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## Key Ingredients in the Rule of Law Recipe: The Role of Judicial Independence in the Effective Establishment of the Rule of Law

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Key Ingredients in the Rule of Law Recipe:

The Role of Judicial Independence in the Effective Establishment of the Rule of Law

by

Lauren A. Shumate

A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Master of Arts  
Department of Government and International Affairs  
College of Arts and Sciences  
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## **DEDICATION**

I dedicate this work with love and gratitude to my family who have been such an important, inspirational influence in my life, and have been involved and supported me during this amazing journey. I extend my sincerest appreciation to my family for always believing in me and helping to shape the person I am today. I offer special thanks to my beloved parents who supported me throughout my tennis career, which ultimately afforded me the opportunity to attend college and reach this point in my life. For waking up at 4:00AM with me and driving me to practice, for taking me to tournaments across the country and around the world, for making me the center of your world, for all the sacrifices you made so I could pursue my dreams, for always pushing me to the next level, and for your unconditioned love and support, I thank you from the bottom of my heart. I also lovingly thank my two little sisters, Marissa and Tiana, for putting up with being drug to all my early-morning practices and spending their weekends at tournaments, and for bringing so much laughter, joy, and love to my life.

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## **ABSTRACT**

In recent decades, countries around the globe have engaged in rule of law and judicial reform initiatives, with such efforts being most prominent in transitional democracies, post-conflict and post-communist countries. Despite the fact that the concepts of judicial independence and the rule of law continue to be contested among political and legal scholars, popular wisdom and belief in the international community suggests that an independent judiciary is the cornerstone of a democratic, market-based society based on the rule of law. However, the disagreement over the extent to which an independent judiciary effects the establishment of the rule of law has resulted in the failure to determine whether an independent judiciary is necessary for the establishment of the rule of law, and thereby a stable and peaceful society where human rights and civil liberties prevail.

This paper examines the effect of judicial independence on the establishment of the rule of law, and analyzes whether the type of political regime and legal system of a country affects judicial independence and the rule of law. I use data available from the most recent years of 2007 through 2012 that are comprised of a set of indicators of judicial independence and the rule of law covering 51 different countries in the global system. OLS multiple regression is used to analyze the effect of three independent variables (legal system, type of political regime, and judicial independence) on two dependent variables (judicial independence and the rule of law). It is expected that higher levels of judicial independence will be strongly associated with an established rule of law, and that the type of political regime and legal system will affect the presence of a highly independent judiciary.

Additionally, I employ qualitative case studies of Serbia and Moldova in order to examine justice sector reforms taking place and assess their impact. The cases of Serbia and Moldova provide an example of the global effort to reform the rule of law and establish an independent judiciary and demonstrates the need to enshrine judicial independence not only within the content of legal documents, but also in practice.

The results of the comparative quantitative analysis demonstrate the importance of judicial independence, particularly de facto judicial independence, in establishing the rule of law. Furthermore, the qualitative studies of Serbia and Moldova show how the lack of judicial independence in both countries can be linked to human rights violations adjudicated by the European Court of Human Rights (ECHR). The goal of this research is to add to the growing field of transitional justice, and contribute to comparative law and politics literature concerning judicial independence and the rule of law.

## CHAPTER ONE

### INTRODUCTION

The famous adage “justice must not only *be* done, but must also be *seen* to be done,” appears to be as applicable in legal systems around the world today as it was over eighty years ago when Lord Chief Justice Hewart first introduced it in the landmark English case *R v. Sussex Justices, ex parte McCarthy* (1929). In recent decades, countries around the globe have engaged in rule of law and judicial reform initiatives.<sup>1</sup> As Carothers suggests, it is impossible to engage in foreign policy debate without the rule of law being offered as the solution to the world’s problems.<sup>2</sup> Furthermore, aid and development programs have focused on judicial independence due to the positive relationship between economic growth and countries with an independent judiciary.<sup>3</sup>

Such reform efforts have been most prominent in transitional democracies, post-conflict and post-communist countries. Eastern Europe has been one of the most fertile regions for rule of law reform with concentrated efforts to “de-Sovietize” and reform their legal systems.<sup>4</sup> However, rule of law initiatives have not been limited to Eastern Europe and former Soviet countries. Other countries that have been and continue to be involved in rule of law reform include Asia, sub-Saharan Africa, the Middle East, and Latin America. These comprehensive rule of law and legal reform efforts have included the rewriting of constitutions and laws, reforming government institutions, and retraining legal personnel. Unfortunately, these efforts have proven to be slow,

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<sup>1</sup> Gretchen Helmke and Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective." *Annual Review Political Science*, 2009: 346.

<sup>2</sup> Thomas Carothers, "The Rule of Law Revival." *Foreign Affairs* 77, no. 2 (March/April 1998): 95.

<sup>3</sup> Bernd Hayo and Stefan Voigt, "Explaining de facto Judicial Independence." *International Review of Law and Economics* (Elsevier) 27 (2007): 271.

<sup>4</sup> Carothers, Thomas, "The Rule of Law Revival," 100.

challenging, and difficult with results often times being indecisive. Nevertheless, because of the universal quality and appeal of the rule of law, it continues to be held as a nonideological solution that hardly anyone will admit to being against.<sup>5</sup>

Despite the fact that the concepts of judicial independence and the rule of law continue to be contested among political and legal scholars, popular wisdom and belief in the international community suggests that an independent judiciary is the cornerstone of a democratic, market-based society based on the rule of law.<sup>6</sup> Moreover, research suggests a close relationship between the rule of law and human rights and stresses the importance of an independent judiciary in securing human rights. Yet, there is significant debate as to whether an independent judiciary guarantees the establishment of the rule of law.<sup>7</sup> While an independent judiciary and strong rule of law have been associated with liberal democracy and a modern market economy, it remains somewhat ambiguous as to whether this provides the most conducive environment for the rule of law to flourish. Concepts such as judicial independence, which is centered on the impartiality of judges and their ability to enforce laws, makes sense on paper but aid providers and legal scholars have found that merely enacting new laws does not bring about the intended results without changing the process of implementation and enforcement.<sup>8</sup>

In addition to the debate over whether an independent judiciary can lead to the establishment of the rule of law and the type of political regime that provides the best environment for this to occur, the type of legal system operating in a country has also begun to receive attention. As a result of the global initiative to firmly establish the rule of law, civil law has been increasingly coming under attack facing criticisms of being inefficient and unable to

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<sup>5</sup> Carothers, "The Rule of Law Revival," 99.

<sup>6</sup> Emma Phillips, "The War on Civil Law? The Common Law as a Proxy for the Global Ambition of Law and Economics." *Wisconsin International Law Journal* 24, no. 4 (2007): 929.

<sup>7</sup> Helmke and Rosenbluth, "Regimes and the Rule of Law," 345-346.

<sup>8</sup> Carothers, Thomas, "The Rule of Law Revival," 104.

protect the individual rights of citizens. In contrast, common law has been seen to offer a better opportunity for establishing an independent and impartial judiciary, which has been viewed as a core element of the rule of law and essential to providing the necessary foundation for economic growth.<sup>9</sup>

Serbia and Moldova are two countries currently sitting at the crossroads of two distinct frameworks, and both are in the relatively early stages of implementing recently launched rule of law and judicial reform initiatives. The cases in Serbia and Moldova provide an example of the global effort to reform the rule of law and establish an independent judiciary and demonstrates the need to enshrine judicial independence not only within the content of legal documents, but also in practice.

Judicial independence is often considered a component of the rule of law, and is frequently included in measures of the rule of law.<sup>10</sup> However, little research exists that separates the two and looks at the relationship between judicial independence and the rule of law. This thesis presents research that examines the effect of judicial independence on the establishment of the rule of law, and analyzes whether the type of political regime and legal system of a country affects judicial independence and the rule of law. I use data available from the most recent years of 2007<sup>11</sup> through 2012 that are comprised of a set of indicators of judicial independence and the rule of law covering 51 countries in the global system. OLS multiple regression is used to analyze the effect of three independent variables (legal system, type of political regime, and judicial independence) on two dependent variables (judicial independence and the rule of law). It is expected that higher levels of judicial independence will be strongly associated with an

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<sup>9</sup> Phillips, "The War on Civil Law," 916.

<sup>10</sup> See rule of law indices: World Justice Project, rule of law measurement; Freedom in the World Survey (Freedom House), measure of civil liberties includes "rule of law" indicator which incorporates a measure of judicial independence; the International Country Risk Guide "law and order" component includes a measurement of judicial independence.

<sup>11</sup> Feld and Voigt's measure of de facto and de jure judicial independence was originally constructed in 2003, but was updated with additional countries in 2007.

established rule of law, and that the type of political regime and legal system will affect the presence of a highly independent judiciary and strengthened rule of law.

I use a qualitative case study research design in order to examine justice sector reforms taking place in Moldova and Serbia. Data available for both countries from 2007 through 2011 containing a set of indicators for judicial independence and the rule of law is used to evaluate the effectiveness of justice sector reforms in Moldova and Serbia and assess their impact.<sup>12</sup> I also examine the number of cases adjudicated by the European Court of Justice in which either country was charged with a violation of human rights and examine whether the type of violation is related to the judiciary.<sup>13</sup> It is expected that higher levels of judicial independence will be strongly associated with an established rule of law, and thus increase respect for human rights.

Because I seek to study the relationship between judicial independence and the rule of law, I will spend considerable time in the following chapter reviewing literature that examines the origin and conceptualization of judicial independence along with discussions that focus on the importance of the rule of law and its association with human rights. I will then turn to literature that suggests that judicial independence can help to establish the rule of law in a country, and thereby create greater respect for human rights. Lastly, since I wish to determine the effect that legal traditions and regime types have on judicial independence, I will focus my attention on literature that is related to the importance of democracies and legal systems based common law.

In chapter three I discuss the definition and measurement of each variable in the study, along with the statistical analysis that is performed and the results of the quantitative analysis. I apply this discussion to the cases of Serbia and Moldova in the fourth chapter. I examine the

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<sup>12</sup>Freedom House, "Freedom in the World," *Freedom House*, <http://freedomhouse.org/report/freedom-world/serbia>. (2007-2012).

<sup>13</sup> European Court of Human Rights, Statistical Information, "Table of Violations", *Violations by Article and by State*, (2009-2011), <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data/OldStats.htm>.

justice sector reforms currently underway in both of these countries and assess the impact they have had thus far, particularly relating to the judicial institution and the establishment of a strong rule of law and respect for human rights. This section is focused on two of my central arguments. That is, the key to establishing judicial independence is not only enshrining judicial independence within the content of legal documents, but also to ensure the independence of the judiciary in practice. I also argue that by establishing the rule of law through judicial independence, greater respect for human rights will prevail. I manifest both of these arguments through case studies involving the justice sector reforms of both Serbia and Moldova, which show the need for judicial independence *in practice*, and also demonstrate how a country can increase respect for human rights by establishing the rule of law through judicial independence. I use these two countries as examples of the global effort to establish judicial independence and the rule of law, and also to demonstrate that it is possible to have a constitutionally established independent judiciary, but that this does not ensure that the judiciary will operate independently in practice.

I use data obtained from the Freedom in the World survey developed by Freedom House to assess the strength of the rule of law in each country and compare this strength to the strength of independence possessed by the judiciary. Furthermore, I show how the lack of judicial independence in both countries can be linked to human rights violations adjudicated by the European Court of Human Rights (ECHR). First, I provide a brief overview of the justice sector reform efforts in each country. I then analyze and examine the data related to judicial independence, rule of law, and human rights, and apply this to the discussion.

The final chapter will serve as the conclusion for the overall body of work. I will discuss and interpret the results from both my quantitative and qualitative analyses. Lastly, I will provide



suggestions for further research related to the topic of judicial independence and the rule of law and ways in which the current study could be improved and expanded upon.

## CHAPTER TWO

### JUDICIAL INDEPENDENCE AND THE RULE OF LAW

#### **The Origin, Conceptualization, and Importance of Judicial Independence**

The concept of judicial independence and the rule of law, as Carothers puts it, is a venerable part of Western political philosophy seen as a rising imperative during the era of globalization.<sup>14</sup> The principle role of an independent judiciary is to uphold the rule of law and ensure the supremacy of law. Justice F.B. William Kelly of the Supreme Court of Nova Scotia contends that the key to establishing the rule of law is ensuring the independence of the judiciary, and providing the setting for a fair and equitable legal system whereby an independent judiciary can flourish.<sup>15</sup> Although judicial independence has become a popular concept in reform initiatives around the world, its actual meaning is still not completely understood and it remains an extremely difficult concept to define and measure. Nevertheless, judicial independence has enjoyed nearly universal consensus as to its normative value as an institutional mechanism to protect and uphold the rule of law along with its importance in the effective operation of constitutional democracy.<sup>16</sup>

#### ***Judicial Independence: Origin, History, and Global Importance***

The American legal system has arguably become one of the most influential in the world, impacting both the formation of international law as well as national law. Gerber reveals an important history and origin of judicial independence. He argues that while the idea of judicial

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<sup>14</sup> Carothers, "The Rule of Law Revival," 95.

<sup>15</sup> Justice F.B. William Kelly, "An Independent Judiciary: The Core of the Rule of Law," [http://icclr.law.ubc.ca/publications/reports/An\\_Independent\\_judiciary.pdf](http://icclr.law.ubc.ca/publications/reports/An_Independent_judiciary.pdf), *Vancouver: International Criminal Justice Center for Criminal Justice Reform and Criminal Justice Policy*, (1996): 20.

<sup>16</sup> Christopher Larkins, "Judicial Independence and Democratization: A theoretical and Conceptual Analysis." *The American Journal of Comparative Law* 44, no. 4 (1996): 607, 625.

independence dates back to antiquity, the first time an independent judiciary was established as part of a specific government architecture was part of early American history and can be found in Article III of the Constitution of the United States of America.<sup>17</sup>

Gerber begins by examining the political theory of an independent judiciary. He claims that the “story” of judicial independence began with Aristotle’s theory of a mixed constitution, and reaches its “climax” with Montesquieu’s idea that political power should be divided among three branches of government – the legislative, executive, and judicial branches of government – to ensure the people’s liberty.<sup>18</sup> He credits John Adams with writing the “concluding chapter” through his development of the political architecture of an independent judiciary; that is, Adams argued that judges must be independent from the executive and legislative branches, and this independence would be possible only if judges were provided tenure with adequate and stable salaries.<sup>19</sup> Gerber explains how the political theory of an independent judiciary and the experiences of the original thirteen states was the basis for Article III in the U.S. Constitution. He states that it was this principle of judicial independence that made judicial review possible, which he claims is the “ultimate expression” of judicial independence and is committed to the protection of individual rights.<sup>20</sup>

Over time, elements such as the separation of powers and judicial review, which Gerber argued was the ultimate consequence and characteristic of judicial independence<sup>21</sup>, along with many other concepts have been borrowed from the American legal system and have been

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<sup>17</sup> Scott Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1607-1787* (New York: Oxford University Press, 2011), 35-37, 325.

<sup>18</sup> *Ibid.*, 325.

<sup>19</sup> *Ibid.*, 325.

<sup>20</sup> *Ibid.*, 333-334.

<sup>21</sup> *Ibid.*, p. 37

“transplanted” into numerous legal systems around the world.<sup>22</sup> The United States Agency for International Development (USAID) appears to agree with Gerber regarding the court’s role in protecting individual rights. USAID states in its policy document that judicial independence contributes to the enforcement of contracts and private property rights, the reduction of corruption, the protection of civil and political rights, and provides restraints on arbitrary government action.<sup>23</sup>

The United Nations has endorsed the importance of an independent judiciary requiring each member state to guarantee the independence of its judiciary in its constitutions or laws of the country.<sup>24</sup> Furthermore, the European Convention on Human Rights recognizes the critical role of judicial independence, enshrining it in Article 6 of the Convention, which guarantees the right to be heard by an independent tribunal.<sup>25</sup>

Membership to many international organizations along with respect in the international community has helped to encourage widespread judicial reform initiatives. International and economic organizations such as the World Bank are using their financial power to facilitate judicial reform in developing countries, citing statistics that link the rule of law to economic growth.<sup>26</sup> In addition, the highly sought-after membership in the European Union has provided major incentive to implement rule of law reforms, with one of its entrance criteria being an independent and impartial judiciary. Moreover, multimillion-dollar democratization projects across the globe, including large financial contributions from the United States have played a significant role in shaping a wide range of judicial reform initiatives.

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<sup>22</sup>Maximo Langer. "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure," *Harvard International Law Journal* 45 no. 1 (2004): 1-2.

<sup>23</sup> United States Agency for International Development (USAID), “Guidance for Promoting Judicial Independence and Impartiality,” *Office of Democracy and Governance*, (Washington, DC: USAID, 2002): 5-6

<sup>24</sup> United Nations General Assembly Secretary General. “Basic Principles on the Independence of the Judiciary,” Art. 1, 1995. <http://www.unrol.org/doc.aspx?d=2248>.

<sup>25</sup> Anne Power, “Judicial Independence and the Democratic Process: Some Case Law of the European Court of Human Rights,” *International Bar Association Conference* (2012): 3.

<sup>26</sup> Helmke and Rosenbluth, “Regimes and the Rule of Law,” 346.

### *Judicial Independence: de facto and de jure Conceptualization*

In its most general sense, judicial independence requires a neutral judge to make fair and impartial decisions, free from outside pressure or coercion.<sup>27</sup> In addition, the judiciary as a whole must be independent and separate from the government and other concentrations of power.<sup>28</sup> It centers on the notion of conflict resolution by a neutral third party. Larkin identifies two reasons why this is important. First, it is essential for justice to prevail; that is, a neutral judge will allow all individuals equal treatment before the law, and ensure protection of their rights.<sup>29</sup> Secondly, the independence of the judiciary is critical when the government is party to the case, so that judges will not be biased in favor of the government. As such the judges must be protected from threats, interference, or manipulation that would cause them to unjustly favor the state.<sup>30</sup>

Larkin further argues that judicial independence must include “political insularity,” meaning that judges should not be used as tools to further political aims nor punished for unpopular decisions seen as preventing their realization.<sup>31</sup> These insularity safeguards typically result from establishing formal structural protections in legal documents. Lastly, Larkin asserts that the relationship of the courts to other parts of the political system and society, and the “extent to which they are seen as a legitimate body for determination of right, wrong, legal, and illegal,” is a highly important aspect to be incorporated into the definition of judicial independence.<sup>32</sup> Based upon his conceptualization of judicial independence, Larkin defines judicial independence as the

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<sup>27</sup> Kelly, “An Independent Judiciary: The Core of the Rule of Law,” 6.

<sup>28</sup> Ibid, p. 6.

<sup>29</sup> Larkins, “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,” 608.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., 609.

<sup>32</sup> Ibid., 610.

*existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact “neutral” justice, and determine significant constitutional and legal values.*<sup>33</sup>

Despite many efforts to define judicial independence, it has remained a difficult concept to measure in reality, and has often resulted in a country’s judiciary being evaluated according to a “checklist” of relevant factors deemed appropriate for determining judicial independence. Nevertheless, many international organizations and institutions have attempted to come up with working definitions of judicial independence. The *Basic Principles on the Independence of the Judiciary*, as outlined by the United Nations, defines judicial independence to be the duty of all governmental institutions to respect and observe the independence of the judiciary, and that this independence is guaranteed by the supreme law of the country.<sup>34</sup>

The council of Europe has also provided important recommendations concerning the independence of the judiciary. In 2010, the Committee of Ministers issued its *Recommendation to Member States on the Subject of Judges; their Independence, Efficiency, and Responsibilities*, which stated among other things that the principle of judicial independence is the “independence of each judge in the exercise of adjudicating functions.”<sup>35</sup> Additionally, the recommendation states that in making their decisions,

*judges should be independent and impartial and able to act, without any restriction, improper influence, pressure, threat or fear of interference, direct or indirect, from any authority, including, authorities internal to the judiciary.*<sup>36</sup>

The European Convention on Human Rights also endorses the concept of judicial

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<sup>33</sup> Ibid., 611.

<sup>34</sup> United Nations General Assembly Secretary General. “Basic Principles on the Independence of the Judiciary,” Art. 1, (1985): <http://www.unrol.org/doc.aspx?d=2248>.

<sup>35</sup> Committee of Ministers, “Recommendation CM/Rec (2010) 12 of the Committee of Ministers to Member States on Judges; Independence, Efficiency, and Responsibility,” Adopted by the *Committee of Ministers* on 17 November 2010, at the 1098<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>36</sup> Ibid.

independence, enshrining it in Article 6 of the Convention, which guarantees the right to be heard by an independent tribunal.<sup>37</sup> According to Anne Power, Judge of the European Court of Human Rights, the Court and former Commission have specifically developed four criteria to determine the independence of a tribunal including (1) the manner of appointment; (2) the term of office; (3) guarantees against outside pressure; and (4) the *appearance* of independence, which will indicate the existence or otherwise of a truly independent judiciary.<sup>38</sup>

The United States Agency for International Development states in its policy document that judicial independence contributes to the enforcement of contracts and private property rights, the reduction of corruption, the protection of civil and political rights, and provides restraints on arbitrary government action.<sup>39</sup> Transparency as an element of judicial independence has equally acquired universal appeal, and according to USAID, transparency is directly linked to adversarial procedures, stating that oral adversarial, and public proceedings have resulted in greater transparency in criminal proceedings in many countries around the world.<sup>40</sup> Additional definitions have included that an independent judiciary decides matters in accordance with the law; it equally and impartially enforces the constitution; it upholds political and civil rights; it can expect its decisions to be implemented and not impeded by other branches of the government; and it is free to make decisions without fear of retribution from other branches of government or political entities.<sup>41</sup>

While it is important that an independent judiciary is guaranteed and established in the supreme law of a country, it is equally important that its independence does not only exist on

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<sup>37</sup> Power, "Judicial Independence and the Democratic Process: Some Case Law of the European Court of Human Rights," 3.

<sup>38</sup> *Ibid.*, 4.

<sup>39</sup> USAID, "Guidance for Promoting Judicial Independence," 5-6.

<sup>40</sup> *Ibid.*, 9.

<sup>41</sup> Shannon Ishiyama Smithey and John Ishiyama "Judicious Choices: Designing Courts in Post-Communist Politics." *Communist and Post-Communist Studies*, 33 (2000): 165-167. See also Larkins, "Judicial Independence and Democratization," 608. And Hayo and Voigt, "Explaining de facto Judicial Independence," *International Review of Law and Economics* (Elsevier) 27 (2007): 278-280.

paper, but is also carried out in practice. Research suggests that judicial independence as it exists in legal documents is insufficient to determine the level of judicial independence that actually exists in a particular country. Unfortunately, too often the reliance on formal indicators of judicial independence do not match reality; that is, it is not representative of the way the judiciary behaves in practice.<sup>42</sup> Studies by Camp-Keith and Howard and Carey indicate the need to go beyond analyzing and assessing formal judicial independence to determining the actual level of judicial independence based upon the behavior of the judiciary in practice.<sup>43</sup>

Thus, once conceptualized, it is possible and important to distinguish between two types of judicial independence – de facto judicial independence and de jure judicial independence. De jure judicial independence is that which is derived from the letter of the law, and focuses on the legal foundations of judicial independence taking into account the method of nominating and/or appointing judges, term lengths, possibility of reappointment, and so on.<sup>44</sup> On the other hand, de facto judicial independence is defined as the *actual* independence enjoyed by judges, and focuses on the factually ascertainable degree of judicial independence.<sup>45</sup> Thus, de facto judicial independence accounts for variables such as effective average term lengths, the number of times judges have been removed from office, salaries, and whether the decisions of the highest court are dependent upon some other branch or body of government in order to be implemented.<sup>46</sup>

Feld and Voigt devised a measure of judicial independence to measure this dual concept of judicial independence by analyzing the judiciary as established by law in the country, and also how it operates in practice. The de jure judicial independence indicator is based on the legal

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<sup>42</sup> Larkins, "Judicial Independence and Democratization," 615.

<sup>43</sup> Linda Camp-Keith, "Judicial Independence and Human Rights Protection Around the World," *Judicature* 85, no. 4 (Jan-Feb 2002): 200. See also Robert M. Howard and Henry F. Carey, "Is an Independent Judiciary Necessary for Democracy," *Judicature* 87, no. 6 (May-June 2004): 285-286.

<sup>44</sup> Lars P. Feld and Stefan Voigt, "Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators," *European Journal of Political Economy* 19 (2003): 501.

<sup>45</sup> *Ibid.*, 498.

<sup>46</sup> *Ibid.*, 503-504.



foundation as found in legal documents of a country, and is comprised of 23 characteristics that are grouped into 12 variables. The de facto indicator focuses on the extent to which judicial independence is factually implemented, and uses 8 variables. These will be discussed in further detail in the next chapter when dealing with the measurement of judicial independence.

Research suggests that many countries that have high levels of de jure judicial independence have low levels of de facto judicial independence.<sup>47</sup> This finding and distinction between de jure and de facto judicial independence suggests that while it is important and necessary to establish de jure judicial independence, it is not sufficient to merely enshrine judicial independence within the context of legal documents. According to Howard and Carey, who studied the impact of de facto judicial independence on democracy, judicial independence is “beyond mere de jure provisions that seemingly protect judicial independence in a democratic and constitutionally responsible manner.”<sup>48</sup> Furthermore, although countries may have a constitutionally established judiciary, the lack of independence in practice can lead to significantly lower levels of political and civil rights for citizens, which results in a decrease in respect for human rights.<sup>49</sup> Therefore, based upon the above discussion, I argue that it is essential that judicial independence be established not only on paper, but in practice as well. As a result, a definition and measure of judicial independence that includes these two indicators is needed for proper assessment, and to provide a benchmark for countries undertaking these reforms to strive towards.

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<sup>47</sup> Ibid., 505.

<sup>48</sup> Howard and Carey, “Is an Independent Judiciary Necessary for Democracy?” 287.

<sup>49</sup> Ibid., 290.

## The Rule of Law and Human Rights

### *Conceptualizing the Rule of Law: Thick versus Thin Definitions*

The rule of law tends to be an abstract concept and tends to vary in meaning across cultures, ethnic groups, religion, geographical space, and time. The phrase *rule of law* has become a popular one in international and domestic politics, but there is still much uncertainty as to what exactly it means. Much like judicial independence, it appears the common response is “you know it when you see it.” Aristotle said more than two thousand years ago that, “The rule of law is preferable to that of any individual.”<sup>50</sup> It is a system in which the laws are public knowledge, they are clear in meaning, and apply equally to everyone.<sup>51</sup> Such a system upholds the political and civil liberties that have gained status as universal human rights over the past several decades.<sup>52</sup> The United Nations has attempted to establish a common rule of law definition designed to guide the work of various agencies and programs within the UN. According to the United Nations, the rule of law is said to be a principle of governance whereby all individuals, including the state, are equally subjected and accountable to the law, which is equally enforced and independently adjudicated, and includes measures to ensure the separation of powers, participation in decision-making, and procedural and legal transparency.<sup>53</sup>

The contested definitions of the rule of law can largely be classified as either “thick” (substantive) or “thin” (formal). Tamanaha attempts to define this classification by distinguishing systematically between formal and substantive definitions of the rule of law. Within each category he essentially constructs a continuum between “thin” and “thick” definitions. According to Tamanaha,

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<sup>50</sup> Aristotle, *Politics*, Book III, 1286, p.78.

<sup>51</sup> Carothers, “The Rule of Law Revival,” 96.

<sup>52</sup> Ibid.

<sup>53</sup> United Nations, Report of the Secretary General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,” UN Doc. S/2004/616 (23 August 2004).

*Formal conceptions of the rule of law address the manner in which the law was promulgated; the clarity of the ensuing norm; and the temporal dimension of the enacted norm...Formal conceptions of the rule of law do not seek to pass judgment upon the actual content of the law itself. Those who espouse substantive definitions go beyond this. They accept that the rule of law has the formal attributes mentioned above...but certain substantive rights are said to be based on, or derived from, the rule of law.<sup>54</sup>*

Thus, thin definitions are more formalistic and akin to “rule by law” without any emphasis on content. These definitions see the rule of law as an instrument of government action and people are ruled by it.<sup>55</sup> In other words, the thin rule of law may not actually be the rule of *good* laws. Joseph Raz emphasizes this point by stating that the rule of law should not be confused with democracy, justice, equality, or human rights. According to Raz “the rule of law” means literally what it says: the rule of the law, where taken in its broadest sense, means people should obey the law and be ruled by it.<sup>56</sup> Thus, Raz states that:

*A non-democratic legal system, based on the denial of human rights, on poverty, on racial segregation, sexual inequalities...may in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies...This does not mean that the nondemocratic system will be better...It will be an immeasurably worse legal system, but it may excel in one respect: in its conformity to the rule of law.<sup>57</sup>*

However, even with his literal stance regarding the meaning of the rule of law, Raz acknowledges some of the overlap between law and morality and the moral virtue of the rule of law. In this sense, Raz seems to contradict himself. Raz states that the law poses the danger of arbitrary power and that the rule of law is designed to minimize this danger created by the law.<sup>58</sup> This appears to recognize that the *rule of law* is more than adherence to formal rules. If the rule of law is to minimize the danger of law itself, this seems to suggest that the rule of law should

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<sup>54</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, and Theory* (Cambridge University Press, 2004), 91.

<sup>55</sup> Joseph Raz, “The Rule of Law and Its Virtue,” in *Liberty and the Rule of Law*, ed. Robert L. Cunningham, (Texas A&M University Press, 1979), 5.

<sup>56</sup> *Ibid.*

<sup>57</sup> Raz, “The Rule of Law,” 4.

<sup>58</sup> *Ibid.*, 16.

protect against the type of repressive, authoritarian system described above. Even the eight principles<sup>59</sup> Raz lists suggest that the rule of law is more than just adherence to formal legal rules. Thus, Raz may not be on the very extreme *rule by law* end of the continuum, but he nonetheless advocates a more “thin” definition of the rule of law.

In contrast, thick rule of law definitions are more substantive with greater emphasis placed on the content of the rules or laws. As a result, a thick definition of the rule of law requires that the law comply with substantive ideals, including liberal and/or social human rights.<sup>60</sup> According to Ringer, a thick view of the rule of law necessarily comprises certain universal moral principles or virtues, inherently liberal in character, and related to freedom.<sup>61</sup> Tamanaha characterizes this thick view as a substantive view that includes individual rights within the rule of law, and draws on Ronald Dworkin’s “rights conception” stating that

*The rule of law on this conception is the ideal rule...it assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole...It requires, as a part of the ideal of law, that the rules in the rule book capture and enforce moral rights.*<sup>62</sup>

Hart further expands on this notion of moral rights and obligations when examining the concept of law. He contends that there is a connection between law and morality, and between morality and justice.<sup>63</sup> Further, Hart contends that there is considerable overlap and many similarities between moral and legal rules,<sup>64</sup> and that the union of primary rules (those which impose duties and require individuals do or abstain from certain actions) and secondary rules (those which confer powers and lead to the creation or variation of duties and powers) are at the

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<sup>59</sup> Ibid, 7-11.

<sup>60</sup> Skanning, Svend-Erik Skanning, "Measuring the Rule of Law." *Political Science Research Quarterly* 63, no. 2 (June 2010): 451.

<sup>61</sup> Thom Ringer, "Development Reform, and the Rule of the Law: Some Prescriptions for a Common Understanding of the 'Rule of Law' and its Place in Development Theory and Practice," *Yale Human Rights & Development Law Journal*, 10 (2007): 190.

<sup>62</sup> Tamanaha, *On the Rule of Law*, on Dworkin's "rights conception," 102.

<sup>63</sup> Hart, "The Concept of Law," 155-157.

<sup>64</sup> Ibid, 172.

center of a legal system.<sup>65</sup> According to Hart, justice represents a segment of morality primarily concerned with the ways in which classes of individuals are treated.<sup>66</sup> Justice then can be said to be the “just” or “fair” application of legal rules or obligations (primary rules).

This concept of the “just” application of law is a common component in substantive definitions of the rule of law and it is the substantive definition of the rule of law that is most often associated with human rights. I tend to gravitate to a more thick, or substantive definition of the rule of law. This is primarily because previous literature suggests that it is this conception that has gained force and recognition with international organizations and institutions and foreign aid donors that seek to promote and fund rule of law reform initiatives in post-conflict and newly democratic states because of its close connection to human rights.

### ***The Relationship Between the Rule of Law and Human Rights***

The fact that the principle of the rule of law has been firmly established in the United Nations Charter suggests a universality of the principle. That is, the concept of the rule of law is not Western, European, or American, but rather is available to all societies. The United Nations asserts that promoting the rule of law nationally and internationally is at the heart of its mission, and that establishing respect for the rule of law is fundamental to achieving a durable peace in the aftermath of conflict, to the *effective protection of human rights*, and to sustained economic progress and development.<sup>67</sup> Skaaning emphasizes that order in society is an essential element, stating that citizens are to comply with the law and that they are to be granted equality under the law.<sup>68</sup> Further, Helmke and Rosenbluth and Carothers stress the importance that individual and minority rights are manifested in the rule of law.<sup>69</sup>

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<sup>65</sup> Hart, “The Concept of Law,” 81, 99.

<sup>66</sup> Ibid, 167.

<sup>67</sup> United Nations, “Rule of Law and Transitional Justice,” UN Doc. S/2004/616, p. 4

<sup>68</sup> Skanning, “Measuring the Rule of Law.” 452.

<sup>69</sup> Helmke and Rosenbluth “Regimes and the Rule of Law,” 346. *See also* Carothers, “The Rule of Law Revival,” 96.

Despite contested definitions of the rule of law, research has indicated a close relationship between the rule of law and human rights.<sup>70</sup> In today's world widespread human rights violations are the norm rather than the exception. The rule of law is seen as directly integral to the implementation of rights, and without the rule of law, rights would remain lifeless paper promises rather than the reality for many throughout the world.<sup>71</sup> Additionally, the rule of law may be indirectly related to better rights protection in that the rule of law is associated with economic development, democracy, and political stability, which are key determinants in rights performance.<sup>72</sup>

Apodaca conducted a study in 2004, which examined 154 developing and transitional countries, and indicates the importance of the rule of law and judicial independence in securing a variety of recognized human rights. According to the findings of this study, the rule of law decreases the government's use of non-judicial execution, torture, forced disappearance, and arbitrary imprisonment. In addition, the findings suggest that the rule of law gives citizens the ability to oust abusive leaders and seek judicial remedy for abuses, while also promoting the peaceful resolution of conflict.<sup>73</sup> Moreover, a high level of rule of law allows nongovernmental and international human rights organizations to flourish, which deters leaders from repressive actions. Hernandez-Truyol establishes that a close relationship exists between the rule of law ideal and the human rights ideal, stating that central to the rule of law ideal is the recognition of individuals' existence within society as both autonomous individuals and community members; that is, free beings with dignitary rights because of their humanness.<sup>74</sup>

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<sup>70</sup> Clair Apodaca, "The Rule of Law and Human Rights," *Judicature* 87, no. 6 (May-June, 2004): 292; *See also* Berta Esperanza Hernandez-Truyol, "The Rule of Law and Human Rights: Panal V. Human Rights Commitments in the Americas: From the Global to the Local," *Florida Journal of International Law* 16 (2004): 168.

<sup>71</sup> Apodaca, "The Rule of Law and Human Rights," 292-293.

<sup>72</sup> *Ibid.*, 294.

<sup>73</sup> *Ibid.*, 297-298.

<sup>74</sup> Hernandez-Truyol, "The Rule of Law and Human Rights," 194.

Furthermore, historical documents such as the English Magna Carta, the U.S. Constitution, the Universal Declaration of Human Rights, and the French Declaration of Rights of the Man and Rights of the Citizen all contain the same essential and fundamental concepts surrounding the principles that political power must be exercised in accordance with law, and disputes among private individuals and between individuals and the state must be subject to independent adjudication. The Universal Declaration of Human Rights explicitly states in its preamble that human rights should be protected by the rule of law.<sup>75</sup> The Magna Charta states

*No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice.*

Contained within this excerpt are basic principles related to judicial independence, the rule of law, and human rights. The fact that all three are present here and are referred to in the same short passage would suggest the close relationship shared amongst these three principles. Moreover, it is stated in the Universal Declaration of Independence that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,” which plainly states the close relationship between the rule of law and its role in securing human rights.

Ronald Dworkin’s definition was referred to earlier in this chapter to demonstrate the substantive meaning of the rule of law, but this definition also demonstrates the close relationship shared between human rights and the rule of law.<sup>76</sup> The Secretary-General has also attempted to establish a common rule of law definition to guide the work of various UN agencies, programs, and departments. The rule of law is said to

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<sup>75</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, at 71, U.N. Doc A/810 (1948), available at <http://www.unhcr.ch/udhr/lang/eng.pdf>

<sup>76</sup> See Tamanaha on Dworkin.

*refer to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*<sup>77</sup>

This definition not only includes formal and substantive principles, but it also represents the idea of the rule of law as something that can be linked to democracy, good governance, and human rights.<sup>78</sup>

While the human rights movement has increasingly encountered conceptual, normative and political challenges, the rule of law seems to be the closest thing in existence to a universal political ideal. In particular, the human rights movement's claim to universality has been shattered by critiques that take issue with the secular, individualistic, liberal commitments of the movement. In contrast, the rule of law appears to be widely accepted by people of different ideological persuasions. While states may differ in their legal cultures, values, and norms the universal principle of the rule of law transcends these differences. However, although "thick" or substantive conceptions of the rule of law have been widely accepted, they are certainly biased towards theories of liberalism, particularly western notions of liberalism with the focus on democratic principles of political and civil rights along with fundamental human rights.

### **Establishing the Rule of Law and Human Rights Through Judicial Independence**

Based upon the above established relationship between the rule of law and human rights, and a significant body of literature that suggest an independent judiciary is necessary to uphold the rule of law and ensure protection for human rights, I argue that by establishing the rule of law

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<sup>77</sup> United Nations, "Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", UN Doc. S/2004/616, p. 4, para. 6, 23 August 2004.

<sup>78</sup> Richard Sannerholm, "Legal Judicial, and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template," *Journal of Conflict and Security Law* 12 no. 1 (2007): 76



and having an independent judiciary to uphold the rule of law will result in the creation of greater respect for human rights. As a result it is necessary to understand the connection shared between judicial independence, the rule of law, and human rights.

The principle role of an independent judiciary is to uphold the rule of law and ensure the supremacy of law. Justice F.B. William Kelly of the Supreme Court of Nova Scotia states that a society in which individuals know their rights are guaranteed by fair laws that apply equally to all citizens, and are applied by a transparent, independent, and impartial judiciary, “is always a secure and stable society.”<sup>79</sup> He contends that the key to establishing the rule of law is ensuring the independence of the judiciary, and providing the environment of a fair and equitable legal system whereby an independent judiciary can flourish.<sup>80</sup> According to Prefontaine and Lee in their document prepared for the World Conference on the Universal Declaration of Human Rights, while independence may take on a variety of forms across different jurisdictions, the same principle applies, namely:

*The protection of human rights is dependent on the guarantee that judges will be free and will reasonably be perceived to be free to make impartial decisions based on the facts and the law in each case, and to exercise their role as prosecutors of the constitution, without any pressure or interference from other sources of the law, especially government.*<sup>81</sup>

Accordingly, the authors hold that this basic premise on the independence of the judiciary is crucial to the maintenance of the rule of law.<sup>82</sup>

Furthermore, in examining the effects of legal institutions on human rights protection, it has been argued that legal institutions, and in particular judicial independence, are significant in

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<sup>79</sup> Kelly, “An Independent Judiciary,” 20.

<sup>80</sup> Ibid.

<sup>81</sup> Daniel Prefontaine and Joanne Lee, “The Rule of Law and the Independence of the Judiciary”, World Conference on the Universal Declaration of Human Rights, Montreal, 7-9 December, 1998, p. 1-2.

<sup>82</sup> Ibid., 2.

protecting human rights.<sup>83</sup> Camp Keith's study examines the relationship between judicial independence and human rights protection with a global set of countries. Ultimately, she concludes that an efficient, equitable, and independent judiciary, which can curtail other branches of government, is an important prerequisite for human rights protection.<sup>84</sup> Specifically, Camp Keith's analysis demonstrates how effective national constitutional provisions on judicial independence are in achieving a truly independent judiciary that is able to limit intrusions upon individual rights by other branches of the government, and that formal judicial independence does have an actual impact on state human rights behavior.

In addition to maintaining the rule of law and providing for democratic stability, an independent court will ultimately prevent political leaders from flagrantly disregarding human rights and constitutional law. Like judicial independence however, it is essential to ensure that the protection of human rights does not merely exist in legal documents and policies, but that this protection is actually implemented and carried out in practice.

The judiciary is ultimately responsible for carrying out and enforcing the law of the land. Essentially this means that the judiciary is charged with upholding the rule of law in a country. Because of the widespread acceptance of a thick or substantive definition of the rule of law which incorporates basic human rights that have been previously outlined in the Universal Declaration of Human Rights, the judiciary then, is ultimately responsible for upholding and protecting these rights as they constitute part of the law within the country. Thus, *de facto* independence of the judiciary is crucial to carrying out this obligation. Therefore, it is argued that an independent judiciary is essential to upholding individual rights and ensuring the protection of human rights by enforcing the laws of a country.

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<sup>83</sup> Frank Cross, "The Relevance of Law in Human Rights Protections", 19 International Review of Law and Economics, 1999, p. 87.

<sup>84</sup> Linda Camp Keith, "Judicial Independence and Human Rights Protection Around the World," 195.

## **Explaining the Global Effort to Establish the Rule of Law**

In the post-Cold War period, democratization and governance reforms have constituted the basis of Western interventions in many post-authoritarian and post-conflict nations across the globe. When examining rule of law and judicial reforms, it is also necessary to look beyond the mere establishment of formal rules and the presence of an independent judiciary and examine in particular the legal traditions and political framework under which such transitions and reforms are taking place. This section will look at some of the arguments and reasons why the common law legal tradition has become preferred over a civil law legal system and address some of the conflicting arguments as to whether democracy is necessary and ensures the success of judicial independence and the rule of law.

### ***Political Regimes***

The development of international legal organizations and institutions that support and advocate democratic principles and human rights, along with the further development of international law and widespread democratization initiatives appears to largely be due to the influence of liberalism and its emphasis on the importance of global standards and the rule of law.<sup>85</sup> Liberal theory rests on the premise that an established democracy results in peaceful relations among other democratic states because of their shared legitimate political orders based upon shared democratic principles. Liberalism represents a particular approach to government, which emphasizes a commitment to the rule of law, individual rights, and representative government with limitations on the powers of the state.<sup>86</sup> Despite weaknesses and limitations in explaining the relationship between states, current practices of many post-conflict states suggests

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<sup>85</sup> Scott Burchill, "Liberalism" in *Theories of International Relations*, ed. Scott Burchill, Andrew Linklater, Richard Devetak, Jack Donnelly, Terry Nardin, Matthew Peterson, Christian Reus-Smit, Jacqui True, 4<sup>th</sup> ed. (New York: Palgrave MacMillan, 2009), 58-62.

<sup>86</sup> *Ibid.*, 58-62.

that liberal democratic theory seems to be the basic justification for spreading democracy around the world and the numerous reform initiatives that are taking place promoting democratic principles including the rule of law, judicial independence, and human rights.

While there has been a global effort to move historically authoritarian regimes towards becoming more democratic and seeking to establish democratic institutions, there is still significant debate as to whether a democracy is necessary for judicial independence and the rule of law to prevail. According to Gibler and Randazzo, in as much as an independent judiciary is considered to be a democratic institution, established democracies are more likely to have a highly independent judiciary as opposed to authoritarian regimes. Although the extent to which democracy plays a role in the establishment of an independent judiciary is highly contested, a significant portion of the literature indicates that independent judiciaries are more likely to be found in democratic societies.<sup>87</sup>

Classic comparative law and politics literature argues that judicial independence is central to the process of democratization and essential to ensure that rules are applied impartially and develop over time. Larkin argues that the rule of law, or the “submission of the state to law” is significant to democratization, and as courts are generally assigned to the enforcement of law and individual rights, courts are powerful actors in maintaining the rule of law.<sup>88</sup> However, the ability for courts to carry out this role is contingent upon the independence of the judicial institution.<sup>89</sup> Gibler and Randazzo suggest that an independent judiciary is necessary for democracies and is crucial in maintaining and establishing the rule of law in a nation because it

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<sup>87</sup> Ishiyama and Smithey, “Judicious Choices,” 164. *See also* Gibler and Randazzo, “Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding,” *American Journal of Political Science*, 55 no. 3 (July, 2011) 696-709; and Phillips, “The War on Civil Law,” 929.

<sup>88</sup> Larkins, “Judicial Independence and Democratization,” 606.

<sup>89</sup> Kelly, “An Independent Judiciary,” 2.

provides a way of checking executive and legislative powers through the protection of citizens' rights.<sup>90</sup>

Smithey and Ishiyama suggest that a consensus exists regarding the important role a powerful and independent judiciary plays in the consolidation of democratic government in post-conflict countries in Eastern Europe.<sup>91</sup> However, this literature merely supports the establishment of an independent judiciary in order to strengthen democratic processes, yet, it's highly debated whether democracy is necessary for judicial independence and the rule of law to prevail. Helmke and Rosenbluth argue that democracy is necessary but is insufficient for judicial independence and that judicial independence does not automatically lead to the rule of law. They conclude that judicial independence may occur without democracy, but without democracy, judicial independence is entirely neutralized by judges' incapacity or unwillingness to challenge the government and thus, will not lead to the rule of law.<sup>92</sup> While the authors suggest that democracy is a necessary element, democracy alone is not sufficient, and they contend that public support plays a crucial role in establishing and maintaining the rule of law.

Similarly, Franklin and Baun conclude that institutions alone are not sufficient to produce stable and effective constitutional governments.<sup>93</sup> They examine the role of political culture in establishing constitutionalism and whether particular institutions of liberal democracy are required to provide for constitutional government. While there is a close relationship between liberal democracy and constitutionalism, there may be other institutional framework options under which the rule of law could be established. Baun and Franklin suggest that regime building that is "constitutional" but not necessarily "democratic" is a possible path to establishing a

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<sup>90</sup> Gibler, and Randazzo, "Testing the Effects of Independent Judiciaries," 697.

<sup>91</sup> Ishiyama and Smithey, "Judicious Choices," 164.

<sup>92</sup> Helmke and Rosenbluth "Regimes and the Rule of Law," 356. *See also*, Alison J. Ayers, "We All Know A Democracy When We See One: (Neo)liberal orthodoxy in the 'democratisation' and 'good governance' project," *Policy and Society*, 27 (2008): 4.

<sup>93</sup> Daniel P. Baun, and Michael J. Franklin, "Political Culture and Constitutionalism: A Comparative Approach." In *Comparative Constitutional Law*, by Vicki C. Jackson & Mark Tushnet, New York: Foundation Press, (1994): 218.

constitutional state.<sup>94</sup> Therefore, while liberal democracy appears to be the best institutional framework for constitutionalism, or a state in which the rule of law prevails, the mere *existence* of democratic institutions alone does not guarantee a constitutional government.<sup>95</sup> This analysis tends to support Helmke and Rosenbluth's claim that public support is of central importance to establishing the rule of law and an independent judiciary, and that democracy alone does not necessarily lead to either.<sup>96</sup>

Despite contradicting literature on the point of whether democracy does in fact lead to judicial independence and the rule of law, widespread global initiatives continue to advocate and propose Western style democracy and democratic principles as being necessary to strengthening the rule of law and the independence of the judiciary. In addition to examining the role played by the type of political regime in justice sector reforms, it is also necessary to look at the type of legal system operating in the various countries where such reforms are taking place.

### ***Common Law v. Civil Law***

As a result of the global initiative to reform and firmly establish the rule of law, the civil law approach has been increasingly coming under attack facing criticisms of lacking transparency, being inefficient, unaccountable, and unable to protect the individual rights of citizens.<sup>97</sup> In addition to the large movement for countries based upon a civil law tradition to adopt elements and borrow concepts from the common law system, nations are increasingly looking specifically to the American adversarial model.<sup>98</sup> In contrast to the civil law system, the common law approach has been upheld as being both transparent and accountable. It has been seen to offer a better opportunity for establishing an independent and impartial judiciary, which

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<sup>94</sup> Ibid., 214.

<sup>95</sup> Ibid., 218.

<sup>96</sup> Helmke and Rosenbluth "Regimes and the Rule of Law," 361-362.

<sup>97</sup> Phillips, "The War on Civil Law," 916.

<sup>98</sup> Ibid., 916. *See also* Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure," 1, 5.

has been viewed as a core element of the rule of law and essential to providing the necessary foundation for economic growth.<sup>99</sup>

Many comparative law scholars have pointed out that today there is no such thing as a purely common law or civil law country, however, there is considerable debate as to the extent that the two are converging. Many if not all systems display some degree of hybridization, and such “mixing” is the result of both historical processes of borrowing, colonization, and imitation, and in some countries, the growth of the modern administrative state.<sup>100</sup> In general, rule of law reforms have been widespread across the globe, and at the heart of such initiatives has been criminal justice and judicial reform. However, there has been considerable debate as to whether a common law adversarial model would be more successful in achieving these goals versus its counterpart of the civil law inquisitorial model.

Phillips argues that common law adversarial procedure would establish the kind of transparent, efficient, and accountable criminal justice system, which in turn would lead to the rule of law necessary for economic growth.<sup>101</sup> Phillips refers to this attack on civil law as the “global war on civil law”, and asserts that the ascendancy of common law is most clearly seen in developing countries where a robust judicial system has been seen as a key ingredient in the establishment of the rule of law, and also a necessary foundation for economic growth.

Common law advocates argue that an adversarial system offers greater transparency, accountability, improved efficiency, a better business climate, and eliminates corruption.<sup>102</sup> Civil law on the other hand is said to represent an antiquated, inefficient, and overly regulatory system that is unable to protect individual rights or property interests. Whether one system is in fact

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<sup>99</sup> Ibid., p. 919.

<sup>100</sup> Ibid., p. 919, 922.

<sup>101</sup> Ibid., p. 915.

<sup>102</sup> Ibid., 916.

superior over another appears to be relatively insignificant to those implementing new policy. The numerous global reform efforts seem to demonstrate an acceptance of the belief that the adoption of a common law system is the most efficient and productive way to establish the rule of law. Phillips asserts that the common law tradition is not being upheld as a *superior* model to that of civil law in terms of advancing a set of legal principles, but rather, common law is perceived as a more *efficient* model for facilitating a particular kind of economic reality.<sup>103</sup>

With concern focusing on the protection of individual rights and strengthening international investment, justice officials in civil law countries are increasingly turning to the common law tradition as a “source of innovation and reform”.<sup>104</sup> Such support can be seen in many Eastern European and Latin American countries, as well as in regions in Sub-Saharan Africa, Asia, and the Middle East.<sup>105</sup>

Current research on the causes and consequences of the rule of law has increasingly begun to receive attention. However, this research is limited by the debate over whether the presence of democratic processes or a particular legal system results in the effective establishment of an independent judiciary and rule of law. Moreover, while there appears to be some consensus regarding the presence of the rule of law and judicial independence in strengthening democratic processes, it is unclear as to what extent the regime type effects the development of either and whether democracy is needed for the rule of law and judicial independence to prevail.

### **Research Questions and Hypotheses**

During the last three decades, approximately eighty countries have gone through democratization and have faced the challenges of dealing with the consequences and crimes of

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<sup>103</sup> Ibid., p. 949.

<sup>104</sup> Ibid., p. 948.

<sup>105</sup> Carothers, “The Rule of Law Revival,” 95-96.



previous authoritarian rulers.<sup>106</sup> Many countries have undertaken massive reparatory, criminal, and institutional reforms from which the field of ‘transitional justice’ has emerged. However, the field is still in a relatively young stage and there is considerable disagreement on key conceptual and theoretical issues, and a lack of systemic empirical testing.<sup>107</sup>

One particular sub-field that has been the topic of much debate has been that of ‘institutional’ transitional justice, which is primarily concerned with democratic reforms in areas such as the rule of law and the judiciary. However, this research is, for the most part incomplete. The disagreement over the extent to which an independent judiciary effects the establishment of the rule of law has resulted in the failure to determine whether an independent judiciary is necessary for the establishment of the rule of law, and thereby a stable and peaceful society where human rights and civil liberties prevail. There is limited empirical evidence that focuses specifically on the relationship between judicial independence and the rule of law, and demonstrates whether an independent judiciary is necessary for the effective establishment of the rule of law, and if so, what it is that leads to judicial independence. Thus, while there is substantial literature that suggests the importance of judicial independence and the rule of law, little has been done to separate judicial independence from the rule of law to analyze the relationship between the two.

Thus, the goal of this research is to narrow the existing gap in the literature discussed above, and answer the following three questions:

- 1) Is a highly independent judiciary exceedingly important for the establishment of the rule of law?
- 2) Does the type of political regime affect whether a country has a highly independent judiciary and strongly established rule of law?

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<sup>106</sup> Paola Cesarini, “Transitional Justice,” in *The Sage Handbook of Comparative Politics*, ed. Todd Landman and Neil Robinson, 497-498.

<sup>107</sup> Ibid.

- 3) Is the type of legal system in a country determinative of high levels of judicial independence and strong rule of law?

Based upon the existing literature related to the effectiveness of democratic institutions and processes in establishing judicial independence, I hypothesize that countries that are classified as democracies and operate on the basis of a common law legal system will be more likely to have a strong rule of law and established independent judiciary than those which are classified as autocracies and operate under a civil law system. Additionally, relative to comparative law literature that suggests that judicial independence provides the foundation for effectively establishing the rule of law, I predict that a positive relationship will exist between judicial independence and the rule of law. That is, countries that exhibit higher levels of judicial independence will also have a strongly established rule of law.

Answering these questions will ultimately allow for a more in-depth understanding of the connection between judicial independence and the rule of law. It will also provide further evidence in support of policy initiatives that seek to reform the judiciary in an effort to establish human rights and the rule of law. Furthermore, focusing on the type of legal system and political regime that best reflect the presence of an independent judiciary will contribute to the existing literature by providing empirical support of systems which are most likely to produce judicial independence, and will perhaps provide insight on what can be expected in the future in terms of judicial reform strategies.

## CHAPTER THREE

### QUANTITATIVE COMPARATIVE ANALYSIS

#### **Method and Data**

My research will employ both a quantitative aggregate approach and a detailed qualitative approach (the qualitative portion of the research will be discussed in the next chapter). This chapter deals with the quantitative component of my research, which examines the major independent countries in the global system. Unfortunately, due to missing data for some of the variables in my study, only 51 countries are included in the population of my analysis. I will use OLS multiple regression analysis to analyze the effect of three independent variables (legal system, type of political regime, and judicial independence) on two dependent variables (judicial independence and the rule of law). I rely on data from 2007 through 2012, the most recent years available for each of the 51 countries represented in my study. The data is taken from existing databases, datasets, and indices including the World Justice Project – Rule of Law Index, Center for Systemic Peace – State Fragility Index and Matrix, Polity IV Project – Polity Scores, and the CIA World Fact Book. Additionally, I rely on a dataset developed by Feld and Voigt to construct a measure of judicial independence.<sup>108</sup>

To measure judicial independence, I rely on a dataset developed by Feld and Voigt that gauges judicial independence according to a set of two indicators, which include de jure judicial independence and de facto judicial independence, both of which will be discussed in greater detail below. Data for the de jure indicator were available for 75 countries, while data for the de

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<sup>108</sup> Feld and Voigt, “Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set Indicators,” 500-504.

facto indicator was only obtainable for 66 countries.<sup>109</sup> Countries were only included in the dataset if a they contained a minimum of three variables for the de facto indicator, which explains the unequal and relatively low number of countries in the dataset.<sup>110</sup> Due to the unequal numbers between the set of indicators, I cross-referenced the countries to ensure the same countries were represented in both sets. Countries that appeared in one of the indicators but not the other were dropped from the dataset.

I use the World Justice Project (WJP) Rule of Law Index to measure the rule of law in my analysis. The WJP Index includes eight factors, with each factor further broken down into a number of sub factors, in order to obtain an overall rule of law index score. The WJP Rule of Law Index for 2012-2013 covers ninety-seven countries. I cross-referenced these countries with those that I was able to obtain de facto and de jure judicial independence scores for and eliminated those that were not included in my dataset for judicial independence. Because the WJP Rule of Law Index includes factors that also measure the independence of the judiciary, it was necessary to subtract these factors out and recalculate the rule of law index scores for each country included in my analysis (this will be discussed in further detail below).

Since I was only able to obtain data relating to judicial independence for a limited number of countries in the global system, and because it is necessary to have an equal amount of data and information across the same countries, only 51 countries are used in the analysis. There are shortcomings in my analysis based on the fact that only 51 countries are used. Namely, there are not an equal number of countries from the various regions around the world. That is, some areas such as the Middle East and Africa are underrepresented in the study. However, there is significant variance among the 51 countries that are included in terms of the type of political

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<sup>109</sup> Ibid., 504.

<sup>110</sup> Ibid.

regime and legal system and also the level of judicial independence and strength of the rule of law. Additionally, although not all regions are represented equally, each region of the world is included. It should also be noted that the 51 countries taken from the Feld and Voigt measure are included among the countries in the other data sources for rule of law, type of legal system, and type of political regime.

### **Variables: Testing the Effects of Judicial Independence on the Rule of Law**

#### *Dependent Variable*

When testing the effect of judicial independence on the rule of law, the dependent variable is the rule of law, which is represented as an index score between 0 and 1, with low values denoting a weaker rule of law and high values indicating a strong rule of law. The rule of law is a fairly abstract concept and can be difficult to measure in that such a concept can take on many different meanings depending on the individual defining it. The meaning can vary across cultures, racial and ethnic groups, religion, geographical space, and time. Furthermore, as previously discussed, definitions of the rule of law vary between “thick,” or substantive definitions and “thin,” or formal definitions. Thus, I attempted to construct a definition that was most consistent and common among the literature I reviewed.

The United Nations has attempted to establish a common rule of law definition designed to guide the work of various agencies and programs within the UN. According to the United Nations, the rule of law is said to be a principle of governance whereby all individuals, including the state, are equally subjected and accountable to the law, which is equally enforced and independently adjudicated, and includes measures to ensure the separation of powers, participation in decision-making, and procedural and legal transparency.<sup>111</sup> Similarly, Skaaning

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<sup>111</sup> United Nations, Report of the Secretary General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,” UN Doc. S/2004/616 (23 August 2004).

emphasizes that order in society is an essential element, stating that citizens are to comply with the law and that they are to be granted equality under the law.<sup>112</sup> Further, Helmke and Rosenbluth and Carothers stress the importance that individual and minority rights are manifested in the rule of law.<sup>113</sup> For the purposes of my study, I tend to gravitate towards a “thick,” or substantive definition of the rule of law, as previous literature suggests that it is this conception that has gained force and recognition with international organizations and institutions along with foreign aid donors that seek to promote and fund rule of law reform initiatives in post-conflict and newly democratic states. Thus, I conceptualized the rule of law to mean that people obey and respect the law and are ruled by it, while the government, which respects its citizens’ individual political rights and civil liberties is also ruled by the law, and subjected to it.

To measure the rule of law I rely on the Rule of Law Index constructed by the World Justice Project (WJP). The WJP Rule of Law Index is derived from a set of principles that represent a working definition of the rule of law and is intended to provide a comprehensive assessment of the extent to which countries adhere to the rule of law in practice.<sup>114</sup> It covers a total of 97 countries and is measured according to nine factors that are further broken down into forty-eight subfactors.<sup>115</sup> The index scores are constructed from over 400 variables that are drawn from the collection of two original sources of data: a General Population Poll (GPP) conducted by leading local polling agencies using a representative sample of 1,000 respondents in three cities per country; and a series of Qualified Respondents’ Questionnaires (QRQ) which

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<sup>112</sup> Svend-Erik Skanning, "Measuring the Rule of Law." 452.

<sup>113</sup> Helmke and Rosenbluth "Regimes and the Rule of Law," 346. *See also* Carothers, "The Rule of Law Revival," 96.

<sup>114</sup> Arast, M., Botero, J., Ponce, A., & Pratt, C. "WJP Rule of Law Index 2012-2013." Washington, D.C. *The World Justice Project*, 2012-2013: 2.

<sup>115</sup> Quantitative data is not available for the ninth factor, informal justice, which deals with the role of traditional, tribal, and religious courts as well as community-based systems in resolving disputes and is measured according to two concepts: whether such traditional, communal, and religious dispute systems are in fact impartial; and the extent to which these systems respect and protect fundamental human rights. Thus, the dataset really represents the rule of law according to eight factors and forty-six indicators. According to WJP, efforts have been made over the last three years to collect this data, however, the complexities of these systems and collecting data across various countries has been challenging. Therefore, although some data has been collected on this factor, WJP does not include it in the aggregated scores and rankings.

consists of closed-ended questions and is completed by country experts, practitioners, and scholars who have qualified expertise in civil and commercial law, criminal justice, labor law, and public health.<sup>116</sup> To conceptualize the rule of law, the WJP constructs a working definition according to a set of principles that were derived from international standards and norms as well as national constitutions.

The WJP attempts to balance its definition between thin and thick conceptions of the rule of law by incorporating both substantive and procedural elements. Nevertheless, their definition can be said to lean more on the thick, or substantive side of the rule of law continuum with its incorporation of factors that capture the extent to which a country respects core human rights. The WJP defines the rule of law as a “rules-based system in which four universal principles are upheld: 1) the government and its officials and agents are accountable under the law; 2) the laws are clear, publicized, stable, and fair, and protect fundamental human rights, including security of persons and property; 3) the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and 4) justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”<sup>117</sup> The eight factors that capture the measurement of the four principles listed above include: limited government powers; absence of corruption; order and security; fundamental rights; open government; regulatory enforcement; civil justice; and criminal justice. The final scores and rankings were constructed based upon codifying questionnaire items into numeric values; producing raw country scores by aggregating the responses from several individuals (experts or general public); the raw scores were then

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<sup>116</sup> Ibid., 1-2. According to the WJP, over 2,500 experts and 97,000 other individuals from around the world have participated in the project to date.

<sup>117</sup> Ibid., 2, 9.

normalized and aggregated into sub-factors and factors using simple averages; the final rankings and scores were produced using the normalized scores.<sup>118</sup>

Because I seek to analyze the relationship between judicial independence and the rule of law, it is important that the measures of these variables do not overlap with one another. That is, a factor designed to measure the level of judicial independence cannot be included in the measurement of the overall rule of law score, and vice versa. The WJP Rule of Law Index includes several factors that are related to the independence of the judiciary. Therefore, it was necessary to subtract these factors out and recalculate the rule of law index score for each country in my analysis. When recalculating scores for the rule of law index, I followed the same method of calculation as outlined by the WJP. Once I removed the necessary sub-factors, I then recalculated the scores for each of the eight factors by adding the sub-factor scores contained within each factor together and dividing by the number of sub-factors to obtain a new aggregated score for each factor. The eight factor scores were then added together and divided by eight to produce a new rule of law index score between 0 and 1 for each country.

The first factor in the WJP Rule of Law Index, limited government powers, measures the extent to which those who govern are subject to law and contains seven sub-factors. Sub-factor 1.3 was removed because it measures the concept of judicial independence as a component of the system of checks and balances. The remaining six sub-factors collectively measure the effective limitation of government powers in the law; the effectiveness of institutional checks on government power by the legislature and independent auditing and review agencies; whether government officials are sanctioned for misconduct; and the effectiveness of non-governmental

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<sup>118</sup> Ibid, 12.



oversight by the media and civil society, and the extent to which transitions of power happen in accordance with the law.<sup>119</sup>

Factor two essentially measures the absence of corruption. The WJP defines corruption to be the “use of public power for private gain,” and looks at three forms of corruption when measuring this variable including bribery, improper government influence by public or private interests, and misappropriation of public funds or other resources.<sup>120</sup> Although this factor contains a sub-factor, which relates to the level of corruption within the judiciary, it is not removed from the index because corruption is not synonymous with independence, impartiality, and neutrality, and therefore, does not pertain to the independence of the judiciary. The absence of corruption deals with adherence to the law and not abusing power. Thus, corruption is not included in the definition of judicial independence and as such it does not make sense to remove it from the index. The third factor is “order and security,” and measures the extent to which society assures the security of persons and property. According to WJP, security is one of the many defining aspects of the rule of law in a society and also is “a precondition for the realization of the rights and freedoms that the rule of law seeks to advance.”<sup>121</sup> That said, this factor contains three sub-factors that include the absence of crime, absence of political violence, and the absence of violence as an acceptable means of remedy for personal grievances. There were no sub-factors removed from this factor of the index.

While the WJP Rule of Law Index does balance between formal and substantive measures of the rule of law, its most substantive measure focuses on basic human rights as they have been enumerated by various international standards, including the Universal Declaration of Human Rights. This recognizes that the rule of law must go beyond the mere notion of “rule by

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<sup>119</sup> Ibid., 13.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

law” and must encompass more than just a system of rules. According to the WJP, a “system of positive law that fails to respect core human rights established under international law does not deserve to be called a rule of law system.”<sup>122</sup> Thus, the fourth factor measures “fundamental rights,” which is measured by the extent to which fundamental human rights are protected. Although this factor does not include the full range of rights that exist, it does include and focus on those rights that have been firmly established under international law and are most closely related to the rule of law. There are eight sub-factors contained within the factor of fundamental rights, which can be classified according to three categories of rights: civil and political rights; social, economic, and cultural rights; and environmental and developing rights. There were no subtractions from this factor.

The fifth factor is “open government” and measures the extent to which a society has clear, publicized, and stable laws; whether administrative proceedings are open to public participation; and whether official information is available to the public.<sup>123</sup> There are four sub-factors through which the open government factor is measured. Factor six is “regulatory enforcement” and measures the extent to which regulations are fairly and effectively enforced according to five sub-factors. Neither one of these factors had any of its sub-factors removed.

The last two factors are “civil justice” (factor 7) and “criminal justice” (factor 8). Civil justice is measured according to seven sub-factors that measure the accessibility, affordability, effectiveness, impartiality, and cultural competency of the civil justice system. In general, this factor is designed to measure whether citizens can resolve their grievances peacefully and effectively through the civil justice system.<sup>124</sup> Sub-factor 7.2 (civil justice is free of discrimination) measures the impartiality of the system and the extent to which it is free from

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<sup>122</sup> Ibid., 14.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid., 15.

discrimination. This includes the court system or formal dispute resolution system. As such, since impartiality is included in the definition of an independent judiciary, this sub-factor was removed. The sub-factors 7.5 (civil justice is free of improper government influence) and 7.6 (civil justice is effectively enforced) were also removed on the basis of their relation to judicial independence. Sub-factor 7.5 measures whether formal decisions are free of improper influence by public officials or private interests, which again is tied to whether the judiciary is acting independently. Sub-factor 7.6, which measures the effective enforcement of civil justice, was also removed because this is tied to the judiciary's role of enforcing laws and decisions. This has to do with the ability of the judiciary to independently enforce civil justice, that is, the formal resolution of a dispute is not dependent upon another branch of government for enforcement.

The final factor, "criminal justice," is also comprised of seven sub-factors that measure the effectiveness of the criminal justice system as a whole. The WJP stresses that an effective criminal justice system is a key component of the rule of law because it provides a means to resolve grievances and bring action against individuals for offenses against society.<sup>125</sup> Like the civil justice factor, criminal justice included two sub-factors that each dealt with impartiality and improper government influence. As a result, these two sub-factors (8.4 and 8.6) were dropped from the index score. The final result was eight factors designed to provide a comprehensive measure of the rule of law that together were further broken down into a total of forty sub-factors. This was then recalculated according to the methods described above providing for an overall rule of law index score for each country in the analysis.

### ***Independent Variable***

The independent variable in the study is judicial independence, which is represented as an index score between 0 and 1, with low values being associated with low levels of judicial

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<sup>125</sup> Ibid., 15-17.

independence and high values being associated with high levels of judicial independence. Much like the rule of law, judicial independence is also an abstract concept to measure. Likewise, definitions of judicial independence can also vary across cultures, racial and ethnic groups, religion, geographical space, and time. Here again it becomes necessary to try and find a common denominator in the various meanings of judicial independence amongst the existing literature. The *Basic Principles on the Independence of the Judiciary*, as outlined by the United Nations, defines judicial independence to be the duty of all governmental institutions to respect and observe the independence of the judiciary, and that this independence is guaranteed by the supreme law of the country.<sup>126</sup> Kelly asserts that an independent judiciary makes fair and impartial decisions, is free from outside pressure or coercion, and is separate from the government and other concentrations of power.<sup>127</sup>

Additional definitions have included that an independent judiciary decides matters in accordance with the law and justice; it equally and impartially enforces the constitution; it upholds political and civil rights; it can expect its decisions to be implemented and not impeded by other branches of the government; and it is free to make decisions without fear of retribution from other branches of government or political entities.<sup>128</sup> While it is important that an independent judiciary is guaranteed and established in the supreme law of a country, it is equally important that its independence does not only exist on paper, but is also carried out in practice. Feld and Voigt devised a measure of judicial independence to measure this by analyzing the judiciary as established by law in the country, and also how it operates in practice.

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<sup>126</sup> United Nations General Assembly Secretary General. "Basic Principles on the Independence of the Judiciary," Art. 1, 1995. <http://www.unrol.org/doc.aspx?d=2248>.

<sup>127</sup> Kelly, "An Independent Judiciary: The Core of the Rule of Law," [http://icclr.law.ubc.ca/publications/reports/An\\_Independent\\_judiciary.pdf](http://icclr.law.ubc.ca/publications/reports/An_Independent_judiciary.pdf), *Vancouver: International Criminal Justice Center for Criminal Justice Reform and Criminal Justice Policy*, 6.

<sup>128</sup> Ishiyama and Smithey, "Judicious Choices: Designing Courts in Post-Communist Politics," 165-167. *See also* Larkins, "Judicial Independence and Democratization," 608. *And* Hayo and Voigt, "Explaining de facto Judicial Independence," 278-280.

For my research, I conceptualize judicial independence by defining it as the impartial resolution of conflict by a neutral third party and the extent to which a judiciary is free to exert its own judgment without fear of retribution; all governmental institutions and branches respect this freedom, and it is guaranteed by the supreme law of the country. Ultimately, I decided to use the measure and dataset developed by Feld and Voigt, which measures judicial independence according to a set of two indicators – de jure judicial independence and de facto judicial independence. The authors define de jure judicial independence to be that which is established by law, and de facto judicial independence to be that which is actually adhered to and carried out in practice.<sup>129</sup>

The information was obtained by country experts through a questionnaire that was e-mailed to them with a summary explaining the purpose and hypotheses of the research project. The country experts included Supreme Court judges, law professors, lawyers, and leaders from international organizations who were asked to give information on the legal structure of the judiciary and were not required to make personal evaluations of the situation in the country.<sup>130</sup> The de jure indicator was calculated for 75 countries and the de facto obtained from 66 countries.

Unfortunately, due to low response rates there is a significant number of countries not included, and some regions are underrepresented in terms of the number of countries included in the research. Albeit these shortcomings, I decided to use this data as it presents the most accurate measure of judicial independence for the largest number of countries as previously discussed above. I cross-referenced the data between the de jure and de facto indicators to ensure that the same countries were included in both indicators. The de jure judicial independence indicator is based on the legal foundation as found in legal documents of a country, and is comprised of 23

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<sup>129</sup> Feld & Voigt, “Economic Growth and Judicial Independence,” 501, 503.

<sup>130</sup> *Ibid.*, 504.

characteristics that are grouped into 12 variables. Each of the variables is given a value between 0 and 1, with higher values indicating a higher level of judicial independence while lower values are associated with a lower level of judicial independence. Because information was not available for all 12 indicators, the sum of the coded variables that were available were divided by the total number of variables, resulting in an overall de jure score between 0 and 1.<sup>131</sup>

The 12 variables that make up the de jure indicator include whether the highest court is established in the constitution; the level of difficulty in amending the constitution; the appointment procedure of judges; judicial tenure; the determination of judicial salary; adequate compensation; the ability to remove judges from office with the exception of doing so by legal procedure; whether judicial terms are renewable; accessibility of the court and ability to initiate proceedings; the allocation of cases; the presence of judicial review; and whether court decisions are published and available to the public.<sup>132</sup>

The de facto indicator focuses on the extent to which judicial independence is factually implemented, and uses 8 variables that are also assigned a value between 0 and 1 with higher values indicative of higher levels of judicial independence. According to the authors, in order to ensure some level of accuracy, only countries that had at least three variables for de facto independence available were scored and ranked.<sup>133</sup>

The 8 factors making up the de facto indicator include the effective average term length; whether a judge was removed before the end of term; influence of a judge dependent upon the number of judges on the court; whether judicial incomes remained constant in real terms; development of the court's budget; changes in the basis of the legal foundation of the highest court; and whether decisions of the highest court are dependent upon some other branch or body

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<sup>131</sup> Ibid., 501.

<sup>132</sup> Ibid., p. 501-503.

<sup>133</sup> Ibid., p. 504.

of government in order to be implemented.<sup>134</sup> The de facto score is obtained in the same manner as the de jure score. I derive an overall judicial independence score for each of the 51 countries by adding the de jure and de facto scores together and dividing it by two (assuming equal weight for both indicators), and obtain a value between 0 and 1. Because one of my arguments centers on the fact that I believe a de facto measure of judicial independence is a better indicator of the actual level of independence and thus a better predictor of the rule of law, I use both the overall judicial independence score that I constructed using the Feld and Voigt indicators and I also use the de jure and de factor scores as individual scores when testing the effects of judicial independence on the rule of law.

## **Variables: Analysis of the Effects of Legal System and Regime Type on Judicial Independence**

### *Independent Variables*

In dealing with whether the type of regime and legal system affect the level of judicial independence and rule of law in a country, two independent variables are used – type of political regime and type of legal system. The type of political regime is defined as the system of government that is in power. For the purposes of this study, I classify the type of political regime as either democracy or non-democracy. To determine a country’s political regime I rely on the “governing authority” factor of the Polity IV dataset, which ranges from “fully institutionalized autocracies” through “mixed authority regimes” to “fully institutionalized democracies”.

This categorization is based upon a 21-point scale that ranges from (-10) hereditary monarchy to (+10) consolidated democracy, and is divided into three categories: autocracies (-10 to -6), anocracies (-5 to +5), and democracies (+6 to +10).<sup>135</sup> The Polity IV dataset covers all

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<sup>134</sup> Feld and Voigt, “Economic Growth and Judicial Independence,” 503-504.

<sup>135</sup> Jagers, Monty G. Marshall and Keith. "Polity IV Project." <http://www.cidcm.umd.edu/inscr/polity/index.htm>, 2002.

major independent countries with a population of 500,000 or greater in the most recent year over the period of 1800-2010, and it measures regime characteristics and change.<sup>136</sup> For my analysis, countries that score in the range of a democracy are coded 1 and all others (those classified as either anocracies or autocracies) are classified as non-democracy and coded 0.

The second independent variable is the type of legal system, which is conceptualized as the legal tradition upon which a country bases its laws. I obtain this information from the CIA World Fact Book, which contains country entries that include sections on Land, Water, People, Government, Economy, Communications, and Defense Forces. Information on a country's legal system is contained under the Government section, and includes information regarding systems based on civil law (including French law, the Napoleonic Code, Roman law, Roman-Dutch law, and Spanish law); common law (including British and United States common law); customary law (legal systems where laws are seldom written down, they embody an organized set of rules regulating social relations, and they are agreed upon by members of the community); religious law (stems from the sacred texts of religious traditions and in most cases professes to cover all aspects of life as a seamless part of devotional obligations to a transcendent, imminent, or deep philosophical reality); and mixed law (consists of elements of some or all of the other main types of legal systems - civil, common, customary, and religious).<sup>137</sup>

It is certainly difficult to quantify a country's legal system, and doing so certainly is not an unflawed process. Nonetheless, to measure this variable, I rank a country's legal system on the basis of the type of legal tradition in place in the country. Based on previous literature that suggests that the common law legal tradition provides a better environment for the rule of law to

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<sup>136</sup> Ibid.

<sup>137</sup> Central Intelligence Agency. *The World Fact Book*. <https://www.cia.gov/library/publications/the-world-factbook/index.html>, Washington, D.C.: Central Intelligence Agency, 2009.



prevail, I begin with common law as the highest ranking and go downward from there. However, as previously mentioned, it is difficult today to find a legal system that is purely common law or civil law and as such it becomes necessary to account for this when coding/ranking the legal systems of various countries. In addition, with *stare decisis* being one of the hallmark features of a common law system, I argue that this particular feature further supports the notion that common law provides a more conducive environment for judicial independence, the rule of law, and human rights to prevail. This is because by having a system by which a judge has the ability to *interpret* laws and apply them to specific cases, and also the ability to interpret and determine the constitutionality of laws allows for a judicial system that could be better equipped to uphold the rule of law and protect human rights. The human element of interpreting laws allows laws to be applied to certain cases and could lead to better protection of human rights, whereas if judges are required to be more “mechanical” and make decisions strictly based only on the legal codes or laws as they are written down, it could lead to less protection for human rights.

Again, this is not to say that common law is better than or superior to civil law or any other type of legal system for that matter, simply that a common law system will produce an environment better suited for the success of judicial independence and the rule of law (in this case, a substantive conception of the rule of law, which includes the protection of basic human rights). Thus, the legal systems are coded in the following manner: a purely common law system is coded “1”; civil/common law mixed is coded “2”; a purely civil law system is coded “3”; and a mixed system of civil/common law mixed with customary/Islamic/ religious/traditional law is coded “4”.

### ***Dependent Variable***

When analyzing the effects of the type of legal system and political regime, the dependent variable is judicial independence and is conceptualized and measured in the same manner as when it served as an independent variable in the study.

### **Control Variables**

When analyzing the effects of the type of regime and legal system on judicial independence I control for the rule of law. In all models I control for political violence and armed conflict, political characteristics of the regime in power, and the number of years since the constitution was last amended. Although GDP has been correlated with both the rule of law and judicial independence, GDP in fact has been shown to be a result of judicial independence<sup>138</sup> and the rule of law.<sup>139</sup> That is, economic development is dependent upon the existence of a strong rule of law and a de facto independent judiciary to ensure the application of such rules and law. Therefore, it does not seem appropriate to control for this variable as a potential cause of judicial independence or the rule of law. Additionally, based upon this evidence, I also do not control for development factors such as life expectancy, unemployment, and literacy rate as these are closely related to the level of economic development in a country. Furthermore, when such development indicators along with a country's annual GDP were put into the model, the R square actually declined meaning that the explanatory power of the model declined. Thus, it does not appear that these factors help to explain my models of judicial independence and the rule of law and it does not appear to be necessary or appropriate to control for them in the study.

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<sup>138</sup> Feld and Voigt, "Economic Growth and Judicial Independence," 497, 516. Feld and Voigt find that de facto judicial independence does positively influence real GDP growth per capita.

<sup>139</sup> Phillips, "The War on Civil Law?," 915, 928. Phillips asserts that the rule of law leads to economic development growth. She also quotes the general counsel to the World Bank, Ibrahim Shihata, as saying that "sustainable economic growth cannot occur without a system based on abstract *rules* which are actually applied and on functioning *institutions* which ensure the appropriate application of such rules."

Research suggests that military crises in a country can lead to the rejection of democratic institutions and principles, and thus could affect results obtained for judicial independence and the rule of law.<sup>140</sup> Furthermore, it is expected that an unstable country with frequent regime changes and armed conflict will result in a weaker and less developed rule of law. I control for this by using the “Security Effectiveness” score from the Center for Systemic Peace – State Fragility Index (SFI). The Security Effectiveness score represents total residual war and provides a measure of general security and vulnerability to political violence including armed conflict episodes.<sup>141</sup> The score is calculated according to three indicators: the sum of annual scores for all wars in which the country is directly involved for each continuous period of armed conflict; interim years of “no war” between periods of armed conflict; and years of peace, or no war, since the end of the most recent war period.<sup>142</sup> The final value is converted to a four-point fragility scale.

In addition to stability and armed conflict being linked to levels of judicial independence and the rule of law, literature also suggests that political regime characteristics are linked to democratic principles, which in turn can affect the strength of the rule of law in a particular country. That is, democracies and their inherent characteristics make them a more peaceful form of government because they attach importance to respect for law and value liberty, humanity, and welfare above power.<sup>143</sup> Therefore, it is necessary to control for this in my study. To account for this, I rely on the State Fragility Index Political Legitimacy score, which measures regime/governance inclusion. The five indicators used to determine this score include:

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<sup>140</sup> Gibler and Randazzo, “Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding,” 699. See also Michael C. Desch, “War and Strong States, Peace and Weak States?” *International Organization* 50 (2), 1996: 237-268. And also, William R. Thompson “Democracy and Peace: Putting the Cart before the Horse?” *International Organization* 50 (1) 1996: 141-174.

<sup>141</sup> Monty G. Marshall and Benjamin R. Cole, “State Fragility Index and Matrix,” *Center for Systemic Peace*, (2012): 8.

<sup>142</sup> *Ibid.*, 8.

<sup>143</sup> Joe D. Hagan, “Domestic Political Systems and War Proneness,” *Mershon International Studies Review*, 38 no. 2 (Oct. 1994): 185.

factionalism; ethnic group political discrimination against 5% or more of the population; political salience of elite ethnicity; polity fragmentation; and exclusionary ideology of ruling elite.<sup>144</sup> The final score is calculated by adding together these five indicators. I anticipate that countries that have authoritarian characteristics, or lower political legitimacy scores will be more likely to have low levels of judicial independence and the rule of law.

Since stability of the constitution and laws within a country are generally included in most definitions of the rule of law, I also account for this through measuring the stability of a country's constitution. That is, I anticipate that a country that frequently amends, changes, or rewrites its constitution will be less stable and will be less likely to have a strong and stable rule of law. I attempt to capture this aspect by looking at the number of years from the constitution having been revised, amended, or rewritten to 2012. To measure this, I collected data from the CIA World Fact Book that includes the last date a country's constitution has been amended or changed. I subtract this from 2012, the most recent year of data available for all countries, to obtain the number of years.

Because the dependent variable used in this study is measured at the interval level, I employed OLS multiple regression to analyze the models in my study. I used SPSS to analyze a total of 51 countries present in the study. Table 1 reports the means and frequencies of the independent and dependent variables, in addition to how each is measured in the model. Table 2 is the correlation matrix for the independent and dependent variables included in the analysis. Because I argue that de facto judicial independence provides a more accurate picture of actual levels of judicial independence and is a better predictor of the rule of law, I ultimately constructed four models in my analysis that look at both judicial independence as an overall score and judicial independence as two separate indicators – de facto and de jure.

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<sup>144</sup> Marshall and Cole, "State Fragility Index and Matrix," 8-9.

## Results

In keeping with the hypotheses, I use OLS multiple regression analysis to analyze the effect of three independent variables (legal system, type of political regime, and judicial independence) on two dependent variables (judicial independence and the rule of law). In the first model I analyze the effect of judicial independence expressed as an overall score (combining de facto and de jure measures), type of legal system, and type of political regime on the rule of law. As previously discussed, I control for the number of years since the constitution was amended, security effectiveness, and political legitimacy. The results of the OLS multiple regression analysis are reported in Table 3. Overall, the regression was significant with results of the ANOVA significant at less than .001,  $F(6,44) = 12.093$ ,  $p < .05$ . The adjusted R-square (.571) demonstrates that the variables judicial independence, type of legal system, type of political regime, number of years since constitution was amended, security effectiveness, and political legitimacy accounted for 57 percent of the variance in the rule of law. Of the predictors investigated, four of them were significant, namely judicial independence, type of legal system, security effectiveness, and political legitimacy. Additionally, the standard error of the estimate value of .0952 indicates that when using the variables listed above to predict the strength of the rule of law, the regression equation was, on average, incorrect in predicting the rule of law scores only by about .0952 points. The model was also tested for multi-collinearity, which yielded results indicating that there were no issues of multi-collinearity with tolerance levels for all predictors ranging between .853 and .958 and the Variance Inflation Factor (VIF) was less than 2 for each predictor in the model.

Judicial independence was significant ( $b = .202$ ,  $t = 2.298$ ,  $p < .05$ ) and exhibited a positive relationship with the rule of law. That is, with all other variables held constant, every

one-point increase in judicial independence would result in a .202 point increase in the rule of law. This suggests that higher levels of judicial independence result in an increase in the strength of the rule of law.

The type of legal system was also significant ( $b = -.042$ ,  $t = -2.274$ ,  $p < .05$ ). This variable however had a negative relationship with the rule of law, meaning that with everything else held constant, every one-point increase in the type of legal system would result in a .042 decrease in the rule of law. Recall that the type of legal system was measured by ranking a country's legal system 1 through 4, with a value of 1 being a purely common law legal system and most likely to provide an environment conducive to the rule of law and 4 being a mixed system of civil/common/traditional/religious/customary law and being the least likely to produce an environment that would support the rule of law. If the number increases with respect to the type of legal system, or in other words moves further away from common law, the strength of the rule of law will decline. Therefore, the negative relationship observed between the type of legal system and the rule of law suggests that systems that are based upon the common law legal tradition are more likely to have a strongly established rule of law.

Although the type of political regime was not statistically significant, it may still be affecting the strength of the rule of law ( $b = .074$ ,  $t = 1.945$ ,  $p > .05$ ). The p-value for this predictor at .058 was just over what was required for statistical significance. This result could be in part due to the small "n" of only 51 countries in the analysis. Nonetheless, it deserves mention that this factor comes close to being statistically significant and exhibits a positive relationship with the rule of law. This could suggest that countries that are democratic would be more likely to have a strongly established rule of law versus those that are non-democratic.

Both control variables security effectiveness ( $b = -.080, t = -.5.245, p < .05$ ) and political legitimacy ( $b = -.041, t = -2.819, p < .05$ ) are highly significant. Security effectiveness measured political violence and armed conflict with higher scores representative of higher involvement with conflict. Thus, the negative relationship between security effectiveness and the rule of law suggests that higher levels of conflict result in a weaker rule of law. Specifically, all other variables held constant, every one-point increase in security effectiveness would result in a .080 decrease in the rule of law. Similarly, political legitimacy also had a negative relationship with the rule of law indicating that with all other predictors being held constant, every one-point increase in political legitimacy (higher scores being indicative of a more repressive form of governance) would result in a .041 point decrease in the rule of law. This suggests that a more repressive government is likely to be associated with a weaker rule of law. The remaining control variable representing the number of years from when the constitution was amended to 2012 was not significant ( $b = .001, t = .1.191, p > .05$ ). The regression equation for the effect of judicial independence on the rule of law is

$$\text{Rule of Law} = .631 + .202(\text{JI overall}) - .042(\text{legal system}) - .080(\text{security effectiveness}) - .041(\text{political legitimacy})$$

When analyzing the effects of judicial independence on the rule of law in the second model, I split the measure of judicial independence into a de facto score and de jure score. This is in contrast to the first model where judicial independence is represented as an overall score combining measures of de facto and de jure independence together. All other variables in the model remain the same as in Model I. I use OLS multiple regression analysis to analyze the effect of de facto and de jure judicial independence on the rule of law. The results of this model are reported in Table 4.

Overall, the regression was significant with results of the ANOVA significant at less than .001,  $F(7,43) = 10.967, p < .05$ . The adjusted R-square (.583) demonstrates that the variables de facto judicial independence, de jure judicial independence, type of legal system, type of political regime, number of years from when the constitution was amended to 2012, security effectiveness, and political legitimacy accounted for 58 percent of the variance in the rule of law. Of the predictors investigated, four of them were significant, namely de facto judicial independence, type of legal system, security effectiveness, and political legitimacy. Additionally, the standard error of the estimate value of .0939 indicates that when using the variables listed above to predict the strength of the rule of law, the regression equation was, on average, incorrect in predicting the rule of law scores only by about .0939 points. The model was tested for multi-collinearity and the results indicated that there were no issues of multi-collinearity with tolerance levels for all predictors ranging between .735 and .919 and the Variance Inflation Factor (VIF) was less than 2 for each predictor in the model.

The most notable change in this model is that de jure judicial independence is not significant ( $b = -.003, t = -.030, p > .05$ ) while de facto judicial independence is highly significant ( $b = .181, t = 2.661, p < .05$ ). This suggests that de jure independence is not a significant predictor of the rule of law. Furthermore, the negative relationship between de jure judicial independence and the rule of law indicates that with all other variables held constant, every one-point increase in de jure judicial independence will result in a .003 point decrease in the rule of law. This substantiates the claim that a constitutionally established judiciary does not guarantee the independence of the judiciary in practice and does not necessarily lead to a strongly established rule of law. By contrast, de facto judicial independence appears to be a very strong predictor of the rule of law and exhibits a positive relationship with the rule of law.



Everything else held constant, for every one-point increase in de facto judicial independence, there would be a .181 increase in the rule of law. Also notable was the results for the type of political regime, which was still not significant ( $b = .152, t = 1.476, p > .05$ ).

Although the type of political regime was not statistically significant in the Model I, it did come close to being significant. However, in Model II it moves further away from statistical significance. The type of legal system ( $b = -.043, t = -2.276, p < .05$ ), security effectiveness ( $b = -.077, t = -5.013, p < .05$ ), and political legitimacy ( $b = -.039, t = -2.737, p < .05$ ) mostly remained the same and were still significant. Additionally, each of these three variables still had a negative relationship with the rule of law. The number of years from when the constitution was amended to 2012 was still not significant ( $b = .001, t = .910, p > .05$ ). The regression equation for the effect of de jure and de facto judicial independence on the rule of law is

$$\text{Rule of Law} = .670 + .181(\text{JI de facto}) + .043(\text{legal system}) - .077(\text{security effectiveness}) - .039(\text{political legitimacy})$$

The second part of my study attempts to analyze the effects of the type of legal system and political regime on judicial independence. In Model III, I use the overall score of judicial independence as my dependent variable. I again use OLS multiple regression analysis to analyze the effect of the type of legal system and type of political regime on judicial independence. I control for the rule of law, number of years since the constitution was amended, security effectiveness, and political legitimacy. The results of the OLS multiple regression analysis for Model III are reported in Table 5. This regression model was not significant,  $F(6,44) = 2.046, p > .05$ . The adjusted R-square (.111) demonstrates that the model does a fairly poor job of explaining the variables of the type of legal system, type of political regime, number of years from when the constitution was amended to 2012, security effectiveness, and political

legitimacy, with these variables accounting for less than 12 percent of the variance in judicial independence.

Only two of the predictors were significant, rule of law ( $b = .530, t = 2.298, p < .05$ ) and security effectiveness ( $b = .066, t = 2.214, p < .05$ ). Results indicated that there were no issues of multi-collinearity with tolerance levels for all predictors ranging between .423 and .913 and the Variance Inflation Factor (VIF) was less than 3 for each predictor in the model. Although the two variables listed above were significant, the low R-square suggests that there are additional factors that influence the level of judicial independence and these variables are not sufficient for predicting levels of judicial independence.

The last model tested attempts to analyze the effects of legal system and political regime on judicial independence, but here judicial independence is again split into two separate scores of de facto and de jure judicial independence. Because I am concerned with what leads to judicial independence in practice, I use the de facto judicial independence score as the dependent variable in my analysis. OLS multiple regression analysis is used to examine the effects of the type of legal system and political regime on de facto judicial independence. In this model I control for de jure judicial independence, the rule of law, security effectiveness, political legitimacy, and number of years since a constitution was amended. The results of Model IV are reported in Table 6.

The regression in Model IV was significant,  $F(7, 43) = 3.592, p < .05$ . The adjusted R-square value (.266) did go up somewhat, but is still quite low. While it is better than the adjusted R-square obtained when using an overall score of judicial independence, it still indicates that other variables not included here are accounting for the variance in de facto judicial independence. In other words, the predictor variables (de jure judicial independence, rule of law,

type of legal system, type of political regime, number of years since constitution amended, security effectiveness, and political legitimacy) included in this model only account for 27 percent of the variance in the level of de facto judicial independence. Only one of the predictors, rule of law ( $b = .783, t = 2.298, p < .05$ ), was statistically significant. There is a positive relationship that exists between these two variables. Thus, with all other variables held constant, a one-point increase in the rule of law would result in a .783 point increase in de facto judicial independence.

It deserves mention that when analyzing the effects of legal system and political regime on de facto judicial independence, type of political regime moved closer to statistical significance ( $b = .139, t = 1.736, p > .05$ ). Additionally, while de jure judicial independence did not meet the requirement for statistical significance ( $b = .365, t = 1.774, p > .05$ ), it came close. This again could be the result of having a small “n” in the analysis. Both de jure judicial independence and type of political regime exhibited a positive relationship with de facto judicial independence. This indicates that with everything else held constant, every one-point increase in de jure judicial independence would result in a .365 point increase in de facto judicial independence, and with all variables held constant, a one-point increase in the type of political regime would subsequently result in a .139 increase in de facto judicial independence. However, due to the low adjusted R-square, it would be inappropriate to claim that the rule of law, de jure judicial independence, and type of political regime are predictors of de facto judicial independence. The regression equation for the effect of legal system and regime type on de facto judicial independence is

$$JI \text{ de facto} = -.433 + .783(\text{rule of law})$$

## **Discussion**

Overall, the models supported my hypothesis that judicial independence does in fact lead to a strengthened rule of law. Judicial independence, when tested as an overall score, was a statistically significant predictor of the rule of law. The positive relationship between judicial independence represented as an overall score and the rule of law indicates that when all else is held constant, an increase in the level of judicial independence subsequently results in an increase in the strength of the rule of law. Furthermore, my argument that de facto judicial independence provides a better indicator of the strength of the rule of law was also substantiated. When judicial independence was tested as two separate indicators, de facto judicial independence was highly significant while de jure judicial independence was not even close to being statistically significant. Additionally, de jure judicial independence exhibited a negative relationship with the rule of law. This means that with all else held constant, as de jure judicial independence increased the rule of law decreased. This supports my claim that it is possible to have a constitutionally established judiciary, but that this does not guarantee its independence in practice, and also does not help to strengthen the rule of law in practice.

The high statistical significance of de facto judicial independence suggests that the actual independence of the judiciary in practice provides a better indicator of the rule of law. Additionally, the positive relationship observed between these two variables suggests that as levels of de facto judicial independence increase, so too, will the strength of the rule of law. Due to the previously discussed literature demonstrating the close relationship shared between the rule of law and human rights, this observed relationship between judicial independence and the rule of law also supports my argument that judicial independence can, through the strengthening of the rule of law, lead to greater protection for human rights.

In addition to judicial independence being a significant factor in determining the strength of the rule of law, the results of my analysis also suggest that a system based on the common law legal tradition provides a more conducive environment for the rule of law to prevail. This is not to say that some level of the rule of law cannot exist in a country that has a legal system based on something other than common law or has a mixed legal system, but rather that the rule of law will be stronger in countries with a legal system based upon common law. This is based on the finding that a negative relationship existed between the type of legal system and the rule of law.

Because I measured the type of legal system by ranking countries according to their legal tradition, with a purely common law system ranked the highest at 1 and a mixed system of common/civil/religious/traditional/customary law ranked the lowest at 4, the actual increase in *number* with regard to the type of legal system means that it is moving further away from a purely common law system. Thus, with all other variables held constant, an increase in the number associated with the type of legal system results in a decrease in the strength of the rule of law. This supports my argument that countries based upon a common law legal system (or a system that is closer to common law on the ranking scale) will be more likely to have a stronger rule of law.

Although the type of political regime was not statistically significant, it did appear to have some effect on the level of the rule of law. Again, this result could have been because of the relatively small “n” in the analysis. Had there been more countries included, this predictor may have turned out to be statistically significant. Because security effectiveness and political legitimacy to some extent represent characteristics of the type of political regime in power, the fact that they were statistically significant tends to support the notion that countries classified as a democracy are more likely to have a strengthened rule of law. Political legitimacy deals with

regime/governance inclusion and includes factors that to some degree measure the repressiveness of a regime. A more repressive regime would be characterized as one that is based upon authoritarian rather than democratic principles.

Security effectiveness measured the amount of political violence and armed conflict in a country. This too could be characteristic of the type of regime in power since there is a large body of literature that argues that democratic regimes are less likely to initiate war or use military force than are authoritarian regimes.<sup>145</sup> Although this has become a contested point with more recent studies that suggest democracies are as likely to go to war as non-democratic states and democracies are as aggressive in threats of the use of force as non-democracies, widely accepted findings indicate that despite this overall “aggressiveness,” democracies are much less likely to engage in harmed hostilities with one another.<sup>146</sup> This can further be supported in terms of the “democratic peace” as argued by Kantian “liberal internationalism.”<sup>147</sup>

Thus, if the amount of conflict and repressiveness of the regime are taken as indicators of the *type* of regime that is in power, the negative relationship between these variables and the rule of law would then lend support to the fact that the type of political regime does affect the level of the rule of law. That is, a country with a greater degree of repressiveness and more involvement in armed conflict or political violence would be more likely to be characterized as an authoritarian regime. As a result, the negative relationship between these two variables and the rule of law means that as scores increase in terms of conflict and repressiveness (indicative of non-democracy), the strength of the rule of law decreases. Therefore, it could be that the type of political regime in power does affect the rule of law, but that characteristics of a regime such as

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<sup>145</sup> Hagan, “Domestic Political Systems and War Proneness,” 185.

<sup>146</sup> See Michael W. Doyle, “Liberalism and World Politics,” *American Political Science Review*, 80 (1986): 1151-1169; Anne-Marie Slaughter Burley, “International Law and International Relations Theory: A Dual Agenda,” *The American Journal of International Law* 87, (1993): 205-239.

<sup>147</sup> Hagan, “Domestic Political Systems and War Proneness,” 185.

amount of conflict (security effectiveness) and government inclusion/repressiveness (political legitimacy) are better indicators of the strength of the rule of law in a given country.

The remaining control variable, number of years from when the constitution was amended to 2012, was not significant. This could be because laws as they are written down in the constitution are less of a predictor of how they are applied in practice, and as a result, the length of time since a constitution was last amended does not affect the rule of law. A country's constitution merely presents written rules whereas the rule of law is rules being carried out and provides respect for political and civil rights. Therefore, this observed result could be due to the fact that the element of time that has passed since a constitution was amended does not play a role in how well the written rules of the constitution are carried out in practice.

The second part of my analysis examined the effect of the type of legal system and type of political regime on levels of judicial independence, tested as both an overall score and split into de facto and de jure judicial independence scores. When testing effects of legal system and political regime on judicial independence as an overall score, the model was not statistically significant. Additionally, the adjusted R-square was very low indicating the low explanatory power of the model. It is likely that there are other factors that were not included here that are influencing the level of judicial independence. Although the rule of law was statistically significant, due to the low R-square, it would be inappropriate to claim that the rule of law is a predictor of judicial independence. The same could also be said for security effectiveness, which was the only other variable in the model that was statistically significant.

When testing the effects of legal system and political regime on de facto judicial independence, the results indicated the model was significant. Although the value of the adjusted R-square went up slightly from the last model, it still remains low, suggesting that there are other

variables not accounted for in this study that could be the driving force for levels of de facto judicial independence. Furthermore, when observing the effects on de facto judicial independence, the only predictor that was significant in the model was the rule of law. However, much like in the previous model, due to the low R-square, it would be inappropriate to suggest that the rule of law is a predictor of de facto judicial independence. This indicates further research needs to be conducted in order to determine predictors of judicial independence.

It should be noted however, that when observing the effects of legal system and political regime on de facto judicial independence, the type of political regime moved closer to significance, although it still did not meet the requirements of statistical significance. De jure judicial independence was also relatively close to being statistically significant. However, this could again be due to the small “n” in the analysis. In addition to the rule of law, de jure judicial independence and type of political regime exhibited positive relationships with de facto judicial independence. A good portion of the literature suggests that there is a close connection between the rule of law and judicial independence. In fact judicial independence is often included in measures of the rule of law. However, the previous models analyzing the effects of judicial independence on the rule of law suggest that judicial independence, and in particular de facto judicial independence, is a stronger predictor of the rule of law, than the rule of law is of judicial independence.



Table 1 Variable Information

Variables	Measurement	Mean	Frequency %
JI-overall	Continuous between 0 and 1	.610	0-.199=2% .2-.399=11.8% .4-.599=25.5% .6-.799=45.1% .8-.999=15.7%
JI-de jure	Continuous between 0 and 1	.686	0-.199=0% .2-.399=3.9% .4-.599=21.6% .6-.799=49% .8-.999=25.5%
JI-de facto	Continuous between 0 and 1	.552	0-.199=9.8% .2-.399=11.8% .4-.599=39.2% .6-.799=17.6% .8-.999=21.6%
Rule of Law	Continuous between 0 and 1	.611	0-.199=0% .2-.399=7.8% .4-.599=43.1% .6-.799=35.3% .8-.999=13.7%
Legal System	1=Common Law 2=Common/Civil Law 3=Civil Law 4= Civil Law/Common Law-Mixed with Customary/Islamic/Religious/Traditional	3.18	1=5.9% 2=2% 3=60.8% 4=31.4%
Political Regime	0=Non-Democracy 1=Democracy	.82	0=17.6% 1=82.4%
Constitution Amendment	Number of years from last constitutional amendment/revision to 2012	7.12	0-10=82.4% 11-21=7.8% 22-32=3.9% 33-43=2% 44-54=2% 55-65=2%
SFI Security Effectiveness	Total residual war score converted to 4-point fragility scale 0=0; 1=0.1=15; 2=15.1-100; 3=greater than 100	.51	0=72.5% 1=7.8% 2=15.7% 3=3.9%
SFI Political Legitimacy	Regime/Governance inclusion calculated by adding 5 indicators. Scale 0-3	.94	0=45.1% 1=21.6% 2=27.5% 3=5.9%

Table 2 Correlation Matrix with r and p values for indicators of the rule of law, judicial independence (overall), and judicial independence (de facto)

	JI Overall	JI de facto	Rule of Law
JI Overall	1		.272 (.053)
JI de facto		1	.415 (.002)**
JI de jure		-.269 (.056)	.021 (.882)
Legal System	.140 (.328)	.415 (.002)**	-.321 (.021)*
Political Regime	.274 (.052)	-.127 (.374)	.389 (.005)**
Constitution Amendment	.126 (.377)	.403 (.003)**	.253 (.073)
SFI Security Effectiveness	.122 (.394)	.225 (.113)	.532 (.000)***
SFI Political Legitimacy	-.027 (.852)	-.122 (.392)	-.444 (.001)**

p values are indicated in parentheses. \*p<0.05; \*\*p<0.01; \*\*\*p<0.001

Table 3 Regression coefficients with t and p values for effects of judicial independence on the rule of law

Model I.				
Model	b	Beta	t	Sig.
Constant	.631		7.402	.000***
Judicial Independence	.202	.227	2.298	.026*
Legal System	-.042	-.216	-2.274	.028*
Political Regime	.074	.195	1.945	.058 n.s.
Constitution Amendment	.001	.114	1.191	.240 n.s.
SFI Security Effectiveness Score	-.080	-.496	-5.245	.000***
SFI Political Legitimacy	-.041	-.277	-2.819	.007**

\*p<0.05; \*\*p<0.01; \*\*\*p<0.001; n.s.=not significant

Table 4 Regression coefficients with t and p values for effects of de facto and de jure judicial independence on the rule of law

Model II.				
Model	b	Beta	t	Sig.
Constant	.670		6.424	.000***
Judicial Independence – de jure	-.003	-.003	-.030	.976
Judicial Independence – de facto	.181	.284	2.661	.011*
Legal System	-.043	-.217	-2.276	.028*
Political Regime	.057	.152	1.476	.147 n.s.
Constitution Amendment	.001	.088	.910	.368 n.s.
SFI Security Effectiveness	-.077	-.479	-5.013	.000***
SFI Political Legitimacy	-.039	-.265	-2.737	.009**

\*p<0.05; \*\*p<0.01; \*\*\*p<0.001; n.s.=not significant

Table 5 Regression coefficients with t and p values for effects of Legal System and Political Regime on judicial independence (overall)

Model III.				
Model	b	Beta	t	Sig.
Constant	.184		.896	.375 n.s.
Rule of Law	.530	.471	2.298	.026*
Legal System	-.006	-.026	-.179	.859 n.s.
Political Regime	.068	.159	1.072	.290 n.s.
Constitution Amendment	.000	.025	.178	.860 n.s.
SFI Security Effectiveness	.066	.365	2.214	.032*
SFI Political Legitimacy	.030	.183	1.215	.231 n.s.

\*p<0.05; n.s.=not significant

Table 6 Regression coefficients with t and p values for effects of Legal System and Political Regime on de facto judicial independence

Model IV.				
Model	b	Beta	t	Sig.
Constant	-.433		-1.458	.152 n.s.
Judicial Independence – de jure	.365	.232	1.774	.083 n.s.
Rule of Law	.783	.499	2.661	.011*
Legal System	.020	.065	.486	.629 n.s.
Political Regime	.139	.234	1.736	.090 n.s.
Constitution Amendment	.002	.125	.970	.337 n.s.
SFI Security Effectiveness Score	.058	.231	1.484	.145 n.s.
SFI Political Legitimacy	.035	.152	1.109	.274 n.s.

\*p<0.05; n.s.=not significant

## CHAPTER FOUR

### **RULE OF LAW AND JUDICIAL REFORM IN SERBIA AND IN MOLDOVA: AN EXAMPLE OF A GLOBAL EFFORT<sup>148</sup>**

While there has been a global movement towards adopting democratic and judicial reform strategies with the belief that doing so will result in strengthening the rule of law and evoke greater respect for human rights, whether such efforts will lead to these desired outcomes remains highly contested. Nevertheless, countries around the world have succumbed to the belief that such notions of the rule of law and judicial independence are true and they have adopted reform strategies to help them gain entrance into international organizations and economic institutions. Eastern Europe has been fertile ground for introducing such reforms in its effort to move away from communist rule. Serbia and the Republic of Moldova are snapshot specific examples of the judicial and rule of law reforms that are occurring both in Eastern Europe and around the world today.

In carrying out the qualitative portion of my research study, I take a closer look at the effect of judicial independence on the establishment of the rule of law, and the extent to which a strengthened rule of law can increase respect for human rights. The cases of Serbia and Moldova provide an example of the global effort to reform the rule of law and establish an independent judiciary and demonstrate the need to enshrine judicial independence not only within the content of legal documents, but also in practice and implementation.

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<sup>148</sup> Portions of this chapter have been previously published in *Buletinul Stiințific Studențesc, Istorie - Relații Internaționale - Științe Politice*, Universitatea Liberă Internațională Din Moldova, 4 (September, 2013): 291-314, and have reproduced with permission from ULIM.

The primary goal of this in-depth study is to apply the discussion from the quantitative analysis to the cases of Serbia and Moldova. Specifically, I use these two countries as examples to demonstrate that it is possible to have a constitutionally established independent judiciary, but that this does not ensure that the judiciary will operate independently in practice. Furthermore, I show how the lack of judicial independence in both countries can be linked to human rights violations adjudicated by the European Court of Human Rights (ECHR). Thus, my focus is on the following question:

How does an independent judiciary contribute to the establishment of the rule of law to enhance respect for human rights in post-conflict and post-communist countries?

I expect to find that higher levels of judicial independence will be strongly associated with an established rule of law, and thus increased respect for human rights. First, I provide a brief overview of the justice sector reform efforts in each country. I then will analyze and examine the data related to judicial independence, rule of law, and human rights, and apply this to the discussion.

I employ qualitative case studies of Serbia and Moldova to examine justice sector reforms taking place and assess their impact. Data available for both countries from 2007 through 2011 that is comprised of a set of indicators of judicial independence and the rule of law is used to evaluate the effectiveness of justice sector reforms in Serbia and Moldova. I use data obtained from the Freedom in the World survey developed by Freedom House to assess the strength of the rule of law in each country and compare this to the strength of independence possessed by the judiciary.

I analyze the various policy and strategic documents that deal with the justice sector reforms in each country along with other programs and initiatives by various outside

organizations. These include USAID, the International Commission of Jurists, the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (ICJ/CIJL), and the Soros Foundation, which seek to reduce corruption and enhance judicial independence and the rule of law. I also examine the number of cases adjudicated by the European Court of Justice in which either country was charged with a violation of human rights, and examine whether the type of violation is related to the judiciary.

Serbia and Moldova come from highly complex and complicated backgrounds, both of which involve a history of conflict, communism, and contested rule. Modern day Serbia was not officially born as an independent state until 2006, when Montenegro declared itself independent. Prior to this, Serbia had been a part of the Socialist Republic of Yugoslavia until 1990 when it adopted a constitution in which it formally severed ties with socialist constitutionalism.<sup>149</sup> Since the end of Milosevic's regime, Serbia has sought to strengthen the independence of the judiciary and enhance its role in advancing legal and judicial reforms. Similarly, the Republic of Moldova has also recently initiated justice sector reforms that seek to strengthen judicial independence, reduce corruption, strengthen the rule of law, and promote greater respect for human rights.

The Republic of Moldova is still a very young country and parting with its Soviet past and transitioning to an independent democratic nation has not been an easy feat. In fact, it was not until 1990 that Moldova declared its independence from the USSR and adopted its constitution in 1994. Historically, Moldova has been a country of ever-shifting borders and alliances, and it has been the scene of contested territories and disputed identities. As such, this has resulted in a continuously evolving culture and identity for Moldova as both an independent state and a nation of people.

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<sup>149</sup> Vladan Petrov, "The Constitution, Political Parties and Constitutional Systems." *University of Belgrade, Faculty of Law*, (2012): 4-5.

Although both countries have made significant strides towards establishing an independent democratic nation based on the rule of law and also in the progressive development of the justice sector, the integrity of the justice system itself remains inadequate. Despite substantial institutional changes along with amendments to the national legal framework, high levels of corruption exist within the justice and law enforcement systems, and the quality of services provided within the justice system remains low. This has resulted in a number of human rights cases being initiated before the European Court of Human Rights, whereby both Serbia and Moldova have been found guilty of human rights violations as established under the European Convention of Human Rights. Furthermore, the violations found within these cases can be tied to the lack of independence of the court and are related to elements often considered to be factors in determining the independence of the judiciary in practice (*de facto* judicial independence).

## **Serbia**

The Constitution of 1990 returned Serbia to the values of classical, liberal democratic constitutional order and paved the way towards democratic socialist constitutional order.<sup>150</sup> This Constitution defined Serbia as a “democratic state of all the people based on human and minority rights and freedoms, the rule of law, and social justice;” it accepted the principle of sovereignty of the people; and guaranteed “personal, political, national, economic, social, cultural, and other human and civil rights.”<sup>151</sup> Following a period of over fifty years in which Serbia engaged in “voting without elections,” the new Constitution reinstated democratic election processes. Unfortunately, the Constitution looked better on paper than it did in actual practice. During the “Milosevic Era” the Constitution was little more than a common political instrument.

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<sup>150</sup> Ibid., 2.

<sup>151</sup> Ibid.

Serbia was part of the State Union of Serbia and Montenegro, which evolved from the Federal Republic of Yugoslavia, from 2003 to 2006. When Montenegro declared its independence in May 2006 Serbia held a two-day referendum that ratified a new Constitution to replace that of the Milosevic Era.<sup>152</sup>

### ***History, Structure, and Organization of Serbia's Judiciary***

The judiciary in post-socialist Serbia is regulated by a “package of laws on the judiciary,” which was originally adopted in 2001; however, amendments to these laws in 2002 and 2003 shifted leading responsibilities to the legislative branches of government.<sup>153</sup> This led to a reduction in judicial independence with the judiciary in fact becoming more dependent upon the government. However, with the amendment to the package in 2004, the judiciary regained some of its former institutional independence. The contemporary judiciary and court system in Serbia has its roots in the emergence of an independent constitutional monarchy that emerged in the second half of the 19<sup>th</sup> century after a prolonged period of Ottoman rule.<sup>154</sup>

Serbia's legal system and judiciary is based on a civil law inquisitorial system and has been most influenced by the legal traditions of its European neighbors such as Germany, Austria, and France, but the most significant and enduring influence on Serbia's judicial system has been the legacy of socialist rule in Yugoslavia.<sup>155</sup> The court system in Serbia is divided into two divisions, the courts of general jurisdiction and specialized courts. The municipal and district courts serves as the courts of general jurisdiction and there are also courts of appeal, which were formed in 2002 but were initially delayed in being put into operation. Serbia also has administrative courts and commercial courts that deal with administrative disputes and a wide

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<sup>152</sup> American Bar Association, “Judicial Reform Index for Serbia,” *American Bar Association*, (2005).

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*



range of commercial issues. The Supreme Court is the highest court and it hears cases on appeal, issues opinions on draft laws, and provides the uniform application of law by the courts.<sup>156</sup> Serbia also has a Constitutional Court, which only hears matters that are directly related to Serbia's constitution, such as whether laws and regulations are in conformity with the constitution. Additionally, in 2003, Serbia established specialized panels on war crimes, which have jurisdiction over crimes against humanity, violations of international law, and criminal acts defined by Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>157</sup>

### ***Judicial Reform in Serbia***

During the “Milosevic era” the court system was merely a political instrument, and judges were often pressured into deciding cases according to the desires of the executive and legislative authorities.<sup>158</sup> Since the end of Milosevic's regime, Serbia has sought to strengthen the independence of the judiciary in practice and enhance its role in advancing legal and judicial reforms. Serbia's recent commitment to strengthening its rule of law and establishing a truly independent judiciary can be linked to its efforts in gaining membership to the European Union, whereby it currently has attained “candidate” status. Following the end of Milosevic's regime, Serbia's democratically oriented government sought to strengthen the independence of the judiciary by adopting a new “package of laws on the judiciary” that gave the judiciary the power to regulate its own affairs.<sup>159</sup> Furthermore, in an effort to initiate judicial reform, the government created a number of expert advisory groups such as the Council for Reform of the Judiciary, which ultimately adopted a Strategy for Judicial Reform. Unfortunately, this initiative was

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<sup>156</sup> Anna Lou Triol, interview by Lauren Shumate. *Serbia's Rule of Law and Judicial Reform Initiatives* (April 6, 2012).

<sup>157</sup> American Bar Association, “Judicial Reform Index for Serbia,” *American Bar Association*, (2005).

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

unsuccessful. However, the creation of the Commission for the Implementation of the National Judicial Reform Strategy in 2004, which put forward the framework for judicial reform focusing primarily on judicial independence, transparency, accountability, and efficiency spanning from 2006-2013, has proved to be more successful at creating educational programs and cooperating with international efforts and standards than the previous initiative.<sup>160</sup>

According to a judicial reform report by the American Bar Association, the creation and establishment of the Judges Association of Serbia (JAS) and the Judicial Center for Professional Education and Advanced Training (JTC) has improved the judiciary's independence and has helped to make it more effective in supporting the rule of law in Serbia.<sup>161</sup> Furthermore, the report states that Serbia has made important strides in reforming the judiciary by providing structural safeguards for judicial independence and by improving education and training programs for judges and other legal personnel.<sup>162</sup> However, the appointment of judges remains politicized, judges are still subject to improper outside influence, and judicial salaries remain low thereby producing an environment conducive to corruption.<sup>163</sup> Thus, not only does the implementation of these comprehensive reforms to the judicial system and rule of law in Serbia require a substantial amount of training and educational programs, but it also requires the changing of long held traditional beliefs and attitudes by the judiciary as well as the executive.

The ABA Rule of Law Initiative in Serbia has partnered with the U.S. Department of Justice and the Serbian Judicial Training Center to aid in the new Criminal Procedure Code Training.<sup>164</sup> Additionally, the ABA has established an Anti-Corruption and Public Integrity program, which is focused on ensuring that judges and prosecutors who are charged with the

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> American Bar Association. "Rule of Law Initiative: Serbia Programs," *American Bar Association*, (2012) Accessed: Feb. 21, 2012. [http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/europe\\_eurasia/serbia/programs.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/serbia/programs.html)

administration of justice, do so in a way that is professionally and ethically responsible.<sup>165</sup> The ABA has also established Legal Education and Legal Profession Reform programs that include programs focused on continuing education programs with training for judges, prosecutors, and other legal personnel, and programs centered on creating an independent group of judges through the National Judicial Reform Strategy Commission and Judicial Training Center.<sup>166</sup>

In an effort to aid Serbia on its path to gaining EU membership, the United States has offered multimillion dollar funding to help establish judicial reform and rule of law programs. The United States Agency for International Development (USAID) recently launched a new five-year \$21.8 million project in October of 2011 to strengthen Serbia's rule of law and help detect and prevent corruption.<sup>167</sup> This new program initiated by USAID, the Judicial Reform and Government Accountability project, will support the independence of the judiciary, increase public awareness of judicial reforms, and strengthen the ability of the Serbian government's independent agencies and civil society organizations to counter corruption.<sup>168</sup> Essentially, given that Serbia already has a constitution which establishes judicial independence and guarantees human and minority rights, these reform efforts are intended to help implement these constitutionally established elements in practice.

While Serbia's Constitution of 2006 includes fundamental principles including the rule of law, separation of powers among three branches of government, and judicial independence, serious gaps in these areas have been identified, mainly in how they actually operate in practice, and are hindering Serbia's accession to the EU. According to data from the ECHR, in 2009 Serbia was found guilty of human rights violations in 16 cases, the majority of which dealt with

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<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> USAID Serbia, "Separation of Powers Project," *USAID Serbia*, August 24, 2012, <http://serbia.usaid.gov/usaid-programs/sectors/strengthening-democratic-structures/separation-of-powers-project.656.html>.

<sup>168</sup> USAID Serbia, "Judicial Reform and Accountability," *USAID Serbia*, August 27, 2012, <http://serbia.usaid.gov/usaid-programs/sectors/strengthening-democratic-structures/judicial-reform-and-government-accountability.1030.html>.

the court's failure to protect individual rights, and can be traced to the lack of *de facto* independence of the judiciary.<sup>169</sup> In 2010, the number of cases dropped to 9, and 2011 saw an increase of 3 cases with a total of 12; but most notably, all of the violations were classified under the same categories of human rights violations.<sup>170</sup> These cases included violations of right to a fair trial, right to liberty and security, right to effective remedy, protection of property, and the length of proceedings; all of which are constitutionally protected.

The failure of the judiciary to protect and uphold these basic human rights established by law in Serbia demonstrated the lack of judicial independence in practice. Thus, this lack of independence in practice has thereby weakened the rule of law (as these are also common elements used in thick, or substantive rule of law definitions) and respect for human rights. Although according to Freedom House data on political rights and civil liberties, since 2007 Serbia has improved its overall freedom rating from 2.5 to 2, and specifically its political rights score from 3 to 2 while civil liberties has remained at 2.<sup>171</sup> Clearly, ECHR data suggests that violations of human rights are still a problem in Serbia. Many of these cases can be traced to the lack of independence and efficiency of the judiciary in practice because it is not sufficiently doing its job of upholding the rule of law as established in the constitution.

In an effort to combat these issues, USAID has initiated several programs that are designed to help Serbia move closer to EU accession by strengthening judicial independence and the rule of law. Such reform programs include the Separation of Powers Program, which is intended to strengthen the judicial and parliamentary branches of the government; the Organization for Security and Cooperation in Europe (OSCE) Good Governance Program, which

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<sup>169</sup> European Court of Human Rights, Statistical Information, "Table of Violations", *Violations by Article and by State*, (2009-2011), <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data/OldStats.htm>.

<sup>170</sup> Ibid.

<sup>171</sup> Freedom House, "Freedom in the World," *Freedom House*, <http://freedomhouse.org/report/freedom-world/serbia>. (2007-2012).

aims to increase the capacities of institutions, public officials, and civil society to ensure good governance through improving the legislative framework, enhancing existing public accountability mechanisms, and promoting best practices in public accountability; and, the Political Processes Programs, which is designed to enhance the ability of key actors, including the government, political parties, parliament, and civil society to develop institutional capacities and strengthen relations between institutions within the political environment.<sup>172</sup>

While the above programs are highly important in helping Serbia enhance its rule of law initiatives and strengthen its judiciary, the most recent and most significant institutional and structural change has come in the adoption of a new Criminal Procedure Code. As previously stated, Serbia is based upon a civil law inquisitorial model. In September of 2011, Serbia passed a new Criminal Procedure Code, which went into effect in early 2013, which moves its legal system from an inquisitorial model to a more American adversarial model. The new CPC incorporates adversarial hallmarks such as cross-examination, expanded cooperating agreements, prosecutor-led investigations, and the concept of plea-bargaining.<sup>173</sup>

Perhaps most importantly, the new CPC involves changes to the role of judges, whereby judges will no longer serve conflicting roles as both investigator and arbitrator, but rather will act only as neutral arbitrators, resolving disputes between parties based on evidence presented.<sup>174</sup> In doing so, judges are effectively removed from the role of inquisitor and restored to the role of arbitrator. The CPC that had originally been established in 2001 outlines two investigative stages, police investigation and court investigation, with the investigative judge taking the leading role in the court investigation phase.<sup>175</sup> Additionally, the judge also had the leading role

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<sup>172</sup> USAID Serbia, (2012) <http://serbia.usaid.gov/usaaid-programs/sectors/strengthening-democratic-structures.23.html>.

<sup>173</sup> Anna Lou Triol, interview by Lauren Shumate. *Serbia's Rule of Law and Judicial Reform Initiatives* (April 6, 2012).

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

at trial, with the authority to examine issues beyond the parties' motions, which would seem contrary to the notion of the impartiality of judges. Prosecutors may now conduct investigations against both identified and unknown subjects, while the defense may also independently carry out its own investigations.<sup>176</sup> In an effort to increase efficiency, the new CPC also expands the use of plea-bargaining, the use of cooperating witnesses, and summary proceedings.

While the new CPC looks good on paper, putting it into practice may prove to be more difficult. As part of the training and preparation process for the new CPC, the United States Department of Justice organized a roundtable discussion dealing with courtroom and trial practice and brought in a United States Circuit Court Judge to help lead the discussion. Some of the topics covered during this seminar included the review and confirmation of indictments, pretrial conferences, and trial advocacy issues including the ruling on objections, and scope of examinations. Considerable time was also dedicated to answering questions regarding the new "neutral arbitrator" role of Serbian judges at trial, in addition to questions regarding the novel adversarial hallmarks such as cross-examination and prosecutor-led investigations.<sup>177</sup>

In observing this roundtable discussion, I noted the significant amount of confusion by the Serbian judges who appeared to be very unclear as to what their new role was to entail.<sup>178</sup> Up to this point, Serbia's judges have taken the lead role in investigations. This is now changing with the new CPC, which is incorporating prosecutor-led investigations. Many questions focused on the role of the court in the investigations under the new CPC and whether it was permissible to suggest that parties gather and present a particular piece of evidence that has not yet been obtained and presented to the court.<sup>179</sup> Additionally, many questions arose with regard to the

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<sup>176</sup> Ibid.

<sup>177</sup> Notes from meeting April 6, 2012 with Serbian Judicial Academy, "Roundtable Discussion: Courtroom and Trial Practice."

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

novel concept of cross-examination and the extent and scope that was permissible, and also the proper process for reviewing and confirming indictments.<sup>180</sup>

However, the bulk of questions dealt with the role of the judge during investigation and at trial, and seemed to suggest somewhat of a reluctance to give up some of their previously held investigatory power. This mentality is also more common among the older generation of the court, while newer judges have had the benefits of judicial training and seminars that support the newly reformed judiciary. Furthermore, the types and extent of the questions from the Serbian judges also suggests a significant amount of confusion with regard to the new CPC. As a result, implementing such reforms may prove to be difficult, and the process to successfully implement these reforms could be quite slow.

As Serbia's novel reform initiatives are in their very early stages, it remains to be seen how they will be received and carried out in practice, and whether these changes or "legal transplants" will, in fact, lead to the strengthening of the judiciary, and in turn the rule of law and respect for human rights. As with any country undergoing comprehensive reforms to its legal and governing system, the *will* to reform is a highly important element for the success of the initiatives. Furthermore, such reform efforts to establish an independent judiciary with a judiciary that has traditionally been dependent upon the government and has bent to the executive's will certainly will not occur overnight. Additionally, overcoming the confusion of the Serbian judges with regard to their new roles as neutral arbitrators will be no small task. A significant amount of additional training and educational programs will be necessary. However, if Serbia is, in fact, able to improve and strengthen the independence of its judiciary, this could very well lead to the strengthening of the rule of law and thereby respect for human rights. This would then undoubtedly lead to very positive strides towards Serbia's acceptance into the

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<sup>180</sup> Ibid.

European Union.

## **Republic of Moldova**

Moldova is comprised of two rather broad regions that includes the area between the Prut and Dnestr Rivers, which was known as Bessarabia, and the area beyond this known as Transnistria, which is adjacent to Ukraine.<sup>181</sup> Bessarabia, which previously had belong to the independent Moldovan state in the 15<sup>th</sup> century and had been ruled by the Ottomans in the 16<sup>th</sup> century, was ceded to Russia following the Russo-Turkish War.<sup>182</sup> Thereafter in the early 1900's, the Moldovan Autonomous Soviet Socialist Republic (MASSR) was established.

MASSR was formed within the Ukrainian Soviet Socialist Republic, with Transnistria later becoming a part of MASSR and Bessarabia was later annexed through the signing of the secret Molotov-Ribbentrop Pact between the USSR and Germany.<sup>183</sup> The result was the merging of Bessarabia and the MASSR, which became the Moldovian Soviet Socialist Republic (the fifteenth republic within the USSR). It was not until 1990 that Moldova declared its independence from the USSR. However, with its declaration of independence, a group of separatists pursued a policy of succession from Moldova, and in the same year this group declared its separation from Moldova, and by the following year created the Republic of Transnistria (TMR).<sup>184</sup> The result of this separation and building tensions was a large-scale outbreak of fighting in which many lives were lost. It finally ended with the signing of a cease-fire agreement, and upon the ratification of the new Moldovan constitution in 1994, Transnistria was offered a certain level of autonomy, but legally still remained a part of Moldova. However,

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<sup>181</sup> Special Committee on European Affairs of the New York City Bar. "Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova." *The Association of the Bar of the City of New York*. 13.

<sup>182</sup> *Ibid.*, 13.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, 14-15.



Transnistria was not interested in this offer of autonomy, but rather seem more interested in sovereignty.

### ***The Conflict Between Moldova and Transnistria***

The “frozen conflict” between Moldova and Transnistria represents the conflict that exists between these two areas over who should control the area of Transnistria, which has existed as an autonomous region since the separatist conflict in the early 1990’s. By law this area is part of Moldova, however, the separatists have been in effective control of the region and it currently exists as a *de facto* regime by international law standards. According to the New York City Bar’s report, the separatist crisis in Moldova is characterized by “ethnic tensions, Russian troops, Soviet-era arms stockpiles, smuggling, money laundering, and corruption.”<sup>185</sup> However, central to the conflict is the TMR’s argument for full autonomy and attempts at secession from the Republic of Moldova.

The New York City Bar sent a team of legal scholars to Moldova and Transnistria in 2005 to meet with key policy leaders and stakeholders. Resulting from the Mission’s work, the New York City Bar composed a report that examines the history of the Moldovan-Transnistrian conflict as well as the status of Transnistria under international law. Additionally, the report considers what actions the TMR may take with regard to the conversion of property and provides an assessment of the legal actions and duties of “third party” states to the conflict. Specifically, this report examines three legal issues in international law pertaining to the conflict, and considers arguments made by both the Moldovan government and the separatists occupying and controlling Transnistria.

The three legal issues include 1) whether the TMR has a right to autonomy or sovereignty through succession under international law; 2) what actions may the separatists legally take

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<sup>185</sup> Ibid.

under international law regarding the conversion of property in Transnistria; and 3) the role of “third-party” states, specifically what the international legal responsibility and implications are with regard to Russia’s economic pressure and military presence in the TMR, as well as recent actions by Ukraine.<sup>186</sup>

Out of the three legal issues considered, the international legal status of the TMR is most central to the conflict, and the answers to the additional legal questions posed largely depend upon the status of the TMR. According to the report, there is no specific right to autonomy under international law, and there was no legal basis found for such a claim. Further, the report concluded that the basic legal requirements for secession to occur were not met by the TMR. Transnistria asserted two main arguments in favor of their autonomy and possible sovereignty: a) that as a result of the “denunciation” by the USSR of the Moldov-Ribbentrop Pact (established modern boundaries of Moldova), which is alleged to have been illegal, Transnistria should revert to an autonomous state; and b) they argued for autonomy under the international legal concept of self-determination.<sup>187</sup>

The report finds that no legal right to autonomy can be found in international law, and that “grants of autonomy” are mainly issues of domestic law.<sup>188</sup> Gagauzia, a southern region within Moldova housing a Turkic Christian minority, declared independence one month prior to Transnistria, but accepted a “level of autonomy” within the state of Moldova.<sup>189</sup> The autonomy of Gagauzia became part of the Moldovan Constitution under Article 111, which also provided for Transnistrian autonomy. While Gagauzia enjoys a special autonomous status, the Transnistrians cringed at this form of power-sharing offered and did not accept this level of

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<sup>186</sup> Ibid., 6.

<sup>187</sup> Ibid., 26, 28.

<sup>188</sup> Ibid., 29.

<sup>189</sup> Ibid.

autonomy offered to them.<sup>190</sup> Transnistria maintains that they will not become part of Moldova, that they must maintain their own army, and their own currency – that latter two aspects are considered hallmarks of sovereignty.

Thus, through their analysis of these claims, the report concludes that what the TMR really seems to be perusing is not autonomy but rather sovereignty. The difference being that sovereignty is considered a state's right under international law to be free (barring violations of international law) to rule as they see fit and to be free from any outside interference. However, this is a characteristic of statehood, whereas autonomy generally refers to an aspect of sovereignty and allows a region to make its own policy decisions with minimal interference from the national government.

The report also examines the argument of self-determination. Under international law, the basic norm of self-determination states, “it is the right of a people of an existing state to choose their own political system and to pursue their own economic, social, and cultural development.”<sup>191</sup> However, the right to self-determination in international law does not guarantee a general right of secession. Under international law, the basic requirements of secession require proof that a) the secessionists are a “people”; b) the states in which they are currently a part of is guilty of brutal violations of human rights; and c) there are no other “effective remedies” under domestic or international law.<sup>192</sup> Accordingly, after considering each of these points, the report concludes that the TMR does not satisfy these basic legal requirements, and thus has no right to secede from Moldova.

In order to determine the actual legal status of the TMR in international law, the report considered two points: a) the role of recognition in the process of state formation; and b) whether

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<sup>190</sup> Ibid.

<sup>191</sup> Ibid., 34.

<sup>192</sup> Ibid., 38.

the TMR is a *de facto* regime.<sup>193</sup> The fact that the TMR is not recognized by the international community despite the fact that they are in effective control over the territory, and also the continuous objections by Moldova suggest that the TMR is a *de facto* regime. After considering legal arguments by the TMR and analyzing the concept of insurgents and belligerents in international law, the report concludes that the TMR is best described as a *de facto* regime, which is in effective control over a portion of territory within a state, but whose *de jure* control is not accepted by any state and exists, by law, as part of Moldova who continuously contests its secession attempts.<sup>194</sup> In addition, it is held that the TMR has the right to take actions required for the care and security of the population under its control, but it is still bound by international law, and any agreements concluded may not be binding should the TMR be reintegrated into the Moldovan state.<sup>195</sup>

The designation of the TMR as a *de facto* regime leads to several other conclusions with regard to the other two legal issues posed at the beginning of the report. As a *de facto* regime, the TMR is afforded some rights, but it also has responsibilities and is prohibited from taking certain actions as well. Of particular concern is the TMR's conversion of Moldovan property in Transnistria. According to international law, as a *de facto* regime the TMR does not have the right to sell off, damage, or depreciate the value of Moldovan state assets or any private property contained within the territory that they are effectively controlling.<sup>196</sup> As a result, the report concludes that it is difficult to justify the TMR's privatization program, and should the TMR be reintegrated with Moldova, these transactions would not be upheld.

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<sup>193</sup> Ibid., 52.

<sup>194</sup> Ibid., 65.

<sup>195</sup> Ibid., 66.

<sup>196</sup> Ibid., 9.

Finally, with regard to the role of “third-party” states in this conflict, the report turns to the involvement of Russia and Ukraine. Under the concept of sovereignty as it relates to the independent state of Moldova, it is the duty of “third-party” states not to interfere so as to disrupt Moldova’s efforts to resolve the conflict. The report concludes that the activities by Russia including economic pressure, military assistance to the TMR, energy politics, and their overall enabling of TMR, which could not effectively exist autonomously of Moldova if not for their support, amounted to inappropriate intervention by Russia into the domestic affairs of Moldova.<sup>197</sup>

In summary, it is held that the TMR has no right to autonomy under international law, and has not satisfied the legal requirements of self-determination and secession under international law. Thus, the region is best described as a *de facto* regime that is in effective control over territory within the state of Moldova, but is not recognized by any other state in the international community. As a *de facto* regime, the TMR has the right to act to care for and protect its population, however, they do not have the right to sell off Moldovan assets. Lastly, the actions by Russia as a “third-party” state may not, at this point, result in state responsibility for a wrong done to Moldova, but should be closely monitored as their actions appear to be inappropriately intervening in the domestic affairs of Moldova.

The above discussion regarding the conflict between Transnistria and Moldova is important to note because although Transnistria is a *de facto* regime and has been offered a certain level of autonomy (which they declined to accept), Transnistria is legally still a part of Moldova. This means that their actions with regard to the rule of law and human rights, or lack thereof, ultimately reflects poorly on the state of Moldova as a whole and Moldova is held

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<sup>197</sup> Ibid., 11.

responsible. However, although this is a partial cause of the weakening of the rule of law in Moldova, it is not the only cause.

### ***History, Structure, and Organization of Moldova's Judiciary***

The Moldovan Judiciary has been shaped by Soviet traditions and historically been subordinate to the executive. Following Moldova's independence in 1990 and the ratification of the new constitution in 1994, Moldova instituted its first round of judicial reforms with a series of new laws governing the judiciary and the court system between 1994 and 1996.<sup>198</sup> Also during this period, Moldova joined the Council of Europe and ratified the European Convention on Human Rights (1997).<sup>199</sup> However, the reforms that took place in the early 2000's, which were aimed at ending corruption actually increased government control over the judiciary and the judiciary became less independent from the government. There were reports of "telephone justice" whereby the government provided instruction to the judiciary, and it appeared that the judiciary was returning to its "Soviet-tradition" past where it was compliant with the executive's demands.<sup>200</sup>

In more recent years however, the justice sector has undertaken additional reforms that have helped to reverse the retrogressive measures of the early 2000's and have sought to strengthen the independence of the judiciary and limit the role of the executive. This effort has been made through legislative reform and most recently the adoption of a comprehensive justice sector reform strategy that is to be implemented over a six-year period. Although this represents an important step in securing the independence of the judiciary, the process has been slow and much work remains to be done.

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<sup>198</sup> Soros Foundation, Moldova, "Reforming the Judiciary in Moldova: Prospects and Challenges," *International Commission of Jurists*, (2013): 10.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

The basic organization of Moldova’s court system includes the District Courts, Courts of Appeal, and the Supreme Court. The Superior Council of Magistracy is the main governing body of the judiciary, and is responsible for judicial appointments, evaluation of judicial performance, inspection, and disciplinary matters.<sup>201</sup> The District Courts examine all types of cases with judges having no specialty in one area of the law, while the Courts of Appeal are more specialized and are designated as civil (commercial and administrative matters) and criminal (minor/severe crimes).<sup>202</sup> There is also a Constitutional Court, which is outside the court system and independent of all branches of government and is the final authority on all constitutional issues related to the law.<sup>203</sup>

In various meetings with judges of the Supreme Court and District Court and officials from the Constitutional Court, the same legal concept of judicial independence was stated, that is, all personnel consistently reiterated that “by law” judges are required to take a passive rather than investigative role in proceedings by listening to arguments by the parties to a case and making neutral independent rulings.<sup>204</sup> However, various county reports, which will be discussed in further detail below, suggest that this is not the case indicating that judges are subject to outside influence, and tend to be highly involved in the case. This supports the idea that constitutionally, Moldova has an independent “adversarial” judiciary, but in practice it is subject to corruption and operates on the basis of an “inquisitorial” system with the judges having active roles in the proceedings.

### ***Justice Sector Reforms in the Republic of Moldova***

Since establishing its independence and adopting a constitution, which provides for the

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<sup>201</sup> Ibid., 13.

<sup>202</sup> Notes from meeting of March 11, 2013 with the Honorable Svetlana Filincova, Deputy President of the Supreme Court of Justice, Moldova.

<sup>203</sup> Ibid.

<sup>204</sup> Notes from meeting of March 11, 2013 at the Supreme Court of Justice, the Botanica District Court, and the Constitutional Court, Republic of Moldova.

establishment of an independent judiciary and organizes a system that is to accept and respect the rule of law, Moldova has struggled with the actual implementation of these legally established principles. A report in 2004 by the International Commission of Jurists highlights several concerns that are critical to the establishment of *de facto* judicial independence, including the nomination and dismissal of judges, judicial salaries and court budget, and judicial corruption.<sup>205</sup> The findings of this report suggest the presence of low levels of *de facto* judicial independence.

The mission to Moldova carried out by the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (ICJ/CIJL) has concluded that, despite efforts by the post-independent Moldovan Government to reform its justice sector, the rule of law suffers serious shortcomings that must be addressed.<sup>206</sup> According to the finding of the report, the breakdown in the separation of powers has resulted in a judiciary that is largely submissive to the directives of the government, with the executive branch able to substantially influence judicial appointments through the Supreme Council of Magistracy that lacks independence. The report details issues and areas of concern regarding the judiciary and offers recommendations, and concludes by saying that “beyond allegations of corruption, the Moldovan judiciary has substantially regressed in the last three years, resulting in court decisions that can pervert the course of justice when the interests of the Government are at stake.”<sup>207</sup>

An updated report by the Soros Foundation that was carried out in 2013, reiterates many of these concerns, although notes that Moldova has made progressive strides since 2009 when it began additional justice sector reform efforts (this was following the fall of the democratically

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<sup>205</sup> International Commission of Jurists, “Moldova: The Rule of Law in 2004,” *Report of the Center for the Independence of Judges and Lawyers*, (2004): 49.

<sup>206</sup> *Ibid.*, 42-45.

<sup>207</sup> *Ibid.*, 5.



elected communist regime which existed for almost ten years).<sup>208</sup> The report also applauds the most recent justice sector strategy released for 2011-2016.<sup>209</sup> However, according to the report, the judiciary is still widely distrusted by the public, is prone to corruption and influence by public authorities and private persons and entities.<sup>210</sup> Considering that many definitions of judicial independence hold the judiciary should be free from improper influence, this finding that the judiciary is subject to outside improper influence suggests a breakdown in *de facto* judicial independence.

The goal of this most recent mission to Moldova was to “assess the factors impeding the effective functioning of the judiciary... appointment, selection, training, and security of tenure of the judiciary.”<sup>211</sup> The mission met with key actors of the justice sector including judges of the Supreme Court, Court of Appeal, District Court, and the President of the Constitutional Court among other legal personnel and institutions such as the National Institute of Justice, NGO’s, expert lawyers, and the prosecutor’s office.

After analyzing various aspects of the judicial system the report made conclusions and recommendations specific to certain areas of the judicial system. Such areas included judicial pay and tenure, judicial qualifications, appointments, and training, and the role of investigative judges. The report notes the very low judicial salaries and states that this negatively impacts efficiency and creates the conditions for corruption.<sup>212</sup> Additionally, the report also states the need to secure tenure of judges to protect from outside influence, and suggests the reconsideration of the insecurity of judges’ positions during the first five years of their judicial

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<sup>208</sup> Soros Foundation, Moldova, “Reforming the Judiciary in Moldova: Prospects and Challenges,” *International Commission of Jurists*, (2013): 9-11.

<sup>209</sup> *Ibid.*, 11.

<sup>210</sup> *Ibid.*, 9-11.

<sup>211</sup> *Ibid.*, 9.

<sup>212</sup> *Ibid.*, 37.

career.<sup>213</sup> Furthermore, the International Commission of Jurists (ICJ) expresses concern regarding the uneven quality of judges that are appointed and advocate for strengthened efforts to allocate resources to the National Institute of Justice (NIJ) to ensure the adequate training of judges and provide for continuing education.

Presently, there are investigative judges in Moldova and efforts are being made to integrate them into the general judicial body. These investigative judges have, in the past, failed to provide adequate reasons for orders of pre-trial detention, which has led to findings of violation by Moldova of the right to liberty in Article 5 of the European Convention on Human Rights.<sup>214</sup> The majority of these investigative judges are former police officers or prosecutors, and they have failed to distance themselves from the prosecution office. Thus, the report cautions the integration of these investigative judges into the general judicial body where they could hear cases, saying that this could weaken judicial independence and lower the quality of judicial decision-making.<sup>215</sup>

The report by the Soros Foundation recognized the positive progress that has been made with the most recent justice sector reform initiatives. However, the report also pointed to the fact that not only are legislative and organizational reforms required, but a cultural shift is also necessary for the success of the newly reformed justice sector. It specifically pointed to the commitment and cooperation of the senior judiciary, stating that the mindset of judges has been a serious obstacle to reform.<sup>216</sup> This assertion was further substantiated by an interview conducted with a staff attorney in the Criminal Justice and Law Enforcement division of the U.S. Embassy that is involved with the justice sector reforms in Moldova. During this meeting it was stated that

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<sup>213</sup> Ibid., 38.

<sup>214</sup> Ibid., 21.

<sup>215</sup> Ibid., 22.

<sup>216</sup> Ibid., 37.

the education and mindset of the older generation of judges has impeded reform efforts, with judges taking an active role in investigations, retaining a close relationship with the prosecution office, and remaining compliant with executive direction.<sup>217</sup> As a result of the lack of tradition of a strong independent judiciary, the success of these reforms require a significant change of attitude towards the judiciary from all branches of state power, and perhaps most importantly from the judiciary.<sup>218</sup>

An additional concern noted by the report was that as a result of the weaknesses in judicial independence, the judiciary does not provide reliable protection of human rights, citing judgments issued against Moldova by the ECHR and other reports.<sup>219</sup> Such violations include violating the right to liberty due to judges often authorizing pretrial detention without sufficient reasons being given, and also violating the right to a fair trial, as a result of the failure of judges to give adequate reasons for criminal convictions.<sup>220</sup>

According to data by the ECHR and Freedom House, Moldova has had a greater number of human rights violation cases adjudicated against them and have had a lower freedom rating than that of Serbia. In 2009, there were a total of 30 cases where Moldova was found to be in violation of human rights practices, and the number has had little variation since, with 28 cases in 2010, and 31 cases in 2011.<sup>221</sup>

It should be noted however, that this also includes the Transnistria region, which is legally still considered a part of Moldova. According to Promo-Lex, a non-profit organization dedicated to promoting Human Rights in Moldova, with particular focus on the Transnistrian

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<sup>217</sup> Notes from meeting March 13, 2013 with Radu Foltea, Staff Attorney – Criminal Justice and Law Enforcement division, United States Embassy – Moldova.

<sup>218</sup> Soros Foundation, Moldova, “Reforming the Judiciary in Moldova: Prospects and Challenges,” *International Commission of Jurists*, (2013): 37.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*, 9-10

<sup>221</sup> See ECHR

region, the Association referred seven new cases of human rights violations in the Transnistrian region to the ECHR in 2011.<sup>222</sup> In a meeting with, Ion Manole, the director of Promo-Lex, it was stated that the Transnistrian conflict has led to Moldova feeling they have no responsibility for the human rights violations in this region because they do not have control over the region, and thus, this leaves them with the inability to help with the violations of human rights in in Transnistria.<sup>223</sup>

Furthermore, the regime change in 2009 should also be mentioned. Moldova was the only former USSR country at the time to democratically elect a government, however, that government fell in 2009. As previously discussed, countries experiencing military crises or conflict and countries with an unstable or transitioning regime are more likely to experience a weakened rule of law. Thus, the conflict involving Transnistria and the fall of the communist regime and transition of the communist government to a more Western inspired government could be a partial cause of the weakened rule of law and lack of respect for human rights. Additionally, the cases involving violations of human rights in Transnistria are included in the total number of cases for Moldova.

Like Serbia, the cases adjudicated against Moldova (including the separatist region of Transnistria) by the ECHR for the most part were also classified under the same categories of human rights violations, and similarly could be attributed to the lack of independence of the judiciary and its failure to uphold the rule of law and ensure the protection of human rights. This is despite the fact that all of these principles are established in Moldova's Constitution. Also, dating from 2007 to the present, Moldova's ratings for political rights and civil liberties seem to

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<sup>222</sup> Promo-Lex. "Promo-Lex Association Activity Report 2011- Moldova," *Promo-Lex Association*, 2012: 6.

<sup>223</sup> Notes from meeting with Ion Manole, Promo-Lex. "Human Rights in Transnistria." Joint Course at ULIM, Chisinau, Moldova. March 15, 2013.

reflect this lack of respect for human rights.<sup>224</sup> In 2007, Moldova recorded an overall freedom rating of 3.5 with civil liberties scored at 4 and political rights earning a score of 3. Since then, this has improved slightly to an overall freedom rating of 3 with civil liberties and political rights both scoring 3.<sup>225</sup>

In September of 2011, an expert team consisting of Dovydas Vitkauskas, Stanislav Pavlovschi and Eric Svanidze, conducted a project to assess the needs of the justice sector in Moldova, identifying priority areas of intervention to increase the efficiency of the EU-funded assistance, helping intensify cooperation of the EU with the Moldovan authorities, and making recommendations as to how to fulfill the justice sector objectives.<sup>226</sup> These efforts are intended to aid Moldova on its path to EU accession, and Moldova is being closely monitored by its pro-EU membership financial donors with regard to its judicial reform and rule of law strengthening efforts. The coalition team established the following five ‘umbrella’ areas of problems in the Moldovan justice sector, namely a certain lack of:

- a. internal and external sector dialogue, interaction and coordination for better institutional and legislative design;
- b. performance by the courts;
- c. performance by and independence of the pre-trial investigation and prosecuting bodies;
- d. access to and execution of justice; and
- e. institutional, legal and practical tools to combat corruption and impunity.<sup>227</sup>

In an effort to improve the independence of the judiciary, strengthen the rule of law, and ensure protection of human rights, the Ministry of Justice developed a seven-pillar

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<sup>224</sup> See Freedom House

<sup>225</sup> Ibid.

<sup>226</sup> Dovydas Vitkauskas, Stanislav Pavlovschi, and Eric Svanidze, “Assessment of Rule of Law and Administration of Justice for Sector Wide Programming in Moldova, Final Report, *EuropeAid*, 127054/C/SER/MULTI, September 2012: 6.

<sup>227</sup> Ibid., 6.

comprehensive justice sector reform strategy<sup>228</sup> that included strategic directions, specific intervention areas, execution deadlines, and institutions that will be responsible for the implementation of each pillar. The strategy defines the “justice sector” to include the judiciary as well as a wide range of other authorities and institutions that contribute to justice such as prosecutorial bodies, related legal professions, probation system, prison system, the Ministry of Justice, and the Constitutional Court. According to the draft strategy, the general objective of the reform strategy is to establish “an accessible, efficient, independent, transparent, professional and accountable justice system in compliance with European standards that are meant to ensure the rule of law and observance of human rights, and contribute to public trust in the judiciary”.<sup>229</sup>

The Ministry of Justice developed the reform strategy after identifying key factors and problems through extensive consultations with important justice sector institutions. The identified problems in the current justice system were determined through the analysis of various reports produced by international organizations, the European Union, and civil society. Following the analysis conducted by the Ministry of Justice, the identified problems facing the justice sector in the Republic of Moldova included issues such as ineffective court management, lack of transparency and accountability in the justice sectors, the high level of perceived corruption, and the inadequate quality of services provided by justice sector related professions. As a result, the strategy identifies four reform determining factors, which include: 1) the low-level of public trust in justice; 2) the quasi-general perception of the advanced degree of corruption in the justice sector; 3) the creation of an environment favorable for the economic

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<sup>228</sup> Ministry of Justice for the Republic of. “Strategy for Justice Sector Reform 2011-2015,” *Moldova: Ministry of Justice*, (2011): 1-2. The strategy identifies seven pillars and specifies strategic directions for each pillar. The seven pillars of the reform strategy include 1) judicial system; 2) criminal justice; 3) access to justice and enforcement of court decisions; 4) integrity of actors of the justice sector; 5) role of justice for economic growth; 6) observance of human rights in the justice sector; and 7) well-coordinated, well-managed, and responsible justice sector.

<sup>229</sup> *Ibid.*, 11.

growth and investments; and 4) EU integration aspirations of the Republic of Moldova.<sup>230</sup> These factors helped to establish both the general and specific objectives and lead to the development of the seven pillars of the strategy.

The reform strategy is based on a six-year implementation period, and is to be passed by the Parliament. Should the objectives of the strategy be successfully carried out, it is hoped that it will result in a justice system that is fair and responsible to society and exhibits “zero-tolerance” for corruption. Once the strategy is passed by the Parliament, the strategy document indicates that a “Strategy Implementation Action Plan” will be launched, which will include measures for each pillar and information with regards to specific intervention areas within each strategic direction.<sup>231</sup> The strategy identifies seven pillars and specifies strategic directions for each pillar. The seven pillars of the reform strategy include 1) judicial system; 2) criminal justice; 3) access to justice and enforcement of court decisions; 4) integrity of actors of the justice sector; 5) role of justice for economic growth; 6) observance of human rights in the justice sector; and 7) well-coordinated, well-managed, and responsible justice sector.<sup>232</sup>

As the strategy mentions, the Republic of Moldova has been plagued with corruption for quite a long time. In order for the strategy to be successful, not only must behavior that actors in the justice system have been accustomed to be changed, but it also requires a tremendous amount of education to teach an alternative method. Then these actors must be convinced that such a method and system is superior to the prior corrupt one and must refrain from reverting back to “old ways”. Time will tell whether these changes will, in fact, lead to the strengthening of the judiciary, and in turn the rule of law and respect for human rights. The strength of the *will* to reform will be key in either the success or failure of the strategy’s implementation.

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<sup>230</sup> Ibid., 6

<sup>231</sup> Ibid., 9.

<sup>232</sup> Ibid., 11.

The American Bar Association's Rule of Law Initiative (ABA ROLI) in Moldova has also implemented programs to aid in the implementation of the strategy. According to a meeting with ABA ROLI representatives, the ABA has two main programs, which include the Criminal Law and Anti-Corruption programs that seek to provide assistance with the action plan of the judicial reform strategy, offer continuing legal education, and provide feedback and commentary on draft laws and legislation.<sup>233</sup> The Anti-Corruption Program is partnered with the U.S. Embassy, and is specifically mentioned in the Strategy with regard to the implementation aspect of the Strategy.<sup>234</sup> Additionally, the Criminal Law Program provides training in human rights and supports the effective application of the new civil and criminal procedure codes.<sup>235</sup> As a result, the ABA ROLI also plays an important role in the reform process of the justice sector.

Like Serbia, these initiatives are in their very early stages, and it remains to be seen how they will be received and carried out in practice. The points of reform in the strategy offer a good base starting point for reforming the justice sector in the Republic of Moldova. The strategy is extremely detailed both in the prior analysis and in the development of specific areas and strategic directions of the policy. Additionally, the strategy provides sufficient detail as to how each pillar would be implemented, and which institutions will be responsible in doing so. Furthermore, working groups are created to oversee the process along with a group that will oversee the entire process. These groups will monitor progress and produce reports on the implementation of the strategy. While all of this collectively points in a positive direction for reforming the justice system in the Republic of Moldova, it still leaves the question of how this

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<sup>233</sup> Notes from meeting with Daniela Railean and Mihaela Vidaicu, American Bar Association's Rule of Law Initiative in the Republic of Moldova. Joint Course ULIM. Chisinau, Moldova, March 15, 2014.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.



comprehensive strategy will be received by the different institutions, personnel, and leaders in both the justice system and administrative system that are charge with implementation.

The strategy sounds good in theory and on paper, but actually carrying it out is something completely different. Nevertheless, it is hoped that the judicial reform efforts in Moldova will reduce corruption and lead to a more independent, transparent, and efficient judiciary that will uphold the rule of law and protect human rights. Should this effort be successful, it will greatly enhance Moldova's likelihood of being granted EU membership and could help to speed up the process. However, with Transnistria's declaration of independence from Moldova and their actions as a separatist regime, along with their refusal to accept a certain level of autonomy and Moldova's virtual inability to help solve the human rights violations in Transnistria, Moldova remains faced with an uphill battle for the future.

## **Conclusion**

Based upon the examination of various reports and data related to the justice sector and rule of law in both Serbia and in Moldova, the lack of judicial independence in practice, has clearly weakened the rule of law and respect for human rights. This is based upon the finding in the various reports, meetings, and interviews analyzed above, and the data obtained from the ECHR and corresponding political rights and civil liberties scores from Freedom House, which has been used in numerous studies to measure both the strength of the rule of law and human rights. Additionally, despite constitutional provisions that establish the independence of the judiciary and guarantee the acceptance of the rule of law, the numerous reform efforts by NGO's and international organizations in both countries suggest that these provisions are not being upheld and carried out in practice. This further demonstrates the need to account for *de jure* and

*de facto* judicial independence in order to accurately assess its success in upholding the rule of law and protecting human rights.

As previously discussed, the judiciary is ultimately responsible for carrying out and enforcing the law of the land. Essentially, this means that the judiciary is charged with upholding the rule of law in a country. Because of the widespread acceptance of a thick or substantive definition of the rule of law which incorporates basic human rights that have been previously outlined in the Universal Declaration of Human Rights, the judiciary then, is ultimately responsible for upholding and protecting these rights as they constitute part of the law within the country. Thus, *de facto* independence of the judiciary is crucial to carrying out this obligation. As demonstrated by the various reports and ECHR cases in Serbia and Moldova, a breakdown in or lack of judicial independence ultimately results in the weakening of the rule of law and thereby the violation of human rights.

While the countries of Serbia and Moldova differ in their approaches to reforming their justice sector, their goal remains the same. That is, the reforming of their justice system in order to ensure the independence of the judiciary in practice so as to uphold the rule of law by creating more effective, efficient, and transparent criminal proceedings, and simultaneously providing for human rights protections that are consistent with European and international standards. Serbia has progressed beyond the strategizing phase and has ratified a new Criminal Procedure Code, which represents its most significant structural and legislative change, going beyond strategic advising and oversight programs such as those being provided by USAID and other international agencies committed to aiding Serbia on its path to EU membership.

The most significant action pursued recently by Moldova involves the adoption of a comprehensive justice sector reform strategy. This strategy, as previously stated, seeks to

achieve more or less the same goals as Serbia's new CPC. That is, to build a justice sector that is efficient, independent, transparent, and accountable to society, while also meeting European standards that ensure the rule of law and the protection of human rights. The main difference between the actions of Serbia and those of Moldova is the fact that Serbia has now taken legislative action to put its strategy into action. However, it remains to be seen if these ideas expressed on paper will be able to be carried out in practice within the judiciary without interference from other political bodies. Moldova having just recently passed its strategy is at an earlier stage in the implementation process, which according to the strategy will take place over a period of six years. Thus, it remains to be seen if, like Serbia, these ideas and goals on paper will be carried out in practice.

The goal of this chapter has been to further enhance the understanding of the importance of judicial independence and the rule of law in securing human rights through case studies of Serbia and the Republic of Moldova. Because Serbia and Moldova are currently sitting at the starting gate for the new justice sector reforms, how they are actually implemented and what the practical effects are in reality remain to be seen. However, while the proper methods and institutional frameworks are debated, the global effort to strengthen the rule of law and establish an independent judiciary that will in turn lead to more transparent, efficient, and democratic processes is laudable, and will hopefully lead to more economic growth and enhance the protection of individual human rights around the world.

## **CHAPTER FIVE**

### **CONCLUSION**

Over the past twenty years, rule of law and judicial reform has taken center stage throughout the world. Membership to many international organizations, which require that countries have an established independent judiciary and abide by the rule of law, has helped to encourage widespread rule of law and judicial reform initiatives. Such initiatives have been most prominent in post-conflict and transitioning nations. Multimillion-dollar democratization projects across the globe have played a significant role in shaping a wide range of reform initiatives. Furthermore, the United States has played a large financial role in many justice sector reform initiatives, contributing millions of dollars to help strengthen the rule of law and establish judicial independence and promote democratic principles around the world.

While concepts of judicial independence and the rule of law continue to be contested, the actions to reform the rule of law found throughout the international community suggests that an independent judiciary is the foundation of a democratic society based on the rule of law. While there has been a global movement towards adopting more common law adversarial procedures in civil law systems, it is debated as to whether such institutional changes can, in fact, be “transplanted” and have the same desired effects that they had in their originating system. Furthermore, it is contested as to whether an independent judiciary actually leads to the rule of law and establishment of human rights. There is also a limited amount of literature that distinguishes between de facto and de jure judicial independence, and thus does not adequately evaluate the true level of judicial independence within a given country.

Although some previous research has investigated the relationship between judicial independence, democracy, and market economies, and also the association between the rule of law and democracy, very little research exists that examines the relationship between judicial independence and the rule of law. An additional shortcoming in the literature is that in many cases, judicial independence is included in the definition and measurement of the rule of law, but little has been done to isolate them and study the effects of one on the other. The disagreement over the necessity for liberal democratic processes and the extent to which an independent judiciary effects the establishment of the rule of law has resulted in the failure to determine whether an independent judiciary is necessary for the establishment of the rule of law, and thereby a stable and peaceful society where human rights and civil liberties prevail. There is limited empirical evidence that focuses specifically on the relationship between judicial independence and the rule of law, and demonstrates whether an independent judiciary is necessary for the effective establishment of the rule of law, and if so, what it is that leads to judicial independence.

The goal of this study has been to narrow the gaps in the literature described above. Based upon the results of my analyses, I assert that judicial independence, while not sufficient for establishing the rule of law, does operate to strengthen the rule of law. Due to the close relationship shared between the rule of law and human rights, I argue that judicial independence, through strengthening the rule of law, operates to also enhance respect for human rights. While I found that judicial independence measured both as an overall score and split into de facto and de jure scores had a significant impact on the strength of the rule of law, de facto judicial independence was a better indicator of the rule of law.

Overall, the models supported my hypothesis that judicial independence does in fact lead to a strengthened rule of law. Additionally, the results demonstrated that a system based upon the common law legal tradition was more likely to produce an environment conducive to the success of the rule of law. Although the type of political regime did not meet the standards to be considered statistically significant, it came close to being significant. As previously stated, this is likely due to the small “n” in my study. Thus, it is likely that the type of political regime does exert some influence on the strength of the rule of law, and a democracy is more likely to lead to a strengthened rule of law. With both security effectiveness and political legitimacy being statistically significant, it could be that the type of political regime in power does affect the rule of law, but that *characteristics* of a regime such as amount of conflict (security effectiveness) and government inclusion/repressiveness (political legitimacy) are better indicators of the strength of the rule of law in a given country.

Although the models analyzing the effects of the type of political regime and legal system on judicial independence were limited in their ability to explain the variance in judicial independence, these models did suggest that, while not statistically significant, de jure judicial independence and political regime may play a factor in determining de facto judicial independence. The rule of law was also a significant factor in the model. However, due to the low value of the adjusted R-square it would be inappropriate to claim that any of these variables were indicators of de facto judicial independence. Future research should attempt to look at additional factors that lead to de facto judicial independence.

The cases of Serbia and the Republic of Moldova further demonstrate the need to account for de jure and de facto judicial independence in order to accurately assess its success in upholding the rule of law and protecting human rights. Serbia and Moldova are two countries

currently sitting at the crossroads of two distinct frameworks, and both are in the relatively early stages of implementing recently launched rule of law and judicial reform initiatives. The cases in Serbia and Moldova provide an example of the global effort to reform the rule of law and establish an independent judiciary and demonstrates the need to enshrine judicial independence not only within the content of legal documents, but also in practice. These two countries provide an example of the fact that it is possible to have a constitutionally established independent judiciary, but that this does not ensure that the judiciary will operate independently in practice. Both Serbia and Moldova have made significant strides with regard to their reform initiatives, however, much work still remains to be done. Perhaps most importantly is that these reforms be carried out in practice.

This research seeks to contribute to the growing field of institutional justice, and add to the existing comparative law and politics literature on judicial independence and the rule of law. The goal of this study has been to further enhance the understanding of the importance of judicial independence and the rule of law in securing human rights through both a quantitative analysis and a case study of Serbia and the Republic of Moldova. I have attempted to review competing definitions for both the rule of law and judicial independence, and formulate a conceptual definition of each. Following this I sought to establish the relationship shared between judicial independence, the rule of law, and human rights. I argued for the need to distinguish between de facto judicial independence and de jure judicial independence because a constitutionally established judiciary does not ensure the independence of the judiciary in practice, nor does it necessarily lead to the rule of law.

Unfortunately, there are some shortcomings in my analysis. Namely, only 51 countries are included in the analysis and there are some geographic regions of the world that are

underrepresented in my study. Additionally, the thick, or substantive conception of the rule of law could be seen as being liberally biased. However, this conception of the rule of law is that which has gained force within the international community and is used by international organizations such as the United Nations.

Nevertheless, the results of my analysis have demonstrated that judicial independence, particularly de facto judicial independence, is a significant factor in strengthening the rule of law. This research is by no means comprehensive, nor does it deal with all of the conflicting arguments and complexities surrounding democracy, judicial independence, and the rule of law. It is merely intended to further the understanding of the relationship between judicial independence and the rule of law and potential ways that both can successfully be achieved. Future research should focus on devising a measure of judicial independence that incorporates both de jure and de facto indicators and covers all major independent countries in the global system, and provides for an empirical analysis of the relationship between judicial independence, the rule of law, and human rights.



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