Political Freedom in the Developing and Developed World:
What Difference Do Courts Make?

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Abstract

In this paper we examine the critical issue of judicial independence and political and civil rights. Though often taken as axiomatic, there is surprisingly little systematic analysis of the hypothesis that an independent judiciary is a necessary condition for political freedom. Our paper attempts to separate the effect of judicial independence from other sources of democratic freedom and liberty. Using a systematic analysis of time series cross sectional data, and a qualitative analysis of judicial independence and the concept of due process, we find that while there is some effect from judicial independence, at least when judicial independence interacts with social development, this influence is less than many theorists have proposed or speculated. Our results show that judicial independence without more is not enough to lead to greater political rights or even an increase in civil liberties. It is only with greater social development that judicial independence becomes a factor.
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1. Introduction

Though often taken as axiomatic, surprisingly little systematic analysis of the hypothesis that an independent judiciary is a necessary condition for political freedom has occurred. While a normative precept or defining condition of a functional judiciary, judicial independence may be less significant for the protection of civil liberties and political rights, as well as the functioning of parliamentary politics than previously thought. There may be other liberal institutions that are more important than courts, including political parties, self-restraining executives and military, an active civil society with vigorous nongovernmental organizations and the media, a functioning economy, and a liberal culture valuing the rule of law and freedom itself. The implication of the hypothesis is that a lawful regime requires an independent judiciary to assure minorities, majorities, individuals and even criminal defendants that rulers will not oppress them.

Our paper will attempt separate the effect of judicial independence from other sources of democratic freedom and liberty. We operationalize freedom in terms of civil and political rights, as estimated by Freedom House. For the other social and economic factors, we rely on UNDP Human Development Index, the Fraser Institute and the State Department. In addition to addressing the importance of judicial independence, we also want to examine potential interactions with judicial independence. That is, what social or economic factors can interact with judicial independence to enable and facilitate democratic freedoms? That is, is judicial independence most effective in conjunction with social and economic factors?
We propose to address these questions by examining judicial independence, political rights and civil liberties through a combination of quantitative and qualitative evidence. Quantitatively we propose to use a panel data, or a time series cross sectional approach, of 123 countries for the time period 1992 through 1999. Because many countries do not have reliable statistics and because the statistics were based on some subjective judgment we also use qualitative comparative analysis to support and amplify our qualitative conclusions. Specifically, we compare two former Soviet bloc countries and their relative judicial independence, to examine our quantitative conclusions. These tests of the same hypotheses should provide more specific connections between the variation in judicial independence and freedom.

2. Research on Political Freedom

For reasons reflecting the sociology of knowledge, scholars have ignored judicial independence and have emphasized factors like modernization, (Lipset 1959), socialization, (Weber 1946) economic development, (Stepan and Linz 1996), civil society, (Cohen and Arato 1992) and social capital (Putnam 1993, 1995, 1996). There is clear evidence that democratization processes affect the extent of freedom, particularly in the latter Third Wave of some one hundred new democracies, most of whom came quickly to regime change without much prior liberalization or social mobilization.

The difference between transitional and consolidated democracies result from whether the societies remain more traditional and therefore more susceptible to traditional or charismatic sources of legitimacy (Weber 1946) and the extent to which any regime, whether totalitarian, authoritarian, or democratic, is performing adequately. Lipset epitomizes the modernization theory’s hypotheses that underscore the “efficacy” of a system, particularly regarding its economic performance. There is a near scholarly
consensus that for most cases (India and Costa Rica excepted), economic efficacy is a necessary, but not a sufficient condition for democratic legitimacy. Many scholars emphasize the political party as essential (Huntington 1968); others free elections (Carey 1997), parliaments, executives, and judiciaries.

The centuries of European development of protections, first for criminal defendants was followed in the Enlightenment by judicial protections of free speech, association, and religion and most recently, the political rights of parties to compete in elections and parliaments, as well as citizens to vote. In the transitional democracies that have emerged since 1974, unlike Western democracies, the political rights have preceded before the civil rights were secured. This is because parties can compete in reasonably free elections without the protection of independent judiciaries, especially if foreign election observers of reasonable competence and neutrality are present.

During the Third Wave from 1974 to 1992, some one hundred new countries became democracies, though many are ambiguous, hegemonic authoritarian or competitive authoritarian regimes. The large majority of states in Asia and Africa have poor human rights records, with the worst regional record being in the Middle East. Asia and Africa are also the setting for the majority of the world’s indigenous peoples, whose treatment by modern states has produced gross and systematic human rights violations. During the post-Cold War era, some of these states became failed or genocidal states, while others established Islamic fundamentalist regimes (Sudan, Iran, Afghanistan), or faced armed insurgencies (Philippines, Algeria) or terrorism (Pakistan)—all of which correlate negatively with the practice of human rights. Writing about the situation in 2001, Adrian Karatnycky of Freedom House shows that the postcolonial “region” is weaker than Europe and the Americas for protecting freedom.
Of the 53 countries in Africa, 9 are free, 24 are partly free, and 20 are not free. In Asia, 18 of the region’s 39 countries are free, 10 are partly free, and 11 are not free…Of the 14 Middle Eastern countries (excluding those in North Africa) the roots of democracy and freedom are weakest. (Karatnycky 2002)

In such states, there is very little judicial independence or freedom. It is difficult to explain the causes for the lack of freedom under such conditions affecting 31 of the world’s 180 countries and another 34 that are partly free. While the number of closed hegemonic regimes in the world has radically decreased in the past decade, according to Diamond from 20 to 11 percent of states from 1974 to 2001. (Diamond 2001, p.26), the 79 from Africa and Asia alone are all states where a functioning judiciary is not possible. Still, despite the long odds at promoting freedom, it is possible to imagine situations where judicial independence could be exerted, perhaps only occasionally, in the face of enormous intimidation. Many of the British colonies, for example, developed strong judiciaries and their judiciaries have fared comparatively better than their political system, such as in Nigeria and Pakistan. The occasional exertion of judicial influence might assure some degree of freedom, if a positive, causal relationship exists.

Why might judicial independence lead to greater freedom? Despite the different approaches taken by scholars of the developed and developing democracies, most would agree that the judiciary is one of the most important, perhaps the most important, necessary condition needed for democratic consolidation. In particular, the hypothesis is that an institutionalized and independent judiciary is essential to consolidating democratic legitimacy. Both Machiavelli and Montesquieu observed that dictatorships and democracies were able to secure extensive civil liberties since the Renaissance in the Italian city-states and the European states that emerged since 1648. The advent of political rights associated with the Enlightenment was built on a foundation of individual
rights secured by courts. Montesquieu noted that the separation of powers between the judicial and executive branches was far more important than any separation between the legislative and the executive associated with presidential democracies. The reason is that the most harm that can be caused by governments are perpetrated by executives; the only check on them is a resolute judiciary in which any ordinary citizen ideally can protect their civil rights.

Alexander Hamilton echoes these ideas. He suggests that the very purpose of judicial independence is to counter-balance majoritarian will. Hamilton argued that “the complete independence of the courts of justice is peculiarly necessary …[because]…the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority” (Hamilton Federalist 78, 1961, 457). The independence of the judiciary operated as a "safeguard against the effects of occasional ill humors in the society” (Hamilton 1961, 470).

Despite the apparently axiomatic proposition, and near universal normative approval, empirical scholarship has virtually ignored the role of independent government institutions, particularly the judiciary, as a source of rights, liberties and political freedom in the both consolidated and transitional democracies. We seek to test whether this position equally true in common law and code legal systems; Western and non-Western political cultures; traditional and modern societies; and presidential, semi-presidential and parliamentary democracies, through our global analysis.

3. Defining Freedom

Freedom, and the components thereof are the dependent variables of our study. There are different measurements of freedom, which could include economic, social and
cultural indicators, as well as civil and political ones. For our statistical analysis, we chose to use the Freedom House indexes of political rights and civil liberties for our dependent variables. The organization defines political rights as those that “enable people to participate freely in the political process, which is the system by which the polity chooses authoritative policy makers and attempts to make binding decisions affecting the national, regional, or local community. In a free society, this represents the right of all adults to vote and compete for public office, and for elected representatives to have a decisive vote on public policies” (Freedom House Methodology 2001, p.2) Civil liberties is defined “to include the freedoms to develop views, institutions, and personal autonomy apart from the state” (Freedom House Methodology 2001, p.2) In particular, the organization examines the protection of minorities and the protection of freedom of expression.

Over a series of questions in this area, the group then rates countries on a one to seven scale, with one representing the most political rights or civil liberties, and seven the least. They then combine these two measures for an overall evaluation of freedom. We averaged our two other scores to create our freedom variable.

Following this, we have three dependent variables, political rights For ease of interpretation, we recoded this to have seven represent the highest level of political rights, civil liberties and freedom and one represent the lowest. Hence each of our dependent variables ranges from 1 the lowest level of political rights, civil liberties and freedom, to 7, the highest level of political rights, civil liberties and overall freedom.

4. A Model of Freedom – Data and Measurement

To compare the relative influence of judicial independence and economic and other developmental influences on political rights, civil liberties and general freedom, we
chose to use several commonly accepted measures of each, and to code and develop one key variable, judicial independence.

In general, judicial independence is often defined as the extent to which a court may adjudicate free from institutional controls, incentives, and impediments imposed or intimidated by force, money or other extralegal, corrupt methods by other individuals, institutions outside the judiciary, whether part of the government or powers outside of it (Davis 2002, Becker 1970, Blondel 1969). Judicial independence is beyond mere *de jure* provisions that seemingly protect judicial independence in a democratic and constitutionally responsible manner. True judicial independence must also exist *de facto*.

In almost all states, judicial independence is guaranteed *de jure*, often in the constitution and has the status of a universal norm in theory, but honored in the breach.  

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

Of course, currently there is no one accepted, or even widely used measure of judicial independence, and many suffer from inability to obtain reliable data, or cultural, social or economic biases. Schmidhauser, while not offering an actual measure, conceptualizes an eleven-part typology for measuring and comparing judicial independence.

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independence, premised on Weber’s systemic conceptualization. Schmidhauser argues for the inclusion of factors such as selection method, with appointed judges usually considered to have greater independence than elected judges, term of office, with a longer or even a life term aiding greater independence, and salary and term of office guarantees. One scholar, using factor analysis has developed such a scale for the fifty states of the United States (see Davis 2002).

However, to create a global study of judicial independence that incorporates the developing and developed world, authoritarian, emerging and fully democratic regimes, as well as civil and adversarial systems is not only beyond the scope of this manuscript, but given data limitations, not feasible at this time. For the most part, the available research focuses on single-country studies, often with different criteria of judicial independence, even in the same volume of studies.

Our solution was to use United States State Department annual human rights reports for each nation. The reports are prepared and published annually and in each report the author assesses the independence of the judiciary. Though there are guidelines attempting to promote consistency and reduce bias (Americas Watch et al. 1985) and there has been improvement over the years, there are still problems associated with the subjective assessment of a subjective criterion like judicial independence. The authors do not rely on constitutional provisions, but usually assess the independence of the judiciary in practice or in fact, as well as in law. As evidence of independence, the authors usually rely on freedom from pressure from other branches of government, particularly executive control, and freedom from such things as bribery and corruption. This is an implicit preference of a democratic conception of judicial independence, as opposed to a broader conceptualization that accepted judges acting independently but also on the basis of
biased on extra-constitutional criteria for adjudication. Because these criteria are not made explicit in the reports, it is difficult to be sure that the scores offered are consistent. However, since the concept of judicial independence is more technical and less politicized than many other human rights issues, our concern over bias is less than it would be, for example, if we were rating the presence, extent and causes of political violence, for example, the efficacy of parliaments, or the fairness of elections. (Diamond 2002)

There is an implicit bias in the reports, one that we accept, that an independent judiciary is a legitimate democratic institution and functions to insure against corruption or abuse of power by other branches of government or by the majority against voting or ethnic or religious minorities. Hence, a judiciary, for example, in a nation previously under Soviet control might be independent in the sense that the justices are appointees of the old regime and hostile to the emerging democratic forces. Neither the reports, nor our coding, listed this type of court as an independent judiciary.

Human Rights Watch (HRW) and Amnesty International (AI), two prominent International Nongovernmental Organizations, also evaluate many states covered by the nearly universal coverage of the US report (which omits itself). The evaluations are sometimes with each reflecting different emphases on topics and criteria, both in specific cases and in more general conclusions. Sometimes, each source focuses on different topics of concern within the ambit of human rights. Each has a distinct language of interpretation, from which inferences can be made not only about their methodologies but also their organizational culture. However, we chose the State Department because the site provides the most systematic and broad coverage, whereas AI and HRW cover selective human rights topics, which they find more salient. Though AI and HRW
provide more depth on the selected topics, the two NGOS often do not even discuss judicial independence. HRW and AI have the character of ad hoc reporting. The NGO reports, for all their apparent impartiality, do not examine this issue as broadly as the State Dept. For Syria, for example, neither NGO report addresses judicial independence. The State Dept. concludes, “The Constitution provides for an independent judiciary, but the two exceptional courts dealing with cases of alleged national security violations are not independent of executive branch control…political connections and bribery at times influence verdicts.” The AI and HRW reports briefly summarizes a few highlights of the year 2000, focusing more on the due process aspects of policing and torture than of the judiciary. Similar State Dept. conclusions about limited judicial independence were also not taken up for Romania. Fortunately for our analysis, the State Department (or for that matter AI and HRW) does not link the conclusions about judicial independence with the state of freedom in a country. Thus, a priori, there is any bias towards a finding of political freedom in countries with judicial independence.

We focused solely on the highest court of each nation, and we coded this measure as a dichotomous variable, with a 1 representing judicial independence, and 0 otherwise. We coded as independent a judiciary therefore that functioned, in practice, independent of the executive and legislature, was relatively free from corruption and bribery. While we recognize that such forcing judicial independence into a dichotomous variable fails to capture all the nuances, or degrees of independence, it still allows us to have a reliable, testable measure the influence of independence on political freedom. To test the
reliability of our judicial independence coding we double coded 15% of the data. We achieved 75% agreement (Kappa=.70; p<.001) on whether a court was independent or subject to control by other branches of government.

For our control variables we constructed or obtained several measures of economic, cultural and social development. One of key independent variables is the Human Development Index (HDI). The index is a compilation of “longevity, knowledge and living standards” (1990, p.12). Although the measure has changed over the year, there is a consistency and facial validity to the yearly ratings measure. We used mean scores for missing data, and the missing year of 1996.

Another control variable for economic development is a free market score, compiled by the Fraser Institute (2002). We take no position on the normative implications of these Free Market scores. We use this as a proxy for economic development. In general we assume greater free markets correlate with greater economic prosperity, or at least greater per capita income. For this variable, we rely on the annual Economic Freedom of the World Reports, published by The Fraser Institute in conjunction with members of the Economic Freedom Network. The reports rank countries on their level of economic freedom, which the institute defines as the extent to which one can pursue economic activity without interference from government. In this ranking, economic freedom is built upon personal choice, voluntary exchange, the right to keep earnings, and the security of property rights. In theory scores can range from a 1, the least free market to a 10, complete free market. We used yearly averaging to fill in missing data.

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2 The coding was done by one of the co-authors, a lawyer as well as a PhD, with the reliability coding by a recent PhD graduate, also a lawyer who has written in the area of comparative politics and judicial independence.
For a third control variable, we followed Poe and Tate and Poe, Keith and Tate, and created a measure of former British colonization, and we call this variable, British influence. This variable is dichotomous, with 1 representing former British influence, and 0 otherwise. Poe, Keith and Tate concluded that countries that have experienced British colonial rule tend to have relatively fewer personal integrity abuses than others. (Poe, Keith and Tate 1999) Some comparative political scientists have noticed the correlation between British colonialism and democratic stability in the developing world. India, which should never be democratic under most modernization theories of democratic correlates, remains democratic and a human rights protector, at least compared to the region of postcolonial states in Africa and Asia. Myron Weiner and Ergun Obzudun concluded in 1987 that a disproportionate number of democracies in the developing world were former British colonies. (Weiner and Obzudun 1987) Also, Dominguez noted the higher probability of liberal regimes among ex-British colonies (Dominguez 1987).

Prior to the 1990s, British postcolonies were significantly more democratic and liberal than other postcolonial states from Asia and Africa that became independent after World War II. Since the end of the Third Wave, while still important, the significance of whether a state was a British or French colony has lessened. In the 1990s, former British colonies had Freedom House scores of 4.92, 4.94 and 4.65 for the three decades, whereas former French ones scored 5.62, 5.85, and 4.88. Thus, French ex-colonies had higher average scores in the 1970s and 1980s, but were nearly the same on average by the 1990s. The variation among British colonies is very large. While it has the most democracies and the most human rights protection, it also has the many with the worst scores. Egypt, Kenya, Nigeria, Sudan, Swaziland, Somalia and Tanzania all had scores
above five and more had them above 3.5. Many former French colonies, Algeria, Cameroon, Chad, Mauritania, among them, had scores above five too. Thus, while we expect the variable to matter, we expect it to have less of an impact than earlier studies since our focus is on the 1990’s and the other studies incorporating this variable encompassed an earlier time frame.

Our final two variables are interactive judicial independence terms. That is, we created variables that interact judicial independence with our control variables of economic and social development. This way we can assess the influence of judicial independence in conjunction with greater social and economic development. The first is an interactive variable of judicial influence and free market scores. This will show the influence of free markets in states with independent judiciaries as compared to those without, which drop out of the analysis due to the coding of 0. The second is an interactive variable of judicial influence and human development scores. Similar to the free market – judicial independence interactive variable, this variable will show the influence of HDI scores in states with independent judiciaries as compared to those without, which again drop out of the analysis due to the coding of 0.

A complete listing of the variables with the means and standard deviations are listed in Table 1, which follows:

Table 1 here

The descriptive data a show a world remarkably centered. Roughly half our sample shows up as countries with independent judiciaries (mean .55), and the average free market and human development scores also fall roughly in the mid point of these scales, with the free market scores at 5.67 (out of 10) and the human development index at .67 (out of 1). The political rights, civil rights and overall freedom scores are slightly
past the midpoints, with mean scores of 4.41, 4.26, and 4.33 out of 7, respectively. Given this naturally mean centered data, we next turn to a multivariate analysis to test the hypothesis of the importance of an independent judiciary to determine the causes of the variation.

5. Method and Results

Method. The data we used for the analysis, an examination of 123 nations over an eight-year period (1992-1999), is commonly known as time series cross sectional data. As such the error structure is more complicated than simpler cross sectional or time series data. To deal with these potential problems, we used several commonly accepted methods for this type of panel data.

Specifically, to control for correlated errors and potential underestimation of the standard errors, we employ a Prais Winston regression with panel corrected standard errors (see Greene 1997, see also Beck and Katz 1995a, 1995b) We also modeled this as an AR1 process to control for any time dependency within the panels. We did not assume independence of the observations. Using this method provides the most conservative test of the data, and although we lose some efficiency, we believe this strengthens the reliability of the results (Greene 1997). Results are the same as in a simple regression analysis, and thus are easy to interpret. Although the dependent variables are bounded, there is no evidence that they are nonlinear, and hence we did not perform any logarithmic transformation.

3 We performed basic heteroscedasticity and autocorrelation tests on the equations in the model. For heteroscedasticity we graphed the estimated squared residuals ($u_t^2$) against the estimated $Y_t$, and against several of the explanatory variables. We also performed White’s general heteroscedasticity test (see Greene 1997, p. 550). The chi square values obtained were all below the critical chi square value at the .05 level of significance. For autocorrelation we used a modification of the Bruesch-Godfrey test suggested by Greene.
We ran three separate analyses. The first uses political rights as the dependent variables; the second uses the civil liberties measure, and the third uses political freedom, which is simply an average of the first two dependent variables.

**Results.** We present the results of the analyses for each of our dependent variables in Table 2.

Table 2 here

An overview of the results shows strong support for those scholars who believe that economic and social development matter more than constitutional or institutional structure. Cultural influence, in the form of British influence also matters, however, as we predicted, the substantive affect of British influence is less than we might have found if the analysis included years prior to 1992.

**Political Freedom.** Examining our first analysis, political freedom, we can see that the substantive and statistically significant predictors of political rights are free markets, social development and British influence. Since British influence is a dichotomous variable, a former British colony (.612, p<.001), on average will have an increased political rights score of more than half a point on the seven-point scale, with all other variables held constant.

Each unit increase in the free market score (.489, p<.001) increases political rights by almost one-half of a point on the scale. A standard deviation increase leads to a three quarters increase in political freedom, while a two standard deviation increase leads to almost a point and one half increase in political freedom, all other variables held constant. Put another way, the difference between an average state such as, Pakistan and Bolivia (political rights score of 6), both of which do not have independent judiciaries, might be
the difference in that Bolivia has a free market score one standard deviation greater than that of Pakistan.

The Human Development Scores (2.16, p<.001) have a measurable, if smaller affect on political rights. Each unit increase in the HDI score increases political rights by .02. A shift of two standard deviations, which approximates a shift from a low Human Development Index score to a high Human Development Index score, increases political rights by about three quarters of a point on the scale.

*Civil Liberties.* Free markets, British influence and human development lead to increases in civil liberties. Each has a slightly smaller affect on civil liberties than on political freedom. While judicial independence alone does not lead to increased civil liberties, through an interaction with human development (1.53, p<.001), judicial independence does have a positive affect on civil liberties. It is a small, but measurable affect on civil liberties, with a unit increase in the interaction leading to a one percent increase in the civil liberties score. With all other variables held constant, a standard deviation shift leads to a quarter point increase in Civil Liberties, while a two standard deviation shift leads to almost one-third of a point increase on the civil liberties scale.

British influence (.481, p<.001), has a slightly weaker influence on civil liberties than it does on political rights, with the presence of British influence leading to over a .48 increase in civil liberties scores, while social development (1.53, p<.001), has a smaller affect on civil liberties than on political rights, although the interaction with judicial independence increases the importance of social development.

Finally the affect of free markets is on civil liberties is almost the same as it is for political freedom, with a one unit increase worth slightly less than one half a point on the scale and a two standard deviation shift leading to almost one and one half point increase.
Freedom. Our final multivariate analysis is the combined average score we label freedom. As one would expect, the coefficients average in value between the political rights and civil liberties results. Of interest for our analysis are the results of the interaction of judicial independence and the Human Development Index (1.14, p<.01). The result for this variable is statistically and substantively significant, and shows that an independent judiciary together with increased social development will, on average, lead to an overall increase in freedom.

6. Judicial Independence and the Problem of Due Process

Of course, we recognize that the State Department's fairly consistent methodological review of judicial independence still tends to lack perspective in scope and degree. Its heavy criticism for some cases may reflect its implicit higher standards and expectations for some cases than for others. The State Department is also a state organization, with its own organizational and political biases. Thus, in this section we want to use the aforementioned NGO sources that are concerned more with due process and human rights to compliment the State Department reports. After all, if judicial independence is meant to promote the rule of law, so that no leader is above the law, then human rights records indicate the extent which judicial independence is promoting this core democratic and liberal value. The State Department, and their view however reliable, is insufficient.

When we combine due process with judicial independence, we find several types of situations. One type finds relatively high judicial independence with due process violations. As noted above, the State Dept. concluded that substantial progress had been achieved in independence since August 2000, when budget and administrative powers had been transferred to the courts. However, the State Department’s evaluation of Thailand's due process concluded that its judiciary was "subject to corruption and has a reputation for
venality." Pretrial detention was lengthy, even though police were required to file charges within 48 hours of arrest. The same report also concluded that police killed numerous suspects while trying to apprehend them and police "beat suspects, at times to coerce them into confessions." AI noted "widespread abuses in the administration of justice" in Thailand, such as torture to obtain confessions. Similarly, Turkey received some praise for its judicial independence from the State Dept., which noted, "various officials acknowledge the need for constitutional and legislative change to further strengthen that independence." Yet, the State Dept. found violations such as "extra judicial killings, torture and death from excessive force." HRW expressed concerns that the courts were not "safeguarding" free speech in the face of political pressure. HRW also wrote the Turkish Foreign Minister to work for reforms, which would stop the torture of incommunicado detainees.

A second type finds both judicial dependence and due process violations. In Kenya, for example, HRW cited police corruption, harassment, use of excessive force and unlawful confinement. AI noted that the police killed eighteen people in 2001. The State Dept. cited more than two hundred suspects and detainees who died in police custody. It also found that Kenyan law permitting those detained to visit with their lawyers and their families frequently violated. This impunity is supported by courts, which fail to prosecute offenders in government. Judges are accused of "corruption, incompetence, neglect of duty, drunkenness, and...racketeering," the State Dept. concludes. Similarly, in Kuwait, HRW finds hundreds of cases of torture, executions and disappearances without government investigation. AI finds dozens of detainees held without charge or trial. The State Dept. finds the police and army torturing offenders. A third example, Pakistan, has many inmates detained without charges or trials, according to AI. The State Dept. finds that "persons in jail awaiting trial sometimes are held for periods longer than the sentence they would receive if
convicted. All three sources conclude that the police can act corruptly and violently with impunity. There are also abuses of women's rights under the Shariat Islamic or customary law tribal courts, where victims of rape are occasionally prosecuted for fornication because the testimony of males count more than from females. Another case with poor performance, but with signs of optimism is Russia. HRW and the State Dept. describe corruption and bribery in the justice system. HRW says that judges are still "subject to political pressure." The State Dept. warns of the prevalence of extra judicial killings, as well as the improper arrest and indefinite detentions. These comments do not even refer to the impunity of Russian war crimes in Chechnya. Venezuela is another authoritarian electoral regime without reported judicial independence and due process. Police and soldiers who commit crimes, such as detaining opposition members who are uncharged with crimes, are often tried in military courts, which rarely punish violators proportionately. The police intimidate and influence civilian judicial decisions. In this second category, we still find large differences between countries that utilize more or less violence and bribery.

A third type of situation are ambiguous situations, where both independence and due process are accepted as legitimate and often respected, but subject to arbitrary or politically motivated exceptions that go unnoticed by the courts. Poland, for example, is depicted by the 1999 State Dept. as "independent, but inefficient...Prisons are poorly kept. Civil trial can take up to three years." There is bribery in the court system, and verdicts are not enforced. Yet, many detainees do obtain bail; trials are held publicly and appeals are granted. A fourth type of case has no judiciary as we know them in democracy, or it is part of a hybrid system of secular, religious, and customary courts, as well as general lawlessness. Armenia has begun to recover with its 1990s war with Azerbaijan, though the political encroachments on judicial independence are many, especially the president's constitutional
prerogative through a council of Justice, to discipline or dismiss judges. (State Dept.) Similarly, In 1999, the president dismissed commissioned members who were to recommend strengthening the independence of the judiciary. Azerbaijan has been even less ready de facto to accept a regime based on the rule of law, after its seven decades of Soviet rule and subsequent war. However, it has passed more de jure reforms than Armenia. (State Dept.) Under the Taliban regime, the judiciary (and legislature) were non-functional. Under the transitional authority led by Hamid Karzai, Islamic courts may emerge along with secular ones, but it is too soon to tell. In the Republic of Congo, the ongoing-armed conflict since 1997 makes it impossible for its legal system to function, despite the attempts to establish the rule of law in 1992. In Algeria the civil war since the terminated 1991 elections until it ended late in the decade led to the courts usually supporting the army-backed Bouteflika government. Pre-trial detentions remained high throughout the decade. Judges are beholden to the state or are intimidated by violence. (State Dept.) Angola's civil war has continued since the early 1970s, notwithstanding the assassination of rebel-leader Jonas Sivimbi in 2001. Its judiciary, where it functions in the parts of the country not affected by the war, is not independent of the ruling MPLA. (State Dept.) In all these cases, peace and the introduction of democracy will allow courts to function in a way that then lets them protect fundamental liberties.

How can we assess these three types of sub-optimal systems of judicial dependence on the state of civil and political freedom? Until a regime has begun liberalization or democratization, most social and political problems are resolved outside the legal system itself. New courts or old courts inherited from authoritarian or traditional rule are often unprepared to handle the resolution of the problems that are submitted to them. That is they are not sufficiently adaptable and autonomous to manage complex problems coherently.
Why should this be so? One factor would appear to be the lack of institutionalization. Courts need experience, training, and political support from the outside for its development and independence from political parties, the military and influential groups in society that might bribe its members.

For postcolonial states in about seventy Asian and African states which became independent after World War II, they have imported legal institutions that usually had not been well established under colonialism. They can comprise common law/adversarial, code-based/inquisitorial systems, or a hybrid of the two. Judges are not independent because they generally were not so under colonialism. However, the British postcolonies, especially in the Commonwealth Caribbean, Israel, and to an extent in Bangladesh, have established some independence. For most the Third Wave regimes that have not completed their democratic transitions and by definition have not implemented the rule of law, these processes of making a judiciary independent require both lawyers and judges to develop expertise and autonomy and the non-judicial actors to refrain from pressuring the courts and to respect their judgments. This involves a complex set of adaptations and evolutions. Clearly, non-judicial actors influence the relative extent of judicial independence, just as judicial actors create a system that achieves differing degrees of competence and autonomy. Certainly, political culture is crucial at an ultimate level of causality. Civic and legal education in schools are also necessary, but long-term processes.

However, how do independent courts promote human freedom? Virtually all major political issues, especially human rights ones, do end up in court when they are managed democratically. This means that no political criteria are applied to mistreatment by the state of its citizens. As courts develop, they depoliticize problems that had been settled arbitrarily by the state in its own interest in the past. Tampering of judicial processes become less
frequent and a liability. Where have we seen evidence of this progress? For this we have to undertake a time-based analysis to discern this improvement. In the remainder of this paper, we will analyze such instances of judicial improvement by relying on the reports of these three organizations, only over the past two decades, as well as other secondary sources.

Some cases present the first signs of judicial independence and freedom. In Costa Rica, which has been democratic since 1948, judicial independence took a few more decades to be established before its autonomy was established enough to challenge the government. Until reforms in 1989, all Supreme Court declarations of unconstitutionality required a two-thirds vote, which is hard to achieve. Since then, the judiciary has become the final arbiter on the law. (In Croatia, for example, under Franjo Tudjman's elected dictatorship from 1991-1997, the number of unresolved cases doubled. Many judges were appointed from his regime, who have since been asked to resign or reform themselves since the democratic transition initiated by the democratic elections in 1998. Some of these authoritarian judges claim their independence is now threatened by reforms. (Council of Europe 2000) Similar optimism existed in the Republic of Congo prior to the seizure of power by force in 1997 by Sassou-Nguesso and his militia. Previously, the Supreme Court rulings on the disputed elections of 1993 suggested a major step toward the rule of law. (Clark 1994).

Some semi-democracies lack the political support to limit the influence of the president. Argentina has lacked judicial independence for much of its history-- despite the historic prosecution of the military leaders from the junta regime under the Alfonsin government, the first elected one in its democratic transition in the mid-1980s. Despite constitutional guarantees, the many coups and intimidating coups ("white coups") under the democracy have induced concessions or cowardice from the courts. Moreover,
constitutional protections of "states of siege" have reduced the range of judicial authority to less than what a democratic court system would adjudicate. In addition to these authoritarian prerogatives, bribery is endemic.

By contrast, in the Ivory Coast, which had a number of political disruptions, particularly from 2000-2001, including a rigged election, it is very difficult to assess positive effects of judicial independence. The courts still fail to implement the legal principles found in its constitution and basic laws. The effect of decades of one-party rule still has not receded (Amnesty International 2002).

Finally we can examine independence in two similar states, Romania and Bulgaria. For this section, we will rely on research by Ganev on Bulgaria and Carey on Romania. Bulgaria's commitment to judicial independence has been validated in practice, particularly its Constitutional Court. (Ganev 1997) It has induced the protection of minority rights, such as the Supreme Court 1991 decision validating the right of ethnic Turks to form a political party, the Movement for Rights and Freedom, in its very first case. The nationalist fraction in the BSP undemocratic objective was prevented by independent judicial review of constitutional procedures. Ever since that moment, all political actors energetically seek the intervention of the Justices and abide by their decisions. The notion of "the constitutionally resolved conflict" became an element of Bulgarian political practices. (Ganev forthcoming) Finland and France, as well, are regarded as having both formal and substantive judicial independence by all three data sources.

Romanian and Bulgarian constitutional practices in the post communist period is distinguished by the role of the Constitutional Court. In Romania, it is a relatively minor and neglected player whose constitutional role is still ambiguous. The difference may be
traced to the early strategic choice of Bulgarian political elites to rely on the Court as an arbiter in their incessant struggles. (Grzymala-Busse 1999) One of the sharpest contrasts between the two countries is the executive supervision of the courts. In Bulgaria, the president vetoed legislation on Oct. 15, 1998 that would have given the government power over judicial officials, especially the justice minister's supervision of the administration of the highest courts and of the national prosecutor's office. Instead, the Supreme Judicial Council was given this supervisory responsibility, while administration remained with the procuracy and the highest courts themselves, preserving their autonomy. (Constitution Watch 1998) Bulgaria's top court has not hesitated to render important decisions, overturning constitutional depredations. For example, in Oct. 1999, the Constitutional Court ruled that re-election of members to the Supreme Judicial Council was unconstitutional, and the latter obeyed. When two members refused to resign, the Supreme Administrative Court upheld the Council's decision. (Constitution Watch 2000)

By contrast, Bulgaria's commitment to judicial independence has been validated in practice, particularly its Constitutional Court. (Ganev 1997) It has induced the protection of minority rights, such as the Supreme Court 1991 decision validating the right of ethnic Turks to form a political party, the Movement for Rights and Freedom, in its very first case. the nationalist fraction in the BSP undemocratic objective was prevented by independent judicial review of constitutional procedures. Ever since that moment, all political actors energetically seek the intervention of the Justices and abide by their decisions. The notion of "the constitutionally resolved conflict" became an element of Bulgarian political practices. (Ganev forthcoming)
Romania still has a plurality communist-era judges who misuse their independence with anti-democratic interpretations of the constitution, often to the political benefit of the post-totalitarian political forces. They have not even been publicly identified for their communist backgrounds to see if their integrity has been compromised. Those communist-era judges who have left to make more money as lawyers. By contrast, neighboring Bulgaria has had a communist era purge of judges. One can conclude that this is a key factor, the purging of "independent" judges dating from communism, which has rendered Bulgaria to have more judicial independence.

While Freedom House rated both nations to be relatively free by the end of 2001, with average scores of 6 on our remeasured scale, and both were rated as liberal democracies by Diamond, Bulgaria generally had higher ratings of political and civil freedom than Romania. It is possible that higher judicial independence in Bulgaria supported this rating, as Ganev's assessment suggests. Other factors, however, would include Bulgaria's more inclusive democratic regime, where rival parties have agreed to share power and not to dominate politics entirely.

Both cases constitute hard cases methodologically. Romania’s Constitutional Court did rule that emergency decrees cannot be decreed unless the case for a valid emergency existing has been shown. This sounds quite democratic and responsible. However, in striking down Ordinance 22/1997, which allowed minority languages to be used in local administration, the Court took an undemocratic position that permitted the most minimal group rights to assure the inclusion of a fundamental interest of a minority. When a court acts in a manifestly undemocratic manner in substance, it is difficult to be reassured that it was also insisting on a constitutional procedure designed to limit
excessive executive decrees, which would also usurp legislative authority. Yet, this
democratic interest was also assured by this decision.

Similarly methodological difficulties are seen from Bulgaria. It could be
contended that the Union of Democratic Forces (UDF), which governed from 1997-2001,
learned how to use the mechanism of judicial review to outplay its political opponents.
One could construe this to mean that it unduly interfered with or manipulated Justices.
The other interpretation is that it wanted to halt the undemocratic approach of its then
political opponent, the Bulgarian Socialist Party (BSP). UDF chose to focus on its
constitutional defects, a strategy that worked on numerous occasions. In addition to
urging the Court to strike down unconstitutional laws, the UDF regularly asked Justices
for authoritative interpretation of constitutional texts, and subsequently relied on the
Court’s opinions as it planned its political strategy. While this sounds like interfering with
the judiciary, it is merely a political strategy open to UDF. The rise of litigating political
questions has certainly arisen in the US, including in the controversial decision, *Bush v. Gore*.
However, in this context, no one alleged that the Republicans tampered with
judicial processes, even if dozens of books have been published criticizing the decision as
politicized.

7. Conclusion

In our analysis, we do find some effect from judicial independence, at least when
judicial independence interacts with social development. This influence is less than many
theorists have proposed or speculated. Our results show that judicial independence
without more is not enough to lead to greater political rights or even an increase in civil
liberties. It is only with greater social development that judicial independence becomes a
factor.
Regime change, particularly in the third wave, precedes judicial independence. After leaders have agreed to establish democracy, courts can then have influence. However, the ability of the courts to take steps to limit the power of rulers through the rule of law, will remain dependent on the cooperation of those leaders and those with whom they pact a democratic transition. It is also possible that those regimes, either seeking foreign entry into organizations like NATO, the European Union, or even the African Union, or those seeking foreign investment, which needs legal protection of property, will be more amenable to foreign pressure to respect judicial decisions. However, the process of institutionalization of courts as administrative bodies, as well as the process of socializing political actors to respect the rule of law, takes decades, not years. Thus, a democratic regime change signals a process in which simultaneous actions of judicial independence followed by respect for those judgments can begin. If more of the same follows over a decade without much disruption, then the judiciary will have consolidated its grip over freedom in a country.

Independent courts do protect the rights of ethnic and voting rights. The United States Supreme Court significantly increased the rights of criminal defendants, and ethnic and voting minorities through a series of decisions starting from about 1937 (but see Rosenberg 1991). It might be, however, that social development must precede judicial independence, and that once a certain level of social development is achieved, then an independent judiciary can secure greater civil liberties and overall freedom. That is, and independent judiciary might be a necessary, if hardly sufficient, condition for the protection of human freedom.

Our study suggests those interested in protecting the political rights and civil liberties of citizens in developing democracies should concentrate their efforts on
securing free markets and social equality. Those will have the greatest immediate affect on freedom. Once those are established, then an independent judiciary becomes an important guarantor and protector of rights and liberties. The results also suggest that while British influence is an important predictor of greater political rights and civil liberties, British influence alone will not lead to greater political freedom.

Of course, we recognize the limitations in our definition and measurement of judicial independence. As the case study clearly demonstrates, a dichotomous measure fails to capture any variation in the concept of judicial independence. We recognize that a more nuanced approach might, following Schmidhauser for example, might show that a significant measure of judicial independence will lead to greater political and civil rights and liberties, while lesser independence fails to have any impact. Thus our blunt measure fails to really capture the importance of judicial independence.

We hope and expect that others will improve on our measure. Needless to say, this attempt at measuring this variable will not be the last. But for now, and in full acknowledgement of the provisional nature of scientific conclusions (King, Keohane and Verba 1994), we find, by our measures, less of an impact for judicial independence than many suppose.
<table>
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<tr>
<th>Variable</th>
<th>Mean</th>
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<tr>
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<tr>
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<td>Civil Liberties</td>
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<tr>
<td>Freedom</td>
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### Table 2: Economic Development, Judicial Independence and Political Freedom

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<td></td>
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<td></td>
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<td>(.5815)</td>
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<td>(.392)</td>
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<td>.482***</td>
<td>.538**</td>
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N = 984

NOTE: Standard errors are in parentheses.

Prais Winston Regression with Panel Corrected Standard Errors

*Significant at $p<.05$, **Significant at $p<.01$, *** Significant at $p<.001$. 
References


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http://www.state.gov/g/drl/rls/hrrpt/2001/


www.crimesofwar.org.