

JUDICIAL INDEPENDENCE and human rights protection around the world

by Linda Camp Keith

A truly independent judiciary is expected to be able to counter incursions upon individual rights by other branches of the government. How effective are national constitutional provisions on judicial independence in achieving this goal?

Legal scholars, political scientists, international organizations, and human rights activists all have posited the potentially important role an independent judiciary can play in securing constitutionally promised human rights—indeed, some assert that it is *the* indispensable link in the machinery for securing individual protection against states' human rights abuses.¹ It has long been argued, in fact, that “as a necessary check on the potential excesses of both the executive and legislative branches, only an in-

dependent and impartial judiciary may effectively guarantee the protection of human rights.”²

The nexus between the independence of the judiciary and human rights has been most strongly emphasized by international organizations. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights enumerate an independent judiciary as one of the essential elements for safeguarding human

rights. And the United Nations, which regularly assists in establishing systems of justice, has set forth standards for achieving an independent judiciary in its *Basic Principles on the Independence of the Judiciary*,³ which

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1. Nsereko, *The Police, Human Rights, and the Constitution*, 15 HUM. RTS. Q. 465–84 (1993). See also Ackermann, *Constitutional Protection of Human Rights: Judicial Review*, 21 COLUM. HUM. RTS. L. REV. 59–71 (1989); Blasi and Cingranelli, *Do Constitutions and Institutions Help Protect Human Rights?* in HUMAN RIGHTS AND DEVELOPING COUNTRIES, Cingranelli ed. (Greenwich, Conn.: JAI Press, 1996); Cross, *The Relevance of Law in Human Rights Protection*, 19 INT'L REV. L. & ECON. 87–98 (1999); Fruhling, *Human Rights in Constitutional Order and in Political Practice in Latin America*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITION IN THE TEMPORARY WORLD, Greenberg et al. eds. (New York: Oxford University Press, 1993); International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva: International Commission of Jurists, 1983); Maduna, *Judicial Review and Protection of Human Rights Under a New Constitutional Order in South Africa*, 21 COLUM. HUM. RTS. L. REV. 73–83 (1989); Petrukhin, *The Judicial Protection of the Constitutional Rights and Freedoms in Russia: Myths and Reality*, in JUDICIAL

PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? Gibney and Frankowski eds. (Westport: Praeger, 1999); Scalia, *Federal Constitutional Guarantees of Individual Rights in the United States of America*, in HUMAN RIGHTS AND JUDICIAL REVIEW, Beatty ed. (Dordrecht: Martinus Nijhoff Publishers, 1994).

2. Macovei, *Protection of Human Rights by the Judiciary in Romania*, in JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY, *supra* n. 1, at 6. This view extends back to Alexander Hamilton and Alexis de Tocqueville. See Hamilton, *Federalist* #78, in THE FEDERALIST PAPERS 465 (New York: NAL Penguin, 1961) and de Tocqueville, DEMOCRACY IN AMERICA 261 (New York: Harper and Row, 1966).

3. United Nations High Commissioner for Human Rights, BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY (1985). Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

were adopted by the General Assembly in 1985. While the standards do not carry the force of law, the U.N. has held them forth as a model, encouraging lawmakers everywhere to adopt them in their constitutions. Additionally, the United Nations Human Rights Commission has appointed a Special Rapporteur to help monitor progress and problems in implementing these principles.

The efforts of the United Nations to promote a constitutionally protected, independent judiciary coincide with an unprecedented global trend toward the promulgation of

national constitutions over the past two decades. As of March 1997, Gisbert H. Flanz had documented 184 national constitutions, most of which are new creations.⁴ In fact, more than two-thirds of the world's constitutions were written after 1970, and only six remain that were written prior to the 20th century.⁵

More than 100 states also have written bills of rights—some of which surpass even that of the United States in the depth and breadth of their protections. For many, this trend toward constitutionalism engenders considerable optimism for future human rights protection, an optimism that stems from the general belief that the best way to safeguard individual freedoms is through “the enumeration of rights and their protection by the judiciary.”⁶

While the United Nations and the world's constitutional experts have been busy advising newly independent states and emerging democracies on how best to provide constitutional rights and an independent judiciary, it appears that little empirical analysis to date has addressed the question of whether these provisions actually have an impact on nations' human rights behavior.

I have found only one empirical study that systematically examines the impact of constitutional provisions for judicial independence on human rights behavior across numerous countries. In 1996, Gerard Blasi and David Cingranelli constructed an index of nine attributes of judicial independence and found that constitutional provisions for these attributes were associated with both actual judicial independence and, in turn, protection against political torture, imprisonment, and disappearances.⁷ While their work is a significant effort to address this issue, it is limited to bivariate correlation and examines only 75 countries during a single year.

Another study, Frank Cross's 1999 study of judicial independence, examines the relationship between actual (rather than formal, or constitutional) judicial independence, constitutional protection against un-

reasonable searches, and human rights protection.⁸ He finds that judicial independence does increase the probability of political rights and the protection against unreasonable searches and seizures. Cross's effort to analyze the impact of judicial independence on human rights is commendable; however, his measure of judicial independence is the subjective rating of the late Charles Humana, which provides no replicable operationalization of the concept of judicial independence.⁹ Additionally, the study is limited to a small, not fully representative sample of countries (54 to 58).¹⁰

In light of these research gaps, the goals of this article are two-fold: It first assesses the level of progress that has been made toward adopting international standards in national constitutions between 1976 and 1996. It then examines systematically, across these two decades and with a global set of countries, the impact of constitutional provisions for judicial independence on states' level of human rights protection.

Measures of independence

To some degree, the question of which elements constitute judicial independence remains an empirical as well as a normative one. Since the U.N. principles represent a substantial degree of global consensus on what judicial independence is or should be, I have constructed seven ordinal measures¹¹ for what they describe as the seven key constitutional elements necessary to produce an independent judiciary able to safeguard human rights:¹²

1. Guaranteed terms. The constitution guarantees terms of office, regardless of whether appointed or elected, and restricted removal of judges. This element seeks to protect individual judges from possible professional and personal retribution from the other branches of government. It also attempts to limit any other improper influences that might interfere with judicial impartiality.

2. Finality of decisions. The decisions of judges are not to be subject

to any revision outside any appeals procedures as provided by law. This element is aimed at safeguarding judges' ability to carry out their functions fully without incursions from other state actors.

3. Exclusive authority. The courts have exclusive authority to decide on their own competence, as defined by law—their decisions are made without any restrictions, improper influences, inducements, pressures, threats, or interference, direct or indirect, from any quarter or for any reason. As with the finality of decisions element, this element is aimed at safeguarding judges' ability to carry out their functions fully without incursions from other state actors.

4. Ban against exceptional or military courts. The courts have jurisdiction over all issues of a judicial nature (civilians are tried by ordinary courts or tribunals, not military or exceptional courts). This criterion seems to relate to the criterion that everyone shall have the right to be tried by ordinary courts or tribunals using established

4. Flanz, *CONSTITUTIONS OF COUNTRIES OF THE WORLD* (New York: Oceana Publications, 1997).

5. Blaustein, *CONSTITUTIONS OF THE WORLD* (Nashville: Carmichael and Carmichael, 1993).

6. Rosenthal, *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 401, Henkin and Rosenthal eds. (1990).

7. Blasi and Cingranelli, *supra* n. 1.

8. Cross, *supra* n. 1.

9. Humana, *WORLD HUMAN RIGHTS GUIDE* (New York: Oxford University Press, 1992).

10. Other studies have examined constitutional provisions for individual rights and states' human rights behavior. See, e.g., Davenport, *Constitutional Promises and Repressive Reality: A Cross-National Time-Series Investigation of Why Political and Civil Liberties are Suppressed*, 58 J. POL. 627–54 (1996); Pritchard, *Comparative Human Rights: An Integrative Explanation*, 15 POL'Y STUD. J. 110–28 (1986).

11. Since a constitution may meet a criterion to some degree but not fully, I coded the variables as follows: 0 = no constitution or the constitution does not provide this element; 1 = constitution provides for this element to a limited degree or vaguely but not fully; and 2 = constitution provides for this element fully and explicitly. This coding follows the practice of Cingranelli and Blasi, *supra* n. 1. The data sources I used to code these variables were Blaustein's *Constitutions of the World* (1993) and Flanz's *Constitutions of Countries of the World* (1997), which contain English translations of the vast majority of the current constitutions of the world and, in most cases, information on past constitutions as well.

12. United Nations High Commissioner for Human Rights, *supra* n. 3; Kumaraswamy, *REPORT OF THE SPECIAL RAPporteur ON THE INDEPENDENCE OF JUDGES AND LAWYERS* (submitted pursuant to Commission on Human Rights resolution 1995/36).

Figure 1. Constitutional provision for guaranteed terms of office

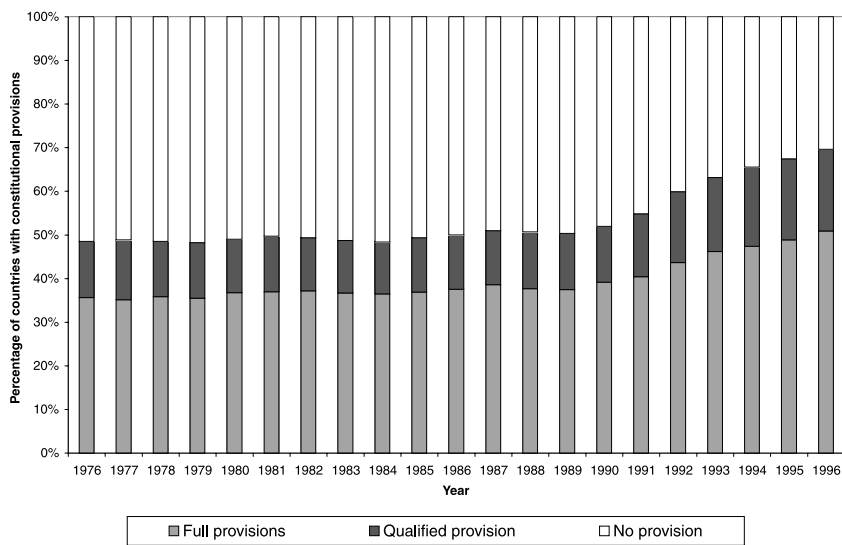
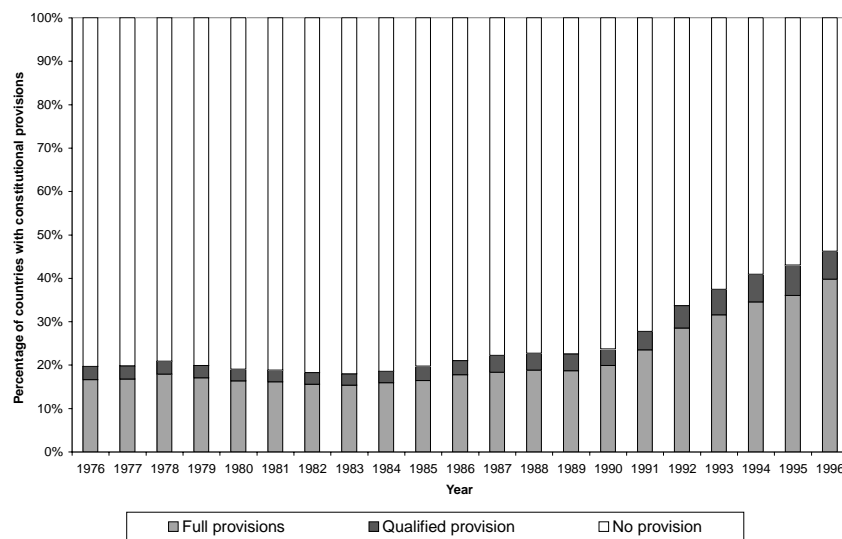


Figure 2. Constitutional provision for finality of decision



power from arbitrary abuses of the other branches through a constitutional grant of power, rather than a grant of power from the state that could be removed at will. The measurement for this element is whether courts are housed in a separate branch from the executive and legislative powers.

7. Enumerated qualifications. The selection and career of judges should be based on merit—qualifications, integrity, ability, and efficiency—and should be decided by an authority independent of government and administration. If the constitutional or legal provisions and traditions allow judges to be appointed by government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions should be based on the above criteria. This provision should lead to judges who are more competent and who have been socialized to the norms of judicial independence, making them more capable of countering incursions upon human rights from other branches.

Trends in independence

Figures 1 through 7 present trend data for each of the seven constitutional provisions for judicial independence during a 21-year period (1976–96). Each of the graphs reports the annual percentage of countries that have adopted the various levels of the constitutional provision under study. While each demonstrates an upward trend following the end of the Cold War, there is substantial variation in the magnitude of the increase across individual provisions.

The largest improvement in national constitutions was the addition of clauses that provide for exclusive judicial authority (see Figure 3). Here we see a 28 percentage point increase in the number of countries with a full or qualified constitutional provision for this element of judicial independence, a change from approximately 38 percent in 1976 to 66 percent in 1996. The second largest improvement appears in the addition of constitutional clauses that specify

legal procedures, rather than in military or exceptional courts.¹³

5. Fiscal autonomy. The courts must have adequate resources. This element is directed both at protecting the courts from the financial retribution of an abusive regime and at en-

suring that the court has adequate resources to carry out its functions fully. It is measured by determining whether the courts are fiscally autonomous—i.e., whether their salaries and/or budgets are protected from reduction by the other branches.

6. Separation of powers. The executive and legislative powers should ensure that judges are independent and that steps are not taken that could endanger the independence of judges. Such formal separation of powers further removes judicial

13. The measure for this element includes an additional score beyond 0, 1, and 2. Constitutions are coded -1 if they explicitly either condone trying civilians in military courts or allow the formation of exceptional courts. I have chosen to give these constitutions a negative score, because not only do the constitutions fail specifically to ban these types of courts (which would have earned a score of zero), they go so far as to explicitly legitimize the use of such courts.

the finality of judicial decisions (see Figure 2). While having no formal provision for this element remained the norm over the entire period, by 1996 the percentage of countries formally requiring this element (either fully or qualified) increased to 46 percent—an improvement of 26 percentage points.

Separation of powers was the most prevalent constitutional provision for judicial independence over the entire 21-year period (see Figure 5). By 1996, 74 percent of countries had either full or qualified provisions for separation of powers, an increase of 24 percentage points from 1976. Guaranteed terms was the second most prevalent (see Figure 1). By 1996, 70 percent of all countries provided for guaranteed terms of office (either fully or qualified), an increase of 21 percentage points from 1976. While no provision for enumerated qualifications remained the norm even by 1996, the percentage of countries with a full or qualified provision for this element did increase from 28 percent in 1976 to 48 percent in 1996 (see Figure 6).

Finally, the improvements in constitutional provisions for the last two elements of judicial independence were half or less than half those achieved with the other five provisions. From 1976 to 1996, there was only a 10 percentage point increase in the presence of constitutional bans on exceptional or military courts (see Figure 7). In 1976, 18 percent of countries had either full or qualified bans, with 7 percent explicitly *allowing* exceptional courts; by 1996, 28 percent had some level of constitutional ban and only 6 percent explicitly allowed exceptional courts. The least amount of improvement was seen with the provision for fiscal autonomy: a 7 percentage point increase, from 20 percent in 1976 to 27 percent in 1996 (see Figure 4).

Overall, the data represent a rather substantial movement toward constitutional provision of judicial independence, as defined by the United Nations' principles. But do efforts to write these provisions into constitutions translate into improved protec-

Figure 3. Constitutional provision for exclusive authority

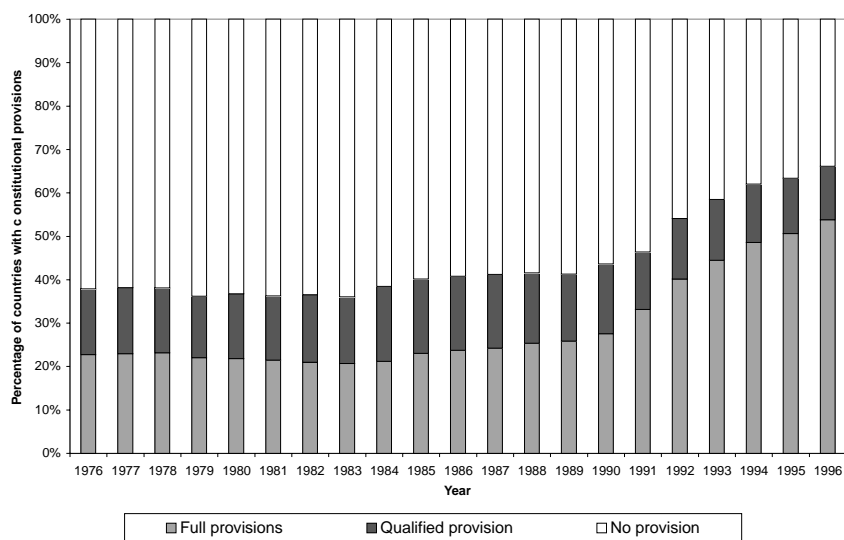
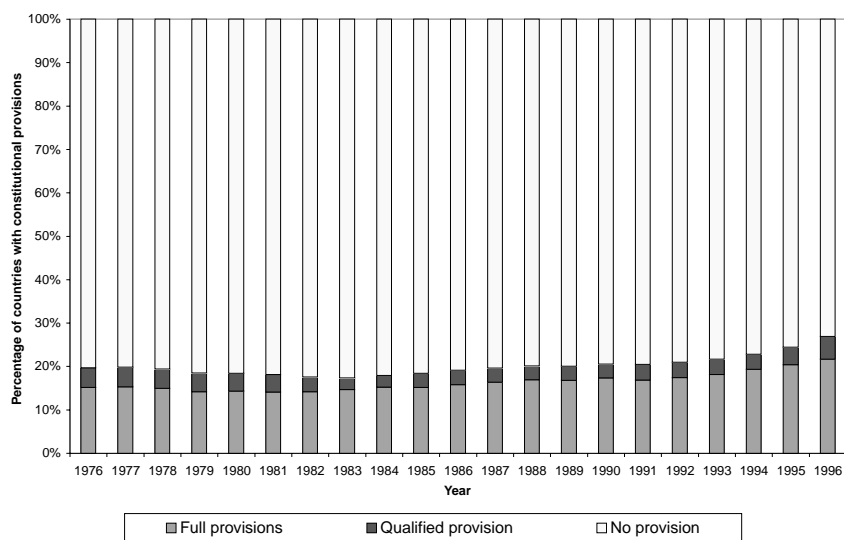


Figure 4. Constitutional provision for fiscal autonomy



tion of human rights, as the United Nations would expect?

Impact on human rights

To analyze the impact of these elements of formal judicial independence on human rights, I employ a broad measure of civil rights and civil liberties—the Freedom House Civil Rights Index.¹⁴ This index, measured on a scale of 1 to 7, comprises a comprehensive list of internationally recognized human rights: equality of rights without discrimination; life, liberty, and security of person; pro-

tection against slavery; protection against torture and cruel and unusual punishment; protection against arbitrary arrest and detention; hearing before an independent and impartial judiciary; protection of privacy, family, and home; freedom of movement and residence; freedom to marry and found a family; freedom of thought, conscience, and religion; freedom of opinion, expres-

14. See, e.g., McCollm, *FREEDOM IN THE WORLD: POLITICAL RIGHTS AND CIVIL LIBERTIES, 1989-1990* (Lanham, Md.: University of America Press, 1990).

Figure 5. Constitutional provision for separation of powers

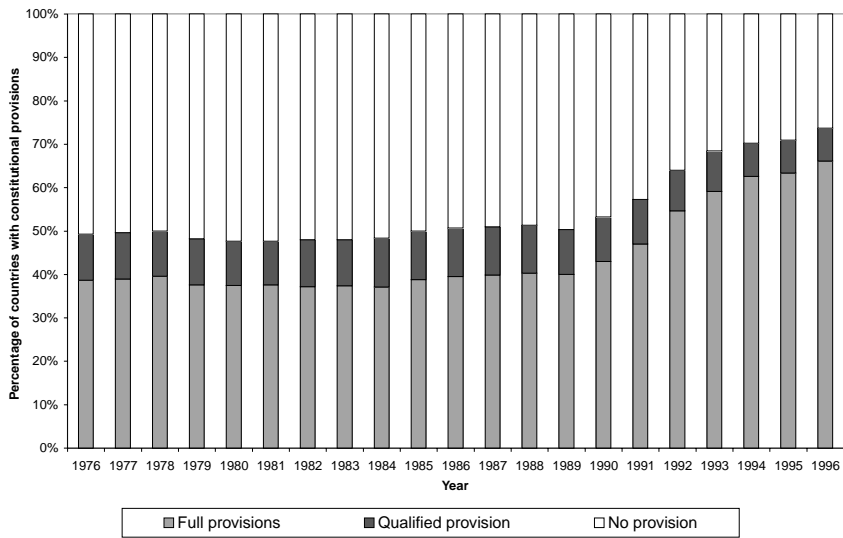
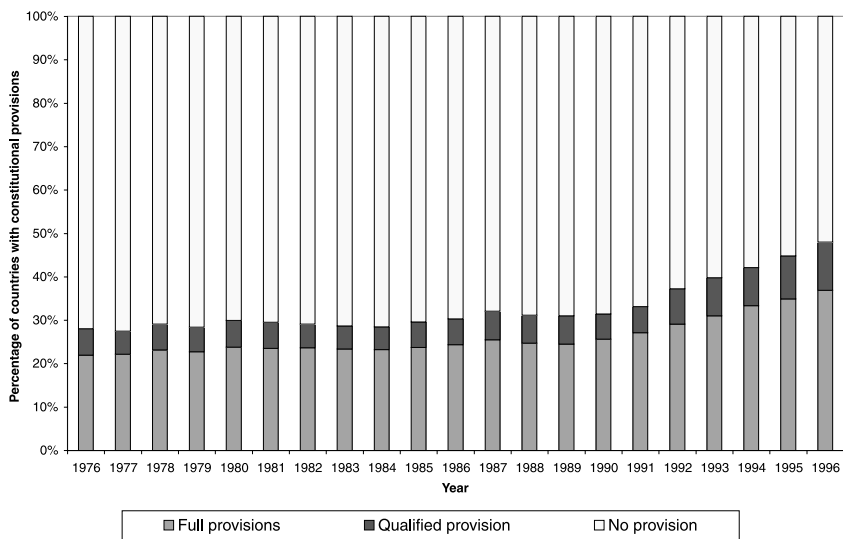


Figure 6. Constitutional provision for enumerated qualifications



sion, and the press; freedom of assembly and association; free trade unions; and equal protection of the law. The nonprofit Freedom House measures how well each country provides for these rights based on an annual survey. To reach its conclusions, the survey team employs a broad range of international sources of information, including both foreign and domestic news reports, NGO publications, think tank and academic analyses, and individual professional contacts.

The measurement is somewhat counter-intuitive—the states with the highest level of freedoms receive the lowest scores—making discussion of this variable in the context of an empirical analysis somewhat complicated. Most political scientists have dealt with this problem by inverting the variable so that the states with the highest level of freedom receive the highest score. I follow this practice here: a state with the highest level of freedom thus receives a score of 7, and a state with the lowest level of freedom receives a score of 1.¹⁵

The relationships of the seven provisions on human rights behavior were tested simultaneously in a regression model.¹⁶ Four of the seven constitutional provisions produced coefficients that were substantively and statistically significant at the level of .10 or better. The provision for guaranteed terms produced the largest coefficient—at .67, it was statistically significant at the .01 level. This result suggests that the adoption of this constitutional provision would result in a .67 improvement on the 7-point civil rights and civil liberties scale, all other things being held equal.

The provision for separation of powers produced the second largest coefficient (.34), which was statistically significant at the .03 level. The coefficient produced for the ban on exceptional and military courts was .29 (significant at the .003 level)—while changing from a constitution that specifically allows these courts to one that bans them would produce an improvement of .58 in the human rights index. And the coefficient for

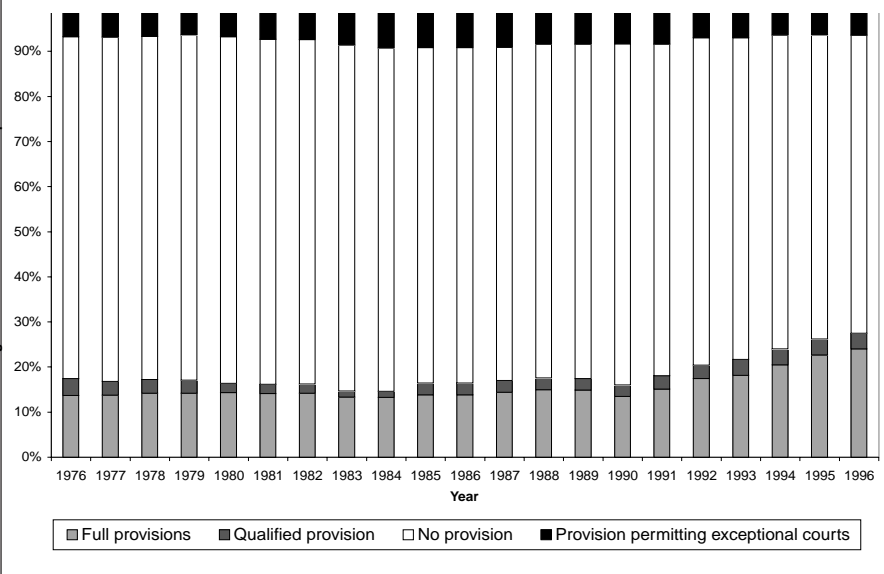
15. As a point of reference, examples of scores from the year 1996 include: 7) U.S., Canada, Japan, and Switzerland; 6) South Korea, Mauritius, Lithuania, and France; 5) Argentina, Macedonia, and Namibia; 4) Papua New Guinea, Nepal, Turkey, and Madagascar; 3) Zimbabwe, Lebanon, and United Arab Emirates; 2) Oman, Yugoslavia, and Zaire; 1) Bhutan, Sudan, Indonesia, and Vietnam.

16. First, I ran preliminary models to test whether the distinction in my coding between “qualified” and “full” constitutional provisions of the individual elements was statistically significant. In the preliminary models, the constitutional measures performed best when the “qualified” and “full” categories were collapsed into a single category. Here, I report the results of the collapsed measures that now distinguish only between countries with (1) or without (0)

constitutional provisions for these elements. The ban on exceptional courts measure continues to have the (-1) coding for countries with constitutions that explicitly allow such courts.

The pooled cross-sectional data set built for this analysis is “an extraordinarily robust research design, allowing for the study of causal dynamics across multiple cases, where the potential cause may even appear at different times in different cases.” Stimson, *Regression in Space and Time: A Statistical Essay*, 29 *AM. J. POL. SCI.* 914–47 (1985). For a more complete description and justification of this approach, see Beck and Katz, *What to Do (and What Not to Do) with Time-Series-Cross-Sectional Data in Comparative Politics*, 89 *AM. POL. SCI. REV.* 634–47 (1995); Beck, Katz, Alvarez, Garrett and Lange, *Government Partisanship, Labor Organization, and Macroeconomic Performance: A Corrigendum*, 87 *AM. POL. SCI. REV.* 945–48 (1993).

Figure 7. Constitutional ban of exceptional courts



fiscal autonomy was significant at the .10 level, producing a small coefficient of .12.

While individually the impact of a country's adopting one of these provisions may appear small, the expected combined impact of a country's simultaneously adopting these four provisions is rather substantial. Should a country that has no constitutional provision for these elements of judicial independence adopt all four provisions, we would expect to see the country's human rights behavior improve by approximately one-and-a-half levels (1.42). The combined impact would be approximately one and three-quarters level (1.71) if the country originally had a constitutional provision that explicitly allowed exceptional courts. To illustrate the level of improvement in real terms, a state earning a score of 3 (such as Indonesia in 1996) could, by implementing these provisions, earn a score of 5 (such as Mexico in 1996), while a level-1 state (China or Sudan in 1996, for example) could improve its score to 3 (Turkey or Nigeria in 1996, for example).

The need for further research

This analysis confirms a global trend toward the adoption of constitutional provisions for judicial independence that began in the early 1990s. By 1996, we see at least a 20

percentage point increase in the number of countries that have adopted either qualified or full provisions for five of the seven elements of judicial independence. The constitutional ban against exceptional courts and the provision for fiscal autonomy are the only elements of judicial independence in which we see an increase of 10 percentage points or less.

While the analysis demonstrates substantial progress in the promulgation of constitutional provisions for judicial independence, it more importantly demonstrates that formal judicial independence does indeed have an actual impact on state human rights behavior. A formal guarantee of judges' tenure in office, which can protect a judge from a dictatorial executive or an overzealous legislature, produces the strongest impact of the four statistically significant constitutional provisions. This provision may shelter a judge from retaliation should the judge position herself between the people and an abusive state—and could be especially important during states of emergency.

The second strongest provision, the ban against exceptional or military courts, may also be important during states of emergency. Reliance on such courts has often translated into egregious abuses of human rights: In Colombia, for example, the

secret court system created for drug and terrorism cases denies the accused such rights as a pretrial hearing and a public trial, and it allows for secret witnesses against the accused. These courts have been used to punish student protestors, peasants, and critics of the regime as terrorists.¹⁷

While this study demonstrates that judicial independence as defined by the United Nations principles can be a barrier to human rights abuse, it is only a first step in exploring the nexus between judicial independence and human rights protection. We must further explore the circumstances under which these provisions work—particularly economic and political conditions.

Additionally, we must fully explore the role of an independent judiciary during times of domestic and external threats, especially during states of emergency. The International Lawyers Association and International Commission of Jurists have proposed several constitutional provisions for states of emergency that, in theory, should work in tandem with constitutional provisions for judicial independence. An empirical assessment of these provisions and their relationship to judicial independence would be an important link in this research.

Most importantly, we need to move beyond assessing formal independence to empirically determining the level of actual judicial independence experienced by a state, a task rather more daunting than identifying specific legal language in a document to identify formal judicial independence. Such an assessment must move beyond the subjective and non-replicable ratings of previous work and would likely require an extensive panel of experts. Only after we have explored these relationships will we be able to assess with full confidence the merit of the international community's faith in the role of an independent judiciary in protecting human rights. ❧

17. Pahl. *Concealing Justices or Concealing Injustices? Colombia's Secret Courts*, 21 DENV. J. INT'L L. & POL'Y 431-40 (1993).