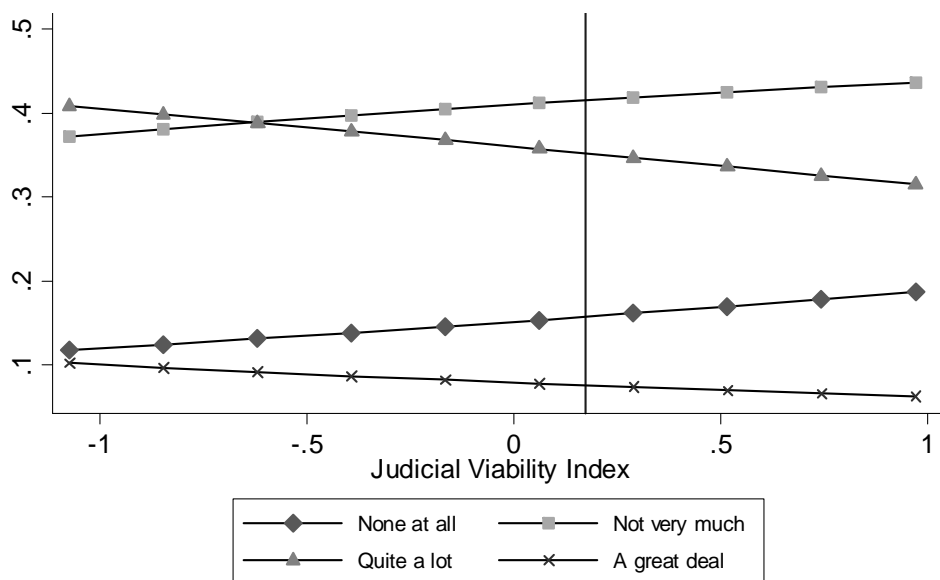
Figure 6.2, Predicted Probabilities of Individual Outcomes: Absolute Confidence

Wave 2 (1989-1993)



Notes:
 -Graph represents predicted probabilities of individual outcomes
 -Vertical line marks the average JVI score in the sample (JVI=-1.045)

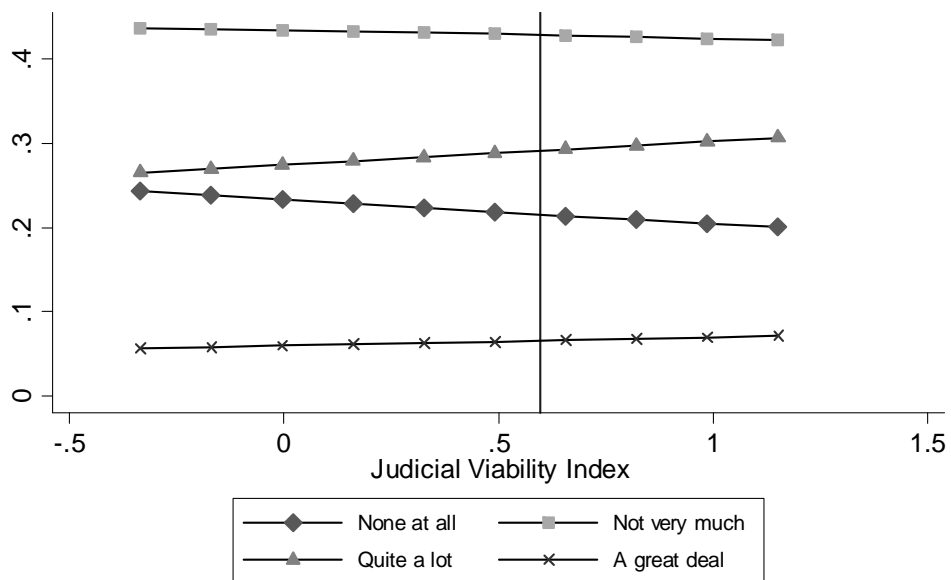
Wave 3 (1995-1998)



Notes:
 -Graph represents predicted probabilities of individual outcomes
 -Vertical line marks the average JVI score in the sample (JVI=0.174)

Figure 6.2. Predicted Probabilities of Individual Outcomes: Absolute Confidence
(continued)

Wave 4 (1999-2000)

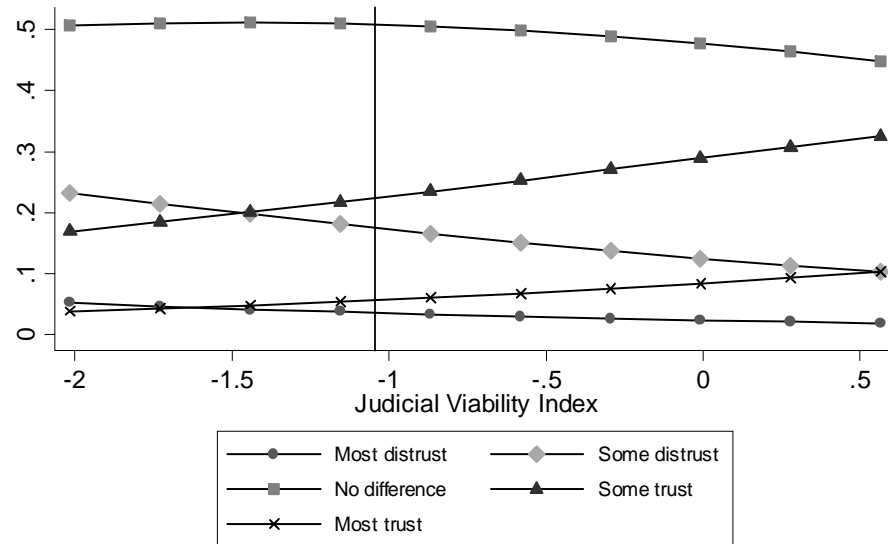


Notes:

- Graph represents predicted probabilities of individual outcomes
- Vertical line marks the average JVI score in the sample (JVI=0.596)

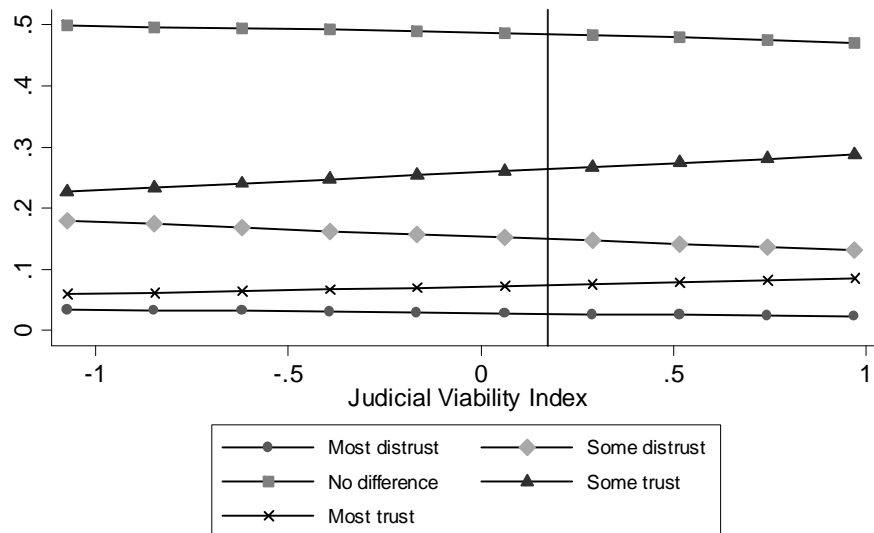
Figure 6.3, Predicted Probabilities of Individual Outcomes, Relative Confidence

Wave 2 (1989-1993)



Notes:
 -Graph represents predicted probabilities of individual outcomes
 -Vertical line marks the average JVI score in the sample (JVI=-1.045)

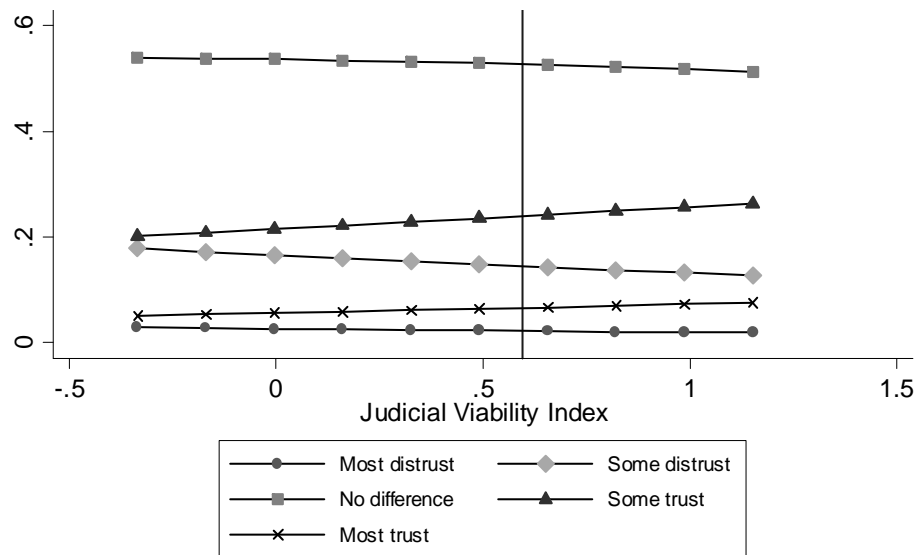
Wave 3 (1995-1998)



Notes:
 -Graph represents predicted probabilities of individual outcomes
 -Vertical line marks the average JVI score in the sample (JVI=0.174)

Figure 6.3. Predicted Probabilities of Individual Outcomes, Relative Confidence
(continued)

Wave 4 (1999-2000)



Notes:

- Graph represents predicted probabilities of individual outcomes
- Vertical line marks the average JVI score in the sample (JVI=0.596)

CHAPTER SEVEN

Judicial Institutionalization and Business Elite Confidence

INTRODUCTION

The previous chapter dealt with the relationship between institutional development of constitutional courts and the mass public confidence in the judiciary. It provided some empirical evidence in support of this relationship in the post-communist region. The analysis of several public opinion surveys showed that the constitutional court (CC) viability—the degree to which the constitutional court accrues differentiation, durability, and autonomy—positively influences public perceptions of the justice system and corresponds with greater public trust in courts. In particular, Chapter 6 showed that CC viability is an important determinant of relative trust and helps explain why citizens of post-communist countries continue to express greater trust in the courts than in the parliament despite the general decline in public trust in all political institutions in the recent years. This chapter addresses the role of CC institutionalization on business elite confidence in the judiciary.

While mass confidence in state and societal organizations is often considered hallmark of democratic governance, elite support for these organizations is less studied. The existing survey research in transitioning societies continues to focus disproportionately on the mass citizenry and largely ignores the question of whether the support for democracy and its institutions is similar among ordinary citizens and social, economic, or political elites. It is undeniable, however, that the elites play an extremely important role in both creation and survival of new democracies (see Higley and Burton 1989; Huntington 1991; Bunce 1995, 1999; Miller, Hesli, and Reisinger 1995, 1997; Linz and Stepan 1996; Fish 2005). Therefore, the legitimacy of post-communist

democratic regimes and institutions should be analyzed from both the mass public and elite perspectives.

In this chapter, I focus upon the role of the economic or business elites. I define such elites as persons who occupy the positions of a general director/manager, financial manager, and/or the owner of a business enterprise. Business elites are found in both the state-owned and the private sectors of the economy. I assume that trust in the judiciary from this group is of special importance for assessing the impact of judicial institutionalization in the post-communist societies. The constitutional rights protections provided by the constitutional courts (e.g., private property guarantees, right to a speedy trial, constitutional guarantees to free and fair competition, freedom of contract¹) are of great and immediate importance to the successes and failures of these businesses, and especially to the owners of private enterprises, and their level of trust in the legal system should therefore be more closely linked to the institutional development of the constitutional courts than that of the mass citizenry.

As in the previous chapter, I similarly argue that as the post-communist constitutional courts develop (i.e. acquire institutional viability through accretion of different measures of durability, autonomy, and differentiation), their institutionalization helps generate more positive elite perceptions of the country's legal system. I test hypotheses regarding business elite confidence in the legal system with the Business Environment and Enterprise Performance Survey (BEEPS) data compiled by the European Bank for Reconstruction and Development (EBRD) and World Bank. The results of this analysis show that the level of constitutional court institutionalization is an important determinant of business elite's perceptions of the legal system. During the 1999-2005 period, businesspersons in countries with highly institutionalized constitutional courts were more likely to express high level of confidence in their legal

¹ Contractual fairness, fair taxes and customs duties, financial restitution, and similar economic/financial issues are commonly brought before the CCs, but are usually framed in terms of constitutional rights to property and freedom of contract, constitutional guarantees of due process/meaningful access to the courts, constitutional right to non-discriminatory treatment, constitutional right to privacy (e.g., limiting state access to financial records), constitutional guarantees of free and fair economic competition, or in terms of the "social justice principles" guaranteed by the constitution (e.g., nonretroactivity of newly passed tax laws). These claims are common in the *Economic Disputes* issue variable coded in my judicial activism dataset and appear in caseloads of all post-communist CCs (for similar arguments, see Sajo 1995; Schwartz 2000; Sadurski 2002).

systems relative to businesspersons in countries where constitutional courts are weakly institutionalized.

Although I consider a number of other important influences on elite confidence in the legal system throughout the study, my interest in these influences is secondary. It is undeniable that factors other than institutional development matter, but my primary objective—one that distinguishes my study from others—is to show that the institutional design of the constitutional courts and its subsequent development has a distinct, independent, and systematic role in explaining business elite confidence in the post-communist courts and legal systems.

DO ELITES AND THE MASSES EVALUATE INSTITUTIONS DIFFERENTLY?

In Chapter 6, I outlined several distinct theoretical reasons why institutional development of constitutional courts has a widespread effect on public confidence in a country's legal system. It is unnecessary to restate these reasons here given that the elites, as members of post-communist societies, will be affected in a roughly similar fashion. Nevertheless, despite the fact the general contours of my argument about the impact of judicial institutionalization apply to the perceptions of both elites and masses, some differences in perceptions and attitudes between the two societal segments have been noted. In particular, the existing research hints at the possibility that the institutionalization of constitutional courts may be more closely linked to the elite perceptions of the country's legal system than to the perceptions of the mass public.

For example, Steen (1996, 2001) found that while the masses evaluate institutions primarily in terms of their outputs, the elite is more attracted by the “intrinsic value” of institutions and regard them as valuable because of their potential benefits. For the elite, argues Steen, the immediate benefits are not as closely related to the value of institutions and the newly-created post-communist political institutions may be expected to enjoy more support among the members of the elite than among the mass public.² If we apply

² Steen provides some evidence to support these assertions. In comparing mass and elite attitudes in the Baltic states in 1994 and 1996, he finds that the mean trust score for all political institutions was higher for the elite than the public in both years and increased between 1994 and 1996 (see Steen 1996). He argues

these arguments to the post-communist legal system and courts, it is reasonable to hypothesize that the elites may regard these institutions as valuable because of their potential benefits and focus less than the masses on the immediate performance of the courts.

In addition, Miller, Hesli, and Reisinger (1997) argue that the post-communist elites and masses hold fundamentally different conceptions of democracy. The authors found that the Russian and Ukrainian elites take “democracy” to mean order, restraint, and legal institutions. When asked to define “democracy,” the elites gave emphasis to the rule of law, protection of private property and economic opportunities, protection of individual rights, procedural fairness, and checks and balances.³

If post-communist elites favor the rule of law and legality as a pre-eminent feature of democracy and regard judicial institutions as intrinsically valuable, then the relatively low levels of confidence in the courts among the post-communist publics reported by other studies (e.g., Mishler and Rose 1997, 2001; Trochev 2005) may be compensated by higher levels of confidence in the elite segment of these societies. Business elites, in particular, depend greatly on the judicial protection of private property, contract enforcement, and fair taxation standards, and may therefore be willing to express higher confidence in the legal system than the masses because they realize the intrinsic value and necessity of such institutions in a free-market capitalist economy and in a newly-established democratic regime. In a sense, then, business elite may be more likely to value judicial institutions for what they are, not just for what they do.

Furthermore, it is possible that business elites—by the virtue of higher levels of educational attainment and their profession—will be more attentive to the constitutional court and more aware of its actual levels of institutionalization and activity than the mass

that this higher level of elite support may compensate for low confidence among the general population and that the elite may serve as a “vanguard for basic confidence” in the new post-communist regimes. In a later article, Steen (2001) compares elite and mass public confidence in Russia, and notes that the “compensation effect” he found in the Baltic states also exists in Russia but is much weaker there. Still, he finds significant differences among the opinions of Russian masses and elites. He argues that these differences cannot be explained by the performance of Russian institutions during the 1990s. Why, then, so much support? The author believes that for the elites these institutions “come to be regarded as valuable because of their potential collective and integrative functions, independent of leaders and outcomes” (Steen 2001: 715).

³ According to the authors, the modal feature of the mass public’s understanding of democracy was the freedom to express oneself without the fear of government repression.

public.⁴ In turn, greater awareness may lead to more confidence. As Gibson, Caldeira, and Baird (1998: 345) forcefully argue, “Greater awareness is associated with the perception that judges are different, that they rely on law not values in making decisions, that they are ‘objective.’ Greater awareness of the institution thus creates a less realistic view of the nature of judging, a view that contributes mightily to the legitimacy of the courts.” If this is the case, the effects of institutional development may be more pronounced on the attitudes of the business elites and we would expect that institutionalization of constitutional courts will be more closely linked to the rising levels of elite confidence in the country’s legal system.

MAPPING CONFIDENCE IN THE LEGAL SYSTEM: THE DEPENDENT VARIABLE

To measure business elite confidence in the legal system, this study relies on the Business Environment and Enterprise Performance Survey (BEEPS) data. BEEPS is a joint initiative of the European Bank for Reconstruction and Development (EBRD) and the World Bank. The survey examines the quality of the business environment as determined by a wide range of interactions between firms and the state. The survey was conducted in three rounds: 1999, 2002, and 2005. BEEPS 1999 surveyed 4,104 enterprises and covers 24 post-communist countries.⁵ BEEPS 2002 covers 6,667

⁴ For example, Reisinger, Miller, Hesli, and Maher (1994) find that the more education the respondent has, the more likely s/he will profess a great deal of confidence in the courts. However, Steen’s (1996) findings suggest that the opposite effect may be just as likely. The author found that the highly educated respondents in the post-communist countries tend to be more critical of the government institutions than the less well educated. Steen’s findings are also confirmed in this study. In the analysis of post-communist mass public perceptions (Chapter 6), I also found that highly educated respondents were more critical of the judiciary than the less well educated. If we assume that business elites are generally more educated than an average citizen, then it is possible that business elites will in fact be even more distrustful of the courts than an average citizen. Finally, and contrary to both sets of findings mentioned above, Mishler and Rose (1997) fail to unearth any statistically significant relationship between education and confidence in post-communist institutions. In summary, three reasonable possibilities exist (positive relationship between educational attainment and trust, negative relationship, or no relationship at all). Because no attempts to analyze business elite confidence in post-communist judiciaries have been made to date, I start, in many ways, with a clean slate.

⁵ Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Slovak Republic, Slovenia, Ukraine, and Uzbekistan.

enterprises in 26 countries: BEEPS 1999 countries plus Serbia-Montenegro and Tajikistan. BEEPS 2005 covers 9,655 enterprises in the same 26 countries as BEEPS 2002.⁶ Country samples were carefully constructed to be representative of different industry sectors, enterprise sizes, geographic location, and ownership (private and state-owned).⁷ Due to missing observations on the explanatory variables and the exclusion of “don’t know” responses for the dependent variable, the actual number of observations (enterprises) considered in the analysis is 3,889 in 1999, 6,153 in 2002, and 9,098 in 2005. In the actual analysis, the average number of firms surveyed per country was 162.04 in 1999, 236.65 in 2002, and 349.92 in 2005.

At each enterprise, face-to-face interviews were conducted with the “person who normally represents the company for official purposes, that is who normally deals with banks or government agencies/institutions.” All respondents fell into one of the following categories: chief executive/president/vice president, owner/proprietor, partner, director, general manager, manager, or finance officer. If one of these persons could not be interviewed at the time, the interviewer did not administer the questionnaire. The questionnaire contains many attitudinal questions (rated on a scale) on confidence in the legal system, corruption and bribery, lobbying activities, infrastructure, and other questions related to the operations of the firm. The dependent variable and several control variables used in this study were extracted from the BEEPS dataset.

The dependent variable is based on the following question: “To what degree do you agree with this statement? ‘I am confident that the legal system will uphold my contract and property rights.’” The respondent was offered the following scale of responses: (1) = strongly disagree; (2) = disagree in most cases; (3) = tend to disagree; (4) = tend to agree; (5) = agree in most cases; (6) = strongly agree; (7) = don’t know. I then recoded the variable in the following manner: (1) = strongly disagree/disagree in most cases; (2) = tend to disagree; (3) = tend to agree; (4) = agree in most cases/strongly

⁶ Interviews were also conducted in Republika Srpska (as a separate sampling unit in Bosnia and Herzegovina) but I exclude these from this analysis. BEEPS were not administered in Mongolia or Turkmenistan, the remaining 2 out of 28 post-communist states, and these countries are therefore not considered in this analysis.

⁷ See EBRD reports on sampling and implementation at <http://www.ebrd.com/country/sector/econo/surveys/beeps.htm>

agree.⁸ The “don’t know” category was recoded with missing values to drop these observations from the data (also see Appendix C for descriptive statistics and the differences between the original and recoded variable).⁹

The region-wide average level of business elite confidence in the legal system (“tend to agree” and “strongly agree” responses) is not particularly low. 54.1% of the post-communist business elites express some or a great deal of confidence in the legal system in 1999, while 45.9% express distrust. In 2002, the positive responses drop by 0.3%, with 53.8% of the elite respondents expressing at least some confidence and 46.2% expressing lack of confidence. In 2005, the final year of BEEPS, 55.4% express confidence in the legal system and 44.6% do not. Thus, looking across the region, the levels of confidence remain relatively stable over the six-year period, with a slim majority expressing some or a lot of confidence in the legal system.

Notable differences do exist across countries, however (see Figure 7.1 below). Across the six-year period, in only two countries—Moldova and Russia—are the business elites distrustful of the legal system by an overwhelming margin. In Moldova, 76.3% of the business elites actively distrust the legal system in 1999, 70.2% distrust it in 2002, and 64.3% in 2005. In Russia, 72.7% lack confidence in the legal system in 1999, 65.3% in 2002, and 63% in 2005. Although these numbers are disturbing, there is a positive trend over time—in both countries the levels of distrust decline by 10% or more within the six-year period.¹⁰

Insert Figure 7.1 here

⁸ I estimated the model with the original and recoded variable and found that this recoding does not change any of the statistical results reported below but helps streamline the presentation and interpretation of changes in the predicted probabilities. Furthermore, it is unclear, at least to me, how “agree in most cases” and “strongly agree” responses differ in substance. BEEPS implementation reports do not address this issue either.

⁹ It is important to note that it is somewhat unclear what the unit of analysis is. According to EBRD intent, the responses represent a “firm’s” position; in practice, however, they represent views of either the manager or the owner of the enterprise. Throughout the remainder of this study, I will refer to an owner, general manager, or financial manager of an enterprise as a respondent and will assume that his/her view represents the view of the enterprise.

¹⁰ In both countries, we also observe increasing levels of constitutional court viability during the same period. Although at this point this is just a correlation, it does provide us with a sign of hope that the hypothesized effect may exist even in countries where lack of business elite confidence in the legal system is relatively high.

BEEPS 1999 data also show that business elites in Kyrgyzstan (59.1%), Lithuania (64.5%), and Ukraine (73.7%) hold negative views of their legal systems. This lack of confidence persists in Kyrgyzstan (64.1%) and Lithuania (59.2%) through 2002, but Ukrainian business elites no longer distrust the legal system in such overwhelming numbers (the proportion of respondents with no confidence declines to 49% in 2002). In 2005, trustful and distrustful business elites in Kyrgyzstan and Lithuania are pretty much evenly split, with 50.8% and 49.8% reporting no confidence respectively. In 2002, Georgian businessmen also express fairly high levels of distrust, with 59% of them reporting negative views toward the legal system, although confidence rebounds in 2005, with full 71% of Georgia's business elite reporting confidence in the legal system. These data make sense in light of Georgia's "Rose Revolution" in 2003 and the subsequent "deepening" of democratization under President Saakashvilli.

Looking broadly across the three time periods, one finds that in 9 of the 26 post-communist countries surveyed by BEEPS (Belarus, Croatia, Georgia, Kazakhstan, Kyrgyzstan, Lithuania, Moldova, Russia, and Ukraine), the level of business elite confidence has improved over time. In 8 countries (Albania, Armenia, Azerbaijan, Czech Republic, Latvia, Macedonia, Romania, and Tajikistan), the levels of confidence remain essentially the same over time with no more than 3% up or down movement observed between 1999 and 2005 confidence levels. In the remaining 9 countries (Bosnia, Bulgaria, Estonia, Hungary, Poland, Slovakia, Slovenia, Uzbekistan, and Serbia-Montenegro), one can observe declining trend in business elite confidence over time, although with the exception of Bulgaria (where only 43.3% of elites are confident of the legal system in 2005), the majority of respondents remain trustful of the legal system and the 2005 levels of confidence are very high in Estonia (70.4%) and Slovenia (65.6%). It is particularly notable that BEEPS 2005 data show that 55.4% of the region's business elites actively trust their legal systems. Out of the trustful elites, almost half said that they "strongly agree" with the statement that "I am confident that the legal system will uphold my contract and property rights." On the surface, then, it seems that Steen's (1996, 2001) argument—that the elite attitudes toward political institutions are more positive than those of the mass public—may apply to the post-communist legal systems.

If we consider sub-regional differences—that is, the differences between Baltics, Central and Eastern Europe, Caucasus, and so on—four observations are worth noting. First, in all European CIS (Commonwealth of Independent States) countries (i.e., Belarus, Moldova, Russia, and Ukraine), there is a positive trend over time—business elite confidence is growing. Still, in two countries (Moldova and Russia) confidence remains fairly low (35.% and 36.1% respectively), while in the other two, more than half of the respondents express very positive views of the legal system (66.6% of respondents in Belarus and 51.8% of respondents in Ukraine). Second, with the exception of Czech Republic, respondents in the rest of the Central and Eastern European states (i.e., Hungary, Poland, Slovakia, and Slovenia) are becoming more critical of their legal systems, although they still remain very confident of their legal system’s ability to protect their contract and property rights in 2005 (more than 50% of respondents express some or a great deal of confidence, with the exception of Czech Republic, where only 46.9% express confidence). Third, Southeastern European states (Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Macedonia, Romania, and Serbia-Montenegro), Baltic states (Estonia, Latvia, and Lithuania), Caucasus states (Armenia, Azerbaijan, and Georgia), and Central Asian states (Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan) do not manifest significant “internal” uniformity—in some, confidence has declined; in others, it has remained the same or increased over time. Finally, business elite confidence levels in the group of new EU member states¹¹ also do not exhibit a uniform temporal pattern. The data thus seem to suggest that by 2005 regional integration did not have a substantial homogenizing influence on the perceptions of business owners and managers in these states. Despite these fairly subtle trends, it is worth noting that the levels of business elite confidence do not show strong intra-regional variation. Counter-intuitively, the more democratic and economically developed countries, such as Hungary, Czech Republic, Poland, and Estonia, are not fundamentally different from the authoritarian (Uzbekistan, Belarus, Kazakhstan, Armenia) or underdeveloped (Kyrgyzstan, Albania, Moldova, Romania) countries in regard to the business elite perceptions.

¹¹ Czech Republic, Hungary, Estonia, Latvia, Lithuania, Poland, Slovakia, and Slovenia became EU members in 2004.

Taking into account these descriptive observations, what explains the variations in business elite confidence in the legal system/courts across countries and over time? What are the origins of business elite trust? And, most importantly, is the level of constitutional court viability systematically related to the business elite confidence in the legal system?

PRIMARY EXPLANATORY VARIABLE: CONSTITUTIONAL COURT VIABILITY

The theory presented above posited that as the constitutional courts develop, their institutionalization will positively impact the perceptions of post-communist business elites of the legal system. To test this hypothesis, I use the measure of institutional development of the post-communist constitutional courts developed in Chapter 4. This measure is available for all 28 post-communist constitutional courts and consists of eleven indicators across the three conceptual dimensions of institutional development.¹² Higher values on this variable are hypothesized to lead to more positive evaluations of the legal system. To gauge the variable's impact on business elite confidence in the legal system, I use the score obtained by the year of the survey (e.g., for the 1999 survey of Albanian business elites, I use the viability score obtained by the Albanian Constitutional Court by the year 1999).

***H:** Higher levels of constitutional court institutionalization will result in more positive business elite opinion of the legal system.*

CONTROLS: INSTITUTIONAL PERFORMANCE VARIABLES

In contrast to the hypothesis presented above, some scholars view political trust as a form of specific support that is contingent primarily upon assessments of contemporary institutional performance. From a performance perspective, trust and

¹² See Chapter 4 for an in-depth discussion of this measure.

confidence depends upon citizens' evaluations of the success with which government institutions provide valued social, economic, and political benefits—trust is something that institutions have to earn (see Rogowski 1974; Anderson 1998; Mishler and Rose 1999; Rothstein 2003). In regard to the post-communist states in particular, proponents of this perspective argue that value-related explanations take on a subordinate role for legitimacy and support, and short term performance considerations are of primary importance to the post-communist citizens (Mishler and Rose 1997). Thus, if people are dissatisfied with the immediate outputs of the legal system, their confidence will be low.

Institutional theories draw an additional distinction between macro-oriented and micro-oriented theories. Macro theories assume that confidence is a collective or group property broadly shared by all members of a society (i.e., rational citizens with full information will evaluate institutions similarly) and therefore emphasize the homogenizing effect of institutional performance on personal evaluations. Micro theories, by contrast, hold that the individuals living in the same society may manifest very different levels of confidence in institutions because they differ either in their personal experiences or in the priorities they assign to common, country-wide institutional circumstances (Mishler and Rose 2001). I control for both macro-level (those that emphasize the impact of aggregate economic or political performance on citizens' confidence) and micro-level (those that focus on the individual evaluations of performance) influences in this analysis.

Performance Perceptions (Micro-level institutional performance)

Micro-level institutional theories emphasize that political trust and distrust are rational responses by individuals to the performance of institutions (March 1988; North 1990; Anderson 1998; Mishler and Rose 2001; Rothstein 2003). According to this perspective, if a person is dissatisfied with the immediate outputs of the political system, his/her confidence in political institutions will be low. I rely on four micro-level variables that control for the possibility that business owner's/manager's level of confidence in the legal system is related to his/her individual evaluations of judicial performance.

First, a respondent's perceptions of the legal system may be affected by his/her assessments of the legal system's transparency. I assume that the ease with which a

businessperson can access legal information affecting his firm is one measure of a transparent legal system. If a respondent has difficulty obtaining information on laws, bureaucratic regulations, and court rulings which have impact on his business, he is not likely to view the legal system as an effective performer, and will therefore express little confidence in it. To derive robust inferences about the impact of the judicial institutionalization, I therefore control for the possibility that an enterprise owner/manager will express higher confidence in the legal system if he perceives that information on the laws, court rulings, and regulations affecting his firm is easy to obtain. The data for this variable is derived from BEEPS.

Second, I use respondents' perceptions of judicial corruption as another measure of the legal system's performance. Numerous scholars argue that corruption systematically undermines democratic principles and performance of political and economic institutions, and, as a result, diminishes people's faith in the political process.¹³ Thus, if an enterprise owner/manager perceives that no payments and gifts are necessary to deal with the courts and court officials, he/she will express higher confidence in the legal system. The data for this variable is derived from BEEPS.

Third, micro-institutional theories argue that an experience with the courts should independently weigh on one's confidence in the legal system. Benesh (2006) finds that trust in courts is affected by an individual's experience with the courts as a defendant, plaintiff, or juror. The author further adds that "Winning or losing is not determinative of experience's effect on court support. Rather, the role in which the respondent experiences the courts (along with his or her perceptions about the fairness of court procedures) colors his or her judgment about them. A focus on the type of experience along with perceptions of procedural justice, then, is more appropriate" (Benesh 2006: 699).¹⁴ To control for the impact of personal experience with the courts, I rely on the BEEPS data. The survey asks respondents how many times their firm appeared as plaintiff in

¹³ For example, Anderson and Tverdova (2003) demonstrate that citizens in countries with higher levels of corruption express more negative evaluations of the performance of the political system and exhibit lower levels of trust in civil servants.

¹⁴ Of course, some defendants win and some plaintiffs lose, and it might be appropriate to also consider the outcome of the case for a particular participant in order to link experience with confidence. However, I am unable to test for a respondent's satisfaction with outcome because BEEPS does not ask respondents how satisfied with the outcome they were or how fair the court was in its ruling. Thus, I focus only on the "psychological comfort level" argument posited by Benesh (2006).

commercial and/or civil cases in the last 36 months, and then repeats the question in relation to a respondent's experience as a defendant. I expect that the owners/managers of business firms who petition the courts on multiple occasions in the plaintiff's role are more confident that the legal system will uphold their contract and property rights than businesspersons who rarely use the courts in the plaintiff capacity. In other words, "repeat" plaintiffs are likely to hold more positive views of the legal system than respondents who have had little or no experience with the courts. On the other hand, if a business owner/manager was summoned as a defendant on multiple occasions, I expect that this individual will express low support for the courts. Put differently, "repeat" defendants are more likely to express low levels of confidence than the defendants who dealt with the courts only once or twice. To reiterate, both variables tap into the "psychological comfort level" associated with a respondent's experience with the courts.

Finally, confidence in the legal system should be closely related to one's perceptions of the court system's effectiveness in enforcing its decisions. It is quite obvious that courts that rule in favor of business interests but cannot enforce their judgments will be perceived as ineffective and the firms will not turn to them to resolve business disputes or to seek protection from bureaucratic encroachments. Such ineffectual courts are not likely to earn trust. Thus, I expect that an enterprise owner/manager will express higher confidence in the legal system if he/she perceives that the court system is able to effectively enforce its decisions. The data for this variable is also derived from BEEPS.

In sum, a respondent's experience with the courts and his/her perceptions of judicial transparency, judicial corruption, and effectiveness of the courts in making their decisions stick will be correlated with his/her general confidence in the legal system. It is clearly necessary to include controls for these individual evaluations of judicial performance in order to derive robust inferences about the impact of the primary variable of interest—the level of constitutional court's viability—on business elite confidence. The coding procedures for these control variables are described in Appendix D and the descriptive statistics appear in Appendix C.

Enterprise Characteristics: Ownership and Size

It is quite possible, in fact likely, that managers of state-owned enterprises will respond differently from the owners or managers of private firms. For example, Steen (2001) finds that governmental elites in Russia (e.g., high level bureaucrats, the members of Federation Council and State Duma, members of regional and local governments) respond differently from the non-governmental elites and express much higher levels of “internal” trust. The author found that the members of the central government were more likely to trust central government than other types of elites. Similarly, Steen found that the members of the regional governments expressed exceptionally high levels of confidence in the regional government. Following Steen’s findings, I therefore control for the possibility that business elites with positions in state-owned enterprises will express systematically higher levels of trust in the legal system, while the owners/managers of private firms will express lower confidence in the legal system. Based on BEEPS question on enterprise ownership, I code private enterprises as 1 and state-owned enterprises as zero (see Appendix D) and expect a negative relationship between ownership and confidence.

It is also possible that there will be systematically different responses from managers and owners of large firms from those who own/operate small firms. On one hand, it would seem that the stakes of judicial performance are much higher for the owners/managers of large firms; they stand to lose a lot more if the courts fail to protect their interests or fail to enforce judgments. On the other hand, it is possible that the stakes of judicial performance and judicial protection are even higher for the owners/managers of small firms. Smaller enterprises may lose less than the large firms in absolute terms, but in relative terms, poor judicial performance is more likely to drive them out of business if court judgments are not implemented, the firms are unable to collect on debts, or contractual obligations are not enforced. At this point, it is unclear whether the size of the enterprise will affect the confidence in the legal system positively or negatively, but it does not preclude the possibility that firm size is an important determinant of an owners’/managers’ confidence. I control for this potential effect although I am agnostic about the directionality of its influence. To measure the size of the business enterprise, I

rely on BEEPS question which asks the respondent about the number of full-time, permanent employees working at the firm (refer to Appendix D for coding procedure).

National Environment (Macro-level institutional performance)

Some institutional theories argue that in the post-communist societies macro-economic performance (measured by country's GDP per capita income) should be highly salient for individual perceptions of political institutions. Mishler and Rose (1997: 426) point out that "Socialization into a state-controlled economy taught citizens to hold government accountable for economic conditions, and the introduction of market reforms has precipitated major economic dislocations." By this logic, poor and deteriorating macro-economic conditions should lead to declining levels of confidence in the courts and other government institutions.¹⁵ On the other hand, good macro-economic conditions result in high levels of business elite confidence in the legal system. To control for this macro-level influence on business elite confidence, I use GDP per capita income data from the European Bank for Reconstruction and Development.¹⁶

I also add a control variable for a country's level of democracy/freedom. I expect that businesspersons are likely to value judicial institutions more in countries that succeed in removing restrictions on individual liberties and providing increased freedoms (see also Mishler and Rose 1997, 2001, 2005; Diamond 1999). Thus, a stronger constitutional and procedural emphasis on individual rights by the political regime should improve business elite's perceptions of and satisfaction with their judicial institutions. This study uses Freedom House data on political rights and civil liberties to control for this influence on elite perceptions.¹⁷

Finally, another aspect of macro-level institutional performance that should have an impact on public confidence in the legal system is the rate of violent crime. As

¹⁵ Some scholars argue that in considering the effects of economic performance on the levels of public trust in political institutions, one must consider both aggregate/national economic performance and individuals' satisfaction with their personal financial conditions. However, Mishler and Rose (1997: 442) find that citizens in post-communist societies are more likely to evaluate institutions based on general macroeconomic conditions than on their personal finances. In either case, since BEEPS do not ask respondents about their satisfaction with their personal financial situation and do not provide any other micro-level measure of economic performance, I am unable to test how the perceptions of one's own finances influence confidence in the legal system.

¹⁶ The data are available at <http://www.ebrd.com/country/sector/econo/stats/index.htm>.

¹⁷ The data are available at <http://www.freedomhouse.org>.

Caldeira (1986: 1216) argues, “crime provides one of the best tests of the efficacy of the legal and political processes.” Since businesses depend greatly on predictable and safe environment, it is appropriate to control for crime in this study. I expect that high rates of violent crime (proxied by homicide rate per 100,000 inhabitants) will have a negative impact on business elite views of the legal system.¹⁸

In sum, controls for macro-level performance—conceptualized in terms of a country’s per capita GDP, respect for political and civil rights, and homicide rate—are necessary to derive robust statistical inferences about the impact of constitutional court viability on business elite confidence in the legal system.

CONTROLS: CIVIC CULTURE VARIABLE

Inglehart (1988, 2003) argues that the publics of different societies are characterized by durable cultural orientations that have major political and economic consequences. He points out that different countries consistently show relative high or low levels of a “civic culture”—a coherent syndrome of personal life satisfaction, political satisfaction, interpersonal trust and support for the existing social order (Inglehart 1988: 1203). Those societies that rank high on this syndrome, argues Inglehart, are much more likely to be stable democracies and have good economic performance than those that rank low (also see Putnam 1993, 1995). Since this culture syndrome is relatively durable, respondents in countries characterized by high levels of “civic culture” respond to poor contemporary economic and political performance with a great deal of inertia. Accordingly, one may expect that cultural differences in the post-communist countries will have predictable effects on the business elite responses about the legal system. Respondents living in a country characterized by high levels of “civic culture” syndrome may respond more positively to the existing political system and its institutions, including the legal system, than respondents in countries characterized by

¹⁸ The data to for this variable are compiled from numerous official government sources, UN Office on Drugs and Crime (UNODC) Division for Policy Analysis and Public Affairs, UN Surveys of Criminal Trends and Operations of Criminal Justice Systems (UNCJS), INTERPOL, and Economist Intelligence Unit *Global Peace Index*. Appendix C provides the descriptive statistics and Appendix D describes how this variable is measured.

low levels of “civic culture.”¹⁹ I control for this possibility in this analysis by including a macro-level variable that captures the post-communist country’s “civic culture” predisposition.²⁰

METHODOLOGY

To reiterate, I hypothesize that institutional development of the constitutional courts contributes positively to the business elite confidence in the legal system. I also control for other important micro- and macro-level influences on business elite confidence levels, such as the respondents’ perceptions of and satisfaction with the actual performance of the legal system, national economic and political environment, and national “civic culture” predispositions. Following the literature, I expect that business elite trust will be affected by these factors. I also consider whether the specific enterprise characteristics (i.e., private vs. state ownership and the size of the firm) impact the perceptions of their owners/managers.

¹⁹ Despite salient criticisms of political culture theories (see Muller and Seligson 1994; Jackman and Miller 1996; Levi 1996; Brehm and Rahn 1997; Newton 1999; Foley and Edwards 1999; Mishler and Rose 2001), they have never been tested against business elite confidence in the legal system. Therefore it is possible that the culture theory may apply in this context and may in fact influence elite perceptions of the legal system and courts. The findings reported in Chapter 6, which show that civic culture predispositions affect mass public confidence levels, further reinforce this possibility.

²⁰ Unfortunately, BEEPS does not ask business owners/managers about life satisfaction, interpersonal trust, and support for the existing order; nor do the surveys include any standard demographic information such as respondent’s age, gender, or educational attainment. Therefore, I cannot test the “civic culture” arguments at the micro/individual level. However, I can test the impact of the “civic culture” at the macro-level by relying on data available from Life in Transition Surveys (LITS) conducted in 27 out of 28 post-communist countries in 2006. If Inglehart is correct, then the post-communist countries are characterized by different levels on the component variables of the “civic culture” syndrome, and conjointly these components should provide a reasonable approximation of the “civic culture” syndrome. Moreover, if we assume alongside Inglehart that these cross-cultural differences are relatively durable, then it is not very likely that the level of “civic culture” in a country in 2006 differs substantially from its level in 1999. Thus, to measure the “civic culture” syndrome in the post-communist countries, I take the countries’ mean scores on four variables—*interpersonal trust*, *life satisfaction*, *attitude toward democracy*, and *courts are important as rights defenders*—from the LITS dataset (see survey methodology and variable descriptions at <http://www.ebrd.com/pubs/econo/lit.htm>). I add these values together and then divide by 18, the maximum possible score that can be obtained across the 4 variables; the resulting proportion is assumed to represent a country’s level of “civic culture.” The country scores range from 0.519 to 0.726, with higher levels representing stronger “civic culture” predisposition.²⁰ Admittedly, this is a rough measure but one that should capture some of the effects postulated by Inglehart’s “civic culture” theory.

To test these arguments, ordered logit procedures are used. This method is appropriate because the dependent variable has four possible and ordered realizations.²¹ Wells and Kriekhaus (2006), however, argue that it is imperative to utilize multi-level statistical methodologies when examining the combined effect of national-level and individual-level variables. Steenbergen and Jones (2002) also note that standard regression techniques yield biased estimates when data are hierarchically organized, with one level (individual respondents) embedded within another level (countries). Put differently, ordered logit procedure for combining national and individual data replicates the national-level variable into hundreds of individual-level observations, and this replication can artificially inflate the statistical significance of national-level variables.

Yet, as Snijders and Bosker (1999:140) note, “a two-level design with 10 groups, i.e., a macro-level sample size of 10, is at least as uncomfortable as a single-level design with a sample size of 10.” Thus, successful application of multi-level models hinges on the availability of sizable numbers of contextual units (see Kreft 1996; Kreft and De Leeuw 1998; Raudenbush 1998). Some contend that the lower limit is 30-50 clusters for robust estimation in a two-level analysis (see Muthén, Khoo, Francis, and Boscardin 2003; Duncan, Duncan, Alpert, Hops, Stoolmiller, and Muthén 1997). This is a steep requirement that is not always met in political science data, and one that I cannot meet here. Therefore, this study uses ordered logit estimation techniques and accepts that doing so entails certain costs.

RESULTS AND DISCUSSION

This study yields a number of interesting findings. First, and most importantly, this analysis confirms positive impact of judicial institutional development on business elite confidence. The results also confirm that micro-level institutional performance variables have significant impact on elite confidence in the legal system. However, this study finds only partial support for macro theories. Some macro-level performance

²¹ See Long and Freese (2003), Hosmer and Lemeshow (2000), Long (1997), and Agresti (1996) for introduction and explanation of ordered logit/probit techniques and other models with categorical dependent variables.

variables do affect business elite confidence, but their impact is modest in comparison to the micro-level variables and the magnitude of their impact is reduced substantially from 1999 to 2005. The macro-level cultural theory, conceptualized in Inglehart's "civic culture" terms, does not receive support in this study. Taken together, the results of this analysis provide a relatively complete picture of what drives business elite confidence in the post-communist legal systems. In the following discussion, I first address the primary variable of interest, constitutional court viability, and then move to the discussion of control variables.

Constitutional Court (CC) Viability

I hypothesized that as the constitutional court (CC) develops institutional viability, business elites will respond with greater confidence in the legal system. The results obtained from the analysis of BEEPS data fully support these expectations. Despite the fact that post-communist constitutional courts are formally separated from the ordinary judiciaries and their influence on elite opinion is filtered through multiple levels of judicial hierarchy, their levels of institutional development do have systematic and positive influence on elite perceptions of a country's legal system. CC viability coefficient is statistically significant and its impact is in the hypothesized direction (see Table 7.1 ordered logit results below). Furthermore, a large absolute difference in BIC' (Bayesian Information Criterion) parameters reported in Table 7.1 indicates that the model with the judicial institutionalization measure is more likely to have generated the observed responses than the model without the measure.²² In other words, I find very strong support for the inclusion of this explanatory variable into analyses of business elite confidence.

Insert Table 7.1 here

An examination of change in predicted probabilities²³ reported in Table 7.2 below reveals that the average impact of CC viability is substantial in 1999 and 2002, but more

²² An absolute difference in BIC' parameters is used to evaluate the overall fit of the model.

²³ These probabilities are calculated by adjusting the variable of interest (in this case, *CC viability*) from its minimum to its maximum value while simultaneously holding the remaining variables at their minimum values. This allows one to make judgments of the variable's impact relative to the baseline probability (calculated holding all variables at their minimum levels) for each category of the dependent variable.

modest in 2005. In 1999, the likelihood of business elite respondents expressing some or a lot of confidence (Y=3 and Y=4 combined) increases by 26.5%, and the likelihood of expressing little or no confidence decreases by 26.6% (Y=1 and Y=2 combined). In 2002, the impact of CC viability is somewhat larger—the likelihood of respondents expressing some and great deal of confidence in legal system increases by 30% and the likelihood of expressing no confidence decreases by 18.2%. Finally, in 2005, as CC viability shifts from its minimum to its maximum value in the sample, the likelihood that respondents express confidence in legal system (Y=3 and Y=4 combined) increases by 14.1% and the likelihood of having no confidence decreases by 7.4%. Thus, although the impact of CC viability is less substantial in 2005, it is still clearly visible.

Insert Table 7.2 here

It is easier to make sense of these statistical results by considering the following graphs. The graphs in Figure 7.2 show that during the 1999-2005 period businesspersons in countries with relatively institutionalized CCs were far more likely to express high level of confidence in their legal systems than businesspersons in countries where constitutional courts are weakly institutionalized. The two upward-sloping lines indicate that as the constitutional court's viability increases from its lowest to its highest value in the sample, the likelihood of respondents expressing some ("tend to agree" responses) and great deal ("strongly agree" responses) of confidence in the legal system increases. Alternatively, the two downward-sloping lines show that as the CC viability grows, the respondents were less likely to respond with "tend to disagree" and "strongly disagree" responses, which indicate a lack of confidence in the legal system.

Insert Figure 7.2 here

The purpose of this analysis was to link the development of organizational infrastructure, and the financial, jurisdictional and personnel conditions of the constitutional courts to the way the legal system, as a whole, is perceived by the business elites. In the beginning of this study, I assumed that the constitutional rights protections provided by the constitutional courts (e.g., private property guarantees) are of great and immediate importance to the successes and failures of these businesses, and especially to

the owners of private enterprises, and hypothesized that their level of trust in the legal system should therefore be more closely linked to the institutional development of the constitutional courts than that of the mass citizenry. The BEEPS data seemingly support these arguments. The predicted probabilities reveal that the impact of CC viability is substantial. Moreover, my findings are not bound to a few cases—this study considered 26 out of 28 post-communist countries (93% of the region is thus covered)—and therefore less likely to be influenced by “outlier” countries or be criticized for case selection based on the values on the dependent variable. While I do not hold that the arguments are necessarily valid for other times, still less for all other countries or regions, these findings bolster the possibility that the impact of constitutional court development may have a more general effect on citizens’ confidence and is not limited to the post-communist region.

One may also question whether a less complex variable, say, the age of the constitutional court, would have a similar influence on business elite perceptions—if Country A constitutional court is 10 years old and Country B court is 3 years old, one might suspect that there would be systematic differences in confidence levels. In other words, was it necessary to use a complex, multi-faceted, annualized index of constitutional court viability to show that the relationship between constitutional courts and business elite confidence in the legal system exist? The answer is yes. In models which I do not report here, I re-estimated the models sequentially using only one of the eleven component indicators included in the CC viability measure. Neither the age of the court, nor its judicial review powers, nor the length of judicial terms of office, nor did any other individual indicator reveal statistically significant results. Furthermore, when I re-estimated the models using only those provisions related to the constitutional courts that were located in the founding constitutions, the data revealed no relationship between constitutional court initial design and elite confidence in the legal system. In short, and similar to my earlier arguments, reliance on only one feature of constitutional court institutionalization or only on the constitutional court design provisions outlined in the founding constitutions is inadequate.

Although the primary objective of this study was to show the empirical link between CC viability and business elite confidence, this analysis allows one to draw

other important conclusions about the origins of elite confidence in the post-communist legal systems. Considering the analysis of the control variables overall, it seems that an enterprise owner or manager, with a substantial experience with the court system as a plaintiff, who believes that the courts are able to enforce their judgments, who perceives that little judicial corruption exists and that the legal system is transparent, and who lives in a country where the murder rate is low, and individual rights are protected will demonstrate the highest levels of confidence in courts. These findings confirm the validity of institutional theories of trust and extend their application beyond the conventional analyses of mass public opinion to the less-studied perceptions of business elites. I address each of the control variables in greater detail below.

Performance Perceptions (Micro-level institutional performance)

I posited that the individual members of business elite living in the same society may manifest very different levels of confidence in the legal system because they differ either in their personal experiences or in their evaluations of judicial performance. Specifically, I expected that if a respondent has difficulty obtaining information on laws, bureaucratic regulations, and court rulings which have impact on his business, he is not likely to view the legal system as an effective performer, and will therefore express little confidence in it. The BEEPS data strongly support this expectation (see Table 7.1), and the impact of legal transparency on confidence is substantial. As the variable moves from its lowest value (i.e., one strongly disagrees that laws/regulations/court rulings are easy to access) to its highest value (i.e., one strongly agrees that laws/regulations/rulings are easily accessible), the likelihood of a businessperson reporting confidence in the legal system increases by 10.1% in 1999, by 33.3% in 2002, and by 27.9% in 2005 (Y=3 and Y=4 combined; see Table 7.2). Moreover, these results show that over time, as the regulatory system becomes more complex and the courts rule on more and more issues pertaining to business operations, the impact of legal transparency increases substantially. These results are eminently reasonable and empirically confirm the common impression that legal transparency matters greatly for one's confidence in the legal system.

I also introduced controls for judicial corruption and suggested that if a businessperson has to rely repeatedly on gifts and bribery to receive fair treatment by the

courts, he is not likely to respond with high level of confidence in the legal system. Put differently, perceptions of rampant judicial corruption will have a predictable, negative effect on trust in the judiciary. The results reported in Table 7.1 support this notion unequivocally—the sign on the coefficient is negative (i.e., the more one perceives that he has to bribe court officials, the less likely he is to express confidence in the legal system) and highly significant in all three years. As Table 7.2 shows, the substantive impact of this variable is large. If one’s answers “always” to the question “Thinking now of unofficial payments/gifts that a firm like yours would make in a given year, could you please tell me how often would they make payments/gifts to deal with courts?,” the likelihood of that respondent having complete lack of confidence in the legal system ($Y=1$) rises by 25% in 1999, by 26.6% in 2002, and by 23.7% in 2005. On the other hand, perceptions of a very “clean” legal system improve one’s confidence by 28.9% in 1999, by 18.1% in 2002, and by 14.4% in 2005 ($Y=3$ and $Y=4$).

It is interesting to note that the positive influence of perceiving the legal system as devoid of corruption is reduced in half from 1999 to 2005. Why might this be the case? One possibility for this reduced impact is that judicial corruption is less of a problem in 2005 than it was in 1999. There is some evidence to support this conclusion. In 1999, 62.8% of business elites across the post-communist region, according to BEEPS, reported that they have never bribed court officials and only 12% said that they “frequently,” “usually,” or “always” give bribes for judicial services. In 2005, on the other hand, 70.3% of business elites reported that they have never bribed court officials and only 8.6% said that they “frequently,” “usually,” or “always” give bribes for judicial services. Transparency International (TI) *Global Report 2007: Corruption in Judicial Systems* similarly shows that since the early 2000s, individuals with higher incomes (business managers/owners would clearly fall into this category) were less likely to be affected by corruption in the judiciary than the low- or middle-income citizens. Furthermore, the 2007 TI report shows that judicial corruption is a much less of a problem in the post-communist region than in Latin America and Africa, and in comparison to police corruption in the post-communist countries. On average, only 5% of TI respondents in the post-communist region reported judicial corruption to be a serious problem in 2007, whilst almost 20% reported police corruption as a significant

challenge.²⁴ Finally, it is worth noting that in countries where respondents perceive that judicial corruption is rampant, this study finds some of the lowest levels of confidence in the legal system. For example, the 2005 levels of elite confidence are 43.3% in Bulgaria, 44.6% in Macedonia, 35.8% in Moldova, and 36.1% in Russia. At the same time, 31% of business elites in Bulgaria, 37% in Macedonia, 32% in Moldova, and 30% in Russia also reported that they have “sometimes,” or more frequently, given bribes to the courts.

Following Benesh (2006), I controlled for the impact of experience with courts on respondent’s confidence in the legal system. Specifically, I expected that the owners/managers of business firms that petition the court on multiple occasions in the plaintiff’s role are more confident of the legal system than those that rarely use the courts in the plaintiff capacity. I also expected that if a business owner/manager appears as a defendant on multiple occasions, then this individual is less likely to express high support of the legal system. Both control variables attempted to tap into the respondent’s “psychological comfort level” (see Benesh 2006). Throughout the six-year period, 27.8% of the sampled firms appeared in courts at least once as plaintiffs (4,070 firms) and 14.5% as defendants (2,116 firms).

The analysis of BEEPS data support “repeat plaintiffs” claim in all three years under the analysis. Table 7.2 shows that respondents that appeared in the courts on multiple occasions as plaintiffs were 21.3% more likely to express confidence in the legal system in 1999 (Y=3 and Y=4 combined), 19.9% more likely to express confidence in 2002, and 22.1% more likely to express confidence in 2005. No support was found for the “repeat defendants” claim. In 1999 and 2005 data, the coefficient is negative, as expected, but statistically insignificant. In 2002, the coefficient is still insignificant but positive, suggesting that the more often the respondent’s firm appeared in courts as a defendant, the more likely he is to view the courts favorably (counter to the hypothesized effect). The data seem to suggest that although both defendants and plaintiffs have high stakes and low control over case outcomes some differences between these types of judicial experience do exist, at least in the post-communist region. The conclusion that “repeat” plaintiffs express more positive attitudes toward the legal system than respondents that have no experience with the courts in this capacity is clearly reasonable

²⁴ The report is available at TI website at http://www.transparency.org/policy_research/surveys_indices/cpi

and empirically confirms some common-sense notions about what drives confidence in courts.

Finally, I posited that confidence in the legal system should be closely related to one's perceptions of the court system's effectiveness in enforcing its decisions. The results support this expectation unequivocally and the change in predicted probabilities shows that this perception-based variable has the largest impact of all variables included in the model. Table 7.2 indicates that if a respondent believes that the courts are always able to enforce their decisions, their likelihood of expressing the highest level of confidence in the legal system ($Y=4$) increases by 53.7% in 1999, 40.5% in 2002, and 42.5% in 2005. Even though it was used only as a control variable, the impact of this perception-based measure of judicial performance is truly one of the most important findings of this study of business elite opinions.

Enterprise Characteristics: Ownership and Size

I hypothesized that enterprise characteristics such as the firm's ownership (private versus state-owned) and its size are related to the manager's/owner's level of confidence in the legal system. I expected that private business owners/managers would be more skeptical toward state institutions, including the legal system, than managers of state-owned enterprises. The results of this analysis do not reveal a consistent relationship. In 1999, I find that business elites from the private sector were in fact more critical of the legal system (see Table 7.1 ordered logit results). The impact, as Table 7.2 shows, is relatively large—change in predicted probabilities reveals that private sector elites are 14.2% more likely to express no confidence in the legal system ($Y=1$ and $Y=2$ combined) than managers of the state-owned firms. In some respects, then, this finding confirms Steen's impressions that elites from the state sector express higher levels of "internal" trust and that non-governmental elites are generally more critical of the government institutions. However, the variable becomes insignificant in 2002 model and the coefficient flips signs. In 2005, the data show that private sector elites are actually more trusting of the legal system than the managers of state-owned enterprises (the coefficient is positive and statistically significant). The influence of this variable is not large—the private sector business elites are only 5.6% more likely to express confidence in the legal

system than elites from the state-owned sector (Y=3 and Y=4 combined; see 2005 predicted probabilities in Table 7.2).

One possible explanation for these results is that since 1999, private sector elites have seen significant court victories, improved legal system efficiency, greater judicial activism in favor of private business rights, more government-enacted reforms that strengthen the private sector, and more consistent enforcement of judicial decisions by the bureaucrats and bailiffs, and as a result, express more favorable views of the legal system. Reports from the World Bank, EBRD, and European Union show that across the entire region (even in relatively authoritarian regimes such as Belarus) business environment for private businesses has indeed improved substantially. World Bank *Doing Business* reports, for example, show that the pace of business reforms varied across regions, with Eastern Europe and Central Asia reforming the most (followed by South Asia and rich countries, with Latin America reforming the least) and Croatia being the top reformer in the region. In 2004-2007 period, more than 80% of the countries in the post-communist region simplified business regulations, strengthened property rights, eased tax burdens, increased access to credit and reduced the cost of exporting and importing.²⁵ Business elites from the state-owned sector, on the other hand, have seen the size of government-owned assets decline over time, government subsidies and protections for state-owned enterprises decline or disappear altogether, and a more competitive, free marketplace emerge. In many respects, the courts have also been more favorable toward the private sector. As a result, the confidence in the legal system by the managers of state-owned enterprises has predictably declined. In sum, the substantive interpretation of the findings reported here are unequivocally positive, but nevertheless, the inclusion of this control variable is only partly supported.

The stipulated relationship between the size of the enterprise (proxied by the number of full-time, permanent employees) and elite confidence in the legal system is not supported in any of the years analyzed here. The variable is statistically insignificant and the coefficient flips signs over time (negative in 1999 and 2002, and positive in 2005; see Table 7.1). Since I did not specify the direction of causality—as it is unclear how, specifically, firm size should be related to the confidence—I am not sure how to interpret

²⁵ World Bank's *Doing Business* reports are available at <http://www.doingbusiness.org/>

the fact that the coefficient flips signs over time. In either case, the inclusion of this control variable did not yield statistically significant results.

National Environment (Macro-level institutional performance)

To derive robust inferences about the impact of CC viability, this study controlled for per capita GDP (as a proxy measure for macro-economic performance). In relatively wealthy countries, I expected to find more trustful business elites. However, the data fail to support this notion entirely. Table 7.1 shows that per capita GDP is not significantly related to business elite confidence in the legal system and poor macro-level economic conditions do not have deleterious effects on business elite confidence.

I also controlled for the possibility that businesspersons are more likely to value judicial institutions in countries that succeed in removing restrictions on individual liberties and providing increased freedoms. I expected to find that a stronger emphasis on individual rights by the political regime will improve business elite's perceptions of their judicial institutions. The data largely confirm this effect. The coefficient on *FH rights and liberties* variable is negative (as higher values indicate lower degree of rights protection), but it fails to reach statistical significance in 2002 (see Table 7.1). Substantively, the results show that as the regime's procedural emphasis on individual freedoms increases from its lowest level (14) to its highest level (2), business elites are 15% more likely to express confidence in the legal system in 1999 and 3.4% more likely to do so in 2005 (Y=3 and Y=4 combined). This decline in impact seems to suggest that this macro-level performance measure is playing a considerably lesser role on the perception of the business elites over time, and other considerations figure more prominently in their answers on confidence in the legal system.²⁶

Finally, I expected that the homicide rate, as another control variable capturing the national environment, will have an important consequence on elite confidence in the legal system. Businesses depend greatly on predictable and safe environment and I

²⁶ Also, Freedom House's measure is an imprecise tool, so it is possible that as most countries achieve "free" and "partly free" status, the variable's impact partly washes out. FH rates countries that score 1.0 to 2.5 as Free, 3.0 to 5.0 as Partly Free, and 5.5 to 7.0 as Not Free on each of the two component variables (i.e., civil liberties and political rights). Thus, a combined score of 2.0 to 5 indicates that a country is Free, 6 to 10 as Partly Free, and 11 to 14 as Not Free. In 2005, 74% of the respondents lived in post-communist countries that ranked Free or Partly Free.

therefore posited that high murder rates would have a negative impact on business elite views of the legal system. BEEPS data largely confirm this insight. The homicide rate is statistically significant and negatively related to respondent's confidence in the legal system in 1999 and 2005, but like *FH rights and liberties* variable, fails to achieve significance in 2002.²⁷ In years where the variable is significant, however, the likelihood of a respondent having some or great deal of confidence in the legal system (Y=3 and Y=4) increases by 17.2% in 1999 and by 8.7% in 2005 as the number of murders falls (see change in predicted probabilities in Table 7.2).

In sum, national environment—conceptualized in terms of the country's respect for individual rights and its homicide rate—impacts confidence in the legal system more or less consistently. However, it is important to emphasize that the impact of these system-level variables is substantially reduced over time. This finding reflects a possibility that the end of the initial transition period reduced the salience of business elite concerns with crime and with the general predisposition of the regime; aggregate performance continues to affect confidence in the legal institutions but only to the extent that the businesspersons ascribe it importance relative to other concerns. Quite surprisingly, the state of the national economy did not have a distinguishable impact on business elite confidence.

Civic Culture Syndrome

I hypothesized alongside Inglehart that respondents living in a country characterized by high levels of “civic culture” syndrome will respond more positively to the existing political system and its institutions, including the legal system, than respondents in countries characterized by low levels of “civic culture.” Yet, the results of this analysis show that civic culture predispositions are not important determinants of business elite confidence (see Table 7.1). Business elites in countries characterized by higher levels of “civic culture” are no more likely to respond positively to the legal system. It remains possible that no relationship was found because my measure of “civic culture” is imprecise. The analysis in Chapter 6, for example, showed that micro-level

²⁷ Perhaps there is something peculiar about business elite responses in 2002 that I overlooked and further studies may reveal.

measures of interpersonal trust and life satisfaction were important determinants of mass public perceptions of the judiciary. Since I was unable to address cultural explanations at the micro-level in this chapter (as I have done in Chapter 6) I would therefore interpret these results with some caution. However, it is also possible that business elites' views are, quite simply, less influenced by cultural predispositions than those of the masses and better measures of "civic culture" would not have changed these results. In either case, this study does not find a relationship between "civic culture" and business elite confidence in the legal system.

CONCLUSION

Several important conclusions emerge from this analysis. First, the conventional wisdom on the origins of mass public trust in political institutions applies relatively well to the analyses of elite trust. In particular, the results of this study strongly support micro-institutional explanations of trust. Business elite trust or distrust in the legal system is in large part determined by the individual's satisfaction with the performance of the courts.²⁸ This is an important but an anticipated finding.

Second, this study reveals that in many respects confidence in the legal system is not a system-level attribute as macro-institutional and macro-cultural theories suggest. The effects of macro-political performance (i.e., *FH rights and liberties* and *homicide rate*) on confidence are present, but seem to be mediated at the micro level by an individual's value-laden perceptions. Macro-economic performance (*per capita GDP*) and national civic culture predispositions seem to be entirely unrelated to business elites' confidence in the legal system. One significant exception to the conclusion regarding macro-level theories is the effect of the primary variable of interest—the institutionalization of the country's constitutional court. As a system-level variable, constitutional court viability proves to have a consistent, highly significant, and positive

²⁸ The largest impact on a businessperson's confidence in the legal system is his/her perceptions of how effective the courts are in enforcing their decisions. The business elites are also highly affected by their perceptions of legal transparency and, to a somewhat lesser extent, their experience with courts (as plaintiffs) and their perceptions of judicial corruption.

effect on business elite's perceptions of the legal system. This makes for a truly interesting and important finding of this study; it is the first empirical confirmation that the levels of constitutional court viability are actually related to the elites' views of the legal system and courts. Across the time period analyzed in this study, the businesspersons in countries with highly institutionalized constitutional courts are on average 23.5% more likely to express high level of confidence in their legal systems relative to the businesspersons in countries where the constitutional courts are weakly institutionalized.

Third, although numerous studies find that mass public skepticism and distrust are pervasive in the post-communist societies, the present analysis of business elite opinions provides some ground for optimism. It shows that the owners and managers of business enterprises are less skeptical and more trusting of the legal system than the masses. As Steen (2001) argues, and this study finds, the elite serve as a "vanguard for basic confidence" in the post-communist region. Furthermore, this study hints at a possibility that post-communist legal systems may not need to enjoy widespread public support to survive and prosper, at least in the near future. Perhaps these legal systems may at first be able to build up a critical mass of support by catering to a relatively small, yet influential group—the business-sector elites. Of course, as Gibson, Caldeira, and Baird (1998) argue, to the extent that the legal system satisfies only a single constituency, it is not likely to acquire widespread loyalty and trust, but this narrow elite support may give the legal system sufficient time to become more efficient, capable, and responsive. In turn, as the legal system's capacity and visibility grows over time, it will develop a reservoir of support among other constituencies.

Finally, while this study finds that elites are substantially more trustful of their legal institutions and more responsive to the institutional viability of the constitutional courts than the masses, it cannot definitively answer why this is the case. As Steen argues, it remains possible that the elites are more attracted by the "intrinsic value" of institutions and regard them as valuable because of their potential benefits. However, the results of this analysis cast some doubts on this conclusion. This study shows that contemporary evaluations of judicial performance are closely related to the business elite confidence in the legal system and that the post-communist judiciaries may enjoy more

support among the members of the business elite because, unlike the mass public, these elites perceive the courts to work relatively well.

However, there is another way to interpret these relatively high levels of elite confidence. Gibson, Caldeira, and Baird (1998) argue that greater awareness of the legal institutions provides the framework for interpreting and evaluating the outputs of courts and creates a less realistic view of the nature of judging, a view that contributes to the support for the courts. It does not take a great leap of faith to assume that business enterprise directors, owners, and chief financial officers are more aware of the legal system and its component parts than the ordinary citizens.²⁹ If it is the elite's greater awareness that leads to high levels of trust in the legal system, then it is also possible that greater awareness distorts elite views of the performance of the legal system. Counter-intuitively, then, it may be that the ordinary citizens who know little about the courts are driven by purely rational evaluations of their performance, whereas the more-aware and more-educated elites hold a less realistic view of the judiciary. Still, since I was unable to explicitly test how knowledgeable the elites are of the legal system in general or of the constitutional courts in particular, this is a reasonable speculation but not a definitive conclusion.

²⁹ In fact, one can also interpret the observed impact of the experience variable as a partial confirmation of the proposition that the respondents who are more aware of the courts are also more likely to express confidence in the legal system; "repeat" plaintiffs are clearly more aware of the courts than respondents who petition the courts rarely.

TABLES

Table 7.1, Business Elite Confidence in the Legal System (Ordered Logit)

Variable	1999	2002	2005
INSTITUTIONAL FEATURES			
<i>Constitutional court viability</i>	.619 (.204)**	.853 (.104)***	.518 (.084)***
MICRO-LEVEL PERFORMANCE			
<i>Accessibility of laws/rulings/regulations</i>	.085 (.034)*	.292 (.025)***	.249 (.021)***
<i>Frequency of bribing court officials</i>	-.258 (.034)***	-.208 (.030)***	-.196 (.024)***
<i>Plaintiff in civil/commercial cases</i>	.010 (.004)**	.010 (.005)*	.011 (.005)*
<i>Defendant in civil/commercial cases</i>	-.002 (.007)	.009 (.013)	-.012 (.009)
<i>View courts as able to enforce decisions</i>	.484 (.031)***	.440 (.026)***	.495 (.022)***
ENTERPRISE CHARACTERISTICS			
<i>Private enterprise</i>	-.573 (.107)***	.094 (.091)	.202 (.092)**
<i>Firm size</i>	-.042 (.066)	-.022 (.039)	.014 (.038)
MACRO-LEVEL PERFORMANCE			
<i>FH rights and liberties (added indices)</i>	-.072 (.017)***	-.006 (.013)	-.047 (.009)***
<i>Per capita GDP income (natural log)</i>	.105 (.207)	.042 (.058)	-.050 (.038)
<i>Homicide rate (per 100,000 inhabitants)</i>	-.033 (.016)*	-.027 (.021)	-.042 (.017)*
MACRO-LEVEL CULTURE			
<i>Civic culture syndrome</i>	-1.244 (2.508)	.222 (1.834)	1.648 (1.252)
/cut1	.695 (.768)	.501 (.542)	-.164 (.383)
/cut2	1.966 (.769)	1.803 (.544)	1.020 (.383)
/cut3	3.523 (.772)	3.264 (.546)	2.521 (.385)
N (observations)	2,852	4,420	6,492
N (countries)	24	26	26
Log pseudolikelihood	-3553.183	-5573.641	-8237.480
Wald chi2	529.04	713.96	908.05
Prob > chi2	0.000	0.000	0.000
Count R2	0.412	0.398	0.428
McKelvey and Zavoina's R2	0.229	0.219	0.237
Difference of BIC' parameters	55.968	69.602	35.121

Data clustered by country; robust standard errors are reported in parentheses; all significance tests are two-tailed; a large difference of BIC' indicates that model with the judicial viability measure is more likely to have generated the data than the model without the viability measure (i.e., very strong support for the inclusion of CC viability measure into the model); Count R2 statistic reflects the proportion of responses correctly predicted by the model; McKelvey and Zavoina's R2 provides the closest approximation of Adjusted R2 statistic found in OLS; * p<0.05; ** p<0.01; *** p<0.001.

Table 7.2. Change in Predicted Probabilities: Business Elite Confidence in the Legal System

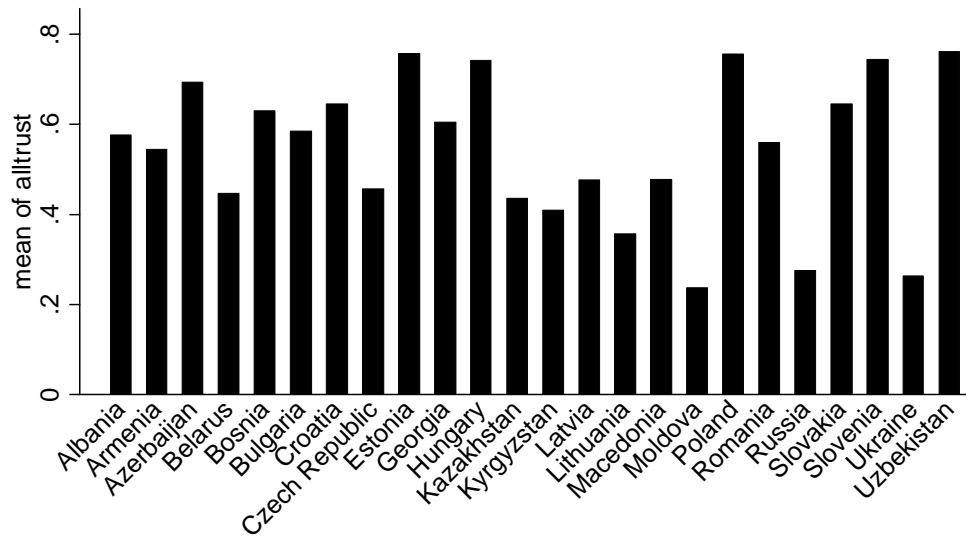
	Strongly Disagree	Tend to Disagree	Tend to Agree	Strongly Agree
	Pr (Y=1)	Pr (Y=2)	Pr (Y=3)	Pr (Y=4)
BEEPS 1999				
Baseline probability	0.183	0.252	0.341	0.225
Constitutional court viability**	-0.128	-0.138	0.222	0.043
Ease of access to laws/rulings/regulations*	-0.055	-0.045	0.018	0.083
Frequency of bribing court officials***	0.250	0.039	-0.143	-0.146
Plaintiff in civil/commercial cases**	-0.198	-0.015	0.113	0.100
Defendant in civil/commercial cases	0.064	-0.014	-0.032	-0.017
View courts as able to enforce decisions***	-0.163	-0.206	0.167	0.537
Private enterprise***	0.101	0.041	-0.058	-0.084
Firm size	0.017	0.003	-0.011	-0.010
FH rights and liberties (added indices)***	0.108	0.042	-0.062	-0.088
Per capita GDP income (natural log)	-0.034	-0.026	0.014	0.046
Homicide rate (per 100,000 inhabitants)*	0.132	0.041	-0.078	-0.094
Civic culture syndrome	0.052	0.010	-0.032	-0.031
BEEPS 2002	Pr (Y=1)	Pr (Y=2)	Pr (Y=3)	Pr (Y=4)
Baseline probability	0.217	0.300	0.386	0.098
Constitutional court viability***	-0.073	-0.109	0.241	0.059
Ease of access to laws/rulings/regulations***	-0.251	-0.083	0.128	0.205
Frequency of bribing court officials***	0.266	-0.085	-0.118	-0.063
Plaintiff in civil/commercial cases*	-0.171	-0.028	0.097	0.102
Defendant in civil/commercial cases	-0.107	-0.005	0.061	0.052
View courts as able to enforce decisions***	-0.323	-0.173	0.091	0.405
Private enterprise	-0.024	0.001	0.013	0.009
Firm size	0.011	-0.002	-0.006	-0.003
FH rights and liberties (added indices)	0.040	-0.005	-0.021	-0.014
Per capita GDP income (natural log)	0.027	-0.003	-0.014	-0.009
Homicide rate (per 100,000 inhabitants)	0.117	-0.037	-0.052	-0.027
Civic culture syndrome	-0.011	0.002	0.005	0.004
BEEPS 2005	Pr (Y=1)	Pr (Y=2)	Pr (Y=3)	Pr (Y=4)
Baseline probability	0.187	0.263	0.481	0.068
Constitutional court viability***	-0.051	-0.023	0.107	0.034
Ease of access to laws/rulings/regulations***	-0.265	-0.015	0.150	0.129
Frequency of bribing court officials***	0.237	-0.092	-0.102	-0.042
Plaintiff in civil/commercial cases *	-0.222	0.001	0.126	0.095
Defendant in civil/commercial cases	0.193	-0.071	-0.086	-0.037
View courts as able to enforce decisions***	-0.416	-0.148	0.139	0.425
Private enterprise*	-0.069	0.012	0.036	0.020
Firm size	-0.007	0.002	0.004	0.002
FH rights and liberties (added indices)***	0.048	-0.013	-0.023	-0.011
Per capita GDP income (natural log)	0.064	-0.018	-0.031	-0.015
Homicide rate (per 100,000 inhabitants)*	0.155	-0.069	-0.063	-0.024
Civic culture syndrome	-0.085	0.023	0.042	0.020

Note: changes in predicted probabilities are calculated by moving the variable of interest from its minimum to its maximum value, while simultaneously holding the other variables constant (at their minimum levels).

FIGURES

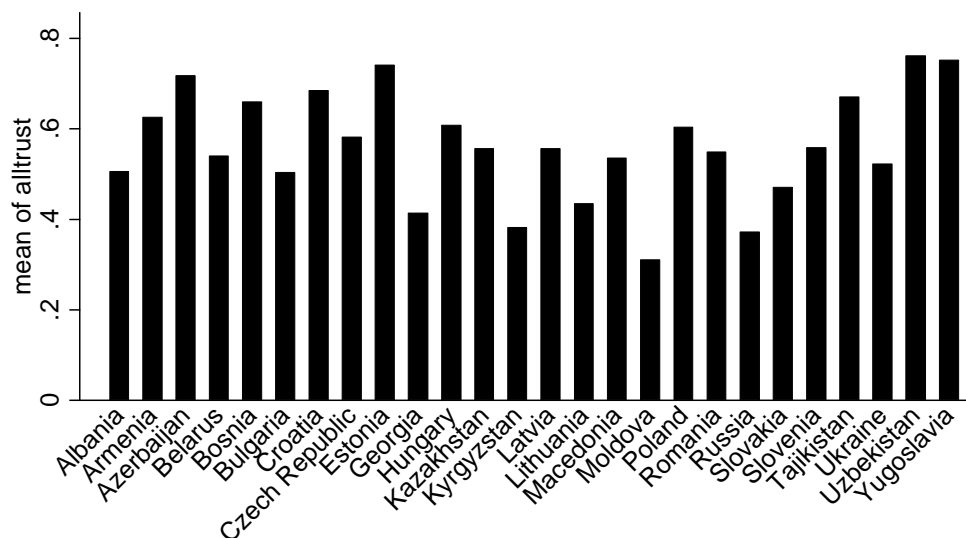
Figure 7.1. Business Elite Confidence in the Post-Communist Legal Systems

BEEPS 1999



Note: Mean levels of confidence in the legal system by country
(‘some’ and ‘great deal’ of confidence responses combined)

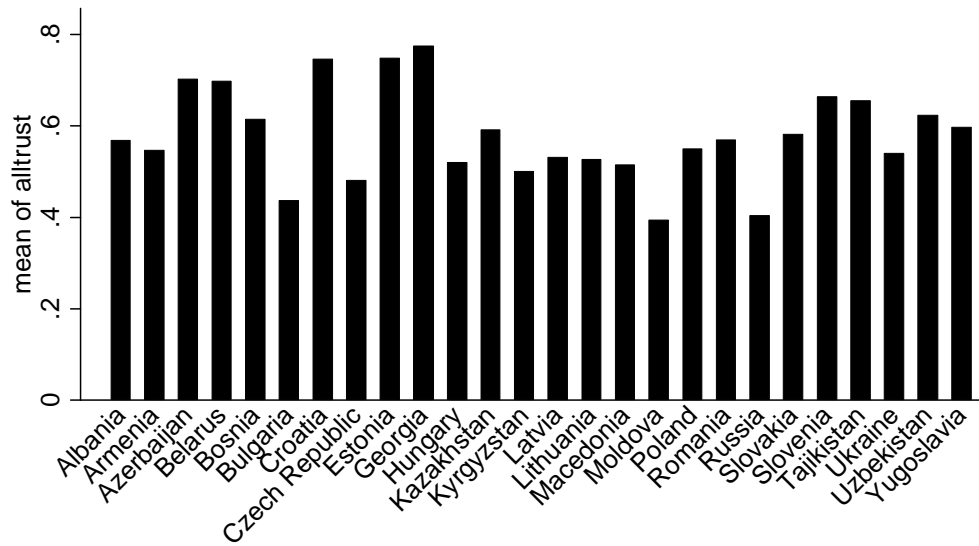
BEEPS 2002



Note: Mean levels of confidence in the legal system by country
(‘some’ and ‘great deal’ of confidence responses combined)

Figure 7.1, Business Elite Confidence in the Post-Communist Legal Systems (continued)

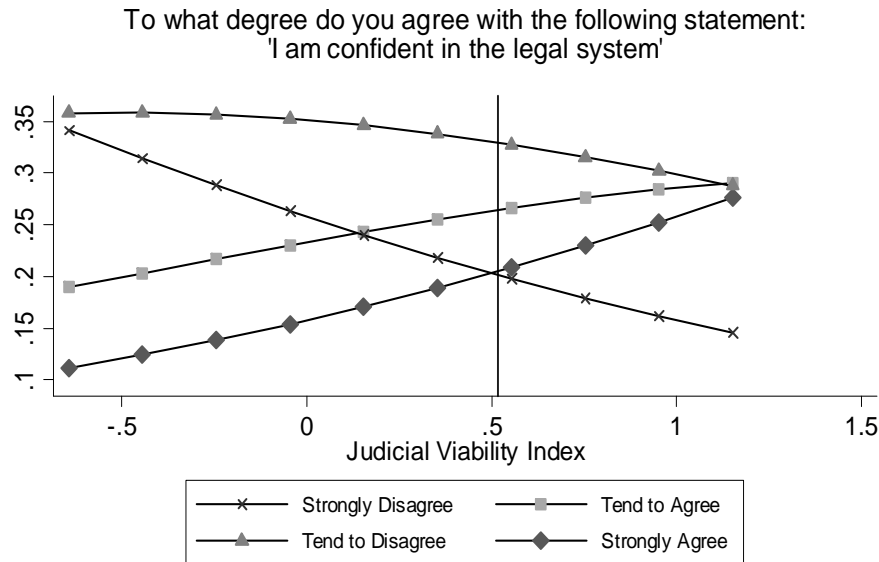
BEEPS 2005



Note: Mean levels of confidence in the legal system by country
(‘some’ and ‘great deal’ of confidence responses combined)

Figure 7.2, Predicted Probabilities of Individual Outcomes, 1999-2005

BEEPS 1999



BEEPS 2002

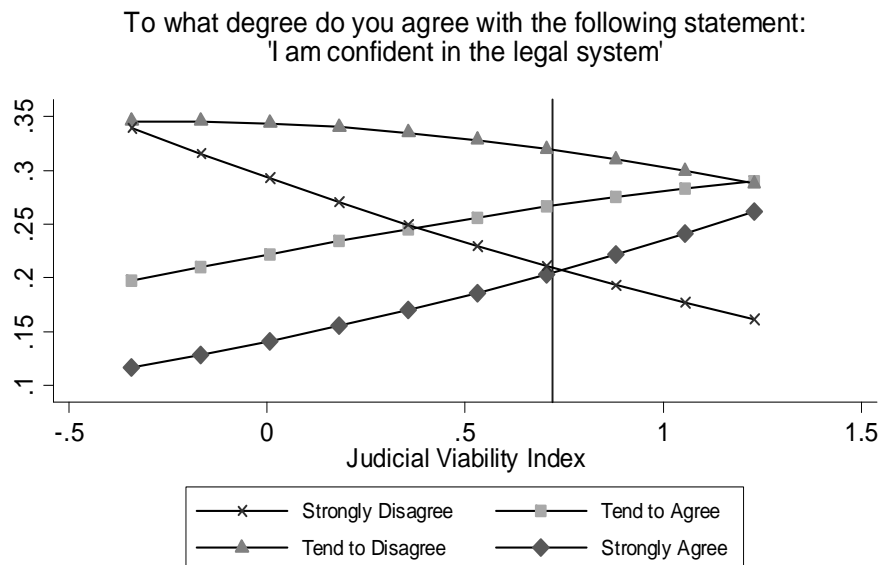
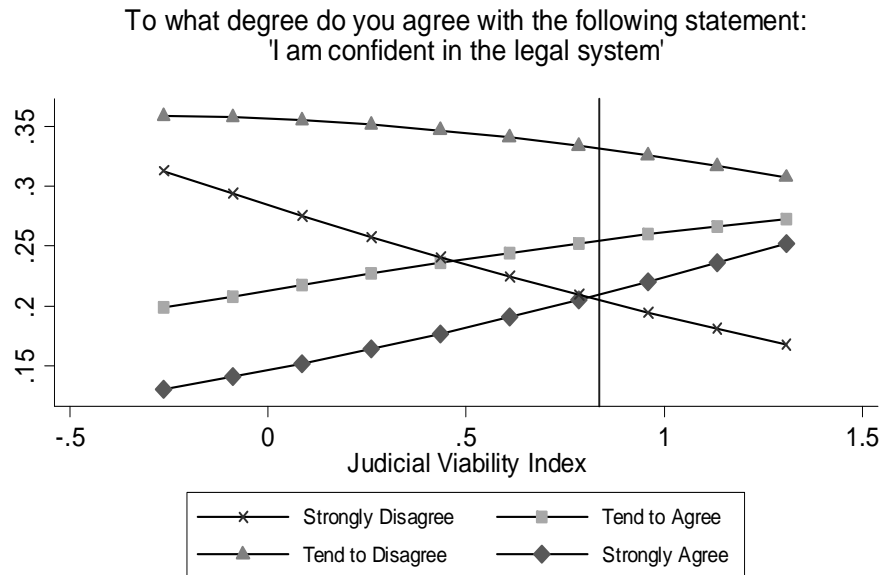


Figure 7.2. Predicted Probabilities of Individual Outcomes, 1999-2005 (continued)

BEEPS 2005



Notes:

-Graph represents predicted probabilities of individual outcomes

-Vertical line marks the average JVI score in the sample (JVI=0.835)

CHAPTER EIGHT

Conclusion

INTRODUCTION

Constitutional courts (hereafter CCs) can perform important functions in the consolidation and maintenance of democratic regimes. They provide a site for the enforcement of constitutional rights and for the delineation of the powers of government bodies. By adjudicating constitutional questions and enforcing constitutional provisions, CCs make the constitution a living document that shapes and directs the exercise of political power, rather than merely a collection of fine phrases that symbolize internationally-recognized norms. CCs can contribute, in other words, to making a new regime a state governed by law, respectful of its citizens, and in turn, respected and trusted by the citizens. Yet, as I have argued throughout this study, not all CCs manage to attain this valuable goal. Some become powerless structures, unable to engender public respect and confidence, compel compliance with their decisions, or restrain the appetites of elected politicians. Much depends on the ability of constitutional designers and those leaders who execute their design to establish a CC that has adequate powers and a proper relationship to the other branches of government and to the citizenry.

In Chapters 2 and 3, I explained that when political actors create a CC, their intent regarding the scope of the court's relative authority, resources, and accountability to its creators is revealed in the institutional design that is adopted in the founding constitution.¹ Institutional design, in other words, is a formal blueprint that gives a CC a basic responsibility (i.e., to adjudicate constitutional disputes) and basic tools to fulfill

¹ Chapter 2 outlined various institutional choices embodied in the constitutions, organic statutes, and court rules of procedure. It introduced the reader to the provisions which bear directly on the constitutional court's powers, independence, and organizational efficiency.

this responsibility (i.e., jurisdiction over cases and litigants, financial resources, and so on). However, simply having formal responsibility is not enough. In order for a CC to fulfill its role as prescribed by its basic institutional design, and to survive and prosper over time, it must move from the vision of the original founders to a well-defined set of organizational structures, goals, roles, and functions. Thus, if we want to make sense of the CC's actual stature and influence in the post-transition environments, we must look beyond its basic design in the founding constitution to the dates of its implementation and analyze the precise nature of changes in the court's institutional structure after its creation. Stated more generally, the benchmark by which to evaluate a country's progress on constitutional and judicial reforms should be their implementation, and not their initiation. Stated more specifically, if we wish to understand the variation across CCs in terms of their authority and influence, we must examine how they develop over time. The key concern of Chapter 3 thus centered on the following question: What qualities must a constitutional court acquire over time to become an effective policy-maker in the democratizing state?

I theorized that the process of judicial institutionalization is a temporal process by which a court incrementally acquires—through implementation of enabling legislation—the characteristics and qualities which its creators sought to instill in its institutional design. Following previous studies, I specified that institutional development is a process by which a CC becomes differentiated, durable, and autonomous, and that by developing these characteristics, a CC will acquire stability and value representative of a *viable institution*. Chapter 3 further explained that differentiation refers to the distinctiveness of the court's identity and mission from other political institutions and its surrounding political environment; a court's level of durability depends on the court's capability to adapt to changes in its environment; and, autonomy is reflected the relationship between judicial capabilities to make independent decisions and external pressures. I argued that incremental increases in a CC's autonomy, durability, and differentiation levels are reflected in the rising overall level of judicial institutionalization. I further explained that the development of each dimension is important on its own right because each contributes differently to the development of a viable CC (i.e., they tap into different qualities of a viable institution in ways exclusive to each dimension). Yet, I stressed that

autonomy, durability, and differentiation become meaningful only conjointly; while specific processes and components should still be analyzed, it is the nesting of these processes into the whole that gives them institutional meaning.

Although I conceived of institutional development as a uniform, monotonic, and homogenizing process *in theory*, I explained that, in practice, CCs develop in different ways and at different rates. Some courts develop high levels of autonomy first but develop comparable levels of differentiation only much later in time; others develop a unique identity but lack in durability; and yet another set of courts becomes durable, but not very autonomous. In some cases, it may take decades for autonomy, durability, and differentiation to converge at sufficiently high levels. And, of course, some CCs do not attain a status of a viable institution, and are eventually marginalized, dissolved, or replaced. To quote Hibbing (1988: 708), “the concept of institutionalization ... illustrates a general tendency, but with facets that fall victim to politics at particular moments.”²

I further proposed that the institutional viability is an important determinant of a CC’s ability to contribute to the process of democratic consolidation in the newly-established democratic regimes. I argued that this is precisely the reason why judicial institutionalization deserves scholarly attention; if the changes in the level of institutional development do not produce a corresponding change in the institution’s impact on its personnel as well as on its surrounding political and social environment, the concept

² On several occasions I noted that this *temporal process of institutionalization is driven primarily by the actions of the elected branches*. CCs are largely unable to influence their own structure and powers; strictly speaking, the elected branches of government must pass ordinary and constitutional legislation in order to give the courts a “political space” to exist and function. The extent to which elected politicians can impose their preferred institutional design of a CC is dependent on their bargaining power and the perceived uncertainty about future electoral outcomes. If the constitution-drafting process and the subsequent transition are dominated by a single political party or a dominant political actor, such as the president, the institutional capabilities of the CC are likely to be limited and the specific design of the court will increase the responsiveness of the CC judges to the priorities of the dominant actor(s). On the other hand, where CCs are designed in conditions of intense competition between multiple political forces, strong and accessible CCs are likely to emerge. Although I do not explicitly consider the determinants of judicial institutionalization in this dissertation, the argument outlined above is informed by my previous research. In my 2007 MPSA Conference paper, I test these propositions and empirically show that moderate legislative fragmentation (ideally, 3 or 4 parties of roughly equal strength), executive branch independence from the legislative control (i.e., adoption of semi-presidential or presidential system), and the country’s participation in the EU accession program induce elected politicians to empower the constitutional courts and limit their own ability to influence its future composition and decisions. In short, political fragmentation and the EU accession process promote the institutional development of the post-communist CCs. See Bumin, Kirill M. (2007). “Determinants of Judicial Institutionalization: A Study of the Post-Communist Constitutional Courts.” Paper presented at the annual meeting of the Midwest Political Science Association in Chicago, IL. Available at <http://www.mpsa.org>

would be worth little study. To the extent that the judicial viability is adequately measured, the levels of institutional development of the CCs should correspond favorably (or unfavorably) with the courts' ability to become a distinctive and respectable force within the post-communist regimes. By this logic, modest levels of judicial viability should constrain the CCs while greater degrees should enhance the impact of the CCs on their legal and political environments.

I introduced two potential impacts associated with the institutional development of the CCs. One of these impacts is internal to the organization, while the other captures the effects of CC institutionalization on the surrounding environment. Specifically, I hypothesized that the level of institutional development impacts the degree to which a CC judges become actively involved in deciding constitutional disputes and the degree to which they invalidate policies of other major political actors when these policies violate the constitution and infringe on citizens' rights. I also hypothesized that the level of CC institutionalization has broad significance for the citizens' perceptions of the national legal system and their confidence in the integrity, impartiality, and effectiveness of the legal system in protecting their constitutionally-established political and civil rights. As the guardian of the constitution, I argued, the CC's stature and viability figures prominently into citizens' evaluations of the national legal systems and the degree to which they perceive that the democratizing country has transformed from a "rule by law" society to a "rule of law" society.

I chose to test this theory in the context of the post-communist transitions for two main reasons. First, the post-communist region provides an ideal laboratory for comparison—it contains a large number of cases (28 in all) and exhibits sufficient variation in social, economic, and political outcomes, including the outcomes of judicial and constitutional reforms.³ At the same time, historical causes are limited, largely because of the homogenizing effects of communist rule and the temporal similarities in

³ All of the post-communist countries adopted the same basic design of constitutional review, the European centralized model, making it easier to compare the process of CC institutionalization and its associated impacts across the region. In Chapter 2, this study argued that there is ample evidence to suggest that historical trends and popular perceptions influenced the decision of post-communist countries to select the European model of constitutional review. At the same time, I explained that despite the fact that the post-communist countries adopted the European model, the region exhibits a large degree of variability in the specific organizational details included in the designs of post-communist CCs and in the scope of their subsequent institutional evolution.

when these transitions commenced (Linz and Stepan 1996; Geddes 1995; Laitin 2000; Fish 2005). As Bunce (2000: 725) argues, “communism was a distinctive domestic and international political-economic system—it was recently in place, relatively long lived, unusually invasive, clearly demarcated in spatial terms, and relatively consistent over time and across country in its institutional design.” This combination of variable outcomes and constrained causes is, of course, precisely what comparative scholars value. Additionally, the wealth of quantitative data on post-communist states that have become available online in recent years furnishes many opportunities for explaining judicial institutional development in a fairly broad comparative perspective.

Second, as Ginsburg (2003: 6) points out, providing for a system of centralized constitutional review is now the norm among democratic constitution drafters around the world.⁴ The current prevalence of centralized constitutional review around the world makes investigation of the institutional development of the post-communist CCs directly relevant and important to our general understanding of the factors that drive the institutionalization and the impacts of the CCs in the democratizing countries around the world. In focusing on the post-communist region, my aim is, therefore, to advance the study of judicial institutionalization as a *general* explanation for judicial behavior and public trust in courts.

To begin the empirical investigation, in Chapter 4, I identified eleven empirical indicators of judicial institutionalization across the three conceptual dimensions of differentiation, durability, and autonomy. The selection of these indicators was informed by the previous theoretical and empirical research, as well by an in-depth study of the post-communist constitutional texts and enabling legislation. I collected data on these indicators in 28 post-communist states over the 1989-2005 period, paying close attention to the dates of initiation and implementation of various reform legislation related to the CCs. Following McGuire (2004), I hypothesized that each of the eleven variables illuminates some aspect of the CC’s integration into the system of national policy-making and that each indicator represents an imperfect replication of a single, unobserved pattern

⁴ Ginsburg (2003: 9) notes that “In new democracies, there may be particularly strong reasons to distrust a decentralized system. After all, the judiciary was typically trained, selected, and promoted under the previous regime. While some judges may have been closet liberals, there is little ability to ensure that these judges will wield power in a decentralized system. Furthermore, there may be significant popular distrust of the [ordinary] judiciary.”

of institutional growth. I also argued that as a matter of measurement, composite measure is likely to be a more reliable indicator of CC institutionalization than any one indicator alone.

Accordingly, I employed factor analysis to confirm that these indicators represent a single underlying dimension of institutionalization. The factor analysis of various indicators of judicial differentiation, autonomy, and durability showed that these indicators indeed represent a single underlying dimension of institutionalization. The single factor score explained 89% of the variance in the considered indicators and accounted for all three component dimensions.⁵ These results carry a concrete conceptual and substantive meaning—this analysis found that a single underlying dimension of judicial institutionalization exists and that it is possible to gauge the extent of courts' institutional development through careful analysis of formal constitutional provisions and enabling legislation over time.

I labeled this composite measure of CC institutionalization, the *judicial viability score*. Since judicial viability measure is calculated based on annual changes to the courts, it captures the dynamic evolutionary process the post-communist CCs underwent during the first decade and a half of their countries' transitions. This cross-national time-series measure of judicial institutional development then served as the primary independent variable for the subsequent empirical chapters, in which I attempted to illustrate that institutionally-developed courts play a substantially larger role in the politics of transitional societies than their less-institutionalized siblings. The following section reviews and assesses the findings of the empirical chapters against the theory outlined in Chapter 3, draws comparative conclusions about the impacts of CC institutionalization across the post-communist region, and notes some limitations of my explanation. I then conclude this study with some comments about my future research agenda.

⁵ Furthermore, the eleven indicators of the judicial viability model loaded negatively or failed to reach meaningful levels of communality on the second and third factors. Substantively, these results mean that it is more appropriate to consider conceptual dimensions of institutionalization—autonomy, durability, and differentiation of CCs—conjointly rather than separately.

THE IMPACT OF JUDICIAL INSTITUTIONALIZATION ON POST-COMMUNIST SOCIETIES

The theory outlined in Chapter 3 posited that the level of CC institutionalization influences the collective behavior of CC judges in their exercise of constitutional review and affects the confidence of the country's citizens in their national legal systems. I argued that conjointly these factors—public confidence and judicial behavior—will indicate the extent to which the CC has emerged as a viable institution. Does the empirical evidence from the post-communist region support my theoretical arguments? Is there sufficient evidence to indicate that institutional development has this salutary effect on the courts' exercise of constitutional review and on citizens' attitudes?

My research shows that the level of institutional development of the post-communist CCs is indeed an important determinant of their policy-making authority and societal perceptions of the post-communist legal systems. In Chapter 5, I discovered that the level of CC viability significantly impacts the degree to which post-communist CCs become actively involved in deciding constitutional disputes and the degree to which they invalidate the policy choices of other major political actors. In Chapters 6 and 7, I showed that CCs' institutionalization positively contributes to the ordinary citizens' and business elites' perceptions of the country's legal system and helps explain why, despite an often-cited general decline in confidence in all public institutions, citizens in the post-communist societies continue to express greater confidence in the judiciary than in the parliament. Taken together, these results indicate that in order to derive robust inferences about judicial behavior and public trust in courts in the post-communist countries, future analyses should account for the level of CC institutionalization.

It is also worth noting that my analyses did not unearth substantial intra-regional variation in the levels of business elite confidence, mass public confidence, or judicial activism in the post-communist countries. Although one might expect that Central and Eastern European countries (Czech Republic, Hungary, Estonia, Poland, Slovakia, and Slovenia) would exhibit fundamentally different levels of confidence and rates of invalidation by the CCs than the Caucasus states (Armenia, Azerbaijan, and Georgia), Balkan states (Albania, Bosnia and Herzegovina, Croatia, Macedonia, and Serbia and

Montenegro), Baltic states (Estonia, Latvia, and Lithuania), or European CIS states (Belarus, Moldova, Russia, and Ukraine), the data do not show this to be the case.⁶ Subtle intra-regional differences do exist, but they are far less pronounced than one would expect based on different countries' level of ethnic heterogeneity, religion, level of economic development or growth during the post-communist era, level of democracy, or geographic location. For example, relatively authoritarian polities (e.g., Belarus, Armenia) were no more likely to exhibit low (high) levels of business elite and mass public confidence than relatively democratic states (e.g., Hungary, Lithuania); Central Asian businesspersons were no more likely to exhibit low (high) levels of confidence than respondents in Central and East European or Baltic states; states with large Muslim populations (e.g., Azerbaijan, Albania, Tajikistan, Bosnia and Herzegovina) were no more likely to exhibit low (high) levels of confidence than states with predominantly Catholic (e.g., Poland, Slovakia, Slovenia) or Orthodox (e.g., Bulgaria, Belarus, Ukraine, Georgia, Russia) religious traditions. The lack of strong intra-regional differences discovered in this analysis should be of interest to the students of the post-communist transitions and judicial politics, especially those who believe that there is something fundamentally "special" or unique about particular subsets of post-communist countries (e.g., Schwartz 2000; Smithey and Ishiyama 2002).

Constitutional Court Viability, Activism, and Independence

One of the most striking features of the transitions in the post-communist region has been the spectacular growth in the role and prominence of constitutional courts and tribunals. The situation today is one in which all the post-communist countries have CCs, and while the viability and effectiveness of these tribunals varies greatly, many of them stamped their authority on the process of constitutional transition and on important public policies. Some of their decisions have had enormous financial and budgetary implications, some transgressed clear and strong popular feelings, and others invalidated

⁶ As I discuss in the following paragraphs, my ability to test the hypothesized relationships was significantly limited by the unavailability of data for the Central Asian states, especially Mongolia and Turkmenistan. It is possible that data for these countries would reveal their difference from the rest of the post-communist region. However, given that I am unable to explicitly consider mass public confidence levels and judicial activism in Central Asia, more research is necessary to determine whether these states are in fact different from the rest of the post-communist region.

delicately crafted political compromises. Many of the post-communist CCs considered in this study have performed a wide range of constitutionally-prescribed roles, including overseeing elections, deciding upon the prohibition of political parties, and adjudicating on the conflicts of competencies between government institutions. At least some of the CCs of the region have dealt with important national policies in a manner contrary to the wishes of the presidents, parliamentary majorities, and governments of the day. Important aspects of policies on abortion,⁷ adoption,⁸ the death penalty,⁹ lustration (the screening of officials suspected of improprieties under the auspices of the communist regime),¹⁰ criminal prosecution of former communist officials responsible for crimes against the people during the communist period,¹¹ conduct of elections,¹² taxation,¹³ referenda,¹⁴

⁷ For example, the decision of the Polish CC (Decision No. K. 26/96, May 28, 1997) invalidated certain amendments of June 1994 Penal Code which liberalized abortion rights. Similarly, the decision of Hungarian CC (Decision No. 31/1992) struck down abortion regulation and stressed that it violated the mother's basic human rights to self-determination and human dignity. The Court further ruled that the fetus' right to life is a statutory, and not a regulatory or even a constitutional, issue and that it is up to the legislature to determine the legal status of fetus.

⁸ In Moldova, the CC declared that a decision of the government creating a National Committee for Adoption was unconstitutional (Decision No. 11, June 27, 2006). The CC ruled in favor of the appeal by two members of Parliament who challenged the move on the grounds that only the legislature (rather than the executive branch) has the authority to restructure the administration.

⁹ The abolition of the death penalty was decided by the CCs in Lithuania (Decision No. 2/98, December 9, 1998), Ukraine (Decision No. 231, December 29, 1999) and Hungary (Decision No. 23/1990). These CCs provided an almost identical justification for their decisions—death penalty infringes on the constitutionally-guaranteed right to life and the prohibition of cruel, inhuman, or degrading treatment or punishment that violates a person's dignity. In February 1999, Russian CC also effectively abolished the death penalty by ruling that the death penalty provisions of Criminal Code run counter to the federal Constitution which declares that any person tried for a crime punishable with capital punishment has the right to have his case examined by a trial of jury. And, since at that time there were provisions for the trial by jury in only 10 of Russia's 89 regions, the CC prevented the lower courts from pronouncing any more death sentences in the absence of a national system for trial by jury to judge the crimes that carried death sentence.

¹⁰ For example, Lithuanian CC invalidated a part of the 1999 statute "On the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of the Regular Employees of This Organization" as unconstitutional on the grounds that it restricted a constitutionally-guaranteed right to freely choose one's occupation (see Decision No. 24/98, March 4, 1999).

¹¹ In Hungary, in a Decision No. 11/1992 (March 5, 1992) the CC struck down "An Act Concerning the Right to Prosecute Serious Criminal Offences committed between 21 December 1944 and 2 May 1990 that Had Not Been Prosecuted for Political Reasons of 4 November 1991." The effect of the statute would have been to extend retrospectively statutory period of limitation during which offences occurring during the 1956 massacres could be prosecuted.

¹² In Azerbaijan, the CC confirmed the results of November 6, 2005 legislative elections in the vast majority of Azerbaijan's electoral districts; however, the CC ruled that election "irregularities" and vote "discrepancies" observed in 10 districts, and the subsequent failure of the Central Electoral Commission (CEC) to address these issues, require that a fresh round of elections be held in these districts (decision dated December 1, 2005). On June 5, 2006, the CC confirmed the results of repeat elections in the 10 districts and noted that the CEC fully complied with the court's directives. On October 30, 2003, the Russian CC struck down a sub-section of Article 48 of the law "On Fundamental Guarantees of Voters

citizenship requirements,¹⁵ government control over the ordinary courts,¹⁶ entrepreneurial activity,¹⁷ and issuance of personal identification numbers for citizens¹⁸ have all been

Rights” that sought to strengthen state regulation over independent media outlets, particularly coverage of election campaigns. The court ruled that the sub-section of the law—which outlawed “political agitation,” defined as criticizing or supporting candidates and their parties, as well as reporting on their policies and background—is unconstitutional because it could be used to restrict freedom of expression during election campaigning. As a matter of another example, in 2002 the Moldovan CC held the parliamentary statute “On Establishing the Date of General Local Elections” unconstitutional to the extent that it shortened the terms of incumbent local officials and required early local elections (see Decision No. 10, M.O. 33-5/3; February 19, 2002). There are numerous other examples of CCs dealing with electoral issues, from Belarus, Armenia, Slovakia, Hungary, Czech Republic, Ukraine, and Croatia, as well as many other countries. All 19 post-communist CCs analyzed in Chapter 5 ruled on various election-related issues. In some instances, the CCs invalidated election results or electoral commissions’ decisions on candidates’ eligibility. In a majority of the election-related cases, however, the CCs chose to let the challenged election result, election-related statute, or CEC decision stand. In this regard, Armenian example is instructive. On April 16, 2003, the Armenian CC issued a ruling (Decision No. 412) on a dispute related to 2003 presidential election. It found a significant number of election-related violations that may have tainted the outcome, but refused to nullify the results. Subsequently, the CC issued a statement that the incumbent president was elected in accordance with the Constitution and the Electoral Code. In its decision, the CC nevertheless suggested that the newly-elected National Assembly and the president, within one year, organize a referendum of confidence as an effective measure to overcome social resistance observed after the election results were announced. However, the CC’s proposal on holding a referendum of confidence was non-compulsory, and as such, fell on deaf ears and was rejected by implication (due to the government’s inaction for at least one year).

¹³ For example, in 2004, a Georgian citizen appealed to the CC of Georgia against the unconstitutionality of the temporary regulation “On Imposition of Tax on Environmental Pollution and Rules of Payment” adopted by the Government, and referred to Article 94 of the Constitution which provides that taxes and duties must be paid in the amount and order defined by law. He also argued that the Article 21 of the Constitution ensures the right to property and empowers the legislature to protect property from illegal encroachment against it. The CC agreed and held that the imposition of unconstitutional taxes breaches the right to property and that the adoption of the normative act by the executive, which defines the amount and rules of payment of a certain tax, is impermissible and violates the principle of separation of powers enshrined in Articles 5 and 94 of the Constitution (see Decision No. N1/2/204, April 30, 2004). See also, the decision of Polish CC, No. K 8/97 (December 16, 1997), striking down a number of provisions of the tax statute of July 26, 1991.

¹⁴ In Hungary, the CC found unconstitutional the motions for referenda on whether capital punishment should be restored (Decision No. 11/1999) and on changing the form of government (Decision No. 28/1999). The CC explained that these decisions are in conformity with the CC’s earlier interpretation of the Constitution and its decision that no referendum may aim at initiating an amendment of the Constitution (Decision No. 2/1993).

¹⁵ In Slovenia, the CC annulled part of a law on the amendments to the “Law on Foreigners” (see Decision No. U-I-206/02, June 17, 2002). The amendments aimed to change the required period before an immigrant could apply for permanent resident status from three to eight years.

¹⁶ For example, the Bulgarian CC took strong position in 2003 in support of judicial independence and restrained legislative efforts to increase the Ministry of Justice (MOJ) authority over the ordinary judiciary (see especially Decision No. 3, April 10, 2003). Some observers note that, ironically, this decision may have prompted the recent constitutional amendments that returned some administrative and other powers over the judiciary to the MOJ (see e.g., Ganey 2007).

¹⁷ Georgian CC struck down a provision of the law “On Entrepreneurs” which allowed the holder of at least 95% of a company’s shares to force minority shareholders to sell their shares (see Decision No. GEO-1999-3-003, July 27, 1999).

¹⁸ September 13, 2006 marked a major event for the Armenian CC as it heard its first case brought by a private citizen (constitutional amendments earlier that year expanded CC’s jurisdiction to rule on petitions

struck down. On multiple occasions, post-communist CCs affirmed citizens' constitutional rights, such as the right to fair trial,¹⁹ private property,²⁰ pensions and retirement benefits,²¹ housing,²² and freedom of movement.²³ Admittedly, this list of

brought by ordinary citizens). Two elderly women challenged the government's refusal to pay pensions and salaries to citizens without the use of identity cards equipped with unique personal identification (PIN) numbers. Since the start of the identity card program in 2002 (named "Social cards"), many people expressed opposition to the need to enter PIN numbers in order to gain access to funds. The court found for the plaintiffs, thereby requiring the State Social Protection Fund to pay 1,317 retirees who were earlier denied their pensions (Decision No. 641). See also decision of the Hungarian CC on April 13, 1991, in which the CC declared the use of uniform personal identification numbers unconstitutional (Decision No. 15/1991).

¹⁹ In 2001, the CC of Bosnia and Herzegovina heard a constitutional complaint in which the appellant challenged the judgment of the Supreme Court, arguing that it violated his constitutional right to a fair trial, as well as the enjoyment of his rights without discrimination, as provided for in Articles II.3 and II.4 of the Constitution. He stated that since he was not given the opportunity to participate in the appeal proceedings before the Supreme Court, the principle of equality of the parties to the proceedings was not respected (the public prosecutor attended the session of the Supreme Court). The CC ruled that if neither the appellant nor his legal counsel were present at the hearing dealing with factual and legal aspects of the appeal and the public prosecutor was present, this would constitute a violation of the right to a fair trial, the violation of the principle of equality of arms, as well as the violation of the right to an adequate defense, even if the hearing was based on a valid law. The CC thus found in favor of the appellant (see Decision No. 24/3-01, April 19, 2001).

²⁰ For example, in 2001, an appeal was brought to a Russian CC by a Moscow resident against the city authorities who had invoked a city ordinance in claiming almost half her plot because it exceeded the maximum amount allowed by the city ordinance. In contesting the constitutionality of the ordinance, the appellant cited Articles 55.2 and 55.3 of the Constitution, which ban laws that abolish or diminish rights and liberties of individual and citizen. In siding with the appellant, the CC also invoked Article 35.3 of the Constitution, which prohibits "depriving [a citizen] of [private] possession" other than by a court decision. Citing recent decisions in which the notion of "possession" had been extended to cover privately-owned real estate as well as other property, the CC found the city ordinance unconstitutional and upheld the Federal Land Code, which prohibits limiting the amount of legitimately acquired private urban real estate (see Decision No. 16, December 13, 2001).

²¹ In Croatia, the CC invalidated in 1998 a provision of the 1993 Code on Equating Retirement Incomes on the basis that the code demanded that pensions increase relative to changes in the cost of living rather than relative to the increase of average incomes. Similarly, Polish CC ruled that a 1995 law which would suspend the indexation of pensions in the forth quarter of 1996 was unconstitutional (Decision K. 8/96, July 17, 1996). Russian CC, by its Ruling No. 231 of June 27, 2005 (SZ RF 2005, No. 29, Item 3097), extended the right of mothers of disabled children to receive earlier retirement benefits than the fathers of such children, and made mothers eligible to receive the federal retirement benefit at fifty years of age, if they have paid social security tax for at least fifteen years and were involved in the upbringing of a child to eight years of age who had been disabled since birth.

²² In 2000, Hungarian CC made a significant decision on the motion lodged by parliamentary commissioners in which it interpreted the provision of the constitution declaring the right to social security to include the right to housing. In its ruling, the CC pointed out that the right to social security laid down in the constitution contains state guarantees for the minimum of subsistence, and that rights such as the right to housing may be derived as fundamental constitutional rights. The Court further noted that in framing the system of social provisions, government and the legislature must remember that the protection of human life and dignity is a basic constitutional requirement and that the state has the obligation to provide for the basic conditions of human existence, including shelter for the homeless in order to ward off the dangers directly threatening human life (see Decision No. 42/2000).

²³ In Russia, the CC has made multiple rulings over the years to overthrow the infamous (and now informal) *propiska* system, which prevents non-residents from moving into cities like Moscow and St. Petersburg.

examples of the post-communist CCs' jurisprudence sheds light on only a small portion of these courts' work, but it is no coincidence that Russian, Polish, Hungarian, Bulgarian, Lithuanian, Georgian, and Slovene CCs figure prominently in these examples—as my research indicates, these courts' activism is substantially influenced by their high level of institutional development.

In Chapter 5 I found that the post-communist CCs with higher levels of institutional development are, on average, 15.8% more likely to overturn, invalidate, or reverse policy decisions of other government institutions than their less institutionally-developed siblings.²⁴ The statistical analysis also revealed that the impact of CC viability on judicial activism is larger than the impact of any other contextual or environmental variable included in the statistical model. Although I found that independent of the court's level of viability, CC judges are sensitive to the appeals by particular litigants,²⁵

Although Yeltsin officially abolished *propiska* in 1993, it was replaced by various municipal regulations (in at least 10 of Russia's regions), such as exorbitant fees and taxes for registration and complicated application and permit procedures, which have had the same substantive effect as *propiska*. Altogether, from 1991 through 2006, the court has struck over 80 municipal and regional regulations and laws as violation of Article 27 of the Constitution, which guarantees the right of free movement, choice of residence, and a “place to stay.”

²⁴ The impact of institutional viability on activism becomes even larger if the published decisions by the Belarusian CC are excluded from the analysis. As I argued in Chapter 5, activism by Belarusian CC must be treated with extreme caution. Although in the first years of its existence (1994-1996), the Belarusian CC was quite independent and willing to rule against President Lukashenka's policies, it has been largely subservient to the president since then. Lukashenka at first ignored the Court's rulings, then vilified it in the press and attempted numerous attacks on the Court's jurisdiction and financial autonomy. The Lukashenka-sponsored 1996 amendments to the 1994 Constitution substantially watered down the Court's authority and institutional safeguards and expanded the size of the court from 11 to 12 members. In 1997, 6 of the original 11 CC judges resigned under pressure and were replaced by Lukashenka's allies; 2 other judges who refused to resign were dismissed by the President before the end of their term (for an explanation of how this occurred, see the testimony of one of the dismissed CC judges, Mikhail I. Pastukhov, before the UN Human Rights Committee (Communication No. 814/1998 [2003], available online at <http://www1.umn.edu/humanrts/undocs/814-1998.html>). Since 1997, Lukashenka have used the Court to overturn statutes, court rulings, or bureaucratic regulations which undermine his authority or impede the implementation of his preferred policies. As a result, the Belarusian CC's high rate of activism does not represent its actual level of independence or its policy influence as a viable institution. The Courts is indeed a watchdog, unhappily not of the constitution, but of other government institutions' compliance with Lukashenka's policy agenda.

²⁵ I found that the post-communist CCs are particularly deferential to the presidential requests to invalidate legislative statutes and regional/local policies; they are 13.9% more likely to rule in favor of the presidents. It is interesting that the CC are more likely to invalidate legislative statutes and local ordinances on the presidential appeal both in countries with relatively weak presidents (e.g., Hungary, Bulgaria, Moldova), as well as in countries with very powerful presidents (e.g., Russia, Azerbaijan, Armenia, Belarus). This observation suggests that, as a structural/environmental variable, presidential and semi-presidential systems provide political environments highly conducive to judicial intervention and policy-making. While it may be true that presidentialism is not good for democratic consolidation (see e.g., Linz 1990, Stepan and Skach 1993; Power and Gasiorowski 1997; Ishiyama and Velten 1998), my findings confirm Ackerman's (1997)

more attentive to certain issues of the litigated case,²⁶ and more likely to actively engage in policy-making in certain political environments,²⁷ the level of CC institutionalization has a distinct, positive, and substantial influence on the CC's ability to actively shape public policies. Put simply, I found that institutional development translates into political power and substantially enhances the impact of the post-communist CCs.²⁸

The analysis of caseloads also revealed that the post-communist CCs generally perceive themselves as protectors of individual rights and liberties and, dependant on their levels of viability, are more or less able and willing to challenge the authority of powerful political actors on appeals from private citizens. Where CCs side with an individual against government institutions in political, civil, economic rights cases, or in election disputes, I argued, the reason cannot be the lower potential for reprisal or the greater possibility of compliance. The power of government institutions to retaliate against the court or to ignore or overrule its decisions is always greater than that of individuals. CCs' activism on the behalf of individual citizens, therefore, is an indication not only of their policy-making authority but also a reflection of their relative independence. In this regard, the data show that the courts with higher levels of viability are significantly more likely to side with the weaker litigants (i.e., local/regional governments, weaker central government institutions, and private citizens).²⁹ They are

argument that separation of powers systems are conducive to judicial activism. Furthermore, the post-communist CCs are also 8.6% more likely to invalidate government policies—especially, legislative statutes and bureaucratic regulations—when asked to do so by the private citizens. Minority parties in the legislature, on the other hand, are not particularly successful in their appeals against legislative majority-passed laws, presidential orders, or bureaucratic regulations.

²⁶ The courts are more likely to become actively involved in deciding cases involving economic disputes and political and human rights, as well as those involving disputes over governmental authority, but somewhat less likely to intervene in electoral disputes.

²⁷ Taken together, the results for presidentialism and legislative fragmentation variables indicate that the most fortuitous environments for active and independent CCs are those where the presidential branch is independent and relatively influential and the parliamentary power is evenly split between two or three major parties. This constitutional configuration seems to be ideal for the development of active judicial power in the post-communist region.

²⁸ This conclusion is also consistent with the research on judicial institutionalization in the United States. For example, McGuire (2004) found that the US Supreme Court's policy influence gradually increased over time as the Court acquired greater levels of institutional viability.

²⁹ Additional tests reveal that the nine most viable CCs in the 19-country sample (Bulgarian, Georgian, Hungarian, Latvian, Lithuanian, Polish, Russian, Slovak, and Slovene CCs) are 27% more likely to rule in favor of individuals when they challenge bureaucratic regulations than the less-institutionalized CCs (Armenian, Azeri, Belarusian, Bosnian, Croatian, Czech, Estonian, Moldovan, Romanian, and Ukrainian CCs). The more-viable courts are also approximately 19% more likely to invalidate legislative statutes and approximately 7% more likely to invalidate presidential decrees and acts of government on the appeal from

able to do so because high levels of institutional viability (and the specific factors that comprise CC's autonomy, durability, and differentiation) minimize the severity and the likelihood of reprisals against the court by powerful political actors for unfavorable decisions.³⁰ I thus find that viable courts are not only more likely to actively shape public policies but are also more likely to act independently of, and in opposition to, the wishes of powerful actors than their less-institutionalized siblings. Additional research is certainly necessary—especially in-depth case studies of how viable CCs rule on “grand cases” and how they justify their invalidations in such cases—to better understand the nature of CCs' decision-making and independence, but the results of my analysis strongly support the possibility that institutional viability and judicial independence are not just correlated, but are in fact causally related.

Furthermore, Chapter 5 showed that CC viability has a consistent, positive effect on the collective behavior of CC judges not only across the sampled post-communist countries, but also over time. During the 1992-2006 period, relatively small temporal increases in CC viability levels resulted in commensurably small temporal changes in the probability of a CC invalidating policy decision of another government institution, while more substantial increases in CC viability from one year to the next led to a more substantial impact on the level of CC's activism. Simply put, as post-communist CCs institutionalize, they become more assertive in exercising their constitutionally-prescribed roles; this is true even of those post-communist courts that attain relatively modest levels of viability by 2005. The level of institutional viability acquired by the

citizens and/or local governments than their less-institutionalized siblings. Viable CCs are also 12% more likely to invalidate election results or rule against other decisions made by the electoral commissions than less-institutionalized courts, although they still remain relatively restrained when it comes to intervening in these types of cases. Finally, although I found that CCs typically uphold lower court rulings in the post-communist region, additional tests reveal that the more-developed CCs are nonetheless 24% more likely to rule in favor of individuals who challenge lower court rulings than the less-institutionalized CCs.

³⁰ Elected branches have a variety of tools they can legally use to retaliate against the actions of courts, such as appointing sympathetic judges, passing legislation that overrides court rulings, failing to provide the court with sufficient organizational resources, or even amending the constitution to undermine the court's decisions. But politicians are able to do so only to the extent that they are sufficiently coherent as a group to amass the support necessary to attack the court, and the level of judicial institutionalization intervenes crucially in this regard. Constitutional provisions and enabling legislation outline the institutional safeguards for the CCs and include a host of factors, such as the ease with which court decisions can be overturned, the penalties imposed on government institutions for failure to comply with the CC rulings, nomination/appointment procedures for CC judges, professional requirements to serve on the courts, judicial term of office, procedures for financing the court, as well as internal rules of procedure for the consideration of cases and rendering of decisions.

court thus represents an underlying set of incentives and resources available to its members to shape the scope of their political influence.³¹ And, the collective behavior of judges on the CC responds to the temporal improvements in the court's institutional capacity with relatively high degree of accuracy. Taken together, Chapter 5 findings thus indicate that when institutional viability is adequately measured,³² it corresponds quite favorably with the constitutional courts' ability to become a distinctive, respectable, and relatively independent force within the post-communist regimes.

Though the findings described above provide support for institutional explanations for judicial activism, I am not advocating that scholars abandon other explanations. Constitutional courts do not exist in a vacuum and CC judges take many factors beyond their own institutional capabilities into account when making politically-consequential decisions. My analysis shows that the political environment in which these courts operate and the context in which the specific decisions are made (i.e., litigants and issues in the case) are important determinants of the CCs' policy influence and behavioral independence. Some post-communist political environments and cases provide CC judges with more opportunities to act independently and to shape national policies, while other political settings limit the scope of their independence and impact. Georg Vanberg (2005: 175) characterizes this well: "The power of constitutional courts is considerable but constrained. The judges who serve on these courts cannot afford to consider only the constitutional text, legal principles, or their own preferences. Because implementation of judicial decisions is potentially problematic, judges must take into account the likely reactions of other actors to decisions by the court." Ultimately, because the judges on the post-communist CCs care about making efficacious rulings (i.e., those

³¹ For example, the reader may remember that in Chapter 4 I argued that more flexible standing provisions, allowing for direct appeals to the CC by individuals and minority parties in the legislature—as one indicator of CC's autonomy—provide the courts with an opportunity to render decisions which are creative and expansive of rights, and contrary to the preferences of the government. I expected that CCs which possess greater jurisdictional flexibility over litigants are more likely to become viable institutions and, in turn, to act in a fashion that promotes their institutional objectives. The evidence presented in Chapter 5 bear this expectation out—relatively viable CCs possess expansive jurisdiction over litigants and are more likely to use this authority to actively shape public policies than CCs possessing restrictive access to litigants.

³² Additional tests revealed that reliance on only one feature of CC design or only on the provisions outlined in the founding constitutions is inadequate if we want to accurately measure the court's policy-making influence. It is necessary to look beyond the provisions in the founding constitution to the dates of their implementation to accurately capture the actual level of CC viability and its impact on the court's behavior.

that are complied with and faithfully enforced) and about avoiding government's retaliation for unfavorable rulings,³³ they are, and will remain, attentive to the social and political environments in which they operate.

The conclusion that CCs are strategic actors, constrained by their own institutional weaknesses and existing configurations of political power, and concerned with faithful compliance with their decisions, is further reinforced by the cross-national differences in the CC caseloads. There are some notable differences across the post-communist region in the types of cases that different CCs are willing to invalidate. As I describe in Chapter 5, during the time period analyzed in this study, the CCs in authoritarian and semi-authoritarian regimes which enjoyed wide popular support, such as Belarus, Armenia, Azerbaijan, Moldova, Romania (until 1996), Slovakia (until 1998), Ukraine (until 2003), often reviewed and overturned local/municipal ordinances and regulations of bureaucratic agencies (and to a lesser extent, the decisions of the ordinary courts), but were fairly timid in nullifying policies of the dominant political actors (e.g., presidential orders/decrees, laws passed by the pro-presidential majorities in the legislature, or acts of coalition governments in parliamentary systems). In short, in countries where the political power remained concentrated in the hands of a powerful president and/or a dominant legislative party, the CCs' caseloads and instances of nullification fell into a more or less predictable pattern. The courts were less likely to hear cases concerning government competencies; least likely to rule against the president, representatives of his administration, or his Cabinet; most likely to focus on adjudicating "safe cases"—cases concerning lower courts', local governments', and administrative agencies' compliance with the central government directives³⁴; and almost completely unwilling to invalidate the acts of government on conduct of elections or CEC decisions

³³ Weapons that elected branches can use to attack the court for unfavorable rulings include removing cases from the jurisdiction of the court, impeaching judges, refusing to raise salaries, underbudgeting for material factors related to the proper functioning of the CC, such as buildings and staff. Although substantial levels of CC viability minimize the likelihood and severity of government's reprisals, no court can prevent a determined and powerful assault.

³⁴ Many of these cases did concern individual economic rights (e.g., pension guarantees, tax laws, rights to inheritance of property, private property and debt repayment disputes) and individual political or civil rights (e.g., rights of criminal defendants to a speedy trial and legal representation, freedom of movement and residence, social welfare guarantees for the elderly), and Belarusian, Moldovan, Ukrainian, Croatian, and Romanian CCs have been quite ready to rule in favor of citizens' rights in such cases. However, it is worth noting that most of these cases were appealed to the court by the dominant political actors, especially the presidents (or representatives of the administration), the Ministry of Justice, or the Procuracy.

on election-related disputes (since these decisions typically favored candidates of the ruling party or presidential allies). On the other hand, more viable constitutional courts operating in countries with more competitive political environments, such as Bulgaria, Hungary, Czech Republic, Lithuania, Slovenia, Georgia, and Poland, heard cases across a broader spectrum of issues, were more even-handed in the types of cases they invalidated, and were somewhat less likely to consistently favor one party or the president in their rulings. Predictably, allegations of electoral fraud were also much less common in these countries than in countries with semi-authoritarian or authoritarian regimes.

Many more examples can of course be provided but my point should be clear by now—the post-communist CCs are strategic actors and they pay close attention to the preferences and the power of the litigants in the cases that they adjudicate. Where diffusion of political power and a competitive political environment favor active judicial intervention, viable CCs are more likely to emerge and to assert their authority on important national issues. Where concentrated political power or strong preferences by the dominant political actors place limits on CCs' independence, relatively high level of institutional viability gives courts some additional wiggle room to be active and independent in adjudicating politically-sensitive cases. Where authoritarian regimes emerged in the early days of the post-communist period and retained power over time, CCs remain institutionally-weak and their policy-making behavior remains highly contingent upon the wishes of those in power.

Constitutional Court Viability and Citizens' Perceptions of the Post-Communist Legal Systems

In the opening chapters of this dissertation, I noted that in the post-communist countries undergoing legal and constitutional reforms, the communist-era legacies—subordination of the judiciary to state interests and to the Communist Party apparatus and the exploitation of the judiciary by the state as an official device to validate state prerogatives—continue to cloud how judges and court systems are perceived. The residuals of these legacies are lingering sentiments of fear of, distrust in, and contempt for the institution of the judiciary among many citizens of the post-communist countries.

Yet, as it has often been noted, public confidence in the judiciary is essential to its legitimacy as a guarantor of rights and freedoms (see e.g., Gibson and Caldeira 2003). If courts are not seen as independent, impartial, and effective, citizens will not turn to them to resolve their problems, but may instead seek recourse through violence or extralegal means.

I explained in Chapter 2 that the designers of the post-communist constitutions were in fact sensitive to and troubled by these public perceptions of the judiciary, and that one of the main reasons why they opted for the European, centralized model of constitutional review was to overcome these negative legacies (see also Stone Sweet 2000; Shapiro and Stone Sweet 2002; Ginsburg 2003). By creating a new institution charged explicitly with monitoring the state's commitment to the rule of law, formally separated from the discredited judicial branch carried over from the communist period, and staffed by respected academics and legal scholars (rather than politicians or communist-era judges), constitutional designers sought to engender greater public confidence in the legal system and to express the new regime's commitment to constitutional principles and to the protection of individual rights. In Chapters 3 and 6, I further explained that the degree to which elected politicians remain committed to these admirable goals over time, is, in part, reflected in their commitment to the institutional development of the constitutional courts after the initial transition is completed. These courts, if institutionalized, become the flagships of the rule of law and constitutional faith in the transitional democratic regimes and their stature and visibility will affect citizens' views of the legal system as a whole. In short, I posited that the elected branches' sustained efforts to create viable constitutional tribunals is a necessary (albeit insufficient) condition to convince the public (and the international community) of the regime's long-term commitment to democracy, the rule of law, and limited government.

If the post-communist CCs are indeed designed and empowered with public in mind, it is reasonable to ask how successful these efforts have been in improving public perceptions of the integrity, impartiality, and effectiveness of the post-communist legal systems. I addressed this question in Chapters 6 and 7, in which I examined how ordinary citizens' and business elites' perceptions of the legal system are influenced by the level of constitutional court viability. The basic hypothesis that I tested in both chapters is

whether individuals' confidence in the legal system is systematically related to the level of CC institutionalization. Although I theorized that the individuals living in the same society will likely manifest different levels of confidence in legal institutions because they differ in their subjective experiences and evaluations of the political system's performance, I argued that the presence of viable CCs will have a homogenizing and positive effect on personal attitudes toward the legal system. My findings confirm this beneficial effect of institutional viability on both public and business elite confidence. The impact of CC viability is substantial—indeed, one of the largest influences in both sets of statistical models.

Although my study generated a number of other interesting findings about other determinants of citizens' trust in the legal system, I will not focus on them here (as I have addressed them in sufficient detail in each of the chapters); nor will I focus on the differences across countries and over time in the levels of business elite and public confidence (as I devoted a separate section to the discussion of these differences in each chapter).³⁵ Rather, in the following paragraphs, I draw some tentative comparisons and (admittedly speculative) conclusions across the analyses of public and business elite confidence data as they relate to the primary variable of interest, the level of CC viability. I also identify some interesting questions that emerged in the course of these analyses.

It is of course important to remember that these comparisons should be treated with caution—the time periods analyzed in these chapters differ, as do the countries covered by the different surveys, survey questions and response categories, and control variables. These differences are substantial; in fact, so substantial that I chose to consider business elite and mass public opinions in two separate chapters. Nevertheless, taken together, these analyses reveal that the evidence in support of my theory is not bound to a

³⁵ See “Mapping Confidence in the Legal System: Dependent Variable” sections in Chapters 6 and 7. It is worth noting, however, that the data do not reveal any systematic differences between post-communist countries in the levels of public or elite confidence based on a country's level of ethnic heterogeneity, religion, level of economic development or growth during the post-communist era, level of democracy, or geographic location (e.g., Balkans vs. Baltics vs. Caucasus and so on). Relatively authoritarian polities (e.g., Belarus, Armenia) were no more likely to exhibit low (high) levels of confidence than relatively democratic states (e.g., Hungary, Lithuania); Central Asians were no more likely to exhibit low (high) levels of confidence than respondents in Central and East European or Baltic states; states with large Muslim populations (e.g., Azerbaijan, Albania, Tajikistan, Bosnia and Herzegovina) were no more likely to exhibit low (high) levels of confidence than states with predominantly Catholic (e.g., Poland, Slovakia, Slovenia) or Orthodox (e.g., Bulgaria, Belarus, Ukraine, Georgia, Russia) religious traditions.

few cases, or certain years, or certain countries, or specific social groups. Conjointly, Chapter 6 and Chapter 7 findings suggest that the level of CC development and citizens' confidence in the judiciary are not simply correlated, but are in fact causally linked. These results also encourage at least cautious optimism about the potential for nurturing political trust in post-communist legal institutions through the empowerment of constitutional courts.

In regard to the perceptions of ordinary citizens, I discovered that in the *absolute confidence* models, as CC viability shifts from its minimum to its maximum value in the sample, the likelihood of a respondent expressing “quite a lot” and “a great deal” of confidence in the legal system increases by a respectable 10.3% in Wave 2 (1989-1993) and by 5.5% in Wave 4 (1999-2000) of *World Values Survey* (WVS); the likelihood of a respondent expressing no confidence decreases by an additional 6.3% in Wave 2 and by 4.4% in Wave 4.³⁶ I further discovered that the impact of CC viability on ordinary citizens' confidence is more substantial in the *relative confidence* models than the observed impact in the *absolute confidence* models.³⁷ Data show that the likelihood of a respondent expressing some and great deal of confidence in the justice system relative to his/her confidence in the parliament increases by 17.8% in Wave 2 (1989-1993), 13.5% in Wave 3 (1995-1998), and 9.5% in Wave 4 (1999-2000). Consistent with one of my hypotheses (Hypothesis 2), the impact of CC viability on one's relative confidence is larger than the impact on one's absolute confidence—for the citizens who differentiate

³⁶ In Wave 3 (1995-98) *absolute confidence* model, I discovered a more complex relationship between CC viability and confidence. In countries that score above the mean on the CC viability variable (Bulgaria, Czech Republic, Georgia, Hungary, Lithuania, Macedonia, Moldova, Poland, Slovakia, Romania, Russia, and Slovenia), institutional development of the CC is statistically significant and positively related to public confidence in the justice system; its effect on public confidence is substantial. On the other hand, in countries that score below the CC viability mean (Albania, Armenia, Azerbaijan, Belarus, Bosnia, Croatia, Estonia, Latvia, Serbia-Montenegro, and Ukraine), the relationship is statistically significant and negative. I noted that one possible explanation for these findings is that during the 1995-98 period there is some sort of threshold effect—CC viability has to reach sufficiently high levels in order to exert positive influence on public perceptions. However, I am not entirely certain how to interpret this finding. On the one hand, this suggests that my original theory should be reformulated to account for this non-linear relationship. On the other hand, the finding for Wave 3 data may be spurious and driven by a peculiar combination of countries and values on the control variables included in the Wave 3 model. Additional tests should clarify whether the theory outlined in this dissertation sufficiently explains the relationship between judicial institutionalization and public confidence. For the time being, I acknowledge a possibility of an existence of a threshold effect but conclude that it is premature to discount the original theory.

³⁷ *Relative confidence in the justice system* was measured by subtracting respondent's answer to the WVS question about his/her level of confidence in the parliament from his/her response to the question about confidence in the justice system (for a similar coding scheme, see Smithey and Ishiyama 2002).

between government institutions, the level of CC viability is an important determinant of their greater confidence in the legal system relative to the parliament. Substantively, the results of my analysis show that during the 1989-2000 period approximately 50% of the ordinary citizens in the post-communist societies make fine-grained distinctions between judicial and parliamentary institutions,³⁸ that the justice system is their relative favorite, and that the institutional viability of CCs is an important determinant of this preference. Given that the constitutional court stands at the apex of the legal and constitutional hierarchy, it is not surprising that the level of CC viability has such a salutary effect.

It is notable that in comparison to WVS data, BEEPS data analyzed in Chapter 7 seem to indicate that business owners and managers—from both the private sector and state-owned enterprises—express more positive views of the post-communist legal systems than the mass public. On average, over the 1999-2005 period, 54.4% of the post-communist business owners and managers express some or great deal of confidence in the legal system's ability to protect their property and contract rights. These confidence levels are also fairly stable over time, with a small 1.3% increase in region-wide confidence levels from 1999 to 2005. On the other hand, as I describe in Chapter 6, WVS data show that only 40.6% of ordinary citizens express “quite a lot” or “great deal” of confidence in their justice systems if we look broadly over the entire 1989-2000 period. WVS public opinion data further reveal that the levels of mass public confidence (“quite a lot” and “great deal” of confidence responses) decline by 7.2% from 42.8% in 1989-1993 to 35.6% in 1999-2000 period. It is of course difficult to draw direct comparisons between these data since the time periods and survey questions differ across BEEPS and WVS, but more recent mass public opinion surveys seem to confirm that public confidence is indeed distinctly lower than the observed levels of post-communist business elite confidence. For example, *Life in Transition Surveys* (LITS) conducted in 2006 by the European Bank for Reconstruction and Development in 27 post-communist

³⁸ This stands in contrast to some of the arguments made by Mishler and Rose (1997, 2001), who argue that most ordinary citizens in post-communist societies do not make fine-grained distinctions between political institutions with which they have little familiarity or experience. My analysis, on the other hand, discovers that despite relative “indifference” toward different political institutions expressed by many post-communist respondents, 51.5%, 50.1% and 46.9% of respondents were nevertheless capable of making more fine-grained assessments in Wave 2, Wave 3, and Wave 4, respectively.

countries show that only 28.4% of the mass public respondents express “positive” trust in the post-communist courts across the region.³⁹

These findings lead to an interesting question: Why do we observe substantially different levels of confidence for the ordinary citizens relative to the business owners and managers? As I noted in Chapter 7, one plausible explanation for these systematic differences in the confidence levels may lie in the manner in which elites evaluate democracy in general and post-communist government institutions in particular. For example, Steen (1996, 2001) found that while the masses evaluate institutions primarily in terms of their outputs, the elites are more attracted by the “intrinsic value” of institutions and regard them as valuable because of their potential benefits. For the elite, according to Steen, the immediate benefits are not as closely related to the value of institutions, and the newly-created post-communist political institutions enjoy more support among the members of the elite than among the mass public.⁴⁰ If we extend Steen’s findings to the post-communist legal system and business elites, it is reasonable to hypothesize that the business elites may regard legal system as valuable because of its potential benefits and focus less than the masses on its immediate performance. In addition, Miller, Hesli, and Reisinger (1997) argue that the post-communist elites and masses hold fundamentally different conceptions of democracy. The authors found that the Russian and Ukrainian elites take “democracy” to mean order, restraint, and legal institutions. When asked to define “democracy,” these elites gave emphasis to the rule of

³⁹ LITS data is available on EBRD website at <http://www.ebrd.com/pubs/econo/lit.htm>

⁴⁰ In many respects, Steen’s argument is similar to the notion of “diffuse support,” which is widely embraced by the proponents of the legitimacy theory. According to Easton (1965: 273), diffuse support refers to “a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants.” Stated differently, diffuse support is institutional loyalty; it is support that is not contingent upon satisfaction with the immediate outputs of the institution (see Gibson, Caldeira, and Baird 1998; Gibson and Caldeira 2003; Gibson, Caldeira, and Spence 2003). “Institutional loyalty” or “diffuse support” thus captures the notion that failures to make decisions that are pleasing in the short-term does not necessarily undermine basic commitments to support the institution. However, what separates Steen’s analysis from the arguments made by the legitimacy theory proponents is that he applies this argument specifically to the analysis of elite *and* mass public attitudes (rather than focusing exclusively on the diffuse support among the mass public) and empirically shows that post-communist elites indeed express greater levels of “diffuse support” than the post-communist publics.

law, protection of private property and economic opportunities, protection of individual rights, procedural fairness, and checks and balances.⁴¹

If these previous studies are correct, then the post-communist business elites may associate “democracy” with the rule of law, protection of private property and economic opportunities, protection of individual rights, procedural fairness, and checks and balances (see Miller, Hesli, and Reisinger 1995, 1997), and regard judicial institutions “as valuable because of their potential collective and integrative functions, independent of leaders and [contemporary] outcomes” (see Steen 2001: 715). The BEEPS data seemingly support these arguments; the legal system does in fact enjoy substantial support among the members of the business elite. Unfortunately, I cannot directly test this explanation—that elites profess greater confidence in the legal system than the masses because they conceive democracy in rule of law terms and value the legal system even when it fails to perform adequately—since neither BEEPS nor WVS measure the respondent’s conception of “democracy” or his/her diffuse support (i.e., support for the legal system independent of one’s satisfaction with its actual performance).

Experience with the courts (and satisfaction with this experience) seems like another plausible explanation for the higher levels of business elite confidence. Common sense suggests that business elites are more likely to have some experience with the courts (either as plaintiffs or defendants) than the ordinary citizens.⁴² Furthermore, Chapter 7 found that a businessperson’s evaluations of contemporary judicial performance are closely related to his/her confidence in the legal system. In fact, businesspersons who were relatively satisfied with the performance of the post-communist legal systems (i.e., perceive that bribery of court officials is rare or non-existent, that legal information relevant to their businesses is easy to acquire, and that the courts are able to effectively enforce their decisions most of the time) were 79.3% more likely to express high confidence in the legal system than the dissatisfied respondents

⁴¹ According to the authors, the modal feature of the mass public’s understanding of democracy was the freedom to express oneself without the fear of government repression.

⁴² Throughout the six-year period, 27.8% of businesspersons said that their firm appeared in courts at least once as plaintiffs (4,070 firms) and 14.5% (2,116 firms) of respondents mentioned that their firms appeared before the court in the defendant’s capacity. Furthermore, I found that business owners and managers who petitioned the courts on more than one occasion (i.e., “repeat plaintiffs”) were 21.3% more likely to express confidence in the legal system in 1999, 19.9% more likely to express confidence in 2002, and 22.1% more likely to express confidence in 2005.

over the 1999-2005 period. And, approximately 40% of the business elite respondents across the region reported high degree of overall satisfaction with the performance of the legal system. In short, it is possible that the post-communist legal systems enjoy more widespread support among the members of the business elite because, unlike the mass public, these elites perceive the courts to work relatively well. Again, this is a reasonable possibility but since WVS surveys do not provide a comparable set of questions, I cannot assess either the experience of the ordinary citizens with the legal system nor their relative satisfaction with such experience to draw comparisons to the business elite data.

The analyses also seem to hint at the possibility that business elite perceptions are more responsive to the institutional viability of the constitutional courts than those of the mass public. Over the 1999-2005 period, businesspersons in countries with highly institutionalized CCs were on average 23.5% more likely to express high level of confidence in their legal systems relative to the businesspersons in countries where the CCs are weakly institutionalized. More specifically, in 1999, the likelihood of business elite respondents expressing some or a lot of confidence increases by 26.5%, and the likelihood of expressing little or no confidence decreases by additional 26.6% in countries where the CCs have obtained relatively high viability levels. In 2002, the impact of CC viability is somewhat larger—as the level of CC viability shifts from its minimum to its maximum level in the sample, the likelihood of respondents expressing some and great deal of confidence in the legal system increases by 30% and the likelihood of expressing no confidence decreases by an additional 18.2%. Finally, in 2005, as CC viability shifts from its minimum to its maximum value in the sample, the likelihood that respondents express substantial confidence in legal system increases by 14.1% and the likelihood of having no confidence decreases by 7.4%. Although the impact of CC viability is less substantial in 2005, it is still larger than the impact observed in the public confidence models. These findings beg the question of what can account for these differences. Why are the effects of institutional development more pronounced on the attitudes of the business elites?

Although the data limit my ability to explicitly consider this question at this time, one particular explanation seems plausible. It does not take a great leap of faith to assume that business enterprise directors, owners, and chief financial officers are more aware of

the legal and constitutional changes in their home countries than the ordinary citizens. And, since some constitutional rights protections provided by the CC (e.g., private property guarantees, constitutional guarantees of free and fair competition) are of great and immediate importance to the successes and failures of the post-communist businesses, and especially to the owners of private enterprises, businesspersons' confidence in the legal system may be more closely linked to the level of CC viability than that of the mass citizenry. If and when the ordinary judiciary fails them, the presence of a viable CC may provide business elites with an additional forum to address their grievances. Stated differently, the business elites could be more attentive to and concerned with the elected branches' commitment to create a viable CC and, in turn, more likely to respond with greater confidence in the legal system's ability to protect their property and contract rights as the CC's viability grows.⁴³

In short, there are several plausible explanations which may account for the different levels of public and business elite confidence, and for the different magnitudes of the impact of CC viability on confidence, observed in this study. Unfortunately, until more discriminate and comprehensive data on both the mass public and the business elite attitudes become available, we will not be able to explicitly test these different explanations and to provide concrete answers to these questions. What the available empirical data do show, however, is that mass public and elite confidence levels behave quite differently in the post-communist states. Over time, it seems that the mass public is becoming increasingly distrustful of the legal system, while business elites become more (or at least, remain no less) confident of the legal system's ability to protect their interests/rights. At least on the surface, the data analyzed in the dissertation therefore suggests that business elites are not "opinion leaders" in the post-communist societies (at least, not in regard to the public perceptions of the legal system).

Finally, it is worth noting that the overall impact of CC viability on mass public and business elite confidence is declining over time. On average, the impact of CC viability is reduced twofold when comparing WVS Wave 2 levels to Wave 4 levels and

⁴³ Combined with the Chapter 5 finding that the viable post-communist CCs are more likely to rule in favor of appeals by private citizens and invalidate government policies concerning economic issues, this possibility makes great deal of sense.

BEEPS 1999 results to BEEPS 2005 results.⁴⁴ Although this finding may be somewhat easier to explain in terms of mass public perceptions (in light of declining levels of mass public confidence over time), the fact that it is also found for the business elites (who are no less confident in the legal system in 2005 than they were in 1999) raises some questions in light of my original theory. One would expect that as the courts institutionalize, these improvements will result in commensurate temporal improvements in the levels of confidence. Small infusions of viability from one year to the next should result in similarly small improvements in citizens' perceptions, while larger institutional changes affecting the CCs should result in larger impact on perceptions during the following year.⁴⁵ Contrary to these common sense expectations, the statistical analysis reveals that over time, as CC become more institutionally-developed, the impact of this variable on perceptions is diminished. Why might this be the case and what does it tell us about the viability-confidence relationship in the future?

It is possible that over time the post-communist respondents become less sensitive to the institutional design considerations and that other considerations begin to figure more prominently into their assessments of the justice systems. It also might be the case that respondents are not only influenced by the level of CC viability but also by the scope/rate of institutional changes in the CC—since there have been fewer fundamental changes in the CC designs across the region in the last 5-7 years of the analysis, the citizens may be responding with less “intensity.” At this point, it remains unclear what is behind these results, but this is an interesting discovery and I plan to address it in future analyses.

Although I am frustrated by my own inability to provide more definitive answers to these important questions in this dissertation, I fully expected that my analysis would generate new research questions and expose some potential weaknesses in my theory. The goals of this dissertation were admittedly modest—to adapt the theory of organizational institutionalization to the study of the post-communist constitutional

⁴⁴ For example, in Chapter 6, I discovered that the likelihood of mass public respondents expressing some and great deal of confidence in the justice system relative to parliament increases by 17.8% in Wave 2, 13.5% in Wave 3, but only 9.5% in Wave 4. Similarly, in Chapter 7, I found that the likelihood of a businessperson expressing some or great deal of confidence in the legal system increases by 26.5% in 1999, 30% in 2002, but only 14.1% in 2005.

⁴⁵ I found this positive temporal effect in the analysis of CC viability impact on judicial activism levels in Chapter 5.

courts, to construct an empirical measure of judicial viability, and to provide a few initial empirical tests to confirm the utility of the concept of judicial institutionalization for the future research on constitutional courts—and much remains to be done. At the same time, it would be inappropriate to downplay my findings; the data clearly confirm the beneficial effect of CC viability on both public and business elite confidence. The impact of CC viability on citizens' confidence is substantial and largely confirms my original theoretical expectations.⁴⁶ Moreover, these analyses reveal that the evidence in support of my theory is not bound to a few cases, or certain years, or certain countries, or specific societal segments. It is thus reasonable to conclude that if the process of CC institutionalization remains ignored in the future analyses of public and elite trust/confidence in the post-communist legal systems and courts, researchers will miss an important determinant of citizens' perceptions.

Some Shortcomings and Limitations of This Study

Although I have amassed one of the largest collections of data on the post-communist CCs, my analysis is limited in some important ways and I want to briefly note them here. First, my ability to test the theory in the context of Central Asian countries was significantly limited by the lack of data on CC decisions and public and elite confidence. In particular, with the exception of the business elite confidence levels, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan are not accounted for in most of the statistical analyses. And, I was unable to test any of the hypothesized relationships between viability and confidence or activism in two post-communist states—Mongolia and Turkmenistan. The vast majority of these states score very low on my judicial

⁴⁶ One may also question whether a less complex variable, say, the age of the CC, would have a similar influence on mass public and business elite perceptions—if Country A constitutional court is 10 years old and Country B court is 3 years old, one might suspect that there would be systematic differences in confidence levels. In other words, was it necessary to use a complex, multi-faceted, annualized index of constitutional court viability to show that the relationship between CCs and citizens' confidence in the legal system exist? The answer is yes. When I re-estimated the models sequentially using only one of the eleven component indicators included in the CC viability measure, neither the age of the court, nor its judicial review powers, nor the length of judicial terms of office, nor did any other individual indicator revealed statistically significant results. Furthermore, when I re-estimated the models using only those provisions related to the CCs that were located in the founding constitutions, the data revealed no relationship between CC initial design and elite/public confidence in the legal system. In short, and similar to my earlier arguments, reliance on only one feature of CC institutionalization or only on the CC design provisions outlined in the founding constitutions is inadequate.

viability measure⁴⁷ and common sense suggests that given these low viability levels, the Central Asian CCs would not be particularly active policy-makers, would rarely (if ever) rule against the policies of authoritarian and very powerful presidents,⁴⁸ and would be unable to affect citizens' perceptions of their country's legal systems.

Anecdotal evidence, and few expert assessments of CCs conducted in these countries, seem to confirm the theory proposed in this study. The CCs of Kazakhstan, Turkmenistan, Tajikistan, and Uzbekistan—the least developed CCs in the post-communist region—are largely inactive, rendering approximately 10 decisions on an annual basis. Central and East European Law Institute of the American Bar Association (CEELI-ABA) *Judicial Reform Index* (JRI) assessment team and Open Society Institute both note that these courts have not rendered any politically-significant or controversial rulings since their creation (although I was unable to find a single case description to confirm these assessments).⁴⁹ For example, CEELI-ABA reported that in Uzbekistan, neither lawyers nor lower court judges interviewed by the JRI assessment team in 2002 could cite one key CC decision that had an important influence on civil rights or liberties; nor could they cite one decision that had arguably been made against the interests of the executive power; several respondents also referred to the CC as a “dead” organization.⁵⁰ JRI 2004 assessment team similarly found that Kazakh CC has been “largely a creature of the executive... has not been very active... deciding less than 10 cases per year on the

⁴⁷ In 2005, Kazakh CC ranks 25th out of 28 post-communist CCs in terms of its institutional viability, Kyrgyz CC ranks 17th, Mongolian—18th, Tajik—26th, Turkmen—28th, and Uzbek—27th.

⁴⁸ With the exception of Mongolia, all Central Asian states have “super-presidential” regimes—presidential regimes where legislatures play extremely limited role in the policy-making process due to the excessive concentration of power in the presidential office. Mongolia has a balanced semi-presidential regime, with split executive (i.e., the president is directly elected for a fixed term of office, has power to veto legislation in whole or in part, and issue decrees which become effective with the prime minister's signature; government is headed by the prime minister, who is nominated by the president and confirmed by the parliament; prime minister's post is subject to parliamentary vote of confidence). In practice, Mongolia is the only Central Asian state that was characterized by a competitive political environment during the 1990-2005 period, with Mongolian People's Revolutionary Party (MPRP; former Communist Party) and Motherland Democratic Coalition (composed of three opposition parties, with Democratic Party being the most influential of the three) alternating control of the presidency, the government, and the parliamentary majority status.

⁴⁹ Since these CC's jurisdiction over litigants is extremely limited—only select few national institutions, such as the president and the parliament can appeal to the CCs—and since all institutions that can appeal to the CC are controlled by the presidents and staffed with their close allies, regional experts report that these courts have not heard any cases that would pose direct challenge to the ruling regime.

⁵⁰ See *Uzbekistan 2002 JRI report*, available at http://www.abanet.org/rol/publications/judicial_reform_index.shtml

merits of the case,” that its decisions have been “repeatedly vetoed by the President,” and that the CC “does not have direct jurisdiction over decrees issued by the President.”⁵¹

According to the available evidence and as my theory predicts, Kyrgyz and Mongolian CCs, which obtain somewhat higher levels of CC viability (ranked 17th and 18th respectively out of 28 CCs in 2005), are marginally more active and independent than the other Central Asian CCs.⁵² Ginsburg (2003) conducts the most extensive study of the Mongolian CC to date, in which he notes that “the political importance of the court has been most apparent in its extensive involvement in separation-of-powers issues,”⁵³ but that the “Mongolian case illustrates the court’s need to build up its institutional power”⁵⁴ and that, overall, the court “failed to effectively exercise its [constitutionally-prescribed] power”⁵⁵ and “for the most part acted with caution.”⁵⁶ In short, despite my inability to fully test the theory in the Central Asian countries, what little evidence does exist seems to support my theoretical expectations. Nevertheless, I have to acknowledge this important limitation of my analysis—my empirical findings and inferences apply mostly to the post-communist countries outside of the Central Asia region.

⁵¹ See *Kazakhstan 2004 JRI* report (especially, pp. 11-14), available at http://www.abanet.org/rol/publications/judicial_reform_index.shtml

⁵² Kyrgyz CC, according to JRI 2003 report (p. 11), “has made some controversial decisions. In perhaps its most important political case, it found that the President could run for a third term, despite the two term limitation mandated in the Constitution, on the grounds that the Constitution was adopted during the course of the President’s first term. DECISION OF THE CONSTITUTIONAL COURT July 13, 1998. Many observers cite this case as indicative of the lack of the Court’s independence. The Court also decided a series of cases that some saw as limiting the effectiveness and independence of the Supreme and High Arbitration courts. DECISIONS OF THE CONSTITUTIONAL COURT April 27, 2000, December 6, 2000, April 17, 2001, and February 12, 2002. Finally, the Court refused to allow the enforcement of a private arbitration decision concerning the ownership of a hotel because the Constitution did not provide for the use of private arbitration in Kyrgyzstan (it now does). DECISION OF THE CONSTITUTIONAL COURT, December 5, 1997. Again, many observers feel that this decision was made to protect certain important local financial interests. On the other hand, the Constitutional Court pointed to decisions it made limiting the powers of the procuracy, including prohibiting it from participating in civil matters in which the State did not have a direct interest. DECISION OF THE CONSTITUTIONAL COURT, May 15, 1996. It also has decided cases that it claims were against the interests of the state and local executive powers.” JRI assessment is thus consistent with my earlier discussion—CCs with limited institutional capabilities tend to be more active on cases in which local government policies or bureaucratic regulations are challenged, somewhat more likely to rule in favor of the presidential appeals than relatively institutionalized CCs, and less active in invalidating cases which directly challenge the authority of the ruling party. See *Kyrgyz Republic 2003 JRI* report, available at http://www.abanet.org/rol/publications/judicial_reform_index.shtml

⁵³ Ginsburg, 2003, p. 182.

⁵⁴ *Ibid.*, p. 205.

⁵⁵ *Ibid.*, p. 253.

⁵⁶ *Ibid.*, p. 262.

Another potentially important limitation of my analysis concerns the inherent bias in the available data on CC decisions. It is important to remember that since my sample of cases contains only published decisions which the courts themselves make available online, judicial activism data are susceptible to a major source of bias: court officials who provide the raw information that I use for descriptive and causal inferences have reasons to overestimate the influence of the court to demonstrate to the website visitors that the court is an important institution and is doing a good job.⁵⁷ In short, since my sample contains only published decisions, it is important to reiterate that my inferences and conclusions are generalizable only to these rulings and that it is possible that unpublished cases which are not included in this analysis may fundamentally change any inferences and conclusions drawn.

Finally, some readers may note that a significant shortcoming of this analysis is that I did not evaluate the relationships between the three dependent variables (i.e., public confidence, elite confidence, and judicial activism). For example, some may be curious whether CC activism influences public and elite confidence, or alternatively, whether public and elite confidence levels influence the rate of CC activism, or whether the mass public perceptions are affected by business elites' perceptions. Indeed, these questions are interesting, important, and should be addressed in future research; however, I chose to exclude examination of these relationships from this dissertation for several reasons.

My primary goal throughout this study has been to show that institutional development is a theoretically and empirically significant variable in research on the post-communist courts. This is necessary and important on its own right because it is common practice in the comparative judicial politics discipline (and especially in the post-communist research) to assume that provisions in the founding constitutions regarding the CC's independence and powers are faithfully implemented and therefore provide a good measure of the courts' actual capabilities or a good proxy measure of the court's actual level of independence. My study shows that such assumptions are unreasonable and unrealistic, and that we must look beyond the provisions in the

⁵⁷ In particular, the cases selected for translation into English are chosen with foreign observers in mind and are therefore most likely to overestimate the court's activism and its independence. I also suspect that this problem is more severe in countries with relatively authoritarian regimes, such as, Armenia, Azerbaijan, and Belarus, although it is impossible to know the degree to which this bias affects my statistical findings.

founding constitutions to the specific dates of their implementation if we are to understand what the courts actually do and how they are actually viewed by the public.⁵⁸ By showing that judicial institutionalization is an important albeit often ignored variable in the judicial politics research, I am therefore paving the way for more complex and rigorous analyses of activism and confidence (and the interactive effects of these two variables) in the future.

Additionally, the inclusion of public/elite confidence variables into judicial activism chapter, or judicial activism measure into the public and business elite confidence chapters, would result in a huge loss of data available for the analysis of the primary relationships of interest, the relationships between CC viability and activism/confidence. For example, business elite confidence data are available for all 19 countries considered in the activism chapter, but only for 3 years—1999, 2002, and 2005. Public confidence measure for relevant countries provides even less coverage. For some countries, I would only be able to assess the impact of CC viability on activism in a single year if public confidence measure is included (and therefore would not be able to assess any temporal effects of institutional development); a few of the countries would be dropped from the statistical analysis altogether since public confidence levels for them are unavailable. Furthermore, since the WVS data is only available for the 1990s, I would not be able to assess the relationship between viability and activism during the 2001-2006 period in any of the 19 countries addressed in the activism chapter. In short, by including public and/or elite confidence variables into activism chapter, I automatically lose 60-80% of data collected and coded for the analysis.⁵⁹

If I include judicial activism rates into public and elite confidence chapters, I encounter similar problems to those outlined above. For instance, the inclusion of activism rates into elite confidence chapter would cause the statistical program to drop 7 countries from the analysis (I have elite confidence data for 26 states, but activism data for only 19 states). Since my ability to test the theory in Central Asian states and in

⁵⁸ Furthermore, I do not claim to provide a comprehensive explanation for what drives confidence or activism in the post-communist states (nor would I be able to do so due to the lack of empirical data for some theoretically-relevant variables).

⁵⁹ Moreover, since public/elite confidence does not have a direct effect on the level of CC institutionalization and may only have direct effect on judicial activism, I do not run into endogeneity problems in terms of making causal inferences regarding institutionalization-activism relationship by excluding these measures.

Serbia-Montenegro is already quite limited, and since I do not have data on CC decisions in these states, it would have been unreasonable to bypass an opportunity to test at least one observable implication of my theory in these states. In short, given that my primary interest is to assess the effects of institutional development on confidence and activism (not the impact of activism on confidence), loss of such a large proportion of the data for the sake of what essentially amounts to a control variable is unjustified.

Moreover, as King, Keohane, and Verba (1994: 173) note: “In general, *we should not control for an explanatory variable that is in part a consequence of our key causal variable* (original emphasis).” Since my theory specifies that judicial activism and citizens’ confidence are both influenced by the level of CC viability, including these variables into the model would attribute part of the causal effect of my key explanatory variable to these control variables. In sum, while I agree that it is necessary to assess the relationships between activism and public confidence to derive a more complete understanding of these phenomena, such analyses would not significantly contribute to the goals of this dissertation and can be addressed at a later date.

CONCLUSION

Focusing on the post-communist countries, this dissertation provided a theoretical and empirical account of how constitutional courts develop into viable political actors and traced some of their impacts on the post-communist politics and societies. Taken together, the empirical chapters made an important contribution to our understanding of the constitutional courts’ decision-making and of citizens’ perceptions of the post-communist legal systems. The most important conclusion arising from my analysis is that while the impact of post-communist constitutional courts certainly depends on their surrounding environment, their institutional characteristics should not be ignored. At the same time, my study illustrated the importance of devising precise measures of judicial power—unless researchers delve deeper, and look beyond specific constitutional provisions to the dates of implementation, our inferences about the nature of judicial power will remain incomplete. Stated more generally, the benchmark by which to

evaluate a country's progress on constitutional and judicial reforms should be the implementation of reforms, not just their initiation. Stated more specifically, if we wish to understand the variation across constitutional courts in terms of their authority and influence, we must examine how they develop over time.

It is also worth noting that the applicability of the theory and the empirical indicators of judicial institutionalization is not limited to the post-communist region or to the use of quantitative techniques. It is possible to apply my approach to other courts in other regions and assess the degree to which judicial institutionalization provides an explanation for judicial behavior and public trust in courts in environments that differ substantially from the post-communist region. This work has already begun. For example, Bumin, Randazzo, and Walker (2005) MPSA paper showed that the measures of judicial viability are applicable to Latin American constitutional and supreme courts and that their levels of viability conform well to other scholars' assessments of these courts' political impact. Building on Bumin, Randazzo, and Walker (2005) and my 2007 MPSA paper, Christina Dallara (2007) provides a detailed qualitative examination of the institutional development of Serbian, Croatian, and Slovenian judiciaries and shows that the judicial viability framework and indicators are useful tools for the study of the ordinary courts. Rachel Ellet (2008) uses the conceptual framework and the judicial viability measure elaborated in this analysis in her dissertation "Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania, and Uganda." She shows that the theoretical framework and indicators of judicial institutionalization introduced in this study are amendable to both quantitative and qualitative methods (she uses the latter), and apply equally well to the study of African judiciaries.

Future Research Agenda

Although this study answered several important questions, it has generated many new ones. The goals of this dissertation were admittedly modest and much remains to be done. What follows is a brief outline of my future research agenda.

One area of importance highlighted in this dissertation is the importance of devising temporal measures of institutional viability. Therefore, one of my objectives is to collect additional data on the post-communist constitutional courts and to extend the

coverage through 2009. Although there have been fewer changes in the post-communist constitutional courts' structure and powers in the recent years than during the first decade of transitions, these courts continue to evolve⁶⁰ and it is important to keep abreast of these institutional changes.

Another important area highlighted in my research is the complex and multifaceted nature of the constitutional court decisions. It would be fruitful to construct a more-nuanced and precise measure of judicial activism (or several measures) to allow for a more accurate assessment of the relationship between judicial viability, judicial activism, and judicial independence. In coding cases for this dissertation, I collected extensive data and constructed more than 20 distinct variables based on the decision type, litigated issues, various types of appellants and respondents to the litigated cases, and variety of other characteristics. It is now necessary to utilize these data to their fullest potential to further the research on the post-communist constitutional courts' decision-making behavior. Additionally, I plan to conduct several in-depth studies of the post-communist constitutional courts—especially, how these courts rule on “grand cases” and how they justify their invalidations in such cases—to better understand the dynamics between institutional growth and behavioral independence.

Further research is also needed to address the “stronger courts, lower public confidence” paradox discovered in this analysis and to understand the temporal relationship between judicial viability and its impact on public/elite confidence (i.e., I found that as the constitutional courts become more viable, their positive impact on public and business elite confidence, counter-intuitively, diminishes over time). I plan to focus on these issues in my future research, as the necessary data becomes available.

⁶⁰ For example, in Armenia, constitutional amendments adopted in 2006 expanded the constitutional court's jurisdiction over litigants; the court can now hear appeals by the citizens. Less than two months after the amendment came into force, the court utilized its expanded institutional authority and accepted a petition by two elderly women who challenged the government's refusal to pay pensions and salaries to citizens without the use of identity cards equipped with unique personal identification (PIN) numbers. The Constitutional Court ruled in favor of the appellants and ordered the government to pay 1,317 retirees who were earlier denied their pensions. In Russia, 2008 constitutional amendments abolished presidential term limits and extended presidential term by two years, thereby affecting the coding for the *relative term* of constitutional judges (which measures one aspect of constitutional court's durability—the length of constitutional judges' term of office relative to the term of office of the elected politicians). Since 2005, constitutional changes have also been adopted and ratified in Latvia, Georgia, Azerbaijan, Bulgaria, Kazakhstan, and several other post-communist countries and it is important to assess how (if at all) these changes affect the constitutional courts.

Finally, it would be very beneficial to conduct interviews with legal and political elites—the judges on the ordinary courts, lawyers, and/or elected politicians—in select post-communist countries to assess how their views of the constitutional court (and its role in the legal and constitutional hierarchy) change over time as the court evolves (or fails to evolve) into a viable institution. Institutional development and activity of the constitutional courts, as well as compliance with and enforcement of their decisions, depend greatly on the support from political and legal elites, and to this end, studying their opinions and the determinants of their support for the constitutional courts would be particularly fruitful.

APPENDICES

APPENDIX A: Descriptive Statistics—WVS data (Chapter 6)

Variable	N	Mean	Std. Dev.	Min	Max
<i>Absolute confidence</i>	61627	2.34	0.85	1	4
<i>Relative confidence</i>	56307	0.16	0.88	-2	2
<i>Constitutional Court viability</i>	71839	0.04	0.89	-2.02	1.15
<i>Life satisfaction</i>	70938	5.49	2.50	1	10
<i>Interpersonal trust</i>	68736	1.24	0.43	1	2
<i>Interest in politics</i>	70253	2.16	0.90	1	4
<i>Satisfaction with household's finances</i>	53068	4.30	2.47	1	10
<i>Perceived corruption</i>	26796	1.90	0.76	1	4
<i>FH rights and liberties (combined indices)</i>	70796	6.41	2.89	3	12
<i>GDP per capita (natural log)</i>	65273	8.63	0.63	7.17	9.63
<i>Homicide rate</i>	67533	8.33	6.93	1	22.8
<i>Age</i>	71774	2.11	0.76	1	3
<i>Gender</i>	71800	0.54	0.50	0	1
<i>Education level</i>	68471	1.94	0.71	1	3
<i>Income level</i>	61703	1.96	0.78	1	3

Absolute confidence variable coding (WVS)		N	%
<i>None at all</i>	1	10,041	16.29
<i>Not very much</i>	2	26,022	42.22
<i>Quite a lot</i>	3	20,194	32.77
<i>A great deal</i>	4	5,370	8.71

Original relative confidence variable			Recoded relative confidence variable		
	N	%		N	%
-3	193	0.34	-2	1,794	3.19
-2	1,601	2.84			
-1	8,849	15.72	-1	8,849	15.72
0	28,269	50.21	0	28,269	50.21
1	13,572	24.1	1	13,572	24.1
2	3,306	5.87	2	3,823	6.79
3	517	0.92			

APPENDIX B: Variable Descriptions—WVS data (Chapter 6)

- ***Confidence in the justice system:*** Variable derived from WVS data; the question asks, “Could you tell me how much confidence you have in [justice system]?” (1) = a great deal; (2) = quite a lot; (3) = not very much; (4) = none at all. The variable was then recoded so higher numerical values represent greater interest, arriving at the following coding scheme: (1) = none at all; (2) = not very much; (3) = quite a lot; (4) = a great deal.

- ***Confidence in the parliament:*** Variable derived from WVS data; the question asks, “Could you tell me how much confidence you have in [parliament]?” (1) = a great deal; (2) = quite a lot; (3) = not very much; (4) = none at all. The variable was then recoded so higher numerical values represent greater interest, arriving at the following coding scheme: (1) = none at all; (2) = not very much; (3) = quite a lot; (4) = a great deal.

- ***Constitutional court viability:*** An annual measure of institutional development of the constitutional court, derived from the principal factor analysis on indicators of autonomy, durability, and differentiation (see Chapter 3). The scores for the relevant post-communist sample (from 1989 through 2000) range from -2.02 to 1.15, with higher values representing greater degree of institutional development.

- ***Life satisfaction:*** Variable derived from WVS data; the question asks, “All things considered, how satisfied are you with your life as a whole these days?” (1) = dissatisfied; (10) = satisfied. The variable measures life satisfaction in one-point increments, where higher numerical values represent greater level of satisfaction.

- ***Interpersonal trust:*** Variable derived from WVS data; the question asks, “Generally speaking, would you say that most people can be trusted or that you need to be very careful in dealing with people?” (1) = most people can be trust; (2) = can’t be too careful. The variable was then recoded so higher numerical values represent greater interest, arriving at the following coding scheme: (1) = can’t be too careful; (2) = most people can be trusted.

- ***Interest in politics:*** Variable derived from WVS data; the question asks, “How interested would you say you are in politics?” (1) = very interested; (2) = somewhat interested; (3) = not very interested; (4) = not at all interested. The variable was then recoded so higher numerical values represent greater interest, arriving at the following coding scheme: (1) = not at all interested; (2) = not very interested; (3) = somewhat interested; (4) = very interested.

- ***Satisfaction with financial situation of household:*** Variable derived from WVS data; the question asks, “How satisfied are you with financial situation of your household?” (1) = completely dissatisfied; (10) = completely satisfied. The variable measures satisfaction with financial situation of household in one-point increments, where higher numerical values represent greater level of satisfaction.

- **Extent of political corruption:** Variable derived from WVS data; the question asks, “How widespread do you think bribe taking and corruption is in this country?” (1) = almost no public officials are engaged in it; (2) = a few are; (3) = most are; (4) = almost all public officials are engaged in it. The variable was recoded so higher numerical values represent greater interest, arriving at the following coding scheme: (1) = almost all public officials are engaged in it; (2) = most are; (3) = a few are; (4) = almost no public officials are engaged in it.

- **Civil liberties and political rights:** To capture the current state of democratic governance, this study uses Freedom House’s cross-national time-series data from the *Freedom in the World* dataset which measures political rights and civil liberties to proxy the level of democracy around the world. Political rights and civil liberties indices contain numerical ratings between 1 and 7 for each country, with 1 for the most free and 7 for the least free. This study adds the two indices together to construct a single variable that represents country’s annual democracy score. The country scores range from 2 (most democratic/free) to 14 (least democratic/free).

- **Per capita GDP:** Natural log of real GDP per capita income in US dollars from the European Bank for Reconstruction and Development. The logged per capita income ranges from 7.17 (\$1,306.04) to 9.63 (\$15,213.85).

- **Homicide rate per 100,000 inhabitants:** Data compiled from several official government sources, United Nations Office on Drugs and Crime (UNODC) Division for Policy Analysis and Public Affairs, UN Surveys of Criminal Trends and Operations of Criminal Justice Systems (UNCJS), and Economist Intelligence Unit *Global Peace Index*. The country scores range from 1 to 22.8.

- **Age:** Variable derived from WVS data; the question asks “This means you are ____ years old” (1) = 15-29 years; (2) = 30-49 years; (3) = 50 and more years.

- **Gender:** Variable derived from WVS data; (1) = male; (2) = female. The variable was then recoded, arriving at the following coding scheme: (0) = male; (1) = female.

- **Education:** Variable derived from WVS data; this is a three level index representing highest educational attainment on country basis (1) = lower; (2) = middle; (3) = upper.

- **Income:** Variable derived from WVS question: “Here is a scale of incomes. We would like to know in what group your household is, counting all wages, salaries, pensions, and other incomes that come in. Just give the letter of the group your household falls into, before taxes and other deductions.” (1) = low; (2) = medium; (3) = high.

APPENDIX C: Descriptive Statistics—BEEPS data (Chapter 7)

Variable	N	Mean	Std. Dev.	Min	Max
<i>Absolute confidence</i>	18282	2.52	1.10	1	4
<i>Constitutional court viability</i>	19140	0.73	0.43	-0.64	1.31
<i>Ease of access to laws/rulings/regulations</i>	18797	3.99	1.46	1	6
<i>Frequency of bribing court officials</i>	16292	1.64	1.17	1	6
<i>Plaintiff in civil/commercial cases</i>	14634	1.82	5.93	0	99
<i>Defendant in civil/commercial cases</i>	14581	0.57	2.76	0	80
<i>View courts as able to enforce decisions</i>	17024	2.71	1.05	1	4
<i>Private enterprise</i>	19140	0.26	0.44	0	1
<i>Firm size</i>	19140	2.48	0.72	2	4
<i>FH rights and liberties (added indices)</i>	19140	6.34	3.64	2	14
<i>Per capita GDP income (natural log)</i>	19140	8.72	0.74	6.77	9.93
<i>Homicide rate (per 100,000 inhabitants)</i>	19140	6.91	5.57	1.26	22.8
<i>Civic culture syndrome</i>	19140	0.67	0.04	0.52	0.73

Absolute confidence variable original coding*		N	%
<i>Strongly disagree</i>	1	1,945	10.64
<i>Disagree in most cases</i>	2	2,482	13.58
<i>Tend to disagree</i>	3	4,160	22.75
<i>Tend to agree</i>	4	5,369	29.37
<i>Agree in most cases</i>	5	3,165	17.31
<i>Strongly agree</i>	6	1,161	6.35

Absolute confidence variable recoded		N	%
<i>Strongly disagree</i>	1	4,427	24.22
<i>Tend to disagree</i>	2	4,160	22.75
<i>Tend to agree</i>	3	5,369	29.37
<i>Strongly agree</i>	4	4,326	23.66

Original absolute confidence variable			Recoded absolute confidence variable		
	N	%		N	%
1	1,945	10.64	1	4,427	24.22
2	2,482	13.58	2	4,160	22.75
3	4,160	22.75	3	5,369	29.37
4	5,369	29.37	4	4,326	23.66
5	3,165	17.31			
6	1,161	6.35			

* Missing observations on the dependent variable (“don’t know” responses) dropped from this analysis comprise 13.11% of the original data in 1999; 10.19% in 2002; and 10.76% in 2005.

APPENDIX D: Variable Descriptions—BEEPS data (Chapter 7)

- ***Confidence in the legal system:*** Variable derived from BEEPS data; the question asks, “To what degree do you agree with this statement? I am confident in the legal system.” (1) = strongly disagree; (2) = disagree in most cases; (3) = tend to disagree; (4) = tend to agree; (5) = agree in most cases; (6) = strongly agree; (7) = don’t know. The variable was then recoded in the following manner: (1) = strongly disagree/disagree in most cases; (2) = tend to disagree; (3) = tend to agree; (4) = agree in most cases/strongly agree. The “don’t know” category was recoded with missing values to drop these observations from the data.

- ***Constitutional court viability:*** An annual measure of institutional development of the constitutional court, derived from the principal factor analysis on indicators of autonomy, durability, and differentiation (see Chapter 3). The scores for the relevant post-communist sample range from -0.64 to 1.31, with higher values representing greater degree of institutional development.

- ***Ease of access to laws, court rulings, and administrative regulations:*** Variable derived from BEEPS data; the question asks, “To what degree do you agree with the following statement? Information on the laws, court rulings, and regulations affecting my firm is easy to obtain.” (1) = strongly disagree; (2) = disagree in most cases; (3) = tend to disagree; (4) = tend to agree; (5) = agree in most cases; (6) = strongly agree; (7) = don’t know. The “don’t know” category was recoded with missing values to drop these observations from the data.

- ***Frequency of bribing court officials:*** Variable derived from BEEPS data; the question asks, “Thinking now of unofficial payments/gifts that a firm like yours would make in a given year, could you please tell me how often would they make payments/gifts to deal with courts?” (1) = never; (2) = seldom; (3) = sometimes; (4) = frequently; (5) = usually; (6) = always.

- ***Plaintiff in civil or commercial cases:*** Variable derived from BEEPS data; the question asks, “How many cases in civil or commercial arbitration courts have involved your enterprise as a plaintiff?” The variable ranges from 0 to 99.

- ***Defendant in civil or commercial cases:*** Variable derived from BEEPS data; the question asks, “How many cases in civil or commercial arbitration courts have involved your enterprise as a defendant?” The variable ranges from 0 to 80.

- ***Court system is able to enforce its decisions:*** Variable derived from BEEPS data; the question asks, “How often do you associate the following descriptions with the court system in resolving business disputes? Able to enforce its decisions.” (1) = never; (2) = seldom; (3) = sometime; (4) = frequently; (5) = usually; (6) = always; (7) = don’t know. The “don’t know” category was recoded with missing values to drop these observations from the data.

- **Private enterprise:** Variable derived from BEEPS data; the question asks, “What is the legal organization of this company?” (1) = private; (2) = state-owned. The variable was then recoded in the following manner: (0) = state-owned; (1) = private sector.

- **Size of the firm:** Variable derived from BEEPS data; the question asks, “How many permanent, full-time employees does your firm have now?” (2) = between 2 and 49; (3) = between 50 and 249; (4) = 250 or more.

- **Civil liberties and political rights:** To capture the current state of democratic governance, this study uses Freedom House’s cross-national time-series data from the *Freedom in the World* dataset (available online at <http://www.freedomhouse.org>) which measures political rights and civil liberties to proxy the level of democracy around the world. Political rights and civil liberties indices contain numerical ratings between 1 and 7 for each country, with 1 for the most free and 7 for the least free. This study adds the two indices together to construct a single variable that represents country’s annual democracy score. The country scores range from 2 (most democratic/free) to 14 (least democratic/free).

- **Per capita GDP:** Natural log of real GDP per capita income in US dollars from the European Bank for Reconstruction and Development. The logged per capita income ranges from 6.77 (\$871.32) to 9.63 (\$15,213.85).

- **Homicide rate per 100,000 inhabitants:** Data compiled from several official government sources, United Nations Office on Drugs and Crime (UNODC) Division for Policy Analysis and Public Affairs, UN Surveys of Criminal Trends and Operations of Criminal Justice Systems (UNCJS), and Economist Intelligence Unit *Global Peace Index*. The country scores range from 1.26 to 22.8.

- **Civic culture syndrome:** Variable is derived from LITS data; it represents a combination of country mean scores on four variables—*interpersonal trust*, *life satisfaction*, *attitude toward democracy*, and *courts are important as rights defenders* (see Appendix B). I add these values together and then divide by 18, the maximum possible score that can be obtained across the 4 variables; the resulting proportion is assumed to represent a country’s macro-level political culture. The scores range from 0.519 to 0.726, with higher levels representing stronger civic culture predisposition.

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