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The Judiciary Under Siege:  
The Role of Civil Society in Insulating and Advancing Judicial Independence

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## Abstract

### The Judiciary Under Siege:

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By Ekaterine Dvalishvili

This thesis examines why in certain cases, judicial attacks on courts lead to an increase in levels of judicial independence. In the study of judicial politics, scholars have widely written about the importance of judicial independence in establishing and maintaining the rule of law. Despite the importance of an independent judiciary, judges often face a variety of politically motivated attacks that seek to limit their independence. While these attacks often decrease the level of independence, in certain cases, the level of judicial independence increases following the attack. I hypothesize that in cases of massive attacks, a robust civil society can mobilize to insulate the judiciary. The empirical findings from this study indicate that massive attacks very rarely take place in countries with robust civil societies. The rare instances in which massive attacks have occurred have all been in the context of major political crises. The key implication from these findings is that a robust civil society prevents attacks from occurring.

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## I. Introduction

Over the past twenty years, many scholars have written about the “judicialization of politics,” as well as the empowerment and propagation of constitutional courts. This scholarship has been paralleled by a greater examination of judicial independence, which has been recognized as an international norm. It is this mechanism that allows the power of the other branches of government to be constrained, promoting the rule of law over arbitrary power. Yet, despite the normative importance of judicial independence and formal guarantees that may exist in a constitution, the levels of de facto judicial independence significantly varies across the globe.<sup>1</sup> Attacks on the judiciary have been well documented in Latin America and have become more prominent in Eastern Europe, in recent years. The scholarship has addressed the various conditions under which attacks manifest, how they differ in emerging democracies compared to developed democracies, and indicators that determine whether political actors will seek to attack judicial independence or uphold it.

Attacks on the judiciary always have an “inevitably political” nature to them, in that political actors use them to manipulate the judiciary and curb judicial independence, so that they may advance their own political interests.<sup>2</sup> However, attacks do not always result in a decrease in the level of judicial independence; in certain cases, attacks lead to an increase in the judicial independence. This is a puzzle that the scholarship thus far has not addressed. Consequently, this thesis examines: What factor(s) explain(s) why in certain cases, judicial attacks on courts lead to an increase in levels of judicial independence?

Answering this question will allow scholars to further develop their understanding of the often strategic relationship that exists between political actors and the judiciary, as well as the

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<sup>1</sup> Tiede 2006, 160

<sup>2</sup> Jillani 2012, 431

ability of judges to stabilize regimes and the rule of law. I suggest that civil society can act as a moderator between judicial attacks and judicial independence, serving to defend the judiciary from attacks and emboldening the justices. In countries where there is a robust civil society present, I expect to find that judicial attacks will not result in a decrease in de facto judicial independence. Alternatively, in countries lacking a robust civil society, attacks on the judiciary I expect will lead to a decrease in de facto judicial independence of the constitutional court.

I begin with a literature overview of concepts related to judicial review, judicial independence, and attacks on the judiciary. I then develop a quantitative model that I test using the statistical software R. If this hypothesis turns out to be correct, the study would indicate that in the face of direct threats from political actors, there are mechanisms that the judiciary or civil society actors can pursue to substantially safeguard judicial independence. More specifically, it would reinforce the enormous power of civil society in the scholarship of judicial politics and democratic consolidation.

## **II. Theory**

### **A) Overview of the Role of Judiciary in Protecting “Rule of Law”**

The “rule of law,” a concept first expressed by Dicey as the sovereignty of law over arbitrary power, is at the center of democratic and good governance. The judiciary serves a critical role as the principal guardian of the rule of law.<sup>3</sup> These “third-party adjudicator[s]” settle disputes,<sup>4</sup> protect individual liberties and guarantee that the law is the basis of government through the process of judicial review.<sup>5</sup> Over the past twenty years, an extensive literature has emerged examining the rapid global expansion of judicial review. This phenomenon has often

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<sup>3</sup> Finkel 2008, 4.

<sup>4</sup> Russell 2001, 9

<sup>5</sup> Finkel 2008, 4.

been referred to as the “judicialization of politics.”<sup>6</sup> The term encompasses the greater significance of the judiciary in addressing and resolving politically and culturally salient questions, often related to public policy.<sup>7</sup> While this process is also evident in the proliferation of courts at the international level, most notably in the example of the European Court of Justice, it is more so visible in the establishment of empowered constitutional courts following the third wave of democracy.<sup>8</sup> Constitutional adjudication, a subset of judicial review that specifically entails the “resolution of constitutional disputes and the enforcement of the constitution as higher law,” ensures the legality of the entire judicial system, as well as the normative foundation of the state itself.<sup>9</sup> In contrast to other courts, the jurisdiction of a constitutional court is limited to matters of constitutionality. These “specialist” courts stand apart from the rest of the judiciary (as well as the legislature) in that they hold a “monopoly on the exercise of constitutional review.”<sup>10</sup>

New democracies face the challenge of democratic building in the absence of pre-existing independent political and social institutions; this can result in an uneven development of government and civil society. However, courts can overcome these institutional weaknesses, by establishing and enforcing a constitutional structure.<sup>11</sup> Constitutional courts, in particular, promote the future viability of the democratic experiment and self-governance, by placing constraints on political actors.<sup>12</sup> Harding et al. (2009), for instance, associate the proliferation of constitutional courts since the “third wave” to the process of democratization and the establishment and maintenance of “rule of law.” From their comparative analysis, the scholars note that transitions to democracy have invariably been followed by the creation of these

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<sup>6</sup> Vanberg 2015, 168.; See Tate and Vallinder 1995

<sup>7</sup> Vanberg 2015; Hirschl 2008

<sup>8</sup> Hirschl 2008

<sup>9</sup> Stone Sweet 2000, 29

<sup>10</sup> Stone Sweet 2000, 33; See Harding et al. 2009

<sup>11</sup> Issacharoff 2015, 192.

<sup>12</sup> Issacharoff 2015, 279.

courts.<sup>13</sup> While models of constitutional review can vary, constitutional courts are established with specific purposes in mind. They help uphold adherence to new constitutions, serve as counterweights to legislative majorities, and “ensure unity and finality in interpretation”<sup>14</sup> More broadly speaking, courts establish boundaries between the various branches of government, thereby protecting the power balance.<sup>15</sup> Skatch builds off of Fleming (1997) to say that in the absence of un-institutionalized social organizations, the activism of the court can encourage democratic consolidation and corrects the failures of democracy through “agenda setting” and “party-building” functions.<sup>16</sup>

## **B) Importance of Judicial Independence to Rule of Law**

Within the scholarship of judicial and constitutional review, it is necessary to discuss the importance of an independent judiciary, which many scholars argue is a prerequisite for the rule of law,<sup>17</sup> as well as a liberal democracy.<sup>18</sup> Without judicial independence, the judiciary cannot fulfill their core responsibility as a third-party adjudicator and settle disputes;<sup>19</sup> nor can they serve as the guardians of constitutional limits.<sup>20</sup> Citing O’Donnell (1994), Chavez (2004) notes that maintaining the rule of law in a democracy requires horizontal (i.e. inter-branch) accountability wherein the different bodies of government monitor and “hold one another accountable to the law and to the public.” This contrasts vertical accountability, wherein the public holds political actors responsible through the electoral process.<sup>21</sup> In order to promote this

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<sup>13</sup> Harding et al 2009, 12

<sup>14</sup> Harding et al 2009, 5; See also Stone Sweet 2000, 137-138

<sup>15</sup> Czarnota, Krygier, and Sadurski 2005, 68.

<sup>16</sup> Czarnota, et al. 2005, 15

<sup>17</sup> See Popova 2012, Tide 2006

<sup>18</sup> Russell 2001, 1

<sup>19</sup> Russell 2010, 601

<sup>20</sup> Finkel 2008, 4.

<sup>21</sup> Chavez 2004, 10; O’Donnell 1994

system of accountability, an independent judiciary is essential. At times referred to as judicial authority or judicial power, this mechanism allows the court to control and constrain the “operation and power”<sup>22</sup> of the other branches and passionate actors, thus ensuring the separation of power and compliance with the constitution. Additionally, it can allow for the protection of “political minorities.”<sup>23</sup>

Chavez is careful to note that while an independent judiciary does not necessarily guarantee the rule of law, it does play a vital role in its foundation, particularly in checking arbitrary power.<sup>24</sup> Judicial independence has been said to promote economic and democratic development, enhancement of justice, good governance, and government accountability.<sup>25</sup> The establishment and maintenance of judicial independence, as opposed to simply a system of judicial review, should be the top priority and focus for new democracies.

### **C) Challenges in Defining the Term**

Given the extensive scholarship on the topic, a variety of definitions, ranging from highly specific to very broad, have been proposed to conceptualize judicial independence. This variety has led to confusion regarding the term.<sup>26</sup> However, similarities can be distinguished in the use of the term. For instance, several scholars have found common ground broadly defining it in terms of a relationship, in which judges are free from influence, control, or pressure from other political institutions or actors.<sup>27</sup> Ramseyer (1994), in his influential piece, simply defines judicial independence as “courts where politicians do not manipulate the careers of sitting judges.”<sup>28</sup> The

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<sup>22</sup> Aydin 2012, 105.

<sup>23</sup> Vanberg 2015, 169.

<sup>24</sup> Chavez 2004,

<sup>25</sup> Popova 2012, 168; Aydin 2012, 105.

<sup>26</sup> Tiede 2006

<sup>27</sup> See Fiss 2013, Russell 2001, Tiede 2006

<sup>28</sup> Ramseyer 1994, 721

inference drawn from this broad definition is that he is referring to a relationship between political actors and judges. Russell (2001), on the other hand, takes the definition a bit further and is more explicit in how he identifies the two conflicting ways that political scientists have used the concept. First and foremost, he emphasizes that judicial independence is a “relational” concept, in which judicial independence refers to the “autonomy of judges—collectively and individually—from other individuals and institutions.”

Some scholars have also understood judicial independence to refer to “judicial behavioral,” that is to say the ability of a judge to “think and act independently.<sup>29</sup>” However, in seeking to establish a general theory for judicial independence, Russell places precedence on the relational understanding. He explains that judicial independence is “about connections—or, more precisely, the absence of certain connections—between the judiciary and other components of the political system.”<sup>30</sup> Gardbaum (2015) views the term as the “institutional separation of the judicial function from the others,” offering two necessary conditions: insularity and impartiality. Under these conditions, judges can freely make decisions on their own accord without bias, politics or partisanship.<sup>31</sup> Tiede specifically expresses the term in relation to the *executive* and measures the concept “by the amount of discretion that individual judges exercise in particular policy areas.”<sup>32</sup>

Having acknowledged these similarities, the primary distinction involved in defining judicial independence is whether or not it is a fixed concept. Consequently, scholars have distinguished between “de jure independence” and “de facto” independence. De jure independence refers to the level of independence embedded in the constitution through the

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<sup>29</sup> Russell 2001, 6

<sup>30</sup> Russell and Obrien 2001, 3

<sup>31</sup> Gardbaum 2015, 304.

<sup>32</sup> Tiede 2006, 131

process of judicial appointments and the number of actors involved, as well as guarantees of tenure, which can insulate judges from outside influence and offer them a sense of security in making their decisions. De facto independence, on the other hand, refers to how the formal rules are applied in practice and the ability of the judges to consistently adjudicate based off of their sole interpretation of the law.<sup>33</sup> In this context, Tiede, building on McCubbins et al. (2006), asserts that de facto judicial independence can fluctuate depending on policy and politics of the time, such as changes in the political composition of government branches.<sup>34</sup>

Ramseyer (1994) demonstrates how de facto and de jure independence differ in practice in his qualitative analysis of imperial Japan, modern Japan, and modern United States. His analysis shows that while the constitutions of both modern Japan and modern US insulate judges from political actors, in practice, Japanese politicians have used the process of job assignments and promotions to influence judges. They did so by rewarding judges, who ruled in favor of the party's preferences and were considered loyal, with favorable career opportunities and by punishing those who have ruled against the party.<sup>35</sup> Ramseyer and Rasmusen (2001) follow with a quantitative study examining the voting behavior and career development of four hundred Japanese judges to show that despite institutional guarantees of independence, political actors, in practice, do manipulate judges.<sup>36</sup> Thus, judicial independence is more than what is guaranteed and institutionalized within formal statute.<sup>37</sup> It is also important to acknowledge that levels vary across consolidated democracies.<sup>38</sup> From this understanding, Chavez suggests that it should be viewed as a "continuous variable," rather than a dichotomous one.<sup>39</sup> For the purposes of this

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<sup>33</sup> See Aydin 2013; Rios-Figueroa & Staton 2009; Popova 2016

<sup>34</sup> Tiede 2006, 152; McCubbins et al. 2006

<sup>35</sup> Ramseyer 1994

<sup>36</sup> Ramseyer and Rasmusen 2001

<sup>37</sup> See Ramseyer 1994, 739; Herron and Randazzo 2003

<sup>38</sup> Gardbaum 2015, 305.

<sup>39</sup> Chavez 2003, 426

thesis, I examine de facto judicial independence as a concept wherein judges are free from undue influence, control, or pressure from other political institutions or actors.

#### **D) Defining an “Attack”**

It is important to acknowledge that judges cannot be absolutely independent. For instance, Tiede’s definition of judicial independence, mentioned earlier, hinges on this fact, which is evident in that ultimately courts interpret the laws that the legislatures pass and also in that they may receive funding from the legislatures.<sup>40</sup> Russell, similarly, writes that absolute independence in which judges are free from any influence in the world is neither realistic, nor desirable, as some limits on judicial independence can promote a degree of judicial accountability.<sup>41</sup> In the same vein, Fiss (2013) argues that regardless, to accommodate for both judicial legitimacy and popular sovereignty, there should be some limit to judicial independence.<sup>42</sup> Scholarship on this topic has yet to reach consensus on how independent a judiciary should be. This question ultimately lies beyond the scope of this thesis, but it does highlight the normative nature of judicial independence and the concepts pertaining to it.<sup>43</sup>

Judicial independence can be considered at risk when “influences undermine a judge’s capacity to adjudicate” as a third-party.<sup>44</sup> In his general theory, Russell identifies his relational understanding of judicial independence as being “two-dimensional” in that sources and targets of attacks on judicial independence can vary. Russell distinguishes the sources as either external, i.e. including any government and nongovernmental actor outside of the judiciary, or internal to

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<sup>40</sup> Tiede 2006, 131

<sup>41</sup> See Russell 200, 12; See Russell 2010, 601

<sup>42</sup> Fiss 2013

<sup>43</sup> Russell 2001, 3

<sup>44</sup> Russell 2001, 12

the judiciary. The “targets of influence or control” can be either individual judges or the entire judiciary.<sup>45</sup>

### **i. Modes of Attack**

Russell offers four avenues through which judicial independence may be subdued: “structural, personnel, administrative, and direct.”<sup>46</sup> The modification of structures encompasses the processes of appointment, removal, and remuneration. Some of these processes may be enshrined in the constitution. However, not every attempt at modifying the structure can be considered an attempt to infringe on judicial independence. It is only when structural changes are used to influence the outcome of judicial decisions that they can be viewed as a threat to judicial independence.<sup>47</sup> Personnel modifications overlap with the previous category in that “methods of appointing, remunerating, and removing judges” can be used to control composition. The focus here is that these methods directly apply to the judicial personnel. Protection of tenure and arbitrary removal of a judge are the primary concerns. Attempts to modify court administration include budgeting and case assignments.<sup>48</sup> In some instances, the jurisdiction of a court may be altered, with new courts created to handle politically salient cases.<sup>49</sup> Direct attacks include verbal attacks in the media, bribery, or intimidation through “threats to the personal safety of the judge or the judge’s family.”<sup>50</sup>

These indicators correspond with those identified by Chavez in her scholarship on the rule of law and judicial independence in Argentina (2003). She offers five types of indicators for

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<sup>45</sup> Russell 2001, 11

<sup>46</sup> Russell 2001, 13

<sup>47</sup> Russell, 2001, 13

<sup>48</sup> Russell, 2001, 21; See also Heckman et al. 2010

<sup>49</sup> Heckman et al. 2010

<sup>50</sup> Russell 2001, 21; See also Heckman et al. 2010

judicial independence that encompass both formal guarantees and informal behaviors. They, similarly, include a “transparent and merit-based appointment process,” protection of tenure and salary, stability in the size of the court, and the presence of rulings that contest the interests of the executive.<sup>51</sup> Generally speaking, from these criteria, an attack on the judiciary can be understood as any attempt to interfere with the autonomy of a judge through influence, control, or subordination. Any instance of court packing that significantly increases the number of loyal judges to sway the court, reduction in salary, or arbitrary removal (i.e. purging) of judges can all be viewed as acts meant to attack and constrain judicial independence.<sup>52</sup> Finally, according to Herron and Randazzo (2003), judicial behavior may also be influenced by the economic conditions and country-specific contextual factors, such as the level of civil liberties, the structure and power of the executive system, and political fragmentation.<sup>53</sup> In the context of this thesis, I define an attack on the judiciary as any attempt to interfere with the autonomy of a judge through influence, control, or subordination.

### **E) Variations in De Facto Judicial Independence: What Motivates Attacks on the Judiciary?**

Variations in the level of judicial independence over time stem from benefits political actors may receive from either enforcing judicial independence or from limiting it. To address this variation, Vanberg (2015) notes that previous scholarship has identified endogenous and exogenous explanations for what factors may motivate political actors to support judicial independence. From an exogenous perspective, he highlights the role of broad public support in promoting judicial authority. In democracies, political actors may not receive a positive benefit

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<sup>51</sup> Chavez 2003, 425

<sup>52</sup> Chavez 2003

<sup>53</sup> Herron and Randazzo 2003, 425

from complying with judicial orders and upholding judicial autonomy, but they do avoid the potential costs that would stem from public backlash. In this example, Vanberg refers to public support as a “shield” for judicial independence.<sup>54</sup> Endogenously, he explains that policy makers receive informational benefits from judicial review, as courts can “weed out” undesirable legislation, *ex post*. They can also shift responsibility for unpopular decisions from policy makers. When power is divided among various branches, judicial review can protect the boundaries of power from being encroached.<sup>55</sup> In this way, policy makers directly benefit from an independent judiciary.

While most past scholars have concentrated on the various benefits that policy makers receive from promoting independent judiciaries,<sup>56</sup> Popova (2010) establishes that this scholarship has overlooked the obvious benefits that policy makers receive from constraining judicial independence on an individual case basis by manipulating, influencing or attacking judges. In her work, she distinguishes between consolidated democracies and electoral democracies to contend that attacks on judicial independence in an emerging democracy are associated with lower costs. Because political actors face a great deal of political uncertainty, they operate under shorter time horizons in which the benefits of pressuring the courts are higher when party systems are less institutionalized and as a result, lack stable sources of organization and financing. Each decision could potentially destroy the party.<sup>57</sup> Popova presents an empirical model of judicial outputs in Russian and Ukrainian lower courts to demonstrate the incentives political actors may have for attacking courts and reducing the independence of the judiciary.

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<sup>54</sup> Vanberg 2015, 177

<sup>55</sup> Vanberg 2015, 172

<sup>56</sup> See Vanberg 2015; Ramseyer 1994; Stephenson 2003

<sup>57</sup> Popova 2010, 1209.

Her scholarship explains why judicial independence so often comes under attack. Incentives to limit judicial independence do in fact exist, and are empirically evident in that attacks against courts have been widespread across the world. Ultimately, a cost-benefit analysis is at the heart of why political actors choose to manipulate judicial independence. For instance, in Latin America, where purging of the judiciary is common, executives have attacked the courts to avoid removal, in times of political crises. Helmke (2017) suggests that when the risk of being removed is high, the costs of manipulating the judiciary are low, and thus presidents are more likely to try and dominate the judiciary. In the case of inter-branch conflicts, Helmke finds that the threat of presidential instability can spark legislative instability, in addition to judicial instability.<sup>58</sup> In recent years, Eastern Europe has also received more attention for the dramatic increase in attacks. This is especially notable in Hungary, where the once renowned constitutional court has been significantly subjugated as its jurisdictional powers have been stripped.<sup>59</sup>

Like most scholars, Popova's work demonstrates a decrease in the level of judicial independence when facing political attacks. However, social scientists have yet to explain why levels of judicial independence do not decrease, but rather increase in certain cases in which political actors choose to attack the judiciary. This creates a puzzle for political science scholarship in that we find the opposite behavior of what we should expect. What could be resulting in this anomaly? I contend that the enormous power of civil society allows it to act as key moderating variable between attacks on the judiciary and the level of judicial independence of the constitutional court. This variable can not only insulate but also empower judges during attacks.

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<sup>58</sup> Helmke 2017

<sup>59</sup> Bogdandy and Sonnevend 2015

## F. Preserving Judicial Independence: The Role of Civil Society

Similar to the judicialization of politics, a great deal has been written on the importance of civil society since the third wave of democratization. Most of this scholarship has focused on the role of civil society and civil society organizations (CSOs) in assisting in democratic development.<sup>60</sup> The popularity of the concept in modern scholarship has led to extensive debates regarding its definition, significance, and normative value.<sup>61</sup> It is commonly acknowledged that civil society exists distinctly from the family, market and state, however the intricacies of the term are highly contested to the point that the concept has been referred to as “elusive”.<sup>62</sup> Wnuk-Lipiński (2007) writes that, at the most basic level, civil society encompasses “non-state institutions, organizations and civic associations functioning in the public domain.”<sup>63</sup> Kopecky and Mudde (2003) assert that the most recognized definition views civil society as “a set of organizations that operate between the state, the family” and the market that seek to influence the state.<sup>64</sup> The term has also been viewed as a “space of social relations”<sup>65</sup> and “a realm of association and collective action [...] that often takes an institutionalized form.”<sup>66</sup>

While each definition has its nuances, it is clear that civil society entails a form of public participation that takes a variety of forms. In these case, civil society has some structural element to it and a cultural value, where it serves as an “intermediary between state and society,” influencing, monitoring, and disciplining the state by mobilizing from the bottom-up.<sup>67</sup> Diamond (1999) refers to this mobilization in cases where democratic principles are violated as the ‘checking and limiting’ function of civil society. Civil society is also valued for its ability to

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<sup>60</sup> See Ngok 2009; White 2004; Diamond 1999

<sup>61</sup> Kopecky and Mudde 2003, 10

<sup>62</sup> Vendeja 2009, 138; Hochstetler 2013

<sup>63</sup> Wnuk-Lipiński 2007

<sup>64</sup> Kopecky and Mudde 2003, 10

<sup>65</sup> Vendeja 2009

<sup>66</sup> Hotchsteter 2013

<sup>67</sup> See Ngok 2009

develop and promote “democratic socialization of citizens.”<sup>68</sup> A normative point of contention in defining this term is whether it may encompass anti-democratic or uncivil elements. According to Manela and Heinrich (2007), the broad “scope of interests advanced collectively in the public sphere, and the methods used by those actors” allows for these elements to be present in civil society.<sup>69</sup>

Past scholarship has already noted the linkages that exist between the judiciary and civil society. Tushnet, (2015) writing about dominant party systems, states that civil society can offer support to the judiciary by mobilizing when the judiciary’s independence is being limited. He acknowledges that the ability of civil society to insulate and defend the judiciary depends on several factors, including whether the dominant party relies on CSOs in managing social tensions and whether CSOs have international backing that could result in “external criticism” and pressure.<sup>70</sup> Trochev and Ellett’s work (2014), on the other hand, focuses specifically on “off-bench resistance,” which they define as the ability of judges to protect their own autonomy.<sup>71</sup> The piece, centered on hybrid regimes, contends that judges can do so through a variety of mechanisms. They offer examples of collective mobilization from Pakistan to Uganda to Egypt and state that in addition to mobilizing allies, judges can negotiate, complain to the public and media, and strike. Ultimately, they argue that the collective nature of this form of resistance is possible through “strong social networks,” an element of a robust civil society.<sup>72</sup>

On a broader scale, Chavez’s work (2004, 2008) focuses on the capacity of reform coalitions in emerging democracies to promote the establishment of rule of law and judicial independence. While these reform coalitions can generally include a diverse group of actors,

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<sup>68</sup> Wnuk-Lipiński 2007

<sup>69</sup> Malena and Heinrich 2007, 340

<sup>70</sup> Tushnet 2015, 118. See also Keck and Sikkink 1998

<sup>71</sup> Trochev and Ellett 2014

<sup>72</sup> Trochev and Ellett 2014, 80

ranging from international organizations to media, domestic CSOs that mobilize from the bottom are especially a key component.<sup>73</sup> Thus she stresses the importance of a robust civil society and the presence of civil society organizations seeking to “influence governmental policy.”<sup>74</sup> She bases her argument on Keck and Sikkink’s model (1998),<sup>75</sup> extending the idea that coalitions are created on the basis of shared values, principles, and mutual agreement on what is considered “right and wrong” in the actions of an executive. Chavez acknowledges the associations that exist between civil society and the media, which can serve as a source of information to the public, raising awareness of infringements on the rule of law or judicial independence. Reform coalitions can use the press to disseminate information in these instances. This process can help lead to the creation of new CSOs and encourage the mobilization of civil society actors.<sup>76</sup> On the other end of the spectrum, analyzing new democracies in Eastern Europe, Blokker (2014) argues that the democratic crises that have emerged in recent years expose a continuous absence of a robust civil society with the capacity to hold government officials and institutions accountable. While his comparative analysis is specific to Eastern Europe, it does nevertheless bolster the importance of civil society in the scholarship of judicial politics in terms of establishing the ramifications of its absence.<sup>77</sup>

Within civil society, special attention needs to be accorded to the role of the legal community. Chavez, in accordance with other scholarship, also acknowledges that the bar and the bench are critical actors at the forefront of the reform coalitions, given that they place value on an independent judiciary. She notes that “lawyers, prosecutors, judges, and members of human rights organizations” are particularly effective owing to their expertise and deep

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<sup>73</sup> Chavez 2004, 20

<sup>74</sup> Chavez 2004, 21

<sup>75</sup> See Keck and Sikkink 1998

<sup>76</sup> Chavez 2004, 22-23

<sup>77</sup> Blokker 2014

commitment towards judicial independence.<sup>78</sup> Halliday, Karpik, and Feeley (2007) have a similar understanding of legal professionals and develop the term “legal complex,” to encompass these actors.<sup>79</sup> The term refers to the relationship between lawyers, judges, and other actors who have legal training and are invested in protecting and advancing political liberalism.<sup>80</sup> Halliday et al. define political liberalism as being comprised of three components: a moderate state, civil society, and basic legal freedoms. Because the scholars define a moderate state as one where separation of power is present and there are limits to power, it can be inferred from their definition that judicial independence is inherently an essential component of political liberalism.<sup>81</sup> In this way, their use of the term, legal complex, suggests that these legally trained professionals would mobilize in defense of judicial independence.

However, given that people with legal training pursue a variety of legal professions, it is challenging to establish the boundaries for the legal complex when defining the term. Another dimension to this definition is that, the term cannot be viewed as a fixed structure of actors encompassing all legal professions relating to all matters. Instead, these people selectively coalesce around specific issues; consequently, membership should be viewed as fluid and as segmented. Citing several case studies from across the world, they assert that the integral role of the legal complex in promoting political liberalism cannot be underemphasized.<sup>82</sup> Halliday et al. also categorize the various instances in which the legal complex mobilizes. For instance, the entirety of the legal complex may mobilize in defense of political liberalism; mobilization could be limited to various segments; segments or the entire complex may be prevented from mobilizing; or the majority of the legal complex could be hostile to the principles under attack

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<sup>78</sup> Chavez 2004, 20; 138

<sup>79</sup> Halliday et al. 2007, 35

<sup>80</sup> Halliday, Karpik, and Feeley 2007

<sup>81</sup> Feeley 2012, 4

<sup>82</sup> Halliday et al. 2007, 9

and thus may fail to mobilize.<sup>83</sup> That being said, the mobilization of the entirety of the legal complex seldom takes place.<sup>84</sup> This does raise the possibility that the legal complex can mobilize for certain components of political liberalism and perhaps not for others. While methods of mobilization varied in these scenarios, the scholars note that alliances were frequently formed within the legal complex between judges and private lawyers.<sup>85</sup>

Civil society organizations that may mobilize in defense of judicial independence extend beyond the legal profession, and thus beyond the “legal complex.”<sup>86</sup> They can also include business organizations that recognize the economic costs that stem from “executive subordination of the courts.”<sup>87</sup> As a result, the legal complex should not be viewed independently from civil society. Scholars should understand that it operates hand-in-hand with other segments of civil society. In fact, in their analysis, Halliday et al. note that mobilization of the legal complex can spur the mobilization of these other segments.<sup>88</sup> Together, these networks act as watchdogs, monitoring attempts that seek to limit judicial independence. They then disperse this information to the public, raising awareness and promoting increased transparency.<sup>89</sup> The coalitions can also promote vertical accountability, by mobilizing public support through the electoral process.<sup>90</sup> For the purposes of this study, I specifically envision civil society as the intermediary space between the family, the government and the market, where citizens associate in groups to collectively influence the state.

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<sup>83</sup> Halliday et al. 2007, 12

<sup>84</sup> Halliday et al. 2007, 35

<sup>85</sup> Halliday et al. 2007, 16

<sup>86</sup> Halliday, Karpik, and Feeley 2007

<sup>87</sup> Chavez 2004, 141

<sup>88</sup> Halliday et al. 2007, 18

<sup>89</sup> Bakolias 2000

<sup>90</sup> Chavez 2008

### **i. The Case of Pakistan**

The 2007 Lawyers' Movement in Pakistan serves as an example of civil society insulating judicial independence. The Movement emerged following the suspension of Chief Justice Chaudhry on grounds of corruption by the authoritarian Musharraf regime. However, the actual conflict between the executive and the judiciary dates back to 1999, when the newly dismissed military chief, General Pervez Musharraf, led a coup deposing the prime minister. This act ended the period of democratic rule that began in 1988 and served as a continuation of the pattern in Pakistani history of political instability and military interference.<sup>91</sup> In addition to dissolving the national assembly, Musharraf suspended the 1973 constitution and declared a Provisional Constitutional Order (PCO) that not only elevated him to the presidency but also placed executive action and his administration outside the bounds of judicial review.<sup>92</sup> Soon after, Musharraf mandated that all judges swear an oath of loyalty to him and the new provisional order. Those who refused were dismissed and replaced by judges selected by Musharraf, an action that resulted in the removal of six judges from the Supreme Court, including Chief Justice Siddiqui, and the appointment of Iftikhar Chaudhry as the new Chief Justice.<sup>93</sup> These actions served to constrain the independence of the judiciary, which now served to legitimize the regime.

The Supreme Court, which holds the power of constitutional review, sanctioned these actions on the premise that they were necessary to hold the integrity of the state, in the context of a government breakdown.<sup>94</sup> The court granted him three years for this purpose. Near the end of this period, Musharraf used a controversial referendum to run for president unopposed and

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<sup>91</sup> Ghias 2010; Jillani 2012

<sup>92</sup> Baer 2011, 71

<sup>93</sup> Baer 2011, 73

<sup>94</sup> Jillani 2012

legitimize his power for the next five years. In the following years, as Musharraf pursued an economic liberalization agenda, the court was permitted to exercise its right of judicial power to target low-level corruption. The Chaudhry Court took an active role in reviewing economic policy through the process of public interest cases that were related to construction safety and urban planning.<sup>95</sup> In turn, the regime complied with these low-level rulings (even those that it did not favor) to retain judicial credibility and regime legitimacy.

However, by 2007, facing re-election and growing unpopularity, Musharraf sensed that the Court's growing judicial activism and promotion of political liberalization threatened his interests.<sup>96</sup> Because the constitution did not permit his contestation for a second term and because he could not do so without an acquiescent Chief Justice, Musharraf asked Chaudhry to resign on the premise of misconduct.<sup>97</sup> Chaudhry's refusal, given his innocence, and subsequent suspension ignited the constitutional crisis and countrywide protest. After Chaudhry challenged the reference of misconduct filed by Musharraf, the Supreme Court reinstated him.

The 2007 interference on the independence of the judiciary sparked the mobilization of the legal complex, with Chaudhry actively engaging with regional bar association across the country.<sup>98</sup> To counter this expansion of independence, Musharraf declared a state of emergency, on the premise that Pakistan was a "'frontline State' in the war against terror."<sup>99</sup> He proceeded to implement a second provisional constitutional order and demanded that judges, once again, swear an oath of loyalty to him. This was met with heavy resistance from senior judges, with Chaudhry initiating a review of Musharraf's state of emergency. Musharraf retaliated by having the army arrest Chaudhry, in addition to any other dissident judge who refused to take the oath;

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<sup>95</sup> Ghias 2010, 995

<sup>96</sup> Ghias 2010

<sup>97</sup> Jillani 2012

<sup>98</sup> Ghias 2010

<sup>99</sup> Jillani 2012

in their place, he appointed political cronies. This outright assault on the independence of the court mobilized the legal complex to launch a political movement in defense of the judiciary. The mobilization involved effective organizational capacity between the courts, the media, and bar associations. While the courts ensured the media continued to operate freely, the bar associations boycotted lower courts, and the lawyers across the country joined street protests that were particularly effective in generating public support.<sup>100</sup>

In his detailed historical case study of Pakistan and the Lawyers' Movement, Ghias (2010) notes that while the media and overall distrust towards the regime were important factors in the movement, it was ultimately the sustained campaign by the bar associations for political liberalization that led to the demise of the regime and the protection and survival of the judiciary.<sup>101</sup> Most importantly, not only did civil society safeguard judicial independence in the moment, but it also later emboldened the Court to further pursue judicial independence by directly confronting the regime in efforts towards political liberalization.<sup>102</sup> The effective mobilization of the bar associations, and the legal complex in general, demonstrates that civil society organizations have a heightened institutional ability to coalesce supporters in a collective and organized defense of the judiciary.<sup>103</sup> Their mobilization results in the attenuation of the judicial attack on the court and an increase in the level of judicial independence. Figure 1, below, demonstrates the evolution of judicial independence in Fiji over time. While the attacks in 2007 resulted in an increase in the level of independence of the judiciary, it is also possible to infer that insulation of the court may result in holding the level of judicial independence constant.

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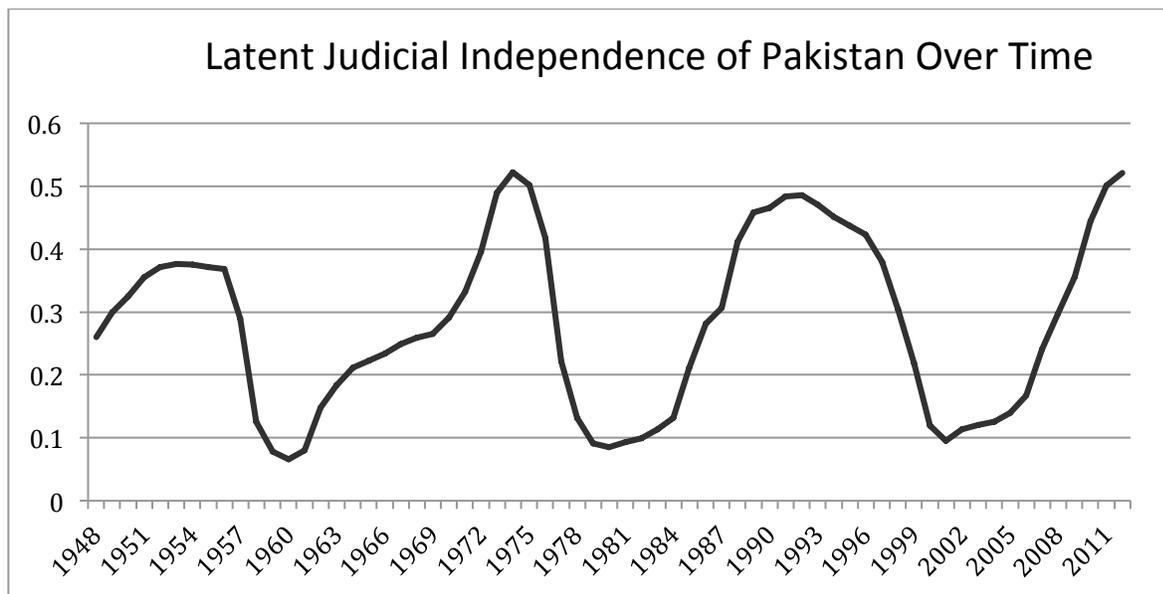
<sup>100</sup> Ghias 2010, 1008

<sup>101</sup> Ghias 2010, 1004

<sup>102</sup> Ghias 2010, 1015

<sup>103</sup> Ghias 2010, 990 and 1016

**Figure 1: LJI in Pakistan across Time<sup>104</sup>**



### III. Hypothesis

Past scholarship has shown that attacks on the judiciary influence judicial independence. However, the impact on judicial independence may vary depending on whether a polity has a developed civil society or not. My hypothesis is as follows:

*In places where there is a robust civil society, significant attacks on courts will either increase the level of judicial independence or maintain the current level. In places where there is a weak civil society, significant attacks on constitutional courts will strongly reduce levels of judicial independence.*

This hypothesis suggests that civil society serves as a moderator between judicial attacks and judicial independence. It may be falsifiable if attacks on a constitutional court result in a decrease in judicial independence in a country with a robust civil society.

<sup>104</sup> Linzer and Staton, 2015b

#### **IV. Data and Methodology**

In order to test this hypothesis, I set up an empirical model that seeks to demonstrate whether the robustness of civil society, in the presence of large attacks on the judiciary, impacts the level of judicial independence in a country in a given year. Thus, my independent variables are level of attack and robustness of civil society. I operationalize the two variables by utilizing data that is publically available through the Varieties of Democracy (V-Dem) project.

Although this data was published recently, it is noteworthy for its scope, which encompasses three hundred fifty different indicators and sixteen million data points relating to various measures of democracy. It currently includes data from over 170 different countries from 1900-2015. This project is the result of an international collaboration comprising over fifty scholars and 2,500 Country Experts, who undergo a rigorous recruitment process. The indicators are assessed in four categories: factual indicators coded by members of the V-Dem team, factual indicators coded by Country Coordinators, evaluation of indicators based on multiple ratings provided by Experts, and composite indices. Country Experts are primarily academics or professionals and 60% of the Experts coding a particular country-survey are either native or permanent residents of the state.

The initial survey used to gather the data was piloted in 2011 for 12 countries, and over the course of the two years, the questions were revised. Questions that require multiple ratings from Country Experts are typically ordinal and are ranked on a specific scale. In their choice of rankings, they avoid using interval-level scales and try to limit questions open to interpretation. However, they note there is a challenge in scale inconsistency and use a “Bayesian item response theory (IRT) modeling technique [to] estimate latent polity characteristics.” For the sake of consistency and the problem of cross-national comparability, they use lateral coders, experts

coding several countries typically for one year, and bridge coders, experts coding the entire time series for several countries in one or more surveys. This is a highly reliable data set, and given the number of indicators presented in the dataset and the quality of research, utilizing V-Dem ensures consistency in my analysis. In addition to creating newly compiled data for democracy indicators for democracy, it also collects measures for background factors like economics and demographics from other reputable sources such as Freedom House, Polity IV, World Bank Governance Indicators, etc.

### **A) Independent Variable: Attacks**

I define an attack on the judiciary as any attempt to interfere with the autonomy of a judge through influence, control, or subordination. As stated earlier, this can include threats of suspension, direct interference in the operation of the court, court packing, purging, and threats to salary or tenure. I operationalize this by creating an additive index of attacks that averages three indicators from the V-Dem dataset: government attacks on the judiciary; court packing; and judicial purges. I label this additive index as “safety” in my model, to refer to the absence of attacks. Thus, the higher the score of safety in my index, the less significant the attacks are.

The first indicator is the most direct and offers a latent score with the question: How often did the government attack the judiciary’s integrity in public? No available data source currently measures the level of an attack, but V-Dem’s indicator does measure the frequency. Countries are coded on an ordinal scale, which is then converted to an interval scale by the measurement model. V-Dem’s court-packing indicator distinguishes between politically motivated increases of the size of the court, regular increases and no increases, using an ordinal scale that is then converted to an interval scale by the measurement model. Finally, the judicial

purges indicator examines the removal of judges, distinguishing between arbitrary and necessary removals on an ordinal scale that is converted to interval by measurement model. I am most interested in examining the impact of massive attacks that intend to significantly reduce independence. Therefore, I first define a big attack as a year in which the safe index drops by one unit (or one standard deviation). I refer to extremely large attacks on the judiciary as a year in which the safe index drops by a unit of 1.5.

### **B. Independent Variable: Civil Society**

As mentioned earlier, a variety of definitions have been proposed to conceptualize civil society, the most common of which has viewed civil society in terms of a set of organizations. Malena and Heinrich (2007) argue that the array of definitions has amounted to a failure in developing a systematic framework for conceptualizing and operationalizing civil society. As a result, development of the concept, both theoretically and empirically, has been hindered. This is evident in that despite the fact that civil society can be directly observed and measured, extensive data on the strength and scope of civil society is limited in availability. Better empirical understanding of civil society is essential to enhancing not only future developmental efforts but also the role of civil society across space and time in studying democracy, rule of law, and judicial independence.

In order to develop a valid method of operationalizing civil society, it is first essential to identify a consistent definition. In their work, Malena and Heinrich conceptualize it as “an arena, outside the family, the government, and the market, where people associate to advance their interests.” They directly contrast this with the more traditional definition, which views the concept as a set of organizations. In their definition, citizens are at the core of civil society

instead of CSOs. Malena and Heinrich believe an organizational understanding of the term places an inflated value on the number of existing organizations, while undervaluing (if not ignoring) informal activities. Furthermore, they state the conceptualization is biased towards states “where formal or registered organizations are more prevalent.”<sup>105</sup> The purpose of their conceptualization is to emphasize “the importance of its role in providing a public space where diverse societal values and interests interact.” They contend that this is a more holistic perspective, allowing social scientists to fully examine the characteristics of the arena. Finally, they note that their definition inherently identifies civil society as a “political phenomenon” rather than an economic one. From this definition, they identify 74 possible indicators, divided into 4 categories that capture the full breadth of civil society: the structure and the environment civil society operates under, its values and finally its impact.

This proposed methodology has the potential to fully capture the complexity of civil society and has been applied by CIVICUS in their Civil Society Index (CSI) project in over 50 countries.<sup>106</sup> That being said, the project was established in 1998, piloted from 2000-2002 and implemented afterwards. It offered yearly snapshots of civil society in these countries since the mid 2000s. In recent years, it evolved to offer rapid assessments, given the volatile nature of civil society in recent years. The project does not offer retroactive data to establish the state of civil society before its implementation. This presents a drawback to my study given that the majority of my data is from the 20<sup>th</sup> century. The CIVICUS project and methodology could present significant potential for the study of civil society, if future scholars choose to adapt it.

Unfortunately, the data is too limited in its scope to be used in this study.

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<sup>105</sup> Malena and Heinrich 2007, 340

<sup>106</sup> Malena and Heinrich 2007

Consequently, for the purposes of my project, I have chosen to pursue the use of the civil society index created by the V-Dem project. They measure the robustness of civil society in the dataset using the question: How robust is civil society? The clarification of the question defines civil society as the intermediary space between the private sphere and the state, where “citizens organize in groups [i.e. CSOs] to pursue their collective interests and ideals. Using an interval scale, the core civil society index is aggregated by taking the indicators for CSO entry and exit, CSO repression, and CSO participatory environment.<sup>107</sup> Using this measure falls in line with Ghias’s findings that CSOs have an institutional capacity to mobilize the public in support of the judiciary.<sup>108</sup>

Developing a measure to specifically address the legal complex would be ideal, but it proves difficult given the nature of the term itself. Halliday et al. note in their work on the legal complex (2007) that “dynamism in the concept” stems from its inherent “variability across issues, sites, and time.”<sup>109</sup> The fluid nature of membership complicates the ability to establish boundaries for the concept in terms of which legally trained professionals can be considered part of the legal complex.<sup>110</sup> Aside from the problem of properly conceptualizing the term, a significant challenge lies in that no available data currently exists that can offer a valid measure for the number of lawyers, number of judges, or even the number of bar associations found across countries. In this regard, directly operationalizing the size of the legal complex as a subset of civil society is not possible.

V-Dem’s measure for civil society does not isolate the scope of the legal complex in a polity, however using the index as general measure is still valid. This is possible given that the

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<sup>107</sup> Bernhard et al. 2015

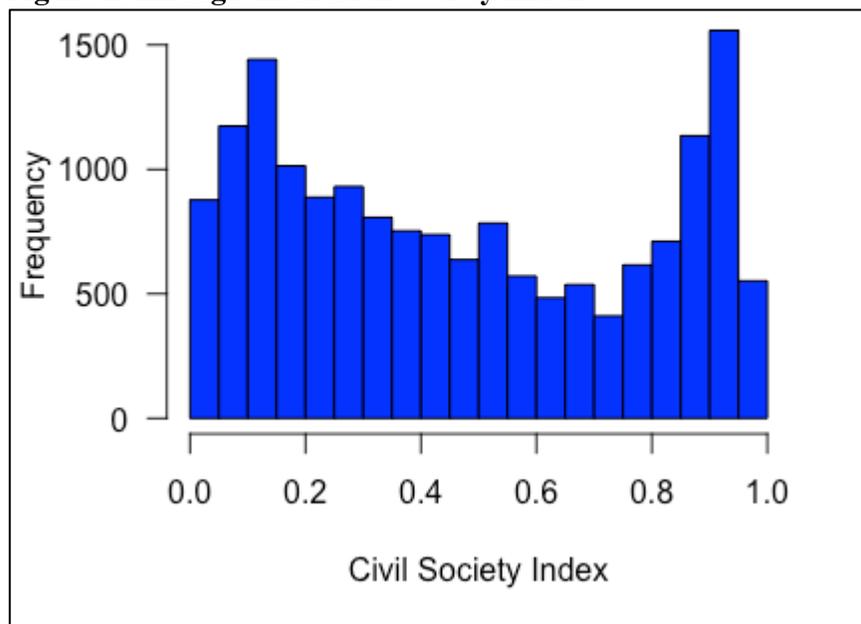
<sup>108</sup> Ghias 2010, 990 and 1016

<sup>109</sup> Halliday et al. 2007, 9

<sup>110</sup> Halliday et al. 2007, 7

legal complex and the rest of civil society are in theory correlated, operating as a coalition that can be mobilized together to help protect judicial independence. While it would be ideal to examine attacks as the unit of analysis and test whether civil society organizations mobilize, this type of data is not currently available. Instead, for the sake of pragmatism, the measure I propose using through V-Dem allows for civil society to be viewed conceptually as the potential for mobilization. In the scenario where a robust civil society is present, the potential for mobilization is higher; this would produce a different output than the scenario in which civil society is lacking. The distribution of the variable is visible below in Figure 2.

**Figure 2: Histogram of Civil Society Index**



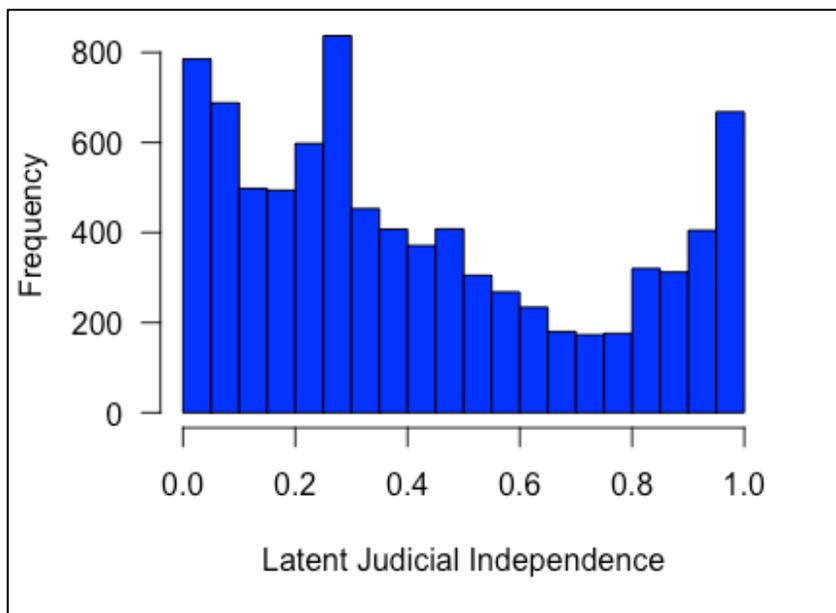
### **C) Dependent Variable: Judicial Independence**

For the purposes of this study, I focus on de facto independence as my dependent variable. Operationalizing this term has a weakness in that it cannot be objectively or directly measured.<sup>111</sup> While V-Dem offers a measure for judicial independence, it is necessary to use

<sup>111</sup> Aydin 2013, 117; See Staton 2004

outside data, given that the survey questions for both judicial attacks and judicial independence may have been administered to the same people. Instead, I will be using a latent measure of de facto judicial independence (LJI) developed by Linzer and Staton (2015), covering 200 countries from 1948 to 2012. Linzer and Staton make note of the common difficulties in measuring the concept and the variety of definitions used in previous indicators. Their model assesses eight previously developed indicators, extracts the commonalities, and develops a new valid aggregate measure for the concept for time-series, cross-sectional data. In this way, it addresses the high measurement error found in existing scores.<sup>112</sup> This dataset is publically available on Dataverse. The distribution of this variable is visible in the histogram presented as Figure 3 below.

**Figure 3: Histogram of Latent Judicial Independence**



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<sup>112</sup> Linzer and Staton 2015a

## **D) Control Variables and Fixed Effects**

As indicated by Herron and Randazzo (2003), judicial behavior may be influenced by the economic conditions<sup>113</sup> and country-specific contextual factors, such as the level of civil liberties, the structure and power of the executive system, and political fragmentation.<sup>114</sup> To address for confounding relationships such as this, I control for economic development and the level of democratization. While economic development is not part of the democratic indicators that V-Dem covers, it does compile data from other reputable sources. For instance, economic development can be measured by GDP per capita from the Maddison-Project (2013) or real GDP per capita from Haber & Menaldo (2011). Finally, for level of democracy, V-Dem compiles an index from Vanhanen and Lundell (2014).

## **E. Empirical Model**

One obvious challenge to establishing causal inference from my research design is that my independent variable, attacks on the judiciary, cannot be randomly assigned. This raises the possibility of the presence of a confounding relationship from omitted or unmeasured variables. It is also important to address the risk of endogeneity stemming from reverse causation, i.e. an exercise in increased judicial independence can result in an increase in judicial attacks.

### **i. Ordinary Least Squares Regression**

To establish causality between my independent and dependent variables, I first applied an ordinary least squares (OLS) regression in R, given that my dependent variable is continuous. In the first model, LJI is regressed on attacks (referred to in the model as “safe” to indicate an

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<sup>113</sup> The Lawyer’s Movement in Pakistan also suggests that economic conditions are linked to the level of judicial independence, as indicated by Ghias (2010).

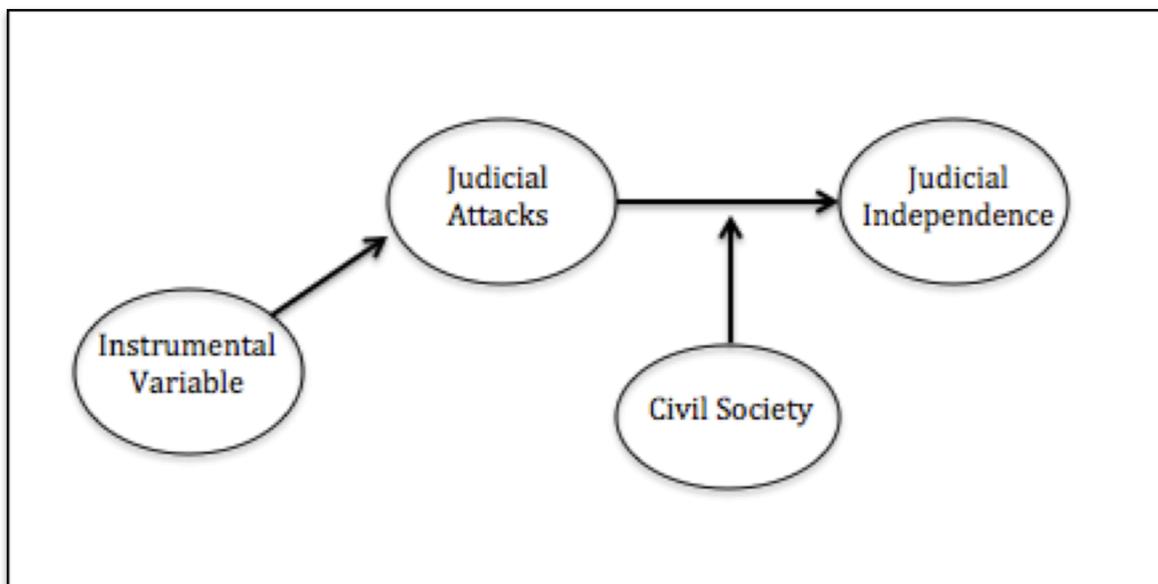
<sup>114</sup>Herron and Randazzo 2003, 425

absence of attacks) and civil society, without any interaction or covariates. The second model introduces the interaction between safety and civil society but does not introduce any controls. In the third model, I maintain the interaction by regressing LJI on attacks, but I also include control variables for democracy and GDP per capita. Finally, in the fourth model, I regress LJI on attacks, include the control variables, and account for fixed effects. The inclusion of fixed effects allows me to capture the presence of any omitted variable that could uniquely be associated with a given country and thus impact both the independent and dependent variables; as a result, I am able to control for variation within the country over time. Finally, because the data is clustered by COW (correlates of war) country codes, it is important to acknowledge that the data points are not independent from one another. To account for this, I correct the standard error for clustering. Finally, to determine whether attacks have short-term or long-term effects, I apply a time lag for one year, two years, and five years.

## **ii. Instrumental Variables for Attacks and Two Stage Least Squares Estimation**

Due to the fact that attacks cannot be randomized, the causal inference drawn from the OLS regression may not be entirely accurate. There could be an outside variable impacting both the independent and dependent variables. Once again, there is also a possibility for reverse-causation. In order to address this, I model two potential instrumental variables (IV) for attacks: change in regime, indicated by regime breakdown and change in regime, indicated by democratic transition. The idea behind the IV is that it can be used to predict the independent variable for attacks (i.e. “safety), but it would have no relation to the judicial independence dependent variable. The use of the IV would eliminate the possibility of reverse causation in that its effect would run through judicial attacks and then would impact judicial independence. Civil society

would remain as a moderating independent variable between attacks and independence. This relationship is indicated below in Figure 4.



**Figure 4: Model with instrumental variable should eliminate problem of reverse causation**

For change in regime, I use data taken from Boix, Miller, and Rosato's Complete Data Set of Political Regimes (2012), which offers a measure for democratic breakdown and democratic transition for 219 countries and covers 1800-2007.<sup>115</sup> I estimate the instrumental variables using two-stage least squares (2SLS). Safety is first regressed on each instrumental variable. This produces a predicted value for the independent variable, which is then regressed on the dependent variable (LJI). The result presents the effect of the independent variable on the dependent variable. The model assumes that the effect of the IV variable is administered through attacks, and thus the only way the IV impacts independence is by causing attacks. There should be no correlation between the IV and independence, as the predicted value removes the effect of the dependent variable from the independent variable. However, it is important to emphasize that

<sup>115</sup> Boix et al. 2014.

for the instrumental variable to be effective, it must be highly correlated to the independent variable.

## **V. Results**

### **A) Ordinary Least Squares Regression**

The results of the OLS regression, with standard errors clustered on state, are visible in Table 1 below. The coefficients for the judicial safety index can be interpreted as the effect of the safety associated with a one unit change in independence when civil society is 0. This effect is somewhat negative, if not essentially 0, across the various models. Similarly, the civil society index can be read as the effect of civil society when safety is 0. However, civil society seems to be positively correlated with independence, in a statistically significant manner at a p-value of  $<0.01$  in each model. The interaction between safety and civil society can then be interpreted as the average effect of safety for every level of civil society. When civil society is low, the effect of safety is negative, meaning that without a robust civil society, the safer the score of a country (i.e. lacking attacks), the less independent the judiciary is. While this may seem puzzling, this could be an indication that the judiciary in these countries are completely subservient and do not need to be attacked. Meanwhile, as civil society becomes more robust, the safer a country is, the more independent the judiciary is. In these polities, a significant attack has the potential to undermine judicial independence. These results hold true across the various time lags that were administered (indicated below in Tables 2, 3, and 4).

The fourth model, which accounts for control variables and confounding variables at the country level through fixed effects, is the best explanatory model to examine. While there is a decrease in the number of observations, it has the highest R<sup>2</sup>, indicating high variability. The

results here similarly indicate that attacks undermine independence only when a robust civil society is present. In a country with a relatively vigorous civil society, attacks have the potential to be seriously problematic to the independence of the judiciary.

**Table 1: OLS Regression of LJI with Standard Errors Clustered on State:**

	No Interaction	Interaction between absence of attacks and civil society	Interaction model with controls	Interaction model with controls and fixed effects
	(1)	(2)	(3)	(4)
<i>Judicial Safety Index</i>	0.096*** (0.012)	-0.040*** (0.015)	-0.026 (0.017)	0.003 (0.014)
<i>Civil Society Index</i>	0.567*** (0.036)	0.461*** (0.033)	0.270*** (0.035)	0.222 *** (0.034)
<i>Judicial Safety X Civil Society</i>		0.262*** (0.024)	0.165*** (0.027)	0.080** (0.031)
<i>Democracy Indicator</i>			0.175*** (0.026)	0.125*** (0.021)
<i>Ln (GDP/cap)</i>			0.063*** (0.011)	0.070*** (0.012)
<i>Constant</i>	0.075*** (0.019)	0.086*** (0.017)	-0.371*** (0.083)	-0.173 (0.128)
<i>State Fixed Effects?</i>	No	No	No	Yes
<i>Observations</i>	8,580	8,580	6,911	6,911
<i>R2</i>	0.633	0.691	0.776	0.928
<i>Adjusted R2</i>	0.633	0.691	0.775	0.926
<i>Residual Std. Error</i>	0.186 (df = 8577)	0.171 (df = 8576)	0.146 (df = 6905)	0.084 (df = 6750)

Note:

\*p<0.1; \*\*p<0.05; \*\*\*p<0.01

**Table 2: OLS Regression of LJI with Standard Errors Clustered on State: including two-year time lag**

	No Interaction	Interaction between absence of attacks and civil society	Interaction model with controls	Interaction model with controls and fixed effects	Interaction model with controls, fixed effects and two year lag
	(1)	(2)	(3)	(4)	(5)
<i>Judicial Safety Index</i>	0.096*** (0.012)	-0.040*** (0.015)	-0.026 (0.017)	0.003 (0.014)	
<i>Civil Society Index</i>	0.567*** (0.036)	0.461*** (0.033)	0.270*** (0.035)	0.222 *** (0.034)	
<i>Judicial Safety X Civil Society</i>		0.262*** (0.024)	0.165*** (0.027)	0.080** (0.031)	
<i>Judicial Safety Index (2 yr lag)</i>			0.175*** (0.026)	0.125*** (0.021)	
<i>Civil Society Index (2 yr lag)</i>			0.063*** (0.011)	0.070*** (0.012)	
<i>Judicial Safety X Civil Society (2 yr lag)</i>					0.001 (0.014)
<i>Democracy Indicator</i>					0.230*** (0.033)
<i>Ln (GDP/cap)</i>					0.079*** (0.031)
<i>Constant</i>					0.101*** (0.019)
<i>Lngdp_2</i>					0.077*** (0.013)
<i>Constant</i>	0.075*** (0.019)	0.086*** (0.017)	-0.371*** (0.083)	-0.173 (0.128)	-0.224* (0.134)
<i>State Fixed Effects?</i>	No	No	No	Yes	Yes
<i>Observations</i>	8,580	8,580	6,911	6,911	7,005
<i>R2</i>	0.633	0.691	0.776	0.928	0.919
<i>Adjusted R2</i>	0.633	0.691	0.775	0.926	0.917
<i>Residual Std. Error</i>	0.186 (df = 8577)	0.171 (df = 8576)	0.146 (df = 6905)	0.084 (df = 6750)	0.089 (df = 6844)

Note:

\*p&lt;0.1; \*\*p&lt;0.05; \*\*\*p&lt;0.01

**Table 3: OLS Regression of LJI with Standard Errors Clustered on State: including one-year time lag**

	No Interaction	Interaction between absence of attacks and civil society	Interaction model with controls	Interaction model with controls and fixed effects	Interaction model with controls, fixed effects and <b>one</b> year lag
	(1)	(2)	(3)	(4)	(5)
<i>Judicial Safety Index</i>	0.096*** (0.012)	-0.040*** (0.015)	-0.026 (0.017)	0.003 (0.014)	
<i>Civil Society Index</i>	0.567*** (0.036)	0.461*** (0.033)	0.270*** (0.035)	0.222 *** (0.034)	
<i>Judicial Safety X Civil Society</i>		0.262*** (0.024)	0.165*** (0.027)	0.080** (0.031)	
<i>Judicial Safety Index (1 yr lag)</i>			0.175*** (0.026)	0.125*** (0.021)	
<i>Civil Society Index (1 yr lag)</i>			0.063*** (0.011)	0.070*** (0.012)	
<i>Judicial Safety X Civil Society (1 yr lag)</i>					0.002 (0.014)
<i>Democracy Indicator</i>					0.226*** (0.033)
<i>Ln (GDP/cap)</i>					0.079*** (0.031)
<i>Constant</i>					0.115*** (0.020)
<i>Ln (GdP/cap) (1 yr lag)</i>					0.073*** (0.012)
<i>Constant</i>	0.075*** (0.019)	0.086*** (0.017)	-0.371*** (0.083)	-0.173 (0.128)	-0.200* (0.130)
<i>State Fixed Effects?</i>	No	No	No	Yes	Yes
<i>Observations</i>	8,580	8,580	6,911	6,911	6,958
<i>R2</i>	0.633	0.691	0.776	0.928	0.925
<i>Adjusted R2</i>	0.633	0.691	0.775	0.926	0.923
<i>Residual Std. Error</i>	0.186 (df = 8577)	0.171 (df = 8576)	0.146 (df = 6905)	0.084 (df = 6750)	0.086 (df = 6797)

Note:

\*p&lt;0.1; \*\*p&lt;0.05; \*\*\*p&lt;0.01

**Table 4: OLS Regression of LJI with Standard Errors Clustered on State: including five-year time lag**

	No Interaction	Interaction between absence of attacks and civil society	Interaction model with controls	Interaction model with controls and fixed effects	Interaction model with controls, fixed effects and five year lag
	(1)	(2)	(3)	(4)	(5)
<i>Judicial Safety Index</i>	0.096*** (0.012)	-0.040*** (0.015)	-0.026 (0.017)	0.003 (0.014)	
<i>Civil Society Index</i>	0.567*** (0.036)	0.461*** (0.033)	0.270*** (0.035)	0.222 *** (0.034)	
<i>Judicial Safety X Civil Society</i>		0.262*** (0.024)	0.165*** (0.027)	0.080** (0.031)	
<i>Judicial Safety Index (5 yr lag)</i>			0.175*** (0.026)	0.125*** (0.021)	
<i>Civil Society Index (5 yr lag)</i>			0.063*** (0.011)	0.070*** (0.012)	
<i>Judicial Safety X Civil Society (5 yr lag)</i>					-0.005 (0.015)
<i>Democracy Indicator</i>					0.227*** (0.034)
<i>Ln (GDP/cap)</i>					0.065** (0.033)
<i>Constant</i>					0.056*** (0.017)
<i>Ln (GdP/cap) (1 yr lag)</i>					0.089*** (0.014)
<i>Constant</i>	0.075*** (0.019)	0.086*** (0.017)	-0.371*** (0.083)	-0.173 (0.128)	-0.255* (0.146)
<i>State Fixed Effects?</i>	No	No	No	Yes	Yes
<i>Observations</i>	8,580	8,580	6,911	6,911	7,122
<i>R2</i>	0.633	0.691	0.776	0.928	0.897
<i>Adjusted R2</i>	0.633	0.691	0.775	0.926	0.895
<i>Residual Std. Error</i>	0.186 (df = 8577)	0.171 (df = 8576)	0.146 (df = 6905)	0.084 (df = 6750)	0.101 (df = 6962)

Note:

\*p&lt;0.1; \*\*p&lt;0.05; \*\*\*p&lt;0.01

Given that my hypothesis seeks to examine the impact of large attacks on judicial independence, I subset the data to determine when countries had large attacks (defined here as a drop by 1 unit in the safety measure) and when countries had giant attacks (defined as a drop by 1.5 units in safety measure). The analysis indicates that 112 large attacks take place, 32 of which may be considered massive. I then subset this further by adding the condition of a robust civil society, defined here as at least 0.7 on the measurement scale. The result of this analysis is striking in that it indicates that in the presence of a robust civil society, only 8 massive attacks have taken place in five different countries. These cases are visible in Table 5 below.

**Table 5: Countries with massive attack and a robust civil society**

Country Name	Year	Big Attack	Giant Attack	Breakdown	Civil
<b>Ecuador</b>	2004	1	1	0	0.8421148
<b>Argentina</b>	1955	1	1	0	0.7016595
<b>Argentina</b>	1958	1	0	0	0.7415099
<b>Argentina</b>	1990	1	1	0	0.9172134
<b>Ukraine</b>	2014	1	0	NA	0.7287337
<b>Pakistan</b>	2007	1	1	1	0.7153091
<b>Fiji</b>	1987	1	1	0	0.7692696
<b>Fiji</b>	2000	1	0	0	0.7692696

There is some drawback to this analysis in that attacks cannot be randomly assigned to indicate variation, the number of observations are limited (given the nature of attacks), and the possibility of endogeneity remains. The findings from the OLS regression ultimately reveal that the effect of safety depends on having a robust civil society. This is likely because in places without robust civil societies, “safety” may be a reflection of a lack of independence. From my hypothesis, I expected to find that in the presence of an attack, a robust civil society would mobilize to protect the independence of the judiciary. The results are surprising, as I was not expecting to find that states with robust civil society very rarely experience significant attacks.

The implication that can be drawn here is that while civil society could potentially come to the defense of judicial independence, the robustness of civil society, first and foremost, works to prevent attacks from taking place.

Regarding my initial question and hypothesis: an attack on a court may lead to an increase in judicial independence, however most of these attacks are not classified as massive. Thus, I shift focus to more deeply examine the five exceptions wherein significant attacks occurred in the presence of robust civil societies. These exceptions raise the question of when these attacks do occur, in what context do they manifest? I explore these cases in the proceeding sections, with the exception of Pakistan in 2007, which was discussed at length in section II from a theoretical standpoint.

#### **B) IV and Second Order Least Squares Estimation Results:**

To address the problem of endogeneity that remains in the OLS Regression, I turned to the instrumental variable and the second order least squares estimation using Stata. However, the first stage analysis of the instrumental variable reveals that democratic transition or breakdown is not a good instrument for attack, as it is weakly correlated with attacks (indicated by a very high p-value of nearly 0.6). The measure of attacks has more or less the same mean regardless of democratic transition or breakdown. Because breakdown of regime is weakly correlated with attacks on the judiciary, it is not a reliable instrumental variable. Consequently, an attack on the judiciary may be endogenous to the independence of the judiciary, and I cannot rule out the possibility of reverse causation.

### **C) Exceptions to the Study: Attacks manifest in situations of serious political crisis**

Examining these results necessitates that we ask the question: what explains the manifestation of these attacks and under what conditions did they take place? While these attacks are very much tied to the specific political context of the respective state, generally speaking, they seem to manifest during extreme political crises that present existentialist threats challenging the future viability of the state. More specifically, they are instances of institutional instability in the developing world.

#### **i. Argentina 1955 and 1958:**

For much of the 20<sup>th</sup> century, Argentine politics were dominated by cycles of military interventions, subsequent military regimes, and extreme political instability. In fact, from 1950-onwards, Argentina stands apart for having experienced the most regime transitions than any other country.<sup>116</sup> During this period, the “primacy of parliament and the rule of law” were disregarded and would not be respected until the transition to democracy in 1983.<sup>117</sup> These cycles resulted in high judicial turnover, as courts were purged due to the affiliation and loyalty of the judges to the previous regime. Iaryczower et al. (2002) note that despite justices being granted life tenure, since the first interruption of democratic rule in 1930, the tenure has averaged around 4.6 years, due to various “resignation[s], impeachment[s], or irregular removal[s].”<sup>118</sup> A notable consequence of this extreme political instability is that judicial purging from the first Peron administration onwards effectively reduced, if not eliminated, confidence and respect of the courts, as well as the “norm of judicial independence.”<sup>119</sup> Biles (1976) also notes that the

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<sup>116</sup> Helmke 2017

<sup>117</sup> Munck 1997, 6

<sup>118</sup> Iaryczower et al. 2002, 702

<sup>119</sup> Iaryczower et al. 2002

instability resulted in the acquiescence of the courts to the expansion of executive power during the military regimes, with the justices essentially accommodating themselves to the de facto regimes.<sup>120</sup>

1955 and 1958 present two of these instances of political instability, during which time the military ousted the once-immensely popular President Juan Péron during the Liberator Revolution (Revolucion Libertadora) and established a provisional military government that lasted until 1958.<sup>121</sup> Peron's removal came at a time of increased socio-political tensions that had compromised his popularity with the public and the military (with several coup attempts taking place in the early '50s); most notable were his conflicts with the Catholic Church and his positive treatment of foreign investors.<sup>122</sup> Some scholars have attributed the decline in his popularity to the death of his wife, Eva Peron, in 1952, as she was critical in mobilizing support for him.<sup>123</sup> With Peron's removal, all of his appointees were also purged. After the provisional military government fell apart in 1958, President Frondizi appointed a new judiciary<sup>124</sup> and expanded the court from a size of five to seven.<sup>125</sup>

## **ii. Argentina 1990**

Despite the court's acquiescence during the military regimes, Larkins (1998) contends that since the transition to democracy in 1983 with the election of Alfonsín, the judiciary was relatively impartial and insular. The attacks on the Argentine Supreme Court in 1990 were preceded by national elections that resulted in the election of Carlos Menem as president, as well

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<sup>120</sup> Biles 1976

<sup>121</sup> Biles 1976

<sup>122</sup> Loveman 1999

<sup>123</sup> Lockard 2015

<sup>124</sup> Biles 1976

<sup>125</sup> Chavez 2004b

as his Peronist party sweeping Congress.<sup>126</sup> The attacks were the result of court packing scheme during which Meron proposed expanding the Supreme Court to include four more justices, raising the total to nine judges. Despite objection from the sitting justices and the Radicals, the main opposition party, the Peronist majority was able to pass the measure since it was not legally considered unconstitutional. Menem was given free reign to quickly appoint new justices, who in spite of questionable qualifications for the post had were closely affiliated with him or the party. Given the speed of the nomination and approval process, the appointments were handled in less than a transparent manner. Following the resignation of two other justices, in protest to Menem's actions, the president was able to make two further appointments to the Court.<sup>127</sup> Such attacks on judicial independence extended beyond the high court, although the majority of them were directed towards the Supreme Court.<sup>128</sup> The final result was a subversion of judicial independence and the elimination of any effective judicial constraints on the power of the executive.<sup>129</sup> Larkins (1998) uses the term coined by O'Donnell (1994) to refer to Menem's democratic regime as a "delegative democracy," differentiating it from other representational democracies. Here, political power is "wholly delegated" to the executive who becomes the "primary source of public policy."<sup>130</sup> While vertical accountability remained in Argentina, horizontal accountability had been circumvented and subdued.

It is important to understand the specific socio-economic context under which these attacks took place. Sarlo (1994) suggests that public acquiescence to the attacks on the judiciary was a result of the scars left from the economic troubles of the 1980s. At the time of Menem's election, Argentina had experienced severe unemployment and several occurrences of

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<sup>126</sup> Larkins 1998

<sup>127</sup> Chavez 2004b, 457

<sup>128</sup> Larkins 1998

<sup>129</sup> Finkle 2008; See also Chavez 2004b

<sup>130</sup> Larkins 1998, 423 and 424; See also O'Donnell 1994

hyperinflation, which had at one point reached 1,000 percent. The acting President, Alfonsín, transferred power months before Menem's term was set to begin at the peak of the crisis.<sup>131</sup> Because rapid economic stabilization was unanimously prioritized, the Argentine population essentially accorded Menem a "blank check" in exchange for "minimal stability." The public came to perceive that not all institutions could be respected at this time, and thus in the pursuit of market reforms, state intervention was accepted. High popularity for Menem and his economic policies even allowed him to amend the constitution in 1994, permitting him to run for re-election. The economic conditions of the time, Menem's popularity, and the legislative majority of the Peronist Party<sup>132</sup> explain the failure of civil society in mobilizing in defense of judicial independence and assuaging the impact of the attacks. Figure 4, below, demonstrates this drop in independence.

**Figure 5: LJI in Argentina across Time**



<sup>131</sup> Larkins 1998

<sup>132</sup> Sarlo 1994

### iii. Ecuador 2004

Ecuador's Constitutional Court, known as the Tribunal Constitucional (TC), was first established in 1999 with the purpose of exercising constitutional review. It continued to exist until the new constitution replaced it with the Corte Constitucional, at which point its powers were expanded to include the ability to "interpret law and create specific jurisprudence. During the time that the TC operated, it was party to the extreme institutional instability that marked the politics of Ecuador's unconsolidated rule of law.<sup>133</sup> This is most evident given that during the less than ten years that the TC existed, Ecuador had "five different presidents and at least fourteen distinct legislative coalitions or mobile majorities." Meanwhile, the court was unconstitutionally restructured on four different occasions, with the majority of the judges being purged; no judge was able to ever complete the full four-year term. As a result, the TC was considered "one of the most unstable courts in Latin America."<sup>134</sup>

Basabe-Serrano and Polga-Hecimovich (2013) offer a systematic explanation "for judicial turnover and instability" in the country. Referencing the likes of Helmke, they argue that inter-branch conflict, ideology, partisanship, and the volatile nature of coalition government are all at fault. For instance, when the 2004 judicial attack occurred with the purging and replacement of the entire court, the former government coalition had collapsed.<sup>135</sup> These attacks were also directed towards the judges of the Supreme Electoral Court and the Supreme Court of Justice (in which all thirty-one justices were replaced at once). In their report on Ecuador, the Washington Office on Latin America noted that these replacement appointees had been appointed on the basis of loyalty to the coalition.<sup>136</sup>

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<sup>133</sup> Basabe-Serrano 2012, 128

<sup>134</sup> Basabe-Serrano 2012, 135

<sup>135</sup> Basabe-Serrano and Polga-Hecimovich 2013, 155

<sup>136</sup> Edwards 2005

What is interesting in the case of Ecuador is the lack of resistance shown from the judges of the TC, despite the arbitrary and unconstitutional manner in which they were removed. This lack of resistance was also visible during the three other times that the court was restructured. That being said, a broad segment of civil society did demonstrate capacity to mobilize. Edwards points to the outcry from the “professional legal organizations, the national association of mayors, national and local chambers of commerce, national leaders of the Catholic Church” and the media, in response to the attacks. Her description highlights the role of the legal complex in the face of the attacks, which ultimately led to mass demonstrations, particularly in Quito and Guayaquil, over the course of the next few months.<sup>137</sup> Eventually, the protests calling for the president’s resignation resulted in the Armed Forces Joint Command withdrawing support from the president, who was also in the midst of various corruption scandals. Congress later voted to remove him from office, declaring the Vice President as interim president.<sup>138</sup>

Scholars like Pérez-Liñán (2007) and Hochstetler (2006) contend that corruption scandals and economic crises can lead to the public mobilization of civil society; this is likely to result in congressional removal of the president.<sup>139</sup> Pérez-Liñán contextualizes Latin American democratization, to state that from the 1980s to the 1990s a transition occurred in terms of the power of the power accorded to various political players. As the power of the military receded, the media began to serve as the “guardians of public morality.”<sup>140</sup> This development also coincided with the growth in power of popular movements. In this context, public mobilization has adopted the “moderating power role” formerly played by the military.<sup>141</sup>

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<sup>137</sup> Edwards 2005

<sup>138</sup> Basabe-Serrano and Polga-Hecimovich 2013

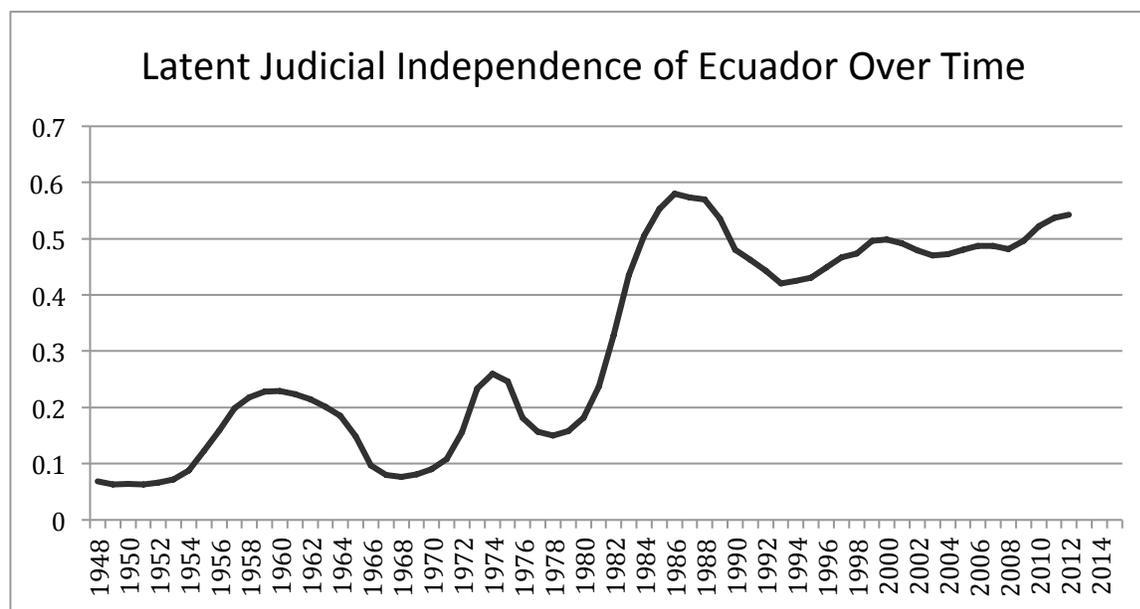
<sup>139</sup> Pérez-Liñán 2007; Hochstetler 2006

<sup>140</sup> Pérez-Liñán 2007, 10

<sup>141</sup> Helmke 2016; Hochstetler 2006

In place of military coups, impeachment became the “standard procedure” to remove the executive.<sup>142</sup> However, while the mobilization of civil society across broad social segments had a key role in this process, its ultimate impact is difficult to isolate. For instance, Acosta and Polga-Hecimovich (2010) contend that multiple causal factors were at play, ultimately stressing the influence of eroding legislative coalitions to explain the removal of Gutiérrez.<sup>143</sup> That being said, in this case, despite the variety of factors involved, civil society did mobilize and did have a tangible impact when public support for the regime was lacking. Figure 5, below, demonstrates that judicial independence during this period did not drop significantly, but rather gradually increased.

**Figure 6: LJI in Ecuador**



<sup>142</sup> Perez-Linan 2007, 5

<sup>143</sup> Acosta and Polga-Hecimovich 2010

#### iv. Ukraine 2014:

The Ukrainian attacks on judicial independence stem from a ruling passed by the Parliament dismissing twelve of the eighteen judges from the Constitutional Court, on the grounds of “breaching the oath of a judge.” These dismissals were essentially purges, tainted with obvious political bias. However, this major attack needs to be viewed in the context of the broader political crises that had emerged earlier in the fall. The Euromaiden protest first erupted in November 2013 after President Yanukovich suddenly withdrew from the Vilnius Summit that was meant to draw Ukraine into the EU’s Eastern Partnership. This pro-European demonstration quickly grew to encompass notable anti-government characteristics. At the time, Yanukovich not only controlled the executive and the judiciary, having subverted its independence, but he also possessed a parliamentary majority.<sup>144</sup>

Demonstrations first began with a few hounded people airing grievances regarding the state of affairs in Ukraine, but by November 24<sup>th</sup>, it had grown to include 100,000 people. These numbers only grew further after authorities tried dispersing the crowd with a violent crackdown on protesters, through the use of special police units known as “Berkut”.<sup>145</sup> By December, protesters began to better organize, establishing camps and barricades in Kiev’s central square of Maidan, with the number of participants estimated to near a million people at one point.<sup>146</sup> Popova refers to protest literature to explain the motivation of the protestors stemmed from a perception that they had been “deprived of the rule of law, to which they were entitled as citizens of a democratic state.”<sup>147</sup> As Euromaidan grew, multiple grievances emerged at the center of the public mobilizations. These included the country’s geopolitical relationship to the EU and

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<sup>144</sup> Kudelia 2014

<sup>145</sup> Khemlko and Pereguda 2014

<sup>146</sup> Wilson 2014

<sup>147</sup> Popova 2014, 66

Russia, the “resignation of the government,” “police brutality,” and civil liberties.<sup>148</sup> This aligns with the scholarship focused on instability in Latin America that states that while mass protests may commence on the basis of a specific grievance, they are likely to magnify into a general call for the government’s resignation.<sup>149</sup>

Popova believes that the overall politicization and subordination of the judiciary during the Yanukovych regime additionally contributed to the broad mobilization of civil society, raising the costs for the protesters.<sup>150</sup> During Euromaidan, the courts became a tool of harassment, evident in the politically motivated arrests of protesters, activists, and political opponents.<sup>151</sup> Popova’s analysis (2016) of Euromaidan indicates that the costs of pressuring the courts in this period were extremely low, with significant short-term gains to be had in manipulating the judiciary. Despite the government’s efforts to repress and end the dissent, the protests persisted, even expanding to various other parts of Ukraine. On February 21<sup>st</sup>, parliament voted to restore the 2004 constitution, and on February 22<sup>nd</sup>, parliament voted to remove Yanukovych from office, replacing him with an interim president.<sup>152</sup> It was on February 24<sup>th</sup> that the parliament moved to purge the judges of the Constitutional Court. These can be interpreted as attempts towards lustration, i.e. removing judges, who are associated with corruption in the previous regime and who supposedly failed to uphold the responsibilities of the judiciary and the rule of law.<sup>153</sup> The legislature dismissed five judges of the Constitutional Court and recommended that the interim President and Congress of Judges remove the other seven, in order to establish a fresh judiciary untainted by the corruption of the previous regime. A few

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<sup>148</sup> Popova 2014, 65; See also Khemlko and Pereguda 2014

<sup>149</sup> Helmke 2017

<sup>150</sup> Popova 2014

<sup>151</sup> Popova 2016

<sup>152</sup> Wilson 2014

<sup>153</sup> Popova 2014b

days later on February 27<sup>th</sup>, the Crimean coup began to unfold.<sup>154</sup> On April 11<sup>th</sup>, the government began to target the ordinary judiciary through the process of lustration with the passage of “On Restoring Trust in the Judicial System of Ukraine.”<sup>155</sup>

This attack on the court took place in the midst of the political crisis that began in November and after the president had been removed. At the time of the attacks on the Constitutional Court, the public had already been mobilized and were deeply committed in establishing an independent judiciary, in a country where the judiciary has been subservient since the early post-Soviet days (Popova 2016). In fact, Popova (2015) identifies that of those mobilized, a greater share of people were more invested in establishing an independent judiciary than signing the EU Association Agreement. She cites several instances of CSOs actively working towards this goal, most notably the “Reanimation Package of Reforms (RPR),” a collective of over 100 NGOs. Despite this deep commitment from reform coalitions within civil society towards judicial reform and creating an independent judiciary, realizing this goal has proved elusive. Political actors have purged the judiciary and replaced judges with loyalists on the premise of lustration.<sup>156</sup> Today, popular support of the judiciary stands lower than it was prior to the Euromaidan Revolution. Popova does state that this case poses problems for theories focused on the establishment of judicial independence. The sustained involvement of civil society also raises questions in the context of this study, given that political actors have not responded favorably to these efforts. Finally, judges within the judicial system have failed to demonstrate agency and have once-again easily acquiesced to politicians.<sup>157</sup> Significant scholarship addressing the Ukrainian judiciary thus far has been lacking. This case certainly

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<sup>154</sup> Popova 2015; Wilson 2014

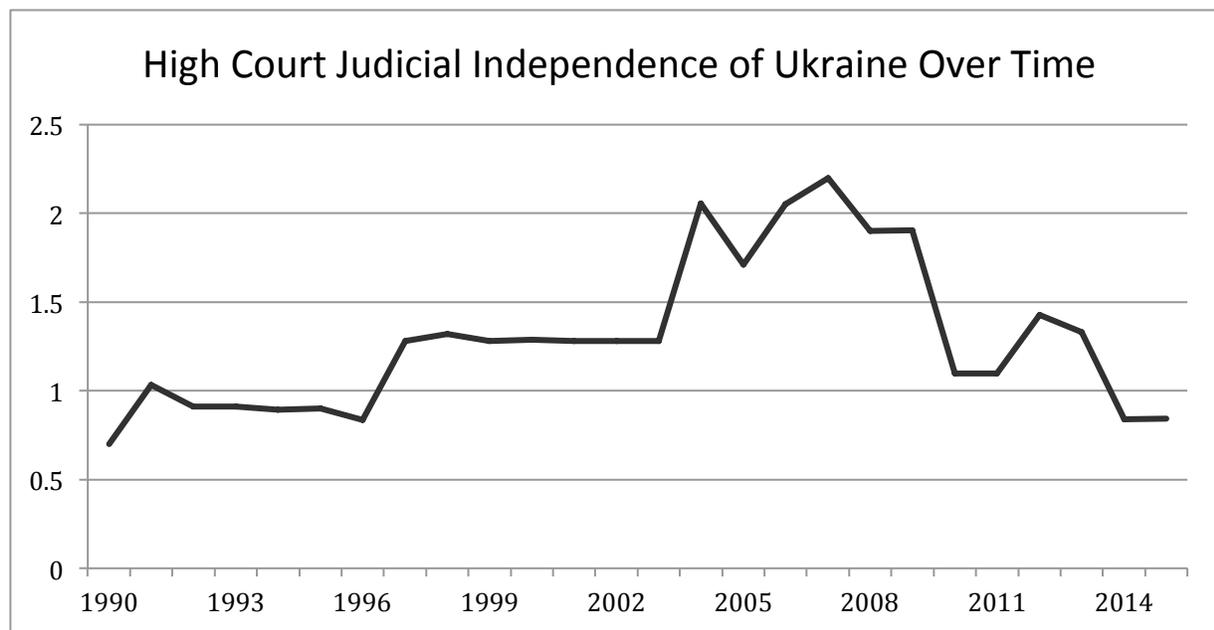
<sup>155</sup> Popova 2014b

<sup>156</sup> Popova 2014b

<sup>157</sup> Popova 2015

presents the need for further research, particularly in how the mobilization of civil society in defense of judicial independence failed to meet its intended goal.

**Figure 7: High Court Independence in Ukraine<sup>158</sup>**



#### v. Fiji 1987 and 2000:

Since 1987, political instability in Fiji has manifested in the form of three military-led coup d'états and one civilian led putsch turned “military mutiny.” Schieder (2012) contends that while military coups are not unique to Fiji, the country is noteworthy in the frequency of the coups and the influence that they have come to carry in the political culture.<sup>159</sup> Consequently, Fiji has been described as having a “coup culture” that has exposed its “deeply divided plural society.”<sup>160</sup> The former British colony, which received its independence in 1970, is primarily composed of indigenous Fijians and Indo-Fijians, descendants of South Asian indentured laborers introduced

<sup>158</sup> Coppedge et al. 2016a; Because LJI data is not available beyond 2012, this figure specifically demonstrates high court independence using data from the Varieties of Democracy Project

<sup>159</sup> Schieder 2012

<sup>160</sup> Schieder 2012, 45

during the colonial administration.<sup>161</sup> While the two groups are of relatively same size, they are highly polarized and have limited interaction between them. Furthermore, besides “inter-” and “intra-” ethnic divisions, Fiji is characterized by class divisions, which also contribute to its political instability.

Indigenous Fijians controlled political power until 1987, at which point a new cabinet and caucus, primarily composed of Indo-Fijians, were elected. After an attempted military coup in May, a second one in September succeeded in deposing the government. When these deposed members of government pursued legal action with the High Court, the 1970 constitution was abrogated and replaced with a more “race-based” constitution in 1990.<sup>162</sup> This attack on the rule of law and judicial independence resulted in the resignation of several judges from the High Court (as well as many magistrates), all of who would be replaced by the new regime.<sup>163</sup> The attempted 2000 civilian putsch (which later evolved into a full-on military coup) was led by George Speight and several members of the military. Together, they held the government hostage for over fifty days. This was, similarly, led as a response to the election of an Indo-Fijian government, particularly the election of an Indo-Fijian prime minister.<sup>164</sup> Tarte suggests that this desire to establish a Fijian state, espousing indigenous rights, is also a reaction towards democracy.<sup>165</sup> The nationalistic character of the two coups reflects the desire of restoring the political and cultural supremacy of indigenous Fijians. In this manner, Schieder argues that the military coups extend beyond ousting governments.<sup>166</sup> In fact, the 1987 had broad appeal among indigenous Fijians.<sup>167</sup> Nevertheless, this split within civil society could impact the ability and

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<sup>161</sup> Schieder 2012; Llewellyn-Fowler and Overton 2010

<sup>162</sup> See Draunidalo 2009, 311; Schieder 2012

<sup>163</sup> See Draunidalo 2009

<sup>164</sup> Schieder 2012; and Overton 2010

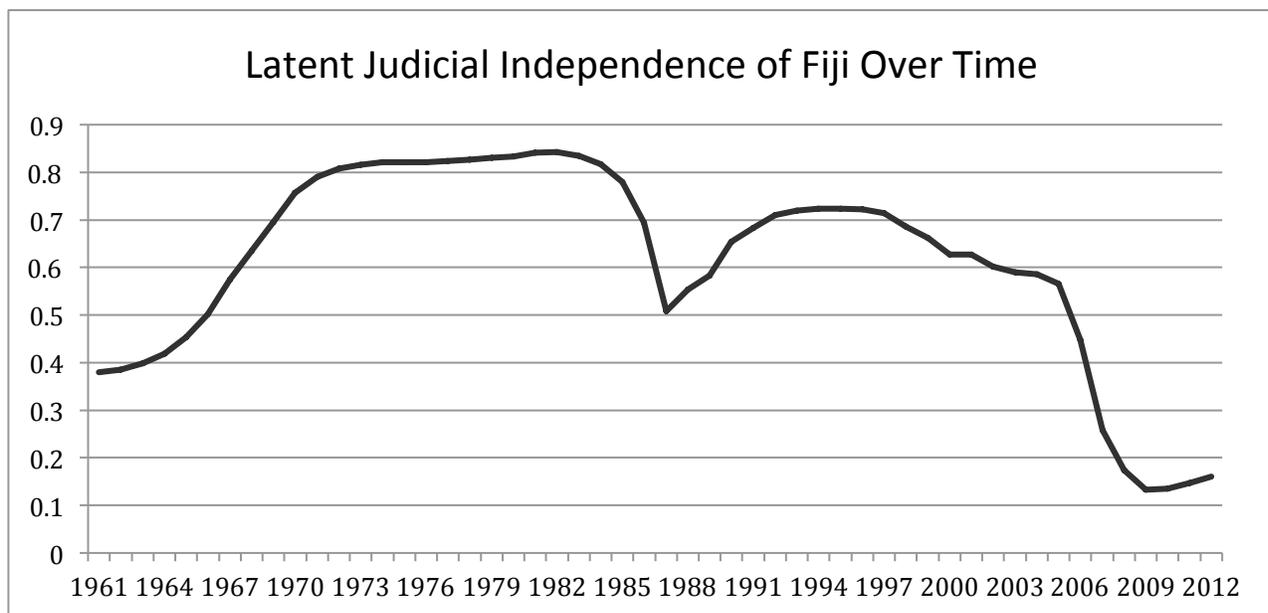
<sup>165</sup> Tarte 2009

<sup>166</sup> Schieder 2012, 57

<sup>167</sup> Tarte 2009

desire for civil society to mobilize in defense of democratic values, like judicial independence and the rule of law. It necessitates further scholarship for how much of civil society is needed to garner effective response. At this time, no significant qualitative study has been conducted to examine the response of civil society following the coup. This polarization of civil society, in the context of the significant attacks on the judiciary, however, raises the question of how judicial independence increased after the 1987 coup, as indicated by Figure 7 below. Further scholarship explicitly focused on the mobilization of civil society or the lack thereof in Fiji could be beneficial to explaining this.

**Figure 8: LJI in Fiji over time**



## VI. Conclusion and Implications for Further Scholarship

This study sought to determine the impact of civil society and judicial attacks on judicial independence. The most notable result of my study is that very few significant attacks occur in states with robust civil society. This suggests that the presence of a robust civil society, first and foremost, prevents attacks from taking place. Thus the importance of civil society stems from its

ability to prevent attacks on the judiciary. Furthermore, it implies the interdependent relationship that exists between the judiciary and civil society: as much as citizens rely on an independent judiciary to uphold the rule of law and democracy, the judiciary also relies on a robust civil society to ensure its independence.

When attacks do occur, it is in the presence of major political crises that threaten the viability of the regime. Institutional crises, such as presidential impeachments or coups against the government, could present a challenge beyond the influence of the civil society. In the case of Pakistan, the mobilization of lawyers flourished in the context of “overwhelming support of the people”<sup>168</sup> and spurred the mass participation of civil society and media. From the opposite perspective, in Argentina, civil society failed to broadly mobilize in defense of judicial independence because the regime’s actions were considered permissible out of economic necessity. The case of Fiji demonstrates a significant split in civil society that may have broad mobilization from occurring. These cases imply that if the regime maintains popular support, albeit for whatever reason, civil society may fail to protect the judiciary.

### **A) Linkages with Public Support**

Scholars like Vanberg (2001), Stephenson (2004), and Carruba (2009) have explored relationship between public support, also known as judicial legitimacy, and judicial attacks. Most notably, they have emphasized the ability of public support to safeguard judicial independence. However, most of this scholarship has been in the context of voters in democratic politics pressuring the government and holding elected officials accountable through the ballot box.<sup>169</sup> In this context, public support for the judiciary is higher than other divisions of government.

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<sup>168</sup> Jilani 2012, 431

<sup>169</sup> See Vanberg 2001; Stephenson 2004

Elected officials, realizing the high costs associated with attacking the judiciary, are less likely to do so. Vanberg, thus, contends that public support for the judiciary “provides a shield for judicial independence.”<sup>170</sup> However, this type of scholarship tends to overemphasize the role of ballot box, ignoring that elections encompass numerous issues and that voters may prioritize “the economy or crime” over judicial independence.<sup>171</sup>

That being said, Helmke’s work in Latin America (2010) demonstrates that public support impacts judicial independence in that the courts with the highest public approval ratings have had the fewest attacks.<sup>172</sup> She uses data from the *Latinobarómetro* to see how public support has varied across various countries in correlation with attacks on courts, which result in lower judicial independence. She also examines alternative explanatory variables like political fragmentation, constitutional protections, judicial power, and the level of economic development in each country. In her statistical analysis, she addresses endogeneity (i.e. attacks lowering public support not vice versa) by using a lagged measure of public support. Her work, thus, suggests that public support serves to prevent attacks from taking place. However, this conclusion does not necessarily offer the whole picture. For instance, speaking generally of the Latin American judiciary, Helmke describes the frequent history of using formal and informal procedures to impede judicial independence.<sup>173</sup> She notes that in the region, public support for the judiciary is traditionally lower. However, by referencing the case of Ecuador in 2004-2005, Helmke establishes that despite the fact that public support for the Ecuadorian judiciary was dismally low, civil society did mobilize in masses to protest President Gutierrez’s attempts of packing the

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<sup>170</sup> Vanberg 2015

<sup>171</sup> Helmke 2010

<sup>172</sup> Helmke 2010, 403.

<sup>173</sup> Helmke 2004

court.<sup>174</sup> As discussed earlier, the demonstrations ultimately led to Gutierrez's removal from executive office. Mobilization of civil society can signal eroding support for the regime.<sup>175</sup> So while support for the judiciary was low, support for the executive's actions was also lacking. This could imply that the area of focus perhaps should not be public opinion of the court but rather public attitude towards the regime and how those attitudes are channeled into action through civil society. The linkages between public support and civil society need closer examination.

Helmke's work, in conjunction with the findings from this study, presents several avenues for further scholarship. First, how does popular support (whether for the regime or for the judiciary) translate to and permeate through civil society, i.e. how does support manifest itself outside of the ballot box? After all, it is through the social networks and CSOs within civil society that collective action can be mobilized to address social problems.<sup>176</sup> Theoretically, the presence or absence of public support for the regime should be channeled through the organizational capacity of CSOs. Several other questions remain. The case of Ukraine in 2014 raises the question of: is a robust civil society a necessary but not a sufficient condition for protecting the judiciary? The process of how civil society mobilizes also calls for further examination, in terms of which parts mobilize first and encourage the remaining segments. In the presence of an attack, how much of civil society needs to be mobilized for judicial independence to be protected?

To address these questions, it will be necessary to develop a more comprehensive measure of civil society in the future—perhaps in line with the methodology used by the CIVICUS project. It would also be beneficial to develop a valid global measure of the legal

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<sup>174</sup> Helmke 2010

<sup>175</sup> Kim and Bahry 2008

<sup>176</sup> Eikenberry and Kluver 2004

complex, as one does not currently exist. This would allow for a more quantitative approach to studying the legal complex. Future scholarship should seek to conduct in-depth qualitative studies of how civil society mobilized or failed to mobilize in the outlier cases presented in this project, paying particular attention to studying the presence and role of the legal complex. This is especially important for the case of Ukraine, where civil society did mobilize, yet judicial independence remains elusive. Such scholarship could enhance the findings presented in this thesis. Identifying a more robust instrumental variable for attacks on the judiciary would improve the empirical model presented here. For instance, examining the stability of the regime, instead of breakdown of regimes, could have potential.

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