

# A CONCEPTUAL FRAMEWORK AND AN EMPIRICAL METHODOLOGY FOR MEASURING JUDICIAL IDEOLOGY

## THE CASE OF THE SLOVENIAN CONST. COURT

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Research project „Ideology on the Courts“,

Graduate School of Government and European Studies (Nova Univerza)  
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# Conceptual framework

## **I. CONCEPTUAL AND NORMATIVE CONTESTATION:**

- Ideology: an essentially contested concept
- Judicial ideology as anathema in (some influential) legal circles

## **II. DEFINITION:**

- Ideology as a comprehensive system of values, beliefs and views of a judge.

### III. FACTUAL PROBLEM

- Ideology needs to be expressed in order to be observed and measured
- Practice of concealing judicial ideology
  - Courts as bastions of secrecy
  - Judicial decisions: unanimous, anonymous and unpublished
  - Judges not allowed to write separately
- Separate opinions as a textual, „objective“ source of judicial ideology

## IV. SYSTEMIC DIVISIONS EXPLAINED

- COMMON LAW v. CIVIL LAW SYSTEMS
- THREE CONCEPTIONS OF LAW (AND JUDICIAL IDEOLOGY)
  - OBJECTIVE CONCEPTION: no room for judicial ideology
  - SUBJECTIVE CONCEPTION: pervasiveness of judicial ideology, no room for law.
  - DISCOURSIVE CONCEPTION: law as an argumentative, discursive practice, inevitability of judicial ideology, the need for transparency, research and measuring.

# Empirical methodology

## I. MULTI-DIMENSIONAL IDEOLOGY

### ECONOMIC

Equality of income and wealth; state intervention *or* free market.  
Position 1 = most in favour of equality and intervention.

### SOCIAL

Rights and liberties of individuals and social groups *in relation to* (the rights of) other individuals, social groups or the „collectivity“ (society).  
Position 1 = most in favour of individual and minority groups' rights.

### AUTHORITARIAN

Rights and liberties of individuals and social groups *in relation to* the „state“ and state institutions, including courts.  
Position 1 = most in favour of individual rights.

Each dimension comprises 5 positions (positions 1 to 5).  
Not all CC decisions have all three dimensions.

## **II. ADDITIONAL PROPERTIES ANALYSES**

### **INTERNATIONAL DIMENSION OF THE DECISION**

- Does the decision refer to international, EU or foreign law, or relevant judicial practice?
- To what extent is this used as an argument for the decision?

Scores 1-4 (4=the decision is based on international law).

### **PRO-GOVERNMENT ORIENTATION OF THE DECISION**

- Is the decision against or in line with the opinion of the Government and of the Parliament (when available)?
- To what extent are the arguments of the court in line with the arguments of the Government / Assembly?

Scores 1-4 (1=the decision is opposite to the Govt' opinion).

### III. SAMPLING OF CC DECISIONS FOR THE ANALYSIS

Criteria for selection of decisions:

- self-labelled as „important“ by the constitutional court
- related to important pieces of legislation, human rights, individual and political liberties
- consequences of the decision or its precedential nature
- tight voting and/or existence of separate opinions
- controversial in public or political debate

Target:

- at least 20 decisions in each year,
- at least 3 comparative samples from different periods,
- ideally 20 decisions for each year over a 25 years' period.

## **IV. STEPS IN THE ANALYSIS OF A DECISION**

1. Ideological position of the decision.
2. Ideological position of a hypothetical opposite decision.
3. Ideological position(s) of judges' separate opinion(s).
4. Scoring of judges' votes and separate opinions.

### **KEY CONSIDERATIONS WHEN DETERMINING POSITIONS:**

- Possible different decisions (in substance, consequences).
- Key arguments used for the decision (or against it).
- Auxillary arguments and issues (sometimes very revealing).

**This kind of analysis always includes an element of judgement.**



## V. MEANS TO REDUCE SUBJECTIVITY

- An interdisciplinary and interprofessional team
- Each decision analysed and scored by at least two members of the team
- Regular meetings to discuss complex individual decisions and methodological issues
- Learning by experience: first a pilot analysis of 5 decisions (by all); then a pilot sample of 50 decisions
- Standardised templates for reports on each decision:
  - Key information on the decision and summary of arguments
  - Justification for selection of each position
- Peer-review

## VI. SCORING – THE BASIC CASE

EC/SOC/AUTH DIMENSION	1	2	3	4	5
Decisions, counter-decisions	CD			D	
Judges who voted IN FAVOUR			1	1	1
Judges who voted AGAINST	1	1			

EC/SOC/AUTH DIMENSION	1	2	3	4	5
Decisions, counter-decisions		CD		D	
Judges who voted IN FAVOUR			0,5	1	1
Judges who voted AGAINST	1	1	0,5		

**Constitutional Court as a whole:** always gets 1 point at the position of the decision (D) – and at no other position.

**Judges:** we cannot know the *true position* only from the vote, but we may assume that it is close to what the judge voted for (D or CD) – we therefore give points for all *adjacent positions*.

## VII. SCORING WITH SEPARATE OPINIONS

EC/SOC/AUTH DIMENSION	1	2	3	4	5
Decisions, counter-decisions		CD		D	
Separate opinions (P, N)					PSO
Judge(s) who gave the PSO					2
Judges who voted IN FAVOUR			0,5	1	0,5
Judges who voted AGAINST	1	1	0,5		

EC/SOC/AUTH DIMENSION	1	2	3	4	5
Decisions, counter-decisions		CD		D	
Separate opinions (P, N)	NSO				
Judge(s) who gave the PSO	2				
Judges who voted IN FAVOUR			0,5	1	1
Judges who voted AGAINST	0,5	1	0,5		

**Judges who wrote separate opinions:** receive 2 points for the position of the SO and for no other position – we assume that SO reveals their *true position*.

**Judges without SO:** receive only 0.5 instead of 1 at the position of the SO – it is less likely that this is their true position because they did not join (co-sign) the SO. (*Exception:* when PSO=D or NSO=CD)

# Empirical results from the first sample

- Properties of the sample
- Ideological profile and the „ideal point“ of the Court
- Contested vs unanimous decision: judges' ideal points
- What drives unanimity and dissent?
- Diversity and clustering among judges
- Independence of ideological dimensions

# The Sample

PERIOD:	<b>2002-2006</b>	NUMBER OF OBSERVATIONS IN THE SAMPLE:	<b>108</b>
DECISIONS WITH AN ECONOMIC DIMENSION			38
DECISIONS WITH A SOCIAL DIMENSION			52
DECISIONS WITH AN AUTHORITARIAN DIMENSION			103
DECISIONS WITH A GOVERNMENT / PARLIAMENT OPINION			69
UNANIMOUS DECISIONS		56%	61
CONTESTED DECISIONS*		44%	47
DECISIONS WITH SEPARATE OPINION(S)		40%	44

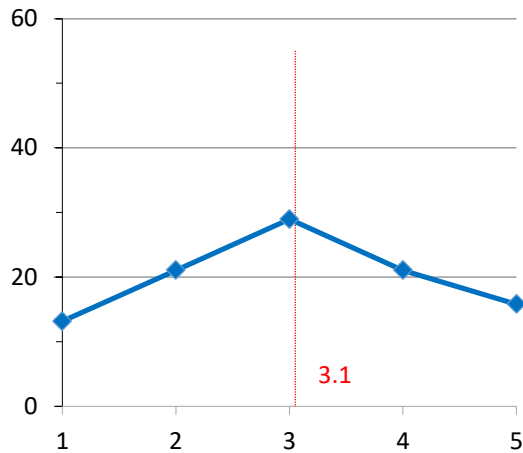
\*At least 1 judge votes against at least a part of the decision.

# The Judges

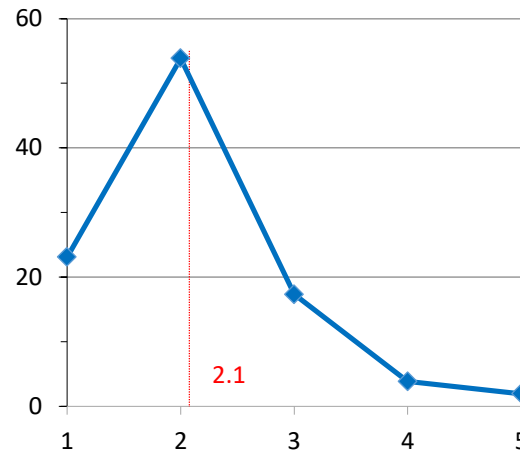
	VOTED	FOR	AGNST	MIXED	% FOR	PosSO	NEGSO
Čebulj	106	91	11	4	<b>85.8</b>	0	6
Fišer	98	90	6	2	91.8	8	7
Janko	101	96	4	1	<b>95.0</b>	0	0
Krisper-K.*	82	73	6	3	89.0	3	4
Modrijan	102	89	8	5	87.3	2	4
Ribičič	102	89	9	4	87.3	10	10
Škrk	94	86	6	2	91.5	5	4
Tratnik*	86	75	8	3	87.2	0	0
Wedam-L.	99	90	2	7	90.9	8	4

\* Appointed in May 2012 – did not take part in first 13 decisions in the sample.

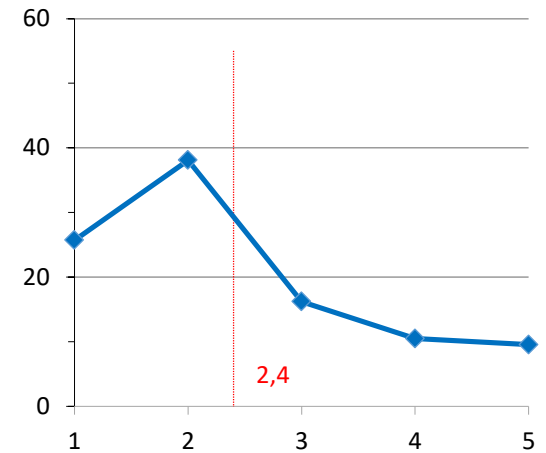
# Constitutional Court's Ideological Profile



Economic



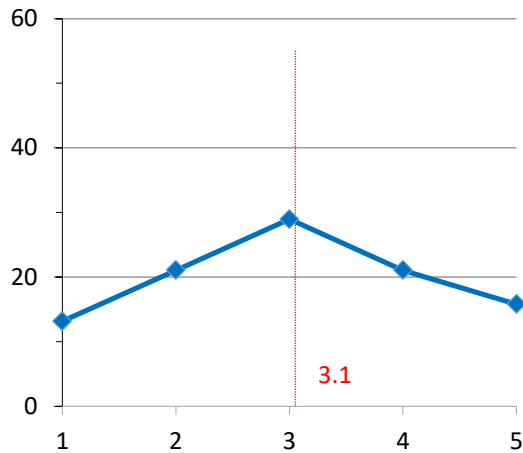
Social



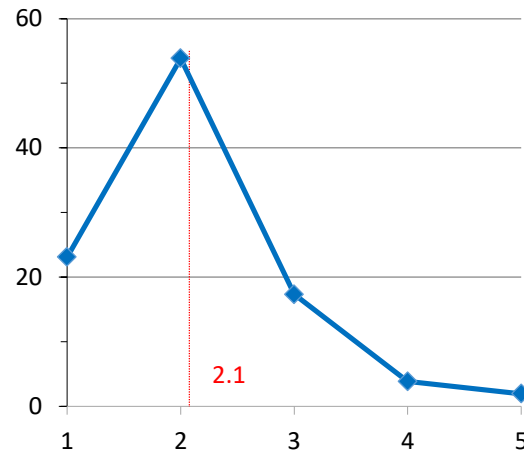
Authoritarian

More liberal socially than regarding relations between individuals and the state.  
No strong preferences on the economic dimension.

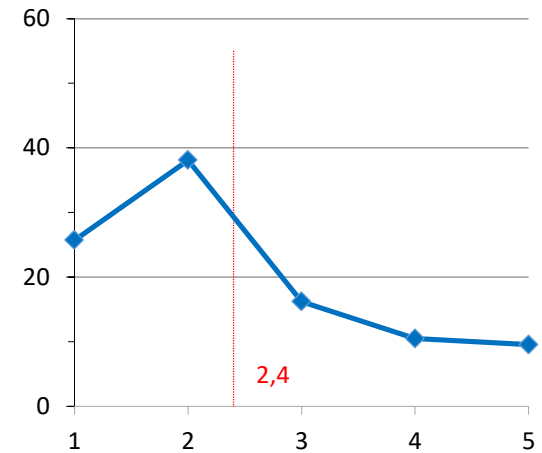
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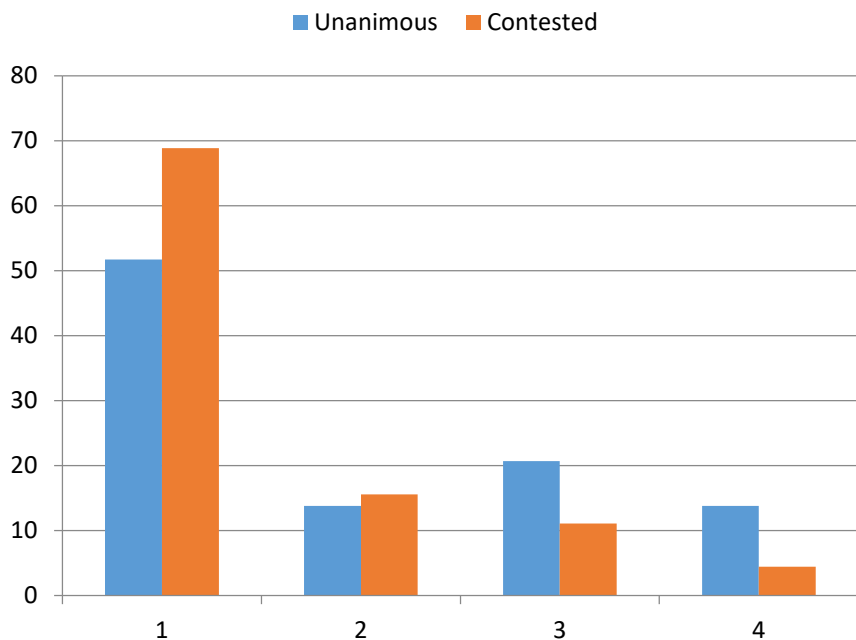


# Ideal points in contested vs unanimous decisions

Judge	Social dimension			Authoritarian dimension		
	All decisions	Unanimous decision	Contested decisions	All decisions	Unanimous decision	Contested decisions
Čebulj	2.3	1.9	2.9	2.5	2.2	2.9
Fišer	2.2	1.9	2.7	2.4	2.2	2.7
Janko	2.2	1.9	2.6	2.6	2.2	3.0
Krisper-K.	2.2	2.0	2.6	2.6	2.3	3.1
Modrijan	2.3	1.9	2.9	2.6	2.2	3.1
Ribičič	2.1	1.8	2.5	2.3	2.2	2.4
Škrk	2.0	1.8	2.4	2.5	2.3	2.9
Tratnik	2.2	1.9	2.8	2.5	2.3	2.8
Wedam-L.	2.1	1.9	2.4	2.3	2.1	2.6
The Court	2.1	1.5	3.0	2.4	1.9	2.6
Median of judges	2.2	1.9	2.6	2.5	2.2	2.9

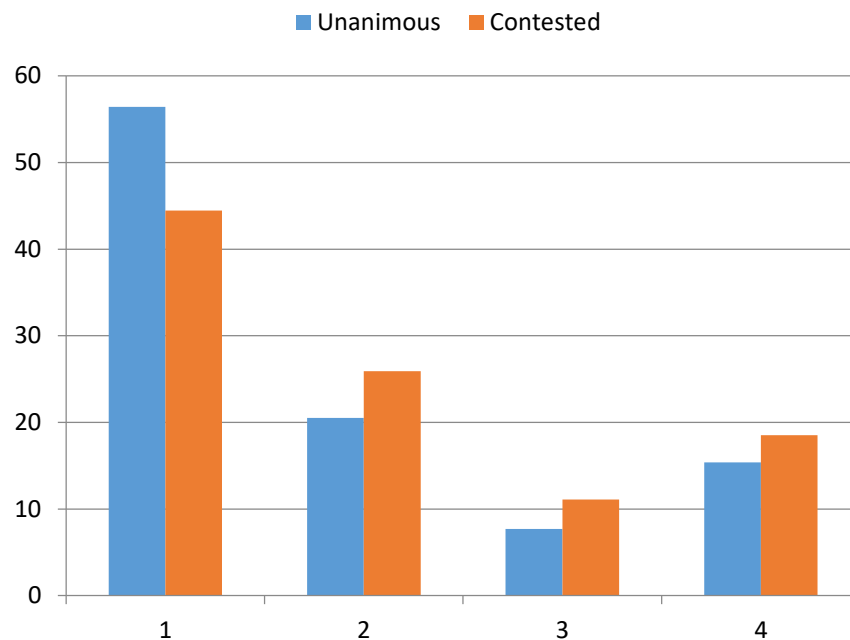
Unanimous decisions tend to be more liberal (with a higher intensity).  
In contested decision, positions of the Court and all judges are closer to the centre.

# Other drivers of unanimity and dissent: international law and opposing the Gov't



## International dimension

3&4: refers to the international body of law / legal practice.



## Pro-government orientation

1: the decision is opposed to the government's position on the case

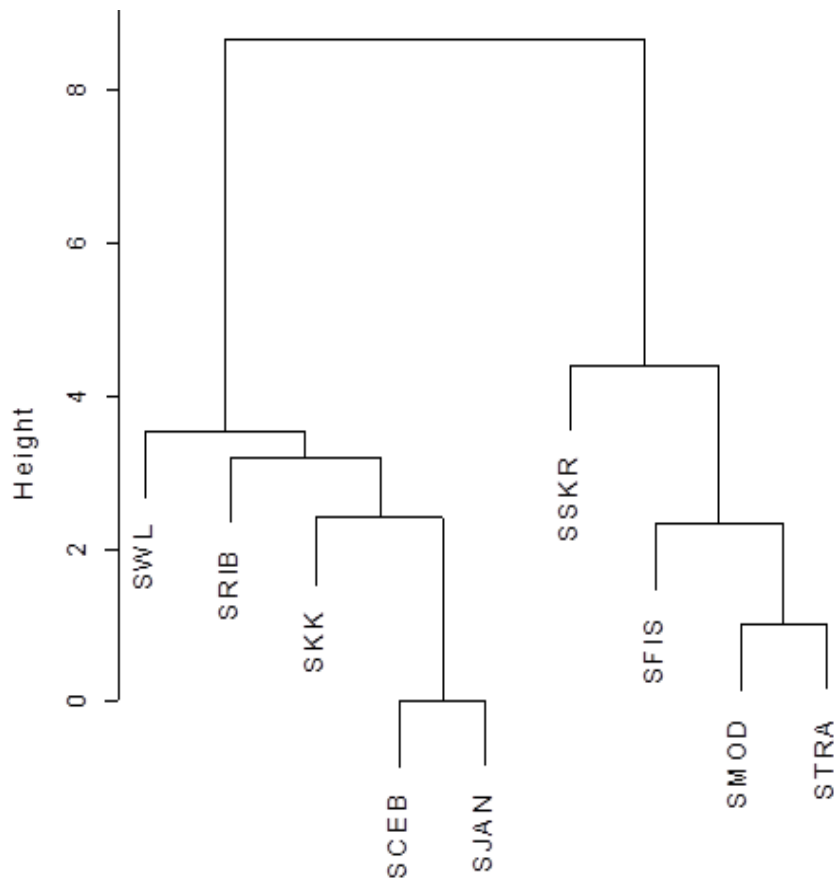
In decision referring to int'l law, the share of unanimous decisions is higher. Consensus has a higher value when the Court opposes the government. Disagreeing with both Court and Gov't is an incentive for dissent: out of 26 dissenting votes in this subsample, 21 were coded as 1 (and 2 as partly opposing).

# Diversity among judges: pair-wise correlations between positions on decisions

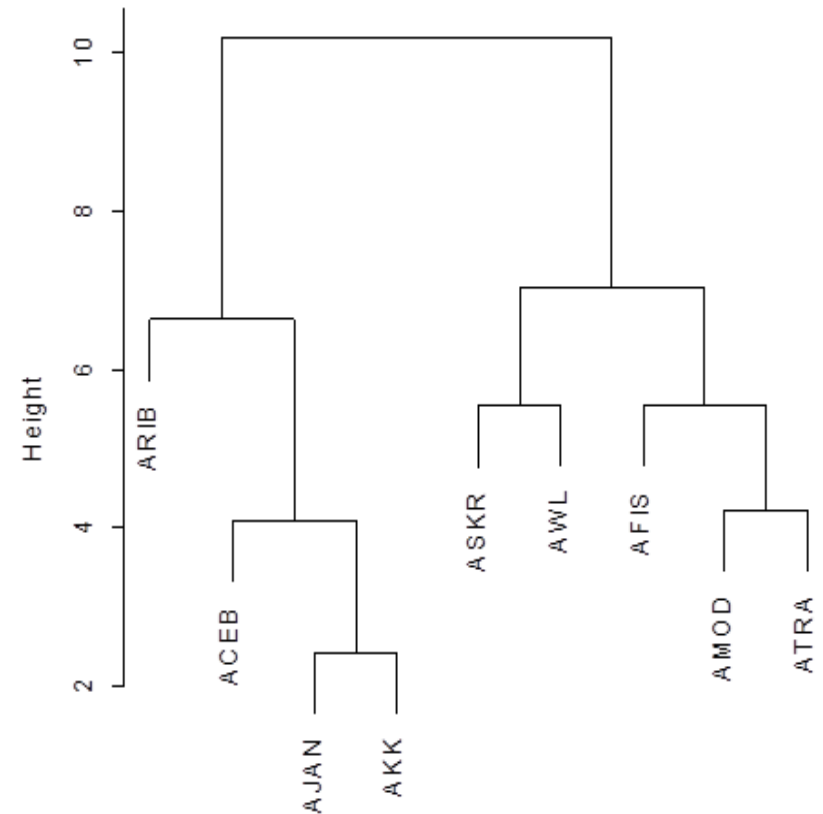
Authoritarian dimension

	Court	Čeb.	Fiš.	Jan.	K-K.	Mod.	Rib.	Škr.	Tra.
Čebulj	0.75								
Fišer	0.73	0.56							
Janko	0.88	0.76	0.66						
Krisper-K.	0.73	0.64	0.63	0.75					
Modrijan	0.73	0.62	0.73	0.70	0.73				
Ribičič	0.69	0.50	0.57	0.62	0.51	<u>0.48</u>			
Škrk	0.79	0.60	0.59	0.69	0.73	0.66	0.51		
Tratnik	0.59	<u>0.47</u>	0.74	0.57	0.77	0.74	<u>0.36</u>	0.75	
Wedam-L.	0.80	0.55	0.67	0.75	0.72	0.67	0.56	0.82	0.70

# Diversity among judges: clustering based on positions on individual decisions



Social dimension



Authoritarian dimension

The two groups are the same, except for 1 judge (WL).

# Interdependence of ideological dimensions

	Court	Čeb.	Fiš.	Jan.	K-K.	Mod.	Rib.	Škr.	Tra.	W-L.
Economic / Social	0.37 (20)	-0.01 (19)	0.25 (20)	0.25 (20)	0.17 (13)	0.06 (20)	-0.00 (19)	-0.21 (15)	-0.10 (17)	0.24 (18)
Economic / Authoritarian	<b>-0.30</b> (38)	-0.51 (37)	-0.29 (37)	<u>-0.28</u> (37)	<u>-0.42</u> (27)	-0.30 (38)	<b>-0.37</b> (36)	<b>-0.52</b> (32)	<b>-0.41</b> (31)	<u>-0.35</u> (32)
Social / Authoritarian	<b>0.45</b> (49)	0.61 (48)	0.50 (45)	<b>0.50</b> (47)	<b>0.41</b> (37)	<b>0.43</b> (48)	<b>0.45</b> (45)	<u>0.35</u> (39)	<b>0.45</b> (42)	<u>0.34</u> (47)

Correlations between positions on ideological dimensions in individual decisions. Number of observations reported in parenthesis.

Coefficients in bold are significantly different from zero at the 95% significance level, and underlined coefficients at the 90% level.

# Conclusions

- Overall, the Court protected individual/group rights more strongly against other individuals/groups than against the authority of the State
- Unanimity was more likely when decisions were based on international body of law and opposing the government's position on the case
- Dissenting votes are more likely when the judge's position on the case is less liberal, and when his/her position opposes both the Court and the Gov't position
- There is a positive correlation between scores for social and „political“ liberalism at the level of individual judges
- Judges who are less liberal on the authoritarian dimension seem to be more in favour of economic interventionism